INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Discovery Global LLC

v.

Slovak Republic

(ICSID Case No. ARB/21/51)

AWARD

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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17 January 2025

Representation of the Parties

Representing Discovery Global LLC:

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TABLE OF ABBREVIATIONS

AFE	Authorization for expenditure
Akard Agreement	Agreement of 23 October 2015 between Akard and Discovery
Alpha	Alpha Exploration LLC
AOG	Until 29 April 2014, Aurelian Oil & Gas Slovakia s.r.o. and thereafter Alpine Oil & Gas s.r.o.
AOG Subsidiaries	Radusa Oil & Gas s.r.o., Magura Oil & Gas s.r.o. and Dukla Oil & Gas s.r.o.
Aurelian	Aurelian Oil & Gas plc.
BIT or Treaty or the US-Slovakia BIT	Treaty between the Czech and Slovak Federal Republic and the United States of America concerning the Reciprocal Encouragement and Protection of Investment signed on 22 October 1991
C-[#]	Claimant's Exhibit
Cadogan	Cadogan Petroleum
Cesty Smilno	Cesty Smilno s.r.o.
CC or Civil Code	Act No. 40/1964 Coll. the Civil Code, as amended
Code of Civil Procedure	Act No. 99/1963 Coll. the Code of Civil Procedure, as amended
CL-[#]	Claimant's Legal Authority
Claimant	Discovery Global LLC or Discovery
Claren	Claren Energy Corporation
Clermont	Clermont Energy Partners LLP
Clermont Agreement	Exploration Project Agreement of 7 July 2014 between Clermont and Discovery
Constitution of the Slovak Republic	Act No. 460/1992 Coll. the Constitution of the

or Constitution	Slovak Republic, as amended
Counter-Memorial	Respondent's Counter-Memorial dated 31 March 2023
Construction Act	Act No. 50/1976 Coll. on spatial planning and construction order, as amended
Criminal Code	Act No. 300/2005 Coll. Criminal Code, as amended
DCF	Discounted Cash Flow
Discovery Polska	Discovery Polska LLC
Discovery	Discovery Global LLC or the Claimant
EIA	Environmental Impact Assessment
EIA Act	Act No. 24/2006 Coll. On Environmental Impact Assessment and on Amending and Supplementing Certain Laws, as amended
EIA Amendment	Amendment to the EIA Act adopted on 21 October 2016
EIA Directive	Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment of 13 December 2011
ER	Expert Report
ER1	First Expert Report
ER2	Second Expert Report
EUR	Euros
Exploration Licenses or Exploration Area Licenses	The Svidník Exploration License, Medzilaborce Exploration License and Snina Exploration License
FET	Fair and Equitable Treatment
Forest Act	Act No. 326/2005 Coll. on Forests, as amended
FTG	Full Tensor Gravity Gradiometry

GCOS	Geological Chance of Success
Geology Act	Act No. 569/2007 Coll. on Geological Works, as amended
Hearing	Hearing held in London from 2 to 7 February 2024
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ILC	International Law Commission
ILC Articles	Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts
JKX	JKX Oil and Gas plc.
JOA	Joint Operating Agreement
JV	Joint Venture
JV Partners	AOG, JKX and Romgaz
LSR or State Forestry	LESY Slovenskej republiky
Memorial	Claimant's Memorial dated 30 September 2022
Mining Act	Act No. 44/1988 on Protection and Use of the Natural Resources, as amended
MMBO	Million Barrels of Oil
MoA	Ministry of Agriculture of the Slovak Republic
MoE	Ministry of Environment of the Slovak Republic
MoI	Ministry of Interior of the Slovak Republic
MoT	Ministry of Transportation of the Slovak

	Republic
MoU	Draft Memorandum of Understanding between AOG and Claren
MST	Minimum Standard of Treatment
MT	Magneto Telluric
NAFTA	NAFTA a.s.
Nature Protection Act	Act No. 543/2002 Coll. on Nature and Landscape Protection, as amended
PEA	Preliminary Economic Assessment
PFS	Pre-Feasibility Study
PIIP	Petroleum Initially in Place
PO	Procedural Order
Preliminary EIA	Preliminary Environmental Impact Assessment
PSPR	Public Special Purpose Road
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder dated 14 December 2023
Reply	Claimant's Reply dated 18 September 2023
Respondent	The Slovak Republic or Slovakia
RfA	Claimant's Request for Arbitration dated 30 September 2021
RL-[#]	Respondent's Legal Authority
Road Act	Act No. 135/1961 Coll. on Roads, as amended
Road Traffic Act	Act No. 8/2009 Coll. on Road Traffic, as amended
Rockflow	Rockflow Resources
Romgaz	Societatea National de Gaze Naturale "ROMGAZ" S.A.

San Leon	San Leon Energy plc
Settlement Agreement	Settlement Agreement of 30 March 2018 between Akard and Discovery
Sk	Slovak koruna or Slovak crown
SLO	Social License to Operate
Slovakia	The Slovak Republic or the Respondent
Smilno Roads	Cesty Smilno s.r.o.
Tr. Day [#] [page:line]	Transcript of the Hearing
ÚGKK	Office of Geodesy, Cartography and Cadastre of the Slovak Republic
US or USA	United States of America
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties signed on 23 May 1969 and entered into force on 27 January 1980
WS	Witness Statement
WS1	First Witness Statement
WS2	Second Witness Statement

I. INTRODUCTION

1. The present dispute arises under the Treaty between the Czech and Slovak Federal Republic and the United States of America concerning the Reciprocal Encouragement and Protection of Investments, signed on 22 October 1991 (the "Treaty" or the "BIT")[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). It relates to oil and gas exploration rights in north-eastern Slovakia.

A. THE PARTIES

1. The Claimant

2. The claimant is Discovery Global LLC, a privately held company operating in the oil and gas sector, incorporated in the State of Texas under the laws of the United States of America ("US" or "USA"), with registration number 800741189 and its registered headquarters at 1048 Texan Trail, Grapevine, Texas 76051 ("Discovery" or the "Claimant").[2] Until his demise on 27 June 2024, Michael P. Lewis was Discovery's President and CEO, as well as its sole shareholder.[3] Mr. [redacted] was thereafter appointed as Discovery's President and CEO.

3. The Claimant is represented in this arbitration by:

Elliott Phillips
Neil Newing
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138 Fetter Lane
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1 US-Slovakia BIT (C-1).

2 The Claimant's initial name was Blue Sky Aircraft Services, LLC, and it was incorporated on 4 December 2006. The Claimant changed its name to Discovery Polska LLC on 25 August 2013 (filed in the Office of the Secretary of State of Texas on 3 September 2013), and to Discovery Global, LLC on 14 July 2016 (filed in the Office of the Secretary of State of Texas on 20 July 2016). See Discovery Global LLC certificate of incorporation, 4 December 2006 (C-28).

3 See Memorial, para. 17; Rejoinder, para. 219; Lewis WS1, para. 2.

2. The Respondent

4. The respondent is the Slovak Republic ("Slovakia" or the "Respondent").

5. The Respondent is represented in this arbitration by:

Stephen Anway
Rostislav Pekař
Tatiana Prokopová
David Alexander
Eva Dragúňová
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B. THE TRIBUNAL

6. The Arbitral Tribunal is composed of:

- Prof. Gabrielle Kaufmann-Kohler, a Swiss national, President
- Mr. Stephen L. Drymer, a Canadian national, Arbitrator
- Prof. Philippe Sands KC, a British and French dual national, Arbitrator.

7. The Centre appointed Ms. Jara Minguez Almeida as Secretary of the Tribunal.

8. With the consent of the Parties, the Tribunal appointed Dr. Magnus Jesko Langer, a lawyer of the President's law firm, as Assistant to the Tribunal. His *curriculum vitae* and a declaration of impartiality and independence were circulated to the Parties.

II. PROCEDURAL HISTORY

9. On 1 October 2021, the Centre received an electronic copy of the Request for Arbitration dated 30 September 2021 (the "RfA" or the "Request"), accompanied with 26 factual exhibits (C-1 to C-26).

10. On 22 October 2021, the Secretary-General of ICSID registered the arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

11. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention. The Tribunal would consist of three arbitrators, one to be appointed by each Party and the presiding arbitrator by agreement of the two co-arbitrators, after consulting on the proposed presiding arbitrator with the Parties.

12. On 17 December 2021, following appointment by the Claimant, Mr. Stephen L. Drymer accepted his appointment as arbitrator. On the same day, following appointment by the Respondent, Prof. Philippe Sands KC accepted his appointment as arbitrator.

13. On 31 January 2022, following appointment by the co-arbitrators pursuant to the Parties' agreement, Prof. Gabrielle Kaufmann-Kohler accepted her appointment as presiding arbitrator.

14. On the same day, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Arbitration Rules.

15. On 1 February 2022, in accordance with ICSID Administrative and Financial Regulation 15(1)(c) and 15(2) (the "Regulation"), the ICSID Secretariat requested that each Party make an initial advance payment of USD 150,000 within 30 days.

16. The ICSID Secretariat received payment from the Claimant on 8 March 2022 and on 10 March 2022 it received payment from the Respondent.

17. On 23 February 2022, the ICSID Secretariat, acting on behalf of the Tribunal, circulated a draft procedural order. The Parties provided their comments on the draft procedural order on 17 and 24 March 2022.

18. On 4 March 2022, the Respondent requested that the Tribunal order the disclosure of eight categories of information in relation to the Claimant's third-party funding arrangement with 24LF Capital. The request was accompanied with 4 legal authorities (RL-1 to RL-4).

19. On 18 March 2022, the Claimant provided information in relation to four requests

formulated by the Respondent on 4 March, but objected to the remaining requests on the ground that they were irrelevant to the issue of security for costs and that the requested documents contain privileged information.

20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 25 March 2022 by videoconference. In addition to discussing the content of the draft procedural order, the Tribunal and the Parties discussed and agreed on transparency rules applicable to the present proceedings, including on the applicability of the UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration ("Transparency Rules") as adjusted to ICSID proceedings. It was agreed that the Tribunal would issue a separate order about the transparency regime governing the arbitration.

21. On 28 March 2022, the Tribunal issued Procedural Order No. 1 ("PO1"), setting out the procedural rules governing this arbitration.

22. On 29 March 2022, pursuant to the Tribunal's directions of 22 March 2023, the Respondent provided additional comments in relation to the Claimant's third-party funding arrangement with 24LF Capital and maintained its request for the disclosure of four categories of information. The letter was accompanied with 6 legal authorities (RL-5 to RL-10).

23. On 5 April 2022, the Claimant commented on the Respondent's letter of 29 March. The Claimant's letter was accompanied with 11 legal authorities (CL-1 to CL-11).

24. On 7 April 2022, the ICSID Secretariat, acting on behalf of the Tribunal, sent to the Parties a draft procedural order setting out the transparency rules governing this arbitration. The Parties provided their comments on the draft on 21 April 2022.

25. On the same day, the Respondent further commented the Claimant's letter of 5 April. The Claimant responded to these further comments on 14 April 2022.

26. On 20 April 2022, the Tribunal denied the Respondent's application to obtain information on four categories of information on the grounds that their relevance to security for costs had not been sufficiently shown and, to the extent the application seeks to establish facts relevant to jurisdiction and quantum, it is premature.

27. On 22 April 2022, the Tribunal issued Procedural Order No. 2 ("PO2"), setting out the transparency regime of this arbitration.

28. On 23 June and 22 July 2022, the Claimant informed the Respondent that it was negotiating with potential insurers to cover the risk of an adverse costs award.

29. On 19 August 2022, the Respondent filed a request for security for costs, accompanied

with 12 factual exhibits (R-1 to R-12) and 12 legal authorities (RL-11 to RL-22).

30. On 30 September 2022, the Claimant filed its memorial (the "Memorial"), accompanied by 204 factual exhibits (C-27 to C-102, C-104 to C-126, C-128, C-130 to C-137, C-139 to C-148, and C-150 to C-236), 51 legal authorities (CL-12 through CL-62), the witness statements of Messrs. Michael Lewis and Alexander Fraser, and expert reports of Prof. Dr. Marek Števček, Mr. Alan Atkinson from Rockflow Resources Ltd ("Rockflow"), Dr. Simon Moy from Rockflow, and Mr. Colin Howard from Rockflow.

31. On 7 October 2022, the Claimant commented on the Respondent's request for security for costs.

32. On 21 October 2022, the Respondent filed a reply on its request for security for costs, accompanied with 14 legal authorities (RL-23 to RL-36).

33. On 4 November 2022, the Claimant filed a rejoinder on the Respondent's request for security for costs.

34. On 18 November 2022, the Tribunal issued directions concerning the Respondent's request for security for costs. In particular, it ordered the Claimant to provide by 20 January 2023 an instrument securing a potential cost order, such as an insurance policy or bank guarantee, or advise that it has not been able to obtain security for costs, with a description of its efforts and of the reasons for the lack of success.

35. On 20 January 2023, the Claimant informed the Tribunal that it had been able to secure on 19 January 2023 an ATE insurance policy for USD 1 million, together with an anti-avoidance endorsement.

36. On 3 February 2023, the Respondent informed the Tribunal that the ATE policy secured by the Claimant did not provide adequate security, except if the Claimant addressed additional points, the Respondent's potential cost liability was capped at USD 200,000, and the Parties maintained their right to address the costs of the premium in costs submissions.

37. On 10 February 2023, the Claimant addressed the points raised in the Respondent's letter of 3 February.

38. On 15 February 2023, the Claimant submitted an amended version of the anti-avoidance endorsement.

39. On 20 February 2023, the Tribunal decided that the ATE insurance policy and the anti-avoidance endorsement complied with its directions of 18 November 2022 and that no further action was necessary in relation to the Respondent's request for security for costs.

40. On 23 March 2023, the Tribunal issued a revised procedural calendar.

41. On 31 March 2023, the Respondent filed its counter-memorial (the "Counter-Memorial"), accompanied by 94 factual exhibits (R-13 to R-106), 73 legal authorities (RL-37 to RL-109), the witness statements of Ms. Marianna Varjanová, Mr. Ľuboš Leško, Dr. Vladislava Slosarčiková and Mr. László Sólymos, and the expert reports of Dr. Ľubomír Fogaš, CSc., Dr. Chris Longman from SLR Consulting ("SLR"), and of Dr. Tiago Duarte-Silva and Mr. Richard Acklam from Charles River Associates ("CRA").

42. On 5 May 2023, the Parties simultaneously exchanged their requests to produce documents in the form of a Redfern Schedule. The Claimant's Redfern Schedule was divided into 21 categories of documents and the Respondent's Redfern Schedule into 55 categories of documents, accompanied with 2 legal authorities (RL-110 to RL-111). The Claimant's introductory remarks to the Respondent's Redfern Schedule were accompanied with 7 factual exhibits (C-237 to C-243) and 6 legal authorities (CL-63 to CL-68).

43. On 19 May 2023, the Parties submitted their respective objections to the document production requests.

44. On 2 June 2023, the Parties produced non-objected documents and provided the Tribunal with their Redfern Schedules containing the outstanding document production requests.

45. On 9 June 2023, the Claimant wrote to the Tribunal with regard to issues of privilege and jurisdiction arising out of the Respondent's requests for production of documents, and the Respondent commented on the Claimant's letter on 14 June 2023, accompanied with 5 legal authorities (RL-112 to RL-116).

46. On 20 June 2023, the Tribunal issued Procedural Order No. 3 ("PO3") resolving the outstanding document production requests.

47. On 15 September 2023, the Tribunal confirmed the Parties' agreement to extend the deadlines for the filing of the Claimant's reply memorial until 18 September 2023 and the Respondent's rejoinder memorial until 11 December 2023.

48. On 18 September 2023, the Claimant filed its reply memorial (the "Reply"), accompanied by 179 factual exhibits (C-244 to C-288, C-290 to C-319, C-321 to C-379, C-381 to C-416, and C-418 to C-426), 31 legal authorities (CL-70 to CL-100), the second witness statements of Messrs. Lewis and Fraser and the first witness statement of Mr. Vladimír Baran, and the second expert reports of Prof. Dr. Števček, Mr. Atkinson, Dr. Moy and Mr. Howard.

49. On 15 November 2023, in accordance with Regulation 15(1)(c), the ICSID Secretariat requested that each Party make an additional advance payment of USD 250,000 by

15 December 2023.

50. On 6 December 2023, the Tribunal confirmed the Parties' agreement to extend the deadline for the filing of the Respondent's rejoinder memorial until 14 December 2023.

51. On 7 December 2023, the ICSID Secretariat received the Claimant's payment of USD 249,982.

52. On 14 December 2023, the Respondent filed its rejoinder memorial (the "Rejoinder"), accompanied by 117 factual exhibits (R-107 to R-223), 50 legal authorities (RL-117 to RL-166), the second witness statements of Ms. Marianna Varjanová, Mr. Ľuboš Leško, Dr. Vladislava Slosarčiková and Mr. László Sólymos, and the second expert reports of Dr. Fogaš, CSc., Dr. Longman, and of Dr. Duarte-Silva and Mr. Acklam.

53. The ICSID Secretariat received the payment of USD 249,950 from the Respondent on 20 December 2023.

54. On 22 December 2023, each Party notified the other Party and informed the Tribunal of its intention to cross-examine all of the other Party's witnesses and experts at the hearing.

55. On 30 December 2023, the ICSID Secretariat, on behalf of the Tribunal, sent a draft Procedural Order No. 5 on pre-hearing matters (the "draft PO4") to the Parties and invited them to provide their comments by 8 January 2024 as well as their proposals for the hearing agenda.

56. On 8 January 2024, the Parties submitted their comments on the draft PO4.

57. On 10 January 2024, in accordance with PO1, the Tribunal and the Parties held a pre-hearing organizational meeting by video link to discuss the organization of the hearing (the "Hearing").

58. On 12 January 2024, the Tribunal issued Procedural Order No. 4 ("PO4") on pre-hearing matters and the Centre made the recordings of the pre-hearing conference available to the Parties and the Tribunal.

59. The Hearing was held at the IDRC in London, between 2 and 7 February 2024. The following persons attended the Hearing in whole or in part:

- <u>The Tribunal</u>

  Members of the Tribunal

  Prof. Gabrielle Kaufmann-Kohler, President
  Mr. Stephen L. Drymer, Arbitrator

Prof. Philippe Sands KC, Arbitrator

Secretary of the Tribunal

Ms. Jara Minguez Almeida

Assistant to the Tribunal

Dr. Magnus Jesko Langer

- Claimant's counsel and representatives

Counsel

Mr. Mark Tushingham	Twenty Essex
Mr. Neil Newing	Signature Litigation
Mr. Colin Grech	Signature Litigation
Mr. Pietro Grassi	Signature Litigation
Mr. Ben Pharoah	Signature Litigation

Party representative

Mr. Alexander Fraser

- Claimant's witnesses and expert

Witnesses

Mr. Alexander Fraser
Mr. Michael Lewis
Mr. Vladimir Baran

Experts

Mr. Marek Števček
Mr. Alan Atkinson
Mr. Simon Moy
Mr. Colin Howard

- Respondent's counsel and representatives

Counsel

Mr. Stephen Anway	Squire Patton Boggs
Mr. Rostislav Pekař	Squire Patton Boggs
Ms. Tatiana Prokopová	Squire Patton Boggs
Mr. Dave Alexander	Squire Patton Boggs
Mr. Jakub Kamenický	Squire Patton Boggs

Mr. Douglas Pilawa	Squire Patton Boggs
Ms. Christina Luo	Squire Patton Boggs
Ms. Adriana Pavlovičová	Squire Patton Boggs

Party representatives

Mr. Julián Kupka	Ministry of Finance
Ms. Zuzana Ješková	Ministry of Finance
Ms. Petra Lešová	Ministry of Finance
Mr. Róbert Baláž	Ministry of Finance

- Respondent's witnesses and experts

Witnesses

Ing. László Sólymos
Dr. Vladislava Slosarčíková
Ms. Marianna Varjanová
Mr. Ľuboš Leško

Experts

Dr. Ľubomír Fogaš
Dr. Chris Longman
Ms. Claire Jordan
Mr. Ewan Whyte
Dr. Tiago Duarte-Silva
Mr. Richard Acklam

- Court reporter

Ms. Anne-Marie Stallard

- Interpreters

Ms. Katarina Tomova
Mr. Pavol Sveda
Mr. Will Behran

60. The Tribunal heard opening statements by counsel and evidence from the fact witnesses and experts listed above.

61. The Hearing was audio- and video-recorded and transcribed verbatim, in real time, in English. Copies of the audio-video recordings and the transcripts were delivered to the Parties. In accordance with PO2, the audio-video recordings were uploaded on the ICSID website.

62. At the end of the Hearing, the Tribunal and the Parties held a procedural discussion concerning post-hearing matters.

63. On 19 March and 25 April 2024, the court reporter circulated the final Hearing transcripts which included the Parties' agreed corrections. In accordance with PO2, the transcripts were uploaded on the ICSID website.

64. They simultaneously filed their submissions on costs on 17 May 2024. The Claimant filed its response submissions on costs on 24 May 2024 and the Respondent files its response submission on 27 May 2024.

65. On 25 September 2024, the Claimant informed the Tribunal of the passing of Mr. Lewis on 27 June 2024. It further stated that Mr. [redacted] had been appointed President and CEO of Discovery and it confirmed that it maintained its claim in the arbitration.

66. On 23 October 2024, in accordance with Regulation 15(1)(c), the ICSID Secretariat requested that each Party make an additional advance payment of USD 80,000 by 22 November 2024.

67. The ICSID Secretariat received the Claimant's payment of USD 79,982 on 20 November 2024 and on 22 November 2024 it received the Respondent's payment of USD 80,000.

68. The proceedings were closed on 27 December 2024.

69. On 9 and 10 January 2025, respectively, the Respondent and the Claimant filed updated statements of costs.

III. THE MAIN FACTS

70. The following summary provides a general overview of the present dispute. Additional facts will be discussed in the Tribunal's analysis. Except where otherwise stated, the facts in the following section are undisputed or deemed established.

A. THE SLOVAK LEGISLATIVE FRAMEWORK FOR OIL AND GAS EXPLORATION

71. Pursuant to Article 4 of the 1992 Slovak Constitution, the Slovak Republic owns the natural wealth located in its territory.[4] Article 44 sets forth the right to the protection of the environment and cultural heritage. Article 44(3) specifies that "[n]o one may endanger, or damage the environment, natural resources, and the cultural heritage beyond the extent laid

[4] Constitution of the Slovak Republic, Article 4 (R-18).

down by law".[5] Under Article 44(4), the State must ensure "a cautious use of natural resources, ecological balance, and effective environmental care".[6]

72. According to Article 4 of the Geology Act, only a holder of a geological authorization can perform geological works.[7] The Ministry of Environment ("MoE") issues such authorization "for an indefinite period of time".[8] In addition, geological works can only be carried out in an exploration area defined by the MoE, which issues an exploration area license.[9] The validity periods of such licenses are governed by Article 24(8) of the Geology Act in the following terms:

> "The exploration area shall be determined by the Ministry for the period required by the client and necessary for the performance of the geological works and for the area not exceeding the area justified by the most appropriate performance of the geological works from a technical and economic point of view. If the period specified is insufficient for the completion of the activities, it may, at the request of the exploration area holder, be extended by a period which is strictly necessary for the completion of the geological works. An extension of time must be requested at least three months before the expiry of the time limit. […]".[10]

73. Article 29 of the Geology Act, which is entitled "Entry onto and use of foreign property", requires an exploration license holder to obtain the consent of the owner of the land to conduct geological works on "foreign property" (paragraph 3) or, in the absence of consent, an order from the MoE granting access (paragraphs 4-5). Article 29 reads in relevant part as follows:

> "(1) For the purpose of carrying out geological works in the public interest, the contractor of geological works and persons authorised by him are entitled to enter foreign property, to establish on it workplaces, access roads and water and energy supply, carry out necessary land improvements and remove vegetation.
>
> (2) The activities referred to in paragraph 1 may be carried out only to the extent necessary, for the necessary period of time and for reasonable compensation.
>
> (3) The contractor of geological works is obliged to agree with the owner of the property the scope, method of carrying out and duration of the geological works and to notify the owner of the property of the commencement of the execution of the geological works in writing at least 15 days in advance.
>
> (4) If the owner of the property does not agree with the scope, manner and duration

5 Constitution of the Slovak Republic, Article 44(3) (R-18).

6 Constitution of the Slovak Republic, Article 44(4) (R-18).

7 Geology Act, Article 4(1)(a) (R-42).

8 Geology Act, Article 6(3) (R-42).

9 Geology Act, Articles 21(1) (R-42).

10 Geology Act, Article 24(8) (R-42).

of the exercise of the authorization under paragraph 3 and no agreement is reached, the Ministry shall decide based on the application of the geological contractor of the geological works.

(5) The foreign property may be used for the performance of geological works involving geological works or geological objects, by the geological contractor according to the agreement with the owner of the property. If no agreement is reached, the decision shall be taken on the contractor's proposal by the Ministry.

[…]

(9) The time limit for issuing a decision pursuant to paragraphs 4 and 5 shall be six months from the date of submission of the application by the geological works contractor. If this time limit is insufficient for objective reasons, the Ministry shall be authorized to extend that period by an additional six months.

[…]

(12) Without the consent of the owner of the property and without a decision of the Ministry pursuant to paragraphs 4 and 5, the contractor of geological works may restrict the ownership right only in urgent public interest, for the prevention or elimination of an imminent natural disaster and for the prevention of and the elimination of accidents pursuant to a special regulation, and only for the time strictly necessary".[11]

74. Pursuant to Article 50(7) of the Forest Act, forest property owned by the Slovak Republic and managed by a state-owned entity may be leased to third parties, for instance to conduct geological works, provided the Ministry of Agriculture ("MoA") gives its "prior consent". That provision reads as follows:

> "(7) The exchange, lease, lending and transfer of the management of forest property owned by the State shall require the prior consent of the Ministry, except for the transfer of the management of forest property owned by the State in the administration of a legal entity founded or established by the Ministry of Defence or established by the Ministry of the Environment of the Slovak Republic. Prior consent of the Ministry is not required for the lease of State-owned forest property with an area of less than 5000 m² which is not directly connected to State-owned forest property of a similar nature. Leased State-owned forestry property may not be subleased unless otherwise agreed. The borrower may not leave forest property owned by the state for use by another entity. The consent of the Ministry shall also be required for an exemption affecting forest land pursuant to Article 3(1)(a) to (c) and (e) owned by the State, except for exemption in military forests and recreation areas established before the entry into force of this Act and for decision-making pursuant to Article 3(2)".[12]

75. The Parties agree that Slovak law provides for a permitting process to engage in oil and

[11] Geology Act, Article 29 (R-42).

[12] Forest Act, Article 50(7) (R-70).

gas exploration that is structured as follows:[13]

(a) Geological authorization: The interested party must apply for and obtain from the MoE a general authorization to perform geological works in accordance with Articles 4-6 of the Geology Act.[14]

(b) Exploration area license: The interested party must apply for and obtain from the MoE a decision on the determination of the exploration area in accordance with Articles 22-24 of the Geology Act.[15]

(c) Geological project design: Pursuant to Article 12 of the Geology Act, the exploration area license holder must commission a geological project design from an entity hired to perform geological works for the interested party that stipulates *inter alia* which geological works need to be carried out and sets out an approach towards their implementation.[16] Pursuant to Article 25(8) of the Geology Act, the geological project design must be submitted to the MoE within three months of the determination of the exploration area and any later amendments within 30 days from the approval by the exploration area license holder.[17] The technical part of the geological project design must be submitted to the relevant nature protection authority for its comments in accordance with Article 9(1)(n) of the Nature Protection Act.[18]

(d) Right to explore land: The interested party must obtain the consent from all the land owners or apply for a decision from the MoE under Article 29 of the Geology Act.[19]

(e) Notification of initiation to the Slovak Geological Institute: Pursuant to Article 13(1) of the Geology Act, the interested party must notify the Slovak Geological Institute of the commencement of exploration no later than on the day of such commencement.[20]

(f) Notification of initiation to the District Mining Office: Pursuant to Article 13(4)

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13 Counter-Memorial, para. 33; Reply, para. 14.

14 Geology Act, Articles 4-6 (R-42).

15 Geology Act, Articles 22-24 (R-42).

16 Geology Act, Article 12 (R-42).

17 Geology Act, Article 25(8) (R-42).

18 Act No. 543/2002 Coll. on Nature and Landscape Protection, as amended (the "Nature Protection Act"), Article 9(1)(n) (R-43).

19 Geology Act, Article 29 (R-42).

20 Geology Act, Article 13 (R-42).

of the Geology Act and Articles 2 and 5a of the Act on Mining Activities, the interested party must notify the District Mining Office of the commencement of exploration eight days prior to starting the activity.[21]

(g) Preliminary EIA / Full EIA: Since 1 January 2017, pursuant to Article 29 and Annex 8 of the Environmental Impact Assessment Act ("EIA Act"), the interested party submits a "project intent" plan to the District Office, which then performs a preliminary EIA if drilling deeper than 600 meters is involved. If the District Office concludes there is a likely significant effect on the environment, then a full EIA must be performed.[22]

(h) Further permits for specific types of geological works: The interested party must apply for permits for specific types of geological works, such as permits for blasting works pursuant to Article 47 of the Explosives Act.[23] Moreover, if geological works are performed in protected areas, the interested party must apply for and obtain permits from relevant nature protection authorities, as required for instance under Articles 13(2)(f) and 14(2)(f) of the Nature Protection Act.[24]

(i) Notification for specific geological works (drilling): The interested party must notify the District Mining Office of drilling activities eight days prior to their start.[25]

(j) Approval of final report summarizing results and calculation of reserves: Under Articles 17 and 18 of the Geology Act, the interested party must submit for approval to the MoE a final report summarizing works performed and the results of the exploration, including the calculation of reserves.[26]

(k) Certificate of reserved mineral deposit: Based on the approval of the final report and the calculation of reserves, the MoE issues a certificate on a reserved mineral deposit in accordance with Article 6 of the Mining Act.[27]

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21 Geology Act, Article 13(4) (R-42); Act No. 51/1988 Coll. on Mining Activities, as amended, Articles 2 and 5a (R-44).

22 Act No. 24/2006 Coll. on Environmental Impact Assessment, as amended (applicable as of 1 January 2017) (the "EIA Act"), Article 29, Annex 8 (R-45).

23 Act No. 58/2014 Coll. on Explosives, as amended, Article 47 (R-46).

24 For instance, Nature Protection Act, Articles 13(2)(f) and 14(2)(f) (R-43).

25 The Regulation of the Slovak Mining Agency No. 89/1988 Coll. on rational utilization of exclusive deposit and on permission and reporting the mining activity and on reporting the activity carried out by mining manner, as amended, Article 13 (R-47).

26 Geology Act, Articles 17-18 (R-42).

27 Act No. 44/1988 on Protection and Use of the Natural Resources, as amended (the "Mining Act"), Article 6 (R-48).

(l) Decision on protective deposit territory: In accordance with Articles 16 and 17 of the Mining Act, the interested party must apply to the District Mining Office for a decision on protective deposit territory, which prevents third parties from interfering with the area.[28]

B. THE OIL AND GAS ENDOWMENT OF SLOVAKIA

76. The Slovak Republic is part of the North Carpathian region. The North Carpathian mountains comprise an older range called the Inner Carpathians and a younger range called the Outer Carpathians. These ranges are separated by a narrow tectonized belt called the Pieniny Klippen Belt.[29] Whereas Central Slovakia is located in the Inner Carpathians, the northern and northeastern parts of Slovakia are located in the Outer Carpathians.[30]

77. The Outer Carpathians comprise a series of nappes and thrust sheets, with overlaying sequences of flysch-type sediments deposited between the late Jurassic and early Miocene.[31] These nappes, which extend southward from Poland into Slovakia, comprise (i) the Skole nappe, (ii) the sub-Silesian nappe, (iii) the Silesian nappe, (iv) the Dukla nappe, and (v) the Magura nappe.[32] Northeastern Slovakia is essentially underlain by the Dukla and Magura nappes.[33] The Claimant's exploration license areas are mostly underlain by the Magura nappe with a portion around the town of Smilno called the "Smilno tectonic window" underlain by the Dukla nappe.[34]

78. Oil and gas exploration in the North Carpathians dates back to the second half of the 19th century. Oil production started in Poland in 1858 in the Bobrka-Rogi field, across the Slovakian border.[35] In total, around 150,000 shallow wells (less than 500 meters) and over 8,000 deep wells (more than 1,000 meters) have been drilled in Poland (mostly in the

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28 Mining Act, Articles 16-17 (R-48).

29 Modified from Geology and Hydrocarbon Resources of the Outer Carpathians, Poland, Slovakia, and Ukraine: General Geology, Slaczka et al., AAPG Memoir 84, 2006, pp. 221-258 (CDL-1).

30 Longman ER1, p. 4, Figure 1; Bulletin 2204-D North Carpathian Province, USGS, 2006, p. 4, Figure 2 (AA-034).

31 Bulletin 2204-D North Carpathian Province, USGS, 2006, p. 7 (AA-34).

32 Bulletin 2204-D North Carpathian Province, USGS, 2006, p. 8 (AA-34).

33 Longman ER1, p. 6, Figure 2; Modified from Geology and Hydrocarbon Resources of the Outer Carpathians, Poland, Slovakia, and Ukrain: General Geology, Slaczka et al., AAPG Memoir 84, 2006, p. 241, Figure 12 (CDL-1); Ceranka, Oil Production in Outer Carpathians, 2015, p. 9 (AA-11).

34 AOG Smilno Project of Geological Works, 11 November 2015, p. 1 (C-88); Operating Committee ("Opcom") Presentation, 16 September 2015, p. 30 (C-80).

35 Atkinson ER1, para. 33; Ceranka, Oil Production in Outer Carpathians, 2015, p. 2 (AA-11).

"foredeep Miocene gas province to the north").[36] As of 2013, "69 oil and 26 gas deposits [had] been discovered in the Carpathians with cumulative economic reserves in place of 446 Mbbl of oil, 12242 MMcf of gas".[37]

79. Oil and gas exploration in Slovakia dates back to the end of the 19th century. In total, around 42 wells were drilled "in and around" the Claimant's license area in northeast Slovakia, 11 of which deeper than 1,000 meters.[38] Around 26 wells were drilled until the 1950s on surface features and seeps in the area covered by the Claimant's exploration licenses, including two wells in 1905 and 1910 in the Smilno area called the Otto and Marta wells,[39] five wells between 1897 and 1914 around Krivá Oľka,[40] as well as 16 wells in the Mikova field between 1911 and 1941 at a depth of 35 meters and a deeper well between 1941 and 1943 at Matej-V at a depth of 1,369 meters, these latter wells having produced around 1.6 million barrels of oil ("MMBO").[41]

80. In the 1950s, 2D seismic data was conducted in the area covered by the Claimant's exploration licenses.[42] According to Mr. Lewis, the Claimant's main witness and ultimate owner, who passed away in a tragic accident in the late stage of the proceedings, the quality of that data "was poor and acquired over too small an area", and thus "little useful sub-surface information was gained from this survey".[43]

81. In total, 30 wells were drilled in the Claimant's exploration license areas between 1896 and 1998, 26 wells until the 1950s (including 7 wells deeper than 1,000 meters) and four deep wells thereafter:[44]

- Between 1972 and 1978, an exploration well was drilled at Zboj-1 up to a depth of 5,002 meters;[45]

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36 Atkinson ER1, p. 11; Atkinson ER2, para. 41; Bulletin 2204-D North Carpathian Province, USGS, 2006, p. 16, Figures 7 and 9 (AA-34).

37 Ceranka, Oil Production in Outer Carpathians, 2015, p. 6 (AA-11).

38 Atkinson ER2, para. 42.

39 AOG Smilno Project of Geological Works, 11 November 2015, p. 2 (C-88).

40 Project of Geological Works Kriva Olka, 2 November 2015, pp. 2-3 (C-82); Project of Geological Works Poruba, 2 November 2015, pp. 4-5 (C-83).

41 Technical Data (2018-03-14), p. 2 (AA-59); Opcom Presentation, 16 September 2015, p. 18 (C-80); Atkinson ER1, para. 33; Lewis WS1, para. 23(a).

42 Technical Data (2018-03-14), p. 2 (AA-59).

43 Lewis WS1, para. 23(b).

44 Atkinson ER1, pp. 26 and 61, Annex 4, Table 4.1; Opcom Presentation, 16 September 2015, p. 36 (C-80).

45 Atkinson ER1, p. 61, Annex 4, Table 4.1.

- Between October 1978 and December 1983, the Slovak national oil company NAFTA drilled an exploration well at Smilno-1, close to the town of Smilno.[46] The well was drilled to a depth of 5,700 meters (Dukla unit), with intervals being tested at 2,990 to 5,700 meters.[47] Gas flowed at 4.8 MMscf/d from the top-most interval at 2,990-3,015 meters;[48]

- Between January 1986 and September 1989, an exploration well was drilled at Zborov-1 up to a depth of 5,500 meters, with flow testing being conducted in various intervals between 2,436 and 5,500 meters;[49]

- In 1998, the last well was drilled at Alexander-1 up to a depth of 1,502 meters.[50]

C. AOG'S ACTIVITIES PRIOR TO THE ACQUISITION BY DISCOVERY IN 2014

82. On 17 and 18 July 2006, the British company Aurelian Oil & Gas PLC ("Aurelian") obtained from the MoE three exploration area licenses to search for oil and gas deposits in the districts of Svidník (the "Svidník Exploration License"), Medzilaborce (the "Medzilaborce Exploration License") and Snina (the "Snina Exploration License"), all located in the Prešov region in north-eastern Slovakia (together, the "Exploration Licenses" or "Exploration Area Licenses"),[51] as illustrated in the following map:[52]

46 Moy ER1, para. 66.

47 Moy ER1, para. 66. See VUGI_Smilno_FinReport.pdf (SM-3); Drilling Schedule from Report (Smilno1).xlsx, rows 52 and 94 (SM-4).

48 Moy ER1, para. 66.

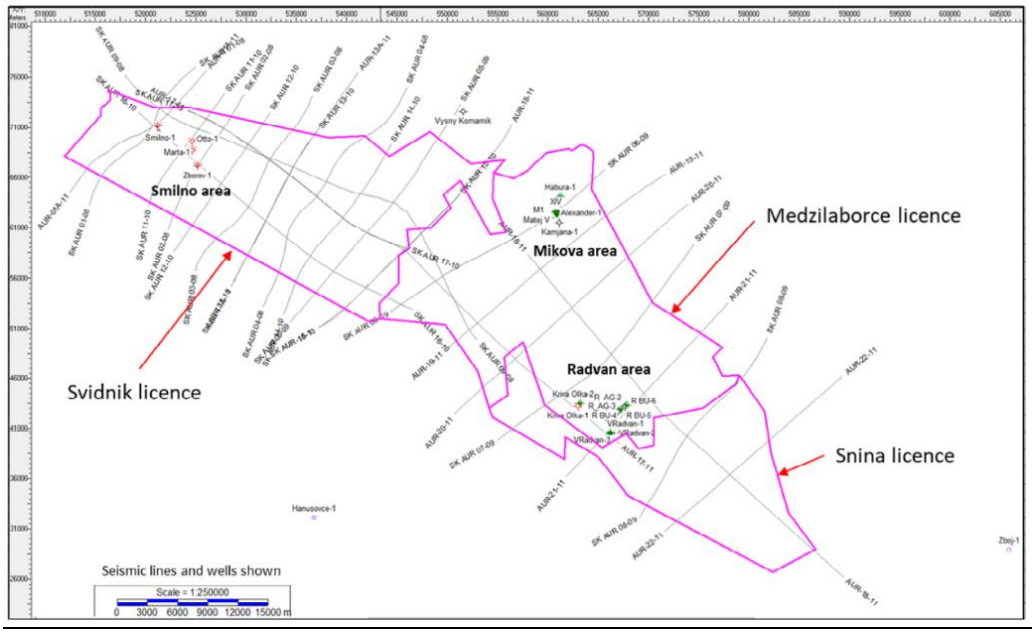
49 Moy ER1, para. 68. See VUGI_Zborov_FinalTechSupervisionPT.pdf (SM-6); 20220117 Well Test Results & Gradients v1.xlsx (SM-7).

50 Technical Data (2018-03-14), p. 2 (AA-59).

51 Statement about determination of exploration area (Svidník), NR.: 7677/2006-6.2, 18 July 2006 (C-2 and R-14); Statement about determination of exploration area (Medzilaborce), NR.: 7673/2006-6.2, 17 July 2006 (C-3 and R-30); Statement about determination of exploration area (Snina), NR.: 7674/2006-6.2, 18 July 2006 (C-4 and R-31).

52 Atkinson ER1, p. 10, Figure 3-1.

83. The Exploration Licenses initially covered an area of 2,442.2 km².[53] The following map shows the initial boundaries of the Exploration Licenses:[54]



84. The Exploration Licenses were extended on 26 July 2010 for four years until 1 August 2014 without changes to the surface areas.[55] In 2013, Aurelian voluntarily relinquished

53 Specifically: 760.1 km² in Svidník, 721.1 km² in Medzilaborce, and 961 km² in Snina.

54 Atkinson ER1, p. 13, Figure 3-3.

55 According to the MoE, these extensions were justified because AOG had spent 160% of the planned finances in Svidník, 155% in Medzilaborce and 135% in Snina. Decision about extension of the geological survey permit

surface areas across all three licenses, thus reducing the total area to 1,537 km².[56] The Exploration Licenses were extended for the remaining surfaces for another two years in July 2014 until 1 August 2016, whereby the Snina surface area[57] was further reduced bringing the total area to 1,246.69 km².[58]

85. On 18 September 2006, Aurelian and AOG Nominees Limited, a partner company of the former, established a Slovak subsidiary by the name of Aurelian Oil & Gas Slovakia s.r.o. ("AOG"), a private limited liability company, for the purpose of conducting the exploration activities in the areas covered by the Exploration Licenses and AOG assumed all the rights and obligations under the Exploration Licenses.[59] AOG was registered in the Slovak commercial registry on 25 November 2006.[60] Its initially registered share capital was Sk 200,000, with Aurelian contributing Sk 170,000 and AOG Nominees Limited Sk 30,000.[61] On 28 March 2009, Aurelian and AOG Nominees Limited contributed a further EUR 5,643 and EUR 996, respectively.[62]

86. Thereafter, AOG created three Slovak subsidiaries to conduct the exploration activities in the areas covered by the Exploration Licenses: Radusa Oil & Gas s.r.o., Magura Oil & Gas

(Svidník), Ref. No.: 44505/2010, File No.: 998/2010-9.3, 26 July 2010, p. 10 of the pdf document (C-5); Decision about extension of the geological survey permit (Medzilaborce), Ref. No.: 44515/2010, File No. 1000/2010-9.3, 26 July 2010, p. 9 of the pdf document (C-6); Decision about extension of the geological survey permit (Snina), Ref. No.: 44509/2010, File No.: 1000/2010-9.3, 26 July 2010, p. 9 of the pdf document (C-7).

56 Specifically: 469.98 km² in Svidník, 529.31 km² in Medzilaborce, and 539 km² in Snina. Longman ER1, p. 5, Table 1. The MoE approved these area reductions in June 2013. See Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 5 of the pdf document (C-12); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 5 of the pdf document (C-13); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 4 of the pdf document (C-14). According to a February 2013 project update by San Leon, AOG envisaged a partial relinquishment in August 2013: "It is understood that the relinquishment proposal and a report documenting all work undertaken needs to be submitted to the Ministry by the end of March, prior to relinquishment in August". Solvakia Project Update on exploration activities and geological filedwork: Svidník, Medzilaborce & Snina Blocks, February 2013, pp. 5 and 30 of the pdf document (C-45).

57 Specifically, 248.4 km² for Snina. The surface areas in Svidník (468.98 km²) and Medzilaborce (529.31 km²) remained unchanged.

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

59 AOG Full Extract from the Commercial Register, 17 February 2023, p. 7 of the pdf document (R-49).

60 AOG Full Extract from the Commercial Register, 17 February 2023, p. 7 of the pdf document (R-49).

61 AOG Full Extract from the Commercial Register, 17 February 2023, pp. 3 and 7 of the pdf document (R-49).

62 AOG Full Extract from the Commercial Register, 17 February 2023, p. 3 of the pdf document (R-49).

s.r.o. and Dukla Oil & Gas s.r.o. (together, the "AOG Subsidiaries").[63]

87. On 4 April 2008, the AOG Subsidiaries entered into a farm-in agreement with the Dutch company JKX (Nederland) B.V. ("JKX"), through which JKX obtained a 25% interest in the Exploration Licenses for a total consideration of EUR 293,661.74.[64]

88. On 5 June 2008, the AOG Subsidiaries entered into a farm-in agreement with the Romanian company Societatea Nationala de Gaze Naturale "ROMGAZ" S.A. ("Romgaz"; together with Aurelian and JKX, the "JV Partners"), according to which Romgaz was transferred a 25% interest in the Exploration Licenses for an amount of EUR 293,661.74.[65] As a result, from June 2008 onwards, AOG, through its three subsidiaries, held a 50% stake in the Exploration Licenses.

89. On 28 November 2008, the AOG Subsidiaries concluded joint operating agreements ("JOA") with JKX.[66] Those JOAs were novated and amended on 1 May 2009.[67]

90. On 28 March 2009, AOG Finance Limited replaced AOG Nominees Limited as shareholder of AOG.[68]

91. Following a decision of AOG's shareholders on 20 July 2010, the AOG Subsidiaries merged into AOG on 30 September 2010.[69] AOG's registered share capital was EUR 26,556; Aurelian held 99% contributing EUR 22,572 and AOG Finance Limited held

63 AOG Full Extract from the Commercial Register, 17 February 2023 (R-49).

64 [redacted]

65 [redacted]

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

67 Novation and Amendment of Joint Operating Agreement for area known as Medzilaborce in the Slovak Republic, 1 May 2009 (C-241); Novation and Amendment of Joint Operating Agreement for area known as Svidník in the Slovak Republic, 1 May 2009 (C-242); Novation and Amendment of Joint Operating Agreement for area known as Snina in the Slovak Republic, 1 May 2009 (C-243).

68 AOG Full Extract from the Commercial Register, 17 February 2023, p. 2 of the pdf document (R-49).

69 AOG's merger with Aurelian's operating subsidiaries, 20 July 2010 (C-33); Aurelian Oil & Gas Slovakia s.r.o. Deed of Association, 20 July 2010, Article IV (C-34); AOG Full Extract from the Commercial Register, 17 February 2023, p. 9 of the pdf document (R-49).

1% contributing EUR 3.984.[70]

92. On 10 February 2012, the press announced that Aurelian was looking for a buyer due to "disappointment over progress of its exploration for gas in Poland, Slovakia and other central and eastern European fields".[71]

93. On 25 January 2013, the Irish company San Leon Energy plc ("San Leon") acquired all of Aurelian's share capital for EUR 62 million.[72] According to the Claimant, "Aurelian and AOG Finance Ltd continued to hold the entirety of the participation interests in AOG" until AOG was acquired by Discovery.[73]

94. On 14 August 2013, Aurelian Oil & Gas Limited replaced Aurelian as the majority shareholder of AOG.[74]

D. EXPLORATION ACTIVITIES PRIOR TO 2014

95. Between 2006 and 2010, AOG purchased and reprocessed existing 2D seismic data, undertook field work and acquired additional 2D seismic data.[75] Specifically, AOG undertook preliminary processing of gravity data in March 2007, conducted a field survey in June 2007, and prepared partial reports between August and October 2007.[76] AOG then acquired 128 km² of new 2D seismic data in 2008 and 2009 and 149 km² in 2010.[77] On the basis of the 2D seismic data obtained between 2008 and 2010, AOG identified a number of "leads" that it wanted to further explore through an "infill seismic survey" in order to advance prospects for drilling by 2012.[78] Its total expenditures between 2006 and 2010

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70 AOG Full Extract from the Commercial Register, 17 February 2023 (R-49); Aurelian Oil & Gas Slovakia s.r.o. Deed of Association, 20 July 2010, Article IV (C-34).

71 Financial Times, *Aurelian's sale plan fails to lift shares*, 10 February 2012 (R-55).

72 San Leon Energy plc Annual Report and Accounts 2013, p. 83 (C-228). See Memorial, para. 46; Counter-Memorial, para. 50; Longman ER1, p. 5, Table 1.

73 Memorial, para. 46.

74 AOG Full Extract from the Commercial Register, 17 February 2023, p. 2 of the pdf document (R-49).

75 See Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013, p. 4 of the pdf document (C-45); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 5 of the pdf document (C-12).

76 Annual Report, 2007 (R-50).

77 Annual Report, 2009 (R-51); Annual Report, 2010 (R-52); Aurelian Oil & Gas Slovakia s.r.o. – Smilno Annual Report to the Ministry of Environment, January 2011, p. 3 of the pdf document (C-36).

78 Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013, p. 13 of the pdf document (C-45).

(including exploration area fees) amounted to EUR 7,456,522.[79]

96. Between 2011 and 2013, AOG prepared geological and exploration studies, acquired 2D seismic data over 449 km² and performed gravimetric surveys.[80] Based on the data obtained during the 2010 survey, in April 2011, AOG identified a number of additional "leads" and "prospects" in the Svidník license area, in particular the Zborov-A, Zborov-B, Smilno-A and Smilno-B "prospects", as well as the Zborov-C and Zborov-D "leads".[81] In 2012, AOG conducted an aero-gravity survey and identified the location for an exploration well at Cierne-1, which it planned to drill "in late 2013 or 2014".[82]

97. In February 2013, Aurelian prepared a project update on its exploration activities, in which it contemplated relinquishing surface areas across all three license areas by August.[83] In that update, Aurelian identified a number of "risks" and "issues", including "difficult" seismic data, "reservoir uncertainty", "high risk" of identified prospects, and the need for "better seismic".[84]

98. In March 2013, Aurelian received from Bridgeporth Ltd. the interpretation studies of the airborne high resolution full tensor gravity gradiometry ("FTG") data and magnetic data.[85] While the purpose of these studies was to "confirm and identify new leads", they concluded that existing seismic data "has generally been of poor quality" because of the structurally complex geology, which resulted in "misinterpretations of the seismic data and significant errors on the predicted locations and depths of formations".[86] The studies added that "key information" about the "complex geological area" "was still lacking", and that the "FTG

79 Aurelian Oil & Gas Slovakia s.r.o. – Smilno Annual Report to the Ministry of Environment, January 2011, p. 5 of the pdf document (C-36).

80 See Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013, pp. 4 and 15 of the pdf document (C-45); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 5 of the pdf document (C-12).

81 Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013, p. 14 of the pdf document (C-45).

82 JKX Oil & Gas plc Annual Report 2012, p. 65 (C-42).

83 Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013, p. 5 of the pdf document (C-45).

84 Slovakia Project Update on exploration activities and geological fieldwork: Svidník, Medzilaborce & Snina Blocks, February 2013 (C-45).

85 FTG Qualitative and Quantitative interpretation of full tensor gravity, 4 March 2013 (C-47); FTG Carpathian Thrust and Fold Belt Qualitative and Quantitative interpretation of full tensor gravity, 22 March 2013 (C-46).

86 FTG Qualitative and Quantitative interpretation of full tensor gravity, 4 March 2013, p. 3 of the pdf document (C-47); FTG Carpathian Thrust and Fold Belt Qualitative and Quantitative interpretation of full tensor gravity, 22 March 2013, p. 10 (C-46).

leads could be used to locate new seismic acquisition" and "to locate shallow wells".[87] According to those studies, the Zborov-B "prospect" remained the "best prospect in the portfolio", although "possibly smaller than thought", further adding that Zborov-A and Smilno-B were "of interest".[88]

99. Although AOG had budgeted a total of EUR 9,787,934 for its exploration activities between 2006 and August 2013 (EUR 5,002,000 for Svidník, EUR 3,239,567 for Medzilaborce, and EUR 1,546,367 for Snina), it spent in reality a total of EUR 15,115,619 in that period (EUR 6,946,582 for Svidník, EUR 4,044,298 for Medzilaborce and EUR 4,124,739 for Snina).[89]

E. ACQUISITION BY DISCOVERY IN 2014

100. On 16 September 2013, Discovery GeoServices Corporation and San Leon entered into a confidentiality agreement to discuss the potential acquisition of a 50% interest in Aurelian.[90]

101. On 1 December 2013, Discovery Polska LLC ("Discovery Polska") and San Leon signed a non-binding letter of intent setting forth the terms and conditions under which San Leon would sell its 50% interest in the Exploration Licenses.[91] One of the key conditions precedent was a waiver of the right of first refusal by the JV Partners,[92] which JKX provided on 3 December 2013 and Romgaz six days later.[93]

102. On 24 March 2014, Discovery Polska entered into an agreement to acquire AOG for a cash consideration of EUR 153,054.50 and an "overriding royalty of 3.5% of 100% of all

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87 FTG Carpathian Thrust and Fold Belt Qualitative and Quantitative interpretation of full tensor gravity, 22 March 2013, pp. 88-89 (C-46).

88 FTG Qualitative and Quantitative interpretation of full tensor gravity, 4 March 2013, p. 57 of the pdf document (C-47).

89 Decision about exploration area term extension (Svidník), Record Number: 33590/2014, File Number: 5670/2014-7.3, 10 July 2014, p. 4 of the pdf document (C-8); Decision about exploration area term extension (Medzilaborce), Record Number: 33409/2014, File Number: 5670/2014-7.3, 9 July 2014, p. 4 of the pdf document (C-9); Decision about exploration area term extension (Snina), Record Number: 34186/2014, File Number: 5668/2014-7.3, 15 July 2014, p. 6 of the pdf document (C-10).

90 Confidentiality Agreement between San Leon Energy plc and Discovery GeoServices Corporation, 16 September 2013 (C-49).

91 Non-Binding Letter of Intent between Discovery Polska LLC and San Leon Energy plc, 1 December 2013 (C-50).

92 Non-Binding Letter of Intent between Discovery Polska LLC and San Leon Energy plc, 1 December 2013, Item 3(a) (C-50).

93 Letter of 3 December 2013 from JKX (C-51); Letter of 9 December 2013 from Romgaz (C-52).

petroleum" produced and sold in the license areas.[94]

103. On 5 April 2014, the sale was closed and Discovery Polska thus acquired AOG and a 50% share in the Exploration Licenses.[95]

104. On 29 April 2014, AOG changed its name from Aurelian Oil & Gas Slovakia s.r.o. to Alpine Oil and Gas, s.r.o.[96]

105. On 30 January 2015, for GBP 120,000 San Leon sold the entitlement to the overriding royalty of 3.5% to Alpha Exploration LLC ("Alpha"), a company wholly owned by Mr. Lewis.[97] On 3 November 2015, Alpha assigned the royalty to AOG for USD 10.[98]

F. LICENSE EXTENSIONS IN 2014 AND 2016

106. On 24 April 2014, AOG applied for an extension of the Exploration Licenses,[99] which the MoE granted in July 2014 for two years until 1 August 2016,[100] with a reduction in size of the surface of the Snina Exploration License (from 539 km² to 248.4 km²).[101] This reduction brought the total surface area of the three licenses down to 1,246.69 km².[102]

107. On 21 April 2015, the JV Partners obtained a fourth license, valid for four years, in the area of Pakostov (the "Pakostov license"; since the Pakostov license is not part of the subject matter of this dispute, it is not included in the definition of the Exploration Licenses).[103] The intention behind the acquisition of that license was to "support a potential 3-D seismic

94 Participation Interest Purchase and Sale Agreement, Article 1.2.1 (C-56).

95 AOG Full Extract from the Commercial Register, 17 February 2023, p. 3 of the pdf document (R-49).

96 AOG Full Extract from the Commercial Register, 17 February 2023, p. 1 of the pdf document (R-49).

97 Agreement for Purchase of Overriding Royalty Interest, 30 January 2015 (C-67).

98 Assignment of Overriding Royalty Interest, 3 November 2015 (C-84).

99 Decision about exploration area term extension (Svidník), Record Number: 33590/2014, File Number: 5670/2014-7.3, 10 July 2014, p. 2 of the pdf document (C-8); Decision about exploration area term extension (Medzilaborce), Record Number: 33409/2014, File Number: 5670/2014-7.3, 9 July 2014, p. 2 of the pdf document (C-9); Decision about exploration area term extension (Snina), Record Number: 34186/2014, File Number: 5668/2014-7.3, 15 July 2014, p. 4 of the pdf document (C-10).

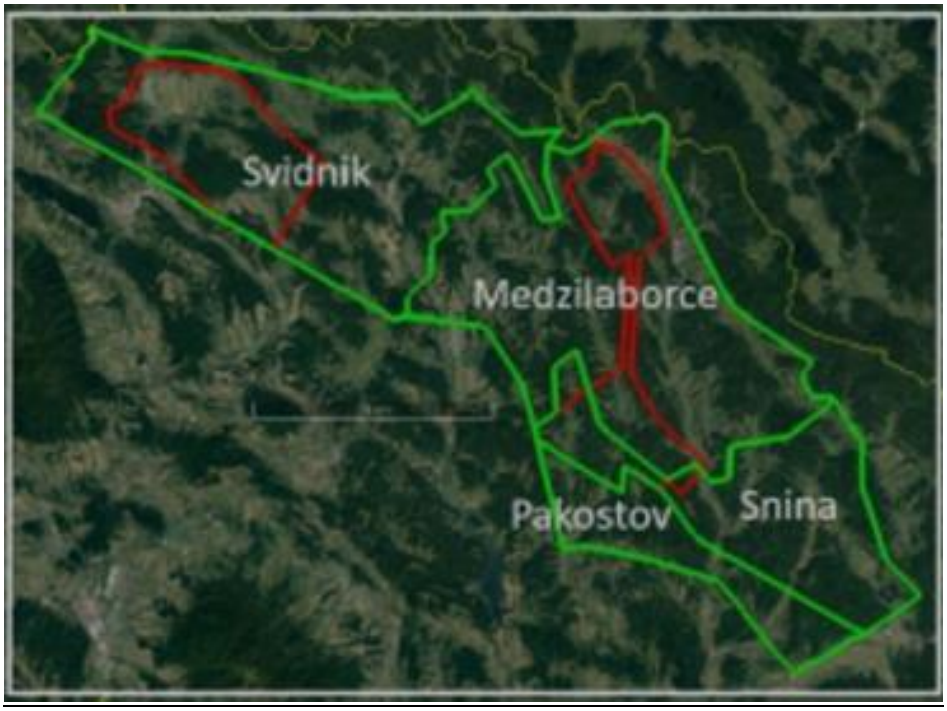
100 Decision about exploration area term extension (Svidník), Record Number: 33590/2014, File Number: 5670/2014-7.3, 10 July 2014 (C-8); Decision about exploration area term extension (Medzilaborce), Record Number: 33409/2014, File Number: 5670/2014-7.3, 9 July 2014 (C-9); Decision about exploration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

101 Specifically, 248.4 km² for Snina. The surface areas in Svidník (468.98 km²) and Medzilaborce (529.31 km²) remained unchanged.

102 Specifically: 468.98 km² for Svidník, 529.31 km² for Medzilaborce and 248.4 km² for Snina.

103 Pakostov license, 21 April 2015 (C-71).

survey" planned for the Exploration License areas.[104] The following map shows the boundaries of the Exploration Licenses and the Pakostov license:[105]



108. On 16 September 2015, AOG and JKX Slovakia B.V. entered into a JOA in relation to the Pakostov license.[106]

109. On 20 April 2016, the MoE received AOG's applications for an eight-year extension of the Exploration Licenses, coupled with a request for a reduction in the size.[107]

110. In June 2016, the MoE extended the Exploration Licenses for five years. Specifically, the Medilaborce and Snina Exploration Licenses were extended on 7 June 2016 until 1 August 2021, with a reduction of both areas (93.87 km² for Medzilaborce and 34.36 km² for

104 See AOG's report to Partners, 28 February 2019, p. 2 (C-205).

105 Moy ER1, p. 18, Figure 5-1.

106 Joint Operating Agreement between Alpine Oil & Gas s.r.o. and JKX Slovakia B.V. relating to the area known as Pakostov in the Slovak Republic, 16 September 2015 (C-240).

107 See Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 5 of the pdf document (C-12); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 5 of the pdf document (C-13); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 5 of the pdf document (C-14).

Snina).[108] The Svidník Exploration License was extended on 14 June 2016 until 1 August 2021, with a reduction of the surface area from 468.98 km² to 135.53 km².[109] In other words, after these reductions, the total surface area of the Exploration Licenses amounted to 263.76 km².

111. For all three extensions, the MoE held that a five-year extension (as opposed to the eight years requested by AOG) appeared "sufficient for the performance of geological works (exploratory wells, pumping tests, supplementary geophysical surveys and development of the final report)".[110] As regards the reduction of the surface area, the MoE stated that it accepted AOG's proposals for the following reasons:

> "Size of any exploration area depends on the decision of its holder, provided that change of the size of the exploration area will not have adverse effect on the objective of the geological task. In the case in question, reduction of the size of the exploration area will not have any adverse effect on the objective of the geological task, this will fulfilled [sic] also if the size of the exploration area is reduced and reduction of the size of the exploration area has no unfavourable impact on the rights and legitimate interests of other entities".[111]

112. The green lines on the following map show the reduced boundaries of the Exploration Licenses as of June 2016:[112]

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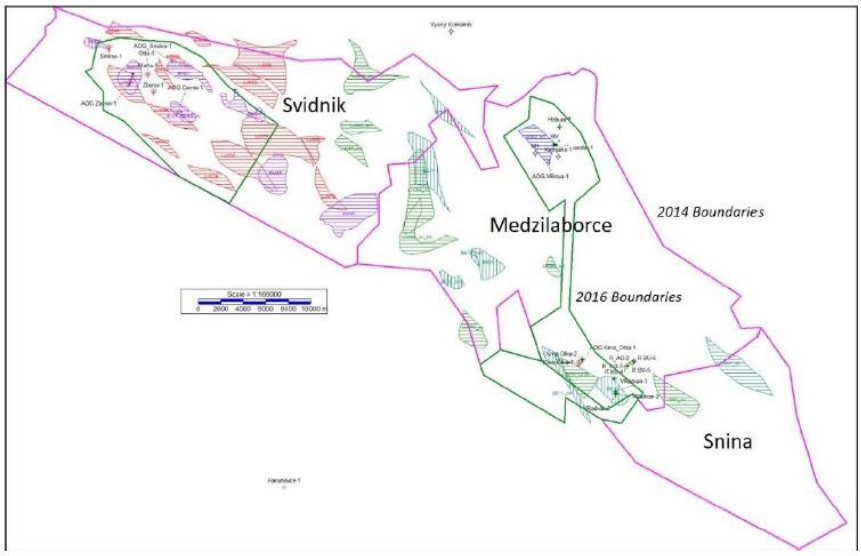
108 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 4 of the pdf document (C-13); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 4 of the pdf document (C-14).

109 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 4 of the pdf document (C-12).

110 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 9 of the pdf document (C-12); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 8 of the pdf document (C-13); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 8 of the pdf document (C-14).

111 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 9 of the pdf document (C-12); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 9 of the pdf document (C-13); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 8 of the pdf document (C-14).

112 Moy ER1, p. 24, Figure 6-1.



G. EXPLORATION ACTIVITIES SINCE 2014

113. On 5 March 2014, Discovery Polska presented its initial review of the existing seismic data (i.e. the 2D data) and its "new exploration concept" to its future partners.[113] This exploration concept contained two options: the first involved "[w]orking in areas of old wells and shows, complimented by the old wells, field mapping, new seismic data, plus MT [Magneto Telluric studies]"; the second "[w]orking in new areas, based on new seismic data plus MT".[114] Regarding the MT studies, the presentation specified that MT had been used since the 1970s to explore areas that are "inaccessible (cost prohibitive) to seismic acquisition", but that it "[l]acks the resolution of seismic data".[115] The exploration concept further envisaged "[a]dditional geophysical activities" and the drilling of "two shallow test wells" in 2014, followed by an "[e]valuation of deep potential" and the drilling of "at least one deep test well" in 2015, and, for 2016, either the extension of existing licenses, the application for new concessions or the application for production licenses.[116] The presentation also contemplated the acquisition of additional geophysical studies, in particular MT "and possible additional seismic [studies] on high-graded areas, time

113 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014 (C-53).

114 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014, p. 10 of the pdf document (C-53).

115 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014, p. 27 of the pdf document (C-53).

116 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014, p. 11 of the pdf document (C-53).

permitting", the cost for the MT being estimated at USD 386,075.[117] It further contained a priority ranking of shallow drilling locations, namely Vyxna Radvan, Shallow Smilno, Solnik and Mikova, with an estimated cost for a shallow well of USD 1,926,503, including a 25% contingency.[118]

114. On 10 April 2014, the JV Partners gathered for a first Operating Committee Meeting.[119] During that meeting, JKX and Romgaz approved Discovery Polska's exploration plan and budget, as well as its intention to seek an extension of the Exploration Licenses together with a partial relinquishment of the Snina Exploration License.[120] Mr. Lewis presented the expenditures required for the MT studies, specifying that budget or surface constraints would likely mean that "the number of points actually recorded would be less than the number of points in the submitted plan".[121] Mr. Lewis further explained that the estimated cost of the first two shallow wells would "probably be less than the $1.8 million dollars US set forth in the budget" (corresponding to EUR 1,309,140 per well), that he hoped to obtain the drilling permits "within 90 to 180 days" and that an authorization for expenditure ("AFE") would be submitted to the partners before starting to drill.[122] The approved budget for the remainder of 2014 (Q2 to Q4) amounted to EUR 3,538,412 (EUR 1,769,206 for AOG and EUR 884,603 for each of the other partners), comprising EUR 308,872 for "Tellurics Acquisition & Processing" in Q2 (EUR 76,435 in Svidnik, EUR 203,208 in Medzilaborce and EUD 29,228 in Snina), EUR 43,638 for geological services allocated evenly from Q2 to Q4, and EUR 2,618,280 for two "[m]andatory wells" in Q4 (one in Svidník and one in Medzilaborce).[123]

115. The price of crude oil started to drop in June 2014, and over the following months the price per barrel would go from over USD 100 to USD 45 in March 2015.[124]

116. The second Operating Committee Meeting took place on 11 September 2014.[125] During that meeting, AOG made a technical presentation assessing the historical seismic data and

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117 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014, p. 69 of the pdf document (C-53).

