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

Case No. ARB/21/51

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

Day 6 Hearing on the Merits Wednesday, 7th February 2024

Before:

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

DISCOVERY GLOBAL LLC

Claimant

-v-

SLOVAK REPUBLIC

Respondent

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

> Transcript produced by Anne-Marie Stallard and Emma Lovell

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10:28 1	Wednesday, 7 February 2024	10:31 1	in the treaty is an autonomous EET standard, not limited
	Wednesday, 7 February 2024 (10.28 am)	10:31 1	in the treaty is an autonomous FET standard, not limited
2			to the minimum standard of treatment in customary
3	THE PRESIDENT: Good morning, everyone. I hope you still	3	international law, and so therefore, based on the
4	have some energy for this last stretch of this final day	4	interpretation of the ordinary meaning of the terms of
5	of hearing. It's a short day.	5	the BIT, taken together with the consistent
6	Is there anything you wish to raise before we go	6	jurisprudence of the tribunals who we have quoted
7	into I give you the floor, Mr Tushingham?	7	extensively in our Memorial, our position is that the
8	MR TUSHINGHAM: Nothing from the Claimant's side.	8	FET standard in the treaty does protect an investor's
9	THE PRESIDENT: Nothing from the Claimant. Nothing from the	9	legitimate expectations.
10	Respondent.	10	PROFESSOR SANDS: So where does it come from? It's not in
11	Then you have the floor, please.	11	the text of the treaty, it's not in the negotiating
12	Submissions on behalf of the Claimant	12	history, it's not in the practice of states, it's not
13	MR TUSHINGHAM: Thank you very much, Madam President,	13	part of customary international law. Where does it come
14	members of the Tribunal.	14	from?
15	Let me give you a road map of where I am going to go	15	MR TUSHINGHAM: It comes from the ordinary meaning of the
16	this morning in my submissions. I'm going to start with	16	terms fair and equitable treatment, interpreted
17	legitimate expectations, and just briefly recap a few	17	PROFESSOR SANDS: Can you explain that a little bit more?
18	points there, and also remind you of the other	18	MR TUSHINGHAM: Of course. Perhaps it would be most easily
19	components of the FET standard in the BIT upon which we	19	done by reference to our Reply, which is at so it's
20	rely.	20	page 135 of our Reply, from paragraphs 257 and
21	I will then move to Krivá Ol'ka and address measures	21	following.
22	8 through 10.	22	So this is by way of response to the other side's
23	I will then turn to EIA, and address measures 11	23	position that the FET standard in the treaty simply is
24	through 14.	24	a mirror of the minimum standard of treatment under
25	And then I will end with Smilno.	25	customary international law, and here we are explaining
	Page 1		Page 3
10.00 1		10.22 1	
10:29 1	So as to legitimate expectations, I would like to	10:32 1	why that is wrong and why the ordinary meaning of the
2	if we could pull up on the screen, if possible, the	2	terms used in the treaty do protect an investor's
2 3	if we could pull up on the screen, if possible, the transcript from Day 1, page 8 of the PDF.	2 3	terms used in the treaty do protect an investor's legitimate expectations. So this is 257 and following.
2 3 4	if we could pull up on the screen, if possible, the transcript from Day 1, page 8 of the PDF. And this is just a short passage from my opening	2 3 4	terms used in the treaty do protect an investor's legitimate expectations. So this is 257 and following. So if we
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10:33 1	arbitrarily. But I am here talking about legitimate expectations.	10:37 1	So here the Respondent's case is that "the BIT imposes the minimum standard of protection of
3	Perhaps we can take it by reference to the Memorial,	3	investors", established by customary international law,
4	it might be easier, because this is where we set out our	4	the minimum standard of treatment, and they seek to
5	case initially.	5	derive that proposition from the reference in Article II
6	So if we go to page 89 of our Memorial. So we here	6	to the words:
7	quote the terms of the BIT Article II(2)(a):	0 7	" and shall in no case be accorded treatment less
8	"Investment shall at all times be accorded fair and	8	than that which conforms to principles of international
9	equitable treatment."	9	law."
10	Obviously in order to then determine the content of	10	Now, as to that, we say, that is a floor. That is
11	that standard, the starting point is the ordinary	11	not the ceiling. So you've got to give meaning to the
12	meaning of the words, obviously well familiar	12	initial parts of Article II:
13	principles. But we've cited many awards here in the	13	" shall at all times be accorded fair and
14	footnotes noting that the ordinary meaning provides only	14	equitable treatment."
15	limited assistance. But it's not of no assistance at	15	So if the state's parties had intended to simply
16	all. The ordinary meaning of the terms "fair and	16	mirror the standard of protection provided by customary
17	equitable" require just, even-handed, unbiased and	17	international law, they wouldn't have included those
18	legitimate treatment. But, significantly, at 211, the	18	last words. They would be otiose.
19	ordinary words have to be read in context, and this is	19	So that's why we say this is an autonomous FET
20	the key point, because if you go over the page to look	20	standard, not simply a standard that mirrors the
21	at the preamble, the object and purpose of the BIT is to	21	protection provided by the minimum standard of
22	provide a stable environment for investment.	22	treatment. So that's the point that we develop in our
23	So if, in order to ensure that that purpose and	23	Reply.
24	object is given full effect, a conclusion that the	24	Then if we go forward in the Counter-Memorial, and
25	treaty does not protect an investor's legitimate	25	this goes on for a long many pages, but we can go
	Daga 5		Dage 7
	Page 5		Page 7
10:35 1	protection would not give full effect to that object.	10:38 1	forward to internal page 102, PDF page 102.
10:35 1	protection would not give full effect to that object. But I think more importantly, if we go down to 213	10:38 1 2	forward to internal page 102, PDF page 102. So here they are engaging with our contention that
10:35 1 2 3	protection would not give full effect to that object. But I think more importantly, if we go down to 213 and we then look at the various standards that many	10:38 1 2 3	So here they are engaging with our contention that
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10.40 1		10.42 1	
10:40 1	just let me find the exact reference. (Pause)	10:43 1	necessarily requires that Slovakia will not prevent AOG
2	Yes, and it's page 144 of the Reply. And if we go	2	from doing that. And that is obviously right, because
3	down slightly, it's actually, this is exactly the award	3	you have a licence-holder who is paying licence fees to
4	I was intending to refer to. So it's a case involving	4	the state to enable it to carry out this work. It has
5	Slovakia.	5	an obligation to the state to do it, and it is,
6	The Tribunal in this case, Muszynianka please	6	therefore, necessarily implicit that the state won't
7	forgive my pronunciation noted that the main	7	prevent AOG from completing the work.
8	components of the doctrine of FET and legitimate	8	And we really didn't hear much by way of response to
9	expectations are helpfully summarised in the Antaris	9	that in opening, and we just say it follows naturally
10	award, and in that award the tribunal held that:	10	0
11	"A claimant must establish that (a) clear and	11	the licences and the Geology Act.
12	explicit (or implicit) representations were made by or	12	
13	attributable to the state in order to induce the	13	
14	investment, (b) such representations were relied on	14	5 5 1 5
15	by the Claimants, and (c) those representations were	15	**
16	subsequently repudiated by the state."	16	•
17	So those are the key elements on which we rely and	17	act in this way, to be placing obstacles to companies
18	that is the test which we embrace, and we say therefore	18	
19	it is sufficient for a state to have made an implicit	19	
20	representation in exploration licences, when read	20	
21	together with the legislative background, the Geology	21	ask itself is, are obstacles being put in the way of AOG
22	Act. Provided that those representations were relied	22	
23	upon by the Claimant and were subsequently repudiated by	23	
24	the state, then there is a violation of the FET	24	
25	standard.	25	which frustrated Discovery's expectation of being able
	D 0		P (1
	Page 9		Page 11
	Page 9		Page 11
	Page 9		Page 11
10:41 1	Page 9 PROFESSOR SANDS: So it's an implicit representation?	10:45 1	Page 11 to complete its work. Because unless the lease was
10:41 1		10:45 1 2	
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2	PROFESSOR SANDS: So it's an implicit representation? MR TUSHINGHAM: Yes.	2	to complete its work. Because unless the lease was approved to enable it to access the site, it wouldn't be
2 3	PROFESSOR SANDS: So it's an implicit representation? MR TUSHINGHAM: Yes. PROFESSOR SANDS: Is the representation in granting	2 3	to complete its work. Because unless the lease was approved to enable it to access the site, it wouldn't be able to complete the task. It was prevented from even
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10:46 1	stabilisation clause in the licences that were granted.	10:48 1	to drill the wells that it was trying so desperately to
2	But what we are saying is that when we are applying	2	drill.
3	for permits and approvals to enable us to complete the	3	So we just stress this link between the obligation
4	task which we have an obligation to the state to	4	to do the work, the obligation of Slovakia not to
5	perform	5	prevent that work, and what would have happened in
6	PROFESSOR SANDS: Not to complete the task: to carry out the	6	a but-for scenario.
7	task. And that task has to be carried out in accordance	7	But, of course, as I mentioned earlier, we don't
8	with other applicable laws.	8	rest our case entirely on legitimate expectations. As
9	MR TUSHINGHAM: Yes.	9	I explained in opening by reference to the Crystallex
10	PROFESSOR SANDS: And in accordance with the wishes of civil	10	award, and that's slides 159-161 of my presentation, we
11	society.	11	also rely on the obligation of Slovakia not to act
12	MR TUSHINGHAM: We would not subscribe to the latter point,	12	inconsistently, and that seems to be accepted: you can't
13	because that's not a component of the Ministry's	13	have one arm of the state denying what the other arm of
14	consideration of every single so take the forestry	14	the state is affirming. And then most importantly
15	lease, for example. There's no suggestion that the	15	PROFESSOR SANDS: I mean, that happens the whole time in
16	forestry the Ministry of Agriculture is required to	16	every state in the world. That's the nature of
17	consider whether drilling at Krivá Ol'ka would be	17	government. There are different ministries and we've
18	consistent with the wishes of society. That is not	18	all lived through experiences where Ministry A says this
19	a relevant part of the consideration that the Ministry	19	is what you can do and Ministry B says: no, we've got to
20	should be taking into account.	20	check the environmental obligations, blah blah blah, so
21	PROFESSOR SANDS: But exploration would be. So the state	21	that proposition cannot be right.
22	then has a positive duty to prevent any citizen from	22	MR TUSHINGHAM: Well, our fundamental point on inconsistency
23	objecting to the exploration?	23	is, if one state body and I'm thinking here
24	MR TUSHINGHAM: No. Of course we accept that the	24	particularly about the licences that were granted and
25	population, whether as part of the EIA process, whether	25	then renewed over a ten-year period; you will recall the
	Page 13		Page 15
10.47 1	as part of the licence renewal process is artitled to	10.50 1	
10:47 1	as part of the licence renewal process, is entitled to	10:50 1	flow chart I provided in opening.
2	participate. And indeed they did. And that is part of	2	So as part of the licences, the process of granting
23	participate. And indeed they did. And that is part of the democratic process.	2 3	So as part of the licences, the process of granting the licences, and as part of each successive application
2 3 4	participate. And indeed they did. And that is part of the democratic process.PROFESSOR SANDS: But what if they object? The state has to	2 3 4	So as part of the licences, the process of granting the licences, and as part of each successive application to renew, numerous state bodies are approached,
2 3 4 5	participate. And indeed they did. And that is part of the democratic process.PROFESSOR SANDS: But what if they object? The state has to stop that?	2 3 4 5	So as part of the licences, the process of granting the licences, and as part of each successive application to renew, numerous state bodies are approached, including the district offices, and they are asked: do
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Page 14

