

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 1
Hearing on the Merits

Thursday, 1st 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

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and Emma Lovell

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<p>09:30 1 Thursday, 1 February 2024 2 (9.30 am) 3 THE PRESIDENT: We start with the attendees. You, of 4 course, by now know the Tribunal: Mr Drymer on my left, 5 Professor Sands on my right. The secretary of the 6 Tribunal Ms Mínguez Almeida there in the back, and the 7 assistant of the Tribunal next to her, Dr Langer. 8 Now, can I turn the floor to the Claimants. 9 Mr Tushingham, you want to introduce who is here on 10 behalf of the Claimants. 11 MR TUSHINGHAM: Thank you very much, Madam President. My 12 name is Mark Tushingham, counsel of Twenty Essex; 13 Mr Neil Newing of Signature, Mr Pietro Grassi of 14 Signature, Mr Colin Grech of Signature, Mr Alexander 15 Fraser of Discovery, and Mr Ben Pharoah of Signature. 16 MR ANWAY: Stephen Anway from Squire Patton Boggs and with 17 your leave, Madam President, I will have my team members 18 introduce themselves. 19 MR PEKAR: Good morning, Madam President, members of the 20 Tribunal, I'm Rostislav Pekar from Squire Patton Boggs. 21 MR PILAWA: Good morning, I'm Douglas Pilawa from 22 Squire Patton Boggs. 23 MS PROKOPOVÁ: Good morning, I'm Tatiana Prokopová, 24 Squire Patton Boggs. 25 MR ALEXANDER: Good morning, I'm David Alexander from</p> <p style="text-align: center;">Page 1</p>	<p>09:34 1 hearing schedule that's Annex A to that order. Some of 2 the rules are also found in Procedural Order No. 1. 3 Over the entire hearing each party has 14.5 hours, and 4 that includes openings and the answers to the questions 5 of the Tribunal on the last day. 6 Today we'll start with the opening statements, two 7 hours and a half each. We have received the 8 demonstrative exhibits and, if I'm not mistaken, we have 9 already received the presentation by email from the 10 Claimant, which is to be sent before you start 11 presenting. 12 Tomorrow we'll start the witness examinations. As 13 you know, this hearing is public in the sense that it 14 will be posted, the audio video recording will be posted 15 on the ICSID website, so we should please make sure that 16 the technician does stop the recording whenever we go 17 off the record, because otherwise we have all kinds of 18 break conversations that are recorded, and that is not 19 good. 20 And if you ever have to address a confidential 21 matter, please raise it before you start so we can mark 22 the recording and the transcript confidential. 23 Is there any question, comments about how we 24 proceed, or any other topic on the Claimant's part? 25 MR TUSHINGHAM: Nothing from the Claimant's side.</p> <p style="text-align: center;">Page 3</p>
<p>09:33 1 Squire Patton Boggs. 2 MR KAMENICKÝ: I'm Jakub Kamenický, from Squire Patton 3 Boggs. 4 MS LUO: Christina Luo, Squire Patton Boggs. 5 MR KUPKA: Julián Kupka from the Ministry of Finance. 6 MS LEŠOVÁ: Petra Lešová from the Ministry of Finance as 7 well. 8 MS JEŠKOVÁ: Zuzana Ješková from the Ministry of Finance. 9 THE PRESIDENT: Can I just -- I didn't hear you well, can 10 you repeat? 11 MS JORDAN: Claire Jordan, SLR Consulting. 12 THE PRESIDENT: Thank you. 13 MR WHYTE: Ewan Whyte, SLR Consulting. 14 DR LONGMAN: Chris Longman, also of SLR Consulting. 15 MS SKAF: Nicole Skaf, Charles River Associates. 16 MR ACKLAM: Richard Acklam, Charles River Associates. 17 DR DUARTE-SILVA: Tiago Duarte-Silva, Charles River 18 Associates. 19 THE PRESIDENT: Thank you. 20 Fine, I think that we have everyone that we have on 21 the list, and Mr Fraser is the party representative, so 22 he is admitted to the hearing before his testimony. 23 We are here to hear oral argument and then the 24 witnesses and expert examination will follow the rules 25 that are set in Procedural Order No. 4, including the</p> <p style="text-align: center;">Page 2</p>	<p>09:36 1 THE PRESIDENT: Nothing. On the Respondent's part? No, 2 none either. 3 Fine, then I can give the floor for the opening 4 argument to the Claimant. 5 (9.37 am) 6 Opening statement on behalf of the Claimant 7 MR TUSHINGHAM: Thank you very much, Madam President, 8 members of the Tribunal. 9 In 2014 Discovery and its subsidiary, AOG, embarked 10 on a project to explore for oil and gas in north-eastern 11 Slovakia. Discovery invested in Slovakia in reliance on 12 exploration licences that had been granted by the Slovak 13 Government under the Geology Act. The licences and the 14 Geology Act imposed an express obligation on AOG to 15 design, investigate and evaluate a geological task: to 16 explore for oil and gas within the concession areas. 17 When Discovery invested in Slovakia, it legitimately 18 expected that Slovakia would not prevent AOG from 19 completing that task. But when the rubber hit the road, 20 from late 2015 onwards, and Discovery tried to drill its 21 exploration wells, Slovakia prevented AOG from 22 completing the task. 23 Between late 2015 and early 2018, organs of the 24 Slovak Republic made a series of decisions which 25 ultimately caused the project to fail, and I'll refer to</p> <p style="text-align: center;">Page 4</p>

<p>09:38 1 those decisions as "the impugned measures". 2 These measures are all attributable to Slovakia, and 3 they place Slovakia in breach of its obligations to 4 Discovery under the BIT. 5 Now, the impugned measures had significant 6 consequences: they destroyed the commercial viability of 7 the project; they caused Discovery's funders to stop 8 funding the project; they caused Discovery's JV partners 9 to withdraw, and they completely wiped out the value of 10 Discovery's investment. Discovery therefore seeks 11 an award of reparation to compensate it for the losses 12 which it has suffered. 13 (Slide 2) So in my presentation this morning I will 14 be addressing topics 1 through to 5; and Mr Newing will 15 be addressing topic 6, quantum. I intend to spend most 16 of my time on topic 2, taking the Tribunal through the 17 underlying documents related to the impugned measures. 18 In the interests of time, I will be skipping over 19 some of my slides quite quickly, and I won't take the 20 Tribunal through the detail of every single document 21 that's on the screen, but you have exhibit references in 22 the presentation, as you will see shortly, and so the 23 Tribunal can go back to certain documents, if it wishes, 24 in due course. 25 So we begin with the background facts and starting</p> <p style="text-align: center;">Page 5</p>	<p>09:41 1 So that was the policy background against which 2 Discovery invested in Slovakia. 3 (Slide 8) We now move to the legislative background, 4 and I'll begin with the Geology Act on slide number 9. 5 The purpose of the Geology Act was to encourage 6 private companies to explore for oil and gas in 7 Slovakia. That purpose is clear from various provisions 8 of the Act which I will take you to shortly. But the 9 purpose is also clear from the Act's transposition into 10 Slovak law of the European Directive that I've quoted on 11 this slide. 12 (Slide 10) Moreover, the former Minister of the 13 Environment, Mr Sólymos, who you will be hearing as 14 a witness in this arbitration, confirmed as much in 15 an interview he gave in 2017. He was asked: 16 "Why isn't prospecting done by the Government?" 17 And his answer was: 18 "The government has no money for this and this is 19 why it rents out exploration areas to firms and 20 companies involved in such activities. In return, the 21 government gets information about the state of the 22 country's natural resources." 23 (Slide 11) Now, the Geology Act established four 24 stages for any oil and gas exploration project, and in 25 the following slides I will briefly summarise the</p> <p style="text-align: center;">Page 7</p>
<p>09:39 1 with the policy background. 2 (Slide 5) At the times material to this dispute, 3 Slovakia imported over 98% of its oil and gas from 4 Russia, and that is undisputed. 5 (Slide 6) In 2013, Slovakia's import dependency, and 6 hence the size of its energy trade deficit, was 7 identified as a matter of concern by the European 8 Commission. 9 (Slide 7) Successive Slovak governments had 10 acknowledged the risks posed by Slovakia's near total 11 dependence on Russian imports of hydrocarbons and energy 12 security was therefore a key pillar of Slovakia's energy 13 policies. To this end, the policies acknowledged 14 a desire by Slovakia to encourage domestic oil and gas 15 exploration and extraction. 16 The 2014 policy, which you will see on the slide 17 here, said: 18 "The future of gas extraction efforts in Slovakia 19 depends on the verification of new exploration 20 concepts... that are financially intensive and 21 associated with significant geological and technical 22 risks. The feasibility of such projects fully depends 23 on the clarity provided in geological and mining 24 legislation and on the enforcement of exploration rights 25 on the basis of this legislation."</p> <p style="text-align: center;">Page 6</p>	<p>09:42 1 provisions relevant to each stage. These provisions we 2 say are relevant and important for two reasons: first, 3 because they provide the background to the exploration 4 licences, and are relevant to the contents of 5 Discovery's legitimate expectations; and second, because 6 the provisions will put in context some of the 7 terminology used in the parties' pleadings and in my 8 oral presentation this morning. 9 (Slide 12) So we begin with stage 1, which is the 10 grant of an exploration licence. So looking at 11 Article 3(c), Article 2(1) and Article 21, the 12 geological work -- and that's a key term -- that AOG was 13 carrying out in Slovakia was deposit geological 14 exploration, 21(2)(a). 15 Under Article 24(1), the Ministry was responsible -- 16 that's the Ministry of Environment -- was responsible 17 for determining the areas in which exploration for oil 18 and gas may be carried out. 19 In order to carry out such work it was necessary to 20 apply to the Ministry for the determination of 21 an exploration area, and under Article 24(8) the 22 exploration area was determined: 23 "... for the period required by the client and 24 necessary for the performance of the geological 25 works..."</p> <p style="text-align: center;">Page 8</p>

<p>09:44 1 And if that period specified was insufficient, the 2 Ministry could extend the period to enable the works to 3 be completed. 4 (Slide 13) Article 24(10) confirmed that 5 an exploration area could be awarded to: 6 "... a group of clients who jointly finance ... 7 exploration works." 8 And that was the position here because AOG, JGX and 9 Romgaz were jointly financing the works as JV partners. 10 Article 24(11) provided that every holder of 11 an exploration area: 12 "... shall hold the relevant exploration interest, 13 which represents its share of the rights and obligations 14 [and that's an important word] attributable to the 15 holder of the exploration area under this Act and in the 16 geological works." 17 And in this case the relevant exploration interests 18 under the licences were 50% AOG, 25% JGX, and 25% 19 Romgaz. So that's stage 1. 20 (Slide 14) Stage 2 of the Geology Act relates to the 21 design of a geological task, and this is another key 22 term that is used throughout the Act and in the 23 exploration licences themselves. It is defined in 24 Article 11(1) as: 25 "... a subject-matter, local and temporal definition</p> <p style="text-align: center;">Page 9</p>	<p>09:47 1 here. 2 Now, in its pleadings Slovakia says that the 3 licences and the Act merely gave a contractor a right to 4 do the work, but not an obligation. We say that is 5 an untenable interpretation of the Act, and particularly 6 Article 14. It is entirely standard in oil and gas 7 concessions, as the Tribunal will well know, for states 8 to impose an obligation on a licence-holder to do the 9 work, and the regime in Slovakia was no different: why 10 would Slovakia wish to impose an obligation on 11 a contractor? 12 Well, first and foremost because Slovakia wanted to 13 know how much oil and gas was in the ground. 14 Minister Sólymos acknowledged as much in his 2017 15 interview that we looked at earlier, and that was 16 because of Slovakia's near total reliance on imports. 17 The second reason is because an exploration licence, 18 by its nature, confers exclusivity. If a licence-holder 19 simply had a right but not an obligation to do the work, 20 the licence-holder could simply sit on its hands and 21 deprive other parties of the opportunity to investigate 22 how much oil and gas was in the ground. But that is not 23 what Slovakia intended, and one can see that not only 24 from these provisions, but also from Article 22(4) on 25 the next slide (16) here.</p> <p style="text-align: center;">Page 11</p>
<p>09:45 1 of a range of questions that convey an economic, 2 scientific or technical objective of the task ..." 3 And then the keywords: 4 "... to be designed and investigated through 5 geological work, and evaluated in the final report of 6 the geological task." 7 Article 12(1), on the right-hand side, imposed 8 an obligation on the geological contractor to draw up 9 a geological design in respect of such task, and I'll 10 explain later how that was done by AOG. 11 (Slide 15) Moving now to stage 3, this relates to 12 the investigation of the geological task, and there are 13 a number of key provisions here which we rely on. The 14 key one is Article 14. Article 14(1) says: 15 "The ... contractor shall start to investigate 16 the... task after the ... design has been approved ..." 17 And then Article 14(2): 18 "The geological contractor shall investigate the ... 19 task in accordance with the approved ... design [and 20 then these are important words] so as to achieve the 21 objective of such ... task as quickly and efficiently as 22 possible." 23 That obligation to investigate was then mirrored by 24 and was consistent with reporting obligations imposed on 25 the holder under Article 25, as you see on the slide</p> <p style="text-align: center;">Page 10</p>	<p>09:48 1 So, under Article 22(4), if the works were not 2 commenced within one year, the Ministry had the right to 3 revoke the licence. If the works were not commenced 4 within two years, the Ministry was obliged to cancel the 5 exploration area. 6 So we say Slovakia's clear intention was to ensure 7 that the work was investigated as quickly and 8 efficiently as possible, so that Slovakia could know 9 about the state of its natural resources. And of course 10 along the way the licence-holder had to pay licence fees 11 to Slovakia. 12 (Slide 17) There are a few other provisions relevant 13 to stage 3, which I will briefly go through now. During 14 the investigation of the task, Article 29 made clear 15 that a contractor was entitled to enter foreign property 16 to carry out geological works, and this had a two-stage 17 process. First of all, under Article 29(3), the 18 contractor was first obliged to seek agreements with the 19 owner of the relevant property. But, second, and if no 20 agreement was reached, then under Article 29(4), the 21 Ministry shall decide on the application of the 22 contractor. And that is referred to as a "compulsory 23 access order", and that procedure is relevant to 24 Discovery's allegations concerning the Krivá Ol'ka 25 exploration well, which I'll come to later on.</p> <p style="text-align: center;">Page 12</p>

<p>09:49 1 So that's stage 3. 2 (Slide 18) Stage 4 is the evaluation of the task. 3 And that stage, of course, is only reached once the task 4 has been investigated, and here we see in Article 16(1) 5 again another express obligation on the contractor to 6 evaluate in a final report, and that final report, as 7 you see from Article 16(3), must contain a calculation 8 of the reserves. 9 (Slide 19) One final feature of the regime is this: 10 an exploration licence-holder has a priority right under 11 Slovak law to apply for a mining licence within one year 12 after filing the final report, and a mining licence 13 allows a contractor to extract hydrocarbons which have 14 been discovered under an exploration licence, of course 15 in exchange for a royalty. 16 (Slide 20) Now, Discovery's DCF model on quantum in 17 this arbitration requires the Tribunal to assume in 18 a but-for scenario that AOG would have been granted 19 a mining licence. We say, based on past statistics, it 20 was overwhelmingly likely that AOG would have been 21 granted such a licence, and that likelihood is 22 re-enforced by Slovakia's incentive to reduce its 23 imports of hydrocarbons as acknowledged in its energy 24 policies. 25 (Slide 21) So we now move to the licences</p> <p style="text-align: center;">Page 13</p>	<p>09:53 1 (Slide 25) Now, I will now very briefly summarise 2 the evolution of the licences. They were first granted 3 by the Ministry in 2006 to a company called Aurelian, 4 and you will see references here to all of the 5 provisions on the slide. 6 (Slide 26) In 2008, JKX and Romgaz farmed into the 7 licences and each acquired a 25% interest, with Aurelian 8 holding the remaining 50%. 9 (Slide 27) In July 2010, AOG was incorporated as 10 a Slovak entity. 11 (Slide 28) In 2014, in March of that year, Discovery 12 acquired AOG and AOG also granted a royalty, 13 an overriding royalty, in favour of Aurelian. So the 14 price for the transaction, the consideration, had two 15 components: the price paid by Discovery to acquire AOG 16 itself, but also a royalty payable to Aurelian if 17 hydrocarbons were later discovered in the licence areas. 18 And so it is clear from the transaction that substantial 19 contingent obligations were undertaken (Slide 29), and 20 it's clear that Discovery took on a substantial risk and 21 commitment when it entered into this investment in 2014. 22 (Slide 30) In July of 2014, the Ministry extended 23 the exploration licences for another two years, and in 24 these licences the licence-holders were identified as 25 AOG, JKX and Romgaz.</p> <p style="text-align: center;">Page 15</p>
<p>09:51 1 themselves, and Discovery's acquisition of AOG. 2 (Slide 22) As you will see on this map, the licences 3 covered a substantial area in north-eastern Slovakia, 4 shown in blue, on the border with Poland and located in 5 the Carpathian region. 6 (Slide 23) Discovery's expert geoscientist, 7 Mr Atkinson, concludes that the licences were located in 8 a highly prospective region, and this map shows the 9 licences were adjacent to a large number of oil and gas 10 fields in neighbouring Poland and in the north 11 Carpathian province. 12 This was a region which was well known to Mr Lewis 13 and Mr Fraser, Discovery's CEO and CFO respectively. 14 From about 2007 onwards, they had both spent many years 15 working in Poland on oil and gas exploration projects, 16 and it was this work which led Mr Lewis to discover the 17 licence areas over the border in Slovakia. 18 (Slide 24) Between 1898 and 1998, over 30 wells had 19 been drilled on the licence areas, and this included one 20 very deep well in Smilno, in 1982, which produced 21 substantial quantities of natural gas during flow tests. 22 At that time, in 1982, there was no suitable market 23 for the amount of gas that had been discovered. But by 24 the time Discovery invested in Slovakia in 2014, there 25 most certainly was a market.</p> <p style="text-align: center;">Page 14</p>	<p>09:54 1 (Slide 31) In September of 2014, AOG became the 2 operator under joint operating agreements that were 3 concluded with JKX and Romgaz, and pursuant to these 4 contractual arrangements, AOG had all of the rights of 5 the parties under the licence, there was obviously a JOA 6 for each licence, and shall have exclusive charge of and 7 conduct of all joint operations. 8 And during the project there were frequent operating 9 committee meetings, as is entirely standard, throughout 10 the project by Discovery, JKX and Romgaz. 11 (Slide 32) In July of 2016, the Ministry extended 12 the licences for another five years, in other words 13 until July of 2021, and once again the licence-holders 14 were AOG, JKX and Romgaz. 15 (Slide 33) Now, before the licences were granted and 16 extended over this period, Slovakia, the Ministry, 17 approached many other state entities to ascertain 18 whether they objected to the exploration licences or the 19 extensions, and time and time again no state entities 20 objected. And that fact was expressly recorded on the 21 face of the licences, and we've given one example here 22 from the 2016 licence, where the district office in 23 Prešov confirmed that: 24 "[Issuance] of a Decision extending the term of 25 validity of the ... Exploration Area will not affect the</p> <p style="text-align: center;">Page 16</p>

<p>09:56 1 interests associated with conservation of nature and 2 landscape and the District [Office] ... therefore did 3 not raise any objections." 4 And the terms of the other licences are to the same 5 effect. And I'll come back to this point later, but we 6 say it's relevant when the Tribunal examines whether 7 Slovakia frustrated Discovery's legitimate expectations. 8 (Slide 34) Moreover, within the licences themselves, 9 the Ministry expressly acknowledged that the geological 10 works were necessary and beneficial, so I'll focus on 11 two passages here, highlighted: 12 "The proposed term of validity ... reflects the need 13 to carry out additional geological works the performance 14 of which is required to achieve the objective of the 15 geological task." 16 So that obviously ties back into the provisions of 17 the Act: 18 "It therefore follows that the geological activities 19 performed by the holder of exploration area are 20 beneficial from the aspect of gathering knowledge about 21 the degree of geological exploration of the territory... 22 The Ministry deems it necessary to admit the application 23 filed by the holder of exploration area who will ensure 24 that additional valuable knowledge about the territory 25 of the Slovak Republic will be gathered during the so</p> <p style="text-align: center;">Page 17</p>	<p>09:58 1 to as the first and fourth expectations. 2 So as to the first, because AOG had an obligation to 3 design, investigate and evaluate the task, Discovery 4 necessarily expected that Slovakia would not prevent AOG 5 from completing the task. This was the quid pro quo of 6 AOG's obligation to the Slovak Republic: I will do the 7 work, but in return you will not prevent me from 8 completing it. And so Discovery's first legitimate 9 expectation, we say, was based on that clear and 10 implicit representation, which we say Slovakia made in 11 the licences, when read together with the Geology Act. 12 Discovery also legitimately expected that geological 13 exploration could be carried out without any other 14 relevant organ of the Slovak State objecting. And what 15 was the source of that expectation? Well, again, it was 16 the terms of the licences. As we saw earlier, the 17 licences recorded that the Ministry had approached 18 numerous state entities to ascertain whether they 19 objected, and not one single state entity objected 20 between 2006 and 2016 within the licence provisions. 21 And so the licences therefore implicitly represented 22 that no other relevant organ would object. 23 (Slide 38) So we now move on to a brief summary of 24 the project, and I'll then turn on to examine the 25 impugned measures.</p> <p style="text-align: center;">Page 19</p>
<p>09:57 1 extended period." 2 And the terms of the other licences are to the same 3 effect. 4 (Slide 35) What is more, the licences also 5 acknowledged that AOG envisaged drilling exploration 6 wells to depths of up to 1,500 metres, performing 7 pumping tests and then preparing a final report. And 8 Slovakia therefore knew very well what AOG was planning 9 to do because it had been told as much in the 10 applications. 11 And so against that background, we can now consider 12 the terms of the licences themselves in more detail. 13 And of course it is necessary to interpret the licences 14 against the background of the Geology Act and, as we 15 saw, in Articles 12, 14 and 16 of the Act, there were 16 obligations imposed on the contractor to design, 17 investigate and evaluate the task, and those same 18 obligations were then unsurprisingly incorporated as 19 conditions of the licences; see particularly 20 paragraphs 1, 2 and 3, which we've quoted here. 21 Now, AOG owed these obligations to the Slovak 22 Republic throughout the project. 23 (Slide 37) And why is this important? Well, because 24 it explains the context of Discovery's expectations, and 25 I'm going to concentrate, orally, on what we've referred</p> <p style="text-align: center;">Page 18</p>	<p>10:00 1 (Slide 39) So after the acquisition in 2014, 2 Discovery developed an exploration strategy initially 3 focused on shallower oil and gas targets. 4 (Slide 40) As part of that strategy, Discovery 5 carried out detailed interpretations of seismic data as 6 well as magneto-telluric surveys, which were obtained on 7 the licence areas. And that analysis, which took place 8 throughout the project, from 2014 onwards, enabled 9 Discovery to identify suitable prospects to drill for 10 oil and gas. 11 (Slide 41) Discovery then summarised its analyses in 12 detailed and lengthy presentations at operating 13 committee meetings. We've given references on this 14 slide to some of those presentations, and it is clear 15 from these documents that Discovery was serious and 16 committed to this project, and undertook a significant 17 amount of preparatory work. 18 But these three presentations of course are not the 19 sum total of that work. In this arbitration Discovery 20 has voluntarily disclosed over 16,000 documents to 21 Slovakia, many of which evidence the detailed analysis 22 that Discovery undertook throughout the project. 23 (Slide 42) What is more, Discovery had also 24 considered how to commercialise oil and gas discoveries. 25 So as to oil, that would have been collected in tanks</p> <p style="text-align: center;">Page 20</p>

10:02 1 and trucked to a nearby refinery, 60 kilometres by road
 2 to the north. And as for natural gas, in 2014 Discovery
 3 had prepared a feasibility study to construct
 4 a 15-kilometre pipeline from Smilno to the nearest
 5 high-pressure pipeline owned by SPP, which is the Slovak
 6 gas distribution company.
 7 (Slide 43) And on this slide you will see
 8 a reference to that preliminary feasibility study, where
 9 SPP confirms that its high-pressure pipeline had the
 10 capacity to receive natural gas from Smilno at the rates
 11 requested by AOG.
 12 So that was commercialisation.
 13 Turning now to financing. At the same time that all
 14 of this work was going on, Discovery was also working to
 15 secure external funding for the project. Mr Lewis says
 16 in his witness statement that he could have funded
 17 Discovery's share himself, but he preferred to reduce
 18 the risk by sharing the cost and upside with a suitable
 19 investor, and so hence the efforts that were undertaken
 20 in 2014 and 2015 to attract external funding.
 21 (Slide 44) Now, in its pleadings, Slovakia asserts
 22 that nobody was interested in the project, and we
 23 fundamentally disagree, because Slovakia has ignored
 24 a key contextual factor that was occurring at that time,
 25 as you will see on this slide, namely a total collapse

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10:03 1 in the market price for crude oil in mid-2014 which, as
 2 Mr Fraser says, had caused investor sentiment to
 3 deteriorate. And he goes on to explain that in his
 4 witness statement.
 5 (Slide 45) But as market prices began to recover,
 6 Discovery's efforts to attract financing eventually bore
 7 fruit in October of 2015 in the form of the Akard
 8 agreement under which a consortium of investors agreed
 9 to finance Discovery's share of the cost of drilling the
 10 initial wells.
 11 (Slide 46) So with funding in place, Discovery
 12 developed a plan to drill three initial exploration
 13 wells, one on each licence: the Smilno well; the Krivá
 14 Ol'ka well, and the Ruská Poruba well. And as Mr Lewis
 15 explains in his witness statement, these three wells
 16 were intended to be a proof of concept to enable AOG to
 17 fund the drilling and development of further wells.
 18 But, and importantly, Discovery was also prepared to
 19 drill more wells if those initial three wells did not
 20 result in a discovery.
 21 (Slide 47) For each well, detailed documents were
 22 prepared, a project of geological works, a detailed
 23 drilling programme, and an authorisation for
 24 expenditure. And, as the names suggest, these documents
 25 form part of the geological task which AOG was obliged

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10:04 1 to carry out under the licences.
 2 So if we cast our minds back to the four stages of
 3 the Geology Act, AOG's design and approval of these
 4 documents marked the completion of stage 2, and so by
 5 2015, Discovery was ready to move to stage 3:
 6 investigation.
 7 (Slide 48) But Discovery's projects -- and this is
 8 an important point -- were not limited to these three
 9 wells. As Mr Lewis explains, Discovery as part of the
 10 investigation work had identified many other prospects,
 11 and so once these first three wells had been drilled,
 12 then further wells would have been drilled on the
 13 licences as well.
 14 (Slide 49) So from late 2015 onwards, Discovery
 15 started to investigate the geological task, and this is
 16 a picture of the Smilno drilling site taken in 2016.
 17 And Slovakia was aware of all of the work that AOG was
 18 carrying out from the annual reports that were submitted
 19 each year.
 20 (Slide 50) But despite all of this preparatory work,
 21 and by a series of impugned measures, which were passed
 22 by different state organs from late 2015 onwards,
 23 Slovakia prevented Discovery from completing the task,
 24 and I will go through the key complaints that we've
 25 raised in relation to Smilno, Krivá Ol'ka, and then in

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10:06 1 relation to the environmental impact assessment process.
 2 (Slide 51) So that concludes the background, and we
 3 now move on to the impugned measures.
 4 (Slide 52) We thought it would be helpful to
 5 summarise on a single slide a table of all of the
 6 impugned measures which we've addressed extensively in
 7 our pleadings.
 8 So on the left-hand side we list three topics:
 9 Smilno, Krivá Ol'ka, and EIA.
 10 On the top row we list the different Slovak state
 11 organs that were responsible for the measures: the
 12 police, the judiciary, a prosecutor, the Ministry of
 13 Interior, the Ministry of Agriculture, the Ministry of
 14 Environment and the district offices. And in the table
 15 itself, we list the 14 impugned measures, which I will
 16 expand upon this morning. So please don't be daunted by
 17 this table: I will do my best to elaborate.
 18 (Slide 53) So we begin with Smilno, and in this
 19 slide we summarise chronologically the seven impugned
 20 measures that we set out in the table, and I'll go
 21 through each of them now. But first some background
 22 points. I'm not going to spend time summarising each
 23 one; I'll go through it in due course (Slide 54).
 24 (Slide 55) So, the Smilno drilling site was located
 25 on privately-owned farmland about 800 metres away from

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<p>10:07 1 the southern boundary of the village of Smilno. The 2 site was accessible via a public road which ran from the 3 village to the Smilno site entrance, and we've included 4 a picture here from a Google Earth satellite image taken 5 in 2006. 6 (Slide 56) In 2015, AOG entered into leases over the 7 Smilno site and obtained permits from the district 8 offices to use the farmland to carry out exploratory 9 drilling. 10 (Slide 57) Between 2015 and into 2016, AOG prepared 11 the Smilno site in readiness for the well to be drilled, 12 and this satellite image taken in 2016 shows that AOG 13 prepared the drilling site -- the yellow square that you 14 see here -- which measured about 80 metres by 60 metres. 15 (Slide 58) Now, it is not in dispute that the road 16 was the only viable access route for AOG to move its 17 drilling rig and other heavy machinery onto the site. 18 (Slide 59) But before any work had been done at 19 Smilno, AOG had received confirmation from the mayor, 20 Mr Baran, who you will hear as a witness in this 21 arbitration. In 2015 he told AOG that the road: 22 "... had always been used by members of the public 23 as a road and public accessway for hundreds of years 24 without any issues." 25 And Mr Baran, of course, is one of Discovery's</p> <p style="text-align: center;">Page 25</p>	<p>10:10 1 THE PRESIDENT: Can I just ask a question? 2 MR TUSHINGHAM: Sure. 3 THE PRESIDENT: When you speak of attribution under 4 Article 4, you speak of attribution of liability, not 5 necessarily obligations? 6 MR TUSHINGHAM: Of course. But I think it's not in dispute 7 that his conduct in confirming -- 8 THE PRESIDENT: Is this the conduct of a state organ, is 9 that what you're saying? 10 MR TUSHINGHAM: Exactly. Exactly. No matter how -- no 11 matter where the state organ sits in the hierarchy of 12 the state apparatus. 13 (Slide 61) Now, it's clear that Discovery relied on 14 what the mayor had told Discovery in 2016, namely that 15 the road was a public road, and to give just two 16 examples you can see on this slide an email from 17 Mr Lewis of 5 August 2015, and on the right-hand side he 18 says: 19 "Smilno location ... 20 Access road is a public road ... 21 Photo attached of Stanislav on the Smilno location 22 with the mayor of Smilno ..." 23 Then below, at the bottom of the screen, with 24 a presentation from December of 2015: 25 "Access road.</p> <p style="text-align: center;">Page 27</p>
<p>10:09 1 witnesses in this arbitration. 2 (Slide 60) What's more, in 2016, the mayor also 3 confirmed, in a letter that you will see on the right, 4 that: 5 "the field track situated on parcel of land ... has 6 been used by the general public for many decades ... as 7 access road to access the adjacent plots of land ... and 8 is publicly accessible." 9 And to put this in context, if you look on the 10 left-hand side, the mayor says in his witness statement: 11 "I have never heard of anyone apart from AOG being 12 prevented from using this Road based on any assertion by 13 any of the landowners that the Road is private 14 property..." 15 Now, since Mr Baran was the mayor of Smilno, his 16 contemporaneous statements to AOG in 2015 are 17 attributable to Slovakia under Article 4 of the ILC 18 Articles, and that's important when the Tribunal comes 19 to examine whether Slovakia acted inconsistently and 20 hence in breach of the FET standard in relation to the 21 conduct of other state organs in relation to the road. 22 Because, as you know, many other state organs took 23 an alternative position, opposite position, on the basis 24 that the road was private, and I'll come to that 25 shortly.</p> <p style="text-align: center;">Page 26</p>	<p>10:11 1 Land lease (not required)." 2 So this was Discovery's understanding, 3 contemporaneous understanding. 4 (Slide 62) What's more, the road was clearly -- 5 PROFESSOR SANDS: Sorry, could I just ask on this, I've been 6 through your pleadings, and there's no reference in the 7 pleadings to an exercise of due diligence on the part of 8 the developer. Can we take it from that that the 9 developer did not engage in any exercise of due 10 diligence and did not receive any legal opinion in 11 relation to these issues? 12 MR TUSHINGHAM: You mean specifically in relation to the 13 road? 14 PROFESSOR SANDS: In relation to the road and in relation to 15 the use of the area. It's just, having been through 16 your pleadings, there isn't any reference to it, so 17 I don't know whether that means: (a) there was no due 18 diligence, or (b) there was a due diligence but it 19 hasn't been made available to us. 20 MR TUSHINGHAM: It may depend on what is meant by the 21 concept of due diligence. Of course we can't point to 22 a legal opinion that has been produced in this 23 arbitration which confirms at the time that the road was 24 a public road. But what is certainly clear from the 25 documents that I just took you to is that the mayor had</p> <p style="text-align: center;">Page 28</p>

