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

VIDEOCONFERENCE:
HEARING ON THE MERITS AND JURISDICTION

Monday, September 28, 2020

The World Bank Group

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

PROF. PIERRE TERCIER, President of the Tribunal
DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator
PROF. ZACHARY DOUGLAS, Co-Arbitrator
Also Present:

MS. SARA MARZAL YETANO  
Secretary to the Tribunal

MS. MARIA ATHANASIOU  
Tribunal Assistant

Court Reporters:

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MR. DRAGOS TANASE
MR. SIMON LUSTY
MR. RICHARD BROWN
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Representing Roșia Montană Gold Corporation:

MS. CECILIA JAKAB
MS. ELENA LORINCZ
MR. MIHAI BOTEA
APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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

PRESIDENT TERCIER: So, we will start.

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

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

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

I start with the technical issues. It is clear that everything is based now on a protocol on PO33, and we have, I hope now a system that works. I would like to thank (drop in audio) ICSID for arranging everything.
On the List of Participants, you know the members of the Arbitral Tribunal already, Professor Horacio Grigera Naón, Maria Athanasiou, Professor Zachary Douglas, and our Secretary is Ms. Sara Marzial. The assistant is Maria Athanasiou. And we have also as Court Reporter David Kasdan and as ICSID Conference Officer, Lamiss Al-Tashi.

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

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

And just a last point, I would like to report that the Witness or rather the Experts have the right also to access to the opening without objection from one side. We have received this morning and for us (drop in audio) a special request from (drop in audio) the list or the name of the people who are on both sides.
I start with Claimants. Mrs. Cohen, introduce the people who are on your side.

Please, Mrs. Cohen.

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

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

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

I believe that may be it.

Hmm?

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

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

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

Please, Dr. Heiskanen, you have the floor.

DR. HEISKANEN: Thank you, Mr. President.

Good morning and good afternoon to everybody.

On the Respondent's side, the counsel team is from Lalive, first of all myself; then my colleagues, Matthias Scherer, Noradèle Radjai, Lorraine de Germiny, Christophe Guibert de Bruet, David Bonifacio, Baptiste Rigaudeau, Emilie McConaughey, Victoria Leclerc, and Stela Negran. IT support provided to the Lalive team by Greg Gaillard and Ken Kotarski. Then we have our colleagues in Bucharest, Crenguta Leaua, Andreea Simulescu, Liliana Deaconescu, Andreea Piturca, and Stefan Deaconu, and
IT support for LDDP is provided by Ionela Mihaila and Doru Mihaila.

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

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

PRESIDENT TERCIER: My question is whether
they were really fact witnesses? They're witnesses to--

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

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

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

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

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

(Pause.)

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

PRESIDENT TERCIER: Okay. Good.
Thank you.
On your side, Dr. Heiskanen?

DR. HEISKANEN: Nothing further to add.
Thank you very much.

PRESIDENT TERCIER: Okay. Now, I think it
could be time just to mention this letter, a message that was received early this morning by our Secretary from the General Counsel Advocate General Bureau (drop in audio) of the Government of Canada. I don't think you have received a copy of this letter.

Sara, am I right?

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

PRESIDENT TERCIER: Okay. I will read it to you. "Mrs. Marzal, I'm writing with respect to the (drop in audio) case. I understand that the virtual hearing will be taking place in this matter early this week and that the details of the Hearing are set out in Procedural Order 33, which is not yet on the ICSID website. I'm seeking a copy of this Procedural Order, pursuant to Annex C of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Government of Canada has the right to attend the hearing, and may want to avail itself of this right.
Now, it was too late to react, especially because the Members of the Tribunal have received this a few minutes ago.

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

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

PRESIDENT TERCIER: Okay. Dr. Heiskanen?

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

PRESIDENT TERCIER: Very well. I think (drop in audio) there are two requests. One is to receive a copy of Procedural Order No. 33 and apparently without (drop in audio) they would like to
attend. And we do not, of course, suspend the meeting in order to allow them to join. So, I would be grateful, indeed, if both Parties give their position during the break, and the Arbitral Tribunal will then (drop in audio).

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

ARBITRATOR DOUGLAS: Yes, indeed.

PRESIDENT TERCIER: Fine. Good.

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

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

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

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

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

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

On your side, Dr. Heiskanen?

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

PRESIDENT TERCIER: Fine.

I come now to Point No. 3, just recalling a few important rules. I don't want to go (drop in audio) to PO 33. Important for us is to recall you on the rules concerning the time, the allocation of time. I draw your attention to Paragraph 16. You remember that you have a total of 14 hours that you are free to
use as you see fit, and that our Secretary will use
the chess-clock system.

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

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

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

Any special point that you would like me to
raise or a question on your side, Sara?

SECRETARY MARZAL YETANO: Nothing else.

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

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

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

Mrs. Cohen.

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

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

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

PRESIDENT TERCIER: Fine. Thank you very much.
We are now coming to the real subject of the Hearing, namely the Opening Statement, and we will start, of course, with the Claimants.

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

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

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

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

PRESIDENT TERCIER: Please go ahead.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MS. COHEN SMUTNY: When we met last in December 2019, we discussed the evidence in the record mostly relating to liability. The evidence that
remains to be addressed that we plan to discuss this week relates mostly to the Claim for compensation.

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

On September 9th, 2013, the leaders of the governing coalition pronounced that the Law that the Government had declared would decide whether the Roșia Montană Project would be done was to be rejected; and so, in due course, it was. Everything that followed was consistent with the fact that the political decision had been taken by the Government that the Project would not be done and that the Government was terminating its joint venture with Gabriel, putting an
end effectively to RMGC's Bucium Projects as well. Romania's failure to treat Claimants' investment in accordance with the law, culminating in the State's political rejection of the Project Rights, rendered those rights worthless. Thus, Romania's breach of its BIT obligations caused Claimants to incur losses in the amount of the value of the Project Rights. The Claimants each owned shares that derived their value from the Project Rights. Thus, Claimants incurred losses in the amount of the value of the Project Rights through the deterioration of the value of the shares they held.

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

What we see here is a chart graphing the progression of Gabriel Canada's share price over time. The Valuation Date is noted, and one can see the
progression in the years on the lower axis.

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

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

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

Restitution does not mean re-establishing the situation that would have existed if the wrongful act had not been committed. Restitution thus ensures an assessment of a factual situation and is not a hypothetical inquiry into what the situation would have been had the wrongful act not been committed. It may be necessary to make that hypothetical inquiry into the but-for situation when restitution or compensation in an equivalent amount is not sufficient to wipe out the consequences of the wrongful act. In
such cases, restitution may be completed by compensation for such additional damage.

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

Re-establishing status quo ante in this case means assessing value as of July 29, 2011. Restitution is the remedy that is applicable to any wrongful act. It is not limited to claims of expropriation. It applies following a breach of any BIT provision. When the wrongful act results from conduct extending over time, as in this case, re-establishing the status quo ante means referring to the date prior to the start of the wrongful conduct. The rule ensures that we assess the situation absent the impacts of the wrongful conduct and absent also the impacts of the threat of the wrongful conduct.

In this case, the evidence shows that the date immediately prior to the start of the drawn-out,
publicly aired, politicized decision-making process regarding Gabriel and the Roșia Montană Project was July 29, 2011.

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

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

Indeed, the evidence as to the status quo ante shows, based on the average market capitalization of Gabriel Canada over the entire year of 2011, that the value of the Project Rights did not materially
change over the course of 2011. You can see that here--this is a graph again of Gabriel Canada's market price over the Year 2011. The two dates that we've been discussing are indicated. The purple line relates to--and we'll talk about that more later this week--the purple line relates to the 90-day average market capitalization that Compass Lexecon refers to, and the green line refers to the average market capitalization of Gabriel Canada over the entire year of 2011.

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

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

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

SECRETARY MARZAL YETANO: Claimants' side,
somebody who called in?

MS. COHEN SMUTNY: What?

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

(Pause.)

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

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

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

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

MS. COHEN SMUTNY: Okay. Thank you.
Continuing. In 2011, the Government cited the increased gold prices—well, let me start here by saying Respondent has argued that Claimants chose a July 2011 Valuation Date due to the high price of gold prevailing at that time. That is wrong. The Valuation Date follows from the rules of reparation for a wrongful act. Respondent's conduct dictates the Valuation Date. Indeed, the evidence shows the increase in the price of gold at that time was among the reasons motivating the Government to require changed economic terms.

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

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

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

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

        And Ripinsky and Williams, in a survey that
they describe and discuss in a publication, having
surveyed the decisions of many investment tribunals,
they observed that the common denominator with respect
to Fair Market Value has been that Fair Market Value
represents a reasonable price that would normally be paid by a willing buyer and a willing seller of the asset.

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

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

Gabriel's investors included
significant--sorry--sophisticated institutional investors who materially increased their holdings during 2011, transacting at a time proximate to the Valuation Date.

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

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

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

Indeed, as Mr. Henry explained in his written statements, the Project Rights were considered to be a trophy asset and were a highly attractive acquisition target. Indeed, Project Rights of the type at issue in this case are very rare, considering in particular their size; that is to say, the size of the Roșia Montană deposit in particular.
Respondent's contention that a fair-market valuation of the Project Rights must be based on lower gold prices finds no support in any contemporaneous evidence or in any legal authority. There is no basis to conclude that investors at the time were not aware of the evolution of gold prices. There is no basis to doubt that the actual observed market value already took expectations about the price of gold into account. In other words, the observed market price for Gabriel's shares, far from being inflated, reflected expectations based on a vast amount of readily available information about the likely future
The statement of Charles Jeannes, who, at the time was CEO of Goldcorp, one of the world's then-largest gold companies, also makes clear that well-informed sophisticated market participants engaged in transactions throughout 2011 accepting the then-prevailing prices as fair market measures that took account of informed expectations about gold prices. There is no support for Respondent's arbitration argument that the actual market value of Gabriel's shares in 2011 was inflated because gold prices were high at that time. Real gold prices, like many commodities, go through pricing cycles. Indeed, gold prices today are even higher than they were in 2011.
Specifically, Respondent argues that a buyer or seller would assume that there would be significant delays due to litigation regarding the PUZ, or urbanism plan, in the area of the Project. However, as Professor Podaru explained in his written reports, the litigations challenging the urbanization plans in the area of the Project were based principally on the Ministry of Culture's failure to declassify historical monuments in the area of the Project and thus cannot have been expected but for the wrongful acts.

