INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DISCOVERY GLOBAL LLC

(United States)

Claimant

– v –

THE SLOVAK REPUBLIC

Respondent

(ICSID Case No. ARB/21/51)

RESPONDENT'S REJOINDER

14 December 2023

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

SQUIRE PATTON BOGGS

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I. INTRODUCTION

1. Discovery's Reply exemplifies a claimant incapable of taking responsibility for its own actions. In its short time in the Slovak Republic, Discovery[1] violated Slovak law, made poor business decisions, committed strategic and legal blunders, and showed a profound disregard for the very citizens that called this land their home. Discovery's Reply either avoids these points altogether or seeks to excuse them by arguing that, even when it violated the law and breached express obligations under contractual agreements, the Slovak Republic should have simply overlooked these errors. The US-Slovakia BIT requires lawful treatment—not preferential treatment.

2. The reality is that the Slovak authorities on which Discovery casts aspersions had little-to-no role in this dispute. At each well location, Discovery made serious mistakes *before* any of the State actions that it now claims give rise to a breach of the BIT:

   (a) **Smilno**: Were it not for Discovery's failure to secure private landowners' permission to use their land, the Police (including the traffic inspectorate), the state prosecutor, and the Slovak courts would not have even been involved.

   (b) **Krivá Oľka**: Were it not for Discovery's failure to request an extension of the Lease Agreement timely, the MoA would have never been a target of Discovery's claim that it should have overlooked this breach of the Lease Agreement.

   (c) **Ruská Poruba**: Were it not for Discovery's (*i*) failure to secure private landowners' permission to use their land, (*ii*) failure to wait for its injunction to be effective, and (*iii*) failure to obtain the injunction against the right party, it would not have had any encounter with the Police at this location.

3. Similarly, were it not for Discovery's disrespectful treatment of the local citizens and disregard of their environmental concerns, it would have likely gained community acceptance of its project. As Discovery itself reported in September 2018, its failure to

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Slovak Republic's Counter-Memorial. Except where appropriate to distinguish between them, the Slovak Republic uses the name "Discovery" to refer to Claimant and AOG. All emphasis in quotations is added unless otherwise indicated.

achieve community acceptance—in other words, its failure to obtain a SLO—was the reason that it decided to wind up its operations in Slovakia:[2]

> In view of the considerable challenges we continue to face in gaining local acceptance anywhere in the region, we regrettably feel the time has come to relinquish our remaining license and wind up operations in Slovakia. The Smilno location will need to be restored, and AOG still holds casing, wellheads and float equipment in storage with a book value of more than €250,000.

4. In short, Discovery's failures and misjudgments are the foundation for the problems it experienced, not the Slovak Republic. It was Discovery alone who made the choice to:

(a) Attempt to drill without notice to the local community and dismiss the concerns they raised;[3]

(b) barricade Ms. Varjanová's car with concrete panels instead of simply calling her;[4]

(c) violate the preemption rights of the Access Land's owners, instead of seeking their consent; [5]

(d) create a new legal entity for the sole purpose of circumventing the Interim Injunction in Smilno;[6]

(e) "*go ahead anyway*" [7] and use the field track, even though the traffic inspectorate did not agree with Discovery that the field track was a public special purpose road ("**PSPR**");

(f) antagonize the local population in every-day encounters;[8]

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2 AOG Report to Romgaz dated 6 September 2018, **R-116**.

3 *See infra* Section V.B.2.

4 Respondent's Counter-Memorial, ¶¶ 93, 129.

5 Respondent's Counter-Memorial, ¶¶ 88-89.

6 Respondent's Counter-Memorial, ¶¶ 98-100.

7 Email from Mr Fraser dated 26 October 2016, **C-340**.

8 Respondent's Counter-Memorial, ¶¶ 103-110.

(g) fail to timely request an extension of its Lease Agreement;[9] and

(h) make numerous legal mistakes in its attempts to drill in Ruská Poruba.[10]

5. The Tribunal need only look at the local citizens' words as expressed at the time. Once Discovery finally engaged with—rather than antagonize—the local population, the local citizens told Discovery precisely what the Slovak Republic told the Tribunal in its Counter-Memorial: Discovery "*appeared to be secretive and evasive*" about environmental issues and the local citizens felt that they "*had not been shown sufficient respect*:"[11]

> This meeting seems to have been surprisingly productive. [redacted] turned up with [redacted] – both of them from Ruska Poruba – and also, to our surprise, [redacted] from VLK. We explained that we had wanted to meet with them in order to hear their concerns and if possible find any common ground. There were a lot of complaints along the lines that they had not been shown sufficient respect in the past: we had assumed we could come in and drill there without getting their consent, and they considered we had lied about who owned what land or who had the right to be on what land. We also appeared to be secretive and evasive about the environmental implications, which suggested to them that there were issues which they should be concerned about.

6. Not only was Discovery dismissive of the citizens who called this land their home, it openly *mocked* them. The Tribunal will recall that, with its Memorial, Discovery submitted a picture of Mr. Crow with a cast on his leg, which Discovery claimed he suffered after one of the local citizens struck him with their car.[12] That was a lie. In its Counter-Memorial, the Slovak Republic embedded a video of the incident, which shows that Mr. Crow faked the injury and mocked the citizens' concern.[13] Mr. Crow was laughing during the entire charade.

7. What was Discovery's response to having been caught in this lie? Buried deep in its Reply, at paragraph 400(3) on page 199, Discovery's only response to this video was as follows:[14]

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9 Respondent's Counter-Memorial, ¶¶ 145-148.

10 Respondent's Counter-Memorial, ¶¶ 168-171.

11 First activists meeting note dated 5 February 2017, **R-117**.

12 Respondent's Counter-Memorial, ¶ 104; *see* Photograph of Ron Crow dated June 2016, **C-112**; Fraser First WS, ¶ 55.

13 Respondent's Counter-Memorial, ¶ 28.

14 Claimant's Reply, ¶ 400(3).

(3) As to Mrs Varjanová's video of Mr Crow, there is no evidence that this isolated incident "*increased tensions with the activists*", as Slovakia asserts.

8. In a submission that spans well more than 200 pages and having been caught in such a serious misrepresentation to the Tribunal, one would have expected more. At a minimum, one would have expected that Discovery make Mr. Crow available as a witness in this arbitration to explain himself. It did not do so. In short, it is now undisputed that Mr. Crow faked this injury, and the whole story was a ruse.

9. Discovery's misrepresentations—and its refusal to openly admit it after being caught—speaks volumes about its credibility.

10. Discovery not only failed to produce a witness statement from Mr. Crow, but it also failed to offer testimony on other important allegations. Numerous key players are missing:

    (a) Where is Stanislav Benada? He was Discovery's in-country representative who communicated and met with most of the authorities that Discovery targets in this arbitration.

    (b) Where are Igor Meluš and Macej Karabin? They were Discovery's engineer and geologist. Notably, it was Mr. Meluš who interacted with the Police at various times regarding the Smilno Site and was responsible for overseeing AOG's Preliminary EIA applications.

    (c) Where are Dáša Cvečková and Karol Wolf? They routinely met with government ministries (notably, the MoA and the MoE) and are the sources of Discovery's latest theories about why the MoA refused to overlook Discovery's breaches of the Lease Agreement.

11. The silence from these individuals—who were actually on the ground in Slovakia and meeting with the relevant authorities—speaks volumes. And Discovery knows it. Its Reply is now filled with new theories and concocted stories, all of which Discovery uses to claim that Slovakia "*intended*" to prevent AOG from undertaking its exploration

activities. Discovery makes this accusation no less than five times in its Reply.[15] But it never supports these accusations with any documentary evidence or testimonial evidence from these individuals.

12. The reality is that Discovery came into the Slovak Republic with no respect for the country's rules, regulations, and the very foundations of the oil and gas exploration regime. The Tribunal need look no further than the following extract from a presentation that Discovery prepared for the MoE in December 2016. When discussing its complaints to the MoE, and the reasons why its project was not progressing, Discovery complained about the system of land ownership in the Slovak Republic:[16]

Issue	Nature	Comment
5. System of land ownership	• Highly fragmented ownership of land and multiple ownership of land parcels renders process of securing land and access rights exceptionally complicated • Many land parcels are undergoing inheritance procedures • Situation further complicated by lack of clarity in rights of lessor and lessee	• Attempting to secure land access causes significant delay, frustration and expense • **Constitutes a major obstacle to any investment involving the use of agricultural or forestry land**

13. In fact, one year later, in a presentation it prepared in September 2017, Discovery admitted that the Slovak Republic's "*exceptionally fragmented and complex system of land ownership*" in-and-of-itself "*may well be enough on its own to prevent AOG from continuing to do business in Slovakia*":[17]

> • A further challenge in Slovakia is the exceptionally fragmented and complex system of land ownership, which imposes a huge burden of cost and risk on oil and gas companies; without government intervention or support, **this issue may well be enough on its own to prevent AOG from continuing to do business in Slovakia**

14. The investor takes the State as it finds it. As a foreign investor, Discovery was obligated to conduct due diligence, understand the regulatory system in which it was allegedly investing, and manage its expectations accordingly. It is obvious that Discovery did none of that. Obtaining access rights to land is one of the most basic obligations on a company looking to prospect for oil and gas. In the Slovak Republic, that process—and the system of land ownership that operates in tandem—might not have been to Discovery's liking, but that is not a breach of the BIT.

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15 Claimant's Reply, ¶¶ 296-298, 300-301.

16 Email from M. Lewis to [redacted] dated 9 December 2016, **R-118**.

17 AOG Presentation dated September 2017, **R-119**.

15. Nevertheless, Slovak law provides a clear path on how an oil and gas investor secures rights of access. The investor must seek consent to use the land where it wishes to operate. It must first seek that consent from the landowner itself. If the landowner agrees, then the oil and gas investor may proceed. If the landowner objects, Slovak law—specifically, the Geology Act—provides for an Article 29 proceeding (*i.e.*, an administrative proceeding specific for oil and gas activities), where the investor can seek a state order overruling the landowner's objections. And even then, if the Article 29 proceeding does not conclude in the investor's favor, it can seek court intervention. As shown throughout this Rejoinder, Discovery either failed to undertake this process, did not understand this process, or did not care to follow it through. It may well be that oil and gas investors, like Discovery, find this process time consuming, complicated, and something that increases costs. But that, too, is no breach of the BIT.

16. Unable to discharge its burden of proof, Discovery has asked this Tribunal to carry that burden for it. Its case now rests almost exclusively on requests for adverse inferences. Those requests are baseless and only further proof that Discovery cannot carry its burden on its own.

17. But even if the Tribunal were to somehow find that Slovakia violated the US-Slovakia BIT (it did not), Discovery's case fails on causation because the alleged breaches did not cause the project's failure. As Slovakia explained in its Counter-Memorial, Discovery's project failed because it:

    (a) never attracted the capital it needed;

    (b) never obtained a SLO during the critical period before it commenced activities;

    (c) did not follow the Slovak legal and regulatory framework; and

    (d) never received the landowners' permission to use their land.

18. This last point bears particular emphasis. As explained below, Discovery's own conduct showed that it knew landowner permission was required. It was only after Discovery failed to obtain that permission that it invented its PSPR theory (the "**PSPR Theory**"), under which no landowner consent would be required. In short, Discovery's

PSPR Theory, now offered in this arbitration, is a creative afterthought to its failure to obtain landowner consent.

19. Even more telling, document production has revealed that Mr. Čičvara, an engineer from the Slovak traffic inspectorate, told Discovery that he did *not* agree that the field track in Smilno was a PSPR.[18] In internal documents reflecting that opinion, Discovery's response was stunning: it stated that, in face of that opinion, "*we threatened them with litigation if they failed to keep the track open and* ***told them we were going to go ahead anyway***."[19] Put another way, Discovery decided that, regardless of Slovak law, it would proceed anyway, even if it infringed upon the rights of those who owned the field track in Smilno.

20. Not only was Discovery going to "*go ahead anyway*", but it was going to "*try and fence the whole track if possible. If not, we will put a gate across the entrance to the track*":[20]

> Mike,
>
> The meeting was pretty frustrating – the main guy Lazorcik (I think no. 3 in Bardejov after Szcepanski and Sliva) was sympathetic, but deferred to his 'civil engineer' on the question of whether the track is a 'special purpose road' which the police are obliged to keep open. Cicvara was not prepared to agree that the track could be a special purpose road, even though [redacted] the senior traffic policeman in Humenne thought it was. We threatened them with litigation if they failed to keep the track open and told them we were going to go ahead anyway.
>
> Redacted for legal privilege
>
> We have decided to try and fence the whole track if possible. If not, we will put a gate across the entrance to the track. Work starts on fencing the location tomorrow, and on fencing the track next week beginning on Thursday (due to religious holidays on Tuesday 1 and Wednesday 2 November).

21. It is no wonder Discovery was unsuccessful in the Slovak Republic.

22. When Discovery finally engaged with the local citizens, it entered into a community agreement to undergo Preliminary EIAs (the "**2017 Community Agreement**").[21] The 2017 Community Agreement represented a fresh start, after which the failure of the project could not have been caused by anything the Slovak Republic did.

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18 Email from Mr Fraser dated 26 October 2016, **C-340**.

19 Email from Mr Fraser dated 26 October 2016, **C-340**.

20 Email from Mr Fraser dated 26 October 2016, **C-340**. *See also* Email from A. Fraser to M. Sikora, 26 October 2016, **R-221**.

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

23. Mr. Fraser, however, testifies that when the District Offices ordered the Full EIAs, the project was "*beginning to prove economically unviable*":[22]

> 104. By the end of 2017, and against the background of the decisions ordering full EIAs, it was beginning to prove economically unviable to continue, particularly if we were to be required to undergo a full EIA procedure for every exploration well. The delays that we had encountered to date had come at a huge cost, as while we had not yet been able to drill, we nonetheless had to continue to incur a significant amount of expenditure including on Licence fees, salaries, overheads, legal fees, the preliminary EIA applications, aborted drilling costs, etc. By this stage, Mike Lewis, Discovery's sole shareholder, was becoming seriously concerned about continuing to fund its activities in Slovakia (not least as Akard had defaulted by this point on the grounds of the delays we had encountered, as mentioned in paragraph 15 above).

24. That is wholly implausible. For a project that would supposedly generate hundreds of millions of dollars in revenues, why would three Full EIAs render that project "*economically unviable*"?

25. Discovery has no answer. Instead, it argues that it did not enter into the 2017 Community Agreement—and agree to Preliminary EIAs—because of the local citizens.[23] Rather, Discovery argues that it was the Minister of Environment who apparently pressured Discovery into doing so, such that Discovery had no choice but to submit to this process.[24] Yet again, Discovery has lost track of the facts.

26. In his second witness statement, Minister Sólymos explains that Discovery denied his request for it to undergo a Preliminary EIA in late 2016.[25] It was only months later, when Discovery realized that it needed to engage with the local community, that it agreed to undertake the Preliminary EIAs as part of its agreement with the local citizens—*and those citizens alone*. And, in fact, that is exactly what Mr. Fraser originally testified.[26]

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22 Fraser First WS, ¶ 104.

23 Claimant's Reply, ¶¶ 162-163.

24 Claimant's Reply, ¶¶ 159-163.

25 Sólymos Second WS, ¶¶ 5-10.

26 Fraser First WS, ¶¶ 94-95.

27. Beyond this new and contrived argument, Discovery now devotes pages and pages of its Reply to contesting the Preliminary EIA Decisions. It claims that, because it volunteered to do the Preliminary EIAs, the Full EIAs should have never been ordered and that the decisions were improperly decided. Two responses are in order:

(a) *First*, why does Discovery believe that "volunteering" to do a Preliminary EIA has any bearing on the ultimate result? No state authority ever told Discovery that, if warranted based on the results of the Preliminary EIA, a Full EIA would not be required. As the record now shows, Discovery's legal counsel and its EIA consultants told Discovery that this was one of the two possible outcomes under the applicable law.[27] Moreover, since AOG volunteered to submit to the Preliminary EIA to allow local citizens to raise their comments, the Full EIA could not have been ruled out. Otherwise, what would be the point of submitting to the voluntary Preliminary EIA in the first place?

(b) *Second*, why is an investment-treaty arbitration the proper forum to hear challenges to these Slovak administrative decisions? It is not the role of this Tribunal to act as an appellate authority in Slovakia over administrative decisions. Not only could Discovery have appealed the Preliminary EIA Decisions, but it was actually successful in the one decision that it *did* appeal. Yet despite prevailing in that appeal, Discovery stopped participating in those proceedings. And it also chose not to appeal the other Preliminary EIA Decisions, even though it would have been the same appellate body, before whom it just succeeded, that would have heard those appeals.

28. At the end of the day, however, the Tribunal need not speculate on the matter. Discovery itself has admitted that it had insufficient funding for the project both *before* and *after* the imposition of the Full EIAs. *That* is the reason Discovery did not appeal these decisions. In February 2017, before the Full EIAs were ordered, Discovery acknowledged that AOG was on the verge of liquidation, due to a lack of necessary funding:[28]

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[27] *See infra* ¶¶ 188-190, 373-374.

[28] Rejoinder to Akard Response dated 15 January 2017, **R-120**.

> Notwithstanding the foregoing, and despite numerous prior failed attempts, DG is willing to meet with Akard within the next seven days, on a strictly without prejudice basis, to see if a compromise can be found and a credible timetable for funding agreed. If no such agreement can be reached, then DG considers it will have no choice but to rely on its rights under the Notice and Section 3.6 of the Agreement, and to seek alternative sources of funding with a view to ensuring the continued viability, if at all possible, of its Slovak entity (Alpine). Although not legally obliged to do so, DG will also seek to ensure, but without any legal obligation on its part, that Akard ultimately receives the return of its $1.95 Million investment.
>
> If DG is unsuccessful in securing alternative funding within a few weeks, then it will almost certainly place Alpine into liquidation. Given, therefore, that the best chance of enabling Akard to obtain the return of its investment is to allow DG to secure fresh funding for Alpine, we recommend that Akard provide any waivers necessary to allow DG to put alternative funding in place.

29. Eight months later, in October 2017, nothing had changed. Discovery informed JKX and Romgaz that "*AOG doesn't have the funding in-place to continue to battle*":[29]

> Mike Lewis (Alpine) stated that AOG doesn't have the funding in-place to continue to battle, or for arbitration, suggesting that Alpine doesn't have the horsepower or appetite for it. Alpine suggested that it would like to reduce to a 5% interest in the project
>
> *Page 3 of 4*

30. The documents speak for themselves.

31. Discovery ran out of money.

32. But even if Discovery had found financing for its project, it still would have never generated the massive sums it now claims as damages in this arbitration. When Discovery left the Slovak Republic, it had a plan to drill three exploration wells—nothing more. Based on those three wells, Discovery now claims that it would have constructed the largest onshore oil and gas project in Europe in the last decade, comprising 99 producing wells scattered across the mountainous regions of Eastern Slovakia, all constructed and brought online in six years.[30] Such a model for exploration and exploitation could never have been achieved.

33. Beyond the patently unrealistic development plan (created by Discovery's experts for the purposes of this arbitration), the project would have failed from first principles. The

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29 Minutes of Operating Committee Meeting dated 3 October 2017, **C-382**.

30 SLR Second Report, p. iii, ¶¶ 73, 94, 173.

amounts of oil and gas in the Exploration Area Licenses, and the risk attached to them, do not justify their commercial development.

34. We come full circle. The reason that every investor turned Discovery's project down—both at the beginning when it sought funding, and at the end after it ran out of money—had nothing to do with the Slovak Republic. Rather, the project and its geophysical characteristics were simply not worth the capital commitments. In the words of a Canadian investor, whose Slovakian geologists analyzed the technical merits of the investment, the "*chance of success is a major problem*:"[31]

> Mike, [redacted] is mostly about cash flow and as such exploring for oil and gas is not usually in his portfolio . We have had several geologist's look at the play, both of whom we born in Slovakia, and because of very large topographical variations, the chance of success is a major problem.
> If after the first phase of exploration has been completed and producing, perhaps an override on the PDP reserves would be more in the realm of our participation.
> Good luck with your quest.
> Regards.
>
> [redacted] P.Eng.
> Senior Evaluations Consultant

35. Importantly, no new data between the date of this email and the end of the project emerged to change this conclusion. The only activity that Discovery undertook in the Slovak Republic was to reprocess the same data it inherited from prior owners (and which Dr. Longman confirms is of poor quality[32]) and run a so-called MT analysis, which is a novel oil and gas prospecting technique that is so unreliable that Discovery's own experts do not even trust it.[33]

36. In short, there is no evidentiary basis to conclude that Discovery would have become a going concern. This arbitration represents Discovery's attempts to accomplish what would have been impossible had it not abandoned its project—monetizing a doomed project. That is the only reason why Discovery brings this arbitration.

37. And, indeed, this appears to have been the strategy from the beginning of the project. In October 2015, one year and six months after Discovery acquired AOG, Discovery finally secured the limited funding it lacked to begin the most basic of exploration

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31 Email from Kinnear to [redacted] dated 11 December 2014, **R-121**.

32 SLR First Report, ¶ 28.

33 Atkinson First ER, ¶¶ 204-211.

works in the Slovak Republic. Eight months later, in June 2016, it was already consulting White & Case on how to sue the Slovak Republic in international arbitration:[34]

> 2) White & Case - [redacted]
>
> A short description of the situation and specification whether they could estimate the costs related to the following:
> 1st step – evaluation whether it would be possible to proceed against the Slovak Republic through arbitration
>
> Commentary: they are not sure whether they want to go against the state (they will consider this)
> So far, all arbitrations against the Slovak Republic have been won by the Slovak Republic

38. The majority of the events that Discovery alleges violated the BIT occurred *after* this communication with White & Case. In other words, Discovery began planning for an arbitration *before* the vast majority of the acts at issue even occurred.

39. That should tell the Tribunal everything it needs to know.

* * *

40. In support of its Rejoinder, the Slovak Republic hereby attaches:

(a) The second witness statement of **Ms. Marianna Varjanová** ("**Varjanová Second WS**");

(b) The second witness statement of **Mr. Ľuboš Leško** ("**Leško Second WS**");

(c) The second witness statement of **JUDr. Vladislava Slosarčíková** ("**Slosarčíková Second WS**");

(d) The second witness statement of **Mr. László Sólymos** ("**Sólymos Second WS**");

(e) The second expert report of **Doc. JUDr Ľubomír Fogaš, CSc.** ("**Fogaš Second ER**");

[34] Email from S. Benada to A. Fraser dated 14 June 2016, p. 3, **R-122**.

(f) The second export report of **Dr. Chris Longman** from SLR Consulting ("**SLR Second Report**");

(g) The second expert report of **Dr. Tiago Duarte-Silva** and **Richard Acklam** from Charles River Associates ("**CRA**" and "**CRA Second Report**");

(h) Factual Exhibits **R-107** to **R-223**; and

(i) Legal authorities **RL-117** to **RL-166**.

II. THE FACTUAL STATE OF PLAY FOLLOWING DISCOVERY'S REPLY

41. The case that Discovery now advances in its Reply is a shell of the story that it told in its Memorial. The combination of the Slovak Republic's Counter-Memorial and document production has caused Discovery to cast aside large parts of its case. For nearly every major point that Discovery put before this Tribunal as a breach of the BIT, either the documents compel a different result, or no evidence exists at all—other than unsupported witness testimony. The following sections show that the factual pillars on which Discovery's case rested have now collapsed.

A. Discovery was always dependent on external financing and ultimately ran out of money

42. As Slovakia explained in its Counter-Memorial, one of the reasons the project failed was because Discovery ran out of money.[35] In its Reply, and despite Slovakia's request for documents showing its financial fortitude, Discovery has failed to submit *any* documentary evidence that it had enough funding to carry the project forward.

43. It is now clear that Discovery could not attract funding because potential investors were unimpressed by the project **(1)**. Discovery finally secured limited funding in 2015 from Akard—an unknown player in the oil and gas industry **(2)**. After Akard defaulted on its minimal funding obligations in late 2016, Discovery acknowledged that AOG was on the verge of "*liquidation*"[36] **(3)**. And, in any event, Discovery *chose* not to pursue its project in Slovakia **(4)**. Slovakia addresses each in turn.

1. Discovery ran out of money because potential investors were unimpressed with the project

44. Within three months of acquiring AOG, Discovery began searching for critical financing. On 7 July 2014, it entered into an agreement with Clermont Energy Partners LLP ("**Clermont**"), whereby Clermont would seek investors for Discovery's project in exchange for a success fee (the "**Clermont Agreement**").[37] The Clermont Agreement

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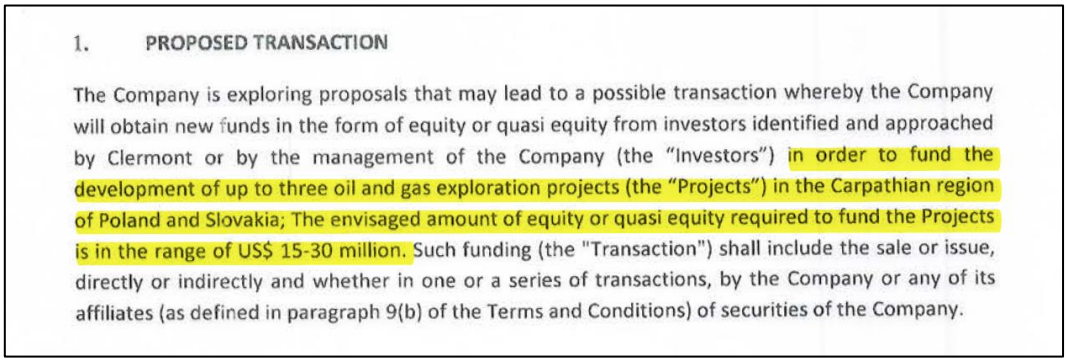
35 Respondent's Counter-Memorial, ¶¶ 428-443.

36 Rejoinder to Akard Response dated 15 January 2017, **R-120**.

37 Exploration Project Agreement between Discovery and Clermont dated 7 July 2014 ("**Clermont Agreement**"), **R-123**.

stated that the estimated equity or quasi-equity required to fund the first three oil and gas wells was USD 15-30 million:[38]



1. PROPOSED TRANSACTION

The Company is exploring proposals that may lead to a possible transaction whereby the Company will obtain new funds in the form of equity or quasi equity from investors identified and approached by Clermont or by the management of the Company (the "Investors") in order to fund the development of up to three oil and gas exploration projects (the "Projects") in the Carpathian region of Poland and Slovakia; The envisaged amount of equity or quasi equity required to fund the Projects is in the range of US$ 15-30 million. Such funding (the "Transaction") shall include the sale or issue, directly or indirectly and whether in one or a series of transactions, by the Company or any of its affiliates (as defined in paragraph 9(b) of the Terms and Conditions) of securities of the Company.

45. Discovery and Clermont spent the next year-and-a-half searching for investors for Discovery's project. Their efforts ultimately failed. From the outset, investors turned down Clermont's offers because Discovery's project was either too risky or because the geological data was not promising.

46. In October 2014, Clermont approached Horizon Petroleum to invest in Discovery's project. Not only did Horizon Petroleum find the deal unattractive, but it compared Discovery's project to another it was considering and remarked that the other project was "*much less risky since oil has already been commercially produced from the play*."[39] In other words, Discovery's project was not worth the risk.

47. As for the terms that Discovery was seeking, Discovery's CEO, Mr. Lewis, explained that "*Alex [Fraser] has infected me with this concept that we can* ***get everything funded and still keep half the deal****…if that's not true, then we need to know that sooner rather than later*." [40] In other words, Discovery was seeking an investor who would commit the initial capital to drill the first three wells, while Discovery nevertheless would "*keep half the deal*."[41] As shown below, no investor was willing to agree to this arrangement.

48. In November and December 2014, Clermont and Discovery approached Kinnear Financial Limited based in Calgary, Alberta.[42] After sending geological data to

38 Clermont Agreement, Art. 1, **R-123**.

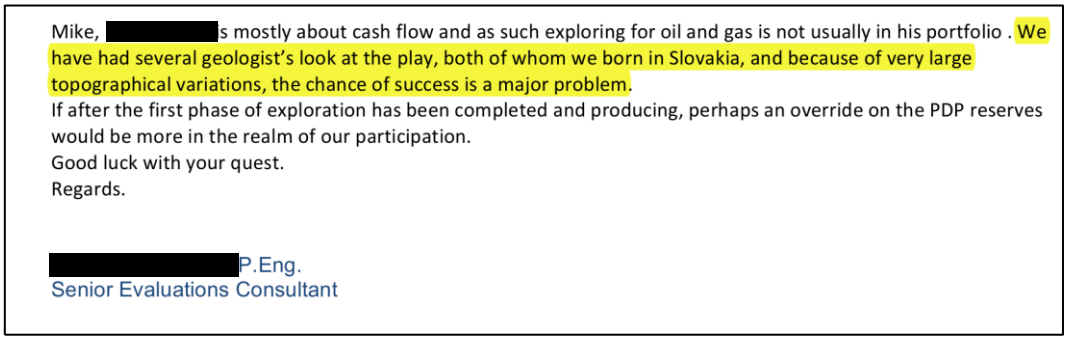
39 Email from [redacted] to Clermont dated 20 October 2014, **R-124**.

40 Email from M. Lewis dated October 2014, **R-125**.

41 Email from M. Lewis dated October 2014, **R-125**.

42 Email from Clermont to Kinnear dated 17 November 2014, **R-126**.

Kinnear's representative, Kinnear declined to invest because its Slovakian geologists considered that the "*chance of success is a major problem*:"[43]



Mike, [redacted]s mostly about cash flow and as such exploring for oil and gas is not usually in his portfolio . We have had several geologist's look at the play, both of whom we born in Slovakia, and because of very large topographical variations, the chance of success is a major problem.
If after the first phase of exploration has been completed and producing, perhaps an override on the PDP reserves would be more in the realm of our participation.
Good luck with your quest.
Regards.

[redacted]P.Eng.
Senior Evaluations Consultant

49. Clermont asked Mr. Lewis to comment on this remark because it was "*coming from an experienced Canadian investment outfit*."[44] Mr. Lewis ultimately connected with Kinnear, who explained that "*the issue is not really topography, but is more the comparatively complex geology of a thrust belt*."[45] This is precisely what the Slovak Republic's expert in this arbitration, Dr. Longman, has concluded: that Discovery's project was unlikely to yield significant volumes of oil or gas.[46]

50. In mid-January 2015, Mr. Lewis instructed Clermont to "*begin discussions with other potential investors*."[47] Prior to this time, Discovery had been trying to secure a deal through a broker named Michael Turko, who was affiliated with Gulf Shores. As part of his own due diligence, Mr. Turko asked an independent engineer to prepare a so-called "51-101" related to Discovery's project. A 51-101 is a Canadian securities filing document that requires specific disclosures for oil and gas activities.[48] Among other requirements, a 51-101 must include information on the quantity of oil and gas associated with the prospective investment.

51. An independent engineer prepared the 51-101. Upon receipt of this 51-101, Mr. Fraser explained that "*[y]ou will have seen that the 51-101 prepared for* [redacted] *puts some*

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43 Email from Kinnear to [redacted] dated 11 December 2014, **R-121**.

44 Email from Clermont to M. Lewis dated 11 December 2014, **R-127**.

45 Email from M. Lewis to Clermont dated 11 December 2014, **R-128**.

46 SLR First Report, ¶¶ 9, 22, 60; SLR Second Report, p. iii.

47 Email from M. Lewis to A. Fraser and Clermont dated 21 January 2015, **R-129**.

48 D. Elliot, *Oil and gas disclosure requirements and new issues: NI 51-101 sets standards*, Standards, Best Practices & Guidance for Mineral Resources & Mineral Reserves, Canadian Institute of Mining, Metallurgy and Petroleum ("CIM"), September 2011, **R-130**.

much lower resource numbers on our prospects that [sic] we do."[49] Just days later, Mr. Fraser had a conversation with an investor named [redacted] who, according to Mr. Fraser, was "*arguing that the 51-101 report only supports a recoverable resource of 611mbo gross*" and that, on this basis, "*the financial commitments are too high*."[50] In short, the expected quantities of oil and gas from the independently prepared 51-101 did not justify the capital being sought from investors.

52. Clermont and Discovery discussed how best to spin the low figures in the 51-101 to investors. The contemporaneous documents show that they proposed stating that the 51-101 showed risked volumes or that the 51-101 did not "*properly reflect the potential even in the most conservative view*":[51]

> I agree. We should push back and say if they dont like the deal theyre out. I can advantageously replace [redacted] In any case I can get into a conference call at 3pm or at 6:30pm, maybe a touch earlier. Alternatvely [redacted] can explain to Yogi that the 51-101 does not reflect the asset properly. Either it is a risked volume (but that is the reason you are getting in on such favorable terms) or the recoverable volumes (610mbbl) do not properly reflect the potential even in the most conservative view.

53. Their effort to spin the independent report failed. Ultimately, Clermont had a discussion with Mr. [redacted] himself and told him that his position was "*reasonable*" and "*not surprising*":[52]

> I just had a discussion with [redacted] His position, in view of what I understand is the information available to him is pretty reasonable. The draft 51-101 on page 5 indicates that the low estimate for unrisked recoverable prospective resources is 610,000 bbl out of 8 leads. The net recoverable prospective resources out of the two prospects to be gain by GUL amounts to 39,200 bbls (in exchange for an investment program of US$3.35M. The total area covered by the 2 prospects included in the proposed farm out is 114 acre which is 0.47Km2.
>
> It is not surprising that [redacted]eaction is what it is. I had explicitly indicated that we needed to have a discussion with the independent engineer to indicate prospective resources and acreage which give a fair impression of the reality of this deal. Either this modified 52-101 has not been produced/prepared or is has not been provided to [redacted]
>
> I thought it was going to be relatively straightforward to get a 51-101 which reflects the attractivenesss of the deal. Clearly this is an issue.

54. To put these figures in perspective, the quantum model that Discovery has put before this Tribunal claims that Discovery's 18 oil leads (created by its experts) yields an

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49 Email from A. Fraser to M. Lewis and Clermont dated 22 January 2015, **R-131**.

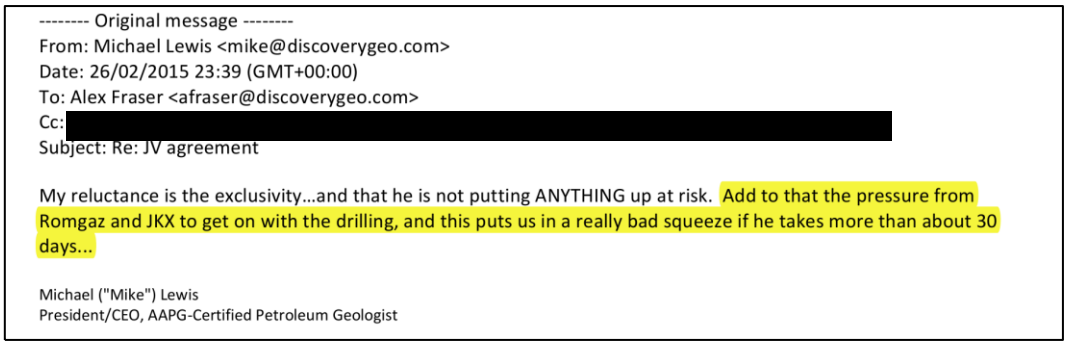
50 Email from A. Fraser dated 7 February 2015, **R-132**.

51 Email from Clermont to Discovery dated 8 February 2015, **R-133**.

52 Email from Clermont to [redacted] and Discovery dated 9 February 2015, **R-134**.

average of 6.4 MMstb[53]—a figure *10 times greater* than the mid-case (best case) from the 51-101.[54] It does so despite the fact that nothing has been done in the intervening years to produce a single drop of oil.

55. By late February 2015, almost a year had passed since Discovery had purchased AOG, and it was still searching for funders. At that point, Discovery was continuing to negotiate with [redacted] from Gulf Shores, who was claiming that he could raise the funds Discovery needed in 45 days.[55] In response, Mr. Lewis explained that he was receiving pressure from Romgaz and JKX to drill and that, if Mr. [redacted] took more than 30 days to raise funds, this would put Discovery in "*a really bad squeeze*:"[56]



-------- Original message --------
From: Michael Lewis <mike@discoverygeo.com>
Date: 26/02/2015 23:39 (GMT+00:00)
To: Alex Fraser <afraser@discoverygeo.com>
Cc: [redacted]
Subject: Re: JV agreement

My reluctance is the exclusivity...and that he is not putting ANYTHING up at risk. Add to that the pressure from Romgaz and JKX to get on with the drilling, and this puts us in a really bad squeeze if he takes more than about 30 days...

Michael ("Mike") Lewis
President/CEO, AAPG-Certified Petroleum Geologist

56. Whether Mr. Lewis actually had the required funds to begin drilling, as he apparently claims without substantiation, Discovery was resolute on not pressing forward with drilling plans until it received outside funding. And the contemporaneous communications with additional investors demonstrate that Discovery needed that outside funding.

57. One month later, in March 2015, Discovery approached another investor and explained that, for drilling two wells in Slovakia, it needed USD 3.3 million:[57]

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53 Howard Second ER, Table 3.3.

54 SLR Second Report, ¶¶ 37-38.

55 Email from A. Fraser to M. Lewis dated 26 February 2015, **R-135**.

56 Email from M. Lewis to A. Fraser dated 26 February 2015, **R-136**.

57 Email from Clermont to [redacted] dated 4 March 2015, **R-137**.

Dear Eugeniusz, dear Artur

As indicated during our meeting I wanted to introduce you to this project oil and gas project in Poland and Slovakia. The operating company is called Discovery Poland (led by Michael Lewis, a very experienced US and Poland based geologist) whom I believe you may have met 3 years ago. Discovery is the company which owns the Slovak acreage I was telling about on the phone, and which has the operating team getting ready to immediately drill two wells on their 3 Northern Slovakia concessions. To fund this first tranche of operations, Discovery need about US$3.3M.

58. This raises the obvious question: if Mr. Lewis was so confident in his project, and if he had the money (as he now contends), why would he not make this small contribution to turn it into the massive profits that he now claims were all but certain?

59. In any event, he did not do so. Just two weeks later, Mr. [redacted] finally signed the Gulf Shores agreement,[58] which obligated Gulf Shores to (*i*) raise funds to cover AOG's costs to drill two wells, (*ii*) fund USD 200,000 for AOG's overhead for the first quarter of 2015, and (*iii*) to reimburse Discovery for sunk costs amounting to USD 655,000.[59] Despite this agreement, however, Mr. [redacted] failed to attract any investors. On 7 May 2015, Mr. Lewis informed Clermont that Mr. [redacted] "*is done and struck out*":[60]

Jean-Michel:
[redacted] says he is done and struck out.
Have you anyone else we should show this to, or are you also finished?
Oil price is up, the project is maturing rapidly…all we need is even ONE hole in the ground to prove our concept. I can't believe this fantastic project is still unfunded…

Michael Lewis
mike@discoverygeo.com

60. Lacking critical funding, and with investors rejecting the project at every turn, Discovery terminated the Clermont Agreement with effect from 23 July 2015.[61]

2. Discovery secured limited funding at the end of 2015 and executed the Akard Agreement

61. Discovery also failed to attract investors in July, August, and September 2015.

58 Farm-In Agreement between Discovery and Gulf Shores dated 19 March 2015, **C-270**.

59 Farm-In Agreement between Discovery and Gulf Shores dated 19 March 2015, Art. 2.2, **C-270**.

60 Email from M. Lewis to Clermont dated 7 May 2015, **R-138**.

61 Email from A. Fraser to Clermont dated 28 August 2015, **R-139**.

62. In October 2015, Mr. Fraser reached back out to Clermont and explained that a "*potential investor group in the US is taking a strong interest in the Slovakia project*."[62] He therefore asked Clermont if it would agree to be a reference for Discovery.[63]

63. The deal with the group of US investors would become the Akard Agreement, described below. Reporting back to Clermont, Mr. Lewis explained that "*[i]nvestors were putting up the capital for the first 3 wells for 80/20 before payout and then back to 50/50 for several more payouts. They also finance the additional drilling*."[64] Consistent with Discovery's and Clermont's previous communications with other investors, Mr. Lewis then explained that this deal "*gives us the money we need […] but we work for them a long time*":[65]

> Thanks, Jean-Michel. Investors are putting up the capital for the first 3 wells for 80/20 before payout and then back to 50/50 after several more payouts. They also finance the additional drilling. So, it gives us the money we need…but we work for them a long time. In this market, I'm just glad we got any money at all!!!
>
> So, now we get to drill wells and find oil and gas! It's been a long time.
>
> Michael ("Mike") Lewis
> mike@discoverygeo.com

64. Signed on 25 October 2015, the Akard Agreement appeared to provide the funding that Discovery desperately needed. The recitals echo Mr. Lewis' message to Clermont, explaining that "*Alpine has **need** of additional capital to **continue its operations***:"[66]

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62 Email from A. Fraser to Clermont dated 13 October 2015, **R-140**.

63 Email from A. Fraser to Clermont dated 13 October 2015, **R-140**.

64 Email from M. Lewis to Clermont dated 24 October 2015, **R-141**.

65 Email from M. Lewis to Clermont dated 24 October 2015, **R-141**.

66 Agreement between Discovery and Akard dated 23 October 2015, Recitals, **C-282**.

Recitals:

A. DP is an exploration company that owns 100% of Alpine Oil and Gas, s.r.o ("**Alpine**"), a limited company organized under the laws of the Republic of Slovakia and performing oil and gas exploration in that country;

B. Alpine owns the following interests (areas are approximate) in the Republic of Slovakia (the "**Licenses**"):

License Name	Sq Km	Acres	Alpine Interest
Svidnik	469	116,000	50.0%
Medzilaborce	529	131,000	50.0%
Snina	249	61,000	50.0%
Pakostov	127	31,000	75.0%

C. Alpine has need of additional capital to continue its operations; and

D. AKARD agrees to provide capital under the terms and conditions set forth herein.

65. The Akard Agreement obliged Akard to commit USD 3.7 million dollars to the project. The long-sought funding would be used to cover the costs of the initial three wells. Akard's funds would also be used (*i*) to repay Mr. Lewis for the Overriding Royalty, which Mr. Lewis transferred to Discovery for nominal consideration of USD 10, and (*ii*) to repay other entities that had funded Discovery's operations in Slovakia:[67]

£0.65	€0.88	Loan Amounts			Distribution		
Tranche	Date	EUR	USD	GBP	Amount	USD	Payee and General Purpose
A	10/23/2015	€230,000	$0	£0	€230,000	*$261,364*	Alpine for 50% of 2015 Concession Fees
B	11/03/2015	€352,000	$75,000	£150,000	€205,000	*$232,955*	Alpine for 50% of Initial Wells locations
					€147,000	*$167,045*	Alpine for wellheads and casing pre-pay
		$705,769			$75,000	*$75,000*	Alpine for October/November overhead
					£150,000	*$230,769*	Alpha Exploration for "San Leon Override"
C	12/01/2015	€1,056,500	$75,000	£0	€1,056,500	*$1,200,568*	Alpine for balance of Initial Wells AFEs
		$1,275,568			$75,000	*$75,000*	Alpine for December/January overhead
D	01/04/2015	€600,000	$75,000	£0	€600,000	*$681,818*	Alpine for completion cost @ €200,000 per well (success case only)
		€756,818			$75,000	*$75,000*	Alpine for February/March overhead
E	01/04/2015	€0	$709,325	£0	$115,000	*$115,000*	Clearview/Drewry for loan repayment
					$31,500	*$31,500*	Clearview/Drewry for loan interest
					$365,711	*$365,711*	Clearview/Houghton for loan repayment
		$709,325			$60,114	*$60,114*	Clearview/Houghton for loan interest
					$137,000	*$137,000*	Equity Funding Fee (based on $3.7 Million)
TOTAL		$1,638,500	$859,325	£150,000		***$3,708,844***	

66. In exchange for this financing, Akard would receive different equity levels in the project—initially 80% and later 50%. Akard would also be required to continue investing in the project to maintain its equity position:[68]

67 Agreement between Discovery and Akard dated 23 October 2015, Art. 3, **C-282**.

68 Agreement between Discovery and Akard dated 23 October 2015, Art. 6.4, **C-282**.

Period	Sharing Proportion		
	Before Payout	Risk Compensation	Fully Vested
AKARD	80.0%	65.0%	50.0%
DP	20.0%	35.0%	50.0%
Total	100.0%	100.0%	100.0%

6.4.1. The "**Before Payout**" period begins when AKARD funds the Initial Tranches. It ends at the start of the Risk Compensation period.

6.4.2. The "**Risk Compensation**" period begins at the first point in time during the Before Payout period when Newco has made full payment to AKARD for all outstanding loans plus interest on the loan amounts, plus $11,100,000 USD as initial risk compensation. It ends at the start of the Fully Vested period.

6.4.3. The "**Fully Vested**" period begins at the first point in time during the Risk Compensation period when Newco has made full payment to AKARD for all outstanding loans plus interest on the loan amounts, plus $14,800,000 USD as further risk compensation.

67. With this financing supposedly secured, Discovery and AOG could potentially stay afloat in the Slovak Republic.

3. Akard's refusal to fund the project prompted Discovery to leave Slovakia

68. Discovery's relationship with Akard, however, was problematic from its inception. Akard soon defaulted. As Mr. Lewis explained in a letter to Akard after the default, Akard's refusal to engage with Discovery following the Akard Agreement's conclusion created "*disagreements and confusion*" and "*severely strained [the Parties' relationship] and DG's finances*" from the outset:[69]

> Beginning within days of signing the Agreement, our attorney [redacted] attempted many times to engage with [redacted] to finalize detailed transaction documentation as contemplated by the Agreement, but without response from AKARD. As a result, the parties have been forced to operate under the Agreement, even though it was expressly intended to be superseded. This has fostered disagreements and confusion as to the precise responsibilities and rights of the parties, and severely strained this relationship and DG's finances.

69. Then, at a pivotal meeting in December 2016, Akard "*revealed*" that, not only did it not have the funds to cover existing and future cash calls, but the money it had invested in the project to date *was not even its own*. Akard had been sourcing funds from third-parties, and those third-parties were simply "*not interested in participating further*":[70]

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69 Akard Notice of Default dated 2 January 2017, p. 2, **R-142**.

70 Akard Notice of Default dated 2 January 2017, p. 3, **R-142**.

> Eventually, as DG's financial position became increasingly precarious, another meeting was held at CVP's offices on December 1, 2016. At this meeting, AKARD/CVP revealed that it did not have the funds available to pay either the existing or the future cash calls. It also revealed that AKARD/CVP had not invested any of its own funds into the project since the signing of the Agreement, as all the investments made were from third parties, and that these third parties were not interested in participating further.
>
> DG has therefore concluded that AKARD/CVP is unable to fulfill its obligations under the Agreement, and any further delays allowed for negotiation serve only to exacerbate the financial problems faced by DG and Alpine. Nevertheless, as it has done from the beginning of the relationship, DG gave AKARD/CVP more time (namely the remainder of December 2016) to try and get its funding in place so that AKARD/CVP could meet its financial commitments.

70. Desperate for a way out, on 18 December 2016, Discovery presented Akard with a proposal whereby Akard would acquire AOG.[71]

> On December 18, 2016, DG sent a lengthy status update to AKARD/CVP reiterating that AKARD/CVP needed to immediately pay its arrears of cash calls, but giving the option of starting with a minimum payment of $33,000 by 20 December, 2016. No payment or response was received from AKARD/CVP.
>
> Also on December 18, 2016, because of the critical state of Alpine's finances, DG presented AKARD/CVP with another alternative proposal whereby AKARD/CVP could acquire Alpine. That proposal also lapsed with no response from AKARD/CVP.

71. Akard never responded.

72. Either Akard had no more funding or simply was not interested. Discovery explained to Akard that, as of January 2017, Discovery had "***no alternative sources of capital***" because it had relied "*on repeated assurances from AKARD/CVP that the* ***necessary funding*** *would be made available*."[72] As Discovery also noted, Akard had "*always had the opportunity to significantly influence the ongoing future costs, and DG has historically responded to AKARD/CVP's requests,* ***to the point of endangering its own solvency***":[73]

> DG currently has no alternative sources of capital in place, relying as it has on repeated verbal assurances from AKARD/CVP that the necessary funding would be made available. Under these circumstances, AKARD/CVP's commitments to DG cannot be treated as *optional*, to be evaluated on receipt of each cash call or invoice from DG. After costs are incurred by DG on behalf of AKARD/CVP's interest, reimbursement of those costs is *mandatory*. AKARD/CVP has always had the opportunity to significantly influence the ongoing future costs, and DG has historically responded to AKARD/CVP's requests, to the point of endangering its own solvency.

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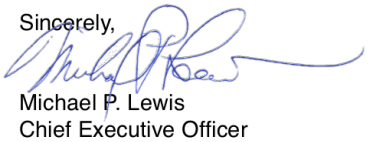
71 Akard Notice of Default dated 2 January 2017, p. 4, **R-142**.

72 Akard Notice of Default dated 2 January 2017, p. 4, **R-142**.

73 Akard Notice of Default dated 2 January 2017, p. 4, **R-142**.

73. On 2 January 2017, Discovery provided Akard notice of default under the Akard Agreement. In the notice of default, Discovery stated that it intended "*to immediately seek alternative sources of funding with a view of* ***ensuring the continuation of its operations***":[74]

> If DG finds itself obliged to enforce a default against AKARD/CVP, it intends to immediately seek alternative sources of funding with a view to ensuring the continuation of its operations. Although it is not legally obliged to do so, DG will also seek to ensure, but without legal obligation on its part, that AKARD/CVP ultimately receives the return of its $1.95 Million investment.
>
> Sincerely,
>
> 
>
> Michael P. Lewis
> Chief Executive Officer

74. After Akard responded to this letter,[75] Mr. Lewis wrote another letter to Akard, again explaining the dire financial situation in which Discovery found itself now. Mr. Lewis explained that Akard's failure to fund Discovery "*has meant that Alpine's future is now seriously at risk*."[76] Mr. Lewis further stated that it was "*truly possible*" that Alpine would become "*insolvent*" because of Akard's non-funding:[77]

> As set forth in the Notice, DG has worked hard to be available to Akard to resolve any issues that Akard might have. But Akard has been unresponsive. Akard's failure to meet its many assurances regarding the funding of DG's Slovak operations, or to make or even respond to suggestions regarding the continued funding of Alpine's operations, has meant that Alpine's future is now seriously at risk. DG therefore urgently needs to investigate the availability of alternative sources of funding, but is prevented from doing so while the Agreement remains in force (Section 26). If, as is truly possible, Alpine becomes insolvent, this will most probably result in the loss of both Akard's and DG's entire investment in Alpine.

75. Mr. Lewis then went further, admitting to Akard that, if Discovery could not secure alternative funding "*within a few weeks*", then he would "*almost certainly place Alpine in liquidation*":[78]

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74 Akard Notice of Default dated 2 January 2017, p. 5, **R-142**.

75 Akard Response to Notice of Default dated 13 January 2017, **R-134**.

76 Rejoinder to Akard Response dated 15 January 2017, **R-120**.

77 Rejoinder to Akard Response dated 15 January 2017, **R-120**.

78 Rejoinder to Akard Response dated 15 January 2017, **R-120**.

> Notwithstanding the foregoing, and despite numerous prior failed attempts, DG is willing to meet with Akard within the next seven days, on a strictly without prejudice basis, to see if a compromise can be found and a credible timetable for funding agreed. If no such agreement can be reached, then DG considers it will have no choice but to rely on its rights under the Notice and Section 3.6 of the Agreement, and to seek alternative sources of funding with a view to ensuring the continued viability, if at all possible, of its Slovak entity (Alpine). Although not legally obliged to do so, DG will also seek to ensure, but without any legal obligation on its part, that Akard ultimately receives the return of its $1.95 Million investment.
>
> If DG is unsuccessful in securing alternative funding within a few weeks, then it will almost certainly place Alpine into liquidation. Given, therefore, that the best chance of enabling Akard to obtain the return of its investment is to allow DG to secure fresh funding for Alpine, we recommend that Akard provide any waivers necessary to allow DG to put alternative funding in place.

76. It is important to place these remarks in context. Discovery sent this communication on 15 February 2017. At this point in time, AOG was already on the verge of "*liquidation*". In other words, Discovery ran out of money:

(a) *before* it agreed to do the Preliminary EIAs;

(b) *before* the District Offices ordered Discovery to conduct Full EIAs;

(c) *before* it reduced its Exploration Area Licenses in April 2018; and

(d) *before* the MoE included a requirement for Discovery to conduct a Preliminary EIA on the Svidník Exploration Area License for any future wells.

77. No further funding was ever forthcoming.[79] Thus, everything that occurred after January 2017 occurred at a time when Discovery was, in effect, *insolvent*. The Slovak Republic will return to this point in Section V on causation.

4. Discovery made the conscious choice not to continue funding its operations in the Slovak Republic

78. Not only would third parties not invest in the project, but neither would Discovery or its owners. Their failure to do so shows that they, too, had come to the view that the project was too risky.

79. Later in 2017, after Discovery was ordered to undergo Full EIAs for each of its wells, Discovery told both JKX and Romgaz that it not only lacked the funding to continue,

[79] As explained below, in 2017, Discovery only had discussions with two investors, both of which chose not to invest in the project. *See infra* Section V.A.3.

but it did not have the "*horsepower or appetite*" to move forward (either with the project or even with an arbitration):[80]

> Mike Lewis (Alpine) stated that AOG doesn't have the funding in-place to continue to battle, or for arbitration, suggesting that Alpine doesn't have the horsepower or appetite for it. Alpine suggested that it would like to reduce to a 5% interest in the project
>
> *Page 3 of 4*

80. AOG was so short on cash that, at this same meeting, it suggested reducing its interest from 50% to 5% because it "*didn't feel that it would be able to pay its share of the license fee*":[81]

> Mike Lewis (Alpine) stated that AOG doesn't have the funding in-place to continue to battle, or for arbitration, suggesting that Alpine doesn't have the horsepower or appetite for it. Alpine suggested that it would like to reduce to a 5% interest in the project
>
> and stay involved to the extent desired by the partners, if that could be accommodated by the partners. Otherwise, Alpine was going to continue to seek additional funding, and keep the partners informed on its progress. But Alpine didn't feel that it would be able to pay its share of the license fee.
>
> There was discussion about this, with no decision made. It was left that JKX and Romgaz would discuss it and determine if they wanted to continue the project, and on what basis.