118 Discovery-AOG presentation to JKX and Romgaz (Partners Presentation), 5 March 2014, pp. 69-70 of the pdf document (C-53).

119 Opcom Minutes, 10 April 2014 (C-58).

120 Opcom Minutes, 10 April 2014, p. 1 of the pdf document (C-58).

121 Opcom Minutes, 10 April 2014, p. 2 of the pdf document (C-58).

122 Opcom Minutes, 10 April 2014, p. 2 of the pdf document (C-58).

123 AOG's approved proposed budget for 2014, 10 April 2014, p. 2 of the pdf document (C-57).

124 Crude oil chart, 2012-2022 (C-41).

125 Opcom Minutes, 11 September 2014 (C-61).

presenting the next exploration activities.[126] In that presentation, it stated that in 2010 and 2011 Aurelian had identified "[m]ultiple prospects and leads",[127] and that AOG was currently re-evaluating those leads and prospects and assessing the MT data it had acquired in the Ravdan area (including the Ravdan, Oľka, Oľka Stromy, Hrubov and Poruba "Prospects"), the Smilno area (including the "Smilno Prospect"), the Solnik area and the Mikova area.[128] The presentation further specified that "[w]ork is proceeding quickly to identify shallow projects (+/-1000m)", further adding that "only about 30% of the MT surveys acquired have been processed for these targets".[129]

117. During that meeting, Mr. Lewis told his partners that it was AOG's intention to drill two wells (namely the Oľka and the Stromy Prospects) "before the end of 2014", i.e. in November and December, that "the phase 1 acquisition of the MT surveys was completed", that 30% of the interpretation of that data had been completed, and that the already processed data showed that "certain prospects stood out that were very interesting".[130] Mr. Lewis added that "he did not intend to use the MT surveys alone for purposes of selecting a drill site", but that that data would be used "to confirm what the 2D seismic, surface mapping and gravity data showed".[131] According to him, "[t]he seismic data, the gravity data and the surface geology correlated nicely with the MT results".[132] He added that "the biggest issue" remaining "related to reservoir quality", which was the "least quantified variable", and that it would only be possible to "know specifically what the porosity of the reservoir rock is until we actually drill the wells".[133]

118. Mr. [redacted] from JKX stated that his company "was disappointed in the seismic", that it was looking for "deeper targets" and that the "seismic was not sufficiently clear for such purposes".[134] He further expressed concern about the ability of the MT data to distinguish between water and hydrocarbons.

119. After summarizing the "prospects" he had identified, Mr. Lewis discussed the proposed schedule of activities, which included "a 3D seismic survey over Radvan in Q1 and over

126 Partner's technical presentation, 11 September 2014 (C-62).

127 Partner's technical presentation, 11 September 2014, p. 6 of the pdf document (C-62).

128 Partner's technical presentation, 11 September 2014, pp. 11-59 and table on p. 60 of the pdf document (C-62).

129 Partner's technical presentation, 11 September 2014, pp. 60-61 of the pdf document (C-62).

130 Opcom Minutes, 11 September 2014, p. 2 of the pdf document (C-61).

131 Opcom Minutes, 11 September 2014, p. 2 of the pdf document (C-61).

132 Opcom Minutes, 11 September 2014, p. 2 of the pdf document (C-61).

133 Opcom Minutes, 11 September 2014, p. 2 of the pdf document (C-61).

134 Opcom Minutes, 11 September 2014, p. 3 of the pdf document (C-61).

Smilno in Q3 or Q4 of 2015" "to image the deeper prospects", it being specified that "acquiring the 3D seismic is better in winter".[135] Asked by Mr. [redacted] whether a 3D survey was still necessary if the MT worked sufficiently well, Mr. Lewis answered that "even if the MT works as expected, we still need a 3D survey to identify the fault compartments".[136]

120. In the end, the JV Partners agreed to drill two wells in Medzilaborce (Oľka and Stromy) in 2014 and "one firm well" in Svidník (Smilno) in 2015 in order to "satisfy the minimum work commitment", and further agreed that "[a] decision on the 3D survey would be made later contingent on the results of the drilling activities".[137]

121. A third Operating Committee Meeting took place on 28 November 2014.[138] Mr. Lewis started the meeting by stating that the AFE approval process had taken longer than anticipated, to which Mr. [redacted] from Romgaz answered that "Romgaz needed a lower AFE number in order to obtain approval", since the "AFEs were higher than the approved budget".[139] Mr. [redacted] added that Romgaz needed "a cost breakdown of the well".[140]

122. Mr. Fraser, AOG's new CFO, stated that AOG intended to drill two wells in the first quarter of 2015, two wells in the third quarter of 2015, and to conduct a "3D seismic survey in the third quarter".[141] Mr. [redacted] from JKX suggested that AOG drill an additional well during 2015 and further suggested that AOG drill "two firm wells in 2014 and one firm well in 2015 with two contingent wells in 2015".[142] He also asked whether a "3D modelling program had been prepared", adding that "the 3D seismic survey should not be firm because there was more technical work that needed to be done".[143] Mr. Lewis answered that currently "no in-depth modeling ha[d] been done", that "seismic data is very helpful to image faults and compartmentalize formations", since MT "really does not do this", and that the scope of the 3D survey would be "1000 meters and deeper".[144]

123. Mr. [redacted] said that Romgaz had difficulties with the AFEs, since the geological costs

135 Opcom Minutes, 11 September 2014, p. 4 of the pdf document (C-61).

136 Opcom Minutes, 11 September 2014, p. 5 of the pdf document (C-61).

137 Opcom Minutes, 11 September 2014, p. 5 of the pdf document (C-61).

138 Opcom Minutes, 28 November 2014 (C-66).

139 Opcom Minutes, 28 November 2014, p. 1 (C-66).

140 Opcom Minutes, 28 November 2014, p. 1 (C-66).

141 Opcom Minutes, 28 November 2014, p. 2 (C-66).

142 Opcom Minutes, 28 November 2014, p. 3 (C-66).

143 Opcom Minutes, 28 November 2014, p. 2 (C-66).

144 Opcom Minutes, 28 November 2014, p. 2 (C-66).

were spread over the surface areas, with the result that those costs were higher for Snina than for Medzilaborce although no drilling was planned for Snina, adding that "Romgaz does not want to allocate costs based on surface basis".[145]

124. Finally, Mr. Lewis discussed the need to apply for an additional concession area "south of the Radvan project area", since that additional area was "necessary for the 3D seismic survey".[146] When asked if AOG could start the 3D survey before obtaining the new concession area, Mr. Lewis answered "no", because the Ministry had advised him that "AOG cannot acquire any data on a license it does not hold".[147]

125. According to the 2014 annual reports provided to the MoE, the cost for the MT measurement and processing amounted to EUR 190,878.40 (EUR 116,367.04 in Medzilaborce, EUR 45,368.34 in Svidník and EUR 29,143.02 in Snina).[148] The JV Partners also spent EUR 151,970.74 on drilling preparation, EUR 55,368.63 on geological services, and EUR 20,661.33 on uncovered operator and overhead work. Thus, for 2014, the JV's total expenditures on geological work and work management amounted to EUR 418,879.10 (EUR 286,554.46 in Medzilaborce, EUR 85,673.22 in Svidník and EUR 46,651.42 in Snina).[149]

126. The 2015 budget was approved by Romgaz on 2 February 2015 and by JKX on 5 February 2015.[150] The total budgeted costs for that year amounted to EUR 16,096,799, divided into EUR 3,896,799 as "2015 firm budget" and EUR 12,200,000 as "2015 optional budget", and comprising EUR 2,600,000 in Q1 for drilling costs of "firm wells", EUR 5,700,000 in Q3 for "optional wells", EUR 1,350,000 in Q1 and Q3 for "Completion and testing – optional", and EUR 4,800,000 in Q3 for "3D seismic – optional".[151] Regarding drilling costs more specifically, the budget envisioned spending EUR 2,600,000 in Q1 to drill "firm wells" in the Medzilaborce area and respectively EUR 1,900,000 in Q3 to drill "optional wells" in Svidník and Snina.

127. On 24 June 2015, Mr. Lewis told the JV Partners that AOG would "start the 3-D seismic

145 Opcom Minutes, 28 November 2014, p. 2 (C-66).

146 Opcom Minutes, 28 November 2014, p. 3 (C-66).

147 Opcom Minutes, 28 November 2014, p. 3 (C-66).

148 AOG Report to MOE – Medzilaborce, 2014 (C-252); AOG Report to MOE – Snina, 2014 (C-253); AOG Report to MOE – Svidník, 2014 (C-254).

149 AOG Report to MOE – Medzilaborce, 2014 (C-252); AOG Report to MOE – Snina, 2014 (C-253); AOG Report to MOE – Svidník, 2014 (C-254).

150 JOA Budget, 2 February 2015, p. 2 of the pdf document (C-68).

151 JOA Budget, 2 February 2015, p. 1 of the pdf document (C-68).

design process", including a "detailed cost estimate on the permitting, acquisition and processing of the data", and also stated that, once approved by the Operating Committee, AOG would "go out for bid".[152]

128. On 25 August 2015, Mr. Lewis informed his JV Partners that drilling programs had been submitted to the Mining Authority for wells planned at Smilno-1, Stromy-1 (which AOG renamed Krivá Oľka in 2015) and Poruba-1.[153]

129. On 16 September 2015, a fourth Operating Committee Meeting took place.[154] During that meeting, AOG explained to its partners that it had been "working full time since the beginning of the year" to obtain permits for the Oľka and Krivá Oľka wells, but that the "process was significantly delayed because of protests and Ministry issues".[155]

130. Regarding the Oľka site, Mr. Crow stated that "[m]atters had been going smoothly" "until some protests were made" about "possibly drilling shale gas wells", which then led "the Wolf environmental group" to appear and use "quite unscrupulous methods to whip up local anxiety". This had led "the Ministry" to slow down its approval process, thus prompting AOG "to suspend" that process and change its focus to obtaining a permit for Poruba-1, which location, other than "a road access issue that is currently being resolved", "basically appears ready to drill".[156] JKX and Romgaz stated that they would not oppose replacing the Oľka well with the Poruba well but stated that this should be submitted to the operating committee for approval, to which AOG responded that "it had not properly followed JOA protocols, and promised to do better in the future".[157]

131. Regarding the Krivá Oľka site, AOG explained that the "well is basically ready to drill, pending formal acceptance by the Ministry committee", which should be given in October 2015.[158]

132. Finally, regarding the Smilno-1 site, AOG repeated that the "location is basically ready to drill".[159] Concern was expressed that time had been spent on permitting the Smilno well location "even though this well had not been formally approved by the operating

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152 Email of 25 June 2015 from Mike Lewis to Partners, p. 2 of the pdf document (C-78).

153 Partner Progress Report, 25 August 2015 (C-79).

154 Opcom Minutes, 16 September 2015 (C-81); Opcom Presentation, 16 September 2015 (C-80).

155 Opcom Minutes, 16 September 2015, p. 1 of the pdf document (C-81).

156 Opcom Minutes, 16 September 2015, p. 2 of the pdf document (C-81).

157 Opcom Minutes, 16 September 2015, p. 2 of the pdf document (C-81).

158 Opcom Minutes, 16 September 2015, p. 2 of the pdf document (C-81).

159 Opcom Minutes, 16 September 2015, p. 2 of the pdf document (C-81).

committee".[160]

133. More generally, Romgaz "expressed concern about the timing of the drilling program, saying that if the wells are not drilled by February at the latest", insufficient time would remain to review the test results and obtain the approval of its board to apply for license extensions in February 2016.[161] JKX for its part stated that funds had been approved "to drill two wells this year" and added that it had "a very strong preference for drilling to be commenced this year".[162] AOG responded that new AFEs and the "remaining location approvals" would be ready "by [the] end of October 2015".[163]

134. On 3 December 2015, a fifth Operating Committee meeting took place, during which AOG updated its partners about the status of the Smilno-1, Krivá Oľka-1 and Poruba-1 wells, its engagement with local activists, and its intention to relinquish part of the license areas in its upcoming license extension requests.[164] The JV Partners approved the AFE for the Poruba-1 well, as well as the 2016 work program and budget.[165] Regarding the well timing, AOG provided the following information:

> "The first well location is expected to be ready by 15 January and all three locations are due to be ready shortly after that. Alpine [is] expected to have the first well drilled by the end of January and to be starting on the third well by the beginning of March. The current plan is to start with the AOG Smilno #1 well, although the order could change depending on the weather and other factors. The expectation is to put the AOG Smilno #1 (gas) well on a 'short term' test and to put the AOG Kriva Oľka #1 and AOG Poruba #1 (oil) wells on long term test as soon as possible after drilling".[166]

135. Regarding "PR and activist groups", AOG provided the following update:

> "There were no particular pending issues to report with local activists. However, Mr. [redacted] reported that there had been approaches from the local press seeking information. It is important to respond to these requests as the press might otherwise seek answers from sources less well disposed towards Alpine [AOG]. Mr. [redacted] therefore proposed some form of engagement with the local press in early January in order to

160 Opcom Minutes, 16 September 2015, p. 3 of the pdf document (C-81).

161 Opcom Minutes, 16 September 2015, p. 3 of the pdf document (C-81).

162 Opcom Minutes, 16 September 2015, p. 3 of the pdf document (C-81).

163 Opcom Minutes, 16 September 2015, p. 3 of the pdf document (C-81).

164 Opcom Minutes, 3 December 2015 (C-100).

165 Opcom Minutes, 3 December 2015, p. 4 of the pdf document (C-100); 2016 JOA Budget, 3 December 2015 (C-97).

166 Opcom Minutes, 3 December 2015, p. 2 of the pdf document (C-100).

communicate Alpine's [AOG's] key messages".[167]

136. According to the 2015 annual reports filed with the MoE, the JV Partners spent a total of EUR 987,351 on geological work and work management.[168] This included EUR 148,849 on geological work (EUR 42,415 in Svidník, EUR 80,242 in Medzilaborce and EUR 26,192 in Snina), EUR 426,438 on "Work Control – Drilling Preparation", EUR 122,154 on "Permitting (handling of entries and conflicts)", EUR 65,097 on technical works and EUR 202,206 on the purchase of material for drilling.[169]

137. On 16 February 2016, the JV Partners amended the 2016 budget,[170] and on 11 October 2016, Mr. Lewis provided a "Well Reports" to the JV Partners, regarding the Smilno-1, Krivá Oľka-1, Poruba-1, Zborov-1 and Habura-1 locations.[171]

138. On 8 November 2016, a sixth Operating Committee Meeting was held,[172] at which AOG told its partners that "[s]ome further MT points had been processed and interpreted, and the geological case for the main targets was reviewed, including the Zborov and Habura targets".[173] Mr. Fraser summarized AOG's efforts "to overcome protesters and other opposition, working with lobbyists and PR firms".[174] He added that in relation to the Krivá Oľka site, AOG was facing "implacable opposition of a junior minister within the Ministry of Agriculture called Mr. [redacted], who has staked his reputation on not permitting oil and gas drilling", which was the reason why AOG had applied for a compulsory access order under Article 29 of the Geology Act.[175] He said that AOG was still "unable to gain access" to the Poruba site and that it was facing "determined opposition from a small group of protesters" at the Smilno site.[176]

139. The JV Partners reviewed the 2016 expenditures, noting that non-exploration related expenditures exceeded the budget "as a result of the considerable obstacles and delays"

167 Opcom Minutes, 3 December 2015, p. 2 of the pdf document (C-100).

168 AOG Report to MOE – Medzilaborce, 2015 (C-261); AOG Report to MOE – Snina, 2015 (C-263); AOG Report to MOE – Svidník, 2015 (C-264).

169 AOG Report to MOE – Medzilaborce, 2015 (C-261); AOG Report to MOE – Snina, 2015 (C-263); AOG Report to MOE – Svidník, 2015 (C-264).

170 2016 JOA Budget Amendment, 16 February 2016 (C-297).

171 AOG report to JKX and Romgaz, 11 October 2016 (C-148).

172 Opcom Minutes, 8 November 2016 (C-342).

173 Opcom Minutes, 8 November 2016, p. 3, item 7 (C-342).

174 Opcom Minutes, 8 November 2016, p. 1, item 2 (C-342).

175 Opcom Minutes , 8 November 2016, p. 1, item 2 (C-342).

176 Opcom Minutes, 8 November 2016, p. 1, item 2 (C-342).

and that exploration related expenditures would "undershoot considerably".[177] They further discussed the 2017 work program and budget. The work program consisted of "three firm wells", including the Smilno-1 well "expected to be drilled before the end of 2016", and "two optional wells".[178] AOG informed its partners that it had "carried out some preliminary work in researching a Zborov well location earlier in the year" but that it had "suspended this activity once it had reached the point where an announcement to the local community would be required".[179] Finally, the JV Partners decided to amend the draft work program and budget and approve them at a later date.[180]

140. According to the 2016 annual reports provided to the MoE, the JV Partners spent a total of EUR 1,290,939.90 on geological work and work management in that year.[181] This included EUR 124,431.20 on geological work (EUR 66,564.80 in Svidník, EUR 31,380.50 in Medzilaborce and EUR 26,485.90 in Snina), EUR 830,611.90 for well control and preparation (EUR 506,849.60 in Svidník, EUR 212,497.60 in Medzilaborce and EUR 111,264.70 in Snina), EUR 193,519.50 on "Permitting (handling of entries and conflicts) including media and legal services" (EUR 105,007.40 in Svidník, EUR 58,741 in Medzilaborce and EUR 29,771.20 in Snina), EUR 3,609.10 on land leases and EUR 8,419.10 on operating costs.[182]

141. The 2017 work program and budget was approved by Romgaz on 23 January 2017 and by AOG and JKX on 10 February 2017.[183] It contemplated the following exploration activities:

- Drilling of a firm well at Smilno-1 in January 2017 for EUR 839,000;
- Drilling of a firm well at Medzilaborce-1 in February 2017 for EUR 990,000;
- Drilling of a firm well at Snina-1 in June 2017 for EUR 1,145,000;
- Drilling of an optional well at Zborov-1 in May 2017 for EUR 1,020,000;
- Drilling of an optional well at Medzilaborce-2 in July 2017 for EUR 1,386,000; and

177 Opcom Minutes, 8 November 2016, p. 2, item 3 (C-342).

178 Opcom Minutes, 8 November 2016, p. 3, item 6 (C-342).

179 Opcom Minutes, 8 November 2016, p. 3, item 8 (C-342).

180 Opcom Minutes, 8 November 2016, p. 4, item 11(1) (C-342).

181 AOG Report to MOE – Medzilaborce, 2016 (C-292); AOG Report to MOE – Snina, 2016 (C-294); AOG Report to MOE – Svidník, 2016 (C-295).

182 AOG Report to MOE – Medzilaborce, 2016 (C-292); AOG Report to MOE – Snina, 2016 (C-294); AOG Report to MOE – Svidník, 2016 (C-295).

183 2017 JOA Budget, 10 February 2017 (C-367).

- In the month following each drilling an "[o]ptional" "[c]ompletion and testing", in February-March and June-August 2017, for a total of EUR 1,500,000 (EUR 300,000 for each month).[184]

142. On 3 November 2017, there was a seventh (and apparently final) Operating Committee Meeting.[185] Mr. Fraser first provided an update about local opposition. He explained that AOG had "been speaking to the activists and VLK for much of this year", and that it had agreed to complete "a preliminary EIA for each location" in exchange for the activists "withdraw[ing] their opposition and allow[ing] Alpine [AOG] to drill".[186] He said that AOG had already applied for "preliminary EIA clearance" and that AOG's consultants Chempro had advised that those applications "would go through without any issues".[187] That said, in the case of Smilno and Ruská Poruba, decisions had already been issued requiring "a longer form of impact assessment", but that the scope had still to be determined.[188] An appeal against the Ruská Poruba decision had been filed. The partners then discussed the option of leaving the JV, with JKX and Romgaz stating that they "would discuss it and determine if they wanted to continue the project, and on what basis".[189] They then tabled the approval of the 2018 budget until the partners decided whether they would remain engaged in the project or not.[190]

143. JKX's 2017 Annual Report provides the following description of the JV's exploration activities in 2017:

> "During 2017 there was no progress with the exploration licenses in Slovakia and at year end there were no further exploration or evaluation planned or budgeted. There is no clear indication that FVLCD [i.e. Fair Value Less Costs of Disposal] is greater than zero and the assets were impaired in full by $7.9m".[191]

144. According to the 2017 annual reports submitted to the MoE, the JV Partners spent a total of EUR 508,683 on geological works and "works supervision".[192] This included

184 2017 JOA Budget, 10 February 2017, p. 1 of the pdf document (C-367).

185 Opcom Minutes, 3 October 2017 (C-382).

186 Opcom Minutes, 3 October 2017, p. 1 of the pdf document, item 2.A. (C-382).

187 Opcom Minutes, 3 October 2017, p. 1 of the pdf document, item 2.A. (C-382).

188 Opcom Minutes, 3 October 2017, p. 1 of the pdf document, item 2.A (C-382).

189 Opcom Minutes, 3 October 2017, pp. 3-4 of the pdf document, item 3 (C-382).

190 Opcom Minutes, 3 October 2017, p. 4 of the pdf document, item 6 (C-382).

191 JKX Annual Report, 2017, 27 April 2018, pp. 58 and 107 (C-352 and CRA-29). See JKX Oil & Gas, Annual Report 2018, 5 April 2019, p. 104 (CRA-31).

192 AOG Report to MOE – Medzilaborce, 2017 (C-354); AOG Report to MOE – Snina, 2017 (C-356); AOG Report to MOE – Svidník, 2017 (C-357).

EUR 373,230 on "Geological works (project management and well development)" (EUR 148,269 in Svidník, EUR 152,792 in Medzilaborce and EUR 72,170 in Snina), EUR 113,979 for "Permitting (inputs and conflicts, incl. EIA, media and legal services)", EUR 2,705 for the lease of land in Svidník, EUR 14,071 for storage and procurement of drilling materials, and EUR 4,698 for overhead costs.[193]

145. The 2018 budget was approved by AOG and JKX on 30 January 2018 and by Romgaz on 10 February 2018. That budget contemplated the "drilling of one well at Sarisske Cierne in Q2 [of 2018] and one well at Smilno in Q4".[194] It provided for EUR 40,000 between January and April 2018 for the drilling of a firm well at Cierne-1, with no further expenses planned after April.[195] The reason for this limitation was that the budget was "designed to allow the partners to withdraw from the licences if it is judged that insufficient progress is made in securing a well location at Sarisske Cierne by the end of March 2018".[196] In this respect, they agreed as follows:

> "Any party may withdraw from all three licences (but not from less than three) on giving 30 days' written notice to the other parties expiring on 30 April 2018, following which it shall not be liable for the remainder of any 2018 work program and budget, i.e. for the period after 30 April 2018".[197]

146. On 19 February 2018, JKX notified its JV Partners of its intent to withdraw from the JV and assign its interest to a third party,[198] and, on 16 March 2018, JKX sent a formal notice of withdrawal from the Exploration Licenses.[199]

147. According to the 2018 annual reports provided to the MoE, the JV Partners spent EUR 410,735 for the Svidník Exploration License, including EUR 49,272 for "Geological works and supervision of works", EUR 336,963 for "Other proposals not included in geological works" and EUR 24,500 for "Exploration area fees & charges".[200]

148. In sum, the annual reports between 2014 and 2018 show that a total of EUR 3,616,588

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193 AOG Report to MOE – Medzilaborce, 2017 (C-354); AOG Report to MOE – Snina, 2017 (C-356); AOG Report to MOE – Svidník, 2017 (C-357).

194 2018 JOA Budget, 10 February 2018, p. 2 of the pdf document (C-388).

195 2018 JOA Budget, 10 February 2018, pp. 3 and 8 of the pdf document (C-388).

196 2018 JOA Budget, 10 February 2018, p. 2 of the pdf document (C-388).

197 2018 JOA Budget, 10 February 2018, p. 2 of the pdf document (C-388).

198 See Email of 22 February 2018 from Romgaz re JKX departure (C-185).

199 Email of 16 March 2018 from JKX re. withdrawal (C-187); Letter of 16 March 2018 from JKX re. withdrawal - Medzilaborce (C-188); Email of 16 March 2018 from JKX re. withdrawal - Snina (C-189); Letter of 16 March 2018 from JKX re. withdrawal - Svidník (C-190).

200 AOG Report to MOE – Svidník, 2018 (C-386).

were spent on exploration works and related expenses.

H. EFFORTS TO DRILL EXPLORATION WELLS AT SMILNO, KRIVÁ OĽKA AND RUSKÁ PORUBA

149. The following sections provide more specific facts about the Claimant's exploration activities in each license area at issue in this dispute. The facts in relation to the preliminary EIA procedures are set forth in a subsequent section.

1. Smilno

150. AOG attempted on three different occasions to drill an exploration well at the Smilno site: a first time in December 2015 and January 2016, a second time between 16 and 18 June 2015, and a third time between 15 and 17 November 2016. These efforts failed because local activists and protesters blocked the access to the site.

151. The Smilno-1 site is within the Svidník Exploration License and located between the villages of Smilno and Nižný Mirošov in the Bardejov district.[201] The wellsite is about 800 meters southeast of Smilno and about 1 km away from road no. 77 connecting Bardejov and Svidník.[202] The "prospect" is within the so-called Smilno tectonic window, 10 km long and 2 km wide, where "deposits of the Dukla (or Grybów) unit outcrop from under the Magura Unit rocks".[203]

152. As explained by Mr. Fraser, the drill site could be accessed along an "unmetalled road running East from Smilno in the direction of the adjacent village of Mikulášová and some nearby forest" (the "Access Road").[204] According to the "E" Land Registry and the title deed no. 1367, the Access Road is located on land plot no. 2721/780, registered as "arable land" and co-owned by approximately 170 people.[205]

153. On 4 November 2014, the Land and Forestry Department of the Bardejov District Office granted to AOG a permit for geological exploration on agricultural land at the Smilno site, on condition *inter alia* that "[t]he start, progress and end of the work shall be agreed upon with the farmer using the agricultural land in question, or with another user of the agricultural land".[206] On 10 November 2014, AOG obtained the consent from the cooperative of shareholders Biodružstvo Smilno to use the real property in question for

201 Detailed Drilling Programme Smilno, December 2015, p. 9 (C-95).

202 Detailed Drilling Programme Smilno, December 2015, p. 19 (C-95).

203 Detailed Drilling Programme Smilno, December 2015, p. 10 (C-95).

204 Fraser WS1, para. 35.

205 Land Registry Extract Plot (2721), 20 June 2016 (C-140); Title Deed No. 1367, 21 March 2023 (R-35).

206 Permit from Bardejov District Office for geological exploration, 4 November 2014, p. 2, item II.4 (C-64).

exploration purposes.[207]

154. On 1 June 2015, AOG applied to the Bardejov District Office for a permit to conduct geological exploration at the Smilno site.[208]

155. On that same day and on 15 June 2015, AOG entered into lease agreements with Ms. [redacted] and Mr. [redacted], who together owned parcel 2732/1 in the "E" Register ("Lot E 2732/1"), to conduct exploratory drilling at the Smilno site.[209]

156. On 17 June 2015, the Bardejov District Office granted AOG a permit to conduct geological exploration at the Smilno-1 site, on condition *inter alia* that "[t]he beginning, progress and end of the work shall be communicated to farming structure using the agricultural land in question, or to the land owners in order to prevent damage to the land and the agricultural crops".[210]

157. On 25 August 2015, Mr. Lewis told the JV Partners that "all land permits including for the entry road have been received" and that "[a]ccess from the main highway is under construction" and would be finished by 15 September.[211] He also told them that a drilling program had been submitted to the Mining Authority.[212]

158. As described above, on 16 September 2015, during the fourth Operating Committee Meeting, AOG advised its partners that "[t]his location is basically ready to drill", further adding that the "Operator will prepare and submit an AFE for this well by end of October 2015".[213]

159. On 11 November 2015, AOG elaborated its project of geological works for the Smilno site.[214] According to that project, AOG's aim was to "explore and test the potential gas accumulation within the structure called the Smilno tectonic window".[215]

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207 Agreement to use Real Property – Consent from Biodruzstvo, 10 November 2014 (C-65).

208 Application to the Bardejov District Office for permit of geological exploration rights in Smilno, 1 June 2015 (C-75).

209 Lease for Smilno well site, 1 June 2015 (C-74); Lease for Smilno well site, 15 June 2015 (C-76).

210 Permit from the Bardejov District Office of geological exploration rights in Smilno, 17 June 2015, p. 2, item II.4 (C-77).

211 Partner Progress Report, 25 August 2015 (C-79).

212 Partner Progress Report, 25 August 2015 (C-79).

213 Opcom Minutes, 16 September 2015, p. 2 of the pdf document, item 3.4 (C-81).

214 AOG Smilno Project of Geological Works, 11 November 2015 (C-88).

215 AOG Smilno Project of Geological Works, 11 November 2015, p. 1 (C-88).

160. At the 3 December 2015 meeting of the Operating Committee, it was decided that Smilno-1 would be the first well, and that the well location should "be ready by 15 January", with the first drilling "by the end of January", for a budgeted cost of EUR 986,000.[216] The budget also provided for an expenditure of EUR 300,000 in February 2016 for "Completion and testing – optional".[217] The drilling plan envisioned a first drilling down to 200 meters depth and a second to 1,200 meters depth.[218] Additionally, it was determined that "[t]he access road [would] need to be upgraded and in one place relocated slightly, by agreement with the mayor".[219]

161. As noted above, AOG first attempted to drill an exploration well at Smilno in December 2015 and January 2016. On 6 December 2015, AOG started to level the Smilno site to prepare it for drilling operations. On 14 December 2015, AOG's access to the site was blocked because Ms. Varjanová, one of the co-owners of the road, had parked her car, a green Renault, across the Access Road.[220] She replaced that car on 17 December 2015 with a white Fiat van.[221]

162. On 17 December 2015, "for a nominal €100" AOG purchased a 1/700 ownership share of the Access Road from one of its co-owners, Mr. [redacted], one of the two individuals from whom it had previously obtained a lease for parcel 2732/1.[222]

163. Ms. Varjanová again appeared at the site on 19 December 2015 with "someone from VLK", i.e. *Lesoochranárske zoskupenie VLK*, a Slovak environmental NGO known as the Forest Protection Movement ("VLK" or "Wolf"). Mr. Fraser explains that the Mayor of Smilno "and some of the nearby landowners" complained to the police on 22 December 2015 about the road being blocked.[223]

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216 Opcom Minutes, 3 December 2015, p. 2, item 4 (C-100); AOG 2016 approved budget, 3 December 2015, pp. 1-2 (C-97).

217 AOG 2016 approved budget, 3 December 2015, p. 2 (C-97).

218 Detailed Drilling Programme Smilno, December 2015, p. 21 (C-95).

219 Opcom Minutes, 3 December 2015, p. 1 (C-100); Detailed Drilling Programme Smilno, December 2015, p. 22 (C-95).

220 Email of 14 December 2015 from [redacted] to AOG team with attached Police reports, p. 2 of the pdf document (C-102); Fraser WS1, para. 36.

221 Fraser WS1, para. 37.

222 Fraser WS1, para. 38; Fraser WS2, para. 10. See Decision of the District Court of Bardejov, 18 February 2016, p. 4 (C-125) ("the purchase contract of 17 December 2015 between [AOG] and [[redacted] for the real property recorded in OC No. 1367, cadastral territory Smilno, lot no. 2721/780 with an area of 11,660 m2 with a 1/700 share belonging to the seller [i.e., [redacted]]"). See also Counter-Memorial, para. 87; Rejoinder, para. 107, referring to Letter of 30 December 2015 from Law Office Slamka to Ms. Varjanová (R-36).

223 Fraser WS1, para. 37.

164. On 29 December 2015, AOG sent a complaint to the Smilno Municipality about the Access Road being "blocked for a long time by a damaged vehicle" and requested that the municipality "arrange for a peaceful situation" pursuant to Article 5 of the Civil Code and ensure unhindered passage.[224]

165. On the next day, AOG's attorney, Dr. Róbert Slamka, sent Ms. Varjanová a copy of AOG's ownership certificate over plot No. 2721/780 and enjoined her to remove her "motor vehicle of white colour" within three days.[225]

166. On 12 January 2016, AOG held a press conference in Prešov about its planned activities in the license areas, including at the Smilno site.[226]

167. On 14 January 2016, AOG's staff lifted up the white van "manually and pushed it to the side of the Road".[227] According to Mr. Fraser, the van was put back across the road later in the day, with a chain fixing it to the ground, and a "handwritten sign" with the words "might explode".[228]

168. On 16 January 2016, AOG filed a criminal complaint at the Bardejov District Police Department claiming that the "truck, Fiat Fiorino, license plate no. [redacted]" parked on the road violated AOG's "rights as a co-owner of this real property".[229]

169. On the same day, AOG again moved the van to the side of the road, but, says Mr. Fraser, Ms. Varjanová once again parked her car on the road to block access to the Smilno site.[230] Three days later, on 19 January 2016, the car was once more replaced by the white van "chained down with a heavy chain".[231]

170. On 20 January 2016, in a status update, AOG informed its JV Partners that leases and permits for the Smilno-1 site were "100% complete", that the drilling location was "leveled", that it was preparing to "install plastic liner", to "gravel location" and to

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224 Letter of 29 December 2015 from AOG to Smilno Municipality (R-153).

225 Letter of 30 December 2015 from Law Office Slamka to Ms. Varjanová (R-36).

226 AOG press conference (video), 12 January 2016 (C-115). See Fraser WS1, para. 40.

227 Fraser WS1, para. 40.

228 Fraser WS1, para. 40. See Photograph of the car with the bomb warning sign, January 2016 (C-96); Photograph of white car, 18 January 2016 (C-107); Photograph of car, 19 January 2016 (C-119); Photograph of car, 23 January 2016 (C-122); Photograph of car, 23 January 2016 (C-123).

229 See Resolution of the District Police Department Bardejov, 15 February 2016, p. 1 of the pdf document (R-150).

230 Fraser WS1, para. 40.

231 Fraser WS1, para. 41.

"concrete pad", that construction of the Access Road was "50% completed" and that it was expected to be completed within "2 weeks".[232] AOG stated that "a local", i.e. Ms. Varjanová, "one of 700 owners on the access road", opposed AOG's access to the Smilno #1 site by "chaining her car to the ground to block the access road".[233] AOG further stated that Ms. Varjanová "has legal right to park her car on the road".[234] According to that document, AOG's plan was to "temporarily suspend operations" once the location had been prepared "until a second location is ready", since it could not "justify the mob/demob of the drilling rig for just one well".[235]

171. On 21 January 2016, the Bardejov District Court received a motion dated 19 January 2016 filed by Ms. Varjanová seeking to invalidate AOG's purchase of a share in the Access Road because the sale allegedly breached the pre-emption rights of existing co-owners under Article 140 of the Slovak Civil Code.[236] The motion included a request for an interim injunction seeking to prevent AOG from using the road and to prevent AOG from removing "things placed by the plaintiff on the property" until the validity of the purchase had been determined by the court.[237]

172. On 23 January 2016, AOG, with the assistance of the contractor Trans-Wiert, cut the chain attaching the van to the road with an "electric saw", lifted the van to place it on the side of the road, and "put concrete blocks around it so that it could not be driven away".[238] Subsequently, AOG parked a truck on the road "to protect the access to the Road".[239] According to Mr. Fraser, that truck was blocked "by another car" in the morning of 25 January 2016 and Mr. Varjanová appeared with two other activists and a camera crew from TV Joj.[240]

173. On the same day, Ms. Varjavoná filed a criminal complaint at the Bardejov District Police Department against AOG complaining that AOG's employees had "damaged a metal chain that was attaching the truck Fiat Fiorino of white color" and "subsequently tampered with the vehicle by moving it to another place with the help of a digger, damaging the chassis

232 Report to Partners – Status Update, 20 January 2016, p. 2 (C-120).

233 Report to Partners – Status Update, 20 January 2016, p. 2 (C-120).

234 Report to Partners – Status Update, 20 January 2016, p. 2 (C-120).

235 Report to Partners – Status Update, 20 January 2016, p. 2 (C-120).

236 See Decision of District Court of Bardejov, 18 February 2016, p. 1 (C-125).

237 Decision of District Court of Bardejov, 18 February 2016, p. 1 (C-125).

238 Fraser WS1, para. 41.

239 Fraser WS1, para. 41.

240 Fraser WS1, para. 41.

and body of the vehicle".[241]

174. On 3 February 2016, AOG requested assistance from the Smilno Municipality to remove a dark blue metallic Volkswagen Passat blocking the entrance of the Access Road.[242] The Smilno Municipality responded to that request on 9 February 2016, stating that it had called on the owner of that vehicle to remove the car, which owner had informed the municipality "that the obstacle has been removed".[243]

175. On 9 February 2016, a "routine meeting" took place between Mr. [redacted], AOG's country manager, and officials at the MoE. According to Mr. Fraser, the discussions concerned AOG's "difficulties" at Smilno and other planned well locations.[244]

176. On 15 February 2016, the Bardejov District Police Department referred the criminal complaint filed by AOG on 16 January 2016 on the grounds that Ms. Varjanová's actions to park her Fiat Fiorino truck on the access road with a sign "danger of explosion, zone 2" constituted a willful "misdemeanor against civil coexistence" under Slovak law.[245] The Police Department, however, added that "[o]nly the relevant court is competent to resolve the property relationship and to decide on legitimacy of entitlements of the specific persons to the specific parcels of land", further adding that "only the court is competent to uphold the validity or existence of the lease agreements".[246]

177. On 18 February 2016, the Bardejov District Court granted the interim measures sought by Ms. Varjanová (the "Interim Injunction").[247] Specifically it ordered AOG to refrain from using the road and interfering with Ms. Varjanová's rights "until the issue of [AOG's] ownership right and the issue of whether the legal act has not infringed the rights of the other co-owner" had been resolved.[248]

178. On 2 March 2016, AOG appealed before the Regional Court in Prešov the decision of the

241 See Resolution of the District Police Department Bardejov, 24 March 2016, p. 3 of the pdf document (R-150).

242 Letter of 3 February 2016 from AOG to Smilno Municipality (R-151).

243 Letter of 9 February 2016 from Smilno Municipality to AOG (R-152).

244 Fraser WS1, para. 43.

245 Resolution of the District Police Department Bardejov, 15 February 2016, pp. 1-2 of the pdf document (R-150).

246 Resolution of the District Police Department Bardejov, 15 February 2016, p. 2 of the pdf document (R-150).

247 Decision of District Court of Bardejov, 18 February 2016 (C-125).

248 Decision of District Court of Bardejov, 18 February 2016, p. 7 (C-125).

Bardejov District Court of 18 February 2016.[249]

179. On 7 March 2016, the Bardejov District Office dismissed a complaint filed by Ms. Varjanová against Mr. [redacted] for carrying out maintenance work on the Access Road on 18 December 2015 on the grounds that he did not willfully disrupt "civil cohabitation".[250]

180. On the same day, AOG informed its JV Partners that it had "advertised to purchase at least one share of this road legitimately" until the other co-owners no longer wished to exercise their right of pre-emption, with the understanding that "[o]nce we own a legitimate share, we are assured that we can legally remove any blocking cars, and can return to work".[251]

181. On 24 March 2016, the Bardejov District Police Department dismissed the complaint filed by Ms. Varjanová on 23 January 2016 on the grounds that, absent a demonstration that the Fiat Fiorino truck had been intentionally damaged, there was "no reason to initiate a criminal prosecution".[252]

182. On 12 April 2016, AOG established the company Cesty Smilno s.r.o. ("Cesty Smilno" or "Smilno Roads") in an attempt to secure a right to the Access Road.[253] By 22 April 2016, a co-owner of the Access Road, Mr. [redacted], agreed to "transfer his share" of 1/315 in the Access Road as a non-monetary contribution to Cesty Smilno.[254]

183. On 14 April 2016, the Regional Court in Prešov dismissed AOG's appeal and upheld the Interim Injunction.[255]

184. On 20 April 2016, AOG applied for an eight-year extension of the Svidník Exploration License.[256]

185. On 11 May 2016, Mr. Lewis informed his JV Partners that AOG had "now secured an ownership interest in the access road by establishing a new Slovak company which will

249 Appeal of 2 March 2016 of AOG against the decision of District Court Bardejov (LF-17).

250 Decision of Bardejov District Office – Case No. OU-BJ-OVVS-2016/001484-LES, 7 March 2016 (C-300).

251 Status Update and Activity Summary, 7 March 2016, p. 1 (R-154).

252 See Resolution of the District Police Department Bardejov, 24 March 2016, pp. 3-4 of the pdf document (R-150).

253 Counter-Memorial, para. 98; Rejoinder, para. 112.

254 Counter-Memorial, para. 98; Fraser WS1, para. 47.

255 Decision of Regional Court in Prešov, 14 April 2016 (R-63).

256 See Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 5 of the pdf document (C-12).

lease access to Alpine personnel and contractors". He further stated that AOG had "been fined €2,000 by the Mining Authority for failing to give 8 days' notice of the commencement of well location construction works last December".[257]

186. On 17 May 2016, AOG's counsel, Mr. Sýkora, wrote to the Mayor of Smilno, Mr. Baran, requesting "information on the nature of the road" and opining that "the road in question is a public special purpose road" ("PSPR") that had been used by citizens and local farmers "for decades without any restriction".[258]

187. On 18 May 2016, Mr. [redacted] "on behalf of company Cesty Smilno s.r.o.", sought the consent of several co-owners to use the "field road" to realize its exploration drilling at the Smilno site, which, according to the Respondent, it obtained from at least Ms. [redacted].[259]

188. On 6 June 2016, Mr. Baran responded to Mr. Sýkora's email of 17 May, stating that "the field track" in question had "been used by the general public for many decades (100-200 years) as access road", further stating that it was "publicly accessible".[260]

189. On 7 and 8 June 2016, AOG "decided to upgrade" the Access Road "by laying some more crushed stone along the length of it", which works were carried out by the local construction firm GMT projekt, spol. s.r.o.[261]

190. On 14 June 2016, the MoE extended the Svidník Exploration License for a period of five years (i.e. until 1 August 2021), with a reduced surface area of 135.53 km².[262]

191. Between 16 and 18 June 2016, AOG attempted for the second time to drill an exploration well at the Smilno site.[263] As with the first drilling attempt, Ms. Varjanová and local

257 AOG Status Update, 11 May 2016, p. 1 (C-308).

258 Email of 17 May 2016 from Mr. Sýkora to Smilno Municipality (R-155).

259 Counter-Memorial, para. 99, referring to Consent of 23 May 2016 from Ms. [redacted] (R-64). The Tribunal notes that exhibit R-64 is a request of consent of 18 May 2016 addressed to an unidentified person and that it does not contain any alleged consent dated 23 May 2016 by Ms. [redacted].

260 Statement of Smilno municipality regarding the classification of the Road, 6 June 2016 (R-156) (using the term "field track"); Statement of Smilno municipality regarding the classification of the Road, 6 June 2016 (C-18) (using the term "track"); Letter of 17 June 2016 from AOG's Attorney to Bardejov Police, p. 7 of the pdf document (C-315) (using the term "dirt road").

261 Fraser WS1, para. 52; Fraser WS2, paras. 13-15.

262 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 4 of the pdf document (C-12).

263 See Slamka Partners – Smilno report by JUDr. Pavol Vargaestok of the events on 16-18 June 2016, 14 December 2016 (C-161); Fraser WS1, paras. 50 and 53-57.

protestors prevented AOG from achieving that goal, although AOG did manage to drive a surface conductor into the ground up to a depth of 21 meters.[264] Ms. Varjanová had again blocked the Access Road with her car during the night of 15 June and AOG lifted the car to the side of the road the following morning. Ms. Varjanová blocked the Access Road again and a "second car arrived to block the entrance as well".[265]

192. According to Ms. Varjanová, on 16 June 2016, when she and "some other activists" tried to go closer to the drilling location, "[t]wo dark SUVs blocked one activist's car", with Mr. Crow, AOG's chief operating officer, standing in front of and "[o]ne of his colleagues" standing behind the car.[266] Mr. Crow then "suddenly bent over and grabbed his leg, imitating that the activists drove the car into him and injured his leg", waved his hand suggesting "that they should move the car towards him" and "smiled the entire time".[267] By contrast, Mr. Fraser says that Ms. Varjanová's "boyfriend" drove his car into Mr. Crow, caused "him to fall over and suffer bruising and some cuts", such that Mr. Crow had to have his leg put in a cast in a local hospital.[268] Mr. Fraser adds that "we pressed the Police to bring a charge for assault but they did not do this".[269] The incident is recorded on a video.[270]

193. On 17 June 2016, in reference to Mr. Baran's letter of 6 June 2016, Mr. Sýkora, on behalf of Cesty Smilno, requested that the police maintain public order "on and around" the Access Road, which he qualified as a PSPR "within the meaning" of Article 22 of the Road Act and Article 22 of its implementing decree.[271]

194. On 18 June 2016, with yet another blockade by protestors, AOG called the police,[272] which, according to the state prosecutor, Dr. Vladislava Slosarčiková, in turn called the

264 AOG's internal report: weekly status report, 15 June 2016, p. 3 of the pdf document (C-135).

265 Fraser WS1, para. 53; Photographs of cars blocking Road, June 2016 (C-113); Photographs of cars blocking Road, June 2016 (C-114).

266 Varjanová WS1, paras. 31-32.

267 Varjanová WS1, para. 32.

268 Fraser WS1, para. 55.

269 Fraser WS1, para. 55.

270 Videorecording of Mr. Crow's incident (R-65). See Photograph of Ron Crow dated June 2016 (C-112).

271 Letter of 17 June 2016 from AOG's Attorney to Bardejov Police (C-315). The Tribunal notes that the Claimant entitled Exhibit C-315 as a letter from "AOG's Attorney", but the letter itself states that Mr. Sýkora sent the letter "[a]s a legal representative of Cesty Smilno, s.r.o.".

272 See Slamka Partners – Smilno report by JUDr. Pavol Vargaestrok of the events on 16-18 June 2016, 14 December 2016, p. 2 of the pdf document (C-161).

prosecutor's office.[273] Dr. Slosarčiková explains that on arrival at the site she "did not observe any signs of criminal activity, or signs of potential criminal activity" and therefore left.[274] The Claimant asserts that before leaving the site Dr. Slosarčiková instructed the police to stop helping AOG,[275] something she denies.[276] AOG abandoned its second drilling attempt on that day.

195. On 20 June 2016, AOG and Mr. [redacted] acknowledged before the District Court of Bardejov that the purchase contract of 17 December 2015 breached the co-owners' pre-emption right.[277]

196. On 11 July 2016, AOG filed a motion before the District Cour of Bardejov to cancel the Interim Injunction.[278] On 16 September 2016, Ms. Varjanová responded to AOG's motion to cancel the Interim Injunction.[279]

197. On 5 October 2016, the District Court of Bardejov determined that the purchase contract of 17 December 2015 between AOG and Mr. [redacted] was "null and void due to the violation of the pre-emption right during the transfer of the co-ownership interest".[280]

198. On 11 October 2016, the District Court of Bardejov requested that AOG state within 15 days whether it maintained its motion to cancel the Interim Injunction.[281]

199. On 11 October 2016, the District Traffic Inspectorate of Bardejov denied a request of the municipality of Smilno to place a road sign at the entrance of the Access Road because "it is not a crossroads but merely a conjunction of a country road".[282]

200. On 3 November 2016, in response to a request for information dated 31 October, the mayor of Smilno, Mr. Baran, stated that no functional class or category had been assigned to the

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273 Slosarčiková WS1, para. 12; Slosarčiková WS2, para. 5.

274 Slosarčiková WS1, para. 14; Slosarčiková WS2, para. 8.

275 Fraser WS2, para. 17; Email of 28 July 2016 from [redacted] to Alexander Fraser and others (C-332).

276 Slosarčiková WS1, para. 16.

277 Letter from Mr. [redacted] to the District Court Bardejov, 20 June 2016 (LF-22); Letter from AOG to the District Court Bardejov, 20 June 2016 (LF-23). See Order of the Bardejov District Court, 5 October 2016, p. 3, para. 14 (C-147).

278 See Fogaš ER2, para. 54, 2nd indent.

279 See Fogaš ER2, para. 54, 3rd indent.

280 Judgment of the Bardejov District Court, 5 October 2016, p. 2 (C-147); Judgement of the District Court Bardejov, File No. 1/C/29/2016-268, 5 October 2016 (LF-16).

281 See Fogaš ER2, para. 54, 5th indent.

282 Letter of 11 October 2016 from the Police to the Smilno municipality, p. 2 of the pdf document (C-153).

Access Road, that there was no zoning decision, no building permit, no occupancy decision, no technical documentation, no archived occupancy permit in respect to that road, and that the municipality had not permitted any construction or technical modification.[283]

201. Between 15 and 17 November 2016, AOG attempted for a third time to drill the Smilno well, but these efforts were again prevented by local activists that blocked the Access Road.[284]

202. On 22 November 2016, AOG submitted a freedom of information request to the Ministry of Transportation ("MoT") and the Police Presidium to ask whether a field track, if registered on the land registry, was a PSPR.[285]

203. On 23 November 2016, Ms. Varjanová filed an appeal at the Prešov Regional Court against the decision of the District Court of Bardejov of 5 October 2016.[286] The Respondent explains that, as a result, the interim injunction remained in place.[287]

204. On the same day, the Regional Police Corps of Prešov sought guidance from the Ministry of Interior ("MoI") about the classification of the Access Road.[288]

205. On 24 November 2016, the District Court of Bardejov invited AOG and Mr. [redacted] to comment within 10 days on Ms. Varjanová's appeal. AOG received that notice on 2 December 2016 and the court received AOG's comments on 12 December 2016. Mr. [redacted] received the notice on 5 December 2016, but did not provide any comments.[289]

206. The MoT responded on 29 November 2016 to AOG's 22 November request, by stating that, under Section 22 of the Road Act, "special purpose roads serve for the connection of manufacturing plants or individual structures and real properties to other roads, or for communication purposes within closed sites", such as "tracks and forest paths, access roads to manufacturing plants, construction sites, quarries, mines, sand pits and other sites, and roads within closed sites and structures". It added, however, that it was "not authorised to provide legally binding interpretations of legal regulations", which competence belonged

283 Letter of 3 November 2016 from Smilno Municipality (R-61).

284 See Memorial, para. 127; Fraser WS1, paras. 70-72; Photograph – road block, 15 November 2016 (C-154).

285 See Statement of the Ministry of Transport regarding the classification of the Road, 29 November 2016 (C-21); Memorial, para. 122.

286 Appeal filed by Ms. Varjanová, 23 November 2016 (C-155).

287 Counter-Memorial, para. 133.

288 See Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016 (C-23).

289 See Fogaš ER1, para. 88.

to the Supreme Court of the Slovak Republic.[290]

207. On 2 December 2016, AOG requested that the District Court of Bardejov "immediate[ly]" mark "the clause affirming the finality and enforceability" of the 5 October 2016 judgment, on the grounds that Ms. Varjanová had no "active procedural standing" to appeal that judgment.[291] In the alternative, AOG requested that the court decide "without undue delay on the petition of the first defendant for the cancellation of the interim injunction, which was delivered to the Court as early as on 12 July 2016".[292] The court received that submission on 12 December 2016.[293] In doing so, so says Dr. Fogaš, AOG responded to the request of the District Court of Bardejov dated 11 October 2016.[294]

208. On 8 December 2016, the MoT received from AOG a "request to supplement the opinion" issued on 29 November. The MoT responded the following day opining that "a track for which no building permit or decision approving its use […] has existed, and that has been registered in the Land Register, can be deemed a special purpose road, taking into account its traffic-related importance, designation and technical condition". It again added that only the Supreme Court was authorized to "ensure a unified interpretation and unified application of laws and other generally binding legal regulations".[295]

209. On the same day, AOG filed an application at the Regional Court in Prešov to have Ms. Varjanová's appeal struck out.[296]

210. On 19 December 2016, the MoI responded to the guidance request of the Prešov Police of 23 November, by stating that the Access Road was "not a special purpose road and must be seen as private land the public use of which is not justified by any tangible evidence".[297] The MoI added that "the plot of land in question is private land with several co-owners" and that, according to the judgment of the Bardejov District Court, AOG was "not a co-

290 Statement of the Ministry of Transport regarding the classification of the Road, 29 November 2016 (C-21).

291 Repeated Request of AOG to District Court Bardejov, 2 December 2016 (LF-24).

292 Repeated Request of AOG to District Court Bardejov, 2 December 2016, p. 2 of the pdf document (LF-24).

293 Repeated Request of AOG to District Court Bardejov, 2 December 2016, p. 3 of the pdf document (LF-24).

294 Fogaš ER2, para. 54, 5th indent.

295 Statement of the Ministry of Transport regarding the classification of the Road, 9 December 2016 (C-22).

296 See Fraser WS1, para. 76.

297 Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016, pp. 1-2 of the pdf document (C-23).

owner of that land".[298]

211. On 22 December 2016, AOG requested an opinion from the MoI about whether the Access Road was a PSPR in the sense of Section 22 of the Road Act and its implementing decree.[299] The MoI responded to that request on 30 December 2016 stating that it did not have the authority to issue a "generally binding interpretation of laws and other generally binding legal regulations", that only the Supreme Court had that authority, further referring AOG to the MoT, as the "competent and central government agency", to "address the question whether a track is a public special purpose".[300]

212. On 12 January 2017, the District Court of Bardejov submitted to the Prešov Regional Court a "Submission Report" concerning Ms. Varjanová's appeal, including AOG's comments of 12 December 2016.[301]

213. On 27 February 2017, the Prešov Regional Court struck out Ms. Varjanová's appeal.[302] That decision was received by the Bardejov District Court on 4 April 2017, which then communicated it to the disputing parties on 2 May 2017.[303] According to Prof. Števček, the Claimant's legal expert, the decision of the Prešov Regional Court came into force on 19 May 2017 and was stamped with the "Confirmation Clause of Finality" on 14 July 2017.[304]

2. Krivá Oľka

214. The Krivá Oľka-1 wellsite is located within the area of the Medzilaborce Exploration License outside the village of Krivá Oľka. Until 2015, that location was called Stromy-1. It is situated "about 1 km from the crossroad with the main road from Oľka" on land owned by the Slovak Republic and managed by LESY Slovenskej republiky, i.e. a State-owned company tasked with managing the forests owned by the Slovak Republic ("LSR" or "State Forestry") under the control of the MoA.[305] According to the Claimant, AOG's "detailed and extensive geological surveys" conducted since 2014 had revealed that the Krivá Oľka

298 Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016, p. 2 of the pdf document (C-23).

299 See Statement of the Ministry of Interior regarding the classification of the Road, 30 December 2016 (C-24).

300 Statement of the Ministry of Interior regarding the classification of the Road, 30 December 2016 (C-24).

301 Submission Report of District Court Bardejov, 12 January 2017 (LF-20). See Fogaš ER1, para. 88.

302 See Resolution of Presov Regional Court, 4 April 2017, p. 4 of the pdf document (C-170).

303 Resolution of Presov Regional Court, 4 April 2017 (C-170). See Fraser WS1, para. 76.

304 Števček ER2, para. 41. See Fogaš ER2, paras. 51-52.

305 Memorial, para. 132; Kriva Olka Detailed Drilling Program, December 2015, p. 17 (C-91).

site "had good prospects of producing oil".[306]

215. On 19 December 2014, and in accordance with Article 5(1) of the Forest Act, AOG requested that the District Office in Humenné grant a forest exemption for the Krivá Oľka site,[307] which that office did on 13 January 2015 for one year until 15 January 2016 over an area of 9,354 m² (the "Forest Exemption").[308]

216. On 10 April 2015, LSR granted its consent to log 202 trees by the end of the year in the Turcovce forest in the area of the Krivá Oľka site.[309]

217. On 27 April 2015, AOG discussed with LSR the possibility to obtain a lease to drill at the Krivá Oľka site.[310] The following day, Mr. Crow informed Mr. Lewis about a field trip at the "Stromy #1", saying that only a "few trees" remained at "Stromy #1" and that drilling could start "[o]nce the lease is authorized by the Minister of Agriculture".[311]

218. On 4 May 2015, AOG entered into a lease agreement with LSR, valid until 15 January 2016, to conduct exploration activities in the forest surrounding the Krivá Oľka site (the "Lease").[312] The Lease covered the area of the Forest Exemption.[313] Pursuant to Article III(2) of the Lease, any extension would need to be sought "no later than one month" before expiry, i.e. by 15 December 2015.[314] Pursuant to Article 50(7) of the Forest Act, the MoA had to approve the Lease by giving its "prior" consent, which it did on 19 October 2015.[315]

219. On 16 December 2015, upon AOG's request filed two days before, on 14 December, the Humenné District Office extended the Forest Exemption until 31 January 2017.[316]

220. On 23 December 2015, LSR received a request from AOG dated 16 December 2015 to

306 Memorial, para. 130.

307 Acts on Forests, Article 5(1) (R-70); Counter-Memorial, para. 141. See Decision of District Office Humenné, 13 January 2015 (R-97).

308 Decision of District Office Humenné, 13 January 2015 (R-97).

309 State Forestry consent for logging, 10 April 2015 (C-70).

310 See Memorial, para. 133.

311 Email of 28 April 2015 from Ron Crow to AOG Team (C-72).

312 Lease Agreement of 4 May 2015 between AOG and State Forestry (C-73).

313 Lease Agreement of 4 May 2015 between AOG and State Forestry, p. 8 of the pdf document (C-73). See Memorial, para. 134.

314 Lease Agreement of 4 May 2015 between AOG and State Forestry, Article III(2) (C-73).

315 Lease Agreement of 4 May 2015 between AOG and State Forestry, pp. 7-8 of the pdf document (C-73).

316 See Letter of 14 January 2016 from State Forestry, pp. 9-10 of the pdf document (C-296).

extend the Lease,[317] which led to AOG and LSR executing an Addendum No. 1 extending the Lease until 1 August 2016 (the "Lease Amendment") on 14 January 2016.[318] On that day, LSR sent the Lease Amendment to the MoA seeking its "prior" consent. The MoA received the Lease Amendment the following day, on 15 January 2016, which is the day when the Lease expired.[319]

221. On 17 January 2016, AOG applied to the MoA to obtain its "prior" consent for the Lease Amendment.[320]

222. On 21 January 2016, AOG informed its JV Partners that, although the leases and permits were "100% complete", the MoA had "terminated" the Lease "due to a misunderstanding". It added that "[t]he language was roughly '15 January, or so long as Alpine holds valid licenses', and they [the MoA] took the position of the shorter term".[321] Although the site would be "completely cleared of trees and brush" by 22 January, AOG could not "proceed further without the Ministry of Agriculture permit".[322] Its plan was therefore to "[s]uspend activities until receipt of the permit and obtain support from the police and law enforcement officials".[323]

223. In a letter of the following day, the MoA wrote to AOG that the latter's request for consent had erroneously been addressed to the Managing Director of the Forestry and Timber Processing Section of the MoA, and that it was being forwarded to the Head of the Service Office of the MoA, since only that office had "competence to issue and sign prior consent to the lease of forest land".[324]

224. While it had applied for an eight-year extension of the Medzilaborce Exploration License in April,[325] on 27 May 2016, AOG requested a meeting with the Minister of Agriculture Gabriela Matečná to discuss the Lease Amendment, which was still pending.[326] A few days later, on 7 June 2016, the MoE extended the Medzilaborce Exploration License until

317 Letter of 16 December 2015 from AOG to State Forestry (R-74). See Counter-Memorial, para. 147.

318 Addendum No. 1 extending the Lease Agreement, 14 January 2016 (C-116).

319 Letter of 14 January 2016 from State Forestry (C-296).

320 Application for Ministry of Agriculture consent, 17 January 2016 (C-118).

321 Report to Partners – Status Update, 21 January 2016, p. 3 (C-120).

322 Report to Partners – Status Update, 21 January 2016, p. 3 (C-120).

323 Report to Partners – Status Update, 21 January 2016, p. 3 (C-120).

324 Letter of 22 January 2016 from the Ministry of Agriculture to AOG (C-121).

325 See Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 5 of the pdf document (C-13).

326 Letter of 27 May 2016 from AOG to the Ministry of Agriculture (C-132).

1 August 2021.[327] At the same time, the MoA advised that a meeting with Minister Matečná was "not possible in the near future" "due to time reason".[328]

225. Later in June, Minister Matečná wrote to AOG that the MoA could not approve the Lease Amendment because the Lease had expired, the extension request was belated, and the proposed duration of the Lease Amendment did not comply with the terms of the Lease. She also recommended that AOG apply for a compulsory access order under Article 29 of the Geology Act.[329]

226. In the following month, AOG sent LSR a petition dated 18 July and received four days later asking for the conclusion of a new lease.[330]

227. On 30 August 2016, the MoE received AOG's application for compulsory access order under Article 29 of the Geology Act in order to restrict the ownership rights of LSR over an area of 8,076 m² from 1 October 2016 to 31 July 2021 (the "Article 29 Application").[331]

228. On 20 September 2016, the MoE requested that AOG pay certain fees within 15 days before the Article 29 Application could be processed and that it demonstrate that the MoA had "been contacted and asked to issue a preliminary consent for the conclusion of a lease agreement with the administrator of the property of interest".[332]

229. On 27 September 2016, AOG provided the MoE with its letter of 18 July 2016 proposing that LSR conclude a new lease agreement, and added that "[t]o date, more than two and a half months after the letter was sent, the property custodian has not responded to the request in any way".[333]

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327 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 4 of the pdf document (C-13).

328 Email of 7 June 2016 from the Ministry of Agriculture to AOG (C-134).

329 Letter of 23 June 2016 from the Minister of Agriculture to AOG, p. 1 of the pdf document (C-19). See MoA Briefing Note, 23 June 2016, p. 2 of the pdf document (C-326).

330 AOG Letter to State Forestry, 18 July 2016 (C-142). See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, p. 11 of the pdf document (C-156).

331 AOG section 29 application, 30 August 2016 (C-143). See Ministry of Environment response to AOG Application under s.29 of the Geology Act, 20 September 2016, p. 1 of the pdf document (C-144); Memorial, para. 144.

332 Ministry of Environment response to AOG Application under s.29 of the Geology Act, 20 September 2016 (C-144).

333 Letter of 27 September 2016 from AOG to the MoE (C-334).

230. In response to a request from the MoE dated 10 October 2016,[334] LSR provided on 25 October 2016 its comments and observations on the Article 29 Application.[335]

231. In response to a request for comments from the MoE dated 9 November 2016,[336] the MoA stated on 23 November that it was not a "party to the proceedings" in connection with the Article 29 Application, since LSR managed the land on which AOG wanted to drill.[337]

232. On 2 December 2016, the MoE requested that LSR advise whether it had processed AOG's petition of 18 July 2016.[338] LSR responded on 29 December 2016 saying that it did not process AOG's new lease proposal since AOG had filed the Article 29 Application upon the MoA's recommendation.[339]

233. Between 30 January and 6 February 2017, the MoE and the MoA exchanged correspondence on the issue of whether the MoA was a party to the proceedings and whether it intended to attend the hearing scheduled for 7 February 2017.[340]

234. On 7 February 2017, an oral hearing took place to address the Article 29 Application as well as "certain discrepancies in the statements" of the participants.[341] According to the account provided the following day by AOG's attorney, Mr. Beran, the hearing mostly concerned the question whether MoA was a participant to the proceedings. He added that the MoE had tried to "persuade us to submit [a] new request" to LSR, but that AOG "denied resolutely as we do not trust LESY SR or Ministry of Agriculture that they will process our

334 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, pp. 6-7 of the pdf document (C-156).

335 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, pp. 3-5 of the pdf document (C-156).

336 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, pp. 8-9 of the pdf document (C-156).

337 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, p. 1 of the pdf document (C-156).

338 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, p. 10 of the pdf document (C-156).

339 See Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016, pp. 11-12 of the pdf document (C-156).

340 Letter of 30 January 2017 from the MoA (C-360); Letter of 31 January 2017 from the MoA (C-361); Emails between the MoA and MoE, 31 January 2017 to 1 February 2017 (C-362); Emails between the MoA and MoE, 3-6 February 2017 (C-363).