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

Respondent also argues that a Construction Permit would not be issued until all surface rights
were acquired. The record, however, demonstrates that construction permits could have and would have been issued in phases allowing construction of the Project to progress accordingly.
A fundamental requirement of compensation is that it must be based on a measure of loss that is free of the impacts of the wrongful conduct. That would be achieved in this case with a Valuation Date set prior to the commencement of the wrongful course of conduct commencing in 2011. If, however, the Tribunal concludes that Romania's wrongful conduct is
not characterized as a composite act commencing in 2011, compensation, nevertheless, still must be based on a measure of loss that is absent the impacts of Romania's wrongful conduct or the threat thereof.

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

Wrongful conduct includes politicizing and then failing to complete the environmental-permitting process for the Roșia Montană Project, coercive public demands for changed economics in the State's joint venture with Gabriel and in the terms of the Roșia Montană License, and failing to issue exploitation licenses for the Bucium Projects.
By September 9, 2013, when the Decision of the governing coalition to reject the Roșia Montană Project was announced, the impacts--the negative impacts--of the State's wrongful conduct, including permitting delays over the sustained period since early 2012 had profound negative impacts on the market's valuation of the Project Rights. What the evidence shows is that, from early 2012, when the Environmental Permit was expected and would have been issued but for the State's wrongful political blockage of the permitting process, the polluting impacts of Romania's wrongful conduct were reflected in the actual market value of the Project Rights as reflected in Gabriel's share price. Consequently, any measure of value of the Project Rights based on Gabriel Canada's actual share price beginning from early 2012 cannot be relied upon as a basis for compensation without first adjusting to correct for the impacts of the wrongful conduct.

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

MR. LEW: Can you hear me? I don't see--I'm
not sure you can hear me or see me? You can hear me? Can you see me? Okay. Great. Thank you. I couldn't tell. It's probably good I can't see myself.

So, good morning, everybody, good afternoon.

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

I think a number of parts of this presentation are going to have Confidential Information, and I think we're going to have to revert perhaps at a break with more precision so I think I can't be more precise right now and will endeavor to do so as needed.
Let's now examine some of the key disclosures about the Project focusing on the year-end Annual Information Form dated March 9, 2011, which is Exhibit C-1808, and the accompanying annual Management discussion and analysis, which is Exhibit R-307.
First, regarding surface rights, Gabriel's disclosures describe the need for and status of surface rights acquisitions and in restrictive terms, the procedure for expropriation.

Gabriel's disclosures describe the significant risks to the Project arising from the need to acquire surface rights within the Project footprint in order to obtain construction permits. The disclosure emphasized the need to acquire surface rights to apply for Construction Permits and that the Company might not succeed in acquiring them. The Company, therefore, disclosed that there were significant risks, that the acquisition of surface rights could be delayed, which could negatively impact Gabriel's Development Plans, increase costs or prevent the development of the Roșia Montană Project altogether.

With respect to litigation, Gabriel disclosed that NGOs had brought a multitude of legal challenges against permits and approvals with the
objective of delaying and stopping the Project.
Gabriel disclosed the volume of NGO litigation and
summarized it by topic, including with respect to the
Roșia Montană Mining License, land-use regulations,
the environmental-permitting process, Archaeological
Discharge Certificate No. 4 for Cârnic, and urbanism
certificates.

Gabriel disclosed that litigations often
take many months for an initial decision, additional
time for the Court's reasoning, at least one appeal
lasting an additional number of months, and that
procedural disputes can lead to additional legal
actions.
Gabriel disclosed that there are significant risks that such legal challenges could result in the suspension, annulment, or termination or prevent the issuance of required approvals, could add costs, or prevent development of the Roșia Montană Project itself. Gabriel also specifically disclosed that current and any future NGO litigation may continue to cause potential setbacks to the Project timeline.

Gabriel disclosed that, in addition to the
many legal challenges, NGOs had organized a continuous opposition campaign that included public protests. As demonstrated at the last hearing, the Company had a Social License both locally and nationally during the relevant time period, but did disclose that NGOs were engaged in a variety of activities to try to influence public opinion. Gabriel disclosed that continued opposition to the Project could result in delays and additional costs or prevent development of the Project.
Instead, as we will discuss later, given the massive world class deposit at Roșia Montană, the
critical assessment and driver of market value was whether, not when, the gold would be extracted, which turned on whether the Project would be permitted, with the main focus naturally being on the Environmental Permit.
Romania's argument is flawed because it
focuses principally on the buyer rather than on the assumptions it would inform a fair-market analysis, which must reflect the price at which the buyer and seller would both agree, as Ms. Smutny explained.

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

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

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

Nevertheless, as we've described, Gabriel disclosures did refer to the fact that there had been
over 140 separate litigation files commenced by NGOs since 2004 and that such litigations could result in significant delays, including due to appeals and related procedural aspects. It is, therefore, reasonable to assume that the hypothetical buyer and seller would factor in the risk of litigation delays as the market--as the actual market value certainly already did.

The second fundamental flaw in Romania's counterfactual timeline, its reliance on alternative facts, is that it focuses on the litigation that led to the annulment of the SEA Endorsement that was needed for the Project area urbanism plan, of course, the PUZ. As Professor Podaru explains, that litigation centered on the Ministry of Culture's refusal to take steps to correct errors in the 2010 List of Historical Monuments, to remove Cârnic from the List of Historical Monuments when it issued the second Cârnic ADC in 2011, and the culture authorities' related failure to delineate protection areas for the historical monuments in the Project area. The SEA Endorsement was thus annulled
principally on the ground that it did not reflect that
historical monuments in the area of the Project in
accordance with the LHM then in effect.

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

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

Minister Hunor publicly stated that he would
not remove Cârnic from the 2010 List of Historical
Monuments until after economic renegotiations.
Following NGO challenge, the Court annulled the SEA
Endorsement because it was premised on a description
of the historical monuments as reflected in the 2004
LHM and not on the 2010 LHM which, among other things, included Cârnic in a two kilometer radius around Orlea as a historical monument.

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

The SEA annulment in turn frustrated approval of the urbanism plan in the area of the Project. Respondent's proffered counterfactual scenario, therefore, includes four years of delay for litigation grounded in the State's own political blocking and repudiation of the Project.
The evidence simply does not support these assertions. As shown at the first hearing, RMGC reasonably expected it would be able to acquire the remaining properties without expropriation. And if expropriation were needed, it was available and would not have materially delayed the Project, which would be implemented in phases, not pursuant to one Construction Permit, as Gabriel--sorry, as Romania now argues.
As shown at the first hearing, expropriation is available under Mining Law Article 6 and Expropriation Law Article 6-7 to support mining activity licensed by the State. As Professor Podaru explains, the Construction Law envisions the possibility of obtaining Construction Permits for a project in phases, meaning that after the Environmental Permit is issued, surface rights,
including any needed archaeological discharge, could
be also obtained in phases as needed to support
successive Construction Permits.

As Professor Bîrsan discusses, the
expropriation process must be reasonable in duration
and may be completed within one year. Indeed, while
contending a longer time would be more realistic, in
Indeed, while contending a longer timeline would be more realistic in view of the terms that the Law sets out, as well as the estimated length of court proceedings, Professors Sferdian and Bojin conclude that the best-case scenario for expropriation process would last approximately one year.
(Pause.)

MR. LEW: Can the Tribunal hear Mr. Greenwald when he speaks?

MS. COHEN SMUTNY: I cannot. No.

MR. LEW: Maybe now would be a good time for a 10-minute coffee break then, but it's obviously up
PRESIDENT TERCIER: Okay. We introduce--do you know approximately where you are, close to the middle or approximately?

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

PRESIDENT TERCIER: Okay.

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

PRESIDENT TERCIER: Okay. Good.

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

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

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

Okay. We start again in 15 minutes. Thank
you very much.

(Recess.)

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

DR. HEISKANEN: Yes, we are ready.

PRESIDENT TERCIER: Fine.

So, Mr. Greenwald, you have the floor.

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

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

DR. HEISKANEN: The Respondent has no objection.

PRESIDENT TERCIER: Okay. So, Sara, would
you please send PO 33 to the Government.

SECRETARY MARZAL YETANO: Will do.

PRESIDENT TERCIER: Okay. Thank you very much.

Mr. Greenwald, you have the floor.

MR. GREENWALD: Thank you.
The notion that these analysts in 2011
uncritically repeated the Company's 2009 cost disclosures either ignores or misreads the text of their Report. As Mr. Cooper explains, analysts’ references to initial capital, construction capital, pre-production capital, they all have the same meaning. They do not include financing costs, working capital or other costs.
As I will now discuss, permitting was the key driver of changes in Gabriel's market capitalization. We'll turn to Volume 4.

By early 2012, Romania's wrongful treatment of Gabriel's investments negatively impacted Gabriel Canada's share price, so having now seen that Romania's explanations for the drop in Gabriel's market capitalization do not withstand scrutiny, they do not hold up to the evidence, we'll now explain what the contemporaneous evidence does show about what actually affected Gabriel's market capitalization in 2012 to 2013.
The Tribunal will recall from the last hearing that the TAC met three times on September 22nd, 2010, December 22nd, 2010, and March 9, 2011, and completed its review of the EIA Report except for two non-substantive chapters.

