

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 4
Hearing on the Merits

Monday, 5th February 2024

Before:

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

DISCOVERY GLOBAL LLC

Claimant

-v-

SLOVAK REPUBLIC

Respondent

Secretary to the Tribunal: JARA MÍNGUEZ ALMEIDA

Assistant to the Tribunal: MAGNUS JESKO LANGER

Transcript produced by Anne-Marie Stallard
and Emma Lovell

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08:54 1 Monday, 5 February 2024
2 (9.30 am)
3 THE PRESIDENT: Fine, I see everyone is ready to proceed,
4 and I see Professor Števček is online. It's a little
5 weird having no one there.
6 Do I look into this camera, I suppose? Yes.
7 Is there anything to be raised before we start with
8 the examination?
9 MR TUSHINGHAM: Nothing from the Claimant's side,
10 Madam President.
11 MR PEKAR: Nothing, Madam President.
12 THE PRESIDENT: Good, then we can start.
13 PROFESSOR JUDr MAREK ŠTEVČEK (called)
14 (Evidence interpreted)
15 THE PRESIDENT: Good morning, sir. Do you hear me well?
16 That is, do you hear the interpreter?
17 PROFESSOR ŠTEVČEK: Yes, greetings. We can hear you very
18 well.
19 THE PRESIDENT: Excellent. So thanks for being with us this
20 morning. You are Marek Števček?
21 PROFESSOR ŠTEVČEK: Yes, indeed, I confirm.
22 THE PRESIDENT: You are a professor of civil law at the
23 Comenius University in Bratislava?
24 PROFESSOR ŠTEVČEK: Yes, that is correct.
25 THE PRESIDENT: And you're currently director of the

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09:34 1 MR MAJERNÍK: Yes, of course. I'll do it. Is this better?
2 THE PRESIDENT: Good. Can we have the names of the people
3 who are there, or do we have them on the participant
4 list? I don't think so.
5 MR MAJERNÍK: Madam President, members of the Tribunal, my
6 name is Andrej Majerník and I am on behalf of Discovery.
7 THE PRESIDENT: Fine.
8 Can the other person please introduce herself?
9 MS PAVLOVICOVA: Adriana Pavlovicova, I am here on behalf of
10 Squire Patton Boggs.
11 THE PRESIDENT: Thank you. I think, for the interpreters,
12 I'm just mentioning that we have it on the recording, so
13 I think that is enough, and I see counsel nodding so we
14 can proceed.
15 Professor, you are heard as an expert. As an expert
16 you are to make only such statements that are in
17 accordance with your sincere belief. Can you please
18 confirm that this is what you will do by reading the
19 expert declaration that you should have there in front
20 of you. You do, yes, absolutely.
21 PROFESSOR ŠTEVČEK: I solemnly declare upon my honour and
22 conscience that my statement will be in accordance with
23 my sincere belief.
24 THE PRESIDENT: Thank you.
25 So now we can proceed. You will first be asked

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09:32 1 university?
2 PROFESSOR ŠTEVČEK: Yes.
3 THE PRESIDENT: Good.
4 You provided us with two written expert opinions,
5 the first one of 30 September 2022, and the second one
6 of 15 September 2023. Do you have your opinions with
7 you?
8 PROFESSOR ŠTEVČEK: Yes, I have them both with me.
9 THE PRESIDENT: And they are in clean, unannotated copies?
10 PROFESSOR ŠTEVČEK: Yes, I have printed copies.
11 THE PRESIDENT: You have no notes on your copies?
12 PROFESSOR ŠTEVČEK: No. Please have a look.
13 THE PRESIDENT: Good. Excellent.
14 Are you sitting alone in the room?
15 He has two people in the room.
16 PROFESSOR ŠTEVČEK: No, I'm here with two of my colleagues,
17 one lady and one gentleman colleagues.
18 THE PRESIDENT: And this is agreed like this? Yes.
19 MR PEKAR: Madam President, it is --
20 PROFESSOR ŠTEVČEK: I think this is how it has been agreed?
21 MR PEKAR: It is agreed, Madam President. But I would
22 kindly ask the gentleman sitting to the left of
23 Professor Števček to go further away a little bit.
24 THE PRESIDENT: Yes, because he is in -- can you please move
25 somewhat away from the witness?

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09:36 1 questions by Claimant's counsel, and then we will turn
2 to Respondent's counsel.
3 Mr Tushingham.
4 (9.36 am)
5 Direct examination by MR TUSHINGHAM
6 Q. Thank you, Madam President.
7 Professor Števček, do you see me on the screen in
8 front of you?
9 A. Yes. Yes. Well, specifically not you, Mark, I am
10 afraid.
11 Q. Well, you can hear me, as I understand; is that right?
12 A. I can hear you, yes.
13 THE PRESIDENT: Can I step in, because I forgot to mention
14 something before.
15 Professor, you can confirm to us that you have no
16 other communication channels open than the one on which
17 we communicate now, which is the Zoom video link, and
18 possibly one screen where you will be shown documents;
19 is that right?
20 A. Yes, I confirm there is no other communication channel
21 that I would have.
22 THE PRESIDENT: You have switched your phone into flight
23 mode?
24 A. Yes, I do.
25 THE PRESIDENT: Good. Thank you. Apologies for the

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09:37 1 interruption.
2 MR TUSHINGHAM: Thank you, Madam President. No problem at
3 all.
4 Professor Števec, I understand that you wish to
5 make a few corrections, minor corrections, to the
6 English translations of your two expert reports; is that
7 right?
8 A. Yes, Mark. Indeed that is so. There were two terms not
9 well understood in the translation. So I would like to
10 change that to the term "public special purpose road"
11 everywhere that has been in my expert report mentioned.
12 And there is the paragraph 5.1, there was a wrong
13 translation, "merits". Instead it's supposed to be
14 "jurisdiction".
15 THE PRESIDENT: I should say for the record that we have
16 been handed a list of the corrections, and I assume
17 Respondent's counsel has as well?
18 MR TUSHINGHAM: Indeed, Madam President.
19 So with your leave, we would invite that document to
20 be added to the record. We can, of course, assign
21 a number to it after the examination.
22 THE PRESIDENT: Thank you.
23 MR TUSHINGHAM: Professor Števec, are there any other
24 corrections that you would like to make to your expert
25 reports apart from the corrections listed in this

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09:39 1 document?
2 A. No, none.
3 MR TUSHINGHAM: Thank you.
4 Would you please now answer any questions that
5 Mr Pekar has for you.
6 THE PRESIDENT: Before Mr Pekar starts, I would like to ask
7 that whenever we are not asking questions about
8 a specific document, we see just the screen with the
9 witness. And here we see the witness statements. Can
10 you remove the witness statements, and make sure that we
11 see the witness in -- on a large screen.
12 Who controls this? (Pause)
13 Cross-examination by MR PEKAR
14 Q. Thank you, Madam President.
15 Good morning, Professor Števec.
16 A. Good morning.
17 Q. Professor Števec, my name is Rostislav Pekar. I am
18 counsel for the Slovak Republic, and I will ask you
19 a few questions this morning regarding your two witness
20 statements.
21 Because we are on transcript and because we are only
22 connected by video, I would kindly ask you to answer in
23 an audible manner to any of my questions so that we have
24 it on the transcript and so that I can hear the
25 interpretation of that answer that I am working on.

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09:41 1 A. I will do my best.
2 Q. Thank you, Professor Števec.
3 My first questions will actually relate to the
4 corrections of your expert reports. Do the corrections
5 come from your personal review of the English version of
6 your English -- of your reports?
7 A. To put things in the right perspective, there were
8 multiple versions of my -- over the time of my expert
9 report, which is quite, I suppose, normal and
10 understandable. Each one version was then translated.
11 I don't know whether it has been the same person every
12 time a new translation was made out, or there were
13 several persons, in fact.
14 In any event, yes, I have identified two specific
15 terms with which I was not satisfied the way they were
16 translated. The first one, "merits" as opposed to
17 "jurisdiction", I think is only a translation error,
18 because from the context, I, in Slovak, never mentioned
19 the word "merits". Perhaps "act", or "substance of
20 act". In my Slovak version of the report has always
21 been the word "jurisdiction".
22 With regards to the second term, that's the "public
23 special purpose road", of course in English there could
24 be multiple equivalents in English, how to translate
25 this into English, and I think that the term "public

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09:44 1 special purpose road" covers all content of the term by
2 which the legislator had in mind when enacting in
3 legislation the very term of "public special purpose
4 road".
5 Q. Thank you, Professor Števec. So you agree that "public
6 special purpose road" is the best translation of the
7 Slovak original term; correct?
8 A. I dare to say yes. I'm convinced, due to what I've just
9 said before, that it really covers all substantial signs
10 of content: one is special purpose, that is supposed to
11 serve a certain purpose; and the next one is being
12 public, so it's publicly accessible.
13 Q. And Professor Števec, I would ask you to look at
14 paragraph 11.5 of your first expert report in both
15 English and Slovak, please.
16 A. So I'm at liberty to view my report; right?
17 Q. Yes, you are. And I would like to ask you to view both
18 the English and the Slovak version, and I believe it
19 would be helpful now to have these two versions on the
20 screen as well.
21 A. Mm-hm.
22 Q. Would you agree with me, sir, that there are two
23 sentences in the English version which span over almost
24 three lines, while there is only one sentence in the
25 Slovak original; correct?

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09:46 1 A. Yes. But if I may add, in English the first sentence
 2 only mentions the merits of the fact, saying that the
 3 Madame Varjanová had filed an appeal; the second
 4 sentence says "the notice of appeal was struck out", and
 5 I don't know why there is only the second sentence in
 6 the English version saying that -- in the Slovak
 7 version, rather, that the appeal has been struck out.
 8 I don't know how to justify this being -- this
 9 discrepancy between the two language versions.
 10 Q. Now I would ask you to please turn to paragraph 32 of
 11 your second expert report. And, again, it would be
 12 helpful to have both language versions in front of us on
 13 the screen.
 14 So in paragraph 32 you are quoting Article 120,
 15 paragraph 1 of the Code of Civil Procedure; is that
 16 correct?
 17 A. Yes.
 18 Q. Could you please read out loud in Slovak, so that it can
 19 be interpreted by the interpreters we have here, the
 20 quote from paragraph 120 in the Slovak original. And
 21 I would ask the members of the Tribunal to compare that
 22 to the translation we have in the English version as
 23 they listen.
 24 A. Yes, I can:
 25 "[As read] The parties are obliged to mark evidence

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09:51 1 that you were. I would just ask you to confirm that the
 2 English version which says, "the court shall be under
 3 an obligation to take additional evidence", is, I would
 4 say, diametrically opposed to the Slovak version, which
 5 says that exceptionally it may take other evidence;
 6 correct?
 7 A. Yes, I confirm that. The sentence, or the law, is
 8 formulated as "option", which I consider completely
 9 logical, because it is up to the court to consider
 10 whether or not the proposed evidence, or even evidence
 11 not proposed by parties, will be taken into
 12 consideration or not. It's up to the discretion of the
 13 court, while in the English version, indicates
 14 an obligation imposed to the court.
 15 Once again, allow me to emphasise it is not my
 16 responsibility for the English translation.
 17 MR DRYMER: Professor, pardon me. Is the remainder of the
 18 bolded sentence in English correct? In other words, the
 19 court may exceptionally take evidence "when such
 20 evidence is necessary to establish the facts"? Is that
 21 part correct?
 22 A. I would translate the phrase, "establish the facts in
 23 proceedings" differently.
 24 MR DRYMER: And how would you translate that personally?
 25 Yourself, I mean?

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09:49 1 to substantiate their claims. The court shall decide
 2 which of the marked evidence will be executed. The
 3 court may also exceptionally take other evidence than
 4 those proposed by the parties if the proceedings is
 5 necessary to make a decision on merits."
 6 Q. Professor Števec, I apologise, I would ask you to read
 7 the last sentence again because there was one important
 8 Slovak word which was missed on the interpretation. And
 9 this is no criticism of the interpreters; I understand
 10 it's not easy.
 11 So please read just the last sentence again.
 12 A. "[As read] The court may exceptionally also take
 13 evidence other than that proposed by the parties if its
 14 taking is necessary to decide the case."
 15 Q. Thank you very much, Professor Števec.
 16 I understand that you understand written English;
 17 correct?
 18 A. Yes.
 19 Q. Would you agree with me that the sentence that you can
 20 see in bold in the English version is completely
 21 different from the last sentence of the Slovak original?
 22 A. If I may, I'll take a minute to read it. (Pause)
 23 Yes, but I'd like to emphasise that of course it was
 24 not me making the translation into English.
 25 Q. Yes, Professor Števec, and I did not mean to suggest

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09:53 1 A. I guess, off the top of my head, this as though
 2 indicates that "establish the facts", which doesn't
 3 necessarily have to be an issue of fact, because the law
 4 says about the importance of the decision on the merits.
 5 But I would not dare now to give you an exact
 6 translation right away.
 7 MR DRYMER: Very well. Thank you, sir.
 8 MR PEKAR: Well, maybe one last point.
 9 Professor Števec, would you agree with me that
 10 there is an adjective which was translated as
 11 "necessary", in Slovak it's "nevyhnutné"; would you
 12 agree with me that the best translation would be
 13 something like "unavoidable"?
 14 A. Yes. I guess so.
 15 Q. Yes, thank you.
 16 Now, Professor Števec, I would ask you to turn to
 17 paragraph 28 of your first expert report. And for the
 18 record, this is one of the paragraphs which is subject
 19 to the errata sheet submitted this morning, which saves
 20 me two questions. So thank you very much for these
 21 corrections, Professor Števec.
 22 Please let me know when you have had a chance to
 23 read the corrected English version of 28. (Pause)
 24 A. I have it.
 25 Q. Thank you very much.

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09:55 1 So when you say, Professor Števec, in the
 2 correction sheet, that it's supposed to be "public
 3 special purpose road", you referred to Article 1(2)(d)
 4 of the Road Act, correct? And we will have a brief look
 5 at it. It is Exhibit R-175. And what we can see in
 6 Article 1(2) is that:
 7 "Surface roads are divided according to traffic
 8 significance, destination and technical equipment on
 9 (a) State highways,
 10 (b) state roads,
 11 (c) municipal roads,
 12 (d) special purpose roads."
 13 So we are in agreement that what you mean in
 14 paragraph 28 is "special purpose road" within the
 15 meaning of Article 1(2)(d) of the Road Act; correct?
 16 A. Yes.
 17 Q. So now going back to paragraph 28 of your report, of
 18 your first report, you state there that the character of
 19 the field track in Smilno as a public special purpose
 20 road stems from Exhibit C-18; correct?
 21 A. Yes, correct.
 22 Q. So can we please have Exhibit C-18 on the screen.
 23 So please, Professor Števec, review the document,
 24 and let me know when you have had a chance to review the
 25 document.

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10:00 1 screen. And I would like you, Professor Števec, then
 2 to confirm that this is, indeed, the same Slovak
 3 original, C-18 and R-156.
 4 A. I can only see the Slovak version, that's the Smilno
 5 municipality confirmation, and I see a part of an
 6 English translation. However, I'm unable to confirm
 7 what translation that is, whether I have ever seen it
 8 before. That's something I cannot tell you now.
 9 Q. No, Professor Števec, apologies, I probably misspoke.
 10 I was just asking you to confirm the Slovak original.
 11 That the Slovak original is the same as the one you have
 12 under C-18, and the same as the one you referred to in
 13 paragraph 28?
 14 A. Yes, I understand; confirm it is identical text.
 15 Q. Okay. So Professor Števec, you confirm that this
 16 document in the Slovak original refers to "field road"
 17 or "field track"; correct?
 18 A. "Field road" yes, it is written there expressis verbis.
 19 Q. It does not use the words "public special purpose road";
 20 correct?
 21 A. Understandably it is not there. I've been explaining
 22 that. I think in my second report. It's difficult to
 23 expect of a municipal office of a small village to
 24 reflect all legal terms. Basically that's unthinkable.
 25 I think with each -- every one of our lawyers have

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09:57 1 A. It's quite illegible, or I'm not seeing entirely the
 2 Slovak version because of the split screens. Do you
 3 want me to focus on the English text instead?
 4 Q. I will see if we can enlarge the Slovak version a little
 5 bit. Is it better now?
 6 A. No, because there is an overlap of part where I see the
 7 video images of the court in session.
 8 THE PRESIDENT: We can remove the English for now so the
 9 witness can see better the Slovak; is that better, sir?
 10 A. It is better, thank you. A little smaller, if I may.
 11 Smaller, rather.
 12 MR PEKAR: Now speaking for the room, I think the issue may
 13 be that he has a smaller screen and as a result he does
 14 not see things which we have on the right side. So if
 15 the Slovak original goes on the left side and the
 16 English translation on the right side, he will be able
 17 to see the Slovak version and we here on broader screens
 18 will be able ...
 19 (Pause)
 20 A. I confirm that I can see that now.
 21 Q. Okay. Thank you very much. And apologies for the
 22 technical issues we were resolving here.
 23 Now, later in these proceedings we filed another
 24 translation of this document under Exhibit No. R-156.
 25 So now I would ask that R-156 be displayed on the

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10:02 1 encountered this: that a lay public simply is not using
 2 legal terminology.
 3 However, in terms of logical semantics, every term
 4 has certain term features, the essentialia negotii, it's
 5 called in legal theory. Now, when various certificates
 6 issued by the Smilno municipality declare clearly that
 7 the road has been used by the public, as number one,
 8 I dare say it is the same, that that is a public road.
 9 And if it is claimed clearly that it's been used as
 10 field road, specifically as a connector, an access road
 11 to mines, to mine quartz, that simply is the same term
 12 feature used by the legislator to establish the special
 13 purpose of a communication, meaning road. That is why
 14 I deduced a conclusion that this document, even though
 15 it does not feature legal terms and features, however,
 16 descriptively refers to all the term features, and in my
 17 opinion one can conclude without any reasonable doubt
 18 that this is a public special purpose road.
 19 The normative text itself states, if I remember
 20 correctly, specifically the mine as one exemplary
 21 calculations of what is the purpose of any special
 22 purpose road.
 23 So to me the term features have been met, and
 24 I repeat, we cannot expect -- I think it was Mr Mayor,
 25 or who signed the letter, who I expect does not have

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10:04 1 legal education, we may not expect them to be using
2 legal terminology and definitions.
3 Q. So just to summarise, and this is a simple yes or no
4 question, sir, on the basis of this document alone, you
5 are able to conclude beyond reasonable doubt that the
6 road is a public special purpose road; correct?
7 A. Yes. I dare to make this conclusion.
8 Q. Yes. And now if the letter is addressed to someone who,
9 unlike you, knows the actual condition of the road?
10 And, for example, that person knows that the mine had
11 been closed for 70 years. Would that change your
12 assessment, sir?
13 A. No, because in that certificate, or letter, there is
14 a present continuous tense used, "is being used". So it
15 continues to be used by the public for decades, or maybe
16 centuries.
17 If the Smilno municipality wanted to say that this
18 has been some time in the past, I expect they would use
19 past tense. In that letter it says clearly "is being
20 used for decades", 100 to 200 years in parentheses.
21 I understandably am not familiar with the local
22 conditions, I have never physically been in that
23 municipality or on that road, and I can only base my
24 conclusions on what I was given. Meaning from this
25 argument, I deduce my claim that this continues to be

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10:07 1 a publicly used road, special purpose road, thus:
2 "public special purpose road".
3 THE INTERPRETER: As the witness put in English.
4 MR PEKAR: Professor Števec, I would kindly ask you to
5 focus on the specific manner in how I formulate my
6 questions.
7 My question was, I was asking you to take into
8 consideration the fact that the letter is addressed to
9 a person, which, unlike you, was aware of the actual
10 condition of the road. And, for example -- and you can
11 take that as hypothetical.
12 So hypothetically, if that person was aware that the
13 mine had been closed for 70 years, would that change
14 your very strong opinion you have of this letter?
15 A. No.
16 Q. Would it change your opinion if, hypothetically, the
17 mine had been using the road on the basis of a lease
18 agreement it had with the then owners of the road?
19 A. No. Due to a simple reason: I judge the text. Counsel
20 is trying to add something into the text which is simply
21 not present in the text. In terms of grammar, in its
22 interpretation of the text, it says clearly that which
23 I've already mentioned, and I am not sure about this
24 additive hypothesis, how to take them into
25 consideration. I did not have them at my disposal when

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10:09 1 writing the report. Even now when Mr Counsel is
2 declaring them, this has no bearing on the meaning of
3 the text.
4 I repeat, this is not a decision issued in
5 an administrative proceedings, because no such thing
6 exists. No one has ever requested such decision. It is
7 a confirmation by the Smilno municipality, and
8 basically, I'll tell you frankly, I don't care to whom
9 it's been addressed, because the text is so
10 straightforward, there are no additive hypothesis that
11 are going to change my opinion.
12 THE PRESIDENT: Can I ask you for a clarification?
13 When you wrote your reports, did you have the letter
14 requesting the advice of the mayor?
15 A. Yes, I surely had it at my disposal. However --
16 THE PRESIDENT: No, stop here. You had it.
17 A. I don't know if it was right from the start, because
18 I did mention that there were multiple versions in time
19 of my report. But yes, when finalising my report, I was
20 basing my report on this submitted evidence letter.
21 THE PRESIDENT: Would it change your opinion if I remind you
22 that the request specifically used the term "public
23 special purpose road"?
24 A. I'm not sure I understand the question.
25 THE PRESIDENT: If I ask you just --

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10:11 1 A. If I try to reformulate the question, if I may. Meaning
2 that if there was mentioned in the letter the legal term
3 "public special purpose road"; is that what you're
4 asking about?
5 THE PRESIDENT: The request for the opinion says:
6 "Please confirm that this is a public special
7 purpose road."
8 Does that change your opinion -- does the fact that
9 the response uses a different term, that is "field
10 track", change your opinion?
11 A. I understand now.
12 First of all, I think -- I have not seen this
13 particular request. If I remember correctly, I did not
14 have at my disposal the request of Cesty Smilno for
15 issuance of this confirmation.
16 Secondly, likely it would not change my opinion --
17 THE PRESIDENT: Sorry, I must have misunderstood you,
18 because I understood that, just before you answered to
19 me, that you had seen the request when you drafted your
20 final version of your expert reports?
21 A. I think we are misunderstanding each other. I have seen
22 this respond to the request, what we have on display.
23 THE PRESIDENT: Good.
24 A. I guess I have not seen the actual request itself, by
25 somebody asking municipality of Smilno to issue such

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10:13 1 information. I have only seen this final information
 2 respond to the request.
 3 THE PRESIDENT: Good. That's clarified now.
 4 Now, take it from me that the request says: can you
 5 please confirm that this road is a public special
 6 purpose road. And then the answer is what we have here.
 7 Would that change your opinion?
 8 A. Once again, I'm going to say no, due to the same reason
 9 I have said before. I don't think we should assume with
 10 the Smilno mayor that he would be aware of legal terms
 11 used by legislation. Which means to me, even if to such
 12 a specific question, he would formulate this answer we
 13 see here. I would equally conclude the same: that yes,
 14 indeed, this is a public special purpose road, within
 15 the meaning of the legislative term.
 16 THE PRESIDENT: Thank you. And apologies, Mr Pekar.
 17 MR PEKAR: Thank you, Madam President.
 18 Professor Števec, are you aware of the fact that
 19 Mr Baran is a witness in this arbitration?
 20 A. Who is Mr Baran?
 21 Q. Professor Števec, if we scroll down the document, you
 22 will see the signature of the Mayor of Smilno. His name
 23 is Vladimír Baran; can you see that, sir?
 24 A. Yes, I see that. But I have no knowledge of him being
 25 a witness in this particular hearing.

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10:15 1 Q. So actually he was heard as a witness on Saturday, and
 2 we will show you on screen, and I will read out loud, so
 3 that you have it translated into Slovak, his answers to
 4 questions asked by Arbitrator Sands.
 5 It starts on page 72, line 1 of the transcript, and
 6 ends on page 73, line 4. It is PDF page 22.
 7 I will wait for the document to be on the screen, as
 8 this will help the interpreters.
 9 I was referring to PDF page, not internal
 10 pagination. So internal pagination 72, and PDF 22.
 11 So we can see there at 11.25, Professor Sands asked:
 12 "So you carried out the assessment of how to
 13 characterise the field road or the track or the path or
 14 the road, or whatever it is?"
 15 Answer:
 16 "Yes".
 17 Professor Sands:
 18 "So you're explicitly asked, with the draft
 19 response, to characterise it as a special purpose road,
 20 that characterisation, and you don't do that. So you've
 21 gone through an intellectual exercise of your own, and
 22 you appear to have rejected that characterisation, and
 23 used a different characterisation.
 24 Could you explain to us your thinking on why you did
 25 not follow the suggestion that was put in the draft, and

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10:17 1 instead characterised it as a field track? What was
 2 your thinking behind that?"
 3 Answer:
 4 "Because it's me, I don't need to be, you know,
 5 advised or told what to do, and I said it's, as it was,
 6 and it is called by the local people 'polná cesta',
 7 which means field road. There are no road signs, so it
 8 rules out the possibility of it being a special purpose
 9 road, in spite of the fact that it has been used for
 10 a century and it's known among all villagers in Smilno
 11 that it's a road. But you know it's -- the paved works,
 12 it's -- you know, it's field road. Field road, yes. We
 13 call it field road."
 14 So would you agree with me, Professor Števec, that
 15 the Mayor of Smilno was actually aware of the legal term
 16 "special purpose road"?
 17 A. I would disagree with you because the mayor is not
 18 a qualified lawyer, and only a qualified lawyer -- and
 19 even, I think, only court, is authorised to interpret
 20 legal terms.
 21 Of course, this is the first time I see this. I do
 22 not know Mr Baran, the mayor. I do not know his
 23 thinking. But from what you have read to me, it is
 24 completely clear to me that legal definitions are not
 25 clear to him, because when I use the term "field road",

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10:19 1 it is a component out of a larger amount entitled
 2 "public special purpose road". And that's the term used
 3 by legislator.
 4 So if the mayor is using "field road", so it's a sub
 5 sum of the "public special purpose road", because in the
 6 legal definition there is a demonstrative enumeration of
 7 that which is considered special purpose road. That
 8 could be public or non-public. Or, special purpose road
 9 demonstratively named by the legislator also "field
 10 road". So if the mayor claims it's a field road, then
 11 he claims it is special purpose road. If he claims it
 12 is being used publicly, has been used for decades, he
 13 claims it is public special purpose road. This is how
 14 I would see this.
 15 Q. But would you agree with me that this is not how the
 16 mayor saw it; correct?
 17 A. I don't consider your question correct, because
 18 I'm unable to say what the mayor had or did not have in
 19 mind when he testified before the Tribunal. This is not
 20 the right question to be put to me.
 21 Q. Fair enough, sir.
 22 MR DRYMER: I have a very quick follow-up question on
 23 precisely this point. Once again, counsel, you've read
 24 my mind. Mr Tushingam has done the same throughout the
 25 hearing as well.

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10:21 1 Sir, could I ask you to enlarge the transcript on
 2 the screen?
 3 Professor, I've heard everything you said a moment
 4 ago. I just have a very particular question. You'll
 5 see that during -- in the mayor's answer at one point he
 6 says:
 7 "There are no road signs, so it rules out the
 8 possibility of being a special purpose road ..."
 9 Those are the mayor's own words. Do you agree with
 10 that analysis?
 11 You're the first lawyer, other than the parties'
 12 counsel in this arbitration, to whom we have the
 13 opportunity to put such questions.
 14 A. I would kindly ask again, because we have the same
 15 problem, I only see a part of the text. So if it could
 16 be put to the left on the screen because of the video
 17 windows I have on my screen. Because I do see only up
 18 to three-quarters of the text from right to left.
 19 MR DRYMER: I don't know if that --
 20 (Pause)
 21 I don't want to make it more difficult for the
 22 witness.
 23 A. I will kindly ask my colleague here in the room if she
 24 can do that for me; is that okay?
 25 THE PRESIDENT: Yes. (Pause)

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10:23 1 A. Very well, I can see the right side of the text on the
 2 screen. Thank you.
 3 Now, when I'm reading this:
 4 "There are no road signs, so it rules out ... of
 5 [this] being a special purpose road ..."
 6 Again, I respect the mayor as a person, but
 7 obviously he will not be an expert to administrative
 8 law.
 9 MR DRYMER: Of course.
 10 A. Neither am I. I'm no administrative law expert. But as
 11 far as I know, and I have studied the Road Act and the
 12 executive regulation accompanied to that, there is no
 13 mention anywhere of any road sign as a feature of this
 14 being a special purpose road.
 15 I think this interpretation of the mayor is invalid,
 16 because the act only says that it connects two points,
 17 either within an area, or multiple areas, based on which
 18 it is then judged whether or not this is a public road.
 19 But it doesn't say anywhere about any road signs
 20 needing to be a feature necessary for a special purpose
 21 road.
 22 I'll repeat, if I may, once again, the feature
 23 points of special purpose road. I'm only a civil
 24 lawyer, but I take the liberty of saying that the
 25 administrative regulation, the Road Act, has established

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10:24 1 term features of special purpose road differently,
 2 completely, as to what the mayor perceives.
 3 MR DRYMER: Thank you.
 4 A. I repeat, the mayor obviously is no lawyer, he is no
 5 expert, so that is why I would not blame him for not
 6 using feature terms as established by the legislator.
 7 MR DRYMER: I assure you, there is no blame at issue here.
 8 I am simply taking advantage of your own expertise.
 9 Thank you. That's very helpful.
 10 MR PEKAR: Professor Števček, let's please look at Article 3
 11 of the Road Act. This is, again, R-175.
 12 Subparagraph (2). I will read it out loud:
 13 "Local state administration in matters of local
 14 communications and special-purpose communications shall
 15 be performed by municipalities on the basis of delegated
 16 exercise of state administration. Municipalities shall
 17 determine the use of traffic signs and traffic devices
 18 on local communications and special-purpose
 19 communications and shall permit reserved parking places
 20 thereon. Municipalities, as part of the delegated
 21 exercise of state administration, deal with
 22 misdemeanours under Article 22c in the area of local
 23 communications and special-purpose communications."
 24 Can you see that, sir? Thank you. There is the
 25 Slovak version on screen. We just need to roll down to

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10:26 1 Article 3(2).
 2 The English version needs to go further down. We
 3 are there in the Slovak version. Oh, we don't have --
 4 we have it, yes. Perfect.
 5 So, Professor Števček, would you agree with me that
 6 the Smilno municipality is actually the state organ that
 7 has jurisdiction over special purpose roads in its
 8 territory?
 9 A. Yes, I agree. It is not a state body, but it acts as
 10 a transferred power from public administration, yes.
 11 Q. And it is the municipality which also determines the use
 12 of traffic signs and traffic devices on special purpose
 13 communications; correct?
 14 A. Yes.
 15 Q. So if the municipality and Mayor Baran decided not to
 16 put a road sign on the field track, would it actually
 17 confirm that he did not consider the field track to be
 18 a special purpose road?
 19 A. I think that this shortcut is not quite acceptable,
 20 because I personally am familiar with many special
 21 purpose roads on which the municipality never erected
 22 any road signs -- traffic signs, that is. So from the
 23 fact that there is, let's call it a communication,
 24 a road, as a working term, there are no road signs on
 25 this road, to me logically one cannot assume the

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10:28 1 conclusion from that that this is not a special purpose
 2 road.
 3 To put it differently, there are special purpose
 4 roads where the municipality has decided to place road
 5 signs, and there is a number of special purpose roads
 6 the municipality has not decided to place any road
 7 signs. And I'm quite sure -- I dare to declare -- that
 8 there is a number of special purpose roads the
 9 municipality is not even aware of its power to do so.
 10 Q. Would you then agree with me that Mr Baran, or the
 11 municipality of Smilno, being the body of
 12 self-government with the delegated state power to
 13 exercise administration in the matter of special purpose
 14 roads, that that body is the best placed to answer the
 15 question whether a track, field track, in its territory
 16 is a special purpose road or not?
 17 A. I think the municipality is that body which knows best
 18 the local conditions. It's capable of judging them
 19 best. But I dare not say whether at the end of the day
 20 the municipality is capable, in legal terms, to judge
 21 what the legislator had in mind when enacting the term
 22 "public special purpose road", because there is no
 23 conclusion from this act or any other that
 24 a municipality were to make a decision about what is and
 25 what is not public special purpose road. The

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10:31 1 municipality only executes administration as a delegated
 2 power from state administration. But the fact what is
 3 and what is not special purpose road, I dare say is
 4 derived directly ex lege. The municipality merely
 5 executes administration over such road, and I do agree
 6 that it has the power to potentially place, or not to
 7 place, on such road, appropriate road signs.
 8 And it also has the power to issue sanctions for
 9 violations of the appropriate legislation.
 10 Q. Okay. So let's look at the legislation. Let's scroll
 11 up this time to Article 1(3) of the Road Act. It
 12 states:
 13 "Surface communication consists of the road body and
 14 its components. The road body is demarcated the outer
 15 edges of ditches, gutters, embankments and cuts of
 16 slopes, frame and cladding walls, at the foot of
 17 retaining walls and on local roads half a meter behind
 18 raised curbs, sidewalks or green belts."
 19 Can you see that, sir?
 20 A. Yes.
 21 Q. So would you agree with me that this is a definition of
 22 a surface road?
 23 A. Yes, this is a legal definition of surface road.
 24 Q. And as we can see in Article 1(2), a special purpose
 25 road is a subset of surface roads; correct?