341 Minutes of Oral Hearing regarding AOG's Article 29 Application, 7 February 2017 (C-365). See Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, pp. 2-3 of the pdf document (C-25).

request in due course".[342]

235. On 8 February 2017, the MoE decided to exclude the MoA from the proceedings as of 28 February 2017 since the MoA "did not have the status of a participant to the proceedings".[343]

236. On 9 February 2017, the MoE invited AOG to justify why it requested a restriction of ownership rights for a duration of "almost five years".[344] On 15 February 2017, AOG responded to the MoE's letter of 9 February by saying that, based on its "experience with preparatory works" and the resistance of "local activists", it would need "a time reserve should similar complications occur" and provided a timeline.[345]

237. In response to a request by the MoE dated 21 February 2017, LSR commented on 24 February on AOG's letter of 15 February by saying that it "did not have experts in geological work and could not ensure and assess within three days whether the required time corresponded to the time required for the planned work".[346]

238. On 6 March 2017, the MoE denied AOG's compulsory access request because it deemed that the MoA's prerogative of giving "prior consent" to a lease entered into by LSR "could not be considered a private law institute, but a public competence which the [MoE] could not transfer to itself":

> "Due to the fact that by decision in the given matter the Ministry would accede to the competences of another governmental agency whose competence is regulated by a special legal regulation, the Ministry had to decide to reject the submitted petition".[347]

239. On 24 March 2017, AOG appealed the MoE's decision arguing that it was based on an "incorrect legal assessment".[348] Upon a request from the MoE dated 31 March 2017, LSR commented on 6 April 2017 on AOG's appeal.[349] AOG's appeal was then submitted on

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342 Email of 8 February 2017 from Viktor Beran (C-366).

343 See Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 3 of the pdf document (C-25).

344 Ministry of Environment Response re. Application under s.29 of the Geology Act, 9 February 2017 (C-165).

345 AOG response to Ministry of Environment re. s.29 of the Geology Act, 15 February 2017 (C-167).

346 See Decision of Minister of Environment, 13 June 2017, p. 4 of the pdf document (C-174).; Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 3 of the pdf document (C-25).

347 Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 5 of the pdf document (C-25).

348 See Decision of Minister of Environment, 13 June 2017, p. 5 (C-174).

349 See Decision of Minister of Environment, 13 June 2017, p. 6 (C-174).

12 April 2017 to the MoE's appellate body, the Special Commission, which concluded that the MoE's decision of 6 March should be annulled because the legal relationship opposing AOG and LSR had the character of a "private law relationship".[350]

240. On 13 June 2017, following the recommendation of the Special Commission, the Minister of the Environment, Mr. Sólymos, quashed the MoE's decision of 6 March 2016 denying AOG's request for a compulsory access order because granting an access order would interfere with the prerogatives of the MoA and because further fact-finding was necessary to ascertain whether or not AOG and LSR could agree on a new lease.[351] He therefore returned the Article 29 Application to the MoE's Department of State Geological Administration "for a new discussion and decision".[352]

241. On 27 June 2017, the MoE suspended the resumed Article 29 proceedings "pending the resolution of the preliminary question, which is the submission of documents demonstrating the results of negotiations between the parties to the proceedings on the conclusion or non-conclusion of an agreement on the use of the real estate concerned located in the district of Medzilaborce, municipality Oľka".[353]

242. On 4 July 2017, AOG responded to the MoE by saying that LSR never responded to AOG's new lease proposal of 18 July 2016 and that the 7 February 2017 hearing had shown that LSR never submitted AOG's lease proposal to the MoA.[354]

243. It is undisputed that AOG never attempted to obtain a new lease from LSR and thus that it never provided the requested information to the MoE.[355]

244. On 27 November 2017, AOG requested that the MoE lift the "unlawful" suspension of the proceedings, which it said "cause[d] undue delay", because AOG had provided the requested documents as early as 27 September 2016, when it already told the MoE that LSR never responded to AOG's new lease proposal of 18 July 2016.[356]

245. On 2 January 2018, the MoE submitted AOG's request of 27 November 2017 to the

350 See Decision of Minister of Environment, 13 June 2017, p. 9 (C-174).

351 Decision of Minister of Environment, 13 June 2017, pp. 8-9 (C-174).

352 Decision of Minister of Environment, 13 June 2017, p. 1 (C-174).

353 Decision of 27 June 2017 of the MoE (R-75).

354 Letter of 4 July 2017 from AOG (C-374).

355 See Fraser WS1, para. 88; Fraser WS2, para. 39; Email of 5 October 2017 from Alexander Fraser (C-383).

356 Letter of 27 November 2017 from AOG (C-384).

appellate body pursuant to Article 50 of the Administrative Procedure Code.[357] On 31 January 2018, Minister Sólymos informed AOG that the appellate body found that AOG's request to lift the suspension was unfounded because AOG had not submitted "the required documents, but remained inactive" and insisted that AOG provide those documents since it bore the burden of proof.[358]

246. On 30 April 2018, AOG and Romgaz informed the MoE that they were relinquishing the Medzilaborce Exploration License, which relinquishment the MoE accepted on 25 May 2018.[359]

247. On 21 June 2018, the MoE rejected the Article 29 Application on the ground that AOG had relinquished the Medzilaborce Exploration License.[360]

3. Ruská Poruba

248. The site of Poruba-1 is located in the Humenné district on farmland about 1.5 km out of the town Ruská Poruba within the area covered by the Snina Exploration License.[361] It is accessible by a 0.5 km long "forest track" (the "Poruba Access Road").[362] Poruba-1 is situated on land plots E-KN No. 526/9, E-KN No. 526/7, E-KN No. 526/6, E-KN No. 526/5 and E-KN No. 525, and registered in title deeds nos. 206, 204, 203, 202 and 161 of the cadastral area Ruská Poruba.[363] Those land plots are co-owned by several individuals. The Poruba Access Road is also located on privately owned land plots, including land plots E-KN No. 513 and E-KN No. 527 which are managed by the forest land owners' community called Urbáska spoločnost'-Pozemkové spoločenstvo Ruská Poruba ("Urbariát").[364] Part of the Poruba-1 Access Road is also on land managed by LSR.[365]

249. On 15 July 2014, the MoE extended the Snina Exploration License until 1 August 2016.[366]

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357 See Letter of 31 January 2018 from Minister Sólymos, p. 4 (C-387).

358 Letter of 31 January 2018 from Minister Sólymos, pp. 4-5 (C-387).

359 Ministry of Environment Decision on Medzilaborce relinquishment, 25 May 2018 (C-199).

360 Decision of the MoE, 21 June 2018 (C-201).

361 Detailed Drilling Programme Poruba, December 2015, p. 9 (C-94).

362 Fraser WS1, para. 25. The "Detailed Drilling Programme" states as follows: "The area of planned drilling is 1km south of the village Ruska Poruba (Prešov region, Humenne district)". Detailed Drilling Programme Poruba, December 2015, p. 17 (C-94).

363 See Resolution of the District Court Humenné, File No. 5C/564/2015-84, 27 November 2015, p. 2 (R-77).

364 Counter-Memorial, para. 167.

365 See Resolution of the District Court Humenné, File No. 5C/564/2015-84, 27 November 2015, p. 2 (R-77).

366 Decision about exploration area term extension (Snina), Record Number: 34186/2014, File Number: 5668/2014-7.3, 15 July 2014, p. 3 of the pdf document (C-10).

At that time, AOG was still focused on the Oľka site.[367] In June 2015, due to local opposition to drilling at that site, AOG shifted its focus to Poruba-1.[368] The Snina Exploration License was again extended on 7 June 2016 for five years until 1 August 2021 and the license area was reduced to 34.36 km².[369]

250. Although by the end of August 2015 AOG considered that it had "finalized" the "[d]rill site and entry road leases",[370] it faced a "road access issue" by the middle of the next month.[371] In contrast to LSR, which granted AOG permission to use the Poruba-1 Access Road, Urbariát refused "to enter into any agreement for adequate compensation" with AOG.[372] As a result, AOG requested the District Court in Humenné to order Urbariát to allow it to use the Poruba Access Road,[373] which the court did on 27 November 2015. It thus ordered Urbariát to give AOG access to the Poruba Access Road situated on land plots E-KN No. 513 and E-KN No. 527 (the "Poruba Injunction").[374] Urbariát appealed that decision.[375]

251. During the pendency of the appeal, on 22 December 2015, AOG sought to bring heavy machinery to Poruba-1.[376] According to Mr. Fraser, a "large group of protesters" of 60-80 persons gathered at the site, "many" of which were "the same protesters as were active at Smilno and Krivá Oľka".[377] After the year end break, on 15 January 2016, AOG tried to access the Poruba-1 site "to start preparatory work". However, two co-owners of plot

367 Partner's technical presentation, 11 September 2014, p. 60 of the pdf document (C-62).

368 Email of 25 June 2015 from Mike Lewis to Partners, p. 3 of the pdf document (C-78); Partner Progress Report, 25 August 2015 (C-79).

369 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), 7 June 2016, p. 4 of the pdf document (C-14).

370 Partner Progress Report, 25 August 2015 (C-79).

371 Opcom Minutes, 16 September 2015, p. 2 of the pdf document, item 3.2 (C-81).

372 See Resolution of the District Court Humenné, File No. 5C/564/2015-84, 27 November 2015, p. 2 (R-77).

373 See Resolution of the District Court Humenné, File No. 5C/564/2015-84, 27 November 2015, p. 1 (R-77).

374 Resolution of the District Court Humenné, File No. 5C/564/2015-84, 27 November 2015 (R-77). See Opcom Minutes, 3 December 2015, p. 1 (C-100).

375 Reply, para. 148.

376 Counter-Memorial, para. 170. The JV Partners approved the AFE for the Poruba-1 well on 3 December 2015 and AOG intended to finish location preparation in the course of February 2016 and to drill an exploration well in March 2016. Opcom Minutes, 3 December 2015, p. 4 of the pdf document, item 15(6) (C-100); 2016 JOA Budget, 3 December 2015 (C-97); Drilling Plan, 3 December 2015 (C-99). See also Detailed Drilling Programme Poruba, December 2015, pp. 5-6 (C-94); Operations Update for Opcom, 3 December 2015, p. 5 of the pdf document (C-101).

377 Fraser WS1, para. 27. See also Counter-Memorial, para. 170.

No. 513 blocked the access with a Škoda vehicle.[378] According to AOG, several cars were actually "chained together" and a concrete barrier obstructed the road.[379] AOG had the Škoda towed away.[380]

252. On 19 February 2016, the Court of Appeal in Prešov overturned the Poruba Injunction *inter alia* because it was "not apparent from what the Court of First Instance concluded that the plaintiff [i.e. AOG] had a right to use the land in question" and because the co-owners of land plots E-KN No. 513 and E-KN No. 527 had refused to allow AOG to use their land.[381]

253. According to Mr. Fraser, AOG decided to suspend its operations at Ruská Poruba after the Prešov Regional Court overturned the Poruba Injunction: "Rather than attempt to seek further legal remedies, the decision was taken to suspend further operations at Ruská Poruba and focus our efforts on the Smilno and Krivá Oľka locations".[382] In that context, on 25 May 2018, the MoE approved AOG's request of 30 April 2018 to relinquish the Snina Exploration License.[383]

I. PRELIMINARY EIA PROCEEDINGS

254. In 2013, the EU Commission initiated infringement proceedings against the Slovak Republic due to its failure to properly transpose Directive 2011/92/EU, as amended by Directive 2014/52/EU (together the "EIA Directive"),[384] into Slovak law.[385] The Slovak Republic had sought to implement the EIA Directive by way of the EIA Act. The latter required a preliminary EIA for "exploitation drills" and not for deep "exploration drills", which should have been covered as well under the EIA Directive.[386]

255. As a consequence, the Slovak Republic amended the EIA Act on 25 November 2016, by changing the list of activities requiring a preliminary EIA (or screening procedure) and a

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378 See Resolution of the District Directorate of Police Forces, 28 July 2016, p. 1 (R-80).

379 Report to Partners – Status Update, 20 January 2016, p. 5 of the pdf document (C-120).

380 See Resolution of the District Directorate of Police Forces, 28 July 2016, p. 1 (R-80). See also Report to Partners – Status Update, 20 January 2016, p. 1 of the pdf document (C-120).

381 Decision of Presov appeal court, 19 February 2016, p. 4 (C-126).

382 Fraser WS1, para. 28.

383 Ministry of Environment Decision on Snina relinquishment, 25 May 2018 (C-200).

384 See [redacted]

385 Directive 2011/92/EU of the European Parliament and of the Council, 13 December 2011 (R-83); Directive 2014/54/EU of the European Parliament and of the Council, 16 April 2014 (R-86).

386 EIA Act (applicable until 31 December 2016), Annex 8 (R-82).

mandatory EIA ("full EIA").[387] The amendment took effect on 1 January 2017.

256. On 29 November 2016, the MoE issued a press release saying that it had initiated an audit of AOG's activities at Smilno. The release added that, because "the current legislative and procedural [framework] does not give rise to a legal obligation on the license holder to carry out an EIA", Minister Sólymos' plan was to "ask" AOG that it "offer" to carry out an EIA.[388] On the same day, a meeting was arranged between AOG and the Ministry, to take place upon the Minister's return from a visit to Mexico.[389]

257. The meeting took place on 15 December 2016.[390] On the eve of the meeting, AOG sent Minister Sólymos a presentation[391] addressing its commitment to environmental compliance, its efforts to implement its drilling program, and the "opposition and/or obstruction" from various actors, including the MoA, the police, the prosecutor's office, the "court system", the "[s]ystem of land ownership", the church, and local protesters who had "succeeded in corrupting the public debate, causing the authorities to turn away".[392]

258. At the 15 December 2016 meeting, Minister Sólymos asked AOG to voluntarily conduct a preliminary EIA for its exploratory drills.[393] A few days later, AOG refused to perform a preliminary EIA for Smilno and Krivá Oľka, but did agree to do so for Ruská Poruba and future wells on certain conditions:

> "If the Ministry assures us that (i) the voluntary environmental impact assessment (EIA) is legally feasible and the competent authorities will find a procedural framework within which to deal promptly with the company Alpine, and, at the same time, (ii) the Ministry clearly confirms that, when making a decision pursuant to Section 29 of Act No.569/2007 Coll. on Geological Works, as amended ('Section 29'), they will provide Alpine (provided that it submits documents proving that it is not possible to come to an agreement with owners of the real estate needed for the geological survey) with all necessary cooperation regarding the use of the real estate in Krivá Oľka, Zborov, Habura, Ruská Poruba and Oľka and will not unreasonably decide against Alpine or cause unreasonable delays, the company Alpine will agree to voluntarily undergo the environmental impact assessment (EIA) in relation to the planned drilling at Zborov, Habura, Ruská Poruba and

387 EIA Act, 2017 (C-225).

388 Ministry of Environment Press Release, 29 November 2016 (C-157).

389 Email of 29 November 2016 from [redacted] to Alexander Fraser (R-162).

390 See Letter of 21 December 2016 from AOG to the Minister of the Environment (C-162); Memorial, para. 166.

391 Letter of 14 December 2016 from AOG to the Minister of the Environment (C-160). See AOG's presentation slides for meeting at the Ministry of Environment, 13 December 2016 (C-159).

392 AOG's presentation slides for meeting at the Ministry of Environment, 13 December 2016, pp. 14 and 16-17 (C-159).

393 Sólymos WS2, para. 8. See Memorial, para. 168; Rejoinder, para. 161.

> Oľka. Alpine is also ready to voluntarily undergo the environmental impact assessment (EIA) with respect to other exploratory drillholes, subject to the cooperation between the Ministry and Alpine with respect to such drillholes, pursuant to Section 29, should Alpine need it".[394]

259. In an article published on 27 January 2017, Minister Sólymos is quoted saying that AOG had complied with applicable legislation and that there was "no legal or legitimate reason" for revoking its licenses, as some opponents were demanding. He added that "[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". He also stated that AOG accepted to perform voluntary preliminary EIAs for "new bore holes":

> "On the other hand, they [i.e. AOG] admitted that there was nothing that would prevent them from conducting a screening/fact-finding procedure if new bore holes were to be drilled within their exploration area, even though they are not required to do this under the law. […].[395]

260. The following month, on 15 February 2017, the MoE issued a press release reporting that an "in-depth ministerial inspection" about AOG's activities in Smilno "did not prove fundamental misconduct" or "violations that would have a significant impact on the environment", only "some administrative deficiencies" such as the "late fulfillment of the obligation to notify about the start of work".[396] The press release further stated that Minister Sólymos had sought to agree with AOG "on a friendly step to voluntarily carry out an environmental impact assessment beyond the scope of the law".[397]

261. According to Mr. Fraser, around that time, AOG came to understand that it needed to "find some common ground" with the activists:

> "We were coming to the conclusion that it was effectively impossible to proceed without establishing some sort of dialogue with the activists opposed to our operations, in order to hear their concerns (even though we considered them misplaced) and attempt to find some common ground".[398]

262. As a result, AOG had meetings with activists, including members of VLK, in February and

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394 Emphasis in the original. Letter of 21 December 2016 from AOG to the Ministry of Environment, pp. 1-2 of the pdf document (C-162).

395 Korzar article – Minister Comments on the Borehole Near Smilno, 27 January 2017 (C-164).

396 Ministry of Environment Press Release dated 15 February 2017 (C-168).

397 Ministry of Environment Press Release dated 15 February 2017 (C-168).

398 Fraser WS1, para. 92.

March 2017.[399] Although the activists initially demanded that AOG perform full EIAs, the discussions progressively turned to AOG voluntarily conducting preliminary EIAs "for all wells", in exchange for the activists withdrawing their opposition.[400] Mr. Lewis agreed to do so and to issue a joint press release with VLK[401] as an informal commitment without any "protracted approvals process".[402] On that basis, AOG started preparing a set of "key principles" on its engagement with local communities.[403]

263. As a result of these meetings, in a press release of 5 April 2017, AOG made public its commitment to conduct a preliminary EIA "for each exploration well, including those where operations have already started". It also reported on the key principles of its engagement with local communities.[404]

264. On 6 June 2017, AOG submitted a preliminary EIA application for Smilno-1[405] and, on 2 August 2017, the Bardejov District Office decided that AOG was to conduct a full EIA for that site.[406]

265. AOG then submitted a preliminary EIA application for Poruba-1 on 4 July 2017,[407] and the Humenné District Office ordered AOG to conduct a full EIA on 7 September 2017.[408] Following an appeal filed by AOG on 6 October 2017,[409] the District Office in Prešov quashed that decision on 11 January 2018 and remanded the issue back to the first instance

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399 First activists meeting note dated 5 February 2017 (R-117); Email of 5 February 2017 from [redacted] to A. Fraser (R-163); Email of 6 February 2017 from Mr. Fraser (R-164); Key principles – Alpine Oil & Gas Commitment to communities in North East Slovakia, 11 February 2017 (C-166); Email of 19 February 2017 from Alexander Fraser (C-369); Third activists meeting note dated 4 March 2017 (R-145); AOG's report to Partners, 10 March 2017 (C-169); Fourth activists meeting note dated 24 March 2017 (R-146); Fraser WS1, para. 93.

400 First activists meeting note dated 5 February 2017 (R-117).

401 Email of 5 February 2017 from A. Fraser to [redacted], p. 2 of the pdf document (R-164).

402 Email of 5 February 2017 from Mr. Lewis, p. 2 of the pdf document (R-164).

403 Key principles – Alpine Oil & Gas Commitment to communities in North East Slovakia, 11 February 2017 (C-166).

404 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017 (C-171).

405 AOG Smilno preliminary Environmental Impact Assessment application, 6 June 2017 (C-173); Preliminary EIA submission of Smilno-1, May 2017 (R-87).

406 Decision re. Smilno Environmental Impact Assessment, 2 August 2017 (C-176).

407 AOG Poruba preliminary Environmental Impact Assessment application, 4 July 2017 (C-175); Preliminary EIA submission of Poruba-1, June 2017 (R-88).

408 Humenne District Office Decision, 7 September 2017 (C-179).

409 Environmental Impact Assessment appeal against the Humenne district office decision, 6 October 2017 (C-181).

authority.[410]

266. Finally, on 7 August 2017, AOG submitted a preliminary EIA application for Krivá Oľka,[411] and, on 8 March 2018, the Medzilaborce District Office decided that AOG needed to conduct a full EIA for that site.[412] AOG never appealed the decisions of the Bardejov and Medzilaborce District Offices.

J. WITHDRAWAL OF THE JV PARTNERS AND RELINQUISHMENT OF THE EXPLORATION LICENSES

267. After JKX withdrew from the JV, the MoE received on 30 April 2018 a request from AOG and Romgaz to relinquish the Medzilaborce and Snina Licenses.[413] They explained that they took that decision because of "persistent resistance of citizens and members of some municipal councils […], negative resolutions of the members of the Prešov self-governing region council and, above all, steps taken by the activists".[414] On the same day, the MoE received an application from AOG and Romgaz to reduce the size of the Svidník Exploration License.[415]

268. On 25 May 2018, the MoE confirmed the decision to relinquish and abolish the Medzilaborce and Snina Licenses.[416] On 8 June 2018, the MoE notified its decision reducing the area of the Svidník Exploration License to 34.22 km².[417] In its decision the MoE included the condition that a preliminary EIA would have to be performed for

410 District Authority Presov: Environmental Impact Assessment Decision on the appeal Ruská Poruba, 11 January 2018 (C-184).

411 AOG – Kriva-Olka preliminary Environmental Impact Assessment application, 7 August 2017 (C-177); Preliminary EIA submission of Krivá Ol'ka, July 2017 (R-89).

412 Medzilaborce District Office Decision, 8 March 2018 (C-186).

413 See Ministry of Environment Decision on Medzilaborce relinquishment, 25 May 2018, p. 2 of the pdf document (C-199); Ministry of Environment Decision on Snina relinquishment, 25 May 2018, p. 2 of the pdf document (C-200).

414 See Ministry of Environment Decision on Medzilaborce relinquishment, 25 May 2018, p. 2 of the pdf document (C-199); Ministry of Environment Decision on Snina relinquishment, 25 May 2018, p. 2 of the pdf document (C-200).

415 See Decision Modifying an Exploration Area, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidník), 8 June 2018, p. 5 of the pdf document (C-15).

416 Ministry of Environment Decision on Medzilaborce relinquishment, 25 May 2018 (C-199); Ministry of Environment Decision on Snina relinquishment, 25 May 2018 (C-200).

417 Decision Modifying an Exploration Area, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidník), 8 June 2018 (C-15).

drillings deeper than 600 meters in conformity with Article 29 of the EIA Act.[418]

269. On 7 April 2020, Romgaz notified AOG of its intention to withdraw from the JV and the Svidník Exploration License.[419]

270. AOG retained the Svidník Exploration License "through to its expiry in July 2021".[420]

IV. OVERVIEW OF THE PARTIES' POSITIONS

A. PRELIMINARY OBJECTIONS

1. Respondent's position

271. The Respondent challenges the jurisdiction of the Tribunal or the admissibility of the claims on several grounds:[421]

(i) Discovery is not a protected investor under the BIT because it is a mailbox company lacking activities and assets;[422]

(ii) Discovery made no qualifying investment under Article I(1)(a) of the BIT, because it is a "pass-through entity", with no identifiable assets or "contribution of its own" and because any funds disbursed originated either from "Mr. Lewis, other companies he owned or controlled, and Akard";[423]

(iii) Discovery did not make a qualifying investment under Article 25(1) of the ICSID Convention, since it did not make a "significant" or "substantial" contribution and took no risk;[424]

(iv) Pursuant to Article X(1) of the BIT, Discovery cannot invoke the BIT's substantive obligations, since the claims arise out of measures taken to maintain public order, to prevent "civil unrest", and to protect Slovakia's "environment

418 Decision Modifying an Exploration Area, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidník), 8 June 2018, p. 4 of the pdf document (C-15).

419 Romgaz Notice of Withdrawal, 7 April 2020 (C-234).

420 Lewis WS2, para. 93.

421 Counter-Memorial, paras. 221-262; Rejoinder, paras. 217-248; Tr. (Day 1), 193:19-198:24 (Pekar).

422 Counter-Memorial, paras. 223-234.

423 Counter-Memorial, paras. 226 and 233; Rejoinder, paras. 218-222 and 243-244.

424 Counter-Memorial, paras. 249- 253; Rejoinder, paras. 234-248.

and drinking water";[425]

(v) Based on the carve-outs in Annex I of the BIT in relation to "ownership of real property" and "hydrocarbons", Discovery's claims of discriminatory treatment are "inadmissible or otherwise outside this Tribunal's jurisdiction";[426]

(vi) Discovery's corporate structure breaches good faith and amounts to an abuse of process.[427] Moreover, Discovery has unclean hands because Mr. Crow faked an injury and AOG disregarded the Interim Injunction;[428]

(vii) Discovery failed to comply with the procedural precondition set forth in Article VI(2) of the BIT to consult and negotiate before acceding arbitration.[429]

2. Claimant's position

272. The Claimant responds that the preliminary objections raised by the Respondent "are all misconceived"[430] and submits that the Tribunal has jurisdiction over the dispute and that all of its claims are admissible.[431] More specifically, its position is as follows:

(i) As a US company, Discovery is a protected investor under the BIT;[432]

(ii) Discovery made protected investments under the BIT, including "its ownership of and interest in AOG and its economic interest in AOG's assets (in particular, the Licences)", and expended "each year" "significant sums" in AOG's exploration activities";[433]

(iii) Discovery made a protected investment under Article 25(1) of the ICSID Convention because the BIT's definition of investment "automatically" satisfies the definition in Article 25(1) and, in any event, Discovery made a "substantial contribution of time, money and resources" in the "expectation of a commercial

425 Counter-Memorial, paras. 239-245.

426 Counter-Memorial, paras. 246-248.

427 Counter-Memorial, paras. 254-257.

428 Discovery added this argument at the Hearing (Tr. (Day 1), 193:23-196:6 (Pekar)).

429 Counter-Memorial, paras. 258-262.

430 Tr. (Day 1), 76:1 (Tushingham).

431 Memorial, paras. 198-208; Reply, paras. 194-252.

432 Memorial, para. 201(2)-(3); Reply, paras. 195-203.

433 Memorial, para. 201(4)-(5); Reply, paras. 204-216.

return and at its own risk";[434]

(iv) Slovakia's reliance on Article X(1) of the BIT is "misconceived", since that provision only operates as a defense on liability, imposes "strict conditions", is not "self-judging", and the Respondent identifies no measures that were "necessary" to protect public order or essential security interests;[435]

(v) The Respondent cannot rely on the exceptions listed in the Annex of the BIT in relation to "ownership of real property" and "hydrocarbons", since it failed to notify the US, either before or after the BIT's entry into force, of a derogation to the obligation of national treatment under Article II(1) of the BIT;[436]

(vi) Discovery acted in good faith; as a matter of US and Texas law, a limited liability company with a single shareholder "automatically" qualifies as a "pass-through" entity for tax purposes;[437]

(vii) Discovery complied with the procedural preconditions under Article VI(2) and (3)(a) of the BIT.[438]

B. SUBSTANTIVE CLAIMS

1. Claimant's position

273. The Claimant alleges four substantive violations of the BIT: unfair and inequitable treatment, arbitrary and discriminatory treatment, failure to provide effective means, and unlawful expropriation. The Claimant submits that it was subjected to a "torrent of regulatory inconsistency, arbitrary decision-making, and discriminatory treatment" by Slovakia, in addition to measures violating its legitimate expectations to conduct exploratory drilling and measures amounting to an indirect expropriation.[439]

274. For the Claimant, those measures, whether individually or collectively, "completely wiped out the value" of its investment, since they "prevented AOG from performing its basic obligations to Slovakia under the Licences, namely to complete its geological

434 Memorial, para. 206-208; Reply, para. 233-244.

435 Reply, paras. 220-226.

436 Reply, paras. 228-229.

437 Reply, paras. 194 and 245-248.

438 Memorial, paras. 202-205.

439 Reply, para. 3.

exploration".[440] The Claimant argues in this context that, but for Slovakia's conduct, AOG "would have drilled multiple wells and those wells would have yielded substantial discoveries of oil and gas".[441]

275. The Claimant contends that it legitimately relied on representations and assurances contained in the Exploration Licenses, renewals and extensions, that AOG would be able to drill exploratory wells in the license areas.[442] However, the Slovak Republic frustrated those expectations by preventing AOG from drilling exploration wells at Smilno and Krivá Oľka,[443] and by obliging AOG to perform preliminary EIAs and then ordering it to perform full EIAs.[444]

276. In respect of **Smilno**, the Claimant contends that the police's failure to secure access to the drill site, including its refusal to remove vehicles and activists and to approve road signs; the State prosecutor's abuse of authority by "intervening in a civil dispute" between AOG and Ms. Varjanová and instructing the police to cancel its policing operation; and the MoI's instruction to the police that the Access Road was a private road all prevented AOG from drilling at Smilno.[445] It asserts that no land owner consent was required to use the Access Road since it was "publicly accessible", and that all necessary permits and consents had been secured.[446] Moreover, the Slovak judiciary denied justice to Discovery by preventing AOG from using the Access Road.[447] Additionally, the "unwarranted and unreasonable delay" in dealing with Ms. Varjanová's appeal breached the effective means standard under Article II(6) of the BIT.[448] Those measures were also inconsistent and arbitrary,[449] and contributed to the creeping expropriation of the Claimant's investments.[450]

277. In relation to **Krivá Oľka**, the Claimant argues that the MoA's refusal to approve the extension of the Lease and the MoE's refusal to grant access to the site under Article 29 of the Geology Act, based on an "instruction from higher up", coupled with the suspension

440 Reply, para. 4.

441 Reply, para. 4.

442 Reply, paras. 268-277.

443 Reply, para. 289(1).

444 Reply, para. 289(2).

445 Memorial, paras. 227-231; Reply, paras. 3(1) and 291-298.

446 Reply, para. 292.

447 Memorial, para. 228; Reply, paras. 337-348.

448 Memorial, paras. 258-262; Reply, para. 370.

449 Memorial, paras. 230, 233-234 and 239-257; Reply, paras. 316 and 329-331.

450 Memorial, paras. 263-269; Reply, paras. 373-381.

of the Article 29 proceedings, also breached its expectation to be able to drill an exploration well at that site.[451] Those measures were equally inconsistent, arbitrary, non-transparent and discriminatory,[452] and contributed to the creeping expropriation of the Discovery's investments.[453] Furthermore, the delays in handling AOG's Article 29 Application and appeal breached the effective means provision of the BIT.[454]

278. Finally, in connection with the **EIA process**, it is the Claimant's submission that the decisions of the district offices ordering a full EIA for Smilno, Ruská Poruba and Krivá Oľka, as well as the MoE requirement for a preliminary EIA for future wells undermined its expectation that it would be able to proceed with its exploration program. In addition, the decisions were arbitrary, inconsistent with prior statements of the MoE and discriminatory.[455] They also contributed to the creeping expropriation of the Claimant's investments.[456] For the Claimant, ordering full EIAs and imposing a preliminary EIA for future wells "was the last nail in the coffin of Discovery's investment and […]precipitated the withdrawal of AOG's JV Partners and ultimately destroyed the value of Discovery's investment".[457]

2. Respondent's position

279. The Respondent denies having breached any standard under the BIT and requests that all of Discovery's claims be dismissed.[458] It argues that it acted "entirely" consistently with its international obligations and that the claims are "manifestly baseless".[459]

280. Specifically, the Respondent disputes having frustrated the Claimant's legitimate expectations,[460] acted inconsistently[461] or arbitrarily in respect to the Smilno and Krivá

451 Memorial, paras. 232-234; Reply, paras. 3(2), 138 and 299-304.

452 Memorial, paras. 230 and 233-234; Reply, paras. 317, 332-334 and 359-366.

453 Memorial, paras. 263-269; Reply, paras. 373-381.

454 Memorial, para. 262(2); Reply, paras. 370-372.

455 Memorial, paras. 235-238; Reply, paras. 3(3), 318, 335 and 367-369.

456 Memorial, paras. 263-269; Reply, paras. 373-381.

457 Memorial, para. 238.

458 Counter-Memorial, paras. 272-425; Rejoinder, paras. 249-527.

459 Rejoinder, para. 249.

460 Counter-Memorial, paras. 294-344; Rejoinder, paras. 257-398.

461 Counter-Memorial, paras. 345-355; Rejoinder, paras. 399-426.

Oľka sites or the EIA process,[462] denied justice to Discovery or AOG,[463] breached the effective means standard,[464] or having indirectly expropriated the Claimant's investments.[465]

281. In respect of **Smilno**, the Respondent asserts that "it was AOG's legal mistakes and failure to obtain landowner consent that resulted in its downfall".[466] AOG had no right to use the Access Road[467] and was bound to respect the Interim Injunction. Discovery's argument according to which that "field track" was a public special purpose road ("PSPR") is an "after-the-fact" invention that AOG never invoked at the time.[468] Neither the Bardejov District Court's decision to grant the Interim Injunction nor the Prešov Regional Court's decision to uphold that injunction were arbitrary or biased against AOG.[469] The statutory conditions for the Interim Injunction were satisfied, in particular the threat of imminent harm.[470]

282. Coming to **Krivá Oľka**, neither the MoA's denial of the Lease Amendment nor the MoE's refusal to issue a compulsory access order barred Discovery from drilling in Krivá Oľka.[471] The MoA did not approve the Lease Amendment because AOG did not request an extension of the Lease in time.[472] As for the MoE, it denied an access order for lack of proof that AOG had been unable to conclude a new lease with LSR.[473] The argument that there was an instruction from the highest level of the MoE is "divorced from common sense".[474] The Minister of Environment, Mr. Sólymos, denies having given such instruction and later quashed the MoE's decision.[475]

462 Rejoinder, paras. 427-473.

463 Counter-Memorial, paras. 356-373; Rejoinder, paras. 474-491.

464 Counter-Memorial, paras. 401-408; Rejoinder, paras. 508-514.

465 Counter-Memorial, paras. 409-424; Rejoinder, paras. 515-527.

466 Counter-Memorial, paras. 312-322; Rejoinder, paras. 288-327.

467 Rejoinder, para. 296.

468 Rejoinder, para. 291.

469 Counter-Memorial, paras. 369-373; Rejoinder, paras. 481-491.

470 Counter-Memorial, para. 370; Rejoinder, para. 482, referring to Fogaš ER1, section 3.1.3; Fogaš ER2, section II.A.3.

471 Rejoinder, para. 328.

472 Rejoinder, paras. 334-343.

473 Rejoinder, paras. 348-356.

474 Rejoinder, para. 358.

475 Rejoinder, paras. 357-360.

283. Turning to the **EIAs**, the Respondent stresses that Discovery "*volunteered* to undergo Preliminary EIAs" for Smilno, Krivá Oľka and Ruská Poruba, and, hence, could not legitimately expect not to be subject to a preliminary EIA.[476] Discovery is wrong to argue that the district offices should have refrained from entertaining the preliminary EIA applications, or that it legitimately expected that the preliminary EIAs would not progress to full EIAs.[477] In the same vein, Discovery erroneously argues that it legitimately expected that the EIA Amendment would not apply to its post-2017 drills.[478] The inclusion of a preliminary EIA requirement in the 2018 extension of the Svidník Exploration License was "in accordance with the EIA Amendment" and thus not "illegitimate".[479] In any event, AOG could have appealed that decision but chose not to.[480]

V. REQUESTS FOR RELIEF

A. THE CLAIMANT'S REQUESTS FOR RELIEF

284. In its Memorial, the Claimant requested that the Tribunal:

> "(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

476 Emphasis in the original. Counter-Memorial, paras. 330-344; Rejoinder, paras. 367-372.

477 Rejoinder, paras. 373-374.

478 Rejoinder, paras. 375-381.

479 Rejoinder, paras. 391-398.

480 Rejoinder, para. 398.

appropriate".[481]

285. The Claimant reserved its right to "introduce (at a subsequent stage of this arbitration) additional claims, arguments, and evidence".[482]

286. In its Reply, the Claimant requested that the Tribunal:

> "(1) **DECLARE** that it has jurisdiction over Discovery's claims and that Discovery's claims are admissible;
>
> (2) **DECLARE** that Slovakia has breached its obligations to Discovery under the BIT;
>
> (3) **ORDER** Slovakia to compensate Discovery for the loss of the FMV of its investments arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation quantified using a DCF model in an amount to be determined by the Tribunal, but in any event not less than USD 133,054,614 plus an additional USD 1,965,198.39;
>
> (4) in the alternative to (3), **ORDER** Slovakia to compensate Discovery for the loss of opportunity to earn profits arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event not less than USD 53,000,000 plus an additional USD 1,965,198.39;
>
> (5) in the alternative to (4), **ORDER** Slovakia to compensate Discovery for the loss of the FMV of its investments arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation quantified using a market comparable method in an amount to be determined by the Tribunal, but in any event not less than USD 36,000,000, plus an additional USD 1,965,198.39;
>
> (6) in the alternative to (5), **ORDER** Slovakia to compensate Discovery for the wasted investment costs arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event not less than USD 3,736,375;
>
> (7) **ORDER** Slovakia to pay pre-award interest at a rate and in an amount to be determined by the Tribunal on: *(i)* any monetary compensation ordered pursuant to request for relief (5) or (6) above; and *(ii)* Discovery's legal and other costs as determined by the Tribunal under request for relief (8) below;
>
> (8) **ORDER** Slovakia to pay post-award interest at a rate and in an amount to be determined by the Tribunal on any monetary compensation and costs awarded to Discovery from the date of the Tribunal's award to the date of final payment by

[481] Emphasis in the original. Memorial, para. 335.

[482] Memorial, para. 336.

Slovakia of the sums due under the award;

(9) **ORDER** Slovakia to reimburse Discovery for all of its legal and other costs incurred in connection with this arbitration, including:

(a) the total premium (including the deferred and contingent premium), plus applicable taxes, payable by Discovery to its ATE insurer (Arcadian Risk Capital Limited); and

(b) the sums payable by Discovery to its funder (24LF Capital LLC) in connection with the funding of Discovery's legal costs;

(10) **GRANT** such further and other relief as the Tribunal considers just and appropriate".[483]

287. These requests remained unchanged.

B. THE RESPONDENT'S REQUESTS FOR RELIEF

288. In its Counter-Memorial and Rejoinder, the Respondent requested the following relief:

"(a) a declaration dismissing Discovery's claims;

(b) an order that Discovery pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal".[484]

289. These requests remained unchanged.

[483] Emphasis in the original. Reply, para. 474.

[484] Counter-Memorial, para. 623; Rejoinder, para. 737.

VI. ANALYSIS

A. PRELIMINARY MATTERS

290. Prior to addressing the Parties' dispute, the Tribunal will address certain preliminary matters: (1) the applicable procedural law, (2) the law governing jurisdiction, (3) the law governing the merits, (4) the relevance of previous decisions or awards and (5) adverse inferences.

1. Applicable procedural law and transparency

291. This arbitration is governed by the ICSID Convention, the ICSID Arbitration Rules in force as of 10 April 2006, and the procedural orders adopted in the course of this arbitration, in particular PO1.

292. PO2 set out the transparency rules applicable to the present proceedings, which are based on the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration adjusted to ICSID proceedings. More specifically, as reflected in PO2, the Parties agreed to publish the Parties' main written submissions, the lists of exhibits, legal authorities, witness statements and expert reports; non-disputing party submissions and the Parties' written observations thereon; hearing transcripts; procedural orders, decisions and the award. The Parties further agreed to make the recording of the Hearing accessible on the ICSID website. Publication is subject to the protection of "confidential and protected" information as specified in PO2.

2. Law governing jurisdiction

293. It is common ground that the jurisdiction of this Tribunal is governed by Article 25 of the ICSID Convention and Article VI of the BIT. In other words, jurisdiction is governed by international law.

294. Article 25(1) of the ICSID Convention reads in relevant part as follows:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

295. In turn, Article VI of the BIT reads in relevant part as follows:

> "1. For the purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by 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.

2. 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 disputed-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.

3. (a) 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 or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL') or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:

   (i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and

   (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.

   If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

   (b) Each Party hereby consents to the submission of an investment dispute for settlement by conciliation or binding arbitration:

   (i) to the Centre, in the event that the Government of the Czech and Slovak Federal Republic becomes a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ('Convention') and the Regulations and Rules of the Centre, and to the Additional Facility of the Centre, and

   […]

   (c) Conciliation or arbitration of disputes under (b)(i) shall be done applying the provisions of the Convention and the Regulations and Rules of the Centre, or of the Additional Facility as the case may be.

   (d) The place of any arbitration conducted under this Article shall be a country which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York in 1958.

> (e) Each Party undertakes to carry out without delay the provisions of any award resulting from an arbitration held in accordance with this Article VI. Further, each Party shall provide for the enforcement in its territory of such arbitral awards.
>
> […]".[485]

3. Law governing the merits

296. Discovery's claims are based on rights and obligations set forth in the BIT. Hence, the BIT is the primary source of law governing the merits of the dispute.

297. The BIT contains no choice of law provision. As a consequence, if an issue finds no answer in the BIT, the Tribunal will have to apply the law of the host State and international law "as may be applicable", or in the terms of Article 42(1) of the ICSID Convention:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

298. In applying the BIT and, if necessary, Slovak law and "such rules of international law as may be applicable", it will be for the Tribunal to determine whether an issue is subject to national or international law.

4. Iura novit curia

299. When applying the law, the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. In accordance with the principle *iura novit curia* a tribunal may form its own opinion about the meaning of the law, provided it does not surprise the Parties with a legal theory that they could not anticipate.[486]

5. Relevance of previous decisions or awards

300. In support of their positions, both Parties have relied on previous decisions or awards, either to conclude that the same approach should be adopted in the present case or in an effort to explain why this Tribunal should depart from an approach reached by another tribunal.

301. The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time,

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485 US-Slovakia BIT, Article VI (C-1).

486 See, for instance, *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment, 25 July 1974, para. 18; *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295; *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award, 23 April 2012 (hereinafter "*Oostergetel v. Slovak Republic*"), para. 141 (RL-75).

however, the Tribunal considers that, unless there are compelling reasons to the contrary, it may take note of, and be guided by, the legal solutions reflected in a series of consistent cases, subject, of course, to the specifics of the BIT and to the circumstances of the actual case. In so doing, the Tribunal is of the view that it will contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

6. Adverse inferences

302. The Claimant contends that the Respondent failed to comply with several of the Tribunal's document production orders in PO3 and requests that the Tribunal infer that the documents which the Respondent failed to produce in breach of PO3 are adverse to its pleaded case.[487] The Claimant observes that Slovakia only produced 40 responsive documents requests granted by the Tribunal,[488] when itself it produced over 2,000 documents voluntarily.[489]

303. The Claimant makes the following requests for adverse inferences:

- Request No. 1: the Respondent having failed to produce "any documents" in relation to the events of 18 June 2016 without satisfactory explanation, the Claimant requests an adverse inference that Dr. Slosarčikova "abused her authority by intervening in a civil dispute and/or instructing the Police to cancel their policing operation";[490]

- Request No. 2: the Respondent having failed to produce documents "evidencing the Police's internal consideration" of the road signage "scheme" leading to its decision on 11 October 2016 without satisfactory explanation, the Claimant requests an inference "that the Police refused to approve the signs at the entrance of the Road because Mr [redacted] and/or Mr [redacted] made a personal decision to thwart AOG's exploration activities at Smilno";[491]

- Request No. 3: the Respondent having failed to produce documents from January to June 2016 about the decision-making process of Minister Matečná or Mr. [redacted] and about "the reason why the Minister took the unusual decision to sign the letter dated 23 June 2016 instead of Mr [redacted]", the Claimant seeks an inference that

487 Reply, para. 9.

488 Reply, para. 9.

489 Reply, para. 9.

490 Reply, para. 97.

491 Reply, para. 109.

these documents "would reveal that: (*i*) the MoA's decision-making process was arbitrary, opaque and lacking in good faith, and (*ii*) the MoA's reasons for refusing to approve the Amendment were pretextual";[492]

- Request No. 4: the Respondent having failed to produce "internal communications within and between State Forestry and the MoA evidencing their internal consideration of AOG's request between 18 July 2016 and 25 October 2016" (see PO3, Annex A, Request No. 7(i)), the Claimant requests the Tribunal to infer "that such documents would be adverse to the interests of Slovakia" and show that the MoA's decision was arbitrary and pretextual;[493]

- Request No. 5: the Respondent having failed to produce documents evidencing the "instruction from the high levels of" the MoE in March 2017 relayed by Mr. [redacted] to AOG's lawyers (see PO3, Annex A, Request 7), the Claimant requests the Tribunal to infer that these documents are "adverse" to Slovakia's case;[494] and

- Request No. 6: the Respondent having failed to produce internal communications of the district offices "relating to their consideration of AOG's applications or the preparation of the EIA Decisions", the Claimant requests that the Tribunal infer that these documents are "adverse to Slovakia's case".[495]

304. In general, the response of the Respondent is that Discovery, being unable to discharge its burden of proof, is attempting to have the Respondent "carry that burden for it", with the result that Discovery's case rests almost exclusively on "baseless" requests for adverse inferences".[496]

305. More specifically, the Respondent provides the following responses:

- Request No. 1: the Respondent states that it informed Discovery "why no documents exist", especially since Dr. Slosarčiková "was not obliged to prepare any report related to her trip to Smilno";[497]

- Request No. 2: the Respondent answers that the police inspectorate

492 Reply, para. 124.

493 Reply, para. 132.

494 Reply, para. 138(4).

495 Reply, para. 183.

496 Rejoinder, paras. 16 and 205-215.

497 Rejoinder, para. 210(a), referring to Letter of 22 June 2023 from Squire Patton Boggs (US) LLP to Signature Litigation (C-416).

contemporaneously told AOG why the road signage scheme was refused, namely because "the field track was not a PSPR";[498]

- Request No. 3: the Respondent comments that the MoA denied the extension of the Lease because AOG had "missed the deadline";[499]

- Request No. 4: in relation to communications about the "new lease agreement", Slovakia responds that "AOG knew contemporaneously that LSR [i.e. State Forestry] did not forward [the new lease agreement] to the MoA and that was why the MoA did not receive it";[500]

- Request No. 5: the Respondent opposes that the request for instructions from "higher ups at the MoE" is "absurd" since it asks to prove a negative, considering that Minister Sólymos testified that "there was no instruction";[501] and

- Request No. 6: the Respondent answers that it explained to Discovery why there were no drafts of the preliminary EIA decisions "and why no communications between the District Offices were located".[502]

306. The Tribunal will address these requests for adverse inferences in the course of its analysis if and where appropriate.

B. PRELIMINARY OBJECTIONS

307. The Claimant initiated this arbitration pursuant to Article VI of the BIT and Article 25 of the ICSID Convention (the relevant parts of which are reproduced at paragraphs 294 and 295 above). The Tribunal must ensure *ex officio* that the Centre has jurisdiction and the Tribunal is competent to exercise that jurisdiction over the dispute. In this context, it is undisputed that the Tribunal is the "judge of its own competence", as established in Article 41 of the ICSID Convention.

308. At the outset, it is common ground that the Slovak Republic is a successor State to the BIT, that the Slovak Republic signed the ICSID Convention on 27 September 1993, and that the Convention entered into force in respect of the Slovak Republic on 26 June 1994.

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498 Rejoinder, para. 210(b).

499 Rejoinder, para. 210(c).

500 Rejoinder, para. 210(d).

501 Rejoinder, para. 210(e).

502 Rejoinder, para. 210(f), referring to Letter of 22 June 2023 from Squire Patton Boggs (US) LLP to Signature Litigation (C-416).

309. With respect to the BIT's jurisdictional requirements, the Respondent rightly does not deny that this dispute concerns an alleged breach of a right conferred or created by the BIT with respect to an investment, as required under Article VI(1)(c) of the BIT; that it has consented in writing to ICSID arbitration in accordance with Article VI(3) of the BIT; that the Claimant consented in writing to ICSID arbitration and that it also validly selected ICSID arbitration for purposes of resolving the dispute. Neither does the Respondent argue that an exception listed in Article VI(3)(a) applies.

310. As regards the requirements under Article 25(1) of the ICSID Convention, the Respondent rightly does not contest that the dispute is a legal dispute arising directly out of an investment between an ICSID Contracting State and a national of another Contracting State. By contrast, Slovakia challenges jurisdiction on the following grounds:

- Discovery is not a qualifying investor (Section 1 below);
- Discovery has no qualifying investment under the BIT because it neither contributed nor engaged in an act of investing (Section 2 below);
- Discovery has no qualifying investment under the ICSID Convention because it made no substantial contribution and took no risks (Section 3 below);
- Discovery's use of corporate forms is such that it made no *bona fide* investment (Section 4 below);
- Discovery's unclean hands in connection with Mr. Crow's faking of an injury and AOG's disregard of the Interim Injunction is a jurisdictional or admissibility bar (Section 5 below; objections added at the Hearing);[503]
- Discovery's failure to comply with procedural preconditions to arbitration contained in Article VI(2) of the BIT renders its claims inadmissible (Section 6 below);
- The claims concern measures required to maintain public order under Article X(1) of the BIT (Section 7 below);
- The national treatment and MFN claims fall under the carve-outs in Annex I(3) of the BIT (Section 8 below).

311. At the Hearing, the Respondent expressly noted that it only raises "three jurisdictional

[503] Tr. (Day 1), 193:23-196:6 (Pekar).

objections",[504] namely that Discovery has no investment under the BIT and the ICSID Convention, and that in any event questions arise whether it made a *bona fide* investment. At the Hearing, the Respondent did not mention these three objections but put forward an unclean hands defense. Therefore, the Tribunal understood that the Respondent no longer pursued the preliminary objections listed in the previous paragraph. Out of abundance of caution, it will nonetheless briefly address those objections.

1. Is Discovery a qualifying investor?

a. Parties' positions

312. The Respondent argues that the Claimant is not an eligible investor under the BIT because it is a mailbox company lacking activities and assets that made no contribution or act of investing.[505] In the Respondent's submission, there is no evidence that Discovery has "any material purpose or activities other than holding the shares in AOG", which shares it acquired for nominal consideration.[506] Accordingly, its "naked shareholding, absent any eligible contribution *by* Discovery, is insufficient".[507] It adds that contributions made by third parties, such as Mr. Lewis or Akard, "do not transform Discovery from a passive asset-holder into an active '*investor*' to which the BIT exceptionally grants international legal rights".[508]

313. The Claimant responds that the Respondent's position is irreconcilable with the ordinary meaning of the term investor in the BIT. It adds that the Respondent's active contribution argument has been rejected by numerous tribunals and that it ignores the facts of the case.[509] The Claimant highlights that the term "investor" does not appear in the BIT and that there is no requirement under Article I(i)(b) of the BIT that a "company" make any contribution or act of investing to qualify as an "investor".[510] It follows, so says the Claimant, that it need not demonstrate that it is an "investor" or made a contribution or act of investing for the Tribunal to have *ratione personae* jurisdiction.[511]

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504 Tr. (Day 1), 196:16-17 (Pekar).

505 Counter-Memorial, paras. 223-234.

506 Counter-Memorial, para. 234.

507 Emphasis in the original. Counter-Memorial, para. 226.

508 Counter-Memorial, para. 234.

509 Reply, paras. 195-211.

510 Reply, para. 197.

511 Reply, para. 199.

b. Discussion

314. The Tribunal must ensure that it has jurisdiction *ratione personae* over the Claimant. As noted by the Claimant, the BIT does not use the word "investor" but the term "company of a Party". Article I(1)(b) defines a "company of a Party" as:

> "any kind of corporation, company, association, state or other enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned".[512]

315. Moreover, Article VI(2) of the BIT contemplates investment disputes "between a Party and a national or company of the other Party" and Article VI(3) allows the concerned "national or company" to consent in writing to submit such investment disputes to ICSID arbitration.[513]

316. The Respondent does not dispute, and rightly so, that Discovery is a "company of a Party" pursuant to Article I(1)(b) of the BIT. The record indeed confirms that Discovery is a privately held company incorporated in the State of Texas, USA.[514] Specifically, the company Blue Sky Aircraft Services, LLC was registered on 4 December 2006 in Texas.[515] That company changed its name to Discovery Polska, LLC on 3 September 2013 and then again to Discovery Global, LLC on 20 July 2016.[516] There is thus no question that Discovery is a "company of a Party".

317. The question of the existence of an active contribution by Discovery is irrelevant to whether the Claimant qualifies as a "company of a Party". In reality, it goes to the existence of a protected investment, which the Tribunal will address in the following section.

318. In sum, the Tribunal concludes that it has jurisdiction *ratione personae* over the Claimant.

2. Did Discovery make a qualifying investment under the BIT?

a. Parties' positions

319. The Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* on the ground that the Claimant has no eligible investment under Article I(1)(a) of the BIT because it

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512 BIT, Article I(1)(b) (C-1).

513 BIT, Articles VI(2) and (3) (C-1).

514 Discovery Global LLC Certificate of Incorporation, 4 December 2006 (C-28).

515 Discovery Global LLC Certificate of Incorporation, 4 December 2006, p. 6 of the pdf document (C-28).

516 Discovery Global LLC Certificate of Incorporation, 4 December 2006, pp. 1-5 of the pdf document (C-28).

made no contribution or active investment.[517] It argues that any funds disbursed originated either from "Mr. Lewis, other companies he owned or controlled, and Akard".[518] Specifically, out of the USD 3.7 million alleged sunk costs, USD 2 million were borrowed from Mr. Lewis and the remainder provided by Discovery GeoServices Corporation, Alpha Exploration LLC, or Akard.[519] None of those contributions were made *by* Discovery.[520]

320. In addition, the Respondent invokes *Standard Chartered Bank v. Tanzania* to argue that Discovery did not actively contribute to an investment and that passive shareholding is insufficient.[521] In reliance on *Rand v. Serbia,* it also submits that, since there is no economic link between those contributions and Discovery, the Claimant did not demonstrate that it bore the financial burden of those contributions.[522]

321. The Respondent further argues that any dispute arising out of Discovery's alleged interest in the Exploration Licenses before 2020 falls outside the Tribunal's jurisdiction *ratione temporis,* because AOG held only a 50% interest in those licenses until JKX and Romgaz withdrew in 2018 and 2020 respectively.[523] It follows, says the Respondent, that Discovery did not own or control an eligible investment "until, at the earliest, 2020".[524]

322. The Claimant responds that its shares in AOG and its economic interest in the Exploration Licenses qualify as protected investments under the BIT.[525] It explains that Discovery paid for its interest in AOG and expended "significant sums in exploration activities".[526] The argument that Discovery's acquisition of AOG was for "nominal consideration" ignores that Discovery funded AOG's activities from 2014 onwards.[527] In addition, Discovery's

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517 Counter-Memorial, para. 233; Rejoinder, paras. 218 and 224-233.

518 Rejoinder, para. 218.

519 Rejoinder, paras. 220-222; Tr. (Day 1), 198:11-17 (Pekar); Respondent's Opening Presentation, Slides 164-167 (RP-1), referring to *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023 (hereinafter "*Rand v. Serbia*"), para. 237 (CL-99).

520 Tr. (Day 1), 198:11-17 (Pekar); Respondent's Opening Presentation, Slides 164-167 (RP-1), referring to *Rand v. Serbia*, para. 237 (CL-99).

521 Counter-Memorial paras. 232-234; Rejoinder, paras. 219 and 224-233, referring to *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (hereinafter "*Standard Chartered Bank v. Tanzania*"), paras. 227-228 and 257 (RL-42).

522 Tr. (Day 1), 198:11-17 (Pekar); Respondent's Opening Presentation, Slides 164-167 (RP-1), referring to *Rand v. Serbia*, para. 237 (CL-99).

523 Counter-Memorial, paras. 235-238.

524 Counter-Memorial, para. 238.

525 Memorial, para. 201(2)-(4); Reply, paras. 195-233.

526 Memorial, para. 201(5).

527 Reply, paras. 210-211.

"officers/agents also made a significant and active contribution of time and money into AOG's exploration activities throughout the project".[528] Although the Respondent's "active contribution" test is unsupported by "consistent jurisprudence" and *Standard Chartered Bank v. Tanzania* is an "outlier", the Claimant in any event satisfies such test.[529]

323. According to the Claimant, Slovakia "concedes that Discovery's ownership of AOG qualifies as an '*investment*' under the BIT".[530] Moreover, the Exploration Licenses qualify as protected investments under Article I(1)(a)(v) of the BIT.[531] Since AOG was the operator under the JOAs with "exclusive charge and conduct of all Joint Operations", Discovery "controlled directly or indirectly" the Exploration Licenses at all relevant times.[532]

b. Discussion

324. Article I(1)(a) of the BIT defines an "investment" as an investment in the territory of the contracting State owned or controlled directly or indirectly by nationals or companies of the other:

> "(a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes
>
> (i) tangible and intangible property, including rights such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual property which includes, inter alia, rights relating to:
>
> Literary and artistic works, including sound recordings,
>
> inventions in all fields of human endeavor,
>
> industrial designs,
>
> semiconductor mask works,
>
> trade secrets and confidential business information, and

528 Reply, para. 206(2).

529 Reply, para. 204.

530 Reply, para. 212.

531 Reply, paras. 212-214.

532 Reply, paras. 215-216.

trademarks, service marks, and trade names;

and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law, including concessions to search for, cultivate, extract, or exploit natural resources".[533]

325. The Claimant asserts that its investments in the Slovak Republic comprised (i) its shares in AOG and (ii) its economic interest in AOG's assets, in particular, the Exploration Licenses.[534] It notes that it "paid for its interest in AOG and its assets" and later invested sums in exploration activities.[535]

326. The Respondent rightly agrees that Discovery owned AOG since 2014.[536] In March 2014, Discovery acquired 100% of AOG's shares for EUR 153,054.[537] Even though the Respondent argues that EUR 153,054 is a "paltry" sum, this does not detract from the fact that Discovery paid to acquire AOG's equity and that the ownership of shares qualifies as an investment under Article I(1)(a)(ii) of the BIT. This finding alone suffices to dismiss the Respondent's objection that the Claimant had no qualifying investment.

327. As for the Exploration Licenses, the Respondent contends that Discovery did not own or control them, at least not until 2020.[538] The record, on the other hand, shows that AOG owned a 50% interest in the licenses and JKX and Romgaz each held 25%.[539] In 2018, JKX relinquished its 25% share and Romgaz did the same two years later.[540] In other words, between 2014 and 2018, i.e. the time period of the challenged measures, Discovery indirectly owned AOG's 50% interest in the licenses. Since AOG was the operator under

533 US-Slovakia BIT, Article I(1)(a) (C-1).

534 Memorial, para. 201(4).

535 Memorial, para. 201(5).

536 Counter-Memorial, para. 237.

537 Participation Interest Purchase and Sale Agreement, Article 1.2.1 (C-56).

538 Counter-Memorial, paras. 236-238.

539 [redacted]

540 Email of 16 March 2018 from JKX re. withdrawal (C-187); Letter of 16 March 2018 from JKX re. withdrawal – Medzilaborce (C-188); Letter of 16 March 2018 from JKX re. withdrawal – Snina (C-189); Email of 16 March 2018 from JKX re. withdrawal – Svidník (C-190); JKX notice of withdrawal from Medzilaborce, 20 April 2018 (C-195); JKX notice of withdrawal from Snina, 20 April 2018 (C-196); Romgaz formal notice of relinquishment re. Svidník, 6 April 2018 (C-191); Romgaz notice of withdrawal from Medzilaborce, 25 April 2018 (C-197); Romgaz notification of withdrawal from Snina Licence, 25 April 2018 (C-198); Romgaz Notice of Withdrawal, 7 April 2020 (C-234).

the JOA[541] and was thus in charge of all operations to develop the license areas,[542] the Tribunal additionally considers that AOG's interest amounted to a controlling interest. It follows that Discovery's indirect interest in the licenses qualifies as a protected investment under Article I(1)(a)(v) of the BIT.

328. Another argument put forward by Slovakia is that Discovery was a passive shareholder. Neither Article I(1)(a) nor Article VI of the BIT require that an investment be "active". For the purposes of Article I(1)(a), there must be an "investment", without a qualifying adjective, which materializes in an asset situated in a Contracting State.

329. The record establishes that Discovery acquired AOG for EUR 153,054.50 and later financed part of AOG's exploration activities. The purchase and sale agreement was entered into by Discovery (at that time still called Discovery Polska, LLC). Although there is no documentary evidence showing the transfer of EUR 153,054.50, the Respondent does not dispute that Discovery made the payment. In fact, it accepted that this amount was "spent by Discovery to acquire the AOG shares".[543]

330. Similarly, according to the reports provided to the MoE, the JV Partners spent a total of EUR 4,095,719 on exploration between 2014 and 2020.[544] Out of that amount, Discovery

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541 Opcom Minutes, 11 September 2014, p. 5, item 2 (C-61) ("2. Amendment of the JOA to identify Alpine as the Operator: All parties agreed").

542 Article 4.2(A) of the Joint Operating Agreements reads as follows: "Subject to the terms and conditions of this Agreement, Operator shall have all of the rights, functions and duties of the Parties under the Licence and shall have exclusive charge of and shall conduct all Joint Operations". For Medzilaborce, see Joint Operating Agreement between Magura Oil & Gas s.r.o. and JKX Slovakia B.V. relating to the area known as Medzilaborce in the Slovak Republic, 28 November 2008 (C-237); Novation and Amendment of Joint Operating Agreement for area known as Medzilaborce in the Slovak Republic, 1 May 2009 (C-241). For Svidník, see Joint Operating Agreement between Radusa Oil & Gas s.r.o. and JKX Ondava B.V. relating to the are known as Svidník in the Slovak Republic, 28 November 2008 (C-238); Novation and Amendment of Joint Operating Agreement for area known as Svidník in the Slovak Republic, 1 May 2009 (C-242). For Snina, see Joint Operating Agreement between Dulka Oil & Gas s.r.o. and JKX Carpathian B.V. relating to the area known as Snina in the Slovak Republic, 28 November 2008 (C-239); Novation and Amendment of Joint Operating Agreement for area known as Snina in the Slovak Republic, 1 May 2009 (C-243). For Pakostov, see Joint Operating Agreement between Alpine Oil & Gas s.r.o. and JKX Slovakia B.V. relating to the area known as Pakostov in the Slovak Republic, 16 September 2015 (C-240).

543 Counter-Memorial, para. 231.

544 According to the reports provided to the MoE, AOG spent a total of EUR 867,102.09 in 2014 (EUR 859,391 according to Mr. Fraser, of which Discovery bore EUR 429,695), EUR 1,454,199 in 2015 (EUR 1,453,198 according to Mr. Fraser, of which Discovery bore EUR 736,199), EUR 1,513,233 in 2016 (of which Discovery bore EUR 769,478), EUR 713,338 in 2017 (of which Discovery bore EUR 366,269), EUR 410,735 in 2018 (EUR 410,699 according to Mr. Fraser, of which Discovery bore EUR 234,883), EUR 274,780 in 2019 (of which Discovery bore EUR 183,196), and EUR 179,725 in 2020 (EUR 178,959 according to Mr. Fraser, of which Discovery bore EUR 158,455). See AOG Report to MOE – Medzilaborce, 2014 (C-252); AOG Report to MOE – Snina, 2014 (C-253); AOG Report to MOE – Svidník, 2014 (C-254); AOG Report to MOE – Medzilaborce, 2015 (C-261); AOG Report to MOE – Pakostov, 2015 (C-262); AOG Report to MOE – Snina, 2015 (C-263); AOG Report to MOE – Svidník, 2015 (C-264); AOG Report to MOE – Medzilaborce, 2016

incurred EUR 2,878,176 million for "AOG's share of the exploration expenditures incurred on the project between 2014 and 2020",[545] including license fees as well as exploration costs.[546]

331. The Respondent's objection that, although the "payments were formally made by Discovery/AOG", the funds "came from Mr. Lewis, his other companies, and Akard" does not appear well-founded.[547] As noted in *Rand v. Serbia*, numerous investment tribunals have held that the origin of capital is irrelevant as long as there is an "economic link between the funds and the investor" sufficient to show that the investor "is the one ultimately bearing the financial burden of the contribution".[548]

332. In a letter sent to Akard on 2 January 2017, Mr. Lewis stated that he had "loaned about $2.0 Million" to Discovery from January 2013 through September 2015 for exploration activities in Slovakia.[549] At the Hearing, Mr. Lewis confirmed that the money was provided to Discovery, not AOG. [550] The present situation is different from the one in *Rand v. Serbia*, where some claimants had made no contribution at all.[551]

(C-292); AOG Report to MOE – Pakostov, 2016 (C-293); AOG Report to MOE – Snina, 2016 (C-294); AOG Report to MOE – Svidník, 2016 (C-295); AOG Report to MOE – Medzilaborce, 2017 (C-354); AOG Report to MOE – Pakostov, 2017 (C-355); AOG Report to MOE – Snina, 2017 (C-356); AOG Report to MOE – Svidník, 2017 (C-357); AOG Report to MOE – Svidník, 2018 (C-386); AOG Report to MOE – Svidník, 2019 (C-392) and AOG Report to MOE – Svidník, 2020 (C-395). See also Fraser WS2, para. 52 and Annex 1; Reply, para. 468(3), referring to Spreadsheet of License Expenditure, 2014-2020 (CH-19).

545 Reply, para. 468(3), referring to Spreadsheet of License Expenditure, 2014-2020 (CH-19); Fraser WS2, para. 52 and Annex 1.

546 For instance, the JV Partners paid license fees of EUR 436,800 in 2014, EUR 449,680 in 2015, EUR 198,380 in 2016, EUR 198,380 in 2017, and EUR 24,500 in 2018, 2019 and 2020. See AOG Slovakia licences – licence expenditure 2006-2017 (CH-19). Spreadsheet of License Expenditure, 2014-2020 (CH-19).

547 Counter-Memorial, para. 231; Rejoinder, paras. 241 and 245.

548 *Rand v. Serbia*, paras. 234-237 (CL-99).