Gabriel reported the TAC's progress and noted that the Company's objective in 2011 was completing the TAC process for the review of the EIA for the Project and ultimately receipt of EIA approval.
On July 14, 2011, the Ministry of Culture did issue ADC No. 9 for Cârnic, which discharged the entire Industrial Area for the Project, as discussed at the last hearing, except for Orlea, where mining was to begin in Year 7 of the operations. So, this put the market focus squarely on EIA approval.
In October 2011, as the Tribunal will recall, the permitting process moved toward finalization and completion. RMGC responded to the TAC's final questions, TAC members visited the Project
site, and the Ministry of Environment scheduled the November 29, 2011 TAC meeting which RMGC reasonably expected would be the last TAC meeting before a decision was taken to recommend issuing the Environmental Permit. Gabriel disclosed on November 2nd, 2011, that a further and potentially final TAC meeting is expected to be held in the next month. And analysts predicted EIA approval by year-end or early 2012. That was the expectation at the time.
Now, as the Tribunal will recall from the December Hearing, statements made by the Minister of the Environment Mr. Borbely reinforced the expectation that the Environmental Permit would be issued in early 2012, subject to the Government successfully renegotiating its economic interest and taking a favorable political decision. Because there were obviously improper political criteria that were being put in this process that was supposed to be legal and administrative, once the Government took the decision to issue the environmental permit, the Project clearly would have proceeded expeditiously.

So, briefly to review Minister Borbely's statements, Minister Borbely stated on November 29, 2011 that a final decision would have to be taken in
one to two months maximum, also referring to political factors.

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

The Tribunal also will remember seeing a lengthy video of this interview on December 27th, 2011, where Minister Borbely confirmed, among other things, that his demands relating to the cyanide level of 3 ppm and to environmental guarantees were met, that the issues were clarified along the way, and he declared that there could be a decision on the Environmental Permit by the end of January, subject to the State getting a more advantageous contract.
Now, Minister Borbely's statements reaffirmed the numerous statements made by the TAC President at the November 2011 TAC meeting, which we also reviewed at the last hearing. In light of the progress in the TAC and Mr. Borbely's statements, Project opponents also expected an imminent decision approving the EIA. This is confirmed both in Alburnus Maior press releases in
January 2012 that you can see referred to, and in the
testimony of Professor W. Henisz. You heard at the
last hearing where he explained the opposition was
resigned to defeat at this time in December 2011.

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

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

Disclosures by Gabriel and reporting by
analysts, therefore, shifted from discussing expected
issuance of the Environmental Permit to discussing the lack of a decision on the permit and the standstill in the EIA process. The negative impact on Gabriel's market capitalization was severe.

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

While Dr. Burrows notes certain references in contemporaneous analyst reports to delay, the reports showed that the market concerns were not about delays relating to surface rights acquisitions or expropriations or first gold pour. They were not about increased costs. They were, instead, focused on the delay in and uncertainty of the environmental permitting process. Had the Ministry of Environment recommended issuing the Environmental Permit in January 2012, as the market expected and as the Law required, Gabriel's share price would have surged
higher rather than decline sharply in the face of the
Government's politically motivated unlawful failure to
act.

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

So, first, in its 2011 Annual Information
Form filed on March 14, 2012, Gabriel disclosed that
all technical issues were clarified at the last TAC
meeting, but no decision had been taken. So, contrary
to expectations, the market was now aware that the
Environmental Permit was not issued, and that it was
subject to uncertainty.
Then, in April 2012, the news agency Reuters reported statements by a lawyer for Project opponents who asserted falsely that a Romanian Court Decision required a suspension of the EIA process.
News then broke that Mr. Korodi, the Minister of Environment, who had suspended the EIA process back in September 2007, was replacing Mr. Borbely as Minister of Environment, which amplified concerns of further delays and another political holdup in the EIA process.
Now, Gabriel's first quarter 2012 reporting in May 2012--here you see May 10th, 2012 in the press release--confirmed the standstill and the uncertainty in the EIA process, and this reporting by the Company led to another round of negative analyst reports.
And so, it's in this context that the precipitous 80 percent drop in Gabriel's share price from early March 2012 to May 15, 2012, occurred, not for the reasons Dr. Burrows and Romania speculate in this Arbitration.
Now, after this period, a few weeks later, Prime Minister Ponta added to the uncertainty and delay by announcing that permitting was blocked for political reasons until after the year-end parliamentary elections, and this is in early June 2012. The Tribunal will recall these slides from the first hearing back in December. Prime Minister Ponta announced that: "the Government's position regarding the mining project remained unchanged. Gabriel must offer a larger share of the Project to the State, give up political lobby activities, suggesting improper attempts at influencing decisions which were baseless, and noted that to go forward these conditions are mandatory."

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

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

In its second quarter 2012 Press Release and
reporting in August 2nd, 2012, Gabriel repeated Prime Minister Ponta's statement that no permitting decisions would be made until after the elections, also noting there's been no correspondence on the renegotiation issues demanded by this Government.

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

And so, you see when the Ministry of Environment published the draft Environmental Permit
conditions which alone should have signaled a favorable endorsement of the permit was forthcoming, and when the Government included the Project in its National Plan for Strategic Investment and Job Creation, both on July 11, 2013, analysts commented that: "progress is likely to only be evident in the outcome of the vote on the Project expected this fall."
and you can see that on the next slide, Claimants' Demonstrative No. 1, the market movement after the Valuation Date.

I turn now to Ms. Smutny.

MS. COHEN SMUTNY: I will now make a number of observations regarding Gabriel's actual market capitalization relative to market indices.
I now will turn the floor over to my colleague, Mr. Pham.

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

Gabriel invested approximately $760 million to develop the world-class Roșia Montană and Bucium Projects. The Roșia Montană Project is among the top 20 undeveloped gold projects globally, and the largest
undeveloped gold project in Europe, excluding Russia. It contains Measured and Indicated Mineral Resources of 17.1 million ounces of gold, and 81.1 million ounces of silver; plus, Inferred Mineral Resources of 1.4 million ounces of gold and 4.1 million ounces of silver.

Within these resources, the Project contains Mineral Reserves of 10.1 million ounces of gold and 47.6 million ounces of silver.
Gabriel's investments attracted the backing of Newmont Mining and other major investors. As the Tribunal is well aware, Gabriel's principal asset has been its ownership interest in RMGC through which it has sought to develop the Projects in partnership with the Romanian State through Minvest.

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

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

The Roșia Montană Project was developed by expert international and Romanian consultants. As you can see on Slide 6 of Volume 5, there's a list of the
various international and Romanian consultants that played a role in the Roșia Montană Project. These include some of the most reputable and leading consultants in the mining industry.
I would now like to speak about issues relating to the technical and environmental plans for the Project. The Tribunal is, of course, aware that both parties have put forth a number of expert reports on technical issues such as Cyanide Management, the Tailings Management Facility, Waste Management and closure issues.

For the most part, those issues have not featured prominently in the Parties' Memorials and none of the experts will be appearing before the Tribunal for examination. We believe this is largely
a reflection of the fact that there is no meaningful
dispute about the technical and environmental merits
of this Project.

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

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

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

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

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

Finally, these critiques purport to identify inconsistencies with best practice. They do so by referencing standards and expectations that would be applicable only to later stages of the Project. In short, there is no meaningful dispute about the technical and environmental merits of the Project. As the evidence reviewed during the last hearing shows, none of Respondent's various post hoc criticisms assembled for the purposes of this Arbitration explain
why the Environmental Permit was not issued for the Roșia Montană Project. Rather, as numerous statements from senior government officials confirm, the criteria for issuing the Environmental Permits were met. These criticisms provide no support for Respondent's Social License arguments. Social License is not required under Romanian Law and is irrelevant to project permitting, as the Tribunal heard in December 2019. In any event, the Project had a Social License at the critical moments when the Environmental Permit should have been issued, and as will be discussed in this presentation, the technical and environmental issues were discussed with stakeholders in TAC meetings and public consultations.

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

As the Tribunal hears concerns raised on environmental issues by Respondent, we want to give some context for the Tribunal to keep in mind. First, as a historical matter, the Roșia Montană area was already heavily polluted due to the
Romanian State's prior unsafe mining practices. The Project area had been heavily polluted from centuries of mining, including by the Romanian State through its State-owned companies RosiaMin and Minvest from the 1960s through 2006. This mining used outdated technologies without regulation or rehabilitation by the State. You can see the pictures of the--can we go back, please?--of the acid, the reddish acid-rock drainage that Mr. Greenwald referred to. This is what's happening in the waterways of the area. And as Claimants' Expert Christian Kunze notes, "this historical pollution represents some of the most severe water quality degradation that I have observed anywhere in the world" and this statement stands unrebutted.

To this day, the Romanian State continues to permit heavily polluting operations at the nearby Rosia Poieni copper mine. Rosia Poieni is a copper mine operated by the State-owned company Cupru Min. It is located only 4 kilometers from the Roșia Montană Project site. It has been named the most significant regional polluter by independent experts. And you can
see some of the results of that in the picture on Slide 14.

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

The tragedy here is that RMGC's plans would have minimized environmental impacts from the Project and even remediated existing pollution from prior projects. This has been recognized repeatedly, including by Minister Delegate for Infrastructure Projects Dan Șova. He notes that the Project will have a positive influence and will lead to an improvement in water quality downstream of the Project area. The Independent Group of International Experts concluded, the Project "should result in a very significant improvement in water quality in the local streams compared with the current situation," which would lead to a very "significant contribution to the improvement of water quality in the Abrud River."
Professor Paul Whitehead of the University of Reading conducted a water modeling study and he found that the Project "will remove the majority of the Roșia Montană and Corna sources of historic acid-rock drainage that currently pollute the rivers systems with metals." And in this Arbitration, Respondent's Expert Mark Dodds-Smith concedes "it is accepted that the development of the mine would have remediated sources of pollution within the RMGC License area."

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

NAMR wrote a letter in 2007 noting that the
cyanide technology proposed for the Project was safe, widely used in gold mines throughout the world, and that there was "no economic efficient alternative" for the use of cyanide for gold-mining projects in Romania.