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10:51 1	a state is fully at liberty whether or not to grant	10:54 1	underlying note of that meeting at C-124. And if
2	these licences and impose that obligation. But when	2	I could ask for that to be brought up, please.
3	that obligation is imposed on the contractor in the	3	This is not a document we have seen before, but
4	licences and in the Geology Act, and when an investment	4	Mr Drymer, you will recall you mentioned a reference to
5	is then made in Slovakia in reliance on those licences,	5	Mr Fraser's first witness statement, and this is the
6	which was obviously the evidence of Mr Lewis, which went	6	underlying note to which reference is made.
7	unchallenged, that has consequences at the international	7	So this is a meeting between AOG and Ms Mat'ová, and
8	level. And that is our key point on legitimate	8	you will recall that she was the director of the
9	expectations, to which we don't really hear, from what	9	Department of State Geological Administration, and
10	we've heard so far, a credible answer.	10	another MoE official.
11	So that's all I'm going to say, unless the Tribunal	11	Second paragraph the English is not great, I am
12	would like to hear anything more on that.	12	afraid, but we will do our best:
13	THE PRESIDENT: No.	13	"Both one fully understand our troubles. Few months
14	MR TUSHINGHAM: I'm sorry it's taken a bit longer.	14	are attacked by activists and administration. Just
15	THE PRESIDENT: I think you should move on because otherwise	15	today finalised a letter for the President."
16	we will be here until tonight.	16	Just pausing there, it's clear the project was being
17	MR TUSHINGHAM: I just wanted to clarify that the sort of	17	discussed at the highest levels of government, even
18	questions and the interaction we've had, obviously that	18	before the election in March 2016.
19	was longer than I was intending to expect to take. But	19	The bullet points are also important. First bullet
20	I'll move as quickly on as possible now to Krivá Ol'ka.	20	point:
21	MR DRYMER: I need to tell you that anything you have to say	21	" the situation in oil sector is new for
22	in response to the Tribunal's questions is very	22	everybody.
23	relevant.	23	Ministry has no force to help us.
24	MR TUSHINGHAM: Exactly, and I'm very glad to assist you as	24	Ministry support Alpine in all what is in it's
25	much as we can.	25	responsibility."
	Page 17		Page 19
10.52 1	So I think it would be helpful just to begin with	10:55 1	And I'll come back to some of these bullet points in
10:52 1	So I think it would be helpful just to begin with	10:55 1	And I'll come back to some of these bullet points in a moment and what we draw from them
2	three contextual points about Krivá Ol'ka. And the	2	a moment and what we draw from them.
2 3	three contextual points about Krivá Ol'ka. And the first is this: it was barely touched on during our	2 3	a moment and what we draw from them. Just moving down a few more bullet points:
2 3 4	three contextual points about Krivá Ol'ka. And the first is this: it was barely touched on during our friend's opening presentation. It was said, "We need	2 3 4	a moment and what we draw from them. Just moving down a few more bullet points: "Geological department [that's obviously the
2 3 4 5	three contextual points about Krivá Ol'ka. And the first is this: it was barely touched on during our friend's opening presentation. It was said, "We need not spend much time on it". And it is easy to see why.	2 3 4 5	a moment and what we draw from them. Just moving down a few more bullet points: "Geological department [that's obviously the department in which Ms Mat'ová works] is permanently
2 3 4 5 6	three contextual points about Krivá Ol'ka. And the first is this: it was barely touched on during our friend's opening presentation. It was said, "We need not spend much time on it". And it is easy to see why. Because if Slovakia had a good defence to our	2 3 4 5 6	a moment and what we draw from them. Just moving down a few more bullet points: "Geological department [that's obviously the department in which Ms Mat'ová works] is permanently attacked in last few months and in all case confirmed
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2 3 4 5 6 7 8	three contextual points about Krivá Ol'ka. And the first is this: it was barely touched on during our friend's opening presentation. It was said, "We need not spend much time on it". And it is easy to see why. Because if Slovakia had a good defence to our allegations at Krivá Ol'ka we would have expected to have heard it by now. It was barely touched on it	2 3 4 5 6 7 8	a moment and what we draw from them. Just moving down a few more bullet points: "Geological department [that's obviously the department in which Ms Mat'ová works] is permanently attacked in last few months and in all case confirmed that Alpine activity is 100% legal and Slovak state guarantee right make exploration there."
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10:57 1	attacking Minister Sólymos for having extended the	10:59 1	measure. The Minister of Agriculture herself, Gabriela
2	exploration licences, and documents such as R-162. And	2	Matecna. She was the person who wrote to AOG on behalf
3	we also refer here to Mr Fraser's testimony at	3	of the Ministry on 23 June 2016, refusing to approve the
4	transcript Day 2, page 133, line 15, through to	4	amendment to the lease, C-19. Slovakia did not even
5	page 134, line 10.	5	mention her name in opening. They put forward the
6	Now, this is a key contextual factor, the media	6	Minister of Environment, Mr Sólymos, as a witness, but
7	pressure, which is relevant to all of the impugned	7	not the Minister of Agriculture, and that was evidently
8	measures, but particularly at Krivá Ol'ka.	8	a tactical decision, we say.
9	The second thing we draw from this note is that the	9	The second person who you didn't hear from, and he
10	permanent officials at the Ministry, at the coalface,	10	is a key person, is Mr Regec. He was the head of the
11	who were dealing with AOG, specifically Ms Mat'ová, were	11	service office of the Ministry of Agriculture, and again
12	supportive of AOG and were suggesting that the situation	12	we heard no reference to his name in opening. It is
13	would become more normalised after the election.	13	clear from the documents in our opening presentation at
14	Now, that prediction ultimately turned out to be	14	100-103 that he was the person who had the competence to
15	wrong. The prediction after the election was far from	15	approve the amendment. He was the official with the
16	normalised, and again this is another key contextual	16	most important evidence to give about the Ministry of
17	factor which we say lends strong inferential support to	17	Agriculture's internal decision-making process. He was
18	the notion that an instruction was given from above to	18	nowhere to be seen.
19	refuse AOG's application at Krivá Ol'ka.	19	And the important point there is that the documents
20	Conversely, the fact that the permanent officials at	20	I took you to in opening at slides 102-103 show that
21	the coalface were supportive makes it highly unlikely	21	Mr Regec was from the SNS party, which was in charge of
22	that it was those officials who were responsible for	22	the Ministry of Agriculture. He had based his
23	refusing the application.	23	pre-election campaign on opposing AOG's project, and
24	That's all I was going to say about this document.	24	after he was appointed as the head of the service office
25	And the third contextual factor is that after the	25	he was using his position to withhold approval for the
	Page 21		Page 23
10.58 1	election AOG's project and specifically the drills at	11.01 1	amendments for an improper purpose
10:58 1	election, AOG's project, and specifically the drills at	11:01 1	amendments for an improper purpose.
2	Krivá Ol'ka, became a political hot potato for the	2	And somewhat remarkably, there was no response to
2 3	Krivá Ol'ka, became a political hot potato for the government. There was negative coverage about the	2 3	And somewhat remarkably, there was no response to any of this in opening or in evidence.
2 3 4	Krivá Ol'ka, became a political hot potato for the government. There was negative coverage about the project throughout the national media, as Mr Sólymos	2 3 4	And somewhat remarkably, there was no response to any of this in opening or in evidence. Slovakia has also not explained its failure to
2 3 4 5	Krivá Ol'ka, became a political hot potato for the government. There was negative coverage about the project throughout the national media, as Mr Sólymos confirmed, that's transcript Day 3, pages 131-132.	2 3 4 5	And somewhat remarkably, there was no response to any of this in opening or in evidence. Slovakia has also not explained its failure to disclose any internal Ministry of Agriculture documents
2 3 4 5 6	Krivá Ol'ka, became a political hot potato for the government. There was negative coverage about the project throughout the national media, as Mr Sólymos confirmed, that's transcript Day 3, pages 131-132. Mr Sólymos described the situation as "a sensitive	2 3 4 5 6	And somewhat remarkably, there was no response to any of this in opening or in evidence. Slovakia has also not explained its failure to disclose any internal Ministry of Agriculture documents which reveal the decision-making process which led to
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		1	
11:02 1	a party to the lease. No such provision was set out in	11:05 1	before June 2016 by the Ministry of Agriculture. AOG
11.02 1	the lease as to why that period was included, and most	2	would have therefore been able to access the Krivá Ol'ka
3	importantly, there was no time limit specified under	3	site and drill its well before the expiry of the
	Article 50(7) of the Forest Act within which the		
4 5		4	extended term, that was extended until August 2016. And, importantly, AOG would have been able to drill that
5	Ministry needed to give its approval. This was	5	
6	an entirely separate administrative process.	6 7	well before the amendments to the EIA Act came into
7	So as at the date of the amendment, the lease was	7	force on 1 January 2017. And in that regard we refer
8	not "dead", which is the word that was used in opening	8	the Tribunal to Mr Lewis' second statement at
9	by Slovakia. The lease was extended by State Forestry,	9 10	paragraph 23 for the timing that it would have taken to
10	but needed to be approved by the Ministry.	10	actually drill the well and conduct the flow tests.
11 12	Now, the only other point that was raised in opening in relation to this was a reference to AOG's letter to		So all of that could have been done and that's why
12		12 13	we say, on that ground alone, measure 8 is enough for us to win on Krivá Ol'ka.
13 14	State Forestry on 18 July 2016. That's R-161. If we could just pull that up, please	13	
	could just pull that up, please.		But if the Tribunal wishes to go on to consider
15 16	So recall, the date of this document is after the Minister of Agriculture has refused to approve the	15	measures 9 and 10, this relates to the Ministry of
16	Minister of Agriculture has refused to approve the amendment to the lease, and Slovakia points to the fact	16 17	Environment's conduct in refusing the order, we say also that conduct breached the BIT, and I will take this as
	*		
18 19	that in this document, if we scroll down, please.	18	quickly as I can. Here I'm going to remind you again of who you did
19 20	So you see a reference here in the second paragraph to the original lease agreement, and those are important	19 20	not hear from on Slovakia's side: three permanent
20 21	words, so a reference there to the original lease before	20 21	Ministry officials who had been working for the Ministry
21 22	the amendment, and then in the last line:	21	since well before the 2016 election. First, Ms Jánová,
22	"After five months, the Ministry justified its	22	she was the director general, DG, of the geology
23 24	disapproval of the amendment by the fact that the	23 24	directorate, that's transcript Day 3, 105, lines 10-11.
24 25	original Lease Agreement expired and the formal	24	She had been the director general since at least 2011.
20	original Lease Agreement expired and the format	25	She had been the director general since a reast 2011.
	Page 25		Page 27
11:04 1	requirements were not fulfilled "	11:07 1	Ms Mat'ová was the director of the department of
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2	And then go over the next page:	2	state geological administration, transcript Day 3,
2 3	And then go over the next page: "Since the original lease agreement has expired, it	2 3	state geological administration, transcript Day 3, page 104, lines 12-22. She was Ms Jánová's deputy and
2 3 4	And then go over the next page: "Since the original lease agreement has expired, it is not possible to renew it with amendment no. 1"	2 3 4	state geological administration, transcript Day 3, page 104, lines 12-22. She was Ms Jánová's deputy and had been the director of the department since at least
2 3	And then go over the next page: "Since the original lease agreement has expired, it is not possible to renew it with amendment no. 1" And therefore that's why a request is made to State	2 3	state geological administration, transcript Day 3, page 104, lines 12-22. She was Ms Jánová's deputy and had been the director of the department since at least 2014. She signed the 2014 licences. That's C-8.
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11:08 1	AOG's application, not least because in his evidence he	11:11 1	a conversation written by an attorney and reported to
2	explains that the entire AOG issue, the whole case, was	2	his client. There is no suggestion that the attorney
3	an important event for a Ministry, "even for myself"	3	had any motive to conceal or misrepresent matters.
4	(Day 3, page 109, line 23). We say it is very likely	4	The third point is that Mr Hrvol is not a witness
5	that those minutes would have referred to the	5	within Discovery's control. He is an official within
6	application.	6	Slovakia's control. It would have been the simplest
7	There are also likely to be other internal documents	7	thing in the world for Slovakia to produce a witness
8	which have not been disclosed. You will recall that	8	statement from Mr Hrvol denying what is set out in this
9	Mr Sólymos accepted it was likely that Ms Mat'ová and	9	email. But they have not done so. They have known
10	Mr Hrvol would have been involved in internal	10	about this allegation since the Memorial,
11	discussions at the Ministry about AOG's application,	11	paragraphs 152-153, and the Reply, but no witness
12	transcript Day 3, page 117, lines 6-9. And also he	12	statement came forward.
13	accepted that Ms Jánová and Ms Mat'ová communicated with	13	And the fourth point is that Slovakia has not
14	each other, page 141, lines 14-24.	14	produced internal documents which contradict the account
15	We heard nothing, again, in opening by way of	15	set out in the email. The documentary exhibits that we
16	an explanation for these disclosure failures, and during	16	have placed before you are consistent with the account
17	Mr Sólymos' cross-examination you will recall I pointed	17	set out in this email, and we rely here by way of
18	the reference to file no. 2205-2017 in the top	18	example on Exhibit C-337. That's the email dated
19	right-hand corner of the Ministry's decision in March	19	17 October 2016, where Mr Hrvol is said to have
20	rejecting the application. That's transcript Day 3, 158	20	confirmed that he saw no reason why the Ministry should
21	through to 159.	21	not decide in favour of AOG. That's entirely consistent
22	Mr Sólymos confirmed that he had not looked through	22	with what is set out in this email. And then Exhibit
23	that file before he came to give testimony that's	23	R-213, which is Mr Fraser's email dated
24	page 160 and it seems highly likely that the prior	24	15 December 2016, reporting on his meeting with the
25	drafts of the Ministry's decision, to which I'll come	25	Minister that day, where they discussed the Article 29
	Page 29		Page 31
11:10 1	shortly, would have been held within that file. No	11:13 1	application, and was led to believe the application
2	satisfactory explanation has been given for the failure	2	would be approved, and that the Minister was prepared to
2 3	satisfactory explanation has been given for the failure to produce those prior drafts.	2 3	would be approved, and that the Minister was prepared to help AOG but only if he got some positive PR.
2 3 4	satisfactory explanation has been given for the failure to produce those prior drafts. The next point here relates to the famous email,	2 3 4	would be approved, and that the Minister was prepared to help AOG but only if he got some positive PR. What, then, should the Tribunal make of Mr Sólymos'
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2 3 4 5 6	satisfactory explanation has been given for the failure to produce those prior drafts. The next point here relates to the famous email, Exhibit C-370, if we could bring this up, please. So this is the email on 9 March, which you will have seen	2 3 4 5 6	would be approved, and that the Minister was prepared to help AOG but only if he got some positive PR. What, then, should the Tribunal make of Mr Sólymos' denial in his witness statement, his second witness statement, that he ever gave an instruction? Well,
