

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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 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 1

HEARING ON THE MERITS

Monday, December 2, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room C3-150
Washington, D.C.

The hearing in the above-entitled matter came on
at 9:00 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

Court Reporters:

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Interpreters:

MS. MARLIENA FILIP

MS. ALEXANDRA IULIANA MLADEN

MS. ALEXANDRA DOBRIN

ALSO PRESENT:

Attending on behalf of the Claimants:

MS. ABBY COHEN SMUTNY
MR. DARRYL LEW
MR. BRODY GREENWALD
MR. PETR POLÁŠEK
MR. HANSEL PHAM
MR. FRANCIS VASQUEZ JR.
MR. ANDREI POPOVICI
MS. GABRIELA LOPEZ
MR. FRANCIS LEVESQUE
MR. WILLIAM STROUPE
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MS. ANCA DIANA PUSCASU
MS. OANA-MIRUNA URECHE
MS. RUXANDRA NIȚĂ
MS. ANGELICA-IULIANA HOGAȘ-PINTILIE
MR. CORNEL POPA (via video for Prof. Birsan)
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APPEARANCES:

Represent Gabriel Resources Ltd.:

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MR. RICHARD BROWN

MR. DANIEL KOCHAV

MS. RUTH TEITELBAUM

Representing Roşia Montană Gold Corporation:

MR. MIHAI BOTEA

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

DR. VEIJO HEISKANEN
MR. MATTHIAS SCHERER
MS. NORADÈLE RADJAI
MS. LORRAINE de GERMINY
MR. CHRISTOPHE GUIBERT de BRUET
MR. DAVID BONIFACIO
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P R O C E E D I N G S

1
2 PRESIDENT TERCIER: Good morning, ladies and
3 gentlemen. I would like to welcome you here at the
4 ICSID Hearing Centre. I have the honor to open the
5 First Session of the Hearings in the arbitration case
6 ICSID 15/31, between Gabriel Resources Limited and
7 Gabriel Resources (Jersey) Limited versus Romania.

8 Let me at the outset express the wish that
9 this Hearing will take place in the most serene and
10 constructive spirit in order to give to this Tribunal
11 all information it needs in order to render a fair and
12 just award.

13 I would like to start with the presentation.
14 On my left-hand side, Professor Horacio Grigera Naón;
15 on my right-hand side, Professor Zachary Douglas. My
16 name is Pierre Tercier. I want to recall you that I
17 replaced Ms. Teresa Cheng, who was the President of
18 this Tribunal from the start, and now she has another
19 function. She resigned.

20 I would like also to also introduce Ms. Sara
21 Marzal Yetano, who is the Secretary of this Tribunal;
22 and also the assistant to the Tribunal, Mrs. Maria

1 Athanasiou, with your agreement. She's a Senior
2 Associate at my office. The two Court Reporters are
3 David Kasdan and Mrs. Margie Dauster. I don't know if
4 the Interpreters are already in the room somewhere?
5 They are there. They are also in action already? I
6 don't know that. In any case I would like to--

7 SECRETARY MARZAL YETANO: Not yet.

8 PRESIDENT TERCIER: No, they're not? Not
9 yet. Good.

10 That's for the Tribunal. May I invite the
11 Claimants to introduce their team that is on your
12 side.

13 Please, Ms. Cohen Smutny.

14 MS. COHEN SMUTNY: Thank you very much.

15 My name is Abby Cohen Smutny, counsel for
16 Claimants. With me on the counsel team, Mr. Darryl
17 Lew, Mr. Brody Greenwald, Mr. Hansel Pham, Mr. Frank
18 Vasquez, Mr. Andrei Popovici, Ms. Gabriela Lopez,
19 Mr. William Stroupe, Ms. Dara Brown, Ms. Nuha Hamid.

20 Our co-counsel from the Tuca law firm,
21 Ms. Levana Zigmund, Ms. Anca Puscasu, and Ms. Oana
22 Ureche.

1 Also representing Gabriel Resources in the
2 room is Mr. Simon Lusty, Mr. Richard Brown, Ms. Ruth
3 Teitelbaum, Mr. Dan Kochav, Mr. Mihai Botea.
4 Technical Assistance also in the room is Ms. Jennifer
5 Coimbra. Also experts who will be testifying during
6 this Hearing later, Professor Schiau and Professor
7 Podaru are here today.

8 PRESIDENT TERCIER: Thank you very much.
9 Everybody on that side has been mentioned. Good.

10 Please, Dr. Heiskanen.

11 DR. HEISKANEN: Mr. President, Members of the
12 Tribunal, good morning. My name is Veijo Heiskanen,
13 counsel for the Respondent. I will ask each of the
14 members of the Respondent's team to introduce
15 themselves.

16 MR. SCHERER: Matthias Scherer, Partner at
17 Lalive.

18 DR. LEAUA: Crenguta Leaua, Partner at Leaua,
19 Damcali, Deaconu Paunescu, LDDP.

20 MS. RADJAI: Noradèle Radjai, Lalive.

21 MS. SIMULESCU: Andreea Simulescu, Partner
22 Leaua, Damcali, Deaconu, Paunescu, LDDP.

1 MS. de GERMINY: Lorraine de Germiny, Lalive.

2 MS. McCONAUGHEY: Emilie McConaughey, Lalive.

3 MR. KOTARSKI: Ken Kotarski, Lalive.

4 MR. DE BRUET: Christophe Guibert de Bruet,

5 Lalive.

6 MR. BONIFACIO: David Bonifacio, Lalive.

7 MR. RIGAUDEAU: Baptiste Rigaudeau, Lalive.

8 MS. MARAVELA: Mihaela Maravela, LDDP.

9 MS. DEACONESCU: Liliana Desconescu, LDDP.

10 MS. FILATOV: Andra Soare Filatov, LDDP.

11 MS. PITURCA: Andreea Piturca, LDDP.

12 MS. CHALIKOPOULOU: Nicole Chalikopoulou,

13 Lalive.

14 MR. GRANE: Patricio Grane, Lalive.

15 MS. NEGRAN: Stela Negran, Lalive.

16 PROFESSOR TOFAN: Dana Tofan, legal expert.

17 DR. POP: Alina Pop, Christian University

18 "Dimitre Cantemir" from Bucharest.

19 DR. STOICA: Augustin Stoica.

20 PRESIDENT TERCIER: Okay. Everybody has been

21 mentioned. Yes, it seems to be the case.

22 DR. HEISKANEN: Indeed.

1 PRESIDENT TERCIER: Fine. I will now address
2 with you a certain number of issues. Some have been
3 raised very recently. We will go through all of them,
4 and probably the Arbitral Tribunal will then need a
5 short break in order to decide on some issues, if
6 necessary. It might be that we will take a bit more
7 time than to what was originally considered.

8 Fine. I start with the tentative schedule.

9 The last draft, we have the one prepared by
10 the Secretariat, and it is from the 29th of
11 November 2019. According to this, Mr. Boc will be
12 heard as a witness on Saturday. This is now
13 clarified. I would like to know what happened with
14 Mr. Bode.

15 DR. HEISKANEN: Mr. President, we have spoken
16 with Mr. Bode this morning. Unfortunately, he will
17 not be available to come to the Hearing in Washington,
18 D.C. in person. He will be available for a
19 videoconference or examination by videoconference next
20 week. He will confirm tomorrow whether it will be
21 Tuesday, the 10th or Wednesday, the 11th.

22 PRESIDENT TERCIER: He was scheduled to

1 testify on Friday, the 6th, so this is no more
2 possible?

3 DR. HEISKANEN: No. I think we have
4 indicated in our earlier correspondence that it would
5 be either the 10th or the 11th if it's by
6 videoconference, and whether it's still one or the
7 other still needs to be confirmed. We hope to be able
8 to come back to the Tribunal tomorrow.

9 PRESIDENT TERCIER: Okay.

10 Comment on your side, Respondent--Claimants,
11 sorry.

12 MR. LEW: We'll consider the offer of a
13 videoconference cross-examination and revert.

14 PRESIDENT TERCIER: Okay. Good.

15 Considering the Schedule, it will be of
16 course adapted. It's not really necessary in view of
17 the recent development. I recall because it's
18 important that the time that will be devoted to direct
19 and to redirect as well as cross from the side of
20 Claimants are maximum and that we, in fact, on the
21 Respondent's side, we have to adapt because you gave
22 an overall time, and it will be adapted, depending on

1 the witness or the Expert.

2 It is your understanding?

3 DR. HEISKANEN: That is our understanding,
4 and we understand also that there will be a
5 communication at the end of the day from the Secretary
6 of the Tribunal showing how much time has been spent,
7 so we'll be going on a day-by-day basis.

8 PRESIDENT TERCIER: Okay. You anticipated
9 the next point that I was going to make, that you will
10 receive a report on the day by day on the total time
11 that will be devoted for the day.

12 A comment on your side, Claimants?

13 MS. COHEN SMUTNY: No, no.

14 PRESIDENT TERCIER: Okay.

15 Then we come to the next. It is Claimants'
16 request to resubmit Exhibit C-575, and the letter we
17 have received yesterday, I recall that this document
18 has been submitted for the first time on the 30th of
19 June 2017, in the opening Memorial and now we have
20 received a request from 27 November and to the
21 exchange of letters that you know.

22 Okay. Now, I would be grateful if we could

1 have the very last position you have, starting with
2 Claimants.

3 MR. VASQUEZ: Yes, Mr. President.

4 So, by way of background, there are two
5 exhibits in the record that are a similar but not
6 quite the same letter. One of them is C-575; one of
7 them is R-215. These documents are referred to
8 extensively by Mr. Avram and Ms. Mocanu in their
9 statements and then in the pleadings themselves.

10 There was some confusion over which one was
11 sent first and when it was sent. And so, those two
12 documents are already in the record. What we would
13 like to put in the record is the transmittal e-mails
14 that came from Respondent to the Claimants, one on
15 September 22nd, 2011, transmitting C-575; and the
16 second on September 26th, 2011, transmitting R-215,
17 just to clarify that for the record and then have the
18 witnesses address it when they take the witness box,
19 and that is our position as we'd like to put those two
20 e-mails into the record.

21 PRESIDENT TERCIER: Good.

22 Respondent?

1 DR. HEISKANEN: Indeed, we understand that
2 the Claimants do not object to the admission of the
3 internal official version of C-575 to the record. The
4 Respondent doesn't object to the admission of the two
5 e-mails to the record, so it seems that there is no
6 issue that is between the Parties.

7 MR. VASQUEZ: I don't think that's quite
8 correct.

9 We have not seen the document that he refers
10 to, the internal correspondence. We would like to be
11 able to see that before we decide whether we have any
12 objections to it, whether we can put that in the
13 record and reserve an objection or how the Tribunal
14 would like to handle that. This document is something
15 that has never been produced by Respondent to us in
16 any way shape or form as far as we know, and so it's
17 completely--unlike the e-mails which they sent to us,
18 this document is completely new, and we don't even
19 know what it is.

20 PRESIDENT TERCIER: Dr. Heiskanen?

21 DR. HEISKANEN: Well, there is no mechanism
22 for a prior review by the other Party of documents

1 into the record that the other Party seeks to produce,
2 so we don't see why there is a need for--indeed that
3 is not appropriate to have this kind of review. When
4 the Claimants earlier this week or actually last week
5 proposed to produce these e-mails to the record, they
6 didn't offer for the Respondent to review them first
7 to see whether we have an objection, so the
8 understanding seems to be that there is no need for
9 such a review the document by the other Party before a
10 document is admitted into the record, so the
11 Respondent position remains that it is for the
12 Tribunal now to decide whether these three documents
13 should be admitted into the record without any prior
14 screening by the Claimants.

15 MR. VASQUEZ: We would still like the
16 opportunity to be able to object even if it's admitted
17 into the record right now is our position on that.

18 And we would like that this happened today,
19 whatever is going to be admitted so that we can
20 prepare properly for examinations of the witnesses
21 when they come up.

22 PRESIDENT TERCIER: You're always

1 anticipating my point. My second question was indeed,
2 in case the Tribunal would accept the request, when
3 would we be able to produce it today? The two
4 documents?

5 MR. VASQUEZ: We will put our two e-mails in
6 today.

7 PRESIDENT TERCIER: Okay. On your side?

8 DR. HEISKANEN: We will be able to produce it
9 today.

10 PRESIDENT TERCIER: Okay. So, the Arbitral
11 Tribunal will decide on that subject during our short
12 break.

13 Good. The next point is the EU Application.
14 You remember that EU came three days before the start
15 of the Hearing, with requests to intervene as an
16 Non-Disputing Party. It was on the 27th of November.
17 We had invited the Parties to comment. Claimants
18 objected. Respondent had no objection. You have seen
19 that the Arbitral Tribunal decided--informed the EC
20 that we will decide during the first week of the
21 Hearing and after we have deliberated, EU have been
22 informed of that. We have told the EU, that EC--that

1 they have rights to come as an observer, but we have
2 no news from the EU, or EC, so we will decide on that.
3 It's not urgent to do that right now. We will decide
4 it in the course of this week.

5 Comment on your side? Claimants?

6 MS. COHEN SMUTNY: No further comment on
7 that.

8 PRESIDENT TERCIER: Comment on the other
9 side, Respondent?

10 DR. HEISKANEN: No further comments from the
11 Respondent.

12 PRESIDENT TERCIER: Thanks very much.

13 The next point is the Parties' rebuttal
14 document. Okay. So we had, as you know, the 21st of
15 November we sent a letter considering PO 23 and PO 24
16 and requesting the Parties to resubmit only their
17 rebuttal document that will be used during their
18 opening and in direct or cross, and we said that it
19 should not exceed 100 pages. So, Claimants submitted
20 their list on the 25th of November 2019 with 100
21 pages; Respondent did it on the 27th of November, and
22 with some reservation, and we had an objection from

1 Claimants.

2 May I invite Claimants to comment the
3 objection and the point that you have raised.

4 MS. COHEN SMUTNY: Thank you.

5 Claimants have no objection if solely the
6 pages referenced by the Respondent are the ones that
7 are used. Respondent put in several documents with
8 many pages and indicated only one or two as indicated
9 in our letter.

10 And so, from the Claimants' point of view,
11 there's a question, well, why are those other pages
12 in, and if there is going to be a reference to the
13 broader document for context or whatever reason,
14 Claimants actually do not object to that as long as
15 Claimants are given the same opportunity. Claimants
16 have put in very limited excerpts of certain
17 documents; and, if there is a natural desire to refer
18 to the document as a whole, just for context, if
19 that's what the Respondent is seeking to do, Claimants
20 just wish to have equal opportunity in that respect.

21 So, it's not an objection absolutely; it's
22 more of a request that the Parties just follow the

1 same understandings of what will be accepted, so I
2 just want to emphasize there were new documents that
3 we put in with absolutely simply the excerpt, and we
4 would wish, if there is an intention on the
5 Respondent's side to refer to the full document and
6 then just the page, we would want to have the same
7 opportunity, should that need arise.

8 PRESIDENT TERCIER: To make it clear, the
9 documents--some documents are in Romanian and have not
10 been translated. We're dealing with the translation,
11 of course, not on the full document for the time
12 being, which we will do later. Is that the question?

13 MS. COHEN SMUTNY: Yes, quite correct, but we
14 don't know precisely how that document will be used.
15 Some of it may be used in examination, some of the
16 witnesses, of course, speak Romanian, and so it's a
17 little unclear to us the point of putting in that full
18 document, so the fact that it's only one or two pages
19 translated doesn't fully answer the concern expressed.

20 PRESIDENT TERCIER: Good.

21 Respondent?

22 DR. HEISKANEN: The position that the

1 Claimants now formulate is slightly different from the
2 one that was communicated to us yesterday. So, if the
3 Tribunal doesn't mind, we would like to confer on this
4 new proposal and get back to you with the Respondent's
5 position after the lunch break, for instance.

6 PRESIDENT TERCIER: Claimants?

7 MS. COHEN SMUTNY: That's fine.

8 PRESIDENT TERCIER: Good. Thank you.

9 Of course, my co-Arbitrators know me, you can
10 intervene whenever you wish, and I would be grateful
11 if you do that.

12 We come to the next point, the question of
13 the confidentiality issues. I recall that in P025, in
14 Item D, it was confirmed that the hearing will be
15 broadcasted in closed-circuit television pursuant to
16 Section 20.6 of P01, Section 4 of P03, and the
17 Protocol on Confidentiality communicated by the
18 Tribunal Secretary on 8th of October 2019.

19 The List of Participants in the public was
20 communicated by our Secretary on the 25th of
21 November 2019. Has it been updated, or it--it has
22 been updated; yeah?

1 SECRETARY MARZAL YETANO: Yes, I circulated
2 an updated version yesterday.

3 PRESIDENT TERCIER: Okay. Have you an
4 objection on your side, Claimant, on the people...

5 MS. COHEN SMUTNY: Claimants do not.

6 PRESIDENT TERCIER: Respondent?

7 DR. HEISKANEN: No objection.

8 PRESIDENT TERCIER: Okay. May I ask
9 Ms. Marzal Yetano to shortly recall the procedure that
10 we will follow.

11 SECRETARY MARZAL YETANO: So, basically, the
12 procedure outlined in the protocol, and I would be
13 grateful if the Parties, and I've already--you have
14 already communicated who in your team is going to give
15 me the visual cues, but also the person who's speaking
16 to let us know that confidential information is going
17 to be discussed before it begins and also to have
18 someone from the Parties inform me when we should
19 resume with the open session. Just be mindful of the
20 rules of the protocol so that I can keep a good track
21 of when to close and when to open the session.

22 PRESIDENT TERCIER: Who is the holder of the

1 Green Card on Claimants' side?

2 MS. COHEN SMUTNY: Mr. Stroupe from our
3 team--

4 PRESIDENT TERCIER: Okay.

5 MS. COHEN SMUTNY: --will be sitting there.
6 Hopefully Sara will be able to see the red and green.
7 We do not anticipate a lot of red, but there may be
8 some red today.

9 PRESIDENT TERCIER: On your side?

10 DR. HEISKANEN: On the Respondent's side, it
11 will be Ms. McConaughey.

12 PRESIDENT TERCIER: Okay. I would just like
13 to make one or two points on my side. You understood
14 that the goal for the Tribunal is really to get more
15 information as possible, so I would be very, very
16 grateful if we do not have too many incidents and too
17 many problems, especially with confidentiality.
18 Probably, we could have other problems. So, if you
19 could really try to delimit first the confidential
20 assessment that you can do and limit also the
21 objection so that we can go forward. Importantly,
22 that the Arbitral Tribunal received all information it

1 needs and for the public, of course, also, but it's
2 not the same interest.

3 And as Sara, or Ms. Marzal Yetano, just said,
4 it's important when the speaker mentioned that you
5 will do a confidential statement that it also mention
6 when we have again the green light. Is that clear for
7 you, Ms. Cohen Smutny?

8 MS. COHEN SMUTNY: Yes, it is clear.

9 PRESIDENT TERCIER: And your side?

10 DR. HEISKANEN: Very clear.

11 PRESIDENT TERCIER: Okay. Then we come to
12 the question of the demonstrative exhibits. There is
13 a difference to be made between the presentation and
14 the demonstrative exhibits. We have received the
15 demonstrative exhibits and you remember that during
16 the pre-hearing conference call, it has been decided,
17 had been agreed, that the demonstrative exhibits
18 should be submitted 48 hours before the Hearing.
19 Respondent did submit some, Respondent not.

20 Do you have a comment on your side, Ms. Cohen
21 Smutny?

22 ARBITRATOR GRIGERA NAÓN: Claimants.

1 PRESIDENT TERCIER: Claimants. Sorry. You
2 have to accept some and sometimes correct--make
3 corrections.

4 MS. COHEN SMUTNY: Yes, thank you.

5 Claimants are confident that there are no
6 demonstratives in its presentation. We will have
7 PowerPoint slides that will be discussing the record,
8 and we will certainly have snapshots of certain
9 exhibits, all of which will be labeled, but it will be
10 just a promenade through certain exhibits and
11 discussion, and we're confident that there is nothing
12 that is a demonstrative.

13 PRESIDENT TERCIER: Thank you.

14 Respondent?

15 DR. HEISKANEN: Yes. As you mentioned,
16 Mr. President, we produced our demonstrative exhibits
17 yesterday. They are probably a couple which do not
18 really qualify as demonstrative exhibits, but in order
19 to avoid any debate about these issues, we included
20 them in the package.

21 PRESIDENT TERCIER: Okay. And you have no
22 objection to the way it has been presented until now

1 on Claimants' side?

2 DR. HEISKANEN: No.

3 PRESIDENT TERCIER: We will see--

4 DR. HEISKANEN: We understand the Claimants
5 do not have any demonstrative exhibits. If any issues
6 arise during the presentation today, we will let the
7 Tribunal know our position.

8 PRESIDENT TERCIER: Very good.

9 The next and an overall item or other
10 questions, first, we will have during the course of
11 this hearing to find dates for the second session in
12 July. We've seen that there are difficulties on
13 Claimants' side for the Experts. We don't need to do
14 it now, but I would really take time to do that.

15 Secondly, there is still a reservation made
16 by Respondent and probably also implicitly by
17 Claimants, opportunity to file further document after
18 the Hearing. This was with your surrebuttal filing,
19 and this is an open question that we'll have to
20 discuss.

21 These are the points that I wanted to
22 mention.

1 Do my co-Arbitrators have a point that they
2 would like to raise at this juncture?

3 On Claimants' side, do you have another
4 point?

5 MS. COHEN SMUTNY: No.

6 Perhaps just a small point of clarification,
7 when the mention was made of the tentative hearing
8 schedule, I just want to clarify that Claimants'
9 understanding is those time periods are indicative and
10 that there will be flexibility. I think we've tried
11 to estimate, but it's not entirely clear, so those are
12 neither minimums nor maximums, but we understand that
13 we need to get through the Hearing, and we are hopeful
14 that those indicative times are, in fact, absolutely
15 indicative.

16 PRESIDENT TERCIER: Okay. As we said, we
17 will use it in a flexible way, of course, but
18 "flexible," of course, does not encompass abuses and
19 we will deal with this as we can.

20 Respondent, do you agree with this?

21 DR. HEISKANEN: Yes.

22 Obviously, and as the Tribunal is aware, the

1 Respondent has been only able to indicate at this
2 point the average time that it will spend with each
3 witness. We both--both Parties are aware what the
4 time budget is, so it is for the Parties to manage
5 their time budget as they see fit.

6 PRESIDENT TERCIER: Okay. Do you have on
7 your side another point you would like to raise?

8 DR. HEISKANEN: Yes. Two points.

9 First of all, just to clarify the scope of
10 direct examination. In its letter of
11 20 November 2019, the Tribunal reconsidered some of
12 its earlier decisions, and it confirmed, and I quote
13 from the Tribunal's decision, that "neither Party may
14 elicit new evidence during direct examination or
15 prejudice the other Party's procedural rights, and
16 especially the right to be heard."

17 We understand that this ruling applies, and
18 that there would be--and neither Party can introduce
19 or elicit new evidence on direct examination. We
20 understand that this is the Tribunal's position and
21 that both Parties will respect that position.

22 PRESIDENT TERCIER: You mentioned two points?

1 DR. HEISKANEN: Yeah.

2 PRESIDENT TERCIER: You want the first--
3 (Overlapping speakers.)

4 PRESIDENT TERCIER: Claimants, whether you
5 have a comment to make to that?

6 MS. COHEN SMUTNY: I'm sorry, I'm not sure
7 that Claimants' understanding is precisely what
8 Respondent's counsel just described. There are some
9 new rebuttal documents that some witnesses may be
10 commenting on. In that sense, it may be considered
11 new evidence.

12 And so just to be clear, and we hope we will
13 avoid interruptions and debates about it, but the
14 scope of direct is, from Claimants' point of view,
15 quite limited, and we understand that it will be
16 limited to what was originally envisioned, comments
17 briefly on statements already given, and limited
18 comments on the limited rebuttal documents that may be
19 relevant to a particular witness.

20 DR. HEISKANEN: There is no issue that the
21 documentary evidence has been admitted into the
22 records. I was only referring to the potential new

1 evidence to be elicited during the direct examination,
2 and we understand that there will be no new evidence
3 on direct examination.

4 MS. COHEN SMUTNY: Well, I'm not sure if
5 we're saying the same thing because if a witness
6 comments on a new rebuttal document, the Witness's
7 comment may be considered new testimony, so I'm not
8 sure if we're completely joining issue--perhaps we
9 are--but the whole point of putting a new document in
10 front of a witness and asking that witness to comment
11 briefly on that document, the Witness is going to say
12 some things necessarily that have not been said in a
13 witness statement previously. This is going to be
14 limited because it will be tied to a document, it will
15 be a comment on a document. That's our understanding.

16 PRESIDENT TERCIER: Dr. Heiskanen?

17 DR. HEISKANEN: Then the Parties have a
18 different understanding of what the Tribunal's ruling
19 means. There is no dispute that the new documents are
20 on record. The question is whether further new
21 evidence can be produced on direct examination, and
22 the Tribunal's ruling that I quoted is very clear that

1 there is going to be no new evidence.

2 So, there seems to be a difference of views,
3 and we have explained previously what the Respondent's
4 position on this issue is. It's an issue of principle
5 obviously because the Respondent will not be in a
6 position to cross-examine a witness on new evidence
7 that has just been produced a few minutes prior to the
8 cross-examination is supposed to start. We will not
9 be able to confer with the client on the new evidence,
10 so it's simply not possible to cross-examine a witness
11 on new evidence that is produced on direct
12 examination.

13 PRESIDENT TERCIER: The notion of new
14 evidence is, to be clear, there are documents that
15 have not been filed and could be submitted to the
16 Witness? That's what you're in mind or not?

17 MS. COHEN SMUTNY: No, no. We're talking
18 about rebuttal documents that have been given an
19 exhibit number and have been submitted.

20 PRESIDENT TERCIER: Okay. Yeah.

21 MS. COHEN SMUTNY: A new whichever Document
22 Number it is, a witness may be asked to identify the

1 document and comment briefly on it.

2 ARBITRATOR GRIGERA NAÓN: The documents are
3 in the record?

4 PRESIDENT TERCIER: The documents are in the
5 record?

6 MS. COHEN SMUTNY: At this point they all
7 are.

8 DR. HEISKANEN: We simply reiterate that we
9 have no issue with the new documents, but if the
10 witnesses comment on those documents and make other
11 statements that contain new evidence that is not
12 already on record--

13 PRESIDENT TERCIER: Okay.

14 DR. HEISKANEN: --the Respondent objects to
15 that. We understand that that is not admissible under
16 the Tribunal's ruling.

17 So, either the Tribunal will have to clarify
18 that ruling or confirm that ruling as we would
19 suggest. Otherwise, the Tribunal--the Respondent will
20 have to each time raise and maintain its objection to
21 that new evidence.

22 PRESIDENT TERCIER: Okay. We will do it.

1 Do you have further comment? No?

2 Oh, yes. Sorry.

3 MS. COHEN SMUTNY: Other than it's obviously
4 critical that the Parties have a clear understanding
5 of what's permitted.

6 PRESIDENT TERCIER: Okay. Which will avoid
7 further incident.

8 Dr. Heiskanen, you had a second point.

9 DR. HEISKANEN: The second point is a
10 practical one. We anticipate that the examination of
11 Mr. Tanase may start already and will likely start
12 already tomorrow afternoon, so we would just ask the
13 Claimants to confirm that Mr. Tanase is available for
14 examination as of tomorrow afternoon.

15 MR. GREENWALD: Do you mean Mr. Henry?

16 DR. HEISKANEN: We mean Mr. Tanase.

17 PRESIDENT TERCIER: Tanase is to be heard on
18 Wednesday, yeah?

19 MR. GREENWALD: You need to complete
20 Mr. Henry's examination tomorrow and complete your
21 opening tomorrow and then begin Mr. Tanase.

22 DR. HEISKANEN: Indeed there will be

1 Respondent's open tomorrow and the examination of
2 Mr. Henry tomorrow, but it is not excluded at all that
3 we will be able to also start with Mr. Tanase
4 tomorrow.

5 MR. GREENWALD: I think what the Claimants
6 would like to avoid is having Mr. Tanase on the stand
7 for five minutes and then held over until Wednesday,
8 so we will see where we are with the Schedule tomorrow
9 as things progress.

10 PRESIDENT TERCIER: But would he be available
11 in case for more than five minutes in the afternoon?

12 MR. GREENWALD: Well, he's here, so he will
13 be available, if that's where we are in the Schedule.

14 PRESIDENT TERCIER: Okay. So, we will see.

15 DR. HEISKANEN: That's what we--that's what
16 we had in question.

17 PRESIDENT TERCIER: Okay. Good.

18 Another point?

19 DR. HEISKANEN: That's all we have,
20 Mr. President.

21 PRESIDENT TERCIER: Thank you very much.

22 I would like to conclude this preliminary

1 phase and preliminary question with one or two
2 statements.

3 The Arbitral Tribunal is fully aware of the
4 importance of the case for both Parties. We also are
5 aware of the fact that this is a very, on the
6 sensitivity of this case, we would like, therefore, to
7 assure you that we are aware of it, and that we will
8 conduct the procedure and render an Award in the most
9 quiet and serene spirit. Therefore, I also urge all
10 participants to have the same behavior. We don't need
11 aggressivity. On the contrary, if we could really
12 keep the best spirit and avoid that the President has
13 to intervene and use his right to make the
14 Parties--between the Parties. I'm sure you will
15 comply with this important wish.

16 Fine. This having been said, we have a short
17 break, so that the Arbitral Tribunal can deal with, I
18 think there are two now, two remaining points that
19 have to be decided right now.

20 Fine? Okay.

21 (Brief recess.)

22 PRESIDENT TERCIER: Let's resume.

1 The Arbitral Tribunal has decided the
2 following on the open questions.

3 The first concerning C-575, the new version,
4 and R-215. Both Parties are invited to produce this
5 document today, if possible, before start of the
6 Hearing this afternoon. If you have objections, we
7 will look at them, but those documents should be
8 now--all documents should be in the record.

9 Yes, Mr. Vasquez?

10 MR. VASQUEZ: Yeah. Just for clarification,
11 we have two documents and they have one. I think.

12 PRESIDENT TERCIER: I amended before you
13 started, but we know that.

14 Concerning the second point, bit more
15 difficult because of the very, very exceptional
16 procedures that has been followed in the last days.
17 The Arbitral Tribunal prefers also or, rather
18 exceptional position, each Party is invited to present
19 to produce or to submit to the Tribunal or to the
20 other Party a bullet point list of potential document
21 that each new document--I mean new document in the
22 file, that it would use for the direct examination of

1 the witnesses coming the next day, so that there will
2 be no surprise. Have you understood my position?

3 MS. COHEN SMUTNY: I think that may have
4 already been done; no?

5 PRESIDENT TERCIER: For the direct, no, no, I
6 don't think so.

7 MR. GREENWALD: Well, we did, Mr. President,
8 provide a list of topics that would be addressed by
9 the Witnesses in their direct examination.

10 PRESIDENT TERCIER: That's is true, yeah, but
11 this implies also the document.

12 MR. GREENWALD: And then in the table of
13 rebuttal documents we did identify which witnesses
14 potentially it would relate to for each document.

15 PRESIDENT TERCIER: There will be no
16 surprise.

17 MR. GREENWALD: So, if there is--we have
18 provided this information essentially already to the
19 Respondent.

20 PRESIDENT TERCIER: You're right, but even
21 though to also understand that it is not always easy
22 for the Members of the Tribunal to go through all the

1 documents that we have received and to decide it.
2 Would it be possible to just select for each, out of
3 your list, to select for each witness the point that
4 will be addressed? I'm sure you can do it
5 electronically in five minutes.

6 MR. LEW: Do you mean select the point or
7 just identify the document?

8 PRESIDENT TERCIER: The document would be
9 sufficient in order to avoid the problem that had been
10 raised.

11 MR. LEW: I think for anything that was newly
12 submitted as a rebuttal document, I think we'd be able
13 to identify which documents would be addressed by that
14 witness during the direct examination.

15 (Tribunal conferring.)

16 PRESIDENT TERCIER: And on your side?

17 DR. HEISKANEN: Yes. To commence, first of
18 all, the Claimants have indicated previously which
19 document would be commented by which witness, but
20 there has been a long list of witnesses that, for
21 instance, that this document will be addressed during
22 the direct examination of this and this and this and

1 this witness, along with the witnesses which is not
2 really any kind of indication of who is going to
3 comment, so it would be helpful to know which
4 documents are going to be addressed by which witness,
5 but it doesn't really address the Respondent's
6 concern, which doesn't go to the documentary evidence.
7 It goes to the new oral evidence that may be elicited
8 from a witness during the direct examination, which,
9 in our understanding, is not allowed under the
10 Tribunal's ruling which I referred to earlier today.

11 MR. GREENWALD: We think it clearly is
12 allowed under the Tribunal's ruling. What the
13 Tribunal ruled is that the witnesses and experts could
14 testify as to the new rebuttal documents that were
15 limited in scope to the 100 pages of each Party, and
16 what they were not to do was to elicit new evidence
17 during their testimony; that is, to describe other
18 documentary evidence not in the record that would then
19 be called for through that examination. That's how we
20 understood the Tribunal's ruling.

21 PRESIDENT TERCIER: Okay. The question of
22 how the Tribunal ruling is to be understood is to be

1 said again and probably more precisely by the
2 Tribunal, but we consider that it would already be a
3 step forward if you could provide us with this list
4 and on each side would also be applicable to the
5 other.

6 Would it be agreeable with you?

7 MR. GREENWALD: Yes, thank you,
8 Mr. President.

9 PRESIDENT TERCIER: Dr. Heiskanen?

10 DR. HEISKANEN: Yes, again, it's helpful, but
11 it doesn't address the Respondent's concern which goes
12 to the oral evidence rather than the documentary
13 evidence.

14 PRESIDENT TERCIER: Okay. So, we don't need
15 to decide right now, and the Tribunal will use the
16 lunch break to decide to give you a more precise
17 answer, okay?

18 Good. Both sides.

19 Fine, these are the two points that we had to
20 discuss, and we are waiting for Respondent's position
21 concerning the Romanian documents, the Romanian
22 documents. Okay.

1 DR. HEISKANEN: We will come back to the
2 Tribunal after the lunch break.

3 PRESIDENT TERCIER: Yes. Fine.

4 Thank you very much. If there is no further
5 point, we--oh, yes, there is one.

6 MR. GREENWALD: I think that for the
7 Claimants we just have to underscore that this issue
8 of testimony, which we understand the Tribunal has
9 clarified a number of times now, has really been
10 fundamental to our case in the way that the Respondent
11 presented its Rejoinder, which we've laid out in
12 detail in our Application of July 19, 2019, and our
13 follow-up letter in August, and in the correspondence
14 since then. So, this is not a new issue, and it's
15 been very clear that there would be testimony so that
16 the witnesses and experts can join issue with the
17 Respondent's case.

18 And the Tribunal has taken note of the issues
19 raised by both Parties, and it was for this reason
20 that we understood that the rebuttal documents were,
21 in our view, limited to the 100 pages, and that that
22 is what the witnesses and experts could testify to,

1 and now we understand you to be asking for a list of
2 which documents each witness and expert will address.

3 And so, in our view, this is a fundamental
4 issue for the Claimants, and the Respondent's concerns
5 have been addressed.

6 PRESIDENT TERCIER: Dr. Heiskanen?

7 DR. HEISKANEN: The Claimants had some six
8 months to produce rebuttal evidence, and the
9 Respondent's position has always been throughout these
10 months that if the Respondents wish to--if the
11 Claimants wish to produce new oral evidence, they
12 should produce witness statements from the witnesses,
13 and the issue is now really the scope of the oral
14 evidence, and we understand from the Tribunal's ruling
15 of 28th November, which was, indeed, as the Tribunal
16 itself indicated, a reconsideration of its earlier
17 decisions, as we understand it, in response to the
18 concerns that the Respondent had raised previously;
19 that there would be no new oral evidence admitted at
20 this stage of the proceedings. The Tribunal did allow
21 new documentary evidence to be produced, and that
22 evidence is on the record. We have no issue with the

1 documentary evidence. The remaining issue, with which
2 we have an issue, is possible new oral evidence to be
3 produced at this Hearing, to which we strongly object.

4 PRESIDENT TERCIER: Okay. I think the
5 question is on the table, and I would like to go
6 further, but I will discuss it with my co-Arbitrators,
7 and I will come with the confirmation or better
8 explanation, if need be.

9 Okay, can we go further? Or do you have
10 another point?

11 MS. COHEN SMUTNY: No, other than I think
12 it's obvious that this point is fundamental, and our
13 position has been made clear, I think.

14 PRESIDENT TERCIER: Okay.

15 MS. COHEN SMUTNY: We're prepared to begin
16 Opening Statement when the Tribunal is ready.

17 PRESIDENT TERCIER: Okay.

18 Before that, I would like to ask my
19 co-Arbitrators whether they have a question?

20 It's not the case. Good.

21 In that case, please, Ms. Cohen Smutny, you
22 have the right to start with the presentation.

1 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

2 MS. COHEN SMUTNY: We're passing out the
3 beginning of Opening Statement. These are the
4 PowerPoints that I'm going to walk through.

5 I wish to start, Members of the Tribunal by
6 saying that the Claimants--

7 DR. HEISKANEN: There is just one copy of
8 this. Would you mind having an electronic version
9 sent to the Respondent's team?

10 MS. COHEN SMUTNY: We will be distributing
11 electronic, as agreed. Certainly at the end of the
12 day we'll be distributing electronic.

13 DR. HEISKANEN: We prefer to have it now.

14 MS. COHEN SMUTNY: I don't think we can do
15 that right now. I think the Agreement is that we
16 distribute hard copy at the time of the presentation
17 and that electronic presentations are distributed
18 thereafter.

19 PRESIDENT TERCIER: Sorry--

20 DR. HEISKANEN: These are the kinds of
21 incidents we wanted to avoid.

22 PRESIDENT TERCIER: Okay. But we're going to

1 do something else. Would it be possible to have it
2 after lunch break? Probably you can. In the
3 meantime, you can use--you have the screens, and you
4 can use it. It's as it is.

5 Okay. Please, Ms. Cohen Smutny.

6 (Pause.)

7 MS. COHEN SMUTNY: Are we ready?

8 PRESIDENT TERCIER: Yeah, yeah.

9 MS. COHEN SMUTNY: The Claimants are
10 grateful, Mr. President, for the opportunity to
11 present its case, their case, and we thank the
12 Tribunal's attention and time. It's a very large
13 record, and we appreciate the very serious attention
14 of the Tribunal to this very significant record.

15 Let's go to the first slide.

16 We begin with the Romanian mining sector in
17 the 1990s.

18 Romania is a country with important Mineral
19 Resources and a significant mining sector. After
20 decades of Communist rule, the mining sector was in
21 tremendous need of investment, modernization, and
22 reform. It was dominated by the State, the mining

1 sector was; State enterprises operated hundreds of
2 mines, and employed many thousands. The vast majority
3 of the State-run mines were severely loss-making,
4 inefficient, and reliant upon outdated--outdated,
5 polluting technologies. In the 1990s, the State
6 prioritized revitalization of this critical sector and
7 actively sought foreign partners who would bring
8 much-needed investment.

9 We have a number of photos which come from
10 the record. You might recognize them. These are some
11 pictures from Mr. Tanase's annex. This one is showing
12 the RosiaMin--it's one of the state enterprises--their
13 headquarters and their yard. The next, a State-owned
14 processing plant, the next a State-owned ore crusher,
15 and now.

16 The State, through Minvest and its
17 predecessor State entities, had been conducting large
18 scale open-pit gold mining at Rosia Montana, a
19 well-known mining community in the so-called "Golden
20 Quadrilateral" region, and had taken steps to develop
21 mining further on neighboring properties including
22 Bucium. This is a schematic of the area noting the

1 location of several of the mine properties we will be
2 discussing during the course of this Hearing: Rosia
3 Montana, Bucium below, Rosia Poieni next to Rosia
4 Montana.

5 The State, through Minvest and its
6 predecessor entities was mining the Cetate and Cârnic
7 Massifs at Rosia Montana. This is a picture of
8 Cetate. Here is a picture of the Cetate waste dump.
9 This is another picture of the Cetate waste dump.

10 Next. The areas around Rosia Montana are
11 heavily polluted due to decades of outdated mining
12 practices employed by the State. We have a few
13 pictures from Mr. Avram's statement.

14 The State lacked resources to pursue further
15 development and improvement, and here are some more of
16 the pictures that one sees in the Witness Statements
17 and their annexes as indicated on the slide.

18 Acid-rock drainage, sometimes called "ARD,"
19 is toxic, and one sees this rust color in the water
20 that is ARD. That is the toxic acid-rock drainage.

21 This is acid-rock drainage flowing out of one
22 of the old mine galleries referred to also as "adits."

1 Next.

2 This is another one, toxic ARD flowing out of
3 old mine galleries. It flows through the waterways
4 into the Rosia Valley.

5 We see more of the water as it flows through
6 the rivers.

7 The ARD contaminates the Rosia valley in this
8 way. It flows into the Abrud River, a significant
9 river in the region. And as one can see here, the
10 Abrud flows into the Aries River as well.

11 The large, accident-prone neighboring
12 State-run copper mine, Rosia Poieni, is the most
13 significant regional polluter. This is a picture of
14 the mine pit at Rosia Poieni. The next--go back--the
15 next is the Rosia Poieni mine waste dump, and then
16 this is the Tailings Management Facility from Rosia
17 Poieni.

18 Rosia Montana suffers from severe
19 depopulation and economic decline. These are several
20 pictures from the town. And here is another and
21 another.

22 ARBITRATOR GRIGERA NAÓN: Do we have

1 approximate dates for these pictures?

2 MS. COHEN SMUTNY: I believe the dates of the
3 pictures are largely stated in the record, but these
4 are pictures; certainly the waterways are identical
5 today. Some of the buildings have since been
6 renovated, a few of them, so a few of these pictures
7 of the older buildings have since been renovated by
8 RMGC, as is reflected in the record, but many
9 buildings remain as reflected in these pictures.

10 Okay. I'm now going to give an overview of
11 the claims in this case, a brief overview.

12 This case is about the breach by Romania of
13 the most fundamental protection afforded to a foreign
14 investor under investment treaties, the undertaking to
15 treat investments in accord with the rule of law.

16 The Claims presented arise from Romania's
17 treatment of Gabriel's investment on the basis of
18 politics, without with regard for the applicable legal
19 process and without regard for vested legal rights.

20 In short, the State solicited Gabriel's
21 investment and entered into a joint
22 venture--RMGC--with Gabriel as its partner. The

1 Government issued Mining Licenses, embodying the key
2 policy decision to promote mining within the License
3 Perimeters. Mining within these perimeters was to be
4 developed in accordance with the applicable law
5 governing the various relevant aspects. These
6 included the regulation of environmental impacts,
7 protection of cultural heritage assets, and the
8 acquisition of surface rights.

9 Gabriel invested substantially to demonstrate
10 the feasibility using industry best practices and Best
11 Available Techniques of exploiting the world-class
12 mineral deposit at Rosia Montana and the deposits at
13 Bucium. Gabriel funded, as required by law,
14 archaeological research to permit the Romanian culture
15 authorities to make decisions regarding whether mining
16 could be permitted within the relevant areas. Gabriel
17 made substantial investments to acquire the surface
18 rights needed, following World Bank and IFC Guidelines
19 in doing so, and building a sizable new community for
20 those households preferring resettlement over simple
21 property acquisition.

22 And Gabriel invested very significantly,

1 engaging independent experts, to assess the
2 environmental impacts of the Rosia Montana Project
3 detailed in a thorough EIA Report presented for review
4 to the competent authorities in the Year 2006.

5 Gabriel, through RMGC, also worked to earn
6 the trust and support of the local community--and
7 while there were always some who did not support the
8 Project (as is typical for mining projects), there is
9 no serious dispute that the community, with deep roots
10 in mining, yearned for all the benefits that the
11 Project would bring and identified strongly with it.

12 Gabriel, through RMGC, also worked hard and
13 earnestly to respond to the criticisms and tactics of
14 the anti-mining NGOs, who seemed to distrust mining
15 companies and government officials in equal measure.
16 Over time, Gabriel, through RMGC, made great strides
17 in doing so, notwithstanding numerous
18 politically-imposed obstacles. For example, Gabriel
19 overcame the politically motivated delay of the EIA
20 Review Process from 2007 to 2010 that blocked its
21 progress, allowing disillusionment to grow among those
22 waiting to see the tangible benefits the Project would

1 bring.

2 But Romania was not only struggling to
3 reform, modernize, and revitalize its mining sector.
4 It also was struggling since the 1990s to establish
5 institutions of governance and a political body
6 trusted by its citizens, many of whom perceive
7 politicians as corrupt, and who in polls have
8 expressed among the highest levels in Europe of
9 distrust in government. As well organized,
10 well-funded NGOs campaigned against the project and
11 against any politician who would support it, various
12 senior politicians, looking to score political points
13 against opponents, freely and without foundation
14 accused each other of being in the pocket of the gold
15 company, continually tarnishing the Company's
16 reputation.

17 When the Environmental Permitting process for
18 the Project, having recommenced in 2010, was nearing
19 positive completion, rather than allow the
20 administrative process to be completed for the
21 Environmental Permit, as the Law required, which would
22 have required those in government to take the

1 responsibility for issuing the Environmental Permit,
2 they decided that the Government would allow the
3 Project to proceed only if those in office could
4 extract political advantage in doing so. Thus, rather
5 than holding the Project permitting to the Standards
6 and process imposed by law, which clearly would have
7 required those in government to issue the
8 Environmental Permit, they resolved to take the
9 Decision out of the legal process and make the
10 Decision politically on terms that suited them.

11 In August 2011, the Government of Emil Boc
12 began by publicly denouncing the State's interest in
13 the Project and insisting the economic terms of the
14 State's joint venture with Gabriel had to be
15 renegotiated. The Government coerced renegotiation by
16 public and private statements of numerous senior
17 officials, making crystal clear to Gabriel, who, by
18 then, already had invested hundreds of millions of
19 dollars into the Project, that the Project would not
20 be permitted unless Gabriel increased the State's
21 economic interest in the joint venture.

22 As reflected at and after the meeting of the

1 TAC on November 29, 2011, the Ministry of Environment
2 completed its technical review and all issues then
3 identified by the Ministry of Environment and the TAC
4 to make the Project permit-ready were resolved. The
5 permit should have been issued by Government Decision
6 shortly thereafter, and certainly in 2012. Had that
7 happened, there would not have been any special law
8 and no events of 2013. Issuance of the Environmental
9 Permit, being the main permit, is understood to be a
10 major milestone, as recognized even by Respondent's
11 own experts. Once issued, Project opposition would
12 have continued to subside, as it had been at that
13 time, Gabriel would have raised more capital, would
14 have taken the steps to acquire the remaining surface
15 rights, and would have proceeded to construction.

16 The permitting process, however, was not
17 allowed to proceed, and the Environmental Permit was
18 not issued because Gabriel and the Government did not
19 reach agreement on a renegotiated deal. As permitting
20 the Project was unacceptable politically without the
21 improved economics for the State, the absolute need
22 for which had been broadcast repeatedly to the public,

1 the Government maintained the block on project
2 permitting throughout 2012, from the fall of the Boc
3 Government in February 2012, to the fall of the
4 subsequent Ungureanu Government in April, and as
5 clearly stated by the interim Ponta Government that
6 nothing would happen in 2012 until after year-end
7 elections.

8 Victor Ponta had earlier campaigned for
9 office by accusing his political opponent, without
10 basis, of taking bribes from the Gold Corporation and
11 by accusing the Company publicly, also without basis,
12 of buying politicians for support. As he commenced
13 his term as Prime Minister, it was to fall to him to
14 affix his signature to the Government Decision issuing
15 the Environmental Permit, as the Law required him to
16 do without conferring any discretion upon him in that
17 regard--that is, if the Law were followed.

18 So, Ponta's Government devised a way for him
19 not to take responsibility as Prime Minister for
20 issuing the Environmental Permit and green lighting
21 the Project, that he, for political gain earlier, had
22 publicly denounced as corrupt. While the Ponta

1 Government maintained the political demand that the
2 economics had to be improved for the State, the
3 Government decided that once that was obtained and all
4 permitting requirements were confirmed as having been
5 met, it would then introduce a Special Law for the
6 Project, which would be the vehicle through which
7 Parliament, not the Government, would decide whether
8 this project would go forward or not. It would appear
9 that Prime Minister Ponta was prepared to accept
10 whatever result would come from Parliament--yes or no
11 to the Project--but, he would maintain his consistent
12 political position, and in his capacity as Member of
13 Parliament, vote "no" for the Special Law.

14 So, in 2013, the Government promptly verified
15 that the Project met all legal requirements for the
16 Environmental Permit; and Gabriel, with no real
17 choice, given the Government's insistence that
18 renegotiation was mandatory, accepted in principle
19 revised economic terms. Gabriel did not need or want
20 a Special Law to be submitted to Parliament, although
21 it consistently maintained that the Government should
22 support long-proposed changes in general legislation

1 that would assist Project development in the mining
2 sector.

3 In August 2011, the Ponta Government
4 submitted the Special Law to Parliament and, by doing
5 so, was clearly perceived by the public, which already
6 was highly distrustful of politicians and the
7 Government, as promoting through a special deal the
8 Project that Ponta himself repeatedly had claimed was
9 corrupt.

10 Mass protests erupted. Both leaders of the
11 Government coalition--Prime Minister Ponta and Senator
12 Crin Antonescu--then promptly responded to the
13 protests and announced that they would vote against
14 the Special Law and they expected there would be
15 "party discipline" so that the Special Law would be
16 rejected and the Project would not be done. Although
17 government officials testified to Parliament in favor
18 of the Project's merits and emphasized that the
19 Project met all applicable legal requirements for
20 permitting, consistent with the political direction of
21 the coalition Party leadership, the Special Law was
22 rejected by Parliament.

1 The Government had its Decision: The Project
2 would not be done. While no formal decision has ever
3 been taken in the Environmental Permitting procedure,
4 the State's political decision was unequivocal, as was
5 made clear in the period that followed. No further
6 meaningful step was taken in the environmental
7 permitting procedure. The State stopped cooperating
8 in maintaining the capitalization of RMGC, its joint
9 venture with Gabriel. NAMR, the mining authority,
10 failed to issue RMGC's Bucium Exploitation Licenses.
11 ANAF, the State Fiscal Authorities, launched
12 retaliatory and abusive investigations against RMGC,
13 which continue to this day. In fact, a letter was
14 submitted to RMGC days before this Hearing.

15 The Government proposed a ten-year Moratorium
16 on the use of cyanide. The Ministry of Culture
17 declared the entire Rosia Montana area to be an
18 historical monument and submitted an Application for
19 its listing as a UNESCO World Heritage site where no
20 further mining can be done.

21 Claimants' case is extensively supported. We
22 will be reviewing more of it as the day proceeds.

1 Respondent's case is remarkable principally for the
2 extreme measures taken to limit Claimants' ability to
3 respond to its arguments and to engage with its
4 evidence, including, among other things, by choosing
5 to make its case in significant measure only in the
6 Rejoinder. Claimants' witnesses and experts
7 necessarily are limited in their ability to respond to
8 Respondent's evidence.

9 It is obvious why Respondent proceeded in
10 this manner. Its case upon examination does not
11 withstand scrutiny. It is based on incomplete,
12 misleading and outright false representations and
13 argument. The Tribunal, in evaluating the record,
14 therefore, must bear this very much in mind. It
15 cannot accept as reliable assertions made by
16 Respondent on points made meaningfully only in the
17 Rejoinder.

18 The other remarkable aspect of Respondent's
19 case is who among the decision-makers for the State
20 does not provide any witness statement and who is not
21 here to testify. The list is long. This is a factor
22 the Tribunal also must consider when evaluating the

1 record evidence and the reliability of assertions made
2 by Respondent.

3 For the remainder of today, we will discuss
4 the following topics in this opening. We will review
5 Gabriel's joint venture with the State. We will
6 provide an overview of the permitting process, we will
7 discuss surface rights acquisition, we will discuss
8 cultural heritage research and the decisions taken.
9 We will review the political process that blocks
10 permitting beginning in 2011 and evolves to the
11 political decision to reject the Project and Gabriel's
12 joint venture with the State entirely. We will
13 address then the events in 2014 and thereafter that
14 confirm the State's decision, and we will also comment
15 on Respondent's objections to jurisdiction.

16 I'm going to turn now to the first of the
17 next topics: Gabriel's joint venture with the State.
18 This subject is described in detail by the way in the
19 Witness Statements of Cecilia Szentesy and the First
20 Expert Opinion of Professor Bîrsan.

21 To revitalize its ailing mining sector, the
22 State in the 1990s embarked upon a series of legal and

1 economic reforms. The State closed many mines and
2 reorganized State mining enterprises to operate only
3 as licensed to do so and planned to issue Mining
4 Licenses only for those projects for which technical
5 and economic feasibility could be demonstrated. As
6 Rosia Montana was among the State's important
7 operating mines, the State prioritized finding a
8 partner to explore revitalization of its operations in
9 the area, including for the neighboring Bucium
10 property.

11 The State entered into a series of agreements
12 with Gabriel Jersey, first to assess the feasibility
13 of developing profitable mining operations in Rosia
14 Montana and in Bucium, and if the results proved to be
15 positive, to develop and operate the mines to modern
16 standards.

17 And just a point of clarification about the
18 two Claimants, Gabriel Jersey entered the Agreement
19 with the State first in 1996, and Gabriel Canada
20 acquired Gabriel Jersey in April 1997. Gabriel Jersey
21 is the direct contract partner with the State.
22 Gabriel Canada, which is publicly traded, raises

1 capital for the enterprise accessing capital markets
2 and attracting Shareholders to the enterprise.

3 All expenses associated with the feasibility
4 assessment that was to be done and development that
5 was to be done was to be financed by Gabriel Jersey:

6 First, they were to assess a project to
7 process tailings; and, as that proved to be not viable
8 to assess feasibility for the mineralized areas in
9 Rosia Montana. A number of the key exhibits to these
10 points are referenced here on this slide.

11 The several competent State authorities
12 approved all aspects of the proposed joint venture of
13 the State with Gabriel. Reference on this slide here
14 is made to the several agreements and approvals with
15 respect to the joint venture and for the Project as it
16 began.

17 The State and Gabriel formed the
18 joint-venture company named "Rosia Montana Goldcorp."
19 The Tribunal may recall that actually at first it was
20 named "Euro Gold," and the name was soon thereafter
21 changed to "Rosia Montana Goldcorp," or RMGC. Gabriel
22 Jersey is the Shareholder in RMGC, and a Party to a

1 number of the Agreements with State mining company
2 Minvest. The State and the principal shareholders
3 here are listed.

4 The other State enterprises that are listed
5 here, the three others, these are Minority
6 Shareholders, they held nominal number of shares,
7 collectively 1.2 percent, to satisfy the then existing
8 five Shareholder minimum legal requirement that
9 existed then in the Law. That requirement was later
10 relaxed, and Gabriel acquired their shares.

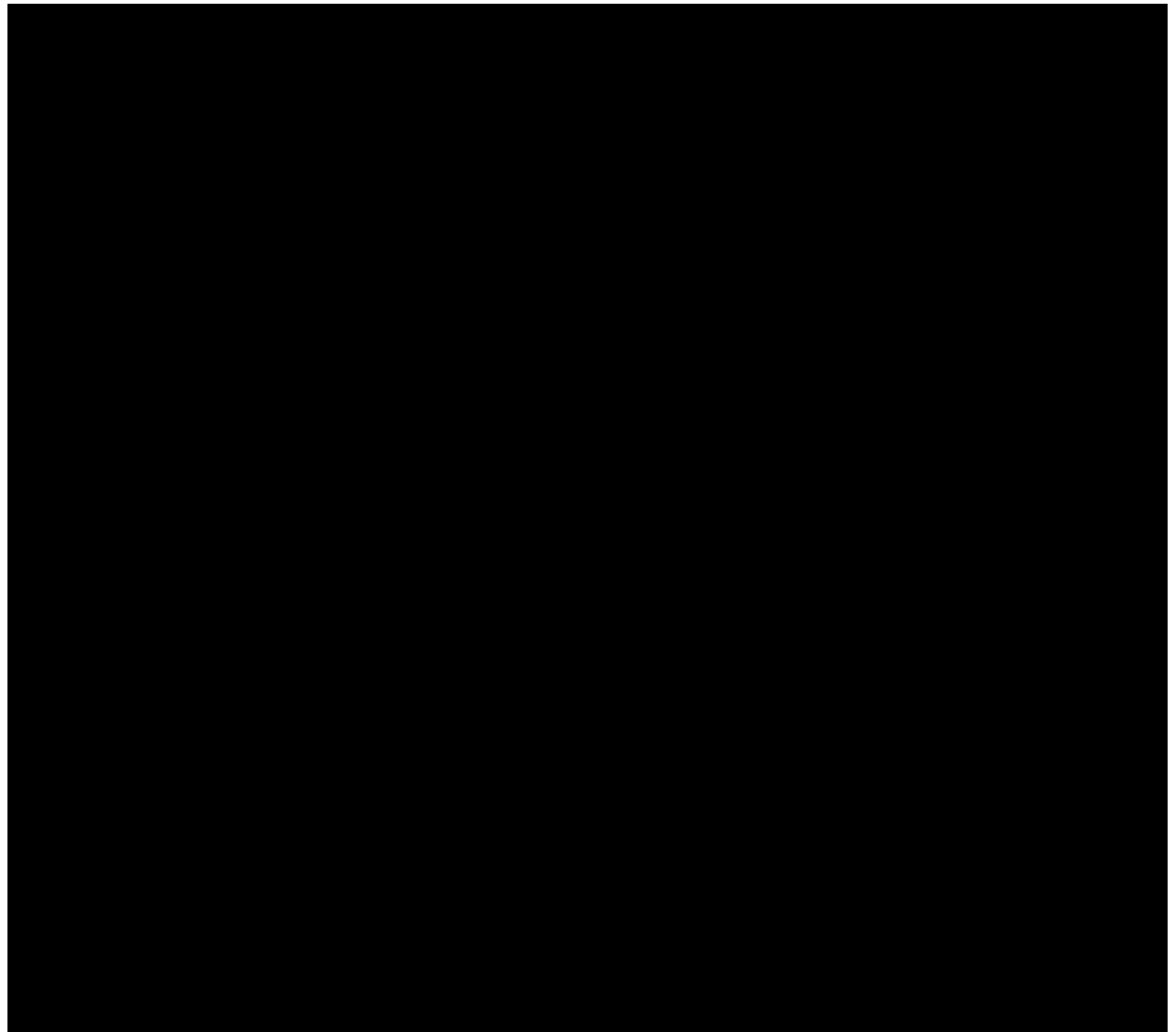
11 As mentioned and as continued as the joint
12 venture progressed, Gabriel was to finance all
13 expenses associated with RMGC's activities, and RMGC
14 was to bear all expense related to an exploration
15 Project both for Rosia Montana and for Bucium. And
16 again, these exhibits are referenced in the record.

17 The next slide here, this is the document
18 that is the geological project for exploration in
19 Rosia Montana which was outlined by the State, and a
20 similar geological project outlined by the State was
21 organized for the Bucium property, which is reflected
22 right here.

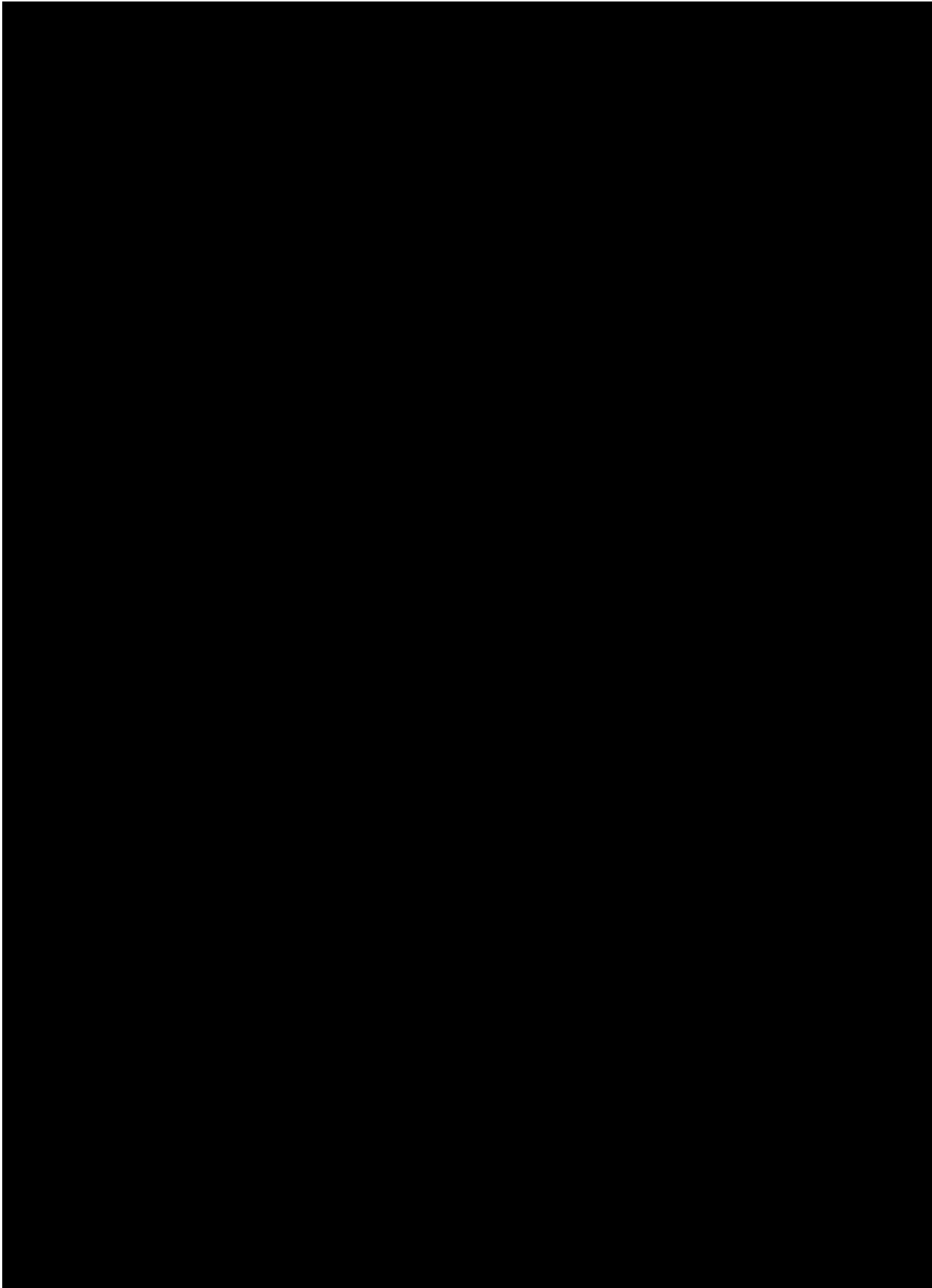
1 We're now about to speak to some provisions
2 of the Rosia Montana License. This is confidential
3 material, subject to Romanian laws on confidentiality,
4 so perhaps we're on red? Okay, I see.

5 (End of open session. Attorneys' Eyes Only
6 information follows.)

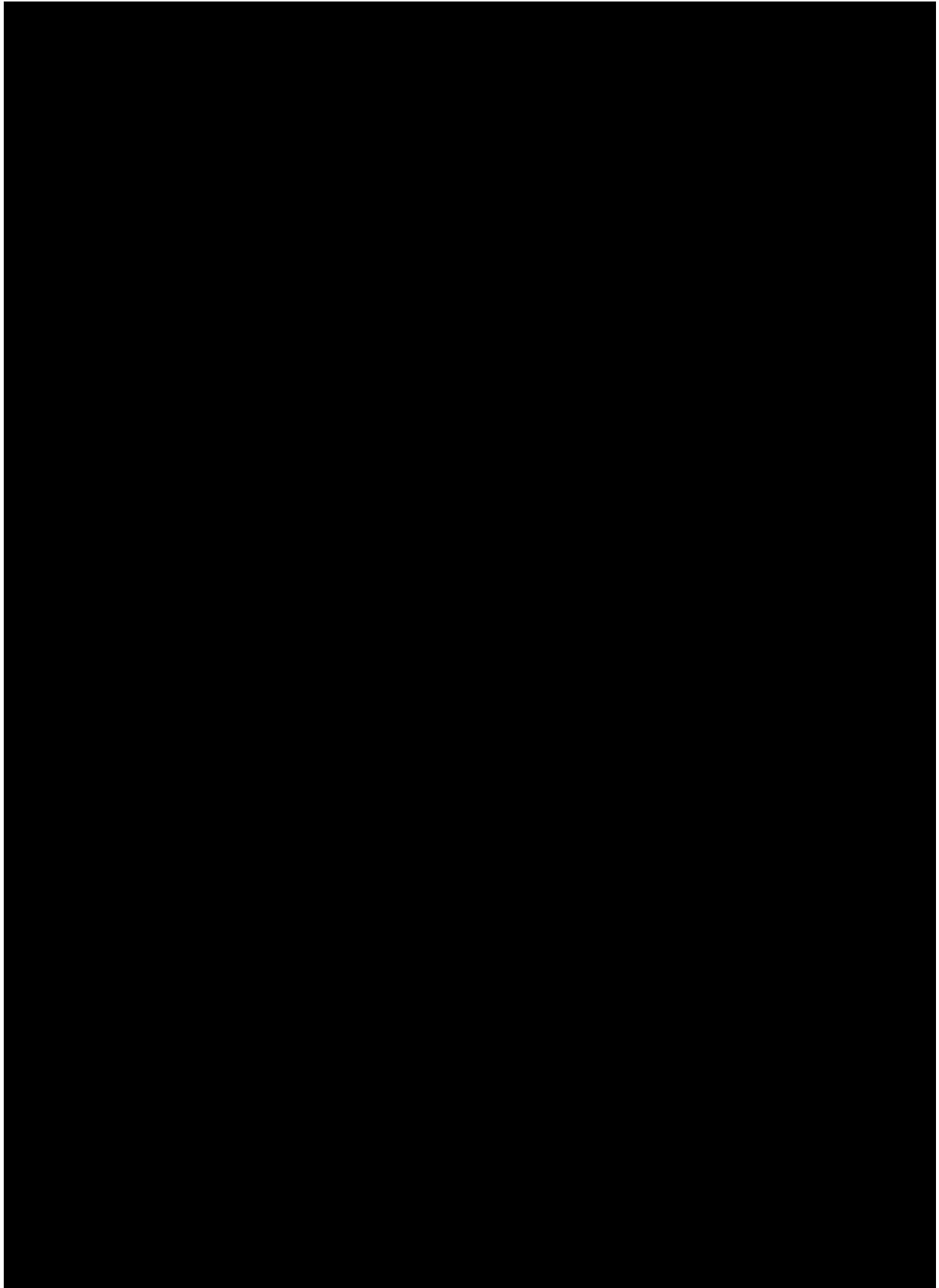
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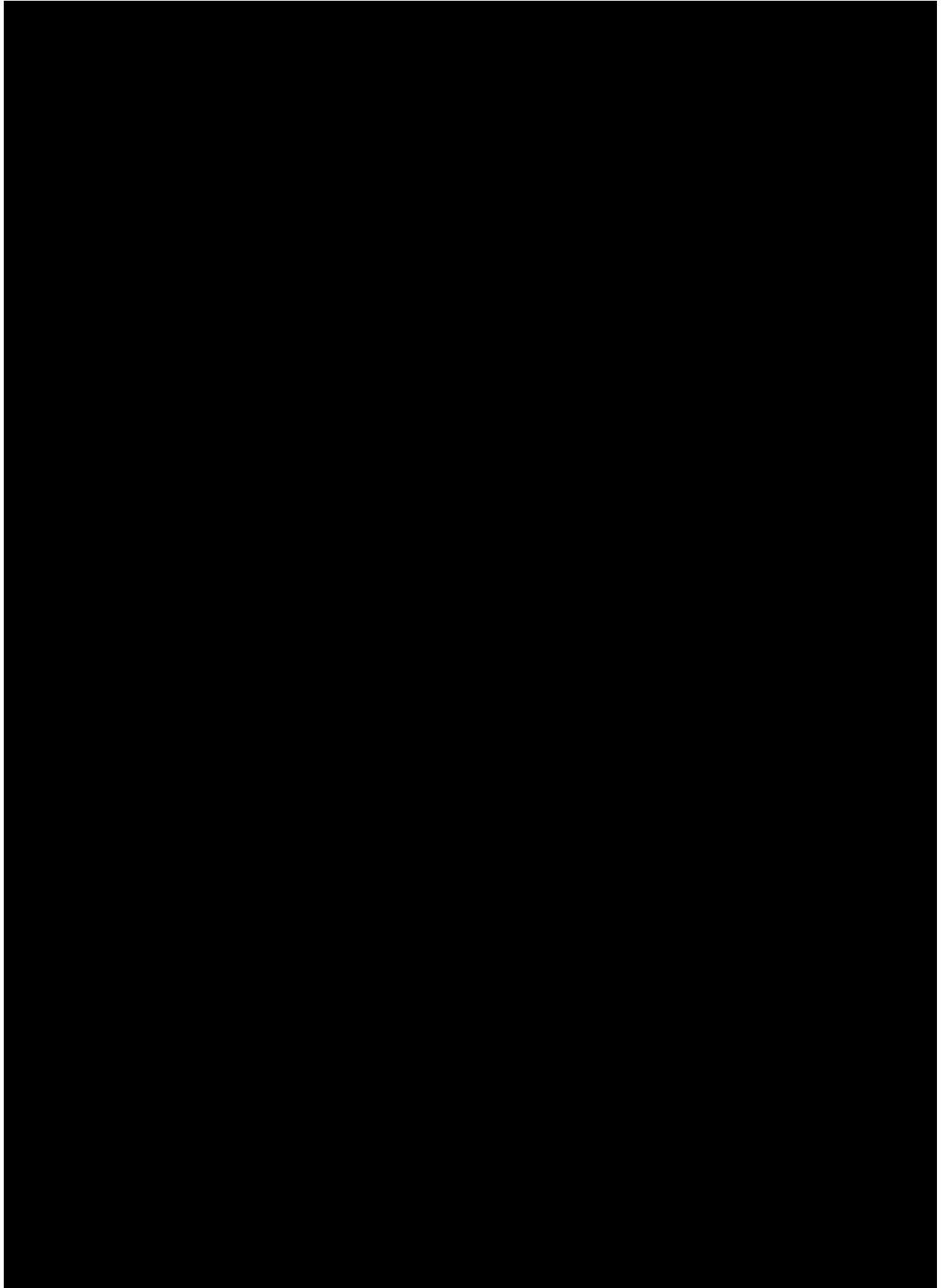
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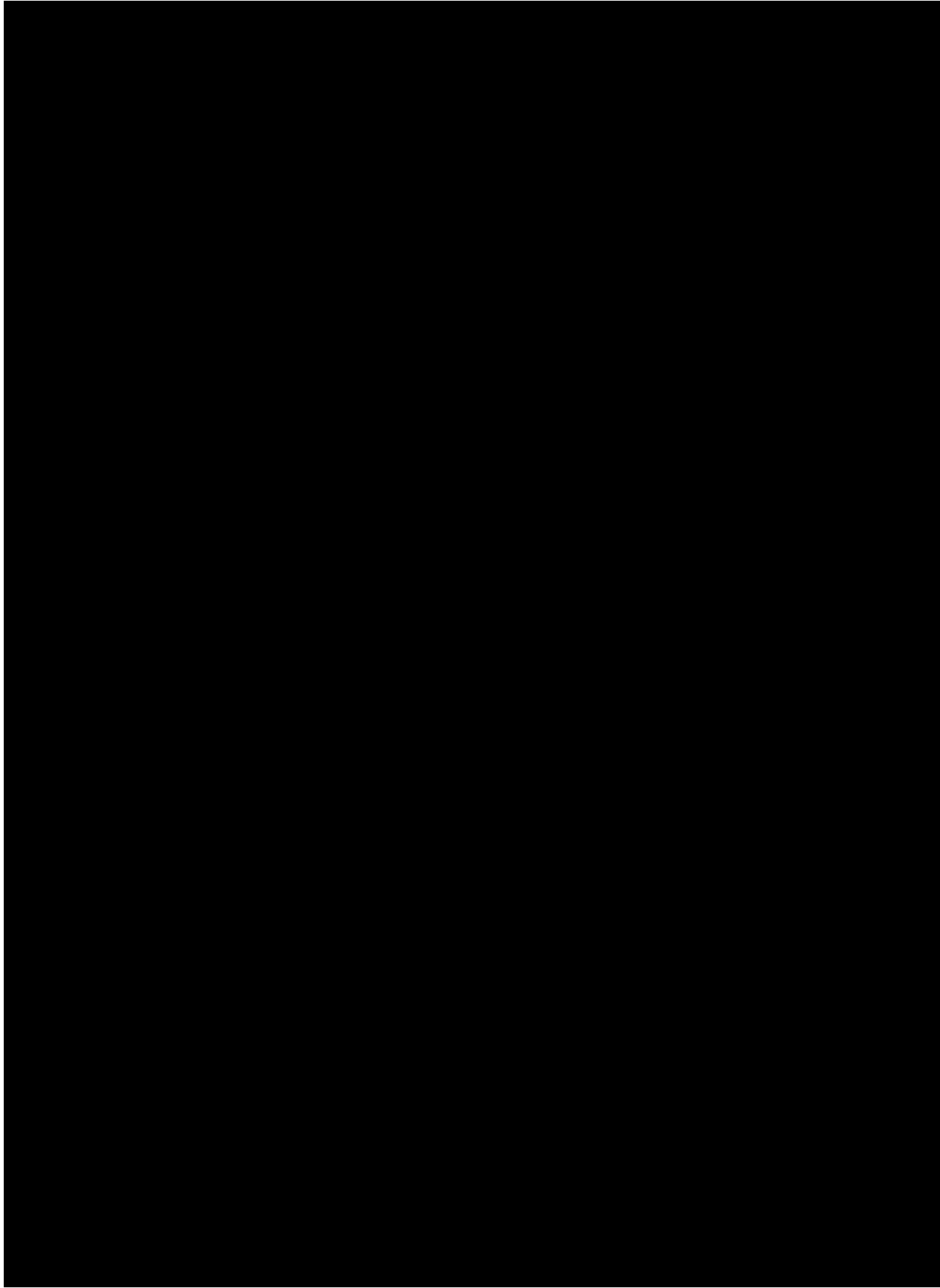
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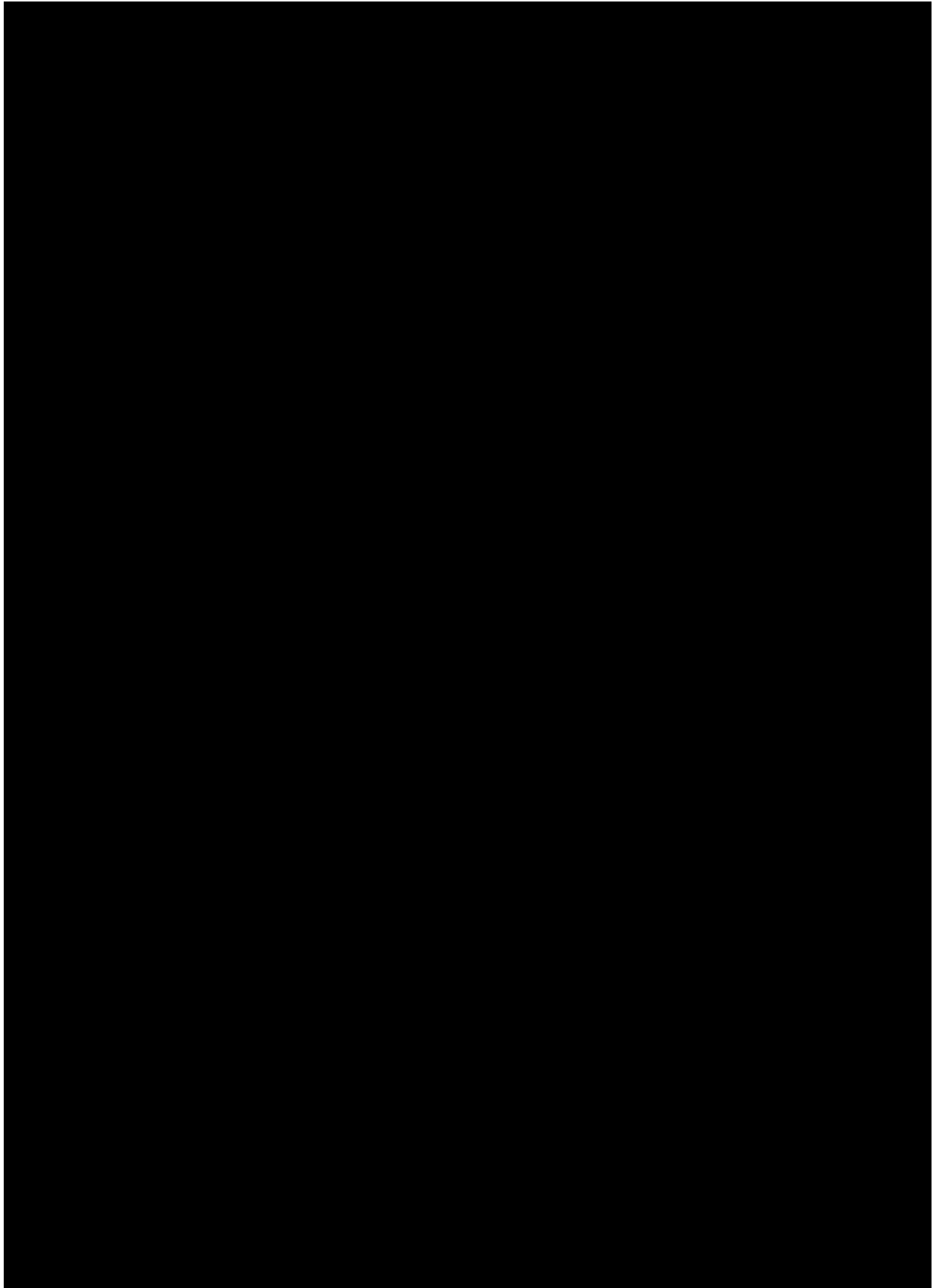
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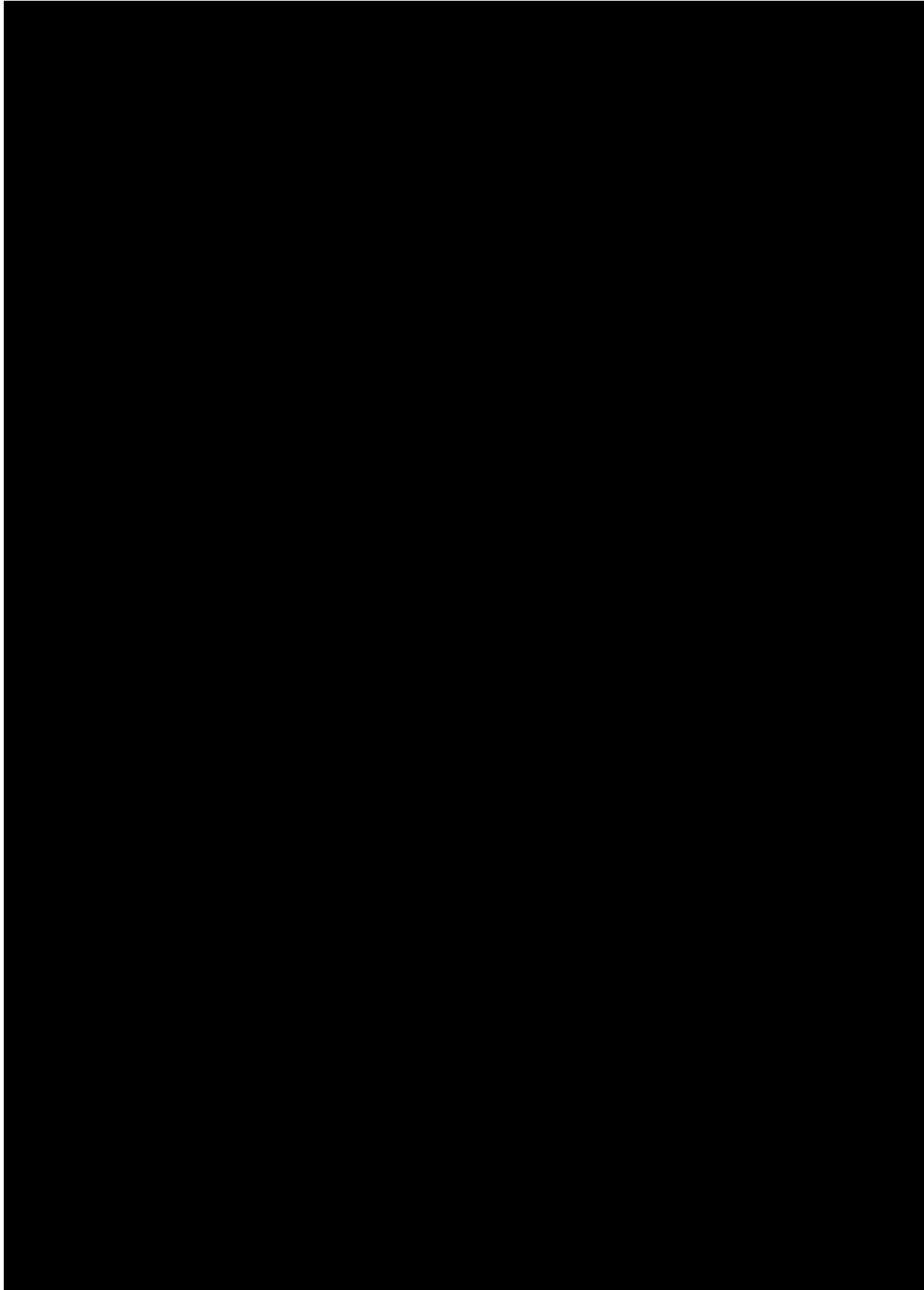
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PRESIDENT TERCIER: According to the
15 schedule, we would have a coffee break at 11:30.
16 Would that be fine for you?
17

18 MS. COHEN SMUTNY: That--yeah. Let's see
19 where it naturally breaks. That might be fine.

20 PRESIDENT TERCIER: No, no. You can decide
21 where you put it. But sometime this would be, and
22 then we would have 11:45 to 1:15. So one hour and a

1 half.