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

A few words about the Cyanide Code or the formal name of which is the International Cyanide Management Code, and this is important because the Cyanide Code represents best practices for Cyanide Management, and it tells developers how to use it in a safe manner, in a manner that is accepted as best practices. Gabriel voluntarily committed to comply
with the Cyanide Code and be subject to third party
independent audits that verify compliance. The
Cyanide Code was an initiative implemented to address
Environmental Management of cyanide during its
production, transport and use in the gold and silver
mining industry. This was prepared under the auspices
of the United Nations Environment Program with input
from multiple stakeholders, including regulatory
agencies and environmental organizations.

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

Now, when the Tribunal hears about Baia
Mare, please keep in mind that the Cyanide Code was
specifically designed to address and avoid incidents
like Baia Mare. As renowned cyanide expert Terry
Mudder noted: "If the gold-mining operations at which
the major environmental incidents occurred had been
certified under the Cyanide Code, all of them could have been averted."

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

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

This is echoed by other independent experts, including Dr. Terry Mudder, as noted, a world-renowned authority on cyanide and Stephan Theben, a former European Commission representative in the Steering Committee for the development of the Cyanide Code. Respondent's arbitration experts acknowledged the
merits of RMGC's Cyanide Management Plan. Notably, you see statements from Ms. Cathy Reichardt. She acknowledges that the Cyanide Management Plan prepared by RMGC is "a comprehensive and systematic document whose structure is aligned to that of the Cyanide Code." She concludes that "code compliance was a core consideration in project design."

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

Now, to the extent that there remain inconsistencies of the Cyanide Code, in Ms. Reichardt's view, please keep in mind that Respondent's Expert's critique of Project compliance with the Cyanide Code have fundamental flaws, as you will see on the next slide. In particular, it's one of Expert Cathy Reichardt, who just made those statements about the Cyanide Management Plan, claimed that aspects, some aspects, of the Project were not consistent with the Cyanide Code but, in doing so, she made claims that were misguided because Ms. Reichardt evaluated the Project as though it was already in
operation when it was not. Throughout her Report, Ms. Reichardt made a fundamental error in failing to evaluate the Project using the Cyanide Code's pre-operational verification protocol which applies to Projects in the pre-operational phase like the Roșia Montană Project.

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

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

Respondent's Expert Christine Blackmore also
makes a fundamental flaw with her Report. She criticizes the Expert Report of Mr. Lambert for applying a 2016 pre-operational protocol, that she argues was less comprehensive than the 2009 version that she was referring to. In fact, this is wrong. Mr. Lambert referred to a 2018 pre-operational protocol and that version did not differ materially from the 2009 version that Ms. Blackmore looked at. Presumably identifying this mistake as part of hearing preparation, Ms. Blackmore submitted an amended report that corrects most, but not all, of her erroneous statements.
Notably, the Romanian Government agreed that RMGC did not need to establish the final cyanide transport route until the end of the construction.
period. This is reflected in Exhibit C-555, the Ministry of Environment Note for Public Consultation, which includes the Ministry of Environment's proposed conditions and measures for issuing the Environmental Permit. What that states is that: "Titleholder shall assess each alternative route before establishing the final route for the first sodium cyanide transport at the end of the construction period."

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

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

Critically, Romanian Government authorities contemporaneously endorsed and approved RMGC's TMF
design. The Romanian National Committee on large dams unanimously agreed that the Project was feasible from the perspective of dam safety. The Romanian Central Commission for Endorsement of the Assessment Documentation of Dam Safety also unanimously voted to endorse the safe operation of the tailings dam. Based on this endorsement, the Ministry of Environment issued Dam Safety Permits in 2010, 2012, and 2014.

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

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

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

Again, when the tribunal hears about Baia Mare, please keep in mind that, in light of historical dam failures, including at Baia Mare, the TMF was designed to very high standards.
Now, critically the material differences between the Baia Mare and Roşia Montană TMF designs were communicated contemporaneously to stakeholders in Romania. The safety and robustness of the TMF design was communicated to the TAC and the general public to address comments and to allay concerns. As part of the EIA public consultation process, the differences between the Baia Mare and the TMF design were summarized and presented and an example of that is at C-337, which presents some three pages of a chart comparing the differences between Roşia Montană and Baia Mare, making critical comments about why RMGC's TMF would be different and more protective. A sample of that is on the slide.

The final comment relates to some issues raised by Respondent's Expert that RMGC should have considered dry-stack tailings technology. In fact,
RMGC did contemporaneously consider a dry-stack approach, but it determined that such an approach was not appropriate, due to the seasonally wet and cold climate at the site. Given the precipitation at Roșia Montană as explained by Patrick Corser, many of the reported environmental and safety benefits of a dry-stacked tailings approach would be lost.

Now, as a rebuttal document, Claimants have submitted Exhibit C-2962, which is an excerpt from a report by a U.S. environmental regulator, and shows agreement that most of the benefits of dry-stacking are lost in wet environments. Some of the passages include statements such as, in a wet climate dry-stacking has major environmental disadvantages. Once exposed to rain or snow, the dry-stack becomes wet, so most of the benefits of dry-stacking are lost. Dry-stack tailings that become wet again but are not submerged are subject to oxidation and leaching of heavy metals. That Report talks about another potential environmental challenge being the generation of fugitive dust from the dried stacks, and that in wet climates fugitive dust containing reactive
minerals could pose a significant risk to the surrounding environment.

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

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

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

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

Based on the findings of the Alburnus Maior Research Program, the Romanian State recommended certain sites be preserved in situ while issuing Architectural Discharge Certificates (ADCs) for 90 percent of the Project. And the Ministry of
Culture commended the archaeological research underlying the discharge, noting that "the measures for preservation through registration in situ, the museistic exposure and the publication are compliant with the national legislation and the good international practices." Respondent's Expert concedes that the archaeological research was carried out in an exemplary manner. This is from Dr. Claughton. He notes: "The evidence I have seen regarding the techniques used throughout the investigations conducted on site indicates that the research was indeed conducted in an exemplary manner."
Finally, the Ministry of Culture Research Project for Orlea approved in 2013 by the NAC, contemplated "an approach observant of the preservation by record concept," and this reflects "the expectation that following completion of the research, an ADC would be issued" for Orlea.

The market took the status of the ADCs into account. Information regarding the status of the ADCs issued in the Project area was well covered in the
press, and the fact that the ADC for Orlea had not yet been issued with information taken into account. You saw from Mr. Lew's presentation the various securities filings from Gabriel, which made clear the status of Orlea, including the fact that mining in Orlea and Jig will begin in Year 7 of the mine life and that the archaeological discharge certificates had been issued as needed for the first seven years.

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

Next, a few words about the Chance Finds Protocol. The Chance Finds Protocol did not create risks for the Project. Contrary to Respondent's misguided arguments on this topic, the Chance Finds Protocol, which Gabriel made public by publishing it
on its website, you can see that in the Second Report from Compass, Paragraph 28, Footnote 65, was not something that would have had an impact on the market value of the Project Rights.

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

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

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

As further described in the Expert Report of David Jennings and the legal opinion of Professor Schiau, any temporary work stoppage to conduct additional archaeological research would be limited in
time and scope. The Chance Finds Protocol described in its text a process for archaeological monitoring, formulated to cause minimal disturbance to the mine construction and operations plans, provided that one of its main objectives is to resume constructive/operations work that has been temporarily stopped in a certain area.

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

Respondent's argument that properties within the Roșia Montană Historical Town Center had to be acquired by RMGC is not supported. Respondent submitted as part of its rebuttal evidence an Expert Report by Mr. Michael McLoughlin in response to questions as to what properties must be acquired to permit implementation of the Project. Mr. McLoughlin is offered as an expert in blasting rock in open-pit mining. His Report focuses on several properties in and around the Roșia Montană Historical Town Center.
He concludes that these properties would become uninhabitable during certain phases of the Project implementation. On this basis, Respondent presumably contends that such properties are among those that must be mandatorily acquired in order to implement the Project. In fact, however, the contemporaneous record relating to the Project is clear, that RMGC did not need to acquire the properties in and around the Roșia Montană Historical Town Center.

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

Further, the impacts on these properties were carefully studied and considered. Romania's Ministry of Public Health and the Timișoara Public Health Institute conducted an extensive health impact
study on the Project area in August 2007 which was included in the EIA Report. And that's Exhibit C-387.03.

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

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

The impacts on the protected area specifically of blasting within the vicinity of the Project was also the subject of contemporaneous analysis and reporting included in the EIA Report. This can be shown in Chapter 4.03 of the 2006 EIA Report at Exhibit C-213 and the 2010 Update at C-382. Section II of this chapter explains that some households may choose to retain dwellings in the
protected zones and the chapter describes the studies that specifically address the impacts of blasting in those areas.

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

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

In order to obtain the construction permits necessary to implement the Project, RMGC had to obtain real rights to the land on which the construction activities would be implemented, and this is explained in the legal opinions of Professor Podaru, at Paragraph 42, and Professor Bîrsan, his First Legal Opinion at Section 4 at C.1.
Finally, RMGC would be liable for any
damages caused by the mining works. As the construction permit would not have extended to the Buffer Zone area, RMGC did not have to obtain real rights to properties in that area. To the extent that houses in the Buffer Zone were expected to become temporarily uninhabitable for some time during Project development, RMGC would have been required to accommodate and/or to compensate affected residents accordingly. Affected property owners, however, would not have been required to sell their properties if they did not wish to do so. Analogously, RMGC, as a license-holder, would be liable for any damages, including environmental damages caused by its mining activities.

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

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

(Pause.)

PRESIDENT TERCIER: Sorry, it was me. My
first question: What is the time (drop in audio) used by Claimant? I don't hear you. Sara? Sara, I don't hear you. Do you hear me? I don't hear you.

Do my co-Arbitrators hear me? Me and Sara?

No, so Sara, the problem is with you.

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

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

PRESIDENT TERCIER: Yes.

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

And as you will also recall in the December Hearing, when the Tribunal asked when the breach occurred, the breach occurred in the Claimants' submission, the Claimants explained that it was
actually not necessary or relevant to identify the date of breach. In response to the Tribunal's questions earlier this year, the Claimants did, for the first time, introduce a date for the alleged breach of the two Treaties, 9 September--on or about 9 September 2013, but they maintained the Valuation Date of 29 July 2011.

