

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 9

HEARING ON THE MERITS

Wednesday, December 11, 2019

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

The hearing in the above-entitled matter came on
at 9:00 a.m. before:

PROF. PIERRE TERCIER, President of the Tribunal

DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

ALSO PRESENT:

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Secretary to the Tribunal

MS. MARIA ATHANASIOU
Tribunal Assistant

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MR. DARRYL LEW
MR. BRODY GREENWALD
MR. PETR POLÁŠEK
MR. HANSEL PHAM
MR. FRANCIS VASQUEZ JR.
MR. ANDREI POPOVICI
MS. GABRIELA LOPEZ
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MR. RICHARD BROWN

Representing Roşia Montană Gold Corporation:

MR. MIHAI BOTEA

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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MS. NORADÈLE RADJAI
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P R O C E E D I N G S

1
2 PRESIDENT TERCIER: So, good morning, ladies
3 and gentlemen. It is my honor to open the eighth day
4 of the First Session of the ICSID arbitration case
5 15/31 between Gabriel Resources Limited and Gabriel
6 Resources (Jersey) Limited versus Romania. I hope you
7 had a good evening, and I wish, of course, that we'll
8 have again an interesting day.

9 I will start with a few points, the first
10 point thanking, of course, our Court Reporter for
11 having sent us yesterday's Transcript.

12 Secondly, we have received from our Secretary
13 the time, the Report on the time. The Tribunal is a
14 bit concerned. We would suggest that we discuss it
15 after the lunch break in order not to lose time right
16 now because we are in a bit under pressure, if you
17 don't mind.

18 The third point, we have received this
19 morning a message from Respondent communicating a
20 certain number of corrections in the Supplemental
21 Opinion of Professor Dragoş. Have you an objection to
22 this list on your side?

1 MS. COHEN SMUTNY: We haven't had a
2 sufficient opportunity to review. I think on the
3 first break we'll advise if we have any issue.

4 PRESIDENT TERCIER: It's not urgent. Good.

5 The fourth point, important point for today
6 to this program, because we have two really times that
7 we cannot change. We'll have first the examination of
8 Mr. Bode that you know will take place through video,
9 it must absolutely start at 11:00; and secondly
10 because, for reasons concerning the Arbitral Tribunal,
11 we have to stop at 11:45 at the latest, so this is
12 already time that should be--pardon, 12:45, sorry.
13 12:45. It was a bit short.

14 Then that's another point, and the last point
15 is the request made by Mr. Bode to have his assistant
16 present in the room. Counsel for Respondent, you wish
17 to comment, or you have a special point you would like
18 to raise in this connection?

19 DR. HEISKANEN: Yes, Mr. President. The
20 purpose of the request is to make sure that there is
21 no interruption with the examination of Mr. Bode.
22 He's the Minister of Transportation. He must have his

1 phone with him at all times for urgent matters, so if
2 there is a call from the President or the Prime
3 Minister, he will have to take the call. The chance
4 that that will happen is not particularly high, but it
5 cannot be excluded, so he wants to have his personal
6 assistant attending the calls so that he can have his
7 phone, Mr. Bode's phone and answer any calls that may
8 come from the President or the Prime Minister during
9 the examination.

10 We are in the process of checking whether
11 Mr. Pisca, who is personal assistant, is a State
12 employee, in which case there would be no issue with
13 confidentiality because he's somebody who's associated
14 with the Respondent.

15 PRESIDENT TERCIER: Yes, Ms. Cohen Smutny.

16 MS. COHEN SMUTNY: It's really up to the
17 Tribunal. It seems to Claimants that the phone can be
18 held by the personal assistant, or if something comes
19 up, we can tolerate the interruption. The odds of an
20 interruption happening during the short examination
21 are low. And having seen what the room looks like
22 through the video yesterday, it's obviously very short

1 and right outside the room, and it's not very far to
2 walk. But we leave it up to the Tribunal. We observe
3 that the rules regarding confidentiality have been
4 clear and have been in force, so we leave it up to the
5 Tribunal.

6 PRESIDENT TERCIER: Thank you.

7 (Tribunal conferring.)

8 PRESIDENT TERCIER: So, thank you. The
9 Arbitral Tribunal considers this examination is
10 extremely important for this case. When there is time
11 that there could be some urgency, but we do not see
12 why the assistant could not be outside the room and in
13 case really of necessity informed, if possible, that
14 we should avoid any interruption. This case is also a
15 very important one, as everybody knows.

16 Okay. Our Secretary will communicate it to.
17 Do you want to have it in writing?

18 DR. HEISKANEN: No, it's fine, sir. It means
19 that he cannot sit in the room, he will have to sit
20 outside, which means that Mr. Bode will then have to
21 have his phone with him because that's the rule of the
22 Romanian Government. So, we cannot exclude

1 interruptions if phone calls come from the President
2 or the Prime Minister, but it's unlikely to happen,
3 but this is just for information. And a second note
4 for the record is that the personal assistant, as we
5 understand is a State employee, so there is no issue
6 of confidentiality.

7 PRESIDENT TERCIER: Okay. I would prefer to
8 have this solution.

9 Okay. It's clear? You can communicate it to
10 Mr. Bode?

11 DR. HEISKANEN: Of course.

12 PRESIDENT TERCIER: You will do it. Fine.

13 So, now we can go further with the--today.
14 In any case, we will start now with the
15 cross-examination of Professor Podaru.

16 OVIDIU PODARU, CLAIMANTS' WITNESS, RESUMED

17 PRESIDENT TERCIER: Good morning, Professor
18 Podaru. You are still under examination, a very long
19 examination, if you add the time of the night, but it
20 is an interruption, and I will give the floor to
21 Dr. Leaua.

22 CROSS-EXAMINATION

1 BY DR. LEAUA:

2 Q. Thank you. Good morning.

3 My name is Crenguța Leaua, I'm counsel for
4 Respondent in this arbitration, and, and I'm going to
5 ask you some questions on the content of your Legal
6 Opinion. In the interest of time, I would be grateful
7 if you could keep your answers as short as possible,
8 and on my end I will try to address my questions so as
9 not to require much elaboration on your part.

10 First of all, it is for us to distribute to
11 you the binder that contains documents that will be
12 presented to you during your cross-examination. You
13 have it on the table; right?

14 A. Yes.

15 Q. Thank you.

16 And then allow me to better understand how to
17 address you.

18 Is it correct to address you "Professor"? I
19 mean, I think that in Romania you are Associate
20 Professor or Maître de Conference; it was translated
21 yesterday as you presented yourself as a lecturer, but
22 I do realize that this is not exactly the university

1 degree in Romania that you currently held?

2 A. Yes. According to the Romanian regulations,
3 according to the university degrees, I'm an Associate
4 Professor, Maître de Conference, and I'm a Ph.D.
5 Director, so there are some scores that one has to
6 fulfill in order to move higher in the hierarchy.
7 According to the regulations, I meet the scoring to
8 also be a university professor, but there is a
9 strategy of the universities that take out superior
10 positions based on certain criteria.

11 Q. Thank you.

12 MS. COHEN SMUTNY: Excuse me--

13 BY DR. LEAUA:

14 Q. I fully understand your position. I'm in
15 exactly the same position. Please, this is not out of
16 disrespect, but that is why I introduced myself as
17 Doctor and not Professor because I'm in exactly the
18 same situation as you are. But now that--

19 MS. COHEN SMUTNY: I'm sorry. I apologize.
20 Is there an index to the materials in the binder? Is
21 there a list of what's in this binder?

22 DR. LEAUA: No, it is not. We will circulate

1 it, if needed, but you will see that it will be
2 sufficient presentation of the references for you to
3 navigate easily in the documents.

4 BY DR. LEAUA:

5 Q. So, that being clarified, I would have one
6 follow-up question.

7 Is it correct that both Professor Tofan and
8 Professor Dragoş were actually assessing your activity
9 as Members of the Committee who awarded you this
10 university title that you currently held?

11 A. Yes, it is true. It's an administrative
12 matter.

13 Q. Like any exam, ever, the relationship between
14 examiner and examinee, I take. Thank you.

15 So, now moving to the content of your
16 opinion, I would like to address you first a general
17 question. You refer in your Legal Opinion, or you
18 draw a conclusion that the Urbanism Plan would be
19 required to align with any conditions imposed in that
20 Environmental Permit, and not the other way around;
21 correct?

22 A. Could you please indicate more exactly in

1 what context I made this statement?

2 Q. Paragraph 10, which is on Page 7 in both
3 English and Romanian of your Legal Opinion, where you
4 state at the end of the paragraph: "There was no
5 basis for the Ministry of the Environment to do so
6 because, inter alia, this Urbanism Plan, as well as
7 later the Construction Permit issued based on it, was
8 required to align with any conditions imposed in the
9 Environmental Permit in any event."

10 And then you also refer to this on
11 Paragraph 154, which is on Page 48 in the English
12 version, and Page 53 in Romanian, where, at the end of
13 the paragraph, you also say that: "Such plans must
14 take into account measures established in the
15 Environmental Permits issued for Projects located in
16 the area of the plan."

17 Do you maintain this view?

18 A. Yes, I maintain this point of view because I
19 upheld it in my opinion.

20 Q. Thank you.

21 Now, let's discuss this.

22 First of all, would you agree with me that a

1 PUZ sets out the regulations specific to an area in an
2 urban or rural locality? Right?

3 A. In principle, yes, it is correct. As a
4 general idea.

5 Q. And the PUZ covers, among others, measures
6 for the Environmental Protection, such as mitigation
7 of pollution sources, prevention of natural risks,
8 wastewater treatment, restoration of land and
9 greening, protection of heritage assets; correct?

10 A. Yes, as a general framework. Indeed, there
11 is a specific assessment of the environmental impact
12 in principle.

13 Q. Okay. And the provisions of the PUZ are
14 applicable erga omnes; therefore, they're of general
15 application for the area that is referred to in the
16 PUZ?

17 A. Yes, this is true as well.

18 Q. So, therefore--

19 (Overlapping interpretation with speaker.)

20 A. This means that it applies to all persons to
21 whom the regulations and the Urbanism Plan imposes
22 conditions present that fall under its scope.

1 Q. That was precisely my next question, so thank
2 you very much for adding your answer, but this could
3 reassure you that I will address the questions in a
4 logical order so you can keep your answers short,
5 because I will address you the questions as to get to
6 a specific point in a way that you can follow.

7 On the other hand now, the Environmental
8 Permit, which is the document issued at the end of the
9 Environmental Impact Assessment, the EIA Procedure, is
10 an individual administrative act; correct?

11 A. Yes, it is correct.

12 Q. Okay. Now, in a normal logic, anybody's
13 logic, it means that the Environmental Permit, an
14 individual administrative act, cannot disregard the
15 conditions and the requirements of PUZ, which is a
16 general act, with application of a normative nature to
17 over all the Investors in that area; correct?

18 A. If you ask me in a general sense, my answer
19 could be: partly true.

20 First of all, I would like you to understand
21 that the two administrative acts, one normative in
22 nature and the other one an individual act, are from

1 two different procedures, so it is arguable that there
2 is a tight connection between them. And I'm saying
3 this in a legal sense.

4 Indeed, the PUZ underlines the Construction
5 Permits. There is a tight connection between them.
6 And, indeed, the Construction Permit must comply with
7 the PUZ. But, in principle, the Environmental Permit
8 has another procedure.

9 So, I have some reserves in saying "yes,"
10 but, on the other hand, the situation of the Project
11 is a particular one, and if you want me to, I will
12 continue to answer or maybe you will ask me another
13 question.

14 Q. My question was of general nature and refers
15 to legal issues and interpretation of the Law in
16 Romania and the ranking between a normative act and an
17 individual act.

18 Now, Application to this case and assessment
19 of fact versus law, it is our belief that will be the
20 task of the Tribunal in this arbitration. For us,
21 although you have addressed a lot of factual issues,
22 we prefer to address you in your capacity as Professor

1 and to stay with the legal interpretation or
2 interpretation of the decisions of the courts of law
3 in Romania. That is why we prefer to look at you
4 within your professional capacity of legal expert, not
5 factually assessing the case.

6 Now, moving on, another legal issue, purely
7 legal issue, of general nature, still. If you look at
8 Administrative Litigation Law, which is 554 of 2004,
9 which is on record as Exhibit C-1767, you have it in
10 your binder as well as Tab 21. If you wish to have it
11 open in front of you, I will, of course, allow
12 you--invite you to do so, but we will display on the
13 screen the English version of the articles of
14 relevance as well. It's up to you.

15 Now, the question, Tab--

16 PRESIDENT TERCIER: Do you want to have them?

17 A. Yes, I would like to have them. Of course, I
18 would like to see the Romanian version.

19 BY DR. LEAUA:

20 Q. Yes.

21 Please go, then, to this law, and I will
22 refer you to the specific paragraphs when needed.

1 Now, according to this law, there are two
2 categories of persons that can challenge an
3 administrative act: One, a person who holds a right
4 or a legitimate interest and who was aggrieved by a
5 public authority by means of an administrative deed
6 due to its failure to resolve a petition within a
7 legal deadline, so that is Category 1. And then
8 another category, Number 2, social organism which
9 claim a public interest to challenge an administrative
10 act.

11 Correct?

12 A. I have never seen these Issues the way you
13 say it.

14 Q. Answer my question. Is it right what I said?

15 A. It is not correct. The social organisms are
16 assimilated to the injured party, is this but one
17 category.

18 Q. I can see that you can see them equally
19 treated by the law, but for the purpose of this
20 discussion, then I should take, then whenever you
21 refer to an aggrieved party, you refer to both
22 categories; correct?

1 A. I do not personally refer to that. This is
2 what the Law states. There is only one definition for
3 the injured party and the same legal text - 2 para. 1
4 let. c or a--I don't remember exactly--speaks about
5 the fact that these interested social organisms are
6 assimilated to the injured party. Yes, it is true,
7 this kind of assimilation is true.

8 Q. Okay. But there is a specific reference made
9 by the law as to the aggrieved person who holds the
10 subjective right or private legitimate interest on one
11 hand, and on the other hand the social organism which
12 claims the public interest in their position towards
13 the administrative act; correct?

14 A. Honestly, I haven't understood the question
15 very well.

16 (Overlapping interpretation with speaker.)

17 Q. Could you please look at Article 2,
18 Paragraph (1), letter (a) which is on Page 1 in
19 English, and on Page 7 in Romanian.

20 ARBITRATOR DOUGLAS: Could I just ask for a
21 clarification? I'm not following certain things.

22 When you refer to "social organisms," are you

1 referring to public authorities?

2 DR. LEAUA: No, NGOs, but I will get that. I
3 will get to that, it's defined in Article 2(1)(s), the
4 definition of "interest social organism," and the
5 first on line is NGOs, and then it continues with a
6 number of other public interest social organisms.
7 It's a broader category.

8 BY DR. LEAUA:

9 Q. So, if you can look at first the definition,
10 you have it on the screen, it's Article 2(1)(s), it's
11 interested social organism, you have NGOs,
12 non-governmental structures, unions, associations,
13 foundations, and other similar bodies, "which act to
14 protect the rights of a certain category of citizens,
15 or to ensure the proper performance of administrative
16 public services," and I think this will address the
17 question of the Tribunal as well.

18 Now, going back to the Article 2(1)(a), in
19 the second, in this paragraph you will see what is the
20 definition of an "affected person," and then you have
21 on one hand "any person who holds a right or
22 legitimate interest, and who was affected," and then

1 in the second part you have "as well as social
2 organisms which claim that a public interest, or the
3 rights or legitimate interests of specific individuals
4 have been harmed by the challenged administrative
5 deed."

6 That's why I make this distinction between
7 any person who holds a right and the social organism.
8 I can see that you treat them together, and this is
9 your approach, now let's move on to Article 8(1).

10 PRESIDENT TERCIER: Sorry, you have to react
11 to the statement, to agree with the statement that has
12 been made right now?

13 BY DR. LEAUA:

14 Q. Do you agree that one can see two categories?

15 A. It is one Category, affected person or
16 injured person by the act. We can see very well that
17 it is one and the same definition. The Law clearly
18 provides that there is an assimilation of the two
19 categories. That's the way I understand it.

20 Now, if you want me, in my CV, I have
21 analyzed this at length. I have here an article--

22 Q: (Overlapping interpretation with speaker.) I

1 do not want to force you to define—I apologize --

2 Q. I just tried to establish your logic, I
3 understand it. Now let's move forward to Article 8(1)
4 of Law 554, the same law, and this Article establishes
5 the remedies that might be sought by an aggrieved
6 person whose rights were affected by an administrative
7 deed or who did not receive an answer from the public
8 authority; correct?

9 A. This is about the object of the legal action;
10 namely, what the aggrieved person may obtain in
11 administrative litigation.

12 Q. Correct.

13 And then these remedies are basically to
14 request annulment, in whole or in part, of the
15 respective administrative deed or to obtain repair of
16 the damage incurred, as the case may be,
17 indemnification for moral loss; correct? So, annul
18 and repair of the damage, including the
19 indemnification for moral loss; correct?

20 A. According to this text, yes, but this is not
21 a general object of administrative litigations. There
22 are other texts, there is the text of the Constitution

1 too, there is Article 1(1), this is what this text
2 says.

3 Q. Exactly. Now, there is a separate Article
4 that provides for remedies that could be sought by
5 third parties alleging breach of a legitimate public
6 interest; correct?

7 A. Which text do you have in mind?

8 Q. I refer to Paragraph 1, Index 2, and it says:
9 "As a derogation from the provisions of Paragraph 1,
10 the judicial complaints grounded on the violation of a
11 legitimate public interest may refer only to the
12 annulment of the deed, or to the obligation of the
13 defendant authority to issue a deed or another
14 document."

15 So, it does not include damages; correct?
16 Only the annulment. Correct?

17 A. Not at all. I don't believe it is correct.
18 Not at all.

19 (Overlapping interpretation with speaker.)

20 PRESIDENT TERCIER: If you can avoid to
21 overlap.

22 BY DR. LEAUA:

1 Q. I asked him if that is what his text is
2 saying. If that's not the case, I can follow your
3 answer. If not, please stay with my questions.

4 A. You were asking me about Article 1(2).

5 Q. Yes.

6 (Overlapping interpretation with speaker.)

7 MS. ZIGMUND: I think he looks at another--

8 DR. LEAUA: Maybe it was translated wrongly,
9 but it is Article 8(1), Index 2, the one that you have
10 on the screen in Romanian language is (in Romanian).

11 Thank you for your help in clarifying this.

12 THE WITNESS: Yes, that is correct.

13 BY DR. LEAUA:

14 Q. Thank you.

15 Now, let's move on to another topic, and that
16 will be more specific this time, but referring also as
17 a general application of the law, to a Decision of the
18 High Court of Cassation and Justice that you analyzed,
19 and that is under Tab 20 in your binder. It's C-2454.

20 PRESIDENT TERCIER: Can you recall the
21 passage where you discuss it in this opinion?

22 DR. LEAUA: Exactly I will do so. Okay.

1 BY DR. LEAUA:

2 Q. Now, you refer in your Legal Opinion to this
3 specific Decision, in Section B.1.1 at Paragraph 58,
4 which is on Page 21 in the English translation and on
5 Page 23 on your Romanian Legal Opinion.

6 Basically, in this context, you referred to
7 the Urbanism Certificate as not being considered in
8 your view an administrative act and, therefore, that
9 it could not be subject of a judicial challenge,
10 suspension or annulment; right?

11 A. I'm sorry, but I couldn't find on Page 23
12 this allegation.

13 Q. This is the context that sets out the idea
14 that later on you substantiate by reference to this
15 Supreme Court Decision, High Court Decision. In this
16 paragraph you refer to the Urbanism Certificate as
17 being--

18 MS. ZIGMUND: I'm sorry, he didn't find the
19 paragraph in the opinion.

20 DR. LEAUA: 58.

21 MS. ZIGMUND: He's looking at the Romanian.

22 DR. LEAUA: Yes, Paragraph 58 is the same

1 number in both languages.

2 MS. ZIGMUND: (In Romanian).

3 BY DR. LEAUA:

4 Q. You do know where you have addressed the
5 topic, I suppose, Professor Podaru, Dr. Podaru? As
6 thus explained below--

7 (Overlapping interpretation with speaker.)

8 Q. --"an Urbanism Certificate is not an
9 administrative deed that can alone be subject to court
10 challenge, suspension, or annulment."

11 This is what you say; correct?

12 A. This is where I introduced the idea, but I
13 was looking for the Decision of the High Court of
14 Cassation and Justice, and I couldn't find it in that
15 paragraph.

16 Q. This is referred to you on Paragraph 66.

17 A. Da.

18 Q. Okay. Good. But the idea is, as I mentioned
19 on the previous paragraph. Okay.

20 Now, let's stay with this Decision, and I
21 will ask you some specific questions. If you can keep
22 your answers short, that would be helpful. And when

1 needed, of course, an elaboration might be possible.

2 This High Court Decision applies only for the
3 future; right? More precisely, starting only with the
4 date of its publication in the Official Gazette of
5 Romania; correct?

6 A. That is correct, in a procedural sense, in
7 the sense that decisions that have already been given
8 and are final cannot be re-discussed. They cannot be
9 challenged. Our lawmaker did not establish other
10 remedies for the review, but that doesn't mean that
11 they acted in a correct manner.

12 When the High Court issues decisions in the
13 interest of the Law, it says very clearly that we have
14 different categories of decisions, different types.
15 And then they explain their own rationale, and they
16 give the formula: These courts acted in a correct
17 manner. That is why I inferred that the rest of the
18 courts did not do so. As we are a nation that learned
19 to abide by *res judicata*, we do so even though in its
20 essence, from a legal point of view, the solution is
21 not correct.

22 Q. But the Civil Court Procedural Code of

1 Romania expressly states that this Decision, these
2 types of Decisions of the High Court of Cassation
3 would be producing effects since their publication;
4 correct?

5 A. Yes. I think so. 520-something.

6 PRESIDENT TERCIER: I'm a bit lost. May I
7 ask a question differently? So, it has no
8 retroactive--

9 DR. LEAUA: Exactly. That is the purpose--
10 (Overlapping interpretation with speaker.)

11 THE WITNESS: From a legal point of view,
12 that is correct. That is what I explained, that they
13 do not apply retroactively. Decisions that have been
14 given and are final cannot be reviewed. They remain
15 as such, but that does not mean that the High Court
16 recognizes their correctness from a legal point of
17 view.

18 PRESIDENT TERCIER: Sorry, but it's not the
19 same. If it cannot be reviewed, that's one thing;
20 another is to see whether the Decision, in part,
21 changed something, has retroactive effects on previous
22 situations. There are two things.

1 THE WITNESS: That is correct, but what I
2 wanted to say is that, for instance, when the European
3 Court of Justice pronounces a decision or when
4 Constitutional Court gives a sentence, there are
5 procedures whereby those processes, those cases can be
6 reopened, but that does not exist in the case of the
7 recourse in the interest of the Law, appeal in the
8 interest of the Law.

9 BY DR. LEAUA:

10 Q. And could you please look at the date of
11 publication in the Official Gazette of Romania of this
12 High Court of Cassation and Justice, and for the
13 record which is this date?

14 A. The 2nd of March 2018.

15 Q. But you didn't mention that in your Legal
16 Opinion; right? The date of publication.

17 A. To be honest, I don't know whether or not I
18 referred it in the footnotes. I can't remember,
19 but...

20 Q. All right.

21 A. May I add something? We are talking about
22 the nature--

1 Q. You will be directed in redirect by the
2 counsel for Claimants. If the need would be to add
3 anything, at this moment you answered my question.
4 Thank you.

5 Now, you have provided as an annex to your
6 opinion a truncated version, only some paragraphs of
7 the High Court Decision. My question to you is: Who
8 made the selection of the paragraphs to be translated?
9 I mean, the English version is limited to a number of
10 paragraphs only. Who made the selection of the
11 paragraphs to be translated only in part? You or
12 Claimants' lawyers?

13 A. It was myself, together with the attorneys in
14 Tuca Zbârcea & Asociatii. We thought it would have
15 been useless for us to translate the entire decision
16 because the file is already quite thick, so we made a
17 decision to only translate several paragraphs, and we
18 did so.

19 Q. You considered the remaining paragraphs as
20 irrelevant to your legal analysis as objective legal
21 expert, independent legal expert?

22 A. No, it's not that they were irrelevant, but

1 they're not that important in order to establish the
2 legal nature of a deed, so that would--that would
3 imply the necessity of us translating them. But any
4 paragraph in this Decision I can explain as long as
5 you do not limit my comments to any particular
6 paragraph. If you would like to discuss the entire
7 Decision, we can do so. No problem.

8 Q. This is precisely what I'm going to do, walk
9 you through some paragraphs, but I'm afraid that the
10 Rules of Arbitration allows me to address you those
11 questions that I consider relevant. I'm a counsel,
12 I'm not a legal expert in the arbitration. I have a
13 different role.

14 So, first, this High Court Decision does not
15 apply to all types of Urbanism Certificates but only
16 to those that are issued for Building Permits;
17 correct?

18 A. Not entirely, not really--

19 (Overlapping interpretation with speaker.)

20 A. There is another decision, the Decision 13
21 of 2018 says that this refers to all Urbanism
22 Certificates. Therefore, even if we may have

1 different opinions on the subject, the High Court says
2 a new challenge is not admissible because the initial
3 Decision clarified all things that needed
4 clarification. That is my understanding. And I
5 understand the practice of the High Court, especially
6 this mandatory one, in a corroborated manner.

7 Q. We will get to Decision Number 13 in a short
8 time, but for now, let's look at this Decision and try
9 to see what we get from this Decision, the
10 understanding that one can get in this Decision, and
11 then we will see what can add or not Decision 13 to
12 this understanding. So, my question to you--

13 MS. COHEN SMUTNY: Why don't we just pose
14 questions to the Witness without the lecture. Maybe
15 we could just do questions without the lecture.

16 DR. LEAUA: I can do questions in the way
17 that I feel appropriate, I think, as you have been
18 never interrupted by our team in the way that your
19 team has phrased questions. Thank you.

20 MS. COHEN SMUTNY: That's because we have not
21 been lecturing the witnesses.

22 PRESIDENT TERCIER: Okay. Okay. Go forward,

1 and go to questions if possible.

2 BY DR. LEAUA:

3 Q. My question was simple and addresses this
4 High Court Decision: Is this Court Decision applying,
5 as it results from its text, not to all type of
6 Urbanism Certificates, but only to those that are
7 issued for Building Permits? Second, I'm addressing
8 the question. "Yes" or "no"?

9 A. I apologize, but I don't think I understood
10 your question. It seems to me that you are asking a
11 different question.

12 Q. It's precisely the same, but I will address
13 it for the third time.

14 This High Court Decision does not apply to
15 all type of Urbanism Certificates but only to those
16 that are issued for Building Permits; correct?

17 A. Do you mean the so-called "Pre-operational
18 Urbanism Certificate"?

19 Q. I'm referring to the exact wording that this
20 Decision of the High Court is using. I'm actually
21 quoting. If that would be helpful for you to better
22 understand the Decision that you have analyzed, maybe

1 you can look at Paragraph 40 of the Decision where you
2 can read the following: "The appeal in the interest
3 of Law, which is the subject of this review"--

4 PRESIDENT TERCIER: Can you just wait?

5 DR. LEAUA: Yes, but this is--

6 PRESIDENT TERCIER: That's okay.

7 DR. LEAUA: -- Paragraph 38 on Page 8 in
8 English and 15 and 16 in Romanian, and I read it for
9 the record: "The appeal in the interest of law, which
10 is the subject of this review refers to the situation
11 of the Urban Planning Certificate issued in order to
12 obtain a Building Permit. More specifically," and
13 then it continues.

14 THE WITNESS: That is correct.

15 Besides this type of certificate, there is
16 another Urbanism Certificate that the person can
17 obtain exclusively for informational purposes, a
18 person that does not want to build anything, but they
19 just want to know what the building laws are for a
20 certain location for a certain plot of land, but it is
21 more important when the final objective is obtaining a
22 Building Permit.

1 BY DR. LEAUA:

2 Q. Now, let's look further to the same
3 Paragraph 40, and see which are the other
4 qualifications that the Supreme Court--

5 PRESIDENT TERCIER: Sorry if I interrupt you,
6 is it possible to have the paragraph highlighted?

7 ARBITRATOR DOUGLAS: I don't think these
8 paragraphs are in the English version. That might be
9 the problem.

10 DR. LEAUA: Yeah, they were the paragraphs
11 considered irrelevant by the Witness.

12 MS. ZIGMUND: I'm sorry, I have to intervene.
13 The Respondent submitted this Decision in full in
14 English, or at least you said so, but it wasn't--

15 DR. LEAUA: Yes.

16 MS. ZIGMUND: --on the record, and so we
17 should have the English entirely from the Respondent.

18 DR. LEAUA: We do. If that is Tab 20--I'm
19 sorry, Tab 23 in your binder, if the Expert now wishes
20 to look in English version of the translation and not
21 in Romanian, which I understand. But if the
22 Tribunal--for the Tribunal, this is submitted by --

1 THE WITNESS: I'm happy with the Romanian
2 version myself.

3 DR. LEAUA: It is DT-14 for the Tribunal.
4 And we will have it displayed on the screen for the
5 use of the Tribunal.

6 ARBITRATOR DOUGLAS: I'm sorry, what was the
7 Exhibit Number?

8 DR. LEAUA: DT-14. It was submitted as annex
9 to Professor Tofan's Legal Opinion in the full English
10 translation.

11 BY DR. LEAUA:

12 Q. So, let's go back to Paragraph 40. We
13 established so far that it refers to Building Permits,
14 and now let's look at what kind of Building Permits
15 are defined by the Supreme Court as being within the
16 scope of the appeal in the interest of law it decided,
17 and we read Paragraph 4 further: "More specifically,
18 the situation in which such certificate includes an
19 interdiction to build or contains other limitations,
20 this being the hypothesis reviewed below."

