INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

GABRIEL RESOURCES

AND GABRIEL RESOURCES (JERSEY) LTD.

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

RESPONDENT'S COUNTER-MEMORIAL

22 February 2018

LALIVE

LEAUA & ASOCIATII

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

Term	Definition
1998 Mining Law	Mining Law 61/1998
2003 Mining Law	Mining Law 85/2003
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter
ADC	Archaeological Discharge Certificate
Alburnus Maior	*Asociaţia Aurarilor Alburnus Maior Roşia Montană,* an NGO established by Roşia Montană residents in September 2000 to represent the interests of families in Roşia Montană and Bucium *vis-à-vis* the Project
ANAF	Romanian National Agency of Fiscal Administration (*Agenţia Naţională de Administrare Fiscală*)
ANAR	National Administration of Romanian Waters (*Administraţia Naţională Apele Române*)
BITs	The Canada-Romania BIT and the UK-Romania BIT
Bucium Applications	RMGC's applications for the Bucium exploitation licenses submitted to NAMR on 11 October 2007
Bucium Exploration License	Concession License for Exploration within the "Bucium Complex" Perimeter No. 218/1999
Claimants	Gabriel Canada and Gabriel Jersey
CNA	National Council for Audiovisual (*Consiliul Naţional Al Audiovizualului*)
County Council	Deliberative authority of the local public administration of a county
Cultural Management Plan	RMGC's proposed mitigation measures for the cultural heritage, as set out in the EIA Report.
Cuprumin	SC Cupru Min SA
DCF	Discounted cash flow analysis

Term	Definition
Department for Infrastructure Projects	Department for Infrastructure Projects of National Interest and Foreign Investments
DGAF	Fiscal Antifraud Directorate General of ANAF ("*Direcţia Generală Antifraudă Fiscală*")
EIA	Environmental Impact Assessment
EIA Directive	Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, 85/337/EEC, No. L 145/40
EIA Procedure	Procedure for the environmental impact assessment of construction projects for purposes of obtaining an environmental permit
EIA Report	Report on Environmental Impact Assessment Study
EPA	Environmental Protection Agency. Among the EPAs organized at the local level, the agency initially territorially responsible for projects at Roşia Montană was the Alba EPA; following the reorganization of the regional environment protection agencies into county agencies, the Sibiu EPA became involved in its place.
Espoo Convention	Convention on Environmental Impact Assessment in a Transboundary Context
EU	European Union
FET	Fair and equitable treatment
FPS	Full protection and security
Gabriel Canada	Gabriel Resources Ltd.
Gabriel Jersey	Gabriel Resources (Jersey) Ltd
GD	Government Decision
GEO	Government Emergency Decision
GO	Government Ordinance
ICDER	The Independent Centre for the Development of Environmental Resources (*Centrul Independent pentru Dezvoltarea Resurselor de Mediu*)

Term	Definition
ICOMOS	International Council on Monuments and Sites
IGIE Report	Report of the Independent Group of International Experts dated 15 November 2006
IFC	International Finance Corp.
IGIE	Independent Group of International Experts
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Joint Special Committee	Joint committee of the Chamber of Deputies and of the Senate established on 17 September 2013 to review the bill and to draft a report for the debate in the plenary sessions of each chamber
License	Roşia Montană exploitation license No. 47/1999
License Area	Area within the License perimeter also corresponding to the industrial area of Roşia Montană
Local Council	The deliberative authority of the municipality
Memorial	Claimants' Memorial on the Merits dated 30 June 2017
MFN clause	Most Favored Nation clause
Minvest	This name designates both Regia Autonomă a Cuprului Deva (which became Companiei Nationale a Cuprului, Aurului si Fierului "Minvest" S.A. in 1998) and SC Minvest Roşia Montană SA, a new company established in October 2013, to which Regia Autonomă a Cuprului Deva transferred some of its assets and liabilities, including its shares in RMGC
NAMR	National Agency for Mineral Resources (*Agentia Nationala pentru Resurse Minerale*)
Negotiation commission	Governmental commission was established in May 2013 to negotiate with RMGC the implementation of the Project
NGO	Non Governmental Organization
Orlea Research Project	Project of Archaeological Research within Orlea Massif prepared (upon instruction from RMGC) and submitted by the National Museum of History to the Ministry of Culture

Term	Definition
PETI	EU Parliament Committee on Petitions
P/NAV	Price to net asset value
Project	The Roşia Montană Project
Project Area	Area within the License perimeter corresponding to the industrial area of the PUZ
PUD	Detailed Urban Plan (*planul urbanistic de detaliu*)
PUG	General Urban Plan (*planul urbanistic general*)
PUZ	Zonal Urban Plan (*planul urbanistic zonal*)
Regulations	Regulation on the working procedure of commissions set up to conduct the prior assessment of the public utility declaration, as approved by GD 583/1994
RMGC	SC Roşia Montană Gold Corporation SA
Romanian Supreme Court	Romanian High Court of Cassation and Justice (*Ċnalta Curte de Casaţie ĸi Justiţie*), formerly Supreme Court of Justice (Curtea Supremă de Justiție)
Roşia Montană Law	Draft Law on certain measures regarding the mining of gold and silver ores in the Roşia Montană perimeter and on stimulating and facilitating the development of mining activities in Romania submitted by the Government to Parliament in August 2013
RRAP	Resettlement and Relocation Action Plan
SEA	Strategic Environmental Assessment
SEA Directive	Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment
SEA Procedure	Procedure for the environmental impact assessments of urban plans (such as a PUZ)
TAC	Technical Advisory Committee
TMF	Tailings Management Facility

Term	Definition
UC	Urban Certificate
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
Waste Management Directive	Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waster from extractive industries and amending Directive 2004/35/EC

1 INTRODUCTION

1 This dispute arises out of a mining project in Roşia Montană, a Transylvanian village that has become a household name throughout Romania and beyond, largely as a result of the events out of which this arbitration arises. The claim is brought by Gabriel Resources Ltd. ("**Gabriel Canada**"), a junior mining company, with no prior experience in mining and no current activity other than the development and the promotion of the Roşia Montană project (the "**Project**"). Gabriel Canada has brought this arbitration with its allegedly indirectly owned subsidiary based in the Isle of Jersey, Gabriel Resources (Jersey) Ltd. ("**Gabriel Jersey**," and together with Gabriel Canada, the "**Claimants**") – a mailbox company with no apparent business activity.

2 Gabriel Canada's claims are brought under the bilateral investment treaty between Canada and Romania (the "**Canada-Romania BIT**"), whereas Gabriel Jersey's claims are based on the bilateral investment treaty between the United Kingdom and Romania (the "**UK-Romania BIT**" and, together with the Canada-Romania BIT, the "**BITs**"). Gabriel Jersey's claims are wholly artificial as it has never actively participated in the Project and appears to have been brought in as a claimant in an attempt to benefit from the less detailed – but not necessarily less restrictive – jurisdictional provisions of the UK-Romania BIT.

3 The Claimants attempt to portray this dispute as a struggle opposing a foreign investor and the State, where the State allegedly frustrated the Claimants' efforts to develop the Project, in particular by allegedly "blocking" the completion of the environmental impact assessment ("**EIA**") process.[1] The facts tell a very different story.

4 The Claimants have only themselves to blame for the stalemate where they found themselves, having failed to secure what any reputable international mining company recognizes to be a fundamental requirement for the development of any large-scale mining project – the social license to develop

[1] See *e.g.* Memorial, p. 6 (para. 21).

and operate. The Claimants also failed to obtain and present all of the information and documentation required to complete the EIA Review Process, largely as a result of court challenges brought by several non-governmental organizations ("**NGO**s"), including Alburnus Maior, a home-grown NGO created by residents of Roşia Montană. These challenges largely resulted from the Claimants' mismanagement of their relationship with the local community and other stakeholders.

5 In attempting to shift the blame for their failures to the Respondent, the Claimants fundamentally mispresent the role and actions of the State *vis-¨-vis* the Project. The Claimants and the State have a shared economic interest in the venture through SC Roşia Montană Gold Corporation SA ("**RMGC**"), a joint venture created in 1997 with the Romanian state-owned entity Regia Autonomă a Cuprului Deva ("**Minvest**"). Since then, Minvest and other State entities have collaborated with the Claimants with the common goal to develop the Project. For over ten years, State authorities have repeatedly issued various administrative deeds and permits for the Project and in turn defended them in court.

6 In their Memorial, the Claimants are virtually silent regarding the social resistance to the Project and the extensive NGO challenges, which are summarized in **Annex IV** to this Counter-Memorial.

7 By any measure, the Project is massive and would have a major social and environmental impact. It would entail the relocation of Roşia Montană and its roughly 880 families and 2,000 inhabitants. With the exception of the historical village center, which RMGC undertook to preserve, Roşia Montană would be transformed into a mining site of nearly 24 square kilometers, larger than the Geneva city area and one-fourth the size of Paris. This was understandably a concern to the local population, even when taking into account the jobs the Project would create.

8 The Project would see a departure from the traditional mining methods and practices of the past. While gold has been mined in the region for some 2,000 years, RMGC hoped to extract, through the use of more developed, industrial-scale technologies and subject to fluctuating world gold prices, roughly 300 tons of gold that it estimated could be economically extracted

in a mere sixteen years. The financial benefits, including jobs, that the Project could therefore offer to the local population were limited in time and did not even cover one generation – a factor which understandably complicated the Claimants' efforts to obtain the social license.

9 The Project envisaged the leveling of the four mountains surrounding Roşia Montană – Cârnic, Cetate, Jig, and Orlea – which would become quarry pits and result in the destruction of over 100 kilometers of underground galleries, including seven kilometers of exceptional Roman mine galleries. The rock from the quarries would be transported by truck to a plant, where it would be treated with a chemical solution containing cyanide. After extraction of the gold, the left-over waste, called the tailings, would be kept in a 300-hectare tailings pond in the Corna Valley, behind a dam 185 meters high – the highest dam ever built in Romania and taller than the Washington Monument. The substantial environmental impact of the Project further contributed to the social resistance that first built up locally and subsequently grew into a social movement of national and even international dimensions.

10 Many residents have refused to relocate from the Project area – a risk that RMGC assumed and a phenomenon over which State authorities have no control. The Claimants' assertion that the local community "overwhelmingly and passionately supported the Project" is misplaced, given the constant drumbeat of opposition to the Project since as early as 2002.[2] While many local residents supported the Project, many did not – and the number of those who did not substantially increased over the years.

11 The Project came about at a time of significant transition for Romania. Following the collapse of the Communist regime, Romania became an Associated State of the European Union in 1995, an Acceding Country in 2004, and a full member on 1 January 2007. Thus, when RMGC acquired the Roşia Montană License in 2000 (the "**License**"), Romania was advancing towards EU accession and a transformation of its legal and regulatory framework, including its environmental laws and regulations. The Project

[2] Memorial at p. 3 (para. 11).

was developed, and the application for environmental permit filed, in the context of this evolving regulatory framework.

12 The Claimants largely ignore the broader social, economic, and environmental context of the Project and focus on events during the period from August 2011 to June 2014, when the Respondent was allegedly ready but failed to issue the environmental permit for the Project. The Claimants contend that the Respondent's conduct during this period resulted in a number of alleged treaty breaches, including expropriation of their alleged investment.

13 However, the Tribunal need not reach these issues since the claims fail on jurisdiction. The Claimants have failed to produce even elementary evidence to substantiate their corporate existence and structure, and they have also failed to prove the extent of their alleged investments in Romania. Furthermore, under Article XIII(3)(d) of the Canada-Romania BIT, an investor is time-barred from submitting its claims to arbitration if more than three years have elapsed from the date of the alleged breach which, on the Claimants' own case, was the beginning of August 2011. This date is more than three years prior to the registration of the Request for Arbitration on 30 July 2015. Many of the claims were also never notified to Romania, nor was there a waiver of the right to initiate or continue litigation before other fora, as required by the Canada-Romania BIT, and some have no basis at all in the applicable BIT.

14 The claims are also without merit.

15 On its face, the expropriation claim fails since RMGC itself continues to operate and the License is still in effect. RMGC's other assets also remain intact. Tellingly, Gabriel Canada has never disclosed to its shareholders that its purported rights in the Project have been expropriated, which shows Gabriel Canada itself does not believe that this is the case.

16 Romania has also always treated the Claimants and their alleged investments fairly and equitably and in accordance with other applicable treaty standards. The Claimants wrongly argue that the Government "blocked" the Project and improperly refused to issue the environmental permit. As noted above though, the Claimants only have themselves to blame for their

predicament, having failed both to satisfy the legal requirements for the Project and to secure the required social license.

17 Citing statements made in 2011 by Government officials who sought to increase the State's participation in the Project, the Claimants make sweeping accusations that the Government held the environmental permit "hostage" in hopes of leveraging a better deal. In the wake of the global financial crisis and the draconian austerity measures that the Government was compelled to impose in 2010 and 2011 to decrease the public deficit, certain officials indeed naturally advocated for a better deal for Romania. The Government, however, never withheld the environmental permit on this basis, and indeed there is no evidence of any link whatsoever between the License negotiation and the EIA Review Process. The Government's non-issuance of a decision on the environmental permit was simply a consequence of RMGC's failure to meet the requirements.

18 Contrary to the Claimants' allegations, the Government sought to support RMGC and the Project. Thus, against a backdrop of intense social opposition to the Project and following lengthy negotiations with RMGC, in August 2013, the Government submitted to Parliament a special draft law concerning the Project (the "**Roşia Montană Law**"). This law sought to facilitate and accelerate the development of the Project, by providing for the amendment of existing legislation, declaring the Project of public utility (thereby permitting the expropriation of recalcitrant residents), and envisaging an expedited permitting schedule.

19 Thus, the Claimants' allegation that, by submitting the Roşia Montană Law to Parliament, the Government "arbitrarily jettisoned the lawful permitting process" and abdicated its legal responsibilities could not be further from the truth.[3] Gabriel Canada's own representatives publicly praised the law at the time.

20 The submission of the Roşia Montană Law to Parliament, however, unleashed a social movement of unprecedented scale in modern, post-Communist Romania. Tens of thousands of people protested in towns and cities

[3] Memorial at p. 8 (para. 29).

across the country for months. As shown in a selection of photographs at **Annex III** to this Counter-Memorial, people of all walks and ages of life expressed their opposition to the Project and the law. This mass social movement became known as the "Romanian Autumn."

21 Following the protests, and after extensive public debates, the two houses of Parliament virtually unanimously rejected the Roşia Montană Law in November 2013 and June 2014. The Parliament simply could not impose on the public a law that fundamentally lacked social legitimacy. This is democratic decision-making in action, not breach of an investment treaty.

22 The Claimants grasp at straws by making the vague and unfounded allegation that "the Government created inviting circumstances for NGOs" to protest against the Project.[4] Romania is, however, not responsible for the conduct of NGOs, or the broader civil society, nor could it lawfully block their access to Romanian courts, and indeed the Claimants do not suggest that this is what Romania should have done. The Respondent has done no more than allow the public to democratically and peacefully express their views in accordance with the law, whether it be in court or in the street.

23 Moreover, the Government's efforts to support the Project – through the preparation and submission of the Roşia Montană Law to Parliament – do not make it responsible for obtaining the social license; this obligation remained, and still remains, the Claimants' own.

24 For all of these reasons, the claims must be rejected.

25 As to quantum, the claim of USD 3.2 billion (excluding interest) is divorced from reality. RMGC never broke ground to construct its mining site – let alone commenced operations. The claim is based on neither the costs it incurred in Romania on the Project, nor an estimate of the revenues and costs the Project would have generated, based on the proven reserves. On the purported basis that Gabriel Canada's rights in the Project were its sole asset, Gabriel Canada has rather valued its alleged losses based on its own

[4] *Id.* at p. 10 (para. 37).

company value on the Toronto Stock Exchange and, more specifically, its average market capitalization over a three-month period in 2011.

26 The Claimants have chosen the end of July 2011 as the valuation date for their alleged losses, thereby displaying their utter contempt for the facts. Nothing happened at the time that could conceivably constitute a breach of either BIT. The sole reason for the Claimants to pick end of July 2011 as the valuation date is that this date coincides with another event – the moment in time when, over the past 40 years, gold prices were at their highest. The Claimants' case on the valuation date is as cynical as it is transparent.

27 The Claimants have also brought claims arising out of RMGC's application for exploitation licenses for an area adjacent to Roşia Montană called Bucium. However, because RMGC filed those applications in October 2007, the Bucium claims are time-barred under the Canada-Romania BIT. For this and other reasons, the Tribunal does not have jurisdiction over the Bucium claims.

28 Accordingly, and as further developed in this Counter-Memorial, the Respondent respectfully requests that the Tribunal dismiss the claims in their entirety and award the Respondent the costs it has incurred and will incur in defending the Claimants' unfounded claims.

29 In support of this Counter-Memorial, Romania submits statements from the following witnesses:

- Ms. Dorina Simona Mocanu: a civil servant with the Ministry of Environment since 2000 and the Director of its Pollution Control and Impact Assessment Directorate, who has been involved in the EIA Review Process for the Project; and,
- Mr. Sorin Mihai Găman: a former General Director with the Directorate for Mineral Resources within the Ministry of Economy (from 2005 to 2017) and member of the Board of Directors of RMGC (from 2006 to 2009 and since 2010), who participated in certain License renegotiation meetings in 2011.

30 Romania also submits reports by the following experts:

- A team of experts from Chris Morgan Associates, including Ms. Larraine Wilde, who has authored a report regarding the EIA Review Process and the EIA Report in general, as well as Ms. Cathy Reichardt, Mr. Dermot Claffey, Mr. Mark Dodds-Smith, and Dr. Peter Claughton, who have authored four appendix reports regarding specific aspects of the Project that were controversial and/or that the experts deem not in line with industry practice, concerning the tailings management facility (Appendix A), cyanide use and management (Appendix B), waste management and the mine closure plan (Appendix C), and cultural heritage issues (Appendix D);
- Mr. Ian Thomson: a principal of SCI-Shinglespit Consultants Inc., who has authored a report regarding RMGC's failure to obtain a social license for the Project;
- Professor Dacian Dragoș: a Jean Monnet Professor of Administrative and European Law with the Babes Bolyai University, Faculty of Political, Administrative and Communication Sciences, Public Management and Administration Department, in Cluj Napoca, Romania, who has authored a legal opinion regarding the procedure to obtain an environmental permit and a building permit in Romania and commented on various aspects of the legal opinions of Professors Mihai and Schiau;
- Dr. James C. Burrows: the Vice-Chairman of Charles River Associates, who has authored a report assessing the quantum of the claims; and,
- A team of experts from Behre Dolbear: including Mr. Bernard J. Guarnera, a principal, Director and Principal Shareholder of the Behre Dolbear Group Inc., Dr. Robert E. Cameron, Senior Associate of Behre Dolbear & Company (USA), Inc., and Mr. Mark K. Jorgensen, Senior Associates of Behre Dolbear Company (USA), who have authored a report regarding the feasibility and costs of the Project.

2 BACKGROUND TO RMGC'S APPLICATION FOR THE ENVIRONMENTAL PERMIT

31 The claims arise out of Romania's alleged failure to grant RMGC the environmental permit for the Project. However, although RMGC secured the License in 1999-2000, it only applied for the environmental permit in December 2004. It is important to understand the background to the claims and the EIA Review Process.

32 Roşia Montană, which would become the target of Gabriel's efforts, had been a mining town for some 2,000 years and through the Communist period (**Section 2.1**). In the mid to late 1990s, a Romanian-Australian citizen named Frank Vasile Timiș, eager for opportunities in the wake of the fall of the Ceaușescu regime, had founded Gabriel Canada and secured the opportunity in Roșia Montană (**Section 2.2**). RMGC in turn assumed the risks that it would obtain all permits necessary to develop the Project. (**Section 2.3**).

2.1 The History of Roşia Montană as a Gold Mining Town

33 Roşia Montană is located in a region known as the Golden Quadrilateral in the Apuseni portion of the Carpathian mountains in Transylvania, in northwest Romania. The region is traditionally known, among other things, for its mining activities. Roşia Montană is part of Alba County, whose capital is Alba Iulia, and is 450 kilometers and over six hours' drive from Bucharest.

34 The maps in **Annex I** show the exact location of Roşia Montană.

35 The area is rural and the infrastructure is poor. Roads are sinuous, narrow, and bumpy. The nearest airport is in Cluj Napoca, two hours' drive away. The nearest train station is in the opposite direction in Zlatna, one and a half hours away. The lack of infrastructure would have entailed significant

costs for RMGC which, had the Project advanced, would have needed to improve access and power supply to the site.[5]

36 The population of Roşia Montană has sharply dropped over the past fifteen years and counts today roughly 600 residents.[6] The closest towns are Abrud and Câmpeni, which are twelve and sixteen kilometers away and count approximately 5,000 and 7,000 inhabitants, respectively. The Project's tailings dam would have been located in the Corna Valley, less than five kilometers above Abrud.

37 The gold at Roşia Montană has been exploited since the Roman times. Over 100 kilometers of underground galleries, including some seven kilometers built by the Romans, wind under the village and its surrounding mountains.[7] In the 19th century, wax tablets dating back to 162 AD were discovered in Roşia Montană and provide insight into the daily life of the settlement called at the time "*Alburnus Maior*" (or "Big Gold"). Roşia Montană continued to be exploited from the 17th to 19th centuries, when it was part of the Austro-Hungarian Hapsburg empire, and again under the 20th century Communist regime. Valuable artifacts, which shed light on the evolution of mining methods and the miners' way of life, remain from these different chapters of history.[8]

38 The Claimants misportray the landscape of Roşia Montană and its surroundings. They allege that "[a] drive up the main road into Roşia Montană

[5] See also **CMA Report**, p. 7 (para. 28); [redacted].

[6] According to official census figures, the Roşia Montană municipality counted 3,872 inhabitants in 2002 and 2,656 in 2011. This municipality is broken down into sixteen villages, one of which is also named Roşia Montană. In 2012, Roşia Montană village had 618 inhabitants.

[7] RMGC press release dated 18 September 2012, at **Exhibit C-766**, p. 2 ("seven kilometers of Roman galleries (summing up discontinuous fragments) were researched, out of a total of over 140 kilometers of galleries dating back to all historical ages."); see also TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 8 (Szentesy); **Jennings**, p. 23 (para. 53); C. Ciobanu, "Romanians mobilise in protest against gold mine plans", *The Guardian*, Sept. 2013, at **Exhibit R-85**.

[8] See **CMA Report Appendix D**, p. 2 *et seq.* (sections 1.3 and 1.4).

shows a landscape deeply scarred" by historic mining and pollution, which have allegedly produced "a stripped and barren lunar-like topography."[9]

39 Roşia Montană indeed suffers from historic pollution resulting from the mining methods used under the Communist regime. Although RMGC undertook to "positively impact the local and regional environment by cleaning up historical pollution,"[10] it has failed to carry out its Project and the area thus still suffers from residual pollution.[11]

40 However, as can be seen in the photos at **Annex II**, the landscape of the village and its surrounding mountains is far from "lunar" or "barren." With the exception of the peak of Cetate, which was exploited and partially flattened in the late 20th century, the mountains surrounding Roşia Montană are green, fertile, and picturesque.[12] The large-scale social opposition to the Project (see **Sections 5.11** and **5.13** below) is in part explained by the wish to protect the landscape.

41 Directly adjacent to Roşia Montană and the Project Area is the Roşia Poieni copper mine, operated by the state-owned company SC Cupru Min SA ("**Cuprumin**"), which is headquartered in Abrud and currently employs some 700 people. Contrary to the Claimants' allegations, Romania has not treated Roşia Poieni preferentially, as compared to RMGC, as set

[9] Memorial, p. 26 (para. 75); see also **CMA Report**, p. 9 (Figures 1 and 2).

[10] See *e.g.* **Avram**, p. 19 (para. 26).

[11] See **CMA Report**, p. 5 (para. 19) and p. 13 (section 6); see also **CMA Report Appendix D**, p. 6 (para. 20).

[12] See also **CMA Report**, p. 4 (para. 12); **CMA Report Appendix D**, p. 5 *et seq.* (section 1.5) and p. 28 (para. 81).

out below.[13] The only other gold mining sites in Romania, also in the permitting phase, are located in Rovina[14] and Certej,[15] some 20 and 100 kilometers from Roşia Montană, respectively.

2.2 Gabriel Canada, a Junior Mining Company with No Track Record, Is Listed on the Toronto Stock Exchange in 2000

42 In the 1990's, Romania started to prepare a new mining law to re-organize its heavily-subsidized State-owned mining companies and to open the market to private companies. Mr. Timiș, as mentioned above, a Romanian-Australian businessman, seized the opportunity to obtain control of close to 5% of the territory of Romania in mining concessions, including the Roşia Montană and Bucium perimeters.[16]

43 Mr. Timiș acted in Romania through a nebulous corporate network which has apparently evolved over the years to include entities in Australia, Canada, Jersey, Barbados, and the Netherlands. The Claimants have not provided any evidence of the ownership rights within this corporate network.[17]

44 Mr. Timiș, who remained a director and shareholder of Gabriel Canada until 2003, has become a controversial figure in the mining industry, with activities extending beyond Romania, into Greece and West Africa. His

[13] See *infra* Section 6.3.4.

[14] The gold and copper project in Rovina would be operated by the company Samax, fully-owned by the Toronto Stock Exchange company Eurosun Mining. The project is at the feasibility stage. C. Jamasmie, "Romania opens door to new gold, copper project lead by Canadians", *Mining.com*, May 2015, at **Exhibit R-86**; "Rovina gold and copper mining", *ejatlas.org*, at **Exhibit R-87**.

[15] The project in Certej would be operated by a joint venture between Minvest and Eldorado Gold, also listed on the Toronto Stock Exchange. The project envisages the extraction of gold and silver through cyanide leaching. The feasibility study was completed in 2015. Eldorado Gold Presentation of Certej Project dated 30 March 2016, at **Exhibit R-88**; see also T. Bradatan *et al*., "Investors guide to the Eldorado Gold Certej mine proposal in Romania", *Mining Watch Romania*, Apr. 2015, at **Exhibit R-89**.

[16] R. Pencea *et al*., "Certej authorities' incapacity to critically analyse new mining projects", *Mining Watch Romania*, Nov. 2013, at **Exhibit R-90**, p. 10.

[17] See *infra* Section 8.1.1.

business model has reportedly focused on establishing companies and obtaining concession rights (at times, allegedly through corruption) before selling his shares. Mr. Timiș was fined for making misleading statements about his projects and is reportedly effectively considered *persona non-grata* on three leading stock exchanges.[18] He has reportedly faced criminal investigations and lawsuits in Burkina Faso and Sierra Leone.[19]

45 The shareholders of Gabriel Canada have included US billionaires Mr. John Paulson and Mr. Thomas Kaplan as well as Mr. Beny Steinmetz, an Israeli billionaire currently under investigation in Israel, Switzerland, and the United States for suspected corruption and bribery, including in connection with an iron mining project in Guinea.[20]

46 In September 2000, Gabriel Canada was listed on the Toronto Stock Exchange. Over the years, Gabriel Canada has raised its stock market value without producing a single ounce and despite its limited in-house know-how and non-existent track record, by focusing on marketing a project with an army of *ad hoc* international experts and consultancy firms.

47 The Project was high-risk from the start, primarily because it entailed the relocation of thousands of residents, the use of cyanide-based technologies which were increasingly facing criticism, in particular in Romania because of the environmental catastrophe in Baia Mare in 2000, which also in-

[18] See *e.g.* D. McCrum and P. Radu, "Romania's Timiș Embroiled in Another Mining Controversy", *OCCRP.org*, Dec. 2014, at **Exhibit R-91**; B. Frith, "ASX cold shoulder is strike three for Frank Timiș", *The Australian*, Apr. 2010, at **Exhibit R-92**.

[19] See *e.g.* S. Beyerle and T. Olteanu, "How Romanian People Power Took on Mining and Corruption", *Foreign Policy*, Nov. 2016, at **Exhibit R-93**; J. Riseborough and T. Biesheuvel, "Frank Timiș Faces Investor Anger as African Minerals Implodes", *Mines and Communities*, Jun. 2015, at **Exhibit R-94**; "African Minerals, London Mining and the fall of Sierra Leone's iron ore sector", *MetalBulletin*, Mar. 2015, at **Exhibit R-95**.

[20] See *e.g.* I. Cobain and P. Beaumont, "Israeli tycoon Beny Steinmetz arrested over Guinea bribery claims", *The Guardian*, Dec. 2016, at **Exhibit R-96**; see also *e.g.* "Romanian anticorruption prosecutors want to arrest Israeli billionaire in corruption case", *Romania Insider*, Mar. 2016, at **Exhibit R-97**.

volved cyanide, and because it overlapped with natural and culturally-protected areas. All of these factors triggered the overarching risk that the Project would meet large-scale social resistance.

2.3 Once RMGC Secured the License, It Assumed the Risk that It Would Obtain All Permits and Surface Rights for the Project Area

48 Under the Romanian Constitution, the State owns the minerals in the subsoil of its territory: an exclusive public property that cannot be exploited by private developers absent a specific authorization (*i.e.* a mining license).[21] Once RMGC secured the License (**Section 2.2.1**), it assumed the risk that it would obtain all requisite permits for the Project. The License in and of itself did not guarantee RMGC the right to build and develop its Project.

49 The Project envisaged the use of various mining technologies and entailed the construction of multiple facilities. Under both EU and Romanian law, to apply for the building permit for those facilities, RMGC needed to obtain (i) the urban plans, which show how the project will integrate with its surroundings (**Section 2.3.2**); (ii) the urban certificate, which sets out the documentation necessary to apply for the building permit (**Section 2.3.3**); (iii) the environmental permit, which establishes the measures that the developer must take to mitigate any negative environmental impact of its project and is at the heart of this dispute (**Section 2.3.4**); and (iv) the surface rights to the Project Area (**Section 2.3.5**). Because of the presence in Roşia Montană of underground archaeological vestiges dating back to the Roman times, RMGC was also required to obtain archaeological discharge certificates (**Section 2.3.6**). Although RMGC also needed to obtain the social acceptance of the Project, local opposition started to stir and grew in the years that followed and expanded well beyond the region (**Section 2.3.7**).

[21] Romanian Constitution, at **Exhibit R-55**, p. 38 (Art. 136(3)-(4)); 1998 Mining Law, at **Exhibit C-1629**, p. 1 (Preamble and Art. 1).

2.3.1 RMGC Secured the License in 2000

50 The sequence of events leading to RMGC's acquisition of the License is largely undisputed, even though it was subsequently the source of stakeholder concerns.[22] Following first contacts in 1995 between Minvest and Gabriel Australia,[23] RMGC was established on 25 August 1997 as the joint venture between Gabriel Jersey and several Romanian State-owned companies.[24] Under the anticipated mining law, still in discussion at the time, Minvest could request an exclusive license for the areas it managed.

51 RMGC and Minvest entered into a cooperation agreement on 30 October 1997, under which Minvest was to obtain the necessary approvals and license from the authorities and RMGC would bear the costs, while the license (once issued) would ultimately be transferred to RMGC.[25]

52 The License, which is both a contract and an authorization under Romanian law, was concluded on 21 December 1998 between the National Agency for Mineral Resources ("**NAMR**") and Minvest (as titleholder), with RMGC as affiliated company pending the transfer of the License. The License came into force on 21 June 1999 and was subsequently supplemented and amended. [redacted].[26]

53 By 1999, Minvest's shareholding in RMGC stood at 19.31%, with Gabriel Jersey owning the other 80.69%. The License obliged RMGC to pay fees,

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[22] Memorial, p. 32 *et seq.* (paras. 92-93); see *infra* Section 2.3.7.

[23] Cooperation Agreement between Gabriel (Australia) and RAC Deva dated 4 September 1995, at **Exhibit C-1645** as subsequently amended ([redacted] and **C-1647**).

[24] RMGC was established under the name Euro Gold Resources S.A. For ease of reference, only the name RMGC is used in these pleadings.

[25] Cooperation Agreement between Euro Gold Resources and RAC Deva dated 30 October 1997, at **Exhibit C-415**, p. 3 (Art. 5).

[26] [redacted]; GD 458/1999 approving Roşia Montană License, at **Exhibit C-982**; see Memorial, p. 37 *et seq*. (para. 104).

royalties, and taxes. [redacted].[27]

54 [redacted].[28] [redacted].[29] The License was then transferred to RMGC on 13 October 2000.[30] [redacted].[31] As in most countries, and as the Claimants acknowledge, this data remained the property of the State.[32]

55 [redacted].[33] Whereas the License foresaw an annual production of 500,000 tons, the Project later envisaged a production of roughly thirteen million tons per year.[34] Due to its

[27] [redacted].

[28] [redacted].

[29] Memorial, p. 35 (para. 99) [redacted].

[30] [redacted]; see also Memorial, p. 48 (paras. 129-133); **Bîrsan**, p. 29 *et seq.* (paras. 105-113 and 159-184); **Szentesy**, p. 10 *et seq.* (paras. 24-26).

[31] [redacted].

[32] 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 6 (Art. 5); Memorial, p. 272 (para. 626).

[33] [redacted].

[34] See *e.g.* TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 6 (Avram).

increased size and projected production, the Project would inevitably have had a greater environmental and socio-economic impact.

56 The License is governed by the Mining Law 61/1998 (the "**1998 Mining Law**"), which sets out RMGC's rights to explore, develop, and exploit the Roşia Montană mining site and its related obligations.[35] The 1998 Mining Law was replaced in 2003 by Mining Law 85/2003 (the "**2003 Mining Law**").[36] Although the Claimants' expert, Professor Bîrsan, explains that the License remained governed by the 1998 Mining Law,[37] [redacted][38] [redacted][39] RMGC thus needed to comply with both the 1998 and 2003 Mining Laws and other legislative amendments.[40]

57 [redacted][41]

[35] 1998 Mining Law, at **Exhibit C-1629**. This law was supplemented with GD 639/1998 setting out the enforcement regulation norms which license titleholders are also bound to apply (**C-1635**). [redacted].

[36] 2003 Mining Law, at **Exhibit C-11 (resubmitted)**.

[37] **Bîrsan**, p. 31 *et seq.* (paras. 114-120).

[38] [redacted]; see also *e.g.* 2006 (Stantec) RRAP, at **Exhibit C-463**, p. 27 *et seq.*; 2006 EIA Report, Public Consultation - Legal, at **Exhibit C-249**, p. 8; [redacted]; see also Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 1 (Art. 3).

[39] [redacted].

[40] 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 17 (Art. 39(1)) (adding a reference to "the environmental protection legislation in force" and need for an "environmental permit/approval"); [redacted].

[41] [redacted]; [redacted].

[redacted][42]

2.3.2 RMGC Needed to Provide Urban Plans

58 Like any construction project, a mining project must comply with the local urban plans and regulations.[43] The urban planning regulations specify how land can be used and what constructions can be built "to stimulate the complex evolution of localities, by preparing and implementing short-, medium- and long-term sustainable and integrated spatial development strategies."[44] Urban plans range from the more general to the more detailed: the General Urban Plan (*planul urbanistic general*, the "**PUG**"), the Zonal Urban Plan (*planul urbanistic zonal,* the "**PUZ**"), and the Detailed Urban Plan (*planul urbanistic de detaliu*, the "**PUD**").[45]

59 The PUG and PUZ establish the parameters with which a project must comply in terms of, for instance, area density and height of constructions. While derogations from these parameters may be possible, they must be approved. A PUG is the main operational land planning instrument, which sets out medium and long-term provisions regarding the functional development of a locality. A PUZ regulates the use of land, the organization of the street network, and the architectural-urban planning organization depending on the urban context and the protection of historical monuments.[46]

60 These urban plans set the framework for any building project. Both types of urban plans should therefore be in place before a building project located within the geographic area in question may be approved. Furthermore, for important projects requiring an EIA, the urban plans should be in place prior to the issuance of the environmental permit, since the very purpose

[42] [redacted].

[43] See *e.g.* 1996 General Urban Planning Regulation, at **Exhibit R-98**, p. 9 (Art. 36).

[44] Law 350/2001 on land development, at **Exhibit R-99**, p. 4 (Art. 10) and p. 41 (Art. 49).

[45] *Id.* at p. 32 *et seq.* (Arts. 44, 45 and 46).

[46] *Id.* at p. 35 *et seq.* (Arts. 46(3) and 47(2)).

of the EIA is to assess how a given project will integrate into and affect its geographic surroundings.[47]

61 At the time of the transfer of the License, there was no PUZ or PUG in place. From the beginning, [redacted].[48] RMGC submitted the necessary documentation for the PUG and for the PUZ for the future industrial area of the Project (the "**Project Area**") to the Abrud and Roşia Montană Municipalities, whose Local Councils approved them on 18 and 19 July 2002 respectively.[49]

62 [redacted].[50] I[redacted].[51] The Ministry of Culture approved the PUZ under the condition, *inter alia*, that RMGC secure

[47] See **Dragos**, p. 12 (para. 69) and p. 51 (para. 272); see also Letter from Ministry of Environment to RMGC dated 15 October 2010, at **Exhibit C-591**, p. 5 *et seq*. ("After conducting the SEA procedure and obtaining all endorsements as requested under the law for the proposal of [PUZ] issued by the initiator, as well as after receiving endorsement within local council (s) for the [PUZ], the preparation of the Project draft may be launched that will fully meet the regulations endorsed through the [PUZ], including for the environmental impact assessment stage.").

[48] [redacted]; see also Gabriel Canada press release dated 11 October 2002, at **Exhibit R-100**, p. 2.

[49] Abrud Local Council Decision dated 18 July 2002, at **Exhibit C-1418**; Roşia Montană Local Council Decision 45 dated 19 July 2002, at **Exhibit C-1414**; Roşia Montană Local Council Decision 46 dated 19 July 2002, at **Exhibit C-1419**. [redacted].

[50] [redacted]; see also Map - Roşia Montană buildings and envisaged mining pits, at **Exhibit R-102**.

[51] [redacted].

the approval of a separate PUZ for the Roşia Montană protected areas, including the historical center.[52]

63 [redacted].[53] This special regime sought to attract investment but also triggered public concerns about the decrease in tax income.[54]

64 [redacted].[55] [redacted].[56] RMGC later invoked the absence of alternatives and the economic emigration to argue that only the Project could stimulate the local economy.[57]

65 NGOs later successfully challenged the Local Council decisions approving the 2002 PUG and PUZ, which were declared unlawful due to a finding

[52] Ministry of Culture Approval of 2002 PUZ dated 20 June 2002, at **Exhibit R-103**, p. 2.

[53] GD 813/1999 declaring the Apuseni Mining Area as disadvantaged dated 7 October 1999, at **Exhibit R-104**; [redacted].

[54] TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 71 (last paragraph).

[55] General Urban Planning Regulation dated 27 June 1996, at **Exhibit R-98**, p. 2 (Art. 6(1)); [redacted]; S. McGrath, "Roşia Montană and Dirty Politics", *Huffington Post*, Oct. 2013, at **Exhibit R-105**, p. 3.

[56] 2006 EIA Report, Public Consultation - Sustainable Development Plan, at **Exhibit C-264**, p. 2; see also R. Bucata, "Local person from Roşia Montană: Gold Corporation blocked 10 years of my life", *Think Outside the Box*, Sept. 2011, at **Exhibit R-106**, p. 8; [redacted].

[57] [redacted], p. 8 (para. 20); Memorial, p. 30 (para. 85) and p. 64 (para. 170).

that members of the Roşia Montană Local Council (and/or their family members) had been working for RMGC and had a conflict of interest.[58]

66 RMGC's urban certificate from 2004 (discussed in **Section 2.3.3** below) required RMGC to amend its PUZ.[59] [redacted].[60]

67 In 2004, Romania implemented EU Directive 2001/42/CE (the "Strategic Environmental Assessment Directive" or "**SEA Directive**") which governs environmental impact assessments of urban plans (the "**SEA Procedure**").[61] As a result, to apply for new and amended urban plans, RMGC needed to obtain permits, approvals and endorsements from various authorities, including an environmental endorsement specifically relating to the PUZ from the local Environmental Protection Agency ("**EPA**").[62]

68 The Claimants argue that the local authorities were required under the 2003 Mining Law to update the urban plans, including the PUG and the PUZ, following the entry into force of the License so they "reasonably expected

[58] See *infra* para. 143.

[59] UC 68/2004, at **Exhibit C-525.04**, p. 4; see **Avram**, p. 39 (paras. 78-84) (describing RMGC's efforts to obtain a new PUZ without noting that the urban certificate required this).

[60] [redacted]; see also AMEC Comparison of 2002 PUZ and draft 2006 PUZ dated 30 November 2010, at **Exhibit R-107** (Orlea and Jig pits appear in blue); Letter from Alba County Council to RMGC dated 23 January 2004, at **Exhibit R-108** (noting "significant differences" between the PUZ and RMGC's urban certificate application).

[61] SEA Directive, at **Exhibit RLA-36**; GD 1076/2004 on SEA Procedure, at **Exhibit R-109**.

[62] See Law 137/1995 on environment protection (excerpts), at **Exhibit C-1768**, p. 2 (Art. 7^1) ("The environmental assessment is intended to integrate environmental protection objectives and requirements in preparation and adoption of certain plans and programs that may have a significant environmental impact.") and *id.* p. 2 (Art. 7^2); see also Law 350/2001 on land development, at **Exhibit R-99**, p. 48 (Section 6) (public consultation).

that the urbanism plans would be modified as needed…"[63] However, applicants are the driving force behind urban plan amendments[64] and RMGC clearly understood at the time that it was required to secure the approval of the urban plans, since it commissioned and submitted such plans in 2002 and 2006.

69 Where a developer wishes to modify its project, it may need to secure the local authorities' approval of an amendment to the urban plans, including the PUG and the PUZ. Substantial changes may require new feasibility studies, environmental impact assessments (including public consultations), for both the urban plans and/or the project, and thus require further endorsements or approvals.[65]

2.3.3 RMGC Needed to Provide a Valid Urban Certificate and the Endorsements and Approvals Described Therein

70 The procedure to obtain the building permit for the Project is mainly governed by Law 50/1991 authorizing the performance of construction works.[66] RMGC needed to obtain an urban certificate, which is both a mandatory and an informative administrative act regarding a geographic area. Valid for up to 24 months, an urban certificate sets out the legal, economic, and technical status of the area and existing constructions as per the urban plans. It also lists the approvals and endorsements necessary to apply for a building permit.[67]

71 RMGC secured the Urban Certificate 68/2004 for the construction works in the Roşia Montană mining industrial area on 20 August 2004 ("**UC**

[63] Memorial, p. 70 (para. 187, n. 295).

[64] Law 350/2001 on land development, at **Exhibit R-99**, p. 42 *et seq.* (Arts. 50-55); Ministry of Public Works Order 176/N/2000 on methodology for drafting PUZ, at **Exhibit R-110**, p. 9 (Art. 2.1) (a PUZ can "be initiated by … persons interested in the achievement of certain objectives in the area.").

[65] **Dragos**, p. 42 (para. 214).

[66] Law 50/1991 on construction works dated 29 July 1991, at **Exhibit R-111**.

[67] *Id.* at p. 7 (Art. 5).

68/2004").[68] The certificate was issued on the basis of a favorable decision of the local councils on the territory of which the Project was to be located. UC 68/2004 provided the blueprint of the existing economic and legal characteristics of the Project Area. It confirmed that over half of the land was owned by private persons, the Romanian State and religious entities, and that the land covered protected natural and cultural heritage sites.

72 RMGC needed to obtain, on the basis of the urban certificate and before its expiry, the approvals and endorsements listed therein, including the environmental permit and the endorsement of the Ministry of Culture.[69] In practical terms, applicants must submit a copy of the urban certificate when applying for such approvals, and indeed RMGC attached UC 68/2004 to its application for the environmental permit.[70] RMGC was required to maintain a valid urban certificate until receipt of the decisions on its applications, including the environmental permit.[71]

73 RMGC also needed to prepare technical documentation in accordance with the urban certificate. This documentation is verified by certified designers and defines the scope of the construction works.[72] RMGC was to prepare this documentation following approval of the PUZ.[73]

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[68] UC 68/2004, at **Exhibit C-525.04**.

[69] *Id.* at p. 6 *et seq.* (under "Permits/approvals and other documents supplied by the applicant").

[70] Letter from RMGC to Alba EPA dated 14 December 2004, at **Exhibit C-525.01**; see also Gabriel Canada press release dated 28 August 2003, at **Exhibit R-112**, p. 2 ("Gabriel [Canada] expects the environmental endorsement to be approved in advance of the scheduled start of mine construction, although submission of the EIA to the Minister of Environment has been delayed pending receipt of the final confirmation of applicable land use zoning, being the urbanism certificate.").

[71] The Claimants' argument that the Government acknowledged the contrary in March 2013 is misleading. Memorial, p. 104 *et seq*. (para. 263). See *infra* para. 299; **Dragos**, p. 31 *et seq.* (paras. 160 *et seq.*).

[72] Law 50/1991 on construction works dated 29 July 1991, at **Exhibit R-111**, p. 8 (Art. 6) and p. 46 (Annex 1).

[73] UC 68/2004, at **Exhibit C-525.04**, p. 6.

2.3.4 RMGC Needed an Environmental Permit

74 In Romania, the environment is protected under domestic, EU, and international law instruments. The Constitution recognizes a right "to a healthy and ecologically balanced environment," [redacted].[74] Multiple EU environmental directives, which are also part of Romanian law, are relevant to this Project, including the EIA Directive, the Waste Management Directive, and the Water Framework Directive[75] as well as directives relating to the conservation of natural habitats and of wild fauna and flora and the protection of groundwater.[76] Key international conventions include the Convention on Environmental Impact Assessment in a Transboundary Context (the "**Espoo Convention**") and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "**Aarhus Convention**").[77]

75 Emergency ordinance 195/2005 on the protection of the environment and other regulations set out the procedure for the environmental impact assessment of construction projects for purposes of obtaining an environmental permit (the "**EIA Procedure**").[78] Such procedures are coordinated either on a county level by an EPA, or on a central level by the Ministry of Environment. By law, the Ministry of Environment coordinates the review

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[74] [redacted].

[75] TAC meeting transcript dated 19 July 2007, at **Exhibit C-478** (Constantin) (noting that compliance with this directive is "of great importance").

[76] Directive 2014/52/EU on the environmental assessment of projects, at **Exhibit RLA-37**; Waste Management Directive, at **Exhibit RLA-38**; Directive 92/43/EEC on the conservation of natural habitats, wild fauna and flora, at **Exhibit RLA-39**; see also **CMA Report Appendix A**, p. 6 *et seq.* (section 2); **CMA Report Appendix C**, p. 3 *et seq.* (section 2).

[77] Espoo Convention, at **Exhibit RLA-40**; Aarhus Convention, at **Exhibit RLA-41**.

[78] GEO 195/2005 repealed Law 137/1995 on the protection of the environment. See **Dragos**, p. 43 (para. 224) and p. 47 (para. 244); **Mihai**, p. 14 (para. 51); Law 137/1995 on environment protection (excerpts), at **Exhibit C-1768**; GEO 195/2005 on environment protection, at **Exhibit R-76**; see also Ministry of Environment Order 860/2002 on approval of EIA procedure and issuance of environmental permit, at **Exhibit C-1774**.

of nuclear energy projects and large mining projects.[79] To date, the Ministry of Environment has coordinated the EIA review of only one project other than that of Roşia Montană – the project to expand the Cernavodă nuclear power plant in southeast Romania. In that case, the Government issued the environmental permit in September 2013.[80]

76 RMGC thus needed to obtain both an environmental endorsement for its PUZ (following an SEA Procedure) and an environmental permit for its Project (following an EIA Review Process). Both must be obtained prior to applying for the building permit.[81]

77 The EIA Review is conducted by a technical advisory committee (or "**TAC**"). Composed of representatives of various state institutions,[82] the TAC analyzes the EIA Report of the developer and discusses the mitigation measures that the developer will need to take, *i.e.* the conditions to be attached to any environmental permit.[83] For nuclear and large mining projects, such as the Project, the Ministry of Environment coordinates the drafting of the environmental permit, including the conditions on which it

[79] Ministry of Environment Order 860/2002 on approval of EIA procedure and issuance of environmental permit, at **Exhibit C-1774**, p. 3 (Art. 4(1)) and p. 18 *et seq.* (Annex I); GEO 195/2005 on environment protection, at **Exhibit R-76**, p. 30 *et seq.* (Arts. 19 and 46(3)).

[80] **Mocanu**, p. 3 (para. 19); GD 737/2013 and Cernavodă environmental permit, at **Exhibit R-113**.

[81] See UC 68/2004, at **Exhibit C-525.04**, p. 7 (under "Endorsements/permits … to be provided by the applicant." The EIA environmental permit appears as "Environmental impact study").

[82] The TAC for the Project consisted of representatives of the following public authorities: Ministry of Environment, Ministry of Waters and Forests (through its subordinated specialist directorates and institutions): National Environmental Guard, National EPA, Ministry of Health, Ministry of Agriculture and Rural Development, Ministry of Regional Development and Public Administration, Ministry of Culture, Ministry of Transport, Ministry of Economy, Commerce and Tourism, Romanian Academy, Geological Institute of Romania, General Inspectorate for Emergency Situations, ANAR and NAMR.

[83] See Ministry of Environment Order 171/2005 on establishing and functioning of central level TAC, at **Exhibit C-1770**; Ministry of Environment Order 405/2010 on establishing and functioning of central level TAC, at **Exhibit C-1771**; Ministry of Environment Order 794/2007 on establishing and functioning of central level TAC, at **Exhibit C-1772**.

is based, and consults the public.[84] Once the Ministry finalizes the environmental permit, the government may issue a decision (to which the environmental permit is an annex).[85] If a developer seeks to change its project after obtaining the environmental permit, it may be required to seek changes to the environmental permit and the relevant conditions.[86]

2.3.5 RMGC Needed the Surface Rights to the Project Area

78 The Mining Law requires a titleholder to obtain rights over the land where it seeks to develop mining activities (including through purchase, lease, or concession), namely, the surface rights.[87]

79 The Claimants argue that RMGC only needed to acquire the surface rights prior to applying for the building permit.[88] However, given the significant number of residents to be relocated, RMGC assumed an important risk if it deferred the acquisition of the totality of the necessary surface rights until after issuance of the environmental permit.[89] Specifically, it faced the

[84] For other projects, local EPAs coordinate and issue the environmental permit. **Mocanu**, p. 4 (paras. 20-22); Ministry of Environment Order 860/2002, at **Exhibit C-538**, p. 11 *et seq.* (Arts. 33-34) and p. 39 (Annex III).