81. Equally important, Discovery's Michael Lewis confirms that even if Discovery had the funds to continue, he chose not to do so. In his second witness statement, Mr. Lewis alleges that he owns "*several royalty interests in oil and gas projects in the United States, which I could have sold or borrowed against, if necessary, to fund AOG's activities*".[82] Mr. Lewis continues that, "*between 2020 and 2022, I was paid an average of around $835,000 each year for some of these royalties. Since these interests are typically worth 6 to 8 times their annual cashflow, this would have been more than enough to fund Discovery's net 50% interest in the exploration project.*"[83]

82. Even if Mr. Lewis could substantiate the claimed assets, this ultimately means that he could have funded Discovery's share of the project, but he simply *chose* not to do so.

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80 Minutes of Operating Committee Meeting dated 3 October 2017, **C-382**.

81 Minutes of Operating Committee Meeting dated 3 October 2017, **C-382**.

82 Lewis Second WS, ¶ 45.

83 Lewis Second WS, ¶ 45.

Far from remaining "*committed to the project to the bitter end*" (as Discovery now alleges in its Reply),[84] Discovery plainly lacked the "*horsepower or the appetite*" to continue.

* * *

83. The foregoing confirms *exactly* what the Slovak Republic told this Tribunal in its Counter-Memorial: the project did not fail because of anything the Slovak Republic did. Rather, it failed because Discovery ran out of money. Its only source of funding, Akard, simply had no desire to continue investing in the project.

B. Discovery's own communications with the local community show that it failed to engage with the local citizens at the critical point in time

84. A second, independent reason that the project failed is because Discovery chose not to engage on a timely basis with the local community in the Slovak Republic—and thus never obtained a SLO. Discovery's antagonistic behavior toward the local citizens contributed substantially to most, if not all, of Discovery's operational problems.[85] The most emblematic example was the video the Slovak Republic exhibited at paragraph 28 of its Counter-Memorial, and which the Slovak Republic described above.[86]

85. With no answer for its conduct on that video. Discovery argues that "*[t]he record does not support Slovakia's assertions*"[87] that Discovery "*ran roughshod over the local community*".[88] In support of this argument, Discovery refers to a list of actions that it took to engage with the local community, but it relegates that list to an annex.[89] That is no coincidence. Discovery's communications with the local citizens *undermine*, rather than *support*, its case.

86. In fact, the community engagement that Discovery undertook was in response to community *opposition*.[90] Thus, none of Discovery's community engagement detracts

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84 Claimant's Reply, ¶ 392.

85 Respondent's Counter-Memorial, ¶¶ 444-455.

86 *See supra* ¶ 6.

87 Claimant's Reply, ¶ 23.

88 Claimant's Reply, ¶ 23.

89 *See, e.g.*, Claimant's Reply, Annex 1, ¶¶ 476-507.

90 *See, e.g.*, Leško Second WS, ¶¶ 9-10; Varjanova Second WS, ¶ 9.

from what the Slovak Republic told the Tribunal from the beginning: Discovery angered citizens of the affected local communities, and those citizens took action so their voices could be heard.

87. In the very first meeting Discovery held with the local citizens in 2017, when it finally realized that it needed to cooperate with them, the landowners told Discovery that they "*had not been shown sufficient respect in the past*."[91] Rather, Discovery had "*assumed that [it] could come in and drill there without getting their consent, and [the activists] considered [Discovery] had lied about who owned what land or who had the right to be on what land*."[92] The landowners also explained to Discovery that it had "*appeared to be secretive and evasive*" about environmental issues:[93]

> This meeting seems to have been surprisingly productive. [redacted] turned up with [redacted] – both of them from Ruska Poruba – and also, to our surprise, [redacted] from VLK. We explained that we had wanted to meet with them in order to hear their concerns and if possible find any common ground. There were a lot of complaints along the lines that they had not been shown sufficient respect in the past: we had assumed we could come in and drill there without getting their consent, and they considered we had lied about who owned what land or who had the right to be on what land. We also appeared to be secretive and evasive about the environmental implications, which suggested to them that there were issues which they should be concerned about.

88. The second meeting Discovery held with the local citizens shed even more light on how Discovery's rough-shod tactics were perceived. As the local citizens explained, "*all went wrong*" in 2014 because "*[t]here was not enough communication*."[94] The local citizens clashed with Discovery's permitting experts (TDE Services), who were "*very aggressive at the town hall meeting, filming people who asked questions and making them feel threatened*."[95] TDE Services "*told lies about the land ownership*" and "*[a]fter that no one was ever going to trust [Discovery]*":[96]

> The problems started when we started planning to drill wells. The Sarisky Cerni location (for the well planned and abandoned in 2012) was fine – the residents did not object there but when we started on the new set of wells in 2014 it all went wrong. There was not enough communication. The Hungarians (TDE) were very aggressive at the town hall meeting, filming people who asked questions and making them feel threatened. The company told lies about the land ownership, the mud. After that no one was ever going to trust us.

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91 First activists meeting note dated 5 February 2017, **R-117**.

92 First activists meeting note dated 5 February 2017, **R-117**.

93 First activists meeting note dated 5 February 2017, **R-117**.

94 Email from Alexander Fraser dated 19 February 2017, **C-369**.

95 Email from Alexander Fraser dated 19 February 2017, **C-369**.

96 Email from Alexander Fraser dated 19 February 2017, **C-369**.

89. Given Slovakia's history with socialism, it is not surprising that the Slovak citizens were sensitive about their land. The Slovak people only recovered their land "*after the end of socialism and they will not lightly give it up again*."[97] As the local citizens explained to Discovery, it is "*up to [Discovery] to get the consent of the local communities*".[98]

> 60 years of socialism have made people very sensitive about their land. They only recovered it after the end of socialism and they will not lightly give it up again. We should have come in a proper way and asked permission. The only way we can gain trust now is by doing the EIA. There is a similar problem with our press releases – they do not show sufficient respect. They need to be more polite, more accessible, and give clear contact details. Bringing Hungarians onto the location was a mistake.

90. Discovery even communicated with Ms. Varjanová at the time. Consistent with her testimony in this arbitration, and with remarks from other local citizens, she explained to Discovery that it "*came into the region in the wrong way—no respect for local people—and now it is too late to fix it*."[99] She expressed concern "*that if the oil industry came to the region it would change forever and it could never be put back*."[100] And while Ms. Varjanová told Discovery that she would "*welcome*" them putting something on her Facebook page, she "*did not think she could allow [Discovery] into Smilno*."[101] Discovery's actions were too little and too late. As Ms. Varjanová testified in her first witness statement, she originally tried to make contact with AOG by placing her phone number on her car.[102] But AOG never called.

91. Ms. Varjanová nonetheless continued meeting with AOG, and AOG continued to meet with the other local citizens.

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97 Email from Alexander Fraser dated 19 February 2017, **C-369**.

98 Email from Alexander Fraser dated 19 February 2017, **C-369**.

99 Email from Alexander Fraser dated 19 February 2017, p. 2, **C-369**; *see also* DenníkN, *She fights against the oil company: I am blocking them with my own body, there is no other way left*, 22 November 2016, **R-144**.

100 Email from Alexander Fraser dated 19 February 2017, p. 2, **C-369**.

101 Email from Alexander Fraser dated 19 February 2017, **C-369**.

102 Varjanová First WS, ¶ 20.

92. In March 2017, a third and fourth meeting occurred and, as the two sides continued to speak, their differences narrowed.[103] As Slovakia explained in the Counter-Memorial, the result of these meetings was the 2017 Community Agreement.

93. Under the 2017 Community Agreement, AOG agreed to undertake Preliminary EIAs for all its drills in exchange for the local citizens ending their demonstrations—a promise that the citizens honored.[104] As AOG remarked at the time in an internal report to JKX and Romgaz, "*the responses from the activists have been much muted*", and AOG "*feel[s] that this is a considerable improvement on the situation [it] was facing last year*":[105]

> Gentlemen:
>
> Since our last report, we had a further meeting with VLK on 31 March at which they reviewed our press release and confirmed they had no objection. Following publication of the press release, the coverage in the national and local press has been generally neutral or positive, and the responses from the activists have been much muted. We feel that this is a considerable improvement on the situation AOG was facing last year, and that we have the opportunity now to develop ongoing working relationships with the activists.

94. Consequently, there can be no dispute that Discovery's initial actions angered a group of local citizens who had sway within the community and that, when it finally engaged with those citizens the way it should have from the beginning, they agreed to stop their opposition.

95. Unable to rebut this fact, Discovery argues that "*Slovakia has not come close to establishing that an overwhelming majority of the local community […] was opposed to AOG's exploration activities*."[106] That is irrelevant. What matters is that, for years, Discovery consciously chose not to engage with the local citizens who were most opposed to its activities. And Discovery's failure to engage with those citizens resulted in nearly every obstacle that Discovery now claims is a breach of the BIT.

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103 Third activists meeting note dated 4 March 2017, **R-145**; Fourth activists meeting note dated 27 March 2017, **R-146**.

104 Respondent's Counter-Memorial, ¶ 190.

105 Report from Mr. Lewis dated 21 April 2017, **R-147**.

106 Claimant's Reply, ¶ 163(3).

C. Discovery's latest argument about the Full EIAs leads to perverse conclusions

96. In its Reply, Discovery has now finally explained its true complaints regarding the Preliminary EIAs to which it voluntarily agreed. The crux of its case now is that, when the District Offices received each application for the Preliminary EIAs, the District Offices *should have* denied each application on the basis of jurisdiction.[107] In other words, the District Offices should have determined that the EIA Amendment did not apply to AOG's drills, and it therefore should have dismissed the applications altogether without even conducting any analysis. Notably, Discovery does not offer any expert evidence that would confirm such an interpretation.

97. In the only Preliminary EIA Decision that AOG actually appealed, it made this argument to the appellate authority, expressly claiming that "*the Appellant therefore moves the Appellate Body to either* ***amend the Decision so that it states that the proposed activity is not to be assessed under the EIA Act****, or to repeal the decision and refer the case back to the Ministry for a fresh decision*."[108]

> Having regard to the above reasons, the Appellant therefore moves the Appellate Body to either amend the Decision so that it states that the proposed activity is not to be assessed under the EIA Act, or to repeal the Decision and refer the case back to the Ministry for a fresh decision.
>
> For the Appellant:
>
> *signed*
>
> Ing. Igor Meluš
> Under Power of Attorney

98. The Appellate Body addressed this argument in full and found that the District Office "*carried out a legitimate investigation procedure*."[109] But the perverse objections of Discovery's appeal, and the arguments it makes before this Tribunal cannot be overlooked.

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107 Claimant's Reply, ¶¶ 165-175.

108 Environmental Impact Assessment appeal against the Humenne district office decision dated 6 October 2017, **C-181**.

109 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba dated 11 January 2018, **C-184**. It is worth noting that District Offices likewise handled NAFTA's EIA applications for exploration drills after 1 January 2017 even in the exploration areas granted before this date. *See* Information about the Intent, **R-148**; Letter from District Office Hlohovec dated 12 December 2018, **R-149**.

99. Discovery made a promise to the community that it would submit to the Preliminary EIA process so environmental issues could be addressed by the competent authority. The local community believed AOG—that much is clear by the community keeping its end of the bargain by stopping its protests.

100. But it is now clear that Discovery was not negotiating in good faith. Had the appellate body actually ruled in Discovery's favor on this argument, it means that Discovery's Preliminary EIA application—that it agreed to undertake in a promise to the community—would have been dismissed from the EIA process altogether. It is now obvious that this was really what Discovery wanted. It wanted the District Offices to deny each application on these grounds, permitting AOG to go back to the community and say, 'we tried.'

101. Against that backdrop, the community had every right not to trust AOG.

* * *

102. Discovery's finances, its failure to engage with the local community, and its credibility were three of the major themes that the Slovak Republic discussed in its Counter-Memorial. Both document production and Discovery's Reply have brought new light to these themes and reinforced their relevance here. The Slovak Republic now addresses the remaining, primary chapters of Discovery's story and explains how the record now stands. We begin with each well site.

D. Smilno

103. This Section is divided into the following subsections:

(a) Discovery's own conduct demonstrates that it knew it needed landowner approval at the Smilno Site, which contradicts its current theory that the field track was a PSPR ("**PSPR Theory**") **(1)**;

(b) When Discovery had the opportunity in the key judicial proceeding on the matter, it did not even raise the PSPR Theory **(2)**;

(c) When Discovery finally asked the mayor to adopt its PSPR Theory (who now testifies for Discovery in this arbitration), the mayor did not do so **(3)**;

(d) Discovery recognized that Ms. Varjanová had the legal right to park her car where she did, which is also inconsistent with its PSPR Theory **(4)**; and

(e) The MoI never "instructed" the Police to do anything regarding the field track **(5)**.

1. Discovery's own conduct demonstrates that it knew it needed landowner approval and even it did not believe its PSPR Theory

104. From the very beginning, Discovery recognized that landowner consent to the field track in Smilno was required. Rather than seek that consent, it engaged in a series of flawed legal strategies to circumvent it. It was only well after these events that it invented its PSPR Theory, under which landowner consent would not have been required.

105. Discovery's current case theory stands on two propositions, namely (*i*) that all field tracks automatically qualify as PSPRs under the Road Act;[110] and (*ii*) that all publicly accessible roads or tracks constitute public roads.[111] In its Reply, Discovery spent pages presenting evidence that the Access Land was an "*access road*"[112] or a "*country road*".[113] Discovery does so in an attempt to rebut the assertion that the field track "*was private property (i.e. not publicly accessible)*", and thus landowner consent was required.[114] Nonsense. Discovery's attempt to conflate these two terms is fundamentally incorrect.

106. As the Slovak Republic explains below and in greater detail in the Appendix, neither of Discovery's theories is correct: (*i*) not all field tracks automatically qualify as a PSPR—they must have certain technical qualities, and (*ii*) the fact that a track is publicly accessible factually—*i.e.*, not fenced off or enclosed—does not automatically

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110 Claimant's Reply, ¶ 72(1).

111 Claimant's Reply, ¶ 65(2).

112 *See, e.g.*, Well site locations visit note dated 20 August 2014, **C-60**; Minutes of Meeting dated 21 July 2015, **C-280**; Decision of Bardejov District Office –Case No. OU-BJ-OVVS-2016/001484-LES dated 7 March 2016, p. 2, **C-300**; Operations Update for Opcom dated 3 December 2015, p. 1, **C-101**; Email from Lukasz Sopel to AOG team with attached Police reports dated 14 December 2015, p. 1, **C-102**. It is worth noting that the vast majority of documents cited by Discovery does not even state that the field track was "*publicly accessible*".

113 Email from Lukasz Sopel to AOG team with attached Police reports dated 14 December 2015, p. 2, **C-102**.

114 Claimant's Reply, ¶ 53.

make it a public road that confers a statutory right of the public to use it. Just because a track might be "*publicly accessible*" as a factual matter does not mean that the public have a legal right to use it freely. For the public to have the statutory right to use a track freely, it must meet certain requirements under the Road Act.

107. AOG's own actions show that it understood that the field track was not such a public road as Discovery now claims, and thus it needed landowner consent. First, on 17 December 2015, two days after AOG's first attempt to use the field track failed due to its clashes with Ms. Varjanová, AOG purchased a share on the Access Land.[115] Had Discovery believed that the field track was a PSPR, there would have been no need to purchase a share in it.

108. Second, on 15 January 2016, AOG's contractor filed a criminal complaint against Ms. Varjanová because she parked her vehicle on the Access Land. Notably, instead of invoking the PSPR Theory, AOG complained that its "*rights as a co-owner of this real property have been violated*."[116]

109. Third, on 3 February 2016, AOG informed the Smilno Municipality that, on the basis of the purchase of its share, it co-owned the Access Land and asked it to remove a vehicle that was parked on *a public (municipal) road* adjacent to the field track (*i.e.*, the car was not parked on the field track itself), claiming that it blocked traffic under the Road Traffic Act:

> I am of the opinion that this person has no lease contract, or other authorization whatsoever, that would allow them to use the Smilno-owned plot of land for car parking purposes, ***and I also believe that the car owner acts in conflict with Article 43 of Act No. 8/2009 Coll. on Road Traffic as amended, when they created obstacle on the local road***, which is blocking landowners in their access to adjacent lands.[117]

110. But when Ms. Varjanová's vehicle was parked *on the field track itself,* AOG never made such a request. This is because AOG recognized that the field track itself was not a PSPR. If it was, then it would have had the right to similarly request the Smilno

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115 Respondent's Counter-Memorial, ¶ 87.

116 Resolution of the District Police Department Bardejov dated 15 February 2016, p. 1, **R-150**.

117 Letter from AOG to Smilno Municipality dated 3 February 2016, **R-151**; *see also* Letter from Smilno Municipality to AOG dated 9 February 2016, **R-152**.

Municipality to remove the vehicle from the field track. Correctly recognizing that the field track was not a PSPR, however, AOG never made such a request before mid-2016. Rather, when Ms. Varjanová's parked her vehicle on the Access Land, AOG requested the Mayor to apply the rules of the Civil Code.[118]

111. Fourth, on 7 March 2016, Discovery considered acquiring another share on the Access Land. Discovery did so because it understood that "*[o]nce we own a legitimate share, we are assured that we can legally remove any blocking cars, and can return to work.*"[119] This document again recognizes that the field track was not a PSPR; if it were, AOG would not need to purchase a share to access it.

112. Fifth, in April 2016, to circumvent the Interim Injunction, Discovery established a subsidiary called Cesty Smilno s.r.o. (in English: "*Roads Smilno*"), which acquired another share on the Access Land.[120] This subsidiary, in turn, planned to "*lease access to [AOG] personnel and contractors*."[121] AOG repeatedly tried to use the Access Land via this subsidiary, even as late as June 2016.[122] Yet again, had AOG thought the field track was a PSPR, it would not have purchased another share to access it.

2. When Discovery had the opportunity in the key judicial proceeding on the matter, it did not even raise the PSPR Theory

113. Discovery also had the opportunity to raise its PSPR Theory in the key judicial proceeding on the matter—but did not do so. On 2 March 2016, AOG appealed the Interim Injunction obtained by Ms. Varjanová.[123] Had the PSPR Theory been correct, then it would have provided a full defense to the Interim Injunction. Yet AOG said nothing timely about its PSPR Theory to the court. Instead, AOG repeatedly claimed that it could use the field track "*because it was a purported co-owner of it*"[124]—an

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118 Letter from AOG to Smilno Municipality dated 29 December 2015, **R-153**.

119 Status Update and Activity Summary dated 7 March 2016, **R-154**.

120 Respondent's Counter-Memorial, ¶¶ 97-100.

121 AOG Status Update dated 11 May 2016, **C-308**.

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

123 Appeal of company AOG against the decision of District Court Bardejov dated 2 March 2016, **LF-17**.

124 AOG, for instance, argued that "*the claimant has decided in contradiction to all the customs to violate* ***the rights of a co-owner*** *— [AOG] by blocking with motor vehicles owned by the claimant and persons known to the claimant.*" *See* Fogaš First ER, ¶ 74; Appeal of company AOG against the decision of District Court Bardejov dated 2 March 2016, **LF-17**.

argument that squarely contradicts its current position that the field track was a PSPR.[125] And while AOG mentioned in one place of its appeal that the track was a field track, not all field tracks are a PSPR. Given AOG's repeated reference to its co-ownership of the Access Land, the court had no reason to assume that AOG was claiming a PSPR Theory.

114. In fact, Discovery would later *concede* Ms. Varjanová's claim, and the court issued its judgment on admission.[126] Having not timely raised its PSPR Theory to the court, Discovery can hardly complain that the court did not address it when it issued the Interim Inunction and that other authorities respected the Interim Injunction afterward.[127]

3. When Discovery finally asked the "friendly" mayor to declare it was a special purpose road, he declined Discovery's invitation, and Discovery sought no judicial relief on the issue

115. It was only in mid-2016—after AOG's first unsuccessful attempt and after the Interim Injunction, when AOG's repeated mistakes were mounting—that it came up with its PSPR Theory.[128] The first document mentioning the PSPR Theory is an email from AOG's counsel to the Mayor of Smilno dated 17 May 2016. There, in addition to requesting official information about the status of the field track, AOG's counsel aired the new PSPR Theory:

> I would like to ask you for information on the nature of the road, specified in the attachment to this e-mail. ***We would like to express our opinion that the road in question is a public special purpose***

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125 Ms. Varjanová had filed her claim to invalidate the purchase agreement under which Discovery purchased a share on the Access Land. She also asked the court to issue the Interim Injunction. The court of first instance issued the Interim Injunction, and Discovery appealed it without mentioning the PSPR Theory. The court dismissed the appeal, and the Interim Injunction remained in force. The first-instance court, however, was still addressing with the merits—*i.e.*, invalidity of the purchase agreement. Discovery later conceded the claim on the merits. After that, and only after writing the letter to the mayor discussed below, did Discovery raise the PSPR Theory, which was untimely.

126 Claimant's Reply, ¶ 132.

127 *See infra* ¶¶ 306, 484-485.

128 Respondent's Counter-Memorial, ¶ 314. For avoidance of doubt, the Slovak Republic does not assert that AOG/Discovery created this argument for the purpose of this arbitration. Rather, the Slovak Republic explained that "*AOG only changed its mind and invented the argument about the Access Land being a public special purpose road in* ***around mid-2016****; it uses this argument ex-post in this arbitration*.". Therefore, Discovery's argument that "*Contrary to Slovakia's assertions, this is not a new legal theory that Discovery has 'invented […] ex-post in this arbitration'*" clearly misses the point. Rather, Discovery came up with this argument only once the Interim Injunction was in place and the Police were obliged to respect it. *See* Claimant's Reply, ¶ 55.

> ***road*** and, according to our information, it has been used by citizens, as well as by a local farmers' cooperative, for decades without any restrictions.[129]

116. The Mayor of Smilno, Mr. Baran (who is a witness for Discovery in this arbitration), responded on 6 June 2016, saying that "*the **field track** situated on [the Access Land] has been used by the general public for many decades (100 — 200 years) as access road to access the adjacent plots of land and a quartz mine […] and is publicly accessible*."[130] Contrary to Discovery's argument, however, that does not mean that the field track is a PSPR, *i.e.*, a road with a statutory right of public to use it.

117. A publicly accessible field track does not mean it is a PSPR. Under Slovak law, a publicly accessible field track that does not qualify as a PSPR means it can be used by the public, *unless the landowner objects*.[131] Once owners express their disagreement, the use of such field track is restricted.[132] This is in contrast with the statutory right of public use of public roads under the Road Act.[133]

118. Thus, when AOG asked the Mayor of Smilno in June 2016 to confirm that the field track was a PSPR, Mr. Baran did not do so. Rather, and importantly, he stated only that it was a "*field track*" and it was "*publicly accessible*."[134] That means that absent the statutory PSPR regime, if the landowners objected to AOG's use, Discovery was not permitted to use it. In other words, the evidence that Discovery claims *supports* its PSPR Theory actually *undermines* it.

119. The Slovak Republic gave Discovery the opportunity to produce documents showing AOG/Discovery's contemporaneous understanding of the field track's status.[135]

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129 Email from M. Sýkora to Smilno Municipality dated 17 May 2016, **R-155**.

130 Statement of Smilno municipality regarding the classification of the Road dated 6 June 2016, **R-156**. As Discovery's translation of exhibit **C-18** was incomplete and omitted the important word "*field*", the Slovak Republic has corrected the translation of original Discovery's exhibit **C-18** and resubmits this exhibit as **R-156**.

131 This can be either explicit or implicit.

132 These rules stem from general rules of Slovak civil law. *See* Civil Code, Arts. 123, 126, **R-157**.

133 Road Act, Art. 6, **R-158**.

134 Around the same time—on 17 June 2016—AOG's attorney wrote its letter to the District Directorate of the Police in Bardejov. *See* Letter from AOG's Attorney to Bardejov Police dated 17 June 2016, **C-315**.

135 Specifically, the Slovak Republic asked Discovery to produce "*[d]ocuments evidencing discussions between members, directors, employees and/or advisors of Discovery, AOG, or among JV Partners, concerning the status of the Access Land in Smilno **as a public special purpose road**, including, but not*

Discovery produced only two: (*i*) AOG's letter to the Mayor of Smilno, and (*ii*) his response, which does not confirm that the Access Land is a PSPR.[136] Consequently, there appear to be *no* documents dated before May 2016 showing that AOG/Discovery considered the field track to be a PSPR.

120. And neither did other Slovak authorities:

- The District Police Department Bardejov: In its resolution dated 15 February 2016, the District Police Department Bardejov rejected AOG's criminal complaint against Ms. Varjanová, because "*[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*."[137] This statement confirms that the District Police Department Bardejov treated this matter as a civil dispute between Ms. Varjanová and AOG as co-owners of the Access Land, and not a crime or misdemeanor relating to traffic on a PSPR.

- The District Traffic Inspectorate in Bardejov: In its letter dated 11 October 2016, the District Traffic Inspectorate in Bardejov denied Discovery's proposed signage on the entrance to the field track in Smilno because "*it is not a crossroads but merely a conjunction of a country road*."[138] This statement confirms that the traffic inspectorate likewise did not consider the field track to be a PSPR. Importantly, this decision was made by a "*civil engineer*."[139]

- The State-appointed engineer from the Traffic Inspectorate in Bardejov: In an email recapping his meeting of 26 October 2016 with the State-appointed engineer Mr. Čičvara from the traffic inspectorate, Mr. Fraser stated that

limited to, minutes from meetings, analyses produced, and/or records of decisions" for the period from June 2015 until June 2016. *See* Procedural Order No. 3, Annex B, Request 18.

136 *See supra* ¶¶ 116-118.

137 Resolution of the District Police Department Bardejov dated 15 February 2016, p. 2, **R-150**.

138 Letter sent by the Police to the Smilno municipality dated 11 October 2016, **C-153**; *see also* Email from A. Fraser to K. Mihaliková dated 26 October 2016, **R-159**.

139 Email from Mr Fraser dated 26 October 2016, **C-340**.

"*Cicvara was not prepared to agree that the track could be a special purpose road*".[140]

- The Ministry of Interior: In its letter of 19 December 2016, the MoI stated that "*[a]ccording to the information we have procured, the plot of land in question is private land*."[141] The MoI therefore concluded that the field track was not a PSPR.

4. Discovery even recognized that Ms. Varjanová had the legal right to park her car where she did, which could not have been the case if it genuinely believed in its PSPR Theory

121. On 16 February 2016, Discovery also contemporaneously confirmed in its internal documents that Ms. Varjanová had "*a legal right to park her car*" on the Access Land.[142] The only circumstance in which she had the right to do so was if the field track was *not* a PSPR. Hence, Discovery's contemporaneous admission that Ms. Varjanová had a right to park her car on the Access Land was, in effect, an admission that the field track was not a PSPR.

* * *

122. Discovery's PSPR Theory is a creative afterthought to its failure to obtain landowner consent. The foregoing shows that everyone—including multiple Slovak authorities and AOG itself—understood that the field track was *not* a PSPR and, therefore, landowner consent was required. But in any event, as the Slovak Republic explained in its Counter-Memorial, even if the field track were a PSPR (it was not), AOG would still need landowner consent for its upgrade and repositioning.[143] To the extent that the Tribunal wishes to understand the granular details for why, under Slovak law, the field track was not a PSPR, the Slovak Republic sets forth those reasons, together with

140 Email from Mr Fraser dated 26 October 2016, **C-340**.

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

142 Report to Partners –Status Update dated 20 January 2016, **C-120**. Discovery tries to downplay the importance of this statement by arguing that while Ms. Varjanová, just as any other member of public, had right to park on the field track, she did not have the right to block it. However, it is clear from the context of the minutes that the discussion related to blocking of the field track with he parked car.

143 Respondent's Counter-Memorial, ¶ 77.

responses to Discovery's arguments, in the Appendix hereto (which, given its length and technical details, it does not include in the body of the Rejoinder itself).

5. The MoI never "instructed" the Police to do anything regarding the field track

123. Finally, contrary to Discovery's allegation, the MoI never instructed the Police to do anything regarding the field track. Discovery argues that the MoI "*had no competence to issue any instruction to the Police as regards whether the Road was publicly accessible*"[144] and absent such instruction, "*AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016*."[145] As explained below, this is fiction.

124. First, the MoI simply sent a letter to the Police on 19 December 2016.[146] In it, the MoI stated that the field track was not a PSPR. This letter was no "*instruction*"; rather, it was guidance given to the Police pursuant to the MoI's statutory authority.[147]

125. Second, contrary to Discovery's assertion, nowhere in this letter does it say that the field track was not "*publicly accessible*", as Discovery suggests in its Reply. Rather, the MoI stated the following:

> [I]f 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 in any way justified, and therefore it is not possible to carry out traffic supervision on such land*** despite the consent granted by its owners.[148]

144 Claimant's Reply, ¶ 112.

145 Claimant's Reply, ¶ 115(4).

146 Statement of the Ministry of Interior regarding the classification of the Road dated 19 December 2016, **R-160**. The Slovak Republic resubmits Discovery's original exhibit **C-23** as **R-160** with corrected translation.

147 Respondent's Counter-Memorial, ¶¶ 122-125; Police Act, Art. 6, **R-067**; Act on Organization of Government Activities and Organization of Central Government, Arts. 11(c), 38, **R-071**.

148 Statement of the Ministry of Interior regarding the classification of the Road dated 19 December 2016, **R-160**.

126. In other words, given that there is no evidence that it is a road with a road body, it cannot be a PSPR with public traffic on it. Thus, even if the owners agree that people use it for agriculture purposes, that consent cannot on its own change its legal character and constitute a PSPR. Accordingly, this statement supports the notion that the field track was not a PSPR conferring a statutory right of the general public to use it.

127. Third, Discovery argues that the MoI "*had no competence to issue any instruction to the Police*"[149] because "*any instructions issued by the MoI to the Police must be in compliance with the law and within the MoI's field of competence*".[150] Discovery is wrong again. The Police *do* fall under the MoI's competence.[151] Thus, the MoI *is* permitted to issue guidance to the Police. The MoI, however, cannot do the same towards the public. This is precisely what the MoI told AOG's attorney in its letter of 30 December 2016.[152]

128. Fourth, Discovery argues that "*if the MoI is asked to express an opinion or provide an instruction to the Police on a matter which is not within its field of competence […], the MoI should cooperate with and procure a statement from the competent state body (here, the MoT)*", and concludes that the "*MoI did not do so in the present case*."[153] That, too, is wrong. The MoI expressly referred to "*the position given by the Ministry of Transport*" in its alleged "*instruction*".[154]

129. Fifth, even if there was an "*instruction*" from the MoI to the Police (there was not), the timing for Discovery's argument does not work. It is undisputed that Discovery's last attempt to drill in Smilno occurred during 15-17 November 2016, *i.e.*, well before the MoI issued its alleged "*instruction*" to the Police. As such, the Police could not have acted upon any "*instruction*" to AOG's detriment.

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149 Claimant's Reply, ¶ 112.

150 Claimant's Reply, ¶ 112(1)(a).

151 Police Act, Art. 6, **R-067**; Act on Organization of Government Activities and Organization of Central Government, Arts. 11(c), 38, **R-071**.

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

153 Claimant's Reply, ¶ 112(2).

154 Statement of the Ministry of Interior regarding the classification of the Road dated 19 December 2016, **R-160**.

130. Finally, Discovery argues that, had the MoI not issued its "*instruction*" on 19 December 2016, "*AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016*."[155] In other words, Discovery argues that it would have been able to mobilize a crew, obtain all of the necessary equipment, and drill an exploration well—without issue—in *12* days during winter in Eastern Slovakia, which also included the Christmas holiday. This timeline is both unrealistic and belied by AOG's own contemporaneous documents.[156]

* * *

131. After the wave of Discovery's accusations recedes, one fact remains standing: Discovery failed to obtain the landowners' permission in Smilno. All of the Smilno facts on which Discovery relies to allege breaches of the BIT stem from that one, dispositive failure.

E. Krivá Oľka

1. The MoA did not approve the Amendment because of Discovery's own failure to timely request an extension of the Lease Agreement

132. As with the Smilno Site, Discovery was the cause for its own failure at the Krivá Oľka site. In its Reply, Discovery does not dispute that its request for a lease extension was untimely and, therefore, in breach of the Lease Agreement.[157] The point now, therefore, is undisputed.

133. We invite the Tribunal to pause here. Discovery concocts alternative theories about internal rivalries between Minister Matečná and Mr. Regec for the ministerial position.[158] It spins webs of conspiracies about Mr. Regec's alleged influence over Minister Matečná[159] and his alleged personal prejudice against AOG.[160] But the real

155 Claimant's Reply, ¶ 115(4).

156 *See, e.g.*, Lewis Second WS, ¶ 24 ("*Drilling and completion of the works in Smilno would have taken about a month, followed by 90 days of flow testing*.").

157 Claimant's Reply, ¶ 128; *see also* Fraser Second WS, ¶ 21.

158 Claimant's Reply, ¶ 125(3).

159 Claimant's Reply, ¶ 125(10).

160 Claimant's Memorial, ¶ 253.

reason that the MoA did not approve the Amendment was AOG's own failure to comply with the Lease Agreement and its subsequent expiration.

134. The MoA transparently communicated the significance of Discovery's untimely action to it:

> [The Lease Agreement] has terminated as a result of the fulfilment and/or nonfulfillment of conditions set out in its Article III dealing with the lease term. ***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***.[161]

135. Discovery's Memorial was silent on all of this. Having been forced to acknowledge its untimeliness in its Reply, Discovery now attempts to excuse AOG's failure by arguing that (*i*) the Lease Agreement had already been extended by LSR, which "*waived*" AOG's failure to comply with its terms,[162] and (*ii*) the MoA "*informally approved*" the Amendment.[163] As explained below, these arguments do not work under Slovak law.

136. First, no agreement under Slovak law that has already expired can be resurrected by an ex-post amendment.[164] Even Discovery contemporaneously recognized that "*[s]ince the original lease agreement has expired, it is not possible to renew it with amendment no. 1*."[165]

137. Recognizing that the Slovak Republic could not amend an expired agreement, Discovery now argues that the Lease Agreement did not terminate because LSR "*had already signed the Amendment to the Lease on 14 January 2016 which had extended*

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161 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**. This is the "*substantive implication*" of AOG's own legal mistake. *See* Fraser Second WS, ¶ 21.

162 Claimant's Reply, ¶ 128.

163 Claimant's Reply, ¶ 125(5).

164 Civil Code, Art. 578, **R-157**.

165 Letter from AOG to LSR dated 18 July 2016, **R-161**.

the term of the Lease until 1 August 2016."[166] That argument fails; for an amendment to be valid, the MoA must approve it, which never occurred:[167]

> 3. This Addendum enters into force on the date of granting consent to rent according to Article 50 par. 7. of Act of the National Council of the SR No. 326/2005 Coll. on Forests, and effective on the day following its publication in the Central Register of Contracts based on Act No. 546/2010 Coll.

138. Therefore, even if LSR agreed and signed the Amendment, it was not valid until the MoA's approval.[168]

139. Second, Discovery argues that the MoA "*informally approved*" the Amendment.[169] In support of this argument, Discovery points to a letter from the Managing Director of the Forestry and Timber Processing Section at the MoA. In that letter, the Managing Director informed AOG that the "*file together with the processed draft of the prior consent to the lease of the state property was forwarded to the office of the Head of the Service Office of the Ministry of Agriculture and Rural Development of the Slovak Republic for further processing*."[170] Under Discovery's account, this letter "*reinforced Discovery/AOG's belief that obtaining approval from the MoA was a mere formality and that approval had, indeed, already been informally given*."[171] The MoA's approval, however, is not a mere formality.

140. In any event, the letter says nothing more than the fact that the Forestry and Timber Processing Section at the MoA had forwarded the file for further processing. It did so because it does not have the competence to approve—whether formally or informally—lease agreements. It even stated so in its letter to AOG.[172] It is hard to see how this could have "*reinforced Discovery/AOG's belief that obtaining approval from the MoA was a mere formality and that approval had, indeed, already been informally given*."[173]

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166 Claimant's Reply, ¶ 127.

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

168 Even Discovery admits in its Reply that "*[u]nless and until the MoA approved the Amendment, AOG was not able to perform exploratory drilling at Krivá Oľka*." *See* Claimant's Reply, ¶ 117.

169 Claimant's Reply, ¶ 125(5).

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

171 Claimant's Reply, ¶ 120.

172 Letter from Ministry of Agriculture to AOG dated 22 January 2016, p. 1, **C-121**.

173 Claimant's Reply, ¶ 120.

* * *

141. AOG failed to request the Amendment timely, and the MoA declined to approve the Amendment on that basis, as under Slovak law it is not possible to amend a contract that has already expired. Thereafter, AOG informed the MoA that should the MoA not approve the Amendment, AOG could invoke Article 29 of the Geology Act.[174] The MoA therefore referred AOG to that procedure. Any other ulterior motives claimed by Discovery are nothing more than speculation and an attempt to create a breach where none exists.

2. Discovery was unable to obtain compulsory access under Article 29 of the Geology Act because it refused to provide documents

142. Discovery was unable to avail itself of Article 29 of the Geology Act because it refused to provide documents to the Slovak authorities. As explained above, under Slovak law, if a contractor cannot secure landowner consent to use a specific property for exploration works, it may apply for compulsory access rights under Article 29 of the Geology Act. In an Article 29 proceeding, the geological works contractor must prove that the public interest in oil exploration will prevail over the particular landowner's interest.[175] In addition, the geological works contractor must evidence that it was unable to reach an agreement with the landowner to use the land in question.[176]

143. Discovery filed an Article 29 application for the Krivá Oľka site, after it breached the Lease Agreement. At an in-person meeting for the Article 29 proceeding, AOG and the MoE learned that LSR had not forwarded to the MoA a new lease agreement that AOG sent to LSR. When the MoE found out, it asked Discovery to submit the new lease agreement again to LSR, so the Article 29 process could run its course. In its own words, Discovery "*denied [the request] resolutely*."[177]

144. This admission is fatal to Discovery's claims. As the applicant in the Article 29 proceedings, AOG had an obligation to reach an agreement on the use of property with

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

175 Constitution of the Slovak Republic, Art. 20, **R-018**.

176 Respondent's Counter-Memorial, ¶ 354.

177 Email from Viktor Beran dated 8 February 2017, p. 2, **C-366**.

its owner.[178] When the MoE requested Discovery to take the simple action of resending a lease agreement to LSR so as to have clear evidence of disagreement, it was Discovery who "*denied resolutely*" this option. Without proving that it tried—but failed—to obtain landowner consent, Discovery failed one of the key requirements necessary to justify an Article 29 compulsory order.

145. Accordingly, the MoE had no other option but to suspend the proceedings because AOG was refusing to cooperate.

F. Ruská Poruba

1. AOG was not able to access the Ruská Poruba site due to its own mistakes

146. As for the final site, Ruská Poruba, Discovery now all but admits that AOG ceased its activities voluntarily because of its own legal mistakes. As Slovakia explained in its Counter-Memorial, AOG sought—and obtained—an interim injunction against Urbariát,[179] an entity which managed certain forest lands in Ruská Poruba.[180] It did this to access the Ruská Poruba location.

147. With this interim injunction in hand, AOG attempted to access the Poruba site in December 2015. Due to its own mistake, however, AOG came to Ruská Poruba before the Poruba Injunction was effective.[181] As a result, it was unable to proceed. Discovery's Slovak law expert does not deny this.

148. AOG returned to Ruská Poruba in January 2016, but its second attempt shared a similar fate. This time, AOG failed to access the site because the Poruba Injunction did not apply to the owners of land plot No. 513, which AOG was trying to access. In other words, AOG requested—and obtained—the Poruba Injunction against the wrong party.

149. Discovery's Reply offers no credible response. Rather, it states that the "*Poruba Injunction expressly referred to land plot No. 513 and ordered the Urbariát to allow*

178 Respondent's Counter-Memorial, ¶ 354.

179 Respondent's Counter-Memorial, ¶¶ 167-169.

180 Contrary to Discovery's assertions, these land plots did not belong to Urbariát. *See* Claimant's Reply, ¶ 144.

181 Respondent's Counter-Memorial, ¶ 170.

AOG to use this plot to access the Poruba Site."[182] Whether or not it referred to land plot 513, Discovery did not file that injunction against the owners of that land—and they were therefore provided no opportunity to respond. Instead, Discovery filed it against only Urbariát. Consequently, the Poruba Injunction could not be imposed against landowners who were not a party to it.

150. Thus, it was not the "*Police's inaction [that] ultimately prevented AOG from accessing the Poruba Site and carrying out its exploration activities*", as Discovery suggests.[183] Rather, it was, yet again, AOG's own legal mistake. As a result of this legal mistake, Discovery terminated the services of its attorney.[184]

2. In any event, Discovery was not actively pursuing Ruská Poruba

151. Following these legal mistakes in January 2016, AOG never returned to Ruská Poruba and did no further work there—that is, until it was allegedly prevented from drilling its exploration well because it was ordered to undergo a Full EIA in September 2017[185] (discussed below).

152. Discovery attempts to justify its inactivity by suggesting that "*AOG would have needed to apply to the MoE for a compulsory access order over the Poruba Track under Article 29 of the Geology Act*." But according to Discovery, "*[g]iven the arbitrary and unfair way in which AOG was treated by the MoE in respect of its Article 29 application at Krivá Oľka […], AOG decided it would be pointless to file a separate Article 29 application for the Poruba Site*."[186] Again, however, the timing of Discovery's argument does not work.

153. The MoE did not decide on AOG's Article 29 application until March 2017. Therefore, the MoE's conduct in the Article 29 proceedings could not justify AOG's inaction between January 2016 (when AOG's attempts at Ruská Poruba failed) and March 2017

182 Claimant's Reply, ¶ 147.

183 Claimant's Reply, ¶ 146.

184 Respondent's Counter-Memorial, ¶ 172; AOG report to JKX and Romgaz dated 11 October 2016, p. 3, **C-148**.

185 Respondent's Counter-Memorial, ¶ 172.

186 Claimant's Reply, ¶ 148.

(when the MoE issued its first instance decision on AOG's Article 29 application).[187] AOG had almost *14 months* to do something in Ruská Poruba, but it chose not to do so.

* * *

154. The foregoing demonstrates that AOG made critical mistakes at each of its well sites. None of the alleged breaches by the Slovak Republic pre-date these legal mistakes. As shown below, all of the facts that form the factual matrix of Slovakia's alleged breaches arose *as a result* of Discovery's own mistakes. The Slovak Republic revisits this causal disconnect between its alleged acts and Discovery's failures in Section V below.

G. Discovery voluntarily chose to undergo Preliminary EIAs because of the local citizens, not Minister Sólymos

155. Having reviewed above each of the well sites, the Slovak Republic now turns to a theme that permeates Discovery's arguments: the Preliminary EIAs.

156. As Slovakia explained in its Counter-Memorial, Discovery's 2017 Community Agreement was a fresh start.[188] Once Discovery finally accepted the necessity of genuine engagement with community activists and agreed the 2017 Community Agreement, AOG very quickly made meaningful progress, and reasonable compromises were reached.

157. Faced with this fact, Discovery changed its story in its Reply. Discovery's new story is that Minister Sólymos "*repeatedly requested AOG to agree to perform a Preliminary EIA*" and that these requests were "*unjustified*".[189] Discovery therefore claims that "*[b]ut for Minister Sólymos' repeated and unjustified public interventions*", AOG would not have (*i*) "*needed to issue [the press release with the activists]*"; (*ii*) "*submitted any applications for Preliminary EIA clearance*"; and therefore (*iii*) "*been ordered by the District Offices to perform a Full EIA prior to carrying out any exploratory drilling*."[190] In other words, Discovery now argues that it only undertook the Preliminary EIAs because of Minister Sólymos.

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187 Decision by the Ministry of Environment regarding the compulsory access order, 6 March 2017, **C-25**.

188 Respondent's Counter-Memorial, ¶ 18.

189 Claimant's Reply, ¶ 160.

190 Claimant's Reply, ¶ 160.

158. This new narrative is plucked from thin air. As the Slovak Republic explains below, Minister Sólymos made *one* proposal to Discovery to undergo a Preliminary EIA, and Discovery rejected it **(1)**. Further, Discovery's own documents show that it undertook the Preliminary EIAs because the local citizens requested it **(2)**. Even if Discovery undertook the Preliminary EIAs because of Minister Sólymos' proposal (it did not), no one, including the Minister, ever promised or assured Discovery that, depending on the results of the Preliminary EIAs, they would not progress to Full EIAs **(3)**. Finally, Minister Sólymos' "*public interventions*" routinely *defended* Discovery and sought to diffuse the tensions, created by Discovery, with the local citizens **(4)**.

1. Discovery rejected Minister Sólymos' proposal to undertake Preliminary EIAs

159. Discovery's Reply goes out of its way to claim that Minister Sólymos made "*repeated*" requests for Discovery to undertake a Preliminary EIA.[191] That is demonstrably false. Minister Sólymos made a single proposal to Discovery, and then referred to that proposal in later press conferences. Discovery's Reply presents these later references to the original offer as the "*repeated requests*" when, in reality, they were not. As shown below, Discovery rejected Minister Sólymos' proposal, and Minister Sólymos even publicly acknowledged that rejection.

160. Minister Sólymos first referenced a voluntary EIA in his 29 November 2016 press release, in which he stated: "*I would like to ask them that they themselves offer to carry out an environmental impact assessment (EIA)*."[192] Following this press release, Discovery's public relations firm called the Minister's office. Both sides agreed that Discovery would write an official letter to the Minister requesting a meeting.[193]

161. That meeting took place on 15 December 2016. There, as Mr. Sólymos confirms in his second witness statement, he and the MoE asked Discovery if it would consider

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191 Claimant's Reply, ¶¶ 158(2), 160, 162, 311(1).

192 Ministry of Environment Press Release dated 29 November 2016, **C-157**.

193 Email from D. Cvečková to A. Fraser dated 29 November 2016, **R-162**.

undertaking a voluntary EIA.[194] As Minister Sólymos further confirms, "*this was the first and the last time I suggested to AOG to voluntarily undergo a Preliminary EIA*."[195]

162. Six days later, on 21 December 2016, Discovery rejected the Minister's proposal. On that date, Discovery explained that a voluntary EIA would not improve the public's opinion because "*the most radical opponents of drilling are now accusing the Ministry officials of acting in favour of the company [AOG]*."[196] As Discovery explained, it was "*convinced*" that, even if a voluntary EIA showed that a Full EIA was not required, "*these radical opponents will once again challenge the results of the fact-finding process, as well as the independence and impartiality of the Ministry*."[197] Finally, Discovery rejected the Minister's offer because it "*would mean to Alpine approximately 6 months of further delay and additional costs of up to EUR 450,000*":[198]

> We understand that in the Ministry's opinion, voluntary submission to the environmental impact assessment (EIA) under Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendment and supplementation to certain acts, as amended, would be the most convincing argument in favour of improving the public opinion in relation to drilling in the north-east of Slovakia. However, we do not entirely share this opinion, as the most radical opponents of drilling are now accusing the Ministry officials of acting in favour of the company Alpine Oil and Gas ("**Alpine**"). These opponents are already questioning the transparency of the administrative procedures in which the exploration areas were designated to Alpine. We are therefore convinced that, even if the environmental impact assessment (EIA) clearly demonstrates that there is no need for a full environmental impact assessment and that all of Alpine's activities are perfectly safe from an environmental perspective, these radical opponents will once again challenge the results of the fact-finding process, as well as the independence and impartiality of the Ministry. In addition, this environmental impact assessment (EIA) would mean to Alpine approximately 6 months of further delay and additional costs of up to EUR 450,000.

163. Thus, Discovery explained that, for Smilno and Krivá Oľka, "*we simply cannot voluntarily undergo the environmental impact assessment (EIA) anymore*":[199]

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194 This is consistent with Mr. Lewis' testimony. Lewis First WS, ¶ 80.

195 Sólymos Second WS, ¶ 8.

196 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

197 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

198 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

199 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

> As regards the exploratory drilling sites in Smilno and Krivá Oľka, where drillholes should have been drilled more than 12 months ago, we simply cannot voluntarily undergo the environmental impact assessment (EIA) anymore, as there has been a significant delay caused by factors beyond our control (the actions of the drilling opponents and the actions or inactions of the police, courts and the Ministry of Agriculture and Rural Development of the Slovak Republic). In addition, our investors have informed us that if the drilling in the Smilno site well does not commence by the end of January 2017, Alpine will consider leaving Slovakia.

164. Instead, Discovery made a counteroffer to the MoE. Rather than agree to voluntary EIAs on Smilno and Krivá Oľka, Discovery offered to conduct voluntary EIAs for *future wells*, provided 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*"[200] with AOG, and (*ii*) the MoE provide additional support to AOG in future Article 29 proceedings. Specifically, Discovery asked that the MoE "*provide Alpine […] 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*."[201]

165. It was clear to the Minister and the MoE that Discovery had rejected the proposal to do a Preliminary EIA. Indeed, only one month after the December 2016 meeting with Discovery, Minister Sólymos and the MoE issued a press release updating the local communities on the situation. In that press release, Minister Sólymos explained that "*no agreement had been reached*" with Discovery for it to conduct a Preliminary EIA because Discovery "*deemed this costly*":[202]

> **Laws Tightened Up**
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> According to the Head of the Ministry of Environment, the case involving prospecting bore holes in the north-east of Slovakia is still alive as a in-depth audit concerning this case is underway.
>
> Mr. Sólymos held discussions with representatives of the mining company at the end of the last year, and he proposed that a fact-finding/screening procedure be initiated. It would be a sort of a preliminary analysis, a "simplified" EIA. However, no agreement has been reached as the private company deemed this costly.

166. Two weeks later, in another press release, the MoE explained that Minister Sólymos "***tried to agree*** *with the Alpine Oil & Gas company on a friendly step to voluntarily*

200 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

201 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

202 Korzar Article –Minister Comments on the Borehole Near Smilno dated 27 January 2017, **C-164**.

carry out an environmental impact assessment."[203] This was a true statement; Minister Sólymos did try—but Discovery rejected his proposal.

167. In this arbitration, Minister Sólymos confirms that his office understood Discovery's counteroffer to be a rejection:

> Indeed, I mentioned this proposal in a few press releases and statements, both before and after our meeting. However, we mentioned this to explain to the public how the Ministry was trying to address environmental concerns—not to pressure AOG. ***We even mentioned in some of these releases that AOG refused this proposal***. At the time, we could not do anything else as we did everything that was in our powers to help with AOG's project. We granted their requests for Exploration Area License extensions several times and our various departments helped them over time by many consultations and responses to their email requests.[204]

168. In sum, Discovery's new narrative that it only undertook the Preliminary EIAs because of Minister Sólymos is untrue. But if this were true, that would be even worse for Discovery. It would show that Discovery did not agree to do the Preliminary EIAs with the local community to gain their trust; rather, it was done for other reasons. In any event, as discussed below, Discovery's own communications with the local citizens show that Discovery's new narrative is false.

2. Discovery undertook the Preliminary EIAs as part of an agreement with the local citizens

169. By February 2017, Discovery realized that it needed to find common ground with the local citizens to move forward. As Mr. Fraser explained in his first witness statement, Discovery was "*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*."[205]

170. That first meeting took place at the beginning of February 2017. One of the very first requests that the local citizens made was for Discovery to conduct Preliminary EIAs

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203 Ministry of Environment Press Release dated 15 February 2017, **C-168**.

204 Sólymos Second WS, ¶ 9.

205 Fraser First WS, ¶ 92.

for its planned wells—a request that Mr. Fraser contemporaneously told the local citizens was "*doable*":[206]

> The message from their side was that if we could provide reassurance on the environmental questions and take other steps to promote trust, they would withdraw their opposition. The most important element in promoting trust would be to comply voluntarily with the preliminary environmental procedure for all wells. I said that this was doable, and we would be happy to share details of the application before it was submitted so that there should be no surprises later. I also said that we would be looking for a more collaborative attitude from them in return. They did not agree 100% to this last point, but they did not reject it either.

171. When Mr. Fraser shared this news with the Discovery team, Discovery's attorney asked if Mr. Fraser said this was "*doable*" for all wells, including the Smilno and Krivá Oľka locations:[207]

> Alex,
>
> Thanks for an update. You are right, this is rather unexpected (but very positive).
>
> Few questions/comments:
>
> When you are saying that preliminary environmental procedure is doable on all wells does it include Smilno and Kriva Olka?

172. In response, Mr. Fraser said yes—Discovery would do the Preliminary EIAs for the Smilno and Krivá Oľka locations:[208]

> Yes, I think we would do the preliminary procedure for Smilno and Kriva Olka as well. Mike do you agree?
>
> If we can get a real agreement with VLK on a basis for operating in the region, we could put it in a press release or even see if they would agree to a joint press release. That might neutralise some of the opposition.
>
> Alex

173. This is important. When Discovery rejected Minister Sólymos' proposal to do Preliminary EIAs, it specifically focused on these two site locations and categorically stated: "*As regards the exploratory drilling sites in Smilno and Krivá Oľka, where*

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206 First activists meeting note dated 5 February 2017, **R-117**.

207 Email from K. Mihaliková to A. Fraser dated 5 February 2017, **R-163**.

208 Email from K. Mihaliková to A. Fraser dated 6 February 2017, **R-164**. Interestingly, even this internal communication shows that Discovery was not contemplating the EIA for Ruská Poruba and AOG was apparently not actively pursuing it.

drillholes should have been drilled more than 12 months ago, we simply cannot voluntarily undergo the environmental impact assessment (EIA) anymore":[209]

> As regards the exploratory drilling sites in Smilno and Krivá Oľka, where drillholes should have been drilled more than 12 months ago, we simply cannot voluntarily undergo the environmental impact assessment (EIA) anymore, as there has been a significant delay caused by factors beyond our control (the actions of the drilling opponents and the actions or inactions of the police, courts and the Ministry of Agriculture and Rural Development of the Slovak Republic). In addition, our investors have informed us that if the drilling in the Smilno site well does not commence by the end of January 2017, Alpine will consider leaving Slovakia.