549 Akard Notice of Default, 2 January 2017, p. 1 of the pdf document (R-142).

550 Tr. (Day 2), 167:7-14 and 170:10-25 (Lewis) ("Q. […] You put in, I should say you loaned about 2 million from January 2013 through to September 2015 into the project; correct? A. I don't know if it's a loan or investment. I didn't characterize it really any way on purpose. It was money the company needed. It's my company. I funded it. But yes, I haven't looked at those numbers. 2 million sounds about right, though"); and ("Q. I'm talking about the 2 million that you said you loaned. A. Alright, but it doesn't say – what I would have done, any transaction that I would have made would have been to Discovery first, and then Discovery would have disseminated that to Alpine as needed. As long as we're saying that, please rephrase, or please ask me again. Q. Well, is there any evidence in the record that you advanced funds to Discovery as opposed to AOG, that you're aware of? A. I don't think I ever advanced funds to Alpine. Q. My question, though, was a little different. A. Okay. Q. Is there any evidence in the record of the entity to whom you advanced funds? A. I don't believe there is").

551 *Rand v. Serbia*, para. 264 (CL-99).

333. Be that as it may, even if the Tribunal were to question who ultimately bore the financial burden of the contribution, it is not disputed that Discovery, not Mr. Lewis, entered into an agreement with Akard in October 2015, under which Akard agreed to lend USD 3,708,844 million to fund the drilling of three wells in the exploration areas (i.e., the Smilno-1, Krivá Oľka-1 and Poruba-1 wells).[552] It is further undisputed that Discovery drew USD 1.95 million under that agreement, which it invested in AOG's operations. The Respondent does not dispute that Discovery has an "ongoing liability to repay Akard" for the loan.[553] Hence, there is no doubt that Discovery bore the financial burden associated with the contribution.

334. For these reasons, the Tribunal dismisses the Respondent's objection that Discovery made no investment in the sense of Article I(1)(a) the BIT.

3. Did Discovery make a qualifying investment under the ICSID Convention?

a. Parties' positions

335. The Respondent further submits that Discovery did not have a qualifying investment under Article 25(1) of the ICSID Convention, since it did not make a "significant" or "substantial" contribution. It argues that Discovery's claimed sunk costs "amount to a paltry USD 3.7 million".[554] Relying on *Rand v. Serbia*, the Respondent argues that Discovery failed to make a "contribution of its own" and "therefore cannot use Mr. Lewis' and Akard's contributions to access arbitration".[555] The Respondent adds that, as a "shell company" with no assets, Discovery "took no risks".[556] In other words, "Discovery does not meet the *Salini* criteria".[557]

336. The Claimant contests that the Tribunal has jurisdiction under the ICSID Convention because the BIT's definition of investment "automatically" fulfils the ICSID text and, in any event, Discovery's investment meets the *Salini* criteria of contribution, duration and risk.[558] It explains that 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".[559] It did so over "an extended period of time" in the "expectation of

552 Agreement between Discovery and Akard, 23 October 2015 (C-282).

553 Reply, para. 244(5).

554 Rejoinder, para. 239.

555 Rejoinder, paras. 243-244, referring to *Rand v. Serbia*, para. 276 (CL-99).

556 Rejoinder, para. 246.

557 Counter-Memorial, para. 252.

558 Memorial, paras. 206-208; Reply, paras. 234-244.

559 Memorial, para. 208(2)(a).

a commercial return and at its own risk".[560] Akard's loan is "immaterial for jurisdictional purposes", since Discovery "bore the financial burden" for the project from March 2014 onwards.[561]

b. Discussion

337. Article 25(1) of the ICSID Convention subjects jurisdiction to the existence of a "legal dispute arising directly out of an investment", without defining the term "investment". The Respondent is of the view that this definition is an objective one, whereas the Claimant adopts the definition adopted in the BIT.

338. The meaning of the term "investment" in the ICSID Convention must be ascertained in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (the "VCLT"), namely on the basis of the term's ordinary meaning, in its context, and in the light of the ICSID Convention's object and purpose. In other words, and as many tribunals have held, it is an objective, as opposed to subjective, meaning not dependent on the intent of the parties to the instrument providing consent, here the BIT.[562]

339. Although ICSID tribunals have adopted different approaches, the evolution of ICSID jurisprudence shows that the definition of "investment" comprises three elements: (i) a commitment or allocation of resources, (ii) duration, and (iii) risk, which includes the expectation of a return or profit (albeit not necessarily fulfilled).[563] Here, the Respondent only questions the elements of contribution and risk.

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560 Memorial, para. 208(2)(b)-(c).

561 Reply, paras. 243-244.

562 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (hereinafter "*Quiborax v. Bolivia*"), para. 212; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (hereinafter "*KT Asia Investment v. Kazakhstan*"), para. 165.

563 *Rand v. Serbia*, para. 228 (CL-99); *Quiborax v. Bolivia*, para. 227; *KT Asia Investment v. Kazakhstan*, para. 173; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 91 (RL-46). See also *Consorzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para. II.13(iv); *L.E.S.I. S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 72(iv); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 para. 110; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 295; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para. 84; *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 6 April 2016, para. 187; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 189; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, para. 237; *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021, para. 159.

340. The requirement of contribution was addressed in the previous section, to which the Tribunal refers. It stresses that, to the extent the ICSID Convention imposes a "substantial" or "significant" contribution, the amounts discussed there meet this characteristic. The Tribunal further adds to its foregoing analysis, as noted in *Rand v. Serbia*, that what matters is not the form of the contribution but its substance, or reality:

> "In the context of the assessment of the existence of a contribution as a prerequisite for an investment, investment tribunals have long held that contributions to the host State can take several forms, that the origin of capital is irrelevant, and that the reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued".[564]

341. It cannot seriously be denied that the Claimant assumed a level of risk as there was no certainty that AOG's exploration activities would identify commercially viable reserves.[565] In addition, Discovery assumed the financial risk associated with the Akard Agreement.[566]

342. For these reasons, the Tribunal concludes that the Claimant made an investment in the sense of Article 25(1) of the ICSID Convention.

4. Did Discovery make a good faith investment?

a. Parties' positions

343. The Respondent raises an additional objection to jurisdiction or admissibility on the ground that the Claimant's "use of corporate forms" breaches good faith and constitutes an abuse of process.[567] It contends that US tax documents reveal that Mr. Lewis used Discovery as a pass-through entity to deduct the latter's losses against his personal tax liability,[568] stressing that Mr. Lewis admitted using Discovery "as a pass-through to benefit from his tax liabilities in the US".[569] For Slovakia, Discovery cannot be a pass-through entity, on the one hand, and, on the other hand, an independent operator having its own assets and activities.[570]

344. The Claimant replies that good faith is not an element of the definition of an investment

564 *Rand v. Serbia*, para. 234 (CL-99).

565 *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, paras. 242-243 (CL-79).

566 Reply, para. 244(5).

567 Counter-Memorial, paras. 221 and 254-257; Rejoinder, para. 247.

568 Counter-Memorial, para. 256.

569 Rejoinder, para. 247.

570 Counter-Memorial, para. 257.

under the BIT or the ICSID Convention and that no corporate restructuring took place to access arbitration.[571] In any event, the Respondent is conflating Mr. Lewis' position with that of Discovery and ignores Discovery's separate legal personality. Under US law, a limited liability company with a sole shareholder like Discovery, automatically becomes a pass-through entity for tax purposes, meaning that its income and expenses are reported on the shareholder's personal tax filing.[572] For the Claimant, this "quirk of US tax law" has no bearing on the Tribunal's jurisdiction and cannot amount to an abuse of process or a breach of good faith.[573]

b. Discussion

345. There is no indication in the record showing that Discovery's investment in the Slovak Republic was not made in good faith or that Discovery in some way abusively sought access to ICSID arbitration. Actually, the Respondent accepts that the "use of pass-through entities to reduce an individual's income tax burden is not itself illegal or contrary to good faith" as a matter of US tax law,[574] and has not challenged the Claimant's explanation that US tax law regards a single-shareholder company as a pass-through entity. Since there is no allegation, let alone any evidence before the Tribunal, that Mr. Lewis improperly reported Discovery's income and expenses in his personal tax filings, the Tribunal fails to see any basis for an abuse or lack of good faith argument. More importantly, the US tax practice does not change the fact that Discovery has separate legal personality and owns assets and incurs liabilities.

346. For these reasons, the Tribunal rejects the Respondent's objection that the Claimant did not make a good faith investment.

5. Does Discovery have clean hands?

a. Parties' positions

347. Additionally, the Respondent insisted at the Hearing that the Tribunal may apply the unclean hands doctrine *ex officio* to act as a bar to jurisdiction or admissibility.[575] As examples of what it considers to be the Claimant's unclean hands, it pointed in particular to Mr. Crow allegedly faking an injury to file a criminal complaint against a Slovak citizen, to AOG's disregard of the injunction prohibiting it to use the Access Road, and to AOG's

571 Reply, paras. 245-247.

572 Reply, para. 248.

573 Reply, para. 248(4).

574 Counter-Memorial, para. 257.

575 Tr. (Day 1), 193:23-196:6 (Pekar).

persistence despite the traffic inspectorate's refusal to qualify that road as a PSPR.

348. The Claimant did not address this argument during the Hearing.

b. Discussion

349. The Respondent raised its unclean hands objection both as a matter of jurisdiction and of admissibility for the first time at the Hearing.[576] It acknowledged that its objection was out of time, but argued that the Tribunal can apply it *ex officio*. While this is correct under ICSID Arbitration Rule 41(2) in respect of jurisdiction, it does not apply to issues of admissibility. The Tribunal will therefore limit its analysis of the Respondent's argument to the question of jurisdiction.

350. Neither the BIT nor the ICSID Convention contain a legality clause requiring that investments be made in accordance with the law of the host State. Although investment tribunals have recognized that, absent a legality clause, the unclean hands doctrine may operate as a jurisdictional bar, this is only so in "particularly serious cases" where an investment was made through "illegal, fraudulent, or corrupt means".[577] It is therefore necessary to review the seriousness of the alleged illegality.

351. Here, as mentioned, the Respondent contends that the Claimant's lack of clean hands is illustrated by: (i) Mr. Crow allegedly faking an injury to file a criminal complaint against a Slovak citizen, (ii) AOG's disregard of the injunction prohibiting it to use the Access Road and (iii) its persistence despite the traffic inspectorate's refusal to qualify that road as a PSPR. First, none of these events relate to Discovery's decision to invest in the Slovak Republic; they allegedly occurred during the life of the investment, after it was made. Second, even if true, none of these instances may be said to be sufficiently serious to justify declining jurisdiction over the claims. While they may play a role in the assessment of the facts surrounding the Smilno claims, and will be examined in that context, they are far from rising to the level of conduct leading to a denial of jurisdiction.

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576 Tr. (Day 1), 195:19-22 (Pekar) ("Yes, Mr Drymer, I'm very well aware of the fact that we are past the deadline for raising such an objection. So that's why we are left with the Tribunal's jurisdiction").

577 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 (hereinafter "*Churchill Mining v. Indonesia*"), para. 493; *Glencore Finance (Bermuda) Ltd v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, 8 September 2023, para. 175.

6. Did Discovery satisfy the procedural preconditions to arbitration?

a. Parties' positions

352. At some point in the arbitration, the Respondent contended that the claims were inadmissible because the Claimant failed to observe the procedural conditions in Article VI(2) of the BIT to consult and negotiate before initiating this arbitration.[578] Specifically, it argued that the Notice of Dispute did not contain "any material legal or factual substantiation" and that the Claimant did not provide the clarifications requested by the Respondent.[579] Later the Respondent abandoned this defense, which is addressed here out of an abundance of caution.

353. The Claimant answers that that it complied with Article VI(2) and (3)(a) of the BIT by seeking to resolve the dispute through negotiations and waiting 6 months before submitting the dispute to arbitration.[580] It argues that the Notice of Dispute sufficiently informed the Respondent of the treaty breaches subject of this dispute and that the Respondent failed to engage in negotiations.[581]

b. Discussion

354. Article VI(2) of the BIT, which is reproduced in paragraph 295 above, states that "the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation". Article VI(3)(a) of the BIT in turn requires the Claimant to wait six months between the date the dispute arose and the initiation of the arbitration. It is undisputed that the Claimant complied with the six-month cooling off period. The only question is whether the Claimant sought to negotiate.

355. At the outset, the Tribunal notes that the Respondent only mentioned its objection in the Counter-Memorial and that it did not respond in subsequent submissions to the Claimant's arguments that it complied with Article VI(2) of the BIT. In fact, as noted above, the Respondent stated at the Hearing that it raised only three preliminary objections, none of which concern Article VI(2). The Tribunal therefore understands that the Respondent does not challenge the force of the arguments provided by the Claimant in its Reply and that it effectively waived this objection. In any event, the Tribunal agrees with the Claimant that it complied with Article VI(2) of the BIT. The Notice of Dispute is 22 pages long and

578 Counter-Memorial, paras. 258-262.

579 Counter-Memorial, para. 259, referring to Email of 9 February 2021 from the Slovak Republic to Discovery (R-93).

580 Memorial, paras. 202-205.

581 Reply, para. 251.

describes in sufficient detail the facts and legal arguments underpinning its case in order to commence settlement discussions. Therein, the Claimant requested Slovakia to engage in negotiations to amicably settle the dispute, further adding that it reserved its right to resort to arbitration if the Parties failed to settle their dispute within six months.[582] The Parties thereafter exchanged numerous communications between February and April 2021 but failed to amicably resolve their dispute.[583]

356. As noted in *Murphy v. Ecuador*, "the obligation to negotiate is an obligation of means, not of results", such that "there is no obligation to reach, but rather to try to reach, an agreement".[584] Here, it cannot be denied, on the basis of the evidence before the Tribunal, that the Claimant sought to enter into negotiations with the Respondent during the six-month cooling-off period and that the Parties failed to reach an agreement. Accordingly, the Claimant complied with the requirements in Article VI(2) of the BIT and the Tribunal therefore rejects the Respondent's objection to the contrary.

7. Do the claims relate to measures taken to maintain public order under Article X(1) of the BIT?

a. Parties' positions

357. The Respondent invokes Article X(1) of the BIT to argue that Discovery cannot invoke the BIT's substantive obligations, since the claims arise out of measures taken to maintain public order and to protect Slovakia's essential security interests. Specifically, the Respondent contends that the disputed measures were intended to prevent "civil unrest" and to protect the "environment and drinking water".[585]

358. The Claimant answers that Slovakia's reliance on Article X(1) of the BIT is "misconceived", since this provision does "not give rise to a jurisdictional objection", but

582 Notice of Dispute, 2 October 2020, paras. 77-79 (C-26).

583 Letter of 17 February 2021 from Signature Litigation LLP to Slovakia (C-400); Email of 18 February 2021 from Slovakia to Signature Litigation LLP (C-401); Email of 24 February 2021 from Slovakia to Signature Litigation LLP (C-402); Letter of 8 March 2021 from Signature Litigation LLP to Slovakia (C-403); Email of 9 March 2021 from Slovakia to Signature Litigation LLP (C-404); Email of 12 March 2021 from Slovakia to Signature Litigation LLP (C-405); Email of 16 March 2021 from Slovakia to Signature Litigation LLP (C-406); Letter of 16 March 2021 from Signature Litigation LLP to Slovakia (C-407); Email of 23 March 2021 from Slovakia to Signature Litigation LLP (C-408); Email of 24 March 2021 from Slovakia to Signature Litigation LLP (C-409); Letter of 24 March 2021 from Signature Litigation LLP to Slovakia (C-410); Letter of 2 April 2021 from Slovakia to Signature Litigation LLP (C-411); Email of 21 April 2021 from Slovakia to Signature Litigation LLP (C-412); Letter of 21 April 2021 from Signature Litigation LLP to Slovakia (C-413).

584 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 135 (RL-49).

585 Counter-Memorial, paras. 239-245.

functions as a defense on liability.[586]

359. In any event, Slovakia failed to produce contemporaneous evidence showing that the disputed measures were necessary. The protests at Smilno did not amount to "mass public unrest" and concerned only a "handful of activists".[587] In fact, the behavior of the police and the State prosecutor only exacerbated the activists' "illegal behavior".[588] As regards Krivá Oľka, the MoA's refusal to approve the Lease Amendment was not necessary to maintain public order or protect an essential security interest.[589]

b. Discussion

360. Article X(1) of the BIT provides:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests".[590]

361. In its Counter-Memorial, the Respondent raised the objection in relation to Article X(1) of the BIT as part of its overall objection that the Claimant failed to make a protected investment. The Claimant answered that Article X(1) had no bearing on the issue of jurisdiction and that it would only operate as a defense to liability "because the substantive obligations owed by Slovakia to Discovery under the BIT will not apply".[591] Notably, the Respondent did not respond in its Rejoinder or at the Hearing to the Claimant's argument and it did not further elaborate on this objection. The Tribunal therefore understands that the Respondent does not object to the Claimant's argument and that it no longer maintains its objection.

362. In any event, the Tribunal agrees with the Claimant that Article X(1) has no bearing on the question of whether the Claimant made a protected investment under the BIT and that it therefore does not go to jurisdiction but to liability. Article X(1) of the BIT does not provide any further element to the question of whether the Claimant made a protected investment and would only allow the Respondent to avoid liability if the conditions mentioned in that provision are met. In other words, if it can be shown that any measure adopted by the Slovak Republic was necessary to maintain public order or to protect an essential security

586 Reply, paras. 218-219.

587 Reply, para. 226(3).

588 Reply, para. 226(3).

589 Reply, para. 226(4).

590 US-Slovakia BIT, Article X(1) (C-1).

591 Reply, para. 219.

interest, the consequence would be that the Respondent could avoid liability for such measure since the substantive protections in the BIT would not apply.

363. For these reasons, the Tribunal rejects the Respondent's preliminary objection based on Article X(1) of the BIT.

8. Are the discrimination claims outside the Tribunal's jurisdiction or otherwise inadmissible under the carve-out in the Annex of the BIT?

a. Parties' positions

364. The Respondent finally invokes the carve-outs in the Annex of the BIT, as amended by Article IV of the Additional Protocol, in relation to "ownership of real property" and "hydrocarbons" to argue that Discovery's claims of discriminatory treatment are "inadmissible or otherwise outside this Tribunal's jurisdiction".[592]

365. The Claimant responds that Slovakia cannot rely on the exceptions listed in the Annex of the BIT in relation to "ownership of real property" and "hydrocarbons", since it failed to notify the US, either before or after the BIT's entry into force, of a derogation to the obligation of national treatment under Article II(1) of the BIT.[593] Moreover, Slovakia failed to show that the disputed measures were necessary to comply with EU law, as required under the Additional Protocol amending the Annex. In fact, both Slovakia's and the EU's policy has always been to diversify energy supplies and improve energy security.[594]

b. Discussion

366. Here again, the Tribunal notes that the Respondent did not pursue or elaborate on this objection after receiving the Reply. It therefore understands that the Respondent does not maintain its objection.

367. In any event, the Claimant rightly points out that Article II(1) of the BIT required the Slovak Republic to notify the United States of America of any exceptions relating to the hydrocarbons sector.[595] The Respondent did not challenge the Claimant's affirmation that

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592 Counter-Memorial, paras. 246-248.

593 Reply, paras. 228-229.

594 Reply, para. 233.

595 Article II(1) of the BIT reads as follows: "Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions

the Slovak Republic never notified any such exceptions. Accordingly, the Respondent did not sufficiently establish that any exceptions in relation to the hydrocarbons sector apply in the present case.

368. It follows that the Tribunal cannot but dismiss the Respondent's preliminary objection based on the Annex of the BIT.

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369. Having rejected all of the Respondent's preliminary objections, the Tribunal now turns to assess the merits of the claims.

C. LIABILITY

1. Introductory remarks

370. The Claimant challenges 14 measures that, it says, allegedly prevented AOG from conducting its drilling operations in the Slovak Republic, and in particular at the Smilno and Krivá Oľka sites.

371. The dispute about Smilno mainly concerns AOG's difficulties in gaining access to the drill site Smilno-1. It involves the following measures:

- Local police refused to acknowledge that the Access Road was publicly accessible and to remove activists or their vehicles that were blocking that road (Measure # 1);
- The police refused to approve a road signage scheme acknowledging that the Access Road was a public road or a PSPR (Measure # 6);
- The judiciary improperly granted and upheld an interim injunction preventing AOG from using the Access Road (Measures ## 2-3);
- The district prosecutor, Dr. Slosarčíková improperly intervened at the Smilno site and instructed the police to stop its operations (Measures ## 4-5);
- The Ministry of Interior improperly instructed the police that the Access Road was

to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, except as stated otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country". US-Slovakia BIT, Article II(1) (C-1).

a private road (Measure # 7); and

- The Bardejov District Office ordered that AOG perform a full EIA for its planned exploratory well (Measure # 11).

372. As regards Krivá Oľka, the Claimant complains about the following measures:

- The MoA refused to approve the Lease Amendment (Measure # 8);
- The MoE first refused to grant a compulsory access order pursuant to Article 29 of the Geology Act (Measure # 9);
- After that decision had been quashed, the MoE improperly suspended the Article 29 proceedings (Measure # 10); and
- The Medzilaborce district office required AOG to carry out a full EIA for its well at Krivá Oľka (Measure # 12).

373. In respect of Ruská Poruba, the Claimant complains that the Humenné district office required AOG to carry out a full EIA for its proposed well (Measure # 13).

374. Finally, the Claimant complains that the MoE imposed the performance of a preliminary EIA for all future wells (Measure # 14).

375. At the Hearing, the Claimant provided a helpful table that summarized the 14 disputed measures:[596]

[596] Claimant's Demonstrative Exhibit 2 (CD-2). See also Claimant's Opening Presentation, Slides 52, 144.

	Police	Judiciary	Prosecutor	MoI	MoA	MoE	District Offices
Smilno	**MEASURE #1:** Refused to acknowledge that the Road was a public road and refused to remove activists' vehicles	**MEASURE #2:** Granted the Interim Injunction which prevented AOG from using the Road	**MEASURE #4:** Intervened in AOG's civil dispute with Ms Varjanová concerning the Interim Injunction	**MEASURE #7:** Instructed the Police that the Road was private land, not a public road			
	MEASURE #6: Refused to approve signage acknowledging that the Road was a public road	**MEASURE #3:** Refused to overturn the Interim Injunction following AOG's appeal	**MEASURE #5:** Instructed the Police to cancel their policing operation at Smilno				
Krivá Oľka					**MEASURE #8:** Refused to approve the Amendment to the Lease under Article 50(7) of the Forests Act	**MEASURE #9:** Refused to grant a Compulsory Access Order under Article 29 of the Geology Act	
						MEASURE #10: Suspended the Article 29 proceedings pending resolution of the "preliminary issue"	
EIA						**MEASURE #14:** Imposed the EIA Condition	**MEASURES #11-13** Issued the EIA Decisions

376. The Claimant submits that the Respondent's conduct in connection with the impugned measures violated the FET standard in Article II(2)(a) of the BIT (Section 3 below), was arbitrary and discriminatory in breach of Article II(1) and II(2)(b) of the BIT (Section 4 below), failed to provide effective means in violation of Article II(6) of the BIT (Section 5 below), and was expropriatory in breach of Article III(1) of the BIT (Section 6 below). The Tribunal will address these claims in turn after having dealt with attribution (Section 2 below).

377. Before going into detailed analysis and discussion of these matters, it may be useful to stress why in essence, and on the basis of a birds-eye view of the evidence before it, the Tribunal entertains significant doubts overall about the basis of the claims, as they are presented.

378. At Smilno, the dispute boils down to AOG's failure to secure the right to use the field track leading to its drill site, the so-called Access Road. The Claimant's case hinges on its argument that, under Slovak law, the Access Road was a type of road that AOG was entitled to use. The evidence before the Tribunal, however, suggests that the Access Road was a private track and not a public road, and one which AOG could not use without the consent of the owners or a ministerial order from the MoE. However, rather than obtaining such consent, the evidence indicates that AOG resorted to self-help, circumvented an interim injunction adopted by the local courts, and generally conducted itself in a manner that, it seems to the Tribunal, needlessly antagonized the local residents. Ultimately, AOG agreed with local activists to undergo a preliminary EIA in exchange for the activists' undertaking to stop their opposition. When the district office reviewed the preliminary EIA application,

it determined that AOG needed to conduct a full EIA. Whatever it may have believed to be the legal reality, AOG chose not to appeal that decision and then abandoned the exploration.

379. The cause for the failure at Krivá Oľka is different. It primarily lies in AOG's legal mistakes and problematic decision-making process. The evidence indicates that AOG did not seek an amendment of the Lease for the site in good time. Then, AOG refused to attempt to obtain a new lease when the MoE asked for it in the context of its Article 29 Application. Finally, although it agreed to subject itself to a preliminary EIA, AOG abandoned its drilling program after the district office imposed the obligation to conduct a full EIA, again without resorting to available remedies.

380. While Discovery and AOG faced a number of setbacks in their operations, the record suggests that it was not immediately apparent that these could be said to be the responsibility of the State, or could on their face be said to rise to the level of a treaty breach. Testimony at the Hearing rather showed that State officials sought to accommodate and support AOG, on the one hand, and at the same time to consider the views expressed by the local population and environmental and climate change activists, on the other. In the end, the record suggests that, confronted with a project that did not run as smoothly as it may have expected and certainly hoped, Discovery decided not to pursue its efforts mainly due to financial constraints.[597]

381. All of these questions are addressed in greater detail below.

2. Attribution

a. Parties' positions

382. The Respondent argues that the "focus" of the claims is "the actions of private activists" and the State's "allegedly deficient response" to those private actions.[598] For the Respondent, "[n]one of the activists' conduct" is attributable to the State, whether under

[597] Mr. Lewis told his JV Partners in October 2017 that he had no more "horsepower or appetite" and refused to invest more funds in the enterprise (Opcom Minutes, 3 October 2017, p. 2 of the pdf document (C-382)). Moreover, Discovery was unable to secure additional funding for the project, notwithstanding the fact that it told potential investors in October 2017 that they would invest in a "[l]ow-cost, low-risk" project (Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor introduction, October 2017, pp. 3 and 11 (C-180)). For instance, potential investors, such as Cadogan Petroleum, required 3D seismic surveys that AOG had planned in 2014 but never acquired (Email of 25 August 2017 from A. Fraser to G. [redacted] (R-198) and Opcom minutes, 11 September 2014, pp. 4-5 of the pdf document (C-61)). Similarly, another potential investor, Claren Energy Corporation, required additional data and ultimately decided not to invest in the project (Letter of Intent from Mr. Lewis to Claren, 15 November 2017 (R-199)).

[598] Counter-Memorial, para. 263.

Articles 4 or 8 of the Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts (the "ILC Articles").[599] Specifically, the activists are not organs of the State, nor did they act on the instruction of, or under the direction or control of the State.[600]

383. The Claimant clarifies that it does not impugn the conduct of the activists. Its claims arise from conduct – whether action or inaction – of State organs, namely the police, the Smilno mayor, the ÚGKK, the judiciary, a State prosecutor, the MoT, the MoI, the MoE and three district offices.[601] It cannot be disputed, and as discussed below it is not disputed, that the conduct of those entities is attributable to the State under Article 4 of the ILC Articles.[602]

b. Discussion

384. As noted, this dispute refers to the conduct of the police, the district offices, the prosecutor's office, the judiciary and various ministries. The Claimant does not complain about the conduct of the activists or other private persons.[603]

385. The Respondent rightly accepts that the bodies listed in the previous paragraph are State organs, whose actions are attributable to the Slovak Republic under Article 4 of the ILC Articles.[604]

386. At the Hearing, the Claimant claimed that the statements of Mr. Baran, the mayor of Smilno, were also attributable to the Slovak Republic.[605] There appears to be no dispute that the mayor of Smilno is part of the Slovak State apparatus and that his conduct as mayor (rather in his capacity as a private citizen) can be attributed to the Slovak Republic under Article 4. That said, the Claimant does not complain about the conduct of the mayor of Smilno, it merely relies on his contemporaneous statements to argue that other State organs acted inconsistently with those statements.

599 Counter-Memorial, paras. 263-271.

600 Counter-Memorial, para. 265.

601 Reply, para. 253.

602 Counter-Memorial, paras. 263-271; Reply, paras. 253 and 255(4). See also Rejoinder, note 476 and para. 421.

603 Tr. (Day 6), 13:6-9 (Tushingham) ("Our complaint is not about the conduct of the activists. Our complaint is about the conduct of the state in making decisions that prevented us from doing the work. So that's the point").

604 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in Yearbook of International Law Commission, 2001, Vol. II, Part Two, p. 40, Article 4 (CL-54).

605 Tr. (Day 1), 26:15-28:3 (Tushingham).

387. In brief, the acts which Discovery challenges are all attributable to the Slovak Republic.

3. Fair and equitable treatment

a. Parties' positions

i. Claimant's position

388. The Claimant submits that the Respondent's conduct breached the FET standard in Article II(2)(a) of the BIT on multiple counts.[606] More particularly, by preventing AOG from implementing its exploration program, the Slovak Republic breached Discovery's legitimate expectations, acted inconsistently, arbitrarily and discriminatorily, and denied justice.

389. In respect of **Smilno**, the Claimant argues that (i) the local police refused to acknowledge that the Access Road was a public road and remove activists blocking that road, (ii) the judiciary wrongfully granted the Interim Injunction which prevented AOG from using the Access Road and thereafter refused to overturn that decision on appeal, (iii) the prosecutor wrongfully intervened in AOG's dispute with Ms. Varjanová and instructed the police to cancel the policing operation at Smilno, and (iv) the MoI wrongfully instructed the police that the Access Road was a private road.[607]

390. As regards **Krivá Oľka**, the Claimant asserts that (i) the MoA wrongfully refused to approve the Lease Amendment under Article 50(7) of the Forests Act, (ii) the MoE wrongfully refused to grant a compulsory access order under Article 29(4) of the Geology Act and (iii) wrongfully suspended the Article 29 proceedings to resolve a "preliminary issue".[608]

391. Finally, in connection with the **EIA** procedure, the Claimant argues that (i) the district offices wrongfully decided that AOG would have to conduct a full EIA for its exploratory drilling at Smilno, Krivá Oľka and Ruska Poruba and (ii) the MoE wrongfully imposed the obligation to perform a preliminary EIA for all future wells.[609]

606 Memorial, paras. 209-238; Reply, paras. 256-348, Claimant's Opening Presentation, Slides 156-165.

607 Claimant's Opening Presentations, Slide 144, measures 1-6.

608 Claimant's Opening Presentations, Slide 144, measures 8-10.

609 Claimant's Opening Presentations, Slide 144, measures 11-14.

ii. Respondent's position

392. The Respondent disputes having breached the FET standard,[610] and submits that it neither frustrated the Claimant's legitimate expectations,[611] nor acted inconsistently[612] or arbitrarily,[613] nor denied justice to Discovery or AOG.[614]

393. As for **Smilno**, the Respondent contends that Discovery was unable to proceed with its exploration program as a result of AOG's legal mistakes and failure to obtain land owner consent to use the Access Road.[615] The Claimant's PSPR arguement would be an "after-the-fact" invention on which its entire case is built when in reality the Access Road is a private road.[616]

394. Coming to **Krivá Oľka**, Slovakia states that AOG's legal mistakes, not the State's conduct, prevented the drilling. The MoA could not approve the Lease Amendment, because AOG's request was late and the Lease had expired by the time the MoA received the extension request.[617] The Respondent further disputes that the MoE refused to issue a compulsory access order due to an instruction from the highest levels of the ministry and adds that the first instance decision was in any event overturned on appeal by Minister Sólymos.[618] AOG then stopped participating in the Article 29 proceedings and refused to seek to obtain a new lease from LSR.[619]

395. Finally, on the **EIA** process, the Respondent argues that AOG voluntarily agreed to undergo preliminary EIAs and thus could not expect that the district offices would refrain from processing the preliminary EIA applications or that the preliminary EIAs would not progress to full EIAs.[620] It further notes that the Claimant is wrong arguing that the EIA Amendment would not apply to drilling operations starting after 1 January 2017.[621] It

610 Counter-Memorial, paras. 272-373; Rejoinder, paras. 250-491; Respondent's Opening Presentation, Slides 169-183.

611 Counter-Memorial, paras. 294-344; Rejoinder, paras. 257-398.

612 Counter-Memorial, paras. 345-355; Rejoinder, paras. 399-426.

613 Rejoinder, paras. 427-473.

614 Counter-Memorial, paras. 356-373; Rejoinder, paras. 474-491.

615 Rejoinder, para. 289.

616 Rejoinder, para. 291.

617 Rejoinder, para. 339.

618 Rejoinder, paras. 357-360.

619 Rejoinder, paras. 361-366.

620 Rejoinder, paras. 368 and 371-374.

621 Rejoinder, paras. 375-390.

finally disputes that the EIA Decisions of the district offices breached the FET standard and adds that, in any event, AOG could have appealed the Smilno and Krivá Oľka EIA decisions, as it successfully did in respect of Ruska Poruba, but rather chose to abandon its operations altogether.[622]

b. Analysis

i. Legal standard

396. Article II(2)(a) of the BIT reads as follows:

> "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that which conforms to principles of international law".[623]

397. The Claimant submits that Article II(2)(a) contains an "autonomous" FET standard,[624] whereas the Respondent contends that the FET standard is limited to the MST.[625]

398. The Tribunal will first determine whether the FET standard in Article II(2)(a) is limited to the MST (a), and then address the content of the standard (b).

(a) Is Article II(2)(a) of the BIT limited to the MST?

399. For the Claimant, the reference in Article II(2)(a) to "principles of international law" does not refer solely to customary international law, but to general principles of international law and "all sources of international law", of which customary international law is only one such source.[626] Slovakia argues that the "prevailing practice" when the BIT entered into force was to link the FET standard to the MST under customary international law.[627]

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622 Rejoinder, paras. 369 and 391-398.

623 US-Slovakia BIT, Article II(2)(a) (C-1).

624 Reply, paras. 257-265; Tr. (Day 1), 76:11-21 (Tushingham); Claimant's Opening Presentations, Slide 157.

625 Counter-Memorial, paras. 272-373; Rejoinder, paras. 250-491.

626 Reply, para. 258(2).

627 Counter-Memorial, paras. 278-284; Rejoinder, paras. 250-253, referring to *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011("*El Paso Energy v. Argentina*"), para. 326 (CL-25); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, para. 292 (CL-43); *Occidental Exploration and Production Company c. Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, para. 190 (RL-125); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 284 (RL-96); *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 291-294 (CL-17); *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008, para. 453 (RL-126); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (hereinafter "*Electroquil v. Ecuador*"), paras. 335-337 (RL-59); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paras. 292-300 (RL-104); *Biwater Gauff*

In support of this argument, it notes that the US is party to the BIT and NAFTA and that NAFTA's FET standard "is more indicative of the prevailing practice at the time the US-Slovakia BIT came into force".[628] It adds that, even if the BIT does not provide for MST, the Tribunal should refrain from sitting on appeal over the legal correctness or substantive reasonableness of the disputed measures; it should merely assess whether the administrative and legal system of the Slovak Republic worked properly "as a whole".[629]

400. The Tribunal must interpret Article II(2)(a) of the BIT according to the rules codified in Article 31 of the VCLT.[630] Accordingly, the meaning of Article II(2)(a) must primarily be ascertained based on the ordinary meaning of the words used, in their context, and in the light of the BIT's object and purpose.[631]

401. Starting with the text of the provision, Article II(2)(a) contains three components: an investment "shall at all times be accorded fair and equitable treatment"; such investment "shall enjoy full protection and security"; and such investment "shall in no case be accorded treatment less than that which conforms to principles of international law".

402. While only the first and third elements are relevant for present purposes, the second plays

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(Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008 (hereinafter "*Biwater v. Tanzania*"), paras. 586-592 (CL-23); *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 (hereinafter "*Liman Caspian v. Kazakhstan*"), para. 263 (CL-38); *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award, 29 July 2014, paras. 392 and 481 (RL-127); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, paras. 483 and 491 (RL-128); *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014 (hereinafter "*Valeri Belokon v. Kyrgyz Republic*"), para. 224 (RL-129); *Murphy Exploration & Production Company – International v. The Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434); Partial Final Award, 6 May 2016, paras. 205-206 and 208 (CL-90); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paras. 520-521 (RL-72); *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, paras. 8.42-8.45 (RL-130); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 319 (RL-131).

628 Rejoinder, para. 251, referring to North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001 (RL-54).

629 Rejoinder, paras. 254-255, referring to *ECE Projektmanagement International GmbH and Kommanditengesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft GmbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (herein after "*ECE v. Czech Republic*"), para. 4.764 (RL-92).

630 Czechoslovakia acceded to the VCLT on 29 July 1987 and, as successor State, the Slovak Republic became a party to the VCLT on 28 May 1993. In any event, the Slovak Republic accepts that the VCLT codifies the rules of treaty interpretation under customary international law. See Counter-Memorial, para. 275; United Nations Treaty Collection, Chapter XXIII "Law of Treaties", Section 1 "Vienna Convention on the Law of Treaties", Vienna, 23 May 1969, at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en#5.

631 *Quiborax v. Bolivia*, para. 212; *KT Asia Investment v. Kazakhstan*, para. 165.

a role in understanding the structure of the sentence. Indeed, the three components appear to be freestanding and disconnected, as is shown by the comma between the first two elements and from the conjunction "and" before the third. The repeated use of the word "shall" further confirms that each component is intended to exist as a distinct and separate obligation. Importantly, there is no textual link between the first and third components suggesting that the Contracting States must accord fair and equitable treatment in accordance with principles of international law or that the FET standard is equivalent to (or coterminous with) requirements under principles of international law. Rather, the words and their sequence seem to indicate that the third element is a floor as opposed to a ceiling.[632]

403. In sum, nothing in Article II(2)(a) suggests that the FET standard equates to the MST. The Respondent's reference to NAFTA Article 1105(1), which was adopted at around the same time is unavailing. NAFTA Article 1105 is expressly entitled "Minimum Standard of Treatment", no such mention is made in Article II(2)(a). Construing Article II(2)(a) as being limited to the MST would imply reading language into that provision that it does not contain.

404. Neither does the language of Article II(2)(a), on its face, appear to restrict FET to a customary international law standard. As noted in *Infinito Gold v. Costa Rica*, the words "principles of international law" refer to a broader category of sources than custom[633] and may include general principles emanating from domestic law, and transposed on the international plane as well as general principles emerging directly on the international level, including from treaties, case law of international courts and tribunals or custom.[634] This understanding is consistent with *Vivendi II v. Argentina*, where the tribunal saw "no basis for equating principles of international law with the minimum standard of treatment", and held that "the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard".[635]

405. The context surrounding Article II(2)(a) does not support a limitation to the MST either. The preamble of the BIT expresses the Contracting Parties' agreement that "fair and

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632 The Tribunal shares the view expressed in that regard in *Azurix v. Argentina*. See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 361 (RL-60). See also *LSG Building Solutions GmbH et al. v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022 (hereinafter "*LSG v. Romania*"), para. 1019 (CL-98).

633 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (hereinafter "*Infinito Gold v. Costa Rica*"), para. 332 (CL-15).

634 *Infinito Gold v. Costa Rica*, paras. 332-333 (CL-15).

635 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.7 (CL-19).

equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". Nothing in this wording points to a limitation of "fair and equitable treatment of investment" to the MST.

406. Article III(1) allows the expropriation or nationalization of foreign investments *inter alia* under the condition that such expropriation or nationalization occur "in accordance with the *general principles of treatment provided for in Article II(2)*" (emphasis added). The reference to the "general principles of treatment" provided in Article II(2), as opposed to "principles of international law", reinforces the view that each of the three components of Article II(1)(a) qualifies as a distinct principle of treatment.

407. Furthermore, there is no contemporaneous instrument in the sense of Article 31(2) VCLT, subsequent practice in the meaning of Article 31(3)(a)-(b), or rule of international law applicable between the Contracting Parties in the sense of Article 31(3)(c) that would buttress the Respondent's interpretation. The reliance on the US Model BIT and the joint statement of the NAFTA Contracting States is inapposite in light of the BIT's actual wording. The same is true of the argument that, being part of customary international law, the MST is a relevant rule of international law to be considered under Article 31(3)(c). While this argument might arguably give content to the third component in Article II(2)(a), it does not assist in determining whether the FET standard is autonomous or not.

408. Finally, the Tribunal may turn to the BIT's object and purpose. Other than the mention of FET in the preamble, there is nothing in the BIT's object and purpose that would point to one interpretation rather than another. As a general matter, the object of an investment treaty is to promote investment to further a State's development and at the same time to protect foreign investors.[636] Here, the preamble states that the US and the Slovak Republic seek to "promote greater economic cooperation", to stimulate economic development through the flow of private capital, to maintain a stable investment framework to ensure the "maximum effective utilization of economic resources", and to raise "living standards and the quality of life" of their populations.[637] In other words, the preamble refers to both private interests of the investor and public interests of the State. Those objectives counterbalance each other, with the consequence that the object and purpose of the BIT – as reflected in the preamble – may be said to be neutral for present purposes and does not

636 See, for instance, *El Paso Energy v. Argentina*, para. 369 (CL-25) and Decision on Jurisdiction, 27 April 2006, para. 70.

637 US-Slovakia BIT, Preamble (C-1).

tilt the balance either way.[638]

409. On this basis, the Tribunal comes to the conclusion that the FET standard in Article II(2)(a) is an autonomous treaty standard that is not limited to customary international law in general or the MST in particular.

410. This conclusion is reinforced by numerous arbitral awards holding that the FET standard can only be equated to the MST if the treaty in question explicitly or implicitly so states.[639] At the same time, the Tribunal is mindful that some tribunals interpreting provisions similar to Article II(2) reached a different outcome. In particular, the *El Paso* tribunal found "that the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard".[640]

411. The relevant treaty provision in *El Paso* was slightly different from the one at stake here, in that it spoke of treatment no less than that required by international law.[641] In addition and more importantly, in its analysis the *El Paso* tribunal did not refer to the VCLT (at least not explicitly). It referred to three divergent approaches adopted by investment tribunals: the first equating FET with the MST; the second dealing with FET as an

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638 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 158; *Churchill Mining Plc v. Republic of Indonesia*, ICISD Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para. 178.

639 *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006 (hereinafter "*Saluka Investments v. Czech Republic*"), para. 294 (CL-11); *Liman Caspian v. Kazakhstan*, para. 263 (CL-38); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 125 (RL-55); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 529 (RL-133); *Valeri Belokon v. Kyrgyz Republic*, para. 224 (RL-129); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (hereinafter "*Crystallex International v. Venezuela*"), para. 530 (CL-26); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (hereinafter "*Philip Morris v. Uruguay*"), para. 316 (RL-57); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, paras. 804-810 (RL-109); *LSG v. Romania*, para. 1019 (CL-98). See also *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, para. 265; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, paras. 491-494; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1003; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, para. 666; *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 530.

640 *El Paso Energy v. Argentina*, para. 336 (CL-25).

641 Article II(2)(a) of the US-Argentina BIT reads as follows: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law". See *El Paso Energy v. Argentina*, para. 326 (CL-25).

autonomous concept; and the third taking an "intermediate, undecided position".[642] The tribunal then sided with the first opinion because of the "identical role assigned to FET and to the international minimum standard".[643] It then concluded that the "true question" was not to compare "two undefined or weakly defined standards", but to "ascertain the content and define the BIT standard of fair and equitable treatment".[644]

(b) The content of the FET standard

412. The Claimant submits that the FET standard of the BIT encompasses several "core protections": the protection of legitimate expectations, the prohibition of inconsistent, arbitrary, discriminatory and non-transparent conduct, as well as the prohibition of procedural and substantive denial of justice.[645]

413. Save with respect to substantive denial of justice, the Respondent largely agrees. With respect to legitimate expectations, it says FET protects legitimate expectations "based on *(i)* specific assurances, *(ii)* given by the host State *(iii) at the time the investment was made* and *(iv) relied on by the investor* in making that investment".[646] Moreover, on its view, an assurance must have a precise content, be specifically addressed to the investor, and be legitimate and reasonable.[647]

414. As noted in many awards, the interpretation of the treaty terms "fair and equitable" yields limited results, such that the contours of the FET standard have progressively been elucidated through arbitral and judicial decisions. While precise formulas may vary, a consensus has emerged that FET may cover the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, the principle of due process and protection against denial of justice.[648]

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642 *El Paso Energy v. Argentina*, paras. 331-334 (CL-25).

643 *El Paso Energy v. Argentina*, para. 336 (CL-25).

644 *El Paso Energy v. Argentina*, para. 335 (CL-25).

645 Memorial, para. 213; Tr. (Day 1), 76:22-77:3 (Tushingham).

646 Emphasis in the original. Counter-Memorial, paras. 294-295.

647 Rejoinder, para. 257.

648 *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 336 (RL-45); *Muszynianka spółka z ograniczoną odpowiedzialnością v. The Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 (hereinafter "*Muszynianka spółka v. Slovak Republic*"), para. 461 (RL-65); *Infinito Gold v. Costa Rica*, para. 355 (CL-15). See also *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (hereinafter "*S.D. Myers v. Canada*"), para. 263 (CL-18); *Bayindir Insaat Turzim Ticaret ve Sayani A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178 (RL-89); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18,

415. Regarding legitimate expectations, it appears settled that such expectations may arise where there is evidence that the State has given clear and specific assurances to an investor, and that the investor has relied on these assurances before it has made the investment.[649] In the words of *Antaris v. Czech Republic*:

> "A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state".[650]

416. In the same vein, the tribunal in *Muszynianka v. Slovak Republic* held as follows:

> "To qualify as legitimate, the investor's expectations must be based on assurances (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; and (iii) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance".[651]

417. The *LSG v. Romania* tribunal emphasized that expectations must be assessed objectively by reference to a prudent investor in the circumstances prevailing at the time of the making of the investment.[652] That tribunal also emphasized that the legitimacy or reasonableness of the expectations must be assessed in conjunction with other elements, including "the investor's own conduct, and the political, socioeconomic, cultural and historical conditions in the host State".[653] As part of the investor's conduct, many tribunals have insisted on the need for evidence that the investor engaged in a meaningful exercise of due diligence.[654]

Decision on Jurisdiction and Liability, 14 January 2010 (hereinafter "*Lemire v. Ukraine*"), para. 284 (CL-31); *Crystallex International v. Venezuela*, para. 547 (CL-26); *LSG v. Romania*, para. 1022 (CL-98).

649 *Crystallex International v. Venezuela*, para. 547 (CL-26).

650 *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018 ("*Antaris v. Czech Republic*"), para. 360(3) (CL-34).

651 *Muszynianka spółka v. Slovak Republic*, para. 462 (RL-65).

652 *LSG v. Romania*, para. 1029 (CL-98).

653 *LSG v. Romania*, para. 1031 (CL-98). See also *Electroquil v. Ecuador*, para. 340 (RL-59); *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (hereinafter "*Pawlowski v. Czech Republic*"), para. 290 (CL-44).

654 *Churchill Mining v. Indonesia*, para. 506; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (hereinafter "*Gavrilovic v. Croatia*"), para. 986 (RL-51); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018 (hereinafter "*South American Silver v. Bolivia*"), para. 648 (RL-66); *Sunreserve Luxco Holdings S.À.R.L. et al. v. The Italian Republic*, SCC Arbitration V (2016/32), Final Award, 25 March 2020 (hereinafter "*Sunreserve Luxco v. Italy*"), para. 714; *Pawlowski v. Czech Republic*, para. 293 (CL-44); *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sàrl v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022 (hereinafter "*BSG Resources v. Guinea*"), para. 899; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (hereinafter "*Alasdair Ross v. Costa Rica*"), para. 58.

418. When it comes to arbitrariness, the ICJ's definition in the *ELSI* case carries particular weight:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. […] It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[655]

419. FET also requires that the State's conduct be reasonable, proportionate and in conformity with due process. A measure is reasonable if it pursues a rational policy for a legitimate public purpose.[656] That assessment may include a review of the consistency of the State's conduct.[657] A measure is proportionate if it is necessary and suitable to achieve a legitimate public purpose, and it does not appear excessive when weighing the interests at stake.[658] Various arbitral tribunals have also held that FET may include a transparency element.[659] Here, Article II(7) of the BIT specifically requires the Contracting States to "make available to the public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments".[660]

420. Finally, FET may also comprise denial of justice, which can be circumscribed as follows:

> "[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. The Tribunal thus concludes that a denial of justice may be procedural or substantive, and that in both situations the denial of justice is the product of a systemic failure of the host State's judiciary taken as a whole. The latter point explains that a claim for denial of justice presupposes the

655 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, para. 128.

656 *Muszynianka spółka v. Slovak Republic*, para. 545 (RL-65). See also *Biwater v. Tanzania*, para. 693 (CL-23); *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 454 (RL-70); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, 23 September 2010 (hereinafter "*AES v. Hungary*"), para. 10.1.1 (RL-62).

657 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006 (hereinafter "*EnCana v. Ecuador*"), para. 158 (CL-27).

658 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (hereinafter "*Electrabel v. Hungary*, Award"), para. 179 (RL-148); *Muszynianka spółka v. Slovak Republic*, para. 566 (RL-65).

659 *Saluka Investments v. Czech Republic*, para. 307 (CL-11); *Lemire v. Ukraine*, para. 284 (CL-31); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 570 (CL-55); *Crystallex International v. Venezuela*, para. 579 (CL-26).

660 US-Slovakia BIT, Article II(7) (C-1).

exhaustion of local remedies […]".[661]

421. This is the place to note that the judiciary – as a State organ – may be found to breach FET by means of acts other than denial of justice. As stated by the majority in *Infinito Gold v. Costa Rica*, "there is no principled reason to limit the State's responsibility for judicial decisions to instances of denial of justice". Indeed, "[h]olding otherwise would mean that part of the State's activity would not trigger liability even though it would be contrary to the standards protected under the investment treaty".[662]

422. With these standards and principles in mind, the Tribunal assesses whether, on the basis of the evidence before it, the Claimant had any legitimate expectations (including what those expectations may have been) and, if so, whether they were frustrated (ii); whether the Slovak Republic engaged in inconsistent conduct (iii); whether its conduct was arbitrary or non-transparent (iv); and whether it denied justice to Discovery or AOG (v).

ii. Legitimate expectations

423. The Claimant asserts that the Respondent frustrated its legitimate expectations to conduct its exploration program at Smilno (a) and Krivá Oľka (b). It further complains that its legitimate expectations were deceived when the Slovak Republic required AOG to carry out a full EIA for pre-2017 drills at Smilno, Krivá Oľka and Ruská Poruba and, more generally, when it imposed an obligation to conduct preliminary EIAs for all post-2017 drills (c).

(a) Smilno

424. The Claimant's case is that the Svidník Exploration License and its renewals contained assurances that AOG would be permitted to carry out its exploration activities, including drilling up to 1,500 meters, which gave rise to legitimate expectations that were deceived.[663] Discovery emphasizes in this context that the Exploration License "imposed an express obligation upon AOG" to conduct its exploration program.[664] However, various

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661 *Infinito Gold v. Costa Rica*, para. 445 (CL-15).

662 *Infinito Gold v. Costa Rica*, para. 359 (CL-15). See also *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, para. 702 (CL-32); *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 118.

663 Memorial, paras. 78-129 and 224-231; Reply, paras. 22, 53-115 and 268-298; Claimant's Opening Presentation, Slides 37, 50, 52-86 and 158.

664 Reply, paras. 19 and 22. In the words of the Claimant, it expected (i) that AOG would "not be prevented from completing the geological exploration that it was permitted to conduct under the terms of the Licences" and (ii) would "be able to complete the necessary geological exploration works", (iii) that exploration at Smilno would be permissible, and (iv) that such exploration "could be carried out without any other relevant organ of

"organs and agents" of the Slovak State, including the police, the judiciary, a prosecutor and the MoI prevented AOG from performing its program.[665]

425. The Respondent disputes this claim.[666] It disagrees that the Svidník Exploration License contained any specific assurances creating legitimate expectations and emphasizes that AOG's right to conduct exploration was subject to compliance with the regulatory framework.[667] It adds that the 2016 renewal post-dates Discovery's investment and therefore cannot be the basis of any legitimate expectations.[668] Slovakia further argues that in any event it breached no legitimate expectations and emphasizes that AOG's "legal mistakes and failure to obtain landowner consent" caused its "downfall".[669]

426. The Tribunal will first address the legal framework governing exploration activities in the Slovak Republic and the rights and obligations of a license holder to determine if Discovery could have the legitimate expectations it claims (Section (i)). It will then assess the status of the Access Road (Section (ii)) in order to determine whether the Respondent's conduct frustrated Discovery's expectations and thus breached the FET standard (Section (iii)).

(i) The regulatory framework and the Exploration License did not generate legitimate expectations

427. It is Discovery's submission that the Svidník Exploration License, including the July 2014 and June 2016 renewals, and the Geology Act generated the legitimate expectation that AOG would be allowed to drill at the Smilno site and that the Slovak authorities would not prevent it from accessing that site.[670] That expectation was based, it argues, "on the clear and implicit representation" made in the licenses "when read together with the Geology Act".[671] These were said to impose on the State an "express obligation" to allow the conduct of exploration activities.[672] For the Claimant, "[t]his was the quid pro quo of

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the Slovak State objecting to such exploration so that no other organ would prevent the exploration" (emphasis omitted). Memorial, para. 226.

665 Although the Claimant argued in its Memorial that the Parliament of the Prešov region also prevented AOG from drilling at Smilno, it did not maintain this argument in subsequent pleadings. Memorial, paras. 78, 128 and 227; Reply, paras. 291-298; Claimant's Opening Presentation, Slides 52, 54, 72-86, 144 and 158.

666 Counter-Memorial, paras. 294-322; Rejoinder, paras. 257-327; Respondent's Opening Presentation, Slides 171-175.

667 Rejoinder, paras. 259-261.

668 Rejoinder, paras. 271 and 274-275.

669 Rejoinder, para. 289; Tr. (Day 6), 83:11-14 (Anway).

670 Tr. (Day 1), 19:3-5 (Tushingham); Tr. (Day 6), 2:11-12 (Tushingham).

671 Tr. (Day 1), 19:8-11 (Tushingham); Tr. (Day 6), 2:16-19 (Tushingham).

672 Claimant's Opening Presentation, Slide 36.

AOG's obligation to […] do the work".[673]

428. As noted above, expectations must be based on clearly articulated and specific representations made by or on behalf of the State, in a manner that induces an investment to be made, prior to it having been made.[674] Where the investment is made in stages, legitimate expectations must be examined "for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganization of the investment".[675]

429. Regarding expectations based on the grant of an exploration license and its renewals, the Tribunal sees no reason why an exploration license could not, in certain circumstances and depending on the particular evidence, be found to contain specific representations or assurances upon which an investor may have legitimately relied in deciding to make or add to an investment. In the present case, however, neither the Svidník Exploration License nor its renewals contain any specific representation that Discovery and AOG would be able to drill at the Smilno site. This is even more apparent if the license is read in conjunction with the Geology Act, a measure of general application which by its very nature cannot be said to be addressed to a specific investor. That legislation manifestly does not, and cannot be said to be, of the nature of giving any specific or clear assurance to a specific investor with regard to a specific site.

430. The Svidník Exploration License determined the extent of the exploration area and the conditions which the license holder had to meet while conducting exploration activities. Under the terms of the initial license dated 18 July 2006, AOG could perform geological works to explore for "oil and flammable natural gas" within a period of four years and in a specified area covering 760.1 km².[676] The 2006 license was extended in July 2010, July 2014 and June 2016.[677] Although the license and its renewals employ the mandatory "shall" to impose various obligations on AOG, for instance, to "carry out geological works" and

673 Tr. (Day 1), 19:5-8 (Tushingham); Tr. (Day 6), 2:12-15 (Tushingham).

674 *Muszynianka spółka v. Slovak Republic*, para. 462 (RL-65); *Antaris v. Czech Republic*, para. 360(3) (CL-34); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (hereinafter "*Electrabel v. Hungary*, Decision on Jurisdiction"), para. 7.76 (RL-74).

675 *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (hereinafter "*Frontier Petroleum v. Czech Republic*"), para. 287 (CL-82); *Muszynianka spółka v. Slovak Republic*, para. 473 (RL-65).

676 Decision on determination of exploration area (Svidník), 18 July 2006, p. 1 (C-2 and R-14).

677 Decision about extension of the geological survey permit (Svidník), Ref. No.: 44505/2010, File No.: 998/2010-9.3, 26 July 2010 (C-5); Decision about exploration area term extension (Svidník), Record Number: 33590/2014, File Number: 5670/2014-7.3, 10 July 2014 (C-8); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016 (C-12).

report on a yearly basis,[678] it does not follow that the State gave the assurance that it could drill or exploit at the Smilno site. At best, Discovery could expect to drill at that site provided it complied with the license conditions and applicable laws. It is true that the 2016 renewal mentions the drilling of "at least two (2) vertical or diverted holes up to 1,500 m deep", as well as short term and protracted pumping tests and additional geophysical surveys.[679] However, it is uncontroverted that drilling exploratory wells was already part of AOG's exploration program under the initial license.

431. The Tribunal is therefore of the view that the Svidník Exploration License and its renewals could not give rise to the legitimate expectations that Discovery claims to have formed. Accordingly, the legitimate expectation claim fails for that reason alone. For completeness and because the Parties have extensively debated this issue, the Tribunal will nevertheless pursue the analysis assuming for purposes of discussion only that Discovery could have expected to drill at Smilno if it complied with the license conditions and the law.

432. The 2006 license contained 42 "[c]onditions for carrying out geological works", of which it is useful to recite the following:

> "The Exploration Area Holder shall:
>
> 1. carry out geological works in accordance with the project of the geological task, which must be prepared in accordance with the Geology Act and other legislation
> 2. pursuant to Article 14 of the Geology Act, prepare a final report and, pursuant to Article 16(2) of the Geology Act, submit a separate part of the final report with the calculation of reserves to the Ministry for review and approval
> 3. pursuant to Article 17 of the Geology Act, submit the approved final report to the Dionýz Štúr State Geological Institute Bratislava […]
> 4. pursuant to Article 22(1) of the Geology Act, submit an annual report on exploration activities to the Ministry, indicating the results of the selected geological works and the funds spent on exploration within six weeks of the end of the calendar year
> 5. when carrying out geological works, it shall comply with the requirements of nature and landscapes protection pursuant to Act No. 543/2002 Coll. on the Protection of Nature and Landscapes, as amended
> 6. submit the project of the geological task (the technical part of the project) to the Regional Environmental Office Prešov for an opinion pursuant to Article 9(1)(n) of the Act No. 543/2002 Coll. on the Protection of Nature and Landscapes
> 7. in the case of the implementation of geological works in protected areas with 2nd

678 Decision on determination of exploration area (Svidník), 18 July 2006, p. 5 (R-14). It is true that the 2016 renewal mentions the drilling of "at least two (2) vertical or diverted holes up to 1,500 m deep", as well as short term and protracted pumping tests and additional geophysical surveys (Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 6 of the pdf document (C-12)). However, it is uncontroverted that drilling exploratory wells was already part of AOG's exploration program under the initial license such that this inclusion does contain any new assurance or representation. Moreover, the 2016 renewal postdates in any event Discovery's decision to invest in Slovakia and thus cannot be the basis of any legitimate expectation.

679 Decision modifying the size of the area and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 6 of the pdf document (C-12).

and 3rd degree of protection, it will proceed pursuant to Article 13(2)(f) and Article 14(2)(f) of the Act No. 543/2002 Coll. on the Protection of Nature and Landscapes, as amended

8. not carry out geological works in the 4th or 5th degree of protection, in justified cases the competent nature protection authority may grant an exemption from the prohibitions pursuant to the Act No. 543/2002 Coll. on the Protection of Nature and Landscapes, as amended
9. when carrying out geological works in the area with the first degree of protection, proceed in such a way as not to interfere with wetlands and the greenery by waterways

[…]".[680]

433. The 2010 extension contained a list of 30 conditions with which Aurelian had to comply, some of them overlapping with the conditions listed in the 2006 license and others being added, such as the obligation to "proceed according to § 29 Geology Act, when entering land plots".[681] The July 2014 extension listed no conditions, but the Claimant did not argue and there is no reason to understand that the conditions as at the 2010 extension ceased to apply. The June 2016 extension, by contrast, expressly required AOG to comply with the conditions of the initial 2006 license and subsequent extensions.[682]

434. As is apparent from the list of "conditions" quoted above, AOG had to comply with an exploration program conforming to the Geology Act, in particular to Article 29,[683] and other applicable legislation. While paragraph 1 of Article 29 entitles a license holder and authorized persons "to enter foreign property" and to establish "access roads",[684] paragraph 3 requires the license holder to "agree with the owner of the property the scope, method of carrying out and duration of the geological works" and to notify the owner 15 days in advance of the commencement of exploration activities.[685] If no agreement can be reached, pursuant to paragraphs 4 and 5 of Article 29, the license holder cannot enter the property

680 Moreover, under conditions not listed above, AOG was, for instance, restricted from exploring in "inner spa areas", had to "proceed in such a way as to ensure all-round protection of surface water and groundwater", could not carry out exploration activities "outside the protection zones of the roads of II. and III. class", and had to "implement geological works so as not to damage the construction and surface of roads of II. and III. class". Decision on determination of exploration area (Svidník), 18 July 2006, pp. 5-7, items 1-9, 18, 25, 32, 34 and 37 (R-14).

681 Decision about extension of the geological survey permit (Svidník), Ref. No.: 44505/2010, File No.: 998/2010-9.3, 26 July 2010, p. 7 of the pdf document, para. 2.6 (C-5).

682 "The holder of exploration area will be required to abide by the terms and conditions set out in the Decision granting the Svidník Exploration Area, as later amended by subsequent Decisions". Decision modifying the size of the area and extending the validity term for the exploration area, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), 14 June 2016, p. 4 of the pdf document (C-12).

683 Decision about extension of the geological survey permit (Svidník), Ref. No.: 44505/2010, File No.: 998/2010-9.3, 26 July 2010, p. 7 of the pdf document, para. 2.6 (C-5).

684 Geology Act, Article 29(1) (R-42).

685 Geology Act, Article 29(3) (R-42).

unless he/she obtains a compulsory access order from the MoE.[686] Pursuant to the Geology Act, AOG was also to submit a series of reports.[687]

435. AOG was further obliged to respect other legislation, for instance environmental norms, prohibition to drill in protected areas (subject to obtaining an exemption), and restrictions in other areas, all provided in the Nature and Landscapes Act.[688] In addition, it was to comply with the Mining Activities Act, the Forest Act, the Protection and Use of Agricultural Land Act, the Integrated Pollution Prevention and Control Act, and the Protection of Occupational Safety and Health Act.[689]

436. Accordingly, Discovery and AOG could not legitimately expect to be allowed to drill if they did not act in compliance with the applicable statutory rules. In determining the legitimacy of expectations, investment tribunals increasingly recognize that an investor "must exercise a reasonable level of due diligence",[690] specifying that "[t]he standard of due diligence that investors are expected to adhere to should meet the threshold of what a 'prudent investor' would 'reasonably' do to know about [the] regulatory framework in question".[691] As noted in *Churchill Mining v. Indonesia*, the "scope of the due diligence depends on the particular circumstances of each case, such as the general business environment, and includes an obligation to ensure that a proposed investment complies with local laws".[692]

437. The Claimant does not deny that the legitimacy and reasonableness of its expectations may depend on the due diligence carried out before deciding to invest.[693] In this context, the Tribunal sees no need to assess whether legitimacy and reasonableness also hinge on whether an operator in the extractive industry "earn[ed] and maintain[ed]" a social license

686 Geology Act, Article 29(5) (R-42).

687 See, for instance, Geology Act, Articles 16 and 25(1)(R-42).

688 Act No. 543/2002 Coll. on Nature and Landscape Protection, as amended (R-43). See Decision on determination of exploration area (Svidník), 18 July 2006, pp. 5-7, items 5, 7-8 (R-14).

689 Act No. 51/1988 Coll. on Mining Activities, as amended (R-44); Act No. 326/2005 Coll. on Forests, as amended (R-70). See Decision on determination of exploration area (Svidník), 18 July 2006, pp. 5-7, items 11-13 and 15 (R-14).

690 *Churchill Mining v. Indonesia*, para. 506; *Gavrilovic v. Croatia*, para. 986 (RL-51); *South American Silver v. Bolivia*, para. 648 (RL-66); *Sunreserve Luxco v. Italy*, para. 714; *Pawlowski v. Czech Republic*, para. 293 (CL-44); *BSG Resources v. Guinea*, para. 899; *Alasdair Ross v. Costa Rica*, para. 58.

691 *Sunreserve Luxco v. Italy*, para. 714.

692 *Churchill Mining v. Indonesia*, para. 506.

693 Tr. (Day 6), 68:13-70:14 (Tushingham) ("The first point is that due diligence, as you quite rightly pointed out, has been said to be relevant to the content of the legitimate expectations standard protected under the FET provision in the BIT").

to operate ("SLO"), as argued by the Respondent.[694] The Tribunal is of course sensitive to the need to ensure compliance with applicable human rights and environmental obligations, and to the legitimate interests and rights of local populations potentially affected by an investment. That said, the record does not point to any rule of Slovak law requiring an investor to obtain a SLO. Moreover, the awards cited by the Respondent, especially *Bear Creek v. Peru* and *South American Silver v. Bolivia*, concerned investments in areas inhabited by indigenous communities, which enjoy particular protections under international law that are not applicable in the present case.[695]

438. Finally, as noted above, the relevant moment in time as at which to evaluate allegedly legitimate expectations is the period before the investor decides to, and actually does, invest. If the investment is made in stages, it is the time when a new investment decision is taken that is relevant.[696] A decision merely implementing an investment (or an element thereof) already decided and planned would not be deemed to be a new investment. Consequently, a decision to drill at a particular site in the context of an existing exploration program or license does not qualify as a new investment requiring a renewed assessment of the legitimacy of the investor's expectations.

