

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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 In the Matter of Arbitration :
 Between: :
 :
 GABRIEL RESOURCES LTD. and GABRIEL :
 RESOURCES (JERSEY) LTD., :
 : Case No.
 Claimants, : ARB/15/31
 :
 and :
 :
 ROMANIA, :
 :
 Respondent. :
 ----- -x Volume 7

VIDEOCONFERENCE:
HEARING ON THE MERITS AND JURISDICTION

Sunday, October 4, 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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APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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MS. LORRAINE de GERMINY
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P R O C E E D I N G S

1
2 PRESIDENT TERCIER: All right. We can now
3 start the official part of this Hearing.

4 Good morning, good afternoon, everybody. I
5 have the honor to open the Day 7 and last day of the
6 Hearing in the ICSID Arbitration Case 15/31 between
7 Gabriel Resources Limited and Gabriel Resources
8 (Jersey) Limited versus Romania.

9 I would like, like always, first make the
10 hoping that you had good rest and that you are in good
11 shape for this last day that is as important as the
12 previous one.

13 Secondly, yesterday, I studied with
14 satisfaction that this Hearing has taken place in an
15 excellent spirit, and I hope very much that it will be
16 also the case today.

17 I will start with a few administrative
18 points or procedural points, the first one by thanking
19 our Court Reporter for sending off the final draft of
20 Day 6.

21 Secondly, concerning the time, I first
22 apologize that I forgot to give the floor to our

1 Secretary, but she wrote to you and gave the time. I
2 would like to recall that Claimant used 10 hours, 48
3 minutes and 35 seconds, and the remaining time, 3
4 hours, 11 minutes and 25 seconds. Respondents used 12
5 hours and 21 minutes and 9 seconds, remains 1 hour, 38
6 minutes and 51 seconds. And the Tribunal has used 1
7 hour 32 minutes and 13 seconds and remains 1 hour, 57
8 minutes and 47 seconds. You have a comment to this,
9 Claimants?

10 MS. COHEN SMUTNY: No, no comments from
11 Claimants. Thank you.

12 PRESIDENT TERCIER: Respondent?

13 DR. HEISKANEN: No comments, Mr. President.

14 PRESIDENT TERCIER: Thank you.

15 Point No. 3, we have received a moment ago
16 Respondent's position/submission concerning so-called
17 alleged "claims." I acknowledge receipt of them. We
18 know that for the procedure Claimant has now a final
19 opportunity to comment, but we have not fixed a time
20 limit.

21 Mrs. Cohen, what would be for you the time
22 limit you would suggest?

1 MS. COHEN SMUTNY: Claimants have not had an
2 opportunity to review the letter that was just sent.
3 A couple of days, two or three days' time would be
4 enough. I'm sure we don't require more than--maybe
5 Wednesday should be fine.

6 PRESIDENT TERCIER: Respondent, do you have
7 an objection?

8 DR. HEISKANEN: Well, we heard a protest on
9 the part of the Claimants when we asked two days a
10 couple of days ago. I think two days would be an
11 appropriate time for the Claimants to come back. That
12 would be equal treatment.

13 PRESIDENT TERCIER: Mrs. Cohen?

14 MS. COHEN SMUTNY: I think we can file this
15 on Wednesday, and--well, I mean, it could be even
16 early in the day. Equal time is not objectionable.

17 PRESIDENT TERCIER: Okay. The Arbitral
18 Tribunal will then decide and communicate to you after
19 the break.

20 The fourth point, you remember yesterday I
21 invited counsel for both Parties to liaise, if
22 possible, in order to have already a first exchange in

1 the question of the PHB. Have you an opportunity to
2 speak about it?

3 Mrs. Cohen.

4 MS. COHEN SMUTNY: No, we have not yet had
5 the opportunity to speak.

6 One proposal would be that perhaps the
7 Parties can confer over the week ahead and see if
8 there is a basis for agreement, and perhaps revert to
9 the Tribunal a week from Monday or some time period
10 approximately a week.

11 PRESIDENT TERCIER: Dr. Heiskanen?

12 DR. HEISKANEN: Our preference would be to
13 discuss the process going forward, all of it today,
14 with the Tribunal. We would be available to discuss
15 with the Claimants' counsel during the meal break
16 today to see whether there is a possibility of having
17 a common basis and come up with a joint proposal to
18 the Tribunal. Our strong preference would be to
19 discuss, even if the Parties are not able to confer
20 today, although we are available to confer today, the
21 proceedings going forward at the end of the Hearing
22 today with the Tribunal.

1 PRESIDENT TERCIER: Mrs. Cohen?

2 MS. COHEN SMUTNY: We certainly can endeavor
3 to speak between the Parties during the day today and
4 see where we get.

5 PRESIDENT TERCIER: Okay. Good.

6 Have you another point before starting with
7 the examination of Dr. Burrows?

8 On Claimants' side.

9 MS. COHEN SMUTNY: I'm sorry, I didn't hear
10 the question.

11 PRESIDENT TERCIER: I'm sorry. My question
12 was whether you have a request or point that you would
13 like to raise before starting the examination of
14 Dr. Burrows?

15 MS. COHEN SMUTNY: Well, my understanding is
16 that Dr. Burrows will make a direct presentation
17 first.

18 PRESIDENT TERCIER: Yeah, I know. Sorry,
19 that was not my point. Probably I'm not clear enough.
20 You have, generally speaking, another request or point
21 concerning the proceeding that you would like to
22 raise?

1 MS. COHEN SMUTNY: Not at this time. We
2 acknowledge that Dr. Burrows circulated further
3 errata.

4 PRESIDENT TERCIER: Yeah, yeah.

5 MS. COHEN SMUTNY: We assume that there is
6 nothing of substance in the errata, and that it's just
7 typos and things of that nature, but we haven't had
8 the opportunity to review it given that it was just
9 sent, so we reserve our right if there is something
10 substantive that requires a response, but we're not
11 expecting that there would be anything.

12 PRESIDENT TERCIER: I will come to it in a
13 moment, come back to it in a moment. But no special
14 requests on your side, Dr. Heiskanen?

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

17 PRESIDENT TERCIER: Okay. If my
18 co-Arbitrators have not a point that they would like
19 to mention, I can start now with the examination of
20 Dr. Burrows.

21 DR. JAMES C. BURROWS, RESPONDENT'S WITNESS, CALLED

22 PRESIDENT TERCIER: Good morning,

1 Dr. Burrows. Welcome in these proceedings. You will
2 be heard as an expert. As such, you are invited to
3 read aloud the Declaration that you must have received
4 or have on your screen.

5 Please, Dr. Burrows.

6 THE WITNESS: I solemnly declare upon my
7 honor and conscience that my statement will be in
8 accordance with my sincere belief. I will not receive
9 or provide communications of any sort during the
10 course of my examination.

11 PRESIDENT TERCIER: Thank you.

12 Because of the rather special feature of
13 this Hearing, the Arbitral Tribunal has ruled on a few
14 points concerning the Experts' examination. I would
15 like to just read three to you.

16 First, no person shall be present in the
17 room with the testifying expert. Can you confirm that
18 there is nobody else in the room?

19 THE WITNESS: At the moment, there is an IT
20 person, and he's leaving right now.

21 PRESIDENT TERCIER: Okay. Secondly,
22 communication you have already mentioned.

1 Then you must remain visible at all times
2 during the examination. Which is easy to control.

3 And you shall not use a virtual background
4 or in any way prevent or limit the recording of the
5 remote venue from which you are testifying.

6 Is it clear?

7 THE WITNESS: Yes, it is.

8 PRESIDENT TERCIER: All right. Dr. Burrows,
9 you have prepared for this Arbitration two reports.

10 THE WITNESS: Yes.

11 PRESIDENT TERCIER: The First Report, Expert
12 Report, of Dr. James C. Burrows is dated 22nd of
13 February 2018 and you have prepared a Second Report
14 dated the 24th of May 2019.

15 Now, we have received a certain number of
16 communications concerning the list of errata. The
17 first was communicated on the 26th of September by
18 Mr. Guibert de Bruet, and the e-mail states
19 "Dr. Burrows has identified a few items he wishes to
20 correct in his Expert Reports and which he lists in
21 the attached errata list. These corrections require
22 the Amendment of Exhibit CRA-212.1 to .3, CRA-13 and

1 CRA-214. "

2 "And then, moreover, and having first sought
3 the Claimants' approval, Dr. Burrows submits two new
4 exhibits to the record, namely CRA-305 and CRA-306,
5 which is referenced in the Second Report, but
6 mistakenly omitted to produce. "

7 Claimants have not objected to it, but has
8 requested a red line version of it.

9 That was the first set with errata to the
10 First Report and errata to the Second Report.

11 Now, we have received a second set of
12 corrections. This has been sent, according to the
13 date here, on the 3rd of October, also by Christophe
14 Guibert de Bruet, again, "a few additional items that
15 he wishes to correct in his Second Expert Report and
16 which he lists in the attached errata." And we have
17 received not only the list but also a clean, red-lined
18 versions of Dr. Burrows's Second Expert Report.

19 Now, Mrs. Cohen, a moment ago just added
20 that, in principle, Claimants have no objections to
21 the second list, assuming that there is nothing
22 material in it, and you reserve the right to correct

1 it. Am I right, Mrs. Cohen?

2 MS. COHEN SMUTNY: Yes, correct. If it's
3 merely correcting typographical errors, there is no
4 objection.

5 PRESIDENT TERCIER: Thank you very much.

6 Now, question to you, Dr. Burrows: Can you
7 confirm the content of the two Expert Reports that you
8 have prepared, of course, with the errata, or do you
9 wish to make some comments or corrections to it?

10 THE WITNESS: No. The current clean
11 versions are the correct versions, and I would like to
12 add, I do regret having to submit the errata, but I
13 can confirm that there are no substantive changes.
14 The vast majority are either typos or, in many cases,
15 identifying exhibits or correcting references to
16 exhibits. Pretty much everything is just of that
17 nature. There is no material or substantive changes,
18 nothing that affects any results.

19 PRESIDENT TERCIER: Thank you very much,
20 Dr. Burrows.

21 Now, you know the procedure how we will
22 proceed. You have first your presentation. You know

1 that you can use one hour. For this presentation, you
2 have communicated demonstrative exhibits--four, I
3 think--demonstrative exhibits, and I have received and
4 assume my co-Arbitrators have also received. For me,
5 it was a printed version of your PowerPoint
6 presentation.

7 Did you communicate also an electronic
8 version of this presentation? I don't know, counsel
9 for Claimant--sorry, counsel for Respondent.