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

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

So, that is the Claimants' claim based on its Request for Relief until today. And as I just
said, even assuming this is considered an additional claim or ancillary claim, under I believe it's Rule 40 of the ICSID Arbitration Rules, "an additional or ancillary claim has to be introduced at the latest in the Reply." Unless the Parties agree otherwise and the Respondent does not agree otherwise, so we formally object to this new claim.

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

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

And beyond that, Claimants wish to, having heard this just now, reserve their right to comment, reflect on this point, and present some further observations either later in the course of this Hearing, if the Tribunal will allow, or thereafter.
PRESIDENT TERCIER: Thank you very much.

Under the control of my co-Arbitrators, I would say we will have today a very long hearing. We have noted the objection, Reply of Respondent. The first answer given by Claimant with the reservation (drop in audio). I suggest that we take it on board and that we will discuss it later when we have oral submissions.

Do you agree with this, Dr. Heiskanen?

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

PRESIDENT TERCIER: Of course.

Good?

MS. COHEN SMUTNY: I was going to say, assuming that the Claimants say further in writing, then presumably Respondent also in writing, and I think we will—the Claimant will leave it to the Tribunal whether this should be done in writing or not.
But one other thing I just want to say preliminarily, the Tribunal, of course, can read the Request for Relief, and the Tribunal is familiar with its own powers and the Request for Relief consistently always said that "the Tribunal is requested to award Claimants compensation on such other basis as the Tribunal may deem warranted," and that needs to be borne in mind whenever considering that Request for Relief. That said, we will reflect further, and if the Parties have more, either, verbally or in writing, of course, we would agree that Respondent could say more as well.

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

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

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

SECRETARY MARZAL YETANO: Can you hear me
now?

    PRESIDENT TERCIER: Yes, we can.

    SECRETARY MARZAL YETANO: Thank you.

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


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

    Dr. Heiskanen?

    DR. HEISKANEN: Just a second.

    (Pause.)

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

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

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

    Thank you very much.

    DR. HEISKANEN: Thank you.

    (Recess.)

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

    DR. HEISKANEN: Understood.

    PRESIDENT TERCIER: Okay, good. You will
have your PowerPoint presentations imminently.
DR. HEISKANEN: Yes. Indeed, I wanted to confirm that the Members of the Tribunal see the slides.

PRESIDENT TERCIER: Okay. Let's go.

DR. HEISKANEN: Fine.

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

DR. HEISKANEN: Very good.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

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

The December Hearing showed that the main reason for RMGC's failure was the social opposition that escalated over the years from the local to the national level and finally to the international level
as we have also seen in these proceedings. The
Project stalled first and foremost because RMGC failed
to secure the Social License and not because of
anything that the Romanian Government did or did not
do. Romania did not breach either of the two
investment treaties, the Canada BIT or the UK BIT and
is, therefore, not liable for any losses the Claimants
allegedly sustained.

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

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

It will hear further evidence that will show
that there is no basis for a finding of liability
simply because there has been no breach of either investment treaty.

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

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

(Pause.)

DR. HEISKANEN: Securing and fast-tracking the various administrative permits and endorsements was one of the main purposes of the Roșia Montană Law. The Law envisaged the Amendment of several laws and the issuance of over 45 permits and endorsements for the Project by June 2014. These were listed in Appendix 2 of the Roșia Montană Law, which, according
to Article 2(1) of that Law, was an integral part of
the Law, as you see on this slide.

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

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

The Respondent's Opening Statement today is
structured around these broad themes or issues or sets
of issues. More specifically, we will cover the issue
of causation. We, of course, argued the Respondent's
legal case on liability at the December Hearing, so we
will not go back to that argument today, even if some
of the evidence that you will hear also relates to the
issue of liability, and even if the Claimants
effectively tried to make earlier today a selective closing of the evidence that was heard in the December Hearing.

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

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

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

Now, causation. A claimant, an investor bringing an international claim before an investment treaty tribunal must establish a causal link between the alleged breach and the claimed loss. In order to be entitled to compensation, it is not enough for the
claimant to establish a breach of the applicable investment treaty. The Claimants must also show that it is the breach that caused the Claimants’ loss. As the Biwater Tribunal said, I quote: "Causing injury, must mean more than simply the wrongful act itself. Otherwise, the element of causation would have to be taken as present in every case." This is Biwater CLA-106, Paragraph 803.

The requirement of causal link has two elements:

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

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

The requirement of causal link is codified in Article 31(2) of the ILC Articles on State Responsibility which you see highlighted on the slide.
in very concise and simple terms.

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

These standards, of course, have also been applied by investment treaty tribunals. In Biwater versus Tanzania, the Tribunal concluded that the claimant had failed to meet the applicable test of
causation. The Tribunal found that the actual proximate or direct cause of the loss and damage for which the Claimant sought compensation where the acts and omissions that had already occurred by 12 May 2005, which was the alleged breach of the Treaty. In other words, there was no causation because the alleged breach of the Treaty occurred after the loss.

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

A similar issue of causation, in that case, in ELSI, the Court applied the underlying or terminal cause test and concluded that the underlying cause of the Claimants' loss was ELSI's—or ELSI's loss was headlong course towards insolvency, which state of affairs it seems to have attained even prior to the
requisition.

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

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

    In other words, the test is whether the Tribunal is able to conclude from the case as a whole and with sufficient degree of certainty that the damage or losses of the investors would, in fact, have
been averted if the Respondent had acted in compliance
with its legal obligations under the NAFTA.

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

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

In Copper Mesa versus Ecuador, another
investment treaty case which also raised the issue of
Social License, the Tribunal found that both the
investor and the Respondent State had contributed to
the investor's loss. The Tribunal, therefore, approached the issues of liability and quantum, both issues of liability and quantum, in terms of contributory negligence or contributory fault. The Tribunal determined in that case that the Claimants' contribution to the alleged loss for purposes of both liability and quantum was 30 percent. On the facts of the case the Tribunal found it could not be less.

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

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

The underlying dominant clause of the
Claimants' claimed loss in this case was the social opposition to the Project, not any measures taken or not taken by the Romanian Government. As we heard again this morning, the Claimants are going to great length in trying to completely disregard the evidence about the social opposition, but the Tribunal cannot close its eyes to the evidence.

My colleagues will now address the technical expert evidence that is on the record, that is relevant not only to the issue of causation, but also to liability and quantum, a broad range of issues.

When you consider this evidence, Members of the Tribunal, you are requested to keep in mind that much of the evidence on these issues was already heard in December. What you will hear today is additional evidence on these very same issues.

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

PRESIDENT TERCIER: Please, Ms. de Germiny.

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

As Romania has demonstrated, it did not
breach either BIT in this case. The Ministry of Environment's non-issuance of the Environmental Permit in 2012 did not amount to a breach of Romanian Law, let alone a BIT breach, because, as discussed at length at the December 2019 hearing, RMGC still needed to address numerous issues, including securing the Ministry of Culture's endorsement for the Project, securing the Ministry of Environment's approval of the Waste Management Plan, securing the approval of the Urban Planning documentation (the PUZ), securing and maintaining a valid Urban Certificate, securing the Water Management Permit that certified compliance with the Water Framework Directive, and securing the necessary surface rights.

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

The Claimants argue in this Arbitration that these issues could not prevent the issuance of the Environmental Permit. Romania disagrees, for reasons explained at length in its written submissions and at
the December Hearing, and I will not repeat those reasons today. In any event, though, it is undisputed that RMGC needed to secure these approvals and to resolve these issues to secure the Building Permit. My colleagues, Ms. Andreea Simulescu and Mr. David Bonifacio, will further address some of these issues in the context of securing the Building Permit. For my part, I will stay with the Environmental Permit a bit longer. I will address today four other issues or let's say areas of technical uncertainty surrounding the Project. They were outstanding and uncertain in 2011, had been for years, and still are today. They concern cyanide transportation and management, risks associated with the TMF and pond seepage, the lack of sufficient research at Orlea, and lack of information regarding post-closure land use.

Romania's technical experts addressed these and other issues in their Reports; and, as they have not been called to testify, I will walk the Tribunal through their evidence and demonstrate that these issues were open, were still being discussed in 2011, and in many instances after 2011.
The existence of these open technical issues is relevant to the Tribunal's analysis in two respects:

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

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

In other words, they failed to show that the Ministry of Environment's non-issuance of the permit caused the losses they claim to have suffered.

Granting an Environmental Permit for a project of this nature is not, in Romania and elsewhere in Europe and
around the world, a "yes" or "no" question. The answer that state authorities will give is either "no" or "yes, but as long as you do the following."

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

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

Even if RMGC had obtained the Environmental Permit in 2012 or thereafter, it is likely that at least some of these technical issues that I will address today would have translated into conditions attached to the permit, and that they would have
likely affected the scheduling and costs of the Project.

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

As Romania's expert, Ms. Christine Blackmore of CMA, has written: "A valid social license to operate is the key for commercial success of a mining venture. This is especially the case where cyanide is proposed. Therefore, preparing information on the management of cyanide for the stakeholders is vitally important for environmental and social acceptance."

In this case the question was not should cyanide be
used, but rather can RMGC demonstrate to stakeholders that it is capable of managing cyanide responsibly.

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

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

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

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

Third, as a result of the accident in 2009, Romania was found to have breached the European Convention on Human Rights by failing to protect the right of the plaintiffs, a father and son who lived near Baia Mare to a healthy and safe environment. The
Romanian Government thus wanted full assurances that this type of accident would not occur again.

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

(Video played.)

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

Shortly thereafter, in May 2006, RMGC submitted, as part of the EIA Report, a cyanide Management Plan which set out generally how RMGC
intended to use and manage cyanide at Roșia Montană. The problem, as I will explain, is all of the elements that plan did not include.

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

So the IGIE warned that the public was not sufficiently informed about the risks of the Project. And to the right, RMGC answers in the first paragraph, that once all the comments are received and responses accepted, RMGC is committed to producing a final
summary EIA Report. RMGC did not, however, commit to producing a revised Cyanide Management Plan that would clarify these issues.