174. In other words, Discovery's attorney was confirming that Discovery would do Preliminary EIAs for all wells—including Smilno and Krivá Oľka—because, just three months earlier, it had *rejected* Minister Sólymos' proposal with regard to those two sites. This, too, confirms that Discovery's decision to submit to Preliminary EIAs was not a result of Minister Sólymos. Instead, it resulted from Discovery's later decision to reach compromise with the local citizens.

175. The follow-up meetings with the local citizens—and AOG's reporting of the same—confirm this. In another meeting in late February, the local citizens explained to Discovery that "*[t]he only way [Discovery] can gain trust now is by doing the EIA*."[210] As Mr. Fraser confirmed about that same meeting, the local citizens' initial reaction was "*do the preliminary EIA and we will see after that*":[211]

> They consider the existing planned location is the worst possible choice. There are some important springs nearby and there is a significant danger of landslides. Sometime in the recent past 1 km of slope moved down the hill near there and 5 houses were covered in earth. It is also too close to the houses at Kriva Olka. We discussed safety plans and rescue plans. We should investigate alternative locations. They will study the key principles and give us their comments. Their initial reaction was: do the preliminary EIA and we will see after that.

176. Discovery contemporaneously reported on these meetings to JKX and Romgaz. On 10 March 2017, Discovery informed its partners that the local citizens "*would like to see AOG conduct preliminary EIAs at all three locations before further steps could be agreed*."[212] In that same update, Discovery explained to its partners that "*[o]ur objective would be to agree that the preliminary EIA process, which is believed to take*

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209 Letter to Ministry of Environment dated 21 December 2016, **C-162**.

210 Email from Alexander Fraser dated 19 February 2017, **C-369**.

211 Email from Alexander Fraser dated 19 February 2017, **C-369**.

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

about 3 months, will be conducted in parallel with the rest of the permitting processes."[213] Discovery also explained to its partners that it had "*agreed to meet with VLK and the protestors in the week beginning 13 March, with a view to finalizing the press release and agreeing a way forward on EIAs*":[214]

> We have agreed to meet with VLK and the protestors in the week beginning 13 March, with a view to finalizing the press release and agreeing a way forward on EIAs. Mr. [redacted] of VLK said that he agreed with the principle of issuing a press release, and that he thought we could quickly move forward with one or more EIAs. We will also attempt at that meeting to get buy-in from the protestors to our choice of well locations.

177. Discovery concluded that update by explaining to its partners that it felt that the "*best strategy at present continues to be to push the discussions* ***with protestors*** *to see if these can yield some kind of consensus*."[215] Nowhere in the update does it state that Discovery was considering Preliminary EIAs because of Minister Sólymos.

178. Conversations about the EIA with the landowners continued into March 2017. Again, Mr. Fraser reported that "*[i]t is difficult to get past first base while [the activists] are still so fixated about EIAs*":[216]

> 2. [redacted] will review the draft press release and get back to us. He agreed with the principle of a press release in order to clear the atmosphere, and was not against the idea of including a quote from him in it, although he hinted he might make the language stronger.
> 3. They are adamant that we should do a preliminary EIA for a whole area or structure rather than for individual wells, and they proved impossible to budge on this. I said that we would analyse this and if it seemed feasible I thought we could do that. They agreed it would remove the need to do preliminary EIAs for subsequent wells. I am not sure whether and if so how this fits into the existing procedures for EIAs.
> 4. They want to see some water analysis that we allegedly did and promised to send them in the past and failed to. Ron/ Stanislav do you know anything about this?
> 5. We should try and send some kind of basic geological interpretation to [redacted]
>
> We agreed to meet again in 10 days' time to finalise the press release and explain our plans on EIAs. It is difficult to get past first base while they are still so fixated about EIAs.
>
> Alex

179. By the end of March 2017, Discovery concluded that, to make peace with the local citizens and find a way forward, it had to agree to the Preliminary EIAs on which the local citizens were "*fixated*".[217] Following another meeting with the landowners in March 2017, Mr. Fraser explained that the local citizens have "*agreed that if we*

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

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

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

216 Third activists meeting note dated 4 March 2017, **R-145**.

217 Third activists meeting note dated 4 March 2017, **R-145**.

conduct the mini-EIA and the results of the EIA are positive, they will not prevent us from drilling there."[218] Mr. Fraser therefore stated that "*[w]e 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 a dialogue with the activists*": [219]

> We saw the activists again on Friday and while we did not achieve a complete breakthrough, we made some encouraging progress. 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.

180. One day later, Discovery updated JKX and Romgaz on the situation. It explained that "*[d]iscussions have continued with the protestors to try and resolve the deadlock and we believe there may now be a prospect of a favorable outcome*."[220] Discovery stated that, not only did it agree to perform Preliminary EIAs, but it proposed involving the local citizens in that process to "*further help build trust*":[221]

> We asked the protesters to provide any necessary cooperation to secure the consent of local landowners, in parallel with the preliminary EIA process which we had agreed to conduct at each location. They were not willing to provide any cooperation while the preliminary EIA processes were ongoing, but they did agree, in relation to Kriva Ol'ka and Ruska Poruba, that if AOG obtained a positive outcome from the preliminary EIA processes then they would withdraw from obstructing us. We consider that if we involve them in each preliminary EIA process, this will further help build trust, and also that we should be able to obtain a similar result at Smilno.

181. Discovery therefore officially proposed to JKX and Romgaz that it "*start the preliminary EIA process at the three original locations, Smilno, Kriva Oľka and Ruska Poruba*."[222] Discovery also noted that "*[t]he process may take three months to complete, although we will attempt to reduce this time* ***by keeping the protestors fully involved*** *in the process and thereby, it is hoped, also pre-empting any later challenges*."[223] Finally, Discovery reiterated that "*our best strategy is to continue to*

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218 Fourth activists meeting note dated 24 March 2017, **R-146**.

219 Fourth activists meeting note dated 24 March 2017, **R-146**.

220 Report from Mr. Lewis dated 28 March 2017, **R-165**.

221 Report from Mr. Lewis dated 28 March 2017, **R-165**.

222 Report from Mr. Lewis dated 28 March 2017, **R-165**.

223 Report from Mr. Lewis dated 28 March 2017, **R-165**.

build relations with the protestors" and that, if this cooperation proves successful, "*then it may be necessary to halt the legal proceedings at Smilno and Kriva Oľka*":[224]

> We feel that our best strategy is to continue to build relations with the protesters. If this finally proves successful, then it may be necessary to halt the legal proceedings at Smilno and Kriva Ol'ka.
>
> Please feel free to raise any questions or comments, as always.
>
> Respectfully,
>
> Michael P. Lewis
> Managing Director/Petroleum Geologist

182. There is no suggestion in any of this correspondence that Minister Sólymos' proposal in December 2016 had somehow forced Discovery to meet the local citizens' request for Preliminary EIAs. To the contrary, just after Discovery published the press release, which memorialized its agreement with the local citizens, Discovery sent another update to JKX and Romgaz to explain that the press release had already led to "*considerable improvement*" and gave Discovery the opportunity "*to develop ongoing working relationships* ***with the activists***":[225]

> Gentlemen:
>
> Since our last report, we had a further meeting with VLK on 31 March at which they reviewed our press release and confirmed they had no objection. Following publication of the press release, the coverage in the national and local press has been generally neutral or positive, and the responses from the activists have been much muted. We feel that this is a considerable improvement on the situation AOG was facing last year, and that we have the opportunity now to develop ongoing working relationships with the activists.

183. Nearly two years later, Mr. Lewis wrote a detailed update to Romgaz explaining the history of Discovery's project in the Slovak Republic. Consistent with Discovery's original claims that it undertook the Preliminary EIAs as part of an agreement with the local citizens, Mr. Lewis' update confirms precisely that. Mr. Lewis explained that "***because of the assurances made by the activist groups****, we agreed to [submit the Preliminary EIAs] as a sign of good faith, to build trust*":[226]

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224 Report from Mr. Lewis dated 28 March 2017, **R-165**.

225 Report from Mr. Lewis dated 21 April 2017, **R-147**.

226 Report from Mr. Lewis dated 28 February 2019, **R-166**.

> It should be emphasized that up until October 2018, Alpine was fully entitled to drill exploration wells on its licenses without completing a preliminary EIA process, as Alpine's licenses had been issued before the preliminary EIA process had become a mandatory legal requirement on 1 January 2017. We were thus not subject to the new law, as was publicly acknowledged by the Minister of Environment at the time. Nevertheless, because of the assurances made by the activist groups, we agreed to meet this requirement as a sign of good faith, and to build trust.

* * *

184. The evidence is overwhelming: AOG voluntarily undertook the Preliminary EIAs because that is the deal it struck with the local citizens. Discovery's new position—that AOG only undertook the Preliminary EIAs because of Minister Sólymos—is an invented story, concocted after-the-fact. In any event, even if Discovery undertook the Preliminary EIAs because of Minister Sólymos (it did not), no one ever promised Discovery that its Preliminary EIAs could not, depending on the findings, lead to requiring the Full EIAs.

185. And it is to that topic which the Slovak Republic now turns.

3. No promises or assurances were made to Discovery as to the outcome of the Preliminary EIAs

186. Discovery repeatedly argues that its decision to perform Preliminary EIAs was beyond its legal obligations and outside the scope of the law. Indeed, it even claims that the District Offices should have dismissed Discovery's Preliminary EIAs due to lack of jurisdiction.[227] By making this argument, Discovery implies that, because it submitted to the Preliminary EIA process voluntarily, the resulting Full EIAs that the District Offices ordered were themselves inappropriate or even illegal.

187. In substance, therefore, Discovery apparently believes that, by agreeing to do Preliminary EIAs, the results of that assessment could only end one way: that no Full EIA would be required, or that it could ignore any contrary conclusion. This is nonsensical. By voluntarily submitting to the Preliminary EIAs, as the Slovak Republic explains in Section IV.A.4 below, Discovery subjected itself to the Preliminary EIA process, and it was required to abide by the results of that assessment. And no one from the Slovak Republic made any promise to the contrary.

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227 Claimant's Reply, ¶ 335(1).

188. The EIA process is prescribed by Slovak law, in accordance with the EIA Directive from the EU. In fact, when the District Offices began ordering Full EIAs, Discovery's own consulting company, which was responsible for completing Discovery's applications, explained this to Discovery:[228]

> Alex,
>
> here is comment to Bardejov´s decision from Chempro (I asked Martina for precise translation):
>
> Unfortunately, the EIA related legislation sets out that if during the screening procedure, the responsible authority passes a decision, that the proposed activity be assessed according to the Law, the assessment process shall continue as if the assessment was obligatory. The scope of assessment and the time schedule is determined by the responsible authority in cooperation with the authority of the responsible ministry and the authority that issues the permit, after having negotiated with the applicant. The scope is determined under Annex 11 of the Law on the EIU. As for the screening procedure, I elaborated it under Annex 9 and Annex 11 is, in fact, "a more detailed EIA" – that is the difference y ou asked about.

189. Discovery's lawyers then repeated this view in their own exchange with Discovery, explaining that Discovery could appeal the decision if it so desired:[229]

> Hi Alex,
>
> the District Office, based upon the screening procedure and statements of all the concerned authorities and other subjects (among others, naturally, also the meaningless objections of the activists), decided that the exploratory drill has to be assessed in the full EIA procedure. This means at least another 6 months, but more probably 1 year, of full EIA procedure.
>
> It is possible to appeal this decision. District Office Prešov is the respective authority that will be deciding on the appeal.

190. If Discovery believed that voluntarily submitting to the Preliminary EIAs meant that a Full EIA could not be imposed, it formed that flawed belief on its own mistaken understanding—despite being represented by attorneys and expert advisors.[230]

4. Minister Sólymos actually defended Discovery and rejected calls by local citizens to cancel the Exploration Area Licenses

191. Finally, the so-called "*unjustified public interventions*" from Minister Sólymos were, in fact, *supportive* of Discovery, and not *hostile* toward it. Minister Sólymos rejected

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228 Email from A. Fraser to V. Beran dated 7 September 2017, **R-167**.

229 Email from A. Fraser to V. Beran regarding Smilno EIA results dated 7 September 2017, **R-168**.

230 Email from M. Lewis to A. Fraser and attorneys, 5 February 2017, ("*So long as we agree that this is an informal process, not requiring the meeting of any requirements, that we would perform in cooperation with them so that they know everything is covered, I agree. I hope you know what I mean. I just don't want to get into some protracted approvals process that takes months to clear up*..."), **R-169**.

calls for AOG's Exploration Area Licenses to be canceled and sought to diffuse the tension, created by AOG, with the local citizens.

192. On 17 January 2017, Minister Sólymos explained in a press release that the current "*tense*" atmosphere was difficult but that "*[w]e want to keep the discussion on the issue at a professional level and without hateful emotions*."[231] Just 10 days later, on 27 January 2017, Minister Sólymos issued another press release in which he explained that, despite calls from some local citizens to revoke AOG's Exploration Area Licenses, "*there is no legal or legitimate reason*" to do so. Minister Sólymos even explained that he would probably become popular if he were to do "*something outside the law*", but confirmed that he would not do so. As he explained, "*[w]e must act within the law*", his goal being to "*calm the situation*":[232]

> What is the Ministry's take on the situation? "There is a company that has obtained the licence back in 2006. According to the applicable legislation, the company had complied with all the conditions and has been here since then. This is like a driving licence. Their driving license has been granted in 2006 and there is no legal or legitimate reason for its revocation, unless they do something illegal. This what the Ministry has on its desk," told us the head of the environment sector.
>
> "We must act within the law. Even if I became quite popular if I did something that is outside the law, I am not going to do it," noted the Minister. He emphasizes that his goal is to calm the situation.
>
> "It is important that local people know that we are going to do our best to alleviate their concerns and that mutual communication be normal, free from emotions and that it occurs at expert level."

193. Further, on 15 February 2017, following a ministerial inspection of AOG's operations at Smilno, Minister Sólymos again explained that there is "*no legal option to stop the exploratory drilling in Smilno*."[233] He also reiterated that "*[c]ompliance with the law is the alpha and omega for us, so we will appeal for expertise and objectivity in the discussion on this topic*."[234] Ultimately, as Minister Sólymos testifies in his second witness statement, "*we did everything that was in our powers to help AOG's project*."[235]

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231 Ministry of Environment Press Release dated 17 January 2017, **C-163**.

232 Korzar Article –Minister Comments on the Borehole Near Smilno dated 27 January 2017, **C-164**.

233 Ministry of Environment Press Release dated 15 February 2017, **C-168**.

234 Ministry of Environment Press Release dated 15 February 2017, **C-168**.

235 Sólymos Second WS, ¶ 9.

194. In short, the public interventions that Discovery decries in its Reply show the exact opposite of what it suggests: Minister Sólymos and the MoE were actually *supportive* of AOG.

H. Discovery has no justification for its failure to pursue remedies under Slovak law for the Full EIA decisions

195. Yet another failure by AOG was its decision not to appeal two out of the three Preliminary EIA decisions.[236] In its Reply, Discovery devotes countless pages criticizing these Preliminary EIA decisions for being arbitrary and unlawful.[237] Those are *precisely* the grounds that AOG should have raised in an administrative appeal of those decisions.

196. Nor would such appeals have been futile. When AOG appealed the Ruská Poruba EIA Decision,[238] the District Office in Prešov—who was the appellate authority for *all three* EIA decisions—decided in AOG's favor.[239] In other words, AOG already prevailed once before the authority who would decide on the other two appeals.

197. Despite its victory before the appellate body, Discovery now claims that it did not appeal the other two Preliminary EIA decisions because AOG "*had no confidence that—even if the decisions were overturned and then remitted back to the District Offices for reconsideration—it would be treated fairly by the District Offices*."[240] Discovery's arguments are easily dismissed.

198. First, Discovery's argument is wrong as a matter of law. The District Offices are bound by the decisions and objections of the appellate authority.[241] Thus, if the appellate authority holds that the District Offices were incorrect in their analyses, those District Offices are obliged to follow their decisions.

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236 Claimant's Counter-Memorial, ¶¶ 204-209.

237 Claimant's Reply, ¶¶ 168-175.

238 Interestingly, AOG appealed only the EIA decision in relation to Ruská Poruba, where, as explained above, AOG did nothing.

239 Respondent's Counter-Memorial, ¶ 206.

240 Claimant's Reply, ¶ 187.

241 Administrative Procedure Code, Art. 59(3), **R-170**.

199. Second, contrary to Mr. Fraser's claims, the remanded proceedings would not be repeated from the start.[242] Rather, the District Offices would only remedy the deficiencies identified by the appellate authority.[243] Applying this principle to Discovery's case: they would not start the process anew.

200. The truth is that Discovery did not pursue appeals for the other two Preliminary EIA decisions because it had run out of money. By early 2017,[244] after years of unsuccessful efforts to find critical funding, Discovery was cash starved. By 2 August 2017, when the first Full EIA was ordered (the Smilno EIA Decision), Discovery's finances had not improved. In fact, just days earlier, on 26 July 2017, AOG suggested to JKX and Romgaz that it should start selling physical materials "*as a short term measure to finance, if possible, the upcoming license payment*":[245]

> **General**
>
> Finally, we suggest it is worth selling the casing, wellheads and other consumables that we are currently holding in stock, as a short term measure to finance, if possible, the upcoming license payment. This would allow us to limit the partner cash calls until there is more clarity as to whether we can finally get access to well locations and drill. The total book cost of the inventory is approximately €350,000. We would try to get the best price available, of course. But clearly, we would have to accept a significant discount.
>
> Please feel free to raise any questions or comments, as always.

201. The scattershot of excuses that Discovery offers in its Reply for not pursuing appeals of the other Preliminary EIA decisions—despite prevailing on the one that it did appeal—are made-for-arbitration arguments. The simple, undeniable reality is that AOG ran out of money and that is why it chose to walk away from its project and instead, prepare grounds for bringing claims in international arbitration.

I. Discovery admits that it needed numerous other permits and authorizations to proceed and asks that the Tribunal simply assume this would have happened

202. In its Counter-Memorial, the Slovak Republic listed the basic permits, authorizations, and other administrative consents Discovery needed just to move from oil and gas exploration to exploitation.[246] As the Slovak Republic explained, and Discovery does

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242 Email from Alexander Fraser, 5 October 2017, p. 1, **C-383**; *see also* Fraser Second WS, ¶ 37.

243 Administrative Procedure Code, Art. 59(3), **R-170**.

244 *See supra* ¶¶ 28, 72-77.

245 Letter from Michael Lewis dated 26 July 2017, **C-376**.

246 Respondent's Counter-Memorial, ¶ 33.

not disagree, Discovery would have needed most (if not all of these) at various points throughout its project.

203. Had Discovery continued prospecting for oil and gas, it would have been obligated to secure at least 10 more permits or authorizations to actually exploit those hydrocarbons.

204. Rockflow's latest development plan calls for 40 exploration wells, followed by 33 oil production wells, followed by 66 gas production wells—in total, 139 wells drilled throughout Eastern Slovakia.[247] Each one of those wells would be subject to all of the permitting described in the Slovak Republic's Counter-Memorial. For instance, an EIA is obligatory for *any* exploitation well. So, too, are mining permits. It is simply not credible for Mr. Lewis to claim that "*the project would have proceeded to these stages had it not been for Slovakia's conduct*."[248] To casually assume this shows just how speculative Discovery's case remains—not to mention the fact that the development plan that would be subjected to this permitting process never existed before this arbitration.

J. Discovery's case on liability now rests entirely on requests for adverse inferences

205. With no evidence that supports its claims (including witness testimony from the key players who were actually in Slovakia), Discovery attacks the Slovak Republic's document production and boasts of its own. Discovery claims that it disclosed "*over 2,000 documents*" whereas Slovakia only produced 40.[249] It claims that Slovakia "*has failed to provide a satisfactory explanation for its woeful disclosure*" and, as a result, Discovery asks the Tribunal to "*draw certain adverse inferences against Slovakia*."[250] All of this was obviously planned and nothing the Slovak Republic disclosed in production would have changed Discovery's strategy.

206. *First*, Discovery probably did produce 2,000 documents in total; however, the reason it did was because it *excluded* from its Memorial *all of the geological data* underpinning its quantum case. Specifically, the Slovak Republic was required to request in document production: (*i*) the Petrel seismic interpretation project that Mr. Atkinson

247 SLR Second Report, ¶ 59.

248 Lewis Second WS, ¶ 22(g).

249 Claimant's Reply, ¶ 9.

250 Claimant's Reply, ¶ 9.

relied upon in his first report (**Request 52**), (*ii*) the Kingdom seismic interpretation project Mr. Atkinson relied upon for his PIIP calculations (**Request 53**), (*iii*) all of the underlying data from the Ceranka study (**Request 54**) that Mr. Atkinson relied upon, and (*iv*) Dr. Moy's MBal digital inputs (**Request 55**). To put into perspective how large these zip files are, the Petrel seismic project alone *comprised more than 600 documents*.

207. On top of these documents on which Discovery built its quantum case (but failed to include with its Memorial), the Slovak Republic was also obligated to request the most basic of documents supporting other parts of its case. Examples of those documents include: the JOA Agreements with JKX and Romgaz (**Request 7**); the Akard Agreement (**Request 40**); the Gulf Shores Agreement (**Request 41**); and Discovery's communications with investors, whom it claimed would not invest because of the Slovak Republic's actions (**Requests 45 and 46**).[251]

208. In short, the reason why Discovery had so many documents to produce was because it inexplicably withheld them when it filed its Memorial.

209. *Second*, Discovery sent the Slovak Republic *one letter* about document production.[252] When the Slovak Republic explained why certain documents did not exist,[253] Discovery rejected those responses. It was never interested in what the Slovak Republic had to say—all of this was tactical.

210. *Third*, Discovery seeks adverse inferences for almost every single part of its case on liability:

(a) Discovery seeks adverse inferences related to the state prosecutor,[254] even though the Slovak Republic already informed Discovery why no documents exist.[255] In any event, Dr. Slosarčíková testifies in her second witness statement

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251 Respondent's Responses and Objections to Claimant's Redfern Schedule, 23 May 2023, **R-223**.

252 Letter from Signature Litigation LLP to Squire Patton Boggs (US) LLP, 15 June 2023, **C-415**.

253 Letter from Squire Patton Boggs (US) LLP to Signature Litigation, 22 June 2023, **C-416**.

254 Claimant's Reply, ¶ 97.

255 Letter from Squire Patton Boggs (US) LLP to Signature Litigation, 22 June 2023, **C-416**.

that she was not obliged to prepare any report related to her trip to Smilno exist.[256]

(b) Discovery seeks adverse inferences related to the traffic inspectorate's decision to deny the Smilno Municipality's road sign scheme,[257] even though the inspectorate told AOG why contemporaneously: the field track was not a PSPR.[258]

(c) Discovery seeks adverse inferences related to the MoA's denial of the Amendment,[259] even though AOG knew it was denied because it missed the deadline.[260]

(d) Discovery seeks adverse inferences regarding LSR's communications with the MoA about the new lease agreement AOG sent to LSR,[261] even though AOG knew contemporaneously that LSR did not forward it to the MoA and that was why the MoA did not receive it.[262]

(e) Discovery seeks adverse inferences because the Slovak Republic did not produce documents showing the so-called instruction from higher ups at the MoE to deny the Article 29 decision.[263] This is absurd and is asking the Slovak Republic to prove a negative. In any event, Minister Sólymos confirms in his second witness statement, as the highest authority at the MoE at the time, that there was no instruction.[264]

(f) Finally, Discovery seeks adverse inferences regarding the Preliminary EIA decisions.[265] Again, the Slovak Republic already explained to Discovery why

256 Slosarčíková Second WS, ¶ 6.

257 Claimant's Reply, ¶ 109.

258 Email from Mr Fraser dated 26 October 2016, **C-340**.

259 Claimant's Reply, ¶ 124.

260 *See infra* ¶ 336.

261 Claimant's Reply, ¶ 132.

262 *See infra* ¶ 352.

263 Claimant's Reply, ¶ 138(4).

264 Sólymos Second WS, ¶ 12.

265 Claimant's Reply, ¶ 183.

no "drafts" of these decisions exist and why no communications between the District Offices were located.[266]

211. All that the above represents is that Discovery has fallen so short of meeting its burden of proof that its case now rests on ill-founded requests for adverse inferences.

212. Finally, Discovery's complaints about the Slovak Republic's production is only to mask its own document production deficiencies. Specifically, Discovery has hidden behind legal privilege to redact documents that (*i*) are not drafted by lawyers and (*ii*) have no lawyer on copy. Despite redacting over 50 documents on the basis of legal privilege, Discovery has only produced a privilege log identifying six of these. All of its other claims of privilege have gone unexplained.

213. It is obvious that Discovery is taking an overexpanded view of what constitutes legal privilege. For two of its requests, Discovery produced the same document. One was redacted on the basis of legal privilege and the other was not. Here is the redacted version:[267]

country and sue for compensation. He invited us to make a proposal as to what we can do to meet him on this issue, and our inclination is to say that provided we get s. 29 approvals for Kriva Ol'ka and all wells following, we will voluntarily submit to the preliminary procedure for new wells drilled after that. If they stop supporting us on s. 29, we can withdraw our cooperation on the preliminary procedure, since we won't be legally bound. [redacted] It will also be designed to help the Minister with his PR. Redacted for legal privilege

214. And here is the same document, unredacted:[268]

country and sue for compensation. He invited us to make a proposal as to what we can do to meet him on this issue, and our inclination is to say that provided we get s. 29 approvals for Kriva Ol'ka and all wells following, we will voluntarily submit to the preliminary procedure for new wells drilled after that. If they stop supporting us on s. 29, we can withdraw our cooperation on the preliminary procedure, since we won't be legally bound. Our lawyers are working up a proposal which we will share with you when we have it. It will also be designed to help the Minister with his PR.

215. There are no lawyers on this exchange. That alone destroys any claims of privilege. But even then, Mr. Fraser's sentence "*[o]ur lawyers are working up a proposal which we will share with you when we have it*" is not privileged. Not even close. This approach to privilege, and Discovery's failure to put all 50+ documents on its privilege

266 Letter from Squire Patton Boggs (US) LLP to Signature Litigation, 22 June 2023, **C-416**.

267 Email from A. Fraser to N. Smith and M. Lewis dated 15 December 2016 (Redacted), **R-213**.

268 Email from A. Fraser to N. Smith and M. Lewis dated 15 December 2016 (Unredacted), **R-214**.

log, raise justified concerns that Discovery is arbitrarily and improperly exerting privilege to its benefit.

* * *

216. This is the state of play. The facts alone dispense with almost all of Discovery's claims. Against this backdrop, the Slovak Republic now turns to jurisdiction.

III. NO JURISDICTION

217. In its Reply, Discovery still falls short of showing that it is a qualifying "*investor*" with a qualifying "*investment*" under the BIT and the ICSID Convention.

A. Discovery has no qualifying investment under the BIT and the ICSID Convention

218. It is now clear from document production that, to the extent anyone actually made an investment in the Slovak Republic, it was Mr. Lewis, other companies he owned or controlled, and Akard. In other words, Discovery has not made a qualifying investment under the BIT and the ICSID Convention.

1. Discovery is a pass-through entity

219. Discovery is nothing but a shell company. It has no identifiable assets, and its only shareholder is Mr. Lewis. As Discovery now admits in its Reply, Discovery is nothing but a pass-through entity.[269]

220. As the facts now stand, USD 2.0 million of the USD 3.7 Discovery claims as its sunk costs came from a personal loan that Mr. Lewis made to Discovery:[270]

> **Background:**
>
> I loaned about $2.0 Million from January 2013 through September 2015 to pay for almost all of DG's share of the geological and geophysical work required to progress the Alpine project in Slovakia.

269 Claimant's Reply, ¶ 248.

270 Akard Notice of Default dated 2 January 2017, **R-142**.

221. Moreover, it appears that other entities Mr. Lewis owns or controls contributed funds into AOG, specifically Discovery GeoServices Corporation and Alpha Exploration, LLC:[271]

> 20.4.Alpine currently has no loans payable other than loans payable to DP or its subsidiaries, or Discovery GeoServices Corporation, or Alpha Exploration, LLC.
>
> 20.5.Alpine is in good standing.

222. An additional USD 1.95 million came from Akard:[272]

> Although AKARD has now advanced approximately $1.95 Million towards the Alpine project, it has also incurred significant arrears on its funding obligations for the period since signing the Agreement. I have had to defer $210,000 in salary due from DG, and to loan over $200,000 to the group, and Alex Fraser has had to defer $90,000 in salary due from DG, all in order to enable the financing of expenditures which AKARD was supposed to fund. In addition to regular overhead and operational costs, these expenditures have also included items that were undertaken specifically at AKARD's request (on "handshake deals"), such as a TDE invoice for Hungary preparations, the additional MT work to fine-tune the prospects and provide a Smilno-1 correlation.

223. In other words, in availing itself of the protections under the BIT, Discovery is claiming credit for amounts that Mr. Lewis invested personally (including amounts from third parties that he owns or controls) and that Akard invested on its own accord. Neither Mr. Lewis, his other companies, or Akard are parties to the present arbitration.

2. Discovery has no investment under the BIT

224. The Slovak Republic explained in its Counter-Memorial that Discovery does not have a qualifying investment under the US-Slovakia BIT because Discovery has not made any contribution and/or act of investing.[273]

225. Remarkably, Discovery disputes the idea that a contribution or act of investing is required to meet the definition of investment under the US-Slovakia BIT.[274] However, the tribunal in *Standard Chartered Bank* held that there must be "*some activity of*

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271 Agreement between Discovery and Akard dated 23 October 2015, Art. 20.4, **C-282**.

272 Akard Notice of Default dated 2 January 2017, **R-142**.

273 Respondent's Counter-Memorial, ¶¶ 223-226.

274 Claimant's Reply, ¶¶ 204-208.

investing"[275] and thus, "*[t]o be considered to have made an investment, [the investor] must have contributed actively to the investment*."[276] Discovery did not.

226. Discovery attacks the *Standard Chartered Bank v. Tanzania* award, claiming that it is an outlier.[277] It is not. The *Standard Chartered Bank* tribunal reached its decision on the basis of several indicators in the language of the UK-Tanzania BIT—many of which are applicable here.

227. *First,* the *Standard Chartered Bank* tribunal examined the object and purpose of the UK-Tanzania BIT, finding that it was born out of a desire to "*create favorable conditions for greater investment by nationals and companies of one State in the territory of the other State*".[278] As set out in the preamble, the UK and Tanzania were focused on increasing "*investment **by** nationals and companies*".[279] The use of the word "*by*", as considered by the tribunal, "*signifies that the company of the first State is the **actor, and implies an active role of some kind for that company***."[280]

228. Similarly, the preamble of the US-Slovakia BIT states that "*Desiring to promote greater economic cooperation between them, **with respect to investment by nationals and companies of one Party** in the territory of the other Party*".[281] The use of the word "*by*" denotes—as the *Standard Chartered Bank* tribunal held[282]—that Discovery is the actor and must have an active role of some kind.

229. *Second,* the *Standard Chartered Bank* tribunal found that the contracting parties must have "*contemplated a cause-and-effect relationship between the Treaty's*

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

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

277 Claimant's Reply, ¶ 204.

278 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 227, **RL-042**.

279 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 228, **RL-042**.

280 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 228, **RL-042**.

281 BIT, Preamble, p. 1, **C-1**.

282 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 228, **RL-042**.

'encouragement and protection […] of such investments' and the increased prosperity and individual business initiative that was the desired result."[283] This reading, as the tribunal held, "*is consistent with an active role contemplated for the investor*."[284]

230. The US-Slovakia BIT contains a similar "*cause-and-effect relationship*". The language in the preamble shows a clear pathway between (*i*) the "*[d]esir[e] to promote greater economic cooperation*, (*ii*) the need to "*agree[] upon the treatment to be accorded such investment* as part of the promotion, and (*iii*) the recognition that it will then "*stimulate the flow of private capital and the economic development of the Parties*".[285] This makes sense: if the investor did not have an active role in its alleged investment, that defeats the purpose of the BIT—which is to promote investments.

231. Contrary to Discovery's claim that reaching the same conclusion here would require departure from the ordinary meaning of the BIT, it is precisely the ordinary meaning that obligates Discovery to show that it contributed actively to its alleged investment.

232. Here, it is apparent that whatever contribution was made to AOG's activities under the Exploration Area Licenses, they were not made by Discovery:[286]

(a) Mr. Lewis (and his other companies) loaned Discovery or AOG USD 2.0 million that it claims to have invested up until September 2015;[287] and

(b) After September 2015 (*i.e.*, after Discovery finally found an external funder), it was Akard who financed USD 1.95 million.[288]

233. As such, Discovery has failed to prove that it has an eligible "investment" under the BIT and, therefore, the Tribunal lacks jurisdiction *ratione materiae*.

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283 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 228, **RL-042**.

284 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 228, **RL-042**.

285 BIT, Preamble, p. 1, **C-1**.

286 Respondent's Counter-Memorial, ¶¶ 226-227.

287 Akard Notice of Default dated 2 January 2017, **R-142**.

288 Akard Notice of Default dated 2 January 2017, **R-142**.

3. Discovery has no investment under Article 25 of the ICSID Convention

234. The Slovak Republic also explained in the Counter-Memorial that Discovery does not have a qualifying investment under Article 25 of the ICSID Convention.[289]

235. In its Reply, Discovery claims that (*i*) the BIT's definition of "*investment*" automatically satisfies Article 25(1) of the ICSID Convention and (*ii*) in any event, it made an "*investment*" within the meaning of Article 25(1).[290] Neither is correct.

236. Discovery cannot claim that it satisfies Article 25 of the ICSID Convention by reference to the BIT. It must demonstrate an investment within the meaning of the BIT and Article 25:

> In examining whether the requirements for an "investment" have been met, ***most tribunals apply a dual test***: whether the activity in question is covered by the parties' consent and whether it meets the [ICSID] Convention's requirements. If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of investment will be relevant. ***In addition, the tribunal will have to establish that the activity is an investment in the sense of the Convention. This dual test has at times been referred to as the "double keyhole" approach or as a "double barrelled" test***.[291]

237. Most tribunals consider that an investor must demonstrate the following requirements: a contribution or allocation of resources, a certain duration, and risk.[292] Some tribunals have altered the weight of each criterion depending on the circumstances of each case. For example, certain tribunals have held that the contribution must be "*significant*" or "*substantial*".[293] Indeed, the requirements that the commitment be "*substantial*" and have "*significance for the host State's development*" were very much "*part of the [ICSID] Convention's object and purpose*."[294] The Slovak Republic agrees: the

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289 Respondent's Counter-Memorial, ¶¶ 249-253.

290 Claimant's Reply, ¶¶ 234-244.

291 C. Schreuer *et al*., *The ICSID Convention: A Commentary* (2nd ed.), Cambridge University Press, ¶ 124, **RL-117**.

292 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 52, **RL-118**.

293 *See, e.g.*, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 53, **RL-119**; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶¶ 123-124, **RL-120**; C. Schreuer *et al*., *The ICSID Convention: A Commentary* (2nd ed.), Cambridge University Press, ¶ 153, **RL-117**.

294 C. Schreuer *et al*., *The ICSID Convention: A Commentary* (2nd ed.), Cambridge University Press, ¶ 153, **RL-117**; *see also Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7,

contribution required to qualify as an "*investment*" under Article 25(1) of the ICSID Convention must be significant.

238. Taken together, it is clear that Discovery has not met the requirements under Article 25(1) of the ICSID Convention.

239. *First*, Discovery has not shown that it made a substantial contribution. Discovery has now admitted that its total sunk costs amount to a paltry USD 3.7 million, comprised of the following:[295]

(a) **EUR 153,054**, being the initial acquisition cost of AOG;

(b) **GBP 120,000**, being the cost of the overriding royalty Discovery acquired from San Leon; and

(c) **EUR 2.8 million**, being the alleged costs that AOG incurred from March 2014 until 2020.

240. And yet these sums are *still* too high. Aurelian sold the royalty to Alpha Exploration, LLC—a company "*affiliated with Discovery*" according to Mr. Lewis—[296] for GBP 120,000 in January 2015.[297] Alpha Exploration LLC then transferred the royalty to Discovery Polska, LLC for nominal consideration of USD 10.[298] Accordingly, Discovery paid only USD 10 for the royalty. Further, Discovery has been noticeably vague about whether this EUR 2.8 million incurred from March 2014 to 2020 *includes* the amounts that Akard invested in the project. There is reason to believe that it does.[299]

Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 29 ("*It is thus quite natural that the parameter of* ***contributing to the economic development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty***."), **RL-121**; *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶ 124 ("*The Tribunal therefore considers that, on the present facts, for it to constitute an 'investment' under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.*"), **RL-120**.

295 Claimant's Reply, ¶ 468.

296 Lewis First WS, fn. 5.

297 Claimant's Reply, ¶ 38.

298 Assignment of Overriding Royalty Interest dated 3 November 2015, **C-84**; Claimant's Reply, ¶ 39.

299 *See infra* ¶¶ 722-724.

241. *Second*, in any event, even assuming that the USD 3.7 million is the true amount that "Discovery" invested, all of these funds came from Mr. Lewis, his other companies, and Akard.

242. Although some tribunals have accepted that the origin of capital is irrelevant in assessing the existence of a contribution, they nonetheless require "*an economic link between the funds and the investor which is such that the contribution made with the funds is that of the investor*."[300] In other words, as observed by the tribunal in *Rand v. Serbia*, "*[w]hat matters is that the investor is the one ultimately bearing the financial burden of the contribution*."[301]

243. In *Rand v. Serbia*, the tribunal examined, among other things, whether the same contribution can be credited to a special purpose vehicle company, called Sembi, which acquired and paid for rights in certain beneficially owned shares, or its ultimate beneficial owner, Mr. William Rand, who funded Sembi for the acquisition of the investment.[302] The *Rand* tribunal was satisfied that the funding of Sembi's acquisition of the rights in the beneficially owned shares constituted Mr. Rand's contribution.[303] The tribunal, however, concluded that the special purpose vehicle, Sembi, did not make a contribution and thus did not satisfy the requirement of a qualifying "*investment*" under Article 25(1). The *Rand* tribunal stated:

> Mr. Rand and Sembi claim to have made one and the same investment being Sembi's acquisition of an interest in the Beneficially Owned Shares. For this investment, they allocated the same resources as their contribution. As explained above, ***this contribution is to be considered as Mr. Rand's contribution. Sembi, in fact, has made no contribution of its own.*** It follows that one of the elements of the definition of investment under Article 25(1) of the ICSID Convention is not met. The Tribunal thus does

300 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 237, **CL-099**.

301 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 237, **CL-099**.

302 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶¶ 240-250, **CL-099**.

303 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 276, **CL-099**.

> not have *ratione materiae* jurisdiction to determine Sembi's claims.[304]

244. The water is similarly muddled here. While Discovery claims to have made a qualifying "*investment*", the evidence is clear that any contributions were made by Mr. Lewis (and his other companies) and Akard—none of whom appear as claimants in this arbitration. According to Discovery, it was Mr. Lewis who provided the USD 2 million personal loan until September 2015, when Akard came in and funded the USD 1.95 million.[305] Discovery, on the other hand, made "*no separate contribution towards this investment*" and therefore "*cannot claim to have an investment of its own*."[306] Put simply, whatever contribution that was made, it was not made by the claimant in this case. Discovery therefore cannot use Mr. Lewis' and Akard's contributions to access arbitration. Nor can it use other funds invested from Discovery GeoServices and Alpha Exploration, LLC.

245. Furthermore, Discovery's claim that it made a "*further contribution*" by paying AOG's annual Exploration Area License fees is unavailing.[307] The claimants in *Rand v. Serbia* made a similar claim, which the tribunal rejected because "*while payments were formally made by [one claimant], he did so with money originating from a loan that Mr. Rand [the true claimant] arranged and was liable to repay*."[308] That, too, is the case here. While payments were formally made by Discovery/AOG, it did so with money that originated from Mr. Lewis and Akard—where the "*clear economic link*" lies.[309]

246. *Second*, Discovery took no risks. It is a shell company with no assets that took loaned amounts from other people and used that to "invest" in the Slovak Republic. There is no risk here because Discovery's status as an LLC shell company with no assets

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304 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 276, **CL-099**.

305 *See supra* ¶ 232.

306 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 264, **CL-099**.

307 Claimant's Reply, ¶ 211(4); *see also* Claimant's Reply, ¶¶ 43, 209(3).

308 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 265, **CL-099**.

309 *Rand Investments Ltd v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 265, **CL-099**.

insulates it completely. As explained below, this is likely why Discovery seeks amounts for Akard on Akard's behalf in this arbitration.[310] Akard has no hopes of collecting on that debt otherwise because Discovery has no assets from which Akard could ever collect.

247. *Third*, Discovery's use of corporate forms invokes the question of whether the investment is *bona fide*.[311] It is obvious that Mr. Lewis has additional companies and that he transfers assets between them for nominal consideration (*i.e.*, the USD 10 royalty[312]). In effect, Discovery has now admitted the obvious: Mr. Lewis uses Discovery as a pass-through to benefit from his tax liabilities in the US.[313]

248. Thus, Discovery has failed to establish that it made an "*investment*" under Article 25(1) of the ICSID Convention.

310 *See infra* Section VI.C.

311 Respondent's Counter-Memorial, ¶¶ 254-257; *see also Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 114, **RL-122**; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Award, 30 March 2022, ¶¶ 218-221, **RL-123**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 October 2018, ¶¶ 260-262, **RL-124**.

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

313 Claimant's Reply, ¶ 248.

IV. NO BREACH OF THE TREATY

249. Discovery's case also fails because the Slovak Republic acted entirely consistent with its obligations under the BIT. The Slovak Republic shows below that each of Discovery's alleged breaches of the BIT are manifestly baseless.

A. The Slovak Republic did not violate the FET standard

250. In its Counter-Memorial, the Slovak Republic showed that the FET standard in Article II(2)(a) of the BIT is the minimum standard of treatment in customary international law.[314] In its Reply, Discovery advocates for a maximalist interpretation of "*fair and equitable treatment*" that goes far beyond the text of the US-Slovakia BIT. Discovery's position is unsupported.

251. The BIT entered into force in 1992. Consequently, awards that post-date it cannot shed light on the meaning of the FET standard in it. Instead, NAFTA's FET standard, which is the minimum standard of treatment under customary international law, is more indicative of the prevailing practice at the time the US-Slovakia BIT came into force.[315] The US is a party to both the US-Slovakia BIT and NAFTA (now USMCA), as it then was.

252. Here, the Tribunal should also be guided by the tribunal in *El Paso v. Argentina*, which had before it another US treaty whose FET standard was similarly-worded to the US-Slovakia BIT.[316] Interpreting that provision of the US-Argentina BIT, the *El Paso v. Argentina* tribunal held:

> ***[T]he position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard***. The Tribunal wishes to emphasize what is, in its view, the specific role played by both the general international minimum standard and the FET standard as found in BITs. The role of these similar standards is to ensure that the treatment of foreign investments, which are protected by the national treatment and the most-favoured investors'

314 Respondent's Counter-Memorial, ¶¶ 278-286.

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

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

> clauses, do not fall below a certain minimum, in case the two mentioned standards do not live up to that minimum.[317]

253. Numerous other treaty tribunals have also linked the FET standard to the minimum standard of treatment.[318]

254. Yet even if the Tribunal were to find otherwise, the Slovak Republic still accorded fair and equitable treatment to Discovery and AOG. The role of the Tribunal is not "*to sit on appeal against the legal correctness or substantive reasonableness of individual administrative acts or the judgments of a municipal court reviewing them*."[319] Rather, as the tribunal in *ECE v. The Czech Republic* held, the FET standard "*is about the operation of the State's administrative and legal system as a whole*."[320]

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317 *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 336, **CL-025**. Although Discovery argues that the *El Paso* tribunal held that it was "*futile*" to compare the content of the MST under customary international law with the BIT's FET standard, it is worth noting that the tribunal made this observation before it came to the conclusion that the FET standard was identical to the international minimum standard. *See* Claimant's Reply, ¶ 262.

318 *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, ¶ 292, **CL-043**; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, ¶ 190, **RL-125**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 284, **RL-096**; *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 291-294, **CL-017**; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008, ¶ 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, ¶¶ 335-337, **RL-059**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 292-300, **RL-104**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 586-592, **CL-023**; *Liman Caspian v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 263, **CL-038**; *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award, 29 July 2014, ¶¶ 392, 481, **RL-127**; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶¶ 483, 491, **RL-128**; *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, ¶ 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, ¶¶ 205-206, 208, **CL-090**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶¶ 520-521, **RL-072**; *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 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, ¶ 319, **RL-131**.

319 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.764, **RL-092**.

320 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.764, **RL-092**; *see also RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 599, **RL-132**; *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award, 29 July 2014, ¶¶ 394-395, **RL-127**.

255. Here, the Slovak Republic easily satisfies this standard. As explained above, the Slovak Republic routinely decided in AOG's favor in various administrative proceedings.[321] When Slovak authorities decided against AOG, the laws of the Slovak Republic afforded AOG the opportunity to appeal those decisions or secure its rights in different ways. Those remedies were not futile. As the record shows, when AOG decided to exercise its rights of appeal (which it rarely did), it usually prevailed. It is thus clear that the Slovak Republic ensured that its "*administrative and legal system as a whole*" worked properly. That is what international law requires of the Slovak Republic, and that is what the Slovak Republic delivered.

256. Against this backdrop, the Slovak Republic addresses Discovery's FET claims below. We begin with legitimate expectations.

1. The Exploration Area Licenses do not create any legitimate expectations

257. Investment treaty tribunals have made clear that, to give rise to a legitimate expectation, an assurance must (*i*) have precise content,[322] and (*ii*) be specifically addressed to the investor.[323] Moreover, (*iii*) the investor must have relied on the assurance[324] (*iv*) at the

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321 For instance, the MoE granted all the requested Exploration Area Licenses and always extended them as AOG sought. The MoE did so even despite strong objections by activists. Minister Sólymos even met with the Church in Prešov to diffuse tensions. *See* Email from Michael Lewis dated 28 June 2016, p. 1, **C-327**; AOG Status Report dated 1 August 2016, p. 1, **C-333**; Ministry of Environment Press Release dated 21 December 2016, **C-163**.

322 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 547, **CL-026**; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 535, **RL-133**; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 376, **CL-025**.

323 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 547, **CL-026**; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 119, 121, **RL-055**; *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, 8 June 2009, ¶¶ 620, 767, **RL-134**; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, ¶¶ 643-644, **RL-094**; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶¶ 241, 243, **RL-064**.

324 *Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 602, **CL-023**; *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, ¶ 835, **RL-135**; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 376, **CL-025**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-059**.

time it made the investment,[325] and (*v*) the expectation derived from the assurance must be legitimate and reasonable.[326]

258. The first alleged basis for Discovery's legitimate expectations are so-called "*clear and explicit/implicit representations and/or assurances*" included in the Exploration Area Licenses (including the 2016 Licenses).[327] Discovery originally claimed that the initial Exploration Area Licenses and the renewed 2016 Licenses "*all contained representations to the licence holder that it would be permitted to carry out geological deposit exploration*" and that "*[t]hese representations were both clear and specific to AOG*."[328] On this basis, Discovery alleged four "*legitimate expectations*" that it claims arose from the Exploration Area Licenses:

(a) AOG "*would not be prevented from completing the geological exploration that it was permitted to conduct under the terms of the Licenses*";[329]

(b) AOG would "*be able to complete the necessary geological exploration works in all three blocks*" (*i.e.*, Svidník, Medzilaborce, and Snina);[330]

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325 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264, **CL-031**; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 956, **RL-051**; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.76, **RL-074**; *Frontier Petroleum Services Ltd v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 468, **CL-082**; *Continental Casualty Co v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 263, **CL-078**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 365, **RL-059**.

326 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 566, 602, **CL-023**; *Azurix v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318, **RL-060**; *Técnicas Medioambientales Tecmed S.A, v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154, **CL-021**; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 127, **RL-061**; *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98, **CL-020**; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.8-9.3.9, **RL-062**.

327 Claimant's Reply, ¶ 288.

328 Claimant's Memorial, ¶ 224.

329 Claimant's Memorial, ¶ 226(1).

330 Claimant's Memorial, ¶ 226(2).

(c) Discovery "*legitimately expected that the three blocks covered by the Licenses were designated areas for geological exploration, and that the Slovak State had already determined that such exploration was permissible*";[331] and

(d) Discovery "*legitimately expected that geological exploration could be carried out without any other relevant organ of the Slovak State objecting to such exploration so that no other organ would prevent the exploration*."[332]

259. Nonsense. As the Slovak Republic explained in its Counter-Memorial, there were no specific assurances in the Exploration Area Licenses that could possibly be understood to give AOG a 'blank check' to conduct its activities.[333] Rather, the Exploration Area Licenses gave AOG the right to prospect for oil and gas—but that right was not unfettered.

260. As Discovery now concedes,[334] there is an entire regulatory framework governing AOG's rights and obligations. Those are the rules and AOG must play by them. The suggestion that the mere possession of an Exploration Area License provides carte blanche authority that the holder of that document can undertake whatever activities it so desires is impossible to reconcile with long established Slovak law and regulation.[335]

261. Under Slovak law, holders of an Exploration Area License must obtain numerous other permits and consents to carry out specific exploration works, not to mention actual exploitation. The Slovak Republic already listed all of these permits in its Counter-Memorial,[336] and Discovery does not dispute any of them.

262. Faced with that response, Discovery revamped its legitimate expectations argument in its Reply and now claims that the Exploration Area Licenses "*imposed an express obligation upon AOG to carry out the 'geological task'*."[337] Therefore, Discovery argues, it "*legitimately expected that AOG would not be prevented from completing its*

331 Claimant's Memorial, ¶ 226(3).

332 Claimant's Memorial, ¶ 226(4).

333 Respondent's Counter-Memorial, ¶¶ 308-311.

334 Claimant's Reply, ¶ 14.

335 Respondent's Counter-Memorial, ¶¶ 310-311.

336 Respondent's Counter-Memorial, ¶ 33.

337 Claimant's Reply, ¶ 19.

geological exploration, across all three blocks, and without any relevant organ of the Slovak State objecting to or preventing such geological exploration."[338] Discovery's new interpretation of the Exploration Area Licenses is equally meritless.

263. Discovery bases this so-called "*express obligation*" on the word "*shall*" contained in the Exploration Area Licenses.[339] By way of example, the Exploration Area License from 18 June 2006 provides:[340]

> **Conditions for carrying out geological works**
>
> 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 in the prescribed form for permanent retention

264. Discovery misreads the Exploration Area License. The imperative "*shall*" relates to *how* the Exploration Area License holder must conduct its geological works—*i.e.*, the Exploration Area License holder is obligated to carry out geological works "*in accordance with the project of the geological task*." In other words, the obligation relates to the conditions under which the task is to be carried out—not the task itself. That interpretation is clear not only from the face of the Exploration Area Licenses, but also from Article 25(4) of the Geology Act, which likewise confirms that the exploration area holder has a right—not an obligation—to perform exploration activities.[341]

265. Accordingly, the Exploration Area Licenses did not impose any *obligation* to conduct exploration works, as Discovery suggests. Rather, the Exploration Area Licenses gave Discovery the *right* to carry out such works, subject to the conditions in each Exploration Area License and in accordance with Slovak law.

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338 Claimant's Reply, ¶ 22.

339 Claimant's Reply, ¶ 19.

340 Decision on determination of exploration area Svidník dated 18 July 2006, p. 5, **R-014**.

341 Geology Act, Art. 25(4) (in Slovak "*má […] právo*"), **R-042**.

266. The second alleged basis for Discovery's legitimate expectations concerns the renewed 2016 Licenses. Discovery initially claimed that the 2016 Licenses expressly permitted AOG to "*drill[] exploration wells of between 1200m and 1500m in depth, pumping tests and geophysical surveys*."[342] That assertion is likewise baseless. As the Slovak Republic explained in its Counter-Memorial, this language in the 2016 Licenses was a restatement of AOG's own application submitted to the MoE. It was not an acknowledgment or assurance by the MoE.[343]

267. In its Reply, Discovery now claims that these "*assurances were not merely a restatement of AOG's application*" but, rather, they "*were an adoption by Slovakia of a formal position in a 'Decision' under the heading 'Justification'*."[344] Therefore, Discovery argues, it "*would be difficult to conceive of more specific and explicit representations and/or assurances to induce an investment than those contained in the Exploration Area Licences*."[345] Not so.

268. It is common practice for administrative authorities—here the MoE—to summarize the *application* submitted, as well as the main submissions raised by participants to the proceedings, before it announces its administrative decision and its reasoning. As one of many examples, the express wording in the Exploration Area Licenses states: "*[a]s described in more detail in the application*" or "*[a]ccording to the filed application*."[346]

269. In fact, the 2016 Licenses explicitly state that in its application, AOG requested "*reduction of the size of the Exploration Area and extension of the term of validity of the exploration area by a time required for performance and completion of all works by **2024***."[347] But the MoE only approved an extension until 1 August 2021.[348] Discovery's argument that the MoE's quotation of AOG's application represents the

342 Claimant's Memorial, ¶ 226(1).

343 Respondent's Counter-Memorial, ¶ 309.

344 Claimant's Reply, ¶ 288.

345 Claimant's Reply, ¶ 288.

346 Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), p. 17, **C-13**.

347 Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), p. 16, **C-13**.

348 Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3 (Medzilaborce), p. 15, **C-13**.

"*adoption by Slovakia of a formal position in a 'Decision' under the heading 'Justification'*"[349] is therefore without merit. But in any event, as the Slovak Republic explained, all geological works under the 2016 Licenses were subject to specific conditions listed therein, including compliance with all statutory regulations and obtaining landowners' consent.[350]

270. In short, the MoE's summary of AOG's application in the 2016 Licenses comes nowhere close to represent an endorsement, adoption, or a specific assurance.

a. The 2016 Licenses post-date Discovery's investment and therefore cannot be the basis of any legitimate expectations

271. In any event, the 2016 Licenses cannot form the basis of a legitimate expectation because they post-date Discovery's 2014 alleged "investment". As the Slovak Republic explained in its Counter-Memorial, legitimate expectations are assessed at the time the investment is made.[351]

272. While Discovery appears to agree in principle, it argues that the time of making its investment should be interpreted more broadly and shall "*encompass the time when 'the investment was decided and made'*."[352] According to Discovery, the making of an investment is "*often a process rather than an instantaneous act*" which "*can take place incrementally over a certain period of time*."[353] Therefore, in reliance on *AES v. Hungary*, Discovery asserts that the Tribunal "*must […] assess whether Discovery held legitimate expectations: (1) as at March 2014 (when Discovery acquired AOG); (2) as*

349 Claimant's Reply, ¶ 288.

350 Respondent's Counter-Memorial, ¶¶ 309-310.

351 Respondent's Counter-Memorial, ¶ 309; *see also Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-059**; *see also Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318, **RL-060**; *Técnicas Medioambientales Tecmed S.A, v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154, **CL-021**; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 127, **RL-061**; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.8-9.3.9, **RL-062**.