439. Here, the relevant point in time is March 2014. This was when the Claimant acquired AOG and decided to invest in its exploration program. It is at that moment that Discovery had to engage in an exercise in due diligence that included careful consideration of the license conditions, as well as the legal, business and political environment, and the specific circumstances of the project.[697]

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694 Counter-Memorial, paras. 11-12, 302-307 and 444-455; Rejoinder, paras. 280-286, referring to *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, § VII.C.7 (CL-61); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (hereinafter "*Bear Creek v. Peru*"), paras. 227 and 600 (RL-39); *South American Silver v. Bolivia*, para. 655 (RL-66); *Pawlowski v. Czech Republic*, para. 290 (CL-44); Resolution adopted by the UN Human Rights Council on 8 October 2021, p. 3 (RL-138); H.G. Burnett, L. Bert, *Environmental and Social Disputes*, in Arbitration of International Mining Disputes: Law and Practice (2017), p. 121 (RL-38); M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), pp. 332-333 (RL-37).

695 The tribunal in *Bear Creek*, for instance, considered the concept of a SLO in the context of Peru's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, and in particular the obligation to consult with indigenous communities and obtain their consent prior to engaging in activities affecting their living space. *Bear Creek v. Peru*, para. 406 (RL-39).

696 *Electrabel v. Hungary*, Decision on Jurisdiction, para. 7.76 (RL-74); *Frontier Petroleum v. Czech Republic*, para. 287 (CL-82); *Muszynianka spółka v. Slovak Republic*, para. 473 (RL-65).

697 Opcom Minutes, 11 September 2014, p. 5 of the pdf document (C-61). See also Opcom Minutes, 16 September 2015, item 4.1 (C-81). The Tribunal notes that AOG identified the Smilno site as a possible well site in the course of the spring of 2015 (Email of 20 May 2015 from Ron Crow (C-424); Email of 20 May 2015 from Michael Lewis (C-423); Varjanová WS1, paras. 9-10). It secured a lease for that location on 1 and 15 June 2015 (Lease for Smilno well site, 1 June 2015 (C-74); Lease of land for Smilno well site, 15 June 2015

440. In summary, the Svidník Exploration License does not contain any specific representation or assurance that Discovery and AOG could drill at the Smilno site. At most, the Claimant could, by March 2014, expect to be able to drill without hindrance, provided it conducted sufficient due diligence and complied with the applicable laws and regulations and the license conditions. On the assumption such an expectation existed, the Tribunal now reviews whether the Slovak Republic could be said to have frustrated that expectation. As the existence of the expectation is conditioned upon the respect of the law, the first question that arises is whether AOG had the right to use the Access Road.

(ii) The status of the Access Road

441. The Claimant's case rests on the proposition that the Access Road was publicly accessible because it is a public special purpose road or PSPR. For the Claimant, a field track automatically qualifies as a PSPR under Article 1(2)(d) of Slovakia's Road Act and Article 22 of Decree No. 35/1984 implementing the Road Act[698] as well as under Article 2(1) of the Road Traffic Act.[699] Discovery adds that in July 2015 the Mayor of Smilno, Mr. Baran, had confirmed that the Access Road was publicly accessible and that official maps showed that it was a "public road".[700]

442. The Respondent contends that the Access Road is a private field track and that AOG was required to secure land owner consent or obtain an access order pursuant to Article 29(3) to (5) of the Geology Act. It also states that, even if the field track were a PSPR, the technical and physical condition of the track was such that it could not be used for heavy drilling machinery and therefore AOG would still have needed to obtain the owners' consent to upgrade the road.

(C-76)), and obtained a one-year permit from the Bardejov District Office to use the "agricultural land" at the Smilno site "for non-agricultural purposes" (Permit from the Bardejov District Office of geological exploration rights in Smilno, 17 June 2015 (C-77)). By 25 August 2015, AOG had submitted a drilling program to the Mining Authority (Partner Progress Report, 25 August 2015 (C-79)) and, by November 2015, it had prepared a project of geological works, a detailed drilling program and an authorization for expenditure ("APE") for EUR 1,175,092 (AOG Smilno Project of Geological Works, 11 November 2015 (C-88); Detailed Drilling Program Smilno, December 2015 (C-95); Authority for Expenditure, Smilno, 4 November 2015 (C-86)). On 3 December 2015, the JV Partners approved the 2016 work program and budget and agreed to drill an exploration well at the Smilno site in January 2016 for EUR 986,000, considering the JV Partners' understanding that, because the Smilno-1 well was a "minimum work obligation" well, no approval from the Operating Committee was required and that approval of the 2016 work program and budget was sufficient (Opcom Minutes, 3 December 2015, items 5 and 15(5) (C-100); AOG 2016 approved budget, 3 December 2015, pp. 1-2 (C-97)).

698 Reply, para. 72(1), referring to Road Act, Article 1(3) (R-57); Decree No. 35/1984, Coll. implementing the Road Act, Article 22 (C-223).

699 Reply, para. 73, referring to Road Traffic Act, Article 2(1) (C-214).

700 Reply, para. 61(2), referring to Minutes of Meeting, 21 July 2015 (C-280); Tr. (Day 1), 81:17-18 (Tushingham).

443. It is undisputed that, in June 2015, AOG had entered into a 15-year lease with the land owners of the Smilno site to drill an exploratory well,[701] and that it had obtained a one-year permit from the Bardejov District Office to such effect.[702] It is equally common ground that the Access Road was the only means of vehicular access to the site. The Parties further agree that, if the Access Road qualifies as a PSPR, AOG could have used it without owner consent and that, if it was a private road or field track, AOG was bound to secure consent or an access order.

444. The question is thus whether the Access Road is a PSPR or not. To resolve this question, the Tribunal will first address the legal framework governing Slovak roads, then review the characteristics of the Access Road. It will then inquire about Discovery and AOG's conduct of an exercise of due diligence and their contemporaneous understanding of the Access Road's status.

The legal framework governing Slovak roads

445. A review of the Slovak legal framework shows that not every field track is a PSPR and that, even if the Access Road were a PSPR, AOG should have adapted to the technical conditions of the road and obtained land owner consent for any upgrades. The Tribunal was assisted by expert evidence and testimony on Slovak law, as provided by Prof. Števček on the Claimant's side and Dr. Fogaš on the Respondent's side.

446. The relevant legal framework comprises the Road Act, its implementing decree and the Road Traffic Act. The Road Act regulates *inter alia* "the construction, use and protection of land roads, rights and obligations of owners and managers of land roads and their users".[703] Aside from governing the road traffic rules, the Road Traffic Act regulates "the competence of public administration authorities" in directing road traffic.[704] Importantly, the Slovak authorities, and in particular the police, only have authority to regulate traffic on the "roads" as defined in those two acts.[705]

447. Article 1(2) of the Road Act and Article 2(1) of the Road Traffic Act distinguish between

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701 Lease for Smilno well site, 1 June 2015 (C-74); Lease of land for Smilno well site, 15 June 2015 (C-76).

702 Permit from the Bardejov District Office of geological exploration rights in Smilno, 17 June 2015 (C-77). See also Application to the Bardejov District Office for permit of geological exploration rights in Smilno, 1 June 2015 (C-75).

703 Road Act, Article 1(1) (R-57).

704 Road Traffic Act, Article 1 (R-174).

705 For instance, the "road manager" or the police have authority to a remove stationary vehicle on such roads if "it forms an obstacle to road traffic". Road Traffic Act, Articles 2(1) and 43 (C-214 and R-174). See also Letter of 3 May 2010 from the Presidium of the Police Forces to Regional Police Directorates, p. 2 (R-202).

four types of "surface roads" or "surface communications" depending on "traffic significance, destination and technical equipment":[706] highways, roads, municipal communications, and special purpose communications.[707] The Parties' common understanding is that PSPRs fall within the last category of "special purpose communications" (the Slovak expression in the Road Act is *účelové komunikácie* and in the Road Traffic Act it is *účelových komunikácií*).

448. The Parties agree that anyone may use the four types of "surface communications" listed in Article 2(1) of the Road Act pursuant to the right of "general use" enshrined in Article 6(1) of the Road Act, which reads as follows:

> "Traffic on surface communications is regulated by special regulations; within their boundaries, everyone can use surface communication[s] in the usual way for the purposes for which they are intended (hereinafter only 'general use'). The users must adapt to the construction condition and traffic-technical condition of the affected communication; it must not damage or pollute it".[708]

449. It follows that the right of "general use" extends to the four categories of roads listed in Article 2(1) of the Road Act, not to other types of roads or tracks.[709] It also follows from this provision that roads must be used "in the usual way", "for the purposes for which they are intended", and taking into account their "construction […] and traffic-technical condition".

450. Moreover, in respect of the fourth road category, Article 22(3) of the Road Act distinguishes between "public and non-public" PSPRs. It establishes a presumption that PSPRs are public, unless they are located "within closed premises or isolated objects" or have been classified as "non-public" by the municipality "with the consent of its owner".[710]

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706 Road Act, Article 1(2) (R-57).

707 Road Act, Article 1(2)(a)-(b) (R-57); Road Traffic Act, Article 2(1) (C-214 and R-174). The Claimant and Prof. Števček do not dispute that the four categories of roads mentioned in Article 2(1) of the Road Traffic Act correspond to the four categories listed in Article 1(2) of the Road Act. Reply, para. 73; Tr. (Day 4), 50:11-18 (Števček).

708 Road Act, Article 6(1) (R-158).

709 The Tribunal notes the Respondent's explanation that, although the 2016 version of the Road Act "did not list special purpose roads" in Article 6, because PSPRs are either public or private, the right of general use nonetheless applied to PSPRs (Rejoinder, Appendix, note 3). Indeed, in 2011, the Regional Court in Prešov held that, although the right of general use in Article 6 of the Road Act only applied to motorways, roads and local roads, this did "not mean that special purpose roads could not have the characteristic of publicly accessible roads", further adding that "[n]on-inclusion of special purpose roads into Section 6 of the Roads Act was caused solely by the fact that special purpose roads, unlike motorways, roads and local roads, are not exclusively intended for general use". Resolution of the Regional Court in Prešov, File no. 6Co/85/2011, 17 October 2011, pp. 4-5 of the pdf document (C-16).

710 Road Act, Article 22(3) (R-175 and C-221).

In other words, anyone can use a PSPR, unless it is "non-public" and provided the use comports with the road's intended purpose and the user adapts to the condition of the road.[711] If the condition of the road does not allow a specific use, according to Article 19(1) of the Road Act, the user must obtain the agreement of the owner of the road to make the necessary adjustments.[712]

451. Under Article 1(3) of the Road Act, "surface communications", including PSPRs, consist of a "road body and its components", including "outer edges of ditches, gutters, embankments and cuts of slopes, frame and cladding walls":

> "Surface communication consists of the road body and its components. The road body is demarcated [by] the outer edges of ditches, gutters, embankments and cuts of slopes, frame and cladding walls, at the foot of retaining walls and on local roads half a meter behind raised curbs sidewalks or green belts".[713]

452. This provision implies that a field track or a forest road only qualifies as a PSPR if it has a "road body".[714] As noted by the District Court of Prešov and the Regional Court of Kosice, a road is of a "tangible nature that is recognizable in the landscape" and possesses "certain technical qualities", meaning that "any modification of a plot of land from which it only follows that the land is used for communication purposes, e.g. after a path has been treaded and no other roadworks have been constructed, cannot be deemed a road".[715] The Regional

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711 The Regional Court in Prešov confirmed in 2011 that owners of "public" PSPRs cannot exclude the public from using such roads, even if privately owned: "According to Section 22(3) of the Roads Act, special purpose roads are divided into public and non-public special purpose roads. Non-public are only those located in closed areas or structures and those that municipalities re-classify to non-public with their owners' consent. Other special purpose roads are therefore public by their nature. The fact that some special purpose roads are designated as public means that it is impossible that such special purpose roads would be used exclusively by their owners". Resolution of the Regional Court in Prešov, File no. 6Co/85/2011, 17 October 2011, p. 5 of the pdf document (C-16).

712 The Respondent's translation of Article 19(1) reads as follows: "For major constructions, mining works or landscaping that require a building permit or other permit according to special regulations, a surface communication is to be used, the construction and technical equipment of which does not correspond to the required traffic on this road, the necessary adjustments must be made to it after agreement with its owner or manager. If performance of the adjustments is not effective or possible, new road communication that corresponds to [the] expected traffic load must be constructed. Construction of new communication or adjustment of existing surface communication shall be secured on own costs of those who necessitate that need". Road Act, Article 19(1) (R-175).

713 Road Act, Article 1(3) (R-57 and R-175).

714 "MR DRYMER: […] If a field road meets the criteria set out in Article 1(3) of the Road Act, is it considered a special purpose road; yes or no? A. Yes". Tr. (Day 4), 45:3-6 (Števček). See also Rejoinder, Appendix, para. 11.

715 Although the appellate court annulled the first instance decision *inter alia* because the "exact nature of [the] technical quality" of the road in question could not be established from that decision, it did not appear to take issue with the interpretation of Article 1(3). The appellate court only specified that it did "not follow" from Article 1(3) that a road structure had to be connected to the ground by a "solid foundation". On this latter point, the MoT took a different view in a decision rendered in June 2023 where it stated, by reference to Article 22(2)

Court in Košice further held that a road body has its "own legal regime different from the legal regime of a land plot".[716] Thus, for instance, the District Court in Prešov considered that modifying a plot of land by laying concrete panels and pouring gravel was a "temporary alteration" that did not allow it to be deemed a road.[717] Similarly, the Regional Court in Košice found that not even a "concrete pavement layer with the thickness of approximately 20 cm" qualified as a PSPR since it had no demarcation on the outer edges or other characteristics of a road body.[718] For its part, the MoT held that "the laying down [of] macadam or other stone materials on a grass surface or making rutts in a field does not constitute a special purpose road".[719]

453. Article 2(4) of the Road Act specifies that the design of surface communications must be carried out in accordance with applicable technical norms and regulations.[720] The technical norm STN 73 6100, which is entitled "Terminology of Surface Communications", defines a "road body" as a "road structure" consisting of an earth bed, a pavement, shoulders and drainage.[721] An "earth bed" is built of "rock and soil using prescribed technology" with a predetermined shape "depending on the terrain, vertical alignment, type and properties of materials", and is divided into an "embankment", a "cutt" and a "cut-off".[722] In turn, an

read in conjunction with Article 16 of the Road Act, that a PSPR "must have the nature of a structure" that is "firmly fixed to the ground" in the sense of Article 43(1) of the Construction Act. Resolution of the Regional Court in Prešov, File no. 6Co/85/2011, 17 October 2011, pp. 2 and 4 of the pdf document (C-16); Decision of the Ministry of Transport, 19 June 2023, p. 7 of the pdf document (R-204). See also Act No. 50/1976 Coll. on spatial planning and construction order, as amended, Article 43(1) (R-201).

716 Judgment of the Regional Court Košice, case No. 6Co/188/2016, 31 January 2017, para. 42 (R-205).

717 Resolution of the Regional Court in Prešov, File no. 6Co/85/2011, 17 October 2011, p. 2 of the pdf document (C-16).

718 Judgment of the Regional Court Košice, case No. 6Co/188/2016, 31 January 2017, paras. 43-44 (R-205) ("It is clear from the layouts of the 'communication' that it is not is [sic] demarcated the outer edges of ditches, gutters, embankments and cuts of slopes, frame and cladding walls, at the foot of retaining walls. It therefore does not meet the definition of a road body, set out in the Road Act. In addition, it is not connected to the land plot by a subsoil that is usual for any structure of surface communication. […] According to the above, we can derive that from the legal perspective, the 'communication' in question is not a surface communication that has an own legal regime. The appellate court is of the opinion that it is more appropriate to use [the] term [of] a 'civil engineering structure (access road)' for that structure that does not have an own legal regime but a legal regulation of the property – land plot on which it is situated. Since the plaintiff is the owner of the land plot on which the civil engineering structure (access road) in question is located, which was not disputed in the proceedings, the plaintiff should be perceived as the owner of the civil engineering structure (access road) located on the land plot").

719 Decision of the Ministry of Transport, 19 June 2023, p. 7 of the pdf document (R-204).

720 Article 2(4) provides: "The design of surface communications shall be carried out in accordance with applicable Slovak technical norms, technical regulations and objectively ascertained results of research and development for the road infrastructure". Road Act, Article 2(4) (R-175). See Rejoinder, Appendix, para. 6.

721 Emphasis in the original. STN 73 6100 Terminology of Surface Communications (R-58).

722 STN 73 6100 Terminology of Surface Communications (R-58).

"embankment" is "[a]n earth bed built of rock or soil in prescribed dimensions above the original terrain level with landscaped slopes and a plain"; a "cutt" is "[a]n earth bed created by excavation and removal of natural soil (rock) to create a leveled plain"; and a "cut-off" is "[a]n earth bed on a slope created in cross section by a cut on one side and embankment on the other side".[723] In all these cases, the earth bed is typically placed above the original terrain level, on top of which a "pavement" is placed that has "shoulders" and "drainage". Consequently, a road body requires some form of civil engineering and a track leading through a field, even if publicly accessible, cannot qualify as a "road" under the Road Act or the Road Traffic Act.

454. Article 22 of the Road Act, entitled "Special purpose roads", specifies the three purposes of PSPRs: connecting separate manufacturing plants, connecting separate objects and real properties with other roads, and transport within closed premises or isolated objects.[724] Importantly, Article 22(2) of the Road Act read in conjunction with Article 16(1) and (2) requires a permit to build a PSPR or a notification for any "alterations" to the "road body" that "do not interfere" with the road's "load-bearing structure" and "maintenance work" affecting the "stability of the structure".[725]

455. The Claimant relies on Article 22 of the Decree implementing the Road Act, which is also entitled "Special purpose roads", to argue that a field or forest road automatically qualifies as a PSPR irrespective of whether such road meets the criteria of Article 1(3) or whether a building permit was issued for its construction under Article 16 of the Road Act.[726]

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723 STN 73 6100 Terminology of Surface Communications (R-58).

724 Road Act, Article 22(1) (R-175) ("Special purpose roads serve to connect individual manufacturing plants or individual objects and real properties with other surface communications or for transport purposes within closed premises or isolated objects").

725 The Regional Court of Košice confirmed that a PSPR "is subject to authorization procedure resulting in a building permit (Article 16(1) of the Road Act) and/or notification (Article 16(2) of the Road Act)". Judgment of the Regional Court Košice, case No. 6Co/188/2016, 31 January 2017, para. 42 (R-205). Article 22(2) provides that "[t]he provision of Article 16 applies to obtaining permission for the construction of a special purpose road". Article 16(1) and (2) in turn reads in relevant part as follows:

"(1) The commencement of the construction of a highway, road or local communication and their alterations shall require a building permit issued by a special building authority (Article 3a), unless specified otherwise hereinafter.
(2) Notification to the special building authority shall be sufficient for
a) construction alterations to the road body and components of the surface communication […],
b) maintenance work on the road body and on components of surface communications which could affect the stability of the structure, its appearance or the environment in the vicinity of the surface communication […]". Road Act, Articles 16(1)-(2) and 22(2) (R-175).

726 Article 22 of the Decree reads as follows:

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

Although Article 22 of the Decree confirms that "field and forest roads" may qualify as PSPRs, it does not say that *all* field and forest roads always qualify as such. The Tribunal therefore cannot agree with the Claimant's position that any field and forest road automatically qualifies as a PSPR.[727] As discussed above, a field and forest road is a PSPR if it has a road body as defined in the legislation.[728] The difference between roads with a road body qualifying *ex lege* as PSPRs and field or forest roads that do not qualify as PSPRs is reinforced by Article 21(1) of the Road Traffic Act, which distinguishes between PSPRs, field tracks and forest roads.[729] As the Regional Court in Košice held, the consequence of that distinction is that a field track lacking road body "does not have an own legal regime" distinct from that of the land on which it is situated and that the owner of the land also owns the field track.[730]

456. Finally, evidence of the practice of Slovak authorities, such as the police and the MoT, shows that, even if they do not meet the requirements under the Road Act, field tracks may qualify as PSPRs, if they are registered as such in municipal registries, for instance in the "Land Register in the cadastral map or the map of the designated cadastral files", or "in

(2) Special purpose roads in enclosed areas and sites are non-public; other special purpose roads may be declared to be non-public by the local national committee on the proposal of the owner, administrator or user of the road in question, in accordance with generally binding regulations.

(3) The legal position of special purpose roads is governed by general regulations". Decree No. 35/1984, Coll. implementing the Road Act, Article 22 (C-223).

727 The Tribunal notes in this context that the Slovak land registry distinguishes between PSPRs and forest or field roads, thus further confirming that the Claimant's understanding on automaticity is unsupported by its own evidence. Land Registry Extract Plot (945) dated 20 June 2016 (C-139).

728 Although Prof. Števček opined that field roads are "[i]n principle" always PSPRs, he agreed that this was only the case if a PSPR met the technical definition of Article 1(3) of the Road Act, namely that the field road would need to have a "road body" (Tr. (Day 4), 43:6-23 (Števček)). He sought to find comfort for his opinion that field roads qualify as PSPRs in Article 22 of the Decree by arguing that the decree was "lex specialis"; however, he conceded after a prolonged exchange that, in case of conflict between a law and a decree, the former would necessarily prevail as a matter of hierarchy of norms (Tr. (Day 4), 43:24-:49:17 (Števček) and, in particular, 49:14-17 (Števček)). In the end, he insisted on numerous occasions that he was not an expert of road law and the Tribunal therefore did not find his explanations, for instance, that the legislator had committed an "error" and that his interpretation based on the decree was to be preferred, to be convincing or helpful (Tr. (Day 4), 47:12-14 and 49:21-22 (Števček)).

729 Article 21(1) reads as follows: "When entering a road from a place off the road, from a field track, from a forest road, from a cycle path, from a residential area or from a pedestrian zone, the driver shall be obliged to give way to a vehicle driving on the road". Road Traffic Act, Article 21(1) (R-174). This distinction is also confirmed by the definition of "Code 22" in the "C" Register, which refers to "22 – Land, on which an engineering structure is built – road, local and special-purpose road, forest road, field road, sidewalk, uncovered parking lots and parts thereof". See Land Registry Extract Plot (945), 20 June 2016 (C-139). The Tribunal notes that Prof. Števček accepted that Article 21(1) differentiates between PSPRs and field or forest roads. Tr. (Day 4), 51:11-14 (Števček).

730 Judgment of the Regional Court Košice, case No. 6Co/188/2016, 31 January 2017, para. 44 (R-205).

other records (e.g. records of the owner or administrator of forest land, field land, etc.)".[731]

457. To summarize, the review of the applicable Slovak legal framework does not support the Claimant's position that any field track as such is automatically to be characterized as a PSPR under the applicable law. The legal framework confirms that a field track can only qualify as a PSPR if it has a "road body" as defined in Article 1(3) of the Road Act and the applicable technical norms. Slovak practice also envisages the possibility of a field track qualifying as a PSPR if it is registered as such by the municipality or in cadastral maps of the land register. In other words, the Claimant can only succeed with its argument that the Access Road is a PSPR if it can show that it fulfils those technical norms or is registered as a PSPR in official registers. Moreover, even if the Access Road is a PSPR, AOG could only have used it in accordance with its technical condition or subject to the owners' agreeing to any upgrades.

The characteristics of the Access Road

458. The Access Road is located in the municipality of Smilno in the district of Bardejov. The title deed no. 1367 shows that it covers an area of 11,600 m² and is registered as "arable land" in the E Land Registry under the lot number 2721/780.[732] As of June 2016, it was co-owned by 171 individuals.[733]

459. The Parties have referred to land plot no. 2721/780 (registered in the E Land Registry) and to land plot no. 945, which covers an area of 11,566 m² and is registered in the C Land Registry.[734] The cadastral map first put in the record suggests that land plots nos. 2721/780

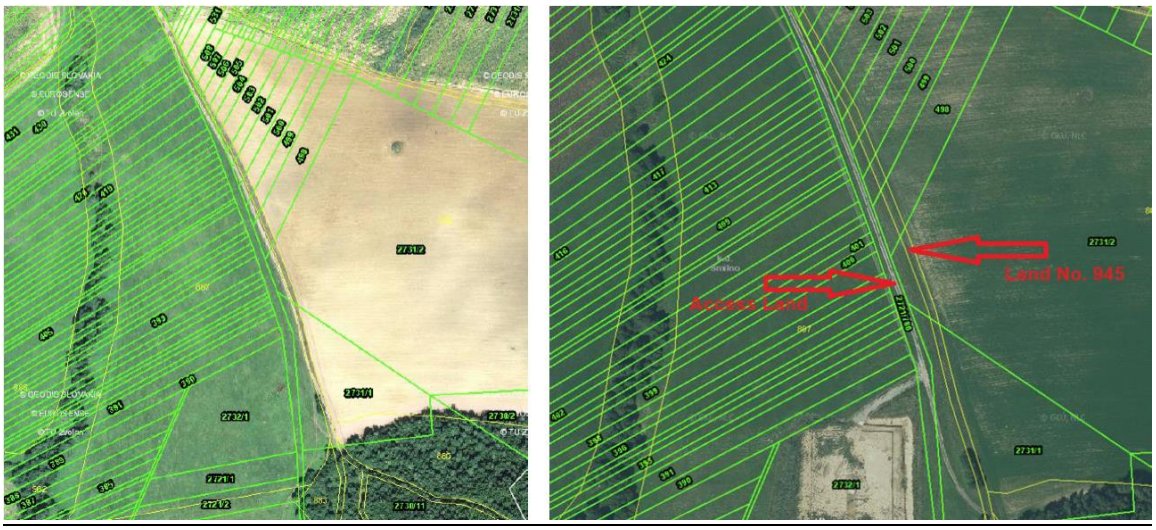
731 Letter of 3 May 2010 from the Presidium of the Police Forces to Regional Police Directorates, p. 2 (R-202); Decision of the Ministry of Transport, 19 June 2023, p. 7 of the pdf document (R-204).

732 Land Registry Extract Plot (2721), 20 June 2016 (C-140); Title Deed No. 1367, 21 March 2023 (R-35).

733 The Claimant asserts that land plot no. 2721/780 was co-owned by 166 individuals. Although the last entry in the extract of the title deed no. 1367 dated 20 June 2016 identifying the last co-owners is number "209", 38 entries have been deleted meaning that the title deed contains only 171 entries. The record confirms that the number of co-owners evolved throughout that period. For instance, in a decision of the Regional Court in Prešov dated 14 April 2016, reference is made to "the other 201 co-owners", which, depending on the reading of that decision, means that there were at that time either 202 or 203 co-owners. By contrast, in a decision dated 16 February 2017, the Regional Court in Prešov stated that title deed no. 1367 listed 216 co-owners. Land Registry Extract Plot (2721), 20 June 2016 (C-140); Resolution of the Regional Court in Prešov, Case Number 22Co/66/2016, 14 April 2016, p. 2 (C-17); Resolution of the District Court Prešov, File No. 20Co/14/2017-256, 16 February 2017, pp. 3-4 (R-59). See Memorial, para. 83; Varjanová WS1, para. 18; Fraser WS1, para. 38.

734 Land Registry Extract Plot (2721), 20 June 2016 (C-140); Land Registry Extract Plot (945), 20 June 2016 (C-139). For instance, the Claimant asserted that the Access Road was, at the same time, registered in the E Land Registry as plot no. 2721/780 and in the C Land Registry as plot no. 945 (Memorial, para. 83).

and 945, although not entirely identical, partly overlap.[735] From the evidence provided with the second round of submissions and in particular the images below, the Tribunal understands that at least until 2010 the Access Road was located on land plot no. 945 (left image) and that, by 2017, it was located, at least in its final section, on land plot no. 2721/780 (right image):[736]



460. Since the Parties agree that, at the relevant time, the Access Road was located on plot no. 2721/780, the Tribunal will primarily refer to that plot, with occasional references to land plot no. 945 where useful.

461. Contemporaneous photographs taken by AOG demonstrate that, at least until June 2016,

735 See Cadastral Map of Land Plots 945 and 2721/780 (R-56). The Tribunal notes that Article 70 of the Cadastral Act establishes a general presumption of validity of cadastral data "unless the contrary is proved", with the exception of "[t]he type of land registered as a parcel of the 'E' register" which "shall not be deemed to be a binding cadastral data". That said, as the Claimant acknowledges, there is no title deed in the record for land plot 945, whereas the record does contain a title deed for land plot 2721/780. Moreover, Ms. Varjanová, one of the undisputed co-owners of the Access Road, testified that she co-owned land plot 2721/780 and she in fact acted in Slovak courts as co-owner of that plot of land. Importantly, AOG entered into a purchase contract on 17 December 2015 to acquire a 1/700 share of the "real property" "registered in the Ownership Certificate number 1367 as land, 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 m²". Finally, Mayor Baran, who is also a co-owner of the Access Road with a 1/315 share, confirmed that title deed no. 1367 related to the Access Road. Accordingly, for all relevant purposes, the Tribunal understands that the Access Road is located on land plot 2721/780. See Act No 162/1995 Coll., on Cadastre of Real Estate and the Registration of Ownership and Other Rights to Real Estate (Cadastral Act) as amended, Article 70 (LF-26); Varjanová WS1, paras. 17-18; Purchase Contract dated 17 December 2015, Article I (C-105); Decision of District Court of Bardejov, 18 February 2016 (C-125); Memorial, para. 83; Land Registry Extract Plot (2721), 20 June 2016, entry 149 (C-140); Tr. (Day 3), 63:20-64:2 (Baran) ("Q. […] So we will pull up the title deed, which is C-140. So if we zoom in, this is an extract from the Land Registry, extract from title deed number 1367. We can see that the date of execution is 20 June 2016. So, sir, do you agree that this is the title deed for the field track, or field road? A. Yes").

736 Rejoinder, Appendix, p. 16. See also Aerial photographs of the field track (R-209).

the Access Road was a field track with no discernible road body. In proximity of the drill site, the track was overgrown with grass with slight markings suggesting that agricultural vehicles occasionally drove over it. Both Ms. Varjanová and Mr. Baran agreed that it was mainly used by local farmers to access the surrounding agricultural lands.[737] Mr. Baran testified that it was also used by hunters, by others collecting strawberries, mushrooms or wood, and by cyclists.[738] Until the end of World War II, the track had also been used to access a quartz mine, which, according to Mr. Baran, used to be "located just 100 hundred meters from AOG's proposed drilling site" within the "V shaped 'forest' next to it".[739]

462. The Access Road is a little over 1km long (between 700 and 800 meters according to Mr. Baran)[740] going from the village of Smilno to AOG's drill site.[741] The following image shows the Access Road marked in bright green and the drill site in the lower right corner:[742]

737 Varjanová WS2, para. 19; Baran WS, para. 19; Tr. (Day 3), 38:12 (Baran).

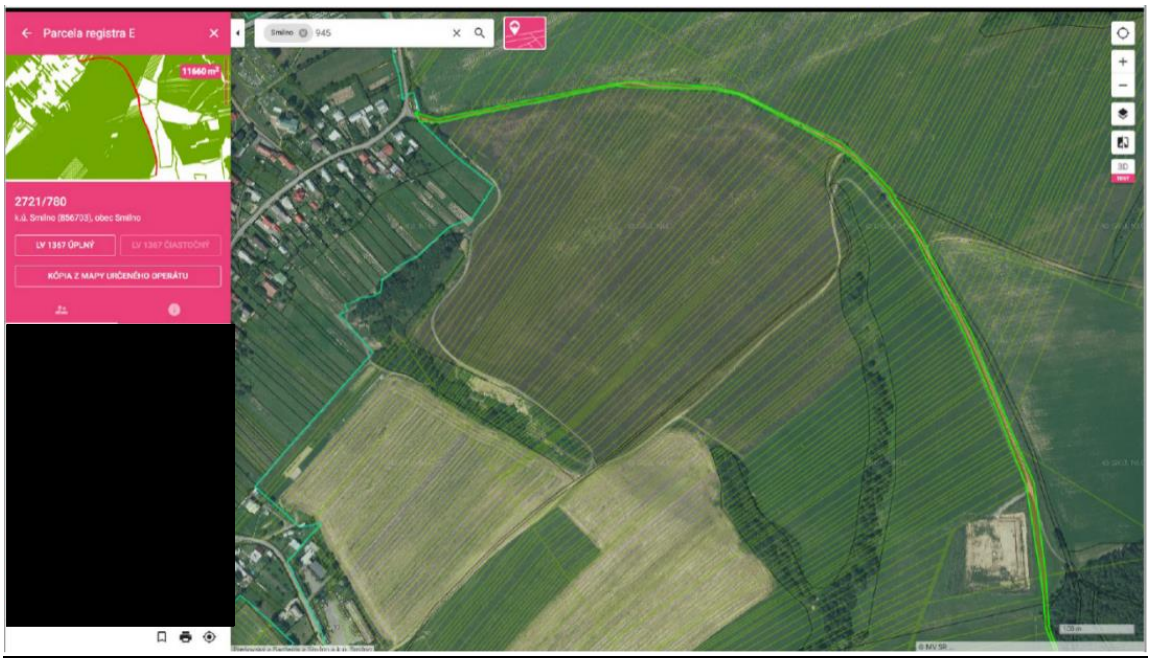
738 "That the road has been used not only by farm vehicles, but also by hunters, by people who were collecting or driving the wood from the forest, by people who go there – I cannot say on a daily basis, because it's not. They're going there to pick up mushrooms, in cars, on motorcycles, pick up strawberries, whatever. So it's a combination of those things. But it's used by public, and it's also a connection – field connection between villages, Smilno and Mikulašová and Cigla for tourists; they use it a lot, bicycles, nowadays"). Tr. (Day 3), 38:12-21 (Baran).

739 Baran WS, para. 19; Tr. (Day 3), 38:3-40:16 (Baran). A historical map from 1920 shows a road leading to the V-shaped forest and the inscription of the word "*Kreminka*" within the forest. Map of Smilno, 23 August 2023 (C-420).

740 Tr. (Day 3), 32:22-24 (Baran).

741 According to AOG's drilling plan, the drill site was "situated about 800m from the southeast boundary of the village in field of crops" and at an "approximate distance" of 1km from the main road no. 77 connecting Bardejov and Svidník. See Detailed Drilling Programme Smilno, December 2015, p. 19 (C-95); AOG Smilno Project of Geological Works, 11 November 2015, p. 13 (C-88).

742 Photograph of the Smilno well site locations; access road (C-227). See also Well site locations visit note, 20 August 2014, p. 15 of the pdf document (C-60).



463. When going from Smilno (in the top left corner) towards the drill site, at about half the distance, another field track bifurcates to the left leading to the village of Mikulášová. According to Mr. Baran, that track was commonly used in the past to connect both localities before a municipal road was built.[743] This may explain why the first half of the Access Road appears paved whereas the second half does not.[744] Mr. Baran also stated that the first part of the road was "used much more", and that the second "was the less-used road".[745] Ms. Varjanová's evidence confirms that "the sections near the municipal road were in better condition than the upper-lying sections", the "initial sections [being] mostly composed of gravel", while the "upper sections [i.e. the second part] were, at most, a mere visible trace left by vehicles that passed over them, depending on the agricultural cooperative's needs".[746]

464. The following three pictures were taken by AOG in August 2014 from the position indicated in the lower left corner: the first at the junction with a municipal road in Smilno,

743 Tr. (Day 3), 38:18-21 and 59:23-60:16 (Baran) ("This one was used much more towards the village of Mikulášová, because they are also employees, and when it's good weather they go by terrain vehicles towards the farm, not using the main road").

744 Tr. (Day 3), 42:14-15 (Baran); Varjanová WS2, para. 20 ("As for the track surface, the sections near the municipal road were in better condition than the upper-lying sections. The initial sections were mostly composed of gravel. However, the upper sections were, at most, a mere visible trace left by vehicles that passed over them, depending on the agricultural cooperative's needs").

745 Tr. (Day 3), 38:18-21 and 59:23-60:16 (Baran).

746 Varjanová WS2, para. 20.

the second at about half-point, and the third in proximity of the drill site:[747]

747 Well site locations visit note, 20 August 2014, pp. 8-10 of the pdf document (C-60).

465. Mr. Baran said that the last picture does not depict the Access Road, which was further to the "upper right side".[748] Be this as it may, the following picture taken on 21 July 2015 and showing Mr. Baran (on the left) standing on the Access Road corroborates that the Access Road close to the drill site was best characterized as a track that passed through the fields:[749]

748 According to Mr. Baran, the site where AOG would ultimately prepare the drill site is, on the third image, located "like 100 meters straight forward". Tr. (Day 3), 41:12-17 (Baran).

749 Email of 5 August 2015 from Michael Lewis, p. 3 of the pdf document (C-281).

466. It is clear from these pictures that the Access Road had no road body. This is buttressed by Mr. Baran's explanation that the exact location of the track changed depending on the season as users sought to avoid the mud caused by heavy rainfall.[750] In fact, the purpose of AOG's 21 July 2015 site visit with Mr. Baran and a "farm engineer", i.e. a member of the board of the Smilno Bio-Association, was precisely to determine "the location of the access road", meaning that the layout of the track was not necessarily apparent on the ground.[751] Following AOG's 21 July 2015 site inspection with Mr. Baran, Mr. Lewis informed the JV Partners that Mr. Baran had requested that the track "be moved a few meters from its original position".[752]

467. It is also clear from these pictures and the evidence more generally that the track as AOG found it was not suited to move heavy machinery. AOG was aware of this, as it planned to upgrade the field track and eventually did so.[753] Specifically, in June 2016, AOG hired the

750 Tr. (Day 3), 30:6-13 (Baran) ("A. Well, I'm not sure it was exactly the track, because there, at that time and even now, there are like two tracks, and when it was muddy, you know, the vehicles went to the left or right, you know, not to get into mud. So it's definitely the direction, but I'm not sure whether we're exactly on that road, I mean geographically. But yes, we're on that road, yes, in the direction to that site").

751 Minutes of Meeting, 21 July 2015 (C-280).

752 Email of 5 August 2015 from Michael Lewis, p. 2 (C-281).

753 For instance, in August 2014, AOG deemed that "maybe half length [sic] of this road requires some modifications only" (Well site locations visit note, 20 August 2014, p. 16 of the pdf document (C-60)). In an internal email dated 6 July 2015, AOG stated that the Access Road "will be repaired and modified in some parts and its 150m part close to the well site will be moved to other location as requested by the mayor and in assistance of surveyor" (Email of 6 July 2015 from Ron Crow, p. 1 (C-278)). Then, in a progress report dated 25 August 2015, Mr. Lewis told the JV Partners that "[a]ccess from the main highway is under construction"

company GMT Project to "upgrade" the Access Road "by laying some more crushed stone along the length of it",[754] which the following image depicts:[755]

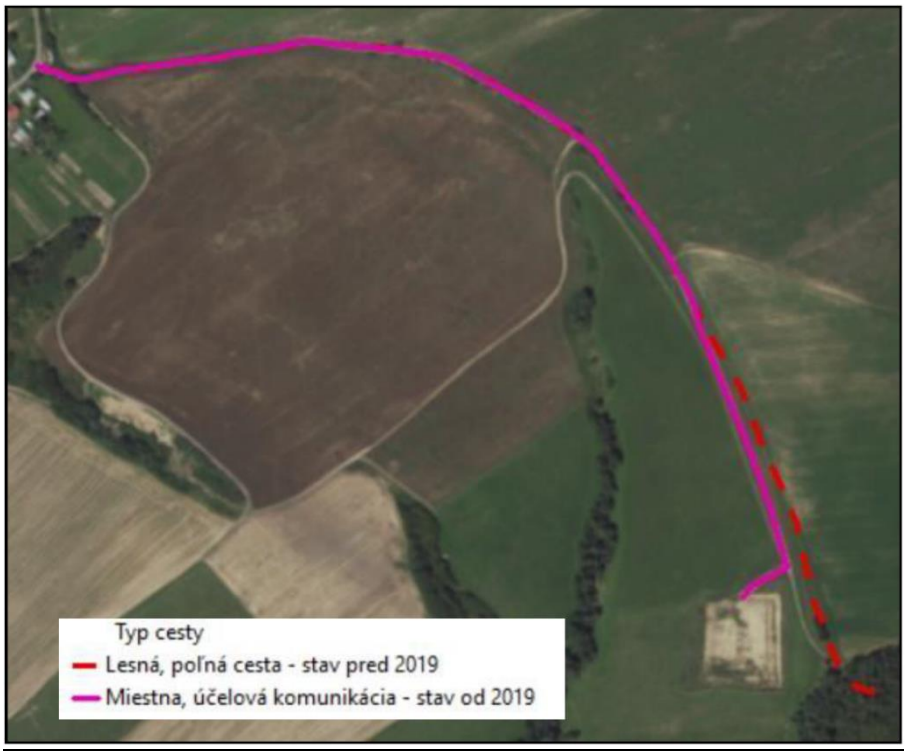
468. In upgrading the track, AOG created "an actual, makeshift 'road'", by moving the last part of the Access Road, originally located on land plot no. 945 (the red dotted line in the photo below), onto land plot no. 2721/780 (the magenta colored line):[756]

and "would be finished by September 15th", further adding that AOG was "in contact with the road construction company", which "will prepare the entrance to our requirements" (Partner Progress Report, 25 August 2015 (C-79)). Although AOG projected a slide during a meeting of the operating committee on 16 September 2015 imaging the Access Road and drill site saying "[l]ess road construction necessary" (Opcom Presentation, 16 September 2015, slide 73 (C-80)), it then told its JV Partners on 3 December 2015 that "[t]he access road will need to be upgraded and in one place relocated slightly, by agreement with the mayor" (Opcom Minutes, 3 December 2015, p. 1 (C-100)). According to AOG's December 2015 drilling program, it hired the company TDE Field Services to build the "access road to the drilling site", but local protests in that month prevented any construction works (Detailed Drilling Programme Smilno, December 2015, p. 22 (C-95)). Mr. Fraser testified that AOG's plan was to "improv[e] the access road, by levelling and draining certain sections of it" (Fraser WS1, para. 34).

754 Fraser WS1, para. 52; Fraser WS2, paras. 13-15. On 18 May 2016, AOG requested from GMT an offer for the "construction/improvement" of the Access Road. That request distinguished works between a 380-meter section of "[u]npaved road" from the bifurcation to the drill site, a 940-meter section of "[p]aved road", and a 20-meter section at the point of entry to the Access Road in the village of Smilno. GMT was asked to lay crushed stone and create drainage on the unpaved section, to improve drainage on the paved section, and to spread some sand or crushed stone to "improve existing road" at the entry point. Email from [redacted] attaching request for quotation from GMT Projekt, 18 May 2016, pp. 1-2 and 7-12 of the pdf document (C-309).

755 Counter-Memorial, para. 102.

756 Compare Statement from the Geodesy and Cartography Office of the Slovak Republic, 8 December 2023, p. 3 of the pdf document (R-212) with Aerial photographs of the field track, pp. 3 and 5 (R-209).



469. The Claimant raises several arguments in an attempt to buttress its PSPR argument. First, it argues that the entry code "22" in the C register for plot no. 945 shows that the Access Road is a PSPR.[757] Code "22" is defined as "[l]and, on which an engineering structure is built – road, local and special-purpose road, forest road, field road, sidewalk, uncovered parking lot and parts thereof".[758] As discussed above, the Claimant's reliance on this register is misplaced since the Access Road is situated on plot no. 2721/780, not on plot no. 945. In any event, code "22" distinguishes PSPRs and forest or field roads and it is impossible to discern from this extract of the register whether plot no. 945 is a PSPR or a field road.[759] Moreover, the extract is dated 20 June 2016, i.e. after AOG's upgrades that took place on 7 June 2016. This means that the Tribunal cannot determine whether this entry relates to the situation before or after the upgrade.

470. Second, the Claimant argues that the contemporaneous cadastral map for land plot no. 945 taken from the online portal of the ÚGKK demonstrates that the Access Road is a PSPR.[760] However, just as with the C register discussed above, the Claimant's reliance on this map is inapposite, since it concerns land plot no. 945 and appears to have been generated after

757 Memorial, para. 84.

758 Land Registry Extract Plot (945), 20 June 2016 (C-139).

759 Tr. (Day 3), 62:12-63:19 (Baran).

760 Tr. (Day 1), 41:17-42:2 (Tushingham); Claimant's Opening Presentation, Slide 83.

AOG's upgrade.[761]

471. Third, the Claimant contends that historical maps and satellite imagery from Google Earth confirm that the Access Road "always has been" publicly accessible and therefore a PSPR.[762] However, these documents are similarly inconclusive. Although the historical military map of 1920 and the ÚGKK map of 2000 identify the Access Road with a "solid black line", there is no legend attached to those maps allowing to ascertain the meaning of that line.[763] As for the satellite image, allegedly from 2006, it only shows a track leading towards the drill site and going into the forest.[764] If anything, that image confirms that the track bifurcating towards the village of Mikulášová was more used at the time than the track in question.

472. Fourth, the Claimant argues that two other official maps on the ÚGKK portal confirm that the Access Road is a PSPR and adds that "Discovery/AOG consulted and relied upon these official maps".[765] These maps identify the Access Road as an "unpaved road"[766] or as a "local, purpose-built communication" whose "surface type" is "loose/unpaved".[767] This description suggests that there is no road body in the sense of Article 1(3) of the Road Act. More importantly, it is apparent that these maps post-date the June 2016 upgrade of the Access Road since they identify the drill site and the last part of the road (the "hook")[768] leading from plot no. 2721/780 to the drill site. In fact, these maps appear to have been generated or downloaded in 2019 or later.[769] Accordingly, they cannot be relied upon as an accurate representation of the situation that pertained at the relevant time.

473. Information provided by ÚGKK on 8 December 2023 and submitted with the Rejoinder suggests that the Access Road was added to ÚGKK's database system (the "ZBGIS system") in 2006 and 2008 and was registered as a "field track until 2019" (in Slovak, a

761 Letter from AOG's Attorney to Bardejov Police, 17 June 2016, p. 6 of the pdf document (C-315). Here too, Mr. Baran confirmed that it was impossible to ascertain from that map and its legend whether the Access Road was registered as a PSPR or a field/dirt road (Tr. (Day 3), 53:14-20 (Baran)).

762 Reply, para. 60(4)-(5); Claimant's Opening Presentation, Slide 62.

763 Historical Military Map of Smilno, 1920 (C-420); Map of Smilno, 2000 (C-245).

764 Google Earth Satellite Images of Smilno, 2006-2016, p. 1 of the pdf document (C-246).

765 Reply, para. 60(2)-(3) and note 119.

766 Map of Smilno, 23 August 2023, pp. 1 and 3 of the pdf document (C-418). See Reply, para. 60(3); Tr. (Day 3), 58:20-59:6 (Baran).

767 Map of Smilno, 23 August 2023, p. (C-419). See Reply, para. 60(3); Tr. (Day 3), 58:20-59:6 (Baran).

768 Rejoinder, Appendix, para. 51.

769 Statement from the Geodesy and Cartography Office of the Slovak Republic, 8 December 2023 (R-212); Tr. (Day 3), 50:21-52:4 (Baran).

"*Lesná, poľná cesta*").[770] The Claimant did not challenge or otherwise comment on this information during the Hearing.[771] The Tribunal therefore can only conclude that the maps and other documents invoked by the Claimant do not support its argument that the Access Road was a PSPR at the relevant time.

474. As a final point, it is recalled that the Smilno municipality confirmed on 3 November 2016, in response to a request for information from the District Police Directorate of Bardejov, that it never issued any "building permit" in relation to "plot of land E 2721/780", nor had it ever "permitted any construction and technical modification".[772] Considering that the construction of a PSPR requires a permit under the Road Act, that statement as well as the absence of any affirmative evidence of any building permit serves to confirm the conclusion that the Access Road was not a PSPR at the relevant time.

475. In sum, against the background of the applicable legal framework, the evidence before the Tribunal as to the physical characteristics of the Access Road establishes that it was not a PSPR.

Due diligence and knowledge of the status of the Access Road

476. The Tribunal notes that in the course of the Hearing it became increasingly apparent that the Claimant had not conducted any meaningful legal due diligence as to the status of the Access Road,[773] although it claimed to have carried out a "factual due diligence" that it said was "extensive".[774] Without addressing whether, in light of its timing, such a purported exercise of due diligence can satisfy the requirement for the invocation of legitimate expectations, the Tribunal notes that the claims as to the exercise in due diligence included "going around and talking to the mayor", and consulting "multiple" "official maps" that

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770 It was first registered on 18 September 2006, based on "[v]erified data", as a "[l]oose/unpaved" "[f]orest, field track" that was "[n]ot maintained in winter". It was then registered on 3 November 2008 "[a]fter on-site inspection" as a "[l]oose/unpaved" "[f]orest, field track" that was "[i]n working condition". The Statement goes on to mention that the status changed on 10 May 2019 to a "local, special-purpose road" (in Slovak, a "*Miestna, účelová komunikácia*"), "based on the assessment by the authorized maker (*of the map*) of how the objects appear in the terrain", it being specified that that determination was "not based on legal documents or opinions" and was "for information purposes only". Statement from the Geodesy and Cartography Office of the Slovak Republic, 8 December 2023, pp. 1-3 of the pdf document (R-212).

771 This document was put to Mr. Baran during cross-examination, but the Claimant did not further raise any issue in its respect during re-direct or at any other time during the Hearing. Tr. (Day 3), 50:21-51:5 (Baran).

772 Letter of 3 November 2016 from Smilno Municipality (R-61).

773 Tr. (Day 1), 28:5-30:19 (Tushingham) ("Of course we can't point to a legal opinion that has been produced in this arbitration which confirms at the time that the road was a public road" and "We can't point to a document which expressly confirms that at the time, prior to the investment, that the road was a public road"). See also Tr. (Day 2), 136:20-22 (Fraser) and Tr. (Day 2), 221:22-222:6 (Lewis).

774 Tr. (Day 1), 29:19-23 (Tushingham).

"expressly identified the road".[775] These investigations were sufficient for Mr. Lewis to say that he "knew at the time" – that is to say by early 2016 – that "there was a public right to use the road".[776] Discovery relied on Mr. Baran's statement that the Access Road was a "public road" or "publicly accessible", which it found "entirely reasonable" and "plainly sufficient", especially since "[n]obody at that time was raising any suggestion that this was private property", adding that "the documents are consistent with that".[777]

477. These explanations are not convincing. There is no evidence before the Tribunal that Discovery obtained legal advice as to the status of the Access Road. Had it done so, it would have discovered that: the operator of the quartz mine, which was in operation until the end of World War II, had secured a lease from the then owner(s) of the field track to access the mine;[778] the Access Road was on privately owned land; even if "publicly accessible", it could only be used for its intended purpose, which did not include the transportation of drilling equipment; under Article 19(1) of the Road Act, upgrading the Access Road required the consent of the land owners;[779] and an agreement with the land owners of the Access Road was required on "the scope, manner and duration" of any exploration, which was also clear from the 2010 license renewal.[780]

478. The Claimant's argument that at the time nobody suggested to it that the Access Road was privately owned is irreconcilable with the facts. In a weekly report of 20 May 2015, Mr. Crow wrote that AOG was finalizing the lease for the drill site and the "road use permit". He added that Mr. Baran would "work with us and our permit group to get all land

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775 Tr. (Day 1), 29:19-30:19 (Tushingham).

776 Lewis WS1, para. 57.

777 Tr. (Day 1), 28:24-29:4 and 30:3-7 (Tushingham).

778 Tr. (Day 3), 39:23-40:3 (Baran) ("Q. So historically the road was leased to a person or a corporation which operated a quartz mine there? A. Exactly. Q So they were using the road on the basis of the lease they had with the owner of the road; correct? A. Correct").

779 Road Act, Article 19(1) (R-175).

780 Mr. Fraser testified that, once he formally became AOG's full-time CFO in July 2015, he assumed the "responsibility for monitoring regulatory or legal matters". He further stated that he generally "became aware" of Article 29 of the Geology Act "probably mid- or late 2015", but not of the "particular subparagraph" in Article 29(3). He could not "recall" when he became aware of that particular provision, further adding that "the day-to-day permitting was handled" by AOG's "Czech country manager", Mr. [redacted], who allegedly "held our hand to make sure we complied with all aspects of the permitting side, including 29(3)". Tr. (Day 2), 4:17-8:1 (Fraser); Geology Act, Article 29(3) (R-42). Additionally, as the Bardejov police directorate did, the Claimant could also have formally asked the Smilno municipality whether a permit had ever been delivered in relation to the Access Road (see Letter of 3 November 2016 from Smilno Municipality (R-61)).

owners permission".[781] Once AOG had secured the lease for the drill site,[782] Mr. Lewis updated the JV Partners on 25 June 2015 that AOG was "[w]orking on the road use permit" and that Mr. Baran would "work with us and our permit group to get any remaining landowner permissions".[783] Then, after the 21 July 2015 site visit, Mr. Lewis informed his JV Partners on 5 August 2015 that the "[a]ccess road is a public road" and that an "[a]greement between AOG and mayor + land user was done to use and prepare current track".[784] Finally, on 25 August 2015, Mr. Lewis told his JV Partners that "[a]ll land permits including for the entry road have been received".[785]

479. The evidence thus makes clear that AOG was aware that it needed "land owner permission" to use the Access Road. Leaving aside the inconsistency between the information that the Access Road was a "public road" and "publicly accessible", and the need to secure a "permit", the Claimant's account that it had entered into an agreement with "mayor + land user" to "use and prepare current track" was strongly refuted by Mr. Baran. The latter repeatedly declared that "[t]here was not an agreement".[786] He explained: "But I didn't sign an agreement. I couldn't. You know, the village is not the owner of the road […]".[787] He also specified that he had not authorized AOG to perform any works on the Access Road: "I couldn't allow them to do the works".[788]

480. It appears to be the case that Mr. Baran said to AOG that the Access Road was a "public

781 Email of 20 May 2015 from Ron Crow (C-424). See also Email of 20 May 2015 from Michael Lewis (C-423). Mr. Fraser stated that Mr. Baran had been "very supportive" and that "he undertook to help us get landowners' permissions" (Fraser WS1, para. 34).

782 Lease for Smilno well site, 1 June 2015 (C-74); Lease of land for Smilno well site, 15 June 2015 (C-76).

783 Email of 24 June 2015 from Mike Lewis to Partners (C-78). The Tribunal further notes that AOG met with the Smilno municipal council on 2 June 2015 to explain its "proposed plans" and answer any questions of the council members. According to Mr. Baran, he and the council members "all agreed that it was not a matter that we could decide on", since that "was a matter between AOG, the State *and the owners of the land*" (emphasis added by the Tribunal). Baran WS, para. 8.

784 Email of 5 August 2015 from Michael Lewis, p. 2 (C-281).

785 Partner Progress Report, 25 August 2015 (C-79).

786 Tr. (Day 3), 36:16 (Baran).

787 Tr. (Day 3), 36:20-22 (Baran). See also Tr. (Day 3), 37:4 (Baran). The Tribunal notes in this context that Mr. Fraser first stated that "it was agreed that there was no issue about using the Road for the purposes of AOG's planned well operations". At the Hearing, he conceded that the signed 21 July 2015 meeting minutes did not record any agreement and specified that his understanding was that there had been a "verbal agreement". Fraser WS2, para. 9; Tr. (Day 2), 125:17-21 (Fraser).

788 Tr. (Day 3), 37:9-15 (Baran).

road",[789] which might have created a misunderstanding. However, there is no evidence to support the assertion that he said that "no permission was required from any person to use the Road".[790] Neither is there a suggestion that a private entity could upgrade a public road, if it was one, without a permit. In any event, a prudent developer would have sought to confirm the mayor's assertion and to ascertain what it meant for its use with heavy machinery – among other aspects of a basic due diligence.

481. The lack of meaningful due diligence is of particular concern as Mr. Baran apparently told AOG during the 21 July 2015 site visit that the Access Road would have to "respect[]" the "original boundary" of land plot no. 945.[791] In spite of this instruction, AOG levelled the "last 500 meters or so" of the track on land plot no. 2721/780.[792] Assuming that AOG thought that the track on land plot no. 945 was "publicly accessible", it could not reasonably expect to be able to displace the track without prior authorization.

482. Be this as it may, subsequent events leave no doubt that the Claimant knew – or should have known – that the Access Road was situated on private property. After meeting with the initial resistance from Ms. Varjanová at the beginning of December 2015, AOG sought to purchase a 1/700 ownership share of plot land no. 2721/780.[793] The Claimant explained that purchase as a "backup plan" to secure "an additional basis to access the Smilno Site".[794] Whatever the merits of that assertion, the evidence shows that, at the very latest from then on AOG was not only aware that the Access Road was claimed as private property,[795] it also began acting in accordance with what it considered to be its rights as

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789 Baran WS, para. 19; Tr. (Day 3), 37:19-38:1 (Baran) ("MR DRYMER: The first sentence of that paragraph says: 'Access road is a public road.' A. Yes. MR DRYMER: Do you consider that an accurate statement? A. Yes. MR DRYMER: Okay. Did you express that to them, to AOG at the time? A. Yes").

790 As AOG seems to have concluded (Fraser WS1, para. 35).

791 The meeting minutes read in relevant part as follows: "The subject of the investigation was the location of the access road on Parcel Type C, Serial No. 945 (unrecorded ownership sheet – built-up area (road)). Individual comments: Provided that the original boundary of the land, serial number 945 registered as built-up area – road, will be respected". Minutes of Meeting, 21 July 2015 (C-280).

792 The Claimant explains that, on 19 November 2015, AOG received a report from a surveyor that "marked out the coordinates of the Smilno Site as well as the '*access road*', the coordinates of which had been based on the '*current cadastral map*'". The report states that "[d]emarcation was carried out on the basis of the coordinates supplied by the client of the contract and the current cadastral map". It is not possible to determine from the coordinates in that report on which land plot the road was to be located, but it is undisputed that AOG relocated that road on land plot no. 2721/780, at least in the last section in proximity to the drill site. Reply, para. 61(4), referring to Delineation Protocol, 19 November 2015 (C-284).

793 Purchase Contract, 17 December 2015 (C-105).

794 Reply, para. 57.

795 According to the police report filed by AOG on 14 December 2015, Ms. Varjanová parked her car on the Access Road and stretched "a line" across the road "with a sign saying Private property". Thus, AOG was aware at the latest from that moment onwards that the Access Road was claimed to be private property. Email

one of the owners. AOG's local lawyer, Mr. Slamka, asked Ms. Varjanová on 30 December 2015 to remove her car on the ground that she was "hindering the co-owner" from entering and transiting through land plot no. 2721/780.[796] Similarly, AOG filed a criminal complaint against Ms. Varjanová on 16 January 2016 alleging a violation of its "rights as a co-owner of this real property".[797] Moreover, early 2016, AOG sought and obtained the consent of at least one co-owner "to the use of the field road located on plot no. 2721/780".[798]

483. Furthermore, in a report to the JV Partners dated 21 January 2016, AOG even acknowledged that Ms. Varjanová, who was "one of 700 owners on the access road" had the "legal right to park her car on the road".[799]

484. Thereafter, the Claimant again attempted to acquire a share of land plot no. 2721/780. In a report dated 7 March 2016, AOG informed its JV Partners that it intended to buy a share because "[o]nce we own a legitimate share, we are assured that we can legally remove any blocking cars, and can return to work".[800] For that purpose, in April 2016, AOG created the company Cesty Smilno s.r.o. (or "Smilno Roads"), which was to purchase a share of plot no. 2721/780 and lease access to that plot to AOG.[801] In the following month, it continued to ask for the consent of other owners.[802]

485. In this context, it is telling that there is no evidence that AOG asserted that the Access Road was a PSPR before April/May 2016. Mr. Fraser explained at the Hearing that the PSPR argument was developed by AOG's new local lawyer, Mr. Sýkora, in the spring of 2016.[803]

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of 14 December 2015 from [redacted] to AOG with attached Police reports, p. 2 of the pdf document (C-102).

796 Letter of 30 December 2015 from Law Office Slamka to Mrs. Varjanová (R-36).

797 See Resolution of the District Police Department Bardejov, 15 February 2016, p. 1 (R-150).

798 See Letter of 18 May 2016 from Mr. [redacted] (R-64). The Respondent mistakenly labelled this exhibit as "Consent from Mrs. [redacted]" dated 23 May 2016, when in reality the document is a letter sent on 18 May 2016 from Mr. [redacted] seeking to obtain Ms. [redacted]'s consent.

799 Report to Partners – Status Update, 21 January 2016 (C-120). In reality, there were about 170 co-owners.

800 Status Update and Activity Summary, 7 March 2016, p. 1 (R-154).

801 AOG Status Update, 11 May 2016, p. 1 of the pdf document (C-308) ("We have now secured an ownership interest in the access road by establishing a new Slovak company which will lease access to Alpine personnel and contractors"). See also Slamka Partners – Smilno report by JUDr. Pavol Vargaestrok of the events on 16-18 June 2016, 14 December 2016, p. 1 (C-161).

802 According to an internal email dated 7 May 2016, a total of "62 consents from 152 holders" had been obtained, 34 by Cesty Smilno and 28 by AOG. Email of 7 May 2016 from [redacted] (C-306); Letter of 18 May 2016 from Mr. [redacted] (R-64). As noted above, the Respondent mistakenly labelled this exhibit as "Consent from Mrs. [redacted]" dated 23 May 2016.

803 Mr. Fraser testified that AOG had retained Mr. Sýkora in March or April 2016: "2016, yes. March, April, I don't recall now. But probably March". Tr. (Day 2), 17:12-19:3 (Fraser).

He confirmed to the Tribunal that before then he had not been aware of the concept of "public special purpose road".[804] Acting on AOG's behalf, Mr. Sýkora first advanced that argument in a request to the municipality of Smilno on 17 May 2016 requesting confirmation that the road was a PSPR which had been used "by citizens, as well as by a local farmers' cooperative, for decades without any restrictions".[805] This request is the first documentary evidence showing some effort on behalf of the Claimant to ascertain the legal status of the Access Road, which reinforces the lack of earlier due diligence.

486. In conclusion, the record demonstrates that, to the extent that due diligence at such late stage of the project may be relevant at all, the Claimant carried out no meaningful or any due diligence about the legal status of the Access Road before the spring of 2016; that it was aware that the Access Road was situated on private property by 17 December 2015 at the latest; and that it did not allege that the Access Road was a PSPR before May 2016.

Slovak authorities consistently rejected the Claimant's PSPR argument

487. The competent Slovak authorities, including the mayor of Smilno, the Bardejov district traffic inspectorate, the MoI, and the first instance and appellate courts all rejected the PSPR argument.

488. As noted above, AOG first requested information from the mayor of Smilno about the "nature of the road" in an email of 17 May 2016.[806] That email had two attachments, which the Claimant filed at the Hearing.[807] The first attachment is AOG's request for information, which reads in relevant part as follows:

> "We request the provision of the following information:
>
> (i) Is the aforementioned field road a public or non-public special purpose road?
>
> (ii) Is the Town of Smilno the owner of the above-mentioned special purpose road?
>
> (iii) Who conducts the management and maintenance of this special purpose road?"[808]

489. The second attachment is a draft provided by AOG for Mr. Baran's suggested use as a

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804 Tr. (Day 2), 16:12-25 and 17:8-11 (Fraser).

805 Email of 17 May 2016 from M. Sýkora to Smilno Municipality (R-155A).

806 Email of 17 May 2016 from M. Sýkora to Smilno Municipality (R-155A).

807 In the course of the Hearing, the Respondent requested production of the attachments and the Claimant voluntarily provided to the Respondent first a Slovak version of the two attachments and then an English translation, which the Respondent accepted, subject to a "correction", and entered into the record as exhibit R-155A. Tr. (Day 2), 21:4-14 (Alexander), 56:6-25 (Tushingham), 58:19-13 (Anway and Tushingham) and 90:18-25 (Tushingham and Alexander).

808 Email of 17 May 2016 from M. Sýkora to Smilno Municipality, p. 2 of the pdf document (R-155A).

template for a response. It reads as follows:

> "Upon reviewing your request, we provide the following statement:
>
> *(i) Is the aforementioned field road a public or non-public special purpose road?*
>
> The field road located on the land parcel EKN parcel No. 2721/780 in the cadastral area of Smilno is **a public special purpose road.**
>
> *(ii) Is the Town of Smilno the owner of the above-mentioned special purpose road?*
>
> The Town of Smilno is not the owner of the above-mentioned special purpose road.
>
> *(iii) Who is responsible for the management and maintenance of this special purpose road?*
>
> The Town of Smilno does not have knowledge of who conducts the management and maintenance of this utility road".[809]

490. Mr. Baran did not use the template. In his answer of 6 June 2016, he wrote that the Access Road was a "field track" ("*polná cesta*") that was "publicly accessible" considering that it had been "used by the general public for many decades (100-200 years) as access road to access the adjacent plots of land and a quartz mine".[810] He added that the municipality "is not the owner of the above mentioned field track".[811] At the Hearing, Mr. Baran testified that he purposefully refrained from qualifying the Access Road as a PSPR.[812] He did not carry out any research; he simply "said it's, as it was", namely that "it is called by the local people 'polná cesta', which means field road".[813] He notably added that there were "no road signs, so it rules out the possibility of being a special purpose road, in spite of the fact that it has been used for a century and it's known among all villagers in Smilno that it's a road".[814]

491. In other words, Mr. Baran did not espouse or offer support for the PSPR argument. Rather,

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809 Emphasis in the original. Email of 17 May 2016 from M. Sýkora to Smilno Municipality, p. 3 of the pdf document (R-155A).