21 So, would you agree with me that not all
22 types of Urban Certificates issued for Building

1 Permits are taken into consideration and analysis and
2 then decided upon the interpretation by the Supreme
3 Court but only those that are forming the hypothesis
4 defined by the Supreme Court, namely that, of such
5 certificates that include an interdiction to build or
6 contains other limitations. Do you agree?

7 A. That is the exceptional situation wherein the
8 High Court says that the Urban Certificate is an
9 administrative deed. But if you follow the rationale,
10 you will see that they depart from the analysis in
11 principle of all Urban Certificates issued with the
12 view to building in all the situations.

13 And the High Court says that, before getting
14 to this exception, to this derogation, they say that
15 these certificates are preliminary deeds that do not
16 have legal effects. But, in this situation, which is
17 expressly analyzed, they make a derogation; and, in
18 this case, the certificate becomes an administrative
19 deed in and on itself, and it produces effects. That
20 is what the High Court focuses on, but it does not
21 start from that premise from the beginning but only
22 after in Paragraphs 46, 45, and 47 where this

1 exceptional category is defined and it is placed in a
2 larger category of the usual nature of the Urban
3 Certificate, which is that of preliminary deed.

4 Q. Thank you for your answer.

5 Now, let's move to the next question that is
6 another paragraph that you didn't submit an English
7 version because you considered it irrelevant, and it
8 is Paragraph I(1) of the Decision, that refers to a
9 number of articles that the Supreme Court took into
10 consideration as scope of her analysis, or its
11 analysis, which is Article 6(1), Article 7(1) of
12 Law 50 of 1991, then Article 2(1)(c), Article 2(1)(e),
13 Thesis I. And then the relevant part to our
14 discussion, Article 8(1) of Law 554 of 2004. You
15 don't see here Article 8(1) Index 2; right?

16 A. Yes, I don't see it. It's obvious. I don't
17 have to say that.

18 Q. And may I then remind you what the content of
19 this paragraph is and go back on it. That paragraph
20 referred to the situation in which there is a
21 derogation from Paragraph 1, and those that are
22 complaining on grounds on violation of legitimate

1 public interest may only refer to the annulment of the
2 deed and not to damages, per a contrario, and the
3 relevant part here is the judicial complaints grounded
4 on the violation of legitimate public interest.

5 You see that?

6 So, this particular hypothesis, Paragraph 1,
7 Index 2, is not subject of the analysis of the High
8 Court Decision that we are currently looking at;
9 correct?

10 Maybe you could have displayed the reference
11 to Paragraph I(1) on the Supreme Court Decision.

12 Do you see that? Do you agree?

13 A. Yes, I can see that.

14 I do not agree. Article I(1) describes, in
15 fact, the request made by the General Prosecutor of
16 Romania. In his request, he probably grounded his
17 request on those texts. But as I said, the request is
18 one thing, and the analysis made subsequently based on
19 that request by the High Court is another thing.

20 In its Decision, when it analyzed the request
21 by the General Prosecutor, it extended the analysis
22 because it understood that the situation submitted to

1 its analysis was an exceptional situation in relation
2 to the general principle.

3 So, first of all, the High Court exposed the
4 general principle. And then it extended its analysis.
5 It went beyond because this is allowed. It's a matter
6 of law when it comes to the legal nature of a deed,
7 and it extended its analysis and tried to depict the
8 context of this situation of exception, and it showed
9 that, in all the other situations and in all
10 situations in general, the Urbanism Certificate is
11 just an administrative operation that does not produce
12 legal effect and, therefore, cannot be challenged in
13 court separately.

14 Just that, in this situation, which indeed
15 overlaps with the request of the General Prosecutor,
16 the Urbanism Certificate is an administrative deed.
17 This is how I understood this matter, but maybe there
18 was a lack of clarity. And, of course, these matters
19 were clarified subsequently because there is another
20 Decision that says all matters pertaining to the legal
21 nature of the Urbanism Certificate have already been
22 resolved by Decision 25.

1 So, practically, the High Court is telling us
2 that, from now on, every discussion should be
3 considered closed as to this topic. This is how I
4 understood things personally.

5 Q. I understand your personal understanding, but
6 let's look at the understanding of the High Court of
7 Romania as to their understanding on what they were
8 deciding. And let's go then to Paragraph--it's
9 actually a section on the second page in English, in
10 Romanian it should be the same, where we have the
11 following paragraph. It's just above the tab with the
12 High Court, so this is the part in which the High
13 Court is defining its scope. You have like this:
14 "The President of the panel declares the debates
15 closed, and the Panel reserves judgment on the appeal
16 in the interest of law. The High Court, deliberating
17 with regard to the appeal in the interest of law,
18 ascertain as follows," and you have there Point I,
19 "the point of law which generated a non-unitary
20 practice," and then Point II, "legal provisions
21 subject to interpretation." And, first of all, you
22 have Article 6, Article 7 of Law 50, and then you have

1 Article 2 quoted entirely by the Supreme Court, so not
2 only by reference but in its entirety. And then you
3 have Article 8, Paragraph 1, not Paragraph 1, Index 2.

4 Do you see that?

5 Okay. And now let's go to the dispositive
6 part.

7 Can you see that? Can you confirm that you
8 have managed to see that paragraph?

9 PRESIDENT TERCIER: Okay. It would be good
10 for the Transcript if you could answer whether you
11 see--

12 THE WITNESS: Yes, I can see the paragraph.

13 BY DR. LEAUA:

14 Q. Okay. And let's move to the dispositive part
15 of the Decision of the Supreme Court. In the name of
16 the Law, the High Court of Cassation and Justice
17 decides, and in--its the last paragraph in English,
18 last page or almost last page, second last--yes, on
19 the bottom of the page. It's Page 10. It says like
20 this: "For the interpretation and enforcement of
21 again Article 6(1) and Article 7(1) of Law 50 of
22 1991," and then "in relation with Article 2(1)(c) and

1 Article 8(1) of Law 554 of 2004."

2 Can you see that, too?

3 A. Yes.

4 Q. Do you still maintain your opinion that this
5 Decision refers also to Article 8(1), Index 2 of
6 Law 554 of 2004?

7 A. It's not that I maintain my opinion whether
8 it refers to Article 8(1) or Article 8(1)(2). If you
9 look at this Decision, it doesn't establish who can
10 challenge it, only implicitly, but it concerns the
11 object of the action, meaning a certificate that
12 contains or not interdictions for the applicant. So,
13 it focuses the analysis on the object of the action.
14 Or I think it is only natural for one and the same
15 object to be identical for all.

16 So, yes, from this point of view, I fully
17 maintain what I said in my opinion, which I submitted
18 to the Tribunal.

19 PRESIDENT TERCIER: Okay. May I just inform
20 you that you have 10 minutes left.

21 DR. LEAUA: I'm on track, I think.

22 BY DR. LEAUA:

1 Q. Now, let's go to this Decision 13 of 2018 of
2 the High Court, the one that you mentioned before, and
3 I wasn't lecturing you when I said that we will
4 address that later. I was actually telling you the
5 truth. Now we are addressing this.

6 You referred to it. It's Exhibit C-2939 on
7 record. This Decision--in your binder, it's Tab 3, if
8 you wish to have it in front of you.

9 Okay. And I will ask you to go to the final
10 part, where you have the dispositive part starting
11 with "THE HIGH COURT OF CASSATION AND JUSTICE, In the
12 name of the Law DECIDES", and it says there it
13 "Rejects as inadmissible the request." Correct?

14 A. Yes, it is correct.

15 Q. So, the Supreme Court did not issue any
16 Decision that in its dispositive part would produce
17 any effects; correct?

18 A. No, it is not correct.

19 Q. Just one second, and I will let you
20 elaborate.

21 Do you see anything else but the rejection of
22 being inadmissible here?

1 A. Yes. I can see the considerations above.

2 Q. So, not the dispositive part, but you're
3 looking at the discussions or analysis of the Supreme
4 Court. That is what you're saying?

5 A. Yes.

6 Q. Do the--under Romanian Law, do other than the
7 dispositive part of an award or a Court Decision
8 produce res judicata or legal effect?

9 A. Yes. According to the civil procedure code,
10 the considerations of a final Court Decision also have
11 the power of res judicata.

12 Q. And then, in your view on this particular
13 matter, this is a matter that the Supreme Court has
14 decided on, decided on--

15 A. In these considerations, the High Court also
16 says that, in respect of this situation, it also
17 decided previously, so a new Decision is not
18 admissible on this matter.

19 So, essentially, this is another procedure
20 somewhat similar to the appeal in the interest of the
21 Law, which must fulfill certain procedural
22 requirements, and one of them is the novelty character

1 of the subject of law in discussion, and the High
2 Court says, since it was solved previously, it's not
3 something new and, therefore, the request is
4 inadmissible.

5 Q. So, it's not something new; that's what
6 you're saying?

7 A. Yes, in the sense that the considerations in
8 Decision 25 cover all the situations. This is what it
9 says.

10 Q. Now, let's put this aside. I will have only
11 one or two questions on one specific topic to you that
12 is still related with your views as to whether the
13 Urbanism Certificate is not an administrative act;
14 and, in your view, you say that it cannot be
15 challenged in court as a stand-alone act, and you
16 considered that this would be a unanimous approach.
17 And I will direct you to two paragraphs of your Legal
18 Opinion, and they are Paragraph 65, which is on
19 Page 24 in English and on Pages 26-27 in Romanian.

20 In this paragraph, you cite a Decision of the
21 Bucharest Tribunal concerning the Request for
22 Annulment and suspension of Urbanism Certificate

1 Number 87 of 2010, and you refer to it in Footnote 90
2 as Exhibit C-2426.

3 Now, can you see that?

4 A. Da--yes, I do.

5 Q. Okay. A few pages further below in your
6 Legal Opinion, and that is Paragraph 73 on Page 28 in
7 English, Pages 29-30 in Romanian, you say that "the
8 practice of the Courts is almost unanimously stating,"
9 and then above you say "unanimously--as unanimously
10 admitted by scholars," and then in the footnote you, I
11 take, refer to the same decisions referring to
12 Urbanism Certificate 87.

13 Now, this is not the only decision issued for
14 the Urbanism Certificate obtained by RMGC; correct?

15 A. That's correct.

16 Q. Now, let's look at the other five other than
17 this one and see what they say. You quote them first
18 in Paragraph 93 of your Legal Opinion, which is on
19 Page 33 in English and Page 35 in Romanian. And
20 there, we have a Decision where the Court admitted the
21 suspension request; correct?

22 A. Correct.

1 Q. Now, let's go to Paragraph 97, which is on
2 Page 33 in English and on Page 36 in Romanian, where
3 we have reference to a court decision that suspended
4 the effects of the Urbanism Certificate 78 of 2006.

5 Do you see that?

6 A. Yes.

7 Q. Let's go on your Legal Opinion on
8 Paragraph 102, Page 34 in English, 37 in Romanian,
9 where we have a Decision of the Timisoara Court of
10 Appeal upholding a judgment of the Timiș Tribunal
11 finding that Urbanism Certificate 105 of 2007 was
12 suspended de jure.

13 Can you see that?

14 PRESIDENT TERCIER: Okay. I'm afraid--can we
15 go to the conclusion because we're now out of time.

16 THE WITNESS: Okay.

17 DR. LEAUA: That is the last question, and
18 that is the last reference, which is Paragraph 114,
19 Page 36 in English, Page 14 in Romanian, where the
20 courts annulled Urbanism Certificate 47 of 2013.

21 BY DR. LEAUA:

22 Q. Now, in view of all these five versus one

1 that you quoted as support of your view, do you still
2 consider that the decisions of the courts are
3 unanimously taking your approach that an Urbanism
4 Certificate is not an administrative act that,
5 therefore, cannot be subject of annulment, suspension,
6 et cetera?

7 A. I want to say one thing. I was really
8 passionate about the legal nature of the Urbanism
9 Certificate. That's why I'm writing now a book in
10 this field. It will be published in about six months,
11 but I have independently researched the evolution of
12 the case law at national level, meaning that I did not
13 refer precisely to this case.

14 Well, there may be in this situation
15 something like four decisions which annulled the
16 Urbanism Certificates, and one decision, together with
17 that issued in the appeal saying that it is not an
18 administrative deed. But my research started from the
19 moment when the old Law of Administrative Litigation
20 was still into force, from around the 90s.

21 And I must say that up to 2005, I think, I
22 haven't found any decision, any scholar saying that

1 the Urbanism Certificate is an administrative deed and
2 no court annulled it. I have found something back
3 then, there was not too much case law, saying that the
4 Urban Certificate was not an administrative act but a
5 conformity endorsement.

6 Only starting with 2005 and in principle only
7 in this situation, there have been courts, mainly the
8 Appellate Court of Alba and Cluj that changed their
9 perspective--"suddenly," I would say--and they
10 established that it is an administrative act and acted
11 accordingly. And then in 2016-2017, the case law
12 became more unitary based on this Decision 25, that
13 is.

14 BY DR. LEAUA:

15 Q. --just look at your own book, which is
16 administrative law commented jurisprudence Exhibit
17 C-1784, Tab 24 in your binder on Pages 3 to 5 in
18 English and 8 to 9 in Romanian. At the very end of
19 this selection, you analyze there different views of
20 the courts, and then you submit your own views. And
21 at the very end, you have one point in which you say
22 clearly that "one thing left to discuss is whether in

1 the case where the Urbanism Certificate is grievously
2 vitiated by illegality (cases where one could say that
3 it generates its own legal consequences, distinct from
4 those of the urbanism regulations in force), one
5 should not recognize to the person that deems herself
6 harmed by it in a right to challenge it in
7 Administrative Court, without having to wait for the
8 Construction Permit, when it could be too late."

9 Do you see that?

10 This is your own view at that time. You were
11 cautious enough at that time to consider that this is
12 a matter that can be looked carefully and this needs
13 to be discussed by the courts of law; correct?

14 PRESIDENT TERCIER: Okay. You can make a
15 short comment, but very short because we are really
16 behind.

17 THE WITNESS: I have always been open to
18 discussion, and I have always agreed that we must
19 discuss.

20 I said from the very beginning this is an
21 issue of controversy, but we look at this matter, this
22 is something that is still open. We should look into

1 it in the future. Of course, when I wrote this book,
2 I didn't think of the situations regarding the case at
3 hand. I was thinking of the person that was harmed by
4 an Urbanism Certificate, and the High Court actually
5 was on my side, stating that this is an issue of
6 controversy.

7 And though in most cases my opinion--the
8 opinion I gave was real, there is an exceptional
9 situation when it should be considered an
10 administrative deed.

11 Q. Thank you very much for your explanation.
12 Thank you.

13 PRESIDENT TERCIER: First, we are really at
14 the end, and if you can start again, because you were
15 speaking at the same time as the translation.

16 DR. LEAUA: I'm sorry for that.

17 So, thank you very much, Professor, for your
18 contribution in answering to my questions in this
19 cross-examination this morning. Thank you.

20 PRESIDENT TERCIER: Thank you very much.

21 THE WITNESS: Thank you.

22 PRESIDENT TERCIER: Claimants?

1 MS. ZIGMUND: Yes, just a brief redirect, if
2 possible. I prefer to speak Romanian.

3 PRESIDENT TERCIER: Not only is this
4 possible, this is your right.

5 MS. ZIGMUND: Thank you.

6 REDIRECT EXAMINATION

7 BY MS. ZIGMUND:

8 Q. Professor, I have only two questions for you.

9 At the beginning of the examination by Prof.
10 Dr. Leaua, you were asked about the statement that the
11 PUZ should reflect--also reflect the conditions from
12 the EP, "Environmental Permits," for the Projects in
13 the area, and you wanted to make a comment about the
14 particular situation of this project.

15 So, I would prefer you to continue.

16 A. I wanted--I showed in my opinion that that
17 phrasing in the opinion does not necessarily refer to
18 a general context, but I referred to concrete matters
19 because my opinion also relates to concrete matters
20 about the Rosia Montana Project, and I showed there
21 that, generally speaking, an urbanism plan is adopted
22 for a larger area--such as a neighborhood, a town if we

1 are speaking about a PUG --while a project is
2 developed on a smaller area from a larger area.

3 So, it is natural that at the moment the plan
4 is drafted not to consider the environmental impact of
5 this project because it's a small area.

6 But, in the particular situation of this
7 project, we are speaking about two different issues:
8 First, since this is a strategic Project for Romania,
9 the EP is approved at the--by the Government at the
10 proposal of the Ministry of the Environment, whereas
11 the plan - an endorsement on environmental impact is
12 approved by a lower authority, so there is another
13 principle of administrative law, namely hierarchical
14 subordination.

15 In the particular situation of this Project,
16 practically, the regulated area, so to speak,
17 regulated by the EP is identified with the area where
18 the plan generates effect. On the other hand, as a
19 rule--and this can be seen from the documents
20 submitted on file--the EPs assess the environmental
21 impact in much more detail than the procedure on
22 environmental impact carried out in the situation of

1 the plan, which is just the general framework.

2 So, if we have an explicit text that tells
3 that when we speak about the same area, a plan or an
4 environmental assessment for a plan should take into
5 account the assessments carried out at the same level
6 but for different plans, so I applied an a fortiori
7 reasoning, and I considered that the same
8 environmental assessment should take into account how
9 this impact was assessed in a report that, on the one
10 hand, is approved at a higher level and, on the other
11 hand, is much more detailed. It would be common sense
12 to proceed in that way. I consider it a legal
13 obligation in this particular situation.

14 Q. Thank you.

15 And for the other question, I wanted to
16 direct you again to your Paragraph 73 of your opinion.
17 It was just up. I would like for you to highlight
18 again, if you can, the second phrase "as unanimously
19 admitted by scholars, whether conformity," well, up to
20 where the quote begins--yeah.

21 Can you please, in order to clarify, what is
22 this sentence saying? What are you saying in this

1 sentence?

2 A. (In English) 73?

3 Q. 73.

4 A. In principle, I explained the question of
5 doctrine which establishes that in general,
6 endorsements or administrative deeds cannot be
7 challenged independently or by their own by
8 administrative litigation.

9 And in the second part, I referred to a Court
10 Decision, one of those that were given in the Rosia
11 Montana Case, where the Court itself found that the
12 practice of courts is generally almost unanimous, and
13 that generally courts have considered that Urban
14 Certificates to be a preliminary legal operation that
15 cannot be challenged separately by administrative
16 litigation, so I commented on a court decision.

17 Q. Okay. And in the first sentence, you don't
18 refer exclusively to the Urbanism Certificates, you
19 referred to endorsements; correct?

20 A. That's correct.

21 Q. So it was a matter of principle. Do I
22 understand correctly?

1 A. Indeed, yes.

2 In general, I said that conformity
3 endorsements cannot be challenged by way of
4 administrative litigation separately.

5 Q. Okay. Thank you.

6 DR. LEAUA: It's--I'm sorry. No.

7 PRESIDENT TERCIER: You have no further
8 questions?

9 MS. COHEN SMUTNY: No further questions.

10 PRESIDENT TERCIER: Good.

11 Yep.

12 QUESTIONS FROM THE TRIBUNAL

13 ARBITRATOR DOUGLAS: Could I just ask for a
14 clarification. As a matter of Romanian Law, if I'm
15 looking at the Law on Administrative Litigation of
16 2004 that you referred to, the indexing Articles,
17 Article 8(1), Index 2, is that something that was part
18 of the Law from the beginning, or is that something
19 that is added to the Law, and that's the Convention
20 for adding provisions to the Law?

21 THE WITNESS: In principle, no, it was not
22 part of the Law from the beginning. Whenever you see

1 the Index 1 or 2, these are subsequent additions to
2 the Law, that is true.

3 ARBITRATOR DOUGLAS: And when was
4 Article I(1), Index 2 added to the Law?

5 THE WITNESS: I couldn't say. The Litigation
6 Law of 2004 was amended six or seven times at least.

7 The most important amendment dates from
8 '07--2006-2007, about two years after--when the Law
9 came into effect. If I had a copy of the Law in front
10 of me, I could show you exactly when each paragraph
11 came into effect, but right now I couldn't say.
12 Although it is a short law that only has 30 Articles.
13 I couldn't say.

14 ARBITRATOR DOUGLAS: Do you recall in the
15 challenges to the Urban Certificate that you refer to
16 in your Expert Report, were the Applicants in each
17 case basing their complaint on Article 8(1), Index 2?

18 THE WITNESS: To be honest, I don't remember
19 that, I tend to say no but that is pure speculation,
20 because I don't know.

21 If I could have a look, if I could see their
22 actual Applications, their challenges, I could say,

1 but right now I cannot say. I don't know.

2 In general, Applications are filed on the
3 grounds of Article 1 and not Article 8. Article 8
4 says what the Court may award and not what the
5 applicant may request. Of course, there is a
6 connection between the two, but the grounds are
7 constitutional--and the Constitution, and Article 1,
8 and a different paragraph here thereunder. The
9 challenger can be the best--the recipient of the deed
10 or a third party.

11 ARBITRATOR DOUGLAS: Thank you very much,
12 Professor Podaru.

13 PRESIDENT TERCIER: You have another
14 question?

15 THE WITNESS: Thank you.

16 ARBITRATOR GRIGERA NAÓN: Counsel for the
17 Respondent, in her questions, she indicated that for
18 the obtaining an Urban Certificate there are certain
19 environmental concerns that have to be addressed, like
20 waste management or pollution of waters, to which
21 extent that is different or is not covered by the
22 Environmental Permit? Is there another level when an

1 Environmental Permit is considered, do any kind of
2 conclusions that may have been previously reached at
3 the moment of issuing or not an Urban Certificate
4 taking into account or not is there an overlap, an
5 interaction, or not?

6 THE WITNESS: I hope I understood your
7 question well.

8 I have to confess that, if my understanding
9 is not correct, I would ask you to please clarify, but
10 from a procedural point of view, the Urban Certificate
11 is the first deed in the normal building proceeding.
12 Which is the general procedure, it starts with the
13 Urbanism Certificate and it ends with the Building
14 Permit. Therefore, the Urban Certificate is very
15 important for this final deed, which is the Building
16 Permit because what does it do? The certificate is an
17 adequate tool. It extracts from all the documents the
18 rules that the Building Permit must abide by. The
19 Environmental Permit is a different thing.

20 ARBITRATOR GRIGERA NAÓN: That was not my
21 question. My question was the substantive issues
22 addressed when rendering or not an Urban Certificate

1 to the extent that they cover environmental matters.
2 Is there an overlap or not with the matters that are
3 considered in order to issue an Environmental Permit?
4 Is there a connection or not? Or whatever conclusion
5 may have been reached at the level of granting or not
6 the Urban Permit are considered when granting the
7 Environmental Permit, or not?

8 THE WITNESS: In my opinion, the answer is
9 "no." I have shown that the EIA proceeding follows
10 from the Building Law. The Applicant must go to the
11 environmental authorities with an Urban Certificate
12 from the very beginning, in my opinion, just to show
13 that an investment has been initiated. It shows--the
14 Urbanism Certificate to show that his or her
15 intentions are serious.

16 The environmental authority sees a short
17 description of the Project. I want to build a
18 cemetery or whatever, something that has an impact on
19 the environment, and a decision is issued that says
20 that the environmental impact proceeding must be
21 carried out, and that is where the role of the Urban
22 Certificate ends, in my opinion. During my activity,

1 I have seen 10 or 20 Environmental Permits because
2 very few of buildings that are erected request or
3 imply an Environmental Permit being issued. But I have
4 seen hundreds of Urbanism Certificates. The Urban
5 Certificate is, in its substance, an inadequate
6 instrument from the point of view of the environmental
7 assessment. It serves nothing. In Romania we have
8 this saying which I will transpose as follows for
9 purposes of this discussion: trying to use the Urban
10 Certificate in assessing the environmental impact is
11 like trying to count hairs using boxing gloves.

12 PRESIDENT TERCIER: Thank you very much. If
13 we have no further question, I would like to thank
14 you, Mr. Podaru, for your examination. Thank you very
15 much.

16 We go now to the next step.

17 MS. ZIGMUND: I'm sorry--

18 PRESIDENT TERCIER: Who is speaking?

19 MS. ZIGMUND: I'm speaking.

20 There is a mistake in translation. He said
21 that Urbanism Certificate is not an adequate
22 instrument for an environmental assessment rather than

1 the environmental permit is not an adequate tool, it
2 should be. It's--I don't know, it moved already, but
3 it's there. It's on the record.

4 PRESIDENT TERCIER: We will not take time--

5 MS. ZIGMUND: Thank you.

6 PRESIDENT TERCIER: --if you could just look
7 between the Parties.

8 We have a recording of the--yeah, we have it.
9 Sorry, if you can look at it. Fine.

10 So, I not only suggest but decide that we
11 will start with the direct examination of Professor
12 Tofan. He's available? He's here?

13 DR. HEISKANEN: "She."

14 PRESIDENT TERCIER: Sorry, sorry. She's
15 here.

16 (Witness steps down.)

17 PROFESSOR DANA TOFAN, RESPONDENT'S WITNESS, CALLED

18 PRESIDENT TERCIER: Okay. You're ready?
19 Fine.

20 Good morning, Professor Tofan. I welcome you
21 in this room, in this Proceeding.

22 THE WITNESS: Good morning.

1 PRESIDENT TERCIER: Yes, you put the
2 microphone. Yeah.

3 I'd like to start, everybody, with the
4 question of the language.

5 In which language do you wish to testify?

6 THE WITNESS: I prefer to testify in
7 Romanian, as I have stated in my Opinion that was
8 drafted in Romanian as well.

9 PRESIDENT TERCIER: You were already in the
10 room before, so I don't need to introduce you to the
11 Members of the Arbitral Tribunal.

12 I would like to recall you that you will be
13 heard as an expert, and as such, may I invite you to
14 read--I hope you--I assume you understand English
15 sufficiently--

16 THE WITNESS: Yes.

17 PRESIDENT TERCIER: --to read it for us.

18 THE WITNESS: I solemnly declare, upon my
19 honor and conscience, that my statement will be in
20 accordance with my sincere belief.

21 PRESIDENT TERCIER: Thank you very much.

22 You have prepared for this Proceeding a Legal

1 Opinion dated 24th of May 2019.

2 Do you have it in front of you?

3 THE WITNESS: (In English) No. I expect my
4 only Opinion--

5 (In Romanian) I am waiting for it to be
6 provided to me. I only have my presentation with me.
7 But I can start with my presentation, if you would
8 prefer, before my Opinion gets here.

9 PRESIDENT TERCIER: I would really like to
10 have the confirmation that your Legal Opinion
11 corresponds to your testimony. You have not, but you
12 know it, certainly.

13 Can you confirm the content of your
14 testimony?

15 THE WITNESS: I can confirm the contents of
16 my Opinion in both its Romanian and English versions.

17 PRESIDENT TERCIER: Okay. How do you
18 have--just making it short because we are a little
19 bit--we have to finish in time.

20 Can you, in a few words, tell us, what is
21 your education and your position and then, also,
22 shortly--very shortly explain the process you followed

1 to prepare this Legal Opinion.

2 THE WITNESS: My name is Dana Tofan. I
3 started my activities as a scientific researcher in
4 1987 at the Legal Research Institute of the Romanian
5 Academy, in the field of administrative law and
6 administration science.

7 In 1992 I started a university career. And
8 following a competition, I started my work as a
9 university assistant at the Law School of the
10 Bucharest University in the field of administrative
11 law.

12 In 2005 I became a university professor. And
13 in 2007, I became a Ph.D. supervisor in administrative
14 law. Since last year, I have been administrating a
15 master program in urban--in urbanism and land
16 planning, organized by the Law School of the Bucharest
17 University together with the urbanism faculty of the
18 architecture university Ion Mincu.

19 I was also involved in several legislative
20 acts in the field of administration, including the
21 Administrative Code of Romania, the Law on
22 Administrative Litigation, and the draft form of the

1 Administrative Code.

2 As regards my publications, this work has
3 been constant from the beginning of my activity.

4 PRESIDENT TERCIER: Okay. I think we have
5 it.

6 THE WITNESS: And this is relevant for the
7 matter. I also wrote a Ph.D. thesis published 20
8 years ago, dedicated to the discretionary power of
9 public authorities in Romania.

10 As regards my Opinion--

11 PRESIDENT TERCIER: Yeah.

12 THE WITNESS: --as regards the drafting of my
13 Opinion, I was asked--I was contacted by telephone,
14 first of all, by the representatives of the Romanian
15 State, by the Romanian law firm, and we established a
16 meeting of the faculty in November 2018, so last year.
17 I remember the day because there was a conference in
18 the faculty the 23rd of November.

19 I then signed a confidentiality agreement. I
20 found out the main elements of the content if I were
21 to accept writing the Opinion. Then I received the
22 Legal Opinion of Professor Podaru for study. And then

1 I agreed to draft this Opinion a few months later, and
2 I was involved consistently in drafting the Opinion,
3 up to the time of its publication.

4 The content reflects exclusively my ideas, my
5 opinions, and my convictions about the matters subject
6 to analysis. For each part of the Opinion, I
7 collaborated with the representatives of the law firm
8 representing the Romanian State, especially when it
9 comes to the form and to the accurate translation of
10 the Opinion into English.

11 In that period, I left aside all other
12 activities except for the teaching activity.

13 PRESIDENT TERCIER: Okay. Good.

14 You will now present the--your--you will make
15 your presentation. You have 20 minutes, according to
16 the time. It is important to finish in time because
17 we have then to go to the next witness.

18 So, please. You have the floor.

19 DIRECT PRESENTATION

20 THE WITNESS: Regarding the structure of my
21 presentation, I have a slide specifying the analyzed
22 aspects, then the summary of findings, the consequence

1 of the presentation of my analysis.

2 My presentation will focus on three major
3 topics: the legal nature of the Urbanism Certificate,
4 potential administrative challenges against an
5 administrative act, and also, when it comes to the
6 silence of the administration when it does not act,
7 when it does not respond to a request.

8 And I will end with a focus on the
9 discretionary power of public authorities, in
10 particular when it comes to the discretionary power or
11 the right of judgment pertaining to the competent
12 environmental protection authority within the context
13 of the issuance of the Environmental Permit.

14 As regards the scope of the analysis, I would
15 not mention these again because I will draw my
16 conclusions immediately.

17 The documents I used in drafting my Opinion
18 were the Legal Opinion of Professor Podaru, punctually
19 and only on certain aspects the First Legal Opinion
20 and the Second--the Supplemental Legal Opinion of
21 Professor Lucian Mihai, also the relevant pleadings in
22 the case and the relevant documents regarding the

1 topics analyzed, and the relevant exhibits provided to
2 me by the counsel for Romania.

3 DR. LEAUA: The translation. She said (in
4 Romanian).

5 That means punctually and only on certain
6 specific aspects, the Legal Opinion of Professor
7 Mihai.

8 THE WITNESS: As regards the Summary of
9 Findings, I will not come back to those because I want
10 to expedite my presentation.

11 Based on my analysis, I reached the following
12 conclusions: Namely that the Urbanism Certificates
13 issued for RMGC had the character of individual
14 administrative acts. Also, that Urbanism Certificates
15 or the existence of a valid UC is necessary throughout
16 the Environmental Impact Assessment Procedure, both in
17 the submission of the request and throughout the
18 procedure, and also in view of obtaining the
19 Environmental Permit.

20 Another finding is that the existence of a
21 granted Mining License does not impose on the
22 authority the adoption of a PUZ. Also that the PUZ is

1 mandatory for the performance of the EIA Procedure and
2 for the issuance of the Environmental Permit.

3 Also, the possibility that any interested
4 party may have the right to challenge, before an
5 Administrative Court, the existence of an act and even
6 the lack of such an act in response to a public
7 authority's request, and also the fact that the public
8 authority that is competent for the issuance of the
9 Environmental Permit has discretionary powers in
10 making its decisions.

11 There are two areas of overlapping with the
12 Opinion of Professor Dragoş or, rather, the Opinions
13 of Professor Dacian Dragoş as regards the Urbanism
14 Certificate and the Environmental Permit.

15 I used the Romanian Legislation, while my
16 colleague--in addition to the Romanian Law--he also
17 used elements of EU Law. But we drew the same
18 conclusions.

19 And now, as regards the Urbanism Certificate
20 itself. I analyzed its legal nature. And on this
21 slide, you can see the first page of the first
22 Urbanism Certificate.

1 On the left side, you can see the elements
2 contained in the Urbanism Certificate, to which I will
3 come back later, in summary, in order to support the
4 legal nature of an individual administrative act of
5 this Certificate.

6 Let me specify that Urbanism Certificates
7 obtained by RMGC were six in number. The first was
8 obtained in 2004, and the last one in 2016.

9 And as I said, and as I elaborated on in my
10 Opinion, in the case of four out of the six Urban
11 Certificates, the Specialized Administrative Court
12 decided on the suspension in certain cases and
13 suspension followed by annulment of each of them that
14 were brought before the courts.

15 As regards the nature as an individual
16 administrative deed of the Urbanism Certificates, I am
17 in disagreement with both Professor Podaru, who denies
18 their nature as individual administrative acts that
19 cannot be challenged before the administrative courts,
20 and also in disagreement with the Opinion of Professor
21 Mihai, who concludes in the same respect.

22 There are several legislative and doctrine

1 and jurisprudence elements that I included in
2 supporting my position, and I would like to mention
3 only one of them, which I consider relevant.

4 It is a change/an amendment made in 2001 to
5 Law 50 of 1991 on the authorization of constructions.
6 This amendment was brought through Law 453 concerning
7 the legal regime of the Urbanism Certificate, which
8 introduced a wider regulation of the Urbanism
9 Certificate.

10 This made the--Professor Antonie Iorgovan,
11 with whom I developed my Ph.D., to appreciate the
12 following, and it's a sentence that you can find above
13 the one quoted by Professor Podaru, to show the nature
14 of conformity endorsement of the Urbanism Certificate.

15 So, in the phrase above this one, at Page 55
16 of Volume 2 of 2005, it is specified that the legal
17 provision transformed the Urbanism Certificate from an
18 administrative operation into an individual
19 administrative deed that can be challenged before the
20 administrative courts because the Urbanism Certificate
21 contains not only rights and obligations for the
22 issuing authority, but also for the Applicant, at

1 least for the fact that it specifies the need for the
2 Applicant to obtain a series of endorsements and
3 approvals in order to reach the end of the procedure,
4 which is the issuance of the Construction Permit.

5 So, there are several elements that I
6 elaborate upon in my Opinion. The Methodological
7 Norms implementing Law 50 of 1991 contained in the
8 tertiary legislation via a ministerial order enshrines
9 ten articles regarding the publicity and nullity of
10 the Urbanism Certificate if even one signature is
11 missing.

12 Concerning matters of doctrine, in the
13 literature there are several papers that I refer to.
14 And I would like to specify that the entire doctrinal
15 documentation is part of my personal library, I used
16 my materials to argue my positions.

17 And I would like to refer to the statement of
18 Professor Podaru, who, in the habilitation thesis
19 published in 2017 called "Administrative Law: A
20 Conception, A Vision," when discussing the
21 Certificate--the Urbanism Certificate as a key step in
22 the construction permitting procedure goes beyond what

1 I said in my Opinion, wondering whether it is more
2 than an individual administrative act, it is a
3 normative act, and from here on, a brief discussion on
4 the terms in which this act can be challenged
5 according to the provisions of the Administrative
6 Litigation Law, Article 11(1) and Article 11(4). So,
7 there are several doctrine elements, and I will not
8 insist upon them at this point.

9 As regards jurisprudence elements used in
10 support of my position, it's not only about
11 jurisprudence; it's also about decisions of appellate
12 courts or decisions of first courts (tribunals or
13 courts of appeal) that provide, and it is true that
14 NGOs filed such challenges, following which the courts
15 accepted suspension and annulment of the Urbanism
16 Certificates issued for RMGC.

17 There are four slides reflecting some of
18 these decisions, and I would like to underline just
19 one idea in this respect.

20 On several occasions, the judge in the case
21 estimates that the Urban Certificate is an individual
22 administrative act adopted in accordance with the Law

1 and reproduces the definition in Article 2 (1) let. c)
2 of the Law on Administrative Litigation.

3 Moreover, there are two jurisprudence
4 elements where RMGC itself, namely, the Applicant of
5 the Urbanism Certificates, as intervenor, filed
6 conclusions and intervened in some of these lawsuits,
7 claiming in 2005 to 2008 that the Urbanism Certificate
8 is an individual administrative act and wishes to
9 benefit from the ensuing effect.

10 There are two such rulings that I indicate in
11 the presentation before the Tribunal, but I will skip
12 those now. Also, I discuss in my Opinion the need for
13 an Urbanism Certificate in order to initiate the EIA
14 Procedure, to conduct it and, at the end, to obtain an
15 EP.

16 There is a distinction that is made between
17 the legislation before 2009 and after 2009, following
18 the amendments brought to the legislation in the
19 field. I would say this is irrelevant in either
20 situation.

21 We are shown why it was necessary not only to
22 submit the technical sheet, which was the requirement

1 before 2009, afterwards also the UC, an Urban
2 Certificate, through its content and the items that it
3 elaborates. It is the technical, economical, legal
4 status of the land and of the constructions built on
5 it, the urban planning requirements for the location
6 of constructions that are to be built, the various
7 endorsements and approvals.

8 And the UC actually refers to the relevant
9 environmental agency to check whether the issuance of
10 an environmental permit is necessary, which, of
11 course, in case of such a complex project, it is.

12 As elements of jurisprudence of case law,
13 there are two decisions that I bring up. There it is
14 ruled that the Urbanism Certificates are based on
15 urbanism plans, which is a sine qua non condition for
16 issuance of the EP because they contain relevant
17 information in order to reach such a final decision.

18 And there is another ruling which I quote and
19 you can see on the screen. "The contested
20 administrative act is one of the central elements of
21 the environmental impact assessment procedure started
22 by the defendant for the purpose of initiating the

1 mining project."

2 As for the obligatory character of the PUZ
3 for the EIA Procedure and in order to issue the EP,
4 there my Opinion contradicts the Opinion of Professor
5 Podaru and the Opinion of Professor Mihai, according
6 to which such a document is not necessary.

7 There are arguments of legislative nature
8 found in tertiary enactments and also, the case law,
9 the doctrine and the environmental law.

10 I only mention that there is a guide from
11 2000 that is still valid, regulating how to develop a
12 PUZ. There, it is provided under certain points, the
13 necessity to envisage some environmental elements and
14 some environmental protection rules that have to be
15 included in the PUZ (which is a normative
16 administrative deed). And based on this information,
17 the EP can be based on when it is issued.

18 DR. LEAUA: The Interpreters are struggling
19 to keep the rhythm. So, please, if you can a little
20 bit, slow down. Thank you.

21 PRESIDENT TERCIER: And if you are
22 interrupted, I can just tell you that you have five

1 minutes left.

2 THE WITNESS: Another aspect, RMGC had the
3 right to challenge not only an administrative deed or
4 a possible decision of rejection of the EP, that it
5 indeed didn't receive, but it had the right to
6 challenge this lack of activity of the administration.
7 The Constitution and the Administrative Litigation
8 Law, place on the same level with the administrative
9 act the failure to solve a request within the legal
10 deadline, thus the possibility to request to the
11 public authority to issue the administrative deed to
12 which one is entitled should it deem that the legal
13 requirements are met and one can initiate a litigation
14 in court and the court may set such an obligation to
15 issue for the competent authority.

16 Now, let's speak about the discretionary
17 power of the public authorities. This is an issue
18 that I analyzed by the end of my Legal Opinion, where
19 I dwell on the legal provisions and the doctrine, as
20 well as the case law also, in relation to my personal
21 knowledge that I acquired throughout the years. It is
22 something known to the public administration, to the

1 public authorities, and doesn't contradict at all the
2 predictably, the clear and conciseness--the clarity
3 and conciseness of the Law.

4 We have the notion of "appreciation right"
5 that results from Article 2(1)(n), that refers to the
6 "abuse of power" defined in relation to the right of
7 appreciation of the public authorities. The abuse of
8 power takes place when the right of appreciation is
9 breached through the breach of the competences, but
10 also through the affecting of the rights and the
11 liberties of the citizens. Discretionary power is the
12 right of any public administration body to make an
13 appreciation when the text of the Law does not show
14 the way to follow.

15 The administration is vast in its
16 functioning. Neither the primary nor the secondary
17 nor the tertiary legal enactors can reflect in the Law
18 all the problems issued from the dynamics of everyday
19 social life. So, there is right of appreciation of
20 the administration.

21 I have found this right of appreciation
22 mentioned in the jurisprudence of the Constitutional

1 Court, our Administrative Courts, in the elements of
2 doctrine. Even Professor Podaru makes this
3 distinction between competence and discretionary
4 power, and I identified it in the issue at bar, in the
5 fact that the last stage order established by
6 Order 860 of 2002, which refers to a quality report.
7 That it is so, it is necessary to assess the quality
8 of the Environmental Impact Report.

9 This quality element is subjective and is at
10 the discretion of the public authorities and the
11 issuing authority beyond the appreciations that all
12 the legal conditions have been satisfied by the
13 applicant from its perspective.

14 Therefore, there are elements in the Law--in
15 the legislation leading to such a conclusion. I have
16 found some elements. I don't know whether I can see
17 it on the slide. We can--I can show it on the slide.

18 We have Article 49 Paragraph 1 of Order
19 860/2002, saying that the EP shall be issued only
20 after the satisfaction--only after the elimination of
21 the negative consequences on the environment brought
22 by a project in compliance with the technical

1 documentation and the legal provisions into force.

2 I would stop here, if you allow.

3 PRESIDENT TERCIER: Thank you very much. As
4 you know, we have now to change a little bit because
5 Mr. Bode could only--Mr. Bode could only be heard by
6 video at 11:00.

7 THE WITNESS: (In English) I understand.

8 PRESIDENT TERCIER: You understand. I'm
9 sorry for that. You will be cross-examined after the
10 lunch. And I would like to recall to you that you are
11 under testimony, meaning--

12 THE WITNESS: (In English) Yes.

13 PRESIDENT TERCIER: --that you are not
14 allowed to have any contact.

15 THE WITNESS: Yes. I can go or I must rest
16 there?

17 PRESIDENT TERCIER: No, no, no. You can go.
18 But, really, we trust you that you will have no
19 contact with representatives or counsel for
20 Respondent. Okay?

21 THE WITNESS: Okay.

22 PRESIDENT TERCIER: Good. Fine.

1 So, we have really a very, very short break.
2 I would like you really to be back in five minutes so
3 that we could proceed with the examination of
4 Mr. Bode.

5 (Brief recess.)

6 PRESIDENT TERCIER: Good evening, Mr. Bode.
7 I know it's 6:00 p.m. in Bucharest. It is 11:00 a.m.
8 in Washington. I would like to start with a few
9 technical points.

10 Would it be possible for you to sit in front
11 of the camera?

12 SECRETARY YETANO: So, at the head of the
13 table.

14 THE WITNESS: Just a minute.

15 (Comments off microphone.)

16 THE INTERPRETER: "Is it okay that way?" was
17 the question.

18 They need to move some tables.

19 PRESIDENT TERCIER: Yes, you are in front of
20 us. I will start with just a question concerning the
21 language.

22 You have expressed that you would wish to

1 speak Romanian.

2 Do you hear me, or do you hear the
3 translation?

4 THE WITNESS: Yes, that's right. I can hear
5 the translation.

6 PRESIDENT TERCIER: Fine. I would like to
7 shortly introduce you to the Members of the Tribunal.
8 I don't know what you--who is with you that you have.

9 On my right-hand side is Professor Horacio
10 Grigera Naón. On my right-hand side is Professor
11 Zachary Douglas. We have the Secretary and the
12 Assistant to the Tribunal. My name is Pierre Tercier.
13 I'm the Chairman of the Tribunal.

14 You will be heard in this procedure--

15 THE WITNESS: Good evening, everyone.

16 PRESIDENT TERCIER: Good evening again.

17 You will be heard in this procedure as an
18 Expert--as a Witness. I would like you to read the
19 declaration that you must have on your table.

20 Can you read it?

21 THE WITNESS: Yes, I have it in front of me,
22 and I will read it now.

1 I solemnly declare, on my honor and my
2 consciousness, that I will tell the truth, the whole
3 truth, and nothing but the truth.

4 PRESIDENT TERCIER: Okay. I would like to
5 start with a few technical aspects.

6 First, it is--you will be heard by--via
7 video. We know--we have heard you might need to have
8 recourse to your phone. We hope very much that it
9 will not be the case so that we have--can have a clear
10 and full examination.

11 Secondly, there will be a transcript made
12 from here. It's important that you avoid to speak at
13 the same time as the other speaker that is expressing
14 himself before you. And then, because we have a
15 translation, it is necessary to wait a little bit, a
16 few seconds, before answering questions that will be
17 put to you. These are the few points that I would
18 like to recall.

19 You have prepared for this Procedure a
20 Witness Statement dated the 6th of May, 2019. Have
21 you this document in front of you?

22 THE WITNESS: Yes, I have it.

1 PRESIDENT TERCIER: Can you confirm--

2 (Discussion off the record.)

3 PRESIDENT TERCIER: Okay. Could we know who
4 is on your side? Because we just hear a voice. Yeah.
5 Okay. Before I go further--

6 THE WITNESS: I will invite them to introduce
7 themselves.

8 PRESIDENT TERCIER: Could we have the
9 translation, please.

10 MR. POPA: I am Cornel Popa. I am an
11 associate at Tuca Zbârcea & Asociatii.

12 MR. BUJU: I am Victor Buju. I am an
13 associate with Tuca Zbârcea & Asociatii law firm.

14 MR. DEACONU: Good morning, everyone. I am
15 Stefan Deaconu, and I am with LDDP, Leaua Damcali
16 Deaconu & Paunescu.

17 PRESIDENT TERCIER: We know that we have not
18 much time. In order to save time, I will not start
19 with my traditional questions.

20 You know how the examination will be
21 conducted. You will be first examined by counsel for
22 Respondent. Then there will be a cross-examination

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

21 PRESIDENT TERCIER: Okay. For us, we will
22 now take a one-hour break, a lunch break, and then we

1 will start--looking at the time, we will start with
2 Professor Tofan's cross-examination.

3 Okay? Good. Let's go.

4 (Whereupon, at 12:39 p.m., the Hearing was
5 adjourned until 1:40 p.m. the same day.)

1 MR. TUCA: Thank you, Mr. President.

2 CROSS-EXAMINATION

3 BY MR. TUCA:

4 Q. Good afternoon, Professor Tofan. My name is
5 Florentin Tuca. I'm from Tuca Zbârcea & Associates,
6 Bucharest; I'm one of the members of the legal team
7 representing the Claimants in this procedure. And I'm
8 going to ask you a few questions about your Legal
9 Opinion submitted in this case. None of them is meant
10 to call into question your professional background or
11 your well-known reputation within the Romanian
12 academic community.

13 In order to avoid any misunderstandings
14 because I'd like to have a discussion on some legal
15 and technical topics, in order to try to speak the
16 same language both metaphorically and literally, and
17 more than that, in order to try to help Members of the
18 Tribunal to speak perfectly Romanian by the end of
19 these two weeks, I will switch into the Romanian
20 language.

21 Thank you very much for your understanding.

22 A. I think so. It's easier--it's very powerful

1 in Romania.

2 DR. LEAUA: I'm sorry, we didn't instruct our
3 expert for this hypothesis, and for that reason I
4 simply would like to make sure that our expert
5 understands that the translation is nevertheless given
6 to the Tribunal and that the dialogue should not
7 follow in a Romanian language rhythm that cannot
8 ensure proper translation for the Tribunal's
9 understanding.

10 Thank you.

11 PRESIDENT TERCIER: Thank you very much. I
12 will, indeed, be happy to be also involved in the
13 dialogue, and to have also a clear understanding on
14 what are the subjects.

15 Yes, please, Mr. Tuca.

16 MR. TUCA: Thank you, Mr. President.

17 BY MR. TUCA:

18 Q. Professor, this is a procedure for the
19 issuance of an administrative deed, and it is correct
20 to presume that the issuer, the public authority,
21 is--has the obligation to abide by the law; is that
22 correct?

1 A. Yes, that is correct.

2 Q. Also, is it correct to start from the
3 assumption that, within the procedure, the Applicant
4 must submit the documents required by law for the
5 issuance of such a deed?

6 A. Yes, those documents have to be submitted.

7 Q. Thirdly, is it correct to presume that the
8 public authority has no right to favor a certain
9 Applicant during the proceeding?

10 A. I do not know what you mean by that wording.
11 What do you mean by "favorizing"?

12 Q. "To favorize" in its meaning in Romanian, is
13 to give a certain advantage to one of the applicants
14 taking part in a proceeding or to grant an advantage
15 that brings benefits to one of the participants in the
16 proceeding, and I will repeat my question: Does a
17 public authority have the right to favor an Applicant
18 in the proceeding?

19 A. To be able to give you a grounded question, I
20 have to ask who is to establish that an applicant has
21 been favorized?

22 PRESIDENT TERCIER: Please, remember that you

1 have to wait; otherwise, indeed, it will be impossible
2 for us to understand the translation.

3 BY MR. TUCA:

4 Q. My question was a question in principle. If,
5 according to Romanian Law, to the relevant Norms that
6 regulate public administration, if an administrative
7 body has the right to grant an advantage, to favorize
8 a participant in the proceeding?

9 A. I will say in answer to that question, that
10 no--there is no legal provision providing, allowing
11 for such a possibility. You referred to Romanian Law,
12 Romanian rules when you started your question.

13 There is no legal provision explicitly
14 stating that administration is allowed to prefer one
15 of the two parties.

16 Q. With all due respect, Professor, I did not
17 expect such an answer from your part, and I'm not
18 prepared to offer an excerpt of the Romanian
19 Constitution in the binders that we have provided.
20 The Constitution of Romania states that all citizens
21 are equal before the Law as a principle, and this is a
22 very well-known provision, isn't it?

1 A. Yes. That is Article 16 of the Constitution,
2 Paragraph 1. Nobody is above the Law.

3 PRESIDENT TERCIER: We will not be able to
4 understand, so please first do not speak at the same
5 time; and, secondly, wait because really we need
6 always a few seconds to listen to the last sentence.

7 Please; otherwise, I will have to intervene
8 too many times.

9 BY MR. TUCA:

10 Q. Consequently, the answer to the question
11 is...

12 A. Which question would that be? The quote from
13 the Constitution?

14 Q. No. To the question whether the public
15 authority has the right, is entitled to favorize an
16 Applicant during a proceeding.

17 A. From what I know in administrative law I have
18 to specify that there is no legal provision to that
19 effect, and my understanding of the quote from the
20 Constitution that you mentioned would lead to the
21 contrary statement: Nobody is above the Law, so I
22 would say that nobody can be favorized from a, let's

1 call it, doctrine point of view.

2 Q. Let us then look together at the document
3 Exhibit Number C-1621. You will find it under Tab 14.

4 In that document, an excerpt from your own
5 scientific work, where you referred to the principle
6 of the legality of administrative deeds. And by that,
7 we understand the obligation for these administrative
8 deeds to be in conformity with the provisions of the
9 Constitution, the laws adopted by Parliament and other
10 enactments having a superior legal force. You agree
11 with this principle?

12 A. I agree with these statements.

13 One remark: This is the first edition of
14 that work in 2004. We have already published a
15 fourth edition, the latest, in 2017.

16 Yes, the legality principle must be abided
17 by. That is the answer--that is the essence.

18 Q. In the light of this principle, the documents
19 deemed essential for the proceeding must be expressly
20 specified; is that not so?

21 A. I don't know what documents you refer to and
22 what proceeding you refer to.

1 You said documents required for the
2 proceeding. Which proceeding would that be, and what
3 documents are you talking about?

4 Q. Again, this is a question of principle that
5 applies to any proceeding, to any administrative
6 proceeding.

7 Is it correct to state that a document that
8 is essential for the carrying out of a proceeding must
9 be expressly required by the law?

10 A. Do you mean administrative proceedings?

11 Q. Yes, that's exactly what I mean.

12 A. What exactly do you understand by a document
13 that is essential? Your question is of a very general
14 nature. Are you focusing on my knowledge as a
15 specialist in administrative law or the specific
16 issues that I addressed in the Legal Opinion that I
17 submitted?

18 I would very much like for you to be more
19 specific so that I can provide an informed answer.
20 What do you mean by "essential documents"? What is
21 that supposed to mean? In Romanian legislation, there
22 are formal aspects that sometimes are deemed to weigh

1 more than issues of substance. Let's take the regime
2 of misdemeanors regulated by Government Ordinance no.
3 2/2001 that refers to the contents of the misdemeanor
4 minutes. There are certain formal conditions that
5 have to be included and which, if not observed, may
6 lead to the minutes of misdemeanor being null and
7 void, but that is another discussion. If you want me
8 to give you a grounded answer, you will have to be
9 more precise in your question.

10 You say "document," you say "essential
11 document." What "essential documents" are we talking
12 about?

13 Q. The document in the absence of which the
14 proceeding may not go further or without which the
15 requested deed cannot be issued.

16 A. What procedure--what proceeding do you have
17 in mind? Is this an administrative proceeding? From
18 the perspective of the administrative law, it is very
19 important to note that there is no code of
20 administrative procedure. Such a code would clarify
21 many problems that we--many hurdles that we encounter
22 in courts dealing with administrative litigation, so

1 that depends on what you mean.

2 Q. Let us, for instance, speak about the EIA
3 proceeding, which is being carried out?

4 A. Yes, we are talking about the EIA Procedure.

5 Q. Could you mention the legal grounds whereon
6 this proceeding was carried out?

7 A. The EIA proceeding was grounded on Order 860
8 of 2002 on the proceeding to assess environmental
9 impact that governed the proceeding in this case, at
10 least for a period of time, because the Law has
11 changed, and it was quite a challenge for me to follow
12 all the legislative amendments that took place during
13 this period of time.

14 I referred to this enactment, which is
15 Exhibit C-1774 in my opinion.

16 Q. When you reviewed these legal provisions,
17 have you identified texts entitling the administrative
18 authorities to ignore procedural steps and deadlines?

19 A. Do you mean Order 860 of 2002?

20 Q. Yes.

21 A. What do you mean, "deadlines that ignore"?

22 There are some deadlines, but this being a

1 complex procedure there is one of ten days, one of
2 five days, one of 15 days. At one point I did try to
3 add them up to see where that would lead us to, but
4 after I looked and reviewed all the provisions, I
5 couldn't come up with a clear answer because it is
6 always--it all hinges on the relationship between the
7 Applicant and the competent authority that requests
8 various information.

9 Q. Professor, with all due respect, my question
10 was very precise. Have you identified any provisions
11 that allowed or entitled the Authorities to ignore
12 procedural stages and deadlines?

13 A. What authorities are you referring to? Are
14 you referring to the competent authority on
15 Environmental Protection? Are you referring to the
16 TAC or the Ministry of the Environment? It's not
17 clear to me to what authority you are referring
18 because I can give you an answer that is satisfactory
19 to what you expect.

20 Q. With all due respect, your avoidance is
21 visible, and let me rephrase the question.

22 You said you studied the Norms that provide

1 for the EIA Procedure, that regulate the EIA
2 Procedure, and I asked you whether, when reviewing
3 these Norms, you identified also rules that entitled
4 the Authorities to ignore the rigors of the procedure.

5 A. I did not identify such Norms, but in my
6 presentation which was a bit rushed towards the end, I
7 have to admit--and I apologize for that,
8 Mr. President--I mentioned Order 860 of 2002 in the
9 context of reviewing the discretionary power of the
10 public authority, in particular the competent
11 authority for Environmental Protection. And I
12 mentioned Article 49, which, in its Paragraph 1, and I
13 quote from memory, this wording: "The Environmental
14 Permit cannot be issued until it is ascertained that
15 all the negative consequences on the environment are
16 eliminated, according to the existing technical
17 documentations and according to the legislation in
18 force."

19 Here, I identified a right of appreciation of
20 the competent authority to issue the Environmental
21 Permit. If it is from the perspective of this text,
22 you said "ignoring," ignoring the procedural

1 deadlines, then I would leave the counsel to interpret
2 the text. The order sets out numerous technical
3 Norms, and I only dwelt upon those in which I was
4 interested in substantiating my opinion.

5 Q. Professor, does challenging an administrative
6 deed in court, affects its validity?

7 A. Counsel, challenging an administrative deed
8 in court does not affect its validity until the judge
9 in the case makes a decision either in the sense of
10 ascertaining the legality of the Act and in the sense
11 of rejecting the action or in the sense of
12 ascertaining the non-legality of the Act and annulling
13 it. There is a special procedure in Article 14 of the
14 Law on Administrative Litigation, 554 of 2004,
15 providing that it may be requested in an emergency
16 procedure the suspension of the administrative deed
17 prior to the request for Annulment at the same time
18 with the launch of the preliminary procedure and the
19 court, in a fast-track procedure, may rule on this if
20 two express conditions are met: Namely, that there
21 are imminent damages or the risk of imminent damage,
22 and well justified cases.

1 In this situation, the Court may ascertain
2 suspension of the deed which ceases to produce effects
3 once it is suspended. And, of course, afterwards, the
4 chain of lawsuits is triggered.

5 —

6 So, the mere initiation of an action in front
7 of the administrative litigation court does not
8 lead to the suspension of the deed, except for
9 one situation: the one ascertained by...

10 Q. Please, excuse me--

11 (Overlapping interpretation with speaker.)

12 DR. LEAUA: Please allow the witness--the
13 Expert to finish the sentence.

14 THE WITNESS: What do you think, Mr.
15 President? Can I continue?

16 PRESIDENT TERCIER: Okay. I must say it is,
17 indeed, difficult because we do not see always the
18 change, in the translation between the change and the
19 answer. That is the first point.

20 And if you could, indeed, follow my two
21 rules, it would be really very important.

22 And, indeed, third, let the Expert finish her

1 sentence.

2 THE WITNESS: Thank you.

3 PRESIDENT TERCIER: Try, and I like people
4 with temper, but wait, really, because it will be
5 difficult to follow. It is already.

6 Okay. Good.

7 THE WITNESS: Article 123(5) of the Romanian
8 Constitution "republished" expressly provides for the
9 possibility of the Prefect to exercise scrutiny over
10 the legality of acts issued by local authorities, and
11 an introduction of the court action entails, according
12 to Paragraph 5 of Article 123, the "de jure"
13 suspension of the deed. So, it is the Prefect that
14 initiates the legal action in the Administrative
15 Litigation Court in fulfilling one of its duties, this
16 leads to the "de jure" suspension of the Act according
17 to the Romanian Constitution and according to Article
18 3 paragraph 1 of Law 554 of 2004 on administrative
19 litigation.

20 Q. I invite you to have a look at a document
21 under tab 2--

22 DR. LEAUA: Before that, Professor, please

1 slow down because references to legal texts cannot be
2 followed by Interpreters when translating numbers or
3 references to specific articles. It's just too fast
4 for them, and we skip the record constantly, so it
5 would be difficult to have a problem on that.

6 BY MR. TUCA:

7 Q. This is the Legal Opinion of Professor Dacian
8 Dragoş filed in this case.

9 A. It's only in English, you will allow me a
10 little more...

11 Q. Paragraph 196.

12 A. Mr. President, please allow me more time to
13 understand the exact meaning.

14 PRESIDENT TERCIER: Take your time.

15 THE INTERPRETER: 196.

16 PRESIDENT TERCIER: You can have a
17 translation into Romanian, if you wish.

18 THE WITNESS: Thank you very much, but I
19 open, it was...

20 (Witness reviews document.)

21 THE WITNESS: This is why I did not submit my
22 opinion in English and I did not want to testify in

1 English because I have an issue with the English
2 terminology.

3 PRESIDENT TERCIER: Okay. Could you--could
4 somebody from your side translate it into Romanian,
5 please.

6 BY MR. TUCA:

7 Q. The fact that the legality of a legal
8 administrative act is challenged--

9 DR. LEAUA: We would like to have the
10 official Interpreters on record and not counsel
11 interpretation, please.

12 MS. ZIGMUND: I will read the English for the
13 translators to be able to translate for you.

14 DR. LEAUA: Yes, please.

15 MS. ZIGMUND: So, the fact that the legality
16 of an administrative act--do you hear?

17 THE WITNESS: Try again.

18 MS. ZIGMUND: The fact that the legality of
19 an administrative act--is that okay? "The fact that
20 the legality of an administrative act is challenged,
21 judicially suspended or annulled poses significant
22 challenges to the enforcement of that act, as a

1 presumption of its validity (legality) is in question
2 or has ceased to exist."

3 PRESIDENT TERCIER: What is the question?

4 BY MR. TUCA:

5 Q. What is your opinion about this statement,
6 about this thesis?

7 A. It can be an interpretation given to a
8 factual situation, that once the act was challenged in
9 the Administrative Court, but you see, there is a
10 succession of three verbs, challenged, suspended or
11 annulled, so challenged, suspended or annulled. In
12 the case of suspension or annulment, it is obvious
13 that it is in question: in case of the suspension- the
14 legality until the annulment case is resolved; in
15 case of the annulment the legality of the Act. And in
16 the opinion of my colleague, Professor Dragoş, there
17 is, of course, the issue of the presumption of
18 legality--yes, the presumption of legality of that
19 Act.

20 So, what is, in fact, the idea? It's an idea
21 of administrative law: As long as an administrative
22 act is challenged in court, then suspicions arise that

1 that act could be affected in terms of its legality.
2 If it is suspended or annulled, that's another
3 discussion.

4 Q. With all due respect, Professor, I would like
5 to insist to maintain a question-answer dialogue. We
6 know that when the Application was filed for the
7 Environmental Permit--

8 A. May I, because I want to specify so that
9 things are clear. So, submission of the application
10 for the triggering of the Environmental Impact
11 Assessment procedure, because it is a procedure
12 underway, it is a procedure that is regulated by law.

13 Q. At that time, the mining project for RMGC--

14 PRESIDENT TERCIER: Mr. Tuca, please, really
15 it's extremely difficult to have only translation, so
16 you have really to comply with the instructions;
17 otherwise, it is very difficult to understand. It's
18 not easy already without that.

19 MR. TUCA: Okay. Let me resume.

20 BY MR. TUCA:

21 Q. At that time, the mining project of RMGC was
22 reflected in a PUZ of 2002. At that time, did the

1 Ministry of the Environment have the competence of
2 assessing the 2002 PUZ?

3 A. I think it was filed with the local
4 authority. It's a procedure that doesn't lead
5 directly to the Ministry of the Environment. The
6 first Urbanism Certificate 68 of 2004 was based on the
7 2002 PUZ, but at the same time its content, in several
8 instances and, in fact, the content of the other five
9 Urbanism Certificates expressly mentioned the need to
10 obtain an amended PUZ because the existing PUZ of 2002
11 did not meet the requirements of the Project intended
12 to be developed.

13 And you connect--you make a connection that
14 has no bearing in what I said in my legal opinion,
15 whether the Ministry had the right to challenge the
16 2002 PUZ?

17 Q. Whether it had the competence.

18 A. And when you say the "Ministry"--

19 I'm sorry, but in relation to the applicable Law,
20 the legislation applicable to this procedure, there is
21 this TAC, the "Technical Assessment Committee," that
22 we talked about that met several times, so the issue

1 of--the making of a proposal for the issuance of the
2 EP depends on the TAC.

3 So, you're asking me whether the TAC was
4 allowed to ask for a PUZ from the Applicant? So, if
5 you allow me, Mr. President, I don't understand the
6 meaning of these questions in relation to the
7 legislation that I reviewed and in relation to the
8 opinion that I have drafted and in connection to the
9 merits of the EIA Procedure. It is not a simple
10 procedure: there is a moment when it is initiated,
11 then there is a period when it's ongoing for a certain
12 period of time which we understand that it cannot be
13 precisely found in the legislation, cannot be framed
14 in a specific deadline. And at the end, the
15 commission recommends to the Ministry that an EP is
16 issued, which is made through a Government Decision.

17 PRESIDENT TERCIER: I think in the interest
18 of everyone, if you could have shorter questions and
19 try to have shorter answers because even if I
20 understand, you have a lot to elaborate, and it would
21 be really better to do it step by step with short
22 questions and short answers.

1 BY MR. TUCA:

2 Q. Is the PUZ an indispensable document for the
3 EIA Procedure?

4 A. Yes. I argued broadly in my opinion,
5 doctrine, law and case -law, on that, that the PUZ is
6 necessary for the EIA Procedure.

7 Q. Did you say there that the PUZ should be
8 approved before the EIA Procedure is initialized? Is
9 that correct?

10 A. If you allow me, the first Urbanism
11 Certificate was issued based on the 2002 PUZ. The
12 first Urbanism Certificate based on which on the 14th
13 of December 2004, the EIA Procedure was started,
14 provided the need for a modified PUZ.

15 And I don't understand which PUZ you had in
16 mind. There is a draft amended PUZ in 2006, but it
17 was never approved by the competent authority.

18 Q. Let's read together Paragraph 197 of your
19 opinion.

20 A. I read it. I know the contents of this
21 paragraph.

22 Q. Am I to understand that such a Decision is

1 made in favor of RMGC?

2 A. No, because they didn't come to the point of
3 making a decision. This is an ongoing procedure, and
4 this is also in line with the idea that I wanted to
5 transmit in this paragraph; namely, that undoubtedly
6 there should have been an approved modified PUZ at the
7 moment when they would have reached the moment of the
8 issuance of the EP. The idea or the contents in para.
9 197 speaks about a right of appreciation of the
10 administration; and, based on this appreciation right,
11 knowing or understanding the vastness and complexity
12 of the Rosia Montana Project, the Ministry of the
13 Environment accepted to start, to initiate the
14 procedure, but it's obviously it wouldn't have
15 finalized it if they didn't have the modified--the
16 approved modified PUZ approved by the local--competent
17 local authority at the moment of taking a decision on
18 the EP.

19 Q. You maintain that the Ministry of the
20 Environment used its discretionary power, so I want to
21 ask you if the Ministry was obliged to motivate the
22 derogation from the legal provision?

1 A. I would ask you, which legal provision do you
2 have in mind? The Ministry didn't come to a final
3 decision. It was an ongoing procedure that was not
4 finalized through a decision. The Ministry didn't
5 come to a decision. It simply considered that based
6 on its appreciation right, and there is no legal
7 provision, that it could start the procedure that does
8 not lead to any effect. It is an ongoing procedure
9 that has not reached the final act that produces legal
10 effects. It is about an ongoing procedure that took
11 place for a certain period of time.

12 Q. According to what you state, the PUZ was
13 indispensable for the procedure.

14 A. The modified PUZ, because there was a PUZ
15 that was approved in 2002. It was necessary to
16 finalize the procedure, to come to a decision.

17 Q. Based on Norms, I suppose?

18 A. Based on legal provisions.

19 I indicated the legislation, the tertiary
20 legislation that is relevant, Ministerial Orders, and
21 I can elaborate, if you allow me, President.

22 PRESIDENT TERCIER: Try really to just stay

1 with the questions--

2 (Overlapping interpretation with speaker.)

3 BY MR. TUCA:

4 Q. Accepting to start a procedure before the
5 approval of the PUZ, the Ministry applied a derogation
6 from the Law; is that true?

7 A. No.

8 Which law are you speaking about? There is
9 no provision--I'm sorry, President. I specified from
10 the very beginning that we don't have
11 administrative-procedural code because that would
12 solve many problems. This is a procedure that is
13 detailed in the Law. It means nothing more than a
14 number of administrative facts or actions that are not
15 finalized by anything but the issuance of a document,
16 and that stage has not been reached.

17 Q. Professor, on the one hand, you said it was
18 necessary to have a PUZ, based on specific norms, that
19 would be approved before the initiation of that
20 procedure--

21 PRESIDENT TERCIER: Let him finish the
22 question, please.

1 BY MR. TUCA:

2 Q. Consequently, the Ministry was obliged to
3 abide by these Norms. On the other hand, you maintain
4 that the Ministry derogated from these norms, and it
5 started the EIA Procedure based on the discretionary
6 power; correct?

7 A. No, because there is no legal provision that
8 would indicate in detail these things.

9 This is what I wanted to point out: When the
10 administration does not have in the Law, Law in a
11 broad meaning, a clear way to follow in order to reach
12 a certain goal that is the issuance of an EP, then it
13 has a right of appreciation. I can't realize which is
14 the legal provision that you contemplate. I said it
15 many times before the President and before the
16 co-Arbitrators, that these Urbanism Certificates
17 provided for the need of a modified PUZ, adapted from
18 the technical point of view to the Project that was to
19 be accomplished.

20 So if you ask about the grounds for the
21 necessity of this PUZ (or for the obligation of the
22 Applicant to initiate the drafting procedure of a

1 draft PUZ that will go to the local authority), the
2 grounds were found in the Urbanism Certificates. As
3 for the concrete drafting, which is also a complex
4 procedure, we have a Guide 176/N of 2000, that details
5 the procedure for drafting the PUZ with a lot of
6 technical details.

7 Q. Professor, could the Ministry have issued or
8 proposed the issuance of the EP without a valid
9 Urbanism Certificate?

10 A. To propose in the absence of a certificate? I
11 state that there should have been a valid Urbanism
12 Certificate throughout the procedure.

13 If you allow me, may I--

14 Q. Could the Ministry have conducted the EIA
15 Procedure without a valid PUZ?

16 A. Stages of the procedure, but it wouldn't have
17 gotten to --. No, it couldn't have finalized.

18 Because it couldn't have been finalized because, in
19 the PUZ, --there is information which is necessary in
20 order to finalize the procedure, and this information
21 is linked to environmental protection and, I can be
22 more specific if you allow me. In the guide that I

1 have mentioned, which is tertiary legislation, there
2 was a Ministerial Order of that time, an order of the
3 MLPAT -those were the initials of the ministry at that
4 time, there are two points that are mentioned in my
5 opinion, 2.7 where it is explicitly provided
6 "Environmental Issues" and 3.7, "Environmental
7 Protection Rules." And these aspects should have been
8 considered and included in the PUZ.

9 ARBITRATOR DOUGLAS: Could I interrupt for a
10 moment. The question was whether it could be
11 conducted, whereas you answered as to whether or not
12 it could be finalized, and they're two different
13 things. Can the process be ongoing without a PUZ, or
14 is it just the case that when you make your final
15 decision you have to have a PUZ?

16 THE WITNESS: It could have been conducted,
17 but at one point, in order to make a decision, they
18 should have considered the elements in the PUZ, so it
19 couldn't have been finalized in the absence of a
20 modified PUZ.

21 On the other hand, allow me to specify that I
22 am charged with administrative law, administrative

1 sciences for many years, but I didn't work in the public
2 administration, at least not after 1990, before that,
3 I worked in the public administration during my
4 internship. I'm not aware of the details of the
5 activity of a committee or a body except from some
6 discussions with people working in the system or from
7 what I've read. You can be familiar with the actual
8 functioning of the administration only if you are inside
9 or within the administration.

10 BY MR. TUCA:

11 Q. Could the Ministry of the Environment propose
12 the issuance of the EP in the absence of the
13 endorsement from the Ministry of Culture?

14 A. Let me say that this is a problem, an issue,
15 that I haven't reviewed, I did not discuss the
16 Ministry of Culture's endorsement. This is something
17 that I didn't analyze at all in my opinion, and I
18 couldn't give you a grounded point of view, because it
19 is a different field of the legislation, another legal
20 regime. I did read it but I do not undertake a
21 precise answer.

22 It is one of the endorsements required under

1 the UC. There is specific legislation there, the law
2 on historical monuments no. 422 of 2001, the legislation
3 on archaeological heritage- the Government Ordinance
4 no. 43/2000, that were debated, I was in the hearing
5 room. So, I cannot undertake to give absolute, an
6 informed answer as long as I haven't reviewed in detail
7 the legislation. I'm not addressing the Ministry of
8 Culture's endorsement, in my opinion--

9 (Overlapping speakers.)

10 Q. However, you have stated that you looked at
11 applicable law when it comes to the EIA Procedure.

12 A. Mr. Tuca, I looked at the applicable law, to
13 the extent of the ideas and convictions that I
14 elaborated in the contents of my opinion. The
15 legislation on the matter is quite complex, it has
16 evolved, and there have been a series of legal
17 enactments in the field, even in the field that I
18 elaborated on in my opinion--

19 Q. I respectfully ask you to limit your
20 answer to--

21
22 (Overlapping speakers.)

1 PRESIDENT TERCIER: Sorry Sir, really, this is
2 an extremely complicated examination. [*Speaking to*
3 *Prof. Tofan*]: And you speak too quickly. You do not
4 take time to pause after your statement, and your
5 answers are extremely long. So, really--I think it is
6 really in the interest of everybody that this
7 examination is constructive, and even if I understand
8 you have a lot of things that you would like to ask or
9 to answer, it is really important now to be a little
10 bit more concise.

11 BY MR. TUCA:

12 Q. Let us read together Para 281 of your
13 opinion, Paragraph 281. 281 is the paragraph number.

14 A. 281, thank you.

15 PRESIDENT TERCIER: Can you now read it, and
16 then we will have a question to which you will answer.

17 THE WITNESS: 281 of my opinion.

18 BY MR. TUCA:

19 Q. In exercising its discretionary power, the
20 administrative body must pursue public interest; is
21 that correct?

22 A. Yes.

1 Q. Let us look at para. 299.

2 In exercising its duties, the administrative
3 body has the obligation of placing itself in the best
4 conditions. Is this correct?

5 PRESIDENT TERCIER: Where are you quoting
6 from?

7 MR. TUCA: Professor Tofan Legal Opinion.

8 PRESIDENT TERCIER: Yeah, but here, what is
9 on the screen?

10 MR. TUCA: 299, final part of this paragraph.

11 PRESIDENT TERCIER: Okay.

12 BY MR. TUCA:

13 Q. Do you confirm that the administrative
14 authority must place itself in the best conditions?

15 A. I confirm that. That is a quotation from my
16 work where I quoted a famous French author, Breban, if
17 I'm not mistaken. I liked this idea; I collect a
18 certain meaning out of that.

19 Q. Is it true that these obligations that the
20 two paragraphs showed are applicable also to the case
21 where administrative bodies work together,
22 collaborate?

1 A. I'm referring in this paragraph to the
2 discretionary power of a certain administrative
3 authority. I did not, it does not affect my idea, I
4 did not have in mind (I told you that --this is a
5 quotation, those are not my ideas, the author is
6 quoted in my book) the report between two public
7 administration authorities, if that is what you are
8 referring to. I referred to the attitude of the
9 administration towards citizens, individuals, legal
10 entities, to which it is addressed. That is what I
11 had in mind.

12 Q. I would like us to look together at the
13 document under C-1901. 20 in the table.

14 Tab 20, that is an endorsement issued by the
15 Ministry of Culture, the Alba County Department for
16 the SEA proceeding. The date of that document is
17 mentioned on the document. It dates from April 2010.

18 A. As far as I can remember, that is not one of
19 the documents, one of the exhibits that I referred to,
20 subject to the fact that I did refer to 120 documents
21 after all.

22 Q. Please wait for my question.

1 Is it true that you reviewed a litigation
2 case on the matter that is included in your Legal
3 Opinion? Is that correct?

4 A. I have reviewed litigious cases that were
5 related, that led to the suspension and then the
6 annulment of the Environmental Endorsement necessary
7 for the amended PUZ following the SEA proceeding.

8 Q. Your analysis starts at para. 215 of your
9 opinion.

10 A. That is correct.

11 Q. According to the document that you have seen,
12 the Ministry of Culture endorsed the SEA proceeding in
13 April 2010; is that correct?

14 A. That is correct, but for the record that is
15 not part of the exhibits that I referred to and that I
16 used in my opinion. This particular document, this
17 ADC 1901...

18 Q. The same Ministry of Culture adopted the List
19 of Historical Monuments of 2010. You will find the
20 document exhibit number C-1266.

21 THE INTERPRETER: 1266 is the exhibit number.
22 I apologize.

1 DR. LEAUA: I would like to put on record an
2 objection to continue with this line of questions
3 because the Expert has made it very clear that
4 cultural issues related with Ministry of Culture are
5 not forming part of her Legal Opinion.

6 PRESIDENT TERCIER: Professor Tofan, do you
7 think you can answer a question in relation with a
8 problem linked to the culture and national heritage?

9 THE WITNESS: This time I haven't heard the
10 question yet. I was focusing to find--

11 PRESIDENT TERCIER: The objection that has
12 been is more general and as to the set of questions
13 linked to this subject matter. Are you able to
14 understand--not only to understand, but to answer or
15 not?

16 THE WITNESS: That depends on what
17 perspective I am asked to answer the question from.

18 I have touched upon this briefly in my
19 opinion from one point of view, a single point of
20 view.

21 PRESIDENT TERCIER: So, we will see the
22 question, and then once you have the question, you

1 will tell us whether you can answer or not.

2 THE WITNESS: Thank you.

3 BY MR. TUCA:

4 Q. I will go back to my kind request that you
5 define an "essential deed for the proceeding". When I
6 asked you if deeds that are essential to a proceeding
7 must be expressly provided by the law, you dodged that
8 question, correct?

9 A. No, I asked you to be more specific, what
10 proceeding do you have in mind, what law, what
11 essential deeds did you have in mind?

12 Q. Para. 141 of your opinion--

13 PRESIDENT TERCIER: Take the time to read it.

14 BY MR. TUCA:

15 Q. It says, e.g. that the Urbanism Certificate
16 was an essential condition in the EIA Procedure.

17 A. Yes.

18 Q. Para. 150 says that the UC is essential;
19 therefore, we have examples of situations where you
20 review and you state that certain deeds, are essential
21 for the procedure.

22 A. Yes, but...

1 Q. At the same time, you hold that the PUZ was
2 an essential element for the proceeding, and you also
3 hold--

4 A. Yes.

5 THE INTERPRETER: Says Mrs. Tofan.

6 BY MR. TUCA:

7 Q. And I asked you: Don't you find that the
8 mandatory nature of these essential deeds for the
9 proceeding should have been expressly provided by a
10 provision in the Law?

11 A. There is the legislation on constructions,
12 Law 50 of 1991, which is the main legal enactment in
13 the field of constructions. It sets out a proceeding
14 that starts with the Urbanism Certificate- individual
15 administrative deed and ends with the Building Permit-
16 individual administrative deed. This is a
17 long-lasting proceeding. The Urbanism Certificate is
18 at the basis of everything that follows during this
19 proceeding. It is important because it contains
20 elements on which environmental protection issues are
21 grounded, it contains, among other items, information
22 and rules with regards to Environmental Protection.

1 And to continue my idea on what you have
2 asked, I was asked whether the Law shouldn't have
3 expressly provided that. In my opinion, I accurately
4 mention the correlation between the legislative norms,
5 I said that the general legal provisions are those of
6 the Construction Law and there are several special
7 legal provisions: Environmental Protection Law, the
8 Law on Historical Monuments, on protected areas, on
9 archeological heritage--all of which come together in
10 this project because this is how it is.

11 It couldn't have been legally expressly
12 provided in the Law. There couldn't have been an
13 express provision, a specific provision, in the Law.
14 Where would that provision be? In the Environmental
15 Protection Law or in the Building Law stating
16 expressly that it is always an Urbanism Certificate
17 must be at the basis of the Environmental Permit. But
18 I do have it in my opinion, if we go to Article 3 the
19 former law, of Law 137 of 1995 or maybe Article 2 of
20 the current regulation, the Government Emergency
21 Ordinance 195 of 2005, that expressly states--let me
22 speak slower--which expressly states that the

1 environmental protection legislation and Environmental
2 Protection Activity must be correlated with Urban
3 Planning and construction legislation. There is a
4 specific provision that I refer to in my Legal Opinion
5 in the context of my analysis.

6 Can I make a clarification because the
7 counsel said "provision" with reference to
8 Article 150, but I am not a law-maker. I do not
9 provide for anything. It's just an observation.

10 Q. Assuming that the Ministry of the Environment
11 had proposed the issuance of the Environmental Permit,
12 in the absence of the documents qualified as essential
13 for the procedure, could it have defended itself by
14 invoking the discretionary power?

15 A. It's a hypothesis you are inviting me to
16 think of, and I'm thinking--and you're asking
17 me--whether the issuing authority could have invoked
18 its discretionary power in the Administrative Court,
19 but who could have challenged the Act because now that
20 we have come to the Court, we have to see who could
21 have challenged. The NGOs, or who could that be? Who
22 could be the Parties in that dispute so that I can

1 think whether the issuing authority could have invoked
2 that discretionary power you are referring to.

3 Q. In the case of any initiator of such a
4 dispute, could the Ministry of the Environment have
5 invoked the discretionary power?

6 A. If you don't allow me to understand who could
7 have been the plaintiff and what could have been the
8 reasons set forth in an action in court, I cannot give
9 you a precise answer about the content of the
10 statement of defense or the claims of the Ministry of
11 the Environment that would have been the respondent.

12 ARBITRATOR DOUGLAS: It's just a hypothetical
13 question, and the hypothesis is that the Ministry
14 hasn't got a document in front of it that it should
15 have, and it nonetheless approves something. And if
16 someone challenges it, anyone challenges it, the
17 Ministry says, "well, we didn't have that document,
18 but we have the discretion to approve it anyway." And
19 the question is whether or not that would be
20 sustainable as a defense.

21 THE WITNESS: I will answer to your question
22 following--the following logic: The right of

1 appreciation is regulated in the Law on Administrative
2 Litigation, and I'm referring here to the
3 discretionary power, and this is in relation to the
4 definition of the "excess of power," Article 2(1)(n)
5 of the Law on administrative litigation.

6 So, it is the plaintiff that could invoke
7 this. In a litigation, it is the plaintiff, potential
8 plaintiff, could invoke that the administrative deed
9 was issued in an excess of power, that the boundaries
10 of the discretionary power of the authority were
11 exceeded.

12 And hypothetically, the Ministry of the
13 Environment, the issuer of the deed, could have
14 defended itself arguing to what extent and how large
15 its margin of appreciation was and that in relation to
16 legal provisions of Order 860, it could have issued
17 that administrative deed; and, based on the court
18 file's documents,--and it is for the judge to decide
19 whether the authority acted beyond the limits of its
20 discretionary power, with excess of power, as claimed
21 by the plaintiff, or not.

22 Now, this excess of power was invoked in this

1 hearing before. It means the right of appreciation of
2 the public authorities and the law, indeed, speaks
3 about breaching the limits of the competences
4 established by law. But then it says "or breach or
5 violation of civil rights and liberties."

6 When discussing in my opinion the
7 discretionary power, I had in mind this second
8 component, the breach of civil rights and liberties
9 because, as the counsel said supporting my position,
10 the public administration must first defend the public
11 interest, but without breaching the private interest
12 and there is this balance between the public interest
13 and private interest, the administration must review
14 which one of them is on a superior position.

15 BY MR. TUCA:

16 Q. Should I understand that the Ministry could
17 have ignored an essential condition and still issued
18 the Environmental Permit by virtue of its
19 discretionary power?

20 A. Well, I apologize, but you led me back from
21 the hypothesis with a challenge in court, and now you
22 are trying to make me to say that it could have issued

1 the Environmental Permit without having the necessary
2 documents, including the PUZ, which I support with
3 thorough arguments in my opinion. No, it could not
4 have done this.

5 Q. In exercising the discretionary power, the
6 administrative authority does--must the authority
7 justify its action?

8 A. I will ask you again: What authority, what
9 administrative authority are you referring to? What
10 action are you referring to? Are you referring to the
11 Project or to a more general perspective?

12 Q. When it comes to the Project, you hold the
13 view that the Ministry of Environment accepted to
14 conduct the EIA Procedure in the absence of a PUZ
15 approved, a valid PUZ approved, before the start of
16 the procedure. Should it have justified this Decision
17 or not?

18 A. There was the PUZ of 2002. The Urbanism
19 Certificates all required an amended PUZ, but for
20 various reasons, this amended PUZ was never adopted,
21 the so-called "Amended 2006 PUZ."

22 I maintain that the procedure was and is a

1 lengthy procedure for several reasons pertaining to
2 both Parties. I wouldn't know the specificities of
3 the administrative work, and I maintain that it could
4 not have issued the Environmental Permit or proposed
5 the issuance because it is the TAC that proposes to
6 the Ministry of the Environment, and the Ministry of
7 the Environment drafts the draft Government Decision
8 which is submitted for approval to the Government
9 because it's issued by Government Decision. So it
10 would not have completed the procedure--it would not
11 have come to the end of the procedure if it didn't
12 have the amended PUZ required by the six Urbanism
13 Certificates.

14 Q. In your Paragraph 311, you maintain--

15 PRESIDENT TERCIER: Do you have the paragraph
16 in front of you?

17 THE WITNESS: I have it, and I listen, yes.

18 PRESIDENT TERCIER: Okay, good.

19 BY MR. TUCA:

20 Q. A valid PUZ must be approved prior to the
21 initiation of the EIA Procedure, although RMGC failed
22 to obtain the approval of the PUZ prior to the

1 initiation of the EIA Procedure, the Ministry of the
2 Environment started the procedure, and I understand
3 that it derogated from the Law. Is it correct? Is
4 this understanding correct?

5 A. No, it's not entirely correct. First, I'm
6 asking you what law was derogated from. I have just
7 told you and extensively shown in my opinion that
8 there are correlated Norms. There is no direct
9 provision concerning the necessity of the PUZ for the
10 procedure. I built a logical argumentation based on
11 the review of the legislation, in which I demonstrated
12 this. I'm saying that a valid PUZ should have been
13 previously approved, this is the reality.

14 And further to the idea in Paragraph 311, I
15 showed that, although it had not obtained the approval
16 of the PUZ before the initiation of the procedure, the
17 Ministry still initiated the procedure awaiting for
18 the amended 2006 PUZ to be approved in order to make
19 the Decision for the issuance of the Environmental
20 Permit.

21 What I said here is very logical. There is a
22 logical correlation between the two ideas, and I said,

1 Mr. President and co-Arbitrators and Professors, that
2 my conviction resulting from the documents and from
3 the legislation is this one.

4 It's not based on the knowledge of the public
5 administration functioning, but the procedure would
6 not have been completed without having the PUZ, which
7 is a specific urbanism documentation with its related
8 regulation. But as it was said repeatedly during
9 these hearings, there is a collaboration between the
10 two Parties, and the procedure was initiated but it
11 produces legal effects only when the procedure is
12 completed with the administrative act that produces
13 legal effects. But of course, there were some
14 shortcomings in the procedure, there were meetings of
15 the consultative body that took a long period of time.

16 PRESIDENT TERCIER: All right. We know that
17 from the file.

18 Further question, please.

19 BY MR. TUCA:

20 Q. My question was much simpler. You said that
21 the PUZ should have been approved prior to the
22 initiation of the procedure based on legal Norms. You

1 didn't show them to us.

2 Secondly, you accepted that the Ministry
3 started the EIA Procedure derogated from this rule,
4 violating it; is it correct?

5 A. No. I did not provide for anything because
6 I'm not a legislator. I just mentioned, and I said
7 this repeatedly, I said that there is full logical
8 coherence in what I said. I said it "initiated" the
9 procedure. I did not say there is an "express legal
10 provisions" because it would have been much simpler if
11 it were the case. I said that there are Norms in the
12 Environmental Protection regulations that establish a
13 correlation between Environmental Protection and Land
14 Planning and the two specific legislations.

15 I said that the procedure, that the lengthy
16 procedure could be initiated pending or awaiting the
17 approval of the PUZ by the competent local authority.

18 Q. Let us look at your Legal Opinion, last
19 paragraph.

20 According to your opinion, one of the
21 appreciation criteria for the opportunity lies on the
22 concrete circumstances where the administrative act is

1 applied, hinting to the public's reaction.

2 A. You said the last paragraph, and now this is
3 the last but one. Which one should I look at? You
4 said the last.

5 Q. 317. And this is the last but one.

6 A. Yes.

7 Q. I'm sorry. Yes, indeed.

8 DR. LEAUA: Second to last one, not the last
9 one.

10 BY MR. TUCA:

11 Q. As a law expert, please point to the grounds
12 that justify your thesis, namely that the public
13 reaction was strong, came from a significant part of
14 the population, and it could not be ignored by the
15 Ministry.

16 A. Let me specify that I'm not a law expert.
17 It's even too much to say an expert or a specialist in
18 administrative law. As for an expert in law, nobody
19 could be such an expert, given how vast legislation
20 is.

21 With regard to this statement, I grounded it
22 on legal grounds, of course. It's an appreciation of

1 the situation that everybody knows. There is the
2 legislation regarding environmental protection. I did
3 not review EU law, the Aarhus Convention of 1998, that
4 was ratified through Law 268 of 2000, if I'm not
5 wrong. And this is exactly what this piece of
6 legislation does. It insists, to a large extent, on
7 public consultations when it comes to major or
8 significantly important projects that can impact the
9 environment.

10 And there is also the Constitution of Romania
11 safeguarding that principle.

12 From this perspective, I wanted to show, and
13 I would like to thank the counsel for taking me to
14 that point that I have not covered in my presentation,
15 that public consultations and the position of the
16 public in front of such a project is paramount to the
17 Decision that is about to be taken, and the Law
18 regulates how this public consultation should take
19 place at every stage of the procedure. I did not
20 develop this part in my analysis, not too much, but
21 from this perspective, I speak the moment when I say
22 that public administration should take into account

1 the public interest.

2 Q. (In English) Let's move on in
3 your--Paragraph 312 and 313. 312 and 313.

4 A. I have understood the paragraphs you
5 mentioned, 312, 313.

6 Q. You speak there about the criterion of public
7 interest, interest of public. What is the difference
8 in your opinion, between the interest of the public and
9 the public interest?

10 A. Public interest is the interest that the
11 administration should take into account. It's just a
12 nuance, it is not a difference between the public
13 interest or the interest of the public. I stressed on
14 the word just to continue my idea. It's the public
15 interest, actually, which is regulated in the
16 Administrative Litigation Law. It is expressly said
17 there that there is a difference between legitimate
18 public interest and legitimate private interest and the
19 law also defines them. It is a condition for the
20 administrative litigation court action together with
21 the injured right. It may also be only the legitimate
22 public interest.

1 As it is the case in these litigations, the
2 legitimate public interest is affected in the Court
3 actions taken by several NGOs.

4 Q. In Paragraph 306 of your Opinion, 306, you
5 speak about the legal conditions in which it is
6 possible to exercise that appreciation right. And in
7 Paragraph 279 on which I would like to dwell more, you
8 maintain a thesis regarding the EIA Procedure and the
9 discretionary power of the public authority.

10 I would like to understand well what is your
11 opinion about the conditions in order to issue the EP
12 as a final act of this procedure. Should I understand
13 that all the legal requirements are to be satisfied as
14 it results from this analysis and from the Law as a
15 matter of fact? And on top of that, cumulatively,
16 there should be a subjective appreciation of the
17 public authority with respect to the satisfaction of
18 these requirements?

19 A. Is this your question?

20 First, when you referred to 306, it was a
21 rather incorrect wording--I mean, what you quoted
22 compared to what I wanted to convey in this paragraph,

1 I cannot restate it from memory but it can be verified
2 from the transcript. I said that (the two paragraphs
3 are correlated, the paragraphs you indicated) even if
4 all the legal requirements are satisfied, the
5 interpretation of the applicable legal requirements
6 indicate a discretionary right of the competent public
7 authority, which I maintain in my opinion based on
8 arguments.

9 As for 279, I maintain that if all the legal
10 requirements are met, the Applicant is entitled to
11 obtain the administrative deed, and the competent
12 authority gives an appreciation to that end. In this
13 final wording I refer to the right of appreciation.

14 And I also pointed to the legal reference
15 explicitly where I have identified this right of
16 appreciation, I do not want to annoy Mr. President and
17 the Co Arbitrators, from--Order 860 of 2002, article
18 49 (1) and also in the last stage of the EIA
19 Procedure, the third stage, there is an appreciation
20 on the quality of the environmental report, and
21 quality is a subjective element. The authority makes
22 an appreciation on the quality of the environmental

1 conditions, whether all the requirements of the
2 environmental protection are complied with.

3 Q. For me, the hypothesis was very clear. We
4 are in a situation when all, absolutely all, the legal
5 requirements, provided in the Law in order to issue
6 the EP are satisfied--letter A of the reasoning, and
7 under letter B, should I understand letter B as a
8 cumulative requirement--a subjective appreciation of
9 the authority? Do I understand correctly what you
10 say? Is that a fair reading?

11 A. No. There are the conditions, the legal
12 conditions that were met from the Applicant's
13 perspective, whereas, in my opinion, as a legal
14 expert, after the review of the legislation, I have
15 shown that the PUZ is mandatory in order to come to a
16 decision whereas the PUZ was not approved and
17 submitted in this procedure.

18 And then I spoke about an appreciation on the
19 quality of the last report drafted in the third stage,
20 the final stage of this procedure, and then I pointed
21 that public consultation is decisive or very important
22 in this procedure. It is the reason why the

1 legislation in the field of Environmental Protection
2 has been amended several times.

3 DR. LEAUA: --one skipping part in
4 translation, "role determinant", that would
5 be--decisive role--

6 (Overlapping interpretation with speaker.)

7 DR. LEAUA: After very important in this
8 procedure, consultation--

9 (Overlapping interpretation with speaker.)

10 MR. TUCA: Thank you very much Mr. President.
11 No further questions.

12 PRESIDENT TERCIER: Dr. Leaua, you have the
13 floor.

14 MS. MARAVELA: No questions on redirect for
15 us.

16 PRESIDENT TERCIER: Thank you. We have
17 questions.

18 QUESTIONS FROM THE TRIBUNAL

19 ARBITRATOR DOUGLAS: Just returning to the
20 last paragraphs of your statement where you're talking
21 about the role of discretion and the public interest,
22 and I just want to propose a hypothetical to you along

1 the same lines as was being asked. Imagine a
2 situation where the TAC Committee has come to a
3 consensus that the permit should be issued, and then
4 it goes to the Ministry of Environment. The Ministry
5 of Environment goes through its checklist and all the
6 boxes are ticked.

7 At that point in time, does the Ministry have
8 a discretion to nonetheless reject the issuance of the
9 permit, or must it issue the permit based upon the
10 satisfaction of the criteria?

11 THE WITNESS: In my opinion, this
12 consultative Committee made up of experts, its
13 Decision, namely the proposal it makes to the Ministry
14 of the Environment, has the role of conformity
15 endorsement. It is mandatory that the Ministry, after
16 it has been provided with all the information needed
17 by a team of specialists for the issuance of the EP,
18 and I correlate this with other pieces of legislation
19 such as education where we have consultative councils
20 and committees having a very clear role. These are
21 specialists that--

22 ARBITRATOR DOUGLAS: Sorry. I think we're

1 getting off the topic a bit.

2 Just imagine this: The Minister of the
3 Environment is in the situation, checklist is
4 completed, and he calls you, and he says, "Professor,
5 I've still got doubts about this because of the public
6 interest or something else. Do I have the discretion
7 not to issue the permit?" And what would your answer
8 be?

9 THE WITNESS: My answer would be clearly
10 "no." That's why I said this is a conformity
11 endorsement. It should be obtained and taken into
12 account. This is my opinion and my interpretation of
13 the legal text because the Committee had all the
14 elements, including the public interest. If they
15 reach the conclusion that the EP should be issued, the
16 Minister of Environment, as a political body, should
17 forward it to the Government with all the documents
18 and elements given by the TAC. They should propose
19 the issuance of the Environmental Permit.

20 This is how I see the things.

21 If the Committee reaches in the end this
22 conclusion. Because the Committee had the competence

1 to analyze everything that was necessary, including
2 public consultations, including the appreciation on
3 the quality of the Report. This is what I believe
4 from my review of the legal provisions in this field.

5 ARBITRATOR DOUGLAS: So, just looking at
6 Paragraph 314 of your statement, then, and you're
7 talking about there the Ministry of the Environment
8 could not ignore the reality of--you're talking about
9 the public interest and the--in that context. So, is
10 it possible that the Ministry of the Environment could
11 take a different view to the TAC Committee as to
12 whether or not it was in the public interest?

13 THE WITNESS: That's maybe interpreted as
14 having a pejorative sense because the TAC is led by a
15 Secretary of State from the Ministry of Environment,
16 that is a decision-making body within the Public
17 Ministry. When I said that, I had the representative
18 of the Public Ministry in mind in its capacity as
19 Chairman of the TAC, as coordinator of the TAC. Even
20 if the President says all criteria are met, the TAC
21 being a collective body, decisions are taken by
22 consensus within the Committee. It cannot be only one

1 member that believes that the permit must be issued.

2 As peers, they're supposed to reach
3 consensus, it is a collective body. The Ministry of
4 Environment having the highest representation in the
5 TAC, if they reach a final decision, and if all
6 criteria are met, they have to be able to make a
7 proposal because the issuance of the EP is a proposal
8 according to the current legislation, so it is a
9 proposal of a draft Government Decision. That is my
10 interpretation. There are several specialists making
11 up that TAC, and they make a decision that is grounded
12 and based on the information that is gathered from
13 specialists in several fields that make up the TAC.

14 ARBITRATOR DOUGLAS: So I think the answer is
15 no, the Ministry of the Environment, once the TAC has
16 given its consensus, can't take a different view to
17 the TAC as to whether or not the Project meets the
18 public-interest requirement?

19 THE WITNESS: Yes. As long as the Chairman of
20 the TAC--.

21 I was waiting for the idea to be uttered.
22 I'm sorry.

1 It is the representative of the Ministry of
2 the Environment who chairs the TAC. This is a
3 question of the theory of endorsements. Mr. Podaru,
4 my colleague from Cluj, elaborates on the same. The
5 conformity endorsement is required and it must be
6 abided by, so what the TAC says must be abided by, and
7 the TAC is led by a representative of the Ministry of
8 the Environment.

9 ARBITRATOR DOUGLAS: Thank you.

10 DR. LEAUA: Just a correction for the record
11 on 2627 in the record, we have two references to the
12 Public Ministry. In fact, it is referred that this
13 was said Ministry of the Environment, Public Ministry
14 was not a part of this discussion. It's just an
15 error.

16 ARBITRATOR GRIGERA NAÓN: Excuse me, I have
17 been listening very attentively to what you say, but
18 you are taking that the TAC is not a merely
19 consultative stage in the procedure because you're
20 talking about consensus, and maybe unanimity. Is that
21 really the situation? Because if the TAC is merely a
22 consultative stage--and I have my doubts that those

1 who are at the TAC are experts, they're
2 representatives of political sectors or certain
3 institutions in Romania, but they're not the Experts,
4 the actual experts, who are looking at the issues.

5 So, did you consider that when you were
6 answering these questions? Because we have evidence
7 in this case which goes against the idea, the
8 decisions of the TAC are taken by consensus and much
9 less by unanimity, so how will you address that?

10 THE WITNESS: As far as I can remember, I
11 only referred to one meeting dating from 2007, in the
12 make up of the TAC, there are representatives of
13 several competent Ministries. Ministries that have
14 roles in the legislation that I referred to, but also
15 technicians from the Ministries are part of the TAC.

16 You have heard the deposition of one TAC
17 member, and I have read some of the statements. These
18 are technicians. It is called an "Advisory
19 Committee," but their proposal is decisive.

20 Let me make a parallel with another piece of
21 legislation that I know of in the education field in
22 Romania, of habilitation orders and granting the

1 titles of "Doctor." The Committee has an advisory
2 role. What the Committee proposes, the Minister always
3 observes. If the Committee, which is consultative,
4 does not give its consent, the Minister will not issue
5 the order to grant the title of "Doctor" or of
6 habilitation. Whatever is proposed by the advisory
7 committee is abided by the Minister of Education, and
8 that has to do with the interpretation of legal texts,
9 a proposal that is made by the TAC is to be applied by
10 the Minister of the Environment by drafting the draft
11 Government Decision. That is how I understand the
12 existing legislation.

13 This approval by consensus in case of
14 collective bodies in the case of, not documents--let
15 us say "decisions." At the level of European
16 institutions, as well as in legislation regarding the
17 procedure to make Government Decisions, if a majority
18 supports a certain position, then the remaining
19 members may agree, but I don't really agree to that
20 consensus. I am for classical majorities in the
21 decision-making process.

22 ARBITRATOR GRIGERA NAÓN: The record is the

1 record.

2 PRESIDENT TERCIER: I'm sorry, I'm a bit slow
3 of the three, and I still am puzzled.

4 Assuming now the TAC makes a report, you said
5 it's a "consultative body." Assuming now that all TAC
6 members have accepted, no questions, it is submitted
7 to the Minister of Environment.

8 Now the question: Does he still have the
9 right to refuse?

10 THE WITNESS: No.

11 PRESIDENT TERCIER: So, the TAC is not
12 only--sorry, I interrupted you.

13 THE WITNESS: No, no.

14 PRESIDENT TERCIER: The TAC is not only
15 consultative but in that case, if really in such a
16 case, the Minister had no choice but to endorse the
17 proposal of the TAC, the TAC is more than a
18 consultative body, probably could play its role if
19 there are different opinions within the TAC, but you
20 see my point--and I think I was not the only one to
21 have a question. But one other point--if I may just
22 add, we're not conducting the redirect, but we have

1 just at this juncture one or two points.

2 There was a mysterious--and I say
3 "mysterious" because I don't have the text in front of
4 me--I think you have been asked would the provision
5 with a letter A and letter B, and the question was if
6 all conditions are fulfilled according to letter A, is
7 it possible nevertheless to refuse based on letter B,
8 well, then it's the point and probably letter B you
9 mention the question of quality, and quality would
10 link me or push away from me and go to a question of
11 discretion.

12 Do you understand my question?

13 THE WITNESS: Yes, I understand your
14 question.

15 All the conditions from the perspective of
16 the Applicant, but from the point of view of the
17 competent administrative authority, the PUZ was
18 required. The PUZ was never submitted as a document.
19 For a decision to be made, they had to take into
20 account the results of the public consultation, and I
21 will not say anything on that because I haven't
22 consulted all the documents pertaining to that. But

1 the quality of the Report also had to be assessed.

2 PRESIDENT TERCIER: Which public
3 consultation?

4 THE WITNESS: Legislation in the field
5 provides for public consultations. That was the
6 purpose of the legislation to enforce the Aarhus
7 Convention, a European Convention that regulates these
8 aspects in detail.

9 PRESIDENT TERCIER: Okay.

10 ARBITRATOR GRIGERA NAÓN: If I may, I'm
11 sorry.

12 PRESIDENT TERCIER: Good.

13 ARBITRATOR GRIGERA NAÓN: But we had started
14 to speak about the TAC. In November 2011, there was a
15 TAC meeting, in that TAC meeting there was a
16 consultation of each of all the Ministries that you
17 mentioned. The only one that apparently was not very
18 clear in his answer was the Ministry of Culture, but
19 according to my knowledge, there was no reference to
20 the PUZ whatsoever. So, at that level, isn't it that
21 the representative of the Ministry had the obligation
22 to elevate whatever were the consequences of that

1 technical consultation to the Government for the
2 Government to decide what to do? Because there was no
3 reference, to my knowledge, in the record that the PUZ
4 issue was raised.

5 So, where do we stand on that one?

6 THE WITNESS: I would like to stress that
7 personally I did not look--I did not review that TAC
8 meeting of November 29, 2011. I only reviewed and
9 only mentioned one TAC meeting of 2007 in a certain
10 context, to specify some elements, some aspects.

11 I haven't reviewed the Minutes of the 29th of
12 November meeting. I don't know what was discussed
13 there, but no decision was taken to this effect.

14 There was no approval then. I do not know about the
15 Ministry of Culture, why there was no approval then.

16 On the other hand, if I place myself in the
17 shoes of the Claimant, in my opinion, I elaborated on
18 the fact that, in this situation, if RMGC deemed that
19 all legal criteria were met and that they were treated
20 unfairly because the EP was not issued. They could
21 have filed a suit before a court of law. Article 52(1)
22 of the Constitution refers to the right of the person

1 injured by an administrative deed or by the failure of
2 the authority to solve its request. So after the
3 finalization of the meeting, RMGC could have filed a
4 written complaint in court saying that it appreciates
5 that all the conditions for the proposal to issue the
6 EP have been met but the EP has not been issued.

7 THE INTERPRETER: I apologize. I have to
8 stop the speaker because I cannot follow her.

9 PRESIDENT TERCIER: I think we have no
10 translation anymore because you're speaking too
11 quickly.

12 THE INTERPRETER: I'm sorry, but I cannot
13 follow at this pace.

14 (Pause.)

15 PRESIDENT TERCIER: I think we will turn to
16 redirect and questions.

17 DR. LEAUA: Yes, thank you.

18 We have a redirect question related with--we
19 have a correction to the record because it was
20 referred to the Witness a document with a specific
21 mention from the Tribunal possibly by error of the
22 content of the document not referring to PUZ. In

1 fact, it does, and we want to put the document in
2 front of the Expert. So, for the Expert to see
3 exactly where is the paragraph where PUZ is referred
4 in the TAC meeting, and then notice exactly what is
5 the context of the question that it is addressed. It
6 is a correction for the record.

7 (Tribunal conferring.)

8 PRESIDENT TERCIER: We have the record, and
9 the record is on, and you can mention it. I don't
10 think we have no need to go back to it.

11 DR. LEAUA: Okay. It's C-486.

12 PRESIDENT TERCIER: You have your objection.

13 DR. LEAUA: It's C-486 on Page 41 where there
14 is a specific reference from the representative of
15 Ministry of Environment, Ms. Daniela Pineta, who
16 specifically says the PUZ must be first approved, and
17 then the Environmental Permit is issued. That means
18 that this specific reference is included in the TAC
19 meeting that the Arbitral Tribunal was referring
20 possibly without noting this specific line. Thank
21 you.

22 PRESIDENT TERCIER: Thank you, it's noted.

1 MS. COHEN SMUTNY: Mr. President, we would
2 want to point out with respect to that same exhibit
3 that in the same pages that follow, Pages 42, 43, it
4 is, indeed then debated whether the PUZ has any
5 relevance, and if the Tribunal is interested, they
6 could see over several pages the result of the debate
7 at that meeting.

8 PRESIDENT TERCIER: Okay. We have taken note
9 of it, and we will turn to it if necessary.

10 Now, we will go to redirect, if I can urge
11 you to be shorter in your answer, it would really be--

12 DR. LEAUA: We don't have anything on the
13 redirect. It was just that specific small point which
14 we found essential for the record. Thank you.

15 PRESIDENT TERCIER: Okay. This time I was
16 too long, sorry.

17 Fine. In that case, you have another point?
18 No other point?

19 Sorry, I thought you were just making a
20 mention before starting the redirect.

21 So, thank you very much for your examination
22 and now it is over.

1 (Witness steps down.)

2 PRESIDENT TERCIER: We take 15 minutes'
3 break, and then we will have Professor Dragoş.

4 (Brief recess.)

5 PRESIDENT TERCIER: So, we will now proceed
6 with the examination of Professor Dragoş.

7 So, indeed, my first question was your
8 reaction to the modification, to the amendment
9 proposed to the Legal Opinions of Mr. Dragoş.

10 MS. COHEN SMUTNY: Yes. Thank you.

11 Claimants only have one point of comment or
12 clarification on the Notification of Errata. The
13 first one is the suggestion to delete Footnotes 207 to
14 209. And the explanation being given is that the
15 footnotes mistakenly refer to a web link, to a
16 publication by an NGO.

17 On the Opinion, in Footnotes 207 to 209, is a
18 link to the EU document, not to an NGO publication.
19 Although we understand that the quotes that are in the
20 text of Page 207, it is to an NGO publication.

21 So, deleting the footnote references, then
22 there would need to be a correct reference to the NGO

1 publication. In other words, the quote--

2 PRESIDENT TERCIER: I see.

3 MS. COHEN SMUTNY: --above the line is to an
4 NGO publication, not to--not to the EIA Procedure. I
5 think we just wanted to clarify that that's what one
6 has in mind. And if so, then there's no objection, as
7 long as it's clear, then, what the quote is from.
8 It's from an NGO publication. Probably it should be
9 listed.

10 PRESIDENT TERCIER: Okay. I will give to the
11 Expert an opportunity to explain and to comment.

12 PROFESSOR DACIAN DRAGOŞ, RESPONDENT'S WITNESS, CALLED

13 PRESIDENT TERCIER: Good afternoon,
14 Mr. Dragoş.

15 THE WITNESS: Good afternoon.

16 PRESIDENT TERCIER: Welcome to this
17 Proceeding. You will testify--

18 THE WITNESS: In English.

19 PRESIDENT TERCIER: --in English.

20 We will--I do not need--I've seen you. You
21 have been in the room before. Really not to introduce
22 the Members of the Tribunal. I think you know them

1 all. You know that you will be heard as an expert.

2 As such, I will invite you to read the
3 document that you have in front of you.

4 THE WITNESS: I solemnly declare, upon my
5 honor and conscience, that my statement will be in
6 accordance with my sincere belief.

7 PRESIDENT TERCIER: Thank you very much.

8 You have prepared for this proceeding two
9 Legal Opinions: the First Legal Opinion dated the 22nd
10 of February 2018, and the Second the 24th of May 2019.

11 Do you have these two documents in front of
12 you?

13 THE WITNESS: Yes.

14 PRESIDENT TERCIER: And you can confirm the
15 contents of these documents?

16 THE WITNESS: Yes.

17 PRESIDENT TERCIER: Fine.

18 Now, it seems to me it is the right time to
19 tell us and to answer the point made by counsel for
20 Claimants concerning the Footnote 207 and 209.

21 THE WITNESS: Yes. I apologize for the need
22 of these corrections. By mistake, of course, when

1 citing the documents, I miscited the document.

2 Indeed, it's a link--it should be a link to
3 an NGO report regarding EIA, but in the text I said
4 that it's the Opinion of the European Commission.

5 Well, I have other documents, and I can
6 provide, if needed, to the Tribunal and to the Counsel
7 of Claimants, supporting my Opinion that the European
8 Commission, indeed, has this view of the facts, but
9 this is not necessary. I can relate to other
10 arguments in other parts of the Opinion to support
11 that. So, it's not critical for my--for my arguments.

12 PRESIDENT TERCIER: Okay. Good. We will
13 take a note of it.

14 You--you know the rules. We don't have the
15 time to repeat everything. And we can--now you can
16 answer to my traditional questions. First, a short
17 introduction about yourself and, secondly, the way you
18 have prepared these two documents.

19 THE WITNESS: Yes. My name is Dacian Dragoş.
20 I'm a Professor of Administrative Law and European Law
21 at Babeş-Bolyai University. I'm based in the Faculty
22 of Political, Administrative, and Communication

1 Sciences and in the Faculty of Law. Actually, my
2 position is within the two faculties because I'm a
3 conducting Ph.D. in the Faculty of Law.

4 I've been teaching and researching
5 Administrative Law, Administrative Procedure, and
6 related subjects for 20 years. I have published
7 numerous papers and chapters in books and books at the
8 national and international publishers. I've been a
9 Marie Curie Postdoctoral Fellow at Michigan State
10 University and Visiting Fellow with the Department of
11 State.

12 And in terms of international cooperation,
13 I'm chairing and participating in International
14 Conferences in Administrative Law and Public
15 Administration. I've been participating with Legal
16 Opinions for National and Foreign Courts.

17 Outside academia, I've been working--I have
18 worked as a legal expert for--within the
19 Commission--actually, I was the President of the
20 Commission for drafting the Administrative Code of
21 Romania--unfortunately, it was not later adopted in
22 the Law, but a draft still exists--and a Member of the

1 Commission for drafting the Administrative Code, which
2 was adopted in the end, and a Member of the
3 Presidential Commission for the Analysis of the
4 Political and Constitutional System of Romania, and
5 also President of the National Council for Research
6 Ethics with the Ministry of Education and Research.

7 So, these are, basically, my qualifications.
8 My extended CV is with the Opinion.

9 PRESIDENT TERCIER: Thank you very much. My
10 only comment is to invite you to speak a bit slower.

11 THE WITNESS: Okay.

12 PRESIDENT TERCIER: Because I'm not sure that
13 the Court Reporter will be able to follow you during
14 the oral examination.

15 Now, you remember my second question? I
16 would like to know the way these two Legal Opinions
17 have been prepared.

18 THE WITNESS: Yes. I have written this
19 Opinion based on the Terms of Reference given by the
20 Counsel for Respondent in which I was asked questions
21 of law based on the exhibits that were already in the
22 record.

1 Of course, I consulted, then, the Legal
2 Opinions of Professors Bîrsan, Schiau, and Mihai, and
3 later on of Professor Podaru, and I have discussed the
4 issues that they raised there. I was instructed to
5 reply to those issues that were already raised in this
6 Arbitration by these professors. So, basically,
7 that's how I started my work.

8 I started in September 2017, and I have
9 written two Legal Opinions, looking at the documents
10 that were cited in these Legal Opinions, and also that
11 I thought that were relevant for dispute.

12 PRESIDENT TERCIER: Thank you very much.

13 So, we will start with your presentation.
14 You have 20 minutes for that.

15 THE WITNESS: Yes.

16 PRESIDENT TERCIER: And then we will have the
17 cross.

18 And who will lead the cross? Mr. Tuca.

19 And then we will have the redirect, and the
20 Tribunal will ask questions if necessary. Fine.

21 Please, you have the floor.

22 DIRECT PRESENTATION

1 THE WITNESS: Thank you. My
2 presentation--because of the lack of time--limited
3 time, I will concentrate my presentation on a few
4 detailed issues, and I will only mention the other
5 general issues in passing and not insist very much on
6 them.

7 The structure of the presentation is in front
8 of you. After the introduction and scope of work, I
9 will present a summary of findings regarding the
10 environmental impact assessment procedure which, in my
11 Legal Opinion, I stated that includes also urban
12 planning and cultural heritage issues and discusses
13 all these issues in an integrated manner.

14 I will explain what is the Development
15 Consent Procedure, an outline of this Development
16 Consent Procedure, and I will dwell on the points of
17 controversy between me and my fellow legal scholars on
18 the Urbanism Certificate, on the Zonal Urban Planning
19 and on the Strategic Environment Assessment and
20 Environmental Impact Assessment. And I will end with
21 conclusions that are related to the whole of my Legal
22 Opinion.

1 First, I've been instructed by the Counsel
2 for Respondent to assess the following issues: First,
3 how the EU and International Law relate to Domestic
4 Law and how are they applied, in terms of the legal
5 procedure to be conducted for the issuance of the
6 Environmental Permit, and in the end the Building
7 Permit, for the Project Rosia--for the Rosia Montana
8 Project.

9 Then I explain the steps in obtaining the
10 development consent and the necessary approvals, a few
11 considerations on surface rights and expropriation
12 procedure and the legal regime of cultural heritage
13 aspects. So, this is basically the summary of my
14 Legal Opinion.

15 As regards the Summary of Findings regarding
16 the EIA Procedure, I explained in my Legal Opinion
17 that the Urban Planning and the EIA are integrated in
18 the Development Consent Procedure, that the EU Law
19 principles are also important for the interpretation
20 of the National Law because the National Law has to be
21 interpreted in light of the EU Law and the EU Law
22 principles, and the assessment of the legality of the

1 procedure needs to be done also, taking into
2 consideration the sources of law that are
3 applicable--all the sources of law that are applicable
4 to the said procedure.

5 There are five steps in obtaining the
6 development consent. First, there is the Urban
7 Certificate which, in my opinion, is an administrative
8 act and is also mandatory for the initiation of the
9 Environmental Impact Assessment. But, also, it needs
10 to be kept valid throughout the procedure because it
11 gives very important information to the
12 decision-makers in the Environmental Impact
13 Assessment.

14 A valid PUZ also needs to be presented during
15 the procedure, of Environmental Impact Assessment,
16 because the urban planning and the environmental
17 planning are integrated procedures, and they need to
18 take into consideration the other legal framework.
19 And in the end, the Environmental Permit is based on
20 the Environmental Impact Assessment Procedure.

21 I also was of the opinion that surface rights
22 are recommended to be secured before the issuing of

1 the Environmental Permit, and that is because the
2 Environmental Impact Assessment also looks at the--to
3 the population, to the human beings. And issues such
4 as relocations or the ownership of the land are also
5 important for a proper Environmental Impact
6 Assessment.

7 In the end, the Building Permit marks the end
8 of the Development Consent Procedure for the
9 construction phase of the Project. And this is issued
10 only after all the endorsements and permits required
11 by the Urban Certificate are obtained.

12 As regards cultural heritage, I show in my
13 Legal Opinion that Rosia Montana was protected both as
14 an archeological site and as a historical monument.
15 First, archeological site based on Governmental
16 Ordinance 43/2000, and as a historical monument based
17 on the--as an inclusion in the List of 91-92 of
18 Historical Monuments.

19 I also am of the opinion that Archeological
20 Discharge Certificates do not automatically lead to
21 the declassification of a historical monument. A
22 proper decision-making procedure is needed in order to

1 reach that level of decision-making.

2 And, also, the Ministry of Culture
3 endorsement is necessary for the issuing of the
4 Environmental Permit. This was issued in 2003--'13,
5 and it was not withdrawn.

6 I will dwell now a little bit on the
7 part--this part on urban planning documentation. I
8 understand this is a matter of contention with the
9 Parties, and, also, the Tribunal sometimes maybe needs
10 more--more details in order to understand the
11 specifics of the Romanian system.

12 The urban planning documentation consists of
13 the General Urban Plan for a whole locality or--so the
14 Zonal Urban Plan for zones of a locality, and the
15 Detailed Urban Plan, if necessary, for plots of land.
16 And these are all regulations that are transposing at
17 the level of localities, the proposals contained in
18 national zoning and county land development plans.

19 This is a specific regulation. This is the
20 legal nature, specific regulation. And these are
21 mandatory for the substantiation and the issuance of
22 the Urban Certificates. The Urban Certificates,

1 actually, are enforcing all these regulations that are
2 adopted at the level of plans.

3 The Urban Certificate, it's an administrative
4 act because it creates rights and obligations for
5 those that are affected or they are interested in this
6 act. The Urban Certificate not only informs the
7 developer of the rights and duties deriving from the
8 laws and from the Urbanism Plans, but also institutes
9 restrictions, talks about permissions, about protected
10 areas, about prohibitions.

11 So, it's truly an administrative act which
12 has to be also kept valid during EIA and for the
13 issuance of the Environmental Permit, because the
14 Urban Certificate is part of an integrated procedure
15 where all urban planning, cultural heritage, and
16 environmental protection issues must be considered
17 together contemporaneously and based on all sources of
18 law, national and European law, but also international
19 conventions when the case.

20 Then, here I drew a little sketch to show how
21 the development consent procedure integrates the urban
22 planning development and the environmental planning.

1 I will talk first about the scenario where the
2 project--specific project fits within the urban
3 planning documentation.

4 So, we have the PUG, a general plan for a
5 locality, and the PUZ for a certain zone of the
6 locality, and the Project that, in the first scenario,
7 fits within this General Planning.

8 Well, in that case, it's very simple because
9 the Urban Certificate actually explains to the
10 developer what are the requirements in order to obtain
11 the building permitting in the end, which marks the
12 development consent. In the meantime, it also
13 requires some endorsements, some approvals, and so on,
14 one of which is the Environmental Permit.

15 So, the Urban Certificate, together with all
16 urban planning documents or acts, are the basis for
17 the conduct of the Environmental Impact Assessment.
18 Also within the Environmental Impact Assessment, an
19 element of environment is the cultural heritage.

20 For that, the Ministry of Culture needs to
21 give its endorsement, which is based on Discharge
22 Certificates, clear the land for development, and, of

1 course, other procedures to be followed by the
2 Ministry of Endorsement--the Ministry of Culture.

3 Based on all this endorsement, the
4 Environmental Permit is issued, and the Environmental
5 Permit, together with the documentation for urban
6 planning, stay at the basis of the Building Permit,
7 which marks the Development Consent for the
8 construction phase of the Project.

9 There are other development consents as
10 required by the EIA directive, in the sense that after
11 the construction phase, it might be necessary, an
12 authorization--environmental authorization for the
13 actual operation of the facilities.

14 So, there must--there could be also, in
15 different stages or successive stages, this
16 development consent be given. And Romanian Law
17 provides also for an environmental authorization after
18 the construction are raised and everything.

19 Well, in the case when the PUZ or the PUG are
20 not accommodating the project, the project needs
21 modifications of the PUZ or the PUG or it's required
22 by the Urban Certificate. Then the modification of

1 the PUZ is proposed by the developer to the local
2 authority, based on a strategic environmental
3 assessment, which looks at the--in general, the
4 sustainable development of the zone, and not to the
5 specific project, which leads to this--to this
6 assessment.

7 So, it's a broader assessment of the impacts
8 on the environment. This strategic environmental
9 assessment is the basis for the PUZ, and then all the
10 stages are occurring in the sequence that I already
11 explained. I explained an EIA is performed for the
12 actual project, environmental permit, and then on
13 leads to the Building Permit.

14 So, this is my understanding of the procedure
15 of development consent based on the provisions of the
16 law--National Law and interpreted in light of the EU
17 Law.

18 I will explain in more detail the PUZ, which
19 is a planning instrument for specific regulation which
20 coordinates the integrated urbanism development of
21 certain zones in the locality and establishes
22 objectives, actions, priorities, restrictions, and

1 permissions for land use.

2 I will cite here the proper legal base for my
3 assertion that PUZ is a very important document for
4 the Environmental Impact Assessment Procedure.

5 You can see there the use of land is provided
6 by PUZ. The development of town utility
7 infrastructure, the legal status and circulation of
8 land plots, protecting the historical monuments, and
9 so on. All of these are elements of the Environmental
10 Impact Assessment. So, I think they are very
11 important for the Environmental Impact Assessment
12 Procedure.

13 I show here the written part and the drawings
14 just as an example of a PUZ--the 2002 PUZ obtained by
15 RMGC. You can see there it relates to environmental
16 issues, to environmental protection, circulation, land
17 occupation, and so on.

18 The drawn pieces also are very important
19 because they relate and they show the ownership over
20 lands, the protected built area, and so on. And this
21 is an example of a drawing from the PUZ. I will leave
22 this for the Tribunal. I will not insist on that.

1 Actually, as regards the factual background,
2 I will leave here the sequence of adoption of PUZ and
3 how they were then impacted by the Urban Certificate
4 and the modifications of the PUZ. This is quite--it's
5 already known, I think, for the Tribunal, but I leave
6 it there to see the sequence of acts that were issued.
7 I would not insist on them.

8 For the New Draft PUZ that was required by
9 the Urban Certificate in 2004, the developer needed to
10 secure 22 approvals--endorsements. Only 19 from what
11 I learned from the documents in the--on the record
12 were secured. So, in the end, this is one reason, why
13 the PUZ was not adopted in the end. It was not able
14 to be secured by the developer.

15 There was a lot of litigation related to the
16 documentation, usually started by NGOs. The courts
17 had the possibility --to look at the legality of the
18 PUZ and the PUG and the decisions that are the basis
19 of those plans.

20 I will not detail this either because of lack
21 of time. I will only say that they were either
22 suspended or annulled in court at different points in

1 time. And also the environmental endorsement for the
2 2006 Draft PUZ was suspended and then annulled in
3 court.

4 So, the conclusion is that during the EIA
5 Procedure, the developer failed to secure a valid
6 updated PUZ due to the missing permits and
7 endorsements, in particular, the environmental
8 endorsement.

9 I will dwell now a little bit on the
10 controversies between Parties regarding the PUZ. This
11 is a main issue of controversy between the Parties,
12 whether the valid PUZ is necessary for the
13 Environmental Permit or not.

14 I will recall that Professor Mihai and
15 Professor Podaru say that there's no indications in
16 the legal framework as to the necessity of the PUZ for
17 the EIA and for the Environmental Permit, and only for
18 the Building Permit is required, this PUZ. Well, my
19 position is different.

20 My position is that the PUZ is required by
21 the Urban Certificate, so it needs to be updated and
22 to be adopted by the local authorities at the

1 initiative of the developer. This PUZ is based on the
2 strategic environmental assessment and also is the
3 basis for the Environmental Impact Assessment of a
4 specific project which needs to fit within the
5 strategic planning, strategic environmental
6 assessment, and also within the strategic urban
7 planning.

8 Why I say this argument is because the PUZ
9 demonstrates how the Project will achieve the
10 integration between urban planning and environmental
11 protection and how it will affect the area and its
12 surroundings. So, in the absence of a valid PUZ, the
13 TAC and the Ministry of Environment cannot recommend
14 or issue the Environmental Permit.

15 My position on the legality of this
16 requirement is based on the fact that in the EIA
17 Directive, it specifically states that the information
18 that needs to be provided by the developer relates
19 also to the site design and size of the Project.

20 And in Annex 4 of the EIA Directive, it's
21 explaining what does it mean, information relating to
22 the Project. Namely, description of the Project

1 comprises, among other things, land use requirements.
2 In my opinion, this is the PUZ. And the PUZ is
3 substantiated for the specific project by the Urban
4 Certificate.

5 Also, Article 12 from the Order 86, that was
6 cited by my colleagues as well, says that the
7 documents that must be submitted by the titleholder
8 when applying for the issuance of the Environmental
9 Permit include a technical memorandum of the project
10 which gives information about the manner in which the
11 envisaged project is integrated in the Urban Planning
12 documentation.

13 This Memorandum of the Project--this
14 information needs to be proved by documents. And
15 these documents are issued by the State authorities.
16 Well, these documents that prove what the Memorandum
17 says are, Urban Certificate, PUZ, PUG, if necessary,
18 and other information.

19 So--and I also noted that Professor Mihai,
20 who contradicts my--my findings, does not address this
21 issue of the applicability of this specific legal
22 provision.

1 We also had controversies regarding the
2 Strategic Environmental Assessment. Professor Podaru
3 says that Strategic Environmental Assessment Procedure
4 is not broader than Environmental Impact Assessment,
5 and it doesn't have to be done prior to the
6 Environmental Impact Assessment.

7 Well, I consider that Strategic Environmental
8 Assessment, by definition, is broader than
9 Environmental Impact Assessment. Strategic
10 Environmental Assessment applies upstream to the--to
11 the plans--to the general plans for the locality and
12 for the zones, and it looks at sustainable development
13 of the zone; whereas Environmental Impact Assessment,
14 it's more environmental for--it's an
15 assessment--environmental assessment for a specific
16 project.

17 So, they are in a clear succession. The SEA
18 should precede the EIA because the SEA then gives the
19 framework for the EIA Procedure to be conducted. And
20 I also have a legal provision to sustain my arguments.
21 Article 5 from the Governmental decision that is
22 transposing the SEA directive in Romania, which says

1 that: "The plan or a program contains the criteria
2 and the requirements that guide the decision-makers in
3 the EIA Procedure for future individual projects."
4 This, in my opinion, shows clearly that the SEA is the
5 basis for future projects' EIAs.

6 I will come to the conclusions that are
7 related to the whole of my Legal Opinion. I
8 extensively showed what Professor Mihai seems to
9 understand completely different than myself, the fact
10 that the EU Law and principles are guiding the
11 interpretation of National Law.

12 The EU Law does not stop to be relevant for
13 the National Law and for the sources of law when, for
14 instance, directives are transposed into National Law.
15 Directives have effect even from the issuance of the
16 directives. They have an obligation of restraint.
17 They have an obligation not to have worse conditions
18 in order to prevent the application of the directive,
19 and so on.

20 There is a huge body of literature that shows
21 that the directives are very important for the actual
22 applications of the National Law. The directives do

1 not have to be contradicted by the National Law. And
2 the EU Law, in general, does not have to be in
3 contradiction with the National Law.

4 You can make a directive's objectives
5 irrelevant by the practice of public administration,
6 by ignoring the scope and the actual objectives of the
7 directives through administrative practice. And this
8 is recognized by the literature and by the case law of
9 the Court of Justice of the European Union.

10 The administrative practice also can be
11 against or contradicting the European Law. So, it
12 should not be a matter of contention between
13 professors of law, I think, that the European Law
14 forms part of the National Law in Member States of the
15 European Union, and it has an influence on the conduct
16 of the procedure, especially in a field which is
17 excessively Europeanized, like environmental law.
18 Because this is a field where we find a lot of
19 European Law applicable.

20 I will not detail the rest of the
21 conclusions. I already did on the PUZ and importance
22 of Urban Certificate. I will only say that the public

1 consultations carried out in this procedure, in my
2 opinion, were carried out lawfully, and they have
3 shown the marked opposition to the Project. And Rosia
4 Montana was always protected under historical and
5 cultural heritage legislation that includes
6 discussions relating to the list and so on.

7 Thank you for your attention. I will be
8 happy to answer any other questions relating to issues
9 that I have not covered in my presentation but are in
10 my Legal Opinion, if the Tribunal wants to.

11 Thank you.

12 PRESIDENT TERCIER: Thank you very much. We
13 have now the cross-examination.

14 Mr. Tuca, you will do it in Romanian?

15 MR. TUCA: In English.

16 PRESIDENT TERCIER: In English. Okay.

17 MR. TUCA: Thank you very much,
18 Mr. President.

19 CROSS-EXAMINATION

20 BY MR. TUCA:

21 Q. Good afternoon, Professor Dragoş. My name is
22 Florentin Tuca. I'm from Tuca Zbarcea & Asociatii in

1 Bucharest, one of the members of the legal team
2 representing the Claimant in this Procedure.

3 Before starting our dialogue, I'd like to ask
4 you a few questions related to your CV because I read
5 your CV with attention.

6 And my first important question is if I could
7 wish you a warm, happy birthday.

8 A. Oh, thank you. It's tomorrow, but...

9 Q. Tomorrow.

10 A. But it's well-received. Thank you.

11 PRESIDENT TERCIER: Never do it before.
12 Really, it's a very, very bad sign.

13 BY MR. TUCA:

14 Q. Second question--not far from your birthday.

15 Professor Dragoş, in your view--in your
16 view--I have a small curiosity--a birth certificate as
17 a legal document could be suspended or not?

18 A. In my opinion, a birth certificate cannot be
19 suspended.

20 Q. Why?

21 A. Because it only can be corrected because a
22 birth certificate only acknowledges some facts. It

1 actually acknowledges something that has happened, the
2 birth.

3 Q. Like the Urban Certificate maybe?

4 A. No, no, no. That's different.

5 Q. The analogy is not accurate?

6 A. No.

7 Q. No?

8 A. They are court certificates, but they are not
9 the same.

10 Q. Ah, not the same.

11 A. On the contrary--

12 Q. They have the same informative character,
13 haven't they?

14 A. Yes. But they are not the same legal nature.
15 But if you want, I can expand that maybe.

16 Q. No, no. Getting back to your Legal Opinions.
17 Thank you very much, and happy birthday.

18 Professor Dragoş, it's correct to say,
19 according to the Romanian Law, that a normative
20 administrative act is a decision?

21 A. Yes.

22 Q. It is correct to say that according to

1 Romanian Law, this normative administrative decision
2 should be dated?

3 A. Yes. In principle, yes.

4 Q. It is correct to say that such a normative
5 administrative decision should be--is supposed to be
6 published; correct?

7 A. Well, that depends on whether you refer to
8 certain periods of time where we could have had this
9 obligation or not in the Romanian Law.

10 If you are referring to after 2000, where we
11 have a law on the legislative technique which also
12 covers administrative acts, and it says that
13 administrative acts that are general in nature--we
14 call it "normative" in Romania--they should be
15 published the same as laws, which inform the general
16 public, and they're applicable to anyone who comes
17 within their remit, and so on.

18 Q. But it's correct to say that the publicity is
19 a principle governing the public law?

20 A. Yes. Publicity, yes.

21 Q. Was the so-called "91-92 LHM" an
22 administrative act? Correct?

1 A. Yes.

2 Q. May I have a short image from your Legal
3 Opinion, Page 25, Subtitle (b).

4 A. First or Second?

5 Q. First one. First one.

6 The 91-92 LHM was legally issued--no. Sorry.
7 B, B, B. Title (b)--subtitle (b), Page 25. The 91-92
8 LHM was an official, mandatory normative act.

9 And my next question: What's the date of
10 this act?

11 A. Well, first, we should see the document. No?
12 If you want to actually talk about the date.

13 PRESIDENT TERCIER: Do you have it?

14 MR. TUCA: It's a huge, huge, huge list.

15 BY MR. TUCA:

16 Q. Was it published in the Official Gazette?

17 A. It was not published in the Official Gazette
18 because at that time, general acts were communicated
19 and made public in other ways. I need to explain a
20 little bit the context for my assertion that this was
21 a proper general act in Romanian Law at that time.

22 Because right after the change of regime,

1 after the communist regime elapsed--collapsed, there
2 were--was a new situation where the new State organs
3 were coping with the transition period, and they
4 adopted modalities of communicating within themselves
5 and with the public that were not--are not to be
6 judged from what we understand today from publication
7 or making public--public an administrative act.

8 Needs to be understood that in those times,
9 it was a practice to communicate even to the general
10 administrative acts, to those interested to the State
11 organs, to the local organs, those that were
12 interested in the application of the Act.

13 They were posted at the premises of the local
14 authorities, circulated among authorities. So, they
15 were, in a way, adapted forms of making public the
16 normative act in Romania. General--general acts.

17 So, this Act was, in fact, communicated to
18 the local authorities in order to be applied, and it
19 was recognized in other documents and in other State
20 documents and State acts as an official List of
21 Historical Monuments. And later on, in the Law, was
22 also said that this List of Historical Monuments was

1 considered to be the proper List of Historical
2 Monuments, so--

3 Q. Getting back to my previous question.

4 You--your opinion is that this important LHM
5 list was official and mandatory and normative act, and
6 you studied in your--you analyze it in your Legal
7 Opinions.

8 And my question was if this List was dated or
9 not.

10 A. Actually, I don't know if it was dated. I
11 only saw an excerpt from the Alba County, which was
12 sent to Alba County. I guess they were sending to
13 each county the List of Historical Monuments that were
14 pertaining to their territory. And that one was dated
15 with a date from--I think it was dated from the
16 issuer.

17 Q. And assuming that this List was, as you said,
18 communicated but communicated to the Municipality A
19 but not to the Municipality B, should the Municipality
20 B be obliged to observe this normative act?

21 A. Again, in those times, there were no such
22 specific rules on publications--publication of general

1 acts. They were posted at the premises of the local
2 authority. Again, if a neighboring local authority
3 would want to find out about that List or other
4 documents that were issued in the same way and
5 communicated in the same way, they would have to
6 travel and to see the premises of this authority.

7 So, it was a matter of functioning the
8 new--the new public administration of Romania then.
9 It was a transitional period. We were finding
10 ourselves again. It was, of course, improvising a
11 lot.

12 But what is important about this list is that
13 so many documentary evidence is that this list was
14 considered at the time, contemporaneously, the proper
15 List of Historical Monuments, and it was respected by
16 State organs and by private persons as well, and was
17 enforced by the State organs accordingly.

18 So, for instance, you couldn't build in a
19 Protected Area or in an area with a Historical
20 Monument. So, no way you could do that.

21 Q. You are referring to this so-called
22 "91-92 LHM." You have in mind the list itself or the

1 decision approving it?

2 A. The list--the list and the decision--well,
3 the decision is only an instrument. It's a vehicle
4 for the list, the instrument approving it.

5 So, it was approved in sequences. They were
6 adopting the list county by county. There are--again,
7 and I can show you. I have cited in my Legal Opinion,
8 if you want, the minutes of the Commission for
9 Historical Monuments saying, "Well we adopted the list
10 for those counties and so on. Today we adopt the list
11 for these four counties. We have several more
12 counties to adopt."

13 So, it was a process, again, that cannot be
14 characterized looking back, you know, retrospectively
15 from what we consider now a decision-making process.

16 Q. Yes, Professor, but we have to--to stay in
17 law and to be very precise specialists in law. And my
18 question was very precise.

19 Have you seen, for instance, this decision
20 approving the so-called "91-92 LHM"?

21 A. No, I have not seen one decision approving
22 the whole list. It was approved in sequence, and it

1 was sent to the local authorities to be enforced in
2 day-to-day activities.

3 Q. Do you know if this decision--assuming that
4 this decision exists--is on the record?

5 A. I don't know.

6 Q. Professor Dragoş, you've analyzed a lot of
7 aspects of Rosia Montana cultural heritage; that's
8 correct?

9 A. Yes. I analyzed from the point of view of
10 procedural law, not substantial law. Cultural
11 heritage--I'm not an expert on cultural heritage,
12 per se.

13 Q. What's the backbone of your Legal Opinion
14 from this perspective?

15 A. You mean generally what's the backbone of the
16 argument or what? What's the specific question?

17 Q. Let's have a look at your Second Legal
18 Opinion, Paragraph 331.

19 So: "The backbone of my position is that
20 Rosia Montana was (and is) protected both as an
21 archeological site and as a historical monument. The
22 later regime of protection was instituted under the

1 91-92 LHM."

2 So, the backbone of your legal position is
3 based on the so-called "91-92 LHM"; in other words, on
4 an official, normative administrative and mandatory
5 act which is not dated, not published, not approved,
6 and not on the record; is that correct?

7 A. Let me answer to all these questions in
8 succession.

9 I have explained why it was not published and
10 still produces legal effects. So, in administrative
11 law we have this theory that no matter how the act is
12 approved, in the end, if it produces legal effects, we
13 can conclude that is an administrative act.

14 We have a lot of acts in practice that are
15 called--I don't know--endorsements or opinions, and so
16 on, that produce legal effects. We have acts that are
17 undated, but they still produce legal effects.
18 Somebody enforces them.

19 Well, you cannot say that those who were
20 aggrieved by that enforcement could not challenge the
21 act because it was not dated. Of course, if somebody
22 is hurt by that act, they could go in court and say,

1 "Well, this act is undated, so it's unlawful or isn't
2 even in existence," and so on.

3 But, again, we were in times where this was
4 the practice of public authorities. I--this practice
5 was also conducted for other issues. For instance,
6 the list of assets in the public domain, it was not
7 published. It was communicated only to public
8 authorities. It was an annex to a governmental
9 decision, and it was not published.

10 Well, regardless of the fact that these are
11 proper methods or not at that time, to conduct
12 decision-making procedures, they were respected in
13 practice, they were enforced by all national
14 authorities, and they were recognized as such.

15 And let me go back to your third and fourth
16 points.

17 So, it was not published, you said? It was
18 not--

19 Q. Dated?

20 A. --dated. It was not--remind me.

21 Q. Apparently approved.

22 A. Approved? I think it was approved by the

1 National Commission of Historical Monuments. There's
2 documentary evidence of how they were working and how
3 they were approving, in succession, different parts of
4 the List for each county. I have cited in my Legal
5 Opinion, Mrs. Cezara Mucenic was part of that
6 Commission and who would give evidence on how they
7 were working and how they were struggling in those
8 times to have this--this list put in place and to
9 protect those Historical Monuments that needed
10 protection.

11 After all, we were coming after the
12 communist period, who disregarded this cultural
13 heritage protection entirely. And it was a
14 rediscovering of this domain in Romania in the '90s or
15 in the '91s.

16 And then you refer in the end to the fact
17 that--it was a fourth point. Sorry.

18 Q. The decision approving the list not on the
19 record.

20 A. Yeah, not on the record.

21 What--what I've seen on the record is that
22 letter to the prefectures, and this one to the

1 prefecture of Alba County, communicating the list
2 which should be then applied in practice by the local
3 authorities. I think that's on the record, and also
4 the testimony of Cezara Mucenic is on the record.

5 So, we have enough elements to draw some
6 conclusions on those times. Yes, we don't have hard
7 evidence on--like we have in recent times, in letters
8 exchanged within the Ministry and the developer, and
9 so on. Would have been so easy to have that now,
10 but...

11 Q. Professor, with all due respect, you said
12 that this list is the backbone of your legal position.

13 A. Yes.

14 Q. So, you have to have an approval to be
15 studied, to be verified, to be checked from a legal
16 perspective. I'm wrong?

17 A. Yes, you are wrong because you're applying
18 concepts from nowadays to '91/'92.

19 Q. In '91 and '92 there were some rules;
20 correct?

21 A. Which rules do you refer to?

22 Q. To laws. Norms. Regulations.

1 A. We had norms. They were adopting--the new
2 Government were adopting laws, and some of the laws
3 were still in place from the communist era. Some were
4 adopted. Some were repealed. There were--yeah, it
5 was an activity of, a normative activity then, yes.

6 Q. We had also an Official Gazette at that time;
7 correct?

8 A. Yes.

9 Q. Assuming--you said--one last question.

10 Assuming that--you said that this list or the
11 decision approving it--I don't know exactly--assuming
12 that one of the two is a normative act, do you accept
13 that this normativity is specific for the
14 administrative--for the--for--and has a general
15 application?

16 A. Yes, that's the different--

17 Q. Assuming--assuming, again--sorry.

18 A. Yes.

19 Q. Assuming, again, that I'd be interested in
20 challenging this normative act in a court of justice,
21 could you indicate to me what is exactly the object,
22 the legal act to be contested in front of a judge?

1 A. Well, if a person needs this list in any
2 form, it's when it's requiring, for instance, a
3 Building Permit. Yeah. And the local authority says,
4 "Well you cannot build there because this area is--or
5 this monument is protected, and you're too near to
6 this monument, so we won't give you the
7 authorization."

8 Then, of course, you can challenge the
9 refusal to give you the Building Permit, and also the
10 list that supposedly is illegal. You find out about
11 the list when you need--you need it. It's--you find
12 out about the list. That was the situation there.

13 Again, it's not to be judged from the rules
14 that we have today. In the Constitution of '91, we
15 only have the publication as a matter of giving legal
16 effects of enforcing--entering into force for laws.
17 We didn't have anything for administrative acts.

18 For administrative acts, we only have this
19 rule from 2000. So, administrative acts, basically,
20 in those periods could have been publicized any--in a
21 manner that was at the disposal of the local
22 authorities and the central authorities, as long as it

1 was publicized somehow.

2 And this was done usually by posting it at
3 the premises of the local administration, maybe
4 publishing it in local gazettes, all these kind of
5 ways of communicating the list.

6 Q. You stated--moving on to another topic. You
7 stated that--in your Legal Opinions--that PUZ was an
8 essential prerequisite for the issuance of EP;
9 correct?

10 A. Yes.

11 Q. And my first question related to this
12 statement, when exactly in time the PUZ was needed for
13 the procedure?

14 At the moment of the application? Before
15 some--between the application and the issuance of EP?
16 At the moment of the issuance of EP?

17 A. Yes. The PUZ was needed when the application
18 was made for the Environmental Permit and for the
19 start of the Environmental Impact Assessment. This
20 PUZ, of course, needed to be modified. So, during the
21 EIA Procedure, while the decision-makers were looking
22 at other aspects of the environmental aspect--the

1 Environmental Protection, the PUZ could have been
2 modified by the developer and presented in a valid
3 form for the proper conduct of the Environmental
4 Impact Assessment.

5 The PUZ is needed for the Environmental
6 Impact Assessment because it gives you an indication
7 on how the Project integrates within the larger area
8 of urban development. This is very important in terms
9 of proper application of the Environmental Impact
10 Assessment.

11 And this is required by the Environmental
12 Impact Assessment Directive. Proper information and
13 the land zoning and how this permits the development
14 of the Project. All this has to be assessed.

15 The Zonal Planning also relates to the
16 protection of historical monuments. You need to know
17 exactly, when assessing the impact on the environment,
18 which historical monuments will be destroyed, will be
19 replaced, will be affected by the project, or
20 which--of course, Environmental Impact Assessment
21 looks at human beings, flora, fauna, soil, air, and
22 climate and interactions between these; whereas the

1 Zonal Planning is very important for the impact on
2 human beings, on soil, on land use, on cultural
3 heritage, so--only to list a few things that
4 are--waters.

5 And all this is necessary for the Impact
6 Assessment. So in my mind, at the beginning of the
7 Procedure. But if changes to the Project are made, it
8 can be adapted and presented again during the
9 procedure until the procedure ends. In the Final
10 Assessment of the Environmental Impact, you need to
11 have a clear indication on what the Urban Zoning
12 Planning is.

13 In the meantime, if a strategic environmental
14 assessment goes to--and is performed and, I don't
15 know, changes the data of the problem, this, again,
16 needs to be considered for the specific project within
17 the Environmental Impact Assessment.

18 This is my understanding of the succession
19 of--

20 Q. Yes. But my question was very precise.

21 Again, assuming that I'm challenging in front
22 of a court the EIA Procedure in 2007. At that time

1 PUZ was or not a condition--an essential prerequisite?

2 A. It was--it was a condition from the
3 beginning. I listed the legal provisions that say
4 that from the beginning, the urban documentation
5 should be deposited together with application for the
6 Environmental Permit and for the conduct of the EIA
7 Procedure.

8 So--because the urban certificate, it's
9 already issued, clearly states that a new PUZ has to
10 be developed and--and approved. And here you have an
11 indication that in order to-- EIA to be completed in
12 the end, you need to have also the PUZ.

13 Q. Let's look at your Supplemental Legal
14 Opinion, Paragraph 181.

15 A. 18--say again? Can you say again the
16 paragraph?

17 Q. 181.

18 When you said that "Professor Tofan reaches
19 the conclusion that a valid PUZ is needed not only at
20 the moment of the issuance of the EP, but also for
21 carrying out the EIA Procedure."

22 So, it's fair to say that in your view, the

1 PUZ, as an essential prerequisite, was for the moment
2 of the issuance of the EP, not from the beginning to
3 the end of the procedure; is that correct?

4 A. No.

5 Q. No?

6 A. No. From that text, clearly, the conclusion
7 is that it's necessary even before the issuing of the
8 Environmental Permit in the EIA Procedure. Of course,
9 it's also necessary at the end when issuing the
10 Environmental Permit. That's logical.

11 Q. But, again, when exactly?

12 A. At the start of the procedure. I already
13 said that, I think quite clearly.

14 Q. You know that at the start of the procedure,
15 a valid PUZ was in place; is that correct?

16 A. That was in place. The valid PUZ was in
17 place, but it needed to be updated/modified by the
18 developer. And this was done in parallel with the
19 conduct of the EIA Procedure. And within the EIA
20 Procedure, the TAC members were waiting for the PUZ to
21 be--the new PUZ to be adopted in order to properly
22 assess the impact on the environment and to, in the

1 end, of course, finalize the EIA Procedure and when
2 the case, propose the Environmental Permit.

3 Q. Please correct my syllogies. According to
4 the--assuming--according to the Law, we needed that
5 PUZ in place in two--at the moment of the application;
6 correct?

7 A. Yeah.

8 Q. First premise.

9 The second one: We had a PUZ in place at the
10 moment of the application.

11 Conclusion: All the requirements are met.

12 It's correct or not?

13 A. No. That PUZ was not valid.

14 Q. You said it was valid.

15 A. No. It was valid in the sense that it was
16 adopted, but it needed to be changed--

17 Q. No.

18 A. --in order to--for the project to be properly
19 assessed from the Environmental Impact point of view.

20 Q. We are lawyers and we have to accept that an
21 act is valid or not. Tertium non datur; correct?

22 A. Well, I didn't express myself well saying

1 that it was valid. Sorry.

2 It was deposited by the developer, but it was
3 not valid for the procedure. It was a PUZ, but not
4 the right PUZ. The right PUZ needed to be developed.

5 Q. Are you aware that that PUZ was valid
6 throughout the procedure?

7 A. It is not valid. The procedure--the
8 decision-making--makers in the procedure were waiting
9 for the right PUZ that would encompass the
10 requirements of the urban certificate. So, if by me
11 saying that a valid PUZ--distinctly saying that, you
12 understand that it was valid throughout the procedure.

13 The one deposited at the beginning? No.
14 That's not my conclusion.

15 PRESIDENT TERCIER: Okay.

16 THE WITNESS: Maybe it was a--

17 PRESIDENT TERCIER: I think you are repeating
18 yourself now.

19 Move to the next question.

20 BY MR. TUCA:

21 Q. One important question. Because you said
22 that this PUZ is very important for the procedure.

1 Do you accept that an important document for
2 a procedure should be expressly provided by the
3 procedural law?

4 A. No. The procedural law cannot state
5 everything. It's impossible to state everything and
6 every document that proves something within the
7 procedure. These documents are proving what the
8 Memorandum of the--of the developer says. The
9 Memorandum gives some information. How can you prove
10 that? Only the developer says that?

11 No. It has to be proved. How do you prove?
12 The integration and environmental aspects into the
13 urban planning and so on, how the zoning is done or
14 what are the requirements, what are the restrictions,
15 what are the prohibitions.

16 How can you prove that? Through documents
17 issued by state organs, urbanism zoning planning,
18 general urban planning, and the Urbanism Certificate
19 that enforces those zonal and urban planning to the
20 specific project.

21 Q. Let's move on.

22 Your Paragraph 412, First Legal Opinion. You

1 said that it is--sorry--another so-called
2 prerequisite--essential prerequisite, surface rights.

3 You said that surface rights--"I believe that
4 it is recommendable that such surface rights are
5 obtained before the issuance of the EP."

6 And in Paragraph 77, for instance, of your
7 Supplementary Legal Opinion, these two are just two
8 examples among many others. Some inconsistencies
9 between your statements regarding this subject. I'd
10 like to have some clarifications.

11 These surface rights are or not mandatory to
12 be--to be--to have an EP?

13 A. Let me be clear. Regardless of the
14 formulations, which--which sometimes may seem to
15 contradict themselves, but they are not because I
16 clearly explained that the--even though there's no
17 express legal obligation to have surface rights before
18 issuing the Environmental Permit, the systematic
19 interpretation of the Law leads to the conclusion that
20 in the EIA Assessment, in the Environmental Impact
21 Assessment, the surface rights are very important.

22 Why? Because EIA is looking at the soil,

1 land occupation, the human beings, relocation of
2 population, how, for instance, the surface rights will
3 be acquired, how they will, for instance, lead to
4 deforestation, to other impacts on the environment.

5 So, yes, surface rights and the way in which
6 the developer will deal with surface rights and how it
7 will obtain these surface rights, it's a very
8 important element of the Environmental Impact.

9 The fact that you have to expropriate a large
10 number of people for the project, that's an
11 environmental concern. That should be assessed during
12 the EIA Procedure.

13 So, of course, nowhere you will find all
14 these requirements in writing explicitly saying this
15 because no laws are working like that. They cannot
16 regulate everything for every situation.

17 But in looking at the sources of law and the
18 legal provisions applicable to this procedure, from
19 the point of view of National Law and European law,
20 one can draw the conclusion in good faith that the
21 surface rights were an important element of the
22 assessment on the environment.

1 That's why I said it's recommendable to be
2 before the Environmental Permit, but definitely
3 secured before the Building Permit because you cannot
4 build something over the houses of people that you
5 have to relocate, or you have to expropriate, and so
6 on.

7 So, these are the matters that have to be
8 considered, of course.

9 Q. From a legal perspective, what happens when
10 such a recommendation is broken? What are the
11 sanctions?

12 A. Well, this recommendation is a part of
13 the--of the right of discretion. We call it, in
14 general terms, the discretionary power. But it's--it
15 sounds more--the legal term in the comparative
16 literature is "discretion." Discretion of the
17 administration.

18 So, the administration is bound by strict
19 rules sometimes or rules that only ensure some limits
20 for the exercise of the discretion. And the
21 discretion is exercised by the public authorities with
22 applying the legal principles, the general legal

1 principles.

2 This is the case where the public authorities
3 must exercise their discretion and see how the surface
4 rights will impact the environment. They may decide
5 that it's okay to--to go ahead with the project in
6 some way or another. And, anyway, a consideration of
7 the surface rights is necessary, and the impact of the
8 project on the human beings, on land, on waters, and
9 so on, which relate to surface rights needs to be
10 considered.

11 So, from there I draw my conclusion that the
12 surface rights should be considered during EIA as
13 well.

14 Q. Another essential--it's your view, not
15 mine--but essential prerequisite for the issuance of
16 the EP was, in your opinion, the Ministry of Culture's
17 endorsement based on ADCs, Archeological Discharge
18 Certificates; is that correct?

19 A. Yes.

20 Q. It was your view that these ADCs were needed
21 in order for the Ministry of Culture to issue its
22 favorable endorsement for the project; correct?

1 A. Yes.

2 Q. The Ministry of Culture issued two favorable
3 endorsements, the first one in 2011, the second one in
4 2013. Two valid endorsements, in our view. We will
5 analyze them in three minutes.

6 But before that, I would like to clarify, to
7 know your position on this essential prerequisite.
8 Because I have at least two--two problems with your
9 theory.

10 The first one is--let's call it a vicious
11 circle. On one side we have this Norm imposing that
12 the Ministry of Culture endorsement is
13 necessary/essential for the land with archeological
14 relevance. Okay? Sorry. That is correct?

15 A. Yes.

16 Q. Okay. If--consequently, if the land--the
17 site has no archeological relevance, we don't need
18 such a Ministry of Culture endorsement?

19 A. No, I cannot agree with that conclusion, and
20 neither with the conclusions that you enter in--put in
21 there, that the two endorsements were actually
22 endorsements in 2011 and 2013.

1 If I may, I can--if the Tribunal allows me, I
2 can explain my position on this.

3 PRESIDENT TERCIER: Yes, I would like you to.
4 And then you can ask a question about that.

5 THE WITNESS: So, first, I would say that the
6 Ministry of Culture needs the ADCs in order to reach a
7 decision towards actually endorsing the project and
8 seeing that the project is not affecting archeological
9 sites that are worth of protection.

10 So, basically, the ADCs are only a step in
11 the issuance of the--well, the ADCs are the result of
12 archeological research, are the final step of
13 archeological research. The other alternative final
14 step of archeological research would be to preserve
15 the archeological vestiges in situ and not to
16 discharge them.

17 If they are discharged, this is at the basis
18 of the decision of the Ministry of Culture to endorse
19 the project. And this is required by law. By law,
20 Governmental Ordinance 43/2000 on archeological
21 protection. And this is very clear in the law.

22 So, I don't know where this idea that has no

1 basis in law that the ADCs are superseding the
2 Ministry of Culture endorsement. The Ministry of
3 Culture endorsement, it's, you know, positive for the
4 project that destroys our archeological sites that are
5 not relevant and were discharged. Yeah.

6 So, this has to be given. This has to be
7 considered. Maybe the area was not wholly discharged.
8 Maybe you have parts of it that still entail some
9 protection. So, there's a proper process of
10 decision-making by the Ministry of Culture for
11 endorsing the project.

12 On the other hand, the 2011 and 2013
13 documents are different in legal nature. The 2011
14 document is a point of view, and the 2013 endorsement,
15 indeed, is the proper endorsement from the Ministry of
16 Culture for the project.

17 And that is based--what happened between 2011
18 and 2013? Well, the Preventive Archeological Project
19 was approved by the National Commission of Archaeology
20 for Orlea. So, that was a new step in future
21 discharging that area. That would entail the Ministry
22 of Culture to give the endorsement with

1 conditionalities on the understanding that the Project
2 will be developed in stages, that this part that was
3 not already discharged will be researched, and they
4 will decide on a later stage what to do with it if
5 somebody--if something is found there of importance
6 for--for protection.

7 So, yes, my opinion is the ADCs are at the
8 basis of the Ministry of Culture endorsement for the
9 Project.

10 BY MR. TUCA:

11 Q. Moving on. This is my second problem
12 with--related to your theory.

13 You said in your Second Legal Opinion,
14 Paragraph 310: "In conclusion, I find that ADCs were
15 needed for the Ministry of Culture's endorsement of
16 the Project, as the GO 43/2000 imposes this
17 condition."

18 Could you--do you have in mind a specific
19 text/a specific rule imposing this condition?

20 A. If I'm allowed, I can show you several texts
21 that, read together, lead to this conclusion.

22 Q. No.

1 A. Again, if you want me to respond exactly to
2 your question. If you're looking for a specific
3 provision that solves all the problems that you are
4 raising, there is no such provisions in any law that
5 solves a particular situation at a particular point in
6 time for a particular project and for a particular
7 Ministry of Culture. So, you won't find that in any
8 legislation anywhere in the world.

9 So, of course, the systematic interpretation
10 of the law is necessary here, and I have enough
11 arguments that the archeological research leads to
12 either ADCs or to the protection of the archeological
13 sites.

14 If ADCs are issued and then, of course, you
15 can develop projects on those areas, except the case
16 where ADCs are only partial or they are annulled or
17 suspended, so on. Because in that case, of course,
18 the area cannot be discharged and is still under
19 protection.

20 So, the Ministry of Culture needs to protect
21 those sites as well. So, this is also a decision by
22 the Ministry of Culture that has to balance the public

1 interest/protection of cultural heritage with the
2 private interest of the developer to get the approval
3 for the project. And the Ministry of Culture has done
4 that in this procedure.

5 Q. Professor, I have to confess that I am not
6 convinced. And I invite you to have a look to your
7 Second Legal Opinion, 274.

8 "I explained in my First Opinion that a
9 Ministry of Culture may only issue"--

10 PRESIDENT TERCIER: Wait a second now.

11 MR. TUCA: Sorry. Sorry.

12 PRESIDENT TERCIER: Do you have it?

13 THE WITNESS: Yes, yes, yes.

14 BY MR. TUCA:

15 Q. So, "The Ministry of Culture may only issue
16 the conformity endorsement required under
17 Article 2(10) of GO 43 based on the ADCs (or lack of
18 ADCs)."

19 Could you explain that?

20 A. Yeah. The conformity endorsement anyway
21 needs to be issued. If there are no ADCs or there are
22 partial ADCs, the conformity endorsement will be with

1 conditionalities.

2 So, you can give a conformity endorsement
3 saying, "Well, we are not agreeing to this project.
4 It cannot be developed."

5 So, the lack of ADCs keeps this route. If
6 you have ADCs for the whole area of the project, you
7 will give a proper, fully--full-body endorsement for
8 the--for the project. That's my understanding.

9 That's why--that's what I said there.

10 Q. Let's have a look at your Second Legal
11 Opinion, Paragraph 313.

12 Before that, you said--you said--before that,
13 you said that these ADCs are endorsements?

14 A. Yes.

15 Q. So, conformity endorsements?

16 A. The ADCs or the endorsement of Ministry of
17 Culture?

18 Q. No, the ADCs.

19 A. No. The ADCs are administrative acts.

20 Q. Okay. 313. 313. "If the Ministry of
21 Culture did issue the required endorsement in
22 April 2013, even if ADCs had not been obtained, the

1 Ministry of Culture issued the required endorsement in
2 the exercise of its margin of discretion."

3 I'm again confused because you said ADCs are
4 an essential prerequisite for the issuance of the
5 endorsement. They're expressly mentioned--expressly
6 mentioned in--in GO 43.

7 A. No. Systematic interpretation--sorry.
8 Systematic interpretation of GO 43 leads to that
9 conclusion. I never said it is expressly stated in
10 ADCs-- in the GO.

11 Q. Anyway, you said that they are essential, and
12 we suddenly discover that the Ministry of Culture has,
13 however, a kind of marginal discretion in issuing the
14 endorsement.

15 How could you explain that?

16 A. Well, the explanation is right there in
17 Paragraph 313. Based on the Law, of course, the ideal
18 situation is to have ADCs for the whole area of the
19 project and, based on those ADCs, a full endorsement
20 can be issued.

21 But the endorsement can be also issued with
22 conditionalities, with future--which are depending on

1 future actions and acts of the developer and of other
2 public authorities.

3 So, in order to allow the advancement of the
4 project, a balancing act--a proper balancing act
5 between the public interest and the private interest
6 was performed by the Ministry of Culture.

7 And the Ministry of Culture looked at the--at
8 the fact that research has been conducted in one part
9 of the area for the project. Discharge certificates
10 were issued there. These discharge certificates were
11 also contested, and some of them were annulled or
12 suspended in the meantime.

13 So, there was uncertainty on how that will
14 go. And that explains why in 2011 it couldn't give
15 the endorsement--the proper endorsement.

16 But in 2013, some more steps were taken in
17 order to have more clarity on the future development
18 of the project in those areas. And this clarity was
19 given by the fact that a research
20 project--archeological research project was approved;
21 the Chance Find Protocol was signed with the--well, it
22 was signed before, but it existed with a developer.

1 There are provisions in the Law saying that
2 if Chance Finds occurs, then the project stops, the
3 competent authorities are announced, a proper
4 investigation and the research is conducted, and the
5 decision is made on whether to preserve the vestiges,
6 if they are found in situ or removed or so on.

7 So, also, the project would be developed in
8 stages. So, in that area that was lacking ADCs, the
9 project would only arrive in Year 7 of the
10 development. So, there was time for research and to
11 proper discharging the area in terms of archeological
12 interest, and also that only one endorsement is given
13 by the Ministry of Culture.

14 You cannot say, "Well, I'm not giving you now
15 the endorsement. Come back later. I will give you a
16 partial endorsement."

17 That's not possible for that area or--it's
18 not possible. It's one endorsement. So, it's
19 unfair--would have been unfair, actually, for the
20 developer not to consider this and to say, "Oh, we're
21 applying the Law in a very strict way. We considered
22 we need ADCs and so on, so we won't give any

1 endorsement until you secure all ADCs. So, see you in
2 a couple of years after you finish the research on
3 Orlea."

4 I think that was a proper exercise of the
5 discretion of the Ministry of Culture, which gave the
6 endorsement with conditionalities. They didn't
7 actually break any rules because there were no express
8 rules requiring very strictly that all the ADCs were
9 in place. It's only a systematic interpretation of
10 the Law that leads to that conclusion that you should
11 base your decision/your endorsement, as a Ministry of
12 Culture, on ADCs.

13 But in no way, in my opinion, they could have
14 given a full endorsement in the absence of ADCs for
15 the whole area.

16 I don't know if I made myself clear or--

17 ARBITRATOR DOUGLAS: You mean a full
18 endorsement without conditions.

19 THE WITNESS: Yes.

20 BY MR. TUCA:

21 Q. In your view, the 2013 Minister of Culture's
22 endorsement was a full endorsement?

1 A. No. It was with conditionalities. So, it's
2 conditional on performing the archeological research
3 in Orlea, on observing the laws on Historical
4 Monuments, because we had in that area monuments that
5 were not already declassified, so it was still
6 protected under the Law.

7 So, yeah, they were--there were conditions
8 on--on the endorsement.

9 Q. Let's look at the first endorsement, please--

10 A. Yes.

11 Q. --in 2011.

12 DR. LEAUA: Objection. I mean, this is the
13 second time that the witness is posed with a
14 characterization that is disputed between the Parties,
15 that he himself explained.

16 So, maybe we can have a different phrasing of
17 the reference to the document of 2011.

18 PRESIDENT TERCIER: Which one? The wording
19 used?

20 DR. LEAUA: "Let's look at the first
21 endorsement, please."

22 It's not an endorsement, in our view. And,

1 also, the Expert has put on record his position as to
2 this first document of 2011 which he does not consider
3 an endorsement. It's a point of view, in the Expert's
4 words.

5 MR. TUCA: I apologize. You're right.

6 PRESIDENT TERCIER: No. I'm sure there is a
7 possibility the Expert could explain whether it is or
8 it is not an endorsement that's given to him. And,
9 secondly, in case really it does not, you can always
10 come back with a redirect.

11 BY MR. TUCA:

12 Q. You are stating in your legal opinion that
13 this point of view issued by the Ministry of Culture
14 on December the 7th, 2011, does not indicate the legal
15 ground based on which it was issued; is that correct?

16 You said--

17 A. Yes.

18 Q. Okay. Let's--

19 PRESIDENT TERCIER: Can you tell where you're
20 quoting from?

21 MR. TUCA: Supplementary Opinion of Professor
22 Dragoş, Paragraph 253.

1 PRESIDENT TERCIER: Okay.

2 BY MR. TUCA:

3 Q. It's on the screen, 253.

4 A. Yes.

5 Q. And on the document itself, Tab 5, for the
6 record, C-446, Point 6: "Taking into consideration
7 Article 2, Para 10, GO 43/2000," is expressly stated
8 that this, let's call it, point of view is taking into
9 consideration this Article from GO 43.

10 Do you consider that it's not a reference to
11 a legal ground of this legal document?

12 A. Yes, I consider that this is not a proper
13 indication of the legal ground for this document, and
14 I base my conclusion on comparing the two documents
15 that you are talking about, the 2011 point of view, in
16 my opinion, and the 2013 proper endorsement.

17 In the proper endorsement in 2013, the
18 Article 2, Para 10, is referred to as a legal base for
19 the endorsement separately and not in preambles like
20 here. These are preambles of the documents. And it's
21 only saying "Taking into consideration Article 2,
22 Para 10."

1 So, in my mind, this indication, corroborated
2 with other indications--if I could see both documents,
3 I could show you very clearly. There are a few
4 elements that led me to the conclusion that this is
5 not the Law--the proper--this is not the proper
6 endorsement for the project.

7 Why? Because this point of view is expressed
8 by the Ministry of Culture in the quality as a member
9 of TAC.

10 In the meeting in 2000--29 November, the
11 Ministry of Culture was not present. And based on the
12 rules of the TAC meetings, those who are not present
13 in the meeting, they have to express a point of view
14 afterwards.

15 Well, this was the point of view that was
16 expressed by the Ministry of Culture after the TAC
17 meeting. And this document, it's not--I have other
18 arguments for which it's not a proper endorsement.
19 The title here, it's not stated. If you maybe can
20 look at it a bit.

21 Or am I allowed to go through the document to
22 show things if you already have it in front of me?

1 PRESIDENT TERCIER: Of course. Is it possible
2 to put it on the screen, please?

3 THE WITNESS: The first page, there's no
4 mentions regarding the title of this document. And
5 you can close that.

6 Okay. The wording of the document is that we
7 are considering this--no, no. It's--you can see
8 there--"Dear Mr. State Secretary," if you can enlarge
9 that paragraph.

10 So, here it's stated that it's a point of
11 view about the issuance of the Environmental Permit.
12 So, it's a point of view in the TAC meeting, from my
13 understanding, and not a proper endorsement.

14 Maybe we don't have the time to see the
15 other--the proper endorsement where it says as a title
16 "Endorsement." It's very clear.

17 The proper legal base is separately--not in
18 preambles as an afterthought. It's a proper legal
19 base cited separately in the document in the 2013, and
20 expresses--the one in 2013 expresses the will of the
21 public authority to endorse the project. It's very
22 clear.

1 Here it's expressed in very vague terms, the
2 fact that we're expressing a point of view regarding
3 the project. Of course, this might have been a
4 document that then in 2013 was used to issue the
5 proper endorsement. So, maybe they worked on it. I
6 cannot say that. I cannot speculate. But the
7 similarities are--are ending there.

8 A proper--I will end with this. A proper
9 assessment of the legal nature of an administrative
10 act needs to be done, looking at the--not only the
11 form or the title or so on of the act, but also, very
12 importantly, to the expression of will of the public
13 authority.

14 I cannot find the expression of will of
15 public authority in this one, whereas I find a very
16 clear expression of will in the 2013 document. So,
17 that's why I said that is a bit complicated to give an
18 explanation, only seeing this one. They have to be
19 compared, and it's an analysis that it's a little bit
20 more.

21 But I've done that analysis because it was a
22 point of controversy between our teams and my--my

1 professors that I have replied to in my Legal Opinion.

2 Sorry.

3 BY MR. TUCA:

4 Q. Thank you very much. Let's move on.

5 I read your analysis, and I saw that a lot of
6 your references are made to the European Law. But
7 I--there are no--you are not of the view that the EIA
8 Directive was not properly implemented in the Romanian
9 Law?

10 A. No. I never said that, that it was not
11 properly implemented.

12 Q. So, there is no question of primacy of EU Law
13 in the case at hand?

14 A. Well, no. There is a question of primacy of
15 EU Law. That's the issue. The primacy of EU Law does
16 not relate, as Professor Mihai says, that--only in
17 cases of controversy or inconsistencies between the
18 EU Law and National Law. The National Law has to be
19 interpreted in light of the EU Law when there is a
20 source of law regarding to that field of Application.

21 So, in my opinion, the EIA Procedure was
22 conducted in accordance to EU Law. So, the conduct of

1 the procedure was in accordance with EU Law.

2 What Professors Mihai and Schiau suggested,
3 to apply very strictly some rules that are not even
4 applicable to this project in order to, I don't know,
5 decide in ten days, or to have only one TAC meeting,
6 or to never refer back to the public for consultation
7 when the EIA Report was updated or such things, those
8 were--would have been against the EU Law, the proper
9 interpretation of the EIA Directive.

10 The EIA Directive says you need to have an
11 effective Environmental Impact Assessment. Aarhus
12 Convention says you need to have an effective and
13 proper participation in decision-making of the public,
14 not only consulting the public for the sake of
15 consulting the public and so on.

16 So, I have arguments for saying that the
17 proper conduct of the procedure needs to take into
18 consideration EU Law as well.

19 Sorry for the long exposé.

20 Q. Let's have a look at the European Union
21 Treaty, Article 228, Paragraph 3.

22 PRESIDENT TERCIER: 288?

1 MR. TUCA: 288. Yes, sir.

2 BY MR. TUCA:

3 Q. In light of this Article, Professor Dragoş,
4 do you agree that in implementing the EIA Directive,
5 the Romanian State enjoys procedural autonomy?

6 A. Yes. But only as long as it doesn't
7 jeopardize the objectives of the EIA Directive. That
8 is clearly stated in the case law of the Court of
9 Justice of the European Union.

10 The procedural autonomy, which, by the way,
11 relates to--generally to court proceedings, it's
12 enjoyed by the Member States only when it does not
13 jeopardize the objectives and the purposes of the
14 Directives, of the EU Law, generally, and moreover to
15 Directives which are an atypical instrument of
16 legislating.

17 Q. Have you identified a major conflict
18 jeopardizing this Project, a conflict between the
19 local Romanian Law--Procedural Law and EIA Directive
20 Procedural Norms?

21 A. No.

22 Q. Let's take an example. Article 31.1,

1 Order 860 for 2002, Document C-1774. It's just an
2 example.

3 PRESIDENT TERCIER: Do you have it with a tab
4 for the--

5 MR. TUCA: On the tab is 25. Excuse me.

6 No. Sorry. 16. 16. 1774.

7 BY MR. TUCA:

8 Q. It's just an example, a procedural example.
9 Let's--"In 10 working days after finalizing the
10 decision of the Technical Assessment Committee, the
11 public authority transmits to the titleholder the
12 decision to issue or to reject, as the case may be,
13 the EP."

14 And my question, Professor Dragoş, is this
15 norm violating a rule or a principle of the European
16 Law?

17 It's just an example.

18 A. Yes. No, in my opinion, it does not because
19 10 working days, it's not a term that would lead to
20 the invalidity of the act. It's only a recommendation
21 term, and it should be adapted to the complexity of
22 the procedure, if the case, or it could be respected.

1 In my opinion, for instance, if the
2 proposal--yes. If the Environmental Permit, for
3 instance, is issued in 20 days or 30 days after it--I
4 won't say this is unlawful, if it can be shown that a
5 proper assessment was--was conducted and there is
6 reasoning behind this--this prolongation of the term.

7 These terms--well, just to mention, these
8 regulations were adopted in Romania having in mind
9 small-scale projects.

10 So, if you can see, the procedure is very
11 swift, one or two TAC meetings, very short days. 10
12 days is very rare in Romania for decision-making.
13 Usually we have a general deadline of 30 days that can
14 be prolonged, and the public authorities take their
15 time to decide on many issues.

16 So, I wouldn't say that for environmental
17 matters that are so complex and so--involving so many
18 risks, a decision like this can be taken in 10 days.
19 Of course, if everything is in order and everything is
20 settled, you can decide in 10 days.

21 But that's an example of how to interpret the
22 deadline within the national law in light of the EU

1 Law. If it's necessary, then the deadline can be
2 prolonged. Of course, you can always have the
3 reasonable deadline, you know. Public authorities
4 should decide in reasonable deadlines and so on.
5 That's a principle that applies here too.

6 But strictly related to this question, I
7 would say that this is not jeopardizing the objectives
8 of the EIA Directive, if applied properly for this
9 complex procedure that is only the second
10 conducted--well, it was the first by then--conducted
11 by Romania for which you have to go back to the source
12 of these EIA regulations, which is the directive.

13 Anytime the EU Law regulates something, the
14 concepts are there in the EU Law. You have to go back
15 when interpreting national legislation to the EU Law
16 to see what the legislator has meant by those
17 concepts, otherwise you just jeopardize the objectives
18 of those regulations. Sorry for--

19 Q. It would be fair to say that this Article,
20 it's one expression among many others of the legal
21 certainty principle?

22 A. It could be considered one of the elements.

1 Q. Is legal certainty principle a fundamental
2 principle of European Law? Isn't it?

3 A. It is among other principles. So, there is a
4 ranking of the principles.

5 Q. You agreed in your legal opinions that
6 Environmental Law principles have been observed by
7 Romanian authorities, and they've been implemented or
8 are in line with Romanian legislation?

9 A. So, let's repeat the question.

10 Q. I will rephrase.

11 A. Yes.

12 Q. You stated in your opinion--sorry--that
13 Romanian legislation is in line with Environmental Law
14 principles.

15 A. Yes.

16 Q. I would be very curious. What principle
17 would motivate the Ministry of Environment decision
18 not to issue the EP?

19 A. Well, the EP is issued by the Ministry of
20 Environment after a proposal by the TAC Committee on
21 the issuance of the Environmental Permit.

22 Well, in this case the proposal goes further

1 to the Government. But it's a succession of steps.
2 The notion of proposal means that if something is
3 proposed to a decision-maker, the decision-maker can
4 either issue the decision, if it has nothing to object
5 to that, or it can go back and tell the--in this
6 case--the TAC Committee to reconsider some issues that
7 are not properly addressed in the proposal. That's my
8 understanding of the Law--the Romanian Law and the
9 concepts of proposal and administrative act that is
10 issued afterwards.

11 So, there is a degree of discretion for the
12 Ministry of Environment on issuing the Environmental
13 Permit if, for instance, new elements appear after the
14 finalization of the TAC meetings and after the
15 proposal.

16 If, for instance, the consultation of the
17 public was not taken into consideration in the
18 proposal, was disregarded, or if outstanding issues
19 regarding the technical aspects were also disregarded
20 and somebody, I don't know, makes a notice to the
21 Ministry, "Well, this would be unlawful," it will be
22 annulled in court. So, what are you doing?

1 So, there is a degree of discretion. Of
2 course, the Ministry is not doing the assessment in
3 the place of TAC. It has to respect. But what can
4 the Ministry do?

5 And here I would explain the opinion of my
6 colleague. I think what she meant by--the fact that
7 the Ministry cannot--cannot not issue the
8 Environmental Permit. I think she meant that he
9 cannot, for instance, reject the Environmental Permit.

10 So, faced with the proposal from the TAC, the
11 Ministry cannot reject the issuing of the
12 Environmental Permit. He can only say, "Well,
13 reconsider it and we're going to issue when it's
14 properly assessed."

15 So, it's either issuing or reconsidering. No
16 rejection going over the head of the TAC and to reject
17 for no reasons or for his own reasons out of the blue
18 this--

19 ARBITRATOR DOUGLAS: What if all the TAC
20 members were bribed?

21 THE WITNESS: Well, that has to be, you know,
22 evidenced somehow.

1 ARBITRATOR DOUGLAS: It's a hypothetical.
2 But what if all the TAC members are bribed? Does the
3 Ministry have to accept the recommendation?

4 THE WITNESS: No. I'm telling you, he has to
5 consider and based on new elements or the elements
6 that have derived from the TAC meetings, to take a
7 decision so he can send back the assessment and redo
8 it, of course. But only if it's for technical reasons
9 that were agreed in TAC.

10 The Ministry is not able to--to reconsider
11 them himself. Say, "Okay, I'm disregarding the TAC,
12 and I'm going over"--or the TAC, for instance,
13 proposed not issuing the Environmental Permit and the
14 Environmental Ministry says, "I'm going to issue the
15 Environmental Permit."

16 So, that's not possible, in my mind.

17 PRESIDENT TERCIER: May I just--I don't know
18 who started to speak.

19 In that regard, I understand that the
20 Ministry could ask the TAC to reconsider? That is
21 your position?

22 THE WITNESS: Yeah, I think.

1 PRESIDENT TERCIER: And you gave as possible
2 grounds new facts that have occurred in the meantime
3 or a point that you consider is not clear enough or
4 that has been objected in another way later on.

5 Is it possible for them to reconsider or
6 to--yeah, to invite the TAC to reconsider the decision
7 based on elements that are--have not been--are not
8 typically in the competence of the TAC? So, taking
9 some--I don't know--element, some political position,
10 anything like that?

11 THE WITNESS: No. I think--I think not.

12 So, this is an assessment that is only in
13 technical terms. Even technical terms means also, for
14 instance, participation with the public or, you know,
15 acceptance of the project among citizens or
16 considerations that are within the Law, within the
17 procedure. This is procedure. This is within the
18 procedure. So, political considerations cannot, of
19 course, be part of this--these considerations. So,
20 evident.

21 BY MR. TUCA:

22 Q. Professor, let's get back to the backbone of

1 your position on cultural heritage. Your Second
2 Opinion, Paragraph 463.

3 "I've explained in my First Opinion that all
4 the assets listed in 91-92 LHM"--

5 A. Just one moment so I can see it on the screen
6 at least.

7 Q. --"including the Rosia Montana site (on a 2km
8 radius) were classified as historical monuments."

9 My first question, what does "site on a 2km
10 radius" mean?

11 A. I think I've cited the exact wording of the
12 List of Historical Monuments. If not, it might be
13 misstated. Maybe that's a clerical error or something
14 like that.

15 Q. Do you have in mind the definition?

16 A. The definition of what?

17 Q. Of this--of this--exactly of this location,
18 "site on a 2km radius."

19 A. Yeah. I would have to see exactly on the
20 List of Historical Monuments, if you can show me that
21 document, exactly how it was defined there. Because I
22 just referred to the List of Historical Monuments.

1 If it's a mistake, and it's not referred
2 correctly, I assume that error. I was referring to
3 what is stated in the List of Historical Monuments.
4 That's the description of the historical monument.

5 Q. We--as legal experts, we have sometimes an
6 important mission, to interpret the Norms. And we
7 have to interpret that, "site on a 2km radius."

8 How could you interpret this?

9 A. What do you mean? Why should I interpret
10 this in terms of legal procedure? I'm not--

11 Q. In terms--

12 A. I don't understand the question.

13 Q. In terms of Romanian language.

14 MR. GUIBERT de BRUET: Could we just be shown
15 the document since he's being asked about it?

16 THE WITNESS: Can I see the List of
17 Historical Monuments, the Romanian version, so we can
18 see exactly how it is there because I--

19 BY MR. TUCA:

20 Q. It's your Second Opinion, 463.

21 PRESIDENT TERCIER: Okay. I think it's
22 clear. We have it in front of us. So which is your

1 question? "2km radius" should have a center somewhere
2 to start--

3 MR. TUCA: Exactly.

4 PRESIDENT TERCIER: --to start making the
5 radius.

6 BY MR. TUCA:

7 Q. Where is the center?

8 A. Well, that's--that's a definition that is for
9 cultural heritage experts to discuss.

10 Q. Okay.

11 A. Because for me, it only is important in terms
12 of procedure. Rosia Montana was protected as a
13 historical monument or not. That gives a certain
14 legal protection for--to the site. The description.
15 And if the proper description in words or something
16 like that is or the--how wide is that, it's--I haven't
17 analyzed.

18 I'm not--I'm not an expert in cultural
19 heritage in substantial aspects in order to have an
20 opinion on that.

21 Q. Professor Dragoş, the mining activities
22 carried out on a site qualified as a historical

1 monument are legal or not?

2 A. No. No.

3 Q. We have, for instance, Article 11, Mining Law
4 85/2003, Document C-11. These activities, you're
5 right, is--the mining activities are strictly
6 forbidden.

7 A. Yes. Let me see.

8 Q. On the record there are some information
9 according to which the state owned company, Minvest,
10 had been performing mining activities on the Rosia
11 Montana site up to 2006.

12 Are you aware of this information?

13 A. Yes. I know something about it. It was not
14 part of my Legal Opinion because it's not--it was not
15 in my Terms of Reference to cover that aspect. It's
16 an aspect of facts and not law because I wasn't
17 looking at what Minvest was doing there.

18 Q. But you--in your view, Rosia Montana site is
19 an historical monument. Point B, the mining
20 activities are strictly forbidden on a historical
21 monument site.

22 So the person or entities who carried out

1 these mining activities on the Rosia Montana site
2 violated the Law; am I right?

3 A. In abstract, yeah, you're right. I cannot
4 opine on what happened with Minvest and other
5 developers there. I would only say that--well, if
6 someone should--would analyze that period, again,
7 should be taken into consideration that--well, in
8 Romania, the laws were not respected in such a great
9 way in some--in some fields.

10 And I think the fact that we entered the
11 European Union has--has given a greater clarity and a
12 greater enforcement of the laws because even the
13 National Laws were enforced by the fact that we had
14 the legal source in the European Union Law.

15 And as you said, from 2006, that was
16 approaching the European Union integration. There was
17 no mining in the area. So I can construct that as an
18 indication that, well, Romania was adapting to some
19 stricter rules and maybe starting enforcing better
20 even their own legislation--its own legislation in the
21 field. Other explanations, I won't go into details
22 because it's facts and not my area.

1 Q. But, again, if Rosia Montana has indeed
2 qualified a historical monument, what about the
3 license issued to RMGC? It's valid or not?

4 A. The license is valid. I never said the
5 license is not valid.

6 Q. But the object of the license is construction
7 works. And, again, it was legal or illegal for the
8 State to grant to a private entity rights to explore a
9 historical monument?

10 A. Well, I don't see the license as a free
11 permit to explore and to destroy historical monuments.
12 You have to explore the zone to see what's in there
13 and decide afterwards to carry out the project, the
14 exploitation project, within the areas that can be
15 exploited.

16 For that reason, you have to either research,
17 discharge, or so on, make available the land, or go
18 around those areas that cannot be developed for mining
19 activities. That's my understanding of the license.
20 It's not a free passport for everything. It's not
21 white check for--for the--

22 Q. What about intervention made on the site

1 qualified by you as historical monument and the
2 provision of Article 5.2.1 of the license?

3 A. First, I should state that I have not covered
4 the Mining Law in detail. That was in the opinion of
5 Professor Bîrsan, and I only referred to--yes, sorry.

6 (Pause.)

7 PRESIDENT TERCIER: You understand the
8 interpretation of the red light is not transmitted to
9 the public--the red light is that it is considered as
10 confidential.

11 (End of open session. Attorneys' Eyes Only
12 information follows.)

ATTORNEYS' EYES ONLY SESSION

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THE WITNESS: First, can I say that the Mining License was not covered in my opinion. It was covered only sporadically referring to the relations with EIA and with the permitting procedure, so the relation between the Mining License and the development consent procedure, so I haven't looked at it in greater detail. It was in the part of Professor Bîrsan's legal opinion that I was not replying to. I refer only to scarce rights--to Surface Rights and to

1 the expropriation.

2 And that's--yeah, it would give me the
3 benefit of reading now--

4 BY MR. TUCA:

5 Q. Getting back to your statement, you said
6 something about exploration in the area. In your
7 view, "exploration" means drilling as well?

8 A. Again, I'm not an expert in mining and what
9 it entails, but it seems to be drilling, yeah, from a
10 general understanding of the concept.

11 Q. But--

12 A. Again, not as an expert but as a--

13 Q. Let's have a look at your second Legal
14 Opinion, Paragraph 278: "The prohibition of the
15 development of projects in areas with archaeological
16 heritage is not restricted in its Application to the
17 actual building phase of a project, as Professors
18 Mihai and Schiau argue. On the contrary, as it is a
19 prohibition meant to implement a constitutional
20 guarantee, it is applicable as well at the stage of
21 planning and permitting of a project which is to be
22 built in such an area."

1 This is your opinion?

2 A. Yes.

3 Q. So, on one side, you said that this is an
4 historical monument. We have facts attesting that
5 there are a lot of mining activities carried out on
6 this site, and you said more than that; there are a
7 lot of other activities strictly forbidden, such as
8 planning and permitting.

9 A. I don't understand your assumption based on
10 this. Maybe you can explain better, but I don't
11 understand what's--the conclusion--your conclusion
12 based on this text.

13 Q. My--you said that the backbone of your legal
14 position is that Rosia Montana was and is
15 archaeological site protected both as an
16 archaeological site and as a historical monument as
17 well?

18 A. Yes.

19 Q. And there are a lot of restrictions
20 concerning an historical monument; do you agree with
21 that?

22 A. Yes.

1 Q. I gave you some examples.

2 A. What are the examples? Drilling?

3 Q. Drilling, planning, permitting, construction
4 works.

5 A. How can you not plan something in the area
6 of--

7 Q. It's your statement.

8 (Witness reviews document.)

9 A. No. It's at the stage of planning and
10 permitting a project which is to be built in such an
11 area.

12 Maybe you misunderstood my text.

13 Q. Okay.

14 A. So, it's applicable, this prohibition, at the
15 stage of planning and permitting for a project, which
16 is to be built in such an area.

17 I don't know; if you want, I can explain
18 something. The License gives the right to explore the
19 area, but again the Laws on heritage protection needs
20 to be respected during this exploration phase. Then
21 exploitation means that the proper Project is proposed
22 and is assessed from the point of view of the

1 environmental protection, environmental impact, is
2 given the green light. And, of course, that means
3 that the proper protection is instituted when the case
4 or other areas are discharged, so you can do more than
5 just prospecting what's in the area.

6 And I'm convinced that in the exploration
7 phase, there were no--are no--I'm not competent to say
8 if there was some illegal activities that were not
9 respecting the Laws on heritage protection in the
10 exploration phase, but that's not for me to say.

11 Q. According to your opinion, in order to be
12 used for a mining Project, the Rosia Montana site
13 should have been declassified--

14 A. Yes.

15 Q. --after the issuance of ADCs; is that
16 correct?

17 A. After--the ADCs are a first step.

18 Q. First step?

19 A. For the declassification. The
20 declassification is a proper decision-making
21 procedure. It has seven steps. I described them in
22 my Legal Opinion.

1 Q. You described them in your Legal Opinion.
2 Those seven steps to be followed in order to obtain an
3 order of declassification.

4 In your second opinion, Paragraph 485, there
5 is a description of this procedure, and my question
6 is: Has the Ministry of Culture issued a
7 declassification order for Rosia Montana site?

8 A. No.

9 Q. No.

10 According to the documents on the record, the
11 Ministry of Culture decided instead to favorably
12 endorse the Project, the mining project?

13 A. With conditions.

14 Q. With conditions?

15 A. With the understanding that archeological
16 research will be conducted, ADCs will be issued, and
17 in the end if a historical monument can be
18 declassified, then works can be performed on the site
19 of the historical monument. If not, that is a
20 separate consideration for the Ministry of Culture to
21 do, to see whether the historical monument is worth
22 protection or not after the underground was discharged

1 of archaeological--following the archaeological
2 research. Maybe there are other elements that are
3 worth of protection in the site of Historical
4 monument, so that's separate consideration. That's
5 why the Law provides for a separate procedure of
6 declassification of historical monuments; otherwise,
7 it would have been useless or, you know--

8 PRESIDENT TERCIER: Mr. Tuca, just--

9 MR. TUCA: Last question.

10 PRESIDENT TERCIER: Fair enough.

11 BY MR. TUCA:

12 Q. Professor Dragoş, given this endorsement, is
13 it fair to say that the favorable endorsement issued
14 by the Ministry of Culture is one of the confirmation
15 that the Rosia Montana site is not, and has not been
16 at that time an historical monument?

17 A. No, not at all. That's only for the
18 archaeological part. Historical monuments part is
19 Law 422 in 2001. That's a proper procedure for
20 declassification of historical monuments. That's in
21 the List of Historical Monuments, so we should not
22 confuse the areas. That's only for archaeological,

1 for what's underground, and further considerations are
2 needed for declassification as a historical monument.

3 Q. Thank you, Professor.

4 MR. TUCA: Thank you, Mr. President. No
5 further questions.

6 THE WITNESS: Thank you.

7 PRESIDENT TERCIER: Thank you very much.

8 DR. HEISKANEN: If we could have just a
9 minute to confer.

10 PRESIDENT TERCIER: I have one question
11 before.

12 We have received two other documents that I
13 had on my desk. Who are these two documents for?

14 THE WITNESS: When I was talking about the
15 urban certificate, I wanted to show how--because I
16 also showed the PUZ on the screen; I wanted to show
17 the Tribunal and everybody could have an Urban
18 Certificate, and the content of the Urban Certificate
19 to showcase why this is important for the conduct of
20 the EIA procedure, so it explains theoretically why
21 the content is important for the EIA procedure.

22 PRESIDENT TERCIER: They are in the file.

1 THE WITNESS: Yes, yes, of course.

2 DR. HEISKANEN: They're part of his
3 presentation.

4 PRESIDENT TERCIER: Oh, yeah, of course.

5 (Pause.)

6 DR. HEISKANEN: Yes, Mr. President.

7 REDIRECT EXAMINATION

8 BY DR. HEISKANEN:

9 Q. Professor Dragoş, the Environmental Permit,
10 you were asked a number of questions about it, and
11 it's not issued without conditions usually. Would be
12 able to comment on who is developing the conditions
13 and how?

14 A. The Environmental Permit is containing the
15 conditions that are drawn from both the members of the
16 TAC who can propose the issuing of the Environmental
17 Permit with conditions, and from the Ministry of
18 Culture, who has in its endorsement a lot of
19 conditions for developing the Project.

20 Q. Ministry of Culture.

21 A. Ministry of Culture, yeah, gives the
22 endorsement with conditions. These conditions are

1 then transferred and incorporated into the
2 Environmental Permit.

3 And also the Ministry of Environment can, of
4 course, impose conditions based on effective--the
5 assessment on the environment, so...

6 DR. HEISKANEN: No further question,
7 Mr. President.

8 PRESIDENT TERCIER: Thank you.

9 Do my co-Arbitrators have a question?

10 QUESTIONS FROM THE TRIBUNAL

11 ARBITRATOR DOUGLAS: Just, firstly just to
12 clarify something you just said. When the TAC
13 proposes conditions, is that before the final
14 consensus or whatever we want to call it goes to the
15 Ministry of Environment, or is that after the Ministry
16 of Environment approves in principle the issuance of
17 the permit and then sends the Draft Decision back to
18 the TAC? So, is it before it goes to the Ministry of
19 Environment or is it after that they attach their
20 conditions?

21 THE WITNESS: I think they should be attached
22 before they go to the Ministry of Environment. If

1 they express--if they are expressed in the TAC
2 meetings.

3 ARBITRATOR DOUGLAS: Okay. So, there would
4 have to be a final TAC meeting where people come up
5 with their conditions?

6 THE WITNESS: Yes, yes.

7 ARBITRATOR DOUGLAS: All right.

8 THE WITNESS: And this should be, in my
9 opinion, should be consensus between the members of
10 the TAC because in their regulation and in the legal
11 framework, because you find a meeting for
12 consensus-reaching, so for reaching consensus. Why
13 should they have the meeting for that if they are
14 allowed to have divergent opinions, so in my mind they
15 have to reach a consensus to be all in agreement over
16 the--the proposal to issue the Environmental Permit.

17 ARBITRATOR DOUGLAS: And how often are
18 conditions attached to an Environmental Permit in
19 Romania?

20 THE WITNESS: Well, I'm not aware. I haven't
21 researched the statistics of that. I think it's
22 pretty often, but...

1 ARBITRATOR DOUGLAS: I just wanted to ask you
2 a general question about the expropriation procedure.
3 I'm not sure if you were here yesterday when I asked
4 questions of Professor Bîrsan.

5 THE WITNESS: Yes.

6 ARBITRATOR DOUGLAS: You were here yesterday?

7 THE WITNESS: I have been here, yeah.

8 ARBITRATOR DOUGLAS: Okay. It seems to
9 me--I've tried my best to work out the differences
10 between you, but it seems to me that essentially it
11 boils down to different interpretation of Law
12 Number 33 of 1994 on expropriation, and so I just
13 wanted to try to see if I can understand the
14 difference of opinion, and maybe it might help if we
15 get the Law in front of us. I think one place it's at
16 is DD-81, if someone could stick that on the screen.

17 Now, I understand Professor Bîrsan--I'm
18 probably mispronouncing his name--but I understand his
19 interpretation based upon Article 6 is that because of
20 mining or extracting of Mineral Resources is mentioned
21 in Article 6, that means it's automatically a public
22 utility, and I think your view is that something else

1 is required, so I wanted to ask you about those
2 conflicting interpretations of what Article 6 means
3 and what it encompasses?

4 THE WITNESS: Yes.

5 Well, let me explain. First, it's not a
6 matter of interpretation of the Law. It's basically a
7 very clear law. It states the steps to be taken for
8 expropriation, so frankly speaking, I was surprised
9 that Professor Bîrsan didn't refer to that law
10 because--

11 (Overlapping speakers.)

12 THE WITNESS: --it's expected that it's a
13 matter of common knowledge for those who are involved
14 in this arbitration.

15 ARBITRATOR DOUGLAS: He did refer to the Law.

16 THE WITNESS: Yes, but not the proper
17 procedure. He said that it's only in court that's
18 done the expropriation. Well, there is a commission
19 that declares the public utility, and that Commission
20 also proposes which lands to be expropriated and what
21 the--the compensation and everything, and it also
22 hears appeals regarding his decisions, and then

1 proposes to the Government and so on and reaches the
2 court procedure. So, it's a proper and well-regulated
3 administrative procedure for declaring the public
4 utility.

5 In that vein, Article 6 from the Law states
6 which types of works or activities are subjected to
7 this administrative procedure because the rest of
8 them--and if you can maybe blow the article--let me
9 see. No, close this one--okay. There is a provision,
10 I will find it, that says that usually is done by law,
11 so expropriation is done by law. As an exception, the
12 Law creates an administrative procedure for some types
13 of works. These works are listed in Article 6. So,
14 for these works, you can obtain the expropriation
15 based on an administrative procedure. For the rest,
16 you need to go and have a proper law adopted by the
17 Parliament.

18 And this procedure is then expanded in the
19 Norms to this law that I also referred in my Legal
20 Opinion that detail.

21 Yes, for work--for any works other than such
22 provided in Article 6, the public utility shall be

1 declared by law for each particular case. This is the
2 principle actually in the law, and the exception is in
3 Article 6, which provides an administrative procedure.
4 And the Norms to the law on expropriation provide in
5 detail how the Commission is appointed, how it works,
6 how it reaches a decision, how it proposes a decision
7 to the owners of the land. If they are unsatisfied,
8 they can challenge the Decision in front of the same
9 Commission. If they are again unsatisfied, then the
10 Decision still can be proposed to the Government, and
11 then, of course, the courts will decide whether the
12 owners have, you know, are right or the Commission.

13 ARBITRATOR DOUGLAS: So, just to be clear,
14 the difference in your opinion or one difference is
15 you say that the Commission's Decision as to whether
16 or not the public utility requirement is satisfied is
17 susceptible to judicial review?

18 THE WITNESS: Yes.

19 ARBITRATOR DOUGLAS: Whereas I think
20 Professor Bîrsan says it isn't.

21 THE WITNESS: How couldn't it be?

22 ARBITRATOR DOUGLAS: That's for us to

1 resolve, but--

2 THE WITNESS: Sorry, I shouldn't have asked,
3 but.

4 (Overlapping speakers.)

5 THE WITNESS: It's quite clear, and any
6 administrative decision is subjected to judicial
7 review.

8 ARBITRATOR DOUGLAS: And then just very
9 briefly, because we're running out of time, what's the
10 procedure, in your view from then on? So the
11 Commission renders its Decision that it's a public
12 utility, then what happens?

13 THE WITNESS: Then the--well, it goes to the
14 Court for the proper expropriation because, in the
15 end, this is a filter, a judicial filter, that no
16 abuses are done by the Government against private
17 property.

18 And the Court, after deciding the
19 expropriation, the State becomes the owner of the
20 property; and, in order to do something with it, there
21 are different procedures because it enters the public
22 domain. The public domain is very limited in the use.

1 You cannot sell, you cannot put any conditionalities
2 on it, so it has to be transferred to the private
3 domain of the State in order to be sold--to sell the
4 property, for instance, or from the public property it
5 can be given in concession. It can be given to a
6 private entity based on a procedure of Concession to
7 be used for a number of years.

8 So, these are the roots in order to get into
9 the private--if you're asking about the development in
10 this case, how they would get the --

11 ARBITRATOR DOUGLAS: Thank you very much.

12 THE WITNESS: -- properties.

13 PRESIDENT TERCIER: No follow-up questions?

14 Thank you very much, Professor Dragoş, so your
15 examination is over, and now you can have a good
16 evening, I hope, as well as I hope for all of us.

17 THE WITNESS: Yes, thank you.

18 (Witness steps down.)

19 PRESIDENT TERCIER: We will first just to see
20 one or two points. The first, of course, is that we
21 will start tomorrow morning at 9:00 with Professor
22 Henisz. That's the way I think we should do it. On

1 this side?

2 MS. COHEN SMUTNY: That's okay, but I think
3 we need to have clarity about the remaining time
4 because, as I think we've said, you know, these were
5 indicative, and we had for some of the witnesses
6 examination that was to come for cross-examination, I
7 think we anticipated now more than what was budgeted,
8 and so I think, you know, it's an issue. I think we
9 need to be very clear about how much time the Tribunal
10 has, how much the Parties have used, and with a view
11 to the equal time, if the Tribunal considers that we
12 need to lose an hour or an hour-and-a-half, it just
13 needs to be dealt with so that we can organize
14 ourselves appropriately, very important.

15 And I think, you know, just limited Thursday
16 and Friday to the type of days we've had, we're going
17 to end up--we're going to end up with a problem
18 vis-à-vis the examinations. We're not going to have
19 the time that we expected to have, and so again,
20 because the budget has always been indicative, some
21 were shorter, some were longer, so the ones that are
22 coming are going to be longer. We need at least to be

1 very clear about what we have so we don't have a
2 problem, especially on the Friday.

3 DR. HEISKANEN: Well, it's quite clear since
4 the pre-hearing conference what the time budget of
5 each Party is. It's for each Party to manage the time
6 budget as it sees fit. And I'm not sure I understood
7 the position clearly, but the equal treatment of the
8 Parties is the equal allocation of time in the time
9 budget. If a Party uses less than what is in the time
10 budget, that's fine, it doesn't mean that there is any
11 breach of equal treatment, but if the suggestion is
12 that the Claimants should be given additional time
13 beyond the time budget, then we object.

14 MS. COHEN SMUTNY: No, no, you have not
15 understood. I think that there are two days left, and
16 I think we have--we haven't really been using--two
17 days suggests 14 hours, if we have seven hours, in
18 fact, we haven't even been using--it hasn't really
19 been a full seven hours per day, it's been less.

20 PRESIDENT TERCIER: It's six.

21 MS. COHEN SMUTNY: I think even based on this
22 budget we have, there may be more than 14 hours.

1 Anyway, I'm not sure that the math works, is what I'm
2 saying. So if we need to make an adjustment on the
3 global number, we should just figure out what that is,
4 and so then the Parties can be treated equally in a
5 global manner.

6 PRESIDENT TERCIER: Okay.

7 Can you give us the time already to have an
8 idea?

9 SECRETARY MARZAL YETANO: All right. So, if
10 we take the total estimate, the 34 hours and 45
11 minutes per Party, Respondent has a remainder of 8
12 hours and 6 minutes, and Claimants 9 hours and 19
13 minutes, so that's a total of 17 hours and 25 minutes
14 for two days, which I agree it's a lot. But if we
15 take into account the estimate, which perhaps that is
16 something to consider, I don't know, for tomorrow, if
17 we did Henisz and Boutilier, I'm sorry for my
18 pronunciation, with the estimates that were
19 provided--but of course they are estimates--that would
20 be 6 hours and 25 minutes of examination time. And
21 for Friday, if we do Stoica, Pop, and Thompson, that
22 would be 6 hours and 50 minutes, so that's the--those

1 are the numbers.

2 And, indeed, in these few last days of
3 hearings we've never spent more than an average of 6.5
4 hours of effective examination time in total.

5 MS. COHEN SMUTNY: So, we're going to run
6 short of time unless we have longer days, tomorrow and
7 Friday, unless we want to take a little break now and
8 get started and start using some of the time this
9 evening. If the Tribunal doesn't want to do that, I
10 think we need to have maybe not the full 17 hours,
11 maybe you decide that it's going to be less than 17
12 hours remaining, but it's not going to be 12 hours
13 remaining. That's a big difference, so I think
14 whatever--obviously it's up to the Tribunal
15 ultimately. I can tell you that we had in mind to be
16 able to use more time. We see how it's going. This
17 is why we've been urging at the end of the day, there
18 was some reluctance to go beyond 6:00, but now we have
19 two days left, so we want to at least have very clear
20 what amount of time we have so we can budget
21 accordingly.

22 PRESIDENT TERCIER: But if we take into

1 consideration the time that has been indicated and
2 that we have on this sheet, you would not use all the
3 time you have been allocated, but you would use all
4 the time that you had--

5 MS. COHEN SMUTNY: That's the point. The
6 point is that these estimates have been indicative,
7 and so that would be treating them as a maximum, so
8 some time we can see we would want longer, some have
9 been shorter, so we wanted to have the flexibility to
10 make them a little bit longer. And so that's the
11 issue because now we have apparently budgeted between
12 the Parties something like 12 hours, but originally
13 the original estimation would have given--so there is
14 a delta right now of five hours, so that's a lot less,
15 two-and-a-half hours less for each Party is
16 significant. So maybe the Tribunal considers globally
17 we need to have two-and-a-half hours each less or
18 maybe one hour each less or something, but whatever it
19 is, maybe you can give some thought. It seems to us--

20 Look, we also heard you that it's very hard
21 for the Tribunal to have a day that's longer than
22 6:00, and obviously we appreciate that we could force

1 to you sit there, but if you can't absorb any more,
2 there really no point, but seriously, we just want to
3 know what you think you can do, and then obviously we
4 would like to just know so we can pace ourselves
5 appropriately, and you will let us know what you feel
6 that you can tolerate usefully.

7 DR. HEISKANEN: The implicit suggestion seems
8 to be that the Tribunal should cut the time available
9 for both Parties, potentially for the remaining two
10 days. We certainly make every effort, as we indicated
11 earlier, that we should be able to finish by Friday
12 evening. It may well be that we don't need the time
13 that we have budgeted tomorrow's examinations, so I'm
14 not sure there will be an issue.

15 PRESIDENT TERCIER: But the point--you have
16 been allocated certain time, I fully understand, and
17 it is right to use it, but there must be a reason to
18 use it, and you must--indeed, if we follow what is
19 here, indeed you would have a little bit less time,
20 but it would correspond to what you had indicated, so
21 you want to have flexibility to be a bit more, to have
22 a bit more?

1 MS. COHEN SMUTNY: That's the request.
2 "Flexibility," we understood, was not necessarily that
3 this was going to be understood as a maximum, and
4 flexibility was only as to less time because--anyway,
5 look, whatever it is, we're not asking to cut time.
6 It's really--but we realized that there's a capacity
7 issue for the Arbitrators as well, so just let us know
8 what it is, and so that we can adjust.

9 DR. HEISKANEN: If I may add, we certainly
10 understand the capacity issue on the Tribunal's side,
11 and the idea is not to make the Tribunal--and make the
12 Tribunal work when you're tired, that's certainly not
13 the goal. And as I said, we have made every effort to
14 make the remaining cross-examinations shorter and as
15 short as possible. We hopefully will be able to
16 achieve that.

17 Again, that will depend also on the Witnesses
18 and Experts to be examined, if there is cooperation.
19 We expect that there won't be any major issues with
20 the remaining time, that this is in the Tribunal's--we
21 are in the Tribunal's hands.

22 MS. COHEN SMUTNY: I just want to say one

1 other thing that--I apologize, I just want to say one
2 other thing, but Claimant's real sole ability to
3 confront some of this evidence that is yet to be
4 dealing with was just in the Rejoinder, so the
5 cross-examination opportunity is a particularly
6 important one for Claimants, so again, just bearing
7 that in mind is an important factor.

8 (Tribunal conferring.)

9 PRESIDENT TERCIER: Okay, that was a good
10 question, and the point for the Tribunal is we do not
11 know exactly the time you would need it and how to
12 organize it.

13 One other possibility would be, yeah, instead
14 of finishing after 6:00, to start before 9:00. That
15 would be for some people probably acceptable. We
16 could already save half an hour and it makes one hour
17 made in two days.

18 Is it confirmed--

19 MS. COHEN SMUTNY: To commence at 8:30?

20 PRESIDENT TERCIER: Hmm?

21 MS. COHEN SMUTNY: Commence at 8:30?

22 THE WITNESS: Yes.

1 MS. COHEN SMUTNY: Yes, that would be fine
2 for Claimants.

3 PRESIDENT TERCIER: Okay. We would already
4 save one hour.

5 DR. HEISKANEN: Yeah, I think we can agree to
6 that working tired is the counsel's privilege, so we
7 assume that privilege.

8 PRESIDENT TERCIER: It is also for
9 Arbitrators' privilege.

10 And then based on that, we could see, and we
11 will now see how to organize it and to--I think that
12 would be rather optimistic, up to now we had made it,
13 I hope we can finish it.

14 In the worst case, really in the worst case,
15 we could reserve Saturday morning, one hour or two
16 hours, but we could probably see tomorrow, especially
17 after the rather long cross-examination that we have
18 in the program. Okay? Do you like that?

19 Fine. So, I thank you all very much and wish
20 you a very good evening.

21 (Whereupon, at 6:24 p.m., the Hearing was
22 adjourned until 8:30 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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

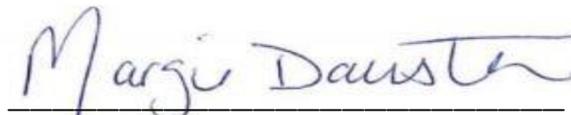


DAVID A. KASDAN

CERTIFICATE OF REPORTER

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

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


MARGIE DAUSTER