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10:33 1 A. Yes. Special purpose road is a part of the sum of
 2 surface roads.
 3 Q. Therefore the definition which applies to all surface
 4 roads also applies to special purpose roads; correct?
 5 A. Yes. As a general clause, definitely yes.
 6 However, right in the Article 4, for instance, there
 7 you have an exception for special purpose roads, in my
 8 view, from those particulars proclaimed by Article 3, or
 9 paragraph 3, rather.
 10 So by legislator themselves, the special purpose
 11 roads are viewed as a specific sub sum, because in
 12 paragraph 4 it enumerates what particulars a road must
 13 meet, and there is no reference therein to special
 14 purpose road. So I deem, if I may, it is because
 15 legislator is aware that the special purpose road's
 16 operation cannot be wedged into a definition. From that
 17 point of view, local conditions must be taken into
 18 consideration. To put it in other words, one may not
 19 expect from every single municipality in Slovakia to
 20 have exactly equal mode of operation, because specifics
 21 must be taken into account of that given location. And,
 22 last but not least, financial considerations as well,
 23 I only speculate, because not every municipality would
 24 have funding sufficient to be able to build such road as
 25 the majority of the public would expect.

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10:35 1 That means I expect your question is leading towards
 2 whether the road track may be considered a special
 3 purpose road. That's when I think yes, because clearly,
 4 the municipality of Smilno, I have no idea what is their
 5 population or budget, but I expect from their own
 6 resources, as the administrator of that road, cannot
 7 afford to build up there something meeting the legal
 8 definition of "surface road".
 9 Put in other words, if I may, special purpose road
 10 is also a road track or forest track. Every one of us
 11 naturally understands the term "field track" or "forest
 12 track", and we have no doubt that either field or forest
 13 track or road, even though it's an inductively correct
 14 conclusion, nowhere in the world obviously is nothing
 15 else other than trotted out or driven out stretch of
 16 ground on which customarily it is driven, which was
 17 confirmed by Smilno itself.
 18 This is how I see it. But, I repeat, I'm no expert
 19 for administrative law, neither for transport or road
 20 law. This is a disclaimer I would like to put on
 21 record.
 22 Q. Thank you, Professor Števec.
 23 I would ask you to really focus on the scope of my
 24 question. I'm trying to ask questions that are simple.
 25 Obviously if you feel the need to answer more than "yes"

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10:37 1 or "no", you are welcome to do so. But please focus on
 2 the scope of my question.
 3 Now, would you agree with me that the legislator in
 4 1(3) speaks of all surface communications; correct?
 5 A. Yes.
 6 Q. And in that provision, which you agreed is the
 7 definition, we see the requirement for a surface
 8 communication to have a road body; correct?
 9 A. Yes. But then I would ask to give me an answer to the
 10 question, what is a road body?
 11 Q. Mr Števec, we will come to the significance of the road
 12 body later on.
 13 PROFESSOR SANDS: Could I just come in here, I'm just
 14 speaking personally on my own account, not for any other
 15 arbitrator, but can I ask the witness this question.
 16 Is it not the case that we have here two opinions:
 17 we have an opinion from the mayor as to the nature and
 18 status of this road; we have an opinion from you, sir,
 19 as to the nature and status of this road. There is
 20 a difference of opinion. You've indicated that
 21 ultimately it's a matter for the courts of Slovakia to
 22 form a view. We aren't going to be able to get a clear
 23 view on this question in these proceedings. So is it
 24 not the case that we're stuck between two opinions and
 25 it is for us, as a Tribunal, to then form a view as to

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10:39 1 which of those opinions is more likely to accord to the
 2 views of the courts of Slovakia?
 3 A. Clearly I would not formulate it in this way, but I do
 4 agree that here exist not even two, I dare to say
 5 multiple legal opinions, because the legal modus
 6 operandi of special purpose roads in Slovakia is really
 7 sort of a field untrodden. It is something no one has
 8 ever tackled, this issue in sufficient depth, and it is
 9 a problem in Slovakia, I completely agree with you. And
 10 since we do not have a sufficiently involved doctrine in
 11 this area, and nor the case law of our courts provide
 12 a clear answer to that, I agree with the opinion that
 13 this question is disputable.
 14 Quite clearly, that is why I think we are debating
 15 this by the role of experts here. There are no clear
 16 answers to this question, and there are even no clear
 17 two opinions; I dare say there are multiple opinions on
 18 how to resolve this issue.
 19 PROFESSOR SANDS: So if there are multiple opinions,
 20 I'm understanding you, sir, to be saying that there is
 21 a multitude of reasonable opinions that go in different
 22 directions. Am I correct in understanding you in that
 23 way?
 24 A. Yes, you do understand absolutely correctly. It is one
 25 of several questions to which there is no clear legal

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10:41 1 answer.
 2 PROFESSOR SANDS: Thank you very much.
 3 MR DRYMER: If I may follow up very quickly on that
 4 question, because Professor Sands was not, it turns out,
 5 the only arbitrator asking himself that question.
 6 You used the words earlier, Professor, "ex lege".
 7 So I'd like to ask you, ex lege, which organ of the
 8 state, in your opinion, has authority, including, it may
 9 be a delegated authority, to decide whether a particular
 10 communication is or is not a PSPR? And I don't mean the
 11 courts. The courts obviously control the actions of the
 12 state in certain respects. Which state organ has
 13 authority or delegated authority in the first instance
 14 to declare the nature and status of a particular
 15 communication?
 16 A. It's a very good question, indeed, and thank you for
 17 that. In my best knowledge there is no such body, in
 18 a meaning that there would be a non-existence of
 19 a specifically legally proclaimed authority of
 20 a specific body of public power, public -- which would
 21 be authorised to crack this issue.
 22 There only exists provision about that the
 23 administration of such road is executed by the
 24 municipality. We do not even have normatively resolved
 25 the question, who is the owner of the road. We know

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10:43 1 only who is the administrator, according to appropriate
 2 act, that it is the municipality. But in terms of civil
 3 law we do not have clearly established who is the owner
 4 of such a road track. And derived from that is clearly
 5 something that I'm not aware of that in the Competence
 6 Act or any other act in Slovakia, there would be
 7 a definition of a body having such an exclusive
 8 authority.
 9 Yes. May I add there exists a general provision in
 10 the Competence Act. That the interpretation is given by
 11 appropriate Ministry or appropriate central public
 12 administration -- or state administration body, rather.
 13 But this interpretation is expressis verbis legally
 14 unbinding. That is stated by each every one of
 15 Ministries when answering any such request for their
 16 position. They would, based on the Competence Act, they
 17 are obliged to provide their position, even within
 18 a deadline -- I think it's 30 days, I'm not sure.
 19 MR DRYMER: Thank you.
 20 A. But every such opinion or position is concluded by words
 21 that:
 22 "This interpretation may not be construed as legally
 23 binding."
 24 THE PRESIDENT: Professor Števec, would it change your view
 25 if I tell you that the road is privately owned?

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10:45 1 A. Madam President, this is a more complicated issue.
 2 I don't want to go into detail completely, but there is
 3 a difference of owning land and there's a difference of
 4 owning road body placed upon the land, regardless of
 5 what the road body is. This result.
 6 THE PRESIDENT: Then I'll put the question differently: does
 7 it make a difference if the road body, assuming there is
 8 one, is placed on private land?
 9 A. No, it would not. I have to say here, as the rector of
 10 the largest Slovak university, that we have had a huge
 11 amount of problems with this. And I'd like to, if
 12 I may, complete my explanation: in Slovakia it does not
 13 apply what does with the rest of Continental Europe from
 14 the times of the Roman law. There is a so-called
 15 superficial principle which says that the landowner is
 16 automatically the owner of everything placed on that
 17 land. This, in Slovakia, may be the only European
 18 country it does not apply.
 19 So in Slovakia, customarily or frequently, there are
 20 different landowners, and different owner of anything
 21 placed upon such land. And I claim that this is exactly
 22 this case here, that the road body, no matter what we
 23 imagine it be, is a different legal entity and it does
 24 not automatically belong to the owner of that land.
 25 THE PRESIDENT: Are roads that are situated on the territory

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10:47 1 of a municipality in principle owned by the
 2 municipality, then?
 3 A. I'm unable to give you a clear answer.
 4 THE PRESIDENT: Okay. Fine. I'll stop here.
 5 Mr Pekar.
 6 MR PEKAR: Thank you, Madam President.
 7 Professor Števec, I think you mentioned several
 8 times that ultimately it's for the courts to decide; do
 9 I recall that correctly?
 10 A. Yes. But again I have to please add, as you know very
 11 well, courts are not capable of concluding a specific
 12 question normatively. They only decide a specific
 13 dispute and responding to a specific legal case.
 14 Q. Sir, if there were a specific legal case addressing
 15 specifically the status of the field track in Smilno,
 16 would you accept that decision?
 17 A. Of course I could accept it to a specific case.
 18 Q. Now, just to follow up on one issue that you mentioned,
 19 you were explaining the potential for split ownership
 20 between the road body, the road as such, and the land on
 21 which the road is built.
 22 I would kindly ask you to review Exhibit R-205,
 23 which is a judgment of the Regional Court in Košice, in
 24 case number 6Co/188/2016, dated 31 January 2017.
 25 So, first of all, have you been able to review this

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10:49 1 decision earlier?
 2 A. No.
 3 Q. Okay. So then I will just scale down on my questions,
 4 and I would kindly ask you to go to paragraph 43.
 5 So I represent to you the dispute was about the
 6 status of a certain structure, whether it was a surface
 7 communication or not.
 8 And here we can read in 43:
 9 "It has been proved beyond doubt by the evidence
 10 taken that no building permit has been issued for the
 11 'communication' in question and that the 'communication'
 12 is not included in the roads network ... The court of
 13 first instance took for the basis also the decision of
 14 the Košice District State Office dated 14 August 1964
 15 (Article 77) by which the following structure was
 16 approved: Heat Plant Košice -- mesto, facility I.
 17 Within the said construction, the area of the facility
 18 was delimited by a zoning permit, issued by Košice
 19 District State Office - Construction Department, dated
 20 18 September 1963. The area of the construction as
 21 a whole was delimited that way, including land plots on
 22 which a civil engineering facility was subsequently
 23 established to connect between individual facilities.
 24 The documents filed by the plaintiff (Articles 142, 143)
 25 that are on the court file indicate how the

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10:51 1 'communication' in question looks like. It is clear
 2 from the layouts of the 'communication' that it is
 3 not... demarcated the outer edges of ditches, gutters,
 4 embankments and cuts of slopes, frame and cladding
 5 walls, at the foot of retaining walls. It therefore
 6 does not meet the definition of a road body, set out in
 7 the Road Act. In addition, it is not connected to the
 8 land plot by a subsoil that is usual for any structure
 9 of surface communication. It corresponds with the
 10 defendant's description of it, i.e. a 'concrete pavement
 11 layer with the thickness of approximately 20 cm,
 12 therefore it became fit for use as an access road to the
 13 plaintiff's plant as well as to places of business and
 14 real property of further entities'.
 15 And it continues in 44:
 16 "According to the above, we can derive that from the
 17 legal perspective, the 'communication' in question is
 18 not a surface communication that has an own legal
 19 regime. The appellate court is of the opinion that it
 20 is more appropriate to use term a 'civil engineering
 21 structure (access road)' for that structure that does
 22 not have an own legal regime but a legal regulation of
 23 the property - land plot on which it is situated. Since
 24 the plaintiff is the owner of the land plot on which the
 25 civil engineering structure (access road) in question is

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10:52 1 located, which was not disputed in the proceedings, the
2 plaintiff should be perceived as the owner of the civil
3 engineering structure (access road) [based] on the land
4 plot."
5 So now I will ask a few questions just on this.
6 So would you agree with me that what the court was
7 resolving in this case was a communication which used to
8 connect several facilities? Correct?
9 A. I disagree. Because this is reasoning of the judgment,
10 and as far as I was able to see, the judgment itself,
11 the declaration, this was not the subject matter of the
12 proceedings.
13 But, forgive me, this is the first time in my life
14 I see this particular judgment, so I will likely be
15 unable to respond to it in a relevant manner.
16 However, if something is in the reasoning part of
17 a judgment, there is no obstacle to res judicata. And
18 if I only could have glimpsed at what was the subject
19 matter in the declaration of the judgment, the question
20 at hand -- the fact in question was not this. I can
21 only assume that in its justification, the court also
22 has spoken about decision. But again this was not
23 binding, because something binding is only the
24 declaration of judgment, and not its justification which
25 is binding.

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10:54 1 And if it were a part of the declaration of the
2 judgment, it is not binding to any other legal matter or
3 case, because the declaratory part of judgment, except
4 for defined exceptions in procedure, is only binding
5 inter partes.
6 I'm not even sure who were the parties to this
7 particular dispute, adjudicated by this court in this
8 judgment. No matter who it was, but in its declaratory
9 part, the judgment is only binding for those two parties
10 to that proceedings. I have no idea, again, who it was.
11 Truly I don't know. So I would not, not dare say, go
12 into expert dispute with the court because the
13 justification part is lengthy, and you understand that
14 I would have to study it thoroughly in order to be able
15 to relevantly answer these questions.
16 Q. Sir, would you agree with me that we lawyers, when we
17 want to see how courts interpret statutory and other
18 legislative provisions, look precisely at the
19 non-formally binding parts of court decisions to be able
20 to see how courts interpret these provisions?
21 A. Yes. But most of all we focus on the highest court
22 authority's interpretation, which Košice Regional Court
23 definitely is not.
24 Q. And if there is no relevant interpretation by the
25 highest authority, we may also look at the

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10:56 1 interpretations provided by the court's level which are
2 one level below, can we not?
3 A. Yes, of course. Definitely I agree. Especially when
4 they convene, it is a part of the procedural tactics.
5 So I fully agree, of course.
6 Q. So I understand, sir, that your strong view on -- that
7 it is your view that a field road is always a special
8 purpose road; correct?
9 A. In principle, yes. If it meets the term particulars
10 that we referred to earlier.
11 Q. By the "particulars", do you mean the particulars set
12 out in Article 1(3) of the Road Act?
13 A. I do not remember exactly those provisions of that
14 article. I rather think it's about the executive
15 decree to, accompanying the Road Act, if I'm not
16 mistaken.
17 Q. So just to make it clear, again, "yes" or "no" would be
18 very helpful.
19 So if we put back document R-175, paragraph 1(3).
20 So in your opinion, does a field road have to meet
21 the definitions set out in 1(3) in order to qualify as
22 a special purpose road?
23 A. A brief answer: yes.
24 One addition: the executive decree is called
25 executive because it specifies in more detail these

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10:58 1 particulars. Meaning that in this case lex specialis,
2 the executive decree says verbis expressis about field
3 tracks, which meet certain point which used to be a mine
4 or a quarry. So I dare say that, yes, it does meet the
5 definition, answering your question.
6 But my justification would go deeper, going into
7 specifics stated by the executive decree.
8 Q. Sir, is it your expert opinion that a definition in
9 a decree can overrule or derogate from a definition in
10 the law?
11 A. It is supposed to clarify definition. It is not
12 an overruling act, because act is a greater strength
13 standard than decree. But it's supposed to, in decree,
14 clarify terms promulgated in act, which in this case
15 I think it has been done so.
16 Q. But just to make the principle clear, if the law
17 requires A, then that A must be met regardless of even
18 an express provision in the decree that A does not
19 apply?
20 A. It does apply in light of how it is clarified in
21 executive decree. That's why it's called executive:
22 that some things are being clarified by it.
23 But I do agree with the fact that it should not go
24 above or against the text of the act.
25 MR DRYMER: So that I don't have to wait for the lawyers in

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11:00 1 their pleadings to interpret your answer for me,
 2 Professor, let me ask you a question directly.
 3 If a field road meets the criteria set out in
 4 Article 1(3) of the Road Act, is it considered a special
 5 purpose road; yes or no?
 6 A. Yes.
 7 MR DRYMER: Thank you.
 8 MR PEKAR: And then I will ask a follow-up question.
 9 If a field road does not meet the criteria set out
 10 in 1(3), is it considered a special purpose road?
 11 A. It may still be considered a special purpose road
 12 because the executive decree establishes additional
 13 particulars when such road may be considered special
 14 purpose road.
 15 Q. We agreed, sir, that the decree cannot overrule
 16 a definition in the law; correct?
 17 A. Yes, we did agree. Of course. Everything I say is that
 18 decree is to provide more detail to act, because it's
 19 an executive decree. So some terms we call vague in our
 20 logic are clarified further by the legislator through
 21 an executive decree, giving it more clear outline to
 22 what may and may not be considered field road.
 23 And if I may make an additional comment: I do not
 24 think that any field road in Slovakia would not meet
 25 a definition in the paragraph 3 of the Road Act, because

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11:02 1 no one has ever said what is considered a road body.
 2 All I say is that a regular, commonplace knowledge of
 3 the issue means that any road -- field road or forest
 4 road is comprised of a road body, but not such road body
 5 that there needs to be a same layer of tarmac as on
 6 a first class road or motorway. To me, this is still
 7 a road body. Even though it's a forest road, field road
 8 connecting point A with point B, I do not see a reason
 9 why it should not be a public special purpose
 10 communication.
 11 Q. Okay. So let me -- you were referring to a decree, so
 12 let's have a look at the decree. The decree is document
 13 C-223, and here you were referring specifically to
 14 Article 22.
 15 So before we get there, I would just confirm for the
 16 record that this is a decree from 1984, which was issued
 17 at the time by the Federal Ministry of Transportation.
 18 And we can see in Article 22 that it says:
 19 "Special purpose roads include, in particular, field
 20 and forest roads, access roads to plants, construction
 21 sites, quarries, mines, sand pits and other objects, and
 22 roads in enclosed areas and sites."
 23 Can you see that, sir?
 24 A. Yes.
 25 Q. Does that provision address the requirement for a road

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11:04 1 body?
 2 A. I don't really know that. And in my view no one at all
 3 knows this in Slovakia.
 4 Q. No, no, I apologise. There was an incorrect
 5 translation.
 6 So my question was: does this provision address --
 7 explains -- the statutory requirement that we see in
 8 Article 1(3) of the Road Act for every surface
 9 communication to have a road body?
 10 A. I think I've already answered this question several
 11 times. I have no reason to change my opinion about
 12 this. But let me just point out, I'm no expert to
 13 neither transport law nor road law. So I dare not say
 14 what is and what is not a road body.
 15 Q. I apologise if there were problems with interpretation.
 16 I will ask the question as simply as I can.
 17 Does Article 22 of the decree address what road body
 18 is?
 19 A. No, it does not, what is road body. But legally, by
 20 a demonstrative enumeration it establishes what is
 21 considered special purpose road.
 22 Q. Okay. So is it your opinion that on the basis of this
 23 provision in the decree, a field road that does not have
 24 a road body is special purpose communication?
 25 A. Yes, I do think so. And I also think that every field

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11:07 1 road does have a road body, even though it's only a
 2 trodden dirt, or driven -- whatever foundation there is,
 3 to the best I deem this a road body, because it serves
 4 to travel from A to B.
 5 Q. Okay. So, sir, let's leave aside the factual question
 6 whether there is a road body or not. Just from a legal
 7 perspective, what you are telling this Tribunal is
 8 that -- and we established that earlier -- in
 9 Article 1(3) of the Road Act, every surface
 10 communication must have a road body; right?
 11 A. I did not say -- I would have to see it again, but yes,
 12 it is a part of the legal definition. But please, once
 13 again, it does not say what is road body.
 14 Q. You also agreed with me that special purpose roads are
 15 a subset of surface communications; correct?
 16 A. Yes.
 17 Q. Therefore, if we look at the text of the law alone,
 18 special purpose roads, being surface communications,
 19 must have a road body, whatever that is?
 20 A. Yes.
 21 Q. So now would you agree with me that since this is
 22 a statutory requirement, this cannot be derogated from
 23 or overruled by Article 22 of the decree?
 24 A. That's an incorrect question. I did say on multiple
 25 occasions that of course the act has a greater legal

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11:09 1 strength than the decree. Counsel in his question is
2 ignoring the fact that decree clarifies a vague term
3 which has been used in act. There is no clear way
4 I have to say this. I've been saying it for maybe four
5 times now: the legislator here has clarified, clearly,
6 a vague term in a manner that through a demonstrative
7 enumeration has established that which is considered
8 special purpose road. Because the act you are referring
9 to, Mr Counsel, is not included. Meaning that it is not
10 a relationship of hierarchy of regulations. It's
11 a relation of executive decree to explaining a fairly
12 vague definition of the act, and to my best opinion and
13 conscience, I insist on this interpretation.
14 THE PRESIDENT: Professor, do you accept -- and I think you
15 do, but let's just clarify -- that the decree cannot
16 contradict the act? As a general proposition.
17 A. Of course I do agree.
18 MR PEKAR: Are you aware, sir, of any other provision in the
19 decree we have in front of us that would clarify the
20 term "road body"?
21 A. No. But, again pointing out, I am no expert to road
22 law.
23 Q. Okay. So I will now ask my last question on road law,
24 and then it might be a good time to break. Actually,
25 it's the last topic. We will see how many questions

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11:11 1 will be needed.
2 I would kindly ask you to look at Article 2 of
3 the Road Traffic Act, which is Exhibit R-174. Now, we
4 can read there that:
5 "For the purposes of this Act, road traffic shall
6 mean the use of highways, roads, local communications
7 and special-purpose communication (hereinafter referred
8 to as 'road') by drivers of vehicles and pedestrians."
9 Can you see that, sir?
10 A. Yes.
11 Q. So would you agree with me that the term "road" is used
12 to define four categories, namely: highways, roads,
13 local communications, and special purpose roads?
14 A. Yes.
15 Q. And this is actually the same four categories of surface
16 communications that we know very well from Article 1(2)
17 of the Road Act; correct?
18 A. I suppose.
19 Q. So now if we look at Article 21 of the Road Traffic Act,
20 it states:
21 "When entering a road from a place off the road,
22 from a field track, from a forest road, from a cycle
23 path, from a residential area or from a pedestrian zone,
24 the driver shall be obliged to give way to a vehicle
25 driving on the road."

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11:13 1 Can you see that, sir?
2 A. (Answer not interpreted).
3 Q. Sorry, I was just asking you whether you --
4 A. From residential zone, give way, vehicle going -- yes,
5 I can see this provision.
6 Q. So I would draw your attention, sir, on the use of the
7 term "road" at the beginning of the provision, and then
8 the field track that we still have on the first line
9 towards the middle; can you see that?
10 A. Yes.
11 Q. Would you agree with me, sir, that this provision
12 distinguishes between "road" as it is defined for the
13 purposes of this act, and a field road?
14 A. Yes. According to this provision, yes.
15 Q. So would you agree with me that for the purposes of the
16 provision, a road is something different than a field
17 road?
18 A. Yes. However, the subject matter of this act is clearly
19 defined differently than the subject matter of what
20 we've discussed until now.
21 Q. And, therefore, would you agree with me that obviously
22 for the purposes of this act, which is about road
23 traffic, a field road is something different from
24 a special purpose road; correct?
25 A. No. I cannot see it from this. It doesn't derive, to

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11:15 1 me, from this.
2 Q. So if we go back to the definition that we saw in
3 Article 2. In Article 2(1) we see that roads for the
4 purposes of this act include "highways, roads, local
5 communications and special-purpose communication";
6 right?
7 A. I do not have the Slovak text in front of me.
8 Q. I would ask that the Slovak text be shown to the
9 witness.
10 MR DRYMER: Please remind me quickly of the exhibit so I can
11 pull it up on my own screen.
12 THE PRESIDENT: R-174.
13 MR PEKAR: This is R-174.
14 MR DRYMER: Thank you. Thank you, madame.
15 MR PEKAR: So in Article 2(1) we can see a definition used
16 for the purposes of this act, and the term "road" means
17 four things: it means "highways, roads, local
18 communications and special-purpose communication"; can
19 you see that?
20 A. Yes.
21 Q. So if you now go back to Article 21. We don't need to
22 change the screen in the English, but we need to scroll
23 down in the Slovak version. And now if I read it out
24 loud by replacing the definition of "road" by its
25 components, 21(1) would state: when entering a highway,

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11:17 1 road, local communication and special-purpose
 2 communication from a place off the highway, road, local
 3 communication and special communication, from a field
 4 track...
 5 Do you follow me?
 6 A. Yes.
 7 Q. So this is why I put to you the proposition that for the
 8 purposes of Article 21 a special purpose road is
 9 something different than a field road; correct?
 10 A. Well, may I respond to this?
 11 Q. Yes, please.
 12 A. Dear colleague, I come out of the criterion of
 13 a rational legislator. A legislator every time and
 14 under all circumstances, call and make relationship
 15 between every provision they enact in order for the new
 16 provision to be fully compatible with the existing legal
 17 system.
 18 Now, that's in theory. But in reality not all
 19 provisions enacted are always coherent, and I think this
 20 is the very product of Slovak legislator not acting
 21 rationally -- I don't want to speak on behalf of the
 22 legislator, this is not my place, neither the counsel
 23 nor me, but I do not think that the legislator wanted to
 24 achieve that what counsel is referring to.
 25 I do not think that the legislator has considered so

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11:19 1 clearly and on fine scales what you are referring to.
 2 But, again, I am no legislator. I dare not respond on
 3 their behalf what they had in mind.
 4 But as a minimum, we have a conflict between two
 5 acts, because the definition used here is different one
 6 to the one used in the Road Act, if I'm not mistaken.
 7 So, again, there is a discrepancy to which
 8 Madam President referred to earlier, and also during
 9 this hearing we've pointed this out on multiple
 10 occasions. Yes, indeed, Slovak legal order briefly is
 11 not coherent, is not consistent, and that is why I would
 12 not make dramatic conclusions from this, me personally,
 13 that the legislator wanted exactly to achieve excluding
 14 field road from special purpose roads, when in other
 15 piece of legislation they claim that yes, indeed, field
 16 road is special purpose road.
 17 I think this is an error on the side of the
 18 legislator, and not their intention.
 19 Q. So, sir, you pointed out to an inconsistency, I believe,
 20 between Article 22 of the decree and these provisions of
 21 the act on road traffic; correct?
 22 A. Yes, but not only the decree, but also the Road Act.
 23 Q. Well, sir, the idea that every field road is a special
 24 purpose road, is only stated in Article 2 of the decree,
 25 is it not?

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11:21 1 A. Even, I think, not every one is there as a field road,
 2 but only the one meeting those term features.
 3 Q. No, sir, there may have been a misunderstanding. The
 4 only provision that you referred to as the provision
 5 stating that every field road is a special purpose road,
 6 is Article 22 of the decree; right?
 7 A. Yes. Because there is no other legal statute addressing
 8 this issue in such detail.
 9 Q. And now, hypothetically, if -- and the decree is an act
 10 of the Ministry of Transportation; correct?
 11 A. I think so.
 12 Q. The Road Traffic Act and the Road Act are both Acts of
 13 the Parliament?
 14 A. Certainly.
 15 Q. Now, hypothetically, imagine the Parliament makes
 16 a terrible mistake and they enact a conflicting
 17 provision to a decree because they are completely
 18 incompetent. As a matter of law, what will prevail: the
 19 completely incompetent provision adopted by the
 20 Parliament, or the very rational provision in the
 21 decree?
 22 A. I can imagine quite clearly such situation, and that has
 23 happened on multiple occasions in fact, and based on the
 24 doctrine of sovereignty of the legislator result that no
 25 matter how incompetent, it will prevail any lower

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11:23 1 statute.
 2 MR PEKAR: Thank you.
 3 This may be a good moment to break, Madam President.
 4 THE PRESIDENT: Good. Do you have an idea how much more
 5 time you need?
 6 MR PEKAR: I have covered 70% of my outline.
 7 THE PRESIDENT: Good.
 8 Fine, then we'll have a 15-minute break now.
 9 Professor Števec, I would like to ask you not to
 10 communicate with anyone about the facts of the case or
 11 your testimony during the break. And we'll see you
 12 again in 15 minutes. Thank you.
 13 PROFESSOR ŠTEVCEK: I look forward to it. Thank you.
 14 (11.24 am)
 15 (A short break)
 16 (11.43 am)
 17 THE PRESIDENT: So, Professor Števec, are you ready to
 18 continue?
 19 PROFESSOR ŠTEVCEK: Yes.
 20 THE PRESIDENT: And Mr Pekar is too. Good. Please go on.
 21 MR PEKAR: Thank you, Madam President.
 22 Professor Števec, we will now switch topics and
 23 discuss the preliminary injunction against AOG which was
 24 issued by the District Court in Bardejov, upon the
 25 request of Ms Varjanová.