10 MR. GUIBERT de BRUET: Yes, Mr. President.
11 This has been sent.

12 SECRETARY MARZAL YETANO: And,
13 Mr. President, I confirm that I received it and
14 transmitted it seven minutes ago.

15 PRESIDENT TERCIER: Okay, good. Fine. In
16 that case, you will make your presentation, and then
17 we will have the cross-examination and the redirect.
18 I recall that the Members of the Tribunal have the
19 right to ask questions whenever they consider it is
20 useful or opportune.

21 Is it clear for you, Dr. Burrows?

22 THE WITNESS: Yes.

1 PRESIDENT TERCIER: In that case, you have
2 the floor.

3 DIRECT PRESENTATION

4 THE WITNESS: Thank you.

5 First page.

6 Next page, please.

7 I won't dwell on my qualifications. I think
8 they're self-explanatory. My professional training is
9 as an economist. I have worked for over 50 years with
10 Charles River Associates. At various times, I've led
11 the metals and minerals practice. I also have led our
12 litigation or dispute resolution practice. I was CEO
13 of the company for 15 years, during which I took the
14 Company public, so I have experience as a public
15 company's CEO for 10 years. And then I returned to
16 consulting a little bit over 10 years ago. I've
17 co-authored or authored five books on minerals and
18 metals and I've served as an expert in dozens of
19 disputes.

20 Next page.

21 I've summarized our assignment here:
22 Analysis of the valuation of the losses allegedly

1 sustained by the Claimants, including an analysis of
2 the valuation applied by the Claimants' quantum
3 expert, and the preparation of an expert report in
4 support of Romania's submissions on the merits.

5 Next page.

6 This will summarize the assumptions that I
7 have made that applied all the valuation and quantum
8 estimates I provided here. I was instructed by
9 counsel to use the Claimants Valuation Date as July
10 29, 2011.

11 And the valuation standard is Fair Market
12 Value. The price at which a hypothetical,
13 well-informed buyer and a hypothetical, well-informed
14 seller would voluntarily transact, as of the Valuation
15 Date, under no compulsion to buy or sell. And I
16 believe this was also the standard used by Compass
17 Lexecon.

18 Next page, please.

19 So, between Compass Lexecon and CRA, these
20 are the methods we used. The predominant method I
21 used is cash-flow analysis. The discounted-cash-flow
22 analysis. This is the predominant method used by

1 corporations and finance experts for valuation. It
2 was rejected by Compass Lexecon, which I will discuss
3 later.

4 Compass Lexecon used Public Market
5 Capitalization as their primary method. I believe for
6 this matter--this method is unreliable because of
7 incorrect information available to the public as of
8 the Valuation Date and because of the effects of the
9 gold price spike at that time.

10 Next page.

11 Both Compass Lexecon and I use market
12 multiples as a check on value. This provides
13 valuation by inference from values of comparison
14 properties. This method, in my opinion, has very,
15 very low reliability for Mineral Resources because the
16 economic characteristics of mineral properties vary
17 enormously from property to property, and even within
18 properties.

19 Furthermore, in the case of Compass Lexecon,
20 the comparison properties it used are not comparable
21 to the Projects, as I will discuss later.

22 Compass Lexecon also used P/NAV, namely

1 Price to Net Asset Value. This applies P/NAV ratios
2 calculated by analysts of a number of companies, and
3 takes the median of it and applies it to the Roşia
4 Montană NAV or DCF calculated by Compass Lexecon. I
5 believe the results of this analysis are very
6 unreliable. There are no corrections for it for
7 difference across analysts and input assumptions, and
8 the properties included in the sample are not
9 comparable to Roşia Montană, as I will discuss later.

█

█

█

13 Finally, both Compass Lexecon and I report
14 historical costs. This valuation method is sometimes
15 used for Exploration Properties. The available data
16 in this case are inadequate to measure direct
17 expenditures on the Projects. And we know that some
18 expenditures were redundant or inefficient.

19 Next page.

20 I'm turning now to the Discounted Cash Flow
21 part of my presentation.

22 Next page.

1 Discounted Cash Flow is used to estimate an
2 investment's present value expressed in the form of
3 its future cash flows discounted at a rate or a cost
4 of capital that reflects the risk of the cash flows
5 compared to other investments.

6 Next page.

7 Now, the steps of the DCF valuation are to
8 estimate the costs of capital for the Project, the
9 projected cash flows of the Project based on
10 projections of production and sales of gold and
11 silver; prices of gold and silver; and costs of
12 production. And then to calculate the present
13 discounted value of the net cash flows from these
14 earlier calculations.

15 Now, a guiding principle is that future cash
16 flows are less valuable than current cash flows, and
17 that the future cash flows are discounted using an
18 appropriate cost of capital for the Project being
19 valued.

20 Next page.

21 I won't go through the details here, but as
22 you know, Claimant owned 80.69 percent of the shares

1 of RMGC. RMGC effectively owned the Project Rights,
2 so to estimate of value to the Claimant of the
3 properties, we had to first estimate the value of the
4 properties and then take account of side payments,
5 income streams that flow from RMGC to the Claimant and
6 do that properly accounting for the proper percentages
7 and et cetera. That's all basically provided in
8 detail in the exhibits that do the calculations, and
9 the result is the NPV of the Company's ownership of
10 RMGC shares.

11 Next page.

12 My methodology for cost of capital is based
13 on established methodology of both finance and
14 industry experts. I computed DCFs using a cost of
15 capital of 10.2 percent. This includes an estimate of
16 the Country Risk Premium of Romania, which I estimate
17 to be 3.37 percent, and this rate was calculated as
18 being equal to the premium of Romanian
19 euro-denominated ten-year sovereign bonds over the
20 ten-year German euro-denominated sovereign bond,
21 namely the "sovereign yield spread," as it's called.
22 That's assumed to reflect the additional country risk

1 of operating in Romania.

2 Now, I'm still on cost of capital. Compass
3 Lexecon's argument is incorrect that, CAPM, the
4 Capital Asset Pricing Model, is unreliable due to
5 unstable gold betas in my discount rate assumptions.
6 Companies and financial experts routinely use CAPM
7 even if betas vary over time. Betas for most
8 companies are unstable over time. Compass Lexecon
9 does not provide a showing that betas of gold
10 companies are especially unstable compared to other
11 companies. Compass Lexecon's purported evidence of
12 instability on Page 41 of their presentation is
13 misleading because it includes data for years after
14 the Valuation Date, namely it includes data for 2012
15 to 2018. And during the end of that period, betas
16 became more unstable than at the beginning.

17 PRESIDENT TERCIER: Dr. Burrows, may I just
18 interrupt you? Because I think there is a problem,
19 sorry for interrupting you, but the problem was a
20 slide that Professor Grigera Naón now received.

21 Professor Grigera Naón, you have a special?

22 ARBITRATOR GRIGERA NAÓN: This morning, I

1 received a set of slides. Now that I'm checking them,
2 I notice that these slides do not correspond to
3 Dr. Burrows's testimony, but they have delivered to me
4 again Behre Dolbear's slides from September the 30th,
5 so there is a mistake. I think I can cope with this
6 by looking at the slides as they are presented right
7 now, but I wanted to indicate that I haven't received
8 the hard copy of Mr. Burrows's presentation this
9 morning.

10 PRESIDENT TERCIER: Respondent, could you
11 make a comment to that?

12 MR. GUIBERT de BRUET: Well, on behalf of
13 the Respondent, we obviously apologize for the
14 confusion. We will try to have a copy of the slides
15 delivered to Professor Grigera Naón as soon as
16 possible.

17 ARBITRATOR GRIGERA NAÓN: Thank you.

18 PRESIDENT TERCIER: Thank you very much.

19 Dr. Burrows, sorry for the interruption. It
20 starts just a few sentences before so that you can
21 follow, and you can go forward.

22 Please.

1 THE WITNESS: All right. I'm going to
2 repeat the last point.

3 Compass Lexecon's purported evidence of
4 instability is misleading because it includes data on
5 betas for years after the Valuation Date, namely 2012
6 to 2018, and betas were more unstable towards the end
7 of that period than they had been earlier. But,
8 regardless of their degree of stability, betas leading
9 up to the Valuation Date are still the best measures
10 of risk and the Measures that would be used by most
11 major companies and financial experts.

12 The next page I summarized, Compass
13 Lexecon's arguments about DCF not being advisable, and
14 my arguments of why this is wrong.

15 Compass Lexecon argues that the betas of
16 gold stocks are unstable. My answer is that the betas
17 of gold-mining stocks were relatively stable during
18 the 2009 to 2013 period.

19 Second, Compass Lexecon argues that gold is
20 a safe haven and historic value, and that somehow this
21 means you can't use DCF, which is a silly claim
22 because this feature is already reflected in the

1 projections of the price of gold which are an input to
2 the DCF valuation.

3 Finally, Compass Lexecon argues that gold
4 company stocks neither face the same risks nor behave
5 in the same fashion as general equities, and that they
6 do not have a clear correlation with the general
7 market. This claim is not supported by any of the
8 literature cited by Compass Lexecon. Two of the three
9 articles submitted conclude the returns on gold mining
10 stocks are positively correlated with general stock
11 market returns, and a third finds a significant
12 positive correlation with the stock market and
13 positive betas for gold index funds. So, Compass
14 Lexecon has provided no support for any of its
15 arguments.

16 Continuing on Discounted Cash Flow.

17 Next page.

18 The cost and production assumptions in my
19 DCF analysis were based on the 2012 SRK Technical
20 Report with certain adjustments; and, as you may know,
21 Compass Lexecon also used the 2012 SRK Technical
22 Report but did not make the assumptions--the

1 adjustments I made.

2 The first adjustment was to make a number of
3 adjustments based on Behre Dolbear's Expert Report.
4 Those are in the bullets below. I also increased
5 closure costs by 10 percent based on the testimony of
6 Dr. Dodds-Smith.

7 And I assumed RMGC operating costs are equal
8 to actual operating costs through 2014 and to the
9 reduced 2014 expenditure rate from 2014 to April 2018.

10 Next page.

11 The 2012 SRK Report did not take into
12 account the blasting restrictions. The 2012 SRK
13 Report simply updated the 2009 Micon Report without
14 changing resource estimates or mine production.

15 I understand from the evidence that Behre
16 Dolbear provided at the Hearing that SRK did not take
17 into account the applicable blasting restrictions.
18 Thus, SRK did not take into account the effect of the
19 blasting mitigation measures on the Project costs and
20 production rates.

21 There is evidence in this Hearing Behre
22 Dolbear estimated that production levels will be

1 reduced by as much as 70 percent and that the
2 economics of the Project will be correspondingly
3 reduced. And I conclude that lower discounted Present
4 Value would result because of delayed revenues and
5 higher per unit costs resulting from smaller economies
6 of scale.

7 Next page.

8 Moving on more on Discounted Cash Flow.

9 Next page.

10 As this chart shows, there was a speculative
11 bubble in gold prices in 2011. The chart shows the
12 price of gold from 2007 through 2017, and 2017 through
13 2018. And it also shows projections I'm going to talk
14 about later, the first one is projections based on the
15 survey of gold-mining executives, the second is the
16 median of the long-term prices projected by analysts.
17 Those projections are in the 1100 or in the 1138 to
18 1180 range, substantially below the peak price in
19 July 2011. And, as it turns out, they were prescient.
20 The gold market actually did return to those levels in
21 those succeeding years.

22 Next page.

1 My long-term goal in silver price
2 projections for DCF are based on consensus industry
3 projections. The first set was the median long-term
4 projection of gold prices as of the Valuation Date of
5 24 gold-mining analysts. This projection reflects
6 gold industry expectations about price. There is also
7 a survey conducted by PwC once a year, so I had a
8 survey at the end of 2010 for 2011 and the end of 2011
9 for 2012. I took the average of those two surveys and
10 that came out at \$1,180 per ounce. Unfortunately,
11 there is no survey near the Valuation Date.

12 Now, I used the highest estimate of
13 long-term gold prices, namely \$1,180 per ounce, and I
14 believe that no major--or very few, if any, major
15 mining companies would use a price anywhere near the
16 spot price of gold or the futures price in July 2011
17 to evaluate an investment. These projections on this
18 page reflect a consensus of both analysts and the
19 industry about gold prices.

20 Next page.

21 Compass Lexecon alleges that my projection
22 of gold prices is based on an outdated 2010 survey.

1 Now, this is incorrect. As I mentioned just before,
2 the PwC survey is conducted in late 2010,
3 November-December, and late 2011, so there is no
4 survey for July. So, I took the average of the two
5 surveys. Now, I didn't just take this in isolation, I
6 also considered the analysts' progressions which came
7 out with a price very close to the average of the PwC
8 projection. I picked the highest, but I could have
9 picked the analysts or anything in between. I think
10 that was an entirely reasonable approach.

11 Next page.

12 Compass Lexecon also incorrectly argues that
13 I should have used the forward price of gold on the
14 Valuation Date. The futures price of gold, over
15 \$16,000 per ounce as of the Valuation Date reflected a
16 very significant price spike in the gold market. Few,
17 if any, mining companies would make an acquisition
18 based on the short-term price spike of this magnitude.
19 This is confirmed by the fact that both analysts and
20 gold company executives projected gold prices well
21 below the gold futures estimates.

22 Next page.

1 PRESIDENT TERCIER: Dr. Burrows, if I may,
2 just invite you to slow down a bit for our Court
3 Reporter and for us also, please.

4 THE WITNESS: Yes, I apologize.

5 Compass Lexecon's summary of analyst gold
6 price projections based on its P/NAV analysis is
7 incorrect. Compass Lexecon, for its NAV calculations,
8 incorrectly assumes the price projections used in the
9 analysts' P/NAV analyses represent long run market
10 price projections. The analyst assumptions about
11 price in P/NAV analyses are often arbitrary. The
12 price assumptions along with the discount rate
13 assumptions used need to be the same for each property
14 evaluated, but there is no need for them to be
15 realistic long-term projections. They just need to be
16 the same. That's how methodologies work.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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[Redacted text block containing approximately 25 lines of obscured content]

[REDACTED]

7 Moving on to--still on Discounted Cash Flow,
8 I had some assumed timelines for the expropriation and
9 counterfactual scenarios. I assumed based on
10 instructions from the lawyers, from counsel, no delays
11 or additional costs or additional NGO litigation
12 implying with a Chance Finds Protocol and obtaining
13 100 percent of the necessary permits and real estate
14 rights. In other words, I assume that none of these
15 events would cause any additional delays.

16 The Environmental Permit, the Building
17 Permit, and other administrative acts would not be
18 challenged in court by third parties.

19 Now, under this timeline, the Building
20 Permit would be issued in 2018 and production would
21 begin in April 2022.

22 In the actual scenario, next page, this is a

1 scenario in which the Tribunal--after the Tribunal
2 finishes this proceeding, Gabriel continues--the
3 Company continues developing the mine. I make the
4 same assumptions as in the earlier scenarios; and,
5 under this timeline, production would begin in
6 February 2026.

7 Now, this timeline is already out of date
8 because, clearly, it's unlikely the Tribunal will be
9 issuing an award or making a determination in October,
10 so this time would have to be adjusted to take into
11 account the actual ending of this proceeding.

12 Next page.

13 In the expropriation scenario--this is the
14 one where I assumed that the properties actually were
15 expropriated on July 29, 2011--and by "properties" I
16 mean the RMGC rights to those properties--the DCF
17 value of the Project would be \$156 million, this uses
18 my cost assumptions based on Behre Dolbear and CMA.
19 The timeline I'm using based on counsel instructions.
20 The price projections I've already described, and the
21 discount rate of 10.2 percent.

22 The value of RMGC equity would actually be

1 zero, but the value of the Project to the Company
2 would be 156 million because of a stream of payments
3 that would be made by RMGC through the Company, the
4 Management Fee and partial repayment of RMGC debt.

5 Now, I also made a calculation of
6 effectively the cost of delay. So, if the legal
7 outcome of this case indicates that the Company was
8 harmed because its ability to develop the Project was
9 delayed, I use a difference between the counterfactual
10 scenario which is the same timeline as the
11 expropriation scenario, and what I call the "actual
12 scenario," namely the scenario in which the Company
13 continues developing the property after this
14 proceeding. The NPV of the first scenario is
15 235 million, NPV of the second scenario is
16 109 million, resulting in an estimated cost of delay
17 of \$126 million.

18 Now, these are fairly involved calculations.
19 I summarized the actual tables in these DCF scenarios
20 in Appendix B. And, of course, there's additional
21 detail in all the exhibits in my Report.

22 Turning to the Public Market Capitalization,

1 Compass Lexecon uses a company's Public Market
2 Capitalization to estimate the Enterprise Value of its
3 ownership of RMGC shares. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

7 Compass Lexecon also failed to adjust for
8 non-financial assets owned by the Company, including
9 the Company's ownership share of property, plant, and
10 equipment, reported by Compass Lexecon to be
11 \$53.2 million. Any value attributed by investors to
12 the Baisoara property, any value attributed by
13 investors to the Company Management, and any value
14 attributed by investors to the ownership of the
15 Company's shares by Newmont.

16 RMGC reported that it spent \$105 million in
17 property purchases between 2002 and 2008. The value
18 to future developers of the Project of the RMGC Land
19 Rights would be very high. Clearly, the Project could
20 not be developed without control of those land rights.
21 So, if someone else were to try to develop the
22 property later, RMGC would be in a position to demand

1 a very high price for those Land Rights.

2 RMGC also possessed knowhow with respect to
3 the properties which would have significant value to
4 any future developer.

5 Next slide, I'm still on public market cap.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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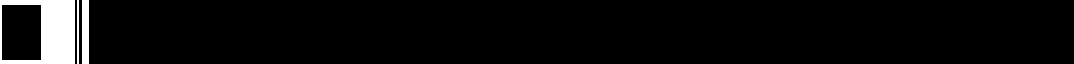
[REDACTED]

1 Moving on, next page.

2 Now I'm talking about Public Market
3 Capitalization, or I'm still talking about Public
4 Market Cap. A useful benchmark is the Company's
5 purchase of Foricon shares of RMGC in July 2011. This
6 purchase implied a value of the Company's shareholding
7 in RMGC of \$791 million.

8 Next page. 





12 So, I'm going to move on now to Public
13 Market--excuse me. I'm still on Public Market
14 Capitalization.

15 Next page.

16 Claimants' estimate of the surrogate market
17 capitalization for the new Valuation Date of
18 September 6, 2013 is flawed. Compass Lexecon
19 estimates the surrogate value by extrapolating the
20 2000--extrapolating the Company's market
21 capitalization on July 29, 2011 to September 6, 2013
22 using three alternative gold share price indexes. And

1 the one they picked, the one they use, is the S&P
2 Index. [REDACTED]

[REDACTED]

9 The next slide summarizes the data on the
10 indexes used. The VanEck and Philadelphia Indexes
11 have companies that are substantially larger than TSX,
12 and they should not be regarded or considered. In the
13 TSX Global Gold Index, as of 2011, the companies had
14 an average value of \$4.494 billion; the MVIS
15 Index--the MVIS Index companies had an average value
16 of \$0.793 billion; and Gabriel's 90-day average market
17 cap on July 29, 2011, which we of course argue was
18 inflated, was \$2.617 billion, pretty much exactly in
19 between the MVIS and TSX Indexes.

[REDACTED]

[REDACTED]

4 Next page.

5 As I noted, the value of the Company as of
6 July 2011 is halfway between the TSX and MVIS Indexes.
7 Extrapolating the value of the Company, it would,
8 therefore, would be appropriate to use the average
9 returns of these two indexes.

[REDACTED]

15 Now, here I show the development of
16 Gabriel's market cap, both actual and indexed to the
17 MVIS Index, between January 2010 and the end of 2013.

18 Next page.

19 If the Company's capitalization had declined
20 during this period in proportion--starting from the
21 Valuation Date in proportion to the index of the gold
22 share prices, it would have been \$706 million on

1 December 31, 2013, versus the actual market cap of
2 \$282 million. [REDACTED]

[REDACTED]

15 Next page.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 Now, Compass Lexecon also adds an enormous
8 Acquisition Premium of 35 percent to the public market
9 cap of the Company. Adding an Acquisition Premium is
10 not a standard feature of valuation analysis. Adding
11 an Acquisition Premium is only justified if there is
12 additional value to the buyers, such as synergies.
13 None of the valuation textbooks I reviewed state that
14 an Acquisition Premium should be added to the Fair
15 Market Value of an asset. The references provided by
16 Compass Lexecon are all to valuation textbooks that
17 describe the results of transactions--the results of
18 transactions, and not that companies should be valued
19 by their market cap. Applying a 35 percent premium is
20 inconsistent with the efficient markets assumption
21 relied on by Compass Lexecon. If markets were
22 efficient, companies would already be priced to

1 include that.

2 The addition of an Acquisition Premium to
3 value is inconsistent with the fact that the vast
4 majority of companies are not sold in any particular
5 year.

6 Next page.

7 I think I may be running short on time, so I
8 think I'm going to skip this page.

9 There is no basis to add an Acquisition
10 Premium to the value of the Projects. For a buyer to
11 pay a premium above the public market cap of an asset,
12 it must perceive a value that is not already
13 incorporated in the value, such as synergy, or
14 asymmetric information, such as belief that the
15 resources are greater than disclosed to the public.

16 The Compass Lexecon examples of transactions
17 at a premium all involved identifiable synergies. All
18 four transactions at a premium identified by
19 Mr. Jeannes had identifiable synergies.

20 Finally, Compass Lexecon didn't provide any
21 information on synergies or other additional values of
22 the Projects to potential buyers.

1 Moving on to market multiples. The market
2 multiples method is analogous to the valuation of
3 real-estate properties using values of comparable
4 properties. And I think--I'm sure everybody listening
5 to this is familiar with that, and I think everybody
6 would agree that, if you want to value a condo in an
7 expensive neighborhood in Paris, you wouldn't use as a
8 comparable vacant farmland or the value of a
9 comparable in a slum in New York City or the value of
10 a ski chalet. But that's effectively what Compass
11 Lexecon did by including many properties that were not
12 comparable in its valuation analysis.

13 Next page.

14 Identifying similar comparison properties
15 for a mineral property is difficult and often
16 impossible because of the huge variation in geologic
17 and other characteristics across mines, and even
18 within a mine. As few, if any, properties will be
19 comparable with respect to all relevant factors, using
20 a market multiples approach may require adjustments to
21 allow property values to be compared on an
22 apples-to-apples basis, just like real estate

1 appraisers will adjust for things like number of
2 bathrooms, square footage, and other characteristics
3 so that they can compare different property values on
4 a consistent basis. This was not done by Compass
5 Lexecon.

6 Next page.

7 Compass Lexecon bases its market multiples
8 valuation on a sample of 77 non-producing gold-mining
9 companies. This sample is large, but it includes many
10 properties that are not comparable. That would be
11 like including estimates of farmland value when you're
12 estimating the value of a condo in a rich neighborhood
13 in Paris. You would get more observations, but they
14 would be--they wouldn't be comparable, and the results
15 would be unreliable.

16 The next page.

17 For example, Compass Lexecon includes
18 properties that are much more advanced than Roşia
19 Montană. These properties have lower risks and much
20 of their investment costs have already been incurred.

21 Compass Lexecon also includes many
22 properties that have substantial non-gold production

1 and are therefore not comparable.

2 Compass Lexecon--next--does not control for
3 numerous other factors that affect value, such as
4 capital costs per ounce, operating costs per ounce,
5 time profile of expected production, risk profile,
6 including country risk.

7 My market multiples analysis--next page--was
8 focused on identifying the most comparable comparison
9 properties to the Roşia Montană Project. I used
10 transparent, reasonable screening criteria, and
11 criteria which could hardly be argued with in terms of
12 whether a property is comparable. For example, you
13 certainly shouldn't include properties that are
14 brownfield or properties under construction.

15 I ended up with four public company
16 comparison projects, but these have already passed
17 through all these screens, so they're more comparable
18 than any of the Compass Lexecon--than the Compass
19 Lexecon comparison projects, and I started with the
20 same list they had. So, what I screened out were the
21 properties that didn't fit this criteria.

22 I did the same thing with transactions--next

1 page--and Compass Lexecon didn't identify any
2 comparable transactions.

3 I then adjusted the comparison properties to
4 reflect differences in their economic factors. I
5 adjusted for the cash-flow projections to reflect
6 Roşia Montană economic factors and I used the
7 resulting changes in value per ounce for the
8 comparison projects to compute adjusted market
9 multiples. For example, if a buyer buys a property
10 for \$100 per ounce, but the Roşia Montană Project has
11 a timeline that's twice as long as the property bought
12 and that would reduce the value in half, I would say
13 that the buyer that was buying Roşia Montană would
14 only pay \$50. [REDACTED]

[REDACTED]

16 Turning to the next page.

[REDACTED]

█ [REDACTED]

2 Now, turning to P/NAV, the Compass Lexecon
3 sample, P/NAV sample, results in upward-biased value
4 estimates. This sample is actually more biased, much
5 more, than the one they use for market multiples. A
6 majority of companies in this sample have producing
7 properties. It should be patently obvious to anyone
8 that a producing property is worth a lot more than a
9 property that's just a Development Property. So,
10 49--48 of their 66 observations are properties that
11 are patently overvalued relative to Development
12 Properties such as Roșia Montană.

13 This sample also included a majority of
14 non-producing companies with properties in countries
15 with very low country risk, such as Canada, the United
16 States, and Australia. And obviously those properties
17 are worth more because of that factor.

18 On net--the net result is that the Compass
19 Lexecon sample only includes eight companies out of
20 the 66 which are both non-producing and in areas of
21 higher country risk, such as Romania.

22 It also includes many--the sample also

1 includes many companies that are not comparable in
2 other important respects. 17 had both open-pit and
3 underground deposits, and four companies had less than
4 50 percent production from gold.

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

12 Now, the cost estimates were low, because
13 Compass Lexecon doesn't include the additional costs
14 identified by Behre Dolbear, and the cost of capital
15 is too low. Compass Lexecon assumes the cost of
16 capital is 5 percent. It does not even add the
17 country risk factor for Romania, which it should have.
18 So, even under its analysis, it should have used
19 8.37 percent.

20 There are also numerous additional technical
21 flaws in the Compass Lexecon P/NAV analogy which I
22 will not go into in detail.

1 So, next page.

2 Next page.

3 Compass Lexecon's calculation of the P/NAV
4 value for the Project, purportedly using my
5 assumptions about cost and timeline, is incorrect.
6 They claim they come up with a value on those
7 assumptions of \$2.702 billion, \$2.702 billion--and a
8 stand-alone value of \$1.5 billion. The first number
9 is the value to the Company.

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

15 Now, I used the Company's P/NAV method--next
16 page--I know you have it there--excluding producing
17 companies, which clearly biases the numbers up, using
18 the expropriation costs and timeline projections, and
19 applying a discount rate of 8.37 percent, which is
20 consistent with the Compass Lexecon analysis when
21 adjusting for country risk, and I get a resulting
22 P/NAV estimate for the Project, the Project itself, of

1 \$174 million and \$544 million for the value to the
2 Company.

3 Now, I would remind the Tribunal that the
4 value to the Company is higher than the value of the
5 Project because there are a number of side payments
6 made by RMGC to Gabriel that come off the top on cash
7 flow. So, the Project, after accounting for those
8 transfer payments, is lower than the actual value to
9 the Company.

10 Turning to historical costs, awarding
11 appropriate historical costs can restore Claimants'
12 financial position to where it was before it began its
13 investment. Now, any award based on appropriate
14 historical costs needs to deduct the value of assets
15 not expropriated, including the value of Land Rights
16 and other real estate needed for minerals development
17 of the Project by future license-holders, or,
18 alternatively, the value of any such real estate for
19 other purposes, the value of real estate not essential
20 for mineral development, the value of other financial
21 assets such as equipment, and the value of know-how in
22 the Projects.

1 Next page.

2 Compass Lexecon calculates total
3 expenditures during the period from 1997 to 2016 based
4 on the Company's consolidated financial statements.
5 These statements include many expenditures not
6 directly related to the Project. Adjusting for these
7 items and adding certain other items such as
8 Management fee, income and interest, and foreign
9 exchange gains, and deducting the value of equipment
10 reduces the estimate of expenditures to
11 \$615.2 million.

12 Next page.

13 RMGC data available for 2003 to 2014 also do
14 not provide detailed data on expenditures directly
15 related to the development of the Project. Total RMGC
16 expenses during 2003 to 2014 were \$209.9 million on
17 operating activities and \$326.1 million on investing
18 activities, for a total of \$535.9 million.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

█ [REDACTED]
█ [REDACTED]

3 Finally, turning to interest, pre-judgment
4 interest, if any damages are actually awarded, should
5 be equal to the risk-free rate. Any Award to
6 Claimants is not being loaned on the same risky basis
7 as those which banks extend when they make loans.

8 Any Award in this matter, if any, would be
9 pursuant to the Canada-Romania and UK-Romania
10 Treaties. Because there is no risk of not collecting
11 a valid Award and because Claimants are not exposed to
12 systematic risk in that Award, namely undiversifiable
13 risk inherent in the overall market, Claimants are not
14 entitled to a rate of interest that compensates it for
15 both the time value of money and risk. The time value
16 of money is equal to a risk-free interest rate, best
17 represented by the U.S. Treasury bill rate from the
18 Valuation Date.

19 And that concludes my direct testimony. I
20 have included some backup exhibits in the appendixes.

21 Thank you.

22 PRESIDENT TERCIER: Thank you very much,

1 Dr. Burrows.

2 May I ask our Secretary the time that had
3 been spent by the Expert?

4 SECRETARY MARZAL YETANO: Approximately 59
5 minutes.

6 PRESIDENT TERCIER: Okay. Good.

7 Now, in Claimants' side, I don't know who
8 will conduct the cross-examination.

9 MR. GUIBERT de BRUET: Just before that,
10 Mr. President, if--I think I saw that Professor
11 Grigera Naón had received the slides. I just wanted
12 to confirm that he had; again, with my apologies.

13 ARBITRATOR GRIGERA NAÓN: Yes, I did, with
14 some consideration by using the hard copy that you
15 delivered to me by Slide 47. Thank you very much.

16 PRESIDENT TERCIER: Okay. Good.

17 I reiterate my question: Mrs. Cohen, who
18 will conduct the cross-examination?

19 MS. COHEN SMUTNY: I will be doing that,
20 Mr. President.

21 PRESIDENT TERCIER: Thank you very much.

22 You have the floor.

1 MS. COHEN SMUTNY: Thank you very much.

2 CROSS-EXAMINATION

3 BY MS. COHEN SMUTNY:

4 Q. Good morning, Dr. Burrows.

5 A. Good morning.

6 Q. Good morning. I'm Abby Cohen Smutny,
7 counsel for the Claimants.

8 As a theoretical matter, you do not dispute
9 that the market capitalization may be a reliable
10 metric for valuing a gold-mining company?

11 A. Yes, under certain circumstances, I would
12 not dispute that.

13 Q. In some--

14 A. Under some circumstances.

15 Q. Right.

16 In some circumstances, it may be the most
17 reliable method available?

18 A. If the market has full information on the
19 Projects.

20 Q. You have provided expert opinions on
21 valuation and other investment-treaty cases; I think
22 you mentioned that during your presentation?

1 A. Yes.

2 Q. You have relied on a market capitalization
3 measure in other cases?

4 A. I'm trying to remember. I'm not sure I
5 have, but if you know of one, let me know. They tend
6 to blend together.

7 Q. Yeah. It was a public hearing in Eco Oro
8 versus Colombia. Did you rely on--

9 A. Yes, that's correct. That's the one I'm
10 trying to think of. Yes, I did.

11 Q. Yes.

12 A. And in--

13 Q. Did you--

14 (Overlapping speakers.)

15 A. In that case, I looked for a public market
16 cap that was clean, that was not the affected by later
17 information, and I assumed in that case that the
18 market had the correct information. I had no evidence
19 that it didn't, so I took a value and I extrapolated
20 it to the Valuation Date.

21 PRESIDENT TERCIER: Dr. Burrows, could you,
22 just in the interest of time, just limit yourself to

1 answering the questions that have been asked of you,
2 please?

3 THE WITNESS: Yes, sir.

4 BY MS. COHEN SMUTNY:

5 Q. Thank you.

6 So, you consider that Gabriel's market
7 capitalization as of the Valuation Date is not a
8 reliable evidence of the value of the Project Rights
9 because of facts that are specific to this case; is
10 that right?

11 A. That's correct.

12 Q. You say that there is, between 2010 and
13 2012, a speculative bubble in the price of gold; is
14 that right?

15 A. Yes.

16 Q. You say this is a result of a significant
17 divergence between the prices in the spot and futures
18 market and the price expectations of virtually all
19 industrial participants in the gold market; is that
20 right?

21 A. Yes, I believe that's correct.

22 Q. You say that, whereas the spot price for

1 gold on the Date of Valuation was, I believe,
2 approximately \$1,600, price projections of surveyed
3 mining executives, for example, was in the range of
4 approximately \$1,100, and the median production of
5 gold-mining analysts was also about \$1,100; is that
6 right?

7 A. I think you meant to say "projection," not
8 "production."

9 Q. You're correct.

10 A. But yes, that's correct. Yeah.

11 Q. Yes. Thank you.

12 So, that's the differential; yes?

13 A. Yes.

14 Q. Gold prices today are up again, over \$1,900
15 an ounce; is that right?

16 A. Yes.

17 Q. You agree that--you agree that gold-mining
18 analysts are a source of information to actual and
19 potential investors in gold-mining companies?

20 A. Yes, they are.

21 Q. You say in your First Report that it is
22 quite possible that buyers and sellers of Gabriel

1 Canada's stock were valuing Gabriel using the high
2 spot prices of gold instead of the much lower
3 expectations of knowledgeable industrial participants
4 in the gold mining business--

5 (Overlapping speakers.)

6 Q. --with the result that Gabriel Canada's
7 public market capitalization was far above what large
8 mining companies would pay for the assets of Gabriel
9 Canada. Does that sound right?

10 A. Yes; yes, I believe that's quite possible,
11 but that's--daily traders, I think, got carried away.
12 It does not necessarily reflect what a company would
13 pay for a gold mine where they have to rely on very
14 long-term price projections.

15 Q. You don't dispute, however, the possibility
16 that investors in Gabriel Canada, some investors in
17 Gabriel Canada, may be--may have been making
18 investment decisions based on the lower expectations
19 of analysts or other knowledgeable industrial
20 participants, do you? Would you dispute that?

21 A. No, they may have. I don't know exactly who
22 was buying and selling. I don't know what went into

1 their calculations.

2 Q. You referred to real property surface rights
3 that RMGC had that you say had--you say the market
4 might have valued--

5 A. Yes.

6 (Overlapping speakers.)

7 Q. --in Gabriel Canada; right?

8 A. Yes.

9 Q. And you say that, even if RMGC does not
10 develop the Project, anyone else who wishes to do so
11 would need to acquire these surface rights, and RMGC
12 could extract most or all of the economic value of
13 those assets from a future developer; is that right?

14 A. I believe that is correct.

15 Q. And that would depend on the State
16 permitting the mine--it would depend on the State
17 permitting the mining of the Project; right?

18 A. Yes.

19 Q. You don't dispute--

20 A. Well, let me clarify that slightly.

21 Another mine development company might
22 decide to, for example, acquire RMGC, even if the

1 State had not given to permission to develop the
2 property, on the expectation that it could get it
3 developed, so another buyer might not necessarily need
4 to have a new set of approvals to decide it wants to
5 buy RMGC and its Land Rights.

6 Q. The new buyer would require an expectation
7 that the State would permit the Project to proceed?

8 A. Yeah, I believe so.

9 Q. You don't dispute Compass Lexecon's
10 observation that Gabriel's movable and
11 immovable--pardon me. Let me say that again. Bit of
12 a tongue twister.

13 You don't dispute Compass Lexecon's
14 observation that Gabriel's movable and immovable
15 property, property plants, and equipment, you don't
16 dispute that, as of June 2011, that amounted to about
17 USD 50 million?

18 A. No, I don't dispute that, because I think
19 the number is \$53.2 million, if I recall correctly.

20 Q. I think that's right. Yes, thank you.

21 You also point to the Baisoara property?

22 A. I do.

1 obtain all land-use rights necessary for proceeding
2 with the Roșia Montană Project; right? That was your
3 instruction?

4 A. Well, yes and no. There was a timeline that
5 I was given, and I was instructed to assume that
6 timeline.

7 Q. So, you do not offer an opinion as to
8 whether RMGC would have been able to obtain all
9 necessary land-use rights?

10 A. I haven't explored that in detail myself. I
11 have certainly seen statements to the effect that many
12 landowners were unwilling to sell, and even that
13 Gabriel disclosed it might have to use expropriation,
14 so that seems like a reasonable statement to me.

15 Q. But did you not independently verify the
16 reasonableness of these--

17 A. No.

18 (Overlapping speakers.)

19 Q. You didn't independently verify that?

20 A. I didn't do my own investigation, but those
21 assumptions seem entirely reasonable to me.

22 Q. You were instructed to assume that the

1 earliest date on which RMGC could have received a
2 Construction Permit for the Roșia Montană Project was
3 April 2018?

4 A. Yes.

5 Q. You do not offer an opinion as to when RMGC
6 could have received a Construction Permit; right?

7 A. Not--not an independent opinion, no.

8 Q. Right.

9 You do not have expertise to offer an
10 opinion on that topic?

11 A. No, I don't.

12 Q. You state that the earliest date at which
13 production could have been initiated was April 2022--

14 A. Correct.

15 Q. --in order to account for time to obtain
16 financing and for completing construction?

17 A. Yes.

18 Q. Does that sound right?

19 A. Yes.

20 Q. You do not offer an opinion regarding how
21 long it would take to obtain financing for the
22 Project?

1 A. No. Not an independent opinion.

2 Q. Right.

3 You observe in your First Report,
4 Paragraph 61--if you wish to review it, take a look at
5 it.

6 A. Hold on for a second.

7 Q. Maybe we could put that up.

8 In Paragraph 61, I'm referring to: "Of
9 course, Gabriel Canada had access to significant
10 amounts of capital already." I see it starts at the
11 bottom of the page. "Of course, Gabriel Canada had
12 access to significant amounts of capital already,
13 raising over"--continue the paragraph, please.

14 A. What paragraph number is this?

15 Q. This is Paragraph 61. I'm sorry. The way
16 it's being blown up, it's hard to see.

17 A. No, I'm sorry. I was in the wrong report.
18 Excuse me.

19 Q. Sorry. So, this is the First Report?

20 A. Yeah.

21 Q. Paragraph 61. "With respect to attracting
22 capital financing for the Project, of course, Gabriel

1 Canada had access to significant amounts of capital
2 already, raising over \$700 million through the
3 issuance of equity and warrants," et cetera. "Compass
4 Lexecon states that, as of the Valuation Date, five
5 institutions had significant holdings of Gabriel
6 Canada shares, providing these institutions with
7 incentives to provide or facilitate access to capital
8 to facilitate additional value creation."

9 And you referred to a presentation of Scotia
10 Capital, but also noted: "Gabriel Canada had several
11 financing alternatives to proceed in developing Roşia
12 Montană in a go-it-alone strategy."

13 This is your--

14 A. I'm sorry, I'm just trying to--

15 (Overlapping speakers.)

16 Q. Go ahead. I'm sorry.

17 A. Yes, those are all correct quotations.

18 Q. It's a comment regarding--it's a comment
19 regarding the ability of Gabriel to attract financing
20 for the Roşia Montană Project development?

21 A. Yes.

22 Q. You also heard testimony earlier this week

1 from Mr. Jeannes that, if a major or senior company
2 were to acquire the Project Rights, it could
3 self-finance the Project?

4 A. I heard that.

5 Q. With regard to timing in your Second Report,
6 you also referred to permitting for cyanide storage
7 and transport, and you rely on reports given by other
8 experts about that process; is that right?

9 A. That's correct.

10 Q. You do not have expertise to offer an
11 opinion on the permitting requirements for cyanide
12 storage and transport?

13 A. That's correct.

14 Q. You did not conduct an independent
15 assessment as to whether Gabriel's estimated timeline
16 to initiate production for Roşia Montană was
17 reasonable?

18 A. No, I did not.

19 Q. You're not offering an opinion on whether
20 Gabriel's estimated timeline was achievable?

21 A. No, I'm not--not an independent opinion.
22 I'm relying on counsel, plus Behre Dolbear.

1 Q. Right. So, when you say--

2 A. And plus the other experts that had opinions
3 on topics related to that.

[REDACTED]

19 Q. You do not have the expertise to assess the
20 amount or the significance of the archaeological
21 investigation that was done at Orlea, do you?

22 A. That's correct.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

4 Q. Are you aware that Respondent's Expert,
5 Mr. McCurdy, stated in his Report that a pervasive
6 mining industry backdrop of Project Sponsors'
7 inability to complete projects on time and within
8 budget, materially high cost overruns, and Project
9 delays prevailed through the time the Project was
10 being defined and developed?

11 A. Yes, I listened to that testimony, and I
12 read his Expert Report.

13 Q. And you also heard the testimony of
14 Mr. Jorgensen of Behre Dolbear, who also described
15 cost overruns in the industry leading up also to the
16 2011 time period?

17 A. Yes.

18 Q. You described in your presentation the DCF
19 measure of value of the Roşia Montană Project that you
20 called the "expropriation scenario," which
21 incorporates various timeline and cost assumptions. I
22 think in your Report, you said it yielded a value of

2 Q. You also explain in your Second Report that
3 the DCF measure implies a value of Gabriel of
4 \$2.12 billion, since the 2009 costs were increased in
5 2011 by using mining cost indices; in other words,
6 even with costs higher, according to indices, that DCF
7 measure--

8 (Overlapping speakers.)

9 A. Can you point me to that paragraph?

10 Q. Yes.

11 Let's look at your Second Report,
12 Paragraph 85, Note 73. Footnote--yes, yes. I was
13 referring to the footnote--I'm sorry--

14 A. I see. I'm reading it.

15 Q. Footnote 69. My apologies. Not 73, 69,
16 clarifying that, with assumed higher costs, that DCF
17 comes to \$2.12 billion. You're explaining that here?

18 A. Yes.

19 Q. And you explain that these DCF measures
20 assume a 10.2 percent discount rate; is that right?

21 A. Yes.

22 Q. These DCF measures do not assign any value

1 to the Bucium Projects?

2 A. No. I think I actually say that somewhere,
3 but yes, you're correct. This is just for Roşia
4 Montană.

5 Q. You don't dispute that rights, even
6 contingent rights, to develop a mineral resource
7 property may have market value?

8 A. Yes, I agree with that.

9 Q. You recall that Bucium contained two
10 deposits: Rodu-Frasin and Tarnita?

11 A. Yes.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

21

PRESIDENT TERCIER: I'm sorry I have

22

interrupted you, but I would like to recall you that

1 you should somewhere suggest a break, if it's made
2 somewhere. Just finish your set of questions, and we
3 can then--

4 MS. COHEN SMUTNY: Actually, why don't we
5 break here? It's a good time for a coffee break. I'm
6 sorry I lost track of time there. Apologies. This is
7 a good time.

8 PRESIDENT TERCIER: It's a good time?

9 MS. COHEN SMUTNY: Yeah.

10 PRESIDENT TERCIER: Good. In this case, we
11 will have 15 minutes' break, and start again 4:00 p.m.
12 Swiss time.

13 Dr. Burrows, I would remind you that you are
14 under testimony and that it is not allowed for you to
15 have any contact with other people.

16 Do you understand?

17 THE WITNESS: Yes, I understand that.

18 PRESIDENT TERCIER: Okay. Good. So, we
19 begin again in 15 minutes.

20 THE WITNESS: Okay. Thanks.

21 (Recess.)

22 PRESIDENT TERCIER: So, Mrs. Cohen, you have

1 the floor.

2 THE WITNESS: I wonder if I could make a
3 slight correction to an answer I just gave?

4 BY MS. COHEN SMUTNY:

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12 Q. Fair enough.

13 This is Behre Dolbear's "rule of thumb";
14 and, according to Behre Dolbear, this is a "rule of
15 thumb" that's derived from a database of approximately
16 400 transactions reflecting what buyers would pay,
17 apparently. So, according to Behre Dolbear, this is a
18 rule of thumb that's derived from review of actual
19 transactions, including with respect to resource;
20 right?

21 A. I believe that's what they say.

22 Q. Let's move on to the next subject.

1 You accept, don't you, that I believe you
2 described in your presentation the fair-market-value
3 standard that it is based on a hypothetical
4 transaction where neither the buyer nor the seller is
5 under any compulsion to transact; is that right?

6 A. Yes.

7 Q. You discussed in your Second Report,
8 Paragraph 94, I believe, Gabriel's purchase of RMGC's
9 shares held by a minority shareholder Foricon. I
10 believe you also discussed that in your presentation
11 this morning?

12 A. Yes.

13 Q. And you suggest that it provides--that
14 transaction, you suggest, provides evidence of the
15 Fair Market Value of the Project Rights held by RMGC?

16 A. I think what I said is that's a useful
17 benchmark.

18 Q. You did not mention this transaction in your
19 First Report.

20 A. No.

21 Q. Dr. Burrows, did you review the Transcript
22 of the December 2019 Hearings--

█ [REDACTED]

█ [REDACTED]

3 SECRETARY MARZAL YETANO: Excuse me,
4 Mr. President, I think your mic is open.

5 PRESIDENT TERCIER: Sorry, it was me. I
6 apologize.

7 THE WITNESS: All right. I see what's on
8 the screen.

9 BY MS. COHEN SMUTNY:

10 Q. I think I'm sorry--one of the
11 difficulties--and I beg the Tribunal's indulgence, one
12 of the difficulties of the remote setting is that just
13 coordination is a little bit more challenging.
14 Everyone is very spread apart, so I just need to make
15 sure that the person who is operating our screen share
16 sees the sentences that we should review.

17 PRESIDENT TERCIER: Take your time.

18 MS. COHEN SMUTNY: Yeah, apologies that this
19 is slow, but I would like Dr. Burrows to be able to
20 see--it's really just a few paragraphs on these two
21 pages.

22 PRESIDENT TERCIER: No problem. Take your

1 time.

2 And Dr. Burrows should also have the time to
3 read it properly.

4 THE WITNESS: Okay. I read what's on the
5 screen.

6 Is there a question?

7 BY MS. COHEN SMUTNY:

8 Q. There is a little bit more. Just one
9 second.

10 A. Okay.

11 (Pause.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 Mr. President, there are no further
2 questions.

3 PRESIDENT TERCIER: Thank you.

4 I give the floor to Respondent.

5 MR. GUIBERT de BRUET: Mr. President, could
6 we take about 5 to 10 minutes to confer and see
7 whether we have any questions on redirect?

8 PRESIDENT TERCIER: This was what I was
9 about to offer to you.

10 Yeah, okay. So, we take 10 minutes, and in
11 10 minutes, we will listen to the cross-examination,
12 yep--to the redirect. Sorry.

13 (Recess.)

14 PRESIDENT TERCIER: Dr. Heiskanen, you have
15 the floor.

16 DR. HEISKANEN: It will be Mr. Guibert de
17 Bruet.

18 PRESIDENT TERCIER: So, good. Mr. Guibert
19 de Bruet.

20 MR. GUIBERT de BRUET: Thank you, Mr.
21 President.

22 REDIRECT EXAMINATION

1 BY MR. GUIBERT de BRUET:

2 Q. Dr. Burrows, you were taken to Paragraph 61
3 of your First Report, if we could go there.

4 A. Yes.

5 Q. And you were shown the sentences that reads
6 "Compass Lexecon states that, as of the Valuation
7 Date." I think there may be an issue with the
8 paragraph numbering, so if you go a little bit
9 further, yes, you can see it right there towards the
10 middle of the bottom of the page.

11 A. Yes, I see it.

12 Q. Could you read to yourself the sentence that
13 starts thereafter. Starting "any impact on value of
14 potential synergies."

15 A. "Any impact on value of potential synergies
16 with a buyer derived from cost savings and corporate
17 overhead costs should be excluded. Such savings
18 relate to Gabriel Canada's corporate functions and not
19 the value of the Claimants' investments in the
20 Projects."

21 Q. And my question is, could you please explain
22 to the Tribunal why you refer to Compass Lexecon and

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

5 MR. GUIBERT de BRUET: Why don't we ask a
6 more specific question.

7 BY MR. GUIBERT de BRUET:

8 Q. You mentioned, Dr. Burrows, that you relied
9 on both expert evidence and instructions from counsel.
10 Could you please clarify which assumptions about the
11 timeline come from expert evidence?

12 A. Well, there was expert evidence on the
13 duration of litigation under the Romanian system.
14 There was expert evidence on how long it would take to
15 expropriate real estate. There was expert evidence
16 from Behre Dolbear on the time for construction and
17 the time required to get the financing and complete
18 the pre-construction activities.

19 So, I relied on a number of other experts
20 for the various assumptions.

21 Q. And could you clarify which assumptions
22 about the timeline came from counsel?

[REDACTED]

13 Q. Thank you, Dr. Burrows.
14 MR. GUIBERT de BRUET: No further questions.
15 PRESIDENT TERCIER: Thank you very much,
16 Mr. Guibert de Bruet.
17 Do my co-Arbitrators have a question to the
18 Expert?
19 Professor Grigera Naón. Are you speaking?
20 You're on mute.
21 ARBITRATOR GRIGERA NAÓN: Can you hear me
22 now?

1 Mr. President. Thank you very much.

2 PRESIDENT TERCIER: Okay. Professor
3 Douglas, do you have a question or questions?

4 ARBITRATOR DOUGLAS: Plural, yes. Not many,
5 but I was wondering if somebody could bring up C-128,
6 which is the SRK Report, the 43-101, and turn to
7 Page 76, where the economic analysis starts.

8 Now, I'm not sure if you had a chance--I
9 mean, you've obviously commented on this in your
10 Reports, I think in particular about the cost
11 assumptions in the DCF that was done by SRK in 2012.

12 You also made the point that this is what
13 happens in these types of disclosures: They do a DCF.
14 But I really wanted to ask you if you've had an
15 opportunity to look at the DCF closely, and I wanted
16 to get a feel for what really explains the difference.
17 Obviously, there are different Valuation Dates, but in
18 terms of the headline points, what explains the
19 difference between yours and the one that SRK did with
20 the Valuation Date later than the next year?

21 PRESIDENT TERCIER: Dr. Burrows?

22 THE WITNESS: Okay. I can't see what's on

1 the screen. I'm trying to see if I can upload it.

2 ARBITRATOR DOUGLAS: Well, if you want to go
3 to the conclusion, you will see the figures they come
4 up with at Page 90. That's Paragraph 22.5.

5 THE WITNESS: Again, I'm just looking at a
6 laptop at a distance, and I can't see--if somebody
7 could highlight it, maybe--

8 ARBITRATOR DOUGLAS: It's on the screen now,
9 as if by magic.

10 Well, actually, just as a preliminary point,
11 when you say that it's standard that they do a DCF in
12 these disclosures, is that a regulatory requirement,
13 or is that just a practical--a matter of practice?

14 THE WITNESS: As part of the 43-101
15 guideline or requirements, you have to show, when they
16 declare Reserves, that they're profitable.

17 Now, one interpretation of that is if they
18 make a dollar in profit, in which case you don't need
19 to do a DCF. But what I often find in these reports
20 is that they do a DCF as part of the determination
21 that this is a profitable deposit, and you can declare
22 Reserves because the definition of "Reserves" includes

1 the fact that it's going to be profitably extracted.
2 That's why you need a Technical Report. It has a mine
3 model and basically has a block model and goes through
4 all the analysis to show that, yes, we can pay for all
5 the costs of getting this to the ground and milling it
6 and getting it to the buyer, and we'll earn enough
7 money from that to return our capital and make a
8 profit, or make lots of capital.

9 Now, they come up with that number. There
10 are a number of differences between what they do and
11 what I do. They, of course, have a much more
12 accelerated production rate than we do. We also
13 adjusted their costs upward based on the Behre Dolbear
14 Report and CMA Report. We used a lower price of gold,
15 and they had a very low discount rate of--their basic
16 result was using a 5 percent discount rate, which
17 creates a substantial value, and they reported one at
18 14 percent, which came out at \$397 million. The
19 discount rate we used was 10.2 percent, so that result
20 would be closer to the 397 than the 1.836. So, that's
21 the range of differences.

22 They also did their analysis as

1 of--effectively, as of Q2 2012, whereas we did
2 everything as of Q--as of July 31--July 29, 2011. So,
3 there are a number of kind of differences, and I would
4 say the biggest--well, the three big ones: We had a
5 significantly longer time scale, and that's material.
6 They had first pour, I believe, in early 2017, but
7 that's starting from 2012. We had first pour of 2022
8 starting from 2011. So, that's a six-year difference.
9 Six years at 10 percent is not quite double, but
10 it's--I can't do the math in my head, but it's pretty
11 close to double. It's maybe 1.85 or 1.9. So, our
12 numbers would be reduced almost by 2 just from that
13 factor alone.

14 And then we had higher costs.

15 And as well as the higher costs, we had a
16 different assumption about ramp-up, lower production
17 in the ramp-up that came from Behre Dolbear, and lower
18 recoveries.

19 So, there are a number of differences in the
20 details, but the big ones would be the extra time, the
21 somewhat higher costs, the difference in the discount
22 rate, and the difference in the gold price.

1 ARBITRATOR DOUGLAS: Can you just remind me
2 the difference of the gold price? What gold prices
3 did you use in--

4 THE WITNESS: We used--I believe we used
5 \$1,180.

6 ARBITRATOR DOUGLAS: Right. Okay.

7 THE WITNESS: And they used \$1,200. It's
8 not a big difference. So, that would probably not be
9 the big driver.

10 ARBITRATOR DOUGLAS: Okay. Yeah.

11 THE WITNESS: It's--the timeline is
12 important, and the cost differences are important,
13 because the cost differences come right off the cash
14 flows. So, those would be the two big drivers.

15 ARBITRATOR DOUGLAS: Okay. That's very
16 helpful. Thank you very much. No further questions.

17 THE WITNESS: And the discount rate, because
18 they use 5 percent, which is very low.

19 ARBITRATOR DOUGLAS: Right. Well, they give
20 different--

21 THE WITNESS: They give different ones.

22 I find in the two 43-101 Reports that the

1 common "rule of thumb" is 5 percent, no matter what
2 the risks are, so that's just--again, just a
3 benchmark. It's not a really serious estimate of cost
4 of capital.

5 ARBITRATOR DOUGLAS: Okay. Thank you very
6 much.

7 THE WITNESS: You're welcome.

8 PRESIDENT TERCIER: I have, personally, no
9 further questions, Dr. Burrows, so we are at the end
10 of your examination.

11 I would like to thank you very much for your
12 presence, for your answers, and so this part of the
13 Hearing is closed.

14 (Witness steps down.)

15 PRESIDENT TERCIER: Now, we have to look at
16 the open issues and what we will do now first thing
17 then for the next step of the procedure.

18 Without having taken a contact with my
19 co-Arbitrator, but I will certainly intervene in case
20 I'm wrong or if they have other points, I would say
21 the open issues for me are the following.

22 The first one: We have to decide whether

1 Claimants should submit its submission to--its answer
2 to the alleged new claims on Tuesday or on Wednesday.
3 The Arbitral Tribunal will decide.

4 Second point--and this is important--you may
5 remember that on the first day, Mr. Polašek raised a
6 certain number of objections--if I'm not mistaken,
7 nine objections--concerning elements that had been
8 introduced in the Opening based on different positions
9 taken by the Parties on the right to use these
10 elements. In the meantime, the Arbitral Tribunal, by
11 majority, has decided, not only once, but twice,
12 because it decided also on the Request for
13 Reconsideration.

14 Now, my question to Claimant is whether they
15 maintain the objections and still wish to develop
16 them, as was envisaged, but of course the idea is not
17 to go back on the rules that have been adopted by the
18 Arbitral Tribunal.

19 I don't know if you want to answer right now
20 or if you want to have time. I think we should
21 introduce a break also for me to discuss with my
22 co-Arbitrator. I don't know.

1 Mrs. Cohen Smutny, can you answer right now,
2 or would you take the time to discuss it with your
3 team?

4 MS. COHEN SMUTNY: Thank you. We will take
5 the time to confer and revert to you after doing so.

6 PRESIDENT TERCIER: Okay. Good.

7 The third point is the question of the
8 Post-Hearing Briefs. I would like to recall that, at
9 the end of September hearing, we discussed it, and
10 it's within the Transcript, and then the Arbitral
11 Tribunal wrote a letter on 17 December 2019.

12 I read to you point 3(b): "After discussing
13 with the Parties on the issue of Post-Hearing Briefs
14 and Closing Arguments, the Arbitral Tribunal decided
15 that it shall at this stage submit to the Party a list
16 of questions. This list of questions and the manner
17 in which the Parties shall be invited to file their
18 answers shall be communicated to the Parties in due
19 course." I know this has been done in Procedural
20 Order No. 27.

21 And now the second paragraph: "The Arbitral
22 Tribunal's decision on having a list of questions at

1 this stage of the proceeding will not deprive the
2 Parties of an opportunity to file Post-Hearing
3 Arguments following the second Hearing, which may deal
4 also with the questions raised in the first hearing.
5 These shall take place in the form of written
6 Post-Hearing Briefs."

7 This is where we are, and this is a point
8 that the Arbitral Tribunal would like the Parties to
9 discuss. I think it would be good; indeed, I know
10 that there is a disagreement between the Parties as to
11 whether this should be made later in writing. I would
12 personally prefer, but again, I'm speaking under the
13 control of my co-Arbitrator, that after this break I
14 will propose to you--or during the break that we will
15 propose to you, you can have a first contact so that
16 we can, not decide, but possibly agree, or see what
17 are the main points.

18 For me, these are the three open issues. I
19 don't know if you have further on your side. Do my
20 co-Arbitrators? I see another question.

21 Professor Grigera Naón? No.

22 Professor Douglas? No.

1 Now, on your side, Mrs. Cohen Smutny, do you
2 have another point that the Arbitral Tribunal should
3 decide upon?

4 MS. COHEN SMUTNY: Well, I think, just to be
5 clear, there is a housekeeping issue relating to the
6 confidentiality of the Hearing Transcript and the
7 streaming that will be done for the public access, and
8 so I just want to make a point that we've not
9 forgotten about that, and we do need to--the Parties
10 will need to verify what segments of the session
11 should be considered confidential.

12 It seems to make sense that perhaps, once
13 the Parties receive--I'm not exactly sure how this
14 will happen--Ms. Marzal, will the Parties receive
15 video? I mean, usually we receive audio recordings.
16 With this kind of session, perhaps we were receiving a
17 different type of file, but at that point the Parties
18 should be able to, similar to reviewing a Transcript,
19 review and indicate what time periods one might
20 consider closed for confidentiality. It just seems
21 that that sort of process should be followed before we
22 do streaming.

1 PRESIDENT TERCIER: Dr. Heiskanen?

2 DR. HEISKANEN: Yes. We don't have any
3 further issues beyond those that the President already
4 listed. And, of course, Mrs. Cohen Smutny is
5 absolutely right that these confidentiality issues and
6 review of the Transcript needs to be done, and
7 probably it's best the Parties try to agree on a
8 timeline for that between themselves.

9 PRESIDENT TERCIER: Okay. So, I see that we
10 know now where we are.

11 My proposal to you is now to have a break,
12 because I would like also to have a short discussion
13 with my co-Arbitrators, and then come back and have
14 the answer to the two--if possible, to the questions
15 that I've raised.

16 Would half an hour, Mrs. Cohen Smutny, be
17 sufficient for you?

18 MS. COHEN SMUTNY: Yes. I think maybe one
19 question that would help the Parties' discussions
20 regarding Post-Hearing Briefs--and maybe this is
21 something that the Tribunal is not ready to indicate,
22 but it would be probably be helpful for the Parties to

1 have an understanding of whether the Tribunal
2 anticipates presently posing additional questions to
3 the Parties, because there is an efficiency issue.
4 Sometimes one prepares a Post-Hearing Brief and, at
5 the same time, also responds to certain questions.

6 So, if we're discussing schedule and
7 possible ways of handling it, it would be helpful to
8 the Parties to know if the Tribunal is in a position
9 to give guidance on what we might expect.

10 PRESIDENT TERCIER: Okay. We have not a
11 Final Decision, but we have already discussed it
12 partly. You remember also that it was in answer to on
13 the part of Dr. Heiskanen's question, whether the
14 Tribunal will ask questions right now.

15 Our position, which is a tentative position,
16 was to say it is an enormous file, and we have to
17 digest it in particular after this Hearing, so I can
18 tell--for the time being, I have not the impression
19 that we are already in a position to prepare a list of
20 questions; that it would be probably be better for us,
21 once we have the Post-Hearing Briefs, to see what
22 other point or points on which we would like to have

1 some further answers. This could be done in a second
2 round--or why not in a virtual hearing?--just to
3 clarify this question.

4 But again, this is really provisional
5 answers. Do my co-Arbitrators agree with the way I
6 resumed our position?

7 Professor Grigera Naón? You have to
8 unmute--to put your mike.

9 ARBITRATOR GRIGERA NAÓN: Okay. I do agree
10 with that view, Mr. President.

11 PRESIDENT TERCIER: Okay. Professor
12 Douglas?

13 ARBITRATOR DOUGLAS: Completely agree.

14 Just one thing that the Parties might
15 consider, because I have seen it happen in a few other
16 cases, and it's worked quite well. Instead of having
17 long, discursive Post-Hearing Briefs which prevent new
18 narratives of old things, another option is to have
19 the Post-Hearing Briefs in the form of a series of
20 propositions with references to everywhere on the
21 record which establishes that proposition, in the
22 estimation of the Party. And it cuts down on length,

1 and that's an extremely useful document to have when
2 one is drafting the Award.

3 But I'll just throw that out there for the
4 Parties to consider. I have seen it happen in a few
5 cases, and it's worked quite well.

6 PRESIDENT TERCIER: Thank you very much,
7 Professor Douglas.

8 Dr. Heiskanen, you have a comment, a double
9 comment, a comment first of my proposal to introduce
10 now a 30 minutes' break so that you can have a first
11 contact with your opponent to just see whether you can
12 agree already--I don't know what is your last
13 position--and make a comment on the suggestions that
14 have been made?

15 Please, Dr. Heiskanen.

16 DR. HEISKANEN: Yes, I agree it would be
17 useful to have a break first for the Parties to
18 discuss and see whether we can agree on basic
19 principles.

20 And we will also consider Professor
21 Douglas's suggestion.

22 PRESIDENT TERCIER: Thank you very much. In

1 that case, we have half an hour. We will start again
2 at 5:30. May I invite my colleagues to go now on our
3 special link?

4 Thank you very much. We will see you--

5 MS. COHEN SMUTNY: Sorry, in one hour or
6 half an hour?

7 PRESIDENT TERCIER: What I did say? I said
8 half an hour; right? Is it sufficient or is it too
9 short?

10 MS. COHEN SMUTNY: It may be too short if
11 we're also going to try to speak, the Parties
12 especially, because it's not so easy. We're not in
13 the same room.

14 PRESIDENT TERCIER: Okay.

15 DR. HEISKANEN: One hour may be safe.

16 PRESIDENT TERCIER: Okay. Good. So, I was
17 about to make a compromise, but I retire my
18 compromise.

19 And you have one hour, so we will meet again
20 at 6:00 Swiss time. Thank you very much.

21 (Recess.)

22 PRESIDENT TERCIER: The first point, just a

1 comment made by Professor Douglas, he heard counsel
2 for Respondent tried to transmit to him a printed
3 version of the PowerPoint, but I think the building
4 was closed, so there is no problem; is that correct?
5 You have another point you wanted to comment,
6 Professor Douglas? Am I right?

7 ARBITRATOR DOUGLAS: No. In relation to the
8 PowerPoint yesterday as well because I'm in an office
9 building which is not open on the weekend. So, if
10 they arrive at some point during the course of the
11 week, that would be great. If not, then I can use the
12 electronic versions.

13 Thank you.

14 PRESIDENT TERCIER: Okay. Fine.

15 The second point concerning the Decision of
16 the time allotted in which Claimant should answer on
17 the so-called "new claims," the Tribunal has decided
18 that the response should be submitted not later than
19 Wednesday by noon Washington time.

20 Thirdly, the question of the objections that
21 had been raised during the first day.

22 Mrs. Cohen Smutny.

1 MS. COHEN SMUTNY: I think Claimants, as
2 we've stated, maintained their objection. However,
3 whether there is any further point that needs to be
4 made or argued, I think Claimants need some time to
5 digest the presentations that were made at the
6 Hearing; and, if there is anything more to say, we
7 will say it, but for the record, Claimants maintain
8 their objection, but I'm not sure if there is anything
9 more that needs to be done on that issue.

10 PRESIDENT TERCIER: Okay. Dr. Heiskanen?

11 DR. HEISKANEN: We have no comment.

12 PRESIDENT TERCIER: Good.

13 The fourth point, I forgot to invite you to
14 agree on the correction of the Transcript. May I
15 invite the Parties to liaise after this Hearing in
16 order to decide when this should be done and how we
17 would be, of course, very extremely grateful if you
18 could make a joint proposal and will be also grateful
19 if you follow David Kasdan's instructions.

20 I think no comment to that; it seems to me
21 clear. Or David, you wish to make a comment?

22 (Pause.)

1 PRESIDENT TERCIER: Next point, the PHB,
2 shall I give the floor--the Arbitral Tribunal will
3 also discuss it but first to listen to the position of
4 the Parties.

5 Ms. Cohen Smutny.

6 MS. COHEN SMUTNY: Well, my understanding is
7 that the Parties have some conditional agreement, but
8 perhaps it's better that Respondent express its
9 position because maybe that's where there is not
10 complete agreement. We understand Respondent has a
11 proposal, and then we can see where we are.

12 PRESIDENT TERCIER: Good. Dr. Heiskanen?

13 DR. HEISKANEN: Yes.

14 The Respondent's main position is, or
15 primary position is, that there should be an oral
16 closing in this matter, which would then bring this
17 process to an earlier end, and would be most
18 cost-efficient. Our proposal would be that the
19 Tribunal first send any questions they may have to the
20 Parties after these two hearings, and there will be a
21 hearing held at an agreeable time in the coming weeks
22 or months, a two-day hearing. The first day, the

1 Parties will make their oral closings, then second
2 day--incorporating their answers to the Tribunal
3 questions, and then second day for rebuttal, and that
4 would be the end of the matter.

5 We have spoken with the Claimants' counsel,
6 and our understanding is they don't agree to this
7 proposal. We still submit it to the Tribunal for a
8 decision as our primary position. But, in the event
9 the Tribunal prefers Post-Hearing Submissions, we have
10 an agreement with the Claimants that there would be
11 two rounds of Post-Hearing Submissions, first round
12 early February. The Claimants have suggested a
13 date--I believe it was for 4 February. We were still
14 checking on our side whether that is an agreeable
15 date. And the second round towards the end of March.
16 I believe the proposal was 26 March. We're still
17 checking on our side if that is still feasible, but in
18 principle there is agreement on two rounds of
19 Post-Hearing Submissions.

20 And we have also agreed--and I speak under
21 the control of the opposing counsel--we have agreed on
22 a page limit or, rather, word limit of 70,000 words

1 for the first round and 35,000 words for the second
2 round, which would translate in terms of the format
3 that the Respondent has been using into 200 and 100
4 pages respectively, although it may be a bit less for
5 the Claimants, given the formatting.

6 And it's also a sort of understanding--I'm
7 not sure there is a full agreement--at least
8 Respondent is prepared to make its Post-Hearing
9 Submissions in the form of propositions on the issues
10 that the Tribunal needs to decide and then citing
11 relevant evidence in the body of the Report, at least
12 the key evidence. Of course, it's for each Party to
13 decide how they want to apply this propositions
14 approach.

15 But that's where we're, to the extent I
16 spoke about the Parties' agreement, I spoke under the
17 control of the opposing counsel.

18 PRESIDENT TERCIER: Okay. Mrs. Smutny, can
19 you confirm? Can you comment?

20 MS. COHEN SMUTNY: Yes. I can confirm that
21 the Parties are agreed--well, Claimants agree to
22 Post-Hearing Briefs. Claimants are willing to agree

1 to two rounds, early February 70,000 words, later in
2 March--March 26 or thereabouts--35,000 words response.
3 These are terms that Claimants would agree.

4 Take note also of the suggestion that
5 propositions and organized evidence would be most
6 helpful, and so Claimants consider that the Parties
7 should take that on board in the spirit of that,
8 but--not to be formally required, but the Parties
9 should present as they consider helpful.

10 From the Claimants' point of view, it's
11 already been clearly established that there will be
12 written Post-Hearing Briefs. So, from the Claimants'
13 point of view, this has already been decided, and
14 there is no reason to revisit that, and should not be
15 revisited. For us, the question was simply whether we
16 have one round or two rounds. Claimants were willing
17 to agree to two rounds as Respondent proposed. So,
18 that's the Claimants' position.

19 PRESIDENT TERCIER: Okay. So, the Arbitral
20 Tribunal has taken note of the Parties' position. We
21 had a discussion. I cannot hide the fact that the
22 limit should be less than what you are about to agree

1 upon or you agreed, but we will come to you. And the
2 idea of propositions seems to be acceptable and seem
3 to be a good proposal. The Arbitral Tribunal will
4 communicate to you its Decision in the coming days and
5 some details the way we will do it. We will decide
6 also on the first and main proposal made by Respondent
7 of Closing Argument.

8 Do we co-Arbitrators have a question at this
9 juncture?

10 Professor Douglas?

11 ARBITRATOR DOUGLAS: No. No further
12 questions. Thank you.

13 PRESIDENT TERCIER: Professor Grigera Naón?

14 ARBITRATOR GRIGERA NAÓN: No further
15 questions, either.

16 PRESIDENT TERCIER: Good.

17 DR. HEISKANEN: Mr. President, if I could
18 add something about the page limit, certainly it would
19 be good if it would be less, but if we incorporate
20 some of the key evidence in the body of the
21 Submission, given the extensive volume of evidence
22 that has been heard in the two hearings, it's very

1 difficult to do it in less than 200 pages. The
2 proposition approach also drives that.

3 PRESIDENT TERCIER: Okay. We will see.
4 Fine.

5 The next point is the question of the
6 confidentiality. It is our Secretary Sara's
7 specialty. I have been told that you will be handling
8 the recording soon, very soon; am I right, Sara?

9 SECRETARY MARZAL YETANO: Yes. I believe we
10 would be able to provide a copy of the video-recording
11 this week, sometime next week.

12 PRESIDENT TERCIER: Okay. So, the Parties
13 will have an opportunity to make their proposal.

14 My last point is to ask you whether you have
15 at this juncture an objection to the way this Hearing
16 has been conducted or request, or new requests.

17 On your side, Mrs. Cohen Smutny?

18 MS. COHEN SMUTNY: Claimants have nothing
19 further to add on that issue.

20 PRESIDENT TERCIER: Thank you very much.

21 Dr. Heiskanen?

22 DR. HEISKANEN: Nothing further from us

1 either, thank you.

2 PRESIDENT TERCIER: Thank you very much.

3 Do my co-Arbitrators have a point they would
4 like to raise? Doesn't seem to be--Professor Douglas?

5 ARBITRATOR DOUGLAS: Just to thank both
6 Parties' counsel.

7 PRESIDENT TERCIER: Okay. I will do.

8 Of course, now the last point, I express my
9 gratitude. I will first express my gratitude to the
10 IT people, Mrs. Al-Tashi in particular. It has worked
11 very well, and I would like to thank you all not only
12 from ICSID but also in the counsel offices.

13 I would also like to thank our, who are no
14 more here, Witnesses and Experts for their very
15 valuable contribution.

16 I would like to thank the Parties, of
17 course, where they were just present and did not
18 intervene. I can confirm that it would be, of course,
19 impossible for the Tribunal, and it was an assumption
20 of Dr. Burrows, to render the Award in October 2020,
21 permitting time. It is, of course, a very difficult
22 case. We are aware of it, we will take it extremely

1 seriously, but you can imagine that we will have to
2 digest this and to come with an award as soon as it
3 seems feasible.

4 I would like to thank our Court Reporter.
5 He's always extremely discreet, but he's always here,
6 and thank you very much, David.

7 My thanks also to Sara who organized
8 everything. Thank you very much, Sara. It was really
9 good. It was from a technical point of view really
10 good. We could express ourselves even if I still
11 consider that it is not really ideal or I miss a
12 little bit the in-person hearings, but really it was
13 well-done, and thank you again, Sara.

14 I would also extend the thanks to your
15 daughter, your family and to all families of the
16 people present here that accepted that we work also
17 over the weekend.

18 I would like to thank the assistant to the
19 Tribunal, Maria. She's always extremely discreet, but
20 very efficient, and this is for me also, of course, an
21 important fact.

22 And, finally, I would like to thank my

1 co-Arbitrators for their valuable contribution. I
2 look forward to working further with them. I'm sure
3 they will also be indulgent as far as necessary, and
4 we will now in the coming weeks and month work tightly
5 together.

6 Thank you very much to all of you. I wish
7 you a very good Sunday, even if Sunday is already
8 largely past. Thank you very much, and goodbye,
9 everybody.

10 DR. HEISKANEN: Thank you, Mr. President.
11 And on behalf of the entire team on the Respondent's
12 side, thank you to the Tribunal for your time and for
13 your dedication to the case. Thank you to the
14 Secretary of the Tribunal and the ICSID Secretariat
15 for a very efficient; a virtually efficient hearing.

16 PRESIDENT TERCIER: Okay. Good that you say
17 it because I think in my list I forgot to thank the
18 counsel, so a horrible omission. It is late, and I
19 cannot read my notes, so I would really like to thank
20 the counsel very much not only for the extremely
21 professional way they conducted this case but also for
22 the excellent spirit in which it has taken place.

1 Sorry for this last omission. I hope it will also be
2 on the Transcript. Thank you very much again. And
3 again, goodbye, everybody.

4 DR. HEISKANEN: Thank you.

5 MS. COHEN SMUTNY: Goodbye, everybody.

6 (Whereupon, at 12:26 p.m. (EDT), the Hearing
7 was concluded.)

CERTIFICATE OF REPORTER

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

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



DAVID A. KASDAN