810 Statement of Smilno municipality regarding the classification of the Road, 6 June 2016, item (i) (R-156).

811 Statement of Smilno municipality regarding the classification of the Road, 6 June 2016, item (ii) (R-156).

812 Tr. (Day 3), 70:19-21 and 71:6-8 (Baran) ("Q. Yes. So in your answer you do not use the expression 'public special purpose road', do you? A. No" and "Q. You did not pick 'local and special-purpose road'; correct? A. That is obviously so, yes").

813 Tr. (Day 3), 71:22-72:18 (Baran). Because Mr. Sýkora's cover email made reference to a prior telephone conversation with Mr. Baran, he was asked whether the draft response was summarizing any advice he had given to Mr. Sýkora. His response was negative: "No, I don't recall that. No". Tr. (Day 3), 68:5-10 (Baran).

814 Tr. (Day 3), 72:18-22 (Baran).

he indicated that the Access Road was a "field track", albeit a publicly accessible one.[815]

492. Faced with the mayor's response, the Claimant asked local officials to approve the placement of a road sign at the entrance to the Access Road that would have signified that it was a PSPR. While the Smilno municipality proposed to place "traffic signs P8 and P1" at the beginning of the Access Road, the Bardejov district traffic inspectorate rejected that proposal on 11 October 2016, determining that the Access Road "is not a crossroads but merely a conjunction of a country road".[816] Under the Road Traffic Act, a "cross road" is "a place where roads cross or connect" and "roads" are "motorways, roads, local roads and special purpose roads".[817] Moreover, under the Decree on Traffic Signage, a traffic sign is erected "to organize, regulate and guide the road traffic",[818] it being recalled that "road traffic" regulation under the Road Traffic Act only applies to "roads".[819] In other words, the traffic inspectorate considered that the Access Road did not qualify as a PSPR or any kind of "road".

493. Thereafter, on 26 October 2016, Mr. Fraser met with the official from the Bardejov inspectorate, Mr. [redacted], the civil engineer who had made the 11 October 2016 determination, and a police officer. Mr. Fraser reported to Mr. Lewis that Mr. [redacted] confirmed that he "was not prepared to agree that the track could be a special purpose road".[820] Mr. Fraser then relayed that "[w]e threatened them with litigation if they failed to keep the track open and told them we were going to go ahead anyway", adding that "[w]e have decided to try and fence the whole track if possible. If not, we will put a gate across the entrance to the track", and further stating that fencing would start the following week.[821] Whatever one thinks of Mr. Fraser's email, the idea of fencing or gating a track is hardly reconcilable with a PSPR.

494. The PSPR argument was also rejected by the MoI in a letter it wrote on 19 December 2016 to the regional traffic inspectorate in Prešov in response to the latter's request for guidance about the Access Road on land plot no. 2721/780 and "in relation to the interpretation and assessment of the terms 'track/rural road' ('*poľná cesta*), 'public road' (*verejná komunikácia*), and 'public special purpose road' (*verejná účelová komunikácia*)".[822] After

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815 Tr. (Day 3), 68:5-10 and 72:25-73:4 (Baran).

816 Letter of 11 October 2016 sent by the Police to the Smilno municipality, p. 2 of the pdf document (C-153).

817 Road Traffic Act, Articles 2(1) and 2(2)(j) (C-214 and R-174).

818 Decree of Ministry of Interior No. 30/2020 Coll., on Traffic Signage, as amended, Article 1(1) (R-173).

819 Road Traffic Act, Articles 1 and 2(1) (C-214 and R-174).

820 Email of 26 October 2016 from Mr. Fraser (C-340).

821 Email of 26 October 2016 from Mr. Fraser (C-340).

822 Emphasis in the original. Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016 (C-23).

recalling the MoT's position that a track or forest road is a special purpose road if it is included in the "special purpose roads passport", has been built with a permit, is registered as such in the Land Registry or special survey real estate-related documentation, or is registered "in a different registry" such as a registry held by the owner or administrator of forest land, the MoI opined that the Access Road was not a PSPR:

> "The Ministry of Interior agrees with your legal opinion based on the fact that if the Smilno municipality does not have available any documentation evidencing the existence of a road on land plot with Parcel No. 2721/780 in the Smilno Real Estate Registration Area, and no other documentation evidencing the existence of such road exists, *then the road in question is not a special purpose road* and must be seen as private land the public use of which is not justified by any tangible evidence, and therefore it is not possible to carry out traffic supervision on such land despite the consent granted by its owners.
>
> According to the information we have procured, the plot of land in question is private land with several co-owners […]".[823]

495. Nor did the courts consider that the Access Road was a PSPR as AOG contended. In early 2017, the District Court of Bardejov and the Regional Court of Prešov denied AOG's request to enjoin Ms. Varjanová and others from restricting AOG's access to the Access Road.[824] That request was premised on AOG's claim that it had "the right to use the access field road" because it had secured the consent of a majority of co-owners or alternatively because the Access Road was a PSPR. The appellate court held that the first claim was unproven,[825] and did not rule on the second. Rather, it held that, even if the Access Road were a PSPR, its technical condition was not suitable for AOG's planned purposes:

> "If the claimant [AOG] claims that the access field road is a public special purpose road, it is necessary to point to the fact that the Communications Act puts certain restrictions on the roads use. *When using a road, users must adjust themselves to the construction-technical condition of the road which the appellate court does not perceive as fulfilled in this case* with regard to the field road condition (it is a relatively narrow road in the middle of arable land, paved with gravel) and the *weight and size of machines and motor vehicles needed for geological deposit exploration*. In addition, use of a road the construction-technical condition of which is not suitable for the requested traffic may lead to fine which means that it is unlawful action that would have been affirmed by the court had the court issued an immediate injunction".[826]

496. In summary, the evidence before the Tribunal points to the clear conclusion that as a matter of Slovak law the Access Road could not be characterized as a PSPR, and that there was

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823 Emphasis added by the Tribunal. Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016, pp. 1-2 of the pdf document (C-23).

824 Resolution of the Regional Court Prešov, File No. 20Co/14/2017-256, 16 February 2017 (R-59). The Respondent mistakenly labelled this exhibit as a resolution from the "District Court Prešov".

825 Resolution of the Regional Court Prešov, File No. 20Co/14/2017-256, 16 February 2017, para. 10 (R-59).

826 Emphasis added by the Tribunal. The appellate court also stressed the constitutional protection of ownership rights, holding that there could be no injunction absent consent of a majority of co-owners. Resolution of the Regional Court Prešov, File No. 20Co/14/2017-256, 16 February 2017, paras. 15 and 22-26 (R-59).

no reasonable basis for the Claimant to have expected otherwise.

497. With these elements in mind and for the sake of completeness, the Tribunal now addresses the measures about which the Claimant complains. As noted above, the Tribunal concludes that the Slovak Republic did not generate any legitimate expectation that Discovery and AOG could drill at Smilno. Even if such an expectation existed, however, the evidence before the Tribunal shows that the Slovak Republic did not fail to honor any such expectation. As mentioned earlier, the following analysis is conducted for completeness only.

(iii) Even if the Slovak Republic had created any legitimate expectations, it did not frustrate them

498. The Claimant complains about the following measures:[827]

- the police refused to remove the cars parked by Ms. Varjanová and other persons on the Access Road in December 2015, January, June and November 2016 ("Measure # 1");
- the Bardejov District Court improperly enjoined AOG from accessing the Access Road ("Measure # 2");
- the Prešov Regional Court refused to overturn the district court's interim injunction ("Measure # 3");
- the prosecutor improperly intervened in AOG's "civil dispute" with Ms. Varjanová in relation to the interim injunction ("Measure # 4");
- the prosecutor instructed the police to cancel its policing operation on 18 June 2016 ("Measure # 5");
- the police refused to approve the road signage scheme that would have clarified that the Access Road was a public road or a PSPR ("Measure # 6"); and
- the MoI improperly instructed the police that the Access Road was not a PSPR ("Measure # 7").

499. While the Claimant did not explicitly contend that the judiciary's conduct frustrated its

827 Memorial, paras. 227-231; Reply, paras. 3(1) and 291-298; Claimant's Opening Presentation, Slides 52 and 158.

legitimate expectations (measures ## 2-3),[828] it claimed that it expected to carry out its exploration "without *any other relevant organ* of the Slovak State objecting".[829] Since the Interim Injunction was issued by the judiciary, the Tribunal will deal with measures ## 2-3 in this section. The Claimant also contends that measures ## 2 and 3 amount to a denial of justice, a claim to which the Tribunal will revert (see paragraphs 656 to 663). Importantly in this context, the Claimant conceded at the Hearing that, if the Tribunal were to find that the Interim Injunction did not breach a treaty standard, then the other claims in relation to Smilno would fall away, except for those relating to the EIAs.[830]

500. As stated above, the Claimant could at best expect to drill at Smilno only if it had first conducted a sufficient exercise in due diligence and complied with the applicable law and the license conditions. The review of the facts above has established that the Claimant does not meet the first condition. The following discussion will demonstrate that it does not meet the second condition either.

Compliance with the law

Period before the Interim Injunction

501. As noted above, under Article 29 of the Geology Act, the Claimant and AOG had to secure consent from the owners or an order from the MoE to access private property.[831] In addition, as is common ground, under Articles 13(4) and 2(4)(b) of the Geology Act and 2 and 5a of the Mining Activities Act, the Claimant and AOG had to notify the District Mining Office eight days prior to the start of exploration activities, including "technical work, in particular drilling".[832] Under the Road Act, the Claimant and AOG also had to

828 Claimant's Opening Presentation, Slide 158.

829 Emphasis added by the Tribunal. Tr. (Day 1), 19:12-14 (Tushingham). See also Memorial, paras. 78 and 128; Reply, para. 81; Claimant's Opening Presentation, Slide 77; Fraser WS1, para. 59 ("[W]e felt that the interim injunction was a serious obstacle preventing us from making any progress whatsoever at the Smilno well"); Tr. (Day 2), 134:12-20 (Fraser) ("We were appalled. You know, we thought it was absolutely ridiculous that […] that asset could be protected by an interim injunction, to us, was absolutely a perversion of justice. It was very, very oppressive").

830 Tr. (Day 6), 79:20-80:2 (Tushingham) ("MR DRYMER: What if the Tribunal were to determine, well, not only was there no breach of the treaty, but the judiciary effectively correctly articulated Slovak law? MR TUSHINGHAM: Yes. MR DRYMER: Would the other measures, or the claims for breaches of the treaty by virtue of the acts of the police, the prosecutor and the MoI fall away? MR TUSHINGHAM: We completely accept that").

831 Geology Act, Article 29 (R-42). This obligation was expressly stated in the 2010 license renewal (Decision about extension of the geological survey permit (Svidník), Ref. No.: 44505/2010, File No.: 998/2010-9.3, 26 July 2010, p. 7 of the pdf document, para. 2.6 (C-5)).

832 Geology Act, Articles 2(4)(b) and 13(4) (R-42); Act No. 51/1988 Coll. on Mining Activities, as amended, Articles 2 and 5a(4) (R-44). See also The Regulation of the Slovak Mining Agency No. 89/1988 Coll. on rational utilization of exclusive deposit and on permission and reporting the mining activity and on reporting

take account of the technical condition of the Access Road and obtain owner consent for upgrades.[833]

502. The Claimant and AOG complied with none of these obligations. AOG did not request permission to use the Access Road prior to the first drilling attempts in December 2015 and January 2016. As the Access Road was a private field track co-owned by around 170 owners, either the consent of the owners or an access order from the MoE was required.[834] AOG had neither and thus contravened Article 29 of the Geology Act when it attempted to access the drill site on 6 December 2015 and later. AOG did not notify the mining authority in due time, with the result that it was fined EUR 2,000 for that failure.[835] And AOG did not adjust to the technical condition of the Access Road when it drove its heavy machinery to the well site.[836]

503. In addition to the public law obligations just discussed, the Claimant and AOG also had to respect the property rights of the owners of the Access Road. The evidence indicates that they failed to comply with those rights, resorted to self-help instead of engaging with the owners or seeking appropriate remedy and did not observe the co-owners' right of first refusal. This conduct ultimately resulted in the Interim Injunction issued by the court, which restrained AOG (and any third party associated with AOG) from using the Access Road pending the resolution of its dispute with Ms. Varjanová about the validity of AOG's purchase of a share of the Access Road.

504. The evidence establishes the following sequence of events. Ms. Varjanová first parked a car (a green Renault) at the entrance of the Access Road on 14 December 2015, and put her telephone number on the front window.[837] She also placed "plastic poles and a string with signaling flags" with "an information sign saying Private Property".[838] AOG did not call her; it removed the plastic poles, continued levelling the drill site and filed a police

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the activity carried out by mining manner, as amended, Articles 12(1)(a) and 13(1) (R-47). See further Counter-Memorial, para. 33; Reply, para. 14.

833 Road Act, Articles 6(1) and 19(1) (R-158 and R-175).

834 Under Article 139(2) of the Slovak Civil Code, the co-owners exercise their management rights through decisions "by the majority of votes calculated on the basis of the size of their shares" and, in case of equal votes or the failure to reach a majority decision or an agreement, the decision is rendered by the courts upon application "of any of the co-owners". Act No. 40/1964 Coll. the Civil Code, as amended, Article 139(2) (R-62).

835 Email of 18 March 2006 from [redacted] (C-303); AOG Status Update, 11 May 2006, p. 1 of the pdf document (C-308). See Lewis WS2, para. 22(f).

836 Fraser WS1, para. 35; Varjanová WS1, para. 19.

837 Varjanová WS1, para. 20; Lewis WS1, para. 55; Fraser WS1, para. 36.

838 Varjanová WS1, para. 19; Email from [redacted] to AOG team with attached Police reports, 14 December 2015, p. 2 of the pdf document (C-102).

report requesting "the offender to be held accountable".[839] Then, according to Mr. Fraser, "[o]n about 17 December 2015, a "heavily dented small white Fiat van" blocked the Access Road.[840] AOG did not try to return to the site until the following month. Instead, on the same day as the Fiat van appeared, it purported to buy a 1/700 share of land plot no. 2721/780 and, on 31 December 2015, AOG's lawyer sent Ms. Varjanová a cease-and-desist letter.[841]

505. When AOG eventually returned to the site on 14 January 2016, the white van was still blocking the Access Road.[842] This, says Mr. Fraser, prompted AOG to lift the van "manually" and move it to the side, but the van was replaced on the road by the end of the day and "attached with a chain to a fixing in the ground".[843] On 16 January 2016, AOG once more moved the van to the side, but Ms. Varjanová "simply parked her green Renault across the Road instead".[844] Three days later, the white van was again parked on the Access Road and "now chained down with a heavy chain".[845] Ms. Varjanová stated that she hoped that chaining the car to the ground would prompt AOG to call her, but she received no call.[846] On 23 January 2016, AOG cut the chain with an electric saw, moved the van to the side and "put concrete blocks around it so that it could not be driven away".[847] By 25 January 2016, various cars were blocking the Access Road and AOG abandoned its attempts to access the drill site until June 2016.[848]

506. The Tribunal cannot but be struck by AOG's resort to self-help. It repeatedly moved Ms. Varjanová's van, twice cut the chain attaching the vehicle to the ground and even put concrete blocks around it. This conduct is surprising considering that AOG told its

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839 Varjanová WS1, para. 20; Fraser WS1, para. 36; Email from [redacted] to AOG team with attached Police reports, 14 December 2015, p. 2 of the pdf document (C-102).

840 Fraser WS1, para. 37; Photograph of White car, 17 December 2015 (C-106).

841 Purchase Contract, 17 December 2015 (C-105); Letter of 30 December 2015 from Law Office Slamka to Mrs. Varjanová (R-36). Based on its purported co-ownership right, AOG also requested assistance from the Smilno municipality on 29 December 2015 to "arrange for a peaceful situation" under Article 5 of the Civil Code. Letter of 29 December 2015 from AOG to Smilno Municipality (R-153).

842 Mr. Lewis, who was on-site on 14 January 2016, says that a "lady", whom he describes as an "activist", was "stubbornly" standing "in the middle of the road, blocking us from accessing the drill site". He adds that the police were called but "they just stood to the side and did nothing". He then goes on to say that, after he left, "the lady, and presumably others, parked a car across the road". Lewis WS1, paras. 57-59.

843 Fraser WS1, para. 40.

844 Fraser WS1, para. 40.

845 Fraser WS1, para. 41; Photograph of White car, 18 January 2016 (C-107).

846 Varjanová WS1, para. 21.

847 Fraser WS1, para. 41; Varjanová WS1, para. 21.

848 Fraser WS1, para. 41; Photograph of cars blocking Road, 25 January 2016 (C-108).

JV Partners on 20 January 2016 that Ms. Varjanová has a "legal right to park her car on the road".[849] At the Hearing, Mr. Fraser had difficulty explaining AOG's antagonizing of Ms. Varjanová, rather than contacting her,[850] or, if it truly believed that it was a co-owner of the Access Road, acting to resolve its disagreements with other owners by seeking appropriate relief in the competent court, before taking matters into its own hands.[851] As the District Court in Bardejov would eventually opine, having recourse to self-help in these circumstances is "inadmissible" if it involves one co-owner interfering with "the rights of other co-owners" or damaging "the rights or things belonging to the other co-owners without a legal reason".[852]

507. AOG and Ms. Varjanová pursued different remedies in relation to these events. AOG filed a criminal complaint against Ms. Varjanová on 16 January 2016, alleging that she was violating AOG's "rights as a co-owner" to use the Access Road.[853] Noting that the "extract of ownership certificate no. 1367" showed that AOG had "a co-ownership share in the parcel at issue, in a portion of 1/700" and that Ms. Varjanová had a 1/210 co-ownership share over the same parcel, the police concluded that "both parties have a co-ownership share on this parcel", with the consequence that this was a property dispute over which the civil courts had jurisdiction.[854]

508. In turn, on 19 January 2016, Ms. Varjanová filed a motion asking the District Court in Bardejov to annul AOG's purchase of a 1/700 share on the ground that the sale breached the pre-emptive rights of the other co-owners. She also requested an interim injunction restraining AOG from using the Access Road and removing things placed on the road pending the resolution of the motion.[855] In her request, Ms. Varjanová argued that AOG

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849 Report to Partners – Status Update, 20 January 2016, p. 2 (C-120).

850 Tr. (Day 2), 33:17-34:3 (Fraser).

851 See footnote 834 above. Act No. 40/1964 Coll. the Civil Code, as amended, Article 139(2) (R-62).

852 Decision of the Bardejov District Court, 18 February 2016, p. 7 (C-125).

853 See Resolution of the District Police Department Bardejov, 15 February 2016 (R-150).

854 The police held as follows: "Only the relevant court is competent to resolve the property relationship and to decide on legitimacy of entitlements of the specific persons to the specific parcels of land". Resolution of the District Police Department Bardejov, 15 February 2016, p. 2 (R-150).

855 The request for relief reads as follows: "The first defendant is obliged to refrain from using the real property registered in the Land Register in Ownership Certificate No. 1367 for the cadastral territory Smilno, municipality Smilno, Bardejov District as a lot of land of the 'E' Register No. 2721/780, arable land with an area of 11,660 m2, until the final closure of the proceedings to determine the invalidity of the purchase contract concluded between the first defendant as the buyer and [redacted] as the seller, on 28 December 2015, the entry of which into the Land Register was permitted under file no. V 2604/2015.

The first defendant is obliged to refrain from removing things placed by the plaintiff on the property registered in the Land Register in Ownership Certificate No. 1367 for the cadastral territory Smilno, municipality Smilno, District Bardejov as a lot of land of the 'E' Register No. 2721/780, arable land with an area of 11,660 m2 both

was resorting to self-help and usurping the management rights of the co-owners.[856] The District Court in Bardejov granted the Interim Injunction on 18 February 2016 and the Regional Court in Prešov upheld that decision on appeal about two months later.[857]

509. On 20 June 2016, AOG acknowledged Ms. Varjanová's claim and conceded that the acquisition of a 1/700 share had breached her pre-emption right and was thus "null and void".[858] On the basis of this evidence, the Tribunal concludes that AOG in effect acknowledged infringing Ms. Varjanová's co-ownership rights over the Access Road.

510. In any event, the Claimant argues that the Interim Injunction was improperly issued and upheld on appeal. To the extent measures ## 2 and 3 deal with these allegations, the Tribunal will address those measures at this juncture.

The Interim Injunction

511. By issuing the Interim Injunction, the Bardejov District Court ordered AOG and any third party authorized by AOG to refrain from using the Access Road and from removing property items which Ms. Varjanová had placed on that road pending the resolution of the

by himself and through third parties, until the final closure of the proceedings to determine the invalidity of the purchase contract concluded between the first defendant as the buyer and [redacted] as the seller, on 28 December 2015, the entry of which into the Land Register was permitted under file no. V 2604/2015". Ms. Varjanová's request for an interim injunction, 19 January 2016, p. 2 of the pdf document (MS-5).

856 The motivation for the request reads in relevant part as follows: "Despite the fact that, as is clear from the motion to commence the proceedings, the first defendant has a 1/700 share in the relevant common property, his supposed right to use the property, according to his ideas, he not only claims with the attached letter, but repeatedly uses self-help, and without anything authorizing him to do so, removes from the relevant property the motor vehicle that the plaintiff has on rent. Despite the fact that the plaintiff has repeatedly turned to the police in this regard without immediate intervention by the court, she cannot prevent the first defendant, either alone or through third parties, from repeatedly physically manipulating the motor vehicle that the plaintiff has on rent, and for the condition of which the plaintiff is responsible. In case of repeated removal of the said motor vehicle, there is also a risk of its damage. The plaintiff has the consent of several co-owners with her procedure in using the relevant lot of land. […] The relevant contract is invalid. Since, despite this fact, the first defendant seeks the exercise of his right of ownership, primarily to use the property in a way that is contrary to the law, since the 1/700 share in common property does not authorize him to make decisions about the management, and thus also the use of the thing, and his claims having no basis in applicable law, are applied by the first defendant by self-help, in which there is a risk of damage, it is necessary for the court to temporarily adjust the relations of the parties to the proceedings". Ms. Varjanová's request for an interim injunction, 19 January 2016, p. 1 of the pdf document (MS-5).

857 Decision of the Bardejov District Court, 18 February 2016 (C-125); Resolution of the Regional Court in Prešov, Case Number 22Co/66/2016, 14 April 2016 (C-17).

858 Letter of 20 June 2016 from AOG to the District Court Bardejov (LF-23); Letter of 20 June 2016 from Mr. [redacted] to the District Court Bardejov (LF-22); Judgment of the District Court Bardejov, File No. 1C/29/2016-268, 5 October 2016, para. 14, p. 3 (LF-16).

dispute about the validity of AOG's purchase of the 1/700 share.[859]

512. The Claimant contends that the first instance and appellate courts lacked jurisdiction over the injunction, that their decisions were arbitrary because the conditions for an injunction were not met, and that the courts were biased against AOG.[860] The Claimant also raises one additional argument in relation to the Interim Injunction to which the Tribunal will revert in the context of the denial of justice claim.

513. As a general matter, the Tribunal notes that investment tribunals should give some degree of deference to the national courts' assessment, application and interpretation of national law, and only step in if there is some "severe impropriety", to use the wording of *Jan de Nul*.[861] The Tribunal sees no evidence of any such impropriety here.

514. More specifically, regarding jurisdiction, the Claimant relies on its legal expert, Prof. Števček.[862] The core of Prof. Števček's opinion is that the Bardejov District Court lacked jurisdiction because civil courts have no jurisdiction over public roads.[863] He insisted that the district and regional courts should have assessed their jurisdiction and investigated the legal status of the Access Road *ex officio*, and that had they done so they should have declined jurisdiction. The difficulty with this opinion is that it is premised on the understanding that the Access Road is a public road or a PSPR. At the Hearing, Prof. Števček accepted that if his understanding in this regard were mistaken, the Bardejov

859 The court held as follows: "In view of the above, it is appropriate that the first defendant should not use the property, nor interfere with the rights of the applicant, until the issue of his ownership right and the issue of whether the legal act has not infringed the rights of the other co-owner – the applicant, are resolved. In the statement of the law, the court did not state that the ban on removing things applies to the first defendant and third parties, as this follows from the very essence of the imposition of the obligation to 'refrain' from using the property and removing things from it. This obligation is directed both to the first defendant, as well as to persons authorized by him, who would possibly derive the right of entry or use of the property only from his rights, or they would thus act arbitrarily, which is inadmissible". The operative part of the decision provides in relevant part: The Court orders a preliminary measure as follows: "The first defendant **is obliged to refrain** from using the real property registered in the Land Register […] and to **refrain** from removing things placed by the plaintiff on the property registered in the Land Register […]. This preliminary measure will last until the final determination of the proceedings conducted by the local court under file no. 1C/29/2016" (emphasis in the original). Decision of the Bardejov District Court, 18 February 2016, pp. 1 and 7-8 (C-125).

860 Memorial, paras. 228-229; Reply, paras. 81-82 and 343-348.

861 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (hereinafter "*Jan de Nul v. Egypt*"), para. 206 (CL-29).

862 Memorial, para. 228(2); Reply, para. 346.

863 Števček ER1, para. 27; Števček ER2, paras. 5.1, 9 and 46.1; Tr. (Day 4), 57:1-4 (Števček); Tr. (Day 4), 73:6-21 (Števček). The tenor of his argument was that the municipality had the prime competence to determine the existence of a PSPR (together with the MoT which could render non-binding interpretations) and that the municipality is the body which knows best the "local conditions" (Tr. (Day 4), 31:16-21 and 96:6-14 (Števček)). As already noted, the municipality of Smilno had rejected AOG's PSPR argument on 6 June 2016 (Statement of the Smilno municipality regarding the classification of the Road, 6 June 2016 (C-18)).

District Court would be competent.[864] It is also noteworthy that AOG never objected before the appellate court that the courts lacked jurisdiction on the ground that the Access Road was a public road or a PSPR. Rather, AOG invoked its purported ownership rights and never argued that the dispute was not a private law dispute.[865] Accordingly, the Tribunal rejects the Claimant's contention that the Bardejov District Court and, by implication, the Prešov Regional Court improperly assumed jurisdiction over the Interim Injunction.[866]

515. The Claimant further contends that the statutory requirement of the existence of a risk of "significant, serious and even irreparable harm" was not satisfied and hence the Interim Injunction should not have been issued.[867] It adds that Ms. Varjanová's "unlawful" blocking of the Access Road "disentitled" her from obtaining the Interim Injunction and that the injunction did not aim at protecting her from losing her pre-emption right.[868]

516. It is generally accepted that one of the purposes of interim measures is to preserve the rights of the litigants during the proceedings and to avoid any aggravation of the dispute. The injunction restraining AOG from using the Access Road during the pendency of the civil law dispute with Ms. Varjanová served only this limited purpose. It regulated the exercise of the parties' alleged rights during the proceedings and was meant to avoid any aggravation of the dispute.

517. This general perspective is confirmed when one reviews the applicable requirements under Slovak law. Article 75(2) of the Code of Civil Procedure requires *inter alia* that the applicant demonstrate the likelihood of a "risk of imminent harm".[869] In reference to that provision, the Bardejov District Court stressed the conditions of necessity and urgency to avoid the occurrence of "immediate" or "imminent" harm, as well as the element of

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[864] Tr. (Day 4), 57:5-9 (Števček) (Q. Now, assuming, just for the purposes of my question, assuming that the field road in Smilno was not a public special purpose road, would the district court have jurisdiction to issue the injunction? A. Yes).

[865] Appeal of company AOG against the decision of District Court Bardejov, 2 March 2017, p. 3 of the pdf document (LF-17).

[866] Moreover, since Prof. Števček, who is a civil lawyer, repeatedly insisted at the Hearing that he is no expert in road law or administrative law, it is unclear to the Tribunal how he reached his conclusion that the Access Road necessarily was a PSPR, even going so far as to say that the Slovak legislator had committed mistakes, for instance, when distinguishing PSPRs from field tracks or forest roads in Article 21 of the Road Traffic Act. Tr. (Day 4), 26:23-24, 26:10, 32:18-21, 47:12-14 and 49:21-22 (Števček).

[867] Memorial, para. 228(1); Reply, para. 345.

[868] Memorial, para. 228(3)-(4), Reply, para. 347.

[869] Article 75(2) reads as follows: "[T]he petition shall include a description of the decisive facts justifying the ordering of the interim measure, the statement of conditions of eligibility of the claim to which the interim protection is to be provided, and the reasoning of the risk of imminent harm". Act No. 99/1963 Coll., the Code of Civil Procedure, as amended, Article 75(2) (LF-4).

proportionality and the need to balance the respective rights of the litigants.[870] Based on the evidence before it, the Bardejov District Court was satisfied that Ms. Varjanová had shown the existence of a risk of immediate harm to her rights as owner of the car that AOG was repeatedly removing through self-help and to her rights as co-owner of the Access Road, such that interim measures were appropriate.[871] As noted above, the court added that resort to self-help was generally "inadmissible" and would be avoided through the imposition of an injunction.[872] The Prešov Regional Court likewise held that it was necessary and urgent to maintain the Interim Injunction because of the risk of imminent harm.[873]

518. In the Tribunal's view, there is nothing to indicate that both courts did anything other than properly apply the applicable standard under Slovak law, and that their reasoning

870 "The prerequisite for the issue of a preliminary measure is the existence of an unavoidable need to temporarily adjust the conditions of the parties before the decision on the case itself. The precondition for satisfying the proposal is also the urgency of the situation that requires an urgent solution of the case to prevent the occurrence of damage, if any. As a result, the court decides on the proposal to order a preliminary measure on the basis of the certification of the asserted facts, while the relevant proof as regards showing the existence of such a right is only carried out in the judicial proceedings. The prerequisite for the court to be able to satisfy the proposal for a preliminary measure is that the plaintiff must at least certify the basic facts necessary for the conclusion about the probability of the claim to be granted preliminary protection as well as certification of the urgency of the need for a temporary adjustment of relations between the parties. Thus, the court orders a preliminary measure only if it is necessary to temporarily adjust the conditions of the parties to the proceedings and there is a risk of causing immediate damage. The nature of the preliminary measure shows that the claim does not have to be proved without doubt, but it needs to be proven. The degree of certification is governed by the situation, primarily by the urgency of the solution. […] The preliminary measure is admissible and justified if: a/ it is claimed and certified that there are legal relations between the parties, b/ these legal relations require temporary adjustment, c/ this temporary adjustment is necessary, d/ there is no irreversible condition in the legal relations between the parties, e/ the legal relations between the parties are not interfered with in an unreasonable manner. The court must consider whether, as a result of the preliminary measure, disproportionate damage will be caused to one of the parties to the proceedings. With a preliminary measure, someone can be limited in the exercise of their rights only to the necessary extent or temporarily". Decision of the Bardejov District Court, 18 February 2016, p. 5-7 (C-125).

871 "[I]n this case it is appropriate that, de facto, before the resolution of the question of the ownership right to the real property of the first defendant on the basis of the action filed for the relative invalidity of the legal act – the purchase contract dated 17 December 2015 (No. V 2604/2015) the relations between the parties to the proceedings are temporarily adjusted in order to prevent possible damage to the applicant consisting in damage to her entrusted property, or her rights arising from joint ownership. […] In view of the above, it is appropriate that the first defendant should not use the property, nor interfere with the rights of the applicant, until the issue of his ownership right and the issue of whether the legal act has not infringed the rights of the other co-owner – the applicant, are resolved". Decision of the Bardejov District Court, 18 February 2016, p. 7 (C-125).

872 Decision of the Bardejov District Court, 18 February 2016, p. 7 (C-125).

873 "After examining the case, the Court of Appeal takes the view that, in the present case, both on the basis of the contents of the file and on the applicant's arguments, there is a proven urgency to order interim measures. In the interim measure, the claimant must certify, in addition to the existence of a claim, that without the interim measure, the possible future enforcement of the decision would be at risk, while the risk of thwarting the enforcement of the decision must be real and must be imminent […]". Resolution of the Regional Court in Prešov, Case Number 22Co/66/2016, 14 April 2016, p. 5 (C-17).

sufficiently indicated why, in their considered view, interim measures were appropriate in the circumstances. The Parties' legal experts mainly disagreed on the level of risk or harm required for such a finding. Prof. Števček advocates a stringent test implying "significant, serious and even irreparable harm".[874] Even assuming this were the correct test, the use of the words "and even" suggests that a risk that does not rise to the level of irreparable harm may suffice. Moreover, Prof. Števček did not say that there was no risk of serious, significant or irreparable harm in this case. His opinion was rather that Ms. Varjanová's conduct should deprive her of protection and he accepted that the condition of imminent harm would be met "if the applicant herself did not violate the law".[875] Since the Access Road was not a PSPR, in the view of the Tribunal, Ms. Varjanová had not breached the law and the expert's conclusion falls away. It is also noteworthy that, on appeal to the Regional Court, AOG did not argue that the Bardejov District Court misapplied the "imminent harm" standard or that there was no such harm present. Although AOG asserted that there was no urgency or necessity, nowhere did it allege the lack of "imminent", "serious" or "irreparable" harm.[876]

519. Finally, the Tribunal fails to see any arbitrariness or bias on the part of the courts, or that

874 Števček ER1, paras. 12-16 and 22-23; Števček ER2, paras. 12-16 and 20-21; Fogaš ER2, paras. 36-39; Tr. (Day 4) 66:24-72:20 (Števček) and 112:12-132:11 (Fogaš). Each expert sought to find support for his position in various decisions of the Slovak Supreme Court that variably refer to "imminent harm" and to "significant, serious and even irreparable harm". For the first proposition, see Resolution of the Supreme Court of the Slovak Republic, File No. 4Obo 89/2012, 26 November 2012 (LF-10) ("Even the interim injunction cannot be granted solely on the basis of applicant's statements without certifying at least basic facts allowing the conclusion about probability of the claim, which should be protected and without certifying imminent harm"); Resolution of the Supreme Court of the Slovak Republic, File No. 6M Cdo 5/2012, 28 November 2012 (LF-11) ("However, it is necessary to have at least the basic facts evidenced that are necessary for the conclusion on probability of the interest that should be given preliminary protection as well as evidencing that justified concern about imminent harm or danger to future execution of a judgment exists"). For the second proposition, see Resolution of the Supreme Court of the Slovak Republic, File No. 4 Obdo 30/2010, 29 April 2011 (MS-3) ("The applicant must declare the grounds for the claim in the merits of the case and thus have locus standi to bring the application. The applicant has the burden of proof as to the facts demonstrating that there is a reason for the injunction and also has the burden of proof as to the facts justifying the proposed injunction. This means that the applicant must certify that, without an injunction, significant, serious and even irreparable harm could occur"); Resolution of the Supreme Court of the Slovak Republic, File No. 1 M Cdo 2/2011, 23 May 2012 (MS-2) ("It follows from the provisions of Article 75 par. 2 of the CCP governing the requirements of a motion for an interim injunction that one of the preconditions for granting the interim injunction is that the applicant justifies the threat of imminent harm to the applicant. This means that the applicant must certify that, without an injunction, significant, serious and even irreparable harm could be caused to the applicant"). The Tribunal was not persuaded by either expert's explanations about the respective relevance of the decisions each expert referred to. While the decisions invoked by Dr. Fogaš postdate those invoked by Prof. Števček, even if only by a few months, it is also true that the decision of the Supreme Court of 23 May 2012 mentions both standards saying that the risk of "imminent harm" meant a showing of a risk of "significant, serious and even irreparable harm".

875 Števček ER1, paras. 22-23; Števček ER2, para. 20.

876 Appeal of company AOG against the decision of District Court Bardejov, 2 March 2016, pp. 2-5 of the pdf document (LF-17).

the contrary view is even arguable. In particular, contrary to Mr. Fraser's insinuation at the Hearing, there is no indication in the record that the courts were subject to political pressure "or some similar influence".[877] Even Prof. Števček resoundingly rejected any such suggestion, adding that in his view the appellate judges had exercised independent and impartial judgment.[878]

520. Accordingly, the Tribunal concludes that the Interim Injunction was properly issued and upheld on appeal. The decisions of the first instance and appellate courts were neither arbitrary nor do they denote any bias against AOG. Thus, subject to its further assessment below of the denial of justice claim, the Tribunal finds that measures ## 2 and 3 did not breach a treaty standard.

Period after the Interim Injunction

521. Considering that there was nothing whatsoever that was improper about the Interim Injunction, it is clear that the Claimant failed to abide by it when AOG subsequently attempted to drill at Smilno in June and November 2016. Mr. Fraser acknowledged that the Interim Injunction was then still in force and that AOG therefore could not use the Access Road.[879] Moreover, as seen above, the Interim Injunction also applied to third parties authorized by AOG.

522. The first thing AOG did in an effort to circumvent the Interim Injunction was to create Cesty Smilno/Smilno Roads in April 2016 for the purpose of acquiring another share in the Access Road to allow AOG to use the track.[880] It did so with the expectation that owning a "legitimate share" would allow it to "legally remove any blocking cars" and "return to work".[881] The Claimant's explanation that it was Cesty Smilno which accessed the drill site not AOG does not assist it as Cesty Smilno was essentially AOG's alter ego.[882]

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877 Tr. (Day 2), 148:8-17 (Fraser).

878 Tr. (Day 4), 75:7-18 (Števček).

879 Tr. (Day 2), 64:9-13, 70:16-19, 77:12-14, 87:8-10, 112:18-25 and 134:21-135:5 (Fraser). See also Tr. (Day 2), 185:4-23 (Lewis).

880 The scheme involved having one co-owner, Mr. [redacted] contribute his share of the Access Road to Cesty Smilno. AOG Status Update, 11 May 2016, p. 1 of the pdf document (C-308) ("We have now secured an ownership interest in the access road by establishing a new Slovak company which will lease access to Alpine personnel and contractors"). See also Slamka Partners – Smilno report by JUDr. Pavol Vargaestrok of the events on 16-18 June 2016, 14 December 2016, p. 1 (C-161); Tr. (Day 2), 89:2-6 (Fraser).

881 Status Update and Activity Summary, 7 March 2016, p. 1 (R-154).

882 Tr. (Day 2), 65:23-66:5 (Fraser) ("Q. And that outside shareholder was the party who, at AOG's suggestion, had contributed its share in the road for the purpose of circumventing the injunction. That rather obvious, isn't it, Mr Fraser? A. I mean, we were – we – the structure involving Cesty Smilno, yes, it was a way to enable us to carry on operations which were not in breach of the injunction, that's what we understood").

As Mr. Fraser confirmed, it had the same management as AOG, no employees of its own, took directions from AOG and was under the full control of AOG.[883] Any doubt on this aspect is extinguished with the confirmation that Discovery hired and paid GMT Projekt to "upgrade" the Access Road, not Cesty Smilno.[884]

523. It is also striking that AOG began to upgrade the Access Road on 7 June 2016, the day after Mr. Baran had refused to accept AOG's PSPR argument and clarified that the Access Road was no more than a "field track".[885] Notwithstanding, AOG proceeded to gravel the Access Road and moved its drilling equipment to the site between 16 and 18 June 2016.[886] In addition to breaching the Interim Injunction and the Geology Act, the upgrade was done without the consent of the land owners and was thus in manifest violation of Article 19 of the Road Act. Finally, although Mr. Fraser stated that, on 16 June 2016, Ms. Varjanová's "boyfriend" had driven his car into Mr. Crow, AOG's Chief Operating Officer, allegedly causing him to "suffer bruising and some cuts",[887] the video of the scene appears to show Mr. Crow mocking the protestors and rather obviously faking the claim that he had been injured.[888]

524. Finally, the same breaches occurred again on the occasion of AOG's third drilling attempt between 15 and 17 November 2016.

525. Rather unsurprisingly, the Claimant's conduct generated increasing opposition from land owners and local residents, as well as other citizens and activists, which started to attract media attention. Whereas Ms. Varjanová was alone in blocking the Access Road in December 2015, by January 2016 she had mobilized other protestors and attracted a camera crew from TV Joj.[889] By June 2016, Mr. Fraser estimates that there were between 20 and 25 protestors (between 30 and 50 according to Dr. Slosarčíková) blocking the Access Road

883 Tr. (Day 2), 64:14-65:22 (Fraser) ("It [Cesty Smilno] had the same direction as AOG, in the sense of the same managers, that's correct"). See also Tr. (Day 2), 66:22-67:12 (Fraser).

884 Email of 18 May 2016 from [redacted] attaching request for quotation from GMT Projekt (C-309); AOG's internal report: weekly status report, 15 June 2016, p. 1 (C-135) ("We used a local (Slovak) contractor"); Fraser WS1, para. 52; Tr. (Day 2), 77:17-25 (Fraser).

885 Statement of Smilno municipality regarding the classification of the Road, 6 June 2016 (R-156).

886 The Tribunal further notes that AOG drilled a 21-meter deep conductor hole. In this connection, although the Respondent did not raise that point, there is no evidence in the record indicating that AOG notified the mining office 8 days before its second drilling attempt, as it should have under Article 13(4) of the Geology Act. See Geology Act, Articles 2(4)(b) and 13(4) (R-42); Act No. 51/1988 Coll. on Mining Activities, as amended, Articles 2 and 5a(4) (R-44).

887 Photograph of Ron Crow, June 2016 (C-112); Fraser WS1, para. 55.

888 Videorecording of Mr. Crow's incident (R-37).

889 Fraser WS1, para. 41.

or otherwise protesting AOG's activities by creating a "human chain".[890] A similar number of protestors showed up in November 2016 again with reporters from TV Joj.[891]

526. The risk of opposition of civil society against the drilling project was foreseeable since the summer of 2015. On 16 June 2015, AOG convened a town hall meeting that was attended by 80 to 100 persons, according to Mr. Baran, "a very significant turn-out".[892] Although Messrs. Lewis and Baran thought that the meeting was "generally" "positive" and that a "majority" "did not object to AOG's plans",[893] Mr. Leško testified that in his view the "information provided to the local inhabitants was unilateral, simplified and incomplete",[894] and Ms. Varjanová similarly stated that AOG "did not help to dispel" the "doubts and worries" the local inhabitants had in relation to drilling.[895] Thereafter she and a few other residents organized a petition expressing disagreement with AOG's plans.[896] A majority of local residents over the age of 15 signed that petition (330 out of 613, i.e. 54%),[897] which was then adopted by the Smilno municipal council on 23 July 2015 (four

890 Fraser WS1, para. 53; Slosarčíková WS1, para. 13; Varjanová WS1, para. 35; Varjanová WS2, para. 24.

891 Fraser WS1, para. 70.

892 Invitation to the municipal public meeting in Smilno, 16 June 2015 (R-17); Baran WS, para. 11.

893 Email of 24 June from Mike Lewis to Partners, p. 1 (C-78); Baran WS, paras. 12-13.

894 Leško WS1, para. 22.

895 Varjanová WS2, para. 6.

896 The petition reads as follows: "We, the undersigned residents, disagree with the activities related to exploration area 'Svidník – Oil and Combustible Natural Gas' that with their consequences have an impact on the environment in municipality Smilno. We therefore request that the Municipal Council of Smilno and the mayor of Smilno express their **disapproval of exploration area 'Svidník – Oil and Flammable Natural Gas'** as well as of all the geological works in the exploration area and related activities that intervene in or have an impact on the environment in Smilno". Emphasis in the original. Signature Sheets (R-107); Resolution of the Smilno Municipal Council, 23 July 2015 (R-15).

897 The Respondent put to Mr. Baran that 341 persons had signed the petition and Mr. Baran responded that "23 out of this petition were not Smilno inhabitants" and "like maybe 20 were under the age of 18, or 15, so yes". After going through those numbers, Mr. Baran agreed with the Respondent's counsel that 318 Smilno inhabitants constituted a majority: "Q. So if 318 signed, that actually is an absolute majority; correct? A. Correct". A review of the signature pages shows that 347 persons signed the petition and that 330 persons resided in Smilno (2 persons only indicated their house number, i.e. "108", and not their location, but the Tribunal understands that they too resided in Smilno, since the following signature comes from house number "107" in Smilno). This corresponds to Ms. Varjanová's statement that "54% of Smilno's residents over 15 years of age" had signed the petition (330/613 = 54%). Even if one were to accept Mr. Baran's representation that "maybe 20" persons were under the age of 15, something the Claimant has not shown to be true, this would still amount to 310 persons (or 308 if one excludes the residents in house no. 108) and thus a majority out of the 613 Smilno inhabitants above the age of 15. For the avoidance of doubt, Mr. Baran confirmed that he knew these people, recognized their names and that he had no reason to believe they did not sign the petition. Information about number of Smilno inhabitants, 25 May 2015 (R-108); Signature Sheets (R-107); Cover letters from Ms. Varjanová to Smilno municipality, July 2015 (R-109); Tr. (Day 3), 14:24-15:5, 21:13-24:7 and 25:12-25 (Baran); Varjanová WS2, para. 15.

votes in favor, one vote against and no abstention).[898] If anything, this result should have given the Claimant pause to reflect on how it might better address the concerns of a large segment of the local population. The failure to do so, coupled with the lack of meaningful due diligence about the Access Road, and the repeated breaches of the law discussed above, largely explain why the Claimant ultimately failed to drill a well in Smilno.

527. With these considerations in mind, the Tribunal will address the disputed measures, it being recalled that the Claimant accepted that if the Interim Injunction was valid, then its claims regarding Smilno, except for the EIA issue, would fall away.[899] This acceptance would allow the Tribunal to dispense with a review of the measures in respect of Smilno other than the EIA claim. In line with its previous approach, it will nevertheless briefly address these matters as a further alternative reasoning.

The disputed measures

The police (Measure # 1)

528. The Claimant complains that, in December 2015 and January 2016, the police refused to remove either Ms. Varjanová's vehicle or disperse the activists who were blocking the Access Road.[900] It raises the same complaint in respect of events in June and November 2016.[901]

529. To recall what has been described above, Ms. Varjanová first parked her green Renault at the entrance of the Access Road on 14 December 2015, at the time of the first drilling attempt, which prompted AOG to file a police report requesting "the offender to be held accountable".[902] The police came on site on 17 and 18 December 2015, at which time a white Fiat van was blocking the Access Road.[903] Mr. Fraser says that the police "made no effort to remove" that van[904] and that the mayor "and some of the nearby landowners" complained to the police on 22 December 2015 about the Access Road being blocked, but

898 Resolution of the Smilno Municipal Council, 23 July 2015, p. 2 of the pdf document (R-15). Mr. Baran confirmed that he was not challenging the legality and legitimacy of that vote. He also confirmed that, during the debate that preceded the vote, nobody (including himself) challenged the legitimacy of the petition or the way the signatures had been collected. Tr. (Day 3), 18:18-23 and 19:24-20:12 (Baran).

899 Tr. (Day 6), 80:8-13 (Tushingham).

900 Memorial, paras. 89-93, 227 and 231; Reply, paras. 77-80 and 295.

901 Memorial, paras. 102-108, 127-128, 227 and 231; Reply, paras. 86-97, 113-115 and 295.

902 Varjanová WS1, para. 20; Fraser WS1, para. 36; Email of 14 December 2015 from [redacted] to AOG team with attached Police reports (C-102).

903 Fraser WS1, para. 37; Photograph of White car, 17 December 2015 (C-106).

904 Fraser WS1, para. 37.

that "again the Police did nothing in response".[905]

530. The police again came on site on 14 January 2016. However, say Messrs. Lewis and Fraser, they once more "made no effort to remove the van".[906] After AOG "manually" lifted the van to move it to the side and Ms. Varjanová replaced it on the track at the end of the day and attached it "with a chain to a fixing in the ground",[907] the police again "did nothing".[908] Similarly, the police "did nothing" two days later when Ms. Varjanová "parked her green Renault across the Road" after AOG had once more moved the white van to the side.[909] When AOG moved the van again on 23 January 2016 and surrounded it with "concrete blocks",[910] Ms. Varjanová called the police but again they failed to intervene.[911] By 25 January 2016, various cars were blocking the Access Road but, according to Mr. Fraser, "[t]he Police patrolled the area and saw all the cars blocking the Road but did nothing whatsoever".[912]

531. The Claimant's complaints regarding the police are unwarranted considering that the Access Road was not a PSPR, but private property. As regards the events before AOG bought a share in the Access Road, the Claimant did not rebut the Respondent's argument that Ms. Varjanová "was able to prove her ownership of the land", whereas AOG could not, and the police thus "could not order her to remove her car from land that she co-owned".[913] After the acquisition, the police appear to have been acting well within their right not to intervene in a private dispute between two co-owners over which it had no jurisdiction absent any indication of criminal conduct. In fact, AOG and Ms. Varjanová both sought the assistance of the police, which refrained from supporting either side. In response to the criminal complaint that AOG filed in January 2016, the police told AOG that "[o]nly the relevant court is competent to resolve the property relationship and to decide on legitimacy of entitlements of the specific persons to the specific parcels of

905 Fraser WS1, para. 37.

906 Mr. Lewis, who was on-site on 14 January 2016, says that a "lady", whom he describes as an "activist", was "stubbornly" standing "in the middle of the road, blocking us from accessing the drill site". He adds that the police was called but "they just stood to the side and did nothing". He then goes on to say that, after he left, "the lady, and presumably others, parked a car across the road". Lewis WS, paras. 57-59; Fraser WS1, para. 40.

907 Fraser WS1, para. 40.

908 Fraser WS1, para. 40.

909 Fraser WS1, para. 40.

910 Fraser WS1, para. 41; Varjanová WS1, para. 21.

911 Varjanová WS1, para. 21.

912 Fraser WS1, para. 41; Photograph of cars blocking Road, 25 January 2016 (C-108).

913 Rejoinder, para. 296.

land".[914]

532. As regards the second and third drilling attempts in June and November 2016, the Tribunal reaches the same conclusion, namely that the police rightly refrained from dispersing activists or removing cars. Indeed, absent criminal acts, it appears that they had no competence to do so. Importantly, the police did disperse protestors and activists who were trespassing on the drill site,[915] as AOG had a lease for that site and thus a valid title and the trespassing infringed criminal laws.

533. Therefore, even if it were to accept that the Claimant could expect to drill at Smilno, *quod non*, the Tribunal could not conceivably accept the contention that the conduct of the police somehow frustrated such expectation.

The prosecutor (Measures ## 4-5)

534. The Claimant further submits that one of the prosecutors of the Bardejov district, Dr. Slosarčíková, improperly intervened in AOG's "civil dispute" with Ms. Varjanová in connection with the Interim Injunction (Measure # 4).[916] It also contends that Dr. Slosarčíková improperly instructed the police to cancel its policing operations at the Smilno site on 18 June 2016 (Measure # 5).[917] For the Claimant, Dr. Slosarčíková "abused her authority" on that day by appearing at the Smilno site, since her "[i]ntervening in this situation was not within her responsibilities or authority".[918] It seeks support from Mr. Baran, who stated that "it is unheard of for a public prosecutor to attend the scene of a protest such as what happened here".[919] Mr. Fraser testified that Dr. Slosarčíková referred AOG's lawyer, Dr. Vargaeštok, to the Interim Injunction and allegedly told him "to advise

914 Resolution of the District Police Department Bardejov, 15 February 2016, p. 2-4 (R-150). That same resolution also records that the police referred AOG's criminal complaint to the district office "for further proceedings", because Ms. Varjanová's actions of parking her car across the Access Road was "a willful act" that constituted "a misdemeanor against civil coexistence" under Article 49(1)(d) of the Act on Misdemeanors. By contrast, it dismissed Ms. Varjanová criminal complaint against AOG's contractors for having severed the metal chain from the white van on 23 January 2016 because there appeared to be no intention to damage her property in the context of a "civil dispute".

915 Fraser WS1, para. 56 ("On 17 June 2016, the access to the Road remained blocked but the contractors were able to continue working on the location. Following a call by one of our lawyers, the Police actually removed protesters from in front of the contractors' vehicles *on the well location*, so it seemed as if they might be becoming more helpful"; emphasis added by the Tribunal).

916 Reply, paras. 87-95; Claimant's Opening Presentation, Slides 78-79.

917 Reply, para. 96; Claimant's Opening Presentation, Slide 80.

918 Memorial, para. 106.

919 Baran WS, para. 26.

AOG not to break the law by accessing the Road".[920] She allegedly "completely rejected" AOG's arguments, conferred with the police, and then left the site.[921] According to Mr. Fraser, the "direct result" of her intervention was that the police stopped "the little they had been doing to assist us".[922] For the Claimant, it cannot be disputed that "before" she "turned up, the Police were dispersing activists" and stopped thereafter.[923]

535. According to the Claimant, Ms. Varjanová called Dr. Slosarčíková to the Smilno site on 18 June 2016. Yet both deny this allegation.[924] In fact, the record shows that AOG called the local police, which the Claimant acknowledges,[925] and the police called the prosecutor's office.[926] Being on "active emergency service duty" that day,[927] Dr. Slosarčíková went to Smilno,[928] because the police on site believed that the "atmosphere was tense" and "were concerned that [a] crime could occur, and that the situation could escalate".[929] The Tribunal sees nothing untoward in this conduct, noting that the Claimant itself considered the situation to have been tense.[930]

536. According to Dr. Slosarčíková, when she arrived on site, there were "around 30-50 activists" forming a human chain near the drilling site.[931] While she did feel a sense of tension, she did "not see any signs of criminal activity taking place" and she considered that this was "a civil dispute between protesters, including owners of the lands that AOG

920 Fraser WS1, para. 57.

921 Fraser WS1, para. 57.

922 Fraser WS1, para. 57.

923 Reply, para. 96.

924 Varjanová WS1, para. 36; Varjanová WS2, para. 26; Slosarčíková WS2, para. 7; Tr. (Day 3), 77:1-2 (Slosarčíková).

925 Memorial, para. 106(2); Slamka Partners – Smilno report by JUDr. Pavol Vargaestok of the events on 16-18 June 2016, 14 December 2016, p. 2 of the pdf document (C-161).

926 Slosarčíková WS1, para. 12; Slosarčíková WS2, para. 5 ("The Police initially reached out to the Regional Prosecutor from Prešov, who in turn contacted the District Prosecutor from Bardejov. Since I was on emergency service duty, the District Prosecutor from Bardejov called me. When I learned about the situation I decided to go to Smilno"); Tr. (Day 3), 87:8-88:13 (Slosarčíková).

927 See Schedule of Service Duty dated 4 January 2016, p. 3 of the pdf document (R-115) ("JUDr. Vladislava Slosarčíková […] 13 June – 20 June 2016").

928 Tr. (Day 3), 88:2-13 and 88:25-89:9 (Slosarčíková).

929 Slosarčíková WS1, para. 12.

930 Memorial, para. 105; Slamka Partners – Smilno report by JUDr. Pavol Vargaestok of the events on 16-18 June 2016, 14 December 2016, p. 2 of the pdf document (C-161) ("The police patrol was called to protect public order").

931 Slosarčíková WS1, para. 13.

wanted to cross, and AOG itself".[932] In the absence of any perceived criminal activity, she considered that she had no authority to act and thus left "without giving any instruction to the Police".[933] On her account, she "briefly spoke with police officers to inform them that I cannot act, and I left".[934]

537. The Claimant's account, that the prosecutor told AOG's lawyer, Dr. Vargaeštok, that AOG had to abide by the Interim Injunction, is unsupported by credible evidence. Assuming it were established, *quod non*, such conduct would in any event hardly be objectionable.

538. The Claimant relies on a report from its lawyer generated six months later on 14 December 2016, in which he recounts that Dr. Slosarčíková invited him for a "discussion of situation" while they were on site and "showed [him] a printed copy of the Preliminary Decision", highlighting AOG's obligations under the Interim Injunction and recommending him to "instruct and prevent client from breaking the law".[935] Dr. Slosarčíková denies this account[936] and states that she "first learned about the Interim Injunction" when Dr. Vargaeštok showed her "copies of certain legal documents, such as the title deed, maps, the Interim Injunction itself, and commercial register excerpts".[937] She says that Dr. Vargaeštok mentioned that the injunction did not apply to Cesty Smilno and asked her to "allow them to pass",[938] which she refused to do for lack of authority.[939]

539. Dr. Slosarčíková was a forthright and highly credible witness. It appears inherently improbable to the Tribunal that she would have appeared at the Smilno site with a copy of the Interim Injunction. She testified that she had never heard of AOG and of AOG's dispute with Ms. Varjanová before.[940] It is more likely that AOG's lawyer would have a copy of the injunction and showed it to Dr. Slosarčíková.

540. The Tribunal is also unconvinced, on the basis of the evidence before it, that

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932 Slosarčíková WS1, para. 14.

933 Slosarčíková WS1, paras. 14 and 16; Slosarčíková WS2, para. 8.

934 Slosarčíková WS1, para. 16.

935 Slamka Partners – Smilno report by JUDr. Pavol Vargaestok of the events on 16-18 June 2016, 14 December 2016, p. 2 of the pdf document (C-161).

936 Slosarčíková WS1, paras. 15-16; Slosarčíková WS2, para. 8.

937 Slosarčíková WS1, para. 16; Tr. (Day 3), 92:15-19 (Slosarčíková).

938 Slosarčíková WS1, para. 16.

939 Slosarčíková WS1, para. 16; Slosarčíková WS2, para. 8.

940 She did say that she was given a file relating to a criminal complaint on a motor vehicle involving Ms. Varjanová, but concluded that there was no criminal offense involved, only a "civil dispute for payment of damages". She said she otherwise was not involved in or aware about protests or other activities in Smilno. Tr. (Day 3), 77:3-6, 78:18-21, 80:14-17, 81:13-20, 82:5-10, 82:14-84:2 (Slosarčíková).

Dr. Slosarčíková instructed the police to abandon its policing operation at the Smilno site. She denies it categorically and was not cross-examined about this point.[941] Dr. Vargaeštok's report of 14 December 2016 does not mention any instruction, only that she "spoke to the police a number of times while she was there and then left at about 3.30 p.m.".[942] Accordingly, even if the Claimant could expect to drill at Smilno, *quod non*, the Tribunal rejects the argument that Dr. Slosarčíková's conduct somehow prevented AOG from doing so. It also denies the related request for adverse inferences due to the non-production of documents related to the 18 June 2016 events. Indeed, it has no reason to doubt the representation of the Respondent's counsel that no responsive documents exist.

The road signage scheme (Measure # 6)

541. The Claimant further submits that the police's refusal to erect road signs at the entrance of the Access Road, which it had promised to do in "numerous documents",[943] frustrated its expectation to drill at the Smilno site.[944] It contends that the police proposed to erect road signs during a meeting with AOG's attorney on 15 July 2016,[945] to "calm the nervous situation down".[946] In reliance on these "assurances", AOG allegedly "engaged extensively with the Bardejov Police Force and the Mayor" and, while the mayor supported the road signage, the police refused to approve it in October 2016.[947] In the Claimant's submission, the police reneged on their promise on the basis of a "pretextual" justification and "inconsistent positions" on the status of the Access Road.[948] In its view, the police also failed to adopt a transparent and fair decision-making process.[949] For the Claimant, the refusal was due to a "personal" decision of Dr. [redacted], the director of the District

941 Slosarčíková WS1, paras. 14 and 16; Slosarčíková WS2, para. 8.

942 Slamka Partners – Smilno report by JUDr. Pavol Vargaestok of the events on 16-18 June 2016, 14 December 2016, p. 2 of the pdf document (C-161).

943 Reply, paras. 99(1) and 101; Claimant's Opening Presentation, Slides 81-84.

944 Reply, para. 296

945 Reply, para. 101; Claimant's Opening Presentation, Slide 81, referring to Email of 15 July 2016 from AOG's Attorney to Mr. Fraser (C-331). See also Email of 20 June 2016 from AOG's Attorney to Police, pp. 1 and 7 (C-315); Fraser WS1, para. 66 ("[A]t a meeting on 15 July 2016 the Police had indicated to our legal advisers that if we could arrange for the Smilno municipality to put up a road sign at the entrance to the Road, which acknowledged that the Road was a public special purpose road, then they would keep the Road open. The Police agreed that the law states that the Road was public even without such a procedure but they said something needed to be done to calm the nervous situation").

946 Reply, para. 102; Fraser WS1, para. 66.

947 Reply, paras. 98 and 102-104.

948 Reply, para. 99(1) and (3).

949 Reply, para. 99(2).

Traffic Inspectorate, and/or his subordinate, Mr. [redacted].[950]

542. Since any alleged assurance or promise given by the police in July 2016 post-dates Discovery's decision to drill at the Smilno site,[951] the Claimant could in any event not rely on those alleged statements even if the Tribunal were to accept that the Claimant could expect to drill at Smilno.

543. Moreover, the police officer alleged to have made the contentious promise, the Director of the Bardejov Police Force, Mr. [redacted] had no competence to this effect, as such competence is vested in the head of the District Traffic Inspectorate of the Bardejov police, Dr. [redacted].[952]

544. In any event, the email recounting Dr. Sŷkora's "informal meeting" with Mr. [redacted] does not mention any promise or assurance guaranteeing a particular outcome. It speaks of a "plan" to "open the procedure" to place a traffic sign, which "should" serve to clarify that the "track" was "public", and asks for Mr. Fraser's agreement to "start the process".[953] In fact, Mr. Fraser himself speaks of a "suggestion", not a promise.[954]

545. More importantly, since the Access Road was not a PSPR, it is unsurprising that the District Traffic Inspectorate rejected the signage scheme on 11 October 2016.[955] Consequently, the Tribunal dismisses the Claimant's argument that Measure # 6 frustrated its expectation to drill at Smilno. In this context, it also rejects the request to draw any adverse inference from the Respondent's alleged failure to produce documents relating to the internal decision-making process of the District Traffic Inspectorate.

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950 Reply, paras. 99(3) and 106.

951 Email of 16 July 2016 from Matej Sŷkora (C-331).

952 Mr. Fraser accepts that "only" the "Bardejov Police traffic department" "could grant formal approval of the design". Fraser WS2, para. 20.

953 Email of 16 July 2016 from Matej Sŷkora (C-331).

954 Fraser WS2, para. 18. The only mention he makes of a promise is that the police had "promised complete support" to enter the Access Road "once the road signs were in place" (Fraser WS1, para. 67). The same defects taint the Claimant's contention that AOG's well engineer, Mr. [redacted], received various "assurances" early October 2016 during "various meetings" with the mayor and members of the traffic department that the signage scheme would succeed. The Claimant provided no detail about the type of assurances or any corroborating evidence of Mr. [redacted]' accounts (Fraser WS2, para. 20). Similarly, the Claimant's contention that Dr. [redacted] and/or Mr. [redacted] reached a "personal decision" or that the decision was "pretextual" is unsupported by any corroborating evidence, other than internal emails and hearsay evidence. Mr. Fraser's email to the JV Partners of 14 October 2016 saying that Mr. [redacted] had told Mr. [redacted] that "he would approve the signage scheme" is irreconcilable with Mr. Fraser's subsequent account that Mr. [redacted] "*still* considers that the track is an agricultural track and so not suitable for a regular road sign" (emphasis by the Tribunal). Email of 14 October 2016 from Mr. Fraser (C-151); Reply, para. 99(3) and 106.

955 Letter of 11 October 2016 from the Police to the Smilno municipality (C-153).

The Ministry of Interior (Measure # 7)

546. The Claimant finally contends that the MoI "instructed" the police in December 2016 that the Access Road was a private road,[956] which was allegedly "inconsistent" with that Ministry's 2010 guidance and thus frustrated its expectations.[957]

547. The record shows that the MoI did not give an "instruction", but merely responded to a request for "methodological guidance" from the Regional Traffic Inspectorate in Prešov on the "interpretation and assessment of the terms 'track/rural road' […] and 'public special purpose road'" in relation to the Access Road.[958]

548. That Inspectorate requested guidance on how to classify the Access Road by reference to the position of the MoT on the classification of PSPRs and due to the lack of entry in the official registries about the status of the Access Road. In its response, the MoI stated that, in the absence of records about the Access Road, the latter was not a PSPR, but "private land" for which "public use" or "traffic supervision" would not be justified.[959]

549. Considering that as a matter of law the Access Road was not a PSPR, there is nothing wrong about this answer, which in any event post-dated AOG's last attempt to access the drill site.

550. For these reasons, even if it were to accept that the Claimant could have had any expectation as to its right to drill at Smilno, *quod non*, the Tribunal would still reject the Claimant's contention that Measure # 7 frustrated its expectation to engage in any such drilling.

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551. On the basis of the foregoing discussion, the Tribunal reaches the conclusion that even if Discovery had legitimate expectations in respect of the Smilno site, which it did not, for the reasons set out above, Slovakia did in any event not fail to honor or frustrate any such

956 Claimant's Opening Presentation, Slides 85-86.

957 Claimant's Opening Presentation, Slides 85-86.

958 Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016, p. 1 (C-23).

959 Statement of the Ministry of Interior regarding the classification of the Road, 19 December 2016, pp. 1-2 (C-23) ("The Ministry of Interior agrees with your legal opinion based on the fact that if the Smilno Municipality does not have available any documentation evidencing the existence of a road on land plot with Parcel No. 2721/780 in the Smilno Real Estate Registration Area, and no other documentation evidencing the existence of such road exists, then the road in question is not a special purpose road and must be seen as private land the public use of which is not justified by any tangible evidence, and therefore it is not possible to carry out traffic supervision on such land").

expectations.