352 Claimant's Reply, ¶ 271; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.12, **RL-062**.

353 Claimant's Reply, ¶ 275.

at July 2014 (when the 2014 Licences were granted); and (3) as at June 2016 (when the 2016 Licences were granted)."[354] Discovery misunderstands the case law.

273. In *AES v. Hungary,* AES Summit made its investment in 1996, when it purchased the outstanding shares of AES Tisza. AES later "*began to invest in (spend money on) the Retrofit of the Tisza II plant*" in 2001.[355] Therefore, the tribunal considered whether AES Summit could base its legitimate expectations on assurances given in two agreements concluded in December 2001.[356] The tribunal agreed because the agreements concluded in December 2001 preceded AES' investments in "*the Retrofit of the Tisza II plant*."[357]

274. In sharp contrast here, the Exploration Area Licenses in 2014 and 2016 do not contain any promise or assurance. Moreover, Discovery's decision to 'reinvest', *i.e.*, to renew its Exploration Area Licenses in 2016, must have been made at the time of its application for renewal at the latest.

275. Consequently, that decision to *renew* was made before these licenses were (re)issued and before the so-called "*clear and explicit/implicit representations and/or assurances*" made in the Exploration Area Licenses even appeared. As a result, Discovery cannot allege (nor does it) that it renewed the Exploration Area Licenses *because of* a specific promise or assurance given to it by the State.

276. Discovery also tries to shoehorn this case into findings from the tribunals in *Crystallex v. Venezuela*, *Frontier Petroleum v. Czech Republic*, and *Tethyan v. Pakistan*. These cases, however, are inapposite:

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354 Claimant's Reply, ¶ 273.

355 *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.13, **RL-062**.

356 *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.13-9.3.16, **RL-062**.

357 Claimant's Reply, ¶ 271; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 4.10(b) ("*AES Tisza would make a four-phased series of improvements ('Retrofit') to the power stations and, in order to finance the proposed retrofit, it could assign, and/or create security interests in the Amendment Agreement*."), **RL-062**.

- The tribunal in *Crystallex v. Venezuela* held that legitimate expectations must be examined "*for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment*."[358]

- Similarly, the tribunal in *Frontier Petroleum v. Czech Republic* found that "*legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment*."[359]

- Finally, the *Tethyan v. Pakistan* tribunal considered the impact of Pakistan's conduct following Tethyan's initial investment on Tethyan's legitimate expectations "*to the extent that it encouraged Claimant to continue investing in the Reko Diq Project and thereby to repeatedly confirm its investment decision*."[360]

277. Discovery therefore argues that "*Slovakia's decisions to renew and extend the Exploration Area Licences in July 2014 and June 2016 gave Discovery the confidence to continue to invest and fund AOG's exploration activities*" because each "*successive renewal and extension of the Exploration Area Licences was a 'decisive step' towards the 'expansion' and 'development' of Discovery's investment in Slovakia*."[361]

278. Discovery, however, does not explain how or why the renewals of the Exploration Area Licenses in 2016 should be considered a "*decisive step*" in Discovery's investments. The record shows that Discovery made its "*decisive step*" to acquire AOG and the Exploration Area Licenses in March 2014. Already at that time, Discovery had anticipated drilling exploration drills. The extension of its Exploration Area Licenses was merely an administrative tool to implement its original 2014 plan. Consequently, there was no "*expansion*" or "*development*" of Discovery's investment.

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358 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 557, **CL-026**.

359 *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 287, **CL-082**.

360 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 901, **RL-109**.

361 Claimant's Reply, ¶ 274(4).

279. In fact, the exact opposite occurred. Discovery repeatedly decided to *reduce* its exploration areas.[362] Most importantly, the sole reason that AOG sought to extend its Exploration Area Licenses in 2016 was because their terms were nearing the end, and AOG wanted to renew *the same* exploration project while it continued, ultimately unsuccessfully, to find investors to provide the necessary capital to fund further exploration activities.

b. Discovery's legitimate expectations must be considered in view of its refusal to take timely steps to obtain an SLO

280. Finally, the legitimacy and reasonableness of an investor's expectations must necessarily be informed by the "*political, social, cultural, and economic conditions*" in which the investment is made, including the investor's own conduct.[363] Accordingly, the legitimacy of Discovery's expectations must take into account the need for a SLO. The SLO concept encompasses notions of trust, legitimacy, social acceptance, and democratic participation in investments. It is used to define "*the level of tolerance, acceptance, or approval of an organization's activities by the stakeholders with the greatest concern about the activity*."[364]

281. In its Reply, Discovery attempts to formalistically narrow this principle by arguing that (*i*) the SLO "*has no basis in either domestic Slovak law or in relevant applicable rules of international law*",[365] and (*ii*) neither AOG nor Discovery are mining companies.[366] These arguments fail for two reasons.

282. *First*, although *South American Silver v. Bolivia* relied on the UNDRIP, the notion of "*political, social, cultural, and economic conditions*" in which the investment is made is much broader. Even in the absence of specific national or international rules, the investor cannot simply ignore the "*political, social, cultural, and economic conditions*"

362 Respondent's Counter-Memorial, ¶¶ 57, 216.

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

364 E. McConaughey *et. al*., *Social License to Operate*, in Investment Law and Arbitration, 10 March 2023, **RL-136**.

365 Claimant's Reply, ¶ 285.

366 Claimant's Reply, ¶ 286.

in which the investment is made. Rather, these are all factors that an investor must take into account and that should define an investor's legitimate expectations.[367]

283. Indeed, the *Bear Creek* tribunal recognized that "*[t]he concept of a 'social license' is closely related to the responsibilities of business enterprises to respect human rights*."[368] In other words, business enterprises must observe and operate in a manner respecting human rights of individuals that may be affected by its activities. The interrelation between international investment law and international human rights has recently been recognized by the *Urbaser* tribunal:

> The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. ***The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights***.[369]

284. Moreover, in its resolution of 8 October 2021, the UN Human Rights Council expressly recognized "*the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights*".[370] The fundamental freedoms of association,[371] peaceful assembly[372] and expression[373] are also essential to protect those who may be affected by an investor's activities. Thus, investors cannot make their investments in disregard of those rights.

285. *Second*, Discovery's argument that neither it nor AOG are mining companies—and thus the "*social license to operate*" does not apply—is misplaced. AOG engaged in oil and gas exploration activities, which involves the same or very similar deep drills as those

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367 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, ¶ 290, **CL-044**.

368 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 227, **RL-039**.

369 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶ 1200, **RL-137**.

370 Resolution adopted by the UN Human Rights Council on 8 October 2021, p. 3, **RL-138**.

371 Constitution of the Slovak Republic, Art. 29(1), **R-018**.

372 Constitution of the Slovak Republic, Art. 28(1), **R-018**.

373 Constitution of the Slovak Republic, Art. 26, **R-018**.

needed for mining[374] and with an ultimate aim to exploit.[375] Thus, the argument that oil and gas exploration companies do not have to take into account "*political, social, cultural, and economic conditions*" is incorrect. In any event, as explained in Section V.B.1 below, SLOs are not restricted to mining companies. Even Discovery contemporaneously recognized that "*the natural resources sector is a sensitive topic in many countries and can often arouse local tensions, and Slovakia is similar to many other countries in this respect*."[376]

286. Applying these principles here, at the time the 2016 Licenses were renewed, Discovery was already (*i*) meeting resistance by local citizens, (*ii*) embroiled in legal disputes stemming from its clashes with the local population, and (*iii*) dealing with the fallout of its numerous legal mistakes. Even assuming that the 2016 Licenses could form any legitimate expectations, those expectations must be measured against all of the circumstances at that time, including Discovery's own conduct.

* * *

287. Against this backdrop, the Slovak Republic turns to the actions Discovery claims violate its legitimate expectations regarding the Exploration Area Licenses. As shown below, Discovery's legitimate expectations claim is nothing more than a request for the Tribunal to hold the Slovak Republic responsible for Discovery's own errors.

2. Smilno: The Slovak Republic did not frustrate Discovery's legitimate expectations

288. Discovery claims that the Slovak Republic frustrated its legitimate expectations in Smilno in the following ways: the Police prevented Discovery from drilling at the Smilno Site when Discovery first tried to access it **(a)**, the state prosecutor prevented Discovery from drilling through an illegal intervention **(b)**, the Police refused to erect certain road signs that would have permitted AOG to access the Smilno Site **(c)**, and

374 Judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others v. Bundesminister für Wirtschaft, Familie und Jugend*, Case C-531/13, ¶¶ 30-31, **RL-139**.

375 Oil and gas exploration in fact falls under "mining activity" under the Act on Mining Activities. *See* Act on Mining Activities, Art. 2(a), **R-044**.

376 Email from Alexander Fraser dated 5 October 2017, p. 1, **C-383**.

the MoI issued "instructions" to the Police, which "*prevent[ed] AOG from completing its exploration activities*"**(d)**.[377]

289. All of Discovery's claims are baseless. The common thread at the Smilno Site is Discovery's argument that the Access Land qualified as a PSPR. As shown above and in the Counter-Memorial, however, it was AOG's legal mistakes and failure to obtain landowner consent that resulted in its downfall.

290. Discovery's arguments about the field track ask this Tribunal to step into the shoes of Slovak regulators and rewrite their assessment of this highly technical matter. Investment tribunals have routinely rejected calls to do just this:

- The tribunal in *B3 Croatian Courier v. Croatia* recognized that "*a certain level of deference is due to national agencies, tasked to regulate highly technical and specialized fields of economic activity (such as the [Croatian Competition Authority]), with regard to their assessment of whether particular forms of conduct ran counter to the prescriptions of national law*."[378]

- Similarly, the tribunal in *Servier v. Poland* recognized that it "*must accord due deference to the decisions of specialized Polish administrators interpreting and applying laws and regulations governing their area of competence*."[379]

- The tribunal in *Crystallex v. Venezuela* also held that "*in matters where a government regulator and/or administration is called to make decisions of a technical nature, those government authorities are the primary decision-makers called to examine the reports presented by the applying investor and the available scientific data*."[380]

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377 Claimant's Reply, ¶¶ 291-298.

378 *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award, 5 April 2019, ¶ 944, **RL-140**.

379 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award, 14 February 2012, ¶ 568, **RL-141**.

380 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 583, **CL-026**.

291. Finding otherwise would require the Tribunal to "*second-guess the substantive correctness of the reasons*"[381] for positions adopted by Slovak authorities in relation to the field track. That is not the role of an international arbitral tribunal. As shown above, AOG itself thought landowner permission or ownership was required at the time.[382] It only invented its PSPR Theory after-the-fact. The fact that AOG *itself* understood that the field track was not a PSPR—as shown by its attempt to acquire an ownership interest in the field track—speaks for itself.

292. Moreover, Slovak law provided AOG the opportunity to appeal numerous decisions by the Police or challenge actions of the Police and the state prosecutor.[383] There is no record of AOG invoking any of these remedies.

a. The Police did not unlawfully prevent AOG from drilling in Smilno when AOG first tried to access the Smilno Site

293. AOG tried to access the Smilno Site via the Access Land in late 2015, but without having acquired the right to use that land.[384] Ms. Varjanová, an actual co-owner of the land, objected to this and took "*plastic poles and a string with signaling flags*" from her ski resort, "*and implanted them in the ground*" on the Access Land to stop AOG. She left her phone number there, too.[385] Nobody from AOG called.

294. Thereafter, Ms. Varjanová parked her vehicle—again with a phone number visible on the front window—on the Access Land. Again, no one called.[386] Instead, when

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381 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 583, **CL-026**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012–17, Award, 24 March 2016, ¶ 505, **RL-142**.

382 *See supra* ¶¶ 107-112.

383 Act on Prosecution, Art. 31, **R-021**; Administrative Procedure Code, Art. 53, **R-170**; Act on the Misdemeanors, Art. 81, **R-218**; Act on Complaints, Arts. 1, 3, **R-219**.

384 Respondent's Counter-Memorial, ¶ 84; *see also* Letter from the Ministry of Environment to AOG dated 4 March 2016, **R-172**.

385 Varjanová First WS, ¶ 19. Contrary to Discovery's assertion, the Slovak Republic does not imply that Ms. Varjanová knew nothing about AOG until excavators came to Smilno. Ms. Varjanová expressly stated in her first witness statement that she learned about AOG before that. *See* Claimant's Reply, ¶ 76; Varjanová First WS, ¶ 10.

386 Varjanová First WS, ¶ 20.

Ms. Varjanová arrived at the Access Land, she found that her vehicle was moved and placed on adjacent land.[387]

295. As the Slovak Republic explained above, at the time of this attempted access, AOG knew that landowner consent was necessary.[388] Therefore, Discovery's argument that "*AOG did not need to obtain Mrs Varjanová's permission because the Road was publicly accessible*" is disingenuous and, in any event, wrong.

296. When the Police were called to intervene in December 2015, Ms. Varjanová was able to prove her ownership of the land. AOG could not. As a result, the Police could not order her to remove her car from land that she co-owned. That was her right. In fact, on 16 February 2016, Discovery actually admitted in internal documents that Ms. Varjanová had "*a legal right to park her car*" on the Access Land.[389] As a result, in a situation where Ms. Varjanová was able to clearly demonstrate her ownership of the Access Land and AOG was not, it is hardly surprising that the Police allowed Ms. Varjanová to park her vehicle on the Access Land.

b. The state prosecutor did not unlawfully prevent AOG from drilling at the Smilno Site

297. AOG returned to Smilno in June 2016. On this occasion:

(a) the Interim Injunction, which Ms. Varjanová had secured to prohibit AOG—and any contractors mandated by AOG—from accessing the field track while her lawsuit was pending, was already in place;[390]

(b) the Police as well as the state prosecutor were bound to respect it;

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387 Varjanová First WS, ¶ 20. As the Slovak Republic explained in its Counter-Memorial, AOG acted illegally when it moved Ms. Varjanová's vehicle. *See* Respondent's Counter-Memorial, ¶ 372. In response, Discovery argues that the fact that the District Office in Bardejov dismissed Ms. Varjanová's complaint about moving her vehicle implies that AOG acted legally. The District Office in Bardejov dismissed Ms. Varjanová's complaint because AOG's illegal act did not constitute a criminal offence. That, however, does not mean that it was not illegal. *See* Claimant's Reply, ¶ 80; Decision of Bardejov District Office – Case No. OU-BJ-OVVS-2016/002305-Pe, 14 March 2016, **C-302**.

388 *See supra* ¶¶ 107-112.

389 Report to Partners –Status Update dated 20 January 2016, **C-120**. Discovery tries to downplay the importance of this statement by arguing that while Ms. Varjanová, just as any other member of public, had right to park on the field track, she did not have the right to block it. However, it is clear from the context of the minutes that the discussion related to blocking of the track with parked car.

390 Respondent's Counter-Memorial, ¶ 101.

(c) AOG or any other parties employed by AOG, including Cesty Smilno, were not entitled to use the field track;

(d) the Mayor of Smilno, as well as the State-appointed traffic engineer, had already declined to declare that the field track was a PSPR;[391] and

(e) the drilling site was nowhere near ready for actual drilling.[392]

298. The target of Discovery's criticisms for this chapter concerns the state prosecutor, Dr. Vladislava Slosarčíková, who arrived to Smilno on 18 June 2016.[393] Dr. Slosarčíková remains the only witness in this arbitration with personal knowledge about her conversations with the police and AOG's attorney that day. Dr. Slosarčíková categorially denies all of the accusations made against her and reconfirms that she did not instruct the police to do anything.[394] Discovery has offered no witness with first-hand knowledge who can dispute her testimony.

299. Shortly after Dr. Slosarčíková left the site, heavy rain started pouring, and everyone else also left. The below picture shows AOG's workers leaving the Smilno Site on 18 June 2016:

391 Statement of Smilno municipality regarding the classification of the Road dated 6 June 2016, **R-156**; Email from Mr Fraser dated 26 October 2016, **C-340**.

392 Respondent's Counter-Memorial, ¶ 101. By way of example, AOG needed to place concrete panels on the Smilno Site before conducting actual drilling. However, pictures included in the Counter-Memorial show that the Smilno Site was merely leveled, without any concrete panels. Even Discovery's own internal documents show that AOG needed to "*restart the location construction*." *See* AOG Status Report dated 1 August 2016, p. 1, **C-333**; Technical Specification of TD 160 CA A7 Drilling Rig, **R-206**.

393 Claimant's Reply, ¶¶ 86-97.

394 Slosarčíková Second WS, ¶ 8.

300. It was due to the heavy rain, not the state prosecutor's instruction to the Police, why everyone left on 18 June 2016.

301. Another point deserves mention here. In its Reply, Discovery argues that "*before Dr Slosarčíková turned up, the Police were dispersing activists*", but "*after Dr Slosarčíková turned up, the Police stopped*".[395] Discovery therefore says that there is a "*natural inference*" that "*Dr Slosarčiková told the Police to cancel their policing operation*".[396] Yet again, however, the timing for Discovery's argument does not work.

302. Discovery bases this "*natural inference*" on the following testimony from Mr. Fraser:

> 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.[397]

303. Dr. Slosarčíková was not present at Smilno on 17 June 2016. Rather, she was there the day after. Moreover, the reason that the Police helped to remove local citizens on 17 June 2016 was because the interaction between AOG and local citizens took place on the actual Smilno Site, not on the Access Land. AOG was able to demonstrate its lease

395 Claimant's Reply, ¶ 96.

396 Claimant's Reply, ¶ 96.

397 Fraser First WS, ¶ 56.

to the Smilno Site[398] and, therefore, the Police lawfully "*removed protesters from in front of the contractors' vehicles on the well location*".[399] The Slovak Republic has never disputed that.

304. The situation on 18 June 2016, however, was different. Contrary to Discovery's allegation, the landowners were not "*trespassing onto the Smilno Site and endangering the safety of the proposed drilling operation by lying on the ground and sitting around the heavy machinery on the Smilno Site*."[400] Rather, as Ms. Varjanová explains, "*[w]hen we returned on 18 June 2016, we decided to stay either on the [Access Land] or on the land adjacent to the drilling site*."[401] Because of Ms. Varjanová's agreement with one of the co-owners of the land adjacent to the Smilno Site, the local citizens were permitted to assemble there.[402] The following picture from that day shows that the local citizens were *not* on the Smilno Site (which can be seen behind them):

305. The only inference that can be drawn from the Police's actions is that the Police protected the rights of those who could adequately demonstrate their entitlement to be on the land.

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

399 Fraser First WS, ¶ 56.

400 Claimant's Reply, ¶ 330.

401 Varjanová Second WS, ¶ 24.

402 Varjanová Second WS, ¶ 25; Title Deed No. 971, **R-110**; Power of Attorney from Mr. Marián Kravčík dated 24 February 2016, **R-111**.

c. The Police did not unlawfully prevent AOG from drilling the third time it tried to access the Smilno Site

306. AOG returned to Smilno on 15-17 November 2016. At the time, (*i*) the Interim Injunction obtained by Ms. Varjanová was still in place, (*ii*) AOG therefore was not entitled to use the Access Land,[403] and (*iii*) the drilling site was nowhere near ready for actual drilling.[404] The reason the Police instructed AOG to remove its trucks from the Access Land was the same as before: AOG had no right to use the Access Land. The Police could not have acted differently, as they were bound by the Interim Injunction.[405]

d. The police did not prevent AOG's drilling by refusing to approve its road signage

307. Nor did the Police prevent AOG from drilling by "*refusing*" to approve its road sign.[406] To recall, AOG requested the Smilno Municipality to erect a road sign at the entrance to the Access Land.[407]

308. The District Traffic Inspectorate—who has ultimate say on the matter—rejected the Smilno Municipality's request for this sign "*because it is not a crossroads but merely a conjunction of a [field track]*."[408] In other words, the land was just a field track.[409]

309. To obscure the objective facts, Discovery argues that the Police (*i*) failed to adopt a transparent and fair decision-making process, (*ii*) allegedly promised to approve the signs, and (*iii*) "*had made a personal decision to thwart AOG's exploration activities in Smilno*."[410] None of those allegations is true.

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403 Respondent's Counter-Memorial, ¶ 127.

404 *See supra* ¶ 130.

405 Email from Mr Fraser in relation to signage dated 14 October 2016, **C-151**.

406 Claimant's Reply, ¶ 115(1).

407 Although Discovery argues that it was the Police who suggested the signage solution to AOG, documents relied upon by Discovery do not support this.

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

409 This decision was made by a certified engineer. *See* Email from Mr Lewis to JKX and Romgaz in relation to signage dated 12 October 2016, **C-150**.

410 Claimant's Reply, ¶ 99(3).

i. *The Police acted lawfully and consistently*

310. Road traffic takes place only on so-called "surface communications".[411] It is not possible to place a road sign on a field track, unless it qualifies as a PSPR.[412] This is only logical because the purpose of road signs is to notify traffic participants and to organize, regulate and guide the road traffic.[413] The Police denied the Smilno Municipality's request for Discovery's sign "*because [the field track] is not a crossroads but merely a conjunction of a [field track]*."[414]

311. This position was consistent with the Road Traffic Act, which defines "*crossroad*" as "*a place where roads cross or connect*."[415] "Roads" in turn, are defined as "*motorways, roads, local roads and special purpose roads*."[416] Thus, since the field track did not qualify as a PSPR, the junction of this field track with the local road was not a crossroad.

312. Discovery nonetheless complains that "*AOG was […] given no prior opportunity to comment*" on the sign approval procedure.[417] The approval procedure, however, was not an administrative proceeding to which AOG was a party.[418] That is hardly surprising as the procedure for approval of a road sign is a public-law matter that does not involve deciding on the rights of individuals, as in administrative procedures. Therefore, the Police were under no obligation to give AOG an opportunity to participate in the procedure and provide its comments.[419]

313. Nevertheless, despite the Police being under no obligation to include AOG, Discovery's own internal documents show that the Police *did* transparently communicate with AOG

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411 Act No 8.2009 (the Road Traffic Act) (2015), Art. 2(1), **C-214**.

412 Decree of Ministry of Interior No. 30/2020 Coll., on Traffic Signage, as amended ("**Traffic Signage Decree**"), **R-173**. This decree replaced the previous decree of Ministry of Interior No. 9/2009 Coll, which implements the Act on Road Traffic, pertaining to traffic signs and traffic equipment. However, the terms relevant for this Rejoinder have not materially changed.

413 Traffic Signage Decree, Art. 1(1), **R-173**.

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

415 Road Traffic Act, Art. 2(2)(j), **R-174**.

416 Act No 8.2009 (the Road Traffic Act) (2015), Art. 2(1), **C-214**.

417 Claimant's Reply, ¶ 105.

418 Road Act, Arts. 3(2), 3(6)-(7), **R-175**.

419 In fact, Discovery does not identify any provision of Slovak law requiring the Police to provide AOG with an opportunity to participate and offer comments in the procedure, only repeatedly complaining that it did not receive this opportunity. *See* Claimant's Reply, ¶¶ 99(2), 105.

throughout the process.[420] The Police even communicated its position to AOG that the field track was *not* a PSPR.[421] And, in the end, Discovery's own internal documents confirm that erecting a road sign was subject to "*final approval*" by the Police.[422]

314. Finally, and in any event, there is no obligation by the Police to place a road sign on *any* road.[423] That decision belongs to the relevant Slovak authority (here, the District Traffic Inspectorate), which alone undertakes the assessment of whether the signage is required for the safety and fluency of road traffic.

ii. *There is no record of any promise to approve the road signs*

315. Discovery relies on a single email as proof of an alleged promise from the Police that the sign would be approved. That email was sent by AOG's counsel to Mr. Fraser, summarizing discussions with the Director of the Bardejov Police.[424] Yet the email explicitly states that this meeting was only "*informal*".[425] Moreover, the meeting was with a Police officer who was not even responsible for approving the road signage.

316. Aware of these evidentiary faults, Discovery seeks help from an internal summary to its partners dated 3 October 2016, where Mr. Lewis informed his JV Partners that "*[t]he police have already informally approved [the sign] and should do so formally in the next couple of days*."[426] It is unclear from where Mr. Lewis received this information. Discovery's documents suggest that it was likely from Mr. Igor Meluš, who was the primary AOG contact communicating with the Police—not Mr. Lewis.[427] This Tribunal does not have the benefit of any testimony from Mr. Meluš, because Discovery has not offered him as a witness. Nor is there any other evidence of a promise made by the Slovak Republic to AOG.

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420 *See, e.g.*, Email from Mr. Fraser in relation to signage dated 14 October 2016, **C-151**.

421 Email from Mr. Fraser in relation to signage dated 14 October 2016, **C-151**.

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

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

424 Email from Matej Sykora dated 16 July 2016, **C-331**.

425 Email from Matej Sykora dated 16 July 2016, **C-331**.

426 AOG report to JKX and Romgaz dated 11 October 2016, **C-148**.

427 Email from Mr Fraser in relation to signage dated 14 October 2016, **C-151**.

iii. *Allegations about the Police's decision to thwart AOG are baseless*

317. Finally, Discovery argues in its Reply that "*the signs were not approved […] because Dr Sliva and/or his subordinate (Mr Cicvara) had made a personal decision to thwart AOG's exploration activities*."[428] Again, Discovery offers no evidence for this accusation.

318. *First*, Discovery refers to an email from Mr. Lewis to his JV Partners dated 12 October 2016, where Mr. Lewis stated that "*AOG had been informed that the Police had 'approved the signage scheme and the document has gone back to the mayor to initiate installation'*."[429] Mr. Lewis, however, does not identify who from the Police apparently told AOG that the signage scheme was approved.

319. *Second*, Discovery then refers to an internal email dated 14 October 2016, where Mr. Fraser summarized the Police's decision about the road traffic signs.[430] Notably, Mr. Fraser's summary was based on his understanding of the discussion held between Mr. Meluš and the Police.[431] Like Mr. Lewis, Mr. Fraser was not at that meeting. Nevertheless, Mr. Fraser states that "*Cicvara apparently* ***still considers*** *that the track is an agricultural track and so not suitable for a regular road sign*."[432] In other words, assuming the veracity of these statements, the Police told AOG that the field track was *not* a PSPR on which traffic can take place. It follows that the Police communicated its understanding about the field track's status to AOG *before* deciding on the matter. Therefore, there was no *volte face* by the Police, as Discovery suggests.[433]

320. *Third*, Discovery refers to a meeting dated 26 October 2016 between AOG's attorneys, the Police, and the Mayor. During that meeting, Mr. Čičvara was "*not prepared to agree that the track could be a special purpose road, even though [REDACTED] the*

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428 Claimant's Reply, ¶ 106.

429 Claimant's Reply, ¶ 106(1); Email from Mr. Lewis to JKX and Romgaz in relation to signage dated 12 October 2016, **C-150**.

430 Claimant's Reply, ¶ 106(2); Email from Mr Fraser to JKX and Romgaz in relation to signage dated 14 October 2016, **C-151**.

431 Email from Mr Fraser to JKX and Romgaz in relation to signage dated 14 October 2016, **C-151**.

432 Email from Mr Fraser to JKX and Romgaz in relation to signage dated 14 October 2016, **C-151**.

433 Claimant's Reply, ¶¶ 99(2), 104.

senior traffic policeman in Humenne thought it was."[434] Discovery, therefore, argues that "*[t]he Police were […] adopting patently inconsistent positions, given that at the earlier meeting on 15 July 2016 the Police had already accepted that the Road was publicly accessible*."[435]

321. As explained above, however, the 15 July 2016 meeting was nothing more than a "*friendly and informal meeting*" between AOG's attorney and a Police officer who had no authority to make any decisions about the signage scheme or make any statements about the status of the field track. The only position officially adopted by the Police was that the field track did not qualify as a PSPR. In fact, as the Slovak Republic explained above, the Police's decision was consistent with numerous other contemporaneous statements by the Slovak authorities in this regard.[436]

322. In sum, the Police's decision not to approve the road signs for the field track in Smilno was lawful and consistent with numerous other contemporaneous documents confirming that the field track was *not* a PSPR. Discovery's allegations of prejudice against AOG is a made-for-arbitration fiction.

e. The MoI never instructed the Police to do anything

323. Discovery's final accusation is that the MoI issued an instruction to the Police concerning the Access Land and had the MoI not done so, "*AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016*."[437] The Slovak Republic already addressed this issue at length above, and it will not repeat those points here. Only three points deserve recalling.

324. *First*, Discovery's final attempts to access the Smilno Site came in November 2016.[438] The so-called "instruction" came on 19 December 2016, in the MoI's letter to the Police. On those facts alone, the letter obviously could not have influenced anything

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434 Email from Mr Fraser dated 26 October 2016, **C-340**; *see also* Internally circulated AOG well status report dated 25 October 2016, **C-152**.

435 Claimant's Reply, ¶ 107.

436 *See supra* ¶¶ 115-120, 310-314.

437 Claimant's Reply, ¶ 115(4).

438 *See supra* ¶ 129.

that preceded it. In fact, Discovery does not even allege that it considered—much less wanted—to go back to the Smilno Site but could not because of this letter.

325. *Second*, the Police never even acted on the MoI's 19 December 2016 letter. Nor does Discovery even contend that the Police understood this to be an "instruction" and then conveyed that "instruction" to AOG, such that AOG was actually prevented from accessing the Smilno Site as a result.

326. *Finally*, the notion that AOG could have accessed the Smilno Site, mobilized its various workers, and completed all of its works from 20 December 2016 to 31 December 2016, during the winter and over the holidays, is absurd on its face.

327. In conclusion, there was no instruction from the MoI, and the MoI never prevented Discovery from accessing the Smilno Site.

3. Krivá Oľka: The Slovak Republic did not frustrate Discovery's legitimate expectations

328. Discovery next argues that the Slovak Republic prevented Discovery from drilling in Krivá Oľka by the MoA's (*i*) denial of the Amendment to the Lease Agreement and (*ii*) conduct in the Article 29 Geology Act proceedings.[439] As explained below, both claims are meritless.

a. The MOA initially approved the Lease Agreement between AOG and LSR

329. On 4 May 2015, LSR signed a lease agreement with AOG (the "**Lease Agreement**") "*for a definite period of time, starting from the date of its entry into force until 15 January 2016*."[440] The Lease Agreement, which covers State property, required the MoA's approval. As explained in the Counter-Memorial, AOG met all of the requirements for the Lease Agreement to be approved by the MoA when it requested it. Five months later, that approval was granted.[441]

330. When AOG requested this Lease Agreement, its Exploration Area License was set to expire on 1 August 2016 and its Forest Exemption on 15 January 2016. Thus, the Lease

439 Claimant's Reply, ¶¶ 117-141.

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

441 Respondent's Counter-Memorial, ¶ 142.

Agreement could not extend beyond 15 January 2016, otherwise it would extend beyond the necessary Forest Exemption.

331. This fact is important because, later in its Reply, Discovery compares AOG's Lease Agreement with one of NAFTA's and complains that NAFTA's lease agreement was for a longer period, *i.e.*, four years.[442] The reason that NAFTA obtained a longer lease from LSR, however, was not due to preferential treatment. Rather, it was because *NAFTA requested its exploration area licenses for longer periods of time* to give itself a comfortable margin in which to conduct its activities.[443] That, in turn, allowed NAFTA to request—and obtain—a longer lease.

332. By contrast, AOG had only requested a two-year extension for its Exploration Area Licenses back in 2014.[444] Consequently, AOG could not—and did not—request and obtain a longer lease.

333. In any event, the Lease Agreement covered State property. It was therefore subject to the MoA's approval. Although Discovery attempts to create the impression that the MoA somehow wanted to thwart Discovery's exploration works, the facts show the exact opposite: absent AOG's breach, the MoA approved the Lease Agreement.[445]

b. In June 2016, the MoA did not approve the Amendment because AOG failed to comply with the Lease Agreement

334. The Lease Agreement contained an extension mechanism by which the "*lease relationship shall be extended in the form of amendment hereto at least by one year, even repeatedly*."[446] To request an extension, AOG was required to deliver that request no later than one month before the termination of the Lease Agreement, *i.e.*, by 15 December 2015.

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442 Claimant's Reply, ¶ 365(1)(a).

443 Lease between NAFTA and State Forestry dated 20 May 2014, Arts. 1.2(a) and 1.2(b), **C-255**.

444 Decision about exploration area term extension of 10 July 2014, Record Number: 33590/2014, File Number: 5670/2014-7.3 (Svidník), p. 1, **C-8**; Decision about exploration area term extension of 9 July 2014, Record Number: 33409/2014, File Number: 5670/2014-7.3 (Medzilaborce), p. 1, **C-9**; Decision about exploration area modification and extension of exploration area term of 15 July 2014, Record Number: 34186/2014, File Number: 5668/2014-7.3 (Snina), p. 2, **C-10**.

445 Claimant's Memorial, ¶ 135.

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

335. This was not some boilerplate language hidden in the Lease Agreement. Rather, Discovery's internal documents show that, precisely because of the unusually short term of the Lease Agreement, LSR and AOG negotiated this condition, and LSR expressly communicated it to AOG. This is clear from the email dated 28 April 2015, where Mr. Crow informed Mr. Lewis that the Lease Agreement allows for "*an automatic ability to extend as long as [AOG has] the proper rights to extract*," but AOG "*will have to apply for the extension with proper paperwork for extraction **1 month in advance***."[447]

336. It is now undisputed that AOG submitted its request well past the deadline[448]—on 23 December 2016. Conveniently, Discovery omitted this from its Memorial. It only acknowledged it when forced to do so by the Slovak Republic.

337. LSR nonetheless tried to submit the request to the MoA. LSR approved the untimely extension on 14 January 2016 (the "**Amendment**"),[449] but, as is standard procedure, that was subject to additional consent from the MoA.[450] LSR therefore requested this consent from the MoA on 14 January 2016, and the request was delivered to the MoA on 15 January 2016—the day on which the Lease Agreement expired.[451]

338. This point is important. To lawfully approve the Amendment, the MoA would have been required to (*i*) convene a meeting of the commission to approve the Amendment, (*ii*) approve the Amendment, (*iii*) have it signed, and (*iv*) publish the Amendment—*all in just a few hours*. But even if all that happened, the Lease Agreement would expire anyway because it would become effective only on the following day, *i.e.*, on 16 January 2016.[452] Furthermore, it would be legally impermissible under Slovak law for the MoA to approve an amendment to a lease agreement that was no longer in force.[453]

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447 Email from Ron Crow dated 28 April 2015, **C-272**.

448 Claimant's Reply, ¶ 128.

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

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

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

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

453 *See supra* ¶¶ 136, 141.

Even AOG contemporaneously recognized that "*[s]ince the original lease agreement has expired, it is not possible to renew it with amendment no. 1*."[454]

339. It follows that the MoA had no choice but to deny the Amendment. And that is precisely what the MoA did:

> [The Lease Agreement] has ***terminated*** as a result of the fulfilment and/or nonfulfillment of conditions set out in its Article III dealing with the lease term. ***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***.[455]

340. Discovery infers foul play by arguing that the MoA responded to AOG only in June 2016, six months after it requested an extension. Yet this passage of time was neither excessive (the original Lease Agreement's approval took five months) nor unexpected. That is hardly surprising, given the prior expiry of the Lease Agreement *ex lege* and the fact that LSR explicitly told AOG that it may take up to six months.[456]

341. More importantly, contrary to Mr. Fraser's testimony that Discovery first learned about the denial in June 2016,[457] Discovery's internal documents contradict his testimony. On 21 January 2016, AOG informed the JV Partners that "*the Ministry of Agriculture (Forestry)* ***terminated***" the Lease Agreement "*on 15 January due to a misunderstanding of the terminology*."[458] Par for the course, AOG was blaming others for its own failures.

342. Finally, Discovery argues that the timing of the MoA's decision was "*significant*" because "*it came a matter of days after the MoE had extended the Exploration Area Licences on 7 June 2016*" and thus, "*the MoA failed to take this significant fact into*

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454 Letter from AOG to LSR dated 18 July 2016, **R-161**.

455 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**. This is the "*substantive implication*" of AOG's own legal mistake. *See* Fraser Second WS, ¶ 21.

456 Email from Ron Crow dated 28 April 2015, **C-272**.

457 Fraser Second WS, ¶ 23.

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

account when declining to approve the Amendment, contrary to the obligation of the MoA to 'closely cooperate' with the MoE under Slovak law."[459] Again, Discovery is wrong.

343. The fact that the MoE extended the Exploration Area Licenses was not connected to, and had no bearing on, the MoA's decision.[460] In fact, Discovery does not even argue that AOG informed the MoE's decision to the MoA in the first place. In any event, the MoA could not violate the law by approving an amendment of the expired Lease Agreement simply because the MoE extended the Exploration Area Licenses.

c. Discovery's alternative theory about the MoA's refusal is meritless

344. To divert the Tribunal's attention away from its own failures, Discovery concocts a web of conspiracies for why the MoA did not approve the Amendment. These conspiracy theories center around Mr. Jaroslav Regec—the former Head of the Service Office at the MoA.[461] According to Discovery, Mr. Regec allegedly refused to approve the Amendment because of his personal and political prejudices towards AOG.[462]

345. Unsurprisingly, Discovery offers no credible evidence to substantiate this theory. All of Discovery's evidence comes from internal documents summarizing what Discovery's PR and lobbying firms allege to have heard through back channels, phone calls, and clandestine interviews with third parties.[463] Discovery, however, has not put forward any of these individuals as witnesses in this arbitration.

346. For example, Mr. Stanislav Benada, who appears to have been a key player during this time, is nowhere to be found in this arbitration. Absent, too, are representatives from Discovery's PR and lobbying firms, specifically those advisors who were the ones feeding this alternative theory to Discovery. This new theory also runs counter to Discovery's own internal documents, which show that it knew already in January

459 Claimant's Reply, ¶ 131(1).

460 Respondent's Counter-Memorial, ¶¶ 149-166.

461 Claimant's Reply, ¶¶ 125(3) and (10).

462 Claimant's Reply, ¶ 302.

463 Claimant's Reply, ¶ 125.

2016—months before Mr. Regec was even appointed to his role—that the Lease Agreement terminated, and it knew exactly why.

347. Left with no other arguments, Discovery attempts to save its claim about alleged improper MoA motives by requesting adverse inferences. Specifically, Discovery accuses the Slovak Republic of withholding documents.[464] The Slovak Republic categorically rejects these allegations. As requested by the Tribunal in its Procedural Order No. 3, the Slovak Republic conducted a reasonable search for documents ordered by the Tribunal and promptly produced all documents responsive to Discovery's document production request in its custody, possession and control. The fact that the Slovak Republic has not produced documents proving these allegations only supports the argument that they are baseless.

d. The MoE treated AOG fairly in the Article 29 proceedings

348. Following the MoA's denial of the Amendment, AOG applied to the MoE for compulsory access under Article 29 of the Geology Act.[465] As previously explained, if an entity cannot secure landowner consent to use a specific property for geological works, which also include establishing access routes, it may apply for compulsory access rights under Article 29 of the Geology Act.

349. In an Article 29 proceeding, the requesting party must prove that, in the particular case, the public interest in oil exploration will prevail over the particular landowner's interest.[466] The requesting party must also prove that it was unable to reach an agreement with the landowner.[467] At the same time, the State encourages party agreement as opposed to issuing an Article 29 compulsory order.[468]

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464 Claimant's Reply, ¶ 124.

465 Ministry of Environment response to AOG Application under s. 29 of the Geology Act dated 20 September 2016, p. 1, **C-144**. AOG informed the MoA in January 2016 that it has a right to invoke Article 29 of the Geology Act. *See* Receipt for the delivery of the Kriva Olka lease amendment to Ministry of Agriculture dated 15 January 2016, **C-117**.

466 Constitution of the Slovak Republic, Art. 20, **R-018**. The Slovak Republic also notes that there is no legal entitlement to a compulsory access order—something Discovery knew. *See* Email from Viktor Beran dated 12 July 2016, **C-330**.

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

468 Administrative Procedure Code, Art. 3(4), **R-170**.

350. And this is *exactly* what the MoE did.

351. After conducting an inquiry and holding an in-person meeting on 7 February 2017 (with AOG present), the MoE discovered that, although the Amendment extending the original Lease Agreement was not approved by the MoA "*due to [AOG's] non-compliance with the contractual conditions*,"[469] the possibility to conclude a new lease agreement was not rejected by LSR and the MoA.

352. Specifically, at the meeting discussed above, LSR explained that AOG's "*proposal for the conclusion of a lease agreement for the property of interest has not been submitted for approval*" to the MoA.[470] In other words, LSR had not forwarded the proposal for a new lease agreement to the MoA. As a result, the MoA was not able to express its agreement or disagreement with the new lease agreement. Therefore, Mr. Hrvol from the MoE tried to "*persuade [AOG] to submit new request to [LSR] with regard to the lease agreement*."[471] This would allow the process to play out as it should—either with AOG reaching agreement on a new lease, or that lease being denied and thus permitting AOG to fulfill one of the Article 29 criterion. Remarkably, however, Discovery's own internal documents reveal that AOG "*denied [this request] resolutely*."[472]

353. A few weeks later, on 6 March 2017, the MoE denied AOG's request for compulsory access to the Oľka Site on procedural grounds.[473]

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

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

471 The reason why the MoE suggested that AOG submit a new request was because AOG's previous, updated lease agreement expired on 1 August 2017. Because the conclusion of the lease agreement and its subsequent approval would take time, the previous proposal that AOG submitted to LSR was not usable. *See* Proposal of Lease Agreement between LSR and AOG, **R-176**.

472 Email from Viktor Beran dated 8 February 2017, p. 2, **C-366**. On a side note, Discovery puts much weight on the fact that Mr. Hrvol allegedly informed AOG that he saw "*no reason why the [MoE] should not decide in [AOG's] favor*." It is important to note here that the MoE did not have any information about this at the time of this alleged communication. In the end, the purpose of the administrative proceedings is to ascertain facts necessary for deciding the matter. Thus, even if Mr. Hrvol initially expressed his views about the matter, it does not mean that the MoE was not allowed to issue a different decision considering the facts that transpired during the administrative proceedings. *See* Claimant's Reply, ¶ 135; Email from Viktor Beran dated 17 October 2016, **C-337**.

473 Decision by the Ministry of Environment regarding the compulsory access order dated 6 March 2017, **C-25**.

354. AOG then appealed this decision. The Minister of Environment, Mr. Sólymos, decided in AOG's favor, quashing the decision and returning the matter for further proceedings.[474] Minister Sólymos found that the MoE "*in the proceedings dealt primarily with the issue of the lack of prior consent of the [MoA] to the lease of forest property of the state in the form of [the Amendment] to the already terminated lease agreement, which is not the subject of proceedings*."[475] He concluded that the MoE should instead focus on the positions of the parties to conclude a new lease agreement.[476]

355. That Minister Sólymos considered the first instance decision flawed, however, cannot amount to a breach of the FET standard. The conclusion of the tribunal in *ECE v. The Czech Republic* is instructive here:

> The purpose of due process is however, while enabling the decision-maker to exercise its administrative or judicial powers, to see to it that that is done in a manner which is fair to the interests of an investor; ***it follows that there can be no violation of fair and equitable treatment in a flawed decision at first instance which is subsequently reversed on appeal***, and the effects of which were therefore only temporary.[477]

356. This is precisely what happened here.

e. Discovery's claim about an alleged "instruction" issued at the MoE against AOG is baseless and incorrect

357. Discovery argues that the "*real reason why the application was refused was because officials higher up within the MoE did not want AOG to carry out its exploratory*

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

475 Decision of Minister of Environment dated 13 June 2017, p. 8, **C-174**.

476 In its Reply, Discovery makes much of the fact that the MoA and the MoE had different views about the MoA's participation in the administrative proceedings. None of this is relevant. AOG does not claim that these inter-agency discussions somehow breached the BIT. Furthermore, AOG contemporaneously recognized that "*leasing of forest property to a legal person, it is a civil relationship in which the state acts as a legal person, while as a subject of a civil relationship it has the same status as the other party to this relationship and it does not exercise its sovereignty*." In other words, LSR's actions are not attributable to the Slovak Republic, nor would they be if Discovery ever suggested otherwise. *See* Claimant's Reply, ¶¶ 136-137; Decision of Minister of Environment dated 13 June 2017, p. 5, **C-174**; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, ¶¶ 183-186, **RL-143**.

477 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.805, **RL-092**.

drilling activities at Krivá Oľka"[478] or that someone at the MoE issued an instruction "*to decide against AOG*."[479]

358. This argument is divorced from common sense. The Minister of Environment *is the highest official* at the MoE. The fact that he decided in AOG's favor conclusively disproves any theory that "*officials higher up within the MoE did not want AOG to carry out its exploratory drilling activities at Krivá Oľka*".[480] Just the opposite.

359. Discovery knows this. It therefore accuses the Slovak Republic of withholding documents evidencing the existence of this (non-existent) instruction.[481] In other words, it seeks adverse inferences because the Slovak Republic cannot prove a negative (*i.e.*, that this "document" does not exist). Simply put, there is no document of an "*instruction*" because there was never an instruction in the first place.

360. Desperate to claim otherwise, Discovery infers the existence of the "*instruction*" from information included in the Slovak Republic's privilege log.[482] That is an awfully thin reed on which to build an alleged breach of a treaty. But to put the matter to rest, Mr. Sólymos rejects Discovery's allegation in his second witness statement in the strongest of terms and confirms that he never issued such an instruction against AOG. Nor did he ever hear of any such instruction being issued.[483]

f. AOG stopped participating in the Article 29 proceedings after its successful appeal

361. When the matter returned to the MoE, the MoE proceeded as Minister Sólymos ordered. It requested AOG to provide "*documents demonstrating the results of negotiations between [AOG and LSR] on the conclusion or non-conclusion*" of a new lease

478 Claimant's Reply, ¶ 139.

479 Claimant's Reply, ¶ 2(b).

480 Claimant's Reply, ¶ 139.

481 Claimant's Reply, ¶ 138(4).

482 Claimant's Reply, ¶¶ 138(5)-(6).

483 Sólymos Second WS, ¶¶ 12-13. The Slovak Republic rejects Discovery's allegation that it chose not to call any witness to testify about the Article 29 proceedings because it "*knows that such testimony would be adverse to its case*." At the outset, it is Discovery's burden to prove that someone issued the alleged "*instruction*" or that the administrative proceeding was unfair or illegal. Discovery, however, falls short of this requirement. In any event, despite Discovery's failure to meet its burden of proof, the Slovak Republic introduces the testimony of the Minister of Environment—the highest officer at the MoE—who conclusively disproves these allegations.

agreement.[484] The MoE suspended the proceedings until AOG submitted all required documents.[485]

362. In its Reply, Discovery complains that the MoE "*imposed unjustified and arbitrary procedural roadblocks to delay AOG's application*."[486] According to Discovery, the MoE's request for documents was "*inconsistent, arbitrary, inexplicable and pretextual*" because the MoE already had the requested documents.[487] Discovery is wrong again.

363. At the February 2017 meeting discussed above, LSR explained that AOG's "*proposal for the conclusion of a lease agreement for the property of interest has not been submitted for approval*" to the MoA.[488] Thus, LSR had not forwarded the proposal for a new lease agreement to the MoA. As a result, the MoA was not able to express its agreement or disagreement with the new lease agreement. This means that the MoE was still looking for proof that the landowner (*i.e.*, LSR and the MoA) did not consent to the proposed activity on its land—a necessary requirement for a Article 29 compulsory order.

364. As noted, when Mr. Hrvol from the MoE tried to "*persuade [AOG] to submit new request to [LSR] with regard to the lease agreement*," AOG "*denied [this request] resolutely*."[489] It simply refused to resubmit a new lease agreement to LSR. This admission is crucial and fatal to Discovery's claims. Without proving that it attempted—but failed—to obtain landowner consent, AOG failed to fulfill one of the key requirements to justify an Article 29 compulsory order.[490]

365. Under such circumstances, Discovery cannot claim that its legitimate expectations were frustrated by the MoA's or MoE's actions.

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484 Decision of the Ministry of Environment dated 27 June 2017, p. 1, **R-075**.

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

486 Claimant's Reply, ¶ 141.

487 Claimant's Reply, ¶ 141(2).

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

489 Email from Viktor Beran dated 8 February 2017, p. 2, **C-366**.

490 Finally, MoE's internal documents confirm that the MoE was unable to act due to AOG's inactivity. *See* Letter from Geology and Natural Resources Division to Legal and Legislative Division dated 29 December 2017, **R-177**.

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366. To the extent that the Exploration Area Licenses created any legitimate expectations (they did not), it was Discovery's repeated failures to abide by Slovak law that led to its problems at each well site. Whatever expectations Discovery may have had about its ability to drill *only* with the Exploration Area Licenses do not trump its obligation to operate within the regulatory framework appropriately. It failed to do so.

4. There were no legitimate expectations concerning the Preliminary EIA

367. The second pillar of Discovery's legitimate expectations case concerns the EIA process and the EIA Amendment. Discovery claims that the Exploration Area Licenses and Minister Sólymos' remarks in 2016 and 2017 created legitimate expectations that "*it would not be required to perform a Preliminary EIA before drilling its exploration wells under the Exploration Area Licenses*."[491] Discovery therefore alleges that the Slovak Republic's "*conduct (specifically, the District Offices and the MoE) in issuing the EIA Decisions and imposing the EIA Condition […] violated [these expectations]*."[492] Discovery effectively raises two issues.

368. *First*, after Discovery voluntarily agreed with the local citizens to submit Preliminary EIAs for its three wells in 2017, the District Offices in charge of those Preliminary EIAs ordered AOG to undergo Full EIAs. Discovery claims that this violated its legitimate expectations and that the decisions were arbitrary (the latter being discussed in Section IV.A.7).

369. *Second*, when Discovery applied to the MoE to reduce the area of its only remaining Exploration Area License in 2018—the Svidník Exploration Area License—the MoE approved this reduction, but also included a requirement, in line with the EIA Amendment, that any future well drilled would be subject to a Preliminary EIA. This is the second alleged breach related to the EIA.

370. The Slovak Republic begins with the Preliminary EIAs which Discovery undertook voluntarily.

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491 Claimant's Reply, ¶ 310.

492 Claimant's Reply, ¶ 305.

a. Discovery's legitimate expectations are self-defeating because it voluntarily agreed to the Preliminary EIAs

371. Discovery *volunteered* to undergo Preliminary EIAs for its three drills—Smilno, Krivá Oľka, and Ruská Poruba. Even though Discovery now claims that Minister Sólymos pressured Discovery into the Preliminary EIAs, the Slovak Republic already demonstrated above that this new narrative is false.[493]

372. Whatever Minister Sólymos might have said about the EIA Amendment does not change the fact that Discovery volunteered to undergo this process. It cannot possibly have had a legitimate expectation that it would not be subject to a Preliminary EIA *if it volunteered to do one*.

b. No Slovak state organ assured Discovery of the outcome of the Preliminary EIAs

373. Moreover, no Slovak state organ ever made any promise or assurance regarding the Preliminary EIAs that Discovery agreed to undertake. Thus, even if Discovery undertook the Preliminary EIAs because of Minister Sólymos (not true), no one from the Slovak Republic ever told Discovery that the District Offices would deny these based on a lack of jurisdiction (which Discovery now remarkably claims they should have done) or that their Preliminary EIAs would not progress to a Full EIA if warranted under Slovak law.

374. In any event, as described earlier in this Rejoinder, Mr. Lewis and Mr. Fraser were either misinformed by their legal and consultant teams that a Preliminary EIA could not progress to a Full EIA, or they were not informed at all.[494] Whatever the case, AOG agreed to the process and, in so doing, subjected itself to the results. As explained below in Section IV.A.7 on arbitrariness, had Discovery believed that the Full EIAs were not justified, it should have appealed all of them. Instead, it only appealed one of them—and prevailed—and then abandoned the rest.

5. There were no legitimate expectations concerning the EIA Amendment

375. Discovery argues that it had legitimate expectations that the EIA Amendment would not apply to its project and, therefore, the MoE's inclusion of this requirement on its

493 *See supra* Section II.G.

494 *See e.g.*, Email from A. Fraser to V. Beran regarding Smilno EIA results dated 7 September 2017, **R-168**.

2018 reduced Svidník Exploration Area License breached the BIT. Discovery claims that these legitimate expectations derive from the Exploration Area Licenses and "*the public statements made by the MoE and Minister Sólymos between November 2016 and February 2017*."[495] Neither is credible.

376. At the outset, the Slovak Republic repeats that the Exploration Area Licenses contain no promise or assurance regarding the EIA Amendment. There is nothing guaranteeing that the regulatory framework around oil and gas exploration would be frozen in time.

377. Regarding Mr. Sólymos' and the MoE's comments in 2016 and 2017, these post-date Discovery's decision to invest. On that basis alone, and as a matter of investment-treaty law, they cannot constitute a specific assurance or promise on which Discovery decided to invest.[496] In fact, Discovery does not even try to explain how it relied on Minister Sólymos' comments and how those comments influenced its decision to reduce this Exploration Area License (they did not). None of the requirements for a legitimate expectations analysis is satisfied here.

378. As explained below, and in any event, the reasonableness of Discovery's alleged expectations must be viewed in context **(a)**, the EIA Amendment *did* apply to Discovery's post-2017 drills **(b)**, and, therefore, the MoE's inclusion of the Preliminary EIA requirement in the 2018 reduced Svidník Exploration Area License was to be expected **(c)**.

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495 Claimant's Reply, ¶¶ 307, 309.