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

As mentioned at the December Hearing, the cyanide could have been transported by a combination of ship, rail, and truck. The route and method of transportation would have affected the quantities of cyanide transported and the form in which it was transported. The map on the screen shows one of the routes that RMGC suggested. Under this route, the
cyanide would have arrived in the Port of Constanța on
the Black Sea, gone by train near Bucharest through
the Apuseni Mountains all the way to Zlatna, the train
station closest to Roșia Montană. It would then have
been transported for another 40 or so kilometers by
truck to Roșia Montană.

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

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

And, finally, in connection with
water-management issues generally, the IGIE queried
the number of options that are left for later design or consideration, and RMGC responded that it needed to wait for Government approvals without saying which approvals. RMGC often raised this argument of, "we are not required to do this now" for both technical issues like defining the cyanide transportation route and transporter, and non-technical issues like, for instance, the acquisition of surface rights; namely, that the law did not require it to provide certain information before and for purposes of the Environmental Permit, and that it could wait until either the moment of applying for the Building Permit, or even after the issuance of the Building Permit.

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

Romania's expert, Ms. Christine Blackmore of CMA, explains in her Report that companies are often,
in practice, required to give more information to state authorities than expressly provided for in the Cyanide Code or in the Law. She cites the example of a mining project in which she was involved in Northern Ireland with the Canadian company Dalradian Gold Limited, where there was strong NGO and public opposition during the EIA Procedure. State authorities thus asked Dalradian to provide additional detailed information regarding its envisaged use of cyanide. And Dalradian provided this information, even though it was not required to do so, because it was trying to allay concerns and because it wanted to get its Project approved. Ms. Blackmore discusses this at Paragraphs 72 to 75 of her Report.

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

In addition to the TAC and the IGIE, the public raised questions about cyanide transportation and Management. We see on the screen certain comments made during the public consultations in 2006, and the
TAC also raised questions. We see on the slide excerpts from TAC Meeting Minutes of 2007, where RMGC's consultant from AMEC said the transport impact will be on the local community, the route will be analyzed in detail as soon as the route alternatives are known, and the representative from the Ministry of Transportation said: "We think it's time we make some choices about transportation alternatives."

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

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

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

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

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

Ms. Blackmore confirms that RMGC's Cyanide Management Plan lacked information regarding transportation, as we've summarized on this and the
following slides. Here, this notes certain shortcomings that she has identified with regard to the plan with regard to information about Constanta, for instance, about the unloading facilities and the security and storage facilities in Constanta.

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

The next slide is confidential.

(End of open session. Admitted Secret Material begins.)
ADMITTED SECRET MATERIAL

(Admitted Secret Material ends.)
OPEN SESSION

MS. de GERMINY: Now returning to nonconfidential information.

Ms. Blackmore concludes that RMGC could have defined the cyanide route and method and transporter to help alleviate the TAC's and public concerns. Also, with a defined route, it's not possible--sorry, without a defined route, it is not possible to conduct a meaningful EIA procedure since it is not possible to engage with the stakeholders who are potentially affected by the cyanide transportation, whether they be in Constanta, near Bucharest, or elsewhere.

Determining the transportation route was also important for permitting and planning reasons. RMGC, in the EIA Report and in discussions with the TAC, repeatedly suggested, as I noted earlier that, the cyanide might be transported by rail to Zlatna, but you need special facilities at a train station to transfer and unload cyanide onto trucks and no such facilities exist at Zlatna. Most of the industrial zone of railway facilities have been decommissioned and are in bad shape.
Mr. Tanase acknowledged this to the TAC, and in 2013, he said: "In Zlatna, we are currently considering the possibility of building a transfer and storage terminal, storing the cyanide and other hazardous substances including ammonium nitrate. Because in Zlatna we have that railway line that ends. This involves an investment of several tens of millions of dollars." So, these facilities needed to be built, and RMGC would have needed to apply for the relevant permits, as my colleague Ms. Simulescu will discuss in greater detail. RMGC and Gabriel have never taken into account the time and cost impact on the Project of securing the permits in building the necessary facilities at Zlatna.

As I mentioned earlier, RMGC had announced in March 2006 that it intended to secure a Cyanide Code certification. As RMGC itself explained in the Cyanide Management Plan in May 2006, "companies that become signatories to the code demonstrate their compliance by having their operations inspected by a third-party auditor." We will look at both the Code and the verification protocols.
In the case of Roșia Montană, which was not yet operational, RMGC could have commissioned a pre-operational audit. Ms. Blackmore explains, that had RMGC done the Audit and obtained a positive result, it could have confirmed this publicly, which would have signaled to stakeholders that the Project complied with the Cyanide Code, and this would have likely helped to alleviate concerns about the Project's envisaged use of cyanide.

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

Mr. Henry responded that "this would be very
helpful for us. How do I progress this?"

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

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

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

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

An issue related to that of cyanide use and
Management is that of the risk of a failure of the TMF
dam. This is the dam that holds up the tailings or
the waste from the mine site. In Roșia Montană, the
dam was going to be 185 meters high, the highest dam
ever built in Romania and taller than the Washington
Monument. We have seen in recent decades dramatic dam
failures at mining sites around the world. These
range from again the Baia Mare dam failure in 2000, to
the failure of a dam operated by the major mining
company Vale last year in Brazil. Romania's Expert, Mr. Dermot Claffey, includes with his First Report a list of TMF failures and refers to the legitimate concerns of people who would be effected in the case of Roșia Montană by such a failure.

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

In this case, the public expressed concerns about a possible dam failure at Roșia Montană in 2006. You have examples on this slide with comparisons of concerns coming from Baia Mare. The tailings pond in unlined and is a hazard for the town of Abrud, which was just downstream from where the dam would be, and also concerns from 2009, in case of an earthquake, the TMF will fail, how will Câmpeni be affected, also a
neighboring town, as well as the surrounding areas and further questions about the effect on Abrud.

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

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

Although the Claimant suggests that this concern came solely from the Head of the Geological Institute, the Ministry of Environment raised the issue already in 2005 at the first TAC meeting, asking which are the lining measures for the TMF, how will
the groundwater be protected, what is the risk of
pollution through seepage of toxic substances,
including cyanide?

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

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

And in September 2011, in addition in its
list of over 100 questions to RMGC, the Ministry of
Environment specifically requested information and
documentation about an HDPE liner for the TMF pond, so
it noted the measurements provided in the report are
not sufficient to ensure the impermeabilization of the
Corna tailings pond basin. "Please supplement the EIA
Report accordingly," indicating that—referring to the
levels of the clay lining, natural lining, and noting
that the colluvium deposits are permeable, and that
this is not sufficient to impermeabilize the basin of
the pond according to the European Groundwater
Directive.

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

The public had also expressed the specific
concern on numerous occasions. Again in 2007, someone
writing the TMF is not lined, someone else writing the
risk of seepage is high in case of an earthquake.
Risk of TMF will have a large surface and will be
filled with cyanide. So this was an ongoing concern.

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

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

Respondent's Expert, Mr. Claffey, first observes that a significant number of mines have geomembrane liners, and he opines that given the repeated concerns, RMGC could have proposed a geomembrane liner. This was a real opportunity for RMGC to demonstrate to Project critics that they would go beyond mere technical requirements and provide the highest levels of environmental protection.
Mr. Claffey also says that RMGC could have made a greater effort, given the purportedly high standards to which it aspired.

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

Mr. Claffey, indeed, explains that the dam safety permits that were issued did not address questions of seepage or TMF pond lining, and that these aspects would have been addressed separately by way of conditions imposed as part of the project-permitting process.
Mr. Claffey finally opines that, although Mr. Corser says this issue was carefully studied, RMGC's evaluation was high level and its decision likely motivated by cost.

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

In sum, even assuming that the Ministry's non-issuance of the Environmental Permit amounts to a
BIT breach, which is denied, the TAC would have likely issued the permit upon the condition that RMGC envisaged a geomembrane liner. Indeed, the Claimants must but fail to prove that, had the permit been issued, RMGC would, in all probability, have obtained a permit that did not comprise such a condition. The Claimants need but fail to prove that RMGC would have been able to operate the Project profitably even if it had been required to put in place a geomembrane liner.

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

Over the years, the TAC raised questions about the lack of research at Orlea. We see here an exchange from 2010 where Mr. Timis from the Ministry of Culture asks: "What are the projects and plans of
RMGC regarding the Orlea area?" And RMGC's lawyer responds: "Well, we have started research. And when we finish, we will apply for the ADC."

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

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

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

The TAC specifically--or the Ministry of Environment specifically requested in September 2011 that RMGC provide the ADC for Orlea. This is again, their letter from 22 September 2011. The public also expressed concerns over the years regarding the destruction of the Roman galleries, including those in Orlea. So, someone from 2006 wrote: "As for the
Orlea open-pit where there exists a 45-hectare area that is still inhabited, archaeological investigations have not been performed there. And although RMGC secures the Environmental Permit, there are high chances that the ADC will not be granted." Someone else asked: "Why didn't the Company secure the Archaeological Discharge Certificate for Cârnic and Orlea as well?" RMGC at the time and the Claimants in this Arbitration argue that, because works at Orlea would only start a few years into the Project, RMGC had time to obtain the ADC later on. The uncertainty concerning Orlea could, however, have wide-ranging repercussions, and the Respondent's Cultural Expert, Dr. Peter Claughton, describes the likelihood of significant discoveries in this area. In paragraph 49 of his Second Report, he refers to the "significant uncertainty as to what might be found on and under the area."

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

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

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

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

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

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

The next slide is confidential.

(End of open session. Admitted Secret
Material begins.)
I'm now returning to nonconfidential material.

(Admitted Secret Material ends.)
OPEN SESSION

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

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

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

The Claimants' Expert and main author of the Closure Plan, Dr. Kunze, stated in his Second Report:
"It is not the financial responsibility of the mining company to fund and/or implement the final after-use plan, and thus it would be unusual to include funding in the final budget."