(b) Krivá Oľka

552. The Claimant submits that the Respondent breached its legitimate expectation to drill an exploration well at Krivá Oľka when the MoA refused to approve the Lease Amendment and the MoE denied a compulsory access order and then suspended the proceedings under Article 29 of the Geology Act.[960]

553. After determining whether the Claimant had any legitimate expectations in relation to Krivá Oľka (section (i)), the Tribunal will assess whether the Slovak Republic breached those expectations (section (ii)). As the analysis will show, the Slovak Republic did not generate any legitimate expectation to drill at Krivá Oľka and, even if one were to assume such expectation existed, the Slovak Republic did not frustrate it. As with Smilno, the latter analysis is conducted merely for the sake of completeness.

(i) The Slovak Republic did not generate any legitimate expectations

554. Discovery asserts that the Medzilaborce Exploration License and its renewals, read in conjunction with the Geology Act, contained the implicit representation or assurance that AOG would be able to drill a well at Krivá Oľka.[961] Therefore, so it says, it legitimately expected that no State organ would prevent AOG conducting its exploration program.[962]

555. The Respondent answers that the Medzilaborce Exploration License did not contain any "specific assurances" giving AOG a "blank check" to carry out exploration activities.[963] AOG was to comply with "numerous specific conditions" spelled out in the Medzilaborce Exploration License, including "the obligation to secure all rights required to access and use third-party land".[964]

556. For substantially the same reasons already set out in relation to Smilno, the Tribunal finds that neither the Medzilaborce Exploration License, nor its renewals contain any specific representation that AOG would be able to drill at Krivá Oľka. Accordingly, the Slovak Republic did not generate the expectation now invoked by the Claimant. Even if the Tribunal were to consider that such an expectation existed and that Discovery relied on it when deciding to invest in Slovakia in March 2014, the Claimant could only expect to

960 Memorial, paras. 130-157 and 232-234; Reply, paras. 116-141 and 299-304; Claimant's Opening Presentation, Slides 50, 52, 87-120 and 158.

961 Memorial, para. 224; Reply, para. 288.

962 Memorial, para. 226; Reply, para. 22.

963 Rejoinder, paras. 259-260.

964 Counter-Memorial, paras. 310-311; Reply, paras. 117-141 and 299-304.

conduct its activities at the Krivá Oľka site provided it complied with applicable statutory, regulatory and contractual regimes. For completeness, the Tribunal nonetheless addresses below the measures about which Discovery complains on the assumption that it could expect to drill at Krivá Oľka if it complied with its various obligations.

(ii) Even if the Slovak Republic had created any legitimate expectations, it did not frustrate them

557. The Claimant complains that the following measures prevented AOG from drilling at Krivá Oľka:[965]

- the MoA's refusal to approve the Lease Amendment pursuant to Article 50(7) of the Forests Act in June 2016 (Measure # 8);[966]
- the MoE's denial of a compulsory access order under Article 29 of the Geology Act in March 2017 (Measure # 9);[967] and
- the MoE's suspension of the Article 29 proceedings in June 2017 (Measure # 10).[968]

558. The Respondent denies having frustrated any expectations the Claimant may have had.[969] It argues that AOG's own legal mistakes were the reason for its failure to drill a well at Krivá Oľka.

The MoA's refusal to approve the Lease Amendment (Measure # 8)

559. For the reasons set forth below, and supposing that the Claimant had legitimate expectations, *quod non*, the MoA's conduct does not rise to a breach of legitimate expectations because AOG acted late in requesting the extension of the Lease and the Lease Amendment did not comply with Article III(2) of the Lease. Even if the Tribunal were to find that the MoA's decision refusing the Lease Amendment was too formalistic, it is clear that the extension was subject to other conditions and that AOG did not fulfil these conditions. Put differently, AOG cannot legitimately expect not to be held to binding contractual conditions.

965 Memorial, paras. 72 and 232-234; Reply, paras. 299-304; Claimant's Opening Presentation, Slides 50, 52 and 87-120.

966 Memorial, paras. 232-233; Reply, paras. 300-303; Claimant's Opening Presentation, Slides 88 and 105-115.

967 Memorial, para. 234; Reply, para. 304; Claimant's Opening Presentation, Slides 88 and 116-119.

968 Reply, para. 304; Claimant's Opening Presentation, Slides 88 and 120.

969 Counter-Memorial, paras. 323-329; Rejoinder, paras. 328-365; Respondent's Opening Presentation, Slides 176-179.

560. The Medzilaborce Exploration License was issued on 17 July 2006 and renewed in 2010, 2014 and 2016.[970] Aurelian had already identified the "Stromy Lead" in 2010.[971] Subsequently, AOG identified a well location, calling the prospect "Stromy-1" or "Oľka Stromy" until 2015 and thereafter "Krivá Oľka".[972] On 11 September 2014, the JV Partners agreed to drill an exploration well there, planning to drill by the end of that year.[973]

561. The Krivá Oľka site is situated approximately 500 meters west of the village Krivá Oľka within a Natura 2000 protection area, along the road connecting the Oľka and Krivá Oľka villages, on State-owned forestry land.[974] To drill at that site, AOG needed to obtain a forest exemption from the district office and a lease from the State-owned company LESY Slovenskej republiky ("LSR"). It obtained a forest exemption in January 2015, valid until 31 December 2015,[975] and the Lease Agreement on 4 May 2015, valid until 15 January

970 Statement about determination of exploration area (Medzilaborce), NR.: 7673/2006-6.2, 17 July 2006 (C-3 and R-30); Decision about extension of the geological survey permit (Medzilaborce), Ref. No.: 44515/2010, File No. 1000/2010-9.3, 26 July 2010, p. 9 of the pdf document (C-6); Decision about exploration area term extension (Medzilaborce), Record Number: 33409/2014, File Number: 5670/2014-7.3, 9 July 2014 (C-9); Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 5 of the pdf document (C-13).

971 Partner's technical presentation, 11 September 2014, pp. 6 and 26-32 of the pdf document (C-62).

972 Opcom minutes, 11 September 2014, p. 3 (C-61) ("The first proposed drill site location was in the Oľka Prospect"); Partner's technical presentation, 11 September 2014, pp. 26-32 and 60 of the pdf document (C-62).

973 Opcom minutes, 11 September 2014, p. 3 (C-61). Although AOG encountered delays in obtaining the AFE approvals (Opcom Minutes, 28 November 2014, p. 1 (C-66)), it continued to prepare its drilling operations at Krivá Oľka in 2015. It obtained a temporary exemption in January of that year from the Land and Forest Department of the Humenné District Office to use forest land for exploration purposes until the end of the year, which was extended in December 2015 until 31 January 2017 (Humenné District Office Decision exempting forest plots exempted from their function, 16 December 2015 (C-104); Act No. 326/2005 Coll. on Forests, as amended, Article 5(1) (R-70)); secured logging rights in April 2015 valid until 31 December 2015 (State Forestry consent for logging, 10 April 2015 (C-70)); submitted a drilling program to the mining authority by August 2015 (see Partner Progress Report, 25 August 2015 (C-79)); and prepared a "project of geological works" in November 2015 to drill a 1,200 meter deep exploration well at that site (Project of Geological Works Kriva Olka, 2 November 2015 (C-82)). On 3 December 2015, the JV Partners approved drilling at Krivá Oľka "by the beginning of March" 2016 for an estimated cost of EUR 1,046,000 (Opcom Minutes, 3 December 2015, items 4 and 15(5), pp. 2 and 4 (C-100); Operations Update for Opcom, 3 December 2015, pp. 2 and 5 of the pdf document (C-101); AOG 2016 approved budget, 3 December 2015, pp. 1 and 3 (C-97). See also AOG AFE Proposal Cover Letter, 5 November 2015, pp. 1-2 (C-87)).

974 Project of Geological Works Kriva Olka, 2 November 2015, pp. 8 and 18 (C-82).

975 Humenné District Office Decision exempting forest plots exempted from their function, 16 December 2015 (C-104). The Tribunal notes that it is undisputed that Krivá Oľka is located within the area of the Medzilaborce Exploration License and therefore falls within the jurisdiction of the Medzilaborce District Office. It is thus unclear why the Humenné District Office was involved.

2016. This covered the area of 9,354 m² highlighted in orange:[976]

562. Under Article VIII(5) of the Lease Agreement, that agreement was to be approved by the MoA in accordance with Article 50(7) of the Forests Act,[977] commonly referred to as the "prior consent" procedure applicable to areas exceeding 5,000 m².[978] The MoA granted that consent on 19 October 2015 and the Lease was valid from that moment onwards.[979]

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976 Counter-Memorial, para. 138; Lease Agreement between AOG and State Forestry, 4 May 2015, Article III(1) (C-73) ("The Contract is concluded for a definite period of time, starting from the date of its entry into force until 15 January 2016").

977 Lease Agreement between AOG and State Forestry, 4 May 2015, Article VIII(5) (C-73) ("The Contract becomes valid on the day of the granting of consent to rent according to Article 50 par. 7. Act of the National Council of the Slovak Republic No. 326/2005 Coll. on forests and effective on the day following its publication in the Central Register of Contracts on the basis of Act No. 546/2010 Coll.").

978 Article 50(7) of the Forests Act reads in relevant part as follows: "The exchange, lease, lending and transfer of the management of forest property owned by the State shall require the prior consent of the Ministry […]. Prior consent of the Ministry is not required for the lease of State-owned forest property with an area of less than 5000 m² which is not directly connected to State-owned forest property of a similar nature". Act No. 326/2005 Coll. on Forests, as amended, Article 50(7) (R-70).

979 See Lease Agreement between AOG and State Forestry, 4 May 2015, pp. 7-8 of the pdf document (C-73); Fraser WS1, para. 31. The Tribunal notes in this context that AOG failed to drill the Krivá Oľka well in the time window that was at its disposal, namely between 19 October 2015 and 15 January 2016. Although AOG stated in an internal email of 6 July 2015 that, once the MoA approved the Lease, "we can start building location", nothing indicates that AOG did so (Email of 6 July 2015 from Ron Crow (C-278)). On Mr. Lewis' own account, "[d]rilling and completion of the works in Krivá Oľka would have taken about a month" (Lewis WS2, para. 23). One would have expected AOG to prepare itself while waiting for the MoA's approval of the Lease in order to be in a position to drill promptly after receiving that approval. Paradoxically, notwithstanding AOG's main focus on oil discoveries (Lewis WS1, para. 31) and Krivá Oľka being one of the two the priority wells (Opcom minutes, 11 September 2014, p. 3 (C-61)), and although it was in possession of the main permits for Krivá Oľka and faced little to no local opposition there, AOG shifted its attention to Smilno, a gas well for which no gas transportation infrastructure existed and for which it had not secured access rights.

563. Furthermore, pursuant to Article III(2) of the Lease Agreement, AOG could obtain an extension of the Lease Agreement if it "deliver[ed] a request to the Lessor [i.e. LSR] for the extension of the lease *no later than one month before the termination of the Contract*".[980] Accordingly, as the Claimant accepts[981] and contemporaneously understood,[982] AOG was to submit an extension request by 15 December 2015 at the latest.[983] It is common ground that the MoA had to give its "prior consent" for an extension.

564. As noted above, the forest exemption was due to expire on 31 December 2015. AOG applied for the renewal of that exemption on 14 December 2015 and obtained it two days later.[984] There is no difficulty in this respect. By contrast, according to the date on the request, AOG applied for the lease extension on 16 December 2015. However, LSR received that request on 23 December 2015.[985]

565. Although LSR could have refused the extension because it should have been delivered on 15 December at the latest but was actually delivered 8 days later, it did grant the extension on 14 January 2016[986] and forwarded the Lease Amendment to the MoA.[987] The latter received the Lease Amendment on 15 January 2016, on the day the initial Lease expired.[988]

566. Elections took place in March 2016. On 23 June 2016, the new Minister of Agriculture, Ms. Matečná, informed AOG that she could not approve the Lease Amendment, because the Lease had expired (Article III(1) of the Lease Agreement); AOG had failed to comply with the one-month time limit to seek an extension (Article III(2) of the Lease Agreement); and the proposed duration of the Lease Amendment did not comply with the contractual

980 Emphasis added by the Tribunal. Lease Agreement between AOG and State Forestry, 4 May 2015, Article III(2) (C-73).

981 Reply, para. 128; Tr. (Day 1), 46:23-25 (Tushingham) ("Now, it is true that this request was technically submitted one day late, after the deadline specified in the lease").

982 Email of 28 April 2015 from Ron Crow, p. 1 (C-272) ("Their problem was having a 1 year lease with a 1 year notification for termination which made no sense to them. I understand his concerns. He suggested that we do the 1 year with a 3 month termination with an automatic ability to extend as long as we have the proper rights to extract. *We will have to apply for the extension with proper paperwork for extraction 1 month in advance*"; emphasis added by the Tribunal).

983 Tr. (Day 1), 178:4-13 (Anway).

984 Humenné District Office Decision exempting forest plots exempted from their function, 16 December 2015 (C-104).

985 Letter of 16 December 2015 from AOG to the LSR (R-74).

986 Addendum No. 1 extending the Lease Agreement, 14 January 2016 (C-116).

987 Letter of 14 January 2016 from State Forestry (C-296).

988 Receipt for the delivery of the Kriva Oľka lease amendment to Ministry of Agriculture, 15 January 2016 (C-117).

provisions of the Lease (Article III(2) of the Lease Agreement).[989] Minister Matečná concluded her letter by recommending that AOG apply to the MoE to obtain a compulsory access order under the Geology Act.[990]

567. Out of the three reasons underlying Minister Matečná's decision, the debate between the Parties focused on the first two, in particular on whether the MoA was bound to ratify the Lease Amendment because LSR had already approved it, as the Claimant contends, or whether the MoA could no longer give its prior consent because the lease had expired and could not be resurrected, as Slovakia submits.

568. Whatever the merits of the Parties' positions in this debate, the fact is that the Claimant missed the 15 December 2015 time limit to apply for the lease extension. AOG knew that the lease extension was subject to two levels of approval within one month, of which two weeks were effectively neutralized due to the holiday season. It should therefore have anticipated this situation.[991] Contrary to the Claimant's assertion, the delay was not a mere "technicality". AOG was well aware that the Lease Amendment would only be valid once it had been approved by the MoA.[992]

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989 Minister Matečná wrote as follows: "It follows from documentation pertaining to these proceedings that the validity of the above lease agreement (approved prior to its conclusion by this Ministry pursuant to Section 50(7) of Act No. 326/2005 Coll. on forests, as amended) has terminated as a result of the fulfilment and/or non-fulfilment of conditions set out in its Article III dealing with the lease term. Validity of the said lease agreement has terminated as a result of the expiry of the lease term pursuant to its Article III (1), as well as non-fulfilment of the conditions of its extension pursuant to Article III (2) of the lease agreement; namely, the time limit for applying for a renewal was not complied with, and the length of time for which a renewal was requested was not in conformance with the above contractual provision.

Having regard to the above facts, I would like to inform you that the Ministry of Agriculture and Rural Development of the Slovak Republic will not grant its prior consent to the lease of a State-owned forest land in the form of Amendment 1 to the above lease agreement, as the negotiated contractual terms and conditions required for this have not been fulfilled. Also, I would like to submit that it is irrelevant that the said Amendment 1 has already been signed both by you and the State-owned enterprise LESY Slovenskej republiky, as CEOs of a State-owned enterprises may sign similar documents only after having obtained the prior consent to such lease from the Ministry; otherwise such an act is invalid and the document is not legally binding" (Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval, 23 June 2016 (C-19)).

990 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval, 23 June 2016, p. 2 of the pdf document (C-19).

991 The explanation which AOG gave to Minister Matečná that its intention had been to obtain a lease extending "for the term of AOG's use of the site", but that it had been "instructed" "at the end of 2015" "to obtain a new agreement instead" (Letter of 27 May 2016 to Ministry of Agriculture (C-132)), is perplexing and belied by contemporaneous evidence (Email of 28 April 2015 from Ron Crow, p. 1 (C-272)).

992 Letter of 27 May 2016 to Ministry of Agriculture (C-132) ("AOG's new lease agreement with the State Forestry for this site is not valid until approved by the Ministry of Agriculture"); Email of 6 July 2015 from Ron Crow, p. 2 (C-278) ("Once this is signed we can start building location").

569. In addition, the Lease Amendment provided for a duration "until 01 August 2016",[993] when Article III(2) of the Lease required an extension for "at least […] one year".[994] The Claimant did not explain this discrepancy.[995] It may be due to the fact that the Medzilaborce Exploration License was due to expire in August 2016[996] and that the JV Partners had not yet decided on AOG's suggestion to relinquish part of the license areas "in order to reduce the 2016 licence fee".[997] Be this as it may, the fact remains that, here again, AOG did not fulfil the conditions for the Lease extension, and Discovery cannot reasonably argue that AOG should not be held to its binding contractual conditions.

570. Even if the Tribunal were to consider that the MoA's decision was excessively formalistic or flawed as a matter of Slovak law, that would not in and of itself rise to the level of a breach of an international obligation. It is common place that, without more, a breach of domestic law does not as such amount to a breach of international law.[998] At most, this was a temporary setback that did not doom AOG's exploration plans altogether, especially since AOG had received a five-year extension of the Medzilaborce Exploration License two weeks before Minister Matečná's decision[999] and Mr. Lewis was "excited" about the "many legitimate prospects" he had identified.[1000] Moreover, Mr. Fraser testified that LSR had been collaborative and willing to share information about "all of its land" to enable AOG to identify other possible wells, giving AOG "excellent access to a large number of future well locations".[1001]

571. Before concluding, two further points deserve mention. First, the Claimant argues that the MoA refused to approve the lease extension because of Mr. [redacted]'s personal prejudice or

993 Addendum No. 1 extending the Lease Agreement, 14 January 2016, Article I.A (C-116).

994 Lease Agreement between AOG and State Forestry, 4 May 2015, Article III(2) (C-73).

995 Reply, paras. 126-129.

996 Letter of 14 January 2016 from State Forestry (C-296).

997 Opcom Minutes, 3 December 2015, item 14 (C-100).

998 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, para. 73; *ECE v. Czech Republic*, para. 4.764 (RL-92).

999 Decision modifying the size of the area, and extending the validity term for the exploration area, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), 7 June 2016, p. 4 of the pdf document (C-13).

1000 Lewis WS1, para. 45 ("I strongly believed there were many legitimate prospects in the licence areas. I recall being excited with the number of prospects I could see even from an initial review of the data and I was keen to get underway with drilling"). See, for instance, Well site locations visit note, 20 August 2014, pp. 17-46 of the pdf document (C-60); Opcom minutes, 11 September 2014, pp. 2-5 (C-61); Partner's technical presentation, 11 September 2014, pp. 13-38 and 60 of the pdf document (C-62); Email of 20 May 2015 from Ron Crow (C-424); Email of 20 May 2015 from Michael Lewis (C-423). See also Memorial, para. 172; Fraser WS1, para. 106 (according to whom Habura was "on the Medzilaborce Licence").

1001 Fraser WS1, para. 30.

bias against AOG. Second, the Claimant complains that the MoA took six months to notify its refusal and that AOG could have used that time to initiate Article 29 proceedings.

572. As to the first point, the claim is unsubstantiated. Nothing in the record evidences with sufficient certainty that Mr. [redacted], the newly appointed Head of the Service Office of the MoA, was biased against AOG. As proof, the Claimant relies exclusively on its internal communications or hearsay information from AOG's PR advisers and a lobbying firm called Dynamic Relations 2000 without any corroborating evidence to support its assertions.[1002] For instance, there is no contemporaneous evidence showing that Mr. [redacted] based his "pre-election campaign on opposing AOG's project".[1003] The conversations of AOG's PR adviser, Mr. [redacted], were with two people at the MoA who did not know Mr. [redacted] personally.[1004] As for the alleged conversation on 15 June 2016 between a member of parliament, Mr. [redacted], and Mr. [redacted], during which the latter is said to have asserted that he would "definitely" not sign the lease extension because of "his political career",[1005] nothing in the record shows that Mr. [redacted] influenced Minister Matečná's decision or that Minister Matečná herself was biased against AOG.

573. Further, the Claimant cannot seriously complain that Minister Matečná issued the decision and not Mr. [redacted] and at the same time allege that Mr. [redacted] was biased.[1006] On the basis of these circumstances, the Tribunal does not consider it justified to draw adverse inferences from the Respondent's alleged failure to produce any internal documents relating Mr. [redacted]'s decision-making process. This is also the place to deny the request for adverse inferences in connection with the non-production of communications between LSR and the MoA in relation to AOG's request for a new lease on 18 July 2016, since LSR never submitted that lease proposal to the MoA,[1007] such that responsive documents are unlikely to exist. Even if documents existed, one does not see how they would show that the MoA's refusal of the license extension was arbitrary or discriminatory.

1002 Email of 9 May 2016 from Mr. [redacted] (C-109); Email of 9 May 2016 from Alexander Fraser (C-307); Email of 13 May 2016 from [redacted] to AOG (C-130); Email of 13 May 2016 from [redacted] to AOG Team (C-131); Email of 26 May 2016 from Alexander Fraser (C-310); Report from Mr. [redacted], 14 June 2016, p. 3 of the pdf document (R-122); Email of 15 June 2016 from Snowball (C-314). See Fraser WS2, para. 22; Reply, para. 125; Tr. (Day 1), 49:11-17 and 50:13-16 (Tushingham).

1003 Tr. (Day 6), 23:22-23 (Tushingham).

1004 Email of 9 May 2016 from Mr. [redacted] (C-109).

1005 Email of 15 June 2016 from Snowball (C-314).

1006 In an email to AOG's lobbying firm, Mr. Fraser suggested that the Minister approve the extension instead of Mr. [redacted]: "Alternatively, can the Minister sign instead of Mr. [redacted]?". See Email of 13 May 2016 from Mr. Fraser to [redacted], p. 1 of the pdf document (C-130).

1007 Letter of 29 December 2016 from State Forestry to MoE, pp. 11-12 (C-156); Minutes of Oral Hearing, 7 February 2017, p. 3 of the pdf document (C-365).

574. Turning to the second additional point, it is true that the act of refusal took over five months to be taken. However, the Claimant was aware that the MoA's decision could take between several days and six months, which was the time taken for the original Lease.[1008] Moreover, the Claimant itself mentions that the elections in the spring of 2016 resulted in the decision-making processes in Slovakia being "bogged down" pending the nomination of new officials.[1009] While regrettable, the time taken for the extension was in no way unreasonable.

575. For these reasons, even if it were to accept that the Claimant could expect to drill at Krivá Oľka, *quod non*, the Tribunal would dismiss the claim in relation to Measure # 8.

The MoE's refusal to grant a compulsory access order (Measure # 9)

576. The Claimant further submits that the MoE frustrated its expectation to drill at Krivá Oľka, because it denied a compulsory access order under Article 29 of the Geology Act on "pretextual" grounds.[1010] It contends that, although MoE officials, including from Mr. [redacted], initially stated that the MoE would grant the request, the latter actually denied the application due to instructions from the "higher levels" of the Ministry.[1011] The Claimant adds that, even though Minister Sólymos quashed that denial decision, it "was then back to square one".[1012] During the Hearing, it put to Minister Sólymos that he should have granted the access order, rather than remanding the case to the lower level in the Ministry.[1013]

577. The Respondent answers that while the MoE first refused the access order, Minister Sólymos annulled the refusal, which disproves the allegation of a "higher level"

1008 Email from Ron Crow, 28 April 2015, pp. 1-2 (C-72 and C-272); Fraser WS1, para. 30.

1009 For instance, in an internal email dated 9 February 2016, Mr. [redacted] told Messrs. Lewis and Fraser that the MoE had asked "for patience" considering the election season and that the situation would likely "be more normalised" after the election. Email of 9 February 2016 from [redacted] to AOG Team (C-124). See Fraser WS1, para. 20, 42-43 and 79; Reply, para. 125.

1010 Memorial, paras. 143-154, 232 and 234; Reply, paras. 133-140 and 304; Claimant's Opening Presentation, Slides 52, 88, 109-115.

1011 Memorial, para. 152; Reply, para. 138 referring to Email of 9 March 2017 from Viktor Beran (C-370); AOG's report to Partners, 10 March 2017, p. 2 of the pdf document (C-169) ("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").

1012 Reply, para. 140.

1013 Tr. (Day 3), 165:14-170:25 (Sólymos); Tr. (Day 6), 35:10-25 (Tushingham).

instruction.[1014] Rather than on an instruction, it argues the first-instance decision was based on the recognition that the MoE could not encroach on the prerogatives of the MoA in matters of State-owned forestry land.

578. As set out above, if the holder of an exploration license is unable to agree on access with the manager or owner of the land, he/she can seek from the MoE a compulsory access order under the Geology Act. Article 29(9) of the Geology Act specifies that the MoE must reach a decision within six months, subject to a six-month extension if the initial period is "insufficient for objective reasons".

579. The main facts are undisputed. On 30 August 2016, AOG requested an order under to Article 29 of the Geology Act to access an area of 8,076 m² at Krivá Oľka (the "Article 29 Application").[1015] Prior to that, on 18 July 2016, AOG had proposed to LSR to conclude a new lease for the Krivá Oľka site,[1016] but had received no response.[1017]

580. On 20 September 2016, the MoE requested that AOG show that it had obtained no new lease from LSR, failing which the Article 29 Application could not proceed.[1018] On 27 September 2016, AOG provided its 18 July 2016 lease proposal to the MoE adding that LSR had not responded.[1019]

581. On 10 October and 9 November 2016, the MoE advised LSR and the MoA of the commencement of the Article 29 Application.[1020] On 23 November 2016, the MoA replied that LSR, as the manager of State-owned forests, should be a party to the proceedings and that it did "not have the status of a party to the proceedings".[1021] In response to a request from the MoE to explain how LSR had handled AOG's proposal for a new lease dated

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1014 Counter-Memorial, paras. 160-163 and 323; Rejoinder, paras. 142-145 and 348-360; Respondent's Opening Presentation, Slides 123-124, 177 and 179; Sólymos WS2, paras. 12-13.

1015 AOG's Article 29 Application, 30 August 2016 (C-143). AOG's lawyer, Mr. Viktor Beran, informed AOG on 12 July 2016 about a recommendation issued by the MoE on the information an Article 29 application would have to contain and advised that "there is no entitlement to a positive decision of the Ministry, so a decision in Alpines' favour is by no means assured". Email of 12 July 2016 from Viktor Beran (C-330).

1016 Letter of 18 July 2016 from AOG to State Forestry (R-161).

1017 Tr. (Day 6), 88:20-22 (Anway).

1018 Ministry of Environment response to AOG Application under s.29 of the Geology Act, 20 September 2016 (C-144).

1019 Letter of 27 September 2016 from AOG to the MoE (C-334).

1020 Letter of 10 October 2016 from MoE to State Forestry (C-336); Letter of 9 November 2016 from MoE to MoA (C-345).

1021 Letter of 23 November 2016 from MoA to MoE, p. 1 (C-156).

18 July 2016,[1022] LSR wrote on 29 December 2016 that it had not processed AOG's request because it was following the MoA's "recommendation" to AOG of 23 June 2016 to obtain a compulsory access order and because AOG was aware since then that the MoA had not given its "prior consent".[1023]

582. On 7 February 2017, a hearing was held at the MoE on AOG's Article 29 Application and "the possible conclusion of a settlement".[1024] As no settlement was reached, the hearing dealt with (i) the MoA's argument that it had no standing, (ii) LSR's explanation why it had not processed AOG's request for a new lease, and (iii) an argument by AOG that it was "not possible to modify the material scope" of its exploration program at Krivá Oľka "in terms of reducing […] the area of interest below 5000 m2".[1025]

583. The following day, the MoE concluded that the MoA lacked standing and excluded it from the proceedings.[1026] On 6 March 2017, the MoE's Department of State Geological Administration rejected the Article 29 Application on the ground that the MoE could not infringe upon the MoA's competence in matters of State-owned forest land. Specifically, it held that the MoA did not consent to the Lease Amendment and that itself it could not "replace" such consent.[1027]

1022 Letter of 2 December 2016 from MoE to State Forestry, p. 10 of the pdf document (C-156).

1023 Letter of 29 December 2016 from State Forestry to MoE, pp. 11-12 (C-156).

1024 Minutes of Oral Hearing, 7 February 2017, pp. 2-3 of the pdf document (C-365). AOG's lawyer who attended the hearing, Mr. Viktor Beran, informed his client that "[m]ost of the time" was spent on the question whether the MoA was a participant in the proceedings. He added that the MoE sought "to persuade" AOG to submit a request for a new lease to LSR, but that this was "denied resolutely" because AOG no longer trusted LSR or the MoA to process such a request "in due course" (Email of 8 February 2017 from Viktor Beran, p. 2 of the pdf document (C-366).

1025 Minutes of Oral Hearing, 7 February 2017, p. 3 of the pdf document (C-365).

1026 See Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 3 of the pdf document (C-25).

1027 The MoE provided the following reasoning: "If the validity of the lease agreement pursuant to the Section 50 subsect. 7 of the Forest Act requires the consent of the Ministry of Agriculture, as a competence defined by a rule of public law, the Ministry is of the opinion that such consent cannot be replaced by the procedure pursuant to the Section 29 of the Geological Act, as the aim of the legislation while applying the statutory rule through of [sic] an issue act of application of law, is to get into ownership and usage relationships, such as exclusively private law relationships. The Ministry therefore concluded that the mentioned legal competence of the Ministry of Agriculture could not be considered a private law institute, but a public competence which the Ministry could not transfer to itself through a decision issued in the given matter. In the given matter, it is possible to substitute the manifestation of will of the party to the proceedings – LESY Slovenskej republiky, š.p., as an administrator of the state-owned real estate concerned, but not the consent of the Ministry of Agriculture, as a governmental agency whose public position in the given matter is constituted by a rule of public law. The consent of the Ministry of Agriculture has, by its nature, the character of a precedent condition connected by a rule of public law with the validity or even perfection of a legal act by which forest property owned by the state is left temporarily, by lease or by other contract, to a certain subject of legal relations. Due to the fact that by decision in the given matter the Ministry would accede to the competences of another

584. AOG appealed that decision on 24 March 2017,[1028] and, on 13 June 2017, Minister Sólymos annulled it, based on a proposal made by a special commission of the MoE. He remanded the matter to the Department of State Geological Administration "for a new discussion and decision".[1029] In essence, Minister Sólymos held that the MoE had insufficiently ascertained whether AOG and LSR could conclude a new lease.[1030] Moreover, he disagreed that the MoE would "intervene in the exercise of public competence" of the MoA if a compulsory access order were granted, since the case at hand concerned a "private law relationship" between LSR and AOG.[1031] In other words, the first instance decision was annulled because, contrary to the Department of State Geological Administration's misguided understanding, the MoE would not arrogate to itself the MoA's public competence to approve a lease on State-owned forest land. In reality, granting AOG's request would not have resulted in a lease approved by the MoE instead of the MoA, but in an access order for which no approval from the MoA was necessary.

585. Based on these facts, the Claimant's arguments that the first instance decision was caused by a higher level instruction and that Minister Sólymos should not have remanded the case do not withstand scrutiny. The first argument is rebutted by the fact that Minister Sólymos annulled the first instance decision. It is thus no surprise that the Claimant does not come close to substantiating its assertion of instruction. It relies on internal communications and hearsay about conversations between AOG's lawyer, Mr. Viktor Beran and Mr. [redacted], a junior official in the Department.[1032] This being so, it did not present Mr. Beran to testify about his conversations with Mr. [redacted], while the Respondent offered the testimony of Minister Sólymos. The latter was adamant that he gave no instruction to reject the Article 29 Application[1033] and was not aware of anyone else having done so.[1034] On the basis of the evidence before it, the Tribunal has no reason to doubt Minister Sólymos' testimony,

governmental agency whose competence is regulated by a special legal regulation, the Ministry had to decide to reject the submitted petition". Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 5 of the pdf document (C-25).

1028 See Decision of the MoE, 13 June 2017, p. 5 (C-174).

1029 Decision of the MoE, 13 June 2017, p. 1 (C-174).

1030 Decision of the MoE, 13 June 2017, p. 8 (C-174).

1031 Decision of the MoE, 13 June 2017, p. 9 (C-174).

1032 AOG in particular relies on an email sent by Mr. Beran on 9 March 2017 in which he says that Mr. [redacted] told him that "they were finalizing the wording in favour of AOG, when they received instruction from the high levels of the Ministry, to decide negatively". Mr. Beran further stated that his view was that "they are just scared to pass any decision that might rise negative public reaction". Email of 9 March 2017 from Viktor Beran (C-370). See also AOG Report, 10 March 2017, p. 2 (C-169).

1033 Tr. (Day 3), 149:13-18, 150:16-18 and 151:12-152:1 (Sólymos).

1034 Sólymos WS2, paras. 12-13; Tr. (Day 3), 160:13-18 and 162:16-21 (Sólymos).

which is reinforced by his annulment of the first instance decision.[1035]

586. But even if another official in the MoE had given an instruction, the Claimant has not identified who that official may be. Other than Minister Sólymos, the Claimant mentions two other officials as possibilities: Ms. [redacted], the director general of the Geology Directorate, and Ms. [redacted], the director of the Department of State Geological Administration. The first had no involvement with AOG, but for attending the 15 December 2016 meeting together with Minister Sólymos,[1036] where AOG's internal exchanges show that AOG felt that the officials in attendance "were very aware of and sympathetic about our challenges".[1037]

587. By contrast, Ms. [redacted], who was Mr. [redacted]'s direct superior, conducted the 7 February 2017 hearing and signed the 6 March 2017 decision.[1038] If anybody had instructed Mr. [redacted] to draft a decision denying the Article 29 Application, it might have been her.[1039] However, nothing in the record suggests she did so, or that she had any motive for doing so. Rather, the opposite seems true. Internal AOG emails depict Ms. [redacted] as supportive and understanding of AOG's "troubles".[1040] Actually, the Claimant confirmed at the Hearing that officials at the MoE and "specifically Ms. [redacted]" were "supportive of AOG".[1041]

1035 The Tribunal notes that Mr. Sólymos did not remember receiving two withheld documents entitled "Draft of the information for the Minister" prepared by Mr. [redacted] on 17 October 2016 and 13 February 2017s, identified as document nos. 7_0079 and 7_0081 in the Respondent's privilege log, and which contain "an assessment of potential implications", respectively of "denying" or "positive and negative decisions" in relation to the Article 29 Application. The Respondent stated at the Hearing that a "draft was prepared, but [that] it was not delivered to the Minister", following which Minister Sólymos stated with respect to the first document: "I do not remember at all ever receiving such a document. I don't remember. So I likely have not received it"; and with respect to the second document: "But I don't remember that information at all. I don't even remember ever receiving it. […] I've never seen anything like that". Tr. (Day 3), 125:8-127:23 and 147:7-149:4 (Sólymos); Tr. (Day 6), 91:14-17 (Anway); Respondent's Privilege Log, 14 July 2023, p. 4.

1036 Email of 9 December 2016 from Ms. [redacted] to the AOG attendees ahead of the meeting at the Ministry of Environment (C-158).

1037 Email of 15 December 2016 from Alexander Fraser (C-350); Email of 15 December 2015 from A. Fraser to [redacted] and M. Lewis, 15 December 2015 (R-213).

1038 Minutes of Oral Hearing, 7 February 2017, p. 2 of the pdf document (C-365); Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, p. 5 of the pdf document (C-25); Tr. (Day 3), 114:7-8 (Sólymos).

1039 Although Mr. [redacted] may have "kept assuring" Mr. Beran that there was "no reason" to reject the Article 29 Application (Email of 17 October 2016 from Viktor Beran (C-337); Email of 9 March 2017 from Viktor Beran (C-370)), it may simply be that Ms. [redacted] disagreed with his views and that she had a different legal assessment than the one he might have had.

1040 See, for instance, Email of 9 February 2016 from [redacted] to AOG Team (C-124).

1041 Tr. (Day 6), 21:9-13 (Tushingham).

588. In sum, the Claimant did not establish that the MoE's decision was caused by an instruction from above. In this context, the Tribunal is disinclined to draw an adverse inference from the Respondent's non-production of documents relating to the first instance decision-making process. The Respondent stated that no responsive documents exist about any instruction from "above", which appears plausible considering the facts just reviewed.

589. In its second argument, the Claimant complains about Minister Sólymos remanding the Article 29 Application. It raised this argument for the first time at the Hearing, which limited the Respondent's opportunity to address it.[1042] Be this as it may, the argument is in any event ill-founded. Remanding was one of the options open to Minister Sólymos under Article 59 (2) and (3) of the Administrative Procedure Code:[1043]

> "(2) If there are grounds for it, the appellate body may alter or quash the decision; otherwise, the appeal shall be dismissed, and the decision shall be upheld.
>
> (3) The appellate body shall quash the decision and return the matter to the administrative authority that issued it for new consideration and a decision, if deemed more appropriate particularly for reasons of expediency or economy; the administrative authority shall be bound by the legal opinion of the appellate body".[1044]

590. Moreover, in its appeal brief, AOG itself requested Minister Sólymos either to annul and remand or to amend the first instance decision. Although the Claimant did not file AOG's appeal brief, the decision refers to the request for relief as follows:

> "[T]o annul the contested decision of the Ministry pursuant to the Section 61 subsect.2 of the Administrative Procedure Code and to return the case for a new hearing and decision, or to amend the contested decision".[1045]

591. Finally, further fact-finding was necessary "to establish unequivocally and without any doubt" that AOG and LSR could not agree on a new lease.[1046] Hence, remanding the case to the lower instance made perfect sense.[1047]

592. To conclude, even assuming the Claimant could expect to drill at Krivá Oľka, *quod non*,

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1042 Tr. (Day 3), 165:14-170:25 (Sólymos); Tr. (Day 6), 35:10-25 (Tushingham); Tr. (Day 6), 89:21-91:13 (Anway).

1043 Tr. (Day 6), 35:10-17 (Tushingham).

1044 Act No. 71/1967 Coll. on Administrative Procedure, as amended, Article 59(2)-(3) (R-76A).

1045 Decision of the MoE, 13 June 2017, p. 6 (C-174).

1046 Decision of the MoE, 13 June 2017, pp. 8-9 (C-174).

1047 The appeal decision having clarified that the relationship between LSR and AOG was a matter of private law, that it was LSR, as administrator, that exercised the owner's rights over State-owned forests, and that only LSR had standing as a party in the Article 29 proceedings, it made sense to re-assess the feasibility of a lease agreement under these specifications.

the Tribunal would dismiss the claim in connection with Measure # 9.

The MoE's suspension of the Article 29 proceedings (Measure # 10)

593. It is the Claimant's submission that the MoE's decision, made on 27 June 2017 following remand, suspending the Article 29 proceedings pending the resolution of a "preliminary issue" breached its expectation to drill at Krivá Oľka.[1048] It argues that the MoE's request for documents demonstrating the outcome of negotiations between AOG and LSR was "inconsistent, arbitrary, inexplicable and pretextual" because the MoE had already asked for such documents in September 2016 and knew that no agreement could be reached with LSR on a new lease.[1049] Moreover, it was "tolerably clear" that no lease could be secured, since the MoA had refused to approve the Lease Amendment in June 2016 and LSR had refused to process the new lease proposal in July 2016.[1050]

594. The Claimant disputes the Respondent's contention that AOG ceased participating in the procedure.[1051] For the Claimant, AOG "continued to engage with the MoE in its attempts to obtain a compulsory access order", but the MoE imposed "unjustified and arbitrary procedural roadblocks to delay AOG's application".[1052] Therefore, the Claimant concludes that the MoE did not act in good faith nor process AOG's application fairly.[1053]

595. The Respondent answers that the MoE was justified in suspending the Article 29 proceedings to ascertain that no lease agreement could be concluded and in requesting proof that no lease would be forthcoming.[1054] It stresses that, instead of providing the requested information, AOG stopped participating in the process and subsequently abandoned the Medzilaborce Exploration License.[1055] Accordingly, it was AOG's own conduct that led to its inability to access Krivá Oľka.[1056]

596. The Tribunal notes that under Slovak law a compulsory access order is a measure of last resort, since it imposes restrictions on the use of private property against the will of the

1048 Reply, paras. 133(3) and 141; Claimant's Opening Presentation, Slides 52, 88, 120 and 158.

1049 Reply, para. 141(2)

1050 Reply, para. 141(7).

1051 Reply, para. 141.

1052 Reply, para. 141.

1053 Reply, para. 141, referring to Fraser WS1, para. 88.

1054 Counter-Memorial, paras. 164-166; Rejoinder, paras. 142-145 and 361-365; Respondent's Opening Presentation, Slides 125-127 and 178.

1055 Counter-Memorial, paras. 164-165.

1056 Counter-Memorial, para. 166.

owner. Accordingly, before granting such an order, it was legitimate for the MoE to ensure that AOG and LSR could not agree on a lease (or that the MoA would not give its prior consent).[1057]

597. When the MoE suspended the Article 29 proceedings in June 2017,[1058] the MoE did not know with sufficient certainty whether AOG and LSR could agree on a new lease or whether the MoA would approve it or not. LSR had not processed AOG's request a year earlier because it was following the MoA's recommendation to resolve the access issue under the Article 29 procedure.[1059] During the February 2017 hearing, the MoA only intervened on its standing and expressed no opinion on whether it would approve a new lease if it were to receive a request.[1060]

598. Moreover, contrary to the Claimant's allegation that LSR refused to conclude a new lease, the record shows that AOG itself "resolutely" opposed the idea of seeking a new lease at the February 2017 hearing.[1061] It was therefore reasonable for the MoE to clarify the position.

599. Furthermore, all AOG had to do to lift the suspension was to submit a new lease proposal to LSR and, if the latter reacted negatively or not at all, it could then ask the MoE to resume the proceedings.[1062] Instead, it remained inactive and eventually relinquished the

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1057 The Tribunal notes that the MoE has the duty under Article 32(1) of the Code of Administrative Procedure to ascertain all relevant facts prior to reaching a decision. The provision reads in relevant part as follows: "The administrative body is obliged to ascertain exactly and completely the true state of the matter and, for that purpose, obtain the necessary documents for a decision". Act No. 71/1967 Coll. on Administrative Procedure, as amended, Article 32(1) (R-170).

1058 Decision of the Ministry of Environment, 27 June 2017 (R-75).

1059 Letter of 29 December 2016 from State Forestry to MoE, pp. 11-12 (C-156); Minutes of Oral Hearing, 7 February 2017, p. 3 of the pdf document (C-365).

1060 Minutes of Oral Hearing, 7 February 2017, p. 3 of the pdf document (C-365); Email of 8 February 2017 from Viktor Beran, p. 1 of the pdf document (C-366) ("Ministry of Agriculture did not put forward any statement, positive or negative, regarding the matter itself whatsoever").

1061 Email of 8 February 2017 from Viktor Beran, p. 2 of the pdf document (C-366) ("Mr [redacted] tried to persuade us to submit new request to LESY SR with regard to the lease agreement, which *we denied resolutely* as we do not trust LESY SR or Ministry of Agriculture that they will process our request in due course"; emphasis added by the Tribunal).

1062 The Claimant was contemporaneously aware of the "MoE's guidance on its website for Article 29 application" that AOG did not have to chase down LSR "repeatedly", and that it was sufficient to send "a draft proposal to enter into a lease" to LSR and for "a period of 15 days" to lapse "without any response". Reply, para. 141(5)(a); Letter of 27 November 2017 from AOG, pp. 1-2 of the pdf document (C-384) (citing point 4 of the guideline, providing in relevant part: "The owner or the user or manager of the property need not be approached repeatedly […], the presumption of non-consent shall apply in the proceedings. In the proposal for the conclusion of the contract (or the subject of the consent), it is possible to specify 15 days as the optimal time limit for the owner's response/statement"); Email of 5 October 2017 from Alexander Fraser (C-383) (referring to the "published guidelines on the Ministry of Environment's own website"). As Minister Sólymos explained to AOG, it had to

Medzilaborce Exploration License.[1063]

600. In these circumstances, the Claimant cannot credibly complain about the continuation of the suspension and, assuming that the Claimant could expect drill at Krivá Oľka, *quod non*, the Tribunal would reject this claim.

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601. To conclude, even if the Tribunal were to accept that the Claimant could expect to drill at Krivá Oľka, *quod non*, it finds that none of the disputed measures would have frustrated such expectations. Accordingly, the Tribunal dismisses this limb of the Claimant's FET claim and now addresses the EIA procedures.

(c) EIA

602. The Claimant submits that the stability of the investment framework protected under the BIT was "destroyed" when the Slovak Republic required AOG to perform full EIAs for the Smilno, Krivá Oľka and Ruská Poruba wells, and to carry out preliminary EIAs for any future exploration well.[1064] It asserts that neither the EIA Directive nor the EIA Act applied to AOG's exploration works since the Slovak Republic had already given its "development consent" when granting the Exploration Licenses in 2006[1065] and granted permits to drill at the three sites.[1066]

603. The Claimant further argues that the MoE and Minister Sólymos made clear representations "to AOG directly", on which it relied, to the effect that AOG "was under no legal obligation to conduct an EIA prior to drilling its exploration wells" notwithstanding the amendment to the EIA Act.[1067] According to the Claimant, those representations "generated a further legitimate expectation" that AOG "would not be required to conduct a preliminary EIA".[1068] Yet, the Slovak Republic frustrated those expectations which was "the last nail in the coffin" and "precipitated the withdrawal of

provide proof of (i) a written lease proposal addressed to LSR and the MoA, (ii) a delivery note, and (iii) any responses from LSR and the MoA. Letter of 31 January 2018 from Minister Sólymos, p. 5 of the pdf document (R-387).

1063 AOG notice of withdrawal from Medzilaborce, 13 April 2018 (C-193).

1064 Memorial, paras. 158-197 and 235-238; Reply, paras. 149-193 and 305-314; Claimant's Opening Presentation, Slides 52, 121-142 and 158.

1065 Reply, para. 150-155.

1066 Reply, para. 156-158.

1067 Memorial, para. 236; Reply, para. 158.

1068 Memorial, para. 236.

AOG's JV Partners and ultimately destroyed the value of Discovery's investment".[1069]

604. The Respondent disputes that the Claimant could legitimately expect being exempted from EIA procedures for drills after 1 January 2017 and that, in any event, it did not frustrate any legitimate expectations that the Claimant may have had.[1070] It emphasizes that "Discovery can point to no assurances made to it, at the time it invested, that future environmental assessments would never be required in any circumstance".[1071] Nor can the Claimant rely on supposed later assurances.[1072] The Respondent explains that it enacted the EIA Amendment in full accordance with the police powers doctrine, in response to infringement proceedings commenced by the European Commission in 2013 for its failure to properly transpose the EIA Directive.[1073]

605. Moreover, says Slovakia, neither the MoE nor Minister Sólymos "ever represented to AOG or Discovery that Slovak authorities would not order a full EIA on AOG when AOG agreed to undergo a Preliminary EIA voluntarily" or that the EIA Amendment would not apply to future drills.[1074] The Respondent underlines that AOG voluntarily submitted preliminary EIA applications, but then "chose to abandon the process", although it had prevailed in its appeal from the decision of the Humenné District Office ordering a full EIA for Ruská Poruba.[1075]

606. Finally, the Respondent contends that the inclusion of a reference to the EIA Amendment in the MoE's decision to modify the exploration area of the Svidník Exploration License is "irrelevant" and in any event "consistent with its approach" of restating conditions that "apply *ex lege*".[1076]

(i) The Slovak Republic did not generate any legitimate expectations

607. The Tribunal must first determine whether the Slovak Republic generated any legitimate expectation that AOG would not have to undergo EIA procedures for its exploration drills. As discussed above, in order to succeed on its claim the Claimant must demonstrate the

1069 Memorial, paras. 158 and 238.

1070 Counter-Memorial, paras. 180-210 and 330-344; Rejoinder, paras. 155-201 and 367-398; Respondent's Opening Presentation, Slides 135-155 and 180-183.

1071 Counter-Memorial, para. 330.

1072 Counter-Memorial, para. 330.

1073 Counter-Memorial, paras. 331-341.

1074 Counter-Memorial, paras. 342-343.

1075 Counter-Memorial, para. 210.

1076 Counter-Memorial, paras. 217 and 344.

existence of clear and specific representations on which it relied when it decided to invest. In addition to its overall expectation that the Slovak Republic would not hinder the Claimant's exploration in areas covered by the Exploration Licenses, the Claimant invokes the BIT's preamble that links FET to a stable regulatory framework and various statements by the MoE and Minister Sólymos.[1077]

608. As regards the licenses and their renewals, they do not contain any specific representations that Discovery or AOG would not have to perform EIAs for exploratory drillings or that the legislative framework would not evolve in that regard. The Claimant identifies neither a stabilization clause nor a specific commitment of regulatory stability, and it rightly does not contend that the Exploration Licenses contained an "implied stabilization clause".[1078] The same is true of the preamble of the BIT, which cannot be read as containing a stabilization clause or a guarantee of regulatory stability.[1079]

609. There is a large consensus in investment arbitration that, absent a stabilization clause or a specific commitment of regulatory stability, an investor cannot legitimately expect that the State will not change its legislative and regulatory framework over time, provided the changes are reasonable, proportionate, non-discriminatory and conform with due process.[1080] As noted in *LSG v. Romania*, "[l]egislation and regulation are by nature dynamic and States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of the public interest"[1081] or in the words of *Infinito v. Costa Rica*:

> "Unless they expressly undertake not to do so, States are free to modify the legal regime applicable at the time of the investment to the extent they do so within the limits prescribed by FET, *i.e.*, the evolution must not be unreasonable, discriminatory, disproportionate, or adopted contrary to due process".[1082]

610. In the present case, Slovakia not only had the power to amend its regulatory framework, it was also under an obligation to transpose the EIA Directive into its municipal legal

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1077 Memorial, paras. 235-238; Reply, para. 307.

1078 Tr. (Day 6), 12:23-13:1 (Tushingham) ("Of course we don't go that far, because there was no such implied stabilization clause in the licences that were granted").

1079 The preamble reads in relevant part as follows: "The Czech and Slovak Federal Republic and the United States of America […], Agreeing 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". Slovak-US BIT, preamble (C-1).

1080 *Saluka Investments v. Czech Republic*, para. 304 (CL-11); *AES v. Hungary*, para. 9.3.34 (RL-62); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 666 (CL-36); *Electrabel v. Hungary*, Award, para. 178 (RL-148).

1081 *LSG v. Romania*, para. 1015 (CL-98).

1082 *Infinito Gold v. Costa Rica*, para. 519 (CL-15).

regime.[1083] As the *Electrabel v. Hungary* tribunal held, EU member States cannot in principle be held liable for acting in compliance with a legally binding decision of an EU institution.[1084]

611. Significantly, on 22 March 2013, i.e. before Discovery's investment decision, the European Commission initiated infringement proceedings against the Slovak Republic because it had incorrectly transposed the EIA Directive into the EIA Act and, in particular because Annex 8 of the EIA Act, referred to "exploitation drills" instead of "deep drills", meaning "that 'exploration drills' ha[d] been excluded in the practice".[1085] On 8 July 2016, the Slovak Republic informed the European Commission that it would amend the EIA Act by deleting the word "exploitation", such that all deep drills, including exploration drills, would be captured by the relevant provision.[1086] Consistent with that representation, the Slovak Parliament amended the EIA Act on 25 November 2016, which amendment entered into force on 1 January 2017. Since then, exploratory drills deeper than 600 meters required a preliminary EIA. The following table depicts the amended portion of Annex 8 of the EIA Act (the right-hand column concerns preliminary EIAs and the one to its left mandatory EIAs):[1087]

1083 This directive and its amendment were published on 28 January 2012 and 25 April 2014, respectively. Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, 13 December 2011 (R-83); Directive No. 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, 14 April 2014 (R-86).

1084 *Electrabel v. Hungary*, Decision on Jurisdiction, para. 6.72 (RL-74).

1085 See [redacted]. In February 2015, the Court of Justice of the European Union confirmed that "exploratory drillings are a form of deep drilling" falling within the scope of Annex II, item 2(d) of the EIA Directive (Judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others v. Bundesminister für Wirtschaft, Familie und Jugend*, Case C-531/13, paras. 30-31 (RL-139)).

1086 [redacted].

1087 Neither version filed in the record by the Parties, whether in Slovak or in English, correctly aligns the elements contained in the two columns on the right, and counsel on both sides agreed that the table should read as depicted above. EIA Act (2017), Annex 8(1)(16), p. 13 of the pdf document (C-225); Act No. 24/2006 Coll. on Environment Impact Assessment, as amended (applicable as of 1 January 2017), Annex 8(1)(16), p. 13 of the pdf document (R-200); Tr. (Day 6), 137:19-139:13 (Pekar and Tushingham).

16.	Drills (excluding drills for soil stability investigation related to exploitation activities) in particular:		from 600 m
	- drills for utilizing geothermal energy and geothermal waters	from 500 m	up to 500 m
	- drills for storing radioactive waste	no limit	
	- drills for water sources		from 300 m

612. Put differently, by the time Discovery decided to invest in the Slovak Republic in March 2014, it was – or should have been – aware that EU law required member States to impose a preliminary EIA for "deep drills", and that infringement proceedings were pending against the Slovak Republic in this respect. The Claimant therefore could not legitimately expect that the Slovak Republic would not amend the EIA Act and thereby continue to be non-compliant with the EIA Directive.[1088] Any reasonable exercise in due diligence would have put the Claimant on notice of the coming change in Slovak law.

613. It follows that the EIA Amendment applied to AOG's activities from 1 January 2017 onwards and that AOG would have to perform preliminary EIAs for new drillings below 600 meters.[1089] This was irrespective of whether the Exploration Licenses had been issued at an earlier date and the Slovak Republic had approved the Smilno, Krivá Oľka and Ruská Poruba wells in 2015.[1090]

614. As to the first point, the Claimant understood at the time that a decision on a preliminary EIA "can only be carried out with respect to a specific exploration drill and its impact on the environment, but not in relation to exploration drills in general, nor to their general impacts within a certain area, without the specific exploration drill being precisely specified".[1091] As to the second point, although the Slovak Republic had approved drilling

[1088] It is also noteworthy that, pursuant to the complaint procedure in Article 19 of the EIA Act, anyone from the public is entitled to file a reasoned request that the authorities determine whether an activity that is not listed in Annex 8 must undergo a preliminary EIA. Consequently, AOG could not exclude the possibility prior to 2017 of having to perform a preliminary EIA (and eventually a full EIA) as a result of a complaint procedure under Article 19 of the EIA Act. EIA Act, Article 19 (R-45).

[1089] As Minister Sólymos confirmed. Tr. (Day 3), 186:18-187:14 (Sólymos). See also Sólymos WS1, para. 13 ("The Amendment thus does not apply to exploration activity, it applies to specific exploration drills. Those that were executed before 1 January 2017 are not subject to the Amendment, but it applies to all new exploration drills after 1 January 2017").

[1090] Memorial, para. 176; Reply, paras. 150-151.

[1091] Email of 9 March 2017 from V. Beran to [redacted], p. 3 (R-179).

at Smilno, Krivá Oľka and Ruská Poruba in 2015, the Hearing confirmed that no drilling had begun before 1 January 2017.[1092] Specifically, it is undisputed that AOG never drilled at Krivá Oľka and Ruská Poruba. As regards Smilno, the Claimant and its witnesses consistently spoke of three failed drilling attempts. In fact, in June 2016 AOG drove a surface conductor 21 meters into the ground, but activists prevented it from setting "the conductor pipe in the hole".[1093] The Claimant's technical expert, Mr. Moy, stated that drilling only begins once the surface conductor is in the ground since its purpose is to prevent caving around the drill bit.[1094] Be this as it may, AOG agreed in April 2017 to perform preliminary EIAs for all its drilling locations as a result of its engagement with local activists and environmental organizations.[1095]

615. Finally, the Claimant cannot rely on the public statements of Minister Sólymos or the MoE between November 2016 and February 2017 as a basis of any legitimate expectation, since they postdate Discovery's investment decision.[1096] In any event, those statements do not

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1092 Tr. (Day 3), 186:18-187:14 (Sólymos). See also Sólymos WS1, para. 13 ("The Amendment thus does not apply to exploration activity, it applies to specific exploration drills. Those that were executed before 1 January 2017 are not subject to the Amendment, but it applies to all new exploration drills after 1 January 2017").

1093 Lewis WS1, para. 66. Immediately before AOG's second drilling attempt, it told its JV Partners on 15 June 2016 that the conductor casing would be installed between 17 and 20 June, that it would circulate "the drilling contract with bid analysis by June 20th" and that the plan was "to mobilize the[] rig on July 4th with an anticipated spud date of July 10th" (AOG's internal report: weekly status report, 15 June 2016, p. 3 of the pdf document (C-135)). After protestors had prevented AOG from proceeding with its plans, Mr. Lewis reported on 20 June 2016 to the JV Partners that AOG "did NOT get conductor pipe set" and that the decision was taken "NOT run and cement conductor casing in hole" (Email of 28 June 2016 from Michael Lewis, pp. 1 and 5 of the pdf document (C-327)). During a meeting of the operating committee on 8 November 2016, AOG told its JV Partners that the "well will now be drilled with LWD [i.e., logging while drilling] instead of MWD [i.e., measurement while drilling]" and the partners agreed to negotiating a drilling contract with the company G-Drilling SA, thus confirming that the actual drilling had not yet commenced (Opcom Minutes, 8 November 2016, p. 2 (C-342); Resolution of Operating Committee, 8 November 2016 (C-343)). Similarly, in its letter of 21 December 2016 to Minister Sólymos, AOG stated that it did not agree to voluntarily carry out a preliminary EIA for the Smilno and Krivá Oľka wells because "drillholes should have been drilled more than 12 months ago", further adding that "if the drilling in the Smilno site well does not commence by the end of January 2017", AOG would consider leaving Slovakia (Letter of 21 December 2016 to the Ministry of Environment, p. 2 (C-162)).

1094 Tr. (Day 5), 52:10-53:2 (Moy). See also Moy ER1, para. 47; Lewis WS1, para. 66; Fraser WS1, para. 54.

1095 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017 (C-171). Mr. Fraser explained that, "[b]y early 2017", "[w]e were coming to the conclusion that it was effectively impossible to proceed without establishing some sort of dialogue with the activists opposed to our operations, in order to hear their concerns (even though we considered them misplaced) and attempt to find some common ground". He added that, after initially demanded that no drilling occur, the activists were of the view that "[t]he most important element in promoting trust would be to comply voluntarily with the new preliminary EIA process for all wells". In the end, and "after some hesitation", AOG "agreed to undergo the preliminary EIA". Fraser WS1, paras. 92 and 94-95. See also Memorial, paras. 180-182 and 237(1).

1096 Memorial, paras. 174-180, referring to Ministry of Environment Press Release, "L. Sólymos is sending ministerial in-depth audit to Smilno", 29 November 2016 (C-157); Ministry of Environment Press Release,

say that AOG was "under no legal obligation to conduct an EIA". Nor do they evince that Minister Sólymos uttered "repeated requests" to AOG leaving it "with no other option" but to agree to voluntary EIAs.[1097] Rather, they were made in the broader context of Minister Sólymos' attempts to contain worsening relations between AOG and local activists after AOG's third drilling attempt at Smilno in November 2016[1098] and the "compromise" proposed at the 15 December 2016 meeting that AOG voluntarily agree to conduct preliminary EIAs for all its drill sites,[1099] including those where drilling – according to his understanding – had already begun.[1100] In the end, none of the statements invoked by the Claimant can reasonably be regarded as exempting AOG from performing preliminary EIAs for exploratory wells deeper than 600 meters.

616. In conclusion, the Claimant cannot reasonably assert that it had a legitimate expectation not to be subjected to EIA requirements, or to be entitled to a regime of regulatory stability based on the licenses, the BIT, the Slovak / EU legal framework or the statements of the MoE or Minister Sólymos. For completeness, the Tribunal nonetheless addresses below the measures about which the Claimant complains.

(ii) Even if the Slovak Republic had created any legitimate expectations, it did not frustrate them

617. The Claimant submits that the decisions of the district offices ordering AOG to perform full EIAs for the Smilno, Ruská Poruba and Krivá Oľka wells breached its expectations and precipitated the destruction of its investment in the Slovak Republic (Measures ## 11-13). It further claims that imposing preliminary EIAs for future wells in the new Svidník

17 January 2017 (C-163); Korzar Article – Minister Comments on the Borehole Near Smilno, 27 January 2017, p. 2 of the pdf document (C-164); Ministry of Environment Press Release, 15 February 2017 (C-168).

1097 Memorial, para. 174; Reply, paras. 160-162 and 311(1). Notably, Mr. Fraser qualified Minister Sólymos' proposal as a "wish" (Fraser WS1, para. 91).

1098 By then, local activists were becoming more vocal and organized, and AOG's activities started raising attention at the national level (Ropa Na Východe Article, November 2016 (C-341); Denník N, "She fights against the oil company: I am blocking them with my own body, there is no other way left", 22 November 2016, p. 4 of the pdf document (R-144)). At the same time, the MoE increasingly came in the crosshairs between its support for AOG's activities and having to address complaints from local residents and activists. For instance, the former Prime Minister of the Slovak Republic, Ms. Iveta Radičová, criticized Minister Sólymos for having extended AOG's exploration licenses and called for his resignation (Minister Sólymos Article, Denník N, 3 December 2016 (C-348)). See also Tr. (Day 3), 127:24-132:1 (Sólymos).

1099 Tr. (Day 3), 134:23-25, 172:24-175:8 and 179:11-15 (Sólymos); Sólymos WS2, para. 8. See also Email of 9 December 2016 from Ms. [redacted] to the AOG attendees ahead of the meeting at the Ministry of Environment (C-158); Letter of 14 December 2016 to Minister of Environment (C-160); Email of 15 December 2016 from Alexander Fraser (C-350); Email of 15 December 2015 from A. Fraser to [redacted] and M. Lewis, 15 December 2015 (R-213); Letter of 21 December 2016 to Ministry of Environment (C-162).

1100 Sólymos WS2, para. 8; Tr. (Day 3), 179:2-10 (Sólymos).

Exploration License area breached its expectation to drill there (Measure # 14).[1101]

618. The Respondent objects that the precautionary principle must guide the application of the EIA procedures such that, in case of doubt, a full EIA must be carried out.[1102] It stresses that the district offices considered "numerous complex criteria" contained in Annex 10 of the EIA Act to determine whether AOG's proposed drills were "likely" to have "significant effects on the environment".[1103]

The EIA decisions (Measures ## 11-13)

619. As noted above, following negotiations with local activists in February and March 2017,[1104] AOG volunteered to perform preliminary EIAs for its three sites.[1105] It hired the environmental consultancy firm Chempro, a.s., to prepare the related applications, which it filed on 6 June 2017 for Smilno, 4 July 2017 for Ruská Poruba and 7 August 2017 for Krivá Oľka.[1106]

620. After receiving comments from stakeholders and reviewing the applications, the district offices in Bardejov (Smilno), Humenné (Ruská Poruba) and Medzilaborce (Krivá Oľka) ordered AOG to perform full EIAs, respectively on 2 August 2017, 7 September 2017 and

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1101 Memorial, para. 238.

1102 Rejoinder, paras. 440-442.

1103 Rejoinder, paras. 443-444.

1104 In particular, on 24 March 2017, Mr. Fraser stated: "At least in relation to Ruska Poruba and Kriva Olka, they have agreed that if we conduct the mini-EIA and the results of the EIA are positive, they will not prevent us drilling there. We therefore think it is time to go ahead and start the EIA process in relation to three locations if possible – Ruska Poruba, Kriva Olka and Smilno – and maintain the dialogue with the activists. Even if the results are positive there will still be more work to do in terms of permitting and getting the agreement of the remaining landowners"; Fourth activists meeting note, 24 March 2017, p. 1 (R-146). See also First activists meeting note, 5 February 2017 (R-117); Email of 5 February 2017 from [redacted] to A. Fraser (R-163); Email of 6 February 2017 from [redacted] to A. Fraser (R-164); Email of 19 February 2017 from Alexander Fraser (C-369); AOG's report to Partners, 10 March 2017 (C-169); Third activists meeting note, 4 March 2017 (R-145); Report from Mr. Lewis, 28 March 2017 (R-165).

1105 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017 (C-171); Report from Mr. Lewis, 21 April 2017 (R-147).

1106 For Smilno: Preliminary EIA submission of Smilno-1, May 2017 (R-87); AOG Smilno Preliminary Environment Impact Assessment application, 6 June 2017 (C-173). For Ruská Poruba: Preliminary EIA submission of Poruba-1, June 2017 (R-88); AOG Poruba Preliminary Environmental Impact Assessment application, 4 July 2017 (C-175). For Krivá Oľka: Preliminary EIA submission of Krivá Oľka-1, July 2017 (R-89); AOG Krivá Oľka Preliminary Environmental Impact Assessment application, 7 August 2017 (C-177); AOG's Application, 7 August 2017 (C-378); Annex 7 of AOG's Application (Krivá Oľka), 14 July 2017 (C-375). Fraser WS1, paras. 96-97.