496 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-059**; *see also Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318, **RL-060**; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154, **CL-021**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 127, **RL-061**; *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 468 ("*To the extent that Claimant relies on these statements as creating legitimate expectations that it would be assisted in its dispute with Soska by the state, the Tribunal finds that the relevant statements do not exhibit the level of specificity necessary to generate legitimate expectations.* ***More importantly, as the Tribunal has already noted*** *(see supra paragraphs 287-288),* ***legitimate expectations are temporally tied to the date of making the investment. They must have been in place at the time Claimant's original investment was made. These statements were made after Claimant had already invested in the Czech Republic and therefore could not have generated legitimate expectations by Claimant vis-à-vis the state's treatment of its investment***".), **CL-082**.

a. The reasonableness of Discovery's expectations cannot be viewed in isolation

379. The reasonableness of Discovery's claimed expectation must be evaluated in view of the long-established regulatory environment of the EU and its Member States. A fundamental element of environmental impact assessments in the EU requirements for member states was the right of the public to participate in the review process.[497] Under the EIA Directive, the environmental impact assessment was required for all deep drills.[498] The European Union Court of Justice ("**CJEU**") confirmed already in 2013 that these include exploration drills.[499]

380. Discovery has never contested that it invested with knowledge that an EIA would be required at some point in the exploitation of the assumed oil deposits. At the same time, Discovery does not dispute that the Slovak Republic had the right to adopt the EIA Amendment under the police powers doctrine.[500] Instead, Discovery's dispute is only about the application of the EIA Amendment to AOG's exploration drills.

381. Discovery's claimed expectations as to the EIA review must also be understood in view of the historical fact that regulatory regimes—particularly those impacting environmental protection and energy resource extraction—are unsurprisingly becoming more stringent over time. Nevertheless, Discovery attempts to manufacture a world in which AOG's environmental compliance obligations were frozen in time

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497 EIA Directive, Recital 16, Arts. 6, 11, **R-083**.

498 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 ("**EIA Directive**"), Annex II(2)(d), **R-083**; *see also* European Commission, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, p. 42, **R-084**.

499 The European Court of Justice stated that "*Thus, since exploratory drillings are a form of deep drilling, they fall within the scope of Annex II, No 2(d), to Directive 85/337. Para 31 In the present case, an exploratory drilling operation such as that at issue in the main proceedings, which is aimed at determining the commercial feasibility of a deposit of up to 4 150 metres depth, is a form of deep drilling within the meaning of Annex II, No 2(d), to that directive*." As Discovery was active in exploration in multiple EU countries, it should have been aware of this regulation and could have anticipated its implementation by the Slovak Republic into its national law. Thus, any expectation that AOG would be immune from the EIA cannot be legitimate. *See* Judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others v. Bundesminister für Wirtschaft, Familie und Jugend*, Case C-531/13, ¶¶ 30-31, **RL-139**.

500 Claimant's Reply, ¶ 306. At the same time, Slovak highest courts confirmed that it is permissible to modify rights or obligations, which arose under old legislation, by way of new regulation. This is referred to as "*untrue retroactivity*", under which legal rights and legal relations, which came into existence based on an earlier regulation, do not cease to exist, but are modified in future. *See* Judgment of the Supreme Court of the Slovak Republic, File No. 5Szd/1/2010 dated 29 September 2011, **R-178**.

and could never include an opportunity for the public to be heard, despite the onset of activities with substantial risk to the environment. That is incorrect. As explained below, the EIA Amendment *did* apply to Discovery's post-2017 drills.[501]

b. AOG was obliged to undergo the Preliminary EIA for any new drills post January 2017

382. On 21 October 2016, the Slovak Republic adopted the EIA Amendment. Minister Sólymos confirmed that the EIA Amendment—which extended the Preliminary EIA obligation to exploration drills—was prompted by the European Commission as part of the infringement proceedings.[502] The EIA Amendment became effective on 1 January 2017 and applied to all new drills after 1 January 2017.[503]

383. Discovery does not dispute that the Slovak Republic was entitled to enact the EIA Amendment.[504] Nor does Discovery dispute that the enactment was an appropriate response to the EU infringement proceedings, which had been brought against Slovakia by the European Commission. Instead, Discovery continues to argue that the EIA Amendment did not apply to AOG's drills because AOG's exploration activities were approved back in 2006 by the Exploration Area Licenses. Discovery's analysis is mistaken.

384. As previously explained, the determination of an exploration area itself is not what triggers an EIA screening.[505] The EIA screening is tied to actual deep drills, once the location for those drills has been identified. That only stands to reason. It is impossible to assess the potential environmental impact on areas spanning hundreds of square

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501 In addition, as the Slovak Republic explained in its Counter-Memorial, the EIA Act allows anyone to submit a motion to the relevant authority under Article 19 of the EIA Act. Once filed, the relevant authority is obliged to screen —and impose a Full EIA, if necessary—even for projects that do not fall under any category under the EIA Act. This applied even before 1 January 2017. *See* EIA Act, Art. 19, **R-045**.

502 Sólymos First WS, ¶¶ 8-9; [redacted]. For avoidance of any doubt, the Slovak Republic does not argue that the European Commission ordered the Slovak Republic to apply the EIA Act to AOG.

503 Respondent's Counter-Memorial, ¶¶ 217, 343.

504 Respondent's Counter-Memorial, ¶ 331; Claimant's Reply, ¶ 306.

505 Respondent's Counter-Memorial, ¶ 183.

kilometers, like the Exploration Area Licenses,[506] without knowing precise drilling locations.[507]

385. AOG's internal documents confirm its contemporaneous understanding that an EIA on such a large area is not possible.[508] Even AOG's Slovak attorney confirmed this in his email to VLK in March 2017:

> We understand that you request that, within the screening procedure, assessment of the impact is carried out with respect to exploration drills as such, in relation to a certain area covering a certain geological structure, irrespective of where the exploration drills should be located. ***Although we have sought to use such interpretation of the relevant provisions of law that would allow taking this approach, we have concluded that the legislation does not allow this***. After consultation with the Ministry of Environment of the Slovak Republic, our opinion was confirmed.
>
> ***The screening procedure 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***.[509]

386. This is only logical. According to Article 18(2)(b) of the Slovak EIA Act, any "*proposed activity listed in Annex 8, Part b*" shall be subject to a Preliminary EIA.[510] The "*proposed activity*" in turn, is defined as follows:

> [T]he execution of structures, other installations, a realization intent, or other interventions in the natural surroundings and landscape amending the physical aspects of the location, including the extraction of mineral resources.[511]

387. It follows that only activities that (*i*) are listed in Annex 8 of the EIA Act, and (*ii*) "*amend[] the physical aspects of the location*", are subject to a Preliminary EIA.

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506 AOG's Exploration Areas initially spanned from 721,1 to 960 km^2. *See* Decision on determination of exploration area Medzilaborce dated 17 July 2006, **R-030**; Decision on determination of exploration area Snina dated 18 July 2006, **R-031**.

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

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

509 Email from V. Beran to [redacted] dated 9 March 2017, **R-179**.

510 EIA Act, Art. 18(2)(b), **R-045**.

511 EIA Act, Art. 3(f), **R-200**.

Applying these rules to the present case, the 2006 Exploration Area Licenses did not contain any "*specific exploration drills*", the impacts of which were identifiable at the time. AOG only identified its "*specific exploration drills*" much later in 2015.[512] It was only since then that the specific impacts of proposed exploration drills were identifiable.

388. The CJEU has expressed this same view, that the EIA should take place only when potential impacts are "*identifiable*".[513] Potential impacts are not identifiable without knowing the location of specific drill sites. Accordingly, the EIA Amendment applies to all new exploration drills after 1 January 2017, regardless of when the exploration area license was issued. The Slovak Republic consistently applies this principle to other companies, including NAFTA.[514]

389. In any event, even if Discovery's argument about the Exploration Area Licenses was right (it is not), the Slovak Republic would still be mandated to enforce the EIA Amendment. This is because EU law recognizes so called *ex-post* remedy for failure to comply with the EIA requirements:

> [U]nder Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.[515]

390. In fact, the CJEU went even further and held that these remedial measures include "*revoking or suspending consent already granted*":

> The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example ***by revoking or suspending consent already granted*** in order to carry out such an assessment.[516]

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512 Claimant's Memorial, ¶¶ 66-69; Claimant's Reply, ¶ 156.

513 Judgement of 4 May 2006, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case C-508/03, ¶ 104, **RL-144**.

514 Respondent's Counter-Memorial, ¶¶ 217-218.

515 Judgement of 7 January 2004, *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, Case C-201/02, ¶ 70, **RL-145**.

516 Judgment of 26 July 2017, *Comune di Corridonia and Others v Provincia di Macerata and Provincia di Macerata Settore 10 – Ambiente*, Joined Cases C-196/16 and C-197/16, ¶ 35, **RL-146**.

c. The Preliminary EIA requirement on the Svidník Exploration Area License does not contradict Minister Sólymos' comments

391. Against this backdrop, it follows that the MoE's decision to include a Preliminary EIA requirement for any future wells on the reduced Svidník Exploration Area License was in accordance with the EIA Amendment.

392. Discovery continues to argue that this "*contradict[ed] earlier public statements by the Minister, that AOG could not be compelled to carry out the preliminary EIA procedure for wells on its existing Licences, since they predated the change in the law*."[517] But Discovery continues to misinterpret Minister Sólymos' comments.

393. As the Slovak Republic explained in its Counter-Memorial, and as Minister Sólymos testified in his first witness statement, the press releases and statements issued by the MoE consistently connected the EIA preliminary assessment with actual exploration drills, post-2017.[518]

394. The Slovak Republic also showed that the MoE included the *same condition* in an exploration area license granted to NAFTA, which had been assigned to NAFTA *before* the EIA Amendment—just like in AOG's situation.[519] On this point, Discovery claims that NAFTA's case was different because it was an extension of an exploration area license and not a reduction in the size of the exploration area license. This is a distinction without a difference. In both cases, the requirement for future drills was a declaration of the statutory obligation directly applicable from the EIA Amendment. The MoE imposed such a condition on numerous other companies, too.[520]

395. Thereafter, Discovery suggests that guidance issued by the European Commission shows that the imposition of the EIA requirement was illegitimate. It cites the following: "*renewal of an existing permit […] cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a*

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517 Claimant's Reply, ¶ 193(1); AOG's report to Partners dated 2 November 2018, **C-204**.

518 Respondent's Counter-Memorial, fn. 293; Sólymos First WS, ¶¶ 7-11.

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

520 *See, e.g*., Decision of MoE on extension of Ochtiná exploration area license dated 17 July 2018, **R-100**; Decision of MoE on determination of the exploration area to NAFTA a.s. dated 17 September 2018, **R-180**; Decision of MoE on determination of the exploration area to CE Metals s.r.o. dated 27 January 2017, **R-181**.

'project'."[521] According to AOG, since it was simply renewing an existing permit and "*its application to reduce the Licence area […] did not indicate that it would be making any alterations*," the EIA requirement contradicted this guidance.[522]

396. The European Commission issued its guidance regarding the definition of the term "*intervention in the natural surroundings and landscape*", which is included in the definition of the term "*project*" in the EIA Directive. In other words, the European Commission merely said that "*renewal of an existing permit […] cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site*",[523] be conditioned by the EIA. The Slovak Republic agrees with this principle—but the principle does not apply to AOG's situation.

397. The Slovak Republic did not condition the Exploration Area License's reduction or continued validity on conducting a Preliminary EIA. The Exploration Area License, however, only restated the applicable law, as amended by the EIA Amendment and thus advised AOG that its performance of new exploratory drills in the future would require a Preliminary EIA.[524] This is because new exploratory drills represent "*works or interventions involving alterations to the physical aspect of the site*".

398. In any event, as in many cases before, AOG had the right to appeal the 2018 Exploration Area License, had it thought that the condition was illegal.[525] Once again, it chose not to avail itself of this right under Slovak law and, instead, brings the issue only before this Tribunal.

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521 European Commission, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, p. 9, **R-084**.

522 Claimant's Reply, ¶ 193(3).

523 European Commission, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, p. 9, **R-084**.

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

525 Decision Modifying an Exploration Area of 8 June 2018, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidník) ("*According to Section 61 of the Rules of Administrative Procedure, appeal against this Decision may be lodged to the Ministry of Environment of the Slovak Republic, Nám. Ľ. Štúra 1, 812 35 Bratislava within 15 days of its delivery. This Decision may be subjected to judicial review only after all other available remedies have been exhausted*."), **C-15**.

6. The Slovak Republic did not violate the FET standard through inconsistent actions

399. Discovery also claims that Slovakia violated the FET standard through inconsistent actions from various Slovak authorities. Neither the facts nor the law help Discovery.

a. No inconsistent actions at Smilno

400. *First*, Discovery argues that the "*basis for the Police's decision not to remove the activists or their vehicles from the [field track] and the Police's decision not to approve the signs at the entrance of the [field track]*" was that the field track "*was not publicly accessible*".[526] Discovery claims that this position was inconsistent with statements of the Smilno Municipality, the Cartography and Cadaster Office, and the Police themselves, who all acknowledged that the field track was publicly accessible.[527]

401. Discovery's claim is both factually incorrect and legally irrelevant. The claim is legally irrelevant because the question under Slovak law was not whether the field track was publicly accessible, but whether it qualified as a PSPR. The Police would have had the authority to remove the activists and their vehicles and to approve road signage at the entrance only if the field track qualified as a PSPR.

402. Thus, the Police did not adopt the position that the field track on the Access Land was not publicly accessible.[528] Rather, as explained above, the Police disagreed that the field track qualified as a PSPR within the meaning of the Road Act, *i.e.*, that it was a road suitable for traffic.[529] In fact, the Police actually took the same view as the Smilno Municipality, which acknowledged that the field track was publicly accessible, but did not agree that the field track was a PSPR.[530]

403. Nor did the other authorities take different views. Contrary to Discovery's assertion,[531] the Cartography and Cadaster Office did not recognize that the field track was a PSPR. The cadastral map merely showed that there was a field track, but without any

526 Claimant's Reply, ¶ 316(1), fn. 660.

527 Claimant's Reply, ¶ 316(1).

528 *See supra* ¶¶ 317-322.

529 *See supra* ¶¶ 310-314.

530 *See supra* ¶ 310-322.

531 Claimant's Reply, ¶ 316(1)(c).

conclusion about whether it was a PSPR. Finally, as explained above, the meeting with the Police on 15 July 2016 was merely "*informal*", and the Police did not adopt any official position as to the status of the field track.[532]

404. *Second*, Discovery repeats its argument that there were inconsistencies between positions adopted by the MoT and MoI,[533] even though the Slovak Republic fully explained this issue in its Counter-Memorial.[534] After the District Traffic Inspectorate denied Discovery's road signage request in October 2016, AOG submitted a request for interpretation of Article 22 of the Road Act concerning special purpose roads to the MoT.[535]

405. The MoT responded on 29 November 2016, advising AOG that generally (*i.e.*, not specific to the Access Land in Smilno),[536] "*special purpose roads are divided into public and non-public special purpose roads*" and the "*regime of a special purpose road is prescribed by its owner*."[537] Therefore, the MoT concluded that "*the answer to the question whether a special purpose road is a public or non-public special purpose road depends on the relevant Building Permit and/or use permit relating to a particular special purpose road*."[538]

406. Following AOG's supplementary request, on 9 December 2016, the MoT responded, again without specific reference to the Access Land in Smilno, stating that "*[s]pecial purpose roads are in particular [field tracks] and forest paths, access roads to manufacturing plants, construction sites, quarries, mines, sand pits and other sites, and*

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532 *See supra* ¶¶ 315-316.

533 Claimant's Reply, ¶ 316(2).

534 Respondent's Counter-Memorial, ¶¶ 118-123.

535 According to Article 3c(6) of the Road Act, the MoT is the main state supervisor over the surface communications. *See* Road Act, Art. 3c(6), **R-175**.

536 The fact that it was AOG's attorney who requested this interpretation does not change things because he did not mention Smilno or that he acted on behalf of the AOG in neither of his two letters to the MoT. *See* Claimant's Reply, ¶ 111; Letter from V. Beran to the Ministry of Transport, Construction and Regional Development dated 22 November 2016, **R-182**.

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

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

roads within enclosed sites and structures."[539] The MoT explained that "*a track for which no building permit or decision approving its use has existed, and that has been registered in the Land Register, can be deemed a special purpose road, taking into account its traffic-related importance, designation and technical condition*."[540]

407. Discovery alleges that this position is inconsistent with a letter from the MoI dated 19 December 2016 (10 days later), which—unlike the two general opinions from the MoT—specifically addressed the Access Land in Smilno. There, the MoI stated the following:

> [I]f 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.[541]

408. In other words, the MoI concluded that, in a situation where the Smilno Municipality does not have any documentation evidencing the existence of a road on the Access Land and no other documentation evidencing the existence of such a road, the field track is *not* a PSPR. There is no contradiction between the two letters.

409. Discovery next states that "*there was a further contradiction between the positions adopted by the MoT and the MoI*" because while the MoT "*stated that even if there was no building permit or document from the Smilno Municipality evidencing the 'use' of the Road, the Road could still be deemed a public purpose road*", the MoI said that "*the absence of any documents evidencing the 'existence' of the Road was fatal and that the Road was therefore private land*."[542] These two statements are, again, compatible.

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

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

541 Statement of the Ministry of Interior regarding the classification of the Road dated 19 December 2016, **R-160**.

542 Claimant's Reply, ¶ 111(5).

410. As explained above, the MoT held that "*a track for which no building permit or decision approving its use (in Slovak: kolaudačné rozhodnutie) 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***."[543] What "*evidence[es] the existence*" of the road in the MoT's statement is the Land Register.[544] Discovery's argument is without merit.

411. Likewise, the MoI was opining on the status of the Access Land which was registered as arable land. At the same time, as explained above, at the time AOG was in Slovakia, the cadastral map did not contain any information that the field track was a PSPR.[545] There simply was no inconsistency between the MoI's statement and the cadastral maps, as Discovery suggests.[546]

412. Finally, Discovery argues that the MoI's conclusion about the field track being "*private land*" was inconsistent with the position adopted by the Police at the "*informal*" meeting dated 15 June 2016.[547] As explained above, the Police did not adopt any official position about the status of the field track at that meeting.[548]

b. No inconsistent actions at Krivá Oľka

413. *First*, Discovery argues that "*[b]y refusing to approve the Amendment to the Lease, the MoA acted inconsistently with the MoA's prior conduct (when it originally approved the Lease)*."[549] As the Slovak Republic explained above, the MoA approved the Lease Agreement because AOG fulfilled all requirements when it originally applied for the Lease and the MoA approved it.[550] When the MoA denied the Amendment, it was because AOG had breached the Lease Agreement.[551]

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

544 *See supra* ¶ 125.

545 *See supra* ¶ 403.

546 Claimant's Reply, ¶ 111(4).

547 Claimant's Reply, ¶ 111(4).

548 *See supra* ¶ 321.

549 Claimant's Reply, ¶ 317(1).

550 *See supra* ¶ 329.

551 *See supra* ¶¶ 334-343.

414. *Second*, Discovery argues that "*[b]y refusing to approve the Amendment to the Lease, the MoA acted inconsistently with […] the MoE's prior conduct (when it granted the 2016 Licences)*."[552] As explained above, these are separate acts that operate independently of each other. The outcome of one has no bearing on the outcome of the other. Further, the MoE and MoA have different spheres of competence, which only confirms that the actions of the former do not affect the actions of the latter.[553]

415. Discovery attempts to escape this principle by arguing that the "*organs must be treated as a 'unit' or 'monolith' for the purposes of Slovakia's obligations under international law (irrespective of the position under domestic law)*."[554] Therefore, since "*the MoA and MoE were both acting within the same sphere of powers*", they "*cannot be viewed as distinct bodies which do not cooperate*."[555] Discovery concludes that "*Slovakia cannot escape liability under international law by pointing to its own internal provisions of domestic Slovak law*."[556]

416. Discovery is mixing different concepts. The Slovak Republic agrees that the MoA and the MoE are both organs of the State. But that does not mean their different spheres of competence can be collapsed into one "*monolith*", as Discovery suggests. Rather, ample investment treaty authority confirms that inconsistency can appear only in situations where authorities "*acting within the same sphere of powers*" adopt inconsistent decisions.[557]

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552 Claimant's Reply, ¶ 317(1).

553 Respondent's Counter-Memorial, ¶ 352.

554 Claimant's Reply, ¶ 324.

555 Claimant's Reply, ¶ 323.

556 Claimant's Reply, ¶ 324.

557 *See, e.g., Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶ 551 ("*While a government's conduct might qualify as inconsistent for purposes of FET* ***if the same agency (or two agencies in the same sphere of competence)*** *issue contradictory decisions that cause harm to an investor, this is not the case 'when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency.'*"), **CL-015**; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1420 ("*There is no insconsistency [sic] and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency. The reason is simple: The modern nation-state typically endows different agencies with different legal and policy responsibilities and objectives.*"), **CL-037**; *see also* Respondent's Counter-Memorial, ¶¶ 347-352.

417. The competencies of different authorities are naturally set in "*internal provisions of domestic […] law*." The Slovak Republic already explained that the spheres of competence of the MoA and the MoE differ.[558] And while it is true that these ministries are obliged to cooperate, that cooperation does not mean that they act in the "*the same sphere of powers*", as Discovery suggests.[559]

418. *Third*, Discovery argues that the Slovak Republic acted inconsistently by rejecting AOG's application under Article 29 of the Geology Act. Discovery claims that the MoE allegedly "*accept[ed] in October 2016 that AOG's application was a clear case where the public interest requirement was met*"[560] and that the MoE was "*preparing to issue a decision in AOG's favour but then reversed course after having received instructions from higher up in the MoE to refuse the application*."[561]

419. As to the former, even assuming someone from the MoE stated this, the public interest requirement is not the only requirement that an applicant must show. The MoE can still reject the application under Article 29 of the Geology Act if other requirements—such as the applicant's impossibility of reaching an agreement with the landowner—are not met. Regarding the latter, as explained above, there was no "*instruction from higher up in the MoE to refuse the Article 29 application*."[562] Discovery claims that someone "*higher up*" ordered the MoE to rule against Discovery; but when Discovery appealed that decision, the Minister of Environment ruled in Discovery's favor. It has no response to this in its Reply.

420. *Fourth*, Discovery claims that the MoE's suspension of the Article 29 proceedings until the MoE "*had received documents showing AOG was unable to reach agreement*" with LSR was inconsistent with (*i*) the fact that the MoE already had requested documents and (*ii*) the fact that the MoE had already accepted that "*no agreement has been reached*" with LSR. As the Slovak Republic explained, the LSR representative noted at that meeting that AOG's "*proposal for the conclusion of a lease agreement for the*

558 Respondent's Counter-Memorial, ¶ 352; Act on Organization of Government Activities and Organization of Central Government, Arts. 9, 16, **R-071**.

559 Claimant's Reply, ¶¶ 323-324.

560 Claimant's Reply, ¶ 317(2)(a).

561 Claimant's Reply, ¶ 317(2)(b).

562 *See supra* ¶¶ 123-130; Claimant's Reply, ¶ 138.

property of interest has not been submitted for approval" to the MoA.[563] Put another way, LSR did not forward the proposal for a new lease agreement to the MoA. When the MoE asked AOG to request a new lease, AOG refused.[564]

c. No inconsistent actions with EIA

421. Discovery argues that the Slovak Republic acted inconsistently because "*[t]he EIA Decisions issued by the District Offices were inconsistent with numerous earlier statements attributable to Slovakia which had concluded that AOG's exploration activities were not likely to have a significant adverse effect on the environment*."[565] Discovery refers to (*i*) the statements of the District Office in Prešov submitted as part of the extension of AOG's Exploration Area Licenses in 2014 and 2016, (*ii*) a statement by Minister Sólymos in one news article, and (*iii*) statements of the District Office in Prešov and the District Office in Medzilaborce.[566]

422. *First*, Discovery claims that the EIA Decisions were inconsistent with earlier statements of the District Office in Prešov submitted within the procedure for extension of the Exploration Area Licenses in 2014 and in 2016. It suffices to say that the 2014 statements were issued before any exploration drills were even identified.[567] The 2016 statements were issued in relation to the extension of the Exploration Area Licenses and thus, do not replace EIA procedures to assess *specific* effects of *specific* drilling operations.

423. *Second*, Discovery's assertion that the EIA Decisions were inconsistent with earlier statements of Minister Sólymos from a news article is misplaced, too. There, in response to citizens' concerns, Minister Sólymos said that "*local people can be assured that the activities will not have any unfavourable impacts on their surroundings and the environment in general*."[568] It is clear that Minister Sólymos made this statement

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

564 *See supra* ¶ 143.

565 Claimant's Reply, ¶ 318(1).

566 Claimant's Reply, ¶ 172.

567 Respondent's Counter-Memorial, ¶¶ 59-66.

568 Korzar Article –Minister Comments on the Borehole Near Smilno dated 27 January 2017, **C-164**.

to comfort the public that the MoE would ensure that AOG's drills would be safe. This cannot be read as a statement that no Full EIA would be ordered.

424. *Third*, as the Slovak Republic explains below, there was no inconsistency between the Krivá Oľka EIA Decision and statements of the District Offices in Prešov and Medzilaborce.

425. *Finally*, Discovery argues that "*[t]he EIA Condition imposed by the MoE was inconsistent with the statements of the MoE and Minister Sólymos between November 2016 and February 2017 (viz. that the EIA Amendment did not apply to AOG and that AOG was not legally obliged to perform an EIA)*."[569] This is likewise incorrect because, as the Slovak Republic already explained, Minister Sólymos and the MoE repeatedly stated that the EIA Amendment applies to new drills after 1 January 2017.[570] The Preliminary EIA requirement likewise applied to new exploration drills.

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426. In sum, all of the "inconsistent actions", once viewed in their proper contexts, turn out to be baseless accusations.

7. The Slovak Republic did not breach the FET standard through allegedly arbitrary actions

427. The next components of Discovery's FET case are the so-called arbitrary acts that the Slovak Republic committed. In its Memorial, Discovery presented its claims about alleged arbitrary actions of Slovak authorities under the umbrella of the non-impairment standard under Article II(2)(b) of the BIT.[571] Now, in addition to the non-impairment standard, Discovery advances its claims about arbitrary actions under the umbrella of the FET standard.[572] In doing so, Discovery attempts to lower the standard by arguing that, unlike the non-impairment standard, the FET standard "*can exist irrespective of the harm or impairment that the breach may have caused to the investor*."[573]

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569 Claimant's Reply, ¶ 318(2).

570 Respondent's Counter-Memorial, ¶ 343.

571 Claimant's Memorial, ¶¶ 244-245.

572 Claimant's Reply, ¶¶ 325-328.

573 Claimant's Reply, ¶ 326(2).

428. To be arbitrary, the investor must show that state conduct or measures "*move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes* ***an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive***."[574] While it may be true that "*all measures which are arbitrary are unreasonable*,"[575] the question of whether a State's measure is reasonable "*depends on whether it pursues a rational policy bearing a reasonable relationship with a legitimate public purpose*."[576] As the tribunal in *Electrabel v. Hungary* explained with respect to the reasonableness of a state measure, "*there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it*."[577]

429. Similarly, the tribunal in *Cervin v. Costa Rica* held that, "*it is not enough to allege that the State misapplied the domestic regulatory framework or that its authorities incurred in questionable decisions under domestic law*."[578] Rather, "*it must be established that there has been a deliberate repudiation of the goals and objectives of a State policy*."[579] Finally, the impact of any challenged measure must be proportional to the policy objectives sought.[580] As shown below, Discovery does not even come close to meeting this standard.

a. Actions regarding individual well sites were not arbitrary

430. *First*, Discovery argues that the acts of the Police were arbitrary because it "*refused to accept that the Road was publicly accessible and refused to remove the activists and*

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574 *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 293, **RL-147**.

575 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1446, **CL-037**.

576 *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award, 7 October 2020, ¶ 545, **RL-065**.

577 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 179, **RL-148**.

578 *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, 7 March 2017, ¶ 527, **RL-149**.

579 *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, 7 March 2017, ¶ 527, **RL-149**.

580 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 179, **RL-148**.

their vehicles from the Road".[581] There was nothing here that could possibly qualify as "*shocking*" or a "*repudiation*" of the State's policy objectives, given that the field track was private land and AOG did not have the right to be on it without landowner consent.

431. *Second*, Discovery alleges arbitrariness because "*Dr Slosarčíková inexplicably ordered the Police to cancel their policing operation at Smilno*" despite the fact that "*crimes were being committed at the Smilno Site*."[582] Again, none of this is true, as Dr. Slosarčíková testifies.[583] And even if it were, at its highest, it would have been a "*questionable application of administrative or legal policy*"[584]—nothing more.

432. *Third*, Discovery then claim arbitrariness in the Police's refusal to approve the road signage in Smilno. Again, nothing arbitrary here. The Police denied the Smilno Municipality's request to approve the road sign because the field track was not a PSPR.[585] This conclusion was consistent with the conclusions of other Slovak authorities,[586] and it was communicated to AOG *before* the Police made its final decision.[587]

433. *Fourth*, Discovery claims that "*the MoA had the competence to approve any lease (or lease extension) concluded between [LSR] and a private party over State-owned forestry land*," and thus "*[t]he MoA's refusal to approve the Amendment involved an arbitrary and non-transparent application of this competence and/or an abuse of power for two separate reasons*."[588] The MoA did not approve the Amendment because AOG failed to comply with the Lease Agreement and it expired. The MoA's refusal is completely justifiable. Moreover, the MoA expressly communicated its reasons to

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581 Claimant's Reply, ¶ 329(1).

582 Claimant's Reply, ¶ 330(3).

583 Slosarčíková Second WS, ¶¶ 8-9. At the same time, none of the actions described by Discovery qualify as a crime. In fact, Discovery does not even point to any statutory provision to support its argument. *See* Claimant's Reply, ¶ 330(2).

584 *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 293, **RL-147**.

585 *See supra* ¶ 310.

586 *See supra* ¶ 120.

587 *See supra* ¶¶ 307-322.

588 Claimant's Reply, ¶ 332(1).

AOG.[589] Thus, there is nothing arbitrary or non-transparent here and there is no abuse of power, as Discovery suggests.[590]

434. *Fifth*, Discovery also complains that the "*process followed by the MoA when it considered AOG's request for approval of the Amendment was materially different from the process followed by the MoA when it considered NAFTA's request for approval of a lease over State-owned forestry land*" because "*there is no evidence that the MoA's Forestry Property Commission met to consider AOG's application (as was the case for NAFTA)*."[591] This argument again ignores the fact that AOG failed to comply with the Lease Agreement. When AOG originally requested approval for the Lease Agreement, the MoA processed AOG's application and AOG's request was considered by the same Forrest Property Commission that met to consider NAFTA's lease.[592] Thus, the MoA adopted the same approach in identical circumstances. That it did not do this when AOG requested an extension late—and therefore in breach of the Lease Agreement—is unsurprising.

435. *Sixth*, Discovery argues that the Slovak Republic acted arbitrarily and non-transparently in rejecting AOG's application under Article 29 of the Geology Act because of an alleged "*instruction*" to thwart AOG's project.[593] As explained above, there was no "*instruction*" from any higher official at the MoE and Discovery offers no evidence that "*officials higher up within the MoE did not want AOG to carry out its activities at Krivá Oľka*."[594] Minister Sólymos, who was the highest authority at the MoE at the time, confirms in his second witness statement that no one issued any instructions to thwart AOG's project.[595]

436. *Seventh*, Discovery—for the very first time—argues that the MoE acted arbitrarily when it "*suspended further consideration of AOG's Article 29 Application pending the*

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

590 Claimant's Reply, ¶ 332(1).

591 Claimant's Reply, ¶ 332(3).

592 Minutes from the Forrest Property Commission dated 14 October 2015, **R-183**.

593 Claimant's Reply, ¶ 333(2).

594 Claimant's Reply, ¶ 333(2)(b).

595 Sólymos Second WS, ¶¶ 12-13.

resolution of a 'preliminary issue' namely the submission of documents showing that AOG had been unable to reach agreement with State Forestry to lease the Krivá Oľka Site."[596] As explained above, LSR had not forwarded the proposal for a new lease agreement to the MoA; therefore, the MoA could not grant or deny it.[597] In turn, The MoE could not decide on the Article 29 proceedings without resolving this issue. When the MoE realized this, it asked AOG to make a simple request to LSR for a new lease agreement. AOG refused.[598]

b. The Preliminary EIA decisions were not arbitrary, and Discovery chose not to appeal them

437. Discovery next claims that the Preliminary EIA decisions that ordered Full EIAs were arbitrary because (*i*) the District Offices should have denied the Preliminary EIAs altogether because the EIA Amendment did not apply, and (*ii*) the reasoning in the decisions did not justify the Full EIAs.[599]

438. As described above, Discovery's argument that the District Offices should have denied the Preliminary EIAs on jurisdictional grounds contradicts the very promise it made to the local community. In any event, and again, Discovery *volunteered* itself to the EIA process.

439. Furthermore, and as noted above,[600] the appellate body already rejected Discovery's argument and found that the District Office properly assessed that it had the authority to rule on the application—*i.e.*, the project was covered by the EIA Amendment. This is unsurprising; AOG's application explained that the drill would be conducted only in the future, *i.e.*, it was a new drill, post-2017 and post-EIA Amendment.[601] As the exploration drills were covered in the Annex of the EIA Act after 1 January 2017, the

596 Claimant's Reply, ¶ 334(1).

597 *See supra* ¶ 143.

598 *See supra* ¶ 145.

599 Claimant's Reply, ¶ 335.

600 *See supra* ¶¶ 97-98.

601 Preliminary EIA submission of Smilno-1 dated May 2017, Art. 2.7, **R-184**; Preliminary EIA submission of Poruba-1 dated June 2017, Art. 2.7, **R-185**; Preliminary EIA submission of Krivá Oľka-1 dated July 2017, Art. 2.7, **R-186**.

District Office had no reason to deny these applications on jurisdictional grounds. The same holds true for AOG's other Preliminary EIA applications.

440. As for the substance of the decisions, one of the key principles in European environmental protection law is the so-called precautionary principle.[602] It "*is one of the foundations of the high level of protection pursued by [the European Union] policy on the environment*,"[603] and "*implies that in case of doubt as to the absence of significant effects such an assessment must be carried out*."[604]

441. The European Commission endorsed the same principle, stating that "*[t]he precautionary and prevention principles also imply that in case of doubts as to the absence of significant effects, an EIA must be carried out*."[605] Likewise, the Supreme Court of the Slovak Republic has recognized that a negative decision in a Preliminary EIA "*is a significant interference with the purpose*" of the EIA Act.[606] The same conclusion was then reached by the District Office in Medzilaborce.[607]

442. It follows that the threshold for imposing a Full EIA is not "*deliberately set at a high level to ensure that projects which are unlikely to have significant effects on the environment are not impeded*", as Discovery suggests.[608] Rather, the threshold is low to give effect to the precautionary principle guiding the EIA procedures.

443. This principle guides the scope of assessment required within a Preliminary EIA. When considering whether to order a Full EIA, District Offices shall consider numerous complex criteria set forth in Annex 10 of the EIA Act, including (*i*) the scope of the proposed activity, (*ii*) its interaction with other activities in the affected area, (*iii*) the

602 The Treaty on the Functioning of the European Union, 26 October 2012, Art. 191(2), **RL-150**.

603 Judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, Case C-127/02, ¶ 44, **RL-151**.

604 Judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, Case C-127/02, ¶ 44, **RL-151**.

605 Application of the EIA Directive to projects related to the exploration and exploitation of unconventional hydrocarbon dated 2012, pp. 3-4, **R-187**.

606 Judgment of the Supreme Court of the Slovak Republic, File No. 2Szo/92/2016 dated 18 December 2019, **R-188**.

607 Decision of the District Office Medzilaborce dated 8 March 2018, p. 125, **R-171**.

608 Claimant's Reply, ¶ 166.

carrying capacity of the natural environment, especially when it comes to wetlands, water bodies or forests, and (*iv*) the probability of impact on health or living comfort, to name a few.[609]

444. In view of these principles, the District Offices are only required to assess whether the proposed activity is "*likely to have significant effects on the environment*."[610] The precautionary principle mandates District Offices to err on the side of caution if in doubt. Against that background, the Slovak Republic will now address Discovery's individual claims about each decision.

i. *Smilno EIA Decision*

445. On 16 May 2017, AOG approached the District Office in Bardejov with a request that it not be obligated to include different variations of its proposed activity in its Preliminary EIA application. The District Office in Bardejov agreed, thus deciding in AOG's favor even before AOG submitted its actual application.[611] This fact alone is sufficient to rebut Discovery's speculation that the District Office in Bardejov somehow wanted to "*delay the project even further […] and hence prevent AOG from carrying out its exploration activities*."[612]

446. AOG then filed its application on 6 June 2017. As required by the EIA Act, the District Office published the application, which permitted the public to submit their comments to the proposed activity. The District Office in Bardejov received over *fifty* expert statements from affected authorities and comments from the public.[613]

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609 EIA Act (2017), Annex 10, **C-225**. While assessing these criteria, the District Offices take into account expert statements issued by affected authorities.

610 EIA Directive, Art. 2(1), **R-083**.

611 Letter from the District Office in Bardejov to AOG dated 17 May 2017, **R-189**.

612 Claimant's Reply, ¶ 169(6).

613 Notably, in its draft February 2017 press release, AOG sought to preclude local citizens from filing any objections in the EIA proceedings. However, based on discussions with local citizens, this condition was removed from the community agreement from April 2017. *See* Key principles –Alpine Oil & Gas Commitment to communities in North East Slovakia dated 11 February 2017, **C-166**; Press Release in relation to AOG's commitment to local communities in North-East Slovakia dated 5 April 2017, **C-171**.

447. For example, the Slovenský vodohospodársky podnik, š.p.[614] requested the Full EIA due to the proximity of the proposed drill to the water sources.[615] Furthermore, numerous local citizens expressed their concerns about the lack of emergency plans, impact on natural healing water sources, impact on sources of drinking water, loss of bees, or quality of water from wells.[616] Several of these statements were requests for the District Office to order a Full EIA.

448. The District Office in Bardejov then evaluated AOG's application, together with all submitted comments, and on 2 August 2017, issued its decision ordering the Full EIA for the Smilno well (the "**Smilno EIA Decision**").[617] This decision referred to numerous expert statements submitted by affected authorities. The entire Preliminary EIA procedure took less than two months. AOG participated in the proceedings and the District Office in Bardejov allowed AOG to exercise its procedural rights under the applicable law.

449. In its Reply, Discovery describes in detail the Smilno EIA Decision and complains of the quality of its justification and concludes that it "*was not based upon any rational evidential foundation. Rather, the Decision was arbitrary and was reached in bad faith by the District* Office."[618] Therefore, the "*purpose and effect of the Smilno EIA Decision was to delay the project even further (by requiring a Full EIA) and hence prevent AOG from carrying out its exploration activities*."[619]

450. As explained above, the District Office is only required to assess whether the proposed activity is "*likely to have significant effects on the environment*."[620] The Smilno EIA

614 Slovenský vodohospodársky podnik, š.p. is a state enterprise responsible for water management. *See* Water Act, Art. 48(2), **R-190**.

615 Decision of the District Office Bardejov dated 2 August 2017, **R-191**.

616 Decision of the District Office Bardejov dated 2 August 2017, **R-191**. Some of the villages do not have public water distribution system and they rely fully on water from wells.

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

618 Claimant's Reply, ¶ 169.

619 Claimant's Reply, ¶ 169.

620 EIA Directive, Art. 2(1), **R-083**.

Decision details all comments and requests submitted in the proceedings, and contains sufficient justification.[621]

451. Furthermore, AOG had a right to appeal if it genuinely believed that the reasoning was insufficient.[622] In fact, insufficient reasoning is a typical complaint made on appeal and AOG—represented by counsel—would have known this.

452. The fact that AOG opted not to appeal the Smilno EIA Decision is important because as the tribunal in *ECE v. The Czech Republic* held:

> [A]ny remedies that were available to the Claimants, and would have been or were effective to remedy the defects in the local administrative proceedings, retain their potential relevance and the Tribunal will have regard to them in assessing whether the conduct of the relevant authorities breached the standards of protection contained in the BIT.[623]

453. Similarly, the tribunal in *Cervin v. Costa Rica* found that to find a breach of the FET standard, "*the State's actions must be analyzed globally and, therefore, must take into account the resources that the State has made available to the investors and the use that the latter have made of them in an attempt to rectify any questionable application of the regulatory framework*."[624]

454. In other words, AOG's failure to exhaust available remedies and the fact that these remedies would not be futile is an important fact that the Tribunal must consider. The Slovak Republic maintains that AOG's failure to appeal this administrative decision—when an appeal would not have been futile—disposes of AOG's claim before this Tribunal.

455. After the Smilno EIA Decision became final, and in accordance with the EIA Act, the District Office in Bardejov organized a meeting attended by the representatives of the

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621 Decision from District Office Nové Zámky dated 12 December 2016, **R-215**.

622 Decision re. Smilno Environmental Impact Assessment (Slovak, with English translation) dated 2 August 2017, p. 55, **C-176**.

623 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.747, **RL-092**. Notably, the underlying BIT in this case also did not contain any obligation to exhaust all domestic remedies.

624 *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, 7 March 2017, ¶ 527, **RL-149**.

Smilno Municipality, the District Office in Bardejov, the District Office in Prešov, and AOG.[625] There, participants discussed the scope of the Full EIA.[626] AOG's representative—Mr. Meluš—accepted these conditions without any objections.[627]

ii. *Ruská Poruba EIA Decision*

456. AOG filed its application for the Preliminary EIA of the Ruská Poruba location on 4 July 2017. The District Office in Humenné received *thirty-five* statements from affected authorities and comments from the public. After evaluating these statements, on 7 September 2017, the District Office in Humenné ordered a Full EIA for the Ruská Poruba drill ("**Ruská Poruba EIA Decision**").[628] This decision referred to numerous expert statements submitted by affected authorities. Like the Smilno EIA Decision, the Preliminary EIA procedure here took around *two* months.

457. In this instance, Discovery *did* choose to appeal, and its appeal was successful. The District Office in Prešov quashed the Ruská Poruba EIA Decision and returned it for further proceedings.[629] In other words, the Slovak Republic offered Discovery/AOG a legal system which ensured that Discovery/AOG was allowed to effectively protect its rights.

458. The fact that the District Office in Prešov quashed the Ruská Poruba EIA Decision, however, cannot amount to a breach of the FET standard. The conclusion of the tribunal in *ECE v. The Czech Republic* is relevant here:

> The purpose of due process is however, while enabling the decision-maker to exercise its administrative or judicial powers, to see to it that that is done in a manner which is fair to the interests of an investor; ***it follows that there can be no violation of fair and equitable treatment in a flawed decision at first instance which is***

625 Claimant's Reply, ¶ 176(1).

626 Those were the requirements identified during the Preliminary EIA. *See* Claimant's Reply, ¶ 169(4).

627 Minutes from the Meeting dated 30 November 2017, **R-192**; *see also* Decision of the District Office Bardejov dated 30 November 2017, **R-193**; Report from Mr. Lewis dated 23 January 2018, **R-194**; Report from Mr. Lewis dated 6 December 2017, **R-195**.

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

629 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba (Slovak, with English translation) dated 6 October 2017, p. 1, **C-184**.

> ***subsequently reversed on appeal***, and the effects of which were therefore only temporary.[630]

459. Finally, it is worth recalling that most of Discovery's original claims regarding the Ruská Poruba EIA Decision were that Mr. Harakal—the Head of the Environmental Protection Department at the District Office in Humenné—allegedly told AOG that "*the outcome of the process had already been decided by his superiors in Bratislava*."[631] Once the Slovak Republic explained in its Counter-Memorial that these allegations are implausible and belied by the fact that AOG's appeal was successful,[632] Discovery chose not to repeat them in its Reply.

460. Ultimately, even though it was successful on appeal, Discovery chose to withdraw from the remanded proceedings. The fair inference is, again, that it had exhausted all funding possibilities and chose not to continue its exploration activities in the Slovak Republic.

iii. *Krivá Oľka EIA Decision*

461. AOG submitted its application for the Preliminary EIA of the Krivá Oľka location on 22 August 2017.[633] The District Office in Medzilaborce collected statements from *seventeen* affected authorities, *eight* of which requested a Full EIA, and 174 comments from the public.[634] After evaluating these statements, on 8 March 2018, the District Office in Medzilaborce likewise ordered a Full EIA for AOG's drill in Krivá Oľka ("**Krivá Oľka EIA Decision**").[635] This decision was fully justified and supported by rational and objective foundation of fact or expert opinion.

462. In its Reply, Discovery asserts that the grounds for ordering the Full EIA under the Krivá Oľka EIA Decision were (*i*) "*inconsistent with earlier statements attributable to Slovakia*"; and (*ii*) "*not supported by any rational evidential foundation*."[636]

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630 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.805, **RL-092**.

631 Fraser First WS, ¶ 99.

632 Respondent's Counter-Memorial, ¶¶ 204-209.

633 Decision of the District Office Medzilaborce dated 8 March 2018, p. 1, **R-171**.

634 Decision of the District Office Medzilaborce dated 8 March 2018, pp. 3, 123, **R-171**.

635 Decision of the District Office Medzilaborce dated 8 March 2018, p. 1, **R-171**.

636 Claimant's Reply, ¶ 171.

463. *First*, Discovery argues that the Krivá Oľka EIA Decision is inconsistent with one earlier statement from the District Office in Prešov dated 16 January 2015.[637] There, the District Office in Prešov held that "*there is no assumption of its significant impact on the integrity of the Laborecká Upland Protected Bird Area included in the network of NATURA 2000 protected areas*."[638] Importantly, Discovery fails to mention that the District Office in Prešov issued this opinion in accordance with Article 28(4) of the Act No. 543/2002 Coll on Nature and Landscape Protection, as amended ("**Nature Protection Act**"), under which the District Offices issue assessments regarding the possible impacts of proposed activities in the European network of protected areas.[639] That is a substantially narrower question compared to the scope of the Preliminary EIA.

464. As the Krivá Oľka site is located in a Natura 2000 protected bird area, the District Office in Prešov opined on the possible impact of the proposed drill on certain bird habitat, not on its general impacts on nature, which would be a much broader question assessed under different provisions of the Nature Protection Act. Therefore, the Krivá Oľka EIA Decision explicitly noted that "*this expert opinion according to Article 28 par. 4 of the Nature Protection Act does not replace other statements, consents, exceptions or decisions - required according to the Nature Protection Act […] and statements, consents or decisions required according to other valid legal regulations*."[640]

465. *Second*, Discovery further argues that the Krivá Oľka EIA Decision is inconsistent with the statement of the District Office in Medzilaborce dated 23 January 2015.[641] By way of background, the environmental protection department of the District Office in Medzilaborce issued a statement in response to AOG's request for comments to the project documentation of its drill. In response to this narrow question, the District Office in Medzilaborce stated that "*[t]he location of the construction will not have a significant impact on the threat and change of the current habitat as well as the habitats of wild fauna and flora, or no habitat of European importance or habitat of national*

637 Claimant's Reply, ¶ 172(1).

638 Expert Opinion of the District Office in Prešov dated 16 January 2015, **C-265**.

639 Nature Protection Act, Art. 28(4), **R-043**.

640 Expert Opinion of the District Office in Prešov dated 16 January 2015, p. 3, **C-265**.

641 Claimant's Reply, ¶ 172(2).

importance will be damaged or destroyed."[642] This is, again, a significantly narrower scope than that of the Preliminary EIA assessment.

466. *Third*, Discovery refers to one statement of Minister Sólymos that, while "*circa 8,000 exploratory wells had been drilled to date in Slovakia*," the MoE was "*not aware of even a single environment-related problem occurring as a consequence of those 8,000 prospector bore holes*."[643] Discovery, however, overlooks that these drills were made over the last thirty years. Since then, environmental norms have radically changed and the threshold for assessment has become increasingly stringent over time. Discovery also ignores the fact that each exploration drill is different and thus, while some drills may have no environmental impacts, others can.

467. *Fourth*, Discovery points to the conclusion that "*[e]xecution of the activity proposed might result in contamination of groundwater and surface water with harmful substances, which poses a* ***possible*** *negative impact*"[644] and argues that "*[t]he Tribunal will note that the District Office did not find that this specific issue was* ***likely to have significant effects on the environment*** *(i.e. the relevant threshold under the EIA Act).*"[645] However, Discovery did not include the sentence immediately after the cited one, which states that "*[c]onsidering the current water conditions at the site of the activity proposed,* ***significant impacts of the proposed activity on the water regime as well as possible significant impacts on the quality of groundwater and surface water together with the rock environment are likely***."[646] That was a convenient omission from Discovery's Reply.

468. *Fifth*, Discovery argues that the finding about possible negative effects on groundwater is inconsistent with the MoE's press release dated 15 January 2017,[647] where the MoE stated:

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642 Statement of the District Office in Medzilaborce dated 23 January 2015, **C-266**.

643 Claimant's Reply, ¶ 172(3); Korzar Article –Minister Comments on the Borehole Near Smilno dated 27 January 2017, **C-164**.

644 Decision of the District Office Medzilaborce dated 8 March 2018, p. 124, **R-171**.

645 Claimant's Reply, ¶ 173.

646 Decision of the District Office Medzilaborce dated 8 March 2018, p. 124, **R-171**.

647 Claimant's Reply, ¶ 173(2).

> Envirorezort has dealt with the topic of exploratory wells in Smilna several times in the past. And not once was there evidence of a violation of the law, and thus a threat to the environment. An example is the inspection results of the Slovak Environmental Inspection, which did not prove a violation of the Water Act. Thus, the suspicion that groundwater pollution would occur as a result of the survey was not confirmed.[648]

469. It is clear from this wording that the Slovak Environmental Inspection assessed AOG's own compliance with the law and found that, so far, no groundwater pollution was found in their specific case. The EIA standards, however, are materially different from the assessment by the Slovak Environmental Inspection

470. *Sixth*, Discovery also argues that despite AOG submitting its comments and observations regarding water pollution and landslides in the proceedings,[649] the District Office in Medzilaborce "*did not explain (by reference to objective facts or expert opinion) why AOG's explanations in this regard were incorrect or why AOG's activities 'might' result in groundwater contamination*."[650] For instance, the District Office in Medzilaborce considered the landslides risks based on AOG's own submission and expert statement of the MoE. In any event, the applicable law does not require the District Office to address *all* particular statements in the procedure "*by reference to objective facts or expert opinion*."[651] Thus, the District Office in Medzilaborce was not obliged to address *all* of AOG's additional comments "*by reference to objective facts or expert opinion*."

471. Despite these criticisms, Discovery chose not to appeal this decision.

* * *

472. Discovery spent *seven* pages of its Reply describing and challenging almost each finding in the individual Preliminary EIA decisions. Had AOG wished to challenge these, it should have appealed them and allowed the dedicated Slovak authority to assess these technical and complicated issues. The Slovak Republic again notes that

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648 Ministry of Environment Press Release dated 15 February 2017, **C-168**.

649 Claimant's Reply, ¶ 174.

650 Claimant's Reply, ¶ 173(2).

651 Claimant's Reply, ¶ 173(2).

AOG actually succeeded in the only appeal it did lodge. And even then, despite its success, it stopped pursing the remanded proceedings.

473. *Finally*, Discovery argues that "*conduct of the MoE in imposing the EIA Condition also involved an arbitrary application of Slovak law and/or an abuse of power*."[652] As the Slovak Republic explained above, the EIA requirement was lawful.[653] And again, even if the MoE were wrong to have done this, it cannot possibly rise to the levels required to constitute arbitrariness under the FET standard.

8. The Slovak Republic did not deny justice to Discovery or AOG

a. Denial of justice is a high standard that requires exceptional facts

474. Discovery next argues that the conduct of the Slovak judiciary breached the FET standard by denying it justice.[654] Although Discovery brings these claims under the umbrella of the FET standard, denial of justice is distinct. It cannot be lumped into FET with no appreciation of the distinct and high threshold that denial of justice requires.[655]

475. Denial of justice arises in the face of a *systemic and flagrant* failure of the host State's judiciary to grant due process to the investor and is only available where the investor has exhausted all available local remedies.[656] But even if the Tribunal considers Discovery's denial of justice claim under the umbrella of the FET Standard, Discovery's case still fails.

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652 Claimant's Reply, ¶ 336.

653 *See supra* ¶¶ 382-390.

654 Claimant's Reply, ¶¶ 337-342.

655 *See, e.g., Agility Public Warehousing Company K.S.C. v. Republic of Iraq,* ICSID Case No. ARB/17/7, Final Award, 22 February 2021, ¶ 210 ("*It is clear that the* ***threshold for a claim of denial of justice is high***."), **RL-152**; *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, ¶ 499 ("***An elevated standard of proof is required for finding a denial of justice*** *due to the gravity of a charge which condemns the State's judicial system as such.*"), **RL-057**.

656 *See, e.g., Liman Caspian v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 279, **CL-038**; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 225, **RL-075**; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 254, **RL-076**.

476. Denial of justice traditionally focuses on procedural misconduct of national courts.[657] Unable to identify a procedural issue that meets the high threshold for denial of justice, Discovery is left to allege "*substantive denial of justice*", *i.e.*, decisions on the merits of domestic claims.[658] But as the Slovak Republic has explained, mere misapplication of domestic law does not amount to a denial of justice, whether as an autonomous standard, or under the FET claim.

477. Numerous authors and international tribunals have endorsed this principle.[659] For example, the tribunal in *Iberdrola v. Guatemala* concluded that "*denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided*."[660] Similarly, the *Jan de Nul* tribunal observed that, absent proof of discrimination or severe impropriety, an international tribunal cannot review the scope of jurisdiction of domestic courts or their application of *national law*:

> [T]he Tribunal does not review the scope of the jurisdiction of the national authorities or the application of the law. This may be different if the result were to show discrimination or severe impropriety situation that does not arise here. Hence, the Tribunal can see no element of denial of justice in this allegation.[661]

478. Notably, in its Reply, Discovery does not even try to address these cases. Accordingly, Discovery's reliance on a substantive denial of justice based on a misapplication of domestic law is irredeemably flawed.

479. The Slovak Republic does not argue that "*the misapplication of domestic law by a host State's judiciary can never trigger international liability*", as Discovery suggests.[662]

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657 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), pp. 4, 62, **RL-077**; *Loewen v. USA*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, ¶ 132, **CL-039**.

658 Claimant's Memorial, ¶¶ 222 *et seq*.; Claimant's Reply, ¶ 337.

659 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), p. 73, **RL-077**; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 94 (citing Gerald Fitzmaurice, "*The Meaning of the Term 'Denial of Justice'*", 1932 *BYIL* 93 at 111, n.1 and Charles de Vischer, "*Le déni de justice en droit international*", (1935) 34 *Recueil des cours* 370 at 376), **RL-078**.

