

In the matter of an arbitration  
under the Rules of Arbitration of  
the International Centre for  
Settlement of Investment Disputes

Case No. ARB/21/51

The International Dispute  
Resolution Centre (IDRC)  
1 Paternoster Lane  
LONDON, EC4M 7BQ

Day 6  
Hearing on the Merits

Wednesday, 7th February 2024

Before:

PROFESSOR GABRIELLE KAUFMANN-KOHLER  
MR STEPHEN L DRYMER  
PROFESSOR PHILIPPE SANDS

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DISCOVERY GLOBAL LLC

Claimant

-v-

SLOVAK REPUBLIC

Respondent

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Secretary to the Tribunal: JARA MÍNGUEZ ALMEIDA  
Assistant to the Tribunal: MAGNUS JESKO LANGER

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Transcript produced by Anne-Marie Stallard  
and Emma Lovell

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<p>10:28 1 Wednesday, 7 February 2024          2 (10.28 am)          3 THE PRESIDENT: Good morning, everyone. I hope you still          4 have some energy for this last stretch of this final day          5 of hearing. It's a short day.          6 Is there anything you wish to raise before we go          7 into -- I give you the floor, Mr Tushingham?          8 MR TUSHINGHAM: Nothing from the Claimant's side.          9 THE PRESIDENT: Nothing from the Claimant. Nothing from the          10 Respondent.          11 Then you have the floor, please.          12 Submissions on behalf of the Claimant          13 MR TUSHINGHAM: Thank you very much, Madam President,          14 members of the Tribunal.          15 Let me give you a road map of where I am going to go          16 this morning in my submissions. I'm going to start with          17 legitimate expectations, and just briefly recap a few          18 points there, and also remind you of the other          19 components of the FET standard in the BIT upon which we          20 rely.          21 I will then move to Krivá Ol'ka and address measures          22 8 through 10.          23 I will then turn to EIA, and address measures 11          24 through 14.          25 And then I will end with Smilno.</p> <p style="text-align: center;">Page 1</p>	<p>10:31 1 in the treaty is an autonomous FET standard, not limited          2 to the minimum standard of treatment in customary          3 international law, and so therefore, based on the          4 interpretation of the ordinary meaning of the terms of          5 the BIT, taken together with the consistent          6 jurisprudence of the tribunals who we have quoted          7 extensively in our Memorial, our position is that the          8 FET standard in the treaty does protect an investor's          9 legitimate expectations.          10 PROFESSOR SANDS: So where does it come from? It's not in          11 the text of the treaty, it's not in the negotiating          12 history, it's not in the practice of states, it's not          13 part of customary international law. Where does it come          14 from?          15 MR TUSHINGHAM: It comes from the ordinary meaning of the          16 terms fair and equitable treatment, interpreted --          17 PROFESSOR SANDS: Can you explain that a little bit more?          18 MR TUSHINGHAM: Of course. Perhaps it would be most easily          19 done by reference to our Reply, which is at ... so it's          20 page 135 of our Reply, from paragraphs 257 and          21 following.          22 So this is by way of response to the other side's          23 position that the FET standard in the treaty simply is          24 a mirror of the minimum standard of treatment under          25 customary international law, and here we are explaining</p> <p style="text-align: center;">Page 3</p>
<p>10:29 1 So as to legitimate expectations, I would like to --          2 if we could pull up on the screen, if possible, the          3 transcript from Day 1, page 8 of the PDF.          4 And this is just a short passage from my opening          5 submissions which you will probably recall, but it's          6 probably easier just to take it here.          7 So it's on page 19 at the top, internal page 19,          8 lines 2 through to 11. And so I was talking there about          9 the first legitimate expectation that we say Discovery          10 held:          11 "... Discovery necessarily expected that Slovakia          12 would not prevent AOG from completing the task. This          13 was the quid pro quo of AOG's obligation to the Slovak          14 Republic: I will do the work, but in return you will not          15 prevent me from completing it."          16 And that expectation was based on the clear and          17 implicit representation which we say Slovakia made in          18 the licences, when read together with all of those          19 provisions of the Geology Act that I took you through in          20 opening, which emphasised the mandatory obligation          21 imposed on AOG to complete the task.          22 PROFESSOR SANDS: Sorry, could I just come in and ask          23 straightaway, what is the status of legitimate          24 expectations? It's not in the treaty.          25 MR TUSHINGHAM: Well, our position is that the FET standard</p> <p style="text-align: center;">Page 2</p>	<p>10:32 1 why that is wrong and why the ordinary meaning of the          2 terms used in the treaty do protect an investor's          3 legitimate expectations. So this is 257 and following.          4 So if we --          5 PROFESSOR SANDS: And sorry to push you --          6 MR TUSHINGHAM: Yes.          7 PROFESSOR SANDS: -- but what does it actually say? What is          8 the legal basis for arguing that legitimate expectation          9 is part of the applicable legal framework, and what is          10 the standard to be applied by reference to the          11 applicable legal framework in what a legitimate          12 expectation is? You've referred to an implicit          13 representation.          14 MR TUSHINGHAM: Yes.          15 PROFESSOR SANDS: There's authority that it has to be          16 something more than that. I'd like to know where          17 precisely this comes from, because if your entire case          18 is built on legitimate expectation, we need to know          19 precisely what the source is.          20 MR TUSHINGHAM: Of course, and may I just clarify on that          21 specific point: we don't rest our case exclusively on          22 legitimate expectations. We obviously also rely on the          23 other components of the FET standard, namely: the          24 obligation not to act inconsistently; the obligation to          25 act transparently, and the obligation not to act</p> <p style="text-align: center;">Page 4</p>

<p>10:33 1 arbitrarily. But I am here talking about legitimate 2 expectations. 3 Perhaps we can take it by reference to the Memorial, 4 it might be easier, because this is where we set out our 5 case initially. 6 So if we go to page 89 of our Memorial. So we here 7 quote the terms of the BIT Article II(2)(a): 8 "Investment shall at all times be accorded fair and 9 equitable treatment." 10 Obviously in order to then determine the content of 11 that standard, the starting point is the ordinary 12 meaning of the words, obviously well familiar 13 principles. But we've cited many awards here in the 14 footnotes noting that the ordinary meaning provides only 15 limited assistance. But it's not of no assistance at 16 all. The ordinary meaning of the terms "fair and 17 equitable" require just, even-handed, unbiased and 18 legitimate treatment. But, significantly, at 211, the 19 ordinary words have to be read in context, and this is 20 the key point, because if you go over the page to look 21 at the preamble, the object and purpose of the BIT is to 22 provide a stable environment for investment. 23 So if, in order to ensure that that purpose and 24 object is given full effect, a conclusion that the 25 treaty does not protect an investor's legitimate</p> <p style="text-align: center;">Page 5</p>	<p>10:37 1 So here the Respondent's case is that "the BIT 2 imposes the minimum standard of protection of 3 investors", established by customary international law, 4 the minimum standard of treatment, and they seek to 5 derive that proposition from the reference in Article II 6 to the words: 7 "... and shall in no case be accorded treatment less 8 than that which conforms to principles of international 9 law." 10 Now, as to that, we say, that is a floor. That is 11 not the ceiling. So you've got to give meaning to the 12 initial parts of Article II: 13 "... shall at all times be accorded fair and 14 equitable treatment." 15 So if the state's parties had intended to simply 16 mirror the standard of protection provided by customary 17 international law, they wouldn't have included those 18 last words. They would be otiose. 19 So that's why we say this is an autonomous FET 20 standard, not simply a standard that mirrors the 21 protection provided by the minimum standard of 22 treatment. So that's the point that we develop in our 23 Reply. 24 Then if we go forward in the Counter-Memorial, and 25 this goes on for a long -- many pages, but we can go</p> <p style="text-align: center;">Page 7</p>
<p>10:35 1 protection would not give full effect to that object. 2 But I think more importantly, if we go down to 213 3 and we then look at the various standards that many 4 tribunals have considered in looking at the broad 5 requirements of an autonomous FET standard, not limited 6 to the customary international minimum standards: 7 "... legitimate expectations of the investors have 8 generally been considered central in the definition of 9 FET, whatever its scope. There is an overwhelming trend 10 to consider the touchstone of fair and equitable 11 treatment to be found in the legitimate and reasonable 12 expectations of the Parties, which derive from the 13 obligation of good faith." 14 So that's what we say about the ordinary meaning of 15 the language used in Article II of the treaty by 16 reference to the object and context of the treaty, and 17 by reference to the jurisprudence of the investment 18 tribunals that we cite. 19 Now, it's accepted, or I don't think it's 20 challenged, that in principle, a -- if we go to the 21 Counter-Memorial, our friends then responded to this, 22 and I'll just take you briefly, if this would assist. 23 So this is 89 of the Rejoinder -- sorry, of the 24 Counter-Memorial. So here -- I think it's internal 25 page 94, hard copy page 89.</p> <p style="text-align: center;">Page 6</p>	<p>10:38 1 forward to internal page 102, PDF page 102. 2 So here they are engaging with our contention that 3 the treaty standard protects an investor's legitimate 4 expectations, and 294: 5 "... while it is widely accepted that the protection 6 of an investor's legitimate expectations forms, to 7 a certain extent, part of the FET Standard, it ... does 8 not protect any and all expectations ..." 9 So here, it must be: 10 "... based on ... specific assurances ... given by 11 the host State ... at the time the investment was made 12 and ... relied on by the investor [when] making [the] 13 investment." 14 So it appears to be accepted here by the Respondent 15 that if they are wrong in their position that this 16 simply mirrors the minimum standard of treatment under 17 customary international law, they're accepting that in 18 principle, the treaty does protect an investor's 19 legitimate expectations. 20 Now, in the Reply we then responded to that and took 21 issue with the precise requirements for establishing 22 that an expectation was legitimate. 23 I'm sorry this is taking a bit longer, I think it's 24 helpful. 25 So if we go to the Reply and then we go down to ...</p> <p style="text-align: center;">Page 8</p>

10:40 1 just let me find the exact reference. (Pause)  
 2 Yes, and it's page 144 of the Reply. And if we go  
 3 down slightly, it's actually, this is exactly the award  
 4 I was intending to refer to. So it's a case involving  
 5 Slovakia.  
 6 The Tribunal in this case, Muszynianka -- please  
 7 forgive my pronunciation -- noted that the main  
 8 components of the doctrine of FET and legitimate  
 9 expectations are helpfully summarised in the Antaris  
 10 award, and in that award the tribunal held that:  
 11 "A claimant must establish that (a) clear and  
 12 explicit (or implicit) representations were made by or  
 13 attributable to the state in order to induce the  
 14 investment, (b) such representations were ... relied on  
 15 by the Claimants, and (c) those representations were  
 16 subsequently repudiated by the state."  
 17 So those are the key elements on which we rely and  
 18 that is the test which we embrace, and we say therefore  
 19 it is sufficient for a state to have made an implicit  
 20 representation in exploration licences, when read  
 21 together with the legislative background, the Geology  
 22 Act. Provided that those representations were relied  
 23 upon by the Claimant and were subsequently repudiated by  
 24 the state, then there is a violation of the FET  
 25 standard.

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10:41 1 PROFESSOR SANDS: So it's an implicit representation?  
 2 MR TUSHINGHAM: Yes.  
 3 PROFESSOR SANDS: Is the representation in granting  
 4 a licence that the state will prevent protesters from  
 5 expressing their views that the investor is no longer  
 6 required to engage in such other legal obligations as  
 7 may arise? For example, in relation to an injunction  
 8 from a court, or a requirement that an EIA be carried  
 9 out, or voluntarily entered into?  
 10 What are the parameters of the representation that  
 11 is made? I'm assuming you're not saying that with that  
 12 implicit representation the investor can now expect the  
 13 state to prevent protest, to ensure it has no  
 14 injunctions, or carry out an EIA?  
 15 MR TUSHINGHAM: No. Of course not. Of course not.  
 16 PROFESSOR SANDS: So what's left?  
 17 MR TUSHINGHAM: So what we say is, if we go back to the  
 18 passage in the opening submissions in the transcript, if  
 19 we could bring that up, please, back at internal page 8  
 20 of the transcript from Day 1, so if we go up, please,  
 21 this is lines 2 through to 11.  
 22 The key point we make is that because the licences  
 23 themselves and the Geology Act impose an obligation on  
 24 AOG to complete the geological task that it has  
 25 designed, the quid pro quo, the implied quid pro quo

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10:43 1 necessarily requires that Slovakia will not prevent AOG  
 2 from doing that. And that is obviously right, because  
 3 you have a licence-holder who is paying licence fees to  
 4 the state to enable it to carry out this work. It has  
 5 an obligation to the state to do it, and it is,  
 6 therefore, necessarily implicit that the state won't  
 7 prevent AOG from completing the work.  
 8 And we really didn't hear much by way of response to  
 9 that in opening, and we just say it follows naturally  
 10 from the nature of the obligation that AOG owed under  
 11 the licences and the Geology Act.  
 12 And I would also remind you, if I may, what  
 13 Mr Sólymos said in cross-examination, where I was asking  
 14 him about the Ministry's rejection of AOG's compulsory  
 15 access order application at Krivá Ol'ka. He said:  
 16 "... it was not in the interest of the Ministry to  
 17 act in this way, to be placing obstacles to companies  
 18 conducting survey work within Slovakia."  
 19 That's transcript Day 3, page 154.  
 20 So the point is, the question the Tribunal has to  
 21 ask itself is, are obstacles being put in the way of AOG  
 22 completing its work. And when you analyse the measures,  
 23 but particularly at Krivá Ol'ka -- and I'll obviously be  
 24 developing this later -- we say that is the conduct  
 25 which frustrated Discovery's expectation of being able

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10:45 1 to complete its work. Because unless the lease was  
 2 approved to enable it to access the site, it wouldn't be  
 3 able to complete the task. It was prevented from even  
 4 getting into the site.  
 5 Equally, when the Ministry refuses the compulsory  
 6 access order based on the instruction from above, that  
 7 prevents AOG from completing the task. The same when  
 8 the Ministry imposes the suspension, preventing any  
 9 further consideration of the application.  
 10 PROFESSOR SANDS: But I'm just trying to understand.  
 11 I mean, it happens every day: every state in the world  
 12 gives out a licence to engage in a certain type of  
 13 activity. Your argument seems to be that the moment you  
 14 grant such a licence, you are precluded from having  
 15 regard to or applying any of your other laws that may be  
 16 interpreted or applied in way that could prevent the  
 17 activity authorised by the licence from going forward.  
 18 I'm assuming that cannot be your argument, can it?  
 19 Because the consequence of that would be that every time  
 20 a licence is given, the rest of your legal order is  
 21 effectively suspended. That seems to be what you're  
 22 saying.  
 23 MR TUSHINGHAM: What we say -- we're not saying this is some  
 24 kind of implied stabilisation clause. Of course we  
 25 don't go that far, because there was no such implied

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10:46 1 stabilisation clause in the licences that were granted.  
 2 But what we are saying is that when we are applying  
 3 for permits and approvals to enable us to complete the  
 4 task which we have an obligation to the state to  
 5 perform --  
 6 PROFESSOR SANDS: Not to complete the task: to carry out the  
 7 task. And that task has to be carried out in accordance  
 8 with other applicable laws.  
 9 MR TUSHINGHAM: Yes.  
 10 PROFESSOR SANDS: And in accordance with the wishes of civil  
 11 society.  
 12 MR TUSHINGHAM: We would not subscribe to the latter point,  
 13 because that's not a component of the Ministry's  
 14 consideration of every single -- so take the forestry  
 15 lease, for example. There's no suggestion that the  
 16 forestry -- the Ministry of Agriculture is required to  
 17 consider whether drilling at Krivá Oľka would be  
 18 consistent with the wishes of society. That is not  
 19 a relevant part of the consideration that the Ministry  
 20 should be taking into account.  
 21 PROFESSOR SANDS: But exploration would be. So the state  
 22 then has a positive duty to prevent any citizen from  
 23 objecting to the exploration?  
 24 MR TUSHINGHAM: No. Of course we accept that the  
 25 population, whether as part of the EIA process, whether

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10:47 1 as part of the licence renewal process, is entitled to  
 2 participate. And indeed they did. And that is part of  
 3 the democratic process.  
 4 PROFESSOR SANDS: But what if they object? The state has to  
 5 stop that?  
 6 MR TUSHINGHAM: Our complaint is not about the conduct of  
 7 the activists. Our complaint is about the conduct of  
 8 the state in making decisions that prevented us from  
 9 doing the work. So that's the point.  
 10 PROFESSOR SANDS: Okay. I've taken far too long, I'm very  
 11 grateful.  
 12 MR TUSHINGHAM: No, no, it's very helpful I think to have  
 13 the discussion.  
 14 And this point is fundamental for damages, because  
 15 if the Tribunal is satisfied that any of these measures  
 16 prevented AOG from doing the work, because the way in  
 17 which the permit or approval was refused was part of  
 18 an unfair process, or an inequitable process, then the  
 19 fundamental or the most important consequence of that is  
 20 that AOG is prevented from drilling a well.  
 21 So if the Tribunal is satisfied that these measures  
 22 breached the BIT, it must then wipe out the consequences  
 23 of that, and so the most important consequence is, AOG's  
 24 inability to drill a well. So in a but-for scenario,  
 25 the Tribunal would assume that AOG would have been able

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10:48 1 to drill the wells that it was trying so desperately to  
 2 drill.  
 3 So we just stress this link between the obligation  
 4 to do the work, the obligation of Slovakia not to  
 5 prevent that work, and what would have happened in  
 6 a but-for scenario.  
 7 But, of course, as I mentioned earlier, we don't  
 8 rest our case entirely on legitimate expectations. As  
 9 I explained in opening by reference to the Crystallex  
 10 award, and that's slides 159-161 of my presentation, we  
 11 also rely on the obligation of Slovakia not to act  
 12 inconsistently, and that seems to be accepted: you can't  
 13 have one arm of the state denying what the other arm of  
 14 the state is affirming. And then most importantly --  
 15 PROFESSOR SANDS: I mean, that happens the whole time in  
 16 every state in the world. That's the nature of  
 17 government. There are different ministries and we've  
 18 all lived through experiences where Ministry A says this  
 19 is what you can do and Ministry B says: no, we've got to  
 20 check the environmental obligations, blah blah blah, so  
 21 that proposition cannot be right.  
 22 MR TUSHINGHAM: Well, our fundamental point on inconsistency  
 23 is, if one state body -- and I'm thinking here  
 24 particularly about the licences that were granted and  
 25 then renewed over a ten-year period; you will recall the

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10:50 1 flow chart I provided in opening.  
 2 So as part of the licences, the process of granting  
 3 the licences, and as part of each successive application  
 4 to renew, numerous state bodies are approached,  
 5 including the district offices, and they are asked: do  
 6 you object to this exploration? And they don't.  
 7 So over a ten-year period, that is the conduct of  
 8 these state bodies who are approached. And so our  
 9 complaint on inconsistency is that when the district  
 10 offices then imposed the EIA decisions in 2017 and 2018,  
 11 which put a halt to the project pending a full EIA, that  
 12 is an instance of inconsistent state behaviour by the  
 13 very same state body. And so that is what our real  
 14 complaint is in relation to inconsistency.  
 15 But, of course, we also rely on the obligation of  
 16 the state to act transparently and non-arbitrarily.  
 17 MR DRYMER: I may have some questions later on the  
 18 components of legitimate expectations. But I just want  
 19 to be clear. You seem to be distinguishing, if you  
 20 will, the licences here by insisting on not only their  
 21 permissive nature, it's a right to do something, but the  
 22 requirements --  
 23 MR TUSHINGHAM: Exactly.  
 24 MR DRYMER: -- in the licences themselves.  
 25 MR TUSHINGHAM: Exactly, and that is the key point. So

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10:51 1 a state is fully at liberty whether or not to grant  
2 these licences and impose that obligation. But when  
3 that obligation is imposed on the contractor in the  
4 licences and in the Geology Act, and when an investment  
5 is then made in Slovakia in reliance on those licences,  
6 which was obviously the evidence of Mr Lewis, which went  
7 unchallenged, that has consequences at the international  
8 level. And that is our key point on legitimate  
9 expectations, to which we don't really hear, from what  
10 we've heard so far, a credible answer.  
11 So that's all I'm going to say, unless the Tribunal  
12 would like to hear anything more on that.  
13 THE PRESIDENT: No.  
14 MR TUSHINGHAM: I'm sorry it's taken a bit longer.  
15 THE PRESIDENT: I think you should move on because otherwise  
16 we will be here until tonight.  
17 MR TUSHINGHAM: I just wanted to clarify that the sort of  
18 questions and the interaction we've had, obviously that  
19 was longer than I was intending to expect to take. But  
20 I'll move as quickly on as possible now to Krivá Ol'ka.  
21 MR DRYMER: I need to tell you that anything you have to say  
22 in response to the Tribunal's questions is very  
23 relevant.  
24 MR TUSHINGHAM: Exactly, and I'm very glad to assist you as  
25 much as we can.