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<p>11:44 1 Is it still your opinion, sir, that the District 2 Court in Bardejov did not have jurisdiction to issue the 3 injunction? 4 A. Definitely yes. 5 Q. Now, assuming, just for the purposes of my question, 6 assuming that the field road in Smilno was not a public 7 special purpose road, would the district court have 8 jurisdiction to issue the injunction? 9 A. Yes. 10 Q. Let's have a look at the claim which Ms Varjanová filed. 11 It is document MS-5. And it would be helpful to have 12 the Slovak original of the document too. Perfect. 13 So the Slovak version of this document is actually 14 longer. We only have a partial translation into 15 English. 16 I would just ask you to confirm, sir, have you seen 17 the full Slovak version of the request? 18 A. I cannot confirm that because I think I have the motion, 19 and the action was not given to me to my disposal. 20 Q. So, just to confirm, counsel for Discovery only showed 21 you the motion for interim injunction, but did not show 22 you the action that the motion was in front of? 23 A. No, I was basing on court decisions only. 24 Q. Okay. So you did not even see the request for interim 25 injunction, did you?</p> <p style="text-align: center;">Page 57</p>	<p>11:49 1 Despite the fact that, as is clear from the motion 2 to commence the proceedings, the first defendant has 3 a 1/700 share in the relevant common property, his 4 supposed right to use the property, according to his 5 ideas, he not only claims with the attached letter, but 6 repeatedly uses self-help, and without anything 7 authorizing him to do so, removes from the relevant 8 property the motor vehicle that the plaintiff has on 9 rent. Despite the fact that the plaintiff has 10 repeatedly turned to the police in this regard without 11 immediate intervention by the court, she cannot prevent 12 the first defendant, either alone or through third 13 parties, from repeatedly physically manipulating the 14 motor vehicle that the plaintiff has on rent, and for 15 the condition of which the plaintiff is responsible. In 16 case of repeated removal of the said motor vehicle, 17 there is also a risk of its damage. The plaintiff has 18 the consent of several co-owners with her procedure in 19 using the relevant lot of land." 20 So this is a factual description provided by 21 Ms Varjanová in support of her request for interim 22 injunction; correct? 23 A. I expect so. 24 Q. Would you agree with me, sir, that the way the problem 25 is described here, it is a dispute between co-owners</p> <p style="text-align: center;">Page 59</p>
<p>11:47 1 A. If I'm not mistaken, this has been a few months to 2 years, so the answer is no. 3 Q. Okay. I will just then go through that very quickly. 4 Let's first look at the action, this document MS-5 5 we have in front of us. 6 But you are aware, sir, that the action was for 7 declaration of nullity of an agreement that AOG entered 8 into with one of the many co-owners of the field track, 9 and Ms Varjanová was seeking declaration of nullity of 10 that agreement due to violation of her rights of first 11 refusal. 12 Apologies, there was very incorrect Slovak 13 translation. "Right of first refusal" was translated 14 literally. So maybe if I say "preemptive right". 15 A. Yes, I'm aware of these factual circumstances. 16 Q. And the request for interim injunction, which is 17 actually part of that action, states that: 18 "As follows from the enclosed letter of JUDr Róbert 19 Slamka, the first defendant, after the registration of 20 its ownership rights in the Land Register, requests the 21 conduct from the plaintiff that would, according to his 22 arguments, respect his co-ownership in the lot of land 23 of the 'E' Register No. 2721/780, in the cadastral 24 territory Smilno, registered in the Ownership 25 Certificate No. 1367.</p> <p style="text-align: center;">Page 58</p>	<p>11:51 1 regarding use of a land plot that they co-own? 2 A. Yes. 3 Q. So one co-owner wants to have a car parked there, and 4 the other co-owner does not want that car to be there; 5 correct? 6 A. Definitely not. This is not how it's been formulated. 7 The action and on merits is about relative invalidity of 8 a legal act. That's okay. It's been a dispute between 9 co-owners, and a motion to grant an interim injunction 10 at that time aims, I don't remember exactly -- here it 11 is -- to -- I do not see the very -- request for relief. 12 I cannot see the request for relief in that motion. Can 13 I perhaps see that? 14 Q. In the interests of time -- we will come to the request 15 for relief -- what I am asking you to confirm is that 16 the way that Ms Varjanová describes the problem here, 17 the problem for which she seeks the interim injunction, 18 is a dispute between two co-owners regarding whether one 19 of the co-owners' car can be parked on the land plot or 20 not? 21 MR DRYMER: He has already said yes, I believe. 22 A. I disagree. I don't agree. This is not how it has been 23 formulated. 24 MR PEKAR: Okay. 25 A. It was about an action to declare relative invalidity of</p> <p style="text-align: center;">Page 60</p>

11:53 1 a legal act. And related or not related with that is
 2 the issue of an interim injunction. But not on the
 3 merits, Madame Varjanová had requested invalidity of
 4 a legal act.
 5 Q. Sir, there may be translation issues --
 6 MR DRYMER: May I ask one question, please. I don't mean to
 7 interrupt, but so as to correct my apparent
 8 misunderstanding -- perhaps I'm the only one in the room
 9 who misunderstood.
 10 Do you agree -- no, no, that's not for me to ask you
 11 that.
 12 Do you consider, Professor, that the way the problem
 13 is described here, it is a dispute between co-owners
 14 regarding the use of a land plot that they co-own?
 15 A. Do you think described wherein?
 16 MR DRYMER: Excuse me, is that a question to me?
 17 I will play the witness here and ask you to repeat
 18 the question.
 19 In the request for interim injunction, is the
 20 dispute, as described in that request, a dispute between
 21 co-owners regarding the use of a land plot that they
 22 co-own?
 23 A. If it's formulated like this, then yes.
 24 MR DRYMER: Back to you, Mr Pekar.
 25 MR PEKAR: Thank you.

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11:57 1 "that within 3 days of the receipt of this request"
 2 Ms Varjanová is requested to:
 3 "... remove the motor vehicle of white colour, as
 4 seen in the attached photo, which is allegedly leased by
 5 you personally, as through this unlawful act you are
 6 hindering the co-owner, the company ..."
 7 AOG, with its address represented and so on:
 8 "... in the entrance and transit/passing through the
 9 plot of land ... 2721/780 arable land with an area of
 10 11,660.00 [metres squared] registered on the Ownership
 11 Certificate No. 1367 ..."
 12 Can you see that, sir?
 13 A. Yes.
 14 Q. Would you agree with me that the way Dr Slamka puts the
 15 issue is, again, a dispute between co-owners?
 16 A. Yes.
 17 Q. So, sir, do you agree with me that civil courts have
 18 jurisdiction to issue interim injunctions in disputes
 19 between co-owners that regulate relationship between
 20 co-owners?
 21 A. Of course. Definitely, yes.
 22 Q. And as we know, on the basis of its request, the other
 23 evidence attached to it -- and this letter --
 24 Ms Varjanová obtained the issuance of a preliminary
 25 injunction; correct?

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11:55 1 The beginning of the description starts with
 2 reference to an enclosed letter of JUDr Róbert Slamka,
 3 the first defendant. Now, I represent to you that the
 4 document that we will now show you on the screen is this
 5 letter.
 6 So this letter is Exhibit R-36, tab 8. So what we
 7 can see here is the letter sent by Mr Róbert Slamka to
 8 Ms Marianna Varjanová on 30 December 2015; correct?
 9 A. Yes.
 10 Q. And what we can see in bold is that it states:
 11 "CALL
 12 For the removal of the barrier to entry to the plot
 13 on E-KN maps ... plot No. 2721/780 arable land with
 14 an area of 11,660.00 [metres squared] registered on the
 15 ownership certificate No. 1367 for the cadastral area
 16 Smilno, Municipality SMILNO, district Bardejov."
 17 Can you see that, sir?
 18 A. Yes.
 19 Q. So then we have the text of the letter. In the first
 20 paragraph, Mr Slamka explains that he has been duly
 21 empowered to represent the company Alpine Oil & Gas;
 22 correct?
 23 A. I have not seen the power of attorney, but I have no
 24 reason to doubt this.
 25 Q. And then he presents the call, requesting Ms Varjanová

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12:00 1 A. Yes, she achieved that.
 2 Q. And the injunction became applicable immediately upon
 3 delivery to AOG; correct?
 4 A. Yes.
 5 Q. AOG had the right to file an appeal against the
 6 injunction; correct?
 7 A. Yes.
 8 Q. The appeal, however, did not stay the applicability of
 9 the injunction; correct?
 10 Apologies, there was an incorrect --
 11 A. I don't know if it spoke about the enforceability --
 12 Q. No, apologies, there was an incorrect translation into
 13 Slovak. I will say that again.
 14 The appeal, however, did not stay the applicability
 15 of the injunction; correct?
 16 A. If I understand the question correctly, the appeal has
 17 no suspensive force on the enforceability of such
 18 injunction. So yes.
 19 Q. Yes. Would Ms Varjanová have been liable for damages
 20 caused by the injunction if the injunction had been
 21 quashed on appeal?
 22 A. I don't understand the question.
 23 Q. I'm not surprised you don't understand the question.
 24 Would Ms Varjanová have been liable for damages
 25 caused by the injunction if the injunction had been

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12:02 1 quashed on appeal?
 2 A. If you now are referring to the diction of the
 3 section 77/3 of the former Civil Code of Procedure, that
 4 stipulates such responsibility, for damages, of the
 5 preliminary injunction applicant.
 6 Q. So would it be fair to say that under that provision
 7 there is a certain balance? On the one hand,
 8 a preliminary injunction is always issued just on the
 9 basis of a request of the applicant without giving the
 10 other party an opportunity to say anything about it in
 11 the first instance proceeding. But, on the other hand,
 12 the other party may file an appeal, and if the appeal is
 13 successful then the applicant is liable for any damage
 14 caused by the application of the interim injunction that
 15 it ...?
 16 A. Yes, I agree, it would be responsible.
 17 Q. And isn't it true, sir, that the same rule applies if
 18 the applicant loses the main claim on the merits?
 19 A. Well, the Civil Code of Procedure has not been in force
 20 for the past eight years, nearly. But I think back
 21 then, that's the way it worked.
 22 Q. So in our case Ms Varjanová would have been liable, not
 23 only if the interim injunction had been quashed by the
 24 appellate court, but also if she had lost the main claim
 25 regarding validity or invalidity of the agreement

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12:05 1 between AOG and Mr Tomecek?
 2 A. Yes, in general one can say it this way.
 3 Q. So let's look now at the appeal which was filed by AOG,
 4 and this is document LF-17.
 5 Sir, did you review this document when you were
 6 preparing your expert reports or in preparation for this
 7 cross-examination?
 8 A. No, I only based my preparation on court decisions.
 9 Q. So you would not know, therefore, sir, whether AOG
 10 argued in the appeal whether they had the right of
 11 general use of the field track under the Road Act, would
 12 you?
 13 A. I cannot tell this from this appeal. But from other
 14 documents, it resulted that this is not what they were
 15 referring to.
 16 Q. So from these other documents, do you know whether AOG
 17 stated in the appeal that the land plot on which
 18 Ms Varjanová was parking her car was a public special
 19 purpose road?
 20 A. As far as I can remember correctly, it was more or less
 21 undisputable that they did not refer to this, but this
 22 has been the procedural tactics of the counsel,
 23 Dr Slamka, so I would not like to comment on that.
 24 Q. Okay. So Professor, let's look now at paragraphs 22-24
 25 of your first expert report, where you discuss the

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12:08 1 conditions for granting an interim injunction.
 2 So would you agree with me, Professor -- and
 3 I'm speaking obviously with respect to the then
 4 applicable legal regulations, so I'm speaking of what we
 5 call the Code of Civil Procedure -- that in terms of the
 6 then applicable legislation, one of the conditions for
 7 granting an interim injunction was a threat of imminent
 8 harm; correct?
 9 A. Yes.
 10 Q. And now if we refer to Article 75(2) of the Code of
 11 Civil Procedure, which is LF-4.
 12 MR DRYMER: Which of course the witness knows by heart from
 13 back to front!
 14 MR PEKAR: So this is Article 75(2), please.
 15 Okay, so we are there. 75(2) states:
 16 "Apart from the terms of the petition under
 17 Section 79 Subsection 1, the petition shall include
 18 a description of the decisive facts justifying the
 19 ordering of the interim measure, the statement of
 20 conditions of eligibility of the claim to which the
 21 interim protection is to be provided, and the reasoning
 22 of the risk of imminent harm or the need for a temporary
 23 arrangement of the minor child's ..."
 24 And so on.
 25 So you can see here that what the text of the law

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12:11 1 requires is the risk of imminent harm; correct?
 2 A. Yes.
 3 Q. So now in paragraph 16 of your expert report, you argue
 4 that this actually is a high threshold, and in fact the
 5 harm must be "significant, serious and even
 6 irreparable"; can you see that?
 7 A. Yes.
 8 Q. So we will return to the legal standard later on. Now
 9 I would just like to follow your reasoning and turn your
 10 attention to paragraph 22 of your first expert report,
 11 where you state, broadly, that:
 12 "The threat of ... harm can only be derived from
 13 [Ms Varjanová's] description in the application, and
 14 hence that the imminent harm arises from the risk of
 15 damage to the motor vehicle which the defendant
 16 allegedly disposed of physically - moving the vehicle
 17 from the place where the applicant had put it."
 18 Can you see that, sir?
 19 A. Yes.
 20 Q. And then in paragraph 23 of your first expert report you
 21 state that:
 22 "That argument would succeed if the applicant
 23 herself did not violate the law ... if she had parked
 24 the car in an ordinary parking space and someone would
 25 be trying to move her car."

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12:13 1 Can you see that, sir?
2 A. Yes.
3 Q. So, when I am to apply your standard of harm that needs
4 to be certified in accordance to what you say in
5 paragraph 16, the removal of a car from a parking lot
6 would meet that standard; correct?
7 A. I don't know. I have not considered this. I have been
8 considering specific merits of the situation responding
9 to specific questions put to me.
10 Q. But, sir, if I read the first sentence of what you have
11 in 23, you say:
12 "That argument would succeed if the applicant
13 herself did not violate the law ... if she had parked
14 the car in an ordinary parking space and someone would
15 be trying to move her car."
16 Right? Can you see that sentence?
17 A. Yes.
18 Q. So to me, that sentence is very clear: if I park my car
19 in a parking space, someone removes that, I may go and
20 obtain an interim injunction against the person doing
21 so; right?
22 A. Yes, as long as the vehicle was placed on a road. So
23 the counsellor himself just admitted that this is
24 a special purpose road, because that's where the car was
25 clearly parked. A car may park outside of roads. So

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12:15 1 thank you.
2 Q. There may have been some translation issues.
3 THE PRESIDENT: There may have been some communication
4 issues. I don't think there was any admission.
5 MR PEKAR: So now, what if I am the co-owner of a field, and
6 I park my car on that field, and someone removes my car
7 from the field; would that satisfy the threshold of
8 imminent harm required for the issuance of an interim
9 injunction?
10 A. No. I would have to specify in what manner such harm
11 were to occur, because only by towing a car away, to get
12 from A to B, that on its own does not mean that there is
13 an imminent harm threatening to my property or
14 otherwise.
15 Q. So you are telling me that if I park my car on my land,
16 and then someone comes in every day and tows it away
17 from my land, there is no harm to my property?
18 A. Not necessarily. There has to be damage to your
19 property, because by towing a car, within the meaning
20 a towing service towing away a car, but only maybe
21 moving it a little bit, does not necessarily have to
22 result in damage to the car itself.
23 But we keep forgetting one fact, and that is,
24 I clearly state that the prejudicial issue here is that
25 this was not the land on which the co-owners wanted to

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12:17 1 grow corn, but they were intending to use this land for
2 transit from A to B. So if I place my car on a special
3 purpose road, serving for transport from A to B, clearly
4 by that I am preventing others, even other co-owners, in
5 proper use of that land. And I claim that not only to
6 the co-owners, but since I am fully convinced this was
7 special purpose road, not only to the co-owners, but
8 also to the broader public: I'm preventing them to
9 adequately use such road.
10 Q. Well, there are several components I would like to
11 address.
12 So the first component is that you -- assuming it
13 was a PSPR -- apologies, that's "public special purpose
14 road".
15 Okay, so assuming it is a public special purpose
16 road, so if I see -- so, for example, when leaving this
17 building, I go on back to my hotel and I see that there
18 is a car in the road, do I have the right to tow that
19 car or have it towed somewhere else? Now assuming we're
20 in Slovakia --
21 A. I don't think one can put it this way, because also in
22 the Civil Code in Slovakia, you have Article 6, which
23 says about self-assistance. Meaning that if you meet
24 the conditions of defensive self-assistance, in that
25 case I think yes. But this would depend on the

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12:19 1 circumstances of the case at hand.
2 Q. Okay, and it would be for a court to assess whether the
3 conditions for self-help were met or not; correct?
4 A. Well, there is no accuser, there is no judge, so it is
5 not up to the court ex offio to examine such actions. In
6 the vast majority of cases these things never get to the
7 court because it's usually resolved right on the spot,
8 according to Article 5 of the Civil Code, and the
9 municipality has authority to intervene.
10 So answering your question: yes, if it ever got to
11 the court, that is that body which in this case is
12 capable of and empowered to judge whether or not this
13 has been done within the legislative framework of
14 self-assistance.
15 Q. Okay. So we will turn to that later. Now I am
16 interested in the legal standard of the harm that is
17 required.
18 First of all, there doesn't need to be actual harm;
19 it is sufficient for a threat or risk of harm to be
20 there, correct?
21 PROFESSOR SANDS: Sorry, can I just cut in here. I mean,
22 this is all obviously for you to decide how to proceed.
23 But if I can just ask the witness: the bottom line is,
24 is it not, your view, your opinion, that the
25 first-instance court got it wrong and it should not have

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12:20 1 given an injunction; is that your view?
 2 A. Exactly, yes.
 3 PROFESSOR SANDS: The case then went on appeal, the
 4 injunction was upheld, and your opinion is the Appeal
 5 Court got it wrong; is that correct?
 6 A. Yes, I claim it also in my report that also the Regional
 7 Court in Prešov was wrongful, due to the reason that
 8 ex officio they were supposed to examine their power,
 9 their jurisdiction in fact, not only on merits -- there
 10 was existing jurisdiction on merits -- but the
 11 jurisdiction on granting interim injunction. And that
 12 is where I claim, as resulting from all the facts of the
 13 circumstance, it is clear that everyone was only
 14 interested in transit over that road. Madame Varjanová
 15 and everybody else, beyond any reasonable doubt, were
 16 only interested in transporting mechanisms, vehicles, if
 17 I put it that way, over that road.
 18 So in this case I think that as particulars were met
 19 of public special purpose road, the court was supposed
 20 to have judged that there was no jurisdiction for the
 21 court to grant such interim injunction.
 22 PROFESSOR SANDS: Okay. But the court didn't do that?
 23 A. I'm hearing myself, forgive me, because I have an echo
 24 in my headset.
 25 PROFESSOR SANDS: Could you help us poor arbitrators sitting

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12:22 1 in London, who have no background in Slovak law, know
 2 nothing about the status of Slovak courts, could you
 3 tell us something about the status of this Appeals Court
 4 in the Slovakian court system? How significant a court
 5 is it?
 6 A. Every court is ipso facto an important body of
 7 protection of law. If you are asking about the
 8 structure and hierarchy of the Slovak judicial system,
 9 a regional court is a typical appellate court, meaning
 10 that it is to serve to remedy any wrongdoings of those
 11 district courts, or now even municipal courts we have,
 12 placed within their jurisdiction territory. The
 13 regional court has no jurisdiction to adjudicate general
 14 conclusions. And its precedence effect of its judgments
 15 only relates to specific matter or case within the
 16 instance process.
 17 Above the regional court there is another court,
 18 called the Supreme Court of the Slovak Republic, even
 19 Constitutional Court, which both have the authority to
 20 correct their decisions and judgments, but only based on
 21 initiative -- it's a remedy, either called
 22 an extraordinary appeal in civil proceedings, or
 23 constitutional complaint in constitutional law concept.
 24 So that means the regional court is a middle level
 25 of the judicial system under which there are district

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12:24 1 courts, above which there is Supreme Court of the Slovak
 2 Republic, and Constitutional Court of the Slovak
 3 Republic, which also has the authority to overrule
 4 decisions of regional courts.
 5 Hopefully this has been a sufficient explanation.
 6 Please ask for more to elaborate.
 7 PROFESSOR SANDS: Are the judges on the Appeals Court
 8 independent?
 9 A. Of course.
 10 PROFESSOR SANDS: Do you have any evidence that the judges
 11 on the Appeals Court decided as they did on the basis of
 12 any pressure brought upon them by the state?
 13 A. Definitely I never in my life have heard anything like
 14 that, sir, no.
 15 PROFESSOR SANDS: So your opinion would be, although the
 16 court got it wrong, the Appeals Court got it wrong, it
 17 exercised independent and impartial judgment?
 18 A. No doubt, yes.
 19 PROFESSOR SANDS: Thank you very much.
 20 MR PEKAR: Thank you. So I'll go back to my now
 21 significantly reduced line of questioning.
 22 Please let's assume that the land plot on which
 23 Ms Varjanová was parking her car was not a PSPR. We
 24 already established that in that case the courts would
 25 have jurisdiction. But now my question was: was the

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12:26 1 granting of an interim injunction justified in that case
 2 on the facts certified by Ms Varjanová in her request
 3 for interim injunction?
 4 A. If on that land there was no PSPR, Madame Varjanová was
 5 not supposed to be placing her vehicle there whatsoever,
 6 because she would have violated the law, because motor
 7 vehicles may only communicate over surface roads. If
 8 Madame Varjanová drove on field road or forest road --
 9 I take it back. Only driving on her own land, which
 10 would be a forest or arable land, she would then I think
 11 violate -- it would be a misdemeanour.
 12 I don't know if at that time back then this was
 13 legislated. I really don't remember. But from
 14 a certain point on, it is even a misdemeanour driving
 15 off cleared roads. So from this point of view I deem
 16 that equally the principle would apply, nemo
 17 turpitudinem suam allegare potest. So if I myself
 18 violate law, I may not expect anyone else to be --
 19 provided to me relevant protection.
 20 So if Madame Varjanová parked on a public special
 21 purpose road or parked on her land, however, which would
 22 be either forest land or field road, in both cases she
 23 would be violating the law. So in this way I deem that
 24 in neither one of the modalities an interim injunction
 25 should not have been granted.

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12:29 1 Q. So when people in Slovakia park their cars in their
2 gardens, which are registered as gardens, all of them
3 violate the law; isn't that your testimony, sir?
4 A. Yes. Yes.
5 Q. Okay. So now let's look at the decision of the District
6 Court in Bardejov which granted the injunction. So this
7 is document C-125 and I'll draw your attention to what
8 is on page 7 of the English translation.
9 So in the middle of it now, that would be the 10th
10 line -- 12th. On line 12 it states:
11 "All the more that it is inadmissible for one of the
12 co-owners to interfere with the rights of other
13 co-owners, or to damage the rights or things belonging
14 to the other co-owners without a legal reason and to use
15 the self-help institute in such a way (please see the
16 wording of Article 6 of the Civil Code, the question:
17 what was the immediate threat of unlawful infringement
18 of a right of the first defendant to avert the
19 interference himself in an appropriate way?, or, if
20 there was an interference with his co-ownership rights,
21 why did he not demand their protection from the relevant
22 authority, e.g., before the court, etc.). If there is
23 any disagreement between the co-owners regarding the
24 management of the joint property, it is necessary to
25 submit a proposal according to Article 139 [paragraph] 2

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12:31 1 of the Civil Code, and not to threaten the exercise of
2 the rights of other co-owners in this way, in this case
3 of the applicant."
4 So would you agree with me, sir, that what the court
5 expresses here is the court's opinion that the resort to
6 self-help by AOG, by towing away Ms Varjanová's car, was
7 inappropriate?
8 A. I would not agree with that, because the court, in its
9 resolution on granting preliminary injunction, did not
10 conduct any evidencing. Meaning that this claim is
11 based on, likely, I can only assume, from the claims of
12 the claimant. But this is not what the court states,
13 and I'd like to remind you on the fact, on decision
14 justification and the reasoning, because only the
15 judgment part of a decision is applicable when there has
16 been no evidencing. The court then did not have
17 established facts whether self-help or not has been
18 eligible.
19 Q. Okay, so I appreciate you state this is what the courts
20 said on the basis of the description provided of
21 Ms Varjanová only; right?
22 A. I did not say exclusively. I said "likely".
23 Q. Okay. But -- so you take issue with what the court says
24 because you say facts were only certified instead of
25 proven; right?

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12:33 1 A. Yes, definitely they were not proven.
2 Q. But would you agree with me that if it were actually,
3 you know, factually correct that AOG had towed
4 Ms Varjanová's car away several times, exactly as
5 Ms Varjanová described it in her request for interim
6 injunction, then the court's disapproval of such actions
7 by AOG would be perfectly valid; right?
8 A. I'm a little lost in your question, I have to admit.
9 But if I may respond before you clarify. I would
10 definitely, in this case, not use self-help as a private
11 legal institute, because I claim that this is the public
12 law regulative since this was a case of public special
13 purpose road. And in this case I would refer, I myself,
14 back then, if I had been involved, I would refer to the
15 municipality as the body with jurisdiction to issue even
16 sanctions for blocking public special purpose road.
17 I am not certain or sure why AOG back then has
18 reverted to self-help. In any event, I think it would
19 be more correct to refer to the municipality whose power
20 it is to administer public special purpose roads.
21 Q. Sir, would you agree with me that precisely because
22 self-help is an institute of private law, it is not
23 acceptable for anyone to use self-help to enforce his or
24 her putative public law rights?
25 A. I guess this is for a full expert book, but in

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12:36 1 principle, if we base this on the thesis of relative
2 independence of, in the continental legal system,
3 independence of private and public law. So the overlaps
4 of one into the other should be quite rare, relatively.
5 However, at this moment I would have to think deeper
6 about the question whether I may, as a self-help, defend
7 public subjective law. I would lean towards saying yes.
8 But, again, I repeat, this would require much deeper
9 pondering other than responding like this ex abrupto.
10 Q. Okay. So we may look at what the Appellate Court had to
11 say about the conduct of AOG. We have it in document
12 R-063. And if we look at what is the third paragraph in
13 the English version on page 6. So it also happens to be
14 the third paragraph in the Slovak original, so we can
15 just see there that the Regional Court says:
16 "Defendant 1 must have expected from the very
17 beginning that a legal construct allowing it to carry
18 out geological exploration on a third party land through
19 a (already invalid) purchase of a tiny co-ownership
20 interest may fail. As to whether Defendant 1 acted in
21 good faith, it can be reliably stated that the conduct
22 of Defendant lacked elementary caution. Defendant 1
23 could have been well aware that purchase of a minuscule
24 co-ownership interest without respecting the pre-emption
25 right is very close to violation of ownership rights.

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12:38 1 It is evident that business activities of Defendant 1
2 were based, from the very beginning, on mala fide manner
3 of communication with owners of the affected land. From
4 such a point of view, the conduct of Defendant 1 lacks
5 any bona fide trait."
6 Can you see that, sir?
7 A. Yes, I can see it, but I don't agree with it.
8 Q. But I think we have established here that the court
9 disagreed with the acts of AOG; correct?
10 A. Is this a resolution on the interim injunction?
11 Q. Yes, it is.
12 A. This is not a judgment on the merits?
13 Q. Well, no, this is the decision of the Appellate Court,
14 the Regional Court in Prešov, on the request for interim
15 injunction.
16 A. In that case it applies what I've said before: that
17 definitely the merits have not been established. Quite
18 definitely. But I dare to say here that the regional
19 court made a gross violation, even legally. If I may
20 spend a minute to explain why, I'd like to do so.
21 The concept of -- apologies to interpreters.
22 The concept of relative invalidity of a legal act
23 does not mean at all something which is not acting on
24 good faith. That's a gross misunderstanding of the
25 principles Slovak private law is based upon. Because

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12:40 1 relatively invalid legal act is considered valid until
2 someone will doubt it. So at that time it has been
3 a normal, valid act. Even at the time of granting
4 interim injunction, this has been a normal, valid legal
5 act.
6 When this judgment was made by a court on the
7 merits, one could say this has been invalid. Until
8 then, it's considered valid. And unfortunately -- or
9 maybe fortunately, in the Slovak jurisprudence there are
10 a number, maybe hundreds of cases when a relatively
11 invalid legal act is not disputed by anyone.
12 So then it becomes a normal, relevant, legal act,
13 meaning that the court here assumes the right to decide
14 how at the time X to consider, I don't know how many
15 hundred co-owners. I think simply with, even with the
16 most benevolent interpretation of statutes, cannot hold
17 no thesis of a lack of acting in good interest or on
18 good faith, couldn't exist, because at that time that
19 legal act has been a normal, valid legal act, and that
20 is the substance of the concept of relative invalidity
21 of legal act. It is not unlawful ex lege or absolutely;
22 it only becomes invalid, based on court's judgment, when
23 someone, I understand a different co-owner, would ask
24 for such invalidity to be judged, by when the
25 preliminary injunction motion was filed, court was not

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12:42 1 aware of that. So that is why I disagree.
2 Q. Well, sir, I believe this regional court decides on the
3 basis of the procedure that had been conducted both
4 before the Court of First Instance and then the Regional
5 Court, right? So we are not at the moment when the
6 request for preliminary injunction was filed; right?
7 A. Well, I'm not certain I understand, but, granting
8 an interim injunction is one thing, but deciding by
9 court on merits is a different matter altogether.
10 I apologise if I'm wrong, but if I remember
11 correctly, at the time of Prešov Regional Court making
12 the decision on appeal against the injunction, no merits
13 have been decided yet whether the legal action is
14 invalid or not. This is what I'm talking about.
15 Q. Okay.
16 Now if you look at the last two lines, actually,
17 what the court says was mala fide is the "manner of
18 communication with the owners of the affected land";
19 correct? The court here does not refer to the
20 conclusion of the agreement with Mr Tomecek, but to
21 something different, broader, to the communication with
22 the co-owners; can you see that, sir?
23 A. If you mean the second-last sentence:
24 "It is evident that [from the start of the] business
25 activities of [the other] ... mala fide manner ...

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12:44 1 communication with owners ... affected land."
2 I can see that, and I've already responded to that
3 in my previous remarks.
4 Q. Well, sir, I apologise, but you have not, because in
5 your previous remark you were commenting on the
6 conclusion of the agreement in violation of preemptive
7 rights, and you were stating that that agreement had to
8 be seen as valid until it was declared invalid by the
9 court, as a part of Ms Varjanová's claim on the merits.
10 But what I am telling you here is that the court
11 refers to the communication of AOG, with the owners, in
12 plural, of the land plot. So the court here does not
13 comment on the conclusion of the agreement, but on the
14 much broader issue of AOG's communication; isn't that
15 right?
16 A. Yes, I understand now what you are asking about.
17 I don't remember exactly how many co-owners there
18 were. But I suppose from my own professional background
19 that in many cases it is basically unthinkable to
20 communicate with all co-owners, because very often it
21 happens that several co-owners cannot be found, they are
22 instead represented by the Slovak land fund, or they
23 could be forest owners, co-owners. I'm not specifically
24 familiar with the specifics of this particular case, but
25 to say -- to blame someone with a lack of bona fide that

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12:46 1 they did not communicate with all co-owners is not, or
2 doesn't always have to be, valid, as this claim.
3 Once again, I do not remember the number of the
4 co-owners, but if I remember correctly there were in the
5 order of dozens of co-owners, and it's going to be quite
6 difficult for anyone to communicate with all at once, as
7 it seems to me it is stated here by the regional court
8 in this document. Because, as you put it rightly, they
9 use plural, so to communicate with all co-owners. With
10 the best of intentions, I cannot imagine realistically
11 to be done.
12 Q. Well, just one very last question: do you agree with me
13 that the extracts from the Land Registry in Slovakia,
14 which show the title deed for any plot of land, also
15 show the registered address of each of the owners?
16 A. Yes, they should include the address of residence of
17 each co-owner.
18 Q. Therefore, if I want to give people a fair opportunity
19 to exercise their preemption right, as I'm required
20 under the law, I just send them a letter to the address
21 which is stated in this publicly available register,
22 don't I?
23 A. It doesn't always necessarily have to be that way.
24 I apologise, but even I don't live on my permanent
25 residence address, I am perhaps violating some small

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12:47 1 misdemeanour towards my municipality, but not really
2 because I've registered for temporary residence. But
3 the regular -- it happens quite commonplace, but people
4 do not live at their permanent residence address.
5 Secondly, I'd once again like to dispute the thesis
6 that I'm acting against the law, in violation of -- with
7 law. I do act in accordance with the law until
8 otherwise is proven to me. I'd like to emphasise that.
9 Once again, statute does not give me the obligation
10 to approach every one co-owner -- the Civil Code,
11 I mean; only establishes the right of the co-owners to
12 dispute transfer by motion on a -- deciding on relative
13 nullity of such act.
14 So it's not me having the initiative, that one
15 purchasing the share of land, but it should be other
16 co-owners having the initiative, and also, this is only
17 an inductive argument and not deductively valid
18 argument. From all the co-owners, only one disputed
19 such legal act, so all the others are satisfied with the
20 act. I cast no doubt on the fact that even one such
21 co-owner has such right.
22 But I'm disputing the thesis that I was supposed to
23 approach every one, because they all were interested on
24 obtaining that one small share of the land. I'm quite
25 certain this cannot be claimed.