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

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

Dr. Dodds-Smith concludes that this is not just a deviation from best practice, it's not even
generally accepted practice, and that he does not see a reference in any of the TAC meetings to Dr. Kunze or someone from RMGC saying to the TAC members that RMGC is not going to be addressing post-mining land use.

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

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

So, where does this leave us? The focus and overarching conclusion of the Claimant's technical experts is that the Project complied with Romanian Law
and good or best practices. This conclusion is not entirely surprising in the cases of Mr. Corser, Mr. Jennings, and Dr. Kunze, since they were working for and paid by the Claimants and/or RMGC for many years. Further to RMGC's request, Mr. Corser attended TAC meetings between 2007 and 2011. Dr. Kunze did as well. Mr. Jennings has been advising RMGC since 2011. All three appeared before the Romanian Parliament at RMGC's request in the fall of 2013.

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

In any event, in many respects, Romania's experts agree with the Claimants' Experts, that the Project complied in many respects with good practice. In other instances, though, as I have explained and as summarized on the following slides which we have included for reference, Romania's experts consider that the Project did not comply with good or best practice. We have summary slides for Ms. Larraine
Wilde's conclusions, those of Ms. Reichardt, those of Ms. Blackmore, those of Dr. Dodds-Smith concerning waste management and closure, Mr. Claffey concerning the TMF, and Dr. Claughton concerning cultural heritage.

The question of whether the Project on paper complied with Romanian law and good or best practice is, however, somewhat academic and beside the point. The point is, first, that RMGC could and should have addressed the requests and concerns of the TAC and the public by, for instance, defining its cyanide transportation route and transporter, proposing to implement a geomembrane liner, and/or undertaking the necessary archaeological research at Orlea. All of these issues, all those that we see on the slide were relevant to the Project's permitting and feasibility. RMGC and the Claimants chose not to address these issues, and by not doing so, they further increased the social opposition to the Project. In other words, not only was RMGC responsible for obtaining the Social License, but also by not taking one or more of these steps, RMGC made it more difficult to obtain the
And once the strategy of ignoring these and other issues for years failed, the Claimants preferred to seek to shift the blame to Romania and to try their luck in arbitration proceedings instead.

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

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

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

ARBITRATOR GRIGERA NAÓN: We don't hear you, Mr. President.
PRESIDENT TERCIER: I don't know why.
Can you hear me now?

ARBITRATOR GRIGERA NAÓN: Yes.

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

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

DR. HEISKANEN: Thank you.

(Recess.)

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

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

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

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

PRESIDENT TERCIER: Yes, we can.

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

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

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

As the Tribunal already knows, the Project was complex and massive, spreading over four localities and expanding on over 1,250-hectares. This Project would have been the biggest and the largest-scale gold mine in Europe in the middle of a populated area. Due to this specificity of the Project, there were numerous permits that were required for construction and later on, the operation of the Project. Had RMGC been able to obtain the Environmental Permit, the conditions RMGC had to meet for securing the Building Permit and operating the
mine would have affected the technical and financial feasibility of the Project and the timing of its development as Dr. Heiskanen earlier stated.

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

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

There is no dispute regarding the permits, approvals, endorsements or authorizations (which I will collectively refer to as "permits") that RMGC
needed for the Building Permit. There is a—

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

MS. SIMULESCU: Yes, yes.

PRESIDENT TERCIER: Please proceed.

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

As I will show, RMGC knew that, besides the Environmental Permit, it needed to apply for and secure numerous other permits for the Building Permit, and the Claimants have failed to prove that RMGC initiated the permitting process for the construction
of the Cyanide Storage Facility at Zlatna.

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

This part of my presentation is confidential.

(End of open session. Admitted Secret Material begins.)
ADMITTED SECRET MATERIAL
We can turn to nonconfidential mode now.

(Admitted Secret Material ends.)
OPEN SESSION

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

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

And, second, as the Roșia Montană Law didn't pass, I will explain briefly in the interest of time the main requirements to obtain some of the significant or critical outstanding permits (which were on the critical path) under the permitting process, as per the laws in force at that time. These show on the one hand, RMGC's acknowledgment about the permitting status of the Project as of (drop in audio) mid-2013, and on the other hand, the length of the
process of obtaining the necessary permits as per the
then laws which would have affected the financial
feasibility of the Project and its timing.

I refer now to what Claimants alleged in
their Opening Statement when discussing assertions of
Claimants' analyst

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

The three significant or critical permits or
approvals which are refer to now are a Government Decision on the removal of lands from the national forestry fund for the purposes of the Roșia Montană Project, the Water Management Permit, and the zoning urban plan for the Project. I will introduce now the requirements for the Governmental Decision regarding the removal from the national forestry fund of the land related to the Project. By way of reminder, I mention that RMGC had never initiated the steps to reach the stage of obtaining these rights.

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

For the record, I refer here to Exhibit
C-1255, which is confidential Pages 13 and 14, and to Exhibit R-114.

According to the EIA Report, RMGC planned to deforest 256-hectares of land. You may see this surface/plots on the map marked in green, the red line being the boundary for the Industrial Area for the Roșia Montană Project. Under the Romanian law, the forest lands are protected and managed through a national forestry fund. These lands can be removed only through special procedure involving a Governmental Decision issued based on the agreement of the owner favorably endorsed by the forestry body against an exchange with other lands. The governmental decision is required in this case because of the significance of the area to be deforested. And, for the record, I mentioned here Exhibits R-116 to R-119. Prior to the government decision, the Alba Forestry Directorate and the National Regia of Forests must give their approval. For a complete picture of the procedure underlying the removal of the land from the forestry fund, it's worth mentioning the provisions of land methodology. You may see on the
slide the extensive list of the legal requirements for this procedure, including the obligation of the titleholder to acquire the surface rights for both the deforested and reforested land. Under this law, the titleholder has the obligation to reforest another area at least three times greater. If the forest is on a private land, either private person, private entity or private property of the commune, cities, or counties, the approval of the owner of this land is required, and in case of refusal, expropriation may be commenced but only if the Project is qualified as being of public utility. And for the record, I mention here Respondent's Counter-Memorial Pages 27 and 28, Paragraphs 82 to 84, and also Professors Sferdian and Bojin Legal Opinion, Pages 26 and 28, Paragraphs 110 and 117.

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

Finally, as an additional note, in terms of
agricultural surface rights, as part of the surface rights needed to be acquired for the Building Permit, the Tribunal may see that the removal of such lands from the agriculture circuit for a new destination such as mine activities will be subject as well to a Government Decision.

Another permit which I would like to address now is the Water Management Permit. Romania has already demonstrated both at the December Hearing and in its written submission that RMGC was required but failed to secure this permit to certify compliance with the Water Framework Directive. And, for the record, I mention here Respondent’s Rejoinder Sections 3.3.2.5. and 3.6.1.6. At this stage, I wish to simply add that, as it follows from Appendix 2 to the Roșia Montană Law, showed on this Slide, one of the core requirements for the Water Management Permit was and still is the transfer of the Property Rights over the Corna and Roșia Montană riverbeds to the titleholder of the mining Project, RMGC. The transfer by a concession contract was in the competence of the then Water Forests and Fisheries Department which
functioned at the level of a Ministry. RMGC had not initiated the proceedings for obtaining the required surface rights.

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

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

On this slide, the Tribunal may see that, in
2013, RMGC still had to submit the required documentation for: the Endorsements for the zoning urban plan in the Industrial Area of the Ministry of Culture, of the Ministry of Regional Development and Public Administration and of the Ministry of Agriculture and Rural Development, and also for the Endorsement of the Chief Architect of Alba County Council.

The final step of the approval of the zoning plan is the Approval of the Roșia Montană Local Council.

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

I will continue now with the second topic of my presentation, the permitting and construction of the Zlatna Cyanide Storage Facility. In addition to the outstanding permits required for the Building Permit for the Roșia Montană site, RMGC also needed a Building Permit for the Cyanide Storage Facility at
Zlatna Ampellum. RMGC's consultant proposed through its Report on Dangerous Goods Transport dated July 2012, the Zlatna Ampellum industrial area as a preferred storage facility for the reagents, especially the cyanide, used in the processing phase at Roșia Montană. You've heard my colleague, Ms. Lorraine de Germiny, explaining that there are no unloading or storage facilities at Zlatna to accommodate the cyanide or the other reagents, and also showing that Mr. Tanase acknowledged this to the TAC in 2013.

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

As with Roșia Montană, to build a cyanide transportation and storage facility of this nature, RMGC would need several permits prior to the Building Permit such as: the Urban Certificate which is the starting point for initiating the procedure for
obtaining the Building Permit, the Zoning Urban Plan (the PUZ), which is approved after the strategic environmental assessment procedure and based on other similar permits and endorsements, and the pivotal Environmental Permit which is issued following the Environmental Impact Assessment procedure, which includes a risk assessment under the Seveso Directive. The risk assessment is required because the facility deals with cyanide and other dangerous substances that are subject to this Directive.

RMGC would need to obtain the surface rights for the area where this facility would be built up.
In this project, which is Kronochem Project, the investor applied for the Environmental Permit for the expansion of an existing plant, and the whole procedure, as she notes, from the commencement of the strategic environmental assessment for Urban Plan until the issuance of the Environmental Permit, took almost six years.

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

As it follows from the evidence of the case, the Claimants have made no attempt to prove that there is a reasonable degree of certainty that RMGC would have secured the Building Permit for Zlatna cyanide facility.
I give the floor now my colleague David Bonifacio.

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

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

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

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

I will turn first to the issue of surface rights.

RMGC has not been able to acquire as much as 40 percent of the total surface rights that are required. It did not make any meaningful progress in the acquisition of the necessary surface rights since early 2008. Still today, it has not acquired the
required properties despite its efforts over many years.

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

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

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

This part of my presentation is confidential.

(End of open session. Admitted Secret Material begins.)
We continue in nonconfidential mode.

(Admitted Secret Material ends.)
MR. BONIFACIO: Ms. Lorincz is also technically indefensible, and Romania has produced expert evidence to rebut that evidence prepared by Michael McLoughlin of Behre Dolbear. He's a leading expert in the mining industry with over 40 years of experience in the field of blasting.

