INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration:
Between:

GABRIEL RESOURCES LTD. and GABRIEL RESOURCES (JERSEY) LTD.,
Claimants,
and
ROMANIA,
Respondent.

Case No. ARB/15/31

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
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Secretary to the Tribunal

MS. MARIA ATHANASIOU  
Tribunal Assistant

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MR. BRODY GREENWALD
MR. PETR POLÁŠEK
MR. HANSEL PHAM
MR. FRANCIS VASQUEZ JR.
MR. ANDREI POPOVICI
MS. GABRIELA LOPEZ
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MR. MIHAI BOTEA
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MS. NORADÈLE RADJAI
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P R O C E E D I N G S

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

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

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

The third point, we have received this morning a message from Respondent communicating a certain number of corrections in the Supplemental Opinion of Professor Dragoș. Have you an objection to this list on your side?
MS. COHEN SMUTNY: We haven't had a sufficient opportunity to review. I think on the first break we'll advise if we have any issue.

PRESIDENT TERCIER: It's not urgent. Good.

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

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

DR. HEISKANEN: Yes, Mr. President. The purpose of the request is to make sure that there is no interruption with the examination of Mr. Bode. He's the Minister of Transportation. He must have his
phone with him at all times for urgent matters, so if there is a call from the President or the Prime Minister, he will have to take the call. The chance that that will happen is not particularly high, but it cannot be excluded, so he wants to have his personal assistant attending the calls so that he can have his phone, Mr. Bode's phone and answer any calls that may come from the President or the Prime Minister during the examination.

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

PRESIDENT TERCIER: Yes, Ms. Cohen Smutny.

MS. COHEN SMUTNY: It's really up to the Tribunal. It seems to Claimants that the phone can be held by the personal assistant, or if something comes up, we can tolerate the interruption. The odds of an interruption happening during the short examination are low. And having seen what the room looks like through the video yesterday, it's obviously very short
and right outside the room, and it's not very far to walk. But we leave it up to the Tribunal. We observe that the rules regarding confidentiality have been clear and have been in force, so we leave it up to the Tribunal.

PRESIDENT TERCIER: Thank you.

(Tribunal conferring.)

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

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

DR. HEISKANEN: No, it's fine, sir. It means that he cannot sit in the room, he will have to sit outside, which means that Mr. Bode will then have to have his phone with him because that's the rule of the Romanian Government. So, we cannot exclude
interruptions if phone calls come from the President or the Prime Minister, but it's unlikely to happen, but this is just for information. And a second note for the record is that the personal assistant, as we understand is a State employee, so there is no issue of confidentiality.

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

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

DR. HEISKANEN: Of course.

PRESIDENT TERCIER: You will do it. Fine.

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

OVIDIU PODARU, CLAIMANTS' WITNESS, RESUMED

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

CROSS-EXAMINATION
BY DR. LEAUA:

Q. Thank you. Good morning.

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

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

A. Yes.

Q. Thank you.

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

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

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

Q. Thank you.

MS. COHEN SMUTNY: Excuse me--

BY DR. LEAUA:

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

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

DR. LEAUA: No, it is not. We will circulate
it, if needed, but you will see that it will be
sufficient presentation of the references for you to
navigate easily in the documents.

    BY DR. LEAUA:

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

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

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

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

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

    A. Could you please indicate more exactly in
what context I made this statement?

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

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

Do you maintain this view?

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

Q. Thank you.

Now, let's discuss this.

First of all, would you agree with me that a
PUZ sets out the regulations specific to an area in an urban or rural locality? Right?

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

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

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

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

A. Yes, this is true as well.

Q. So, therefore--

(Overlapping interpretation with speaker.)

A. This means that it applies to all persons to whom the regulations and the Urbanism Plan imposes conditions present that fall under its scope.
Q. That was precisely my next question, so thank you very much for adding your answer, but this could reassure you that I will address the questions in a logical order so you can keep your answers short, because I will address you the questions as to get to a specific point in a way that you can follow.

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

A. Yes, it is correct.

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

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

First of all, I would like you to understand that the two administrative acts, one normative in nature and the other one an individual act, are from
two different procedures, so it is arguable that there is a tight connection between them. And I'm saying this in a legal sense.

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

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

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

Now, Application to this case and assessment of fact versus law, it is our belief that will be the task of the Tribunal in this arbitration. For us, although you have addressed a lot of factual issues, we prefer to address you in your capacity as Professor
and to stay with the legal interpretation or interpretation of the decisions of the courts of law in Romania. That is why we prefer to look at you within your professional capacity of legal expert, not factually assessing the case.

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

Now, the question, Tab--

PRESIDENT TERCIER: Do you want to have them?

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

BY DR. LEAUA:

Q. Yes.

Please go, then, to this law, and I will refer you to the specific paragraphs when needed.
Now, according to this law, there are two categories of persons that can challenge an administrative act: One, a person who holds a right or a legitimate interest and who was aggrieved by a public authority by means of an administrative deed due to its failure to resolve a petition within a legal deadline, so that is Category 1. And then another category, Number 2, social organism which claim a public interest to challenge an administrative act.

Correct?

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

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

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

Q. I can see that you can see them equally treated by the law, but for the purpose of this discussion, then I should take, then whenever you refer to an aggrieved party, you refer to both categories; correct?
A. I do not personally refer to that. This is what the Law states. There is only one definition for the injured party and the same legal text – 2 para. 1 let. c or a--I don't remember exactly--speaks about the fact that these interested social organisms are assimilated to the injured party. Yes, it is true, this kind of assimilation is true.

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

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

(Overlapping interpretation with speaker.)

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

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

When you refer to "social organisms," are you
referring to public authorities?

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

BY DR. LEAUA:

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

Now, going back to the Article 2(1)(a), in the second, in this paragraph you will see what is the definition of an "affected person," and then you have on one hand "any person who holds a right or legitimate interest, and who was affected," and then
in the second part you have "as well as social organisms which claim that a public interest, or the rights or legitimate interests of specific individuals have been harmed by the challenged administrative deed."

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

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

BY DR. LEAUÁ:

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

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

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

Q: (Overlapping interpretation with speaker.) I
do not want to force you to define—I apologize—

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

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

Q. Correct.

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

A. According to this text, yes, but this is not a general object of administrative litigations. There are other texts, there is the text of the Constitution
too, there is Article 1(1), this is what this text says.

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

A. Which text do you have in mind?

Q. I refer to Paragraph 1, Index 2, and it says:

"As a derogation from the provisions of Paragraph 1, the judicial complaints grounded on the violation of a legitimate public interest may refer only to the annulment of the deed, or to the obligation of the defendant authority to issue a deed or another document."

So, it does not include damages; correct?

Only the annulment. Correct?

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

Not at all.

(Overlapping interpretation with speaker.)

PRESIDENT TERCIER: If you can avoid to overlap.

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

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

Q. Yes.

(Overlapping interpretation with speaker.)

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

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

Thank you for your help in clarifying this.

THE WITNESS: Yes, that is correct.

BY DR. LEAUA:

Q. Thank you.

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

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

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

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

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

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

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

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

DR. LEAUA: 58.

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

DR. LEAUA: Yes, Paragraph 58 is the same
number in both languages.

MS. ZIGMUND: (In Romanian).

BY DR. LEAUA:

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

(Overlapping interpretation with speaker.)

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

This is what you say; correct?

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

Q. This is referred to you on Paragraph 66.

A. Da.

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

Now, let's stay with this Decision, and I will ask you some specific questions. If you can keep your answers short, that would be helpful. And when
needed, of course, an elaboration might be possible.

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

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

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

Q. But the Civil Court Procedural Code of
Romania expressly states that this Decision, these types of Decisions of the High Court of Cassation would be producing effects since their publication; correct?

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

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

DR. LEAUA: Exactly. That is the purpose--

(Overlapping interpretation with speaker.)

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

PRESIDENT TERCIER: Sorry, but it's not the same. If it cannot be reviewed, that's one thing; another is to see whether the Decision, in part, changed something, has retroactive effects on previous situations. There are two things.
THE WITNESS: That is correct, but what I wanted to say is that, for instance, when the European Court of Justice pronounces a decision or when Constitutional Court gives a sentence, there are procedures whereby those processes, those cases can be reopened, but that does not exist in the case of the recourse in the interest of the Law, appeal in the interest of the Law.

BY DR. LEAUA:

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

A. The 2nd of March 2018.

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

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

Q. All right.

A. May I add something? We are talking about the nature—
Q. You will be directed in redirect by the counsel for Claimants. If the need would be to add anything, at this moment you answered my question. Thank you.

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

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

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

A. No, it's not that they were irrelevant, but
they're not that important in order to establish the legal nature of a deed, so that would imply the necessity of us translating them. But any paragraph in this Decision I can explain as long as you do not limit my comments to any particular paragraph. If you would like to discuss the entire Decision, we can do so. No problem.

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

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

A. Not entirely, not really--

(Overlapping interpretation with speaker.)

A. There is another decision, the Decision 13 of 2018 says that this refers to all Urbanism Certificates. Therefore, even if we may have
different opinions on the subject, the High Court says
a new challenge is not admissible because the initial
Decision clarified all things that needed
clarification. That is my understanding. And I
understand the practice of the High Court, especially
this mandatory one, in a corroborated manner.

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

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

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

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

PRESIDENT TERCIER: Okay. Okay. Go forward,
and go to questions if possible.

BY DR. LEAUA:

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

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

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

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

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

Q. I’m referring to the exact wording that this Decision of the High Court is using. I’m actually quoting. If that would be helpful for you to better understand the Decision that you have analyzed, maybe
you can look at Paragraph 40 of the Decision where you can read the following: "The appeal in the interest of Law, which is the subject of this review"--

PRESIDENT TERCIER: Can you just wait?

DR. LEAUA: Yes, but this is--

PRESIDENT TERCIER: That's okay.

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

THE WITNESS: That is correct.

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

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

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

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

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

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

DR. LEAUA: Yes.

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

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

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

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

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

BY DR. LEAUA:

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

So, would you agree with me that not all types of Urban Certificates issued for Building
Permits are taken into consideration and analysis and then decided upon the interpretation by the Supreme Court but only those that are forming the hypothesis defined by the Supreme Court, namely that, of such certificates that include an interdiction to build or contains other limitations. Do you agree?

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

And the High Court says that, before getting to this exception, to this derogation, they say that these certificates are preliminary deeds that do not have legal effects. But, in this situation, which is expressly analyzed, they make a derogation; and, in this case, the certificate becomes an administrative deed in and on itself, and it produces effects. That is what the High Court focuses on, but it does not start from that premise from the beginning but only after in Paragraphs 46, 45, and 47 where this
exceptional category is defined and it is placed in a larger category of the usual nature of the Urban Certificate, which is that of preliminary deed.

Q. Thank you for your answer.

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

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

Q. And may I then remind you what the content of this paragraph is and go back on it. That paragraph referred to the situation in which there is a derogation from Paragraph 1, and those that are complaining on grounds on violation of legitimate
public interest may only refer to the annulment of the deed and not to damages, per a contrario, and the relevant part here is the judicial complaints grounded on the violation of legitimate public interest.

You see that?

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

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

Do you see that? Do you agree?

A. Yes, I can see that.

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

In its Decision, when it analyzed the request by the General Prosecutor, it extended the analysis because it understood that the situation submitted to
its analysis was an exceptional situation in relation to the general principle.

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

Just that, in this situation, which indeed overlaps with the request of the General Prosecutor, the Urbanism Certificate is an administrative deed. This is how I understood this matter, but maybe there was a lack of clarity. And, of course, these matters were clarified subsequently because there is another Decision that says all matters pertaining to the legal nature of the Urbanism Certificate have already been resolved by Decision 25.
So, practically, the High Court is telling us that, from now on, every discussion should be considered closed as to this topic. This is how I understood things personally.

Q. I understand your personal understanding, but let's look at the understanding of the High Court of Romania as to their understanding on what they were deciding. And let's go then to Paragraph--it's actually a section on the second page in English, in Romanian it should be the same, where we have the following paragraph. It's just above the tab with the High Court, so this is the part in which the High Court is defining its scope. You have like this: "The President of the panel declares the debates closed, and the Panel reserves judgment on the appeal in the interest of law. The High Court, deliberating with regard to the appeal in the interest of law, ascertain as follows," and you have there Point I, "the point of law which generated a non-unitary practice," and then Point II, "legal provisions subject to interpretation." And, first of all, you have Article 6, Article 7 of Law 50, and then you have
Article 2 quoted entirely by the Supreme Court, so not only by reference but in its entirety. And then you have Article 8, Paragraph 1, not Paragraph 1, Index 2.

Do you see that?

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

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

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

THE WITNESS: Yes, I can see the paragraph.

BY DR. LEAUA:

Q. Okay. And let's move to the dispositive part of the Decision of the Supreme Court. In the name of the Law, the High Court of Cassation and Justice decides, and in--its the last paragraph in English, last page or almost last page, second last--yes, on the bottom of the page. It's Page 10. It says like this: "For the interpretation and enforcement of again Article 6(1) and Article 7(1) of Law 50 of 1991," and then "in relation with Article 2(1)(c) and
Article 8(1) of Law 554 of 2004."

Can you see that, too?
A. Yes.

Q. Do you still maintain your opinion that this Decision refers also to Article 8(1), Index 2 of Law 554 of 2004?
A. It's not that I maintain my opinion whether it refers to Article 8(1) or Article 8(1)(2). If you look at this Decision, it doesn't establish who can challenge it, only implicitly, but it concerns the object of the action, meaning a certificate that contains or not interdictions for the applicant. So, it focuses the analysis on the object of the action. Or I think it is only natural for one and the same object to be identical for all.

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

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

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

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

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

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

A. Yes, it is correct.

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

A. No, it is not correct.

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

Do you see anything else but the rejection of being inadmissible here?
A. Yes. I can see the considerations above.

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

A. Yes.

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

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

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

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

So, essentially, this is another procedure somewhat similar to the appeal in the interest of the Law, which must fulfill certain procedural requirements, and one of them is the novelty character
of the subject of law in discussion, and the High Court says, since it was solved previously, it's not something new and, therefore, the request is inadmissible.

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

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

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

In this paragraph, you cite a Decision of the Bucharest Tribunal concerning the Request for Annulment and suspension of Urbanism Certificate
Number 87 of 2010, and you refer to it in Footnote 90 as Exhibit C-2426.

Now, can you see that?

A. Da--yes, I do.

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

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

A. That's correct.

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

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

Do you see that?

A. Yes.

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

Can you see that?

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

THE WITNESS: Okay.

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

BY DR. LEAUA:

Q. Now, in view of all these five versus one
that you quoted as support of your view, do you still consider that the decisions of the courts are unanimously taking your approach that an Urbanism Certificate is not an administrative act that, therefore, cannot be subject of annulment, suspension, et cetera?

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

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

And I must say that up to 2005, I think, I haven't found any decision, any scholar saying that
the Urbanism Certificate is an administrative deed and no court annulled it. I have found something back then, there was not too much case law, saying that the Urban Certificate was not an administrative act but a conformity endorsement.

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

BY DR. LEAUA:

Q. --just look at your own book, which is administrative law commented jurisprudence Exhibit C-1784, Tab 24 in your binder on Pages 3 to 5 in English and 8 to 9 in Romanian. At the very end of this selection, you analyze there different views of the courts, and then you submit your own views. And at the very end, you have one point in which you say clearly that "one thing left to discuss is whether in
the case where the Urbanism Certificate is grievously vitiated by illegality (cases where one could say that it generates its own legal consequences, distinct from those of the urbanism regulations in force), one should not recognize to the person that deems herself harmed by it in a right to challenge it in Administrative Court, without having to wait for the Construction Permit, when it could be too late."

Do you see that?

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

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

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

I said from the very beginning this is an issue of controversy, but we look at this matter, this is something that is still open. We should look into
it in the future. Of course, when I wrote this book, I didn't think of the situations regarding the case at hand. I was thinking of the person that was harmed by an Urbanism Certificate, and the High Court actually was on my side, stating that this is an issue of controversy.

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

Q. Thank you very much for your explanation.

Thank you.

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

DR. LEAUA: I'm sorry for that.

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

PRESIDENT TERCIER: Thank you very much.