660 *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, ¶ 432, **RL-079**.

661 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶ 206, **CL-029**.

662 Claimant's Reply, ¶ 341(3).

Rather, as the Slovak Republic explained, denial of justice is when a decision was so aberrant that it "*shows that a minimally adequate system of justice has not been provided*".[663]

480. Even if Discovery's proposition that "*substantive denial[s] of justice*" are actionable under the FET standard, its claim still fails. At the very least, Discovery would need to furnish evidence that the decisions of the District Court in Bardejov or the Regional Court in Prešov rest on "*exceptionally outrageous or monstrously grave*"[664] misapplication of Slovak law that cannot be explained by "*any valid legal reason*",[665] or show a "*manifest failure of natural justice in judicial proceedings*".[666] Discovery cannot show either, as the following sections demonstrate.

b. The Slovak courts did not deny justice to AOG/Discovery

481. Discovery argues that the Bardejov District Court's decision to grant the Interim Injunction and the Prešov Regional Court's decision to uphold the Interim Injunction amounted to denial of justice because: (*i*) "*the decisions were arbitrary*;" and/or (*ii*) "*it is to be inferred that the Courts were biased against AOG*."[667] Neither is true.

482. *First*, as Prof. Fogaš explained in his first expert report and confirms in his second, the statutory conditions for granting the Interim Injunction were fulfilled. Ms. Varjanová stated and described in detail all prerequisites necessary for granting the Interim Injunction, including the justification of a threat of imminent harm.[668] Prof. Fogaš therefore concludes that, "*it was justified to grant preliminary protection to the applicant in the form of the Interim Injunction for the period until the decision on the merits becomes effective*."[669]

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663 *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 ¶ 432, **RL-079**.

664 E. J. Aréchaga, *International Law in the Past Third of a Century (Volume 159)* in Collected Courses of the Hague Academy of International Law (1978), p. 282, **RL-080**.

665 E. J. Aréchaga, *International Responsibility of States for Acts of the Judiciary* in Transnational Law in Changing Society (1972), p. 185, **RL-081**.

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

667 Claimant's Reply, ¶ 343.

668 Fogaš First ER, § 3.1.3; Fogaš Second ER, § II.A.3.

669 Fogaš First ER, ¶ 15; Fogaš Second ER, § II.A.3.

483. *Second*, contrary to Discovery's assertion, neither the Bardejov District Court nor the Prešov Regional Court were obliged to *ex officio* investigate the status of the field track on the Access Land. Contrary to Discovery's assertion, the status of the field track was not relevant or material for the court's assessment of its own jurisdiction. The Bardejov District Court had jurisdiction because Ms. Varjanová was pursuing a civil claim related to AOG's violation of her preemption rights. Having jurisdiction, the Bardejov District Court was bound to decide on the merits of the Interim Injunction based on the facts alleged by Ms. Varjanová. Prof. Fogaš therefore concludes that Bardejov District Court acted properly when it did not consider the manner of use of the Access Land.[670]

484. Notably, in its appeal, AOG claimed that its right to use the field track was based exclusively upon its alleged co-ownership of the Access Land.[671] At no point during the appellate proceedings did AOG base its claimed right of usage upon its PSPR Theory.[672] Thus, the status of the field track was not relevant for the Prešov Regional Court's decision on AOG's appeal, either. Prof. Fogaš therefore confirms that the Prešov Regional Court did not err when it affirmed the Bardejov District Court's decision on the Interim Injunction.[673]

485. Discovery knows that, even though the status of the field track as a purported "special purpose road" is an essential element of its claims in this arbitration, it has no answer to the fact that AOG failed to mention this in its appeal. Thus, instead of explaining why AOG failed to invoke the PSPR Theory in its appeal against the Interim Injunction, Discovery shifts the blame to the Slovak Republic yet again.

486. It argues that the Slovak Republic "*has not disclosed a copy of [the] 'investigation file'*" submitted by Ms. Varjanová to support her request for the Interim Injunction.[674]

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670 Fogaš First ER, ¶¶ 76, 80; Fogaš Second ER, § II.A.2.

671 AOG, for instance, argued that "*the claimant has decided in contradiction to all the customs to violate **the rights of a co-owner** — [AOG] by blocking with motor vehicles owned by the claimant and persons known to the claimant*," or that "*the claimant has decided in contradiction to all the customs to violate **the rights of a co-owner** — [AOG] by blocking with motor vehicles owned by the claimant and persons known to the claimant*." Appeal of company AOG against the decision of District Court Bardejov of 2 March 2016**, LF-17**; Fogaš First ER, ¶ 74.

672 The fact that AOG mentioned a "*field road*" once in its appeal does not change a thing. This is because, as explained above, not all field tracks are PSPRs. *See supra* ¶ 106.

673 Fogaš First ER, §§ 3.1.2, 3.2; Fogaš Second ER, ¶ 4.

674 Claimant's Reply, ¶ 346(2).

Discovery states that "*it is clear from the subsequent decisions issued by the Bardejov District Office […] that the legal status of the Road would inevitably have been considered by the Police as part of its investigation*"[675] and thus, the Bardejov District Court "*was either aware of the existence of the Road or, alternatively, ought to have been aware of this fact*."[676] This is obvious speculation—and unwarranted speculation at that.

487. If Discovery wanted this document, it should have asked for it in document production. The reason it did not was because AOG *was a party to the court proceedings* at the Bardejov District Court and thus has a copy of it.[677] Instead of accusing the Slovak Republic of "failing" to disclose a file within its possession, custody, or control, Discovery should have just submitted it for the Tribunal's own benefit. Discovery's ongoing efforts to try and discharge its burden of proof by blaming the Slovak Republic for its own lack of evidence is a common theme.

488. *Third*, Discovery provides no support for its assertions that Ms. Varjanová's "*unlawful conduct disentitled her from obtaining an interim injunction*",[678] or that "*the Interim Injunction was not aimed at protecting Mrs Varjanová's alleged interest (because it prevented AOG from using the Road which was publicly accessible)*."[679] As Prof. Fogaš explains, "*AOG as a co-owner sought to exercise its right to use the [Access Land] and repeatedly removed the motor vehicle leased by the plaintiff from the [Access Land]*."[680] Evidence submitted by Ms. Varjanová also showed that she even submitted "*a criminal complaint about the damage to the vehicle that was caused by its unlawful removal from the Land Plot*" and that this led to the "*commencement of criminal investigation of the minor offence of damage to property belonging to another*."[681] Therefore, Ms. Varjanová had satisfied the court of the necessary elements for an interim

675 Claimant's Reply, ¶ 346(2).

676 Claimant's Reply, ¶ 346(3).

677 Code of Civil Procedure, Art. 44, **R-078**.

678 Claimant's Reply, ¶ 347.

679 Claimant's Reply, ¶ 347.

680 Fogaš First ER, ¶ 61.

681 Fogaš First ER, ¶ 61.

injunction.[682] In other words, Ms. Varjanová used the right procedure to protect her ownership rights.[683]

489. *Fourth*, the fact that Discovery failed to exhaust all available remedies is important both under the FET claim and a denial of justice claim. Discovery, however, does not offer any support for its assertion that these remedies would have been futile.

490. *Finally*, Discovery argues that "*unwarranted delays in the proceedings after June 2016 meant that the Interim Injunction remained in force for many more months, which itself involved a separate breach by Slovakia's Judiciary of the FET Standard*."[684] However, as Prof. Fogaš explains in his second expert report, "*[n]o delays occurred during the first instance and appellate proceedings. The first-instance court and the appellate court conducted the proceedings in accordance with the valid law*."[685]

* * *

491. Discovery has failed to prove that these proceedings were biased, arbitrary, unjust or idiosyncratic such that "*they should compel the Tribunal to conclude that the decisions could not have been reached by an impartial body worth of its name*."[686] At the same time, there is no evidence whatsoever that the Slovak courts "*were biased against AOG*."[687]

B. The Slovak Republic did not violate the National Treatment Standard

492. Beyond FET, Discovery argues that the Slovak Republic violated Article II(1) of the US-Slovakia BIT (the "**National Treatment Standard**") and the discrimination prong of the Non-Impairment Standard in Article II(2)(b). Specifically, Discovery argues that Slovakia treated NAFTA more favorably.

493. Discovery's analysis begins with a flawed test. Discovery argues that it must (*i*) identify an appropriate comparator, (*ii*) establish that the Slovak Republic "*applied to*

682 Fogaš First ER, § 3.1.3.

683 Fogaš Second ER, § II.A.1.

684 Claimant's Reply, ¶ 348.

685 Fogaš Second ER, ¶¶ 6, 50-51.

686 Claimant's Memorial, ¶ 229.

687 Claimant's Reply, ¶ 343.

this comparator treatment more favourable than that which was accorded to Discovery or its investment in Slovakia", and (*iii*) establish that "*there is a lack of a reasonable or objective justification for the difference*."[688] But the appropriate comparator must be in "*like circumstances*".[689] That is a hallmark criterion that Discovery casually excludes, and the reason why is evident: it cannot identify "*like circumstances*".

494. Furthermore, Discovery criticizes the Slovak Republic's reliance on *Festorino v. Poland* because Discovery "*does not rely on 'limited summaries' of licences held by NAFTA as recorded in its annual reports*," but "*on underlying primary documents*".[690] But this misses the point entirely. The Slovak Republic relied on this case to explain that Discovery did not apply the relevant test for a national treatment standard claim:

> To find that these facts demonstrate actionable discrimination, the Tribunal would have to be in possession of *significantly more evidence* proving (*i*) that the Claimants and PGNiG were afforded noticeably different treatment ***in proceedings similar enough to be compared***; and (*ii*) that such a discrepancy ***was nationality-based and not the result of some other confounding variable unrelated to nationality***.[691]

495. As the Slovak Republic explained in its Counter-Memorial and repeats here, Discovery comes nowhere near satisfying these requirements.

1. NAFTA is not an appropriate comparator

496. Discovery argues that the fact that NAFTA is a Slovak entity "*alone is sufficient to constitute NAFTA as an appropriate comparator under the BIT*."[692] Yet NAFTA—like AOG—is a company registered in the Slovak Republic. Both entities are nationals of the Slovak Republic.[693]

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688 Claimant's Reply, ¶ 352.

689 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 710, **RL-066**; *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, ¶ 525, **RL-083**.

690 Claimant's Reply, ¶ 354(3).

691 *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ¶ 747, **RL-082**.

692 Claimant's Reply, ¶ 357.

693 Extract from the Register of Public Sector Partners of Nafta a.s. dated 16 February 2023, **R-098**.

497. At the same time, the Slovak Republic already explained in its Counter-Memorial that NAFTA is a Slovak entity controlled by a foreign national.[694] During AOG's time in Slovakia, Mr. Daniel Křetinský (Czech national) held a 40.45% stake in NAFTA via his Czech company Czech Gas Holding Investment BV.[695] Mr. Daniel Křetinský also indirectly owned 49% of SPP Infrastructure, a. s., which in turn held another 56.15% stake in NAFTA.[696] Thus, contrary to Discovery's assertion, Mr. Křetinský had a majority stake in NAFTA. As for AOG, it is also a Slovak entity controlled by a foreign national—Mr. Michael Lewis. Thus, there can be no element of nationality-based discrimination.

2. NAFTA was not treated more favorably by the MoE

498. Discovery claims that the "*MoE granted a compulsory access order in favour of NAFTA under Article 29 of the Geology Act*," but "*declined to grant an order in favour of AOG*."[697] Based on this singular occurrence, Discovery concludes that NAFTA was treated more favorably.

499. As the Slovak Republic explained in its Counter-Memorial, Discovery omits almost all of the key facts differentiating these two cases. To recall, on 12 May 2010, NAFTA requested compulsory access because the owner of the property in question, the Forest Society Záhorská Ves, refused to agree with NAFTA on conditions for access.[698] The MoE ultimately granted NAFTA's request on 13 April 2012, *i.e.*, almost two years after NAFTA's initial request.[699] The Forest Society Záhorská Ves then appealed the decision. On 21 August 2012, the Minister of Environment *ex officio* quashed the decision granting NAFTA compulsory access, finding that the scope of access rights granted to NAFTA excessively impacted the owner's rights. Thus, after over two years of the proceedings, NAFTA found itself at the very beginning of the procedural process.

694 Respondent's Counter-Memorial, ¶ 386.

695 Claimant's Reply, ¶ 356.

696 SPP Infrastructure Independent Auditor's Report as of 30 June 2016 dated 10 August 2016, p. 9, **R-216**; Nafta Annual Report 2016, p. 8, **R-217**.

697 Claimant's Reply, ¶ 359.

698 NAFTA a.s. section 29 applications dated 2010, pp. 1-2, **C-32**.

699 Decision of the Minister of Environment dated 17 May 2013, p. 2, **R-099**.

500. The MoE then assessed NAFTA's request and issued new decisions granting NAFTA the compulsory access on 1 March 2013. Following the dismissal of the owner's appeal, the decision granting the compulsory access to NAFTA became effective on 21 May 2013, *i.e.*, three years after NAFTA's initial application. At the same time, within this procedure, the MoE repeatedly requested NAFTA to supplement its submission and provide its comments or additional explanations.[700]

501. Discovery does not offer any meaningful response to these facts. All that Discovery states is that its "*complaint of discrimination is not about the length of time it took for the MoE to reach its decision*." Rather, its "*complaint is that NAFTA was treated more favourably than AOG because the MoE granted NAFTA's application whereas the MoE declined to grant an order in favour of AOG*."[701] Notably, Discovery does not even try to demonstrate that alleged differences in treatment "*was nationality-based and not the result of some other confounding variable unrelated to nationality*."[702]

502. NAFTA's case shows that decisions under Article 29 of the Geology Act can be lengthy and complex, often requiring applicants to submit numerous documents to assist the MoE. When the MoE requested NAFTA to submit additional documents, NAFTA complied. Meanwhile, when the MoE requested AOG to submit additional documents, AOG ceased participating in the proceedings. There is no indication of any arbitrary action or discrimination, let alone nationality-based discrimination. Rather, AOG's refusal to participate in the proceedings is the "*reasonable or objective justification*" for different outcomes in these proceedings.[703]

3. NAFTA was not treated more favorably by the MoA

503. Discovery further argues that the MoA treated NAFTA more favorably because it approved NAFTA's lease, whereas AOG's lease was denied.[704] In making this argument, Discovery explains that the "*process followed by the MoA in approving the*

700 *See, e.g.*, NAFTA a.s. section 29 applications dated 2010, pp. 6, 17, **C-32**.

701 Claimant's Reply, ¶ 359.

702 *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ¶ 747, **RL-082**.

703 Claimant's Reply, ¶ 352.

704 Claimant's Reply, ¶¶ 362 *et seq*.

NAFTA Lease was materially different from the process followed in AOG's case"[705] because (*i*) the MoA acted faster when approving NAFTA's lease,[706] (*ii*) unlike AOG's Amendment, NAFTA's lease was discussed at the Forrest Property Commission,[707] and (*iii*) while "*[t]he MoA's decision approving the NAFTA Lease was communicated by the-then Head of the Service Office […] the MoA's decision refusing to approve AOG's lease was communicated by Minister Matečná*."[708]

504. As explained above, the sole reason for the MoA's decision not to approve the Amendment was AOG's breach of the Lease Agreement and subsequent inability to approve the expired Lease Agreement.[709] There is no suggestion that NAFTA failed to comply with its contractual obligations, but that the MoA nevertheless approved its lease. Therefore, a comparison of AOG's treatment in relation to the Amendment with NAFTA's lease fails from the start. As such, NAFTA and AOG were not in "*like circumstances*".

505. The more appropriate comparison would be to compare the approval process for NAFTA's lease with the approval of AOG's Lease Agreement. And there, the procedures were identical. After LSR requested the MoA to approve AOG's and NAFTA's leases, the MoA processed both requests.[710] Both leases were also discussed at the Forrest Property Commission[711] and the MoA approved them. Thus, when actual "*like circumstances*" existed, both AOG and NAFTA were treated the same.

4. EIA

506. Finally, Discovery argues that the "*third instance of Slovakia's discriminatory treatment arises out of the MoE's imposition of the EIA Condition in 2018*."[712] As explained below, this argument suffers from numerous flaws.

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705 Claimant's Reply, ¶ 365.

706 Claimant's Reply, ¶ 365(1).

707 Claimant's Reply, ¶ 365(2).

708 Claimant's Reply, ¶ 365(3).

709 *See supra* ¶¶ 132-141.

710 Whether NAFTA's lease was longer of for larger area is irrelevant. As explained above, the reason why AOG obtained shorter lease was AOG's approach. *See supra* ¶¶ 331-332.

711 *See supra* ¶ 434.

712 Claimant's Reply, ¶ 367.

507. Again, Discovery must identify a comparator who is in "*like circumstances*". It has failed to do this. It has not cited a single document to show that the MoE *did not* impose this requirement on another exploration area license holder who reduced its license post-2017, after the EIA Amendment came into effect. It therefore cannot identify a comparator—let alone one who is in like circumstances. But in any event, the MoE applied this approach in numerous cases and included similar requirements on other exploration area licenses after 1 January 2017.[713] Thus, AOG was not treated differently than others.

C. The Slovak Republic provided Discovery effective means of asserting its claims

508. Discovery claims that the Slovak Republic breached the BIT by not providing effective means for Discovery to assert its claims. There is no merit to this claim. The "*effective means*" standard is not absolute: "*the threshold of 'effectiveness' stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system de novo*."[714]

509. Moreover, as the tribunal in *Apotex* held, the standard of effective means does not apply in non-adjudicatory administrative decision-making. Discovery's only response is that the Slovak Republic "*is wrong to assert that Article II(6) does not apply in 'non-adjudicatory administrative decision-making'*"[715] as "*[t]he award cited by Slovakia (Apotex v USA) is distinguishable*".

510. According to Discovery, *Apotex* is distinguishable because the tribunal in *Apotex* was interpreting Article II(6) of the Jamaica-USA BIT, under which "*[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investments*". Discovery claims that Article II(6) of the US-Slovakia BIT is broader because it covers "*authorizations relating*" to investments. As "*authorizations*" cover

713 *See supra* ¶ 394.

714 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 247, **CL-046**.

715 Claimant's Reply, ¶ 371.

administrative decision-making, Discovery concludes that "*[t]his is unambiguously the language of non-adjudicatory administrative decision-making*."[716]

511. Had Discovery reviewed all of Article II(6) of the Jamaica-USA BIT, it would have found that it is materially identical to Article II(6) of the US-Slovakia BIT:

(a) **Article II(6) of the US-Slovakia BIT**: "*Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments and authorizations relating thereto and investment agreements*."[717]

(b) **Article II(6) of the US-Jamaica BIT**: "*Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations granted by a Party's foreign investment authority*."[718]

512. This alone is sufficient to rebut Discovery's assertion that "*Article II(6) of the US-Slovakia BIT is broader*."[719] In any event, the *Apotex* tribunal reached its conclusion that the effective means standard does not apply to non-adjudicatory administrative decision-making by interpreting the phrase "*asserting claims and enforcing rights*."[720] Article II(6) of the US-Slovakia BIT contains the very same language. Thus, the Tribunal's analysis in *Apotex* is not distinguishable. The effective means standard does not apply to non-adjudicatory administrative decision-making.

513. But even if the effective means standard applied to Article 29 proceedings, Discovery's complaints about the length of the proceedings is misplaced. The duration was caused primarily by AOG's failure to submit a complete application with all required documents and, later, its failure to submit additional documents requested by the MoE.

514. As for its claims about the Slovak courts and alleged delays, this falls well short of breaching the BIT. Both the District Court in Bardejov and the Regional Court in

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716 Claimant's Reply, ¶ 371.

717 Treaty Between the United States of America and Jamaica ("**US-Jamaica BIT**"), 4 February 1994, Art. II(6), **RL-153**.

718 US-Jamaica BIT, Art. II(6), **RL-153**.

719 Claimant's Reply, ¶ 371.

720 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 9.70, **RL-087**.

Prešov followed the traditional procedural steps before deciding on Ms. Varjanová's appeal. Prof. Fogaš concluded in his first expert report that the courts acted lawfully and without any undue delay.[721] Other than the unsubstantiated statement that "*the reason for the delay was entirely Slovakia's fault*", Discovery offers no credible response.[722]

D. The Slovak Republic did not expropriate Discovery's project

515. Finally, Discovery argues that the Slovak Republic committed a "creeping" indirect expropriation based on "*the totality of the measures which Slovakia imposed throughout the project between 2015-2018*."[723] Specifically, Discovery argues that "*[t]he cumulative effect of these measures resulted in a substantial deprivation of the value, use or enjoyment of Discovery's investments*", and "*[t]he combined effect of Slovakia's conduct resulted in a loss of the economic value or economic viability of Discovery's investments and deprived Discovery of the capacity to earn a commercial return*."[724]

516. The flaws with this claim are many.[725] To begin with first principles, Discovery fails to identify what assets were *taken*. As the tribunal in *Generation v. Ukraine* observed, "*[s]ince expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred*."[726] Furthermore, in the words of the tribunal in *Bayindir v. Pakistan*:

> ***The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated***. In the present case, the assets identified by the Claimant, namely its contractual rights, plant and equipment, and the Mobilisation Advance Guarantees, are

721 Fogaš First ER, §§ 3.3-3.4.

722 Claimant's Reply, ¶ 372.

723 Claimant's Reply, ¶ 377.

724 Claimant's Reply, ¶ 377.

725 Respondent's Counter-Memorial, ¶¶ 409-424.

726 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 6.2, **RL-088**.

> within the scope of Article III(1) of the Treaty, and may potentially be subject to an interference amounting to expropriation.[727]

517. Discovery attempts to rectify this failure by arguing that "*the assets/rights which Slovakia indirectly expropriated were Discovery's protected 'investments' under the BIT*."[728] However, as the tribunal in *Waste Management v. Mexico* observed, "*indirect expropriation is still a taking of property*."[729] The Slovak Republic already explained that Discovery retains its shareholding in AOG and it retained all its Exploration Area Licenses until it voluntarily relinquished them.[730]

518. Moreover, "*the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one*."[731] Indeed, numerous practitioners and investment tribunals have emphasized that, absent a "taking", a mere reduction of profitability does not amount to expropriation:

> International tribunals have [] preferred to look and see whether various government interferences have left these essential rights intact at the end of the day, rather than to see whether they have occasioned a diminution in value. ***The tendency is for a diminution in value to remain uncompensated, so long as rights of use, exclusion and alienation remain***.[732]

519. Other tribunals are in accord. In *ECE v. Czech Republic*, the tribunal rejected the investors' claim that the non-implementation of their business plan to build a shopping center due to delays in the issuance of the necessary permits by the Czech Republic amounted to an unlawful expropriation. It explained that the non-realization of the investors' expectation of future benefits does not amount to an expropriation where the investors retained all their assets—*i.e.*, shareholding in the local companies and land

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727 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 442, **RL-089**.

728 Claimant's Reply, ¶ 374.

729 *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 143, **CL-020**.

730 Respondent's Counter-Memorial, ¶ 417.

731 *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 159, **CL-020**.

732 R. Higgins, *The Taking of Property by the State. Recent Developments in International Law*, in Académie de Droit International, 176 Recueil des Cours. Collected Courses of the Hague Academy of International Law, 1982-III (1983) 259, p. 271, **RL-090**; *see also* Z. Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in The Foundations of International Investment Law: Bringing Theory Into Practice (2014), p. 376, **RL-091**.

plots.[733] The tribunals in *Feldman v. Mexico*,[734] *Mamidoil v. Albania*,[735] and *Nykomb Synergetics*[736] all reached the same conclusion. So, too, did the tribunal in *Pope & Talbot v. Canada*, which held that, even if the investor demonstrates diminished profits, there can be no expropriation if the investor is able to fully control, use, enjoy, or dispose of the affected property.[737]

520. In its Reply, Discovery argues that "*Slovakia is […] wrong to assert that proof of a reduction in the value of an investment can 'never' amount to an indirect expropriation*" and "*Slovakia's narrow conception is unsupported by the consistent jurisprudence of investment tribunals*."[738] Notably, although Discovery puts the word 'never' in quotation marks, the Slovak Republic did not say that.

521. In any event, even Discovery's own authorities confirm that the threshold for finding an indirect expropriation is high. For instance, the tribunal in *Burlington Resources v. Ecuador* found that a changed regulatory framework that imposed a new 50% tax rate was not an indirect expropriation because it did not amount to a substantial deprivation of the value of Burlington's investment.[739] Furthermore, the tribunal even held that a subsequent 99% tax rate was still insufficient to find an indirect expropriation. While it diminished Burlington's profits, Burlington failed to show that its investment was rendered worthless and unviable.[740] That is a high threshold for indirect expropriation.

522. Discovery's second authority, *Telenor v. Hungary*, is even less helpful to its case. In deciding whether Hungary's conduct to liberalise its telecommunications system

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733 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.815, **RL-092**.

734 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 103, 112, **RL-093**.

735 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 570, **RL-094**.

736 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, p. 33, **RL-095**.

737 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL/NAFTA, Interim Award, 26 June 2000, ¶ 102, **RL-154**.

738 Claimant's Reply, ¶ 375.

739 *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 430, **CL-051**.

740 *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 456, **CL-051**.

amounted to indirect, creeping expropriation, the tribunal noted that determinative factors include the *intensity* and *duration* of the economic deprivation suffered by the investor as a result of the measures.[741] On analysis, the tribunal concluded that, apart from the compulsory levies required by law, none of the claimant's assets were seized, the relevant agreement remained in force, and the claimant was not denied access to its assets, revenues, or other resources.[742]

523. Finally, Discovery cites *Metalclad v. Mexico*—the *only* successful expropriation case under NAFTA. The claimant's indirect expropriation case concerned two separate government measures, the first being a "set" of measures that led to the denial of a permit to operate a hazardous waste disposal facility.[743] The second was a single measure—a state-level act that converted the property into an ecological reserve, which took away all private use rights from the claimant.[744] Despite the tribunal's finding of expropriation based on the first "set" of measures being overturned in Canadian courts,[745] the case sets a high bar for the type of government actions that amount to an indirect expropriation. Notably, it was the federal government's denial of the permit without *any* basis, and the specific, repeated representations and assurances that it gave to the claimant that ultimately led to the tribunal's finding of expropriation.[746]

524. All of this is in stark contrast with Discovery's case, which boils down to the claim that its inability to drill *three* exploration drills in areas spanning hundreds of square kilometers rendered its investment "*as a whole*" worthless.[747]

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741 *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 70, **CL-076**.

742 *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 80, **CL-076**.

743 *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 1, **CL-035**.

744 *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 59, **CL-035**.

745 *United Mexican States v. Metalclad*, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Justice Tysoe, 2 May 2001, ¶¶ 72, 76, 91, 93-94, 133-134, **RL-155**.

746 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 30 August 2000, ¶¶ 28-41, 102-113, **CL-035**.

747 Claimant's Reply, ¶ 377; *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 67, **CL-076**.

525. As explained above, Discovery still owns AOG's shares and AOG retained all its Exploration Area Licenses until it *voluntarily* relinquished them. Discovery now claims that it did not voluntarily relinquish them—but that is not credible. As shown above, Mr. Lewis had "*no appetite*" to continue in the Slovak Republic.[748] The Slovak Republic has never revoked or otherwise forcibly taken those licenses. This is in stark contrast to *Olympic Entertainment Group v. Ukraine*—another case cited by Discovery—where Ukraine revoked certain gambling licenses issued to the investor, and which the tribunal held to be "*a textbook example of indirect expropriation*."[749] Here, it was Discovery's decision—following its inability to drill three exploration drills for reasons not caused by the Slovak Republic—to relinquish the Exploration Area Licenses.

526. As for the Lease Agreement, Discovery cannot point to any specific and repeated representations that the Slovak Republic gave to it, nor can it point to any unlawful basis on which the Amendment was denied; in fact, it has admitted that it sought the extension late. No indirect expropriation here. As for the EIA Condition, Discovery voluntarily agreed with local citizens to subject its exploration drills to a Preliminary EIA. Therefore, the EIA Condition had no impact on Discovery whatsoever.

527. Stepping back, Discovery was faced with common, administrative issues, or problems of its own making. None of the actions Discovery alleges—alone or as a whole—come close to an indirect expropriation.[750]

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748 Minutes of Operating Committee Meeting dated 3 October 2017, **C-382**.

749 *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, ¶ 106, **CL-050**.

750 Respondent's Counter-Memorial, ¶¶ 420-422.

V. NO CAUSATION

528. The fundamental question for causation remains the same: did the Slovak Republic's purported breaches of the BIT prevent AOG from realizing its oil and gas project in Slovakia? The answer is no. There is no "*direct link between the wrongful act and the alleged injury*" that Discovery has suffered.[751] While Discovery has now calculated various heads of damages to quantify its harm, the "*injury*" remains the same—AOG's inability to complete its oil and gas project.[752]

529. Little debate exists between the Parties on the legal principles regarding causation. Proof of causation requires cause, effect, and a logical link between the two.[753] In the words of the *Blusun v. Italy* tribunal, Discovery must show that Slovakia's measures "*were the operative cause of the […] [p]roject's failure*."[754] Here, Discovery has failed to make this showing, and to the extent its case even progresses to causation, this is where it must end.

530. As explained below, the record now definitively confirms that Discovery's project failed because it ran out of money **(A)**. Second, Discovery clashed with the local community from the very beginning. It failed to obtain an SLO at the outset of the project, and that omission doomed its project from the start **(B)**. Finally, Discovery's own acts and omissions at each drilling location precipitated its problems. To the extent the Tribunal awards any damages at all, Discovery's contributory fault must be considered **(C)**.

A. Discovery's project failed because it did not have the funds to continue

531. Whether Discovery had the funds to continue its project in Slovakia is a straightforward question that Discovery's Reply avoids. In response to the Slovak Republic's substantial showing that AOG never had the capital resources necessary to continue exploration activities, Discovery had the burden to show proof that it could have funded

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751 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 282, **RL-097**.

752 Claimant's Reply, ¶ 385.

753 *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 157, **CL-057**.

754 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 394, **RL-131**.

its operations with or without external financing, and it has failed to carry that burden **(1)**. Moreover, the record now shows that as of January 2017, AOG was on the verge of liquidation, and acknowledged so contemporaneously **(2)**. As of mid- to late 2017, Discovery was still desperate for cash. Its talks with investors show that (*i*) the investors were not reluctant to invest because of the Slovak Republic, (*ii*) nor were the investors aware of AOG's countless mistakes. Rather, the investors did not wish to invest for the same reasons Discovery could not attract investors at the inception: the project was unattractive and too risky **(3)**.

1. Discovery has failed to carry its burden of proof

532. At nearly every stage of these proceedings, the Slovak Republic has questioned Discovery's financial capabilities—past and present. It did so when requesting security for costs;[755] it did so in the Counter-Memorial;[756] and it did so again in document production.[757] The Slovak Republic explicitly requested Discovery to produce documents to show that Discovery had the finances to progress in Slovakia.[758]

533. Discovery objected to the Slovak Republic's document production requests.

534. Fully aware that the Slovak Republic would again expect Discovery to show the most basic evidence that it could finance the project, Discovery has refused to do so. The *only* evidence (if one can call it that) is the following unsupported testimony from Mr. Lewis' second witness statement:[759]

> 45. In support of my statement that I could fund AOG's share of the project on my own, I own several royalty interests in oil and gas projects in the United States, which I could have sold or borrowed against, if necessary, to fund AOG's activities (though my preference was to rely on external funding in the first instance). These are very profitable. For instance, between 2020 and 2022, I was paid an average of around $835,000 each year for some of these royalties. Since these interests are typically worth 6 to 8 times their annual cashflow, this would have been more than enough to fund Discovery's net 50% interest in the exploration project.

755 *See, e.g.*, Respondent's Request for Security for Costs, ¶¶ 10-17.

756 Respondent's Counter-Memorial, ¶¶ 428-443.

757 Respondent's Redfern Schedule, IV.G.

758 Respondent's Redfern Schedule, IV.G.

759 Lewis Second WS, ¶ 45.

535. *First*, there is not a single document on the record to corroborate Mr. Lewis' testimony. Not one. *Second*, and more importantly, even if Mr. Lewis had the capital capacity to invest further in Slovakia, the record here is clear that he remained resolved in his unwillingness to provide it.[760]

2. Discovery ran out of money by early 2017 and repeatedly confirmed thereafter that it lacked the necessary funds to continue

536. In January 2017, Discovery provided notice of default under the Akard Agreement and explained that it had no alternative sources of funding in place:[761]

> DG currently has no alternative sources of capital in place, relying as it has on repeated verbal assurances from AKARD/CVP that the necessary funding would be made available. Under these circumstances, AKARD/CVP's commitments to DG cannot be treated as *optional*, to be evaluated on receipt of each cash call or invoice from DG. After costs are incurred by DG on behalf of AKARD/CVP's interest, reimbursement of those costs is *mandatory*. AKARD/CVP has always had the opportunity to significantly influence the ongoing future costs, and DG has historically responded to AKARD/CVP's requests, to the point of endangering its own solvency.

537. One month later, Mr. Lewis explained to Akard that if Discovery could not secure alternative funding "*within a few weeks*", then he would "*almost certainly place Alpine in liquidation*":[762]

> Notwithstanding the foregoing, and despite numerous prior failed attempts, DG is willing to meet with Akard within the next seven days, on a strictly without prejudice basis, to see if a compromise can be found and a credible timetable for funding agreed. If no such agreement can be reached, then DG considers it will have no choice but to rely on its rights under the Notice and Section 3.6 of the Agreement, and to seek alternative sources of funding with a view to ensuring the continued viability, if at all possible, of its Slovak entity (Alpine). Although not legally obliged to do so, DG will also seek to ensure, but without any legal obligation on its part, that Akard ultimately receives the return of its $1.95 Million investment.
>
> If DG is unsuccessful in securing alternative funding within a few weeks, then it will almost certainly place Alpine into liquidation. Given, therefore, that the best chance of enabling Akard to obtain the return of its investment is to allow DG to secure fresh funding for Alpine, we recommend that Akard provide any waivers necessary to allow DG to put alternative funding in place.

760 *See supra* ¶ 75.

761 Akard Notice of Default dated 2 January 2017, p. 4, **R-142**.

762 Rejoinder to Akard Response dated 15 January 2017, p. 2, **R-120**.

538. By July 2017, Discovery's finances were so precarious that it even suggested selling physical materials "*as a short term measure to finance, if possible, the upcoming license payment*":[763]

> **General**
>
> Finally, we suggest it is worth selling the casing, wellheads and other consumables that we are currently holding in stock, as a short term measure to finance, if possible, the upcoming license payment. This would allow us to limit the partner cash calls until there is more clarity as to whether we can finally get access to well locations and drill. The total book cost of the inventory is approximately €350,000. We would try to get the best price available, of course. But clearly, we would have to accept a significant discount.
>
> Please feel free to raise any questions or comments, as always.

539. And in October 2017, Mr. Lewis informed JKX and Romgaz that "*AOG doesn't have the funding in-place to continue to battle*" and did not have the "*horsepower or appetite*" to continue:[764]

> Mike Lewis (Alpine) stated that AOG doesn't have the funding in-place to continue to battle, or for arbitration, suggesting that Alpine doesn't have the horsepower or appetite for it. Alpine suggested that it would like to reduce to a 5% interest in the project
>
> *Page 3 of 4*

540. In fact, Discovery was so cash starved that, at this same meeting, it suggested reducing its interest in the project from 50% to 5% because it "*didn't feel that it would be able to pay its share of the license fee*":[765]

> Mike Lewis (Alpine) stated that AOG doesn't have the funding in-place to continue to battle, or for arbitration, suggesting that Alpine doesn't have the horsepower or appetite for it. Alpine suggested that it would like to reduce to a 5% interest in the project
>
> and stay involved to the extent desired by the partners, if that could be accommodated by the partners. Otherwise, Alpine was going to continue to seek additional funding, and keep the partners informed on its progress. But Alpine didn't feel that it would be able to pay its share of the license fee.
>
> There was discussion about this, with no decision made. It was left that JKX and Romgaz would discuss it and determine if they wanted to continue the project, and on what basis.

763 Letter from Michael Lewis dated 26 July 2017, p. 2, **C-376**.

764 Minutes of Operating Committee Meeting dated 3 October 2017, p. 3, **C-382**.

765 Minutes of Operating Committee Meeting dated 3 October 2017, pp. 3-4, **C-382**.

541. Discovery maintains in these proceedings that if it had been able to drill three exploration wells, its project would have become an enormously profitable enterprise. If that were really the case, and if Mr. Lewis actually had the funds to do so, then it is simply not plausible that he would have hesitated to cover Discovery's share of the initial wells—an amount Discovery calculated at the time to be roughly USD 3 million.[766]

542. The more plausible answer is that Mr. Lewis had come to share the views of virtually all of the potential investors who chose not to invest in Discovery's project: the prospects were too speculative to warrant any further investment.

3. Discovery failed to attract any investors in 2017 and beyond for the same reasons it struggled to find any investors at all: the project was unattractive

543. Discovery was not the only party in 2017 who had no "*appetite*" for the project. The only two investors Discovery approached after Akard's default also had no desire to invest, even though Discovery had opened a virtual fire sale.

544. The first investor Discovery approached was Cadogan Petroleum ("**Cadogan**"). In July 2017, Cadogan performed a technical evaluation of the project.[767] Just like the early investors who turned Discovery down, Cadogan found the project problematic because of a lack of data—namely, 3D seismic surveys. Cadogan's formal request to Discovery was for 3D seismic surveys to be conducted to "*de-risk*" the project, as confirmed by Mr. Fraser at the time:[768]

> Dear Guido,
>
> It was good to meet on Wednesday, and we have now discussed your points internally.
>
> We understand Cadogan's need to acquire 3D seismic for its own de-risking purposes, and we are willing to propose this to the partners as part of the work program. We would want to see Cadogan actively involved in the design and implementation of the 3D seismic survey.

545. Thus, as of August 2017, investors were *still* turning Discovery down because the project was in such an immature state with little to no data. Even more telling are the terms that Discovery proposed to Cadogan. Discovery offered Cadogan *50% of*

766 Discovery Global Investor Presentation dated June 2017, p. 29, **R-196**.

767 Email from [redacted] to A. Fraser dated 27 July 2017, **R-197**.

768 Email from A. Fraser to [redacted] dated 25 August 2017, **R-198**.

Discovery's interest in each Exploration Area License if Cadogan agreed to fund (*i*) 3D surveys and (*ii*) the drilling of a *single* exploration well on each Exploration Area License:[769]

> We therefore propose the following terms as a way forward:
>
> (1) Cadogan will fund our share of a 3D seismic survey over the first prospect on the Svidnik licence – either Smilno or Sarisske Cierne. Subject to satisfactory results from the 3D survey, Cadogan will then fund our share of a first well on that prospect, in exchange for 50% of our interest in the Svidnik licence.
> (2) Cadogan will have a similar right to fund our share of a 3D survey and first well on each of the Medzilaborce and Snina licences, in exchange for 50% of our interest in each licence.
> (3) Cadogan will be responsible for funding our share of licence fees and G&A on each of the three licences until such time as, in relation to each licence, either (a) a first well is drilled, tested and completed for production on the licence, or (b) Cadogan has elected not to participate on that licence.
> (4) Cadogan will fund our share of subsequent operations, in exchange for 75% of free cash flows attributable to the combined AOG/ Cadogan interest, until such time as Cadogan has recovered all funds disbursed pursuant to this sub-paragraph, plus a return on those funds equal to 25% IRR.

546. Compared to the enormous payout that Discovery claims its project would produce, under these terms, Discovery was basically giving the project to Cadogan and yet it still refused to invest.

547. Notably, nothing in the communications with Cadogan references Slovakia's so-called breaches of the BIT as an obstacle to Cadogan committing to the project. In other words, it was not "*Slovakia's own actions in preventing AOG from carrying out its exploration activities [that] rendered AOG unfinanceable*",[770] as Mr. Fraser testifies. Rather, the obstacle to finding any investors continued to be the immature and risky nature of the project itself.

548. The only other investor that Discovery approached in 2017 was Claren Energy Corporation ("**Claren**"). Their negotiations never made it beyond a draft memorandum of understanding ("**MOU**").[771] Yet that draft MOU continued to show the ongoing weakness of the project.

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769 Email from A. Fraser to [redacted] dated 25 August 2017, **R-198**.

770 Fraser Second WS, ¶ 56.

771 Letter of Intent from Mr. Lewis to Claren dated 15 November 2017, **R-199**.

549. *First*, Discovery's "investment" in the Slovak Republic was minimal. By November 2017, after Discovery had already admitted that it had neither the "*horsepower*" nor "*appetite*" to continue, it had *only* committed €2.1 million to the project:[772]

> Further to recent discussion, this Memorandum of Understanding sets out the principal terms on which Claren Energy Corp. ("**Claren**") will perform additional due diligence and have the option to purchase shares of Alpine Oil and Gas s.r.o., a limited liability company registered in the Slovak Republic ("**Alpine**").
>
> Alpine is a wholly owned subsidiary of Discovery Global LLC ("**Discovery**"), and holds 50% of the Svidnik, Medzilaborce and Snina licenses, with Romgaz and JKX holding 25% each; and 75% of the Pakostov license, with JKX holding 25%; all in the Slovak Republic (the "**Licenses**"). Discovery Global LLC ("Discovery") purchased Alpine from San Leon plc in March 2014. Discovery's share of Alpine's costs through September 2017 are approximately €2.1 million. Alpine's total net (50%) investment in its licenses is approximately €10.1 million (since 2006).

550. *Second*, whatever information Claren had received up until this point was insufficient. It required additional data from Discovery to conduct additional due diligence:[773]

> 1) Due diligence - Claren desires to two of Alpine's 2-D seismic lines over the Licenses, being lines AUR 16-10 and AUR 12-10. All costs incurred by Claren during this due diligence period will be at the sole cost, risk and expense of Claren. Discovery will locate and prepare for shipping all of the data in its possession relative to those seismic lines (the "**Seismic Data**"). Claren will arrange for pickup of those data, and delivery to a facility of its choice. From the date of execution of this Memorandum of Understanding until 10 January, 2018 (the "**Due Diligence Period**"), Claren will do the following:

551. *Third*, Discovery was continuing to offer large percentages of its future profits for minimal amounts of capital:[774]

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772 Letter of Intent from Mr. Lewis to Claren dated 15 November 2017, p. 1, **R-199**. Again, it is unclear how much of these funds were amounts that Akard invested.

773 Letter of Intent from Mr. Lewis to Claren dated 15 November 2017, pp. 1-2, **R-199**.

774 Letter of Intent from Mr. Lewis to Claren dated 15 November 2017, p. 2, **R-199**.

2) Election - If Claren so elects on or before the end of the Due Diligence Period, Claren and Discovery will within 30 days of the date of such election execute a mutually acceptable Purchase and Sale Agreement (the "**PSA**") providing for a minimum of the following:

a) Claren will immediately reimburse Discovery for the recently paid 2017-18 license fee (€93,000), plus an additional €160,000 in other recent costs.

b) Claren will "carry" Discovery's net Alpine costs until the total of its carried net Alpine costs equals €2.1 Million (the "Carried" columns in the table below) as reimbursement for Discovery's historical sunk costs. Subsequently, interests will be "Heads-up" (the "Heads-

Alpine Oil & Gas sro Participating Interests	Carried		Heads-up	
	Alpine Costs	Alpine Profits	Alpine Costs	Alpine Profits
Claren Energy Corp.	100%	80%	80%	80%
Discovery Global, LLC	0%	20%	20%	20%
Total	**100%**	**100%**	**100%**	**100%**

552. Yet once again, despite offering Claren what appears to have been the deal of a lifetime, Claren never invested in Discovery's project.

553. And for the avoidance of doubt, just like with Cadogan, there is nothing in this MOU or in the communications with Claren to suggest that the Slovak Republic's alleged breaches of the BIT were rendering Discovery's project "*unfinanceable*".[775] Nor should the Tribunal expect to find these putative investors even bringing up the subject. Discovery was presenting a very "low risk" option to investors when it was pitching the project at this time. Below is an extract from an investor presentation Discovery prepared around October 2017:[776]

- Numerous ***shallow prospects*** (±1200m) expected to have an average of 2.5 MMBOE recoverable, densely present across the concession area; there is also deeper, un-evaluated potential
- Experienced management team with excellent regional knowledge; JV partners are London-listed JKX (25%) and Romanian national oil company Romgaz (25%), both fully supportive

✓ *Low-cost, low-risk entry*
✓ *Proof of concept can be expected to deliver numerous repeat successes*

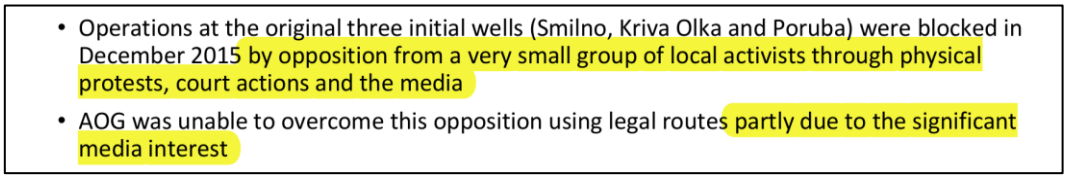
Confidential 3

554. In fact, that same presentation presents a completely different picture than the one Discovery now portrays. Rather than criticizing Slovakia for allegedly thwarting its plans, and in complete contrast to its present-day claims that Slovakia "*intended*" to prevent Discovery's project, Discovery was actively telling investors at the time that it

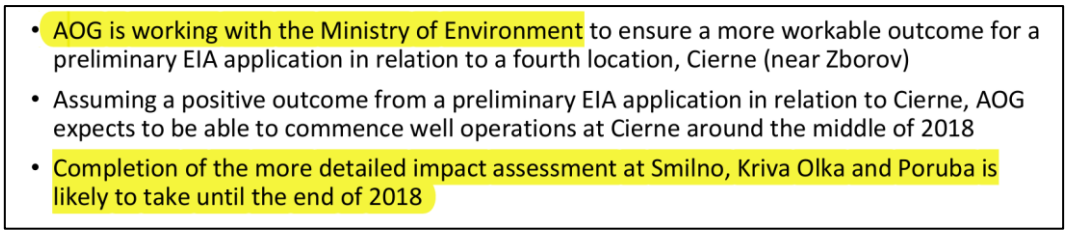
775 Fraser Second WS, ¶ 56.

776 Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor introduction dated October 2017, p. 3, **C-180**.

was a "*small group of activists*" and the "*media*" who were creating issues, but that progress had been made on that front as well.[777]


- Operations at the original three initial wells (Smilno, Kriva Olka and Poruba) were blocked in December 2015 by opposition from a very small group of local activists through physical protests, court actions and the media
- AOG was unable to overcome this opposition using legal routes partly due to the significant media interest

555. Furthermore, Discovery explained that it was working with the MoE and even gave a timetable for when the Full EIAs would be complete:[778]


- AOG is working with the Ministry of Environment to ensure a more workable outcome for a preliminary EIA application in relation to a fourth location, Cierne (near Zborov)
- Assuming a positive outcome from a preliminary EIA application in relation to Cierne, AOG expects to be able to commence well operations at Cierne around the middle of 2018
- Completion of the more detailed impact assessment at Smilno, Kriva Olka and Poruba is likely to take until the end of 2018

556. Discovery now tells this Tribunal that it did not pursue the Full EIAs (or appeal the Full EIA Decisions) because it had no confidence in the Slovak Republic; however, it was providing potential investors at the time a timetable for completion of the Full EIAs.[779] The reality is Discovery did not complete the Full EIAs (despite its agreement with the protestors), because it could not obtain the necessary investor capital to continue, and Mr. Lewis was unwilling to provide additional capital himself.

557. Ultimately, Claren turned Discovery down, just like every other investor (with the exception of Akard) since 2014.

558. There are striking similarities between this case and *Blusun v. Italy*. In *Blusun*, the claimants invested in a solar energy project called the Puglia Project.[780] As the *Blusun* tribunal explained, "*the Puglia Project depended for its success on substantial and*

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

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

779 It was also telling its partners. *See* Report from Mr. Lewis, 3 July 2017, **R-222**.

780 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 6, **RL-131**.

timely project financing which it never obtained."[781] Based on the documentary evidence in that case, the tribunal concluded that the evidence "*produced by the Claimants does not reveal anything more than a reluctance by sometimes marginal sources to commit the necessary funds*."[782]

559. A pivotal document the tribunal examined was a project financing sheet that reviewed the "*state of financial negotiations with 16 potential sources*."[783] Despite the "*upbeat*" and positive outlook on financing negotiations,[784] the document, as held by the tribunal, "*convey[ed] a distinct lack of recent appetite to finance the Project. And so it proved*."[785] Thus, the tribunal held that "*the Claimants have not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the Puglia Project's failure*."[786] Rather, "*[o]f far greater weight was the continued dependence on project financing, and the failure to obtain it was due to […] the size of the Project.*"[787]

560. The facts here compel the same result.

* * *

561. Investor after investor all came to the same conclusion about Discovery's project, both at the beginning and the end: the prospects were wholly unproven and speculative to warrant the investment. In other words, Discovery's project did not fail because of the Slovak Republic; it failed because no investor had the confidence to commit funds to such a risky and unknown project. Not even Mr. Lewis had the confidence to do so.

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781 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 387, **RL-131**.

782 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 388, **RL-131**.

783 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 389, **RL-131**.

784 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 389, **RL-131**.

785 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 389, **RL-131**.

786 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 394, **RL-131**.

787 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 394, **RL-131**.

B. Discovery's project failed because Discovery did not obtain an SLO

562. Discovery failed to obtain an SLO at the outset of its project. It was combative with the local population and failed to win over certain local residents. Discovery encountered activist resistance, protests, and court challenges—all of which stemmed from its failure to engage in meaningful exchanges with the local community. This is a second, independent reason why the project failed.

563. As the Slovak Republic explained in its Counter-Memorial, an SLO represents community engagement and agreement.[788] It is an unwritten social contract, whose prominence in the extractive industries (like oil and gas) is well-known not only to the industry, but also to arbitral tribunals.[789]

564. Discovery contests the SLO's application here as a matter of principle and factually. Both of its objections are meritless. As the Slovak Republic explains below, an SLO does not apply *only* in mining cases and *only* in cases involving indigenous communities **(1)**. Moreover, once Discovery finally sat down with the local citizens and agreed the 2017 Community Agreement, the local citizens stopped protesting **(2)**.

1. An SLO does not only apply in mining cases involving indigenous communities

565. Discovery's first objection to the concept of an SLO is unattractive. It claims that the cases on which the Slovak Republic relied in its Counter-Memorial in discussing the SLO are distinguishable because "*each involved mining companies operating in areas inhabited by indigenous communities*."[790] The SLO therefore does not apply because "*AOG was not a mining company and it was not operating in areas inhabited by indigenous communities*."[791] This is a distinction without a difference, and in any event, it is flawed.

566. *First*, the concept of the SLO began in the mining industry but has since expanded well beyond that. As one author recently explained, "*the concept of social license to operate*

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788 Respondent's Counter-Memorial, ¶ 450.

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

790 Claimant's Reply, ¶ 397(1).

791 Claimant's Reply, ¶ 397(1).

(SLO, simply 'social license' or 'social licensing') originated in the mining industry and its use has also been extended over large infrastructure, energy, and industrial projects."[792]

567. Even if the SLO were confined to the mining industry (it is not),[793] that does not make the concept any the less important here. The core of the SLO "*involves the attempt to gain support from stakeholders and communities*."[794] Indeed, "*the social license terminology has crossed into the mainstream and is now used to describe the corporate social responsibility of any business or organization*."[795]

568. In fact, the Journal of Petroleum Technology ("**JPT**") published an in-depth primer on the SLO in the oil and gas industry in 2016—precisely when Discovery was in the Slovak Republic. As the JPT explained, the "*concept of a social license to operate […] has been applied to extraction industries and has been defined as 'a community's perceptions of the acceptability of a company and its local operations*."[796]

569. Importantly, the JPT noted that community "*can be very broadly defined to include stakeholders and interested parties well outside the immediate areas of operations, or 'any group or individual who can affect or is affected by the achievement of the organization's objectives.*"'[797] In other words, were it not already evident from its immediate artificiality, Discovery's uninformed assertion that the SLO comes into play only with "*indigenous communities*" rings hollow. Moreover, the idea that the local Slovaks, in the small villages where Discovery wanted to drill for oil and gas, have less of a voice because they are not "*indigenous communities*" requires explanation. Is it

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792 J. Górski, *Social License to Operate (SLO) in the Extractive and Energy Sectors*, OGEL 1 (2020), p. 1, **RL-156**.

793 In any event, as explained above, Discovery's works in Slovakia were considered mining works. *See supra*, ¶ 285.

794 M. Meesters *et. al*., *The Social License to Operate and the Legitimacy of Resource Extraction*, Elsevier, 13 December 2020, p. 8, **RL-157**.

795 The Ethics Centre, *Ethics Explainer: Social license to operate*, 23 January 2018 ("*Social license – or social license to operate – is a term that has been in usage for almost 20 years*."), **RL-158**.

796 D. Nathan Meehan, *Social License to Operate*, Journal of Petroleum Technology, 29 February 2016, **RL-159**.

797 D. Nathan Meehan, *Social License to Operate*, Journal of Petroleum Technology, 29 February 2016, **RL-159**.

really Discovery's case that the Eastern Slovaks who inhabit these villages are not indigenous to the region?

570. *Second*, Discovery's argument that the concept of the SLO "*has no basis in either domestic Slovak law or relevant applicable rules of international law*"[798] is a red herring. It is true that the concept of an SLO was embedded in various Peruvian laws that were examined in *Bear Creek v. Peru*.[799] But the fact that Slovak law or the BIT do not expressly incorporate the concept of an SLO does not render it meaningless or without effect here.

571. In fact, various aspects of the Slovak oil and gas permitting regime *do* provide for public participation. In that sense, Slovak law *does* recognize the right of affected individuals to participate in the oil and gas permitting regime. For example, a hallmark component of both the Preliminary EIA and Full EIA procedures *is the public's participation and chance to object* to a given project.[800] That is precisely why the local citizens requested that AOG perform the Preliminary EIAs—they wanted their voices heard.[801] They wanted a neutral body to assess the risks to the environment in which they lived and raised their children.

