

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

----- -x  
 In the Matter of Arbitration :  
 Between: :  
 :  
 GABRIEL RESOURCES LTD. and GABRIEL :  
 RESOURCES (JERSEY) LTD., :  
 : Case No.  
 Claimants, : ARB/15/31  
 :  
 and :  
 :  
 ROMANIA, :  
 :  
 Respondent. :  
 ----- -x Volume 4

VIDEOCONFERENCE:  
HEARING ON THE MERITS AND JURISDICTION

Thursday, October 1, 2020

The World Bank Group

The hearing in the above-entitled matter came on  
at 8:00 a.m. before:

PROF. PIERRE TERCIER, President of the Tribunal

DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

Also Present:

MS. SARA MARZAL YETANO  
Secretary to the Tribunal

MS. MARIA ATHANASIOU  
Tribunal Assistant

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MR. BRODY GREENWALD  
MR. PETR POLÁŠEK  
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MS. CECILIA JAKAB  
MS. ELENA LORINCZ  
MR. MIHAI BOTEA

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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MS. NORADÈLE RADJAI  
MS. LORRAINE de GERMINY  
MR. CHRISTOPHE GUIBERT de BRUET  
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P R O C E E D I N G S

1  
2 PRESIDENT TERCIER: Well, everybody is  
3 ready. In that case, I may start.

4 Good morning, good afternoon, ladies and  
5 gentlemen. It is my honor to open the fourth day in  
6 the final hearing in the ICSID Arbitration Case 15/31  
7 between Gabriel Resources, Limited, and Gabriel  
8 Resources (Jersey), Limited, versus the Republic of  
9 Romania. I again, hope that you had a good rest and  
10 that we'll have an interesting day.

11 We have just the confirmation that there are  
12 no new participants on the side of the Parties. I  
13 just want first to make a few points, and  
14 Dr. Heiskanen had mentioned that he had also a  
15 request. I start with the point traditional.

16 First, my thanks to Mr. Kasdan for the  
17 draft, the final draft, of yesterday's hearing.

18 Secondly, you have received from our  
19 Secretary the confirmation of the time, time used and  
20 especially time left.

21 Thirdly, we, I mean the Tribunal, have  
22 agreed to the draft letter that will be sent by our

1 Secretary to the Canadian Government concerning the  
2 transmission of the Transcript. I've heard just a  
3 moment ago that our Secretary will do it in a moment,  
4 and send copies of this to the Tribunal and to the  
5 Parties.

6 We have received a moment ago Respondent's  
7 Letter concerning the issue of the date, the Valuation  
8 Date. We have it. Of course, we had not the time to  
9 read it or just read it through but not the time to  
10 analyze. Yesterday Mrs. Cohen reserved the  
11 possibility to give an answer to it.

12 Mrs. Cohen, do you maintain or do you use  
13 your reservation, or Mr. Greenwald? I don't know who  
14 will answer.

15 MS. COHEN SMUTNY: Mr. President, Claimants  
16 just received the letter. We've not yet read the  
17 letter, so, yes, we're certainly reserving the right  
18 to respond, but whether we need to respond, we haven't  
19 read the letter yet, so--

20 PRESIDENT TERCIER: Okay.

21 MS. COHEN SMUTNY: Claimants certainly  
22 reserve the right to respond.

1           Perhaps we should read the letter first.

2           PRESIDENT TERCIER: Of course, that's a very  
3 good measure, indeed.

4           But I would also know, when do you think you  
5 could give us an answer?

6           MS. COHEN SMUTNY: Well, certainly in the  
7 first break or by the lunch break or dinner break--the  
8 meal break, after that. We can certainly let you  
9 know.

10           PRESIDENT TERCIER: Okay. Before going to  
11 the program, Dr. Heiskanen, you have required the  
12 floor for another point or request.

13           Please, Dr. Heiskanen.

14           DR. HEISKANEN: Yes, Mr. President.

15           As you will recall, there were many  
16 disruptions during the presentation of Behre Dolbear  
17 yesterday. In order to avoid further similar  
18 disruptions during the examination or presentations of  
19 the Respondent's remaining experts, we request that  
20 the Tribunal makes a ruling on a following issue of  
21 principle; namely, whether the Respondent's Experts  
22 can comment on the evidence given by the Claimants'



1 Experts and Witnesses during this Hearing or, indeed,  
2 on the evidence referred to by the Claimants in their  
3 Opening Presentation.

4 Now, this issue really cannot wait until  
5 after the Hearing since it will affect the remainder  
6 of this Hearing, in particular the program on Friday  
7 and Sunday. The Respondent's position is that the  
8 Respondent's Experts must be able to comment on the  
9 evidence given by the Claimants' Experts and Witnesses  
10 during this Hearing, regardless of whether the  
11 Claimants' Experts and Witnesses have given new  
12 evidence but, in particular, of course, if they have  
13 given new evidence.

14 This is the Respondent's reading of  
15 Paragraph 59 of PO 33, which confirms that the  
16 Respondent's Experts, and I quote, "shall be afforded  
17 an opportunity to respond," to the Claimants' evidence  
18 given at this Hearing.