8 March 2018.[1107]

621. AOG appealed the decision of the Humenné District Office[1108] and the Prešov District Office annulled that decision on 11 January 2018.[1109] However, it did not appeal the decisions of the other district offices. At the time, Mr. Fraser provided the following explanation to the MoE for not appealing the Bardejov decision:

> "Preliminary EIA decisions in relation to Smilno and Ruska Poruba: We find the lack of reasoning or justification in these decisions, and the unprofessional manner in which they have been prepared […] to be extremely discouraging. It is for this reason that we concluded there was no point in appealing the decisions, since the appeal is to a similar authority, and the message to Alpine from these decisions seemed to be pretty clear. If we appeal and the process is handled in the same way, we just create one more unwelcome precedent for future applications. Nevertheless, we are willing to appeal against the Ruska Poruba decision as you suggested, to see if this results in a fairer process".[1110]

622. Discovery considers that the district offices should not have processed the EIA applications, since AOG underwent the EIA procedure on a voluntary basis.[1111] It also finds the district offices' decisions arbitrary, unfair and lacking a "rational foundation of fact and/or expert opinion",[1112] and, for the Bardejov and Humenné decisions, lacking any finding that the drilling activities would have significant effects on the environment.[1113] As for the Medzilaborce decision, says the Claimant, although the district office did conclude that AOG's activities were likely to have a significant impact on the environment, it did so on pretextual grounds without an objective basis.[1114]

623. In the Tribunal's assessment, when AOG filed its EIA Act applications it subjected itself to the preliminary EIA procedure. Once those applications were filed, no matter that they were filed "voluntarily", the district offices were bound to process them in accordance with applicable law, that is, pursuant to Article 29 of the EIA Act.

624. Article 29 of the EIA Act spells out the requirements and process for a preliminary EIA.

1107 Decision re. Smilno Environmental Impact Assessment, 2 August 2017 (C-176); Decision of the Bardejov District Office (Smilno), 2 August 2017 (C-377).

1108 Environmental Impact Assessment appeal against the Humenné District Office decision, 6 October 2017 (C-181).

1109 District Authority Prešov: Environment Impact Assessment Decision on the appeal Ruská Poruba, 11 January 2018 (C-184).

1110 Email of 5 October 2017 from Alexander Fraser, p. 1 (C-383).

1111 Reply, paras. 179 and 335(1).

1112 Reply, paras. 166-175 and 311(2).

1113 Reply, para. 168(1).

1114 Reply, para. 168(2).

Article 29(3) of the EIA Act provides that the assessment shall apply the criteria set out in Annex 10 of the EIA Act and consider comments provided by various stakeholders.[1115] Article 29(13) of the EIA Act specifies that the decision must be reasoned by reference to the Annex 10 criteria and the comments received:

> "The decision given in the screening procedure shall state, in its reasoning, the grounds on which it is based, an evaluation of criteria referred to in paragraph 3 and an assessment of opinions received under paragraph 9 or Section 23(4)".[1116]

625. The Annex 10 criteria relate to the nature and extent of the proposed activity, its place and potential impacts.[1117] It is common ground that a full EIA is required only if the relevant district office finds that the proposed activity is likely to have significant effects on the environment.[1118]

626. The 56-page decision of the Bardejov district office in relation to Smilno summarizes AOG's application and the comments received from 55 stakeholders.[1119] Some authorities raised no objections, others requested further assessments,[1120] and the members of the public all requested a full EIA, raising concerns about the composition of the drilling muds, the potential impacts on groundwater and the absence of emergency plans. The district office then provided its reasoning for ordering a full EIA:

> "Bardejov District Office, Department of the Environment, as the competent state administration body […], assessed the designed construction operation in terms of the significance of the expected impacts on the environment and public health, the state of use of the land and the sustainability of the natural environment, the nature and extent of the designed construction operation, compliance with the land-planning documentation and the level of processing of the designed construction operation. In doing so, it took into account the opinions of the participants in the assessment procedure pursuant to Section 23 subsection 4 of the Act, including the public, and made the ruling as set out in the operative part of this Ruling.
> From the opinions received on the project proposal and from the measures proposed in the designed construction operation, some specific requirements in relation to the designed construction operation have emerged, which will need to be taken into account

1115 The district offices may subsequently request the applicant to provide additional information "to clarify the comments and requirements resulting from the opinions" provided by the authorities and the public. EIA Act, Article 29(3) and (10) (C-225).

1116 EIA Act, Article 29(13) (C-225).

1117 EIA Act, Annex 10 (C-225).

1118 Counter-Memorial, para. 33(g); Reply, para. 166.

1119 Decision of the Bardejov District Office (Smilno), 2 August 2017 (C-377).

1120 For instance, the Prešov Self-governing Region Authority requested "a longer investigation and assessment of the designed construction operation"; the Mikulášová municipality requested a "detailed" assessment "of the risk of endagenring [sic] the drinking water supply"; and the Nižná Polianka municipality requested an assessment of the "designed construction operation/motion". Decision of the Bardejov District Office (Smilno), 2 August 2017, pp. 4 and 11-12 (C-377).

in the assessment procedure in the assessment report.
Other requirements and details will be specified in the scope of the assessment of the designed construction operation, which will be determined by the Bardejov District Office, Department of the Environment in cooperation with the departmental authority, the permitting authority and after discussion with the contracting authority".[1121]

627. The 45-page decision of the Humenné district office relating to Ruská Poruba also summarized the 35 stakeholder comments and reached a similar conclusion:

> "The Humenné District Office, the Department of the Environment, as the competent authority of the state administration […] assessed the project proposal from the point of view of the significance of the expected impacts on the environment and the health of the population, the actual land use and the natural environment resilience capacity, the nature and scope of the proposal, compliance with spatial planning documentation and the project proposal development status. Furthermore, the Office considered the participants' opinions in the assessment process pursuant to section 23, subsection 4 of the Act, including the public, and ruled as stated in the Terms section of this Decision.
> The received opinion letters on the project proposal and the proposed measures revealed some specific requirements in relation to the proposal. Therefore, they shall be considered in the assessment in the evaluation report.
> **Other requirements and details shall be specified in the scope of the evaluation of the proposed activity and shall be determined by the Humenné District Office, the Department of the Environment in cooperation with the state departmental authority, the authorizing authority and upon negotiating with the procurer**".[1122]

628. Finally, as regards Krivá Oľka, the Medzilaborce district office invited AOG to provide additional information and observations on the comments filed by 17 public agencies and 174 members from the public. AOG did so on 18 December 2017.[1123] In a 128-page decision, the district office offered the following reasons for ordering a full EIA:

> "*The competent authority* adequately applied the criteria for the assessment procedure pursuant to § 29 para. 3 *of the Act on Impact Assessment* listed in Annex no. 10, taking into account also the opinions under § 23 par. 4 *of the Impact Assessment Act*.
> In view of the environmental sensitivity of the area concerned, the *competent authority* has decided to further assess, in particular:
> - The fact that the site of the activity proposed reaches over into the Protected Birds Area of Laborecká […] part of the continuous European network of protected areas NATURA 2000. […] Among the activities that are likely to have a significant negative impact on the objects of protection in the locality are the proposed terrain adjustments and changes in outflow conditions. […]
> - The site of the proposed activity is located in the protection zone of III. degree of the water source Ondava – Kučín[…]. Execution of the activity proposed might result in contamination of groundwater and surface water with harmful substances, which poses a possible negative impact [and] significant impacts of the proposed activity on the water regime as well as possible significant impacts on the quality of

1121 Emphasis in the original. Decision of the Bardejov District Office (Smilno), 2 August 2017, pp. 55-56 (C-377).

1122 Emphasis in the original. Humenné District Office Decision, 7 September 2017, p. 2 of the pdf document (C-179).

1123 Kriva Olka preliminary Environmental Impact Assessment objections and responses, 18 December 2017 (C-182).

groundwater and surface water together with the rock environment are likely. […]

- […] Terrain adjustments as well as the exploration well under the activity proposed are likely to have a significant impact on the site. […]

Other requirements and details will be specified under the scope of the assessment of the activity proposed, which will be determined by the *competent authority* on the basis of consultation with the petitioner and with the state nature and landscape protection authority.

As part of the assessment procedure, the *competent authority* assessed the proposed activity 'Exploration well site of AOG-Krivá Oľka-1' in terms of the nature and scope of the activity proposed, the place of execution of the proposed activity, in particular its tolerance capacity and protection provided under special regulations, the significance of the expected effects on the environment and public health, compliance with the zoning documentation and the level of the project elaboration, taking into account the current state of the environment in the area concerned.

[…]

On the basis of the examination and assessment of the submitted project, the comments of the authorities concerned and the public concerned and in view of the assessment of the overall level of environmental protection under the *Impact Assessment Act*, the competent authority concluded that it was not possible to exclude the likely significant impact of the proposed activity […]".[1124]

629. In assessing these decisions, the Tribunal will give a degree of deference to the local authorities as the primary decision-makers with expertise on and proximity to local matters involving environmental protection and public health.[1125] However, as noted by numerous arbitral tribunals, deference to local decision-makers is not unlimited and the application of the margin of appreciation doctrine does not shield a State from any responsibility for serious flaws,[1126] such as arbitrary or discriminatory decisions, or due process violations.[1127]

1124 Emphasis in the original. Medzilaborce District Office Decision, 8 March 2018, pp. 3-6 of the pdf document (C-186).

1125 *Renergy S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para. 928; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 751 and 755; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 468 (RL-58); *Philip Morris v. Uruguay*, paras. 399 and 418 (RL-57); *Crystallex International v. Venezuela*, para. 583 (CL-26); *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, para. 505 (RL-142); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 493; *AES v. Hungary*, para. 9.3.73 (RL-62); *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, para. 153 (RL-68); *Biwater v. Tanzania*, paras. 434-436 (CL-23); *Saluka Investments v. Czech Republic*, para. 284 (CL-11); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 127; *S.D. Myers v. Canada*, para. 263 (CL-18).

1126 *Marion & Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 247 (RL-56); *Crystallex International v. Venezuela*, para. 584 (CL-26).

1127 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1319 (CL-37); *AES v. Hungary*, para. 9.3.40 (RL-62).

630. Bearing in mind these important *caveats*, the Tribunal reviews whether the decisions of the district offices breached FET on the basis of the Claimant's assumed expectation to drill exploration wells. The purpose of the preliminary EIA procedure was to determine whether a full EIA was necessary for AOG's exploration at Smilno, Krivá Oľka and Ruská Poruba, a determination that would depend on the likelihood or possibility of significant effects on the environment,[1128] taking into account the specified criteria, the opinions expressed by stakeholders, and the need for a reasoned decision.

631. Although the Bardejov and Humenné district offices mentioned having assessed the proposed drillings "in terms of the significance of the expected impacts on the environment and public health", they only referred to the stakeholder opinions. There is no reference to an evaluation of the relevant criteria. It follows that the Bardejov and Humenné district offices gave insufficient reasons for purposes of the EIA Act. This finding is confirmed by the appellate judgment that repealed the decision of the Humenné District Office for lack of reasons:[1129]

> "In the reasoning part of a decision, the administrative authority shall state the facts backing the decision, what consideration were taken into account when evidence was assessed, what administrative discretion was applied to the use of legal regulations on which the decision was based, and how the proposals, motions and objections of parties to the proceedings, and their statements concerning the underlying facts were dealt with".[1130]

632. That judgement added that a "reasonable assessment" of the criteria was "crucial" to determine the environmental impact of the proposed activity and had to be "part of the reasoning part of any decision" showing which impacts were "so important" as to warrant a full EIA.[1131]

633. Unlike the Humenné decision, the one issued by the Medzilaborce district office conforms to the requirements of the EIA Act. Having sought additional information from AOG and provided it with an opportunity to comment on the stakeholder opinions, that district office referred to the criteria of Annex 10 and held that significant environmental effects could not be excluded because the drill site was located within a protected area and close to water

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1128 Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, 13 December 2011, Article 1(1) (R-83).

1129 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba, 11 January 2018 (C-184).

1130 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba, 11 January 2018, p. 9 of the pdf document (C-184).

1131 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba, 11 January 2018, p. 10 of the pdf document (C-184).

resources.

634. It follows that Discovery's claim in respect of the Medzilaborce district office fails because the decision is sufficiently reasoned for the purposes of the EIA Act. As for the Humenné decision, the claim fails as the decision was annulled on appeal.

635. By contrast, the reasoning of the Bardejov decision was formally deficient. That being said, the Tribunal does not view that shortcoming as rising to the level of a treaty breach. The district office was confronted with requests for a full EIA from numerous stakeholders and erred on the side of caution. More importantly, there is no indication that it would have reached a different conclusion if it had expressly referred to the Annex 10 criteria.[1132] Nor is there any suggestion that the decision was "pre-determined" or based on a "pretextual justification".[1133]

636. In these circumstances, the Tribunal denies the Claimant's request for adverse inferences from the Respondent's failure to produce preliminary drafts or documents recording internal discussions of the district offices.

637. In any event, AOG had the right to appeal the Bardejov decision, but chose not to do so. It gave no convincing reason for this choice. Nor did it offer a convincing explanation for not pursuing its operations at Ruská Poruba.

638. The Tribunal's point is not that the Claimant had an obligation to exhaust local remedies and then failed to do so, which is not required under the ICSID Convention. Rather, it is that the Claimant did not establish that the decision at issue resulted from gross insufficiencies in the legal system which crossed the threshold necessary to give rise to an FET breach. Though the reasoning of the Bardejov decision did not conform to the statutory requirements, the Tribunal does not see in that failure any prejudice or bias against AOG or any subversion of the Slovak legal system or the rule of law generally such as to harm AOG. To wit, AOG successfully appealed the decision of the Humenné District

1132 The Tribunal notes in this context that, on 30 November 2017, the Bardejov District Office sent to AOG a "scope of assessment" for the full EIA pursuant to Article 30 of the EIA Act, which reveals the main concerns the district office had in relation to potentially adverse environmental impacts. Therein, AOG was requested to assess (i) the impact of chemicals used in the drilling muds, including a description of the chemicals used, (ii) the impact of produced waste, including drilling waste, (iii) the impact of potential accidents, and (iv) the risks and impacts on water resources, including local drinking water. AOG was further requested to (v) elaborate on the "retaining drainage area around the drilling site" and provide "a list of pollutants and volumes of pollutants and propose measures for elimination of pollution of surface and ground water and propose a control system for timely detection of pollutant leaks", and (vi) provide a list of "all the sources of air pollution within the area and functional unit". Decision of the District Office Bardejov, 30 November 2017, sections 2.2.1 to 2.2.6 (R-193).

1133 Reply, paras. 180-184.

Office to the Prešov regional office, the same appeal body that would have reviewed the Bardejov decision had AOG elected to challenge that decision.

639. For these reasons, even if it were to accept that the Claimant could expect to drill exploration wells, the Tribunal would dismiss the claims in relation to Measures ## 11-13.

The order to perform preliminary EIAs for all future wells (Measure # 14)

640. It is the Claimant's further submission that imposing preliminary EIAs for all future exploration wells in the 2018 renewal of the Svidník Exploration License breached its expectations.[1134] It argues that such imposition contradicted the "clear and repeated specific statements" of the MoE and Minister Sólymos that the EIA Amendment would not apply to AOG's exploration wells.[1135] Moreover, says Discovery, that requirement delayed the permitting process and "precipitated" the withdrawal of Romgaz, destroying the value of the investment.[1136] The Respondent disputes this submission.

641. The record shows that on 30 April 2018, AOG applied to reduce the area of the Svidník Exploration License.[1137] On 8 June 2018, the MoE granted the application by issuing a new license for a smaller area. The new license provided that AOG would perform a preliminary EIA pursuant to Article 29 of the amended EIA Act for exploration drills deeper than 600 meters.[1138] That provision simply reflected the statutory obligation for deep exploration drilling found in the amended EIA Act, which had come into force on 1 January 2017 and applied to all future drills.

642. Therefore, even if the Tribunal were to accept that the Claimant could expect to conduct its exploration program, *quod non*, the Claimant cannot successfully complain that the specification in the renewed license breached any such expectation and the Tribunal consequently would also dismiss the claim in relation to Measure # 14.

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643. In conclusion, the Respondent did not generate any expectations in connection with the EIA procedures and more generally with respect to its drilling plans. Even if it had

1134 Memorial, paras. 192-195; Reply, paras. 193 and 314.

1135 Memorial, para. 193; Reply, para. 314.

1136 Memorial, para. 193; Reply, para. 193.

1137 See Decision Modifying an Exploration Area, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3, 8 June 2018, condition no. 2, p. 4 of the pdf document (C-15).

1138 Decision Modifying an Exploration Area, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3, 8 June 2018, p. 5 of the pdf document (C-15).

generated any such expectations, the Respondent did not frustrate them.

iii. Inconsistent treatment

644. The Claimant also asserts that the Slovak Republic breached the FET standard through inconsistent conduct. Specifically, it alleges that:[1139]

- as regards Smilno,
    - there were inconsistencies between, on the one hand, the mayor's statements about the Access Road and official maps showing that the road was public and, on the other hand, the conduct of the police and the Ministry of Interior that refused to accept that the Access Road was a PSPR (Measures ## 1, 6 and 7);[1140]
    - the police was internally inconsistent in relation to the road signage scheme (Measure # 6);[1141]
- on Krivá Oľka,
    - the MoA acted inconsistently by first approving the Lease and then refusing to extend it (Measure # 8);
    - the MoE was inconsistent when refusing to grant the compulsory access order, first by reversing course because of an instruction "from above" and by suspending the resumed Article 29 proceedings (Measures ## 9 and 10);[1142]
- about the EIA proceedings,
    - the positions adopted by the district offices in ordering a full EIA were inconsistent with earlier statements that AOG's exploration had no significant adverse impact on the environment (Measures ## 11-13);[1143]
    - the MoE's decision to impose a preliminary EIA for future exploration wells

[1139] Memorial, paras. 129(3), 141(1), 184, 194, 213(2), 217-218, 230-231, 233-234; Reply, paras. 315-324; Claimant's Opening Presentation, Slide 162.

[1140] Reply, paras. 59-61 and 316(1)(a)-(c) and (2); Claimant's Opening Presentation, Slide 162.

[1141] Reply, paras. 101-102 and 316(1)(d); Claimant's Opening Presentation, Slide 162.

[1142] Reply, paras. 135-138 and 317; Claimant's Opening Presentation, Slide 162.

[1143] Reply, paras. 172-175 and 318(1); Claimant's Opening Presentation, Slide 162.

was also inconsistent with these statements (Measure # 14).[1144]

645. The Respondent challenges this claim. It is of the view that:[1145]

- as regards Smilno,
  - no governmental authority ever stated that the Access Road was a PSPR;[1146]
  - the same applies to the official maps that do not identify that field track as a PSPR;[1147]
  - the Claimant misinterprets AOG's meeting with Mr. [redacted] on 15 July 2016 about the road signage scheme;[1148]
  - there is no inconsistency between the positions adopted by the MoI and the MoT, since the latter was only opining on an abstract question;[1149]
- with respect to Krivá Oľka,
  - the MoA refused to approve the Lease Amendment because AOG failed to comply with the terms for an extension;[1150]
  - the MoE suspended the Article 29 proceedings because AOG failed to prove that no new lease was possible and ended the proceedings because AOG relinquished its exploration license;[1151]
- as to the EIA procedures,
  - there is no inconsistency between Minister Sólymos' statements or the MoE press releases and the decision by the district offices to order full EIAs;[1152]

1144 Reply, paras. 309 and 318(2), Claimant's Opening Presentation, Slide 162.

1145 Respondent's Opening Presentation, Slides 184-188.

1146 Respondent's Opening Presentation, Slide 185.

1147 Respondent's Opening Presentation, Slide 185.

1148 Respondent's Opening Presentation, Slide 185.

1149 Respondent's Opening Presentation, Slide 186.

1150 Respondent's Opening Presentation, Slide 187.

1151 Respondent's Opening Presentation, Slide 187.

1152 Respondent's Opening Presentation, Slide 188.

- the imposition of the obligation to perform preliminary EIA for all future exploration wells simply reflected a statutory obligation.[1153]

646. As discussed above, the FET standard requires consistency in State conduct dealing with foreign investments in the sense that one branch of the State cannot affirm what another branch of the State denies.[1154] When evaluating consistency an important factor is whether a State organ makes statements which fall within its sphere of competence.

647. For substantially the same reasons discussed in the previous sections, the Tribunal fails to see any inconsistency in Slovakia's conduct. Starting with Smilno, the Tribunal's analysis has shown that Slovak authorities, including the police, the mayor, the district office, the MoI and Slovak courts, consistently rejected the PSPR argument. As regards the road signage scheme more specifically, the Director of the Bardejov police force, Mr. [redacted], merely suggested during the informal meeting of 15 July 2016 that AOG attempt to get road signs erected. He did not assure that such scheme would be approved, perhaps for the very reason that that he had no authority to give any such assurances.[1155] Further, the Claimant has not alleged, let alone demonstrated by convincing evidence, that anyone within the District Traffic Inspectorate of the Bardejov police force made any inconsistent statements.[1156]

648. In relation to Krivá Oľka, the Tribunal also refers to the analysis above showing that neither the MoA nor the MoE acted inconsistently. There is no inconsistency in the MoA approving the original Lease and not approving the Lease Amendment because AOG's request for extension was late and did not conform to the terms of the Lease (see paragraphs 559 to 575 above). As for the MoE, the existence of an instruction from the higher levels of the Ministry is not established, it being specified that the record does not convincingly show that Mr. [redacted] gave assurances about the outcome of the Article 29 proceedings, nor that he had the authority to give such representations in the first place (see paragraphs 576 to 592 above). Furthermore, there is no inconsistency in the context of the MoE's suspension of the Article 29 proceedings (see paragraphs 593 to 600 above).

649. Finally, there is no inconsistency in respect of the EIA process. The Claimant's reliance on various statements of the district offices predating the entry into force of the EIA

1153 Respondent's Opening Presentation, Slide 188.

1154 *EnCana v. Ecuador*, para. 158 (CL-27). See also *Crystallex International v. Venezuela*, para. 579 (CL-26).

1155 See Email of 16 July 2016 from Matej Sýkora (C-331).

1156 The fact that Mr. [redacted] allegedly told AOG on 26 October 2016, i.e. after the road signage scheme had been rejected, that the Access Road was a "public road", but "also a field track", is not inconsistent with the directorate's determination that it was not a PSPR. See Email of 26 October 2016 from A. Fraser to [redacted] (R-159).

Amendment is inapposite, since no preliminary EIA was required at the time. Those statements were made in a different context and based on regulations other than those under consideration in a preliminary EIA procedure. This is in particular so because the latter concerns a specific activity at a specific site requiring an evaluation of specific environmental risks under the EIA Act.[1157] In the same vein, the MoE's statement of 15 February 2017 that its inspection at Smilno had not revealed any "suspicion" of groundwater pollution and Minister Sólymos' statements in January 2017 assuring the local population that AOG's activities would not adversely impact the environment cannot be viewed as inconsistent with the decisions ordering full EIAs.[1158] Finally, there is no inconsistency either between statements of Slovak officials, in particular those of Minister Sólymos, and the imposition of a preliminary EIA for future exploratory wells below 600 meters. Minister Sólymos consistently said that the EIA Amendment would apply to all such exploratory wells from 1 January 2017.[1159] The Claimant pointed to no representation that AOG would be exempted from the application of the amended EIA Act.

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650. Accordingly, the Tribunal finds that the Slovak Republic did not act inconsistently and, hence, there is no breach of the FET standard on this count.

iv. Arbitrary and non-transparent treatment

651. It is the Claimant's assertion that the measures discussed above were arbitrary and adopted in a non-transparent way. Specifically, it puts forward that:[1160]

1157 For instance, the statement of the Prešov District Office on 16 January 2015 that "there is no assumption of its significant impact" on a protected bird area in the Natura 2000 network was made under the Nature Protection Act and, as the Respondent rightly says, concerned a much narrower question than what was being assessed under the EIA Act (Expert Opinion of 16 January 2015 of the District Office in Prešov (C-265)). Similarly, the statement of the Medzilaborce District Office on 23 January 2015 that drilling at Krivá Oľka would "not have a significant impact" on the habitats of wild fauna and flora concerned a narrower scope than the one under the EIA Act (Statement of 23 January 2015 of the District Office in Medzilaborce (C-266)).

1158 MoE Statement – The inspection of the geological survey did not show any serious irregularities, 15 February 2017 (C-168); Korzar Article – Minister Comments on the Borehole Near Smilno, 27 January 2017 (C-164).

1159 Minister Sólymos was reported saying that, under the EIA Amendment, "new exploratory wells are subject to an environmental impact assessment process", that "[a]nybody, who would today intend to apply for an exploration area and do any test drilling, will be required to carry out a screening/fact-finding procedure", and that, in contrast to "old wells", "[n]ew exploratory wells are already subject to environmental impact assessment". Ministry of Environment Press Release, 17 January 2017 (C-163); Korzar Article – Minister Comments on the Borehole Near Smilno, 27 January 2017, p. 2 of the pdf document (C-164); Ministry of Environment Press Release, 15 February 2017 (C-168).

1160 Memorial, paras. 213(4), 244-245 and 252-257; Reply, paras. 325-336; Claimant's Opening Presentation, Slide 163.

- in relation to Smilno,
    - the police's refusal to accept that the Access Road was publicly accessible was arbitrary and abusive;[1161]
    - the same is true of the conduct of Dr. Slosarčíková during AOG's second drilling attempt in June 2016;[1162]
    - the same is equally true of the police's refusal to approve the road signage scheme in October 2016;[1163]
- in connection with Krivá Oľka,
    - the MoA acted arbitrarily and in a non-transparent manner when refusing to approve the Lease Amendment;
    - the MoE did so by refusing to grant a compulsory access order and by suspending the resumed Article 29 proceedings;[1164]
- in respect of the EIA process,
    - the decisions of the district offices ordering full EIAs "involved an arbitrary application of the EIA Act and/or an abuse of power";
    - the same applies to the MoE's imposition of the obligation to perform preliminary EIAs for future wells.[1165]

652. The Respondent challenges these contentions and argues that:[1166]

- regarding Smilno,
    - the police could not remove vehicles or disperse protestors situated on the Access Road, since that field track was on private land;[1167]

[1161] Reply, para. 329.

[1162] Reply, para. 330.

[1163] Reply, para. 331.

[1164] Reply, paras. 332-334.

[1165] Reply, paras. 335-336.

[1166] Rejoinder, paras. 427-473; Respondent's Opening Presentation, Slides 189-195.

[1167] Rejoinder, para. 430.

- the State prosecutor had no authority to intervene in the absence of any criminal conduct;[1168]

- the police could not approve the road signage scheme since the Access Road was not a PSPR.[1169]

- about Krivá Oľka,

  - the MoA's refusal to approve the Lease extension was "completely justifiable" since the Lease had expired;[1170]

  - there was no instruction from "officials higher up" in the MoE;[1171]

  - the resumed Article 29 proceedings had to be suspended to ensure that AOG and LSR could not agree on a new lease.[1172]

- as regards the EIA process,

  - the preliminary EIA decisions complied with the precautionary principle under EU law, the Claimant chose not to appeal two decisions, and although it successfully appealed one decision "it stopped [pursuing] the remanded proceedings";[1173]

  - imposing a preliminary EIA on post-2017 drills, even if wrong, "cannot possibly rise to the levels required to constitute arbitrariness under the FET standard".[1174]

653. A violation of domestic law does not breach the FET standard unless it is abusive or arbitrary. As stated in *Muszniank*a:

> "Non-compliance with domestic laws by State authorities may form the basis of a successful FET claim, if (i) there is proof of arbitrary conduct in the application of the

1168 Rejoinder, para. 431.

1169 Rejoinder, para. 432.

1170 Rejoinder, para. 433.

1171 Rejoinder, para. 435.

1172 Rejoinder, para. 436.

1173 Rejoinder, paras. 437-473.

1174 Rejoinder, para. 473.

laws in question; or (ii) there is some form of abuse of power".[1175]

654. For the reasons already reviewed in detail above, the Tribunal considers that the conduct of the Slovak Republic does not qualify as arbitrary or abusive.[1176] No element in the record suggests that the disputed measures were adopted in pursuance of ulterior motives such as to harass AOG or to prevent it from conducting its activities. To the contrary, the overall impression that emerges from the record is that the Slovak authorities were largely supportive of AOG's operations, sought to defuse tensions with local activists and corrected on appeal mistakes that first-instance decision-makers may have made.

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655. In these circumstances, the Tribunal cannot but dismiss this claim.

v. Denial of justice

656. The Claimant submits that the Slovak judiciary violated the FET standard by arbitrarily prohibiting AOG from using the Access Road.[1177] It contends that the decision of the Bardejov District Court granting the Interim Injunction and the one of the Prešov Regional Court upholding that injunction were arbitrary and biased against AOG.[1178]

657. Specifically, the Claimant argues, first, that the conditions for granting the Interim Injunction were not fulfilled since Ms. Varjanová did not establish "significant, serious and even irreparable harm", a requirement settled in "long-standing decisions of the Slovak Supreme Court".[1179] Second, the courts' failure to decide whether the Access Road was publicly accessible was arbitrary since that was a "fundamental question" and the courts "trespassed upon the competence of the competent administrative body".[1180] Third, Ms. Varjanová's conduct "disentitled her" from obtaining the Interim Injunction.[1181] Fourth, the requirement of exhaustion of local remedies for a denial of justice finding should not apply because any appeal would have been futile due to the "unwarranted

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1175 *Muszynianka spółka v. Slovak Republic*, para. 467 (RL-65); *Crystallex International v. Venezuela*, para. 552 (CL-26).

1176 For Smilno, see paragraphs 511 to 520 and 528 to 550, it being recalled that the Claimant accepted that all of its claims regarding events at Smilno in 2015 and 2016 fail if the Tribunal concluded, as it did, that Interim Injunction was properly issued (Tr. (Day 6), 80:8-13 (Tushingham)). For Krivá Oľka, see paragraphs 559 to 600, and for the EIA decisions, see paragraphs 619 to 642.

1177 Memorial, paras. 219-223; Reply, paras. 337-348; Claimant's Opening Presentation, Slides 164-165.

1178 Memorial, para. 229; Reply, para. 343.

1179 Reply, para. 345.

1180 Reply, para. 346.

1181 Reply, para. 347.

delays" in maintaining the Interim Injunction in force after June 2016.[1182]

658. The Respondent denies having committed a denial of justice.[1183] The threshold for a denial of justice, it argues, is "particularly high", only flagrant systemic failures of the judiciary being subject to sanction.[1184] It argues that the Claimant failed to demonstrate that the impugned decisions rested on an "exceptionally outrageous or monstrously grave" misapplication of Slovak law, or were "biased, arbitrary, unjust or idiosyncratic".[1185] First, the statutory conditions for the Interim Injunction were fulfilled.[1186] Second, neither court was obliged to deal *ex officio* with the status of the Access Road, especially considering that AOG had not pleaded that the road was publicly accessible but rather that it was a co-owner of that road.[1187] Third, there is no support for the assertion that Ms. Varjanová's conduct disentitled her from obtaining the interim relief.[1188] Fourth, the Claimant provides no support for its assertion that seeking to exhaust local remedies would have been futile,[1189] not to speak of the fact that no delays occurred during the first instance and appellate proceedings.[1190]

659. The Tribunal has already stated above (paragraphs 420 and 421) that, in addition to a procedural denial of justice, the State's judiciary can breach FET by reaching manifestly arbitrary, unjust or idiosyncratic decisions. An error in the application or interpretation of domestic law without more is not a treaty breach. What is needed is an error that "no merely competent judge could have committed", showing that no "minimally adequate system of justice" was provided.[1191] Accordingly, as noted above, the Tribunal can only step in if there is evidence before it of some "severe impropriety".[1192] In addition, it must be noted that denial of justice sanctions the failure of a system as a whole, which explains the reason

1182 Reply, para. 348.

1183 Counter-Memorial, paras. 356-373; Rejoinder, paras. 474-491; Respondent's Opening Presentation, Slides 196-200.

1184 Counter-Memorial, para. 356; Rejoinder, paras. 474-480.

1185 Counter-Memorial, paras. 368 and 373; Rejoinder, para. 491.

1186 Counter-Memorial, para. 370; Rejoinder, para. 482.

1187 Counter-Memorial, para. 371; Rejoinder, paras. 483-487.

1188 Counter-Memorial, para. 372; Rejoinder, para. 488.

1189 Rejoinder, para. 489.

1190 Rejoinder, para. 490.

1191 *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, para. 432 (RL-79).

1192 *Jan de Nul v. Egypt*, para. 206 (CL-29).

for the requirement of exhaustion of local remedies.[1193] Exhaustion allows the judicial system to correct possible mistakes.

660. The Claimant's denial of justice claim contains four prongs. The Tribunal already rejected the first three prongs in its analysis above (paragraphs 511 to 520). The fourth prong, which is addressed below, relates to alleged undue delays in the court proceedings.

661. On 20 June 2016, AOG acknowledged Ms. Varjanová's claim that the purchase agreement of 17 December 2015 was "null and void"[1194] and, on 11 July 2016, it filed a motion to cancel the Interim Injunction. Ms. Varjanová commented on that motion on 16 September 2016.[1195] On 5 October 2016, the Bardejov District Court issued a judgment recognizing Ms. Varjanová's claim[1196] and, on 11 October 2016, it asked AOG to comment within 15 days whether it insisted on its motion to cancel the Interim Injunction. However, AOG only filed its comments on 2 December 2016, which the court received on 12 December 2016.[1197] In the meantime, although she had prevailed, Ms. Varjanová filed an appeal on 23 November 2016 against the 5 October 2016 judgment.[1198] It is clear that her intent was to keep the Interim Injunction in force during the appeal.[1199]

662. Even though her appeal was obstructive and ultimately failed,[1200] the fact remains that the courts had to follow certain procedural steps under the Code of Civil Procedure to address that appeal. On 24 November 2016, the Bardejov District Court invited AOG and the other respondent, Mr. [redacted], who received the notice on 2 and 5 December 2016 respectively, to comment on the appeal within ten days, which AOG did on 12 December 2016.[1201] As Dr. Fogaš explained,[1202] as Mr. [redacted] had not filed any comments within the time-limit

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1193 See, for instance, *ECE v. Czech Republic*, para. 4.764 (RL-92). See also *Helnan International Hotels, A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, 14 June 2010, para. 50; *Oostergetel v. Slovak Republic*, para. 225 (RL-75).

1194 Letter of 20 June 2016 from AOG to the District Court Bardejov (LF-23); Letter of 20 June 2016 from Mr. [redacted] to the District Court Bardejov (LF-22); Judgment of the District Court Bardejov, File No. 1C/29/2016-268, 5 October 2016, para. 14 (LF-16).

1195 See Repeated Request of AOG to District Court Bardejov, 2 December 2016 (LF-24).

1196 Judgment of the District Court Bardejov, File No. 1C/29/2016-268, 5 October 2016, para. 14 (LF-16).

1197 Repeated Request of AOG to District Court Bardejov, 2 December 2016 (LF-24).

1198 Appeal of 23 November 2016 filed by Mrs. Varjanová (C-155). The 5 October 2016 judgment had been served on Ms. Varjanová on 8 November 2016 (see Submission Report of District Court Bardejov, 12 January 2017, p. 1 of the pdf document (LF-20)).

1199 Varjanová WS1, para. 38.

1200 Števček ER1, para. 40; Fogaš ER1, para. 84.

1201 Repeated Request of AOG to District Court Bardejov, 2 December 2016 (LF-24).

1202 Fogaš ER1, para. 88; Fogaš ER2, para. 48.

of 15 December 2016, the court waited to see if comments were still forthcoming. Apparently as a result and due to the holiday season, the file was not forwarded to the appellate court until 12 January 2017.[1203] That court then dismissed the appeal on 27 February 2017,[1204] i.e. one and a half months after receiving the file. The Bardejov District Court received that decision on 4 April 2017 and, according to the Claimant, it was communicated to the litigants on 2 May 2017.[1205] That decision then entered into force on 19 May 2017, when it was "served on the last party to the proceedings", it being specified that the courts have "no control over" the moment such decision becomes final, since they must wait for proof of receipt.[1206]

663. It follows from this chronology that the only delay caused by the courts is the one linked to the communication of the appellate decision to the lower court and then to the parties, which took from 27 February to 2 May 2017 and is not explained. Other delays are attributable to the parties. That two-month delay can in no way justify a finding of denial of justice in the circumstances of this case.[1207]

c. CONCLUSION ON FET

664. For the reasons discussed above, the Tribunal concludes that the Respondent did not breach its FET obligations. The failure of AOG's drilling project was largely a consequence of its own actions and inactions. In summary:

- At Smilno, there is no evidence that AOG performed a meaningful exercise in due diligence on the status of the Access Road, and the evidence makes clear that it sought to use that field track without the owners' consent. Once it realized that its understanding about the legal status of the field track was incorrect and that its actions were stirring up local resistance, instead of engaging with the land owners and activists, it resorted to self-help and further antagonized its opponents by disregarding the Interim Injunction issued by the local court, upgrading and repeatedly using the field track.

- As for Krivá Oľka, the origin of the troubles seem to lie in the failure of AOG to

1203 Submission Report of District Court Bardejov, 12 January 2017 (LF-20).

1204 Resolution of the Prešov Regional Court, 27 February 2017 (C-170).

1205 The Resolution of the Prešov Regional Court is stamped as being received by the Bardejov District Court on 4 April 2017. Memorial, para. 116, referring to Resolution of the Prešov Regional Court, 27 February 2017 (C-170).

1206 Števček ER1, para. 48; Fogaš ER1, para. 97; Fogaš ER2, para. 52.

1207 It is noted that the Slovak Supreme Court held that issuing a decision on appeal within one year was timely (Resolution of the Constitutional Court of the Slovak Republic, File No. I. US 399/2019-11, 26 September 2019 (LF-21)).

request the Lease extension on time, although it had secured all the permits. It then sought a compulsory access order and successfully appealed the first instance decision that had denied the order, but then decided not to pursue those proceedings, which was a surprising failure.

- Similarly, in respect of the EIAs, AOG decided to relinquish the Snina Exploration License although it had successfully appealed against the decision of the Humenné District Office that ordered it to conduct a full EIA and chose not to appeal the EIA decisions concerning Smilno and Krivá Oľka.

665. It is true that some of the Slovak authorities made certain decisions which give rise to questions. For instance, the MoA may have been excessively formalistic in not approving the Lease extension. The first instance decision of the MoE refusing a compulsory access order was arguable, but was ultimately quashed. In the same vein, although the reasons given by the district offices to order full EIAs were not in conformity with the statutory requirements, they were neither arbitrary nor biased. In addition, remedies were available against those decisions and, when AOG made use of those remedies, they were effective. In the end, these questionable decisions caused no more than temporary setbacks, which did not prevent AOG from conducting its exploration program.

4. Arbitrary and discriminatory treatment

a. Parties' positions

i. Claimant's position

666. The Claimant submits that the Respondent's conduct was arbitrary and discriminatory and therefore in breach of Article II(1) and II(2)(b) of the BIT.[1208] Regarding arbitrary treatment, the Claimant reiterates the arguments addressed above. Regarding discrimination, the Claimant contends that "without any reasonable or objective justification" the Slovak Republic treated NAFTA more favorably than AOG when (i) the MoE granted NAFTA a compulsory access order,[1209] (ii) the MoA approved a four-year lease in favor of NAFTA,[1210] and (iii) the MoE only imposed on AOG the obligation to perform preliminary EIAs for all future deep drills in a decision reducing the license area,

[1208] Memorial, paras. 155-157, 194 and 239-257; Reply, paras. 349-369; Claimant's Opening Presentation, Slides 163 and 166.

[1209] Memorial, paras. 249-250; Reply, paras. 359-361.

[1210] Memorial, paras. 251-253; Reply, para. 362-366.

whereas that obligation was imposed on other license holders in licenses renewals.[1211]

ii. Respondent's position

667. The Respondent disputes this claim and argues that NAFTA is not an appropriate comparator because, as AOG, it is a Slovakian entity, controlled by a foreign national, such that "there can be no element of nationality-based discrimination".[1212] Second, NAFTA was not treated more favorably by the MoE or the MoA.[1213] It took the MoE three years to process NAFTA's request for a compulsory access order and NAFTA complied with the MoE's requests for additional documents.[1214] Further, the MoE imposed the obligation to perform preliminary EIAs in "numerous cases" after 1 January 2017.[1215] As for the MoA, NAFTA and AOG were not in like circumstances since AOG had failed to seek a timely Lease extension.[1216]

b. Analysis

668. The Claimant's arguments about arbitrary treatment are in effect identical to the ones that the Tribunal has already dismissed in the context of the FET analysis above at paragraphs 651 to 655. Hence, for substantially the same reasons as above, the Tribunal dismisses the claim for arbitrary treatment.

669. The following analysis is thus limited to the discrimination claim.

i. Applicable legal framework

670. Article II(1) of the BIT reads as follows:

> "Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded

1211 Memorial, para. 257; Reply, paras. 367-369.

1212 Counter-Memorial, paras. 385-386; Rejoinder, paras. 496-497.

1213 Counter-Memorial, paras. 387-395; Rejoinder, paras. 498-505; Respondent's Opening Presentation, Slide 202.

1214 Counter-Memorial, paras. 387-391; Rejoinder, paras. 498-502; Respondent's Opening Presentation, Slide 202.

1215 Counter-Memorial, paras. 396-400; Rejoinder, paras. 394 and 506-507; Respondent's Opening Presentation, Slide 202.

1216 Counter-Memorial, paras. 392-395; Rejoinder, paras. 503-505; Respondent's Opening Presentation, Slide 202.

> pursuant to any exceptions shall, except as stated otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country".[1217]

671. Article II(2)(b) of the BIT provides:

> "Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party".[1218]

672. Discrimination exists where an investor suffers "different treatment in similar circumstances without reasonable justification".[1219] It follows, as noted in *Pawlowski v. Czech Republic*, that the Claimant must (i) identify a suitable comparator that is in like situation, (ii) prove that it suffered less favorable treatment than the comparator, and (iii) establish that there was no reasonable justification for the difference in treatment.[1220]

ii. Discussion

673. The Tribunal will leave open the question whether Article II(1) and (2)(b) only contemplates nationality-based discrimination and whether NAFTA, a Slovak entity controlled by foreign interests, can be an appropriate comparator. Even if this question were resolved in favor of Discovery, the latter would fail to establish an unjustified difference in treatment.

674. Starting with the compulsory access order, the record shows that it took the MoE almost two years to process NAFTA's application. When the owner of the forest property appealed the decision granting the compulsory access order, the Minister of Environment quashed the decision and the MoE granted a new compulsory access order in a subsequent procedure.[1221] By contrast, it took the MoE around seven months to process AOG's application and, although it first refused to grant the order, Minister Sólymos quashed that refusal about three months later. More importantly, the Claimant does not contest that

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1217 US-Slovakia BIT, Article II(1) (C-1).

1218 US-Slovakia BIT, Article II(2)(b) (C-1).

1219 *Saluka Investments v. Czech Republic*, para. 313 (CL-11); *Lemire v. Ukraine*, para. 261 (CL-31); *Crystallex International v. Venezuela*, para. 616 (CL-26).

1220 *Pawlowski v. Czech Republic*, para. 534 (CL-44).

1221 NAFTA a.s. section 29 applications dated 2010 (C-32); Decision of the Minister of Environment, 17 May 2013 (R-99).

NAFTA diligently submitted the documentation requested by the MoE,[1222] whereas AOG refused to provide the MoE with evidence that it had failed to secure a new lease from LSR, and it ultimately abandoned the process.[1223]

675. Turning then to the MoA's refusal of the Lease extension, the Claimant contends that the process for NAFTA's lease was "materially different" because (i) that lease was approved within three months as opposed to six months for AOG's Lease, (ii) the Forestry Property Commission met to consider NAFTA's lease unlike for AOG's Lease extension, and (iii) the decision approving NAFTA's lease was communicated by the Head of the Service Office whereas the one refusing AOG's extension request was communicated by Minister Matečná.[1224] Although literally addressing communication, that latter complaint rather seems to go to the identity of the decision-maker.

676. The Tribunal first observes that the approval of a lease is different from the extension of an existing lease. In this respect, the Claimant did not establish that the Forestry Property Commission was required to meet to consider lease extensions, nor did it rebut the Respondent's assertion that the commission had met to discuss AOG's initial lease. Further, the three month difference in processing the initial leases cannot without more be considered as a sign of discrimination, particularly when AOG knew that the lease approval could take up to six months.[1225] Moreover, the Claimant's allegations about the identity of the person who made or communicated the decision do not suggest, let alone prove, discriminatory treatment, not to speak of the fact that one decision was about an initial lease and the other about an extension.

677. Finally, the MoE's imposition of preliminary EIAs for all deep drillings in the 2018 decision amending the Svidník Exploration License was a mere restatement of a statutory obligation. The MoE had included similar requirements in other exploration licenses issued after 1 January 2017, including in a license extension granted to NAFTA.[1226] The Claimant's point that these instances concern license extensions as opposed to amendments is a "distinction without a difference",[1227] and can certainly not as such amount to discrimination.

1222 Decision of the Minister of Environment, 17 May 2013, pp. 2-3 (R-99).

1223 Counter-Memorial, paras. 388 and 390.

1224 Reply, para. 365.

1225 Fraser WS1, para. 30; Email of 28 April 2015 from Ron Crow to AOG Team (C-72).

1226 Decision of MoE on extension of NAFTA a.s. exploration area licence, 19 March 2018 (R-91); Decision of MoE on extension of Ochtiná exploration area license, 17 July 2018 (R-100); Decision of MoE on determination of the exploration area to NAFTA a.s., 17 September 2018 (R-180); Decision of MoE on determination of the exploration are to CE Metals s.r.o., 27 January 2017 (R-181).

1227 Rejoinder, para. 394.

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678. On this basis and for reasons set forth at paragraphs 651 to 655, the Tribunal dismisses the claim for arbitrary and discriminatory treatment.

5. Effective means

a. Parties' positions

i. Claimant's position

679. Discovery claims that the Respondent violated Article II(6) of the BIT by failing to provide effective means,[1228] in particular in connection with the "unwarranted and unreasonable delay" in dealing with Mrs Varjanová's appeal, with the Article 29 Application and with AOG's related appeal.[1229] Contrary to the Respondent's argument, the Claimant considers that Article II(6) is sufficiently broad to cover "authorizations relating" to investments, which encompass administrative decisions.[1230]

ii. Respondent's position

680. The Respondent disputes having breached Article II(6) of the BIT.[1231] It argues that the effective means standard "is not absolute" and "does not apply in non-adjudicatory administrative decision-making".[1232] Even if that standard applied to the Article 29 proceedings, Slovakia contends that delays were "caused primarily by AOG's failure to submit" documents.[1233] Similarly, in connection with alleged judicial delays, the courts "followed the traditional procedural steps" and "acted lawfully and without any undue delay".[1234]

1228 Memorial, paras. 111-116, 144-154 and 258-262; Reply, paras. 370-372; Claimant's Opening Presentation, Slide 167.

1229 Memorial, para. 262.

1230 Reply, para. 371.

1231 Counter-Memorial, paras. 401-408; Rejoinder, paras. 508-514; Respondent's Opening Presentation, Slides 203-204.

1232 Counter-Memorial, paras. 402-403; Rejoinder, paras. 508-512, referring to *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (hereinafter "*Apotex v. USA*"), para. 9.70 (RL-87).

1233 Counter-Memorial, para. 408; Rejoinder, para. 513.

1234 Rejoinder, para. 514.

b. Analysis

i. Applicable legal framework

681. Article II(6) of the BIT reads in relevant part as follows:

> "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments and authorizations relating thereto and investment agreements".[1235]

682. The wording just quoted is clear; it covers "authorizations relating" to investments. In addition to means to enforce rights in court, this effective means provision extends to non-adjudicatory administrative decision-making. In that sense, it differs from the effective means provision of the Jamaica-USA BIT at issue in *Apotex*, on which the Respondent relies.[1236]

ii. Discussion

683. The Claimant complains about delays in processing (i) Ms. Varjanová's appeal against the 5 October 2016 decision of the Bardejov District Court and (ii) the Article 29 Application.[1237] On the first complaint, the Tribunal refers to its analysis in the context of the denial of justice claim at paragraphs 660 to 663 above.

684. As regards the Article 29 Application, the complaint goes to delays at the first instance and appellate levels.[1238] In respect of the first, the Claimant appears to rely on Mr. [redacted]'s statement that Article 29 proceedings "typically" take two to four months.[1239] This timeframe ignores that AOG's original application was incomplete and had to be supplemented.[1240] It also disregards that AOG's application was not "typical", it involved a lease agreement with an entity administering public lands, which required MoA approval. These specificities inevitably required more time. The MoE had to address whether the MoA was a party to the Article 29 proceedings, and nothing suggests that the MoE or the MoA was inactive or dilatory.[1241] By comparison, NAFTA's first instance Article 29

1235 US-Slovakia BIT, Article II(6) (C-1).

1236 *Apotex v. USA*, para. 9.70 (RL-87).

1237 Memorial, paras. 111-116, 144-154 and 262(2); Reply, paras. 133-141 and 372.

1238 Memorial, paras. 144-154 and 262(2); Reply, paras. 133-141 and 372.

1239 Reply, para. 135(2), referring to Email of 17 October 2016 from Viktor Beran (C-337).

1240 Ministry of Environment response to AOG Application under s.29 of the Geology Act, 20 September 2016 (C-144).

1241 Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture, 25 November 2016 (C-156).

proceedings took nearly two years.[1242]

685. As to the appeal, AOG filed its appeal on 24 March 2017 and the appellate decision was rendered on 13 June 2017.[1243] It is difficult to see where the delay lies. To the extent the Claimant's complaint includes the suspension of the Article 29 proceedings, the Tribunal found above that any delays were of the Claimant's own making.

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686. In summary, for these reasons and those set out at paragraphs 679 to 682, the Tribunal dismisses the claim that the Respondent breached Article II(6) of the BIT.

6. Expropriation

a. Parties' positions

i. Claimant's position

687. The Claimant submits that Slovakia breached Article III(1) of the BIT by indirectly expropriating its shareholding in AOG and destroying its investments in the Slovak Republic.[1244] For the Claimant, the "totality of the measures which Slovakia imposed throughout the project between 2015-2018" amount to a creeping indirect expropriation, the "cumulative effect" of which was to substantially deprive the Claimant of the investment's "value, use or enjoyment", and to inflict "a loss of the economic value or economic viability".[1245] Discovery submits that this indirect expropriation was "unlawful" because Slovakia did not act for a public purpose, in accordance with due process, in a non-discriminatory manner, and did not provide prompt, adequate and effective compensation.[1246]

688. The Claimant disputes the assertion that it voluntarily relinquished the Exploration Licenses and insists that it was forced to do so in 2018 to mitigate its losses resulting from

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1242 NAFTA submitted its Article 29 application on 14 May 2010 and the MoE granted that application on 13 April 2012. NAFTA a.s. section 29 applications dated 2010 (C-32); Decision of the Minister of Environment, 17 May 2013, pp. 1-2 of the pdf document (R-99).

1243 Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017 (C-25); Decision of Minister of Environment, 13 June 2017 (C-174). To compare NAFTA's appeal took somewhat longer, as it was filed on 4 May 2012 and the Minister of Environment issued his decision on 21 August 2012. NAFTA a.s. section 29 applications dated 2010 (C-32); Decision of the Minister of Environment, 17 May 2013, pp. 1-2 of the pdf document (R-99).

1244 Memorial, paras. 263-269; Reply, paras. 373-381; Claimant's Opening Presentation, Slide 168.

1245 Reply, para. 377(1)-(2).

1246 Reply, para. 377(3).

the Respondent's breaches.[1247] The argument that AOG had no right to use the Access Road is a "straw man argument", since the road was publicly accessible and the police prevented AOG from using it.[1248] Moreover, the MoA and the MoE deprived AOG of the economic benefits accruing under the Exploration Licenses.[1249] Finally, the decisions ordering a full EIA and the imposition of a preliminary EIA for future wells, although the EIA Amendment did not apply to AOG's activities authorized before its enactment, deprived AOG of the value, use or enjoyment of the Exploration Licenses.[1250]

ii. Respondent's position

689. The Respondent challenges this claim.[1251] It stresses that Discovery "retains its shareholding in AOG" and that "it retained all its Exploration Area Licenses until it voluntarily relinquished them".[1252] It adds that it is not established that any assets were taken or that the investment was "rendered worthless and unviable".[1253]

b. Analysis

i. Applicable legal framework

690. Article III(1) of the BIT reads in relevant part as follows:

> "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)".[1254]

ii. Discussion

691. The Tribunal starts by noting that Discovery still owns the shares in AOG and that AOG relinquished the Medzilaborce and Snina Exploration Licenses in April 2018 and did not

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1247 Reply, para. 376.

1248 Reply, para. 379.

1249 Reply, para. 380.

1250 Reply, para. 381.

1251 Counter-Memorial, paras. 409-424; Rejoinder, paras. 515-527; Respondent's Opening Presentation, Slides 205-206.

1252 Counter-Memorial, paras. 417-418; Rejoinder, paras. 517 and 525.

1253 Rejoinder, para. 521.

1254 US-Slovakia BIT, Article III(1) (C-1).

seek an extension of the Svidník Exploration License, which expired in July 2021.[1255]

692. The measures which the Claimant impugns here are the same measures of which it complained in the context of its FET, arbitrary and discriminatory treatment, and effective means claims. All of these measures have been extensively examined above and none has been held to rise to the level of a treaty breach. For reasons of judicial economy, the Tribunal refers to its discussion above. A measure that does not breach FET or a similar standard cannot conceivably constitute an expropriation. The same is true of the cumulative effect of a series of measures. If none represents a breach individually, their addition will not turn them into a breach. Or, differently put, adding zeros will still give zero.

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693. In conclusion, the Tribunal dismisses the expropriation claims.

VII. TRANSPARENCY

694. In conformity with the Parties' consent to publish the Award and the transparency regime set out in PO2, the Award shall be made available to the public. Pursuant to paragraph 23 of PO2, the Parties shall therefore notify the Tribunal within 30 days from the date of dispatch of the Award if they seek protection of confidential information. Pursuant to paragraphs 17 and 18 of PO2, the other Party may then raise reasoned objections to transparency within 30 days and the Parties shall thereafter seek to resolve those objections within 15 days. If necessary, the Tribunal will then rule on any outstanding objections.

695. It follows that, as is foreseen in paragraph 22 of PO2, the Tribunal will remain in office until all transparency objections have been resolved.

696. In addition, pursuant to paragraph 27(v) of PO2, the documents referred to in Section III of PO2 will, upon completion of the case, continue to be made available to the public on the ICSID website.

VIII. COSTS

A. PARTIES' POSITIONS

1. Claimant's position

697. The Claimant seeks recovery of all of its costs incurred in connection with this arbitration

[1255] AOG notice of withdrawal from Medzilaborce, 13 April 2018 (C-193); AOG notice of withdrawal from Snina, 13 April 2018 (C-194). See Lewis WS1, para. 93.

based on the principle that costs follow the event. It also claims interest on costs awarded at a rate to be determined by the Tribunal from the date of the Award to payment.[1256] Its costs were mostly funded by 24LF Capital LLC ("24LF")[1257] and the remaining part was either paid directly by Discovery "or will become payable by Discovery directly in the event of success".[1258]

698. In addition to other costs and expenses, the Claimant claims GBP 1,688,465.55 for Signature's fees and other costs, including a GBP 330,903 success fee,[1259] GBP 251,600 for Mr. Tushingham's fees and GBP 42,975 for Mr. Hain's fees.[1260] It further claims the ATE insurance premium of USD 209,850 including a premium tax, plus a deferred and contingent premium of USD 544,450.[1261] Finally, Discovery claims a return on 24LF's investment being the greater of (i) three times the amount of GBP 2,841,402.96 invested by 24LF, namely GBP 8,524,208.88 or (ii) 30% of all amounts awarded up to USD 50 million, plus 20% of all amounts awarded between USD 50 and 100 million, plus 10% of all amounts awarded over USD 100 million.[1262]

699. The Claimant argues that these costs and expenses are reasonable, that it acted in good faith throughout the proceedings and that its conduct did not increase the Respondent's costs.[1263] It rejects the Respondent's contention that it should not be considered as prevailing unless it succeeds on a majority of the 14 disputed measures or does not succeed on causation or in establishing damages.[1264] It also disagrees that the Respondent should be awarded a substantial portion of its costs even if it were to prevail.[1265]

700. On this basis, using the lower figure of GBP 8,524,208.88 for 24LF's return on investment, the Claimant seeks the following relief:

1256 Memorial, paras. 333-334 and 335(4)-(5); Reply, para. 474(8)-(9); Claimant's Submission on Costs, 17 May 2024; Claimant's Reply on the Respondent's Submission on Costs, 24 May 2024.

1257 Claimant's Submission on Costs, 17 May 2024, para. 4.

1258 Claimant's Submission on Costs, 17 May 2024, note 2.

1259 Claimant's Submission on Costs, 17 May 2024, para. 8-14.

1260 Claimant's Submission on Costs, 17 May 2024, paras. 15-18.

1261 Claimant's Submission on Costs, 17 May 2024, paras. 31-51, as updated in Claimant's Updated Costs Schedule, 10 January 2025, p. 2.

1262 Claimant's Submission on Costs, 17 May 2024, paras. 52-57, as updated in Claimant's Updated Costs Schedule, 10 January 2025, p. 2.

1263 Claimant's Submission on Costs, 17 May 2024, para. 6; Claimant's Reply Submission on Costs, 24 May 2024, paras. 8-13.

1264 Claimant's Reply Submission on Costs, 24 May 2024, para. 4.

1265 Claimant's Reply Submission on Costs, 24 May 2024, para. 5.

"(1) ORDER Slovakia to compensate Discovery for the costs incurred in connection with the arbitration in the amounts of:

(a) GBP [11,204,931.75], plus

(b) EUR 174,725.87, plus

(c) USD [997,515.76]".[1266]

2. Respondent's position

701. The Respondent requests the Tribunal to award it the totality of its costs, including legal fees, expert fees, arbitral expenses for ICSID and the Tribunal, and other costs, as well as interest on any awarded amount at a reasonable commercial rate from the date of the Award until payment.[1267] It claims legal fees and costs for EUR 3,228,596.54 (not including advance payments to ICSID).[1268]

702. The Respondent explains that, pursuant to a representation agreement, its counsel Squire Patton Boggs cannot invoice more than EUR 55,000 for legal fees per month, meaning that if Squire Patton Boggs incurs a larger amount in a given month, the excess amount is carried over into the following month (unless there is an unused amount from previous months).[1269] This mechanism is intended to apply until the end of the month following the issuance of the Award.

703. As of 17 May 2024, of the EUR 2,182,638 for counsel fees, the excess amount represents EUR 697,638, which the Slovak Republic is settling in monthly instalments of EUR 55,000.[1270]

704. The Respondent argues that its costs are reasonable considering the complexity of the case, that Discovery's claims were "exaggerated, spurious, and presented a one-sided story",[1271] and that the Claimant should not be considered as the prevailing Party unless it succeeds

[1266] Emphasis omitted. Claimant's Submission on Costs, 17 May 2024, para. 60, as updated in Claimant's Updated Costs Schedule, 10 January 2025, p. 2, not including advances to ICSID.

[1267] Counter-Memorial, para. 623(b)-(c); Rejoinder, para. 737(b)-(c); Respondent's Submission on Costs, 17 May 2024, pp. 1 and 4.

[1268] Respondent's Submission on Costs, 17 May 2024, p. 3 and Annex A, as updated in the Respondent's Updated Statement of Costs, 9 January 2025.

[1269] Respondent's Submission on Costs, 17 May 2024, p. 3.

[1270] Respondent's Submission on Costs, 17 May 2024, p. 4.

[1271] Respondent's Submission on Costs, 17 May 2024, pp. 1 and 4.

in a majority of the 14 disputed measures, as well as on causation and damages.[1272] Even if the Slovak Republic were to succumb in this arbitration, it should still be awarded a substantial portion of its costs because Discovery increased time and costs during the arbitration.[1273]

705. In addition, the Respondent objects to the Claimant's request for reimbursement of the deferred and contingent premiums under the ATE insurance,[1274] the upfront premium of USD 200,000,[1275] and the claim for 24LF's return on investment.[1276]

B. ANALYSIS

706. Article 61(2) of the ICSID Convention provides the Tribunal with the power to set the Parties' costs and determine their allocation:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".

707. One distinguishes broadly three approaches in the practice of ICSID tribunals on cost allocation. Some tribunals follow the principle "costs follow the event", which implies that the losing party bears the costs of the proceedings, including those of the prevailing party. Other tribunals leave costs lie where they fall, i.e. the parties share the arbitration costs equally and each party bears its own costs. Still others mix the two first approaches, taking various circumstances into account, including the success of the claims, legitimacy of litigating them, genuineness of the issues raised, conduct of the Parties in the arbitration and other parameters.

708. In the circumstances, the Tribunal deems it fair and appropriate to follow the third approach just outlined, but to weigh it heavily on the question of success. The Respondent clearly prevailed. While the Claimant succeeded on jurisdiction, the Slovak Republic won on all the substantive claims. It is true that some of the latter's conduct was questionable; however, the Tribunal held that it did not rise to the level of a treaty breach. The Tribunal was also struck by the Claimant's lack of serious due diligence and its various mistaken legal assumptions. As to the Parties' conduct in the arbitration, both proceeded in a

1272 Respondent's Submission on Costs, 17 May 2024, p. 3.

1273 Respondent's Submission on Costs, 17 May 2024, p. 3.

1274 Respondent's Reply Submission on Costs, 27 May 2024, pp. 2-3.

1275 Respondent's Reply Submission on Costs, 27 May 2024, pp. 2-3.

1276 Respondent's Reply Submission on Costs, 27 May 2024, pp. 2 and 3.

professional and cooperative manner. Weighing all these different elements, the Tribunal comes to the conclusion that it is fair that, in addition to its own costs, the Claimant bear 100% of the ICSID costs and 75% of the Respondent's costs and expenses.

709. The Respondent's legal fees and costs amount to EUR 3,228,596.54, including counsel fees of EUR 2,182,638. According to the Respondent's latest cost submissions, pursuant to its representation agreement with counsel, the Slovak Republic will only cover the amount of EUR 2,035,000.00 if the Award is issued in January 2025. It follows that the Slovak Republic incurred total costs in the amount of EUR 3,080,958.54. Accordingly, the Tribunal orders the Claimant to pay the Respondent EUR 2,310,718.90 to cover 75% of its legal and other costs.

710. Subject to additional costs related to the redaction process of the Award, the costs of the arbitration, including the fees and expenses of the Tribunal and the Assistant, ICSID's administrative fees and direct expenses, amount so far to:[1277]

Arbitrators' Fees and Expenses		(in USD)
	Gabrielle Kaufmann-Kohler	233,116.12
	Stephen Drymer	148,546.33
	Philippe Sands KC	77,750.00
Tribunal Assistant's Fees and Expenses		120,755.51
ICSID's Administrative Fees		188,000
Direct Expenses[1278]		146,328.66
Total		**914,496.62**

711. After the finalization of the redaction process, the ICSID Secretariat will send to the Parties the final account statement containing the total amount of arbitration costs and reimburse any remainder to the Parties in proportion to the payments that they advanced to ICSID.

712. Both Parties request interest on costs at a reasonable commercial rate from the date of the final award until the date of payment. The Claimant proposes USD LIBOR plus 4%, compounded annually, whereas the Respondent suggests simple interest equivalent to the yield on Slovak government 10-year bonds. Since both Parties seek interest on costs, the Tribunal awards such interest. As to the rate, the Tribunal considers it appropriate to award the Respondent simple interest equivalent to the yield of 2-year Slovak government bonds

[1277] The arbitration costs have been met by the Parties' advance payments of USD 480,000 each. In the Tribunal's view, the costs of the arbitration comprise the costs incurred after the commencement of the case as per ICSID's financial statement and therefore exclude the fee for lodging the request for arbitration.

[1278] Direct expenses include meeting-related expenses, venue, catering and audiovisual services, interpretation, court reporting and translation, Secretary travel expenses and attendance fee as per ICSID's Financial Statement.

from the date of the Award until payment.

IX. OPERATIVE PART

713. For the reasons set forth above, the Tribunal:

(i) DECLARES that it has jurisdiction over the dispute;

(ii) DECLARES that the Respondent has not breached the US-Slovakia BIT;

(iii) DISMISSES the claims on the merits;

(iv) ORDERS the Claimant to pay to the Respondent one half of the total arbitration costs as reflected in ICSID's final account statement;

(v) ORDERS the Claimant to pay to the Respondent EUR 2,310,718.90 for its legal fees and other costs incurred in connection with this arbitration;

(vi) ORDERS the Claimant to pay simple interest on the sums awarded in (iv) and (v) above, at the rate equivalent to the yield of 2-year Slovak government bonds, from the date of the Award until payment;

(vii) ORDERS either Party to notify the Tribunal within 30 days from the date of dispatch of the Award if it seeks protection for confidential information, after which the other Party may raise reasoned objections within 30 days; the Parties shall then seek to resolve any objections within 15 days; and

(viii) DISMISSES all other claims and requests.

[Signed]

Mr. Stephen L. Drymer
Arbitrator

Date: 15 January 2025

Prof. Philippe Sands KC
Arbitrator

Date:

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date:

[Signed]

Mr. Stephen L. Drymer
Arbitrator

Date:

Prof. Philippe Sands KC
Arbitrator

Date: 10 January 2025

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date:

Mr. Stephen L. Drymer
Arbitrator

Date:

Prof. Philippe Sands KC
Arbitrator

Date:

[Signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date: 16 January 2025