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

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

Apart from other findings, his main conclusion is that houses in the Historical Center would be subject to significant damage and risk of
injury, and accordingly they would be uninhabitable.

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

In turn, if RMGC implemented the mitigation measures and best practices required to permit the arbitration of the Historical Center, which we heard once again this morning as a possibility, well the Project would require the use of small diameter blastholes, which will slow the drilling and the blasting process resulting in reducing the mining production rate and making this Project uneconomic.

So, RMGC needed to acquire the properties in the Historical Center to implement the Project.

This part of my presentation is confidential.

(End of open session. Admitted Secret Material begins.)
I continue in non-confidential mode.

(Admitted Secret Material ends.)
OPEN SESSION

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

I turn now to the issue of project financing.

The second fundamental thorn in the flesh of the Project was the inability to secure Project financing. Gabriel Canada explained this in numerous regulatory filings. Gabriel Canada "does not have the financial resources to complete the permitting process, acquire all necessary surface rights, or construct the mine at Roșia Montană." It added that the Project is dependent upon its ability to obtain significant additional financing from external sources, and it cautioned that the Project could stall
as a result, as a failure to obtain sufficient
funding. Well, Romania agrees with the summary of the
situation not only as of this date of the disclosure,
but indeed as of any date since at least 2011 until
today.

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

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

As for the construction of the mine, SRK
estimated such costs at $1.4 billion in 2012, but that
estimate is wrong, as were the previous cost estimates
prepared for the Project, and Dr. Heiskanen will
address this point in more detail in a moment.
The costs would, in fact, be close to $2 billion if the dry-stack tailings facility was included, if other necessary equipment indicated by Messrs. Guarnera and Jorgensen are added, and if post-closer costs quantified by Dr. Dodds-Smith of CMA are included.

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

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

This part of my presentation is confidential.

(End of open session. Admitted Secret Material begins.)
(Admitted Secret Material ends.)
OPEN SESSION

MR. BONIFACIO: Mr. McCurdy's report refers to other factors which would have further constrained the availability of financing, the Project's failure to comply with Equator Principles, the Project's risk of delay as a result of archaeological risks.

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

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

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

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

All relevant factors must be jointly considered by the Qualified Person when assessing whether at the time of reporting extraction of the minerals is reasonably justified.
Mr. McCurdy also confirms in his Expert Report that a failure to design the Project in a manner compliant with the Equator Principles would constrain the availability of funding for the Project.
The principles are widely applicable among leading banking institutions worldwide which are estimated to arrange at least 80 percent of global project lending. Project finance will only be available if the principles are respected by the sponsor.

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

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

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

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

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

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

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

The Claimants argue that the potential for delay stemming from the implementation of the protocol was not material because a temporary stop in one location would not necessarily preclude continued work
in other areas. However, this argument ignores the possibility of work stoppage in an area in the construction schedule’s critical path. There is a substantial potential for delays as a result of archaeological finds since the start of construction works as Dr. Claughton concluded in his report.

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

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

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

PRESIDENT TERCIER: Thank you, Mr. Bonifacio.
Dr. Heiskanen, you have the floor.

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

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

Mrs. Cohen, what is your position?

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

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

DR. HEISKANEN: Mr. President, I would just add that we are certainly aware that the Tribunal indicated that you would be prepared to sit a bit longer today until 9:30 Central European Time, but I don't think we will be able to finish by that time. I
think it's probably in the interest of everybody that we finish tomorrow morning. This won't affect the Schedule because we have already gone beyond the scheduled time for today, the normal day is until 8:00. So, we're almost already one hour beyond the allocated time for today.

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

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

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

PRESIDENT TERCIER: Okay. My question to you, Dr. Heiskanen, you think that you would not be able to do that (drop in audio)?
DR. HEISKANEN: I think it will be very close to the remaining allocated time, so we would go well beyond 9:30 Swiss time.

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

(Pause.)

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

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

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

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

PRESIDENT TERCIER: Indeed.

DR. HEISKANEN: Now, we will be dealing now for conclusion on the issues of quantum. The
Claimants' case on quantum fails for a number of reasons, and these include, therefore, the four main reasons you see on the screen:

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

Now, first, the Claimants' valuation is based on the assumption that they have lost all of their investments in RMGC. They have, therefore, effectively quantified only one of their claims, the claim for expropriation, but not their other claims, including the claim for the alleged breach of the fair-and-equitable-treatment standard, which, based on the Claimants' own submissions, is their Main Claim. It follows that, if the Tribunal finds there has been no expropriation, it cannot rely on the Claimants' valuation.
An expropriation claim necessarily assumes that the Claimants have lost all of their investments in Romania. However, the evidence is clear that this is not the case. On 30th June 2011, less than a month before the Valuation Date, Gabriel Canada held Property, Plant and Equipment worth CAD 51.2 million, as you see on the slide. The Experts agree that this amounts to over USD 53.2 million. This is Gabriel Canada's Interim Consolidated Financial Statements of June 30, 2011.

We will now go to the confidential mode.

(End of open session. Admitted Secret Material begins.)
Back to the nonconfidential mode.

(Admitted Secret Material ends.)
OPEN SESSION

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

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

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

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

As we heard during the Claimants' Opening Statement this morning, they have now presented an alternative Valuation Date of 6 September 2013, as indicated this is a new claim, and we object to the Claim as a matter of admissibility. But, as you will have seen, even on this theory, the real Valuation Date still remains 2011 or July 2011 because the Claimants have simply indexed the value of their assets based on the stock market capitalization in July 2011 to a number of alternate indices, so it
still suffers from the same flaws as the initial claim. We reserve the right to respond more fully to this claim, if the Tribunal decides that it is admissible.

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

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

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

Importantly, had the Claimants relied on this date, 9 September 2013 instead of July 2011, Gabriel Canada's stock market capitalization would have been a fraction of its value. This was a consequence of a significant decline in the price of gold during this period, as we will see in a moment, and increase of RMGC's reported costs, as we will also
see in a moment; but also, and most importantly, a consequence of the social opposition to the Project, the systematic litigation by the NGOs against any permit granted to RMGC.

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

Importantly, as you see, the share price never recovered from this collapse. On the contrary, when Gabriel Canada complained about the market's reaction to the news about the Court Decision a few days later, on 9 April 2012, its share price fell by a further 14 percent. The relevant Court Decision of Alba Iulia—the Court Appeals Decision is Exhibit
R-207, and we have also indicated on the slide some of the commentary by the analysts about the impact of the Court Decision on the Company's prospects.

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

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

What instead happened the day before and the weekend before 9 September 2013 and the preceding week was the massive demonstrations against the Roșia
Montană Law. It is these demonstrations, social opposition to the Project, that caused a further collapse by another 50 percent of Gabriel Canada's share price.

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

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

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

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

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

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

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

The Claimants make no attempt whatsoever to directly value RMGC's assets. Their valuation starts and ends with Gabriel Canada's stock market
capitalization. This is, of course, circular reasoning and a manifestly flawed method, and it results in a massive overstatement of the alleged loss.

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

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

Third, the Claimants' Expert, Compass Lexecon, applied a baseless acquisition premium to Gabriel Canada's share price, which further inflates a quantum of the Claim.
I will address each of these points now in a bit more detail.

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

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

We will now go into the confidential mode.

(End of open session. Admitted Secret Material begins.)
We now go back to the nonconfidential mode.

(Admitted Secret Material ends.)
OPEN SESSION

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

Third, the Claimants' Experts add a massive
35 percent acquisition premium to Gabriel Canada's
market capitalization, which inflates the already
grossly overstated claim by a further $852 million.
The figure that I just mentioned is $852 million. The
Tribunal should pause here as this is something
essential and important about the seriousness of this
claim. The Claimants are effectively suggesting that,
in the event the Romanian Government decided to
expropriate RMGC's Mining License lawfully for a
public purpose, it would have to pay a premium of
$852 million in excess of the stock market capitalization of Gabriel Canada, which, in itself, is an inflated measure of the value of the License. There is no economic or legal rationale whatsoever for such a windfall in the case of an expropriation. There is no legal rationale because, even outside the expropriation scenario, acquisition premiums have not been accepted, as you see on the slide. Claimants attempt to argue (drop in audio) premium or an acquisition premium as being, in fact, protected by investment treaty tribunals has been rejected in every known case in which it has been claimed.

Now we go back to the confidential mode.

(End of open session. Admitted Secret Material begins.)
(Admitted Secret Material ends.)
DR. HEISKANEN: The proper method to value mining assets is the discounted-cash-flow method, the DCF method. As Dr. Brady will testify during this week, the DCF method is a widely used method in the mining industry, and it is the primary method of valuation. This is the case for a number of reasons, including in particular because it directly values the assets in question and not the proxy.

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

Now, in conclusion, in light of all the evidence you heard in December and the further evidence that you will hear in this Hearing, the fact that the Project stalled is entirely understandable, if not foreseeable. The Claimants sought to build a massive gold mine at the heart of historical Europe in a densely populated area. The Project would have
involved relocating the entire village of Roșia Montană and, therefore, destroying the community, as we heard in December. It would have involved destroying four mountaintops and converting them into mining pits. It would have involved destroying a significant part of the cultural heritage of the area, and it would have involved building a massive tailings dam overlooking the town of Abrud, a town of some 5,000 people. It would also have involved inevitably using cyanide-based technologies that had earned a very bad name in the region.

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

Thank you very much.

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

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

SECRETARY MARZAL YETANO: I can hear you.

PRESIDENT TERCIER: Sorry. Can you give the
time used by the Respondent?

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

PRESIDENT TERCIER: Good.

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

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

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

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

PRESIDENT TERCIER: Thank you very much.
Dr. Heiskanen?

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

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

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

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

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

DR. HEISKANEN: Thank you.

MS. COHEN SMUTNY: Thank you.

(Whereupon, at 3:51 p.m. (EDT), the Hearing
was adjourned until 8:00 a.m. (EDT) the following day.)
CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN