

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

----- -x  
 In the Matter of Arbitration :  
 Between: :  
 :  
 GABRIEL RESOURCES LTD. and GABRIEL :  
 RESOURCES (JERSEY) LTD., :  
 : Case No.  
 Claimants, : ARB/15/31  
 :  
 and :  
 :  
 ROMANIA, :  
 :  
 Respondent. :  
 ----- -x Volume 1

VIDEOCONFERENCE:  
HEARING ON THE MERITS AND JURISDICTION

Monday, September 28, 2020

The World Bank Group

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

PROF. PIERRE TERCIER, President of the Tribunal

DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

Also Present:

MS. SARA MARZAL YETANO  
Secretary to the Tribunal

MS. MARIA ATHANASIOU  
Tribunal Assistant

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MR. BRODY GREENWALD  
MR. PETR POLÁŠEK  
MR. HANSEL PHAM  
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MR. RICHARD BROWN  
MS. RUTH TEITELBAUM

Representing Roşia Montană Gold Corporation:

MS. CECILIA JAKAB  
MS. ELENA LORINCZ  
MR. MIHAI BOTEA

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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

1  
2           PRESIDENT TERCIER:   So, we will start.

3           Good morning or good afternoon, ladies and  
4 gentlemen.  It is my honor to open this final hearing  
5 in the arbitration case Gabriel Resources and Gabriel  
6 Resources (Jersey) Limited versus Romania, ICSID case  
7 ARB/15/31.

8           I welcome you both, and I wish to express  
9 the wish that the Hearing will take place in the best  
10 spirit without any incidents, and that the Arbitral  
11 Tribunal will receive the information it needs in  
12 order to render an Award.

13           I will go first through a few points.  
14 technical issues, if any, List of Participants  
15 updated, then the recall of some important rules,  
16 asking whether you have other requests and a few words  
17 on this program.

18           I start with the technical issues.  It is  
19 clear that everything is based now on a protocol on  
20 PO33, and we have, I hope now a system that works.  I  
21 would like to thank (drop in audio) ICSID for  
22 arranging everything.

1           On the List of Participants, you know the  
2 members of the Arbitral Tribunal already, Professor  
3 Horacio Grigera Naón, Maria Athanasiou, Professor  
4 Zachary Douglas, and our Secretary is Ms. Sara Marzal.  
5 The assistant is Maria Athanasiou. And we have also  
6 as Court Reporter David Kasdan and as ICSID Conference  
7 Officer, Lamiss Al-Tashi.

8           Now, concerning the Parties, I would like to  
9 recall first that we had received a list.

10           Secondly, in this list we have also the  
11 mention of those who are participants who will be  
12 active speakers. All others should be muted and not  
13 appear on video. And we should also have the  
14 confirmation that nobody else will participate or have  
15 access to the Hearing.

16           And just a last point, I would like to  
17 report that the Witness or rather the Experts have the  
18 right also to access to the opening without objection  
19 from one side. We have received this morning and for  
20 us (drop in audio) a special request from (drop in  
21 audio) the list or the name of the people who are on  
22 both sides.

1 I start with Claimants. Mrs. Cohen,  
2 introduce the people who are on your side.

3 Please, Mrs. Cohen.

4 MS. COHEN SMUTNY: Hello. Good morning.  
5 For me, good morning, good afternoon, Members of the  
6 Tribunal. I will endeavor to name all of those who  
7 are presently connected for the Claimants. There is  
8 myself, Abby Cohen Smutny, from White & Case; my  
9 colleagues from White & Case, Darryl Lew, Brody  
10 Greenwald, Petr Polašek, Hansel Pham, Ms. Gabriela  
11 Lopez Stahl, Francis Levesque, Dara Brown, Daniel  
12 Shults.

13 I believe from the Claimants also in the  
14 virtual hearing room, Mr. Dragos Tanase, Simon Lusty,  
15 Richard Brown, Ruth Teitelbaum, Cecilia Jakab, Elena  
16 Lorincz, Mihai Botea.

17 And from the expert team, there are a few  
18 people, I believe. I might need to check the list of  
19 participants, but I believe joining us this morning is  
20 Ms. Carla Chavich, Mr. Stephen Hurley. If there's  
21 someone else on the line, perhaps one of my colleagues  
22 could mention.



1 (Pause.)

2 I believe that may be it.

3 Hmm?

4 Ah, Mr. Mike Armitage is on and perhaps  
5 Mr. Nick Fox, as well, from SRK.

6 I believe that is who is present in the  
7 hearing room.

8 PRESIDENT TERCIER: Thank you very much,  
9 Mrs. Cohen.

10 Please, Dr. Heiskanen, you have the floor.

11 DR. HEISKANEN: Thank you, Mr. President.  
12 Good morning and good afternoon to everybody.

13 On the Respondent's side, the counsel team  
14 is from Lalive, first of all myself; then my  
15 colleagues, Matthias Scherer, Noradèle Radjai,  
16 Lorraine de Germiny, Christophe Guibert de Bruet,  
17 David Bonifacio, Baptiste Rigau, Emilie  
18 McConaughy, Victoria Leclerc, and Stela Negran. IT  
19 support provided to the Lalive team by Greg Gaillard  
20 and Ken Kotarski. Then we have our colleagues in  
21 Bucharest, Crenguta Leaua, Andreea Simulescu, Liliana  
22 Deaconescu, Andreea Piturca, and Stefan Deaconu, and

1 IT support for LDDP is provided by Ionela Mihaila and  
2 Doru Mihaila.

3           Then we have the experts, most of them are  
4 joining from Boston from the offices of CRA, we have  
5 Bernard Guarnera, Mark Jorgensen, Robert Cameron, Karr  
6 McCurdy, and then from Denver, and IT support for Dr.  
7 Brady is provided by Regus, Jim Burrows, CRA; Tiago  
8 Duarte-Silva, CRA; Martin Malabanan, CRA; Mike Loreth,  
9 CRA; and IT support for CRA in Boston provided by  
10 Jeury Soto, and Randy Montgomery. I believe that's  
11 all on our side.

12           Mr. President, just one preliminary issue.  
13 Our understanding is that, under the Tribunal's  
14 rulings, I believe it's PO1, the witnesses of fact,  
15 which should not be allowed to attend the Opening  
16 Statement and, as you will recall, there are two  
17 witnesses of fact on the Claimants' side to be heard  
18 at this Hearing, Mr. Cooper and Mr. Jeannes. And our  
19 understanding is that, as witnesses of fact, they  
20 should not be allowed to attend the Opening  
21 Statements.

22           PRESIDENT TERCIER: My question is whether

1 they were really fact witnesses? They're witnesses  
2 to--

3 DR. HEISKANEN: They are witnesses of fact.  
4 I don't think there is any dispute about that.

5 PRESIDENT TERCIER: Mrs. Cohen, do you have  
6 a comment?

7 MS. COHEN SMUTNY: The comment is moot.  
8 They are not present.

9 PRESIDENT TERCIER: Okay. (Drop in audio).  
10 You have a further comment on your side on  
11 the list of participants, Mrs. Cohen?

12 MS. COHEN SMUTNY: Did we have a supplement?  
13 No. No, I think--

14 (Pause.)

15 MS. COHEN SMUTNY: My colleagues confirm  
16 that we've given a full list.

17 PRESIDENT TERCIER: Okay. Good.

18 Thank you.

19 On your side, Dr. Heiskanen?

20 DR. HEISKANEN: Nothing further to add.

21 Thank you very much.

22 PRESIDENT TERCIER: Okay. Now, I think it

1 could be time just to mention this letter, a message  
2 that was received early this morning by our Secretary  
3 from the General Counsel Advocate General Bureau (drop  
4 in audio) of the Government of Canada. I don't think  
5 you have received a copy of this letter.

6 Sara, am I right?

7 SECRETARY MARZAL YETANO: I haven't  
8 transmitted it to the Parties yet. I can do  
9 this immediately.

10 PRESIDENT TERCIER: Okay. I will read it to  
11 you. "Mrs. Marzal, I'm writing with respect to the  
12 (drop in audio) case. I understand that the virtual  
13 hearing will be taking place in this matter early this  
14 week and that the details of the Hearing are set out  
15 in Procedural Order 33, which is not yet on the ICSID  
16 website. I'm seeking a copy of this Procedural Order,  
17 pursuant to Annex C of the Agreement between the  
18 Government of Canada and the Government of Romania for  
19 the Promotion and Reciprocal Protection of  
20 Investments, Government of Canada has the right to  
21 attend the hearing, and may want to avail itself of  
22 this right.

1           Now, it was too late to react, especially  
2 because the Members of the Tribunal have received this  
3 a few minutes ago.

4           Can you make at this juncture a comment on  
5 your side, Mrs. Cohen?

6           MS. COHEN SMUTNY: My understanding--and I  
7 want to emphasize this is subject to consultation of  
8 the Bilateral Investment Treaty--but from my  
9 recollection, the representative of Canada has a right  
10 to attend the Hearing, and so Claimants have, on that  
11 basis, no objection. If one of my colleagues will  
12 correct me if I'm mistaken, please, but on that basis  
13 that there is a right in the Treaty, then there is no  
14 objection on the Claimants' side.

15           PRESIDENT TERCIER: Okay. Dr. Heiskanen?

16           DR. HEISKANEN: Mr. President, we will need  
17 to confer and see what the position is. We will  
18 revert during the next break.

19           PRESIDENT TERCIER: Very well. I think  
20 (drop in audio) there are two requests. One is to  
21 receive a copy of Procedural Order No. 33 and  
22 apparently without (drop in audio) they would like to

1 attend. And we do not, of course, suspend the meeting  
2 in order to allow them to join. So, I would be  
3 grateful, indeed, if both Parties give their position  
4 during the break, and the Arbitral Tribunal will then  
5 (drop in audio).

6 Are you in agreement my co-Arbitrators (drop  
7 in audio)--

8 ARBITRATOR DOUGLAS: Yes, indeed.

9 PRESIDENT TERCIER: Fine. Good.

10 Come to the next point, and the next point  
11 is (drop in audio) no problem. We had received on the  
12 18th of September from Claimants the rebuttal  
13 documents and the list; then we have received also the  
14 errata and the new version of the reports of (drop in  
15 audio). No objection. We have received the document,  
16 demonstratives exhibits for the Opening, and we have  
17 received, and I would like to thank both Parties also,  
18 a printed version of the PowerPoints presentation for  
19 the Opening.

20 May I ask both Parties to send us an  
21 electronic copy of these documents so that we can have  
22 also them on our computer? Mrs. Cohen, is it

1 possible?

2 MS. COHEN SMUTNY: I'm checking with my team  
3 now. My understanding is that it was already sent, so  
4 I'm asking my colleagues to verify that we already  
5 have sent that.

6 PRESIDENT TERCIER: I'm checking. It's  
7 possible because we received so many e-mails recently.

8 SECRETARY MARZAL YETANO: Yes, if I may  
9 interrupt, the Claimants' opening presentation was  
10 received, the electronic copy, and was transmitted.

11 PRESIDENT TERCIER: Okay, good. Thank you  
12 very much for the information.

13 On your side, Dr. Heiskanen?

14 DR. HEISKANEN: Yes. We will be sending our  
15 slides during the break before we start.

16 PRESIDENT TERCIER: Fine.

17 I come now to Point No. 3, just recalling a  
18 few important rules. I don't want to go (drop in  
19 audio) to PO 33. Important for us is to recall you on  
20 the rules concerning the time, the allocation of time.  
21 I draw your attention to Paragraph 16. You remember  
22 that you have a total of 14 hours that you are free to

1 use as you see fit, and that our Secretary will use  
2 the chess-clock system.

3           Then, important point again is for everybody  
4 to be muted--of course not the active speaker and not  
5 here--on video, and I would also mention the fact that  
6 the witnesses, the sequestration we have made.

7           And I draw also your attention on  
8 Paragraph 77 concerning the transparency, and in  
9 particular I rely at any time during the Hearing, the  
10 Parties may request that the part of the Hearing be  
11 private and thus excluded from the recordings. (Drop  
12 in audio) In fact, the Parties shall already inform  
13 the Tribunal before topics are raised or immediately  
14 if they begin to be raised which could reasonably be  
15 expected to address confidential information. I would  
16 like to invite our Secretary to look at it (drop in  
17 audio).

18           And my last point concerning so that we not  
19 address it, you remember under Paragraph 79 that we  
20 may ask for the (drop in audio) according to PO 27  
21 concerning the questions (drop in audio).

22           Any special point that you would like me to



1 raise or a question on your side, Sara?

2 SECRETARY MARZAL YETANO: Nothing else.

3 I would just simply remind the Parties that  
4 if they wished to, in addition to any oral indication  
5 regarding the confidentiality of the Hearing, they  
6 wished to use the chat feature and indicate session  
7 open, session closed, that would be fine. We will  
8 have a record of the chat and we'll distribute it  
9 later.

10 And also just to remind everyone to mute  
11 their microphones when not speaking.

12 PRESIDENT TERCIER: Okay. Good. Are there  
13 other points, questions or requests from Claimants'  
14 side?

15 Mrs. Cohen.

16 THE WITNESS: No, there is not. Thank you.

17 PRESIDENT TERCIER: And on Respondent's  
18 side, Dr. Heiskanen?

19 DR. HEISKANEN: Nothing from our side,  
20 Mr. President.

21 PRESIDENT TERCIER: Fine. Thank you very  
22 much.

1           We are now coming to the real subject of the  
2 Hearing, namely the Opening Statement, and we will  
3 start, of course, with the Claimants.

4           We have now received the Opening. Thank you  
5 very much. We have received it (drop in audio) just a  
6 few minutes ago, and I thank you.

7           Mrs. Cohen, you have now the floor. You  
8 remember that you have up to three hours, and if you  
9 could so organize it in a way that we can have a  
10 15-minute break somewhere at a moment that seems to  
11 you opportune having also in mind the needs of David  
12 of the concerns of the Transcript.

13           So, is it clear, or you have a point you  
14 would like to raise? Otherwise, you may start.

15           MS. COHEN SMUTNY: Okay. If everyone is  
16 ready, Mr. President, if we're ready, Claimants are  
17 ready to begin.

18           PRESIDENT TERCIER: Please go ahead.

19           OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

20           MS. COHEN SMUTNY: When we met last in  
21 December 2019, we discussed the evidence in the record  
22 mostly relating to liability. The evidence that

1 remains to be addressed that we plan to discuss this  
2 week relates mostly to the Claim for compensation.

3           Last December, we saw that, beginning in  
4 August 2011, the Government effectively adopted a  
5 policy that RMGC's Projects, and in particular the  
6 Roșia Montană Project, would be permitted to proceed  
7 only if the Projects were deemed politically  
8 acceptable, which required, among other things,  
9 improved economics for the State. Repeated statements  
10 of senior members of the Government, both with conduct  
11 consistent with those statements, made clear that  
12 policy was adhered to and implemented even as the  
13 Government changed twice in 2012.

14           On September 9th, 2013, the leaders of the  
15 governing coalition pronounced that the Law that the  
16 Government had declared would decide whether the Roșia  
17 Montană Project would be done was to be rejected; and  
18 so, in due course, it was. Everything that followed  
19 was consistent with the fact that the political  
20 decision had been taken by the Government that the  
21 Project would not be done and that the Government was  
22 terminating its joint venture with Gabriel, putting an

1 end effectively to RMGC's Bucium Projects as well.

2           Romania's failure to treat Claimants'  
3 investment in accordance with the law, culminating in  
4 the State's political rejection of the Project Rights,  
5 rendered those rights worthless. Thus, Romania's  
6 breach of its BIT obligations caused Claimants to  
7 incur losses in the amount of the value of the Project  
8 Rights. The Claimants each owned shares that derived  
9 their value from the Project Rights. Thus, Claimants  
10 incurred losses in the amount of the value of the  
11 Project Rights through the deterioration of the value  
12 of the shares they held.

13           Once the Project Rights lost value, the  
14 share price of Gabriel Canada, which derived its value  
15 from the Project Rights, collapsed to the very low  
16 level where it remains today, reflecting the market's  
17 expectation of the value of the only assets that  
18 Gabriel retains, such as the claims presented in this  
19 Arbitration.

20           What we see here is a chart graphing the  
21 progression of Gabriel Canada's share price over time.  
22 The Valuation Date is noted, and one can see the

1 progression in the years on the lower axis.

2           By the way, GBU is the ticker symbol for  
3 Gabriel Canada. You'll see on some of the charts GBU;  
4 that relates to Gabriel Canada's share price.

5           I'll now address some considerations  
6 relating to the Valuation Date.

7           The Valuation Date follows from application  
8 of the basic rules regarding reparation. Restitution,  
9 which is the primary form of reparation for a wrongful  
10 act in international law, refers to re-establishing  
11 the status quo ante, the situation that existed prior  
12 to the occurrence of the wrongful act.

13           Restitution does not mean re-establishing  
14 the situation that would have existed if the wrongful  
15 act had not been committed. Restitution thus ensures  
16 an assessment of a factual situation and is not a  
17 hypothetical inquiry into what the situation would  
18 have been had the wrongful act not been committed. It  
19 may be necessary to make that hypothetical inquiry  
20 into the but-for situation when restitution or  
21 compensation in an equivalent amount is not sufficient  
22 to wipe out the consequences of the wrongful act. In

1 such cases, restitution may be completed by  
2 compensation for such additional damage.

3           Thus, we first evaluate what is needed to  
4 re-establish the situation as it was prior to the  
5 wrongful act. We may make a hypothetical inquiry into  
6 the but-for situation thereafter if further  
7 compensation is needed to wipe out the consequences of  
8 the wrongful act.

9           Re-establishing status quo ante in this case  
10 means assessing value as of July 29, 2011.

11 Restitution is the remedy that is applicable to any  
12 wrongful act. It is not limited to claims of  
13 expropriation. It applies following a breach of any  
14 BIT provision. When the wrongful act results from  
15 conduct extending over time, as in this case,  
16 re-establishing the status quo ante means referring to  
17 the date prior to the start of the wrongful conduct.  
18 The rule ensures that we assess the situation absent  
19 the impacts of the wrongful conduct and absent also  
20 the impacts of the threat of the wrongful conduct.

21           In this case, the evidence shows that the  
22 date immediately prior to the start of the drawn-out,

1 publicly aired, politicized decision-making process  
2 regarding Gabriel and the Roșia Montană Project was  
3 July 29, 2011.

4           As the Tribunal recalls, there are two  
5 Claimants in this case, each bringing a claim under a  
6 different BIT. As the UK BIT entered into force in  
7 January 1996, for Gabriel Jersey's claim there are no  
8 temporal limitations as to the Tribunal's ability to  
9 take the State's conduct into account as of  
10 August 2011.

11           The Canada BIT entered into force on  
12 November 23rd, 2011. For Gabriel Canada, therefore,  
13 Romania's conduct could only be in breach of the  
14 Canada BIT starting from that date. Nevertheless, the  
15 Tribunal may take account of the value of the Project  
16 Rights prior to November 23rd, 2011, in order to  
17 assess the status quo ante in relation to Romania's  
18 conduct thereafter.

19           Indeed, the evidence as to the status quo  
20 ante shows, based on the average market capitalization  
21 of Gabriel Canada over the entire year of 2011, that  
22 the value of the Project Rights did not materially

1 change over the course of 2011. You can see that  
2 here--this is a graph again of Gabriel Canada's market  
3 price over the Year 2011. The two dates that we've  
4 been discussing are indicated. The purple line  
5 relates to--and we'll talk about that more later this  
6 week--the purple line relates to the 90-day average  
7 market capitalization that Compass Lexecon refers to,  
8 and the green line refers to the average market  
9 capitalization of Gabriel Canada over the entire year  
10 of 2011.

11 SECRETARY MARZAL YETANO: I'm terribly sorry  
12 to interrupt. But there is a call-in No. 4 that has  
13 not been identified in the List of Participants, and I  
14 would ask whoever is (drop in audio) calling No. 4 to  
15 identify himself or herself before we can continue.

16 (Pause.)

17 SECRETARY MARZAL YETANO: Can Claimants'  
18 counsel or Respondent's counsel help me identify this  
19 caller?

20 DR. HEISKANEN: The Respondent doesn't know  
21 who the person might be.

22 SECRETARY MARZAL YETANO: Claimants' side,



1 somebody who called in?

2 MS. COHEN SMUTNY: What?

3 I understand that this comes from Ruth  
4 Teitelbaum, but I think--one moment we'll clarify,  
5 because if the connection is not proper, it needs to  
6 be corrected.

7 (Pause.)

8 MS. COHEN SMUTNY: I'm told Ms. Teitelbaum  
9 dialed in on another line because her audio connection  
10 via the WebEx link was not working. I don't know if  
11 there's a way that that could be verified.

12 SECRETARY MARZAL YETANO: If she could  
13 speak, and if she confirms orally, then that would be  
14 perfect that she's there.

15 I mean, I assume that--I guess we can  
16 proceed like that, if nobody has any objection. I  
17 assume that caller No. 4 is Ruth Teitelbaum, and you  
18 may continue. She is not able to confirm right now  
19 orally.

20 PRESIDENT TERCIER: Okay. If there is no  
21 objection, I think, Mrs. Cohen, fine, you may proceed.

22 MS. COHEN SMUTNY: Okay. Thank you.

1           Continuing. In 2011, the Government cited  
2 the increased gold prices--well, let me start here by  
3 saying Respondent has argued that Claimants chose a  
4 July 2011 Valuation Date due to the high price of gold  
5 prevailing at that time. That is wrong. The  
6 Valuation Date follows from the rules of reparation  
7 for a wrongful act. Respondent's conduct dictates the  
8 Valuation Date. Indeed, the evidence shows the  
9 increase in the price of gold at that time was among  
10 the reasons motivating the Government to require  
11 changed economic terms.

12           I draw your attention here to a number of  
13 statements made during the time in 2011, a number of  
14 statements by President Basescu, regarding the need to  
15 renegotiate, change economic terms due to the  
16 then-prevailing high price of gold. Prime Minister  
17 Boc, also in August 2011, making the same point.  
18 Minister of Culture Kelemen Hunor, later in October,  
19 repeating once again the need for renegotiation, in  
20 view also of the increased price of gold; and Minister  
21 for Environment Borbely commenting later in the year,  
22 emphasizing that these things had been discussed

1 within the Government and with the President.

2 I'll now make some comments regarding the  
3 fair market value measure of damages.

4 Both Parties accept that value of the  
5 Project Rights means their Fair Market Value. The  
6 Fair Market Value is the price a hypothetical buyer  
7 and seller, both with reasonable knowledge and  
8 neither under compulsion, would accept. Although the  
9 assessment may be based on a hypothetical transaction,  
10 the standard is intended to approximate the price at  
11 which an actual unforced transaction would occur in  
12 normal conditions free of the impacts of the wrongful  
13 conduct.

14 "Fair Market Value" is defined, for example,  
15 by the American Society of Appraisers as referring to  
16 the price a buyer and seller would accept when both  
17 have reasonable knowledge of the relevant facts.

18 And Ripinsky and Williams, in a survey that  
19 they describe and discuss in a publication, having  
20 surveyed the decisions of many investment tribunals,  
21 they observed that the common denominator with respect  
22 to Fair Market Value has been that Fair Market Value

1 represents a reasonable price that would normally be  
2 paid by a willing buyer and a willing seller of the  
3 asset.

4           The share price of Gabriel Canada and, by  
5 extension, its market capitalization is a robust,  
6 non-speculative and highly reliable measure of the  
7 Fair Market Value of a minority interest in the  
8 Project Rights. The Project Rights were Gabriel's  
9 only significant asset. Investors had access to  
10 extensive information about Gabriel, including  
11 numerous securities disclosures by the Company, a  
12 tremendous amount of NGO press and other media  
13 coverage aimed at the market regarding Gabriel and the  
14 Project. Investors also had access to numerous  
15 reports and recommendations of specialist market  
16 analysts.

17           Gabriel shares were actively traded over the  
18 relevant time period, meaning numerous real-world  
19 market participants bought and sold shares of Gabriel  
20 on the basis of the very market measure that forms the  
21 basis of the Claimants' claims in this Arbitration.

22           Gabriel's investors included

1 significant--sorry--sophisticated institutional  
2 investors who materially increased their holdings  
3 during 2011, transacting at a time proximate to the  
4 Valuation Date.

5           Thus, this case is practically unique among  
6 investment treaty cases in that the Tribunal does not  
7 need to dissect complex expert analyses of the Fair  
8 Market Value of the rights at issue in order to assess  
9 damages. Gabriel Canada's publicly traded share price  
10 and, by extension, its market capitalization as of  
11 July 29, 2011, reliably reflects the actual Fair  
12 Market Value of the Project Rights from a minority  
13 shareholder perspective free of the impacts of the  
14 wrongful acts. In this case, no speculation or  
15 detailed hypothetical recreations of value is  
16 required. We can simply observe the market's actual  
17 valuation, referring again here to the chart we looked  
18 at before in drawing your attention to that purple  
19 line, which you'll hear Compass describe the basis of  
20 that 90-day average market capitalization prior to the  
21 Valuation Date.

22           To assess the Fair Market Value of the

1 Project Rights, as Compass Lexecon explains in its  
2 reports, one must include an acquisition premium as  
3 the market capitalization reflects the value of the  
4 Project Rights from a minority shareholder  
5 perspective. This is further supported by the  
6 testimony of Charles Jeannes and Barry Cooper, from  
7 whom you will be hearing later this week. As they  
8 explain, nearly every acquisition that takes place in  
9 the gold sector includes a significant acquisition  
10 premium reflecting the market's demand for Project  
11 Rights such as those at issue here.

12           Indeed, as Mr. Henry explained in his  
13 written statements, the Project Rights were considered  
14 to be a trophy asset and were a highly attractive  
15 acquisition target. Indeed, Project Rights of the  
16 type at issue in this case are very rare, considering  
17 in particular their size; that is to say, the size of  
18 the Roşia Montană deposit in particular.

■

■

■

■

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[REDACTED]

11 Respondent's contention that a fair-market  
12 valuation of the Project Rights must be based on lower  
13 gold prices finds no support in any contemporaneous  
14 evidence or in any legal authority. There is no basis  
15 to conclude that investors at the time were not aware  
16 of the evolution of gold prices. There is no basis to  
17 doubt that the actual observed market value already  
18 took expectations about the price of gold into  
19 account. In other words, the observed market price  
20 for Gabriel's shares, far from being inflated,  
21 reflected expectations based on a vast amount of  
22 readily available information about the likely future



1 evolution of the price of gold.

2           The statement of Charles Jeannes, who, at  
3 the time was CEO of Goldcorp, one of the world's  
4 then-largest gold companies, also makes clear that  
5 well-informed sophisticated market participants  
6 engaged in transactions throughout 2011 accepting the  
7 then-prevailing prices as fair market measures that  
8 took account of informed expectations about gold  
9 prices. There is no support for Respondent's  
10 arbitration argument that the actual market value of  
11 Gabriel's shares in 2011 was inflated because gold  
12 prices were high at that time. Real gold prices, like  
13 many commodities, go through pricing cycles. Indeed,  
14 gold prices today are even higher than they were in  
15 2011.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[Redacted text block consisting of multiple lines of blacked-out content]



█ [REDACTED]  
█ [REDACTED] Specifically,

3 Respondent argues that a buyer or seller would assume  
4 that there would be significant delays due to  
5 litigation regarding the PUZ, or urbanism plan, in the  
6 area of the Project. However, as Professor Podaru  
7 explained in his written reports, the litigations  
8 challenging the urbanization plans in the area of the  
9 Project were based principally on the Ministry of  
10 Culture's failure to declassify historical monuments  
11 in the area of the Project and thus cannot have been  
12 expected but for the wrongful acts.

13 Respondent also argues that expropriation of  
14 some properties would be necessary. Claimants,  
15 however, have shown that, had the Environmental Permit  
16 been issued, the majority, if not all, of the  
17 remaining property owners would have sold, and that  
18 even if expropriation would have become necessary, it  
19 was possible without material disruption to the  
20 estimated timeline.

21 Respondent also argues that a Construction  
22 Permit would not be issued until all surface rights

1 were acquired. The record, however, demonstrates that  
2 construction permits could have and would have been  
3 issued in phases allowing construction of the Project  
4 to progress accordingly.

[REDACTED]

[REDACTED]

16           A fundamental requirement of compensation is  
17 that it must be based on a measure of loss that is  
18 free of the impacts of the wrongful conduct. That  
19 would be achieved in this case with a Valuation Date  
20 set prior to the commencement of the wrongful course  
21 of conduct commencing in 2011. If, however, the  
22 Tribunal concludes that Romania's wrongful conduct is

1 not characterized as a composite act commencing in  
2 2011, compensation, nevertheless, still must be based  
3 on a measure of loss that is absent the impacts of  
4 Romania's wrongful conduct or the threat thereof.

5           Romania's wrongful conduct that may have  
6 impacted the market measures include numerous public  
7 statements by senior government officials disparaging  
8 Gabriel, RMGC, and the Roșia Montană Project; the  
9 failure of the Ministry of Culture to declassify  
10 historical monuments following the issuance of ADC, as  
11 required by law, which, as Professor Podaru in his  
12 written reports explains, provided a basis for  
13 litigation impacting local zoning decisions such as  
14 the PUZ in the area of the Project, and that were to  
15 be the basis for issuing Construction Permits.

16           Wrongful conduct includes politicizing and  
17 then failing to complete the environmental-permitting  
18 process for the Roșia Montană Project, coercive public  
19 demands for changed economics in the State's joint  
20 venture with Gabriel and in the terms of the Roșia  
21 Montană License, and failing to issue exploitation  
22 licenses for the Bucium Projects.

1           By September 9, 2013, when the Decision of  
2 the governing coalition to reject the Roşia Montană  
3 Project was announced, the impacts--the negative  
4 impacts--of the State's wrongful conduct, including  
5 permitting delays over the sustained period since  
6 early 2012 had profound negative impacts on the  
7 market's valuation of the Project Rights. What the  
8 evidence shows is that, from early 2012, when the  
9 Environmental Permit was expected and would have been  
10 issued but for the State's wrongful political blockage  
11 of the permitting process, the polluting impacts of  
12 Romania's wrongful conduct were reflected in the  
13 actual market value of the Project Rights as reflected  
14 in Gabriel's share price. Consequently, any measure  
15 of value of the Project Rights based on Gabriel  
16 Canada's actual share price beginning from early 2012  
17 cannot be relied upon as a basis for compensation  
18 without first adjusting to correct for the impacts of  
19 the wrongful conduct.

20           I'm going to stop at this point and turn  
21 over to my colleague, Mr. Lew.

22           MR. LEW: Can you hear me? I don't see--I'm



1 not sure you can hear me or see me? You can hear me?  
2 Can you see me? Okay. Great. Thank you. I couldn't  
3 tell. It's probably good I can't see myself.

4 So, good morning, everybody, good afternoon.

5 As Ms. Smutny just explained, as of the  
6 Valuation Date, Gabriel's market capitalization  
7 reflected a well-informed view of the value of the  
8 Project Rights. To illustrate this, we will walk  
9 through the Company's disclosures to the market in  
10 more detail and explain why the market had materially  
11 accurate information about the Project's risks and  
12 prospects.

13 I think a number of parts of this  
14 presentation are going to have Confidential  
15 Information, and I think we're going to have to revert  
16 perhaps at a break with more precision [REDACTED]

[REDACTED]  
18 [REDACTED] so I  
19 think I can't be more precise right now and will  
20 endeavor to do so as needed.

[REDACTED]  
[REDACTED]



[REDACTED]

[REDACTED]

18 Let's now examine some of the key disclosures about  
19 the Project focusing on the year-end Annual  
20 Information Form dated March 9, 2011, which is Exhibit  
21 C-1808, and the accompanying annual Management  
22 discussion and analysis, which is Exhibit R-307.

1 First, regarding surface rights, Gabriel's  
2 disclosures describe the need for and status of  
3 surface rights acquisitions and in restrictive terms,  
4 the procedure for expropriation.

5 Gabriel's disclosures describe the  
6 significant risks to the Project arising from the need  
7 to acquire surface rights within the Project footprint  
8 in order to obtain construction permits. The  
9 disclosure emphasized the need to acquire surface  
10 rights to apply for Construction Permits and that the  
11 Company might not succeed in acquiring them. The  
12 Company, therefore, disclosed that there were  
13 significant risks, that the acquisition of surface  
14 rights could be delayed, which could negatively impact  
15 Gabriel's Development Plans, increase costs or prevent  
16 the development of the Roşia Montană Project  
17 altogether. [REDACTED]

[REDACTED]  
[REDACTED]  
20 With respect to litigation, Gabriel  
21 disclosed that NGOs had brought a multitude of legal  
22 challenges against permits and approvals with the

1 objective of delaying and stopping the Project.  
2 Gabriel disclosed the volume of NGO litigation and  
3 summarized it by topic, including with respect to the  
4 Roşia Montană Mining License, land-use regulations,  
5 the environmental-permitting process, Archaeological  
6 Discharge Certificate No. 4 for Cârnic, and urbanism  
7 certificates.

█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]

15 Gabriel disclosed that litigations often  
16 take many months for an initial decision, additional  
17 time for the Court's reasoning, at least one appeal  
18 lasting an additional number of months, and that  
19 procedural disputes can lead to additional legal  
20 actions.

█ [REDACTED]  
█ [REDACTED]

[REDACTED]

14 Gabriel disclosed that there are significant  
15 risks that such legal challenges could result in the  
16 suspension, annulment, or termination or prevent the  
17 issuance of required approvals, could add costs, or  
18 prevent development of the Roşia Montană Project  
19 itself. Gabriel also specifically disclosed that  
20 current and any future NGO litigation may continue to  
21 cause potential setbacks to the Project timeline.

22 Gabriel disclosed that, in addition to the

1 many legal challenges, NGOs had organized a continuous  
2 opposition campaign that included public protests. As  
3 demonstrated at the last hearing, the Company had a  
4 Social License both locally and nationally during the  
5 relevant time period, but did disclose that NGOs were  
6 engaged in a variety of activities to try to influence  
7 public opinion. Gabriel disclosed that continued  
8 opposition to the Project could result in delays and  
9 additional costs or prevent development of the  
10 Project.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[Redacted text block]



1 critical assessment and driver of market value was  
2 whether, not when, the gold would be extracted, which  
3 turned on whether the Project would be permitted, with  
4 the main focus naturally being on the Environmental  
5 Permit.

[REDACTED]

[REDACTED]

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22

Romania's argument is flawed because it

1 focuses principally on the buyer rather than on the  
2 assumptions it would inform a fair-market analysis,  
3 which must reflect the price at which the buyer and  
4 seller would both agree, as Ms. Smutny explained.

5           Respondent's argument also is flawed because  
6 the market already was made aware of the risk of  
7 significant timeline delays, and Respondent's alleged  
8 timeline in any event is based on false premises and  
9 improperly incorporates the impacts of Romania's  
10 unlawful conduct.

11           The first fundamental flaw in Romania's  
12 counter-factual timeline is it instructed Dr. Burrows  
13 to assume four years of delay based on ex post  
14 information concerning court proceedings that began in  
15 2011 and ultimately concluded in March 2016 with the  
16 annulment of the SEA Endorsement for the PUZ.

17           Obviously, the hypothetical buyer and seller  
18 would have no basis to assume in 2011 that this  
19 particular litigation would proceed for over four  
20 years.

21           Nevertheless, as we've described, Gabriel  
22 disclosures did refer to the fact that there had been

1 over 140 separate litigation files commenced by NGOs  
2 since 2004 and that such litigations could result in  
3 significant delays, including due to appeals and  
4 related procedural aspects. It is, therefore,  
5 reasonable to assume that the hypothetical buyer and  
6 seller would factor in the risk of litigation delays  
7 as the market--as the actual market value certainly  
8 already did.

9           The second fundamental flaw in Romania's  
10 counterfactual timeline, its reliance on alternative  
11 facts, is that it focuses on the litigation that led  
12 to the annulment of the SEA Endorsement that was  
13 needed for the Project area urbanism plan, of course,  
14 the PUZ. As Professor Podaru explains, that  
15 litigation centered on the Ministry of Culture's  
16 refusal to take steps to correct errors in the 2010  
17 List of Historical Monuments, to remove Cârnic from  
18 the List of Historical Monuments when it issued the  
19 second Cârnic ADC in 2011, and the culture  
20 authorities' related failure to delineate protection  
21 areas for the historical monuments in the Project  
22 area. The SEA Endorsement was thus annulled

1 principally on the ground that it did not reflect that  
2 historical monuments in the area of the Project in  
3 accordance with the LHM then in effect.

4           Thus, Respondent's assumed timeline  
5 improperly seeks to incorporate specific delays that  
6 were caused by Romania's unlawful failure to take  
7 steps to permit the Project.

8           More specifically, the Tribunal will recall  
9 from our Hearing in December that when the State  
10 blocked permitting in 2011 to coerce an increase in  
11 the State's economic stake, the culture authorities  
12 failed to take required actions. The culture  
13 authorities failed to correct unjustified  
14 modifications in the 2010 List of Historical  
15 Monuments, that they had repeatedly acknowledged were  
16 errors.

17           Minister Hunor publicly stated that he would  
18 not remove Cârnic from the 2010 List of Historical  
19 Monuments until after economic renegotiations.  
20 Following NGO challenge, the Court annulled the SEA  
21 Endorsement because it was premised on a description  
22 of the historical monuments as reflected in the 2004

1 LHM and not on the 2010 LHM which, among other things,  
2 included Cârnic in a two kilometer radius around Orlea  
3 as a historical monument.

4 Now, as we discussed, Cârnic should have  
5 been removed from the List of Historical Monuments  
6 once the ADC was issued, but Minister Hunor refused to  
7 do that pending renegotiation.

8 The SEA annulment in turn frustrated  
9 approval of the urbanism plan in the area of the  
10 Project. Respondent's proffered counterfactual  
11 scenario, therefore, includes four years of delay for  
12 litigation grounded in the State's own political  
13 blocking and repudiation of the Project.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]

[REDACTED]

3           The evidence simply does not support these  
4 assertions. As shown at the first hearing, RMGC  
5 reasonably expected it would be able to acquire the  
6 remaining properties without expropriation. And if  
7 expropriation were needed, it was available and would  
8 not have materially delayed the Project, which would  
9 be implemented in phases, not pursuant to one  
10 Construction Permit, as Gabriel--sorry, as Romania now  
11 argues.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15           As shown at the first hearing, expropriation  
16 is available under Mining Law Article 6 and  
17 Expropriation Law Article 6-7 to support mining  
18 activity licensed by the State. As Professor Podaru  
19 explains, the Construction Law envisions the  
20 possibility of obtaining Construction Permits for a  
21 project in phases, meaning that after the  
22 Environmental Permit is issued, surface rights,

1 including any needed archaeological discharge, could  
2 be also obtained in phases as needed to support  
3 successive Construction Permits.

[REDACTED]

19 As Professor Bîrsan discusses, the  
20 expropriation process must be reasonable in duration  
21 and may be completed within one year. Indeed, while  
22 contending a longer time would be more realistic, in



1 view of the terms that the Law sets out, as well as  
2 the estimated--sorry, I think we have to catch up.  
3 It's on the next slide, yeah.

4           Indeed, while contending a longer timeline  
5 would be more realistic in view of the terms that the  
6 Laws set out, as well as the estimated length of court  
7 proceedings, Professors Sferdian and Bojin conclude  
8 that the best-case scenario for expropriation process  
9 would last approximately one year.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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1 to the Tribunal.

2           PRESIDENT TERCIER: Okay. We introduce--do  
3 you know approximately where you are, close to the  
4 middle or approximately?

5           MR. LEW: I would say approximately in the  
6 middle.

7           PRESIDENT TERCIER: Okay.

8           MR. LEW: I'm getting told no. My  
9 approximation--yeah, we will give you maybe a better  
10 estimate after the break.

11           PRESIDENT TERCIER: Okay. Good.

12           So, we take a 15 minutes' break. We start  
13 again 10 minutes before for us, so adapt your timing.

14           I recall that at the end I would be grateful  
15 to have both Parties, but especially Respondent's  
16 position, concerning the requests of the Government of  
17 Canada.

18           Okay. From my co-Arbitrator, I don't think  
19 we need to have follow-up right now, except if one of  
20 you requires it. Doesn't seem to be the case. One  
21 smiles, the other says no.

22           Okay. We start again in 15 minutes. Thank

1 you very much.

2 (Recess.)

3 PRESIDENT TERCIER: Mr. Greenwald, you  
4 ready, too? And on Respondent's side, Dr. Heiskanen,  
5 you're ready, too?

6 DR. HEISKANEN: Yes, we are ready.

7 PRESIDENT TERCIER: Fine.

8 So, Mr. Greenwald, you have the floor.

9 MR. GREENWALD: Mr. President, Members of  
10 the Tribunal, just on the procedural point you asked  
11 about earlier, we have been shown Annex C, Section II.  
12 Paragraph 4 provides the Canadian representative a  
13 right to attend any hearing, so Claimants have no  
14 objection, of course, to the representative attending  
15 the Hearing, provided it's not going to interrupt when  
16 a break happens and that can be done.

17 PRESIDENT TERCIER: Okay. Sorry to  
18 interrupt you. May I ask Dr. Heiskanen whether if he  
19 could give his position.

20 DR. HEISKANEN: The Respondent has no  
21 objection.

22 PRESIDENT TERCIER: Okay. So, Sara, would

1 you please send PO 33 to the Government.

2 SECRETARY MARZAL YETANO: Will do.

3 PRESIDENT TERCIER: Okay. Thank you very  
4 much.

5 Mr. Greenwald, you have the floor.

6 MR. GREENWALD: Thank you.

[REDACTED]

[Redacted text block containing multiple lines of obscured content]





[REDACTED]

22

The notion that these analysts in 2011

1 uncritically repeated the Company's 2009 cost  
2 disclosures either ignores or misreads the text of  
3 their Report. As Mr. Cooper explains, analysts'  
4 references to initial capital, construction capital,  
5 pre-production capital, they all have the same meaning.  
6 They do not include financing costs, working capital  
7 or other costs.

[REDACTED]

[Redacted]

[Redacted]

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[Redacted text block]

[REDACTED]

11           As I will now discuss, permitting was the  
12 key driver of changes in Gabriel's market  
13 capitalization. We'll turn to Volume 4.

14           By early 2012, Romania's wrongful treatment  
15 of Gabriel's investments negatively impacted Gabriel  
16 Canada's share price, so having now seen that  
17 Romania's explanations for the drop in Gabriel's  
18 market capitalization do not withstand scrutiny, they  
19 do not hold up to the evidence, we'll now explain what  
20 the contemporaneous evidence does show about what  
21 actually affected Gabriel's market capitalization in  
22 2012 to 2013.



[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The

Tribunal will recall from the last hearing that the TAC met three times on September 22nd, 2010, December 22nd, 2010, and March 9, 2011, and completed its review of the EIA Report except for two non-substantive chapters.

Gabriel reported the TAC's progress and noted that the Company's objective in 2011 was completing the TAC process for the review of the EIA for the Project and ultimately receipt of EIA approval.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[Redacted text block]

[REDACTED]

16  
17  
18  
19  
20  
21

On July 14, 2011, the Ministry of Culture did issue ADC No. 9 for Cârnic, which discharged the entire Industrial Area for the Project, as discussed at the last hearing, except for Orlea, where mining was to begin in Year 7 of the operations. So, this put the market focus squarely on EIA approval.

[REDACTED]

[REDACTED]

19                   In October 2011, as the Tribunal will  
20 recall, the permitting process moved toward  
21 finalization and completion. RMGC responded to the  
22 TAC's final questions, TAC members visited the Project

1 site, and the Ministry of Environment scheduled the  
2 November 29, 2011 TAC meeting which RMGC reasonably  
3 expected would be the last TAC meeting before a  
4 decision was taken to recommend issuing the  
5 Environmental Permit. Gabriel disclosed on  
6 November 2nd, 2011, that a further and potentially  
7 final TAC meeting is expected to be held in the next  
8 month. And analysts predicted EIA approval by  
9 year-end or early 2012. That was the expectation at  
10 the time.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

8           Now, as the Tribunal will recall from the  
9 December Hearing, statements made by the Minister of  
10 the Environment Mr. Borbely reinforced the expectation  
11 that the Environmental Permit would be issued in early  
12 2012, subject to the Government successfully  
13 renegotiating its economic interest and taking a  
14 favorable political decision. Because there were  
15 obviously improper political criteria that were being  
16 put in this process that was supposed to be legal and  
17 administrative, once the Government took the decision  
18 to issue the environmental permit, the Project clearly  
19 would have proceeded expeditiously.

20           So, briefly to review Minister Borbely's  
21 statements, Minister Borbely stated on November 29,  
22 2011 that a final decision would have to be taken in

1 one to two months maximum, also referring to political  
2 factors.

3           The Tribunal will recall seeing a video at  
4 the last hearing where Minister Borbely repeated on  
5 December 18, 2011, that a decision would be taken in  
6 January or February 2012, but that politics would be  
7 considered even if all technical aspects were  
8 clarified. And the references to UDMR by Mr. Borbely  
9 here, UDMR was the political party of both Minister of  
10 Environment Borbely and the Minister of Culture Mr.  
11 Hunor, and was part of the ruling coalition together  
12 with Prime Minister Boc's PDL Party, as the Tribunal  
13 will recall.

14           The Tribunal also will remember seeing a  
15 lengthy video of this interview on December 27th,  
16 2011, where Minister Borbely confirmed, among other  
17 things, that his demands relating to the cyanide level  
18 of 3 ppm and to environmental guarantees were met,  
19 that the issues were clarified along the way, and he  
20 declared that there could be a decision on the  
21 Environmental Permit by the end of January, subject to  
22 the State getting a more advantageous contract.

1                   Now, Minister Borbely's statements  
2 reaffirmed the numerous statements made by the TAC  
3 President at the November 2011 TAC meeting, which we  
4 also reviewed at the last hearing. [REDACTED]

[REDACTED]

19                   In light of the progress in the TAC and  
20 Mr. Borbely's statements, Project opponents also  
21 expected an imminent decision approving the EIA. This  
22 is confirmed both in Alburnus Maior press releases in

1 January 2012 that you can see referred to, and in the  
2 testimony of Professor W. Henisz. You heard at the  
3 last hearing where he explained the opposition was  
4 resigned to defeat at this time in December 2011.

5 We're now going to see how Romania's  
6 unlawful treatment of the Project and failure to  
7 permit it polluted Gabriel's market capitalization and  
8 caused it to decline sharply in the period that  
9 followed.

10 Romania's political treatment of permitting  
11 subverted the market's expectations as the evidence  
12 shows, and we discussed in detail at the last hearing  
13 the Ministry of the Environment never took a decision  
14 on the Environmental Permit, even though the legal  
15 requirements for issuing the permit were met. This  
16 political holdup blocked issuance of the Environmental  
17 Permit after the November 2011 TAC meeting. And  
18 during 2012, it fueled increasing concerns that the  
19 Environmental Permit would not be issued in the near  
20 term, or at all.

21 Disclosures by Gabriel and reporting by  
22 analysts, therefore, shifted from discussing expected

1 issuance of the Environmental Permit to discussing the  
2 lack of a decision on the permit and the standstill in  
3 the EIA process. The negative impact on Gabriel's  
4 market capitalization was severe.

5 As Dr. Burrows acknowledges, Gabriel's  
6 market capitalization declined precipitously by over  
7 80 percent. It declined from almost \$2.8 billion on  
8 December 1st, 2011, two days after the November 29,  
9 TAC meeting to \$2.35 billion on March 1st, 2012, and  
10 then all the way down to under \$485 million on May 15,  
11 2012.

12 While Dr. Burrows notes certain references  
13 in contemporaneous analyst reports to delay, the  
14 reports showed that the market concerns were not about  
15 delays relating to surface rights acquisitions or  
16 expropriations or first gold pour. They were not  
17 about increased costs. They were, instead, focused on  
18 the delay in and uncertainty of the environmental  
19 permitting process. Had the Ministry of Environment  
20 recommended issuing the Environmental Permit in  
21 January 2012, as the market expected and as the Law  
22 required, Gabriel's share price would have surged

1 higher rather than decline sharply in the face of the  
2 Government's politically motivated unlawful failure to  
3 act.

4           And I'm now going to walk through events and  
5 disclosures in this period from early March to May 15,  
6 2012. The key point is, had the Environmental Permit  
7 been issued, these events either would not have  
8 happened or they would not have had any material  
9 impact on Gabriel's market capitalization.

10           So, first, in its 2011 Annual Information  
11 Form filed on March 14, 2012, Gabriel disclosed that  
12 all technical issues were clarified at the last TAC  
13 meeting, but no decision had been taken. So, contrary  
14 to expectations, the market was now aware that the  
15 Environmental Permit was not issued, and that it was  
16 subject to uncertainty. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

2

Then, in April 2012, the news agency Reuters reported statements by a lawyer for Project opponents who asserted falsely that a Romanian Court Decision required a suspension of the EIA process.

3

4

5

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[REDACTED]

4 News then broke that Mr. Korodi, the  
5 Minister of Environment, who had suspended the EIA  
6 process back in September 2007, was replacing  
7 Mr. Borbely as Minister of Environment, which  
8 amplified concerns of further delays and another  
9 political holdup in the EIA process. [REDACTED]

[REDACTED]





[REDACTED]

17                    Now, Gabriel's first quarter 2012 reporting  
18 in May 2012--here you see May 10th, 2012 in the press  
19 release-confirmed the standstill and the uncertainty  
20 in the EIA process, and this reporting by the Company  
21 led to another round of negative analyst reports.

22

[REDACTED]

[REDACTED]

18                   And so, it's in this context that the  
19 precipitous 80 percent drop in Gabriel's share price  
20 from early March 2012 to May 15, 2012, occurred, not  
21 for the reasons Dr. Burrows and Romania speculate in  
22 this Arbitration.

1           Now, after this period, a few weeks later,  
2 Prime Minister Ponta added to the uncertainty and  
3 delay by announcing that permitting was blocked for  
4 political reasons until after the year-end  
5 parliamentary elections, and this is in early  
6 June 2012. The Tribunal will recall these slides from  
7 the first hearing back in December. Prime Minister  
8 Ponta announced that: "the Government's position  
9 regarding the mining project remained unchanged.  
10 Gabriel must offer a larger share of the Project to  
11 the State, give up political lobby activities,  
12 suggesting improper attempts at influencing decisions  
13 which were baseless, and noted that to go forward  
14 these conditions are mandatory."

15           Prime Minister Ponta also emphasized that no  
16 decision would be taken on the Project until after  
17 parliamentary elections stating: "I want to discuss  
18 this matter in a serious manner next year."

19           Gabriel accordingly disclosed that the  
20 Project remained politically blocked, and you can see  
21 that.

22           In its second quarter 2012 Press Release and

1 reporting in August 2nd, 2012, Gabriel repeated Prime  
2 Minister Ponta's statement that no permitting  
3 decisions would be made until after the elections,  
4 also noting there's been no correspondence on the  
5 renegotiation issues demanded by this Government.

█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]

11 And as the Tribunal is well-aware, the Ponta  
12 Government then insisted after its election at  
13 year-end 2012 on a political decision on the Project  
14 through a vote on the Special Law in Parliament, and  
15 this focused the market on the outcome of that vote.  
16 The events of 2013, it' undeniable, focused the market  
17 on Parliament's vote on the Special Law, which the  
18 Ponta Government made a political condition for the  
19 Project to proceed. The Tribunal will recall that in  
20 detail from the previous hearing.

21 And so, you see when the Ministry of  
22 Environment published the draft Environmental Permit

1 conditions which alone should have signaled a  
2 favorable endorsement of the permit was forthcoming,  
3 and when the Government included the Project in its  
4 National Plan for Strategic Investment and Job  
5 Creation, both on July 11, 2013, analysts commented  
6 that: "progress is likely to only be evident in the  
7 outcome of the vote on the Project expected this  
8 fall."

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4 [REDACTED] and you can

5 see that on the next slide, Claimants' Demonstrative

6 No. 1, the market movement after the Valuation Date.

7 I turn now to Ms. Smutny.

8 MS. COHEN SMUTNY: I will now make a number

9 of observations regarding Gabriel's actual market

10 capitalization relative to market indices.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

13 I now will turn the floor over to my  
14 colleague, Mr. Pham.

15 MR. PHAM: Thank you very much. And we will  
16 be starting with Volume 5 of Claimants' opening. And  
17 I would like to start by making a few observations  
18 about the economic feasibility of the Project.

19 Gabriel invested approximately \$760 million  
20 to develop the world-class Roşia Montană and Bucium  
21 Projects. The Roşia Montană Project is among the top  
22 20 undeveloped gold projects globally, and the largest

1 undeveloped gold project in Europe, excluding Russia.  
2 It contains Measured and Indicated Mineral Resources  
3 of 17.1 million ounces of gold, and  
4 81.1 million ounces of silver; plus, Inferred Mineral  
5 Resources of 1.4 million ounces of gold and  
6 4.1 million ounces of silver.

7           Within these resources, the Project contains  
8 Mineral Reserves of 10.1 million ounces of gold and  
9 47.6 million ounces of silver.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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█ [REDACTED]

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3 Gabriel's investments attracted the backing  
4 of Newmont Mining and other major investors. As the  
5 Tribunal is well aware, Gabriel's principal asset has  
6 been its ownership interest in RMGC through which it  
7 has sought to develop the Projects in partnership with  
8 the Romanian State through Minvest.

9 Gabriel's major shareholders include Newmont  
10 Mining, one of the largest gold-mining companies in  
11 the world, as well as significant institutional  
12 investors with extensive experience and expertise in  
13 the precious metals industry, such as Electrum,  
14 Paulson & Company, BSG, and The Baupost Group.

15 Recognizing the value of the Projects and  
16 the economic potential their development presented  
17 Gabriel's major shareholders all maintained, and  
18 through 2011, some substantially increased their  
19 Investments in Gabriel.

20 The Roşia Montană Project was developed by  
21 expert international and Romanian consultants. As you  
22 can see on Slide 6 of Volume 5, there's a list of the

1 various international and Romanian consultants that  
2 played a role in the Roşia Montană Project. These  
3 include some of the most reputable and leading  
4 consultants in the mining industry.

[REDACTED]





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12           I would now like to speak about issues  
13 relating to the technical and environmental plans for  
14 the Project. The Tribunal is, of course, aware that  
15 both parties have put forth a number of expert reports  
16 on technical issues such as Cyanide Management, the  
17 Tailings Management Facility, Waste Management and  
18 closure issues.

19           For the most part, those issues have not  
20 featured prominently in the Parties' Memorials and  
21 none of the experts will be appearing before the  
22 Tribunal for examination. We believe this is largely

1 a reflection of the fact that there is no meaningful  
2 dispute about the technical and environmental merits  
3 of this Project.

4           There is overwhelming evidence that RMGC  
5 prepared comprehensive, technical and environmental  
6 plans for the Project that met or exceeded applicable  
7 Romanian standards and requirements, and were  
8 exemplary of International Best Practice. The  
9 Tribunal can see this from the plans themselves as  
10 well as the reports from Claimants' Experts explaining  
11 the content of those plans.

12           It is also critical that this is confirmed  
13 by the Romanian Government authorities who had  
14 contemporaneously approved and gave praise to the  
15 Project. There are independent third-party  
16 consultants, governmental entities, and international  
17 organizations that repeatedly gave contemporaneous  
18 endorsements of the technical and environmental plans  
19 by RMGC.

20           Finally, in this Arbitration, Respondent's  
21 Experts acknowledge often that the plans satisfied  
22 applicable Romanian, European, and/or international

1 standards.

2           To the extent Respondent's arbitration  
3 experts maintain critiques of the Project's technical  
4 and environmental plans, those critiques fall into a  
5 number of categories. Either they raise post hoc  
6 issues that were never considered as problematic  
7 contemporaneously, or they offer misleading  
8 observations based on isolated passages from documents  
9 taken out of context or that were rendered moot by  
10 later analyses and reports.

11           These critique criticize aspects of the  
12 Project that were, in fact, the responsibility of the  
13 Romanian Government, not RMGC.

14           Finally, these critiques purport to identify  
15 inconsistencies with best practice. They do so by  
16 referencing standards and expectations that would be  
17 applicable only to later stages of the Project. In  
18 short, there is no meaningful dispute about the  
19 technical and environmental merits of the Project. As  
20 the evidence reviewed during the last hearing shows,  
21 none of Respondent's various post hoc criticisms  
22 assembled for the purposes of this Arbitration explain

1 why the Environmental Permit was not issued for the  
2 Roşia Montană Project. Rather, as numerous statements  
3 from senior government officials confirm, the criteria  
4 for issuing the Environmental Permits were met. These  
5 criticisms provide no support for Respondent's Social  
6 License arguments. Social License is not required  
7 under Romanian Law and is irrelevant to project  
8 permitting, as the Tribunal heard in December 2019.  
9 In any event, the Project had a Social License at the  
10 critical moments when the Environmental Permit should  
11 have been issued, and as will be discussed in this  
12 presentation, the technical and environmental issues  
13 were discussed with stakeholders in TAC meetings and  
14 public consultations.

15           Finally, Respondent's criticisms do not  
16 credibly detract from the reliability of the market's  
17 assessment of the value of the Project Rights.

18           As the Tribunal hears concerns raised on  
19 environmental issues by Respondent, we want to give  
20 some context for the Tribunal to keep in mind.

21           First, as a historical matter, the Roşia  
22 Montană area was already heavily polluted due to the

1 Romanian State's prior unsafe mining practices. The  
2 Project area had been heavily polluted from centuries  
3 of mining, including by the Romanian State through its  
4 State-owned companies RosiaMin and Minvest from the  
5 1960s through 2006. This mining used outdated  
6 technologies without regulation or rehabilitation by  
7 the State. You can see the pictures of the--can we go  
8 back, please?--of the acid, the reddish acid-rock  
9 drainage that Mr. Greenwald referred to. This is  
10 what's happening in the waterways of the area. And as  
11 Claimants' Expert Christian Kunze notes, "this  
12 historical pollution represents some of the most  
13 severe water quality degradation that I have observed  
14 anywhere in the world"and this statement stands  
15 un rebutted.

16 To this day, the Romanian State continues to  
17 permit heavily polluting operations at the nearby  
18 Rosia Poieni copper mine. Rosia Poieni is a copper  
19 mine operated by the State-owned company Cupru Min.  
20 It is located only 4 kilometers from the Roşia Montană  
21 Project site. It has been named the most significant  
22 regional polluter by independent experts. And you can

1 see some of the results of that in the picture on  
2 Slide 14.

3           In spite of this deplorable record by Rosia  
4 Poieni, Romania has repeatedly issued Rosia Poieni  
5 environmental authorizations and water permits,  
6 including most recently in 2018, while refusing to  
7 permit the environmentally sound and technically  
8 robust Roşia Montană Project.

9           The tragedy here is that RMGC's plans would  
10 have minimized environmental impacts from the Project  
11 and even remediated existing pollution from prior  
12 projects. This has been recognized repeatedly,  
13 including by Minister Delegate for Infrastructure  
14 Projects Dan Şova. He notes that the Project will  
15 have a positive influence and will lead to an  
16 improvement in water quality downstream of the Project  
17 area. The Independent Group of International Experts  
18 concluded, the Project "should result in a very  
19 significant improvement in water quality in the local  
20 streams compared with the current situation," which  
21 would lead to a very "significant contribution to the  
22 improvement of water quality in the Abrud River."

1           Professor Paul Whitehead of the University  
2 of Reading conducted a water modeling study and he  
3 found that the Project "will remove the majority of  
4 the Roşia Montană and Corna sources of historic  
5 acid-rock drainage that currently pollute the rivers  
6 systems with metals." And in this Arbitration,  
7 Respondent's Expert Mark Dodds-Smith concedes "it is  
8 accepted that the development of the mine would have  
9 remediated sources of pollution within the RMGC  
10 License area."

11           Turning now to cyanide, the Project adopted  
12 best practices for the safe use and Management of  
13 cyanide. Cyanide is widely used in gold-mining and  
14 was the optimal technology for the Project in terms of  
15 efficiency and environmental protection. Respondent's  
16 arbitration expert Ms. Cathy Reichardt accepted that  
17 cyanide was appropriate for the Project, when she  
18 stated: "It is therefore my opinion that from a  
19 financial, technical, and risk management point of  
20 view, there was no practical alternative to the use of  
21 cyanide-based gold extraction technology at RMGC."

22           NAMR wrote a letter in 2007 noting that the

1 cyanide technology proposed for the Project was safe,  
2 widely used in gold mines throughout the world, and  
3 that there was "no economic efficient alternative" for  
4 the use of cyanide for gold-mining projects in  
5 Romania.

6           With respect to the Roşia Montană Project,  
7 we want to emphasize that the Project adopted highly  
8 conservative safety measures with respect to the use  
9 of cyanide. RMGC's plans would keep concentrations of  
10 cyanide discharges at an average of 3 parts per  
11 million in a tailings pond. This is below the limit  
12 of 10 parts per million established by the EU's Mining  
13 Waste Directive and well below the limit of 50 parts  
14 per million accepted by countries like the United  
15 States, Australia, and Canada.

16           A few words about the Cyanide Code or the  
17 formal name of which is the International Cyanide  
18 Management Code, and this is important because the  
19 Cyanide Code represents best practices for Cyanide  
20 Management, and it tells developers how to use it in a  
21 safe manner, in a manner that is accepted as best  
22 practices. Gabriel voluntarily committed to comply



1 with the Cyanide Code and be subject to third party  
2 independent audits that verify compliance. The  
3 Cyanide Code was an initiative implemented to address  
4 Environmental Management of cyanide during its  
5 production, transport and use in the gold and silver  
6 mining industry. This was prepared under the auspices  
7 of the United Nations Environment Program with input  
8 from multiple stakeholders, including regulatory  
9 agencies and environmental organizations.

10           NAMR noted that the Cyanide Code was drafted  
11 "to improve the Management of Cyanide in order to  
12 minimize the risks for workers, community and  
13 environment." As Respondent's Expert Ms. Reichardt  
14 acknowledges, the Cyanide Code is "generally accepted  
15 as representing good practice with respect to Cyanide  
16 Management in the gold industry."

17           Now, when the Tribunal hears about Baia  
18 Mare, please keep in mind that the Cyanide Code was  
19 specifically designed to address and avoid incidents  
20 like Baia Mare. As renowned cyanide expert Terry  
21 Mudder noted: "If the gold-mining operations at which  
22 the major environmental incidents occurred had been

1 certified under the Cyanide Code, all of them could  
2 have been averted."

3           And that understanding of the Cyanide Code  
4 is important because the Project's Cyanide Management  
5 Plan was in compliance with the Cyanide Code's  
6 requirements. And again, repeatedly acknowledged.  
7 This includes statements by Ms. Rovana Plumb, the  
8 former Romanian Minister of Environment, who said  
9 about the Project, "everything that is related to  
10 Cyanide Management is in accordance with the  
11 International Cyanide Management Code."

12           Similarly, the Independent Group of  
13 International Experts noted, "the outlined cyanide  
14 processing technology is industry standard and  
15 strictly follows the recommendations of the  
16 International Cyanide Management Code."

17           This is echoed by other independent experts,  
18 including Dr. Terry Mudder, as noted, a world-renowned  
19 authority on cyanide and Stephan Theben, a former  
20 European Commission representative in the Steering  
21 Committee for the development of the Cyanide Code.  
22 Respondent's arbitration experts acknowledged the

1 merits of RMGC's Cyanide Management Plan. Notably,  
2 you see statements from Ms. Cathy Reichardt. She  
3 acknowledges that the Cyanide Management Plan prepared  
4 by RMGC is "a comprehensive and systematic document  
5 whose structure is aligned to that of the Cyanide  
6 Code." She concludes that "code compliance was a core  
7 consideration in project design."

8 She also states: "I would deem the Project  
9 to be substantially compliant with the majority of the  
10 requirements of the Cyanide Code."

11 Now, to the extent that there remain  
12 inconsistencies of the Cyanide Code, in  
13 Ms. Reichardt's view, please keep in mind that  
14 Respondent's Expert's critique of Project compliance  
15 with the Cyanide Code have fundamental flaws, as you  
16 will see on the next slide. In particular, it's one  
17 of Expert Cathy Reichardt, who just made those  
18 statements about the Cyanide Management Plan, claimed  
19 that aspects, some aspects, of the Project were not  
20 consistent with the Cyanide Code but, in doing so, she  
21 made claims that were misguided because Ms. Reichardt  
22 evaluated the Project as though it was already in

1 operation when it was not. Throughout her Report,  
2 Ms. Reichardt made a fundamental error in failing to  
3 evaluate the Project using the Cyanide Code's  
4 pre-operational verification protocol which applies to  
5 Projects in the pre-operational phase like the Roşia  
6 Montană Project.

7           Now, Ms. Reichardt has been called for  
8 cross-examination, and she is not appearing. You may  
9 recall that, after Ms. Reichardt put in her Report,  
10 Claimant submitted an expert report from John Lambert  
11 with its Reply, pointing out this fundamental error,  
12 after which Ms. Reichardt declined to put in another  
13 report and is declining to be available for  
14 cross-examination. Her reasons are personal reasons,  
15 unspecified.

16           Now, in light of the fact that her LinkedIn  
17 page shows that she continues to be a mining  
18 consultant, it's Claimant's position that there is  
19 essentially no reason for her unavailability. Her  
20 Report should be stricken, at a minimum given no  
21 weight as it is clearly based on fundamental flaws.

22           Respondent's Expert Christine Blackmore also

1 makes a fundamental flaw with her Report. She  
2 criticizes the Expert Report of Mr. Lambert for  
3 applying a 2016 pre-operational protocol, that she  
4 argues was less comprehensive than the 2009 version  
5 that she was referring to. In fact, this is wrong.  
6 Mr. Lambert referred to a 2018 pre-operational  
7 protocol and that version did not differ materially  
8 from the 2009 version that Ms. Blackmore looked at.  
9 Presumably identifying this mistake as part of hearing  
10 preparation, Ms. Blackmore submitted an amended report  
11 that corrects most, but not all, of her erroneous  
12 statements.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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█ [REDACTED]

█ [REDACTED]



[REDACTED]

20                   Notably, the Romanian Government agreed that  
21 RMGC did not need to establish the final cyanide  
22 transport route until the end of the construction

1 period. This is reflected in Exhibit C-555, the  
2 Ministry of Environment Note for Public Consultation,  
3 which includes the Ministry of Environment's proposed  
4 conditions and measures for issuing the Environmental  
5 Permit. What that states is that: "Titleholder shall  
6 assess each alternative route before establishing the  
7 final route for the first sodium cyanide transport at  
8 the end of the construction period."

9           Turning now to the planned Tailings  
10 Management Facility, which was technically sound and  
11 would not have presented an obstacle to permitting.

12           The TMF design had numerous conservative  
13 design features and exceeded applicable guidelines for  
14 environmental protection and safety. The TMF was  
15 planned to be located in the Corna Valley, which is  
16 well-suited as a site for the TMF due to favorable  
17 geological conditions, including a natural inward  
18 gradient and a low permeability natural liner,  
19 minimizing the potential for groundwater  
20 contamination.

21           Critically, Romanian Government authorities  
22 contemporaneously endorsed and approved RMGC's TMF



1 design. The Romanian National Committee on large dams  
2 unanimously agreed that the Project was feasible from  
3 the perspective of dam safety. The Romanian Central  
4 Commission for Endorsement of the Assessment  
5 Documentation of Dam Safety also unanimously voted to  
6 endorse the safe operation of the tailings dam. Based  
7 on this endorsement, the Ministry of Environment  
8 issued Dam Safety Permits in 2010, 2012, and 2014.

9           As with most aspects of RMGC's environmental  
10 planning, independent experts contemporaneously  
11 endorsed the TMF design. This includes Romanian  
12 experts such as Professor Dan Stematiu, Professor  
13 Mircea Şelărescu, and also the Independent Group of  
14 International Experts, which concluded that the TMF  
15 design was "in accordance with the existing applicable  
16 recommendations and regulations."

17           One-third Party consultant group, the  
18 Norwegian Geotechnical Institute, reviewed the TMF and  
19 concluded that the "estimated probability of  
20 non-performance is about 100 times lower than what is  
21 used as criteria for dams and other containment  
22 structures around the world, and it's lower than the

1 probabilities of non-performance for most other  
2 engineered structures."

3           As you have seen, Respondent's Experts  
4 acknowledged the TMF design was consistent with  
5 regulatory requirements and accepted good practice.  
6 You can see that this is twice acknowledged by  
7 Respondent's Expert Dermot Claffey, who says, the TMF  
8 design was "broadly consistent with regulatory  
9 requirements and generally accepted good practice."

10           Again, when the tribunal hears about Baia  
11 Mare, please keep in mind that, in light of historical  
12 dam failures, including at Baia Mare, the TMF was  
13 designed to very high standards. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

6           Now, critically the material differences  
7 between the Baia Mare and Roşia Montană TMF designs  
8 were communicated contemporaneously to stakeholders in  
9 Romania. The safety and robustness of the TMF design  
10 was communicated to the TAC and the general public to  
11 address comments and to allay concerns. As part of  
12 the EIA public consultation process, the differences  
13 between the Baia Mare and the TMF design were  
14 summarized and presented and an example of that is at  
15 C-337, which presents some three pages of a chart  
16 comparing the differences between Roşia Montană and  
17 Baia Mare, making critical comments about why RMGC's  
18 TMF would be different and more protective. A sample  
19 of that is on the slide.

20           The final comment relates to some issues  
21 raised by Respondent's Expert that RMGC should have  
22 considered dry-stack tailings technology. In fact,

1 RMGC did contemporaneously consider a dry-stack  
2 approach, but it determined that such an approach was  
3 not appropriate, due to the seasonally wet and cold  
4 climate at the site. Given the precipitation at Roşia  
5 Montană as explained by Patrick Corser, many of the  
6 reported environmental and safety benefits of a  
7 dry-stacked tailings approach would be lost.

8           Now, as a rebuttal document, Claimants have  
9 submitted Exhibit C-2962, which is an excerpt from a  
10 report by a U.S. environmental regulator, and shows  
11 agreement that most of the benefits of dry-stacking  
12 are lost in wet environments. Some of the passages  
13 include statements such as, in a wet climate  
14 dry-stacking has major environmental disadvantages.  
15 Once exposed to rain or snow, the dry-stack becomes  
16 wet, so most of the benefits of dry-stacking are lost.  
17 Dry-stack tailings that become wet again but are not  
18 submerged are subject to oxidation and leaching of  
19 heavy metals. That Report talks about another  
20 potential environmental challenge being the generation  
21 of fugitive dust from the dried stacks, and that in  
22 wet climates fugitive dust containing reactive

1 minerals could pose a significant risk to the  
2 surrounding environment.

3           Next, I want to transition to talking about  
4 how the risks associated with the Project Areas'  
5 archaeological heritage were limited.

6           As a reminder--and you heard this in  
7 December 2019--the Romanian Government discharged  
8 90 percent of the Project Area for development on the  
9 basis of a comprehensive archaeological research  
10 program directed by the State.

11           I'm starting to hear an echo. Am I coming  
12 through okay? Okay. Good. I will continue.

13           The archaeological research and preservation  
14 of cultural heritage was addressed by, as you can see,  
15 the Witness Statements of Adrian Gligor, the Expert  
16 Reports of David Jennings, and the legal opinions of  
17 Professor Schiau.

18           Based on the findings of the Alburnus Maior  
19 Research Program, the Romanian State recommended  
20 certain sites be preserved in situ while issuing  
21 Architectural Discharge Certificates (ADCs) for  
22 90 percent of the Project. And the Ministry of

1 Culture commended the archaeological research  
2 underlying the discharge, noting that "the measures  
3 for preservation through registration in situ, the  
4 museistic exposure and the publication are compliant  
5 with the national legislation and the good  
6 international practices." Respondent's Expert  
7 concedes that the archaeological research was carried  
8 out in an exemplary manner. This is from  
9 Dr. Claughton. He notes: "The evidence I have seen  
10 regarding the techniques used throughout the  
11 investigations conducted on site indicates that the  
12 research was indeed conducted in an exemplary manner."

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]

14                   Finally, the Ministry of Culture Research  
15 Project for Orlea approved in 2013 by the NAC,  
16 contemplated "an approach observant of the  
17 preservation by record concept," and this reflects  
18 "the expectation that following completion of the  
19 research, an ADC would be issued" for Orlea.

20                   The market took the status of the ADCs into  
21 account. Information regarding the status of the ADCs  
22 issued in the Project area was well covered in the

1 press, and the fact that the ADC for Orlea had not yet  
2 been issued with information taken into account. You  
3 saw from Mr. Lew's presentation the various securities  
4 filings from Gabriel, which made clear the status of  
5 Orlea, including the fact that mining in Orlea and Jig  
6 will begin in Year 7 of the mine life and that the  
7 archaeological discharge certificates had been issued  
8 as needed for the first seven years.

9           And the Gabriel 2011 annual information form  
10 dated March 4, 2012 similarly explained that RMGC  
11 currently holds ADCs for the proposed Cârnic, Cetate  
12 and Jig open-pits and that as mining at the Orlea  
13 open-pit is not scheduled to commence until Year 7 of  
14 Roşia Montană mine life, RMGC will commence the  
15 application process for an ADC for Orlea in due  
16 course. And this is keeping in mind the discussion  
17 about how construction could proceed in phases.

18           Next, a few words about the Chance Finds  
19 Protocol. The Chance Finds Protocol did not create  
20 risks for the Project. Contrary to Respondent's  
21 misguided arguments on this topic, the Chance Finds  
22 Protocol, which Gabriel made public by publishing it



1 on its website, you can see that in the Second Report  
2 from Compass, Paragraph 28, Footnote 65, was not  
3 something that would have had an impact on the market  
4 value of the Project Rights.

5           The Chance Finds Protocol was a procedure to  
6 monitor mining operations to allow study and  
7 preservation by record of any Chance Finds. It did  
8 not create risks for the Project.

9           As mining would only take place in areas  
10 already thoroughly researched and archaeologically  
11 discharged, the likelihood of further Chance  
12 discoveries was low.

13           Moreover, the Chance Finds Protocol provides  
14 a safeguard through study approach, which allows the  
15 archaeological team to study, record, and recover  
16 movable records from any chance of archaeological  
17 discoveries during the Project's implementation. It  
18 does not provide a basis for preservation in situ.

19           As further described in the Expert Report of  
20 David Jennings and the legal opinion of Professor  
21 Schiau, any temporary work stoppage to conduct  
22 additional archaeological research would be limited in

1 time and scope. The Chance Finds Protocol described  
2 in its text a process for archaeological monitoring,  
3 formulated to cause minimal disturbance to the mine  
4 construction and operations plans, provided that one  
5 of its main objectives is to resume  
6 constructive/operations work that has been temporarily  
7 stopped in a certain area.

8           Finally, I want to conclude with a few notes  
9 on the Report submitted by Mr. McLoughlin, recently  
10 introduced into record and explain with this Report  
11 does not alter the conclusions regarding the Property  
12 Rights RMGC needed to acquire for the Project.

13           Respondent's argument that properties within  
14 the Roşia Montană Historical Town Center had to be  
15 acquired by RMGC is not supported. Respondent  
16 submitted as part of its rebuttal evidence an Expert  
17 Report by Mr. Michael McLoughlin in response to  
18 questions as to what properties must be acquired to  
19 permit implementation of the Project. Mr. McLoughlin  
20 is offered as an expert in blasting rock in open-pit  
21 mining. His Report focuses on several properties in  
22 and around the Roşia Montană Historical Town Center.

1 He concludes that these properties would become  
2 uninhabitable during certain phases of the Project  
3 implementation. On this basis, Respondent presumably  
4 contends that such properties are among those that  
5 must be mandatorily acquired in order to implement the  
6 Project. In fact, however, the contemporaneous record  
7 relating to the Project is clear, that RMGC did not  
8 need to acquire the properties in and around the Roşia  
9 Montană Historical Town Center.

10           Indeed, contemporaneous Project reports were  
11 clear that the owners of property within the Roşia  
12 Montană Historical Town Center, which was to be  
13 treated as a protected area, did not have to sell  
14 their properties. This was set forth in the EIA  
15 Report, was reflected in urbanism plans prepared for  
16 the Project, and was the subject of public  
17 consultations. You can see this in Exhibits C-463,  
18 C-261, and C- 2130.

19           Further, the impacts on these properties  
20 were carefully studied and considered. Romania's  
21 Ministry of Public Health and the Timișoara Public  
22 Health Institute conducted an extensive health impact

1 study on the Project area in August 2007 which was  
2 included in the EIA Report. And that's Exhibit  
3 C-387.03.

4           The Government's health impact study  
5 included a contemporaneous assessment of whether  
6 properties could be inhabited during the Project. The  
7 study shows the Roșia Montană Historical Center was to  
8 be zoned residentially and was surrounded by a  
9 sanitary protection zone. The Government study  
10 concluded that none of the houses in the Roșia Montană  
11 Historical Town Center were to be deemed  
12 uninhabitable.

13           Notably, the Ministry of Culture cited the  
14 study in issuing its endorsement of the Project.

15           The impacts on the protected area  
16 specifically of blasting within the vicinity of the  
17 Project was also the subject of contemporaneous  
18 analysis and reporting included in the EIA Report.  
19 This can be shown in Chapter 4.03 of the 2006 EIA  
20 Report at Exhibit C-213 and the 2010 Update at C-382.  
21 Section II of this chapter explains that some  
22 households may choose to retain dwellings in the

1 protected zones and the chapter describes the studies  
2 that specifically address the impacts of blasting in  
3 those areas.

4           The Ministry of Culture also cited these  
5 studies in issuing its endorsement of the Project.

6           In view of those studies, the Ministry of  
7 Environment's note on public consultation for the  
8 Environmental Permit accordingly referred to  
9 implementation of a noise and vibration monitoring and  
10 management program to include communication with  
11 residents of neighboring areas.

12           In order to obtain the construction permits  
13 necessary to implement the Project, RMGC had to obtain  
14 real rights to the land on which the construction  
15 activities would be implemented, and this is explained  
16 in the legal opinions of Professor Podaru, at  
17 Paragraph 42, and Professor Bîrsan, his First Legal  
18 Opinion at Section 4 at C.1.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]



[REDACTED]

22

Finally, RMGC would be liable for any

1 damages caused by the mining works. As the  
2 construction permit would not have extended to the  
3 Buffer Zone area, RMGC did not have to obtain real  
4 rights to properties in that area. To the extent that  
5 houses in the Buffer Zone were expected to become  
6 temporarily uninhabitable for some time during Project  
7 development, RMGC would have been required to  
8 accommodate and/or to compensate affected residents  
9 accordingly. Affected property owners, however, would  
10 not have been required to sell their properties if  
11 they did not wish to do so. Analogously, RMGC, as a  
12 license-holder, would be liable for any damages,  
13 including environmental damages caused by its mining  
14 activities.

15           In any event, nothing in Mr. McLoughlin's  
16 report detracts from the reasonableness of Claimants'  
17 assumptions about RMGC's ability to obtain the surface  
18 rights it needed to implement the Project.

19           Unless there's any questions, that concludes  
20 Claimants' Opening Presentation.

21           (Pause.)

22           PRESIDENT TERCIER: Sorry, it was me. My



1 first question: What is the time (drop in audio) used  
2 by Claimant? I don't hear you. Sara? Sara, I don't  
3 hear you. Do you hear me? I don't hear you.

4 Do my co-Arbitrators hear me? Me and Sara?  
5 No, so Sara, the problem is with you.

6 Okay. We'll have a break to solve it.

7 DR. HEISKANEN: Mr. President, I have a  
8 brief intervention, with your permission.

9 PRESIDENT TERCIER: Yes.

10 DR. HEISKANEN: As the Tribunal will have  
11 heard, the Claimants sought to introduce a new claim  
12 during their Opening Statement. It's recorded or  
13 reflected at Slides 56 and 57 of Volume 4 of the  
14 Claimants' Opening Statement. It is a new valuation  
15 based on a new Valuation Date of 6 September 2013. As  
16 the Tribunal will recall, the Claimants' claim, until  
17 today, has been that the Valuation Date is  
18 29 July 2011.

19 And as you will also recall in the December  
20 Hearing, when the Tribunal asked when the breach  
21 occurred, the breach occurred in the Claimants'  
22 submission, the Claimants explained that it was

1 actually not necessary or relevant to identify the  
2 date of breach. In response to the Tribunal's  
3 questions earlier this year, the Claimants did, for  
4 the first time, introduce a date for the alleged  
5 breach of the two Treaties, 9 September--on or about  
6 9 September 2013, but they maintained the Valuation  
7 Date of 29 July 2011.

8           Now for the first time, in this Opening  
9 Statement, the Claimants have attempted to quantify  
10 their claim based on an entirely new date. There is  
11 no question that this is a new claim. It is too late  
12 to introduce new claims at this point of the  
13 proceeding, even assuming it were considered an  
14 additional claim rather than a new claim that is not  
15 related to the subject matter of the dispute.

16           There is no question that this is a new  
17 claim. If you look at the Claimants' formulation of  
18 its Request for Relief in the Reply, which is at  
19 Paragraph 750 of the Reply at Subparagraph (c)(i).  
20 The claim is quantified by reference to 29 July 2011.

21           So, that is the Claimants' claim based on  
22 its Request for Relief until today. And as I just

1 said, even assuming this is considered an additional  
2 claim or ancillary claim, under I believe it's Rule 40  
3 of the ICSID Arbitration Rules, "an additional or  
4 ancillary claim has to be introduced at the latest in  
5 the Reply." Unless the Parties agree otherwise and  
6 the Respondent does not agree otherwise, so we  
7 formally object to this new claim.

8 PRESIDENT TERCIER: Okay. Ms. Cohen, you  
9 heard the objection. Do you want to answer now or you  
10 want to answer it later?

11 MS. COHEN SMUTNY: I will answer now insofar  
12 as to say that Claimants are not introducing a new  
13 claim. That is a completely mischaracterized  
14 presentation of the arguments that the Claimants have  
15 made. Claimants have responded to specific questions  
16 posed by the Tribunal. Claimants also have discussed  
17 evidence but did not present a valuation claim.

18 And beyond that, Claimants wish to, having  
19 heard this just now, reserve their right to comment,  
20 reflect on this point, and present some further  
21 observations either later in the course of this  
22 Hearing, if the Tribunal will allow, or thereafter.

1           PRESIDENT TERCIER: Thank you very much.  
2 Under the control of my co-Arbitrators, I would say we  
3 will have today a very long hearing. We have noted  
4 the objection, Reply of Respondent. The first answer  
5 given by Claimant with the reservation (drop in  
6 audio). I suggest that we take it on board and that  
7 we will discuss it later when we have oral  
8 submissions.

9           Do you agree with this, Dr. Heiskanen?

10          DR. HEISKANEN: If the Tribunal considers  
11 that the Claimants will have to be given an  
12 opportunity to make observations, of course, the  
13 Respondent reserves the right to be able to respond to  
14 those observations in writing.

15          PRESIDENT TERCIER: Of course.

16          Good?

17          MS. COHEN SMUTNY: I was going to say,  
18 assuming that the Claimants say further in writing,  
19 then presumably Respondent also in writing, and I  
20 think we will--the Claimant will leave it to the  
21 Tribunal whether this should be done in writing or  
22 not.

1           But one other thing I just want to say  
2 preliminarily, the Tribunal, of course, can read the  
3 Request for Relief, and the Tribunal is familiar with  
4 its own powers and the Request for Relief consistently  
5 always said that "the Tribunal is requested to award  
6 Claimants compensation on such other basis as the  
7 Tribunal may deem warranted," and that needs to be  
8 borne in mind whenever considering that Request for  
9 Relief. That said, we will reflect further, and if  
10 the Parties have more, either, verbally or in writing,  
11 of course, we would agree that Respondent could say  
12 more as well.

13           PRESIDENT TERCIER: I take note of the  
14 objection and the first answer, (drop in audio) we  
15 will take on board, and I will discuss it with my  
16 co-Arbitrators, and see which process we will (drop in  
17 audio).

18           Do my Co-Arbitrators agree with this view?  
19 Thank you very much.

20           Sara, I was about to ask you the time used  
21 by Claimants.

22           SECRETARY MARZAL YETANO: Can you hear me

1 now?

2 PRESIDENT TERCIER: Yes, we can.

3 SECRETARY MARZAL YETANO: Thank you.

4 Claimants had eight minutes left of the  
5 three hours. So, in total, they still have 11 hours  
6 and 8 minutes and 10 seconds left.

7 PRESIDENT TERCIER: Okay. Good. Fine.

8 My second point, we have now, according to  
9 the program, a lunch break or a dinner break of an  
10 hour. I wonder because it will be shortened a little  
11 bit, but I don't want to frustrate the Respondent from  
12 the time you need to prepare yourself. My suggestion  
13 would be to start at 6:30 p.m., which will be  
14 Washington, D.C. 11:45.

15 Dr. Heiskanen?

16 DR. HEISKANEN: Just a second.

17 (Pause.)

18 DR. HEISKANEN: We're fine with 6:30.

19 PRESIDENT TERCIER: I should have asked  
20 before my colleagues who know me, they answered the  
21 question that I agree.

22 The third point is the Arbitral Tribunal has

1 not asked questions, but they have questions for  
2 Claimant. We will not have these questions at the end  
3 of this day because it will be a very long day and  
4 rather late for some of us. So, we'll discuss when we  
5 will ask these questions, and I'm pretty sure that we  
6 will find time somewhere at the very last day that  
7 needs to be followed, but we will revert to you when  
8 we ask questions and how we will do it. This is again  
9 an answer given by the Chairman without consulting  
10 with the co-Arbitrators. (drop in audio) okay.  
11 That's okay. So, ladies and gentlemen, thank you very  
12 much, we will resume at 6:30 Swiss time adapted, 6:30  
13 Swiss time. Okay. So we will begin soon.

14 Thank you very much.

15 DR. HEISKANEN: Thank you.

16 (Recess.)

17 PRESIDENT TERCIER: Dr. Heiskanen, you have  
18 up to three hours, and somewhere you introduce a break  
19 around the middle if possible for 15 minutes. Fine?

20 DR. HEISKANEN: Understood.

21 PRESIDENT TERCIER: Okay, good. You will  
22 have your PowerPoint presentations imminently.

1 DR. HEISKANEN: Yes. Indeed, I wanted to  
2 confirm that the Members of the Tribunal see the  
3 slides.

4 PRESIDENT TERCIER: Okay. Let's go.

5 DR. HEISKANEN: Fine.

6 PRESIDENT TERCIER: Yes, I have it, so  
7 please begin.

8 DR. HEISKANEN: Very good.

9 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

10 DR. HEISKANEN: Mr. President and Members of  
11 the Tribunal, as the Tribunal will recall in Romania's  
12 Opening Statement in December, we said that this case  
13 is effectively about one single issue: Why did the  
14 Roşia Montană Project stall? In other words, why did  
15 RMGC fail to progress the Project and to secure the  
16 Environmental Permit, and the other administrative and  
17 regulatory permits, and why did it fail to secure the  
18 necessary surface rights?

19 The December Hearing showed that the main  
20 reason for RMGC's failure was the social opposition  
21 that escalated over the years from the local to the  
22 national level and finally to the international level



1 as we have also seen in these proceedings. The  
2 Project stalled first and foremost because RMGC failed  
3 to secure the Social License and not because of  
4 anything that the Romanian Government did or did not  
5 do. Romania did not breach either of the two  
6 investment treaties, the Canada BIT or the UK BIT and  
7 is, therefore, not liable for any losses the Claimants  
8 allegedly sustained.

9           The Tribunal heard the factual and expert  
10 evidence on the issue of Social License at the  
11 December Hearing, so there is no need to revisit that  
12 evidence this week; nor is there any need to revisit  
13 the legal argument on the issue which we also  
14 summarized in December and, of course, developed in  
15 more detail in our earlier written submissions.

16           Nonetheless, it is important that the  
17 Tribunal keeps in mind that, much of the evidence that  
18 you will hear this week relates to the same issues on  
19 which you heard evidence in December, in particular on  
20 liability and causation.

21           It will hear further evidence that will show  
22 that there is no basis for a finding of liability

1 simply because there has been no breach of either  
2 investment treaty.

3           You will also hear further evidence showing  
4 that the Claimants' case also fails for lack of  
5 causation. Even assuming the Romanian Government  
6 should have issued the Environmental Permit in 2012,  
7 which is what the Claimant suggests, the Claimants  
8 have not shown that they would have been able to  
9 obtain the other regulatory and administrative permits  
10 that they were required in order to make--required to  
11 obtain in order to make the Project a reality.

12           As the Tribunal will recall from the  
13 December Hearing, securing and fast-tracking, securing  
14 and fast-tracking the--apologies.

15           (Pause.)

16           DR. HEISKANEN: Securing and fast-tracking  
17 the various administrative permits and endorsements  
18 was one of the main purposes of the Roşia Montană Law.  
19 The Law envisaged the Amendment of several laws and  
20 the issuance of over 45 permits and endorsements for  
21 the Project by June 2014. These were listed in  
22 Appendix 2 of the Roşia Montană Law, which, according

1 to Article 2(1) of that Law, was an integral part of  
2 the Law, as you see on this slide.

3           This is what the Parties agreed at the time  
4 would be still required after the Environmental  
5 Permit. We'll come back to Appendix 2 a bit later  
6 today, but that is the background in terms of what is  
7 still required.

8           This Hearing will also show that any  
9 Environmental Permit, had RMGC been able to get one,  
10 would have contained conditions that would have  
11 affected the technical and financial feasibility of  
12 the Project and the timing of its development. This  
13 conditionality is not reflected at all in the  
14 Claimants' case.

15           The Respondent's Opening Statement today is  
16 structured around these broad themes or issues or sets  
17 of issues. More specifically, we will cover the issue  
18 of causation. We, of course, argued the Respondent's  
19 legal case on liability at the December Hearing, so we  
20 will not go back to that argument today, even if some  
21 of the evidence that you will hear also relates to the  
22 issue of liability, and even if the Claimants

1 effectively tried to make earlier today a selective  
2 closing of the evidence that was heard in the December  
3 Hearing.

4           We'll start by looking at the issue of  
5 causation as a matter of international law, the  
6 standards of causation or the tests of causation that  
7 this Tribunal should apply.

8           We will also look at open issues relating to  
9 environmental permitting, the Building Permit, and  
10 financing. These issues are open issues because the  
11 Claimants have not shown with sufficient degree of  
12 certainty that RMGC would have been able to get those  
13 permits and that the Project would have been  
14 technically and financially feasible, even if they had  
15 the Environmental Permit.

16           And, finally, we will look at the Claimants'  
17 case on quantum.

18           Now, causation. A claimant, an investor  
19 bringing an international claim before an investment  
20 treaty tribunal must establish a causal link between  
21 the alleged breach and the claimed loss. In order to  
22 be entitled to compensation, it is not enough for the

1 claimant to establish a breach of the applicable  
2 investment treaty. The Claimants must also show that  
3 it is the breach that caused the Claimants' loss. As  
4 the Biwater Tribunal said, I quote: "Causing injury,  
5 must mean more than simply the wrongful act itself.  
6 Otherwise, the element of causation would have to be  
7 taken as present in every case." This is Biwater  
8 CLA-106, Paragraph 803.

9           The requirement of causal link has two  
10 elements:

11           First, the alleged wrongful act must be the  
12 dominant cause of the loss. In other words, there  
13 must be a sufficient factual link between the alleged  
14 breach and the claimed loss. This is known as the  
15 factual causation.

16           And, second, the claimed loss must not be  
17 too remote. It must be proximately or directly caused  
18 by the alleged wrongful act. This is known as "legal  
19 causation."

20           The requirement of causal link is codified  
21 in Article 31(2) of the ILC Articles on State  
22 Responsibility which you see highlighted on the slide

1 in very concise and simple terms.

2           The commentary to Article 31 explains that  
3 Paragraph 2 deals with both factual and legal  
4 causation. First of all, as you see, the subject  
5 matter of reparation is globally the injury resulting  
6 from and ascribable to the wrongful act rather than  
7 any and all consequences flowing from an  
8 internationally wrongful act, the allegation of injury  
9 or loss due to a wrongful act is, in principle, a  
10 legal and not only historical or a causal process. In  
11 other words, causality, in fact, is a necessary but  
12 not a sufficient condition for reparation. There is a  
13 further element associated with the exclusion of  
14 injury that is too remote or inconsequential to be  
15 subject of reparation. These principles and rules are  
16 trite law, but they are particularly important in this  
17 case if the Tribunal were ever to reach the issue of  
18 causation.

19           These standards, of course, have also been  
20 applied by investment treaty tribunals. In *Biwater*  
21 *versus Tanzania*, the Tribunal concluded that the  
22 claimant had failed to meet the applicable test of

1 causation. The Tribunal found that the actual  
2 proximate or direct cause of the loss and damage for  
3 which the Claimant sought compensation were the acts  
4 and omissions that had already occurred by  
5 12 May 2005, which was the alleged breach of the  
6 Treaty. In other words, there was no causation  
7 because the alleged breach of the Treaty occurred  
8 after the loss.

9           In support of its reasoning on this point,  
10 the Biwater Tribunal referred to the decision of the  
11 ICJ, the International Court of Justice, in the ELSI  
12 Case, where the Court held that ELSI's difficulties  
13 were caused by its own mismanagement over the years  
14 and not by the act of requisition of the Italian  
15 Government authorities, which was the alleged breach  
16 of treaty in that case.

17           A similar issue of causation, in that case,  
18 in ELSI, the Court applied the underlying or terminal  
19 cause test and concluded that the underlying cause of  
20 the Claimants' loss was ELSI's--or ELSI's loss was  
21 headlong course towards insolvency, which state of  
22 affairs it seems to have attained even prior to the

1 requisition.

2           Now, in *Bilcon versus Canada*, a NAFTA case,  
3 the investors raised the same argument as the  
4 Claimants are raising in this case; namely, that their  
5 applications for permits other than the Environmental  
6 Permit, which the Tribunal found in that case was  
7 denied wrongfully, would have been granted by the  
8 Government.

9           The Tribunal first confirmed the applicable  
10 standard of causation, the alleged injury must, in all  
11 probability, have been caused by the breach, as in  
12 *Chorzów Factory*, or a conclusion with a sufficient  
13 degree of certainty is required that, absent a breach,  
14 the injury would have been avoided. In other words,  
15 as a threshold question, the Tribunal had to consider  
16 whether a causal link between the Respondent's breach  
17 of international law and any injury of the investors  
18 had been established at all.

19           In other words, the test is whether the  
20 Tribunal is able to conclude from the case as a whole  
21 and with sufficient degree of certainty that the  
22 damage or losses of the investors would, in fact, have



1 been averted if the Respondent had acted in compliance  
2 with its legal obligations under the NAFTA.

3           The Tribunal found that the investors had  
4 failed to meet this standard in relation to the other  
5 permits. The Tribunal said that, although there was  
6 no doubt that there was a realistic possibility that  
7 the Project would have been approved as a result of  
8 the hypothetical NAFTA-compliant JRP process, it  
9 cannot be said that this outcome would have occurred  
10 in all probability or with sufficient degree of  
11 certainty. In other words, the investors have not  
12 proven that in all probability or with sufficient  
13 degree of certainty, the Project would have obtained  
14 all necessary approvals and would be operating  
15 profitably.

16           This reasoning of the Bilcon Tribunal is  
17 directly relevant to this case if this Tribunal ever  
18 reaches the issue of causation.

19           In Copper Mesa versus Ecuador, another  
20 investment treaty case which also raised the issue of  
21 Social License, the Tribunal found that both the  
22 investor and the Respondent State had contributed to

1 the investor's loss. The Tribunal, therefore,  
2 approached the issues of liability and quantum, both  
3 issues of liability and quantum, in terms of  
4 contributory negligence or contributory fault. The  
5 Tribunal determined in that case that the Claimants'  
6 contribution to the alleged loss for purposes of both  
7 liability and quantum was 30 percent. On the facts of  
8 the case the Tribunal found it could not be less.

9           On the facts of this case, Gabriel versus  
10 Romania, the Claimants' contribution to the alleged  
11 loss cannot be any less than a hundred percent. As we  
12 heard in the December Hearing, the Claimants'  
13 inability to progress the Project was first and  
14 foremost a consequence of their inability to obtain  
15 the Social License; hence they are hundred percent  
16 liable for the alleged loss.

17           Of course, the Claimants' liability can go  
18 beyond a hundred percent since, if the Tribunal  
19 dismisses the Claimants' Claims, as you should, the  
20 Claimants should be ordered to reimburse Romania for  
21 the Arbitration costs.

22           The underlying dominant clause of the

1 Claimants' claimed loss in this case was the social  
2 opposition to the Project, not any measures taken or  
3 not taken by the Romanian Government. As we heard  
4 again this morning, the Claimants are going to great  
5 length in trying to completely disregard the evidence  
6 about the social opposition, but the Tribunal cannot  
7 close its eyes to the evidence.

8 My colleagues will now address the technical  
9 expert evidence that is on the record, that is  
10 relevant not only to the issue of causation, but also  
11 to liability and quantum, a broad range of issues.  
12 When you consider this evidence, Members of the  
13 Tribunal, you are requested to keep in mind that much  
14 of the evidence on these issues was already heard in  
15 December. What you will hear today is additional  
16 evidence on these very same issues.

17 My colleague, Ms. de Germiny, will now take  
18 the floor.

19 PRESIDENT TERCIER: Please, Ms. de Germiny.

20 MS. de GERMINY: Good evening and good  
21 afternoon, Mr. President and Members of the Tribunal.

22 As Romania has demonstrated, it did not

1 breach either BIT in this case. The Ministry of  
2 Environment's non-issuance of the Environmental Permit  
3 in 2012 did not amount to a breach of Romanian Law,  
4 let alone a BIT breach, because, as discussed at  
5 length at the December 2019 hearing, RMGC still needed  
6 to address numerous issues, including securing the  
7 Ministry of Culture's endorsement for the Project,  
8 securing the Ministry of Environment's approval of the  
9 Waste Management Plan, securing the approval of the  
10 Urban Planning documentation (the PUZ), securing and  
11 maintaining a valid Urban Certificate, securing the  
12 Water Management Permit that certified compliance with  
13 the Water Framework Directive, and securing the  
14 necessary surface rights.

15           Although the first two of these issues were  
16 resolved in the spring of 2013, the remainder were  
17 still outstanding thereafter and remain outstanding  
18 today.

19           The Claimants argue in this Arbitration that  
20 these issues could not prevent the issuance of the  
21 Environmental Permit. Romania disagrees, for reasons  
22 explained at length in its written submissions and at

1 the December Hearing, and I will not repeat those  
2 reasons today. In any event, though, it is undisputed  
3 that RMGC needed to secure these approvals and to  
4 resolve these issues to secure the Building Permit.  
5 My colleagues, Ms. Andreea Simulescu and Mr. David  
6 Bonifacio, will further address some of these issues  
7 in the context of securing the Building Permit. For  
8 my part, I will stay with the Environmental Permit a  
9 bit longer. I will address today four other issues or  
10 let's say areas of technical uncertainty surrounding  
11 the Project. They were outstanding and uncertain in  
12 2011, had been for years, and still are today. They  
13 concern cyanide transportation and management, risks  
14 associated with the TMF and pond seepage, the lack of  
15 sufficient research at Orlea, and lack of information  
16 regarding post-closure land use.

17           Romania's technical experts addressed these  
18 and other issues in their Reports; and, as they have  
19 not been called to testify, I will walk the Tribunal  
20 through their evidence and demonstrate that these  
21 issues were open, were still being discussed in 2011,  
22 and in many instances after 2011.

1           The existence of these open technical issues  
2 is relevant to the Tribunal's analysis in two  
3 respects:

4           First, it is relevant to the Tribunal's  
5 assessment of liability. Because these issues were  
6 open in 2012, the Ministry of Environment was not in a  
7 position to issue the Permit and its non-issuance of  
8 the permit cannot amount to a breach of the BITs.

9           Second, should the Tribunal reach that  
10 stage, these issues would also be relevant to the  
11 analysis of causation. Even assuming that Romania has  
12 breached the BITs, which is denied, as Dr. Heiskanen  
13 explained, the Claimants must prove that, had the  
14 Environmental Permit been issued, RMGC would, in all  
15 probability, have obtained all other permits and  
16 managed to operate the Project profitably. They  
17 failed to make that showing.

18           In other words, they failed to show that the  
19 Ministry of Environment's non-issuance of the permit  
20 caused the losses they claim to have suffered.  
21 Granting an Environmental Permit for a project of this  
22 nature is not, in Romania and elsewhere in Europe and

1 around the world, a "yes" or "no" question. The  
2 answer that state authorities will give is either "no"  
3 or "yes, but as long as you do the following."

4           Indeed, according to the EIA Procedure, if  
5 the TAC concludes that the Environmental Permit can be  
6 granted, it then considers the conditions to be  
7 attached to the permit; in other words, the mitigation  
8 measures: "The more complex and important the  
9 Project, the lengthier and more detailed the list of  
10 conditions is likely to be.

11           The Claimants are entirely silent about what  
12 the conditions would have likely been had the  
13 Environmental Permit been issued in 2012 or  
14 thereafter. They have also not demonstrated that RMGC  
15 would have been able to move forward with the Project  
16 and to operate the Project profitably, despite those  
17 conditions.

18           Even if RMGC had obtained the Environmental  
19 Permit in 2012 or thereafter, it is likely that at  
20 least some of these technical issues that I will  
21 address today would have translated into conditions  
22 attached to the permit, and that they would have

1 likely affected the scheduling and costs of the  
2 Project.

3           It is undisputed between the Experts in this  
4 case that for and under the Project, cyanide would  
5 have been necessary to extract the gold at Roşia  
6 Montană. The question of the Project's envisaged use  
7 and management of cyanide thus goes to the very  
8 feasibility, the technical feasibility, of the  
9 Project. The Project's envisaged use of cyanide also  
10 goes to the Social License question. As Romania has  
11 demonstrated, the Project stalled because RMGC failed  
12 to secure the social License, and one of the main  
13 reasons was the public's perception of the Project's  
14 envisaged use of cyanide.

15           As Romania's expert, Ms. Christine Blackmore  
16 of CMA, has written: "A valid social license to  
17 operate is the key for commercial success of a mining  
18 venture. This is especially the case where cyanide is  
19 proposed. Therefore, preparing information on the  
20 management of cyanide for the stakeholders is vitally  
21 important for environmental and social acceptance."  
22 In this case the question was not should cyanide be



1 used, but rather can RMGC demonstrate to stakeholders  
2 that it is capable of managing cyanide responsibly.

3           Before we talk about Roșia Montană, we need  
4 to go back to January 2000 to the Baia Mare dam  
5 failure and cyanide spill some 200 kilometers from  
6 Roșia Montană.

7           Baia Mare is relevant to this dispute for  
8 three main reasons.

9           First, it greatly impacted, tainted public  
10 perception about the Project. Many concerns and  
11 questions about the Project stemmed from what had  
12 happened at Baia Mare.

13           Second, as a result of Baia Mare, the  
14 international community prepared and espoused a  
15 Cyanide Code. And from that point forward, good  
16 practice for mining companies meant compliance with  
17 the code.

18           Third, as a result of the accident in 2009,  
19 Romania was found to have breached the European  
20 Convention on Human Rights by failing to protect the  
21 right of the plaintiffs, a father and son who lived  
22 near Baia Mare to a healthy and safe environment. The

1 Romanian Government thus wanted full assurances that  
2 this type of accident would not occur again.

3 I would like to show a video montage of  
4 short excerpts from a 2004 documentary about Roşia  
5 Montană called "New El Dorado." You will first hear  
6 and see Mr. Zeno Cornea, one of Romania's witnesses in  
7 this arbitration, speaking briefly about Rosa Montana  
8 and Baia Mare. You will then see certain images from  
9 the immediate aftermath of the Baia Mare disaster.

10 (Video played.)

11 MS. de GERMANY: In March 2006, just before  
12 submitting the EIA Report to the Romanian authorities,  
13 RMGC announced that it had become a signatory to the  
14 Cyanide Code established as a result of Baia Mare.  
15 And as Claimants' counsel noted earlier, it announced  
16 that it intended for the Project to be certified in  
17 the Code. That's what we see in the middle of the  
18 screen. I will come back to those announcements later  
19 on.

20 Shortly thereafter, in May 2006, RMGC  
21 submitted, as part of the EIA Report, a cyanide  
22 Management Plan which set out generally how RMGC

1 intended to use and manage cyanide at Roşia Montană.  
2 The problem, as I will explain, is all of the elements  
3 that plan did not include.

4           Several months later, after its review of  
5 the EIA Report, in November 2006, the Independent  
6 Group of International Experts--and by way of  
7 reminder, these were technical experts who reviewed  
8 certain aspects of the EIA Report--expressed concerns  
9 regarding RMGC's Cyanide Management Plan. They made  
10 the following observation relating to RMGC's clarity  
11 in dealing with cyanide issues. The experience of the  
12 IGIE is that neither Hungarian nor Romanian-speaking  
13 public has clear information about the potential  
14 hazards and benefits of the forthcoming development.  
15 IGIE urges more understandable explanations. This  
16 would certainly help in achieving better public  
17 acceptance of the Project.

18           So the IGIE warned that the public was not  
19 sufficiently informed about the risks of the Project.  
20 And to the right, RMGC answers in the first paragraph,  
21 that once all the comments are received and responses  
22 accepted, RMGC is committed to producing a final

1 summary EIA Report. RMGC did not, however, commit to  
2 producing a revised Cyanide Management Plan that would  
3 clarify these issues.

4           The IGIE specifically recommended that RMGC  
5 identify both the name of the cyanide transportation  
6 company and the transportation route, and that it do  
7 so in the EIA documentation. We see that at  
8 Recommendation No. 6. The company chosen for cyanide  
9 transportation should be named in the EIA  
10 documentation and recommendation No. 4; the agreed  
11 transportation chain should be reflected in the final  
12 EIA documentation. In other words, the IGIE  
13 considered that RMGC should provide this information  
14 in advance of and for the purposes of the Ministry of  
15 Environment issuing the Environmental Permit.

16           As mentioned at the December Hearing, the  
17 cyanide could have been transported by a combination  
18 of ship, rail, and truck. The route and method of  
19 transportation would have affected the quantities of  
20 cyanide transported and the form in which it was  
21 transported. The map on the screen shows one of the  
22 routes that RMGC suggested. Under this route, the

1 cyanide would have arrived in the Port of Constanța on  
2 the Black Sea, gone by train near Bucharest through  
3 the Apuseni Mountains all the way to Zlatna, the train  
4 station closest to Roșia Montană. It would then have  
5 been transported for another 40 or so kilometers by  
6 truck to Roșia Montană.

7 RMGC's lengthy response to the IGIE on the  
8 side of the Page concerning transportation was that it  
9 would provide the information about the cyanide  
10 transportation later on. However, to this day, RMGC  
11 has not provided Romanian authorities with that  
12 information.

13 The IGIE also questioned the information  
14 regarding cyanide detoxification. Says there was no  
15 reference found by the IGIE in the EIA document on who  
16 and how often will monitor the effluent quality from  
17 the technology into the tailings ponds. And as we see  
18 on the right, RMGC responded that this information  
19 would be developed in accordance with Government  
20 requirements following environmental approval.

21 And, finally, in connection with  
22 water-management issues generally, the IGIE queried

1 the number of options that are left for later design  
2 or consideration, and RMGC responded that it needed to  
3 wait for Government approvals without saying which  
4 approvals. RMGC often raised this argument of, "we  
5 are not required to do this now" for both technical  
6 issues like defining the cyanide transportation route  
7 and transporter, and non-technical issues like, for  
8 instance, the acquisition of surface rights; namely,  
9 that the law did not require it to provide certain  
10 information before and for purposes of the  
11 Environmental Permit, and that it could wait until  
12 either the moment of applying for the Building Permit,  
13 or even after the issuance of the Building Permit.

14           This argument was overly formalistic and  
15 misplaced, overly formalistic because the law cannot  
16 address all matters, and misplaced because the fact  
17 that Romanian Law requires a defined cyanide  
18 transportation route during the operational phase does  
19 not mean that Romanian authorities may not ask for  
20 that information earlier on.

21           Romania's expert, Ms. Christine Blackmore of  
22 CMA, explains in her Report that companies are often,

1 in practice, required to give more information to  
2 state authorities than expressly provided for in the  
3 Cyanide Code or in the Law. She cites the example of  
4 a mining project in which she was involved in Northern  
5 Ireland with the Canadian company Dalradian Gold  
6 Limited, where there was strong NGO and public  
7 opposition during the EIA Procedure. State  
8 authorities thus asked Dalradian to provide additional  
9 detailed information regarding its envisaged use of  
10 cyanide. And Dalradian provided this information,  
11 even though it was not required to do so, because it  
12 was trying to allay concerns and because it wanted to  
13 get its Project approved. Ms. Blackmore discusses  
14 this at Paragraphs 72 to 75 of her Report.

15 RMGC could have and should have done the  
16 same in this case in numerous instances. Instead it  
17 disregarded or deferred to later issues that it did  
18 not feel required and/or did not wish to address.

19 In addition to the TAC and the IGIE, the  
20 public raised questions about cyanide transportation  
21 and Management. We see on the screen certain comments  
22 made during the public consultations in 2006, and the

1 TAC also raised questions. We see on the slide  
2 excerpts from TAC Meeting Minutes of 2007, where  
3 RMGC's consultant from AMEC said the transport impact  
4 will be on the local community, the route will be  
5 analyzed in detail as soon as the route alternatives  
6 are known, and the representative from the Ministry of  
7 Transportation said: "We think it's time we make some  
8 choices about transportation alternatives."

9 In 2010, the representative again of the  
10 Ministry of Transportation said: "We want additional  
11 clarifications," asking questions about the railway  
12 and the risk of transportation accidents.

13 And again, in 2011, the Ministry of  
14 Transportation at the 29 November 2011 TAC meeting  
15 said: "We had the same observations during the  
16 previous meeting when we sent our point of view. It's  
17 important for you to comply with the Law related to  
18 the transport of hazardous substances and cyanide and  
19 to have a detailed chapter in your documentation, in  
20 your EIA documentation, about how these provisions  
21 will be observed. So supplement the documentation  
22 with these provisions. As to the route you selected,



1 you should clearly know which route it is."

2           Although the cyanide was possibly going to  
3 arrive in Constanta, the Ministry of Transportation's  
4 representative observed in May 2013, so nearly seven  
5 years after the IGIE Report recommendations, the  
6 representative said nobody in Constanta was contacted,  
7 nobody knows about this potential transport. And in  
8 response, Mr. Tanase indicated that the optimum route  
9 would be decided when the time comes.

10           So, RMGC did not address the question, and  
11 the TAC never approved RMGC's Cyanide Management Plan.  
12 Approval of that plan would have come if and when the  
13 Environmental Permit were issued.

14           Following its review of the Roşia Montană  
15 Law in November 2013, the Joint Special Committee of  
16 Parliament also recommended generally based in part on  
17 the views of the representatives of civil society,  
18 that the Ministries consider further the potential  
19 risks associated with the cyanide use.

20           Ms. Blackmore confirms that RMGC's Cyanide  
21 Management Plan lacked information regarding  
22 transportation, as we've summarized on this and the

1 following slides. Here, this notes certain  
2 shortcomings that she has identified with regard to  
3 the plan with regard to information about Constanta,  
4 for instance, about the unloading facilities and the  
5 security and storage facilities in Constanta.

6 She has also described the lack of  
7 information regarding the rail to Zlatna, for  
8 instance, the number of trains, the number of cars per  
9 train. And bearing in mind that this railway would  
10 have transited through the country and through the  
11 Apuseni Mountains which presented difficult terrain.

12 The next slide is confidential.

13 (End of open session. Admitted Secret  
14 Material begins.)

1

ADMITTED SECRET MATERIAL

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(Admitted Secret Material ends.)

## 1 OPEN SESSION

2 MS. de GERMANY: Now returning to  
3 nonconfidential information.

4 Ms. Blackmore concludes that RMGC could have  
5 defined the cyanide route and method and transporter  
6 to help alleviate the TAC's and public concerns.

7 Also, with a defined route, it's not possible--sorry,  
8 without a defined route, it is not possible to conduct  
9 a meaningful EIA procedure since it is not possible to  
10 engage with the stakeholders who are potentially  
11 affected by the cyanide transportation, whether they  
12 be in Constanta, near Bucharest, or elsewhere.

13 Determining the transportation route was  
14 also important for permitting and planning reasons.  
15 RMGC, in the EIA Report and in discussions with the  
16 TAC, repeatedly suggested, as I noted earlier that,  
17 the cyanide might be transported by rail to Zlatna,  
18 but you need special facilities at a train station to  
19 transfer and unload cyanide onto trucks and no such  
20 facilities exist at Zlatna. Most of the industrial  
21 zone of railway facilities have been decommissioned  
22 and are in bad shape.

1           Mr. Tanase acknowledged this to the TAC, and  
2 in 2013, he said: "In Zlatna, we are currently  
3 considering the possibility of building a transfer and  
4 storage terminal, storing the cyanide and other  
5 hazardous substances including ammonium nitrate.  
6 Because in Zlatna we have that railway line that ends.  
7 This involves an investment of several tens of  
8 millions of dollars." So, these facilities needed to  
9 be built, and RMGC would have needed to apply for the  
10 relevant permits, as my colleague Ms. Simulescu will  
11 discuss in greater detail. RMGC and Gabriel have  
12 never taken into account the time and cost impact on  
13 the Project of securing the permits in building the  
14 necessary facilities at Zlatna.

15           As I mentioned earlier, RMGC had announced  
16 in March 2006 that it intended to secure a Cyanide  
17 Code certification. As RMGC itself explained in the  
18 Cyanide Management Plan in May 2006, "companies that  
19 become signatories to the code demonstrate their  
20 compliance by having their operations inspected by a  
21 third-party auditor." We will look at both the Code  
22 and the verification protocols.

1           In the case of Roşia Montană, which was not  
2 yet operational, RMGC could have commissioned a  
3 pre-operational audit. Ms. Blackmore explains, that  
4 had RMGC done the Audit and obtained a positive  
5 result, it could have confirmed this publicly, which  
6 would have signaled to stakeholders that the Project  
7 complied with the Cyanide Code, and this would have  
8 likely helped to alleviate concerns about the  
9 Project's envisaged use of cyanide.

10           Ms. Blackmore's opinion is in line with the  
11 advice that Mr. Jonathan Henry received in July 2013  
12 from the President of the International Cyanide  
13 Management Institute. I'm now looking at events in  
14 2013 on the right-hand side of this timeline. We see  
15 here that the President of the International Cyanide  
16 Management Institute wrote: "Pre-operational  
17 certification allows a company during its permitting  
18 process to demonstrate to stakeholders that it will  
19 manage cyanide responsibly. It helps to assure  
20 stakeholders that the mine will operate safely,  
21 thereby supporting its Social License to operate."

22           Mr. Henry responded that "this would be very

1 helpful for us. How do I progress this?"

2           Shortly thereafter, Mr. Henry contacted the  
3 company AMEC about doing a pre-operational audit, and  
4 AMEC responded on July 24th, 2013, with a proposal,  
5 and similar to what the ICMI President had said, said:  
6 "During the environmental permit process in Romania,  
7 pre-operational certification would allow Gabriel  
8 Resources to demonstrate to stakeholders that it will  
9 manage cyanide responsibly. This will help support  
10 the Social License to operate."

11           AMEC also noted its understanding as we see  
12 in the bottom box, that: "Since the Environmental  
13 Permitting process is now likely to include a law  
14 specific to Roşia Montană, Gabriel Resources intends  
15 to apply for pre-operational certification to support  
16 timely passage of this legislation."

17           So, Gabriel knew that it needed more support  
18 for the Project. It knew that at least part of the  
19 opposition stemmed from concerns regarding cyanide,  
20 and it believed that an audit would help bolster  
21 support.

22           Mr. Henry also asked the company Wardell

1 Armstrong to provide a proposal to do the  
2 pre-operational certification, and they proposed their  
3 lead cyanide auditor, Ms. Christine Blackmore. This  
4 proposal thus arrived right after the first major  
5 street protest against the Project in September 2013,  
6 many of which were focused on the Project's envisaged  
7 cyanide use. RMGC, however, threw in the towel, never  
8 did the Audit, which it could and should have done  
9 years earlier, so no independent accredited auditor  
10 ever assessed, let alone certified, that the Project  
11 met the requirements of the Cyanide Code and at the  
12 pre-operational protocol.

13           An issue related to that of cyanide use and  
14 Management is that of the risk of a failure of the TMF  
15 dam. This is the dam that holds up the tailings or  
16 the waste from the mine site. In Roşia Montană, the  
17 dam was going to be 185 meters high, the highest dam  
18 ever built in Romania and taller than the Washington  
19 Monument. We have seen in recent decades dramatic dam  
20 failures at mining sites around the world. These  
21 range from again the Baia Mare dam failure in 2000, to  
22 the failure of a dam operated by the major mining



1 company Vale last year in Brazil. Romania's Expert,  
2 Mr. Dermot Claffey, includes with his First Report a  
3 list of TMF failures and refers to the legitimate  
4 concerns of people who would be effected in the case  
5 of Roşia Montană by such a failure.

6           Concerns about TMF failures are legitimate,  
7 notwithstanding the assurances of the mining company,  
8 since, as Mr. Dodds-Smith notes, after a tailings  
9 failure in 2016, a commentator said: "The mining  
10 company has long claimed that it performs good  
11 practice but the Report into the failure did not  
12 demonstrate this." As Dr. Dodds-Smith comments, it's  
13 always easy to claim compliance with best practice but  
14 not so easy to achieve.

15           In this case, the public expressed concerns  
16 about a possible dam failure at Roşia Montană in 2006.  
17 You have examples on this slide with comparisons of  
18 concerns coming from Baia Mare. The tailings pond in  
19 unlined and is a hazard for the town of Abrud, which  
20 was just downstream from where the dam would be, and  
21 also concerns from 2009, in case of an earthquake, the  
22 TMF will fail, how will Câmpeni be affected, also a

1 neighboring town, as well as the surrounding areas and  
2 further questions about the effect on Abrud.

3           The TAC expressed similar concerns. As we  
4 see on this slide, these are excerpts from 2007 and  
5 also from the 29 November 2011 TAC meeting from the  
6 representative of the Ministry of Environment,  
7 Ms. Pineta, who requests further explanations; as did  
8 the Romanian Academy in the summer of 2013 which  
9 expressed its serious concerns about risks associated  
10 with dam failure.

11           There was a related concern regarding the  
12 TMF and the TMF pond, and that is the risk of seepage  
13 of toxic substances into the ground and the  
14 groundwater. The TAC raised on numerous occasions  
15 concerns regarding the permeability of the bottom of  
16 the pond and the question of the choice of a liner for  
17 the pond.

18           Although the Claimant suggests that this  
19 concern came solely from the Head of the Geological  
20 Institute, the Ministry of Environment raised the  
21 issue already in 2005 at the first TAC meeting, asking  
22 which are the lining measures for the TMF, how will

1 the groundwater be protected, what is the risk of  
2 pollution through seepage of toxic substances,  
3 including cyanide?

4           And, in 2007, RMGC responded that it did not  
5 think a man-made geomembrane, or HDPE liner was  
6 required. It considered that it was enough to have a  
7 natural compacted clay or colluvium liner at the  
8 bottom of the tailings pond.

9           The TAC, however, continued to ask about  
10 possible toxic seepage and the need for a geomembrane,  
11 an artificial liner, in addition to or instead of the  
12 clay liner. It asked at both this same meeting of  
13 July 2007, as we see on the next slide. The  
14 representative of the Ministry of Environment said:  
15 "We think that one of the substantive problems  
16 resulted from the study of Chapter II is underground  
17 water pollution due to incomplete sealing of Corna TMF  
18 bottom." And this lady concluded this intervention by  
19 saying: "We consider that RMGC strategy regarding TMF  
20 ceiling should be reconsidered." This was also the  
21 subject of discussion in 2013 in a TAC meeting.

22           And in September 2011, in addition in its

1 list of over 100 questions to RMGC, the Ministry of  
2 Environment specifically requested information and  
3 documentation about an HDPE liner for the TMF pond, so  
4 it noted the measurements provided in the report are  
5 not sufficient to ensure the impermeabilization of the  
6 Corna tailings pond basin. "Please supplement the EIA  
7 Report accordingly," indicating that--referring to the  
8 levels of the clay lining, natural lining, and noting  
9 that the colluvium deposits are permeable, and that  
10 this is not sufficient to impermeabilize the basin of  
11 the pond according to the European Groundwater  
12 Directive.

13           They went on to write in the same letter:  
14 "The pond on the Corna Valley must be appropriately  
15 lined. The sump provided to capture exfiltration is  
16 not provided with an HDPE liner, and it is necessary  
17 to have this HDPE liner."

18           The public had also expressed the specific  
19 concern on numerous occasions. Again in 2007, someone  
20 writing the TMF is not lined, someone else writing the  
21 risk of seepage is high in case of an earthquake.  
22 Risk of TMF will have a large surface and will be

1 filled with cyanide. So this was an ongoing concern.

2 And following its review of the Roşia  
3 Montană Law in November 2013, the Joint Special  
4 Committee of Parliament also recommended that state  
5 authorities consider commissioning a study in response  
6 to concerns regarding the location of the envisaged  
7 TMF and the risk of seepage of toxic substances in the  
8 groundwater. We have their conclusion on this slide,  
9 and specifically referring to this concern about  
10 permeability of the pond.

11 So, what do the Experts say? The Claimants'  
12 Expert, Mr. Corser, says in his Second Report that,  
13 "the decision not to include a geomembrane liner was  
14 carefully analyzed."

15 Respondent's Expert, Mr. Claffey, first  
16 observes that a significant number of mines have  
17 geomembrane liners, and he opines that given the  
18 repeated concerns, RMGC could have proposed a  
19 geomembrane liner. This was a real opportunity for  
20 RMGC to demonstrate to Project critics that they would  
21 go beyond mere technical requirements and provide the  
22 highest levels of environmental protection.

1           Mr. Claffey also says that RMGC could have  
2 made a greater effort, given the purportedly high  
3 standards to which it aspired.

4           Mr. Corser , Claimant's Expert, says in his  
5 Second Report, that the Romanian Government never made  
6 a geomembrane liner a condition. He says: "While  
7 RMGC considered the use of a geomembrane liner, the  
8 design of the TMF using the natural liner was sound  
9 and the consideration of the geomembrane liner was  
10 largely an exercise in analyzing all possible  
11 alternatives in case the use of such a liner was ever  
12 made a requirement for permitting. I understand that  
13 this never happened." It never happened because the  
14 TAC never reached the stage of defining the  
15 requirements for permitting, the conditions on which  
16 the Environmental Permit could be issued.

17           Mr. Claffey, indeed, explains that the dam  
18 safety permits that were issued did not address  
19 questions of seepage or TMF pond lining, and that  
20 these aspects would have been addressed separately by  
21 way of conditions imposed as part of the  
22 project-permitting process.

1           Mr. Claffey finally opines that, although  
2 Mr. Corser says this issue was carefully studied,  
3 RMGC's evaluation was high level and its decision  
4 likely motivated by cost.

5           Respondent's Experts from Behre Dolbear,  
6 Mr. Bernard Guarnera and Mr. Mark Jorgensen, whom you  
7 will hear this week, opine that RMGC could have  
8 substituted the proposed TMF with a filtered dry stack  
9 facility. In other words, tailings would be disposed  
10 of in a dewatered state. They would be placed,  
11 spread, and compacted to form an unsaturated, dense  
12 and stable tailings stack, so literally a dry stack.  
13 This would do away with the need for the TMF pond and  
14 the dam. They opine that, while a dry-stack facility  
15 is more expensive, proposing to put one in place would  
16 have assuaged the TAC's and public's concerns about  
17 both the risk of a dam failure and the risk of seepage  
18 of toxic substances into the ground. They also opine  
19 that dry-stack represents better available technology  
20 for this Project.

21           In sum, even assuming that the Ministry's  
22 non-issuance of the Environmental Permit amounts to a

1 BIT breach, which is denied, the TAC would have likely  
2 issued the permit upon the condition that RMGC  
3 envisaged a geomembrane liner. Indeed, the Claimants  
4 must but fail to prove that, had the permit been  
5 issued, RMGC would, in all probability, have obtained  
6 a permit that did not comprise such a condition. The  
7 Claimants need but fail to prove that RMGC would have  
8 been able to operate the Project profitably even if it  
9 had been required to put in place a geomembrane liner.

10           There were concerns arising out of the lack  
11 of research at Orlea massif. As previously explained,  
12 there has only ever been initial investigation at  
13 Orlea, and RMGC has not yet even applied for an  
14 Archaeological Discharge Certificate in connection  
15 with Orlea. We see that on this slide. The areas in  
16 green are the areas that have been subject of an  
17 Archaeological Discharge Certificate, and Orlea in the  
18 top left-hand corner is not in green.

19           Over the years, the TAC raised questions  
20 about the lack of research at Orlea. We see here an  
21 exchange from 2010 where Mr. Timis from the Ministry  
22 of Culture asks: "What are the projects and plans of



1 RMGC regarding the Orlea area?" And RMGC's lawyer  
2 responds: "Well, we have started research. And when  
3 we finish, we will apply for the ADC."

4 And he says: "In any case, this area is not  
5 provided to be operational starting Day 0 but starting  
6 Year 7 or Year 9."

7 And Ms. Pineta of the Ministry of  
8 Environment says: "But you are asking for the permit,  
9 the Environmental Permit, now at Year 0, before  
10 Year 0, and these areas are included in your Project  
11 for which you applied for the Environmental Permit."

12 And RMGC's lawyer concluded at the time:  
13 "What this means is that if we don't get the Discharge  
14 Certificate, it will not be possible to exploit there.  
15 It's quite simple."

16 The TAC specifically--or the Ministry of  
17 Environment specifically requested in September 2011  
18 that RMGC provide the ADC for Orlea. This is again,  
19 their letter from 22 September 2011. The public also  
20 expressed concerns over the years regarding the  
21 destruction of the Roman galleries, including those in  
22 Orlea. So, someone from 2006 wrote: "As for the

1 Orlea open-pit where there exists a 45-hectare area  
2 that is still inhabited, archaeological investigations  
3 have not been performed there. And although RMGC  
4 secures the Environmental Permit, there are high  
5 chances that the ADC will not be granted." Someone  
6 else asked: "Why didn't the Company secure the  
7 Archaeological Discharge Certificate for Cârnic and  
8 Orlea as well?" RMGC at the time and the Claimants in  
9 this Arbitration argue that, because works at Orlea  
10 would only start a few years into the Project, RMGC  
11 had time to obtain the ADC later on. The uncertainty  
12 concerning Orlea could, however, have wide-ranging  
13 repercussions, and the Respondent's Cultural Expert,  
14 Dr. Peter Claughton, describes the likelihood of  
15 significant discoveries in this area. In paragraph 49  
16 of his Second Report, he refers to the "significant  
17 uncertainty as to what might be found on and under the  
18 area."

19           And at Paragraph 92, "the evidence suggests  
20 that extensive areas of underground working of unknown  
21 date exist under the Orlea massif."

22           Other experts from the UK, Professors Wilson

1 and Mattingly and Mr. Dawson also reached a similar  
2 conclusion in 2010, as we see on the slide. They said  
3 the underground evidence at Orlea is very significant,  
4 and the preservation of wooden elements illustrates  
5 the potential for the future discovery of writing  
6 tablets, hydraulic features and so on. On the  
7 surface, no Roman settlement or ore-processing area  
8 has yet been discovered but they can be presumed to  
9 have existed given the density of ancient mining  
10 there. The 2013 study mapping out the research to be  
11 undertaken at Orlea also says there are many  
12 archaeological and historical indications favoring the  
13 presence of archaeological potential and historical  
14 heritage, and this is in a passage concerning the  
15 Orlea massif.

16           Even assuming that the Ministry's  
17 non-issuance of the Environmental Permit in 2012  
18 amounts to a BIT breach, which is denied, the TAC  
19 would have likely made issuance of the permit  
20 conditional upon an ADC for Orlea. Indeed, in 2012,  
21 even less was known about Orlea than in the spring of  
22 2013, and it is thus likely that the Ministry of

1 Environment would have made this a condition.

2           The Claimants must but fail to prove that,  
3 had the Environmental Permit been issued in 2012, in  
4 all probability, that permit would not have required  
5 an ADC for Orlea. They also failed to prove that, had  
6 RMGC been required in 2012 to carry out the Orlea  
7 research, the results of that research would not have  
8 impacted the feasibility of the Project.

9           The final issue I would like to touch upon  
10 today is that of post-closure land use or the  
11 after-use of the mine site. So, this is what happens  
12 on the land after you have rehabilitated the land.  
13 With any mining project, the after-use could involve  
14 reestablishment of a pre-existing land use, the  
15 establishment of a new land use, or a combination of  
16 both.

17           RMGC submitted in 2006, as part of its EIA  
18 Report, a mine rehabilitation and Closure Plan. Under  
19 Romanian Law, RMGC was required to describe the  
20 after-use of the site.

21           The next slide is confidential.

22           (End of open session. Admitted Secret

1 Material begins.)

ADMITTED SECRET MATERIAL

1

[REDACTED]

13

I'm now returning to nonconfidential

14

material.

15

(Admitted Secret Material ends.)

## 1 OPEN SESSION

2 MS. de GERMANY: The TAC raised questions  
3 about the after-use of the site in 2010 and 2011, also  
4 in November 2011, about both the after-use and the  
5 funding of the after-use, and the public also raised  
6 questions about the after-use of the site in 2006:  
7 "How will the area look after the mining? What  
8 surface will be available for agriculture?"

9 Notwithstanding these questions and comments, RMGC  
10 never revised its mine rehabilitation and Closure  
11 Plan.

12 Romania's Expert, Dr. Dodds-Smith, opines  
13 that the Closure Plan did not conform to good practice  
14 mainly because it did not clearly identify the  
15 after-use, and because it only included a summary of  
16 predicted closure costs. He cites authority for his  
17 view that good practice is to identify the after-use  
18 of the mine site at an early stage, and to include  
19 that cost estimate and a breakdown in the Closure  
20 Plan.

21 The Claimants' Expert and main author of the  
22 Closure Plan, Dr. Kunze, stated in his Second Report:

1 "It is not the financial responsibility of the mining  
2 company to fund and/or implement the final after-use  
3 plan, and thus it would be unusual to include funding  
4 in the final budget."

5 Dr. Dodds-Smith responds, expresses his  
6 concern with these statements, says that he  
7 fundamentally disagrees with Dr. Kunze, and refers to  
8 the EU Directive that "the calculation of the  
9 guarantee--the financial guarantee--shall be made on  
10 the basis of the likely environmental impact of the  
11 waste facility, taking into account in particular the  
12 future use of the already-rehabilitated land."

13 As Dr. Dodds-Smith further notes,  
14 Dr. Kunze's statement in this Arbitration, which is  
15 again replicated on this slide, appears to contradict  
16 statements in a presentation he gave to the TAC on  
17 29 November 2011. He gave a PowerPoint presentation,  
18 which stated "with reference to the financial  
19 guarantee calculation based on the likely impact waste  
20 characteristics and after-use."

21 Dr. Dodds-Smith concludes that this is not  
22 just a deviation from best practice, it's not even



1 generally accepted practice, and that he does not see  
2 a reference in any of the TAC meetings to Dr. Kunze or  
3 someone from RMGC saying to the TAC members that RMGC  
4 is not going to be addressing post-mining land use.

5           As Dr. Dodds-Smith further notes, it is the  
6 Environmental Permit that would have comprised any  
7 mitigation measures in connection with mine closure,  
8 that the Ministry of Environment might have wished to  
9 impose, both with respect to mine closure and waste  
10 management.

11           The Claimants must but fail to prove that,  
12 had the Environmental Permit been issued in 2012, RMGC  
13 would, in all probability, have obtained a permit that  
14 did not require RMGC to provide more information  
15 regarding the after-use. They would further need to  
16 prove that had the Ministry of Environment required  
17 RMGC, as a condition of the permit to propose an  
18 after-use for the site, this would not have impacted  
19 the feasibility or viability of the Project.

20           So, where does this leave us? The focus and  
21 overarching conclusion of the Claimant's technical  
22 experts is that the Project complied with Romanian Law

1 and good or best practices. This conclusion is not  
2 entirely surprising in the cases of Mr. Corser,  
3 Mr. Jennings, and Dr. Kunze, since they were working  
4 for and paid by the Claimants and/or RMGC for many  
5 years. Further to RMGC's request, Mr. Corser attended  
6 TAC meetings between 2007 and 2011. Dr. Kunze did as  
7 well. Mr. Jennings has been advising RMGC since 2011.  
8 All three appeared before the Romanian Parliament at  
9 RMGC's request in the fall of 2013.

10 In this Arbitration, they are thus defending  
11 their work of many years, and their Reports do not  
12 contain statements of independence. By contrast,  
13 Romania's technical experts have not been previously  
14 involved with the Project.

15 In any event, in many respects, Romania's  
16 experts agree with the Claimants' Experts, that the  
17 Project complied in many respects with good practice.  
18 In other instances, though, as I have explained and as  
19 summarized on the following slides which we have  
20 included for reference, Romania's experts consider  
21 that the Project did not comply with good or best  
22 practice. We have summary slides for Ms. Lorraine

1 Wilde's conclusions, those of Ms. Reichardt, those of  
2 Ms. Blackmore, those of Dr. Dodds-Smith concerning  
3 waste management and closure, Mr. Claffey concerning  
4 the TMF, and Dr. Claughton concerning cultural  
5 heritage.

6           The question of whether the Project on paper  
7 complied with Romanian law and good or best practice  
8 is, however, somewhat academic and beside the point.  
9 The point is, first, that RMGC could and should have  
10 addressed the requests and concerns of the TAC and the  
11 public by, for instance, defining its cyanide  
12 transportation route and transporter, proposing to  
13 implement a geomembrane liner, and/or undertaking the  
14 necessary archaeological research at Orlea. All of  
15 these issues, all those that we see on the slide were  
16 relevant to the Project's permitting and feasibility.  
17 RMGC and the Claimants chose not to address these  
18 issues, and by not doing so, they further increased  
19 the social opposition to the Project. In other words,  
20 not only was RMGC responsible for obtaining the Social  
21 License, but also by not taking one or more of these  
22 steps, RMGC made it more difficult to obtain the

1 Social License.

2           And once the strategy of ignoring these and  
3 other issues for years failed, the Claimants preferred  
4 to seek to shift the blame to Romania and to try their  
5 luck in arbitration proceedings instead.

6           The second point is relevant to the  
7 Tribunal's analysis of causation, if it were to reach  
8 that stage. Had the Ministry of Environment issued  
9 the Environmental Permit in 2012 when the Claimants  
10 say that the Ministry should have issued the permit or  
11 at any point subsequently, it is likely that the  
12 Ministry would have done so subject to RMGC addressing  
13 one or more of these issues. The Claimants have not  
14 demonstrated that those conditions would not have  
15 affected the technical and financial feasibility of  
16 the Project.

17           This would be now a good time to break,  
18 Mr. President.

19           PRESIDENT TERCIER: Thank you very much. I  
20 believe it is a good time to break (drop in audio).

21           ARBITRATOR GRIGERA NAÓN: We don't hear you,  
22 Mr. President.

1           PRESIDENT TERCIER: I don't know why.

2           Can you hear me now?

3           ARBITRATOR GRIGERA NAÓN: Yes.

4           PRESIDENT TERCIER: Sorry. I will (drop in  
5 audio).

6           We will now have a 15 minutes' break. We  
7 will start again at 8:00 p.m. Swiss time.

8           DR. HEISKANEN: Thank you.

9           (Recess.)

10          PRESIDENT TERCIER: Mr. Heiskanen, your team  
11 is ready?

12          DR. HEISKANEN: Yes, we are ready, and it  
13 will be Ms. Simulescu taking the floor.

14          PRESIDENT TERCIER: Okay, please, Ms.  
15 Simulescu, you have the floor.

16          MS. SIMULESCU: Thank you very much. Can  
17 you hear me?

18          PRESIDENT TERCIER: Yes, we can.

19          MS. SIMULESCU: Thank you very much. Good  
20 afternoon, good evening, Mr. President and Members of  
21 the Tribunal.

22          Besides the open issues relating to the

1 environmental permitting presented by my colleague  
2 Lorraine de Germiny, there were open issues relating  
3 to Building Permit and financing. RMGC has not met  
4 the requirements to build the Project. Significant  
5 permits, surface rights and Project financing were not  
6 secured by RMGC.

7           In my presentation, I will focus on the  
8 significant permits that RMGC failed to secure but  
9 that it still needed to secure to apply for and obtain  
10 the Building Permits. The remaining issues would be  
11 explained by my colleague, Mr. David Bonifacio.

12           As the Tribunal already knows, the Project  
13 was complex and massive, spreading over four  
14 localities and expanding on over 1,250-hectares. This  
15 Project would have been the biggest and the  
16 largest-scale gold mine in Europe in the middle of a  
17 populated area. Due to this specificity of the  
18 Project, there were numerous permits that were  
19 required for construction and later on, the operation  
20 of the Project. Had RMGC been able to obtain the  
21 Environmental Permit, the conditions RMGC had to meet  
22 for securing the Building Permit and operating the

1 mine would have affected the technical and financial  
2 feasibility of the Project and the timing of its  
3 development as Dr. Heiskanen earlier stated.

4           The Claimants provide no proof that if they  
5 had obtained the Environmental Permit, they would have  
6 obtained the Building Permit, which was mandatory for  
7 the start of the construction of the mine and the  
8 plant.

9           Most of the permits that RMGC needed to  
10 secure for obtaining the Building Permit and also for  
11 operating the mine are administrative acts that can be  
12 challenged in court by NGOs, and given the  
13 never-ending challenges of the NGOs in this case, it  
14 is likely that they would have filed suit affecting as  
15 well the technical and financial feasibility of the  
16 Project and the timing of its development or even the  
17 construction and implementation of the Project.  
18 Without the Building Permit, there would be no  
19 Project.

20           There is no dispute regarding the permits,  
21 approvals, endorsements or authorizations (which I  
22 will collectively refer to as "permits") that RMGC

1 needed for the Building Permit. There is a--

2 PRESIDENT TERCIER: Ms. Simulescu, if I may  
3 just interrupt for a second (drop in audio). Could  
4 you hear me?

5 MS. SIMULESCU : Yes, yes.

6 PRESIDENT TERCIER: Please proceed.

7 MS. SIMULESCU: There is a dispute on  
8 whether some of the permits were required only for the  
9 Building Permit or also for the Environmental Permit.  
10 As the Tribunal heard in the December Hearing from the  
11 legal experts and from Ms. Lorraine de Germiny  
12 earlier, several permits or endorsements were  
13 necessary at both permitting phases, such as the  
14 approval of the PUZ, the Water Management Permit,  
15 surface rights and others. But irrespective of when  
16 they were required, RMGC did not have them at any  
17 point in time, including today.

18 As I will show, RMGC knew that, besides the  
19 Environmental Permit, it needed to apply for and  
20 secure numerous other permits for the Building Permit,  
21 and the Claimants have failed to prove that RMGC  
22 initiated the permitting process for the construction



1 of the Cyanide Storage Facility at Zlatna.

2           Romania shows that, even if RMGC had  
3 obtained the Environmental Permit, RMGC knew from the  
4 beginning and throughout the time that dozens of other  
5 permits were required and the Project could not be  
6 implemented without them, as per the evidence I will  
7 further refer to. As the Tribunal heard during the  
8 December Hearing, the Urban Certificates are the deeds  
9 that, amongst others, list the permits required for  
10 the Building Permit. So, for instance, these are two  
11 snapshots from RMGC's Urban Certificates from 2010 and  
12 2013, and the Tribunal may see an excerpt, in  
13 Section 5, the list of permits that RMGC needed to  
14 secure for the Building Permit. I remind in this  
15 context that RMGC obtained its first UC in 2004, so  
16 the list of permits was known since then.

17           This part of my presentation is  
18 confidential.

19           (End of open session. Admitted Secret  
20 Material begins.)





[REDACTED]

7 We can turn to nonconfidential mode now.

8 (Admitted Secret Material ends.)

## 1 OPEN SESSION

2 MS. SIMULESCU: As shown during the December  
3 hearing, the Roşia Montană Law provided for an  
4 expedited route that would help with the Project to  
5 overcome the hurdles and could extensively facilitate  
6 and speed up the implementation of the Project. The  
7 Law's Appendix 2 aimed to implement a timeline for the  
8 permitting process. First, I show the list of permits  
9 that were still outstanding at that time, mid-2013,  
10 and this is Appendix 2 of the Roşia Montană Law on  
11 this slide.

12 Some of these permits were on critical path  
13 whereas some could be obtained in parallel.

14 And, second, as the Roşia Montană Law didn't  
15 pass, I will explain briefly in the interest of time  
16 the main requirements to obtain some of the  
17 significant or critical outstanding permits (which  
18 were on the critical path) under the permitting  
19 process, as per the laws in force at that time. These  
20 show on the one hand, RMGC's acknowledgment about the  
21 permitting status of the Project as of (drop in audio)  
22 mid-2013, and on the other hand, the length of the

1 process of obtaining the necessary permits as per the  
2 then laws which would have affected the financial  
3 feasibility of the Project and its timing.

4 I refer now to what Claimants alleged in  
5 their Opening Statement when discussing assertions of  
6 Claimants' analyst [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13 Contrary to such allegation, as it follows  
14 from the Exhibit C-519, now on the slide, there were  
15 other permits/ approvals to be issued by central level  
16 authorities such as the Government Decision for the  
17 removal from the national forestry fund, the  
18 Government Decision for the removal from the  
19 agricultural circuit, Water Management Permit or  
20 Endorsement for the Building Permit by the National  
21 Agency for the Miner Resources.

22 The three significant or critical permits or

1 approvals which are refer to now are a Government  
2 Decision on the removal of lands from the national  
3 forestry fund for the purposes of the Roşia Montană  
4 Project, the Water Management Permit, and the zoning  
5 urban plan for the Project. I will introduce now the  
6 requirements for the Governmental Decision regarding  
7 the removal from the national forestry fund of the  
8 land related to the Project. By way of reminder, I  
9 mention that RMGC had never initiated the steps to  
10 reach the stage of obtaining these rights.

11           As Romania had explained, both in December  
12 and in our written submissions, RMGC needed to secure  
13 the surface rights for the Project, and the steps RMGC  
14 needed to take to acquire the surface rights depend on  
15 the nature and ownership of the land. These lands,  
16 spreading over several localities belong either to  
17 entities, both private and State entities or to  
18 private persons. These lands are diverse in terms of  
19 their use and function. They include grasslands and  
20 forests, agricultural land, water streams, roads, and  
21 others.

22           For the record, I refer here to Exhibit

1 C-1255, which is confidential Pages 13 and 14, and to  
2 Exhibit R-114.

3           According to the EIA Report, RMGC planned to  
4 deforest 256-hectares of land. You may see this  
5 surface/plots on the map marked in green, the red line  
6 being the boundary for the Industrial Area for the  
7 Roşia Montană Project. Under the Romanian law, the  
8 forest lands are protected and managed through a  
9 national forestry fund. These lands can be removed  
10 only through special procedure involving a  
11 Governmental Decision issued based on the agreement of  
12 the owner favorably endorsed by the forestry body  
13 against an exchange with other lands. The  
14 governmental decision is required in this case because  
15 of the significance of the area to be deforested.

16 And, for the record, I mentioned here Exhibits R-116  
17 to R-119. Prior to the government decision, the Alba  
18 Forestry Directorate and the National Regia of Forests  
19 must give their approval. For a complete picture of  
20 the procedure underlying the removal of the land from  
21 the forestry fund, it's worth mentioning the  
22 provisions of land methodology. You may see on the



1 slide the extensive list of the legal requirements for  
2 this procedure, including the obligation of the  
3 titleholder to acquire the surface rights for both the  
4 deforested and reforested land. Under this law, the  
5 titleholder has the obligation to reforest another  
6 area at least three times greater. If the forest is  
7 on a private land, either private person, private  
8 entity or private property of the commune, cities, or  
9 counties, the approval of the owner of this land is  
10 required, and in case of refusal, expropriation may be  
11 commenced but only if the Project is qualified as  
12 being of public utility. And for the record, I  
13 mention here Respondent's Counter-Memorial Pages 27  
14 and 28, Paragraphs 82 to 84, and also Professors  
15 Sferdian and Bojin Legal Opinion, Pages 26 and 28,  
16 Paragraphs 110 and 117.

17           A significant part of the lands belong to  
18 private persons, as the Tribunal may notice from  
19 Claimants' exhibit on this slide, which shows the  
20 ownership of the forested lands as of 2012 (drop in  
21 audio).

22           Finally, as an additional note, in terms of

1 agricultural surface rights, as part of the surface  
2 rights needed to be acquired for the Building Permit,  
3 the Tribunal may see that the removal of such lands  
4 from the agriculture circuit for a new destination  
5 such as mine activities will be subject as well to a  
6 Government Decision.

7           Another permit which I would like to address  
8 now is the Water Management Permit. Romania has  
9 already demonstrated both at the December Hearing and  
10 in its written submission that RMGC was required but  
11 failed to secure this permit to certify compliance  
12 with the Water Framework Directive. And, for the  
13 record, I mention here Respondent's Rejoinder  
14 Sections 3.3.2.5. and 3.6.1.6. At this stage, I wish  
15 to simply add that, as it follows from Appendix 2 to  
16 the Roşia Montană Law, showed on this Slide, one of  
17 the core requirements for the Water Management Permit  
18 was and still is the transfer of the Property Rights  
19 over the Corna and Roşia Montană riverbeds to the  
20 titleholder of the mining Project, RMGC. The transfer  
21 by a concession contract was in the competence of the  
22 then Water Forests and Fisheries Department which

1 functioned at the level of a Ministry. RMGC had not  
2 initiated the proceedings for obtaining the required  
3 surface rights.

4 I remind the Tribunal that Corna and Roşia  
5 Montană Rivers were essential for the Project because  
6 the tailings management facility was designed to be  
7 built on these rivers. Besides the surface rights,  
8 RMGC needed to meet the requirements of the Water  
9 Framework Directive, transposed in the Romanian Waters  
10 Law, which is for the record Exhibit R-81 resubmitted,  
11 for the Project to be declared of overriding public  
12 interest.

13 I will move on now to the zoning urban plan  
14 and show to the Tribunal that in 2013 there was a  
15 significant number of permits and endorsements  
16 required for the approval of this plan. As it was  
17 acknowledged in prior RMGC's annual reports, and for  
18 the record I mention here confidential Exhibits  
19 C-1115, C-1119, there were around 22 permits required  
20 for the approval of the urban plan, three of which  
21 were constantly missing as RMGC had yet to apply for.

22 On this slide, the Tribunal may see that, in

1 2013, RMGC still had to submit the required  
2 documentation for: the Endorsements for the zoning  
3 urban plan in the Industrial Area of the Ministry of  
4 Culture, of the Ministry of Regional Development and  
5 Public Administration and of the Ministry of  
6 Agriculture and Rural Development, and also for the  
7 Endorsement of the Chief Architect of Alba County  
8 Council.

9           The final step of the approval of the zoning  
10 plan is the Approval of the Roşia Montană Local  
11 Council.

12           It is important to mention here that each of  
13 those permits involve for their approval, in turn,  
14 other permits or approvals or documents. RMGC failed  
15 to finalize the procedure for obtaining the required  
16 permits for the approval of the Zoning Urban Plan.

17           I will continue now with the second topic of  
18 my presentation, the permitting and construction of  
19 the Zlatna Cyanide Storage Facility. In addition to  
20 the outstanding permits required for the Building  
21 Permit for the Roşia Montană site, RMGC also needed a  
22 Building Permit for the Cyanide Storage Facility at

1 Zlatna Ampellum. RMGC's consultant proposed through  
2 its Report on Dangerous Goods Transport dated  
3 July 2012, the Zlatna Ampellum industrial area as a  
4 preferred storage facility for the reagents,  
5 especially the cyanide, used in the processing phase  
6 at Roşia Montană. You've heard my colleague, Ms.  
7 Lorraine de Germiny, explaining that there are no  
8 unloading or storage facilities at Zlatna to  
9 accommodate the cyanide or the other reagents, and  
10 also showing that Mr. Tanase acknowledged this to the  
11 TAC in 2013.

12 In line with the 2012 RMGC consultant's  
13 Report and also with Respondent's Expert in cyanide,  
14 Ms. Blackmore, RMGC would need to have built a  
15 facility, including at least new spur lines off/ up-  
16 loading facility for railcars and an interim storage  
17 space for the cyanide.

18 As with Roşia Montană, to build a cyanide  
19 transportation and storage facility of this nature,  
20 RMGC would need several permits prior to the Building  
21 Permit such as: the Urban Certificate which is the  
22 starting point for initiating the procedure for

1 obtaining the Building Permit, the Zoning Urban Plan  
2 (the PUZ), which is approved after the strategic  
3 environmental assessment procedure and based on other  
4 similar permits and endorsements, and the pivotal  
5 Environmental Permit which is issued following the  
6 Environmental Impact Assessment procedure, which  
7 includes a risk assessment under the Seveso Directive.  
8 The risk assessment is required because the facility  
9 deals with cyanide and other dangerous substances that  
10 are subject to this Directive.

11 RMGC would need to obtain the surface rights  
12 for the area where this facility would be built up.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

5           In this project, which is Kronochem Project,  
6 the investor applied for the Environmental Permit for  
7 the expansion of an existing plant, and the whole  
8 procedure, as she notes, from the commencement of the  
9 strategic environmental assessment for Urban Plan  
10 until the issuance of the Environmental Permit, took  
11 almost six years.

12           Finally, Ms. Blackmore estimated that the  
13 construction of this facility would take from 18 to 24  
14 months. And those estimations do not even take into  
15 account the potential lawsuits by the NGOs that could  
16 be initiated before and after the issuance of the  
17 Building Permit for Zlatna.

18           As it follows from the evidence of the case,  
19 the Claimants have made no attempt to prove that there  
20 is a reasonable degree of certainty that RMGC would  
21 have secured the Building Permit for Zlatna cyanide  
22 facility.

1 I give the floor now my colleague David  
2 Bonifacio.

3 PRESIDENT TERCIER: Please, Mr. Bonifacio.  
4 I think you should push "unmute."

5 MR. BONIFACIO: Can you hear me now? Okay.  
6 My apologies.

7 Mr. President and Members of the Tribunal,  
8 good afternoon, good evening. I will now focus on the  
9 technical evidence regarding two of the key problems  
10 that stood and still stand in the way of the Project's  
11 implementation today.

12 These are, first, RMGC's failure to acquire  
13 the necessary surface rights; and, second, the  
14 unavailability of the required project financing at  
15 any point in time between 2011 and today.

16 I will turn first to the issue of surface  
17 rights.

18 RMGC has not been able to acquire as much as  
19 40 percent of the total surface rights that are  
20 required. It did not make any meaningful progress in  
21 the acquisition of the necessary surface rights since  
22 early 2008. Still today, it has not acquired the



1 required properties despite its efforts over many  
2 years.

3           A single person's refusal to sell its  
4 property has the ability to block the Project because,  
5 in Romania, there is no such thing as forced  
6 relocation, and Gabriel Canada knew that. It has  
7 consistently explained over the years in its  
8 regulatory filings among numerous other documents that  
9 RMGC needed the surface rights over the entirety of  
10 the lands within the Roşia Montană footprint. And, as  
11 you can see on the screen, one such disclosure  
12 explaining that RMGC ability "to obtain Construction  
13 Permits for the mining plant is predicated on securing  
14 100 percent of the surface rights within the Roşia  
15 Montană footprint."

16           But what does that mean? This map prepared  
17 by Gabriel Canada identified the various parts of the  
18 Project. The Project footprint is delineated with  
19 this dark-blue line. You can also see there the  
20 Historical Center of Roşia Montană marked as protected  
21 area in red. It sits right next to and, in fact,  
22 links two of the four Project pits of the Project that

1 are Jig and Cârnic.

2 RMGC required 100 percent of the surface  
3 rights over all areas within the blue line, and that  
4 includes the Historical Center of Roşia Montană.

5 This part of my presentation is  
6 confidential.

7 (End of open session. Admitted Secret  
8 Material begins.)



[REDACTED]

9                   We continue in nonconfidential mode.  
10                   (Admitted Secret Material ends.)

## 1 OPEN SESSION

2 MR. BONIFACIO: Ms. Lorincz is also  
3 technically indefensible, and Romania has produced  
4 expert evidence to rebut that evidence prepared by  
5 Michael McLoughlin of Behre Dolbear. He's a leading  
6 expert in the mining industry with over 40 years of  
7 experience in the field of blasting.

8 Mr. McLoughlin has not been called for  
9 examination, unlike the authors of the other two  
10 reports prepared by Behre Dolbear, Mr. Guarnera and  
11 Mr. Jorgensen, who will testify this week on issues  
12 relating to the Project's technical feasibility.

13 Mr. McLoughlin was asked to opine whether  
14 the Historical Center of Roşia Montană would have been  
15 inhabitable during either the construction or  
16 operation of the Project based on the impact on  
17 structures due to blasting. After his visit to the  
18 site and review of RMGC's exploitation plan,  
19 Mr. McLoughlin's answer is a resounding "no."

20 Apart from other findings, his main  
21 conclusion is that houses in the Historical Center  
22 would be subject to significant damage and risk of

1 injury, and accordingly they would be uninhabitable.

2           Similarly, other buildings in the Historical  
3 Center will be subject to damage and the concurrent  
4 risk of personal injury from blasting.

5           In turn, if RMGC implemented the mitigation  
6 measures and best practices required to permit the  
7 arbitration of the Historical Center, which we heard  
8 once again this morning as a possibility, well the  
9 Project would require the use of small diameter  
10 blastholes, which will slow the drilling and the  
11 blasting process resulting in reducing the mining  
12 production rate and making this Project uneconomic.  
13 So, RMGC needed to acquire the properties in the  
14 Historical Center to implement the Project.

15           This part of my presentation is  
16 confidential.

17           (End of open session. Admitted Secret  
18 Material begins.)











1 OPEN SESSION

2 MR. BONIFACIO: To conclude on surface  
3 rights, RMGC's failure to acquire the necessary land  
4 is the key cause for the Project stalling, and it's  
5 also a key cause for the unavailability of funding for  
6 the Project, as the expert evidence shows. And there  
7 is no basis for the new allegation that we heard in  
8 the Claimants' Opening Statement that external  
9 financing could be arranged concurrently with the  
10 acquisition of surface rights.

11 I turn now to the issue of project  
12 financing.

13 The second fundamental thorn in the flesh of  
14 the Project was the inability to secure Project  
15 financing. Gabriel Canada explained this in numerous  
16 regulatory filings. Gabriel Canada "does not have  
17 the financial resources to complete the permitting  
18 process, acquire all necessary surface rights, or  
19 construct the mine at Roșia Montană." It added that  
20 the Project is dependent upon its ability to obtain  
21 significant additional financing from external  
22 sources, and it cautioned that the Project could stall

1 as a result, as a failure to obtain sufficient  
2 funding. Well, Romania agrees with the summary of the  
3 situation not only as of this date of the disclosure,  
4 but indeed as of any date since at least 2011 until  
5 today.

6 Now, Gabriel Canada has never had the  
7 financial resources to acquire all necessary surface  
8 rights, as demonstrated by the suspension of the land  
9 acquisition program in 2008. It did not have the  
10 financial resources to complete permitting, let alone  
11 to construct the mine.

12 You can see nowhere in this disclosure or  
13 any disclosure on record the explanation we heard in  
14 the Claimants' Opening Statement that the Claimants,  
15 in fact, could self-finance. But you will see in a  
16 moment why the Claimants have had to develop this new  
17 argument when we review the Claimants' financing plan.

18 As for the construction of the mine, SRK  
19 estimated such costs at \$1.4 billion in 2012, but that  
20 estimate is wrong, as were the previous cost estimates  
21 prepared for the Project, and Dr. Heiskanen will  
22 address this point in more detail in a moment.

1           The costs would, in fact, be close to  
2 \$2 billion if the dry-stack tailings facility was  
3 included, if other necessary equipment indicated by  
4 Messrs. Guarnera and Jorgensen are added, and if  
5 post-closer costs quantified by Dr. Dodds-Smith of CMA  
6 are included.

7           In any event, as Dr. Dodds-Smith has  
8 explained in his Report, significant additional costs  
9 were associated with establishing the post-closure  
10 land use, which as my colleague Lorraine de Germiny  
11 explained earlier, have been entirely ignored by RMGC.  
12 The table on the screen does not reflect those  
13 additional costs as they would not have--they have not  
14 so far been specifically quantified. But whether the  
15 amount required was close to \$2 billion or somewhat  
16 below, on any view, the funding required would be  
17 gigantic, and nothing in the record of this  
18 arbitration supports the view that a junior mining  
19 company like Gabriel Canada, which has never  
20 successfully developed any project, let alone a mining  
21 project of this complexity, could secure funding of  
22 such magnitude, irrespective of the finding sources

1 envisaged.

2           Gabriel Canada does not allege in this  
3 Arbitration, let alone prove, that it did or could  
4 secure funding of such magnitude. It was its burden  
5 to do so under the applicable test of causation which  
6 Dr. Heiskanen described earlier. And this failure is  
7 consistent with Gabriel Canada's evasive approach when  
8 asked to explain over the years how it intended to  
9 finance this Project.

10           This part of my presentation is  
11 confidential.

12           (End of open session. Admitted Secret  
13 Material begins.)



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]









## 1 OPEN SESSION

2 MR. BONIFACIO: Mr. McCurdy's report refers  
3 to other factors which would have further constrained  
4 the availability of financing [REDACTED]

5 [REDACTED], the Project's failure to  
6 comply with Equator Principles, the Project's risk of  
7 delay as a result of archaeological risks.

8 I turn now to these three specific aspects  
9 before concluding my presentation with the fourth,  
10 Social License and its impact on funding.

11 Mineral Reserves is a key issue to secure  
12 funding because material changes to the Project's  
13 Reserves affect the economic viability of the Project.  
14 The Project's reserves were most recently declared by  
15 Dr. Armitage of SRK, whose evidence you will hear this  
16 week.

17 Dr. Armitage acted as a Qualified Person,  
18 which is a term of art under the definitions prepared  
19 by the Canadian Institute of Mining and Metallurgy and  
20 Petroleum, or CIM, and it is an important term because  
21 it means a person who is competent to estimate and  
22 declare the existence of a Mineral Reserve namely

1 under National Instrument 43-101.

2           Declaring a Mining Reserve is a key step in  
3 the development of a mining project and accordingly  
4 requires that the Qualified Person analyzes the  
5 so-called "modifying factors." This requires an  
6 assessment of aspects such as the mining and  
7 metallurgical but also legal, environmental and social  
8 aspects of the Project, as you can see on the screen.

9           All relevant factors must be jointly  
10 considered by the Qualified Person when assessing  
11 whether at the time of reporting extraction of the  
12 minerals is reasonably justified.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]

19                   Mr. McCurdy also confirms in his Expert  
20 Report that a failure to design the Project in a  
21 manner compliant with the Equator Principles would  
22 constrain the availability of funding for the Project.

1 The principles are widely applicable among leading  
2 banking institutions worldwide which are estimated to  
3 arrange at least 80 percent of global project lending.  
4 Project finance will only be available if the 10  
5 principles are respected by the sponsor.

6 PRESIDENT TERCIER: Could you speak a bit  
7 slower so our Court Reporter can get it.

8 MR. BONIFACIO: Gabriel Canada has failed to  
9 prove compliance with the principles. Ms. Wilde of  
10 CMA, described how compliance with Principle 2 on  
11 environmental assessment has not been proven at least  
12 with respect to the Zlatna Cyanide Storage Facility.

13 In compliance with Principle 7 requiring an  
14 independent social and/or environmental expert to  
15 review the Project has not been proven, either. The  
16 only independent review of the Project design is that  
17 conducted by Romania's experts in this Arbitration,  
18 and that review has questioned the Project's  
19 compliance with Best Available Technology in various  
20 respects, as my colleague Lorraine de Germiny  
21 explained earlier today.

22 Compliance with Principle 2 is equally in

1 question to the extent that it requires "consideration  
2 of feasible environmentally and socially preferable  
3 alternatives." There is no evidence that dry-stack  
4 technology has been properly considered by RMGC,  
5 despite the fact that, as Behre Dolbear explains, it  
6 is a technology that is more environmentally benign,  
7 and, in any event, would greatly reduce the opposition  
8 to the Project.

9           Regarding cultural risk, as Mr. McCurdy  
10 testifies, the timely implementation of the Project  
11 would have been a key concern for funders as a result  
12 of a background of increased scrutiny of mining  
13 industry's inability to complete projects on time.  
14 Because of the time and cost implications of likely  
15 Chance Finds of archaeological structure or artifacts  
16 during the construction of the Project, this Project  
17 would not be able to secure financing. A due  
18 diligence by any potential funder would expose that  
19 potential for delay and would have deterred the  
20 securing of funding not least because the Project's  
21 official implementation timeline ignored the impact of  
22 Chance Finds, as Dr. Heiskanen will explain in a



1 moment.

2           As Dr. Claughton, of CMA, observes in his  
3 Reports, in Romania, there is extensive evidence that  
4 construction projects can be substantially delayed as  
5 a result of archaeological finds. In the Roşia  
6 Montană Project, that risk is all the more significant  
7 as RMGC undertook to implement a Chance Find Protocol  
8 during the construction and operation phases of the  
9 Project. This Protocol requires depending on the  
10 significance of the find, either the recording,  
11 relocation or in situ conservation of the Chance  
12 Archaeological Find, as required by Romanian Law.

13           While the Chance Finds Protocol was tailored  
14 primarily to address those finds that are most likely  
15 to be made, that is movable items that can be easily  
16 preserved by record, it also expressly provides that  
17 the approach to be applied in case of a Chance Find  
18 depends on the find's significance.

19           The Claimants argue that the potential for  
20 delay stemming from the implementation of the protocol  
21 was not material because a temporary stop in one  
22 location would not necessarily preclude continued work

1 in other areas. However, this argument ignores the  
2 possibility of work stoppage in an area in the  
3 construction schedule's critical path. There is a  
4 substantial potential for delays as a result of  
5 archaeological finds since the start of construction  
6 works as Dr. Claughton concluded in his report.

7           The Project's failure to secure Social  
8 License also completely constrained its ability to  
9 secure robust financing sources. Mr. McCurdy explains  
10 this in his Expert Report, the evidence showing the  
11 Project's failure to secure a Social License, indeed,  
12 needs not be repeated here.

13           To conclude, the Tribunal needs to look no  
14 further for the causes of the Project stalling: The  
15 failure to secure surface rights and financing  
16 dictated the Project's fate, irrespective of Romania's  
17 conduct.

18           And unless the Tribunal has any questions,  
19 this concludes my part of the presentation. Thank  
20 you.

21           PRESIDENT TERCIER: Thank you,  
22 Mr. Bonifacio.

1 Dr. Heiskanen, you have the floor.

2 DR. HEISKANEN: Mr. President, given where  
3 we are, at least on our time zone, it may be a good  
4 idea to call it a day, and we finish our opening  
5 tomorrow morning.

6 PRESIDENT TERCIER: Okay. That's a  
7 surprise. We were ready to go ahead.

8 Mrs. Cohen, what is your position?

9 MS. COHEN SMUTNY: Claimants, of course, we  
10 would prefer to continue and complete today. And if  
11 the Tribunal is prepared to sit, we should complete  
12 the Opening Statements today so that we can keep to  
13 our schedule, and we see no reason to continue  
14 openings tomorrow. There is time still today.

15 PRESIDENT TERCIER: Okay. I think we should  
16 discuss it with members of the Arbitral Tribunal.  
17 (drop in audio) can we go off.

18 DR. HEISKANEN: Mr. President, I would just  
19 add that we are certainly aware that the Tribunal  
20 indicated that you would be prepared to sit a bit  
21 longer today until 9:30 Central European Time, but I  
22 don't think we will be able to finish by that time. I

1 think it's probably in the interest of everybody that  
2 we finish tomorrow morning. This won't affect the  
3 Schedule because we have already gone beyond the  
4 scheduled time for today, the normal day is until  
5 8:00. So, we're almost already one hour beyond the  
6 allocated time for today.

7           PRESIDENT TERCIER: You are right, but there  
8 is the Schedule was already that we would have  
9 openings on Day 1, and the question also is that there  
10 are two aspects. The first aspect is whether the  
11 Arbitral Tribunal is still ready to listen to your  
12 presentation. And second is what you mentioned that  
13 you would not be able to finish in the time that was  
14 reserved.

15           May I ask, Sara, how much time Respondent  
16 used until now?

17           SECRETARY MARZAL YETANO: Yes. Respondent  
18 still had 55 minutes to finish the three hours  
19 allocated for Opening Statement.

20           PRESIDENT TERCIER: Okay. My question to  
21 you, Dr. Heiskanen, you think that you would not be  
22 able to do that (drop in audio)?

1 DR. HEISKANEN: I think it will be very  
2 close to the remaining allocated time, so we would go  
3 well beyond 9:30 Swiss time.

4 PRESIDENT TERCIER: Okay. I will consult  
5 with my co-Arbitrators, (drop in audio).

6 (Pause.)

7 PRESIDENT TERCIER: We had a short  
8 deliberation, and it was a good test to see how this  
9 works when we have the day break. Sorry for the  
10 delay.

11 We have decided that we will stick to the  
12 program as it has been agreed. It is true it will  
13 take a long time, but given this is the first day and  
14 we are doing quite well, and we don't want to change  
15 the program.

16 So, Dr. Heiskanen, you have the floor for  
17 the last part of your presentation.

18 DR. HEISKANEN: Thank you very much. We, of  
19 course, are in the hands of the Tribunal.

20 PRESIDENT TERCIER: Indeed.

21 DR. HEISKANEN: Now, we will be dealing now  
22 for conclusion on the issues of quantum. The

1 Claimants' case on quantum fails for a number of  
2 reasons, and these include, therefore, the four main  
3 reasons you see on the screen:

4           First of all, the Claimants only quantify  
5 their claim for expropriation but not their other  
6 claims. Second, the Claimants' valuation assumes they  
7 have lost all of their assets, which is clearly not  
8 the case on the basis of evidence. The Claimants  
9 apply an incorrect valuation method, and they apply a  
10 flawed valuation--incorrect Valuation Date, and they  
11 apply a flawed valuation method.

12           Now, first, the Claimants' valuation is  
13 based on the assumption that they have lost all of  
14 their investments in RMGC. They have, therefore,  
15 effectively quantified only one of their claims, the  
16 claim for expropriation, but not their other claims,  
17 including the claim for the alleged breach of the  
18 fair-and-equitable-treatment standard, which, based on  
19 the Claimants' own submissions, is their Main Claim.  
20 It follows that, if the Tribunal finds there has been  
21 no expropriation, it cannot rely on the Claimants'  
22 valuation.

1           An expropriation claim necessarily assumes  
2 that the Claimants have lost all of their investments  
3 in Romania. However, the evidence is clear that this  
4 is not the case. On 30th June 2011, less than a month  
5 before the Valuation Date, Gabriel Canada held  
6 Property, Plant and Equipment worth CAD 51.2 million,  
7 as you see on the slide. The Experts agree that this  
8 amounts to over USD 53.2 million. This is Gabriel  
9 Canada's Interim Consolidated Financial Statements of  
10 June 30, 2011.

11           We will now go to the confidential mode.

12           (End of open session. Admitted Secret  
13 Material begins.)





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8                   Back to the nonconfidential mode.

9                   (Admitted Secret Material ends.)

## 1 OPEN SESSION

2 DR. HEISKANEN: At the end of 2013, several  
3 months after the alleged expropriation, Gabriel Canada  
4 reported an increase in the value of its consolidated  
5 non-current assets, "consolidated" that is including  
6 the assets of its subsidiaries such as RMGC, and  
7 including its mineral properties; and that there was  
8 an increase from CAN 521 million in 2012 and to over  
9 \$612 million in 2013.

10 This is in 2013, several months after the  
11 alleged expropriation.

12 The Claimants' quantum experts, Compass  
13 Lexecon, suggest that the value of all of these assets  
14 held both by RMGC and Gabriel Canada can be  
15 disregarded because they are not, in their view,  
16 significant. The Romanian taxpayer is likely to  
17 disagree with this view, and so should, in our  
18 submission, this Tribunal. These assets or the value  
19 of these assets which are still held by RMGC and  
20 Gabriel Canada should be deducted in any valuation of  
21 RMGC.

22 Third, the Claimants' Valuation Date is also

1 clearly wrong as a matter of law. It is wrong also  
2 because it is inconsistent with the Claimants' own  
3 case. The Claimants have now finally, in their  
4 answers to the questions that the Tribunal put to them  
5 after the December Hearing, made their case on the  
6 date of the alleged breach. It is on or about  
7 9 September 2013. Before it was set out in the  
8 Claimants' answers it had not been identified at any  
9 stage of these proceedings. However, even if this is  
10 the alleged date of the breach, the Claimants have not  
11 used this date as the Valuation Date for the claimed  
12 loss.

13           As we heard during the Claimants' Opening  
14 Statement this morning, they have now presented an  
15 alternative Valuation Date of 6 September 2013, as  
16 indicated this is a new claim, and we object to the  
17 Claim as a matter of admissibility. But, as you will  
18 have seen, even on this theory, the real Valuation  
19 Date still remains 2011 or July 2011 because the  
20 Claimants have simply indexed the value of their  
21 assets based on the stock market capitalization in  
22 July 2011 to a number of alternate indices, so it

1 still suffers from the same flaws as the initial  
2 claim. We reserve the right to respond more fully to  
3 this claim, if the Tribunal decides that it is  
4 admissible.

5           The Claimants' approach is also inconsistent  
6 with the Canada-Romania BIT and the UK-Romania BIT,  
7 using a different Date of Valuation from the date of  
8 the alleged breach. As you see on the slide, under  
9 Article VIII of the Canada BIT, the Valuation Date  
10 must be immediately before the expropriation or at the  
11 time the proposed expropriation became public  
12 knowledge, whichever is earlier. The UK BIT contains  
13 essentially the same rule.

14           In other words, both Treaties require that  
15 the Valuation Date must be immediately before the  
16 expropriation or before it became public knowledge.  
17 On the Claimants' own case, the breach occurred on or  
18 about 9 September 2013 and not in July 2011, so the  
19 Valuation Date must be immediately before  
20 September 2013, 9 September 2013.

21           The fact that the Claimants rely on a theory  
22 of composite breach or a creeping expropriation does

1 not affect the Valuation Date. It does not allow the  
2 Claimants to move the Valuation Date some two years  
3 before the alleged breach. The relevant provision is  
4 the one that you see on the slide. This is Article 15  
5 of the ILC Articles on State Responsibility which  
6 deals precisely with the composite breach, creeping  
7 expropriation, and it confirms the breach of an  
8 obligation which is the result of a composite act  
9 occurs when the act or omission occurs which, taken  
10 with the other actions or omissions, is sufficient to  
11 constitute the wrongful act. On the Claimants' own  
12 case, this date was 9 September 2013. There is no  
13 legal basis for the Valuation Date that has been  
14 suggested, and effectively the Claimants are now  
15 recognizing their mistake by bringing a new claim.

16           Importantly, had the Claimants relied on  
17 this date, 9 September 2013 instead of July 2011,  
18 Gabriel Canada's stock market capitalization would  
19 have been a fraction of its value. This was a  
20 consequence of a significant decline in the price of  
21 gold during this period, as we will see in a moment,  
22 and increase of RMGC's reported costs, as we will also

1 see in a moment; but also, and most importantly, a  
2 consequence of the social opposition to the Project,  
3 the systematic litigation by the NGOs against any  
4 permit granted to RMGC.

5           We heard some explanation this morning  
6 during the Opening Statement--or this afternoon,  
7 rather--which were designed to hide the truth. Gabriel  
8 Canada's share price collapsed by over 23 percent on  
9 5 April 2012. This was after the Company reported on  
10 that date, on the annulment, of its PUZ, Zoning Urban  
11 Plan for the Roşia Montană area. This was a  
12 litigation commenced by Alburnus Maior, local NGO,  
13 together with others. They were successful, RMGC  
14 appealed, and they lost the appeal, and this was the  
15 result.

16           Importantly, as you see, the share price  
17 never recovered from this collapse. On the contrary,  
18 when Gabriel Canada complained about the market's  
19 reaction to the news about the Court Decision a few  
20 days later, on 9 April 2012, its share price fell by a  
21 further 14 percent. The relevant Court Decision of  
22 Alba Iulia--the Court Appeals Decision is Exhibit

1 R-207, and we have also indicated on the slide some of  
2 the commentary by the analysts about the impact of the  
3 Court Decision on the Company's prospects.

4           It is clear that, on that date and during  
5 this period in the spring of 2012 the concern was not  
6 the permitting process. The concern was the  
7 continuing and persistent NGO and social opposition to  
8 the Project which caused the share price to collapse.

9           We heard about another collapse that  
10 allegedly occurred, the collapse of the share price on  
11 9 September 2013. This was allegedly the result of  
12 the political decision to repudiate the Project based  
13 on statements made by Mr. Ponta and the President of  
14 the Senate on that date. These statements, as we have  
15 explained in our previous submissions and in  
16 particular our written submissions, don't amount by  
17 any stretch of imagination to a breach of a treaty,  
18 and we refer the Tribunal to the evidence that is  
19 already on record.

20           What instead happened the day before and the  
21 weekend before 9 September 2013 and the preceding week  
22 was the massive demonstrations against the Roşia

1 Montană Law. It is these demonstrations, social  
2 opposition to the Project, that caused a further  
3 collapse by another 50 percent of Gabriel Canada's  
4 share price.

5           This is the story. It is the social  
6 opposition, NGO litigation, and broader social  
7 opposition to the Project that caused the collapse of  
8 the share price in April 2011 and a further collapse  
9 in September 2013. The loss or reduction or collapse  
10 in the market capitalization of Gabriel Canada has  
11 nothing to do with the permitting process. We refer  
12 the Tribunal to Exhibit R-644-650; Annex II to the  
13 Counter-Memorial, which shows the protests; Annex III  
14 of the Counter-Memorial, which shows the extensive  
15 demonstrations that occurred during the week and the  
16 weekend preceding 9 December 2013.

17           Although the Claimants now have made an  
18 attempt to make a selective closing on the evidence  
19 heard in December, we will not spend more time on this  
20 issue. The evidence is on record, and the Tribunal is  
21 familiar with it. There is no evidence of a breach of  
22 treaty during the period of 2011 to 2013 or any date



1 later.

2           We just wish to remind the Tribunal that the  
3 early Valuation Date, July 2011, not only allows the  
4 Claimants to benefit from the gold price  
5 bubble--again, we'll get to this in a moment--it also  
6 gives the Claimants a much longer interest accrual  
7 period. The latest update of the Claimants' interest  
8 claim amounts to some \$1.5 billion. This is in the  
9 second Compass Lexecon Report, Table 7 at Page 64.

10           Now, the Claimants' proposed valuation of  
11 their claimed loss is based on a flawed methodology.  
12 On the Claimants' case, what they have lost is RMGC's  
13 rights under the Mining License, what they call the  
14 "Project Rights." But instead of seeking to value  
15 these so-called "Project Rights" or RMGC's assets more  
16 broadly, the Claimants rely on a proxy, the stock  
17 market capitalization of Gabriel Canada on the Toronto  
18 Stock Exchange on 29 July 2011. In other words,  
19 instead of seeking to value RMGC's rights under the  
20 Mining License and its other assets directly, Gabriel  
21 Canada seeks to value itself.

22           The other Claimant, Gabriel Jersey,

1 similarly relies on a proxy, the value of its parent  
2 company Gabriel Canada, even if there are two other  
3 corporate entities, Gabriel Jersey and Gabriel Canada,  
4 in the corporate chain, Gabriel Barbados and Gabriel  
5 Netherlands, as you see on the slide.

6 To summarize, first, Gabriel Canada's market  
7 capitalization is, in the Claimants' case, equivalent  
8 to 80 to--69 percent of the value of RMGC's Mining  
9 License and other assets. That is the assumption,  
10 that Gabriel Canada's market capitalization is  
11 equivalent to 80 percent of the value of RMGC's Mining  
12 License and other assets.

13 Second, that Claimants also assume that the  
14 value of Gabriel Jersey's shareholding in RMGC is  
15 equivalent to the stock market capitalization of  
16 Gabriel Canada. And third, the Claimants also assume  
17 that 80 percent of the value of RMGC's Mining License  
18 and other assets is equivalent to the value of Gabriel  
19 Canada's stock market capitalization.

20 The Claimants make no attempt whatsoever to  
21 directly value RMGC's assets. Their valuation starts  
22 and ends with Gabriel Canada's stock market

1 capitalization. This is, of course, circular  
2 reasoning and a manifestly flawed method, and it  
3 results in a massive overstatement of the alleged  
4 loss.

5           First, the Claimants' valuation includes not  
6 only the value of RMGC's rights under only the Mining  
7 License, it also captures the value of other assets of  
8 Gabriel Canada and RMGC and of the other companies in  
9 the group, including the value of the Real Property  
10 and other assets they held, directly and indirectly,  
11 as well as any value investors may have placed on  
12 Gabriel Canada for reasons other than the Project.  
13 The value of these other assets is significant.

14           Second, Gabriel Canada's share price, as of  
15 29 July 2011, the Valuation Date, reflected a  
16 speculative bubble in the price of gold, which reached  
17 historically high levels in the summer of 2011.

18           Third, the Claimants' Expert, Compass  
19 Lexecon, applied a baseless acquisition premium to  
20 Gabriel Canada's share price, which further inflates a  
21 quantum of the Claim.

22

█ [REDACTED]  
█ [REDACTED]  
█ [REDACTED]  
4 [REDACTED] I will address each of  
5 these points now in a bit more detail.

6 First, we already discussed the issue of  
7 Gabriel Canada's and RMGC's other assets, and we  
8 looked at the evidence, so there is no need to look at  
9 this in more detail.

10 Second, the Claimants' Valuation Date  
11 coincides, as we just said, with the bubble that had  
12 developed in the international gold markets during the  
13 period leading to July 2011.

14 We will now go into the confidential mode.

15 (End of open session. Admitted Secret  
16 Material begins.)



[REDACTED]

12                   We now go back to the nonconfidential mode.  
13                   (Admitted Secret Material ends.)

## 1 OPEN SESSION

2 DR. HEISKANEN: By basing their claim and  
3 the valuation of their claim on those prevailing  
4 bubble prices, the Claimants have effectively made a  
5 speculative claim. And, as the Tribunal is certainly  
6 aware, speculative claims are not allowed under  
7 international law. This is one of the really few  
8 principles, legal principles, governing valuation, and  
9 it's been accepted by a number of tribunals, including  
10 the tribunals you see the passage of the Gemplus  
11 versus Mexico Award on this slide.

12 Third, the Claimants' Experts add a massive  
13 35 percent acquisition premium to Gabriel Canada's  
14 market capitalization, which inflates the already  
15 grossly overstated claim by a further \$852 million.  
16 The figure that I just mentioned is \$852 million. The  
17 Tribunal should pause here as this is something  
18 essential and important about the seriousness of this  
19 claim. The Claimants are effectively suggesting that,  
20 in the event the Romanian Government decided to  
21 expropriate RMGC's Mining License lawfully for a  
22 public purpose, it would have to pay a premium of

1 \$852 million in excess of the stock market  
2 capitalization of Gabriel Canada, which, in itself, is  
3 an inflated measure of the value of the License.  
4 There is no economic or legal rationale whatsoever for  
5 such a windfall in the case of an expropriation.  
6 There is no legal rationale because, even outside the  
7 expropriation scenario, acquisition premiums have not  
8 been accepted, as you see on the slide. Claimants  
9 attempt to argue (drop in audio) premium or an  
10 acquisition premium as being, in fact, protected by  
11 investment treaty tribunals has been rejected in every  
12 known case in which it has been claimed.

13           Now we go back to the confidential mode.

14           (End of open session. Admitted Secret

15 Material begins.)





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

















## 1 OPEN SESSION

2 DR. HEISKANEN: The proper method to value  
3 mining assets is the discounted-cash-flow method, the  
4 DCF method. As Dr. Brady will testify during this  
5 week, the DCF method is a widely used method in the  
6 mining industry, and it is the primary method of  
7 valuation. This is the case for a number of reasons,  
8 including in particular because it directly values the  
9 assets in question and not the proxy.

10 The DCF method is also flexible. It allows  
11 input of all the relevant variables, all quantities,  
12 all prices, costs, timely implementation of the  
13 Project, and other relevant factors. The DCF method  
14 is the method that should have been used by the  
15 Claimants in this case, but they did not.

16 Now, in conclusion, in light of all the  
17 evidence you heard in December and the further  
18 evidence that you will hear in this Hearing, the fact  
19 that the Project stalled is entirely understandable,  
20 if not foreseeable. The Claimants sought to build a  
21 massive gold mine at the heart of historical Europe in  
22 a densely populated area. The Project would have

1 involved relocating the entire village of Roşia  
2 Montană and, therefore, destroying the community, as  
3 we heard in December. It would have involved  
4 destroying four mountaintops and converting them into  
5 mining pits. It would have involved destroying a  
6 significant part of the cultural heritage of the area,  
7 and it would have involved building a massive tailings  
8 dam overlooking the town of Abrud, a town of some  
9 5,000 people. It would also have involved inevitably  
10 using cyanide-based technologies that had earned a  
11 very bad name in the region.

12           This was a high-risk project to begin with.  
13 In retrospect, it is perhaps not surprising that it  
14 involved such an intense social opposition. Rather,  
15 it would have been surprising if it did not.

16           Thank you very much.

17           PRESIDENT TERCIER: Thank you very much,  
18 Mr. Heiskanen.

19           I first ask our Secretary whether she can  
20 hear us--can you hear me?

21           SECRETARY MARZAL YETANO: I can hear you.

22           PRESIDENT TERCIER: Sorry. Can you give the

1 time used by the Respondent?

2 SECRETARY MARZAL YETANO: Yes. Respondent  
3 still has--well, only 13 minutes remaining from out of  
4 the three hours; and so, in total, the Respondent has  
5 11 hours and 13 minutes remaining.

6 PRESIDENT TERCIER: Good.

7 Do you have a comment at least of the way it  
8 has been made on the time? Mrs. Cohen?

9 MS. COHEN SMUTNY: Sorry, I'm having trouble  
10 hearing you, Professor Tercier. Are you asking if  
11 there was any--

12 PRESIDENT TERCIER: If you have any  
13 requests, any comments to make at this juncture  
14 concerning the opening? I know I have a problem with  
15 the mike (drop in audio).

16 MS. COHEN SMUTNY: No--I mean, in the sense  
17 that the Claimants had the opportunity to present its  
18 Opening, and there is no objection about that.  
19 Respondent has made a number of objections, and  
20 Claimants reserve the right to come back on that. But  
21 no, no further comment at this time.

22 PRESIDENT TERCIER: Thank you very much.

1 Dr. Heiskanen?

2 DR. HEISKANEN: Nothing further from us at  
3 this stage.

4 PRESIDENT TERCIER: Okay. So, thank you  
5 very much both of you, all of you. We will meet again  
6 tomorrow at 2:00 p.m. Swiss time. Sara, I think it  
7 would be good if we try to be on-line a little bit  
8 earlier. What would you propose?

9 SECRETARY MARZAL YETANO: Well, we always  
10 ask people to start connecting around 30 to 15 minutes  
11 before so that we can start promptly at 8:00, to  
12 whatever time in Switzerland, 8:00 a.m. in Washington,  
13 D.C.

14 PRESIDENT TERCIER: Good. And my  
15 co-Arbitrators (drop in audio) tomorrow at the time  
16 (drop in audio).

17 Good. Thank you very much to all of you.  
18 Have a nice evening, and others have a good night, and  
19 see you tomorrow. Thank you very much, indeed.

20 DR. HEISKANEN: Thank you.

21 MS. COHEN SMUTNY: Thank you.

22 (Whereupon, at 3:51 p.m. (EDT), the Hearing

1 was adjourned until 8:00 a.m. (EDT) the following  
2 day.)

## CERTIFICATE OF REPORTER

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

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



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DAVID A. KASDAN