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10:52 1 So I think it would be helpful just to begin with  
2 three contextual points about Krivá Ol'ka. And the  
3 first is this: it was barely touched on during our  
4 friend's opening presentation. It was said, "We need  
5 not spend much time on it". And it is easy to see why.  
6 Because if Slovakia had a good defence to our  
7 allegations at Krivá Ol'ka we would have expected to  
8 have heard it by now. It was barely touched on -- it  
9 was not touched on at all in cross-examination of  
10 Mr Fraser or Mr Lewis, and apart from my questions in  
11 cross-examination to Mr Sólymos -- on which more  
12 shortly -- you heard nothing from any other witness on  
13 Slovakia's side.  
14 Now, the second key contextual point relates to  
15 the March 2016 election. That is a key event in the  
16 chronology here, because I explained in opening that new  
17 ministers and officials were appointed after the  
18 election, and it is clear that those appointments had  
19 repercussions for the approvals that Discovery needed at  
20 Krivá Ol'ka.  
21 Now, in this regard, consider what AOG was being  
22 told by Ministry of Environment officials at a meeting  
23 shortly before the election on 9 February 2016. And  
24 this is touched on in Mr Fraser's first witness  
25 statement at paragraph 43, but you can see more from the

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10:54 1 underlying note of that meeting at C-124. And if  
2 I could ask for that to be brought up, please.  
3 This is not a document we have seen before, but  
4 Mr Drymer, you will recall you mentioned a reference to  
5 Mr Fraser's first witness statement, and this is the  
6 underlying note to which reference is made.  
7 So this is a meeting between AOG and Ms Mat'ová, and  
8 you will recall that she was the director of the  
9 Department of State Geological Administration, and  
10 another MoE official.  
11 Second paragraph -- the English is not great, I am  
12 afraid, but we will do our best:  
13 "Both one fully understand our troubles. Few months  
14 are attacked by activists and administration. Just  
15 today finalised a letter for the President."  
16 Just pausing there, it's clear the project was being  
17 discussed at the highest levels of government, even  
18 before the election in March 2016.  
19 The bullet points are also important. First bullet  
20 point:  
21 "... the situation in oil sector is new for  
22 everybody.  
23 Ministry has no force to help us.  
24 Ministry support Alpine in all what is in it's  
25 responsibility."

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10:55 1 And I'll come back to some of these bullet points in  
2 a moment and what we draw from them.  
3 Just moving down a few more bullet points:  
4 "Geological department [that's obviously the  
5 department in which Ms Mat'ová works] is permanently  
6 attacked in last few months and in all case confirmed  
7 that Alpine activity is 100% legal and Slovak state  
8 guarantee right make exploration there."  
9 And then if you move down a bit as well, the next  
10 bullet point:  
11 "Ministry department supposed that in last months  
12 increased situation is linked with election campaign.  
13 Ministry supposed that after election a situation  
14 will be more normalised."  
15 And then the final bullet point:  
16 "Ministry ask for patience."  
17 What do we draw from this email and Mr Fraser's  
18 testimony at paragraph 43 of his first witness  
19 statement? Well, the Ministry, specifically the  
20 department that Ms Mat'ová worked in, were already under  
21 significant pressure as at February 2016 based on the  
22 activists' media campaign against AOG's project. And  
23 that pressure intensified after the election, as we saw  
24 from documents such as C-348, and that was the article  
25 where the former Prime Minister of Slovakia was

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<p>10:57 1 attacking Minister Sólymos for having extended the                  2 exploration licences, and documents such as R-162. And                  3 we also refer here to Mr Fraser's testimony at                  4 transcript Day 2, page 133, line 15, through to                  5 page 134, line 10.                  6 Now, this is a key contextual factor, the media                  7 pressure, which is relevant to all of the impugned                  8 measures, but particularly at Krivá Ol'ka.                  9 The second thing we draw from this note is that the                  10 permanent officials at the Ministry, at the coalface,                  11 who were dealing with AOG, specifically Ms Mat'ová, were                  12 supportive of AOG and were suggesting that the situation                  13 would become more normalised after the election.                  14 Now, that prediction ultimately turned out to be                  15 wrong. The prediction after the election was far from                  16 normalised, and again this is another key contextual                  17 factor which we say lends strong inferential support to                  18 the notion that an instruction was given from above to                  19 refuse AOG's application at Krivá Ol'ka.                  20 Conversely, the fact that the permanent officials at                  21 the coalface were supportive makes it highly unlikely                  22 that it was those officials who were responsible for                  23 refusing the application.                  24 That's all I was going to say about this document.                  25 And the third contextual factor is that after the</p> <p style="text-align: center;">Page 21</p>	<p>10:59 1 measure. The Minister of Agriculture herself, Gabriela                  2 Matecna. She was the person who wrote to AOG on behalf                  3 of the Ministry on 23 June 2016, refusing to approve the                  4 amendment to the lease, C-19. Slovakia did not even                  5 mention her name in opening. They put forward the                  6 Minister of Environment, Mr Sólymos, as a witness, but                  7 not the Minister of Agriculture, and that was evidently                  8 a tactical decision, we say.                  9 The second person who you didn't hear from, and he                  10 is a key person, is Mr Regec. He was the head of the                  11 service office of the Ministry of Agriculture, and again                  12 we heard no reference to his name in opening. It is                  13 clear from the documents in our opening presentation at                  14 100-103 that he was the person who had the competence to                  15 approve the amendment. He was the official with the                  16 most important evidence to give about the Ministry of                  17 Agriculture's internal decision-making process. He was                  18 nowhere to be seen.                  19 And the important point there is that the documents                  20 I took you to in opening at slides 102-103 show that                  21 Mr Regec was from the SNS party, which was in charge of                  22 the Ministry of Agriculture. He had based his                  23 pre-election campaign on opposing AOG's project, and                  24 after he was appointed as the head of the service office                  25 he was using his position to withhold approval for the</p> <p style="text-align: center;">Page 23</p>
<p>10:58 1 election, AOG's project, and specifically the drills at                  2 Krivá Ol'ka, became a political hot potato for the                  3 government. There was negative coverage about the                  4 project throughout the national media, as Mr Sólymos                  5 confirmed, that's transcript Day 3, pages 131-132.                  6 Mr Sólymos described the situation as "a sensitive                  7 issue"; that's transcript Day 3, 157, lines 19-22. And                  8 Mr Sólymos confirmed that the Ministry of Agriculture                  9 and the Ministry of Environment were controlled by                  10 different political parties. You will recall SNS were                  11 in charge of the Ministry of Agriculture and Most in                  12 charge of the Ministry of Environment. And we say it's                  13 clear that each Ministry was trying to pass the parcel                  14 from one Ministry to the other to avoid having to make                  15 a decision in AOG's favour.                  16 So those are the contextual factors that I would                  17 just ask you to bear in mind when you look at the                  18 individual measures.                  19 So I'll begin with measure 8, which is the MoA's,                  20 the Ministry of Agriculture's refusal to approve the                  21 amendment to the lease.                  22 We don't need to look at this document anymore                  23 unless you would like to.                  24 So I will begin by reminding you of who you did not                  25 hear from on Slovakia's side in relation to this</p> <p style="text-align: center;">Page 22</p>	<p>11:01 1 amendments for an improper purpose.                  2 And somewhat remarkably, there was no response to                  3 any of this in opening or in evidence.                  4 Slovakia has also not explained its failure to                  5 disclose any internal Ministry of Agriculture documents                  6 which reveal the decision-making process which led to                  7 the refusal, and it has also not explained why these two                  8 people have not come here to explain their conduct.                  9 In opening, it was said:                  10 "The bottom line is that ... AOG failed at                  11 Krivá Ol'ka ... because it made [a] mistake. It didn't                  12 request the lease extension by the deadline ..."                  13 That's transcript Day 1, page 177.                  14 But I already explained why that case theory does                  15 not work in opening.                  16 Whether the lease extension request was submitted                  17 one day late or seven days late does not matter. The                  18 State Forestry agreed to extend the lease by signing the                  19 amendment on 14 January, and it's conceded that State                  20 Forestry was an independent entity and therefore had                  21 authority to take that decision.                  22 It was suggested in opening that the Ministry of                  23 Agriculture needed to give its approval within the                  24 30-day period between 15 December and 15 January that                  25 was specified in the lease. But the Ministry was not</p> <p style="text-align: center;">Page 24</p>

<p>11:02 1 a party to the lease. No such provision was set out in 2 the lease as to why that period was included, and most 3 importantly, there was no time limit specified under 4 Article 50(7) of the Forest Act within which the 5 Ministry needed to give its approval. This was 6 an entirely separate administrative process. 7 So as at the date of the amendment, the lease was 8 not "dead", which is the word that was used in opening 9 by Slovakia. The lease was extended by State Forestry, 10 but needed to be approved by the Ministry. 11 Now, the only other point that was raised in opening 12 in relation to this was a reference to AOG's letter to 13 State Forestry on 18 July 2016. That's R-161. If we 14 could just pull that up, please. 15 So recall, the date of this document is after the 16 Minister of Agriculture has refused to approve the 17 amendment to the lease, and Slovakia points to the fact 18 that in this document, if we scroll down, please. 19 So you see a reference here in the second paragraph 20 to the original lease agreement, and those are important 21 words, so a reference there to the original lease before 22 the amendment, and then in the last line: 23 "After five months, the Ministry justified its 24 disapproval of the amendment ... by the fact that the 25 original Lease Agreement expired and the formal</p> <p style="text-align: center;">Page 25</p>	<p>11:05 1 before June 2016 by the Ministry of Agriculture. AOG 2 would have therefore been able to access the Krivá Oľka 3 site and drill its well before the expiry of the 4 extended term, that was extended until August 2016. 5 And, importantly, AOG would have been able to drill that 6 well before the amendments to the EIA Act came into 7 force on 1 January 2017. And in that regard we refer 8 the Tribunal to Mr Lewis' second statement at 9 paragraph 23 for the timing that it would have taken to 10 actually drill the well and conduct the flow tests. 11 So all of that could have been done and that's why 12 we say, on that ground alone, measure 8 is enough for us 13 to win on Krivá Oľka. 14 But if the Tribunal wishes to go on to consider 15 measures 9 and 10, this relates to the Ministry of 16 Environment's conduct in refusing the order, we say also 17 that conduct breached the BIT, and I will take this as 18 quickly as I can. 19 Here I'm going to remind you again of who you did 20 not hear from on Slovakia's side: three permanent 21 Ministry officials who had been working for the Ministry 22 since well before the 2016 election. First, Ms Jánová, 23 she was the director general, DG, of the geology 24 directorate, that's transcript Day 3, 105, lines 10-11. 25 She had been the director general since at least 2011.</p> <p style="text-align: center;">Page 27</p>
<p>11:04 1 requirements ... were not fulfilled..." 2 And then go over the next page: 3 "Since the original lease agreement has expired, it 4 is not possible to renew it with amendment no. 1 ..." 5 And therefore that's why a request is made to State 6 Forestry to enter into a new lease. 7 But this letter was obviously sent after the 8 Ministry had already refused to approve the amendment, 9 and of course, as at that date, then the original lease 10 agreement had expired. So it wasn't possible to renew 11 it with the amendment because of the Ministry's refusal 12 to approve the amendment. 13 So we say, in short, the Ministry of Agriculture's 14 conduct in measure 8 was a textbook example of an FET 15 breach. It prevented AOG from drilling the Krivá Oľka 16 well and therefore violated Discovery's legitimate 17 expectations. It involved Slovakia acting 18 inconsistently, and, for good measure, it involved 19 Slovakia acting non-transparently and arbitrarily. 20 Now if the Tribunal is satisfied that measure 8 was 21 a breach of the BIT, the Tribunal need not go on to 22 consider whether measures 9 and 10 or measure 13 are 23 breaches of the BIT. 24 Why is that? Because in a but-for scenario, the 25 amendment to the lease would have been approved well</p> <p style="text-align: center;">Page 26</p>	<p>11:07 1 Ms Mat'ová was the director of the department of 2 state geological administration, transcript Day 3, 3 page 104, lines 12-22. She was Ms Jánová's deputy and 4 had been the director of the department since at least 5 2014. She signed the 2014 licences. That's C-8. 6 And the third official was Mr Hrvol, state 7 councillor of the same department, he was a junior 8 official. And Annex 11 to our opponent's letter dated 9 29 January 2024 shows that Mr Hrvol's job description 10 was signed in 2011. So he had been there for a long 11 time. 12 They were the officials at the coalface who were 13 dealing with AOG's application. They were the officials 14 who had relevant evidence to give to explain what 15 happened internally, but they were nowhere to be seen 16 and no satisfactory explanation has been given for that. 17 The next point leading on from missing witnesses 18 relates to the missing documents. 19 Now, we learned during cross-examination that 20 Mr Sólymos usually attended weekly ministerial meetings 21 with the DGs of all departments, transcript Day 3, 22 page 103, lines 5-9. He recalled that the Ministry took 23 minutes of those meetings, page 105, lines 12-14. It's 24 likely, we say, that those minutes would have provided 25 evidence of the Ministry's internal consideration of</p> <p style="text-align: center;">Page 28</p>

<p>11:08 1 AOG's application, not least because in his evidence he          2 explains that the entire AOG issue, the whole case, was          3 an important event for a Ministry, "even for myself"          4 (Day 3, page 109, line 23). We say it is very likely          5 that those minutes would have referred to the          6 application.          7 There are also likely to be other internal documents          8 which have not been disclosed. You will recall that          9 Mr Sólymos accepted it was likely that Ms Mat'ová and          10 Mr Hrvol would have been involved in internal          11 discussions at the Ministry about AOG's application,          12 transcript Day 3, page 117, lines 6-9. And also he          13 accepted that Ms Jánová and Ms Mat'ová communicated with          14 each other, page 141, lines 14-24.          15 We heard nothing, again, in opening by way of          16 an explanation for these disclosure failures, and during          17 Mr Sólymos' cross-examination you will recall I pointed          18 the reference to file no. 2205-2017 in the top          19 right-hand corner of the Ministry's decision in March          20 rejecting the application. That's transcript Day 3, 158          21 through to 159.          22 Mr Sólymos confirmed that he had not looked through          23 that file before he came to give testimony -- that's          24 page 160 -- and it seems highly likely that the prior          25 drafts of the Ministry's decision, to which I'll come</p> <p style="text-align: center;">Page 29</p>	<p>11:11 1 a conversation written by an attorney and reported to          2 his client. There is no suggestion that the attorney          3 had any motive to conceal or misrepresent matters.          4 The third point is that Mr Hrvol is not a witness          5 within Discovery's control. He is an official within          6 Slovakia's control. It would have been the simplest          7 thing in the world for Slovakia to produce a witness          8 statement from Mr Hrvol denying what is set out in this          9 email. But they have not done so. They have known          10 about this allegation since the Memorial,          11 paragraphs 152-153, and the Reply, but no witness          12 statement came forward.          13 And the fourth point is that Slovakia has not          14 produced internal documents which contradict the account          15 set out in the email. The documentary exhibits that we          16 have placed before you are consistent with the account          17 set out in this email, and we rely here by way of          18 example on Exhibit C-337. That's the email dated          19 17 October 2016, where Mr Hrvol is said to have          20 confirmed that he saw no reason why the Ministry should          21 not decide in favour of AOG. That's entirely consistent          22 with what is set out in this email. And then Exhibit          23 R-213, which is Mr Fraser's email dated          24 15 December 2016, reporting on his meeting with the          25 Minister that day, where they discussed the Article 29</p> <p style="text-align: center;">Page 31</p>
<p>11:10 1 shortly, would have been held within that file. No          2 satisfactory explanation has been given for the failure          3 to produce those prior drafts.          4 The next point here relates to the famous email,          5 Exhibit C-370, if we could bring this up, please. So          6 this is the email on 9 March, which you will have seen          7 many times before. And the question here is whether the          8 Tribunal can be satisfied that Mr Hrvol made the          9 statements that are recorded in this email from AOG's          10 attorney. We say the Tribunal can be so satisfied for          11 four reasons.          12 The first reason is, this is a contemporaneous          13 record of a conversation between AOG's attorney and          14 Mr Hrvol. If you scroll down, please, to the bottom,          15 you will see that on 8 March a colleague of Mr Beran's          16 says to Mr Fraser:          17 "Since the period has expired, tomorrow we will also          18 chase Mr Hrvol regarding [section] 29 ..."          19 And if you then look at the email at the top, the          20 very next day:          21 "... we talked to Mr Hrvol regarding the decision          22 under section 29 ..."          23 So it's a contemporaneous record.          24 The second point is, the Tribunal is entitled to          25 attach significant weight to a contemporaneous record of</p> <p style="text-align: center;">Page 30</p>	<p>11:13 1 application, and was led to believe the application          2 would be approved, and that the Minister was prepared to          3 help AOG but only if he got some positive PR.          4 What, then, should the Tribunal make of Mr Sólymos'          5 denial in his witness statement, his second witness          6 statement, that he ever gave an instruction? Well,          7 Slovakia's legal team appear to have made a tactical          8 decision not to inform Mr Sólymos about the allegations          9 made by Discovery in its Memorial regarding the          10 application. And you will recall transcript Day 3,          11 page 111, line 17, through to 113, line 12:          12 "No. I was not informed to speak on this issue."          13 He didn't even know at the time of his first witness          14 statement that this was an issue. That is a tactical          15 decision which is revealing, and builds on the points          16 I've already made about Slovakia having no credible          17 defence to the Krivá Ol'ka allegations.          18 Instead, Mr Sólymos addressed this issue for the          19 first time in his second witness statement in three          20 short paragraphs, but he was relying on his own attempt          21 to recall events which had occurred nearly seven years          22 earlier in 2017. And this is transcript Day 3,          23 page 113, lines 22-23:          24 "I only had information that I remember."          25 Three further things became apparent in cross.</p> <p style="text-align: center;">Page 32</p>

<p>11:14 1 First of all, apart from the documents mentioned in his 2 witness statement, he had not been shown any other 3 internal Ministry of Environment documents relating to 4 AOG's application. That's pages 113, 115 and page 142. 5 He didn't speak with Mr Hrvol before he came to give 6 evidence, despite the fact that it would have been 7 obvious to speak to Mr Hrvol. And then third -- and 8 this is the key point -- he had not even seen this email 9 that's on the screen before he came to give evidence. 10 This is transcript Day 3, page 154, lines 2-16. So he 11 had not even seen it. We say that is very revealing. 12 It doesn't provide a promising start to give any weight 13 to his testimony. 14 But it became worse, because he accepted that his 15 recollection may be different if he had been able to 16 refresh his memory by reference to the contemporaneous 17 documents, transcript Day 3, page 149, lines 3-22: 18 "Well, definitely. I don't remember everything from 19 seven years ago. I would be reading hundreds of 20 documents back then. Had I seen something later on, 21 recently, I would have remembered. It's quite logical." 22 Now, Mr Sólymos suggested that if he was the 23 appellate body, he would not enter or interfere with 24 first-instance decisions. But you will recall, 25 Madam President, that in response to your questions you</p> <p style="text-align: center;">Page 33</p>	<p>11:17 1 an instruction was given. When you take it all 2 together, it all points in the same direction. 3 Now, the final point on this is Slovakia says: well, 4 the instruction theory can't work because in June the 5 Minister granted AOG's appeal -- granted the appeal in 6 AOG's favour. That was Day 1, transcript page 181. 7 Well, Mr Sólymos didn't grant AOG's appeal. He 8 annulled, as you will recall, the original decision, and 9 remanded it back to the Ministry for a new decision. 10 You will recall that in cross an issue arose about 11 whether the Minister had the power to annul and remand 12 or annul and amend. We have sent you overnight -- you 13 may not have seen, but -- Exhibit R-076A. This is 14 articles 59 and 61 of the administrative procedure code, 15 which show that the Minister did have the choice, either 16 to alter the original decision, or to quash it and 17 return it back to the first-instance authority. So the 18 Minister could have granted AOG's application within the 19 context of the appeal, but he did not. 20 If the Minister had exercised that power, that would 21 have likely generated further negative publicity, which 22 the Minister was so keen to avoid and the Ministry was 23 receiving. And so the appeal, we say, is not a complete 24 answer, and it didn't remove the existing obstacle which 25 the Ministry had put in AOG's way.</p> <p style="text-align: center;">Page 35</p>
<p>11:16 1 were asked, he said -- he accepted that usually he would 2 not have been involved in first-instance decisions, and 3 that's transcript Day 3, pages 150-151. 4 So there were exceptions, and it is inconceivable 5 that in this case, where the Minister himself described 6 the AOG issue as an important event for the Ministry and 7 himself, and where he had attended a meeting with AOG on 8 15 December where the application was discussed, that he 9 wasn't involved in any way in the decision. 10 So there are two possible explanations with which 11 you are left. The first is that the Minister did give 12 the instruction, but he has forgotten. It's not 13 surprising, given the passage of time and the fact that 14 he hadn't been able to refresh his memory by reference 15 to the contemporaneous documents. Or, someone else from 16 high levels of the Ministry gave the instruction, but 17 Slovakia has not identified that person's name, and 18 because of the disclosure failures we don't know what 19 went on. 20 So we say it is more likely than not that it was the 21 Minister who gave the instruction, and had he been able 22 to refresh his memory by reference to all of the 23 internal documents, then his recollection most likely 24 would have been different. 25 But ultimately, we say the email is clear that</p> <p style="text-align: center;">Page 34</p>	<p>11:19 1 But in any event, we say the reliance on the appeal 2 is a non sequitur. The mere fact that the Minister 3 quashed the original decision doesn't negate the 4 proposition that an instruction was given before the 5 original decision was issued. 6 The final point, then, is Slovakia says: well, 7 Discovery walked away from the process after the 8 decision was quashed. That was transcript Day 1, 9 page 182. But that is a complete distortion of the 10 facts, and the Tribunal has this point already, but we 11 refer to our Reply at paragraph 141, and you will have 12 seen what we've said on that. 13 So, again, we say the Ministry's conduct under 14 measures 9 and 10 were another textbook example of 15 an FET breach. They frustrated Discovery's legitimate 16 expectations, they involved Slovakia acting 17 inconsistently, and they also involved another 18 non-transparent and arbitrary behaviour. 19 So that's all I was going to say about Krivá Ol'ka, 20 unless the Tribunal has any more questions. 21 I will now move on to EIA. 22 So the Tribunal asked yesterday: how do we reconcile 23 Mr Lewis' oral evidence that the EIA was the "nail in 24 the coffin", transcript Day 2, pages 224-225, and AOG's 25 voluntary offer to perform the preliminary EIA for the</p> <p style="text-align: center;">Page 36</p>