<p>10:13 1 told AOG and Discovery at the time that the road was 2 a public road. And we say that to the extent that that 3 due diligence was required, confirmation from the mayor 4 of the village was plainly sufficient. 5 PROFESSOR SANDS: But it's a pretty central issue, the 6 status of this right of way, and relying on one 7 individual might raise the issue in a prudent 8 developer: we ought to at least undertake some actions 9 to satisfy ourselves that the mayor is correct. 10 My question is actually a very simple one: was a due 11 diligence exercise carried out with local lawyers, or 12 was it not? 13 MR DRYMER: Prior to the investment, I would add. For my 14 interest. 15 MR TUSHINGHAM: We can't point to a document which expressly 16 confirms that at the time, prior to the investment, that 17 the road was a public road. And that's obvious, because 18 prior to the investment, of course, the specific 19 drilling site at Smilno had not been identified. But 20 after the investment was made, of course extensive -- 21 you can call it due diligence, perhaps not in a legal 22 sense of actually obtaining a legal opinion, but factual 23 due diligence was undertaken, and that is important 24 because we say hindsight is, of course, a wonderful 25 thing. At the time that Discovery was looking at and</p> <p style="text-align: center;">Page 29</p>	<p>10:16 1 intervention, in advance of the investment by AOG, and 2 in advance of the acquisition by Discovery of AOG's work 3 thus far, it appears to be the case that there was no 4 legal due diligence in relation to these issues; is that 5 correct? 6 MR TUSHINGHAM: That is correct, because the specific Smilno 7 well site had not been identified at that stage. Yes. 8 PROFESSOR SANDS: Thank you. 9 MR TUSHINGHAM: So we say despite the overwhelming evidence 10 from the mayor and from the maps, it is somewhat 11 surprising that Slovakia's position in this arbitration 12 is that the road was not a public road. Instead, 13 Slovakia's position is that it was private land that AOG 14 was not entitled to use absent landowner consent. 15 We say that is an absurd position which Slovakia has 16 been driven to adopt in an attempt to defend the 17 indefensible conduct of numerous Slovak state organs who 18 prevented AOG from using the road during the project. 19 But before turning to the detail, we ask, 20 rhetorically: why did Slovakia include this road in its 21 official maps? Slovakia has no answer to that question, 22 and we say the answer is obvious: because it was 23 a public road which had been used as such for hundreds 24 of years, as the mayor himself confirmed. 25 (Slide 66) So we will now move very briefly to some</p> <p style="text-align: center;">Page 31</p>
<p>10:14 1 investigating the location of the Smilno site, it was 2 obviously going around and talking to the mayor, and we 3 say it's entirely reasonable for Discovery to have 4 relied on what the mayor was saying about the road. 5 Nobody at that time was raising any suggestion that 6 this was private property, and the documents are 7 consistent with that. And, just to reinforce the point, 8 I think, this is the next point on due diligence: 9 Slovakia's official maps upon which Discovery relied 10 during the project expressly identified the road. You 11 can see them here on the screen. And this was not just 12 one single map: you have multiple maps that were 13 published by the Slovak Republic's cartography and 14 cadaster office, UGKK, and they were publicly available 15 on an online geoportal maintained by UGKK. And so that 16 is important when the Tribunal later comes to examine 17 whether different Slovak state organs acted 18 inconsistently in relation to the legal status of 19 the road. 20 (Slide 63) So we have given some annotated examples 21 here to contemporaneous presentations in 2014 and again 22 in 2015 showing the due diligence -- the use of that 23 term that I will use broadly -- being undertaken, access 24 road and reliance on the maps. 25 PROFESSOR SANDS: Just to be clear then, taking my friend's</p> <p style="text-align: center;">Page 30</p>	<p>10:17 1 Slovak law regarding roads, and I'll take this as 2 quickly as I can. 3 Slovakia concedes in this arbitration that the road 4 is a "field track", and in Slovak that is "Polna Cesta", 5 and that term, as I understand it, also can be 6 translated as "field road". So field track, field road 7 are the same things. 8 We say that that concession is fatal because a field 9 track or a field road is a type of public road under 10 Slovak law. 11 More specifically, it is a type of public special 12 purpose road, which Slovakia abbreviates with the 13 acronym PSPR. 14 (Slide 67) So on this slide we summarise the key 15 provisions of the Road Act and the Road Decree which are 16 relevant to this issue. 17 Beginning with Article 1, subparagraph (2) divides 18 surface roads into four categories, the fourth of which 19 is "special purpose roads". 20 Article 6(1) provides that: 21 "... within their boundaries, everyone can use 22 surface [roads] in the usual way for the purposes for 23 which they are intended ..." 24 And that's the concept of "general use". 25 The concept of a special purpose road is then</p> <p style="text-align: center;">Page 32</p>

<p>10:19 1 elaborated in Article 22, and it provides in paragraph 2 (1) that such roads: 3 "... serve to connect ... real properties with other 4 surface [roads]." 5 So looking back at Article 1(2) you have a special 6 purpose road connecting real properties with other types 7 of road. 8 Special purpose roads in paragraph (3) are then 9 divided into public and non-public roads, but, reading 10 on, Article 22(3) then sets out two exhaustive 11 circumstances in which a special purpose road can be 12 non-public. The first is if the road is located "within 13 closed premises or isolated objects". In that scenario 14 such a road is non-public. That is not the case here, 15 because the road was publicly accessible. 16 And the second circumstance is if the road is 17 classified as non-public by the municipality with the 18 consent of its owner. But in this case, the Smilno 19 municipality never made any such classification, and so 20 if neither circumstance applies, the road is 21 automatically a public special purpose road. 22 So one then moves forward to Article 22 of the Road 23 Decree, see the excerpt on the right-hand side, which 24 implemented the Road Act, and Article 22(1) provides: 25 "Special purpose roads ... include, in particular,</p> <p style="text-align: center;">Page 33</p>	<p>10:21 1 Decree. So for that reason alone, the argument fails. 2 Proposition 2. Assume we are wrong about that. 3 Slovakia then says: well, a publicly accessible field 4 track that does not qualify as a PSPR means it can be 5 only used by the public unless the landowner objects. 6 And you can see footnote 131 there: 7 "This can be either explicit or implicit." 8 No authority is cited for that proposition, and we 9 say it's clearly unworkable practicably. How can 10 a member of the public possibly know whether a landowner 11 has implicitly objected to the use of the road? Can 12 different landowners implicitly object to some people 13 using the road whilst consenting to others? None of 14 that is explained. 15 But it is clear from Article 123 of the Civil Code, 16 which you see on the right-hand side, that an owner is 17 entitled to use, possess and dispose of the subject of 18 his ownership within the limits of the law. Therefore, 19 if a field track is located on private land, which is 20 co-owned by a number of co-owners, the co-owners must 21 respect the public's general right to use the road under 22 Article 6 of the Road Act, that's the general use 23 provision. So private ownership has to yield to the 24 public right. 25 So the argument fails legally. But even if the</p> <p style="text-align: center;">Page 35</p>
<p>10:20 1 field and forest roads ..." 2 As well as access roads. And so it therefore 3 follows from the concession that the road is a public 4 special purpose road within the meaning of the Act. 5 (Slide 68) Now, Slovakia appears to accept that if 6 the road was a PSPR then this has certain consequences 7 for the impugned measures. So Slovakia says in its 8 Rejoinder: 9 "The Police would have had the authority to remove 10 the activists and their vehicles and to approve road 11 signage at the entrance only if the field track 12 qualified as a PSPR." 13 Now, in its Rejoinder we saw for the first time 14 a raft of new technical arguments about the road under 15 Slovak law. (Slide 69) There is an entire appendix 16 devoted to this topic. Many of those arguments did not 17 appear in the Counter-Memorial, and they are not 18 supported by any expert evidence on Slovak law. We have 19 not had an opportunity to respond in writing to all of 20 these new arguments, but I will just address one, which 21 is set out at paragraph 117 of the Rejoinder. 22 So we say this argument is hopeless. Proposition 1 23 of the argument is: not all publicly accessible field 24 tracks are PSPRs. But as I've already explained, that 25 is wrong, having regard to the Road Act and the Road</p> <p style="text-align: center;">Page 34</p>	<p>10:23 1 argument had any legs legally, it doesn't even work on 2 the facts. The land plots on which the road was located 3 was co-owned by 166 individual co-owners. Only one of 4 those co-owners objected to AOG using the road. That 5 was Ms Varjanová, who you will be hearing as a witness. 6 There is no evidence that any of the other 165 7 co-owners objected to AOG using the road. Article 139 8 of the Civil Code, which you will see here, provides, 9 unsurprisingly, that "co-owners shall decide on the 10 management of the joint thing by ... majority", but 11 Ms Varjanová didn't represent the majority. 12 So in summary, the arguments about the road are: 13 one, contradicted by the mayor and Slovakia's official 14 maps; two, unsupported by any expert evidence on Slovak 15 law; three, irreconcilable with the provisions of 16 the Road Decree and the Road Act. And so for all those 17 reasons we say the argument doesn't work. 18 (Slide 70) So now moving on to examine the impugned 19 measures. From late 2015 onwards and into 2016, 20 activists persistently blocked the road with their 21 vehicles, and you will have read this, obviously, in our 22 pleadings. We have included references to some of the 23 exhibits here. The police refused to remove those 24 vehicles from the road, and the police refused to accept 25 that the road was a public road.</p> <p style="text-align: center;">Page 36</p>

10:24 1 (Slide 71) And so this leads on to the first
 2 impugned measure which we summarised in the table
 3 earlier. As a result of the police's conduct in
 4 refusing to remove the vehicles and refusing to accept
 5 that the road was a public road, Discovery was prevented
 6 from using the road to bring its drilling rig to the
 7 Smilno site. Slovakia's conduct therefore prevented
 8 Discovery from drilling the Smilno well.
 9 (Slide 73) We now move on to the second impugned
 10 measure, which is the interim injunction which was
 11 granted in February of 2016. And following
 12 an application brought by Ms Varjanová, and without
 13 notifying AOG, the Bardejov District Court granted
 14 an interim injunction which ordered AOG to refrain from
 15 using the land plot on which the road was located.
 16 Because the injunction was granted without notice,
 17 AOG had no opportunity to argue that it shouldn't have
 18 been granted (Slide 74). AOG's only option was to file
 19 an appeal, and once AOG filed its appeal, the Prešov
 20 Regional Court dismissed or upheld the district court's
 21 decision, and so the injunction remained in place and
 22 the regional court dealt with the case without ordering
 23 an oral hearing.
 24 (Slide 76) Now, in its appeal, AOG specifically
 25 argued that the land plot had been used by individuals

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10:26 1 from Smilno as a "field road", and that Mrs Varjanová
 2 was blocking the field road. And, as we saw earlier,
 3 a field road is a type of special purpose public road
 4 under Slovak law.
 5 What's more, the regional court in its decision
 6 expressly acknowledged that:
 7 "... attempts to protect someone's rights by
 8 obstructing an access road with a motor vehicle is not
 9 an appropriate solution."
 10 And the court was obviously referring there to
 11 Ms Varjanová.
 12 The court was therefore fully aware that
 13 Ms Varjanová was obstructing a road and described this
 14 as "not an appropriate solution", and yet the court
 15 still prevented AOG from using the road. An appeal
 16 against the regional court's decision was not
 17 permissible.
 18 (Slide 77) So the injunction therefore prevented AOG
 19 from using a public road and, as a result, once again
 20 Slovakia prevented Discovery from drilling the Smilno
 21 well, this time by the conduct of the judiciary.
 22 In his expert report on Slovak law, Discovery's
 23 expert, Professor Števec, concludes that both decisions
 24 are inexplicable and involve serious errors, and you
 25 will be hearing further from him in the arbitration.

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10:27 1 (Slide 78) So the fourth and fifth impugned measures
 2 concern a state prosecutor, Dr Slosarcikova, who turned
 3 up at the Smilno site on 18 June 2016, and after she
 4 arrived she proceeded to intervene in the civil dispute
 5 between Ms Varjanová and AOG, and this is a post that
 6 Ms Varjanová published the day after these events.
 7 Dr Slosarcikova, the prosecutor:
 8 "... explained the legal situation to [AOG's] lawyer
 9 in our presence and checked whether he understood the
 10 text of the injunction and asked him to respect it."
 11 (Slide 79) Dr Slosarcikova admits in her witness
 12 statement at paragraph 14 that where no criminal
 13 activity is observed, a prosecutor has no authority to
 14 act in a civil dispute; but the documents show that
 15 Dr Slosarcikova did precisely that, and we say that was
 16 a clear abuse of authority by a Slovak state official,
 17 which had consequences.
 18 The activists, led by Ms Varjanová, were emboldened
 19 by the prosecutor's intervention, and so continued to
 20 block the road.
 21 PROFESSOR SANDS: You haven't addressed it. Can you just
 22 tell us who the activists were and what their objections
 23 were, because we haven't heard anything about that.
 24 MR TUSHINGHAM: Yes. So Ms Varjanová was the leader of the
 25 activists, led, assisted by one of the other witnesses

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10:28 1 who you'll hear in the arbitration, Mr Lesko, and
 2 together with his colleagues at VLK, which was a forest
 3 protection organisation. They objected to AOG's project
 4 on various grounds, including environmental grounds, and
 5 you will obviously hear more from them in the
 6 arbitration when they give evidence.
 7 (Slide 80) We say the documents also show that the
 8 same state prosecutor gave instructions to the police
 9 when she was present at the site, and we have included
 10 references in our reply at paragraph 96. And again that
 11 had consequences for Discovery, because without the
 12 police's cooperation, who were there at the site at the
 13 same time the prosecutor was there, the road remained
 14 blocked and Discovery was prevented from using it.
 15 (Slide 81) So moving on then to July of 2016, after
 16 these events, AOG had a meeting with the police, and
 17 during this meeting it was revealed that there was
 18 tension between the police and the attorney's office,
 19 and we understand that to be a reference to the
 20 Prosecutor's Office. And as recounted in this email
 21 from AOG's attorney in July:
 22 "... they need [to do something] in order to behave
 23 in a way that would clean the track. The plan is to
 24 open the procedure to place the traffic signs on the
 25 village communication [...] This should be sufficient

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<p>10:30 1 for everyone to see that the track is public - they 2 agree that the law states that our track is public even 3 without such procedure but they say we need to do 4 something more to calm the nervous situation down." 5 Now, chronologically this meeting took place after 6 the mayor had sent his letter in June of 2016 confirming 7 that the field track was publicly accessible; that was 8 on slide 60. 9 So the mayor's letter was then passed on to the 10 police, which you will see in Exhibit C-315, and so the 11 police evidently took on board what the mayor had said 12 and reconsidered their earlier position. 13 What then happens? (Slide 82) Well, three months 14 later, in October, the police performed a volte-face and 15 they refused to approve the signage at the entrance of 16 the road, and that is the sixth measure. 17 (Slide 83) There were two attachments to the 18 police's letter, one of which was entitled "Map", which 19 you can see on the left-hand side, and the footer of 20 that document shows that it was taken from UGKK's 21 geoportal. What would the police have seen on the 22 geoportal in 2016? Well, the document on the right is 23 a screenshot from the geoportal taken in 2016, and that 24 screenshot shows that the description was "road, local 25 and special purpose road". So it's perfectly clear that</p> <p style="text-align: center;">Page 41</p>	<p>10:32 1 letter the police would have had no basis to defy what 2 the Ministry of Interior had said. Slovakia concedes 3 that the police fall under the MoI's competence. 4 (Slide 86) What's more, the MoI's instruction was 5 inconsistent with guidance promulgated by the MoI in 6 2010. This was a document that appeared for the first 7 time together with the Rejoinder. We say it actually 8 supports our case, because in the Ministry of Interior's 9 letter in 2010 it said: 10 "... a field track or forest road is always 11 a special-purpose road under ... the Road Act if ... 12 [it is] in the cadastral map or the map of the 13 designated cadastral files; or 14 (d) it is in other records." 15 Well, of course, that was the case here, and so it 16 was always a public -- a special-purpose road. 17 So in summary, by the end of 2016, Slovakia had 18 prevented Discovery from drilling the Smilno well by 19 these seven impugned measures. Slovakia's message to 20 Discovery was clear: we are not going to allow you to 21 use the road to drill your exploration well; and so it's 22 unsurprising that Discovery did not try and return to 23 Smilno after 2017. 24 (Slide 87) So we now move on to the Krivá Ol'ka 25 well, and Discovery's claims here centre on three</p> <p style="text-align: center;">Page 43</p>
<p>10:31 1 the road was a special purpose road, identified as such, 2 and yet the police still refused to approve the signage. 3 (Slide 84) Now, understandably, Discovery was 4 incensed when it learned about the police's refusal, and 5 so at a meeting between AOG and the police, Mr Cicvara, 6 who was "a civil engineer within the police", refused to 7 accept that our road was a special purpose road. He 8 accepted it was a public road but said it was also a 9 field track. 10 So the police were clearly tying themselves in knots 11 and adopting a position that was inconsistent with the 12 mayor, with the maps and with the police's position at 13 the meeting in July. 14 (Slide 85) Then, to add insult to injury, in 15 December, the Ministry of Interior issued an instruction 16 to the police, and that's the seventh impugned measure. 17 The Ministry said: 18 "... the road in question is not a special purpose 19 road and must be seen as private land the public use of 20 which is not justified by any tangible evidence, and 21 therefore it is not possible to carry out traffic 22 supervision ..." 23 Now, in its Rejoinder at 124, Slovakia says this was 24 not an instruction but merely "guidance". We say that's 25 an untenable reading of the letter. Upon receipt of the</p> <p style="text-align: center;">Page 42</p>	<p>10:34 1 impugned measures imposed in 2016 and 2017. 2 MR DRYMER: May I ask one question before you move on? 3 MR TUSHINGHAM: Yes. 4 MR DRYMER: It's along the same lines as Professor Sands 5 asked earlier. 6 Is your case that this understanding in regard to 7 the public nature of this road, the accessibility of the 8 site, was reached by AOG prior to committing to the 9 Smilno site? 10 MR TUSHINGHAM: Prior to committing, yes. Yes. 11 MR DRYMER: I'm not asking about the time of the investment. 12 I'm asking about prior to the time of committing to the 13 Smilno drill site. 14 MR TUSHINGHAM: Exactly. Because we saw earlier in the 15 slide where the authorisation for expenditure, the 16 detailed drilling programme and the project of 17 geological works were approved in late 2015, and that 18 had taken place after the mayor had already given his 19 confirmation, as we saw in the documents from August of 20 2015, and you saw that in the slide. So it's clear, we 21 say, that that was the position. 22 MR DRYMER: Thank you. 23 MR TUSHINGHAM: (Slide 89) So we now move on to Krivá Ol'ka, 24 and I'll begin with some background points. 25 The Krivá Ol'ka well site was located on land owned</p> <p style="text-align: center;">Page 44</p>

<p>10:35 1 by Slovakia and managed by a state-owned enterprise 2 called State Forestry, which is also referred to by the 3 abbreviation LSR. 4 (Slide 90) Discovery intended to use the Krivá Ol'ka 5 well as a proof of concept to drill further wells on 6 state-owned land, and that was important because 7 a substantial proportion of the licence areas covered 8 state-owned land. So a successful drill at Krivá Ol'ka 9 would have paved the way for further wells to be drilled 10 on state-owned land, and that was AOG's strategy, as 11 Mr Fraser says in his witness statement. 12 (Slide 91) Slovakia concedes that State Forestry is 13 an independent entity, and I'll come back to that point 14 in a moment, but it's important. So State Forestry has 15 discretion to decide whether to lease any of the land to 16 third parties and conducts its business independently. 17 (Slide 92) In May of 2015, AOG signed a lease with 18 State Forestry over the site. The contracting parties 19 were simply State Forestry and AOG. The Ministry of 20 Agriculture was not a contracting party. 21 Article 3, subparagraph (1) provided that the 22 initial term of the lease was for an initial term 23 expiring on 15 January 2016. But under subparagraph 24 (2), AOG had the ability to extend the initial term by 25 making a request one month before the termination, in</p> <p style="text-align: center;">Page 45</p>	<p>10:38 1 because, as I mentioned earlier, Slovakia concedes that 2 State Forestry is an independent entity that has 3 discretion to decide what leases to enter into. So 4 therefore it was within State Forestry's power to waive 5 this technicality and that is exactly what State 6 Forestry did. It signed a new amendment to the lease on 7 14 January, extending the term until August. 8 (Slide 98) On the same day, State Forestry sought 9 the approval of the MoA under the same procedure. The 10 Forest Act and the amendment, though, didn't specify any 11 deadline by which the Ministry had to grant such 12 approval. The amendment entered into force once the MoA 13 had approved the amendment. And of course the Ministry 14 wasn't a party to the lease, so it wasn't a matter 15 within its concern. 16 MoA approval was the last piece in the state 17 approval jigsaw for the Krivá Ol'ka well. AOG had 18 already obtained all other consents and approvals to 19 drill the well. But unless the Ministry approved the 20 amendments, of course, AOG was unable to access the land 21 to drill the well. 22 (Slide 99) On 17 January, AOG wrote to the Ministry 23 stressing the importance of granting prompt approval, 24 and you will see in this letter that AOG says it was 25 important, because interruption of work would bring</p> <p style="text-align: center;">Page 47</p>
<p>10:37 1 other words, by 15 December. 2 (Slide 93) Once the lease was signed, State Forestry 3 needed to obtain approval from the Ministry of 4 Agriculture under a procedure, an administrative 5 procedure, known as "prior consent"; that's 6 Article 50(7) of the Forests Act. 7 The term "prior consent" is slightly misleading, 8 because the way it worked in practice was that State 9 Forestry would first sign the lease, and only then seek 10 approval from the Ministry, and that's set out in our 11 Reply at paragraph 129. 12 (Slide 94) So State Forestry sought approval from 13 the MoA and Discovery had been led to believe that this 14 approval was just a formality. 15 (Slide 95) In October the MoA eventually approved 16 the lease, and this had taken a bit longer than had been 17 expected. The lease was approved by the then head of 18 the service office, Mr Stredák of the Ministry of 19 Agriculture. But by this date there were only a few 20 months left before the initial term of the lease was set 21 to expire, so on 16 December AOG requested State 22 Forestry to extend the initial term (Slide 96). 23 Now, it is true that this request was technically 24 submitted one day late, after the deadline specified in 25 the lease. (Slide 97) But this was of no consequence</p> <p style="text-align: center;">Page 46</p>	<p>10:39 1 losses and, above all, the impossibility of performing 2 the obligation to the Slovak Republic represented by the 3 Ministry, and that picks up on the point I made earlier 4 about the licences and the Geology Act imposing 5 an obligation. 6 (Slide 100) On 22 January, an official within the 7 Ministry, Mr Hatar, told AOG that: 8 "The file together with the processed draft of the 9 prior consent ... was forwarded to the office of the 10 Head of the Service Office ... for further processing." 11 And there are two important points to note about 12 this letter: first, the Ministry confirmed that the 13 competence to approve the amendment belonged to the head 14 of the service office. That was consistent with what 15 had happened in October when the then head of the 16 service office, Mr Stredak, had approved the lease. 17 The second point is that the Ministry did not 18 suggest that a one-day delay in requesting an extension 19 to the lease, on 16 December, had presented any 20 difficulty for the Ministry's ability to approve the 21 amendment. In fact, it appears from this letter that 22 the Ministry's approval process was already underway, 23 because the file and process draft of the approval had 24 already been forwarded to the service office. 25 (Slide 101) The next key event in the chronology is</p> <p style="text-align: center;">Page 48</p>

10:41 1 that in March 2016 a parliamentary election took place
2 in Slovakia, and this is a key event in the chronology.
3 After the election, a new coalition government was
4 formed. New ministers and officials were appointed, and
5 these new appointments had repercussions for the permits
6 and approvals that Discovery needed for the project. In
7 particular, Gabriela Matecna was appointed as the new
8 Minister of Agriculture, and Mr Jaroslav Regec, as
9 I understand it's pronounced, was appointed as the new
10 head of the service office.
11 (Slide 102) We say it's clear that Mr Regec was
12 using his position as the head of the service office to
13 withhold MoA approval of the amendment for an improper
14 purpose; namely to further his own political career. In
15 short, this decision was a politically motivated
16 decision by Mr Regec, who had the upper hand over the
17 Minister.
18 Discovery, as you will have seen from our pleadings,
19 has disclosed a large number of documents which we say
20 support this conclusion, and we've referred to some of
21 those documents in our Reply at paragraph 125, and also
22 on these slides, which I'm not going to read unless the
23 Tribunal would like me to.
24 (Slide 103) But we say there is one important one,
25 which I will just point you to on the left of this

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10:42 1 slide:
2 "Clear message: personal meeting with Mr Regec was
3 negative. Mr Regec had based his pre-election campaign
4 on opposing the AOG activities. He is the 1st
5 substitute of the ... (SNS) and under no circumstances
6 will he consent to the ... lease."
7 And SNS was one of the coalition parties who was
8 part of the government appointed in 2016 after the
9 election.
10 So I want to make three key points about where we
11 are on this point. The first is that Slovakia has
12 introduced no exhibits and no witness testimony to
13 contradict what AOG was being told about Mr Regec. The
14 evidence is therefore all one way, and the documents
15 show that Mr Regec was using his powers as the head of
16 the service office for an improper purpose.
17 The second point is that Slovakia has not produced
18 a single state official to testify about the Ministry's
19 internal decision-making process. Mr Regec and the
20 Minister herself, the key players, are missing
21 witnesses, and their absence speaks volumes. Discovery
22 made it perfectly clear in its pleadings that it was
23 challenging the propriety of their conduct by reference
24 to these documents.
25 And the third point is that despite the Tribunal's

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10:43 1 order for production in Procedural Order No. 3, and
2 without providing any satisfactory explanation, there is
3 not a single internal document which reveals the
4 internal decision-making process of Mr Regec or the
5 Minister. We say it is clear that such documents exist,
6 because you only have to look at what we were told when
7 the Ministry's official told us that the process draft
8 had been sent to the head of the service office. It was
9 clear that this was being considered internally.
10 Witness testimony from these two individuals, and
11 internal MoA documents, we say would show two things:
12 first, that Mr Regec was using his powers for
13 an improper purpose, and second, that the reasons
14 ultimately given by the Minister for refusing to approve
15 the amendment were pretextual, and we therefore invite
16 the Tribunal to draw those adverse inferences against
17 Slovakia.
18 (Slide 104) In May 2016, AOG sought a meeting with
19 the Minister, but AOG was told that she was too busy.
20 (Slide 105) And then this leads to the eighth
21 impugned measure, which we see on the slide here.
22 In June 2016 the Minister informed AOG that it would
23 refuse to approve the amendment under the Forestry Act.
24 So, as a result of this decision, Slovakia prevented AOG
25 from drilling the Krivá Ol'ka well.