[85] GEO 195/2005 on environment protection, at **Exhibit R-76**, p. 30 (Art. 19); Ministry of Environment Order 860/2002, at **Exhibit C-538**, p. 14 (Art. 46); see GD 737/2013 and Cernavodă environmental permit, at **Exhibit R-113**.

[86] Ministry of Environment Order 860/2002, at **Exhibit C-538**, p. 15 (Art. 50) ("(1) The environmental agreement shall be revised if new elements, not known of on the issuance date. (2) The project or activity developer shall inform, in writing, the competent authority for environmental protection any time there is a substantial change of the data that formed the grounds of the environmental agreement issuance…").

[87] [redacted]; 1998 Mining Law, at **Exhibit C-1629**, p. 5 (Art. 6(1)) and p. 11 (Art. 28(a)); 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 6 (Art. 6).

[88] **Bîrsan**, p. 60 (n. 219) (referring to Article 1 of Law 50/1991); Law 50/1991 on construction works, at **Exhibit R-111**, p. 12 *et seq.* (Art. 7).

[89] RMGC committed to comply with international standards, including the World Bank Directive on Involuntary Resettlement which required RMGC – in addition to obtaining the surface rights – to prepare a resettlement action plan and assist affected landowners and residents (both home-owners and tenants) to resettle or relocate. See 2006 (Stantec) RRAP, at **Exhibit C-463**, p. 9 and p. 35; Memorial, p. 66 (paras. 176-177).

risk of either needing (i) to change its Project (if even possible) to work around those pockets of residents who refused to move (and to redo an EIA on that basis) or (ii) to have the Project declared of public utility and complete an expropriation process, for neither of which RMGC had any guarantee of success.

80 Aware of these risks, RMGC commenced its efforts to acquire the surface rights to the Project Area early on and well before applying for the environmental permit.[90]

81 At the time RMGC received the License, the land subject thereto, which spread over several communes (Roşia Montană, Abrud, and Bucium) was not uniform in terms of its use or function. Over half of the area was grasslands and forests; other areas were agricultural, and included roads, water streams, and railroads. [redacted].[91]

82 The steps RMGC needed to take to acquire the surface rights depended on the nature and ownership of the land. First, the Project Area covered large areas of forests, agricultural lands, and water streams, which may each be declassified following specific legal regimes.[92]

83 For instance, Romania protects and manages its forests through a national forestry fund, which is considered an asset of national interest.[93] Forest land can only be removed from this fund through exchange with other land

[90] See *e.g.* Memorial, p. 67 (para. 179) (indicating that properties were purchased in 2002).

[91] [redacted]; RMGC Draft PUZ (map, excerpt), June 2006, at **Exhibit R-114**.

[92] See *e.g.* 2006 EIA Report, Ch. 4.07 Landscape, at **Exhibit C-220**, p. 45 (forests); 2006 EIA Report, Ch. 04.08 Community Sustainable Development Programme dated 31 December 2006, at **Exhibit C-221**, p. 165 (land use); RMGC Draft PUZ (map, excerpt), Nov. 2010, at **Exhibit R-115**.

[93] The national forestry fund is regulated by the Forest Code of 1996, replaced by a new code in 2008 which notably modified the conditions to remove land from the forestry fund. 1996 Forest Code (excerpts) dated 24 April 1996, at **Exhibit R-116**, p. 2 (see notably Art. 4); 2008 Forest Code (excerpts) dated 27 March 2008, at **Exhibit R-117**, p. 2 (see Art. 3).

or through compensation, after obtaining authorizations from the local forest authorities and, depending on the size of the forest land, also from the Ministry of Waters and Forests or the Government (including the Ministry of Culture for the protection of monuments, as the case may be).[94] The beneficiary of the land exchange pays, in addition to taxes, compensation for the losses incurred by the premature sale of the wood prior to its exploitation age and the expenses for the forestation of the new plot.[95] If the forest is on private land, the approval of the owner is necessary, failing which the interested party may commence expropriation proceedings, but only if the project qualifies as a public utility.[96]

84 Second, as the Project covered private residential land, RMGC needed to relocate the affected population as part of its commitment to abide by international standards. As the Claimants recognize, RMGC had to "relocate or resettle affected households, as well as a number of small businesses, public facilities, churches and cemeteries."[97] As from 2002, the company focused on acquiring these areas, and elaborated resettlement and relocation plans, which formed a fundamental aspect of its surface rights acquisition strategy.[98] To implement this program, RMGC created a Community Relations Department, with over 90 staff and consultants.[99] Gabriel Can-

[94] Law 18/1991 on land resources (excerpts), at **Exhibit R-118**, p. 6 (Arts. 95 and 97); 1996 Forest Code (excerpts) dated 24 April 1996, at **Exhibit R-116**, p. 1 *et seq.* (Arts. 54-56); GO 96/1998 on forests (excerpts), at **Exhibit R-119**, p. 3 (Art. 27); 2008 Forest Code (excerpts) dated 27 March 2008, at **Exhibit R-117**, p. 5 *et seq.* (Art. 40).

[95] 1996 Forest Code (excerpts) dated 24 April 1996, at **Exhibit R-116**, p. 1 (Art. 55); 2008 Forest Code (excerpts) dated 27 March 2008, at **Exhibit R-117**, p. 6 *et seq.* (Art. 41).

[96] GO 96/1998 on forests (excerpts) dated 27 August 1998, at **Exhibit R-119** (Art. 24 (1)) ("The definitive occupation of land from the private property forest fund … shall be approved with the prior consent of the landowners … In cases where the landowners disagree, the land may be occupied under the conditions established under the legal regulations on expropriation for a public utility cause.").

[97] Memorial, p. 66 (para. 175).

[98] See *e.g.* 2006 (Stantec) RRAP, at **Exhibit C-463**, p. 42.

[99] 2004 Project Presentation Report, at **Exhibit C-525.03**, p. 159; see **Lorincz**, p. 1 *et seq.* (para. 2).

ada acknowledged that the process was "complicated and time consuming."[100] RMGC proposed to resettle the affected population one hour and a half-drive away from Roşia Montană, in the new Recea neighborhood.[101]

85 If RMGC did not obtain landowners and residents' consent to sell their land and/or relocate, it needed to ask the State to exercise its sovereign prerogatives and expropriate the properties in question.[102] However, property rights are protected under the Constitution, so expropriation can only take place for reasons of public utility and must be accompanied by just and prior compensation.[103]

86 Significantly, RMGC had no guarantee it would be able to force unwilling land- and home-owners to sell their property and residents to leave. Since private property can only be expropriated by the State, RMGC would need

[100] Gabriel Canada 2003 Annual Report, at **Exhibit R-120**, p. 2 and p. 13; see also Gabriel Canada 2005 Annual Report, at **Exhibit R-121**, p. 23 (warning "there is no certainty that the acquisition of all surface rights will be carried out within the timeframe and within the range of costs we have … estimated.").

[101] See Memorial, p. 275 *et seq.* (para. 631) (noting that RMGC donated the Recea infrastructure to Alba Iulia).

[102] GD 639/1998 with application norms for 1998 Mining Law, at **Exhibit C-1635**, p. 4 (Art. 5); see also Gabriel Canada 2009 Annual Information Form, dated 10 March 2010, at **Exhibit C-1807**, p. 19 ("exploitation concession holders [do not have] the ability to expropriate land directly, nor are there specific legal mechanisms under Romanian law to allow a governmental authority to expropriate land under a mining concession on behalf of a private company (or having a private company as beneficiary)."); Minutes of Public Consultation in Zlatna dated 2 August 2006, at **Exhibit C-283**, p. 2 (Avram) ("With respect to expropriation … we will initiate negotiations with every landlord, and if we face a refusal, we have analyzed several alternatives within the EIA and will try to rethink the project so no one will be affected."); 2006 (Stantec) RRAP, at **Exhibit C-463**, p. 9 ("RMGC has decided to acquire land on a "willing seller/willing buyer" basis, and to avoid, as far as practical, the use of expropriation…").

[103] Law 33/1994 on expropriation, at **Exhibit R-122**, p. 1 (Art. 1) and p. 7 (Preamble referring to the constitutionally protected private property rights); 1998 Mining Law, at **Exhibit C-1629**, p. 5 (Art. 6(d)); 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 7 (Art. 9); see also 2006 (Stantec) RRAP, at **Exhibit C-463**, p. 32 *et seq.* (section 3.3.3 setting out the legal framework on expropriations for public utility); **Dragos**, p. 70 (para. 386).

to successfully complete a two-step expropriation procedure, with the associated risks which RMGC and the Claimants have always downplayed.[104]

87 As a first step, RMGC would need to apply to a commission for projects of national or local interest (established by the Government or the county council) for a preliminary recommendation that the Project is of public utility.[105] This recommendation, registered in a protocol, would need to be approved by the competent public authorities (Government or county council depending on the national or local interest involved) in a declaration of public utility.[106] To reach their decision, the commission and then the competent authorities take into account policy, economic, and social issues.[107] Government representatives noted on various occasions with RMGC that the Project had not been declared of public utility.[108]

88 RMGC would then need to inform local authorities and the public of its intent to seek to expropriate certain land- and home-owners. These actions and decisions would be subject to court challenge.[109]

[104] See *infra* paras. 697-712.

[105] RMGC knew that it needed this declaration of public utility, as demonstrated by the inclusion of a provision to that effect in the Roşia Montană Law. See *infra* paras. 305 and 337.

[106] Law 33/1994 on expropriation, at **Exhibit R-122**, p. 1 *et seq.* (Arts. 7-8 and 10(2)) (also noting that such declaration is made only if the work is registered in the PUZ); GD 583/1994 on commissions for public utility declarations, at **Exhibit R-123**, p. 4 *et seq.* (Arts. 19 and 21-23), p. 7 (Appendix 2: form for the commission's protocol) and p. 8 (Appendix 3: form for the declaration of public utility); see also *id.* at p. 3 (Art. 8) (noting that the file is submitted by the initiator of the work, *i.e.* here by RMGC); **Bîrsan**, p. 58 (n. 206) (improperly referring to Law 255/2010, as it applies to specific types of mining projects, such as exploitation of lignite).

[107] Law 33/1994 on expropriation, at **Exhibit R-122**, p. 2 (Art. 10).

[108] See *e.g.* TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 32 (Mereuta) ("This project is not a project of public utility, so expropriation is out of the question.") and p. 33 (Filip) ("Not being a public utility objective."); see also TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 5 (point 4) (Ragalie).

[109] Law 33/1994 on expropriation, at **Exhibit R-122**, p. 3 (Arts. 12-14); see also **Dragos**, p. 71 (paras. 394-397).

89 [redacted].[110]

2.3.6 RMGC Needed to Obtain Archaeological Discharge Certificates

90 [redacted].[111] Specifically, RMGC was aware of the archaeological site[112] [redacted][113] and that no building permit could be issued unless the archaeological research and discharge of the area was completed.[114]

91 Before implementing large-scale projects such as highways, mines, or oil wells in areas with known or potential archaeological heritage, project de-

[110] [redacted].

[111] [redacted].

[112] At the time the License was transferred to RMGC, the Roşia Montană archaeological site was listed (i) in the 1991 list of historical monuments (along with other sites and monuments of Roşia Montană), (ii) in the annexes to Law 5/2000, and (iii) on the Romanian Archaeological Repertory. See 1991 LHM, at **Exhibit C-1273**, p. 8 *et seq.*; Law 5/2000 approving National Land Improvement Plan, at **Exhibit R-124**, p. 5 and p. 3 (for the natural areas of Piatra Despicată and Piatra Corbului); Romanian Archaeological Repertory (excerpts), at **Exhibit R-125**, p.1 *et seq.*; see also **Dragos**, p. 17 *et seq*. (paras. 89, 94, and 100); 2000 Settlement Record, at **Exhibit C-1409.01**, p. 6 (under "Protection"); UC 68/2004, at **Exhibit C-525.04**, p. 2 *et seq*. (listing the protected sites and monuments).

[113] [redacted].

[114] See *supra* para. 62.

velopers must (i) undertake and fund preventive archaeological research,[115] (ii) obtain, if the results of the research allow, archaeological discharge certificates ("**ADC**s") for the areas affected by the works,[116] and (iii) implement measures to protect the archaeological heritage.[117] Once in possession of the ADCs,[118] the project developer needs the Ministry of Culture's endorsement before applying for the building permit.[119]

92 The impact of a project on the cultural heritage is part and parcel of an environmental impact assessment.[120] Within the EIA Review Process,

[115] GO 43/2000, at **Exhibit C-1699**, p. 2 *et seq.* (Arts. 2(1)(c) and (c^3), 5(1^1), and 6); see **Schiau**, p. 16 *et seq.* (paras. 57-76) (setting out types of research and funding requirements).

[116] GO 43/2000, at **Exhibit C-1699**, p. 6 (Art. 5(2)-(3)). An ADC is necessary to delist a site or monument from the list of historical monuments, for those archaeological sites and monuments also subject to this regime of protection; to date, RMGC has not obtained ADCs for the entire Project Area. See *e.g.* Law 422/2001, at **Exhibit C-1702**, p. 12 (Art. 18).

[117] GO 43/2000, at **Exhibit C-1699**, p. 5 (Art. 5); see also **Gligor**, p. 22 (para. 54).

[118] Following legislative amendments in 2006, local culture directorates took over from the Ministry of Culture the responsibility of issuing ADCs. For Roşia Montană, the competent authority now is the Alba Cultural Directorate. See GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 5 (Art. 5(5)).

[119] Law 50/1991 on construction works, at **Exhibit R-111**, p. 5 (Art. (1)(a)(4)) and p. 12 (Art. 7); GO 43/2000, at **Exhibit C-1699**, p. 20 (Art. 18(b)); GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 5 (Art. 5(15)); see also *e.g.* UC 68/2004, at **Exhibit C-525.04**, p. 6 (under "Specific endorsements"); **Mihai**, p. 93 (n. 240).

[120] GO 43/2000 (consolidated up to Nov. 2006), at **Exhibit C-1700**, p. 5 (Art. 2(9)) ("Preliminary archaeological research is mandatory in all cases where environmental permits are issued with regard to areas with archaeological heritage, as the sole modality for identifying, describing and evaluating the direct and indirect effects that investment projects may have on archaeological heritage."); La Valetta Convention on Protection of Archaeological Heritage, at **Exhibit C-704**, p. 4 (Art. 5 iii) (EIAs must take full consideration of archaeological sites).

RMGC thus needed the Ministry of Culture's endorsement of the Project,[121] including of the proposed mitigation measures for the cultural heritage, as set out in the EIA Report ("**Cultural Management Plan**").[122]

93 RMGC understood and accepted that it needed to complete archaeological research in the Project Area.[123] As described by Dr. Claughton, RMGC undertook extensive research, notably within the context of the Alburnus Maior National Research Program between 2001 and 2006, in the Project Area as well as in the historical center of Roşia Montană.[124] The Claimants' witness, Mr. Adrian Gligor, explains that the program sought to "assess what should be preserved *in situ* and what areas may be discharged."[125] Over the years, RMGC submitted research projects (to obtain excavation permits for each of the archaeological campaigns that took place each year) and the

[121] GO 43/2000 (consolidated up to Nov. 2006), at **Exhibit C-1700**, p. 5 (Art. 2(10)) (referring to the "principle of integrated conservation"); Memorial, p. 75 (para. 198); **Mihai**, p. 92 (paras. 360-362); see also TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 4 (Pineta) ("The [building permit] in the area with archaeological heritage is approved only based on the endorsement of the Ministry of Culture and the [EIA] procedure is integrated in the procedure for obtaining the construction authorization. Thus, the [building permit] is based on the [EIA], which is based on the [ADC].").

[122] Comprising a chapter of the EIA Report and appended management plans: Chapter 4.9 of the EIA Report (**C-224**), Baseline Report (**C-225**), two management plans, one for archaeological sites (**C-226**) and one for historical monuments (**C-227**), and the Cultural Heritage Management Plan (**C-228**); subsequent updates were prepared following public consultations (**C-333**, **C-334**, **C-335** and explanatory note at **C-388.01**); see also Memorial, p. 91 (para. 237); TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 8 (Istvan) ("given the national/international importance of the site, the [Ministry of Culture] requested … the development of a management plan for the archaeological heritage and of a management plan for the historical monuments and protected areas, developed according to … Law 564/2001, approving [GO 47/2000]. These plans were financed by [RMGC] and they were developed by [OPUS]."); TAC meeting transcript dated 10 May 2005, at **Exhibit C-533**, p. 17 and p. 50 *et seq.* (Annex 3); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 54 (Gligor).

[123] GO 43/2000, at **Exhibit C-1699**, p. 5 *et seq.* (Art. 5(1)) ("regulat[es] or prohibit[s] human activities" until completion of the preventive or rescue archaeological research); TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 42 (Anton) (the ADC is necessary before the Ministry of Culture can issue its endorsement of the Project).

[124] **CMA Report Appendix D**, p. 12 *et seq.* (section 2.3); Ministry of Culture Order 2504/2001, at **Exhibit C-1306**; see also TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 33 *et seq.* (Gligor).

[125] **Gligor**, p. 9 (para. 27) and p. 31 (para. 67); Memorial, p. 52 *et seq.* (paras. 143 and 149).

ensuing research reports (to request ADCs) to the Ministry of Culture and its local branch (the Alba Cultural Directorate), the National Commissions for Archaeology and for Patrimony, and the National Institute of Heritage, for their respective endorsement.[126] The authorities accepted the experts' recommendations and issued, between 2001 and 2008, the corresponding ADCs.[127] As discussed below, Alburnus Maior and two other NGOs, ICDER and *AsociaŞia SalvaŞi Bucurextiul,* subsequently challenged the ADCs for Cârnic.[128]

94 RMGC was required under Romanian law to fund the archaeological research and alleges to have invested some USD 10.5 million from 2001 to 2006.[129] The Claimants allege that the research "covered the majority of the Project area, far exceeding the scope recommended in the archaeological feasibility study or required for purposes of permitting Project development." This allegation is misleading since the research did not cover Orlea, as the Claimants admit.[130]

95 The Claimants contend that RMGC invested "more than USD 30 million" in the cultural heritage conservation, restoration and maintenance undertakings set out in the Cultural Management Plan.[131] Over the years, RMGC

[126] See *e.g.* Memorial, p. 52 *et seq.* (paras. 144-147).

[127] In 2001 and 2002, RMGC obtained ADCs for the areas where the facilities were to be built (plant, access road, pipelines, power lines, dam, TMF) (ADC 1320/2001, at **Exhibit C-669**) as well as for Cârnic surface (ADC 1231/2002, at **Exhibit C-670**); in 2004, RMGC obtained seven ADCs for the areas bordering the Roşia Montană historic center, including ADC 4/2004 for Cârnic massif (ADC 3/2004, at **Exhibit C-671**; ADC 4/2004, at **Exhibit C-672**; ADC 63/2004, at **Exhibit C-674**; ADC 64/2004, at **Exhibit C-675**; ADC 65/2004, at **Exhibit C-676**; ADC 66/2004, at **Exhibit C-677**; ADC 67/2004, at **Exhibit C-678**); in 2006 and 2008, RMGC obtained ADCs for part of the industrial area between Orlea and Jig (an area called Tarina) and for the sandstone quarry area (Pârâul Porcului); see also Map - Roşia Montană ADCs, Underground Workings and Envisaged Mining Pits, at **Exhibit R-126** (setting out the discharged areas. The Cârnic area is marked as tentative because of the litigation relating to ADC 9/2011, discussed *infra* in Section 4.5.2).

[128] See *infra* paras. 147 and 212.

[129] Memorial, p. 54 (para. 148); National History Museum Report on Alburnus Maior Research Program (2001-2006), at **Exhibit C-1375**, p. 53.

[130] Memorial, p. 53 (n. 205); **Gligor**, p. 9 *et seq.* (para. 28).

[131] Memorial, p. 56 *et seq.* (para. 155 and n. 223); **Gligor**, p. 21 *et seq.* (paras. 50-60).

commissioned and funded numerous cultural heritage studies, which Mr. Gligor states RMGC was "not required to do" pursuant to Romanian law but which was allegedly consistent with international best practice.[132]

96 Relying on the results of the Alburnus Maior National Research Program, in 2006, RMGC submitted a new updated feasibility study for the Project, in which it adapted the footprint of the Project *inter alia* to take into account the ADCs issued until that date and the areas identified for *in situ* protection (including Cărpeniș, Hop-Găuri, and Piatra Corbului).[133] In line with the Cultural Management Plan, archaeological artefacts found outside the protected areas were collected for conservation in other locations, including the proposed museum.[134]

97 Based on the research and studies conducted at Roşia Montană, RMGC was aware of the likelihood of additional finds in the future.[135] It thus concluded with the National Museum of History in 2007 a Protocol for Chance Finds, which provided that, in case of archaeological discoveries during the construction, exploitation or closure works, RMGC would suspend works to allow further archaeological research.[136] Depending on the discoveries and the required protection measures (ranging from conservation

[132] **Gligor**, p. 8 (para. 24) and p. 14 (paras. 35-36) ("voluntarily implemented and funded…").

[133] **Szentesy**, p. 25 (para. 48) (explaining that one of the reasons for RMGC's new feasibility study of 2006 was to amend the project in light of the research done onsite up until that time); **Gligor**, p. 11 (paras. 32-33) and p. 16 (paras. 40-41); Memorial, p. 55 (paras. 150-152).

[134] See *e.g.* Law 422/2001, at **Exhibit C-1702**, p. 4 (Art. 4(9)); [redacted].

[135] See **CMA Report Appendix D**, p. 16 *et seq.* (paras. 45-46); see also TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 50 (Hegedüs) ("even if an [ADC] is given for the Cârnic Massif, chances are that we find there things that must be preserved *in situ*.").

[136] 2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Chance Find Protocol, at **Exhibit C-388.03**, p. 33; see **CMA Report Appendix D**, p. 18 (para. 50); see also GO 43/2000, at **Exhibit C-1699**, p. 7 (Art. 5(6), (9), and (10)); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 55 *et seq.* (Timiș and Gligor) (discussing the Chance Find Protocol and RMGC's proposed mitigation measures and required budget).

by record to *in situ* preservation), RMGC might need to amend (to the extent legally or technically possible) or terminate the Project (at least in the protected area).[137] RMGC accepted this risk.[138]

2.3.7 RMGC Needed the Social License for the Project

98 It is widely accepted in the mining industry that mining companies must obtain a social license for their projects, namely their acceptance by the affected community and other stakeholders.[139] Gabriel Canada had always understood that it needed the social license for the Project.[140] Indeed Mr. Tănase explicitly acknowledged at the time that "if the community doesn't want the project, we don't make it."[141]

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[137] Law 422/2001, at **Exhibit C-1702** p. 7 (Art. 10 (2)) (now found at Law 422/2001 as republished on 20 November 2006, at **Exhibit C-1703**, p. 5 (Art. 11 (2)); 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 7 (Art. 11); **Schiau**, p. 7 (para. 17).

[138] See *e.g.* TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 56 *et seq.* (Gligor and Timiș) (discussing the consequences of the discovery of the "Temple of Apollo," which would *de facto* have brought an end to the Project as expressly recognized by RMGC which answered that it "will comply if we come to that, as we comply with all regulations."). This discussion was continued in the following TAC meeting. See **C-483**, p. 46); see also Ministry of Environment Note for public consultation dated 11 July 2013, at **Exhibit C-555**, p. 26 ("Titleholder shall not perform mining activities on land where protection regime related to archaeological site is applicable, for as long as for the respective land the protection regime provided by the law is applicable."); see also *supra* n. 111.

[139] **Thomson**, p. 5 *et seq.* (paras. 15-22); 2006 (Stantec) RRAP, Annexes, at **Exhibit C-464**, p. 102 ("The core principle of sustainable development is to improve human well-being over time, with the goal that children's lives be as good as, or better than, their parents. Mining companies will get in exchange the "social license" – the social support needed in order to develop their mining projects."); see also Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 31 ("after nine years of its active presence at Roşia Montană, the community today is socially divided and poorer from a strictly economic point of view. During all these years the company was never able to prove that it has the social license to operate.").

[140] See *e.g.* TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 4 (Aston) ("If we have any environmental problems or social problems that show that our promises are only words and not action, we are very aware that … you will turn us down and we go bankrupt."); Gabriel Canada 2009 Annual Report, at **Exhibit R-128**, p. 3 (referring to its "commitment to win the 'social license' with which to operate").

[141] See Interview of D. Tănase and S. Barbu, *Realitatea TV*, May 2009, at **Exhibit C-900**, p. 6.

99 Starting in 1998, RMGC commenced exploration and drilling in Roşia Montană to assess the feasibility of the Project.[142] As a result of these activities, the residents in the region gradually learned of the existence of RMGC and the Project. [redacted][143]

100 In early 2000, a major environmental disaster rocked Romania which would shape the public's perception of the Project. On 30 January 2000, a dam at the Baia Mare gold mine, located just 250 kilometers north of Roşia Montană, cracked due to heavy rains and released 100,000 cubic meters of water contaminated with cyanide into the Danube River, killing 1,400 tons of fish, contaminating drinking water, and generally causing pollution throughout Romania, Hungary, and Serbia and ultimately the Black Sea, some 2,000 kilometers away.[144] Some commentators called it the "worst environmental disaster in Europe since Chernobyl."[145]

101 In the years that followed, people voiced concerns that the same type of accident could occur at Roşia Montană. Both at the time and in this arbitration, the Claimants have dismissed such concerns on the basis that the Baia Mare facilities were outdated.[146] However, the fear of another Baia

[142] Memorial, p. 46 (para. 125).

[143] [redacted]; see also F. Mădărăşan, "The Roşia Montană Project causes conflicts in the Orthodox Church", *Informatia.ro*, Sept. 2003, at **Exhibit R-129**; M. Bran, "Gold fever divides farmers of Roşia Montană", *Le Monde*, Nov. 2000 (excerpt), at **Exhibit R-130**; C. Lukács, "A gigantic project in the Carpathians. Roşia Montană and its tons of gold", *Courrier International*, Oct. 2003, at **Exhibit R-131**.

[144] EU Commission, "Communication on the Safe Operation of Mining Activities: A Follow-up to Recent Mining Accidents", Oct. 2000, at **Exhibit C-932**, p. 6 *et seq.*; UNEP/OCHA, "Assessment Report on Cyanide Spill at Baia Mare, Romania", Mar. 2000, at **Exhibit C-721**, p. 16; see also **CMA Report Appendix A**, p. 5 *et seq.* (para. 17).

[145] C. Roche *et al.*, "Mine Tailings Storage: Safety Is No Accident, A UNEP Rapid Response Assessment", *UNEP and GRID-Arendal*, 2017, at **Exhibit R-132**, p. 44.

[146] Memorial, p. 269 *et seq.* (para. 619); *e.g.* Transcript of TV show Judeca Tu!, *TV R1*, dated 23 February 2012, at **Exhibit C-438**, p. 18 (Tănase).

Mare has always remained a source of public concern,[147] in particular since the Roşia Montană Project also envisaged the use of cyanide and a much larger tailings pond and dam.[148]

102 In addition, RMGC faced grievances and increasing criticism in connection with its relocation efforts. On 8 September 2000, local residents established an association called *Asociaţia Aurarilor Alburnus Maior Roşia MontanĂ* ("**Alburnus Maior**") to represent the interests of families in Roşia Montană and Bucium *vis-¨-vis* the Project.[149] Alburnus Maior later led the "Save Roșia Montană" campaign, which became the largest social and environmental movement ever in Romania (see **Sections 5.11** and **5.13** below).

103 Over the years, other NGOs that opposed the Project for environmental, cultural, social or other reasons, joined forces with Alburnus Maior.[150] The *Centrul Independent pentru Dezvoltarea Resurselor de Mediu* (the Independent Centre for the Development of Environmental Resources or "**ICDER**"), based in Cluj, was involved with Alburnus Maior in the litigation to suspend RMGC's urban certificate.[151] Other influential NGOs that

[147] See *e.g.* Minutes of public debate (re PUZ amendment) dated 11 June 2002, at **Exhibit R-133**, p. 2 ("problems … from Baia Mare, which could also happen at Roşia Montană"); D. Dumitrescu, "Exploitations in Roşia Montană, criticized in EP", *curierulnational*, Mar. 2006, at **Exhibit C-860** ("Hungarian MP fears that the incident would reoccur…"); Minutes of Public Consultation in Roşia Montană dated 24 July 2006, at **Exhibit C-280**, p. 1; Minutes of Public Consultation in Abrud dated 25 July 2006, at **Exhibit C-270**, p. 2; **CMA Report Appendix B**, p. 59 (para. 244); **CMA Report**, p. 17 *et seq.* (paras. 52-59),

[148] **CMA Report**, p. 17 (Table 1).

[149] **Thomson**, p. 13 (para. 36); see also *id.* at p. 16 *et seq.* (paras. 46 and 49) and p. 26 *et seq.* (paras. 88-90).

[150] Pro-mining NGOs based in Roşia Montană include *Asociatia Pro RoşiaMontanĂ*, Pro Justice Association (*Asociatia Pro Dreptatea RoşiaMontanĂ*), and the Future of Mining Trade Union (*Sindicatul Viitorului Mineritului*). See *e.g.* Open Letter from Pro Roşia Montană Association *et al.* endorsed by local Mayors *et al.* dated 18 January 2010, at **Exhibit C-1486**; Open Letter from Pro Roşia Montană Association to Ministry of Environment dated 9 April 2009, at **Exhibit C-1488**.

[151] See *infra* Section 3.4.1.

became involved include the Legal Resources Center,[152] Greenpeace Romania,[153] Mining Watch Romania,[154] and the *FundaŞia CulturalŁ RoĸIa MontanŁ* (Roşia Montană Cultural Foundation).[155]

104 In November 2002, Alburnus Maior presented a series of concerns with the Project, on the basis of a report by two Austrian professors who opined that the Project did not comply with EU law, a geophysicist's analysis that the dam proposed in the feasibility study presented major shortcomings, and the opposition voiced by 47 archaeological experts from Europe and North America concerned for the local cultural heritage.[156] Alburnus Maior concluded that "investors should be wary of backing the … project given the ongoing concerns around corruption, high environmental risks, and the broad-based local and international opposition."[157]

105 At the end of 2003, the General Assembly of the International Council on Monuments and Sites issued a resolution "reiterat[ing] its concern about the on-going mining operations" in Roşia Montană and "call[ing] upon the urgent intervention of the National Authorities and the international community to ensure the appropriate protection of the site."[158]

106 Around the same time, the EBRD and International Finance Corp. ("**IFC**"), the World Bank's private sector lending branch, withdrew their

[152] A Bucharest-based NGO involved with Alburnus Maior in court proceedings relating to RMGC and the Project since its Strategic Litigation Program of 2005.

[153] The Bucharest-based branch of Greenpeace, involved with Roşia Montană since 2002. During a campaign held between 23 July and 3 August 2004, Greenpeace Romania collected 27,000 signatures against the Project which were sent to Prime Minister Năstase. See "History of the Save Roşia Montană Campaign 2002-2013", *rosiamontana.org*, at **Exhibit R-134**, p. 4.

[154] A Cluj-based NGO involved with the Save Roşia Montană campaign from the outset.

[155] A Roşia Montană-based NGO created in 2009 to preserve the identity and unique natural and cultural heritage of Roşia Montană and surroundings.

[156] "Evaluating Risk - Investors' guide to Gabriel Resources Limited's Roşia Montană Mine Proposal", *Mineral Policy Center*, Nov. 2002, at **Exhibit R-135**, p. 2 and p. 4.

[157] *Id.* at p. 5.

[158] ICOMOS Resolution dated 30 October 2003, at **Exhibit R-136**.

tentative financial support of the Project, reportedly because of the environmental and social concerns voiced at the time.[159]

107 In 2004, Alburnus Maior created a festival called "Fânfest," which served as a platform for exchanging information and voicing opposition to the Project.[160] The festival brought thousands of people to Roşia Montană and was subsequently organized almost every year until 2015.

108 After 2004, the opposition to the Project intensified and spread to the local and national level, as set out in **Sections 4** and **5** below.

[159] N. King Jr, "Romanian Gold Mine Loan Blocked by World Bank Chief", *The Wall Street Journal*, Oct. 2002, at **Exhibit R-137** ("The World Bank official, citing environment and social concerns in its decision to back away from the project, said the case was 'an example of how we're seeking to have an open dialogue with all our development partners'.").

[160] 2007 Update to EIA Report, Public Consultations, Vol. 53 - Sustainable Development, at **Exhibit C-338**, p. 42 *et seq.* (describing the 2004-2006 editions of FânFest and the idea behind its creation "to assist the locals in finding alternative development methods" with "FânFest [also being] a celebration for all volunteers and those preoccupied by the sustainable development of Romanian rural areas").

3 THE EIA REVIEW PROCESS UP UNTIL SEPTEMBER 2007

109 [redacted].[161] Shortly thereafter, the Ministry of Environment confirmed that, due to its size and nature, by law, the Project would require an environmental impact assessment ("**EIA**").[162] It thus established a TAC to assess RMGC's forecast of the Project's environmental impact.[163]

110 On 10 May 2005, the TAC convened for the first time and discussed the scope and procedure for the EIA Review Process.[164] Shortly thereafter, the Ministry of Environment sent to RMGC guidelines for the environmental impact assessment, which included the technical issues that RMGC would need to address in its report.[165]

111 Further to these instructions, one year later, on 15 May 2006, RMGC submitted the EIA Report, which comprised ten chapters as well as operation and management plans and six baseline reports, totaling 34 volumes and some 5,000 pages. [166]

112 In the weeks and months that followed, Romania conducted both a transboundary and domestic consultation process in accordance with Romanian and EU law, both of which gave rise to an unprecedented number of questions from the public (**Sections 3.1** and **3.2**). The TAC examined the EIA Report and, over the course of four meetings in 2007, raised questions with RMGC (**Section 3.3**). In parallel with the EIA Review Process, RMGC

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[161] [redacted].

[162] Letter from Ministry of Environment to RMGC dated 27 April 2005, at **Exhibit C-1753**, p. 4; see also Ministry of Environment Order 860/2002, at **Exhibit C-538**.

[163] See *supra* para. 77.

[164] TAC meeting transcript dated 10 May 2005, at **Exhibit C-533**.

[165] Letter from Ministry of Environment to RMGC dated 24 May 2005, at **Exhibit C-534**, p. 9 *et seq.*

[166] The ten chapters were: (1) General Information, (2) Technological Processes, (3) Waste, (4) Potential Impacts, (5) Assessment of the Alternatives, (6) Monitoring, (7) Risk Cases, (8) Description of the difficulties, (9) Non-Technical Summary, and (10) Transboundary Impacts. See **Exhibits C-193** to **C-241**.

faced successful court challenges by NGOs to its urban plans and certificates and the ADC for Cârnic (**Section 3.4**). Partially as a result of these rulings, which upheld the challenges, in September 2007 the Ministry of Environment announced that the TAC could not reasonably continue the EIA Review Process in the circumstances (**Section 3.5**).

3.1 Hungary Voices its Concerns Regarding the Project

113 In accordance with the Espoo Convention, which requires States to consult one another regarding projects that may have transboundary environmental effects, Romania notified its neighbors regarding RMGC's application for the environmental permit.[167] Hungary responded and actively engaged in the consultation process over the following years.

114 Hungary was sensitive to the risks inherent to the Project since it had been the victim of a major environmental disaster at the hands of a Romanian gold mining plant just a few years earlier – the Baia Mare dam disaster described above.[168] The accident led the EU to adopt a new Mining Waste Directive[169] and the international mining community, including the International Council on Metals and the Environment, environmental organizations, and cyanide producers, to draft a code to regulate the use of cyanide in mining.[170] Many countries, including Costa Rica, Turkey, the Czech Re-

[167] Letters from Romania to Hungary, Moldova, Ukraine, Serbia and Montenegro, and Bulgaria dated 21 December 2004, at **Exhibit C-528**; see also "Miklós Persányi requests his Romanian counterpart to provide information in the case of Verespatak", *Kvvm.hu*, Jan. 2005, at **Exhibit C-453**.

[168] See *supra* para. 100; see also Hungary Opinion regarding the Project, 2011, at **Exhibit C-572**; EU Commission, "Communication on the Safe Operation of Mining Activities: A Follow-up to Recent Mining Accidents", Oct. 2000, at **Exhibit C-932**, p. 6 *et seq.*; UNEP/OCHA, "Assessment Report on Cyanide Spill at Baia Mare, Romania", Mar. 2000, at **Exhibit C-721**, p. 6 *et seq.* and p. 43.

[169] Memorial, p. 96 (n. 415).

[170] **van Zyl**, p. 7 (para. 23).

public, and Hungary, took steps towards limiting the use of cyanide in mining,[171] while the EU Parliament called on the Commission to ban cyanide mining technology.[172]

115 RMGC and the Project bore similarities with Baia Mare. At the time of the dam failure, the Baia Mare plant was, like RMGC, operated by a joint stock company, Aurul S.A., partially owned by a junior mining company, Esmeralda Exploration Limited of Australia. RMGC also envisages to extract gold using a cyanide solution, as was the case at Baia Mare.

116 On the other hand, the Project is significantly larger than that of Baia Mare, with a surface area four times larger and a dam nine times higher.[173]

117 In the circumstances, it is not surprising that Hungary accepted Romania's invitation to participate in the EIA Review Process and requested that RMGC provide information regarding the Project's possible environmental effects and RMGC's proposed mitigation measures.[174]

118 The following year, in May 2006, RMGC submitted the EIA Report to the Romanian authorities, which promptly transmitted it to Hungary.[175] Hungarian authorities posed questions and raised concerns regarding the EIA Report, both in writing and through bilateral discussions with Romanian authorities.[176] Two public hearings were held in Hungary, in Budapest and

[171] Notwithstanding certain proposals to ban the use of cyanide in mining in Romania, no such laws have been enacted. See J. Laitos, "The Current Status of Cyanide Regulations", *E&MJ*, Feb. 2012, at **Exhibit R-138**, p. 40; **CMA Report**, p. 7 (para. 26); M. Duţu, "Legal issues in the implementation of the Roşia Montană Project", *RRDM*, Mar. 2004, at **Exhibit R-139**, p. 163 (Ch. 6); Hungary Opinion regarding the Project, 2011, at **Exhibit C-572**, p. 6.

[172] European Parliament Resolution dated 5 May 2010, at **Exhibit R-140**; European Parliament Resolution dated 27 April 2017, at **Exhibit R-141**.

[173] **CMA Report**, p. 17 (Table 1); EU Commission, "Communication on the Safe Operation of Mining Activities: A Follow-up to Recent Mining Accidents", Oct. 2000, at **Exhibit C-932**, p. 6 *et seq.*

[174] Letter from Ministry of Environment to RMGC dated 24 May 2005, at **Exhibit C-534**, p. 9 *et seq.*

[175] Letter from RMGC to Ministry of Environment dated 15 May 2006, at **Exhibit C-535**.

[176] See *e.g.* Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**; Letter from Prof. Antypas *et al.* to Ministry of

Szeged, in August 2006.[177] The Hungarian public raised concerns regarding the risks of a cyanide spill, the financial guarantees in case of an accident, compliance with EU directives regarding mining waste and the protection of groundwater, and the possible transportation of cyanide through Hungary.[178]

119 Hungarian authorities also relayed concerns that, notwithstanding faults in the ground where the tailings pond was to be built, RMGC was not envisaging a lining at the bottom of the pond. Such a lining, which even the Baia Mare plant had had, was considered necessary to prevent the seepage of toxic substances into the groundwater.[179]

120 Hungarian authorities also conveyed concerns regarding RMGC's legal problems. Referring to the need for a valid urban certificate for an EIA Procedure, they noted that the Romanian courts had suspended the first urban certificate[180] and that the new urban certificate issued in May 2006 (UC 78/2006) improperly excluded provisions for the tailings pond and dam. They also noted that the Project required changes to the urban plans of Abrud, Câmpeni, and Bucium.[181]

Environment dated 1 July 2006, at **Exhibit R-142**; EIA public consultation questions and RMGC responses (Vol. 80) dated 24 September 2006, at **Exhibit R-143**; "Hungary will use all legal means to stop the Roşia Montană Project", *ActMedia*, Jan. 2007, at **Exhibit C-425**; Transcript of bilateral Espoo Convention meeting dated 30 July 2007, at **Exhibit C-541**; Transcript of bilateral Espoo Convention meeting dated 31 July 2007, at **Exhibit C-542**.

[177] Minutes of Public Consultation in Szeged dated 28 August 2006, at **Exhibit C-281**; Minutes of Public Consultation in Budapest dated 29 August 2006, at **Exhibit C-276**.

[178] Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 3, p. 7, and p. 11.

[179] *Id.* at p. 15; see also *id*. at pp. 17-18 and p. 21 (describing the lack of liner as violating the groundwater directive); **CMA Report**, p. 12 (para. 43).

[180] See *infra* para. 142.

[181] Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 20.

121 Finally, Hungarian authorities noted with concern the Project's impact on archaeological vestiges, affirming that "the majority of the area under the project's footprint has not been researched according to the law."[182]

122 In the context of their bilateral consultations, Romanian and Hungarian authorities created an *ad hoc* committee of experts to discuss the Project, which in turn engaged six experts to review the EIA Report. On 15 November 2006, the Independent Group of International Experts submitted its conclusions regarding the EIA Report and, more specifically, the Project's transboundary effects (the "**IGIE Report**").[183]

123 The Claimants misleadingly suggest that these experts endorsed the Project without reservation.[184] The experts raised concerns regarding the use of cyanide, water management, the operation of the tailings management facility, and the plans relating to the closure of the mine and related financial guarantee, all of which "require[d] full resolution to the satisfaction of the Ad Hoc Committee prior to such discussions and evaluation."[185] They also noted that given the "highly cyclic nature of gold prices … the possibility exists … in the project life cycle that it is loss-making."[186] The IGIE's review was limited both in scope (by only reviewing certain aspects of the EIA Report) and time (by only reviewing the Project over a 6-week period).[187]

124 In their Memorial, the Claimants dismiss Hungary's concerns, suggesting that the "Project did not present any material transboundary environmental impacts," and that there was a "consensus of independent experts that there

[182] *Id.*, p. 25.

[183] IGIE Report dated 30 November 2006, at **Exhibit C-502**, p. 39.

[184] Memorial, p. 96 *et seq.* (paras. 246-248).

[185] IGIE Report dated 30 November 2006, at **Exhibit C-502**, p. 39.

[186] *Id.*; see also **CMA Report**, p. 55 (para. 207).

[187] IGIE Report dated 30 November 2006, at **Exhibit C-502**, p. 2 *et seq.* (describing calendar of work and limitations of the report); see also **CMA Report Appendix C**, p. 14 *et seq.* (section 7.3).

was no possibility of the Project causing *any* negative transboundary effects."[188] However, the IGIE report did not opine as to whether or not the Project might have transboundary effects.[189] Furthermore, under the Espoo Convention, Romania was bound to address and consider Hungary's concerns when taking its decision.[190]

125 By September 2007 and in the years that followed, Hungary maintained serious reservations regarding the Project.[191]

3.2 The Public Voice their Concerns Regarding the Project

126 In parallel with the transboundary consultation and in accordance with Romanian law, the Ministry of Environment launched a domestic public consultation process. [redacted][192] In June 2006,[193] the Ministry of Environment ensured that both it and other State entities, including certain regional EPAs, published the EIA Report via their websites and/or made it available in hard copy at their offices. Fourteen public debates were then held in Romania between 24 July 2006 and 25 August 2006 in the following localities: Roşia Montană, Abrud, Câmpeni, Bistra, Baia de Arieş, Turda,

[188] Memorial, p. 87 (para. 226) and p. 99 (para. 249) (emphasis in original).

[189] **CMA Report**, p. 55 (para. 209); **CMA Report Appendix B**, p. 61 (para. 255) (re possible transboundary effects).

[190] See also **Dragos**, p. 60 (paras. 331-337).

[191] Hungarian Ministry of Environment press release dated 13 September 2007, at **Exhibit C-550**; see *infra* para. 176.

[192] Ministry of Environment Order 860/2002 on approval of EIA procedure and issuance of environmental permit, at **Exhibit C-1774**, p. 13 *et seq.* (Ch. III); 2006 EIA Report, Public Consultation - Exploration, at **Exhibit C-245**; Letter from RMGC to the Ministry of Environment dated 31 May 2006, at **Exhibit C-443**; [redacted].

[193] Ministry of Environment Note on public consultation plan dated 2 June 2006, at **Exhibit R-144**; [redacted]; Letter from RMGC to Hunedoara EPA dated 6 June 2006, at **Exhibit C-442**; 2007 Update to EIA Report, Public Consultations Vol. 11, at **Exhibit C-296**.

Zlatna, Brad, Alba Iulia, Arad, Cluj, Bucharest, Deva, and Lupșa.[194] The Ministry of Environment gave the public until 25 August 2006 to submit questions.

127 The public response revealed strong and widespread concern.[195] The Ministry of Environment received an unprecedented number of comments – 5,610 questions and 93 contestations from over 6,000 people – which it sent to RMGC on 31 January 2007. These comments totaled 678 pages and included both written comments and questions from the public debates (from 489 interventions).[196]

128 The Claimants' complaints that the Ministry of Environment took an unreasonable amount of time to send these comments and did not filter them are misplaced.[197] It was entirely reasonable for the Ministry of Environment to take five months to review the questions and comments from the public and to sort them by issue. Moreover, RMGC did not complain of the Ministry's alleged delay at the time, including when it provided its answers on 4 May 2007.[198] The volume of its answers – 91 volumes totaling

[194] See minutes from public debates (including in Hungary) at **Exhibits C-270** to **C-283**.

[195] See *e.g.* H. Eyres, "Romania's Minefield", *Financial Times*, Mar. 2007, at **Exhibit R-145** (referring to negative opinion poll re Project); see also Gabriel (Canada) 2004 Annual Information Form, at **Exhibit C-1802**, p. 25 *et seq.* ("The incidents at the Baia Mare and Baia Borsa tailings management facilities in Romania, in neither of which Gabriel [Canada] has any interest or involvement, have dramatically increased public awareness of the environmental and safety hazards of the mining industry… In particular, a shift in such attitudes away from support for the mining industry may adversely affect Gabriel [Canada]'s ability to, or may prevent Gabriel [Canada] from, developing a new mine at Roşia Montană.") and p. 27 ("continued opposition to the Roşia Montană project by certain Romanian academics, both Romanian and international [NGOs] and other special interest groups, could contribute to such delays.").

[196] Letter from Ministry of Environment to RMGC dated 31 January 2007, at **Exhibit C-539**.

[197] Memorial, p. 101 (n. 438).

[198] Gabriel Canada was in any event not affected by this allegedly improper delay since it recognized in May 2007 that it had been working "since last August [2006] to identify and answer likely questions.". Gabriel Canada press release dated 4 May 2007, at **Exhibit R-146**; see also 2007 Update to EIA Report, Public Consultations Vol. 78, at **Exhibit C-363** (providing answers to questions); Memorial, p. 100 (para. 252).

more than 25,000 pages – speaks to the magnitude, diversity, and complexity of the questions and comments.[199]

129 At the same time as the public consultation, in mid-2006, the United Nations Development Program ("**UNDP**") sent a team to Roşia Montană to assess the "social, economic and environmental conditions."[200] It noted that RMGC staff had acknowledged that prior RMGC management had mishandled relations with the local community and caused "significant resentment."[201] The UNDP further found that RMGC's "resettlement/relocation compensation strategy caused local discontent," since it "favoured people with large families and small houses and caused resentment among owners of large houses."[202] The report also relayed the views of Alburnus Maior that RMGC's PUZ of 2002 had asphyxiated Roşia Montană by preventing new economic activities, including the construction of a hotel, in the affected zone.[203]

130 The public's concerns related to the Project's environmental, social, and cultural impact and risks, and its economic viability. There were also concerns that RMGC had obtained the License illegally[204] and that, as a junior

[199] **Exhibits C-286** to **C-330** and **C-333** to **C-375**.

[200] UNDP/BRC, Provisional Report on Sustainable Development Pathways for Roşia Montană, Jul. 2006, at **Exhibit C-503**, p. 43.

[201] *Id.* at p. 19; see also Minutes of Public Consultation in Budapest dated 29 August 2006, at **Exhibit C-276**, p. 22 (Aston) ("I do believe that RMGC acted not as professionally as they could have done between 2002-2005"); TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 4 (Aston) ("When we first started with this Project, we started with small studies, without communicating and we managed to get into a little bit of a mess.").

[202] UNDP/BRC, Provisional Report on Sustainable Development Pathways for Roşia Montană, Jul. 2006, at **Exhibit C-503**, p. 19 *et seq.*; see also **Thomson**, p. 22 *et seq.* (section 5.3).

[203] UNDP/BRC, Provisional Report on Sustainable Development Pathways for Roşia Montană, Jul. 2006, at **Exhibit C-503**, p. 21; see also *id.* at p. 19 ("RMGC acknowledges that the [PUZ] approved in 2002 (which prevents economic activities other than mining in Roșia Montană) combined with delays in the commencement of mining activities (as a result of bureaucratic procedures and RMGC itself) led to very significant frustration among the local population.").