572. Discovery devotes an entire Annex of its Reply to all of its so-called community engagement undertaken in Slovakia.[802] Discovery undertook those actions because it ultimately learned, at a later stage in the project, that engaging with the community in which it would be drilling oil and gas wells was important. The only problem for Discovery was that those actions were too little and too late.

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798 Claimant's Reply, ¶ 397(2).

799 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 259, **RL-039**.

800 *See, e.g.*, EIA Act (applicable as of 1 January 2017), Arts. 8, 10, 12, 24, 30, 48, 52, **R-200**. The right of the public to intervene in certain proceedings in Slovakia also derives from Article 9(3) of the Aarhus Convention.

801 Leško First WS, ¶ 25.

802 Claimant's Reply, Annex 1, ¶¶ 476-507.

2. Discovery's combative and dismissive attitude towards the local population led to the project's failure

573. Though Discovery contests that it failed to obtain a SLO, it has little to say in defense of the specific facts on which the Slovak Republic relied:

(a) Ms. Varjanová's car: Discovery claims that "*AOG did not act illegally by physically moving her car*."[803] Whether AOG was acting legally misses the point. The fact remains that Ms. Varjanová left her contact information on her car, including her phone number, to have a conversation with AOG about its activities.[804] AOG discarded that and resorted to self-help by physically moving her car and barricading it in with concrete panels.[805]

(b) The Interim Injunction: Discovery says that it "*did not attempt to circumvent the Interim Injunction*"[806] and therefore it did not increase tensions with the local population. That is simply false. Once AOG was prohibited from using the Access Land via the Interim Injunction, it created a new entity—which it thought would not be bound by the Interim Injunction—to enable access to the Smilno Site.[807] The action was an obvious scheme to circumvent the Interim Injunction. Everyone else knew this was the case.

(c) The faked injury by Mr. Crow: Discovery claims that "*there is no evidence that this isolated incident 'increased tensions with the activists', as Slovakia asserts*."[808] The evidence is in the video itself. For good order, in case either Discovery or the Tribunal had their computers muted, we would kindly ask that they watch the video with sound. That will tell the Tribunal all it needs to know on how those who bore witness to this event truly felt.

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803 Claimant's Reply, ¶ 400(1).

804 Varjanová First WS, ¶ 20.

805 Varjanová First WS, ¶ 21.

806 Claimant's Reply, ¶ 400(2).

807 Respondent's Counter-Memorial, ¶ 98.

808 Claimant's Reply, ¶ 400(3).

574. As various publications have noted, the SLO comprises three elements: legitimacy, credibility, and trust. Discovery violated each of these in its interactions with the local population.

(a) **Legitimacy**: For an extractive project to be legitimate, it "*must contribute to the well-being of the community, **respect existing traditions and lifestyles, and be conducted in a manner the community considers fair***."[809] Discovery did the opposite. As explained earlier, it entered into a community that was extremely sensitive about land ownership, having experienced 60 years of socialism. In light of this, Discovery "*should have come in a proper way and asked permission*."[810]

(b) **Credibility**: Credibility in the context of an SLO means "*that operators and their contractors communicate openly and honestly with the community, deliver on the actions they promise, and provide benefits to the community*."[811] Again, Discovery did the opposite. In the words of the local citizens that Discovery interviewed when it finally sat down to listen to their concerns, the local citizens felt that they "*had not been shown sufficient respect in the past*."[812] Rather, Discovery had "*assumed that [it] could come in and drill there without getting their consent, and [the local citizens] considered [Discovery] had lied about who owned what land or who had the right to be on what land*."[813] Furthermore, Discovery "*appeared to be secretive and evasive*" about environmental issues.[814]

(c) **Trust**: Trust "*requires consistency in communications and execution. Once it is established, project participants and the community engage in real*

809 D. Nathan Meehan, *Social License to Operate*, Journal of Petroleum Technology, 29 February 2016, **RL-159**.

810 Email from Alexander Fraser dated 19 February 2017, **C-369**.

811 D. Nathan Meehan, *Social License to Operate*, Journal of Petroleum Technology, 29 February 2016, **RL-159**.

812 First activists meeting note dated 5 February 2017, **R-117**.

813 First activists meeting note dated 5 February 2017, **R-117**.

814 First activists meeting note dated 5 February 2017, **R-117**.

dialogue."[815] This was a major barrier to Discovery's project. As the local citizens themselves remarked at the time, "*all went wrong*" in 2014 because "*[t]here was not enough communication*."[816] Specifically, Discovery's permitting company, TDE Services, "*told lies about the land ownership*" and thus, "*[a]fter that no one was ever going to trust [Discovery]*."[817]

575. Had Discovery taken the time to meet with the local community and the activists from the outset, it would have fared far better. No better evidence exists than what transpired after the 2017 Community Agreement was finalized.

576. Once Discovery actually opened a dialogue with those opposed to its operations, agreement was quickly reached.[818] Discovery would undertake Preliminary EIAs and, in exchange, the local citizens would stop protesting or otherwise stop seeking to block Discovery's project.[819]

577. And that is exactly what happened. As contemporaneously reported by Mr. Lewis, once the 2017 Community Agreement was reached, and the corresponding press release was issued, "*the responses from the activists have been much muted*" and AOG "*fe[lt] that this is a considerable improvement on the situation [it] was facing last year*":[820]

> Gentlemen:
>
> Since our last report, we had a further meeting with VLK on 31 March at which they reviewed our press release and confirmed they had no objection. Following publication of the press release, the coverage in the national and local press has been generally neutral or positive, and the responses from the activists have been much muted. We feel that this is a considerable improvement on the situation AOG was facing last year, and that we have the opportunity now to develop ongoing working relationships with the activists.

578. The results speak for themselves. Had Discovery taken the simple action of sitting down with the local citizens at the outset of its operations—and not after it already created an uproar—it would likely not have encountered anything like the level of

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815 D. Nathan Meehan, *Social License to Operate*, Journal of Petroleum Technology, 29 February 2016, **RL-159**.

816 Email from Alexander Fraser dated 19 February 2017, **C-369**.

817 Email from Alexander Fraser dated 19 February 2017, **C-369**.

818 Respondent's Counter-Memorial, ¶ 453.

819 Respondent's Counter-Memorial, ¶¶ 187-192.

820 Report from Mr. Lewis dated 21 April 2017, **R-147**.

community resistance that resulted from its aggressive methods. Discovery's aggressive methods and the ensuing community resistance resulted in almost all of the issues Discovery experienced at Smilno, and which it now claims are breaches of the BIT by the Slovak Republic. Indeed, but for the community resistance:

(a) There would likely have been an agreement concerning the Access Land;

(b) Ms. Varjanová would likely not have been forced to seek an Interim Injunction to protect her ownership rights;

(c) Ongoing protests at the Smilno Site could have been abated at a much earlier date;

(d) The Police would not have been called to the Smilno Site;

(e) The state prosecutor would not have been called to the Smilno Site;

(f) Discovery would have never discussed erecting signs with the Police at the Smilno Site; and

(g) Discovery would have built a trusting relationship with the community, which would have allowed it to conduct its business in a way that protected Discovery's desire to work in the area, but without trying to silence the local population.

579. The Slovak Republic originally told this Tribunal that Discovery ran roughshod over the local community. Not only does that remain true, but the interviews Discovery conducted with the local population reinforce this conclusion. It was Discovery's choice to comport itself in this manner; it cannot now blame the Slovak Republic for that strategic blunder. Nor can it blame the State for the legitimate demands of its local citizens that they be allowed to participate and be heard through the Preliminary EIA process.

C. Discovery's own negligent acts and omissions at each site precipitated all of its problems, and the Tribunal must consider this if it orders any damages

580. Discovery recognizes that contributory fault is an established principle in international law, as reflected by Article 39 of the ILC Articles.[821] It challenges its application here, but never undertakes any analysis of the facts.

581. All the Slovak Republic must show is that Discovery committed "*a wilful or negligent act or omission*" that "*materially contributed to the damage [caused]*."[822] The commentary to the ILC Articles contradicts Discovery's allegations that the threshold to meet here is a strict one:

> [A]rticle 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights. While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[823]

582. Each well location where Discovery sought to conduct exploration works involved different processes that Discovery needed to follow. Each were distinct, and it was Discovery's obligation to understand how to navigate those. Yet at each well location, Discovery's own negligent acts in each specific process precipitated all of the ensuing so-called breaches of the BIT. In other words, all of the alleged breaches at each well location post-date a negligent act that gave rise to the very circumstances that form the basis of each purported breach.

583. **Smilno**. Discovery's first negligent act was its failure to secure rights to the Access Land, either through seeking consent from the co-owners of the land or through Article

821 Claimant's Reply, ¶ 387.

822 Claimant's Reply, ¶ 387.

823 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Art. 39, ¶ 5, **CL-054**.

29 of the Geology Act. That failure led to Ms. Varjanová parking her car on the Access Land, which Discovery contemporaneously acknowledged was her legal right.[824]

584. Discovery's second negligent act was its attempt to purchase a share in the Access Land, which violated the preemption rights of all the co-owners of that land.[825] This is undisputed. That violation resulted in the Interim Injunction obtained by Ms. Varjanová, and thus began the dispute over whether AOG could use the Access Land.

585. **Krivá Oľka**. Discovery's negligent act was its failure to timely request an extension of the Lease Agreement, which Discovery finally admits that it filed eight days late.[826] That failure resulted in the Lease Agreement's expiration, meaning that the MoA could not approve the Amendment. As a result of this failure, AOG was required to pursue Article 29 proceedings. All of this began with Discovery's failure to request the extension on time.

586. **Ruská Poruba**. Discovery's negligent act here was twofold. First, instead of invoking Article 29 of the Geology Act to obtain access to this land, Discovery rushed to the Slovak courts to obtain an interim injunction against Urbariát, the landowner.[827] The problem, however, was that AOG obtained an interim injunction against the wrong landowners. As the Slovak Republic noted in its Counter-Memorial, and which Discovery did not deny in its Reply, this legal mistake ultimately led to Discovery firing its Slovak attorney.[828]

* * *

587. Each well site location shares a common thread. Discovery committed a negligent act at each well location at the outset of its project. Those acts—and those failures—are the ultimate source of the events about which Discovery now complains in this arbitration. This is not a case where the State is alleged to have breached the BIT, and then the investor's contributory fault arose thereafter. Rather, here, the investor's own

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

825 Respondent's Counter-Memorial, ¶¶ 97-100.

826 Claimant's Reply, ¶ 128.

827 Respondent's Counter-Memorial, ¶¶ 168-169.

828 Respondent's Counter-Memorial, ¶¶ 167-172.

negligent acts gave rise to the dispute and the ultimate, alleged breaches of the BIT and ensuing (purported) damages. To the extent Discovery is awarded anything at all, it should be nominal damages, in light of its own contributory fault.

VI. QUANTUM

588. Discovery first told this Tribunal that it lost over half a billion dollars because of the Slovak Republic's alleged breaches of the BIT.[829] It calculated that loss through a discounted cash flow ("**DCF**") analysis, even though Discovery never drilled a single exploration well in the Slovak Republic. All it had in hand when leaving the Slovak Republic was a plan to drill three exploration wells. Nothing more.

589. Yet after receiving the Slovak Republic's Counter-Memorial, and once subjected to the most basic criticisms, Discovery's damages have dramatically changed. Discovery's DCF now asks for USD 133 million in damages[830]—a USD 435.2 million *reduction* to the claim it advanced in its Memorial.[831] That change alone demonstrates the unreliability of Discovery's DCF.

590. Beyond that, and in the alternative, Discovery now asks for the following heads of damages:

(a) USD 53 million for so-called lost opportunity damages;[832]

(b) USD 36 million using a comparable companies valuation;[833]

(c) USD 5.01 million using a comparable transactions valuation;[834] or

(d) USD 3.7 million in so-called sunk costs.[835]

591. Having first told this Tribunal it was owed over half a billion dollars, Discovery now proposes an array of alternatives in the hope that the Tribunal might choose to award it something. Each of these amounts is flawed in important respects, and none should be awarded.

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829 Claimant's Memorial, ¶ 324.

830 Claimant's Reply, ¶ 430.

831 Claimant's Memorial, ¶ 270.

832 Claimant's Reply, ¶ 433.

833 Claimant's Reply, ¶ 455.

834 Claimant's Reply, ¶ 455.

835 Claimant's Reply, ¶ 469.

A. Discovery has failed to prove that a DCF is appropriate in this case

592. Discovery rightly notes in its Reply that it bears the burden to show "*what would likely have happened if [] Slovakia had not breached its obligations under the BIT*".[836] On Discovery's case, but for Slovakia's purported breaches, it would have developed an oil and gas project in accordance with the Rockflow Reports—an oil and gas project that, as SLR confirms, would have been one of the largest on-shore hydrocarbon projects created in Europe in the last decade.[837]

593. Yet Rockflow's entire DCF bore no relation to Discovery's actual activities in the Slovak Republic:

(a) Rockflow created the 40 oil and gas leads that it then subjected to various analyses to determine which of these would be "successful";[838]

(b) In creating those oil and gas leads, Rockflow performed geological analyses based on alleged Polish analogues (*i.e.*, not Discovery's own well data because it had none) to determine the purported levels of oil and gas in each deposit;[839]

(c) After determining which of these leads would be successful by various computer modeling, Rockflow then constructed a hypothetical development plan for how these oil and gas deposits would be exploited;[840]

(d) That development plan envisioned: 40 exploration wells being drilled in 2017, 52 oil production wells being drilled and put into production in 2018, and 74 gas production wells drilled in 2023 and brought on production.[841]

(e) All of the drilling and construction for this mammoth project, in a mountainous region, would take 6 years;[842] and

836 Claimant's Reply, ¶ 421.

837 SLR Second Report, ¶¶ 94, 173.

838 Respondent's Counter-Memorial, ¶ 492; Atkinson First ER, ¶¶ 3.5.2-3.5.7. All of these exploitation drills would have needed to undergo an EIA.

839 Respondent's Counter-Memorial, ¶ 492; Atkinson First ER, ¶ 3.6.

840 Respondent's Counter-Memorial, ¶ 492; Moy First ER, §§ 10.1-10.2.

841 Respondent's Counter-Memorial, ¶ 582.

842 SLR First Report, ¶ 154.

(f) Rockflow then used the results of its production plan to calculate a DCF and arrive at a net present value that Discovery claimed as its damages.

594. Were it not evident enough how artificial Discovery's DCF is, two components of Discovery's revised DCF in the Reply deserve highlighting: both the "successful" oil and gas deposits and Rockflow's development plan have now changed.[843] In other words, in the Memorial, Discovery told this Tribunal that "but for" the Slovak Republic's breaches, it would have discovered specific oil and gas deposits. Yet in response to the Slovak Republic's Counter-Memorial, Discovery's new DCF model produces a *different* set of oil and gas deposits that Discovery now claims would be the ones it would exploit.[844] How Discovery would develop these new deposits has changed, too. In other words, the original development plan that Discovery said would have occurred in a "but for" scenario is now completely different in the Reply.[845]

595. This is the exact *opposite* of a "but for" scenario. The minimum basis for a "but for" scenario would be actual, contemporaneous proof of (*i*) Discovery's identification of these successful deposits and (*ii*) detailed, contemporaneous feasibility studies showing the development plan it now claims it would have undertaken. The fact that both the successful deposits and the development plan have changed only highlights the hypothetical nature of Discovery's DCF. A quantum expert is supposed to quantify the existing project—not build it from top-to-bottom.

596. But Discovery presses forward with it. In fact, Discovery's defense of its DCF reads as if the Slovak Republic's Counter-Memorial does not exist. Discovery has offered no meaningful response to the argument that the pre-exploratory phase at issue here is uniquely inappropriate for the use of a DCF analysis. It continues to argue points the Slovak Republic addressed in its Counter-Memorial. For example, Discovery again claims that "*DCF models are 'constantly used' by tribunals to establish the FMV of an investment*."[846] Similarly, Discovery states that "*[c]ommentators have praised an income based valuation methodology using a DCF […] as 'theoretically the strongest'*

843 SLR Second Report, p. ii, ¶¶ 10, 14, 168.

844 SLR Second Report, ¶ 10.

845 SLR Second Report, ¶ 14.

846 Claimant's Reply, ¶ 406.

and 'a real world method that businessmen and financiers apply every day in deciding how much to invest in a business.'"[847]

597. The facts of each case determine whether a DCF is appropriate. Here, it is not. As the Slovak Republic explained in its Counter-Memorial, using a DCF to value a non-going concern is the rare exception, not the rule.[848]

598. As explained below, contrary to Discovery's assertions, whether to use a DCF is a legal question and not one of expert evidence **(1)**. Discovery cannot discharge its burden to show that a DCF is appropriate by relying on a "but for" scenario **(2)**. Finally, and in any event, Discovery's DCF continues to be riddled with errors and is built on flawed geoscience **(3)**.

1. Whether to use a DCF is a legal question and not one of expert evidence

599. Discovery's justification for continuing to use a DCF rests on a fundamental error: it claims that whether to use a DCF is "*a question of expert evidence*."[849] That is wrong. The Tribunal retains discretion on the appropriate valuation method in any dispute; however, that discretion in choice of valuation is appropriately informed by the applicable legal principles for damages.[850] Damages that are too speculative or remote cannot be ordered by an arbitral tribunal.

600. Different tribunals have expressed these concepts in various terms, such as foreseeability, remoteness, and proximate harm. For example, the tribunal in *Gemplus*

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847 Claimant's Reply, ¶ 406.

848 Respondent's Counter-Memorial, ¶¶ 462-469.

849 Claimant's Reply, ¶¶ 407-408.

850 *Gemplus v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 12-57 ("*As indicated above, the Tribunal has experienced considerable difficulties in deciding certain quantum issues in these arbitration proceedings. It is not the Tribunal's function, as an arbitration tribunal, to make a simplistic binary choice between the very different cases advanced by the two sides. Moreover, given these issues' dependence on multiple findings of fact by the Tribunal, it would not even be possible to do so in the present case, even if this Tribunal were willing to do so (which it is not). Ultimately, the Tribunal must exercise its own arbitral discretion in assessing compensation by reference to the applicable legal principles and the particular facts, as determined by the Tribunal*."), **CL-081**; *see also Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶ 645 ("*Given the wide spectrum of results that different valuations may yield, tribunals need to retain a certain margin of appreciation in determining the final compensation due . This does not mean that the tribunal becomes an amiable compositeur, because the tribunal's margin of appreciation can only be exercised in a reasoned manner and within the boundaries of the principles of international law for the calculation of damages*."), **CL-040**.

v. Mexico (Discovery's own case) explained that if the losses claimed "*are found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established*."[851]

601. For its part, the tribunal in *S.D. Meyers v. Canada* explained that damages "*may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor*."[852] The tribunal continued, and explained that "*[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the* ***proximate*** *cause of the harm*."[853]

602. If, like here, the DCF is too speculative or the damages too remote, then as a matter of law, they cannot be awarded to Discovery. Put another way, it is Discovery's burden to prove that a DCF *in this case* does not result in damages that are too remote, uncertain, or speculative. It has failed to meet that burden, as explained below.

2. Discovery cannot discharge its burden of proof by claiming that the evidence required for a DCF would have existed "but for" Slovakia's conduct

603. Only a handful of tribunals have used a DCF to award damages for a non-operational project.[854] For those that have, they did so because the claimant was able to produce contemporaneous evidence that the alleged future profitability of the enterprise was sufficiently certain.

604. A non-exhaustive list of the type of evidence tribunals have accepted to justify using a DCF on a non-operational project is:

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851 *Gemplus v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶ 12.56, **CL-081**.

852 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 140, **RL-160**.

853 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 140, **RL-160**; *see also Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 787 ("*The Arbitral Tribunal considers that in order to succeed in its claims for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value*."), **CL-023**.

854 *See generally* Respondent's Counter-Memorial, ¶¶ 470-488.

(a) The existence of detailed business plans, including feasibility studies or independent third-party development plans, prepared contemporaneously;[855]

(b) The availability of proven Reserves (with a capital "R");[856]

(c) No uncertainty regarding the availability of financing;[857]

(d) Substantiated information on the price and quantity of the products or services;[858] and

(e) Low regulatory pressure, such that the claimant "*should be able to establish the impact of regulation on future cash flows with a minimum of certainty*."[859]

605. The Slovak Republic's Counter-Memorial discussed all of this at length and the awards that have considered this very issue.[860] In its Reply, Discovery does not even bother to engage with these points, claiming that "*[l]ittle would be gained by a detailed point-by-point rebuttal of Slovakia's lengthy submissions regarding these awards*."[861] That is nothing but capitulation disguised as convenience.

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855 Respondent's Counter-Memorial, ¶ 472; *see also Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, fn. 1257, **CL-026**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**.

856 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438, **RL-106**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 820, **CL-055**; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 493-494, **CL-061**.

857 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438, **RL-106**; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶ 77, **RL-107**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 202, **CL-026**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 820, **CL-055**; T*ethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1413, **CL-061**.

858 *See, e.g., Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**.

859 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**.

860 Respondent's Counter-Memorial, ¶¶ 462-487.

861 Claimant's Reply, ¶ 413.

606. It then brushes aside these cases by stating that "*[t]he tribunals in these awards did not lay down legal criteria […] [i]nstead, the tribunals simply considered various factors (with the assistance of expert evidence) by which they were persuaded to use a DCF model*."[862] In fact, Discovery even criticizes the Slovak Republic as being "*wrong to suggest that these awards establish legal criteria which must be satisfied before a DCF model can be used*."[863]

607. Discovery fails to grasp the overarching point: tribunals require this type of evidence *to reduce* the double layer of speculation in a DCF on ***non***-going concerns.

608. Put another way, if every claimant could fulfill the above criteria by claiming that it would have met these requirements "but for" the actions of the State, then DCFs on non-operational projects would no longer be an exception to the general rule. It therefore follows that a "but for" scenario assuming that these criteria are fulfilled is self-defeating. Yet this is exactly what Discovery asks this Tribunal to do here.

609. For example, on the requirement of contemporaneous feasibility studies or development plans, Dr. Moy explains these would have been created in a but for scenario. He testifies in his second expert report that "*[p]re-sanction planning and feasibility studies for the oil discoveries will commence as soon as the first discovery is made*."[864] In other words, there were none existing when Discovery left Slovakia and Discovery fails to meet this requirement.

610. Similarly, regarding the availability of Reserves, the Slovak Republic explained at length in its Counter-Memorial why resource classification is paramount in hydrocarbon projects.[865] A declaration that a project has Reserves is usually made by an independent petroleum engineer through a Competent Persons Report or similar document. Generally speaking, a declaration that a project has Reserves shows that the project is commercially viable, which then clears the way for the project to qualify for financing.[866] Arbitral tribunals appreciate the significance of this resource

862 Claimant's Reply, ¶ 413(2).

863 Claimant's Reply, ¶ 408.

864 Moy Second ER, ¶ 106.

865 Respondent's Counter-Memorial, ¶¶ 542-551.

866 Respondent's Counter-Memorial, ¶ 535.

classification system and have therefore required contemporaneous surety of Reserves.[867]

611. Here, Dr. Moy states that "*following discovery of hydrocarbons, there would be a 100% chance of development and that the[] discovered hydrocarbon volumes would be classifiable as reserves in a 'But-For' case*."[868] Again, assuming that Discovery would have had Reserves defeats the requirement of showing the existence of Reserves contemporaneously. In any event, Dr. Longman reconfirms in his second expert report that even if Discovery had continued to explore for oil and gas, it would not have achieved Reserves.[869]

612. Finally, as for the criterion of "*no uncertainty regarding the financing of the project*",[870] Discovery devotes an entire section of its Reply stating all the reasons why it is "*reasonable **to assume** that Discovery would have been able to finance the project*."[871] This project would have cost hundreds of millions of dollars.[872] Putting to one side how assuming that Discovery could have raised these amounts is patently absurd, the record already shows that investors were not even interested in financing the most basic funds for exploration wells. Nothing in the record could possibly support any reasonable assumption that Discovery would have financed this project:

(a) *First*, no one was interested in financing Discovery's project at the end of 2017—Discovery only had discussions with two investors;[873]

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867 Respondent's Counter-Memorial, ¶ 538.

868 Moy Second ER, ¶ 136.

869 SLR Second Report, ¶ 174.

870 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438, **RL-106**; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶ 77, **RL-107**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 202, **CL-026**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 820, **CL-055**; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1413, **CL-061**.

871 Claimant's Reply, ¶¶ 555-561.

872 SLR Second Report, ¶ 91.

873 *See supra* ¶¶ 543-557.

(b) *Second*, Mr. Lewis explained at the end of 2017 that Discovery did not have the funds to continue;[874] and

(c) *Third*, Discovery assumes that it would have had financing because, in a but for scenario, it would have had Reserves. Therefore, it would have qualified for reserves-based lending.[875] But again, this relies on a but for scenario to prove something that should be demonstrated contemporaneously.

613. The reality is that Discovery's Reply cannot demonstrate that, as of the date it left Slovakia, its project met any of the requirements that previous tribunals have used to justify a DCF for a non-operational enterprise. Discovery is therefore left with asking the Tribunal to assume that each of these would be met in this case. In the words of the *Al-Bahloul v. Tajikistan* tribunal, which also rejected a DCF for a non-operational oil and gas project, there are "*too many unsubstantiated assumptions to justify the application of the DCF-method*."[876] The same is true here.

614. As its final attempt to salvage the principle of a DCF in this case, Discovery cites *Divine Inspiration v. Democratic Republic of Congo* because the tribunal in that case employed a DCF, even though the hydrocarbons project was at an early stage of its development. But Discovery omits a mountain of distinguishing facts in that case:

(a) *First*, the Democratic Republic of Congo ("**DRC**") *did not challenge* the likelihood that the claimant would be able to carry out oil prospecting operations.[877] Here, the Slovak Republic obviously challenges the likelihood that Discovery would have been able to carry out its project based on (*i*) its inability to fund the project or attract investors to fund it, and (*ii*) a low chance of success due to the general lack of prospectivity in the Exploration Area Licenses.

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874 Minutes of Operating Committee Meeting dated 3 October 2017, **C-382**.

875 Claimant's Reply, ¶ 560.

876 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶¶ 95-96, **RL-107**.

877 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 195, **CL-094**.

(b) *Second*, both preambles of the agreements between the claimant and the DRC explicitly stated that the claimant "*has demonstrated its technical and financial capacity in oil exploration and production*", which was further proof of the claimant's capabilities to execute the project.[878] Here, again, Discovery has failed to show that it had the technical or financial capabilities to execute the Rockflow development plan.

(c) *Third*, on the probable reserves, the tribunal noted that the DRC did not dispute the volume of probable reserves adopted by the claimant's expert or the success rate that he applied to them.[879] The tribunal therefore found that the likelihood of exploitable resources was established and not hypothetical.[880] The opposite is true in this case; the Slovak Republic and its experts challenge the hydrocarbon estimates in Rockflow's DCF.

(d) *Fourth*, the DRC did not rely on its own experts from the Ministry of Hydrocarbons, which the tribunal noted had "*all the technical element and analytical resources that enable them to contradict or nuance the analyses of the [claimant's report] and provide the [tribunal] with their own estimate of the risk of success.*"[881] It therefore failed to provide the tribunal with any alternative valuation. Here, again, the Slovak Republic and its experts contest the entirety of Discovery's DCF.

(e) *Fifth*, the tribunal noted that its application of the DCF method was "***not criticised by the Respondent*** *which points out that 'the [claimant's expert]*

878 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 195, **CL-094**.

879 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 198, **CL-094**.

880 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 198, **CL-094**.

881 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 202, **CL-094**.

reports are structured in accordance with international standards."[882] The tribunal therefore found it to be the most appropriate method.[883]

615. There is nothing remotely similar between *Divine Inspiration* and this case. The record before this Tribunal demonstrates the inappropriateness of any exception here to the well-established principle that DCFs should not be used for ***non***-operational enterprises.

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616. Yet even looking beyond the fact that Discovery's DCF fails as a matter of principle, the entire DCF model continues to be replete with speculation, error, and flawed geoscience. As will be shown below, once the Tribunal begins to examine its components, the speculative nature of the DCF is exacerbated.

3. Discovery's DCF continues to be riddled with undue speculation and flawed geoscience

617. Dr. Longman has conducted an analysis of the second Rockflow reports, and his conclusions remain unchanged from his first report.[884] The figures that Rockflow's analyses produce are unjustifiable. Moreover, it is now clear why Discovery and its experts withheld their geological models when filing the Memorial, and only produced them in document production: the levels of data manipulation used in those models defies reason and is contrary to industry standards.[885] Dr. Longman's second report details all of these points. For the purposes of this Rejoinder, the Slovak Republic highlights five of them.

a. The "successful" oil and gas deposits and the development plans have changed since Rockflow's first reports

618. Despite Dr. Longman and SLR not introducing any new technical data or re-running Rockflow's geological models (because the underlying data was not included with the

882 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 205, **CL-094**.

883 *Divine Inspiration Group PTY v. Democratic Republic of Congo*, ICC Case No. 22370/DDA, Final Award, 7 November 2018, ¶ 205, **CL-094**.

884 SLR Second Report, ¶¶ 99, 192.

885 SLR Second Report, pp. ii-iii.

Memorial), Rockflow's "successful" oil and gas deposits have changed.[886] As Dr. Longman explains, Rockflow's original DCF quantified 9 leads resulting from Mr. Howard's decision tree analysis.[887]

619. Yet in response to the most basic of criticisms from the Slovak Republic, Rockflow has hit "redo" on its model, and out popped 8 leads this time. Four of these are *completely new fields*.[888] This is not the only change, however. The actual development plan that Rockflow presented has also changed. Discovery and Rockflow originally told this Tribunal that Discovery would have drilled 170 wells in total: 40 exploration wells, 52 oil producing wells, and 74 gas producing wells.[889] Now they tell the Tribunal that, actually, Discovery would have drilled 139 wells: 40 exploration wells, 33 oil producing wells, and 66 gas producing wells.[890]

620. These two changes epitomize the artificiality of Discovery's "but for" scenario and its DCF. This is not a situation where a party's DCF has changed because the parties and experts have disputed the 'normal' pressure points (*e.g.*, the correct discount rate to apply, the valuation date, which commodity futures index to consult, etc.). Rather, Rockflow and Discovery have altered the very foundations of the DCF itself.

621. This is precisely the reason why tribunals require, among other evidence, contemporaneous business plans and feasibility studies, prepared in the normal course of business, when considering a DCF on non-operational enterprises.[891] Now that SLR has issued a second report, Rockflow's "successful" leads and development plans might change again, resulting in another new DCF valuation. This is just another reason in a long list to reject Rockflow's DCF.

886 SLR Second Report, p. ii.

887 SLR Second Report, ¶ 10.

888 SLR Second Report, ¶ 10.

889 SLR First Report, ¶ 144.

890 SLR Second Report, ¶ 59.

891 *See supra* ¶ 604.

b. Independent evaluations of the Exploration Area Licenses confirm Rockflow's analyses are dramatically inflated

622. Thanks to document production, the Slovak Republic has now learned that at least two independent consultants produced reports assessing the overall prospectivity of various parts of Discovery's Exploration Area Licenses. The first is a competent persons report ("**CPR**") procured by Aurelian in 2012,[892] and prepared by RPS Energy Consultants Limited ("**RPS**"). The second is a draft Canadian national instrument 51-101 prepared in December 2014.[893] Both support Dr. Longman's overall conclusions, and consequently, show how flawed Rockflow's conclusions remain. The Slovak Republic addresses each in turn.

623. The CPR is an important document. A CPR "*is a report commissioned by a company and carried out by an independent professionally qualified person to provide an independent view of the reserves or resources of the company's assets*".[894] As Dr. Longman explains, the purpose of a CPR "*is to form part of a prospectus or similar document in order for the company to obtain financing or investment*."[895]

624. In preparing the CPR, RPS analyzed four prospects and identified 11 other leads, though it did not analyze those. For the four prospects, RPS assigned in-place and recoverable gas volumes, and a geological probability of success ("**GPOS**").[896] This GPOS is equivalent to Rockflow's Geological Chance of Success ("**GCOS**").[897] The results of RPS' independent analysis are summarized in the following table:[898]

892 RPS CPR Evaluation of Aurelian Oil & Gas Ltd Assets in Poland, Slovakia and Romania, **CDL-008**.

893 Evaluation of the Interests of Gulf Shores Resources Ltd. In Medzilaborce, Svidnik and Snina Oil and Gas Concessions in North-Eastern Slovakia, 31 December 2014, **CDL-010**.

894 SLR Second Report, fn. 9.

895 SLR Second Report, fn. 9; *see also* Howard First ER, ¶ 289.

896 SLR Second Report, ¶¶ 19-24.

897 SLR Second Report, ¶ 22.

898 SLR Second Report, ¶ 23.

RPS 2012 Svidnik Block Prospective Resources								
Propect	Reservoir	Gross In Place Resources (bcf)			Gross Recoverable Resources (bcf)			GCoS
		P90	P50	P10	P90	P50	P10	
Zborov A	Palaeocene II	6	31	103	2	9	36	8%
	Eocene III	7	29	84	2	9	28	6%
	Palaeocene III	12	54	170	3	17	59	6%
Zborov B	Palaeocene I	5	31	112	2	13	47	13%
	Eocene II	3	22	84	1	6	24	9%
	Palaeocene II	5	34	116	2	11	38	9%
	Eocene III	2	13	48	1	4	13	6%
	Palaeocene III	6	46	159	2	13	45	6%
Smilno A	Palaeocene	2	13	41	1	5	16	12%
Smilno B	Palaeocene	1	8	33	0	2	9	12%

625. As the far-right column shows, the RPS CPR calculated a GCOS ranging from 6% to 13%, with an average of 9% for these gas leads. Meanwhile, Rockflow's GCOS for gas leads is 20.6%.[899] While the gas leads that RPS analyzed are not identical to those that Rockflow presents, they are nevertheless in the same geological system.

626. In the same vein, *no oil potential* was reported in the CPR.[900] And ultimately, the CPR ascribed *no economic* value to any of the hydrocarbons in Slovakia. As Dr. Longman confirms, "*this independent review and evaluation by RPS confirms my own conclusions from the first report that there are significant risks associated with the identification of any prospectivity within the Slovak blocks held by […] Discovery Global*."[901]

627. As for the 51-101, that is a Canadian regulatory filing that governs the disclosure of oil and gas activities for securities purposes. As explained, this document was prepared for Gulf Shores when it was seeking investors on Discovery's behalf. And just like the CPR, the contents of the 51-101 contrast with Rockflow's figures.

628. To start, the 51-101 did not even assign any geological chance of success or chance of development to the leads it analyzed because of a lack of data.[902] It makes no risk

899 SLR Second Report, ¶¶ 24-25.

900 SLR Second Report, ¶ 31.

901 SLR Second Report, ¶ 28.

902 SLR Second Report, ¶ 35.

assessment at all because of this. It did, however, provide estimates of in-place and recoverable resources. The 51-101's findings are shown in the below table:[903]

2014 Draft 51-101 Submission							
Lead	Reservoir	Gross In Place Resources (MMb)			Gross Recoverable Resources (MMb)		
		Low	Best	High	Low	Best	High
Ol'ka	Beloveza	0.179	0.737	2.168	0.027	0.129	0.434
Stromy	Beloveza	0.518	2.561	8.852	0.078	0.448	1.770
Radvan	Beloveza	0.397	3.520	14.950	0.060	0.616	2.990
Lead 1	Beloveza	1.737	12.703	48.594	0.261	2.223	9.719
Lead 2	Beloveza	0.094	1.296	7.500	0.014	0.227	1.500
Lead 3	Beloveza	0.449	3.560	15.629	0.067	0.623	3.126
Lead 4	Beloveza	0.117	0.571	2.018	0.018	0.100	0.404
Lead 5	Beloveza	0.587	2.988	9.921	0.088	0.523	1.984
Total		**4.079**	**27.935**	**109.631**	**0.612**	**4.889**	**21.926**
Average		**0.510**	**3.492**	**13.704**	**0.076**	**0.611**	**2.741**

629. In the 51-101, the average unrisked prospective resources equate to 76,250 bbl/lead in the low case and 0.6 MMstb in the best (mid) case. Both scenarios assume a 17.5% recovery factor.[904] Meanwhile, Dr. Moy's 18 oil leads, with his 25% recovery assumption, results in an average of 6.4 MMstb. In other words, Dr. Moy's results are 10 times higher than the 51-101.[905]

630. While there is no perfect comparison between the leads from the 51-101 and the leads Rockflow now quantify, the closest would be to compare the Ol'ka and Stromy leads from the 51-101 with Mr. Atkinson's LU07D.[906] In the 51-101, the aggregated best (mid) case Gross In-Place Resources is 3.3 MMstb STOIIP.[907] On Mr. Atkinson's analysis, that figure is 25.6 MMstb STOIIP.[908] In other words, Mr. Atkinson's figure is almost 8 times higher than the 51-101.[909]

631. Furthermore, the single largest lead in the 51-101 is one that Mr. Atkinson has not even identified as a lead in his own model.[910] As Dr. Longman concludes, "*the draft 51-101 document provides a realistic assessment of the potential of the anticipated two well*

903 SLR Second Report, ¶ 34.

904 SLR Second Report, ¶ 36.

905 SLR Second Report, ¶ 37.

906 SLR Second Report, ¶ 38.

907 SLR Second Report, ¶ 39.

908 SLR Second Report, ¶ 39.

909 SLR Second Report, ¶ 39.

910 SLR Second Report, ¶ 41.

drilling programme and demonstrates […] that this was not an attractive investment opportunity."[911]

* * *

632. It is no surprise that Rockflow did not consider these documents when conducting its various analyses. The CPR and draft 51-101 come to the exact opposite conclusions as Rockflow. This is unsurprising. Unlike Rockflow's analyses, those in the CPR and the draft 51-101 were not made for arbitration.

c. Rockflow's estimated hydrocarbon volumes are dramatically out of line with historical data

633. In the first SLR Report, Dr. Longman performed preliminary benchmarking analyses to show that Rockflow's hydrocarbon estimates were considerably higher than known, producing Polish wells.[912] He has expanded his benchmarking in the second SLR Report by analyzing data from over 60 oil/gas fields and 500 wells drilled on the four nappes from the Southern Carpathians: the Skole nappe, the Silesian nappe, the Dukla nappe, and the Magura nappe.[913] To recall, Discovery's Exploration Area Licenses are dominated by the Magura nappe and, to a lesser extent, the Dukla nappe.[914] Discovery does not dispute this.

634. With that data for each nappe, Dr. Longman compared the historical data with Rockflow's analyses for the following categories: oil fields (discovered recoverable resources), gas fields (discovered recoverable resources), oil recovery per well, and exploration and development activity levels. This benchmarking exercise conclusively shows that Rockflow's analyses produce results that are unjustifiably high and that cannot be reconciled with historical data. The Slovak Republic addresses these categories in turn.

911 SLR Second Report, ¶ 43.

912 SLR First Report, ¶¶ 114-118.

913 SLR Second Report, p. ii.

914 SLR First Report, ¶¶ 12-13.

Oil fields (discovered resources)

635. Rockflow's analysis identifies 18 oil leads in Discovery's Exploration Area Licenses.[915] It claims that 3 of these leads are successful. According to Rockflow's analysis, the average oilfield recovery volume in these three "successful" leads is 4.4 MMstb. The historic average oilfield recovery volume from the Dukla and Magura nappes (*i.e.*, the nappes of Discovery's Exploration Area Licenses) is 0.5 MMstb and 0.7 MMstb respectively.[916] In other words, Rockflow's figures are 6-7 times *higher* than historical data.[917]

636. Similarly, regarding oil resource density, Rockflow's analysis produces a result of 10.7 MMstb per 1000 km^2.[918] In other words, for every 1000km^2, one would expect to find 10.7 MMstb of recoverable oil according to Rockflow.[919] That figure is 9 times *greater* than the historical averages from the Dukla and Magura nappes.[920] The Tribunal can see that in the below table from SLR's Second Report, in the last column on the right:[921]

Nappe or Area	Area / 1000 km^2	Number of fields	Field Cumulative MMstb	Average MMstb / field	MMstb per 1000 km^2
Poland Skole nappe	2.9	7	11.3	1.6	3.9
Poland Silesian nappe	8.0	38	61.5	1.6	7.8
Poland Dukla nappe	1.6	4	1.9	0.5	1.2
Poland Magura nappe	6.4	11	7.5	0.7	1.2
Poland all	18.8	60	82.2	1.4	4.4
Second Rockflow Reports	**1.25**	**3**	**13.3**	**4.4**	**10.7**

637. Indeed, were one to accept Rockflow's oil resource density figures, that would mean that Discovery's Exploration Area Licenses are *more* prolific than the Silesian nappe, which has, by far, proven to be the most productive nappe in the region historically.[922]

915 SLR Second Report, ¶ 50.

916 SLR Second Report, ¶ 50.

917 SLR Second Report, ¶ 50.

918 SLR Second Report, ¶ 51.

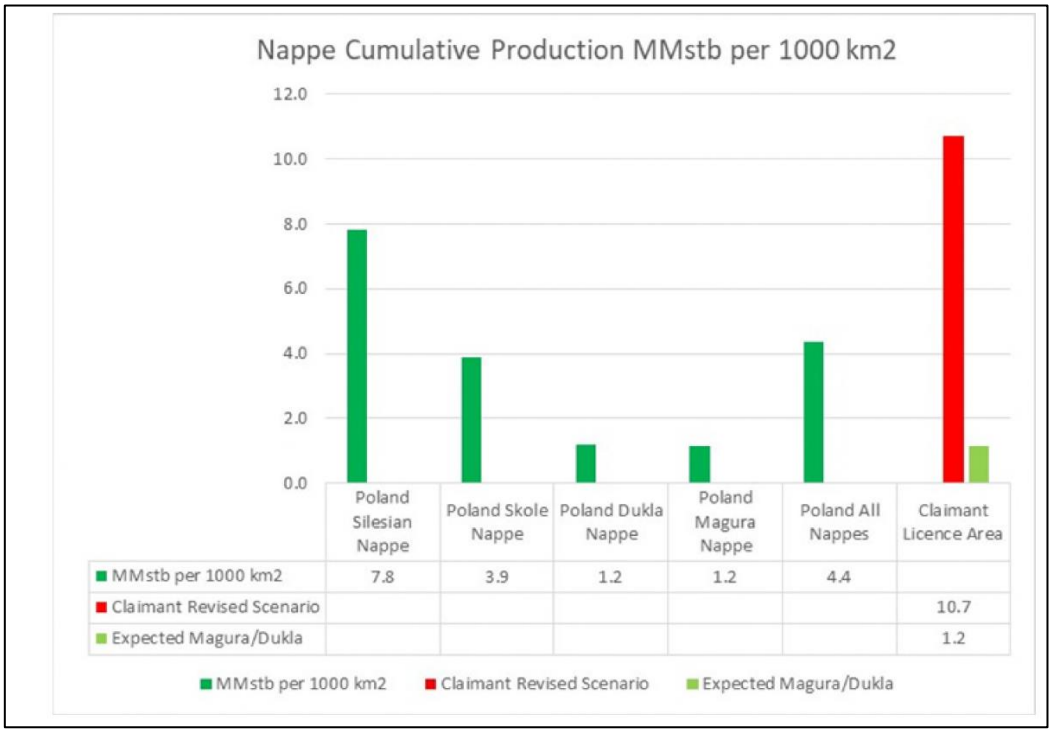
919 SLR Second Report, ¶ 51.

920 SLR Second Report, ¶ 51.

921 SLR Second Report, ¶ 49, Table 4.

922 SLR Second Report, ¶ 51.

The following graph shows how Rockflow's estimated oil production per 1000 km^2 is irreconcilable with historical data from all four nappes Dr. Longman examined:[923]



638. As the above graph shows, Rockflow's estimated oil recoveries per 1000 km^2 (in red) is the major outlier. Compared to the historical averages of the Dukla and Magura nappes, Rockflow's analysis produced results that would be unheard of for the region. Ultimately, Dr. Longman concludes that these discrepancies "*demonstrate[] that the assumptions being used in Rockflow's calculations are not calibrated with the reliable, real-world data available*."[924]

Gas fields (discovered recoverable resources)

639. Dr. Longman conducted a similar benchmarking exercise for gas fields. Specifically, he analyzed the ratio of gas fields per 1000 km^2 in both the Dukla and Magura nappes. The results of that analysis are in the following table:[925]

923 SLR Second Report, ¶ 51, Figure 2.

924 SLR Second Report, ¶ 50.

925 SLR Second Report, ¶ 55.

AREA	1000 km²	Gas fields	Fields / 1000 km²
Poland Dukla nappe	1.6	1	0.6
Poland Magura nappe	6.4	2	0.3
Rockflow Second Reports	1.25	5	4

640. As the table indicates, historical data shows an average of 0.6 and 0.3 gas fields per 1000 km^2 in the Dukla and Magura nappes respectively. [926] Meanwhile, Rockflow's analysis shows a figure that is 7 times higher—4.0 gas fields per 1000 km^2.[927] Once again, as Dr. Longman notes, "*this is another example of Rockflow's analysis producing inexplicably higher figures than historical data*."[928]

Oil recovery per well

641. Rockflow's exaggerated figures become even worse when looking at oil recovery well data. For the most productive Silesian nappe, the historical average of oil recovery per well is 28 Mstb.[929] On Rockflow's analysis, for the three oil leads it quantifies in its DCF, the average oil recovery per well is ***404 Mstb***.[930] That is not a typo. In fact, that figure is even closer to 500 Mstb per well across all 18 oil leads that Rockflow has presented in its analysis. [931] The following graph shows the extreme discrepancies with Rockflow's analysis: [932]

926 SLR Second Report, ¶ 56.

927 SLR Second Report, ¶ 56.

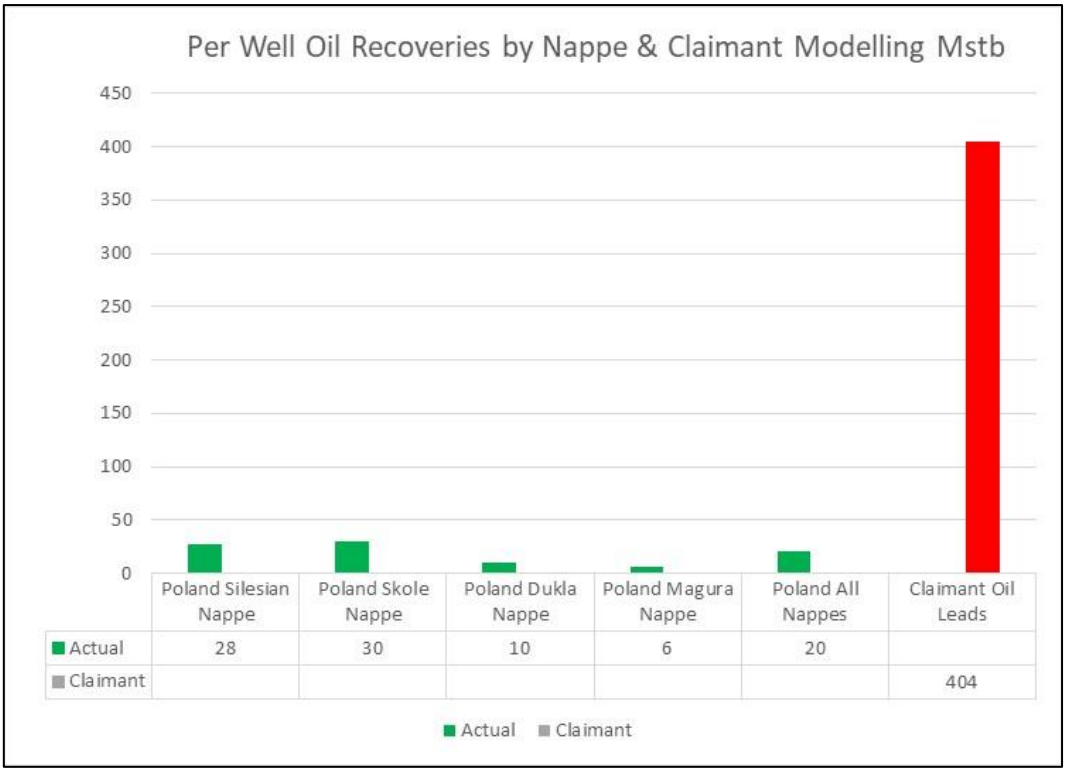
928 SLR Second Report, ¶ 57.

929 SLR Second Report, Figures 4-5.

930 SLR Second Report, ¶ 67.

931 SLR Second Report, ¶ 67.

932 SLR Second Report, Figure 5.



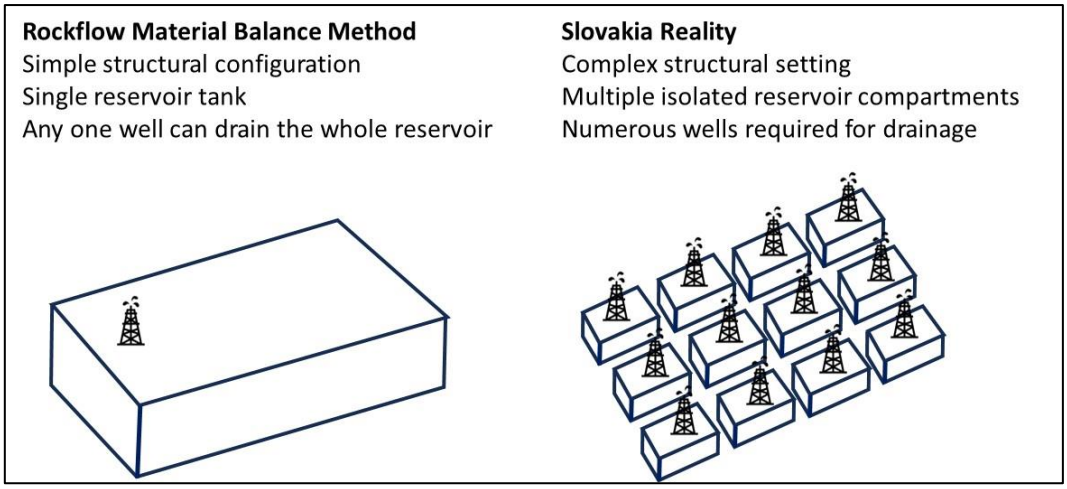
642. As Dr. Longman explains, of the nearly 500 wells drilled in southern Poland over a 120-year period, the best producing wells appear in Mr. Atkinson's exhibit **AA-011**. Only one well has *ever* exceeded 400 Mstb, and yet Rockflow now claims that this is the average recovery of the thirty three wells it quantifies in its DCF.[933]

643. As Dr. Longman explains, the primary reason why Rockflow's analysis is so flawed is because Dr. Moy assumes that a single well can drain an entire reservoir of oil.[934] His approach can be seen in the figure below:[935]

933 SLR Second Report, ¶ 67.

934 SLR Second Report, ¶ 68.

935 SLR Second Report, ¶ 68, Figure 6.



644. As Dr. Longman explains, however, this overlooks "*the complex geology in the Claimant's Exploration Area Licences*."[936] In this part of the world (*i.e.*, the Carpathians), "*the well drainage areas are relatively small and this is why so many wells are required*", as evidenced by previous development projects on older fields.[937] In other words, Dr. Moy's approach is incompatible with the geological realities underlying Discovery's Exploration Area Licenses.

Exploration and development activity levels

645. As explained in more detail below, Rockflow's revised development plan now calls for 139 wells to be drilled in six years.[938] The first 40 wells would be exploration wells that, on Rockflow's plan, result in eight oil/gas discoveries.[939] Thereafter, 33 oil wells and 66 gas wells would be drilled—these being the development wells.[940] All of this drilling would start and end in the span of six years. This would be unprecedented.

646. As Dr. Longman explains, he has analyzed historical drilling rates from the Dukla and Magura nappes. Such little activity has occurred since 2000 that Dr. Longman cannot even compare Rockflow's drilling rates to historical figures. He must go back to 1980-1999 just to find "*enough activity to offer a reliable dataset*."[941]

936 SLR Second Report, ¶ 68.

937 SLR Second Report, ¶ 68.

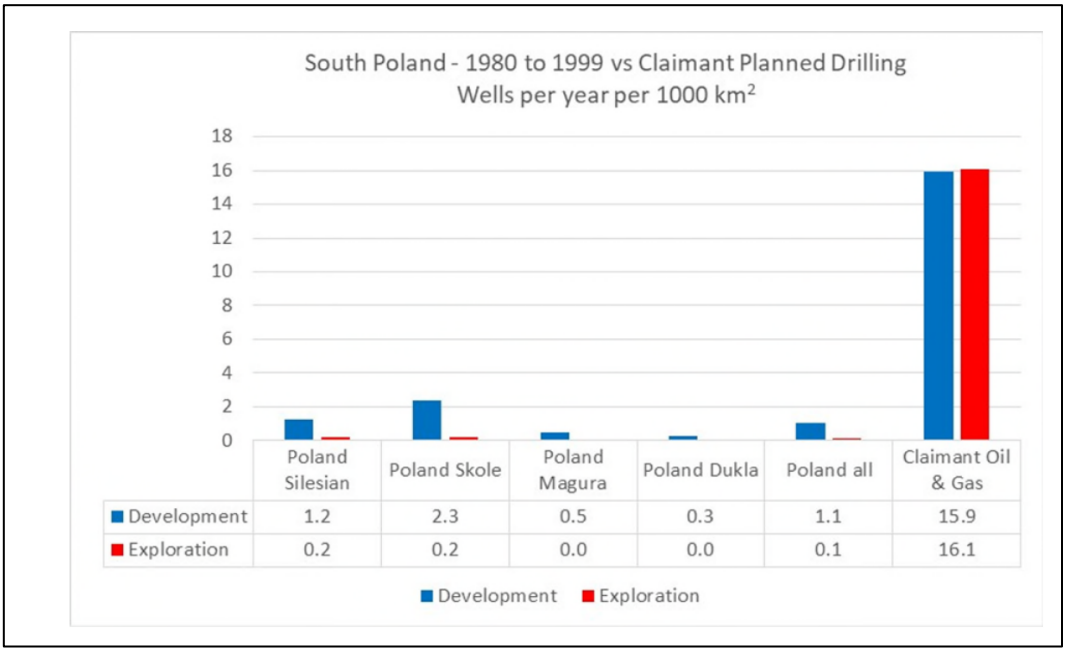
938 SLR Second Report, ¶¶ 59, 95.