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10:45 1 (Slide 106) Now, in our Reply we've explained why
2 the reasons ultimately given by the Minister were wrong
3 and pretextual. I won't repeat those submissions, but
4 instead I will focus on one new point raised for the
5 first time in the Rejoinder at paragraph 137.
6 Slovakia says the Minister could not have approved
7 the amendment because the lease had "already expired",
8 and an agreement which has "already expired" cannot be
9 resurrected by an ex post amendment. This argument was
10 not raised in the Counter-Memorial, and the argument
11 does not work on the facts.
12 As we saw earlier, the Ministry was not a party to
13 the lease or the amendment. It was within State
14 Forestry's power as an independent entity to extend the
15 term of the lease by signing the amendment on
16 14 January. This extension meant that the lease had not
17 already expired as at the date when State Forestry
18 sought approval from the MoA. Moreover, neither the
19 amendment nor the Forestry Act provided that MoA
20 approval needed to be obtained before the initial term
21 had expired. So that's a new argument, but we say it
22 doesn't work on the facts.
23 (Slide 107) There is one final point about Krivá
24 Ol'ka. After June 2016, in other words after the
25 Minister's refusal, AOG tried to enter into a new lease

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<p>10:46 1 with State Forestry, and it sent a draft lease to State 2 Forestry on 18 July. 3 (Slide 108) But State Forestry never responded to 4 this request. So that's the end of Krivá Ol'ka as 5 regards the MoA, and we've given a reference here to the 6 orders for production that you made in PO3, which 7 I don't need to go through. 8 (Slide 109) So we now move on to consider the 9 Ministry of Environment's conduct at Krivá Ol'ka, and 10 this relates to the compulsory access order application, 11 and that gives rise to two further impugned measures 12 which I will shortly explain. 13 So because the Ministry had refused to approve the 14 amendment, AOG had no other option but to apply for such 15 an order to the Ministry of Environment, and without 16 that order, AOG was unable to access the site. 17 (Slide 110) In October and November of 2016, the 18 Ministry of Environment accepted that no agreement had 19 been reached between AOG and State Forestry on access to 20 and use of the Krivá Ol'ka site, and I'll come back to 21 the importance of that point shortly. 22 (Slide 111) In December of 2016, State Forestry also 23 told the Ministry of Environment that it had not 24 responded to the draft lease proposal that had been 25 submitted in July because the Ministry of Agriculture's</p> <p style="text-align: center;">Page 53</p>	<p>10:49 1 received instruction from the high levels of the 2 Ministry, to decide negatively." 3 We say this email from AOG's attorney provides clear 4 evidence that AOG's application was subverted by 5 political considerations, and a clear pattern starts to 6 emerge. AOG engages in good faith with two different 7 government ministries, the Ministry of Agriculture and 8 the Ministry of Environment, to obtain access to the 9 Krivá Ol'ka site. But then the process is subverted by 10 other political considerations. 11 Now, in its Rejoinder, Slovakia denies that any 12 last-minute instruction was given to decide negatively. 13 We dispute that, and the reference in this email to the 14 ministry being "scared to pass any decision that might 15 rise negative public reaction" requires the Tribunal to 16 consider the background and context of what was going on 17 at this time. 18 (Slide 114) To take just one example, consider the 19 Minister's second witness statement on this slide, on 20 the left-hand side. At paragraph 6 he says: 21 "... as a Minister [this is Mr Sólymos] I was aware 22 of their problems with activists ..." 23 And at paragraph 7 he says: 24 "We at the Ministry ... were in the crossfire from 25 both sides ..."</p> <p style="text-align: center;">Page 55</p>
<p>10:47 1 position on the matter was clear. 2 (Slide 112) The Ministry of Environment then 3 convened an oral hearing to discuss the application 4 in February, and that was attended by representatives of 5 the Ministry: the Ministry of Agriculture, the Ministry 6 of Environment, State Forestry, and AOG. And the two 7 MoE officials were Ms Mat'ová, who was the director of 8 the Department of State Geological Administration, and 9 Dr Hrvol, state councillor of the same department. 10 Once again, Slovakia has not called either of these 11 officials as witnesses. According to these minutes, no 12 substantive discussion took place about whether it was 13 in the public interest for the Ministry to grant a 14 compulsory access order. Instead, as you may have seen 15 from our pleadings, there was a procedural dispute 16 between the Ministry of Agriculture and the Ministry of 17 Environment about whether the Ministry of Agriculture 18 should even be a party to these proceedings. 19 (Slide 113) So we then move forward to March of 20 2017, and in this email, on 9 March, AOG's attorney 21 informed Mr Fraser: 22 "We talked to Mr Hrvol regarding the decision ... he 23 informed us that the decision has been issued ... but 24 that it will be negative ... he said they were 25 finalising the wording in favour of AOG, when they</p> <p style="text-align: center;">Page 54</p>	<p>10:50 1 Now, we say that this rather underplays the 2 situation in which the Minister and the Ministry found 3 itself. 4 As Mr Fraser explains, on the right-hand side, the 5 activists who were opposed to AOG's project, had pursued 6 an aggressive media campaign. It is clear that this 7 campaign had placed the Ministry and the Minister under 8 some considerable pressure. High levels of the Ministry 9 were afraid of making decisions that might arouse 10 negative public reaction, and that provides some 11 explanation for why an instruction was given from high 12 levels to refuse the order. 13 (Slide 115) Now, in Procedural Order No. 3 Slovakia 14 was ordered to produce documents evidencing the internal 15 consideration of the application. That order 16 specifically included, as you will see from Request No. 17 8, drafts of the decision that it was allegedly 18 preparing in favour of AOG, plus internal communications 19 involving Ms Mat'ová and Mr Hrvol. But without any 20 satisfactory explanation Slovakia has failed to produce 21 the wording of the draft decision which the Ministry was 22 finalising in favour of AOG, or the instruction which 23 was given from high levels. 24 What's more, neither Mr Hrvol nor Ms Mat'ová are 25 witnesses. They were the officials at the coalface, and</p> <p style="text-align: center;">Page 56</p>

<p>10:52 1 they are the individuals with relevant evidence to give. 2 Why hasn't Slovakia called these officials? Because it 3 is clear that their testimony would confirm what 4 Mr Hrvol had told AOG's attorney in the email that we 5 saw on 7 March 2017. And so we therefore invite the 6 Tribunal to draw that adverse inference against 7 Slovakia. 8 (Slide 116) So this leads to the ninth impugned 9 measure, which was the Ministry's decision to deny the 10 application. That decision, again, prevented AOG from 11 accessing the site and prevented AOG from drilling the 12 Krivá Ol'ka well. And it's important to consider the 13 reasons purportedly given. 14 So the Ministry rejected the application purportedly 15 on the basis that any decision in favour of AOG would: 16 "... accede to the competences of another 17 governmental agency [that's the Ministry of Agriculture] 18 whose competence is regulated by a special legal 19 regulation [namely the Forestry Act] ..." 20 And so therefore the Ministry decided to reject the 21 petition. 22 We say this justification was contrived and another 23 example of a game of pass-the-parcel from one government 24 ministry to the other. The Ministry of Environment had 25 never previously raised any issue of this nature in its</p> <p style="text-align: center;">Page 57</p>	<p>10:54 1 been excluded from participating in an appeal to 2 a government ministry against a planning decision 3 relating to the development of the claimant's shopping 4 centre. The claimant alleged that this exclusion of 5 a party from the proceeding was a breach of due process 6 and a violation of the FET standard in the relevant BIT. 7 The tribunal rejected that argument, holding that the 8 exclusion had effects which are "only temporary". 9 That's the key passage that we seek to emphasise here. 10 But if we go on to the next slide (119), the reasons 11 why the breaches were found not to be made out was 12 because the ministry's decision to exclude the 13 subsidiary from the proceedings was quashed by the 14 Minister, and in all subsequent phases of the 15 administrative proceedings the project company was 16 treated as a participant in the planning proceedings, 17 and so therefore the due process complaint was "more 18 formal than substantial". 19 But the facts of the present case are simply not 20 comparable. There are numerous reasons -- and we don't 21 have time to go through them all. I can, if the 22 Tribunal would like me to, but I'm going to emphasise 23 two. 24 The first is, this was not a case where AOG was 25 excluded from proceedings at first instance in a</p> <p style="text-align: center;">Page 59</p>
<p>10:53 1 dealings with AOG prior to the decision, and that the 2 Ministry resorted to such a contrived justification we 3 say lends further inferential support to the proposition 4 that an instruction was given from high levels to decide 5 negatively. 6 (Slide 117) What happened next? Well, AOG appealed 7 against the Ministry's decision and the Minister formed 8 a special commission to examine AOG's appeal. And on 9 13 June, based on the special commission's proposal, the 10 Minister quashed the decision and returned the matter 11 back to the Ministry "for a new discussion and 12 decision". 13 But by this time Discovery had been engaging over 14 an 18-month period to seek access to the Krivá Ol'ka 15 site with two different agencies, and by June, Discovery 16 was back to square one. All the while AOG was paying 17 licence fees to Slovakia and was prevented from drilling 18 its well. 19 (Slide 118) Now, in the Rejoinder, Slovakia seems to 20 think that the quashing decision is a trump card, which 21 absolves it from international responsibility. 22 Unsurprisingly we disagree. 23 In its Rejoinder, Slovakia refers to the award in 24 ECE v Czech Republic, but ECE is readily 25 distinguishable. In ECE the claimant subsidiary had</p> <p style="text-align: center;">Page 58</p>	<p>10:56 1 decision which was later quashed. On that ground alone 2 the award is distinguishable. 3 But second, and more fundamentally, this was not 4 a decision which had effects which were only temporary 5 for AOG, and that's the key point. The effects of the 6 decisions were continuous. Throughout the entire 7 process, AOG could not access the Krivá Ol'ka site, and 8 so this award does not help Slovakia. 9 (Slide 120) But the story doesn't end with the 10 quashing decision because the Ministry continued to act 11 inconsistently and arbitrarily thereafter. As we 12 explained in our Reply, AOG continued to engage with the 13 Ministry after the quashing decision. 14 But just 14 days later, what happens? The Ministry 15 suspends the proceedings, pending the resolution of 16 a "preliminary issue". That preliminary issue was the 17 submission of documents: 18 "... demonstrating the results of negotiations 19 between the parties to the proceedings on the conclusion 20 or non-conclusion of an agreement on the use of the real 21 estate ... in Krivá Ol'ka." 22 Now, I referred in slide 110 to the letters that 23 were sent to the Ministry of Environment in late 2016 24 where it had already accepted that no agreement had been 25 reached. So the Ministry was acting inconsistently to</p> <p style="text-align: center;">Page 60</p>

10:57 1 avoid having to make any decision in AOG's favour.
2 And so, in summary, Slovakia's message to Discovery
3 throughout 2016 and 2017 was clear: we will not grant
4 you any approval that allows you to access the Krivá
5 Ol'ka site to drill your exploration well.
6 So that concludes Krivá Ol'ka. I don't know whether
7 the Tribunal would like to take a short break.
8 THE PRESIDENT: Yes, I had thought that it might be good to
9 have a break around exactly this time.
10 MR TUSHINGHAM: Perfect.
11 THE PRESIDENT: Which is 11.00.
12 So you are a little bit over half of your
13 presentation, I assume?
14 MR TUSHINGHAM: Yes.
15 THE PRESIDENT: Yes.
16 Should we take 15 minutes now?
17 MR TUSHINGHAM: Great.
18 THE PRESIDENT: Resume at 11.15, and then you can complete
19 your presentation.
20 MR TUSHINGHAM: Thank you very much.
21 THE PRESIDENT: Good. Thank you.
22 (10.58 am)
23 (A short break)
24 (11.18 am)
25 THE PRESIDENT: Mr Tushingham, before you start, just on how

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11:18 1 we will proceed.
2 Professor Sands has a commitment that's an important
3 one he has to attend at 1.30. He needs to leave here
4 a little before 1 o'clock. So we thought once you are
5 done maybe you could start about half an hour with your
6 presentation, and then we'll have the break. Otherwise
7 we will have to have a long break, and I think we are
8 all pleased if we end a little earlier this afternoon.
9 Is that an acceptable way forward?
10 MR ANWAY: Yes, very happy to accommodate the Tribunal.
11 THE PRESIDENT: That's fine with the Claimant as well?
12 MR TUSHINGHAM: That's fine by the Claimant.
13 THE PRESIDENT: Then you have the floor, Mr Tushingham.
14 MR TUSHINGHAM: Thank you very much, Madam President.
15 So the final set of impugned measures relates to the
16 environmental impact assessment process, and this slide
17 sets out in a chronology the measures which were imposed
18 between August 2017 and June of 2018 (Slide 122), and
19 before developing those measures I will briefly explain
20 the relevant background.
21 So in October 2016, Slovakia passed an amendment to
22 its EIA Act, which came into force on 1 January 2017.
23 Prior to that date, the Act did not require an EIA
24 before an exploration well could be drilled. An EIA was
25 only required when a contractor wanted to extract

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11:19 1 hydrocarbons from an exploration well.
2 But under the EIA amendment, a contractor who was
3 proposing to drill an exploration well to a depth
4 greater than 600 metres -- please forgive me for not
5 zooming in on this slide, it's very small, but -- if
6 an exploration well greater than 600 metres required
7 a preliminary EIA to be submitted to the relevant
8 district office (Slide 123). And I'll come back in
9 a moment to explain why this new requirement under the
10 amendment did not apply to AOG's exploration wells.
11 (Slide 124) Now, the EIA Act established a lengthy
12 seven-stage process to assess the environmental impact
13 of proposed activities. We have summarised that process
14 in this demonstrative flow chart, which I don't have
15 time to go through in detail, but the Tribunal has all
16 of the references there.
17 Based on the EIA Act as it stood in 2014, this
18 process was not and could not have been contemplated by
19 Discovery when it acquired AOG. Moreover, this process
20 was not and could not have been contemplated by
21 Discovery --
22 PROFESSOR SANDS: Sorry, could I just ask about that,
23 because I do know a little bit about these EIA
24 directives, and if you go back to your slide on
25 page 123.

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11:21 1 MR TUSHINGHAM: Yes.
2 PROFESSOR SANDS: You will see that the date of the
3 directive at the EU level which brought this into effect
4 was December 2011.
5 MR TUSHINGHAM: Yes.
6 PROFESSOR SANDS: With a lengthy period for states to bring
7 into effect their legislation.
8 So on its face, a reasonable due diligence would
9 have thrown up that at some point before 2017 this
10 directive would have had to have been implemented at
11 domestic law.
12 So when you say they couldn't have known, it would
13 be helpful to understand the timing element also.
14 MR TUSHINGHAM: So based on the domestic legislative
15 position as it stood in 2014, when the investment --
16 when AOG was acquired, based on the domestic legislative
17 regime, that couldn't have been contemplated, and that
18 was reinforced if you look particularly at Article 1 of
19 the law.
20 (Slide 125) So this is the EIA Act as it stood both
21 before and after the amendment. So this law regulates
22 proposed activities prior to a decision on their
23 location, or prior to their permit under separate
24 legislation, and we've referred in our Memorial, in our
25 Reply, to the equivalent provision under the directive,

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<p>11:22 1 which we say is consistent with this domestic provision. 2 So on a plain reading of the Act the amendment did 3 not apply to AOG's wells, and why was that? Because the 4 Act regulated the procedure prior to a decision on their 5 location or permit, and that specifically included 6 legislation under the Geology Act. 7 In this case, the activities were permitted under 8 the Geology Act because the Ministry had granted the 9 licences in 2006, and, significantly, a decision on 10 their location had been made in 2015. And we saw that 11 from the detailed documents that I showed you during the 12 design of the geological task. 13 (Slide 126) And, indeed, Slovakia concedes that AOG 14 identified the location of its specific exploration 15 drills in 2015. So we say it follows that the amendment 16 did not apply to AOG's wells. 17 In late 2016 and early 2017, both the Ministry and 18 the minister confirmed that AOG was not legally obliged 19 to perform a preliminary EIA for its exploration wells 20 (Slide 127). We have summarised the relevant statements 21 in our Reply at 309, and I won't repeat them here, but 22 you have all of the references there. 23 (Slide 128) But in late 2016, the minister started 24 repeatedly asking AOG voluntarily to agree to perform 25 a preliminary EIA. Slovakia says in its Rejoinder at</p> <p style="text-align: center;">Page 65</p>	<p>11:25 1 environment". So that's the threshold. 2 (Slide 132) So we turn, then, to the first EIA 3 decision at Smilno. This was issued in August 2017 by 4 the Bardejov district office, and there are three key 5 points: the first point is, the district office in its 6 decision did not even conclude that the relevant 7 threshold was engaged. There was no justification and 8 no explanation that the project, the activities were 9 likely to have significant effects on the environment. 10 And yet an order for a full EIA was still made. 11 The purported justification was limited to a single 12 nebulous paragraph, which we have highlighted on this 13 slide. All that Slovakia can say by way of defence of 14 this decision is that: 15 "It details all comments and requests submitted in 16 the proceedings and contains sufficient justification." 17 Rejoinder at paragraph 450. 18 But it was not enough for the district offices 19 simply to repeat verbatim comments and requests which 20 had been submitted to it after AOG filed its 21 application. An order for a fuller EIA needed to be 22 based on a rational foundation of fact, and justified by 23 reference to the thresholds, in other words, significant 24 effects. This was not done. 25 (Slide 133) The Ruská Poruba EIA decision was issued</p> <p style="text-align: center;">Page 67</p>
<p>11:24 1 158-159 that the minister only made "one proposal", but 2 the record shows that he made three separate requests, 3 and we've included them here on the slides. Two 4 requests were made in public statements, which were 5 issued on 29 November and 3 December, and then a third 6 request was made at a meeting with AOG on 15 December. 7 (Slide 129) These requests understandably placed AOG 8 in an invidious position. It was being singled out by 9 the minister as the only exploration licence-holder in 10 Slovakia who was being asked to perform a preliminary 11 EIA, even though it had no legal obligation to do so. 12 In reality, Discovery had no other option but to submit 13 to the process. 14 (Slide 130) So in mid-2017, AOG submitted 15 preliminary EIAs for the three wells to the district 16 offices, and we've given a reference here to AOG's 17 Smilno EIA application. It is an extremely detailed 18 document, supported by technical explanations and 19 evidence, which explained the task, the design of the 20 well, and the reasons why the well and the work would 21 not have significant effects on the environment. 22 (Slide 131) It is common ground that an order for 23 a full EIA could only have been made by the district 24 offices if they were satisfied that the exploration 25 drills were "likely to have significant effects on the</p> <p style="text-align: center;">Page 66</p>	<p>11:27 1 in September 2017, and the purported justification given 2 by the Humenné district office was almost identical to 3 the Smilno EIA decision, and so all of the criticisms we 4 make about the Smilno decision apply here too. 5 (Slide 134) And then as to the Krivá Ol'ka well, 6 that decision was issued in March of 2018, and we have 7 explained in detail in our Reply at 171-175 why this 8 decision was not based on any rational evidential 9 foundation, and was inconsistent with numerous earlier 10 statements that Slovakia had made. 11 So, in short, the project to drill these three wells 12 was halted not only by the individual impugned measures 13 we looked at earlier in relation to Smilno and Krivá 14 Ol'ka; the project was also halted because of purported 15 environmental considerations, which were raised for the 16 first time by the district offices in their decisions. 17 What does Slovakia say in response? Well, for the 18 first time in the Rejoinder we see a reference to the 19 precautionary principle. No reference was made to that 20 principle in the Counter-Memorial, and this is, we say, 21 an ex post facto attempt by Slovakia to defend the 22 indefensible decisions. 23 The authorities that have been cited by Slovakia in 24 its Rejoinder, and which have linked the precautionary 25 principle to environmental impact assessments, were</p> <p style="text-align: center;">Page 68</p>

<p>11:28 1 concerned with unconventional hydrocarbon exploration 2 projects (Slide 135). In other words, exploring for 3 shale gas using hydraulic fracking, and you can see that 4 on this slide. This is one of the authorities that is 5 cited by the Respondent. 6 (Slide 136) But in its project AOG was undertaking 7 conventional hydrocarbon exploration and Slovakia knew 8 this. Some of the activists had presented comments to 9 the district offices during the preliminary EIA 10 applications, and they tried to suggest that AOG was 11 targeting unconventional hydrocarbon sources. But in 12 its response to the Medzilaborce office, as you will see 13 on the right-hand side of this screen, AOG said: 14 "This objection is unjustified for the following 15 reason: 16 ... the Claimant does not even plan to carry out 17 unconventional mining." 18 And that was consistent with numerous other 19 statements that AOG had made prior to that date. This 20 was Ms Varjanová's submission to the district office. 21 (Slide 137) But in any event, the authorities that 22 have been cited by the Respondent in relation to the 23 precautionary principle in the Rejoinder, do not provide 24 a justification for the decisions. According to this 25 case, which the Respondent relies upon, the</p> <p style="text-align: center;">Page 69</p>	<p>11:31 1 "... will not have any unfavourable impacts on their 2 surroundings and the environment in general." 3 Yet, a few months later, the district offices 4 reached precisely the opposite conclusion and ordered 5 a full EIA which put a halt to the project based on 6 purported environmental considerations. 7 Minister Sólymos also noted that 8,000 exploration 8 wells had been drilled in Slovakia, and the Ministry: 9 "... was not aware of even a single [environmental] 10 problem occurring as the consequence of those 8,000 11 [wells]." 12 Against that background, why did AOG's proposed 13 drills suddenly propose such a significant risk to the 14 environment when the decisions were made? Slovakia has 15 no answer to that question. 16 (Slide 141) The final point is that, once again, 17 Slovakia has produced no witness testimony from any 18 state official who was involved in these decisions, and 19 no internal documents relating to these decisions, 20 despite having voluntarily agreed to search for those 21 documents. 22 Those facts, we say, only reinforce our case that 23 the district offices' decision-making process was flawed 24 and that the decisions had no rational evidential 25 foundation.</p> <p style="text-align: center;">Page 71</p>
<p>11:30 1 precautionary principle applies: 2 "... if it cannot be excluded on the basis of 3 objective information that the plan or project will have 4 significant effects on the site concerned." 5 Now, in the present case we say there was no 6 objective information on which the district offices 7 could have concluded that the drills posed significant 8 risks of environmental effects. 9 (Slide 138) In its pleadings Slovakia tries to 10 downplay the impact of the EIA decisions. But this is 11 wrong. As a result of these decisions Discovery was now 12 staring down the barrel of a lengthy, expensive and 13 open-ended full EIA process for all wells which could 14 have gone on for years before any exploration well could 15 be drilled. The decisions were, as we've said in our 16 pleadings, the final nail in the coffin for the project. 17 (Slide 139) Moreover, the decisions were 18 inconsistent with numerous previous statements which 19 Slovakia had made, and I would like to focus 20 specifically on one statement that the minister himself 21 made in January 2017, in other words before the EIA 22 applications were submitted. 23 (Slide 140) Minister Sólymos in this document 24 specifically assured local residents that AOG's 25 activities:</p> <p style="text-align: center;">Page 70</p>	<p>11:32 1 Then the final impugned measure relates to the EIA 2 condition which was imposed in June 2018 on the Svidník 3 licence (Slide 142) which then required AOG to perform 4 a preliminary EIA before drilling any new exploration 5 well to a depth greater than 600 metres. 6 So that concludes the impugned measures, and you see 7 here (Slide 144) again the same table I showed you 8 earlier on. 9 I would now like to highlight the consequences of 10 the impugned measures, and I want to highlight five. 11 (Slide 146) The first is that the measures prevented 12 Discovery from completing the geological task. That, we 13 say, is clear from the evidence and from the documents 14 that I've shown you this morning. 15 (Slide 147) The second is that the measures 16 destroyed the economic and commercial viability of the 17 project, and we've included references here from the 18 witness evidence of Mr Lewis and Mr Fraser. Having been 19 prevented from completing the task over many years by 20 Slovakia's own conduct, as we have seen, the project 21 failed both economically and commercially. There was 22 a clear link between the two. 23 And at this point I would like to consider the 24 operating committee meeting minutes (Slide 148) that are 25 included on the slide here. So these minutes are of</p> <p style="text-align: center;">Page 72</p>

11:34 1 a meeting that took place in October 2017, and Slovakia
2 refers to these minutes extensively in its Rejoinder, as
3 you will have seen.
4 But Slovakia is looking at events from the wrong end
5 of the telescope, and Slovakia ignores the context in
6 which the remarks were made by Mr Lewis, as quoted on
7 the right-hand side.
8 This meeting occurred, number one, after AOG had
9 been slogging away at Smilno since late 2015 without
10 being able to use the road to access the Smilno site;
11 number two, after AOG had been going round in circles
12 since January 2016 with the Ministry of Agriculture and
13 the Ministry of Environment without being able to access
14 the Krivá Oľka site; and number three, after the
15 district offices had already ordered full EIAs for both
16 Smilno and Ruská Poruba.
17 So having been subjected to an onslaught of impugned
18 measures by Slovakia since late 2015 which prevented the
19 task from being completed, Mr Lewis' remarks are
20 understandable.
21 Moreover, JKX and Romgaz were coming to the same
22 conclusion as Mr Lewis, and you can see on the
23 right-hand side:
24 "JKX said that 'all the ways out seem to have
25 closed', and 'political barriers are erected wherever

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11:35 1 they're needed'.
2 So the third consequence of the impugned measures is
3 that they caused Akard to stop providing funding to
4 Discovery for the project (Slide 149). Akard had
5 entered into its agreement with Discovery
6 in October 2015, but more than one year had gone by and
7 none of the initial exploration wells had been drilled,
8 because of the impugned measures. Akard had clearly
9 lost patience, and one can see that from Akard's
10 response in this letter. This is Akard's attorney:
11 "[Discovery, that's 'DG'] has also breached
12 Section 4 of the Agreement by failing to cause its 100%
13 owned subsidiary, Alpine ... to 'use its best efforts to
14 drill ... the Initial Wells.' To date not one well has
15 been drilled, nor have any drilling operations commenced
16 after almost fifteen (15) months of operations."
17 What did Mr Lewis say in response to Akard?
18 (Slide 150):
19 "DG has regularly provided information by telephone,
20 electronic conference and email about Alpine's ongoing
21 efforts to drill the Initial Wells. DG has also
22 attended many meetings with Akard over the past year ...
23 Akard is also well aware of the problems Alpine has
24 faced with protesters and with obstruction by the
25 courts, police and other government officials."

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11:37 1 (Slide 151) So the fourth consequence of the
2 impugned measures was that they caused JKX to withdraw
3 from the project, and we can see on the slide here the
4 reasons that JKX gave in the documents for that
5 decision. We say there is a clear link between the
6 impugned measures and the decision by JKX to withdraw,
7 and those remarks are consistent with JKX's remarks in
8 the minutes from October of 2017.
9 (Slide 152) Later on, Romgaz also withdrew from the
10 project, citing opposition of institutions and
11 population to drilling wells in the area of interest.
12 (Slide 153) Fifth, the impugned measures prevented
13 Discovery from securing further external funding for the
14 project in 2017 and 2018. Against the background of the
15 impugned measures, it is unsurprising that Discovery was
16 unable to attract further external funding for the
17 project in 2017 and 2018. In short, and as Mr Fraser
18 says, Slovakia's own conduct rendered the project
19 unfinanceable in 2017 and 2018.
20 (Slide 154) So those are the consequences. I will
21 now move very briefly to jurisdiction.
22 In its Counter-Memorial, Slovakia, as you will have
23 seen, raised a scattershot of jurisdictional objections.
24 None of those objections were foreshadowed by Slovakia
25 in the extensive consultations which took place before

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11:38 1 the arbitration, and the objections are all misconceived
2 for the reasons that we have explained in detail in our
3 Reply. Jurisdiction is taken very lightly in the
4 Rejoinder -- and we say rightly so -- and I'm not
5 proposing to say anything more orally about it, unless
6 the Tribunal has any questions. And we can probably
7 move on to liability.
8 (Slide 155) So, again, I'm going to take this
9 relatively briefly, because you have heard from us
10 extensively in writing.
11 As to FET (Slide 157) the FET standard in the
12 bilateral investment treaty is not limited to the
13 minimum standard of treatment under customary
14 international law. Again, we've addressed this
15 extensively in our Reply. We say it is clear that
16 Article II(2)(a) is an autonomous FET standard, and
17 we've explained why the ordinary meaning of the BIT and
18 the consistent jurisprudence of investment tribunals
19 provides no support for Slovakia's interpretation. And
20 again, this point is taken very lightly in the
21 Rejoinder.
22 It is clear that the FET standard encompasses the
23 following core protections: first of all, Slovakia must
24 not frustrate an investor's legitimate expectations;
25 second, Slovakia must not act inconsistently; third,

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<p>11:39 1 Slovakia must not act arbitrarily or non-transparently; 2 and, fourth, Slovakia must not commit a denial of 3 justice. 4 (Slide 158) So as to legitimate expectations. Here 5 we've provided a cross-reference to the table, 6 summarising which measures we say frustrated Discovery's 7 legitimate expectations. And as I explained at the 8 beginning, we say Discovery held legitimate expectations 9 based on the terms of the licences and the Geology Act. 10 Each of the measures that we've listed here frustrated 11 Discovery's legitimate expectations. 12 Number one, they prevented AOG from completing the 13 geological task. And number two, they involved numerous 14 Slovak state organs objecting to the exploration. That 15 ties back with the two expectations that I addressed 16 earlier. 17 So taking the police as one example. The police's 18 conduct in relation to the road undoubtedly prevented 19 AOG from completing the task, and involved a state organ 20 objecting to the exploration. Without being able to use 21 the road to bring the drilling rig to the site, 22 Discovery was unable to drill its well. And similar 23 conclusions apply to the prosecutor's conduct and the 24 MoI's conduct in instructing the police that the road 25 was a private road, private property.</p> <p style="text-align: center;">Page 77</p>	<p>11:42 1 very familiar to this Tribunal, but we draw particular 2 attention to Crystallex, and the discussion from 3 paragraphs 576 onwards. 4 Crystallex was, of course, a case where the 5 investor's project to exploit a gold deposit was halted 6 by a permit denial letter issued by Venezuela's Ministry 7 of Environment on purported environmental grounds, and 8 the issue was whether the denial of that permit breached 9 the autonomous FET standard in the relevant BIT. And at 10 paragraph 578, the tribunal quoted the well-known 11 definition or explanation of the concept of 12 arbitrariness, and we would draw attention to that test 13 particularly as regards the conduct of the Ministry of 14 Agriculture and the Ministry of Environment in relation 15 to the impugned measures at Krivá Ol'ka. 16 At paragraph 579, the tribunal noted that the notion 17 of transparency is linked to consistency: one arm of the 18 state cannot affirm what another arm denies to the 19 detriment of a foreign investor, and that point is 20 relevant to many of the impugned measures. 21 At paragraph 581, the tribunal made the point that 22 it is a state's prerogative right to grant or deny 23 a permit or approval as a matter of domestic law, 24 especially one affecting natural resources. 25 But, a state would incur liability under the BIT if</p> <p style="text-align: center;">Page 79</p>
<p>11:41 1 Reduced to its core, Slovakia's defence concerning 2 the events at Smilno rest on an assertion that the road 3 was private land, but that is wrong for the reason that 4 we have explained in detail. 5 At Krivá Ol'ka, the Ministry of Agriculture's 6 conduct in refusing to approve the amendment prevented 7 AOG from completing the task and involved yet another 8 state organ objecting to the exploration, and the same 9 conclusion applies to the Ministry of Environment's 10 conduct in refusing to grant a compulsory access order, 11 and then later suspending the proceedings. This conduct 12 too prevented AOG from completing the task, and involved 13 the Ministry objecting to the geological exploration. 14 And then the same conclusions, you will of course 15 understand, apply to the environmental impact assessment 16 process. 17 And specifically there, the exploration licences had 18 asked, or recorded whether the district offices objected 19 to the exploration, and we saw earlier that they 20 recorded no objection. And then suddenly in 2017, the 21 district offices objected in the EIA decisions. 22 So that's legitimate expectations. 23 So we now move forward to the other limbs of the FET 24 standard (Slide 159), and it's instructive briefly to 25 recap some of the principles which will, of course, be</p> <p style="text-align: center;">Page 78</p>	<p>11:44 1 the treatment of the investor in the process leading to 2 the denial was unfair or inequitable, because it was 3 arbitrary, lacking in transparency or consistency, and 4 the same basic point is made in the last sentence. 5 (Slide 160) The next point arising from this award 6 relates to the concept of deference, and that is 7 a concept invoked by Slovakia in its pleadings. But the 8 tribunal in Crystallex makes the point that deference to 9 primary decision-makers cannot be unlimited, because 10 otherwise the standards of protection in the BIT would 11 be rendered nugatory. 12 Moving to 590, on the facts of Crystallex: 13 "The Permit denial letter [was] a mere two and 14 a half pages [and] purports to set out the alleged 15 reasons for denying the Permit." 16 And you see reference there to environmental 17 considerations. 18 But the tribunal concluded that the way in which 19 those matters had been put forward in the letter was 20 arbitrary and evidenced a lack of transparency and 21 consistency. 22 593: 23 "For the Tribunal, Venezuela had the burden to 24 elucidate the reasons for denying the Permit with some 25 kind of supporting data ..."</p> <p style="text-align: center;">Page 80</p>

<p>11:45 1 And we say that's particularly relevant to the EIA 2 decisions, which weren't based on any rational 3 foundation of fact or data. The same basic points at 4 594 and 597. 5 (Slide 161) And then at 599, references to: 6 "... changes in policy at the national level started 7 to have repercussions over the permitting process [and] 8 political pressure regarding the project ... [beginning] 9 to pervade the process." 10 And those considerations are particularly relevant 11 and analogous here as regards the conduct of the 12 Ministry of Agriculture and the Ministry of Environment, 13 as we saw when I took you through the measures. 14 (Slide 162) So, applying those principles, we say 15 Slovakia acted inconsistently, and hence in breach of 16 the FET standard in the BIT. 17 At Smilno, on the one hand, the mayor and Slovakia's 18 official maps confirmed that the road was a public road. 19 On the other hand, the police and the Ministry of 20 Interior refused to accept that the road was a public 21 road. What's more, the police themselves were adopting 22 internally inconsistent positions, and all the while 23 Discovery was prevented from using the road to drill its 24 exploration well. 25 Similar inconsistencies occurred at Krivá Ol'ka:</p> <p style="text-align: center;">Page 81</p>	<p>11:48 1 regional court. 2 Now, Slovakia denies that the FET standard protects 3 against a substantive denial of justice. We disagree, 4 and respectfully embrace the conclusions of the majority 5 in Infinito Gold which we have summarised on this slide 6 but I don't have time to go through in detail. 7 (Slide 165) Applying these principles, it is clear 8 that the conduct of Slovakia's judiciary also breached 9 the FET standard, and again we have addressed this point 10 in detail in our written pleadings and you will be 11 hearing further from Professor Števec next week whose 12 opinions on Slovak law we say amply support these 13 conclusions. 14 (Slide 166) As to the other substantive protections, 15 again, there is insufficient time orally to elaborate on 16 what we've already said in writing about national 17 treatment, effective means and expropriation, but we 18 maintain that Slovakia breached these other substantive 19 protections for the reasons explained in our pleadings. 20 (Slide 169) So I will now, with the Tribunal's 21 leave, address my final topic before handing over to 22 Mr Newing on quantum. 23 So, causation (Slide 170). The legal test for 24 causation is common ground: was there a sufficiently 25 clear direct link between Slovakia's breaches of the BIT</p> <p style="text-align: center;">Page 83</p>
<p>11:46 1 approval of the lease versus refusal to approve the 2 amendment, and then refusal to grant a compulsory access 3 order. And then, again, further inconsistencies during 4 the EIA applications. The district offices had 5 confirmed during the licence renewals that exploration 6 would not affect interests associated with conservation 7 of nature and landscape. Minister Sólymos had issued 8 his assurance to local residents that there wouldn't be 9 any unfavourable impacts on the surroundings and the 10 environment in general, and yet the EIA decisions were 11 issued. 12 (Slide 163) What's more, Slovakia acted 13 non-transparently and arbitrarily. I've already touched 14 on this point in my oral submissions, and we've dealt 15 with the point extensively in our written pleadings. 16 I won't repeat what we've said; we say applying the 17 legal principles summarised in Crystalex, the impugned 18 measures involved the police, the prosecutor, the 19 Ministry of Agriculture, the Ministry of Environment, 20 and the district offices acting non-transparently and 21 arbitrarily. 22 (Slide 164) Finally, turning to the conduct of 23 Slovakia's judiciary. This, too, also breached the FET 24 standard, and this relates to the decisions of the 25 interim injunction from the district court and the</p> <p style="text-align: center;">Page 82</p>	<p>11:49 1 and Discovery's inability to complete the project. 2 Applying that test, we say the answer is clearly yes. 3 The impugned measures placed Slovakia in breach of its 4 obligations under the BIT. These breaches prevented 5 Discovery from completing its project, and those 6 breaches therefore wiped out the value of Discovery's 7 investment. 8 Slovakia's arguments on causation, we say, have no 9 merit. 10 (Slide 171) So for the first time in its Rejoinder, 11 Slovakia refers to this award in <i>Blusun v Italy</i>, but the 12 facts of this case are readily distinguishable. 13 And you can see on the next slide (172) that <i>Blusun</i> 14 was a case where, number one, the project never obtained 15 the substantial financing which was required, and number 16 two, in the arbitration itself the claimant investor 17 conceded that its failure to obtain such financing was 18 the immediate and proximate cause of the project's 19 failure. 20 By contrast in this case, Slovakia did obtain 21 substantial financing for the project, initially from 22 Mr Lewis, then from Akard, and on the basis of that 23 funding, it engaged in a lengthy process over two and 24 a half years to advance the project. And, second of 25 all, Discovery does not admit that the immediate or</p> <p style="text-align: center;">Page 84</p>

11:50 1 proximate cause of the project's failure was the absence
 2 of financing.
 3 It is true that Akard stopped providing funding
 4 in January 2017. But at that point, Discovery did not
 5 suddenly give up on the project. As we have seen,
 6 Discovery continued to engage with the Ministry of
 7 Environment to obtain a compulsory access order, but it
 8 was rebuffed in March 2017, and then later again in
 9 2017, when the Ministry suspended the proceedings.
 10 Moreover, Discovery continued to engage with the EIA
 11 process throughout 2017 and into 2018. It was these
 12 impugned measures, all of the impugned measures from
 13 late 2015 onwards, which were the proximate cause of the
 14 project's failure. So Slovakia's argument does not work
 15 on the facts.
 16 (Slide 173) Moreover, Discovery's inability to
 17 obtain further external funding in 2017 and 2018 was
 18 a consequence of the impugned measures. This was not
 19 the proximate cause of the failure of the project.
 20 Now, in its Rejoinder at 78-82, Slovakia says: well,
 21 okay, the project failed because Mr Lewis made
 22 "a conscious choice" to stop funding the project in
 23 2018. And we reject that submission.
 24 Slovakia relies in support of its submission on the
 25 minutes from October of 2017, which we looked at

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11:52 1 earlier, the operating committee meeting minutes, and
 2 Slovakia has distorted the context in which those
 3 remarks were made.
 4 The reason why no further activities were undertaken
 5 after 2018 was because Slovakia's own conduct had
 6 prevented Discovery from completing the task. So at
 7 Smilno we've seen all of the measures, at Krivá Ol'ka
 8 the same, and then again with respect to the EIA
 9 process.
 10 (Slide 174) Slovakia's next line of attack on
 11 causation is based on the concept of a social licence to
 12 operate, SLO. Now, Slovakia's conception of this
 13 concept is uncertain and has evolved considerably
 14 throughout the arbitration, as you can see here. By
 15 these descriptions, a social licence to operate seems to
 16 be all things to all people.
 17 (Slide 175) Looking at the awards that have applied
 18 this concept, this concept has been applied but only
 19 where there was a clear legal basis for doing so, in
 20 either the national law of the host state, or in
 21 relevant and applicable rules of international law.
 22 But in this case Slovakia concedes in its Rejoinder
 23 that neither Slovak law nor the BIT expressly
 24 incorporate the concept. So this case is
 25 distinguishable from awards such as South American

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11:53 1 Silver, or Bear Creek, where the concept was linked to
 2 relevant and applicable rules of domestic or
 3 international law.
 4 But even if the Tribunal were willing to apply
 5 Slovakia's ill-defined concept, its argument must fail
 6 on the facts.
 7 (Slide 176) Discovery did not fail to obtain
 8 a social licence. As you may have seen from annex 1 of
 9 our Reply, we summarise the extensive evidence of AOG's
 10 community engagement throughout the project. Much of
 11 that evidence has either been ignored or
 12 mischaracterised by Slovakia.
 13 So, consider the Rejoinder at paragraph 4(a) on the
 14 left-hand side. It's said that Discovery made the
 15 choice to:
 16 "Attempt to drill without notice to the local
 17 community ..."
 18 Well, we say that is a clear distortion of the
 19 evidence. See our Reply at paragraphs 28-30, at
 20 paragraph 76 and the entirety of Annex 1, citing the
 21 extensive evidence of community engagement that started
 22 way back in 2015.
 23 Consider also paragraph 87 of the Rejoinder. Here
 24 it's said:
 25 "In the very first meeting Discovery held with the

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11:54 1 local citizens in 2017 ..."
 2 That also ignores the extensive evidence summarised
 3 in Annex 1, which shows that numerous meetings were held
 4 with the local community from as early as February 2015.
 5 So the argument on causation does not get off the
 6 ground factually, but in any event, any alleged failure
 7 to obtain a social licence was not the proximate cause
 8 of the failure of the project. The proximate cause was
 9 the impugned measures.
 10 (Slide 177) And the final line of attack on
 11 causation is based on contributory fault. It is common
 12 ground that damages could only be reduced if Slovakia
 13 can show that Discovery committed a wilful or negligent
 14 act or omission within the meaning of Article 39 of the
 15 ILC Articles. Slovakia relies on three incidents in its
 16 Rejoinder at 583-586, but none comes anywhere close to
 17 a wilful or negligent act or omission.
 18 So at Smilno, it's said that Discovery was negligent
 19 because the road was private property and AOG failed to
 20 secure access rights. But as we've explained,
 21 Slovakia's case theory here is wrong because the road
 22 was a public road. Discovery cannot be blamed for
 23 relying on Slovakia's official maps or the mayor's
 24 contemporaneous statements.
 25 At Krivá Ol'ka it's said that Discovery was

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<p>11:56 1 negligent because AOG made a one-day delay in requesting 2 its extension to the lease. But, as we've explained, 3 that was of no consequence. State Forestry waived the 4 technicality and agreed to extend the term of the lease. 5 So Discovery's complaint is that the Ministry, 6 specifically Mr Regec, withheld approval on pretextual 7 grounds and for an improper purpose. And thereafter, 8 the Ministry of Environment refused to grant 9 a compulsory access order. Discovery can't be blamed 10 for the conduct of these two state organs. 11 Then as to the EIA process, Slovakia does not allege 12 that Discovery was guilty of any wilful or negligent act 13 or omission during the EIA process, and so that argument 14 does not work. 15 So that's all I have to say on causation and I'll 16 now hand over to Mr Newing. 17 MR NEWING: Thank you very much. I'm going to address the 18 Tribunal on quantum. I apologise, my slides are not 19 quite as interesting as Mr Tushingam's and are more in 20 the standard style of just words on a page. But also in 21 the interests of time I won't be running through 22 absolutely everything on the slides. I've included 23 relevant quotes from relevant case law, but the Tribunal 24 will be familiar with many of the cases, so I will run 25 through some of these relatively quickly, beginning with</p> <p style="text-align: center;">Page 89</p>	<p>11:58 1 property lost. 2 The Tribunal will have seen that the main area of 3 disagreement between the parties is the methodology that 4 should be used to do this, and in particular whether the 5 Tribunal should use a DCF method, and that's what I'll 6 address in more detail. 7 Both parties refer to other cases where it has or 8 has not been accepted, but at the end of the day it's 9 for the Tribunal to find the most appropriate 10 methodology for this case that results in full 11 reparation, and the quote in Lemire v Ukraine on the 12 slide supports that. 13 (Slide 181) So the first question which the Tribunal 14 will need to consider is what is the factual situation 15 that, more probably than not, Discovery would have been 16 in had the breaches not been committed, i.e. the but-for 17 scenario. Mr Tushingam has already explained the 18 consequences of Slovakia's breaches, which must be 19 eliminated in this but-for scenario, and so I don't 20 intend to go through them in any detail. The relevant 21 assumptions that have been made are on the slide and 22 have been dealt with in the Claimant's Memorial at 23 paragraphs 294-298. 24 (Slide 182) So then we turn to the question of what 25 is the compensation that Discovery should receive to</p> <p style="text-align: center;">Page 91</p>
<p>11:57 1 the legal principles the Tribunal must consider when 2 determining the appropriate award of damages. These are 3 not controversial, and we understand them to be common 4 ground (Slide 179). 5 The key points have been set out in our Memorial at 6 paragraphs 271-280 and are on the slide, but the 7 generally accepted principle is that set out in the 8 decision in Chorzów Factory, which requires the state to 9 make full reparation. That is, that it must as far as 10 possible wipe out all of the consequences of the illegal 11 act and re-establish the situation which would, in all 12 probability, have existed if that act had not been 13 committed. 14 (Slide 180) So what the Tribunal is required to do 15 in assessing damages is to restore the injured party to 16 the situation which it more likely than not would have 17 been in had the wrongful act not been committed. This 18 is the but-for principle. It does not mean that the 19 Tribunal must find precisely what would have happened, 20 as the Respondent appears to suggest in its Rejoinder, 21 only what the situation is that more likely than not the 22 Claimant would have been in, but for the Respondent's 23 breaches. 24 The assessment of damage is generally accepted as 25 being to find the fair market value, or FMV, of the</p> <p style="text-align: center;">Page 90</p>	<p>12:00 1 eliminate all of the negative consequences of the 2 breaches and put it in that but-for situation. This is 3 legally what the Tribunal are seeking to achieve. 4 We submit it is then a matter of evidence and expert 5 evidence as to how such a value is to be calculated. 6 It is common ground that there are three main 7 approaches: an income-based approach; a market-based 8 approach, and an asset-based approach. Whilst it is 9 a question ultimately for the Tribunal to consider which 10 of these methods meets the standard for reparation, we 11 submit it can only do so by being guided by the expert 12 evidence as to which is the most appropriate way to 13 calculate the FMV and achieve the goal of granting 14 Discovery full reparation in this case. And Discovery's 15 position is that the income method, and particularly the 16 use of a DCF model, is the only approach that will 17 result in an FMV that gives full reparation. 18 Alternatives have been put forward in the Claimant's 19 Reply, based on the other approaches. But this was in 20 response to the Respondent's objection to the income 21 approach in its Counter-Memorial, and so this should not 22 be seen as any form of acceptance by Discovery that the 23 DCF approach is not appropriate. 24 (Slide 183) So turning to look in more detail at the 25 income-based valuation and DCF approach.</p> <p style="text-align: center;">Page 92</p>

<p>12:01 1 (Slide 184) Slovakia challenges the use of DCF in 2 this case on the basis that it considers it to be 3 inappropriate for a project at the exploration stage and 4 which has not yet conducted any drilling. However, DCF 5 is commonly used by potential purchasers when valuing 6 targets, including at the exploration level, and 7 particularly in the oil and gas industry, as the future 8 cash flow is reasonably ascertainable because of the 9 nature of the market. It is possible to have 10 an estimate of the price, and so as long as you can have 11 an estimate of the volume and the cost, both of which we 12 say are present here, as set out by the experts upon 13 whom Discovery relies, then you can conduct a DCF 14 analysis and adjust it as necessary to the level of 15 perceived risk. That is precisely what we say 16 Discovery's experts have done. 17 We also point out that Discovery itself has 18 contemporaneously used a basic DCF method when 19 estimating a value for potential profits of some of the 20 shallower prospects when marketing to its potential 21 investors. An example of this for the Tribunal's 22 reference can be seen on page 30 of Exhibit C-180, 23 although I do not need to turn that up now. 24 (Slide 185) Discovery's experts confirm why DCF is 25 the most appropriate approach. As already mentioned,</p> <p style="text-align: center;">Page 93</p>	<p>12:03 1 they did. That expenditure was approved in the form of 2 authorisation for expenditure, AFEs, for three 3 exploration wells. That could only have happened on the 4 back of the analysis that Discovery conducted. 5 Mr Howard and Dr Simon Moy, another of Discovery's 6 experts, both refer to surveys carried out by the 7 Society of Petroleum Evaluation Engineers in 2018 and 8 2022, which report that DCF was by far the most useful 9 method of valuation. 10 Further, and of particular relevance, Dr Moy refers 11 in his second report to a paper from the Society of 12 Petroleum Engineers -- which confusingly is not the same 13 thing as the SPEE -- in 2016, which confirms that the 14 valuation of an exploration portfolio is commonly based 15 on an expected value approach based on a DCF valuation 16 of exploration success cases for the prospective 17 resources within the portfolio. 18 The Tribunal will have seen from the pleadings that 19 there was an issue as to whether the hydrocarbons in 20 this case should be classified as prospective resources, 21 contingent resources, or reserves. It is accepted that 22 until any discovery is made, there are only prospective 23 resources, although Discovery submits that the Tribunal 24 must put itself in the but-for scenario, and so cannot 25 just consider the position at the time the project</p> <p style="text-align: center;">Page 95</p>
<p>12:02 1 the products are commodities and trade easily in 2 well-developed and liquid markets. In addition, Colin 3 Howard, one of Discovery's experts, notes that large 4 projects of this nature are only undertaken after the 5 owners have conducted an analysis of project viability, 6 otherwise they wouldn't be investing as much as they 7 did, and it must be remembered here that the total 8 investment from all parties, so including the joint 9 venture parties, in this project was €20 million at the 10 time it came to an end. 11 Discovery had conducted such analyses. It is not 12 a case, as the Respondent would lead you to believe, 13 where Discovery had performed no analysis. Indeed, 14 after purchasing AOG, and in order to determine the most 15 appropriate exploration wells to drill first, Discovery 16 conducted numerous analyses, including an extensive 17 interpretation of the 2D seismic data that had been 18 acquired by Aurelian but not yet fully processed, and 19 entirely new magneto-telluric analyses. 20 That interpretation and analysis continued across 21 2014 to 2016, as can be seen from the reports that AOG 22 was giving to its JV partners over time -- references to 23 some of those are on the slide -- as those JV partners 24 themselves needed to be confident of the analysis and 25 plans to improve the expenditure for the programme. And</p> <p style="text-align: center;">Page 94</p>	<p>12:05 1 stopped. Once a discovery is made, they become at least 2 contingent resources, and depending on the level of 3 commerciality, they may be reserves. 4 One of the mistakes we say Slovakia and its experts 5 continue to make is to treat the hydrocarbons in this 6 case as prospective resources, even in a but-for 7 scenario when discovery has been made, which is simply 8 wrong. 9 But the relevance of this 2016 SPE paper is to say 10 that even in a case where you only have prospective 11 resources, DCF is still a common method of valuation. 12 This has also been established by Discovery's 13 experts by reference to the June 2011 and March 2020 14 Oilfield International reports that were carried out for 15 Tower Resources where a DCF method was used to value the 16 prospective resources held at that time. These are 17 real-world examples where DCF has been used to value 18 early-stage developments. 19 (Slide 186) There is also a real-world example of 20 DCF being used on these very licence areas. 21 In April 2010 Macquarie Equities Research published 22 a briefing paper on Aurelian Oil & Gas, and the 23 reference for that is on the slide. That included 24 a breakdown showing the value per share attributable to 25 the different assets held, including the Slovak</p> <p style="text-align: center;">Page 96</p>

<p>12:06 1 licences, and 19p per share risked was attributed to the 2 Smilno prospect. 3 It is worth noting that this paper also states that 4 there were 339 million shares in issue at that time, 5 meaning that the Smilno prospect, which in itself was 6 not the entire licence area, was at that point reported 7 to be worth £64.4 million in April 2010. 8 Mr Howard explains in his second report that this 9 19p per share risked value can only have been arrived at 10 using DCF modelling, showing, again, not only that it is 11 used at an early stage, but it has been used on these 12 very assets and indeed at an earlier stage even than the 13 current valuations. 14 Slovakia's experts seek to criticise the use of DCF 15 for an early stage project and rely on two codes: VALMIN 16 and CIMVAL. Both of these codes are for mining and the 17 latter in fact explicitly states it's not for petroleum 18 assets. 19 Mr Howard explains in his second report, and the 20 reference is on the slide at paragraph 76 (Slide 187), 21 that mining projects are fundamentally different and 22 have much greater uncertainty throughout the exploration 23 and discovery stages. This is also relevant when 24 considering that many of the authorities relied on are 25 mining cases.</p> <p style="text-align: center;">Page 97</p>	<p>12:08 1 So where it appears to be accepted that DCF would be 2 appropriate for producing assets, and it is also clear 3 that both of these factors would affect a valuation of 4 those such assets, it is clear that the drop in value 5 has no bearing at all on the appropriateness of DCF 6 method in this case. 7 In any event, as I mentioned earlier, Slovakia's 8 experts' criticisms all stem from the incorrect 9 assumption that we are valuing only prospective 10 resources (Slide 189). In the but-for scenario, 11 however, a discovery has been made and all the valuation 12 codes relied on by Slovakia's experts consider the 13 income approach to be appropriate once a discovery has 14 been made. 15 (Slide 190) Other valuation experts have also agreed 16 that DCF is appropriate, and certainly more appropriate 17 than using a comparables method for upstream oil and gas 18 projects. I've set out some quotes on the slide with 19 the relevant references, but I'm not going to go through 20 them at this stage in the interests of time. 21 (Slide 191) Prior tribunals have also used DCF for 22 early-stage oil and gas investments. In the case of 23 Divine Inspiration Group v Democratic Republic of Congo, 24 which was a case where the tribunal found that the DRC 25 had breached its obligations under a contract which</p> <p style="text-align: center;">Page 99</p>
<p>12:07 1 What may or may not be an appropriate approach for 2 valuing a mining project at different levels of maturity 3 therefore does not necessarily apply to valuing 4 petroleum projects. 5 Slovakia's experts also suggest that DCF is 6 inappropriate as it would not be used to report 7 an accounting book value, and may not be permitted for 8 reporting financial information on a stock exchange. 9 Neither of those, however, are exercises that the 10 Tribunal is being asked to do in this arbitration. What 11 the Tribunal is being asked to do is to establish the 12 FMV that would put Discovery in the position it most 13 likely would have been, but for Slovakia's breaches. 14 (Slide 188) The only additional argument that 15 Slovakia's experts come up with in their second reports 16 is to suggest that the significant decrease in the 17 valuation from the Claimant's Memorial to its Reply 18 indicates why DCF is inappropriate for this case. 19 However, that is a red herring. The significant drop in 20 value relates to two external factors, which can be seen 21 in orange on the slide. The greatest drop in value is 22 as a result of the change in price. The second greatest 23 drop is the result of an introduction in Slovakia of 24 a windfall tax. Both of these factors would affect any 25 valuation at any stage.</p> <p style="text-align: center;">Page 98</p>	<p>12:10 1 permitted the claimant to explore and exploit certain 2 oil and gas concessions in the DRC, at the date of the 3 breach the exploration activities were at an early 4 stage, and no drilling had yet been commenced, as is the 5 case here. In that case the tribunal accepted the 6 expert evidence as to the likelihood of exploitable 7 hydrocarbon resources and used the DCF method to 8 quantify the loss, describing it as "a recognised and 9 commonly used method in the world of finance for the 10 evaluation of projects and companies". 11 Slovakia seeks to distinguish this case in its 12 Rejoinder, but its comments miss the point. It claims 13 that it is not comparable because in that case the 14 Respondent did not challenge the DCF method. But that 15 is precisely why it is relevant, as that indicates that 16 in that case, both sides considered the DCF method to be 17 appropriate. The simple fact that Slovakia is 18 challenging it in this case does not make it any less 19 relevant. 20 In any event, the tribunal did not adopt the DCF 21 method simply because the respondent did not challenge 22 it, but because it considered it to be inappropriate. 23 The rest of the sentence, which is quoted at 24 paragraph 614(e) of the Respondent's Rejoinder goes on 25 to say that in this case with respect to the assessment</p> <p style="text-align: center;">Page 100</p>

<p>12:11 1 of future losses in a long-term project, DCF appears to 2 be the most appropriate method. 3 The other points Slovakia makes about this case are 4 similarly wide of the mark, as they are based on the 5 fact that the respondent in that case did not challenge 6 the volumes of probable reserves or the chance of 7 success applied; that is to say, the inputs for the DCF 8 model. It is true that Slovakia challenges those here, 9 but those are then simply matters on which the experts 10 will have differing opinions and it will be for the 11 Tribunal to make a determination. The simple fact 12 parties do not agree on the inputs does not render the 13 use of DCF inappropriate; otherwise it would rarely be 14 used. 15 (Slide 192) There are also further cases where DCF 16 has been adopted, which are set out in the Claimant's 17 Memorial, and there are some in the next two or three 18 slides, which I'm going to go through relatively quickly 19 (Slide 193) and without going through the quotes in 20 detail in the interests of time. But the Tribunal is 21 obviously invited to read them in due course, to the 22 extent they're not already familiar with them 23 (Slide 194). 24 (Slide 195) Two cases I will turn to though are 25 those which Slovakia refers to in its Counter-Memorial</p> <p style="text-align: center;">Page 101</p>	<p>12:13 1 forward in this case is that exploration would have been 2 successful, and obviously that's a matter that the 3 Tribunal needs to consider. 4 But the absence of drilling itself cannot prevent 5 the application of the DCF, because that is precisely 6 the issue that was prevented by Slovakia's breaches, and 7 in the but-for scenario those negative consequences must 8 be eliminated. 9 The third factor is that the Claimant would have 10 been able to finance and perform exploitation. Again, 11 in the but-for scenario, and as Mr Tushingam has 12 explained, it is Discovery's position that financing for 13 exploitation would have been available, as the partners, 14 JKX and Romgaz, and the external funder, Akard, would 15 not have left the project and, similarly, other 16 investors would not have been put off by Slovakia's 17 conduct. 18 A discovery would also have likely made other 19 financing options available. Mr Howard in his second 20 report talks about reserve-based lending, for example. 21 Finally, the fourth factor is the Claimant would 22 have been able to sell any hydrocarbons produced. We 23 don't think this is actually necessarily something 24 that's challenged, that Discovery would have been able 25 to sell in the current market, given the nature of the</p> <p style="text-align: center;">Page 103</p>
<p>12:12 1 where DCF was rejected, and which they say set out 2 circumstances which must be shown for DCF to be used for 3 an early-stage investment. These are the cases of 4 Al-Bahloul v Tajikistan and Bahgat v Egypt. 5 The tribunal in Al-Bahloul expressly considered that 6 DCF might in fact be justified when considering the 7 exploration of hydrocarbons, as we are here, and so did 8 not reject it as a possibility, but simply went on in 9 that case to decide whether it was appropriate. 10 The tribunals in those cases did not lay down any 11 legal criteria which would need to be satisfied for the 12 use of a DCF model. They were simply setting out the 13 factors they consider were relevant in those cases. 14 Nonetheless, in this case Discovery, in fact, we 15 say, would meet the factors in those cases in the 16 but-for scenario. 17 (Slide 196) On this slide I have set out a table 18 showing how Discovery satisfies the factors that were 19 raised in Al-Bahloul. So the first factor was that the 20 Claimant could finance exploration. Discovery had the 21 financing for exploration, and indeed tried to drill on 22 several further occasions, and that financing would have 23 remained in place for the further exploration. 24 The second is that exploration would have been 25 successful. The expert evidence that we have put</p> <p style="text-align: center;">Page 102</p>	<p>12:14 1 product, the energy policy in place in Slovakia, and of 2 course the demand both in Slovakia and the region 3 generally. 4 Turning to the second case, Discovery also considers 5 the factors in Bahgat are satisfied (Slide 197). In 6 that case, four slightly different factors were set out, 7 the first being that there should be detailed business 8 plans. Well, as Mr Tushingam has explained, and this 9 was referenced on slide 47, Discovery did produce 10 detailed drilling programmes. 11 A full detailed business plan as to the entire 12 project would not be expected though at the exploration 13 stage. Indeed, the SPE guidelines, which are set out at 14 Exhibit CRA-43, one of the exhibits to one of the 15 Respondent's expert reports, specifically note that 16 a plan at the exploration stage is only likely to be 17 outlined in broad conceptual terms. 18 The second factor is that there is information on 19 the price and quantity of the products and services. 20 Again, for the reasons I've just said, this doesn't seem 21 to be something that can really be challenged. 22 Third, there is availability of financing, which 23 I've already discussed; and fourth, the existence of 24 a stable regulatory environment. Slovakia is obviously 25 a member of the EU, we would submit has a stable</p> <p style="text-align: center;">Page 104</p>

<p>12:16 1 regulatory environment, and we do not understand 2 Slovakia to challenge that. 3 Further, its desire to diversify its energy supplies 4 and reduce its dependence on Russian imports and improve 5 its energy security was expressly acknowledged in the 6 energy policies, as Mr Tushingham has mentioned. 7 (Slide 198) So we say that those cases, far from 8 showing why DCF would be inappropriate, in fact help 9 support our position in this case that DCF is the 10 appropriate method. 11 So, on the basis that DCF is the appropriate method, 12 Discovery relies on three experts to then calculate the 13 FMV on a DCF basis: Mr Alan Atkinson, who is 14 a geoscientist; Dr Simon Moy, who is a reservoir 15 engineer, and Mr Colin Howard, a petroleum economist. 16 We refer to these as the Rockflow experts, or 17 Rockflow reports. I will just mention that Simon Moy is 18 now with a different firm called Xodus, but for 19 convenience we're still going to refer to them as 20 Rockflow. 21 They use industry-standard techniques for 22 identifying and estimating prospects, which are used by 23 these experts frequently in their quantification of 24 hydrocarbons and preparing DCF models. 25 The inputs and outputs derived by Rockflow are</p> <p style="text-align: center;">Page 105</p>	<p>12:18 1 Mr Longman's own first report. 2 So, looking quickly at what Rockflow have done 3 (Slide 199). So Mr Atkinson has assessed the 4 hydrocarbon prospectivity of the licence areas by 5 reviewing the exploration history in the region and 6 analysing geological data available from numerous 7 sources, some of those which are set out on the slide, 8 all of which indicate, he says, that there are 9 hydrocarbons in place. 10 He identified 40 prospects, 30 of which are 11 identified using maps created by EGI, which have not 12 been challenged. EGI is an independent body from the 13 University of Utah who recently conducted a study in the 14 area. 15 Mr Atkinson concludes that if AOG had been able to 16 proceed with its exploration it is highly likely 17 hydrocarbons would have been discovered. It is true 18 that Mr Atkinson did not rely on the magneto-telluric 19 data that Discovery obtained, but this was not because 20 he did not trust it, as has been suggested by Slovakia. 21 He makes clear at paragraphs 208-211 of his first report 22 that he was not aware of there being a peer-reviewed 23 study of this type of process so as to enable it to be 24 used in an independent report where he had no personal 25 experience of it, although he does note that it appears</p> <p style="text-align: center;">Page 107</p>
<p>12:17 1 reasonable, robust, and conservative. I don't intend to 2 go through their reports in detail at this stage as each 3 of the three experts will give you a short presentation 4 in advance of their evidence. But I will briefly 5 outline what they cover. 6 I will just say at the outset that Discovery objects 7 to the suggestion made at paragraph 617 of the Rejoinder 8 that the underlying Kingdom projects, which is the 9 projects containing all of the maps and surveys and 10 seismic data, et cetera, that were used by Mr Atkinson, 11 were withheld. That is not the case. They were 12 expressly referred to in his original report but they 13 are not a document that can just be exhibited; they are 14 a whole programme. And it was not known at that point 15 if Slovakia would even challenge the geology, let alone 16 instruct a relevant expert. But it was not hidden that 17 these had been used. If Slovakia's expert had 18 considered he needed it to do his work, it could have 19 been asked for immediately. We do not know why it was 20 only requested at document production, and that may have 21 been a tactical choice. But the point is, no new points 22 actually arise from it. The only real point that has 23 been complained of from the review of the underlying 24 projects is one that was already explained in Mr 25 Atkinson's first report, and indeed was responded to in</p> <p style="text-align: center;">Page 106</p>	<p>12:19 1 to correlate closely with the successful gas test in the 2 historic Smilno I well. Ultimately, he concludes that 3 he did not need to use it as the other sources were 4 sufficient for him to carry out his task. 5 For valuation purposes he then estimates the volume 6 of hydrocarbons potentially available to be produced, 7 the PIIP, using a probabilistic method. He then 8 determines the chance of discovery, GCOS, geological 9 chance of success, for each prospect, and conducts a 10 benchmarking exercise to confirm the reasonableness of 11 his PIIP and GCOS estimates. 12 (Slide 200) Mr Howard then, having made appropriate 13 adjustments to determine what is known as the economic 14 chance of success, or ECOS, as explained in his report, 15 conducts a decision-tree analysis to determine the best 16 estimate of which of the prospects identified by 17 Mr Atkinson would be successfully drilled and 18 subsequently developed. This is identifying the P50 19 case, being those cases where there is an equal chance 20 that the potential outcomes would be greater or lower. 21 This results in eight prospects being identified in 22 the P50 case. Relevantly, these eight prospects include 23 both the Smilno and Krivá Ol'ka prospects that Discovery 24 planned to drill, as well as the Zborov prospect it had 25 been considering, which is dealt with in Mr Fraser's</p> <p style="text-align: center;">Page 108</p>

<p>12:21 1 first witness statement at paragraph 107. 2 This indicates both the accuracy of Discovery's own 3 analyses, but also that the wells Discovery itself was 4 planning to drill would be drilled in the but-for 5 scenario and would more likely than not be successful. 6 Dr Moy has then used the P50 scenario identified by 7 Mr Howard and produced a development plan to determine 8 the best or mid-case technically recoverable volumes. 9 He has also considered Discovery's actions at the time, 10 concluded there was a clear intention to drill, and 11 identified a viable export route that was known to 12 Discovery at the time. He considers that all of the 13 commercial criteria would have been met for the 14 recoverable volumes to be considered as reserves. 15 Mr Howard uses those recoverable reserve volumes to 16 calculate the net present value of the projects in the 17 but-for scenario as being around \$532.2 million, of 18 which Discovery's claim is a 25% share of this, around 19 \$133 million. 20 In addition, and separately to what the experts have 21 done, Discovery claims an additional sum to repay Akard. 22 In this regard, the amount of just under \$2 million is 23 not, as the Respondent suggests in its Rejoinder, 24 a claim on behalf of Akard for part of its share of 25 profits. Following Akard's withdrawal, it was agreed</p> <p style="text-align: center;">Page 109</p>	<p>12:23 1 discovered volume simulation, and in fact, of those 2 eight, he considers three of them not to be prospects 3 and so does not conduct any further assessment of them. 4 However, even if you have a right to discount those 5 prospects, which is not accepted, all that means is that 6 he does not agree that they should be part of the P50 7 case. It does not mean that the remaining five are the 8 only viable prospects or that the licence areas must 9 therefore have a lower level of prospectivity, as he has 10 simply not conducted a wider assessment. He does not 11 conduct his own assessment of what the P50 volume would 12 be, or identify prospects that would correspond to 13 a P50. 14 In any event, we say he is wrong to discount those 15 three prospects, as two of them are the planned wells at 16 Smilno and Krivá Ol'ka, for which there were AFEs, and 17 indeed for Smilno, drilling operations have been tried 18 to be commenced several times. These clearly, 19 therefore, meet the definition of a prospect, as they 20 were sufficiently well defined to represent a viable 21 target in the judgment of those approving the funds to 22 start preparing for drilling operations. 23 Dr Longman's rejection of these two locations for 24 prospects is therefore untenable. 25 In respect of the other five prospects, Dr Longman</p> <p style="text-align: center;">Page 111</p>
<p>12:22 1 that this sum would be repaid from any monies earned by 2 Discovery from the licences, and in the but-for 3 scenario, Akard would have received this as part of its 4 25% share. But that does not mean Discovery is claiming 5 it on its behalf. Discovery's claim is for full 6 reparation of the value of its own 25% share, i.e. the 7 full value that it should get without any reduction to 8 repay Akard. Accordingly, in order to put Discovery in 9 the position it would have been but for Slovakia's 10 breaches, i.e. with its full 25% share, it must receive 11 its own share net of the sum it has to repay Akard, 12 hence the claim for the additional sum to repay Akard. 13 (Slide 202) Slovakia's experts criticise the use of 14 DCF by Rockflow and criticise some of the inputs. But 15 they do not themselves offer a DCF valuation. If the 16 Tribunal is persuaded, therefore, that the DCF approach 17 is appropriate, the only DCF model it has is that put 18 forward by Discovery. 19 The Respondent's expert, Dr Longman, in his second 20 report, claims that the licence areas contain no 21 commercially viable resources, but it is worth 22 remembering he has not actually assessed the entire 23 licence areas. He has considered in general terms the 24 methodology used by Mr Atkinson and then has assessed 25 only the eight prospects corresponding to Rockflow's P50</p> <p style="text-align: center;">Page 110</p>	<p>12:24 1 accepts that there could be potential resources in 2 place, although his PIIP and GCOS estimates are lower 3 than Mr Atkinson's. As I say, he conducts no DCF 4 valuation of his own, but it is notable that even on the 5 Respondent's case therefore, it is in fact possible to 6 estimate the volumes sufficiently to be able to design 7 a development scheme and perform a DCF valuation. The 8 suggestion made by the Respondent that there is 9 insufficient data to do so is therefore now contradicted 10 by their own expert evidence. 11 (Slide 203) Turning briefly, in the few minutes that 12 I have left -- 13 THE PRESIDENT: Yes, let me just check how much time you 14 have left, because you have -- the two of you have been 15 interrupted once in a while. 16 MS MINGUEZ ALMEIDA: 10 more minutes. 17 MR NEWING: Thank you. I probably won't need that. I had 18 thought about five. 19 THE PRESIDENT: I had less, but we agreed that the secretary 20 will take the time, so she prevails. 21 MR DRYMER: That's the last time you'll ask! 22 MR NEWING: As I said, Discovery's primary case is for loss 23 of profits based on the DCF. As that was challenged in 24 the Counter-Memorial, Discovery has put forward 25 alternatives, the first of which is a claim for loss of</p> <p style="text-align: center;">Page 112</p>

<p>12:26 1 opportunity to drill and potentially make profits. 2 The position in this regard has been set out in the 3 Claimant's Reply from paragraph 434 onwards, and so I do 4 not intend to spend a lot of time on this. But the 5 primary case is that of Sapphire v NIOC, and the 6 relevant quotes are on this slide, both from this case 7 and further cases over the page (Slide 205). 8 Slovakia does not really challenge the principle of 9 a loss of opportunity claim, but challenges its 10 application in this case on two grounds: that the only 11 lost opportunity was drilling three exploration wells, 12 and secondly that there is no basis for the amount 13 claimed. 14 As to the first point, this seems to assume that the 15 Tribunal is able only to consider the immediate next 16 steps that Discovery was planning to take. But if the 17 Tribunal is persuaded, as Discovery submits it should 18 be, that there is sufficient certainty that had wells 19 been drilled a discovery would have been made, then the 20 lost opportunity clearly extends beyond just the 21 drilling of these three wells. 22 In this regard, Slovakia would not have successively 23 renewed the exploration licences had it thought there 24 was a zero chance of hydrocarbons being discovered, and 25 as I mentioned earlier, Discovery and its JV partners</p> <p style="text-align: center;">Page 113</p>	<p>12:28 1 region and it is not a politically unstable country, and 2 so there is minimal risk of troubles. 3 Accordingly, Discovery submits that its estimate of 4 40% is entirely reasonable, particularly in light of the 5 robust and conservative evidence from the Rockflow 6 reports that this project would, in all likelihood, have 7 succeeded and yielded substantial profits. 8 Turning then to a market-based valuation (Slide 9 209). Slovakia's experts claim that the appropriate 10 approach to use is a market-based approach, looking at 11 comparable transactions. However, such an approach is 12 not appropriate here. Firstly, there is simply no 13 market comparable one can look at to see what a buyer 14 would pay as at the date of the award. The attempts 15 made by the other side to rely on prior transactions 16 from 2015 are inappropriate and fail to take into 17 account the significant additional analysis carried out 18 on the licence areas since then, including the 19 interpretation of the seismic data, the magneto-telluric 20 data, the EGI study, all of which have reduced the risk 21 and increased the definition of the prospects, and all 22 of which would be taken into account by someone looking 23 to buy this today. 24 Mr Howard also explains why, in particular, the San 25 Leon royalty transaction is not an appropriate</p> <p style="text-align: center;">Page 115</p>
<p>12:27 1 would not have invested many years of time and over 2 €20 million into the project if they had thought it was 3 a worthless commercial opportunity or that it was 4 limited to just three exploration wells. 5 (Slide 206) As to the value to be ascribed to this 6 claim, Discovery accepts that this is much more at the 7 discretion of the Tribunal but considers that 8 appropriate pointers can be taken from the Sapphire v 9 NIOC case. 10 In that case, the claimant claimed loss of profit at 11 \$5 million. This was in 1963 so those monies meant 12 a lot more in those days than they do now. The 13 arbitrator, having determined that he could award 14 damages for the loss of opportunity, considered the 15 valuation provided by the claimant's expert, but 16 determined that he had not factored in relevant risks, 17 such as the desolate region with difficult access and 18 unfavourable climate, and trouble such as war and other 19 crises. 20 He ultimately fixed the compensation for lost 21 opportunity at \$2 million, that is to say, 40% of the 22 original claim. It is worth remembering, as I say, this 23 decision is from 1963, so that is still a large sum. 24 Discovery's claim does not suffer from the same 25 kinds of risks. There is sufficient access to the</p> <p style="text-align: center;">Page 114</p>	<p>12:29 1 transaction, as it is not a transaction at fair market 2 value. It is notable in this regard it is this 3 transaction, which produces the lowest valuation of 4 those put forward by the Respondent, that the Respondent 5 then chooses as being the most appropriate, 6 notwithstanding that the other two transactions on which 7 it relies both took place after that transaction. 8 The further valuation conducted by the Respondent's 9 experts at CRA using so-called comparable companies is 10 also not appropriate as those companies are not, in 11 fact, comparable, for the reasons set out in Mr Howard's 12 second report. 13 (Slide 210) But, in any event, even if those 14 companies were to be considered comparable, Mr Howard 15 has explained in his second report why the comparisons 16 drawn were still wrong, as they included obvious 17 outliers. 18 Further, CRA improperly discounts its valuations by 19 90-95%, it says on the basis that Discovery only holds 20 prospective resources. This is wrong on two counts: 21 first, as already explained, in the but-for scenario 22 there would have been a discovery and so they would not 23 be prospective resources anymore. Second, as explained 24 by Mr Howard in his second report, it is inappropriate 25 to apply such a discount when the GCOS has already been</p> <p style="text-align: center;">Page 116</p>

12:30 1 applied to achieve risk to volumes on the basis of which
2 the market valuation was undertaken. To apply a further
3 discount of 90-95% is to effectively double discount.
4 Indeed, Dr Longman in his second report appears to
5 accept this, yet CRA have not done so.
6 While Mr Howard maintains there is no way of
7 conducting an appropriate market-based valuation as
8 there is simply no comparable transaction or company at
9 the date of the award, he has nonetheless calculated
10 that if a valuation was conducted based on a correct
11 analysis of the Respondent's comparable companies, i.e.
12 using only those which are appropriate and not applying
13 the incorrect discount, this would result in
14 a calculation of Discovery's 25% share of around
15 \$36 million.
16 (Slide 211) Finally we turn to sunk costs, which we
17 say is an exceptional award, but is nonetheless the bare
18 minimum which should be granted.
19 As set out in the quotes on the slide, it does not
20 represent the value of the investment, but it is
21 nonetheless the minimum that should be guaranteed to the
22 investor. The Respondent does not seem to accept this,
23 arguing for a valuation which is lower, even, than sunk
24 costs, apparently on the basis that those sunk costs
25 have not been proven.

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12:32 1 This is, however, not true. Discovery has produced
2 the reports which it provided to the Ministry of
3 Environment each year and AOG's financial statements to
4 support its claim here. While it is true that those
5 statements are unaudited, they have been prepared by
6 reputable accountancy firms, Baker Tilly and
7 Grant Thornton, and there is no reason to believe, nor
8 has any been put forward, that they are not accurate.
9 Accordingly, at the very least, Discovery claims
10 that it is entitled to recover the \$3.7 million odd it
11 has paid out in sunk costs plus pre-award interest on
12 a compound basis.
13 As to interest, Slovakia has challenged the use of
14 USD LIBOR on the basis that it ceased to exist last
15 year. In this regard, a secured overnight financing
16 rate, or SOFR, generally seems to have been recommended
17 to replace this, and the Claimant can provide revised
18 calculations based on this rate, should that be helpful.
19 As a very final note, the Claimant notes that all of
20 the valuations that have been carried out by its experts
21 can be brought up to date at any time at the Tribunal's
22 request, and with any changes to inputs as may be
23 requested.
24 That concludes our opening statement. Thank you.
25 THE PRESIDENT: Thank you very much to the two of you.

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12:33 1 Is it fine if we switch over now directly, and you
2 have about 20 or 25 minutes, to see where you can break
3 easily?
4 MR ANWAY: Happy to get started.
5 THE PRESIDENT: Good. Please, Mr Anway.
6 MR ANWAY: I understand they're attempting to upload the
7 PowerPoint right now but they're having some technology
8 issues.
9 MR PILAWA: We have a PowerPoint. Our system at Squire
10 Patton Boggs is having an issue, so I'm just going to
11 try to upload it to Box right now so that everyone can
12 access it.
13 THE PRESIDENT: Yes, you can share it, that's fine. We can
14 check it out later on.
15 MR PILAWA: Okay, that's fine.
16 (Pause)
17 We're trying to share it via Zoom, if someone can
18 let Christina Luo to access the Zoom link so that she
19 can share her screen.
20 THE PRESIDENT: Whoever is the Zoom host should give rights.
21 (Pause)
22 I think you can start.
23 (12.35 pm)
24 Opening statement on behalf of the Respondent
25 MR ANWAY: Thank you, Madam President, and distinguished

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12:35 1 members of the Tribunal. I'd like to begin by thanking
2 you on behalf of the Slovak Republic for the careful
3 attention that you have paid to this important case.
4 Our presentation today will be divided into five
5 parts. I will begin with the facts, then Mr Pekar will
6 cover jurisdiction and breach, and finally Mr Pilawa
7 will address causation and damages.
8 I first turn to the facts, and let me just make one
9 preliminary remark, if we could go back a slide, please.
10 Discovery's presentation today was noteworthy less
11 for what it did say and more for what it did not say.
12 Most of the significant problems with Discovery's claim
13 were not even addressed this morning. The strategy
14 appears to simply be to ignore key facts. I'm going to
15 walk you through them during our presentation today and
16 I apologise, members of the Tribunal, you will tire how
17 many times I say "We heard nothing about that this
18 morning".
19 Let's start with who Discovery is. (Slide 4)
20 This is Discovery's headquarters, in a small town of
21 Forney, Texas. Discovery purchased AOG in 2014 for no
22 more than €153,000. Shortly after doing so, it engaged
23 a broker to search for funders. It needed initially
24 15-30 million for the project, something it never came
25 remotely close to achieving.

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12:37 1 Now, you were told this morning it wasn't true that
 2 they had problems finding investors. In fact, the
 3 investment environment, and technical merits of the
 4 project were the primary reason why every single
 5 investor it approached, save one, turned Discovery down.
 6 Mr Lewis, the CEO of Discovery, and a witness in
 7 this arbitration, explains that:
 8 "Early potential investors were pulling out of the
 9 deal because of the collapse in oil prices that occurred
 10 in July 2014."
 11 (Slide 7) But it wasn't just the price of oil that
 12 gave investors pause, although to be sure that was part
 13 of it. The technical merits of the licence areas were
 14 also a road block. On this slide, slide 7, you will see
 15 a reputable company refusing to invest in the project
 16 because its Slovak geologists found "the chance of
 17 success [to be] a major problem".
 18 This is in 11 December 2014, well before there's any
 19 allegation of improper state conduct.
 20 (Slide 8) And an independent report that Discovery
 21 had procured for investors showed that the financial
 22 commitments that Discovery was seeking were not
 23 justified compared to the quantity of oil and gas
 24 contained in the licence areas, as shown on this slide.
 25 Put another way, the economic upside of the project was

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12:40 1 (Slide 11) As you heard, there are three drilling
 2 locations at issue: Smilno, Krivá Ol'ka, and Ruská
 3 Poruba. I will address the facts with respect to each
 4 of these sites in turn.
 5 First, Smilno. (Slide 12) This is an aerial picture
 6 of the Smilno village and surrounding countryside where
 7 Discovery decided to drill. It selected a private plot
 8 of agricultural land, which is indicated in orange on
 9 this picture. We call the orange area the drilling
 10 site.
 11 Now, AOG signed a lease with the owner of this plot
 12 to use it for exploration. But it did not conclude
 13 a lease for the lands that lead to the drilling site,
 14 which we call the access land. The access land is
 15 private property, co-owned by private citizens.
 16 Members of the Tribunal, you asked questions this
 17 morning about the due diligence that was done, about the
 18 status of that access land. One of them may have been
 19 to check the public register. What you see on slide 13
 20 is the title deed for the property that shows it is
 21 private property. This document is publicly available
 22 and would be part of any elementary due diligence
 23 process.
 24 The private citizens use the land to access their
 25 surrounding agricultural fields. They also, the owners

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12:38 1 seriously exaggerated.
 2 (Slide 9) Indeed, from July 2014, when it first
 3 engaged that broker to find a funder, until
 4 October 2015, more than a year, AOG searched for
 5 external financing, but no one would invest in the
 6 project. And, again, that's before there's any alleged
 7 improper conduct by the state.
 8 It was not until October 2015 that AOG found
 9 an external financier, Akard. But the problems between
 10 AOG and Akard started immediately. As shown on this
 11 slide, within days of signing the funding agreement with
 12 Akard, Akard was refusing to even return AOG's calls
 13 (Slide 10).
 14 Ultimately, you will hear later that the
 15 relationship between AOG and Akard deteriorated so
 16 significantly that the money stopped flowing, AOG
 17 alleged notice of default, and Akard threatened internal
 18 investigations for possible violations of the Foreign
 19 Corrupt Practices Act. I'll show you that document
 20 later today. Akard was the single and only source of
 21 external financing that AOG was ever able to secure.
 22 And much more on that later.
 23 Now, AOG signed its agreement with Akard
 24 in October 2015, and putting these financing issues
 25 aside, that's really where our story begins.

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12:42 1 of this plot, do not object if villagers using this
 2 access land use it to connect, for example, to the
 3 forest for recreational use.
 4 The only mechanism for the general public to have
 5 a legal right to use private land would be by statute.
 6 For example --
 7 PROFESSOR SANDS: Sorry, can I just ask, what land precisely
 8 does this relate to? We don't have a map and so we're
 9 in foggy-foggy land about what part of land you're
 10 talking about. Secondly, this is dated 21 March 2023,
 11 and so might indicate the status as of that date, but
 12 leaves open the question of what the status was in 2014
 13 or 2015.
 14 MR ANWAY: With respect to the second question, there's no
 15 dispute that this property was owned by these same
 16 individuals back at the time in question. That, to my
 17 knowledge, has never been challenged, and of course the
 18 reason we weren't able to pull the deed from back years
 19 ago is we weren't aware there was going to be a claim,
 20 and these allegations had never been made.
 21 With respect to the map itself ...
 22 THE PRESIDENT: I'm sure there's a map with the road.
 23 MR ANWAY: Do we want to pull up the aerial shot?
 24 MS PROKOPOVÁ: Yes, the map is in the record and of course
 25 this title deed relates to the plot of land which we use

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12:43 1 and define in the arbitration as the access land.
2 THE PRESIDENT: But can you show us on this map what is the
3 access land exactly?
4 PROFESSOR SANDS: That relates to that particular deed?
5 MS PROKOPOVÁ: Exactly.
6 MR ANWAY: Tatiana, I think they're asking if you can ...
7 We have a map that actually shows what area is the
8 access land. We're looking for it right now.
9 THE PRESIDENT: I'm sure there is one, yes. But we can do
10 this later. Yes, why don't you carry on.
11 MR DRYMER: In any event, just looking at this photo for the
12 sake of the record, am I correct to understand that
13 you're referring to the land on which the white road or
14 track is situated between the drilling site and the
15 village, sort of in the upper left corner?
16 MR ANWAY: That's correct.
17 MR DRYMER: That's what you mean by the access land, whether
18 it's under one deed or several deeds.
19 MR ANWAY: It's one deed. And to be clear it is undisputed,
20 I believe --
21 MR DRYMER: Yes.
22 MR ANWAY: -- that the alleged road, what we call the field
23 track, which I'll come to in a moment, was on the access
24 land.
25 As I was saying, the only mechanism for the general

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12:46 1 you a picture of that alleged public road before AOG
2 accessed it, and you see it on slide 16.
3 This is the alleged "public road". The picture was
4 taken in August 2014, just before AOG arrived into town.
5 You can see it is a grassy land. And to your question,
6 Professor Sands, it is undisputed that the title deed
7 I showed you a few slides earlier covers this land.
8 This picture of this field track is part of the land
9 that is subject to that private deed.
10 You can see there is no road body whatsoever.
11 Now, I want to be clear, members of the Tribunal,
12 this is Discovery's document. They took this picture.
13 Now, you were shown aerial pictures today, you've
14 been shown other pictures of the road where it looks
15 like there's lots of gravel, and you may be wondering
16 what's the difference. As you will soon hear, AOG
17 unlawfully went onto the property and upgraded it. And
18 so every time you're shown a picture of the alleged
19 public road, please be careful and ask: what date was
20 that taken? Was it before AOG went onto the property
21 and unlawfully upgraded the road, or [after]? This is
22 AOG's -- I'm sorry, this is -- yes, AOG's own picture,
23 Discovery's own picture, taken in August 2014.
24 MR DRYMER: Am I correct to understand that we'd need to ask
25 when was the photo taken, in other words before or after

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12:45 1 public to have a legal right to use private land would
2 be by statute. For example, the Slovak law provides for
3 forests, even if privately owned, to be available for
4 appropriate public use. And, similarly, the Slovak Road
5 Act provides that surface communications -- and that's
6 a keyword here, surface communications -- which includes
7 highways, state roads, municipal roads, and special
8 purpose roads, are available for general use. But they
9 can only be used in accordance with their technical
10 condition and purpose.
11 Now, the Slovak Roads Act provides that a surface
12 communication must be designed according to technical
13 norms, must be issued a building permit, and must
14 comprise a so-called road body. And the courts have so
15 held -- and I'll take you to the statute that actually
16 provides for that as well, but this is one decision from
17 a court decision that has made that finding (Slide 14).
18 And on the next slide (15) you'll also see that the
19 Slovak Ministry of Transportation has also explained
20 that placing gravel or other stone material on a grassy
21 land or track does not automatically transform it into
22 a public road.
23 Now, as you know, in this arbitration, AOG says that
24 on the privately owned access land there was a public
25 road that connected to the drill site. I want to show

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12:48 1 these improvements, but also where it was taken? Are we
2 to --
3 MR ANWAY: This is one part of the road that goes on for ...
4 MR DRYMER: But does it look like tyre tracks on grass the
5 entire way to the village?
6 MR ANWAY: I think there are other points of the field track
7 where it looks like it's a little more worn, but
8 certainly there is no road body at any point in time.
9 MR DRYMER: Very good. No road body at any point on that
10 track.
11 MR ANWAY: Exactly.
12 MR DRYMER: Between the village and the drill site.
13 MR ANWAY: Exactly.
14 MR DRYMER: Thank you.
15 MR ANWAY: As this picture shows, there was no "public road"
16 when AOG arrived. It's what we call a field track, and
17 as you can see, barely one, at that.
18 Now, you heard this morning that Discovery argues
19 this is a particular type of public road called a public
20 special purpose road, what we call a PSPR. I want to be
21 clear from the beginning: a field track is not a PSPR.
22 Now, if we go to the next slide (17), you'll see,
23 and I'll come to the actual statute that was cited this
24 morning in just a moment, but you'll see guidelines
25 issued by the presidium of the police forces of the

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12:50 1 Slovak Republic dated 3 May 2010, well before AOG was
2 trying to access the site. And this was shared with the
3 regional traffic inspectorates around the country, and
4 it says, and I quote:
5 "... a field track or a forest road cannot be
6 specified as a [PSPR] under the [Slovak] Road Act ..."
7 Well before AOG was ever involved.
8 (Slide 18) Now, if we go to the next slide,
9 Article 29(3) provides that AOG had to obtain landowner
10 permission, and to notify the landowner before
11 commencing works.
12 And now I come to the statute that was cited today
13 (Slide 19), Article 22 of the Road Act. This is a slide
14 from the opening statement that was presented to you
15 this morning.
16 There has been some confusion. Article 22(3)
17 provides that a special purpose road may be public or
18 non-public. Non-public would mean enclosed areas. Let
19 me give you an example: if you have a manufacturing
20 plant, one where the manufacturing plant has a road in
21 it which is technically designed to be a road, it has
22 a road body, it was issued a permit for the building of
23 that road, but it's closed in the manufacturing site and
24 used by the people at the manufacturing facility. That
25 would be an example of a non-public special purpose

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12:51 1 road.
2 But that at all does not rebut Slovakia's position
3 that not all tracks equal a PSPR. And here's why, and
4 this is what was missed this morning: Article 22(3)
5 applies only to special purpose communications. That is
6 to say, it needs to be a road body to even fall under
7 Article 22. The track in Smilno is not a special
8 purpose road at all, public or private. It's private
9 land.
10 The reason why it is not a special purpose road is
11 Article 1(3) of the Road Act, and I want to go to it
12 now: (Slide 20)
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 so on.
17 In other words, Article 22 only applies if it's
18 a surface communication in the first place, and because
19 there's no road body and because there was no permit
20 granted for the building of a road, this is neither
21 a public special purpose road nor a private one: it is
22 a private field track.
23 And even if AOG didn't know it had the requirement
24 to notify and obtain consent from the landowners when
25 entering onto their private property, the Ministry of

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12:53 1 Environment put AOG on express notice of this provision
2 in 2010 when it specifically told AOG it must comply
3 with Article 29 "when entering land plots" (Slide 22).
4 Members of the Tribunal, AOG never obtained the
5 landowner's permission to use the access land. Instead,
6 in its first attempt to access the drilling site,
7 in December 2015, it simply rolled into Smilno,
8 unannounced, without ever asking or even notifying the
9 local inhabitants whether it could roll its heavy
10 machinery and excavators onto its lands. And this is
11 the first of many legal mistakes that AOG made under
12 Slovak law.
13 Now, during my presentation today, I'm going to walk
14 you through a long list of legal mistakes that AOG made
15 under Slovak law, and to make sure we categorise them
16 all, we're going to have a running slide (Slide 23),
17 where we add to it each mistake that AOG makes as our
18 chronology proceeds. This is the first mistake.
19 AOG never obtained landowner permission to use the
20 access land as required by Article 29(3) of the Geology
21 Act.
22 (Slide 24) Indeed, AOG's CFO, Mr Fraser, a witness
23 in this arbitration and here with us today, admits that
24 on 6 December 2015, AOG's contractors arrived at Smilno
25 with equipment and started levelling the area, without

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12:55 1 even giving notice, much less asking permission.
2 Now, as the Tribunal knows, we have put into
3 evidence witness statements from two local citizens. We
4 are not here representing them. We are not their
5 lawyers. Their conduct is private conduct and not
6 attributable to the state. And we are here only
7 representing the state. But we nevertheless put their
8 testimony into the record so the Tribunal can hear
9 first-hand from the local citizens about what really
10 happened.
11 One of those local citizens is Ms Varjanová. She
12 testifies, now on slide 25:
13 "... excavators and heavy machinery started to
14 arrive to Smilno and AOG brought cabins for workers.
15 AOG used the Land to access the drilling location.
16 Despite the Land being privately-owned, nobody informed
17 me and sought my permission to use it."
18 (Slide 26) Another local citizen who is a witness in
19 this arbitration, Mr Leško, testifies, and I quote:
20 "... AOG and its representatives acted very
21 arrogantly towards local inhabitants. My perception is
22 that they did not consider local inhabitants as partners
23 or even affected parties who have a compelling interest
24 in activities being performed behind their houses and on
25 their lands."

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12:56 1 (Slide 27) And Mr Leško goes on to explain why the
2 local citizens were so concerned, not simply because an
3 oil company was accessing their land unlawfully, but
4 that public information stated that those affiliated
5 with the company had a history of controversial and
6 environmentally damaging methods of oil and gas
7 extraction, such as, and I quote, "shale gas, fracking,
8 and dangerous chemicals".
9 Members of the Tribunal, this was not the local
10 citizens' paranoia. Mr Lewis himself in this
11 arbitration admits that he established his reputation in
12 the industry through "fracking" and horizontal wells.
13 The local citizens' concerns were understandable.
14 What did they do? They sought to protect their
15 rights and give notice of their objection.
16 (Slide 29) Ms Varjanová, not a state actor but
17 a private citizen, testifies that she:
18 "... took plastic poles and a string with signaling
19 flags which we use in our ski resort, implanted them in
20 the ground and hung on them a sign reading 'private
21 property'. I thought it was important that as the
22 landowners, we made ourselves visible."
23 What was AOG's response? Did it seek to engage with
24 the local community and understand their concerns? No,
25 it simply removed the string and continued using the

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12:57 1 land anyway.
2 (Slide 30) So on 14 December 2015 --
3 THE PRESIDENT: I hate to interrupt you, but I see time is
4 passing.
5 MR ANWAY: Sure.
6 THE PRESIDENT: When is a good time to stop because
7 Professor Sands will need to leave.
8 MR ANWAY: Let me just take 30 seconds?
9 THE PRESIDENT: Yes, that's fine.
10 MR ANWAY: It simply removed the string and continued to use
11 the property anyway, and so, on 14 December 2015,
12 Ms Varjanová parked her car across the field track
13 entrance, blocking access to the land.
14 (Slide 31) And, as Ms Varjanová testified, she left
15 her phone number visible in the vehicle so that AOG
16 would call her. But AOG never bothered calling her.
17 (Slide 32) What did it do instead? Two days later,
18 on 17 December, it purported to purchase a 1/700th
19 interest in the access land from one of the
20 shareholders. The price? €100.
21 Now, I ask you to pause there and think about what
22 that means, just before we take this break. This is
23 a recognition by AOG that this was private land. If the
24 field track was a public road, specifically a PSPR, as
25 Discovery now claims, there was no need for AOG to buy

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12:59 1 a share in the land. The field track would be public.
2 Indeed, as you'll soon see, the PSPR theory was
3 a belated afterthought, when other theories had failed.
4 AOG never claimed that the field track was a PSPR
5 until much, much later (Slide 33).
6 I'll pick up, members of the Tribunal, after lunch
7 with that 1/700th interest and what happens next.
8 THE PRESIDENT: Thank you for stopping now. We can resume
9 at -- is 2.15 the right time? Good. Then have a good
10 lunch, everyone.
11 (1.00 pm)
12 (Adjourned until 2.15 pm)
13 (2.16 pm)
14 THE PRESIDENT: Good. I hope everyone had a good lunch, and
15 we're ready to resume.
16 Mr Anway, you have the floor again.
17 MR ANWAY: Thank you, Madam President.
18 Before I get started on the timeline again, I'd like
19 to first address a number of questions from the Tribunal
20 that came out this morning.
21 The first matter I would like to address was
22 a question from Professor Sands about the date of the
23 title deed that we had put forward. It has come to our
24 attention that there is, in fact, an earlier title deed
25 in the record, and I wanted to call your attention to

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14:17 1 it. In fact, we have up on the screen paragraph 83 from
2 Discovery's Memorial, where they state, and I quote:
3 "The road is situated on a plot of land which is
4 registered on Slovakia's land registry [then gives the
5 number] (which is co-owned by 166 individuals
6 landowners)."
7 Then if you scroll down to footnote 101 you will see
8 they cite Exhibits C-139 and C-140, and we have up on
9 your screen now C-140, which is the title deed for the
10 same property, but this time dated June 20, 2016. And
11 it's the same co-owners.
12 The second question I wanted to address was,
13 I think, in response to multiple questions from the
14 Tribunal, which is to understand exactly what land is
15 the access land and we wanted to show you. We finally
16 found the map that displays it most clearly. We're
17 going to put that up right now at C-227. This is
18 Claimant's exhibit.
19 Let me just spend a moment trying to lay some
20 groundwork for this satellite image. In the lower
21 right-hand corner you can see what is the forest, or at
22 least the beginnings of the forest, and in the upper
23 left-hand corner you can see the village. Those light
24 green lines that run perpendicular to the field track
25 are individual plots of land, and so down each lane, if

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14:18 1 you will, is each one of the property owner's parcel of
2 land. That land is not co-owned; it's owned by the
3 individuals, or the particular individual that owns that
4 lane. It's the field track which was created so that
5 they could access their individual lanes that is
6 co-owned by everyone.
7 And so the deed that I showed you this morning, and
8 the deed that I just showed you from 2016, covers the
9 field track. That is what is co-owned by all of the
10 different landowners.
11 MR DRYMER: The landowners whose properties abut the track,
12 I guess.
13 MR ANWAY: And the track's precise purpose for being created
14 in the first place was so that these people could get to
15 their individual lanes; that's how they accessed, as
16 I said at the very beginning, their agricultural land.
17 Okay, with that I think I will go back to the
18 timeline now. And where I left off was Ms Varjanová.
19 (Slide 34) Now, I had just explained prior to us
20 adjourning for lunch that AOG purchased a 1/700th
21 interest in the access land that I just showed you.
22 Now, I could be mistaken, members of the Tribunal,
23 but this will be the first time I'll say it, and I will
24 be corrected if I'm wrong, I didn't hear anything about
25 the 1/700th purchase this morning. You might ask why.

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14:20 1 It's because it's inconsistent with the theory that
2 the road is public, as I noted before lunch. That whole
3 theory is inconsistent with the idea that AOG would have
4 to purchase a parcel of land because if it really were
5 a PSPR it would have been open to the public. And we
6 submit that is why you heard nothing about this purchase
7 of a 1/700th interest this morning.
8 But in attempting to purchase that 1/700th interest
9 in the land, AOG made another mistake (Slide 35), now
10 its second. Because under Article 140, if we go back to
11 the prior slide (34) -- maybe it's the slide in front of
12 it. But if you go to Article 140 of the Slovak Civil
13 Code it states that if there's a co-ownership share in
14 the private property and it's to be transferred, the
15 co-owner shall have a right of preemption. It's
16 basically a right of first refusal.
17 But, as Ms Varjanová testifies -- and the statute is
18 on slide 33 -- and Ms Varjanová testifies (Slide 34):
19 "... AOG, the seller was obliged to inform all
20 co-owners and offer them the opportunity to acquire the
21 ownership share. This did not happen."
22 Now, on 30 December 2015, AOG writes Ms Varjanová,
23 telling her to stop blocking access to the site with her
24 car (Slide 36), and now alleges to her -- wrongly,
25 because it did not respect the preemption right -- that

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14:22 1 it is now a co-owner of the access land. The sole basis
2 for this assertion is its purported purchase of the
3 1/700th share. The PSPR theory is not even mentioned.
4 But Ms Varjanová knew her statutory right of first
5 refusal was not respected, and she did not move her car.
6 I want to pause here and address a comment that was
7 made this morning by counsel for Discovery, which was
8 that Ms Varjanová was the only landowner that ever
9 protest.
10 I direct your attention to Exhibit LF-17, we'll pull
11 it up on the screen. This is AOG's own appeal -- it's
12 their document -- in a court proceeding that I'll
13 describe in a moment. And if we scroll down you will
14 see -- and this is one of many documents that stand for
15 this proposition, but just to cite you one, AOG itself
16 said:
17 "Documents submitted by the Claimant [that's
18 Ms Varjanová] showing consent of 10-15 co-owners to the
19 blocking of access to the land ..."
20 It is not true, members of the Tribunal, that she
21 was the only co-owner that protested, and you'll see
22 much more evidence of that later.
23 So she does not move her car, and when AOG returns
24 to Smilno in January 2016, Ms Varjanová's car is still
25 blocking her land, and now it is chained to the ground.

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14:24 1 Now, please notice, members of the Tribunal, there
2 is no state activity about which AOG or Discovery
3 complains at this point. This is a purely private
4 dispute between entities that claim ownership of the
5 same private property.
6 With the car still blocking access to the field
7 road, AOG calls the police. (Slide 37) this is
8 explained by Mr Lewis in his witness statement,
9 an excerpt of which is now on your screen. What did the
10 police do? They came and listened to both sides.
11 Again, recall that this time AOG is not alleging that
12 the road is public. Its argument is that it has
13 a private ownership interest because it bought 1/700th
14 of a share in the land. In other words, at this point
15 in time, everyone is conducting themselves as if this is
16 private property. And one party is telling the police:
17 I'm a co-owner of this private land. And the other is
18 saying: no, you're not.
19 Members of the Tribunal, that is a textbook, classic
20 example of a private civil dispute.
21 So what did the police do that we're told breached
22 public international law? (Slide 38) It is said
23 because this is a private civil dispute that the
24 competent authority to decide the matter is not the
25 police but the Slovak civil court. To quote the police,

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14:25 1 now up on slide 38:
 2 "Only the relevant court is competent to resolve the
 3 property relationship and to decide on legitimacy of
 4 entitlements of the specific persons to the specific
 5 parcels of land."
 6 That is absolutely correct. The police did exactly
 7 what they were supposed to do.
 8 This is the first instance of state action about
 9 which Discovery complains (Slide 39). Now, because
 10 there's private conduct here and public conduct here,
 11 we're going to start a running slide of all the acts by
 12 the state about which AOG complains, and this is the
 13 first.
 14 The police determined that the issues on the field
 15 track were a private dispute and "Only the relevant
 16 court is competent to resolve the property
 17 relationship". This, we're told, is a violation of
 18 public international law.
 19 As we add to this slide throughout the presentation,
 20 I would ask you to keep asking that same question: where
 21 is the breach?
 22 MR DRYMER: Well, the other side has put a page that shows
 23 14 specific measures. Does your list overlap with
 24 theirs?
 25 MR ANWAY: It does.

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14:26 1 MR DRYMER: Very good.
 2 MR ANWAY: My list will contain 10 --
 3 MR DRYMER: You'll describe the measures differently,
 4 I'm sure.
 5 MR ANWAY: Indeed.
 6 MR DRYMER: For you they're actions, for them they're
 7 impugned measures, but they do overlap.
 8 MR ANWAY: Yes. I will have 10 ultimate actions here,
 9 Mr Pekar will take on the additional ones, but in any
 10 event, I will cover all of the 14.
 11 MR DRYMER: Thank you.
 12 MR ANWAY: What does AOG do next? Does it pick up the phone
 13 and call Ms Varjanová to have a discussion? Does it
 14 file a civil action, which is the way private property
 15 disputes should be resolved? It does neither.
 16 Instead, on 14 January, AOG uses a forklift to
 17 physically pick up Ms Varjanová's car, damaging it in
 18 the process, and moving it from one portion of her land
 19 to another (Slide 40).
 20 Please pause here and notice, AOG did this while
 21 they were unlawfully on land she co-owned. And as
 22 Mr Fraser testifies, on 16 January they do it again.
 23 And then we get to one of the very interesting documents
 24 that was produced in document production by Discovery
 25 (Slide 41).

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14:28 1 On 20 January 2016, right around the same time, AOG
 2 issues a report to its JV partner. This paragraph
 3 discusses the issue of the field track and access to it,
 4 and it notes Ms Varjanová:
 5 "... keeps chaining her car to the ground to
 6 block... access ..."
 7 And then it admits, and I quote, Ms Varjanová "has
 8 [the] legal right to park her car" where she did, on the
 9 field track. This is a recognition that AOG knew at the
 10 time that it was improper to be forcibly moving her car.
 11 I would note one other thing about this document.
 12 Look at the redaction. Read it in context. It looks
 13 quite critical. Their inference is that it may relate
 14 to the prior sentence, but we don't know what it says.
 15 In any event, on 19 January 2016, Ms Varjanová
 16 brings an action in the district court, claiming that
 17 AOG's 1/700th share purchase breached her preemption
 18 right.
 19 I want to pause here, members of the Tribunal, and
 20 tell you that today AOG and Discovery admit that they
 21 breached her preemption right. It is undisputed. It is
 22 common ground. We'll come back to that court action in
 23 a minute because it becomes crucially important for the
 24 rest of the chronology.
 25 Four days later, on 23 January 2016, AOG comes back

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14:29 1 to the site and it is again blocked by Ms Varjanová's
 2 car, which is chained to the ground. What does it do
 3 this time? Not only does it again forcibly move the car
 4 out of the way; it barricades the car with cement blocks
 5 all around it so she can't move it back.
 6 And here, on slide 43, is a picture of AOG doing
 7 this. All this on land that AOG did not properly have
 8 an interest in, an ownership interest in, because we
 9 know they violated the preemption right, and that
 10 Ms Varjanová co-owns.
 11 Mr Fraser admits that AOG did this (Slide 44). And
 12 it's not, as I noted earlier, just Ms Varjanová and
 13 Mr Leško who protest AOG's actions. It was other
 14 concerned local citizens, and Mr Fraser himself admits
 15 this. He says on 25 January 2016 other cars blocked the
 16 road, other activists appeared. This was not a single
 17 local citizen objecting to AOG's actions.
 18 (Slide 46) Another example to what I just showed you
 19 before, and we will see more throughout this week,
 20 a petition to the municipality was signed by more than
 21 300 local citizens objecting to AOG's activities.
 22 That's more than half of the population of the city.
 23 This was signed a year prior to the events
 24 I'm describing but the opposition continued.
 25 On 3 February 2016, AOG contacts the Smilno

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14:31 1 municipality (Slide 47) and requested the police remove
2 another car that was on a public road, which was
3 blocking access to the field track.
4 Now, this is very different than where Ms Varjanová
5 parked her car. She parked her car on the field track,
6 which she is a co-owner of. In this instance, by
7 contrast, the car about which AOG was complaining was on
8 the public road that led to the field track. What did
9 the municipality do? Well, because the car was parked
10 on a public road rather than the field track, the
11 municipality ordered its removal, and on
12 9 February 2016, the municipality responded to AOG
13 stating that the car had been removed, and you can see
14 that on slide 48.
15 Please notice what's going on. The municipality is
16 distinguishing between public property and private
17 property. Between a public road and a field track.
18 Exactly as it should be doing.
19 And so this is our second instance of state action:
20 the police helped AOG by removing a car when it was
21 parked on a public road as opposed to a field track.
22 Now, what happens next sets the stage for the rest
23 of this dispute. (Slide 50) on 8 February 2016, the
24 Slovak District Court issues an interim injunction, as
25 requested by Ms Varjanová. Here is the operative part

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14:33 1 of the injunction on slide 50.
2 As you will see, there are two actions that the
3 injunction prohibits AOG from doing. First, it
4 prohibits AOG from accessing the access land -- that is
5 the field track -- and second, it prohibits AOG from
6 removing "things placed by the plaintiff on the
7 property", obviously in reference to her car.
8 The court states that the injunction, at the bottom
9 of the screen, will remain in effect until the case is
10 decided on the merits.
11 On the next slide (51) you will see the court's
12 reasoning. And it's important, I think, to read the
13 quote:
14 "... before the resolution of the question of the
15 ownership right to the real property of the first
16 defendant [the first defendant is AOG] on the basis of
17 the ... purchase contract [that's the 1/700th
18 purchase]... the relations between the parties to the
19 proceedings are temporarily adjusted in order to prevent
20 possible damage to the applicant [that's Ms Varjanová]
21 consisting in damage to her entrusted property, or her
22 rights arising from joint ownership."
23 Then skipping down:
24 "All the more that it is inadmissible for one of the
25 co-owners to interfere with the rights of other

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14:34 1 co-owners, or to damage the rights or things belonging
2 to the other co-owners without a legal reason and to use
3 the self-help institute in such a way ..."
4 Moreover, and this becomes crucially important later
5 (Slide 52), the court made clear that the injunction not
6 only applied to AOG, but to third parties also
7 authorised by AOG. And let me read you this quote. It
8 says:
9 "In the statement of the law ..."
10 Which I'm told in Slovak means the operative part of
11 this decision:
12 "... the court did not state that the ban on
13 removing things applies to [AOG] and third parties, as
14 this follows from the very essence of the imposition of
15 the obligation to 'refrain' from using the property and
16 removing things from it."
17 And then it makes unmistakably clear, and this is
18 the key language:
19 "This obligation is directed both to [AOG], as well
20 as to persons authorised by him ..."
21 What does this mean? I, the judge, didn't state in
22 the operative part that the injunction also applies to
23 third parties directed by AOG in addition to AOG itself,
24 but the order does apply to them, and the reason
25 I didn't include it in the operative part is because

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14:35 1 it's so obvious. It is, to use the court's language,
2 "from the very essence of the ... obligation to
3 'refrain' from [interfering with] property".
4 Members of the Tribunal, you will see why this is so
5 important in a moment.
6 Now, Discovery tells you that the entering of this
7 injunction is a violation of public international law,
8 but let me remind you that they now admit they violated
9 her preemption right.
10 (Slide 53) We now have our third instance of state
11 conduct: the trial court grants an injunction to
12 a private citizen on the basis that AOG's purchase of
13 a share breached her preemption right, which AOG now
14 admits is true: they did breach it (Slide 54).
15 I ask you, do you see any violation of public
16 international law?
17 (Slide 55) On 2 March 2016, AOG appeals the interim
18 injunction. And what AOG argues in this appeal,
19 represented by outside counsel, is very important. It
20 does not argue that the injunction was incorrect because
21 the field track is a public road, a PSPR, everyone has
22 access to it. Instead, it argues it's a co-owner; in
23 other words their theory for use of the field track is
24 that it's private, not public land. Again, you heard
25 nothing about that this morning.

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14:37 1 (Slide 56) So if we add to our slide of legal
2 mistakes that AOG made, we now have our third. If AOG
3 genuinely believed that the field track was a PSPR, what
4 conceivable basis would there be for its failure to
5 raise the argument to the Slovak court in its appeal of
6 the interim injunction?
7 And this means, because the Court of Appeals affirms
8 the trial court's injunction, that the injunction stays
9 in place (Slide 57).
10 But look what the Court of Appeals stated:
11 "Defendant 1 [that's AOG] could have been well aware
12 that purchase of a minuscule co-ownership interest
13 without respecting the preemption right is very close to
14 violation of ownership rights. It is evident that
15 business activities of [AOG] were based, from the very
16 beginning on mala fide manner of communication with
17 owners of the affected land. From such a point of view,
18 the conduct of [AOG] lacks any bona fide trait."
19 I would respectfully submit, members of the
20 Tribunal, that is not a surprising conclusion from the
21 court, given that Article 29 of the Geology Act clearly
22 required AOG to give notice and obtain consent before
23 entering someone else's land, much less picking up and
24 in the process damaging their property.
25 (Slide 58) So this is the fourth instance of state

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14:38 1 conduct: the Court of Appeals has affirmed the trial
2 court's injunction because, as AOG later admitted, it
3 violated Ms Varjanová's preemption right.
4 (Slide 59) You will now see, Tribunal members, that
5 AOG's mala fide conduct continued and, indeed, permeated
6 its activities for the next year. Immediately after the
7 Court of Appeals' decision, AOG creates a shell company
8 for the sole purpose of circumventing the court-issued
9 injunction. And Mr Fraser admits it. He states in his
10 witness statement, now up on slide 59:
11 "Following the rejection of AOG's appeal against the
12 interim injunction ..."
13 AOG forms a new company. This new company is called
14 Cesty Smilno. The name translates into "Smilno Roads",
15 which makes it sound like it's a municipal entity that
16 takes care of the roads, and I will be referring to it
17 by its English name, Smilno Roads, and what I'm about to
18 describe is AOG's Smilno Road scheme.
19 Using this new shell company, AOG convinces
20 a landowner to contribute -- to contribute -- rather
21 than sell a share in the land plot as an in-kind capital
22 contribution to the newly established shell company.
23 There is no dispute that AOG was the controlling
24 shareholder of Smilno Roads. This was, without
25 exaggeration -- and it is effectively all but

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14:40 1 admitted -- an attempt to circumvent the court's
2 injunction that had been affirmed by the Court of
3 Appeals less than three weeks earlier. It's why
4 I showed you that the injunction was not just against
5 AOG: it specifically applied to third parties that AOG
6 may direct.
7 (Slide 60) I ask you again, members of the Tribunal:
8 did you hear anything about Smilno Roads and the shell
9 company this morning?
10 On 17 May 2016, AOG approaches the mayor, and it's
11 in this communication, for the very first time,
12 six months after it first tried to access the site and
13 after it had already made its arguments to the Court of
14 Appeals against the injunction, it now comes up with its
15 PSPR theory.
16 I'd like to pause here. The PSPR theory does not
17 work for two reasons: first, as we've explained, the
18 field track has no road body. It was not established
19 with a permit. It is not a PSPR. And, contrary to what
20 Claimant's counsel said this morning, these were not new
21 arguments in our Rejoinder. We went into more detail
22 about it based on the arguments we received in the
23 Reply. But we put it in an appendix because you,
24 members of the Tribunal, don't need to wade into the
25 granular details of why a field track is not a PSPR

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14:42 1 under the Slovak Road Act.
2 Because, even if it was a PSPR, and it is not, any
3 user must take the road as he finds it, consistent with
4 its existing condition and purpose.
5 (Slide 61) Article 6(1) of the Roads Act provides
6 this:
7 "Traffic on surface communications ..."
8 And again, this is not a surface communication, but
9 I'm assuming for the purposes of this argument it is:
10 "... everyone can use surface communication in the
11 usual way for the purposes for which they are
12 intended... The users must adapt to the construction
13 condition and traffic-technical condition of the
14 affected communication ..."
15 (Slide 62) Articles 16 and 22 of the Road Act also
16 state that a permit is required:
17 "The commencement of the construction of a highway,
18 road or local communication and their alterations shall
19 require a building permit ... by a special building
20 authority ..."
21 It's undisputed that AOG never received a permit.
22 And Article 22 provides on special purpose roads,
23 which again this is not, that in addition to the permit
24 they have to obtain permission for the construction of
25 the special purpose road. Next slide.

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14:43 1 (Slide 63) And if it was a surface communication, it
2 also must be made only after agreement with its owner,
3 and we'll come back to that point in a moment.
4 Now, on 18 May 2016, AOG's shell company, Smilno
5 Road, writes to a landowner (Slide 64), and it informs
6 it, and I quote, that:
7 "To ensure transportation to our site, our company
8 has therefore decided to use [Smilno Roads] that owns
9 a share in [the] plot ... and at the same time is able
10 to transport our materials and repair the road."
11 And it asks for the landowner's consent.
12 I would ask you to note three things about this
13 exhibit. First, if you notice the second highlight:
14 "Since the seller did not offer his/her share to
15 other co-owners (who have the preemption right), the
16 purchase contract will be probably annulled."
17 What does that mean? That means that AOG is
18 recognising the legitimacy of Ms Varjanová's preemption
19 right, that it didn't respect it, and that it will
20 therefore likely lose on the merits of the pending case
21 for which the injunction is in place.
22 Number two, AOG is openly stating in this letter
23 that it has created the new shell company for the
24 purpose of transporting AOG's materials to the drill
25 site. I don't know how to stress this enough: there is

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14:45 1 an injunction in place that prohibits precisely this
2 activity.
3 Third, notice that AOG and Smilno Roads are alter
4 egos in this letter. It's signed by Smilno Roads, but
5 look at the first sentence:
6 "We created Smilno Roads."
7 They are alter egos.
8 Alright, now let me take you back to when AOG sent
9 the letter to the mayor floating its PSPR theory for the
10 first time. What were they asking? They were asking
11 the mayor to confirm that the road is a PSPR.
12 (Slide 65) On June 6, 2016, the mayor responds, and
13 I want to be clear about this because this document has
14 been misconstrued. He declined to confirm that AOG's
15 new legal theory is correct, that the road is a PSPR.
16 Instead he calls it a field track, and then he describes
17 factually the historical uses of it. Yes, he says it's
18 publicly accessible, which means it's not fenced, there
19 are no signs staying "Stay off the property", "Private
20 property", at least before AOG came, and of course we
21 have all noted that the landowners did allow villagers
22 to use the land to access their agricultural plots and
23 to visit the forest. Not major commercial activities.
24 What AOG was seeking from the mayor was for him to
25 agree with the theory that the field track was the PSPR.

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14:46 1 That's the magic language from the statute and what they
2 asked for, and the mayor didn't give it to them.
3 (Slide 66) And so we have the mayor's response to
4 our state action slide.
5 (Slide 67) On 7-8 June 2016, AOG forges ahead with
6 the Smilno Road scheme, not only accessing the field
7 track; they're now upgrading it, in direct violation of
8 the interim injunction that prohibits them from even
9 accessing the property, and in direct violation of
10 statutes of owner consent, and, if it were a PSPR, for
11 the permit that would be required.
12 And AOG admits they paved the road while the
13 injunction was in effect. Here's Mr Fraser admitting:
14 "... we decided to upgrade the Road by laying some
15 more crushed stone along the length of it."
16 There is an injunction that prohibits them from even
17 accessing the site.
18 On slide 68 you can see the upgrade they did to the
19 road.
20 Now, at times, we're told this was mere maintenance,
21 so it's nothing. Mr Fraser himself calls it
22 an "upgrade", which indeed it was. And even if it were
23 just maintenance, owner consent is required. There is
24 an injunction in place. The 1/700th share purchase is
25 now the subject of that litigation. AOG has now

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14:48 1 attempted to circumvent the court's injunction by
2 establishing a shell company and directing it to do this
3 in direct violation of the court's order.
4 In fact, AOG actually moved the road at various
5 locations, physically altered its path, as we've shown
6 in our appendix to the Rejoinder. And the fact that the
7 field track could be moved -- and it sometimes does,
8 based on weather and pedestrian traffic -- shows it
9 doesn't have a stable body.
10 These pictures show a serious, flagrant violation of
11 the court-issued injunction.
12 Now, you may ask: well, how did AOG understand the
13 injunction? Well, Mr Fraser tells us. This is from his
14 witness statement, paragraph 44: (Slide 69)
15 "... [the] interim injunction against AOG ...
16 specifically prohibited AOG from accessing the plot ...
17 and from removing anything from the plot that had been
18 placed there by Ms Varjanová, pending a determination of
19 the validity of AOG's purchase of a share in the Road."
20 That's his understanding. And yet we see AOG now
21 openly violating the injunction. We heard nothing this
22 morning to excuse, or even attempt to explain away, this
23 flagrant violation of the injunction.
24 (Slide 70) What does Ms Varjanová say about the
25 shell company? She posts the next day on her website:

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14:49 1 "The Oil Guys Are Back.
2 The same people, the same intent, the same practices
3 disguised as a new limited liability company. [Smilno
4 Roads] in which [AOG] holds a majority share, has
5 resumed the works and has been paving the road in Smilno
6 from Tuesday despite the two-fold prohibition from the
7 court."
8 (Slide 71) Then we get to 14 June 2016. What
9 happens on that date? An email is sent to Mr Fraser
10 stating that Discovery is plotting to bring an
11 arbitration against the Slovak Republic. Discovery
12 asked White & Case to estimate the cost of doing so, but
13 White & Case wasn't interested.
14 I ask you, members of the Tribunal, recall where we
15 are in the timeline (Slide 72). We are in June 2016.
16 Please ask yourself: what on earth would the claim have
17 been? Look at the state action that's occurred up to
18 this point in time. Not only is there nothing that
19 would come remotely close to a breach of public
20 international law; there's nothing improper at all.
21 On 16 June 2016, AOG makes its second attempt to
22 access the site using Smilno, despite the injunction
23 prohibiting them from doing so (Slide 73), and again
24 they move her car. Ms Varjanová drives her car back to
25 block AOG's access, and a second car joins her.

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14:51 1 But something else happens that day (Slide 74), and
2 I want to quote this very carefully from Mr Fraser's
3 witness statement:
4 "... Mrs Varjanová's boyfriend drove his car into
5 our Chief Operating Officer, Ron Crow, from behind,
6 causing him to fall over and suffer bruising and some
7 cuts. He was taken to the local hospital where his leg
8 was put in a cast. Afterwards we pressed the Police to
9 bring a charge for assault but they did not do [so]."
10 Let's park for a moment why someone needs a cast for
11 "bruising and some cuts". Mr Fraser attached this
12 picture of Mr Crow to his witness statement, and I'd ask
13 you to note three things: number one, that AOG says this
14 supposed incident took place on 16 June 2016; number
15 two, I would ask you to observe that Mr Crow is wearing
16 a light blue, short-sleeved shirt; and number three, I'd
17 ask you to notice that Mr Crow is wearing dark blue
18 pants. Just keep that in mind.
19 (Slide 76) Because we now know that Mr Crow faked
20 his injury. Thankfully, one of the activists was
21 videotaping the event. That video was on this slide,
22 and let's watch it. (Slide 77).
23 (Video played)
24 What does this show? That Mr Crow, on 16 June 2016,
25 that same day he was supposedly hit by the car, is

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14:53 1 wearing the same short-sleeved blue shirt, the same dark
2 blue pants, and pretending to have the same left leg
3 that he had a cast on in the picture before injured,
4 smiling and mocking the protesters.
5 Mr Crow faked his injury, and according to Mr Fraser
6 and his testimony in this arbitration, AOG attempted to
7 press the police to arrest someone on these false
8 charges; to arrest one of the local inhabitants for
9 a crime they never committed.
10 I just want to point out, as an aside, this video is
11 taken after they did the upgrades to the road, which is
12 why the road looks so different from the picture
13 I showed you at the beginning. But obviously that's not
14 the key point here.
15 We pointed out that Mr Crow faked his injury, and
16 presented this video in the opening pages of our
17 Counter-Memorial. It is no exaggeration to say that
18 Discovery was caught submitting a fictitious piece of
19 evidence to the Tribunal.
20 (Slide 78) What is Discovery's response in its
21 Reply? Well, given how prominently we emphasised this
22 false evidence in our Counter-Memorial, we were quite
23 anxious to see how Discovery would respond. But when we
24 received the Reply we couldn't find a response until,
25 buried deep in the 200-page reply at paragraph 400(3) we

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14:55 1 saw this. This is the totality of Discovery's response
2 to our establishment that Mr Crow faked his injury, and
3 I quote:
4 "As to Ms Varjanová's video of Mr Crow, there is no
5 evidence that this isolated incident 'increased tension
6 with the activists', as Slovakia asserts."
7 That's it. No denial that Mr Crow faked his injury.
8 No denial the picture was taken on the same day as the
9 video. No denial that Discovery had in fact submitted
10 fictitious evidence to this Tribunal.
11 AOG was caught red-handed faking an injury to the
12 police which Mr Fraser said caused him, or AOG more
13 generally, I should say, to press the police to bring
14 criminal charges against a local protester. Think about
15 that.
16 It was trying to have a protester arrested based on
17 false charges to buttress its claim for improper state
18 action.
19 Members of the Tribunal, we respectfully submit that
20 this is a very serious matter regarding the credibility
21 of Discovery and AOG.
22 (Slide 80) And if you need any more evidence that
23 Mr Crow's injury was faked, note that you heard, again,
24 nothing about it this morning.
25 Note also, now on your screen slide 81, that AOG's

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14:57 1 Slovak lawyer provided the company a report of the
2 events on 16-18 June 2016, and there's no mention of
3 this injury at all.
4 So this is the next instance of state action: the
5 Smilno police did not arrest an activist whom Mr Crow
6 falsely claimed assaulted him (Slide 82).
7 I want to be clear how important this is. Mr Crow
8 is the COO, he's the chief operating officer. He's
9 right up at the top of the company. And Discovery has
10 not made him available for cross-examination.
11 But there's something even more important about
12 Mr Crow's credibility. Discovery has only submitted
13 three fact witnesses in this case: Mr Lewis, the CEO of
14 Discovery, Mr Fraser the CFO of Discovery, and the
15 mayor. So only two people from Discovery/AOG, but
16 neither of those people were the ones consistently on
17 the ground in Slovakia to witness the vast majority of
18 the events in question.
19 (Slide 83) And this is particularly glaring when one
20 reviews Mr Fraser's witness statement, where he
21 testifies for almost 13 pages, from paragraphs 36
22 through 72, about all manner of facts, almost none of
23 which he has personal knowledge of. In that stretch of
24 37 paragraphs he says he only has personal knowledge of
25 events in five of them.

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14:58 1 In other instances he states, with no citation, that
2 the information was reported to him by "unnamed people".
3 Who provided Mr Fraser the knowledge for these
4 32 paragraphs?
5 Well, Mr Crow was the most senior person on the
6 ground. He reported directly to Mr Lewis, and in that
7 role he even reported to JV partners. Mr Fraser's
8 primary source of information was almost certainly
9 Mr Crow, who has now established himself as a fabricator
10 of stories and who has not been made available to us as
11 a witness. And that raises a larger problem with
12 Discovery's case, and that is that Discovery has not
13 made available so many witnesses who were actually on
14 the ground consistently in Slovakia (Slide 84). Not
15 just Mr Crow at the top of the slide, but the lawyer who
16 issued the report I just showed you, and many others.
17 Back to the timeline. Recall the second effort by
18 AOG to access the site is underway. It started
19 on June 16, when Mr Crow faked his injury, and lasted
20 two more days.
21 (Slide 85) On 17 June the protesters moved from the
22 field track to the drill site itself, on which AOG had
23 a lease. Mr Fraser testifies:
24 "Following a call by one of our lawyers, the police
25 actually removed protesters from in front of the

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14:59 1 contractors' vehicles on the well location ..."
2 On the well location. Why is that important?
3 Because the protesters moved from their land to AOG's
4 land. And what did the police do? They got the
5 protesters off the AOG's land.
6 In other words, the police, just like the
7 municipality I showed you before, are distinguishing
8 between the citizens' private property, where the police
9 will not remove them because it's their land, and AOG's
10 land, where the police will remove them. The police,
11 again, are acting precisely as they should.
12 The third and final day, on June 18 (Slide 86) the
13 protesters stayed off the well location, they went back
14 on the field track, and here's a picture of them all
15 standing in unison. That doesn't look like a single
16 landowner to me, members of the Tribunal.
17 On the same day the prosecutor gets called.
18 MR DRYMER: Isn't one of the allegations that numbers of
19 these people weren't landowners at all?
20 MR ANWAY: Some of them weren't; some of them were, though.
21 MR DRYMER: That came from other parts of the district?
22 MR ANWAY: That's correct, including, for example, Mr Leško,
23 but as I noted before, citing AOG's own brief at the
24 Court of Appeals, they acknowledged that she had
25 obtained 10-15 different signatures of landowners

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15:01 1 specifically.
2 Okay. The prosecutor is a topic that Mr Fraser
3 addresses in his witness statement, and he states:
4 "However, a state prosecutor ... made an appearance
5 at the road, even though there was no reason for her to
6 be there ..."
7 In fact, however, it was AOG that called the police
8 who, in turn, called the prosecutor.
9 (Slide 88) And this is from the prosecutor's witness
10 statement, who you will hear from later this week. She
11 first learned about the interim injunction when she
12 arrived from AOG's lawyer, not the activists. The
13 lawyer for AOG showed her, together with other
14 documents, the injunction.
15 (Slide 89) And AOG told the prosecutor that the
16 interim injunction only applied to AOG and not its newly
17 created company, Smilno Roads. Members of the Tribunal,
18 that was a false representation. You've seen that the
19 interim order explicitly states that it applies to third
20 parties directed by AOG. And having made that false
21 representation to the prosecutor, AOG asks her to
22 intervene and let them pass. Her response: I don't have
23 the authority or reason to act because I don't see
24 criminal activity; this appears to be a civil dispute.
25 And she leaves. That's it. That's it. (Slide 90).

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15:02 1 (Slide 91) So we add this state action to supposed
 2 breaches of the treaty: the state prosecutor was called
 3 to the site by AOG, concluded it was a civil dispute,
 4 and left. A violation of the treaty?
 5 (Slide 92) Now, I told you before that AOG conceded
 6 later that it breached Ms Varjanová's preemption right.
 7 This is the document where they did. They filed
 8 a document with the district court conceding
 9 Ms Varjanová's claim and recognising they had violated
 10 her preemption right, while they are in the process of
 11 violating the injunction that was issued in this very
 12 case and on this very basis.
 13 (Slide 93) On 5 October 2016, the district court
 14 grants Ms Varjanová's claim, given AOG's concession.
 15 And if this case died there it would have meant the end
 16 of the temporary injunction, and of course the share
 17 purchase agreement was null and void.
 18 (Slide 94) But, Ms Varjanová, a private citizen,
 19 based on the advice of her lawyer -- and I'm reading
 20 from her witness statement here, slide 94 -- appealed
 21 that judgment, which kept the injunction alive. Similar
 22 to in my country, the second you file a notice of
 23 appeal, you strip the trial court of any jurisdiction
 24 and the only court that can decide whether the appeal is
 25 proper or not is the Court of Appeals. So the

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15:04 1 injunction stays in place.
 2 Now, there are complicated reasons, which we can
 3 explain, as to what her argument was for appealing; it
 4 had to do with the nature of the declaratory relief and
 5 whether it was an appropriate case for declaratory
 6 relief. But, in any event, she appeals.
 7 Mr Fraser says this was an abuse of process in his
 8 witness statement. I would ask you to think about that,
 9 members of the Tribunal.
 10 Within days of the Court of Appeals' affirmation of
 11 the injunction, Mr Fraser and AOG go out and create
 12 a shell company for the purpose of doing exactly what
 13 the Slovak court prohibited them from doing. They had
 14 been in ongoing violation of the injunction ever since.
 15 They're flouting the injunction -- for months -- and
 16 they have the audacity to accuse her lawyer with
 17 an abuse of process?
 18 And I would note that despite claiming an abuse of
 19 process before this Tribunal, AOG never made that
 20 argument to the Slovak court. Why? Perhaps it's
 21 because AOG was actively violating the court's
 22 injunction. Given that, can you blame Ms Varjanová,
 23 a private actor, not attributable to the state, can you
 24 blame her for filing the appeal?
 25 Did it ever occur to AOG's lawyers that

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15:05 1 Ms Varjanová's lawyer may have been concerned about
 2 obvious attempts underway to circumvent the injunction
 3 by AOG and its shell company on the ground and in plain
 4 view? Perhaps counsel wanted to preserve the
 5 flexibility to pursue further injunctive relief.
 6 But in any event, Discovery does not dispute that
 7 the injunction remained in place and in effect until the
 8 Court of Appeals dismissed the matter, which did not
 9 occur until 2017.
 10 Okay. Now at this point AOG has been in discussions
 11 with authorities on its desire to have signs put up on
 12 the field track, basically a yield sign. And the reason
 13 it wanted this was apparently thinking: if we stick
 14 a public sign up, that immediately makes it a PSPR. And
 15 AOG asks the mayor to propose the signage to the body in
 16 charge of such matters, which was the district traffic
 17 inspectorate.
 18 (Slide 95) AOG's position was that the joining of
 19 the public road to the field track was a "crossroads"
 20 under the Roads Traffic Act. Under the Act a crossroads
 21 is where two public roads connect, and AOG wanted
 22 the yield sign put on the field track.
 23 Well, on 14 October 2016, the district court
 24 inspectorate issues its decision, finding that this was
 25 "not a crossroads but merely a conjunction of a [field]

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15:07 1 road", or "country road", which means field road in
 2 Slovak.
 3 In other words, these are not two public roads
 4 joining: one is public, and the other is a private field
 5 track.
 6 (Slide 96) And now we get to another very important
 7 document that AOG produced in document production, and
 8 they cited this document today to you, but they cut out
 9 the most important part. So let me show it to you.
 10 This is a letter -- or an email -- dated
 11 26 October 2016, from Mr Fraser to Mr Lewis, reporting
 12 on the meetings with the police that day. And look what
 13 he says. The police deferred to the "civil engineer" on
 14 the question of whether the track is a special purpose
 15 road which the police are obligated to keep open. Let's
 16 stop there.
 17 The civil engineer to which Mr Fraser refers worked
 18 at the district traffic inspectorate. So the police are
 19 deferring to the correct body that decides these issues.
 20 And he goes on to say that the civil engineer at the
 21 district traffic inspectorate was not prepared to agree
 22 that the track could be a special purpose road. So the
 23 real authority on the issue is not prepared to agree
 24 with the PSPR theory.
 25 And then they go on:

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<p>15:08 1 "... even though [redacted name] the senior traffic 2 police officer ... thought it was." 3 You might ask why in the world the name of a police 4 officer is legally privileged? I don't know. 5 In any event, the city they cite where the traffic 6 policeman apparently agreed with them is not in the 7 district in which Smilno is located. It's a totally 8 different district. So it's unclear why AOG was 9 contacting this police officer at all. 10 But what's most important is what he says next, and 11 remember there's an injunction in place prohibiting them 12 from accessing the site: (Slide 96) 13 "We threatened them with litigation if they failed 14 to keep the track open and told them [and I would ask 15 you to circle this language] we were going to go ahead 16 anyway." 17 Not only is there a court-ordered injunction in 18 place -- which they don't dispute, you read how 19 Mr Fraser interpreted that injunction; not only has the 20 authority now, the district traffic inspectorate, said, 21 this is not a PSPR; they are going ahead anyway. 22 And then perhaps most remarkably, he states: we are 23 going to put a fence up around the field track. 24 A fence. On property they are under an injunction to 25 not even access.</p> <p style="text-align: center;">Page 169</p>	<p>15:11 1 of inaction by the police, a violation of public 2 international law, was in fact the police doing the 3 right thing again. 4 So we add to our list of state action about which 5 Discovery complains that the police distinguished 6 between the injunction being in effect and not being in 7 effect. 8 On 17 November 2016, AOG planned works were 9 abandoned for the third and final time, and on 10 22 November, AOG requests interpretation from the 11 Ministry of Transportation and police, and it asks them 12 to agree that all field tracks are PSPRs (Slide 98). It 13 does not ask the Ministry of Transport whether this 14 particular field track is a PSPR. It asks the Ministry 15 of Transport to make a definitional ruling: are all 16 field tracks PSPRs? 17 And on 29 November, and these are letters that have 18 been misconstrued by Discovery, so I want to be very 19 clear about them (Slide 99), the Ministry responds and 20 does not agree that all field tracks equal PSPRs. 21 Instead, it says, very rightly, it depends on factors, 22 such as whether there is a building permit, the 23 particulars of the field track, et cetera. That means 24 the answer to AOG's question is: no, not all field 25 tracks are PSPRs.</p> <p style="text-align: center;">Page 171</p>
<p>15:10 1 I might just pause here and ask: if the road really 2 were public, a PSPR, how could AOG put a fence around 3 it? 4 What you see, members of the Tribunal, from this 5 document, is the utter disrespect with which AOG treated 6 the Slovak people and its legal system. It decided once 7 again that the safer route, rather than go about 8 procedures set up by Slovak law, as Ms Varjanová did, 9 was to engage in renewed self-help of the most 10 aggressive tactic yet: to put a fence up around the 11 privately-owned field track, while it's under 12 an injunction not even to access the property. The plan 13 was simple: we will fence the entire road, exclude the 14 public, exclude the landowners, and lock the gate. 15 Didn't hear anything about that this morning either. 16 (Slide 97) But as Mr Fraser testifies, the 17 protesters again blocked access to the property and he 18 complains: 19 "The Police refused to accept that the interim 20 injunction was of no further effect and said that this 21 was an issue for the Court." 22 Members of the Tribunal, as you've now seen, the 23 police were indeed correct: the injunction was still in 24 effect, and it applied to the shell company, Smilno 25 Roads. So what Mr Fraser is complaining about in terms</p> <p style="text-align: center;">Page 170</p>	<p>15:13 1 Unsatisfied with this answer, on 7 December AOG asks 2 for an additional interpretation, asking whether, if 3 there is no building permit, a field track can be 4 a PSPR. 5 Two days later, the Ministry states again, it 6 depends on a variety of factors, and it says in 7 principle a field track can be a PSPR depending on 8 factors, and even without a building permit, but that 9 doesn't mean all are (Slide 101). And it certainly 10 doesn't mean this particular track, which they were 11 never asked about, is a PSPR. 12 There is nothing inconsistent with these letters and 13 Slovakia's position in this case. To the contrary, they 14 are consistent with Slovakia's positions in this case. 15 (Slide 102) Now, given how much pressure AOG was 16 putting on the police, the police then asked for 17 an opinion from the Ministry of Interior, the police's 18 supervisory body, and on 19 December the Minister of 19 Interior issued an opinion, stating -- and this is on 20 slide 102 -- it is not a PSPR "and must be seen as 21 private land". 22 In other words, the Ministry of Interior's opinion 23 was consistent with the Ministry of Transportation's 24 opinion. 25 Now, AOG, you heard this morning, says this was</p> <p style="text-align: center;">Page 172</p>

15:14 1 an instruction to the police to prevent AOG from
 2 accessing the site. That can't logically follow. AOG's
 3 last attempt to access the site was November 2016. Here
 4 we are in December. So even if this were
 5 an instruction -- and it's not -- AOG never attempted to
 6 access the site after it, so the police could not have
 7 prevented them from accessing the site because of this
 8 opinion. It's logically impossible.
 9 Meanwhile, what's going on with the financing of the
 10 project? (Slide 103). Around this time Akard tells AOG
 11 that it has no money and, furthermore, that it has been
 12 relying on third parties to meet its obligations under
 13 the Akard agreement.
 14 (Slide 104) And shortly thereafter, now on slide
 15 104, Mr Lewis writes to Mr Akard stating:
 16 "If [Discovery] is unsuccessful in securing
 17 alternative funding within a few weeks, then it will
 18 almost certainly place [AOG] into liquidation ... Time
 19 is of the essence."
 20 Okay, now, what I'm about to tell you next is
 21 something that Discovery did not tell you in its
 22 Memorial, and it is remarkable that it didn't do so.
 23 On 2 December 2016 AOG files an application for its
 24 own interim injunction against Ms Varjanová and to
 25 refrain from blocking AOG's access to the field track.

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15:16 1 Now, this is the first time that AOG has ever raised
 2 its PSPR theory with a court (Slide 105). And, by the
 3 way, Smilno Roads files the same action.
 4 I will ask you, members of the Tribunal, why, if the
 5 PSPR theory had any merit, would AOG not have raised it
 6 in this kind of action before? Recall that it first
 7 came up with this theory in May 2016. We're now
 8 seven months later. I would respectfully submit it's
 9 because it knew that theory had no merit.
 10 And on 2 January 2017, the district court concludes
 11 that AOG had not sustained its burden of proof to show
 12 the field track was a PSPR.
 13 And it goes on to say that even if it had been
 14 a PSPR, there are two other death knells to the PSPR
 15 theory: number one, the constitution treats the right of
 16 ownership as a fundamental right, and that right
 17 includes a right to control the use of one's own
 18 property, and they cannot be compelled by the state to
 19 open their land without compensation and proof that it's
 20 in the public interest. This is classical
 21 constitutional law on the restriction of eminent domain.
 22 And number two, a PSPR requires that the user accept
 23 the road in the condition that it exists, and someone
 24 that uses the road for some other purpose is subject to
 25 fines. Here the use of heavy trucks on the narrow

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15:17 1 agricultural track was impossible, and of course AOG all
 2 but admitted that when they upgraded the road so that
 3 they could bring their vehicles onto it.
 4 In substance, the court found that AOG's requested
 5 preliminary injunction would be unlawful under the Road
 6 Act.
 7 (Slide 107) And on 16 February 2017 the appellate
 8 court upholds the lower court's decision, dismissing
 9 AOG's injunction.
 10 Now, why is it so concerning that AOG did not tell
 11 you about these court actions in its Memorial? Here is
 12 AOG testing its PSPR theory before the Slovak courts,
 13 and the courts unanimously rejected the argument.
 14 But, rather than tell the Tribunal this, they
 15 represented to this Tribunal that the PSPR theory was
 16 still viable. It is no longer viable.
 17 The district court has now rejected the PSPR theory.
 18 The Court of Appeals has now rejected the PSPR theory.
 19 The Ministry of Interior has now rejected the PSPR
 20 theory. The traffic director inspectorate has rejected
 21 the PSPR theory. The Ministry of Transportation,
 22 although not asked the question about this particular
 23 track, gave an opinion consistent with the rejection of
 24 the PSPR theory, and the mayor, when asked to adopt the
 25 theory, specifically refused to do so.

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15:19 1 In other words, no state body, not a single one, has
 2 ever adopted the theory that the field track was a PSPR
 3 in its then current condition.
 4 Now, before we leave Smilno there's one final point
 5 I would like to leave you with. On slide 110 this is
 6 one of our demonstratives. Look how many times -- look
 7 how many times AOG violated the injunction.
 8 We trust the Tribunal understands how serious it is
 9 for a party to intentionally violate a perfectly valid,
 10 lawfully issued, court-ordered injunction, and we would
 11 respectfully submit that it is not appropriate for
 12 a party which acted unlawfully this many times to be
 13 before you today claiming to be the victim.
 14 With that, we leave Smilno and we go to the second
 15 site, Krivá Ol'ka, and we need not spend much time on
 16 it, despite Discovery's counsel doing so this morning.
 17 MR DRYMER: Excuse me, let me just ask you a quick question.
 18 Can you be a little bit more technical than: not
 19 appropriate for them to be before us. Are you seeking
 20 a conclusion from us in this regard?
 21 MR ANWAY: We have in connection with the contributory
 22 fault.
 23 MR DRYMER: Yes. That's it though, that part of it. Okay.
 24 MR ANWAY: I will leave that to Mr Pekar --
 25 MR DRYMER: Very good.

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15:21 1 MR ANWAY: -- to talk about when he talks to the legal
2 implications of this.
3 MR DRYMER: Thank you.
4 MR ANWAY: The bottom line is that the reason AOG failed at
5 Krivá Ol'ka is because it made another mistake. It
6 didn't request the lease extension by the deadline, and
7 again, Discovery did not tell you this in their
8 Memorial.
9 On 4 May 2015 AOG signed a lease agreement with LSR,
10 I also call the entity Lesy. Lesy is the state-owned
11 company that manages the Slovak forests.
12 Now, I want to be very clear about this. The acts
13 of Lesy are not attributable to the state under public
14 international law, and there is very clear case law on
15 this point. Mr Alexander and I represented the
16 Czech Republic in a case called *Intertrade v*
17 *Czech Republic* about 10 years ago, and of course
18 Slovakia and the Czech Republic have a common ancestry
19 where Lesy was the same entity, now two separate
20 entities; but the entire issue on which we won that case
21 was whether Lesy's acts were attributable to the state
22 for purposes of the ILC Articles and the tribunal
23 concluded that its acts were not so attributable.
24 It is not disputed in this case that that law stands
25 and applies to this case. In other words, Discovery

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15:22 1 does not dispute that Lesy's actions are not
2 attributable to the state.
3 On 4 May, Lesy signs the lease agreement, the lease
4 is for one year. To extend the lease beyond one year,
5 AOG was required to request an extension no later than
6 one month before the termination of the lease. That
7 means that it needed to make the request on
8 15 December 2015 (Slide 113).
9 (Slide 114) And AOG was well aware of this
10 requirement. This is a contemporaneous document from
11 the famous Mr Crow where he states:
12 "We will have to apply for the extension with proper
13 paperwork ... 1 month in advance."
14 Members of the Tribunal, it is undisputed that AOG
15 did not make a request within that deadline (Slide 115).
16 You heard today they say: we missed it by one day. No
17 they didn't. They missed it by seven days. The day
18 they filed the request it was stamped, and it shows you
19 that it was seven days late. It's just that their
20 document was dated six days later -- or earlier,
21 I should say.
22 So this was not missing the deadline by a few hours
23 or even a few days; this was seven days late.
24 Now, I want to correct another impression that was
25 given today, which is that the late notice was given to

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15:23 1 the Ministry, and it was the Ministry that had -- the
2 late notice was given to Lesy, and whatever Lesy thought
3 it could or couldn't do with that, the Ministry
4 ultimately has to approve it.
5 Now, there was also some suggestion this morning,
6 and I can pull the record -- cite for this, but that AOG
7 wasn't aware that the Ministry of Agriculture was going
8 to have to approve extensions, but I'll show you right
9 in the lease where it specifically says they do.
10 Slide 116, is it? No...
11 (Slide 117)
12 "Final Provisions."
13 This addendum enters into force on the date of
14 granting consent to rent according to ..."
15 And that is the Ministry of Agriculture's approval,
16 so they were well aware -- it was in fact stated in the
17 lease itself -- that the Ministry had to approve it.
18 And although we were told this morning we did not
19 raise this argument that the Ministry could not
20 resurrect a dead contract through an ex post amendment
21 in our Counter-Memorial, and that it's somehow a new
22 argument in our Reply -- or Rejoinder, I should say, let
23 me just read to you what we wrote in our
24 Counter-Memorial, paragraph 154:
25 "On 7 June 2016, the Minister of Agriculture ...

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15:25 1 announced she was not approve the retroactive
2 'extension' of the Lease Agreement. By that time, the
3 Lease Agreement had been terminated for almost six
4 months."
5 This is not a new argument we've made. What's new
6 about it is that AOG is even acknowledging it, since it
7 never raised it in the Memorial in the first place.
8 To state the obvious, the Ministry doesn't have the
9 capacity to bring back a dead contract by "amending" it.
10 And even AOG contemporaneously recognised this to be
11 true. This is a letter from AOG to Lesy, and look what
12 it says:
13 "Since the original lease ... has expired, it is not
14 possible to renew it with amendment ..."
15 Totally different than what you were told this
16 morning. And this is their own document (Slide 119).
17 Now, AOG had told the Minister of Agriculture -- the
18 Ministry, I should say, that if it did not approve this
19 extension AOG would proceed under Article 29 of the
20 Geology Act, the so-called compulsory access provision.
21 And under that provision, if a lease agreement cannot be
22 struck with a landowner voluntarily -- that would be
23 with Lesy here -- the Ministry can, when certain
24 circumstances are present, substitute the landowner
25 agreement with an administrative decision.

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<p>15:26 1 So when the Ministry denied the request for 2 an extension on the basis that the lease had expired, 3 the Ministry suggested, in line with AOG's own 4 suggestion: try Article 29. But it was AOG's 5 suggestion -- and you've been told to the contrary -- 6 that it would proceed with an Article 29 application if 7 it did not succeed in the renewal. And so AOG did, and 8 it files an Article 29 application for compulsory 9 access. 10 (Slide 120) Now, this is a matter of last resort, 11 and it must take place before the Ministry of 12 Environment. 13 The first instance decision-maker within the 14 Ministry of Environment originally rejected AOG's 15 Article 29 application. Now, what you heard this 16 morning was that Discovery claims this decision was 17 based on an instruction from above. That theory cannot 18 possibly be right, because the Minister himself, who you 19 will hear from later this week, granted the appeal in 20 AOG's favour. He ordered the first instance 21 decision-maker to figure out what's really going on, and 22 if a new contract between Lesy and AOG is possible. 23 This is a matter of last resort, this compulsory 24 process. He wants to know: can we still figure out 25 a voluntary solution.</p> <p style="text-align: center;">Page 181</p>	<p>15:30 1 injunction against the wrong person. And it never went 2 back for an injunction against the right person. 3 AOG does not dispute these mistakes. As you can see 4 on slide 132, it says it terminated its attorney because 5 of them. 6 So we add this to the list of AOG's mistakes under 7 Slovak law (Slide 133). 8 (Slide 134) Following these legal mistakes, 9 in January 2016, AOG never returned to Ruská Poruba. 10 Okay, let's now take a step back, and let's not just 11 look at Ruská Poruba but all three sites together, 12 because they're all implicated by the final topic, which 13 is the EIAs. 14 (Slide 136) The requirement to perform EIAs comes 15 from EU law. You see the EU directive on your screen, 16 2011. Under the EU EIA directive of 13 December 2011, 17 an EIA was required for all deep drills. That means 18 both exploratory and mining drills. 19 Now, when the Slovak Republic transposed this 20 directive into their domestic legislation in the Slovak 21 language, the domestic legislation used the phrase 22 "mining drills" rather than "deep drills", and as 23 a result, the language of the statute was interpreted 24 not to require EIAs for exploratory drills, only mining 25 drills.</p> <p style="text-align: center;">Page 183</p>
<p>15:28 1 And consistent with that instruction, on remand, the 2 first instance decision-maker required AOG to provide 3 some evidence, if it still wanted to proceed with 4 Article 29, that Lesy would not agree to a new contract. 5 What was AOG's response? They said: we deny the request 6 resolutely. Refused to apply for a new lease with Lesy 7 and voluntarily walked away from the Article 29 8 proceeding. 9 Let me repeat that. (Slide 126) After its 10 successful appeal AOG stopped participating in the 11 Article 29 proceeding voluntarily. 12 So as we wrap up Krivá Ol'ka, why did it fail? 13 Because AOG made the mistake of not renewing the licence 14 by the deadline, and because of that it voluntarily 15 walked away from an Article 29 proceeding that it had 16 just prevailed in on appeal. 17 Now we move to the third site, Ruská Poruba (Slide 18 129). It is undisputed that here, again, AOG made 19 numerous legal mistakes under Slovak law, and this is 20 not disputed. In fact, you will see that they fired 21 their lawyer for these mistakes. 22 First, it requested and obtained an injunction 23 (Slide 130), but then tried to execute it before the 24 Respondent was even served, and so it wasn't yet 25 effective; and then, second, realised it got the</p> <p style="text-align: center;">Page 182</p>	<p>15:31 1 But in 2013, now up on your screen (Slide 137), the 2 CJEU confirmed that the directive included exploratory 3 drills. And so in that same year the EU Commission 4 started infringement proceedings about how Slovakia 5 transposed the EU directive. And one of the 6 Commission's comments, and this is in the record, was 7 that the Slovak Republic's use of the phrase "mining 8 drills" was incorrect because it omitted "exploratory 9 drills" and that it needed to be corrected. 10 And so, as you can see on the next slide, Slovakia 11 corrected it (Slide 138) in the EIA amendment effective 12 1 January 2017. 13 Now, you know Discovery's position here: because 14 their licences were granted in 2006, last updated in 15 2016, they're not subject to the amendment. We don't 16 agree. The question is when the drilling takes place, 17 not when the licences are granted. 18 But, in any event, under EU law, as confirmed by the 19 CJEU, the Slovak Republic was required to enforce this 20 provision of EU law in any event. 21 Now, I want to correct a factual matter here. 22 You've been told that the Minister forced AOG to do the 23 preliminary EIAs. That is categorically untrue, and 24 I will show you. 25 The Minister met with AOG one and only time, on</p> <p style="text-align: center;">Page 184</p>

15:33 1 15 December 2016, and at that meeting, which occurred
 2 months before what I'll call the fresh start press
 3 release that I'll come to in a minute, AOG complained
 4 about the opposition from local citizens. And the
 5 Minister said one way to calm the citizens down would be
 6 to voluntarily submit to a preliminary EIA.
 7 That was the end of the meeting, and several days
 8 later, on 21 December 2016 (Slide 142) AOG responds in
 9 a letter, and they said: no, we're not doing that. It's
 10 too costly, and they say the activists would not accept
 11 it.
 12 (Slide 143) And the minister never responded. He
 13 never sees AOG again. He didn't force AOG to do
 14 anything (Slide 144).
 15 As it turns out, and you will soon see this, in
 16 a few minutes, the Minister was right in his advice to
 17 AOG, because months later AOG did voluntarily agree to
 18 do the preliminary EIA in response to the concerns
 19 expressed by the local citizens, and they did accept it.
 20 In sum, the Minister made a single proposal to
 21 Discovery, trying to be helpful, which he then referred
 22 to in later press conferences. But they weren't
 23 repeated requests. It was one meeting. And Discovery
 24 rejected that proposal.
 25 Now, a few months later, after AOG had said, no,

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15:36 1 be to comply voluntarily with the preliminary
 2 environmental procedure for all wells. I said that this
 3 was doable, and we would be happy to share details of
 4 the application before it was submitted so that there
 5 should be no surprises later."
 6 (Slide 147) On 10 March 2017 AOG reported to
 7 partners about another meeting with the citizens that
 8 same month, March 2017, where:
 9 "... the protesters were insistent that they wanted
 10 to see a preliminary EIA ..."
 11 Skipping down:
 12 "Our objective would be to agree that the
 13 preliminary EIA process, which is believed to take about
 14 3 months, will be conducted in parallel with the rest of
 15 the permitting processes."
 16 There is nothing about the Minister forcing them to
 17 do EIAs here. They are agreeing to do the EIAs because,
 18 as you saw from Mr Lewis' testimony, they said they now
 19 had no choice but to engage with the local citizens and
 20 try to reach common ground.
 21 I would note that Article 19 of the EIA Act also
 22 allows any activity to be subject to a preliminary EIA
 23 based on a reasoned motion from members of the public,
 24 and as you now know, ultimately, AOG agreed to do the
 25 preliminary EIA (Slide 148).

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15:34 1 we're not doing preliminary EIAs, AOG finally decides,
 2 all too late, it needs to engage with the local
 3 citizens, and try to obtain the social licence from them
 4 that it never attempted before. And Mr Lewis states,
 5 paragraph 83 on slide 145, and I quote:
 6 "I agreed with Alex Fraser that it seemed that we
 7 had little choice but to talk to the key activists to
 8 see if we could find any common ground with them."
 9 Think about that. Here we are, almost three years
 10 after they first rolled in with their heavy machinery
 11 and excavators, unannounced, and only now do they think
 12 it's time to talk to the activists to see if they can
 13 reach common ground?
 14 What did the local community say when AOG finally
 15 engaged with them, finally started to treat them with
 16 a modicum of respect, rather than hostility? The
 17 community became more open to the project. The main
 18 thing that the citizens said they wanted, and I'm going
 19 to show you documents where AOG acknowledged this, was
 20 that they were concerned about their environment and
 21 they wanted preliminary EIAs done. Hardly
 22 an unreasonable request.
 23 (Slide 146) Reporting on the first meeting with the
 24 activists in February 2017, Mr Fraser stated:
 25 "The most important element in promoting trust would

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15:37 1 (Slide 149) This then leads to an important
 2 document. A press release from AOG on 5 April 2017, now
 3 up on your screen, C-171:
 4 "[AOG] ... has announced its commitment to observe
 5 certain key principles in the conduct of its operations
 6 in north-eastern Slovakia, in order to promote trust and
 7 confidence amongst local communities ... AOG will
 8 prepare and submit an application under the preliminary
 9 environmental procedure described in [the statute]."
 10 And look what happens. Mr Lewis testifies the press
 11 release -- next slide (150) -- had already led to
 12 "considerable improvement" and gave Discovery the
 13 opportunity to "develop ongoing working relationships
 14 with the activists".
 15 Members of the Tribunal, this was a fresh start. As
 16 you can see, it wasn't the Minister that required AOG to
 17 do the preliminary EIAs. It's shocking that if you
 18 treat citizens as real people and with respect, instead
 19 of antagonising them, they may be more receptive to you.
 20 Now, as you know, there has been a debate between
 21 the parties on whether the EIA was mandatory or not.
 22 Regardless, you can see AOG agreed to do one. So
 23 whether it was voluntary or not, if the preliminary EIA
 24 justifies a full EIA, then you have to perform the full
 25 EIA; otherwise, what's the point of the preliminary EIA?

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<p>15:39 1 (Slide 151) So the preliminary EIAs go forward, and 2 to be clear, the EIAs were not for the entire area of 3 the licence area. It was for the drills. And the 4 results of the EIAs, the preliminary EIAs, for those 5 three drills, were that full EIAs were required. And 6 here, in all three preliminary EIA proceedings, the 7 affected authorities, municipalities and inhabitants 8 filed scores of objections based on concerns: 50 from 9 Smilno, 35 from Poruba, 191 from Krivá Ol'ka. In all 10 three locations, many of them demanded full EIA 11 assessments. And the main reasons were concerns 12 regarding the preservation of water resources, 13 landslides, and wetlands, to name a few.</p> <p>14 Now, if AOG disagreed with these decisions to 15 proceed with full EIAs, it had the opportunity to appeal 16 them, and in fact it did appeal one. Strangely, it was 17 Poruba, the one that it had previously deserted, but it 18 appealed it, and the appellate body granted its appeal. 19 It concluded that the first instance body relied 20 appropriately on the submitted objections when opposing 21 the full EIA, but failed to provide a sufficient 22 explanation and requested the deficiencies to be 23 corrected in the remainder of the proceedings 24 (Slide 154). And AOG then just walks away. On all 25 three sites. It never appeals the preliminary EIA</p> <p style="text-align: center;">Page 189</p>	<p>15:42 1 veracity of such representations; and whether [Discovery 2 Global/AOG] has fully complied with all laws and 3 regulations, including the Foreign Corrupt Practices 4 Act."</p> <p>5 Discovery was never able to attract external 6 financing commitments from anyone other than Akard. You 7 heard this morning Discovery tell you that it could not 8 attract potential investors because they saw 9 an obstructionist government. The contemporaneous 10 documents tell a very different story.</p> <p>11 First, recall that before there was even any state 12 action at all that was complained of, AOG couldn't 13 attract any financing for more than a year. But even 14 after there was state action, those contemporaneous 15 documents show that potential investors were asking 16 technical questions about the project, and AOG wasn't 17 providing them the answers.</p> <p>18 (Slide 157) And then I take you to a critical 19 document, the minutes of the operating committee meeting 20 dated 3 October 2017, where both Mr Lewis and Mr Fraser 21 were in attendance. And they discuss about whether to 22 continue proceeding with the project, or to abandon it. 23 And look at the very different view these two men have: 24 "Alex said that he feels that it could be a long 25 process, but that he felt we will ultimately prevail."</p> <p style="text-align: center;">Page 191</p>
<p>15:40 1 findings on two of the three sites and the one that it 2 does appeal it wins. And it walks away from Slovakia.</p> <p>3 Why does it walk away without appealing the other 4 two? Or proceeding with the third that it did win on? 5 Well, I'm now in my presentation where I began (Slide 6 155), the lack of financing.</p> <p>7 Its financial records show that AOG was insolvent 8 and had always been so. The real reason Discovery did 9 not proceed further is because it ran out of money.</p> <p>10 As this letter from Mr Lewis shows, up on your 11 screen, dated 26 July 2017 (Slide 155), just days before 12 the Smilno EIA decision, AOG suggested to its JV 13 partners that it should start selling physical assets 14 "as a short term measure", and as I noted at the outset 15 of my remarks, the relationship between AOG and its 16 financier, Akard, had completely broken down.</p> <p>17 On 2 January 2017 AOG made threats of breaches and 18 default against Akard, Akard makes the same allegations 19 back against AOG, and now we look at Akard's response 20 where it states it is Discovery Global that is in 21 default:</p> <p>22 "In addition, Akard is investigating whether or not 23 certain representations made by [Discovery Global], and 24 upon which Akard relied, were actually truthful when 25 made or were made recklessly and without regard to the</p> <p style="text-align: center;">Page 190</p>	<p>15:44 1 Members of the Tribunal, this is the man who is 2 closest to the EIAs and the laws, between him and 3 Mr Lewis, and he thinks this can still be a success.</p> <p>4 But look at what Mr Lewis says: 5 "... AOG doesn't have the funding in-place to 6 continue to battle, or for arbitration, suggesting that 7 [AOG] doesn't have the horsepower or appetite for it."</p> <p>8 The closer person to the EIA and the legal issues 9 remained confident AOG would ultimately prevail and the 10 project should go forward. But Mr Lewis' comments made 11 clear that AOG has not only failed to produce reliable 12 external funding, but its only source of internal 13 funding, Mr Lewis, is heading for the door.</p> <p>14 And so AOG ultimately decides to abandon the project 15 and pursue arbitration that you will now recall it had 16 been plotting for two years.</p> <p>17 (Slide 158) Interestingly, however, when AOG 18 explained why it was abandoning the project to its JV 19 partner, it said this in conclusion, and I quote: 20 "In view of the considerable challenges we continue 21 to face in gaining local acceptance anywhere in the 22 region, we regrettably feel [that] the time has come to 23 relinquish our remaining license and wind up operations 24 in Slovakia." 25 Nothing about state action.</p> <p style="text-align: center;">Page 192</p>

15:45 1 Members of the Tribunal, you've now heard the real
2 story. And now that you've heard it, let's go back to
3 our slide listing the state action at issue, and I ask
4 you: where is the breach?
5 Madam President, at this point I would ask your
6 leave to turn the floor over to Mr Pekar, but if it is
7 an appropriate time for a break, that is fine as well.
8 THE PRESIDENT: That's a perfect time for a break. So let's
9 take -- do you want 20 minutes; is that fine? -- and
10 resume at 4.10, and then you can continue with the
11 presentation.
12 MR ANWAY: Thank you.
13 (3.46 pm)
14 (A short break)
15 (4.11 pm)
16 THE PRESIDENT: Good, I think everyone is ready to continue.
17 Mr Pekar, you have the floor.
18 MR PEKAR: Thank you, Madam President.
19 Good afternoon, Madam President, members of the
20 Tribunal. I will take the floor from Mr Anway and
21 continue with our submissions on jurisdiction and
22 liability.
23 Before doing so I would like to revert to a question
24 that Mr Drymer asked with respect to what we make of the
25 devastating facts that Mr Anway laid out with respect to

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16:12 1 the conduct of AOG and Discovery.
2 Just to recall, we were discussing the fake injury
3 of Mr Crow and how that was misused to file a criminal
4 complaint against an innocent Slovak citizen, and then,
5 worse yet, even used as evidence in this arbitration.
6 We also saw AOG's decision to go forward with the access
7 to the site, despite the discussion they had with the
8 traffic inspectorate, which clearly told them that the
9 field track was not a PSPR. And Mr Anway also showed
10 you the number of times that AOG accessed the site
11 during the pendency of the court injunction which
12 expressly prohibited them from doing so.
13 Mr Anway explained that this is obviously relevant
14 for the contributory fault argument that we have as
15 a part of our damages claim, but this obviously is not
16 enough. It does not stop there. These acts are also --
17 MR DRYMER: And that was my question, whether it stopped
18 there or not.
19 MR PEKAR: So, it doesn't, yes.
20 It's also relevant for the concept of social
21 licence, and the relationship that AOG had with the
22 local population. It is quite clear that the reckless
23 behaviour that AOG showed at the site only irritated and
24 justifiably increased the opposition against their
25 activities in Smilno.

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16:14 1 It is also relevant for the assessment of legitimate
2 expectations, because it is, again, quite clear that
3 a company which behaves in this way cannot expect to be
4 treated, I would say -- well, one must be aware of the
5 fact that such reckless behaviour will trigger
6 consequences.
7 And finally, I would also like to mention that, as
8 we all know, under Article 41(2) of the ICSID
9 Convention, the Tribunal has the power to review
10 jurisdiction ex officio. So even though we did not
11 raise an objection to that effect, the Tribunal
12 certainly has the power to decide ex officio that enough
13 is enough, and apply the unclean hands doctrine as
14 a jurisdictional bar to hearing Claimant's claims. We
15 leave that in the hands of the Tribunal.
16 MR DRYMER: We have the discretion to do so, you're saying,
17 but you're not expressly asking us. You're reminding us
18 that we have --
19 MR PEKAR: Yes, Mr Drymer, I'm very well aware of the fact
20 that we are past the deadline for raising such
21 an objection. So that's why we are left with the
22 Tribunal's jurisdiction.
23 MR DRYMER: Very well. Thank you.
24 THE PRESIDENT: And leaving us with the discretion, you are
25 saying that unclean hands is a matter of jurisdiction as

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16:15 1 opposed to inadmissibility? Or are you not saying this?
2 MR PEKAR: There are tribunals who treat that as a matter of
3 jurisdiction, other tribunals who treat it as a matter
4 of admissibility. So we plead both, or we leave it
5 again to the Tribunal's appreciation as to which of the
6 two the Tribunal believes fits better.
7 THE PRESIDENT: Thank you.
8 MR DRYMER: If either.
9 MR PEKAR: If either, yes.
10 Okay, so with that I will just very briefly address
11 jurisdiction and the merits. This morning I saw a total
12 of 15 slides on jurisdiction and liability combined.
13 Six of them were divider slides. I have a little bit
14 more slides, but in the interests of time I will go
15 through them at the speed of light.
16 With respect to jurisdiction (Slide 161) we raise
17 three jurisdictional objections. I will not address all
18 of them today. The only one where I would like to draw
19 the Tribunal's attention, to a development which is only
20 reflected in our Rejoinder -- because this morning
21 I heard that in the Rejoinder we didn't do much about
22 our jurisdictional objections; that I believe is not
23 true.
24 (Slide 162) In our Rejoinder we mentioned for the
25 first time a case which was not available at the time

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<p>16:17 1 when we filed our Counter-Memorial, and this is 2 Rand v Serbia, which is well known to certain members of 3 the Tribunal, and also counsel team, and we cite this 4 case for the proposition that, when interpreting the 5 requirement for a contribution as one of the hallmarks 6 of investment under Article 25 of the ICSID Convention 7 (Slide 165), the Tribunal stated that contribution must 8 be made with funds economically linked to the investor, 9 which must be the only "ultimately bearing the financial 10 burden of the contribution". 11 And when we think about the impact of this holding, 12 we believe that what the Rand tribunal is saying here is 13 that it is not enough for an asset to be recorded and 14 reported on the balance sheet of the investor. It's not 15 enough for the expenses associated with the investment 16 to have been expended by the investor. But we must also 17 look at what is behind it. As the tribunal put it, 18 there must be an economic link to the investor which 19 goes beyond mere formality. 20 (Slide 166) In the Rand v Serbia case the issue was 21 that one of the claimants was a Cypriot holding company 22 that had been funded exclusively by its ultimate 23 beneficial owner, a Canadian citizen from Vancouver, who 24 was also one of the claimants. And the tribunal held 25 that the money was spent on the acquisition of the</p> <p style="text-align: center;">Page 197</p>	<p>16:20 1 which Discovery claims we breached is the standard of 2 fair and equitable treatment. I believe that these 3 claims are based on a misconception with respect to what 4 the standard provides for, especially in relation to 5 legitimate expectations, but also in relation to what 6 type of conduct is susceptible of violating the 7 standard. 8 (Slide 170) Most importantly, the FET standard, like 9 other standards of protection under the BIT, "is about 10 the operation of the State's administrative and legal 11 system as a whole". This is very important, because 12 what we saw this morning is that several of the 13 14 measures which allegedly violated the BIT are, in 14 fact, first instance decisions rendered by various 15 administrative and one judicial organ of Slovakia. 16 A first instance decision cannot constitute 17 a violation of any investment treaty absent some very 18 extraordinary circumstances that we haven't seen here, 19 because what the state guarantees to the investor in 20 an investment treaty is the functioning of the system, 21 not the fact that every single first instance decision 22 will be correct. 23 We all know, in all legal systems in the world, how 24 many times the first instance decision is wrong. That's 25 why we have routinely the possibility to appeal against</p> <p style="text-align: center;">Page 199</p>
<p>16:19 1 investment in Serbia. So even though the investment was 2 recorded on the books of Sembi, the Cypriot holding 3 company, since the contributions had been made by its 4 ultimate beneficial owner, and then only channelled 5 through the Cypriot SPV, the contribution counts as 6 a contribution of the claimant and therefore of the 7 ultimate beneficial owner, and therefore the tribunal 8 retained jurisdiction over the ultimate beneficial 9 owner, but not over the SPV. 10 We submit that if these principles are applied to 11 the facts of this case (Slide 167), we can see that even 12 assuming that Discovery spent the 3.7 million, as it 13 claims, we also know that all of these funds came from 14 Mr Lewis, his other companies, and Akard. And 15 therefore, applying the logic of the Rand v Serbia 16 decision, these contributions are contributions by 17 Mr Lewis' companies and Akard, but not by Discovery. 18 And that's the basis on which we state that 19 Discovery has not made a contribution within the meaning 20 of Article 25 of the ICSID Convention, which deprives 21 this Tribunal of its jurisdiction <i>ratione materiae</i>. 22 So this is the one new development in our Rejoinder 23 which I wanted to highlight today. With the remainder 24 of our jurisdictional objections we rest on our papers. 25 So now liability (Slide 169). The first standard</p> <p style="text-align: center;">Page 198</p>	<p>16:22 1 court decisions, we have the possibility to appeal 2 against administrative decisions. 3 The state is judged by the final product of its 4 administrative organs. This is the appellate decision, 5 the final decision of the administrative or judicial 6 authorities of the state. The state cannot be judged 7 solely on the first instance decision. 8 And we cited the ECE case for that proposition. 9 Again, the ECE case rings a bell on this side of the 10 table. The ECE case is perfectly apposite because the 11 ECE case was about basically a sort of competition 12 between two commercial centres which had to be built in 13 one city in the Czech Republic, and one of the centres 14 was significantly delayed in the permitting process by 15 a back and forth between the first instance and second 16 instance authority. At the end, I believe it was the 17 second instance decision was correct. 18 The claim was: that's very nice that only the second 19 instance decision engages the international 20 responsibility of the state, but the delays harmed us so 21 much that we had to abandon the project, because the 22 competing commercial centre was able to be finalised in 23 the meantime and all the tenants went to the project 24 which was finalised first. 25 So the tribunal was very well of the fact that there</p> <p style="text-align: center;">Page 200</p>

16:24 1 was some economic impact of the length of the
 2 proceedings, but the tribunal just said: look, a first
 3 instance decision can be wrong, this is something that
 4 you must take into account for your planning purposes
 5 when you create timelines for the development of
 6 a commercial centre; you know this is subject to
 7 permitting; there can be third parties making all sorts
 8 of applications to hinder the development project; this
 9 is just a normal way how administrative justice
 10 functions.
 11 So this is just about the ECE v Czech Republic case.
 12 But otherwise, the proposition that the state should
 13 be judged only by the final product of its
 14 administrative authorities is a very well-known
 15 principle. We can cite, for example, to Helnan v Egypt,
 16 which I believe was one of the first cases which made
 17 that distinction quite clearly.
 18 So now with respect to --
 19 MR DRYMER: Is Claimant's case about whether or not the
 20 first instance courts got things right under domestic
 21 law? I thought they were claiming under a breach of
 22 international law?
 23 MR PEKAR: No, no. So they say: because the first instance
 24 administrative or judicial authority got it wrong under
 25 Slovak law, that is also a violation of public

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16:25 1 international law.
 2 MR DRYMER: Yes.
 3 MR PEKAR: And we say: yes, it may have been a mistake --
 4 and it was, because the decision was quashed under
 5 Slovak law -- but that's not a violation of public
 6 international law.
 7 MR DRYMER: I see. And you're saying there, and you've said
 8 this several times, they've ignored what happened
 9 afterwards --
 10 MR PEKAR: Exactly.
 11 MR DRYMER: -- whether the decisions were overturned, either
 12 by a court of appeal or by a minister or some other sort
 13 of action.
 14 MR PEKAR: Correct.
 15 MR DRYMER: That's the point; I understand.
 16 MR PEKAR: Or sometimes they did not even appeal.
 17 MR DRYMER: Yes, of course, including courts of appeal.
 18 MR PEKAR: No, well, sometimes they didn't give the
 19 appellate authority a chance to correct it because they
 20 did not appeal.
 21 MR DRYMER: Noted. Noted.
 22 MR PEKAR: So now with respect to legitimate expectations.
 23 We heard this morning that Claimant's legitimate
 24 expectations were based on the licence for the
 25 exploration area, and the content of the Geology Act

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16:26 1 (Slide 172).
 2 There's nothing wrong with this statement as such,
 3 but then, when we saw the application of that Act to, if
 4 you like, the very specific events which are told to
 5 have violated the legitimate expectations, there is
 6 a serious misconception. I believe at the beginning of
 7 the presentation we saw this morning, it was suggested
 8 that the legitimate expectation based on the exploration
 9 licence and the Geology Act was that all Slovak organs
 10 would do all they can to make it possible for Claimants
 11 to just drill at any place they like.
 12 The area is very broad. It is perfectly
 13 understandable that their placement of specific drills
 14 would be subject to further permitting process, and this
 15 permitting process will have to take into account both
 16 public interest, which is to be defended and expressed
 17 by Slovak authorities, and that's why it's wrong to
 18 suggest that once the exploration licence is issued, no
 19 Slovak authority can oppose any drilling activity.
 20 That's plainly wrong. If a drilling activity conflicts
 21 with public interest in the protection of nature,
 22 cultural heritage sites and so on, then it's perfectly
 23 appropriate for the organs of the Slovak State to oppose
 24 such drilling despite the prior issuance of the
 25 exploration licence.

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16:28 1 Also, the specific drilling has to take into account
 2 the private law interests of the citizens and of the
 3 owners, as we have seen it at Smilno.
 4 And, again, the fact that the Slovak Republic issued
 5 the exploration licence does not mean that the
 6 Slovak Republic created the legitimate expectations that
 7 any disputes with citizens would be resolved in favour
 8 of the holder of the exploration licence.
 9 So these are the two points, and we have seen it as
 10 well, and I will go through them when addressing the
 11 specific alleged breaches, how distant these alleged
 12 breaches are from the very general alleged legitimate
 13 expectations which Claimant claims stem from the
 14 exploration licence.
 15 So to summarise that, the licences did not give any
 16 assurances to Discovery that it would be able to
 17 prospect for oil and gas without the need to meet
 18 additional requirements, additional conditions.
 19 And objections against specific drilling or
 20 prospecting activities could be formulated by the state
 21 organs of the Slovak Republic, despite the issuance of
 22 the licence.
 23 MR DRYMER: And are you taking account of the point made
 24 forcefully this morning by Mr Tushingham that the
 25 licences didn't just grant rights; they imposed

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16:30 1 obligations?
 2 MR PEKAR: Well, if they imposed obligations, this is still
 3 an obligation to do that in accordance with Slovak law,
 4 with the norms of protection of environment, et cetera.
 5 So in my opinion, actually, it's a distinction without
 6 much difference. You know, the fact -- whether it's
 7 a right or an obligation to do that is not so crucial
 8 from the perspective of the ability of the organs of the
 9 Slovak Republic to have a say in how specifically the
 10 drilling activities are or are not to be conducted and
 11 where.
 12 MR DRYMER: And what do you say to the point -- I have my
 13 notes, but I don't purport to quote perfectly accurately
 14 from the transcript, but I have noted Mr Tushingham
 15 putting it to us that there was a clear, implicit
 16 representation by the Slovak Republic that: if I,
 17 Discovery, do the work required by the licence, you, the
 18 state, will not prevent me from doing that work.
 19 MR PEKAR: Well, we need to look at what is authorised in
 20 the licence.
 21 MR DRYMER: Yes.
 22 MR PEKAR: It's exploration on a very large area of, I think
 23 thousands of kilometres square. This is what I meant
 24 when I said that it does not mean that I can just pick
 25 my -- I say: oh, it happens that a cultural heritage

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16:31 1 site is within my area so I will put my exploration
 2 drill there.
 3 So technically, yes, the licence says I can explore
 4 within that large area. But it does not mean that I can
 5 do it everywhere, so I need some sort of further
 6 proceeding, actually, to establish whether what
 7 specifically I propose to do is in accordance with
 8 public interest and in compliance with the protection of
 9 private law rights of other people in Slovakia, or not.
 10 Another important thing, which I believe is somehow
 11 forgotten on the other side of the table, is that it is
 12 settled investment arbitration law that legitimate
 13 expectations require assurances, specific assurances;
 14 that the specific assurances must be directed to the
 15 investor; and also that they must exist at the time of
 16 making the investment, they must be the basis for making
 17 the investment. Because what we then heard very often
 18 is reliance on some, like, statements in the media,
 19 which were general, not directed to AOG or Discovery,
 20 but also made long, long after the decision to invest,
 21 be it whether we understand by that the decision to buy
 22 AOG or the decision to commit to a specific site, as
 23 Mr Drymer put it.
 24 So in both cases, actually, the statements post-date
 25 both of these dates quite significantly.

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16:33 1 (Slide 173) So now, to do it really quickly, why the
 2 Slovak Republic did not frustrate Discovery's legitimate
 3 expectations in relation to the Smilno site.
 4 So fundamentally what happened at the Smilno site
 5 was a dispute with the landowners, and Discovery was not
 6 able to drill because it failed to obtain the consent of
 7 the owners of the land. That was fundamentally what
 8 happened here.
 9 We heard that the PSPR theory actually was not
 10 developed by Discovery or AOG until quite late in the
 11 Smilno case, or project. And the PSPR theory was
 12 rejected by every single Slovak authority which had to
 13 express its views about it contemporaneously, including
 14 Slovak courts.
 15 So I will not go through this, but, frankly, this --
 16 again, because Mr Anway covered that very nicely. Every
 17 single alleged breach with respect to the Smilno site
 18 has something to do with the PSPR. There was no PSPR,
 19 therefore no breach.
 20 One very important aspect is that even if we
 21 admitted for the sake of Claimant's argument that the
 22 field track was a PSPR, there is the provision of
 23 Article 6, and Article 6 provides that a PSPR, precisely
 24 because it's privately owned, and it's sort of the
 25 lowest category of publicly accessible communications --

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16:35 1 so provided it's a communication -- can be used only in
 2 the condition in which it is. And it can be improved
 3 only with the consent of the owner of the road.
 4 Which means, and what we saw in Smilno quite clearly
 5 is that the field track was not in a condition which
 6 would permit the use envisaged by AOG. And AOG admitted
 7 that when it decided to upgrade the field track without
 8 the consent of the owners. Which is remarkable, and
 9 shows the total disrespect for the landowners that AOG
 10 consistently showed at the Smilno site.
 11 (Slide 175) So now let me address what happened at
 12 Krivá Ol'ka.
 13 (Slide 176) What happened there is admittedly --
 14 I mean, Claimant admits that AOG asked for the extension
 15 of the lease agreement it had with Lesy too late. The
 16 lease agreement clearly stated that it was to expire on
 17 15 January 2016, and it also very clearly stated that if
 18 an extension was required, it had to be applied for
 19 30 days in advance. And these 30 days, they do not come
 20 just out of nowhere: they were there because of the
 21 approval process involving the Ministry of Agriculture.
 22 What happened is that AOG missed the deadline. It
 23 missed the deadline by eight days, even though it tries
 24 to pretend it was only one day, it was eight days. And,
 25 also, quite importantly, it was on 23 December, the

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<p>16:37 1 period at the end of the year. 2 MR DRYMER: Eight days or 80? 3 MR PEKAR: Eight. 4 MR DRYMER: I understood that; that was just for the benefit 5 of the transcript. 6 MR PEKAR: So having missed that deadline, this created the 7 situation that, yes, Lesy signed, still on January 14, 8 but it was forwarded for the Ministry's approval only 9 on January 15. This is exactly what was not supposed to 10 happen and exactly why the 30-day deadline or buffer was 11 there under the contract, because then the Ministry did 12 not process, and actually never had an opportunity to 13 process, its approval before the expiry of the 14 agreement. 15 There's one thing which was not mentioned this 16 morning, and this is that Slovak civil law does not 17 allow the parties to extend an expired agreement. Such 18 an agreement would be null and void under Slovak law, 19 under Slovak private law, as a matter of the Civil Code. 20 (Slide 177) Then we have, and it relates to measure 21 number 9, we have the Article 29 proceedings at the 22 Ministry of Environment in relation to Krivá Ol'ka, and 23 what happened there, that's one of the examples of 24 a successful appeal. 25 So there was a first instance decision which denied</p> <p style="text-align: center;">Page 209</p>	<p>16:40 1 notice that the EIA Act needed to be amended because of 2 the EIA directive, and so on, so even if that EIA 3 amendment had come without prior warning, still, neither 4 the standard of FET, nor the licences, shielded AOG from 5 its non-retroactive application. 6 And the application of the amendment obviously was 7 not retroactive (Slide 181). The rule was very clear: 8 for all new drilling, for post January 2017 drilling, 9 a preliminary EIA was necessary in accordance with the 10 Act. That also addresses the EIA condition, which is 11 the measure number 14. That condition was imposed to 12 reflect that statutory requirement. 13 (Slide 182) Importantly, this approach was applied 14 across the board. When NAFTA, a Slovak company 15 comparable to -- well, which Claimant claims was 16 comparable to AOG, had its licences, it had to comply 17 with the same requirement. 18 In any event, the EIA issue is a non-issue because 19 Discovery agreed voluntarily to undergo this procedure. 20 It was not imposed by the Minister. 21 Mr Anway took you through the chronology, I have it 22 on this slide (183). Again, you can see the Minister 23 suggested it. It was immediately rejected by AOG, and 24 it was only much later, in April 2017, that AOG agreed 25 to it in the process of appeasement with the local</p> <p style="text-align: center;">Page 211</p>
<p>16:38 1 the application. It was quashed by the Minister, who 2 remanded the case back to the geology section. The 3 geology section was not instructed to reject AOG's 4 application, but it was instructed to continue with the 5 procedure, and AOG decided not to participate. 6 So the procedure was suspended for AOG to supply 7 certain documents and attempt to obtain a new lease 8 agreement with Lesy. AOG said: no, we would not even 9 try to obtain that agreement. Even though they knew 10 themselves that all they had to do was to apply with 11 Lesy; if Lesy did not respond within 15 days, they could 12 go back to the Ministry and say: look, we tried, we were 13 not successful, continue with the Article 29 procedure. 14 That would have happened. They decided not to do 15 that. We submit this is because at the time they were 16 already creating a case for arbitration and they were no 17 longer interested in pursuing the procedures under 18 Slovak law. 19 That brings me to the environmental impact 20 assessment (Slide 180). So first of all, the licences 21 which were granted did not provide for any freezing of 22 the regulatory framework in Slovakia. The requirement 23 for freeze of regulatory framework also does not stem 24 from the FET standard as such. 25 Therefore, even if Discovery and AOG had not been on</p> <p style="text-align: center;">Page 210</p>	<p>16:42 1 opposition. 2 (Slide 184) Maybe one last point before we go to 3 causation and quantum, which I forgot to cover when 4 speaking of legitimate expectations. 5 This morning it was suggested somehow that the maps 6 can be a source of legitimate expectation as to the 7 source of the field track. That comes as a big 8 surprise. The maps in Slovakia, I would say everywhere 9 in Europe, they simply represent every track, every 10 path, very, very small, without providing any indication 11 as to its ownership or use. A map is just a map. It's 12 not a representation of how the field track can be used 13 or cannot be used, how it looks in reality, et cetera. 14 Obviously there's a difference between a highway and 15 a small path in the forest, but I don't see how a map 16 could be the source of any legitimate expectations. 17 (Slide 186) So, with that -- and I'm really 18 skipping, I apologise to the Tribunal for doing that so 19 quickly -- 20 MR DRYMER: You promised us lightspeed! 21 MR PEKAR: Yes, and I'm not living up to the promise yet. 22 One thing which I believe is important as well is 23 that in all of the ... yes, that the Slovak authorities 24 did not act arbitrarily in relation to the EIAs, because 25 the applicant, AOG, very clearly stated in each of the</p> <p style="text-align: center;">Page 212</p>

16:44 1 applications that they were only about to begin the
2 activity, the drilling activity. So to the extent it
3 was alleged that somehow the decisions were incorrect
4 because they were supposed to find there was no
5 jurisdiction because the drilling activities had already
6 started and therefore did not require further approval,
7 this is wrong and this is disproved by the very content
8 of the EIA applications filed by AOG.
9 So with that, obviously we will hear more on the
10 court decisions from Mr Fogaš, and during his
11 cross-examination. Therefore, I think I can, with the
12 Tribunal's permission, pass the floor to Mr Pilawa.
13 THE PRESIDENT: Thank you.
14 MR PILAWA: Thank you, Madam President. So with the time
15 remaining I really just want to address a couple key
16 issues on causation, and finish with quantum to really
17 contextualise what's going on with quantum.
18 So starting with causation. I want to talk about
19 financing.
20 So on the next two slides is a timeline of the
21 financing issues, the point being that from the very
22 outset of this project Discovery could not attract any
23 capital for this project. We've devoted an entire
24 section of our Rejoinder to that, but I really want to
25 focus on the second slide (Slide 210), which shows that

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16:46 1 by January 2017 Discovery provides notice of default
2 under the Akard agreement and at this point it has no
3 alternative sources of funding.
4 The rest of this timeline shows the breaches, or the
5 alleged breaches, that occurred after this, and it's
6 just important to note that with each of these, when
7 this occurred, it was already at a moment when Discovery
8 had no money to continue.
9 And that brings me to the allegation that's been
10 made over and over, that the reason why it couldn't
11 attract capital, or the reason why Akard defaulted or
12 why Akard pulled out was because of Slovakia's actions,
13 and I don't think that that's really borne out by the
14 documents.
15 Before we get there, if we could go to slide 211.
16 I think it's also important to realise that whatever
17 funds Discovery had, and we've still seen no documentary
18 evidence of that, Mr Lewis was not interested in using
19 these. He says that right here in his second witness
20 statement on slide 211. He says:
21 "I own several royalty interests ... which I could
22 have sold or borrowed against, if necessary ..."
23 So the strategy here was not to use his own funds,
24 even though apparently he had them, and to rely on
25 external funding.

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16:47 1 And so we've seen over and over that there was
2 a lack of capital because no one wanted to invest.
3 Well, apparently Mr Lewis didn't want to invest as well.
4 But coming back to Akard. If we could go to slide
5 218. The allegation for Akard has been that it pulled
6 out of the deal because of the Slovak Republic's
7 actions. But that's not the case at all, and you can
8 see that here in Mr Lewis' own words. He explains here
9 that in 2016, when there were delays in the project,
10 Akard told Discovery to persevere: keep going, we're
11 going to keep funding you. That's what Akard was
12 saying. It just so happened that Akard didn't have any
13 money. As Mr Anway noted earlier, Akard was relying on
14 three or four other parties to fund itself, and then it
15 would fund Discovery Global.
16 So this idea that Akard pulled out of the deal isn't
17 true at all because it was Discovery that gave notice of
18 default and said "We want out". The idea that Akard
19 pulled out because of these delays is just not supported
20 by Mr Lewis' own words.
21 And that brings me to the funding that Discovery
22 sought in 2017 and 2018. Again, we've seen the
23 allegation over and over that nobody wanted to invest
24 because of Slovakia's actions. But we haven't seen any
25 documentation of that, and I just want to show one of

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16:48 1 the negotiations with those.
2 If we can go to slide 220. So Discovery only spoke
3 with two investors in 2017. It couldn't attract anyone
4 else. No one else came to the table. One of them was
5 Cadogan Energy, and you can see here that Cadogan wanted
6 more data. It wanted more data to de-risk the project.
7 In other words, what was already on the table was not
8 adequate.
9 There's nothing in these negotiations or
10 negotiations with Clarion Energy, which was the second
11 company that Discovery sat down with, there's nothing in
12 those negotiations about Slovakia's treatment or the
13 investment environment.
14 In fact, if we go to the next slide (221), we know
15 that at the time Discovery was telling people that this
16 was a "Low-cost, low-risk entry". It was saying that it
17 was working with the government with respect to the
18 preliminary EIAs and it was actually giving a timeline
19 for those preliminary EIAs. The reality is simply that
20 it couldn't find anybody else to fund the deal, and
21 Mr Lewis didn't want to fund the deal. It ran out of
22 money.
23 And that brings us to the second reason why this
24 project failed (Slide 222), and that involves the social
25 licence to operate, and we've talked about this a little

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<p>16:50 1 bit earlier and we've heard about it from Claimant's 2 counsel. But the concept didn't originate in domestic 3 law. This is something that comes from the extractives 4 sector. It's an unwritten social contract and it has 5 arisen in the mining and oil and gas industry for years. 6 There are some tenets to it, you can see that on the 7 next slide (225), ideas like legitimacy, credibility, 8 trust, all of those addressing the relationship that one 9 must have with the environment, where there might be 10 a mine or an oil and gas well. 11 (Slide 226) Now, of course we know that investment 12 treaty tribunals are no stranger to this, and I think 13 it's important to discuss the case law that Discovery's 14 counsel did not address today. We know the Bear Creek v 15 Peru and we've never shied away from the fact that 16 Slovak law is different and that Slovakia is not 17 a signatory to the same conventions. 18 But the social licence to operate does not exist 19 only in Peruvian law or international conventions, and 20 we know that because of Tethyan Copper. We've put that 21 on the record. Tethyan Copper discussed the social 22 licence to operate and it did not do so in the context 23 of domestic law or international conventions. It did it 24 in the context of the extractives sector with the 25 tribunal understanding that if a company wants to mine</p> <p style="text-align: center;">Page 217</p>	<p>16:53 1 Slovakia. 2 (Slide 230) Discovery Global sat down with the local 3 community in February of 2017 and it reached agreement 4 in April 2017, about two and a half months. Imagine 5 what would have happened had it simply done that at the 6 very beginning of this project. And that two and a half 7 months, that was after all of the confrontations that we 8 talked about earlier. 9 And so those are the two reasons why this project 10 ultimately did not succeed: there was never any funding, 11 none from the beginning, and no one wanted to fund the 12 deal at the end, and; ultimately we saw earlier, as 13 Mr Anway noted, Discovery simply could not gain local 14 acceptance. It could not do that. 15 And that brings me to quantum, and I just want to 16 visualise one thing in quantum. We've heard a lot about 17 the discounted cash flow analysis. We've heard a lot 18 about the but-for scenario. But we haven't really seen 19 what that but-for scenario is, and I think it's 20 important to understand the damages model put before 21 this Tribunal and understand the assumptions that need 22 to be made to arrive at this. 23 (Slide 233) So on your screen this is what you have 24 been told would occur but for Slovakia's actions. This 25 is a diagram of what would be one of the largest onshore</p> <p style="text-align: center;">Page 219</p>
<p>16:51 1 or if a company wants to exploit oil or gas or other 2 resources, then there will be consequences within the 3 environment. And, frankly, we've already seen that the 4 application of the social licence to operate was really 5 important for the Eastern Slovaks in Slovakia. And 6 I want to go to those words, the words of the Eastern 7 Slovaks who sat down with Discovery Global. 8 (Slide 228) This is the first meeting notes with the 9 activists, when Discovery Global finally sat down with 10 them, and they said that they hadn't been shown 11 sufficient respect in the past. Discovery had lied 12 about who owned what land or who had the right to be on 13 the land, and they appeared secretive. 14 And if we can go to the next slide (229), you'll 15 note here that all went wrong in 2014. That's at the 16 very beginning of the project. Decades of socialism had 17 made Slovaks very sensitive about their land. They only 18 recovered it at the end of socialism, and they weren't 19 going to give it up lightly, and that Discovery should 20 have come in with a better understanding of the land. 21 The only problem is that Discovery Global decided to do 22 this at the end of the project instead of the beginning; 23 and we've already seen that, had it just taken the time 24 to do this at the beginning of the project, it most 25 likely would have had a different experience in</p> <p style="text-align: center;">Page 218</p>	<p>16:54 1 oil and gas projects in European history. I will not 2 call this Discovery's project because it was entirely 3 created by its experts for the purposes of this 4 arbitration, and I want you to understand the sheer 5 enormity of this project. 6 It starts with the drilling of 40 exploration wells. 7 Of those 40 exploration wells, eight of them are deemed 8 to succeed -- and I say "deemed to succeed" because 9 that's what Rockflow's statistical hypothetical models 10 produce, models that have been run through 10,000 11 variations to arrive at what is considered to be 12 a successful project. After those 40 exploration wells 13 are drilled, another 99 wells are drilled, so 139 wells 14 drilled in all. These 99 wells would be the actual 15 production wells, and all of this would be taking place 16 in an area that spans over 1,000 square kilometres of 17 mountainous terrain in Eastern Slovakia. 18 On a closer inspection in the top left you will see 19 a non-existent central processing facility to handle gas 20 discoveries. All of the permitting for that would need 21 to be secured. It would need to be built, it would need 22 to be paid for. 23 You will also see a red line. That's a 55-kilometre 24 gas pipeline which would lead from discoveries in the 25 west all the way to the east. All the permitting for</p> <p style="text-align: center;">Page 220</p>

<p>16:55 1 that would need to be secured, it would need to be 2 built, it would need to be paid for. 3 You will see another pipeline in blue, 4 21.4 kilometres and, yes, all of the permitting for that 5 would be needed: it would need to be built, it would 6 need to be paid for. 7 And we arrive at this final product through 8 countless complex calculations with hundreds of 9 variables all because of one simple fact: Discovery has 10 not drilled a single well in Slovakia (Slide 234). 11 Everything that you just saw before you is the results 12 of a model that was constructed for the purposes of this 13 arbitration. It's filled with estimates. It's filled 14 with assumptions. I obviously don't have the time to 15 walk through the case law and the discounted cash flow 16 analysis, but we've put it in our papers, and we think 17 that that model is just inappropriate to be used here 18 for a variety of reasons, not the least of which being: 19 who would have paid for that? Who could have brought 20 that project into existence? Again, the largest oil and 21 gas project in Europe, all built within the span of 22 six years. 23 I believe that's the end of my time. 24 Madam President, on behalf of the Slovak Republic, 25 that's the end of our opening statement.</p> <p>Page 221</p>	<p>16:58 1 MR ANWAY: Thank you very much. 2 (4.58 pm) 3 (The hearing adjourned until 9.30 am the following day) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Page 223</p>
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<p>16:57 1 THE PRESIDENT: Thank you. 2 Fine. Do my colleagues have questions for either 3 party? No. 4 I don't have questions now either. We will listen 5 to the witnesses with interest, carrying this forward. 6 Tomorrow we will start with Mr Fraser, and then we 7 will continue with Mr Lewis; is that the plan? 8 Are there any questions or issues that we need to 9 address before we adjourn for the day? 10 MR TUSHINGHAM: Nothing from Claimant's side. 11 THE PRESIDENT: No. On the Respondent's side? 12 MR PEKAR: Just one technical question. Will Mr Baran be 13 available in case we finish the first two witnesses 14 earlier? 15 MR TUSHINGHAM: Yes, he will. 16 MR PEKAR: Okay. Thank you. 17 THE PRESIDENT: Yes. I think we have provided that 18 witnesses -- experts should be available half a day 19 before and half a day after their scheduled examination. 20 So I hope this works, because it will allow us to be 21 more efficient, if we make better progress than what you 22 have estimated. 23 Fine. Then I wish everybody a good evening, and 24 we'll see each other tomorrow morning at 9.30. 25 Goodbye.</p> <p>Page 222</p>	
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