[204] Various groups alleged that the contract that created the joint venture (RMGC) had been signed a day before the state-owned company made known that it was seeking an international partner. See *e.g.* S. Beyerle and T. Olteanu, "How Romanian People Power Took on Mining and Corruption", *Foreign Policy*, Nov. 2016, at **Exhibit R-93**, p. 4; see also Letter from Save

mining company with limited capital, it would not be able to keep its commitments. According to the UNDP Report, some feared that "the RMGC project [wa]s a 'mirage' aimed at raising the price of Gabriel's shares on the Toronto stock exchange following the approval of the EIA and enabling the realization of quick gains by the shareholders."[205]

131 In its 2006 disclosures, Gabriel Canada acknowledged that "continued opposition to the Roșia Montană project by certain Romanian and international NGOs, academics, and other special interest groups, could contribute to such [Project] delay."[206]

3.3 The Technical Advisory Committee Examines the EIA Report and Raises Questions Regarding the Risks of the Project

132 Following RMGC's submission in May 2007 of its responses to the questions from the public, the TAC convened to discuss the now supplemented EIA Report. The TAC's task was substantial: it needed to analyze an EIA Report and related technical documents of thousands of pages and to determine whether RMGC's proposed measures to mitigate the environmental impact of the Project were adequate. If it concluded that the permit could be granted, it needed to consider the conditions to be attached to the permit.[207]

Roşia Montană Group to Ministry of Environment dated 21 March 2011, at **Exhibit R-147**. See also **Bîrsan**, p. 6 *et seq.* (Sections II and III) (explaining why he considers these concerns to be unsubstantiated).

[205] UNDP/BRC, Provisional Report on Sustainable Development Pathways for Roşia Montană, Jul. 2006, at **Exhibit C-503**, p. 17.

[206] Gabriel Canada 2005 Annual Information Form, at **Exhibit C-1803**, p. 28; see also Gabriel Canada 2008 Annual Information Form, dated 6 March 2009, at **Exhibit C-1806**, p. 22 ("The publicly stated objective of the NGOs in initiating and maintaining these legal challenges is to use the Romanian court system not only to delay as much as possible, but to ultimately stop the development of the Roşia Montană Project."); Gabriel Canada 2009 Financial Report, at **Exhibit R-148**, p. 3 ("multiple legal challenges brought forward by NGOs in Romania may continue to cause potential setbacks to the Project timeline."); see also M. Wooldridge, "New gold mine draws fires", *BBC News,* Dec. 2006, at **Exhibit R-149**.

[207] **Mocanu**, p. 4 (para. 22).

133 During four meetings between 26 June 2007 and 9 August 2007, the TAC and RMGC discussed the first four chapters.[208] Because the EIA Report comprised some 18,000 pages, it was obvious that several meetings would be required to review it, and indeed the TAC and RMGC had agreed from the outset that this was the case.[209]

134 Throughout these meetings, the TAC posed questions regarding the Project, in order to identify and assess the risks it entailed. With reference to the Baia Mare disaster, its members posed questions regarding the risk of a failure of the tailings dam.[210] In addition to Baia Mare, other tailings dams had given way, at various mining sites around the world, over the previous 30 years.[211] In 1972, in nearby Certej, Romania, the dam of a copper mine, which was 30 meters high, had failed, inundating the village and killing 89 people. (By comparison, the Roşia Montană tailings dam was to be 185 meters high and located immediately above Abrud and its 5,000 inhabitants.) In 1985, in Stava, Italy, a fluorite tailings dam had given way and killed 268 people.[212] In 1992, a dam at a gold mining plant in Colorado had failed, causing loss of aquatic life on a 25-kilometer stretch of the nearby river.[213] In 1998, a dam at the mining plant in Aznalcóllar, Spain broke, polluting some 4,500 hectares of land.[214]

135 The TAC also posed questions on the risks of using cyanide to extract gold ore. As the Romanian Academy's representative observed, a number of

[208] See minutes of 2007 TAC meetings at **Exhibits C-482**, **C-477**, **C-478**, and **C-475**.

[209] TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 3 (Stoica).

[210] TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 18, p. 25 and p. 27.

[211] See also **CMA Report Appendix A**, p. 5 (para. 14) and p. 16 *et seq.* (List of Tailings Dam Failures).

[212] Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 13; see also *id.* at p. 18.

[213] See EU Commission, "Communication on the Safe Operation of Mining Activities: A Follow-up to Recent Mining Accidents", Oct. 2000, at **Exhibit C-932**, p. 4.

[214] See *id.* at p. 5.

prior mining accidents, in addition to that at Baia Mare, had involved cyanide leaks. For instance, in 1995, a Canadian-owned mine in Guyana had leaked over 1.2 billion liters of cyanide solution into a local river.[215]

136 The TAC further inquired about the risk of seepage from the tailings pond.[216] While tailings ponds often have an artificial liner to prevent seepage of toxic substances into the ground, RMGC considered that a natural, clay liner would suffice in this case. The representative of the Ministry of Environment requested assurances that the clay liner at the bottom of the tailings pond would ensure the pond's impermeability.[217] This need was particularly important given the existence of several ground and surface water sources in the Corna Valley.[218]

137 The TAC also inquired about RMGC's urban plans and certificates and the absence of an environmental endorsement for the PUZ.[219] Separately, the Ministry of Culture noted that it would not be able to take a position prior to RMGC's securing an update of the PUG, which would take into account

[215] Since 1994, there have also been cyanide-related mining accidents in Kyrgyzstan, South Africa, and Taiwan. See TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 24 (Răgălie); N. Logan, "Romanians protest Canadian-owned gold mining operation", *Global News*, Sept. 2013, at **Exhibit R-150**; see also Minutes of Public Consultation in Szeged dated 28 August 2006, at **Exhibit C-281**, p. 10; J. Jusupjan, "Kyrgyzstan - Cyanide Spill Offers Lessons", *RadioFreeEurope*, Jun. 1998, at **Exhibit R-151**; Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 15.

[216] TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 26 (Chiriac), p. 31 *et seq.* (Bălărie); TAC meeting transcript dated 19 July 2007, at **Exhibit C-478**, p. 10 (Tudor), p. 12 (Chiriac); TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 9 (Găbudeanu).

[217] TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 26 (Chiriac).

[218] See Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 4; see also *id.* at p. 18.

[219] TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 7 ("we cannot rule now given that the [PUZ] is actually going to be prepared."), p. 9 (requesting update of PUG), and p. 13 (where the representative of the Ministry of Development observed "the permitting is only possible based on a legally approved urbanism documentation."); see also TAC meeting transcript dated 19 July 2007, at **Exhibit C-478**, p. 4 (Pătraşcu).

the results of the Alburnus Maior research program.[220] Remarkably, at none of the TAC meetings in 2007 did RMGC disclose that, as discussed below, its PUZ and urban certificate were being challenged by NGOs in court.[221]

138 The TAC raised numerous other questions, including the following:

- how RMGC planned to handle recalcitrant residents unwilling to move, given that the Project had not been declared of public utility and thus could not trigger expropriation procedures;[222]
- the storage and geological stability of waste stockpiles and the risk of their sliding into the TMF and creating a wave that would lead to water flowing over the dam;[223]
- the apparent absence of discussion of the impact of air pollution from the Project on vegetation in the area;[224]
- the frequency, size, and routes of heavy truckloads to and from the site and their impact on the environment (including their air emissions and vibrations),[225] as well as the risk of an accident involving hazardous substances;[226]

[220] TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 8 *et seq.* (Istvan) (also noting the ongoing preparation at the time of the PUZ for the historical center).

[221] See *infra* Section 3.4; see also TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 13 *et seq.* (Szentesy) (describing the status of the urban documentation without mentioning the litigation, saying "we consider the 2002 [PUZ] as still valid.").

[222] TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 5 (item 4); TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 32 (Mereuta) and p. 33 (Gheorghe).

[223] TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 9 (Găbudeanu); TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 25 (Găbudeanu); see also **CMA Report Appendix A**, p. 12 *et seq.* (section 4).

[224] TAC meeting transcript dated 19 July 2007, at **Exhibit C-478**, p. 20 (Ştefan).

[225] *Id.* at p. 24 (Ion); see also *id.* (Ştefan) ("the approach on the vibrations is superficial…"); TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 36 *et seq.* (Ion Irimia).

[226] TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 37 (Tudor).

- insufficient explanations regarding mitigation measures for the biodiversity and landscape;[227]
- the insufficiency of sums allocated to remediation and rehabilitation;[228]
- lack of compliance with Romanian legislation and regulations;[229]
- the technical and financial measures relating to the environmental rehabilitation of the mine after its closure as well as the contents; [230] and,
- the quantity and effects of mercury that would be produced during the extraction process.[231]

139 The TAC also commented on the Cultural Management Plan.[232] The representative of the Ministry of Culture emphasized that "the vibrations are the problem" and noted the absence of "a noise monitoring program running during the operations' phase, for the historical monuments."[233]

[227] TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 22 (Baz).

[228] See TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 5 (item 5).

[229] See *e.g. id.* at p. 6 (Morohoi) (regarding compliance with laws on hazardous substances); TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 22 (Baz) and p. 36 (Ion Irimia).

[230] TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 5 (Răgălie, the translation mistakenly notes Stoica), p. 25 (Găbudeanu), p. 28 (Ministry of Environment representative).

[231] *Id*. at p. 25 (Găbudeanu), p. 28 (Ministry of Environment representative), and p. 29 (Morohoi).

[232] See TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 9 (Istvan) ("we consider that those management projects are properly prepared, … [although] it would have been more advisable to be developed by experts in management, not in restoration."); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 54 *et seq.* (notably noting the lack of an "operational handbook" (at p. 56) and of a "restoration project" on the basis of which reliable budget estimates could be made (at p. 58)).

[233] TAC meeting transcript dated 19 July 2007, at **Exhibit C-478**, p. 24 (Nicolae) (noting that the noise and vibrations issue had already been identified when the 2002 PUG was issued); see also **CMA Report Appendix D**, p. 18 (para. 49) and p. 24 (paras. 69-70); **CMA Report**, p. 38 *et seq.* (section 6.2.1.1); Map - Roşia Montană mining pit blast zones, at **Exhibit R-152**.

3.4 NGOs Successfully Challenge RMGC's Urban Plans and a Critical Archaeological Discharge Certificate

140 During the EIA Review Process, NGOs commenced court proceedings, challenging the validity of the urban plans and certificate (**Section 3.4.1**), and a key ADC (**Section 3.4.2**).[234]

3.4.1 NGOs Successfully Challenge RMGC's Urban Certificate and Plans

141 To obtain the environmental permit, RMGC needed to have a valid urban certificate and PUZ. Although RMGC had previously obtained an urban certificate and had secured the approval of a PUZ (which it, however, still needed to amend), starting in January 2005, NGOs launched a litigation campaign to challenge the validity of these documents.

142 [redacted][235][redacted][236][redacted]

[234] See also Alburnus Maior *et al.* Preliminary complaint dated 22 March 2006, at **Exhibit R-153**; Alburnus Maior *et al.* Preliminary complaint dated 21 June 2006, at **Exhibit R-154**.

[235] [redacted]; see also Letter from RMGC to Alba EPA dated 14 December 2004, at **Exhibit C-525** (enclosing UC 68/2004); Letter from Alburnus Maior to Alba County Council dated 8 March 2004, at **Exhibit R-156**; Letter from Alburnus Maior to Alba County Council dated 31 August 2004, at **Exhibit R-157** (requesting disclosure of information of public interest, under Law 544/2004, in relation with RMGC's urban certificate); Alburnus Maior *et al.* Administrative challenge dated 8 October 2004, at **Exhibit R-158**.

[236] [redacted]; [redacted].

[redacted][237]

[redacted][238]

143 [redacted][239]

[redacted][240]

[redacted][241]

144 Notwithstanding these court proceedings, RMGC applied and obtained a second urban certificate on 26 April 2006 ("**UC 78/2006**").[242] [redacted]

[redacted][243]

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[237] [redacted]

[238] [redacted]

[239] Roşia Montană Local Council Decision 46 dated 19 July 2002, at **Exhibit C-1419**; [redacted]

[240] [redacted]

[241] [redacted]

[242] On 10 November 2005, the Ministry of Environment had written to RMGC regarding the expiration of the prior certificate, UC 68/2004. Letter from Ministry of Environment to RMGC dated 10 November 2005, at **Exhibit R-165**. See also UC 78/2006, at **Exhibit R-166**.

[243] [redacted]; EIA

145 Despite the significance of the urban certificate and plans, at neither the May 2005 nor the 2007 TAC meetings did RMGC's representatives disclose this pending litigation (including the 20 July 2007 court decision) or its possible impact on the EIA Review Process.[244]

3.4.2 NGOs Successfully Challenge Archaeological Discharge Certificate ADC 4/2004

146 Following archaeological research between May and October 2003, RMGC obtained on 15 January 2004 an archaeological discharge certificate for the Cârnic massif ("**ADC 4/2004**").[245] A portion of the eastern side of the massif, in the area of Piatra Corbului ("the Raven's Peak"), remained protected for conservation *in situ*.[246]

147 [redacted].[247] [redacted].[248]

Report (Intro.) dated 15 May 2006, at **Exhibit R-169** (referring to UC 78/2006); Letter from RMGC to Ministry of Environment dated 20 June 2007, at **Exhibit R-170**.

[244] See *supra* paras. 58-73; see also Gabriel Canada 2005 Annual Information Form, at **Exhibit C-1803**, p. 20 (describing zoning issues but not mentioning litigation).

[245] ADC 4/2004, at **Exhibit C-672**.

[246] **Gligor**, p. 16 (paras. 40-41) (noting RMGC's amendment of the Project to maintain Piatra Corbului as a protected area).

[247] [redacted]; see also Alburnus Maior Administrative challenge dated 1 February 2004, at **Exhibit R-172**.

[248] [redacted]; Law 5/2000 approving National Land Improvement Plan, at **Exhibit R-124**; see *supra* n. 112.

148 [redacted][249] [redacted][250] As discussed below, in December 2008, the Supreme Court ultimately annulled ADC 4/2004.[251]

149 Despite the significance of ADC 4/2004 for the Project, at neither the May 2005 nor the 2007 TAC meetings did RMGC's representatives refer to this litigation or its impact on the EIA Review Process.[252] During the public consultations, RMGC brushed the issue aside by stating that a new ADC would be sought after "tak[ing] into consideration and fix[ing] all the gaps identified by the Court as reasons for annulling the Certificate 4/2004."[253]

150 In Gabriel Canada's public disclosures, it mentioned, but minimized the relevance of, the litigation relating to ADC 4/2004 and the risk involved.[254]

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[249] [redacted].

[250] [redacted].

[251] See *infra* para. 166.

[252] TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 40 (Gligor) (referring, when generally presenting cultural heritage aspects of the Project, to the ADCs obtained and expressly naming Piatra Corbului as protected area, but remaining silent on the litigation relating to ADC 4/2004); **Dragos**, p. 54 *et seq.* (para. 291 *et seq.*) (describing significance of ADCs).

[253] SEA public consultation questions with RMGC answers dated 30 March 2009, at **Exhibit R-174**, p. 68; see also Gabriel Canada 2008 Annual Information Form, dated 6 March 2009, at **Exhibit C-1806**, p. 23.

[254] Gabriel Canada press release dated 12 July 2006, at **Exhibit R-175** ("The retrial will not delay the commencement of construction … as the [ADC] relates to an area of the project to be developed later in the life of the mine."); Gabriel Canada press release dated 28 July 2006, at

Gabriel Canada later generally explained that it participated in the court cases, through RMGC

> "to ensure that the Romanian courts … are presented with a legally correct, fair and balanced analysis of why the various Romanian regulatory authorities' actions are in accordance with the relevant and applicable laws."[255]

3.5 The Stay of the EIA Review Process Was in Accordance with Romanian Law

151 Unaware of the Cluj Tribunal's 20 July 2007 decision to stay UC 78/2006 but aware that the urban certificate was about to expire (on 26 July 2007), the Ministry of Environment informed RMGC that the EIA Review Process would resume once RMGC submitted a new urban certificate.[256] That same day, RMGC expressed its disagreement that an urban certificate was required to continue the EIA Review Process but nevertheless submitted a new urban certificate dated 27 July 2007 ("**UC 105/2007**").[257]

152 Given the similarity with UC 78/2006, which the Alba Tribunal had just suspended,[258] NGOs challenged UC 105/2007 via both court and adminis-

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Exhibit R-176, p. 2 ("We already have the necessary [ADCs] for the area required to begin construction in the spring of 2007.").

[255] See *e.g.* Gabriel Canada 2009 Financial Report, at **Exhibit R-148**, p. 3; Gabriel Canada 2008 Annual Information Form, dated 6 March 2009, at **Exhibit C-1806**, p. 22.

[256] The Claimants wrongly contend that the Ministry informed RMGC on 30 July that it could not continue the EIA procedure "because … UC 78/2006 had been suspended by a court in Cluj…". Memorial, p. 104 (para. 262); see also Letter from Ministry of Environment to RMGC dated 30 July 2007, at **Exhibit C-1754**.

[257] Although RMGC disputed the notion that it was required to maintain a valid urban certificate during the EIA Procedure, it had applied for a new urban certificate on 1 June 2007, *i.e.* just before the expiry of UC 78/2006. See Letter from Gabriel and RMGC to Ministry of Environment dated 30 July 2007, at **Exhibit C-1764** (also failing to mention the Cluj Tribunal's decision dated 20 July 2017); see also TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 4 (Filipaș) (describing need for urban certificate).

[258] See *supra* para. 144.

trative proceedings. First, they applied to the Alba County Council to revoke UC 105/2007.[259] [redacted][260] [redacted]. They relied in part on a recently-enacted amendment to Law 554/2004 that confirmed that, "[w]here a new administrative deed is issued, having the same contents as another administrative deed that has been suspended by the court of law, it is suspended *ipso jure*."[261]

153 Referring to the amendment of Law 554/2004, on 12 September 2007, the Ministry of Environment informed RMGC that the TAC could not reconvene until RMGC submitted a new, valid urban certificate.[262] As the TAC process was a matter of public interest, the then Minister of Environment, Mr. Attila Korodi, also held a press conference to inform the public of the status of the EIA Procedure.[263]

154 [redacted].[264]

155 [redacted]

[259] See Letter from Alba County Council to ICDER dated 20 September 2007, at **Exhibit R-177**; Alburnus Maior Motion to annul dated 22 August 2007, at **Exhibit R-178**.

[260] [redacted].

[261] Law 554/2004 on administrative litigation (as amended in 2007) (excerpts), at **Exhibit C-1767**, p. 5 (Art. 14 (5)); see also Constitutional Court decision dated 26 February 2008, at **Exhibit R-180** (rejecting RMGC's argument that Art. 14(5) was unconstitutional).

[262] Letter from Ministry of Environment to RMGC dated 12 September 2007, at **Exhibit C-548**, p. 1.

[263] Minister of Environment Korodi press conference transcript dated 13 September 2007, at **Exhibit C-549**.

[264] [redacted]; Letter from Ministry of Environment to RMGC dated 18 October 2007, at **Exhibit R-181**.

[redacted][265][redacted][266]

156 [redacted][267][redacted][268]

157 In this arbitration, the Claimants continue to challenge the position taken by the Ministry of Environment in September 2007. Professor Mihai opines that the Ministry's reliance on the amended provision of Law 554 (Article 14(5)), which had come into effect on 2 August 2007, was improper.[269] However, that provision was immediately applicable and thus governed the future effects of UC 105/2007.[270] Although Professor Mihai contends that a determination that Article 14(5) applied to UC 105/2007 could only be made by a court of law,[271] Article 14(5) provided for the

[265] [redacted]

[266] [redacted]

[267] [redacted]

[268] [redacted]

[269] **Mihai**, p. 80 *et seq.* (paras. 307 *et seq.*) and p. 84 *et seq.* (paras. 324 *et seq.*).

[270] See Civil Procedure Code (excerpt), at **Exhibit R-185** ; see also Law 554/2004 on administrative disputes (excerpt) dated 2 December 2004, at **Exhibit R-186** (Art. 28) ("The clauses of this law shall be supplemented by the … Civil Procedure Code"); see also **Dragos**, p. 36 (para. 182).

[271] **Mihai**, p. 86 *et seq.* (paras. 330 *et seq.*).

suspension "*ipso jure*" of an administrative deed, *i.e.* by (automatic) operation of law.[272] It was thus not necessary for a court to pronounce the suspension.[273]

158 For all of these reasons, the Ministry of Environment's position that the TAC could not reconvene unless and until RMGC submitted a valid urban certificate was in accordance with Romanian law.

159 [redacted].[274]

160 The Claimants' suggestion that Mr. Korodi blocked the Project for political reasons is incorrect and wholly unsubstantiated.[275] As Mr. Korodi indicated at the time, on various occasions, the Ministry aimed to take a decision regarding the environmental permit following completion of the EIA Review Process and in accordance with the law.[276]

161 When the EIA Review Process halted in September 2007, RMGC was far from securing the environmental permit. The TAC still needed to review six chapters of the EIA Report and other relevant documents. RMGC was embroiled in the NGO litigation and faced social resistance that was intensifying and spreading beyond the region.

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[272] Law 554/2004 on administrative litigation (as amended in 2007) (excerpts), at **Exhibit C-1767**, p. 5 (Art. 14(5)).

[273] This conclusion is all the more clear when Article 14(5) is read in conjunction with the rest of Article 14, which refers to court-ordered suspensions of administrative deeds. See also **Dragos**, p. 35 *et seq.* (para. 176 *et seq.*).

[274] [redacted]; see *infra* para. 162.

[275] Memorial, p. 103 (paras. 258-260). Although Former Minister Barbu criticized Mr. Korodi's actions in November 2007, she was no longer with the Government and thus not privy to the exchanges with RMGC or the documentation at issue. Memorial, p. 106 (para. 268).

[276] See *e.g.* "Gabriel Resources is waiting for the environmental permit to invest 2.5 billion dollars in the Apuseni Mountains", *Wall-Street.ro*, Apr. 2007, at **Exhibit C-543**; Mocanu WS, p. 15 (para. 71).

4 THE EIA REVIEW PROCESS BETWEEN JUNE 2010 AND NOVEMBER 2011

162 RMGC did not submit a new urban certificate to the Ministry of Environment until 3 May 2010.[277] On 21 June 2010, Minister Borbély publicly announced that the TAC would convene and that, in all likelihood, it would resume the EIA Review Process.[278]

163 Alburnus Maior and ICDER issued a joint press release criticizing the Ministry's position and contending that the conditions for the continuation of the EIA Review Process were not in place. They noted that the three prior urban certificates had been either suspended or annulled in court and that UC 87/2010 was already under attack in court. [redacted].[279]

164 On 23 June 2010, the TAC concluded that the EIA Review Process could continue.[280] Since the prior TAC meeting in August 2007, not much had changed as RMGC had failed to make progress on three key fronts for the Project: the approval of its revised urban plans, the maintenance of its ADC for Cârnic, and the acquisition of surface rights.

165 First, RMGC had not secured the approval of its amended PUZ, as required under the urban certificate.[281] Although it had submitted its proposed plan

[277] Letter from RMGC to the Ministry of Environment dated 3 May 2010, at **Exhibit C-875**; UC 87/2010, at **Exhibit C-808**; see also Letter from Ministry of Environment to RMGC dated 26 May 2010, at **Exhibit R-188** (regarding differences between urban certificates and requesting PUZ).

[278] "The Ministry of Environment Resumes the Authorization Procedure for the Roşia Montană Investment", *Mediafax.ro*, Jun. 2010, at **Exhibit R-189**.

[279] Alburnus Maior *et al.* Joint press release dated 23 June 2010, at **Exhibit R-190**, p. 1; see also Greenpeace Romania *et al.* Preliminary complaint dated 5 May 2010, at **Exhibit R-191**; [redacted].

[280] TAC meeting minutes dated 23 June 2010, at **Exhibit C-565**, p. 2; Letter from TAC President to RMGC dated 29 June 2010, at **Exhibit C-552**.

[281] See *supra* para. 66; UC 68/2004, at **Exhibit C-525.04**, p. 7.

to the Roşia Montană Municipality in June 2006,[282] it had not yet obtained all of the requisite endorsements of that plan. It would, for instance, only obtain, from the Sibiu EPA, the environmental endorsement for its amended PUZ in March 2011.[283] [redacted].[284]

166 [redacted].[285]

167 [redacted].[286] [redacted].[287] [redacted].[288] [redacted]:

[282] Letter from RMGC to Municipality dated 14 June 2006, at **Exhibit R-193**.

[283] Contrary to the Claimants' complaints, the Sibiu EPA did not unreasonably delay the issuance of the environmental endorsement for the PUZ. See *infra* para. 296; Memorial, p. 122 (para. 307); **Avram**, p. 41 (para. 84); Sibiu EPA decision on environmental endorsement for PUZ dated 7 March 2011, at **Exhibit C-598**; Letter from Sibiu EPA to RMGC dated 29 March 2011, at **Exhibit C-623**.

[284] [redacted]; see *supra* para. 143.

[285] [redacted].

[286] [redacted].

[287] [redacted].

[288] [redacted]

[redacted][289]

168 In its public disclosures, Gabriel Canada minimized the importance of these decisions. Following the Brașov Court's decision, the CEO of Gabriel Canada noted his disappointment in a press release but no mention was made in the annual report of that year.[290] Gabriel Canada alleged that the Supreme Court's decision did not "suspend, terminate or delay any permitting processes," without referring to the possible impact of the decision on the Ministry of Culture's decision to endorse the Project, which was required for the environmental permit.[291]

[redacted]

[289] [redacted]

[290] Gabriel Canada press release dated 27 November 2007, at **Exhibit R-195**; Gabriel Canada 2007 Annual Report, at **Exhibit R-196** (where no mention is made of any litigation); Gabriel Canada 2007 Financial Report, at **Exhibit R-197**, p. 4 (admitting the importance of the ADC but saying that RMGC could apply for another), see also p. 4 *et seq.* ("Since summer 2007, the Company has lost a number of court cases, causing greater concern for the rule of law in Romania, as well as concern for potential setbacks to the Project.").

[291] Gabriel Canada press release dated 10 December 2008, at **Exhibit R-198**; see also Gabriel Canada press release dated 5 March 2009, at **Exhibit R-199**, p. 4.

169 [redacted].[292]

170 [redacted].[293]

171 The Claimants' position is misplaced since a "call" to "the State" would not have allowed RMGC to expropriate Roşia Montană residents. Because the Project had not been declared a public utility, as RMGC was well aware, it had no means to force residents to move.[294] RMGC would need to apply for the Project to be declared a public utility, but had never had any guarantee that its application would be successful. Alternatively, it would need to adapt its Project (and thus the EIA Report) to take into account residents who refused to move.[295] Thus, in 2013, one of the key benefits to RMGC of the proposed Roşia Montană Law was the provision declaring the Project of public utility (see below **Section 5.10**).

[292] [redacted].

[293] [redacted].

[294] See TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 5 (para. 4); TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 32 (Mereuta) and p. 33 (Gheorghe); Minutes of Public Consultation in Zlatna dated 2 August 2006, at **Exhibit C-283**, p. 2 (Avram) ("we will initiate negotiations with every landlord, and if we face a refusal, we have analyzed several alternatives within the EIA and will try to rethink the project so no one will be affected.").

[295] See *supra* para. 79; see also Interview with Environment Minister Korodi, *Economic Weekly Capital*, Jul. 2007, at **Exhibit C-546**, p. 2 (noting that a failure to relocate residents could mean having to redo an EIA).

172 Since the previous TAC meeting and in the wake of Romania's accession to the EU, environmental and other laws had continued to evolve.[296] In June 2010, the TAC determined that, in light of these changes, RMGC needed to submit an updated version of its EIA Report that complied with the amended legal provisions.[297] Although RMGC never supplied a consolidated updated version of the EIA Report, it provided notes with updates to the EIA Report on 26 October[298] and 30 November 2010.[299]

173 In accordance with Romanian and EU law, and as it had done five years earlier, Romania submitted the updates to the EIA Report to Hungary (**Section 4.1**) and to the Romanian public (**Section 4.2**). The TAC resumed its review of the EIA Report and met with RMGC to discuss the Project (**Section 4.3**). Contrary to the Claimants' allegations, the TAC did not finish its review of the EIA Report by the end of November 2011, since RMGC had not provided all of the requisite information and documentation (**Section 4.4**). Because of this outstanding information and documentation, and the challenge proceedings filed by NGOs against a key endorsement and ADC (**Section 4.5**), in December 2011, the TAC was not in a position to issue a recommendation to the Ministry regarding the environmental permit (**Section 4.6**). *A fortiori*, the Ministry of Environment and the Government were in no position to take a decision on the environmental permit in late

[296] See *e.g.* TAC meeting minutes dated 23 June 2010, at **Exhibit C-565**, p. 2 (paras. 6-9); **Dragos**, p. 4 *et seq.* (paras. 21-50).

[297] See TAC meeting minutes dated 23 June 2010, at **Exhibit C-565**, p. 2 (paras. 6-10); see also TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 4 *et seq.* (Tănase); Letter from Ministry of Environment to RMGC dated 15 October 2010, at **Exhibit C-591**.

[298] RMGC submitted three volumes of documentation comprising explanatory notes, responses to questions from the TAC, and additional reports. Letter from RMGC to Ministry of Environment dated 26 October 2010, at **Exhibit C-592**; TAC's Observations on EIA Report and RMGC's Answers submitted on 26 October 2010, at **Exhibit C-593**. In December 2010, the Ministry of Environment asked for a consolidated, updated version of the EIA Report, with the outdated parts removed, noting that "half of the content [of the EIA Report] is no longer valid." TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 85. RMGC, however, never acceded to this request. **Mocanu**, p. 9 (para. 45).

[299] Letter from RMGC to Ministry of Environment dated 30 November 2010, at **Exhibit C-594.00** (providing further documentation regarding the EIA Report Chapter 4.2 on Air and in response to questions from Hungary); **CMA Report**, p. 30 *et seq.* (paras. 107-119).

2011 or early 2012 (**Section 4.8**). Furthermore, contrary to the Claimants' allegations, discussions between RMGC and the Government in late 2011 regarding a possible renegotiation of the License did not affect the EIA Review Process (**Section 4.7**).

4.1 Hungary Voices its Opposition to the Project

174 In accordance with the Espoo Convention, in January 2011, Romania sent the updated EIA Report to Hungary.[300]

175 Professor Mihai opines that "the EIA Rules of Procedure in a Transboundary Context… do not provide for an additional phase of transboundary consultations when new documents are submitted during the EIA Procedure."[301] This is not correct. Romania was legally required to submit the updates to the EIA Report to the Hungarian authorities, as part of Romania's continuing obligation under the Espoo Convention to provide Hungary "relevant information on the proposed activity and its possible significant adverse transboundary impact."[302] RMGC also appears to have shared this view at the time since when the TAC informed RMGC of its intention to provide the updated EIA Report to Hungary, RMGC did not object.[303]

176 Notwithstanding the additional information from Romania, Hungary's concerns regarding the Project did not dissipate.[304] In August 2011, Hungary communicated its opposition to the Project. It indicated, *inter alia*,

[300] Letter from Romania to Hungary dated 18 January 2011, at **Exhibit R-200**; see also Letter from Ministry of Environment to Ministry of Foreign Affairs dated 4 August 2011, at **Exhibit R-201**.

[301] **Mihai**, p. 49 (para. 198).

[302] **Dragos**, p. 60 (para. 332); Espoo Convention, at **Exhibit RLA-40**, p. 6 (Art. 5); see also *id.* at Art. 4(2).

[303] TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 85.

[304] See also Letter from Ministry of Environment to RMGC (enclosing Hungary's comments of 25 Feb. 2010) dated 30 March 2010, at **Exhibit C-619**, p. 4 (p. 2 of Hungary's letter) (noting that the proposed clay liner is "insufficient").

that experts had found that "the analysis of accidents risks [was] insufficient," and that the EIA Report "le[ft] numerous technical questions unanswered and it fail[ed] to justify certain engineering solutions despite [Hungary's] specific requests" and also "fail[ed] to give a technically adequate description of the impacts of the proposed investment project…"[305] It concluded that the report was "biased," "contain[ed] contradictions and several major uncertainties," and "fail[ed] to give an in-depth account of the potential problems and adverse consequences."[306]

177 In view of what it considered to be "serious deficiencies of the… EIA documentation," Hungary objected to Romania's issuance of an environmental permit for the Project.[307]

4.2 Romanians Continue to Voice their Concerns Regarding the Project

178 In March 2011, the Ministry of Environment published the updates to the EIA Report on its website and invited the public to send any comments or questions by 5 May 2011.[308]

179 Contrary to Professor Mihai's views,[309] it was entirely appropriate and indeed legally required for Romania to publish these documents and thus to continue to consult the public. This continued consultation was in keeping with Romanian law and the Aarhus Convention.[310] Disclosure of this documentation was *a fortiori* justified given complaints in 2005 to the Aarhus Convention Compliance Committee that Romania was not providing suf-

[305] Hungary Opinion regarding the Project, 2011, at **Exhibit C-572**, p. 2; see also Letter from Hungary to Romania dated 3 August 2011, at **Exhibit R-202**.

[306] Hungary Opinion regarding the Project, 2011, at **Exhibit C-572**, p. 2.

[307] *Id.* at p. 7.

[308] See also Memorial, p. 142 (para. 353).

[309] **Mihai**, p. 50 (para. 202); see also generally *id.* at para. 271(a).

[310] **Dragos**, p. 55 *et seq.* (paras. 303 and 311); see also TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 56 (Anton) ("the civil society is entitled and can ask questions and ask anyone to account for anything.").

ficient access to the EIA Report. In April 2008, the Committee had concluded that Romania had violated the Aarhus Convention, but had in the meantime remedied the situation.[311] Again, RMGC appears to have shared this view at the time as it did not raise any objections when authorities indicated that the updates to the EIA Report would be disclosed to the public for comment.[312]

180 Two years later, in March 2013, when RMGC was asked to comment on Romania's compliance with the Aarhus Convention, it confirmed that Romania had properly managed the consultation process:

> "Each step of the EIA Procedure or other regulating procedure (scoping, establishing the assessment domains, public consultations, assessment of the report's quality) undertaken so far has complied with the provisions regarding the public access to environmental information and public participation in the process of decision making."[313]

181 The Project continued to generate great interest, as it had five years earlier, as reflected by the over 500 responses received from the public and transmitted to RMGC on 29 July 2011.[314] On 26 August 2011, RMGC sent to the Ministry of Environment a new appendix to the EIA Report, containing its answers to those questions.[315]

182 In parallel with the consultation process, Romanian NGOs lodged complaints with the EU regarding the Project. Between October 2010 and May

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[311] Aarhus Compliance Committee Findings dated 16 April 2008, at **Exhibit R-203**, p. 6 (para. 33).

[312] See *e.g.* TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 88.

[313] Letter from RMGC to Ministry of Large Projects dated 15 March 2013, at **Exhibit C-885**, p. 6 *et seq.*

[314] Letter from Ministry of Environment to RMGC dated 29 July 2011, at **Exhibit C-625**.

[315] Letter from RMGC to Ministry of Environment dated 26 August 2011, at **Exhibit C-626.01**; RMGC's responses to questions and comments raised in 2011 public consultations (in Romanian) dated 26 August 2011, at **Exhibit C-626.02a**; RMGC's responses to questions and comments raised in 2011 public consultations (in Romanian) dated 26 August 2011, at **Exhibit C-626.02b**; Memorial, p. 142 (para. 353).

2011, three Romanian associations filed petitions with the EU Parliament Committee on Petitions (the "**PETI**"), arguing that the Project did not comply with EU environmental directives.[316] Following a site visit in November 2011, the delegation from PETI requested further information from Romania[317] and, in July 2012, the PETI issued the following recommendation:

> "2. [The PETI] invites the Romanian concerned authorities to ensure that **all precautionary measures are taken** for the protection of the environment before taking their final decision as regards the granting of the environmental permit to the *Roşia Montană* project; urges the Romanian authorities not to grant their consent before ensuring that all possible inconsistencies are eliminated and all remaining aspects are clarified in a satisfactory and provable way; further, invites the authorities to set clear benchmarks and timelines that need to be observed; invites the Company to properly observe the provisions of *Directive 2006/21/EC on the management of waste from extractive industries* with respect to the use of best available techniques …"[318]

4.3 The Technical Advisory Committee Examines the EIA Report and Raises Questions Regarding the Risks of the Project

183 The TAC met six times between June 2010 and November 2011.

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[316] PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**, p. 8 (describing petitioners' fears that their "home village would be totally destroyed" as well as concerns regarding the absence of contingency plans and of a sufficient financial guarantee); see also *id.* at p. 15.

[317] See PETI Notice to Members dated 29 May 2015, at **Exhibit R-205**, p. 1 *et seq.* and p. 4; PETI Notice to Members dated 11 February 2011, at **Exhibit R-206**, p. 3; PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**, p. 3 *et seq.*

[318] PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**, p. 13 *et seq.* (emphasis added) (also "call[ing] on the authorities to give proper consideration to the recommendations contained in the *European Parliament resolution on a general ban on the use of cyanide mining technologies in the European Union* …").

184 In June 2010, the TAC met following RMGC's submission of UC 87/2010 and the Ministry of Environment's determination that the TAC would resume examination of the EIA Report. At the meeting, the TAC determined that several further meetings would be necessary and noted that all members would need to participate in the decision to recommend granting or rejecting the application.[319]

185 In September 2010, the TAC met with RMGC, which gave an overview of the Project. The TAC members raised concerns regarding, *inter alia*, the transportation of cyanide,[320] the relocation of some 970 households,[321] the risk of seepage from the tailings pond of toxic waters into the groundwater,[322] the noise and vibrations,[323] and the opposition of civil society and NGOs to the Project.[324] The Ministry of Culture provided comments on RMGC's Cultural Management Plan, including its proposed mitigation measures for the conservation, documentation and research of the cultural heritage, also in the historical center.[325] The representative of the Ministry of Development referred to RMGC's lack of valid urban plans and certificate and stressed that they were required for the environmental permit:

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[319] TAC meeting minutes dated 23 June 2010, at **Exhibit C-565**, p. 1 (para. 3).

[320] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 6, p. 40, and p. 49; **CMA Report Appendix B**, p. 60 (para. 248).

[321] TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 11.

[322] *Id.* at p. 25 (Cazan).

[323] *Id.* at p. 16 (Cârlan).

[324] *Id.* at p. 44 (Haiduc) (noting "I have not heard anything about opposition against this project from civil society") and p. 55 (Mocanu) (listing NGO actions); see also *id.* at p. 56 (where RMGC's representative noted "we were attacked every time by various NGOs on procedural and formal matters...").

[325] TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 41 (Angelescu) ("it is necessary to have a detailed discussion regarding the commitments … in terms of conservation *in situ* and the possibility to be relocated or for which the creation of replicas will be proposed. … methodology of research and documentation of heritage values … monitoring the conservation status of all historical monuments … monitoring the mining works by an independent team of archaeologists throughout the project's life …protocol on archaeological discoveries made during mining project works … ensuring the functioning of the Mining Museum in accordance with the law…").

> "[W]e are at the [SEA] stage and not at the stage of [EIA]; as such, in order to substantiate our point of view, we need accurate information on the procedural stage for developing these [PUZs] that are required by [UC 87/2010]. The important issue, I repeat, is the fact that the endorsements obtained in the [PUZ] phase may change the exact solution…Therefore, in accordance with the legislation in force, there is a certain timeline from our point of view and the impact assessment phase of the project is…subsequent to the strategic assessment related to plans. So…we consider necessary both to comply with this timeline, but especially that [RMGC] provide all the information related to these urbanism plans for protected area and industrial site, required by law."[326]

186 In response, RMGC's representative admitted that RMGC had not yet secured all necessary endorsements of its proposed PUZ.[327]

187 The TAC concluded the meeting by instructing RMGC to update the EIA Report based on both legislative changes and factual developments.[328]

188 Following RMGC's submission of the updates to the EIA Report on 30 November 2010, the TAC met on 22 December 2010. At the meeting, in addition to giving an overview of the EIA Report, RMGC explained the status of the urban plans and related litigation as well as the litigation relating to the ADC for Cârnic.[329] Chapters 1 through 7 of the EIA Report were then discussed. The TAC posed questions regarding, *inter alia*, the

[326] TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 37 *et seq.*; see also *id.* at p. 16 *et seq.* and p. 52 (referring to need for SEA procedure in connection with the deforestation of 256 hectares).

[327] *Id.* at p. 38; see also *id.* at p. 42 (Angelescu) (noting that the Ministry of Culture "will issue endorsements, too, but when we'll have the [PUZ]."); Transcript of Traian Băsescu's visi to Roșia Montană dated 29 August 2011, at **Exhibit C-1503.01**, p. 3 (Tănase).

[328] TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 53 *et seq.*, p. 57, and p. 59 (Mocanu).

[329] TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 4; see also *id.* at p. 63 (Timiş) (representative of Ministry of Culture enquiring about PUZ for historical center).

permeability of the tailings pond and the envisaged clay liner,[330] the safety of the dam,[331] the release of mercury emissions into the air,[332] the vibrations,[333] the emissions values of the envisaged and alternative technologies,[334] the effects of possible future archaeological discoveries on the Project,[335] and the envisaged heavy and frequent truck loads to and from the site, and the lack of proper infrastructure.[336] The TAC again also raised concerns regarding RMGC's lack of a valid PUZ.[337] RMGC's representative recognized that RMGC was far from obtaining the building permit and that it was "still at an absolutely preliminary point."[338]

189 The TAC met with RMGC again on 9 March 2011 to discuss the over 5,600 questions and comments received from the public in 2006.[339] (In parallel, the consultation process regarding RMGC's updates was ongoing.) These comments included questions about the use and management of cyanide, the lining at the bottom of the tailings pond, the risk of a dam failure, the protection of the cultural heritage at Roşia Montană, and the post-closure

[330] *Id.* at p. 25 *et seq.*

[331] *Id.* at p. 35 *et seq.*

[332] *Id.* at p. 38.

[333] *Id.* at p. 67.

[334] *Id.* at p. 78 and p. 81.

[335] *Id.* at p. 56; see also **CMA Report Appendix D**, p. 25 *et seq.* (para. 72).

[336] TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 71.

[337] See *Id.* at p. 72 to 74.

[338] *Id.* at p. 74.

[339] See *supra* para. 127; TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 2; see also Letter from Ministry of Environment to RMGC dated 18 February 2011, at **Exhibit C-1757**; Email from Ministry of Environment to RMGC dated 1 March 2011, at **Exhibit C-1750**.

and rehabilitation plans,[340] many of which RMGC's representatives described as "legitimate" and "justified concerns."[341]

190 The Claimants' assertion that the "Ministry of Environment in consultation with the TAC **favorably reviewed** the EIA Report in meetings held from September 2010 to March 2011" is ambiguous.[342] Although the TAC diligently reviewed the EIA Report in accordance with Romanian law and without objections from RMGC, it did not take a view on whether or not to approve the EIA Report, nor considered the conditions on which such an approval could be granted.

191 On 29 July 2011, the Ministry of Environment transmitted to RMGC the over 500 questions from the public, to which RMGC responded on 26 August 2011.[343]

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[340] See *e.g.* TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 2; see also *id.* at p. 31 *et seq.* ("They want a list with the names of the people who will be held liable should the tailings pond break and Abrud wiped out of the face of the earth. They want to know who will be personally liable when people will die on Corna Valley and in Abrud, when the ecological disaster will strike. They don't want the name of some Barbados-like organization, but people to go to jail when an ecological disaster happens. These are the public's concerns, I am sharing them with you"), p. 16, p. 24, p. 36 *et seq.* ("In 2000, the Company's management stated that the Roman galleries in Orlea will not be affected by the project, but now it has changed its mind; which is the situation?", "What does the company's representatives understand by protected area? What is the surface area, the limits and what does RMGC want to protect there?"), p. 37 ("the proposal for the resettlement of nine cemeteries. It is not normal for cemeteries and churches to be resettled." and "What will happen with the churches in Roşia Montană? They will collapse after two blasts."), p. 53, p. 59, p. 62, and p. 67; see also **CMA Report Appendix C**, p. 13 *et seq.* (section 7).

[341] TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 25, p. 31 and p. 45; see also *e.g.* TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 15 (Avram) ("Thank you for your observations. We consider them all valid."); see also **CMA Report Appendix B**, p. 61 (para. 253).

[342] Memorial, p. 301 (para. 682(a)) (emphasis added).

[343] See *supra* para. 181; Letter from Ministry of Environment to RMGC dated 29 July 2011, at **Exhibit C-625**; Letter from RMGC to Ministry of Environment dated 26 August 2011, at **Exhibit C-626.01**; RMGC's responses to questions and comments raised in 2011 public consultations (in Romanian) dated 26 August 2011, at **Exhibit C-626.02a**; RMGC's responses to questions and comments raised in 2011 public consultations (in Romanian) dated 26 August 2011, at **Exhibit C-626.02b**.

192 The Claimants suggest in their Memorial that the Government should have issued the environmental permit in August 2011.[344] As discussed below, this suggestion is bewildering given that the Government was in no position to issue a decision on the environmental permit until RMGC submitted its answers to the questions from the public, the TAC reviewed those answers, and the TAC finalized its review of the EIA Report.[345]

193 The Ministry of Environment carefully analyzed RMGC's answers to the questions from the public and, on 22 September 2011, sent a list of over 100 clarification questions from the TAC regarding the chapters of the EIA Report that the TAC had reviewed thus far.[346]

194 Following receipt of the RMGC's responses to the TAC's questions,[347] the TAC visited Roşia Montană from 19 to 21 October 2011.[348]

195 Shortly thereafter, on 24-25 November 2011, the PETI sent its delegation to Roşia Montană to investigate the complaints regarding the Project.[349]

196 The TAC then convened on 29 November 2011 to discuss a wide array of topics and documents, including Chapters 8 and 9 of the EIA Report, RMGC's answers to the TAC's questions of 26 September, the IGIE Report, and issues that had surfaced during the TAC and PETI site visits.[350]

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[344] Memorial, p. 300 (para. 681) ("beginning in August 2011 the State…did not issue the environmental permit…").

[345] See *infra* paras. 198-206.

[346] See Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 14 (also indicating that RMGC still needed to provide the Water Management Permit and the ADC for Orlea).

[347] Letter from RMGC to Ministry of Environment dated 11 October 2011, at **Exhibit C-441**.

[348] TAC minutes of site visit to Roşia Montană dated 20 October 2011, at **Exhibit C-631**; see also List of TAC members attending Roşia Montană site visit, at **Exhibit C-447**.

[349] PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**; see *supra* para. 182.

[350] Letter from Ministry of Environment to RMGC dated 28 October 2011, at **Exhibit C-835**; Letter from Ministry of Environment to RMGC dated 4 November 2011, at **Exhibit C-790**; see TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 2; see also *supra* para. 122.

Contrary to the Claimants' allegations, issues remained outstanding after this TAC meeting.

4.4 The Ministry of Environment Was Not in a Position to Take a Decision Regarding the Environmental Permit in August 2011

197 In their Memorial, the Claimants suggest that, as of August 2011, the Ministry of Environment should have taken a decision regarding RMGC's application for the environmental permit. They contend that

> "beginning in August 2011 the State through an unlawful series of acts and omissions, first rejected the economic terms of its long-standing agreements with Gabriel and RMGC and ultimately rejected the Project as designed and presented by Gabriel and its independent experts, and did not issue the environmental permit or allow the Project to proceed despite its acknowledged compliance with the applicable permitting requirements."[351]

198 This contention is misplaced since, in August 2011, the EIA Review Process was far from finalized.

199 [redacted][352] [redacted].

[351] Memorial, p. 300 (para. 681); see also *id.* at p. 301 (para. 682(b)) (stating that "August 2011 marked the beginning of the end for the Roșia Montană Project and Gabriel's associated substantial investments in Romania. In that month, the Government in word and deed made clear that the EIA procedure would proceed no further unless Gabriel agreed to the State's demand for increased shareholding in RMGC and a higher royalty percentage.").

[352] See *supra* para. 181; [redacted].

200 [redacted].[353]

201 [redacted].[354]

202 Fourth, the Ministry of Culture had not yet endorsed the Project.[355] The TAC had inquired as to the status of the archaeological research and the ADCs, in particular for Cârnic and Orlea.[356] Although in March 2011 RMGC acknowledged "the objections legitimately raised by the Ministry of Culture" as well as the conclusion that the environmental permit could not be issued absent "a clear situation" for Orlea and Cârnic,[357] this had not been achieved by August 2011.

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[353] [redacted].

[354] [redacted].

[355] See *supra* para. 92.

[356] TAC meeting transcript dated 22 September 2010, at **Exhibit C-487**, p. 4 (Angelescu) (noting the ongoing discharge procedure for Cârnic and expressing concern that a negative answer from the National Archaeology Commission could block the EIA) and p. 54 (noting the judicial cancellation of ADC 4/2004); TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 45 (Pineta) (summing up the "unclear [situation] for these 4 pits" for which RMGC was requesting an environmental permit and noting that the procedure for the discharge of Cârnic was ongoing, but that "[t]he situation is … unclear mainly for Orlea pit, that's why we cannot have a clear opinion and point of view with regard to this pit right now.") The explanation of State Secretary Vasile Timiş to the Ministry of Environment, to the effect that ADCs represented the Ministry of Culture's endorsement, was misguided but did not delay the process. Indeed there was no ADC for the whole Project Area at the time and Mr. Timiş also noted the lack of ADC for Orlea. Letter from the Ministry of Culture to the Ministry of Environment dated 16 September 2011, at **Exhibit C-1380**; Memorial, p. 150 (n. 709).

[357] TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 45 (Zbârcea, counsel for RMGC, and Pineta).

203 At the time (and to this day), the research to be undertaken by RMGC at Orlea remains outstanding so no ADC has been issued.[358]

204 For Cârnic, the Alba Cultural Directorate had just issued ADC 9/2011 on 14 July 2011.[359]

205 [redacted][360] However, the decision to issue the ADC followed a process that was independent from the negotiations regarding RMGC's financial commitments for cultural heritage. Such commitments were grounded in RMGC's legal obligations under Romanian law, but the Ministry of Culture needed a guarantee that RMGC was able to make these contributions.[361] At the time, the responsibility to issue ADCs had been transferred from the Ministry of Culture to the decentralized local branches, such as the Alba Cultural Directorate, which would issue the ADC after receiving the endorsement of the National Archaeological Commission.[362] The endorsement for Cârnic was given on 12 July 2011, *i.e.* prior to the conclusion of the Protocol on 13 July 2011.

206 For all of these reasons, in August 2011, the Ministry of Environment was in no position to take a decision regarding RMGC's application for the environmental permit.