11:20 1 three exploration wells in the April 2017 press release?  
2 That's C-171.  
3 Now, it's important that we be clear about what we  
4 mean by the EIA issue, and I think it would be helpful  
5 if we could begin with our opening presentation,  
6 slide 124. I promised no new slides, so this is an old  
7 slide.  
8 CP-1, slide 124.  
9 PROFESSOR SANDS: While we are waiting, can I just say  
10 personally how nice it has to have you do advocacy  
11 rather than reading from a PowerPoint.  
12 MR TUSHINGHAM: That's -- I quite agree.  
13 PROFESSOR SANDS: It really is a lot nicer, as  
14 an arbitrator, to hear you doing your stuff.  
15 MR TUSHINGHAM: Thank you very much, Professor.  
16 If we could go to page 124. If you see on the  
17 right, just where there's the dialogue box above "214",  
18 if you could just type into there "124". (Pause)  
19 It was also one of the demonstratives. I wonder  
20 whether that's quicker, to pick that up in that way.  
21 There we go. This is probably easier.  
22 Okay, exactly, this is the right slide. So  
23 I skipped over this slide in my opening, for which  
24 apologies, because time was short. But obviously  
25 I think it's just important to emphasise a few points

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11:23 1 here.  
2 The first step in the EIA process was the applicant  
3 submitting a preliminary EIA to the district office, and  
4 that was the voluntary step that AOG committed to take  
5 for its three exploration wells in the April 2017 press  
6 release. But, importantly, under the act, that step did  
7 not automatically lead to an order for a full EIA.  
8 The second and third steps are the gravamen of  
9 Discovery's complaint of a BIT breach.  
10 So the district offices had to conduct proceedings  
11 to decide whether a full EIA was required, and after  
12 conducting those proceedings the district office then  
13 issued a decision on whether a full EIA was required.  
14 And at that stage, step 3, the district office could  
15 either say, no, we don't require a full EIA, or, yes, we  
16 do require a full EIA.  
17 And it's common ground, and this is slide 131 of my  
18 presentation -- we don't need to go forward to that  
19 now -- that an order for a full EIA could only have been  
20 made if the district offices were satisfied that the  
21 activity was likely to have significant effects on the  
22 environment. And so this is the key complaint, and this  
23 is measures 11 through 13.  
24 In order to comply with the FET standard in the BIT,  
25 an order for a full EIA could only have been made after

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11:25 1 conducting a procedure which was not arbitrary and in  
2 which the applicant was treated fairly. That's the  
3 words of the Tribunal in Crystallex at paragraph 581,  
4 slide 159 of my presentation.  
5 So when Slovakia made the EIA decisions requiring  
6 a full EIA, measures 11 through 13, it breached that  
7 standard because it acted inconsistently, it acted  
8 arbitrarily, and it frustrated Discovery's legitimate  
9 expectations. And it was those decisions which were the  
10 final nail in the coffin. And I'll go through this in  
11 a bit more detail if it would assist the Tribunal.  
12 Next, I think, it would be helpful if we could go  
13 back to slide 122, and this is the timeline. So what  
14 we're talking about with measures 11 through 13 are the  
15 three EIA decisions, and they of course came before --  
16 sorry, they came after AOG had made a voluntary  
17 commitments to the activists to perform the preliminary  
18 EIA. But, of course, our complaint is about the  
19 treatment which we suffered at the hands of the state in  
20 those three decisions.  
21 So I hope that helps the Tribunal reconcile those  
22 two aspects. Unless the Tribunal -- I can help you any  
23 further.  
24 PROFESSOR SANDS: We were taken to a document -- and I can't  
25 remember, I've got it in my notes -- which summarised

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11:26 1 the process between step one, preliminary EIA, and  
2 a document which described I think the 174 people who  
3 contributed.  
4 MR TUSHINGHAM: Yes.  
5 PROFESSOR SANDS: And then the state organisations, and  
6 thereupon a decision was taken.  
7 MR TUSHINGHAM: Exactly.  
8 PROFESSOR SANDS: So could you just tease out a little bit  
9 more what went wrong in that process?  
10 MR TUSHINGHAM: Yes, I'm going to do exactly that,  
11 Professor.  
12 But just before I go to that, can I just set out why  
13 we say there was a breach of the FET standard in  
14 relation to these measures?  
15 So we say, and we've addressed this point in detail,  
16 and it's Reply at 165 through to 175, which is our  
17 factual examination of the EIA decisions, and then our  
18 complaint on liability is at paragraph 318, and then  
19 335, subparagraph (2) of the Reply. So that's where  
20 we've pleaded the point.  
21 And we say first of all Slovakia acted  
22 inconsistently when it made these EIA decisions, because  
23 Slovakia had previously concluded that AOG's exploration  
24 activities were not likely to have a significant adverse  
25 affect on the environment. And I'm referring there

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11:27 1 specifically to two things: the first is, do you  
 2 remember during the licence renewal process over that  
 3 ten-year period between 2006 and 2016? At each stage  
 4 the district offices were asked whether they objected,  
 5 and some of the questions that were raised were whether  
 6 there were environmental objections to the exploration,  
 7 and at each stage the district offices said: no, we do  
 8 not object.  
 9 THE PRESIDENT: But would that mean that when you go into  
 10 the preliminary EIA process, you expected that in any  
 11 event there would be no decision for a full EIA --  
 12 MR TUSHINGHAM: Precisely.  
 13 THE PRESIDENT: -- because somehow the decision was already  
 14 preempted by the prior decisions, or observations on the  
 15 lack of negative impact.  
 16 MR TUSHINGHAM: Exactly. But I think rather than saying  
 17 preempted, perhaps how we would put our case is that  
 18 when AOG submitted these applications, it did so against  
 19 the background not only of those non-objections in the  
 20 licence renewal process, but critically also Minister  
 21 Sólymos' statement in January of 2017 -- and this is  
 22 slide 140. Perhaps we could just go to that because  
 23 this is also quite important.  
 24 So this is the 8,000 wells point, and you will  
 25 remember I took you to this in opening. So:

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11:30 1 then you have accepted this?  
 2 MR TUSHINGHAM: We completely accept that, and --  
 3 THE PRESIDENT: So you are more complaining about the fact  
 4 that the investigation was not properly conducted; is  
 5 that what it is?  
 6 MR TUSHINGHAM: In large part, yes. And we would put it  
 7 as -- draw an analogy with the Crystallex case, because  
 8 we say that is the clearest analogy we can draw with  
 9 another case that has considered similar issues.  
 10 Now, of course, that was not a case involving  
 11 an environmental impact assessment, but it was a case  
 12 where a permit was denied on purported environmental  
 13 grounds, the tribunal concluding that the way in which  
 14 those environmental grounds were raised did not follow  
 15 a fair process. And the point was in that case that the  
 16 tribunal said in order to put a halt to the project on  
 17 environmental grounds, those grounds needed to be  
 18 supported by evidence and data, and it was incumbent  
 19 upon the state to support those allegations by reference  
 20 to a foundation of fact.  
 21 And if we just look at the Smilno EIA decision, and  
 22 this picks up on Professor Sands' point, so if we go to  
 23 377, please. Exhibit C-377.  
 24 So this is the Smilno EIA decision, which was handed  
 25 down by the district office on 2 August, and we've

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11:29 1 "What matters is that local people can be assured  
 2 that the activities will not have any unfavourable  
 3 impacts on their surroundings and the environment in  
 4 general."  
 5 And then critically, the last paragraph:  
 6 "To this day, we at the Ministry are not aware of  
 7 even a single environment-related problem occurring as  
 8 the consequence of those ... [wells]."  
 9 Now, of course we don't accept that that alone can  
 10 amount to inconsistent behaviour, but we point to that  
 11 as an important contextual consideration when the  
 12 Tribunal examines the EIA decisions, because the  
 13 Tribunal can ask itself: when the district offices then  
 14 issued their decisions a few months later in 2017, what  
 15 was suddenly the very large environmental problem that  
 16 was supposedly caused by these wells? Because you can't  
 17 just make a decision for a full EIA on the basis of  
 18 speculation. In order to comply with the BIT, it has to  
 19 be based upon a rational foundation of fact: the  
 20 suggestion that the drill would have a significant  
 21 effect on the environment.  
 22 THE PRESIDENT: Would you accept that if you make an offer  
 23 for a preliminary EIA, then if the EIA is correctly  
 24 conducted and it comes to the conclusion that there is  
 25 a risk for the environment that requires a full EIA,

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11:32 1 obviously referred to this in our slides.  
 2 So the district office upon the application by AOG,  
 3 and you will see the application at C-373, which we  
 4 don't need to go to now, but the conclusion is that it  
 5 shall be assessed pursuant to the EIA Act, and that is  
 6 the order for a full EIA.  
 7 And if you then scroll down, please, do you see the  
 8 heading "Reasoning"? So the key point here is that this  
 9 decision, I am afraid -- I can only describe it as  
 10 a travesty of a decision, because if you scroll through,  
 11 you see that pages 1 through to 3 are a summary of AOG's  
 12 application, and you will see that if you look in more  
 13 detail at the application at C-373.  
 14 MR DRYMER: And it's an application for a preliminary, is it  
 15 not?  
 16 MR TUSHINGHAM: Correct. Exactly. This is the preliminary  
 17 EIA application. And it was prepared by a professional  
 18 consultant called Chempro. It spanned 37 pages. It  
 19 included six further annexes. And the whole purpose of  
 20 the application was to explain why the activity, the  
 21 well, was not likely to have significant effects on the  
 22 environment. So that's the baseline against which the  
 23 decision has to be judged.  
 24 Pages 4 through to 55 of this document then quote,  
 25 verbatim, the 55 comments that were submitted by the

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<p>11:34 1 various bodies and citizens, and it's interesting to                  2 have a look at some of those comments.                  3 So if you could go to page 9, please.                  4 So comment number 6. This is the Bardejov district                  5 office, department of road transport and land                  6 communications, sending a letter on 12 July, and it's                  7 obviously received the application. And the issue is                  8 actually access: how do we access the site?                  9 So, what does the district office say:                  10 "The proposed site is accessible from                  11 a comprehensive road (dirt road) connected to the                  12 road... in the cadastral territory of Smilno."                  13 So this is the district office telling AOG and the                  14 other district office that AOG can access the site using                  15 the field road.                  16 But what is then said in the next paragraph is:                  17 "In view of the [Road Act], the state administration                  18 in matters of local and comprehensive communications is                  19 carried out by municipalities ..."                  20 And you will recall that that was                  21 Professor Števček's precise point: this fell within the                  22 jurisdiction of the municipality, and so the Bardejov                  23 district office says:                  24 "... we refer the matter to the municipality of                  25 Smilno for the direct handling of [this] matter."                  Page 45</p>	<p>11:36 1 Other requirements ... will be specified in the                  2 scope..."                  3 And that's obviously at the next stages in the flow                  4 chart.                  5 So our key point here is that if you were going to                  6 put a halt to the project on the basis of environmental                  7 grounds, you needed to explain, by reference to                  8 a rational foundation of fact, why the activities were                  9 likely to have significant effects on the environment.                  10 And we say that the district office's failure to do so                  11 did not accord with treatment that can be termed fair                  12 and equitable treatment.                  13 PROFESSOR SANDS: You've taken us at page 56:                  14 "Other requirements and details will be specified in                  15 the scope of the assessment ..."                  16 MR TUSHINGHAM: Yes, that's the full EIA.                  17 PROFESSOR SANDS: Well:                  18 "Other requirements and details will be specified in                  19 the scope of the assessment ..."                  20 MR TUSHINGHAM: Yes. So if you go back to the flow chart in                  21 my presentation.                  22 PROFESSOR SANDS: "Other requirements". I may be just                  23 wrong, I'm reading that as being: the full requirements                  24 of what is to be assessed will be set out in the future                  25 decision.                  Page 47</p>
<p>11:35 1 What does the Smilno municipal office then say?                  2 Look at number 7:                  3 "The municipality of Smilno, represented by the                  4 mayor ... has no objection to the [project] concerning                  5 the access from the main road (dirt road) connected to                  6 the class I road no. 1/77 ..."                  7 So what we understand there is being said is: you                  8 can use this road to access the drill site.                  9 Now, of course, some other citizens and some state                  10 bodies, including another municipality, objected, and                  11 they insisted on a full EIA.                  12 But the question is whether -- if you go forward to                  13 the conclusion at page 55, so there's a heading entitled                  14 "Conclusion", and then this is the sum total of the                  15 analysis, and I would invite the Tribunal to read this                  16 very carefully in due course. It doesn't really say                  17 very much in the first paragraph. It says: we "took                  18 into account the opinions", and "made the ruling as set                  19 out in the operative part". And if you go forward to                  20 the next page, and at the top:                  21 "From the opinions received on the project proposal                  22 and from the measures proposed in the designed                  23 construction operation, some specific requirements in                  24 relation to the designed construction operation have                  25 emerged, which will need to be taken into account ...                  Page 46</p>	<p>11:37 1 MR TUSHINGHAM: We understand -- it's accepted, I think, on                  2 the other side, this is the order for a full EIA to take                  3 place.                  4 PROFESSOR SANDS: So what does that mean:                  5 "Other requirements and details ..."                  6 MR TUSHINGHAM: If I could just take you to the flow                  7 chart --                  8 PROFESSOR SANDS: Yes, but also, relatedly, how does this                  9 decision compare to other decisions in relation to this                  10 document and decision adopted at this stage of the                  11 process? Is this different from other decisions? Does                  12 this depart from normal practice?                  13 THE PRESIDENT: Yes, I had the same question. What is the                  14 legal basis in Slovak law for this process, in the sense                  15 of, what is the administration meant to do?                  16 MR TUSHINGHAM: Yes, of course.                  17 THE PRESIDENT: Does it have to investigate?                  18 MR TUSHINGHAM: Yes. So if I could take you to the flow                  19 chart, this puts it in the legal basis. So if we go to                  20 slide 124.                  21 MR DRYMER: You're being asked what exactly are the                  22 proceedings in box 2 meant to be.                  23 MR TUSHINGHAM: Exactly, so in box 2 -- one in box 2 and                  24 box 3, those are the provisions of the EIA Act which                  25 establish what the district office has to do. And we've                  Page 48</p>



<p>11:39 1 got the references in the footnote to those articles in 2 the act. And if we turn to the act, I don't think we 3 have time now, but they set out that the district office 4 must take into account a wide range of factors, and they 5 are set out in an annex explaining what has to be taken 6 into account. You can't just order a full EIA on the 7 basis of speculation. It's got to be based on some 8 rational foundation of fact. 9 PROFESSOR SANDS: Just on that, if you look at the third 10 box: 11 "District office issues a decision on whether a Full 12 EIA is required." 13 I assume that's C-377. 14 MR TUSHINGHAM: Exactly. 15 PROFESSOR SANDS: And then the next box says: 16 "If a Full EIA is required ..." 17 MR TUSHINGHAM: If an order for a full EIA has been made. 18 PROFESSOR SANDS: Which it has. 19 MR TUSHINGHAM: Yes. 20 PROFESSOR SANDS: "... District Office then determines the 21 scope of the Full EIA." 22 MR TUSHINGHAM: Correct. 23 PROFESSOR SANDS: So we haven't seen that yet. 24 MR DRYMER: Those are the further criteria. 25 MR TUSHINGHAM: So if you then look at R-193, that then</p> <p style="text-align: center;">Page 49</p>	<p>11:41 1 even got to this process if the district offices had 2 done their job properly. 3 PROFESSOR SANDS: But, again, sorry, I'm just trying to 4 understand the process. So this document now, we're 5 now November -- 6 MR TUSHINGHAM: Correct. 7 PROFESSOR SANDS: So, September, October, November, it's 8 three months later. 9 MR TUSHINGHAM: Exactly. 10 PROFESSOR SANDS: They've now come up with the full detailed 11 scope. 12 I'm just now trying to work out in parallel in my 13 mind, we've got this entire process with the EU 14 directive which has wrongly been transposed by the 15 Slovak State into domestic law. There are proceedings 16 against Slovakia for that. They then have to amend 17 their adoption of their rules. 18 MR TUSHINGHAM: Which was January. 19 PROFESSOR SANDS: Which was January. In the meantime there 20 has been a judgment of the Court of Justice of the 21 European Union, which says that in certain circumstances 22 exploratory drilling may be the subject -- 23 MR TUSHINGHAM: And we fully -- 24 PROFESSOR SANDS: I understand. But what I'm trying to work 25 out then is: to what extent does this EIA requirement --</p> <p style="text-align: center;">Page 51</p>
<p>11:40 1 takes you to what the district offices then require to 2 be done. But this is, of course, after the order for 3 a full EIA has been made. So, once that decision has 4 been made, you then open up the full EIA process. So 5 this is the scope of assessment. 6 And you see here, then, later down the page on 7 page 2, so this is the scope, and specific terms. So 8 what's being said here is, then, you need to elaborate 9 in detail on all of these matters. So this is what then 10 has to be done. 11 Now, what we say is, if there was a concern about, 12 for example, contamination of groundwater, if that was 13 the only objection which was raised, or which the 14 district office had at the screening process, at the 15 preliminary EIA process, then the order for a full EIA 16 should have been limited to that specific issue, because 17 that was obviously one of the issues that the activists 18 were concerned about and which were raised in the 19 comments. 20 But instead, we get a full scope EIA on everything. 21 And we say the problem here is that all of these 22 specific terms, the concerns that these issues would 23 have a significant impact on the environment, just did 24 not have any rational foundation of fact. 25 And so at the screening process, we shouldn't have</p> <p style="text-align: center;">Page 50</p>	<p>11:42 1 MR TUSHINGHAM: You mean this document? 2 PROFESSOR SANDS: This document, R-193, November 2017, 3 purport to give effect to the requirements under the EU 4 directive, because the EU directive, once it requires 5 an EIA, doesn't actually operate to, if you like, home 6 in on the particular areas of concern. Once you're 7 subject to that requirement, it's the full whack. 8 So you're saying they shouldn't have done that. 9 MR TUSHINGHAM: Correct. Correct. 10 PROFESSOR SANDS: And I'm trying to understand the basis, 11 against this background, on which you say they fell into 12 error by requiring, if you like, a full EIA, rather than 13 a partial EIA. 14 You may be able to explain that, but I'm just trying 15 to work out ... 16 MR TUSHINGHAM: No, I think that's helpful. I think what we 17 would say is that if these were the concerns that were 18 troubling the district offices -- the district office at 19 the date of the August decision, then in order to comply 20 with the BIT, the district offices needed to be 21 transparent with AOG and tell them during the process: 22 these are the specific concerns we have. That is what 23 a state must do. It is not enough simply to make the 24 decision and then later on say: we have these concerns. 25 Because if they had been raised earlier, AOG would</p> <p style="text-align: center;">Page 52</p>

11:44 1 have then been able to say: look, this is what we say in  
 2 our application, and this is why the chemicals that we  
 3 are using will not pose significant effects on the  
 4 environment and we can satisfy you that this won't pose  
 5 a problem.  
 6 But they didn't do that --  
 7 PROFESSOR SANDS: But again, I'm just trying to -- it's  
 8 a complex and moving situation here.  
 9 MR TUSHINGHAM: I know.  
 10 PROFESSOR SANDS: Because of two processes going in  
 11 parallel, the EU process and the Slovak process.  
 12 The way the EU process works -- I know nothing about  
 13 the Slovak process beyond what I've learned in these  
 14 proceedings, but I do know the EU process well -- there  
 15 isn't a possibility for, if you like, a partial EIA.  
 16 Once you fall within the scope, you've got to do a full  
 17 whack.  
 18 So what you are saying is, they had a duty to set  
 19 out with precision --  
 20 MR TUSHINGHAM: Exactly, exactly.  
 21 PROFESSOR SANDS: -- what the particular areas of  
 22 environmental concern were.  
 23 MR TUSHINGHAM: Were, before the August decision.  
 24 PROFESSOR SANDS: Before the August decision, or in  
 25 the August decision.