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12:49 1 Q. Okay. So, sir, under your interpretation, the
2 preemptive right under Slovak law is
3 a "catch-me-if-you-can" type of provision?
4 A. I don't consider this worth commenting.
5 MR PEKAR: Well, then I don't consider it worth asking you
6 further questions.
7 A. Thank you.
8 THE PRESIDENT: Any questions in re-direct?
9 MR TUSHINGHAM: A couple. They will be very short,
10 I promise you, Madam President.
11 (12.50 pm)
12 Cross-examination by MR TUSHINGHAM
13 Q. Professor Števček, this is for the reference in the
14 transcript at 11.47. Do you recall being asked whether
15 you saw a copy of the request for an interim injunction
16 that had been filed by Ms Marianna Varjanová before you
17 signed your expert reports; do you recall that?
18 (Page 57, line 24)
19 A. That what occurred today, do you mean?
20 Q. Alright. Perhaps I could do it in this way instead. If
21 you could be shown, please, Exhibit MS-5. And if you
22 could -- yes, exactly. And in the Slovak, if you could
23 move forward, please, I think it's to page -- if we go
24 forward a couple of pages. And again. Yes. There.
25 So, Professor Števček, you were asked whether you

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12:51 1 saw a copy of this document before you finalised your
2 expert opinions, and your answer in the transcript was:
3 "If I'm not mistaken, this has been a few months to
4 years, so the answer is no."
5 (Page 58, lines 1-2).
6 Can you confirm whether you saw a copy of this
7 document before --
8 A. Yes, that is correct. But truly I don't remember having
9 seen a copy of this document, but I have seen all
10 relevant matters of fact compiled in court decisions.
11 I can certainly confirm that.
12 I do not remember this specifically having seen this
13 particular document. As you know well, the documents
14 were being provided in tranches at a time. I did not
15 have them all available. There were multiple versions
16 of my report, so to the best of my conscience and
17 knowledge I do not remember ever having seen this
18 particular document on display.
19 Q. Could I refresh your memory, please, by reference to
20 another paragraph in your expert report. Could you be
21 shown your second expert report, please, at
22 paragraph 25. It should be page 9 of the English,
23 I'm not sure which page in the Slovak it is.
24 MR PEKAR: This is the wrong expert report we have on the
25 screen.

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12:52 1 MR TUSHINGHAM: That's Professor Fogaš. So
 2 Professor Števec's, please. Thank you. And page 9 of
 3 the English, please, and then the equivalent. And then
 4 over one page in the Slovak --
 5 THE PRESIDENT: It's further down.
 6 MR TUSHINGHAM: -- in the Slovak. Yes.
 7 Professor Števec, do you see in footnote number 6
 8 a document MS-5, and it's referred to in the paragraph
 9 as "the Request for granting the Interim Injunction".
 10 Does that refresh your memory about whether you saw this
 11 document before you signed your second expert report?
 12 A. MS-5? Oh, MS-5 is the document you have shown earlier.
 13 Of course, no doubt about it. Please do consider that
 14 it has been at least a year and a half since I have seen
 15 it, so please, this is what you should attribute it to.
 16 THE PRESIDENT: I think I understand the answer that you had
 17 seen the request?
 18 A. Yes, no doubt. From this evidence it becomes clear.
 19 MR DRYMER: Well, you even refer to it in paragraph 25, in
 20 the ninth line from the bottom.
 21 A. It could be. Please ...
 22 MR DRYMER: Yes.
 23 A. There were an extreme number of documents and not every
 24 one I remember exactly.
 25 THE PRESIDENT: No, I think we've resolved this. Let's

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12:55 1 carry on.
 2 MR TUSHINGHAM: My second question in re-examination, and
 3 this is transcript at 10.48 (page 38, lines 14-16), you
 4 were asked:
 5 "... if there were a specific legal case addressing
 6 specifically the status of the field track in Smilno,
 7 would you accept that decision?"
 8 Do you recall that question?
 9 A. Yes, I remembered, it was about the Košice Municipal
 10 Court.
 11 Q. Yes. Could you -- are you referring to the decision of
 12 the Košice Municipal Court there? Is that what you're
 13 referring to?
 14 A. I'm not sure we're speaking about the same thing.
 15 Q. Are you aware of any case --
 16 A. Mr Counsel this morning has shown me some judgment and
 17 I remember that being Košice Municipal Court judgment.
 18 Q. Yes.
 19 A. But this was a Regional Court Košice, but I'm not sure
 20 of the question.
 21 Q. Perhaps I could do it this way, then. Could you be
 22 shown Exhibit R-059, please.
 23 Professor Števec, have you seen a copy of this
 24 decision before?
 25 A. Of course, this is the Prešov Regional Court resolution

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12:56 1 on appeal against, if I'm not mistaken, the interim
 2 injunction motion. Yes, of course, I have worked with
 3 this particular document.
 4 Q. This document is different from the resolution of the
 5 regional court in the proceedings that were originally
 6 brought by Ms Marianna Varjanová. This, I will
 7 represent to you, is a decision in connection with
 8 an application for an interim injunction that was
 9 brought by AOG against Ms Marianna Varjanová in late
 10 2016. And my question is: have you seen a copy of this
 11 decision before?
 12 A. Once again, if we are speaking about the Prešov Regional
 13 Court resolution, by which it dealt with appeal against
 14 decision of the Bardejov District Court, and, if
 15 I remember correctly, on granting interim injunction,
 16 then yes, I have been working with this particular
 17 resolution.
 18 THE PRESIDENT: Professor Števec, this is a different
 19 application for a different injunction, and this
 20 application is brought by AOG, not against AOG, and this
 21 is the appellate decision on this other application.
 22 A. That is in the vice versa.
 23 THE PRESIDENT: Yes.
 24 A. So AOG was the applicant.
 25 THE PRESIDENT: Yes.

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12:58 1 A. And Madame Varjanová was the defendant in this case.
 2 This is what we're discussing, yes?
 3 THE PRESIDENT: And others, yes.
 4 Now, I don't know what the question is.
 5 MR TUSHINGHAM: The question was, because Professor Števec
 6 said:
 7 "... if there were a specific legal case addressing
 8 specifically the legal status of the field track in
 9 Smilno, would you accept that decision?"
 10 And the Professor was not taken to this particular
 11 decision, so I was just going to ask him a few short
 12 questions about it, with the leave of the Tribunal.
 13 THE PRESIDENT: That's fine. Yes.
 14 MR TUSHINGHAM: Professor Števec, just take a moment, if
 15 you would, to familiarise yourself with this decision,
 16 and I will ask you whether you agree with the court's
 17 analysis in this decision.
 18 A. Do you want me to read it now?
 19 Q. Well, perhaps we can do it by coming to paragraph 11 and
 20 onwards. So on page 4 of the English.
 21 So if you could read paragraphs 11 through to 15,
 22 please.
 23 A. Yes. (Pause)
 24 The court only quotes applicable legislation. One
 25 may not either agree or disagree with it; one may only

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13:00 1 acknowledge it.
 2 Q. Well, let's look at paragraph 15. In paragraph 15 of
 3 the judgment, the court says:
 4 "If the claimant claims that the access field road
 5 is a public special purpose road, it is necessary to
 6 point to the fact that the Communications Act puts
 7 certain restrictions on the roads use. When using
 8 a road, users must adjust themselves to the
 9 construction-technical condition of the road which the
 10 appellate court does not perceive as fulfilled in this
 11 case with regard to the field road condition ..."
 12 And my question to you is, do you agree with the
 13 analysis there or not?
 14 THE PRESIDENT: But do we agree that the analysis is
 15 hypothetical? It adopts the standpoint of the claimant.
 16 MR TUSHINGHAM: Exactly. Exactly, yes.
 17 MR PEKAR: Madam President, I'm sorry to interrupt,
 18 I believe this actually is a misrepresentation because
 19 it's not the analysis of the court; it's just a recital
 20 of what is stated probably in the request. In other
 21 words it's not clear to me whether 12, 13 and 14 refer
 22 to what the court says, or if it just follows from 11
 23 and repeats what the applicant had said.
 24 THE PRESIDENT: Yes, we'll have to read this carefully, but
 25 that seems to be the case at first sight, at least, yes.

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13:05 1 I'm far from that. But the sentence saying that even
 2 single co-owner would express their dissent simply is
 3 not in line with the current legal system of Slovakia.
 4 That's all I can say to that. I'm sorry about that, but
 5 I under no circumstances can agree with this.
 6 Well, just to understand me, please, co-owners in
 7 the mode of co-ownership in the Slovak civil law, there
 8 is a majorisation principle applicable. So the size of
 9 the share is important. So it's not thinkable, forgive
 10 me, for anyone to claim that even a single shareholder
 11 or co-owner of such share of land would have legal
 12 consequences. It would apply if a single co-owner would
 13 have a majority share compared to all the rest of the
 14 co-owners, which in this case was not the case.
 15 So the sentence logically cannot be true.
 16 Q. Can I ask you one final question about this decision.
 17 Could you move forward to paragraph 29, please. Could
 18 you just read that paragraph to yourself?
 19 A. Yes, yes, I'm trying. (Pause)
 20 I cannot agree with that. Then again, this ignores
 21 applicable legislation, the last sentence, regardless of
 22 whether this is or is not public road, because
 23 non-public special purpose roads are only within
 24 a single enclosed area. Everything else are, by
 25 default, public special purpose roads. So the last

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13:02 1 MR TUSHINGHAM: Could we move on, possibly, then, just to
 2 one further paragraph in the judgment. This is
 3 paragraph 24. And my question is whether you agree with
 4 the court's analysis in this paragraph?
 5 A. I disagree. I think I've quite broadly tried to explain
 6 it over the past hours. So, once again, I cannot agree
 7 with this because the court claims that the land and any
 8 other road on it is a single unit, with which
 9 I disagree. These are two legal entities, which could
 10 have and do have different legal mode.
 11 In other words, if I may add, right the first
 12 sentence saying:
 13 "The owners of land ... are also the owners of the
 14 field road, located on the land ..."
 15 Forgive me, but this is a gross disrespect to the
 16 Slovak legal system. There is no such superficial
 17 principle enacted, meaning that in Slovakia it's very
 18 commonplace that the landowner, entity A, and any entity
 19 owner, such as shrubs, structure, could be entity B on
 20 the same land.
 21 So I cannot, as a civil law professor, subscribe to
 22 this particular claim here.
 23 Q. And what about paragraph 26: do you agree with the
 24 court's reasoning here?
 25 A. No. Definitely not. I don't want to offend anyone.

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13:07 1 sentence is completely ignoring the applicable
 2 legislation.
 3 Q. And one final question --
 4 A. In the first sentence, if I may --
 5 Q. One final question --
 6 A. That the -- on the access field to Smilno has no --
 7 where is the legal certainty in Slovakia? Who else
 8 would have the power to decide whether or not this is
 9 a public special purpose road, if not either the
 10 Ministry of Transport which, based on the Competence
 11 Act, is authorised to interpret this law -- this is
 12 a non-binding interpretation, mind you -- and the
 13 municipality of Smilno, who equally empowered the
 14 municipality by applicable legislation.
 15 Now, what is binding legal act? Then I think we
 16 resign completely on the fact that the public
 17 administration and self-administration bodies to people,
 18 but to entities, they are supposed to help them. So,
 19 based on this interpretation, it would mean that the
 20 public power bodies must do all they can. For people to
 21 be confused about this, that entity who are supposed to
 22 tell them how it is would not, and how can one then live
 23 in such country? When someone else: it is not my
 24 jurisdiction, I take my hands off of this, well, then
 25 the rule of law would have to cease to exist in

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13:09 1 Slovakia.
 2 I'm sorry, I apologise, I'm kind of in disagreement
 3 with this. Public power bodies are here to make easier
 4 the lives in complex legal relationships to people and
 5 other entities. If we were to adopt this thesis, we
 6 would then resign to such system. That is why, forgive
 7 me, I must not agree with this.
 8 Q. And my final question is, my understanding is that this
 9 decision was issued in connection with an application
 10 for an interim injunction. Does any part of the
 11 decision establish a binding legal precedent under
 12 Slovak law?
 13 A. Now, the term of precedent, I know we are formally on
 14 British soil, but the precedents in continental law is
 15 very doubtful. We do have in the Slovak legal system
 16 precedential binding, but within the instance procedure
 17 on a specific case without general binding effect.
 18 So neither Prešov Regional Court or Bardejov
 19 District Court do not have the power, authority, to
 20 formulate legal precedents. Even the Slovak Supreme
 21 Court or Constitutional Court, in their case it would be
 22 theoretically very doubtful whether they can formulate
 23 a precedent.
 24 So definitely not a precedent, but with the highest
 25 court authorities, the judgments have a very powerful

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13:10 1 interpretative effect. But, once again, these are not
 2 binding precedents.
 3 So no Prešov Regional Court or Bardejov District
 4 Court are capable of formulating such precedent.
 5 MR TUSHINGHAM: I have no further questions. Thank you,
 6 Professor.
 7 THE PRESIDENT: Thank you. Do my colleagues have questions?
 8 I have just one.
 9 (1.11 pm)
 10 Questions from THE TRIBUNAL
 11 MR DRYMER: One very quick question, one particular and
 12 quick question, Professor, and in the interests of time
 13 I would ask you to try and answer it as specifically and
 14 as quickly as possible.
 15 At paragraph 20 of your second report you referred
 16 to the nemo turpitudinem principle, what some of us
 17 might call us the "nemo dat" principle or, poor English
 18 speakers, the principle that one may not be heard to
 19 invoke his own turpitude; correct? That is one element
 20 of your critique of what the courts have done here.
 21 If one looks, however, at R-63, which we saw
 22 earlier, at page 6, could I ask the technician to turn
 23 that up? For the benefit of the witness in particular,
 24 on the screen. I have it on my own screen. Right,
 25 page 6. Fifth paragraph, it begins in English:

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13:13 1 "Nonetheless ..."
 2 Could you highlight that, please? Professor, you
 3 see the paragraph? I know you might not see the Slovak
 4 version -- ah, there it is -- but I understand you read
 5 English.
 6 When I read this several weeks ago, it occurred to
 7 me that this is the court's attempt in fact to balance
 8 rights and to consider the fact that Ms Varjanová ought
 9 not to have obstructed this access road. Do you agree
 10 with me?
 11 A. Yes.
 12 MR DRYMER: In other words, this is the court's attempt to
 13 wrestle with the very principle that you say they
 14 ignored?
 15 A. Well, at the same time -- thank you, Madam President,
 16 for the argument -- a simple answer is yes.
 17 MR DRYMER: I'm not arguing, and I'm not the President.
 18 A. And it says even here that it was an access road, so as
 19 though the court agrees with the fact that this is
 20 an access road and it was not appropriate to block it.
 21 MR DRYMER: Right, so the court did, if you will, consider
 22 whether, or attempt to consider, or commenced to
 23 consider, whether or not Ms Varjanová acted contrary to
 24 the law, and took that into consideration in its
 25 judgment, it seems to me?

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13:15 1 A. Of course. It is a very legitimate legal impression.
 2 MR DRYMER: Thank you.
 3 A. But let me emphasise, it is still a resolution on
 4 granting preliminary injunction where the court does not
 5 exercise evidencing; in fact, you do not evidence, you
 6 only certify fact.
 7 And semantically appropriate to that is the careful
 8 language of the court in its document, in its judgment,
 9 pointing out that this could be a problem; since they
 10 have not conducting evidencing, they have no authority
 11 to provide more detail, or more depth. This is how
 12 I would read it. But, in principle, one cannot disagree
 13 with what you just said.
 14 MR DRYMER: Thank you, sir. That was my sole question. The
 15 rest has been very comprehensively covered by counsel,
 16 and by previous questions that we've asked you.
 17 Merci, madame.
 18 THE PRESIDENT: Professor Števec, I would simply like to
 19 make sure that I understood you correctly. At 13.07
 20 (page 96, lines 7-13) approximately -- and I'm saying
 21 this for reference to the transcript, it should not
 22 concern you -- you were calling for more legal certainty
 23 in Slovakia. And you then said:
 24 "Who else would have the power to decide whether or
 25 not this [road] is a special purpose road, if not either

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13:16 1 the Ministry of Transport ..."
 2 And then you referred to the basis for its powers:
 3 "... and the municipality of Smilno ..."
 4 And you also referred to the basis for the power.
 5 Is that -- do I understand you correctly? It's the
 6 Ministry, and you explained that this is not a binding
 7 interpretation, but still it has the competence to give
 8 it, and the municipality?
 9 A. Yes. But neither one of those two are binding. But in
 10 this case not even the court interpretation is binding.
 11 And that's absurd. Court interpretation is only absurd
 12 inter partes, in this particular case.
 13 But in order for this issue to be resolved once and
 14 for all, I think it should be in the power by bodies of
 15 public power different than court. For instance,
 16 Ministry of Transport should issue a methodological
 17 guidelines. No matter how unbinding, but it would bring
 18 much more light into this area, while the court, no
 19 matter how high or superior it is to the protection of
 20 legality, may not issue any generally binding
 21 guidelines, only mediate inter partes case. This is
 22 what I had in mind.
 23 THE PRESIDENT: Thank you. I think you've clarified that
 24 fact.
 25 MR TUSHINGHAM: Could I just raise one point on the

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13:18 1 transcript. I think at 13.17.24 (page 101, line 11),
 2 the reference is "absurd". I think I heard "observed";
 3 is that correct? It may be an interpretation ...
 4 THE PRESIDENT: I heard "absurd".
 5 THE INTERPRETER: He said "absurd".
 6 THE PRESIDENT: But we can ask him.
 7 MR DRYMER: Yes, indeed. I heard "absurd".
 8 THE PRESIDENT: Can the interpreter refer back?
 9 A. I'm sorry, I don't remember. I would have to be made
 10 familiar with the context of the sentence.
 11 THE PRESIDENT: The interpreter could refer back to the word
 12 that was used then, and ask in Slovak what word was
 13 used, and then translate it back to us? (Pause).
 14 A. I truly don't remember exactly, but I have no doubt
 15 about this. I guess I have used this word. If I meant
 16 the situation of the state of law, or rule of law in
 17 Slovakia, I think it would be a quite appropriate word.
 18 THE INTERPRETER: Now a comment by the interpreter, if
 19 I may? The interpreter remembers a word "absurd" has
 20 been used.
 21 THE PRESIDENT: Thank you.
 22 MR TUSHINGHAM: Thank you.
 23 THE PRESIDENT: Professor Števec, this was a long
 24 examination, but we are now getting to the close of it.
 25 So we would like to thank you very much for your

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13:19 1 assistance this morning. And that ends -- we can now
 2 disconnect the connection.
 3 PROFESSOR ŠTEVCEK: I'd also like to thank you very much for
 4 your patience. It's been very beneficial to me, as
 5 a professional experience. So I equally thank you, and
 6 wish you a nice day. Goodbye.
 7 THE PRESIDENT: Goodbye. Thank you.
 8 So this is obviously a good time for us to break.
 9 But I should say that we were a little concerned by the
 10 time that was taken for the cross-examination. Of
 11 course on both sides you know that you're in charge of
 12 the allocation of your time, and there will be no time
 13 for extensions. I think we've been clear about that,
 14 and that is what it will be.
 15 MR TUSHINGHAM: We certainly understand, Madam President.
 16 THE PRESIDENT: Good. Excellent.
 17 Then have a good lunch, everyone. Should we be back
 18 at 2.15?
 19 MR TUSHINGHAM: That would be fine.
 20 THE PRESIDENT: Is that fine? Good.
 21 (1.21 pm)
 22 (Adjourned until 2.15 pm)
 23 (2.16 pm)
 24 PROFESSOR DR JUDr L'UBOMÍR FOGAŠ (called)
 25 THE PRESIDENT: Good afternoon, although you have been with

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14:17 1 us this morning already.
 2 Do you hear the interpretation?
 3 PROFESSOR FOGAŠ: Yes, I can hear it well, Madam President.
 4 THE PRESIDENT: Can you please confirm that you are
 5 L'ubomír Fogaš?
 6 PROFESSOR FOGAŠ: Yes, I am.
 7 THE PRESIDENT: And you are a practising attorney. You have
 8 also taught civil law as a professor?
 9 PROFESSOR FOGAŠ: Yes, this is true.
 10 THE PRESIDENT: You have submitted two expert reports, the
 11 first one of 31 March 2023 and the second one of
 12 11 December 2023?
 13 PROFESSOR FOGAŠ: Yes, indeed, that is correct.
 14 THE PRESIDENT: You're heard as an expert in this
 15 arbitration. As an expert, you are under a duty to make
 16 only statements in accordance with your sincere belief.
 17 Can you please state this by reading the expert
 18 declaration?
 19 PROFESSOR FOGAŠ: I solemnly declare upon my honour and
 20 conscience that my statement will be in accordance with
 21 my sincere belief.
 22 THE PRESIDENT: Thank you.
 23 Can I turn to you first, Dr Pekar?
 24 MR PEKAR: Thank you, Madam President. We have no
 25 questions.

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14:19 1 THE PRESIDENT: Good. That was fast! Then I turn to
 2 Mr Tushingham.
 3 (2.19 pm)
 4 Cross-examination by MR TUSHINGHAM
 5 Q. Thank you very much, Madam President.
 6 Dr Fogaš, good afternoon.
 7 A. Thank you, the same to you.
 8 Q. Would you prefer if I referred to you as Dr Fogaš or
 9 "Sir"; what would be your preference?
 10 A. I'll leave it fully up to you. Both is pleasant.
 11 Q. Thank you very much.
 12 I was reading through your CV and I wanted to just
 13 ask some very brief questions about your background.
 14 As I understand it, you obtained your doctorate in
 15 law in 1976; is that right?
 16 A. Yes, that is correct.
 17 Q. In 1985 you then became an associated professor of civil
 18 law at PF UK; is that right?
 19 A. Yes.
 20 Q. And then I also read with interest that between 1990 and
 21 2002 you spent 12 years as an elected politician in the
 22 Slovak Republic; is that correct?
 23 A. Yes, that is correct.
 24 Q. In both the National Council and then also as a Deputy
 25 Prime Minister of the Government for legislation; is

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14:20 1 that correct?
 2 A. Yes, this period covers both mandates when I was part of
 3 the supreme constitutional authorities, or elected
 4 positions.
 5 Q. And do you accept, therefore, that as a result of your
 6 12-year career in politics, you have a past affiliation
 7 with the Respondent in this arbitration?
 8 A. After 12 years in politics, I came to the conclusion
 9 that Slovak legal order is fully adaptable and adapted
 10 to the conditions of the European Union law, and I have
 11 decided to return back to my former profession.
 12 Q. I understand. And as I understand it, after you retired
 13 from politics, you then became an attorney at law, and
 14 later a professor at PF UK?
 15 A. Yes. I have returned back to my alma mater and I have
 16 taken over the department of civil law as the head of
 17 the department.
 18 Q. And is it correct that since 2017 you have not held any
 19 academic position at that university; is that right?
 20 A. Yes, that is correct.
 21 Q. Thank you.
 22 I would like to begin, if I may, by looking at the
 23 conditions for granting an interim injunction under
 24 Slovak law.
 25 Could I ask that you be shown Exhibit LF-4, and in

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14:23 1 the English it is page 22, and in the Slovak it should
 2 be page 15.
 3 So in the English it should be page 22, not
 4 Article 22. Yes. And in the Slovak it should be
 5 page 15.
 6 Sir, do you see Article 74 of the Code of Civil
 7 Procedure, CCP, on the screen?
 8 A. Yes, I can see that.
 9 Q. And that provision, as I understand it, empowers the
 10 court to grant an interim injunction before proceedings
 11 are initiated; is that correct?
 12 A. Yes, that is correct. This was the possibility to
 13 a higher degree of flexibility in the Code of Civil
 14 Procedure, to impose an interim injunction before the
 15 proceedings, or at the same time as the proceedings have
 16 begun, or during the course of proceedings.
 17 Q. Could you please move forward to Article 102, which
 18 should be at page 37 of the English, and page 26 of the
 19 Slovak. And if we could scroll down to the bottom,
 20 Article 102. If we could scroll down on the English
 21 just slightly, please. Yes.
 22 Is it correct that Article 102 is the provision
 23 which empowers the court to grant an interim injunction
 24 after proceedings have been initiated?
 25 A. Yes.

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14:25 1 Q. And in the present case, is it correct that Ms Varjanová
 2 relied on Article 102 in her request for an interim
 3 injunction, which was filed in January of 2016?
 4 A. Yes.
 5 Q. Now, I hope this is going to be uncontroversial, but
 6 would you agree that Ms Varjanová substantive action was
 7 for a declaration nullifying a purchase contract which
 8 AOG had concluded with Mr Tomecek in December of 2015?
 9 A. Yes. This referred to an action with the purpose of
 10 declaring a nullity of such an agreement.
 11 Q. Yes. And in that regard, Ms Varjanová relied upon
 12 provisions in the Civil Code, specifically Article 40a
 13 and Article 144; do you recall that?
 14 A. If you could please repeat that question again.
 15 Q. If I could just show you, perhaps it might be easier, by
 16 reference to your first expert report, at paragraph 14.
 17 That's the second expert report, I am afraid. It's the
 18 first expert report.
 19 Do you see in paragraph 14 you refer to the action:
 20 "... which had its substantive law basis in private
 21 law under ... the Civil Code ..."
 22 And you refer to Articles 40a and 140 of the Civil
 23 Code; do you see that?
 24 A. Yes, I can see that.
 25 Q. And on the same day that Ms Varjanová initiated her

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14:28 1 substantive action, she also filed a request for
2 an interim injunction against AOG and you refer to that
3 at paragraph 15.
4 A. Yes.
5 Q. Do you agree that Ms Varjanová's claim for substantive
6 relief nullifying the purchase contract did not
7 automatically entitle her to obtain an interim
8 injunction restraining AOG from using the land plot?
9 A. I believe that the procedure was such that the request
10 for interim injunction was submitted, and as
11 a follow-up, I don't know whether this was the case of
12 days or week -- apologies. So first the action was
13 submitted and then the request for granting the interim
14 injunction was submitted.
15 Q. Yes. My question is just slightly different, which is:
16 do you agree that the claim for substantive relief that
17 Ms Varjanová was seeking to obtain in her action did not
18 automatically give her an entitlement to request
19 an interim injunction? She needed to satisfy additional
20 conditions in order to obtain an interim injunction; do
21 you agree?
22 A. The act clearly promulgated the conditions under which
23 the request for an interim injunction can be submitted,
24 and I am deeply convinced that these conditions were
25 fulfilled at that time.

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14:30 1 Q. Could you please be shown Exhibit MS-5. And in the
2 Slovak it's page 4, in the English it's page 1. This,
3 as I understand it, sir, is Ms Varjanová's request for
4 an interim injunction; do you see that?
5 MR PEKAR: Objection: mischaracterisation. The document is
6 both the claim and the request.
7 MR TUSHINGHAM: That's entirely fair. I will rephrase.
8 This part of the document is the request for
9 an interim injunction; do you agree?
10 A. Yes, I do.
11 Q. And you can see that Ms Varjanová relies on Article 102
12 of the Code of Civil Procedure; do you see that?
13 A. Yes, I do.
14 Q. So, in order to obtain an injunction, Ms Varjanová
15 needed to establish that there was a substantiated need
16 temporarily to adjust the situation of the parties under
17 Article 102(1); do you agree?
18 A. I think that's what she did.
19 MR DRYMER: Have you seen this document before, sir?
20 A. Yes, I have.
21 MR DRYMER: Very good.
22 MR TUSHINGHAM: By contrast, if there is no substantiated
23 need temporarily to adjust the situation of the parties,
24 do you agree that, hypothetically speaking, the court
25 cannot grant an interim injunction under Article 102?

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14:32 1 A. This was the issue of a dispute between co-owners, and
2 the immediate injunction is a measure of securing --
3 guaranteeing of a situation where, during the course of
4 the dispute, or before a ruling is made, rights of one
5 of the parties shall not be violated. So I believe this
6 is a common practice.
7 Q. Perhaps you could just be shown your first expert
8 report, please, at paragraph 29. Do you have that in
9 front of you?
10 A. In print?
11 Q. Yes. In your first expert report at paragraph 29.
12 A. Yes. What I have in front of me is my second expert
13 assessment, and there I insisted on the fact that the
14 court should have considered the nature of the landlord.
15 This is the text of the second expert assessment.
16 Q. Perhaps if you could do it by reference to the document
17 that is on the screen, sir. Ah, you have it there.
18 Do you have paragraph 29 in hard copy in your first
19 expert report; do you have that in front of you?
20 A. [Yes].
21 Q. And the sentence which begins:
22 "Such situation occurs if there is a substantiated
23 need to temporarily regulate legal relationships of the
24 parties due to a threat of damage and/or increase of
25 damage."

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14:34 1 And as I understand it, you were referring there to
2 Article 102(1) of the CCP?
3 A. Yes.
4 Q. So if there is no substantiated need, hypothetically
5 speaking, temporarily to adjust the situation of the
6 parties, the court cannot grant an interim injunction;
7 do you agree?
8 A. Well, yes, because the condition for issuing the
9 immediate injunction needs to satisfy certain conditions
10 first.
11 Q. Yes. Thank you.
12 Could you go back now, please, to Exhibit LF-4, and
13 if we move on to Article 75 of the Civil Code, which is
14 at page 22 of LF-4 in the English, and page 15 in the
15 Slovak. So it's page 22 in the English of LF-4, and
16 page 15 in the Slovak. (Pause)
17 I don't think we have the right document on the
18 screen. It's an exhibit to Dr Fogaš' expert report,
19 Exhibit LF-4. Yes, that's it. Exactly. Great.
20 And if we could just scroll down slightly on the
21 Slovak.
22 Dr Fogaš, do you see Article 75 of the CCP on the
23 screen in front of you?
24 So do you see in Article 75(1) it provides that:
25 "The interim injunction shall be ordered by the

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14:37 1 court upon a petition."
 2 And then 75(2) provides that:
 3 "... the petition shall include ..."
 4 And then the words I'm interested in are:
 5 "... the reasoning of the risk of imminent harm ..."
 6 Do you see those words, "imminent harm"?
 7 A. Could I please see the whole text of the article?
 8 Because I can only see the first half of it in the
 9 Slovak version. (Pause)
 10 Yes.
 11 Q. Yes. And do you recall Professor Števec's opinion in
 12 his expert reports (page 6, para 16, first expert
 13 report) that the words "imminent harm" mean:
 14 "... that the applicant must certify that, without
 15 an injunction, significant, serious and even irreparable
 16 harm could occur."
 17 Do you recall his testimony, or his opinion, in that
 18 regard?
 19 A. Yes.
 20 Q. And in your first expert report at paragraph 37, do you
 21 recall saying that Professor Števec did not provide
 22 "any court decision that would properly justify that
 23 conclusion"; do you recall your opinion in that regard?
 24 A. You are asking at a different issue. In point 37 of my
 25 expert report, I debate with Mr Števec the case whether

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14:41 1 characterises the conditions for issuing the immediate
 2 injunction.
 3 This is also stipulated in my report. It says the
 4 risk of imminent harm, not serious, irreparable or
 5 significant harm. So I cannot consider such conclusion
 6 as a correct one.
 7 Q. Can you please be shown Exhibit MS-2. In the Slovak it
 8 is on page 4. Perhaps if we just start, please, on
 9 page 1 of the Slovak, in fairness.
 10 Sir, this is a resolution of the Supreme Court of
 11 the Slovak Republic dated 12 May 2012, as I understand
 12 it. Have you seen this resolution of the Supreme Court
 13 before?
 14 A. I don't know if I have seen it, but I think I know it.
 15 Q. Could you please turn to page 4 of the Slovak and the
 16 highlighted passage? And in this passage of the Supreme
 17 Court's resolution, the court says:
 18 "It follows from the provisions of Article 75
 19 [paragraph] 2 ... governing the requirements of a motion
 20 for an interim injunction that one of the preconditions
 21 for granting the interim injunction is that the
 22 applicant justifies the threat of imminent harm ... This
 23 means that the applicant must certify that, without
 24 an injunction, significant, serious and even irreparable
 25 harm could be caused to the applicant."