THE WITNESS: Thank you.

PRESIDENT TERCIER: Claimants?
MS. ZIGMUND: Yes, just a brief redirect, if possible. I prefer to speak Romanian.

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

MS. ZIGMUND: Thank you.

REDIRECT EXAMINATION

BY MS. ZIGMUND:

Q. Professor, I have only two questions for you. At the beginning of the examination by Prof. Dr. Leaua, you were asked about the statement that the PUZ should reflect--also reflect the conditions from the EP, "Environmental Permits," for the Projects in the area, and you wanted to make a comment about the particular situation of this project.

So, I would prefer you to continue.

A. I wanted--I showed in my opinion that that phrasing in the opinion does not necessarily refer to a general context, but I referred to concrete matters because my opinion also relates to concrete matters about the Rosia Montana Project, and I showed there that, generally speaking, an urbanism plan is adopted for a larger area—such as a neighborhood, a town if we
are speaking about a PUG -- while a project is
developed on a smaller area from a larger area.

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

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

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

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

Q. Thank you.

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

Can you please, in order to clarify, what is this sentence saying? What are you saying in this
A. (In English) 73?

Q. 73.

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

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

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

A. That's correct.

Q. So it was a matter of principle. Do I understand correctly?
A. Indeed, yes.

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

Q. Okay. Thank you.

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

PRESIDENT TERCIER: You have no further questions?

MS. COHEN SMUTNY: No further questions.

PRESIDENT TERCIER: Good.

Yep.

QUESTIONS FROM THE TRIBUNAL

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

THE WITNESS: In principle, no, it was not part of the Law from the beginning. Whenever you see...
the Index 1 or 2, these are subsequent additions to
the Law, that is true.

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

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

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

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

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

If I could have a look, if I could see their
actual Applications, their challenges, I could say,
but right now I cannot say. I don't know.

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

ARBITRATOR DOUGLAS: Thank you very much, Professor Podaru.

PRESIDENT TERCIER: You have another question?

THE WITNESS: Thank you.

ARBITRATOR GRIGERA NAÓN: Counsel for the Respondent, in her questions, she indicated that for the obtaining an Urban Certificate there are certain environmental concerns that have to be addressed, like waste management or pollution of waters, to which extent that is different or is not covered by the Environmental Permit? Is there another level when an
Environmental Permit is considered, do any kind of conclusions that may have been previously reached at the moment of issuing or not an Urban Certificate taking into account or not is there an overlap, an interaction, or not?

THE WITNESS: I hope I understood your question well.

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

ARBITRATOR GRIGERA NAÓN: That was not my question. My question was the substantive issues addressed when rendering or not an Urban Certificate
to the extent that they cover environmental matters.

Is there an overlap or not with the matters that are considered in order to issue an Environmental Permit? Is there a connection or not? Or whatever conclusion may have been reached at the level of granting or not the Urban Permit are considered when granting the Environmental Permit, or not?

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

The environmental authority sees a short description of the Project. I want to build a cemetery or whatever, something that has an impact on the environment, and a decision is issued that says that the environmental impact proceeding must be carried out, and that is where the role of the Urban Certificate ends, in my opinion. During my activity,
I have seen 10 or 20 Environmental Permits because very few of buildings that are erected request or imply an Environmental Permit being issued. But I have seen hundreds of Urbanism Certificates. The Urban Certificate is, in its substance, an inadequate instrument from the point of view of the environmental assessment. It serves nothing. In Romania we have this saying which I will transpose as follows for purposes of this discussion: trying to use the Urban Certificate in assessing the environmental impact is like trying to count hairs using boxing gloves.

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

We go now to the next step.

MS. ZIGMUND: I'm sorry--

PRESIDENT TERCIER: Who is speaking?

MS. ZIGMUND: I'm speaking.

There is a mistake in translation. He said that Urbanism Certificate is not an adequate instrument for an environmental assessment rather than
the environmental permit is not an adequate tool, it should be. It's--I don't know, it moved already, but it's there. It's on the record.

PRESIDENT TERCIER: We will not take time--

MS. ZIGMUND: Thank you.

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

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

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

DR. HEISKANEN: "She."

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

(Witness steps down.)

PROFESSOR DANA TOFAN, RESPONDENT'S WITNESS, CALLED

PRESIDENT TERCIER: Okay. You're ready?

Fine.

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

THE WITNESS: Good morning.
PRESIDENT TERCIER: Yes, you put the microphone. Yeah.

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

In which language do you wish to testify?

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

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

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

THE WITNESS: Yes.

PRESIDENT TERCIER: --to read it for us.

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

PRESIDENT TERCIER: Thank you very much.

You have prepared for this Proceeding a Legal

Do you have it in front of you?

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

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

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

Can you confirm the content of your testimony?

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

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

Can you, in a few words, tell us, what is your education and your position and then, also, shortly--very shortly explain the process you followed
to prepare this Legal Opinion.

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

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

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

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

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

PRESIDENT TERCIER: Okay. I think we have it.

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

As regards my Opinion--

PRESIDENT TERCIER: Yeah.

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

I then signed a confidentiality agreement. I found out the main elements of the content if I were to accept writing the Opinion. Then I received the Legal Opinion of Professor Podaru for study. And then
I agreed to draft this Opinion a few months later, and I was involved consistently in drafting the Opinion, up to the time of its publication.

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

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

PRESIDENT TERCIER: Okay. Good.

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

So, please. You have the floor.

DIRECT PRESENTATION

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

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

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

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

The documents I used in drafting my Opinion were the Legal Opinion of Professor Podaru, punctually and only on certain aspects the First Legal Opinion and the Second--the Supplemental Legal Opinion of Professor Lucian Mihai, also the relevant pleadings in the case and the relevant documents regarding the
topics analyzed, and the relevant exhibits provided to me by the counsel for Romania.

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

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

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

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

     Another finding is that the existence of a granted Mining License does not impose on the authority the adoption of a PUZ. Also that the PUZ is
mandatory for the performance of the EIA Procedure and for the issuance of the Environmental Permit.

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

There are two areas of overlapping with the Opinion of Professor Dragoș or, rather, the Opinions of Professor Dacian Dragoș as regards the Urbanism Certificate and the Environmental Permit.

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

And now, as regards the Urbanism Certificate itself. I analyzed its legal nature. And on this slide, you can see the first page of the first Urbanism Certificate.
On the left side, you can see the elements contained in the Urbanism Certificate, to which I will come back later, in summary, in order to support the legal nature of an individual administrative act of this Certificate.

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

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

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

There are several legislative and doctrine
and jurisprudence elements that I included in supporting my position, and I would like to mention only one of them, which I consider relevant.

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

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

So, in the phrase above this one, at Page 55 of Volume 2 of 2005, it is specified that the legal provision transformed the Urbanism Certificate from an administrative operation into an individual administrative deed that can be challenged before the administrative courts because the Urbanism Certificate contains not only rights and obligations for the issuing authority, but also for the Applicant, at
least for the fact that it specifies the need for the
Applicant to obtain a series of endorsements and
approvals in order to reach the end of the procedure,
which is the issuance of the Construction Permit.

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

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

And I would like to refer to the statement of
Professor Podaru, who, in the habilitation thesis
published in 2017 called "Administrative Law: A
Conception, A Vision," when discussing the
Certificate—the Urbanism Certificate as a key step in
the construction permitting procedure goes beyond what
I said in my Opinion, wondering whether it is more than an individual administrative act, it is a normative act, and from here on, a brief discussion on the terms in which this act can be challenged according to the provisions of the Administrative Litigation Law, Article 11(1) and Article 11(4). So, there are several doctrine elements, and I will not insist upon them at this point.

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

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

On several occasions, the judge in the case estimates that the Urban Certificate is an individual administrative act adopted in accordance with the Law
and reproduces the definition in Article 2 (1) let. c) of the Law on Administrative Litigation.

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

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

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

We are shown why it was necessary not only to submit the technical sheet, which was the requirement
before 2009, afterwards also the UC, an Urban Certificate, through its content and the items that it elaborates. It is the technical, economical, legal status of the land and of the constructions built on it, the urban planning requirements for the location of constructions that are to be built, the various endorsements and approvals.

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

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

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

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

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

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

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

PRESIDENT TERCIER: And if you are interrupted, I can just tell you that you have five
minutes left.

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

Now, let's speak about the discretionary power of the public authorities. This is an issue that I analyzed by the end of my Legal Opinion, where I dwell on the legal provisions and the doctrine, as well as the case law also, in relation to my personal knowledge that I acquired throughout the years. It is something known to the public administration, to the
public authorities, and doesn't contradict at all the predictably, the clear and conciseness—the clarity and conciseness of the Law.

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

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

I have found this right of appreciation mentioned in the jurisprudence of the Constitutional
Court, our Administrative Courts, in the elements of doctrine. Even Professor Podaru makes this distinction between competence and discretionary power, and I identified it in the issue at bar, in the fact that the last stage order established by Order 860 of 2002, which refers to a quality report. That it is so, it is necessary to assess the quality of the Environmental Impact Report.

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

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

We have Article 49 Paragraph 1 of Order 860/2002, saying that the EP shall be issued only after the satisfaction—only after the elimination of the negative consequences on the environment brought by a project in compliance with the technical
documentation and the legal provisions into force.

I would stop here, if you allow.

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

THE WITNESS: (In English) I understand.

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

THE WITNESS: (In English) Yes.

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

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

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

THE WITNESS: Okay.

PRESIDENT TERCIER: Good. Fine.
So, we have really a very, very short break. I would like you really to be back in five minutes so that we could proceed with the examination of Mr. Bode.

(Brief recess.)

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

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

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

THE WITNESS: Just a minute.

(Comments off microphone.)

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

They need to move some tables.

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

You have expressed that you would wish to
speak Romanian.

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

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

PRESIDENT TERCIER: Fine. I would like to shortly introduce you to the Members of the Tribunal. I don't know what you--who is with you that you have. On my right-hand side is Professor Horacio Grigera Naón. On my right-hand side is Professor Zachary Douglas. We have the Secretary and the Assistant to the Tribunal. My name is Pierre Tercier. I'm the Chairman of the Tribunal.

You will be heard in this procedure--

THE WITNESS: Good evening, everyone.

PRESIDENT TERCIER: Good evening again. You will be heard in this procedure as an Expert--as a Witness. I would like you to read the declaration that you must have on your table.

Can you read it?

THE WITNESS: Yes, I have it in front of me, and I will read it now.
I solemnly declare, on my honor and my consciousness, that I will tell the truth, the whole truth, and nothing but the truth.

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

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

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

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

THE WITNESS: Yes, I have it.
PRESIDENT TERCIER: Can you confirm--

(Discussion off the record.)

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

THE WITNESS: I will invite them to introduce
themselves.

PRESIDENT TERCIER: Could we have the
translation, please.

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

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

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

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

You know how the examination will be
conducted. You will be first examined by counsel for
Respondent. Then there will be a cross-examination
that--by counsel for Claimants, and then there will be
a redirect.

The Members of the Tribunal have the right to
ask you a question whenever they consider it could be
necessary.

Is it clear to you?

THE WITNESS: Yes.

PRESIDENT TERCIER: Okay.

THE WITNESS: Very clear.

PRESIDENT TERCIER: Good. Please,

Ms. Radjai, you have the floor.
A. Let me see that.

Minister Bode?

BY MS. RADJAI:
CROSS-EXAMINATION

BY MS. COHEN SMUTNY:
Q. Kelemen Hunor remained Minister of Culture of UDMR?
Q. Yes. You considered the State as Gabriel's
THE WITNESS:

Just a second.

BY MS. COHEN SMUTNY:

Prime Minister--
MS. COHEN SMUTNY: Yes.

THE WITNESS: Yes. This is what we can see...

BY MS. COHEN SMUTNY:

Q. You wanted to be informed about the status of that. Yes?
whether he was also a Member of the Board of

draft a note, he could draft a memo, he could draft
the screen here too.

one in the Directorate for Mineral Resources within 

for information.
was informed of this matter. Before I took office.

A. Yes.
and the Romanian Government.

A. Yes.
Q. But it was mentioned in the note that we were

A. I don't understand.
A. I considered that this note—and I still consider this—that this note shows elements in the

Yes?

cite the note in Footnote 7.
Mr. G: A. I don't understand.

It must have been somewhere in between those timelines.
Q. Was the note--
want to make a distinction between both?

BY MS. COHEN SMUTNY:

PRESIDENT TERCIER: Where?
PRESIDENT TERCIER: Mr. Bode. Mr. Bode. Yeah.
between counsel what is the correct version. Fine.

BY MS. COHEN SMUTNY:

with Gabriel.
BY MS. COHEN SMUTNY:

Q. You see it.

A. Before I came in office.
Gabriel that is also described in the note we
he had information about the results in the Draft.
no official document and I had not been involved in the full video.

BY MS. COHEN SMUTNY:
A. What I said to Mr. Tănase was that this
And I also told him that the talks that we
brief the Prime Minister on the status of
received such a mandate. Had I received such a
role that I understood I was
interest.
MS. COHEN SMUTNY: There are no further continue.
(Pause.) or no more?
By Ms. Radej: 

The economic impact of the deal between the Government and Gabriel?

A. I don't remember that Mr. Tănase had
Q. What did certain actions. Mr. Tănase and I could discuss had or had not done.
3 and then R-463 at Tab 4. This is the--this is Mr. G man. And then at Tab 4, we have R-463, which is
A. Yes, I can.
BY MS. RADJAI:

Memorandum. It's not a Memorandum itself. Let me

MS. COHEN SMUTNY: I think this is both
PRESIDENT TERCIER: Correct. Go to the next
redrection.
THE WITNESS: Yes. The moment I met
THE WITNESS: I can't see that. I can't see
enter into force and shall remain effective between 1 of Romania."

that we have.

about an official document.
THE WITNESS: I was a member of the
PRESIDENT TERCIER: Okay. For us, we will now take a one-hour break, a lunch break, and then we
will start--looking at the time, we will start with Professor Tofan's cross-examination.

Okay? Good. Let's go.

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

DANA TOFAN, RESPONDENT'S WITNESS, RESUMED

PRESIDENT TERCIER: All right. So, now we are back, and he nods, so it means he has understood that we are back on record, and I would like now to restart the examination of Professor Tofan.

Professor Tofan, you have just mentioned that you would like to make two corrections to what? To your Witness Statement or to your presentation, to what? To your expert report or to what?

THE WITNESS: To my Legal Opinion, very small corrections.

At Paragraph 117, 1-1-7, Page 35 in the Romanian version, it says the "issuer"--it has to say "issuer" and not "Applicant." The English version is correct. It says "issuer."

And under Note 130, at Page 42 in the Romanian language version, the exhibit number is C-1766 instead of C-1776.

Thank you.

PRESIDENT TERCIER: Okay, good.

Now we may proceed.
MR. TUCA: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. TUCA:

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

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

Thank you very much for your understanding.

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

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

Thank you.

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

Yes, please, Mr. Tuca.

MR. TUCA: Thank you, Mr. President.

BY MR. TUCA:

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

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

A. Yes, those documents have to be submitted.

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

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

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

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

PRESIDENT TERCIER: Please, remember that you
have to wait; otherwise, indeed, it will be impossible for us to understand the translation.

BY MR. TUCA:

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

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

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

Q. With all due respect, Professor, I did not expect such an answer from your part, and I'm not prepared to offer an excerpt of the Romanian Constitution in the binders that we have provided. The Constitution of Romania states that all citizens are equal before the Law as a principle, and this is a very well-known provision, isn’t it?
A. Yes. That is Article 16 of the Constitution, Paragraph 1. Nobody is above the Law.

PRESIDENT TERCIER: We will not be able to understand, so please first do not speak at the same time; and, secondly, wait because really we need always a few seconds to listen to the last sentence. Please; otherwise, I will have to intervene too many times.

BY MR. TUCA:

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

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

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

A. From what I know in administrative law I have to specify that there is no legal provision to that effect, and my understanding of the quote from the Constitution that you mentioned would lead to the contrary statement: Nobody is above the Law, so I would say that nobody can be favorized from a, let’s
call it, doctrine point of view.

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

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

A. I agree with these statements.

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

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

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

A. I don't know what documents you refer to and what proceeding you refer to.
You said documents required for the proceeding. Which proceeding would that be, and what documents are you talking about?

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

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

A. Do you mean administrative proceedings?

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

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

I would very much like for you to be more specific so that I can provide an informed answer. What do you mean by "essential documents"? What is that supposed to mean? In Romanian legislation, there are formal aspects that sometimes are deemed to weigh
more than issues of substance. Let's take the regime of misdemeanors regulated by Government Ordinance no. 2/2001 that refers to the contents of the misdemeanor minutes. There are certain formal conditions that have to be included and which, if not observed, may lead to the minutes of misdemeanor being null and void, but that is another discussion. If you want me to give you a grounded answer, you will have to be more precise in your question.

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

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

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

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

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

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

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

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

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

A. Do you mean Order 860 of 2002?

Q. Yes.

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

There are some deadlines, but this being a
complex procedure there is one of ten days, one of five days, one of 15 days. At one point I did try to add them up to see where that would lead us to, but after I looked and reviewed all the provisions, I couldn't come up with a clear answer because it is always—it all hinges on the relationship between the Applicant and the competent authority that requests various information.

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

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

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

You said you studied the Norms that provide
for the EIA Procedure, that regulate the EIA Procedure, and I asked you whether, when reviewing these Norms, you identified also rules that entitled the Authorities to ignore the rigors of the procedure. 

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

Here, I identified a right of appreciation of the competent authority to issue the Environmental Permit. If it is from the perspective of this text, you said "ignoring," ignoring the procedural
deadlines, then I would leave the counsel to interpret the text. The order sets out numerous technical Norms, and I only dwelt upon those in which I was interested in substantiating my opinion.

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

A. Counsel, challenging an administrative deed in court does not affect its validity until the judge in the case makes a decision either in the sense of ascertaining the legality of the Act and in the sense of rejecting the action or in the sense of ascertaining the non-legality of the Act and annulling it. There is a special procedure in Article 14 of the Law on Administrative Litigation, 554 of 2004, providing that it may be requested in an emergency procedure the suspension of the administrative deed prior to the request for Annulment at the same time with the launch of the preliminary procedure and the court, in a fast-track procedure, may rule on this if two express conditions are met: Namely, that there are imminent damages or the risk of imminent damage, and well justified cases.
In this situation, the Court may ascertain suspension of the deed which ceases to produce effects once it is suspended. And, of course, afterwards, the chain of lawsuits is triggered.

—

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

Q. Please, excuse me--

(Overlapping interpretation with speaker.)

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

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

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

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

And, indeed, third, let the Expert finish her
sentence.

THE WITNESS: Thank you.

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

Okay. Good.

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

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

DR. LEAUA: Before that, Professor, please
slow down because references to legal texts cannot be followed by Interpreters when translating numbers or references to specific articles. It's just too fast for them, and we skip the record constantly, so it would be difficult to have a problem on that.

BY MR. TUCA:

Q. This is the Legal Opinion of Professor Dacian Dragoș filed in this case.

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

Q. Paragraph 196.

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

PRESIDENT TERCIER: Take your time.

THE INTERPRETER: 196.

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

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

(Witness reviews document.)

THE WITNESS: This is why I did not submit my opinion in English and I did not want to testify in
English because I have an issue with the English terminology.

PRESIDENT TERCIER: Okay. Could you—could somebody from your side translate it into Romanian, please.

BY MR. TUCA:

Q. The fact that the legality of a legal administrative act is challenged—

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

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

DR. LEAUA: Yes, please.

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

THE WITNESS: Try again.

MS. ZIGMUND: The fact that the legality of an administrative act—is that okay? "The fact that the legality of an administrative act is challenged, judicially suspended or annulled poses significant challenges to the enforcement of that act, as a
presumption of its validity (legality) is in question or has ceased to exist."

PRESIDENT TERCIER: What is the question?

BY MR. TUCA:

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

A. It can be an interpretation given to a factual situation, that once the act was challenged in the Administrative Court, but you see, there is a succession of three verbs, challenged, suspended or annulled, so challenged, suspended or annulled. In the case of suspension or annulment, it is obvious that it is in question: in case of the suspension—the legality until the annulment case is resolved; in case of the annulment the legality of the Act. And in the opinion of my colleague, Professor Dragoș, there is, of course, the issue of the presumption of legality—yes, the presumption of legality of that Act.

So, what is, in fact, the idea? It's an idea of administrative law: As long as an administrative act is challenged in court, then suspicions arise that
that act could be affected in terms of its legality. If it is suspended or annulled, that's another discussion.

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

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

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

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

MR. TUCA: Okay. Let me resume.

BY MR. TUCA:

Q. At that time, the mining project of RMGC was reflected in a PUZ of 2002. At that time, did the
Ministry of the Environment have the competence of assessing the 2002 PUZ?

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

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

Q. Whether it had the competence.

A. And when you say the "Ministry"

I'm sorry, but in relation to the applicable Law, the legislation applicable to this procedure, there is this TAC, the "Technical Assessment Committee," that we talked about that met several times, so the issue
of--the making of a proposal for the issuance of the EP depends on the TAC.

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

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

Q. Is the PUZ an indispensable document for the EIA Procedure?
A. Yes. I argued broadly in my opinion, doctrine, law and case law, on that, that the PUZ is necessary for the EIA Procedure.

Q. Did you say there that the PUZ should be approved before the EIA Procedure is initialized? Is that correct?
A. If you allow me, the first Urbanism Certificate was issued based on the 2002 PUZ. The first Urbanism Certificate based on which on the 14th of December 2004, the EIA Procedure was started, provided the need for a modified PUZ.

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

Q. Let's read together Paragraph 197 of your opinion.
A. I read it. I know the contents of this paragraph.

Q. Am I to understand that such a Decision is
made in favor of RMGC?

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

Q. You maintain that the Ministry of the Environment used its discretionary power, so I want to ask you if the Ministry was obliged to motivate the derogation from the legal provision?
A. I would ask you, which legal provision do you have in mind? The Ministry didn't come to a final decision. It was an ongoing procedure that was not finalized through a decision. The Ministry didn't come to a decision. It simply considered that based on its appreciation right, and there is no legal provision, that it could start the procedure that does not lead to any effect. It is an ongoing procedure that has not reached the final act that produces legal effects. It is about an ongoing procedure that took place for a certain period of time.

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

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

Q. Based on Norms, I suppose?

A. Based on legal provisions.

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

PRESIDENT TERCIER: Try really to just stay
with the questions--

(Overlapping interpretation with speaker.)

BY MR. TUCA:

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

A. No.

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

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

PRESIDENT TERCIER: Let him finish the question, please.
BY MR. TUCA:

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

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

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

So if you ask about the grounds for the necessity of this PUZ (or for the obligation of the Applicant to initiate the drafting procedure of a
draft PUZ that will go to the local authority), the
grounds were found in the Urbanism Certificates. As
for the concrete drafting, which is also a complex
procedure, we have a Guide 176/N of 2000, that details
the procedure for drafting the PUZ with a lot of
technical details.

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

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

If you allow me, may I--

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

A. Stages of the procedure, but it wouldn't have
gotten to --. No, it couldn't have finalized.
Because it couldn't have been finalized because, in
the PUZ, --there is information which is necessary in
order to finalize the procedure, and this information
is linked to environmental protection and, I can be
more specific if you allow me. In the guide that I
have mentioned, which is tertiary legislation, there was a Ministerial Order of that time, an order of the MLPAT—those were the initials of the ministry at that time, there are two points that are mentioned in my opinion, 2.7 where it is explicitly provided "Environmental Issues" and 3.7, "Environmental Protection Rules." And these aspects should have been considered and included in the PUZ.

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

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

On the other hand, allow me to specify that I am charged with administrative law, administrative
sciences for many years, but I didn't work in the public administration, at least not after 1990, before that, I worked in the public administration during my internship. I'm not aware of the details of the activity of a committee or a body except from some discussions with people working in the system or from what I've read. You can be familiar with the actual functioning of the administration only if you are inside or within the administration.

BY MR. TUCA:

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

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

It is one of the endorsements required under
the UC. There is specific legislation there, the law on historical monuments no. 422 of 2001, the legislation on archaeological heritage— the Government Ordinance no. 43/2000, that were debated, I was in the hearing room. So, I cannot undertake to give absolute, an informed answer as long as I haven't reviewed in detail the legislation. I'm not addressing the Ministry of Culture's endorsement, in my opinion—

(Overlapping speakers.)

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

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

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

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

BY MR. TUCA:

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

A. 281, thank you.

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

THE WITNESS: 281 of my opinion.

BY MR. TUCA:

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

A. Yes.
Q. Let us look at para. 299.

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

PRESIDENT TERCIER: Where are you quoting from?

MR. TUCA: Professor Tofan Legal Opinion.

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

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

PRESIDENT TERCIER: Okay.

BY MR. TUCA:

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

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

Q. Is it true that these obligations that the two paragraphs showed are applicable also to the case where administrative bodies work together, collaborate?
A. I'm referring in this paragraph to the discretionary power of a certain administrative authority. I did not, it does not affect my idea, I did not have in mind (I told you that -- this is a quotation, those are not my ideas, the author is quoted in my book) the report between two public administration authorities, if that is what you are referring to. I referred to the attitude of the administration towards citizens, individuals, legal entities, to which it is addressed. That is what I had in mind.

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

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

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

Q. Please wait for my question.
Is it true that you reviewed a litigation case on the matter that is included in your Legal Opinion? Is that correct?

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

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

A. That is correct.

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

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

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

THE INTERPRETER: 1266 is the exhibit number.

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

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

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

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

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

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

PRESIDENT TERCIER: So, we will see the question, and then once you have the question, you
will tell us whether you can answer or not.

THE WITNESS: Thank you.

BY MR. TUCA:

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

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

Q. Para. 141 of your opinion--

PRESIDENT TERCIER: Take the time to read it.

BY MR. TUCA:

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

A. Yes.

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

A. Yes, but...
Q. At the same time, you hold that the PUZ was an essential element for the proceeding, and you also hold--

A. Yes.

THE INTERPRETER: Says Mrs. Tofan.

BY MR. TUCA:

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

A. There is the legislation on constructions, Law 50 of 1991, which is the main legal enactment in the field of constructions. It sets out a proceeding that starts with the Urbanism Certificate—individual administrative deed and ends with the Building Permit—individual administrative deed. This is a long-lasting proceeding. The Urbanism Certificate is at the basis of everything that follows during this proceeding. It is important because it contains elements on which environmental protection issues are grounded, it contains, among other items, information and rules with regards to Environmental Protection.
And to continue my idea on what you have asked, I was asked whether the Law shouldn't have expressly provided that. In my opinion, I accurately mention the correlation between the legislative norms, I said that the general legal provisions are those of the Construction Law and there are several special legal provisions: Environmental Protection Law, the Law on Historical Monuments, on protected areas, on archeological heritage—all of which come together in this project because this is how it is.

It couldn't have been legally expressly provided in the Law. There couldn't have been an express provision, a specific provision, in the Law. Where would that provision be? In the Environmental Protection Law or in the Building Law stating expressly that it is always an Urbanism Certificate must be at the basis of the Environmental Permit. But I do have it in my opinion, if we go to Article 3 the former law, of Law 137 of 1995 or maybe Article 2 of the current regulation, the Government Emergency Ordinance 195 of 2005, that expressly states—let me speak slower—which expressly states that the
environmental protection legislation and Environmental Protection Activity must be correlated with Urban Planning and construction legislation. There is a specific provision that I refer to in my Legal Opinion in the context of my analysis.

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

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

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

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

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

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

THE WITNESS: I will answer to your question following--the following logic: The right of
appreciation is regulated in the Law on Administrative Litigation, and I'm referring here to the discretionary power, and this is in relation to the definition of the "excess of power," Article 2(1)(n) of the Law on administrative litigation.

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

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

Now, this excess of power was invoked in this
hearing before. It means the right of appreciation of the public authorities and the law, indeed, speaks about breaching the limits of the competences established by law. But then it says "or breach or violation of civil rights and liberties."

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

BY MR. TUCA:

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

A. Well, I apologize, but you led me back from the hypothesis with a challenge in court, and now you are trying to make me to say that it could have issued
the Environmental Permit without having the necessary
documents, including the PUZ, which I support with
thorough arguments in my opinion. No, it could not have done this.
Q. In exercising the discretionary power, the administrative authority does--must the authority justify its action?
A. I will ask you again: What authority, what administrative authority are you referring to? What action are you referring to? Are you referring to the Project or to a more general perspective?
Q. When it comes to the Project, you hold the view that the Ministry of Environment accepted to conduct the EIA Procedure in the absence of a PUZ approved, a valid PUZ approved, before the start of the procedure. Should it have justified this Decision or not?
A. There was the PUZ of 2002. The Urbanism Certificates all required an amended PUZ, but for various reasons, this amended PUZ was never adopted, the so-called "Amended 2006 PUZ."
I maintain that the procedure was and is a
lengthy procedure for several reasons pertaining to both Parties. I wouldn't know the specificities of the administrative work, and I maintain that it could not have issued the Environmental Permit or proposed the issuance because it is the TAC that proposes to the Ministry of the Environment, and the Ministry of the Environment drafts the draft Government Decision which is submitted for approval to the Government because it's issued by Government Decision. So it would not have completed the procedure--it would not have come to the end of the procedure if it didn't have the amended PUZ required by the six Urbanism Certificates.

Q. In your Paragraph 311, you maintain--

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

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

PRESIDENT TERCIER: Okay, good.

BY MR. TUCA:

Q. A valid PUZ must be approved prior to the initiation of the EIA Procedure, although RMGC failed to obtain the approval of the PUZ prior to the
initiation of the EIA Procedure, the Ministry of the Environment started the procedure, and I understand that it derogated from the Law. Is it correct? Is this understanding correct?

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

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

What I said here is very logical. There is a logical correlation between the two ideas, and I said,
Mr. President and co-Arbitrators and Professors, that my conviction resulting from the documents and from the legislation is this one.

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

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

Further question, please.

BY MR. TUCA:

Q. My question was much simpler. You said that the PUZ should have been approved prior to the initiation of the procedure based on legal Norms. You
didn't show them to us.

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

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

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

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

According to your opinion, one of the appreciation criteria for the opportunity lies on the concrete circumstances where the administrative act is
applied, hinting to the public’s reaction.

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

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

A. Yes.

Q. I'm sorry. Yes, indeed.

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

BY MR. TUCA:

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

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

With regard to this statement, I grounded it on legal grounds, of course. It's an appreciation of
the situation that everybody knows. There is the legislation regarding environmental protection. I did not review EU law, the Aarhus Convention of 1998, that was ratified through Law 268 of 2000, if I'm not wrong. And this is exactly what this piece of legislation does. It insists, to a large extent, on public consultations when it comes to major or significantly important projects that can impact the environment.

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

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

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

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

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

A. Public interest is the interest that the administration should take into account. It's just a nuance, it is not a difference between the public interest or the interest of the public. I stressed on the word just to continue my idea. It's the public interest, actually, which is regulated in the Administrative Litigation Law. It is expressly said there that there is a difference between legitimate public interest and legitimate private interest and the law also defines them. It is a condition for the administrative litigation court action together with the injured right. It may also be only the legitimate public interest.
As it is the case in these litigations, the legitimate public interest is affected in the Court actions taken by several NGOs.

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

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

A. Is this your question?

First, when you referred to 306, it was a rather incorrect wording--I mean, what you quoted compared to what I wanted to convey in this paragraph,
I cannot restate it from memory but it can be verified from the transcript. I said that (the two paragraphs are correlated, the paragraphs you indicated) even if all the legal requirements are satisfied, the interpretation of the applicable legal requirements indicate a discretionary right of the competent public authority, which I maintain in my opinion based on arguments.

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

And I also pointed to the legal reference explicitly where I have identified this right of appreciation, I do not want to annoy Mr. President and the Co Arbitrators, from--Order 860 of 2002, article 49 (1) and also in the last stage of the EIA Procedure, the third stage, there is an appreciation on the quality of the environmental report, and quality is a subjective element. The authority makes an appreciation on the quality of the environmental
conditions, whether all the requirements of the
environmental protection are complied with.