19 Now, in our submission, this is simply a  
20 matter of due process, the right to rebut the evidence  
21 heard at this Hearing. It cannot be that the  
22 Claimants' Experts can give new evidence at this

1 Hearing, but the Respondent's Experts cannot even  
2 comment on it.

3           We trust that there is, in fact, no dispute  
4 between the Parties on this issue. Looking at the  
5 Claimants' letter of yesterday on the issue of the new  
6 claim that was introduced on Monday during the  
7 Claimants' Opening Presentation, if you look at Page 3  
8 of the Claimants' letter, in the last paragraph, the  
9 Claimants say that, and I quote: "There is no  
10 prejudice to the Respondent if the evidence is  
11 allowed, the new claim is allowed, as it is open to  
12 Respondent to present argument as to whether it  
13 considers the analysis at issue related to a measure  
14 of loss incurred as a result of Romania's wrongful  
15 conduct. It is open to Respondent to address these  
16 issues both during this Hearing as well as in  
17 Post-Hearing Briefs."

18           If this is the rule that the Parties agree  
19 applies to evidence, new evidence, referred to during  
20 the Opening Statement, it must be the rule that also  
21 applies to any new evidence given by the Claimants'  
22 Witnesses and Experts during this Hearing. It is, in

1 fact, an obligation of the Experts to modify their  
2 opinions if new evidence comes to their attention, so  
3 this is an issue, a fundamental issue of due process,  
4 and that is our submission and request to the  
5 Tribunal.

6 PRESIDENT TERCIER: Thank you,  
7 Dr. Heiskanen.

8 Mrs. Cohen.

9 MS. COHEN SMUTNY: The Claimants' position--

10 PRESIDENT TERCIER: We don't hear you well.

11 MS. COHEN SMUTNY: Sorry.

12 In Claimants' submission, the rule has been  
13 very clear about how we are dealing with the issue of  
14 rebuttal evidence. The Claimants have been permitted  
15 a very limited type of rebuttal, and Claimants'  
16 rebuttal, maybe some has been presented as was  
17 indicated in the rebuttal letters in opening. Some  
18 Claimants' Witnesses, some of them are giving rebuttal  
19 testimony as indicated in letters in very controlled  
20 conditions relating to certain rebuttal documents, the  
21 same with respect.

22 So, to the extent that the rebuttal evidence

1 was--since the rebuttal evidence was addressed in the  
2 opening, and to the extent that Claimants' Witnesses  
3 present rebuttal evidence, which is tied to a new  
4 rebuttal document under these very controlled  
5 conditions, Claimants--I'm sorry, Respondent then, of  
6 course, is permitted to respond to the new evidence,  
7 the new evidence being the new rebuttal evidence.  
8 That is what has been agreed in terms of the rebuttal  
9 procedure; and, on that point, I expect that the  
10 Parties agree.

11           There is now a new request from the  
12 Respondent that the Respondent's Experts should also  
13 be able to comment on testimony that is given in  
14 cross-examination in response to questions. That is  
15 not what the Respondent's Experts are permitted to  
16 comment on, and, no, they are not permitted to give  
17 new testimony in response to testimony that is  
18 elicited in cross that they might have heard, and they  
19 are not permitted to offer new observations about the  
20 evidence that's already in the record that is not  
21 rebuttal.

22           So, the scope of the direct is very clear,

1 and it's been established now since immediately before  
2 the December 19 hearing. The Experts, in their  
3 direct--and Witnesses in their direct presentation can  
4 summarize within the time limits indicated the  
5 testimony that they've already provided.

6 In addition, there's a very specific  
7 rebuttal procedure that has been agreed and  
8 established, and that is, as the Tribunal knows well;  
9 the Claimants may make rebuttal observations with  
10 respect to rebuttal documents; and, as to that new  
11 rebuttal evidence, the Respondent can offer  
12 observations.

13 It is not the general rule. The Parties  
14 have not agreed to a general rule that experts can  
15 just offer observations about things they hear at the  
16 Hearing or things that they've thought of now that  
17 they would like to add. That is not part of the  
18 procedure, and Claimants strongly object to that.

19 PRESIDENT TERCIER: Thank you.

20 Dr. Heiskanen, you have a comment?

21 DR. HEISKANEN: Yes, a very brief comment.

22 First of all, the rule cannot be that the

1 Respondent experts can comment only on new evidence  
2 that is submitted on rebuttal but not on new evidence  
3 that is give outside rebuttal. That would be rather  
4 perverse as a rule. So, this is the issue. The  
5 Claimants--the experts indeed on both sides, and in  
6 this case in particular the Respondent's Experts, have  
7 an obligation to give evidence to the Tribunal; that  
8 is, the evidence to the best of their knowledge and to  
9 their conviction. Anything, if any new evidence comes  
10 to the attention during this Hearing, they have an  
11 obligation to inform the Tribunal of the evidence--how  
12 that evidence affects their evidence. It cannot be  
13 that their role is limited to parroting what is in  
14 their reports. That is a fundamental issue for the  
15 Tribunal to decide.

16           There is, indeed, a ruling by the Tribunal  
17 on the rebuttal evidence to the effect that Mrs. Cohen  
18 just explained, which is to the effect that the  
19 Claimants' Experts and Witnesses of fact in December  
20 and at this Hearing were given the opportunity to  
21 introduce new evidence and certain new documents that  
22 were introduced but without identifying what they were

1 going to say on the basis of those documents, and the  
2 Respondent's Experts and Witnesses were given an  
3 opportunity by the Tribunal to comment on that new  
4 evidence.

5           As the Tribunal is aware, the Respondent  
6 maintains an objection to that ruling because the  
7 ruling does not allow Respondent's Witnesses and  
8 Experts to know in advance of the Hearing what the new  
9 evidence will be. It will be heard for the first time  
10 at this Hearing, so the opportunity that is given is  
11 not sufficient.

12           Be that as it may, that is the procedure.  
13 That is not the procedure that has been agreed, but  
14 that is the procedure that the Tribunal has decided.  
15 But the issue that we are raising goes beyond that  
16 ruling, and we request the Tribunal to take a view on  
17 that issue of principle, whether Respondent's experts  
18 can comment on new evidence given by the Claimants'  
19 Experts and Witnesses at this Hearing whether by way  
20 of direct examination or cross-examination or whether  
21 or not it qualifies as rebuttal evidence; or, indeed,  
22 whether it's evidence introduced by the Claimants'

1 counsel in the Opening Statements. This will be  
2 fundamental because the Respondent's Experts will be  
3 commenting in particular on the new evidence that was  
4 given by the Claimants' counsel, or referred to by the  
5 Claimants' counsel in the Opening Statements. We  
6 understand there is no objection on that issue based  
7 on the Respondent's claim--the Claimants' letter that  
8 I referred to earlier, so the question really applies  
9 or the issue that we are raising relates to the new  
10 evidence given by Claimants' Experts and evidence  
11 during this Hearing, whether or not it's rebuttal  
12 evidence.

13 PRESIDENT TERCIER: Thank you very much,  
14 Dr. Heiskanen.

15 Mrs. Cohen?

16 MS. COHEN SMUTNY: Again, so just to  
17 clarify, so the Tribunal I hope understands the  
18 Claimants' position. The Respondent's Expert can  
19 comment on rebuttal evidence that was discussed and  
20 addressed in the Opening. And, of course, the  
21 Respondent's Experts can comment on rebuttal evidence;  
22 that is, I think, at least the Parties agree on that



1 issue.

2           It is not acceptable for Respondent's  
3 Experts to offer new observations on evidence that  
4 they hear at the Hearing when the Claimants' Experts  
5 have not had the opportunity to do that. You know,  
6 sometimes in hearings, Parties and tribunals agree  
7 that there should be Witnesses--Experts that confer,  
8 and there may be new questions that get posed to both  
9 Parties' Experts. Sometimes it's conferencing,  
10 sometimes the Tribunal poses questions to both  
11 experts. That's the way the Tribunal can hear if  
12 there are some new developments or new aspects that  
13 the Tribunal would like to hear from both Experts and  
14 the Experts have not had the opportunity to speak to  
15 that. Apart from that procedure, which is a procedure  
16 that allows both Parties' Experts an opportunity to  
17 speak to perhaps some new aspects that the Tribunal  
18 might wish to hear expert comments on, unless there's  
19 a procedure like that, the rules are very clear. The  
20 direct presentation is limited to an Executive  
21 Summary, so to speak--a sort of teach-in--that is just  
22 summarizing for the Tribunal's--just to refresh

1 recollection about what is in the Expert reports, and  
2 then the experts are presented for cross-examination.  
3 Experts on cross-examination can answer the question,  
4 whatever the question is, but that's it. They're not  
5 entitled on a direct presentation to offer all sorts  
6 of new observations including on what they've heard.  
7 It's very simple. And if the Tribunal would like to  
8 hear from the experts on new aspects that the Tribunal  
9 finds interesting and would find it helpful to hear  
10 from the Experts what did you think about what we  
11 heard on Day 2 or Day 3, that sort of question then is  
12 posed to both experts so that they can comment; either  
13 it's done simultaneously or, you know, in some other  
14 way that the Tribunal may prefer to do.

15           But, clearly, there is no procedure that  
16 permits the Respondent's Experts to simply offer new  
17 expert observations in the course of their testimony.  
18 That's just not what is accepted.

19           PRESIDENT TERCIER: Thank you very much,  
20 Mrs. Cohen.

21           Do my co-Arbitrators have a follow-up  
22 question?

1 Professor Douglas.

2 ARBITRATOR DOUGLAS: Just so I'm absolutely  
3 clear, in circumstances where the Claimants' Expert  
4 has mentioned something in its Opening presentation,  
5 which, whether right or wrong, the Respondent's Expert  
6 thinks may be a new point, do they have an opportunity  
7 to address that point in their Opening Presentation,  
8 or not? I mean, obviously, if it's not a new point  
9 then the question is moot because it will be covered  
10 in whatever response that they provided in writing  
11 beforehand, but I guess the circumstance is when it's  
12 basically a new point, are they permitted to address  
13 that point in their direct?

14 MS. COHEN SMUTNY: No. I think what the  
15 Parties are permitted to do in a situation like this,  
16 if Respondent's Expert hears some other witness or  
17 expert say something that they find relevant, what the  
18 Respondent should do or what a Party should do in that  
19 circumstance is advise the Tribunal that this is a  
20 material new point, and they should seek leave to make  
21 some sort of testimony on it, and then both Parties  
22 should be able to speak to that. That's what should

1 happen.

2           If there's something material that is heard  
3 in the course of a hearing that will change someone's  
4 expert opinion, then a Party should speak up and say  
5 "we just heard something that's material," and there  
6 needs to be some new testimony on it because it alters  
7 other testimony that was earlier given.

8           ARBITRATOR DOUGLAS: Just on that very  
9 narrow point, can the Respondent's Expert refer to the  
10 direct presentation given by the Claimants' Expert?

11           MS. COHEN SMUTNY: Not unless it's rebuttal,  
12 not on redirect. Not unless it's rebuttal. That's  
13 the idea.

14           I mean, if we're going to have a different  
15 sort of procedure in which the Experts can comment on  
16 each other's presentations, we could have a procedure  
17 like that. That's sometimes done, particularly in  
18 witness conferencing, that sort of thing is sometimes  
19 done. That's not what we've agreed to here.

20           ARBITRATOR DOUGLAS: Okay.

21           MS. COHEN SMUTNY: Otherwise, we have a  
22 situation in which the Respondent's Experts are

1 offering new testimony on new observations. The idea  
2 should be that both Parties should be able to at the  
3 end of the day comment on all of the evidence.

4           The other point is that, I think if the  
5 Tribunal were to rule that experts can comment on any  
6 thing that has happened in the Hearing up until now,  
7 at least that would have to be made very clear--first  
8 of all, I want to state, obviously, Claimants do not  
9 agree to this because this was not the procedure that  
10 was agreed, and the Experts are there for  
11 cross-examination. But, certainly, we've proceeded  
12 under the assumption that the presentation is the  
13 presentation. And I think that if new experts started  
14 to make observations, new observations about what they  
15 heard at the Hearing, and this would be new evidence,  
16 Respondent would be objecting to that. Respondent's  
17 apparent outstanding objection is that hearing new  
18 expert evidence, you know, is a burden that is unfair.

19           So, what they're proposing is completely  
20 contrary. It's a bit contradictory to say that on the  
21 one hand the rebuttal evidence is something that is a  
22 problem for the Respondent, but then there should be

1 an opportunity for the Experts to offer new expert  
2 observations on evidence that they're hearing even at  
3 the Hearing.

4 PRESIDENT TERCIER: Dr. Heiskanen, a final  
5 comment?

6 DR. HEISKANEN: Yes.

7 First of all, it's not correct to say that  
8 this is the procedure that has been agreed because  
9 there's nothing in the procedure on this particular  
10 issue, so it's an issue that the Tribunal needs to  
11 decide.

12 And the rule that Mrs. Cohen just described  
13 may or may not be appropriate for witnesses of fact,  
14 but it certainly cannot apply to experts, given the  
15 nature of the evidence that experts are giving. They  
16 are giving opinions. Their evidence is opinions.  
17 They have an obligation vis-à-vis the Tribunal to  
18 modify their opinions, if anything comes to their  
19 attention in terms of evidence that causes them to  
20 change their opinions.

21 It is in the Tribunal's interest to get the  
22 evidence, and it is in the Respondent's right to rebut

1 the evidence given by the Claimants and their Experts  
2 and Witnesses. It's a very simple issue, in our  
3 submission.

4 PRESIDENT TERCIER: Okay. Thank you very  
5 much. The Tribunal will, indeed, rule on these  
6 questions, and sufficiently in time so that to avoid  
7 to have further incidents and objections with the  
8 presentation of the Experts.

9 Fine. Are there further requests before we  
10 start the examination of the Witness?

11 Mrs. Cohen?

12 MS. COHEN SMUTNY: Nothing further at this  
13 time.

14 PRESIDENT TERCIER: Dr. Heiskanen?

15 DR. HEISKANEN: Nothing from us,  
16 Mr. President.

17 PRESIDENT TERCIER: Thank you very much.

18 So, we start now--just one point with the  
19 program. We do not know how long it will be. We have  
20 the two witnesses that will be examined today, but I  
21 would like nevertheless make the reservation for  
22 Respondent to see whether Mr. McCurdy could possibly

1 be heard partly or make his presentation already this  
2 evening or this afternoon, depending where you are.

3 Dr. Heiskanen, could you confirm that it  
4 could be possible to have a contact with him? I  
5 recall that, according to the Rule, he should be  
6 available one day before.

7 DR. HEISKANEN: He's available, if  
8 necessary.

9 PRESIDENT TERCIER: Thank you very much.

10 So, we now turn to the examination of  
11 Mr. Barry Cooper.

12 BARRY COOPER, CLAIMANTS' WITNESS, CALLED

13 PRESIDENT TERCIER: Good morning,  
14 Mr. Cooper. It must be rather early for you or as in  
15 the middle of the day. Thank you very much for being  
16 here with us.

17 You know that you will be heard in this  
18 procedure as a witness. As such, I would like to  
19 invite you to read the Declaration. You should have  
20 it. Could you have the Witness Declaration?

21 THE WITNESS: I don't recall seeing that.  
22 Maybe I'm not familiar with the term, but I don't



1 recall seeing that Declaration.

2 PRESIDENT TERCIER: Okay. Is it possible,  
3 Sara, to send it to the Witness?

4 SECRETARY MARZAL YETANO: I can share it  
5 with him right now, if you want, so he can read it  
6 from the screen. Just a second.

7 (Pause.)

8 SECRETARY MARZAL YETANO: Can you see the  
9 statement here?

10 THE WITNESS: I see--

11 SECRETARY MARZAL YETANO: Okay.

12 THE WITNESS: That looks like the start now.

13 PRESIDENT TERCIER: Okay. Can you read it,  
14 please?

15 THE WITNESS: Yes. You want me to read it?

16 PRESIDENT TERCIER: Yes, please.

17 THE WITNESS: Witness Declaration: I  
18 solemnly declare upon my honor and conscience that I  
19 shall speak the truth, the whole truth and nothing but  
20 the truth. I will not receive or provide  
21 communications of any sort during the course of my  
22 examination.

1           PRESIDENT TERCIER: Thank you very much.

2           Because we have a rather special proceeding,  
3 the Arbitral Tribunal made a ruling, and I would like  
4 to read some of them because they are relevant for  
5 your examination.

6           First, no person shall be present in the  
7 room with the testifying witness. You can confirm it?

8           THE WITNESS: Correct.

9           PRESIDENT TERCIER: Any communications by a  
10 witness during their examination are prohibited, you  
11 just declared it. Each witness shall affirm at the  
12 start that he or she will not receive or provide  
13 communication. Again, the witness shall remain  
14 visible at all time. We'll confirm it. The Witness  
15 shall not use a virtual background or in any way  
16 prevent or limit the recording of the remote venue  
17 from which he or she is testifying.

18           Are these rules clear to you?

19           THE WITNESS: Yes, they are, and they're all  
20 correct.

21           PRESIDENT TERCIER: Okay. Good. So,  
22 Mr. Cooper, you will be heard as a witness, as I said;

1 and, for that, you have prepared a Witness Statement,  
2 and this Witness Statement is dated 30 October 2018.

3 Have you this document in front of you or  
4 before you?

5 THE WITNESS: Yes, I do have that.

6 PRESIDENT TERCIER: Okay. My question to  
7 you is whether you can confirm the content of this  
8 statement, or do you wish to make amendments or change  
9 something to it?

10 THE WITNESS: I can confirm the statement,  
11 and I have no changes to it, sir.

12 PRESIDENT TERCIER: Thank you very much.

13 This is your testimony, and it is based on  
14 your testimony that we'll have the direct and the  
15 cross and the redirect in a moment.

16 I just would like to invite you in a few  
17 words to introduce yourself, and what were the  
18 conditions under which you have been invited to  
19 prepare this Witness Statement. Please.

20 THE WITNESS: Yes. My name is Barry Cooper.  
21 I live in Oakville, Ontario, which is just outside of  
22 Toronto. I retired from being a mining analyst seven

1 years ago from a company called CIBC, or Canadian  
2 Imperial Bank of Commerce. There I was an equities  
3 analyst for 17 years covering the gold sector, and  
4 before that I worked in industry, mining industry, as  
5 an exploration geologist for several companies for  
6 about another 17 to 20 years.

7 PRESIDENT TERCIER: Thank you very much.

8 So, the procedure will be the following. As  
9 you know, we will start with the direct, and I assume  
10 it will be Mr. Greenwald who will start with the  
11 direct.

12 Please, Mr. Greenwald, you have the floor.

13 MR. GREENWALD: Thank you, Mr. President.  
14 Good morning.

15 PRESIDENT TERCIER: Could you speak a bit  
16 louder?

17 DIRECT EXAMINATION

18 BY MR. GREENWALD:

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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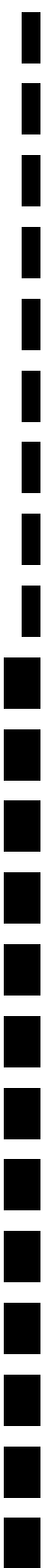
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PRESIDENT TERCIER: Thank you very much,

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Mr. Greenwald.



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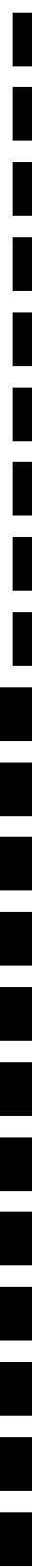
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13                   PRESIDENT TERCIER: Sorry, if you--just to,  
14 because you should find some time, the best or the  
15 more appropriate time to introduce a break.

16                   MS. RADJAI: Okay. So, now would be a good  
17 time for a break.

18                   PRESIDENT TERCIER: Okay. Good. So, we  
19 will have a 15 minutes' break, and we will start again  
20 at exactly 4:00 p.m. Swiss time.

21                   Mr. Cooper, I would like to remind you that  
22 you are under testimony, and you know that you

1 have--you're not allowed to have any contact with the  
2 representative of the Party or other counsel.

3 THE WITNESS: I understand.

4 PRESIDENT TERCIER: Good. May I recall my  
5 co-Arbitrators that I would like to have a very short  
6 discussion on our own session.

7 Thank you very much.

8 (Recess.)

9 PRESIDENT TERCIER: Very well. So, I  
10 suggest that we do the second part of the  
11 cross-examination.

12 MR. GREENWALD: Mr. President?

13 PRESIDENT TERCIER: Just one question  
14 before. Of course, I know that it's always extremely  
15 difficult to make an estimate, but you can tell us  
16 approximately where you are in your examination, or I  
17 know where you are, but I mean approximately?

18 MS. RADJAI: So, my best estimate is that  
19 we're halfway through. And just for the Tribunal to  
20 know that we think we would have more time with  
21 Mr. Cooper than with Mr. Jeannes, at least based on  
22 our current best estimate.

1           PRESIDENT TERCIER: Okay. A comment to  
2 that, Mr. Greenwald?

3           MR. GREENWALD: Yes, that's fine. We were  
4 going to ask just as a courtesy so we could let  
5 Mr. Jeannes know approximately when. I assume then  
6 that we'll be breaking for a meal before he will be  
7 examined.

8           And then the second comment I would make to  
9 that is that the direct examination for Mr. Jeannes  
10 will be longer than was done earlier today. As the  
11 Tribunal is aware, we have a number of rebuttal topics  
12 that have been identified since I believe October and  
13 November of last year with rebuttal documents that  
14 were also notified to Respondent on Friday, so--

15           PRESIDENT TERCIER: Okay. Good. Let's  
16 first listen to Mr. Cooper. We'll see later on how it  
17 will develop. Fine.

18           Ms. Radjai, you have the floor for the  
19 cross-examination of Mr. Cooper's second part.

20           MS. RADJAI: Thank you.

21           BY MS. RADJAI:



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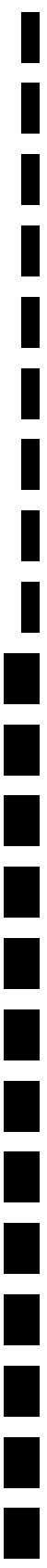
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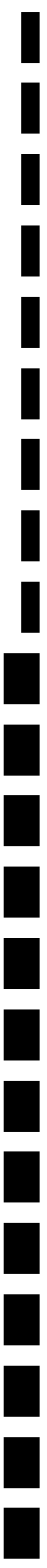
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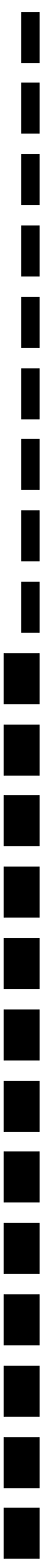
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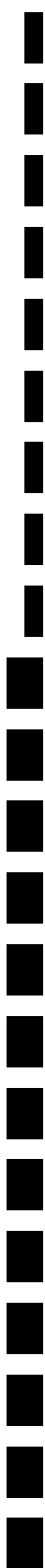
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MS. RADJAI: Mr. President, if I can take

1 just a 5-minute break to see what remains, and we may  
2 be able to then cut it shorter.

3 PRESIDENT TERCIER: Okay. One question to  
4 Mr. Greenwald, what do you think, depending of course  
5 on the answer that we're given by Ms. Radjai, but do  
6 you think you can make your redirect right after the  
7 cross, or do you think it would be better to have what  
8 we call now the "tea break" in between?

9 MR. GREENWALD: I think we would like a  
10 break to confer as colleagues. Whether or not we need  
11 it to be--I think a relatively--can you give me one  
12 second, Mr. President?

13 (Pause.)

14 MR. GREENWALD: Mr. President, you know, I  
15 think it will be a relatively few questions. So, if I  
16 could have 5-10 minutes between the end of  
17 cross-examination and the start of redirect, just to  
18 confer with my colleagues, but we would prefer to have  
19 the meal break after Mr. Cooper is completed so that  
20 he could actually relax and enjoy himself and have a  
21 nice meal, other than being held over waiting for us.

22 PRESIDENT TERCIER: Okay. Good. Fine. So,

1 first, five minutes to Ms. Radjai, and then we will  
2 see how things will develop.

3 Mr. Cooper, you are still under examination  
4 and condemned to solitude.

5 THE WITNESS: Yes, sir.

6 (Pause.)

7 PRESIDENT TERCIER: Good. So, Ms. Radjai.

8 MS. RADJAI: Thank you, Mr. President.

9 Thank you, Mr. Cooper. We have no further  
10 questions for you.

11 PRESIDENT TERCIER: Okay. Thank you very  
12 much.

13 Then the ball is on your field,  
14 Mr. Greenwald.

15 MR. GREENWALD: If we could then take a  
16 five- or 10-minute coffee break, and then we'll wrap  
17 up rather quickly and can have lunch or dinner.

18 PRESIDENT TERCIER: Okay. Fine. Let's take  
19 a 10 minutes' break right now.

20 Or you tell us when you are back, we'll see  
21 it on screen so that we could proceed. Yes, please.

22 MR. GREENWALD: Thank you.

1 Thank you, Mr. President.

2 (Recess.)

3 PRESIDENT TERCIER: Okay. Everybody seems  
4 to be here.

5 REALTIME STENOGRAPHER: Yes, sir.

6 PRESIDENT TERCIER: So, Mr. Greenwald, you  
7 have the floor.

8 MR. GREENWALD: Thank you, Mr. President.

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7 PRESIDENT TERCIER: Thank you very much.

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19 PRESIDENT TERCIER: Okay. Good.

20 Do my co-Arbitrators have a question to the

21 Witness?

22 Professor Grigera Naón? No. Professor

1 Douglas?

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PRESIDENT TERCIER: Thank you, Professor Douglas. I have no further questions to the Witness.

Mr. Cooper, I would like to thank you very much. Your examination is over.

(Witness steps down.)

PRESIDENT TERCIER: And we will now have our break, we take a one-hour break. That means we will start again at Swiss time 6:30 p.m., and we will start with the direct examination by Claimant.

May I ask my co-Arbitrators to go just for a very, very short intervention on our own session?

MS. RADJAI: Mr. President, just before we break, with your discretion, we would just like to clarify one point for the record, which is that C-2121, which was just put to Mr. Cooper is one of the documents listed--sorry, C-2122--is one of the

1 documents listed with his Witness Statement and is  
2 mentioned at Footnote 1, for the record.

3 PRESIDENT TERCIER: Okay. I've taken note  
4 of it.

5 Fine. So, we meet again in one hour, and  
6 again, my co-Arbitrators will, just for a few minutes,  
7 be together. Thank you very much.

8 THE WITNESS: Thank you.

9 MS. RADJAI: Thank you, Mr. Cooper.

10 (Recess.)

11 PRESIDENT TERCIER: So, here is our witness.  
12 Fine. I start with one point.

13 Mrs. Cohen Smutny, I would like to hear  
14 whether you have now used your reservation or do you  
15 want to reply to Respondent's position concerning the  
16 alleged new claims?

17 MS. COHEN SMUTNY: The Claimants--

18 PRESIDENT TERCIER: We don't hear you.

19 MS. COHEN SMUTNY: Apologies.

20 Yes, confirming that claimants now have  
21 reviewed Respondent's Letter regarding its objection  
22 and do wish to be permitted to respond, and

1 proposes--Claimants propose to do so promptly, if the  
2 Tribunal would allow one--Claimants could respond by  
3 tomorrow morning, that would be fine.

4 PRESIDENT TERCIER: Morning for whom?

5 MS. COHEN SMUTNY: Well, before the start of  
6 tomorrow's hearing.

7 PRESIDENT TERCIER: Okay. And  
8 Dr. Heiskanen, do you want to reserve the possibility  
9 to react?

10 DR. HEISKANEN: Yes, indeed. We would like  
11 to see first what the Claimants have to say and then  
12 state our position.

13 PRESIDENT TERCIER: Okay, good. Fine.

14 Now, if there are no further requests, we  
15 may start with the examination of Mr. Charles Jeannes.

16 CHARLES JEANNES, RESPONDENT'S WITNESS, CALLED

17 PRESIDENT TERCIER: Good morning or good  
18 afternoon, I do not know anymore where we are. Here  
19 it's really already a bit late. Welcome in these  
20 proceedings. You know that you will be heard,  
21 Mr. Jeannes, as a witness; and you know that, as  
22 such--first of all, you don't know--if you don't know

1 you're learning--to read a Declaration, a solemn  
2 Declaration. Do you have the form in front of you?  
3 You are mute.

4 Mr. Jeannes, we don't hear you.  
5 Mr. Jeannes?

6 Sara? What happened? I don't hear you  
7 either, but you are mute.

8 SECRETARY MARZAL YETANO: Yes, I was  
9 sharing--hello, Mr. Jeannes. Can you hear us? We  
10 cannot hear him.

11 MR. GREENWALD: We're going to look into  
12 this, Sara, and see if I can figure out what's  
13 happening on the technical side.

14 Can you hear us? Can you indicate if you  
15 can hear us? I'm not sure he can hear us either.

16 PRESIDENT TERCIER: Mr. Jeannes, do you hear  
17 me?

18 SECRETARY MARZAL YETANO: It seems he can  
19 hear us, but we cannot hear him.

20 Can you make sure that the mike in your  
21 computer is not turned off?

22 MR. GREENWALD: Can we have our IT call the

1 Witness? Is that agreeable to both sides to assist  
2 with this?

3 DR. HEISKANEN: Yes, it's acceptable.

4 MR. GREENWALD: Thank you. We'll do that  
5 now.

6 SECRETARY MARZAL YETANO: Also try to  
7 disconnect and reconnect. That's how I solve all my  
8 problems.

9 There are two mikes. One is your computer,  
10 and then the other is the Head set mike. And if  
11 either one of those is turned off, you might be able  
12 to...

13 (Pause.)

14 SECRETARY MARZAL YETANO: Also our IT  
15 people, I could give them a call.

16 MR. GREENWALD: Our IT people are going to  
17 call or are calling.

18 PRESIDENT TERCIER: Mr. Jeannes, have you  
19 also checked the volume? Maybe it's very, very low?  
20 No? Okay. Can't hear you.

21 (Pause.)

22 MR. GREENWALD: Mr. Jeannes, if you can hear



1 us if you can check your phone, people are trying to  
2 give you a call. IT is trying to give you a call.

3 Straight to voice-mail.

4 They'll try again.

5 My understanding is he's trying to re-log in  
6 to the WebEx plane.

7 THE WITNESS: Can you hear me now? This  
8 required me to rejoin.

9 PRESIDENT TERCIER: Okay. So, Mr. Jeannes,  
10 you're with us. You hear me?

11 THE WITNESS: Yes, I can.

12 PRESIDENT TERCIER: Yes, okay. So, now  
13 we'll start again, and welcome again with, we see you  
14 and we hear you, so we tell us--I'm saying that to  
15 you, you will be heard as a witness, and, as such, you  
16 have to read aloud the Declaration. You have received  
17 it on your screen, I think, a moment ago. There, you  
18 have it.

19 Please.

20 THE WITNESS: I solemnly declare upon my  
21 honor and conscience that I shall speak the truth, the  
22 whole truth, and nothing but the truth. I will not

1 receive or provide any communications of any sort  
2 during the course of my examination.

3           PRESIDENT TERCIER: Okay. For the purpose  
4 of this procedure, the Tribunal has prepared a  
5 procedural order and some of the parts are important  
6 for this examination. I just take them very quickly  
7 through.

8           No person shall be present in the room with  
9 a testifying witness. You can confirm it?

10          THE WITNESS: Yes. No one is here.

11          PRESIDENT TERCIER: Confirm that any  
12 communications are prohibited, that also you will not  
13 receive or provide communication of any sort during  
14 the course of your examination. You must be visible  
15 at all times. This is easy to control. And you shall  
16 not use a virtual background or any way prevent or  
17 limit the recording of the remote venue from which  
18 you're testifying.

19           Is that clear for you?

20          THE WITNESS: Yes, it is, thank you.

21          PRESIDENT TERCIER: Okay. You have prepared  
22 for this Arbitration a witness statement. It is dated

1 the 23rd of October 2018. Have you this document in  
2 front of you?

3 THE WITNESS: I do.

4 PRESIDENT TERCIER: Can you confirm the  
5 content of this statement, or you wish to make  
6 amendments or corrections?

7 THE WITNESS: I can confirm the content of  
8 the statement without any amendment.

9 PRESIDENT TERCIER: Okay. You know that in  
10 procedure this is your testimony, and you know also  
11 that now you will be submitted to a direct examination  
12 and then to the cross-examination and possibly to the  
13 redirect. The members of the Arbitral Tribunal have  
14 the right to ask questions, if they consider it is  
15 opportune or useful.

16 In this case, there is one special point,  
17 the fact that new documents have been presented on  
18 which you can be examined by counsel for Claimants,  
19 the list of the things, and the documents were  
20 submitted in Claimants' letter dated 19th of June. If  
21 I'm not mistaken, it was--yeah, 18 September 2020,  
22 where the list was given. This was with the document.

1 So, is it clear for you?

2 THE WITNESS: Yes.

3 PRESIDENT TERCIER: Okay. In that case,  
4 Mr. Greenwald, you have the right or you can start  
5 with the direct.

6 MR. GREENWALD: Thank you, Mr. President.

7 DIRECT EXAMINATION

8 BY MR. GREENWALD:

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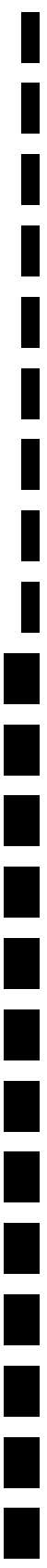
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1 Mr. Jeannes?

2 THE WITNESS: Oh, I'm sorry. Yes, I do hear  
3 you.

4 PRESIDENT TERCIER: It's rather late in  
5 Europe.

6 So, Mr. Greenwald.

7 MR. GREENWALD: Thank you, Mr. President.

8 REDIRECT EXAMINATION

9 BY MR. GREENWALD:

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





1 my co-Arbitrators have a question?

2 Professor Douglas.

3 ARBITRATOR DOUGLAS: Yes, just a couple.

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR DOUGLAS:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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5 PRESIDENT TERCIER: It's best to recall,  
6 first may I ask our Secretary to give the time, time  
7 used and time left.

8 SECRETARY MARZAL YETANO: So, Claimants have  
9 a total of 6 hours and 19 minutes and 28 seconds left;  
10 Respondent, 5 hours and 27 minutes and 36 seconds; and  
11 the Tribunal 2 hours and 40 minutes and 51 seconds.

12 PRESIDENT TERCIER: Comments to that,  
13 Mrs. Cohen?

14 MS. COHEN SMUTNY: No comments on the time.

15 PRESIDENT TERCIER: Dr. Heiskanen?

16 DR. HEISKANEN: No comments.

17 PRESIDENT TERCIER: I recall that tomorrow  
18 beginning of the Hearing we will receive the Reply  
19 from Claimant concerning the question of the so-called  
20 "new claims" and we will then see whether the  
21 Respondent will have a further opportunity to comment.

22 Do you have another point that you would

1 like to raise on your side, Mrs. Cohen?

2 MS. COHEN SMUTNY: No, we do not at this  
3 time.

4 PRESIDENT TERCIER: Thank you.

5 Dr. Heiskanen?

6 DR. HEISKANEN: Yes, simply we are hoping to  
7 receive the Tribunal's ruling on the request that we  
8 raised this morning. There will be two of the  
9 Respondent's Experts testifying tomorrow, and it would  
10 be very helpful to know whether they'll be allowed to  
11 comment on the evidence that was heard today, for  
12 instance.

13 PRESIDENT TERCIER: Okay. We will, indeed,  
14 discuss it right after the end of this session.

15 Okay. Otherwise, if there is nothing else,  
16 I wish you a very pleasant afternoon or evening or  
17 even night. Thank you very much, and I invite my  
18 co-Arbitrators to switch on the other session, please.  
19 Bye.

20 DR. HEISKANEN: Thank you.

21 (Whereupon, at 2:46 p.m. (EDT), the Hearing  
22 was adjourned until 8:00 a.m. (EDT) the following

1 day.)

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



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DAVID A. KASDAN