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11:45 1 MR TUSHINGHAM: Exactly, yes.  
 2 PROFESSOR SANDS: But I then have two questions. The first  
 3 is: does this set of steps depart from what happened in  
 4 other projects in Slovakia? And, secondly, what is to  
 5 be done in the circumstance that EU law, apparently,  
 6 I'm not expressing a view on it, but apparently requires  
 7 you to do a full whack EIA. However absurd that may be,  
 8 that is apparently what the EU law requires.  
 9 MR TUSHINGHAM: Do you mind if I just take two seconds, just  
 10 to --  
 11 PROFESSOR SANDS: Please.  
 12 MR TUSHINGHAM: Because this is an important point, but I am  
 13 conscious we are ...  
 14 PROFESSOR SANDS: Please. Please.  
 15 (Pause)  
 16 MR TUSHINGHAM: Could I just help you on the -- come back on  
 17 the EIA directive point if I may? I'm entirely in the  
 18 Tribunal's hands if you would like me to elaborate on  
 19 this, but I think it's important, and then I will come  
 20 back to the specific decision in this case.  
 21 So if we could pull up R-083, which is the EIA  
 22 directive. And page 4.  
 23 So the project with which we were concerned was  
 24 listed in Annex II, not in Annex I. So:  
 25 "Subject to Article 2(4), for projects listed in

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11:47 1 Annex II, Member States shall --"  
 2 PROFESSOR SANDS: But you are aware of that --  
 3 MR TUSHINGHAM: I know. I know.  
 4 PROFESSOR SANDS: Which is almost incomprehensible,  
 5 actually, to read.  
 6 MR TUSHINGHAM: But just taking the language of the  
 7 directive itself.  
 8 PROFESSOR SANDS: But then you are going to have to take us  
 9 to the judgment, because the judgment basically says  
 10 that an exploratory project on Annex II may nevertheless  
 11 be subject to a mandatory requirement. That's the  
 12 difficulty.  
 13 MR TUSHINGHAM: Well, I just want to just ...  
 14 PROFESSOR SANDS: Because this alone doesn't -- my reading  
 15 was probably as yours was: it appears to be Annex II, no  
 16 issue.  
 17 But then when you read the judgment from 2015, they  
 18 seem to say: no, in certain circumstances you require,  
 19 even for exploratory -- drilling particularly; I think  
 20 it's particularly if it goes beyond 600 metres you've  
 21 got to have a mandatory EIA. So that's my confusion.  
 22 MR TUSHINGHAM: I know.  
 23 PROFESSOR SANDS: The European Court of Justice judgment is  
 24 almost unreadable.  
 25 MR TUSHINGHAM: I will just, if I may, just work through the

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11:48 1 directive first and then we can go to the judgment.  
 2 So:  
 3 "... Article 4(2), for projects listed in Annex II,  
 4 Member States shall determine whether the project shall  
 5 be made subject to an assessment in accordance with  
 6 Article 5 to 10."  
 7 And that is full EIA:  
 8 "Member States shall make that determination  
 9 through:  
 10 (a) a case-by-case examination;  
 11 Or  
 12 (b) thresholds ... set by the Member State."  
 13 So:  
 14 "When a case-by-case examination is carried out or  
 15 thresholds are set, the relevant criteria as set out in  
 16 Annex III shall be taken into account."  
 17 So those are the criteria that are then mirrored in  
 18 the domestic act.  
 19 So this is at the screening stage; this is once the  
 20 preliminary EIA application has been submitted.  
 21 So even if we then go to the judgment and accepting  
 22 the 2015 judgment on its terms, of course we would  
 23 accept that it is therefore a project listed in  
 24 Annex II, exploratory drills, and which Member States  
 25 are then left with a decision on whether to order a full

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11:49 1 EIA or just stop it at the preliminary EIA stage.  
 2 That's the key point, and that's why we say the  
 3 process that was followed did not comply with the  
 4 requirements of the FET standard in the treaty.  
 5 But significantly, it's not just the process, it's  
 6 also the question of whether the suggestion that the  
 7 decisions had significant effects on the environment had  
 8 a rational foundation of fact. That's the key point.  
 9 And so if Slovakia was going to say, "We think this  
 10 drill in Smilno has significant effects on the  
 11 environment", it needs to justify that by reference to  
 12 facts and evidence, and none of those facts have been  
 13 put forward by the other side, as was the case in  
 14 Crystallex.  
 15 PROFESSOR SANDS: And where does it say that in the  
 16 directive though, because the directive gives to the  
 17 state the duty to determine whether to move to a full  
 18 EIA.  
 19 MR TUSHINGHAM: Correct.  
 20 PROFESSOR SANDS: It then requires the full EIA to govern --  
 21 I mean, it may be absurd, but to cover everything.  
 22 MR TUSHINGHAM: If an order for a full EIA has been made,  
 23 and that's the key point.  
 24 PROFESSOR SANDS: But -- which it has in this case.  
 25 MR TUSHINGHAM: Which we say they shouldn't have done.

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11:51 1 practice in relation to this case? I don't know what  
 2 the answer to that question is.  
 3 MR TUSHINGHAM: I think my response to that would be as  
 4 follows. In relation to this aspect, measures 11  
 5 through 13, we are not complaining of a breach of  
 6 national treatment. We're not saying that the process  
 7 that was followed in this case in relation to these  
 8 decisions was different from the process that was  
 9 followed in other decisions. We are attacking the  
 10 decisions themselves.  
 11 THE PRESIDENT: You are saying that the decision lacks  
 12 reason, no?  
 13 MR TUSHINGHAM: Exactly, exactly.  
 14 THE PRESIDENT: That's essentially what you're saying?  
 15 MR TUSHINGHAM: And also lacks a rational foundation of  
 16 fact.  
 17 THE PRESIDENT: But that is more difficult for us to see.  
 18 If there are no reasons you don't know what is behind  
 19 the reasoning.  
 20 MR TUSHINGHAM: Well, exactly, and so therefore it was  
 21 an arbitrary decision.  
 22 PROFESSOR SANDS: But arguing against that, on the other  
 23 hand you're going to have to address the fact that there  
 24 were -- 174 statements somehow came in, separately some  
 25 public bodies came in, some of the public bodies said we

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11:50 1 PROFESSOR SANDS: Does the EIA directive of the  
 2 European Union say, you have to, at the case-by-case  
 3 preliminary assessment stage, have to set out in that  
 4 initial decision what your reasons are for going to  
 5 a full EIA.  
 6 MR TUSHINGHAM: See Article 4(3):  
 7 "When a case-by-case examination is carried out or  
 8 thresholds or criteria are set for the purpose of  
 9 paragraph 2, the relevant selection criteria ... in  
 10 Annex III shall be taken into account."  
 11 So that's at the preliminary stage.  
 12 PROFESSOR SANDS: "Shall be taken into account". It doesn't  
 13 say -- as someone who has spent a long time on these  
 14 wretched directions --  
 15 MR TUSHINGHAM: Of course.  
 16 PROFESSOR SANDS: -- it doesn't require you to specify  
 17 particularly what the basis is in a particularised way.  
 18 And the way that most countries work -- including the  
 19 United Kingdom -- is to say: we've decided we need to  
 20 move to a full EIA.  
 21 Which is why the question that I have for you is:  
 22 has Slovakia departed from its normal practice, in other  
 23 words, are there other EIA preliminary decisions,  
 24 equivalent to the one from August 2017, which specify in  
 25 great detail, and have they departed from their own

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11:52 1 have no problem with this project, others said we have  
 2 a problem with this project; and it's therefore possible  
 3 for a reasonable reader to glean from that that the  
 4 decision-maker must have been influenced by the totality  
 5 of those submissions that were made.  
 6 MR TUSHINGHAM: We would accept that there is a reasonable  
 7 inference, and we don't have time, I'm afraid, given  
 8 time, to go through the Krivá Oľka decision.  
 9 But I would encourage you to read back through the  
 10 Reply at 165 through to 175 where we do undertake  
 11 a comprehensive analysis of why the 174 decisions -- in  
 12 other words, what were the three concerns that were  
 13 raised in the Krivá Oľka decision, and why those  
 14 concerns didn't have a rational foundation of fact and  
 15 weren't properly put forward in a manner that complied  
 16 with the FET standard.  
 17 So that's all I'll say. But it was those three  
 18 measures which we say destroyed the economic and  
 19 commercial viability of the project, as you see most  
 20 closely from slides 147-148 of my opening, and that's  
 21 the October 2017 minutes. And it was that full EIA  
 22 process -- see slide 138 -- that could have taken as  
 23 long as three years. And that's the key point on the  
 24 final nail in the coffin.  
 25 Now, assuming that the Tribunal concludes that the

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11:53 1 EIA decisions breached the FET standard, in other words,  
 2 that those orders for a full EIA were not compliant with  
 3 the treaty, the Tribunal must then wipe out the  
 4 consequences of that illegal act. So we then assume  
 5 that in a but-for scenario a full EIA would not have  
 6 been ordered.  
 7 Well, where does that leave Smilno? Well, the  
 8 Smilno EIA decision was issued in August 2017. You will  
 9 recall that the interim injunction ended in May of  
 10 2017 -- Ms Varjanová's interim injunction. So the  
 11 interim injunction would no longer have prevented AOG  
 12 from entering onto the land plot. And we saw earlier in  
 13 the comments submitted by the Bardejov district office  
 14 during those preliminary EIA proceedings, it was  
 15 accepted that the proposed site is accessible using the  
 16 field road. What's more, the district office deferred  
 17 to the mayor, and he raised no objection.  
 18 And so based on those comments, we say that in  
 19 a but-for scenario it is inherently likely that AOG  
 20 would have been able to use the road, the access land,  
 21 to access the Smilno site.  
 22 Now, Professor Sands, you pointed yesterday to  
 23 Professor Števec's answer to your question: there are  
 24 no clear answers to this question.  
 25 Professor Števec was not conceding that the road

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11:55 1 was not a PSPR. His firm view, both in his expert  
 2 reports and in cross, was that this was a PSPR. And  
 3 obviously we accept the Tribunal is entitled to examine  
 4 that opinion.  
 5 But significantly, this is not a case of rival  
 6 expert opinions, because Slovakia's expert was not  
 7 instructed to express any opinion on whether the road  
 8 was a PSPR. And Dr Fogaš accepted that. This is  
 9 transcript Day 4, page 139, lines 18-24. See also the  
 10 Rejoinder appendix, page 4, footnote 8.  
 11 So you won't find anything of assistance in  
 12 Dr Fogaš' reports, and that's why I didn't ask him any  
 13 questions about the road issue in cross. So you are  
 14 left with Professor Števec's opinion, which we say the  
 15 Tribunal should accept, and we say that this road was  
 16 a PSPR.  
 17 But my final argument here is, even if the Tribunal  
 18 doesn't accept that, in other words, even if the  
 19 Tribunal doesn't accept that the road was a PSPR,  
 20 I would invite you to turn to the Rejoinder at  
 21 paragraph 575. And this is where I'm going to leave  
 22 Smilno. It's internal page, PDF page 178. Hard copy  
 23 pagination 172, electronic page 178 of the Rejoinder.  
 24 Now, this is where they referred to our April 2017  
 25 press release. This is the community agreement, C-171.

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11:57 1 So at paragraph 576:  
 2 "Discovery would undertake Preliminary EIAs and, in  
 3 exchange, the local citizens would stop protesting or  
 4 otherwise stop seeking to block Discovery's project."  
 5 And so the bargain that was reached with the local  
 6 community in the press release was: you will undertake  
 7 preliminary EIAs, and in exchange we will stop blocking  
 8 your project.  
 9 So if the order for a full EIA had not been made --  
 10 which we say in a but-for scenario you should assume  
 11 that it had not been made -- then there would be no  
 12 longer any blockages on the road, and if AOG couldn't  
 13 have used the road as a PSPR, if you move forward,  
 14 please, to paragraph 578(a), over the page, this is  
 15 Slovakia's own case:  
 16 "There would likely have been an agreement  
 17 concerning the Access Land."  
 18 So we say in a but-for scenario, taking the 2017  
 19 community agreement on Slovakia's own case, the Tribunal  
 20 is entitled to assume that an agreement would have been  
 21 reached on the ability to use that land.  
 22 So even if AOG had not been able to use the road on  
 23 the basis that it was a PSPR, this is what would have  
 24 most likely happened, and that would have enabled AOG to  
 25 drill its well.

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11:58 1 Now, if the Tribunal agrees with that analysis, it  
 2 does not need to decide whether impugned measures 1  
 3 through 7 in my table breached the FET standard. What  
 4 the Tribunal must do is ask what would have happened in  
 5 a but-for scenario if the order for a full EIA at Smilno  
 6 had not been made.  
 7 And so we say the answer to that question is  
 8 provided in Slovakia's own Rejoinder.  
 9 And so, unless the Tribunal would like me to address  
 10 measures 1 through 7, I'm happy to do so if you have any  
 11 questions, or if you would like me to, but that's where  
 12 we would rest our case on Smilno.  
 13 THE PRESIDENT: I have a question going back to your saying  
 14 the interim injunction was lifted in May 2017.  
 15 MR TUSHINGHAM: Yes.  
 16 THE PRESIDENT: And the preliminary decision -- the decision  
 17 for the EIA, for the full EIA was taken in August of  
 18 2017.  
 19 MR TUSHINGHAM: August, yes. Yes.  
 20 THE PRESIDENT: And so if that decision had not been taken,  
 21 or had not ordered a full EIA, then the drilling could  
 22 have started --  
 23 MR TUSHINGHAM: Correct.  
 24 THE PRESIDENT: -- from June on.  
 25 MR TUSHINGHAM: Exactly.

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11:59 1 THE PRESIDENT: And by the fact that this decision was taken  
2 in August, that destroyed the project.  
3 Now, I have a causation issue there, because once  
4 you start, when you have a drilling project, do you not  
5 always have to imagine that there may be an EIA that  
6 does delay you?  
7 MR TUSHINGHAM: Ah. Sorry. So I think in terms of June, so  
8 we're not saying that drilling would have taken place --  
9 started in June, immediately after the --  
10 THE PRESIDENT: No, but even if it was sometime during the  
11 three years that you're saying the EIA delayed the  
12 project.  
13 MR TUSHINGHAM: Yes. Well, the point is, if -- so the  
14 decision was issued in August and that was when the  
15 order was made for the full EIA. If the Tribunal is  
16 satisfied that that decision was a breach of the FET  
17 standard, then in a but-for scenario you must wipe out  
18 the consequence of that decision.  
19 THE PRESIDENT: Yes, and my question is what are the  
20 consequences? The consequences are the costs of the  
21 delay, they're not the full project.  
22 MR TUSHINGHAM: Well, the consequence, the most important  
23 consequence, coming back to my legitimate expectation  
24 point, is the inability to drill the well.  
25 THE PRESIDENT: But not forever. For three years, or the

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12:01 1 time of the EIA.  
2 MR TUSHINGHAM: I'm being slow. Please forgive me. My  
3 basic point here is that if the order for a full EIA had  
4 not been made, then there was no other impediment to  
5 Discovery then being able to use the road to access the  
6 Smilno site to drill its well. And so in a but-for  
7 scenario, you would then assume that the well would have  
8 been drilled and that discoveries would have been made.  
9 That's the key point.  
10 And so on a damages point of view, that's the  
11 but-for scenario in which you are operating.  
12 THE PRESIDENT: I don't have a problem with the but-for.  
13 I have a problem with your actual.  
14 MR TUSHINGHAM: The actual, yes.  
15 THE PRESIDENT: Yes, because what is the damage caused by  
16 this decision in August, assuming it is --  
17 MR TUSHINGHAM: Yes, I'm now with you. Please forgive me,  
18 it's been a long night!  
19 So the actual scenario in which Discovery found  
20 itself was then obviously a three-year period where not  
21 only was it not able to undertake any drill at all, it  
22 was also required to then undergo the costs of a full  
23 EIA process, but, most significantly, incurring  
24 overheads and continuing to pay licence fees to the  
25 state during that period where it's not able to do any

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12:02 1 work.  
2 And so the point that was being made at  
3 the October 2017 meeting, the OCM meeting, this is  
4 slides 147 and 148 of my opening, the point that was  
5 being made there as at October is: we can't justify  
6 sitting on our hands for three years; it is not  
7 commercially viable to do so.  
8 And so that's the actual situation in which AOG  
9 found itself.  
10 THE PRESIDENT: Yes. Yes. But you see that it is difficult  
11 on this basis to then justify damages for lost profits  
12 going forward.  
13 MR TUSHINGHAM: But what we would say is, at the very least,  
14 it would justify -- do you mind if I just take one  
15 moment?  
16 THE PRESIDENT: Yes, sure. (Pause)  
17 MR TUSHINGHAM: So the point I would make there on this is  
18 as follows: this wasn't obviously just Smilno. This was  
19 all three drilling sites. And so you have to look at  
20 the situation in which AOG found itself, having been  
21 prevented from drilling a well at Krivá Oľka since  
22 early 2016, and then also now at Smilno.  
23 And the second point is -- sorry, forgive me.  
24 (Pause)  
25 But in terms of then how you then put that forward

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12:04 1 into damages, we would say at the very least there is  
2 a loss of opportunity to drill. That unquestionably  
3 exists. But if you are looking at damages on the basis  
4 of a market valuation, if Discovery had been able to  
5 undertake its drill at Smilno, it would be sitting on  
6 a licence that had a value which you can derive from the  
7 market valuation. And that's the case also at  
8 Krivá Oľka.  
9 So that's how we say it ties together and how we say  
10 the Tribunal should obviously grant an award of damages  
11 in favour of Discovery.  
12 THE PRESIDENT: Thank you.  
13 PROFESSOR SANDS: One aspect you haven't mentioned, and it  
14 does relate also to this EIA issue, and it came up in,  
15 I think, exchanges in relation to the nature and extent,  
16 if any, of a full due diligence done before the  
17 investment was made and in the course of the investment  
18 itself. I mean, there is some authority in the  
19 jurisprudence to which you've made reference that the  
20 legitimate expectation is not a sort of an absolute  
21 right. It's linked to other steps, and one of the steps  
22 is the extent to which a due diligence was or was not  
23 carried out.  
24 So we don't have any evidence before us as to a sort  
25 of formal legal due diligence. But if one homes in

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12:05 1 particularly on the issue of the EIA, and that moment  
 2 when a voluntary undertaking would have been entered  
 3 into, in the context of conversations with members of  
 4 a local community, to submit yourself to a preliminary,  
 5 shall we call it, EIA, one would have thought that  
 6 a reasonable investor would turn their mind at that  
 7 point to the risk that a voluntary preliminary EIA could  
 8 morph into something more horrible, namely what actually  
 9 happened.  
 10 And we don't seem to have before us any evidence --  
 11 but I'm inviting you to say, "Yes, actually there is  
 12 that evidence" -- that the minds of the investors were  
 13 turned to that possibility.  
 14 In other words, if I'm an investor and I enter into  
 15 a voluntary agreement of that kind, I want to know  
 16 what's the real risk, and I'm going to take certain  
 17 steps to inform myself as to the possibility that this  
 18 moves to the unfortunate next phase which, on your side,  
 19 it moved to.  
 20 MR TUSHINGHAM: Yes.  
 21 PROFESSOR SANDS: What steps were taken by the investor, by  
 22 way of due diligence, to inform itself as to the risk of  
 23 submitting itself to a voluntary preliminary EIA?  
 24 MR TUSHINGHAM: Professor Sands, obviously a lot of  
 25 questions, but I will do my best to summarise, and

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12:07 1 I have a number of points I would like to make.  
 2 The first point is that due diligence, as you quite  
 3 rightly pointed out, has been said to be relevant to the  
 4 content of the legitimate expectations standard  
 5 protected under the FET provision in the BIT. But that  
 6 question of due diligence is not relevant to the other  
 7 strands, namely inconsistency and arbitrariness. So  
 8 it's no defence to a state to say, "You should have  
 9 undertaken more due diligence", if the actual complaint  
 10 is that the state has acted arbitrarily. That just  
 11 doesn't work. And so we would say, to the extent that  
 12 due diligence is relevant at all, it could only be  
 13 relevant to legitimate expectations. So that's the  
 14 first point I would make.  
 15 PROFESSOR SANDS: But just on that, in relation to the  
 16 arbitrary standard or discriminatory standard, at that  
 17 particular moment that you are about to agree to  
 18 a voluntary EIA process, I would have thought you ask  
 19 yourselves the question: what is the possibility this  
 20 could go into something worse?  
 21 MR TUSHINGHAM: And I'm going to take you --  
 22 PROFESSOR SANDS: What evidence is there that that question  
 23 was asked?  
 24 MR TUSHINGHAM: Yes. So if we could go, please, to  
 25 Mr Fraser's first witness statement at paragraph 97, and

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12:08 1 you will recall that I mentioned in the EIA application  
 2 they were professionally drawn-up applications by  
 3 a company called Chempro. Chempro were the agency that  
 4 drafted those applications.  
 5 So if we could pull up Mr Fraser's first witness  
 6 statement at page 34, PDF page 34, paragraph 97.  
 7 I'll just wait for it to be pulled up. Page 34.  
 8 So if we scroll down, please, to the bottom.  
 9 So he is talking, in the third to last line, on  
 10 2 August --  
 11 PROFESSOR SANDS: Is this the first or second witness  
 12 statement?  
 13 MR TUSHINGHAM: This is Mr Fraser's first witness statement.  
 14 So:  
 15 "On 2 August 2017, the Bardejov district office  
 16 issued a decision ordering a full EIA in relation to the  
 17 planned Smilno well. This came as a real surprise both  
 18 to us and to Chempro. There were no distinguishing  
 19 characteristics about the site, from an environmental  
 20 perspective, that made it seem a suitable case for  
 21 a full EIA, and Chempro had indicated to us, based on  
 22 their experience, that they expected the application to  
 23 go through without difficulty. The decision itself gave  
 24 no grounds for its conclusion, which I understood it  
 25 should have done by law and found very strange."