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

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

And then I spoke about an appreciation on the
quality of the last report drafted in the third stage,
the final stage of this procedure, and then I pointed
that public consultation is decisive or very important
in this procedure. It is the reason why the
legislation in the field of Environmental Protection has been amended several times.

DR. LEAUA: --one skipping part in translation, “role determinant”, that would be--decisive role--

(Overlapping interpretation with speaker.)

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

(Overlapping interpretation with speaker.)

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

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

MS. MARAVELA: No questions on redirect for us.

PRESIDENT TERCIER: Thank you. We have questions.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DOUGLAS: Just returning to the last paragraphs of your statement where you're talking about the role of discretion and the public interest, and I just want to propose a hypothetical to you along
the same lines as was being asked. Imagine a
situation where the TAC Committee has come to a
consensus that the permit should be issued, and then
it goes to the Ministry of Environment. The Ministry
of Environment goes through its checklist and all the
boxes are ticked.

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

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

ARBITRATOR DOUGLAS: Sorry. I think we’re
getting off the topic a bit.

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

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

    This is how I see the things.

    If the Committee reaches in the end this conclusion. Because the Committee had the competence
to analyze everything that was necessary, including public consultations, including the appreciation on the quality of the Report. This is what I believe from my review of the legal provisions in this field.

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

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

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

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

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

I was waiting for the idea to be uttered.

I'm sorry.
It is the representative of the Ministry of the Environment who chairs the TAC. This is a question of the theory of endorsements. Mr. Podaru, my colleague from Cluj, elaborates on the same. The conformity endorsement is required and it must be abided by, so what the TAC says must be abided by, and the TAC is led by a representative of the Ministry of the Environment.

ARBITRATOR DOUGLAS: Thank you.

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

ARBITRATOR GRIGERA NAÓN: Excuse me, I have been listening very attentively to what you say, but you are taking that the TAC is not a merely consultative stage in the procedure because you're talking about consensus, and maybe unanimity. Is that really the situation? Because if the TAC is merely a consultative stage--and I have my doubts that those
who are at the TAC are experts, they're representatives of political sectors or certain institutions in Romania, but they're not the Experts, the actual experts, who are looking at the issues.

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

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

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

Let me make a parallel with another piece of legislation that I know of in the education field in Romania, of habilitation orders and granting the
titles of "Doctor." The Committee has an advisory role. What the Committee proposes, the Minister always observes. If the Committee, which is consultative, does not give its consent, the Minister will not issue the order to grant the title of "Doctor" or of habilitation. Whatever is proposed by the advisory committee is abided by the Minister of Education, and that has to do with the interpretation of legal texts, a proposal that is made by the TAC is to be applied by the Minister of the Environment by drafting the draft Government Decision. That is how I understand the existing legislation.

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

ARBITRATOR GRIGERA NAÓN: The record is the
record.

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

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

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

THE WITNESS: No.

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

THE WITNESS: No, no.

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

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

Do you understand my question?

THE WITNESS: Yes, I understand your question.

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

    PRESIDENT TERCIER: Which public consultation?

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

    PRESIDENT TERCIER: Okay.

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

    PRESIDENT TERCIER: Good.

    ARBITRATOR GRIGERA NAÓN: But we had started to speak about the TAC. In November 2011, there was a TAC meeting, in that TAC meeting there was a consultation of each of all the Ministries that you mentioned. The only one that apparently was not very clear in his answer was the Ministry of Culture, but according to my knowledge, there was no reference to the PUZ whatsoever. So, at that level, isn't it that the representative of the Ministry had the obligation to elevate whatever were the consequences of that
technical consultation to the Government for the Government to decide what to do? Because there was no reference, to my knowledge, in the record that the PUZ issue was raised.

So, where do we stand on that one?

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

I haven't reviewed the Minutes of the 29th of November meeting. I don't know what was discussed there, but no decision was taken to this effect. There was no approval then. I do not know about the Ministry of Culture, why there was no approval then.

On the other hand, if I place myself in the shoes of the Claimant, in my opinion, I elaborated on the fact that, in this situation, if RMGC deemed that all legal criteria were met and that they were treated unfairly because the EP was not issued. They could have filed a suit before a court of law. Article 52(1) of the Constitution refers to the right of the person
injured by an administrative deed or by the failure of the authority to solve its request. So after the finalization of the meeting, RMGC could have filed a written complaint in court saying that it appreciates that all the conditions for the proposal to issue the EP have been met but the EP has not been issued.

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

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

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

(Pause.)

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

DR. LEAUA: Yes, thank you.

We have a redirect question related with—we have a correction to the record because it was referred to the Witness a document with a specific mention from the Tribunal possibly by error of the content of the document not referring to PUZ. In
fact, it does, and we want to put the document in front of the Expert. So, for the Expert to see exactly where is the paragraph where PUZ is referred in the TAC meeting, and then notice exactly what is the context of the question that it is addressed. It is a correction for the record.

(Tribunal conferring.)

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

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

PRESIDENT TERCIER: You have your objection.

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

PRESIDENT TERCIER: Thank you, it's noted.
MS. COHEN SMUTNY: Mr. President, we would want to point out with respect to that same exhibit that in the same pages that follow, Pages 42, 43, it is, indeed then debated whether the PUZ has any relevance, and if the Tribunal is interested, they could see over several pages the result of the debate at that meeting.

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

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

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

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

Fine. In that case, you have another point?

No other point?

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

So, thank you very much for your examination and now it is over.
(Witness steps down.)

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

(Brief recess.)

PRESIDENT TERCIER: So, we will now proceed with the examination of Professor Dragoș.

So, indeed, my first question was your reaction to the modification, to the amendment proposed to the Legal Opinions of Mr. Dragoș.

MS. COHEN SMUTNY: Yes. Thank you.

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

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

So, deleting the footnote references, then there would need to be a correct reference to the NGO
publication. In other words, the quote--

PRESIDENT TERCIER: I see.

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

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

PROFESSOR DACIAN DRAGOŞ, RESPONDENT'S WITNESS, CALLED 

PRESIDENT TERCIER: Good afternoon,
Mr. Dragoş.

THE WITNESS: Good afternoon.

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

THE WITNESS: In English.

PRESIDENT TERCIER: --in English.

We will--I do not need--I've seen you. You 
have been in the room before. Really not to introduce 
the Members of the Tribunal. I think you know them
all. You know that you will be heard as an expert.

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

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

PRESIDENT TERCIER: Thank you very much.

You have prepared for this proceeding two
Legal Opinions: the First Legal Opinion dated the 22nd

Do you have these two documents in front of
you?

THE WITNESS: Yes.

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

THE WITNESS: Yes.

PRESIDENT TERCIER: Fine.

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

THE WITNESS: Yes. I apologize for the need
of these corrections. By mistake, of course, when
citing the documents, I miscited the document.

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

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

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

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

THE WITNESS: Yes. My name is Dacian Dragoș. I'm a Professor of Administrative Law and European Law at Babeș-Bolyai University. I'm based in the Faculty of Political, Administrative, and Communication
Sciences and in the Faculty of Law. Actually, my position is within the two faculties because I'm a conducting Ph.D. in the Faculty of Law.

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

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

Outside academia, I've been working--I have worked as a legal expert for--within the Commission--actually, I was the President of the Commission for drafting the Administrative Code of Romania--unfortunately, it was not later adopted in the Law, but a draft still exists--and a Member of the
Commission for drafting the Administrative Code, which was adopted in the end, and a Member of the Presidential Commission for the Analysis of the Political and Constitutional System of Romania, and also President of the National Council for Research Ethics with the Ministry of Education and Research.

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

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

THE WITNESS: Okay.

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

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

THE WITNESS: Yes. I have written this Opinion based on the Terms of Reference given by the Counsel for Respondent in which I was asked questions of law based on the exhibits that were already in the record.
Of course, I consulted, then, the Legal
Opinions of Professors Bîrsan, Schiau, and Mihai, and
later on of Professor Podaru, and I have discussed the
issues that they raised there. I was instructed to
reply to those issues that were already raised in this
Arbitration by these professors. So, basically,
that's how I started my work.

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

PRESIDENT TERCIER: Thank you very much.

So, we will start with your presentation.

You have 20 minutes for that.

THE WITNESS: Yes.

PRESIDENT TERCIER: And then we will have the
cross.

And who will lead the cross? Mr. Tuca.

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

Please, you have the floor.

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

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

I will explain what is the Development Consent Procedure, an outline of this Development Consent Procedure, and I will dwell on the points of controversy between me and my fellow legal scholars on the Urbanism Certificate, on the Zonal Urban Planning and on the Strategic Environment Assessment and Environmental Impact Assessment. And I will end with conclusions that are related to the whole of my Legal Opinion.
First, I've been instructed by the Counsel for Respondent to assess the following issues: First, how the EU and International Law relate to Domestic Law and how are they applied, in terms of the legal procedure to be conducted for the issuance of the Environmental Permit, and in the end the Building Permit, for the Project Rosia—for the Rosia Montana Project.

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

As regards the Summary of Findings regarding the EIA Procedure, I explained in my Legal Opinion that the Urban Planning and the EIA are integrated in the Development Consent Procedure, that the EU Law principles are also important for the interpretation of the National Law because the National Law has to be interpreted in light of the EU Law and the EU Law principles, and the assessment of the legality of the
procedure needs to be done also, taking into
consideration the sources of law that are
applicable--all the sources of law that are applicable
to the said procedure.

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

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

I also was of the opinion that surface rights
are recommended to be secured before the issuing of
the Environmental Permit, and that is because the
Environmental Impact Assessment also looks at the—to
the population, to the human beings. And issues such
as relocations or the ownership of the land are also
important for a proper Environmental Impact
Assessment.

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

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

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

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

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

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

This is a specific regulation. This is the legal nature, specific regulation. And these are mandatory for the substantiation and the issuance of the Urban Certificates. The Urban Certificates,
actually, are enforcing all these regulations that are adopted at the level of plans.

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

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

Then, here I drew a little sketch to show how the development consent procedure integrates the urban planning development and the environmental planning.
I will talk first about the scenario where the project--specific project fits within the urban planning documentation.

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

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

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

For that, the Ministry of Culture needs to give its endorsement, which is based on Discharge Certificates, clear the land for development, and, of
course, other procedures to be followed by the
Ministry of Endorsement--the Ministry of Culture.

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

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

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

   Well, in the case when the PUZ or the PUG are
not accommodating the project, the project needs
modifications of the PUZ or the PUG or it's required
by the Urban Certificate. Then the modification of
the PUZ is proposed by the developer to the local authority, based on a strategic environmental assessment, which looks at the--in general, the sustainable development of the zone, and not to the specific project, which leads to this--to this assessment.

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

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

I will explain in more detail the PUZ, which is a planning instrument for specific regulation which coordinates the integrated urbanism development of certain zones in the locality and establishes objectives, actions, priorities, restrictions, and
permissions for land use.

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

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

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

The drawn pieces also are very important because they relate and they show the ownership over lands, the protected built area, and so on. And this is an example of a drawing from the PUZ. I will leave this for the Tribunal. I will not insist on that.
Actually, as regards the factual background, I will leave here the sequence of adoption of PUZ and how they were then impacted by the Urban Certificate and the modifications of the PUZ. This is quite—it's already known, I think, for the Tribunal, but I leave it there to see the sequence of acts that were issued. I would not insist on them.

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

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

I will not detail this either because of lack of time. I will only say that they were either suspended or annulled in court at different points in
time. And also the environmental endorsement for the 2006 Draft PUZ was suspended and then annulled in court.

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

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

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

My position is that the PUZ is required by the Urban Certificate, so it needs to be updated and to be adopted by the local authorities at the
initiative of the developer. This PUZ is based on the strategic environmental assessment and also is the basis for the Environmental Impact Assessment of a specific project which needs to fit within the strategic planning, strategic environmental assessment, and also within the strategic urban planning.

Why I say this argument is because the PUZ demonstrates how the Project will achieve the integration between urban planning and environmental protection and how it will affect the area and its surroundings. So, in the absence of a valid PUZ, the TAC and the Ministry of Environment cannot recommend or issue the Environmental Permit.

My position on the legality of this requirement is based on the fact that in the EIA Directive, it specifically states that the information that needs to be provided by the developer relates also to the site design and size of the Project.

And in Annex 4 of the EIA Directive, it's explaining what does it mean, information relating to the Project. Namely, description of the Project
comprises, among other things, land use requirements. In my opinion, this is the PUZ. And the PUZ is substantiated for the specific project by the Urban Certificate.

Also, Article 12 from the Order 86, that was cited by my colleagues as well, says that the documents that must be submitted by the titleholder when applying for the issuance of the Environmental Permit include a technical memorandum of the project which gives information about the manner in which the envisaged project is integrated in the Urban Planning documentation.

This Memorandum of the Project--this information needs to be proved by documents. And these documents are issued by the State authorities. Well, these documents that prove what the Memorandum says are, Urban Certificate, PUZ, PUG, if necessary, and other information.

So--and I also noted that Professor Mihai, who contradicts my--my findings, does not address this issue of the applicability of this specific legal provision.
We also had controversies regarding the Strategic Environmental Assessment. Professor Podaru says that Strategic Environmental Assessment Procedure is not broader than Environmental Impact Assessment, and it doesn't have to be done prior to the Environmental Impact Assessment.

Well, I consider that Strategic Environmental Assessment, by definition, is broader than Environmental Impact Assessment. Strategic Environmental Assessment applies upstream to the--to the plans--to the general plans for the locality and for the zones, and it looks at sustainable development of the zone; whereas Environmental Impact Assessment, it's more environmental for--it's an assessment--environmental assessment for a specific project.

So, they are in a clear succession. The SEA should precede the EIA because the SEA then gives the framework for the EIA Procedure to be conducted. And I also have a legal provision to sustain my arguments. Article 5 from the Governmental decision that is transposing the SEA directive in Romania, which says
that: "The plan or a program contains the criteria and the requirements that guide the decision-makers in the EIA Procedure for future individual projects."

This, in my opinion, shows clearly that the SEA is the basis for future projects' EIAs.

I will come to the conclusions that are related to the whole of my Legal Opinion. I extensively showed what Professor Mihai seems to understand completely different than myself, the fact that the EU Law and principles are guiding the interpretation of National Law.

The EU Law does not stop to be relevant for the National Law and for the sources of law when, for instance, directives are transposed into National Law. Directives have effect even from the issuance of the directives. They have an obligation of restraint. They have an obligation not to have worse conditions in order to prevent the application of the directive, and so on.

There is a huge body of literature that shows that the directives are very important for the actual applications of the National Law. The directives do
not have to be contradicted by the National Law. And
the EU Law, in general, does not have to be in
contradiction with the National Law.

You can make a directive's objectives
irrelevant by the practice of public administration,
by ignoring the scope and the actual objectives of the
directives through administrative practice. And this
is recognized by the literature and by the case law of
the Court of Justice of the European Union.

The administrative practice also can be
against or contradicting the European Law. So, it
should not be a matter of contention between
professors of law, I think, that the European Law
forms part of the National Law in Member States of the
European Union, and it has an influence on the conduct
of the procedure, especially in a field which is
excessively Europeanized, like environmental law.
Because this is a field where we find a lot of
European Law applicable.

I will not detail the rest of the
conclusions. I already did on the PUZ and importance
of Urban Certificate. I will only say that the public
consultations carried out in this procedure, in my opinion, were carried out lawfully, and they have shown the marked opposition to the Project. And Rosia Montana was always protected under historical and cultural heritage legislation that includes discussions relating to the list and so on.

Thank you for your attention. I will be happy to answer any other questions relating to issues that I have not covered in my presentation but are in my Legal Opinion, if the Tribunal wants to.

Thank you.

PRESIDENT TERCIER: Thank you very much. We have now the cross-examination.

Mr. Tuca, you will do it in Romanian?

MR. TUCA: In English.

PRESIDENT TERCIER: In English. Okay.

MR. TUCA: Thank you very much, Mr. President.

CROSS-EXAMINATION

BY MR. TUCA:

Q. Good afternoon, Professor Dragoș. My name is Florentin Tuca. I'm from Tuca Zbarcea & Asociatii in
Bucharest, one of the members of the legal team representing the Claimant in this Procedure.

Before starting our dialogue, I'd like to ask you a few questions related to your CV because I read your CV with attention.

And my first important question is if I could wish you a warm, happy birthday.

A. Oh, thank you. It's tomorrow, but...

Q. Tomorrow.

A. But it's well-received. Thank you.

PRESIDENT TERCIER: Never do it before.

Really, it's a very, very bad sign.

BY MR. TUCA:

Q. Second question--not far from your birthday.

Professor Dragoș, in your view--in your view--I have a small curiosity--a birth certificate as a legal document could be suspended or not?

A. In my opinion, a birth certificate cannot be suspended.

Q. Why?

A. Because it only can be corrected because a birth certificate only acknowledges some facts. It
actually acknowledges something that has happened, the birth.

Q. Like the Urban Certificate maybe?
A. No, no, no. That's different.
Q. The analogy is not accurate?
A. No.
Q. No?
A. They are court certificates, but they are not the same.
Q. Ah, not the same.
A. On the contrary--
Q. They have the same informative character, haven't they?
A. Yes. But they are not the same legal nature. But if you want, I can expand that maybe.
Q. No, no. Getting back to your Legal Opinions. Thank you very much, and happy birthday.
Professor Dragoș, it's correct to say, according to the Romanian Law, that a normative administrative act is a decision?
A. Yes.
Q. It is correct to say that according to
Romanian Law, this normative administrative decision should be dated?

A. Yes. In principle, yes.

Q. It is correct to say that such a normative administrative decision should be--is supposed to be published; correct?

A. Well, that depends on whether you refer to certain periods of time where we could have had this obligation or not in the Romanian Law.

If you are referring to after 2000, where we have a law on the legislative technique which also covers administrative acts, and it says that administrative acts that are general in nature--we call it "normative" in Romania--they should be published the same as laws, which inform the general public, and they're applicable to anyone who comes within their remit, and so on.

Q. But it's correct to say that the publicity is a principle governing the public law?

A. Yes. Publicity, yes.

Q. Was the so-called "91-92 LHM" an administrative act? Correct?
A. Yes.

Q. May I have a short image from your Legal Opinion, Page 25, Subtitle (b).

A. First or Second?

Q. First one. First one.

The 91-92 LHM was legally issued--no. Sorry.

B, B, B. Title (b)--subtitle (b), Page 25. The 91-92 LHM was an official, mandatory normative act.

And my next question: What's the date of this act?

A. Well, first, we should see the document. No? If you want to actually talk about the date.

PRESIDENT TERCIER: Do you have it?

MR. TUCA: It's a huge, huge, huge list.

BY MR. TUCA:

Q. Was it published in the Official Gazette?

A. It was not published in the Official Gazette because at that time, general acts were communicated and made public in other ways. I need to explain a little bit the context for my assertion that this was a proper general act in Romanian Law at that time.

Because right after the change of regime,
after the communist regime elapsed--collapsed, there
were--was a new situation where the new State organs
were coping with the transition period, and they
adopted modalities of communicating within themselves
and with the public that were not--are not to be
judged from what we understand today from publication
or making public--public an administrative act.

Needs to be understood that in those times,
it was a practice to communicate even to the general
administrative acts, to those interested to the State
organs, to the local organs, those that were
interested in the application of the Act.

They were posted at the premises of the local
authorities, circulated among authorities. So, they
were, in a way, adapted forms of making public the
normative act in Romania. General--general acts.

So, this Act was, in fact, communicated to
the local authorities in order to be applied, and it
was recognized in other documents and in other State
documents and State acts as an official List of
Historical Monuments. And later on, in the Law, was
also said that this List of Historical Monuments was
considered to be the proper List of Historical Monuments, so--

Q. Getting back to my previous question.

You--your opinion is that this important LHM list was official and mandatory and normative act, and you studied in your--you analyze it in your Legal Opinions.

And my question was if this List was dated or not.

A. Actually, I don't know if it was dated. I only saw an excerpt from the Alba County, which was sent to Alba County. I guess they were sending to each county the List of Historical Monuments that were pertaining to their territory. And that one was dated with a date from--I think it was dated from the issuer.

Q. And assuming that this List was, as you said, communicated but communicated to the Municipality A but not to the Municipality B, should the Municipality B be obliged to observe this normative act?

A. Again, in those times, there were no such specific rules on publications--publication of general
acts. They were posted at the premises of the local authority. Again, if a neighboring local authority would want to find out about that List or other documents that were issued in the same way and communicated in the same way, they would have to travel and to see the premises of this authority.

So, it was a matter of functioning the new--the new public administration of Romania then. It was a transitional period. We were finding ourselves again. It was, of course, improvising a lot.

But what is important about this list is that so many documentary evidence is that this list was considered at the time, contemporaneously, the proper List of Historical Monuments, and it was respected by State organs and by private persons as well, and was enforced by the State organs accordingly.

So, for instance, you couldn't build in a Protected Area or in an area with a Historical Monument. So, no way you could do that.

Q. You are referring to this so-called "91-92 LHM." You have in mind the list itself or the
A. The list—the list and the decision—well, the decision is only an instrument. It's a vehicle for the list, the instrument approving it.

So, it was approved in sequences. They were adopting the list county by county. There are—again, and I can show you. I have cited in my Legal Opinion, if you want, the minutes of the Commission for Historical Monuments saying, "Well we adopted the list for those counties and so on. Today we adopt the list for these four counties. We have several more counties to adopt."

So, it was a process, again, that cannot be characterized looking back, you know, retrospectively from what we consider now a decision-making process.

Q. Yes, Professor, but we have to—to stay in law and to be very precise specialists in law. And my question was very precise.

Have you seen, for instance, this decision approving the so-called "91-92 LHM"?

A. No, I have not seen one decision approving the whole list. It was approved in sequence, and it
was sent to the local authorities to be enforced in day-to-day activities.

Q. Do you know if this decision--assuming that this decision exists--is on the record?
A. I don't know.

Q. Professor Dragoș, you've analyzed a lot of aspects of Rosia Montana cultural heritage; that's correct?
A. Yes. I analyzed from the point of view of procedural law, not substantial law. Cultural heritage--I'm not an expert on cultural heritage, per se.

Q. What's the backbone of your Legal Opinion from this perspective?
A. You mean generally what's the backbone of the argument or what? What's the specific question?
Q. Let's have a look at your Second Legal Opinion, Paragraph 331.

So: "The backbone of my position is that Rosia Montana was (and is) protected both as an archeological site and as a historical monument. The later regime of protection was instituted under the
So, the backbone of your legal position is based on the so-called "91-92 LHM"; in other words, on an official, normative administrative and mandatory act which is not dated, not published, not approved, and not on the record; is that correct?

A. Let me answer to all these questions in succession.

I have explained why it was not published and still produces legal effects. So, in administrative law we have this theory that no matter how the act is approved, in the end, if it produces legal effects, we can conclude that is an administrative act.

We have a lot of acts in practice that are called--I don't know--endorsements or opinions, and so on, that produce legal effects. We have acts that are undated, but they still produce legal effects. Somebody enforces them.

Well, you cannot say that those who were aggrieved by that enforcement could not challenge the act because it was not dated. Of course, if somebody is hurt by that act, they could go in court and say,
"Well, this act is undated, so it's unlawful or isn't even in existence," and so on.

But, again, we were in times where this was the practice of public authorities. I--this practice was also conducted for other issues. For instance, the list of assets in the public domain, it was not published. It was communicated only to public authorities. It was an annex to a governmental decision, and it was not published.

Well, regardless of the fact that these are proper methods or not at that time, to conduct decision-making procedures, they were respected in practice, they were enforced by all national authorities, and they were recognized as such.

And let me go back to your third and fourth points.

So, it was not published, you said? It was not--

Q. Dated?
A. --dated. It was not--remind me.

Q. Apparently approved.
A. Approved? I think it was approved by the
National Commission of Historical Monuments. There's documentary evidence of how they were working and how they were approving, in succession, different parts of the List for each county. I have cited in my Legal Opinion, Mrs. Cezara Mucenic was part of that Commission and who would give evidence on how they were working and how they were struggling in those times to have this--this list put in place and to protect those Historical Monuments that needed protection.

After all, we were coming after the communist period, who disregarded this cultural heritage protection entirely. And it was a rediscovering of this domain in Romania in the '90s or in the '91s.

And then you refer in the end to the fact that--it was a fourth point. Sorry.

Q. The decision approving the list not on the record.

A. Yeah, not on the record.

What--what I've seen on the record is that letter to the prefectures, and this one to the
prefecture of Alba County, communicating the list which should be then applied in practice by the local authorities. I think that's on the record, and also the testimony of Cezara Mucenic is on the record.

So, we have enough elements to draw some conclusions on those times. Yes, we don't have hard evidence on—like we have in recent times, in letters exchanged within the Ministry and the developer, and so on. Would have been so easy to have that now, but...

Q. Professor, with all due respect, you said that this list is the backbone of your legal position.

A. Yes.

Q. So, you have to have an approval to be studied, to be verified, to be checked from a legal perspective. I'm wrong?

A. Yes, you are wrong because you're applying concepts from nowadays to '91/'92.

Q. In '91 and '92 there were some rules; correct?

A. Which rules do you refer to?

A. We had norms. They were adopting--the new Government were adopting laws, and some of the laws were still in place from the communist era. Some were adopted. Some were repealed. There were--yeah, it was an activity of, a normative activity then, yes.

Q. We had also an Official Gazette at that time; correct?

A. Yes.

Q. Assuming--you said--one last question.

Assuming that--you said that this list or the decision approving it--I don't know exactly--assuming that one of the two is a normative act, do you accept that this normativity is specific for the administrative--for the--for--and has a general application?

A. Yes, that's the different--

Q. Assuming--assuming, again--sorry.

A. Yes.

Q. Assuming, again, that I'd be interested in challenging this normative act in a court of justice, could you indicate to me what is exactly the object, the legal act to be contested in front of a judge?
A. Well, if a person needs this list in any form, it's when it's requiring, for instance, a Building Permit. Yeah. And the local authority says, "Well you cannot build there because this area is—or this monument is protected, and you're too near to this monument, so we won't give you the authorization."

Then, of course, you can challenge the refusal to give you the Building Permit, and also the list that supposedly is illegal. You find out about the list when you need—you need it. It's—you find out about the list. That was the situation there.

Again, it's not to be judged from the rules that we have today. In the Constitution of '91, we only have the publication as a matter of giving legal effects of enforcing—entering into force for laws. We didn't have anything for administrative acts.

For administrative acts, we only have this rule from 2000. So, administrative acts, basically, in those periods could have been publicized any—in a manner that was at the disposal of the local authorities and the central authorities, as long as it
was publicized somehow.

And this was done usually by posting it at the premises of the local administration, maybe publishing it in local gazettes, all these kind of ways of communicating the list.

Q. You stated--moving on to another topic. You stated that--in your Legal Opinions--that PUZ was an essential prerequisite for the issuance of EP; correct?

A. Yes.

Q. And my first question related to this statement, when exactly in time the PUZ was needed for the procedure?

At the moment of the application? Before some--between the application and the issuance of EP? At the moment of the issuance of EP?

A. Yes. The PUZ was needed when the application was made for the Environmental Permit and for the start of the Environmental Impact Assessment. This PUZ, of course, needed to be modified. So, during the EIA Procedure, while the decision-makers were looking at other aspects of the environmental aspect--the
Environmental Protection, the PUZ could have been modified by the developer and presented in a valid form for the proper conduct of the Environmental Impact Assessment.

The PUZ is needed for the Environmental Impact Assessment because it gives you an indication on how the Project integrates within the larger area of urban development. This is very important in terms of proper application of the Environmental Impact Assessment.

And this is required by the Environmental Impact Assessment Directive. Proper information and the land zoning and how this permits the development of the Project. All this has to be assessed.

The Zonal Planning also relates to the protection of historical monuments. You need to know exactly, when assessing the impact on the environment, which historical monuments will be destroyed, will be replaced, will be affected by the project, or which--of course, Environmental Impact Assessment looks at human beings, flora, fauna, soil, air, and climate and interactions between these; whereas the
Zonal Planning is very important for the impact on human beings, on soil, on land use, on cultural heritage, so--only to list a few things that are--waters.

And all this is necessary for the Impact Assessment. So in my mind, at the beginning of the Procedure. But if changes to the Project are made, it can be adapted and presented again during the procedure until the procedure ends. In the Final Assessment of the Environmental Impact, you need to have a clear indication on what the Urban Zoning Planning is.

In the meantime, if a strategic environmental assessment goes to--and is performed and, I don't know, changes the data of the problem, this, again, needs to be considered for the specific project within the Environmental Impact Assessment.

This is my understanding of the succession of--

Q. Yes. But my question was very precise.

Again, assuming that I'm challenging in front of a court the EIA Procedure in 2007. At that time
PUZ was or not a condition—an essential prerequisite?

A. It was—it was a condition from the beginning. I listed the legal provisions that say that from the beginning, the urban documentation should be deposited together with application for the Environmental Permit and for the conduct of the EIA Procedure.

So—because the urban certificate, it's already issued, clearly states that a new PUZ has to be developed and—and approved. And here you have an indication that in order to—EIA to be completed in the end, you need to have also the PUZ.

Q. Let's look at your Supplemental Legal Opinion, Paragraph 181.

A. 18—say again? Can you say again the paragraph?

Q. 181.

When you said that "Professor Tofan reaches the conclusion that a valid PUZ is needed not only at the moment of the issuance of the EP, but also for carrying out the EIA Procedure."

So, it's fair to say that in your view, the
PUZ, as an essential prerequisite, was for the moment of the issuance of the EP, not from the beginning to the end of the procedure; is that correct?

A. No.

Q. No?

A. No. From that text, clearly, the conclusion is that it's necessary even before the issuing of the Environmental Permit in the EIA Procedure. Of course, it's also necessary at the end when issuing the Environmental Permit. That's logical.

Q. But, again, when exactly?

A. At the start of the procedure. I already said that, I think quite clearly.

Q. You know that at the start of the procedure, a valid PUZ was in place; is that correct?

A. That was in place. The valid PUZ was in place, but it needed to be updated/modified by the developer. And this was done in parallel with the conduct of the EIA Procedure. And within the EIA Procedure, the TAC members were waiting for the PUZ to be--the new PUZ to be adopted in order to properly assess the impact on the environment and to, in the
end, of course, finalize the EIA Procedure and when the case, propose the Environmental Permit.

Q. Please correct my syllogies. According to the--assuming--according to the Law, we needed that PUZ in place in two--at the moment of the application; correct?

A. Yeah.

Q. First premise.

The second one: We had a PUZ in place at the moment of the application.

Conclusion: All the requirements are met. It's correct or not?

A. No. That PUZ was not valid.

Q. You said it was valid.

A. No. It was valid in the sense that it was adopted, but it needed to be changed--

Q. No.

A. --in order to--for the project to be properly assessed from the Environmental Impact point of view.

Q. We are lawyers and we have to accept that an act is valid or not. Tertium non datur; correct?

A. Well, I didn't express myself well saying
that it was valid. Sorry.

It was deposited by the developer, but it was not valid for the procedure. It was a PUZ, but not the right PUZ. The right PUZ needed to be developed.

Q. Are you aware that that PUZ was valid throughout the procedure?

A. It is not valid. The procedure—the decision-making—makers in the procedure were waiting for the right PUZ that would encompass the requirements of the urban certificate. So, if by me saying that a valid PUZ—distinctly saying that, you understand that it was valid throughout the procedure.

The one deposited at the beginning? No. That's not my conclusion.

PRESIDENT TERCIER: Okay.

THE WITNESS: Maybe it was a--

PRESIDENT TERCIER: I think you are repeating yourself now.

Move to the next question.

BY MR. TUCA:

Q. One important question. Because you said that this PUZ is very important for the procedure.
Do you accept that an important document for a procedure should be expressly provided by the procedural law?

A. No. The procedural law cannot state everything. It's impossible to state everything and every document that proves something within the procedure. These documents are proving what the Memorandum of the developer says. The Memorandum gives some information. How can you prove that? Only the developer says that?

No. It has to be proved. How do you prove? The integration and environmental aspects into the urban planning and so on, how the zoning is done or what are the requirements, what are the restrictions, what are the prohibitions.

How can you prove that? Through documents issued by state organs, urbanism zoning planning, general urban planning, and the Urbanism Certificate that enforces those zonal and urban planning to the specific project.

Q. Let's move on.

Your Paragraph 412, First Legal Opinion. You
said that it is--sorry--another so-called prerequisite--essential prerequisite, surface rights.

You said that surface rights--"I believe that it is recommendable that such surface rights are obtained before the issuance of the EP."

And in Paragraph 77, for instance, of your Supplementary Legal Opinion, these two are just two examples among many others. Some inconsistencies between your statements regarding this subject. I'd like to have some clarifications.

These surface rights are or not mandatory to be--to be--to have an EP?

A. Let me be clear. Regardless of the formulations, which--which sometimes may seem to contradict themselves, but they are not because I clearly explained that the--even though there's no express legal obligation to have surface rights before issuing the Environmental Permit, the systematic interpretation of the Law leads to the conclusion that in the EIA Assessment, in the Environmental Impact Assessment, the surface rights are very important.

Why? Because EIA is looking at the soil,
land occupation, the human beings, relocation of population, how, for instance, the surface rights will be acquired, how they will, for instance, lead to deforestation, to other impacts on the environment.

So, yes, surface rights and the way in which the developer will deal with surface rights and how it will obtain these surface rights, it's a very important element of the Environmental Impact.

The fact that you have to expropriate a large number of people for the project, that's an environmental concern. That should be assessed during the EIA Procedure.

So, of course, nowhere you will find all these requirements in writing explicitly saying this because no laws are working like that. They cannot regulate everything for every situation.

But in looking at the sources of law and the legal provisions applicable to this procedure, from the point of view of National Law and European law, one can draw the conclusion in good faith that the surface rights were an important element of the assessment on the environment.
That's why I said it's recommendable to be 
before the Environmental Permit, but definitely 
secured before the Building Permit because you cannot 
built something over the houses of people that you 
have to relocate, or you have to expropriate, and so 
on.

So, these are the matters that have to be 
considered, of course.

Q. From a legal perspective, what happens when 
such a recommendation is broken? What are the 
sanctions?

A. Well, this recommendation is a part of 
the--of the right of discretion. We call it, in 
general terms, the discretionary power. But it's--it 
sounds more--the legal term in the comparative 
literature is "discretion." Discretion of the 
administration.

So, the administration is bound by strict 
rules sometimes or rules that only ensure some limits 
for the exercise of the discretion. And the 
discretion is exercised by the public authorities with 
applying the legal principles, the general legal
This is the case where the public authorities must exercise their discretion and see how the surface rights will impact the environment. They may decide that it's okay to--to go ahead with the project in some way or another. And, anyway, a consideration of the surface rights is necessary, and the impact of the project on the human beings, on land, on waters, and so on, which relate to surface rights needs to be considered.

So, from there I draw my conclusion that the surface rights should be considered during EIA as well.

Q. Another essential--it's your view, not mine--but essential prerequisite for the issuance of the EP was, in your opinion, the Ministry of Culture's endorsement based on ADCs, Archeological Discharge Certificates; is that correct?

A. Yes.

Q. It was your view that these ADCs were needed in order for the Ministry of Culture to issue its favorable endorsement for the project; correct?
A. Yes.

Q. The Ministry of Culture issued two favorable endorsements, the first one in 2011, the second one in 2013. Two valid endorsements, in our view. We will analyze them in three minutes.

But before that, I would like to clarify, to know your position on this essential prerequisite. Because I have at least two--two problems with your theory.

The first one is--let's call it a vicious circle. On one side we have this Norm imposing that the Ministry of Culture endorsement is necessary/essential for the land with archeological relevance. Okay? Sorry. That is correct?

A. Yes.

Q. Okay. If--consequently, if the land--the site has no archeological relevance, we don't need such a Ministry of Culture endorsement?

A. No, I cannot agree with that conclusion, and neither with the conclusions that you enter in--put in there, that the two endorsements were actually endorsements in 2011 and 2013.
If I may, I can—if the Tribunal allows me, I can explain my position on this.

PRESIDENT TERCIER: Yes, I would like you to. And then you can ask a question about that.

THE WITNESS: So, first, I would say that the Ministry of Culture needs the ADCs in order to reach a decision towards actually endorsing the project and seeing that the project is not affecting archeological sites that are worth of protection.

So, basically, the ADCs are only a step in the issuance of the—well, the ADCs are the result of archeological research, are the final step of archeological research. The other alternative final step of archeological research would be to preserve the archeological vestiges in situ and not to discharge them.

If they are discharged, this is at the basis of the decision of the Ministry of Culture to endorse the project. And this is required by law. By law, Governmental Ordinance 43/2000 on archeological protection. And this is very clear in the law.

So, I don't know where this idea that has no
basis in law that the ADCs are superseding the Ministry of Culture endorsement. The Ministry of Culture endorsement, it's, you know, positive for the project that destroys our archeological sites that are not relevant and were discharged. Yeah.

So, this has to be given. This has to be considered. Maybe the area was not wholly discharged. Maybe you have parts of it that still entail some protection. So, there's a proper process of decision-making by the Ministry of Culture for endorsing the project.

On the other hand, the 2011 and 2013 documents are different in legal nature. The 2011 document is a point of view, and the 2013 endorsement, indeed, is the proper endorsement from the Ministry of Culture for the project.

And that is based—what happened between 2011 and 2013? Well, the Preventive Archeological Project was approved by the National Commission of Archaeology for Orlea. So, that was a new step in future discharging that area. That would entail the Ministry of Culture to give the endorsement with
conditionalities on the understanding that the Project will be developed in stages, that this part that was not already discharged will be researched, and they will decide on a later stage what to do with it if somebody—-if something is found there of importance for—-for protection.

So, yes, my opinion is the ADCs are at the basis of the Ministry of Culture endorsement for the Project.

BY MR. TUCA:

Q. Moving on. This is my second problem with—-related to your theory.

You said in your Second Legal Opinion, Paragraph 310: "In conclusion, I find that ADCs were needed for the Ministry of Culture's endorsement of the Project, as the GO 43/2000 imposes this condition."

Could you—-do you have in mind a specific text/a specific rule imposing this condition?

A. If I'm allowed, I can show you several texts that, read together, lead to this conclusion.

Q. No.
A. Again, if you want me to respond exactly to your question. If you're looking for a specific provision that solves all the problems that you are raising, there is no such provisions in any law that solves a particular situation at a particular point in time for a particular project and for a particular Ministry of Culture. So, you won't find that in any legislation anywhere in the world.

So, of course, the systematic interpretation of the law is necessary here, and I have enough arguments that the archeological research leads to either ADCs or to the protection of the archeological sites.

If ADCs are issued and then, of course, you can develop projects on those areas, except the case where ADCs are only partial or they are annulled or suspended, so on. Because in that case, of course, the area cannot be discharged and is still under protection.

So, the Ministry of Culture needs to protect those sites as well. So, this is also a decision by the Ministry of Culture that has to balance the public
interest/protection of cultural heritage with the private interest of the developer to get the approval for the project. And the Ministry of Culture has done that in this procedure.

Q. Professor, I have to confess that I am not convinced. And I invite you to have a look to your Second Legal Opinion, 274.

"I explained in my First Opinion that a Ministry of Culture may only issue"

PRESIDENT TERCIER: Wait a second now.

MR. TUCA: Sorry. Sorry.

PRESIDENT TERCIER: Do you have it?

THE WITNESS: Yes, yes, yes.

BY MR. TUCA:

Q. So, "The Ministry of Culture may only issue the conformity endorsement required under Article 2(10) of GO 43 based on the ADCs (or lack of ADCs)."

Could you explain that?

A. Yeah. The conformity endorsement anyway needs to be issued. If there are no ADCs or there are partial ADCs, the conformity endorsement will be with
conditionalities.

So, you can give a conformity endorsement saying, "Well, we are not agreeing to this project. It cannot be developed."

So, the lack of ADCs keeps this route. If you have ADCs for the whole area of the project, you will give a proper, fully--full-body endorsement for the--for the project. That's my understanding.

That's why--that's what I said there.

Q. Let's have a look at your Second Legal Opinion, Paragraph 313.

Before that, you said--you said--before that, you said that these ADCs are endorsements?

A. Yes.

Q. So, conformity endorsements?

A. The ADCs or the endorsement of Ministry of Culture?

Q. No, the ADCs.

A. No. The ADCs are administrative acts.

Q. Okay. 313. 313. "If the Ministry of Culture did issue the required endorsement in April 2013, even if ADCs had not been obtained, the
Ministry of Culture issued the required endorsement in the exercise of its margin of discretion."

I'm again confused because you said ADCs are an essential prerequisite for the issuance of the endorsement. They're expressly mentioned—in GO 43.

A. No. Systematic interpretation—sorry. Systematic interpretation of GO 43 leads to that conclusion. I never said it is expressly stated in ADCs—in the GO.

Q. Anyway, you said that they are essential, and we suddenly discover that the Ministry of Culture has, however, a kind of marginal discretion in issuing the endorsement.

How could you explain that?

A. Well, the explanation is right there in Paragraph 313. Based on the Law, of course, the ideal situation is to have ADCs for the whole area of the project and, based on those ADCs, a full endorsement can be issued.

But the endorsement can be also issued with conditionalities, with future—which are depending on
future actions and acts of the developer and of other public authorities.

So, in order to allow the advancement of the project, a balancing act—a proper balancing act between the public interest and the private interest was performed by the Ministry of Culture.

And the Ministry of Culture looked at the—the fact that research has been conducted in one part of the area for the project. Discharge certificates were issued there. These discharge certificates were also contested, and some of them were annulled or suspended in the meantime.

So, there was uncertainty on how that will go. And that explains why in 2011 it couldn't give the endorsement—the proper endorsement.

But in 2013, some more steps were taken in order to have more clarity on the future development of the project in those areas. And this clarity was given by the fact that a research project—archeological research project was approved; the Chance Find Protocol was signed with the—well, it was signed before, but it existed with a developer.
There are provisions in the Law saying that if Chance Finds occurs, then the project stops, the competent authorities are announced, a proper investigation and the research is conducted, and the decision is made on whether to preserve the vestiges, if they are found in situ or removed or so on.

So, also, the project would be developed in stages. So, in that area that was lacking ADCs, the project would only arrive in Year 7 of the development. So, there was time for research and to proper discharging the area in terms of archeological interest, and also that only one endorsement is given by the Ministry of Culture.

You cannot say, "Well, I'm not giving you now the endorsement. Come back later. I will give you a partial endorsement."

That's not possible for that area or--it's not possible. It's one endorsement. So, it's unfair--would have been unfair, actually, for the developer not to consider this and to say, "Oh, we're applying the Law in a very strict way. We considered we need ADCs and so on, so we won't give any
endorsement until you secure all ADCs. So, see you in a couple of years after you finish the research on Orlea."

I think that was a proper exercise of the discretion of the Ministry of Culture, which gave the endorsement with conditionalities. They didn't actually break any rules because there were no express rules requiring very strictly that all the ADCs were in place. It's only a systematic interpretation of the Law that leads to that conclusion that you should base your decision/your endorsement, as a Ministry of Culture, on ADCs.

But in no way, in my opinion, they could have given a full endorsement in the absence of ADCs for the whole area.

I don't know if I made myself clear or--

ARBITRATOR DOUGLAS: You mean a full endorsement without conditions.

THE WITNESS: Yes.

BY MR. TUCA:

Q. In your view, the 2013 Minister of Culture's endorsement was a full endorsement?
A. No. It was with conditionalities. So, it's conditional on performing the archeological research in Orlea, on observing the laws on Historical Monuments, because we had in that area monuments that were not already declassified, so it was still protected under the Law.

So, yeah, they were--there were conditions on--on the endorsement.

Q. Let's look at the first endorsement, please--

A. Yes.

Q. --in 2011.

DR. LEAUA: Objection. I mean, this is the second time that the witness is posed with a characterization that is disputed between the Parties, that he himself explained.

So, maybe we can have a different phrasing of the reference to the document of 2011.

PRESIDENT TERCIER: Which one? The wording used?

DR. LEAUA: "Let's look at the first endorsement, please."

It's not an endorsement, in our view. And,
also, the Expert has put on record his position as to this first document of 2011 which he does not consider an endorsement. It's a point of view, in the Expert's words.

MR. TUCA: I apologize. You're right.

PRESIDENT TERCIER: No. I'm sure there is a possibility the Expert could explain whether it is or it is not an endorsement that's given to him. And, secondly, in case really it does not, you can always come back with a redirect.

BY MR. TUCA:

Q. You are stating in your legal opinion that this point of view issued by the Ministry of Culture on December the 7th, 2011, does not indicate the legal ground based on which it was issued; is that correct?

You said--

A. Yes.

Q. Okay. Let's--

PRESIDENT TERCIER: Can you tell where you're quoting from?

MR. TUCA: Supplementary Opinion of Professor Dragoș, Paragraph 253.
PRESIDENT TERCIER: Okay.

BY MR. TUCA:

Q. It's on the screen, 253.

A. Yes.

Q. And on the document itself, Tab 5, for the record, C-446, Point 6: "Taking into consideration Article 2, Para 10, GO 43/2000," is expressly stated that this, let's call it, point of view is taking into consideration this Article from GO 43.

Do you consider that it's not a reference to a legal ground of this legal document?

A. Yes, I consider that this is not a proper indication of the legal ground for this document, and I base my conclusion on comparing the two documents that you are talking about, the 2011 point of view, in my opinion, and the 2013 proper endorsement.

In the proper endorsement in 2013, the Article 2, Para 10, is referred to as a legal base for the endorsement separately and not in preambles like here. These are preambles of the documents. And it's only saying "Taking into consideration Article 2, Para 10."
So, in my mind, this indication, corroborated with other indications—if I could see both documents, I could show you very clearly. There are a few elements that led me to the conclusion that this is not the Law—the proper—this is not the proper endorsement for the project.

Why? Because this point of view is expressed by the Ministry of Culture in the quality as a member of TAC.

In the meeting in 2000—29 November, the Ministry of Culture was not present. And based on the rules of the TAC meetings, those who are not present in the meeting, they have to express a point of view afterwards.

Well, this was the point of view that was expressed by the Ministry of Culture after the TAC meeting. And this document, it's not—I have other arguments for which it's not a proper endorsement. The title here, it's not stated. If you maybe can look at it a bit.

Or am I allowed to go through the document to show things if you already have it in front of me?
PRESIDENT TERCIER: Of course. Is it possible to put it on the screen, please?

THE WITNESS: The first page, there's no mentions regarding the title of this document. And you can close that.

Okay. The wording of the document is that we are considering this--no, no. It's--you can see there--"Dear Mr. State Secretary," if you can enlarge that paragraph.

So, here it's stated that it's a point of view about the issuance of the Environmental Permit. So, it's a point of view in the TAC meeting, from my understanding, and not a proper endorsement.

Maybe we don't have the time to see the other--the proper endorsement where it says as a title "Endorsement." It's very clear.

The proper legal base is separately--not in preambles as an afterthought. It's a proper legal base cited separately in the document in the 2013, and expresses--the one in 2013 expresses the will of the public authority to endorse the project. It's very clear.
Here it's expressed in very vague terms, the fact that we're expressing a point of view regarding the project. Of course, this might have been a document that then in 2013 was used to issue the proper endorsement. So, maybe they worked on it. I cannot say that. I cannot speculate. But the similarities are ending there.

A proper--I will end with this. A proper assessment of the legal nature of an administrative act needs to be done, looking at the--not only the form or the title or so on of the act, but also, very importantly, to the expression of will of the public authority.

I cannot find the expression of will of public authority in this one, whereas I find a very clear expression of will in the 2013 document. So, that's why I said that is a bit complicated to give an explanation, only seeing this one. They have to be compared, and it's an analysis that it's a little bit more.

But I've done that analysis because it was a point of controversy between our teams and my--my
professors that I have replied to in my Legal Opinion.

Sorry.

BY MR. TUCA:

Q. Thank you very much. Let's move on.

I read your analysis, and I saw that a lot of your references are made to the European Law. But I--there are no--you are not of the view that the EIA Directive was not properly implemented in the Romanian Law?

A. No. I never said that, that it was not properly implemented.

Q. So, there is no question of primacy of EU Law in the case at hand?

A. Well, no. There is a question of primacy of EU Law. That's the issue. The primacy of EU Law does not relate, as Professor Mihai says, that--only in cases of controversy or inconsistencies between the EU Law and National Law. The National Law has to be interpreted in light of the EU Law when there is a source of law regarding to that field of Application.

So, in my opinion, the EIA Procedure was conducted in accordance to EU Law. So, the conduct of
the procedure was in accordance with EU Law.

What Professors Mihai and Schiau suggested, to apply very strictly some rules that are not even applicable to this project in order to, I don't know, decide in ten days, or to have only one TAC meeting, or to never refer back to the public for consultation when the EIA Report was updated or such things, those were—would have been against the EU Law, the proper interpretation of the EIA Directive.

The EIA Directive says you need to have an effective Environmental Impact Assessment. Aarhus Convention says you need to have an effective and proper participation in decision-making of the public, not only consulting the public for the sake of consulting the public and so on.

So, I have arguments for saying that the proper conduct of the procedure needs to take into consideration EU Law as well.

Sorry for the long exposé.

Q. Let's have a look at the European Union Treaty, Article 228, Paragraph 3.

PRESIDENT TERCIER: 288?
MR. TUCA: 288. Yes, sir.

BY MR. TUCA:

Q. In light of this Article, Professor Dragoș, do you agree that in implementing the EIA Directive, the Romanian State enjoys procedural autonomy?

A. Yes. But only as long as it doesn't jeopardize the objectives of the EIA Directive. That is clearly stated in the case law of the Court of Justice of the European Union.

The procedural autonomy, which, by the way, relates to—generally to court proceedings, it's enjoyed by the Member States only when it does not jeopardize the objectives and the purposes of the Directives, of the EU Law, generally, and moreover to Directives which are an atypical instrument of legislating.

Q. Have you identified a major conflict jeopardizing this Project, a conflict between the local Romanian Law—Procedural Law and EIA Directive Procedural Norms?

A. No.

Q. Let's take an example. Article 31.1,

PRESIDENT TERCIER: Do you have it with a tab for the--

MR. TUCA: On the tab is 25. Excuse me.

No. Sorry. 16. 16. 1774.

BY MR. TUCA:

Q. It's just an example, a procedural example. Let's--"In 10 working days after finalizing the decision of the Technical Assessment Committee, the public authority transmits to the titleholder the decision to issue or to reject, as the case may be, the EP."

And my question, Professor Dragoș, is this norm violating a rule or a principle of the European Law?

It's just an example.

A. Yes. No, in my opinion, it does not because 10 working days, it's not a term that would lead to the invalidity of the act. It's only a recommendation term, and it should be adapted to the complexity of the procedure, if the case, or it could be respected.
In my opinion, for instance, if the proposal—yes. If the Environmental Permit, for instance, is issued in 20 days or 30 days after it—I won't say this is unlawful, if it can be shown that a proper assessment was—was conducted and there is reasoning behind this—this prolongation of the term.

These terms—well, just to mention, these regulations were adopted in Romania having in mind small-scale projects.

So, if you can see, the procedure is very swift, one or two TAC meetings, very short days. 10 days is very rare in Romania for decision-making. Usually we have a general deadline of 30 days that can be prolonged, and the public authorities take their time to decide on many issues.

So, I wouldn't say that for environmental matters that are so complex and so—involving so many risks, a decision like this can be taken in 10 days. Of course, if everything is in order and everything is settled, you can decide in 10 days.

But that's an example of how to interpret the deadline within the national law in light of the EU
Law. If it's necessary, then the deadline can be prolonged. Of course, you can always have the reasonable deadline, you know. Public authorities should decide in reasonable deadlines and so on. That's a principle that applies here too.

But strictly related to this question, I would say that this is not jeopardizing the objectives of the EIA Directive, if applied properly for this complex procedure that is only the second conducted--well, it was the first by then--conducted by Romania for which you have to go back to the source of these EIA regulations, which is the directive.

Anytime the EU Law regulates something, the concepts are there in the EU Law. You have to go back when interpreting national legislation to the EU Law to see what the legislator has meant by those concepts, otherwise you just jeopardize the objectives of those regulations. Sorry for--

Q. It would be fair to say that this Article, it's one expression among many others of the legal certainty principle?

A. It could be considered one of the elements.
Q. Is legal certainty principle a fundamental principle of European Law? Isn't it?

A. It is among other principles. So, there is a ranking of the principles.

Q. You agreed in your legal opinions that Environmental Law principles have been observed by Romanian authorities, and they've been implemented or are in line with Romanian legislation?

A. So, let's repeat the question.

Q. I will rephrase.

A. Yes.

Q. You stated in your opinion--sorry--that Romanian legislation is in line with Environmental Law principles.

A. Yes.

Q. I would be very curious. What principle would motivate the Ministry of Environment decision not to issue the EP?

A. Well, the EP is issued by the Ministry of Environment after a proposal by the TAC Committee on the issuance of the Environmental Permit.

Well, in this case the proposal goes further
to the Government. But it's a succession of steps.

The notion of proposal means that if something is proposed to a decision-maker, the decision-maker can either issue the decision, if it has nothing to object to that, or it can go back and tell the--in this case--the TAC Committee to reconsider some issues that are not properly addressed in the proposal. That's my understanding of the Law--the Romanian Law and the concepts of proposal and administrative act that is issued afterwards.

So, there is a degree of discretion for the Ministry of Environment on issuing the Environmental Permit if, for instance, new elements appear after the finalization of the TAC meetings and after the proposal.

If, for instance, the consultation of the public was not taken into consideration in the proposal, was disregarded, or if outstanding issues regarding the technical aspects were also disregarded and somebody, I don't know, makes a notice to the Ministry, "Well, this would be unlawful," it will be annulled in court. So, what are you doing?
So, there is a degree of discretion. Of course, the Ministry is not doing the assessment in the place of TAC. It has to respect. But what can the Ministry do?

And here I would explain the opinion of my colleague. I think what she meant by--the fact that the Ministry cannot--cannot not issue the Environmental Permit. I think she meant that he cannot, for instance, reject the Environmental Permit.

So, faced with the proposal from the TAC, the Ministry cannot reject the issuing of the Environmental Permit. He can only say, "Well, reconsider it and we're going to issue when it's properly assessed."

So, it's either issuing or reconsidering. No rejection going over the head of the TAC and to reject for no reasons or for his own reasons out of the blue this--

ARBITRATOR DOUGLAS: What if all the TAC members were bribed?

THE WITNESS: Well, that has to be, you know, evidenced somehow.
ARBITRATOR DOUGLAS: It's a hypothetical.

But what if all the TAC members are bribed? Does the Ministry have to accept the recommendation?

THE WITNESS: No. I'm telling you, he has to consider and based on new elements or the elements that have derived from the TAC meetings, to take a decision so he can send back the assessment and redo it, of course. But only if it's for technical reasons that were agreed in TAC.

The Ministry is not able to--to reconsider them himself. Say, "Okay, I'm disregarding the TAC, and I'm going over"--or the TAC, for instance, proposed not issuing the Environmental Permit and the Environmental Ministry says, "I'm going to issue the Environmental Permit."

So, that's not possible, in my mind.

PRESIDENT TERCIER: May I just--I don't know who started to speak.

In that regard, I understand that the Ministry could ask the TAC to reconsider? That is your position?

THE WITNESS: Yeah, I think.
PRESIDENT TERCIER: And you gave as possible grounds new facts that have occurred in the meantime or a point that you consider is not clear enough or that has been objected in another way later on.

Is it possible for them to reconsider or to--yeah, to invite the TAC to reconsider the decision based on elements that are--have not been--are not typically in the competence of the TAC? So, taking some--I don't know--element, some political position, anything like that?

THE WITNESS: No. I think--I think not. So, this is an assessment that is only in technical terms. Even technical terms means also, for instance, participation with the public or, you know, acceptance of the project among citizens or considerations that are within the Law, within the procedure. This is procedure. This is within the procedure. So, political considerations cannot, of course, be part of this--these considerations. So, evident.

BY MR. TUCA:

Q. Professor, let's get back to the backbone of
your position on cultural heritage. Your Second Opinion, Paragraph 463.

"I've explained in my First Opinion that all the assets listed in 91-92 LHM"--

A. Just one moment so I can see it on the screen at least.

Q. --"including the Rosia Montana site (on a 2km radius) were classified as historical monuments."

My first question, what does "site on a 2km radius" mean?

A. I think I've cited the exact wording of the List of Historical Monuments. If not, it might be misstated. Maybe that's a clerical error or something like that.

Q. Do you have in mind the definition?

A. The definition of what?

Q. Of this--of this--exactly of this location, "site on a 2km radius."

A. Yeah. I would have to see exactly on the List of Historical Monuments, if you can show me that document, exactly how it was defined there. Because I just referred to the List of Historical Monuments.
If it's a mistake, and it's not referred correctly, I assume that error. I was referring to what is stated in the List of Historical Monuments. That's the description of the historical monument.

Q. We—as legal experts, we have sometimes an important mission, to interpret the Norms. And we have to interpret that, "site on a 2km radius."

How could you interpret this?

A. What do you mean? Why should I interpret this in terms of legal procedure? I'm not--

Q. In terms--

A. I don't understand the question.

Q. In terms of Romanian language.

MR. GUIBERT de BRUET: Could we just be shown the document since he's being asked about it?

THE WITNESS: Can I see the List of Historical Monuments, the Romanian version, so we can see exactly how it is there because I--

BY MR. TUCA:

Q. It's your Second Opinion, 463.

PRESIDENT TERCIER: Okay. I think it's clear. We have it in front of us. So which is your
question? "2km radius" should have a center somewhere to start--

MR. TUCA: Exactly.

PRESIDENT TERCIER: --to start making the radius.

BY MR. TUCA:

Q. Where is the center?

A. Well, that's--that's a definition that is for cultural heritage experts to discuss.

Q. Okay.

A. Because for me, it only is important in terms of procedure. Rosia Montana was protected as a historical monument or not. That gives a certain legal protection for--to the site. The description. And if the proper description in words or something like that is or the--how wide is that, it's--I haven't analyzed.

I'm not--I'm not an expert in cultural heritage in substantial aspects in order to have an opinion on that.

Q. Professor Dragoș, the mining activities carried out on a site qualified as a historical
monument are legal or not?

A. No. No.

Q. We have, for instance, Article 11, Mining Law 85/2003, Document C-11. These activities, you're right, is--the mining activities are strictly forbidden.

A. Yes. Let me see.

Q. On the record there are some information according to which the state owned company, Minvest, had been performing mining activities on the Rosia Montana site up to 2006. Are you aware of this information?

A. Yes. I know something about it. It was not part of my Legal Opinion because it's not--it was not in my Terms of Reference to cover that aspect. It's an aspect of facts and not law because I wasn't looking at what Minvest was doing there.

Q. But you--in your view, Rosia Montana site is an historical monument. Point B, the mining activities are strictly forbidden on a historical monument site.

So the person or entities who carried out
these mining activities on the Rosia Montana site
violated the Law; am I right?

A. In abstract, yeah, you're right. I cannot
opine on what happened with Minvest and other
developers there. I would only say that—well, if
someone should—would analyze that period, again,
should be taken into consideration that—well, in
Romania, the laws were not respected in such a great
way in some— in some fields.

And I think the fact that we entered the
European Union has—has given a greater clarity and a
greater enforcement of the laws because even the
National Laws were enforced by the fact that we had
the legal source in the European Union Law.

And as you said, from 2006, that was
approaching the European Union integration. There was
no mining in the area. So I can construct that as an
indication that, well, Romania was adapting to some
stricter rules and maybe starting enforcing better
even their own legislation— its own legislation in the
field. Other explanations, I won't go into details
because it's facts and not my area.
Q. But, again, if Rosia Montana has indeed qualified a historical monument, what about the license issued to RMGC? It's valid or not?

A. The license is valid. I never said the license is not valid.

Q. But the object of the license is construction works. And, again, it was legal or illegal for the State to grant to a private entity rights to explore a historical monument?

A. Well, I don't see the license as a free permit to explore and to destroy historical monuments. You have to explore the zone to see what's in there and decide afterwards to carry out the project, the exploitation project, within the areas that can be exploited.

For that reason, you have to either research, discharge, or so on, make available the land, or go around those areas that cannot be developed for mining activities. That's my understanding of the license. It's not a free passport for everything. It's not white check for--for the--

Q. What about intervention made on the site
qualified by you as historical monument and the
provision of Article 5.2.1 of the license?

A. First, I should state that I have not covered
the Mining Law in detail. That was in the opinion of
Professor Bírsan, and I only referred to--yes, sorry.

(Pause.)

PRESIDENT TERCIER: You understand the
interpretation of the red light is not transmitted to
the public--the red light is that it is considered as
confidential.

(End of open session. Attorneys' Eyes Only
information follows.)
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
the expropriation.

And that's--yeah, it would give me the benefit of reading now--

BY MR. TUCA:

Q. Getting back to your statement, you said something about exploration in the area. In your view, "exploration" means drilling as well?

A. Again, I'm not an expert in mining and what it entails, but it seems to be drilling, yeah, from a general understanding of the concept.

Q. But--

A. Again, not as an expert but as a--

Q. Let's have a look at your second Legal Opinion, Paragraph 278: "The prohibition of the development of projects in areas with archaeological heritage is not restricted in its Application to the actual building phase of a project, as Professors Mihai and Schiau argue. On the contrary, as it is a prohibition meant to implement a constitutional guarantee, it is applicable as well at the stage of planning and permitting of a project which is to be built in such an area."
This is your opinion?

A. Yes.

Q. So, on one side, you said that this is an historical monument. We have facts attesting that there are a lot of mining activities carried out on this site, and you said more than that; there are a lot of other activities strictly forbidden, such as planning and permitting.

A. I don't understand your assumption based on this. Maybe you can explain better, but I don't understand what's—the conclusion—your conclusion based on this text.

Q. My—you said that the backbone of your legal position is that Rosia Montana was and is archaeological site protected both as an archaeological site and as a historical monument as well?

A. Yes.

Q. And there are a lot of restrictions concerning an historical monument; do you agree with that?

A. Yes.
Q. I gave you some examples.
A. What are the examples? Drilling?
Q. Drilling, planning, permitting, construction works.
A. How can you not plan something in the area of--
Q. It's your statement.

(Witness reviews document.)
A. No. It's at the stage of planning and permitting a project which is to be built in such an area.

Maybe you misunderstood my text.
Q. Okay.
A. So, it's applicable, this prohibition, at the stage of planning and permitting for a project, which is to be built in such an area.

I don't know; if you want, I can explain something. The License gives the right to explore the area, but again the Laws on heritage protection needs to be respected during this exploration phase. Then exploitation means that the proper Project is proposed and is assessed from the point of view of the
environmental protection, environmental impact, is given the green light. And, of course, that means that the proper protection is instituted when the case or other areas are discharged, so you can do more than just prospecting what's in the area.

And I'm convinced that in the exploration phase, there were no--are no--I'm not competent to say if there was some illegal activities that were not respecting the Laws on heritage protection in the exploration phase, but that's not for me to say.

Q. According to your opinion, in order to be used for a mining Project, the Rosia Montana site should have been declassified--

A. Yes.

Q. --after the issuance of ADCs; is that correct?

A. After--the ADCs are a first step.

Q. First step?

A. For the declassification. The declassification is a proper decision-making procedure. It has seven steps. I described them in my Legal Opinion.
Q. You described them in your Legal Opinion. Those seven steps to be followed in order to obtain an order of declassification.

In your second opinion, Paragraph 485, there is a description of this procedure, and my question is: Has the Ministry of Culture issued a declassification order for Rosia Montana site?

A. No.

Q. No.

According to the documents on the record, the Ministry of Culture decided instead to favorably endorse the Project, the mining project?

A. With conditions.

Q. With conditions?

A. With the understanding that archeological research will be conducted, ADCs will be issued, and in the end if a historical monument can be declassified, then works can be performed on the site of the historical monument. If not, that is a separate consideration for the Ministry of Culture to do, to see whether the historical monument is worth protection or not after the underground was discharged.
of archaeological—following the archaeological
research. Maybe there are other elements that are
worth of protection in the site of Historical
monument, so that's separate consideration. That's
why the Law provides for a separate procedure of
declassification of historical monuments; otherwise,
it would have been useless or, you know—

PRESIDENT TERCIER: Mr. Tuca, just--

MR. TUCA: Last question.

PRESIDENT TERCIER: Fair enough.

BY MR. TUCA:

Q. Professor Dragoș, given this endorsement, is
it fair to say that the favorable endorsement issued
by the Ministry of Culture is one of the confirmation
that the Rosia Montana site is not, and has not been
at that time an historical monument?

A. No, not at all. That's only for the
archaeological part. Historical monuments part is
Law 422 in 2001. That's a proper procedure for
declassification of historical monuments. That's in
the List of Historical Monuments, so we should not
confuse the areas. That's only for archaeological,
for what's underground, and further considerations are needed for declassification as a historical monument.

Q. Thank you, Professor.

MR. TUCA: Thank you, Mr. President. No further questions.

THE WITNESS: Thank you.

PRESIDENT TERCIER: Thank you very much.

DR. HEISKANEN: If we could have just a minute to confer.

PRESIDENT TERCIER: I have one question before.

We have received two other documents that I had on my desk. Who are these two documents for?

THE WITNESS: When I was talking about the urban certificate, I wanted to show how--because I also showed the PUZ on the screen; I wanted to show the Tribunal and everybody could have an Urban Certificate, and the content of the Urban Certificate to showcase why this is important for the conduct of the EIA procedure, so it explains theoretically why the content is important for the EIA procedure.

PRESIDENT TERCIER: They are in the file.
THE WITNESS: Yes, yes, of course.

DR. HEISKANEN: They're part of his presentation.

PRESIDENT TERCIER: Oh, yeah, of course.

(Pause.)

DR. HEISKANEN: Yes, Mr. President.

REDIRECT EXAMINATION

BY DR. HEISKANEN:

Q. Professor Dragoş, the Environmental Permit, you were asked a number of questions about it, and it's not issued without conditions usually. Would be able to comment on who is developing the conditions and how?

A. The Environmental Permit is containing the conditions that are drawn from both the members of the TAC who can propose the issuing of the Environmental Permit with conditions, and from the Ministry of Culture, who has in its endorsement a lot of conditions for developing the Project.

Q. Ministry of Culture.

A. Ministry of Culture, yeah, gives the endorsement with conditions. These conditions are
then transferred and incorporated into the Environmental Permit.

And also the Ministry of Environment can, of course, impose conditions based on effective--the assessment on the environment, so...

DR. HEISKANEN: No further question, Mr. President.

PRESIDENT TERCIER: Thank you.

Do my co-Arbitrators have a question?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DOUGLAS: Just, firstly just to clarify something you just said. When the TAC proposes conditions, is that before the final consensus or whatever we want to call it goes to the Ministry of Environment, or is that after the Ministry of Environment approves in principle the issuance of the permit and then sends the Draft Decision back to the TAC? So, is it before it goes to the Ministry of Environment or is it after that they attach their conditions?

THE WITNESS: I think they should be attached before they go to the Ministry of Environment. If
they express—if they are expressed in the TAC meetings.

ARBITRATOR DOUGLAS: Okay. So, there would have to be a final TAC meeting where people come up with their conditions?

THE WITNESS: Yes, yes.

ARBITRATOR DOUGLAS: All right.

THE WITNESS: And this should be, in my opinion, should be consensus between the members of the TAC because in their regulation and in the legal framework, because you find a meeting for consensus-reaching, so for reaching consensus. Why should they have the meeting for that if they are allowed to have divergent opinions, so in my mind they have to reach a consensus to be all in agreement over the--the proposal to issue the Environmental Permit.

ARBITRATOR DOUGLAS: And how often are conditions attached to an Environmental Permit in Romania?

THE WITNESS: Well, I'm not aware. I haven't researched the statistics of that. I think it's pretty often, but...
ARBITRATOR DOUGLAS: I just wanted to ask you a general question about the expropriation procedure. I'm not sure if you were here yesterday when I asked questions of Professor Bîrsan.

THE WITNESS: Yes.

ARBITRATOR DOUGLAS: You were here yesterday?

THE WITNESS: I have been here, yeah.

ARBITRATOR DOUGLAS: Okay. It seems to me—I've tried my best to work out the differences between you, but it seems to me that essentially it boils down to different interpretation of Law Number 33 of 1994 on expropriation, and so I just wanted to try to see if I can understand the difference of opinion, and maybe it might help if we get the Law in front of us. I think one place it's at is DD-81, if someone could stick that on the screen.

Now, I understand Professor Bîrsan—I'm probably mispronouncing his name—but I understand his interpretation based upon Article 6 is that because of mining or extracting of Mineral Resources is mentioned in Article 6, that means it's automatically a public utility, and I think your view is that something else...
is required, so I wanted to ask you about those conflicting interpretations of what Article 6 means and what it encompasses?

THE WITNESS: Yes.

Well, let me explain. First, it's not a matter of interpretation of the Law. It's basically a very clear law. It states the steps to be taken for expropriation, so frankly speaking, I was surprised that Professor Bîrsan didn't refer to that law because--

(Overlapping speakers.)

THE WITNESS: --it's expected that it's a matter of common knowledge for those who are involved in this arbitration.

ARBITRATOR DOUGLAS: He did refer to the Law.

THE WITNESS: Yes, but not the proper procedure. He said that it's only in court that's done the expropriation. Well, there is a commission that declares the public utility, and that Commission also proposes which lands to be expropriated and what the--the compensation and everything, and it also hears appeals regarding his decisions, and then
proposes to the Government and so on and reaches the
court procedure. So, it's a proper and well-regulated
administrative procedure for declaring the public
utility.

In that vein, Article 6 from the Law states which types of works or activities are subjected to
this administrative procedure because the rest of
them--and if you can maybe blow the article--let me
see. No, close this one--okay. There is a provision, I will find it, that says that usually is done by law, so expropriation is done by law. As an exception, the
Law creates an administrative procedure for some types of works. These works are listed in Article 6. So, for these works, you can obtain the expropriation based on an administrative procedure. For the rest,
you need to go and have a proper law adopted by the Parliament.

And this procedure is then expanded in the Norms to this law that I also referred in my Legal Opinion that detail.

Yes, for work--for any works other than such provided in Article 6, the public utility shall be
declared by law for each particular case. This is the principle actually in the law, and the exception is in Article 6, which provides an administrative procedure. And the Norms to the law on expropriation provide in detail how the Commission is appointed, how it works, how it reaches a decision, how it proposes a decision to the owners of the land. If they are unsatisfied, they can challenge the Decision in front of the same Commission. If they are again unsatisfied, then the Decision still can be proposed to the Government, and then, of course, the courts will decide whether the owners have, you know, are right or the Commission.

ARBITRATOR DOUGLAS: So, just to be clear, the difference in your opinion or one difference is you say that the Commission's Decision as to whether or not the public utility requirement is satisfied is susceptible to judicial review?

THE WITNESS: Yes.

ARBITRATOR DOUGLAS: Whereas I think Professor Bîrsan says it isn't.

THE WITNESS: How couldn't it be?

ARBITRATOR DOUGLAS: That's for us to
resolve, but--

THE WITNESS: Sorry, I shouldn't have asked, but.

(Overlapping speakers.)

THE WITNESS: It's quite clear, and any administrative decision is subjected to judicial review.

ARBITRATOR DOUGLAS: And then just very briefly, because we're running out of time, what's the procedure, in your view from then on? So the Commission renders its Decision that it's a public utility, then what happens?

THE WITNESS: Then the--well, it goes to the Court for the proper expropriation because, in the end, this is a filter, a judicial filter, that no abuses are done by the Government against private property.

And the Court, after deciding the expropriation, the State becomes the owner of the property; and, in order to do something with it, there are different procedures because it enters the public domain. The public domain is very limited in the use.
You cannot sell, you cannot put any conditionalities on it, so it has to be transferred to the private domain of the State in order to be sold—to sell the property, for instance, or from the public property it can be given in concession. It can be given to a private entity based on a procedure of Concession to be used for a number of years.

So, these are the roots in order to get into the private—if you're asking about the development in this case, how they would get the—

ARBITRATOR DOUGLAS: Thank you very much.

THE WITNESS: -- properties.

PRESIDENT TERCIER: No follow-up questions?

Thank you very much, Professor Dragoș, so your examination is over, and now you can have a good evening, I hope, as well as I hope for all of us.

THE WITNESS: Yes, thank you.

(Witness steps down.)

PRESIDENT TERCIER: We will first just to see one or two points. The first, of course, is that we will start tomorrow morning at 9:00 with Professor Henisz. That's the way I think we should do it. On
this side?

MS. COHEN SMUTNY: That's okay, but I think we need to have clarity about the remaining time because, as I think we've said, you know, these were indicative, and we had for some of the witnesses examination that was to come for cross-examination, I think we anticipated now more than what was budgeted, and so I think, you know, it's an issue. I think we need to be very clear about how much time the Tribunal has, how much the Parties have used, and with a view to the equal time, if the Tribunal considers that we need to lose an hour or an hour-and-a-half, it just needs to be dealt with so that we can organize ourselves appropriately, very important.

And I think, you know, just limited Thursday and Friday to the type of days we've had, we're going to end up--we're going to end up with a problem vis-à-vis the examinations. We're not going to have the time that we expected to have, and so again, because the budget has always been indicative, some were shorter, some were longer, so the ones that are coming are going to be longer. We need at least to be
very clear about what we have so we don't have a problem, especially on the Friday.

DR. HEISKANEN: Well, it's quite clear since the pre-hearing conference what the time budget of each Party is. It's for each Party to manage the time budget as it sees fit. And I'm not sure I understood the position clearly, but the equal treatment of the Parties is the equal allocation of time in the time budget. If a Party uses less than what is in the time budget, that's fine, it doesn't mean that there is any breach of equal treatment, but if the suggestion is that the Claimants should be given additional time beyond the time budget, then we object.

MS. COHEN SMUTNY: No, no, you have not understood. I think that there are two days left, and I think we have—we haven't really been using—two days suggests 14 hours, if we have seven hours, in fact, we haven't even been using—it hasn't really been a full seven hours per day, it's been less.

PRESIDENT TERCIER: It's six.

MS. COHEN SMUTNY: I think even based on this budget we have, there may be more than 14 hours.
Anyway, I'm not sure that the math works, is what I'm saying. So if we need to make an adjustment on the global number, we should just figure out what that is, and so then the Parties can be treated equally in a global manner.

PRESIDENT TERCIER: Okay.

Can you give us the time already to have an idea?

SECRETARY MARZAL YETANO: All right. So, if we take the total estimate, the 34 hours and 45 minutes per Party, Respondent has a remainder of 8 hours and 6 minutes, and Claimants 9 hours and 19 minutes, so that's a total of 17 hours and 25 minutes for two days, which I agree it's a lot. But if we take into account the estimate, which perhaps that is something to consider, I don't know, for tomorrow, if we did Henisz and Boutilier, I'm sorry for my pronunciation, with the estimates that were provided--but of course they are estimates--that would be 6 hours and 25 minutes of examination time. And for Friday, if we do Stoica, Pop, and Thompson, that would be 6 hours and 50 minutes, so that's the--those
are the numbers.

And, indeed, in these few last days of hearings we've never spent more than an average of 6.5 hours of effective examination time in total.

MS. COHEN SMUTNY: So, we're going to run short of time unless we have longer days, tomorrow and Friday, unless we want to take a little break now and get started and start using some of the time this evening. If the Tribunal doesn't want to do that, I think we need to have maybe not the full 17 hours, maybe you decide that it's going to be less than 17 hours remaining, but it's not going to be 12 hours remaining. That's a big difference, so I think whatever--obviously it's up to the Tribunal ultimately. I can tell you that we had in mind to be able to use more time. We see how it's going. This is why we've been urging at the end of the day, there was some reluctance to go beyond 6:00, but now we have two days left, so we want to at least have very clear what amount of time we have so we can budget accordingly.

PRESIDENT TERCIER: But if we take into
consideration the time that has been indicated and
that we have on this sheet, you would not use all the
time you have been allocated, but you would use all
the time that you had--

MS. COHEN SMUTNY: That's the point. The
point is that these estimates have been indicative,
and so that would be treating them as a maximum, so
some time we can see we would want longer, some have
been shorter, so we wanted to have the flexibility to
make them a little bit longer. And so that's the
issue because now we have apparently budgeted between
the Parties something like 12 hours, but originally
the original estimation would have given--so there is
a delta right now of five hours, so that's a lot less,
two-and-a-half hours less for each Party is
significant. So maybe the Tribunal considers globally
we need to have two-and-a-half hours each less or
maybe one hour each less or something, but whatever it
is, maybe you can give some thought. It seems to us--

Look, we also heard you that it's very hard
for the Tribunal to have a day that's longer than
6:00, and obviously we appreciate that we could force
to you sit there, but if you can't absorb any more, there really no point, but seriously, we just want to know what you think you can do, and then obviously we would like to just know so we can pace ourselves appropriately, and you will let us know what you feel that you can tolerate usefully.

DR. HEISKANEN: The implicit suggestion seems to be that the Tribunal should cut the time available for both Parties, potentially for the remaining two days. We certainly make every effort, as we indicated earlier, that we should be able to finish by Friday evening. It may well be that we don't need the time that we have budgeted tomorrow's examinations, so I'm not sure there will be an issue.

PRESIDENT TERCIER: But the point--you have been allocated certain time, I fully understand, and it is right to use it, but there must be a reason to use it, and you must--indeed, if we follow what is here, indeed you would have a little bit less time, but it would correspond to what you had indicated, so you want to have flexibility to be a bit more, to have a bit more?
MS. COHEN SMUTNY: That's the request.
"Flexibility," we understood, was not necessarily that this was going to be understood as a maximum, and flexibility was only as to less time because--anyway, look, whatever it is, we're not asking to cut time. It's really--but we realized that there's a capacity issue for the Arbitrators as well, so just let us know what it is, and so that we can adjust.

DR. HEISKANEN: If I may add, we certainly understand the capacity issue on the Tribunal's side, and the idea is not to make the Tribunal--and make the Tribunal work when you're tired, that's certainly not the goal. And as I said, we have made every effort to make the remaining cross-examinations shorter and as short as possible. We hopefully will be able to achieve that.

Again, that will depend also on the Witnesses and Experts to be examined, if there is cooperation. We expect that there won't be any major issues with the remaining time, that this is in the Tribunal's--we are in the Tribunal's hands.

MS. COHEN SMUTNY: I just want to say one
other thing that—I apologize, I just want to say one other thing, but Claimant's real sole ability to confront some of this evidence that is yet to be dealing with was just in the Rejoinder, so the cross-examination opportunity is a particularly important one for Claimants, so again, just bearing that in mind is an important factor.

(Tribunal conferring.)

PRESIDENT TERCIER: Okay, that was a good question, and the point for the Tribunal is we do not know exactly the time you would need it and how to organize it.

One other possibility would be, yeah, instead of finishing after 6:00, to start before 9:00. That would be for some people probably acceptable. We could already save half an hour and it makes one hour made in two days.

Is it confirmed—

MS. COHEN SMUTNY: To commence at 8:30?

PRESIDENT TERCIER: Hmm?

MS. COHEN SMUTNY: Commence at 8:30?

THE WITNESS: Yes.
MS. COHEN SMUTNY: Yes, that would be fine for Claimants.

PRESIDENT TERCIER: Okay. We would already save one hour.

DR. HEISKANEN: Yeah, I think we can agree to that working tired is the counsel's privilege, so we assume that privilege.

PRESIDENT TERCIER: It is also for Arbitrators' privilege.

And then based on that, we could see, and we will now see how to organize it and to--I think that would be rather optimistic, up to now we had made it, I hope we can finish it.

In the worst case, really in the worst case, we could reserve Saturday morning, one hour or two hours, but we could probably see tomorrow, especially after the rather long cross-examination that we have in the program. Okay? Do you like that?

Fine. So, I thank you all very much and wish you a very good evening.

(Whereupon, at 6:24 p.m., the Hearing was 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.

[Signature]

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