2 MS. COHEN SMUTNY: Okay. Returning now to
3 some permitting. A construction permit is required to
4 build mining facilities and to commence mining.
5 Several steps must be completed to obtain a
6 construction permit.

7 The Applicant for a Construction Permit must
8 obtain an Urbanism Certificate, an Environmental
9 Permit, where relevant, archeological discharge,
10 rights to use the land, where relevant, an updated
11 urbanism plan, other permits as may be necessary for
12 the site. A number of construction permits may be
13 issued to correspond with a phased development, while
14 the Environmental Permit is issued for the entire
15 development.

16 I'll now comment on the legal framework
17 applicable to environmental permitting. The Ministry
18 of Environment conducts the administrative procedure
19 that leads to a decision on the Environmental Permit.
20 The decision whether to issue an Environmental Permit
21 and on what conditions is determined following the
22 Environmental Impact Assessment procedure. The

1 procedure is conducted, governed by rules of
2 Administrative Law, and the decision itself is subject
3 to judicial review.

4 The standards of assessment are those set out
5 in the applicable mining--I'm sorry--Environmental
6 laws. The procedure entails a process whereby an EIA
7 Report is prepared by independent experts and
8 subsequently reviewed by the Ministry of Environment,
9 advised by a Technical Assessment Committee referred
10 to as the TAC. The TAC functions under the
11 coordination of the Ministry of Environment. The
12 Ministry considers the TAC members' points of view,
13 which are consultative only.

14 The decision on the Environmental Permit is
15 issued by Government Decision based on a proposal of
16 the Ministry of Environment. When the EIA Review
17 Process is complete, the Ministry of Environment is to
18 make a proposal on the Environmental Permit to the
19 Government. It proposes either to issue the
20 Environmental Permit or to reject the Application.
21 For large projects, the decision on the Environmental
22 Permit is to be issued as a Government Decision based

1 on the Ministry of Environment's proposal.

2 The Ministry of Environment's proposal and
3 the Government Decision must be based on legal
4 criteria. The Decision may not be based on
5 considerations not included in the Environmental Laws,
6 such as political expedience, the extent to which the
7 development of the project will yield a financial
8 benefit to the State, or even whether the Government
9 believes the mining license should be terminated.

10 Professor Mihai explains that while the
11 Environmental Permit is issued by Government decision
12 which gives it legal effect, the decision must be
13 based on the applicable legal bases supported in the
14 Environmental Law. There is no legal basis for the
15 Government to make a decision on any other basis. One
16 might ask: Why then a Government decision?

17 For large projects, the Government decision
18 to issue the permit insures the engagement of the full
19 range of the various competent authorities who
20 exercise control over the many facets of environmental
21 protection implicated by such projects.

22 Being a decision governed by Administrative

1 Law, the limits of the public authority's right of
2 appreciation are established by the applicable legal
3 standards. The public authority must evaluate whether
4 the applicable legal standards have been met. The
5 public authority does not have discretion to impose
6 additional requirements or to decide based on factors
7 not expressly set forth as applicable under the Law.

8 This is what is meant in Article 2(1) of the
9 Administrative Litigation Law in defining what an
10 excess of power means: Exercising the right of
11 appreciation of the public authorities by violating
12 the limits of competence provided by law or by
13 violating the rights and freedoms of citizens.

14 What this means in this case is that it was
15 not open to the Ministry of Environment or to the
16 Government to impose conditions to issuance of the
17 Environmental Permit not found in the Law. Thus, the
18 Ministry of Environment could not lawfully maintain
19 that it would not issue the Environmental Permit
20 before an urbanism plan to accommodate the Project was
21 approved, or that it would not issue the Environmental
22 Permit before a Water Management Permit was obtained,

1 as neither was required for an Environmental Permit.

2 As required by law and in accordance with
3 Terms of Reference established by the Ministry of
4 Environment, Gabriel and RMGC prepared the
5 environmental assessment of the Rosia Montana Project.
6 Gabriel and RMGC engaged independent Romanian and
7 international experts. They prepared a multi-volume
8 EIA Report presenting a thorough assessment of the
9 Project's environmental impacts.

10 The EIA Report reflected Gabriel and RMGC's
11 commitment to employ industry best practices and best
12 available technologies. Preparation of the EIA Report
13 was a substantial and complex undertaking, reflecting
14 a sizeable investment of resources and warranting
15 treatment based on law.

16 As contemplated by the EIA Procedure, Gabriel
17 and RMGC conducted extensive public consultations on
18 the EIA Report under the direction of the Ministry of
19 Environment. Following the consultation process,
20 significant changes to the Project were made to
21 mitigate Project impacts.

22 From 2007 to 2010 the EIA Process was

1 suspended. Gabriel and RMGC considered that
2 suspension was not supported by the applicable rules
3 of Romanian Law, but in 2010 the process was
4 recommenced.

5 Following that suspension in 2010, the EIA
6 Report was updated and further public consultations
7 were conducted taking the updates into account.

8 Romania wrongfully refers to various requirements for
9 issuance of the Construction Permit as alleged

10 obstacles to issuance of the Environmental Permit.

11 And as summarized here with references to the record,
12 the various alleged requirements for the Environmental
13 Permit are confirmed, as is made clear in the record,
14 as being requirements only, in fact, for the
15 Construction Permit.

16 ARBITRATOR DOUGLAS: On the surface rights
17 requirement, I didn't understand the Respondent to be
18 saying that was a requirement for the Environmental
19 Permit. You may be right in relation to the others.

20 But is that your understanding, the
21 Respondent is saying that the surface rights needed to
22 be obtained in full in order to issue the

1 Environmental Permit?

2 MS. COHEN SMUTNY: There are at least a few
3 references in the record where Claimants considered
4 that Respondent was saying that. And perhaps in due
5 course, Respondent might clarify that that's not their
6 position.

7 ARBITRATOR DOUGLAS: Thank you.

8 MS. COHEN SMUTNY: Just finally on what may
9 be the required conditions. The Ministry of
10 Environment does not have the discretion to require
11 additional--that additional requirements be satisfied
12 as a condition for issuance of the Environmental
13 Permit. That is to say the Ministry does not have
14 discretion to add requirements not found in the Law.

15 For the most part, Romania presents arguments
16 in support of its defense in the arbitration that were
17 not maintained in this respect by the authorities
18 contemporaneously. Romania refers to the various
19 steps that must be fulfilled prior to issuance of the
20 construction permit.

21 None of these issues justify the non-issuance
22 of the Environmental Permit nor were they cited as

1 reasons for non-issuance at the time, nor would the
2 Ministry of Environment have had the discretion or
3 right of appreciation to impose requirements that were
4 not set out in the Law.

5 All right. We're going to turn to surface
6 rights acquisition. A mining license provides the
7 licensee the right to develop and exploit the mineral
8 resources within a given perimeter. However, a mining
9 license does not in and of itself provide the license
10 holder with rights to use the land within the
11 perimeter to do so. The licensee must acquire surface
12 rights in order to obtain the construction permit and
13 to commence mining.

14 The Law grants the Titleholder of a license
15 the right to access lands. This is a reference to the
16 Mining Law. The Law requires urbanism plans to limit
17 land use in the area subject to a mining license.
18 That's another provision of the law cited here.

19 The Mining Law directs the local authorities
20 to modify urbanism plans to accommodate mining
21 licenses. This is as reflected in the Mining Law.
22 The Law establishes that the area within the perimeter

1 of a mining license can only be used for mining. Upon
2 issuance of a mining license, the urbanism plan within
3 the license perimeter must reflect a so-called
4 mono-industrial area to accommodate the licensed
5 mining activities. The licensed area can no longer be
6 zoned, for example, for residential use.

7 The Law thus operates in a manner akin to a
8 de facto expropriation of the affected properties.
9 This gives rise to an obligation for the State to
10 ensure compensation to the property owners. If the
11 owners do not want to sell to the licensee, the State
12 will carry out the expropriation procedures for the
13 mining project and compensate the owners.

14 The Mining Law establishes the various means
15 by which the licensee may obtain the right to use the
16 lands necessary. I refer here to Article 6 of the
17 Mining Law with various means to obtain access.

18 RMGC prioritized the acquisition of surface
19 rights needed to develop Rosia Montana. Most
20 properties were acquired on a willing buyer-willing
21 seller basis either as a sale or agreed resettlement.
22 RMGC invested significantly to acquire properties.

1 RMGC--here we see the development--the
2 building of the Recea community in order to resettle
3 families. These are pictures from Ms. Lorincz's
4 Statement. And here are some more pictures. 132
5 families moved into the Recea community.

6 RMGC thus acquired the majority of surface
7 rights needed. RMGC acquired properties from
8 approximately 78 percent of the affected households.
9 Approximately 500 hectares remained to be acquired.
10 That was 200 hectares owned by various, mostly State,
11 institutions. 300 hectares owned by private owners.

12 RMGC stopped property acquisitions in early
13 2008 following the suspension of the EIA Process with
14 the intention to recommence once the Environmental
15 Permit was issued.

16 Most property owners remained eager to sell.
17 RMGC expected to acquire rights to use all remaining
18 affected State properties. RMGC also expected to
19 acquire all remaining affected properties owned by
20 private owners through negotiations notwithstanding
21 some resistance. RMGC expected resistance would
22 diminish once uncertainties regarding the Project

1 permitting were removed.

2 Ms. Lorincz explains why the company expected
3 that in due course it would succeed in acquiring most,
4 if not all, of the properties needed through
5 negotiations. Although availability of expropriation,
6 if needed, was debated by Project opponents, the Law,
7 in fact, is clear that it is available. Expropriation
8 procedures may be employed under Romanian law for a
9 project declared to be of public utility.

10 The Mining Law in Article 6 provides that
11 access to the lands for the license may be obtained
12 through expropriation for public utility cause. The
13 Expropriation Law in Article 6 and 7 confirms that
14 mining is of public utility. The Law thus establishes
15 that expropriation is available to support mining
16 activity licensed by the State. Thus, the license
17 holder does not bear the risk as to whether access to
18 the lands necessary would be available. The risk is
19 only as to the associated costs or potential for delay
20 in relation to the process.

21 Here--referring to the articles that I
22 referenced before. This is Article 6 and 7 regarding

1 public utility. Going to the next slide. There's no
2 serious debate that the Project would have received a
3 declaration of public utility if needed. The
4 Government recognized the Project as being of public
5 utility in the Exposition of Reasons in 2013 for the
6 special Draft Law, and there is no credible basis to
7 assert that the public utility of the Project would
8 not have been recognized earlier if needed.

9 ARBITRATOR DOUGLAS: Could I just ask for a
10 clarification again?

11 So it's your position--your primary position
12 is no further declaration is required because it's
13 already in the law. Your secondary position is that
14 if a declaration of public utility would be required,
15 it would have been granted.

16 MS. COHEN SMUTNY: Yes.

17 RMGC did not expect expropriation would be
18 necessary. Ms. Lorincz explains why expropriation
19 likely was not needed for the majority of those
20 remaining. RMGC's offers were significantly above
21 market.

22 Once the Environmental Permit was granted and

1 it was clear the Project was going forward, for the
2 remaining affected property owners, the choice was
3 between an above-market offer versus an expropriation
4 process leading to a court-determined compensation.
5 RMGC expected most owners would act in their financial
6 self-interest.

7 Respondent argues that RMGC would have had to
8 rely on expropriation for some. Even so--even if so,
9 the dispute is only whether that would entail material
10 delay. Given the relatively small number of
11 properties expected in this category and their nature,
12 there would have been little basis for the types of
13 disputes that could cause undue delay, and the
14 examples cited by Respondent to other projects,
15 Claimants submit, are not comparable.

16 Following an expropriation, land could have
17 been made available for Project use by concession.
18 Concession is one of the means expressly listed in
19 Article 6 of the Mining Law by which a license may
20 obtain--the licensee may obtain the right to use lands
21 in the mining perimeter.

22 Upon expropriation, the land becomes the

1 public property of the State and may be made available
2 to the Project via public concession. While granting
3 a concession may require a public tender, that would
4 not have been an obstacle. In view of the public
5 purpose justifying the expropriation of the property,
6 the mining licensee necessarily would be the only
7 qualified bidder. And this is reflected also in the
8 Exposition of Reasons--this understanding is reflected
9 also in the Exposition of Reasons supporting the Draft
10 Law that the Government recognized that no other
11 entity could justify acquiring a concession.

12 Here are examples. The Concession Agreement
13 that was concluded between RMGC and one of the State
14 entities for one of the lands in the area. Another
15 example of such a Concession Agreement is found here,
16 1610, referencing the public tender procedure that was
17 followed. And then there's another example cited here
18 of another Concession Contract, an example of this
19 process in the record at C-2026.

20 We're not red. We should not be red.

21 All right. I'm going to speak now to
22 cultural heritage. To develop the project in Rosia

1 Montana, Gabriel and RMGC were required by law to
2 invest in archeological research because Rosia Montana
3 was an area known to contain vestiges of mining
4 activity dating back to Roman times.

5 The purpose of the research was to assess
6 whether the area would be cleared for mining. RMGC
7 and Gabriel proceeded to fund and support the largest
8 archeological research program ever conducted in
9 Romania. It was a very significant program by any
10 measure. The program was orchestrated and conducted
11 in its entirety by the State's own culture authorities
12 with an assembly of the world's leading experts in
13 mining archaeology.

14 The research uncovered a number of
15 significant findings warranting in situ preservation
16 as well as a number--numerous artifacts and greatly
17 enhanced knowledge of the area's history. Based on
18 the research conducted, the State culture authorities
19 issued decisions discharging the vast majority of the
20 Project site for mining.

21 When in 1999 the Government approved the
22 Rosia Montana license, although no archeological

1 research had ever been performed in the area, the area
2 was known, due to past chance discoveries, to be an
3 area of archeological interest. The Roman settlement
4 of Alburnus Maior and the Roman mining exploitation of
5 Alburnus Maior are listed on a draft List of
6 Historical Monuments and Archeological Sites that was
7 prepared in 1991 and 1992.

8 Rosia Montana is there listed as an area
9 within a 2-kilometer radius, that is to say the
10 historical monument was listed in that respect.
11 Notably, the listing was considered compatible,
12 however, with the continuation throughout the 1990s
13 and until 2006 with the State, through Minvest,
14 continuing to mine in Rosia Montana, specifically in
15 the Cârnic and Cetate Massifs, without any
16 archeological interventions.

17 As required by law, RMGC, as project
18 developer, funded an initial theoretical assessment
19 and preliminary archeological survey of the area. The
20 study was completed in accordance with an agreement
21 between RMGC and the State entity known by the acronym
22 CPPCN. This is the Ministry of Culture's Design

1 Center for National Cultural Heritage, an organization
2 later reorganized--an enterprise--a State body later
3 reorganized as the National Institute for Heritage or
4 NIH.

5 CPPCN collaborated with several other
6 Romanian State institutions as well as Dr. Béatrice
7 Cauuet of the University of Toulouse, the world's
8 leading authority on mining archaeology.

9 The entire area, including Orlea, was
10 preliminarily researched and assessed in view of the
11 proposed project. A Historical Building Study was
12 also prepared.

13 Following the recommendations of the
14 archeological feasibility study, Gabriel and RMGC
15 thereafter funded an intensive program of
16 archeological research, the purpose of which was to
17 support decisions to be taken by the Ministry of
18 Culture as to archeological discharge.

19 The so-called Alburnus Maior National
20 Research Program was established by a Ministry of
21 Culture Order, and the Order sets out the requirements
22 and obligations of the various State authorities who

1 were to supervise and conduct the program with RMGC as
2 the developer and its requirement to fund.

3 Many of the most reputable Romanian and
4 foreign specialized institutions and numerous
5 individual specialists participated in the Research
6 Program, including some of them listed here. It was,
7 indeed, a substantial and important effort.

8 The Ministry of Culture endorsed--there's a
9 process that followed for the research. The Ministry
10 of Culture endorsed its Archaeology Department to
11 supervise. The work plans were organized by
12 the--under the scientific authority of the National
13 Commission of Archaeology. These are the various
14 institutions--multiple culture institutions were
15 involved in this process.

16 RMGC's sole role was to finance and to
17 provide logistical support, and this is contrary to
18 Claimants' understanding of Respondent Expert
19 Dr. Claughton's opinion that it was RMGC that was to
20 direct the research to be done or the strategy. That
21 is not the case.

22 Here we just have references from some of

1 these exhibits that we've just been citing indicating
2 the State culture authorities with their various
3 responsibilities. The fact that the Ministry of
4 Culture was monitoring the work in progress with
5 regular visits. The Ministry of Culture considered
6 the work was well done and awarded the National
7 History Museum of Romania an award for its role in
8 coordinating the program.

9 Now I'll make a few comments on the
10 Archeological Discharge Certificates that were
11 thereafter issued. The Archeological Discharge
12 Certificates were issued following a regulated
13 administrative process. The archeological team, based
14 on the results of the research, prepared expert
15 reports, made recommendations regarding preservation
16 and discharge. These recommendations were presented
17 to the Archaeology Department of the Ministry of
18 Culture. The documentation was presented for analysis
19 to the National Commission on Archaeology, a State
20 body, in plenary session. That body also heard from
21 NHMR, the program coordinator, before taking a
22 decision, and the Archeological Discharge Certificate

1 was thereafter issued by the Ministry of Culture.

2 The next slide shows an example of one of the
3 ADCs, and this describes the process that was followed
4 in the Certificate. The Ministry of Culture issued
5 ADCs in the area of the Project. Here are the ADCs
6 listed. This is approximately 90 percent of the
7 Project area, as shown on this next map. The green
8 areas reflect the areas subject to archeological
9 discharge certificates.

10 RMGC made adjustments to the Project
11 footprint to account for areas designated for in situ
12 protection. There are various protection areas,
13 including the historic center of Rosia Montana and
14 several other important areas.

15 The next is a picture--the red area are
16 important cultural heritage sites where no mining
17 would take place, and the green around reflects also
18 where no industrial activities would occur. And the
19 white areas are not snow but areas where mining had
20 been and has been conducted up until 2006.

21 The Ministry of Culture stopped research on
22 Orlea. In 2006 it terminated the research in the area

1 at that time. This is an order from that time. This
2 confirmed in 2007--I'm sorry. In 2007 the Ministry of
3 Culture announced it would not issue any further
4 decision relating to the Project until the Ministry of
5 Environment issued the Environmental Permit.

6 This confirmed the Ministry of Culture's
7 decision that it expected the Ministry of Environment
8 to issue the Environmental Permit and that research on
9 Orlea, as remained, would be completed thereafter.
10 And this indeed remained the Ministry of Culture's
11 consistent position.

12 The research completed as of 2006 included
13 preliminary research for Orlea, however, and a further
14 research program for Orlea had been proposed. NHMR
15 had prepared a summary report in 2006 that described
16 the research completed for Orlea, including various
17 diagnostic and prospective surveys that were done.
18 And as preventive research had not yet been conducted
19 in Orlea, NHMR already at that time proposed a plan to
20 complete an exhaustive investigation over a five-year
21 period to include Orlea.

22 And then just some comments on historical

1 monuments in the Project area. Whereas archeological
2 sites are protected by law and discharged by an ADC,
3 archeological sites that have remarkable value may be
4 classified as an historical monument.

5 Historical monuments are subject to a
6 distinct legal protection regime, which may be removed
7 only by a process of declassification. The Law
8 expressly provides that when an ADC is issued for a
9 site that had been classified as an historical
10 monument, the Ministry of Culture is to declassify the
11 site ex officio.

12 A national List of Historical Monuments,
13 referred to also as an LHM, is updated and published
14 every five years. And as of 2004, the first LHM
15 issued under the Law that was passed in 2001 for
16 historical monuments--the Ministry of Culture issued
17 that first List of Historical Monuments. The 2004 LHM
18 reflected the results of the archeological research
19 that had been completed and the discharge decisions
20 taken in the Project area. And this list identified
21 specifically--does not--those areas that are
22 significant and those areas that were subject to ADCs

1 are not listed.

2 ARBITRATOR DOUGLAS: Could I just ask, then,
3 where we stand in terms of the differences between the
4 Parties.

5 So is it accepted by both Parties, then, that
6 an ADC is required for Orlea, but it's not--but your
7 position is it's not required for the Environmental
8 Permit, whereas Respondent says that it is,
9 essentially?

10 MS. COHEN SMUTNY: An ADC is required for a
11 Construction Permit before any mining could begin. It
12 is Claimants' position that an ADC is not required for
13 an Environmental Permit.

14 Claimants understand Respondent perhaps to
15 have said something different. Perhaps Respondent
16 will clarify in due course its position.

17 ARBITRATOR DOUGLAS: Okay. So, that's for
18 Orlea. But it's accepted that one hasn't been issued
19 yet for Orlea?

20 MS. COHEN SMUTNY: That is correct.

21 ARBITRATOR DOUGLAS: And in relation to--is
22 it Cârnic? Am I saying that properly? What's the

1 position in relation to Cârnic?

2 My understanding is that it's been issued,
3 but it's being litigated. Where do we stand on that
4 one?

5 MS. COHEN SMUTNY: Yeah. We'll be talking
6 about that a little more. But in brief, the Cârnic
7 ADC was issued. It was then annulled by Court
8 Decision in 2008. An Application was then made.
9 Again, it was issued a second time. That second ADC
10 for Cârnic is presently in litigation. It's been
11 challenged. No decision has been taken. The ADC's
12 effects were suspended in 2014.

13 ARBITRATOR DOUGLAS: And, so, do we know
14 which court it's before at the moment? Is it first
15 instance or--

16 MS. COHEN SMUTNY: I don't recall, but
17 someone will clarify for you in due course.

18 ARBITRATOR GRIGERA NAÓN: I have two
19 questions.

20 Question Number 1, what is the present
21 situation regarding the licenses? I understand that
22 one of them is expiring in 2019.

1 MS. COHEN SMUTNY: An Application for an
2 extension of the license, which one is entitled to as
3 a matter of right, has been made and was granted.

4 So the Rosia Montana license was extended
5 subject to an Application that has been made during
6 the course of this arbitration. That is the status of
7 the Rosia Montana license. So it is still in effect.
8 Technically it still exists.

9 ARBITRATOR GRIGERA NAÓN: My second question,
10 if you could go to the--to Slide Number 20 of the
11 second set that you have provided us.

12 MS. COHEN SMUTNY: 20, which is a picture?

13 ARBITRATOR GRIGERA NAÓN: No. 20--

14 MS. COHEN SMUTNY: Oh, I'm sorry.

15 ARBITRATOR GRIGERA NAÓN: --of the second
16 volume. I'm sorry if I--

17 MS. COHEN SMUTNY: Sorry. Where's my--I
18 don't have the numbers. Which one?

19 DR. HEISKANEN: "The Law Thus Establishes
20 that the Area Within the Perimeter of a Mining License
21 Can Only Be Used for Mining."

22 ARBITRATOR GRIGERA NAÓN: This one.

1 MS. COHEN SMUTNY: Why isn't it on the
2 screen?

3 Yeah. Sorry. Go ahead.

4 ARBITRATOR GRIGERA NAÓN: "The law thus
5 operates in a manner akin to a de facto expropriation
6 of affected properties."

7 Does that mean that no need of a declaration
8 of public purpose or utility is required? Because if
9 it operates de facto, I would assume that no such
10 declaration is required. Or am I misreading it?

11 MS. COHEN SMUTNY: Well, you will also have
12 the opportunity to pose the question to the Romanian
13 Law expert, Professor Bîrsan, who speaks to this.

14 It's Claimants' position that a declaration
15 of public utility is already in the Law. If one is
16 made, it's a formality to confirm it. So, that's the
17 Claimants' position. And in any event, if one was
18 needed formally, it's Claimants' position that it
19 would have been promptly given if it turned out to be
20 necessary to invoke the expropriation procedure.

21 ARBITRATOR GRIGERA NAÓN: I'm putting this
22 question in part because I understand the Respondent's

1 position to be that that Draft Law that was admitted
2 to Parliament was necessary precisely to obtain that
3 declaration of public purpose. So--

4 MS. COHEN SMUTNY: It's Claimants' position
5 that a declaration did not have to be done via
6 legislation. So a declaration, as Professor Bîrsan
7 explains, the mechanism for declaring, it certainly
8 was not required to be done via legislation. If there
9 needed to be a declaration, one could have been given.
10 Professor Bîrsan explains that in some circumstances,
11 the declaration is made by the Local Authority. In
12 other circumstances, the declaration may be made by
13 the Central Authority. But in any event, that's just
14 an act--an administrative act which can be issued.

15 ARBITRATOR GRIGERA NAÓN: Okay. Thank you.

16 PRESIDENT TERCIER: You know where you are?
17 You want to have a break now or--

18 MS. COHEN SMUTNY: I think this would be a
19 good time for--

20 MR. LEW: I at least need a break given my
21 stage in life.

22 PRESIDENT TERCIER: Okay. We are a

1 bit--yeah, we could have the break right now. 15
2 minutes, and we will then go to the third part.

3 Just a point--sorry--with the--with the
4 electronic version of the PowerPoint. What is the
5 status? You could provide it--you have one for you?
6 I mean one for you. The PowerPoint presentation is
7 ready to be also communicated when?

8 DR. HEISKANEN: We will communicate it
9 tomorrow morning when we start our presentation.

10 PRESIDENT TERCIER: Okay.

11 MS. COHEN SMUTNY: Yeah. I mean, I think
12 during the lunch break, we can organize ourselves and
13 distribute what we've already done, and we'll be
14 distributing these electronic versions promptly.

15 PRESIDENT TERCIER: Very good. Good.
16 15-minute break.

17 (Brief recess.)

18 PRESIDENT TERCIER: In that case, we may
19 proceed.

20 MR. LEW: Thank you.

21 We're now going to discuss Romania's
22 liability-creating conduct beginning August 1, 2011.

1 Evidence supporting Claimants' case is not based on
2 Witness Statements created for purposes of this
3 arbitration but on extensive contemporaneous record
4 evidence that we'll highlight for the Tribunal.

5 For context, in August 2011, the State's
6 existing interest was as follows: Under RMGC's
7 Articles of Association, the State, through Minvest,
8 held 19.31 percent of the shares in RMGC. Gabriel
9 held the other 80.69 percent.

10 Under the License, as amended, the royalty
11 rate was 4 percent. Through this arrangement, the
12 State stood to earn over half of the Project profit
13 without bearing any Project development costs.

14 Adding the amount Gabriel was to invest in
15 the local economy, Romania stood to receive
16 approximately two-thirds of the economic benefits of
17 the Project.

18 Despite the very favorable agreement the
19 State already had with Gabriel, the Government did not
20 approach Gabriel as a partner to discuss the
21 agreements but instead, through statements of numerous
22 senior officials, publicly declared the deal

1 inadequate and said it needed to be renegotiated
2 before the Project could move forward.

3 Prime Minister Emil Boc started things off on
4 August 1. And although the view had previously been
5 expressed that the contract should be renegotiated, as
6 the evidence we will review shows, this time, with the
7 Project close to receiving its Environmental Permit,
8 the Government acted.

9 On August 1, Prime Minister Boc publicly
10 denounced the State's interest as inadequate and said
11 he was not a fan of the Project. Let's hear what
12 Prime Minister Boc said in his own words.

13 (Video played.)

14 MR. LEW: Now, although Prime Minister Boc
15 said it was too early to know if the contract needed
16 to be amended, he made clear that the contract was
17 unfavorable and that the State's economic interest and
18 environmental compliance were the two major issues
19 that needed to be addressed.

20 Prime Minister Boc was soon joined by a
21 chorus of other senior officials: the President of
22 Romania, Traian Basescu; Minister of Environment

1 Borbély; Minister of Culture Hunor. This was not a
2 mere coincidence. These statements were not just
3 happenstance.

4 Minister Borbély was a critical
5 decision-maker because the Ministry of Environment, as
6 you heard, was responsible for endorsing to the
7 Government issuance of the Environmental Permit
8 through a Government decision that the Prime Minister
9 had to sign for the Environmental Permit to be issued.

10 Minister of Culture Hunor was also a critical
11 decision-maker because, among other things, the
12 Ministry of Culture had to endorse issuance of the
13 Environmental Permit.

14 Ministers Hunor and Borbély also were,
15 respectively, the President and Vice President of
16 UDMR--of the UDMR Political Party, which was a key
17 coalition partner in the Boc Government.

18 Minister of Environment Borbély linked
19 clarifying the disadvantageous contract to issuing the
20 Environmental Permit on August 11. Here is a
21 statement of Minister of Environment Borbély reported
22 in the Hungarian press that day, clearly revealing

1 both the coordinated messaging of the senior members
2 of the Government and that the requirements needed to
3 be clarified, including--for acceptance of the
4 Environmental Permit because the contract in its
5 current form is not advantageous enough for the
6 Romanian State.

7 President Basescu a week later declared that
8 the Project must be done provided that the benefits
9 are renegotiated. Here's a phone interview of
10 President Basescu by a TV reporter. Let's hear what
11 he said in his own words.

12 (Video played.)

13 MR. LEW: Less than a week later, Minister of
14 Culture Hunor said that neither he nor Minister of
15 Environment Borbély would go further until after
16 renegotiations. Let's look at the news article
17 reporting what Minister Hunor said.

18 "I have not signed the order yet because
19 there are many aspects that need to be discussed."
20 This was the Order to declassify the Cârnic mountain.

21 "First of all, the level of participation of
22 the Romanian State in that company, and I am not going

1 further until this aspect is clarified, and the
2 Minister of Environment cannot go further either; this
3 must be decided at the governmental level."

4 Now, Prime Minister Boc testifies that there
5 was no link between renegotiation and permitting and
6 that none of his ministers ever indicated to him that
7 they intended to withhold or delay the issuance of
8 permits for the Project.

9 Regardless of what Prime Minister Boc says
10 his ministers said or didn't say to him, it's clear
11 that Minister Hunor here told the rest of Romania that
12 he and Minister Borbély would not do anything to move
13 Project permitting forward until the contract was
14 renegotiated.

15 And he underscored this position
16 emphatically, again, the very next day. Minister of
17 Culture Hunor declared that they could not take
18 another step, regardless of the step, without
19 renegotiation. Let's hear what he had to say.

20 (Video played.)

21 MR. LEW: Now, Romania and its witnesses try
22 to avoid the obvious import of these statements from

1 key decision-makers conditioning decisions regarding
2 Project permitting on renegotiation by characterizing
3 them as personal statements or political statements.

4 But as you can see, these statements are
5 about matters concerning exercise of official
6 functions, not mere personal opinions, and they're
7 statements of intent about how they're going to
8 exercise or not exercise their authority.

9 The next day Prime Minister Boc announced
10 that the Project could not be economically promoted
11 because the contract was detrimental to the Romanian
12 State and must certainly be discussed again. Let's
13 hear what Prime Minister Boc had to say.

14 (Video played.)

15 MR. LEW: Three days later, on August 29th,
16 Prime Minister Boc confirmed renegotiation was
17 mandatory before a final decision could be made about
18 the Project. Let's hear what he had to say.

19 (Video played.)

20 MR. LEW: This is a clear link between
21 economic renegotiations and a decision about whether
22 to continue the Project, in the words of the Prime

1 Minister.

2 Minister of Environment Borbély also said the
3 contract must be renegotiated on September 5th.

4 Here's a news interview of him where he's asked about
5 the renegotiation of the contract, and he says that it
6 "interests" him "as a member of the Government, but
7 the Contract is negotiated; it was negotiated by the
8 Minister of Economy. Evidently, this must be
9 negotiated between the Parties, with an advantage."

10 Now, Mr. Tanase and Mr. Henry testify that
11 the link between renegotiation and the Government's
12 willingness to permit the Project was very clear to
13 them, and for good reason, and they knew they had no
14 choice but to renegotiate if they wanted the Project
15 to proceed. Romania's witnesses, despite these clear
16 public statements, deny this link that we just--we
17 just reviewed.

18 Romania's witnesses also contend that Gabriel
19 and RMGC essentially invited themselves to make a
20 general Project presentation at the Ministry of
21 Economy on September 27, 2011, and that no
22 renegotiations took place until October.

1 Romania's alternative facts are contrary yet
2 again to the contemporaneous record. Minister of
3 Economy Arition, on September 21, requested authority
4 for the Ministry of Economy to renegotiate with
5 Gabriel.

6 This is an excerpt from the Ministry of
7 Economy Memorandum sent to the Government for its
8 Government meeting on September 21 in which he seeks a
9 mandate to increase the profit obtained by the
10 Romanian State as a result of the implementation of
11 the Project. He wants the Ministry of Economy to be
12 authorized to negotiate with Gabriel.

13 Now, at that meeting on September 21, that
14 Government meeting, Prime Minister Boc mandated
15 Minister Arition to renegotiate and increase the
16 State's benefits. To that end, Prime Minister Boc
17 instructed Minister Arition that day, as Minister
18 Arition testifies, to reach out to RMGC/Gabriel.

19 The mandate given to Minister Arition at the
20 September 21 Government meeting was formalized two
21 days later and established an urgent deadline to
22 renegotiate and report back to the Government.

1 This slide is the formalization of the, as it
2 says, assignment established at the Government meeting
3 on September 21. And the Ministry of Economy was
4 mandated to conduct negotiations with the
5 representatives of RMGC in order to increase the
6 benefits for the State. The deadline for this was
7 urgent.

8 Now, Prime Minister Boc claims he doesn't
9 know why an urgent mandate was issued in September of
10 2011 and suggests that the Government was trying to
11 find additional revenue in view of the long-pending
12 economic crisis then affecting Romania.

13 But that explanation is really not credible.
14 A far more credible explanation is that the State
15 waited to demand renegotiations until the
16 environmental permitting process was nearing
17 completion, which gave the State maximum leverage to
18 strong-arm a better deal from Gabriel.

19 On September 22nd--so the very next day after
20 this urgent mandate to renegotiate is issued--the
21 Ministry of Economy, through Mr. Găman, called Gabriel
22 and RMGC to renegotiate. Let's look at a couple of

1 contemporaneous emails.

2 This email is sent on Thursday, September 22,
3 from RMGC's in-house counsel to RMGC personnel and
4 outside counsel, confirming that the Ministry of
5 Economy, through Mr. Găman, called the RMGC General
6 Manager, Dragos Tanase, to a meeting on Tuesday, which
7 is September 27th because it's five days after the
8 Thursday. For what? Renegotiation.

9 This next email was sent the same day by
10 Mr. Tanase to Gabriel's CEO, Jonathan Henry, and
11 others stating, "Negotiations set Tuesday 12:00 p.m."

12 The contemporaneous record is, therefore,
13 crystal clear that this meeting was to renegotiate the
14 State's economic interest in the Project, and it was
15 called by the Ministry of Economy.

16 The first renegotiation took place five days
17 later, on September 27th. What followed in this
18 process was nothing other than a shakedown. It wasn't
19 a real commercial negotiation.

20 Although we'll see documents that refer to
21 renegotiations and offers, this process was not a true
22 commercial negotiation between partners. Both before

1 and during the renegotiations, the State abused its
2 power to approve the Project in order to coerce offers
3 from Gabriel.

4 Eventually, Gabriel offered to meet the
5 State's demand for a 25 percent shareholding, a
6 6 percent royalty, and a 50/50 profit split on
7 production over 300 tonnes of gold, which was worth
8 hundreds of millions of dollars. As we'll see,
9 however, no agreement was reached.

10 On September 27th, senior Gabriel
11 representatives, including its then-CEO, Jonathan
12 Henry, traveled to Bucharest from London for the first
13 renegotiation meeting at the Ministry with Minister
14 Ariton and his team, which included Mr. Găman.

15 Minister Ariton announced he had a mandate to
16 increase the State's interest, and that was what he
17 was going to do.

18 Gabriel argued that the Government already
19 had a deal that was favorable, but Minister Ariton
20 told them to analyze two alternative scenarios, giving
21 the State either increased shares or increased
22 royalties.

1 Two days later the Parties resumed their
2 meeting on September 29th. As directed, Gabriel
3 presented financial analysis of these existing
4 agreements and the alternative scenarios that Minister
5 Ariton had identified. By the end of the meeting, it
6 was very clear that Gabriel had no choice other than
7 to increase the State's interest.

8 So, while Gabriel wrote letters to senior
9 Government officials reminding them of the very
10 excellent deal they already had under the existing
11 agreements, Gabriel began working on its first offer
12 to the State.