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12:10 1 So the point there is that this was not a case where  
 2 AOG submitted to this process expecting that a full EIA  
 3 order would have been made. And that is reinforced,  
 4 I would submit, by having regard to Minister Sólymos'  
 5 statement in January that when 8,000 exploration wells  
 6 have been drilled and not a single environmental problem  
 7 has been identified, that was a reasonable position to  
 8 hold.  
 9 So in my submission it would be unfair to suggest  
 10 that Discovery is in any way responsible for this.  
 11 So that's where I would point the Tribunal to on the  
 12 question of due diligence.  
 13 So unless the Tribunal has any further questions,  
 14 those were going to be my submissions.  
 15 Questions from THE TRIBUNAL  
 16 THE PRESIDENT: Thank you very much.  
 17 I think you had questions?  
 18 MR DRYMER: I haven't even begun!  
 19 But fortunately many of the questions that I had in  
 20 mind to ask have already been discussed, answered,  
 21 either in your submissions or in your responses to my  
 22 colleagues' questions.  
 23 Let's stick with this for the moment, because I will  
 24 go back to Smilno in a second.  
 25 If we look at your slide that you pointed up,

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12:11 1 I think it's page 124, the different boxes in the  
2 proceedings.  
3 MR TUSHINGHAM: Yes.  
4 MR DRYMER: I understand, and you've repeated this a couple  
5 of times, that the gravamen, as you said, later on you  
6 called it the key, were boxes 2 and 3, the proceedings  
7 and the decision that preceded the scope of the full  
8 EIA.  
9 MR TUSHINGHAM: Yes.  
10 MR DRYMER: Can you just clarify something for me, please,  
11 on the proceedings issue, because these are separate --  
12 arguably separate questions: whether the district office  
13 conducted fair proceedings.  
14 Professor Sands asked you whether you can compare  
15 this to proceedings in other cases. I'm not asking  
16 that. I don't want there to be any suggestion that we  
17 don't have sufficient evidence on the record for you to  
18 answer these questions.  
19 Can you tell me where or in what manner the  
20 proceedings here may or may not have reflected the  
21 district office's obligations under an administrative  
22 code or Code of Civil Procedure, or something like that?  
23 MR TUSHINGHAM: I cannot give you an answer to that question  
24 now. We can obviously go away and give it in due  
25 course. But our key point is probably more of

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12:12 1 a forensic point, and it's this, and it goes back to,  
2 again, disclosure.  
3 We asked for full disclosure of all internal  
4 documents that substantiated the orders for a full EIA  
5 by the district offices, and Slovakia voluntarily agreed  
6 to search for those documents, and not a single document  
7 came back.  
8 Now, we say that is rather telling. They confirmed  
9 that no documents have been found. So the fact that  
10 there are no internal documents to substantiate this  
11 process we say just reinforces the unfairness with which  
12 Discovery was treated by the district offices during the  
13 so-called proceedings.  
14 MR DRYMER: Alright. Is that not rather a critique of the  
15 decision, box 3, if you will? That I can more readily  
16 see from your submissions today --  
17 MR TUSHINGHAM: Yes.  
18 MR DRYMER: -- and in the evidence before us. And in fact  
19 I can more readily see that from the paragraph of  
20 Mr Fraser's statement that you pointed up.  
21 MR TUSHINGHAM: Yes.  
22 MR DRYMER: He speaks -- I'm not suggesting he should know  
23 the full details, but he speaks of a procedure whereby  
24 the application was published for comments.  
25 MR TUSHINGHAM: Exactly.

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12:14 1 MR DRYMER: Comments were received. I don't know if the  
2 idea is that is the full procedure required.  
3 But then, of course, the critique -- and I would  
4 think yours too -- goes more to the decision itself.  
5 MR TUSHINGHAM: Exactly. Exactly. Exactly.  
6 MR DRYMER: That clarifies the point.  
7 And of course, even if there was a proper  
8 proceeding, an unfair decision would still vitiate the  
9 process.  
10 MR TUSHINGHAM: Precisely. Precisely.  
11 MR DRYMER: But then you go on, even if that's the gravamen  
12 or key, then you went on at some length today, in  
13 colloquy with Professor Sands, to critique the box 1, 2,  
14 3, 4 --  
15 MR TUSHINGHAM: Yes.  
16 MR DRYMER: -- the imposition of the scope of the full EIA.  
17 MR TUSHINGHAM: This is R-193.  
18 MR DRYMER: Right, exactly.  
19 MR TUSHINGHAM: Yes.  
20 MR DRYMER: And again, logically I understand the point that  
21 even if everything up to box 4 was correct, that  
22 decision too would vitiate the entire process; is that  
23 the case?  
24 MR TUSHINGHAM: Well, we would certainly accept that. Yes.  
25 Yes. But the point is --

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12:15 1 MR DRYMER: Well, I'm not arguing. I'm asking you whether  
2 that ...  
3 MR TUSHINGHAM: Yes, we would maintain that. But the key  
4 point we draw from R-193 is that if these were the  
5 concerns or considerations which the district office was  
6 concerned by, at box 3, or box 2, then in order to  
7 comply with the BIT and the FET standard, they needed to  
8 be put to AOG so that they could be addressed. And we  
9 say they would have been addressed, because you only  
10 look at the Chempro document, and you see why, for  
11 example, a suggestion about chemicals potentially  
12 causing pollution to groundwater would not be a valid  
13 complaint.  
14 MR DRYMER: I think that takes us back to the proceedings  
15 point, and I don't know what proceedings you're telling  
16 us are required. If the only thing required -- I'm not  
17 suggesting this is the case, but if the only thing  
18 required was to receive the Chempro report, to publish  
19 it, to receive comments and then to issue a decision,  
20 I don't see in that loop where there would be any  
21 further discussion with the applicant, and give the  
22 applicant an opportunity to address every concern raised  
23 before a decision is made. I wonder whether the answer  
24 might not be: challenge the decision.  
25 MR TUSHINGHAM: I can tell you this. I will find the

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12:16 1 reference, or my team will find the reference, shortly.  
 2 But during the Krivá Oľka EIA process, it followed  
 3 obviously the same process we have: the application, and  
 4 then it's published, and then we have various comments.  
 5 The district office in that case invited AOG to  
 6 respond to certain comments.  
 7 MR DRYMER: Ah.  
 8 MR TUSHINGHAM: And the point is that during that  
 9 response -- and you see it in the actual decision  
 10 itself.  
 11 MR DRYMER: Yes, thank you.  
 12 MR TUSHINGHAM: We will get the exact document.  
 13 MR DRYMER: I thought I had seen something along those  
 14 lines.  
 15 MR TUSHINGHAM: So the point is that that did not happen at  
 16 Smilno.  
 17 MR DRYMER: I understand.  
 18 MR TUSHINGHAM: And so that is our key complaint.  
 19 MR DRYMER: So that's a distinction between the Smilno EIA  
 20 and the others?  
 21 MR TUSHINGHAM: Exactly.  
 22 MR DRYMER: The other two, the other one?  
 23 MR TUSHINGHAM: I think we explained in our Memorial, if we  
 24 could just --  
 25 MR DRYMER: Well, you know what, let me continue. I've got

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12:18 1 follow a process that is fair, that at the very least in  
 2 order to comply with that obligation, an opportunity  
 3 should have been given.  
 4 MR DRYMER: And here's an example of proceedings --  
 5 MR TUSHINGHAM: Yes.  
 6 MR DRYMER: -- in the record, whether or not they -- okay,  
 7 very good.  
 8 Right, let me switch gears, and come all the way  
 9 back to Smilno, and your very helpful slide 52, table of  
 10 impugned measures. We don't have to look at the  
 11 graphic, but I find it helpful.  
 12 So here's a, I guess, a question of logic and legal  
 13 reasoning. You impugn the actions of the police, the  
 14 prosecutor and the Ministry of Interior, as well as the  
 15 judiciary.  
 16 What if the Tribunal were to find against you in  
 17 respect to the judiciary? What if -- it's all  
 18 hypothetical, you know how this goes.  
 19 MR TUSHINGHAM: Yes. Yes.  
 20 MR DRYMER: What if the Tribunal were to determine, well,  
 21 not only was there no breach of the treaty, but the  
 22 judiciary effectively correctly articulated Slovak law?  
 23 MR TUSHINGHAM: Yes.  
 24 MR DRYMER: Would the other measures, or the claims for  
 25 breaches of the treaty by virtue of the acts of the

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12:17 1 other questions on other points, perhaps while your  
 2 colleagues come to the Memorial paragraphs on that.  
 3 MR TUSHINGHAM: Sure.  
 4 MR DRYMER: Let me switch gears --  
 5 MR TUSHINGHAM: Sorry, I can give you the exhibit reference  
 6 now.  
 7 MR DRYMER: Oh, please.  
 8 MR TUSHINGHAM: It's Exhibit C-182, it's AOG's submission to  
 9 the Medzilaborce district office dated  
 10 18 September 2017, and that was AOG's comprehensive  
 11 response to all of the objections that had been raised  
 12 at Krivá Oľka.  
 13 MR DRYMER: I see.  
 14 MR TUSHINGHAM: And explaining why each objection had no  
 15 merit and wasn't -- and that process wasn't followed in  
 16 relation to Smilno.  
 17 THE PRESIDENT: Is there a requirement that it is followed?  
 18 I'm looking at this EIA Act and it doesn't really help  
 19 me.  
 20 MR TUSHINGHAM: No, I haven't seen any -- unless my team can  
 21 correct me otherwise, I haven't seen any requirement  
 22 that they, under domestic law, that they give an  
 23 applicant an opportunity to comment.  
 24 But we would say that at the level of international  
 25 law, in terms of the obligation of the state to act,

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12:20 1 police, the prosecutor and the MoI fall away?  
 2 MR TUSHINGHAM: We completely accept that.  
 3 MR DRYMER: It's a question. It's not a --  
 4 MR TUSHINGHAM: And that is why I wanted to put my case in  
 5 closing on the basis of saying --  
 6 MR DRYMER: Because that's all on the basis of what the law  
 7 is.  
 8 MR TUSHINGHAM: Because the point is, the prosecutor was  
 9 obviously talking about the injunction.  
 10 MR DRYMER: Of course.  
 11 MR TUSHINGHAM: And of course if the injunction was rightly  
 12 granted, we're not going to suggest that it was  
 13 improper.  
 14 MR DRYMER: Of course, very good.  
 15 MR TUSHINGHAM: But our key point on Smilno is that if you  
 16 are with me in relation to the EIA aspect --  
 17 MR DRYMER: Yes.  
 18 MR TUSHINGHAM: -- this is all in the past and the Tribunal  
 19 doesn't need to concern itself with measures 1  
 20 through 7.  
 21 MR DRYMER: Precisely.  
 22 Well, there you join issue with one point that  
 23 I recall being made by Respondent in its written  
 24 pleadings, that by the time the EIA, the agreement to  
 25 enter into the voluntary EIA arose, everything else is

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12:21 1 water under -- over the dam, under the bridge.  
 2 MR TUSHINGHAM: However you would like to put it. But the  
 3 point is, I think it's described by our friend as  
 4 "a fresh start".  
 5 MR DRYMER: Those are the words I'm looking for.  
 6 MR TUSHINGHAM: And if you are with me on this way of  
 7 expressing the case --  
 8 MR DRYMER: Yes.  
 9 MR TUSHINGHAM: -- we actually turn the Respondent's case to  
 10 our advantage and say: actually, this is what would have  
 11 happened in a but-for scenario.  
 12 MR DRYMER: I fully understand that.  
 13 Excuse me, I had a number of other questions but  
 14 I think they've been covered.  
 15 Madam President, if you will give me a moment to  
 16 look through my notes, I think that might be it.  
 17 THE PRESIDENT: Sure.  
 18 (Pause)  
 19 MR DRYMER: That's it.  
 20 THE PRESIDENT: Good. Thank you very much. It was a little  
 21 longer than we had thought.  
 22 MR TUSHINGHAM: I apologise.  
 23 THE PRESIDENT: But it was very helpful.  
 24 So I suggest we take a 15-minute break now, and then  
 25 we'll listen to the Respondent. Good.

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12:41 1 Discovery has confronted the facts that contradict its  
 2 case; it has simply ignored them. So just as I did in  
 3 the opening statement, Mr Pekar and I today will again  
 4 tell you the facts that are relevant, but were not  
 5 mentioned this morning.  
 6 The second preliminary point is, recall our opening  
 7 statement, and now just think about the evidence that  
 8 you have heard over the past four days. That evidence  
 9 confirmed everything that we told you in our opening  
 10 statement. The evidence at the hearing thus far showed  
 11 you that in its short time in Slovakia, AOG violated  
 12 Slovak law, committed numerous legal errors, and showed  
 13 a profound disregard for the very citizens that called  
 14 this land their home.  
 15 First, some preliminary remarks about Smilno. The  
 16 PSPR theory was the central pillar to Discovery's case  
 17 prior to this hearing. But the Tribunal has now seen  
 18 that it was, indeed, a private dispute between concerned  
 19 citizens and AOG about private land.  
 20 Smilno's mayor, who appeared before you, admitted  
 21 that his view was the field track was not a PSPR but  
 22 instead a field track. Think about the importance of  
 23 that admission. That is AOG's and Discovery's own  
 24 witness admitting that the central theory of their case  
 25 is wrong.

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12:22 1 (12.22 pm)  
 2 (A short break)  
 3 (12.39 pm)  
 4 THE PRESIDENT: So let's resume. I give the floor to the  
 5 Respondent. Mr Anway.  
 6 Submissions by the Respondent  
 7 MR ANWAY: Yes, thank you, Madam President. Members of the  
 8 Tribunal.  
 9 On behalf of Slovakia we would like to begin by  
 10 thanking you for such a well-run hearing and for the  
 11 attention you have paid to this important matter.  
 12 In our presentation today I will provide the  
 13 introduction, in which I will make some brief remarks  
 14 about the three topics identified by the Tribunal  
 15 yesterday, and then we will be going into each topic in  
 16 some more detail.  
 17 I will be handling Smilno; Mr Pekar will then be  
 18 addressing Ol'ka, measures 8, 9 and 10 in the EIAs.  
 19 First the introduction. We have two preliminary  
 20 points. First, what Discovery did this morning is the  
 21 same thing that it did in its opening statement. You  
 22 will recall me saying in our opening statement that the  
 23 strategy appears to be the following: when a fact does  
 24 not fit within Discovery's narratives, it simply treats  
 25 the fact as though it doesn't exist. It is not that

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12:43 1 Indeed, as I told you in the opening statement,  
 2 every state body that has been asked to consider the  
 3 question of whether the track was a PSPR has rejected  
 4 that theory. The district court rejected it, the Court  
 5 of Appeals rejected it, the Ministry of Interior  
 6 rejected it, the traffic directorate rejected it, and  
 7 now, before you members of the Tribunal, the mayor told  
 8 you that he rejected it.  
 9 And so after five days of hearing, it is now  
 10 undisputed that no state body ever adopted the central  
 11 theme to Discovery's claim in this arbitration: that the  
 12 field track was a PSPR.  
 13 I want to talk, if I might, at the outset, about  
 14 an exchange between counsel and Mr Drymer.  
 15 Mr Drymer, you had asked, very rightly: let's  
 16 suppose that the court decisions were correct. What  
 17 happens to all of the other acts that are complained  
 18 about in measures 1 through 7?  
 19 MR DRYMER: You are giving me the opportunity to clarify --  
 20 MR ANWAY: I apologise if I --  
 21 MR DRYMER: No, no, you did great, you did great, that's  
 22 what I said, but I meant correct not only in Slovak law,  
 23 but also untainted by political pressure. Just to be  
 24 clear on that.  
 25 Thank you. Go on.

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12:44 1 MR ANWAY: The answer back was, effectively, that if those  
2 court decisions were correct, the injunction was lawful,  
3 then those acts were no longer challenged.  
4 Now, why is that so important? And this comes back  
5 to Professor Sands' question of Discovery's legal  
6 expert. The question was as follows (Day 4, page 34,  
7 lines 19-23):  
8 "So if there are multiple opinions,  
9 I'm understanding you, sir, to be saying there is  
10 a multitude of reasonable opinions that go in different  
11 directions. Am I correct in understanding you in that  
12 way?"  
13 And the answer was (Day 4, page 34, line 24 to page  
14 35, line 1):  
15 "Yes, you do understand absolutely correctly. It is  
16 one of several questions to which there is no clear  
17 legal answer."  
18 Now, as I've already pointed out, every state body  
19 that ever considered the question came to the same  
20 conclusion, including the courts, which he had  
21 identified -- and I'll point you to that testimony  
22 later -- is the definitive view on what is the status of  
23 this road.  
24 But just pausing on the [question] that  
25 Professor Sands asked and Discovery Global's legal

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12:45 1 expert's response to it, that reasonable minds could  
2 differ on this question.  
3 And then you combine that with this testimony (Day  
4 4, page 75, lines 7-9):  
5 "Professor Sands: Are the judges on the Appeals  
6 Court independent?  
7 Answer: Of course."  
8 Coming from Discovery's own expert (Day 4, page 75,  
9 lines 10-18):  
10 "Professor Sands: Do you have any evidence that the  
11 judges on the Appeals Court decided as they did on the  
12 basis of any pressure brought upon them by the state?  
13 Answer: Definitely I never in my life have heard  
14 anything like that, sir, no.  
15 Professor Sands: So your opinion would be, although  
16 the court got it wrong, the Court of Appeals got it  
17 wrong, it exercised independent and impartial judgment?  
18 Answer: No doubt, yes."  
19 In short this means that Discovery's complaints  
20 about the courts, which is where Mr Drymer's questions  
21 started with counsel, which are effectively denial of  
22 justice claims, cannot possibly meet the standards for  
23 a breach of public international law. That is to say,  
24 the testimony elicited by Professor Sands from  
25 Discovery's legal expert effectively said that these

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12:46 1 judges were not under any improper pressure, they  
2 exercised independent judgment, but in his view they got  
3 it wrong.  
4 Members of the Tribunal, we all agree, you are not  
5 a Court of Appeals that sits in review of lower-court  
6 judgments on domestic law. And when we have the  
7 admission from Discovery's legal expert that reasonable  
8 minds may differ on this -- a theory we don't need to  
9 adopt because we say all of the state decisions on this  
10 issue were uniform, but even if we were to grant that --  
11 coupled with his admission that there is nothing  
12 inappropriate about what the court did, aside from  
13 perhaps reaching the incorrect legal conclusion, it  
14 means it cannot possibly meet the standards of  
15 international law.  
16 I'll come back to that in a moment, including  
17 reference to case law on how egregious a court error  
18 must be for it to rise to the level of a breach of  
19 public international law and equate to a denial of  
20 justice.  
21 Finally, as I'll discuss also in more detail, the  
22 hearing testimony confirmed that AOG did not seek, much  
23 less obtain, the social licence from the local community  
24 before the critical period of time; that the protesters  
25 were not just one or two people, but rather a group of

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12:48 1 local citizens trying to defend their land; that AOG  
2 never obtained the permission required by Article 29 of  
3 the Geology Act to enter that land; that it violated the  
4 landowners' preemption rights when it purchased  
5 a 1/700th share; that a court issued a lawfully granted  
6 injunction prohibiting AOG from even accessing the site;  
7 that it then created a shell company to circumvent the  
8 injunction; that Mr Crow faked his injury; that AOG  
9 waited almost seven months to test its PSPR theory in  
10 court, and when the courts rejected that theory never  
11 tried to access the site again.  
12 Preliminary remarks on Krivá Ol'ka. In short, this  
13 claim is based on a legal mistake made by AOG. The  
14 Ministry ultimately ruled in AOG's favour, and then AOG  
15 refused to participate further. The arguments we heard  
16 today were based on significant misrepresentations of  
17 the Minister's testimony, and Mr Pekar will point you to  
18 examples of that.  
19 It is undeniable that AOG failed to timely extend  
20 the lease. It is undisputed that AOG sent a new  
21 contract for signature to Lesy, and Lesy did not  
22 respond. And it remains undisputed that Lesy's acts are  
23 not attributable to the state.  
24 The only thing the Minister could have done was to  
25 deny the request for the extension because there was no

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12:50 1 way for her to bring back a dead contract to life by  
2 "amending it".  
3 The testimony you heard during this hearing also  
4 confirmed that AOG then started an Article 29 compulsory  
5 process proceeding. During his examination the Minister  
6 explained that the first-instance proceeding is run by  
7 the state geological administration. He is the  
8 appellate body. And that he never issued instructions  
9 regarding the first-instance proceeding. It was  
10 a standard procedure taking place, and there was  
11 a separation of two levels of review.  
12 The testimony confirmed that AOG filed an appeal  
13 with the Minister and won.  
14 During his testimony the Minister explained that as  
15 required by the Code of Administrative Procedure, he, as  
16 the appellate body, is assisted by a committee formed of  
17 prominent law professors and legal scholars in the field  
18 of administrative law. Again, standard practice. And  
19 that the Minister taking advice from that committee  
20 ruled in AOG's favour.  
21 During his testimony, Discovery presented him with  
22 a new theory: that he should have engaged in  
23 fact-finding during the appeal and ruled definitively  
24 for AOG so there was no remand.  
25 Although we were never presented with a fair

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12:51 1 opportunity to respond to that argument, because it was  
2 only put to the witness during this hearing, the  
3 Minister explained that it was standard practice, and of  
4 course, all of us familiar with courts of appeals know  
5 this: for a court of appeals, if it finds there to be  
6 a legal error, and for further fact-finding to be  
7 required, to remand it to the body that typically does  
8 the fact-finding.  
9 In this case the first-instance body has the  
10 personnel necessary to do the fact-finding. And  
11 consistent with that standard practice, a legal error  
12 was found -- it was not a factual error, it was a legal  
13 error -- further fact-finding was required.  
14 Now, what was that further fact-finding? Recall  
15 this is a compulsory process. It is a big deal for  
16 a state to require a private party to relinquish its  
17 right to keep others off their property. It is a remedy  
18 of last resort.  
19 So, before the Ministry is about to impose an order  
20 that forces private parties to relinquish their rights,  
21 it wants to know: is it really the case that we can't  
22 reach agreement here; that there can't be a new contract  
23 signed between AOG and Lesy? And that's the factual  
24 issue on which he requires further investigation on  
25 remand.

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12:52 1 That is eminently reasonable. And that is exactly  
2 what the first-instance body did. It asked AOG to  
3 furnish proof that it could not sign a new contract with  
4 Lesy. And what did AOG do? They walked away. They  
5 walked away from the proceeding. They voluntarily  
6 refused to participate.  
7 Having appealed once in this process and having won  
8 the appeal, when the first-instance body simply asked  
9 them, "Can you provide us some evidence that this really  
10 can't be resolved voluntarily before we do something  
11 that is a remedy of last resort", rather than comply  
12 with that simple instruction -- an eminently reasonable  
13 instruction thereto -- AOG voluntarily walks away.  
14 As for the memo that has received attention, the  
15 record now shows the memo was a draft. It was never  
16 made to the Minister, the Minister never saw it, and he  
17 categorically rejected that he gave any instruction.  
18 I would note also that we are the only party in this  
19 proceeding who has put forth a witness who was part of  
20 the Article 29 proceeding. Discovery has put forward  
21 no one.  
22 In short, I say what I said at the beginning: this  
23 claim, measures 8, 9 and 10, are based on a legal  
24 mistake made by AOG in not requesting the extension to  
25 the lease in a timely manner. The Minister ultimately

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12:54 1 ruled in AOG's favour, and then AOG on remand refused to  
2 participate when it was asked to simply provide evidence  
3 that it couldn't voluntarily reach an agreement with  
4 Lesy.  
5 Finally, the preliminary remarks on the EIAs. The  
6 whole point of a preliminary EIA is to determine whether  
7 a full one is necessary. We now know that AOG agreed  
8 voluntarily to do the preliminary EIAs, and there is no  
9 credible evidence that the state guaranteed that there  
10 would be no full EIA if they performed a preliminary  
11 one.  
12 So how could it possibly be that Discovery can say  
13 they had no legitimate expectation that AOG would have  
14 to perform full EIAs, if that was the result of the  
15 preliminary EIA process?  
16 MR DRYMER: Didn't we hear today that their expectation was  
17 rather that the proceeding would be fair and the result  
18 would be fair?  
19 MR ANWAY: Yes, and Mr Pekar will be addressing that in  
20 detail.  
21 MR DRYMER: There you go. Because I also -- maybe I dreamt  
22 this, but I think I heard a concession that of course,  
23 if that proceeding had fairly resulted in the need for  
24 a full EIA, then that wouldn't be an issue.  
25 MR ANWAY: We did hear that today. I believe for the first

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12:55 1 time, but yes.  
 2 The Minister, to be clear, in his written testimony,  
 3 had stated, and testified, that he thought they had  
 4 already started drilling prior to 1 January 2017.  
 5 But when AOG applied for the EIAs they stated in all  
 6 three applications that the drilling activities would  
 7 start only in the future. That meant that all the  
 8 drilling would have occurred after the Slovak  
 9 legislation had been amended to require the preliminary  
 10 EIAs even for exploration drilling. In other words,  
 11 they knew that they needed preliminary EIAs for all  
 12 three sites.  
 13 And we also saw that this agreement to do the  
 14 preliminary EIAs was not at an instruction from the  
 15 Minister. They had rejected that instruction. Instead,  
 16 the agreement for the preliminary EIAs was based on  
 17 AOG's efforts with local citizens, as a way to try to  
 18 obtain the social licence that it never obtained from  
 19 the start, and for them to stop their opposition to the  
 20 drilling sites.  
 21 Now, this is a key point that was not discussed this  
 22 morning, but it's critically important. You heard AOG  
 23 and Discovery complain about the decisions that full  
 24 EIAs were required. But they could have appealed those  
 25 decisions. And, indeed, they did one: they appealed the

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12:57 1 Poruba site determination that a full EIA was required.  
 2 I asked you rhetorically in my opening statement, I'll  
 3 ask it again rhetorically now: why, of all three sites,  
 4 would that be the site for which you file the appeal on  
 5 the full EIA, Poruba? The site where we're told they  
 6 effectively concluded they had no real prospects.  
 7 And again, what happened on appeal? AOG won. They  
 8 did not even file appeals for the other two. Mr Pekar  
 9 will describe this in more detail later. But having  
 10 decided not to appeal the decisions for full EIAs at the  
 11 time, Discovery cannot come to you, members of the  
 12 Tribunal, and complain about them now. They have to  
 13 give the legal system scope to operate.  
 14 They had the ability to appeal these decisions if  
 15 they thought they were wrong, if they thought the  
 16 process wasn't fair, if they thought the conclusions  
 17 that were reached were made up. But they didn't follow  
 18 those appeals.  
 19 PROFESSOR SANDS: Well, just to be clear on that, there  
 20 isn't a requirement in the BIT to exhaust local  
 21 remedies. I mean, if we take their argument on its  
 22 face, if they considered that there was on its face  
 23 a violation of the standard required by the BIT,  
 24 I'm assuming it's not your case that they had  
 25 an obligation to exhaust local remedies?

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12:58 1 MR ANWAY: Go ahead.  
 2 MR PEKAR: Here I would point to the analysis in the Helnan  
 3 v Egypt case, and then the annulment of Helnan v Egypt,  
 4 which are very instructive on this point.  
 5 The interpretation of the standard of FET and the  
 6 scope of investment protections under the BIT also other  
 7 than the FET was done at the level of the first decision  
 8 in Helnan v Egypt, to require the investor, basically,  
 9 to first use appeals available within the administrative  
 10 procedure, and then bring the issue to the courts as  
 11 well.  
 12 The annulment committee then agreed with that only  
 13 partially, and the annulment committee stated: yes, the  
 14 investor must exhaust appeals available within the  
 15 administrative procedure, not as a matter of exhaustion  
 16 of local remedies, because the local remedies are the  
 17 courts, but as a matter of, I would say, sufficient  
 18 gravity, seriousness of the incorrect administrative  
 19 decision.  
 20 The reasoning is based on the fact that, as we know,  
 21 a simple first-instance administrative body may just get  
 22 it wrong. That's why we have these appeals.  
 23 And we need to give space, as Mr Anway put it, to  
 24 the administration system as a whole to operate, which  
 25 also means that an issue needs to be brought to the

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13:00 1 upper levels of the administration, here the appellate  
 2 administrative body.  
 3 THE PRESIDENT: But of course you understand that there are  
 4 decisions that say otherwise, and how the administrative  
 5 system is organised, and whether you have an appeal to  
 6 an administrative body or to a court will depend from  
 7 jurisdiction to jurisdiction.  
 8 So I don't find this so convincing, frankly.  
 9 MR PEKAR: Well, this is not only in Helnan, it's also in  
 10 ECE v Czech Republic, which was very similar to the  
 11 fact, in fact, in the sense that the delays stemming  
 12 from the multi-level administrative procedure were said  
 13 to be the cause of the problem.  
 14 I believe that if every single wrong administrative  
 15 decision were supposed to engage international liability  
 16 of the state, that would be excellent news for  
 17 investment arbitration specialists.  
 18 PROFESSOR SANDS: But doesn't that go really to the point  
 19 that the President raised in earlier exchanges: it's  
 20 about the nature of the damage that is then recompensed?  
 21 It may well be that if you go too early, the only cause  
 22 of action that arises is in relation to the delay rather  
 23 than the destruction of the entire investment?  
 24 The simple point I think you're hearing from the  
 25 President and from me is, I think we would be -- well,

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13:02 1 I'll speak for myself -- reluctant to read into a BIT  
2 something that looks like an exhaustion of local  
3 remedies rule, when plainly the drafters of the treaty  
4 have not taken that step.  
5 MR PEKAR: I respectfully disagree with that. I've been  
6 doing this for 22 years and I can tell you --  
7 THE PRESIDENT: We have done it for as long or longer.  
8 MR PEKAR: And I believe that the distinction between  
9 exhaustion of local remedies in the sense of court  
10 intervention, and the operation of the administrative  
11 system as a whole, is a well-established one. Obviously  
12 there being no supreme court of investment arbitration,  
13 I'm well aware of the fact that the case law may be  
14 divergent on this and other issues.  
15 MR ANWAY: But that is -- and of course we would never  
16 suggest we have any more experience than the  
17 arbitrators, as we understand the Tribunal is even more  
18 experienced. But the analogy of course is to the court  
19 system where you would not find an exhaustion of local  
20 remedies requirement in the treaty either, but  
21 nevertheless it is very well accepted, as the Tribunal  
22 members know, that when you have a claim for a denial of  
23 justice, it is expected that the party at least avail  
24 itself of the appellate options that are present. And,  
25 the analogy here to the administrative system where you

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13:03 1 similarly have appeals that are available to correct  
2 lower body errors, if they exist, we think is an apt  
3 one.  
4 THE PRESIDENT: Yes, but of course denial of justice is  
5 precisely the exception that confirms the rule about  
6 exhaustion of local remedies.  
7 MR ANWAY: We understand.  
8 In short, with respect to the EIAs, there was no  
9 retroactivity, there was no conflict with any legitimate  
10 expectations, and this cannot be, in our view,  
11 a violation of the treaty because they complain of  
12 first-instance administrative decisions which they could  
13 have made, in two instances did not do so, and in the  
14 one they did appeal they actually prevailed.  
15 Now, let me move on to Smilno in particular. I'd  
16 like to start with an exchange between Professor Sands  
17 and opposing counsel during the opening statement. This  
18 is Day 1, page 28, lines 14-24, and it's over this  
19 critical issue of what due diligence AOG made with  
20 respect to Smilno.  
21 And in response to Professor Sands' question,  
22 counsel stated:  
23 "Of course we can't point to a legal opinion that  
24 has been produced in this arbitration which confirms at  
25 the time that the road was a public road."

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13:04 1 In addition to the due diligence that should have  
2 been performed, Discovery should have expected that  
3 people may oppose its activity on their land.  
4 You now, members of the Tribunal, have heard from,  
5 and seen, some of those local citizens. Ms Varjanová,  
6 when she was asked about whether she agreed with the  
7 description of "activists", said "I feel like a citizen,  
8 not like an activist". You will remember that  
9 testimony. You saw how credible she was. These are not  
10 made-up concerns. This was a landowner trying to  
11 protect her land and her environment.  
12 You also heard from Mr Leško. Again, I told you  
13 during our opening statement we were not here to  
14 represent these private citizens, but we wanted you to  
15 hear their story from them directly, and now you have  
16 had the opportunity to do so, and that's Day 3,  
17 page 226, lines 6-14.  
18 MR DRYMER: Remind me, please, why, other than the very  
19 understandable opportunity to give these citizens,  
20 leading members of their communities, members of their  
21 communities, a chance to speak, why is it important to  
22 your case that we find them credible and their evidence  
23 to be accepted?  
24 MR ANWAY: With respect to the social licence that we say  
25 should have been obtained and never was, and never was

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13:06 1 even sought to be obtained, among other reasons.  
2 MR DRYMER: Very good. Thank you.  
3 Well, later on I'll ask you where that fits into  
4 your defence. But thank you.  
5 MR ANWAY: We trust that their testimony showed that they  
6 were not the only local citizens who protested, that  
7 their concerns were understandable, and that AOG did not  
8 obtain the social licence with them prior to the  
9 critical period of time.  
10 The testimony of Mr Fraser confirmed that  
11 an injunction was issued that prohibited AOG from even  
12 accessing the site, and that it was his understanding  
13 that AOG was not permitted under law to access the site.  
14 His testimony also confirmed that AOG created  
15 a shell company, Smilno Roads, to circumvent that  
16 lawfully issued court injunction. And that despite the  
17 injunction, AOG, using that shell company, in fact  
18 accessed the site repeatedly, modified the road without  
19 landowner permission or a permit, and in violation of  
20 the injunction, and in fact moved the road.  
21 It's easy, I think, to get lost in the minutiae of  
22 the case and forget that. As we pointed out on slide  
23 110 of our opening, that timeline, throughout the  
24 critical time period in this arbitration at Smilno, AOG  
25 was repeatedly violating that injunction. You will see

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13:07 1 on that timeline eight different instances where it  
 2 violated the court-issued injunction.  
 3 In other words, for the vast majority of time that's  
 4 relevant here for Smilno, AOG was in open violation of  
 5 Slovak law.  
 6 We learned during the testimony from the hearing  
 7 that Mr Crow said he was willing to come testify as  
 8 a witness in this arbitration. And, according to  
 9 Mr Lewis, he certainly wasn't prohibiting him from doing  
 10 so. You may ask yourselves, members of the Tribunal, as  
 11 we did, then why isn't Mr Crow here?  
 12 We were criticised quite heavily this morning for  
 13 not making certain people witnesses in this arbitration:  
 14 "It would have been the simplest thing in the world  
 15 for Slovakia to produce a witness statement from  
 16 Mr Hrvol ..."  
 17 That's 11.12.12 (page 31, lines 6-8) from this  
 18 morning.  
 19 We find that an interesting comment to make when  
 20 they are putting forward fictitious evidence of  
 21 a particular individual, they are caught in that, and,  
 22 neither in the Memorial, with that fictitious evidence,  
 23 nor in the Reply when they had the opportunity to  
 24 respond, put any witness statement in from Mr Crow.  
 25 It's confirmed by Mr Fraser's testimony that after

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13:09 1 this faked injury, AOG pressed the police to arrest one  
 2 of the local citizens for it. They criticised the  
 3 police for not arresting the local citizens for it.  
 4 Thankfully the police didn't arrest someone on false  
 5 charges, and yet again acted appropriately.  
 6 We were criticised quite heavily this morning about  
 7 missing documents, again a very interesting charge given  
 8 that we only found out in the middle of the hearing  
 9 about the attachment to AOG's letter to the mayor, which  
 10 turned out to be so important.  
 11 MR DRYMER: You also heard that it was an honest mistake.  
 12 I don't know whether you accept that, but I think that's  
 13 what I heard, that it was intended to be translated and  
 14 somewhere in the process it slipped through the cracks.  
 15 MR ANWAY: Yes. I recall that.  
 16 What about the prosecutor? You saw the prosecutor  
 17 testify. You saw how credible she was. She came to the  
 18 site not because the local citizens called her, as had  
 19 previously been suggested, but because AOG had called  
 20 the police and the police in turn called the prosecutor.  
 21 She testifies that when she arrived at the site she  
 22 was told the injunction didn't apply to them. We now  
 23 know that to be a false representation. And she  
 24 determined that this was a civil dispute rather than  
 25 a criminal one, and left the site.

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13:11 1 What about the mayor? Let's be clear that none of  
 2 the impugned measures rely on the mayor's conduct. But  
 3 the mayor confirmed -- their own witness -- that the  
 4 field track was not a PSPR, the central theme to their  
 5 case, and in fact was only a field track; Day 3,  
 6 page 72.  
 7 What about the courts? There was some discussion  
 8 during the hearing, again for the first time, that the  
 9 action that was brought by AOG for an injunction, and  
 10 the court's decision of it, was somehow improper. But  
 11 those aren't part of the impugned measures either.  
 12 Remember, that court decision you were never even told  
 13 about in the Memorial. Discovery didn't even inform the  
 14 Tribunal that they had tested their PSPR theory before  
 15 the Slovak courts, and that both courts that had  
 16 an opportunity to address that theory had rejected it.  
 17 And, as I said earlier, we have Discovery's legal  
 18 expert, who believes -- and we don't accept this  
 19 proposition, but states that on the issue of the PSPR it  
 20 is one of several questions "to which there is no legal  
 21 answer".  
 22 And now I come to the denial of justice cases.  
 23 What must be necessary for a court's decision,  
 24 a domestic court's decision, to violate international  
 25 law? This is cited in our Counter-Memorial,

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13:13 1 paragraph 356, citing a variety of different cases,  
 2 which you can find in footnote 479:  
 3 "The international delict of denial of justice is  
 4 subject to a particularly high threshold. It only  
 5 sanctions a systematic and flagrant failure of the host  
 6 State's judiciary to grant due process to the investor  
 7 and is only available where the investor has exhausted  
 8 all available local remedies."  
 9 Another cite, from paragraph 363 from our  
 10 Counter-Memorial, citing the Iberdrola v Guatemala case:  
 11 "denial of justice is not a mere error in  
 12 interpretation of local law, but an error that no merely  
 13 competent judge could have committed and that shows that  
 14 a minimally adequate system of justice has not been  
 15 provided."  
 16 Or in Jan de Nul: absent proof of discrimination or  
 17 severe impropriety, an international tribunal cannot  
 18 review the scope of jurisdiction of domestic court or  
 19 their application of national law.  
 20 When you take that authority and you put it next to  
 21 their own legal expert's conclusion, this was an issue  
 22 on which legal minds could differ. As well as the  
 23 admission that there was no improper pressure put on the  
 24 court, and that they were exercising independent  
 25 judgment, it shows you that the criticisms of the courts

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13:14 1 that you have heard in relation to Smilno don't come  
 2 remotely close to breaching public international law.  
 3 And so in sum on Smilno: no due diligence; not  
 4 engaging with activists to get a social licence;  
 5 antagonising them by going on their land to physically  
 6 remove their automobiles; bombard the car with concrete  
 7 cement blocks so they can't remove them; creating  
 8 a shell company to circumvent a lawful court injunction,  
 9 faking an injury and trying to have local citizens  
 10 prosecuted for it. And two court decisions that found  
 11 the PSPR theory to be invalid, together with every other  
 12 state official that had analysed the question and was  
 13 asked to give an opinion about it.  
 14 In conclusion, in the short time in Smilno, AOG, as  
 15 I said, violated Slovak law, committed legal errors and  
 16 showed a profound disregard for the very citizens that  
 17 called this land their home.  
 18 We respectfully submit that Discovery's claim, and  
 19 particularly establishing that the court decisions,  
 20 coming back to the exchange between Mr Drymer and  
 21 counsel this morning, if those decisions are correct, if  
 22 that injunction was lawful, all of those other measures  
 23 fall away. And we would respectfully submit that it has  
 24 been established that claims 1 through 7 now are no  
 25 longer viable.

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13:16 1 Before I turn it over, with your leave,  
 2 Madam President, to Mr Pekar, there's one other issue  
 3 that came out yesterday during the testimony that  
 4 I would ask Mr Pilawa to address very briefly. Just to  
 5 correct something that I think may have caused confusion  
 6 with the Tribunal. Thank you.  
 7 MR PILAWA: Thank you, Madam President.  
 8 So if you will recall, at the end of  
 9 Mr Duarte-Silva's testimony and Mr Acklam's testimony,  
 10 you asked them about the royalty with respect to sunk  
 11 costs, and whether they contested the royalty.  
 12 They didn't mention it in their expert reports, but  
 13 we contest it, and we contested it in our Rejoinder, and  
 14 I can point you to the paragraph and just give a brief  
 15 explanation why, but it's paragraph 725 of our  
 16 Rejoinder. And the reason why we contest it as a sunk  
 17 cost is because Discovery Global or AOG never paid  
 18 £120,000 for that royalty: it was purchased by a company  
 19 called Alpha Exploration, which is another company of  
 20 Mr Lewis', and then transferred to Discovery Global for  
 21 nominal consideration of \$10. And you can find that at  
 22 C-84. And so we do contest that in the sunk costs  
 23 calculations. Thank you.  
 24 MR ANWAY: And it's not to say our submission was that the  
 25 expert was wrong; just that the expert was not asked to

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13:17 1 consider that.  
 2 MR PEKAR: Members of the Tribunal, I will now address you  
 3 specifically on the Krivá Oľka alleged violations of  
 4 the BIT and the EIA-related alleged violations of the  
 5 BIT.  
 6 Before doing so, I would like to respond to a point  
 7 which was put to us in the closing statement of the  
 8 Claimant, stating that we did not really engage with  
 9 their arguments on legitimate expectations. In fact,  
 10 I believe we did. What I would like to point out here,  
 11 and frankly that's a repetition of something that  
 12 I stated already in our opening statement, there is  
 13 a significant misconception on the part of the Claimant  
 14 with respect to how legitimate expectations operate, and  
 15 how they operate specifically in our case.  
 16 I believe that it is undisputed that legitimate  
 17 expectations have to be based on specific assurances  
 18 provided by persons which have the authority to provide  
 19 such assurances. A very good discussion of these  
 20 various categories of assurances which may be provided  
 21 is to be found in, I believe, Continental v Argentina.  
 22 It is, I believe, undisputed that these assurances  
 23 must be provided before or at the time of investment.  
 24 Therefore, to put it differently, the alleged legitimate  
 25 expectations must be investment-backed.

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13:20 1 What is a consequence of just this temporal rule?  
 2 The consequence of this temporal rule is that the only  
 3 source of potential legitimate expectations in the  
 4 present case can be, as it was, I believe, admitted this  
 5 morning, the exploration licences, and potentially  
 6 assurances provided at the time or before Discovery's  
 7 acquisition of AOG in 2014. This morning we haven't  
 8 heard anything about any such assurances given at that  
 9 time.  
 10 The practical and very important consequence is that  
 11 Discovery cannot base its alleged legitimate  
 12 expectations, for example, on the press releases of the  
 13 Ministry of Environment and Minister Sólymos, which were  
 14 issued at the end of 2016, and in the first part of  
 15 2017, because this is well after the time of Discovery's  
 16 investment.  
 17 Now going back to the one document that could in  
 18 theory be a source of legitimate expectations, and this  
 19 is the exploration licences which AOG had at the time  
 20 when it was bought by Discovery.  
 21 Here the problem with Claimant's case is that they  
 22 derive from that document alleged expectations which  
 23 actually do not stem from the text of the document.  
 24 The exploration licences are licences for  
 25 exploration of a very large area in eastern Slovakia.

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13:22 1 We saw that actually on maps, both during the opening  
2 statements and then later during cross-examination of  
3 the industry experts.  
4 We submit there is no basis in the text of these  
5 licences for the contention that somehow Slovakia, by  
6 issuing these licences, committed to approve just any  
7 single location for an exploration drill that would be  
8 located within the licensed areas. The licences simply  
9 do not state that.  
10 What the licence, however, does state specifically,  
11 is that the activities will need to be conducted in  
12 accordance with Slovak law. Therefore, the licence is  
13 just one of several approvals and legal arrangements  
14 which are required for AOG to be able to conduct  
15 an exploratory drill on a specific location somewhere in  
16 the licensed area.  
17 And the licences themselves do not say anything  
18 about a guarantee that the additional hurdles will be  
19 cleared so that a drill can be put on a specific  
20 location within the licensed area.  
21 And these additional hurdles are twofold: first,  
22 there is the requirement for the investor to obtain  
23 a private law title to the land plot on which the  
24 exploratory drilling is supposed to take place; and,  
25 where and when necessary, to obtain private law title to

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13:24 1 access that land plot, if the land plot is not  
2 accessible from a communication, subject to the general  
3 use of such character that even the heavy machinery  
4 needed for the exploratory drilling could be brought to  
5 the site on that communication, relying on the general  
6 use of that communication.  
7 A very minor point which, however, illustrates the  
8 issue was heard during the cross-examination of the  
9 mayor of Smilno, Mr Baran. I asked him a few questions  
10 about the quartz mine which used to be there, and during  
11 that time Mr Baran stated not only that the quartz mine  
12 had shut down shortly after World War II, but also that  
13 the owner of the quartz mine actually had been leasing  
14 access to the mine from the owners of the road. Which  
15 actually is a very valuable testimony, because it  
16 confirms that in the past the use of the road was  
17 subject to the consent of the owners. And that the  
18 owner of the mine actually did obtain this private law  
19 consent, and that's why the owner was able to use  
20 the road.  
21 So this is the first category of issues that AOG  
22 needed to address when placing an exploratory drill  
23 somewhere: to make sure that they have the private law  
24 consent of the owners to do so.  
25 The second category of issues is the compliance with

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13:26 1 public interest. Public interest here means not only  
2 public interest as it may be formulated by various  
3 administrative bodies, but also public interest as  
4 formulated by the citizens, who then have the right to  
5 voice their concerns as a part of administrative  
6 procedures conducted by the administrative authorities.  
7 And obviously then there are rules under Slovak law  
8 how these concerns need to be addressed in a process  
9 which then leads to a final decision, resulting in  
10 an administrative approval, or the lack of approval, for  
11 the location of a certain site at a specific location.  
12 I just thought it will be important to highlight  
13 that nothing in the text of the exploratory licences  
14 suggests that this process was to be skipped or  
15 derogated from when it came to the placement of specific  
16 drilling wells at specific locations. And actually this  
17 morning we heard an admission that Discovery does not  
18 claim there was any sort of stabilisation clause  
19 included in the licence. That becomes relevant with  
20 respect to the EIA.  
21 But before turning to the --  
22 MR DRYMER: Do you agree, at least, with the proposition,  
23 broadly stated, as it was by Claimant, by counsel both  
24 in his opening and in his remarks today, that at the  
25 very least the licences demonstrate or reveal a quid pro

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13:27 1 quo: we will conduct ourselves in accordance with the  
2 rights and obligations imposed upon us, and in exchange  
3 the state will not prevent us from engaging in the works  
4 in which we are required to engage for the licences?  
5 MR PEKAR: It depends on what is understood by the state  
6 preventing. If the negative decision is issued as  
7 a result of the state weighing the competing public  
8 interest, or the interests of the public, then this is  
9 not covered. We would accept that, yes, the state would  
10 not prevent arbitrarily or just because the state had  
11 second thoughts and now thinks that it's not a good  
12 idea, I would say for economic reasons, for example, to  
13 conduct an exploration in the areas.  
14 MR DRYMER: Okay.  
15 I presume you would say that that doesn't arise  
16 necessarily or strictly under the licences themselves  
17 but just as a general proposition of the state's  
18 responsibilities.  
19 MR PEKAR: I would agree with that. Well, I would say  
20 without the state issuing a licence for a certain area,  
21 then the state could say in the future that this area is  
22 restricted for exploration and that it would not violate  
23 anything. But, having issued a licence, the state is  
24 not supposed to do that.  
25 MR DRYMER: Thank you.

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13:29 1 MR PEKAR: So that opening now brings me to what happened  
 2 specifically with Krivá Oľka.  
 3 Actually, we all agree that's an issue which  
 4 probably would have been easily preventable by  
 5 Discovery, if only they had sent a request for extension  
 6 of time, but they didn't.  
 7 So, Discovery had a lease agreement with Lesy. They  
 8 were supposed to ask for its extension by  
 9 16 December 2015, and they didn't. They sent a request  
 10 seven days late, on 23 December 2015.  
 11 Lesy agreed with the extension, in an extension  
 12 agreement, which is -- actually has the legal form of  
 13 an amendment to the original lease agreement, and Lesy  
 14 signed this amendment on 14 January 2016.  
 15 Now, if we please look at this document, which is  
 16 document C-116, and we go to final provisions. Thank  
 17 you, so we can scroll down, please. Yes. And it's  
 18 Roman II, "Final provisions", Arabic 3:  
 19 "This Addendum enters into force on the date of  
 20 granting consent to rent according to Article 50  
 21 [paragraph] 7 of Act of the National Council ... on  
 22 Forests, and effective on the day following its  
 23 publication in the Central Register of Contracts based  
 24 on Act No. 546/2010 [Collection]."  
 25 And that then in combination with Slovak civil law

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13:31 1 creates the problem and exactly the kind of situation  
 2 which the requirement to apply for an extension 30 days  
 3 before expiry was supposed to prevent. Because this  
 4 amendment is then sent to the Ministry of Agriculture on  
 5 the following day, January 15, which also happens to be  
 6 the last day of validity of the original lease  
 7 agreement, and therefore, if, let's say, on January 16  
 8 the Ministry of Agriculture looks at this amendment, it  
 9 sees that the amendment itself is not in legal force,  
 10 because the amendment will enter into legal force only  
 11 on the day when the Ministry approves it. And because  
 12 we are already on January 16, we have the problem which  
 13 stems under civil law in Slovakia, and has not been  
 14 disproved by Discovery in any way, that the civil law of  
 15 Slovakia does not make it possible to extend the  
 16 validity of an agreement after the expiry of that  
 17 agreement.  
 18 So what happened on January 15 is that the original  
 19 agreement expired in accordance with its own terms.  
 20 There was an addendum signed seeking to extend the  
 21 original term, but the addendum was not yet in legal  
 22 force. As a result it did not produce any effects, and  
 23 did not prevent the expiry of the original agreement,  
 24 which then had the consequence that the Ministry of  
 25 Agriculture, now being bound by Slovak civil law, could

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13:33 1 not grant its consent, and thereby bring -- well, it  
 2 could have, but it would have had no legal effect,  
 3 because as of January 16 the original agreement expired.  
 4 A consent granted, let's say at the end of January,  
 5 would have made this amendment enter into legal force,  
 6 but the extensions sought by this amendment would have  
 7 been invalid because that would have been an extension  
 8 done retroactively.  
 9 The legal force of the extension would have  
 10 been January 30. That is two weeks after the expiry of  
 11 the original lease agreement, and this is not possible  
 12 under Slovak civil law.  
 13 MR DRYMER: So you're saying that the lease had already  
 14 expired by the time the amendment crossed the Minister's  
 15 desk?  
 16 MR PEKAR: The lease expired on the same day when this  
 17 amendment was forwarded to the Ministry of Agriculture.  
 18 MR DRYMER: So it wasn't yet expired?  
 19 MR PEKAR: Well, it was the same -- it was the same date, we  
 20 would need to see when exactly it ended up on the  
 21 Minister's desk.  
 22 But I would say that in any event it's not  
 23 reasonable to expect the Minister just to take the  
 24 letter at the day it arrives and approve it immediately.  
 25 MR DRYMER: I take the point. I'm just trying to get the

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13:35 1 chronology down.  
 2 MR PEKAR: So this is what created the problem.  
 3 On 17 January 2016 AOG sent a letter directly to the  
 4 Ministry of Agriculture, where AOG requested that the  
 5 Minister approve the extension, so that was after the  
 6 expiry of the original lease agreement, and AOG also  
 7 stated that if the extension is not approved, AOG will  
 8 be entitled to make an application under Article 29 of  
 9 the Geology Act. This letter is, just for reference,  
 10 this is C-118.  
 11 Then on 18 July 2016, AOG applied with Lesy for  
 12 a new lease. This is the letter that you saw this  
 13 morning because in the letter AOG conceded that it was  
 14 not legally possible to extend an expired contract, as  
 15 I explained it a while ago. And AOG required in that  
 16 letter another lease agreement for a definite period of  
 17 time of approximately one year until 1 August 2017.  
 18 Lesy did not reply to this request. However, it is  
 19 not alleged that this lack of reply violated the BIT, as  
 20 I think it is conceded that the conduct of Lesy is not  
 21 attributable to the Slovak Republic.  
 22 So then what happened is that AOG initiated the  
 23 Article 29 proceedings, which is a measure of last  
 24 resort, if I may call it that way, which allows the  
 25 Ministry of Environment to overrule the lack of consent,

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13:37 1 or silence, of the owner, and grant access to the site  
2 and use of the site itself to an entity conducting  
3 exploration under the Geology Act.  
4 You heard Minister Sólymos explaining how that  
5 procedure was conducted at the Ministry. One thing  
6 I would like to highlight here is that -- and it was not  
7 only in connection with the conduct of the Ministry of  
8 Environment, but also in connection with the conduct of  
9 the Ministry of Agriculture. We were, if I put it  
10 bluntly, accused of withholding documents. That  
11 accusation assumes many things about how the Slovak  
12 Ministries are archiving documents. It assumes a lot  
13 about what documents actually are archived, for how long  
14 the archives have to be maintained, et cetera.  
15 Actually, none of this was discussed by Discovery.  
16 All we heard is: oh, we are certain there must be many  
17 more documents. And we believe that Discovery actually  
18 has the burden of proof to show that there is some basis  
19 under Slovak administrative law for their contention  
20 that when they made their document requests in this  
21 arbitration in 2023, the Slovak Republic was still  
22 required to have documents such as emails exchanged  
23 between Ms Mat'ová and Ms Jánová. There should be some  
24 basis also for saying that Ms Mat'ová and Ms Jánová were  
25 supposed to communicate by email and not just orally, if

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13:39 1 they -- when they meet each other. There's no basis for  
2 the contention that somehow the meetings that the  
3 Minister of Environment had on a weekly basis with the  
4 heads of the various sections were supposed to be  
5 recorded in minutes. There was no explanation with  
6 respect to the level of detail that these minutes were  
7 required to offer. And there was, again, no explanation  
8 for the contention that somehow these minutes should be  
9 available -- what is it -- six years later on the  
10 systems of the Ministry.  
11 Another suggestion of this type was that the files  
12 of the Ministry were supposed to have initial drafts of  
13 any decisions, drafts of the alleged instruction from  
14 the above to decide in a certain way. So I would like  
15 to rectify that.  
16 All that a Ministry or any other administrative body  
17 in Slovakia is supposed to do with respect to  
18 an administrative decision-making process is to archive  
19 documents in what is called the administrative file.  
20 The administrative file -- and that is very important,  
21 because you, this morning, heard about a reference to  
22 a specific file number -- which I don't have here, but  
23 I will find it and give it to you -- that it was  
24 basically the file regarding the Article 29 procedure.  
25 So all documents in the file are at any moment available

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13:40 1 to any participant in the proceedings.  
2 So here, if the file -- if the procedure deals with  
3 AOG's application for access under Article 29, it means  
4 that AOG may, at any time, ask the Ministry to show it  
5 the file, and AOG is entitled to see the entire content  
6 of the file. And the Ministry actually has  
7 an obligation to put all relevant documents into the  
8 file. So there's no, like, two separate storage  
9 systems, one the file and then something for internal  
10 use only. That does not exist under Slovak law.  
11 And the same then holds true for the EIA procedures  
12 which were conducted by the district offices in eastern  
13 Slovakia. The same principle: again, the district  
14 office takes all documents which are relevant and puts  
15 all these relevant documents in the file, and AOG, as  
16 a participant in the proceedings, because it was also  
17 the applicant in the EIA procedures, can access that  
18 file at any moment, not only during the time when the  
19 file is live, so to say, but also thereafter for as long  
20 as the file is archived.  
21 So the reason why we did not produce any documents  
22 in response to some of the document requests is that we  
23 simply stated: the documents are available for you in  
24 these files, just please go and get access to them in  
25 those files. And there was no order by the Tribunal

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13:42 1 that we are required to produce again documents which  
2 are accessible to Discovery in the administrative files.  
3 We do not even know if Discovery went there or not,  
4 because these files are decentralised at the level, but  
5 there was no objection raised against this method of  
6 access to documents at the time.  
7 So we consider it unfair now to use it against us,  
8 the fact that there was no documents exchanged with  
9 respect, or produced in response to some document  
10 requests, if we believe there was an understanding that  
11 these can be accessed in the files to which AOG was  
12 a participant.  
13 So this is to rectify one misconception.  
14 Another misconception, or, I would say, distortion  
15 of the witness testimony of Minister Sólymos, is that  
16 I heard this morning that Minister Sólymos somehow  
17 admitted this was a sensitive procedure. Members of the  
18 Tribunal will recall, certainly, that the sensitivity  
19 comments of the Minister related precisely to the nature  
20 of the interference of the state with the rights of the  
21 owner of the site. He was very careful to explain that  
22 he considers Article 29 procedures to be sensitive  
23 because they restrict the rights of the owners of the  
24 site and an access land by a decision of the Ministry  
25 which actually forces the owner to let exploratory works

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13:44 1 be done on their land.  
2 And another comment of that type related to Minister  
3 Sólymos responding to a question asked by  
4 Madam President, about whether he interferes with  
5 proceedings which are handled by the lower sections of  
6 the Ministry as organs of first instance, and his answer  
7 was: no. And then he added "usually". And that's where  
8 the quote stopped.  
9 But actually there's a further line, Madam President  
10 asked specifically what the "usually" meant, and  
11 Minister Sólymos explained that he did not interfere  
12 categorically. So there was no -- this "usually" was  
13 rectified or clarified upon Madam President's follow-up  
14 question.  
15 So what happened at the Ministry, then, is that  
16 there was a first-instance decision issued which,  
17 roughly speaking, denied jurisdiction, saying that this  
18 matter is not to be decided by the Ministry because the  
19 Ministry would interfere with the jurisdiction of the  
20 Ministry of Agriculture which was supposed to approve or  
21 not approve the lease with Lesy.  
22 That decision was appealed by AOG, and it was then  
23 decided by the Minister; the appeal was decided by the  
24 Minister.  
25 So two points here: first, we heard today again

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13:46 1 about this alleged decision coming from the above for  
2 the first-instance decision to be negative, as  
3 I described it. There is no evidence for such  
4 instruction to be given. It was vehemently denied  
5 several times by Minister Sólymos when the point was put  
6 to him during his cross-examination.  
7 One thing which is very important again is to  
8 rectify the point about when Minister Sólymos was told  
9 by us, counsel for Slovakia, about the allegation. The  
10 point was made that this was done only in connection  
11 with his second witness statement, as he testified on  
12 Saturday.  
13 Indeed, this is factually correct, but the reason  
14 for us doing so is that the Memorial did not tie the  
15 instruction to Minister Sólymos. We did not -- the  
16 allegation that it was Minister Sólymos himself who  
17 issued that instruction was voiced for the first time in  
18 the Reply and, having read that in the Reply, we brought  
19 it to his attention when preparing his second witness  
20 statement, which was filed together with our Rejoinder.  
21 So now we have seen that that has become the  
22 preferred interpretation of what happened, but this is  
23 incorrect: Minister Sólymos denied giving any  
24 instruction, very clearly, and repeatedly.  
25 I believe that we also clarified the issue of the

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13:47 1 information for the Minister, and the privilege log. In  
2 my opinion it is absolutely clear from Minister Sólymos'  
3 testimony that he did not see that document at the time,  
4 and this is consistent with what we understand happened.  
5 Minister Sólymos was not presented that document when  
6 preparing for his witness statement. He also explained  
7 that.  
8 So now we are before the Minister, and the Minister  
9 has to decide on the appeal which was filed. Mr Anway  
10 explained that the Minister has what the law calls  
11 a special commission, but in fact it's not a special  
12 commission in the sense of an ad hoc commission; it's a  
13 commission which is set by the Minister and it's set by  
14 the Ministers in all Ministries in Slovakia to deal  
15 precisely with this very special appeal which can be  
16 filed against the first-instance decision made by the  
17 Ministry. In the Slovak language, actually, it's not  
18 even called an appeal, but uses some different word than  
19 "appeal" which is impossible to translate into English,  
20 so that sometimes leads to a confusion.  
21 But that's why it was called -- on interpretation  
22 sometimes you heard the expression "appellate  
23 commission", so that's how these are normally referred  
24 to. They are, as Mr Anway explained, they comprise  
25 prominent specialists in the field of administrative

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13:49 1 law.  
2 The reality is that Ministers always follow the  
3 recommendations of the appellate commissions simply  
4 because the Minister obviously has no specific education  
5 in the field of administrative law, and if such  
6 a knowledgeable commission recommends something, the  
7 Minister does not decide not to follow the  
8 recommendation.  
9 There is always an exception to the rule. The ECE  
10 case was all about a minister, actually, not following  
11 the recommendation of the commission in that one case.  
12 But that was a different minister in a different  
13 country.  
14 The Minister in theory has the possibility to  
15 decide -- so issue -- so basically rectify the  
16 first-instance decision and issue the decision. In  
17 practice, the Minister always remands the case back  
18 unless the decision can be confirmed. This is what the  
19 Minister I think also confirmed during his  
20 cross-examination, that he either confirms the decision  
21 or quashes the decision and remands it back.  
22 MR DRYMER: Remind me, please, if you can, without pulling  
23 up the document: the recommendation from the special  
24 commission or appellate commission was not only to  
25 quash, but to remand as well; is that right?

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13:50 1 MR PEKAR: Yes. That's right. I'm not sure we have the  
2 document on the record, but Minister Sólymos --  
3 MR DRYMER: No, but it was quoted in the Minister's  
4 decision.  
5 MR PEKAR: Exactly, yes. And I believe on  
6 cross-examination --  
7 MR DRYMER: Am I recalling it correctly, as far as you're --  
8 MR PEKAR: I recall him giving --  
9 MR DRYMER: We'll look it up in the evidence. We don't need  
10 it now. But I seem to recall that, at least as quoted  
11 in the Minister's decision, his commission had he said  
12 not only quash, but quash and remand.  
13 MR PEKAR: Yes. It's actually impossible for the Minister  
14 to quash without remanding.  
15 MR DRYMER: That's true, of course. Alright. Very good.  
16 MR PEKAR: But this does not mean that the Minister said  
17 nothing about the further course of proceedings, because  
18 the Minister -- so the question which was submitted to  
19 the Minister was fundamentally a jurisdictional  
20 question: was it right to say that the Ministry of  
21 Environment doesn't have jurisdiction, or was it not  
22 right to say that they do not have jurisdiction?  
23 And the Minister says, very clearly, that: no, we  
24 have, we the Ministry has jurisdiction and has to decide  
25 the request. And that's very important, because that

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13:52 1 means that the Minister was not just, you know, seeking  
2 to somehow make the procedure last longer and cause any  
3 delays. What the Minister did is that he confirmed: no,  
4 we, the Ministry, has jurisdiction. But now the  
5 Ministry needs to engage in additional fact-finding to  
6 see whether the Article 29 procedure is really to be  
7 used, it being the procedure of last resort, and there's  
8 no possibility for AOG to reach agreement with Lesy.  
9 The absence of such agreement being a precondition for  
10 granting the request under Article 29.  
11 So what the Ministry then did when the file returned  
12 to the section of geology, which was handling this  
13 request, is to follow exactly what the Minister had  
14 suggested. They asked AOG to clarify this factual  
15 point. And at the same time they suspended the  
16 procedure. But the suspension of procedure at the time  
17 when some information is requested from the applicant is  
18 absolutely standard practice, because the administrative  
19 authority has a time deadline for them to issue the  
20 decision, and obviously they do not want to miss the  
21 deadline just because the applicant takes too long to  
22 supply information which was requested.  
23 If you remember, I asked some questions from  
24 Minister Sólymos upon my re-direct, and it was very  
25 clear from the text of the decision that first there is

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13:53 1 the decision to suspend -- sorry, first there is  
2 a reference to the request for information. Then there  
3 is the decision to suspend. And then there is the  
4 sentence saying that, you know, as soon as the -- it's  
5 called in the administrative jargon the obstacle to  
6 further conduct of the proceeding, but that actually  
7 means you need to provide the information. As soon as  
8 we receive the information the procedure will resume,  
9 and it will resume on its own. There's no need for  
10 an additional administrative decision on continuation of  
11 the procedure. That's why that sentence is in the  
12 decision on suspension.  
13 All that AOG was required to do at the time was to  
14 write to Lesy, and either get a negative answer --  
15 obviously if they had gotten a positive answer the  
16 entire Article 29 procedure would have become  
17 redundant -- or, wait for two to three weeks and, having  
18 received no answer, they would have presented that to  
19 the Ministry of Environment saying: we asked for but  
20 didn't get an extension of our contract -- sorry, not  
21 an extension -- a new lease agreement with Lesy.  
22 AOG did not do that. AOG basically said: there is  
23 no way we will ask Lesy again.  
24 And now we submit that to explain this sudden  
25 inactivity on the part of AOG, we need to look at where

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13:55 1 we are in time.  
2 So the refusal came in a document dated 4 July 2017,  
3 which is document C-374, again just for reference.  
4 So, what was going on at the same time on the  
5 funding side of AOG? So we know that AOG had already  
6 run out of money in January of 2017. So we are now  
7 in July, seven months later, and at this point Discovery  
8 was trying, but failing, to secure new financing because  
9 investors wanted more data, and they were not convinced  
10 that the project was worth it. This is document -- the  
11 reference for that is in document R-198. It's an email  
12 to Cadogan where Mr Fraser noted that Cadogan wanted  
13 more data.  
14 And this comes at a time when AOG was so low on  
15 funds at that time that it proposed selling physical  
16 materials to cover short-term cash needs. That stems  
17 from document C-376. That's a letter from Michael Lewis  
18 dated 26 July 2017.  
19 And we respectfully submit that this is the reason  
20 why the Krivá Ol'ka Article 29 application was  
21 abandoned.  
22 So what happened instead is that on  
23 27 November 2017, AOG complained to the Minister for  
24 alleged inactivity of the first-instance body, that's  
25 document C-384, and the Minister rejected AOG's

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13:57 1 complaint on 31 January 2018, stating that the  
 2 Article 29 procedure is a proceeding initiated upon the  
 3 application of the applicant, AOG, and that it had been  
 4 suspended for AOG to provide factual information which  
 5 AOG had not provided.  
 6 So if there was any reason not -- well, the only  
 7 reason why the procedure was not proceeding was AOG's  
 8 refusal to provide the requested information or to show  
 9 that Lesy did not answer to a new request for a lease  
 10 agreement.  
 11 THE PRESIDENT: I am told by the secretary that you have  
 12 spent one hour. A bit more.  
 13 MR PEKAR: Yes, so I will now move to the EIA.  
 14 THE PRESIDENT: I agree that the Claimant's was much longer,  
 15 but they were much more interrupted, and I hope that the  
 16 secretary does interrupt each time we have a question,  
 17 so we only counted the actual presentation time.  
 18 MR PEKAR: And what was then the actual ...  
 19 THE PRESIDENT: How much time did the Claimant use if you  
 20 deduct the time of --  
 21 MS MINGUEZ ALMEIDA: One hour.  
 22 THE PRESIDENT: One hour.  
 23 MR PEKAR: Okay, apologies.  
 24 THE PRESIDENT: We will not cut you off on the spot of  
 25 course, but you know that your time is ...

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14:01 1 them stated that drilling would only start at a later  
 2 date.  
 3 So this is actually very important to now see the  
 4 psychology of AOG, because AOG is making this big  
 5 concession in their discussions with the local community  
 6 by saying: oh, we will do that voluntarily. But in  
 7 fact, they only do something which they would have had  
 8 to do in any event. Because of the factual situation on  
 9 the site.  
 10 THE PRESIDENT: Yes, I think we understand that part.  
 11 MR PEKAR: Yes.  
 12 Second, there are some statements by Minister  
 13 Sólymos which are not accurate because, as he explained,  
 14 upon cross-examination, actually, he had been led to  
 15 believe that the drilling had started at the sites. And  
 16 the reason for it is the meeting with AOG that he had on  
 17 15 December 2016, and a presentation which was brought  
 18 to that meeting, and which, as I said, led him to  
 19 believe that the works were already underway.  
 20 In reality, there was nothing underway in Ruská  
 21 Poruba, nothing underway in Krivá Ol'ka -- that's even  
 22 undisputed -- and the only thing in Smilno was the  
 23 21-metre deep collector hole, which is not drilled.  
 24 THE PRESIDENT: I think in the interests of time, I think we  
 25 are aware of this --

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13:59 1 MR PEKAR: Okay, I was under the impression that it lasted  
 2 longer but yes, there were many questions from the  
 3 Tribunal which sort of --  
 4 THE PRESIDENT: Yes, we are trying to be fair and deduct  
 5 questions and answers to questions.  
 6 MR PEKAR: Okay.  
 7 So anyway, just to finish on Krivá Ol'ka, the  
 8 procedure was abandoned in summer 2017 and we submit  
 9 that it was because of the financial difficulties and  
 10 the lack of funding on the part of AOG. And the  
 11 abandonment went through AOG's refusal --  
 12 THE PRESIDENT: I think we got that part.  
 13 MR PEKAR: You got that, perfect.  
 14 So now moving to the EIAs.  
 15 THE PRESIDENT: And try to be brief.  
 16 MR PEKAR: Yes, I will be very brief there, actually.  
 17 So, number one, we keep referring to them as  
 18 voluntary EIAs, but in reality they were not entirely  
 19 voluntary, because there had been no drilling prior to  
 20 1 January 2017.  
 21 So on proper application of the EIA amendment,  
 22 Discovery, or AOG, actually, had an obligation to  
 23 undergo the EIA process. And if there were any doubts  
 24 about that, they were completely dispelled by AOG's EIA  
 25 applications, which were all filed in 2017, and all of

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14:02 1 MR PEKAR: Okay, of the factual, yes.  
 2 THE PRESIDENT: -- and we will review the evidence in due  
 3 time.  
 4 MR PEKAR: So now we can go just to what was mentioned now.  
 5 What was proposed this morning actually is a total  
 6 confusion between preliminary EIA and the full EIA. The  
 7 proposal was that the BIT somehow requires Slovak  
 8 administrative organs to assess not the existence of  
 9 risk, but engage into an actual discussion of the  
 10 impacts at the stage of the preliminary EIA.  
 11 What happened during the preliminary EIA procedures  
 12 is that there were tens and in one case more than 100  
 13 concerns voiced by the general public about various  
 14 environmental problems with each of the sites.  
 15 We submit that in that situation, the first-instance  
 16 organ had frankly no other way than to order a full EIA.  
 17 THE PRESIDENT: I think you could help us by telling us  
 18 where it states what the first instance must do, because  
 19 I imagine that each time you do a preliminary EIA, there  
 20 is at least one person who has a concern. Does that  
 21 mean that each time you have to go to a full EIA? Or do  
 22 you do some kind of assessment, and what?  
 23 MR PEKAR: So I would submit that this is actually --  
 24 THE PRESIDENT: And the other question, sorry, is do you  
 25 have to give reasons, because I think that was one of

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14:04 1 the points that your opponents made.  
 2 MR PEKAR: Yes. So reasons have to be given. But it's also  
 3 okay to just refer to, not another document, but to, for  
 4 example, refer to the concerns raised by one of the  
 5 participants. If the concerns are summarised in the  
 6 decision, the authority does not need to spend another  
 7 page or two. It's enough for them to just say, as they  
 8 did it actually in this case: in light of the concerns  
 9 raised. That means the concerns -- the concerns however  
 10 have to be listed in the decision, and they were.  
 11 So this is a very, very short, but sufficient  
 12 justification as required under Slovak administrative  
 13 law.  
 14 MR DRYMER: That's the reasons. What about the process?  
 15 There were two boxes.  
 16 MR PEKAR: Yes, the process is governed by, among others,  
 17 Article 29 of the EIA Act, which -- so the process is:  
 18 application comes in, concerns are raised, and the  
 19 administrative authority may, but doesn't have to, give  
 20 the applicant an opportunity to respond.  
 21 THE PRESIDENT: My question is rather, does it have to look  
 22 at the concern and see whether they have some kind of  
 23 justification? And I don't read it in Article 29, but  
 24 maybe you can help us.  
 25 MR PEKAR: What Article 29 does is that it has several

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14:05 1 references to --  
 2 PROFESSOR SANDS: Could we bring it up on the screen? It  
 3 would be helpful.  
 4 THE PRESIDENT: It's C-225.  
 5 (Pause)  
 6 That's it, yes. So let's go to section 29.  
 7 MR DRYMER: It's page 5 of the PDF, I believe. There it is.  
 8 MR PEKAR: So the answer is if we scroll down to  
 9 subparagraph 3 --  
 10 MR TUSHINGHAM: I think it would also be helpful -- sorry,  
 11 forgive me for interrupting, but also paragraph 2 as  
 12 well I think is quite important.  
 13 THE PRESIDENT: Yes.  
 14 MR PEKAR: So in paragraph 3 we can see:  
 15 "In making the decision if a proposed activity or  
 16 its change is to be assessed under this Act [so, in other  
 17 words, if the full EIA is to be conducted] the criteria  
 18 for screening procedure set out in Annex 10 will be used  
 19 accordingly, and the competent authority shall also take  
 20 into account the opinions under Section 23(4)."  
 21 The opinions is all that we saw in the decisions  
 22 sent by other organs of the state and expressions by the  
 23 public.  
 24 So the criteria are laid out in annex 10. But this  
 25 act actually does not specify the level of -- how would

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14:09 1 I call it -- seriousness of a risk that needs to be  
 2 determined for the full EIA to be ordered, and so the  
 3 act only lays out what needs to be taken into  
 4 consideration, and we can look at annex 10, if we have  
 5 it translated. And annex 10 is very similar to the  
 6 annex of the EIA directive.  
 7 MR TUSHINGHAM: May I just interrupt very briefly in  
 8 relation to annex 10. I would just point the Tribunal  
 9 to page 18 of this document, and particularly part III,  
 10 "Significance of potential impact", picking up on ...  
 11 THE PRESIDENT: Can we scroll down?  
 12 MR TUSHINGHAM: Yes, so on the next page, please, so page 18  
 13 of the English. Yes, so:  
 14 "Significance of potential impact."  
 15 THE PRESIDENT: And it is from this criterion that you --  
 16 MR TUSHINGHAM: Precisely.  
 17 THE PRESIDENT: Based on this, that you argue that the first  
 18 instance must apply some kind of assessment to determine  
 19 whether there is a risk?  
 20 MR TUSHINGHAM: Exactly.  
 21 THE PRESIDENT: Thank you.  
 22 MR TUSHINGHAM: And then, just to round it off, the  
 23 importance of reading this act consistently with the  
 24 directive which provides that the criteria threshold is  
 25 significant effects, and I understood that to be common

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14:11 1 ground.  
 2 THE PRESIDENT: And would you like to comment on this?  
 3 MR PEKAR: Yes, I would like to comment just in two  
 4 respects.  
 5 So first of all, it is still the case, as I answered  
 6 in response to your earlier question, that it is enough  
 7 to do this justification of the assessment by reference,  
 8 so for example, as it was done in this decision. So if  
 9 there is a statement given by either another body, or  
 10 a statement given by the public, which in itself  
 11 includes an assessment of the significance of the  
 12 problem identified in the statement, it is sufficient  
 13 for the organ conducting the EIA to refer to that,  
 14 rather than to repeat in great detail that: we agree  
 15 that there is this risk, blah, blah, blah; we agree that  
 16 this risk is significant.  
 17 THE PRESIDENT: Yes, of course, I make a distinction between  
 18 an assertion that there is a risk, and an assessment  
 19 that there is a risk. The assessment implies some  
 20 judgment on the assertion, does it not?  
 21 MR PEKAR: No, it does. My point is that this can be  
 22 expressed by referring to analysis included in one of  
 23 the opinions stated higher up in the decision.  
 24 MR DRYMER: In other words: whereas, whereas, whereas,  
 25 therefore satisfies the reasoning requirement.

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14:13 1 MR PEKAR: Correct.  
 2 THE PRESIDENT: Yes, but not the assessment in the sense  
 3 that whereas Mr So-and-so says this and this, and  
 4 I refer to Mr So-and-so, that would not really be  
 5 an assessment.  
 6 MR PEKAR: No, but I would say in light of what Mr So-and-so  
 7 stated, I ordered the full EIA, it's sufficient.  
 8 THE PRESIDENT: Let's not belabour this. We've understood  
 9 the point and we will --  
 10 PROFESSOR SANDS: Could you give us an explanation also of  
 11 annex 8, if you turn -- go down first to page 12 and  
 12 just explain to us, annex 8 is, "List of proposed  
 13 activities subject to the assessment of their impact on  
 14 the environment", and then you see "Threshold values",  
 15 Part A, compulsory assessment, and then Part B, a  
 16 screening procedure, which I assume is the  
 17 preliminary --  
 18 MR PEKAR: Correct, yes.  
 19 PROFESSOR SANDS: If you go down to the next page, you see  
 20 section 16 "Drillings". If you could explain this  
 21 a bit:  
 22 "... with the exception of drillings for  
 23 investigating the stability of the soil ..."  
 24 So that seems compulsory from 500 metres, and then  
 25 I haven't quite understood, because it's only screening

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14:16 1 geothermal energy, drilling for the storage of nuclear  
 2 waste, water supplies, et cetera. That's not what we  
 3 are dealing with.  
 4 PROFESSOR SANDS: What page is it on, on the C-225-SVK?  
 5 I've got it in front of me.  
 6 MR TUSHINGHAM: 54. And, I mean, even on this it's  
 7 slightly -- but that's the way we understand it.  
 8 MR PEKAR: We confirm that understanding, actually.  
 9 MR TUSHINGHAM: Yes.  
 10 MR PEKAR: So generally for drillings it's 600 metres for  
 11 preliminary or screening. And then there are three  
 12 specific categories of drillings which are subject to  
 13 different rules.  
 14 PROFESSOR SANDS: Okay, got it.  
 15 MR PEKAR: That brings me almost to the end, because one  
 16 thing which I want to address now, and that is important  
 17 because it follows up on the discussion we had about the  
 18 significance of first-instance decisions, there are  
 19 three first-instance decisions on the EIA, and for  
 20 reasons which were not explained, only one of them was  
 21 appealed, and the only one which was appealed is the one  
 22 in Ruská Poruba where there was no realistic prospect of  
 23 finding anything.  
 24 So that begs the question why AOG did not appeal the  
 25 decisions in Krivá Oľka and Smilno. They could have

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14:14 1 "from 600 metres" or "up to 500 metres". It may be  
 2 there is an error in this text, but it would be helpful  
 3 to understand.  
 4 MR PEKAR: Yes, I need to see the Slovak original because,  
 5 as you've pointed out, the translation is --  
 6 PROFESSOR SANDS: Yes. If you could just explain to us  
 7 what, if anything, is the pertinence of this provision?  
 8 MR TUSHINGHAM: Professor Sands, if I could help you,  
 9 I'm very happy to jump in. If you could go to the  
 10 Slovak version at page 54, C-225-SVK. I think there  
 11 may -- we have always understood this and read this to  
 12 mean -- it may be a formatting error, but we have always  
 13 read this to mean if you are going deeper than  
 14 600 metres for any deep drill, for any drill, then it's  
 15 screening.  
 16 But in the first column we understand that to relate  
 17 to the specific types that are then set out in the  
 18 bullet points which we weren't doing when (overspeaking)  
 19 drilling --  
 20 MR PEKAR: So I think the source of confusion is that the  
 21 English translation should be further down.  
 22 MR TUSHINGHAM: Exactly.  
 23 So the 600-metre threshold applies to all drilling,  
 24 so in other words if you are going deeper than 600. But  
 25 the other points are specific threshold, for example for

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14:17 1 just copy-pasted the appeal they filed in the Ruská  
 2 Poruba site, presumably. But they didn't do it. And we  
 3 submit to you that they didn't do it because at that  
 4 time they were already determined to bring  
 5 an arbitration claim against the Slovak Republic.  
 6 And now whether we look at that as a point of  
 7 there's no violation of the BIT by a first-instance  
 8 decision of an administrative organ which can be  
 9 appealed but was not, or whether we look at that through  
 10 the lenses of causation, meaning what harm does such  
 11 a decision do if it could have been rectified on appeal  
 12 but was not, we submit the conclusion is the same.  
 13 AOG did not give Slovakia a fair opportunity to  
 14 address the concerns that Discovery has with the content  
 15 of the EIA decisions, and instead it is transforming  
 16 this Tribunal into an appellate administrative body  
 17 which is supposed to judge these first-instance  
 18 decisions and grant Discovery tens, if not hundreds, of  
 19 millions of euros just because Discovery believes that  
 20 there are some issues with the first-instance decisions.  
 21 And we say this is not how bilateral investment treaties  
 22 are supposed to operate.  
 23 And that, members of the Tribunal, concludes our  
 24 submissions, and I am very grateful for the additional  
 25 time that I was granted to finish my submissions.

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14:19 1 THE PRESIDENT: Thank you.  
2 So that leads us, I think, to the end of this  
3 hearing. In terms of procedure, we will confirm your  
4 agreement about the different deadlines for transcript  
5 corrections and redactions to the video, audio, and  
6 transcript I suppose as well, and then the response  
7 within a certain time as well, and then the cost  
8 submissions.  
9 Is there anything else that the parties would like  
10 to raise at this stage? Comments, questions, including  
11 complaints about the conduct of the arbitration.  
12 MR TUSHINGHAM: Nothing from us. We just are very grateful  
13 to the care and attention that the Tribunal has given to  
14 this case.  
15 THE PRESIDENT: Thank you.  
16 MR ANWAY: None from the Respondent.  
17 THE PRESIDENT: Same questions to Respondent.  
18 MR ANWAY: We have no further comments, and would like to  
19 thank the Tribunal for a very well run hearing.  
20 THE PRESIDENT: Thank you.  
21 Then it remains for the Tribunal to thank first of  
22 all the court reporter, the party representatives, who  
23 sat here for very long hours on both sides, and of  
24 course counsel for a very well handled arbitration, both  
25 in terms of their written submissions and this hearing,

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14:21 1 and also the very collegial attitude and cooperation  
2 that made our lives much easier.  
3 And now I close this hearing, and I wish you all  
4 some rest, I hope, a well deserved rest. Goodbye to  
5 everyone.  
6 MR TUSHINGHAM: Thank you.  
7 (2.21 pm)  
8 (The hearing concluded)

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