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Scope of project:	The aim of the present report is to present the Contractor's initial proposals regarding amendments and additions to the Romanian legislation affecting oil and natural gas transportation in furtherance of the objectives of the INOGATE Programme, namely the facilitation and rationalisation of interstate transportation of oil and natural gas from the Caspian Basin to Europe.
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**Development of the Objectives of the
INOATE Programme in Romania**

TASK 2 REPORT

PROPOSED AMENDMENTS TO THE ROMANIAN LEGISLATION

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Project Title:	DEVELOPMENT OF THE OBJECTIVES OF THE INOGATE PROGRAMME IN ROMANIA	
Project Number:	SUB-PROJECT: RO 9805.01.01-02	
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DRAFT LAW FOR THE ESTABLISHMENT OF INTERSTATE HYDROCARBON
TRANSPORTATION SYSTEMS IN ROMANIA – Initial draft

PROJECT SYNOPSIS

Project Title:	DEVELOPMENT OF THE OBJECTIVES OF THE INOGATE PROGRAMME IN ROMANIA
Project Number:	RO 9805.01.01-02
Country:	ROMANIA

Project objectives:

The overall objective is to create a legal and regulatory environment conducive to private sector investments in oil and gas transport projects. The specific objectives are:

- analysis of the legal and regulatory framework for oil and gas import, export and transit in Romania;
- development of the legal and regulatory framework for oil and gas import, export and transit to enable investments to be made which will meet the objectives of the INOGATE programme for the development of Caspian Sea oil and gas.

Planned output:

1. Findings of the legislative analysis, including the identification of the problem areas, with an indication of severity, and an explanation of proposed changes to the legislative and regulatory framework.
2. Draft legislative and regulatory texts, including a presentation of guidelines and rationale of the drafting exercise; reference to sources; and a presentation of the proposed texts and their integration in the legal framework.
3. Proposal on content and implementation, containing agreements between stakeholders on the content of proposed legislative framework, and an action plan and timetable for implementation of the said framework.
4. Report on the principal findings of bilateral consultation, as well as a report on the Workshop and its findings; and an account of the changes made between the completion of Task 1 and Task 3.
5. Draft Final Report, containing the final drafts of legislation and the proposed action plan and timetable for implementation. To ensure a smooth follow-up, the Report will also include the Contractor's observations of difficulties encountered in completing the project.
6. Final Report, the final version of the above as approved by the Steering Committee.

Planned input:

313 man-days of EU experts, 195 man-days of local experts.

Project activities:

- Review of existing legislation/regulations;
- Drafting of proposals for new/amended legislation/regulations
- Consultation with stakeholders;
- Final proposals for legislation/regulation.

Project start date:

6th January 2001

Project duration:

6 months

INTRODUCTION - BRIEF PRESENTATION OF THE GUIDELINES AND RATIONALE OF THE DRAFTING EXERCISE

The aim of the present Report is to present the Contractor's initial proposals regarding amendments and additions to the Romanian legislation affecting oil and natural gas transportation in furtherance of the objectives of the INOGATE Programme, namely the facilitation and rationalization of interstate transportation of oil and natural gas from the Caspian Basin to Europe.

The previous Task 1 Report contained the findings of the review and assessment of the existing Romanian legislation on the basis of the requirements of a modern institutional framework offering:

- clear legal regime of foreign investments (including areas such as taxation, labour, customs, foreign exchange, etc.) corresponding to international standards;
- clear legal regime of operation of pipelines and associated installations;
- protection of the environment;
- adequate protection both of the state and public interest and the potential investors;
- minimisation of non-financial risks directly resulting in lower financing costs (and, therefore, lower overall project costs and higher project attraction);
- swift and efficient administrative procedures (licences, opinions etc.);
- efficient and objective mechanism for the resolution of disputes;
- compatibility with EU energy legislation.

It is recalled that the Task 1 Report makes a distinction between the "legal" benchmarks and the "market" benchmarks against which the Romanian legislation has been compared and assessed. The "legal" benchmarks refer to the requirements set out principally by the Energy Charter Treaty and which are mandatory, in the sense that Romania has undertaken the obligation to comply with them and adapt its legislation accordingly. Parallel to the "legal" benchmarks, the "market" benchmarks are institutional and legislative elements and provisions which, although not strictly imposed by an international agreement, are nevertheless important and even crucial for the successful establishment and operation of an interstate oil or natural gas transportation system. The INOGATE Umbrella Agreement institutional system addresses exactly this kind of benchmarks, aiming to fulfill the requirements of the states, investors, contractors, and users involved in such a project in a balanced, clear and efficient way. In other words, the "legal" benchmarks reflect amendments which are imposed from the top down (i.e. international law) and are mandatory whereas the "market" benchmarks refer to elements which are considered by market conditions (i.e. investors, international financial institutions, etc.) but are facultative. It is noted here that "market" benchmarks would also include various forms of investment incentives (such as tax and customs duties exemptions), but the present Report is limited to purely institutional issues, such as legislative provisions which offer adequate guarantees, are sufficiently clear and enforceable, and correspond to international and EU standards.

As a result of the above distinction, the present Report is essentially composed of two major parts: Section I refers to the legislative amendments which are required for the full compliance of Romania with the Energy Charter Treaty institutional system, whereas Section II addresses issues which would facilitate the institutional aspects of the

establishment and operation of interstate hydrocarbon transportation systems in Romania.

The Contractor's approach in proposing the changes deemed necessary has been:

- *Minimalist*, in the sense that the changes have been formulated in a way limiting their possible repercussions to already existing legislation to the maximum possible degree, in order not to create undue disturbance in the Romanian legal order;
- *Integrated*, in the sense that the changes proposed have taken into account the existing legislation and blend in harmony with existing laws;
- *Realistic*, in the sense that the capacity of the Romanian legislative and administrative mechanism, as well as the prevailing economic, social and political conditions have been taken into account;
- *Modular*, in that where major changes are proposed, a step-by-step approach, both in terms of content and of time of implementation, is presented to allow for the smooth transition into the new regime.

Particular care has been paid to the rationalisation of the pre-investment phase of an interstate hydrocarbon transportation system, i.e. the phase where the intentions of prospective partners (both on a state and on a commercial level) are explored, the feasibility of a project is assessed and the institutional and contractual framework of the project is worked out. At this sensitive stage, where the risk of the investor is greatest (since there are no guarantees that the project will progress), the Romanian State should move effectively and decisively to streamline the procedures by which it collectively handles such opportunities. This streamlining of the initial phase encompasses:

- the co-ordination of all Ministries and other government agencies, autonomous and regulatory authorities and state-controlled enterprises involved in a proposed project;
- the existence of a procedure of consultation between the above entities under the established initiative of the Ministry of Industry and Resources in order to eliminate duplication of effort or, opposite, delays in response due to unclear delimitation of competence;
- the strengthening of the negotiating power and ability of the Romanian State as a direct result of efficient use of the expertise available at its disposal;
- the offer to investors of a "one-stop shop" procedure by which foreign investors or states interested in the establishment of an interstate hydrocarbon transportation system are informed about the government agency and the procedure they should follow.

It must be noted that the existence of an established procedure for the assessment and further development of proposed projects of interstate hydrocarbon transportation could offer an important comparative advantage to Romania over other states which could host competitive projects. Moreover, Such a co-ordinated response and support on the part of the State will indirectly but certainly assist Romanian enterprises (state-owned or private, which are active in relevant sectors to benefit from the swift and efficient establishment of a major project, such as an interstate hydrocarbon transportation system.

Finally, as already noted in the Inception Report, an element of flexibility of the Contractor's proposals is that the amendments proposed by the Contractor could only be applicable to INOGATE-based projects (as an added incentive for these projects), while

a wider, more systematic harmonisation with the EU and international standards may have a scope and a timetable of implementation independent of that for specific INOGATE projects. This is a matter of choice for the Romanian Government and is a direct result of the capacity of the INOGATE Umbrella Agreement institutional system to form the backbone of an interstate hydrocarbon transportation project even in the absence of a fully developed domestic legal framework.

SECTION I

LEGISLATIVE AMENDMENTS REQUIRED BY THE ENERGY CHARTER TREATY INSTITUTIONAL SYSTEM

I.1 THE OWNERSHIP OF LAND BY FOREIGN PERSONS

I.1.A THE CURRENT SITUATION

Article 41, par. 2 of the Romanian Constitution, Article 3 of the Law 54/98 on the Acquisition of Land and Article 6 of the Emergency Ordinance 92/97 on Direct Investments (approved by the Law 241/98) prohibit the ownership of land in the territory of Romania by foreign legal or natural persons.

However, on the basis of the jurisprudence of the Romanian Constitutional Court, the restriction imposed by the aforementioned legal provisions is greatly tempered in practice through the asserted right of Romanian companies wholly or partly owned or controlled by foreign persons to purchase and own land¹.

I.1.B ASSESSMENT OF THE ISSUE

The first comment to be made is that the above prohibition constitutes a formal breach of the provisions of the Energy Charter Treaty regarding the application of the national treatment principle in the investment stage, i.e. the treatment of foreign investors cannot be worse than the treatment of domestic investors.

Moreover, the right of ownership of real estate may be an important parameter of major infrastructure projects, such as hydrocarbon pipelines, depending on the particular project structure.

On the other hand, the impact of this discriminatory prohibition in practice, as regards the establishment of interstate hydrocarbon transportation systems, is very small, since:

- the vast majority of such projects relies on a concession-based project structure, thereby dispensing with the question of ownership of land;
- the prohibition of ownership can be easily circumvented through the creation of a Romanian company wholly owned by foreign investors.

However, such a sensitive issue should not depend only on the Constitutional Court's case law, due to the fact that the implementation and enforcement of the Court's decisions has reportedly been inconsistent. From another point of view, the Constitutional Court's jurisprudence may also change in future, a fact that may maintain uncertainty.

In view of the above, the Contractor realises that a balance must be sought between the need to conform to the international obligations of Romania and the market requirements for the development of the hydrocarbon transportation sector, on one side, and the understandable sensitivity of the Constitution of Romania regarding ownership of Romanian territory by foreigners, as well as the difficulty and gravity of a Constitutional amendment.

¹ According to the Constitutional Court's Decision 73/1997 "[...] any Romanian legal entity may acquire ownership on land that is essential for the carrying out of its object of activity. [...] Regardless the origin of share capital, the trading companies which have their headquarters in Romania are Romanian nationality entities. [...] No discrimination between Romanian trading companies is acceptable, with respect to the fact that individual associates who incorporated them or hold shares in them are Romanian, foreign citizens or stateless persons."

I.1.C THE CONTRACTOR'S PROPOSAL

Taking into account the aforementioned parameters, the Contractor is of the opinion that the most efficient short-term solution to the issue would be to incorporate the essence of the Constitutional Court's jurisprudence in the provisions of the law, thereby allowing for a practical and clear resolution of the issue in practice.

The Contractor thereby proposes that a provision with the following wording

Any Romanian legal entity, regardless of the origin and distribution of its share capital and the nationality of its shareholders, may acquire ownership of land that is necessary for the fulfillment of its statutory objectives and the carrying out of its legitimate activities.

be adopted either as an amendment of the Law 54/98 on the Acquisition of Land or of the Law on Direct Investments (the existing Law 241/98 or the draft law currently under elaboration) or of both. Another option would be the incorporation of this provision in the proposed draft Law on the Establishment of Interstate Hydrocarbon Transportation Systems in Romania, although this solution is less correct from a systematic point of view than the amendment of the aforementioned laws.

In any case, this is a practical solution which does not formally resolve the issue of incompatibility with the Energy Charter Treaty. Furthermore, the prohibition of ownership of land by foreign persons will have to be abolished at some point in the future, in view of the accession of Romania to the European Union. Therefore, the amendment of the Constitution in that respect is necessary but not urgent.

I.2 THE REFUSAL TO PROVIDE HYDROCARBON TRANSPORTATION SERVICES FOR REASON OF PERFORMANCE OF PUBLIC SERVICES

I.2.A THE CURRENT SITUATION

Article 64³, par. 1d of the Government Decision 1265/1996 on Methodological Norms for the application of the Petroleum Law 134/1995 (as amended by Government Decision 1363/2000) and Article 27, par 1c of Ordinance 60/2000 regarding the regulation of natural gas activities, as amended and completed by the Emergency Ordinance 44/2000, provide for the refusal of provision of hydrocarbon transportation services for reason of performance of public services.

I.2.B ASSESSMENT OF THE ISSUE

Since the Energy Charter Treaty institutional system is aimed at the facilitation of energy transit and the elimination of abusive hindrances to the flow of energy products, the meaning of the term “public services” should be examined to ascertain the limits within which the application of the above provisions could be justified.

I.2.C THE CONTRACTOR’S PROPOSAL

The Contractor is seeking the opinion of the key stakeholders regarding the content of the term “public services” in the context of the above provisions and proposes a reference and discussion of the issue in the upcoming Workshop, which will indicate whether a more specifically worded provision should amend the aforementioned Articles.

SECTION II

LEGISLATIVE AMENDMENTS BENEFITTING THE ESTABLISHMENT AND OPERATION OF INTERSTATE HYDROCARBON TRANSPORTATION SYSTEMS

II.1 THE LEGAL REGIME OF HYDROCARBON PIPELINES

II.1.A THE CURRENT SITUATION

The Petroleum Law 134/95, the Law 213/98 on Public Property and a number of Emergency Ordinances make clear that hydrocarbon transportation pipelines belong to the property of the Romanian state and more specifically to the public domain of the state, meaning that they cannot be sold or alienated.

The first thing to point out regarding this regime is that it is not contradictory to the provisions of the institutional systems of the Energy Charter Treaty and the INOGATE Umbrella Agreement as currently in force. These regimes do not enforce any particular ownership regime and focus, instead, on rules regarding the operation, use and access to hydrocarbon pipelines. In other words, these institutional systems are not "interested" in who owns the pipeline but rather concentrate on how the pipeline is operated in order to ensure the unhindered flow of energy.

Nevertheless, the draft Model Intergovernmental Agreement under elaboration within the framework of the Energy Charter Conference provides for *"the granting of absolute and exclusive rights to land in the [Contracting State's] Territory for such [hydrocarbon transit] Project under clear commercial terms"*. It seems that this provision refers to ownership rights, not allowing third parties access to the land used for a hydrocarbon transit project for any reason and apparently dismissing regimes such as concession. The latter observation is reinforced by the provisions of Article 4 which provides for the access to existing hydrocarbon transportation systems only through the conclusion of transit agreements or the transfer of the ownership itself of such system to investors. Furthermore, the draft Model Host Government Agreement currently negotiated compels for the provision of transit capacity either through transit agreements or through the transfer of ownership of existing systems to investors (again ruling out the possibility of a concession regime arrangement). However, these two texts are still under negotiation and, in any case, they are meant to serve as model texts so the degree of compliance they command is reduced. Nonetheless, the difference between the current provisions of the Romanian legislation and the apparent trends of the Energy Charter Treaty institutional system is hereby noted.

II.1.B ASSESSMENT OF THE ISSUE

The issue of ownership of pipelines may be of importance for future interstate hydrocarbon transportation projects. In other words, whereas the ownership of existing pipelines belongs clearly to the state without causing any problem on the legal and market levels, the ownership of future pipelines may not be as simple a question.

In practice, the possibility of granting a concession over existing pipelines resolves the issue to a great extent, since this is the approach taken in the great majority of cases.

However, it must be noted that the existing legislation concerning the legal regime of pipelines may be open to differing interpretations.

It appears to the Contractor that "pure transit" pipelines, that is, pipelines which transport hydrocarbons across the Romanian territory without discharging any part of their load to

serve domestic Romanian needs, do not fall under the definition of "main" pipelines and, therefore, may be the property of private persons.

Of course, the provisions of the Petroleum Law may lead to the opposite conclusion depending on their editing: *"main pipelines that ensure collection of the petroleum [...] imported and its directing from the points of delivery [...] to export"*. However, the Contractor, based on prior contacts with National Agency for Mineral Resources officials in the framework of previous INOGATE projects, is of the opinion that the distinguishing characteristic of main pipelines is that they serve either domestic production or domestic consumption.

If the above approach is accepted, the problem arises when a pipeline combines the transit of quantities of hydrocarbons with the discharging of parts of its capacity within Romania for the coverage of domestic needs (for the purposes of this distinction, we consider that the discharging of quantities constituting payment in kind of transit fees does not distort the character of a "pure transit" pipeline, since these discharges are not, in the strict sense, aimed at the commercialisation of the transported hydrocarbons within Romania). What is the status of the pipeline then? Conceivably, it is a "main" pipeline, in the terms of the Petroleum Law, since it serves local consumption by providing quantities of hydrocarbons to the Romanian market, and, therefore, should be state-owned.

Another, more remote, interpretation of the Petroleum Law's definition of "main" pipelines may be that it refers to existing pipelines and not to newly-built ones (which, consequently, may be privately-owned).

In any case, the ownership of major pipelines across the Romanian territory is subject to several interpretations, as indicated above, resulting in legal insecurity and, consequently, adding to the uncertainty which may be the difference between the establishment of a pipeline project and its abandonment in favor of a similar project in a neighboring state.

Therefore, the Contractor believes that, although there is no pressing need for the amendment of the legislation dictating the legal status of hydrocarbon pipelines in Romania, the issue of ownership of the pipelines should be the object of further scrutiny and elaboration during the Project Workshop.

II.1.C THE CONTRACTOR'S PROPOSAL

The Contractor considers that the present Project is a good opportunity to discuss possible developments on the issue of pipeline ownership, especially due to the interactive character of the Project and the resulting ability to present proposals and reactions in a forum consisting of all key stakeholders.

In order to facilitate such discussion, the Contractor shall include in the proposed draft Law on the Establishment of Interstate Hydrocarbon Transportation Systems a chapter referring to the legal regime of pipelines which will be self-contained, allowing its removal or amendment without effect to the rest of the proposed draft Law.

II.2 THE CONTROL OF THE COMMON CONVEYER AND OF THE NATURAL GAS CONVEYER OVER FUTURE PIPELINES

II.2.A THE CURRENT SITUATION

Article 64 of the Government Decision 1265/1996 on Methodological Norms for the application of Petroleum Law 134/95 (as amended by Government Decision 1363/2000) provides that the exploitation of the national system of petroleum transportation shall be undertaken by the Common Conveyer following a concession granted by the NAMR to that effect.

It is not yet clear to the Contractor whether the Common Conveyer shall be only one and shall handle all the pipelines comprising the system or whether parts of the system may be the object of separate concessions.

Furthermore, it is also not clear whether the Common Conveyer would automatically take over the exploitation of new petroleum pipelines constructed after the granting of the concession to the Common Conveyer. In other words, the question is: if a new pipeline is constructed (especially an interstate hydrocarbon transportation pipeline), will it have to be operated by the existing Common Conveyer?

A similar situation exists regarding the Natural Gas Conveyer mentioned in the Ordinance 60/2000 regarding the regulation of natural gas activities, as amended and completed by the Emergency Ordinance 44/2000, and the corresponding issues also exist in the natural gas sector.

II.2.B ASSESSMENT OF THE ISSUE

The issue is important when seen in conjunction with the whole question of who may operate a hydrocarbon pipeline on Romanian soil (see also next section for another aspect of the same question). It is also directly related to the question of ownership of hydrocarbon pipelines in Romania (see previous section). If a hydrocarbon pipeline ("main" or other) belongs to the public domain of the state and forms part of the national system of petroleum transportation, then it automatically comes under the control of the already selected Conveyer (Common or Natural Gas): this is understandable for existing pipelines, but it may severely restrict the prospects of establishment of a new pipeline, since an investor may not wish to enter into a mandatory joint venture with the existing Conveyer: a new pipeline may be based on a different ownership / operational structure than existing pipelines.

II.2.C THE CONTRACTOR'S PROPOSAL

In view of the above, the Contractor is, first of all, awaiting an official response on whether there will be a single Conveyer each for the whole petroleum and natural gas transportation systems and, second, whether future pipelines shall automatically come under the purview of the already existing Conveyers. If the answer to these two questions is positive, then the issue will be raised during the Workshop in order to arrive to a proposal on whether to interpret or amend this legal provision in view of the possible problems it may cause to a future pipeline project.

II.3 THE OPERATION OF AN INTERSTATE HYDROCARBON PIPELINE

II.3.A THE CURRENT SITUATION

As mentioned in the previous section, it is highly probable that the whole existing petroleum and natural gas transportation system currently existing in Romania will be operationally assigned by concession to a single operator ("Conveyer") for each type of pipelines.

This situation poses the question whether a future pipeline of either type could possibly be operated by an entity other than the already existing Conveyer: more specifically, in the case of an interstate hydrocarbon transportation system (especially of the type envisaged in the INOGATE Umbrella Agreement institutional system), a common operator of the whole interstate pipeline is the preferred operational approach. However, this international practice could face some problems in view of the existing regime of pipeline operation in Romania, since it could be argued that any pipeline in the Romanian territory would have to be operated by the respective Conveyer and not by some other (possibly with foreign participation) entity.

The problem becomes more complex if we envisage an interstate hydrocarbon transportation system incorporating already existing portions of Romanian pipeline (presumably under the operational control of the respective Conveyer): in that case, and if the common operation of the interstate pipeline approach is followed and accepted by the Romanian side, the Conveyer would have to relinquish operational control to the interstate entity.

II.3.B ASSESSMENT OF THE ISSUE

The questions posed above require a clear answer on the part of the Romanian legislation. It must be clear whether future interstate hydrocarbon transportation systems, whether including existing portions of pipelines or not, can be operated by an entity other than the respective Conveyer which holds the concession provided by the respective legal texts.

It must be underlined that the granting of the possibility of common operation of an interstate pipeline by an entity other than the Conveyer does not necessarily mean that any future pipeline will mandatorily be operated by a common operator but simply that the Romanian legislation clearly allows for such a scenario. The actual decisions regarding the operational structure of an interstate pipeline will belong to the state and commercial entities which will be involved in the planning, establishment and operation of such a pipeline.

II.3.C THE CONTRACTOR'S PROPOSAL

In view of the above, the Contractor proposes the inclusion in the proposed draft Law on the Establishment of Interstate Hydrocarbon Transportation Systems in Romania of a provision clearly allowing for the possibility of concession and/or operation of an interstate hydrocarbon pipeline to an entity other than the Conveyers of the national petroleum transportation system and of the SNT.

II.4 THE APPEAL PROCEDURE FOR THE REFUSAL OF PETROLEUM TRANSPORTATION SERVICES

II.4.A THE CURRENT SITUATION

Article 64³, par. 2 of the Government Decision no. 1265/1996 on Methodological Norms for the application of the Petroleum Law no. 134/1995 (as amended by Government Decision 1363/2000) provides the possibility for an applicant who has been refused by the Common Conveyer to be granted petroleum transportation services to refer such refusal to the NAMR, seeking the reversal of the Common Conveyers refusal.

However, the aforementioned provision is not clear on the procedure to be followed by the NAMR and, especially, does not provide for an appeal before the courts against the NAMR decision on the dispute.

II.4.B ASSESSMENT OF THE ISSUE

Reference to the Law 29/1990 on Administrative Dispute Claims, and especially its par. 1, indicates that the NAMR decision procedure regarding the appeal against the refusal of the Common Conveyer is a previous administrative procedure, against which recourse before the administrative dispute division of the courts is allowed. A contrary interpretation would constitute a violation of Article 21 of the Romanian Constitution regarding the unrestricted access to justice.

It must be emphasized that according to Article 125, par.1 of the Romanian Constitution, justice is to be rendered by the Supreme Court of Justice and the other courts established by the law. Therefore, the common courts have jurisdiction over disputes, whenever a *special law* does not expressly stipulate the jurisdiction of other institutions. This constitutional provision refers to the law in its narrow sense, as an act of the Parliament, and not to other legal instruments, such as a decision issued by the Government for the purpose of implementing a law.

In this respect, it should be mentioned that the Petroleum Law no. 134/1995, does not stipulate any provision with respect to the procedure before NAMR. Moreover, Article 36 regarding the NAMR competence does not contain a specific regulation on the power of the NAMR to resolve any dispute between the Common Conveyer and the applicant, related to the refusal to provide services of petroleum transportation. Following the above constitutional provision, the Petroleum Law itself has to expressly provide the special jurisdiction of the NAMR.

II.4.C THE CONTRACTOR'S PROPOSAL

In view of the above, the contractor proposes:

The amendment of Article 36 of the Petroleum Law, by adding letter l) as follows:

l) settles disputes between the common conveyor and the applicant, in respect to the common conveyor's refusal to provide services of petroleum transportation.

and the amendment of Article 64³, par. 2, of the Government Decision no. 1265/1996 on Methodological Norms for the application of the Petroleum Law no. 134/1995 (as amended by Government Decision 1363/2000) to read as follows:

Any refusal of the common conveyer to provide services of petroleum transportation shall be duly justified and promptly communicated in writing to the applicant and the National Agency of Mineral Resources. The applicant may appeal the refusal before the National Agency of Mineral Resources, which shall issue its decision on the dispute within 30 days. Also the National Agency of Mineral Resources may scrutinise by own initiative the cases of refusal of services by the common conveyer. The decision of the National Agency of Mineral Resources may be appealed before the administrative division of the Court of Appeals, by either the Common Conveyer or the applicant, according to Civil Procedure Code. The unjustified refusal of the common conveyer for provision of services of petroleum transportation shall entail its civil liability.

II.5 THE CAPACITY OF THE NATURAL GAS CONVEYER TO TRADE

II.5.A THE CURRENT SITUATION

Article 12 of the Ordinance 60/2000 regarding the regulation of natural gas activities, as amended and completed by the Emergency Ordinance 44/2000, indicates that the Natural Gas Conveyer may also buy and sell natural gas.

II.5.B ASSESSMENT OF THE SITUATION

Although not a violation of either the Energy Charter Treaty nor the Umbrella Agreement institutional systems, the involvement of the operator of natural gas transmission pipelines in the actual trading of natural gas goes against the recent trends towards the unbundling of transportation and trade activities in favor of transparency and increased guarantees of independence and objectivity of the gas pipeline operator.

It is noteworthy that this mandatory distinction between the operator of a pipeline and the producers/traders of petroleum is imposed by Article 64¹ of the Government Decision 1265/1996 on Methodological Norms for the application of the Petroleum Law 134/95, as amended by Government Decision 1363/2000, regarding petroleum pipelines.

Finally, the establishment of TRANSGAZ SA following the division of ROMGAZ SA according to Government Decision 334/2000 is a further indication that the distinction between transportation and trade of natural gas in Romania may be ready to be adopted.

II.5.C THE CONTRACTOR'S PROPOSAL

Although not an urgent issue, it is the opinion of the Contractor that the possibility of such distinction should be discussed with the key stakeholders with the view of adopting (probably as an amendment of Article 9 of the Ordinance 60/2000) similar provisions to the ones applicable to the petroleum common conveyer:

1. The natural gas conveyer must not:
 - a) be controlled by any natural or legal persons directly or indirectly involved in marketing of natural gas in Romania by owning shares or stock shares or other manner of control by a management contract or any other method which is reasonably deemed as causing conflict of interests that may endanger the transparency and lack of discrimination of the natural gas transportation services;
 - b) be simultaneously controlled by any legal or natural persons which have control or are able to control the legal or natural persons provided by the above letter a) by owning shares or stock shares or other method of control which is reasonably deemed as causing conflict of interests that may endanger the transparency and lack of discrimination of the natural gas transportation services.
2. The natural gas conveyer shall neither directly or indirectly be involved in marketing nor own shares or stock shares or by a management contract which involve the persons provided by paragraph 1) above, or any other

method which is reasonably deemed as causing conflict of interests that may endanger the lack of discrimination of the services performed by the natural gas conveyer.

3. If the events stipulated by paragraph 1) or 2) occur after the authorisation/licence to the natural gas conveyer has been issued, this authorisation/licence shall be terminated according to the law in force.

II.6 THE MODEL NATURAL GAS TRANSIT AGREEMENT BY THE ANRGN

II.6.A THE CURRENT SITUATION

According to Article 15 of Ordinance 60/2000, transit agreements between the operator (= concessionaire) of the natural gas transportation system (SNT) will be based on the model agreement issued by the ANRGN.

Such a model agreement has not yet been issued, and the state of its elaboration is not yet known to the Contractor.

II.6.B ASSESSMENT OF THE ISSUE

It is probable that the Model Agreement will be closely based on the Draft Model Transit Transportation Agreement currently under elaboration within the framework of the Energy Charter Treaty; therefore, the ANRGN will issue its Model Agreement in due time, after the negotiations on the Energy Charter Treaty Forum have been completed.

II.6.C THE CONTRACTOR'S PROPOSAL

The ANRGN should provide information, either before or during the Workshop, regarding the state of elaboration of the Model Agreement as well as an assessment whether said Model Agreement will be available before market developments in the natural gas sector make its existence necessary.

Moreover, the degree of conformity of the Model Agreement with the Energy Charter Treaty principles must be examined and amendments made, if necessary.

II.7 THE DEFINITION OF “SECONDARY OFFICE”

II.7.A THE CURRENT SITUATION

Article 58, par. 7 of Ordinance 60/2000 regarding the regulation of natural gas activities, amended and completed by the Emergency Ordinance 44/2000 refers to the establishment of a secondary office by applicants who do not have a permanent office in Romania.

Through this secondary office, the applicants fulfill a basic requirement imposed by the Ordinance in order to be eligible for an authorisation to create new capacity for production, transportation, storage and distribution of natural gas, or to rehabilitate and modernise existing capacities.

II.7.B ASSESSMENT OF THE ISSUE

Since the eligibility of foreign applicants for projects of that scope is of great importance, it is imperative that no margin for error or misinterpretation of the aforementioned provision exists and that a clear definition of “secondary office” be provided by the Ordinance itself.

II.6.C THE CONTRACTOR’S PROPOSAL

In view of the above, the Contractor proposes the amendment of article 58 par. 7 of Ordinance 60/2000 regarding the regulation of natural gas activities, amended and completed by the Emergency Ordinance 44/2000, as follows:

<p>The applicant which does not have a permanent office in Romania may legally establish and maintain, in accordance with the Trading Companies Law 31/90, a secondary office – agency, representation or other similar offices – for the entire duration of the authorization and/or license.</p>
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II.8 THE COURT JURISDICTION OVER THE ISSUES OF USE OF THE PROPERTY OF THIRD PERSONS BY A NATURAL GAS CONCESSIONAIRE

II.8.A THE CURRENT SITUATION

Article 76, par. 2 of the Ordinance 60/2000 regarding the regulation of natural gas activities, as amended and completed by the Emergency Ordinance 44/2000, provides for court jurisdiction over issues of use of the property of third person by a natural gas concessionaire, without determining whether administrative or common courts are competent.

II.8.B ASSESSMENT OF THE ISSUE

Due to the fact that the concessionaire mainly falls under the jurisdiction of the Administrative Dispute Claims Law, involving administrative courts, while private persons are free to refer to common courts, there exists a need to clarify and determine which courts are competent to try the particular kind of case.

Both, concessionaire and the private owner are private law persons and, therefore, the jurisdiction over the eventual litigation between them belongs to the common court. More importantly, the subject of this specific action, namely the right of use and servitude over the private property land, is directly connected to the Civil Law, which is the domain of common courts.

II.8.C THE CONTRACTOR'S PROPOSAL

In view of the above, the Contractor proposes the amendment of Article 76, par. 2 of the Ordinance 60/2000 to read as follows:

<p>If the agreement provided in par. (1) between the concessionaire and the owner or, as the case may be, the holder of the activity provided in art. 70 letter d), at the request of the concessionaire the common court shall issue a decision which is executive for the rights provided in par. (1).</p>
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II.9 THE EXPROPRIATION PROCEDURES

II.9.A THE CURRENT SITUATION

Law 33/1994 on Expropriation of Real Estate for a Public Interest Purpose provides for an expropriation procedure, the administrative portion of which may last up to a total of 130 days plus whatever amount of time a possible court involvement may require.

II.9.B ASSESSMENT OF THE ISSUE

While expropriation is a state act of very important consequence and the legal protection allowed to the owners of the real estate under expropriation must be correspondingly high, it must be noted that lengthy expropriation procedures are a deterrent to investment in major infrastructure projects based on the availability and clear legal title to large tracts of land, such as interstate hydrocarbon transportation systems.

On the other hand, while it is possible to provide strict time limits to the administrative portion of the procedure, such an approach is not as easy regarding the court procedures, which by definition cannot be obliged to review a case within a specified deadline. It must be noted that in several European jurisdictions, even in the case where a law provides that a court should review a particular type of case within a specific time frame, the court jurisprudence has interpreted such provisions as expressing a wish of the drafter of the law rather than an enforceable obligation of the courts.

II.9.C THE CONTRACTOR'S PROPOSAL

In view of the above, the Contractor proposes to include in the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania a provision granting priority to the handling of expropriation issues related to the establishment of a hydrocarbon transportation project by administrative and court authorities.

II.10 THE UMBRELLA AGREEMENT AUTHORISED COMPETENT ENTITY

II.10.A THE CURRENT SITUATION

The INOGATE Umbrella Agreement provides in its Article 13:

1. Each Party shall designate and notify to the other Parties the national authority, agency, state-owned enterprise or any other authorised legal entity, which will be responsible, according to its national legislation, for the implementation of the present Agreement in each one of the sectors (oil and gas) covered by this Agreement.

2. The Parties accept and guarantee the obligations undertaken by these entities for the implementation of the present Agreement and the Protocols subsequently annexed herein, as their own obligations.

The aim of this provision is to provide a clearly defined representative of each of the states parties to the Agreement in order to allow for swift and efficient initial discussions regarding possible projects, without having to waste effort and time in identifying the competent interlocutor on the part of each state. In other words, a state or a potential investor interested in exploring the possibility of establishing an interstate hydrocarbon transportation system will know in advance which Romanian authority or agency to contact in order to begin the examination of the projects of the project.

This approach, which has already been tried and developed in practice in evolving INOGATE Umbrella-Agreement projects, avoids administrative overlaps, bureaucratic delays and the spreading of responsibility and initiative which can prove very detrimental to the establishment of a project, as project proposals usually take excessive time before they arrive to the proper channels and authorities to be seriously and effectively examined and developed.

The above INOGATE Umbrella Agreement provision is one of the few articles which impose a specific obligation to be fulfilled within a reasonable time by the signatory states. However, to this date no notification of the Authorised Competent Entity (-ies) has been delivered to the Depositary of the Agreement.

It must, furthermore, be noted that the above "one-stop shop" approach to the beginning of the negotiations for the establishment of an interstate hydrocarbon transportation system is not only applicable to INOGATE-based projects but may also be used for any hydrocarbon transportation project. In the next section, the procedure of handling a proposed interstate hydrocarbon transportation project on the part of the Romanian state will be further discussed and analysed; the nomination of the Authorised Competent Entity (-ies) is only the first step of such a procedure.

II.10.B ASSESSMENT OF THE ISSUE

As noted above, the issue will have to be resolved in the near term, as it regards a pending obligation of Romania undertaken by its signature of the INOGATE Umbrella Agreement.

This is also an opportunity to appoint an authority as the starting contact on the part of the Romanian government for any interstate hydrocarbon transportation system (regardless of whether it is an INOGATE-based project or not).

II.10.C THE CONTRACTOR'S PROPOSAL

The Contractor's proposal is incorporated in the attached draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania.

Following discussions with the key stakeholders, the Contractor is of the opinion that the Ministry of Industry and Resources should be appointed as the Authorised Competent Entity for both oil and natural gas projects based on the INOGATE Umbrella Agreement, due to its overall control of the energy sector in Romania.

Another option could be the appointment of the NAMR as the Authorised Competent Entity for oil projects and of the ANRGN for natural gas projects, although the role envisaged for the Authorised Competent Entity (that of representation towards third parties and of co-ordination of the Romanian state entities involved in a proposed project - see next section) would be better served by a single entity of Ministry level having the powers and the administrative capacity to act as the head of a group of state institutions and agencies handling the initial stages of development of a hydrocarbon transportation project.

Such an appointment may also be done independently by a Government Decision to that effect (for example, in the case where the adoption of the proposed draft Law is expected to take too much time). In that case, text of the Government Decision would be as follows:

GOVERNMENT DECISION No __ ON THE NOMINATION OF THE
MINISTRY OF INDUSRTY AND RESOURCES AS THE AUTHORISED
COMPETENT ENTITY FOR THE PURPOSES OF THE INOGATE
UMBRELLA AGREEMENT ON THE INSTITUTIONAL FRAMEWORK FOR
THE ESTABLISHMENT OF INTERSTATE OIL AND GAS
TRANSPORTATION SYSTEMS

ISSUER:
PUBLISHED:

The Romanian Government hereby decides:

SOLE ARTICLE

1. The Ministry of Industry and Resources is nominated as the Authorised Competent Entity representing both petroleum and natural gas sectors for the purposes of the INOGATE Umbrella Agreement on the Institutional Framework for the Establishment of Interstate Oil and Gas Transportation System.

2. The General Directorate for Oil and Gas of the Ministry of Industry and Resources shall handle contacts with the Depositary of the Agreement, other signatory States and parties interested in the implementation of the Agreement and the establishment of interstate hydrocarbon transportation systems in the territory of Romania.
3. The Ministry of Industry and Resources shall submit to the Government a yearly report on the discharge of the tasks mentioned herein.

Signatures - countersignatures

and the text of the notification of the appointment of the Authorised Competent Entity to the INOGATE Umbrella Agreement Depositary would be as follows:

Ministry of Foreign Affairs of Romania

To the Depositary
of the INOGATE Umbrella Agreement on the Institutional Framework for the
Establishment of Interstate Oil and Gas Transportation Systems
Ministry of Foreign Affairs of the Republic of Ukraine
Kiev

NOTIFICATION UNDER ART. 13.1

Pursuant to the provisions of Article 13, par. 1 of the INOGATE Umbrella Agreement on the Institutional Framework for the Establishment of Interstate Oil and Gas Transportation Systems signed and ratified by Romania, we hereby inform the Depositary and the States-Parties that the Authorised Competent Entity for both oil and natural gas sectors shall be the Ministry for Industry and Resources.

The Minister of Foreign Affairs

II.11 THE PROCEDURE FOR THE INITIATION OF INTERSTATE HYDROCARBON TRANSPORTATION PROJECTS

II.11.A THE CURRENT SITUATION

Romania is eager to put its strategic geographical location as well as its experience and know-how of hydrocarbon exploitation operations to full use in order to secure the passage of energy corridors servicing the needs of the region and of the European Union through its territory.

Recent developments have re-invigorated the prospects of major hydrocarbon transportation systems requiring Romanian involvement, among which the most promising seems to be the proposed Constanta – Omisalj oil pipeline currently negotiated under the auspices of the INOGATE Programme.

Similar projects may be developed in the future, requiring a clear and uniform procedure of handling of their initial stages on the part of the Romanian state in order to rationalise the pre-investment stage and minimise its cost in terms of money and time, to limit risk and maximise the co-ordination of various state agencies and organs involved in a hydrocarbon transportation project.

II.11.B ASSESSMENT OF THE ISSUE

In other words, Romania would benefit from the existence of a “game plan” on handling proposals on interstate hydrocarbon transportation projects in an organised manner, clearly describing the stages of project assessment and planning on the part of the state, as well as each state entity’s role and actions in that respect.

It must be underlined that the pre-investment stage is the most critical and, relatively, the most expensive phase of a project since effort and money are spent on a proposal whose merits and possibility of success are not yet clear. For that reason, a foreign investor seeks the most rapid, efficient and clear procedure of conferring with the competent entities and agencies of the state in order to become familiar with the financial, technical, legal and political parameters prevailing in that state.

On the other hand, a state with a developed legislation offering adequate guarantees and incentives and also, equally importantly, clear and efficient procedures of co-operation with state entities will gain a competitive advantage over other states (which may be the hosts of similar/alternative projects), thereby greatly increasing their chances of being involved in major interstate projects.

II.11.C THE CONTRACTOR’S PROPOSAL

To that end, the Contractor proposes the establishment of a procedure regarding the initial handling of a proposed interstate hydrocarbon transportation project for the first stage of assessment of the project, namely:

- the assessment of the desirability of the project and the proposed partners (states, companies, financiers etc.)
- the initial examination of technical parameters of the project
- the handling of preliminary negotiations, especially on the state-to-state level

- the creation of a working group to provide expert input and a forum for the co-operation among the prospective partners.

In this way, the Romanian state not only will improve its “project-friendliness” but will also offer significant assistance to Romanian companies active in the field of hydrocarbon transportation to become parts of major interstate projects.

The procedure proposed does not aim to be a rigid set of steps but rather a series of guidelines based on international practice and taking full advantage of existing mechanisms, such as the INOGATE Umbrella Agreement. It aims to provide a clear starting point for the establishment of interstate hydrocarbon transportation systems and to facilitate the contact with other states or investors interested to create such systems in the region. When the initial groundwork has been laid on a state level, the development of the project may move to the commercial level.

The Contractor’s proposal is incorporated in the draft Law on the Establishment of Interstate Transportation Systems in Romania and will be the object of consultation with the key stakeholders before and during the Project Workshop.

II.12 THE SECURITY GRANTED TO FINANCING INSTITUTIONS

II.12.A THE CURRENT SITUATION

Law 219/98 on Concessions expressly prohibits in Article 28, par.6, the total or partial transfer or assignment of the concession's object to a third party.

II.12.B ASSESSMENT OF THE ISSUE

Although it is perfectly understandable that the concession agreement (especially of a major project having strategic ramifications, such as an interstate hydrocarbon transportation project) cannot be freely transferable by the concessionaire, it must be noted that, since in most such projects financing is provided at least in part by banks and international financial institutions, these lenders require some sort of security over the assets of the receiver of the loan (typically the concessionaire/operator of the hydrocarbon transportation system). The loan agreements, therefore, typically include the assignment of the project to the lenders in the case of default of the loan payment. These lenders, strictly speaking, do not have the technical capacity to operate the system themselves and, therefore, it could be argued that they cannot be the transferees of the concession agreement over the hydrocarbon transportation system. On the other hand, without this kind of security offered, the possibility of financing becomes slimmer the larger (and more costly) the project is.

II.12.C THE CONTRACTOR'S PROPOSAL

In view of the above, the Contractor proposes to include in the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania a provision specifically providing for the possibility of transfer by assignment of the concession agreement as security for the granting of a loan for the establishment of an interstate hydrocarbon transportation system.

SECTION III

TABLES AND ANNEXES

ISSUE	LEGISLATIVE ACT	ART.	COMMENT / PROPOSAL
Foreign persons may not own land in Romania	Constitution Land Acquisition Law 54/98 Direct Investments Law 241/98	41(2) 3	<ul style="list-style-type: none"> • Contrary to the national treatment principle of the ECT • Small impact in practice • PROPOSAL: to reinforce by legislative provision the existing Constitutional Court jurisprudence that companies established in Romania may own land regardless of their ownership structure • PROPOSAL: to note the contradiction with the ECT and invite the future amendment of the provisions, especially in view of future EU membership of Romania
Refusal of transportation services of oil for reason of performance of public services	Gov. Decision 1265/1996 as amended by Gov. Decision 1363/2000	64^3, par. 1d	<ul style="list-style-type: none"> • The definition of “public services” is not clear and may lead to ECT violations • The Contractor has requested feedback from the stakeholders regarding their interpretation of the term • PROPOSAL: to discuss the issue at the workshop and, if necessary, propose a definition compatible with the ECT and amend the existing GD accordingly
Refusal of access to the SNT in case of hindrance to the provision of public services	Ordinance 60/2000 as amended by Ordinance 44/2000	27(1)c	<ul style="list-style-type: none"> • The definition of “public services” is not clear and may lead to ECT violations • The Contractor has requested feedback from the stakeholders regarding their interpretation of the term • PROPOSAL: to discuss the issue at the workshop and, if necessary, propose a definition compatible with the ECT and amend the existing GD accordingly
Hydrocarbon pipelines belong to the public domain state property	Petroleum Law 134/95 and Public Property Law 213/98	8	<ul style="list-style-type: none"> • PROPOSAL: to discuss the issue of ownership of pipelines (especially future) at the workshop • PROPOSAL: the Contractor will include a self-contained chapter on the legal regime of pipelines on the proposed draft Law on the Establishment of Interstate Transportation Systems in Romania

ISSUE	LEGISLATIVE ACT	ART.	COMMENT / PROPOSAL
Do the Common Conveyer of the national system of petroleum transportation and the Natural Gas Conveyer of the SNT control the exploitation of future pipelines?	Gov. Decision 1265/1996 as amended by Gov. Decision 1363/2000 Ordinance 60/2000 as amended by Ordinance 44/2000	64 9	<ul style="list-style-type: none"> • The Contractor has requested feedback from the stakeholders regarding their interpretation of the provisions • PROPOSAL: to discuss the issue at the workshop
Can the operation of the Romanian portion of an interstate oil pipeline be assigned to an entity other than the Common Conveyer?	Gov. Decision 1265/1996 as amended by Gov. Decision 1363/2000	64	<ul style="list-style-type: none"> • PROPOSAL: The issue must be addressed by the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania (see text of the Report)
Appeal for the refusal of transportation services to the NAMR	Gov. Decision 1265/1996 as amended by Gov. Decision 1363/2000	64 [^] 3, par. 2	<ul style="list-style-type: none"> • The possibility of a second-level appeal to the courts against the NAMR decision must be provided
The NG Conveyer may trade natural gas	Ordinance 60/2000 as amended by Ordinance 44/2000	12	<ul style="list-style-type: none"> • The unbundling of NG transportation services from the actual trade of NG (as in the case of oil) is an international trend • PROPOSAL: to discuss the issue at the workshop and, if agreed, to introduce provisions ensuring the independence of the NG Conveyer following the wording of GD 1265/1996
Model NG Transit Agreement issued by the ANRGN	Ordinance 60/2000 as amended by Ordinance 44/2000	15	<ul style="list-style-type: none"> • The Contractor has requested from the ANRGN information regarding the state of progress of drafting the Model • The provisions of the Model Agreement must correspond to the provisions of the ECT institutional system
Definition of "secondary office"	Ordinance 60/2000 as amended by Ordinance 44/2000	58(7)	<ul style="list-style-type: none"> • PROPOSAL: Amendment of the article to incorporate the definition contained in Trading Companies Law 31/1990
Court jurisdiction over disputes between the NG concessionaire and third persons over the latter's property use	Ordinance 60/2000 as amended by Ordinance 44/2000	76	<ul style="list-style-type: none"> • PROPOSAL: Amendment of the article to refer the dispute to the common courts

ISSUE	LEGISLATIVE ACT	ART.	COMMENT / PROPOSAL
Lengthy expropriation procedures	Law 33/1994 on Expropriation of Real Estate for a Public Interest Purpose		<ul style="list-style-type: none"> • PROPOSAL: Priority to the administrative and court handling of project-related expropriations should be provided by the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania (see text of the Report)
Lack of an appointed authority to co-ordinate the negotiations between the state and prospective pipeline investors/operators			<ul style="list-style-type: none"> • PROPOSAL: The issue must be addressed by the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania (see text of the Report)
Lack of a uniform procedure for the initial planning and negotiation of hydrocarbon transportation projects			<ul style="list-style-type: none"> • PROPOSAL: The issue must be addressed by the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania (see text of the Report)
Possibility of assignment of the petroleum concession contract to financing institutions			<ul style="list-style-type: none"> • PROPOSAL: The issue must be addressed by the draft Law for the Establishment of Interstate Hydrocarbon Transportation Systems in Romania (see text of the Report)