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11:14 1	First of all, apart from the documents mentioned in his	11:17 1	an instruction was given. When you take it all
2	witness statement, he had not been shown any other	2	together, it all points in the same direction.
3	internal Ministry of Environment documents relating to	3	Now, the final point on this is Slovakia says: well,
4	AOG's application. That's pages 113, 115 and page 142.	4	the instruction theory can't work because in June the
5	He didn't speak with Mr Hrvol before he came to give	5	Minister granted AOG's appeal granted the appeal in
6	evidence, despite the fact that it would have been	6	AOG's favour. That was Day 1, transcript page 181.
7	obvious to speak to Mr Hrvol. And then third and	7	Well, Mr Sólymos didn't grant AOG's appeal. He
8	this is the key point he had not even seen this email	8	annulled, as you will recall, the original decision, and
9	that's on the screen before he came to give evidence.	9	remanded it back to the Ministry for a new decision.
10	This is transcript Day 3, page 154, lines 2-16. So he	10	You will recall that in cross an issue arose about
11	had not even seen it. We say that is very revealing.	11	whether the Minister had the power to annul and remand
12	It doesn't provide a promising start to give any weight	12	or annul and amend. We have sent you overnight you
13	to his testimony.	13	may not have seen, but Exhibit R-076A. This is
14	But it became worse, because he accepted that his	14	articles 59 and 61 of the administrative procedure code,
15	recollection may be different if he had been able to	15	which show that the Minister did have the choice, either
16	refresh his memory by reference to the contemporaneous	16	to alter the original decision, or to quash it and
17	documents, transcript Day 3, page 149, lines 3-22:	17	return it back to the first-instance authority. So the
18	"Well, definitely. I don't remember everything from	18	Minister could have granted AOG's application within the
19	seven years ago. I would be reading hundreds of	19	context of the appeal, but he did not.
20	documents back then. Had I seen something later on,	20	If the Minister had exercised that power, that would
21	recently, I would have remembered. It's quite logical."	21	have likely generated further negative publicity, which
22	Now, Mr Sólymos suggested that if he was the	22	the Minister was so keen to avoid and the Ministry was
23	appellate body, he would not enter or interfere with	23	receiving. And so the appeal, we say, is not a complete
24	first-instance decisions. But you will recall,	24	answer, and it didn't remove the existing obstacle which
25	Madam President, that in response to your questions you	25	the Ministry had put in AOG's way.
	Page 33		Page 35
	1 age 55		1 age 55
11:16 1	were asked, he said he accepted that usually he would	11:19 1	But in any event, we say the reliance on the appeal
2	not have been involved in first-instance decisions, and	2	is a non sequitur. The mere fact that the Minister
	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151.		is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the
2 3 4	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151. So there were exceptions, and it is inconceivable	2 3 4	is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the proposition that an instruction was given before the
2 3 4 5	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151. So there were exceptions, and it is inconceivable that in this case, where the Minister himself described	2 3	is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the proposition that an instruction was given before the original decision was issued.
2 3 4 5 6	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151. So there were exceptions, and it is inconceivable that in this case, where the Minister himself described the AOG issue as an important event for the Ministry and	2 3 4 5 6	is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the proposition that an instruction was given before the original decision was issued. The final point, then, is Slovakia says: well,
2 3 4 5 6 7	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151. So there were exceptions, and it is inconceivable that in this case, where the Minister himself described the AOG issue as an important event for the Ministry and himself, and where he had attended a meeting with AOG on	2 3 4 5 6 7	is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the proposition that an instruction was given before the original decision was issued. The final point, then, is Slovakia says: well, Discovery walked away from the process after the
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2 3 4 5 6 7 8 9	not have been involved in first-instance decisions, and that's transcript Day 3, pages 150-151. So there were exceptions, and it is inconceivable that in this case, where the Minister himself described the AOG issue as an important event for the Ministry and himself, and where he had attended a meeting with AOG on 15 December where the application was discussed, that he wasn't involved in any way in the decision.	2 3 4 5 6 7 8 9	is a non sequitur. The mere fact that the Minister quashed the original decision doesn't negate the proposition that an instruction was given before the original decision was issued. The final point, then, is Slovakia says: well, Discovery walked away from the process after the decision was quashed. That was transcript Day 1, page 182. But that is a complete distortion of the
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11:20 1	three exploration wells in the April 2017 press release?	11:25 1	conducting a procedure which was not arbitrary and in
2	That's C-171.	2	which the applicant was treated fairly. That's the
3	Now, it's important that we be clear about what we	3	words of the Tribunal in Crystallex at paragraph 581,
4	mean by the EIA issue, and I think it would be helpful	4	slide 159 of my presentation.
5	if we could begin with our opening presentation,	5	So when Slovakia made the EIA decisions requiring
6	slide 124. I promised no new slides, so this is an old	6	a full EIA, measures 11 through 13, it breached that
7	slide.	7	standard because it acted inconsistently, it acted
8	CP-1, slide 124.	8	arbitrarily, and it frustrated Discovery's legitimate
9	PROFESSOR SANDS: While we are waiting, can I just say personally how nice it has to have you do advocacy	9 10	expectations. And it was those decisions which were the final nail in the coffin. And I'll go through this in
10 11		10	a bit more detail if it would assist the Tribunal.
11	rather than reading from a PowerPoint. MR TUSHINGHAM: That's I quite agree.	11	Next, I think, it would be helpful if we could go
12	PROFESSOR SANDS: It really is a lot nicer, as	12	back to slide 122, and this is the timeline. So what
13	an arbitrator, to hear you doing your stuff.	13	we're talking about with measures 11 through 13 are the
14	MR TUSHINGHAM: Thank you very much, Professor.	15	three EIA decisions, and they of course came before
15	If we could go to page 124. If you see on the	15	sorry, they came after AOG had made a voluntary
10	right, just where there's the dialogue box above "214",	10	commitments to the activists to perform the preliminary
18	if you could just type into there "124". (Pause)	18	EIA. But, of course, our complaint is about the
10	It was also one of the demonstratives. I wonder	19	treatment which we suffered at the hands of the state in
20	whether that's quicker, to pick that up in that way.	20	those three decisions.
21	There we go. This is probably easier.	21	So I hope that helps the Tribunal reconcile those
22	Okay, exactly, this is the right slide. So	22	two aspects. Unless the Tribunal I can help you any
23	I skipped over this slide in my opening, for which	23	further.
24	apologies, because time was short. But obviously	24	PROFESSOR SANDS: We were taken to a document and I can't
25	I think it's just important to emphasise a few points	25	remember, I've got it in my notes which summarised
	Page 37		Page 39
11:23 1	here.	11:26 1	the process between step one, preliminary EIA, and
11:23 1		11:26 1 2	the process between step one, preliminary EIA, and a document which described I think the 174 people who
	here. The first step in the EIA process was the applicant submitting a preliminary EIA to the district office, and		
2	The first step in the EIA process was the applicant	2	a document which described I think the 174 people who
2 3	The first step in the EIA process was the applicant submitting a preliminary EIA to the district office, and	2 3	a document which described I think the 174 people who contributed.
2 3 4	The first step in the EIA process was the applicant submitting a preliminary EIA to the district office, and that was the voluntary step that AOG committed to take	2 3 4	a document which described I think the 174 people who contributed. MR TUSHINGHAM: Yes.
2 3 4 5	The first step in the EIA process was the applicant submitting a preliminary EIA to the district office, and that was the voluntary step that AOG committed to take for its three exploration wells in the April 2017 press	2 3 4 5	a document which described I think the 174 people who contributed.MR TUSHINGHAM: Yes.PROFESSOR SANDS: And then the state organisations, and
2 3 4 5 6 7 8	The first step in the EIA process was the applicant submitting a preliminary EIA to the district office, and that was the voluntary step that AOG committed to take for its three exploration wells in the April 2017 press release. But, importantly, under the act, that step did not automatically lead to an order for a full EIA. The second and third steps are the gravamen of	2 3 4 5 6	 a document which described I think the 174 people who contributed. MR TUSHINGHAM: Yes. PROFESSOR SANDS: And then the state organisations, and thereupon a decision was taken. MR TUSHINGHAM: Exactly. PROFESSOR SANDS: So could you just tease out a little bit
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11.07		11.20 1	
11:27		11:30 1	then you have accepted this?
	2 remember during the licence renewal process over that	2	MR TUSHINGHAM: We completely accept that, and
	ten-year period between 2006 and 2016? At each stage	3	THE PRESIDENT: So you are more complaining about the fact
2		4	that the investigation was not properly conducted; is
	and some of the questions that were raised were whether	5	that what it is?
(· · ·	6	MR TUSHINGHAM: In large part, yes. And we would put it
		7	as draw an analogy with the Crystallex case, because
8	5	8	we say that is the clearest analogy we can draw with
1		9	another case that has considered similar issues.
1		10	Now, of course, that was not a case involving
1		11	an environmental impact assessment, but it was a case
1	-	12	where a permit was denied on purported environmental
1		13	grounds, the tribunal concluding that the way in which
1.		14	those environmental grounds were raised did not follow
1		15	a fair process. And the point was in that case that the
1 1'		16 17	tribunal said in order to put a halt to the project on
1		17	environmental grounds, those grounds needed to be supported by evidence and data, and it was incumbent
1		18	upon the state to support those allegations by reference
2		20	to a foundation of fact.
2		20	And if we just look at the Smilno EIA decision, and
2		21	this picks up on Professor Sands' point, so if we go to
2		23	377, please. Exhibit C-377.
2		24	So this is the Smilno EIA decision, which was handed
2		25	down by the district office on 2 August, and we've
	Page 41		Page 43
11:29	1 1	11:32 1	obviously referred to this in our slides.
	that the activities will not have any unfavourable	11:32 1	So the district office upon the application by AOG,
	that the activities will not have any unfavourableimpacts on their surroundings and the environment in	2 3	So the district office upon the application by AOG, and you will see the application at C-373, which we
	 that the activities will not have any unfavourable impacts on their surroundings and the environment in general." 	2 3 4	So the district office upon the application by AOG, and you will see the application at C-373, which we don't need to go to now, but the conclusion is that it
	 that the activities will not have any unfavourable impacts on their surroundings and the environment in general." And then critically, the last paragraph: 	2 3 4 5	So the district office upon the application by AOG, and you will see the application at C-373, which we don't need to go to now, but the conclusion is that it shall be assessed pursuant to the EIA Act, and that is
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11.24 1	various hadies and sitizans, and it's interacting to	11:36 1	Other requirements will be specified in the
11:34 1	various bodies and citizens, and it's interesting to have a look at some of those comments.	11.50 1	Other requirements will be specified in the scope"
2		3	And that's obviously at the next stages in the flow
3	So if you could go to page 9, please. So comment number 6. This is the Bardejov district		chart.
4	5	4 5	
5	office, department of road transport and land		So our key point here is that if you were going to
6	communications, sending a letter on 12 July, and it's	6	put a halt to the project on the basis of environmental
7	obviously received the application. And the issue is	7	grounds, you needed to explain, by reference to
8	actually access: how do we access the site?	8	a rational foundation of fact, why the activities were
9	So, what does the district office say:	9	likely to have significant effects on the environment.
10	"The proposed site is accessible from	10	And we say that the district office's failure to do so
11	a comprehensive road (dirt road) connected to the	11	did not accord with treatment that can be termed fair
12	road in the cadastral territory of Smilno."	12	and equitable treatment.
13	So this is the district office telling AOG and the	13	PROFESSOR SANDS: You've taken us at page 56:
14	other district office that AOG can access the site using	14	"Other requirements and details will be specified in
15	the field road.	15	the scope of the assessment"
16	But what is then said in the next paragraph is:	16	MR TUSHINGHAM: Yes, that's the full EIA.
17	"In view of the [Road Act], the state administration	17	PROFESSOR SANDS: Well:
18	in matters of local and comprehensive communications is	18	"Other requirements and details will be specified in
19	carried out by municipalities"	19	the scope of the assessment"
20	And you will recall that that was	20	MR TUSHINGHAM: Yes. So if you go back to the flow chart in
21	Professor Števcek's precise point: this fell within the	21	my presentation.
22	jurisdiction of the municipality, and so the Bardejov	22	PROFESSOR SANDS: "Other requirements". I may be just
23	district office says:	23	wrong, I'm reading that as being: the full requirements
24	" we refer the matter to the municipality of	24	of what is to be assessed will be set out in the future
25	Smilno for the direct handling of [this] matter."	25	decision.
	Page 45		Page 47
11:35 1	What does the Smilno municipal office then say?	11:37 1	MR TUSHINGHAM: We understand it's accepted, I think, on
2	Look at number 7:	2	the other side, this is the order for a full EIA to take
3	"The municipality of Smilno, represented by the	3	place.
4	mayor has no objection to the [project] concerning	4	PROFESSOR SANDS: So what does that mean:
5	the access from the main road (dirt road) connected to	5	"Other requirements and details"
6	the class I road no. 1/77"	6	MR TUSHINGHAM: If I could just take you to the flow
7	So what we understand there is being said is: you	7	chart
8	can use this road to access the drill site.	8	PROFESSOR SANDS: Yes, but also, relatedly, how does this
9	Now, of course, some other citizens and some state	9	decision compare to other decisions in relation to this
10	bodies, including another municipality, objected, and	10	document and decision adopted at this stage of the
11	they insisted on a full EIA.	11	process? Is this different from other decisions? Does
12	But the question is whether if you go forward to	12	this depart from normal practice?
13	the conclusion at page 55, so there's a heading entitled	13	THE PRESIDENT: Yes, I had the same question. What is the
14	"Conclusion", and then this is the sum total of the	14	legal basis in Slovak law for this process, in the sense
15	analysis, and I would invite the Tribunal to read this	15	of, what is the administration meant to do?
16	very carefully in due course. It doesn't really say	16	MR TUSHINGHAM: Yes, of course.
17	very much in the first paragraph. It says: we "took	17	THE PRESIDENT: Does it have to investigate?
18	into account the opinions", and "made the ruling as set	18	MR TUSHINGHAM: Yes. So if I could take you to the flow
19	out in the operative part". And if you go forward to	19	chart, this puts it in the legal basis. So if we go to
20	the next page, and at the top:	20	slide 124.
21	"From the opinions received on the project proposal	21	MR DRYMER: You're being asked what exactly are the
22	and from the measures proposed in the designed	22	proceedings in box 2 meant to be.
23	construction operation, some specific requirements in	23	MR TUSHINGHAM: Exactly, so in box 2 one in box 2 and
24	relation to the designed construction operation have	24	box 3, those are the provisions of the EIA Act which
25	emerged, which will need to be taken into account	25	establish what the district office has to do. And we've
	Page 46		Page 48

2	-	1	
11:39 1	got the references in the footnote to those articles in	11:41 1	even got to this process if the district offices had
2	the act. And if we turn to the act, I don't think we	2	done their job properly.
		3	PROFESSOR SANDS: But, again, sorry, I'm just trying to
3	have time now, but they set out that the district office		
4	must take into account a wide range of factors, and they	4	understand the process. So this document now, we're
5	are set out in an annex explaining what has to be taken	5	now November
6	into account. You can't just order a full EIA on the	6	MR TUSHINGHAM: Correct.
7	basis of speculation. It's got to be based on some	7	PROFESSOR SANDS: So, September, October, November, it's
8	rational foundation of fact.	8	three months later.
9	PROFESSOR SANDS: Just on that, if you look at the third	9	MR TUSHINGHAM: Exactly.
10	box:	10	PROFESSOR SANDS: They've now come up with the full detailed
11	"District office issues a decision on whether a Full	11	scope.
12	EIA is required."	12	I'm just now trying to work out in parallel in my
13	I assume that's C-377.	13	mind, we've got this entire process with the EU
14	MR TUSHINGHAM: Exactly.	14	directive which has wrongly been transposed by the
15	PROFESSOR SANDS: And then the next box says:	15	Slovak State into domestic law. There are proceedings
16	"If a Full EIA is required"	16	against Slovakia for that. They then have to amend
17	MR TUSHINGHAM: If an order for a full EIA has been made.	17	their adoption of their rules.
18	PROFESSOR SANDS: Which it has.	18	MR TUSHINGHAM: Which was January.
10	MR TUSHINGHAM: Yes.	10	PROFESSOR SANDS: Which was January. In the meantime there
	PROFESSOR SANDS: " District Office then determines the	20	has been a judgment of the Court of Justice of the
20 21	scope of the Full EIA."	20 21	European Union, which says that in certain circumstances
	-	21	
22	MR TUSHINGHAM: Correct.		exploratory drilling may be the subject
23	PROFESSOR SANDS: So we haven't seen that yet.	23	MR TUSHINGHAM: And we fully
24	MR DRYMER: Those are the further criteria.	24	PROFESSOR SANDS: I understand. But what I'm trying to work
25	MR TUSHINGHAM: So if you then look at R-193, that then	25	out then is: to what extent does this EIA requirement
	Page 49		Page 51
		11.40.1	
11:40 1	5 1	11:42 1	MR TUSHINGHAM: You mean this document?
2	be done. But this is, of course, after the order for	2	PROFESSOR SANDS: This document, R-193, November 2017,
2 3	be done. But this is, of course, after the order for a full EIA has been made. So, once that decision has	2 3	PROFESSOR SANDS: This document, R-193, November 2017, purport to give effect to the requirements under the EU
2 3 4	be done. But this is, of course, after the order for a full EIA has been made. So, once that decision has been made, you then open up the full EIA process. So	2 3 4	PROFESSOR SANDS: This document, R-193, November 2017, purport to give effect to the requirements under the EU directive, because the EU directive, once it requires
2 3 4 5	be done. But this is, of course, after the order for a full EIA has been made. So, once that decision has been made, you then open up the full EIA process. So this is the scope of assessment.	2 3 4 5	PROFESSOR SANDS: This document, R-193, November 2017, purport to give effect to the requirements under the EU directive, because the EU directive, once it requires an EIA, doesn't actually operate to, if you like, home
2 3 4 5 6	 be done. But this is, of course, after the order for a full EIA has been made. So, once that decision has been made, you then open up the full EIA process. So this is the scope of assessment. And you see here, then, later down the page on 	2 3 4 5 6	PROFESSOR SANDS: This document, R-193, November 2017, purport to give effect to the requirements under the EU directive, because the EU directive, once it requires an EIA, doesn't actually operate to, if you like, home in on the particular areas of concern. Once you're
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11.44 1	have then been able to say look this is what we say in	11:47 1	Annex II, Member States shall"
11:44 1	have then been able to say: look, this is what we say in our application, and this is why the chemicals that we	11:47 1 2	PROFESSOR SANDS: But you are aware of that
2 3	are using will not pose significant effects on the	2	MR TUSHINGHAM: I know. I know.
	environment and we can satisfy you that this won't pose		PROFESSOR SANDS: Which is almost incomprehensible,
4		4 5	actually, to read.
5	a problem.		MR TUSHINGHAM: But just taking the language of the
6 7 T	But they didn't do that PROFESSOR SANDS: But again, I'm just trying to it's	6 7	directive itself.
	a complex and moving situation here.	8	PROFESSOR SANDS: But then you are going to have to take us
8	AR TUSHINGHAM: I know.	9	to the judgment, because the judgment basically says
	PROFESSOR SANDS: Because of two processes going in	10	that an exploratory project on Annex II may nevertheless
	parallel, the EU process and the Slovak process.	10	be subject to a mandatory requirement. That's the
11 12	The way the EU process works I know nothing about	11	difficulty.
12	the Slovak process beyond what I've learned in these	12	MR TUSHINGHAM: Well, I just want to just
13	proceedings, but I do know the EU process well there	13	PROFESSOR SANDS: Because this alone doesn't my reading
14	isn't a possibility for, if you like, a partial EIA.	14	was probably as yours was: it appears to be Annex II, no
15	Once you fall within the scope, you've got to do a full	15	issue.
10	whack.	10	But then when you read the judgment from 2015, they
17	So what you are saying is, they had a duty to set	18	seem to say: no, in certain circumstances you require,
18	out with precision	18	even for exploratory drilling particularly; I think
	AR TUSHINGHAM: Exactly, exactly.	20	it's particularly if it goes beyond 600 metres you've
	PROFESSOR SANDS: what the particular areas of	20	got to have a mandatory EIA. So that's my confusion.
21 F 22	environmental concern were.	21	MR TUSHINGHAM: I know.
	MR TUSHINGHAM: Were, before the August decision.	22	PROFESSOR SANDS: The European Court of Justice judgment is
	PROFESSOR SANDS: Before the August decision, or in	23 24	almost unreadable.
24 F 25	the August decision.	24	MR TUSHINGHAM: I will just, if I may, just work through the
23	the August decision.	23	WIK TUSHINOHAW. Twin just, in Thiay, just work unough the
	Page 53		Page 55
	R TUSHINGHAM: Exactly, yes.	11:48 1	directive first and then we can go to the judgment.
2 PF	ROFESSOR SANDS: But I then have two questions. The first	11:48 1 2	So:
2 PF 3	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in		So: " Article 4(2), for projects listed in Annex II,
2 PF 3 4	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to	2 3 4	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall
2 PF 3 4 5	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to be done in the circumstance that EU law, apparently,	2 3 4 5	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with
2 PF 3 4 5 6	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to be done in the circumstance that EU law, apparently, I'm not expressing a view on it, but apparently requires	2 3 4 5 6	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Article 5 to 10."
2 PF 3 4 5 6 7	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to be done in the circumstance that EU law, apparently, I'm not expressing a view on it, but apparently requires you to do a full whack EIA. However absurd that may be,	2 3 4 5 6 7	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Article 5 to 10." And that is full EIA:
2 PF 3 4 5 6 7 8	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to be done in the circumstance that EU law, apparently, I'm not expressing a view on it, but apparently requires you to do a full whack EIA. However absurd that may be, that is apparently what the EU law requires.	2 3 4 5 6 7 8	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Article 5 to 10." And that is full EIA: "Member States shall make that determination
2 PF 3 4 5 6 7 8 9 M	ROFESSOR SANDS: But I then have two questions. The first is: does this set of steps depart from what happened in other projects in Slovakia? And, secondly, what is to be done in the circumstance that EU law, apparently, I'm not expressing a view on it, but apparently requires you to do a full whack EIA. However absurd that may be, that is apparently what the EU law requires. R TUSHINGHAM: Do you mind if I just take two seconds, just	2 3 4 5 6 7 8 9	So: " Article 4(2), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Article 5 to 10." And that is full EIA: "Member States shall make that determination through:
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11:49 1	EIA or just stop it at the preliminary EIA stage.	11:51 1	practice in relation to this case? I don't know what
2	That's the key point, and that's why we say the	2	the answer to that question is.
3	process that was followed did not comply with the	3	MR TUSHINGHAM: I think my response to that would be as
4	requirements of the FET standard in the treaty.	4	follows. In relation to this aspect, measures 11
5	But significantly, it's not just the process, it's	5	through 13, we are not complaining of a breach of
6	also the question of whether the suggestion that the	6	national treatment. We're not saying that the process
7	decisions had significant effects on the environment had	7	that was followed in this case in relation to these
8	a rational foundation of fact. That's the key point.	8	decisions was different from the process that was
9	And so if Slovakia was going to say, "We think this	9	followed in other decisions. We are attacking the
10	drill in Smilno has significant effects on the	10	decisions themselves.
11	environment", it needs to justify that by reference to	11	THE PRESIDENT: You are saying that the decision lacks
12		12	reason, no?
13	put forward by the other side, as was the case in	13	MR TUSHINGHAM: Exactly, exactly.
14		14	THE PRESIDENT: That's essentially what you're saying?
15	-	15	MR TUSHINGHAM: And also lacks a rational foundation of
16	-	16	fact.
17	state the duty to determine whether to move to a full	13	THE PRESIDENT: But that is more difficult for us to see.
18	EIA.	18	If there are no reasons you don't know what is behind
18	MR TUSHINGHAM: Correct.	18	the reasoning.
20	PROFESSOR SANDS: It then requires the full EIA to govern	20	MR TUSHINGHAM: Well, exactly, and so therefore it was
20 21	I mean, it may be absurd, but to cover everything.	20 21	an arbitrary decision.
			-
22	MR TUSHINGHAM: If an order for a full EIA has been made,	22	PROFESSOR SANDS: But arguing against that, on the other
23	and that's the key point.	23	hand you're going to have to address the fact that there
24		24	were 174 statements somehow came in, separately some
25	MR TUSHINGHAM: Which we say they shouldn't have done.	25	public bodies came in, some of the public bodies said we
	Page 57		Page 59
	6		C
11:50 1	PROFESSOR SANDS: Does the EIA directive of the	11:52 1	have no problem with this project, others said we have
11:50 1 2	PROFESSOR SANDS: Does the EIA directive of the European Union say, you have to, at the case-by-case	11:52 1 2	have no problem with this project, others said we have a problem with this project; and it's therefore possible
2	European Union say, you have to, at the case-by-case	2	a problem with this project; and it's therefore possible
2 3	European Union say, you have to, at the case-by-case preliminary assessment stage, have to set out in that	2 3	a problem with this project; and it's therefore possible for a reasonable reader to glean from that that the
2 3 4	European Union say, you have to, at the case-by-case preliminary assessment stage, have to set out in that initial decision what your reasons are for going to	2 3 4	a problem with this project; and it's therefore possible for a reasonable reader to glean from that that the decision-maker must have been influenced by the totality
2 3 4 5	European Union say, you have to, at the case-by-case preliminary assessment stage, have to set out in that initial decision what your reasons are for going to a full EIA.	2 3 4 5	a problem with this project; and it's therefore possible for a reasonable reader to glean from that that the decision-maker must have been influenced by the totality of those submissions that were made.
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11:53 1	EIA decisions breached the FET standard, in other words,	11:57 1	So at paragraph 576:
2	that those orders for a full EIA were not compliant with	2	"Discovery would undertake Preliminary EIAs and, in
3	the treaty, the Tribunal must then wipe out the	3	exchange, the local citizens would stop protesting or
4	consequences of that illegal act. So we then assume	4	otherwise stop seeking to block Discovery's project."
5	that in a but-for scenario a full EIA would not have	5	And so the bargain that was reached with the local
6	been ordered.	6	community in the press release was: you will undertake
7	Well, where does that leave Smilno? Well, the	7	preliminary EIAs, and in exchange we will stop blocking
8	Smilno EIA decision was issued in August 2017. You will	8	your project.
9	recall that the interim injunction ended in May of	9	So if the order for a full EIA had not been made
10	2017 Ms Varjanová's interim injunction. So the	10	which we say in a but-for scenario you should assume
10	interim injunction would no longer have prevented AOG	10	that it had not been made then there would be no
12	from entering onto the land plot. And we saw earlier in	12	longer any blockages on the road, and if AOG couldn't
12	the comments submitted by the Bardejov district office	12	have used the road as a PSPR, if you move forward,
13	during those preliminary EIA proceedings, it was	13	please, to paragraph 578(a), over the page, this is
14	accepted that the proposed site is accessible using the	14	Slovakia's own case:
15	field road. What's more, the district office deferred	15	"There would likely have been an agreement
10	to the mayor, and he raised no objection.	10	concerning the Access Land."
18	And so based on those comments, we say that in	18	So we say in a but-for scenario, taking the 2017
18	a but-for scenario it is inherently likely that AOG	18	community agreement on Slovakia's own case, the Tribunal
19 20	would have been able to use the road, the access land,	19 20	is entitled to assume that an agreement would have been
20 21	to access the Smilno site.	20 21	reached on the ability to use that land.
21	Now, Professor Sands, you pointed yesterday to		So even if AOG had not been able to use the road on
22	Professor Števcek's answer to your question: there are	22 23	the basis that it was a PSPR, this is what would have
23 24	no clear answers to this question.	23 24	most likely happened, and that would have enabled AOG to
24 25	Professor Števcek was not conceding that the road	24 25	drill its well.
23	Thessol Steveek was not concerning that the toad	25	drift its well.
	Page 61		Page 63
11:55 1	was not a PSPR. His firm view, both in his expert	11:58 1	Now, if the Tribunal agrees with that analysis, it
2	reports and in cross, was that this was a PSPR. And	2	does not need to decide whether impugned measures 1
3	obviously we accept the Tribunal is entitled to examine	3	through 7 in my table breached the FET standard. What
4	that opinion.	4	the Tribunal must do is ask what would have happened in
5	But significantly, this is not a case of rival	5	a but-for scenario if the order for a full EIA at Smilno
6	expert opinions, because Slovakia's expert was not	6	had not been made.
7	instructed to express any opinion on whether the road	7	And so we say the answer to that question is
8	was a PSPR. And Dr Fogaš accepted that. This is	8	provided in Slovakia's own Rejoinder.
9	transcript Day 4, page 139, lines 18-24. See also the	9	And so, unless the Tribunal would like me to address
10	Rejoinder appendix, page 4, footnote 8.	10	measures 1 through 7, I'm happy to do so if you have any
10	So you won't find anything of assistance in	11	questions, or if you would like me to, but that's where
11	Dr Fogaš' reports, and that's why I didn't ask him any	12	we would rest our case on Smilno.
12	questions about the road issue in cross. So you are	12	THE PRESIDENT: I have a question going back to your saying
13	left with Professor Števcek's opinion, which we say the	14	the interim injunction was lifted in May 2017.
15	Tribunal should accept, and we say that this road was	15	MR TUSHINGHAM: Yes.
16	a PSPR.	16	THE PRESIDENT: And the preliminary decision the decision
10	But my final argument here is, even if the Tribunal	17	for the EIA, for the full EIA was taken in August of
18	doesn't accept that, in other words, even if the	18	2017.
19	Tribunal doesn't accept that the road was a PSPR,	19	MR TUSHINGHAM: August, yes. Yes.
20	I would invite you to turn to the Rejoinder at	20	THE PRESIDENT: And so if that decision had not been taken,
20	paragraph 575. And this is where I'm going to leave	21	or had not ordered a full EIA, then the drilling could
22	Smilno. It's internal page, PDF page 178. Hard copy	22	have started
		23	MR TUSHINGHAM: Correct.
	pagination 1/2, electronic page 1/8 of the Reioinder	25	WIK I USHINGHAWI. COIlect.
23 24	pagination 172, electronic page 178 of the Rejoinder. Now, this is where they referred to our April 2017	23 24	THE PRESIDENT: from June on.
23	Now, this is where they referred to our April 2017 press release. This is the community agreement, C-171.		
23 24	Now, this is where they referred to our April 2017	24	THE PRESIDENT: from June on.

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11:59	, 1	THE DESIDENT: And by the fact that this decision was taken	12:02 1	work.
11.39	1 2	THE PRESIDENT: And by the fact that this decision was taken in August, that destroyed the project.	12.02 1	And so the point that was being made at
	2	Now, I have a causation issue there, because once	2 3	the October 2017 meeting, the OCM meeting, this is
		you start, when you have a drilling project, do you not		slides 147 and 148 of my opening, the point that was
	4		4	
	5	always have to imagine that there may be an EIA that	5	being made there as at October is: we can't justify
	6 7	does delay you?	6	sitting on our hands for three years; it is not
	7	MR TUSHINGHAM: Ah. Sorry. So I think in terms of June, so	7	commercially viable to do so.
	8	we're not saying that drilling would have taken place	8	And so that's the actual situation in which AOG
	9	started in June, immediately after the	9	found itself.
	10	THE PRESIDENT: No, but even if it was sometime during the	10	THE PRESIDENT: Yes. Yes. But you see that it is difficult
	11	three years that you're saying the EIA delayed the	11	on this basis to then justify damages for lost profits
	12	project.	12	going forward.
	13	MR TUSHINGHAM: Yes. Well, the point is, if so the	13	MR TUSHINGHAM: But what we would say is, at the very least,
	14	decision was issued in August and that was when the	14	it would justify do you mind if I just take one
	15	order was made for the full EIA. If the Tribunal is	15	moment?
	16	satisfied that that decision was a breach of the FET	16	THE PRESIDENT: Yes, sure. (Pause)
	17	standard, then in a but-for scenario you must wipe out	17	MR TUSHINGHAM: So the point I would make there on this is
	18	the consequence of that decision.	18	as follows: this wasn't obviously just Smilno. This was
	19	THE PRESIDENT: Yes, and my question is what are the	19	all three drilling sites. And so you have to look at
	20	consequences? The consequences are the costs of the	20	the situation in which AOG found itself, having been
	21	delay, they're not the full project.	21	prevented from drilling a well at Krivá Ol'ka since
	22	MR TUSHINGHAM: Well, the consequence, the most important	22	early 2016, and then also now at Smilno.
	23	consequence, coming back to my legitimate expectation	23	And the second point is sorry, forgive me.
	24	point, is the inability to drill the well.	24	(Pause)
	25	THE PRESIDENT: But not forever. For three years, or the	25	But in terms of then how you then put that forward
		Page 65		Page 67
12:01	1	time of the EIA.	12:04 1	into damages, we would say at the very least there is
12:01	1 2	time of the EIA. MR TUSHINGHAM: I'm being slow. Please forgive me. My	12:04 1 2	into damages, we would say at the very least there is a loss of opportunity to drill. That unquestionably
12:01		MR TUSHINGHAM: I'm being slow. Please forgive me. My		
12:01	2		2	a loss of opportunity to drill. That unquestionably
12:01	2 3	MR TUSHINGHAM: I'm being slow. Please forgive me. My basic point here is that if the order for a full EIA had	2 3	a loss of opportunity to drill. That unquestionably exists. But if you are looking at damages on the basis
12:01	2 3 4	MR TUSHINGHAM: I'm being slow. Please forgive me. My basic point here is that if the order for a full EIA had not been made, then there was no other impediment to	2 3 4	a loss of opportunity to drill. That unquestionably exists. But if you are looking at damages on the basis of a market valuation, if Discovery had been able to
12:01	2 3 4 5	MR TUSHINGHAM: I'm being slow. Please forgive me. My basic point here is that if the order for a full EIA had not been made, then there was no other impediment to Discovery then being able to use the road to access the	2 3 4 5	a loss of opportunity to drill. That unquestionably exists. But if you are looking at damages on the basis of a market valuation, if Discovery had been able to undertake its drill at Smilno, it would be sitting on
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10.05 1		12.00 1	
12:05 1	particularly on the issue of the EIA, and that moment	12:08 1	you will recall that I mentioned in the EIA application
2	when a voluntary undertaking would have been entered	2	they were professionally drawn-up applications by
3	into, in the context of conversations with members of	3	a company called Chempro. Chempro were the agency that
4	a local community, to submit yourself to a preliminary,	4	drafted those applications.
5	-	5	So if we could pull up Mr Fraser's first witness
6	a reasonable investor would turn their mind at that	6	statement at page 34, PDF page 34, paragraph 97.
7	point to the risk that a voluntary preliminary EIA could	7	I'll just wait for it to be pulled up. Page 34.
8	morph into something more horrible, namely what actually	8	So if we scroll down, please, to the bottom.
9	happened.	9	So he is talking, in the third to last line, on
10	-	10	2 August
11	but I'm inviting to you to say, "Yes, actually there is	11	PROFESSOR SANDS: Is this the first or second witness
12	that evidence" that the minds of the investors were	12	statement?
13	turned to that possibility.	13	MR TUSHINGHAM: This is Mr Fraser's first witness statement.
14	In other words, if I'm an investor and I enter into	14	So:
15	a voluntary agreement of that kind, I want to know	15	"On 2 August 2017, the Bardejov district office
16	what's the real risk, and I'm going to take certain	16	issued a decision ordering a full EIA in relation to the
17	steps to inform myself as to the possibility that this	17	planned Smilno well. This came as a real surprise both
18	moves to the unfortunate next phase which, on your side,	18	to us and to Chempro. There were no distinguishing
19	it moved to.	19	characteristics about the site, from an environmental
20	MR TUSHINGHAM: Yes.	20	perspective, that made it seem a suitable case for
21	PROFESSOR SANDS: What steps were taken by the investor, by	21	a full EIA, and Chempro had indicated to us, based on
22	way of due diligence, to inform itself as to the risk of	22	their experience, that they expected the application to
23	submitting itself to a voluntary preliminary EIA?	23	go through without difficulty. The decision itself gave
24		24	no grounds for its conclusion, which I understood it
25	-	25	should have done by law and found very strange."
	Page 69		Page 71
12.07 1			
12:07	I have a number of points I would like to make.	12:10 1	So the point there is that this was not a case where
12:07 1	I have a number of points I would like to make. The first point is that due diligence, as you quite	12:10 1	So the point there is that this was not a case where AOG submitted to this process expecting that a full EIA
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12:11 1	I think it's page 124, the different boxes in the	12:14 1	MR DRYMER: Comments were received. I don't know if the
2	proceedings.	2	idea is that is the full procedure required.
3	MR TUSHINGHAM: Yes.	3	But then, of course, the critique and I would
4	MR DRYMER: I understand, and you've repeated this a couple	4	think yours too goes more to the decision itself.
5	of times, that the gravamen, as you said, later on you	5	MR TUSHINGHAM: Exactly. Exactly. Exactly.
6	called it the key, were boxes 2 and 3, the proceedings	6	MR DRYMER: That clarifies the point.
7	and the decision that preceded the scope of the full	7	And of course, even if there was a proper
8	EIA.	8	proceeding, an unfair decision would still vitiate the
9	MR TUSHINGHAM: Yes.	9	process.
10	MR DRYMER: Can you just clarify something for me, please,	10	MR TUSHINGHAM: Precisely. Precisely.
11	on the proceedings issue, because these are separate	11	MR DRYMER: But then you go on, even if that's the gravamen
12	arguably separate questions: whether the district office	12	or key, then you went on at some length today, in
13	conducted fair proceedings.	13	colloquy with Professor Sands, to critique the box 1, 2,
14	Professor Sands asked you whether you can compare	14	3, 4
15	this to proceedings in other cases. I'm not asking	15	MR TUSHINGHAM: Yes.
16	that. I don't want there to be any suggestion that we	16	MR DRYMER: the imposition of the scope of the full EIA.
17	don't have sufficient evidence on the record for you to	17	MR TUSHINGHAM: This is R-193.
18	answer these questions.	18	MR DRYMER: Right, exactly.
19	Can you tell me where or in what manner the	19	MR TUSHINGHAM: Yes.
20	proceedings here may or may not have reflected the	20	MR DRYMER: And again, logically I understand the point that
21	district office's obligations under an administrative	21	even if everything up to box 4 was correct, that
22	code or Code of Civil Procedure, or something like that?	22	decision too would vitiate the entire process; is that
23	MR TUSHINGHAM: I cannot give you an answer to that question	23	the case?
24	now. We can obviously go away and give it in due	24	MR TUSHINGHAM: Well, we would certainly accept that. Yes.
25	course. But our key point is probably more of	25	Yes. But the point is
			1
	Page 73		Page 75
	1 450 / 0		
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12:12 1	a forensic point, and it's this, and it goes back to,	12:15 1	MR DRYMER: Well, I'm not arguing. I'm asking you whether
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	5		
		10.10.1	
12:16 1	reference, or my team will find the reference, shortly.	12:18 1	follow a process that is fair, that at the very least in
2	But during the Krivá Ol'ka EIA process, it followed	2	order to comply with that obligation, an opportunity
3	obviously the same process we have: the application, and	3	should have been given.
4	then it's published, and then we have various comments.	4	MR DRYMER: And here's an example of proceedings
5	The district office in that case invited AOG to	5	MR TUSHINGHAM: Yes.
6	respond to certain comments.	6	MR DRYMER: in the record, whether or not they okay,
7	MR DRYMER: Ah.	7	very good.
8	MR TUSHINGHAM: And the point is that during that	8	Right, let me switch gears, and come all the way
9	response and you see it in the actual decision	9	back to Smilno, and your very helpful slide 52, table of
10	itself.	10	impugned measures. We don't have to look at the
11	MR DRYMER: Yes, thank you.	11	graphic, but I find it helpful.
12	MR TUSHINGHAM: We will get the exact document.	12	So here's a, I guess, a question of logic and legal
13	MR DRYMER: I thought I had seen something along those	13	reasoning. You impugn the actions of the police, the
14	lines.	14	prosecutor and the Ministry of Interior, as well as the
15	MR TUSHINGHAM: So the point is that that did not happen at	15	judiciary.
16	Smilno.	16	What if the Tribunal were to find against you in
17	MR DRYMER: I understand.	17	respect to the judiciary? What if it's all
18	MR TUSHINGHAM: And so that is our key complaint.	18	hypothetical, you know how this goes.
19	MR DRYMER: So that's a distinction between the Smilno EIA	19	MR TUSHINGHAM: Yes. Yes.
20	and the others?	20	MR DRYMER: What if the Tribunal were to determine, well,
21	MR TUSHINGHAM: Exactly.	21	not only was there no breach of the treaty, but the
22	MR DRYMER: The other two, the other one?	22	judiciary effectively correctly articulated Slovak law?
23	MR TUSHINGHAM: I think we explained in our Memorial, if we	23	MR TUSHINGHAM: Yes.
24	could just	24	MR DRYMER: Would the other measures, or the claims for
25	MR DRYMER: Well, you know what, let me continue. I've got	25	breaches of the treaty by virtue of the acts of the
		-	
	Page 77		Page 79
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12:21	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	12:41 1	Discovery has confronted the facts that contradict its
,	2 MR TUSHINGHAM: However you would like to put it. But the	2	case; it has simply ignored them. So just as I did in
-	point is, I think it's described by our friend as	3	the opening statement, Mr Pekar and I today will again
4	4 "a fresh start".	4	tell you the facts that are relevant, but were not
:	5 MR DRYMER: Those are the words I'm looking for.	5	mentioned this morning.
	5 MR TUSHINGHAM: And if you are with me on this way of	6	The second preliminary point is, recall our opening
,	7 expressing the case	7	statement, and now just think about the evidence that
:	8 MR DRYMER: Yes.	8	you have heard over the past four days. That evidence
9	9 MR TUSHINGHAM: we actually turn the Respondent's case to	9	confirmed everything that we told you in our opening
1		10	statement. The evidence at the hearing thus far showed
1	11	11	you that in its short time in Slovakia, AOG violated
1	2 MR DRYMER: I fully understand that.	12	Slovak law, committed numerous legal errors, and showed
1	3 Excuse me, I had a number of other questions but	13	a profound disregard for the very citizens that called
1	4 I think they've been covered.	14	this land their home.
1	5 Madam President, if you will give me a moment to	15	First, some preliminary remarks about Smilno. The
1	6 look through my notes, I think that might be it.	16	PSPR theory was the central pillar to Discovery's case
1	7 THE PRESIDENT: Sure.	17	prior to this hearing. But the Tribunal has now seen
1	8 (Pause)	18	that it was, indeed, a private dispute between concerned
1	9 MR DRYMER: That's it.	19	citizens and AOG about private land.
2	0 THE PRESIDENT: Good. Thank you very much. It was a little	20	Smilno's mayor, who appeared before you, admitted
2	1 longer than we had thought.	21	that his view was the field track was not a PSPR but
2	2 MR TUSHINGHAM: I apologise.	22	instead a field track. Think about the importance of
2	3 THE PRESIDENT: But it was very helpful.	23	that admission. That is AOG's and Discovery's own
2	4 So I suggest we take a 15-minute break now, and then	24	witness admitting that the central theory of their case
2	5 we'll listen to the Respondent. Good.	25	is wrong.
	Page 81		Page 83
	1 age 01		1 age 65
12:22	(12.22 pm)	12:43 1	Indeed, as I told you in the opening statement,
2	2. (A short break)	2	every state body that has been asked to consider the
3	3 (12.39 pm)	3	question of whether the track was a PSPR has rejected
4	6	4	that theory. The district court rejected it, the Court
4	Respondent. Mr Anway.	5	of Appeals rejected it, the Ministry of Interior
6		6	rejected it, the traffic directorate rejected it, and
5	MR ANWAY: Yes, thank you, Madam President. Members of the	7	now, before you members of the Tribunal, the mayor told
8	3 Tribunal.	8	you that he rejected it.
ç	On behalf of Slovakia we would like to begin by	9	And so after five days of hearing, it is now
10) thanking you for such a well-run hearing and for the	10	undisputed that no state body ever adopted the central
1	attention you have paid to this important matter.	11	theme to Discovery's claim in this arbitration: that the
12	2 In our presentation today I will provide the	12	field track was a PSPR.
1.	3 introduction, in which I will make some brief remarks	13	I want to talk, if I might, at the outset, about
14	about the three topics identified by the Tribunal	14	an exchange between counsel and Mr Drymer.
1:	5 yesterday, and then we will be going into each topic in	15	Mr Drymer, you had asked, very rightly: let's
10	5 some more detail.	16	suppose that the court decisions were correct. What
1′	7 I will be handling Smilno; Mr Pekar will then be	17	happens to all of the other acts that are complained
1	addressing Ol'ka, measures 8, 9 and 10 in the EIAs.	18	about in measures 1 through 7?
19	First the introduction. We have two preliminary	19	MR DRYMER: You are giving me the opportunity to clarify
20	points. First, what Discovery did this morning is the	20	MR ANWAY: I apologise if I
2	same thing that it did in its opening statement. You	21	MR DRYMER: No, no, you did great, you did great, that's
22	2 will recall me saying in our opening statement that the	22	what I said, but I meant correct not only in Slovak law,
23	3 strategy appears to be the following: when a fact does	23	but also untainted by political pressure. Just to be
24	4 not fit within Discovery's narratives, it simply treats	24	clear on that.
2:		25	
	5 the fact as though it doesn't exist. It is not that	25	Thank you. Go on.
	Page 82	25	Thank you. Go on. Page 84

		1	
12:44 1	MR ANWAY: The answer back was, effectively, that if those	12:46 1	judges were not under any improper pressure, they
2	court decisions were correct, the injunction was lawful,	2	exercised independent judgment, but in his view they got
3	then those acts were no longer challenged.	3	it wrong.
4	Now, why is that so important? And this comes back	4	Members of the Tribunal, we all agree, you are not
5	to Professor Sands' question of Discovery's legal	5	a Court of Appeals that sits in review of lower-court
			judgments on domestic law. And when we have the
6	expert. The question was as follows (Day 4, page 34,	6	
7	lines 19-23):	7	admission from Discovery's legal expert that reasonable
8	"So if there are multiple opinions,	8	minds may differ on this a theory we don't need to
9	I'm understanding you, sir, to be saying there is	9	adopt because we say all of the state decisions on this
10	a multitude of reasonable opinions that go in different	10	issue were uniform, but even if we were to grant that
11	directions. Am I correct in understanding you in that	11	coupled with his admission that there is nothing
12	way?"	12	inappropriate about what the court did, aside from
13	And the answer was (Day 4, page 34, line 24 to page	13	perhaps reaching the incorrect legal conclusion, it
14	35, line 1):	14	means it cannot possibly meet the standards of
15	"Yes, you do understand absolutely correctly. It is	15	international law.
16	one of several questions to which there is no clear	16	I'll come back to that in a moment, including
17	legal answer."	17	reference to case law on how egregious a court error
18	Now, as I've already pointed out, every state body	18	must be for it to rise to the level of a breach of
19	that ever considered the question came to the same	19	public international law and equate to a denial of
20	conclusion, including the courts, which he had	20	justice.
21	identified and I'll point you to that testimony	21	Finally, as I'll discuss also in more detail, the
22	later is the definitive view on what is the status of	22	hearing testimony confirmed that AOG did not seek, much
23	this road.	23	less obtain, the social licence from the local community
24	But just pausing on the [question] that	24	before the critical period of time; that the protesters
25	Professor Sands asked and Discovery Global's legal	25	were not just one or two people, but rather a group of
	Page 85		Page 87
10.45 1		12 40 1	
12:45 1	expert's response to it, that reasonable minds could	12:48 1	local citizens trying to defend their land; that AOG
2	differ on this question.	2	never obtained the permission required by Article 29 of
2 3	differ on this question. And then you combine that with this testimony (Day	2 3	never obtained the permission required by Article 29 of the Geology Act to enter that land; that it violated the
2 3 4	differ on this question. And then you combine that with this testimony (Day 4, page 75, lines 7-9):	2 3 4	never obtained the permission required by Article 29 of the Geology Act to enter that land; that it violated the landowners' preemption rights when it purchased
2 3 4 5	 differ on this question. And then you combine that with this testimony (Day 4, page 75, lines 7-9): "Professor Sands: Are the judges on the Appeals 	2 3 4 5	never obtained the permission required by Article 29 of the Geology Act to enter that land; that it violated the landowners' preemption rights when it purchased a 1/700th share; that a court issued a lawfully granted
2 3 4 5 6	 differ on this question. And then you combine that with this testimony (Day 4, page 75, lines 7-9): "Professor Sands: Are the judges on the Appeals Court independent? 	2 3 4 5 6	never obtained the permission required by Article 29 of the Geology Act to enter that land; that it violated the landowners' preemption rights when it purchased a 1/700th share; that a court issued a lawfully granted injunction prohibiting AOG from even accessing the site;
2 3 4 5 6 7	 differ on this question. And then you combine that with this testimony (Day 4, page 75, lines 7-9): "Professor Sands: Are the judges on the Appeals Court independent? Answer: Of course." 	2 3 4 5 6 7	never obtained the permission required by Article 29 of the Geology Act to enter that land; that it violated the landowners' preemption rights when it purchased a 1/700th share; that a court issued a lawfully granted injunction prohibiting AOG from even accessing the site; that it then created a shell company to circumvent the
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12:50 1	way for her to bring back a dead contract to life by	12:52 1	That is eminently reasonable. And that is exactly
2	"amending it".	2	
3	The testimony you heard during this hearing also	3	-
4	confirmed that AOG then started an Article 29 compulsory	4	
5	process proceeding. During his examination the Minister	5	
6	explained that the first-instance proceeding is run by	6	
7	the state geological administration. He is the	7	
8	appellate body. And that he never issued instructions	8	
9	regarding the first-instance proceeding. It was	9	
10	a standard procedure taking place, and there was	10	
10	a separation of two levels of review.	10	
11	The testimony confirmed that AOG filed an appeal	11	
12	with the Minister and won.	12	
13	During his testimony the Minister explained that as	13	
14	required by the Code of Administrative Procedure, he, as	14	
15		15	
	the appellate body, is assisted by a committee formed of prominent law professors and legal scholars in the field		
17		17	
18	of administrative law. Again, standard practice. And that the Minister taking advice from that committee	18	
19	ruled in AOG's favour.	19	
20		20	
21	During his testimony, Discovery presented him with	21	
22	a new theory: that he should have engaged in	22	
23	fact-finding during the appeal and ruled definitively	23	
24	for AOG so there was no remand.	24	
25	Although we were never presented with a fair	25	the lease in a timely manner. The Minister ultimately
	Page 89		Page 91
		10.54 1	
12:51 1	opportunity to respond to that argument, because it was	12:54 1	ruled in AOG's favour, and then AOG on remand refused to
2	only put to the witness during this hearing, the	2	participate when it was asked to simply provide evidence
2 3	only put to the witness during this hearing, the Minister explained that it was standard practice, and of	2 3	participate when it was asked to simply provide evidence that it couldn't voluntarily reach an agreement with
2 3 4	only put to the witness during this hearing, the Minister explained that it was standard practice, and of course, all of us familiar with courts of appeals know	2 3 4	participate when it was asked to simply provide evidence that it couldn't voluntarily reach an agreement with Lesy.
2 3 4 5	only put to the witness during this hearing, the Minister explained that it was standard practice, and of course, all of us familiar with courts of appeals know this: for a court of appeals, if it finds there to be	2 3 4 5	participate when it was asked to simply provide evidence that it couldn't voluntarily reach an agreement with Lesy. Finally, the preliminary remarks on the EIAs. The
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10 55 1		10 50 1	
12:55 1		12:58 1	MR ANWAY: Go ahead.
2		2	MR PEKAR: Here I would point to the analysis in the Helnan
3		3	v Egypt case, and then the annulment of Helnan v Egypt,
4		4	which are very instructive on this point.
5	** *	5	The interpretation of the standard of FET and the
e		6	scope of investment protections under the BIT also other
7	5	7	than the FET was done at the level of the first decision
8	-	8	in Helnan v Egypt, to require the investor, basically,
9		9	to first use appeals available within the administrative
10		10	procedure, and then bring the issue to the courts as
11		11	well.
12		12	· ·
13	e	13	partially, and the annulment committee stated: yes, the
14		14	investor must exhaust appeals available within the
15	• •	15	administrative procedure, not as a matter of exhaustion
16		16	
17		17	courts, but as a matter of, I would say, sufficient
18		18	gravity, seriousness of the incorrect administrative
19	the start, and for them to stop their opposition to the	19	
20		20	0
21		21	a simple first-instance administrative body may just get
22		22	it wrong. That's why we have these appeals.
23		23	And we need to give space, as Mr Anway put it, to
24	1 2 11	24	the administration system as a whole to operate, which
25	decisions. And, indeed, they did one: they appealed the	25	also means that an issue needs to be brought to the
	Page 93		Page 95
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12:57 1	Poruba site determination that a full EIA was required.	13:00 1	upper levels of the administration, here the appellate
2	I asked you rhetorically in my opening statement, I'll	2	administrative body.
2 3	I asked you rhetorically in my opening statement, I'll ask it again rhetorically now: why, of all three sites,	2 3	administrative body. THE PRESIDENT: But of course you understand that there are
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13:02	1 I'll speak for myself reluctant to read into a BIT	13:04 1	In addition to the due diligence that should have
	2 something that looks like an exhaustion of local		been performed, Discovery should have expected that
	remedies rule, when plainly the drafters of the treaty		people may oppose its activity on their land.
	4 have not taken that step.	4	You now, members of the Tribunal, have heard from,
	5 MR PEKAR: I respectfully disagree with that. I've been		and seen, some of those local citizens. Ms Varjanová,
	 doing this for 22 years and I can tell you 		when she was asked about whether she agreed with the
			description of "activists", said "I feel like a citizen,
			not like an activist". You will remember that
	9 exhaustion of local remedies in the sense of court		testimony. You saw how credible she was. These are not
	10 intervention, and the operation of the administrative		made-up concerns. This was a landowner trying to
	system as a whole, is a well-established one. Obviously		protect her land and her environment.
	12 there being no supreme court of investment arbitration,	12	You also heard from Mr Leško. Again, I told you
	13 I'm well aware of the fact that the case law may be		during our opening statement we were not here to
	14 divergent on this and other issues.		represent these private citizens, but we wanted you to
	15 MR ANWAY: But that is and of course we would never		hear their story from them directly, and now you have
	16 suggest we have any more experience than the		had the opportunity to do so, and that's Day 3,
	arbitrators, as we understand the Tribunal is even more		page 226, lines 6-14.
	experienced. But the analogy of course is to the court		R DRYMER: Remind me, please, why, other than the very
	19 system where you would not find an exhaustion of local		understandable opportunity to give these citizens,
	20 remedies requirement in the treaty either, but		leading members of their communities, members of their
	21 nevertheless it is very well accepted, as the Tribunal		communities, a chance to speak, why is it important to
	22 members know, that when you have a claim for a denial of		your case that we find them credible and their evidence
-	justice, it is expected that the party at least avail		to be accepted?
-	itself of the appellate options that are present. And,	24 MI	R ANWAY: With respect to the social licence that we say
-	the analogy here to the administrative system where you	25	should have been obtained and never was, and never was
	Page 97		Page 99
	- 25 //		
13:03	1 similarly have appeals that are available to correct	13:06 1	even sought to be obtained, among other reasons.
13:03	 similarly have appeals that are available to correct lower body errors, if they exist, we think is an apt 		even sought to be obtained, among other reasons. R DRYMER: Very good. Thank you.
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13:03	 lower body errors, if they exist, we think is an apt one. THE PRESIDENT: Yes, but of course denial of justice is precisely the exception that confirms the rule about 	2 MI 3 4 5 5 MI 6 9	R DRYMER: Very good. Thank you. Well, later on I'll ask you where that fits into your defence. But thank you. R ANWAY: We trust that their testimony showed that they
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13:07 1	on that timeline eight different instances where it	13:11 1	What about the mayor? Let's be clear that none of
2	violated the court-issued injunction.	2	the impugned measures rely on the mayor's conduct. But
3	In other words, for the vast majority of time that's	3	the mayor confirmed their own witness that the
4	relevant here for Smilno, AOG was in open violation of	4	field track was not a PSPR, the central theme to their
	Slovak law.		case, and in fact was only a field track; Day 3,
5		5	
6	We learned during the testimony from the hearing	6	page 72. What about the courts? There was some discussion
7	that Mr Crow said he was willing to come testify as	7	
8	a witness in this arbitration. And, according to	8	during the hearing, again for the first time, that the
9	Mr Lewis, he certainly wasn't prohibiting him from doing	9	action that was brought by AOG for an injunction, and
10	so. You may ask yourselves, members of the Tribunal, as	10	the court's decision of it, was somehow improper. But
11	we did, then why isn't Mr Crow here?	11	those aren't part of the impugned measures either.
12	We were criticised quite heavily this morning for	12	Remember, that court decision you were never even told
13	not making certain people witnesses in this arbitration:	13	about in the Memorial. Discovery didn't even inform the
14	"It would have been the simplest thing in the world	14	Tribunal that they had tested their PSPR theory before
15	for Slovakia to produce a witness statement from	15	the Slovak courts, and that both courts that had
16	Mr Hrvol"	16	an opportunity to address that theory had rejected it.
17	That's 11.12.12 (page 31, lines 6-8) from this	17	And, as I said earlier, we have Discovery's legal
18	morning.	18	expert, who believes and we don't accept this
19	We find that an interesting comment to make when	19	proposition, but states that on the issue of the PSPR it
20	they are putting forward fictitious evidence of	20	is one of several questions "to which there is no legal
21	a particular individual, they are caught in that, and,	21	answer".
22	neither in the Memorial, with that fictitious evidence,	22	And now I come to the denial of justice cases.
23	nor in the Reply when they had the opportunity to	23	What must be necessary for a court's decision,
24	respond, put any witness statement in from Mr Crow.	24	a domestic court's decision, to violate international
25	It's confirmed by Mr Fraser's testimony that after	25	law? This is cited in our Counter-Memorial,
	Page 101		Page 103
	1450101		1450 105
13:09 1	this faked injury, AOG pressed the police to arrest one	13:13 1	paragraph 356, citing a variety of different cases,
13:09 1 2	of the local citizens for it. They criticised the	13:13 1 2	which you can find in footnote 479:
	of the local citizens for it. They criticised the police for not arresting the local citizens for it.		
2	of the local citizens for it. They criticised the police for not arresting the local citizens for it. Thankfully the police didn't arrest someone on false	2	which you can find in footnote 479: "The international delict of denial of justice is subject to a particularly high threshold. It only
2 3	of the local citizens for it. They criticised the police for not arresting the local citizens for it.	2 3	which you can find in footnote 479: "The international delict of denial of justice is
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30 (Pages 101 to 104)

		I	
13:14	1 that you have heard in relation to Smilno don't come	13:17 1	consider that.
	-		MR PEKAR: Members of the Tribunal, I will now address you
		3	specifically on the Krivá Ol'ka alleged violations of
	3 And so in sum on Smilno: no due diligence; not		
	4 engaging with activists to get a social licence;	4	the BIT and the EIA-related alleged violations of the BIT.
	5 antagonising them by going on their land to physically	5	
	6 remove their automobiles; bombard the car with concrete	6	Before doing so, I would like to respond to a point
	7 cement blocks so they can't remove them; creating	7	which was put to us in the closing statement of the
	8 a shell company to circumvent a lawful court injunction,	8	Claimant, stating that we did not really engage with
	9 faking an injury and trying to have local citizens	9	their arguments on legitimate expectations. In fact,
	0 prosecuted for it. And two court decisions that found	10	I believe we did. What I would like to point out here,
	the PSPR theory to be invalid, together with every other	11	and frankly that's a repetition of something that
	2 state official that had analysed the question and was	12	I stated already in our opening statement, there is
	asked to give an opinion about it.	13	a significant misconception on the part of the Claimant
	4 In conclusion, in the short time in Smilno, AOG, as	14	with respect to how legitimate expectations operate, and
	I said, violated Slovak law, committed legal errors and	15	how they operate specifically in our case.
	showed a profound disregard for the very citizens that	16	I believe that it is undisputed that legitimate
	called this land their home.	17	expectations have to be based on specific assurances
	8 We respectfully submit that Discovery's claim, and	18	provided by persons which have the authority to provide
	9 particularly establishing that the court decisions,	19	such assurances. A very good discussion of these
	20 coming back to the exchange between Mr Drymer and	20	various categories of assurances which may be provided
	counsel this morning, if those decisions are correct, if	21	is to be found in, I believe, Continental v Argentina.
	that injunction was lawful, all of those other measures	22	It is, I believe, undisputed that these assurances
	fall away. And we would respectfully submit that it has	23	must be provided before or at the time of investment.
	been established that claims 1 through 7 now are no	24	Therefore, to put it differently, the alleged legitimate
2	25 longer viable.	25	expectations must be investment-backed.
	Page 105		Page 107
13:16	1 Before I turn it over, with your leave,	13:20 1	What is a consequence of just this temporal rule?
	 Before I turn it over, with your leave, Madam President, to Mr Pekar, there's one other issue 	13:20 1 2	What is a consequence of just this temporal rule? The consequence of this temporal rule is that the only
	Madam President, to Mr Pekar, there's one other issuethat came out yesterday during the testimony that		The consequence of this temporal rule is that the only source of potential legitimate expectations in the
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13:22 1	We saw that actually on maps, both during the opening	13:26 1	public interest. Public interest here means not only
13.22 1	statements and then later during cross-examination of	13.20 1	public interest as it may be formulated by various
3	the industry experts.	3	administrative bodies, but also public interest as
	We submit there is no basis in the text of these	4	formulated by the citizens, who then have the right to
4			
5	licences for the contention that somehow Slovakia, by	5	voice their concerns as a part of administrative
6	issuing these licences, committed to approve just any	6	procedures conducted by the administrative authorities.
7	single location for an exploration drill that would be	7	And obviously then there are rules under Slovak law
8	located within the licensed areas. The licences simply	8	how these concerns need to be addressed in a process
9	do not state that.	9	which then leads to a final decision, resulting in
10	What the licence, however, does state specifically,	10	an administrative approval, or the lack of approval, for
11	is that the activities will need to be conducted in	11	the location of a certain site at a specific location.
12	accordance with Slovak law. Therefore, the licence is	12	I just thought it will be important to highlight
13	just one of several approvals and legal arrangements	13	that nothing in the text of the exploratory licences
14	which are required for AOG to be able to conduct	14	suggests that this process was to be skipped or
15	an exploratory drill on a specific location somewhere in	15	derogated from when it came to the placement of specific
16	the licensed area.	16	drilling wells at specific locations. And actually this
17	And the licences themselves do not say anything	17	morning we heard an admission that Discovery does not
18	about a guarantee that the additional hurdles will be	18	claim there was any sort of stabilisation clause
19	cleared so that a drill can be put on a specific	19	included in the licence. That becomes relevant with
20	location within the licensed area.	20	respect to the EIA.
21	And these additional hurdles are twofold: first,	21	But before turning to the
22	there is the requirement for the investor to obtain	22	MR DRYMER: Do you agree, at least, with the proposition,
23	a private law title to the land plot on which the	23	broadly stated, as it was by Claimant, by counsel both
24	exploratory drilling is supposed to take place; and,	24	in his opening and in his remarks today, that at the
25	where and when necessary, to obtain private law title to	25	very least the licences demonstrate or reveal a quid pro
	Page 109		Page 111
	1 450 107		1 4 20 1 1 1
13:24 1	access that land plot, if the land plot is not	13:27 1	quo: we will conduct ourselves in accordance with the
13:24 1 2	accessible from a communication, subject to the general	13:27 1 2	rights and obligations imposed upon us, and in exchange
	accessible from a communication, subject to the general use of such character that even the heavy machinery		rights and obligations imposed upon us, and in exchange the state will not prevent us from engaging in the works
2 3 4	accessible from a communication, subject to the general use of such character that even the heavy machinery needed for the exploratory drilling could be brought to	2	rights and obligations imposed upon us, and in exchange the state will not prevent us from engaging in the works in which we are required to engage for the licences?
2 3	accessible from a communication, subject to the general use of such character that even the heavy machinery	2 3	rights and obligations imposed upon us, and in exchange the state will not prevent us from engaging in the works in which we are required to engage for the licences? MR PEKAR: It depends on what is understood by the state
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13:29 1	MR PEKAR: So that opening now brings me to what happened	13:33 1	not grant its consent, and thereby bring well, it
13.27 1	specifically with Krivá Ol'ka.	2	could have, but it would have had no legal effect,
3	Actually, we all agree that's an issue which	3	because as of January 16 the original agreement expired.
4	probably would have been easily preventable by	4	A consent granted, let's say at the end of January,
5	Discovery, if only they had sent a request for extension	5	would have made this amendment enter into legal force,
6	of time, but they didn't.	6	but the extensions sought by this amendment would have
7	So, Discovery had a lease agreement with Lesy. They	7	been invalid because that would have been an extension
8	were supposed to ask for its extension by	8	done retroactively.
9	16 December 2015, and they didn't. They sent a request	9	The legal force of the extension would have
10	seven days late, on 23 December 2015.	10	been January 30. That is two weeks after the expiry of
10	Lesy agreed with the extension, in an extension	10	the original lease agreement, and this is not possible
12	agreement, which is actually has the legal form of	11	under Slovak civil law.
13	an amendment to the original lease agreement, and Lesy	12	MR DRYMER: So you're saying that the lease had already
13	signed this amendment on 14 January 2016.	13	expired by the time the amendment crossed the Minister's
15	Now, if we please look at this document, which is	15	desk?
16	document C-116, and we go to final provisions. Thank	16	MR PEKAR: The lease expired on the same day when this
17	you, so we can scroll down, please. Yes. And it's	17	amendment was forwarded to the Ministry of Agriculture.
18	Roman II, "Final provisions", Arabic 3:	18	MR DRYMER: So it wasn't yet expired?
19	"This Addendum enters into force on the date of	10	MR PEKAR: Well, it was the same it was the same date, we
20	granting consent to rent according to Article 50	20	would need to see when exactly it ended up on the
21	[paragraph] 7 of Act of the National Council on	21	Minister's desk.
22	Forests, and effective on the day following its	22	But I would say that in any event it's not
23	publication in the Central Register of Contracts based	23	reasonable to expect the Minister just to take the
24	on Act No. 546/2010 [Collection]."	24	letter at the day it arrives and approve it immediately.
25	And that then in combination with Slovak civil law	25	MR DRYMER: I take the point. I'm just trying to get the
	Page 113		Page 115
13:31 1	creates the problem and exactly the kind of situation	13:35 1	chronology down.
13:31 1 2	creates the problem and exactly the kind of situation which the requirement to apply for an extension 30 days	13:35 1 2	chronology down. MR PEKAR: So this is what created the problem.
13:31 1 2 3			chronology down. MR PEKAR: So this is what created the problem. On 17 January 2016 AOG sent a letter directly to the
2	which the requirement to apply for an extension 30 days	2	MR PEKAR: So this is what created the problem.
2 3	which the requirement to apply for an extension 30 days before expiry was supposed to prevent. Because this	2 3	MR PEKAR: So this is what created the problem. On 17 January 2016 AOG sent a letter directly to the
2 3 4	which the requirement to apply for an extension 30 days before expiry was supposed to prevent. Because this amendment is then sent to the Ministry of Agriculture on	2 3 4	MR PEKAR: So this is what created the problem. On 17 January 2016 AOG sent a letter directly to the Ministry of Agriculture, where AOG requested that the
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2 3 4 5 6	which the requirement to apply for an extension 30 days before expiry was supposed to prevent. Because this amendment is then sent to the Ministry of Agriculture on the following day, January 15, which also happens to be the last day of validity of the original lease	2 3 4 5 6	MR PEKAR: So this is what created the problem. On 17 January 2016 AOG sent a letter directly to the Ministry of Agriculture, where AOG requested that the Minister approve the extension, so that was after the expiry of the original lease agreement, and AOG also
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13:37 1	or silence, of the owner, and grant access to the site	13:40 1	to any participant in the proceedings.
2	and use of the site itself to an entity conducting	2	So here, if the file if the procedure deals with
3	exploration under the Geology Act.	3	AOG's application for access under Article 29, it means
4	You heard Minister Sólymos explaining how that	4	that AOG may, at any time, ask the Ministry to show it
5	procedure was conducted at the Ministry. One thing	5	the file, and AOG is entitled to see the entire content
6	I would like to highlight here is that and it was not	6	of the file. And the Ministry actually has
7	only in connection with the conduct of the Ministry of	7	an obligation to put all relevant documents into the
8	Environment, but also in connection with the conduct of	8	file. So there's no, like, two separate storage
9	the Ministry of Agriculture. We were, if I put it	9	systems, one the file and then something for internal
10	bluntly, accused of withholding documents. That	10	use only. That does not exist under Slovak law.
11	accusation assumes many things about how the Slovak	11	And the same then holds true for the EIA procedures
12	Ministries are archiving documents. It assumes a lot	12	which were conducted by the district offices in eastern
13	about what documents actually are archived, for how long	13	Slovakia. The same principle: again, the district
14	the archives have to be maintained, et cetera.	14	office takes all documents which are relevant and puts
15	Actually, none of this was discussed by Discovery.	15	all these relevant documents in the file, and AOG, as
16	All we heard is: oh, we are certain there must be many	16	a participant in the proceedings, because it was also
17	more documents. And we believe that Discovery actually	17	the applicant in the EIA procedures, can access that
18	has the burden of proof to show that there is some basis	18	file at any moment, not only during the time when the
19	under Slovak administrative law for their contention	19	file is live, so to say, but also thereafter for as long
20	that when they made their document requests in this	20	as the file is archived.
21	arbitration in 2023, the Slovak Republic was still	21	So the reason why we did not produce any documents
22	required to have documents such as emails exchanged	22	in response to some of the document requests is that we
23	between Ms Mat'ová and Ms Jánová. There should be some	23	simply stated: the documents are available for you in
24	basis also for saying that Ms Mat'ová and Ms Jánová were	24	these files, just please go and get access to them in
25	supposed to communicate by email and not just orally, if	25	those files. And there was no order by the Tribunal
	D 117		D 110
	Page 117		Page 119
13:39 1	they when they meet each other. There's no basis for	13:42 1	that we are required to produce again documents which
13:39 1 2	they when they meet each other. There's no basis for the contention that somehow the meetings that the	13:42 1 2	that we are required to produce again documents which are accessible to Discovery in the administrative files.
2	the contention that somehow the meetings that the	2	are accessible to Discovery in the administrative files.
2 3	the contention that somehow the meetings that the Minister of Environment had on a weekly basis with the	2 3	are accessible to Discovery in the administrative files. We do not even know if Discovery went there or not,
2 3 4	the contention that somehow the meetings that the Minister of Environment had on a weekly basis with the heads of the various sections were supposed to be	2 3 4	are accessible to Discovery in the administrative files. We do not even know if Discovery went there or not, because these files are decentralised at the level, but
2 3 4 5	the contention that somehow the meetings that the Minister of Environment had on a weekly basis with the heads of the various sections were supposed to be recorded in minutes. There was no explanation with	2 3 4 5	are accessible to Discovery in the administrative files. We do not even know if Discovery went there or not, because these files are decentralised at the level, but there was no objection raised against this method of
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12.44 1	he done on their land	12.47 1	information for the Minister and the minilage lag. In
13:44 1	be done on their land.	13:47 1	information for the Minister, and the privilege log. In
2	And another comment of that type related to Minister	2	my opinion it is absolutely clear from Minister Sólymos'
3	Sólymos responding to a question asked by Madam President, about whether he interferes with	3	testimony that he did not see that document at the time,
4		4	and this is consistent with what we understand happened.
5	proceedings which are handled by the lower sections of	5	Minister Sólymos was not presented that document when
6	the Ministry as organs of first instance, and his answer	6	preparing for his witness statement. He also explained
7 8	was: no. And then he added "usually". And that's where the quote stopped.	7	that. So now we are before the Minister, and the Minister
8 9	But actually there's a further line, Madam President	8	has to decide on the appeal which was filed. Mr Anway
9 10	asked specifically what the "usually" meant, and	10	explained that the Minister has what the law calls
10	Minister Sólymos explained that he did not interfere	10	a special commission, but in fact it's not a special
11	categorically. So there was no this "usually" was	11	commission in the sense of an ad hoc commission; it's a
12	rectified or clarified upon Madam President's follow-up	12	commission which is set by the Minister and it's set by
13	question.	13	the Ministers in all Ministries in Slovakia to deal
15	So what happened at the Ministry, then, is that	15	precisely with this very special appeal which can be
16	there was a first-instance decision issued which,	16	filed against the first-instance decision made by the
10	roughly speaking, denied jurisdiction, saying that this	10	Ministry. In the Slovak language, actually, it's not
18	matter is not to be decided by the Ministry because the	18	even called an appeal, but uses some different word than
19	Ministry would interfere with the jurisdiction of the	19	"appeal" which is impossible to translate into English,
20	Ministry of Agriculture which was supposed to approve or	20	so that sometimes leads to a confusion.
21	not approve the lease with Lesy.	21	But that's why it was called on interpretation
22	That decision was appealed by AOG, and it was then	22	sometimes you heard the expression "appellate
23	decided by the Minister; the appeal was decided by the	23	commission", so that's how these are normally referred
24	Minister.	24	to. They are, as Mr Anway explained, they comprise
25	So two points here: first, we heard today again	25	prominent specialists in the field of administrative
	Page 121		Page 123
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13:46 1	about this alleged decision coming from the above for	13:49 1	law.
13:46 1 2	about this alleged decision coming from the above for the first-instance decision to be negative, as	13:49 1 2	-
			law.
2	the first-instance decision to be negative, as	2	law. The reality is that Ministers always follow the
2 3	the first-instance decision to be negative, as I described it. There is no evidence for such	2 3	law. The reality is that Ministers always follow the recommendations of the appellate commissions simply
2 3 4	the first-instance decision to be negative, as I described it. There is no evidence for such instruction to be given. It was vehemently denied	2 3 4	law. The reality is that Ministers always follow the recommendations of the appellate commissions simply because the Minister obviously has no specific education
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10.50 1			
13:50 1	MR PEKAR: Yes. That's right. I'm not sure we have the	13:53 1	the decision to suspend sorry, first there is
2	document on the record, but Minister Sólymos	2	a reference to the request for information. Then there
3	MR DRYMER: No, but it was quoted in the Minister's	3	is the decision to suspend. And then there is the
4	decision.	4	sentence saying that, you know, as soon as the it's
5	MR PEKAR: Exactly, yes. And I believe on	5	called in the administrative jargon the obstacle to
6	cross-examination	6	further conduct of the proceeding, but that actually
7	MR DRYMER: Am I recalling it correctly, as far as you're	7	means you need to provide the information. As soon as
8	MR PEKAR: I recall him giving	8	we receive the information the procedure will resume,
9	MR DRYMER: We'll look it up in the evidence. We don't need	9	and it will resume on its own. There's no need for
10	it now. But I seem to recall that, at least as quoted	10	an additional administrative decision on continuation of
11	in the Minister's decision, his commission had he said	11	the procedure. That's why that sentence is in the
12	not only quash, but quash and remand.	12	decision on suspension.
13	MR PEKAR: Yes. It's actually impossible for the Minister	13	All that AOG was required to do at the time was to
14	to quash without remanding.	14	write to Lesy, and either get a negative answer
15	MR DRYMER: That's true, of course. Alright. Very good.	15	obviously if they had gotten a positive answer the
16	MR PEKAR: But this does not mean that the Minister said	16	entire Article 29 procedure would have become
17	nothing about the further course of proceedings, because	17	redundant or, wait for two to three weeks and, having
18	the Minister so the question which was submitted to	18	received no answer, they would have presented that to
19	the Minister was fundamentally a jurisdictional	19	the Ministry of Environment saying: we asked for but
20	question: was it right to say that the Ministry of	20	didn't get an extension of our contract sorry, not
21	Environment doesn't have jurisdiction, or was it not	21	an extension a new lease agreement with Lesy.
22	right to say that they do not have jurisdiction?	22	AOG did not do that. AOG basically said: there is
23	And the Minister says, very clearly, that: no, we	23	no way we will ask Lesy again.
24	have, we the Ministry has jurisdiction and has to decide	24	And now we submit that to explain this sudden
25	the request. And that's very important, because that	25	inactivity on the part of AOG, we need to look at where
	Page 125		Page 127
13:52 1	means that the Minister was not just, you know, seeking	13:55 1	we are in time.
2	to somehow make the procedure last longer and cause any	2	So the refusal came in a document dated 4 July 2017,
3	delays. What the Minister did is that he confirmed: no,	3	which is document C-374, again just for reference.
4	the Minister has invited stine. Dut was the		
	we, the Ministry, has jurisdiction. But now the	4	So, what was going on at the same time on the
5	Ministry needs to engage in additional fact-finding to	5	So, what was going on at the same time on the funding side of AOG? So we know that AOG had already
5 6	Ministry needs to engage in additional fact-finding to see whether the Article 29 procedure is really to be	5 6	So, what was going on at the same time on the funding side of AOG? So we know that AOG had already run out of money in January of 2017. So we are now
5 6 7	Ministry needs to engage in additional fact-finding to see whether the Article 29 procedure is really to be used, it being the procedure of last resort, and there's	5 6 7	So, what was going on at the same time on the funding side of AOG? So we know that AOG had already run out of money in January of 2017. So we are now in July, seven months later, and at this point Discovery
5 6 7 8	Ministry needs to engage in additional fact-finding to see whether the Article 29 procedure is really to be used, it being the procedure of last resort, and there's no possibility for AOG to reach agreement with Lesy.	5 6 7 8	So, what was going on at the same time on the funding side of AOG? So we know that AOG had already run out of money in January of 2017. So we are now in July, seven months later, and at this point Discovery was trying, but failing, to secure new financing because
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13:57 1	complaint on 31 January 2018, stating that the	14:01 1	them stated that drilling would only start at a later
2	Article 29 procedure is a proceeding initiated upon the	2	
3	application of the applicant, AOG, and that it had been	3	So this is actually very important to now see the
4	suspended for AOG to provide factual information which	4	psychology of AOG, because AOG is making this big
5	AOG had not provided.	5	concession in their discussions with the local community
6	So if there was any reason not well, the only	6	
7	reason why the procedure was not proceeding was AOG's	7	fact, they only do something which they would have had
8	refusal to provide the requested information or to show	8	to do in any event. Because of the factual situation on
9	that Lesy did not answer to a new request for a lease	9	the site.
10	agreement.	10	THE PRESIDENT: Yes, I think we understand that part.
11	THE PRESIDENT: I am told by the secretary that you have	11	MR PEKAR: Yes.
12	spent one hour. A bit more.	12	Second, there are some statements by Minister
13	MR PEKAR: Yes, so I will now move to the EIA.	13	Sólymos which are not accurate because, as he explained,
14	THE PRESIDENT: I agree that the Claimant's was much longer,	14	upon cross-examination, actually, he had been led to
15	but they were much more interrupted, and I hope that the	15	believe that the drilling had started at the sites. And
16	secretary does interrupt each time we have a question,	16	the reason for it is the meeting with AOG that he had on
17	so we only counted the actual presentation time.	17	15 December 2016, and a presentation which was brought
18	MR PEKAR: And what was then the actual	18	to that meeting, and which, as I said, led him to
19	THE PRESIDENT: How much time did the Claimant use if you	19	believe that the works were already underway.
20	deduct the time of	20	In reality, there was nothing underway in Ruská
21	MS MINGUEZ ALMEIDA: One hour.	21	Poruba, nothing underway in Krivá Ol'ka that's even
22	THE PRESIDENT: One hour.	22	undisputed and the only thing in Smilno was the
23	MR PEKAR: Okay, apologies.	23	21-metre deep collector hole, which is not drilled.
24	THE PRESIDENT: We will not cut you off on the spot of	24	THE PRESIDENT: I think in the interests of time, I think we
25	course, but you know that your time is	25	are aware of this
	D. (00		P (0)
	Page 129		Page 131
13.59 1	MR PEKAR: Okay, I was under the impression that it lasted	14.02 1	MR PEKAR. Okay of the factual yes
13:59 1	MR PEKAR: Okay, I was under the impression that it lasted longer but yes, there were many questions from the	14:02 1	MR PEKAR: Okay, of the factual, yes. THE PRESIDENT: and we will review the evidence in due
2	longer but yes, there were many questions from the	2	THE PRESIDENT: and we will review the evidence in due
2 3	longer but yes, there were many questions from the Tribunal which sort of	2 3	THE PRESIDENT: and we will review the evidence in due time.
2 3 4	longer but yes, there were many questions from the Tribunal which sort of THE PRESIDENT: Yes, we are trying to be fair and deduct	2	THE PRESIDENT: and we will review the evidence in due time.MR PEKAR: So now we can go just to what was mentioned now.
2 3 4 5	longer but yes, there were many questions from the Tribunal which sort of THE PRESIDENT: Yes, we are trying to be fair and deduct questions and answers to questions.	2 3 4 5	THE PRESIDENT: and we will review the evidence in due time.MR PEKAR: So now we can go just to what was mentioned now. What was proposed this morning actually is a total
2 3 4 5 6	longer but yes, there were many questions from the Tribunal which sort of THE PRESIDENT: Yes, we are trying to be fair and deduct questions and answers to questions. MR PEKAR: Okay.	2 3 4	THE PRESIDENT: and we will review the evidence in due time.MR PEKAR: So now we can go just to what was mentioned now. What was proposed this morning actually is a total confusion between preliminary EIA and the full EIA. The
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14:04	the points that your opponents made.	14:09 1	I call it seriousness of a risk that needs to be
	MR PEKAR: Yes. So reasons have to be given. But it's also	2	determined for the full EIA to be ordered, and so the
	okay to just refer to, not another document, but to, for	3	act only lays out what needs to be taken into
	example, refer to the concerns raised by one of the	4	consideration, and we can look at annex 10, if we have
	participants. If the concerns are summarised in the	5	it translated. And annex 10 is very similar to the
	decision, the authority does not need to spend another	6	annex of the EIA directive.
	page or two. It's enough for them to just say, as they	7	MR TUSHINGHAM: May I just interrupt very briefly in
	did it actually in this case: in light of the concerns	8	relation to annex 10. I would just point the Tribunal
	raised. That means the concerns the concerns however	9	to page 18 of this document, and particularly part III,
1	have to be listed in the decision, and they were.	10	"Significance of potential impact", picking up on
1	So this is a very, very short, but sufficient	11	THE PRESIDENT: Can we scroll down?
1	2 justification as required under Slovak administrative	12	MR TUSHINGHAM: Yes, so on the next page, please, so page 18
1	3 law.	13	of the English. Yes, so:
1	MR DRYMER: That's the reasons. What about the process?	14	"Significance of potential impact."
1	5 There were two boxes.	15	THE PRESIDENT: And it is from this criterion that you
1	5 MR PEKAR: Yes, the process is governed by, among others,	16	MR TUSHINGHAM: Precisely.
1	, I	17	THE PRESIDENT: Based on this, that you argue that the first
1	application comes in, concerns are raised, and the	18	instance must apply some kind of assessment to determine
1	administrative authority may, but doesn't have to, give	19	whether there is a risk?
2) the applicant an opportunity to respond.	20	MR TUSHINGHAM: Exactly.
2	THE PRESIDENT: My question is rather, does it have to look	21	THE PRESIDENT: Thank you.
2	2 at the concern and see whether they have some kind of	22	MR TUSHINGHAM: And then, just to round it off, the
2	justification? And I don't read it in Article 29, but	23	importance of reading this act consistently with the
2	a maybe you can help us.	24	directive which provides that the criteria threshold is
2	5 MR PEKAR: What Article 29 does is that it has several	25	significant effects, and I understood that to be common
	Page 133		Page 135
	rage 155		rage 155
14:05	references to	14:11 1	ground.
	references to PROFESSOR SANDS: Could we bring it up on the screen? It	14:11 1	ground. THE PRESIDENT: And would you like to comment on this?
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	PROFESSOR SANDS: Could we bring it up on the screen? It would be helpful.	2 3	THE PRESIDENT: And would you like to comment on this? MR PEKAR: Yes, I would like to comment just in two
	 PROFESSOR SANDS: Could we bring it up on the screen? It would be helpful. THE PRESIDENT: It's C-225. 	2 3 4	THE PRESIDENT: And would you like to comment on this? MR PEKAR: Yes, I would like to comment just in two respects.
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14:13 1	MR PEKAR: Correct.	14:16 1	geothermal energy, drilling for the storage of nuclear
2	THE PRESIDENT: Yes, but not the assessment in the sense	14.10 1	waste, water supplies, et cetera. That's not what we
3	that whereas Mr So-and-so says this and this, and	3	are dealing with.
4	I refer to Mr So-and-so, that would not really be	4	PROFESSOR SANDS: What page is it on, on the C-225-SVK?
5	an assessment.	5	I've got it in front of me.
6	MR PEKAR: No, but I would say in light of what Mr So-and-so	6	MR TUSHINGHAM: 54. And, I mean, even on this it's
7	stated, I ordered the full EIA, it's sufficient.	7	slightly but that's the way we understand it.
8	THE PRESIDENT: Let's not belabour this. We've understood	8	MR PEKAR: We confirm that understanding, actually.
9	the point and we will	9	MR TUSHINGHAM: Yes.
10	PROFESSOR SANDS: Could you give us an explanation also of	10	MR PEKAR: So generally for drillings it's 600 metres for
11	annex 8, if you turn go down first to page 12 and	11	preliminary or screening. And then there are three
12	just explain to us, annex 8 is, "List of proposed	12	specific categories of drillings which are subject to
13	activities subject to the assessment of their impact on	13	different rules.
14	the environment", and then you see "Threshold values",	14	PROFESSOR SANDS: Okay, got it.
15	Part A, compulsory assessment, and then Part B, a	15	MR PEKAR: That brings me almost to the end, because one
16	screening procedure, which I assume is the	16	thing which I want to address now, and that is important
17	preliminary	17	because it follows up on the discussion we had about the
18	MR PEKAR: Correct, yes.	18	significance of first-instance decisions, there are
19	PROFESSOR SANDS: If you go down to the next page, you see	19	three first-instance decisions on the EIA, and for
20	section 16 "Drillings". If you could explain this	20	reasons which were not explained, only one of them was
21	a bit:	21	appealed, and the only one which was appealed is the one
22	" with the exception of drillings for	22	in Ruská Poruba where there was no realistic prospect of
23	investigating the stability of the soil"	23	finding anything.
24	So that seems compulsory from 500 metres, and then	24	So that begs the question why AOG did not appeal the
25	I haven't quite understood, because it's only screening	25	decisions in Krivá Ol'ka and Smilno. They could have
	Dec. 127		D 120
	Page 137		Page 139
14:14 1	"from 600 metres" or "up to 500 metres". It may be	14:17 1	just copy-pasted the appeal they filed in the Ruská
14:14 1	"from 600 metres" or "up to 500 metres". It may be there is an error in this text, but it would be helpful	14:17 1	just copy-pasted the appeal they filed in the Ruská Poruba site, presumably. But they didn't do it. And we
			Poruba site, presumably. But they didn't do it. And we
2	there is an error in this text, but it would be helpful	2	Poruba site, presumably. But they didn't do it. And we submit to you that they didn't do it because at that
2 3	there is an error in this text, but it would be helpful to understand.	2 3	Poruba site, presumably. But they didn't do it. And we submit to you that they didn't do it because at that
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14:19 1	THE PRESIDENT: Thank you.	
2	So that leads us, I think, to the end of this	
3	hearing. In terms of procedure, we will confirm your	
4	agreement about the different deadlines for transcript	
5	corrections and redactions to the video, audio, and	
6	transcript I suppose as well, and then the response	
7	within a certain time as well, and then the cost	
8	submissions.	
9	Is there anything else that the parties would like	
10	to raise at this stage? Comments, questions, including	
11	complaints about the conduct of the arbitration.	
12	MR TUSHINGHAM: Nothing from us. We just are very grateful	
13	to the care and attention that the Tribunal has given to	
14	this case.	
15	THE PRESIDENT: Thank you.	
16	MR ANWAY: None from the Respondent.	
17	THE PRESIDENT: Same questions to Respondent.	
18	MR ANWAY: We have no further comments, and would like to	
19	thank the Tribunal for a very well run hearing.	
20	THE PRESIDENT: Thank you.	
21	Then it remains for the Tribunal to thank first of	
22	all the court reporter, the party representatives, who	
23	sat here for very long hours on both sides, and of	
24	course counsel for a very well handled arbitration, both	
25	in terms of their written submissions and this hearing,	
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14:21 1	and also the very collegial attitude and cooperation	
14.21 1	that made our lives much easier.	
3	And now I close this hearing, and I wish you all	
4	some rest, I hope, a well deserved rest. Goodbye to	
5	everyone.	
6	-	
7	(2.21 pm)	
8	(The hearing concluded)	
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