13 Now, also on this day, on September 29th,
14 Minister Ariton decided to establish a Negotiation
15 Commission of Ministry of Economy officials. Neither
16 the request that we saw from Minister Ariton to the
17 Government for authority to renegotiate nor the
18 mandate from the Government to renegotiate even
19 mentioned a Negotiation Commission.

20 Put differently, there was absolutely no need
21 for a Negotiation Commission to be in place in order
22 for Minister Ariton to have commenced renegotiations

1 with Gabriel and RMGC on September 27th and continue
2 them on September 29th.

3 So, on October 5th, Minister of Culture Hunor
4 confirmed to Parliament that the decision of the
5 Government on the Project would include economic
6 considerations. Here is an excerpt from Ministry of
7 Culture Hunor's letter to Parliament.

8 He says, "The decision regarding the Rosia
9 Montana Project is to be made at the Government level,
10 based on economic and other considerations, as well as
11 in accordance with law."

12 So, it's very clear that the Government was
13 not going to limit its permitting decisions to what
14 the Law required but was also going to consider
15 politically motivated, economic, and other
16 considerations.

17 ARBITRATOR DOUGLAS: I'd just ask for a
18 clarification on that. I can see the thrust of your
19 case is the link between issuing the Environmental
20 Permit and the renegotiation.

21 But is it also your case that at some--at
22 some point--and I suspect that may--that point may be

1 fairly early on--that the Government has no discretion
2 not to go through with the Project?

3 So, regardless of the link with the
4 Environmental Permit, is it your position that even if
5 they have no discretion in respect to that permit,
6 there's no discretion left simply not to go forward
7 with the Project at the end of the day?

8 MS. COHEN SMUTNY: I would say, of course,
9 it's always open to the State to decide that it has a
10 change of policy and no longer wants to do mining. It
11 could terminate the mining license with--under
12 applicable Law and, no doubt, pay compensation at that
13 time.

14 But our basic position, which is an
15 overarching theme, is that the way to terminate a
16 project that one doesn't want is not by withholding an
17 Environmental Permit. If one has a change of view
18 about what's desired from a policy point of view, the
19 proper course of action, should that have been the
20 decision, would have been to terminate the license and
21 with whatever consequences would follow. And that is,
22 of course, always open to the State Party to do.

1 ARBITRATOR DOUGLAS: Thank you.

2 MR. LEW: So, on October 5th, Gabriel sent an
3 email to Mr. Găman attaching its first proposal in the
4 form of a Draft Agreement to increase the State's
5 interest in the Project. In the October 5 offer,
6 Gabriel proposed to increase the State's shareholding
7 from 19.3 to 22.5 percent if certain conditions
8 precedent occurred, including enactment of pending
9 amendments to the general Mining Law.

10 There was no obligation for the Government to
11 achieve the conditions precedent, only an obligation
12 for both Parties to exercise best efforts to meet
13 them.

14 The offer made clear that the referenced
15 amendments to the general legislative framework,
16 sought as conditions precedent, were to benefit the
17 entire mining industry, not specifically to implement
18 the Project. The company expressly did not seek
19 preferential treatment in permitting or exemption from
20 highest industry standards or applicable legal
21 requirements.

22 The next day, the day after receiving this

1 first "offer," October 6, 2011, RMGC met for the first
2 and only time with the Negotiation Commission
3 established by Minister Ariton on September 29th.

4 Later that day, after the meeting of the
5 Negotiation Commission, RMGC emailed minutes of the
6 meeting to Mr. Găman, and those minutes confirm and
7 describe the two earlier meetings that were had
8 between Gabriel and RMGC and Minister Ariton and his
9 team.

10 Mr. Găman took the October 6th minutes of the
11 Negotiation Commission meeting and incorporated them
12 almost verbatim into a memorandum to the Government
13 reporting on the negotiations that Minister Ariton
14 signed and submitted to the Government on
15 October 25th.

16 Commenting on the received offer, Minister
17 Ariton recommended that the Government evaluate
18 Gabriel's proposed Draft Agreement. And this is an
19 excerpt from his memorandum.

20 Several weeks later, on October 31, 2011,
21 Minister Ariton and Mr. Găman met again with
22 Gabriel--sorry--with RMGC and its counsel.

1 Mr. Tanase's contemporaneous summary of the meeting
2 sent to Gabriel shows that Prime Minister Boc did not
3 want Minister Ariton to entertain the conditions
4 precedent Gabriel had proposed in the October 5
5 "offer" but, instead, wanted Minister Ariton to focus
6 on negotiating a better economic deal for the
7 Government.

8 We can see in the bottom bullet that
9 Mr. Tanase and the RMGC attendees also told Minister
10 Ariton and Mr. Găman that the last TAC meeting to
11 approve the Environmental--to review the Environmental
12 Impact Assessment Report--the last meeting is coming
13 up on November 29th. "We need to finalize the
14 renegotiation ASAP, especially since two key
15 ministers, Hunor of Culture, Borbély of Environment,
16 mentioned publicly they cannot move forward until
17 renegotiation is completed."

18 So, Gabriel at that point was very motivated
19 to try to remove the blockage of renegotiations, in
20 view of this last TAC meeting coming up, and even told
21 Minister Ariton and Mr. Găman that Ministers Hunor and
22 Borbély, as they must have known, had mentioned that

1 they could not move forward, as we saw, unless the
2 renegotiation was complete.

3 So, in an effort to finalize the
4 renegotiations before the upcoming final TAC meeting
5 on November 29th, on November 3rd Gabriel submitted a
6 simplified Draft Agreement proposal in an email to
7 Mr. Găman. Gabriel offered the same 22.5 percent
8 shareholding and sought the Government's agreement not
9 to demand further share increases.

10 Gabriel dropped its earlier proposed
11 conditions precedent, including any reference to the
12 adoption of pending legislative amendments, to the
13 general Mining Law, but the Government didn't accept
14 that.

15 Prime Minister Boc rejected Gabriel's
16 simplified offer simply because it was not rich
17 enough, not because of any appended conditions.
18 Minister Ariton informed Gabriel and RMGC on
19 November 9th that Prime Minister Boc did not accept
20 the Romanian State holding less than 30 percent of
21 RMGC.

22 Gabriel replied that 30 percent would create

1 numerous financial risks to the Project that could not
2 be accepted. So, Prime Minister Boc next mandated
3 Minister Ariton, on November 25, 2011, to obtain a
4 25 percent shareholding and a 6 percent royalty.

5 Now, economically these are substantially
6 similar and are each worth hundreds of millions of
7 dollars of value, that is to say the 30 percent and 4
8 or the new demand of 25 and 6 that Prime Minister Boc
9 mandated Minister Ariton on the 25th to obtain.

10 Mr. Tanase's contemporaneous email shows
11 Minister Ariton set a deadline for a response to this
12 demand of 25 and 6 for Monday, November 28th, which
13 was the day before the final TAC meeting was
14 scheduled.

15 And this is a call-out to Mr. Tanase's
16 contemporaneous email to Gabriel saying that the
17 mandate Ariton got from Boc is 25 and 6, and he wants
18 an answer by Monday morning.

19 This communication makes clear that although
20 Minister Ariton was informed, discussing things with
21 Gabriel and RMGC, it was, in fact, Prime Minister Boc
22 who was driving them from behind the scenes.

1 Now, Minister Ariton offers a purported
2 justification for the urgent demand of needing an
3 answer by November 28th that's not supported and not
4 credible. Minister Ariton confirms delivering this
5 demand to Gabriel of 25 and 6. He confirms setting
6 his urgent deadline of Monday, the 28th, and he
7 attempts to justify it by referring to a Government
8 meeting coming up on November 30 and the purported
9 need to reach agreement so the Government could amend
10 the general mining royalty rate from 4 to 6 percent.

11 There's no contemporaneous support for this
12 explanation, and it's just not credible. Amending the
13 Law to increase the royalty rate generally to
14 6 percent obviously did not require agreement from
15 Gabriel or RMGC.

16 The timing of Prime Minister Boc's mandate
17 also bears no relation to the Government's proposed
18 legislation to increase the mining royalty to
19 6 percent. This proposal had been pending in the
20 Government since August 2011 and was actually not
21 adopted until November 2013.

22 The only reason to press for an answer on

1 Monday, November 28th, was to exert maximum pressure
2 on Gabriel and RMGC before the final TAC meeting.

3 In response to Prime Minister Boc's demand
4 for 25 and 6, Gabriel agreed, in a letter dated
5 November 27th, that it could give the State a 22.5
6 shareholding and a 6 percent royalty but stated it
7 could give no more.

8 Mr. Tanase spoke to Minister Arition on
9 November 28th and delivered a letter to him that
10 Gabriel's CEO, Jonathan Henry, had signed. This is an
11 excerpt of the, let's call it, offer letter of 22.5
12 and 6. Romania promptly rejected that offer of 22.5
13 and 6 and ramped up the pressure once again.

14 In response, Minister Arition delivered, on
15 November 28th, an ultimatum that the Project would not
16 move forward without 25 and 6.

17 This is a contemporaneous email sent from
18 Mr. Tanase to Gabriel on Monday, November 28th.
19 "Called Arition. Verbally delivered the message that
20 22.5 and 6 was as high as we could go."

21 His reply was something like, "You should
22 tell Gabriel that there are very, very slim chances of

1 moving forward without 25 and 6, suggest that the
2 Board of Gabriel think until tomorrow or after
3 tomorrow if they want the Rosia Montana Project to
4 move forward in due course, to accept 25 and 6."

5 So, on the day of the final TAC meeting, the
6 very next day, Minister Ariton repeated his ultimatum
7 of 25 and 6 or no project. And here's that
8 contemporaneous email that Mr. Tanase reported to
9 Mr. Henry. "24 hours to accept 25 and 6 if we want
10 the Rosia Montana Project to move forward."

11 So, on both the day before and the day of the
12 final TAC meeting, the contemporaneous record shows
13 that Minister Ariton made crystal clear that the
14 future of the Project depended on Gabriel and RMGC
15 meeting the Government demand for 25 and 6.

16 Now, Minister Ariton denies conditioning the
17 Project moving forward on 25 and 6. He testifies he
18 didn't mention the Project to Mr. Tanase but said that
19 there would not be a renegotiated "deal" to increase
20 the State's interest without 25 and 6.

21 This explanation, too, lacks any support and
22 is contradicted by two contemporaneous emails. In

1 addition, were Mr. Ariton's version of events true,
2 Gabriel would not have been motivated to agree to 25
3 and 6. Gabriel didn't want to increase the State's
4 interest at all, let alone to give 25 and 6.

5 The only reason Gabriel was willing to give
6 anything and consistently offered to give more was
7 because the Government made clear, publicly and
8 privately through Minister Ariton, that there would be
9 no project without a renegotiated deal.

10 On the very next day, after receiving this
11 double-barrel ultimatum, Gabriel sent a communication
12 to the Ministry of Economy and offered to move to 25
13 and 6, subject to certain conditions.

14 This next slide is an excerpt of--from that
15 communication, indicating a willingness to even accept
16 25 and 6, but the increase was going to require
17 specific circumstances and implementation, including
18 consideration concerning the Project's timeliness and
19 implementation. So, this offer was subject to
20 conditions.

21 Gabriel also told the Government why. It's
22 because of the possible risk to its board and board

1 members of giving something and getting nothing in
2 return. So, they explained that they had fiduciary
3 duties and were subject to potential lawsuits, if they
4 were simply to give it away and--without trying to get
5 something in return.

6 Now, it's on the basis of this communication
7 that Minister Arition and Prime Minister Boc testify
8 that the Parties had a deal. Minister Arition
9 testifies at the Government meeting on November 30th,
10 he informed the Government that Gabriel had expressed
11 its agreement to 25 and 6 and that subject to
12 clarifications regarding the conditions of the
13 agreement, we had reached consensus.

14 He said Mr. Boc was happy. Boc also
15 testifies that Minister Arition informed him that
16 Gabriel was in agreement and a deal had been reached.
17 Romania argues on this basis that it had no motive to
18 hold up permitting thereafter.

19 This version of events presented for the
20 first time in the Rejoinder is unsupported and
21 contradicted by the contemporaneous record. The
22 Parties never reached agreement in fact or in

1 principle in 2011 and 2012.

2 Now, on November 30th, contrary to Minister
3 Ariton's testimony in this Arbitration, he told
4 Mr. Tanase after the Government meeting that day that
5 he did not discuss Gabriel's proposal.

6 And Mr. Tanase reported that conversation
7 immediately to Gabriel. And this is the
8 contemporaneous email where Mr. Tanase tells Gabriel
9 Mr. Henry talked with him 5 minutes ago. Subject:
10 "ariton - no news."

11 "Spoke to him 5 minutes ago. He said the
12 matter has not been discussed in the Government
13 meeting."

14 The next day, December 1, Mr. Tanase briefly
15 met with both Prime Minister Boc and Minister Ariton
16 during Romania's National Day celebration which was
17 taking place in Alba Iulia. And that was yesterday,
18 December 1. Happy National Day.

19 As Mr. Tanase contemporaneously reported to
20 Gabriel, Prime Minister Boc and Minister Ariton both
21 reiterated the Government's position that the mine
22 could be built with 25 and 6. Neither Mr. Boc nor

1 Mr. Ariton indicated whether the Government would
2 agree to the conditions identified in the
3 November 30th memorandum that we reviewed.

4 This is the email Mr. Tanase sent
5 memorializing that meeting with Mr. Boc and Mr. Ariton
6 confirming what we just discussed.

7 So, on December 5th, 2011, which is the next
8 business day after November 30th--after the
9 November 30th proposal because of the intervening
10 holiday for Romania's National Day--Mr. Tanase
11 submitted a Draft Agreement defining the conditions to
12 Gabriel's 25 and 6 proposal.

13 Gabriel agreed to increase the State's share
14 immediately to 22.5 percent and to transfer the
15 remainder after issuance of the final construction
16 permit. Gabriel also proposed consideration of
17 \$15 million to be paid from Minvest's future
18 dividends.

19 Now, commenting on the substance of Gabriel's
20 proposed conditions that were set forth in this
21 December 5th proposal that elaborated what was
22 presented on November 30th, Minister Ariton states

1 that they had not been subject to negotiations and
2 were problematic.

3 His memorandum to the Government described
4 the proposal and stated that the Government needed to
5 assess it, and if there were a positive answer
6 following that assessment, that there should be a
7 Government decision prepared to approve the agreement.

8 Well, because there was no agreement--the
9 Government did not mandate the Ministry to prepare a
10 Government Decision to approve one--the Government did
11 not agree with and did not accept Gabriel's December 5
12 proposal.

13 Rather than accept the 25-and-6 proposal with
14 the conditions identified, Romania made a new demand.
15 On December 14th, 2011, Minister Arton met briefly
16 with RMGC and said that in addition to the 25 and 6,
17 the Government now wanted a 50/50 profit split on any
18 gold production above a target quantity.

19 Minister Arton agreed to meet the next day
20 with Mr. Tanase and a consultant to discuss that.
21 This is the contemporaneous email sent on
22 December 14th by Mr. Tanase memorializing the meeting

1 with Mr. Ariton at an American Chamber of Commerce
2 meeting that took place in Bucharest that day, in
3 which Minister Ariton told Mr. Vladescu--Mr. Vladescu
4 was the former Romanian Minister of Finance, and he
5 was an adviser to Gabriel and RMGC. He said that "I'm
6 planning to close the Rosia Montana negotiation by the
7 year end with 25 and 6 and 50/50 post," which means
8 the 50/50 profit split.

9 Mr. Vladescu pushed back because Gabriel
10 didn't want to give any more, and Minister Ariton
11 promised to meet the next day.

12 That meeting happened the next day, on
13 December 15th. Minister Ariton reiterated the
14 Government's new demand for a 50/50 profit split in
15 addition to the 25 and 6. And in response to RMGC's
16 objections that this was unnecessary and, certainly,
17 unwanted, he asked for a position paper showing how
18 the State already received close to 50 percent of the
19 gross profit, which is what RMGC said. And RMGC
20 provided that position paper four days later.

21 However, the Government maintained its demand
22 for a 50/50 profit split. This is the contemporaneous

1 email memorializing the meeting I just described with
2 Minister Ariton on December 15th.

3 So, I think there are two points to make
4 based on this. One is that, as you can see in the
5 last line, Gabriel and RMGC considered this new demand
6 for a 50/50 profit split just to be absurd. And,
7 secondly, it shows that Gabriel and the Government had
8 not discussed the conditions to the 25-and-6 offer,
9 which further shows there was no agreement in
10 principle or otherwise.

11 So, recall that on November 29th the final
12 TAC meeting happened. And the TAC completed its
13 technical assessment of the Project that day. And
14 we'll go through that in detail in further session.
15 But the President of the TAC indicated that there
16 would be another meeting to take a decision.

17 So, on December 18th, Minister of Environment
18 Borbély indicated that although the technical
19 endorsement might be ready by January 2012, the
20 economic renegotiations were still ongoing. Let's
21 hear what Minister Borbély had to say on
22 December 18th.

1 (Video played.)

2 MR. LEW: So, Minister Borbély described the
3 negotiations as ongoing and certainly did not suggest
4 that any agreement had been reached with Gabriel. As
5 we'll see in another interview nine days later,
6 Minister Borbély unequivocally conditioned his
7 willingness to endorse issuance of the Environmental
8 Permit on successful renegotiations.

9 On December 19th, 2011--so the next
10 day--Minister of Culture Hunor confirmed the position
11 he stated in August 2011, that he would not remove
12 Cârnic from the List of Historical Monuments until
13 after the renegotiations. He said, "Probably sometime
14 early next year we will also have the results of these
15 discussions about the Contract, and we would need to
16 make a decision in the Government."

17 This is a news report of what Minister Hunor
18 said that day that I just summarized.

19 Mr. Greenwald corrected me. It's a
20 transcript of an interview of Mr. Hunor that day.

21 Thank you.

22 So, we're now going to show a clip of

1 Minister Borbély's TV interview on December 27th. It
2 runs for several minutes. I think we apologized.
3 Because of the length of the cabling, the video is a
4 little jumpy.

5 He addresses a number of points about the
6 State's treatment of the Project. He concludes by
7 saying that the State had to successfully renegotiate
8 its interest before he would endorse issuance of the
9 Environmental Permit.

10 Let's hear what Minister Borbély had to say
11 in his own words in December.

12 (Video played.)

13 MR. LEW: So, straight from the mouth of the
14 Minister of Environment, who had to make the
15 endorsement of Environmental Permit, two conditions:
16 first, a more advantageous contract; and second, of
17 course, meeting the environmental conditions.

18 These are the same two issues identified by
19 Prime Minister Boc back in August 2011, as requiring
20 answers before a final decision could be made whether
21 to continue the Project or not.

22 So, on the same day that Minister Borbély

1 stated that he would not endorse issuance of the
2 Environmental Permit without a successful
3 renegotiation, the Government announced it would
4 double the royalty for precious metals from 4 percent
5 to 8 percent.

6 This development continued to pressure
7 Gabriel and RMGC to give the State the 25 and 6 and
8 50/50 it had demanded. The 8 percent royalty never
9 went into effect. Instead, a 6 percent royalty was
10 adopted in late 2013 and went into effect in 2014.

11 In a further effort to remove renegotiations
12 as an impediment to permitting, Gabriel submitted a
13 new proposal to increase the State's interest on
14 January 26, 2012. The new proposal essentially gave
15 the Government everything it demanded: 25 and 6, with
16 an immediate increase to 24 percent shareholding and
17 only 1 percent to be transferred after issuance of the
18 final construction permit, and a 50/50 split of gross
19 profits on gold production above 300 tonnes.

20 Gabriel also dropped the request for
21 USD 15 million in consideration payment, which was
22 looked at as trying to meet a Romanian legal

1 requirement for consideration for the Contract, but
2 they got comfortable that they didn't need it.

3 This chart is an overview of the course of
4 the forced renegotiations. Under the State's threat
5 of no project, Gabriel steadily gave more and got less
6 until it met the State's essential demands. But no
7 agreement was reached and no offer accepted in 2011 or
8 in 2012.

9 What happened was successive governments
10 collapse without acting on Gabriel's January 2012
11 proposal. Minister Ariton testifies the last proposal
12 essentially did meet the Government's demands and,
13 subject to rewording, he thought the Government was
14 prepared to sign it. But the Government, in fact,
15 never responded.

16 On February 6, 2012, Prime Minister Boc
17 resigned due to mass street protests that were
18 unrelated to the Project. President Basescu appointed
19 a new prime minister, Mr. Ungureanu, to form a new
20 government with the same PDL-UDMR coalition partners
21 that formed the Boc Government. Minister Hunor
22 remained Minister of Culture, and Minister Borbély

1 remained Minister of Environment. Minister Borbély
2 resigned sometime in April.

3 The Ungureanu Government did not withdraw the
4 renegotiation demand. The new Minister of Economy,
5 Mr. Bode, was briefed on the status of renegotiations
6 and permitting and met once with RMGC but took no
7 action, as the Government--the Ungureanu Government
8 fell on April 27th, 2012, due to a Parliamentary vote
9 of no confidence.

10 An interim Government headed by Victor Ponta
11 took over and maintained the renegotiation demand for
12 the Project to go forward but refused to do anything
13 until after year-end elections.

14 Here are two reports about Interim Prime
15 Minister Ponta's position on June 8th. He declared
16 for Bloomberg that the Government's position regarding
17 the Mining Project remained unchanged.

18 "The company must offer a larger share of the
19 Project to the State before going ahead with the
20 Project. When these conditions are met"--which
21 included the renegotiation demand--"we can go forward,
22 but these conditions are mandatory."

1 So, the Ponta Government, when it took over
2 after the Ungureanu Government, maintained the same
3 approach of requiring mandatory renegotiation before
4 the Project could proceed.

5 Prime Minister Ponta also said that the
6 Government wants to postpone decisions on another
7 project and on Rosia Montana until after Parliamentary
8 elections, which were scheduled for the end of 2012.
9 He said, "I want to discuss this matter in a serious
10 manner next year. Unfortunately, legitimate interests
11 of environment and business development have been
12 absorbed into the political campaign."

13 And that's where we're going to end this
14 chapter.

15 ARBITRATOR DOUGLAS: I'd just ask--I mean, it
16 seems to be common ground that the final offer was
17 close to being what was asked for, if not exactly what
18 was being asked for.

19 Fast forward nine years or eight years. We
20 know what happened. No one got anything. So, it's
21 all very well negotiating better terms. But for the
22 Government to realize the benefits of those better

1 terms, the Project needed to happen. And it didn't
2 happen.

3 So, what's your narrative for why there
4 were--there was a block after the final offer that was
5 made by the Claimants? Presumably, given that it did
6 meet the substance of the Government's demands, there
7 wasn't a whole lot of point in holding out for
8 anything else after that.

9 And, indeed, if the Project didn't go ahead,
10 the Government would get nothing as a joint venture
11 partner.

12 MS. COHEN SMUTNY: I would say that,
13 perhaps--and although here we speculate--if the Boc
14 Government hadn't fallen and if the Parties had been
15 able to finalize their deal, perhaps the Project would
16 have gone forward and there wouldn't be an ICSID
17 Arbitration.

18 But what was happening consistently is that
19 the Government was looking for political bases to get
20 comfortable issuing an environmental permit.

21 First, the request focused on the economics.
22 Later there was a greater desire for more political

1 consideration, as we will see. So, one might
2 speculate and say that maybe, if circumstances were
3 different, there might have been agreement on those
4 other terms--because they did seem to be very
5 close--and maybe they would have gone forward. But
6 that just never happened.

7 So, that's the answer.

8 ARBITRATOR DOUGLAS: Does it say anything
9 about this link between the renegotiation and the
10 Environmental Permit? Because, again, if the
11 renegotiation, as you say, is tied to the issuance and
12 the Government's whole benefit is dependent upon that
13 stage being reached, why was it withheld then?

14 MS. COHEN SMUTNY: Well, I think it's not
15 just about the money for this Government. It was
16 about getting political comfort. And for the Boc
17 Government, the focus was about money. And it
18 appears--although we don't know because they never had
19 the opportunity to really finalize. It looked like
20 that the desire at that time was--you know, for
21 greater political comfort would have been satisfied
22 with money, or so it seemed.

1 As you'll see as we walk through it, the
2 needs evolved, and it clearly was not just about money
3 for the political comfort. And so, as the political
4 process evolves, there's an evolution in what is
5 desired politically. And so ultimately things
6 happened the way they happened.

7 But, yes, I think it's a frustration for
8 everyone listening to this story, that one feels that
9 there might have been other solutions along the way.

10 PRESIDENT TERCIER: Next part?

11 MR. LEW: Yeah. I think the next--I guess we
12 have to decide when we either take a break or break
13 for lunch. I think, depending on how long you want to
14 go, this next piece is probably going to be over an
15 hour. So, whatever is convenient for the Tribunal.
16 We should probably start and finish it, no matter when
17 we start it.

18 PRESIDENT TERCIER: It is 12:15. We had in
19 mind to work an hour, until 1:15.

20 MR. LEW: Okay.

21 PRESIDENT TERCIER: Wait. I'm thinking. I
22 don't know how long you will have this afternoon.

1 Does that mean that we are progressing better
2 than expected?

3 MR. LEW: It depends from whose perspective.
4 I think we're in the zone of our time, yeah. Yes.

5 PRESIDENT TERCIER: Okay.

6 MR. LEW: So, it's up to you.

7 Let's say it's going to be about 60, 75
8 minutes to get through this next piece. So, if
9 you--we can do it now. It's up to you.

10 PRESIDENT TERCIER: I would suggest to do
11 that.

12 Have you an objection on your side?

13 DR. HEISKANEN: No. We would prefer to do it
14 now.

15 PRESIDENT TERCIER: Okay.

16 MR. LEW: Great. Thank you.

17 MR. GREENWALD: I think we're...

18 Okay. I'm going to discuss now the
19 environmental permitting for the Project, first in
20 2011 to 2012 and then in 2013, and the evidence that
21 we will review now will clearly show that the EIA
22 Review Process--that is the Environmental Impact

1 Assessment process--was over in both of these time
2 periods and that there was no impediment to issuing
3 the Environmental Permit other than the unlawful
4 political blockage just described.

5 So, as you heard earlier, the Environmental
6 Impact Assessment Review Process was suspended from
7 September 2007 to September 2010; and, after that
8 process resumed, three TAC meetings were held in
9 September 2010, December 2010, and March 2011. At the
10 meeting on December 22nd, 2010, the TAC completed
11 review of the first seven chapters of the
12 Environmental Impact Assessment report, and the TAC
13 President, who was a State Secretary from the Ministry
14 of Environment, Marin Anton, stated at the end of that
15 meeting--this is at Exhibit C-476, Page 84--"we have
16 two more chapters left, Chapter 8 and 9, and until
17 this future meeting of the TAC where we will analyze
18 the last two chapters, we are to clarify any
19 outstanding matters."

20 Those two chapters that remained were
21 non-substantive. You can see one's a two-page summary
22 of difficulties; the other is the non-technical

1 summary. So, if we fast-forward to September 13,
2 2011, the Minister of Environment László Borbély
3 convened a meeting with his team and with RMGC at the
4 Ministry of Environment on September 13, and these are
5 the minutes of RMGC's meeting, of that meeting, and it
6 says: "At the end, LB," that's László Borbély,
7 concluded "We need to set up a firm, strict and
8 intense calendar of activities on both sides"--the
9 company and the Ministry of Environment--"to get done
10 what needs to get done - and take a final resolution
11 on the Rosia Montana Project. We should discuss all
12 the remaining issues during the meeting"--that's that
13 meeting that day--"with the representatives from the
14 Ministry of Environment, and RMGC should provide
15 answers in the following TAC meeting, which should be
16 scheduled as soon as possible."

17 Minister Borbély then suggested it was now or
18 never, and after he finished presenting, Marin Anton,
19 the State Secretary who was the President of the TAC,
20 took over and asked all the members of the Ministry of
21 Environment delegation to list their last issues with
22 the Project, and he said that RMGC will get an

1 official letter soon with all outstanding requests to
2 which RMGC would need to answer in writing.

3 And just before we go on that point about
4 that letter that comes in, Romania's description of
5 these Minutes is emblematic of its treatment of the
6 record generally. Referring to this page of the
7 Minutes, Romania says it reflects an RMGC admission
8 that "we do not comply with the water Directive."
9 What Romania does not point out is that there is an
10 all caps note in the immediately preceding paragraph
11 before that little header that says "water" that you
12 can see in the background, which makes clear that the
13 statements in the pages that follow were made by the
14 Ministry of Environment team not by RMGC, and later in
15 September 2011, as we'll discuss after this meeting
16 took place, the Alba County Council issued a public
17 interest declaration that did satisfy the Water
18 Framework Directive.

19 So, to describe the events leading into the
20 final TAC meeting on November 29, 2011, and why it was
21 to be the final TAC meeting, after this meeting at the
22 Ministry of Environment on September 13, on

1 September 26, the Ministry of Environment sent RMGC
2 the TAC's final list of 102 questions. RMGC promptly
3 answered those final questions on October 11th. The
4 TAC members then visited the project site in Rosia
5 Montana, and as Mr. Avram testifies, it was clear from
6 the site visit that they believed the environmental
7 permit should be issued and the Project implemented,
8 and then two agendas for the November 29 TAC meeting
9 were sent out which included review of the two final
10 EIA Report chapters and RMGC's answers to all of the
11 TAC's final questions.

12 And then as we can see, the Ministry of
13 Environment also requested by letter dated
14 November 15, 2011, that the TAC members submit written
15 points of view on RMGC's answers before the
16 November 29 TAC meeting, so you can see it says that
17 they should be sent to MMP, which is the Ministry of
18 the Environment, by the beginning of the TAC meeting.

19 Now, Romania's witness, Ms. Mocanu, says that
20 the Ministry, through this letter, asked for
21 preliminary points of view on RMGC's answers, but the
22 letter does not refer to a preliminary point of view.

1 It asks for a written point of view. And asking for
2 these written points of view before the TAC meeting
3 began was consistent with it being the end of the
4 technical review process.

5 So, if we move forward to the November 29 TAC
6 meeting, there are numerous statements at that meeting
7 that reflect a clear intent to finalize the EIA review
8 and take a decision on issuing the Environmental
9 Permit. Those are set out in the Reply and in
10 Mr. Avram's Second Witness Statement, and these
11 indicia of finality abound, and I'm going to walk the
12 Tribunal through this meeting on November 29. It's
13 Exhibit C-486 are the Minutes of this November 29 TAC
14 meeting. There are also audio-recordings which
15 accompany the Minutes and which have been discussed by
16 the Witnesses.

17 So, as to the indicia of finality first, at
18 the start of the November 29 meeting, Ms. Mocanu of
19 the Ministry of Environment described a conversation
20 she had earlier that day with an official from the
21 Ministry of Culture about its endorsement, and she
22 said on microphone--she said in the recording--you can

1 hear--that the official asked her about the normative
2 act and what they should bring today in the TAC, and
3 Ms. Mocanu replied "to bring an endorsement." That's
4 what you can hear her saying. This discussion clearly
5 signaled an intent to finalize the EIA procedure
6 because, as we heard earlier, the Ministry of
7 Culture's endorsement is required to issue the
8 Environmental Permit.

9 Then, at the meeting, there is discussion of
10 the checklist--this is in Ministry of Environment
11 document--a checklist on the quality of the EIA
12 Report; and, as Miss Mocanu testifies and as Professor
13 Mr. Mihai elaborates in his expert legal opinions, the
14 checklist is the last step in the completion of the
15 analysis of the EIA Report, and so TAC President
16 Anton, Marin Anton, and Ms. Mocanu discuss the
17 checklist earlier in the meeting. Here's what they
18 said.

19 Mr. Anton asked, "Where is this checklist?"
20 And Ms. Mocanu said: "We will make it."

21 And he said: "And I will open the topic
22 here?"

1 "Yes, but at the end, let's get there--we are
2 not there yet."

3 He says: "We will get there," and she says:
4 "Yes."

5 Now, Ms. Mocanu says that she meant the end
6 of the EIA procedure, not the end of that TAC meeting
7 on November 29th. This explanation is not credible.
8 The context is clear; they're discussing intending to
9 address the checklist at that meeting. And, in fact,
10 as we'll see, Mr. Anton does return to the checklist
11 at the end of the meeting.

12 So, again, still very early in this meeting,
13 you can see on Page 7 of the Transcript at Exhibit
14 C-486, that the TAC-completed review of the final two
15 EIA Report chapters, and the TAC President Mr. Anton
16 said, are there "Any issues? Comments? There are
17 none? Everything is clear? Thank you very much. We
18 reviewed all the 9 chapters of the procedure," so the
19 EIA Report has been reviewed in its entirety.

20 Then later in the meeting, beginning on
21 Page 23 of the Transcript and continuing through about
22 20 pages, each TAC member, having already been asked

1 to provide their written points of view before the
2 meeting began, are now called upon by the TAC
3 President to provide their points of view orally at
4 the TAC meeting on RMGC's answers to the TAC's final
5 questions, and each TAC member in turn--and you can
6 see them listed here--confirmed that they were
7 satisfied with RMGC's answers to the final questions
8 and/or they raised no questions or objections to
9 issuing the Environmental Permit, so let's look now at
10 a few of the key statements made.

11 The first TAC member to answer was Grigore
12 Pop, a representative of the Ministry of Economy.
13 Mr. Pop is the Director of the mineral resources
14 division within the general directorate for Mineral
15 Resources; that is a department headed by Mr. Găman.
16 Mr. Pop says, referring to the Ministry of Economy,
17 and he refers to their double quality of both TAC
18 member and representative of the Romanian State's
19 national interests, he says: "We paid attention to the
20 development of this project. From our point of view,
21 the Project complies with our legislation and the
22 external European legislation, and the answers to the

1 questions which were raised by the TAC members
2 today--we consider that they are covering and
3 satisfactory, more than satisfactory, answering to
4 each uncertainty and each request of the TAC members."

5 Then Octavian Patrascu, he's a representative
6 of the national Environmental Protection Agency.

7 Later in time he's actually the Vice President of the
8 TAC. He says: "Mr. Chairman, the national
9 Environmental Protection Agency finds the answers very
10 appropriate," and he explains how the Project will
11 continue the 2000 years' experience of the Romans and
12 of the empire, and will carry that tradition further.

13 And he concludes by stating that during the
14 requests and during the discussions held for the
15 analysis of the Project, all questions were answered.

16 Stefan Harsu of NAMR, the National Agency of
17 Mineral Resources, the State authority responsible for
18 administering the Mineral Resources, states: "I can
19 say that from the standpoint of NAMR, we are happy
20 with the answers. I'm glad to see that things have a
21 finality. We are happy and we have always said, from
22 the beginning, as geologists and as the people who

1 manage the country's resources, we agree with this
2 project and not only with this project, but with the
3 other projects to come."

4 Then we hear from the Ministry of Culture's
5 representative Csilla Hegedus, and she's asked by the
6 TAC President if the Ministry of Culture has any
7 questions. She says, "No, we do not have."--"So, from
8 the technical point of view, you cleared all the
9 issues; after this, you will have a final point of
10 view." The Ministry of Culture had not yet provided
11 that final point of view, and she says yes, "We are
12 going to have a final point of view." We'll walk
13 through that in a moment.

14 Another indicia of finality is with respect
15 to the Water Framework compliance, the Ministry of
16 Environment asked RMGC to complete its answer on how
17 it complied with the water framework by submitting a
18 copy of the Alba County Council Decision; that is the
19 decision that declared the project to be of
20 outstanding public interest, therefore satisfying the
21 fourth requirement for complying with the Water
22 Framework Directive and the Romanian Waters Law that

1 implements that Directive. That County Council
2 decision was provided. It was issued on September 29,
3 2011, and so what you see on these slides, it's two
4 times in the conversation or in the meeting there's
5 two conversations where both the TAC President Marin
6 Anton and later Ms. Mocanu tell the Company just to
7 submit a copy of that Decision.

8 Now, Ms. Mocanu--and on that, one more point
9 about this Decision is that the Ministry of
10 Environment and ANAR, which is the Romanian national
11 water authority, had met with the company back in
12 July 2011, and asked for either a County Council
13 Decision or three Local Council decisions of Rosia
14 Montana and neighboring Abrud and Campeni to declare
15 the project of outstanding public interest, and
16 indicated that would satisfy the requirement, so now
17 they're asking for the Decision.

18 Ms. Mocanu for Romania testifies that there
19 was a written point of view submitted before the TAC
20 meet--she refers to a written point of view submitted
21 by ANAR before the TAC meeting, and she suggests that
22 this point of view shows that ANAR did not accept

1 RMGC's answers on water framework compliance, that's
2 at Paragraph 195 of her Second Statement, but what you
3 can see is that following discussions at the TAC
4 meeting of RMGC's answers, ANAR's representative was
5 very clear that from the point of view of waters,
6 there were no issues.

7 As Mr. Avram recounts in his testimony and as
8 set out in the Transcript and the audio-recordings,
9 Ministry of Environment officials and the TAC members
10 also made frequent references during this meeting to
11 drafting the Environmental Permit and/or to the
12 conditions to include in the Environmental Permit.

13 And so, it's after all of this happens at
14 this meeting that you move toward the end of the
15 Transcript at Page 47 where the TAC President, Marin
16 Anton says: "From my point of view, and I would like
17 to ask one last thing--all technical discussions, all
18 the questions, all the solutions were discussed within
19 the TAC; if any of the TAC members, of those in the
20 TAC, still have issues to raise, raise them now, in
21 this moment. We can no longer--all issues must be
22 clarified now. If there are any issues left, please

1 raise them so that we can clarify them. There are no
2 more issues."

3 He then says on the next page, Page 48 of
4 Exhibit C-486: "I am going to convene in the
5 following period a meeting for making the decision
6 related to Rosia, whether it's being granted or not,"
7 and whether it is the Environmental Permit for the
8 Project, that's what's going to be granted or not.
9 That's the decision that's going to be made in the
10 next meeting.

11 He then says on that same page, "We'll
12 prepare a checklist for today." This is the checklist
13 described in the earlier conversation with
14 Miss Mocanu. "We'll prepare a checklist for today for
15 the EIA quality report, it will be sent to each
16 Ministry, for you to have it, to analyze...And, with
17 this, the technical discussions about the Rosia
18 Montana Project come to an end. Please expect a next
19 TAC meeting in the near future."

20 There's then some further back and forth, and
21 he says again on Page 51, the last page of the
22 Transcript: "All right, everything is clear for me..."

1 Things are finalized in the TAC, I repeat, there will
2 be a next TAC meeting after you sort out those
3 details, three details," and we'll come to these three
4 details in a moment. And "After I will have all
5 these, I will convene another TAC meeting for a final
6 decision."

7 Now, there are three details left open, and
8 the fact that no decision is taken at this November 29
9 meeting and matters are kept open is consistent with
10 Mr. Tanase's testimony in his Second Witness Statement
11 regarding what Marin Anton later explained to him;
12 namely, that during the TAC meeting, Mr. Anton
13 received phone calls and texts from Minister of
14 Environment Borbély and a call from Prime Minister
15 Boc, instructing him to keep matters open and ensure
16 the TAC would have to meet again.

17 And recall, as we described earlier in
18 Mr. Lew's presentation, this TAC meeting was the same
19 day as this day and the day before that Minister
20 Ariton delivered the 25 and 6 or no Project ultimatum.

21 So, at the end of this meeting there is one
22 clerical task, which is to provide the copy of the

1 Alba County Council decision of September 2011
2 declaring the Project of outstanding public interest,
3 and there are three open issues identified by the TAC.
4 One is the Ministry of Culture's endorsement to issue
5 the Environmental Permit. There is an endorsement
6 required to relocate a geological monument called
7 "Piatra Despicata," and the Geological Institute of
8 Romania wanted to provide clarifications.

9 And what you see on the next slide is that
10 RMGC submitted a copy of the Alba County Council
11 decision the very next day on November 30. Ms. Mocanu
12 testifies that the TAC asked for this decision at the
13 November 29 meeting as we saw, but did not agree it
14 would be sufficient, and that just cannot be accepted.
15 It would obviously make no sense for the TAC to send
16 RMGC on a fool's errand to provide a decision that
17 would not satisfy the requirements.

18 So, the three details that are identified by
19 the TAC, they're addressed promptly within 10 days of
20 the TAC meeting, and you can see this in this table.
21 The Ministry of Culture issued a point of view setting
22 out conditions to include in the environmental permit.

1 That was the Ministry of Culture's endorsement, we'll
2 walk through that, that's on December 7th. The other
3 issues are addressed on December 8 and 9. Of these
4 three issues, only the Ministry of Culture endorsement
5 is disputed by Romania. I will turn to that now.

6 The Ministry of Culture's final point of view
7 that was referenced at the meeting and then provided
8 on December 27th, is Exhibit C-446, and I'll highlight
9 several provisions of it now, and why, as Professor
10 Mihai demonstrates in his Expert Legal Opinions, it
11 was the endorsement of the Ministry of Culture to
12 issue the Environmental Permit.

13 So, first, as you can see here, the point of
14 view is provided in response to a letter from the
15 Ministry of Environment on the day before on
16 December 6th, registered with the Ministry of Culture
17 where the Ministry of Culture was asked to issue a
18 point of view about the issuance of the Environmental
19 Permit. That is what the Ministry of Culture is
20 providing, point of view on issuing the Environmental
21 Permit.

22 Next, you can see that this document issued

1 by the Ministry of Culture on December 7th was based
2 on the legal provision requiring the Ministry of
3 Culture's endorsement for issuance of the
4 Environmental Permit. That's clearly stated in
5 Paragraph 6 of the point of view where it says:
6 "taking into consideration Article 2, Paragraph 10 of
7 government Ordinance Number 43." There is a cite down
8 at the bottom, that's Exhibit C-1701, is this
9 Government Ordinance 43. And if you look at
10 Article 2, Paragraph 10 of that ordinance, you will
11 see that it is the provision of Romanian law requiring
12 the Ministry of Culture's endorsement in order to
13 issue the Environmental Permit.

14 Then the Ministry of Culture's point of view
15 sets out conditions to include in the Environmental
16 Permit and explains that it's in connection to the
17 issuance of the Environmental Permit, sets out
18 conditions to include in the Environmental Permit
19 which extend over a couple of pages and derive from
20 Romanian law.

21 So, for those reasons, and the fact that this
22 document was in substance the same in all material

1 respects to a document later issued in April 2013 also
2 by the Ministry of Culture, which is Exhibit C-655,
3 Romania concedes that that April 2013 document,
4 Exhibit C-655, was a valid endorsement of issuing the
5 Environmental Permit. What Romania argues is that the
6 December 2011 point of view was not the endorsement
7 because it was not labeled endorsement, and that this
8 substantially identical document issued in April 2013
9 was the endorsement because it was labeled
10 "endorsement," and this argument is legally groundless
11 and without merit. Romanian law does not require an
12 endorsement to be issued in any particular form. And
13 as Professor Mihai cogently demonstrates in his Legal
14 Expert Opinions, the December 2011 point of view was
15 in substance the requisite endorsement.

16 And what does that mean? It means that with
17 the environmental technical review complete and the
18 follow-up issues identified at the final TAC meeting
19 on November 29 addressed, the Ministry of Environment
20 was legally obligated to make a decision, and it could
21 make two decisions, but it had to make one. The first
22 decision is it could recommend to the Government that

1 it issue the Environmental Permit, which would be
2 consistent with all the statements made at the
3 November 29 TAC meeting that we reviewed.

4 Now, if it didn't agree with that for any
5 reason and it considered that there were some
6 deficiencies, the other decision it could make is it
7 had to notify RMGC of those alleged deficiencies so
8 that RMGC could address them. But, as there was no
9 renegotiated deal with the Government at any point in
10 2011 or 2012, no decision at all was taken, and the
11 approval process was politically blocked, and I'm
12 going to turn now to show how the Government blocked
13 the process politically on pretextual grounds, and
14 it's because the Ministry of Environment refused to
15 accept, and the Ministry of Culture refused to
16 confirm, that the December 7, 2011 point of view was
17 the endorsement, and this starts with the letter sent
18 on December 19, 2011. This is after the further
19 demands made on December 14th and 15 that Mr. Lew
20 described, and after Minister Borbély's December 18
21 statement. The Ministry of Environment then sends a
22 letter to the Ministry of Culture asking the Ministry

1 of Culture to confirm that its December 7 point of
2 view is issued pursuant to and in compliance with the
3 provisions of Article 2, Paragraph 10, of Ordinance
4 Number 43.

5 Now, what's interesting about this request
6 for confirmation is that they're not suggesting that
7 the point of view was not the endorsement. They're
8 asking for confirmation of it. But they're asking the
9 Ministry of Culture to confirm that it's issued
10 pursuant to and in compliance with the very provision
11 of law that we saw called out in the letter itself.
12 So, the letter says it's issued pursuant to this
13 Article 2, Paragraph 10, of Ordinance Number 43, and
14 now they're asking the Ministry of Culture to confirm
15 that, and the Ministry of Culture never responded to
16 this request. So, on December 27, 2011, in the same
17 interview of Minister Borbély that we saw earlier
18 where he explained that a renegotiated economic deal
19 was a requirement to recommend issuing the
20 Environmental Permit, he also explained that he's
21 waiting for an answer from the Ministry of Culture.
22 Let's play that.

1 (Video played.)

2 MR. GREENWALD: So, he's expecting an answer
3 from the Ministry of Culture, it doesn't come. We can
4 see that in a statement made on February 23rd, from
5 the TAC President. This is the TAC President Marin
6 Anton also again saying that they're waiting for a
7 response from the Ministry of Culture. Let's see what
8 President Anton said.

9 (Video played.)

10 MR. GREENWALD: So, it's very clear, they're
11 done, the review of the EIA Reports or that they're
12 waiting for the Ministry of Culture. This is repeated
13 by Marin Anton, the TAC President, in another
14 interview on March 8. Let's see that.

15 (Video played.)

16 MR. GREENWALD: So, he says "we are waiting
17 now for an opinion from the Ministry of Culture, and
18 depending on it, the Environmental Permit will be
19 issued or not." That opinion was simply to confirm
20 that their earlier December 7, 2011 point of view was
21 the endorsement. It could not be clearer.

22 Again, on April 2012, there is a media report

1 where State Secretary Marin Anton, the TAC President,
2 is quoted as saying he's still waiting for an
3 endorsement from the Ministry of Culture. We cannot
4 make a decision yet because we're waiting for an
5 endorsement from the Ministry of Culture. We have
6 analyzed the papers, and after the document arrives,
7 we'll be able to make a decision. Sources from the
8 Ministry of Culture are then also reported as
9 indicating that a new endorsement would be forthcoming
10 or at least a clarification that they had issued their
11 endorsement, but none was, and so the absence of this
12 continued to block a decision on the Environmental
13 Permit, as there was no economic renegotiated deal.
14 There was no confirmation provided by the Ministry of
15 Culture.

16 And that's the only reason the Ministry of
17 Culture did not confirm its endorsement of the
18 Environmental Permit, and this is, in fact, admitted
19 in 2013 by a Ministry of Culture representative, its
20 representative in the TAC, that politics was the only
21 reason that the Ministry of Culture's December 2011
22 point of view was not treated as its endorsement in

1 2011 or 2012.

2 You can see this. This is a transcript from
3 a meeting on March 22nd, 2013, of a government
4 Inter-Ministerial Commission, Mircea Angelescu, he's
5 the representative from the Ministry of Culture at
6 that meeting. He's having a conversation here with
7 the Ministry of Environment representative, Daniela
8 Pineta, and Mr. Angelescu says: "Our answer was that
9 we were waiting for a written Request," a request from
10 the Ministry of Environment. "We saw no impediment in
11 issuing the endorsement." This is in March 2013. "We
12 can issue the endorsement without a request."

13 And then Ms. Pineta from the Ministry of
14 Environment says, "We've already submitted a written
15 request. We can do it again if you want us to."

16 And he says, Ministry of Culture
17 representative, "you submitted a request under another
18 Government. In short, if you ask for it now, you will
19 receive it." And that's what the Ministry of
20 Culture's TAC representative said. The only reason
21 that the endorsement was not confirmed and the
22 Environmental Permit was not issued in 2011 to 2012

1 was politics. This is a manifest and admitted abuse
2 of power by the Government treating the Project in
3 accordance with politics and political considerations,
4 not law.

5 I now want to turn to the arguments about
6 alleged impediments to issuing the Environmental
7 Permit that are raised by Romania in this arbitration
8 and that are clearly without merit.

9 Romania raises four main issues--let's list
10 all of them. One is that the TAC failed to complete
11 its technical assessment. They say that the Ministry
12 of Culture did not issue its endorsement. They point
13 to what they claim is the lack of an approved Waste
14 Management Plan and to noncompliance, they say, with
15 the Water Framework Directive. All of the other
16 issues that Romania points to in its pleadings, as
17 Ms. Smutny explained earlier, ADC's, water management
18 permit, PUZ, Urbanism Certificate, surface rights, et
19 cetera, to the extent that they're mentioning surface
20 rights, only concern construction permits. They do
21 not concern the Environmental Permit as was laid out
22 in that table.

1 So, we're going to take each of these in
2 turn, but before we do so, I want to go back to the
3 Inter-Ministerial Commission that was convened in
4 March 2013, which confirmed that there were no
5 impediments to issuing the Environmental Permit,
6 contrary to Romania's arguments in this arbitration.

7 Now, this Inter-Ministerial Commission was
8 established in March 2013, and you can see from its
9 Final Report that it was established in order to
10 mediate an efficient dialogue between the State and
11 the representatives of the Project, RMGC, considering
12 that the permitting process for the Project stagnates
13 since November 2011; that is, since the November 29,
14 2011, TAC meeting. This is another acknowledgment of
15 the blockage since that TAC meeting on November 29, 16
16 months went by without a meeting or any attempt to
17 address any alleged issues. Now, this
18 Inter-Ministerial Commission that was established was
19 chaired by a State Secretary, Maya Teodoriu, from the
20 Department of Large Projects, and she later became a
21 judge on Romania's Constitutional Court, so a very
22 well respected lawyer within Romania and later judge.

1 The Commission also included many of the same
2 officials--same officials--representing the same key
3 Ministries participating in the TAC, and you can see
4 Ministry of Environment, Ministry of Culture, NAMR,
5 the water authority, ANAR, et cetera.

6 And in this Final Report issued by this
7 Inter-Ministerial Commission after meetings in
8 March 2013, the Commission concluded that there are no
9 impediments or significant obstacles, legislative or
10 institutional, to hinder a possible future development
11 of the Rosia Montana mining Project. The
12 institutions, all the institutions we just saw, the
13 Ministry of Environment, Ministry of Culture
14 represented in the Working Group did not raise any
15 objections against the development of the Project.

16 And then at Page 9 of this Report, which is
17 Exhibit C-2162, they say: "Under these
18 circumstances," after reviewing all the issues now
19 raised by Romania in this arbitration, or at least
20 many of the ones that were raised at the time, "note
21 that the Ministry of Environment can issue the
22 Environmental Permit, and any other details can be

1 solved along the way." That's what the Government
2 concluded when they finally turned back to the Project
3 after doing nothing since November 29, 2011, and that
4 conclusion of this Inter-Ministerial Commission was
5 approved by the Government as a whole on March 27th,
6 2013. You can see this reflected in a Government
7 information note of April 28, 2013, referring to the
8 activity of the Working Group, presented and approved
9 in the Government meeting of March 27th.

10 And what this means is that the Government
11 conceded that there were no impediments to issuing the
12 Environmental Permit, contrary to the arguments we
13 hear in this arbitration. And given the blockage that
14 occurred from November 2011 to March 2013, that
15 stagnation you saw referenced in the Inter-Ministerial
16 Commission's Report, this conclusion that there were
17 no impediments in March 2013 applies equally in late
18 2011 and early 2012. There were no impediments.

19 So, turning to Romania's arguments, the first
20 being that the TAC did not complete its technical
21 assessment, this is demonstrably incorrect. Not only
22 did we see in the Minutes of the TAC meeting the

1 Transcript repeated statements that the technical
2 assessment was finalized, there are numerous
3 subsequent admissions by the Government that that, in
4 fact, was the case.

5 So first, just to show a few examples of
6 these, in March 2012, a few months after that meeting,
7 Mr. Găman, Romania's witness, sends a memorandum to
8 Minister of Economy Bode, he's the new Minister of
9 Economy, briefing him on the status of both the
10 renegotiations that were ongoing and the permitting
11 process.

12 And in the very first paragraph, he says, the
13 last TAC meeting was in November 2011, and a complete
14 analysis of EIA chapters was presented, and RMGC
15 answered all the questions of the Commission.

16 March 6, 2013, another Government Ministerial
17 memorandum, now from Minister Dan Sova, who is the
18 Minister of Large Projects, put in charge of the
19 Project, he was responsible for the project taking
20 over from the Ministry of Economy. He writes a
21 memorandum to Prime Minister Ponta in March 2013,
22 where he says: "The TAC resumed its analysis of the

1 EIA Report in 2010, and by the end of 2011, all the
2 EIA Report chapters, additional documentation
3 required, and all TAC questions were answered. In the
4 last TAC meeting, which took place in November 2011,
5 the TAC members concluded that all technical issues
6 were clarified and there were no further questions.
7 Consequently, according to the procedure, the final
8 meeting of TAC must be held for the adoption of the
9 recommendation for issuing the Environmental Permit,
10 which is the last step in the procedure."

11 At the Inter-Ministerial Commission meeting
12 on March 11th, the Ministry of Environment was
13 represented by a number of officials; one was a State
14 Secretary at the time, Elena Dumitru. She had taken
15 over as President of the TAC, which had not yet met
16 again since November 2011, and she says in the last
17 meeting in late November, TAC members concluded that
18 the technical issues were clarified.

19 And then in May 2013, the Romanian Government
20 made its submission to the Aarhus Convention
21 Compliance Committee. This submission on behalf of
22 the Government was made by the then-Minister of the

1 Environment in 2013, Rovana Plumb, and she said that,
2 in November 2011, there was a meeting of the TAC. The
3 members of the TAC confirmed that there were no
4 questions with regard to the technical aspects--no
5 questions with regard to technical aspects are
6 outstanding, so it's very clear the technical
7 assessment was completed, and it was time for a
8 decision.

9 The Ministry of Culture's December 2011 point
10 of view, we've already explained why that was the
11 endorsement. This is the first of the three other
12 issues. And I want to note before going into this,
13 that all three issues--the Ministry of Culture
14 endorsement, the Waste Management approval, and the
15 Water Framework Directive--they all are essentially
16 the same story. That is, they were all fully resolved
17 at the time or they were even assuming that were not
18 the case, the Tribunal were to assume that were not
19 the case, they would have been resolved within weeks
20 but for political blockage, and that's evident in 2013
21 because each was swiftly resolved when the Government
22 returned its attention to the Project in the spring of

1 2013. So, starting with the Ministry of Culture's
2 endorsement, I've already explained why that was the
3 point of view from December 2011 was the endorsement.

4 Now, what Romania argues, proceeding from
5 their incorrect premise that it was not their
6 endorsement. Romania argues that it was reasonable
7 for the Ministry of Culture not to issue the
8 endorsement until April 2013, when they concede it was
9 issued because of litigation challenging the Cârnic
10 ADC and the lack of an ADC or approved
11 preventative--preventive archaeological Research
12 Project for Orlea, and these arguments are without
13 merit.

14 So, the circumstances in December 2011, when
15 that point of view that we saw on December 7 was
16 issued, and in April 2013, when the Ministry of
17 Culture issued the endorsement Romania admits was
18 valid were the same. At both times in December 2011
19 and in April 2013, there was an ADC for Cârnic. It
20 was issued in July 2011--that's ADC Number 9--and it
21 was subject to challenge but not suspended.
22 Circumstances were identical. Also at both points in

1 time and all points in time, there was no ADC for
2 Orlea. The preliminary--

3 ARBITRATOR DOUGLAS: Just so I understand it,
4 then, because I think your colleague mentioned that it
5 had been suspended but that it came after the date
6 you're referring to, April 2013; is that right?

7 MR. GREENWALD: Correct. It was not
8 suspended. It came after in 2014.

9 ARBITRATOR DOUGLAS: Okay.

10 MR. GREENWALD: The preliminary
11 archaeological research, which is the only research
12 required by law to issue the Environmental Permit, as
13 explained in Professor Schiau's opinion and as
14 reflected in same Government Ordinance, Article 2,
15 Paragraph 9 that we discussed earlier, had already
16 been completed for Orlea both in 2000 and then again
17 by 2006, and was referenced, it was set out in a
18 preliminary Assessment Report issued in August 2011
19 and actually referenced in the December 2011 point of
20 view. No additional archaeological research was
21 performed for Orlea after December 2011.

22 And another point here is that the treatment

1 of Orlea in the December 2011 point of view is
2 mirrored both in the April 2013 endorsement, which is
3 Exhibit C-655, and in the Draft Environmental Permit
4 conditions published by the Ministry of Environment in
5 July 2013, which is Exhibit C-55. And what I mean by
6 the treatment being mirrored, is that throughout this
7 time period, in 2011 to 2013, the Ministry of Culture
8 understood and took note in both the December 2011
9 point of view and in this April 2013 endorsement that
10 this project was going to be constructed in phases.
11 There were going to be multiple construction permits,
12 and it was going to be built in phases, not all at
13 once.

14 And Orlea was not going to be mined until
15 Year 8 of operations, so there was going to be a
16 30-month construction phase and then eight years of
17 operation before Orlea was going to be mined, which
18 left ample time to complete the preventive
19 archaeological research and obtain a Discharge
20 Decision before Orlea would be mined. And so, in both
21 the December 2011 point of view and the April 2013
22 endorsement, the entire Project except for Orlea can

1 go forward, and Orlea will later to be able to go
2 forward if it obtains a favorable Discharge Decision.
3 And if not, it won't.

4 So, the Ministry of Culture's endorsement was
5 not depending upon a further research proposal for
6 Orlea which was submitted in February 2013. The
7 Ministry of Culture asked for an additional report in
8 February 2013, and this is entirely pretextual to the
9 extent it suggested that this was the basis for the
10 endorsement in April 2013. It does not justify
11 refusal to confirm the endorsement in 2011 and 2012
12 because it was not necessary. But even putting that
13 aside, in response to this request made in February
14 2013, the same official, Dr. Paul Damian of the
15 National History Museum of Romania, who had earlier
16 prepared and submitted the preliminary archaeological
17 Assessment Report for Orlea in August 2011, which was
18 noted in the December 2011 point of view, he prepared
19 another report in February 2013. He did it almost
20 instantly. It's only 30 pages, 12 of which are Table
21 of Contents, cover pages and photo annexes, describing
22 the preventive research that would be needed to

1 support an eventual Discharge Decision of Orlea, and
2 that was then promptly endorsed and approved on
3 March 1st, noting it was based on the Report earlier
4 submitted in August 2011.

5 And the point here is that if this research
6 proposal were needed before the Ministry of Culture
7 could issue its endorsement for the Environmental
8 Permit which it was not, there is no good-faith reason
9 why that was not done prior to February 2013 and not
10 done promptly after August 2011, the Ministry of
11 Culture, as we saw, admitted the only reason for the
12 hold up was politics.

13 Turning to the Waste Management Plan, which
14 is also ready to be approved and was not an impediment
15 to issuing the Environmental Permit, the Ministry of
16 Environment asked RMGC to update its Waste Management
17 Plan. A Waste Management Plan was submitted with the
18 EIA Report in 2006 and was discussed and reviewed
19 within the EIA procedure pursuant to new regulations
20 then in effect. In September 2011, the Ministry of
21 Environment asked RMGC to update this plan. This was
22 not identified at the November 2011 meeting as an

1 obstacle to taking a decision on the Environmental
2 Permit, that is, it was not one of the three details
3 to be addressed, but nonetheless, RMGC promptly
4 resubmitted an updated Waste Management Plan in
5 December 2011 and but for the improper political hold
6 up of permitting, that updated plan would have been
7 approved promptly in 2012.

8 And what I want to note just briefly is that
9 Romania argues or now suggests in its Rejoinder that
10 they asked for this updated plan in September 2010.
11 That's not correct. The reference they make is to a
12 statement at a TAC meeting on unrelated project
13 emergency preparedness issues, not Waste Management
14 Plan.

15 So, after it's submitted in December 2011,
16 NAMR, the National Agency of Mineral Resources,
17 endorsed the updated plan. In March 2012, but in view
18 of the political blockage the Ministry of Environment
19 delayed approval and requested additional information
20 from RMGC. RMGC then promptly complied with that
21 request, and in May 2012 obtained NAMR's approval
22 again, where NAMR noted specifically that RMGC had

1 provided all of the requested information asked for by
2 the Ministry of Environment, but nonetheless, the
3 Ministry of Environment again delayed approval, and in
4 July 2012 again requested more information.

5 And by that time, as we saw from the end of
6 Mr. Lew's presentation, in June 2012, interim Prime
7 Minister Ponta had already announced that nothing
8 would happen regarding the Project until after the
9 2012 year-end elections.

10 And as Mr. Avram testifies during this time,
11 an official in the Ministry of Environment's Waste and
12 Hazardous Substances Management Department, Mr. Mihai
13 Bizomescu explained to Mr. Avram in a meeting that he
14 was ordered not to approve the Waste Management Plan,
15 and RMGC should not resubmit it again until "the
16 political wind changes." That was explained by
17 Mr. Avram in his First Witness Statement.

18 Mr. Bizomescu was not offered as a witness to
19 rebut Mr. Avram's testimony which is unrebutted. And,
20 in fact, RMGC contemporaneously informed the U.S.
21 Embassy in Bucharest of this political blockage.
22 Let's take a look at the e-mail that was sent from

1 Mr. Tanase to Mr. Cunningham, who was the attaché at
2 the U.S. Embassy, explaining that the second
3 application for approval of the Waste Management Plan
4 in April 2012 again was approved by NAMR. Again, it
5 got rejected by the Ministry of Environment, and we
6 were told informally they are on order to reject it
7 anyway. Don't file it again for the third time. We
8 were told informally to wait until the political wind
9 changes, not to force them to play Ping Pong with the
10 plan. Don't send it back to them and make them send
11 it back to you asking for more information. Just
12 wait. And then last week, this is March 27, 2013, we
13 were told informally the Ministry of Environment is
14 now ready to receive our plan for a proper review at
15 this time.

16 So, when they were told that, the Company
17 resubmits the plan on March 22nd, 2013, the
18 resubmitted plan did not differ in any material way
19 from the earlier version submitted in December 2011,
20 and now NAMR and the Ministry of Environment both
21 approved the plan in April and May 2013, and that
22 approval by the Ministry of Environment was given on

1 May 7th. At the TAC meeting, three days later, which
2 was the first TAC meeting convened since November 29,
3 2011, the Ministry of Environment's representative
4 from the Waste Management Department confirmed that
5 the Plan complied with all requirements and standards
6 and with Best Available Techniques, and this rapid
7 approval process from late March through April and May
8 shows, it confirms and demonstrates that the earlier
9 delays, as with the Ministry of Culture endorsement
10 were the result of political blockage and nothing
11 else.

12 Turning now to the Romanian Waters Law which
13 implements the Water Framework Directive, the Project
14 required diversion of two small rivers, the Corna
15 River and the Rosia River, and that is why there had
16 to be compliance with this Romanian Waters Law
17 implementing the Water Framework Directive in order to
18 divert those rivers.

19 So, what you see here on this slide is the
20 Corna River, which is where the tailings management
21 facility was to be built. And as you can see, even in
22 the best of conditions, this is a small stream with

1 very low flow.

2 On the next slide, you see a series of photos
3 from the Rosia River, which as Ms. Smutny showed you
4 earlier was contaminated with acid-rock drainage.

5 And the reason it was to be diverted was the
6 catchment dam was going to be built at that adit 714
7 where the acid-rock drainage flowed out of the old
8 mine gallery, and so they were going to build a dam to
9 collect and treat and improve the water quality.

10 Now, Romanian law does not define which level
11 of Government should declare that a mining project is
12 of outstanding public interest, and that is the only
13 requirement that is contested. All the other
14 requirements that were set out in the Law were
15 contemporaneously admitted as being satisfied and are
16 not disputed in this arbitration.

17 So, the only governmental debate from early
18 2012 through March 2013 was whether the Alba County
19 Council decision issued back in September 2011 and
20 previously requested at a meeting in July 2011 and
21 accepted by the TAC in November 2011, was sufficient
22 to meet this outstanding public interest requirement

1 or whether it would be advisable to make that
2 Declaration at the national level through a government
3 decision. And I think it's clear, I just want to be
4 clear, that this is a different Declaration than a
5 declaration of public utility discussed earlier.

6 The record is clear that, while this was
7 debated, the Project was considered to be of
8 outstanding public interest by all levels of
9 Government.

10 So, first, Marin Anton, in February 2012,
11 stated publicly what they had already stated at the
12 TAC meeting in November 2011, which was that the Alba
13 County Council decision satisfied the applicable
14 requirement. Let's see what he said.

15 (Video played.)

16 MR. GREENWALD: Okay.

17 So, then, at the Inter-Ministerial
18 Commission, this Issue is considered again in
19 March 2013, and the Ministry of Environment
20 representative, one of the representatives at that
21 meeting, was Mr. Gheorghe Constantin. Mr. Constantin
22 was a representative, the director from the Waters

1 Department of the Ministry of Environment. He is
2 actually one of the officials who met with the company
3 on July 18th, 2011, where the Ministry of Environment
4 and the Water Authority asked for either a County
5 Council decision or the three local council decisions
6 to satisfy the outstanding public interest requirement
7 as Mr. Tanase explains at Paragraph 68 of his Second
8 Statement.

9 And what Mr. Constantin explains here is that
10 in the previous discussions, we agreed with the
11 decision of the County Council, but here they are some
12 weren't convinced so they're discussing it again.

13 So, the Commission Chair, Ms. Teodoriu, who
14 is later the judge on Romania's Constitutional Court,
15 she explains that--on the merits from what I
16 understood, correct me if I'm wrong--I can't see the
17 legal basis on which we should change the issues that
18 were finalized or agreed in 2011, when you had that
19 Decision of the County Council where the Project was
20 declared of outstanding public interest. So I do not
21 see why, maybe I missed something, why should we
22 complicate the procedure.

1 And then she says, she confirms that the
2 outstanding public interest Declaration may be made at
3 the local level, and that was stated at this TAC
4 meeting--I mean, at this Inter-Ministerial Commission
5 meeting on March 22nd.

6 Then what happens is the Ministry of
7 Environment doesn't indicate any legal basis for
8 having a different level of outstanding public
9 interest declared. What they request instead is a
10 meeting between the representatives of the Project and
11 the legal team assisting the Ministry of Environment.
12 That is the same legal team sitting across from us,
13 Romania's counsel in this arbitration, and the
14 conclusions from that meeting which took place on
15 March 25th were the same. The legal team from the
16 Ministry of Environment could not provide legal
17 grounds calling for an enactment in order to classify
18 the Project as works of outstanding public interest,
19 but instead as a matter of advisability, indicated it
20 would be a good idea, even though this aspect cannot
21 prevent further development of the Project.

22 Now, Romania argues that the

1 Inter-Ministerial Commission merely concluded that the
2 power to decide in this matter belonged exclusively to
3 the Ministry of Environment. This is a
4 mischaracterization of the Inter-Ministerial
5 Commission's report. The quoted statement is not the
6 Inter-Ministerial Commission's conclusion, but its
7 description of a point of view provided by the
8 Ministry of European Affairs, which indicated it was
9 not actually competent to decide in that point of
10 view.

11 What the Inter-Ministerial Commission
12 actually concluded is reflected in its Final Report,
13 where it says: "In our opinion, there is no legal
14 ground calling for a need to pass a special enactment
15 with a view to classifying the Project in the category
16 of works of outstanding public interest, the Decision
17 of the Alba County Council is sufficient."

18 And the Government's approval of that
19 Inter-Ministerial Commission Report as we saw earlier,
20 reflects its acceptance by the Government that the
21 Alba County Council decision was sufficient. The
22 Ministry of Environment also later confirmed in

1 July 2013: "The Project observes the provisions of
2 the Waters Law and the Water Framework Directive."

3 But in any event, even if a Government
4 Decision or other enactment were necessary to declare
5 the Project of outstanding public interest, there is
6 no good-faith reason other than political blockage why
7 such a declaration was not made. And what we've
8 tabulated on the next page is a table of ministerial
9 or governmental acknowledgments--this is at the
10 central level--that the Project was of outstanding
11 public interest, and you can see the list is quite
12 long.

13 So, the only impediment to the Project
14 receiving its Environmental Permit in 2011 to 2012 was
15 the Government's political blocking of the Project
16 permitting. And as we will demonstrate later, the
17 only impediment to issuing the Environmental Permit in
18 2013 was the Ponta Government's refusal to take any
19 decision and to instead put the Project to a political
20 vote via Special Law in Parliament.

21 I'm going to turn now to Environmental
22 Permitting.

1 PRESIDENT TERCIER: May I just interrupt you?
2 How long you have? You spoke for an hour and a few
3 minutes. I think the hour is over.

4 MR. GREENWALD: I think we're at 55 minutes
5 now, Mr. President, probably another 20 minutes or so
6 to cover the remainder of what is in this bundle. If
7 you prefer, we could break for lunch, but otherwise we
8 could push forward for 20 minutes and complete now.

9 PRESIDENT TERCIER: Okay. My answer, of
10 course, after having consulted my colleague, would be
11 for the afternoon would be--you would be here in line
12 with the program? We would not have difficulties with
13 the remaining part?

14 MR. GREENWALD: We are on time, and we will
15 finish today.

16 PRESIDENT TERCIER: Okay. Good. In that
17 case, go further.

18 MR. GREENWALD: Okay. So, Romania argues
19 that the Ministry of Environment's failure to issue
20 the Environmental Permit--and we're now talking about
21 in 2013--was justified and lawful because allegedly
22 the requirements were not met, and there were

1 outstanding issues, and this is not supported by the
2 contemporaneous record or by any witness testimony
3 even. The only Ministry of Environment witness in
4 this arbitration, Ms. Mocanu, was not involved in the
5 EIA procedure in 2013 as she explains. Deputy Prime
6 Minister and Minister of Environment Gavrilesco, who
7 submitted the letter that was then excluded when
8 called upon to be a witness, declined, so there is no
9 witness. And the fact that the Environmental Permit
10 was ready to be issued in July 2013 cannot be
11 reasonably debated. So, here is what happened.

12 On May 10, the TAC got together for the first
13 time since November 29; and, at that meeting, the
14 acting TAC President, who is the TAC Vice President,
15 Mr. Patrascu, who we saw quoted earlier from the
16 November 29 meeting said: "At the last meeting that
17 took place on November 29, 2011, the conclusion of the
18 representative was that the Environmental Impact
19 Assessment Report complies with the requirements from
20 the technical point of view." That's Exhibit C-484.
21 He then explains it again in this meeting on the next
22 slide.

1 In November 2011, they analyzed the last
2 chapters of the EIA Report, and as I told you from the
3 start, the TAC concluded that, from a technical point
4 of view, the EIA Report complies with the substantial
5 and structural requirements.

6 Now during this meeting, as you'll note, the
7 TAC indicated four issues purportedly remaining to be
8 clarified, which were the Waste Management Plan, the
9 Water Framework Directive, the PUZ, and an Urbanism
10 Certificate, and financial guarantees. And actually
11 none of these issues was identified as open at the
12 November 2011 TAC meeting. Each was addressed by the
13 Inter-Ministerial Commission in March 2013, before
14 this TAC meeting took place, and found not to be an
15 impediment. The first three have already been
16 discussed, and the fourth, financial guarantees, was
17 also not an impediment to permitting. And that is
18 explained on the next slide.

19 Financial guarantees, in short, were a next
20 step to be established after issuance of the
21 Environmental Permit, and RMGC had always committed to
22 cover the required costs of mine closure and any

1 potential unplanned environmental liability. And the
2 TAC President, Ms. Dumitru, admitted that, of course,
3 the negotiation of the amounts of these guarantees
4 could not be an impediment to permitting the Project.

5 So, at this first TAC meeting, it took only
6 two hours for the TAC to confirm that it had completed
7 its work. "I believe the objective we set for
8 ourselves for today's meeting was achieved. We
9 analyzed point by point the aspects left to be
10 clarified, as I said from the beginning, after the
11 last TAC meeting held in November 2011." Another TAC
12 meeting occurs a couple of weeks later, and again the
13 acting TAC President, the Vice President of the TAC,
14 Mr. Patrascu, states, "by taking and analyzing each
15 and every point...let's say it, all the chapters in
16 the EIA Report, we've reached our objectives...From
17 the technical point of view, the part and chapters
18 included in the Environmental Impact Assessment were
19 completed...I do not have to repeat it. Each domain,
20 each chapter was endorsed by a Romanian institution.
21 Professionalism is not in question here."

22 Then on June 10, 2013, the Ministry of

1 Environment sends a letter to all of the TAC members
2 asking them to elaborate and submit in writing on
3 June 14, 2013, the conditions which are mandatory for
4 the purpose of Project implementation, "the specified
5 conditions, measures and indicators will be included
6 in the Final Decision and in the Environmental
7 Permit."

8 And this is done, and those conditions are
9 published in a lengthy note for public consultation on
10 July 11th, 2013. They published the draft conditions
11 and measures for the Environmental Permit in order to
12 make the Decision on the issuance of the Environmental
13 Permit and complete the procedure as noted in the note
14 for public consultation.

15 So, just one point of observation here, which
16 is that Romania argues that the Ministry of
17 Environment did not discuss the specific conditions
18 and measures to include in the Environmental Permit
19 back in 2011 to 2012, but what you can see is this
20 clearly was not an impediment to permitting because
21 even counting from the first TAC meeting on May 10th
22 and not the June 10th letter, to June 11th it took

1 less than nine weeks for the Ministry to reconvene the
2 TAC, to request the TAC members to propose conditions
3 and measures to include in the Environmental Permit,
4 to discuss those at a meeting on June 14th and then to
5 assess and publish the draft conditions.

6 And but for the political blockage, the
7 process could and should have been completed in short
8 order after the November 29, TAC meeting.

9 So, going forward to July 26th, the Ministry
10 of Environment then convenes a final TAC conciliation
11 meeting which is required to be convened in order to
12 allow any dissenting members to reconsider their
13 views. You heard Ms. Smutny explain earlier there is
14 no requirement for unanimity. The TAC members views
15 are only consultative. And so, that's explained by
16 Professor Mihai in his Expert Opinions and the
17 Romanian Academy actually notes its consultative role
18 established by law was fulfilled, and they don't even
19 attend the conciliation meeting. They say our
20 attendance is no longer justified. The role and
21 responsibility for making the decisions being with the
22 competent persons, those are the Ministry of

1 Environment, and these dissenting views were rebutted
2 by RMGC at this meeting on July 26 and rejected by the
3 TAC members.

4 And what you see is at the end of the
5 meeting, Exhibit C-480, Page 15--it's a short
6 meeting--that acting--the acting President,
7 Mr. Patrascu, explains: "As soon as we receive
8 observations on the Draft Environmental Permit
9 conditions, which were published and had a deadline of
10 July 30th, we will probably meet again to discuss a
11 final decision. I think we can conclude that the
12 analysis on the quality and conclusions of the EIA
13 Report has been finalized during all the TAC meetings
14 this year. You will be informed in due time about the
15 meeting for taking the Decision, and then, according
16 to the regulatory procedure, all the TAC members must
17 be present and have mandates."

18 But what happened, the deadline for public
19 consultation on the Draft Environmental Permit
20 conditions lapsed on July 30th. No public comments or
21 questions were communicated to RMGC. The Ministry of
22 Environment then prepared a 44-page Draft Decision.

1 None of Romania's witnesses addresses this Draft
2 Decision in this arbitration. The Draft Decision
3 accepted the EIA Report and proposed to issue the
4 Environmental Permit with the same conditions proposed
5 for public comment, and you can see that call-out.
6 Exhibit C-2075, an excerpt of this Draft Decision
7 accepting the EIA Report and proposing to issue the
8 Environmental Permit in July 2013. But for political
9 reasons, there are no further TAC meetings, there is
10 no decision, the Ministry of Environment failed to
11 make its proposal to issue the Environmental permit,
12 the Government failed to act on the permit. The
13 government, in doing so, disregarded and violated the
14 legal framework governing the permitting process and
15 Gabriel's investment, as laid out by Ms. Smutny
16 earlier. And instead, it unlawfully conditioned the
17 Environmental Permit on Gabriel again renegotiating
18 and increasing the State's economic interest in 2013
19 and on Parliament adopting a Special Law required by
20 the Government.

21 I want to turn briefly before we conclude
22 this morning's session, to social license, which is

1 not relevant to permitting.

2 So, Romania's emphasis on social license is
3 misplaced. Social license is not a legal concept or
4 requirement. It is a sociological concept. It is a
5 metaphor for the level of support that a project or
6 project sponsor has at any given point--at any given
7 point in time among stakeholders, as Dr. Boutilier
8 explains. Romanian law neither recognizes the concept
9 of social license nor requires an applicant for an
10 Environmental Permit or for any permit necessary to
11 implement a mining project, to have a social license
12 and the State, therefore, cannot legitimately invoke
13 the alleged absence of a social license as a reason
14 not to permit the Project.

15 But, in any event, RMGC designed the Project
16 to support sustainable development and to benefit the
17 community and Romania as a whole. And both Parties'
18 experts agree that social license is a dynamic
19 concept, that is it may go up, it may go down,
20 depending on the point in time. It is not static.
21 RMGC made significant efforts to raise the level of
22 its social license under the current management team

1 led by Mr. Tanase. So, in the period from 2009 to
2 2012, one thing that happened is that the Company
3 changed Management from Canadian to Romanian. It
4 hired hundreds of local workers, became the largest
5 employer in the region. It built the new residential
6 neighborhood that you saw pictures of earlier in
7 Recea. It restored and repaired numerous historical
8 buildings in the town center. It rehabilitated and
9 made accessible to the public more than 200-meters of
10 underground Roman mining galleries at
11 Catalina-Monulesti. It built a pilot water treatment
12 facility to demonstrate how the contaminated acid-rock
13 drainage from adit 714 would be treated. It developed
14 tourist attractions, and it also undertook numerous
15 initiatives to engage even more directly than it
16 previously had done with a wide range of stakeholders,
17 and it continued its sponsorship and community support
18 activities.

19 Now, Professor Witold Henisz conducted
20 extensive, independent contemporaneous research not on
21 behalf of any party but as an academic at the
22 University of Pennsylvania, and he concluded in

1 December 2011 that the Company had earned a social
2 license. This is a call-out from his Witness
3 Statement. Where he says: "I concluded that Gabriel
4 Resources had indeed turned an important corner," he's
5 talking about following his visit four years earlier,
6 "following the precepts of good stakeholder
7 engagement. The Company had focused its efforts on
8 addressing the core claims argued by the opposition to
9 discredit them. They did this not only with words and
10 emotions but also had invested time and resources to
11 produce observable, tangible developments on the
12 ground. They also had the support of numerous
13 external stakeholders," and he interviewed dozens of
14 stakeholders upon both of his visits, "of high status
15 and credibility who recounted to us a process of
16 effective engagement by the company that demonstrated
17 respect, understanding and a desire to help the
18 stakeholders achieve their desired goals for
19 themselves and their constituents. When I left
20 Romania in late December 2011, the opposition seemed
21 resigned to defeat. And as a result, for all these
22 reasons, I left Romania in late December 2011 with

1 confidence that the mine had earned a social license
2 to operate and would be permitted, as it should have
3 been, in early 2012."

4 Now, he's not--Professor Henisz is not the
5 only one to have conducted this type of extensive
6 analysis based on interviews of stakeholders at this
7 time. In April 2011, a research team from the
8 University of Exeter's Camborne School of Mines also
9 completed a comprehensive external study funded by the
10 European Commission. It was a study of seven mining
11 projects in five European countries, it included the
12 Rosia Montana Project. And this research established
13 that the Rosia Montana Project outperformed all of the
14 other mining projects studied in terms of local
15 support, trust, and engagement. And you can see this
16 quoted, there are a number of sites to the study,
17 Exhibit C-2045, explaining that out of all the demo
18 sites, it's only in Rosia Montana where the majority
19 of survey Respondents felt sufficiently engaged by
20 their local mining company and the local government.
21 This reflects the high level of consultation that RMGC
22 has had with the stakeholders and in particular with

1 the local community.

2 Now, Dr. Adey provided further summary of
3 this study that was done which was submitted into the
4 record by Romania's--by Romania, and in this four-page
5 summary, she explained that "campaigners"--these are
6 the anti-Project NGOs--"argue that large numbers in the
7 Rosia Montana community are against reopening the mine
8 partly because of claims that many have been forced
9 out of their homes and property. Yet my own
10 independent study of the stakeholder views in 2010, as
11 a research Fellow of the Camborne School of Mines
12 shows rather a different picture. Of the 97 local
13 residents who completed a survey, many of whom I
14 visited and talked to, 95 percent felt positive about
15 mining."

16 She goes on to explain that many were and
17 remained frustrated at the length of time it's taking
18 the Government to make a decision. Perhaps most
19 interesting of all in relation to the SLO, "social
20 license to operate" question, 80 percent felt that
21 RMGC and the local government were engaging them
22 sufficiently in existing or future mine developments,

1 and you saw in this study that not even a majority in
2 any of the other project sites felt that way.

3 So, these are the contemporaneous studies
4 done of comprehensive surveys. They're not of six
5 Project opponents as put forward by Romania's experts,
6 and these comprehensive surveys studies are supported
7 by surveys, polls, and the 2012 Alba County referendum
8 which shows strong levels of support for the Project
9 in Rosia Montana and in the surrounding mining
10 communities. There was a study done in December 2011
11 where over 75 percent of the residents of Zlatna, Baia
12 de Aries, Abrud, and Rosia Montana, which are other
13 mining towns in addition to Rosia Montana, supported
14 development of the Project, and the study found that
15 in Rosia Montana, the overwhelming majority of the
16 population, 84.6 percent is in favor of Project
17 development.

18 December 2012, a referendum was held in 35
19 communities in Alba County, and 79 percent of the
20 voters in Rosia Montana and 71 percent of the voters
21 in areas with mining traditions voted to restart
22 mining in the area and to implement the Project.

1 Overall, two-thirds of the total votes cast were
2 "yes." And while this was not legally valid, didn't
3 meet the requirement which is a 50 percent turnout of
4 registered voters in order to be legally validated,
5 the results show very strong overwhelming support as
6 the Government itself recognized at the time.

7 And other local and regional surveys and
8 polls both by the company and by external companies
9 similarly found high levels of support for the
10 Project.

11 And so, what you see here is both experts of
12 the Parties have actually collaborated in the past.
13 They have a model of social license where the lowest
14 level indicates a lack of social license, and then
15 there are three levels above it that indicate that
16 there is a social license. The lowest of those levels
17 is called "acceptance," and this joint research by
18 Dr. Boutilier, Claimants' expert, and Dr. Thomson,
19 Respondent's expert shows that most mining projects
20 operate with a low level of social license, which is
21 the acceptance level. And based on his analysis of
22 the polls and referendum data and surveys, which

1 Dr. Thomson declined to ever provide, Dr. Boutilier
2 concluded that the Project had a social license
3 locally and nationally, and in fact reached the higher
4 level of approval in Rosia Montana, and he explained
5 that the evidence from Dr. Adey of the Camborne School
6 of Mines, the IMAS polling data, that is national
7 polling data, several other surveys, the referendum in
8 Alba County, all the surveys he went through and the
9 contemporaneous fieldwork by Professor Henisz and by
10 Dr. Adey and others demonstrate that, by late 2011,
11 the Project did establish a "high acceptance" level,
12 social license nationally, an approval level in the
13 Project region, and a high approval level in Rosia
14 Montana, despite adversities imposed on its social
15 license by the Government, namely blockages in the
16 Project and accusations of corruption, as Ms. Smutny
17 discussed earlier, and that from that time forward, in
18 late 2011 the companies national social license
19 remained near the border between high acceptance and
20 low acceptance with a peak in late 2012 to early 2013.
21 That at all times it held firmly in the acceptance
22 level of social license. And that concludes our

1 morning presentation.

2 PRESIDENT TERCIER: Thank you very much.

3 We will now have the lunch break. We take
4 one hour. That's fine with you? So, we will start
5 again at 2:35 p.m., okay?

6 SECRETARY MARZAL YETANO: 2 hours and 46
7 minutes remaining for Claimants' opening.

8 (Whereupon, at 1:35 p.m., the Hearing was
9 adjourned until 2:35 p.m., the same day.)

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AFTERNOON SESSION

PRESIDENT TERCIER: Good afternoon, Ladies and Gentlemen. We will resume.

And I will first explain the position taken by the Arbitral Tribunal in connection with the issue that we had to address this morning. We are aware of the fact that we are in a very special situation because we have accepted new--that new documents may be filed, that Claimant--that counsel may ask a question in direct in connection with these new documents. That, therefore, we have not a Witness Statement allowing us and the other Party to know what are the issues that will be addressed and that, therefore, we have to try to find a solution that on one side yields the opportunity for counsel to ask questions in connection with these exhibits, on the other side to avoid that the other counsel may be surprised and deprived of the possibility in the cross-examination to be prepared.

Therefore, first, we maintain the decision made this morning, that we would like to have a list for each witness, respectively experts, giving the

1 list of the documents that will be addressed.

2 But over that, we would ask counsel to add
3 the main issue that that will address. Not questions
4 because it's probably too far. But, really, the
5 issues in that condition, there will be no real
6 surprise for the other Party.

7 Third point, in case it should appear,
8 because we are a bit improvising, that counsel
9 cross-examining could be surprised, we could always
10 try to find an extra possibility for questions; for
11 instance, the next day or something like that. But
12 this is really an exceptional hypothesis.

13 So concretely now it means that for tomorrow,
14 Claimant is invited to prepare the document for
15 Mr. Henry. For tomorrow morning will it be possible?

16 MR. LEW: Yeah. I mean, we'll prepare it,
17 you know, before he testifies. It would be useful to
18 understand, for scheduling purposes, how long
19 Respondent believes its opening will be so we can make
20 some judgments about when our witnesses, you know,
21 will be here.

22 PRESIDENT TERCIER: That's a second issue

1 there. The first issue is really to have these
2 documents prepared--

3 MR. LEW: Understood. Understood.

4 PRESIDENT TERCIER: --and linked with--sorry.
5 I interrupted you just because you have already
6 anticipated one of my questions.

7 The second, it has been mentioned that
8 Mr. Tanase could possibly be already examined
9 tomorrow, so I think you have also to be prepared for
10 this document. Okay. It's possible for you to do
11 that?

12 MR. LEW: Yes.

13 MR. GREENWALD: We'll do it.

14 PRESIDENT TERCIER: So the principle is
15 understood and special homework for you for tonight is
16 also clarified.

17 On your side, Respondent?

18 DR. HEISKANEN: Yes. Well, first of all, it
19 would be helpful if there's a deadline set by the
20 Tribunal for the list of issues.

21 PRESIDENT TERCIER: Tomorrow morning.
22 Beginning of the hearing.

1 DR. HEISKANEN: Well, that doesn't give much
2 time for Respondent's counsel to prepare for
3 cross-examination.

4 But we also, in the circumstances, have to
5 maintain the objection because the list of issues
6 doesn't give any indication of what the evidence will
7 be. It will identify the issue that will be
8 discussed, but it doesn't identify the evidence that
9 it will be providing contrary to a Witness Statement.

10 If a Witness Statement had been produced
11 prior to this hearing, the Respondent would have been
12 able to prepare for the evidence that would be
13 produced. So in these circumstances, the Respondent
14 will have to maintain the objection. We will see what
15 happens in direct, and we will have to then react
16 accordingly.

17 PRESIDENT TERCIER: Okay. We take note of
18 your objection. I think the Tribunal made efforts in
19 order to find a solution that is acceptable to both
20 Parties.

21 Okay. Do you have--isn't it possible for you
22 to prepare the document for Mr. Henry a bit earlier so

1 that we can--

2 MR. LEW: I think we'll have to see when we
3 finish today. This was an unanticipated assignment.

4 PRESIDENT TERCIER: Okay.

5 MR. LEW: We'll get back to the office.
6 We'll do our best. But I think tomorrow morning is
7 reasonable.

8 I assume their opening is going to be a
9 number of hours. And I can say the number of new
10 documents that Mr. Henry is going to speak to are
11 precious few, and so this will not be an overwhelming
12 burden for Respondent's counsel, I am confident.

13 PRESIDENT TERCIER: Okay. I think the
14 question of when we finish today is probably in your
15 hands. And we will see, indeed, and we will come back
16 to the question at the end of this hearing. Okay?

17 MR. LEW: Okay.

18 PRESIDENT TERCIER: All right. Questions on
19 this side? No.

20 Okay. In that case, Claimant has the floor
21 for the next step.

22 MR. LEW: Thank you.

1 I have the challenge of the first post-lunch
2 slide. I will do my best to keep it interesting. So
3 we're going to talk about the political assessment of
4 the Project in 2013. As shown, in June 2012 Prime
5 Minister Ponta announced that no decisions on the
6 Project would be made until after the 2012 year-end
7 elections and that the Government's position remained
8 unchanged, that Gabriel had to renegotiate and offer
9 the State a larger share of the Project for it to move
10 forward.

11 Mr. Ponta denies in his statement saying the
12 Project would not go forward if Gabriel refused to
13 renegotiate. Mr. Ponta's denial is contradicted by
14 the contemporaneous record, as we will see.

15 So after the elections, consistent with his
16 pre-election statements, you know, Prime Minister
17 Ponta and the Ponta Government maintained the position
18 that the Project could not proceed without
19 renegotiations.

20 The next slide is a report--a news report of
21 Prime Minister Ponta saying that the Project will
22 start if three conditions are met: compliance with

1 environmental standards, increase of royalties, and
2 increase of the participation of the Romanian State.

3 He hasn't changed the public position or the
4 personal one. These are the three conditions. That's
5 January 2013.

6 And I have not changed the public--sorry.
7 "There are three conditions, but for now they are not
8 met. We have to negotiate."

9 On February 8th, Minister of Environment
10 Plumb publicly stated that the Project would go
11 forward after a reassessment of the State's economic
12 benefits. Let's see what she said at the time.

13 (Video played.)

14 MR. LEW: In addition to maintaining the
15 earlier Government position and demand for
16 renegotiations as a condition for the Project to be
17 permitted and move forward, the Ponta Government
18 imposed another unlawful condition. As Mr. Ponta
19 testifies, his Government envisaged that Parliament
20 would enact a Special Law for the Project. The next
21 statement--sorry. The next slide is an excerpt from
22 Mr. Ponta's statement making this point about

1 envisaging a Special Law for it.

2 Now, although Romania acknowledges that a
3 Special Law was not necessary to implement the
4 Project, the contemporaneous record conclusively shows
5 that the Government required and insisted on the
6 Special Law.

7 On February 14th, 2013, Minister Sova
8 dictated the Government's path forward through a
9 Special Law in Parliament. During a meeting with RMGC
10 at Government headquarters, Minister Sova said the
11 Government would not allow the project to proceed
12 unless Parliament enacted a Draft Law specifically
13 designed to approve the Project.

14 RMGC General Manager Dragos Tanase wrote a
15 memo contemporaneously memorializing their key
16 takeaways from the Government's path forward as
17 dictated by Minister Sova. These are some excerpts
18 from that document. I apologize about my voice.

19 The first step forward was for the current
20 political power and Government to take a final
21 decision on the Project. The second step was for RMGC
22 to complete permitting activities and for the Ministry

1 of Environment to recommend issuing the permit.

2 There's actually a--this should be July 2013.
3 There's a typo in there. The Government then required
4 enacting a Draft Law specifically designed to approve
5 the Project, and also economic renegotiation of the
6 State interest is also required. After this, then in
7 early fall Parliament would start debates on the
8 Special Law the Government demanded. And in December,
9 it says here "approval of final law." We, of course,
10 know that that didn't happen.

11 Mr. Tanase's testimony about the meeting with
12 Minister Sova stands unrebutted. He testifies that
13 the meeting on February 14th, 2013, was not a
14 conversation and that the Government's path forward
15 was not open to debate. Neither Minister Sova nor his
16 counselor, Mr. Cernov, who attended the February 14th
17 meeting, is here to testify. But Minister Sova did
18 testify to Parliament in the fall of 2013 that the Law
19 was made for the Romanian State, not for RMGC or
20 Gabriel.

21 There's a transcript of the Parliamentary
22 Special Commission testimony in which Minister Sova

1 testified that the Rosia Montana Gold Corporation does
2 not need this Special Law as the current situation is
3 convenient for them. The Law was made for the
4 Romanian State, not for them.

5 Mr. Tanase's testimony is consistent--sorry.
6 Minister Sova's testimony is consistent with repeated
7 public statements of Prime Minister Ponta and Minister
8 Sova that the Government insisted on the Special Law.

9 On March 14, 2013, Minister Sova publicly
10 stated that the Government's decision on the Project
11 will be subject to a law in the Parliament. Minister
12 Sova declared that Parliament could reject the Project
13 even if the Government approved it. "We want the
14 political class to make a decision." The next slide
15 is a news report from March 14th, that day, showing
16 what Mr. Sova said.

17 In order to secure an increased economic
18 stake in the Project and prepare the Special Law it
19 had demanded, the Government established a Negotiation
20 Commission on April 28, 2013.

21 On May 12th, Minister Sova reiterated that
22 the decision on the Project must be made by Parliament

1 but only if the Project met the requirements to obtain
2 the Environmental Permit. Minister Sova declared
3 again the next day that the Project would only be
4 promoted through a law in Parliament and only if it
5 first met environmental and cultural heritage
6 requirements.

7 Let's see what Minister Sova said
8 contemporaneously about this.

9 (Video played.)

10 MR. LEW: Now, Prime Minister Ponta confirmed
11 that the decision on the Project moving forward would
12 be made by the Parliament of Romania. Let's see what
13 Prime Minister Ponta said in his own words being
14 interviewed by phone during the same TV interview of
15 Minister Sova we just saw. Let's listen to Prime
16 Minister Ponta.

17 (Video played.)

18 MR. LEW: Now, Prime Minister Ponta
19 underscored that he was not just a member of
20 Parliament but the leader of the largest group in
21 Parliament, which means he could control politically
22 how his Party voted in the Parliament, which as we'll

1 see is exactly what he did in Parliament's rejection
2 of the Special Law.

3 Prime Minister Ponta confirmed on May 23rd
4 that Gabriel and RMGC had to increase the State's
5 economic interest and that Parliament shall decide,
6 although he would vote against any Draft Law related
7 to the Project. Let's hear again from Prime Minister
8 Ponta.

9 (Video played.)

10 MR. LEW: So against this backdrop and the
11 establishment of the Negotiation Commission, Gabriel
12 initially offered the State a 22 percent shareholding
13 and a 5 percent royalty. This was, obviously, less
14 than the 25 and 6 offered in January 2012 that had
15 been pending. Gabriel, again, did not want to
16 renegotiate the Project economics but did so because
17 there was no other reasonable option if they wanted a
18 Project. And 16 months had passed by then with no
19 action taken on the Environmental Permit to which the
20 company was by then entitled.

21 State Secretary Nastase, from the Ministry of
22 Large Projects overseen by Minister Sova, told the

1 Technical Assessment Committee, the TAC, on May 31
2 that all of the conditions in the Environmental Permit
3 will be submitted to Parliament as the final deciding
4 factor whether this Project will be done or not.

5 The next slide is an excerpt of the
6 transcript from the TAC meeting from May 31st in which
7 State Secretary Nastase told the TAC, who was meeting
8 to assess the Environmental Permit, that after the
9 Ministry gives the recommendation on the Permit,
10 provided that all drafts are complied with and all
11 endorsements are obtained, a Draft Law will be made
12 which will be submitted to debates in Parliament,
13 together with all the conditions in the Environmental
14 Permit and all the agreements that must be involved in
15 the Project, not only from the point of view of the
16 royalty and the State's share in the company, Rosia
17 Montana Gold Corporation, but also from the point of
18 view of the other economic-financial aspects that are
19 of particular relevance for the Romanian State.

20 All of these will be part of the law that
21 will be submitted to the Parliament for approval as
22 the final deciding factor whether this Project will be

1 done or not. In the end, the Parliament will take the
2 final decision if Romania will make this Project or
3 not.

4 The Negotiation Commission on June 5th
5 rejected Gabriel's offer and demanded as "minimum
6 conditions" the same 25 and 6 that were set forth in
7 the January 2012 offer that had been pending.

8 And the next slide is an excerpt of the
9 letter from the Department of Infrastructure Projects
10 saying, you know, basically, "No thanks. Try again.
11 Let's start from where, you know, you left off."

12 So, Minister Sova on June 8th again stated
13 publicly that the Project's compliance with
14 environmental and cultural heritage conditions were
15 prerequisites to submitting the Draft Law to
16 Parliament so that, you know, if--once the conditions
17 were met or if the conditions were met, which we saw
18 they were, only then would the Law be submitted to
19 Parliament, which is what Minister Sova said. And
20 then he said that the decision on the Project would be
21 made by the entire political class of Romania.

22 Now, on June 11th, Gabriel submitted a final

1 offer of 25 and 6, meeting the State's demand, subject
2 to conditions and reserving all of its rights.

3 Gabriel's offer was conditioned on, among other
4 things, amendments to the general legislative
5 framework applicable to mining projects, not on a
6 Special Law.

7 Gabriel explained that although the Project
8 could be implemented under existing legal framework,
9 the identified amendments would facilitate and
10 expedite its implementation. Gabriel's offer did not
11 mention a Special Law and none of its conditions
12 required one. Gabriel's offer made clear that it
13 expected the Environmental Permit to be approved by a
14 Government decision.

15 In recognition, however, that the Government,
16 as we've seen, had repeatedly stated that it would
17 only approve the Environmental Permit and allow the
18 Project to proceed if Parliament enacted a Special Law
19 for the Project, the offer indicated that the permit
20 may also be "ratified in Parliament, if applicable."

21 Gabriel and RMGC never agreed that the
22 Environmental Permit would depend on Parliament's

1 enactment of the Special Law. Disregarding the
2 applicable legal process, two days later, on
3 June 13th, Prime Minister Ponta confirmed that his
4 Government will demand an increased interest and not
5 take any kind of decision with respect to this
6 Project. Let's hear again from Prime Minister Ponta.

7 (Video played.)

8 MR. LEW: The administrative legal process
9 that was required to review and approve permits by the
10 Government--for the Government to basically say it's
11 going to take no decision and toss it into Parliament
12 for a political judgment is rather shocking.

13 Now, Gabriel--excuse me. Gabriel and
14 RMGC's--during the first Negotiation Commission
15 meeting--sorry--to discuss Gabriel's final offer,
16 Mr. Tanase and other RMGC representatives urged that
17 any legislative proposal refer generally to the entire
18 mining industry and not only to RMGC or the Project.

19 Gabriel's request for general legislative
20 amendments, however, were futile because the Special
21 Law was the Government's chosen vehicle for obtaining
22 a political vote on whether the Project would proceed.

1 The Government insisted upon and needed a Special Law.

2 We're going to highlight in the next slide a
3 few statements before the Negotiation Commission
4 underscoring that the company sought general
5 legislative amendments as conditions to its offer, not
6 a Special Law.

7 This is a transcript of June 14th that, you
8 know, Mr. Nastase again said the Law is going to go to
9 Parliament, and Mr. Tanase said it would be ideal if
10 that referred to the entire mining industry. They
11 didn't want a Special Law.

12 The next slide also, you know, contains
13 Mr. Tanase's responses to the Negotiation Commission
14 saying it would be ideal not to adopt legislative
15 provisions that are specific to Rosia Montana, et
16 cetera.

17 With the Government having determined the
18 path forward through a Special Law, Mr. Tanase was
19 understandably diplomatic in pressing the company's
20 position that it wanted general legislative
21 amendments, not a Special Law.

22 In subsequent communications to the

1 Negotiation Commission, Gabriel/RMGC continued to
2 request that the Environmental Permit be approved by
3 Government decision before any Parliamentary action.
4 That is, they wanted the Government to follow the Law.

5 Gabriel/RMGC continued to indicate that the
6 conditions in its offer should be achieved through
7 general legislative amendments or means other than a
8 Special Law. In view of the Government's insistence
9 that the only path forward was through a Special Law
10 in Parliament, however, Gabriel/RMGC recognized that
11 its proposed conditions could be implemented that way.

12 As part of its forced renegotiation to
13 increase the Government's interest and in view of the
14 further delays in permitting since 2011 and 2012,
15 Gabriel took the position in these communications to
16 the Negotiation Commission that its conditions
17 precedent were required or necessary. The conditions
18 were required for the offer, not for the Project.

19 The Government, however, was steadfast in its
20 determination to put the Project to a vote in
21 Parliament through the vehicle of a Special Law. On
22 July 11, 2013, the Government included the Project in

1 its National Plan on Strategic Investments. During
2 his press conference about that plan, Prime Minister
3 Ponta said the Project would start "when the
4 Parliament decides to, if it is started" and that "we
5 will send it to the Parliament and the Parliament will
6 decide."

7 A week later, July 18th, Prime Minister Ponta
8 reiterated that Parliament will decide either to do
9 the project or not and that the Environmental Permit
10 will be incorporated in the Draft Law and issued only
11 if the Law were enacted.

12 We're going to see now two videos to see what
13 Prime Minister Ponta said in his own words at that
14 time.

15 (Video played.)

16 MR. LEW: Mr. Ponta was clear that even if
17 the Government approved the Project as meeting all
18 requirements, Parliament could decide to reject it,
19 and that was that.

20 In the next video, Prime Minister Ponta is
21 going to explain the Government's approach to the
22 Environmental Permit and whether it's going to be

1 issued. Let's hear what he had to say.

2 (Video played.)

3 MR. LEW: In the next section of our
4 discussion about the political treatment of the
5 Project in 2013, we'll discuss the Government's
6 submission of the Draft Law to Parliament and then the
7 Government's calls for Parliament to reject it.

8 On August 27th, 2013, rather than issue the
9 Environmental Permit, as it was legally obligated to
10 do, the Government announced its submission to
11 Parliament of a Draft Law on the Project and a Draft
12 Agreement with Gabriel/RMGC.

13 The Government submitted the Draft Law with a
14 lengthy exposition of reasons supporting its
15 enactments signed by Prime Minister Ponta and all of
16 the responsible ministers. Recall that in our last
17 session, by the end of July 2013, the Ministry of
18 Environment had completed the TAC proceedings,
19 published conditions, prepared a Draft Permit. This
20 thing was, in the vernacular, kind of ready to go, and
21 it was held up pending Parliament's action.

22 Within days of submitting the Draft Law and

1 Draft Agreement to Parliament, Prime Minister Ponta
2 repeated that he would vote against the Draft Law his
3 Government just submitted. That happened on
4 October 31st. August 31st. Sorry.

5 This is a news article reporting what Prime
6 Minister Ponta said on August 31. "I will vote
7 against this project presented to Parliament which
8 shall decide if we will make such a project or we
9 reject it."

10 A few days later, on September 5th, 2013, the
11 Government confirmed the Project met all permitting
12 requirements but that the Parliament's decision would
13 be final. Let's hear again from Prime Minister Ponta
14 in his own words what he said.

15 (Video played.)
16

17 MR. LEW: Two days later, Minister of
18 Environment Plumb confirmed the Project met all
19 permitting requirements, but Parliament would decide
20 if the Environmental Permit were issued.

21 What follows are two news reports of Minister
22 of Environment Plumb confirming that the Project met

1 the permitting requirements. Go to the next slide.

2 But Ministry of Environment Plumb confirmed
3 in the second news article that Parliament would
4 decide if the permit were issued and that her vote in
5 Parliament would depend on her constituents' views.
6 Again, a dichotomy between the legal administrative
7 process that should have been followed and the
8 political one that was.

9 Despite meeting the requirements for the
10 Environmental Permit, as Prime Minister Ponta also
11 affirmed, the Project was effectively rejected two
12 days later by Romania's political leaders before
13 proceedings even began in Parliament, which began on
14 September 10th, first by co-leader of the governing
15 coalition, Senate President Crin Antonescu, and then
16 by Prime Minister Ponta.

17 In view of their announcements, Prime
18 Minister Ponta confirmed that Parliament would move
19 swiftly to reject the Draft Law and, therefore, in the
20 Government's view, the Project as well. This is
21 before the Draft Law even got a hearing before the
22 Senate Committees in Parliament.

1 Coalition Co-Leader Senator Antonescu and
2 leader of the Senate announced on September 9th that
3 the Project should be rejected, not for technical ones
4 but for political ones, including protests.

5 Let's hear from Senator Antonescu.

6 (Video played.)

7 MR. LEW: Let's now go and review a few
8 points reflected in the transcript of the interview
9 with Senator Antonescu to see why he decided not to
10 support the Special Law which also meant not
11 supporting the Project.

12 So, on the first slide he said: First, a
13 significant number of citizens do not trust that such
14 a project will be useful, that it will use the
15 resources of this nation for its benefit. That cannot
16 be ignored and is more important than a technical
17 data. Second, there's a huge amount of suspicion that
18 policy-makers in this action would not act in
19 accordance with legitimate public interests.

20 On the next slide he continues:

21 "Unfortunately, the top politicians have thrown
22 accusations that deepened or amplified this feeling.

1 I personally do not think any of the important
2 policy-makers--President, Prime Minister, other
3 leaders--are involved in a specific lobby of the Gold
4 Corporation company, that they were--with a very tough
5 word which, unfortunately, was used by these
6 politicians--bribed. Extremely serious accusations
7 were thrown, but the feeling that for most of the
8 Romanian public opinion, the suspicion that such a
9 thing might happen is a second very strong reason
10 which, in my opinion, requires the Project to be
11 stopped."

12 The next slide. "Third," said Senator
13 Antonescu, "it is a Government-initiated project, but
14 the Prime Minister tells us that he will vote against
15 it as a Parliamentarian." And, finally, "in terms of
16 the Environmental Permit...the Minister in charge
17 tells us whether or not"--it should be--"she will give
18 her approval depends on the outcome of the vote in
19 Parliament."

20 So, a purely politicized process, not one of
21 law. The same reasons identified by Senator Antonescu
22 to reject the Project are entirely consistent with

1 Dr. Boutilier's submission that the street protests
2 were primarily anti-Government, not anti-Project.

3 After Senator Antonescu's announcement, Prime
4 Minister Ponta, on September 9th, confirmed he would
5 ensure the swift rejection of the Draft Law, and the
6 Project, therefore, would not be done.

7 We're now going to see a number of videos to
8 hear from Prime Minister Ponta in his own words.

9 Let's play the first video.

10 (Video played.)

11 MR. LEW: So, basically, the political
12 leaders of the country had decided this was going to
13 be rejected before the proceedings even began. Prime
14 Minister Ponta was clear that the imminent rejection
15 of the Draft Law is a rejection of the Project, and
16 for that reason he'd have to find other solutions to
17 give people jobs and to get foreign investment.

18 Now, while in his arbitration Witness
19 Statement, Prime Minister Ponta says that he didn't
20 instruct anyone in Parliament to vote against the
21 Draft Law. Let's see what he said in 2013.

22 (Video played.)

1 MR. LEW: So, in this next video, we'll hear
2 Prime Minister Ponta explain the consequences of
3 rejecting the Project.

4 (Video played.)

5 MR. LEW: Now, as it was clear that a
6 Parliamentary majority so instructed now would reject
7 the Draft Law, Prime Minister Ponta sought to expedite
8 rejection of the Draft Law through a special emergency
9 procedure.

10 Before Prime Minister Ponta will begin to
11 speak in the next video we're going to play, the
12 President of the Chamber of Deputies, that guy
13 standing next to him, had just said that he instructed
14 the political parties in Parliament to prepare to
15 visit Rosia Montana as part of a Special Commission.
16 You'll hear Prime Minister Ponta say there's no point
17 to that, as there was already a majority to reject the
18 Law.

19 Let's hear from Prime Minister Ponta.

20 (Video played.)

21 MR. LEW: Okay. So, the next--oh, we're
22 going to take--we have another section. Okay.

1 So, the next topic we're going to address are
2 the 2013 protests following the submission of the
3 Draft Law to the Parliament.

4 So, the political calls to reject the Project
5 were made in the context of mass street protests in
6 Romania's urban centers in Bucharest and Cluj. The
7 protests began on Sunday, September 1, days after the
8 Government submitted the Draft Law to Parliament and
9 one day after Prime Minister Ponta publicly stated he
10 would vote against it.

11 Another mass protest took place on Sunday,
12 September 8th, the day before Romania's political
13 leaders called upon Parliament to reject the Project.

14 Here's what the September 8th protest in
15 Bucharest looked like.

16 (Video played.)

17 MR. LEW: Romania concedes that the protests
18 began as a reaction to the Government submitting a
19 Project-specific Draft Law to Parliament.

20 The Rejoinder states: As a result of the
21 Government's submission of the Rosia Montana Law to
22 Parliament, massive street protests ensued in

1 Bucharest and around the country.

2 Despite acknowledging the protests were a
3 reaction to the Draft Law, Romania argues that the
4 real motivation was to protest against the Project and
5 for the environment. The evidence, however, shows
6 that the protests were a manifestation of a
7 decades-long, post-communist movement in Romania
8 towards democracy and the rule of law and against
9 perceived political corruption and cronyism.

10 What brought the people to the streets was
11 anger at the perception that the Government was
12 captive to corporate interests and could not be
13 trusted to act in the public interest. The Rosia
14 Montana Law was just the latest and worst example of
15 what they disliked and feared. It was a revolution
16 that started with Rosia Montana, and it was against
17 the existing political class.

18 Now, if Romania's theory were correct and
19 these protests were against the Project, mass street
20 protests should have ensued when Project permitting
21 was far advanced and nearing completion. For example,
22 in December 2011 when we heard the Minister of

1 Environment say that the permit endorsement may be
2 issued within a month, or in July 2013 when the
3 Minister of Environment published conditions for the
4 Draft Permit.

5 But no large-scale protests took place in
6 response to either of those events. As Mr. Tanase
7 testifies, despite intense efforts by activists to
8 organize opposition as the permitting process neared
9 its completion, there were no large-scale protests or
10 demonstrations against the Project in 2011 or 2012.
11 The anti-Project protests and demonstrations in
12 2011/2012 were generally very small in scale, located
13 in university towns far from Rosia Montana, and
14 described as failures by their organizers.

15 Now, in fact, confirming the small-scale
16 protest activity that took place before submission of
17 the Draft Law to Parliament, Romania's own witness,
18 Mr. Jurca, describes 11 protests against the Project
19 from 2000 to 2012 that range from around 30 to over
20 100 people.

21 Now, Dr. Boutilier, in his opinion and
22 Report, demonstrates that the protests in 2013 shared

1 the same themes as other mass protests in Romania from
2 2010 to 2018. While some protestors were
3 pro-environment or anti-Project, the predominant
4 motivation was distrust of the Government and lack of
5 the rule of law.

6 As he says: As much or more anti-Government
7 protests as there were anti-Project. The protests
8 were a manifestation of the broad anticorruption
9 social movement that formed part of the ongoing
10 post-Communist transition to democracy and the rule of
11 law in Romania and elsewhere in Eastern and Central
12 Europe.

13 Now, the contemporaneous published research
14 of Romania's expert, Dr. Stoica, reached, essentially,
15 the same conclusion as did Dr. Boutilier.

16 Protest videos submitted by Romania also show
17 countless examples of anti-Government,
18 anti-corruption, and anti-system themed posters and
19 signs targeting Romania's political leaders. We've
20 captured some screenshots from some of the largest
21 banners and signs from the protests. And their
22 message is clear.

1 Let's look at some of them.

2 Here's the first one. "Goldcorp = Government
3 corruption." That's from Bucharest.

4 Here's from Cluj. "Government of treason has
5 put an end to patience." "Revolution starts in Rosia
6 Montana."

7 Here's another one, on September 8, in
8 Bucharest. "We don't trust our GOLDvernment."

9 September 15 in Bucharest. "Break the circle
10 in the streets," "Lying mass media, ignorant people,
11 corrupt politicians," and "All Romanians against
12 treason."

13 Here's another one from Bucharest in
14 September. "The Romanian press is full of lies." And
15 then having signs about Mr. Ponta, Mr. Ponta and
16 Mr. Sova, and also about capitalism.

17 Now, Romania's President, Mr. Basescu, was
18 asked about these protests during a nationally
19 televised interview on September 29, 2013. During the
20 interview, President Basescu strongly criticized the
21 Government for trying to transfer executive
22 responsibility for deciding the Project permitting and

1 approval from the Government to Parliament.

2 A reporter asked, "Who should make the final
3 decision in this matter?"

4 President Basescu said, "The Government.
5 This is one of the biggest mistakes of the Government,
6 trying to transfer an executive responsibility to the
7 Parliament."

8 Now, let's hear further from President
9 Basescu himself, what he said on September 29th.

10 (Video played.)

11 MR. LEW: It's clear that the submission of
12 the Draft Law demanded by the Government specially for
13 Rosia Montana sparked the protests. Senator Antonescu
14 actually admitted that the common theme of the
15 protests was dissatisfaction, distrust, and suspicion
16 of Government.

17 Let's hear from Senator Antonescu himself.

18 (Video played.)

19 MR. LEW: So, Senate committees held hearings
20 on the Draft Law on September 10th, one day after
21 Senator Antonescu and Prime Minister had called for
22 its swift rejection.

1 Now, the Tribunal ordered Romania to produce
2 transcripts of those hearings, but none were
3 forthcoming. Although the Minister of Environment,
4 Minister of Culture, and other senior officials
5 uniformly testified, as reported in the press, that
6 the Project met applicable permitting requirements,
7 the Senate committees heeded the political call from
8 Senator Antonescu and Prime Minister Ponta to reject
9 the Draft Law in unanimous votes later that day.

10 Minister Plumb's testimony reflected the
11 clear dichotomy between the merits-based review of the
12 Project required by law and the political process
13 unfolding in Parliament.

14 As to the merits of the Project, Minister
15 Plumb reportedly testified about thousands of pages of
16 studies showing no danger of cyanide infiltration;
17 that no other technology in the world could be used to
18 process the ore at Rosia Montana except the cyanide
19 processing; that mandatory standards and conditions
20 were imposed in the current law and will be found in
21 the integrative Environmental Permit; that the Project
22 complied with all mandatory requirements of European

1 law; and that the technology employed bears the lowest
2 risks.

3 She further testified, however, that the
4 permit would only be issued if Parliament approved the
5 Draft Law. And she agreed with Prime Minister Ponta,
6 that both Chambers of Parliament should swiftly reject
7 it.

8 Now, here are some--let me go through some of
9 these news reports pretty quickly.

10 Here's a news report of Minister Plumb's
11 testimony that the Project met permitting
12 requirements. The next one is a news report of
13 Minister Plumb's testimony that the Ministry of
14 Environment would only issue the permit if Parliament
15 adopted the Draft Law.

16 And then, after testifying the Project met
17 the permitting requirements and Parliament would
18 decide, she agreed with Prime Minister Ponta that
19 Parliament should reject the Law.

20 Now, as these events were unfolding in
21 Bucharest on September 10th, things were not going
22 well in Rosia Montana. This news was not

1 well-received, where the vast, vast majority of people
2 strongly and passionately supported this Project.

3 In response to the protests in Bucharest and
4 Cluj, the local communities held their own protests in
5 support of the Project. These are photos from
6 protests in Rosia Montana in support of the Project.

7 Especially after the Senate committees voted
8 to reject the Draft Law on September 10th, there was a
9 feeling of desperation in the local communities, that
10 their voices were not being heard.

11 On September 11th, the day after the Senate
12 committees voted politically to reject the Draft Law,
13 miners in Rosia Montana began protesting underground.
14 And Prime Minister Ponta, as we'll see, admitted on
15 national television that Romania was nationalizing the
16 resources.

17 Let's look at a few videos. The first clip
18 we're going to show you shows Prime Minister Ponta
19 acknowledges again that his Government and earlier
20 Governments were obligated to permit the Project under
21 the procedures established by law and that he sent the
22 Draft Law to Parliament because he didn't want to take

1 that decision.

2 Let's hear what he had to say.

3 (Video played.)

4 MR. LEW: Now, this also actually shows, with
5 the discussion about the permit, that the Government
6 officials considered that the Project would be
7 implemented after the Environmental Permit was issued
8 because, obviously, the Environmental Permit is the
9 largest and most significant inflection point in any
10 major infrastructure project, including mining.

11 So, this was a highly significant permit that
12 should have been issued.

13 Let's look at the next slide from--sorry--the
14 next video from the same interview of Prime Minister
15 Ponta where he will discuss nationalizing the
16 resources.

17 (Video played.)

18 MR. LEW: I mean--so, he's basically
19 acknowledging that by acting in disregard of Gabriel's
20 acquired rights by not permitting the Project, as the
21 Law required, the State was effectively nationalizing
22 those resources.

1 So, in this last clip, you're going to see
2 protests taking place in Rosia Montana. It's a very
3 tense situation. The media are interviewing Cristian
4 Albu, who is the leader of the Mining Union, about the
5 miners who went underground to protest the treatment
6 that this Project was receiving by Romania's leaders.

7 After watching this live video feed of the
8 protesters, Prime Minister Ponta candidly states again
9 the reality that if Parliament reject the Project, it
10 will not be done.

11 Let's watch the video.

12 (Video played.)

13 MR. LEW: So, these 30 miners stayed
14 underground in protest for the next four days. During
15 that time, other Ministers acknowledged that the
16 Project met the permitting requirements but, as
17 Members of Parliament, they might vote against the
18 Draft Law based on the views of their Political
19 Parties.

20 Let's see what they said, starting with
21 Minister Sova. Let's go to the next slide.

22 (Video played.)

1 MR. LEW: Reflecting that same dichotomy
2 between law and politics, the Minister of Culture also
3 said that he supported the Project's technical merit
4 but would vote against it if his Political Party's
5 position were to do so.

6 The next slide is a news report of the
7 Minister of Culture, Daniel Barbu, saying: "I will
8 vote against it. From the technical standpoint, I
9 subscribed to this agreement. And I'm convinced that
10 on the heritage side the Project is absolutely fine.
11 None of the national laws or international provisions
12 on best practices for the preservation of heritage
13 will be violated as long as the PNL"--his
14 Party's--"official position is to vote against, I will
15 vote against."

16 On September 15th, two days later, Prime
17 Minister Ponta convinced the miners to end their
18 underground protest by promising to set up in
19 Parliament a Special Commission that days earlier he
20 had said would be pointless because the political
21 leaders had already decided that the Law would be
22 rejected.

1 Let's look at a couple of statements from
2 Prime Minister Ponta.

3 Before--on this video, Prime Minister Ponta
4 is on the phone from Rosia Montana where he met with
5 the miners who were protesting underground. I think
6 this was day five of their underground protest.

7 Let's hear from Prime Minister Ponta by
8 telephone.

9 (Video played.)

10 MR. LEW: I think it's clear that these
11 people, this Project, this investor deserved better
12 than the Government gave them.

13 Here is another phone interview of Prime
14 Minister Ponta that same day, about his being in Rosia
15 Montana to end the miners' underground protest.

16 Let's hear from Prime Minister Ponta.

17 (Video played.)

18 MR. LEW: So, on September 17th, 2013,
19 Parliament established a Special Commission to examine
20 the Draft Law and prepare a report.

21 The Commission held hearings from
22 September 23 to October 15 that were open to the

1 public and broadcast on national TV. Like the Senate
2 committees that preceded it, however, the Special
3 Commission ignored a veritable parade of positive
4 testimony by senior government officials, endorsing
5 the merits of the Project and, instead, followed
6 political rejections--political directions--excuse
7 me--to reject the Draft Law.

8 I mean, these proceedings were pure political
9 theater, nothing more, because the political leaders
10 had already decided that the Law would be rejected.

11 The next slide shows the parade of senior
12 Government officials who did--and relevant from
13 agencies and ministries--testified to the Special
14 Commission endorsing the Project's merits. The
15 testimony of the Minister of Culture, Mr. Barbu, and
16 Minister of Environment, Mrs. Plumb, is illustrative
17 of the Government's assessment and endorsement of the
18 Project's merits before the Special Commission.

19 Minister of Culture Barbu testified on
20 September 23rd that the Project benefits were great,
21 especially in preserving national heritage, which the
22 State did not have the funds to protect.

1 The next slide is an excerpt from his
2 testimony before the Special Commission, basically
3 saying what I just said, which is that the benefits
4 were great and that without the company to invest in
5 the national heritage in Rosia Montana, the State does
6 not have the funds to protect them.

7 Minister of Environment Plumb testified that
8 the Project safely addressed all of the key issues and
9 met all applicable requirements for the Environmental
10 Permit. Her testimony, an excerpt of it, is on the
11 next slide.

12 She said that the Project safely addressed
13 the use and transport of cyanide with maximum safety
14 and beyond the strict EU requirements.

15 Next slide.

16 She further testified that the Project
17 complied with the International Cyanide Management
18 Code, had enhanced safety measures for the Tailings
19 Management Facility, including in extreme seismic or
20 weather conditions.

21 The Ministry of Environment official and TAC
22 Vice President, Octavian Patrascu, also testified that

1 the Tailings Management Facility design and location
2 were determined based on rigorous analysis and were
3 safe.

4 Minister Plumb concluded that the entire team
5 in the Ministry of Environment was sure it had secured
6 all conditions for environmental protection. And
7 notably, the Draft Law that was sent to Parliament did
8 not impose any obligations on Gabriel or RMGC that it
9 had not already agreed to accept in implementing the
10 Project.

11 Now, on October 5th, Prime Minister Ponta
12 stated that if the Project were not done, he would
13 explain to other investors that only this Project was
14 rejected on a political criterion. Let's hear from
15 Prime Minister Ponta again on October 5th.

16 (Video played.)

17 MR. LEW: In the next slide we'll hear from
18 Prime Minister Ponta what his plan B is if Parliament
19 rejects the Project.

20 (Video played.)

21 MR. LEW: On October 18th Minister Plumb
22 submitted written testimony to the Special Commission,

1 confirming that the Project met the strictest
2 standards, but the Environmental Permit would only be
3 issued if Parliament approved the Draft Law.

4 Minister Plumb--on the next slide there's an
5 excerpt of her written statements--confirmed that the
6 Project met the strictest standards demanded by the
7 European legislation.

8 Here's another excerpt of her written
9 statement testimony. Minister Plumb reiterated,
10 however, that the Government did not want to make a
11 decision and the Environmental Permit, therefore, will
12 only be issued provided Parliament approves the Draft
13 Law. The decision thus rests with the Parliament of
14 Romania.

15 Now, Romania asks the Tribunal to believe
16 that every member of Parliament independently decided
17 to vote against the Draft Law, but, of course, we know
18 that's not what happened.

19 Before the vote--first vote was cast, the two
20 coalition co-leaders, Mr. Ponta and Mr. Antonescu,
21 held a joint press conference and called for the Draft
22 Law's rejection.

1 Let's hear first from Senator Antonescu.

2 (Video played.)

3 MR. LEW: So, first, we see Senate President
4 Antonescu announce that the Special Commission, in
5 breathing its last breath of life, will reject the
6 Draft Law that evening.

7 Let's hear next from Prime Minister Ponta.

8 We'll see that, when asked if all of the
9 members of his Party in Parliament will vote against
10 the Draft Law, he says that the common position of the
11 ruling coalition is to reject the Law.

12 Let's hear from him.

13 (Video played.)

14 MR. LEW: Let's hear from Prime Minister
15 Ponta some more.

16 (Video played.)

17 MR. LEW: So, Prime Minister Ponta confirmed
18 the political rejection of the Special Law by the
19 Special Commission would be replicated in the full
20 Parliament because he and Senator Antonescu had
21 arranged it politically.

22 So, the Special Commission, and later

1 Parliament as a whole, heeded the political calls of
2 their leaders, Senator Antonescu and Prime Minister
3 Ponta, to reject the Draft Law.

4 On the night of their joint press conference
5 that we just saw, the Special Commission voted 17 to
6 0, with two abstentions, to reject the Draft Law. The
7 Senate voted to reject the Draft Law on November 19th,
8 119 to 3, with six abstentions. The Chamber of
9 Deputies did so as well, later in June 2014, 302 to 1.

10 And despite testifying in favor of the
11 Project, Minister Plumb, Minister Barbu, and Minister
12 Sova all refused to vote for the Draft Law as Members
13 of Parliament.

14 One day after the Special Commission voted to
15 reject the Draft Law, Minister Plumb confirmed that
16 the Environmental Permit would not be issued, "as
17 Parliament's decision means the last word for us, and
18 we will observe it."

19 Here's a transcript, on the next slide, of an
20 interview of Minister of Environment Plumb. She said:
21 "Of course Parliament's decision means the last word
22 for us, and we will observe it. The Ministry of

1 Environment role in this draft bill was to have set
2 the highest environmental standards to protect people,
3 to mitigate the risks of such an investment, fully
4 observing all the European and international criteria
5 and standards for this type of investment."

6 What they didn't observe was Romanian Law.
7 Nearly a year later, Prime Minister Ponta confirmed
8 the Project would not be done as a result of
9 Parliament's rejection of the Draft Law. He was
10 interviewed in October 2014.

11 Let's listen to what he said.

12 (Video played.)

13 MR. LEW: We're done with that section.

14 ARBITRATOR GRIGERA NAÓN: May I ask you a
15 question?

16 If all of these demonstrations were not
17 against the mining project and the message that I
18 think you're conveying to us is that what happened in
19 Romania was the consequence of a political
20 determination, which were those political reasons that
21 were so powerful to prompt a political party to,
22 apparently, do things against what some of their

1 members were saying was correct, ministers and all
2 that?

3 MR. LEW: I think Ms. Smutny addressed that
4 earlier. And I'll let her explain.

5 MS. COHEN SMUTNY: What had occurred--and
6 this is reflected in the record--is for such a long
7 time, the politicians are accusing each other of
8 corruptly supporting this Project. So, this Project
9 gained this reputation as being only promoted via
10 corruption. It becomes toxic for the politicians to
11 support it. And this is the reason why it ultimately
12 falls and fails.

13 And the record reflects this. There are a
14 lot of examples in the record of what was said back
15 and forth among the politicians about each other, this
16 one taking a bribe, that one taking a bribe. It can
17 only be promoted--the only reason why this project is
18 supported is because politicians are being paid by the
19 Goldcorp.

20 This is said so many times that this thing
21 becomes politically toxic. And this is why there
22 needed to be a special law. But then the Special Law

1 itself is a toxic mess and results in all of this
2 protest.

3 So, notwithstanding the fact that this was a
4 very good Project, the politicians had made it
5 impossible to support it. And that's the sad reality.

6 MR. LEW: I think, as Ms. Smutny said in her
7 opening remarks today, you know, Prime Minister Ponta
8 had campaigned, when in opposition, against the
9 Project. He called out his political opponents as
10 being in the pocket of the company. And he could not
11 politically get in front of the Project and have his
12 Government approve it.

13 So, he came up with this artifice of a
14 special law that was going to be, sort of, for him, a
15 permit by proxy, but, instead--if the Parliament
16 wanted it, and if the Parliament didn't, that was
17 fine--at bottom, what he did is, rather than follow
18 the Law, he basically sent the Project into the Roman
19 forum for a thumbs up or thumbs down, and then ensured
20 that outcome politically.

21 ARBITRATOR DOUGLAS: Again, returning to the
22 question. We know with the benefit of hindsight that

1 this Project hasn't happened for anyone. So, it's not
2 as if it was blocked, given to a competitor, and the
3 competitor went off and made a fortune. It hasn't
4 happened for anyone.

5 So, when he submitted the Project to
6 Parliament and Parliament ultimately rejected it, is
7 there any possible deduction as to the rationale for
8 that rejection, other than there was no popular
9 support for--not sufficient popular support for that
10 Project? In other words, the politicians couldn't
11 carry it because they didn't have the people behind
12 them?

13 MS. COHEN SMUTNY: Well, again, I think--and
14 I think during the course of this hearing we'll see
15 more of it--there had been so much tarnishing of the
16 image of the Project that, at least among the
17 politicians, they couldn't support it, and then people
18 didn't trust the way it was being promoted.

19 I want to remind that, you know, in 2011,
20 when the negotiations seemed to be about economics,
21 and it appeared that the Parties were close to
22 reaching an agreement--it appears this way--and there

1 are public announcements about how--and it's on
2 television, you saw--and people see that this Project
3 is maybe going to be permitted, one does not see this
4 overwhelming protest.

5 The protests are about this corrupt deal,
6 which seems to be the perception, that there's a
7 corrupt deal, and this is how we're going to decide.

8 So, it was really botched, if you will.

9 ARBITRATOR DOUGLAS: If the perception was
10 that it was a corrupt deal, wouldn't it have made it
11 worse to have done it at a ministerial level? In
12 other words, if there's a bad perception of the deal,
13 doesn't it alleviate the problem to some extent by
14 putting it to the highest representative body of the
15 Constitution, which is the Parliament?

16 Wouldn't it have been worse if, in a sense,
17 it was kept behind closed doors and the public wasn't
18 allowed access to that forum to voice its views?

19 MS. COHEN SMUTNY: Yeah. I mean, I think one
20 needs to look at what was happening in 2011. And it
21 didn't seem that that was the situation. It seems
22 like, you know, what you see is a series of many

1 public statements: Economically this is no good for
2 the State. Economically, it's no good for the State,
3 but, look, we negotiated a deal.

4 And it didn't appear that there was any kind
5 of resistance to that. So, at that level, things
6 maybe could have worked out ultimately. Although,
7 frankly, you know, Gabriel wasn't being given a
8 choice. But, you know, that's where they were then.

9 What happens in 2013 is this explosion of the
10 corruption theme. And at some point, perhaps, it was
11 too late. It became just a toxic mess at that point
12 because it--because it was--there was a greater
13 intensity, I mean, during this campaign, including the
14 political campaign that leads to Ponta's election.

15 The accusations about the Project and the
16 corruption are well detailed in the record. And so,
17 at that point it had really been set up as a mess.
18 So, the theme of corruption, perhaps at that point,
19 could not be avoided. And perhaps there was no way
20 out after what they had done with accusing each other
21 of--everyone was taking bribes from Gold Corporation.
22 They were all saying this back and forth to each

1 other. And these were major statements.

2 So, at that point, perhaps going to
3 Parliament or not going to Parliament--I'm not sure it
4 would have made a difference.

5 ARBITRATOR DOUGLAS: Perhaps at some
6 point--I'm sure we'll come back to it--but it would be
7 useful to have a bit more precision on exactly what
8 the illicit act is in this chain of events, from the
9 Claimants' point of view.

10 Because submitting something to Parliament
11 because you're coming from a position of weakness
12 because you don't have popular support--you know, the
13 Chairman is familiar with a certain country where
14 every time a politician needs to make a decision, they
15 call a referendum, so we have referendums every two
16 weeks about whether we should build a bridge or take
17 away a garbage collection two times a week or one time
18 a week.

19 So, this is something that is part of
20 deliberate Democratic process in some countries. It
21 wouldn't necessarily be a problem, per se, to submit
22 it to a representative organ for a final decision.

1 MS. COHEN SMUTNY: Well, we'll talk about
2 that, actually, a little bit more in the material that
3 we have remaining. But the short answer, which I want
4 to give you now, what is wrongful here is deciding
5 whether to issue permit or not through a political
6 assessment.

7 And if there was a decision taken at some
8 point that there needs to be a political assessment
9 about this Project, there needs, then, to be
10 transparent, open, due process. And, you know, if you
11 say, "Oh, we should have a decision by Parliament"--I
12 mean, what was going on here--and it's expressly
13 admitted--is an outright expropriation.

14 But it's not acknowledged--well, I mean, he
15 acknowledged it on television, but there's no
16 discussion. There's no calling up the investor,
17 "Let's sit down. Look, we can't do this project.
18 Let's negotiate compensation."

19 That's not what happened. There's actually
20 argument in this Arbitration that, "No, it's still
21 open."

22 ARBITRATOR DOUGLAS: I thought that's, in a

1 way, where you're getting in the end, that effectively
2 the fact that Parliament voted down--blocked the
3 Project, canceled the Project.

4 And I was sort of beginning to understand
5 your case to be, well, it's the failure to accept that
6 reality, which is the bridge--but I may be wrong in
7 interpreting your position--rather than the decision,
8 per se, to refer it to Parliament.

9 MS. COHEN SMUTNY: Yeah. The decision--well,
10 there should never be a--well, if you want to say
11 there's a decision to refer to Parliament, what is
12 that decision? That decision is whether we're going
13 to expropriate the Project or not. That's not really
14 a decision about whether we're going to issue an
15 environmental permit.

16 So, that's the lack of transparency, the lack
17 of due process. But what is the wrongful act here is
18 taking an administrative legal process--do we give an
19 Environmental Permit?--taking it out of the legal
20 context and putting it into the political world.

21 And it gets beaten about for a while until we
22 see what the political decision is going to be. At

1 the end it turns out the political decision was no.

2 So, the unlawful act is deciding, "We're
3 going to switch tracks. We're not going to proceed
4 legally. We're going to proceed politically. What's
5 going to be the result? We'll have to see what
6 happens politically, the political result one sees at
7 the end of 2013."

8 So, that's the process, is that subjecting it
9 to the political roller coaster rather than the legal
10 train that it was--that it was on.

11 ARBITRATOR DOUGLAS: Just one last thought.

12 MS. COHEN SMUTNY: Yeah.

13 ARBITRATOR DOUGLAS: If I understand the
14 sequence of events, at least on your case, the
15 Government announced that it wasn't going to support
16 the Draft Law. It then submits the Draft Law, and
17 then the protests follow.

18 That's your sequence, I think, isn't it?

19 MR. LEW: I didn't hear the first--the
20 first--

21 ARBITRATOR DOUGLAS: The first part was that
22 the Prime Minister and others said before they

1 submitted the Draft Law, they wouldn't support the
2 Draft Law. Then the Draft Law is submitted. Then the
3 protests come.

4 That's your sequence, I think, isn't it?

5 MR. LEW: So, we talked about the reason for
6 the Special Law and Prime Minister Ponta's political
7 reasons for that. He then pretty consistently says,
8 "I'm not going to vote for this."

9 But the Government submits it to Parliament.
10 There's a reasoned substantiation note sending the Law
11 to Parliament.

12 And then once the Law goes to Parliament, the
13 protests start. And before the Law is even given a
14 hearing in Parliament, they're calling on it
15 politically to reject it.

16 And I think one of the, perhaps, premises
17 that I don't agree with is that there wasn't
18 sufficient popular support for the Project. I think
19 Senator Antonescu and Dr. Boutilier outline quite well
20 what brought people into the streets. And I think it
21 would be mistaken to equate that with some
22 anti-Project--if you think of it as an animus or

1 position. I think it's for the reasons they said.

2 I mean, you have a Government refusing to
3 follow the Law, you have a Prime Minister--both
4 submitting a law to Parliament and then saying he's
5 not going to vote on it. He has the classic one foot
6 on the boat and one foot on the dock.

7 You have the Minister of Environment saying,
8 "Hey, this thing should get permitted, but we're going
9 to let Parliament decide." I mean, that does not
10 engender confidence in one's governing institutions as
11 a citizen of Romania. So...

12 ARBITRATOR DOUGLAS: Is there not a
13 connection, though, with at least the perception that
14 they may have voted for the law? Because otherwise
15 why turn out and protest against the Law?

16 I mean, perhaps on the streets there's a
17 perception that actually this could go through, and we
18 had better take to the streets to make sure it
19 doesn't.

20 I mean, why else would you hit the streets?

21 MS. COHEN SMUTNY: Well, again, you cannot
22 overlook the couple of years and, in particular,

1 leading to the Government that is elected in 2012,
2 that these politicians, the very senior politicians,
3 are consistently accusing each other of taking bribes
4 from this company.

5 And Ponta had campaigned on a platform of
6 being against this Project. And so, then he comes
7 into office and perhaps realizes that this Project is
8 going to be lawful. I can't support it because he has
9 a particular political position that he has identified
10 with.

11 So, again, that corrupt theme is what really
12 throws everything into what we see in 2013. And you
13 really just need to contrast that with what's
14 happening through the end of 2011. And one just sees
15 nothing like this.

16 MR. LEW: And I think the other thing to keep
17 in mind here is that if this were really anti-Project
18 and people were afraid the Project was going to go
19 into effect, they would have been in the streets when
20 the Minister of Environment said, "Hey, we're a month
21 away," in December 2011, or when--in July 2013, the
22 Ministry of Environment published the conditions.

1 I mean, they're, like, that close to issuing
2 the permit. If this were anti-Project, those people
3 you saw in September would have been in the streets in
4 July.

5 And so, I think we need to keep that in mind
6 as we hear about what the origin and cause of these
7 protests is. Empirically, it didn't happen the way it
8 would have happened if the protests were anti-Project.

9 ARBITRATOR DOUGLAS: Presumably, they weren't
10 calling for the Law to be passed, though, at that
11 point in time.

12 MR. LEW: No. They were out protesting. As
13 we saw, they were outraged at what the Government was
14 doing. I mean, you wouldn't have had that outrage if
15 the Government just followed the Law. But it didn't.
16 It was a bit of a circus.

17 PRESIDENT TERCIER: I have one question at
18 this juncture.

19 You mentioned several times that one of the
20 main difficulties was the question of corruption,
21 because they were accusing. It didn't appear so much
22 in what we've seen until now in the protests.

1 I remember, you know, you have the protests,
2 corruption, and capitalism. But otherwise the reason
3 given by Mr. Ponta, by all these officials,
4 never--okay. Probably they cannot just tell it
5 officially. But they are always going through the,
6 sort of, in interest of the State, in order to find
7 better conditions. They always give a reason that
8 could be--if it's legal or not is another question.
9 But they always give an explanation that it's much
10 more based on the interest of the State.

11 MS. COHEN SMUTNY: Well, once they're in
12 office, then this is what he says. Before he's in
13 office, the statements are: The only reason this
14 Project is being supported is because politicians have
15 been bought.

16 I mean, when they're out of office, these
17 same politicians were accusing this company of buying
18 support. So, there's this corruption theme. Once
19 they're in office, they're saying something different
20 because they're trying to be, one might say,
21 responsible politicians.

22 And, I think, again, as the course of this

1 hearing goes on, you'll see more of those contrasting
2 statements and who was saying what at what time.

3 PRESIDENT TERCIER: Okay. Do you have a
4 question on the other side? No?

5 I suggest to have now a break.

6 MR. LEW: Thank you.

7 PRESIDENT TERCIER: 15 minutes, and we will
8 continue then.

9 (Brief recess.)

10 PRESIDENT TERCIER: I suggest we proceed.

11 Dr. Heiskanen, you have a point that you
12 would like to raise?

13 DR. HEISKANEN: Yes. We discussed in the
14 morning the page limit for the rebuttal documents.

15 The Tribunal made a very clear ruling I
16 believe on the 25th of November that it was a 100 page
17 limit for any rebuttal documents to be produced by
18 either Party. The Claimants wrote to the Tribunal
19 yesterday asking effectively the Respondent to confirm
20 that the untranslated portions, the Romanian-language
21 portions of the Respondent's rebuttal documents will
22 not be used or referenced during the Hearing. That is

1 indeed the case. The Respondent intends to refer only
2 to the 100 pages that were translated and for which
3 there is also a Romanian language version, but the
4 untranslated portions of the Respondent's rebuttal
5 documents that are only in Romanian will not be
6 referred to or relied upon in this Hearing, so we are
7 happy to confirm that, so both Parties comply, and we
8 understand that the Claimants accept that the
9 Respondents on this condition, on this understanding
10 the Respondent's submission of rebuttal documents also
11 complies with the Tribunal's ruling.

12 There was a new suggestion this morning by
13 the Claimants that both Parties should be allowed to
14 go beyond this documentation that is covered by the
15 100 pages. That was a new suggestion, so we wanted to
16 confer on that issue, and we are not prepared to
17 accept it, and our position is that both Parties
18 should follow the Tribunal's ruling, stick to the 100
19 page limit and only use the documents that the
20 Tribunal has allowed and that have been produced by
21 the Parties in compliance with the Tribunal's
22 decision. There should be no reference to any

1 documentation that is outside the 100 page limit.

2 MR. GREENWALD: I think just to clarify on
3 that point, Mr. President.

4 So, these additional untranslated pages, what
5 we were saying earlier is Romania submitted complete
6 documents, and then translated excerpts, whereas we
7 took our documents and submitted an excerpt in both
8 the Romanian version and in a matching translation in
9 English, and so, if their documentation is to be
10 allowed beyond the 100 pages of the Romanian, even if
11 not relied upon, only the English 100 pages are to be
12 relied upon, but they're allowed to submit the
13 complete version of that document in its original form
14 to have it in the record, even though not to be used
15 just to show that it's a complete document and not an
16 incomplete excerpt, then we would want our documents
17 to be treated the same way, so that where we had
18 e-mails with an attachment and we put in only two
19 pages out of a 10-page document, the whole 10 pages in
20 Romanian would go in, and then only the translation
21 that we've already provided that adds up to 100 pages
22 would be in, and we wouldn't refer to the other pages

1 that have not been translated, but the whole document
2 would be in.

3 PRESIDENT TERCIER: But it does not change
4 the fact that only the translated part of the
5 documents that were submitted may be used in the
6 opening or in the Hearing?

7 MR. GREENWALD: Absolutely correct. Our
8 hundred pages would not change.

9 DR. HEISKANEN: I don't see the point in
10 admitting into record documents that will not be used.
11 We are just confirming that the Respondent does not
12 intend to rely on these untranslated portions. They
13 were simply produced for the purpose of showing--for
14 the purpose of avoiding splitting these documents and
15 cutting these documents. That's the only reason for
16 it.

17 PRESIDENT TERCIER: Okay.

18 MR. GREENWALD: What we're also saying is
19 that we did split and cut our documents, so we would
20 put in our original language in the complete form--you
21 know, it should be the same. Either only the excerpts
22 should go in for both Parties or the complete version

1 in the original language excerpted translation that's
2 to be relied upon.

3 PRESIDENT TERCIER: Okay. At this stage,
4 where we are--I think we are in agreement that only
5 the translated part will be used; depending now where
6 they are in the 150 or not, with the original, "yes"
7 or "no," does not matter. Okay?

8 DR. HEISKANEN: Well, the Respondent's 100
9 page limit includes English as well as Romanian of the
10 documents that have been translated into English. We
11 are only talking about documents that are not
12 translated.

13 PRESIDENT TERCIER: Yes, but on the other
14 side, you have also 100 pages based only--over the
15 translation.

16 MR. GREENWALD: Correct. We have 100
17 pages--we have 100 pages, and so--

18 PRESIDENT TERCIER: And you have more?

19 MR. GREENWALD: Correct. They have 150, that
20 they're not relying on 50--

21 PRESIDENT TERCIER: I see.

22 MR. GREENWALD: --saying they're not

1 relevant, but they're part of the complete document.

2 We would have the same thing.

3 PRESIDENT TERCIER: Okay. Good. I think now
4 we are really playing a little bit fine-tune. Good.

5 And another point, okay--no. Let's now first
6 have the opening, and at the end we will have a few
7 points to clarify.

8 Please.

9 MS. COHEN SMUTNY: Okay. I'm going to speak
10 about the events following Parliament's rejection of
11 the Special Law. Following Parliament's rejection of
12 the Draft Law, the Government acted consistent with
13 its Decision that the Project would not be done. The
14 Ministry of Environment convened a number of TAC
15 meetings. These were really just sham meetings
16 purportedly to follow up on parliamentary
17 recommendations. Of course, nothing serious was done
18 in relation to those TAC meetings.

19 Minvest stopped cooperating as Shareholder in
20 recapitalizing RMGC and refused to contribute to
21 maintaining RMGC's Share Capital.

22 NAMR refused to issue Exploitation Licenses

1 to RMGC for the Bucium deposits. The State's Fiscal
2 Authorities launched retaliatory and abusive so-called
3 "antifraud" investigations, which are still going on
4 today, more than six years later, with no apparent end
5 in sight. The Government proposed also a moratorium
6 of 10 years on the use of cyanide expressly aimed at
7 the Project.

8 I'm going to make a few observations now on
9 the developments relating to cultural heritage
10 following the permitting blockage, which started in
11 2011 and thereafter, the overview of which is the
12 following:

13 When starting in 2011, the State took steps
14 to block Project permitting; the culture authorities
15 also failed to take actions that were due. Those
16 failures facilitated certain NGO court challenges,
17 particularly against the urbanism plan requiring
18 approval for the construction permitting of the
19 Project. Following Parliament's rejection of the
20 Special Law, the State culture authorities took steps
21 to undermine earlier decisions that had been made
22 based on the research that had been funded by Gabriel

1 and RMGC that had earlier cleared the way for mining
2 in Rosia Montana.

3 And after this arbitration commenced, the
4 State took steps to declare the entire Project area as
5 an historical monument where no mining would be
6 permitted and to apply for its listing as a UNESCO
7 World Heritage site, which Application renders, even
8 the Application itself, renders any mining in the area
9 of the Project legally impermissible.

10 Just to refer back now to that list of
11 historic monuments, in 2010, the 2010 LHM was issued
12 by the Ministry of Culture in July of that year. It
13 was published in the Official Gazette actually of
14 October of that year. There were some significant
15 differences from the 2004 LHM. Those differences were
16 relating to Orlea and Cârnic. For Orlea, the
17 so-called address was changed to say "the entire
18 locality within a two kilometer radius," and for
19 Cârnic, it was changed to list all the mining
20 galleries in the Cârnic Massif, including so-called
21 medieval and modern era galleries, which had never
22 previously been identified as historical monuments.

1 Go to the next. This is a schematic from the
2 record which shows what that two kilometer radius
3 looks like over that series of ADCs you had seen
4 earlier.

5 The 2010 LHM was unjustified as it included
6 significant areas that were subject to ADCs. There
7 was no new archeological research in the meantime, and
8 there was no new classification orders that would
9 justify or support these changes. Correspondence in
10 the record, a series of letters referenced here,
11 there's extension--it shows--this series of
12 correspondence shows that 2010 LHM listing for Orlea
13 was due to apparently a software error.

14 And extensive correspondence between the
15 local Alba County culture authorities and the National
16 Authorities regarding the descriptions in the 2010 LHM
17 confirm that the entries were considered to have been
18 made in error. And RMGC at first reasonably concluded
19 that those errors would be corrected.

20 The removal of Cârnic from the 2010 LHM was
21 politically blocked starting in 2011. Just to remind
22 the status, initially in 2004, an ADC for Cârnic had

1 been annulled--well, going back to 2008. That 2004
2 ADC for Cârnic had been annulled in December 2008
3 following an NGO challenge. At that time, you may
4 recall the EIA process had been suspended. RMGC--and
5 it was recommenced in the middle of 2010. RMGC
6 submitted an Application for a renewed ADC in June of
7 2010 when that EIA process was ready to be resumed.

8 The renewed Application was fully supported
9 again by the lead experts who had conducted the
10 research, Dr. Damian and Dr. Cauuet, but it became
11 clear after some time that the Ministry of Culture was
12 not acting on the Application. The Ministry of
13 Culture made clear to Gabriel and RMGC that it wanted
14 more investment in culture. This led to the
15 Cooperation Protocol signed on July 15, 2011, between
16 RMGC and the NIH for further investment by Gabriel of
17 approximately \$70 million in culture, and the second
18 ADC was issued essentially at the same time in
19 July 2011.

20 In July 2011 at that time, Minister of
21 Culture Kelemen Hunor publicly stated that when the
22 second Cârnic ADC was about to be issued at that time,

1 he said that the Cârnic Massif would be removed from
2 the 2010 LHM if the ADC was issued. This is quoting
3 from a news article.

4 A few weeks later, as Prime Minister Boc made
5 clear that permitting for the Project would not
6 proceed until the Project economics were renegotiated,
7 the Minister of Culture Hunor likewise made clear that
8 Cârnic also would not be declassified until
9 renegotiations took place, and this is, indeed, what
10 occurred, and so at this time although there was the
11 basis to remove Cârnic from the 2010 LHM, and although
12 Orlea had been described in error, nothing on the 2010
13 LHM, was in fact changed.

14 NGOs then relied on the Orlea and Cârnic
15 listing on the 2010 LHM to seek annulment of the
16 so-called "SEA endorsement," that's Strategic
17 Environmental Assessment endorsement, which frustrated
18 the approval of urbanism plans in the project area.
19 The NGOs argued in their court challenges that the
20 so-called SEA endorsement of that PUZ, that urbanism
21 plan, they argued that it failed to take into account
22 the historical monuments that were described in the

1 2010 LHM.

2 The Court annulled the SEA endorsement only
3 in April 2014 because it found that the endorsement
4 was premised on a description of the historic
5 monuments reflected in the 2004 LHM. Among other
6 things, the court found that the historical monument
7 described in the 2010 LHM as being located within a
8 two kilometer radius around Orlea that admitted error
9 by the culture authorities but had not been corrected.
10 The Court found that that meant that the historical
11 monument was the entire two kilometer area, and on
12 that basis annulled that endorsement, and that
13 annulment, indeed, frustrated the approval at that
14 time of the urbanism plan for the Project Area.

15 In view of the April 2014 SEA Annulment court
16 Decision, in June 2014, RMGC formally requested the
17 NIH to correct the errors on the 2010 LHM. Up until
18 that time, they understood it to be an error. There
19 were many statements saying they were errors, and they
20 understood that this was to be corrected. But when
21 the Court already now in 2014 and this was following
22 the events of 2013, it was at that time that Gabriel

1 formally tried to get the errors corrected.

2 In July 2014, the NIH responded to RMGC
3 stating that the errors would be corrected, will be
4 corrected, on the 2015 LHM, which was then due to be
5 issued soon.

6 RMGC, still now in 2014, commenced
7 administrative and judicial proceedings to challenge
8 and to seek correction of the 2010 LHM, and the
9 Ministry of Culture and the National Institute for
10 Heritage, the "NIH," were the defendants in that
11 action. The NIH and the Ministry of Culture then were
12 filing pleadings starting in January 2015. The
13 culture authorities in their pleadings before the
14 Court in January 2015, disavowed prior decisions and
15 made false representations to the Court in defense of
16 the 2010 LHM. The NIH first pleaded to the Court that
17 the 2010 LHM was rectifying the abuse it claimed was
18 perpetrated under the 2004 LHM, and the NIH asserted
19 in its pleadings and the cites are here, asserted that
20 the 2015 LHM would reinstate the so-called "1992 LHM,"
21 which was that draft List of Historic Monuments that
22 was prepared before any of the research that was later

1 done and before any of the Archaeological Discharge
2 Certificates had been made, and they are saying they
3 are going to reinstate that. The NIH states to the
4 court, incorrectly, and contrary to the culture
5 authorities' own research, that the Rosia Montana area
6 "comprises hundreds of kilometers of mining galleries
7 from the Roman era." That is false. It does not
8 comprise anything even remotely approximate to that
9 much.

10 The NIH also remarkably, in its pleadings to
11 the Court, accuses RMGC of seeking to mine the area
12 without archaeological discharge and without required
13 endorsements. This was a serious false accusation
14 made without any foundation by an important
15 institution of the State intending to influence the
16 Court, and it did influence the Court. The Court
17 ruling that followed reflected the representations
18 made by the culture authorities. Following the
19 issuance of the 2015 LHM, which does come out shortly
20 thereafter, the action seeking an order to direct the
21 Authorities to correct the errors was dismissed as
22 moot, and taking into account the false statements

1 made to the Court by the culture authorities in the
2 action challenging the lawfulness of the 2010 LHM, the
3 Court held that the 2010 LHM was lawful because it was
4 issued by the competent authorities. Indeed, the
5 Court justified its ruling with the observation that
6 mining in the area would be incompatible with the
7 obligation to protect the Roman mining galleries.

8 I'll say a few words now about the adoption
9 of the 2010 LHM which follows.

10 I'm sorry, 2015. 2015.

11 The 2015 LHM was first announced on
12 January 9th, 2016, on the Facebook page of the
13 Minister of Culture Alexandrescu tagging the NGOs
14 opposing the Project. This was announced on the
15 Facebook page. This is before the LHM 2015 is
16 announced officially anywhere else. In his Facebook
17 post, the Minister of Culture drew a circle
18 identifying the new protected area, tagging NGOs
19 opposing the Project.

20 Here is another slide; the Minister of
21 Culture is liking anti-Project pages on Facebook.

22 In January 2016, Mr. Balteanu, the Romanian

1 Culture Ministry's advisor on cultural heritage, is
2 quoted as saying that mining activities are prohibited
3 in view of this LHM.

4 Still in January 2016, and this is still
5 before the 2015 LHM is even published in the Official
6 Gazette, the Minister of Culture Alexandrescu in
7 January 2016 grants an award to the NGO Alburnus
8 Maior, the principal Project opponent for organizing
9 Fânfest and for opposing the Project.

10 The 2015 LHM was adopted without any
11 additional archaeological research or classification
12 procedure. The Alburnus Maior archaeological site is
13 listed as being found in Rosia Montana, the entire two
14 kilometer radius, and the refinements that were
15 reflected in the 2004 LHM were all removed. This is a
16 table that is found in the record that just describes
17 and highlights the difference of the 2015 LHM as
18 compared to the earlier LHMs, and then the next slide
19 is the effects of the description of what would be a
20 historical monument, and I think the Tribunal
21 appreciates that mining is prohibited in an area that
22 is classified as a historical monument.

1 And cultural heritage preservation takes
2 precedence in the zoning laws or the urbanism laws
3 over mining. So, if there is a cultural heritage
4 protection area, it is given precedence in the Law
5 over a mining a Mining License.

6 Romania's Application to UNESCO listing Rosia
7 Montana as a UNESCO World Heritage site was considered
8 and rejected previously including in 2013. In
9 February 2016, consistent with its Decision that the
10 Project would not be done, the Government submitted
11 the State's Application to list the Rosia Montana
12 cultural mining landscape as a World Heritage site.

13 The UNESCO Application is presented in lieu
14 of permitting the Project.

15 The Ministry of Culture commenced
16 classification procedures for additional historical
17 monuments in the Project Area, including some
18 properties that fall under the Tailings Management
19 Facility, an area that had already been
20 archaeologically discharged. These steps further
21 demonstrate the Government's decision to terminate the
22 Project.

1 The Government, then consistent with that,
2 took steps to ensure that the urbanism plan prohibits
3 mining activities and I mentioned, and as reflected in
4 the Legal Authorities in the record, cultural heritage
5 protections take precedence over areas designated for
6 mining, and here is a letter from the Ministry of
7 Culture to the Prime Minister's Office, emphasizing
8 that in view of the UNESCO Application, the
9 delineation of the historical monument for Rosia
10 Montana must be reflected in the urbanism plan and
11 that under the Law, cultural heritage assets must be
12 given priority over mining.

13 Here is an excerpt out of the delineation
14 documentation that then is prepared by the cultural
15 authorities delineating the area designated as a
16 historical monument in support of the UNESCO
17 Application, and here highlighted is a quote from that
18 document discussing the fact that ADCs in the area
19 previously had been issued, but suggesting that a
20 different approach may now be considered.

21 This next slide doesn't appear very clearly.
22 It's somewhat faded, but it shows, and the exhibit

1 reference is made. It shows the delineation of the
2 historical monument around the area of Rosia Montana,
3 and you can see it encompasses the entire area.

4 Romania did submit the Rosia Montana file to
5 UNESCO. The UNESCO application places Rosia Montana
6 or it did place Rosia Montana on the World Heritage
7 so-called tentative list which reflects Romania's
8 preservation commitment of the site in accordance with
9 the Standards of the World Heritage Convention.

10 And as reflected on the UNESCO website, the
11 Rosia Montana application, its tentative listing
12 remains on the list today. It is still listed on the
13 tentative list for Romania reflecting Romania's
14 Application for it to be considered.

15 Romania submitted a full file to UNESCO. The
16 Ministry of Culture created a website devoted to the
17 UNESCO Application. That website is still active
18 today.

19 The UNESCO Application has effects for the
20 required protections under the urbanism law. I
21 mentioned this. The Application itself creates legal
22 effects under the Government Ordinance Number 47,

1 Article 15, which basically provides that the special
2 protection measures for historical monuments apply to
3 the historical monuments for which Romania has
4 submitted to the UNESCO World Heritage Committee for
5 their inclusion, so the very Application which remains
6 pending attracts special protections. The Law imposes
7 these protections and provides precedence over a
8 Mining License. And so long as that protection is in
9 place, it's legally impermissible to conduct mining in
10 the Project Area.

11 Romania's decision to seek deferral of the
12 UNESCO Application does not eliminate those
13 protections. This is one of those press releases in
14 which it's described that Romania will be seeking
15 deferral of the UNESCO Application pending this
16 arbitration. The Government has been clear in its
17 understanding that mining in the area is presently
18 prohibited. The UNESCO Application has been deferred
19 only due to this pending arbitration as is described
20 in a fair number of press releases of the Ministry of
21 Culture.

22 Romania has not withdrawn but has only

1 postponed consideration of the UNESCO Application.
2 The UNESCO Committee granted Romania's Postponement
3 Request, referring the nomination back to the State
4 Party in compliance with UNESCO Operational Guidelines
5 Paragraph 159, and this is highlighted here in the
6 UNESCO Committee's Decision. This is what they have
7 done. They've referred it back to the State in
8 accordance with Paragraph 159 of the Operational
9 Guidelines.

10 What does that mean? The referral back to
11 the State pursuant to the UNESCO Operational
12 Guidelines is a request for additional information.
13 While it defers consideration, it is not a withdrawal
14 of the application. Romania's UNESCO Application has
15 not been withdrawn, and the fact that it has not been
16 withdrawn provides further evidence of Romania's
17 permanent rejection of the Project.

18 I think we will distribute another slide
19 deck. What remains for me to discuss is objections to
20 jurisdiction. We will discuss Respondent's objections
21 to jurisdiction.

22 Respondent has numerous objections to

1 jurisdiction, both under the Canada BIT for Gabriel
2 Canada's claims and under the UK BIT relating to
3 Gabriel Jersey's claims.

4 Respondent appears to have dropped several of
5 its objections during the course of the written
6 submissions. I will address the remainder in the
7 Order shown.

8 We're speaking now about the objections that
9 are under the Canada BIT for Gabriel Canada, starting
10 first with the Notice requirement. The objection is
11 that the Notice requirement is not sufficient to
12 encompass later facts or events that post-date the
13 Notice. That's what I understand the objection to be.
14 Romania argues that Gabriel Canada's Notice of Dispute
15 did not extend to facts and events that occurred after
16 the start of the arbitration. That is wrong.
17 Gabriel's notice provided notice of a measure that was
18 in breach of the Canada BIT, and that measure
19 encompassed the later events and facts that are at
20 issue here.

21 Referring to the terms of the treaty, the
22 relevant provision, Article XIII(2), notice must be

1 provided as to a measure in breach of the BIT. A
2 measure may include a practice or a maintained policy.
3 Measures, the definition of--measure may include a
4 practice of making permitting decisions on the basis
5 of political considerations, of withholding permits.
6 These things can be considered as a measure. There is
7 at least one example here on the slide cited. Other
8 discussions of this are in the written submissions,
9 another tribunal discussing what we mean by "relevant
10 measure" is at least in one example. Gabriel gave
11 notice that the maintained policy and practice of the
12 Romanian authorities not to permit RMGC's Projects was
13 in breach of the BIT. The Romanian authorities have
14 prevented--the Notice states that the Romanian
15 authorities have prevented the Project, the Project
16 there being defined as both Rosia Montana and Bucium,
17 from advancing and proceeding to implementation. The
18 Notice states that Gabriel will incur substantial
19 losses if the Project as so defined is not permitted
20 to proceed in accordance with applicable laws, and
21 that Gabriel was providing notice as contemplated by,
22 among other treaties, the Canada BIT.

1 Read in good faith, the Notice of dispute is
2 well-understood to include the later facts and events
3 reflecting the maintained policy with regard to the
4 Projects, and this understanding is consistent with
5 decisions of many other tribunals, just one of which
6 here is cited as one example. Others are cited in the
7 briefs. In this case, following the Notice of
8 dispute, Romania maintained its practice of not
9 permitting the Projects for political reasons, as
10 later facts and events make abundantly clear.

11 Respondent cites a number of authorities.
12 Claimants submit those authorities, upon examination,
13 are all inapposite. The purpose of the Notice here
14 was fulfilled, a number of examples of authorities
15 that are just not comparable. In any event, in this
16 case, there is no good-faith basis to claim that
17 Romania was not fully notified of Gabriel's claims or
18 that Romania was deprived of an opportunity to engage
19 in amicable discussions to avoid an arbitration. Of
20 course, that is the point of providing notice.

21 I will turn now to the waiver requirement.
22 Again, this is a waiver requirement under the Canada

1 BIT relating to Gabriel Canada.

2 Romania argues that Gabriel Canada's waiver
3 does not extend to facts and events that occurred
4 after the start of the arbitration. It's conceptually
5 similar. That is wrong. The Investor, according to
6 the BIT, must have waived its right to initiate or
7 continue proceedings in relation to the measure at
8 issue. This is a quote of the relevant provision of
9 the Treaty.

10 Gabriel Canada's waiver, reference to which
11 is made here, was filed with the Request for
12 Arbitration. It described the measures as Romania's
13 policy and practice of refusing to permit the Rosia
14 Montana and Bucium Projects, including by failing to
15 take action and by rendering Project implementation
16 impossible, and Gabriel Canada waived its rights to
17 initiate or continue claims in relation to those
18 measures.

19 Gabriel Canada's waiver applies to all facts
20 that are part of Romania's policy and practice in
21 relation to the Projects, including events occurring
22 after the start of arbitration. Claimants' submission

1 is that that waiver was sufficient and encompasses
2 later events part of the same practice.

3 Gabriel Canada submitted a second waiver as
4 further evidence of the full scope of its first
5 waiver. Notwithstanding that the scope of Gabriel's
6 waiver already extended to cover later facts or
7 events, Gabriel submitted a second written waiver as
8 further evidence of its scope to be considered to the
9 extent warranted. The Respondent, in Claimants'
10 understanding, does not dispute that the second
11 written waiver demonstrates that Gabriel's waiver
12 extends to later facts or events. Respondent argues
13 only that it is too late, if we've understood
14 Respondent's argument correctly.

15 The purpose of the BIT waiver requirement is
16 to require the Claimant to select one forum. The BIT
17 does not state that the waiver must be in writing or
18 in any particular form. Its purpose is to avoid
19 litigation in multiple fora regarding the same
20 measure. Where it is clear, the Claimant has
21 committed to proceed only in the international
22 arbitration. The purpose of the waiver requirement is

1 fulfilled. Consistent with its waiver, Gabriel has
2 not initiated or continued any proceedings in relation
3 to the measure at issue in this arbitration.

4 Gabriel's conduct has been fully consistent
5 with its waivers. Respondent's assertion in its
6 pleading that RMGC continues to litigate before
7 Romanian courts is misplaced. RMGC is not the
8 Claimant in this arbitration, so its litigation is
9 irrelevant. In any event, the litigation which they
10 are referencing, which is the only litigation that
11 RMGC has continued, relates to a VAT Assessment that
12 is the subject of RMGC's challenge before the Romanian
13 courts. That measure is not relevant to Gabriel's
14 claims in this arbitration.

15 Now, the Claimants have pointed to antifraud
16 investigations of RMGC conducted by fiscal authorities
17 as evidence of retaliatory conduct by state
18 authorities and Claimants have maintained that
19 evidence gathered in those investigations cannot be
20 used in the context of this arbitration for any
21 purpose, and including not to intimidate witnesses,
22 but the VAT assessment and that measure itself is not

1 the basis of this arbitration.

2 ARBITRATOR DOUGLAS: Can I just clarify on
3 that? When do you say the breach of the FET claim
4 actually occurred? What date do you assign the
5 breach?

6 MS. COHEN SMUTNY: Well, you know, it's very
7 hard to--with hindsight, the company recognized, as
8 reflected by the company's decision making, at the
9 beginning of 2015, that it was all over. I think--and
10 we'll be talking about this--you'll see more during
11 the course of the Hearing, that during 2014, and the
12 record reflects this, the Company is still trying. I
13 mean, you know, the fact is the statements of the
14 politicians were so very clear at the end of 2013, but
15 nothing formally was done. There was no formal
16 decision taken, stating your Application is rejected.
17 They still called the TAC meeting. They still seemed
18 to go through the motions.

19 And so, the Company, of course, naturally
20 given how much they had invested, were still hoping
21 maybe something was going to turn around, and one can
22 see that from the evidence that there are still some

1 efforts to try, and at some point it became clear
2 enough that it was fruitless.

3 ARBITRATOR DOUGLAS: There might have been a
4 hope that things would change?

5 MS. COHEN SMUTNY: If one goes back and looks
6 with hindsight if one is asking, I think that's
7 something for the Tribunal to consider, but I think in
8 hindsight we can see that definitive decisions were
9 made with that Special Law. I mean, one sees that now
10 in hindsight.

11 I mean, I think in realtime it was perhaps
12 hard to say definitively.

13 ARBITRATOR DOUGLAS: But from a legal point
14 of view, you say the breach occurred at the time or in
15 July 2013?

16 MS. COHEN SMUTNY: Not when they submitted.
17 I mean, I think when they rejected--

18 ARBITRATOR DOUGLAS: September-October 2013?

19 MS. COHEN SMUTNY: Others are going to
20 remember the date better than I, of what the exact
21 vote was and when things are rejected definitively,
22 but, you know, they're still going through a process,

1 and I suppose there was at least one could hope, and I
2 think the Company was hoping, that, you know, it was
3 looking, of course, very bad, but--so, until something
4 was done, I think maybe one can speak to when the
5 final vote was. I'm not remembering the date. I
6 don't know if that's really so important to your
7 question right now.

8 ARBITRATOR DOUGLAS: We need to decide when
9 the breach occurred on the basis of what measure, and
10 depending on that Decision--and based on your
11 position, the subsequent acts may cast further light
12 on that breach, but they're not going to be separate
13 claims, they're not going to be separate breaches, are
14 they? Is.

15 MS. COHEN SMUTNY: Well--

16 ARBITRATOR DOUGLAS: Unless you tell me
17 you're making separate claims for what happened after
18 the Notice of Arbitration was filed.

19 MS. COHEN SMUTNY: No, I mean, I think that
20 we've argued in the alternative that if you don't find
21 that the Project--I mean, I think it's very hard to
22 say when was it definitively really over in a

1 situation where no formal decision has ever been
2 taken, so there were a series--there are statements by
3 politicians, then there is a vote in one house of
4 Parliament which theoretically is not supposed to be a
5 decision about the Project, and then there is another
6 vote--I think it's in June 2014--that the Senate
7 votes, and then you have--still they're calling
8 another TAC meeting to go through the motions.

9 So, you know, I think it is really very
10 challenging to say at what point are you really
11 confident that it was completely over? I think--

12 ARBITRATOR DOUGLAS: So sorry to interrupt,
13 but that's not really the question. At what point on
14 your case were there sufficient acts leading to the
15 point where you were denied fair and equitable
16 treatment? That might be the same time when the
17 Project is over, it might not be, but from a legal
18 point of view, when was there a sufficient amount of
19 prejudicial conduct to tip you over the edge of being
20 denied fair and equitable treatment?

21 MS. COHEN SMUTNY: I think it's one of those
22 times when you don't know when exactly you cross the

1 boundary, but at some point you know you're in the
2 other territory, and you look back, and you say,
3 "okay, it's over."

4 When exactly did it cross the threshold of no
5 return? Sometimes one doesn't know where that
6 boundary is until you're well into the other
7 territory.

8 And it seems to me that this is one of those
9 fact patterns, and that was the experience of this
10 company. Going through 2014, not being entirely sure,
11 it was so political what was happening. Governments
12 were occasionally falling.

13 So, you know, no formal decision was taken.
14 So, I think it was, you know, understandable in the
15 circumstance what was on the line. They keep going
16 through the motions, until at some point they realize,
17 and this is in January 2015 is when notice of dispute
18 is was failed. I mean, including you saw those
19 culture authorities and what kind of pleadings they're
20 filing to the Court.

21 And you saw the company was still trying. I
22 mean, the fact that they filed in June or in the

1 second half of 2014, they're still fighting about the
2 2010 LHM, thinking that maybe they can turn something
3 around. I mean, why would they have done that if they
4 really thought it was completely over? They were
5 still trying. They still thought maybe. I mean, at
6 some point I think with the passage of time and
7 further action and further action, and they just at
8 some point realized they are where they are. But
9 where exactly was the definitive point? Perhaps the
10 Tribunal will consider that important to its
11 assessment. We submit it's not important to your
12 assessment.

13 ARBITRATOR DOUGLAS: It's not important to
14 know when the breach occurred?

15 MS. COHEN SMUTNY: It is important to know
16 that a breach did occur at some point. The exact date
17 in which the breach ultimately occurs, no, I don't
18 think you do need to know, and we'll be talking a lot
19 about that more when we talk about quantum and Date of
20 Valuation, and we know when the breach began. And
21 when you have an indirect creeping expropriation of
22 the type that we have here, one goes to immediately

1 prior to the expropriatory act, and that's where you
2 fix the valuation.

3 In the garden variety case where this happens
4 on one day, it's natural to look at one date. But
5 when you have a situation where things are happening
6 over an extended time period, it's most
7 important--it's important to look back and say I know
8 that this occurred. It's important to know when it
9 began, but where exactly did we cross the threshold
10 is, we submit, not so significant, but there are
11 numerous dates that the Tribunal, in its assessment,
12 considers that it's very important to consider that
13 there was a point of no return, and you're persuaded
14 by the evidence that it's on this date or that day
15 with hindsight, that's at least theoretically possible
16 for you to conclude that that's relevant to consider.

17 I'm sorry, you had another question.

18 ARBITRATOR GRIGERA NAÓN: If I am correct,
19 you fix the Valuation Date in July 2011?

20 MS. COHEN SMUTNY: Yes.

21 ARBITRATOR GRIGERA NAÓN: And the basis for
22 that was the continuing conduct?

1 MS. COHEN SMUTNY: Yes.

2 And the basis for that is because there is
3 the concept of fixing the compensation immediately
4 prior to the wrongful act, before the wrongful act
5 starts affecting the value, and also in a situation
6 where here it's hard to say when ultimately that
7 threshold was crossed.

8 And I want to draw your attention to, and I'm
9 sure you're familiar with it, a very important
10 authority that's in the record, Michael Reisman and
11 Robert Sloane article that discusses exactly this type
12 of scenario in which you have an extended period of
13 conduct resulting classically in an indirect
14 expropriation and how one deals with that with--in
15 terms of the analysis for assessing the remedy, so I
16 commend that particular authority to you. You might
17 already be very familiar with it, but we find
18 ourselves in that situation.

19 ARBITRATOR DOUGLAS: So, we have to conclude,
20 then that, the breach was in July 2011?

21 MS. COHEN SMUTNY: You have to conclude that
22 the breach began at that time, August 1, we chose the

1 very end of July because it's the date immediately
2 prior.

3 ARBITRATOR DOUGLAS: So, at that point in
4 time there was sufficient prejudice to go over the
5 edge of a breach of the FET standard?

6 MS. COHEN SMUTNY: Not on August 11, no. It
7 takes time.

8 This is the idea of the notion of creeping
9 expropriation. You're not expropriated with the first
10 step in the process. It takes time, and it did take
11 time here. There was a process that began. In our
12 submission, there is no question that it began. And
13 the process took some time to reach an end.

14 And so, this is why we called it the
15 beginning of the end, but it was a long, extended
16 process, and so that's what we're talking about.

17 So, absolutely, there is no breach. In fact,
18 I will be talking about this more because we're about
19 to start talking about the three-year limitation, so
20 you will hear me addressing exactly this issue for
21 some time, and--

22 ARBITRATOR DOUGLAS: That's the problem in a

1 way, isn't it, because if we fix the breach in
2 July 2011, then we've got a problem with the
3 limitation period.

4 MS. COHEN SMUTNY: No, and I'll walk through
5 that.

6 I think maybe the point is made well enough
7 with waiver and you understand our position. Let's
8 talk about that, about the three-year limitation.

9 So, Article XIII(3) of the BIT provides that
10 an investor may submit a dispute to arbitration only
11 if there is knowledge of the alleged breach and
12 knowledge that the Investor has incurred loss or
13 damage and not more than three years has elapsed from
14 that date on which that knowledge is had.

15 The breach and loss were not known prior to
16 July 30, 2012. Romania argues that events prior to
17 July 30, 2012, fall outside of the Canada BIT's
18 three-year limitation period. That date is three
19 years prior to July 30, 2015, when ICSID registered
20 Gabriel's Request for Arbitration.

21 There are three conditions that must be met
22 for the three-year limitation to begin to run. In

1 order for the three-year limitation period to run, the
2 alleged breach must have occurred, the Investor must
3 have incurred resulting loss or damage, and the
4 Investor must have acquired knowledge or reasonably
5 have been in a position to acquire knowledge of both
6 the breach and the loss.

7 So, let's talk about the alleged breach must
8 have occurred.

9 To determine when the three-year limitation
10 began to run, one must assess when the alleged breach
11 occurred. The measure alleged to be in breach,
12 therefore, must be evaluated.

13 What was the measure alleged to be in breach?
14 The measure that is the basis of Gabriel's claim is
15 the Government's policy and practice of making
16 permitting decisions for RMGC's Projects on the basis
17 of political rather than legal considerations. In
18 this case, that resulted in the decision to reject the
19 Project. That was the result of this unlawful
20 political assessment. This decision related both to
21 Rosia Montana as well as to Bucium.

22 Starting in 2011, the Decision is taken to

1 permit the Project only if the political criterion of
2 improved economics for the State is met, beginning in
3 August 2011, repeated consistent statements of senior
4 government officials made clear that permitting would
5 not proceed unless Project economics were improved.
6 The Government demanded renegotiation and began
7 blocking the legal administrative permitting process.
8 So, now, the Project is in the political arena. It is
9 no longer in the legal arena. It was unlawful to put
10 it in the political arena but whether putting it in
11 the political arena was going to result in a loss at
12 that time remained to be seen.

13 Throughout 2012, a change of government
14 followed by elections stalled that political
15 decision-making process which was now what was
16 applicable to this project, while the
17 legal-administrative procedures remained blocked at
18 all times.

19 In 2013, the political process of assessing
20 whether to permit the Project was certainly
21 accelerated. In hindsight one may say that the
22 process reached its conclusion, but it was not clear

1 at the time the Decision was definitive, and even now
2 it's difficult to say which of those acts made it
3 definitive.

4 Here--there we are, let's go to the next--in
5 2014, the Government went through some motions without
6 allowing any legal process to advance. Throughout
7 2014 and 2015, it confirmed, however, by word and by
8 action and by inaction that a definitive decision had
9 been taken.

10 The decision to reject the Rosia Montana
11 Project was expressly stated. The decision to reject
12 the Bucium Projects, however, was just as clear. The
13 Rodu-Frasin deposit was only feasible to develop
14 together with the Rosia Montana Project, so its loss
15 necessarily followed. As the Government rejected the
16 terms of its joint venture with Gabriel in RMGC, it
17 evidently became unwilling to permit another RMGC
18 Project to proceed, effectively thus rejecting RMGC's
19 Tarnita Project as well. And, in fact, no action has
20 been taken on Bucium in more than five years, even
21 since this arbitration commenced. In principle, there
22 is no reason why an action could not be taken on

1 Bucium but for the fact that the Government has no
2 intention of doing so or allowing that to occur.

3 RMGC's Projects thus were all rejected,
4 contrary to law. Applying a political process for
5 making permitting decisions that resulted in the
6 arbitrary termination of the Projects was, indeed, a
7 breach of multiple provisions of the Canada BIT.
8 Article II, the FET and full protection and security;
9 Article VIII, subjecting Gabriel's investments to
10 measures having effect equivalent to expropriation;
11 and also Article III(1) and Article III(3).

12 To determine when the three-year limitation
13 began to run, one also must assess when the Investor
14 incurred loss resulting from the breach, and here's
15 just as a reminder of the ownership structure, which
16 the Tribunal probably has well in mind. Gabriel
17 Canada is the sole 100 percent indirect shareholder of
18 Gabriel Jersey, which, in turn, is the approximate
19 80 percent Shareholder of RMGC. RMGC is the
20 beneficiary of substantial Project development rights,
21 or was. Those are deriving from the Rosia Montana
22 License and the Bucium Licenses, development rights

1 that are RMGC's principal asset and principal source
2 of value.

3 So, depriving RMGC of the benefit, use and
4 enjoyment of its Project development rights resulted
5 in a tremendous loss to Gabriel in the value of its
6 shareholding which is, of course, derived entirely
7 from those underlying assets.

8 To determine when the three-year limitation
9 began to run, one also must assess when the Investor
10 acquired knowledge of the breach and that the Investor
11 had incurred loss.

12 Prior to July 30, 2012, the Projects had not
13 yet been terminated, therefore, one cannot conclude
14 that loss already had been incurred, not that loss,
15 but was there knowledge prior to July 30, 2012, of the
16 breach and a lesser loss? Claimants submit no, there
17 was not.

18 There was no basis to conclude prior to
19 July 30, 2012, that Gabriel's investments had been
20 effectively expropriated--I think that is clear--but
21 it is also doubtful whether prior to July 30, 2012,
22 one would have concluded that the Government's

1 renegotiation demand was a breach of FET or a treaty
2 violation at that time. Although the conduct prior to
3 July 30, 2012 was arbitrary and abusive, it was not
4 then clear how far it was going to go. It was not
5 clear whether permitting would remain blocked and what
6 the results would be. Not all improper conduct is
7 sufficiently serious to constitute a treaty violation,
8 and Claimants submit that it is doubtful, if based on
9 the facts at that time whether a tribunal would have
10 been convinced without knowing more, without knowing
11 what you know now, if you had been confronted with
12 events up until that time without knowing where it
13 would end, it is doubtful that one would conclude that
14 the treatment up until that point was great enough to
15 constitute a denial of fair and equitable treatment.

16 Gabriel did not acquire knowledge prior to
17 July 30 that the Projects were terminated, nor did
18 Gabriel's acquire knowledge prior to July 30 of a
19 lesser loss, even assuming that conduct prior to
20 July 30, 2012, could be considered to be in breach of
21 the BIT, and that is because, prior to July 30, 2012,
22 Gabriel had engaged in renegotiations but no agreement

1 had been reached. What would follow still remained
2 unknown. The process remained ongoing, the end
3 results remained very threatening, but still unknown.
4 Would there be more negotiations? Would there be
5 something in exchange? At that time, whether there
6 was a loss, how much of a loss--it was all still
7 unknown, Claimants submit.

8 ARBITRATOR DOUGLAS: You can come back to it,
9 but there's just a conceptual difficulty that I'm
10 struggling with.

11 If you say that a creeping expropriation
12 started in August 2011 then, by definition, that means
13 that a loss started to be felt in 2011 because it
14 started to impact upon your investment.

15 So, I'm just struggling to square those two
16 things. If there's no loss or breach occurred prior
17 to July 2012, then how on the other hand could a
18 creeping expropriation start in August 2011 and that
19 be used to justify a Valuation Date in July 2011?

20 MS. COHEN SMUTNY: Yeah, I would say that the
21 assumption is not quite correct that a creeping
22 expropriation entails steps, that every one of them

1 represent loss.

2 And so, of course, it's theoretically
3 possible that creeping expropriation means I take a
4 little from you, I take a little from you, I take a
5 little from you, until you have nothing left.

6 It's also possible to have creeping
7 expropriation which I do things that don't necessarily
8 result in loss, but I'm beginning to set things up
9 incrementally to make it so that one day I'm doing the
10 final thing and then you have a loss.

11 And so, it seems to me the answer to your
12 question is it's not always the case that one is
13 necessarily feeling a loss every day until everything
14 is gone. What one sees is a development of facts and
15 circumstances that are setting things up to eventually
16 lose everything.

17 So, perhaps that's partly your answer to the
18 question. Weren't they losing a little bit all along
19 the way? No, I think there was a threat for sure that
20 they were losing but they didn't actually lose. It
21 wasn't over until it was over. They were still
22 negotiating. Things weren't clear.

1 And I think what is an important point to
2 consider, as you look at the evidence, the offers that
3 Gabriel continued to make--you know, they kept pulling
4 back and trying to start again. It was really at that
5 time--and you have to imagine you're living in
6 realtime through this process--it was not clear--no
7 question threatening. There was no question
8 threatening, but knowing that they had a loss, we
9 submit, was not yet known.

10 ARBITRATOR DOUGLAS: It's just the legal
11 justification for backdating is so that you're not out
12 of pocket for a measure which partially impacted upon
13 the value or rights that you have. And if it didn't
14 partially impact at that time because there was no
15 loss, then it's difficult to see the justification for
16 backdating the Valuation Date.

17 MS. COHEN SMUTNY: Well, this again assumes
18 that all steps along the way are having impacts on
19 value, but there is no question that looking back at
20 some point it does start impacting value, especially
21 if we're talking about Fair Market Value.

22 If we're talking about realtime value as

1 reflected in market measures, then, sure, at some
2 point, these acts which appear more and more likely to
3 be taking away rights in that respect, and especially
4 if we're going to talk about trying to have a remedy
5 that's based on a Fair Market Value, if that reflects
6 expectations of people. Certainly expectations were
7 starting to become depressed as events were unfolding
8 the way they were.

9 But maybe that just goes more to the evidence
10 of loss and how would one best measure loss, but the
11 reason why one goes back to the beginning of the
12 process is to be sure that one captures the causation
13 of loss just correctly, and maybe that's saying the
14 same thing that you are. One wants to be certain that
15 one is capturing the loss caused by the act and not
16 effects of actions over time.

17 Let me comment further here, just to finish
18 this point, we're still on number--I want to just make
19 the point here that stated that Gabriel did not incur
20 loss due to the State's demand for a greater share of
21 the Project because the demand itself did not cause
22 loss, and there was no agreement. I think we just

1 said that.

2 But I also want to emphasize that one could
3 not conclude prior to July 30, 2012, that Gabriel had
4 incurred loss even in the form of delay because it was
5 uncertain at that point whether ultimately there would
6 be delay materially going forward. Again, one has to
7 think about this in realtime.

8 The analysis is the same in relation to the
9 Bucium Projects because, prior to July 30, 2012,
10 Gabriel did not have knowledge of the loss in relation
11 to the Bucium Projects. While NAMR's delay in issuing
12 the Exploration Licenses was improper, the delay did
13 not seem to cause a loss until the Rosia Montana
14 Project was also lost because Gabriel still expected
15 that NAMR was going to process the Bucium Applications
16 after issuing the Homologation Decision for Rosia
17 Montana. The Rodu-Frasin deposit was feasible to
18 develop only together with and as an extension of the
19 Rosia Montana Project, and that Tarnita deposit was
20 covered by the same License and so was expected
21 ultimately to be addressed with Rodu-Frasin. So
22 again, I want to emphasize that, even if one concludes

1 that the delay was wrongful, whether there was loss
2 was not at that point known with respect to Bucium.

3 And speaking a little bit more about Bucium,
4 although in 2014, NAMR's technical staff--and by the
5 way, I'm describing things as reflected on the slide
6 that is referenced in the Witness Statement of
7 Ms. Szentesy. Although in 2014, NAMR's technical
8 staff was still prepared to complete the process for
9 Bucium, nothing actually happened thereafter. And
10 only in hindsight, it is evident that the State
11 rejected the terms of its joint venture with Gabriel
12 and was not going to approve another project for RMGC
13 on that neighboring property. Only after the meetings
14 in 2014 led nowhere did Gabriel's acquire knowledge
15 that the wrongful conduct resulted in loss extending
16 to Bucium as well.

17 The conclusion from the above is that, prior
18 to July 2012, Gabriel did not have knowledge of the
19 breach and knowledge that it incurred loss, and for
20 that reason, the three-year limitation in the BIT does
21 not bar consideration of events prior to July 30,
22 2012, as part of the measure that constitutes the

1 breach.

2 Another important point, though, to make
3 here, in support of its objection regarding the
4 three-year limitation, Respondent refers to the notion
5 that when a breach results from a series of acts and
6 omissions, a so-called "composite act," although the
7 breach occurs when the series is sufficient to
8 constitute the wrongful act, it is deemed to commence
9 with the first act, but this observation does not
10 advance the objection because the issue remains when
11 knowledge of the breach and loss arose. As in this
12 case, the role--as in this case, and I think we've
13 already said this now, the role of the first act in a
14 series is often not appreciated until later and in
15 hindsight.

16 I will speak now to the objection still under
17 the Canada BIT that Gabriel's claims fall within the
18 substantive protections of the BIT the Respondent
19 objects claiming that they do not. This is a
20 reference to Article XVII of the Canada BIT relating
21 to environmental measures. Neither provision, in
22 fact, bars the Claims in this case. Article XVII(2)

1 of the BIT provides that nothing in the agreement
2 shall be construed to prevent a party from adopting
3 measures otherwise consistent with this Agreement,
4 relating to environmental concerns. Article XVII(2),
5 thereby, confirms that any measure taken by the State
6 to address environmental concerns in relation to
7 investment must fully conform to the terms of the BIT.
8 This Article confirms expressly that so-called
9 "environmental measures" that relate to investment
10 activity are not carved out and are not subject to
11 special rules.

12 Article XVII(3) of the BIT provides, as
13 stated here, that, subject to the requirement that
14 measures are not applied in a manner that would
15 constitute arbitrary or unjustifiable discrimination,
16 nothing in this Agreement shall be construed to
17 prevent a party from adopting or enforcing measures
18 that are necessary to protect the environment, et
19 cetera.

20 So, Article XVII(3)--go to the next slide,
21 the whole slide--applies where the State claims
22 certain measures were necessary to ensure compliance

1 with environmental laws. Respondent has not
2 demonstrated, as would be its burden, that measures at
3 issue were necessary to ensure compliance with laws,
4 to protect human, animal or plant life, et cetera, nor
5 could it do so, as the record is overwhelming that the
6 Project met all applicable legal requirements for
7 permitting. Moreover, the WTO Appellate Body observed
8 with respect to analogous provisions, that any claim
9 that such measures were necessary must be assessed
10 against principles of good faith, transparency,
11 fairness and due process.

12 Article XII(1) of the BIT is not relevant
13 here. It does provide that, except as set out in this
14 Article, nothing in this Agreement shall apply to
15 taxation measures. This provision is not relevant
16 because the claims are not presented regarding
17 Taxation Measures. Gabriel's reference to the several
18 investigations pursued against RMGC by the Fiscal
19 Authorities are presented as evidence of retaliatory
20 action taken against RMGC. And the record evidence
21 shows these investigations are abusive and are
22 intended to obtain some perceived advantage for the

1 State. And I want to mention again that these
2 investigations are ongoing, and a request for
3 documents was filed with RMGC two days before this
4 Hearing started, with a requirement to produce
5 thousands of pages of documents on December 12th.
6 This investigation is ongoing, and the timing of it is
7 remarkable.

8 There is no challenge presented to any bona
9 fide taxation measure, and in any event, tax
10 carve-outs apply to bona fide measures and not to
11 abuses by the State authorities. And I want to remind
12 the Tribunal that notwithstanding the fact that these
13 so-called "antifraud investigation" is ongoing. It
14 has been going on for, I think, it's now six years.
15 There has never been any end in sight and no
16 clarification of what even is being investigated.

17 Gabriel Jersey, now we will turn to the UK
18 BIT.

19 ARBITRATOR DOUGLAS: Obviously that's only
20 relevant if you are actually bringing a claim in
21 relation to the VAT investigation. I'm not quite sure
22 as to whether that's the case.

1 MS. COHEN SMUTNY: We've never been intending
2 to bring a claim--we're not bringing a claim against a
3 VAT investigation or any other tax. We bring it to
4 your attention because we've put it in the record.
5 It's evidence of what's going on. Of course, you'll
6 probably remember very well the Provisional Measures
7 phase that we had, it's a reality that this has been
8 ongoing. It's one of the reasons, it's one of the
9 examples of why we have so much concern about our
10 witnesses and the intimidation, which you can imagine
11 getting such a request literally on November 27th with
12 an obligation to produce thousands of documents on
13 December 12th, that that does not have an effect on
14 our witnesses. It certainly does. And for this
15 reason we felt it was necessary for the Tribunal to
16 appreciate this.

17 And, you know, when things were looking like
18 it was going to interfere with the arbitration, we
19 brought Provisional Measures. We're not doing that at
20 this time, and that is not the basis for Gabriel's
21 claims.

22 Gabriel Jersey has covered investments.

1 Respondent objects on the basis that Gabriel Jersey
2 does not have protected investments. The Investment
3 definition is found in Article 1(a) of the UK BIT.
4 Gabriel Jersey's covered investments, each of which
5 meet the definition of that Treaty, include its
6 majority shareholdings in RMGC, contract rights as
7 Shareholder under RMGC's Articles of Association, and
8 rights under loan agreements with Minvest.

9 Gabriel Jersey also has investments held
10 indirectly through RMGC, a number of them
11 "intellectual property" rights, Mining Licenses,
12 associated Project development rights, and assets
13 acquired by RMGC for the Project.

14 And I just want to take a moment on the point
15 of "intellectual property" rights to just emphasize,
16 and I think this is reflected in the written
17 submissions, but I think the Tribunal appreciates how
18 much tremendous amount of engineering materials,
19 analyses, studies have been done and data relating to
20 the resource which is the property of the State, and
21 when there is a really big issue here of potential
22 unjust enrichment by the State should the State ever

1 decide that it wishes to develop the Mine Project.
2 I'm sure we'll talk about that more when we end up
3 talking about remedies which is not the subject of
4 today's--of this week's hearing.

5 Respondent argues that Gabriel Jersey does
6 not have covered investments because it is a passive
7 Shareholder. This argument has no merit, first,
8 because even passive investors are covered by the BIT,
9 and second, because Gabriel Jersey is not a passive
10 investor in RMGC.

11 Objections that the Investor is a mere
12 Holding Company and/or not the ultimate source of
13 funding repeatedly have been rejected. These are just
14 several of the investment treaty cases in which
15 similar objections have been rejected. These are
16 addressed more in the written submissions.

17 Gabriel Jersey as the State's joint-venture
18 partner made investments in Romania by establishing,
19 as majority shareholder, RMGC, and concluding and
20 fulfilling obligations under associated agreements.
21 Gabriel Jersey was a Party to the joint-venture
22 agreements with the State via Minvest, I mentioned the

1 Articles of Association, I mentioned the multiple Loan
2 Agreements, so Gabriel Jersey was a Party to and
3 fulfilled numerous contractual obligations in relation
4 to its joint venture with the State in RMGC, and none
5 of the cases cited by Romania relating to the meaning
6 of the concept of "investment" relate to analogous
7 circumstances. There are some authorities cited by
8 the Respondent saying that the notion of "investment"
9 has an inherent value, but the fact patterns in those
10 other cases bear no resemblance to the role of Gabriel
11 Jersey and its investment, so we submit those cases
12 are not apposite.

13 The Notice requirement under the UK BIT is
14 basically the same argument as under the Canada BIT.
15 Nothing in the terms of Article 7(1) of the UK BIT
16 would exclude consideration of later facts or events
17 for all the reasons that we set forth earlier. And
18 Romania was fully notified of Gabriel's claims and is
19 in no way deprived of the opportunity to engage in
20 amicable discussions to resolve the dispute.

21 And, finally, on the judgment of the Achmea
22 Case, it does not affect this Tribunal's jurisdiction

1 of the more than 14--and it's at this point, more than
2 14 investment treaty tribunals that have considered
3 the jurisdictional objection presented here by
4 Respondent, every single one of them have rejected it.
5 Indeed, each of the arguments made by Respondent in
6 support of its objection have been fully considered
7 and unanimously rejected.

8 In addition, in this particular case, we have
9 a Claimant from the Bailiwick of Jersey, which itself
10 is not an EU member-state. And this additional factor
11 is just another factor that leads to the conclusion
12 that, even if it's considered relevant, the European
13 Court of Justice's rationale in the Achmea Case does
14 not extend or apply here.

15 And then, finally, almost most certainly,
16 Respondent's objection will be moot when the United
17 Kingdom leaves the European Union. One day we expect
18 that is likely to occur.

19 ARBITRATOR DOUGLAS: So, there is no hope,
20 you don't think?

21 (Laughter.)

22 MS. COHEN SMUTNY: With that, that is the end

1 of Claimants' opening.

2 PRESIDENT TERCIER: Thank you very much.

3 Do you have a question?

4 ARBITRATOR GRIGERA NAÓN: No.

5 PRESIDENT TERCIER: No question, so we would
6 like to thank you for your opening.

7 A few points before closing this first day.
8 The time, Sara, could you indicate the time that has
9 been used by Claimants, by Tribunal, and Respondent.
10 The Respondent had not a lot.

11 SECRETARY MARZAL YETANO: So, out of the six
12 hours of the opening, Claimants had only 42 minutes
13 and 15 seconds remaining.

14 And the Tribunal, out of the five hours
15 allocated to the Tribunal, has four hours and 18
16 minutes remaining.

17 PRESIDENT TERCIER: Okay.

18 Question? No.

19 Good. Second point. You remember that this
20 morning we have decided that each Party will submit
21 C-575 and R-195--it's correct? It's the other way
22 around. Sorry, it's a bit late in the day. And you

1 should submit it. Where are you in the compliance
2 with the Tribunal's order?

3 MR. GREENWALD: Claimants have uploaded their
4 exhibits to the Box site. They could not be e-mailed
5 because of their size, but they were already uploaded,
6 and we understood that Respondent has not yet provided
7 its exhibit.

8 PRESIDENT TERCIER: That is the question that
9 I will ask the Respondent.

10 DR. HEISKANEN: I believe it's been agreed
11 through Ms. Yetano that the Parties will submit the
12 exhibits at the same time, at 6:00 today.

13 PRESIDENT TERCIER: I do not remember that
14 being mentioned but you will do it in any case at
15 6:00.

16 DR. HEISKANEN: Yes.

17 PRESIDENT TERCIER: So, it will really not be
18 late. I don't think it's really worth arguing on
19 that.

20 The other two points that we have, concerning
21 the list of the exhibits and the questions, now you
22 know how late it is and/or how soon it is, and we

1 would like to know whether you could prepare this
2 list? When do you think you can submit this list?

3 MR. LEW: I thought you had suggested that we
4 would do it at the start of the proceedings in the
5 morning. I can say that there aren't a lot of
6 documents, I don't think, for Mr. Henry. We'll go
7 back and double-check that, but I thought that you had
8 suggested it would seem reasonable that we would give
9 it to you at the start of the Hearing tomorrow
10 morning. That should be acceptable.

11 PRESIDENT TERCIER: Respondent?

12 DR. HEISKANEN: It's not only Mr. Henry, we
13 expect to be able to start tomorrow also with
14 Mr. Tanase and at least the start of his examination,
15 possibly some of the cross.

16 MR. GREENWALD: We would like to know what
17 Respondent has planned for the day tomorrow before we
18 have--you know, we're not going to have our witnesses
19 sit in the room all day here tomorrow, so we'd like to
20 have an idea of what's happening.

21 PRESIDENT TERCIER: Anticipating my question.

22 DR. HEISKANEN: As we explained, we expect to

1 be able to--we certainly will start with Mr. Henry
2 tomorrow, and we expect to be able to start with
3 Mr. Tanase tomorrow.

4 PRESIDENT TERCIER: But it was not the answer
5 of the question. Do you know how long approximately
6 you will have for your opening?

7 DR. HEISKANEN: For the opening? That will
8 be somewhere in the region of between three and four
9 hours.

10 PRESIDENT TERCIER: Okay. So, you would
11 comply with it in the morning?

12 DR. HEISKANEN: We expect to be able to
13 complete before the lunch break.

14 PRESIDENT TERCIER: Okay. That's what I
15 meant by "morning."

16 Then we will start with Mr. Tanase
17 and--Mr. Henry and then, possibly, with Mr. Tanase.
18 That's okay for you?

19 MR. LEW: Yes.

20 PRESIDENT TERCIER: So, you will be able to
21 present for both witnesses this list that we have
22 mentioned?

1 MR. LEW: Yes.

2 PRESIDENT TERCIER: Okay. Good.

3 Another point you would like to raise on your
4 side? Dr. Heiskanen?

5 DR. HEISKANEN: Yes.

6 Our understanding is that the list of issues
7 will be provided tomorrow morning for both. Mr. Henry
8 and Mr. Tanase, as we indicated earlier, that's very
9 late, and if the Respondent maintains its objection as
10 to the admission of new evidence on direct
11 examination.

12 PRESIDENT TERCIER: I know. Yes, it's noted.
13 Good. Another point?

14 MR. LEW: We will endeavor to do it tonight,
15 if possible. If not, it will be in the morning. We
16 will exercise best efforts.

17 PRESIDENT TERCIER: Okay. We will take a
18 note of it.

19 You have another point?

20 MS. COHEN SMUTNY: No.

21 PRESIDENT TERCIER: Okay. On your side?

22 DR. HEISKANEN: Nothing further,

1 Mr. President.

2 PRESIDENT TERCIER: Fine. One point for me,
3 I wish you have a pleasant evening, and we will meet
4 tomorrow morning at 9:00. I would like to thank you
5 really for your punctuality. I don't know if it's the
6 influence, I was recent chairman, but I'm really very
7 impressed. Thank you very much.

8 MR. LEW: Thank you.

9 (Whereupon, at 5:41 p.m., the Hearing was
10 adjourned until 9:00 a.m. the following 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.



DAVID A. KASDAN

CERTIFICATE OF REPORTER

I, Margie Dauster, RMR-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.

MARGIE DAUSTER