939 SLR Second Report, ¶ 59.

940 SLR Second Report, ¶ 59.

941 SLR Second Report, ¶ 62.

647. From 1980 to 1999, only six exploration wells were drilled in the Dukla and Magura nappes (even though the sector had less regulations then).[942] When looking at the number of wells per 1000 km^2, the results are striking—again because of how out of line Rockflow's exploration and development plan is with historical data from the region:[943]



	Poland Silesian	Poland Skole	Poland Magura	Poland Dukla	Poland all	Claimant Oil & Gas
Development	1.2	2.3	0.5	0.3	1.1	15.9
Exploration	0.2	0.2	0.0	0.0	0.1	16.1

648. As Dr. Longman rightly notes, Rockflow's model is "*radically out of line with the commercial drilling practices used in the real-world discoveries and developments just across the border*."[944]

* * *

649. In short, and as explained by Dr. Longman, Rockflow's analyses systematically—and inexplicably—produce overall results that are divorced from historical data:[945]

(a) the average size of the potential oil discoveries on Rockflow's analysis is approximately 7 times greater than historical data;

942 SLR Second Report, ¶ 63.

943 SLR Second Report, ¶ 63, Figure 4.

944 SLR Second Report, ¶ 63.

945 SLR Second Report, p. ii.

(b) the total discovered oil resource density on Rockflow's analysis is approximately 9 times greater than historical data;

(c) the number of gas discoveries expected on Rockflow's analysis is 6 to 12 times greater than historical data;

(d) the oil recovery per development well on Rockflow's analysis is 10 to 20 times greater than historical data;

(e) the pace of the exploration drilling on Rockflow's analysis is 140 times faster than historical data; and

(f) the pace of development drilling on Rockflow's analysis is 10 times higher than historical data.

650. Ultimately, the idea that oil and gas prospectors, over the last 100 years, have completely overlooked an area that, on Rockflow's analysis, contains two oil fields that would rank in the top eight (in terms of size) of the Carpathian nappes belies credibility.[946] Just like the rest of Rockflow's DCF, none of its oil and gas quantities (nor drilling program) are based in reality.

d. Rockflow's development plans are still unsustainable, and its CAPEX estimations are inadequate

651. To recall, Rockflow's original development plan called for 40 exploration wells, 52 oil production wells, and 74 gas production wells all to be drilled and brought online in the span of six years, from start to finish.[947] Calling this fanciful would be an understatement.

652. Rockflow's latest development plan fares no better. Now, it claims that 33 oil production wells and 66 gas production wells would follow the original 40 exploration wells that Discovery would supposedly drill.[948] Again, these 139 wells would be drilled and brought to production all within the span of six years, and all of this taking place in the mountainous regions of Eastern Slovakia (and subject to the same ownership

946 SLR Second Report, ¶ 74.

947 SLR First Report, ¶ 144.

948 SLR Second Report, ¶ 59.

regime that Discovery complained of to the MoE).[949] This is neither feasible nor believable.

653. There are so many aspects of this development plan that are problematic that it is difficult to choose one to highlight. For the purposes of this Rejoinder, the Slovak Republic focuses on risks and uncertainty. Rockflow's development plan contains *zero* consideration for risks or uncertainties. In other words, the timeline Rockflow has proposed includes no margin for errors. This means that:[950]

(a) All permits and access issues are granted or resolved without delay;

(b) Rig sites are secure and constructed in the most optimal locations;

(c) Three-week exploration wells are consecutively drilled to various depths with relative ease;

(d) New fields are discovered every 15 weeks;

(e) The commerciality of those fields is guaranteed and immediately apparent without further appraisal work;

(f) All necessary equipment is readily available at attractive rates;

(g) Low budget facilities design and construction work is performed on time;

(h) No partners need to be found;

(i) Access to hundreds of millions of dollars of capital is secured at manageable rates; and

(j) No cash flow issues are encountered.

654. As Dr. Longman explains, "*[f]rom a technical & commercial perspective, I find it all but impossible to consider that this scenario could be a realistic outcome of the situation in which the Claimant found itself*."[951] In fact, were this project to succeed, it would be "*the largest onshore development in Europe for more than a decade*."[952]

655. To show just how much of a unicorn this project would be, Dr. Longman and SLR compared Rockflow's development scheme with the *only* project relatively comparable

949 *Supra*, ¶ 12.

950 SLR Second Report, ¶ 91.

951 SLR Second Report, ¶ 92.

952 SLR Second Report, ¶ 94.

in recent years—the Lubiatów project in Poland.[953] Although the Lubiatów project was only the size of *one* of eight fields from Rockflow's analysis, it took five more years from development to production than what Rockflow says would occur in its model.[954] Moreover, and again despite being the size of only one of Rockflow's eight fields, the Lubiatów project required *all* the CAPEX that Rockflow says its model would cost.[955] In other words, Rockflow claims that its project would cost around the same, even though it is *five* times the size.[956] Ultimately, as Dr. Longman confirms, a project the size of Rockflow's would take at least 11 years.[957]

656. The only reason why Discovery and Rockflow continue to rely on a patently absurd development plan is to maximize the returns of its DCF. To believe that Discovery's skeletal crew, run from a residential address in the United States, could have built such an expansive project in the mountainous regions of Eastern Slovakia (and all without having one material delay or failure) epitomizes Rockflow's DCF: it is pure fantasy.

e. Dr. Longman's technical audit of Rockflow's 8 "successful leads" demonstrates further errors with Rockflow's methods

657. As noted, when Discovery filed its Memorial, it did not attach any of the geological models that were the very foundation of its analyses. It was only in document production that Discovery made those available. It is now clear why. Using poor, 2D seismic data, Rockflow has overworked and manipulated the scant data available to it, which results in its outrageous figures.

658. Dr. Longman has now had the opportunity to audit this work. On that audit, he has concluded that three of the "successful" leads are so poorly defined in the data, that he does not even consider these to be valid prospects.[958] As for the remaining five leads, the poor data, unwarranted assumptions, and techniques that violate industry standards have combined to produce figures that the poor data simply cannot support. This is an extremely technical exercise, and one that Dr. Longman describes at length in his

953 SLR First Report, ¶¶ 152-154.

954 SLR Second Report, ¶ 97.

955 SLR Second Report, ¶ 97.

956 SLR Second Report, ¶¶ 97, 174.

957 SLR Second Report, p. iii.

958 SLR Second Report, ¶ 139, Appendix C, ¶¶ C.12-C.21.

report.[959] For the purposes of this Rejoinder, the Slovak Republic makes two overarching points.

659. *First*, the majority of Rockflow's prospects are defined based on so-called two-way time grids, or TWT grids.[960] Under industry standards, true "Prospects" would never be presented in TWT grids.[961] TWT maps are "*a step in the process of generating depth maps and are often used to illustrate exploration concepts (Plays) and sometimes Leads*".[962] In other words, Rockflow's use of these to ultimately define structures and estimate oil and gas already violate basic industry technique.

660. *Second*, Rockflow commits a systematic, arbitrary error when running its analyses, and it concerns the "area" input that Rockflow must populate in the software it uses. When interpreting a specific geological structure and trying to estimate the volumes of oil and gas contained therein, the engineer must input certain figures into software to run the models. One of those inputs is "area".

661. When Rockflow define its area, Rockflow do something that defies reason. Rockflow first identify an area (expressed in km^2) from the structural map before them. But instead of using the area (and boundaries) of that area as the *maximum* area assessed, Rockflow inexplicably *doubles* the size of it—without reason or explanation.[963] This means that Rockflow's analysis is really saying: 'the area defined is X, but it might be double that number.' There is zero justification for this. But to make matters worse, Rockflow then seek to define the *minimum* area. To calculate the minimum, Rockflow takes the original size of the area and halves it.[964] In other words, 'the area defined is X, but it might be half that number.'

662. A tangible example is Rockflow's Prospect BE11. When Rockflow looks at the data before it, Rockflow sections off a 4.0 km^2 area and seeks to calculate the volume of oil

959 SLR Second Report, Appendix C.

960 SLR Second Report, Appendix C, ¶ C.3.

961 SLR Second Report, Appendix C, ¶ C.3.

962 SLR Second Report, Appendix C, ¶ C.3.

963 SLR First Report, ¶¶ 95-96; SLR Second Report, ¶¶ 123-127.

964 SLR Second Report, ¶ 123.

therein.[965] But then Rockflow's analysis *doubles* that area to 8.0 km^2 (*i.e.*, it could be this high) but then *halves* it to 2.0 km (*i.e.*, it could be this low).[966] So, even though Rockflow's map can only support a 4.0 km^2 as the area interpreted, Rockflow nevertheless sets this 4.0km^2 as its P50—*i.e.*, 50% of the time the actual area will be lower or higher than this.[967] But Rockflow already knows that 4.0km^2 is the maximum value its map can support. This artificially skews the calculated volumes to the high side.

663. It also results in instances of double-counting. For example, the following figure shows Rockflow's leads for LU03A and LU03B.[968] The hatched pink area is the original, defined area that Rockflow analyzes.[969] The Rockflow analysis *doubles* the area of this hatched pink section, and that doubling makes the assessed area expand to the area defined by the dark, bolded pink lines.[970] It is obvious from the below that, when leads are relatively close to one another, that doubling of the area component makes both leads blend into one another.[971] This results in a form of double counting, which only exacerbates the skew higher:[972]

965 SLR Second Report, Appendix C, ¶ C.44 and Figure C9.

966 SLR Second Report, Appendix C, ¶ C.44 and Figure C9.

967 SLR Second Report, Appendix C, ¶ C.44 and Figure C9.

968 SLR Second Report, ¶ 125, Figure 12.

969 SLR Second Report, ¶ 125, Figure 12.

970 SLR Second Report, ¶ 125, Figure 12.

971 SLR Second Report, ¶ 126.

972 SLR Second Report, ¶ 126, Figure 12.

664. This is a systemic error that Rockflow makes throughout its calculations and artificially drives all of its oil and gas calculations far higher than what the poor data reflects.

* * *

665. These are only two examples of the flawed geological analyses that Rockflow has employed. Dr. Longman's second report highlights all of the other problems and statistical manipulations embedded in Rockflow's models. And while the hard data now shows the true extent of these flaws, the proof was already evident by looking at the historical data, which shows how out of touch with reality Rockflow's models are.

666. Ultimately, it is simply not credible that companies like Total, Chevron, Orlen, Exxon, Marathon, Eni, and RWE[973] were all familiar with the region, and yet all of these extremely large and successful companies were oblivious to what would, on Rockflow's models, be one of the most successful oil and gas projects the region has ever seen.

B. Discovery's lost opportunity damages must be rejected

667. In its Reply, Discovery takes the result of Mr. Howard's latest DCF, reduces it by 60% without any explanation for that figure, and then claims that this USD 53 million (40% of Mr. Howard's DCF) should be awarded as lost opportunity damages in the

973 Aurelian Corporate Presentation dated 1 January 2012, slide 9, **C-250**.

alternative.[974] This is not an alternative damages calculation—it is the exact same as Discovery's DCF, just reduced by an arbitrary amount.

668. Even if lost opportunity damages are a "*general principle of law*"[975] as Discovery claims, they are rarely awarded. Indeed, as explained by the tribunal in *Caratube v. Kazakhstan*, "*[i]t is true that some international tribunals have awarded damages for lost opportunity, **but such practice is not widely accepted***."[976] Other tribunals and commentators agree.[977]

669. Tribunals have held that there must be a sufficient causal link between the lost opportunity and the breach—with compensation being proportional to the probability of its occurrence.[978] Otherwise stated, a claimant arguing for lost opportunity profits must show "*a high threshold of sufficient probability*."[979] Given the additional layer of speculation in a lost opportunity analysis, tribunals will be "*slow in exercising […] discretion in favor of awarding damages for lost opportunity in case of a failure to provide sufficient elements for the quantification of this claim for damages*."[980]

670. As explained below, the only "lost opportunity" was Discovery's inability to drill three exploration wells, one of which has already been shown to fail **(1)**. Moreover, and in any event, the rationale Discovery uses to calculate its lost opportunity damages appears

974 Claimant's Reply, ¶¶ 433, 445-451.

975 Claimant's Reply, ¶¶ 434-435, fn. 905.

976 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 1149, **RL-161**.

977 *See, e.g., Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, ¶ 382 ("*Finally, **the 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations**.' At most it can be said that **the 'loss of chance' principle is applied in exceptional situations** where there exists a 'harm whose existence cannot be disputed but which it is difficult to quantify.'*"), **CL-046**; A. Sheppard, *Chapter 24: Loss of Chance Damages*, in S. Brekoulakis, *et al*. (eds.), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (2023), p. 255 ("*Nevertheless, the application of 'loss of chance' is rare.*"), **RL-162**.

978 *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 924, **RL-163**.

979 *See, e.g., Anatolie Stati and others v. Republic of Kazakhstan,* SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1689, **RL-164**.

980 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 1152, **RL-161**.

to be its own creation and made solely to dress these damages up as an "alternative" to the DCF **(2)**.

1. The only lost opportunity was Discovery's inability to drill three exploration wells, one of which would have failed

671. The foundation of Discovery's lost opportunity case asks this Tribunal to assess "*the chance that Discovery would have discovered hydrocarbons but for Slovakia's breaches of the BIT*."[981] This is immediately flawed for two reasons.

672. *First*, it is not enough to discover hydrocarbons. If the Tribunal is to undertake this analysis, it must assess whether Discovery would have succeeded in discovering hydrocarbons that were commercially viable. As explained above, and throughout the SLR Reports, even if Discovery continued to prospect for oil and gas, the chance of any commercial discoveries was extremely low.[982] That conclusion is consistent with (*i*) the 51-101 that Discovery procured, (*ii*) the CPR that Aurelian procured, which did not even ascribe any values to the Slovakian deposits,[983] and (*iii*) the numerous investors that rejected Discovery's project throughout the years.

673. *Second*, and similarly, the question again is not whether Discovery would have discovered hydrocarbons. The question is whether Discovery's "but for" scenario would have occurred because that is how Discovery calculates the "maximum value" in its lost opportunity damages.

674. Nothing in the record comes close to demonstrating with "*sufficient probability*"[984] that anything close to Rockflow's development plan would have occurred. As already explained, the entire model was made for this arbitration.[985] Whether Discovery would have even found the successful oil and gas deposits is pure guesswork—not to mention the numerous permits and authorizations it was required to obtain to actually produce oil and/or gas.[986] Foremost among those requirements was the EIA process that every

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981 Claimant's Reply, ¶ 443.

982 *See generally* SLR First and Second Report.

983 *See generally* SLR Second Report.

984 *See, e.g., Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1689, **RL-164**.

985 *See supra* ¶¶ 592-595.

986 Respondent's Counter-Memorial, ¶ 33.

single oil and gas company must undergo (even before the EIA Amendment) if it wants to drill actual production wells.[987]

675. At its highest, the only opportunity that Discovery lost was the ability to drill three preliminary exploration wells at three locations in the Slovak Republic: Smilno, Krivá Oľka, and Ruská Poruba. And even then, (*i*) it is undisputed that Ruská Poruba would have failed,[988] and (*ii*) Discovery would have needed multiple permits and authorizations to turn these into development wells, assuming quantities of commercially viable hydrocarbons were even discovered.[989] On this point, Discovery again explicitly asks the Tribunal to assume it would have been granted all of these permits and authorizations.[990]

676. The free market, as determined by the only two investors Discovery could even entertain in 2017, already determined the value of this opportunity: zero.

2. Discovery's lost opportunity calculations are its own creation and made only to disguise this as an "alternative" claim to the DCF when it is not

677. Were that not enough to dismiss this head of damages, Discovery's valuation method is its own creation. It was created to dress these damages up as an alternative to the DCF when, in reality, it is just another version of it.

678. Discovery submits two "metrics" to assess its lost opportunity damages: a minimum value of €10.9 million, which represents amounts AOG invested since 2006, and a maximum value of USD 133,054,614, which is simply the result of Mr. Howard's latest DCF.[991] According to Discovery, its lost opportunity damages "*lie[] somewhere in between the minimum and maximum values*"[992] but in no event should it be less than 40% of the maximum value—*i.e.*, USD 53 million.

679. This is absurd.

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987 Respondent's Counter-Memorial, ¶ 33.

988 Atkinson First ER, ¶ 112.

989 Respondent's Counter-Memorial, ¶ 33.

990 Claimant's Reply, ¶¶ 567-569.

991 Claimant's Reply, ¶ 445.

992 Claimant's Reply, ¶ 451.

680. *First*, Discovery wrongly calculates the minimum value using the total amount AOG invested in the project since 2006, even though Discovery did not even purchase AOG until 2014.[993] Discovery does this to divert attention from the paltry sums it actually contributed to the project—a mere USD 3.3 million dollars from 2014-2020.[994]

681. *Second*, using Mr. Howard's DCF results as the maximum value is flawed for all of the reasons already discussed in section VI.A.3 above. His DCF is pure speculation.

682. *Third*, the 40% factor applied to the DCF is arbitrary. Discovery claims that (*i*) this 40% figure makes sense because Mr. Atkinson's analyses are robust and conservative (they are not), (*ii*) it was not a new player in the market (it was), and (*iii*) Slovakia would have supported Discovery's project because of the monetary benefits that Slovakia stood to gain.[995] None of these sheds any light on the 40% figure.

683. Ultimately, Discovery appears to advocate for this general approach by claiming that previous tribunals (namely, the tribunals in *Gemplus* and *SPP*) have awarded lost opportunity damages that "*exceeded by a significant margin the amounts invested by the investors*."[996] But ensuring that an investor was awarded compensation in excess of what it invested is not at all why the tribunals in *Gemplus v. Mexico* and *SPP v. Egypt* awarded the sums they did.

684. In *Gemplus*, the tribunal calculated lost opportunity damages through a fair market value lens that asked: what would be the price of the asset in a transaction between a willing buyer and willing seller with all of the knowledge as of the date in question?[997] The *Gemplus* tribunal was not concerned with ensuring that its award would exceed the investor's out of pocket costs.

685. In *SPP*, the tribunal made an explicit finding that "*it is incontestable that the Claimants' investment had a value that exceeded their out-of-pocket expenses. The record shows*

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993 Claimant's Reply, ¶ 446(1).

994 Claimant's Reply, ¶ 446(1). As the Slovak Republic explains elsewhere in this Rejoinder, it is unclear if these figures also include the amounts Akard invested into the project.

995 Claimant's Reply, ¶ 451.

996 Claimant's Reply, ¶ 439.

997 *Gemplus v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 13-100, **CL-081**.

that between February of 1977 and May of 1978, ETDC made sales of villa sites and multi-family sites totalling US$ 10,211,000—more than twice the Claimants' out-of-pocket expenses."[998] In other words, the damages had to be higher than the out-of-pocket expenses because the record demonstrated that it was "*incontestable*".[999]

686. In sum, the minimum and maximum values are nothing but a charade. These lost opportunity damages are nothing more than a percentage of Mr. Howard's DCF analysis. This is just another way for Discovery to shoehorn its flawed DCF back into the equation.

687. The Slovak Republic makes one final point. From 2006 to 2014, AOG invested €7.75 million into the project.[1000] In 2014, when San Leon sought to sell AOG, JKX and Romgaz waived their rights of first refusal vis-à-vis AOG's interests in the Exploration Area Licenses.[1001] Once that happened, San Leon then sold AOG's interests to Discovery for €153,054.50.[1002] That (*i*) JKX and Romgaz had no desire to acquire AOG's interests and (*ii*) San Leon was comfortable selling AOG for next-to-nothing despite €7.75 having been invested in the project should tell this Tribunal all it needs to know about any "lost opportunity" damages.

C. Discovery has not been truthful about the additional Akard sum it seeks and it must be rejected

688. The additional Akard sum that Discovery seeks has been a curious part of this case. According to Discovery, the additional amount of USD 1.9 million that it claimed in its Memorial (and that it still claims in its Reply) would have been paid to Akard out of the profits of its project.[1003] Therefore, Discovery calculated its income based valuations (and still does) net of this amount, on the theory that the USD 1.9 million should not be taken from Discovery's profits.[1004] Even assuming this is true, it has

998 *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶ 214, **CL-073**.

999 *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶ 214, **CL-073**.

1000 CRA Second Report, ¶¶ 71, 76.

1001 Claimant's Memorial, ¶ 50.

1002 Claimant's Memorial, ¶ 52(2).

1003 Claimant's Memorial, ¶¶ 325-327; Claimant's Reply, ¶¶ 431-432.

1004 Claimant's Memorial, ¶ 326; Claimant's Reply, ¶ 431(2).

always been strange that Discovery nevertheless claims that USD 1.9 million *on Akard's behalf* in this arbitration.

689. Assuming this is true, it means that Discovery is seeking USD 1.9 million that does not belong to it. On this basis, the request for USD 1.9 million must be rejected. This Tribunal has no authority to order the Slovak Republic to pay amounts to Akard through Discovery. If Akard wants to bring a claim against the Slovak Republic for this amount, it must do so itself.

690. Furthermore, this claim never sat right with the Slovak Republic, and thus it requested documents from Discovery to support this amount. And the truth has now come to light.

691. As revealed through document disclosure, the USD 1.9 million that Discovery seeks has nothing to do with profits of the project. Rather, it is a debt that Discovery owes to four different companies under a settlement agreement dated 30 March 2018 (the "**Settlement Agreement**").

692. The Settlement Agreement explains that four different companies invested or advanced funds to Discovery: Clearview Partners, Akard Acquisitions, Ross Exploration, and 3WT:[1005]

> WHEREAS:
>
> A. Prior to October 23, 2015, (and prior to the involvement of Akard) Clearview invested $480,711 with Discovery in a financing effort to support certain activities of Discovery's Slovak subsidiary Alpine Oil & Gas s.r.o. (**"AOG"**) (**"AOG Activities"**);
>
> B. On or around October 23, 2015, Akard and Discovery, with the direction, knowledge and consent of Clearview, entered into an investment agreement (the "**Agreement**") relating to the funding by Akard of the AOG Activities;
>
> C. Akard, Ross and 3WT advanced $1,494,605.00 through December 13, 2016 and received a refund of $10,117.61 on January 3, 2017 for a net funded amount of $1,484,487.39 as of January 3, 2017, broken down as follows:
>
> - $260,000.00 from Akard
> - $705,769.00 from Ross
> - $518,718.39 from 3WT

693. Under the Settlement Agreement, Discovery has committed to reimburse all four of these companies "*[s]hould Discovery, or any affiliate or successor of Discovery, other*

1005 Waiver and Release between Discovery and Akard dated 30 March 2018, **C-390**.

than AOG, receive for its own account any cash subsequent to the date of this Release which derives from the activities of AOG, from Discovery's interest in AOG":[1006]

> 5. A) Should Discovery, or any affiliate or successor of Discovery, other than AOG, receive for its own account any cash subsequent to the date of this Release which derives from the activities of AOG, from Discovery's interest in AOG, from the licenses held by AOG in the Slovak Republic or from any assets acquired or received in exchange for the foregoing ("**Eligible Cash**"), Discovery will pay 40% of all
>
> such Eligible Cash to CAR3, within 30 days of receipt, up to a maximum aggregate amount payable hereunder of $1,965,198.39, in the following proportions:
>
> - 24.46% in payment to Clearview,
> - 13.23% in payment to Akard,
> - 35.91% in payment to Ross, and
> - 26.40% in payment to 3WT.

694. As the above extract from the Settlement Agreement shows, the USD 1,965,198.39 that Discovery seeks in this arbitration is a debt that it owes to four different companies pursuant to the Settlement Agreement. It is not an amount due to Akard from the project's profits. Aware that the Slovak Republic would raise this issue, Discovery casually (and briefly) addresses this in its Reply as if it were no big deal.[1007] But the reality is that Discovery never mentioned the particulars of this Settlement Agreement in its Memorial. Nor did it mention that Akard and three unknown entities were actually funding Discovery's project. In fact, as discussed above, *Discovery itself did not even know these entities were funding Akard*, and that was one of the reasons Akard defaulted—these unknown entities were simply done with the project.[1008]

695. In any event, under the Akard Agreement, Akard was only entitled to equity (and, thus, profits) if it actually met its funding obligations.[1009] It is undisputed that Akard *defaulted* on its funding obligations, and thus would be entitled to nothing.

696. Once again, the Slovak Republic cannot help but highlight the profound omissions from Discovery's case. There is a reason why this document only came to light in document

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1006 Waiver and Release between Discovery and Akard dated 30 March 2018, **C-390**.

1007 *See* Claimant's Reply, ¶ 395(5)(c).

1008 *See supra* ¶ 69.

1009 Agreement between Discovery and Akard dated 23 October 2015, ¶ 6.4.1, **C-282**.

production and Discovery was forced to address it—for the first time—in its Reply. We trust the Tribunal now understands why.

697. For the reasons explained above, the Tribunal must reject Discovery's request for USD 1.9 million in addition to any of its damages claims.

D. Discovery's market value damages are unsustainable

698. CRA explained in its first report that the fair market value of Discovery's project was USD 1.2 million to USD 3 million using a market-based approach.[1010] Discovery's responses to these valuations are unsupported, lack economic sense, and again rely on the "but for" crutch Discovery uses throughout its damages case for support. Even adopting Mr. Howard's own approach to market-based calculations, Discovery's project would have only been worth USD 3.2 million.

1. Comparable transactions

a. The overriding royalty values Discovery's project at no more than USD 2 million

699. An actual transaction on Discovery's project exists and that transaction implies a value of less than USD 2 million. As explained in the Counter-Memorial, when Discovery purchased AOG in March 2014, it granted a royalty from the project to Aurelian that translated to 7% net of AOG's 50% share of the petroleum produced.[1011] One year later, Aurelian then sold that royalty back to one of Mr. Lewis' companies for £120,000. The implied valuation of the project by the ex-ante valuation date based on this transaction is **USD 1.82 million**.

700. The significance of this transaction, which is based on the actual project itself, is evident when looking at how Discovery tries to downplay it. Discovery now claims that the royalty's purchase price was the result of a "*fire sale*", that San Leon had "*no one else to sell it to*,"[1012] and that San Leon was in a dire financial state in 2013 and needed the funds. According to Mr. Lewis, San Leon arrived at this precarious financial situation

1010 CRA First Report, ¶¶ 18, 72.

1011 Respondent's Counter-Memorial, ¶ 613.

1012 Lewis Second WS, ¶ 52.

by 2013 because San Leon had amassed a "*large and unfocused portfolio, with licenses in seven different countries and still no production*."[1013]

701. The Slovak Republic notes that Mr. Crow was San Leon's COO from 2011-2013.[1014]

702. For his part, Mr. Howard claims that the royalty sale "*appears to me to have been more 'corporate housekeeping' than a FMV transaction*" and that, while San Leon "*bore no direct costs*" for maintaining the royalty, selling it would "*remove[] the administrative burden of monitoring what, to San Leon, was a management distraction*."[1015] On its face, this is nonsensical.

703. *First*, neither Mr. Lewis nor Mr. Howard substantiate their claims regarding this so-called "*fire sale*". Once again, the person who negotiated this deal (Mr. Crow) has not been made available as a witness in this arbitration.[1016]

704. *Second*, as the second CRA Report notes, "*even if there were cash flow constraints and they led to a fire sale, they are not per se reasons for undervaluation. Rather, those constraints likely existed because investors require more certainty to invest or lend to a company at that stage*."[1017]

705. *Third*, Discovery's and Mr. Howard's attempts to recharacterize this sale are irreconcilable with the supposed pay out of this project. It is "*not plausible that San Leon would sell the ORR for such a small sum if it was worth tens of millions of dollars*."[1018] Indeed, based on Mr. Howard's DCF, the undiscounted value of the project's revenues would be USD 61 million.[1019]

706. Add San Leon to the list of companies who appear to have missed out on the deal of a lifetime.

1013 Lewis Second WS, ¶ 50.

1014 Lewis Second WS, ¶ 51.

1015 Howard Second ER, ¶¶ 336-337.

1016 Lewis Second WS, ¶¶ 51-52.

1017 CRA Second Report, ¶ 33.

1018 CRA Second Report, ¶ 35.

1019 CRA Second Report, ¶ 35.

707. *Fourth*, San Leon was *the* party in the best position to assess the value of this royalty better than anyone else because *it owned Aurelian (and, thus, AOG) immediately before* Discovery. If San Leon truly believed that AOG was sitting on oil and gas fields that would develop into a project that could bring in hundreds of millions of dollars, it would not have sold the royalty for next-to-nothing. As Mr. Howard himself notes, San Leon *bore no direct costs* related to it.[1020] It is difficult to imagine that the "*administrative burden*" of simply monitoring the royalty (*i.e.*, sitting back and watching) was so laborious that San Leon simply could not muster the strength to endure it, despite the jackpot apparently unknown to it.

708. All of these attempts to discredit the sale are without merit.

709. Even taking into account Mr. Howard's misguided criticisms about the index CRA used to value the project as at the ex-ante valuation date, the implied value of the project is still only USD 2.0 million.[1021] Finally, and for good order, even if CRA were to value the project based on the royalty as of 31 October 2023 (from Discovery's Reply), the project's value would be **USD 1.66 million**.[1022]

b. The Akard Agreement shows a maximum implied value of USD 5.2 million

710. Although Discovery failed to attach the Akard Agreement in its Memorial, the details Discovery did include allowed CRA to perform a valuation of the project based on it. As the first CRA Report concluded, the Akard Agreement resulted in a valuation of USD 3.7 million for the project as of the date of that agreement (*i.e.*, October 2015).[1023] Now with the agreement produced and its terms revealed, it is clear that this USD 3.7 million was too high.

711. Whereas CRA had assumed that Akard purchased 50% of the projects proceeds, it actually purchased *more* than 50% for USD 3.7 million.[1024] Furthermore, as CRA notes, the Akard Agreement contained options for Akard to withdraw at various points

1020 Howard Second ER, ¶ 336.

1021 CRA Second Report, ¶ 38.

1022 CRA Second Report, ¶ 38, fn. 63.

1023 CRA First Report, ¶ 57.

1024 CRA Second Report, ¶¶ 5, 46-48.

during the project.[1025] For instance, Akard's second tranche of USD 0.7 million was contingent on final authorizations for expenditure for the initial wells.[1026] The fourth tranche of USD 0.76 was contingent on the actual success of the initial wells[1027] (one of which Rockflow acknowledges would have failed). Thus, Akard's liability decreases if the project does succeed, which reduces its value to Discovery even further.[1028]

712. Even adopting Discovery's preferred ex-post valuation date, the Akard Agreement would imply only a value of USD 5.2 million, which CRA notes is still likely too high.[1029]

2. Comparable companies imply a value of USD 1.1 million at most

713. In the first CRA Report, CRA used only companies that Mr. Howard claimed were comparable, and derived valuations from those ranging from USD 0.15 million to USD 2.3 million.[1030] Despite Mr. Howard now criticizing those companies as not being comparable, he nevertheless tries to use them to produce his own valuation of USD 36 million as of the ex-ante valuation date, which he and Discovery claim represent the minimum amount of compensation due under any market-based valuation.

714. The reason Mr. Howard comes to such an inflated figure is—again—a matter of instruction. Because Mr. Howard has been instructed to operate on a "but for" scenario, all of his analyses (including market-based valuations) assume that Discovery would have had Reserves. This is the main driver of his criticisms and attacks of the CRA Report and, in particular, CRA's use of ADX Energy as a comparator.

715. CRA has addressed each of Mr. Howard's criticisms related to ADX Energy and CRA's overall approach:

(a) Mr. Howard has noted that ADX Energy has both contingent resources and prospective resources. He therefore claims that it is "*incorrect to calculate a*

1025 CRA Second Report, ¶ 50.

1026 CRA Second Report, ¶ 50.

1027 CRA Second Report, ¶ 50.

1028 CRA Second Report, ¶ 50.

1029 CRA Second Report, ¶ 53.

1030 CRA First Report, ¶¶ 62-68, 72.

value of prospective resources from a value that is largely determined by the contingent resource element."[1031] But Mr. Howard misses the point. Prospective resources are less uncertain than Contingent resources. Thus, because ADX Energy's enterprise value of USD 8 million was weighted towards its contingent resources, CRA's implied valuation of Discovery's project of USD 0.15 million *is skewed high*.[1032]

(b) Mr. Howard next claims that ADX Energy's prospective resources are not comparable with Discovery's project.[1033] But as the second CRA Report explains, "*if this were true and the Project's Prospective Resources were 10 times more valuable than ADX Energy's, then the implied valuation of the Claimant's share would still only be $1.5 million*".[1034]

(c) Mr. Howard also criticizes CRA for using Discovery's 105.6 mmboe prospective resources in its calculations.[1035] Instead, Mr. Howard claims, CRA should be using recoverable resources.[1036] Dr. Moy's second report notes recoverable resources of 29.3 mmboe.[1037] Using that amount, which Mr. Howard promotes, means that the implied valuation of the project would be USD 0.04 million—a figure that is still too high.[1038]

716. In sum, CRA concludes that its ex-ante valuation of Discovery's project is **USD 0.04 million**.[1039]

717. Mr. Howard has proposed his own ex ante valuation of USD 36 million through a so-called "*notional best-fit line*".[1040] But as CRA notes, although Mr. Howard describes this as a "*best-fit line*", "*he in fact appears to have calculated a weighted average of*

1031 Howard Second ER, ¶ 376.

1032 CRA Second Report, ¶ 60.

1033 Howard Second ER, ¶ 377.

1034 CRA Second Report, ¶ 61.

1035 Howard Second ER, ¶ 378.

1036 Howard Second ER, ¶ 378.

1037 CRA Second Report, fn. 102.

1038 CRA Second Report, ¶ 62.

1039 CRA Second Report, ¶ 63.

1040 Howard Second ER, ¶ 373.

EV/2P across the various companies (excluding JKX) as of the Ex-ante Valuation Date."[1041] Given that Mr. Howard acknowledges that the project only had prospective resources as of the ex-ante valuation date, "*it is inappropriate to apply an EV/2P [Reserves] multiple without any adjustment for this*."[1042] When adjusting for the discount that the industry applies to prospective resources, "*the implied value of the Claimant's share of the Project is $1.6 million to $3.2 million*."[1043]

718. For its ex-post valuation, CRA follows Mr. Howard's weighted average approach using the same companies, but having removed JKK at Mr. Howard's suggestion, and Cub Energy due to it exiting all oil and gas activities:

(a) *First*, CRA takes enterprise values of these companies as of 31 October 2023, then takes the most recent Reserves data available and extrapolates that to 31 October using production data (which is reported more frequently than Reserves).

(b) *Second*, CRA estimates 2P reserves based on each company's most recent reserves data and their annual averages of daily production rates.

(c) *Third*, CRA takes the ratio of EV to 2P reserves as at the ex-post valuation date.

(d) *Fourth*, CRA calculates the weighted average EV/2P multiple (*i.e.*, Mr. Howard's method) derived from these companies and applies it to Discovery's project, while discounting the prospective resources in accordance with industry standards.[1044]

719. The results, on an ex-post basis and following Mr. Howard's method, imply a value of **USD 0.5 million** to **USD 1.1 million**.[1045]

* * *

1041 CRA Second Report, ¶ 64.

1042 CRA Second Report, ¶ 64.

1043 CRA Second Report, ¶ 64.

1044 CRA Second Report, ¶ 65.

1045 CRA Second Report, ¶ 65.

720. Once again, CRA's valuations on a market-based approach produce consistent results. Discovery's project was simply not worth the investment. It is no wonder that investors were never interested in the deal.

E. Discovery's sunk costs are unverifiable and show just how little Discovery did in Slovakia

721. Discovery's final head of damages are its so-called sunk costs. Discovery claims to have incurred sunk costs of USD 3,736,375.[1046] It adds pre-award interest to this figure for a total claim of USD 6,169,761.[1047]

722. *First*, at the outset, Discovery has been noticeably vague about whether these are amounts that it actually incurred or if this amount includes funds that Akard invested, which Discovery then used to fund AOG. For example, Discovery claims that AOG "*incurred total expenditures*" when describing these amounts.[1048] AOG might have incurred those amounts, but who actually provided the funds that paid for them?

723. According to Discovery, Akard provided at least USD 1.9 million in funding.[1049] Under the Akard Agreement, that USD 1.9 million would have been applied to all of the items in the right column, and up to where the red line stops:[1050]

1046 Claimant's Reply, ¶ 466.

1047 Claimant's Reply, ¶ 469.

1048 Claimant's Reply, ¶ 446(1).

1049 Claimant's Reply, ¶ 431.

1050 Agreement between Discovery and Akard dated 23 October 2015, Art. 3, **C-282**.

3. Initial Tranches: AKARD will timely make the following non-recourse loans to Newco (the "**Initial Tranches**"), and Newco will immediately distribute the funds as shown in the "**Funding Table**" below:

£0.65	€0.88	Loan Amounts			Distribution		
Tranche	Date	EUR	USD	GBP	Amount	USD	Payee and General Purpose
A	10/23/2015	€230,000	$0	£0	€230,000	*$261,364*	Alpine for 50% of 2015 Concession Fees
B	11/03/2015	€352,000	$75,000	£150,000	€205,000	*$232,955*	Alpine for 50% of Initial Wells locations
					€147,000	*$167,045*	Alpine for wellheads and casing pre-pay
		$705,769			$75,000	*$75,000*	Alpine for October/November overhead
					£150,000	*$230,769*	Alpha Exploration for "San Leon Override"
C	~~12/01/2015~~	€1,056,500	$75,000	£0	€1,056,500	*$1,200,568*	Alpine for balance of Initial Wells AFEs
		$1,275,568			$75,000	*$75,000*	Alpine for December/January overhead
D	01/04/2015	€600,000	$75,000	£0	€600,000	*$681,818*	Alpine for completion cost @ €200,000 per well (success case only)
		€756,818			$75,000	*$75,000*	Alpine for February/March overhead
E	01/04/2015	€0	$709,325	£0	$115,000	*$115,000*	Clearview/Drewry for loan repayment
					$31,500	*$31,500*	Clearview/Drewry for loan interest
		$709,325			$365,711	*$365,711*	Clearview/Houghton for loan repayment
					$60,114	*$60,114*	Clearview/Houghton for loan interest
					$137,000	*$137,000*	Equity Funding Fee (based on $3.7 Million)
TOTAL		$1,638,500	$859,325	£150,000		*$3,708,844*	

724. While the Slovak Republic will ultimately confirm the truth at the hearing, it appears that Discovery includes these same sums in Mr. Fraser's own calculation of sunk costs. In fact, the Slovak Republic knows this is true for at least one of these line items—the royalty purchased by Mr. Lewis's company, Alpha Exploration. Presumably, the USD 1.9 million that Akard funded was, in fact, used to reimburse the costs of the override and yet Mr. Fraser nevertheless includes it in his own sunk costs calculations.[1051] If Discovery was already reimbursed this amount from Akard, which Mr. Lewis appears to confirm,[1052] it is completely inappropriate for it to claim it in this arbitration.

725. Yet this is not even the most egregious aspect of the royalty's inclusion. To recall, Aurelian sold the royalty to Alpha Exploration, LLC—a company "*affiliated with Discovery*" according to Mr. Lewis—[1053] for £120,000 in January 2015. Alpha Exploration, LLC then transferred the royalty to Discovery Polska, LLC for nominal consideration of USD 10.[1054] There is therefore zero justification for including the royalty at £120,000 in its sunk costs when Discovery only paid USD 10 for it.

726. *Second*, Discovery has failed to prove these sunk costs. It relies principally on a PDF of a spreadsheet created by Mr. Fraser, which itself relies on Discovery's annual reporting to the MoE. Yet all of the annual reports that Mr. Fraser uses are summary

1051 Fraser Second WS, Annex 1.

1052 Lewis Second WS, ¶ 54.

1053 Lewis First WS, fn. 5.

1054 Assignment of Overriding Royalty Interest dated 3 November 2015, **C-84**.

documents, with no back-up documentation. There is no reconciliation of the amounts that AOG purports to have incurred and the figures that Mr. Fraser presents. There is no evidence that these amounts correspond to specific invoices or other amounts due, and that those payments were actually made. Discovery does not even explain how the annual reports, Mr. Fraser's spreadsheet (including his calculations of foreign exchange rates), and AOG's unaudited financial reports align with one another. Discovery simply claims that they do and asks the Tribunal to believe it.

727. *Third*, the claim for pre-award interest on Discovery's sunk costs defies credibility. The entire premise for this calculation, including how to do it, is a result of counsel's instructions.[1055] Moreover, it makes no sense. The start dates of when this interest is said to run (*i.e.*, the date of each cost incurred) are completely unknown and unproven. Therefore, as a general rule, Mr. Fraser "*calculate[s] the interest as at the end of each calendar year, but with interest for that calendar year being calculated on 50% of the amount incurred that year*."[1056] As the second CRA Report explains, this leads to absurd results: "*[i]f, for example, an expense was incurred in December of a given year, then Fraser Statement 2 assumes it occurred on June 30 – and therefore calculates interest starting months before the expense was incurred*."[1057] That defies all common sense.

728. *Finally*, lost in the discussion of sunk costs is the overarching takeaway that from 2014 to 2020, Discovery claims to have incurred only USD 2.87 million in expenditures (and if the Akard sum is included, that figure is reduced to ~ USD 920,000).[1058] This is all the Tribunal needs to know to understand the justification for the exorbitant damages claims in this arbitration. Discovery is looking for an enormous payout that its project would have never accomplished.

F. Interest

729. Discovery's Memorial made no submissions on the interest rate to be applied to any of its damages, save to acknowledge that the Tribunal has discretion to order damages.

1055 Fraser Second WS, ¶ 53.

1056 Fraser Second WS, ¶ 53.

1057 CRA Second Report, ¶ 90.

1058 Claimant's Reply, ¶ 468(3).

Now, however, Discovery requests compound interest at USD LIBOR + 4% "*to reflect the approximate borrowing costs which Discovery would have to pay*."[1059] It requests post-award interest for its income valuations, and pre- and post-award interest for its one valuation calculated as of 7 June 2018.[1060] All of this is wrong.

730. *First*, USD LIBOR no longer exists. It is not possible to calculate interest based on USD LIBOR + 4%. That alone dispenses with this request.

731. *Second*, by Discovery asking for its approximate borrowing costs, Discovery "*assumes that, by not having funds corresponding to the fair market value of its asset or of the historical costs incurred, Discovery had to borrow that amount*."[1061] But Discovery has not demonstrated that it borrowed anything at all. There is no evidence of any additional interest that Discovery may have incurred. The citation for this request of Discovery's borrowing costs is to another arbitral award. In other words, Discovery's only support for its "approximate borrowing" costs are those from some third-party.

732. *Third*, as the second CRA Report explains, any damages awarded Discovery are not being "loaned" to it, and thus not on the same risk basis of other debts incurred. The only risk of default would be the Slovak Republic defaulting on any award—and Discovery as not even tried to demonstrate why that risk exists (it does not). With no risk of default, Discovery is "*not entitled to a rate of interest that compensates it for both the time value of money and default risk*."[1062]

733. *Fourth*, Discovery relinquished its Exploration Area Licenses and therefore has not continued to hold its asset. It has held a legal claim, unexposed to any business risks. Again, with no default risk and no business risk, any interest rate should only reflect the time value of money.[1063]

734. *Fifth*, merely citing to an award or academic literature to support a claim for compound interest does not discharge Discovery's burden. While compound interest "*might be*

1059 Claimant's Reply, ¶ 472(2).

1060 Claimant's Reply, ¶ 472(3.

1061 CRA Second Report, ¶ 80.

1062 CRA Second Report, ¶ 84.

1063 CRA Second Report, ¶ 85.

appropriate in cases where the aggrieved party could have used its principal by depositing it and earning interest on it, such compounding as an element of full redress must be particularly justified."[1064] Discovery's request for compound interest continues to be unsupported.

735. *Finally,* the Slovak Republic maintains its request for a grace period on the accrual of any post-award interest. The Tribunal has discretion to order this, doing so is an incentive to pay quickly, and other tribunals have employed this technique.[1065]

736. The Slovak Republic's original proposal of simple interest equivalent to the yield on Slovak government bonds was a reasonable one, in light of Discovery's failure to put forward any figures itself. The Slovak Republic maintains that request.

1064 *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021, **RL-165**; *see also* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, pp. 108-109, **CL-054**.

1065 *See, e.g., Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 595, **RL-166**.

VII. REQUEST FOR RELIEF

737. For the foregoing reasons, the Slovak Republic requests the following relief:

(a) a declaration dismissing Discovery's claims;

(b) an order that Discovery pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal.

738. The Slovak Republic reserves the right to modify or supplement the claims and arguments in this submission as permitted by the Tribunal.

Submitted on behalf of the Slovak Republic.
14 December 2023

SQUIRE PATTON BOGGS
Counsel for the Slovak Republic

Defined Terms and Abbreviations	Description
2006 Licenses	Exploration Area Licenses granted by the MoE to Aurelian Oil & Gas plc in July 2006
2016 Licenses	Extensions of the validity of AOG's Exploration Area Licenses granted by Ministry of Environment of the Slovak Republic - Decision modifying the size of the area, and extending the validity term for the exploration area of 14June 2016, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3, **C-12** - Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3, **C-13** - Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), **C-14**
2017 Community Agreement	Community Agreement between Discovery and local citizens of North-East Slovakia as evidenced by Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, **C-171**
2018 License	The Decision of the Ministry of Environment of the Slovak Republic approving AOG's request on the modification of the exploration area in Svidník granted on 8 June 2018: Decision Modifying an Exploration Area of 8 June 2018, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidnik), **C-15**
Access Land	Land plot No. 2721/780 used for the access to the drilling site
Act on Complaints	Act No. 9/2010 Coll. on Complaints, as amended
Act on Courts	Act No. 757/2004 Coll. on Courts and on amendment and supplement of other acts, as amended
Act on EIA / EIA Act	Act No. 24/2006 Coll. on Environmental Impact Assessment and on Amending and Supplementing Certain Laws, as amended
Act on Explosives	Act No. 58/2014 Coll. on Explosives, as amended
Act on Forests	Act No. 326/2005 Coll. on Forests, as amended
Act on Mining Activities	Act No. 51/1988 Coll. on Mining Activities, as amended
Act on Mining Waste	Act No. 514/2008 Coll. on disposing of waste from the mining industry, as amended
Act on Misdemeanors	Act No. 372/1990 Coll. on the Misdemeanors, as amended
Act on Organization of Government Activities and Organization of Central Government	Act No. 575/2001 Coll. Organization of Government Activities and Organization of Central Government, as amended
Act on Prosecution	Act No. 153/2001 Coll. on Prosecution, as amended
Act on Prosecutors	Act No. 154/2001 Coll. on Prosecutors and Aspirants, as amended
Act on the State Enterprise	Act No. 111/1990 Coll. on the State Enterprise, as amended

Administrative Procedure Code	Act No. 71/1967 Coll. on Administrative Procedure, as amended
Akard Agreement	Agreement between Discovery and Akard dated 23 October 2015, **C-282**
Amendment	Amendment to the Lease Agreement between LSR and AOG entered into on 4 May 2015 for the land plots KNC 126, 127 and 128/1 registered on the Ownership Certificate No. 363 of the cadastral area Krivá Oľka for purposes of geological survey and possible extraction of natural hydrocarbons: Addendum No. 1 extending the Lease Agreement dated 14 January 2016, Art. 2(3), **C-116**
AOG	Alpine Oil and Gas, s.r.o.
Aurelian	Aurelian Oil & Gas plc.
BIT	Treaty Between the Czech And Slovak Federal Republic And The United States Of America Concerning The Reciprocal Encouragement And Protection Of Investments, 22 October 1991, **C-1**
Cadogan	Cadogan Petroleum
CC / Civil Code	Act No. 40/1964 Coll., the Civil Code, as amended
CCP / Code of Civil Procedure	Act No. 99/1963 Coll., the Code of Civil Procedure, as amended
CIM	Canadian Institute of Mining, Metallurgy and Petroleum
Civil Procedure Code / CPC	Act No. 160/2015 Coll. Civil Procedure Code, as amended
Civil Procedure Code for Non-Adversarial Proceedings	Act No. 161/2015 Coll. Civil Procedure Code for Non-Adversarial Proceedings, as amended
CJEU	The European Union Court of Justice
Claren	Claren Energy Corporation
Clermont	Clermont Energy Partners LLP
Clermont Agreement	Exploration Project Agreement between Discovery and Clermont dated 7 July 2014
Constitution of the Slovak Republic	Act No. 460/1992 Coll. the Constitution of the Slovak Republic, as amended.
Construction Act	Act No. 50/1976 Coll. on spatial planning and construction order, as amended.
CPR	Competent Persons Report
Criminal Code	Act No. 300/2005 Coll., Criminal Code, as amended
Criminal Procedure Code	Act No. 301/2005 Coll. Criminal Procedure Code, as amended
DCF	Discounted cash flow analysis
Decree implementing the Road Traffic Act	Decree No. 9/2008 implementing the Road Traffic Act dated 20 December 2008
Discovery	Discovery Global LLC
DRC	Democratic Republic of Congo
ECOS	Economic Chance of Success
EGI Study	A geological study that Discovery commissioned at the end of its time in the Slovak Republic
EIA	Environmental impact assessment
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
Exploration Area License	Exploration area license which granted AOG the right to explore for oil and gas: - Decision on determination of exploration area Svidník dated 18 July 2006, R-014; Decision on determination of exploration area Snina dated 18 July 2006, **R-031** - Decision on determination of exploration area Medzilaborce dated 17 July 2006, **R-030**.
Exploration Area Licenses	Discovery's licenses for oil and gas exploration over the following areas: Svidník, Snina, and Medzilaborce
Exploration Areas	Exploration areas: Svidník, Snina, and Medzilaborce, where AOG intended to conduct its exploration activities
Full EIA	Environmental impact assessment in accordance with Act on EIA
GCOS	Geological Chance of Success
Geology Act	Act No. 569/2007 Coll. on Geological Works, as amended
Government Decree No. 50/2002	Government Decree No. 50/2002
GPOS	Geological probability of success
Interim Injunction	Interim Injunction granted by the dictrict Court Bardejov on the basis of request of Mrs. Varjanová to stop AOG from using the land plot of which AOG was co-owner until such time as the court decides on the validity of the acquisition of AOG's co-ownership, due to the circumvention of pre-emption right of other co-owners of the land plot: Decision of District Court Bardejov, case No. 1C/29/2016-93 dated 18 February 2016, **C-125**
JKX	JKX Oil and gas plc.
JPT	Journal of Petroleum Technology
JV Partners	JKX and Romgaz as Aurelian's joint venture partners (and, later, Discovery's) in its Slovak operations
Krivá Oľka EIA Decision	Decision of the District Office in Medzilaborce ordering a Full EIA for AOG's drill in Krivá Oľka: Medzilaborce District Office Decision (Slovak, with English translation) dated 8 March 2018, **C-186**
Land Plot	Land plot registered in the "E" register, plot No. 2721/780, arable land, located in cadastral area Smilno, municipality Smilno, district Smilno, registered on the title deed No. 1367
Lease Agreement	The Lease Agreement between LSR and AOG entered into on 4 May 2015 for the land plots KNC 126, 127 and 128/1 registered on the Ownership Certificate No. 363 of the cadastral area Krivá Oľka for purposes of geological survey and possible extraction of natural hydrocarbons: Lease Agreement between AOG and State Forestry dated 4 May 2015, Art. III(1), **C-73**.
LSR	Lesy Slovenskej republiky, štátny podnik
Mining Act	Act No. 44/1988 on Protection and Use of the Natural Resources, as amended
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
MT analysis	Magnetotelluric analysis carried out by Discovery

NAFTA	NAFTA a.s., an oil and gas company in Slovakia
National Treatment Standard	Article II(1) of the US-Slovakia BIT
Nature Protection Act	Act No. 543/2002 Coll on Nature and Landscape Protection, as amended
Oľka Land	The second drilling site that AOG identified was located in Krivá Oľka
PF UK	Faculty of Law of the Comenius University in Bratislava
PIIP	Petroleum Initially in Place
Police Act	Act No. 171/1993 Coll. on Police Forces, as amended
Poruba Injunction	Resolution of the District Court Humenné, File No. 5C/564/2015 dated 27 November 2015, p. 1, **R-077**
Poruba Land	The third and final exploratory drilling site in Ruská Poruba, which was located on landplots co-owned by several individuals
Preliminary EIA	A preliminary environmental impact assessment
Preliminary EIA Decisions	The three decisions issued by the District Offices of Smilno, Kriva Oľka, and Ruská Poruba ordering Full EIAs
PRMS	Petroleum Resource Management System
PSPR	Public special purpose road
PSPR Theory	Discovery's argument concerning the field track at Smilno
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	Discovery's experts, Rockflow Resources
ROI	Return on investment
Romgaz	Societatea Nationala de Gaze Naturale "ROMGAZ"S.A.
RPS	RPS Energy Consultants Limited
Ruská Poruba EIA Decision	Decision of the District Office in Humenné dated 7 September 2017, ordering a Full EIA for Ruská Poruba drill: Humenne District Office Decision (Slovak, with English translation) dated 7 September 2017, **C-179**
Settlement Agreement	Settlement Agreement dated 30 March 2018 between Akard and Discovery
SLO	Social license to operate
Smilno EIA Decision	Decision of the District Office Bardejov dated 2 August 2017, ordering a Full EIA on AOG's planned drill in Smilno: Decision re. Smilno Environmental Impact Assessment (Slovak, with English translation) dated 2 August 2017, **C-176**
Smilno Roads	Cesty Smilno s.r.o.
Smilno Share	Aco-ownership share on the Access Land from one of its co-owners, Mr. Rastislav Tomeček, purchased by AOG
Smilno Site	Drilling site in Smilno located on a land plot owned by Mrs. Emília Dinišová and Mr. Rastislav Tomeček
Traffic Signage Decree	Decree of Ministry of Interior No. 30/2020 Coll., on Traffic Signage, as amended
Urbariát	Forest landowner community called Urbárska spoločnosť-Pozemkové spoločenstvo Ruská Poruba
VCLT	Vienna Convention on the Law of Treaties
Water Act	Act No. 364/2004 Coll., on Waters and on the Amendment of Act of the Slovak National Council no. 372/1990 Coll. on Misdemeanors as amended