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14:39 1 the imminent or irreplaceable or other type of harm is
 2 to arise. This is something totally different than what
 3 your question aims at.
 4 Q. Well, as I understood it from paragraph --
 5 A. I suppose then you refer to point 36 of my expert
 6 report.
 7 Q. I'm looking at paragraph 37, where you say --
 8 A. Yes.
 9 Q. "... the author does not provide any reference to any
 10 provision of the CCP, any professional literature or any
 11 court decision that would properly justify that
 12 conclusion."
 13 And what Professor Števec is discussing there is
 14 the concept of imminent harm; that's right, isn't it?
 15 A. The act at the time when the court proceedings were held
 16 included wording that one of the conditions for imposing
 17 the immediate injunction is the imminent harm. Not as
 18 Professor Števec has stated, where he claims that
 19 serious, significant or even irreparable harm can occur.
 20 In my expert assessment, expert report, I have
 21 referred to the single document which has been written
 22 in Slovakia regarding these -- I reminisce this was
 23 a book by Professor Mazák, the former President of the
 24 Constitutional Court, at the moment the head of the
 25 Judicial Council of Slovakia, where in his book he

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14:43 1 Do you see that?
 2 A. Yes, I can see that.
 3 Q. The Supreme Court is the highest court in the Slovak
 4 Republic in the hierarchy of the courts; is that right?
 5 A. It is so.
 6 Q. And so this decision supports Professor Števec's
 7 opinion as to the meaning of the words "imminent harm"
 8 in Article 75, subparagraph (2) of the CCP; do you
 9 agree?
 10 A. I don't agree. Professor Števec himself stated in his
 11 testimony today that the rulings of the court are not
 12 binding. This is the first thing.
 13 The second thing, that this case law of the Supreme
 14 Court was never generalised, meaning that the Supreme
 15 Court issuing its collection of case law, in which it
 16 publishes the most relevant and binding findings, which
 17 are to complement the reading of law, or which are to
 18 instruct courts at a lower level on how to rule in civic
 19 cases, civic disputes.
 20 This case law has never been published. Above all,
 21 it's from 2012. Nor has it become a basis, or
 22 a precedence, for a ruling of lower courts, a reality
 23 such that the new wording of the Civil Procedures Code
 24 does not even include parts referring to such imminent
 25 harm.

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<p>14:45 1 So even in the period from which this document 2 originates, it couldn't have been generalised for all 3 courts in Slovakia ruling on similar cases, because 4 they, first of all, might have not been familiar with 5 it, as it has not been published in the collection of 6 rulings of the Supreme Court. 7 Q. Could you please be shown Exhibit MS-3. As I understand 8 it, this is a judgment, or resolution, of the Supreme 9 Court dated 29 April 2011. Have you seen a copy of this 10 resolution before? 11 A. I have not seen it but I've heard about it. 12 Q. Could you please turn to page 8 in the Slovak. And 13 again here we see exactly the same language being used 14 by the Supreme Court as in the earlier decision that we 15 saw just before, don't we? 16 A. It's not exactly the same wording, but it is a similar 17 wording, and it is from the same period. Nor this case 18 law has ever been published in the collection of rulings 19 and opinions of the Supreme Court of the Slovak 20 Republic, therefore it has not become a basis for the 21 ruling of the courts in Slovakia. The practice has 22 always been such that the part of ruling has used one 23 legal sentence to be published, which then included also 24 a detailed commentary, which helped the courts in their 25 rulings.</p> <p style="text-align: center;">Page 117</p>	<p>14:49 1 we need to immediately resolve the relations between the 2 parties. All literature which has been published on 3 this, including case law, stipulates that before 4 an immediate measure, or injunction is ordered, no other 5 examining is ordered other than those that was present 6 in paper form, together with the action to the court. 7 So at that point it is not even possible to settle 8 what is an imminent or significant or even irreparable 9 harm. At that time it is not possible to define that. 10 My opinion, my personal opinion, is such that the 11 original law, which stated that we need to first of all 12 demonstrate at least an imminent harm, any form of 13 imminent harm, that was a more correct wording than the 14 present wording, which doesn't refer to any such harm. 15 I believe that our Civil Procedure Code has been in 16 practice for a rather short period of time, and we will 17 definitely see its amendment, and this will be one of 18 the issues addressed. Namely, to conclude, I'd like to 19 state that it shouldn't refer to "serious" or "even 20 irreparable harm". I wouldn't say that this should be 21 in the present wording, because this would need to be 22 proven. This would need to be proven. But referring to 23 "imminent harm" is something I could live with. But, as 24 I have said, today we have no such references there. 25 MR DRYMER: Right. Even imminence would need to be proven,</p> <p style="text-align: center;">Page 119</p>
<p>14:47 1 None of the case laws, none of the rulings that you 2 have shown to me have ever been published in such 3 a collection. Therefore, it has never become the basis 4 for a ruling of lower courts in Slovakia. Since these 5 readings have not been adopted in practice, the current 6 wording of the law does not include any reference to it. 7 MR DRYMER: Doctor, if I may, I'm not trying to put any 8 formal characterisation on these legal texts, alright, 9 we haven't discussed it, we're not there yet. But on 10 their face they stand for the proposition that 11 an applicant for this sort of injunction must certify 12 that absent the injunction, significant -- I'm quoting: 13 "... significant, serious and even irreparable harm 14 could occur." 15 I understand your point that these particular 16 judgments, for various reasons, have not formed part of 17 the body of law applicable to lower courts. 18 I understand your comments on that. But are you telling 19 us that this proposition, regarding the need for 20 "significant, serious and even irreparable harm" is not 21 a proposition known to Slovak law, related to this sort 22 of injunction at all? 23 A. The construction of the procedural code, whether this 24 has been the CPC or CCP, so both whether this is Civil 25 Procedure Code or Code of Civil Procedure, is such that</p> <p style="text-align: center;">Page 118</p>	<p>14:50 1 though, I suppose? That's a factual question. 2 A. I believe that if I understand the broad scope of civil 3 proceedings, sometimes it is sufficient for the harm -- 4 for the threat of the harm to loom. It doesn't have to 5 be characterised by a certain scope or size. For 6 example, when we talk about minors, or when we talk 7 about payment of damages, or when we talk about disputes 8 between co-owners, as is this one. In any case, the 9 longer the illegal state were to continue, for example, 10 an invalid agreement, the longer it lasts, the higher 11 the damage that might occur. Therefore, I think that 12 a referral to a threat of harm had its place in the 13 wording of the law. 14 But, as I have said, there was no serious, 15 significant or even irreparable harm -- this was not the 16 degree of the harm to be demonstrated, because at the 17 time when the court is ruling, we need to consider the 18 real situation. 19 An action is submitted; even if you submit the 20 proposal for the immediate injunction a week after, it's 21 still an insufficient amount of time for the court to 22 examine the individual evidence, because this requires 23 an immediate action on the side of the court, whether 24 this is meant to protect the ownership, or a child, or 25 a legal capacity, or any basic rights of citizens.</p> <p style="text-align: center;">Page 120</p>

14:52 1 MR DRYMER: Thank you, Doctor.
2 MR TUSHINGHAM: Sir, thank you very much. Could you please
3 be shown now Exhibit MS-4. And as I understand it, this
4 is an extract from a textbook edited by authors,
5 including Professor Števček, entitled "The Code of Civil
6 Procedure" published in 2012.
7 Have you seen an extract -- this extract before?
8 A. I don't know which specific text you refer to, but
9 I know the textbook. Yes, of course.
10 Q. The right-hand side of the screen, could you just scroll
11 down to the bottom, please. And do you see in the
12 highlighted passage there; could you just read that to
13 yourself, please. (Pause)
14 A. Yes, I've read that. This refers to one of the rulings
15 of the Supreme Court. Nevertheless, probably the same
16 one. The author is a member of a department who is the
17 single one, or she has been left alone with this legal
18 opinion.
19 At the same time, I'd like to state that no other
20 commentary during the validity of the Code of Civil
21 Procedure, since the 1960s until 2012, no other ruling
22 has ever had such a commentary, whether this was the
23 author of the former Code of Civil Procedure, Mr Rubeš
24 or other following scholars like Madame Winterová, or,
25 for example, Mr Ceska(?) or other professors, would ever

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14:54 1 provide a similar commentary who were leading authors on
2 the issues. And, nevertheless, all of us, or most of
3 us, have contributed to writing these academic papers.
4 This is an isolated academic opinion.
5 Q. But do you agree, sir, that Professor Števček and the
6 other authors of this, or editors of this textbook, are
7 authoritative figures in the field of civil procedure?
8 A. I think that the freedom of investigation of scientific
9 inquiry is guaranteed in Slovakia. Everyone is entitled
10 to his or her own opinion. Every single book that
11 I have wrote included proposals to amend and to expand
12 the legislation, so I fully understand that my
13 colleague, if she was the author of this part, she came
14 with a certain proposal, which in my opinion would
15 complicate the imposing of immediate injunctions because
16 it would significantly reduce the possibility of
17 protecting basic rights and that is why this has not
18 been adopted in our civil law.
19 Q. Sir, I would like you to assume in my favour, for the
20 purposes of this discussion, that an applicant must
21 certify that without an injunction, significant, serious
22 and even irreparable harm could occur. I would like you
23 to make that assumption for the purposes of this
24 question.
25 Assume that there is a dispute between a plaintiff

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14:55 1 and a defendant about who is the owner of a priceless
2 painting. And assume that the defendant has threatened
3 to physically destroy the painting. You would agree
4 with me that that would provide evidence of significant,
5 serious and even irreparable harm; do you agree?
6 A. Speaking honestly, this measure in the civil law is to
7 provide a fast method of protection. Irrespective of
8 whether we are talking about a priceless painting or
9 a less valuable painting, it can still have
10 an exceptional value to the owner. For example, this
11 can be painted by the father, or a brother of the owner,
12 or someone to whom this painting will commemorate and
13 remind the personality until eternity; and it would be
14 very difficult, apart from specific material estimate,
15 it would be very difficult for us to estimate what does
16 it mean for a specific person.
17 In case of a piece of art which has -- which is from
18 a known author, it could probably be possible to have
19 a specific number, to put a price tag on that. But in
20 that case, for different parties -- the different
21 parties to the dispute would have different weapons.
22 Someone would be asked to demonstrate more. Someone
23 would be asked to demonstrate less. And the court, even
24 in civil disputes, especially in ownership disputes, the
25 court is expected to provide the same level of

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14:57 1 protection, irrespective of whether we are talking about
2 valuable or less valuable things, if these items have
3 other values that cannot be accounted for or that cannot
4 be defined at that particular moment.
5 So even for the future to define that there is
6 a significance here of possibly even irreparable harm,
7 that would require a totally different approach to
8 immediate injunctions and, from the very outset, admit
9 a certain evidencing. That, however, is not admitted,
10 or not considered in our Civil Code.
11 The Constitution, and even the Bill of Rights, even
12 the International Conventions on Human Rights, they
13 protect life. And also ownership. And also ownership.
14 Protection of life cannot depend from the fact that
15 whether we are protecting a rich or poor individual.
16 Protecting ownership also cannot depend from protecting
17 a vast fortune or a small fortune, small property. The
18 protection has to be provided immediately, and also to
19 the best extent possible, in order to avoid future
20 damages, future harms.
21 If this is to happen, if this is to be safeguarded,
22 we have the immediate injunction, which is of
23 a temporary nature only. And practically, it always
24 lasts only until a valid court ruling on the case. Only
25 until justice is being served, if we consider the

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14:59 1 rulings of the court something that philosophically
 2 embodies justice in society.
 3 Q. Dr Fogaš, we have a limited amount of time this
 4 afternoon and I would appreciate it, if you could, just
 5 to listen carefully to my question and try and keep your
 6 answers succinct.
 7 I'm going to change the hypothetical now. Assume
 8 that the dispute before the court relates to the right
 9 to use a land plot. I'm talking about real property
 10 here. Unless the defendant has made a threat --
 11 A. [Yes].
 12 Q. -- that results -- relating to the physical condition of
 13 the land plot, the condition in Article 75(2) of the CCP
 14 will not be satisfied, because there is no risk of
 15 either imminent harm or even irreparable harm to the
 16 land plot itself; do you agree?
 17 A. Again, I repeat that the law doesn't require the
 18 presence of a significant, serious or even irreparable
 19 harm to be present. The act, the law says that at
 20 a given point in time, the valid Code of Civil Procedure
 21 stated that we need to demonstrate imminent harm.
 22 If you want me to respond to the degree of
 23 protection to the land parcel, I believe that every time
 24 when a land parcel is being used by someone who is not
 25 entitled to it, whose ownership rights are at least

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15:01 1 dubious, given the fact that an action has been
 2 submitted, it is right and proper to make sure that no
 3 harm is done on that given land lot.
 4 MR DRYMER: And an injunction might serve to prevent such
 5 imminent harm, you would say?
 6 A. You are perfectly right. This is what all such measures
 7 in civil dispute law are for.
 8 MR TUSHINGHAM: Sir, in the answer that you just gave, prior
 9 to Mr Drymer's question, you said:
 10 "... I believe that every time when a land parcel is
 11 being used by someone who is not entitled to it, whose
 12 ownership rights are at least dubious ..."
 13 Do you agree with me that as at the date of the
 14 decisions by the Bardejov District Court and the Prešov
 15 Regional Court, there had been no final ruling on the
 16 merits about the validity or invalidity of the purchase
 17 contract between AOG and Mr Tomecek?
 18 A. The ruling on the merit is a ruling which is conducted
 19 only once evidence is being examined, after all the
 20 individual procedural steps are taken. The immediate
 21 injunction is issued for the interests of safeguarding
 22 the rights of the party whose rights are to be protected
 23 before the evidence is being examined. So, yes, at the
 24 time when the immediate injunction has been issued,
 25 there doesn't have to be a final ruling on the case on

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15:02 1 the merit. If there would be a ruling on the merit,
 2 such immediate injunction would be useless.
 3 Q. And in her request for an injunction that we looked at
 4 earlier, Ms Varjanová advanced two separate claims for
 5 relief: the first was an order against AOG refraining --
 6 an order requiring AOG to refrain from using the land
 7 plot itself; and the second was an order requiring AOG
 8 to refrain from removing things placed on the land plot
 9 by Ms Varjanová; do you agree?
 10 A. I believe that the immediate injunction aimed towards
 11 preventing the use of a piece of real estate that has
 12 been characterised as an arable land.
 13 Q. Could we just look, then, please, at the request, which
 14 is at MS-5. And on to page 2 of the English, please.
 15 And in the Slovak, if we could turn to page 4.
 16 So do you see on the page there that:
 17 "... the plaintiff claims that the court should
 18 order this [interim injunction]."
 19 And then there were two prayers for relief. The
 20 first, that the "defendant is obliged to refrain from
 21 using the real property", and that's what you have
 22 referred to as the land plot in your reports; is that
 23 right?
 24 A. Yes.
 25 Q. And the second, in the second paragraph, was an order

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15:04 1 that:
 2 "The first defendant [be] obliged to refrain from
 3 removing things placed by the plaintiff on the
 4 property."
 5 On the land plot. Do you agree?
 6 A. Yes.
 7 Q. So unless there was a risk of imminent harm to the land
 8 plot itself, in other words the physical condition of
 9 the land plot, the condition in Article 75(2) of the CCP
 10 would not be satisfied; do you agree?
 11 A. If there was no imminent harm, I would agree, yes, that
 12 the conditions would not be there. You are asking
 13 a theoretical question here.
 14 Q. Well, it's not entirely theoretical, sir, because if you
 15 look back at the request on the previous page.
 16 A. Yes.
 17 Q. And in the English as well, please. I'm going to
 18 suggest to you that the only evidence that was before
 19 the court related to a threat of damage to the motor
 20 vehicle. There was no evidence of a threat of imminent
 21 harm to the land plot itself, in other words the
 22 physical condition of the land plot; do you agree?
 23 A. But such an evidence had no need to be submitted. There
 24 was no need to submit anything like that. It could have
 25 been submitted in the proceedings on the merit.

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15:06 1 Q. But in order to obtain an injunction restraining AOG
2 from using the land plot, Ms Varjanová needed to certify
3 that there was a risk of imminent harm to the land plot
4 itself; don't you agree?
5 A. Well, I ask for forgiveness for a slightly longer
6 intervention, but if the land lot was used, for example,
7 by heavy machinery, if it was to be used by such
8 vehicles without the adoption of necessary measures,
9 a possible damage and threat, harm to the land lot,
10 could occur.
11 The court had the possibility to ascertain and to
12 consider whether damage, or whether harm, is present to
13 the whole piece of real estate or only to the items
14 which are placed on the land lot.
15 Q. Do you see any reference in the request, though, to any
16 evidence of damage to the physical condition of the land
17 plot by heavy machinery?
18 A. I believe that the court needs to ascertain -- needs to
19 consider the whole proposal as such, and in the broader
20 context -- and this is only my theoretical
21 consideration -- that it came to the conclusion that as
22 it relates to the protection of ownership rights,
23 because this was a dispute between co-owners, the real
24 estate itself has to be protected as well.
25 Q. But I am afraid I'm going to have to ask my question

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15:08 1 again: is there any reference in the request to evidence
2 of damage, or a risk of damage, to the physical
3 condition of the land plot?
4 A. I think that in the action, the action describes the
5 situation on the ground to a sufficient degree for the
6 court to come to a conclusion, even for a formulation of
7 the immediate injunction.
8 From the text that you have submitted to me, it also
9 stems that, as it is referred to in the letter of
10 Dr Slamka, the defendant, since its entry of its
11 ownership into the cadaster, has been asking for actions
12 on the side of the plaintiff, which is to respect his or
13 her ownership on the land parcel. Which basically says
14 that: on the basis of a purchase contract, I am the
15 owner and I can use the land lot in any way I see fit.
16 The ownership right or the use right, the rights of
17 use to the land lot, are determined from the ownership
18 right, it's basically defined by the ownership title to
19 the land. Therefore I think that the description of the
20 situation on-site is sufficient for the court.
21 MR DRYMER: Are you suggesting, Doctor -- no, I won't be so
22 coy. My understanding of your testimony earlier was
23 that any time a person who is not entitled to a parcel
24 of land threatens to enter onto that parcel of land,
25 there is a risk of imminent harm to that land that can

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15:10 1 be enjoined?
2 A. Yes, there is a potential harm, potential threat.
3 MR DRYMER: And is that an imminent harm, in your view, such
4 as might allow for a temporary injunction, or interim
5 injunction of this sort?
6 A. If such person, which is not in legal standing, whose
7 ownership title is dubious, enters such a land lot --
8 for example it would park its vehicles there, it would,
9 I don't know, carry out certain activities on the land
10 lot -- there is a threat to the land lot itself. So
11 there is a possible harm.
12 MR DRYMER: So is the nature of the trespassers trespassing
13 relevant? Does it matter if he parks a car or drives
14 heavy machinery, or just purports to go walking on it?
15 Does that have any impact on the court's consideration
16 of an interim injunction?
17 A. I believe that what needs to be considered is the
18 specific situation, the specific case, individually,
19 case by case.
20 At the same time, what we need to consider is the
21 length and mode of use of that given land lot. Imagine
22 that someone becomes an owner of a garden, without legal
23 title. For example, you cut the trees and you replace
24 them with new ones. Or, for example, you proceed with
25 other steps, you start to carry out other steps which

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15:12 1 can, in his or her opinion, be oriented towards future,
2 it can be for the benefit of the future.
3 But the original owner, who is entitled, who was
4 either bypassed or tricked or in any other way, his
5 ownership rights remain, he may not wish for such
6 actions, and there is a potential of harm.
7 We always need to consider the special situation or
8 the cases case by case, and the court is entitled to
9 adopt its own assessment and to adopt a ruling on
10 a basis of its own understanding of the situation, and
11 assess the potential for the imminent harm.
12 MR TUSHINGHAM: Thank you, sir. I'm going to move to
13 a slightly different aspect of the injunction now.
14 So, do you agree with me that in deciding whether
15 there is a need, temporarily, to adjust the situation of
16 the parties, and I'm thinking back to Article 102(1), do
17 you agree that the court must consider whether
18 disproportionate damage would be caused to one of the
19 parties as a result of the granting of the interim
20 injunction?
21 A. Could you please repeat the question again? What should
22 I agree with?
23 Q. Yes, I will repeat again.
24 Do you agree that in abstract terms, in deciding
25 whether or not to grant an interim injunction, the court

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15:13 1 must consider whether disproportionate damage would be
2 caused to one of the parties, for example the defendant,
3 as a result of the grant of the injunction?
4 A. The law had these situations in mind, and in one of the
5 stipulations it obliges the proponent of the immediate
6 injunction, in cases where such immediate injunction had
7 not a legal standing, has been improper one, to
8 compensate for the damages. So yes, the defendant is
9 protected. In the end, the damages will be compensated.
10 The plaintiff is not the one who is protected.
11 So the court has to also consider all issues, all
12 matters at hand. Quite clearly, we have provided for
13 the protection of the defendant by means of the
14 stipulations regarding the compensation of damages.
15 Even the defendant is protected in a way that even if
16 an immediate injunction is quashed, even if the
17 defendant wins the trial and the action is refused, even
18 in such cases he or she is entitled for compensation of
19 damages.
20 Therefore, in a situation when the court is to rule,
21 all these issues are to be considered and the ruling has
22 to be done in line with the law, and I believe that
23 an impartial judge will do so.
24 Q. Could you please be shown Exhibit C-125, and it should
25 be page 7 of both the English and the Slovak. This is

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15:17 1 order not to have any damage on it. In such way I would
2 protect both parties to the dispute. And I would also
3 consider the fact that I will not be causing
4 an irreparable situation. The painting would continue
5 to exist, it would be protected, and in the meantime the
6 parties would sue who is the true owner of the painting.
7 In this line, I would also read the text that you have
8 just highlighted to me.
9 Q. Do you agree that in considering whether
10 disproportionate damage would be caused to one of the
11 parties to the proceedings, the court could consider
12 a wide range of circumstances, including the size and
13 monetary value of the property, whether the injunction
14 might prevent the defendant from carrying on its
15 business, whether the defendant's business activities
16 are in the public interest, factors of this kind; do you
17 agree that those would be relevant to the assessment of
18 disproportionality?
19 A. I agree with you that the court needs to assess all
20 aspects.
21 However, as I have said, ownership is protected from
22 the convention on basic human rights all the way through
23 the Constitution, and specific laws, as is the case in
24 Slovakia, and I would not reduce it to wealth. I would
25 rather, instead, link it to measures that would prevent

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15:15 1 the decision of the Bardejov District Court in the
2 injunction proceedings and it's page 7.
3 Do you see the top paragraph there that begins:
4 "The preliminary measure is admissible and justified
5 if ..."
6 And then:
7 "... e/ the legal relations between the parties are
8 not interfered with in an unreasonable manner. The
9 court must consider whether, as a result of the
10 preliminary measure, disproportionate damage will be
11 caused to one of the parties to the proceedings."
12 Do you see that?
13 A. Yes, I can see it.
14 Q. And this is a decision that you say was justified. And
15 so you must agree that the court must consider that in
16 deciding whether to grant an injunction; do you agree?
17 A. A while ago you asked a question relating to a painting
18 and whether we can define what degree of protection
19 should be provided by the court. Well, to perhaps
20 explain my position, I'd like to use a similar
21 situation.
22 If we had a painting, the immediate injunction, in
23 order to prevent any further limitations to its use,
24 I would forbid any further sale of the painting and
25 I would order for it to be stored somewhere safe in

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15:19 1 the arising of damages to one or the other party in
2 an adequate manner. And at the same time I need to
3 protect the owner.
4 So in this I mean, in order to protect the owner
5 from actions of the other side, meaning the side which
6 is not -- which is acting illegally.
7 Q. Well, do you also agree that in the court's
8 consideration of those aspects, the court should
9 consider whether alternative relief, short of
10 an injunction, would be more proportionate? For
11 example, an order for monetary compensation, rather than
12 a prohibition on the use of the property?
13 A. I think you refer to -- are you referring to a case
14 which is subject to the considerations of this Tribunal?
15 Or are you talking in general?
16 Q. Well, I'm referring to this specific case, and I'm only
17 just going to ask you this. It appears from the
18 district court's judgment that the court did not
19 consider whether disproportionate damage would be caused
20 to AOG's business activities by the grant of this
21 injunction; do you agree?
22 A. I don't think I can answer this question, because
23 I cannot see inside the heads of the judges, what
24 everything was considered in their ruling.
25 On the other hand, if you are referring to

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15:21 1 1C/29/2016 what we also need to take into consideration
 2 is whose right is superior, whether the right of those
 3 who have a legally acquired certain item, as was the
 4 case here, or whether we are talking about protecting
 5 the right of the potential owner who clearly, according
 6 to the law, is entitled to his or her rights.
 7 This is what you can see from this action, you know,
 8 who is on a firm legal standing, because the call for
 9 declaring relative invalidity of the agreement has been
 10 exercised, and since this was a relative invalidity it
 11 was quite clear since it was exercised that in the end,
 12 the purchase agreement will be nullified, will be
 13 invalid.
 14 Therefore, to respond to a question whether the
 15 court was to protect more the interests of AOG or should
 16 have leaned more towards protecting the rights of Madame
 17 Varjanová, I mean, we cannot provide you with a single
 18 clear answer. I'm not a judge.
 19 If I was a judge, I would definitely protect the
 20 owner, the one whose ownership rights are at risk. To
 21 a higher degree, at least.
 22 MR DRYMER: Is proportionality an element of the law on this
 23 point? Is a court obliged to consider what in the
 24 common law, and certain civil law jurisdictions, would
 25 be called the balance of inconveniences?

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15:23 1 A. Yes, there are situations when the court needs to
 2 consider this. But this was not the case.
 3 MR DRYMER: Thank you. Thank you. Not in the context of
 4 this sort of interim injunction, is that what you're
 5 telling us?
 6 A. No.
 7 MR DRYMER: Thank you. "No" I am right, or "No" I'm wrong?
 8 A. I'm correct simply because in this case it is impossible
 9 to provide any other form of protection for the real
 10 estate other than preventing its use. What other
 11 possible remedy do we have?
 12 MR TUSHINGHAM: Well, another possible remedy, sir, would be
 13 an order for the payment of damages if it is later found
 14 that the land has been wrongfully used; do you agree?
 15 A. If there was a situation where the court would rule too
 16 late in the case, there would be a delayed ruling, I can
 17 imagine that, together with ruling on the ownership,
 18 a certain compensation of damages would be also implied
 19 that would, for example, include a calculation of rental
 20 fees for the period over which the piece of real estate
 21 has been used wrongfully, or without a legal title.
 22 But we still need to return back to this stipulation
 23 that in the meantime the piece of real estate can be
 24 damaged to such a degree, or its character can be
 25 changed, or its value can be reduced, that such

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15:24 1 situation can be irreparable, and there is no other way
 2 of preventing that other than creating or adopting
 3 a means of safeguarding such as this immediate
 4 injunction.
 5 Q. So are you accepting there, sir, that the damage needs
 6 to be irreparable?
 7 A. I never said that. I never said that. You asked
 8 whether other compensation is permissible, and I replied
 9 that if there was no immediate injunction and the piece
 10 of real estate would be used until the decision on the
 11 merit of the case, the court could also oblige to pay
 12 a certain compensation. This was not the case, because
 13 the immediate measure, the immediate injunction has been
 14 stipulated.
 15 However, in no case have I said that the condition
 16 of irreparable or significant harm needs to be satisfied
 17 first. Here, the only thing that had to be satisfied
 18 was the imminent harm.
 19 Q. I'm going to move to a new topic now.
 20 Sir, unless I am mistaken, in your two expert
 21 reports you do not express any opinion either way about
 22 whether a field road is a type of special purpose road
 23 within the meaning of the Road Act; have I understood
 24 your expert reports correctly on that point?
 25 A. In relation to my expert reports, I was never given this

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15:26 1 question. I can comment only in general terms.
 2 Q. I'm going to now turn to the question of jurisdiction of
 3 the court to grant an injunction, and this will be my
 4 final topic.
 5 I want to try and see if you agree with some basic
 6 points with me in relation to the court's jurisdiction.
 7 First of all, do you agree with me that jurisdiction
 8 is one of the conditions for the conduct of a court
 9 proceeding?
 10 A. Civil disputes, civil cases are administered by
 11 a specific set of conditions and one of them is also the
 12 jurisdiction of the court. That's what I think
 13 you referred to, the jurisdiction of the court.
 14 Q. Exactly, sir.
 15 My second question is: do you agree that under
 16 Article 103 of the Code of Civil Procedure, a court must
 17 constantly monitor whether it has jurisdiction?
 18 A. Yes, the jurisdiction of the court has to be
 19 continuously examined throughout the proceedings.
 20 Q. And that examination has to be undertaken by the court
 21 itself; do you agree?
 22 A. The lack of jurisdiction can be underlined or pointed by
 23 one of the parties to the dispute. Yes, but this is
 24 also one of the ex-offo obligations of the court.
 25 Q. And this ex-offo obligation applies at all stages of the

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15:28 1 proceedings including when a party applies for
 2 an interim injunction; do you agree?
 3 A. Yes, I'm convinced about that.
 4 Q. And the issue of whether a court has jurisdiction is
 5 a question of law; do you agree?
 6 A. Could you please repeat, because we couldn't understand
 7 the last part of your question? If you could please
 8 rephrase that?
 9 Q. I'm sorry, I'll try and rephrase.
 10 The question of whether a court has jurisdiction
 11 over a particular dispute is a question of law; do you
 12 agree?
 13 A. Yes, this is a procedural problem.
 14 Q. And if the court concludes it does not have
 15 jurisdiction, it must terminate the proceedings under
 16 Article 104 of the CCP; is that right?
 17 A. If there is a situation that it is established that the
 18 court does not have jurisdiction or loses its
 19 jurisdiction, yes, in such case the proceedings have to
 20 be stopped. And it has to be submitted to the
 21 responsible or corresponding authority.
 22 Q. Do you agree with Professor Števček that the
 23 iura novit curia principle forms part of Slovak law?
 24 A. Well, that's an ancient Roman principle and I think it's
 25 respected in all legal orders, including the Slovak one.

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15:30 1 Q. And so that principle means that in legal proceedings,
 2 parties are not required to prove the contents of a law
 3 published in the collection of laws of the Republic; is
 4 that right?
 5 MR PEKAR: Apologies, I hear that the translation was not
 6 done properly, so please repeat your question.
 7 MR TUSHINGHAM: Of course.
 8 In a legal proceeding, a party is not required to
 9 prove the contents of a law that has been published in
 10 the collection of laws of the Slovak Republic?
 11 A. Well, I don't know if I understood the question
 12 properly. If I could ask you for the third rendition,
 13 because we've grasped only half of it.
 14 THE PRESIDENT: Yes, I think the question is: does a party
 15 have to prove the content of the law, like you would
 16 prove the facts of one's case. It's a question asked by
 17 a common law lawyer. Because for civil law lawyers, in
 18 principle we do not prove the law, and that is probably
 19 the difficulty with the question.
 20 A. A party to the dispute needs to describe the case and it
 21 needs to formulate the request for relief, so what the
 22 party's asking for, and the request for relief is the
 23 defining for every further step of the proceedings,
 24 including the jurisdiction of the court. If the request
 25 for relief is formulated as it aims towards protection

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15:32 1 of public interests, for example, well, in such case the
 2 submission to the court might not be successful.
 3 However, in principle it applies that the citizen
 4 doesn't need to be familiar with the articles and the
 5 law. This is what the court should be familiar with.
 6 MR TUSHINGHAM: And so do you agree that at the time when
 7 the Bardejov District Court and the Prešov Regional
 8 Court issued their judgments in 2016, they should be
 9 familiar with the contents of the Road Act, a statute?
 10 A. If I understood the submitted documents well, Madame
 11 Varjanová has been asking for the protection of her
 12 co-ownership rights. This was a dispute between two
 13 co-owners. Precisely this was the validity or
 14 invalidity of a purchase agreement which was concluded
 15 without her being offer[ed] the rights to buy that share
 16 of the land.
 17 This has been supported by a document, by
 18 an ownership bill. The ownership bill referred to the
 19 specific land cadaster parcel where it also included
 20 a reference to the arable land at hand. This was the
 21 content of the proposal.
 22 To that, we need to also add that the general
 23 principle of reliability of texts, of decrees, of
 24 documents, needs to be respected, of title deeds issued
 25 by the cadaster. It's also called material declaration.

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15:34 1 The data inserted into the cadaster are inserted on the
 2 basis of the proposal for insertion, once the court
 3 receives the document that this is a parcel that
 4 includes arable land, and I don't know whether it was
 5 the obligation of the court to examine that. I don't
 6 think it was the duty of the court to examine that
 7 document. Simply the general principle stands that such
 8 a document is valid, unless proven otherwise. And since
 9 no one has objected to the validity of the document,
 10 I don't think it was for the court to study the Road
 11 Act. That's the fact.
 12 Q. Sir, could you please be shown LF-26. And in the Slovak
 13 version I think it is page 29.
 14 Is this the provision that you are alluding to in
 15 your answer to my previous question?
 16 A. Yes. Article 70, paragraph (1) stands that:
 17 "The cadastral data referred to in Article 7 shall
 18 be deemed to be reliable unless [proven otherwise]."
 19 Q. Could you read the final sentence of Article 70(2),
 20 please, to yourself. (Pause)
 21 A. Yes, I have read that.
 22 Q. And do you recall that in Ms Varjanová's request for
 23 an interim injunction, she was seeking an order
 24 restraining AOG from using the land plot registered in
 25 the E register as number 2721/780?

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15:36 1 A. Yes, this is the case.
 2 Q. So the type of land registered as a parcel of the
 3 E register is not deemed to be binding cadastral data,
 4 is it?
 5 A. Yes. The act says that the binding data is not the type
 6 of land. It doesn't however mean that the court is
 7 obliged to investigate the type of the land parcel,
 8 unless the party to the proceedings as dominus litis
 9 requires such an examination, it does not need to prove
 10 otherwise but it may seek such issue to be examined. Of
 11 this data.
 12 Q. Could you now be shown Exhibit MS-1, please. Have you
 13 seen a copy of this judgment of the Supreme Court from
 14 April 2021, to which Professor Števec refers in his
 15 expert report; have you seen that before? (Pause)
 16 A. If you could please formulate a question?
 17 Q. Sure. My question is whether you have read a copy of
 18 this decision of the Supreme Court before coming here to
 19 give evidence today?
 20 A. I don't think I've read the full extent of it.
 21 Q. Okay. Perhaps I can refresh your memory, to be fair.
 22 If you could go to your first expert report, please?
 23 MR DRYMER: Paragraph?
 24 MR TUSHINGHAM: I'm just getting the exact paragraph number.
 25 (Pause)

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15:41 1 Do you see that?
 2 A. Yes, I can see that.
 3 Q. And in the next paragraph beginning with the words
 4 "Grounds of the Judgement", in the English translation,
 5 you can see that the claimant sought a judgment ordering
 6 the defendant to refrain from passing through a land
 7 plot which the claimant owned; do you see that?
 8 A. Yes, I can see that.
 9 Q. And the claimant argued that the defendant was passing
 10 through that land without the claimant's consent; do you
 11 agree?
 12 A. Yes.
 13 Q. So, as formulated by the claimant, this was a private
 14 law dispute about the use of the claimant's real
 15 property; do you agree?
 16 A. But this is a totally different merit because here the
 17 party to the dispute was not the owner. This was not
 18 a dispute between owners. Therefore, we cannot apply
 19 this stipulation of the law to this case, because as
 20 long as I remember, this dispute was about a prohibition
 21 of entry or the prohibition of use of a private road,
 22 which for many years was used for access, for entering.
 23 However, here, the jurisdiction of civil courts has not
 24 been established to act in such a matter.
 25 So this is clearly based on other merits and also on

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15:39 1 It is at paragraph number 68. It starts at 66, to
 2 be fair.
 3 A. Oh yes, I do recall now.
 4 Q. And I'm going to just start with some basic questions
 5 which I hope you may be able to agree with, in which
 6 case we can take this kind of questioning a bit more
 7 quickly.
 8 Do you agree that in this case, the case began in
 9 the first-instance court as a private law dispute about
 10 whether the defendant was obliged to refrain from using
 11 the Claimant's land plot?
 12 A. First of all, it has to be said that the scope of this
 13 dispute had a different dimension, it has public
 14 interest dimension, because this was a special purpose
 15 road, a public road, and the action aimed towards
 16 establishing whether on the basis of applicable law the
 17 use of road should be prohibited.
 18 Q. Okay. Maybe we can do this by reference to the
 19 decision, then. If you could be shown, please, Exhibit
 20 MS-1. And in the first paragraph, beginning with the
 21 word "Resolution" in English, and in the fifth line in
 22 Slovak, the seventh line in English, the judgment
 23 records that:
 24 "... the dispute concerns the obligation to refrain
 25 from the use of real property."

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15:43 1 other legal situations. So I don't think that this case
 2 law can be used in this case as well.
 3 Q. But, sir, do you see in the paragraph beginning with the
 4 words "Grounds of the Judgement", and then it is in the
 5 English seven lines down -- six lines down:
 6 "The Claimant sought that entitlement on the basis
 7 of a statement that a road had been built on the land in
 8 question of which the Claimant is the owner ..."
 9 So the claimant was the owner of the land on which
 10 the road was located; do you agree?
 11 A. But who was using it? That person who was using it was
 12 not the owner. So that is not a dispute between two
 13 co-owners.
 14 Q. The defendant's defence was, it had a public right to
 15 use the road.
 16 A. But in our dispute, the one which is submitted to this
 17 Tribunal, this was the case of two co-owners, one
 18 supposed co-owner and one factual co-owner. So we are
 19 focusing on solely a private property dispute. This has
 20 a different public law dimension. Therefore, it is
 21 unapplicable in this case. I have also argued along the
 22 same line in my expert report.
 23 Q. Okay. Well, let's go on a few more paragraphs in the
 24 judgment. So if you could turn to page 3 in the English
 25 text, please, and page 2 in the Slovak. I am afraid the

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15:45 1 paragraph numbering does not entirely correspond and it
 2 is rather dense, so I will try my best.
 3 Do you see a paragraph in the English beginning with
 4 the number "5" in the middle of the page beginning:
 5 "The Supreme Court of the Slovak Republic (the
 6 'Supreme Court' or 'Court of Final Appeal') ..."
 7 Does the Tribunal have that part of it, and, sir, do
 8 you have that section?
 9 A. I can't see it.
 10 Q. Yes, I am afraid it's very difficult. If you scroll
 11 down slightly -- if we could scroll down in the Slovak
 12 slightly, please. And there should be a number 5.
 13 MR DRYMER: Somewhere between the 4 and the 6. It doesn't
 14 seem to be there.
 15 MR TUSHINGHAM: I wonder whether our friends on the other
 16 side could help us locate the right paragraph. It's the
 17 paragraph beginning:
 18 "The Supreme Court of the Slovak Republic..."
 19 MR DRYMER: "Najvyšší súd..."
 20 However that's pronounced.
 21 MR TUSHINGHAM: Yes, 5, there we go, we've got it. Do you
 22 see that section?
 23 A. [Yes].
 24 Q. So the Supreme Court:
 25 "... concluded, that the subject matter of the case

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15:46 1 was not an issue falling within the jurisdiction of
 2 general courts and ... cancelled the judgements
 3 delivered by the courts in the [proceedings below],
 4 stayed the proceedings and referred the case to the
 5 [competent authority]."
 6 Do you see that?
 7 A. Yes, I can see that. I've read that.
 8 Q. And so that order would only have been made if this was
 9 a dispute between two private parties, which the court
 10 was granting a stay of in favour of the competent
 11 authority; do you agree?
 12 A. I believe that there were strong items of public law
 13 interest. Therefore the lack of jurisdiction of the
 14 court has been mentioned here.
 15 I think, again, that the merits of the case were
 16 totally different. In our case we talk about the
 17 dispute between two co-owners. In this case, however,
 18 this was a dispute between the owner, who wanted to
 19 prevent his road to be used as public road against
 20 others.
 21 So this is a totally different situation, and
 22 a different case. I'm not -- I don't want to assess the
 23 merits of this case, but, again, this ruling is
 24 inapplicable to the case presently being discussed.
 25 Q. But if the court in the case at hand, in other words

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15:48 1 between AOG and Ms Marianna Varjanová, was required to
 2 assess whether it had jurisdiction, don't you agree that
 3 the court's decision in this case, about whether a court
 4 had the jurisdiction to pronounce upon the status of
 5 a road, was relevant?
 6 A. Well, I'm now trying to find a way of how to respond
 7 shortly.
 8 Disputes between co-owners and ownership disputes
 9 cannot be resolved by anyone else, according to the
 10 Slovak legal system, other than a court. In this case,
 11 as this was a dispute on co-ownership, it's always
 12 a civic dispute, because it's a civil dispute and this
 13 was specifically covered by paragraph 48 and following.
 14 So in that case, the transfer of ownership rights or
 15 preemptive rights are being discussed. Such disputes
 16 simply cannot be interrupted, and forwarded to some
 17 other proceedings, especially if we base the decision on
 18 the fact that the submitted evidence testified towards
 19 a civil character of the dispute.
 20 If we had a dispute between two co-owners of a land
 21 lot where, for example, the body of the highway is
 22 built, irrespective of what is on the land lot, it is
 23 still an issue of a dispute between two co-owners and
 24 no one else would rule on that, only a civil court.
 25 A different issue is the fact that a highway body

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15:50 1 has its own road body, which has been certified, it has
 2 been legally introduced into operation according to the
 3 valid legal norms. That's a different situation.
 4 However, a field road, which has no body of road, is
 5 simply to its full extent in the ownership of the
 6 co-owners, and no one else can rule other than the
 7 court.
 8 That's what is the main difference here, that this
 9 is a dispute between two co-owners, and what we see here
 10 is an issue in public law and public interest.
 11 Apologies for sharing my own personal opinion, but
 12 I think that in order to resolve the ownership dispute,
 13 it's irrelevant what is built or what is present on the
 14 piece of real estate. The land can be bought as it
 15 is --
 16 THE PRESIDENT: I think your position is very clear.
 17 MR TUSHINGHAM: I have no further questions in
 18 cross-examination.
 19 THE PRESIDENT: Questions in re-direct, Mr Pekar?
 20 (3.51 pm)
 21 Re-direct examination by MR PEKAR
 22 Q. Yes, we have just a few.
 23 Dr Fogaš, you remember being shown to decisions of
 24 the Slovak Supreme Court regarding the qualifications to
 25 the requirement to show the threat of imminent harm, do

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15:51 1 you?
 2 A. I think that ad hoc such decisions are present.
 3 MR DRYMER: But you remember being shown them?
 4 A. You think those that have been shown here ... yes, I've
 5 seen them, yes.
 6 MR PEKAR: And these were Exhibits MS-2 and MS-3. In the
 7 interests of time I will represent to you that these
 8 decisions are dated 23 May 2012 and 29 April 2011
 9 respectively.
 10 Now I would like to show you an exhibit to your
 11 first expert report. The Exhibit No. is LF-10.
 12 Do you recall having opined on that decision in your
 13 first expert report, sir?
 14 A. I don't see the description of the case here, the
 15 minutes of the case.
 16 I think so, yes. I think I did.
 17 Q. And I would kindly ask you to look at the date of the
 18 decision. It's not translated into English, but if you
 19 read it out loud in Slovak, it will be.
 20 No, the date is on the last line of the first
 21 paragraph, sir.
 22 A. 2012, I can see it now. Yes.
 23 Q. Sorry, sorry. That's my mistake. Please scroll down to
 24 the very end of the document. So we need the last page
 25 of the Slovak document.

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15:54 1 A. Yes.
 2 Q. Now the interpreter said something I didn't say. The
 3 interpreter actually said "26 November 2012", so that's
 4 why the witness answers "Yes".
 5 Do you agree that the decision is dated
 6 26 November 2012; correct?
 7 A. Yes, I do.
 8 Q. And now if we look at page 5, please. Does the Supreme
 9 Court opine on the standard of harm which is required
 10 for the issuance of an interim injunction in its
 11 decision?
 12 A. Well, I can see that the court assesses the conditions
 13 that need to be satisfied for the issuance of immediate
 14 injunction, that the certain basic facts allowing for
 15 the conclusion about the probability, about the imminent
 16 harm, need to be certified first. So this is the term
 17 that we have been using so far.
 18 MR DRYMER: Imminent harm needs to be certified? That's not
 19 what the English side says.
 20 A. All conditions need to be certified before issuing the
 21 immediate injunction. This is what it refers to.
 22 MR PEKAR: If I may?
 23 MR DRYMER: Please help.
 24 MR PEKAR: This is a very strangely formulated sentence. It
 25 is in the negative. So: even the interim injunction

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15:56 1 cannot be granted without certifying imminent harm.
 2 MR DRYMER: Thank you.
 3 A. May I --
 4 THE PRESIDENT: What does "certify" mean? Who certifies?
 5 The applicant states that, is that what it means?
 6 MR PEKAR: No, Madam President. So in the Slovak language
 7 there are two different levels of proof, which is very
 8 imprecise.
 9 THE PRESIDENT: Yes.
 10 MR PEKAR: One lower, which is used for interim injunctions,
 11 and higher, which is used for the decision on the
 12 merits, and in Slovak there are two different verbs to
 13 explain these two.
 14 So we just propose to use "certify" because --
 15 THE PRESIDENT: For the lower.
 16 MR PEKAR: For the lower standard of proof.
 17 THE PRESIDENT: Which just shows a likelihood.
 18 MR PEKAR: Yes.
 19 THE PRESIDENT: Yes, so it is the general standard that is
 20 well known for provisional remedies.
 21 MR PEKAR: Yes.
 22 So, Dr Fogaš, you would agree with me that the court
 23 here only refers to imminent harm, without any further
 24 qualifications; correct?
 25 A. Yes, this is the case.

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15:58 1 Q. And if you remember, we saw that this decision
 2 post-dates the two decisions that were shown to you by
 3 counsel for Claimant; correct?
 4 It "post-dates". Sorry, there was an incorrect
 5 translation.
 6 A. Yes, this is the case. May I perhaps explain one
 7 mechanism?
 8 Q. Yes.
 9 A. Since I was also part of the meeting of the college of
 10 the judges of the Supreme Court in relation to adopting
 11 measures that shall be published in the collection of
 12 the rulings and the case law of the Supreme Court, often
 13 the situation occurred where some of the tribunals ruled
 14 and the different senate would rule in a different way.
 15 In such case, the college of the judges ruled that,
 16 given the case that the cases were highly specific and
 17 highly different, which are rare, and seldomly
 18 replicated, such rulings would not be published in the
 19 collection of case law. In order to make sure that
 20 an exceptional case would become a rule, rather, the
 21 college of judges decided to wait for the new Civil
 22 Code.
 23 MR DRYMER: What about this case? Was it published? Do you
 24 know?
 25 This particular judgment we're looking at

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15:59 1 of November 2012, was it published? Is it any more
 2 authoritative than the other two?
 3 A. I think that this is one of those rulings that were not
 4 published. It only shows that the terminology was later
 5 used as a legal terminology.
 6 MR DRYMER: Yes.
 7 A. Perhaps could we return it back to the beginning?
 8 This is the case, as I have said. (Pause)
 9 MR DRYMER: For the moment, does either counsel have further
 10 questions?
 11 MR PEKAR: I was not sure if the Tribunal had any.
 12 THE PRESIDENT: Sorry, I didn't understand you had no
 13 questions.
 14 Any questions?
 15 No, no questions either from my side.
 16 So, Dr Fogaš, thank you very much for your
 17 assistance. This ends your examination.
 18 PROFESSOR FOGAŠ: Thank you also very much for having me
 19 here. Have a nice evening.
 20 THE PRESIDENT: Thank you.
 21 We should now take a break, is that fine? And then
 22 we will hear Mr Atkinson.
 23 MR PEKAR: I think we need to rearrange on our side a little
 24 bit. Five minutes will be enough.
 25 THE PRESIDENT: No, I think we can take 15 because we have

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16:02 1 been going for an hour and 45 minutes now, and I think
 2 for the court reporter and the interpreters, they will
 3 be happy about a break.
 4 MS MINGUEZ ALMEIDA: The interpreters are leaving; we are
 5 not using them this afternoon.
 6 THE PRESIDENT: That's right, thank you for saying so. And
 7 that is a good opportunity for me to thank them. It was
 8 very smooth. Thank you very much.
 9 THE INTERPRETER: Thank you as well.
 10 THE PRESIDENT: And now we can take a break.
 11 (4.02 pm)
 12 (A short break)
 13 (4.19 pm)
 14 THE PRESIDENT: Good afternoon.
 15 MR ALAN ATKINSON (called)
 16 THE PRESIDENT: Can you please confirm to us that are Alan
 17 Atkinson?
 18 MR ATKINSON: That is right. I am Alan Atkinson, sorry.
 19 THE PRESIDENT: Yes, that's what I understood. You're from
 20 Rockflow Resources?
 21 MR ATKINSON: That's correct.
 22 THE PRESIDENT: You are one of the three experts that we
 23 will hear from your firm.
 24 You have provided us with two reports, the first one
 25 dated 28 September 2022; the second one

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16:20 1 15 September 2023.
 2 MR ATKINSON: Yes.
 3 THE PRESIDENT: Do you have them there?
 4 MR ATKINSON: I do, thank you.
 5 THE PRESIDENT: Yes, good. You are heard as an expert. As
 6 an expert you are under a duty to make only statements
 7 in accordance with your sincere belief. Can you please
 8 confirm that this is what you will do.
 9 MR ATKINSON: Yes, certainly. I solemnly declare upon my
 10 honour and conscience that my statement will be in
 11 accordance with my sincere belief.
 12 THE PRESIDENT: Thank you. And now you have a presentation,
 13 as we understand.
 14 MR ATKINSON: I do.
 15 THE PRESIDENT: As you know, you have 15 minutes for your
 16 presentation.
 17 (4.21 pm)
 18 Presentation by MR ALAN ATKINSON
 19 MR ATKINSON: Alright, thank you very much.
 20 Well, good afternoon, everyone.
 21 The clicker is not working. (Pause)
 22 Okay. Good afternoon, everyone, my name is Alan
 23 Atkinson, I will describe the geological and geophysical
 24 work undertaken for this arbitration.
 25 My instructions are shown on the left of this

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16:22 1 slide -- oh, sorry, no they're not. This is a summary
 2 of my experience for your later reference (Slide 3).
 3 (Slide 4) My instructions are shown on the left
 4 here. They were to identify prospects on the Claimant's
 5 licence area, calculate petroleum volumes in those
 6 prospects, and calculate the geological chance of
 7 success of finding petroleum in those prospects.
 8 The work I undertook is listed on the right-hand
 9 side there, which addressed those instructions. In
 10 addition, I undertook some benchmarking exercises to
 11 check my volume estimates were reasonable and to check
 12 my geological chance of success was supportable.
 13 I will now go through all of those on the following
 14 slides.
 15 (Slide 5) So, starting with assessing prospectivity.
 16 The prospectivity of the area is indicated by nearby oil
 17 and gas fields in southern Poland shown as red and green
 18 spots on this geology map. They line a similar
 19 geological basin to the Claimant's licence area. The
 20 Claimant's licence area itself contains lots of evidence
 21 for the presence of oil and gas, including oil seeping
 22 out of the ground, oil and gas shows in every well that
 23 has been drilled in the area. It also contains one old
 24 oilfield, Mikova, which was providing oil to the Germans
 25 during the Second World War.

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<p>16:23 1 I'll draw your attention just to one other well, 2 this was drilled in 1900, Vysny Radvan 1, which, shortly 3 after commencing drilling, oil spurted 12 metres into 4 the air, as drawn to scale on that photograph of the 5 Mikova field. Anyway, with all that evidence 6 I concluded that the area was prospective for oil and 7 gas. 8 So I just mentioned a moment ago that I thought 9 there were some similarities between southern Poland and 10 the Claimant's licence area in Slovakia. So let me -- 11 there are also some differences, and I will describe 12 them on this next slide (6). 13 So Polish oil fields are found on the Silesian 14 nappe, the Dukla nappes and the Magura nappes, which are 15 geological provinces. That's in Poland. In Slovakia we 16 only have the Magura nappes and the Dukla nappes, so 17 there's immediately a difference. And a lot of the oil 18 and gas is found in the Silesian nappes. It's found in 19 the other nappes too, but on the Silesian nappe. 20 So I would suggest that the Silesian nappe is 21 analogous but not identical to the Magura nappe, because 22 it shares very similar geological history. Depositional 23 mechanisms, how the rocks got into the sea or the ocean 24 that was formerly the Magura nappe. It was largely 25 shale. Occasionally sands were deposited in there, so</p> <p style="text-align: center;">Page 161</p>	<p>16:26 1 in the thousands. In contrast to the white spots, which 2 you may or may not be able to see in Slovakia, you may 3 not be able to see them because they number in the tens, 4 there's not very many of them. 5 It's very clear from this map that the Claimant's 6 licence area clearly needs more drilling before it can 7 be said to be fully appraised. 8 Why are there fewer wells in Slovakia? Well, it's a 9 different country, it was part of the Austro-Hungarian 10 Empire until the end of the First World War, and in 11 southern Poland and in Slovakia you can see from the 12 elevation map that it's hillier. Those hills are 13 covered in trees and back in the 19th century/early 20th 14 century, access would have been more difficult, as it is 15 now, meaning there's just generally less oil and gas 16 activity. 17 Another thing to note is, even to the untrained eye, 18 if you look at the shapes on the left-hand map, which is 19 the geology, on the right-hand map you can see the 20 hills, and the hills and the geology line up to one 21 another. So back in the 19th century/early 20th 22 century, it was fairly easy to link an oil seep with 23 a hill: ah, I'll dig a pit there, drill a well there, 24 find some oil. And you can do your exploring on 25 a surface map, on a structure map.</p> <p style="text-align: center;">Page 163</p>
<p>16:25 1 we have underwater avalanches of sand shooting into the 2 basin, creating turbidites. It had the same tectonic 3 history, so as Africa moved north and smashed into 4 Europe it created mountains, the Alps, the Carpathian 5 Mountains, and these same forces created the structures 6 that are -- form my prospect. So it has many 7 similarities. 8 There are differences. A key difference is that in 9 the Silesian nappe there were better sands. There are 10 lots of wells, there's proven to be better reservoir 11 sands. So they're thicker, maybe up to 50 metres thick. 12 They're good porosity, they're 11%, that's just 13 an indicator of how good they are. In the Magura nappe 14 by comparison they're 7.5%. Lower number, less good 15 sands. So there's some basic rock differences there, 16 but enough similarities for me to be able to use it as 17 an analogy. 18 Another difference is that there are many more wells 19 drilled on the Silesian nappe (Slide 7) and so because 20 of that it's yielded more oil and is better understood, 21 as I'm showing you here. 22 So on the right-hand side I've displayed 23 an elevation map, just showing you the height of the 24 hills in yellow there. All the pink spots there are the 25 wells drilled in Poland and, as you can see, they number</p> <p style="text-align: center;">Page 162</p>	<p>16:27 1 In southern Poland and Slovakia it's that much more 2 difficult. It's hillier, it's a little less clear the 3 linkage between the underground geology and the surface, 4 and you need modern techniques like seismic to help you 5 find the oil and gas. So there's some differences. 6 (Slide 8) Moving on to defining prospects then, 7 having established the prospectivity of the area. So 8 based on all the evidence I would expect to find 9 petroleum in folds, and this is, as I mentioned, created 10 by Africa colliding with Europe, rumpling the surface 11 rocks, like if you are pushing a table cloth and it all 12 gets folded over; that's the sort of fold I'm looking 13 for in the geological record. 14 So I'll show a seismic section (Slide 8). What that 15 is is a vertical slice through the earth, just imagine 16 slicing down a few kilometres into the earth, and the 17 different rock strata are indicated by different colours 18 there, and what you do is interpret horizons. These are 19 boundaries between the different rock strata. And to 20 the trained eye you can see some folds on there. Now, 21 I'm not going to expect you to spot them. Even to 22 an expert they are rather difficult to see on this 23 seismic. The seismic itself doesn't reveal the detail 24 of the folds. So I've indicated where the folds are on 25 that seismic section.</p> <p style="text-align: center;">Page 164</p>

<p>16:29 1 By showing you these examples from Poland you can 2 see what sort of traps, prospects, I am going to expect. 3 I'm expecting folds. Basically the trap that the 4 oil is going to accumulate in is like an upturned bowl, 5 and if in that upturned bowl you have got some reservoir 6 sands, if you've got space between the grains of sand, 7 oil will percolate up and collect in the reservoirs in 8 that trap. 9 The sands -- the oil doesn't escape because the 10 green layer is the shales overlying the sands, and 11 that's what stops it from escaping. So that's the basic 12 prospect that I'm looking for in this area. 13 (Slide 9) So with that in mind, I'm going to show 14 you how we calculate the volumes. So I've got a map on 15 the right-hand side. That map was made from the 16 interpreted horizons. And on the left-hand side you can 17 see another seismic section I've highlighted in that 18 green horizon there. If you interpret that on several 19 seismic sections you can end up making a map like on the 20 right-hand side. 21 I identified prospects as separate bumps or closures 22 on that map, so close to where I've got the arrows on 23 the right-hand side. 24 Often, in the North Sea, the Gulf of Mexico, modern 25 places, you will have 3D seismic data. Now you have</p> <p style="text-align: center;">Page 165</p>	<p>16:32 1 uncertainty can lead to significant volume uncertainty, 2 and you can have half the volume, you can have double 3 the volume. It depends on what the true nature of the 4 underground strata are. 5 So Dr Longman took the prospects that I'd mapped and 6 he said that the areas of my prospects are the largest 7 they can be, pretty much as large as they can be, and 8 when he went through the complicated process of 9 calculating volumes, he said: make that the P10. In 10 other words, in all the different combinations of area 11 and thickness and all the complicated volume 12 calculation, the area will only be bigger than I, Alan 13 Atkinson, have mapped, 10% of the time. Most of the 14 time the area will be smaller than that (Slide 9). 15 When I ran the volumes, I said, well, my mapped 16 areas, there's uncertainty here, so I think half the 17 time the area of the prospects could be larger, half the 18 time it could be smaller. So I put it as what they call 19 the P50 in the volume calculation. And I did that 20 because I thought that was a fair representation of the 21 uncertainty in the prospects that I'd created. 22 So this is a critical difference, because with 23 Dr Longman's approach, it causes the hydrocarbon 24 volumes, the petroleum volumes, to be 40% lower than the 25 ones that I've calculated, and it's down to whether you</p> <p style="text-align: center;">Page 167</p>
<p>16:30 1 seismic lines every 25 metres, regular over the whole 2 area. 3 If you've only got 2D seismic, quite often the 4 seismic is acquired maybe every 250 or 500 metres, and 5 you make maps from this data. 6 Our seismic sections here are separated by 7 3,000 metres or 6,000 metres depending on where you are. 8 So what we've got is not very much seismic. It's not 9 a seismic-led exploration area, and the surfaces are 10 rather poorly constrained between the lines. 11 Even on the lines, as you can see on the left-hand 12 side, this is a section taken from Dr Longman's report, 13 and that white arrow indicating uncertainty in where the 14 green horizon goes, that's his arrow. And I would quite 15 agree with him, it's somewhat uncertain where the 16 horizons go. So that horizons could be shallower or 17 deeper. And what that means, if I just draw on there 18 that blue horizontal line, that maybe suggests that's 19 an oil/water contact, then you can see that the 20 uncertainty in the horizon, the green line, leads to 21 uncertainty in what the area, the extent of the prospect 22 is, and that leads to uncertainty in the volume too. It 23 might be a little tiny volume. It might be 24 a middle-sized volume. It might be a big volume. And 25 you can see that this considerable structural</p> <p style="text-align: center;">Page 166</p>	<p>16:33 1 say the areas are the P10 or the P50. 2 Of course I stand by my own numbers. I think 3 Dr Longman is wrong to pin them at the P10 because 4 basically he's saying that the prospect area essentially 5 can't be very much larger than I have mapped, and 6 I think that underestimates the uncertainty in the 7 structures. 8 So there we are. That's volumes. 9 (Slide 11) Now, with all that uncertainty, even I, 10 when I run through the process and try and apply best 11 practice to generate these volumes, I need to check that 12 I've not gone very far wrong. So I did some 13 sense-checking. I undertook a benchmarking exercise, 14 I contrasted the volumes to the next-door oil and gas 15 basin in Poland, and this is a figure from one of my 16 earlier reports, and one can go through it in detail. 17 But it shows that the volumes I calculated were 18 conservative compared to Poland, 13 million barrels 19 compared with 51 or 63, however you want to compare it. 20 So Dr Longman undertook his own benchmarking 21 exercise, and his results led him to the opposite 22 conclusion, shown by the orange bar on the right of that 23 graph there, that my volumes were much bigger than you 24 would expect in Poland. 25 So the process that he did was to, if you look at</p> <p style="text-align: center;">Page 168</p>

16:35 1 the right-hand map, which is taken from his report, you
 2 see there's the pink-hatched area in the middle, and
 3 that's the Silesian nappe. So he's got a database that
 4 tells him how many millions of barrels of oil are in
 5 that area, divided those millions of barrels of oil by
 6 the area of the pink polygon, and came up with
 7 a resource density which is plotted on the graph as the
 8 green bars there.
 9 I would suggest that Dr Longman has taken the wrong
 10 areas here. If, actually, he used the correct areas, he
 11 would come up with some different results.
 12 So as you can see, the green spots are the oil
 13 fields, and the green spots only occupy the bottom
 14 right-hand third of that pink area. So if you take the
 15 number of millions of barrels in there and divide it by
 16 a third of the volume, it gives you three times the
 17 resource density. So really the resource density isn't
 18 that green bar; it's that star in the middle there.
 19 Similarly, the Magura nappe, the oil occupies
 20 a fifth of that blue polygon area and actually the
 21 resource density is five times what it says there. And
 22 if you take the whole, all of the oil in all of the
 23 nappes, it ends up looking a bit like that. So it's
 24 four times bigger.
 25 So now by comparison, my orange bar, which is

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16:36 1 essentially the same calculation on my estimated volumes
 2 in the Claimant's licence area, is starting to look
 3 a little bit more reasonable, compared with Poland.
 4 Because I already think that you would find less oil
 5 than Poland because of the difference in the reservoir
 6 quality.
 7 There you go. So that's the sense-check on the
 8 volumes.
 9 (Slide 12) My final task was to calculate the
 10 geological chance of success, and Dr Longman and I both
 11 took essentially the same approach, and I've compared
 12 the results here.
 13 Now, for the five prospects that Dr Longman did the
 14 evaluation for, you can see that his estimate on the
 15 right-hand side there of the geological chance of
 16 success was 7.5%, 0.075, and I came up with 19%, 0.19.
 17 So his estimate is 61% less than mine.
 18 I haven't got time, I don't think, to go through all
 19 of the elements of the chance of success, so I'll just
 20 focus on the biggest contributor, which is seal, which
 21 accounts for two-thirds of that difference.
 22 So I understand from a detailed review of appendix C
 23 of Dr Longman's second report that he's not really
 24 recognised the prospect style of folded strata that I
 25 discussed earlier on, and I think he believed the traps

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16:37 1 rely on fault seal, and so gives them a low chance of
 2 success. And by that, if you look at the right-hand
 3 seismic section there, I've got a green arrow wiggling
 4 up with "Leak". So there's not a folded upturned basin
 5 shape there, is there; it keeps going up and the idea is
 6 the oil sneaks out of that black line, which is a fault,
 7 and gets to surface, so it's leaked.
 8 So that, the chance that that black line seals is
 9 what he's risked, he's given.
 10 Now, in fact, as I discussed earlier, the traps are
 11 actually folds, they're just the seismic doesn't show
 12 them, it hasn't got that degree -- that quality.
 13 Now we've got plenty of wells which tell us that
 14 there is seal sitting on top of the sands, it goes sand,
 15 shale, sand, shale, sand, shale, and they are in this
 16 upturned bowl shape. So really you are relying on the
 17 shale presence for your seal, not on the fault sealing.
 18 And, as you saw, you come up with a different number.
 19 I've come up with 0.85 rather than 0.5.
 20 Just before I move on from this slide, I'll just
 21 point out these two red blobs there. Again, I'm sorry
 22 about this. Unless you are a trained geologist all of
 23 this is a lot of information in a very short space of
 24 time. But those aren't upturned bowls; they are what
 25 Dr Longman was saying, that's a fault-sealed trap: the

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16:39 1 sands go up, you come across a fault, if that fault
 2 doesn't seal, whoosh, off your oil goes.
 3 But you can see from there that in those Polish
 4 fields the oil is trapped. So that fault is sealing,
 5 and I've seen that in many examples of Polish data, that
 6 a lot of the faults do seal. So even if they aren't(?)
 7 faulted, these traps are likely to seal, there's a lot
 8 of shale in the system.
 9 Okay, try not to take my word for it. As another
 10 thing, calculating geological chance of success is
 11 a notoriously difficult thing to do and prone to bias
 12 and subjectivity (Slide 13). We understand that, all
 13 the geoscientists working with this sort of data, and we
 14 do what we can to make the process systematic and
 15 objective. I made an attempt in my first report on
 16 there, but let me just show you. On the right-hand side
 17 here --
 18 THE PRESIDENT: I think you're --
 19 MR ATKINSON: Am I over?
 20 THE PRESIDENT: -- over the time, unless the secretary
 21 corrects me, by two minutes. But you can, of course
 22 give the conclusion.
 23 MR ATKINSON: That's fine. That was the last slide, really.
 24 It was just showing that the published tables show, they
 25 back up my 0.85 number for upturned bowl type prospects.

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16:40 1 And there you go, my conclusions.
 2 THE PRESIDENT: Thank you.
 3 To whom do I give the floor?
 4 Cross-examination by MR PILAWA
 5 Q. Excellent, thank you so much.
 6 Hello, Mr Atkinson.
 7 A. Afternoon.
 8 Q. My name is Douglas Pilawa and I will be conducting your
 9 cross-examination today.
 10 You started the presentation with your instructions,
 11 and I'm going to start there as well. So if you can
 12 open up to paragraph 6 of your first expert report, you
 13 should have a copy of it there?
 14 A. I do.
 15 Okay. Yes.
 16 Q. Great. So in paragraph 6 you state that you were:
 17 "... instructed to provide an independent assessment
 18 of the hydrocarbon exploration prospectivity of the
 19 licence areas, including an independent estimate of the
 20 hydrocarbon volumes in place attributable to the licence
 21 areas, and estimating the chance of finding them."
 22 Now, you understood that instruction to give you
 23 a certain level of autonomy in your assessment; right?
 24 A. I did, yes.
 25 Q. Yes. You weren't confined to what Discovery Global

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16:41 1 might have planned to do or what it was doing in
 2 Slovakia; right?
 3 A. That's correct.
 4 Q. Right. So just as an example, Discovery Global had
 5 three authorisations for expenditures for the first
 6 three wells. You know that, right?
 7 A. Yes.
 8 Q. Right. So it was going to drill at those three wells,
 9 but your assessment goes beyond that; fair?
 10 A. Yes.
 11 Q. So those first three wells, and I'm happy to take you to
 12 the specific paragraphs in your expert report, but
 13 I'm starting at 109 of your first expert report. That
 14 first well was Smilno.
 15 A. Yes.
 16 Q. And I see that in your modelling you assign that
 17 prospect number BM01?
 18 A. Yes.
 19 Q. And the second well was the Stromy prospect at
 20 Krivá Ol'ka and that's equivalent to LU07D?
 21 A. Yes.
 22 Q. And the third well was Ruská Poruba and I understand
 23 that you don't think there's an accumulation of oil or
 24 gas there?
 25 A. That's correct. I think that all of these prospects

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16:43 1 have a certain risk, and I think Poruba, just the risk
 2 was so low that I chose not to describe it as
 3 a prospect.
 4 Q. Right, so you don't give it a number?
 5 A. Yes.
 6 Q. In your opinion, had Discovery drilled, had it moved
 7 forward, had it drilled a well there, it wouldn't have
 8 found an accumulation of oil or gas?
 9 A. There would be a low chance that that would happen.
 10 Q. Right. It's not included in your model so I think it's
 11 safe to say you don't believe that it would have found
 12 oil or gas there, right?
 13 A. I think it would be accurate to say that I think there
 14 would be a very low chance that they would find oil or
 15 gas, not zero.
 16 Q. Yes, low enough for you to exclude it from your model,
 17 right?
 18 A. That's correct yes.
 19 Q. Now, I can take you to this document and I'm sure you
 20 have seen a few of them, but you're generally aware that
 21 Discovery Global was presenting its own version of
 22 prospects to investors and to its JV partners. You're
 23 aware of that, right?
 24 A. Yes. I saw documents to that effect, yes.
 25 Q. Okay, I'll pull one up for you, just to help you. If we

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16:44 1 can pull up C-180. Right, and we'll scan this real
 2 quick.
 3 This is an October 2017 investor presentation. And
 4 if we can go to page 29.
 5 Thank you. You can see that, right?
 6 A. Yes.
 7 Q. So for example here we have Discovery telling investors
 8 that it was targeting these seven prospects, and as part
 9 of your independent assessment you were not asked to
 10 perform any validation of these figures; right?
 11 A. That's correct.
 12 Q. You weren't asked to say whether these prospects in
 13 particular would have succeeded; fair?
 14 A. That's correct.
 15 Q. Correct.
 16 And I also understand that as part of this, with the
 17 data that Discovery had, you were able to select the
 18 data that you felt was most appropriate for your
 19 analysis; fair?
 20 A. I'm not sure if that's accurate, actually. I used all
 21 of the data that I was given.
 22 Q. I'm not sure about that. So let's go to paragraph 207
 23 of your first expert report. Page 63.
 24 So paragraph 207 starts with a discussion about MT
 25 data, or an MT technique that Discovery Global was

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16:46 1 using; does that sound familiar to you?
2 A. Absolutely, yes.
3 Q. Right. So if we go down to paragraph 208 you state that
4 you were:
5 "... unable to obtain a detailed description of the
6 theory or application of the MT method used ... on the
7 Claimant's licence areas."
8 And your ultimate conclusion is then, if we go to
9 the next page, in paragraph 211. Right, so here you
10 say:
11 "... since there is a lack of peer reviewed evidence
12 for this implementation of the MT technique, and I was
13 not able to establish a strong empirical basis for its
14 predictions of pay, I would not rely on it in my
15 assessment of prospectivity and did not use MT data to
16 help estimate PIIP or prospect GCOS."
17 You recall that now, right?
18 A. Absolutely, yes.
19 Q. Now, you understand that Mr Lewis of Discovery Global
20 was a big fan of using this technique; fair enough?
21 A. He uses it a lot and has trust in it, yes.
22 Q. So he is a fan of it?
23 A. Your words, yes.
24 MR DRYMER: The "technique" being MT?
25 MR PILAWA: MT, yes.

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16:48 1 analysis, so you're quite right.
2 Q. Yes. And one of the reasons why you didn't feel
3 comfortable using it is because of the lack of
4 peer-reviewed evidence on it; right?
5 A. That's right. There's all sorts of interesting new
6 lines of research in our business. There's a lot of
7 money to be made, so people try new things all the time.
8 Sometimes they catch oil and they become mainstream;
9 other times they don't catch oil and they just fall by
10 the wayside. I think this is probably in the middle at
11 the moment, this one.
12 Q. Yes, I'm just quoting paragraph 211 of your first expert
13 report, that's it.
14 A. Yes.
15 Q. So I think we've already discussed the fact that it's
16 not really a mainstream tool; right?
17 A. Yes.
18 Q. Okay.
19 Now, from the date of its purchase of AOG in 2014
20 until it left Slovakia, Discovery did not acquire any
21 new data on the licence areas apart from this MT data;
22 correct?
23 A. I believe you are right. I think they reprocessed
24 seismic data but didn't acquire any new seismic data.
25 Yes.

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16:47 1 MR DRYMER: For the record.
2 MR PILAWA: For the record.
3 A. Single point MT. MT is used across -- throughout
4 academia and by all sorts of people. But this
5 particular application of multi -- magneto-tellurics
6 is --
7 Q. Yes, this particular technique.
8 A. -- not as widely employed.
9 Q. It's not as widely employed, yes.
10 So you have no reason to doubt that Discovery Global
11 would have continued to use this had it continued its
12 prospecting activities; right?
13 A. I think that's likely.
14 Q. Yes. One of the advantages, for example, of the MT data
15 is that it's relatively cheap to acquire; right?
16 A. Compared with seismic data for --
17 Q. Yes, compared to seismic data.
18 A. When comparing with drilling wells, yes.
19 Q. And compared with drilling wells.
20 So I come back to the original question: even though
21 that this was Discovery's -- one of its methods of
22 prospecting for oil and gas, you excluded it from your
23 analysis?
24 A. Yes. That is correct. I evaluated it, so I didn't
25 ignore it, but I evaluated and didn't use it in my

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16:49 1 Q. Yes. So there is magnetic data, for example, gravity
2 data that Discovery had inherited, and seismic data.
3 But from the date of its purchase until the end of
4 Slovakia it had only reinterpreted that data; you agree
5 with me there?
6 A. No, they had done some reprocessing as well, I think the
7 seismic was reprocessed, the gravity was reprocessed,
8 the magnetic was reprocessed. So that level of work.
9 Q. Yes, so there was some reprocessing, some
10 reinterpreting. But in terms of brand-new data, from
11 2014 until the end of its time in Slovakia, it did not
12 acquire any new data on the licence areas; right?
13 A. Apart from the MT data.
14 Q. Apart from the MT data.
15 A. Yes.
16 Q. Okay.
17 So there was a little bit of a discussion in your
18 presentation, and I thank you for that, about seismic
19 data and how it's used. That's actually what you are
20 using to interpret and map new prospects, or leads.
21 I know there's a debate between the experts on that, but
22 I'll use "prospects" for you.
23 A. It was part of the information used. It's an important
24 part. But I also used surface geology. In fact, as
25 I said in my first report, this is a notoriously

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16:51 1 difficult place to work, onshore in a thrust
 2 environment. If you look at the seismic data, very
 3 experienced people like myself, they can still find it
 4 challenging to understand what the seismic is telling
 5 them, and a good way forward is to actually do what
 6 Discovery Geo(?) did, which is to ask someone like EGI
 7 to undertake a structural restoration study, because
 8 they can incorporate the seismic with other data, like
 9 gravity and magnetics, and they can form an integrated
 10 understanding.
 11 So they did that piece of work and I, like I think
 12 Dr Longman, took a look at that and said: well, we can't
 13 better that, that's as good a piece of work as you are
 14 going to get and it makes the most sense of the seismic
 15 data, so --
 16 Q. If I can, Mr Atkinson, I was again just reading from
 17 your expert report at paragraph 72.
 18 A. I was just responding.
 19 Q. Yes. I'm just trying to confirm where you say:
 20 "I have used this seismic data to audit existing
 21 structural interpretations, and to map new prospects."
 22 A. Oh, yes, to audit, yes. So I had to audit what EGI did.
 23 They did a nice piece of work but I wasn't going to take
 24 that on trust, so I looked at the seismic data, looked
 25 at the gravity data to check what they have done, or

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16:52 1 audit what they'd done.
 2 Q. Yes, and so, just from this paragraph again, you are
 3 using that seismic data to map new prospects; correct?
 4 A. Yes.
 5 Q. Thank you. So obviously the quality of that data is
 6 important; right?
 7 A. Yes.
 8 Q. And generally speaking, the 2D seismic data that
 9 Discovery was interpreting at the time, to map new
 10 prospects, was of poor quality; right?
 11 A. You've always got to be careful in making that judgment:
 12 is the data poor quality or does the geology make it --
 13 mean that you can't see very much on the seismic. And
 14 I think it's probably a combination of the two things.
 15 So the geology and the structures are very
 16 complicated. That reduces the quality of the seismic.
 17 And then there's a separate question: was the data
 18 acquired in the right way and processed in the right
 19 way. It's not an area which lends itself to good
 20 seismic, I think.
 21 Q. Right. So why don't we just pull up C-46. For your
 22 help, Mr Atkinson, you cite this document at 44 of your
 23 first expert report, footnote 44. And if we can just go
 24 to page 10, please.
 25 You know what, we can stay here on this front page

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16:53 1 just to orient Mr Atkinson, apologies for that.
 2 Right, so this is the qualitative and quantitative
 3 interpretation of full tensor, the gravity data that
 4 Aurelian had procured and which Discovery had
 5 interpreted. You are familiar with this; correct?
 6 A. Yes, I read that report.
 7 Q. So if we can go to page 10 of the PDF itself. Yes,
 8 right there. And I think this is actually the
 9 geophysical problem that you were just talking to me
 10 about at section 1.2, if we could zoom in on that to
 11 help Mr Atkinson see.
 12 A. I think that -- yes, I think that is what I just said,
 13 yes.
 14 Q. Yes, so the seismic data has generally been of poor
 15 quality in the area, and a reason for the poor quality
 16 of that is indeed, as you noted, the structurally
 17 complex geology, the intense thrusting, et cetera.
 18 I think it's uncontroversial right here and you
 19 would agree that those problems can lead to difficulties
 20 in interpreting that seismic data; right?
 21 A. I would definitely agree with that.
 22 Q. Right. Thank you.
 23 And I just want to come back real quickly to the way
 24 that you identified "prospects" -- I'll say that for
 25 you.

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16:54 1 A. Thank you.
 2 Q. So if we can go to page 45 of your second expert report.
 3 A. Okay, I'm there.
 4 Q. I'm not -- oh, there we are.
 5 Right, so just above this image is paragraph 112.5,
 6 and you explain that when you were first instructed,
 7 "the Claimant provided a map of 38 leads and prospects".
 8 Can you tell me why you didn't include this in your
 9 first expert report?
 10 A. Why didn't I include that ...
 11 I included it in the second report because there
 12 was -- that's right, there was reference made to the
 13 number of prospects I'd created.
 14 Well --
 15 Q. Maybe this will help you. Also in that paragraph 112.5
 16 you state, referring to when you were first instructed:
 17 "This map informed my understanding of the
 18 Claimant's views on prospectivity, and informed my own
 19 independent view."
 20 What did you mean by that?
 21 A. Ah. Good question. What I meant by that was that if
 22 you look at the site -- they were going for a structural
 23 place, for starters, and not stratigraphic, which is
 24 a different thing. So we're looking for folds. You can
 25 look at the seismic, and wherever there is a blob on

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16:56 1 this map, figure 5.2, you can see on the seismic that
 2 there's potentially -- there's a thrust or a good
 3 likelihood of a thrust, you can link them back to the
 4 surface geology, and they are areas where, if you just
 5 take a first look at the seismic, you think: there's
 6 potentially a trap there.
 7 When I did the same process using EGI's report,
 8 which is a more advanced piece of work, not surprisingly
 9 many of the prospects sort of broadly coincided, because
 10 they're based on seismic.
 11 Q. Right. So did you generate your prospects before or
 12 after you received this map?
 13 A. After.
 14 Q. After. Okay. And was the goal to plot roughly the same
 15 amount as this map?
 16 A. No. No. In fact, I... I've got to say, I generated
 17 a lot more than 40, but they were outside this licence
 18 area and so we had to cut them back. So I had many more
 19 than this.
 20 Q. Well, yes, if they were outside the licence area you
 21 wouldn't put them in, right?
 22 A. They were inside an earlier version of the licence area.
 23 Q. Understood. Thank you for clarifying that.
 24 So when you wrote your first report, did you have
 25 access to or did you know about the competent person's

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16:57 1 report that Discovery had inherited from Aurelian that
 2 covered the Slovakian licences?
 3 A. I saw that at one point. I think -- I can't remember
 4 the exact timing. I suspect it was after I did my first
 5 report.
 6 Q. Right. And you didn't mention -- well, let me ask you
 7 this, in fairness: did you see it before you wrote your
 8 second expert report?
 9 A. Yes. I might need someone to confirm this, but I think
 10 that came up in document discovery.
 11 Q. Good memory.
 12 A. Yes.
 13 Q. Indeed. So --
 14 A. I think that was before my second report?
 15 Q. That was.
 16 A. Just to get the timelines right.
 17 Q. Can you say with confidence that you reviewed it?
 18 A. Yes. Yes, briefly at that time, and then more carefully
 19 when Dr Longman presented it as an exhibit.
 20 Q. And is there a reason you didn't mention it in the
 21 second expert report?
 22 A. I can say that it broadly supported what I've done, when
 23 I've looked at it after Dr Longman's report.
 24 Again, it was -- I was doing an independent piece of
 25 work. I really didn't care what anyone else thought.

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16:59 1 I was giving my own opinion. So I think that's
 2 probably the answer --
 3 Q. No, that's fine, I understand that you didn't --
 4 I'm just going to wait for the transcript because
 5 I don't want to put words in your mouth. But you said:
 6 "... I was doing an independent piece of work.
 7 I really didn't care what anyone else thought. I was
 8 giving my own opinion."
 9 That's right, from the transcript.
 10 So can you open your second report to page 45.
 11 A. Yes.
 12 Q. And if you can go to footnote 107, please.
 13 I'm just a little intrigued because here you're
 14 using apparently a competent person's report that's on
 15 the Slovakian licences from 2009 to corroborate your
 16 results. And now you just told me that you didn't use
 17 the Aurelian CPR because you were doing an independent
 18 piece of work. And I'm just trying to understand how
 19 you chose to use which one?
 20 A. Well, I didn't really use that, did I? I commented on
 21 it in a footnote.
 22 Q. Well, I don't know. I think you state here in 107, you
 23 say this is "in line with my estimate", and I read that
 24 to be you were using that to support your estimates; is
 25 that a fair reading?

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17:00 1 A. How would you describe that ... I think I was -- is ...
 2 "CPR produced by Gaffney Cline". Which CPR is that?
 3 It's obviously not the RPS CPR.
 4 Q. No, I was asking myself the same question, because the
 5 CPR is --
 6 A. Yes, yes, no, it's a different one.
 7 Q. It's not actually in the record. It's simply referred
 8 to in that document, which raised some questions for me.
 9 A. Okay, yes, I think that CPR was shown to me late in
 10 the -- this is the second report we're talking about.
 11 I think late in the day I probably saw that and, because
 12 it was new information to me, I thought: make note of
 13 it, as it was information I'd seen --
 14 Q. Yes, so it was new information to you, so you included
 15 it in the second report.
 16 A. Yes.
 17 Q. The Aurelian CPR was new information to you but you
 18 didn't include that in the second report?
 19 A. Ah. Yes.
 20 Q. That's fair?
 21 A. Yes.
 22 Q. Okay. And what about the draft 51-101 that Discovery
 23 Global had acquired as part of its fundraising efforts;
 24 were you aware of that document?
 25 A. Again, I think that one came up during document

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17:01 1 discovery, so I had a look at it then and then had
2 a closer look when it was presented in Dr Longman's
3 second report.
4 Q. And is it fair for me to assume that you didn't include
5 that document either because you were conducting
6 an independent assessment?
7 A. I struggle to remember quite what I thought when I first
8 saw it, but I certainly, after thorough review, I just
9 thought it was a very poor piece of work and really
10 didn't contribute to my understanding or anyone's
11 understanding of the prospectivity of the area.
12 Q. Right. So the CPR from 2009 that you reviewed but
13 didn't attach to your report was a better piece of work,
14 and that's why you relied on it?
15 A. The footnote 107?
16 Q. Yes.
17 A. The single reference to the CPR in my report we're
18 talking about, yes, the GaffneyCline --
19 Q. Yes, the one you used to support your estimates, that
20 one.
21 A. Alright. I think I'd call that footnote 107
22 an off-the-cuff comment, that someone else had produced
23 volumes which were similar to mine. What I could have
24 done in there was also mentioned the RPS CPR, which
25 supported my chances of success estimates, and volumes

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17:02 1 are quite similar, and if I had mentioned the 51-101
2 document I would have said that that was a poor piece of
3 work and wasn't worthy of comparing with --
4 Q. Right, so you could have done all that --
5 A. I could have done all that.
6 Q. -- but you didn't do that, right?
7 A. No.
8 Q. Maybe we should take a look real quickly at the SLR
9 report, maybe just to get your thoughts on something.
10 If we could pull up Dr Longman's second report, it might
11 also be referred to as the SLR report, the second one.
12 And if you can go to paragraphs 24 and 25. Right, and
13 if you can zoom in on those.
14 So I think you had said earlier that you had
15 reviewed the RPS CPR before your second report. You
16 believe that it supported your estimates, but you did
17 not attach it to your second expert report; is that
18 fair?
19 A. Just -- just to be absolutely precise, I remember
20 looking at it, we had a discussion about it, about its
21 significance, and moved on. I then took a closer look
22 at it in response to Dr Longman's second report, so
23 I think we just didn't attribute too much significance
24 to it.
25 Q. Right. Is the reason why you didn't attribute too much

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17:04 1 is because the geological chance of success in it is two
2 times yours?
3 A. You mean two times smaller?
4 Q. No -- I'm sorry, two times smaller, yes.
5 A. Okay, yes.
6 Q. The difference is two times.
7 A. I'm sorry, but you've just ...
8 Dr Longman has actually not taken the correct
9 information from the RPS CPR. If you look at the next
10 page in his -- the true chance of success for Zborov A
11 and Zborov B, and instead of being 6, 6 or 8%, it's
12 actually 16%. I don't know if anyone can confirm that,
13 or 32%.
14 Q. Right.
15 A. He's just not read the CPR properly and misunderstood
16 the chance of success.
17 So when you drill a well and it has three reservoirs
18 in it --
19 Q. I understand --
20 A. -- you have three bites of the cherry, so the chance of
21 success is only limited(?) to one reservoir.
22 Q. Mr Atkinson, please.
23 A. So that's actually wrong.
24 Q. Mr Atkinson, you'll get the opportunity on re-direct.
25 A. Okay, no problem.

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17:05 1 Q. Okay. Thanks. You could have said all of that in your
2 second report, right? Because you had reviewed this
3 document. I'm just trying to understand why you
4 included some and didn't include others.
5 So your testimony right now is that you reviewed
6 this, you made some conclusions about it, and you
7 excluded it; that's fair, right?
8 Yes or no?
9 A. I think my statement is that we fairly superficially
10 reviewed it, gave it a read through, discussed the
11 contents and moved on. Which is a different level of
12 review to that which I gave it when Dr Longman included
13 it as an exhibit in the second report.
14 Q. Yes, did you undertake the same level of review for the
15 2009 CPR that you included in footnote 107?
16 A. Yes. Superficial, I guess.
17 Q. Superficial, but good enough to include in the report?
18 A. As a footnote to my report, yes.
19 Q. To support your estimates; right?
20 A. Yes.
21 Q. Okay.
22 Okay, moving on to PIIP, and just a brief --
23 MR DRYMER: It's always dangerous to try to imagine what's
24 in counsel's mind. I know that since that's where
25 I spent much of my life. But I wonder whether in due

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17:07 1 course the suggestion is going to be made to the
 2 Tribunal that you included reference only to studies or
 3 estimates or reports that you decided were in line with
 4 your estimates, and excluded those which weren't.
 5 I don't know if that's what we're going to be told,
 6 but just in case it is, what would be your answer to
 7 that?
 8 A. No, is my answer. Everything I looked at, thoroughly,
 9 contributed to my report and has been mentioned. I've
 10 been very open about what's -- yes. So nothing has been
 11 excluded.
 12 The only things that haven't been heavily
 13 incorporated were things that I looked at briefly, and
 14 there were things that weren't at my disposal when I was
 15 doing the majority of the work.
 16 But, for example, in document discovery, we had
 17 a quick look at some reports, and I can barely remember
 18 this GaffneyCline report which was brought to my
 19 attention, and we had a look at it and thought: well,
 20 that's not going against what I've said, so I'll include
 21 a reference to it.
 22 MR DRYMER: Very good. Thank you.
 23 A. And the same with the RPS CPR report. I should have
 24 included that because that was actually quite
 25 supportive.

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17:09 1 reports are within the Magura and the Dukla nappes;
 2 right?
 3 A. That's correct.
 4 Q. So when it comes to your petroleum initially in place
 5 calculations, those amounts represent the estimated
 6 volume of hydrocarbons that are potentially available
 7 within each prospect?
 8 A. Yes.
 9 Q. Yes.
 10 A. Yes.
 11 Q. And obviously these are still only potential amounts,
 12 but with all of your prospects being within the Magura
 13 and the Dukla nappes, the PIIP estimates represent
 14 potential amounts of oil and gas within those areas of
 15 the Magura and Dukla nappes?
 16 A. Correct.
 17 Q. Now, I think you said it earlier, but if you could just
 18 confirm, historically, the Silesian nappe has been more
 19 productive than the Magura and the Dukla nappes?
 20 A. That is correct.
 21 Q. Now, I want to walk through, briefly, the three
 22 benchmarking exercises that you undertook. So we're
 23 going to start with the first report. I know you've
 24 updated it, so we'll get to the second report. I'm just
 25 saying that now in case you feel compelled to take me

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17:08 1 MR DRYMER: Thanks. Please continue.
 2 MR PILAWA: No problem. Thanks.
 3 Just talking in broad strokes about what PIIP
 4 estimates are, your instructions are to calculate
 5 an independent estimate of hydrocarbon volumes in place,
 6 and then estimating the chance of finding them. There
 7 is a level of uncertainty in this, you acknowledge that;
 8 right?
 9 A. Very much so. Yes, in fact our job is to capture the
 10 range of uncertainty.
 11 Q. Right, so there's a level of uncertainty in this.
 12 Now, without drilling an actual exploration well you
 13 don't know actually if there's oil or gas at that
 14 specific accumulation; fair?
 15 A. That's correct, right.
 16 Q. And the estimates, of course, are only as good as the
 17 data you have on hand?
 18 A. Yes.
 19 Q. Fair statement?
 20 A. Yes.
 21 Q. Good. So you talked about this a little bit in the
 22 presentation you just gave, but Discovery's licence
 23 areas lie within the Magura and the Dukla nappes; right?
 24 A. That's correct.
 25 Q. And all of the prospects that you've created in your

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17:10 1 there.
 2 So if we could start with the first benchmarking
 3 exercise and we'll go to paragraph 175 of your first
 4 expert report on page 74.
 5 A. Oh, sorry, say that again? First report?
 6 MR DRYMER: 175.
 7 A. Paragraph 175.
 8 MR PILAWA: Correct.
 9 A. Sorry, I misheard you.
 10 Q. Totally fine.
 11 A. Yes. I'm there.
 12 Q. Okay. So here this is your benchmarking exercise to
 13 show that your PIIP estimates are reasonable. And you
 14 benchmark your results against three anticlines in the
 15 Silesian nappe in Poland; right?
 16 A. That's correct.
 17 Q. And we can see those in the image there after paragraph
 18 178. The average of those three anticlines in the
 19 Silesian nappe is 49 MMboe, and the average of each fold
 20 that you analysed in Discovery's licence areas are 11-14
 21 MMboe per fold; you recall that?
 22 A. Yes, I do.
 23 Q. Okay. And I understand that because that analysis
 24 showed that the Claimant's license area contained lower
 25 amounts than the benchmarked amounts, you concluded that

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17:12 1 this was reasonable; is that fair?
 2 A. That's fair.
 3 Q. Okay. But you do agree with me that it's expected that
 4 the Silesian nappe contains more oil or gas than the
 5 Magura and the Dukla nappe; right?
 6 A. No. No, I don't agree -- I don't think that. It's
 7 proven to have more oil and gas.
 8 Q. Yes.
 9 A. Because it's been drilled. I think on the basis of the
 10 wells that have been drilled in the Magura nappe to
 11 date, it's fair to expect the Silesian nappe to have
 12 more.
 13 Q. Uh-huh.
 14 A. That's not to say that in the future we won't find that
 15 more wells are drilled in the Magura nappe and we'll
 16 find better sands.
 17 I think the basic point that the Silesian nappe has
 18 probably generally got more oil than the Magura nappe is
 19 a fair point.
 20 Q. Okay. I realise there's a lot of uncertainty in the oil
 21 and gas world and in figuring out what will happen in
 22 the future, but I think I heard you say that generally
 23 we would expect the Silesian nappe to have more oil and
 24 gas than the Magura and Dukla nappes?
 25 A. Yes. Based on current data.

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17:13 1 Q. But comparing the PIIP estimates to the Silesian nappe
 2 says nothing about whether the estimates are reasonable
 3 in relation specifically to the Magura and the Dukla
 4 nappes, does it?
 5 A. I think what I was attempting to do with this was just
 6 to say, if my volumes had come in higher, or the same as
 7 the Silesian nappe, I would have been worried. Well, in
 8 fact I wouldn't have been worried, I would have redone
 9 my analysis, and changed some assumptions to get to
 10 a lower number.
 11 Q. If I can ask you about that right there.
 12 A. Mm.
 13 Q. Sorry, but if it would have been higher that would have
 14 caused concern because historically the Magura and the
 15 Dukla nappes have produced less oil; right?
 16 A. Yes.
 17 Q. Okay. So you're going over to three anticlines in what
 18 has historically been a more productive nappe. But that
 19 says nothing about what's taking place within the Magura
 20 and Dukla nappes in relation to themselves; do you agree
 21 to that?
 22 A. I'm not sure I do. Where the Magura nappe has been
 23 drilled so far and is in Poland, it's -- this very
 24 smallish oilfield has been found, there's nothing -- if
 25 you come 50 kilometres south to the Claimant's licence

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17:15 1 area, you may find the same small oil fields. You may
 2 find bigger; you may find smaller.
 3 Q. Yes.
 4 A. Yes.
 5 Q. Yes, that's fair. But you were very specific to choose
 6 three anticlines in the Silesian nappe and nothing
 7 prevented you from doing that exclusively within the
 8 Magura nappe; correct?
 9 A. Ah, I can explain why I chose those ones. It's
 10 because --
 11 Q. No, I just want to -- you had the ability to undertake
 12 a benchmarking exercise exclusively within the Magura
 13 nappe. You had that ability, right?
 14 A. No.
 15 Q. I think you just did it on your slide earlier today?
 16 A. It's because the folds are less easy to identify because
 17 they are a little more complicated in the Magura nappe.
 18 So the Silesian nappe, you can see the folds that are on
 19 the map that -- you are seeing that there now. The
 20 surface geology map allows you to identify where the
 21 folds are, so they are just easily identifiable.
 22 Q. Okay.
 23 A. So I went for the easy -- folds that were easiest to be
 24 able to be identified.
 25 Q. But there is oil production in the Magura nappe; right?

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17:16 1 A. There is.
 2 Q. Okay. And we'll come back to the third benchmarking
 3 exercise that you've done, but that was done, part of
 4 that, exclusively within the Magura nappe; right?
 5 In fairness, Mr Atkinson, we'll bring it up and
 6 we'll come to that.
 7 A. Yes, yes.
 8 Q. Okay, so let's go to the second benchmarking exercise
 9 you did in your second report. And if we can keep this
 10 image from the first report -- sorry, should have told
 11 you before.
 12 Okay. Are we able to go back to the original page
 13 that we were just looking at? I believe this was
 14 page 74 of the first report.
 15 THE PRESIDENT: It's actually page 53.
 16 MR PILAWA: Yes, that one right there. Keep that one up.
 17 And then in the second report, page 33 of the second
 18 report. Right. Right there.
 19 So, this second benchmarking exercise, and if we can
 20 zoom in on the top one. I'm just interested in the area
 21 that's selected.
 22 EPE OPERATOR: The one on the right-hand top?
 23 MR PILAWA: That would be great, thank you very much.
 24 I think the one above that, sorry. Yes, thank you.
 25 So you have selected two 1,245 square kilometre

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17:18 1 areas. It's the same size as Discovery's licence area.
 2 But if we look at these pictures, this new benchmarking
 3 exercise still captures almost the entirety of the two
 4 larger anticlines from the first benchmarking exercise;
 5 right?
 6 A. Yes.
 7 Q. And if we look at both images closely, if you can kind
 8 of zoom out on that one a little bit, this second
 9 benchmarking exercise only extends into the Magura nappe
 10 just the slightest bit. I notice the borders are
 11 removed on the right, but if you're looking at the
 12 images, it just touches the Magura nappe the slightest
 13 bit. Is that a fair characterisation?
 14 A. Are you talking about the blue polygon?
 15 Q. Right.
 16 A. Well, it captures a lot of the oil fields on the Magura
 17 nappe, I believe.
 18 Q. Right. It captures that tiny little pocket.
 19 A. Well, yes, where the oil is on the Magura nappe.
 20 Q. Yes, where the oil is.
 21 A. Yes.
 22 Q. That little sweet spot. Okay.
 23 So what I'm struggling with is, why didn't you just
 24 draw this area exclusively within the Magura nappe?
 25 A. Ah. Because at this stage I think my -- I have oil and

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17:21 1 resource density in the Magura nappe using the Silesian
 2 nappe data. I'm saying how much oil per square
 3 kilometre is there in Poland. I would expect to be
 4 below that. I'm contrasting, I'm benchmarking, I'm not
 5 saying they're the same.
 6 Q. I understand that, but I don't understand benchmarking
 7 to be the same or necessarily what the purpose of this
 8 is. The ultimate purpose of your expert report is to
 9 give an amount that is found within the Magura nappe.
 10 You are giving the Tribunal an amount that's either in
 11 the Magura nappe or the Dukla nappe. Those are where
 12 all your prospects are; right?
 13 A. Exactly.
 14 Q. Those are where all the prospects are, right?
 15 A. Yes.
 16 Q. Exactly. So the purpose of the PIIP estimates are to
 17 tell the Tribunal that: we should expect a certain
 18 amount of oil and gas from the Magura nappe and the
 19 Dukla nappe. And my question to you is, why go looking
 20 for an analogous basin when you can just look in the
 21 Magura and Dukla nappes themselves?
 22 A. The reason is because in the Dukla nappe, let's start
 23 with the Dukla nappe, it contains certain reservoir
 24 sands, the -- I call them Menilite type sands, the
 25 better quality type sands, and they are found in the

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17:19 1 gas fields in the Magura nappe and the Dukla nappe in
 2 the Claimant's licence area.
 3 Q. Mm-hm.
 4 A. So not exclusively in the Magura nappe, and I was just
 5 estimating average properties across those two nappes.
 6 And I was just choosing areas from Poland, in the blue
 7 polygon, which incorporated two of the nappes as well.
 8 I wasn't -- yes. It's not just the Magura nappe in
 9 Slovakia, I think is what I'm saying.
 10 Q. I understand that. But if you want to look at what's in
 11 the Magura nappe, isn't the best place to start the
 12 Magura nappe?
 13 A. I wasn't looking just at the Magura nappe. I was
 14 looking at the Magura and Dukla nappes.
 15 Q. And Dukla nappe. So if you want to look at what's
 16 expected from the Magura nappe, you look at the Magura
 17 nappe; if you want to look at what's expected in the
 18 Dukla nappe, you look at the Dukla nappe?
 19 A. I see that the basins are analogous, and that I can use
 20 the Silesian nappe to compare with the Magura nappe.
 21 Q. Mm-hm.
 22 A. With the caveat that there was less good reservoir
 23 there, and that there would -- and so any estimates
 24 I make from my -- and remember this is a benchmarking
 25 exercise so I'm contrasting; I'm not trying to find the

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17:22 1 Dukla nappe in Poland and they're also found in the
 2 Silesian nappe. So I can use all of the Silesian -- in
 3 my estimation I could use all of the Silesian data to
 4 support prospects directly in the Dukla nappe. So
 5 that's one reason.
 6 And the Silesian nappe has oilfields in the better
 7 quality reservoirs, and it also has oilfields in the
 8 poorer quality reservoirs. So mixed in amongst all
 9 those oilfields in Poland are some in -- although they
 10 are in the Silesian nappe, they contain similar rocks
 11 that you would find in the Magura nappe. That's what
 12 I mean by "analogous".
 13 THE PRESIDENT: I'm not sure I understand this, because
 14 I understood before that the Silesian nappe would be
 15 more productive as a rule. So if you just make it
 16 analogous, that doesn't take into account the higher
 17 productivity.
 18 A. If I may just say what I mean by "analogous". Analogous
 19 is not -- I would make a point of saying it's not the
 20 same as, but --
 21 THE PRESIDENT: No, that I understand.
 22 A. -- there are so many similarities that geologically they
 23 are analogous. Specifically, I'll find some of the
 24 really best reservoirs in the Silesian nappe, and
 25 I won't find them in the Magura nappe. So the very best

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17:23 1 reservoirs.
 2 But the poorer reservoirs, the flysch, the --
 3 there's the stuff where there's just shale and then
 4 a bit of sand, shale and then a bit of sand, the not so
 5 good reservoirs, that's everywhere. That's in the
 6 Silesian nappe, the Magura nappe, the Dukla nappe. So
 7 some of the oilfields in Poland have sands which are --
 8 they're more similar to the Magura nappe. The opposite
 9 is not true. The Magura nappe does not have sands
 10 similar to the best ones in the Silesian nappe.
 11 THE PRESIDENT: Yes. That may be the issue, no?
 12 A. Yes. So when I started this whole exercise there was --
 13 I thought: I can keep things simple, I can work out the
 14 resource density in Poland, or somewhere, the millions
 15 of barrels per square kilometre, and just multiply by
 16 1,245 square kilometres. And I immediately hit the
 17 problem that I indicated that Dr Longman had run into:
 18 what is the resource density, what is the area that
 19 I should consider, how many barrels do I put in that
 20 equation. It's a very difficult thing. So I went down
 21 the traditional route of mapping specific project
 22 prospects, and I thought that would be more defensible,
 23 more transparent, to everyone. So I took that approach.
 24 And so I did that, I came up with a number, the
 25 amount of oil in place. But as you've seen, this really

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17:25 1 is uncertain, so I've got to make sure that I'm not
 2 really a long way from reality, and hence -- well, how
 3 much oil and gas is there in Poland. I'm expecting
 4 there to be less here proportionately than Poland, and
 5 that was the exercise I was undertaking.
 6 THE PRESIDENT: And can you show me on these maps what, in
 7 your benchmarking, is on the Magura nappe? Because
 8 I'm not sure I understand this.
 9 A. Yes, I think -- can you see the pink polygon and the
 10 blue polygon at the top?
 11 THE PRESIDENT: Yes.
 12 A. Where you've just got blue polygon and no pink polygon,
 13 that's probably largely Magura nappe.
 14 THE PRESIDENT: Yes.
 15 A. One more thing, and to come back to the question that
 16 was raised earlier --
 17 THE PRESIDENT: If I'm trying to look at the broken line,
 18 whatever it is --
 19 A. That's the national boundary.
 20 THE PRESIDENT: -- then it's a little bit ...
 21 A. Yes, there you go. That area there.
 22 THE PRESIDENT: That I understood, yes. Is this in the
 23 Magura nappe, when I look at the map on the left? It
 24 seems to be further up, no?
 25 A. Oh yes. There we've got it on there, haven't we?

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17:26 1 So there's a bit in that corner where the blue is
 2 present and the pink isn't. It's Magura and a bit of
 3 Silesian as well. It comes back in, doesn't it.
 4 THE PRESIDENT: Yes, so there's not much Magura nappe. Or
 5 do I misunderstand?
 6 A. And that is one of the points, and to come back to your
 7 question, there's just not as much data. There's a few
 8 oilfields there, but as I tried to show in my
 9 presentation earlier, you move south, it gets hilly,
 10 it's wooded, there's just been less oil and gas
 11 exploration. So there are fewer oilfields.
 12 So I think our database of oilfields, just using
 13 that -- I think I also showed Dr Longman's graph, even
 14 with my changed area -- it's still quite a modest amount
 15 of oil per square kilometre.
 16 But it's based on a small amount of data. As is my
 17 orange bar. Or it's based on three fields, that orange
 18 bar on that graph. If one of them didn't succeed, it
 19 would be two-thirds of the height. If two of them
 20 didn't succeed, it would be one-third of the height.
 21 THE PRESIDENT: Apologies.
 22 MR PILAWA: No problem.
 23 I have no further questions, Madam President.
 24 THE PRESIDENT: Questions in re-direct, Mr Newing?
 25 (5.28 pm)

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17:28 1 Re-direct examination by MR NEWING
 2 Q. Yes.
 3 Mr Atkinson, you were discussing earlier, there was
 4 a discussion about whether there had been any
 5 reinterpretation of data after Discovery purchased AOG;
 6 do you recall that?
 7 A. Yes.
 8 Q. And you referred to it as having been reprocessed.
 9 A. Yes.
 10 Q. For the record, that was at transcript 16.50 (page 180,
 11 line 3).
 12 A. Mm-hm.
 13 Q. Can you explain what you mean, what's the difference
 14 between reprocessed or reinterpreted?
 15 A. Oh okay, yes. Certainly.
 16 So seismic data is acquired in the field and you end
 17 up with some tapes, digital tapes of data, and it is
 18 a big process to take that raw data and create the
 19 images we've been looking at, with the seismic sections.
 20 There's quite a bit of seismic processing goes on. So
 21 that is done. It gives you a seismic section. You can
 22 look at that, interpret the horizons, do what you do.
 23 So that's an interpretation exercise.
 24 Quite often you go back to the raw data that's been
 25 acquired, those tapes, digital tapes of data, and you

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17:29 1 have another go at processing it to try to make a better
 2 image of the subsurface. And then you can interpret
 3 that; that would be a reinterpretation of the
 4 reprocessed data.
 5 Q. Thank you.
 6 A. So is that -- yes?
 7 Q. And you mentioned, when you were discussing the quality
 8 of the seismic, you mentioned -- and again, for the
 9 record, this is transcript 16.53, (page 182, lines
 10 14-17) -- there was a question as to whether data was
 11 acquired in the right way and processed in the right
 12 way.
 13 So, bearing in mind how you've just explained the
 14 difference, does the way that something is processed
 15 affect how useful that data is?
 16 A. That is -- yes, if the seismic data has been processed
 17 poorly it will be hard to interpret it. If it's been
 18 processed well, it will be easier to interpret.
 19 Q. Thank you. Could we please now turn to ...
 20 MR DRYMER: Who did -- you mentioned reprocessing of the
 21 data. Who did reprocessing in this case?
 22 A. The -- I think, and someone may be able to correct me,
 23 but I think the last --
 24 MR DRYMER: Your counsel is not allowed to.
 25 A. Oh. I'm pretty sure that the last phase of processing

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17:30 1 was done by a company based in Aberdeen called Seismic
 2 Image Processing Ltd, SIP, and I definitely recall
 3 seeing some seismic processing reports from them, and
 4 I think, you know, if -- they are a well-established
 5 company.
 6 MR DRYMER: When would that have been done, do you recall?
 7 And on whose behalf, is what I'm getting at?
 8 A. I believe for the Claimant. I think I was -- it was
 9 either -- 2012, maybe? I would have to -- I would
 10 probably refer to my notes and find the answer, but
 11 I think around about 2012. There was some processing
 12 going on as late as 2014, so I've heard anecdotally.
 13 I think actually my colleague has -- Colin Howard
 14 has a timeline which he has created as an exhibit.
 15 MR DRYMER: My mic is not working -- I'm going to speak
 16 loudly and try --
 17 I don't mean to be obtuse, but I will ask this
 18 question as neutrally as I can: have processing or
 19 reprocessing techniques advanced over time? I don't
 20 know if it's a function of computer power or not.
 21 A. No, they have. But I think possibly more significant --
 22 this is very --
 23 MR DRYMER: Computing power, I meant.
 24 A. -- fairly straightforward to the seismic processing.
 25 Computing power comes into play with 3D data when you

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17:32 1 have vast volumes, but this is 2D data, so it's a little
 2 different. Actually, probably the most significant
 3 thing is experience, so the first guys who acquire the
 4 data would have processed it, come up with a result, and
 5 then every succeeding person will have built on that and
 6 done a slightly better job, based on what the previous
 7 people did. So it's an evolutionary thing.
 8 It's more of a human thing than a computer thing, to
 9 be honest, with 2D seismic.
 10 MR DRYMER: So when Mr [Newing] asked you: does the way that
 11 data is processed affect how useful that data is, what
 12 you're saying is it depends on who is doing the
 13 interpretation? Or the processing of the data.
 14 A. Both of those things. Both of those things, yes. So
 15 you would like to think --
 16 MR DRYMER: Not the manner in which the technique is used,
 17 or it is that -- it's all a question of know-how is what
 18 you're saying?
 19 A. I think so, yes. And, in fact, in the reports I think
 20 I might have written it somewhere, or I read it, that
 21 actually each succeeding seismic acquisition in the
 22 field improved. So there was one -- I think there is
 23 a mixture of companies: there was a Hungarian company,
 24 a Polish company, maybe a Slovakian company. They
 25 acquired the first data, that was --

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17:33 1 MR DRYMER: Yes.
 2 A. Then the next guys came along, acquired some more data.
 3 They learnt from the previous lot and changed the way
 4 they acquired.
 5 MR DRYMER: I see. I see.
 6 A. So it was an evolutionary thing.
 7 MR DRYMER: Thank you.
 8 Back to you, Mr Tushingham -- Mr Newing, pardon me.
 9 Excuse me, sir. I didn't see who was talking.
 10 MR NEWING: That's okay.
 11 MR DRYMER: I just heard. Pardon me.
 12 MR NEWING: Mr Atkinson, you were taken earlier to footnote
 13 107 in your second report. If we could please have that
 14 up on the screen, it's at page 45.
 15 A. Say that page again, please?
 16 Q. Page 45.
 17 A. Of the second report?
 18 Q. Of the second report.
 19 A. Ah, okay.
 20 Q. Do you have that?
 21 A. I do, thank you.
 22 Q. This says:
 23 "I also note that a 2009 CPR produced by Gaffney
 24 Cline & Associates for a previous operator of the
 25 Claimant's licence estimated a gross gas resource ..."

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17:34 1 And at the end you will see it says:
 2 "See CH065 ..."
 3 A. Ah, yes. Yes.
 4 Q. Is that a reference to one of your exhibits?
 5 A. Ah yes. That's to one of my colleague's exhibits.
 6 Q. That's to, indeed, Mr Howard.
 7 A. Yes.
 8 Q. Can we please pull up CH-065. Is this the document that
 9 you were referring to that you had seen that referred to
 10 the Gaffney Cline & Associates CPR?
 11 A. Right, okay. That looks familiar, yes. Yes, it's
 12 coming back to me now.
 13 Q. Thank you.
 14 You were also asked some questions about the
 15 geological chance of success in the RPS competent
 16 person's report that were referred to in Dr Longman's
 17 report; do you recall that?
 18 A. I do.
 19 Q. And do you recall that you said that you believed that
 20 Dr Longman had misread the document and that the true
 21 chance of success was higher? Do you recall that?
 22 A. That's correct, yes.
 23 Q. Can I ask for Exhibit CDL-008 to be pulled up, please.
 24 This is the RPS competent person's report, isn't it?
 25 A. That's correct, yes.

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17:36 1 Q. Could I ask for us to turn to PDF page 92, please,
 2 internal page 84. Is this the document that you were
 3 referring to?
 4 A. Yes, that's correct.
 5 Q. Would you like to explain your position?
 6 A. Yes. So looking at the top table, the Zborov B
 7 prospect, the RPS evaluated that -- a well drilled on
 8 that prospect as having five sands in it, on the
 9 left-hand side: Palaeocene, Eocene, et cetera,
 10 et cetera. So each one of those sands individually,
 11 they give a chance of success of finding, as high as 13
 12 and as low as 6.
 13 It's a slightly complicated way of doing it, but if
 14 you have five bites of the cherry, you're increasing
 15 your chance of finding one of those sands. So all told,
 16 even though one sand has a 13%, another one has 9,
 17 another one has 6, overall the chance of finding a sand
 18 with a well at that location, just one, is 30%. So that
 19 there says "STOCHASTIC TOTAL (given at least 1
 20 success)", and on the right-hand column GPoS of 30.
 21 It's a complicated bit of statistics, but -- so that
 22 prospect itself has a 30% chance of success, not a 6%
 23 chance of success.
 24 We had conversations amongst the team about whether
 25 we should do this, and because it's rather complicated,

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17:38 1 difficult to communicate, difficult to implement, we
 2 made a simplifying assumption that we find a single sand
 3 in a success case and the thickness would vary, which
 4 made it easier to estimate my chance of success. Which
 5 was, I think -- I did compare it with Zborov B, it's not
 6 dissimilar to my chance of success on a similar
 7 prospect.
 8 And I think the same is true for Zborov A.
 9 MR NEWING: Thank you, I have no further questions.
 10 (5.38 pm)
 11 Questions from THE TRIBUNAL
 12 MR DRYMER: One general question about something you said
 13 near the outset of your -- I think in your presentation,
 14 or maybe later on in your examination, the concept of
 15 this not being a "seismic-led" exploration area.
 16 I think I understand, and I think that this wasn't
 17 seismic-led by virtue of the geology and by virtue of
 18 the fact that there just wasn't much seismic data
 19 available, could you just expand briefly, or explain
 20 briefly what you mean by "seismic-led exploration". Is
 21 that a critique or is that just an observation?
 22 A. Just an observation. The opposing expert and myself, we
 23 work in parts of the world where we have lots of seismic
 24 and everything is very seismic focused. I spend most of
 25 my time on my day job interpreting seismic data.

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17:39 1 Occasionally you work in an onshore environment like
 2 this and the data is poorer quality, there's less of it.
 3 This is a bit of an extreme. I have worked in areas in
 4 Kurdistan, in northern Iraq, where there was no seismic
 5 and I had to come up with -- I authored a competent
 6 person's report on a thing called Sangaw North, which
 7 was a Sterling Energy prospect.
 8 MR DRYMER: Just out there no seismic because nobody
 9 bothered or because seismic wouldn't have revealed
 10 anything.
 11 A. They hadn't got round to it yet. There's just a hill,
 12 just like those ones in the Silesian nappe when you look
 13 at the map and there's a hill, and you can just work out
 14 that that hill means under the ground there's
 15 a structure which you might be able to drill and find
 16 oil. So I had to try and come up with prospective
 17 resources on the basis of a hill.
 18 We're a stage further on from that. We're still
 19 very frontier, we've got 25, I think it is, seismic
 20 lines, so we're better off than I was in Iraq.
 21 The next stage, and I think, as I understand it,
 22 they would try and drill a well, find some oil, get
 23 some -- you know, build on that and when you've got
 24 enough confidence, and probably ability to borrow money,
 25 I suppose, spend some more money on the seismic and

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17:40 1 define the prospects better.
 2 So I should probably qualify what I said. It is --
 3 it's right on the cusp. A lot of these prospects exist
 4 because there's seismic there. But they're not
 5 completely described by seismic. It's right on the cusp
 6 between having no seismic and having a reasonable
 7 amount. It's up in the middle.
 8 I think one -- I created one prospect, which was --
 9 oh no, no. It had one seismic line on it. But mainly
 10 I created it because the surface geology map, the
 11 geology map told me there was a fold underneath, and
 12 therefore I could expect to drill there and find some
 13 structures. I think there probably was at least one
 14 seismic line.
 15 MR DRYMER: Thank you.
 16 THE PRESIDENT: If I take a big-picture view, I understand
 17 what you have done is looked at the volumes -- at
 18 estimates of volumes in place, and geological chances of
 19 extracting these volumes; is that what it is?
 20 A. Yes, the geological chance of success, let me just
 21 explain what that is. It's if we drill the well on
 22 a prospect, what is the chance of encountering oil or
 23 gas which you could -- would flow to surface, and you
 24 think: ah, yes, if there's enough down there I could
 25 probably make a successful oil or gas field here.

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17:42 1 The one thing it doesn't do, it doesn't say how much
 2 is down there. It just says that I've found some,
 3 I don't know how much, just some, which is capable of
 4 flowing up to surface.
 5 So that says I've made a discovery, and then you
 6 drill a few more wells and you hope you're on the curve
 7 and that you've found a lot of oil. It may be you've
 8 found a small amount. So I would call that a success --
 9 I'm a technical person; it's a technical success. My
 10 commercial friend --
 11 THE PRESIDENT: But it's not necessarily a commercial
 12 success.
 13 A. Yes, it requires --
 14 THE PRESIDENT: And that is what your colleagues reviewed?
 15 A. Yes. Yes.
 16 THE PRESIDENT: Yes. So you have calculated the volumes of
 17 resources, we're at the level of resources, we're not
 18 speaking about reserves; right?
 19 A. I shan't pick you up on the picky terminology, but
 20 I think you're right: oil that's in the ground, not the
 21 amount of oil that will eventually end up on surface,
 22 yes.
 23 THE PRESIDENT: And this is oil that not is in the ground
 24 but may be in the ground. It's a potential ...
 25 A. That is absolutely correct, yes.

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17:43 1 THE PRESIDENT: Or potentially available oil.
 2 A. Yes. Yes. It's a very early stage, it's exploration,
 3 so we haven't proven it yet, so it's what we expect to
 4 be there.
 5 THE PRESIDENT: And it's to be sure whether oil is in the
 6 ground you must drill?
 7 A. That's correct.
 8 THE PRESIDENT: Yes.
 9 And you work with probabilities, and you do the P90,
 10 P50, P10 probabilities; is that right?
 11 A. Yes, that's correct. Actually, my job is really to
 12 capture the range, because it's very difficult to say
 13 how much is actually there. So if you capture the --
 14 you say how little there could be and how much there
 15 could be and then in the middle is the best estimate.
 16 THE PRESIDENT: But still you're not sure that there is oil:
 17 it's not only a matter of quantity, it's a matter of
 18 principle, of fact; is that right?
 19 A. That's right. That's correct. So in the terms that
 20 you're describing it, if I say there's a 20% chance of
 21 success, there's a 20% chance of success of there being
 22 oil there.
 23 THE PRESIDENT: But there could be one drop?
 24 A. There could be just a little drop, and then you're at
 25 the start of the curve. There could be very little and

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17:45 1 then it could be quite lots, or it may be really a lot.
 2 So -- but you just get on to that range of volumes.
 3 That's where the chance of success is.
 4 THE PRESIDENT: Right. Thank you. I just wanted to be sure
 5 that I had understood this correctly.
 6 Thanks, I had no other questions.
 7 So no further questions? So that leads us to the
 8 end of your examination. Thank you very much,
 9 Mr Atkinson.
 10 MR ATKINSON: Thank you, Madam President. Thank you,
 11 Tribunal.
 12 THE PRESIDENT: So, looking forward to the continuation
 13 tomorrow, we will hear Mr Moy and Mr Howard; is that
 14 right?
 15 MR NEWING: That's correct.
 16 THE PRESIDENT: Then Mr Longman, and Mr Duarte-Silva and
 17 Mr Acklam most likely Wednesday morning? Or how is
 18 this -- I'm first looking at you, because you -- no,
 19 I need to look at you because you are first doing the
 20 cross-examinations.
 21 MR PILAWA: Right. So I think that we could be done with
 22 Dr Moy and Mr Howard in the morning.
 23 THE PRESIDENT: And then we would take Mr Longman in the
 24 afternoon?
 25 MR NEWING: Yes.

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17:46 1 THE PRESIDENT: And that can certainly be completed?
 2 MR NEWING: Yes, I intend to complete -- if it works that
 3 way I intend to complete Dr Longman tomorrow afternoon.
 4 THE PRESIDENT: So we would have for Wednesday morning left
 5 Mr Duarte-Silva and Mr Acklam, I mean together.
 6 MR NEWING: Correct.
 7 THE PRESIDENT: Does this sound like a reasonable plan?
 8 MR PILAWA: Reasonable to me, yes.
 9 THE PRESIDENT: Good. Is there anything that we need to
 10 discuss?
 11 As we said, tomorrow at the end of the day we will
 12 give you some either questions or indications of topics
 13 that we were more interested in your addressing on
 14 Wednesday afternoon.
 15 MR NEWING: Thank you, Madam President.
 16 (Pause)
 17 THE PRESIDENT: Can we start earlier tomorrow, at 9 o'clock,
 18 or is this a difficulty?
 19 MR ANWAY: I think that's fine with us.
 20 THE PRESIDENT: That's fine with you?
 21 MR NEWING: That's fine with us. I was just checking with
 22 Dr Moy that he would be available, that was all.
 23 THE PRESIDENT: Yes, good.
 24 MR NEWING: That's fine.
 25 THE PRESIDENT: Then let's start at 9.00 tomorrow morning.

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17:48 1 MR ANWAY: Madam President, if I might just inquire, or just
 2 confirm, what the Tribunal's plans are with respect to
 3 Wednesday? My recollection was, was that the Tribunal
 4 said it did not wish to have closing arguments, but
 5 instead that there would be sort of an hour or so,
 6 understanding that timing is flexible, of questions and
 7 answers with the parties.
 8 THE PRESIDENT: What we have in mind is that tomorrow before
 9 we close for the day, we will give you a few indications
 10 of what we would like to hear on Wednesday. For
 11 instance, we would say, I don't know: we have not heard
 12 much about Krivá Ol'ka, for instance. And then: can you
 13 please emphasise this rather than Smilno, which has been
 14 discussed a lot.
 15 I'm not saying this now. I'm just -- this may be
 16 a possibility, or there may be a particular legal issue
 17 that we would like to hear more about. And then we may
 18 have questions on the spot as well, of course.
 19 MR ANWAY: Sure, okay.
 20 THE PRESIDENT: But the idea is more to give you
 21 some indication, and then you have an hour to wrap up;
 22 whatever else you think is important to say, of course
 23 you will tell us.
 24 MR DRYMER: Do you think they should expect questions from
 25 the Tribunal during the wrap-up, or is this more of

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17:49 1 a pleading? That's what Mr Anway was asking.
 2 THE PRESIDENT: Well, it will essentially be a pleading that
 3 can be interrupted by questions, because -- yes, that
 4 may well happen. So I'd better say it like that.
 5 MR ANWAY: I certainly expected the questions. I guess what
 6 I was trying to ascertain -- we had some discussion
 7 earlier today about this too, I don't want to speak for
 8 both parties, but I think this is very helpful --
 9 whether we should be preparing a presentation as such
 10 tonight. But it sounds like we should be waiting to
 11 hear what your concerns are first tomorrow.
 12 THE PRESIDENT: I think, yes, it might be a little premature
 13 to prepare something tonight because it may be besides
 14 what we are really interested in. So if you can reserve
 15 the preparation for tomorrow night --
 16 MR ANWAY: And that's what we have planning on.
 17 THE PRESIDENT: -- that would make more sense, yes.
 18 MR DRYMER: But nor are we asking you to spend all night
 19 tomorrow preparing 100 pages.
 20 MR TUSHINGHAM: That was what I was just going to ask!
 21 I think certainly -- sorry, Professor Sands.
 22 PROFESSOR SANDS: And it may be there are very few
 23 questions. It may be there are very short ailments.
 24 MR TUSHINGHAM: I think, I'm speaking for myself here, but
 25 I may speak for Mr Newing as well, we are unlikely,

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17:50 1 I think, to be able to be able to pull together another
 2 slide presentation, but we will certainly have
 3 a comprehensive set of answers to questions.
 4 But if you would very much prefer a slide
 5 presentation, then we will do our best. I'm just
 6 wondering what the Tribunal's preference would be.
 7 THE PRESIDENT: Well, I mean there's ways of being
 8 convincing even without slides!
 9 MR TUSHINGHAM: I quite agree!
 10 THE PRESIDENT: Sometimes, you look at people and you tell
 11 them something, it may be more effective than having
 12 100 slides.
 13 MR TUSHINGHAM: Yes.
 14 THE PRESIDENT: So we're not expecting slides.
 15 MR TUSHINGHAM: That's very helpful.
 16 THE PRESIDENT: I mean, we're not prohibiting slides, unless
 17 you want to agree between the two of you. But we are
 18 not really expecting slides.
 19 MR TUSHINGHAM: That's very helpful, thank you.
 20 THE PRESIDENT: It's more, you can explain a few things and
 21 we may then add additional questions if we have any.
 22 MR TUSHINGHAM: Perfect.
 23 THE PRESIDENT: Is that sufficient clarification?
 24 MR TUSHINGHAM: That's very helpful.
 25 MR ANWAY: Very helpful and consistent with what I think the

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17:51 1 Tribunal had originally told us.
2 MR DRYMER: I should say we're sensitive too to the fact --
3 I'm always sensitive to the fact that it's somehow oddly
4 easier living out of a suitcase and a war room, than it
5 is for people who are in their own cities with other
6 obligations close at hand, to be working through the
7 night. So, I just mention that for myself.
8 PROFESSOR SANDS: Following on from my friend, since neither
9 of these sides have appeared before me before, people
10 who have will know that I am constitutionally opposed to
11 slides.
12 MR DRYMER: Now you tell them!
13 PROFESSOR SANDS: I want advocacy. Slides are a complete
14 distraction to advocacy.
15 MR ANWAY: Then we apologise for our opening statement!
16 PROFESSOR SANDS: That is my personal view.
17 THE PRESIDENT: I would beg to differ in the sense that
18 there are slides that are helpful. It all depends how
19 you do them.
20 That allows us now to close for the night, and we'll
21 discuss slides later on!
22 See you tomorrow. 9 o'clock.
23 MR TUSHINGHAM: Thank you.
24 (5.53 pm)
25 (The hearing adjourned until 9.00 am the following day)

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