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[358] See *infra* para. 249 (regarding the research) and para. 309 (regarding the Ministry of Culture's endorsement of the Project under the express condition that an ADC for Orlea be obtained prior to any works being undertaken in that area).

[359] ADC 9/2011, at **Exhibit C-680**; National Archaeology Commission meeting minutes dated 12 July 2011, at **Exhibit C-1377**; Ministry of Culture press release dated 14 July 2011, at **Exhibit C-1280**.

[360] Memorial, p. 129 *et seq.* (paras. 325-328) and p. 301 (para. 682(a)); [redacted].

[361] The TAC also raised concerns regarding RMGC's ability to foot the bill for cultural heritage. See *e.g.* TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 61 (Timiș) and p. 69 (Hegedus); see also *supra* para. 91.

[362] See *supra* n. 118.

207 Furthermore, several hundreds of people remained to be removed and relocated from the Project Area.[363] By deferring the completion of the relocation process, RMGC ran the risk that, notwithstanding the issuance of an environmental permit, the Project would not be possible due to the refusal of certain residents to sell their properties.

208 The Claimants refer to statements by President Băsescu, Minister of Culture Hunor, and Minister of Environment Borbély in the summer of 2011, which in the Claimants' view suggested that the Government had improperly delayed the Project.[364] However, the statements by Minister of Culture Hunor[365] and President Băsescu,[366] which the Claimants cite, reflect a misunderstanding at that point in time of the status of the EIA Review Procedure, as RMGC would have been perfectly aware at the time. The statements in question thus should not be given weight. As for Minister Borbély, although he fittingly described the Project as a story "which never ends," he also confirmed that the Ministry would approve the application if he were "convinced that there will be no pollution risks in the area."[367]

[363] See TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 53 (where Mr. Tănase indicated that 20% of the population still needed to be relocated). RMGC did not contest the allegation that it only owned 17% of the land to which it needed to acquire the surface rights. See *id*. at p. 38 *et seq.*

[364] Memorial, p. 139 (para. 346 and n. 646).

[365] Minister Hunor is quoted as saying in 2011 that "[i]t is unacceptable to keep the investors here for 11 years and say nothing" and that "all the governments after 2000 are responsible, as they have not given an answer." Memorial, p. 139 (para. 346 and n. 646 quoting **Exhibit C-892**). These statements reflect a misunderstanding, since RMGC had not applied for the environmental permit until 2004 and since the Government had actively engaged in the EIA Review Process in accordance with Romanian law since then.

[366] President Băsescu is quoted as saying "[W]e are delaying it [the Project] because of the cowardice of politician men…" Memorial, p. 139 (n. 646) (quoting **Exhibit C-833**). RMGC had, however, not even applied for the environmental permit until 2004 and numerous issues prevented the Ministry of Environment from issuing the environmental permit.

[367] Memorial, p. 139 (n. 646) (quoting **Exhibit C-792**).

4.5 September 2011: NGOs Challenge RMGC's Urban Plans and a Critical Archaeological Discharge Certificate

209 In September 2011, NGOs commenced further court proceedings, challenging both the environmental endorsement for the PUZ (**Section 4.5.1**) and the new ADC for Cârnic (**Section 4.5.2**).

4.5.1 NGOs Challenge RMGC's Environmental Endorsement for the Industrial Urban Plan

210 [redacted][368] [redacted][369]) As explained above, the environmental endorsement for the PUZ, which the Sibiu EPA granted following an SEA Review Process, differed from the environmental permit that RMGC sought to obtain from the Ministry of Environment further to the EIA Review Process.[370]

211 [redacted][371] [redacted].

[368] [redacted]; see *supra* para. 165.

[369] See *infra* para. 383; [redacted]; [redacted].

[370] See *supra* paras. 67 and 76.

[371] [redacted].

4.5.2 NGOs Challenge Archaeological Discharge Certificate ADC 9/2011

212 The Alba Cultural Directorate issued ADC 9/2011 on 14 July 2011 ("**ADC 9/2011**").[372] [redacted][373] [redacted].[374]

213 [redacted]

[redacted][375]

214 Professor Schiau states that, in support of these challenges to ADC 9/2011, the NGOs invoked "the confusing and erroneous entries in the 2010 LHM."[376] He refers to Order 2361/2010 of the Ministry of Culture of 12 July 2010 updating the list of historical monuments (which had previously been updated in 2004), against which the Claimants raise numerous complaints in the arbitration.[377] These complaints can be swiftly dismissed for the following reasons.

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[372] ADC 9/2011, at **Exhibit C-680**.

[373] [redacted].

[374] [redacted].

[375] [redacted]; see also *e.g.* Gabriel Canada 2009 Annual Information Form, dated 10 March 2010, at **Exhibit C-1807**, p. 36 ("successful legal challenges to the validity of any [ADC] could negatively impact Gabriel's development plans, require additional work and re-application for [ADCs], result in additional delays and expenses on our part, or prevent the development of the Roşia Montană Project.").

[376] **Schiau**, p. 81 *et seq.* (paras. 329 and 332-333).

[377] 2010 LHM, at **Exhibit C-1266**.

215 First, the Claimants complain that Cârnic remained listed on the list of historical monuments in 2010 although it had been discharged through an ADC.[378] However, at the time the list was published, on 12 July 2010, the Romanian courts had canceled ADC 4/2004 discharging Cârnic.

216 The Claimants further complain that the ADC should have triggered the start of a declassification procedure.[379] When the National Commission of Archaeology approved the new ADC for Cârnic in 2011, it also approved the initiation of the declassification.[380] Once ADC 9/2011 was challenged and pending completion of the litigation, there was no longer any basis for the declassification process to continue.

217 Second, although the Claimants consider the 2010 list of historical monuments to be arbitrary,[381] this issue had already been decided by the Romanian courts. [redacted][382] [redacted][383]

218 Third, although the Claimants allege that the authorities had undertaken but failed to correct errors in the 2010 list of historical monuments,[384] this

[378] Memorial, p. 132 (para. 331).

[379] *Id.*

[380] National Archaeology Commission meeting minutes dated 12 July 2011, at **Exhibit C-1377**, p. 4.

[381] **Schiau**, p. 73 *et seq.* (paras. 296 and 299); see also *id.* at p. 84 (para. 336); Memorial, p. 127 (para. 320).

[382] [redacted].

[383] [redacted].

[384] Memorial, p. 132 *et seq.* (para. 332).

issue is also moot. [redacted][385] [redacted][386] [redacted][387] [redacted][388]

219 By focusing on the 2010 list of historical monuments in relation with the NGOs' challenge to ADC 9/2011, the Claimants seek to divert attention away from the other grounds on which the NGOs based their challenge, including the research done, which is an issue critical for the arbitration as explained above.[389] [redacted][390] [redacted][391]

385 [redacted].
386 [redacted].
387 [redacted].
388 [redacted].
389 See *supra* paras. 90-91.
390 [redacted].
391 [redacted].

[redacted][392]

220 RMGC requested changes of venue for both the cancellation and suspension cases, which the Supreme Court granted on 31 October and 5 November 2013. The cases were transferred to the Buzău (cancellation) and Suceava (suspension) courts. As explained below, ADC 9/2011 was suspended in 2014 and the proceedings are still pending.[393]

4.6 The EIA Review Process Was Not Finalized by 29 November 2011

221 In their Memorial, the Claimants make a series of allegations regarding the 29 November 2011 TAC meeting, including primarily that the TAC *de facto* concluded its review of the EIA Report and that the Ministry of Environment and Government should then have granted the environmental permit. The Claimants make the grave and yet spurious allegation that the then Prime Minister and the Minister of Environment interfered with the TAC's work and sought to prevent it from concluding its review of the EIA Report. These allegations are without any merit.

222 [redacted][394] However, the summons notices

[392] [redacted]

[393] See *infra* para. 385; **Schiau**, p. 26 (para. 93).

[394] Memorial, [redacted] p. 144 (para. 354).

for the 29 November TAC meeting made no mention that it would be the final meeting. On the contrary, the notices referred to numerous outstanding issues and documents to discuss, including the issues that had arisen from the TAC and PETI site visits as well as Chapters 8 and 9 of the EIA Report.[395] Nor does the transcript from that TAC meeting indicate an understanding at the commencement of the meeting that it would be the final meeting.[396] Thus, there is no evidence that the TAC "intended" to finalize its review of the EIA Report on 29 November 2011.

223 [redacted][397] RMGC representatives did not, however, indicate either during or after the meeting that it had been improperly disrupted. Nor do the meeting minutes reflect any interruption. Ms. Mocanu, who was present, recalls no such interruption.[398]

224 [redacted][399] [redacted] evidence is hearsay and in any event has no evidentiary value given that the alleged statements were made for the first time five years after the fact, during the arbitration, [redacted][400]

[395] Letter from Ministry of Environment to RMGC dated 28 October 2011, at **Exhibit C-835**; Letter from Ministry of Environment to RMGC dated 4 November 2011, at **Exhibit C-790**.

[396] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 2.

[397] [redacted].

[398] **Mocanu**, p. 14 (paras. [redacted]68).

[399] [redacted].

[400] "Ungureanu dismissed Marin Anton from the Ministry of Environment before the fall of the Government", *Cotidianul.ro*, Apr. 2012, at **Exhibit C-490**.

225 Notwithstanding the purported interference of the Prime Minister and the Minister of Environment, the Claimants contend that the TAC completed its review of the EIA Report on 29 November 2011.[401] However, they also recognize that, during the meeting, the TAC expressly mentioned certain issues that RMGC and State authorities still needed to clarify, following which the TAC would meet again.[402]

226 For instance, RMGC still needed to provide a declaration that the Project was of public interest, further also to the Ministry of Environment's specific requests.[403] This declaration was necessary because the Project envisaged the diversion of the Corna River and would thus require a derogation from the Water Framework Directive.[404] It also needed to provide documentation relating to the protected natural site called "Piatra Despicată" (the "Split Rock"),[405] issues remained to be clarified with the Geological Institute,[406] and the Ministry of Culture needed to endorse the Project.[407]

227 [redacted],[408] RMGC had not yet submitted its amended Waste Management Plan, in which RMGC was required to describe, in accordance with regulations amended in 2010, how it intended to manage waste from the Project, including waste (barren) rock removed to access the ore as well as

[401] Memorial, p. 142 (para. 352).

[402] *Id.* at p. 147 (para. 362); see also *id.* at para. 365.

[403] See Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 4 (question 10) (seeking assurance of compliance with Article 4 of Water Framework Directive).

[404] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 24 *et seq.*; see also Letter from ANAR to RMGC dated 29 November 2011, at **Exhibit R-214** (noting that RMGC has not demonstrated compliance with the Water Framework Directive).

[405] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 28.

[406] *Id.* at p. 25.

[407] The Ministry of Culture's endorsement of the Project was a prerequisite to the environmental permit. See GO 43/2000 (consolidated up to Nov. 2006), at **Exhibit C-1700**, p. 5 (Art. 2(10)); see also TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 29.

[408] [redacted]; Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit R-215**, p. 12 (para. 75).

tailings from the process plant. The approval of the Waste Management Plan was a prerequisite to the environmental permit.[409]

228 The TAC's work was far from done in late 2011 since it had not even proceeded to the stage of discussing – let alone drafting – the specific mitigation measures that RMGC would need to take and thus the conditions to be attached to a possible environmental permit. Gabriel Canada thus naturally disclosed in December 2011 that "further meetings or documentation [might] be requested."[410]

229 The representatives of the Ministry of Environment also stressed to RMGC that the environmental permit could not be issued unless and until it secured the approval of its PUZ by the Roşia Montană Local Council.[411] [redacted].[412] The representatives of the Ministry of Environment reminded RMGC's representatives that the PUZ was a prerequisite to the environmental permit because, otherwise, there was a risk that the PUZ would be inconsistent with the assumptions underlying the environmental permit.[413] Thus, for instance, a change in the

[409] Ministry of Environment Order 2042/2010 on mining waste management dated 22 November 2010, at **Exhibit R-216**, p. 3 (Art. 7).

[410] Gabriel Canada press release dated 29 December 2011, at **Exhibit C-1437**.

[411] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 41 (where the Ministry of Environment representative stated that "[t]he PUZs must first be approved and then the [environmental] permit is issued.").

[412] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 42 and p. 43 [redacted].

[413] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 42 (stating that "if the PUZ is approved in a different form than the one considered now, during the project stage, … we will have to resume this process …. So, if the PUZ is changed or it's not approved in the form we took into consideration during this stage of the procedure of environmental impact assessment for the Roşia Montană project, any amendment to the PUZ will turn us back …"); see *supra* para. 69; see also Letter from Ministry of Environment to RMGC dated 26 May 2010, at **Exhibit R-188**.

geographical limits of the PUZ would give rise to an inconsistency with the environmental permit's description of the Project Area.[414]

230 The Claimants rely heavily on statements by Mr. Anton during the meeting to the effect that the technical review of the Project was complete.[415] However, as they admit, Mr. Anton also made clear that the TAC would need to convene again.[416] In any event, his alleged statements, which had no legal effect, did not affect RMGC's obligation to secure the approval of its PUZ and to provide outstanding information to the TAC.

4.7 The Negotiations Regarding the License in Late 2011 Did Not Affect the EIA Review Process or Cause the Government to Withhold the Environmental Permit

231 In the wake of the global financial crisis and the draconian austerity measures that the Romanian Government was compelled to impose in 2010 and 2011 to decrease the public deficit,[417] certain members of the Government expressed a wish to renegotiate the terms of the License. The Claimants refer to statements to the press by President Băsescu, Prime Minister Boc, Minister of Environment Borbély, and Minister of Culture Hunor from August and September 2011 criticizing the economic terms of the License.[418] The Claimants extrapolate from these statements that the

[414] See TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 43 (Mocanu).

[415] Memorial, p. 145 (para. 358) and p. 302 (para. 682(d)).

[416] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 48 ("I am going to convene in the following period a meeting for making the decision related to Rosia, whether it's being granted or not."); Memorial, p. 147 (para. 362).

[417] "IMF Survey: Romania Poised for Growth", *IMF News*, Mar. 2011, at **Exhibit R-217**; see also Gabriel Canada press release dated 3 August 2011, at **Exhibit R-218**, p. 2 ("The Romanian Government continued to implement austerity measures intended to … comply with the requirements of the International Monetary Fund emergency aid programme.").

[418] Memorial, p. 136 *et seq.* (paras. 337-341) (citing **Exhibits C-627**, **C-537**, **C-791**, **C-1430**, **C-628**, **C-1479** and **C-629**, respectively).

Government "evidently made a policy decision that it would not allow the Project to be permitted unless Gabriel agreed to strike a new bargain."[419]

232 This argument is unfounded for several reasons. First, it was not improper for the Government to wish to renegotiate the License. Trying to renegotiate the License was its prerogative and RMGC engaged in such discussions without raising any protests.[420]

233 Second, in none of the press statements cited by the Claimants did the Minister of Environment say that he would withhold issuance of the environmental permit unless RMGC agreed to renegotiate the License.[421] The Claimants' allegations are therefore not supported by their own evidence.

234 Third, Prime Minister Boc never indicated that the Government had resolved not to issue the environmental permit unless the License were renegotiated. He expressed his dissatisfaction with the terms of the License and indicated that, although in his personal capacity, he was "not a fan" of the Project, "as the leader of the Government, [he was] waiting for the official position of the specialists," *i.e.* the TAC.[422] He affirmed that a decision would be made when "all the documentations and … materials are prepared, because the decision must be substantiated on documents, not on

[419] Memorial, p. 136 (para. 337).

[420] See Memorial, p. 140 (para. 348); E. Reguly, "Gabriel Resources sees progress on Romanian gold project", *The Globe and Mail*, Aug. 2011, at **Exhibit C-1441** (citing Mr. Henry as saying "[r]ecent statements from senior Romanian politicians suggest that they need to show the country is getting a better deal, especially since they are imposing austerity measures on the economy" and "[w]e anticipate going to the table"); [redacted].

[421] Memorial, p. 136 *et seq.* (paras. 338-342).

[422] "Emil Boc: The decision on the Roșia Montană mining project must be substantiated based on documents, not stories", *Agerpres.ro*, Sept. 2011, at **Exhibit C-791**.

stories."[423] Minister Hunor similarly asserted that the decision to go forward with the Project would "be based on the opinions of experts and not on political arguments."[424]

235 Fourth, although one press article suggests that Mr. Băsescu conditioned his continued support for the Project on a renegotiation of the License, he also made clear at the time that a possible renegotiation was not his but rather the "Government's problem."[425] As President of Romania, he had no role in the permitting process for the Project. Mr. Băsescu, who had been President since 2004 and constantly supported the Project, added that while "probably a negotiation would bring us more [*i.e.* State interest], [t]he important thing is to start the mine because we need to increase the gold reserve."[426] He expressed his concern that, in any event, "the environmental protection must be very well planned."[427]

236 [redacted][428] [redacted][429]

[423] *Id.*

[424] "Boc: I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed", *Mediafax.ro,* Aug. 2011, at **Exhibit C-627**, p. 2.

[425] "Interview with Traian Băsescu", *TVR1*, Aug. 2011, at **Exhibit C-1479**, p. 1; see also "Mr. Traian Băsescu supports Roşia Montană Project", *Romania-Actualitati.ro,* Aug. 2011, at **Exhibit C-457**.

[426] "Interview with Traian Băsescu", *TVR1*, Aug. 2011, at **Exhibit C-1479**, p. 2.

[427] "Traian Băsescu: Romania needs the Roșia Montană Project, provided the terms for sharing of benefits are renegotiated", *Agerpres.ro*, Aug. 2011, at **Exhibit C-628**.

[428] [redacted].

[429] [redacted].

237 [redacted][430][redacted][431][redacted][432][redacted][433]

238 [redacted][434]

239 [redacted][435][redacted][436]

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430 [redacted].
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434 [redacted].
435 [redacted].
436 [redacted].

240 [redacted][437]

241 [redacted][438] However, there is no evidence that the Ministry of Environment, which would take the decision, was involved in these negotiations. Nor is there any evidence that the Ministry of Environment improperly refrained from taking a decision regarding the environmental permit in late 2011 for reasons related to these negotiations. Irrespective of these negotiations, the Ministry of Environment could not take a decision on the environmental permit in late 2011 or early 2012 for the reasons explained in **Sections 4.6** and **4.8**.

4.8 The Ministry of Environment Was Not in a Position to Take a Decision Regarding the Environmental Permit by January 2012

242 The Claimants allege that the Ministry of Environment is required to take a decision regarding an application for an environmental permit within ten working days of whichever is later (a) the TAC meeting at which the TAC members express their points of view; (b) the expiry of the term of 30 working days for TAC members to submit their views in writing; or (c) where the TAC members do not agree, the conciliation meeting.[439]

243 In their Memorial, the Claimants argue that the Ministry of Environment should have taken a decision regarding the environmental permit in January 2012:

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437 [redacted].

438 [redacted].

439 *Id.* at p. 74 (para. 197).

> "Given the resolution of the issues raised at the November 29, 2011 TAC meeting and the fact that none of the TAC members submitted written objections within 30 working days of that meeting, *i.e.*, by January 16, 2012, the Ministry of Environment was required by law to take a decision on the environmental permit and to communicate it to RMGC within 10 working days from that date, *i.e.*, by January 31, 2012, and to publish the decision within five working days thereafter, *i.e.*, by February 8, 2012."[440]

244 The Claimants' argument conflicts with their position at the time. Gabriel Canada was not expecting a decision in January 2012, but rather was "awaiting formal feedback from the TAC as to whether further meetings or documentation will be requested."[441] It noted in March 2012, that it was "look[ing] forward to the TAC recommendation in the coming months."[442]

245 In any event, the Ministry of Environment was far from taking a decision on the environmental permit in January 2012 for, *inter alia*, the following reasons.

246 Over the years, representatives of the Ministry of Culture had regularly attended the TAC meetings and noted that the Project needed to comply with the law.[443] As of December 2011, contrary to the Claimants' allegations, the Ministry of Culture had not yet endorsed the Project.[444] Although it had sent a letter on 7 December 2011 providing certain views regarding

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[440] *Id.* at p. 151 (para. 366); see also *id.* at p. 302 (para. 682(d)).

[441] Gabriel Canada press release dated 29 December 2011, at **Exhibit C-1437**, p. 1.

[442] Gabriel Canada press release dated 14 March 2012, at **Exhibit R-219**.

[443] See *e.g.* TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 56 (Timiş) ("if the approval is received, if the project is launched, our problem is to ensure all the necessary conditions to save as much a part [as possible] from the heritage that would be discovered."); TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 43 (Angelescu) ("the law provides that whatever happens near historical monuments or to historical monuments, should only take place in certain conditions set out in the law.").

[444] Memorial, p. 75 (para. 198); **Mihai**, p. 94 (para. 370) and p. 97 (para. 386).

the Project,[445] this document did not qualify as the requisite "endorsement" (or "*aviz*") and highlighted the importance of the research to be done at Orlea.[446] When asked by the Ministry of Environment about the status of the document, the Ministry of Culture thus would not confirm that it was the requisite endorsement.[447]

247 Contrary to the Claimants' suggestions,[448] the Ministry of Culture's non-issuance of an endorsement in December 2011 was logical and reasonable, particularly in light of the open questions regarding both Cârnic and Orlea, including the lack of (confirmed) ADCs for these two areas.[449]

248 As explained above, NGOs had filed a court challenge to the ADC 9/2011 concerning Cârnic, which was still pending in January 2012.[450]

249 Furthermore, archaeological research remained outstanding for Orlea, which RMGC knew was a prerequisite to apply for the ADC and to obtain the Ministry of Culture's endorsement.[451] In August 2011, RMGC had submitted to the Ministry of Culture the "Archaeological assessment report regarding the surface and underground archaeological vestiges from the

[445] Letter from Ministry of Culture to Ministry of Environment dated 7 December 2011, at **Exhibit C-446**.

[446] See also Transcript of TV show Judeca Tu!, *TV R1*, dated 23 February 2012, at **Exhibit C-438**, p. 11 (where State Secretary of Ministry of Culture and RMGC representative discussed the outstanding endorsement); **CMA Report Appendix D**, p. 26 *et seq.* (para. 76).

[447] See Draft Letter from Ministry of Culture to Ministry of Environment dated 5 January 2012, at **Exhibit C-638**; Letter from Ministry of Environment to Ministry of Culture dated 16 March 2012, at **Exhibit C-1381**. It is only in April 2013 that the Ministry of Culture indicated being in a position to issue the endorsement (as discussed *infra* at para. 309).

[448] See Memorial, p. 149 (para. 365, second bullet point) and p. 153 (paras. 372-373).

[449] See TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 45 (Pineta) ("From the point of view of the Environment Ministry, we must issue the regulatory act. That act cannot be issued if you do not have a clear situation from the Ministry of Culture for the Orlea and Cârnic pits." A position with which RMGC indicated its agreement).

[450] See *supra* para. 212.

[451] TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 59 (Timiş and Dragomir, RMGC counsel) ("are you aware of the prior research problem? Answer: *Sure*"); GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 3 *et seq.* (Art. 2(9)-(11)); see also *supra* Section 2.3.6.

area of ORLEA Massif."[452] This preliminary assessment represented the first step on the basis of which a preventive archaeological research project was to be prepared.[453] Subsequently, on 12 February 2013, the National Museum of History, upon instruction from RMGC,[454] prepared and submitted to the Alba Cultural Directorate a "Project of Archaeological Research within Orlea Massif" (the "**Orlea Research Project**"), which the Alba Directorate forwarded the following day to the Ministry of Culture.[455]

250 The National Museum of History emphasized that the preventive research was "a necessity … prior to the implementation of Roşia Montană mining project."[456] Dr. Paul Damian, the lead archaeologist who had supervised the Alburnus Maior National Research Program, explained that RMGC had approached the Museum and the same team from Toulouse, France, that had previously been involved in Roşia Montană, to prepare the Orlea Research Project "to undertake the legal procedures to acquire the [ADC] for the entire location of the future open pit of Orlea," which was also listed on the list of historical monuments; once RMGC obtained the ADC, "the declassification procedure [could] lawfully be enforced."[457] On the basis

[452] Letter from RMGC to Ministry of Culture dated 26 August 2011, at **Exhibit C-1385**; 2011 Archaeological Assessment Report of Orlea, at **Exhibit C-1484**.

[453] 2011 Archaeological Assessment Report of Orlea, at **Exhibit C-1484**, p. 14 *et seq.* (points 5.1 and 5.2) (referring to theoretical and field assessments); Ministry of Culture Order 2392/2004 on archaeological standards and procedures dated 6 September 2004, at **Exhibit R-220**, p. 2 *et seq.* (Annex 1 on Theoretical Assessment) and p. 4 *et seq.* (Annex 2 on Field Examination); see also **CMA Report Appendix D**, p. 26 (paras. 73-74).

[454] Ministry of Culture Order 2392/2004 on archaeological standards and procedures dated 6 September 2004, at **Exhibit R-220**, p. 6 *et seq.* (Annex 3 on Archaeological Excavation) (the investor, here RMGC, must fund the preparation of the preventive research project as well as the research itself).

[455] Letter from Alba Cultural Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at **Exhibit R-221**; see also **CMA Report Appendix D**, p. 27 (para. 77).

[456] Letter from National History Museum to Alba Cultural Directorate dated 12 February 2013, at **Exhibit R-222**.

[457] Letter from Alba Cultural Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at **Exhibit R-221**, p. 7; see also *id.* at p. 8 ("there are no legal provisions restricting the performance of archaeological research of a preventive nature, in the case of areas with archaeological heritage items identified and classified, as is the case of the Orlea Massif area… [T]he building and operation activities required to be performed in developing

of the research carried out until that time in the Orlea, Cârpeni and Țarina areas, Dr. Damian emphasized the "remarkable indications on underground sectors where the archaeological potential is considerable."[458]

251 Two weeks later, in March 2013, the National Archaeological Commission endorsed the Orlea Research Project as well as the preliminary assessment.[459] In a letter dated 18 March 2013, the Ministry of Culture explained that it was only following the receipt of these endorsements that the Ministry of Culture itself was in a position to endorse the Project.[460]

252 To date, RMGC has not performed (together with the National History Museum) the research described in the Orlea Research Project, although the Claimants recognize that the Ministry of Culture authorized the preventive research for Orlea.[461] The Claimants speculate that "it was unlikely that preventive archaeological research at Orlea would identify sites of signif-

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the [Project] may not be initiated before the completion of the said preventive archaeological researches, conducted in observance of the legal provisions applicable to such a case.").

[458] Letter from Alba Cultural Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at **Exhibit R-221**, p. 11 and p. 22 ("there are many archaeological and historical indications favouring the presence of archaeological potential and historical heritage."); see also *id.* at p. 20 (noting that in the Orlea sector, "[m]ine water draining gullies were built, access ways were developed, and areas where excavation debris could be sore[d] were identified and prepared.").

[459] Minutes of National Archaeology Commission (excerpt attached to Letter dated 14 March 2013) dated 1 March 2013, at **Exhibit R-223**.

[460] Letter from Ministry of Culture to Ministry for Infrastructure Projects dated 18 March 2013, at **Exhibit C-1360**; see also Letter from Ministry of Culture to National History Museum *et al.* dated 12 March 2013, at **Exhibit C-1305**. Thus, the Ministry of Culture had not been in a position to sign the draft endorsements to which the Claimants refer. Memorial, p. 158 *et seq.* (paras. 383-385); Draft Letter from Ministry of Culture to Ministry of Environment dated 5 January 2012, at **Exhibit C-638**; Draft letter from Ministry of Culture to Ministry of Environment dated 9 February 2012, at **Exhibit C-639**.

[461] Memorial, p. 63 (n. 256). The Claimants' complaints regarding the Ministry of Culture's delivery of field survey permits instead of approving the preventive archaeological research are thus misplaced. *Id.* at p. 59 *et seq.* (para. 165). In 2010, RMGC did not complain about the types of permits delivered for the research at Orlea. See TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 59 (Damian, RMGC counsel).

icant value that would justify a decision to reject an application for archaeological discharge of Orlea."[462] As noted, the conclusions set out in the Orlea Research Project attest to the contrary and according to Dr. Claughton, the Claimants' assumption is misplaced.[463]

253 Since "this research [at Orlea] was never conducted,"[464] the National Commission for Archaeology and the Ministry of Culture have been unable to assess the possible discharge of the area, which thus remains a known unknown for the implementation of the Project, with all uncertainties and risks identified and discussed above still relevant.[465]

254 In January 2012, the Ministry of Environment was far from taking a decision on the environmental permit for reasons additional to the absence of endorsement from the Ministry of Culture.

255 For instance, RMGC had not yet submitted its updated Waste Management Plan to the Ministry of Environment and did not do so until March 2012.[466]

256 Nor had RMGC secured the approval of its amended PUZ.[467] Furthermore, the validity of UC 87/2010 was still being challenged in the courts. [redacted][468]

[462] Memorial, p. 63 (para. 169).

[463] **CMA Report Appendix D**, p. 16 (paras. 45-46).

[464] Memorial, p. 63 (n. 256).

[465] See *supra* para. 97 and n. 143; see **CMA Report Appendix D**, p. 27 (para. 79) ("This situation may trigger timing and logistical issues, given that archaeological research would be performed at the same time as and in close proximity to the construction and/or mining activities.").

[466] See Letter from Ministry of Environment to RMGC dated 17 April 2012, at **Exhibit C-646**; see also **CMA Report Appendix C**, p. 6 *et seq.* (section 4).

[467] Furthermore, the court proceedings regarding the validity of the 2009 Local Council decision re-approving the 2002 PUZ were still pending as of January 2012. See *supra* n. 353.

[468] See Excerpt from website of Bucharest Court of Appeal re Case 61273/3/2010, at **Exhibit R-224**; [redacted].

257 The question of RMGC's compliance with the Water Framework Directive was still at issue. Following the 29 November 2011 TAC meeting, RMGC had submitted a copy of the Alba County Council declaration that the Project was of public interest.[469] Contrary to the Claimants' allegations, neither the TAC, nor the Ministry of Environment had, however, notified RMGC that this declaration would suffice for purposes of derogating from the Water Framework Directive.[470]

258 Thus, the TAC had not even reached the stage of setting out the specific conditions to be attached to the possible environmental permit. The Ministry of Environment was thus hardly in any position to issue the permit in January 2012.[471]

[469] Although the Directive requires a declaration of "overriding public interest" ("*interes public superior*"), the Alba County Council's declaration referred to "special public interest" ("*interes public deosebit*"). Water Framework Directive, at **Exhibit R-83**, p. 4 (item 32) and p. 11 (Art. 4(7)(c)). The Claimants have inaccurately translated these terms as "outstanding public interest." Letter from RMGC to Ministry of Environment dated 30 November 2011 attaching Alba County Council decision dated 29 September 2011, at **Exhibit C-632**; see also **Tanase II**, p. 28 (para. 71).

[470] In February 2012, the Ministry of European Affairs confirmed that the decision of the Alba County Council was not sufficient to "certify that [the Project was of] … overriding public interest" for purposes of derogating from the Water Framework Directive. Letter from Ministry of European Affairs to Ministry of Environment dated 16 February 2012, at **Exhibit R-225**; see also Letter from ANAR to Ministry of Environment dated 24 January 2012, at **Exhibit R-226**; **Mocanu**, p. 14 (para. 66).

[471] See also Letter from Ministry of Transport to Ministry of Environment dated 9 January 2012, at **Exhibit R-227** (expressing concerns regarding infrastructure and transportation of cyanide).

5 RMGC FAILS TO SECURE THE SOCIAL LICENSE AND SEEKS TO BYPASS THE REGULATORY FRAMEWORK THROUGH A SPECIAL AGREEMENT WITH THE GOVERNMENT

259 As explained above, a key requirement for any international mining project is the social license, namely the stakeholders' approval, including the approval of the local community. Thus, a mining company must obtain and maintain both the legal license (namely, all permits required by law) as well as the social license for any given project. Gabriel Canada recognized early on that it needed to obtain the social license for the Project.[472]

260 By early 2012, RMGC was still far from securing a social license, as the Project was facing growing social opposition. It had faced over 70 court or administrative challenges in Romania, filed by Alburnus Maior and other Romanian NGOs and relating primarily to its urban plans and certificates and ADCs.[473] The Project had also been the subject of two NGO petitions under the Aarhus Convention (relating to an alleged lack of transparency of the EIA Review Process) as well as three petitions to the PETI (relating to an alleged lack of legal compliance).[474]

261 Resistance to the Project was increasingly evolving from local opposition to a broad-based national movement. Over the years, the local association of Alburnus Maior, based in Roşia Montană, had gained increasing support from around the country. The FânFest festival in Roşia Montană had continued annually since 2004 and gathered thousands of visitors from all corners.[475] Various regional and national associations, including, for instance, the Romanian association of scientists based in Cluj Napoca, *Ad Astra*,[476]

[472] See *supra* paras. 98-108.

[473] See Annex IV.

[474] See *supra* paras. 179 and 182.

[475] See *supra* para. 107; see also "History of the Save Roşia Montană Campaign 2002-2013", *rosiamontana.org*, at **Exhibit R-134**, p. 3 *et seq.* (listing the FânFests of 2004, 2005, 2006, 2007 and 2010).

[476] Letter from Ad Astra to Ministry of Environment dated 2 June 2010, at **Exhibit R-228**; PETI Notice to Members dated 11 February 2011, at **Exhibit R-206**.

and the Romanian Architects Union,[477] had voiced their concerns regarding the environmental, cultural, and social impact of the Project.[478] In November 2011, a petition signed by 100,000 Romanians against the Project was submitted to the Parliament.[479] Gatherings and protests against the Project had taken place in Cluj and Bucharest in 2010 and 2011.[480]

262 Social resistance reached new proportions when, in January 2012, simultaneous protests took place in cities around Romania, including Bucharest, Cluj-Napoca, Timişoara, Braşov, and Iaşi.[481]

263 It was against this backdrop that RMGC sent the Government in January 2012 a draft agreement that sought the State's undertaking to issue outstanding permits and a declaration that the project was of public utility (**Section 5.1**). Due to changes in the Government in 2012, the Government was not able to engage in further discussions with RMGC at the time.

264 By early 2013, RMGC still did not have all of the necessary documentation and the Project was facing relentless social opposition (**Section 5.2**). RMGC sought the assistance of the State and the State was prepared to negotiate and to increase its stake, given the financial hardship it found itself in, in the aftermath of the global financial crisis. As Gabriel Canada reported at the time, Romania had been one of the hardest hit countries and

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[477] M. Gotiu, "The Romanian Architects Union condemns the Canadian Project in Roşia Montană", *Voxpublica*, Dec. 2010, at **Exhibit R-229**; Adevarul, "Roşia Montană - between cyanide and a job", *stiri.com*, Feb. 2011, at **Exhibit R-230**.

[478] See also Letter from ICOMOS Romania *et al.* to Minister of Culture *et al.* dated 24 January 2011, at **Exhibit C-1451** (advocating for UNESCO inscription).

[479] "100,000 against the mine from Roşia Montană", *stiri.com.ro*, Nov. 2011, at **Exhibit R-231**.

[480] See *e.g.* "Occupy TVR Cluj!", *stiridecluj.ro*, Nov. 2011, at **Exhibit R-232**; see also "Greenpeace activists demand Roşia Montană Gold Corporation to stop working on a disaster", *rosiamontana.org*, Jul. 2010, at **Exhibit R-233**; "The Gold March or Gold for the President", *rosiamontana.org*, Sept. 2011, at **Exhibit R-234**.

[481] Alburnus Maior press release "Out in the street for Roşia Montană!" dated 22 January 2012, at **Exhibit R-235**; Alburnus Maior press release "Beyond cold, press and manipulation, Roşia Montană is not for sale" dated 29 January 2012, at **Exhibit R-236**; see also Alburnus Maior press release "Roşia Montană's celebration. 1881 years of historical documentation" dated 10 January 2012, at **Exhibit R-237** (referring to event on 6 February 2012).

had required a USD 26 billion emergency assistance bailout package from the IMF and other lenders.[482] By February 2013, the Government and RMGC had agreed to submit to Parliament a special law for the Project (**Section 5.3**). The Government established in March 2013 an interministerial commission to review the Project (**Section 5.4**). Shortly thereafter, RMGC made several successive offers to the State, which proposed the amendment of its package of rights and obligations under the License and the governing legal and regulatory framework. These offers became the subject of negotiations between RMGC and the Government, which worked together towards submission of a bill and agreement for the Project (**Section 5.5**).

265 In parallel with these negotiations, the TAC convened and the Ministry of Environment consulted the public regarding the possible issuance of the environmental permit (**Sections 5.6** and **5.7**). Following these meetings, two TAC members, the Romanian Academy and the National Geological Institute, confirmed their reservations concerning the Project (**Sections 5.8** and **5.9**).

266 In August 2013, the Government submitted to the Senate the draft law and agreement negotiated with RMGC (**Section 5.10**). The submission of the draft Roşia Montană Law triggered the most important social movement of modern times in Romania, when thousands of people took to the streets and protested against the Project (**Section 5.11**). These protests culminated in the Parliament's nearly unanimous rejection of the bill in June 2014 (**Section 5.12**). This rejection confirmed that RMGC had failed to obtain the social license for the Project (**Section 5.13**). RMGC failed thereafter to propose a way forward for the Project (**Section 5.14**).

[482] See *e.g.* Gabriel Canada 2012 Annual Information Form, at **Exhibit C-1810**, p. 10.

5.1 January 2012: RMGC Offers to Conclude a Special Agreement in Exchange of the State's Undertaking to Issue Outstanding Permits and a Declaration that the Project was of Public Utility

267 Against this backdrop, in January 2012, RMGC renewed its offer to the Government to renegotiate the License. [redacted][483]

268 [redacted][484] [redacted][485] [redacted][486]

269 [redacted][487]

270 [redacted][488]

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483 [redacted]

484 [redacted]

485 See *supra* paras. 79-87.

486 See *supra* para. 257.

487 [redacted]

488 [redacted]

271 Due to changes in the Government in 2012, the Government was not able to engage in further discussions with RMGC regarding the possible renegotiation of the License. Just days after RMGC sent its draft agreement and following backlash to health care reforms and the austerity measures of the previous two years, on 6 February 2012, Prime Minister Boc was forced to resign.[489]

272 Following calls from the leaders of the opposition party, the Social Liberal Union, Messrs. Victor Ponta and Crin Antonescu, for early parliamentary elections, the majority coalition block of three parties – the PDL (the Democratic Liberal Party), the UDMR (Democratic Alliance of Hungarians in Romania), and the UNPR (National Union for the Progress of Romania) – tentatively agreed that the government could stay in power until the next elections, as long as an independent technocrat were appointed prime minister. On 9 February, President Băsescu appointed Mr. Mihai Răzvan Ungureanu as prime minister.[490]

273 Less than three months later, on 27 April 2012, the Social Liberal Union voted a motion of no confidence against Mr. Ungureanu and his cabinet. Mr. Ungureanu was forced to resign and President Băsescu appointed the president of the Social Liberal Union, Mr. Ponta, as prime minister.[491] Mr. Ponta had a mandate of only six months until the next parliamentary elections (in December 2012). It was not until those elections that the Social Liberal Union acquired a majority in Parliament, resulting in Mr. Ponta's re-appointment as prime minister and giving him a stable political mandate.[492]

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[489] See Gabriel Canada press release dated 14 March 2012, at **Exhibit R-219**, p. 1 and p. 3.

[490] See *Romaniaôs new government wins parliamentary approval*, Reuters dated 9 February 2012, at **Exhibit C-1474**.

[491] "Victor Ponta, the transition Prime Minister", *Voxeurope*, May 2012 dated 8 May 2012, at **Exhibit C-577**; see also C. Badea *et al.*, "Partial parliamentary election results 2012: USL wins by majority, ARD calls for resignations", *Ziare.com*, Dec. 2012, at **Exhibit R-238**.

[492] C. Badea *et al.*, "Partial parliamentary election results 2012: USL wins by majority, ARD calls for resignations", *Ziare.com*, Dec. 2012, at **Exhibit R-238**.

274 As a result of these shifts in power, neither Mr. Boc nor Mr. Ungureanu, nor Mr. Ponta prior to his party's parliamentary victory in December 2012, had the political mandate to pursue negotiations with RMGC further to its January 2012 offer. This political mandate was important and necessary since the Project had become a controversial issue.[493]

275 The Claimants' contention that the new government "refused to take any decision in 2012 concerning Project permitting" is, however, wrong.[494] The Ministry of Environment renewed key permits to RMGC in April 2012: the dam safety permits.[495] It also responded and liaised promptly with RMGC with regard to its updated Waste Management Plan, which RMGC did not submit to the Ministry of Environment until March 2012.[496]

[493] See **Thomson**, p. 28 (paras. 93-95).

[494] The Claimants in part refer to local authorities' non-renewal in mid-2012 of a water management permit for the PUZ. Memorial, p. 157 (para. 381) and p. 162 (para. 393). However, local authorities had requested additional information required by law, which RMGC declined to provide. Letter from Mureş Water Basin Administration to RMGC dated 7 June 2012, at **Exhibit C-652**; Letter from RMGC to Mureş Water Basin Administration dated 3 July 2012, at **Exhibit C-567**; see also Ministry of Environment Order 799/2012 on documentation for water management permits, at **Exhibit R-239**, p. 3 (Art. 7(c)(3) (requiring proof of ownership of the land on which the project is to be built).

[495] The Claimants argue that the Ministry of Environment unlawfully delayed in issuing the dam safety permits. Memorial, p. 108 *et seq.* (paras. 273-279). As the Claimants note, starting in September 2008, RMGC successfully challenged the Ministry for not granting the permits. Notwithstanding the Claimants' argument that the Ministry's position was unjustified and politically-motivated, [redacted]; dam safety permits dated 29 June 2010 at **Exhibits C-509** and **C-810**; renewed dam safety permits dated 18 April 2012 at **Exhibits C-511** and **C-809**.

[496] See TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 9 (Pătraşcu) and p. 10 (Avram); see also *supra* paras. 227 and 255.

Although RMGC complained of the Ministry's requests for further information, those requests were entirely reasonable.[497] Moreover, RMGC did not respond to the Ministry's July 2012 request for information until the spring of 2013.[498]

276 The Minister of Environment announced on 3 May 2012 that the TAC would not reconvene until RMGC submitted a valid PUZ and urban certificate.[499] [redacted][500]

277 Gabriel Canada and RMGC issued press releases attacking the Minister's comments.[501] They asserted that RMGC had a valid urban certificate, UC 87/2010, omitting to mention that the validity of that urban certificate was the subject of litigation.[502]

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[497] [redacted]; Letter from Ministry of Environment to RMGC dated 17 April 2012, at **Exhibit C-646**; Letter from Ministry of Environment to RMGC dated 4 July 2012, at **Exhibit C-649**.

[498] Letter from Ministry of Environment to Department for Infrastructure Projects dated 19 March 2013, at **Exhibit C-883**, p. 2; [redacted].

[499] "The legal advisors recommend stopping the assessment of the project in Roşia Montană due to the lack of a valid Zonal Urban Plan" dated 3 May 2012, at **Exhibit C-430** (stating that "the lack of a valid … (PUZ) is an obstacle in the continuation of the procedure" and noting need for "a new urban planning certificate that will reflect a valid PUZ…").

[500] [redacted]; see also "The legal advisors recommend stopping the assessment of the project in Roşia Montană due to the lack of a valid Zonal Urban Plan" dated 3 May 2012, at **Exhibit C-430**, p. 2; see *supra* n. 353.

[501] Gabriel Canada press release dated 3 May 2012, at **Exhibit C-782**; see also "The legal advisors recommend stopping the assessment of the project in Roşia Montană due to the lack of a valid Zonal Urban Plan" dated 3 May 2012, at **Exhibit C-430**, p. 2; see also *supra* para. 229 (regarding RMGC's admission at 29 November 2011 TAC meeting that it did not have valid urban plans in place).

[502] See *supra* paras. 163, 201, and 256.

278 Later that month, RMGC obtained the approval of the 2002 PUG and PUZ, for a third time, by the Roşia Montană Local Council, notwithstanding the prior court decisions declaring the Local Council's earlier decisions (regarding those urban planning documents) illegal.[503] In any event though, from the start, RMGC had known that it needed to amend its 2002 PUZ.[504]

279 In the wake of the Parliamentary elections and his re-appointment as Prime Minister, in January 2013, Mr. Ponta reportedly stated that the Project "w[ould] start if three conditions [we]re met: compliance with environmental standards, increase of royalties and increase of the participation of the Romanian state in the project company."[505] The Claimants complain that the Ministry of Environment had already established that the Project "met the applicable environmental standards" and that Mr. Ponta thereby "confirmed that the Government already rejected the Project on the terms previously agreed…"[506]

280 However, Mr. Ponta's statements were hardly surprising, let alone improper. The Ministry of Environment had not confirmed that the Project "met the applicable environmental standards." Furthermore, Mr. Ponta's comments that the State's interest would be increased were logical given RMGC's offers and proposed draft agreement of January 2012.

5.2 By Early 2013, Social Opposition to the Project Had Intensified

281 By early 2013, and over just the preceding year, the Project had faced five more court and administrative challenges.[507] NGOs had organized anti-

[503] Roşia Montană Local Council decision dated 31 May 2012, at **Exhibit C-1420**; see *supra* paras. 143 and 276.

[504] See *supra* para. 66.

[505] "Victor Ponta: Roşia Montană will move within the competence of the Ministry of Large Projects", *Hotnews.ro*, Jan. 2013, at **Exhibit C-831**.

[506] Memorial, p. 167 (para. 403).

[507] See Annex IV, p. 6 *et seq.* (rows 70-74).

Project protests and events as well as sent several open letters to the Government.[508] Following the January 2012 protests,[509] on 15 March 2012, Alburnus Maior had created an environmental "quarantine" around the offices of the Ministry of Environment in Bucharest.[510] The seventh edition of FânFest had taken place in Roşia Montană in August 2012 and drawn numerous visitors.[511]

282 RMGC's marketing campaign had drawn criticism and had had, for some, the opposite of the intended effect. In April 2012, a group of artists, architects, journalists, and writers had initiated an extensive poster campaign in 43 towns around Romania to denounce RMGC's, in their view, toxic media campaign.[512]

283 It was in this context that RMGC and Government representatives discussed the future of the Project, as described below.

5.3 February 2013: RMGC and the Government Agree to Submit to Parliament a Special Law for the Project

284 [redacted]

[508] See *e.g.* Alburnus Maior press release "The Roşia Montană project cannot receive approval in its current form" dated 12 April 2012, at **Exhibit R-240**; Open letter from Alburnus Maior to Prime Minister dated 6 June 2012, at **Exhibit R-241**.

[509] See *supra* para. 262 and n. 481.

[510] Alburnus Maior press release "The Ministry of Environment put under quarantine!" dated 15 March 2012, at **Exhibit R-242**.

[511] Alburnus Maior press release "FânFest 2012 - Keep the mountains where they belong: resistance through culture" dated 3 April 2012, at **Exhibit R-243**.

[512] See Alburnus Maior press release "The Golden Lie that Kills – MindBomb for Roşia Montană" dated 13 April 2012, at **Exhibit R-244**; see *infra* paras. 354-355.

[redacted][513] [redacted]
[redacted].[514]

285 To overcome the hurdles it was facing, RMGC needed a law (versus a mere Government decision or contractual undertaking). In view of the intensifying public resistance, which had expanded beyond the local to the regional and national level, RMGC understandably had a strong interest in trying to get around the issue by way of a special law.[515] In March 2013, the CEO of the international insurance firm Allianz thus publicly announced, following a risk assessment procedure, that, "[a]s a result of what we found, Allianz will not do business with Gabriel Resources and will not insure the proposed project."[516]

286 [redacted][517] [redacted]
[redacted]."[518]

287 [redacted][519]

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513 [redacted].

514 [redacted].

515 See **Thomson**, p. 26 *et seq.* (section 5.5), see also *id.* at p. 18 (para. 52).

516 See S. McGrath, "Roşia Montană and Dirty Politics", *Huffington Post*, Oct. 2013, at **Exhibit R-105**, p. 3.

517 [redacted]; see also Transcript of TV show Judeca Tu!, *TV R1*, dated 23 February 2012, at **Exhibit C-438**, p. 32 (Simion, legal advisor of Alburnus Maior) ("We are there to stay and however long it will last from now, we will appeal absolutely all environmental agreement or certificate issued by the relevant ministries…").

518 [redacted].

519 [redacted].

288 [redacted][520]

289 The Claimants unscrupulously complain in this arbitration of the Government's submission of the Roşia Montană Law to Parliament.[521] However, RMGC had agreed by February 2013 to the idea of a special law regarding the Project. It then negotiated with the Government the draft law and agreement.[522] As explained below, Gabriel Canada publicly praised the Government's submission of the law to Parliament, well aware that the law was the only way it could hope to circumvent social resistance to the Project.[523]

5.4 March 2013: An Interministerial Commission Issues an Informative Note Regarding the Project Based on Limited and Partially Inaccurate Information

290 In March 2013, the Government created an interministerial commission to assist in identifying the issues relating to the progress of the Project. Several government agencies were represented in this commission, many of which also participated in the TAC.

291 [redacted][524] It requested the respective ministries' written comments regarding the status of the Project

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[520] [redacted].

[521] See Memorial, p. 8 *et seq*, (paras. 29, 32) and p. 192 *et seq*, (paras. 449-450).

[522] *Id.* at p. 196 (para. 456); Gabriel Canada press release dated 28 August 2013, at **Exhibit C-1436** (referring to negotiations).

[523] See *infra* paras. 334-335.

[524] [redacted]; Interministerial Commission meeting transcript dated 11 March 2013, at **Exhibit C-471**, p. 22 (where Mr. Tănase indicated his hope to have a new urban certificate soon), p. 24 (where the Ministry of Development representative

and gave RMGC the opportunity to respond.[525] In this context, following the Ministry of Environment's renewed request, RMGC submitted its revised Waste Management Plan, which was required for the environmental permit and which the Ministry promptly approved.[526] Similarly, the Ministry of Culture issued its endorsement of the Project in April 2013.[527]

292 [redacted][528][529][530]

293 During these meetings and in correspondence, RMGC misinformed the commission with regard to two issues.

noted "you will have to restart the permitting procedure based on the new [urban] certificate"), and p. 26 (where Ministry of Development representative requested updated information regarding RMGC's urban plans); see also Letter from Ministry of Regional Development to Department for Infrastructure Projects dated 14 March 2013, at **Exhibit R-245**; Ministry of Environment Observations and Questions dated 14 March 2013, at **Exhibit C-834**, p. 1 (paras. 5-6).

[525] See *e.g.* Ministry of Environment Observations and Questions dated 14 March 2013, at **Exhibit C-834**; Letter from RMGC to Ministry of Large Projects dated 15 March 2013, at **Exhibit C-885**.

[526] Letter from Ministry of Environment to Department for Infrastructure Projects dated 19 March 2013, at **Exhibit C-883**, p. 2; Letter from RMGC to Ministry of Large Projects dated 22 March 2013, attaching RMGC responses to Interministerial Commission questions dated 22 March 2013, at **Exhibit C-880**, p. 8; see also Letter from Ministry of Environment to RMGC dated 7 May 2013, at **Exhibit C-658** (approving Waste Management Plan).

[527] Letter from Ministry of Culture to Ministry of Environment (Endorsement) dated 10 April 2013, at **Exhibit C-655**.

[528] NAMR initially approved the Roşia Montană resources and reserves in 1998 and RMGC submitted to NAMR an update in 2006, following RMGC's decision to increase the scope of the Project. Letter from RMGC to NAMR dated 2 October 2006, at **Exhibit C-740**; [redacted].

[529] Memorial, p. 80 (para. 209); [redacted].

[530] [redacted].

294 [redacted][531] [redacted][532] However, it failed to mention that, in 2008, the courts had found the Local Council decisions approving that 2002 PUG and PUZ illegal.[533] RMGC also failed to explain that, in any event, it was required to prepare and secure the approval of an amended version of the 2002 PUZ.[534] [redacted][535]

295 At the meetings, RMGC dismissed the relevance of the urban plans and certificate, even though they were required for the environmental permit,[536] as State representatives reminded RMGC.[537]

296 RMGC blamed the Sibiu EPA for allegedly delaying issuance of the environmental endorsement for the PUZ (granted in March 2011) and, in turn,

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[531] [redacted].

[532] Roşia Montană Local Council decision dated 31 May 2012, at **Exhibit C-1420**; see *supra* para. 278; [redacted].

[533] See *supra* paras. 143 and 165.

[534] See *supra* para. 66.

[535] [redacted].

[536] See *supra* para. 60; **Dragos**, p. 31 *et seq.* (section V.1.B. and V.2.).

[537] Letter from Ministry of Environment to Department for Infrastructure Projects dated 19 March 2013, at **Exhibit C-883**, p. 3 *et seq.* ("the issuance of the environmental permit can only be carried out based on a valid urbanism certificate") and ("the characteristics of the technical project must be included in an approved [PUZ]… [T]he issuance of the environmental permit for the project … can be carried out after the approval of the [PUZ] … **but the Local Council has not approved this [PUZ] yet** …") (emphasis in original); see also Letter from Ministry of Regional Development to Department for Infrastructure Projects dated 14 March 2013, at **Exhibit R-245**.

the approval of its PUZ.[538] However, it was not unreasonable for the Sibiu EPA to take nearly four years to issue the endorsement (following RMGC's submission of an environmental study in August 2007) given the complexity of the Project (and thus the need for RMGC to provide additional clarifications and documents), the mandatory public consultation, and the active participation of Hungary.[539]

297 RMGC did not let on that it still needed four endorsements for its PUZ,[540] [redacted][541] RMGC's assertion that those proceedings, which were still pending in March 2013, were not of a "nature to influence [the Sibiu endorsement's] validity" was astounding given that the very validity of the permit was at stake.[542] RMGC was well aware that the continuing court litigation was hampering the Project.[543]

298 Second, RMGC misinformed the commission with regard to prior discussions with the TAC on a possible derogation from the Water Framework

[538] Interministerial Commission meeting transcript dated 22 March 2013, at **Exhibit C-472**, p. 17 *et seq.*; see also Memorial, p. 122 (para. 307); see *supra* paras. 165 and 210.

[539] Letter from RMGC to Sibiu EPA dated 9 August 2007, at **Exhibit C-602**; see also Interministerial Commission meeting transcript dated 22 March 2013, at **Exhibit C-472**, p. 19 (Ginavar) ("you started with the [PUZ] in 2006, in 2010 there were still two permits to be issued that have not been issued till this day, you have not submitted them...").

[540] Interministerial Commission meeting transcript dated 22 March 2013, at **Exhibit C-472**, p. 23 (Tănase); TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 42 *et seq.* (Tănase) (noting that RMGC had not yet applied for certain PUZ endorsements).

[541] [redacted].

[542] Letter from RMGC to Ministry of Large Projects dated 15 March 2013, at **Exhibit C-885**, p. 5.

[543] See *e.g.* Gabriel Canada 2013 Consolidated Financial Statements, at **Exhibit C-1831**, p. 8 ("continued political, public, and NGO opposition to the Project; and the multitude of legal challenges to permits issued in respect of the Project demonstrate the significant risks that the Project faces.").

Directive. The Ministry of Environment noted that, for RMGC to derogate from the Water Framework Directive with regard to its plans to divert the Corna River, it needed to obtain from central authorities a declaration that the Project was of public interest.[544] RMGC disagreed, stating that the declaration from the Alba County Council of September 2011 sufficed. It claimed that both the Ministry of Environment and the TAC had recognized that that declaration from the Alba County Council sufficed.[545] [redacted][546]

299 In their Memorial, the Claimants rely on the conclusion of the commission that there were "no legal or administrative impediments for the Project to proceed."[547] However, the commission's conclusions had rendered a merely "informative note" based on both limited and partially inaccurate information and its conclusions were not final, nor binding. Furthermore, although RMGC came to these meetings with its lawyers, Romania had no legal counsel present during these discussions.[548]

[544] Letter from Ministry of Environment to Department for Infrastructure Projects dated 19 March 2013, at **Exhibit C-883**, p. 2 *et seq*.

[545] Interministerial Commission meeting transcript dated 22 March 2013, at **Exhibit C-472**, p. 8 and p. 12; Letter from RMGC to Ministry of Large Projects dated 22 March 2013, attaching RMGC responses to Interministerial Commission questions dated 22 March 2013, at **Exhibit C-880**, p. 8 *et seq*.

[546] [redacted]; see *supra* paras. 226 and 257.

[547] Memorial, p. 303 (para. 682(g)); see also *id.* at p. 299 (para. 678(f)).

[548] Interministerial Commission meeting transcript dated 22 March 2013, at **Exhibit C-472**, p. 5 (Mr. Tănase brushed aside the comment of the representative of the Ministry of Environment that she wished to consult with external counsel, asserting that "there is no need to meet Leaua, we know what they said, we are aware of their opinion…").

5.5 May to July 2013: RMGC Renews its Offer to Conclude a Special Agreement in Exchange of the State's Undertaking to Issue Outstanding Permits and a Declaration that the Project Was of Public Utility

300 In May 2013, a governmental commission was established to negotiate with RMGC "on all aspects of the implementation" of the Project and to "evaluat[e] … actual possibilities to fulfil the commitments undertaken by the parties" (the "**Negotiation Commission**").[549] The commission was chaired by Mr. Şova.

301 [redacted][550] [redacted][551] [redacted][552]

302 [redacted][553]

[549] Information Note attached to Negotiation Commission meeting minutes dated 28 April 2013, at **Exhibit C-451**, p. 2.

[550] [redacted].

[551] [redacted].

[552] See *supra* para. 267; [redacted].

[553] [redacted].

[redacted][554]

303 [redacted][555]:

> [redacted]
>
> [redacted][556]

304 The [redacted] seemed to assume both that RMGC would meet the requirements for obtaining the permits and that local and central Governmental authorities would issue the permits in question. It did not take

554 [redacted].

555 [redacted]: [redacted].

556 [redacted]).

into account possible delays due to likely challenges by NGOs,[557] over which the Government obviously had no control.

305 [redacted][558][redacted][559]

306 The Government and RMGC representatives worked together to finalize the terms of a draft agreement and draft law to submit to Parliament.[560]

5.6 May to July 2013: The Technical Advisory Committee Convenes to Discuss Outstanding Issues

307 In parallel with the negotiations between RMGC and the Government, the TAC and RMGC convened in May and June 2013 to discuss outstanding issues regarding the Project.[561]

308 Professor Mihai opines that the EIA Procedure was *de facto* and improperly suspended between November 2011 and May 2013.[562] However, the absence of TAC meetings during that time was hardly surprising given,

[557] See *e.g.* Transcript of TV show Judeca Tu!, *TV R1*, dated 23 February 2012, at **Exhibit C-438**, p. 32 (where NGO representative indicated "[w]e are there to stay and however long it will last from now, we will appeal absolutely all environmental agreement or certificate issued by the relevant ministries…").

[558] [redacted]

[559] [redacted]

[560] See Memorial, p. 196 (para. 456); Gabriel Canada press release dated 28 August 2013, at **Exhibit C-1436** (referring to negotiations).

[561] As the Claimants admit, the acting President of the TAC noted that "certain aspects remained to be clarified." Memorial, p. 181 (para. 426) (citing **Exhibit C-484**, p. 3 *et seq.*).

[562] **Mihai**, p. 66 *et seq.* (paras. 259-260 and 295).

inter alia, the absence of Project endorsement from the Ministry of Culture, RMGC's continued failure to secure an approved amended PUZ, and the pending litigation relating to its urban plans and certificates and the Cârnic ADC.

309 RMGC had only recently secured (in April 2013) the requisite endorsement of the Ministry of Culture.[563] Following the National Commission for Archaeology's approval of RMGC's preventive archaeological research project on 1 March 2013[564] and in light of the Chance Find Protocol (reviewed by the National Commission of Archaeology and the TAC in 2010-2011),[565] the Ministry of Culture had issued a conditional endorsement in April 2013, stipulating that the completion of the archaeological research at Orlea remained a prerequisite for the decision to either discharge or protect Orlea.[566]

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[563] Letter from Ministry of Culture to Ministry of Environment (Endorsement) dated 10 April 2013, at **Exhibit C-655**.

[564] Letter from Ministry of Culture to National History Museum *et al.* dated 12 March 2013, at **Exhibit C-1305**, p. 1 ("The National Archaeological Commission, reunited in a meeting on 1 March 2013 … proposed the approval of the *Preventive archaeological research project in the Orlea massif perimeter* … in the context of implementing a prior research procedure..."); Minutes of National Archaeology Commission (excerpt attached to Letter dated 14 March 2013) dated 1 March 2013, at **Exhibit R-223**; see *supra*. paras. 249-251.

[565] See *e.g.* National Archaeology Commission meeting minutes dated 12 July 2011, at **Exhibit C-1377**, p. 4 ("The National Commission of Archaeology insisted that the archaeological surveillance is undertaken over the entire duration of the project, even in the area which will be archaeological discharged, so that the stopping of the works and the archaeological research can be carried out for any eventual archaeological chance find, according to the legislation in force. … The TAC meeting … imposed a permanent monitoring of the archaeological status during the works which will be possible to stop any time when new archaeological vestiges are chance found."); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 55 *et seq.* (Timiş) (enquiring about "the means to ensure the monitoring of the archaeological supervision during the implementation of the mining project"); TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 40.

[566] Letter from Ministry of Culture to Ministry of Environment (Endorsement) dated 10 April 2013, at **Exhibit C-655**; see also Ministry of Environment Note for public consultation dated 11 July 2013, at **Exhibit C-555**, p. 24 *et seq.* (for conditions regarding the heritage).

310 During the 2013 TAC meetings, the TAC and RMGC discussed various issues including RMGC's envisaged financial guarantee, the Waste Management Plan, compliance with the Water Framework Directive, and the status of its urban plans.[567] The Claimants allege that none of these issues had been "identified at the November 29, 2011 TAC meeting as requiring clarification."[568] However, both the question of RMGC's compliance with the Water Framework Directive and the status of its urban plans had in fact been discussed.[569] Furthermore, RMGC was well aware in late 2011 that it still needed to provide an updated Waste Management Plan, which the Ministry of Environment had requested twice in September 2011.[570]

311 The TAC asked RMGC about these and other issues,[571] including RMGC's continued uncertainty regarding the route by which cyanide and other hazardous materials would arrive on site (whether it be by rail, truck, and/or ship to the port of Constanţa on the Black Sea).[572] The representative of the Ministry of Transport noted that Constanţa did not have an area "big enough" to receive properly ships of the nature envisaged by RMGC.[573]

312 Mr. Tănase admitted that, even if the environmental permit were issued, RMGC would need to spend substantial amounts to take all steps necessary to obtain the building permit:

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[567] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 4 (Patrascu); Letter from Ministry of Environment to RMGC dated 29 April 2013, at **Exhibit C-1759** (referring to the need to discuss the Water Framework Directive and the urban plans and certificate).

[568] Memorial, p. 182 (n. 864).

[569] See *supra* paras. 226 and 229.

[570] See *supra* paras. 227, 275, and 291.

[571] TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 21 (Cazan) (referring to missing documentation necessary for the Water Management Permit); TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 4 (Pârvu) (requesting that certain information be updated), p. 5 (Gabor) (requesting documentation to issue the Water Management Permit).

[572] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 12 *et seq.* (Buică).

[573] The TAC asked for certain documentation where necessary. See *e.g.* TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 13 (Buică); see also TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 15 (Avram) (recognizing that certain observations of the Ministry of Health were "all valid").

> "the acquisition of these properties, the relocation, all of these entail significant costs, we must go through another financing, so there are many details, things which shall be initiated when we are certain we go through with the environmental permit."[574]

313 When asked specifically by the TAC President about the status of RMGC's urban plans and the related litigation, Mr. Tănase asserted that RMGC had a "valid PUG, PUZ, and urbanism certificates … confirmed by final and irrevocable court decisions."[575] With regard to the PUG, he affirmed that "there is a PUG as of 2002, which was extended in 2012 until 2014,"[576] again omitting to mention that the courts had declared the Local Council decisions approving that PUG and PUZ illegal.[577]

314 Similarly, Mr. Tănase asserted that RMGC had had a PUZ "since 2002" and that it "was extended until 2014," and that "[i]n 2006, [it] … was updated so as to identically reflect the structure of the [EIA Report]. This is undergoing approval…"[578] [redacted][579]

315 Although Mr. Tănase referred to RMGC's new urban certificate, UC 47/2013 dated 22 April 2013 ("**UC 47/2013**"),[580] he omitted to mention the litigation surrounding RMGC's prior urban certificates and the

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[574] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 19 (Tănase).

[575] *Id.* at p. 20 (Tănase).

[576] *Id.*

[577] See *supra* para. 143.

[578] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 20 (Tănase).

[579] See *supra* para. 67; [redacted].

[580] TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 20 (Tănase); see also UC 47/2013, at **Exhibit C-924**; RMGC Application for urban certificate dated 31 January 2013, at **Exhibit R-248**.

likelihood that this urban certificate would also be challenged. Just days later, on 23 May 2013, NGOs filed an administrative challenge to the urban certificate before the Alba County Council [redacted].[581]

316 The Claimants' complaint that RMGC's representatives were compelled to repeat their views regarding the Project to the TAC is misplaced.[582] For a project of this size and complexity and given the reservations of neighboring Hungary with regard to the environmental impact of the Project, the TAC had a duty to analyze the EIA Report with great care and to raise questions.[583]

317 Following these TAC meetings, Gabriel Canada announced that it was "confident that it [could], and [would], comply with its environmental obligations and [that it] look[ed] forward to concluding its discussions with the TAC and relevant Ministries on this topic..."[584]

[581] Alburnus Maior *et al.* Administrative challenge dated 23 May 2013, at **Exhibit R-249**; [redacted].

[582] **Mihai**, p. 69 (para. 266).

[583] TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 16 *et seq.* (Cazan) ("I want to go back as many times as it is necessary to clarify certain aspects because this project may lead to an infringement procedure declared by the European Commission and this is why I would like for us to be very sure and very convinced about this project, so that we are never accused for errors and so that we take all the necessary measures."); see also TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 10 (Hârşu).

[584] Gabriel Canada Management's Discussion & Analysis, Second Quarter 2013, at **Exhibit R-251**, p. 3 (also saying that it was looking forward "to a successful process through Parliament of the Project specific legislation noted by Mr. Ponta").

5.7 July 2013: The Ministry of Environment Consults the Public Regarding Possible Measures and Conditions to Be Included in the Environmental Permit

318 By letter dated 10 June 2013, the Ministry of Environment invited TAC members to communicate in writing their conditions for issuance of the environmental permit by 14 June.[585]

319 Following receipt of the input from certain TAC members, on 11 July 2013, the Ministry of Environment published a note regarding measures and conditions to be included in an environmental permit for the Project and invited the public to provide any comments by 30 July 2013.[586]

320 The Claimants and their expert, Professor Mihai, criticize Romania for having consulted the public at this point in time.[587] However, Gabriel Canada described this consultation as a "positive procedural development" at the time.[588] Furthermore, publication of this note was within the discretion of the Ministry of Environment.[589] The consultation was not only appropriate but necessary, given the growing opposition to the Project.

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[585] Letter from Ministry of Environment to TAC members dated 10 June 2013, at **Exhibit C-554**; Letter from Geological Institute to Ministry of Environment dated 13 June 2013, at **Exhibit C-659**; Letter from Ministry of Agriculture to Ministry of Environment dated 13 June 2013, at **Exhibit C-660**; Letter from Ministry of Transport to General Directorate for Foreign Affairs dated 13 June 2013, at **Exhibit R-252**; Letter from Ministry of Transport to Ministry of Environment dated 14 June 2013, at **Exhibit C-662**; Letter from Ministry of Culture to Ministry of Environment dated 14 June 2013, at **Exhibit C-661**.

[586] Ministry of Environment Note for public consultation dated 11 July 2013, at **Exhibit C-555**; see also TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**, p. 15 (Pătrascu).

[587] **Mihai**, p. 71 (para. 271(b)); Memorial, p. 303 *et seq.* (para. 682(g)).

[588] Gabriel Canada Management's Discussion & Analysis, Second Quarter 2013, at **Exhibit R-251**, p. 3.

[589] As RMGC was aware, NGOs had challenged Romania before the Aarhus Compliance Committee in March 2012 for non-disclosure of documents. Greenpeace Romania *et al.* Petition to Aarhus Convention Compliance Committee dated 13 March 2012, at **Exhibit R-253**; TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 9 (Pătrascu); see also TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**, p. 15 (Pătrascu); Interministerial Commission meeting minutes dated 28 May 2013, at **Exhibit C-1404**, p. 2; see also **Dragos**, p. 61 *et seq.* (paras. 338-346).

5.8 July 2013: The Romanian Academy and the National Geological Institute Confirm their Reservations Regarding the Project

321 In May 2013, the Romanian Academy confirmed to the TAC that it had "great reservations" regarding the Project.[590] Shortly thereafter, on 20 June 2013, it sent a letter that detailed several reasons to reject RMGC's application for an environmental permit, including the impact on the archaeological vestiges, the risk of micro-earthquakes caused by the extraction process endangering in turn the stability of constructions and increasing the risk of dam failure.[591] It also noted the Project's lack of social legitimacy, [592] of which RMGC and the TAC were obviously aware.[593]

322 Professor Mihai opines that, because the Romanian Academy had been allegedly opposed to the Project since 2003, its "point of view thus necessarily was not based on any assessment of the EIA Report."[594] This opinion reflects the Claimants' persistent presumption that the TAC could not reach any conclusion other than to approve the Project. In the Claimants' view, not granting the environmental permit could only mean not understanding the EIA Report.

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[590] TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 9 (Vlad); see also TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**, p. 10 (Pătrascu) (referring to Romanian Academy Point of view dated 21 June 2013, at **Exhibit C-1763**) (where Academy considered that its "consultative role established by the law was fulfilled and [its] presence at the TAC meeting set for June 26, 2013 … [was] no longer justified, the role and responsibility for making the decisions being with the competent persons.").

[591] Romanian Academy Point of view dated 21 June 2013, at **Exhibit C-1763**; see also Romanian Academy press release dated 4 March 2003, at **Exhibit C-1745**.

[592] Romanian Academy Point of view dated 21 June 2013, at **Exhibit C-1763**, p. 8 (para. 20) (noting that the views of civil society could not be ignored).

[593] TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 11 (Senzaconi) ("obviously, there are concerns … the public and the academia must express such concerns.") and (Tănase) (referring to the "controversy around the gold in Roşia Montană …"); TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 7 (Marincea) ("We are not against mining projects; on the contrary, we support them, because we support the balance between investors. But neither can we go against the public opinion…").

[594] **Mihai**, p. 96 (para. 380).

323 It was, however, within the Romanian Academy's discretion and its prerogative to conclude that the RMGC had not properly addressed the environmental, social, and cultural impact of the Project. Were the TAC simply meant to rubberstamp every project, it would serve no purpose. With the exception of one meeting in 2011, the Romanian Academy attended every TAC meeting up until its letter of June 2013 (namely 10 out of 11 meetings). Its representatives participated in those meetings and asked questions. To say that this highly respected institution of academics did not review the EIA Report is belied by the evidence.

324 The National Geological Institute also confirmed its reservations regarding the Project.[595] Its representatives explained to the TAC that, although the Institute had, when it was under the interim direction of Mr. Ștefan Grigorescu (between June 2011 and October 2012), endorsed the Project in December 2011, they considered that endorsement improper.[596]

325 Professor Mihai's criticism that the Institute's repudiation of the December 2011 endorsement was arbitrary is unfounded.[597] Apart from Professor Mihai's lack of qualification to assess the technical views of the Institute, its representative explained that the December 2011 endorsement did not reflect the views of the Institute (but rather only those of its signatory) and was based on insufficient review of the Project.[598] The Institute's representatives had regularly attended and participated in the TAC and ultimately maintained its reservations regarding the Project and, more specifically, its method of ore extraction.[599] It thus indicated that, in its view,

[595] TAC meeting transcript dated 31 May 2013, at **Exhibit C-485**, p. 20 *et seq.* (Mărunţiu); see also Letter from Geological Institute to Ministry of Environment dated 28 May 2013, at **Exhibit C-1239**.

[596] TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 6 *et seq.* (Marincea) (explaining that the December 2011 endorsement had not been approved by the Institute's scientific council); see also TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**, p. 3 (Bindea).

[597] **Mihai**, p. 96 (para. 378).

[598] See TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**, p. 3 (Bindea).

[599] Letter from Geological Institute to Ministry of Environment dated 29 May 2013, at **Exhibit R-254**; Letter from Geological Institute to Ministry of Environment dated 13 June 2013, at

RMGC should revise the methodology for ore extraction due to its concern that use of the cyanide leaching method would generate significant hazardous waste. It also recommended that RMGC undertake a detailed geological study of the Corna Valley area where RMGC envisaged the tailings pond and indicated its willingness to assist RMGC in doing so.[600]

326 In accordance with the TAC Order, the Ministry of Environment convened a TAC meeting to encourage the Romanian Academy and the Geological Institute to reconsider their views.[601] [redacted][602]

5.9 The Ministry of Environment Was Not in a Position to Issue the Environmental Permit in July 2013

327 The Claimants allege that the Ministry of Environment, following its publication of the note for public consultation in July 2013, should have issued the environmental permit.[603]

328 This argument is without merit since RMGC and the Government had agreed months before to prepare and submit to Parliament a special law and agreement for the Project. Indeed they had been working together to that end.

Exhibit C-659; see also TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 13 *et seq.* (Marincea) (raising concerns regarding cyanide-based technology and protection of cultural sites and vestiges).

[600] Letter from Geological Institute to Ministry of Environment dated 13 June 2013, at **Exhibit C-659**, p. 1 *et seq.*

[601] TAC meeting transcript dated 26 July 2013, at **Exhibit C-480**; Ministry of Environment Regulation on organization and functioning of central TAC dated 23 June 2010, at **Exhibit C-564**, p. 3 (Art. 14(2)).

[602] [redacted].

[603] Memorial, p. 304 (para. 682(h)).

329 Moreover, the Ministry of Environment was far from issuance of an environmental permit in July 2013. For any project, it is usual for State authorities to attach a series of conditions to an environmental permit. The more complex and important the project, the lengthier and more detailed the list of conditions is likely to be. Although certain TAC members had provided input regarding possible conditions for the environmental permit for the Project, the TAC had not yet discussed in detail the specific and mandatory conditions and mitigation measures. Contrary to Professor Mihai's views,[604] the TAC would then need to reach a consensus regarding the conditions to be attached to the environmental permit, in order to issue a favorable recommendation to the Ministry of Environment.

330 A number of issues were pending. For instance, RMGC still had not secured valid urban plans and its environmental endorsement for the PUZ was being challenged in court. Its latest urban certificate dated 22 April 2013 was the subject of administrative complaints and court litigation.[605] The litigation relating to the Cârnic ADC was also pending and RMGC still needed to provide clarifications to the Ministry of Agriculture and to the National Water Agency.[606]

331 While the Claimants argue repeatedly that the Project "met or … surpassed all applicable Romanian and EU standards and employed EU-approved Best Available Techniques to responsibly exploit" the site,[607] the CMA expert team has identified aspects of the Project that, in their view, did not

[604] **Mihai**, p. 96 (para. 382).

[605] UC 47/2013, at **Exhibit C-924**; Alburnus Maior *et al.* Administrative challenge dated 23 May 2013, at **Exhibit R-249**. Ultimately, UC 47/2013 was annulled on retrial. See Excerpt from website of Bistriţa-Năsăud Tribunal re Case 9498/117/2013, at **Exhibit R-255**.

[606] Letter from Department for Infrastructure Projects to RMGC dated 12 June 2013, at **Exhibit C-1001**, p. 2 and p. 3.

[607] Memorial, p. 298, para. 678(e) and (f).

comply with best practice and/or required further investigation or clarification.[608] The issues identified by CMA were essentially the same as those identified by TAC members at the time.

5.10 August 2013: The Government Seeks to Support RMGC and the Project by Submitting the Roşia Montană Law to Parliament

332 On 27 August 2013, Prime Minister Ponta submitted, on behalf of the Government, the draft Roşia Montană Law to the Senate.[609] The bill had two components: the bill itself and an agreement (with appendices) between the State and RMGC, which the bill approved and which was formally declared an integral part of the bill. Prime Minister Ponta also provided a detailed "exposition of reasons" to adopt the bill.[610]

333 Throughout their Memorial, the Claimants argue that the Government "abandoned" the process envisaged by law by submitting the bill to the Parliament. They complain that "[t]he law did not provide a role for Parliament in the permitting process."[611]

334 Their argument today is wildly inconsistent with their position at the time. On 28 August 2013, Gabriel Canada announced how "highly encouraged" it was by the negotiations with the Government and the submission of the draft law to Parliament. Mr. Henry lauded the benefits of the bill, including the "significant extension to the mining licence, and other long-term legal and fiscal conditions" and the "schedule of permitting milestones that include estimated first gold production in November 2016." He further stated:

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[608] **CMA Report**, p. 63 (para. 240); **CMA Report Appendix B**, p. 60 (para. 251); see also **CMA Report Appendix D**, p. 18 (para. 49).

[609] Government Decision on the draft Law, at **Exhibit C-578**; Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**.

[610] Government Exposition of reasons dated 27 August 2013, at **Exhibit C-817**.

[611] Memorial, p. 300 (para. 680).

> "The Romanian Government's decision to approve a law specific to the Roşia Montană Project represents a significant milestone for all stakeholders. We are extremely encouraged by this major step towards progression of the permitting process and consider it to be a clear sign of endorsement by the Government for investment into Romania."[612]

335 Gabriel Canada's statements and conduct at the time demonstrate not only their support, but also their eagerness to see this law – which benefitted and granted RMGC preferential treatment as compared to other mining companies – submitted to Parliament.

336 The Government alone could not enact the measures that RMGC insisted upon. The bill envisaged the amendment of several laws and ordinances, including Law 571/2003 regarding the Fiscal Code (providing that certain expenses would be considered expenses made to achieve taxable income), the 2003 Mining Law, the 2008 Forest Code, GEO 34/2013 regarding the use of grasslands, and GEO 57/2007 regarding natural protected areas and habitats.[613] With the exception of Law 571, these are all organic laws, which could only be amended by law (and not by a government ordinance).[614]

337 The bill envisaged measures to enable the possible expropriation of landowners.[615] The bill declared the Project of public utility and national public

[612] Gabriel Canada press release dated 28 August 2013, at **Exhibit C-1436**; see also Gabriel Canada press release dated 5 September 2013, at **Exhibit R-256** ("We look forward to the Romanian Parliament's review of the Roşia Montană Project.").

[613] Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 4 *et seq.* (Art. 5).

[614] Organic laws may be amended by government ordinance only in cases of emergency, but must in any event be submitted thereafter to Parliament for approval. See Romanian Constitution, at **Exhibit R-55**, p. 32 (Art. 155(4)).

[615] Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 4 *et seq.* (Art. 5(II)).

interest,[616] thereby seeking to dispense RMGC from obtaining a government decision to that effect. The bill proposed to add provisions to the Mining Law regarding expropriations for mining projects of public utility and national public interest.[617]

338 The bill provided, in its Appendix II, an "Implementation Timeline" for the Project. It thus envisaged that state authorities, both central and local, would grant RMGC all necessary permits within set, tight deadlines (and thus assuming that RMGC would meet the requirements for those permits).[618] It provided that the environmental permit and building permit would be issued in September 2013 and June 2014, respectively, and that over twenty permits and endorsements would be issued in between.

339 The main benefit to the State of the Roşia Montană Law was an increased interest in the Project, via an increase of the Minvest's shareholding in RMGC from 19.31% to 25%. Significantly though, this increase, which was to occur in two stages, was contingent upon, first, the issuance of the environmental permit without "any significant changes as compared to… the EIA Report and Feasibility Study" and, second, compliance with the Implementation Timeline:

> "all the authorizations required by law for commencing the commercial operation (exploitation) stage of the Project were issued within terms which were not significantly delayed as compared to the terms stipulated in the authorization calendar provided under Art. 11 [and Appendix II], and such authorizations do not contain

[616] Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 1 (Art. 3); see also Romanian Constitution, at **Exhibit R-55**, p. 16 (Art. 44(3)) ("No one may be deprived of his/her property, except for a reason of public interest, specified by law, with just and prior compensation.").

[617] See *e.g.* Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 5 *et seq.* (new arts. 6^1 and 6^2 to be introduced in the 2003 Mining Law).

[618] *Id.* at p. 1 (Art. 1(2)) and p. 12 (Art. 11) (referring to Appendix II); Roşia Montană Law, Appendix II dated 27 August 2013, at **Exhibit R-257**.

> any significant negative changes as compared to the Projects specifications, as described in the EIA Report and the Feasibility Study;"[619]

340 The law was controversial. As Mr. Şova had explained in February 2013, it was likely that the law, if adopted, would be challenged and possibly invalidated by the Constitutional Court. For instance, it exposed the Government to claims that it was improperly granting preferential treatment to one foreign investor, over other foreign or domestic investors. This preferential treatment could be deemed to amount to state aid in violation of EU law. The Government was heavily criticized for submitting the bill and for going out of its way to support RMGC.[620]

341 The Claimants refers to Prime Minister Ponta's public statements on 31 August 2013 that he would vote against the Project as "Janus-faced."[621] However, Mr. Ponta explained that he distinguished between his role and responsibilities as prime minister and as member of Parliament. As prime minister, he deemed it necessary for the Parliament to review this controversial Project and had thus led a Government effort of months to develop a law and agreement destined to take every measure to develop the Project; in his individual capacity as member of Parliament, he, however, felt the right and obligation to vote against the proposed law. This dual view was understandable and justified in the circumstances.

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[619] Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 7 (of law) (new Art. 20(2^1)(4) and p. 2 (of agreement) (Art. 1(1)(b)(i)).

[620] See *e.g.* "Kelemen Hunor: The Government should withdraw the Roşia Montană Project from Parliament", Mediafax.ro, Sept. 2013, at **Exhibit C-1447** (where Mr. Hunor is quoted as saying: "if you issue a law for a company, regardless of its name, and we speak now of [RMGC], but tomorrow, and the day after tomorrow, why not issue for another firm, for another mine, or for another business. It is not fair, it is not constitutional…").

[621] Memorial, p. 205 (para. 475, n. 978) (citing **Exhibit C-789**); see also *id.* at p. 193 *et seq.* (para. 450).

5.11 The Reaction of the Civil Society: Thousands of Romanians Take to the Streets to Protest Against the Project and the Roşia Montană Law

342 The day after Prime Minister Ponta submitted the bill to the Senate, on 28 August 2013, four protesters chained themselves to the fence of a government building in Bucharest.[622] This event marked the beginning of what would become known as the "Romanian Autumn" – the months-long uprising of thousands of Romanians against the Project and leading up to the Parliament's rejection of the Roşia Montană Law in June 2014. Photographs of these protests may be found in **Annex III** to this Counter-Memorial and are excerpted below. Videos of these protests are referenced in the footnotes.

343 The street protests commenced on 1 September 2013 and continued across the country throughout the entire month.[623] Important protests of thousands of people paralyzed portions of Cluj and Bucharest on 1, 3 and 8 September 2013.[624]

[622] Video of protesters chaining themselves to government building in Bucharest dated 28 August 2013, at **Exhibit R-258**.

[623] See *e.g.* Video of Protest in Cluj dated 1 September 2013, at **Exhibit R-259**; Video of Protest in Bucharest dated 3 September 2013, at **Exhibit R-260**; Video of Protest in Bucharest dated 8 September 2013, at **Exhibit R-261**; C. Vasile, Video-photo montage of Protests dated September 2013, at **Exhibit R-262**; Save Roşia Montană press release "Romania out on the streets for at Roşia Montană" dated 29 August 2013, at **Exhibit R-263**; see also Alburnus Maior press release "Roșia Montană has 6000 new citizens willing to fight for its people and heritage" dated 20 August 2013, at **Exhibit R-264**.

[624] *Id.*

344 Protests continued on Monday 9 September, with reportedly more than 15,000 people protesting around the country, including an estimated 8,000 in Bucharest (pictured below), 6,000 in Cluj, and 900 in Braşov.[625]

345 The Claimants refer to the statements of that same day by Mr. Antonescu, the then President of the Senate and co-head (with Mr. Ponta) of the Social Liberal Union, that "[t]he project should be either withdrawn … or … rejected."[626] He explained that "one cannot govern ignoring the street" and that "no one can ignore these people." Contrary though to the Claimants' statements, Mr. Antonescu did not "call on Parliament to reject" the bill. He expressed his personal position and intended vote and made clear that he did not speak "as president of the party or as president of the Senate."

346 Mr. Ponta's statements on 9 September, to which the Claimants also refer, must also be put in context.[627] The gravity and scale of the protests, which Mr. Ponta described as "very important," had prompted him to speak to the

[625] D. Mihailescu, "No to cyanide: the biggest open-pit gold mine project in Europe faces opposition", *Le Monde*, Sept. 2013, at **Exhibit R-265**.

[626] Memorial, p. 207 (para. 480, n. 985) (citing **Exhibit C-832**).

[627] *Id.* at p. 208 (para. 481, n. 987) (citing **Exhibits C-872** and **C-793**).

press about the bill.[628] Although Mr. Ponta expressed his view that the bill would be rejected – in view of the protests and views expressed as a result by Mr. Antonescu – he did not "call on" Parliament to do so.[629] He also reiterated the advantages of the Project.[630]

347 On 11 September and in parallel with protests in Bucharest and Roşia Montană (both against and for the Project), Mr. Ponta participated in a television show regarding the Project against a backdrop, in the words of the interviewer, of exceptional "social tension."[631] Mr. Ponta explained that the Project affected not only Alba County, but also "Romania's future as a country" and referred, as the Claimants note, to the benefits that the adoption of the bill would bring the country.[632] He confirmed that the Government supported the bill[633] and emphasized the need for an informed, public debate in Parliament.[634] The next day, Mr. Șova also expressed support for the bill.[635]

348 The protests continued. On 15 September, an estimated 30,000 people marched in Bucharest (pictured on the next page), while others marched in Cluj.[636]

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[628] "Interview of Prime Minister Victor Ponta", B1TV, Sept. 2013, at **Exhibit C-872**, p. 2.

[629] See Memorial, p. 207 (para. 480); see also "Statements made by PM Victor Ponta", *DIGI TV*, Sept. 2013, at **Exhibit C-793**.

[630] "Statements made by PM Victor Ponta", *DIGI TV*, Sept. 2013, at **Exhibit C-793**.

[631] M. Gâdea, "Interview with Prime Minister Victor Ponta", *Antena 3*, Sept. 2013, at **Exhibit C-437**, p. 1.

[632] *Id.* at p. 1, p. 2, and p. 8; see also Memorial, p. 211 *et seq.* (para. 488).

[633] M. Gâdea, "Interview with Prime Minister Victor Ponta", *Antena 3*, Sept. 2013, at **Exhibit C-437**, p. 3.

[634] *Id.* at p. 10 *et seq*; see also "Live press conference with Victor Ponta and Dan Şova", *Antena 3,* Sept. 2013, at **Exhibit C-643**, p. 3 *et seq.*

[635] "Live press conference with Victor Ponta and Dan Şova", *Antena 3,* Sept. 2013, at **Exhibit C-643**, p. 6.

[636] Video of Protest in Bucharest dated 15 September 2013, at **Exhibit R-266**; S. McGrath, "Romanians protest in Trafalgar Square against cyanide mining in Roșia Montană", *The Independent*, Sept. 2013, at **Exhibit R-267**; Video of Protest in Cluj-Napoca dated 15 September 2013, at **Exhibit R-268**; "Interview of Victor Ponta", *B1 TV*, Sept. 2013, at **Exhibit C-1483**, p. 1.

349 That same day, Mr. Ponta met with miners in Roşia Montană, and he assured them that their voices would be heard. As the Claimants note, in an interview that same day, Mr. Ponta stressed that the members of Parliament should make an informed, independent decision about the bill and not based on the views of their political party.[637]

350 The Claimants' suggestion that the local communities all supported the Project, is false.[638] For instance, tens of thousands protested in Cluj on 22 September 2013 (pictured on the next page).

[637] "Interview of Victor Ponta", *B1 TV*, Sept. 2013, at **Exhibit C-1483**, p. 2; see also Memorial, p. 215 *et seq.* (paras. 497-498).
[638] Memorial, p. 215 (para. 495).

351 People also protested in Câmpeni, just 16 kilometers from Roşia Montană, on 25 September and 6 October (pictured below).[639]

[639] Video of Protest in Câmpeni (excerpt) dated 25 September 2013, at **Exhibit R-269**.

352 The protesters came not from a marginal fringe, but rather from all walks and ages of society, including parents with their children, university students, and elders. The protesters were not hooligans; they were ordinary Romanians. The protests were peaceful, sometimes taking the form of silent sit-ins.[640] They took place both day and night, rain or shine, in towns and cities across Romania, including Bucharest, Cluj, Braşov, Iaşi, Sibiu, Timişoara, and Baia Mare.[641] Protesters brandished the slogan "*Uniti salvam Roκia MontanŁ*" ("United we save Roşia Montană").

353 Opposition to the Project crossed the Romanian borders. On 2 September, Hungary called on Romania to stop the Project.[642] Protests took place in 75 cities worldwide including Paris, Washington D.C., Berlin, Budapest, Toronto, London, Singapore, New York, and Shanghai.[643] World personalities, including Prince Charles, actor Woody Harrelson, and businessman George Soros, reportedly spoke against the Project.[644]

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[640] See Video of Protest in Bucharest dated 3 September 2013, at **Exhibit R-260**.

[641] See Annex III; see also *e.g.* L.C., "Golden profits v environmental concerns", *The Economist*, Sept. 2013, at **Exhibit R-270**; G. Wong, "Protests continue in Bucharest against gold mine plan in Roşia Montană", *The Guardian*, Sept. 2013, at **Exhibit R-271**; C. Ciobanu, "Romanians mobilise in protest against gold mine plans", *The Guardian*, Sept. 2013, at **Exhibit R-85**; S. McGrath, "Romanians protest in Trafalgar Square against cyanide mining in Roşia Montană", *The Independent*, Sept. 2013, at **Exhibit R-267**; S. McGrath, "Roşia Montană and Dirty Politics", *Huffington Post*, Oct. 2013, at **Exhibit R-105**; D. Mihailescu, "No to cyanide: the biggest open-pit gold mine project in Europe faces opposition", *Le Monde*, Sept. 2013, at **Exhibit R-265**; L. Dale-Harris, "Mine Project Launches Protest Movement", *Spiegel Online*, Sept. 2013, at **Exhibit R-272**; M. Matyiku, "Romanian Canadians Protest Against Roşia Montană Mining Project", *Epoch Times*, Oct. 2013, at **Exhibit R-273**; C. Buzasu, "Massive protests seek to halt Romanian gold mining project", *GlobalPost*, Sept. 2013, at **Exhibit R-274**.

[642] K. Verseck, "Protests erupt in Romania over gold mine", *DW*, Sept. 2013, at **Exhibit R-275**.

[643] See *supra* n. 641.

[644] S. Beyerle and T. Olteanu, "How Romanian People Power Took on Mining and Corruption", *Foreign Policy*, Nov. 2016, at **Exhibit R-93**, p. 7.

354 Although Gabriel Canada sought to minimize these events,[645] it intensified its media coverage.[646] On 15 October 2013, the National Council for Audiovisual (the "**CNA**"), which ensures that Romania's media operate in an environment of free speech and balance of information, sanctioned RMGC for producing misleading advertisements:

> "the form of … the commercials …as well as the content and message they convey are inaccurate and they are not such as to provide the audience with sufficient and clear information about the 'product or service' offered to the audience."[647]

355 The CNA concluded that RMGC was "promot[ing] a petition that induces the idea of a social campaign," but was promoting a "commercial campaign, a campaign that by omission can influence the audience in formulating a proper and correct opinion."[648]

356 The Romanian Autumn has been described as the most significant social movement in Romania since the fall of Communism.[649]

5.12 The Parliament Thoroughly Reviews and Rejects the Roşia Montană Law

357 After its submission by the Government, the Parliament thoroughly reviewed the draft Roşia Montană Law.

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[645] See *e.g.* Gabriel Canada press release dated 18 September 2013, at **Exhibit R-276** (omitting to mention street protests).

[646] Joint Special Committee report dated November 2013, at **Exhibit C-557**, p. 56; see also S. McGrath, "Roşia Montană and Dirty Politics", *Huffington Post*, Oct. 2013, at **Exhibit R-105**, p. 3; L.C., "Golden profits v environmental concerns", *The Economist*, Sept. 2013, at **Exhibit R-270**.

[647] CNA decision dated 15 October 2013, at **Exhibit R-277**, p. 4; S. McGrath, "Roşia Montană and Dirty Politics", *Huffington Post*, Oct. 2013, at **Exhibit R-105**, p. 5 *et seq.*

[648] CNA decision dated 15 October 2013, at **Exhibit R-277**, p. 5.

[649] See *e.g.* S. Beyerle and T. Olteanu, "How Romanian People Power Took on Mining and Corruption", *Foreign Policy*, Nov. 2016, at **Exhibit R-93**.

358 On 17 September 2013, in accordance with Article 64 of the Constitution, it created a joint committee of the Chamber of Deputies and of the Senate (the "**Joint Special Committee**") to review the bill and to draft a report for the debate in the plenary sessions of each chamber.[650] The Joint Special Committee comprised nineteen members designated by the parliamentary groups.

359 The Claimants describe the sessions of the Joint Special Committee as "political theater" and accuse it of "disregard[ing] the testimony endorsing the Project" from Government Ministers, RMGC, and its experts and of ultimately reaching conclusions "motivated by politics, not grounded in fact."[651] This is a wholly misleading account. The Committee held extensive public debates (eleven meetings as well as a site visit) and heard from dozens of stakeholders as well as reviewed extensive documentation.[652] Although the Claimants complain that they were given little air time, they acknowledge that numerous government ministers, including the Ministers of Environment and Culture, testified at length in favor of the bill.[653] They also acknowledge that RMGC had the opportunity to answer questions in writing, in addition to the oral debates.[654] The Claimants' criticisms of the Committee for inviting "Project opponents and street protesters to appear with no particular knowledge or experience in the relevant subject matter"

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[650] Parliament decision establishing the Joint Special Committee dated 17 September 2013, at **Exhibit C-909**, p. 1 (Art. 1); see also Memorial, p. 217 (para. 500).

[651] Memorial, p. 217 (para. 500) and p. 227 (para. 512); see also *id.* at p. 306 (para. 682(n)) (referring to "testimony from all relevant Ministers and other senior Government officials unequivocally endorsing the merits of the Project…").

[652] See *e.g.* Joint Special Committee hearing transcript dated 23 September 2013, at **Exhibit C-929**; Joint Special Committee hearing transcript dated 24 September 2013, at **Exhibit C-506**; Joint Special Committee hearing transcript dated 30 September 2013, at **Exhibit C-507**; Joint Special Committee hearing transcript dated 1 October 2013, at **Exhibit C-1694**; Joint Special Committee hearing transcript dated 2 October 2013, at **Exhibit C-1620**; Joint Special Committee hearing transcript dated 3 October 2013, at **Exhibit C-558**; Joint Special Committee hearing transcript dated 8 October 2013, at **Exhibit C-1260**; Joint Special Committee hearing transcript dated 11 October 2013, at **Exhibit C-904**; Joint Special Committee hearing transcript dated 15 October 2013, at **Exhibit C-1531**.

[653] Memorial, p. 219 *et seq.* (paras. 503-504); see also *id.* at p. 225 *et seq.* (paras. 509 and 517).

[654] *Id.* at p. 223 *et seq.* (para. 505).

reflects their disdain for the views of civil society and flies in the face of basic principles of a healthy democracy. [655] It is also wholly misguided as it was the Claimants', and not the Government's responsibility to secure the required social license. The fact that the Government sought to support the Project by agreeing to submit the Roşia Montană Law to Parliament does not make the Government responsible for obtaining the social license; this remained, and still remains, the Claimants' own task. Indeed, the large-scale social opposition to the Roşia Montană Law is evidence of the Claimants' own failure, over the years, to engage informatively and constructively with the social society, in order to secure the social license it was fully aware it was its responsibility to obtain.

360 On 12 November 2013, the Joint Special Committee issued its report, which recommended the reassessment of certain technical aspects of the Project, and it voted to recommend rejection of the bill (with 17 votes against the bill and 2 abstentions).[656] The Claimants' argument that the Committee thereby exceeded its legal authority is misplaced given that the Committee has discretion to assemble all information that it deems relevant to the Parliament's analysis and decision-making.[657] To provide views regarding the bill, it evidently needed to consider the Project more broadly.

361 In accordance with Senate Regulations, the bill was submitted to and almost unanimously rejected by the Senate on 19 November 2013, with 119 votes against and three in favor of the law, and six abstentions.[658]

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[655] *Id.* at p. 224 (para. 506).

[656] Joint Special Committee report dated November 2013, at **Exhibit C-557**; Joint Special Committee Vote dated 11 November 2013, at **Exhibit C-664**, p. 1; Memorial, p. 226 *et seq.* (paras. 510-511).

[657] Constitutional court decision dated 15 November 2017, at **Exhibit R-278**, p. 2 (para. 32); see also Memorial, p. 232 (para. 523).

[658] Senate voting role on Draft Law dated 19 November 2013, at **Exhibit C-878**; Memorial, p. 230 *et seq.* (para. 518).

362 In accordance with Article 75(3) of the Constitution, the bill was then submitted to the Chamber of Deputies on 27 November 2013.[659] On 16 December 2013, the Joint Special Committee formally adopted its report, which was submitted to the Chamber of Deputies on 10 February 2014. The Chamber of Deputies debated the bill on 23 April 2014 and, on 3 June 2014, almost unanimously rejected the bill, with 302 votes against, one in favor, and one abstention.[660]

5.13 The Rejection of the Roşia Montană Law Was a Consequence of RMGC's Failure to Secure the Social License for the Project

363 The Parliament's rejection of the Roşia Montană Law was an acknowledgement of what had already become manifest during the demonstrations – that the Project lacked the necessary social legitimacy. As noted above, this does not make the State responsible for the lack of social legitimacy – obtaining the social license was always, and remains, the Claimants' responsibility.[661]

364 [redacted][662] [redacted][663] [redacted]

[659] Letter from Senate to Chamber of Deputies dated 19 November 2013, at **Exhibit C-580**.

[660] Memorial, p. 230 (para. 518).

[661] See also **Thomson**, p. 24 *et seq.* (section 5.4).

[662] [redacted]; [redacted] 1; "Romanian print media advertising reaches EUR 97 mln: Most advertised brands: Orange, Vodafone, Roşia Montană", *actmedia*, Sept. 2011, at **Exhibit R-280**; RMGC Tax payer point of view and annex dated 28 June 2016, at **Exhibit C-41**, p. 36 *et seq.* (describing amounts that RMGC paid Leo Burnett from 2009 to 2010); TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 4 (Mr. Aston recognizing bad communication in early years).

[663] [redacted].

[redacted][664] Although RMGC spent large sums on advertising its Project, it failed to engage in meaningful dialogue with stakeholders and was often dismissive of criticism.[665]

365 The Claimants argue that the local community massively supported the Project. They produce a letter from local to central authorities calling for their endorsement of the Project[666] and refer to a local referendum in Alba County in December 2012 and assert that the results were "overwhelmingly in favor of restarting mining operations and implementing the Project."[667] Participants were, however, not asked to vote for or against the Project, but rather whether they "agree[d] with recommencing the mining in the Apuseni Mountains and the exploitation in Roşia Montană?"[668] It is hardly disputed that the inhabitants of the region of Roşia Montană traditionally support mining in the region. Whether they support the Project is a separate question. Nor were the results "overwhelmingly in favor" of mining since 35.90% of participants voted "no," reflecting a heavily divided community. Due to low turn-out, the referendum results were invalidated.[669]

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664 [redacted].

665 **Thomson**, p. 27 *et seq.* (paras. 91[redacted]; PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**, p. 5 (quoting Mr. Tănase as saying, when asked "why the Project had so many opponents", that "those people who opposed the project took the easy information out" and that "they should better inform themselves.").

666 See *e.g.* Mayors of Apuseni Mountains Communities press release dated 8 September 2013, at **Exhibit C-1293**.

667 Memorial, p. 165 *et seq.* (para. 400).

668 Alba Local County decision dated 16 November 2012, at **Exhibit C-796**, p. 1 (Art. 2); see also "REFERENDUM - 80% of Roşia Montană locals voted in favor of re-launching mining industry through RMGC's Project during the referendum organized on 9 December 2012", *Luju.ro*, Dec. 2012, at **Exhibit C-890** (which is equally misleading).

669 Alba County Electoral Bureau meeting minutes dated 10 December 2012, at **Exhibit R-281**; Alba County Electoral Bureau decision dated 11 December 2012, at **Exhibit R-282**; see also **Thomson**, p. 29 *et seq.* (paras. 100-105).

366 In sum, RMGC faced significant opposition and failed to obtain the social license for this Project, as demonstrated by the following key events:

- The dozens of administrative and court proceedings since 2004, which NGOs commenced to challenge RMGC's administrative deeds, including urban plans, urban certificates and ADCs;[670]
- The opposition to the Project voiced during the public consultation;[671]
- Hungary's opposition to the Project;[672]
- RMGC's failure to persuade some affected residents to sell their homes and to relocate;[673] and,
- The protests, gatherings, and petitions against the Project, in particular the massive protests in late 2013.[674]

367 In the circumstances, the Parliament's nearly unanimous rejection of the Roşia Montană Law in the fall of 2013 and June 2014 was anything but surprising – it merely recorded RMGC's own failure to obtain the required social license for the Project – or assuming it had it at some point, it had since lost it.[675] The Government did what it could to support the Claimants, but in a democratic State, it is simply not possible for the State to impose laws that are not socially legitimate.

5.14 Following the Rejection of the Roşia Montană Law, RMGC Failed to Propose a Way Forward for the Project

368 The Claimants argue that "the Project still could have been implemented regardless of whether the Draft Law was adopted..."[676] As explained above, RMGC needed the Roşia Montană Law to circumvent the hurdles it faced on the Project, including, in particular, the impossibility to force

[670] See *supra* sections 3.4 and 4.5; Annex IV.

[671] See *supra* paras. 127, 130, and 180.

[672] See *supra* paras. 176 and 353.

[673] See *supra* paras. 89, 169, and 268.

[674] See *supra* paras. 342-356.

[675] **Thomson**, p. 13 *et seq.* (paras. 35 and 38) and p. 31 *et seq.* (paras. 106 and 109-110).

[676] Memorial, p. 229 (para. 515).

recalcitrant residents to sell their properties and to relocate, as well as to minimize further NGO challenges.

369 In the absence of the Roşia Montană Law, RMGC could and still can implement its Project pursuant to the existing legal framework. However, apart from failing to secure the social license, it has failed to date to obtain the necessary permits and administrative deeds and this through no fault of the Government.

370 After the rejection of the bill, it was incumbent upon RMGC to resume and complete the regular permitting process and to find ways to secure the social license – whether by resuming its engagement with the civil society soon or immediately after the rejection of the law or after letting the dust settle. The State's only role was to conduct the permitting process in accordance with the law.

371 The Claimants contend that "[t]he Government's refusal to permit the Project … following Parliament's rejection of the Draft Law was a manifest excess of authority…"[677] However, the Ministry of Environment (and the Government) could not have issued the environmental permit, because the legal requirements were not met.

372 The Claimants argue that "[f]ollowing [the] parliamentary votes, the Government refused to take any further action to permit the Project."[678] At the same time, they criticize the Ministry of Environment for "re-opening the EIA procedure in 2014 at the recommendation of Parliament."[679]

373 Following the Parliament's rejection of the Roşia Montană Law, the Government did not "refuse" to take action and demonstrated its good faith by

[677] *Id.* at p. 229 (para. 515).
[678] *Id.* at p. 231 (para. 520).
[679] *Id.* at p. 233 (para. 525).

convening the TAC twice: in July 2014 and April 2015.[680] The latter meeting took place even after Gabriel Canada had sent its notices of dispute on 20 January 2015.[681]

374 As these meetings confirmed, the EIA Review Process was and remains open. Insofar as RMGC wished in 2014 to develop the Project notwithstanding the Parliamentary results, it should have proposed a plan to State authorities to revise the Project and to obtain the necessary social support. It was not the Government's role or duty to propose a plan to RMGC.

375 The Claimants complain that, at the April and July 2014 meetings, the TAC discussed a possible further study of the TMF, given concerns and recommendations by the Joint Special Committee.[682] However, it was entirely within the TAC's discretion to consider the possible commissioning of an additional study.[683] This technical question did not affect the question – which had now become much more important – of how RMGC would propose to take the Project forward in light of the public opposition to the Project.

376 RMGC proposed no additional or alternative plans. Instead, already in May 2014 and thus even before the vote of the Chamber of Deputies, Ga-

[680] See TAC meeting transcript dated 24 July 2014, at **Exhibit C-479**; TAC meeting transcript dated 27 April 2015, at **Exhibit C-474**; Letter from Ministry of Environment to RMGC dated 17 July 2014, at **Exhibit C-667**; Letter from Ministry of Environment to RMGC dated 22 April 2015, at **Exhibit C-1761**.

[681] Formal notice requesting consultation dated 20 January 2015, at **Exhibit C-8**; see also Notice requesting consultation dated 22 April 2015, at **Exhibit C-9**.

[682] Memorial, p. 234 *et seq.* (paras. 528-530).

[683] The TAC members communicated in mid-2014 their tentative conditions for a possible study. See **Mocanu**, p. 11 (para. 52); Letter from Geological Institute to Ministry of Environment dated 24 July 2014, at **Exhibit R-283**; Letter from Ministry of Health to Ministry of Environment dated 25 July 2014, at **Exhibit R-284**; Letter from ANAR to Ministry of Environment dated 28 July 2014, at **Exhibit R-285**; Letter from Ministry of Culture to Ministry of Environment dated 29 July 2014, at **Exhibit R-286**; Letter from National EPA to Ministry of Environment dated 12 August 2014, at **Exhibit R-287**.

briel Canada disclosed its successful efforts to raise financing for arbitration proceedings.[684] In other words, instead of acknowledging its own failure in obtaining the social license, it sought to shift the blame to the Government.

377 The Claimants' criticism of the Ministry of Environment for not issuing the environmental permit after the 27 April 2015 TAC meeting is particularly misplaced given their own effective abandonment of the Project, as reflected by its notices of dispute, reiterated just days before.[685]

378 Professor Mihai argues that, by not convening the TAC between July 2013 and April 2014 and then after 27 April 2015, the Ministry of Environment breached Romanian law.[686] These arguments do not pass muster. The TAC did not deem it necessary to convene between July 2013 – just before the submission of the Roşia Montană Law to Parliament – and April 2014 – when the law was still subject to review by the Chamber of Deputies.

379 Although the TAC met in April 2014, the TAC President emphasized the informal nature of the meeting.[687] There was *a fortiori* no reason for the TAC to meet after 27 April 2015, in light of the notices of dispute, and then the Request for Arbitration on 30 July 2015.

380 In the circumstances, the Claimants' reproach of the Government for "not issu[ing] any legal decision … [or] offer of compensation" is wholly misplaced.[688]

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[684] Gabriel Canada press release dated 26 May 2014, at **Exhibit R-288**.

[685] Memorial, p. 236 (para. 532).

[686] **Mihai**, p. 66 *et seq.* (paras. 259-260).

[687] TAC meeting transcript dated 2 April 2014, at **Exhibit C-473**, p. 1.

[688] Memorial, p. 307 (para. 683).

6 RMGC HAS TO DATE FAILED TO MEET THE LEGAL REQUIREMENTS TO DEVELOP THE PROJECT AND TO SECURE THE SOCIAL LICENSE

381 The Project is currently at a standstill, because RMGC has to date failed to obtain the necessary permits and the social license for the Project (**Section 6.1**), not because of any action on the part of Romania. The Ministry of Environment has conducted the EIA Review Process in accordance with the law (**Section 6.2**), and State authorities have not blocked the Project (**Section 6.3**).

6.1 RMGC has Failed to Obtain all Necessary Permits and the Social License for the Project

382 RMGC has failed to meet key requirements for the Project.

383 [redacted][689] The Claimants argue that these judicial challenges were not relevant because, by law, the authorities were required to amend the PUZ, which in any event was not necessary to complete the EIA Procedure.[690] However, as explained above, it was RMGC's responsibility to secure the permits for and the approval of the necessary urban plans, including the PUZ, prior to issuance of the environmental permit.[691]

384 Second, RMGC does not have a valid urban certificate for the Project. On 10 July 2013, NGOs applied to the Cluj Tribunal to annul UC 47/2013. On re-trial, by decision dated 7 October 2016, the Bistriţa-Năsăud Tribunal

[689] [redacted].

[690] Memorial, p. 70 *et seq.* (paras. 185-187, n. 295).

[691] See *supra* paras. 60 and 66.

granted the application for annulment.[692] [redacted][693]

385 [redacted].[694] [redacted][695] The case on the merits of the validity of ADC 9/2011 is currently pending before the first instance court.[696] Significantly, the Ministry of Culture's endorsement of April 2013 was based in part on the ADCs, including ADC 9/2011.[697]

386 Fourth, RMGC has not secured the social license for the Project, in the absence of which, the Project could not proceed, even if RMGC obtained all requisite legal permits.

387 Finally, as the Claimants admit, RMGC has not obtained the requisite surface rights.[698] The Claimants assert that RMGC "was well placed to acquire the remainder [of property within the Project area] upon the successful conclusion of the EIA review process and issuance of the environmental permit."[699] RMGC is, however, hardly "well placed" given that a number of private homeowners refuse to sell their property to RMGC, which would thus have no choice but to seek to have the Project declared of public utility

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[692] Excerpt from website of Bistrița-Năsăud Tribunal re Case 9498/117/2013, at **Exhibit R-255**.

[693] UC 98/2016, at **Exhibit R-290**; [redacted].

[694] [redacted].

[695] [redacted].

[696] **Schiau**, p. 26 (para. 93).

[697] See also TAC meeting transcript dated 2 April 2014, at **Exhibit C-473**, p. 16 (Hegeduș) (referring to the litigation on the annulment of ADC 9/2011).

[698] Memorial, p. 299 (para. 678(g)); Gabriel Canada 2009 Annual Information Form, dated 10 March 2010, at **Exhibit C-1807**, p. 37 (p. 34 of the hardcopy) (highlighting need to "acquire all necessary surface rights over the footprint of the new mine … to obtain financing for construction of the new mine…").

[699] Memorial, p. 299 (para. 678(g)).

in view of expropriation procedures.[700] It would, however, have no guarantee of succeeding.[701]

6.2 The EIA Review Process Has Been Conducted in Accordance with Romanian Law

388 The Claimants allege, relying on the Mihai Legal Opinion, that the EIA Review Process was contrary to Romanian law in various respects. These allegations are, however, without merit.

389 First, the Claimants' allegation that, under Romanian law, the Ministry of Environment is not permitted to convene more than one TAC meeting to analyze the EIA Report is misplaced.[702] Given the significance of the Project and the volume of documentation, it was understood by all the concerned that it would have been impossible to review and discuss the EIA Report in just one session. It was patently reasonable for the TAC to meet over the course of several sessions to discuss the EIA Report, as agreed with RMGC at the very outset in 2007.[703] RMGC repeatedly agreed without objection to meetings with the TAC to review the EIA Report.[704] Fur-

[700] Mining Law No. 85/2003, published in the Official Gazette of Romania, Part I, No. 197 (resubmitted) dated 27 March 2003, at **Exhibit C-11 (resubmitted)**, p. 6 (Art. 6); see S. Beyerle and T. Olteanu, "How Romanian People Power Took on Mining and Corruption", *Foreign Policy*, Nov. 2016, at **Exhibit R-93**, p. 5 (referring to the "[e]normous pressure put on those who were unwilling to leave..."); see also R. Bucata, "Local person from Roşia Montană: Gold Corporation blocked 10 years of my life", *Think Outside the Box*, Sept. 2011, at **Exhibit R-106**.

[701] See *e.g.* Explanatory Note dated 25 July 2013, at **Exhibit C-837**, p. 5 ("the Project requires large areas of land, with different legal regimes, and the pursuit of the general expropriation procedure can lead to a *de facto* blockage due to major delays that may occur in practice.").

[702] **Mihai**, p. 35 (para. 128).

[703] TAC meeting transcript dated 26 June 2007, at **Exhibit C-482**, p. 3 (TAC President Stoica) ("There are approximately 18,000 pages to be studied and analyzed and … this cannot be completed in one meeting … There will be organized TAC meetings addressing clear topics"); see also *id.* at p. 11 (the TAC and RMGC will be notified in advance of each meeting); TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 42 (Stoica) ("these issues must be analyzed thoroughly and not hastily...").

[704] See *e.g.* TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 2 (referring to next meeting without objection from RMGC); TAC meeting transcript dated 19 July 2007, at

thermore, the other national EIA Procedure that the Ministry of Environment has coordinated to date, relating to the Cernavodă Nuclear Plant in southeast Romania, involved several TAC meetings between December 2006 and April 2013.[705]

390 Second, contrary to the Claimants' allegations, as explained in **Section 3.5**, the interruption of the EIA Review Process between September 2007 and June 2010 was in accordance with Romanian law.

391 Third, Professor Mihai's opinion that the Ministry of Environment improperly allowed TAC members to address issues, such as cyanide transportation and urban plans, even though they were allegedly not relevant to the environmental permit, is incorrect.[706] The TAC members had discretion to raise the issues they deemed relevant to their assessment of the EIA Report.

392 Fourth**,** Professor Mihai opines that the Ministry of Environment improperly allowed continued discussions regarding the same issues.[707] However, the TAC was entitled to raise questions it had raised earlier if it was not satisfied with RMGC's answers.[708] Although Professor Mihai suggests that certain TAC representatives may not have been at times "sufficiently informed," the meeting minutes demonstrate the diligence of the TAC members whose meetings with RMGC often lasted for several hours and addressed highly technical issues.[709]

393 Apart from its challenge of the September 2007 decision of the Ministry of Environment, RMGC did not otherwise challenge the lawfulness of the

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Exhibit C-478, p. 29 (*id.*); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 84 (*id.*); see also TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 88 (*id.*); TAC meeting transcript dated 10 May 2013, at **Exhibit C-484**, p. 2 (Juganaru) (*id.*).

[705] Ministry of Environment, "Cernavodă Power Plant", *www.mmediu.ro*, Oct. 2013 (excerpt), at **Exhibit R-292**; **Mocanu**, p. 8 (para. 37).

[706] **Mihai**, p. 68 (para. 265 (a)).

[707] *Id.* at p. 68 (para. 265(b)).

[708] See **Dragos**, p. 10 (para. 32) (regarding precautionary principle).

[709] See *e.g.* TAC meeting transcript dated 10 July 2007, at **Exhibit C-477**, p. 42 (Stoica) (referring to five hours of meeting); **Mihai**, p. 69 (para. 266).

EIA Review Process, whether it be by administrative complaint or by court challenge.[710]

6.3 Romania Has Not Blocked the Project

394 The Claimants raise various arguments that, since the rejection of the Roşia Montană Law, Romania has blocked the Project. However, as explained above, following the rejection of the Roşia Montană Law, it was the task of RMGC, not that of the Government, to take the Project forward. Moreover, as explained above, the Ministry of Environment's convening of the TAC in 2014 and 2015 demonstrates its good faith towards RMGC. The Claimants' various arguments are addressed below.

6.3.1 Minvest Has Acted in Accordance with its Shareholder Obligations

395 The Claimants argue that, immediately after the Joint Special Committee's vote on the Roşia Montană bill, "the Ministry of Economy refused to allow Minvest to participate as shareholder in the recapitalization of RMGC that was needed in order to prevent the risk of RMGC's dissolution."[711] In fact, and for the reasons explained below, any hypothetical dissolution of RMGC – which has not been proposed and is not supported by any shareholder – is entirely within the Claimants' control, and they did not (and do not) require Minvest's participation or cooperation.

396 [redacted][712]

[710] **Dragos**, p. 66 *et seq.* (paras. 366-372) (noting that RMGC could have filed suit).

[711] Memorial, p. 237 (para. 537); see also *id.* at p. 307 (para. 684(a)).

[712] [redacted]

397 The proposal was prompted by the provisions of Article 153[24] of Law No. 31/1990, which provide in relevant part that, if the net assets of a company are reduced to less than half of the subscribed share capital, it must immediately convene an extraordinary general meeting in order to decide if the company should be dissolved.[713] Unless the shareholders resolve at the extraordinary general meeting to dissolve the company, by the end of the subsequent financial year, the company must either (i) increase its net assets to at least half the value of its share capital, or (ii) decrease its share capital by an amount at least equal to the losses that could not be recovered from reserves.[714]

398 Pursuant to Article 7.7 of RMGC's Articles of Association, "[i]n no case, the share capital quota currently held by [Minvest] be decreased as a result of a subsequent capital increase where [Minvest] does not subscribe."[715] Furthermore, pursuant to Article 15.2 of the Articles of Incorporation, if a decrease of the share capital is ascertained, no shareholder can request or support, directly or indirectly, the dissolution of the company.[716] [redacted][717]

399 [redacted],

[redacted].

[713] Excerpts of Company Law No. 31/1990, as amended dated 16 November 1990, at **Exhibit C-84**, p. 1 (Art. 153[24](1)).

[714] *Id.* at p. 1 (Art. 153[24](4)).

[715] RMGC Articles of Incorporation dated 1 November 2013, at **Exhibit C-188**, p. 12 (Art. 7.7)).

[716] *Id.* at p. 26 (Art. 15.2).

[717] [redacted].

[redacted][718] However, Article 7.4 only provides that "[n]ewly issued shares … must be subscribed entirely, free from any encumbrances …", and does not specify at whose expense the shares must be subscribed.[719]

400 The Claimants eventually acceded to Minvest's request, although they now argue that they were forced to agree because of the risk of RMGC's dissolution.[720] However, there was no risk of dissolution, nor were the Claimants forced to accede to Minvest's proposal.

[718] [redacted].

[719] RMGC Articles of Incorporation dated 1 November 2013, at **Exhibit C-188**, p. 12 (Art. 7.4). In a footnote of their Memorial, the Claimants argue that "Article 7.7 did not provide Minvest any right to obtain RMGC shares without paying for them", relying this time on Articles 9.2 and 9.4 of RMGC's Articles of Association. Memorial, p. 239 (n. 1119). Article 9.2 states: "Shares have equal value and give Shareholders equal voting rights and the right to participate in the distribution of benefits, proportionally with each shareholder's contribution to the share capital subscribed and fully paid, unless provided otherwise in these Articles of Incorporation, as well as any other rights provided in the present Articles of Incorporation or in the Company Law." RMGC Articles of Incorporation, at **Exhibit C-188**, p. 13. Article 9.4 states: "Shareholders must exercise their rights in good faith, in full observance of rights and legitimate interests of the Company and the other Shareholders. Holding shares involves the *ipso jure* adhesion to the Articles of Incorporation of the Company." *Id.* The Claimants' reliance on these Articles is misplaced, since Article 9.2 recognizes that the rule that Shareholders must pay for the shares that they subscribe is subject to contrary provisions in the Articles of Association, "as well as any other rights provided in the present Articles of Incorporation or in the Company Law." Article 7.7 clearly describes one such right. Moreover, as discussed below, Minvest's exercise of its rights under Article 7.7 in the circumstances at issue was not contrary to good faith or the full observance of any other rights or legitimate interests of the Company and its other Shareholder.

[720] Memorial, p. 240 (para. 544) ([redacted]).

401 First, in accordance with Article 15.2 of the Articles of Incorporation, Minvest could not request or support the dissolution of RMGC.[721] Even in the absence of its obligations under Article 15.2, Minvest could not obtain the dissolution of RMGC without Gabriel Jersey's consent, since Article 11.4.4 of the Articles of Incorporation requires a two thirds majority of the share capital for the dissolution of the company.[722]

402 Second, pursuant to Article 153^{24}(4) of Law 31/1990, the consequence of a failure to increase net assets to at least half of the value of the share capital is not the dissolution of the company. Instead, the company must "proceed with the reduction of the share capital by an amount at least equal to the losses that could not be covered from reserves."[723] Therefore, unless RMGC's net assets amount to less than RON 45,000 (*i.e.* 50% of the minimum share capital for a joint stock company),[724] the Claimants can unilaterally bring RMGC into compliance with the requirements of Article 153^{24} by reducing the company's share capital.[725]

[721] [redacted]

[722] RMGC Articles of Incorporation dated 1 November 2013, at **Exhibit C-188**, p. 20 (Art. 11.4.4).

[723] Excerpts of Company Law No. 31/1990, as amended dated 16 November 1990, at **Exhibit C-84**, p. 1 (Art. 153^{24}(4)).

[724] Article 10 of Company Law No. 31/1990, at **Exhibit R-293**, p. 1 ("The registered capital of the joint-stock company and of the limited partnership by shares cannot be lower than LEI 90,000.").

[725] [redacted]

403 In summary, Minvest was acting within its rights when it suggested that the Claimants subscribe, on behalf of Minvest, the necessary share amount in order to replenish RMGC's share capital, while maintaining the ownership interest mandated by the Articles of Incorporation. The Claimants were free to agree or disagree with this suggestion, as they had other means at their disposal to bring RMGC in compliance with the requirements of Article 153[24] of Company Law No. 31/1990.

404 Nor was there any risk that RMGC would be dissolved without the Claimants' consent. However, it was and is for Gabriel Jersey, as majority shareholder, to arrange for the necessary financing to develop the Project, and to minimize losses or pursue alternative means of generating income while RMGC attempts to meet the regulatory requirements for obtaining the environmental permit.[726]

6.3.2 The Anti-Fraud Investigation and the VAT Assessment Conducted by ANAF Are Neither Retaliatory nor Abusive

405 The Claimants' allegations relating to the anti-fraud investigation and the VAT assessment were raised for the first time in the context of its requests for provisional measures, and were rejected by the Tribunal. In their Memorial, the Claimants repeat essentially the same allegations.

This is because, pursuant to Article 11.4.4 of RMGC's Articles of Incorporation, a General Extraordinary Meeting is "validly convened in the presence of Shareholders who hold at least 51% of the share capital," and the "decision … to decrease or increase the share capital … is always made with a majority of two thirds of the share capital." RMGC Articles of Incorporation dated 1 November 2013, at **Exhibit C-188**, p. 20 (Art. 11.4.4).

726 [redacted]

406 Although the Tribunal has already rejected the Claimants' unfounded conspiracy theory, the Claimants attempt once more to draw a connection between the rejection of the Roşia Montană Law and the extension to RMGC of the criminal investigation into the Kadok Group.[727] The Claimants' argument is little more than speculation, alleging that "making RMGC a subject of this criminal investigation was highly suspicious both temporally and substantively,"[728] that the "fact and timing of the State's decision to make RMGC the subject of a criminal investigation (despite the lack of any apparent basis to have done so) was clearly not happenstance,"[729] and

> "[t]he State prosecutor made RMGC the subject of the money laundering/tax evasion investigation one week later and on the same day that the Senate voted in accordance with the Special Commission's recommendation to reject the Draft Law. Doing so conveniently provided the State with a basis to note in the Trade Registry that RMGC is 'under criminal investigation,' and thus tarnish its reputation, and also provided the State with the ability to extract documents and information from RMGC if and when useful to the State's interests."[730]

407 The truth is much more mundane, and it can be readily ascertained by examining an exhibit provided by the Claimants. [redacted][731]

a) [redacted].

b) [redacted]

[727] Memorial, p. 245 *et seq.* (Section IX.C.1).

[728] *Id.* at p. 245 (para. 559).

[729] *Id.* at p. 246 (para. 561).

[730] *Id.* at p. 247 (para. 562).

[731] [redacted].

[redacted].

c) [redacted].

d) [redacted].

408 There is no indication anywhere that this criminal investigation bears any relationship whatsoever with the consideration of the Roşia Montană Law, or that the decision of the Ploieşti prosecutor's office to extend the investigation to RMGC was in any way motivated by an attempt "to extract documents and information from RMGC if and when useful to the State's interests."[732] In summary, the Claimants' misguided and unsupported suspicions of a connection between the timing of the investigation and the consideration of the Roşia Montană Law are conclusively dispelled by the Claimants' own evidence.

409 [redacted][733] This allegation is premised on nothing more than [redacted] speculative interpretation of a news article. [redacted]

[732] Memorial, p. 247 (para. 562).

[733] [redacted].

[redacted][734] However, neither [redacted] nor the Claimants provide any basis to conclude that the RISE Project's publication of this document was contrary to Romanian law.

410 [redacted][735] [redacted] description of the contents of this news article is both speculative and unsupported by its contents. First, while the article contains inaccuracies, there is no evidence that the article is "defamatory;" and indeed RMGC does not appear to have shared this view and taken any legal action. Second, while the article includes the unsupported statement that "[t]his year, according to the Tax Agency, RMGC spent almost 15 million Ron,"[736] [redacted]

411 In summary, [redacted]

412 With respect to the nature and purpose of ANAF's VAT assessment and the DGAF's anti-fraud investigation, the Claimants disregard the Tribunal's

[734] [redacted] (citing "RMGC investigated in a major money laundering criminal case", *Riseproject.ro*, Dec. 2013, at **Exhibit C-1544**).

[735] [redacted] (citing "Where does RMGC money come from?", *Riseproject.ro*, Dec. 2013, at **Exhibit C-1545**).

[736] "Where does RMGC money come from?", *Riseproject.ro*, Dec. 2013, at **Exhibit C-1545**, p. 1.

decision on these issues,[737] and largely re-iterate their discredited and unsupported allegations, contending that (i) the VAT assessment and the anti-fraud investigation are retaliatory; (ii) the scope of ANAF's and the DGAF's requests for documents in the context of their investigations is abusive; and (iii) ANAF and the DGAF improperly sought these documents for the purposes of Romania's defense in this arbitration.[738]

413 However, the Tribunal already considered and rejected these allegations in its decision of 22 November 2016:

> "Claimants' allegation that the actions of ANAF and DGAF are abusive and retaliatory to the commencement of the arbitration is a serious allegation and more cogent and convincing evidence would be required for this to be established. The invitation for a mere inference to be drawn by reason of the timing of the investigations is not, in the Tribunal's view, adequate. The Tribunal has not been shown evidence as to what documents have been improperly or abusively seized or that the witnesses have been asked questions beyond the ambit of the relevant anti-fraud investigation. The Tribunal appreciates that given the confidentiality of the investigation, Claimants may not be able to identify and particularize the questions that were asked of the witnesses. Yet, in the absence of such evidence, it is not for the Tribunal to conclude there were such abusive actions as alleged.
>
> As to documents that have been collected, the Tribunal is not able to come to any view as to whether or not the scope was beyond what was necessarily required. The Tribunal has evidence that no classified and confidential documents have been collected and this

[737] See Decision on Claimants' Second request for provisional measures dated 22 November 2016, p. 21 *et seq*. (Section IV.D).

[738] Memorial, p. 250 *et seq*. (Section IX.C.3).

> remains unchallenged. There is no allegation that privileged documents such as communications with counsel have been obtained as was in the case of *Libananco*."[739]

414 The Tribunal also was not convinced by the Claimants' allegation that the investigations were collecting documents for the purposes of Romania's defence in this arbitration, that the timing of the investigations demonstrated that they were retaliatory, or that the scope of the requests for documents was abusive.[740] [redacted][741] [redacted][742]

[739] Decision on Claimants' Second request for provisional measures dated 22 November 2016, p. 22 *et seq*. (paras. 99-100). [redacted].

[740] Decision on Claimants' Second request for provisional measures dated 22 November 2016, p. 23 *et seq*. (paras. 101-105).

[741] [redacted].

[742] [redacted].

415 The Claimants' allegation that Romania failed to provide legal protection and security by conducting purportedly "retaliatory investigations of RMGC that lack any plausible grounding in fact or law following the commencement of this arbitration"[743] is similarly premised on a false assumption that is not supported by any new evidence. Whether or not ANAF's VAT assessment is grounded in fact and in law is for the Romanian authorities and, if necessary, courts to determine.[744] [redacted][745] as well as the related enforcement proceedings initiated as a result of RMGC's failure to pay by the specified deadline.[746] RMGC's challenges to the enforcement proceedings have been dismissed.[747]

6.3.3 The Application for Roşia Montană to Become a UNESCO World Heritage Site Does Not Impact the Project

416 On 18 February 2016, the then Minister of Culture submitted an application to UNESCO for the "Roşia Montană Mining Cultural Landscape" to be declared a World Heritage Site. On 4 January 2017, the Ministry of Culture submitted the full application to UNESCO.[748] The Claimants argue that the application "makes abundantly clear that the State will not allow the Project to proceed…"[749] They also complain of the list of historical

[743] Memorial, p. 321 *et seq*. (para. 712(g)).

[744] Respondent's Rejoinder to Claimants' Second Request for Provisional Measures, p. 43 *et seq*. (paras. 123-124).

[745] [redacted].

[746] Excerpt from website of Câmpeni Court regarding status of Case No. 1608/203/2017, at **Exhibit R-296**; Excerpt from website of Câmpeni Court regarding status of Case No. 1609/203/2017, at **Exhibit R-297**; Excerpt from website of Câmpeni Court regarding status of Case No. 1744/203/2017, at **Exhibit R-298**.

[747] *Id.*

[748] See Memorial, p. 263 (para. 604) and p. 265 (para. 609).

[749] Memorial, p. 264 (para. 605).

monuments which includes, in its latest version of 2015, the locality of Roşia Montană "within a 2 km radius."[750]

417 The Claimants' allegations are misconceived. The Ministry of Culture has endorsed the Project (in April 2013) and has not retracted that endorsement – irrespective of the list of historical monuments and the UNESCO application.[751] If and when RMGC meets the permitting requirements, secures the requisite ADCs (*i.e.* the courts uphold the validity of the challenged Cârnic ADC), and obtains the social license for the Project, the Ministry of Culture would at that point address any requests to declassify Roşia Montană and take the appropriate steps in accordance with the law. Furthermore, the UNESCO application is in its early stages and its outcome is uncertain. If it progresses successfully, and if it becomes apparent that it may adversely affect RMGC's rights, the Government will take the appropriate measures in accordance with the law.

6.3.4 The Roşia Poieni Mining Operations Are Substantially Different from those Envisaged at Roşia Montană

418 The Claimants seek to contrast the State's approach to Roşia Montană with its attitude *vis-¨-vis* the neighboring copper mining site at Roşia Poieni, which the state-owned company Cuprumin operates. They contend that State authorities have discriminated against RMGC by not granting it the environmental permit, while at the same time permitting the allegedly heavy polluting operations of Roşia Poieni.[752]

419 However, Roşia Poieni and Roşia Montană are not comparable. Not only do the current Roşia Poieni operations and the envisaged Roşia Montană operations involve different minerals and technologies, but they are also not subject to the same legal regime. Cuprumin was set up in 1977 and started its activity soon thereafter, in accordance with the legislation in force at the time. It has operated continuously since then and thus, unlike

[750] See *id.* at p. 255 (para. 583); see generally *id.* at p. 254 *et seq.* (paras. 582-598).

[751] See *supra* para. 309.

[752] Memorial, p. 275 *et seq.* (para. 633 *et seq.*).

the Project, has not undergone an environmental impact assessment pursuant to the EIA Directive and related Romanian legislation, which apply to new investment projects or significant variations of existing projects.[753] Its 2014 environmental permit was thus not issued pursuant to an EIA Review Process.[754]

420 Although the Claimants complain that Roşia Poieni's operations are pollutant, they do not allege that they fail to comply with the applicable law. Furthermore, the Claimants' description of the failure in April 2017 of the Roşia Poieni tailings pond and its consequences is exaggerated. Cuprumin immediately addressed the issue and the authorities concluded that there had not been "chemical substance pollution of the downstream water courses," nor effect on the Mureş river.[755]

[753] See also **CMA Report**, p. 22 *et seq.* (paras. 72-80); Ministry of Environment Order 860/2002, at **Exhibit C-538**.

[754] Environmental Permit dated 16 September 2014, at **Exhibit C-419**.

[755] Ministry of Environment *et al.* Report dated 6 April 2017, at **Exhibit R-299**, p. 1; Memorial, p. 276 (para. 636); see also ANAR Mureş Water Basin Administration Information Note dated 7 April 2017, at **Exhibit C-428**.

7 ROMANIA HAS ACTED IN ACCORDANCE WITH ROMANIAN LAW IN RELATION TO THE BUCIUM LICENSE

421 [redacted][756] [redacted][757] Under Romanian law, exploration licenses "establish[] the exploration perimeter, the works program, including the environmental protection measures to be applied, the phases and timeline of the works, the necessary documentation, the rights and obligations of the titleholder, according to the law."[758]

422 Over the years, the parties to the Bucium Exploration License entered into several addenda.[759] [redacted][760] [redacted].[761]

423 [redacted][762]

[756] [redacted].

[757] [redacted]; NAMR Order 123/1999 dated 12 August 1999, at **Exhibit C-1088**; Memorial, p. 43 *et seq.* (paras. 116[redacted]).

[758] GD 639/1998 with application norms for 1998 Mining Law, at **Exhibit C-1635**, p. 6 (Art. 15); see **Bîrsan**, p. 72 *et seq.* (paras. 310-316); [redacted].

[759] See **Bîrsan**, p. 74 *et seq.* (paras. 320-330).

[760] [redacted]; Memorial, p. 45 (para. 120).

[761] [redacted].

[762] [redacted].

[redacted][763] [redacted]
[redacted]
[redacted]
[redacted]
[redacted][764] [redacted]
[redacted]
[redacted][765]

424 The Bucium Exploration License expired on 19 May 2007.[766] Anticipating the expiry of this license, RMGC had prepared and submitted to NAMR, on 16 May 2007, a work program for the period between the end of the Bucium Exploration License and the delivery of the subsequent licenses.[767] The Claimants explain that no response was received from NAMR so RMGC stopped its activities within the perimeter.[768] The Claimants' narrative is misguided. Under Romanian law, RMGC was protected, and accordingly NAMR did not have to respond, in view of Article 17(2) of the 2003 Mining Law under which the titleholder "is entitled to continue conservation and maintenance mining activities … until the entry into force of the exploitation license."[769]

425 [redacted][770] [redacted]
[redacted]
[redacted]

[763] [redacted].
[764] [redacted]; [redacted]
[redacted].
[765] [redacted].
[766] See **Szentesy**, p. 52 (para. 116).
[767] Letter from RMGC to NAMR dated 16 May 2007, at **Exhibit R-300**.
[768] **Bîrsan**, p. 85 (para. 384).
[769] See also *id.* at p. 85 (para. 383); [redacted]
[redacted]
[redacted]
[redacted].
[770] [redacted].

[771] T[redacted]

[772] [redacted].

426 [redacted][773] These feasibility studies, along with other technical documentation required under Article 20 of the 2003 Mining Law, were submitted to NAMR on 11 October 2007, thus forming RMGC's application for exploitation licenses for the two areas (the "**Bucium Applications**").[774]

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[771] [redacted].

[772] [redacted].

[773] [redacted].

[774] Letter from RMGC to NAMR dated 11 October 2007, at **Exhibit C-1131**; **Szentesy**, p. 58 (n. 272) (references to the "complete package of the required technical documents…").

427 The Claimants complain that Romanian State authorities, including NAMR, failed to act on that application.[775] According to Professor Bîrsan, RMGC had timely met the condition precedent (applying for the exploitation licenses within 90 days of NAMR's approval of the final exploration report, which had to be obtained within 60 days of the expiry of the Bucium License) and thus became vested with the right to obtain the exploitation licenses.[776] Professor Bîrsan fails to consider that, before NAMR could take any decision on the Bucium Applications, (i) the homologation process of the resources and reserves had to be completed before (ii) the negotiation of the terms of the envisaged exploitation license could start.

428 First, NAMR had to verify and register the mineral resources, *i.e.* these must have undergone the process known as homologation.[777] [redacted][778] [redacted][779] There was no "failure;" the process is still underway, as explained below, and in any event, the law does not provide a deadline within which homologation must take place.

[775] Memorial, p. 274 (para. 629); **Bîrsan**, p. 76 (para. 337); [redacted].

[776] **Bîrsan**, p. 76 *et seq.* (paras. 337-362 and 392-398 (exclusive right), paras. 363-374 (completion of the condition precedent) and paras. 399-405 (reasonable timeframe)).

[777] GD 639/1998 with application norms for 1998 Mining Law, at **Exhibit C-1635**, p. 8 (Art. 26); see Memorial, p. 179 (para. 420); **Bîrsan**, p. 50 *et seq.* (paras. 210-212); see also NAMR Order 174/2005 on evaluation of resources and reserves dated 6 December 2005, at **Exhibit R-301**.

[778] [redacted].

[779] [redacted]; Memorial, p. 244 (para. 555); [redacted].

429 A homologation process entails an intricate review of highly technical documents.[780] While reviewing RMGC's documentation, NAMR identified missing or improper documents and requested additional documents from RMGC. Exchanges ensued between NAMR and RMGC up until April 2009. [redacted][781] However, RMGC only followed-up with NAMR after five years of silence, in July 2014, when RMGC asked NAMR to "order the verification and registration of the … resources/reserves … from BUCIUM deposit."[782]

430 Second, following completion of the homologation process, Articles 17(1) and 18(2)(a) of the 2003 Mining Law provide that an exploitation license is directly granted to the titleholder of the exploration license, without having to proceed with public tender proceedings. As recognized by Professor Bîrsan, Article 20(1) of the 2003 Mining Law provides, however, that the exploitation license is directly granted "through negotiation."[783] RMGC thus had a right to negotiate exploitation licenses directly with NAMR, provided that the applications were otherwise complete and met the legal requirements.[784] The Claimants were aware, also at the time, that before any exploitation license can be issued to RMGC for the Bucium perimeter, negotiations with NAMR have to take place, during which the terms and

[780] See also *supra* para. 292.

[781] [redacted].

[782] Although Bucium specifically came up in the TAC discussions (relating to the Roşia Montană Project), RMGC did not complain of delay in connection with the application for the Bucium exploitation licenses. See TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 66 (quoting Mr. Tănase as saying, "at the end of the exploration program [in Bucium] we will determine whether those perimeters are commercially exploitable and decide whether to propose mining projects to be authorized, but we haven't made this decision yet" and that the Bucium "licenses will be discussed separately" since there was still a question mark "whether the deposits there are exploitable or not from a commercial point of view. For this, we still need to carry out a series of works. If we are ever to reach this conclusion, they will follow the legal authorization way, just like Roşia Montană did.").

[783] **Bîrsan**, p. 84 (para. 376).

[784] 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 9 (Art. 17(1) and 20).

conditions of the new licenses are settled.[785] Professor Bîrsan seeks to minimize the relevance and scope of the negotiations by stating that most of the envisaged license's provisions "derive directly from the law" and the technical documentation to be submitted is also "highly regulated."[786] Several issues must nevertheless be negotiated, notably in relation with royalties, the surface of the exploitation perimeter, the duration of the license, and the financial guarantee.[787] Here again, there is no timeframe provided in the law within which the invitation to negotiate must be extended to the applicant.

431 Had RMGC considered there to be any impropriety in the time taken or procedure followed by NAMR to homologate and then assess the Bucium Applications, including negotiating the terms of the envisaged licenses, RMGC could have submitted a complaint with NAMR. RMGC also had the possibility to file, on the basis of Law 544/2004 on administrative proceedings, an administrative complaint with NAMR followed by a judicial challenge before the Romanian courts. It did not do either, which indicates that at the time RMGC had nothing to complain about.

432 In February 2015, NAMR requested that RMGC update the technical documentation submitted in 2007.[788] [redacted][789] However, the Claimants had already initiated the present dispute in January 2015, and accordingly any

[785] See *e.g.* Gabriel Canada 2007 Annual Information Form, at **Exhibit R-302**, p. 25.

[786] **Bîrsan**, p. 84 (para. 377-378); see also *id.* at p. 87 (paras. 396-397).

[787] Norms for the 2003 Mining Law, at **Exhibit C-12**, p. 8 (Art. 31) (regulating the issues to be included in an exploitation license) corroborated with *id.* p. 22 *et seq.* (Arts. 94, 99 and 100) (setting out the negotiation procedure, albeit in case of public offers).

[788] Letter from NAMR to RMGC dated 6 February 2015, at **Exhibit C-1077**; NAMR Order 202/2013 on environmental rehabilitation dated 4 December 2013, at **Exhibit R-303**; **Bîrsan**, p. 69 (n. 256).

[789] Letter from RMGC to NAMR dated 2 March 2015, at **Exhibit C-1141**; [redacted].

communication between RMGC/the Claimants and NAMR after that date must be assessed in this context.

433 In sum, RMGC's Bucium Applications are still pending,[790] and a decision on those applications requires completion of the homologation process, consisting notably in the review of the updated technical documentation submitted to date, most recently in 2015. The authorities will inform RMGC when a decision is reached in accordance with the applicable laws.

[790] See also Letter from River Extragold to RMGC dated 17 January 2017 and Letter from NAMR to River Extragold, at **Exhibit C-1096**; **Szentesy**, p. 60 (para. 132).

8 THE CLAIMS FALL OUTSIDE THE TRIBUNAL'S JURISDICTION

434 The Claimants have set out their entire case on jurisdiction in no more than eight paragraphs of their 417-page Memorial.[791] In these eight paragraphs – set out at the end of the Memorial in a section dealing with the "standing" of the Claimants – the Claimants merely cite some of the provisions of the two BITs to support their position and repeat generalities such as "Gabriel Canada has made investments in Romania," without any further argument, let alone demonstration that they have done so, or indeed any reliable supporting evidence.[792]

435 The Claimants bear the burden of proving all aspects of the Tribunal's jurisdiction under the two BITs as well as the ICSID Convention. The Claimants have failed to meet this burden on a number of points. Even the more elementary burden – the burden of allegation – has often not been met.

436 The Respondent will demonstrate in this Section that Gabriel Canada's claims do not fall within the Tribunal's jurisdiction (**Section 8.1**). The Claimants have similarly failed to prove that Gabriel Jersey's claims fall within the Tribunal's jurisdiction (**Section 8.2**). Finally, to the extent that the Claimants have failed to establish jurisdiction under the two BITs, the Tribunal also lacks jurisdiction under the ICSID Convention (**Section 8.3**).

8.1 Gabriel Canada's Claims Fall Outside the Tribunal's Jurisdiction

437 Gabriel Canada's claims arise out of measures taken by the Respondent, allegedly in breach of the Canada-Romania BIT, between 11 October

[791] Memorial, p. 377 *et seq.* (paras. 834-841).
[792] *Id.*

2007[793] to 4 January 2017.[794] According to the Claimants, these measures constitute a composite breach of the Canada-Romania BIT:

> "Recognized as a composite act, whether as a series of measures tantamount to expropriation or a series of acts and omissions constituting a lack of fair and equitable treatment or a combination of other treaty violations that cumulatively resulted in the total deprivation of the value of Gabriel's investments, it is evident that the conduct giving rise to the violations at issue began in August 2011 and following the events of 2013 ripened into treaty violations that caused the complete deprivation of the value of Gabriel's investments."[795]

438 Gabriel Canada has failed to establish the Tribunal's jurisdiction over these claims. First, Gabriel Canada has failed to produce even basic evidence showing that it qualifies as a Canadian investor under the BIT (**Section 8.1.1**). Second, Gabriel Canada cannot claim both on its own behalf and on behalf of RMGC; and as it has chosen to claim on its own behalf, its claims, to the extent made effectively on behalf of RMGC, fall outside the Tribunal's jurisdiction (**Section 8.1.2**). Third, Gabriel Canada alleges that a number of events that took place only after it served the Notice of Dispute on Romania constitute breaches of the treaty. Since these claims were never notified to Romania, they were never subject to negotiations between the Parties, and Gabriel Canada never waived its right to initiate or continue parallel proceedings in relation to them. They therefore fall outside the Tribunal's jurisdiction or, alternatively, are inadmissible (**Section 8.1.3**). Fourth, Gabriel Canada's claims are excluded in their entirety by

[793] The date of the Bucium Applications. See Letter from RMGC to NAMR dated 11 October 2007, at **Exhibit C-1131**, p. 1; see also Memorial, p. 308 (para. 684 d)) (FET claims); *id*. at p. 320 (para. 712 d)) (FPS claims); *id*. at p. 332 (para. 735 h)) (national treatment/non-impairment claims); *id*. at p. 342 (para. 753 g)) (umbrella clause claims); *id*. at p. 360 (paras. 799 a), f) and h)) (expropriation claims).

[794] The date of Romania's application for Roșia Montană to become a UNESCO World Heritage Site, as reported in the press. Ministry of Culture press release dated 5 January 2017, at **Exhibit C-897**, p. 1; see also Memorial, p. 265 (para. 609); *id.* at p. 308 (para. 685 b)) (FET claims); *id.* at p. 363 (para. 799 g)) (expropriation claims).

[795] Memorial, p. 399 (para. 896).

the three-year limitation in the Canada-Romania BIT as the alleged composite breach occurred before the critical jurisdictional date (**Section 8.1.4**). Fifth, to the extent that Gabriel Canada's claims arise out of contract, they are inadmissible (**Section 8.1.5**). Finally, Gabriel Canada's claims are limited by the substantive provisions of the BIT and therefore Gabriel Canada must meet a heightened burden of proof (**Section 8.1.6**).

8.1.1 Gabriel Canada Has Failed to Establish that It Is an "Investor" of Canada

439 Under Article XIII(1) of the Canada-Romania BIT, the jurisdiction of the Tribunal is limited to adjudicating disputes between Romania and "an investor of the other Contracting Party."[796] Article I(h)(ii) of the BIT further defines an "investor," in the case of Canada, as:

> "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Romania."[797]

440 The Claimants state in their Memorial that "Gabriel Canada is a corporation duly constituted under the laws of the Yukon Territory, Canada."[798] They further explain – in a footnote – that:

> "Gabriel Canada was originally incorporated under the Company Act of British Columbia, Canada under the name 'PIC Prospectors International Corporation,' it later changed its name to 'Starx Resources Corp.,' and in April 1997 it was continued under the Yukon Business Corporations Act changing its name to Gabriel Resources Ltd. On April 11, 1997, Gabriel Canada acquired all of the issued and outstanding shares of Gabriel Jersey at which time Gabriel Jersey became the wholly owned subsidiary of Gabriel Canada and

[796] Art. XIII(1), Canada-Romania BIT, at **Exhibit C-1**, p. 14.

[797] *Id*. at Art. I(h)(ii), p. 3.

[798] Memorial, p. 377 (para. 834).

Gabriel Canada indirectly acquired interests in the Roşia Montană Project and the Bucium Projects."[799]

441 The sole evidence submitted by the Claimants in support of their contentions is a document apparently generated by Gabriel Canada itself, an "Annual Information Form" dated 17 April 2000.[800] This is woefully inadequate, even assuming the document had some evidentiary value, which it does not, since given its date, it does not establish the Tribunal's jurisdiction over Gabriel Canada on any of the critical jurisdictional dates – the date the claims allegedly arose, or the date when the Claimants gave their consent to arbitrate, or the date when the Request for Arbitration was registered with ICSID.

442 Accordingly, the Claimants have utterly failed to establish the Tribunal's jurisdiction over Gabriel Canada.

8.1.2 Gabriel Canada Cannot Claim both on Its Own Behalf and on Behalf of RMGC

443 The Canada-Romania BIT establishes two separate jurisdictional regimes based on the legal interest of the claimant:

a) claims of investors on their own behalf when they have themselves incurred loss or damage as a result of an alleged breach of the BIT (Article XIII(1); and,

b) claims on behalf of a local subsidiary which the investor owns or controls when it is the local subsidiary that has incurred the alleged loss or damage (Article XIII(12) of the BIT).

[799] Memorial, p. 377 (para. 834, n. 1654).

[800] Gabriel Canada 1999 Annual Information Form, at **Exhibit C-1797**.

444 The regime, which is consistent with Canada's long-standing treaty practice, is similar to that established in Articles 1116(2) and 1117(2) of the NAFTA[801] and in Articles 10.16(1)(a) and (b) of the DR-CAFTA.[802]

445 Article XIII(1) of the Canada-Romania BIT provides:

> "Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that **the investor has incurred loss or damage by reason of, or arising out of, that breach**, shall, to the extent possible, be settled amicably between them.[803]

446 If an investor makes a claim under Article XIII(1), it may submit the dispute to arbitration only if it first waives the right to initiate or continue any parallel legal proceedings it may have initiated, and only if no more than three years have elapsed from the date the claim arose:

> "3. An investor may submit a dispute as referred to in paragraph 1 to arbitration in accordance with paragraph 4 only if: …
>
> b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; …
>
> d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge

[801] Arts. 1116(2) and 1117(2), North American Free Trade Agreement (adopted on 17 December 1992, entered into force 1 January 1994), Chapter 11, at **Exhibit RLA-16**, p. 6.

[802] Art. 10.16, Dominican Republic-Central America-United States Free Trade Agreement (adopted on 5 August 2004, entered into force on 1 January 2009), at **Exhibit RLA-42**, p. 10-12.

[803] Art. XIII(1), Canada-Romania BIT, at **Exhibit C-1**, p. 14 (emphasis added).

of the alleged breach and knowledge that the investor has incurred loss or damage."[804]

447 Claims under Article XIII(12) of the BIT require that both the investor and the local subsidiary consent to arbitration, that both waive any right to initiate or continue any other legal proceeding arising out of the alleged breach, and that no more than three years have elapsed from the date the claim arose; moreover, in such a case, any award will be made to the local subsidiary. Consent and waiver are not required if the respondent State has deprived the investor of control of the local subsidiary. Article XIII(12) provides:

"(a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person constituted or duly organized under the applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case:

(i) any award shall be made to the affected enterprise,

(ii) the consent to arbitration of both the investor and the enterprise shall be required,

(iii) both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind, and

(iv) the investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

[804] Art. XIII(3), Canada-Romania BIT, at **Exhibit C-1**, p. 14 *et seq*.

> (b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:
>
> (i) a consent to arbitration by the enterprise under sub-subparagraph 12(a)(ii), and
>
> (ii) a waiver from the enterprise under sub-subparagraph 12(a)(iii)."[805]

448 Thus, a Canadian investor that owns or controls a local subsidiary in Romania must choose between bringing a claim on its own behalf under Article XIII(1) and bringing a claim on behalf of the local subsidiary under Article XIII(12). What the investor cannot do is bring claims against Romania under both provisions.

449 In the present case, Gabriel Canada invokes Article XIII(1) of the BIT,[806] that is, it claims on its own behalf for loss or damage allegedly incurred by Gabriel Canada itself. However, while invoking Article XIII(1), Gabriel Canada formulates its claims not in terms of alleged loss or damage incurred by itself, but in terms of loss or damage allegedly incurred by its local subsidiary, that is, RMGC. According to the Claimants:

> "Gabriel Canada's losses entail most prominently, the **loss of the value of the rights to develop the Roşia Montană Project and the Bucium Project**, the rights to which it enjoyed through its indirect ownership interest in RMGC."[807]

450 The right to develop the Roşia Montană Project and the right to negotiate licenses over the Bucium perimeter are not rights that belong to Gabriel Canada; they are rights that belong to RMGC. The only rights enjoyed by Gabriel Canada are those attached to its alleged shareholding in Gabriel Jersey. Under the clear language of Article XIII(1), Gabriel Canada can

[805] Art. XIII(12), Canada-Romania BIT, at **Exhibit C-1**, p. 16 *et seq*.

[806] Memorial, p. 377 (para. 835, n. 1658).

[807] *Id*. at p. 377 (para. 836) (emphasis added).

only claim compensation for alleged loss or damage to the value of its alleged shareholding in Gabriel Jersey; it has no standing to claim any compensation for any loss or damage sustained by Gabriel Jersey (which has indeed brought its own claim) and, even less, by RMGC. Had the Claimants wished to make a claim for compensation for any loss or damage allegedly incurred by RMGC, they should have brought their claim on RMGC's behalf under Article XIII(12), and they should have complied with the relevant requirements under that provision. This is not what they have done. Consequently, to the extent that Gabriel Canada claims compensation for loss or damage allegedly incurred by RMGC, its claims fall outside the Tribunal's jurisdiction or, alternatively, are inadmissible.

451 Moreover, to the extent that Gabriel Canada has brought its claims under Article XIII(1) of the Canada-Romania BIT, it has failed to comply with the relevant provisions of Article XIII, as demonstrated below.

8.1.3 Gabriel Canada's Claims Fall Outside the Tribunal's Jurisdiction to the Extent They Fail to Comply with Article XIII(2) and (3) of the Canada-Romania BIT

452 Under Article XIII(2) of the Canada-Romania BIT, claims can be submitted to arbitration after a six-month cooling-off period, calculated as of the date when the investor has notified the respondent State of the dispute:

> "If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph 4. For the purposes of this paragraph a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[808]

[808] Art. XIII(2), Canada-Romania BIT, at **Exhibit C-1**, p. 14 (emphasis added).

453 The notice of dispute thus defines the scope of the dispute to be submitted to arbitration ("alleging that a measure taken or not taken by the … Contracting Party is in breach of this Agreement"). Thus, in the present case, only measures that Gabriel Canada alleged in its Notice of Dispute to have been in breach of the BIT are in compliance with Article XIII(2) and can be submitted to arbitration in accordance with Article XIII(4).

454 As noted above, Article XIII(3)(b) of the BIT further requires that the investor waives its right to initiate or continue any parallel proceedings relating to the claims notified to the Contracting Party. If such a waiver has not been provided, the claims cannot be submitted to arbitration.

455 It follows from these provisions that Gabriel Canada cannot raise any claims in this arbitration that have not been properly notified to Romania in a notice of dispute, and in relation to which it has not waived its right to initiate or continue proceedings before other fora, including before Romanian courts. This applies, *a fortiori*, to claims that have allegedly only arisen during these arbitration proceedings; these claims have not been properly notified, have not been subject to settlement negotiations in accordance with Article XIII(1), and Gabriel Canada has not waived its right to initiate or continue further proceedings in relation to such claims.

456 Gabriel Canada's claims, as set out in the Memorial, are based on facts and events many of which took place months and even years after Gabriel Canada notified Romania of its claims in its Notice of Dispute on 20 January 2015 and waived its right to initiate or continue parallel litigation on 17 July 2015.[809] These facts and events include the following:

¶ In April 2015, the Respondent allegedly convened a "pointless and pretextual" TAC meeting;[810]

[809] Formal notice requesting consultation dated 20 January 2015, at **Exhibit C-8**; Gabriel Canada's Waiver in Support of Its Request for Arbitration dated 17 July 2015, at **Exhibit C-6**.

[810] Memorial, p. 236 (para. 532); see *id.* at p. 308 (para. 684 c)) (regarding FET claims) and p. 363 (para. 799 g)) (regarding expropriation claims).

¶ [redacted];[811]

¶ [redacted];[812]

¶ In December 2015, the Respondent allegedly failed to correct errors in the 2010 list of historical monuments and wrongfully defined and expanded historical monuments within the Project footprint;[813]

¶ [redacted];[814]

¶ In December 2016, the Respondent allegedly sponsored a bill to impose a moratorium on the use of cyanide in mining projects;[815]

¶ In 2016, the Respondent allegedly "stopped cooperating" in appointing members of to RMGC's Board and in recapitalizing RMGC;[816] and

¶ In January 2017, the State allegedly turned the entire area of Roşia Montană into a UNESCO World Heritage Site, thus purportedly acknowledging that the Government had "rejected" the Project.[817]

457 Gabriel Canada never notified these claims to Romania, they were never subject to negotiations between the Parties, and Gabriel Canada never waived its right to initiate or continue parallel proceedings in relation to

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[811] Memorial, [redacted]; *id*. at p. 320 (para. 712 d)) (FPS claims); *id*. at p. 332 (para. 735 h)) (national treatment/non-impairment claims); *id*. at p. 342 (para. 753 g)) (umbrella clause claims); *id*. at p. 360 *et seq.* (paras. 799 a), f) and h)) (expropriation claims).

[812] [redacted] and p. 309 (para. 685 c)) (FET claims); *id*. at p. 320 *et seq*. (para. 712 e)) (FPS claims); *id*. at p. 363 (para. 799 g)) (expropriation claims).

[813] *Id*. at p. 258 (para. 539) and p. 308 (para. 685 a)) (FET claims); *id*. at p. 320 (para. 712 e)) (FPS claims); *id*. at p. 331 (para. 735 f)) (national treatment/non-impairment); *id*. at p. 363 (para. 799 g)) (expropriation claims).

[814] [redacted]; *id*. at p. 307 (para. 684 b)) (FET claims).

[815] *Id*. at p. 268 *et seq.* (para. 617) and p. 308 (para. 685 b)) (FET claims); *id*. at p. 363 (para. 799 g)) (expropriation claims).

[816] *Id*. at p. 240 (para. 544, [redacted] and p. 307 (para. 684 a)) (FET claims); *id*. at p. 341 (para. 753 f)) (umbrella clause); i*d*. at p. 363 (para. 799 g)) (expropriation claims).

[817] *Id*. at p. 265 (para. 609) and p. 308 (para. 685 b)) (FET claims); *id*. at p. 363 (para. 799 g)) (expropriation claims).

them. They therefore fall outside the Tribunal's jurisdiction or, alternatively, are inadmissible.

8.1.4 Gabriel Canada's Claims Fall Outside the Tribunal's Jurisdiction Since They Arise out of Measures Taken Prior to 30 July 2012

458 As noted above, Article XIII(3)(d) of the Canada-Romania BIT establishes a time limit for submitting claims to arbitration. According to Article XIII(3)(d), an investor may submit a dispute notified to the respondent State to arbitration only if

> "**not more than three years** have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[818]

459 Gabriel Canada submitted the present dispute to arbitration on 30 July 2015, which is the date when the Request for Arbitration was registered by ICSID.[819] Accordingly, the Tribunal's jurisdiction is limited to claims that are based on alleged breaches that occurred after 30 July 2012. Claims based on alleged breaches that occurred prior to this date are out of time and therefore outside this Tribunal's jurisdiction.

460 The Claimants are aware of the jurisdictional issue and argue that the three-year limitation period is "satisfied" because, in light of the "creeping nature" of Romania's alleged treaty breaches, "the cumulatively unlawful and ultimately destructive effect of Romania's conduct became apparent only within three years of the date Gabriel Canada commenced arbitration."[820] The Claimants' argument is, however, unsupported by the evidence.

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[818] Art. XIII(3), Canada-Romania BIT, at **Exhibit C-1**, p. 14 *et seq.* (emphasis added).

[819] Letter from ICSID to Romania dated 30 July 2015.

[820] Memorial, p. 378 (para. 838).

461 The Claimants' own case demonstrates that they had "first acquired, or should have first acquired knowledge" of the alleged treaty breaches well before 30 July 2012. The Claimants' claims are in substance based on the alleged attempt by the Romanian Government to "extort" the Claimants to agree to amend the terms of the License and to "block" the environmental permitting process if the terms of the License were not amended.[821] The Claimants allege that, already in November 2011, the Government delivered an "ultimatum" to the Claimants that the Project would not proceed if the Claimants did not agree to amend the terms of the License. According to the Claimants, the Government around the same time, in November 2011, also interfered with the EIA Review Process and managed to "block" it.[822] As a result of these maneuvers, the Claimants then allegedly "succumbed" to the Government's pressure and made an improved offer to amend the License in January 2012. All of these events took place before 30 July 2012.

462 [redacted][823]

Given that the claims in this arbitration are in substance based on the Government's alleged "ultimatum" and its alleged "blocking" of the environmental permitting process, both of which took place already in 2011, it is manifest that more than three years had elapsed from "the date on which [Gabriel Canada] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [Gabriel Canada] has incurred

[821] Memorial, p. 300 *et seq*. (para. 682) (FET claims); *id*. at p. 319 (para. 712 a)) (FPS claims); *id*. at p. 329 *et seq*. (para. 735 b)) (national treatment/non-impairment claims); *id*. at p. 340 (para. 753 b)) and p. 360 (para. 799 a)) (expropriation claims).

[822] *Id*. at p. 302 *et seq*. (para. 682 d)) (FET claims); *id*. at p. 319 (para. 712 a)) (FPS claims); *id*. at p. 329 *et seq*. (paras. 735 a) and b)) (national treatment/non-impairment claims); *id*. at p. 340 (paras. 753 b) and c)) and p. 360 (paras. 799 a) and d)) (expropriation claims).

[823] [redacted]; see also *supra* para. 302.

loss or damage," until 30 July 2015, when the Claimants' Request for Arbitration was registered by ICSID.

463 In light of the Claimants' own case, it is simply not credible that it was only several months after the Government's alleged "ultimatum," its alleged "blocking" of the environmental permitting process, and the Claimants' "succumbing" to this "ultimatum", that Gabriel Canada "first acquired knowledge" of the alleged breach and the related damage (that is, after 30 July 2012). Indeed, again on the Claimants' own case, nothing of interest happened between January 2012, when the Claimants allegedly "succumbed" to the Governments' pressure, and 11 June 2013, when they already raised the prospect of international arbitration and therefore must certainly have "acquired knowledge" of the alleged breach. During much of this period, from February 2012 until December 2012, because of the political situation (as explained in **Section 5.1** above), the Romanian Government did not have the political mandate to take a position on socially controversial issues such as the Project.

464 The fact that the Claimants' case is based on a theory of a composite act that allegedly extended over a period of time, consisting of alleged actions and omissions of the Respondent that took place in part before and in part after 30 July 2012, does not assist Gabriel Canada. According to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**"), in the case of a composite act, the breach of an international obligation occurs "when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[824] As noted above, the Claimants' most serious allegations relate to alleged actions and omissions of the Romanian Government (the "ultimatum" and the "blocking" of the environmental permitting process) that took place well before 30 July 2012, in the second half of 2011. It follows that, on the Claimants' own case, the alleged composite act occurred well before 30 July 2012, the critical jurisdictional date. Gabriel Canada's case therefore falls in its entirety outside the jurisdiction of the Tribunal.

[824] ILC Articles, at **Exhibit CL-61**, p. 54 (Art. 15(1)).

465 Moreover, to the extent that Gabriel Canada's claims relate to facts or events that took place prior to 23 November 2008, they fall outside the jurisdiction of the Tribunal on the further basis that the Canada-Romania BIT only entered into force on 23 November 2011[825] (since although according to Article XVIII(6), the Treaty applies to any dispute that arose not more than three years prior to its entry into force, *i.e.*, 23 November 2008, which is therefore the critical jurisdictional date, Gabriel Canada also makes claims and allegations relating to facts and events that took place prior to this date). Consequently, for instance, the Claimants' claims relating to the Bucium Applications, which were filed in October 2007, fall outside the Tribunal's jurisdiction under Article XVIII(6) of the Treaty. The same applies to all other claims and allegations that Gabriel Canada makes or may make ("may," as the Claimants do not always specify the date of the alleged breaches, and perhaps intentionally so) in relation to any fact or event that took place before 23 November 2008.

8.1.5 Gabriel Canada's Umbrella Clause Claim Falls Outside the Tribunal's Jurisdiction

466 Although the Canada-Romania BIT does not contain any so-called umbrella clause, Gabriel Canada nonetheless seeks to bring a claim for alleged breaches by Romania of its contractual obligations *vis-¨-vis* Gabriel Canada.[826] In support of its umbrella clause claim, Gabriel Canada purports to rely on Article III(1) of the Canada-Romania BIT ("**MFN clause**"), which

[825] The Canada Romania BIT was signed on 8 May 2009 and ratified by Romania on 26 November 2009. See Canada-Romania BIT, at **Exhibit C-1**, p. 23. Thereafter, on 7 December 2009 Romania informed Canada of the completion of the procedures required in Romania for the entry into force of the treaty. See Note from Romania to Canada dated 7 December 2009, at **Exhibit R-304**. However, it was not until **23 November 2011** that Canada notified Romania of the completion of the procedures required in its territory for the entry into force of the treaty. See Note from Canada to Romania dated 23 November 2011, at **Exhibit R-305**. Accordingly, as the Claimants acknowledged in their RfA, the treaty only "entered into force on Nov. 23, 2011". See Claimants' Request for Arbitration, p. 1 (n. 1).

[826] Memorial, p. 334 (para. 739).

in its view allows it to import the umbrella clause of Article 2(2) of the UK-Romania BIT.

467 This is misplaced. The MFN clause in Article III(1) of the Canada-Romania BIT does not allow importation of investment protection standards from other BITs that are not included in the basic treaty. Article III(1) provides:

> "Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third state."[827]

468 The provision is narrowly worded and only provides for MFN treatment "in like circumstances." Consequently, it only protects against differential or discriminatory treatment of investments that are as a matter of fact in like circumstances; it does not allow Gabriel Canada to claim protection under investment protection standards that are not contained in the basic treaty. The narrow scope of the "like circumstances" clause is well established in NAFTA jurisprudence, which contains a similar provision.[828]

469 Thus, in *Cargill v. Mexico* the claimant claimed that the respondent had interfered with the claimant's investment in breach of Chapter 11 of NAFTA. The claimant alleged, *inter alia*, that the respondent had violated the MFN clause in Article 1103 of NAFTA, which as noted above is similar to that contained in the Canada-Romania BIT.

470 The tribunal found that "it must be demonstrated first that the … Claimant's investment is in 'like circumstances' with the investment of an investor of another Party or of a non-Party" and, second, "that the treatment received by Claimant was less favourable than the treatment received by

[827] Art. III(1), Canada-Romania BIT, at **Exhibit C-1**, p. 5.

[828] Art. 1103(1), NAFTA, at **Exhibit RLA-16**, p. 2.

the comparable investor or investment."[829] The tribunal ultimately concluded that the claimant had failed to make the first part of the test because it had not shown that it was in "like circumstances" compared to investors of another NAFTA Party, or that its investments were in "like circumstances" with the investments of an investor of another NAFTA party.[830]

471 Similarly, in *Apotex v. U.S.A.*, the claimant claimed that the respondent had breached Article 1103 of NAFTA.[831] The tribunal noted that it was "common ground" between the parties that establishing a breach of Article 1103 required a showing that the claimant or its alleged investment was in like circumstances with an identified foreign investor or foreign investment and had received treatment less favourable than that accorded to the identified investors or investments.[832] The tribunal ultimately held that the investors referred by the claimant were not in "like circumstances" and thus rejected their MFN claims under Article 1103 NAFTA. [833]

472 Investment treaty tribunals faced with MFN clauses containing similar language have adopted the same approach. Thus, in *Bayindir v. Pakistan*, the claimant argued that the respondent had breached the MFN clause in the Turkey-Pakistan BIT, which provided:

> "Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in **similar situations** to investments of its investors or to investments of investors of any third country, whichever is the most favourable."[834]

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[829] *Cargill, Inc. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/05/2, 18 September 2009, at **Exhibit CL-163**, p. 61 (para. 228).

[830] *Id.* at p. 63 (para. 234).

[831] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Award, ICSID Case No. ARB(AF)/12/1, 25 August 2014, at **Exhibit RLA-43**, p. 192 (hard copy: Part VIII, page 1) (para. 8.1).

[832] *Id.* at p. 193 (hard copy: Part VIII, page 2) (para. 8.4).

[833] *Id.* at p. 214 (hard copy: Part VIII, page 23) (para. 8.77).

[834] The tribunal noted that this clause covers both national treatment and MFN obligations. *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID

473 The tribunal determined that its task was:

> "[t]o decide whether Pakistan has breached Article II(2), the Tribunal must first assess whether Bayindir was in a 'similar situation' to that of other investors … If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors."[835]

474 The tribunal ultimately rejected the claim on the basis that the claimant had failed to provide "sufficiently specific data on the terms and the performance of the different contracts involved."[836] The tribunal concluded that since "one of the necessary requirements of a breach of Article II(2), the similarity of situations, [wa]s not met," there was no breach of the MFN standard.[837]

475 While in *Cargill, Apotex* and *Bayindir* the claimant was claiming a breach of the MFN clause and did not seek to import another investment protection standard from another treaty – which is what the Claimants seek to do here – this is not a relevant difference as it does not affect the interpretation of the treaty. There is obviously no basis to interpret the same treaty provision differently, depending on the claim that is being made.

476 To the extent that Gabriel Canada seeks to rely on alleged breaches by the Respondent of its contractual obligations *vis-¨-vis* Gabriel Canada in support of its claims for breaches of investment protection standards other than the umbrella clause, its claims are also equally misplaced. First, Gabriel Canada is not a party to any of the contracts it purports to rely upon – the Roşia Montană License, the Bucium Exploration License and RMGC's Articles of Association – and therefore is not in a position to make any breach of contract claims. Second, to the extent that Gabriel Canada's claims are based on RMGC's Articles of Association, the alleged breaches

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Case No. ARB/03/29, 27 August 2009, at **Exhibit CL-87**, p. 113 (paras. 386-387) (emphasis added).

[835] *Bayindir v. Pakistan*, Award, 27 August 2009, at **Exhibit CL-87**, p. 114 *et seq.* (paras. 389-390).

[836] *Id*. at p. 122 (para. 417).

[837] *Id.* at p. 123 (para. 420).

are not attributable to the Romanian State since it is not a party to that agreement – the counterparty to the agreement is Minvest, a legal entity separate from the State and operating under private law. Even assuming Minvest had breached the Articles of Association (which is denied), its conduct would not be attributable to the State.

477 Consequently, the Tribunal lacks jurisdiction over Gabriel Canada's umbrella clause and other contractual claims.

8.1.6 Gabriel Canada's Claims Are Limited by the Substantive Provisions of the BIT

478 The Canada-Romania BIT contains typical provisions to Canadian investment treaties dealing with environmental measures and taxation measures, which constrain the ability of investors to make claims based on such measures. Gabriel Canada has failed to consider the relevance of these provisions to its claims, even if its principal claims and allegations are based on such measures.

8.1.6.1 Claims Relating to Environmental Measures Are Governed by a Special Regime

479 Article XVII(2) and (3) of the Canada-Romania BIT provides:

> "2. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> 3. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:
>
> (a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) to protect human, animal or plant life or health; or

(c) for the conservation of living or non-living exhaustible natural resources."[838]

480 In this case, as explained above in **Section 8.1.4**, Gabriel Canada's principal claims, and its principal allegations, in this arbitration arise out of the environmental permitting process conducted by the Ministry of Environment. This process manifestly qualifies as a "measure … that [Romania] considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns," within the meaning of Article XVII(2) of the BIT. It also manifestly qualifies as a "measure … necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement … [or] to protect human, animal or plant life or health," within the meaning of Article XVII(3) of the BIT. While Article XVII(2) requires, for the special regime to apply, that such measures be "otherwise consistent with this Agreement," there is no such qualification in Article XVII(3), and in any event the object and purpose of the special regime established in these two provisions is to protect the Contracting State's legitimate regulatory space and to reserve a margin of discretion in environmental matters. An investor who seeks to bring a claim that allegedly arises out of such *prima facie* legitimate measures bears an additional burden – indeed a heightened burden – of proving that such measures amount to a breach of the treaty.[839]

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[838] Art. XVII(2) and (3), Canada-Romania BIT, at **Exhibit C-1**, p. 19 *et seq.*. An additional interpretation element for this provision is contained in Art. II(5), pursuant to which Romania had an obligation not to relax its environmental legislation to retain investments in its territory, including the alleged investments of Gabriel Canada. See *id*. at Art. II(5), p. 5.

[839] *Al Tamimi v. Oman*, Award, 3 November 2015, at **Exhibit RLA-44**, p. 135 *et seq.* (para. 387-389) and p. 164 *et seq.* (paras. 445-446 and n. 912-913 and 915). Investment treaty tribunals have similarly applied a heightened burden of proof in cases of alleged corruption and fraud, abuse of process, and conspiracy. See *e.g. EDF (Services) Ltd. v. Romania*, Award, ICSID Case No. ARB/05/13, 8 October 2009, at **Exhibit CL-103**, p. 63 *et seq.* (para. 221); *Bayindir v. Pakistan*, Award, 27 August 2009, at **Exhibit CL-87**, p. 63 (223-224); *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated June 1, 2009, at **Exhibit CL-108**, p. 85 (para. 326); *Rumeli Telekom A.S. and Telsim Mobil*

481 In the present case, while Gabriel Canada contends that the environmental permitting process conducted by the Ministry of Environment was delayed, and that the Respondent's alleged failure to grant the environmental permit was wrongful, it does not even allege that the environmental permitting process, in itself, was *prima facie* illegitimate. Gabriel Canada therefore bears the heightened burden of proving that the actions of the Respondent, taken in the context of what is indisputably a legitimate governmental process designed to address important and sensitive environmental concerns, were not merely the result of the application of entirely legitimate laws and regulations and as such fully compatible with the BIT.

482 As demonstrated in **Sections 9.1, 9.2** and **9.4** below, the Claimants have not come even close to meeting that burden.

8.1.6.2 Claims Relating to Taxation Measures are Governed by a Special Regime

483 The Canada-Romania BIT also establishes a special regime applicable to taxation measures. Under Article XII(1) of the Treaty,"[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures."[840] Article XII also establishes special procedures for dealing with claims by investors relating to taxation measures, including for expropriation claims, allowing such claims subject to certain procedural requirements.[841]

Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, Award, ICSID Case No. ARB/05/16, Award, 29 July 2008, at **Exhibit CL-140**, p. 191 (para. 709); *Chemtura Corp. v. Government of Canada*, Award, 2 August 2010, at **Exhibit CL-162**, p. 37 (para. 137).

[840] Art. XII(1), Canada-Romania BIT, at **Exhibit C-1**, p. 13.

[841] *Id*. at Art. XII, p. 13 *et seq.* ("2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency.; 3. Subject to paragraph 2, a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor,

484 As explained above, the Claimants raise a number of claims and allegations in relation to the tax fraud investigations into the Kadok group of companies (which were extended to RMGC in November 2013), the VAT Assessment, the ANAF audits and the ANAF investigations.[842] As demonstrated in the provisional measures phase,[843] and as Gabriel Canada has not even attempted to demonstrate that it has complied with Article XII, these claims fall outside the Tribunal's jurisdiction.[844]

8.2 Gabriel Jersey's Claims Fall Outside the Tribunal's Jurisdiction

485 Gabriel Jersey makes its jurisdictional case in a handful of lines, without any attempt to demonstrate, on the basis of evidence, that it in fact meets the jurisdictional requirements of the UK-Romania BIT.[845] The Respondent's principal jurisdictional objection in relation to Gabriel Jersey's claims is that the Gabriel Jersey has not met even the basic burden of allegation, let alone established, on the facts, that its claims fall under the Tribunal's jurisdiction.

486 First, Gabriel Jersey has not proven that it is a UK investor, or that it has made any investments in Romania. Second, like Gabriel Canada, Gabriel

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jointly determine that the measure does not contravene such agreement; 4. Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation.; 5. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs 3 and 4 within six months after being notified, the investor may submit its claim for resolution under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party.").

[842] See *supra* para. 456. See also *supra* paras. 405-415.

[843] Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 46 *et seq*. (para. 135); Respondent's Rejoinder to Claimants' Second Request for Provisional Measures, p. 39 *et seq*. (paras. 114-128).

[844] *EnCana v. Ecuador*, Award and Partial Dissenting Opinion, 3 February 2006, at **Exhibit RLA-13**, p. 40 (para. 142); see also *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, Award, ICSID Case No. ARB(AF)/11/3, 24 November 2015, at **Exhibit RLA-45**, p. 71 *et seq*. (paras. 244-246).

[845] Memorial, p. 378 *et seq.* (paras. 839-840).

Jersey has also brought claims that have not been previously notified to Romania. Finally, Gabriel Jersey's claims, to the extent that they are purportedly brought under the umbrella clause in Article 2(2) of the UK-Romania BIT, fail in part for the same reasons as those brought by Gabriel Canada. These three objections are set out below.

487 The Tribunal's personal (*ratione personae*) jurisdiction under Article 7(1) of the UK-Romania is limited to disputes between a national or company of one Contracting Party and the other Contracting Party.[846] A "company" in respect of the United Kingdom is defined Article 1(d)(i) as:

> "corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of this Article."[847]

488 The Claimants assert that "Gabriel Jersey is a company incorporated under the laws of the Bailiwick of Jersey."[848] They also allege that "Gabriel Jersey was incorporated in 1996 under the laws of the Bailiwick of Jersey, UK and has been indirectly wholly-owned subsidiary of Gabriel Canada since April 1997."[849]

489 Neither allegation is supported by reliable evidence. The Claimants merely refer to a document "Consolidated Financial Statements" dated 1997[850] which however does not and cannot, in view of its date, establish the Tribunal's jurisdiction over Gabriel Jersey on any of the critical jurisdictional dates – the date the claims allegedly arose, the date when Gabriel Jersey consented to arbitration, or the date when the Request for Arbitration was registered. Accordingly, the Claimants have not proven that Gabriel Jersey qualifies as a UK investor under Article 1(d)(I) of the Treaty, and that it can invoke Article 7(1) of the Treaty.

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[846] Art. 7(1), UK-Romania BIT, at **Exhibit C-3**, p. 5.

[847] *Id.* at Art. 1(d)(i), p. 3.

[848] Memorial, p. 378 *et seq.* (para. 839).

[849] *Id.* at p. 378 (para. 839, n. 1662).

[850] Gabriel Canada 1997 Consolidated Financial Statements, at **Exhibit C-1815**.

490 Nor is there any evidence that Gabriel Jersey has made any investments in Romania. It appears to be merely a mailbox company, passively holding shares in RMGC. The Claimants have not established that Gabriel Jersey's passive shareholding constitutes a legitimate "investment" in any substantive sense of this term and as such is worthy of protection under the BIT.

491 Second, under Article 7(1) of the UK-Romania BIT, claims can be submitted to arbitration after a three-month cooling-off period, calculated as of the date when the investor has notified the respondent State of the dispute:

> "Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, **after a period of three months from written notification of a claim**, be submitted to international arbitration if the national or company concerned so wishes."[851]

492 In light of this provision, Gabriel Jersey cannot raise any claims in this arbitration that were not properly notified to Romania in Gabriel Jersey's Notice of Dispute dated 20 January 2015.[852] This applies, *a fortiori*, to claims that have allegedly arisen only during these arbitration proceedings; these claims have not been properly notified and have not been subject to settlement negotiations in accordance with Article 7(1).

493 As demonstrated in **Section 8.1.3**, the Claimants raise a number of claims and allegations based on measures that were taken after the service of the Notice of Dispute on 20 January 2015. Consequently, all of these claims fall outside the Tribunal's jurisdiction or, alternatively, are inadmissible before the Tribunal.

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[851] Art. 7(1), UK-Romania BIT, at **Exhibit C-3**, p. 5 (emphasis added).

[852] Formal notice requesting consultation dated 20 January 2015, at **Exhibit C-8**.

494 Finally, Gabriel Jersey invokes the umbrella clause of Article 2(2) of the UK-Romania BIT,[853] which provides:

> "Each Contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[854]

495 However, the umbrella clause of Article 2(2) does not assist Gabriel Jersey and does not allow it to bring contractual claims since it is not a party to the Roşia Montană License and the Bucium Exploration License, and since Romania is not a party to RMGC's Articles of Association. As demonstrated above in **Section 8.1.5** in relation to Gabriel Canada, Gabriel Jersey has no standing to make claims under a contract to which it is not a party, and similarly it cannot have any claims against the Respondent on the basis of RMGC's Articles of Association as the Romanian State is not a party to that Agreement.

8.3 The Claims Do Not Fall Within the Tribunal's Jurisdiction under the ICSID Convention

496 The ICSID Convention itself does not contain any consent to arbitrate, and consequently ICSID jurisdiction must be established on the basis of a consent provided in the relevant investment contract or applicable international investment treaty. The ICSID Convention can therefore never expand the scope of consent provided in another legal instrument; it can only limit it.[855] Conversely, to the extent that there is no consent under the applicable BIT, there is no consent under the ICSID Convention.

497 Thus, to the extent that the Claimants have failed to establish the Tribunal's jurisdiction over Gabriel Canada's claims under the Canada-Romania BIT, or over Gabriel Jersey's claims under the UK-Romania BIT, they have also failed to establish jurisdiction under the ICSID Convention.

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[853] See *infra* Section 9.5.

[854] Art. 2(2), UK-Romania BIT, at **Exhibit C-3**, p. 4.

[855] C. Schreuer et al., *The ICSID Convention: A Commentary* (2nd edition, Cambridge University Press, 2009), at **Exhibit RLA-46**, p. 230.

9 ROMANIA HAS COMPLIED WITH ITS OBLIGATIONS UNDER THE TWO INVESTMENT TREATIES

498 The Claimants present their claims as claims of "Gabriel", without distinguishing between claims made by Gabriel Canada and those made by Gabriel Jersey. However, the claims of each of the two Claimants must be assessed and determined under the applicable treaty.

499 Gabriel Canada must prove its allegation that investments allegedly owned by it were indirectly expropriated in breach of Article VIII of the Canada-Romania BIT, that they were not accorded fair and equitable treatment ("**FET**") and full protection and security ("**FPS**") under Article II of the Treaty, and that they were not accorded national treatment under Article III of the Treaty.[856] Similarly, Gabriel Jersey must prove that its alleged investments were expropriated in breach of Article 5 of the UK-Romania BIT, that they were not accorded FET and FPS, that they were impaired by unreasonable and discriminatory treatment, and that Romania breached the umbrella clause in Article 2 of the UK-Romania BIT.[857]

500 The Claimants have failed to prove the alleged breaches. Contrary to the Claimants' case, their alleged investments have not been expropriated (**Section 9.1**). The Claimants have also failed to establish that Romania failed to provide FET and FPS to the Claimants' investments (**Sections 9.2** and **9.3**), failed to provide national treatment to the Claimants' investments, or that it has impaired the Claimants' investments by unreasonable, arbitrary or discriminatory measures (**Section 9.4**). Nor have the Claimants established that Romania has breached the umbrella clause of the UK-Romania BIT (**Section 9.5**).

[856] Memorial, p. 416 (para. 931 a)).

[857] *Id*. at p. 416 (para. 931 b)).

9.1 Romania Has Not Expropriated the Claimants' Alleged Investments

501 After notifying Romania of alleged breaches of the two investment treaties in January 2015 relating to "persistent delays in permitting," which had allegedly "damaged the ability for development" of the Project and reiterating that they were "firmly committed to the development of the Project,"[858] the Claimants' position in the Memorial has radically changed. They now allege that, well before the date the Claimants notified Romania of the alleged breaches, Romania had already expropriated all of the Claimants' investments, including the License. The taking had allegedly started in August 2011[859] and was completed in 2013.[860]

502 However, to this day, the Claimants have failed to inform their shareholders of the alleged expropriation. As late as July 2015, the Claimants did not hesitate to confirm that the Project was well alive:

> "The Company still believes the interests of all stakeholders in the Project, particularly the Romanian State would be served best by its permitting and development and Gabriel continues to be available to engage with the Romanian President and Government in order to achieve this objective. Whether this becomes a reality or not falls wholly on Romania's political decision makers to demonstrate a commitment to the Project and to the mining industry in general… The Company remains willing to work with the Romanian Authorities and other stakeholders to build a world class mine…"[861]

503 That the Claimants' expropriation claims are merely an afterthought is reflected in the fact that, in the Memorial, they are introduced after the Claimants' other claims.[862] This is somewhat illogical since, if the Claimants really believed that their investments had been expropriated, and not only damaged as a result of the alleged breaches of other treaty standards,

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[858] Formal notice requesting consultation dated 20 January 2015, at **Exhibit C-8**, p. 1.

[859] Memorial, p. 342 *et seq.* (para. 757) and p. 375 *et seq.* (paras. 830-831).

[860] *Id.* at p. 399 *et seq.* (para. 896).

[861] Gabriel Canada press release dated 21 July 2015, at **Exhibit R-306**, p. 2.

[862] Memorial, p. 342 *et seq.* (paras. 755-833).

one would have expected that the Claimants would pursue the expropriation claims as their main claims.

504 Indeed, the Claimants' lack of faith in their expropriation claims is understandable since their own evidence does not support them. The Claimants' shareholding in RMGC has not been affected, RMGC still today holds the License and its other assets and is free to develop the Project if it complies with the legal permitting requirements and secures the social license. Nothing has changed, other than the Claimants' apparent loss of interest in the Project as a result of the large-scale social opposition.

505 As to the Bucium perimeter, while the Claimants barely mentioned it in the Notice of Dispute and the Request for Arbitration,[863] the Claimants now complain that Romania indirectly expropriated RMGC's mining rights in Bucium as well.[864] However, as a matter of fact, RMGC does not possess any rights of exploitation in the Bucium perimeter that could have been expropriated.

506 The Claimants' creative allegations of conspiracy and extortion on which the expropriation claims are based are not borne out by the evidence (**Section 9.1.1**). The Claimants' expropriation claims fail, both under the Canada-Romania BIT (**Section 9.1.2**) and the UK-Romania BIT (**Section 9.1.3**).

9.1.1 The Claimants Have Not Established the Factual Basis of their Expropriation Claims

507 The Claimants contend that measures allegedly taken by Romania amounted to an expropriation indirectly and incrementally; that contract and other intangible rights have been expropriated; that Romania's intentions are not dispositive for the purposes of establishing an indirect expropriation; and that an expropriation effected incrementally constitutes a

[863] Formal notice requesting consultation dated 20 January 2015, at **Exhibit C-8**, p. 1; Claimants' Request for Arbitration, p. 7 (para. 21) and p. 14 (para. 36).
[864] Memorial, p. 359 (paras. 796-798).

composite act within the meaning of the ILC Articles.[865] The Claimants conclude that "Gabriel's investments not only were subject to measures having an effect equivalent to expropriation, but Romania's expropriation of Gabriel's investments failed to fulfil any of the BITs' legality requirements."[866]

508 The Claimants group their allegations supporting their expropriation claims under eight different headings, covering events between 11 October 2007[867] to 4 January 2017.[868] In summary, these events include NAMR's alleged delayed processing of the Bucium Applications since early 2008, the non-advancement of the EIA Review Process between 2007 and 2010, the alleged delay in renewing dam safety permits and archaeological permits between 2007 and 2010, the updates to the 2004 list of historical monuments (in 2010 and 2015), various statements of Romanian politicians between August 2011 and 2013, the evolution of the EIA Review Process between 2011 and 2015, the renegotiations of the License between the fall of 2011 and the spring of 2013, the submission to Parliament in the summer of 2013 and the subsequent rejection of the Roşia Montană Law in 2013-2014, the criminal investigations of tax fraud extended to RMGC in the fall of 2013, Minvest's shareholder's dispute with Gabriel Jersey between the fall of 2013 and present date, the proposed moratorium on the use of cyanide towards the end of 2016, and Romania's application for Roşia Montană to become a UNESCO World Heritage Site in January 2017.[869]

[865] Memorial, p. 345 *et seq*. (paras. 760-794).

[866] *Id*. at p. 365 (para. 805).

[867] The date of the Bucium Applications. See Letter from RMGC to NAMR dated 11 October 2007, at **Exhibit C-1131**, p. 1.

[868] The date of Romania's application for Roşia Montană to become a UNESCO World Heritage Site, as reported in the press. Ministry of Culture press release dated 5 January 2017, at **Exhibit C-897**, p. 1.

[869] Memorial, p. 360 *et seq*. (para. 799 a) to h)).

509 The Claimants contend however that only some of these events are relevant to their expropriation claim, namely "Romania's conduct beginning in August 2011."[870] The Claimants remain elusive as to the exact date on which, or how, the combined effect of the events beginning in August 2011 ripened into an expropriation; they also do not specify when the process came to an end.[871] While the Claimants appear to remain intentionally vague on these issues, in an effort to avoid the associated jurisdictional issues, the Claimants' expropriation claims are in any event unfounded.

510 The Claimants allege that "the Government unlawfully, and in support of its coercive attempts to wrest from Gabriel a greater economic take from the Project, first blocked, and then ultimately rejected, the Roşia Montană Project."[872]

511 However, Romania did not "block" the Project. The environmental permitting process was marred by numerous NGO court and administrative challenges and RMGC's failure to comply with the permitting requirements.[873] Nor did Romania "reject" the Project. The permitting of the Project simply could not (and still cannot) be completed unless and until the legal requirements are met. RMGC failed to obtain a valid urban certificate, the requisite surface rights, and the requisite endorsements and permits for its 2006 amended PUZ. Furthermore, the validity of a key ADC (for Cârnic) is pending before the courts, and RMGC has not yet even applied for the ADC for Orlea. Importantly, it also failed to secure the social license to develop the Project.[874]

512 The Claimants allege that in the summer of 2011, "Gabriel and RMGC successfully overcame [permitting] obstacles to the point that the technical review of the Project through the EIA procedure was nearly complete and

[870] Memorial, p. 342 *et seq*. (para. 757).
[871] See *infra* paras. 556-557.
[872] Memorial, p. 360 (para. 799 a)).
[873] See *supra* paras. 382-387.
[874] *Id.*

the Project was proceeding apace towards permitting."[875] This is incorrect.[876]

513 The EIA Review Process was not close to completion in the summer of 2011; a number of entirely legitimate and important concerns raised by the TAC remained to be addressed by RMGC. The TAC still needed to review RMGC's answers to questions from the public (received on 26 August 2011) and the Hungarian Government (received on 11 October 2011), and the remaining chapters of the EIA Report also had to be reviewed. Importantly, the Ministry of Culture had not yet endorsed the Project.[877] Until all these issues were addressed to its satisfaction, the TAC would not be in a position to issue its recommendation and the following steps in the procedure for the issuance of the environmental permit could not be taken by the relevant authorities, namely the Ministry of Environment and the Government. In any event, RMGC had not (and still has not) secured the approval of its (amended) PUZ, which its urban certificate expressly requires. Court proceedings regarding the urban certificate then in force, *i.e*. UC 87/2010, were pending as of August 2011.[878]

514 The Claimants allege that in August 2011 the Prime Minister "began to criticize the State's previously agreed economic take from the Project."[879] According to the Claimants, "[h]is statements were promptly echoed and amplified by the President, the Minister of Environment, and the Minister of Culture, and repeated statements were made to the press and on television that were variations on the President's clear statement that, as far as the State was concerned, for the Project to proceed, it was 'mandatory to renegotiate.'"[880] The Claimants also assert that "the Minister of Culture thus announced that neither he nor the Minister of Environment, whose

[875] Memorial, p. 360 (para. 799 b)).
[876] See *supra* paras. 183-207.
[877] See *supra* paras. 197-206.
[878] *Id.*
[879] Memorial, p. 360 *et seq.* (para. 799 c)).
[880] *Id*.

ministries were most critical to Project permitting, would permit the Project until the level of the State's participation was 'clarified.'"[881] The Claimants further contend that the renegotiation was mandatory "for the Project to proceed," and that Romania was abusing its public powers to extort a better commercial deal from RMGC:

> "Particularly in hindsight, it is evident from these statements that the Government effectively held the Project's permitting hostage and made a clear and deliberate decision that it would not allow the Project to proceed unless Gabriel met the State's ransom for more RMGC shares and higher royalties."[882]

515 However, the Claimants' account of the statements of the Prime Minister (and other officials) is inaccurate and misleading;[883] nor does it reflect the events as they unfolded at the time. Thus, the Ministry of Environment and the TAC were continuing their work, in a regular manner, during the summer 2011 – the period during which the State allegedly made its "threats." The Claimants have also failed to prove their allegation that government officials improperly interfered with the TAC process. Indeed, there was no such interference as shown by the continuation of the review of the EIA Report, which work was particularly intense during the second semester of 2011 and until the end of November 2011, as the Claimants themselves recognize in the Memorial.[884]

516 By the summer of 2011, the Claimants appear to have acknowledged the major difficulties they were facing with obtaining the required permitting for the Project and started looking for ways to avoid or relax the requirements that RMGC could not meet, and to expedite the permitting of the Project. The Government, in the aftermath of the global financial crisis that had hit Romania particularly hard, was understandably interested in improving the benefits that the State would obtain from the development of

[881] Memorial, p. 360 *et seq.* (para. 799 c)).
[882] *Id*.
[883] See *supra* paras. 208 and 233-235.
[884] See *supra* paras. 183-196; Memorial, p. 142 *et seq*. (paras. 353-366).

the Project. In the circumstances, RMGC and the Government entered into negotiations to amend the terms of the License.[885]

517 [redacted][886] [redacted][887] [redacted][888]

518 The Claimants allege that "the Government in a concerted manner abusively intervened in the administrative permitting process to prevent its completion and with it the issuance of the environmental permit."[889] The Claimants' case is twofold: first, on 29 November 2011, "the Prime Minister and Minister of Environment each directed the TAC President to ensure that the EIA procedure was not completed;"[890] and second, also on 29 November 2011, "the Minister of Economy conveyed the message to RMGC that there would be no environmental permit and no Project if the Government's revised economic terms were not met."[891]

519 The first allegation relates to the TAC meeting of 29 November 2011 and is only based on hearsay evidence.[892] The Claimants' allegation is contradicted by the evidence on record as to how that TAC meeting in fact unfolded. This evidence shows that the meeting proceeded in a regular man-

[885] See *supra* paras. 231-241.
[886] See *supra* paras. 237-239.
[887] *Id.*
[888] *Id.*
[889] Memorial, p. 361 *et seq*. (para. 799 d)).
[890] *Id*.
[891] *Id*.
[892] See *supra* para. 224.

ner, and that there were no "interventions." It was also specifically recorded that various technical issues were still to be addressed in future TAC meetings, and accordingly, contrary to what the Claimants allege, the technical assessment was not completed at that meeting. Even assuming that, contrary to the evidence on record, there had been an "intervention," any such alleged intervention had no impact on the process. It is undisputed that, at the end of the meeting, there were still a number of outstanding technical issues to be addressed in future meetings.[893]

520 The second allegation – that the Minister of Economy conveyed the message to RMGC that there would be no environmental permit and no Project if the Government's revised economic terms were not met – remains similarly unproven. [redacted][894]

521 There is no contemporaneous evidence of any threats of withholding the environmental permit, including in the Claimants' mandatory disclosures to their shareholders.[895] Nor is there any evidence that RMGC turned to the courts of Romania to seek relief against the allegedly improper conduct of the Ministry of Economy. Indeed, there is no evidence that, at any point in time, the Government sought to make a link between the contractual negotiations (which were conducted between RMGC and the Ministry of Economy) and the work of the TAC or the Ministry of Environment. The renegotiations of the License were not in any way linked to the TAC's review, or the issuance of any other permit to the Project, nor does the Claimants' own evidence support their allegations.[896]

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[893] See *supra* paras. 221-230.

[894] [redacted]).

[895] Gabriel Canada 2011 Annual Information Form, dated 14 March 2012, at **Exhibit C-1809**, p. 5.

[896] See *supra* paras. 236-241.

522 The Claimants contend that "[a]lthough Gabriel and RMGC eventually succumbed to the pressure and acceded to the Government's demands, the Government continued to block the permitting process, effectively holding the Project in suspended animation throughout 2012."[897] They further contend that "[t]he Government's failure to issue the crucial environmental permit to RMGC following the Ministry of Environment's favorable completion of the technical assessment of the EIA Report in November 2011 and its de facto suspension of the EIA procedure throughout 2012 were both unlawful."[898]

523 The Claimants' first allegation is a *non-sequitur*. If the Government was able to achieve the greater share of the benefits of the Project in the November 2011 renegotiations, why would it then decide to "block the permitting process" and destroy what it had obtained in the negotiations? The Claimants' case is simply not credible, and in any event, as noted above, is not supported by the evidence.

524 The Claimants' allegation is also contradicted by contemporaneous evidence; indeed, the Ministry of Environment renewed key permits to RMGC in April 2012 – the dam safety permits. It also responded promptly and liaised with RMGC in relation to its updated Waste Management Plan.[899] The Ministry's conduct is not consistent with the Claimants' allegation that the Government deliberately sought to "block" the Project.

525 Also, contrary to what the Claimants allege, the TAC meetings were not "suspended" in 2012. The meetings simply could not go ahead as RMGC was not able to present the requisite documentation, including valid urban planning documentation and the endorsement of the Ministry of Culture.[900]

526 Neither was there a "failure" to issue the environmental permit in 2012 since neither the Ministry of Environment, nor the Government was in a

[897] Memorial, p. 361 *et seq*. (para. 799 d)).
[898] *Id*.
[899] See *supra* para. 275.
[900] See *supra* paras. 308-309.

position to take the process further given the outstanding technical and legal issues and the absence of recommendation from the TAC. As noted above, the alleged "completion of the technical assessment of the EIA Report in November 2011" is wholly unfounded. The TAC was far from completing the review in November 2011, let alone about to issue a favorable recommendation.[901]

527 The Claimants allege that "[r]ather than issue the environmental permit and allow the Project to proceed as the law required, the Government simply refused to do so and instead put the Roşia Montană Project's future in Parliament's hands through the proxy of the Draft Law."[902] As demonstrated above, the Claimants' allegation grossly misrepresents the events.

528 Contrary to the Claimants' case, the Roşia Montană Law had no impact on the technical work undertaken by the TAC. RMGC and the Government had agreed and worked together on the Project to submit both the Roşia Montană bill and the draft special agreement to Parliament. RMGC stood to benefit greatly from the Roşia Montană Law, which would have amended laws applicable to the Project and would have put in place an expedited permitting schedule, which in turn would have allowed RMGC to shortcut the challenges it was facing and would continue to face.[903]

529 RMGC accepted this way of proceeding and was involved in the preparation of the Roşia Montană Law.[904] On the day of the submission of the bill to Parliament, the Claimants informed their shareholders as follows:

> "Gabriel [Canada] is pleased to announce that, further to the approval of the Romanian Government ('Government') of draft legislation ('Draft Law') relating to the Rosia Montana Project ('Project'), the Draft Law has now passed to the Romanian Parliament ('Parliament') for debate. This legislation, if approved, will

[901] See *supra* paras. 197-206.

[902] Memorial, p. 361 *et seq*. (para. 799 d)).

[903] See *supra* paras. 284-289 and 300-306.

[904] *Id.*

> establish a framework for the re-invigoration of the mining industry across Romania and assist the development of the Project…
>
> Jonathan Henry, Gabriel's President and Chief Executive Officer stated:
>
> '*We look forward to the Romanian Parliamentôs review of the Rosia Montana Project…*'"[905]

530 The Claimants now suggest that "[t]he Government made clear that it would translate a parliamentary 'No' on the Draft Law into a 'No' on the entire Roşia Montană Project. In doing so, the Government completely disregarded and abandoned the legal regime governing Gabriel's investment."[906]

531 That allegation is unfounded since the Government never said that a "No" to the Roşia Montană Law would mean a "No" to the environmental permit or any other pending application for a permit relating to the Project. Following the rejection of the Roşia Montană Law, the TAC and RMGC met to discuss the Project, and State authorities have renewed certain permits, including the dam safety permits. It was, however, up to RMGC, following the rejection of the Roşia Montană Law, to propose a way forward for the Project,[907] and to deal with the problems that it had faced and continued to face – in particular, the failure to obtain the requisite surface rights, the requisite endorsements and permits for its proposed (2006) amended PUZ, a valid urban certificate for the Project, a valid ADC for Cârnic (upon which the Ministry of Culture endorsed the Project in April 2013), as well as its failure to secure the social license.[908]

532 The Claimants seek to confuse these issues by linking the fate of the Roşia Montană Law and the fate of the Project: what was voted upon, and rejected, was the Roşia Montană Law, not RMGC's right to implement the

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[905] Gabriel Canada press release dated 5 September 2013, at **Exhibit R-256**, p. 1 *et seq.* (emphasis in the original).

[906] Memorial, p. 361 *et seq.* (para. 799 d)).

[907] See *supra* paras. 368-380.

[908] See *supra* paras. 382-387.

Project under the License. The Project was linked to the Roşia Montană Law only insofar as the Romanian legislature had to be persuaded that a privileged treatment of the Project was justified in the circumstances. What was ultimately rejected was the proposed privileged treatment of the Project, not the Project itself.

533 The Claimants also allege that "[f]or admitted political reasons, the Prime Minister and the Senate leader, who headed the ruling coalition Government, pre-emptively and effectively called upon Parliament to reject the Draft Law, and by proxy the Project."[909] While some senior officials indeed did not support the law, their individual stance on the Roşia Montană Law had no effect on the Project, the License or any asset of RMGC. Indeed, the Parliament eventually rejected the Roşia Montană Law nearly unanimously.[910]

534 The Claimants allege that "[t]hese political votes completely disregarded the Government's own specialized assessment and endorsement of the Project's merits, including through the laudatory parliamentary testimony of key Ministers and other Government officials."[911] Again, the Claimants confuse the Roşia Montană Law and the Project. The State cannot impose a law that is perceived as fundamentally socially illegitimate, in particular when the responsibility for securing the required social license is that of RMGC, and not that of the Government.

535 The Claimants acknowledge that the Project remained unaffected by the rejection of the Roşia Montană Law, and that the EIA Review Process continued as did other proceedings addressing RMGC's pending applications. However, they allege that "although the Government already had withdrawn support for the Project," "the Ministry of Environment held additional TAC meetings without legal basis, going through the motions so as to appear to be providing further process in 2014 and in 2015."[912] Nonetheless, these meetings (and renewal of other permits) demonstrate the

[909] Memorial, p. 362 (para. 799 e)).

[910] See *supra* paras. 357-362.

[911] *Id*.

[912] Memorial, p. 363 (para. 799 g)).

Government's good faith and willingness to continue to consider the development of the Project, should RMGC be able to meet all the permitting requirements and to obtain the required social license.

536 The Claimants further assert that, after the rejection of the Roşia Montană Law, "the State prosecutor commenced abusive and groundless [redacted] investigations of RMGC."[913] The Claimants' account of the investigations is inaccurate and, in any event, the asserted link between them and the rejection of the Roşia Montană Law does not exist.

537 In November 2013, the Ploieşti Public Prosecutor's Office extended to RMGC and over 40 other companies an ongoing investigation into the Kadok group of companies.[914] It is uncontested that RMGC had a contract with the Kadok group of companies, and that it had made payments to companies that belong to the group.[915] Whether or not there was tax evasion, tax fraud and/or money laundering as a result thereof on the part of the Kadok group of companies, and whether or not it involved other companies, including RMGC, is something for Romanian [redacted] authorities to determine.

538 The Claimants allege that the fact and timing of the State's decision to make RMGC the subject of a [redacted] investigation provided Romania "with a basis to note in the Trade Registry that RMGC is 'under [redacted] investigation,' and thus tarnish its reputation, and also provided the State with the ability to extract documents and information from RMGC if and when useful to the State's interests."[916]

539 The Claimants have provided no evidence in support of their suggestion that the investigations sought to tarnish RMGC's reputation or extract documents and information from RMGC. Both contentions are unfounded

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913 [redacted].

914 See *supra* paras. 407-408; **Tanase II**, p. 92 (para. 240).

915 Gabriel Canada Management's Discussion and Analysis, Second Quarter 2016, at **Exhibit R-20**, p. 5; **Tanase II**, p. 92 (para. 239).

916 Memorial, p. 247 (para. 562).

and, in any event, irrelevant to the expropriation claims. The investigations have had no impact on the operations of RMGC. The conservatory measure ordered by the Ploiești public prosecutor consisting of blocking the funds corresponding to the purchase price of the goods ordered from the Kadok group is an entirely legitimate measure and involves a modest sum of money.[917]

540 The Claimants further complain that "Minvest stopped cooperating as shareholder in RMGC" since November 2013.[918] The Claimants have indeed sought to persuade Minvest to make significant cash contributions to RMGC or to accept a new loan from the Claimants. However, Minvest does not have the necessary resources to invest in RMGC. The Claimants have known of Minvest's constraints since the beginning of the Project and Minvest is entitled to freely take the decisions that are consistent with its commercial interests as a shareholder in RMGC. Whether or not it is in its best commercial interest to accept a new loan is something that only Minvest can decide, in light of all relevant considerations, including tax implications. Although the State owns Minvest, the shareholders' dispute is between Minvest and Gabriel Jersey,[919] and not between the State and the Claimants. In any event, the Romanian State, in its commercial capacity as a shareholder of Minvest, is exploring and will continue to explore ways with Minvest to assist it in amicably resolving the shareholders' dispute between Minvest and Gabriel Jersey.

541 The Claimants complain that in December 2016 "[t]he Government proposed a moratorium on the use of cyanide in mining that is clearly incompatible with and would prevent implementation of the Project."[920] The Claimants' allegation is irrelevant in the context of their expropriation claims. First, the proposal was of no consequence as it was not approved;

[917] **Tanase II**, p. 92 (para. 240).

[918] Memorial, p. 363 (para. 799 g)).

[919] See *supra* paras. 395-404.

[920] Memorial, p. 363 (para. 799 g)).

and second, and in any event, the proposal was driven by legitimate environmental policy concerns which have been supported or adopted by many other countries as well as the European Parliament.[921] Third, the Claimants and RMGC have not demonstrated that they were in any way affected by this proposal.

542 The Claimants assert that "[t]he Government also has confirmed that it considers utterly meaningless RMGC's development and exploitation License for mining within the Roşia Montană perimeter, most of which is subject to still valid archaeological discharge certificates, by pronouncing the entire area of Roşia Montană a historical monument and thus precluding any activity that would disturb the landscape."[922] The Claimants' allegation is misguided.

543 Historical monuments located in the Roşia Montană area have been listed and protected since 1991, long before RMGC obtained the License. The list of historical monuments has been updated several times since then (in 2004, 2010 and 2015). The list reflects the status of historical monuments as of the date of its publication and, in case of new discoveries or developments, monuments can be added or removed in accordance with the law. To the extent that a listed site becomes the subject of an ADC, it may then be delisted. To the extent the ADC for a listed site is challenged or annulled in court, those developments may also affect the list of historical monuments.[923]

544 In this case, and regardless of the inclusion of Roşia Montană in the list of historical monuments, the Ministry of Culture has formally endorsed the Project. Its endorsement is, however, premised upon the existence of certain ADCs, including the ADC for Cârnic, which is currently being challenged by NGOs before Romanian courts. The Ministry's endorsement also contains conditions relating to the future research at Orlea.[924]

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[921] See *supra* para. 114.

[922] Memorial, p. 363 (para. 799 g)).

[923] See *supra* paras. 90-97 and 215-219.

[924] See *supra* para. 309.

545 Thus, if and when all permitting requirements are met, RMGC will have to work together with the Ministry of Culture to implement all measures defined in its Cultural Management Plan and any other conditions that may be attached to the environmental permit. The Claimants know this well and indeed acknowledge in the context of their allegations regarding Roşia Poieni that the list of historical monuments does not affect the development of a mining project.[925] Moreover, even if it did, the Claimants and RMGC have accepted the risk, when obtaining a mining license for an area that is known for its cultural heritage, parts of which were already declared historical monuments at the time RMGC obtained the License, that it might not be able to exploit the area in full, or that the implementation of the Project could otherwise be affected, as a result of discoveries to be made during the development of the Project.

546 The Claimants also complain that Romania is "actively pursuing its application to list Roşia Montană's 'cultural mining landscape' as a UNESCO World Heritage Site."[926] As with the list of historical monuments, this application, which is at an early stage, does not have any direct or immediate impact on the Project. There is no indication as to if and when the application will be decided, and whether it will be successful, in particular given Romania's existing commitments under the License.[927]

547 The Claimants allege that "the State has effectively abandoned its shareholder agreement with Gabriel as well as the License, and has abandoned the parties' joint venture company, RMGC."[928] The Claimants' allegation has no basis in fact. The License continues to be valid and in force, and Romania has respected its terms at all times. As to the Claimants' allegation of breach of RMGC's Articles of Association, Romania is not a party

[925] Memorial, p. 333 *et seq*. (para. 737).
[926] *Id*. at p. 363 (para. 799 g)).
[927] See *supra* paras. 416-417.
[928] Memorial, p. 363 (para. 799 h)).

to that agreement and could not have breached it. Furthermore, there is no evidence of any contractual breach let alone repudiation by Minvest.[929]

548 Finally, the Claimants allege that "Gabriel's investments in relation to the neighboring Bucium Projects were pulled into the political maelstrom that swirled around RMGC, and were also effectively blocked and rejected."[930] The allegation is unfounded and indeed contradicted by the Claimants' own evidence.

549 The Bucium Exploration License was awarded on 20 May 1999, and it expired on 19 May 2007.[931] Consequently, as from 19 May 2007, RMGC has had no rights whatsoever under any mining license in that perimeter.

550 RMGC applied for two exploitation licenses in the same perimeter in October 2007 and those applications were, according to the Claimants, to be decided within 90 days.[932] The Claimants now allege that the Government failed to decide on the Bucium Applications. The alleged failure to decide the applications took place more than three years before the alleged "political maelstrom" relating to the Roşia Montană Project, which allegedly started in August 2011.

551 Nonetheless, the Claimants allege that "[t]he State's continued refusal to move forward on RMGC's applications for exploitation licenses … cannot be viewed credibly as anything other than the intentional rejection … of the Bucium Projects."[933] The allegation is unfounded, for several reasons.

552 Before the Bucium Applications could be decided, NAMR needed to homologate the reserves and resources as explained above in **Section 7**. NAMR has not yet completed that work, and the law does not provide a timeframe within which NAMR must do so.[934] RMGC also did not expect

[929] See *supra* 395-404 and *infra* Section 9.5.

[930] Memorial, p. 360 (para. 799 a)).

[931] See *supra* paras. 421-424.

[932] See *supra* paras. 426-427.

[933] Memorial, p. 363 (para. 799 h)).

[934] See *supra* para. 428.

the applications to be decided before it solved the permitting challenges that it was facing in the Roşia Montană Project, as Gabriel Canada told its shareholders:

> "RMGC has applied to the NAMR to upgrade the exploration concession license relating to the Bucium Project into two exploitation concession licenses, however **no formal decision is expected until further progress has been made on permitting the Project at [Roșia Montană]**."[935]

553 Accordingly, RMGC never complained about an undue delay in the processing of the Bucium Applications, let alone seek legal recourse before NAMR or in the Romanian courts.[936] [redacted][937] omitting to mention RMGC's inaction for over five years, between the last submission of documents in April 2009 and a follow-up in July 2014.[938]

554 [redacted][939] The Claimants cannot prove NAMR's allegedly "intentional rejection" of the Bucium Applications. The applications have not been rejected; they are being analyzed on the basis of the most recent information provided by RMGC in March 2015 and will be decided in accordance with applicable law and regulations.[940]

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[935] Gabriel Canada 2012 Annual Information Form, at **Exhibit C-1810**, p. 15 (emphasis added).

[936] See *supra* paras. 430-431.

[937] [redacted]; [redacted]

[938] See *supra* para. 429.

[939] [redacted].

[940] See *supra* paras. 432-433.

9.1.2 Romania Has Not Breached Article VIII of the Canada-Romania BIT

555 The Claimants allege, without distinguishing between Gabriel Canada and Gabriel Jersey, that they "had a bundle of rights and legitimate expectations in relation to [their] investments in RMGC and in particular in respect of the Roşia Montană Project."[941]

556 As noted above, the Claimants argue that "Romania's conduct beginning in August 2011 ultimately gave rise to an indirect, creeping expropriation of Gabriel's investments."[942] The claim is based on an alleged composite act, without any attempt to engage with the applicable legal test under the provision invoked (Article VIII), or to explain concretely what protected investments of Gabriel Canada were allegedly affected, by which precise measures, and how.[943]

557 Moreover, while the alleged "composite act" started in August 2011, the Claimants have been unable to identify any particular measures taken by Romania throughout the summer of 2011, including in August 2011, that would constitute the first step of the alleged "composite act." All that the Claimants can point to in August 2011 are statements of Romanian politicians which expressed their personal view that it would be appropriate for Romania to reconsider the benefits that the State was to obtain from the Project.[944] These statements have not impacted Gabriel Canada's investments in any way, and the Claimants have not even attempted to show that they did. On the contrary, the evidence shows that Romania supported RMGC's efforts to overcome the permitting difficulties that it was facing over the years, not least by working and preparing together with the Claimants and RMGC the Roşia Montană Law.

558 Even assuming the Tribunal had jurisdiction over acts that allegedly occurred in the summer of 2011 (which is not the case, as demonstrated in

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[941] Memorial, p. 359 (para. 796).

[942] *Id*. at p. 342 (para. 757).

[943] That amounts to a failure to plead a case. See *e.g. Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012, at **Exhibit RLA-47**, p. 85 (para. 320).

[944] See *supra* paras. 208 and 233-235.

Section 8.1.4 above), the evidence shows that the Respondent did not take any measures in August 2011, when the alleged creeping expropriation started.

559 Moreover, as a matter of international law, the various actions or omissions which are alleged to constitute a composite act, must form part of a coordinated pattern; not any haphazard collection of events, put together after the fact, constitutes a composite act. As stated by the *EDF v. Romania* tribunal, which was faced with similar allegations of creeping expropriation:

> "The measures that Claimant has in mind, the aggregate effect of which would have brought about the creeping expropriation of its investment, have been individually examined by the Tribunal, which has reached for each of them a conclusion adverse to Claimant's claim. The only possible takings in the instant case were the sanctions of the Financial Guard, for which there was a judicial recourse, and GEO 104, which was a non-compensable police power measure. In the Tribunal's view, the measures in question, also taken in their aggregate effect, do not constitute a creeping expropriation, in addition to which **there was no evidence of a coordinated pattern adopted by the State for their implementation**."[945]

560 In this case, the Claimants' purported "composite act" consist of a disjointed collection of events which have no "coordinated pattern" other than the alleged linkage between the Government's purported attempt in August 2011 to "extort" benefits from the Claimants and RMGC, and the "blocking" of the environmental permitting process. However, as demonstrated above, there is, as a matter of fact, no evidence of any such "link." Moreover, the Claimants' investments have not been expropriated; RMGC continues to hold the License and all other assets and has made various applications in relation to the Project to Romanian authorities since the alleged dates of taking, including during this arbitration.

[945] *EDF (Services) Ltd. v. Romania*, Award, ICSID Case No. ARB/05/13, 8 October 2009, at **Exhibit CL-103**, p. 101 (para. 308) (emphasis added).

561 Unsurprisingly, Gabriel Canada's claim fails to meet the legal test for indirect expropriation under the Canada-Romania BIT. The relevant provision is Article VIII(1) of the Treaty, which applies to both direct and indirect expropriations:

> "Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable."[946]

562 The notion of "measures having an effect equivalent to nationalization or expropriation" is elaborated upon in Annex B of the BIT:

> "(a) The concept of 'measures having an effect equivalent to nationalization or expropriation' can also be termed 'indirect expropriation.' Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
>
> (b) The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the severity of the economic impact of the measure or series of measures, although the sole fact that a measure or series of

[946] Art. VIII, Canada-Romania BIT, at **Exhibit C-1**, p. 10.

> measures of a Contracting Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
>
> (ii) the extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations, and
>
> (iii) the character of the measure or series of measures, including their purpose and rationale; and
>
> (c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."[947]

563 Accordingly, to establish an indirect expropriation under Annex B and Article VIII(1), Gabriel Canada must prove the existence of measures attributable to Romania that have an effect equivalent to direct expropriation. To make that showing, it must cumulatively establish, on the facts, that (1) "the severity of the economic impact of the measure[s]" is such that they have an effect equivalent to expropriation; (2) they substantially interfered with Gabriel Canada's distinct, reasonable, investment-backed expectations; and (3) the character of the measures, including their purpose and rationale, is such that they must be considered equivalent to expropriation. It must also (4) rebut the presumption against indirect expropriation set out in Annex B(c).

564 The Claimants have failed to establish each of the requirements of Annex B, as demonstrated below.

565 As to the "severity of the economic impact" of the measures, an indirect expropriation requires a substantial, radical, severe or fundamental deprivation of rights:

[947] Annex B, Canada-Romania BIT, at **Exhibit C-1**, p. 25.

> "the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for indirect expropriation, taking or deprivation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralisation**.**"[948]

566 As demonstrated above, in this case there is no proof of any such effect on Gabriel Canada's investments. The Claimants' rights in RMGC, and the License held by RMGC, remain intact. From the day of the award of the License until today, RMGC has always had the right to perform mining activities in the Roşia Montană perimeter, provided that the exercise of such rights is allowed and consistent with the applicable environmental and land-use planning laws, and provided that it secures the necessary social license.[949] This situation has not changed.

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[948] *Enkev Beheer B.V. v. Republic of Poland*, First Partial Award, PCA Case No. 2013-01, 29 April 2014, at **Exhibit RLA-48**, p. 96 (para. 344); see also *Electrabel S.A. v. Republic of Hungary*, Award, ICSID Case No. ARB/07/19, 25 November 2015, at **Exhibit RLA-49**, p. 243 (hard copy: Part VI – page 19) (para. 6.62); *Metalclad Corp. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000, at **Exhibit CL-131**, p. 28 (para. 103); *T®nicas Medioambientales Tecmed S.A. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, 29 May 2003, at **Exhibit CL-122**, p. 44 *et seq*. (para. 116); *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, at **Exhibit RLA-50**, p. 35 *et seq*. (paras. 102-104); *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 69 *et seq*. (paras. 282-285); *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, at **Exhibit RLA-52**, p. 42 *et seq*. (paras. 200-201); *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, at **Exhibit CL-116**, p. 169 *et seq*. (paras. 603-604); *GAMI Investments, Inc. v. United Mexican States*, Final Award, 15 November 2004, at **Exhibit CL-165**, p. 47 *et seq*. (paras. 123-126); *Telenor Mobile Communications A.S. v. Republic of Hungary*, Award, ICSID Case No. ARB/04/15, 13 September 2006, at **Exhibit CL-158**, p. 30 *et seq*. (paras. 63-67); *Sempra Energy International v. The Argentine Republic*, Award, ICSID Case No. ARB/02/16, 28 September 2007, at **Exhibit CL-93**, p. 83 *et seq*. (paras. 284-285); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006, at **Exhibit CL-91**, p. 57 (para. 188).

[949] See *supra* Section 2.3.

567 Indeed, without the alleged measures, the Claimants would have been in the same situation that they find themselves in today: with a project that lacks the necessary permits and social license. This is the same situation that the Claimants were in in August 2011, when the alleged creeping expropriation process commenced. Gabriel Jersey's shareholding in RMGC has not been affected, nor, therefore, Gabriel Canada's alleged shareholding in Gabriel Jersey.

568 At most, the Claimants have suffered from permitting delays which however the Claimants have not demonstrated to be attributable to Romania. Furthermore, the delay has not prevented the completion of the Project, nor has it affected the Project in a manner, or to an extent, that would be tantamount to expropriation of RMGC or its assets. Annex B to the BIT clearly provides that the mere "adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred."[950]

569 Nor has Gabriel Canada proven that it had any "distinct, reasonable, investment-backed expectations" in relation to the Project that were substantially affected by the alleged measures. The Claimants' expectations are well documented and were communicated by Gabriel Canada to its shareholders on many occasions.

570 First, in 2001, shortly after the transfer of the License to RMGC, Gabriel Canada explained to its shareholders:

> "There can be no assurance that all permits which Gabriel may require for exploration, construction of mining facilities and conduct of mining operations will be obtainable on reasonable terms or on a timely basis, or that such laws and regulations would not have an adverse effect on any mining project that Gabriel may undertake."[951]

571 In 2010, Gabriel Canada reiterated its expectations with respect to the Project:

[950] Annex B, Canada-Romania BIT, at **Exhibit C-1**, p. 25.

[951] Gabriel Canada 2000 Revised Annual Information Form, at **Exhibit C-1798**, p. 22.

> "Gabriel must obtain a large number of permits, approvals and authorizations from the local, county and federal levels of the Government of Romanian in order to proceed with the development, construction and operation of the Roşia Montană Project. These approvals and authorizations may require amendments to existing legislative or regulatory frameworks by the Romanian Federal, Regional, County or Local governments in order to complete the permitting and financing of the Roşia Montană Project.
>
> No modern mine has ever been permitted, constructed or operated in Romania. The existing EU and Romanian laws relating to the permitting of a large-scale industrial project like Roşia Montană are being applied for the first time in Romania in this case. As the first company to attempt to permit a modern mine in Romania, there are significant risks that the governmental review and approval process and actions with respect to permitting could be delayed due to circumstances beyond Gabriel's control."[952]

572 Second, as to the social license, Gabriel Canada was fully aware of the challenges that it was facing:

> "As a mining company seeking the 'social license' with which to operate, we know where we come down in this debate. Long before any mining takes place, we are judged on our impact on the local community. This notion makes our commitment to sustainable development central to our success at Roşia Montană."[953]

573 The Claimants accordingly expected a complex process to acquire all "permits, approvals and authorizations from the local, county and federal levels," and they understood that they might not be able to obtain all the required permits, and even if they did, that the Project might not remain economically viable in view of the conditions attached to such permits.

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[952] Gabriel Canada 2009 Annual Information Form, dated 10 March 2010, at **Exhibit C-1807**, p. 32.

[953] Gabriel Canada 2009 Responsibility Report, at **Exhibit C-764**, p. 1.

574 The Claimants were also aware that the Project could "require amendments to existing legislative or regulatory frameworks," and that the amendments would have to be approved by the competent State organs, which could accept or reject the proposed new legislation. The Claimants were also aware that they would have to secure the social license for the Project, and that if they failed, it would become non-feasible, even if they were able to obtain all the required legal permits.[954]

575 In light of the Claimants' expectations, the alleged measures could not have, and in fact did not, "interfere" with them. The EIA Review Process was complex and time-consuming because of the very nature of the Project, and because it was hampered by RMGC's inability to meet the various legal requirements for the completion of the review. The Claimants also

[954] Several tribunals have recognized that the social license is a fundamental requirement for the development of mining projects. See *Bear Creek Mining Corporation v. Republic of Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, at **Exhibit RLA-53**, p. 226 (para. 599) ("The Tribunal is not persuaded that Claimant has provided sufficient evidence in support of its claim that a hypothetical purchaser of the Santa Ana Project would have been able to **obtain the necessary social license to be able to proceed with the Project**, if it had been provided an opportunity to invest the necessary time and resources. Given the extent of the opposition, and the reasons for it, the Tribunal doubts that the Project could, in the short term at least, be considered to be viable by the time Supreme Decree 032 was adopted.") (emphasis added); *Copper Mesa Mining Corporation v. The Republic of Ecuador,* Award, PCA Case No. 2012-2, 15 March 2016, at **Exhibit RLA-54**, p. 47 (hard copy: Part 2 – page 2) (para. 2.16) (The tribunal summarized the issues on liability which it had to decideñ[w]hether Ascendant Ecuador and the Claimant failed to obtain **the required social licence to operate** the Junín concessions; and whether such failure was wholly attributable to the Claimant?") (emphasis added). The social license to operate was also an important issue in other mining disputes. See *Pac Rim Cayman LLC v. Republic of El Salvador*, Claimant Memorial on Merits and Quantum, ICSID Case No. ARB/09/12, 29 March 2013, at **Exhibit RLA-55**, p. 54 (para. 109) ("Our employees were trained to represent the Company in an open, honest and respectful manner, and **worked hard daily to earn the Companies' 'social license' to operate in El Salvador.**") (emphasis added); *South American Silver Limited v. Plurinational State of Bolivia*, Respondent's Rejoinder, PCA Case No. 2013-15, 21 March 2016, at **Exhibit RLA-56**, p. 208 *et seq*. (para. 653). The social license to operate has also been an issue in the context of development of energy projects. See *Mesa Power Group LLC v. Government of Canada*, Witness Statement of Rick Jennings, PCA Case No. 2012-17, 28 February 2014, at **Exhibit RLA-57**, p. 7 (para. 19) ("Increasingly, public acceptance or social licence is critical to determining whether projects are able to be approved and constructed."); *Lone Pine Resources Inc. v. The Government of Canada*, Respondent's Rejoinder, ICSID Case No. UNCT/15/2, 4 August 2017, at **Exhibit RLA-58**, p. 4 (para. 10), p. 17 (para. 43), p. 20 *et seq*. (paras. 51-53) and p. 45 (paras. 117-118).

requested changes to the existing laws, which changes were reflected in the Roşia Montană Law; however, as explained above, the Law was not approved.[955] Indeed, for the Claimants, the Roşia Montană Law was effectively an attempt to obtain, with the help of the State, the social license that it had failed to secure itself.

576 The Claimants have also failed to establish that the "character" of the alleged measures, "including their purpose and rationale," justify the finding of an indirect expropriation in accordance with Annex B of the Canada-Romania BIT. There is no link between the purpose and rationale of the various alleged measures, other than that of applying in good faith the existing laws or, as to the Roşia Montană Law, seeking to support the Claimants in the Project. There is no evidence to support the Claimants' allegation that the Romanian Government engaged in "coercive attempts to wrest from Gabriel a greater economic take from the Project,"[956] or that it "held the Project's permitting hostage" and "would not allow the Project to proceed unless Gabriel met the State's ransom for more RMGC shares and higher royalties."[957]

577 The Claimants attempt to rely on statements made by Romanian political figures, but these statements are taken out of context and in any event do not support the preposterous allegations the Claimants are making. Indeed, investment treaty tribunals have consistently, and rightly, considered irrelevant statements of politicians that are not accompanied by concrete

[955] The Claimants allege that they "reasonably and legitimately expected that the State would honor and respect its contractual commitments and agreements with Gabriel and with RMGC, and that it would assess the Project permitting fairly, transparently, in good faith, and in accordance with the applicable law and administrative process, notably including the State's review of the EIA Report under the auspices of the Ministry of Environment in consultation with the TAC.". Memorial, p. 299 (para. 679). If they were legally relevant as the Claimants describe them, those expectations were fully met, as shown *infra* in Section 9.2 in the context of the FET claims.

[956] Memorial, p. 360 (para. 799 a)).

[957] *Id*. at p. 360 *et seq*. (para. 799 c)).

measures, or that are contradicted or belied by the State's action.[958] As the tribunal explained in *S.D. Myers v. Canada*, it is the record as a whole that must be considered when assessing the conduct of the State, not the statements of individual politicians, who may simply express their own political views:

> "The intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives. Each of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole."[959]

578 Finally, the Claimants also fail to rebut the presumption in Annex B(c) of the BIT, to the effect that measures that are designed and applied to protect legitimate public welfare objectives, such as the environment, do not constitute expropriation except in rare circumstances:

> "Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."[960]

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[958] See *e.g. Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, at **Exhibit CLA-30**, p. 214 *et seq.* (hard copy: Part III – Chapter B – p. 4) (para. 8); see also *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/01, 15 January 2008, at **Exhibit RLA-59**, p. 63 *et seq.* (para. 137).

[959] *S.D. Myers v. Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 35 (para. 161).

[960] Annex B(c), Canada-Romania BIT, at **Exhibit C-1**, p. 25.

579 The presumption must be read in conjunction with Article XVII(2) and (3) of the Canada-Romania BIT which, as demonstrated above in **Section 8.1.6.1**, requires a heightened burden of proof to establish a breach of treaty in circumstances where the measures relate to legitimate exercise of governmental authority. The Claimants have manifestly failed to meet that burden, and do not even allege that the laws and regulations governing the EIA Review Process are inconsistent with the Canada-Romania BIT.

580 The Claimants contend that not only their rights under the Roşia Montană License, but also their rights in relation to the Bucium perimeter were expropriated. The legal basis of the Claimants' claim appears to be that, on the basis of its Bucium Applications, RMGC held development rights over the Bucium perimeter.[961]

581 Whether or not RMGC held mining rights as a result of its application for exploitation licenses for the Bucium perimeter is an issue that can only be determined by reference to Romanian law and not international law, which does not contain any substantive rules relating to creation of property rights.[962]

582 Under Romanian law, RMGC does not own any mining or other rights in the Bucium perimeter, and accordingly the alleged measures could not have affected RMGC's rights. Professor Bîrsan confirms in his legal opinion that until an exploitation license is granted, an applicant does not hold exploitation rights in a mining perimeter:

> "[T]he exclusive right to obtain the exploitation license is deemed fully exercised and exhausted as of the date the exploitation license is obtained, or, on the contrary, when the application for obtaining

[961] Memorial, p. 377 (para. 836).

[962] Art. 1(g), Canada-Romania BIT, at **Exhibit C-1**, p. 2; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi ® Szolg§ltat· Kft. v. The Republic of Hungary*, Award, ICSID Case No. ARB/12/2, 16 April 2014, at **Exhibit RLA-60**, p. 50 (para. 162); see also *Garanti Koza v. Turkmenistan*, Award, 19 December 2016, at **Exhibit CL-96**, p. 127 *et seq*. (para. 331); Z. Douglas, *The International Law of Investment Claims* (1st edition, Cambridge University Press, 2009), at **Exhibit RLA-61**, p. 52 (para. 101).

the exploitation license is dismissed or expressly waived by the titleholder."[963]

583 The Claimants were aware of this and Gabriel Canada informed its shareholders that, even if the Bucium Applications were successful, a negotiation process would have to be completed before an exploitation license could be obtained by RMGC:

> "RMGC made such application … and is currently awaiting a response from the NAMR as to when negotiations can begin on the terms and conditions of the new exploitation concession license."[964]

584 The situation with the Bucium Applications is virtually the same as that faced by the tribunal in *Oxus v. Uzbekistan*. There, the tribunal held that the titleholder only had a right to formal, exclusive and good faith negotiations with the government, and that such right was not "property" under the applicable law and accordingly did not qualify as an "asset" under the applicable BIT:

> "The Arbitral Tribunal is of the opinion that **a right to formal negotiations cannot be subject to an 'expropriation' in the sense of Article 5 of the BIT, because it lacks the nature of proprietary right, *i.e.* of 'asset' in the sense of Article 5(2) of the BIT**. Finding otherwise by following Claimant's reasoning would lead to assuming that the State had an obligation to conclude an agreement at specific conditions. This would contradict the relevant contractual provisions, which emphasized aspects such as a 'negotiation' and 'mutually acceptable terms.' Finding that a right to mere formal negotiations could be subject to expropriation in the sense of Article 5 of the BIT would lead to transforming an obligation to do something according to certain standards (*i.e.* '*une obligation de moy-*

[963] **Bîrsan**, p. 85 (para. 385).

[964] Gabriel Canada 2007 Annual Information Form, at **Exhibit R-302**, p. 25; see also **Bîrsan**, p. 86 (para. 391).

> *ens*') into an obligation to achieve a certain result (*i.e.* '*une obligation de r®sultat*'). This cannot be the purpose or meaning of Article 5 of the BIT."[965]

585 Case law is consistent on the issue. For example, in *Emmis v. Hungary*, Sláger Rádió held a license to broadcast which subsequently expired. The claimants argued that their rights had been expropriated, including their right to an "incumbent advantage" in a tender proceeding subsequent to the expiry of the license. The tribunal held, after a careful review of Hungarian law:

> "In the final analysis, the Tribunal is satisfied that the only proprietary right that Claimants had, capable of protection from expropriation, was the Broadcasting Right it acquired in 1997. That right was a right of limited duration. It expired on 18 November 2009. None of the ways in Claimants have sought to plead their case on the injustices that they allege were perpetrated upon them in the 2009 Tender meet the basic requirement of a property right."[966]

586 Similarly, in this case, the sole right held by RMGC was the procedural right to have its applications processed in accordance with the applicable law; but this right does not constitute property under Romanian law. It is therefore not "an asset" within the meaning of Article I(g) of the Canada-Romania BIT which could constitute an investment and as such could be expropriated.

587 Consequently, Gabriel Canada's expropriation claim is bound to fail, first, because the facts upon which the claim is based have not been proven and, second, because even assuming they had been proven, the claim does not pass the legal test for indirect expropriation under the BIT.

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[965] *Oxus Gold plc v. Republic of Uzbekistan*, Final Award, 17 December 2015, at **Exhibit RLA-62**, p. 152 *et seq*. (para. 301) (emphasis added).

[966] *Emmis v. Hungary*, Award, 16 April 2014, at **Exhibit RLA-60**, p. 80 (para. 255); see also *Generation Ukraine, Inc. v. Ukraine*, Award, ICSID Case No. ARB/00/9, 16 September 2003, at **Exhibit CL-135**, p. 95 *et seq*. (para. 22.1).

9.1.3 Romania Has Not Breached Article 5 of the UK-Romania BIT

588 The Claimants allege that the same set of facts on which they rely in support of their expropriation claim under the Canada-Romania BIT also amounts to a breach of Article 5(1) of the UK-Romania BIT. Article 5(1) provides, in the relevant part:

> "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation."[967]

589 Although Gabriel Jersey fails to plead its legal case, its indirect expropriation claim appears to be based on "measures having effect equivalent to nationalization or expropriation." The UK-Romania BIT does not define these measures; however, the test to establish an indirect expropriation is well established in international law. In the seminal *Starrett Housing* case, the Iran-United States Claims Tribunal explained indirect expropriation in these terms:

> "[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[968]

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[967] Art. 5(1), UK-Romania BIT, at **Exhibit C-3**, p. 5.

[968] *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Ban Omran, and Bank Mellat*, Award, ITL 32-24-1, 19 December 1983 (reprinted in 4 Iran - United States Claims Tribunal 112, 1985), at **Exhibit CL-119**, p. 154.

590 Investment treaty tribunals have consistently referred to this standard as the applicable standard.[969]

591 Gabriel Jersey's expropriation claim under the UK-Romania BIT fails substantially for the same reasons as Gabriel Canada's expropriation claim fails under the Canada-Romania BIT. First, as demonstrated above, the claim fails on the facts because Gabriel Jersey's shareholding in RMGC, nor RMGC's assets, including the License, have not been rendered useless as a result of any action taken by the Government; and second, even assuming such rights had been affected (which is denied), they have not been affected to an extent that amounts to expropriation, whether direct or indirect.[970]

592 Consequently, Gabriel Jersey's expropriation claim stands to be dismissed for lack of merit.

9.2 Romania Has Accorded Fair and Equitable Treatment to the Claimants' Alleged Investments

593 The Claimants allege that "beginning in August 2011 the State through an unlawful series of acts and omissions" breached its obligation to accord FET to the Claimants' investments.[971] It appears that, although the Claimants do not state it explicitly, their FET claims, like their expropriation claims, are based on the composite act theory.[972] While the Claimants rely, in substance, on the very same allegations in support of their FET claims

[969] See *supra* n. 948.

[970] As to the Bucium perimeter, under the UK-Romania BIT applications for rights are not an "asset", let alone one "admitted in accordance with the laws and regulations in force in the territory of Romania". See Art. 1(a), UK-Romania BIT, at **Exhibit C-3**, p. 3. The Claimants and RMGC have no rights in that perimeter that could have been expropriated.

[971] Memorial, p. 300 (para. 681).

[972] *Id*. at p. 300 (para. 681); *id*. at p. 309 (para. 686) ("The foregoing course of conduct by Romania, beginning in August 2011 cumulatively and over time egregiously violated the State's obligation under the BITs to afford Gabriel's investments fair and equitable treatment").

as they rely upon in support of their expropriation claims,[973] they make no attempt to explain how the same set of facts can simultaneously amount both to an expropriation and to a breach of the FET standards.

594 The Claimants' FET claims fail on the facts as they have failed to establish the factual basis of their claims (**Section 9.2.1**); and in any event, the Respondent's alleged conduct does not amount to a breach the FET standards under the two applicable BITs (**Sections 9.2.2** and **9.2.3**).

9.2.1 The Claimants Have Failed to Establish the Factual Basis of their FET Claims

595 The Claimants summarize the factual basis of their FET claims in the following terms:

> "[Romania] successively blocked the permitting process in support of its coercive and ultimately successful attempts to wrest from Gabriel an offer for a greater shareholding in RMGC and a higher royalty rate, in manifest disregard of the State's contractual agreements that formed the basis for Gabriel's investment. Thereafter, the Government completely jettisoned the lawful permitting process. Apparently for reasons of political expediency and a desire to avoid political accountability, the Government took the arbitrary decision to place the fate of the Project in Parliament's hands and to abide by Parliament's political judgment whether to endorse or, in the alternative, effectively terminate the Project."[974]

596 The Claimants' allegations are then developed in a series of bullet points, and as noted, although the Claimants do not state it clearly, it appears that these various events should be considered together ("cumulatively") and thus constitute a "composite act."[975]

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[973] Compare *id*. at p. 359 *et seq*. (para. 799 a) to h)) and *id*. at p. 301 *et seq*. (paras. 682 a) to n), 684 a) to d) and 685 a) to c)). On substance, the only additional factual allegation included in the FET claim is a recast of the allegations made in the provisional measures phase regarding the VAT audits, VAT Assessment and ANAF investigations.

[974] Memorial, p. 300 *et seq*. (para. 682).

[975] *Id*. at p. 301 *et seq*. (paras. 682 a) to n), 684 a) to d) and 685 a) to c)).

597 The listed events include NAMR's alleged delayed processing of the Bucium Applications after 2008, the updates to the 2004 list of historical monuments (in 2010 and 2015), various statements of Romanian politicians after August 2011 and until 2013, the development of the EIA Review Process between 2011 and 2015, the renegotiations of the License between the fall of 2011 and the spring of 2013, the submission to Parliament in the summer of 2013 and subsequent rejection of the Roşia Montană Law throughout 2013-2014, the Government's handling of the social protests against the Roşia Montană Law in the summer of 2013, the [redacted] investigations of tax fraud extended to RMGC in the fall of 2013, Minvest's shareholder's dispute with the Claimants lasting between the fall of 2013 and today, the proposed moratorium on the use of cyanide of the end of 2016, the VAT audits, VAT Assessment and ANAF investigations in 2016-2017 and Romania's application for Roşia Montană to become a UNESCO World Heritage Site in January 2017.[976]

598 The Claimants vaguely suggest that the listed events show that Romania did not respect the Claimants' rights, acted without transparency and due process, abused its power through coercive negotiations, disregarded the applicable rules and revoked its own prior decisions, all affecting the alleged legitimate expectations of the Claimants.[977]

599 In light of the overwhelming overlap between the allegations invoked in support of the FET breach claims and those underlying the expropriation claim, Romania only addresses below the main factual contentions that the Claimants appear to advance in support of their FET claims, *i.e.* that Romania (1) allegedly "blocked" the environmental permitting process; (2) "extorted" a larger share of benefits from Project; (3) "jettisoned" the environmental permitting process; and (4) placed the "fate" of the Project in Parliament's hands which effectively terminated the Project.

600 The Claimants' contentions have no merit.

[976] Memorial, p. 301 *et seq.* (paras. 682 a) to n), 684 a) to d) and 685 a) to c)).
[977] *Id.* at p. 309 (para. 687).

601 As to the first allegation, Romania never "blocked" the environmental permitting process. As demonstrated above, RMGC was simply unable to present the necessary documentation in support of its application, given the numerous NGO court and administrative challenges that resulted in annulment of a number of critical documents.[978] Consequently, RMGC has been unable to obtain the requisite surface rights, the requisite endorsements and permits for its proposed (2006) amended PUZ, and a valid urban certificate for the Project. It has also been unable to maintain a valid ADC for Cârnic, given that its first ADC was annulled and the validity of its second ADC is pending before the courts. All of these difficulties are fundamentally a consequence of RMGC's failure to obtain the necessary social license to develop the Project.[979]

602 Nor is there any merit in the Claimants' allegation that the Romanian Government tried "to wrest from Gabriel an offer for a greater shareholding in RMGC and a higher royalty rate."[980] The evidence rather shows that after the summer of 2011, the Claimants and RMGC freely entered into negotiations with the Government to amend the terms of the License. [redacted][981]

603 Romania did not "extort" the Claimants or RMGC before, during or after the November 2011 negotiations. Romania did not exert its governmental authority, or *puissance publique*, to start negotiations, nor in the course of the negotiations, let alone abuse its authority to strongarm RMGC into reaching an agreement; and in any event, the agreement that was eventually reached, was never implemented. As demonstrated above, there was

[978] See *supra* paras. 383-385.

[979] See *supra* paras. 364-366.

[980] Memorial, p. 300 *et seq.* (para. 682).

[981] See *supra* paras. 237-239.

also no link between these negotiations and the EIA Review Process, or the issuance of any other permit to the Project.[982]

604 The Claimants allege that after the November 2011 negotiations, the Government completely "jettisoned" the environmental permitting process. However, as demonstrated above, Romania complied at all times with the applicable rules and the Claimants have not identified any rules that would have been breached, nor complained that they were not properly heard in the course of the process.[983]

605 Nor were the TAC meetings suspended between November 2011 and May 2013. The absence of TAC meetings during this period was simply a consequence of RMGC's continued failure to secure the Ministry of Culture's endorsement (which it obtained in April 2013), an approved amended PUZ, and the pending litigation relating to both its urban planning documentation and the Cârnic ADC.[984]

606 Nor was the Ministry of Environment or the Government in a position to take a decision, either in 2012 or 2013, on RMGC's application for the environmental permit since the EIA Review Process had not been completed and the relevant legal requirements had not been met. Moreover, although the EIA Review Process did not progress during this period, the Ministry of Environment renewed key permits to RMGC in April 2012, the dam safety permits, and it also responded promptly and liaised with RMGC regarding the updated Waste Management Plan.[985]

607 During the TAC meetings in the spring of 2013, the TAC and RMGC discussed a number of issues, including RMGC's envisaged financial guarantee, the Waste Management Plan, compliance with the Water Framework Directive, and the status of RMGC's urban plans. Further to those meet-

[982] See *supra* paras. 236-241.

[983] See *supra* paras. 388-393.

[984] See *supra* para. 308.

[985] See *supra* para. 275.

ings, on 11 July 2013, the Ministry of Environment published a note regarding measures and conditions to be included in an environmental permit for the Project and invited the public to provide any comments by 30 July 2013.[986]

608 Although some TAC members had provided input regarding possible conditions for the environmental permit for the Project, the TAC had not yet discussed in any detail the specific and mandatory conditions and mitigation measures. The TAC would then need to reach a decision on the specific conditions to be attached to the environmental permit, in order to issue a favorable recommendation to the Ministry of Environment.[987] There were further discussions in the TAC meetings held in 2014 and 2015 regarding technical issues linked to the mitigation measures proposed in the EIA.[988] In the circumstances, the TAC was obviously not in a position to take a decision either on the permit or the conditions to be attached to it.

609 The Claimants also complain about the Roşia Montană Law and its rejection in Parliament. While the Claimants acknowledge that "in form the Parliament was only asked to review the Draft Law," they allege that "in substance the Government made clear that Parliament's vote on the Draft Law would serve as a proxy for a decision as to whether the Government would in effect terminate the Project altogether or issue the environmental permit to which it was clearly entitled and allow it move forward."[989] The Claimants further contend that "the law did not provide a role for Parliament in the permitting process."[990]

610 These allegations are unfounded. First, RMGC and the Government had agreed and worked together on the project to submit both the Roşia Montană bill and the draft special agreement to Parliament. RMGC stood to

[986] See *supra* paras. 307-320.
[987] See *supra* paras. 327-331.
[988] See *supra* paras. 371-380.
[989] Memorial, p. 304 (para. 682 h)).
[990] *Id*. at p. 300 (para. 680).

benefit greatly from the Roşia Montană Law, which amended laws applicable to the Project and put in place an expedited permitting schedule, which would have allowed RMGC to shortcut the challenges it was facing and would continue to face. RMGC accepted this way of proceeding and was involved in the preparation of the Roşia Montană Law.[991]

611 Also, as demonstrated above, the decision on the environmental permit was not affected by the submission of the Roşia Montană Law to Parliament. With or without the Roşia Montană Law, only the Ministry of Environment and the Government could issue the environmental permit following a recommendation by TAC. This procedure did not change, and would not have changed, even if the proposed Roşia Montană Law had been enacted.

612 Nor did the rejection of the Roşia Montană Law affect the EIA Review Process or any other permitting process. The TAC meetings held at the time when the Roşia Montană Law was being debated, and thereafter, as well the renewal of other permits applied for by RMGC demonstrate the Respondent's good faith and willingness to continue to consider the development of the Project, should RMGC eventually be able to meet all the permitting requirements and to obtain the required social license.

9.2.2 Romania Has Not Breached Article II(2) of the Canada-Romania BIT

613 The Claimants allege that Romania's conduct allegedly "cumulatively" breached Article II(2) of the Canada-Romania BIT. Article II(2) provides:

> "(a) Each Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

[991] See *supra* paras. 284-289 and 300-306.

> (b) The concepts of 'fair and equitable treatment' and 'full protection and security' in subparagraph (a) do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[992]

614 Annex D of the Treaty further clarifies the standard of fair and equitable treatment:

> "For greater certainty, 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the customary international law minimum standard of treatment of aliens…"[993]

615 Accordingly, in order to establish the alleged breach of Article II(2), Gabriel Canada must show that the Respondent's conduct was inconsistent with the minimum standard of treatment of aliens.[994] As demonstrated above, the Claimants have failed to establish the factual basis of their claims. Since the determination of whether the FET standard has been breached is essentially a fact-driven determination, the Claimants' failure to establish the relevant facts automatically calls for the dismissal of Gabriel Canada's claim.

616 However, the Claimants also misstate the applicable legal standard.

617 The Claimants contend that a breach of Article II(2) may result from an accumulation of different acts and rely on *Rompetrol v. Romania* in support.[995] However, they misstate the *Rompetrol* tribunal's findings. While the *Rompetrol* tribunal agreed that the breach of the FET standard may consist of a composite act, it stressed that "**this would only be so** where

[992] Art. II(2), Canada-Romania BIT, at **Exhibit C-1**, p. 4 (emphasis added).

[993] Annex D, Canada-Romania BIT, at **Exhibit C-1**, p. 30.

[994] Claimants' Request for Arbitration, p. 14 *et seq.* (para. 37).

[995] Memorial, p. 281 *et seq.* (para. 651).

the actions in question disclosed **some link of underlying pattern or purpose** between them; a mere scattered collection of disjointed harms would not be enough."[996]

618 Similarly, the *Glamis v. U.S.A.* tribunal held:

> "The Tribunal determines that, for acts that do not individually violate Article 1105 to nonetheless breach that article when taken together, there must be some additional quality that exists only when the acts are viewed as a whole, as opposed to individually. It is not clear, in general terms, what such quality would be in all circumstances."[997]

619 The Claimants' case does not meet this standard. It consists of a series of events that are not connected as a matter of fact and Romanian law. Just as the alleged "extortion" by the Government of more substantial benefits from the Project has no link whatsoever with the EIA process, which was hampered by RMGC's own failure to obtain the necessary documentation to progress the review process, there is no link between RMGC's failure to obtain such documentation and any State conduct. RMGC's failure to obtain the necessary documentation was a direct consequence of its own failure to obtain the necessary social license.

620 The Claimants also misrepresent the content of the minimum standard of treatment. According to the Claimants, the carefully crafted language of Article II(2) and Annex D should effectively be ignored because the minimum standard of treatment provides for the same level of protection as the FET standard.[998]

621 The Claimants seek to rewrite the Canada-Romania BIT. The minimum standard of treatment under customary international law is not the same as

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[996] *The Rompetrol Group N.V. v. Romania*, Award, ICSID Case No. ARB/06/3, 6 May 2013, at **Exhibit CL-151**, p. 146 (para. 271) (emphasis added).

[997] *Glamis Gold Limited v. United States of America*, Award, 8 June 2009, at **Exhibit CLA-7**, p. 13 (para. 25).

[998] Memorial, p. 282 (para. 652).

the treaty-based FET standard;[999] were it otherwise, the governments of Canada and Romania would not have wasted the time and effort in negotiating and drafting a treaty text that incorporates the minimum standard of treatment rather than the FET standard. In other words, the Claimants' argument contradicts a basic rule of treaty interpretation – the terms of the treaty must be given an effective meaning, or *effet utile*.[1000] As the tribunal in *Lemire v. Ukraine* stated the issue:

> "What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could

[999] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, ICSID Case No. ARB/11/33, 3 November 2015, at **Exhibit RLA-44**, p. 133 *et seq*. (paras. 382-383); see also *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, Award, ICSID Case No. ARB/01/3, 22 May 2007, at **Exhibit CL-92**, p. 82 (para. 258); *Sempra v. Argentina*, Award, 28 September 2007, at **Exhibit CL-93**, p. 89 (para. 302); *OKO Pankki OYJ, VTB Bank (Deutschland) AG, Sampo Bank PLC v. Estonia*, Award, ICSID Case No. ARB/04/5, 19 November 2007, at **Exhibit CLA-47**, p. 63 *et seq*. (paras. 230, 236 and 238); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008, at **Exhibit CL-106**, p. 175 *et seq*. (para. 591); *Total S.A. v. The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/04/1, 27 December 2010, at **Exhibit CL-67**, p. 55 (para. 125); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 11 April 2011, at **Exhibit RLA-63**, p. 73 *et seq*. (para. 329).

[1000] See *e.g Burlington Resources Inc. v. Republic of Ecuador*, Decision on Reconsideration and Award, ICSID Case No. ARB/08/5, 7 February 2017, at **Exhibit CL-198**, p. 61 (para. 166); *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No ARB/07/19, 30 November 2012, at **Exhibit CL-109**, p. 212 (hard copy: Part VII – page 23) (para. 7.83); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/11/2, 4 April 2016, at **Exhibit CL-62**, p. 170 (para. 634); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, Award, PCA Case No. 2011-17, 31 January 2014, at **Exhibit CLA-42**, p. 82 (para. 227); *Oxus Gold v. Uzbekistan*, Final Award, 17 December 2015, at **Exhibit RLA-62**, p. 165 (para. 354); *WNC Factoring Ltd (WNC) v. The Czech Republic*, Award, PCA Case No. 2014-34, 22 February 2017, at **Exhibit RLA-64**, p. 115 (para. 353).

> and should be transcended if the FET standard provided the investor with a superior set of rights."[1001]

622 The Claimants' position is also contradicted by the practice of investment treaty tribunals, which have consistently taken the view that a breach of the minimum standard of treatment requires egregious conduct. The relevant standard was originally defined in the *Neer* case:

> "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[1002]

623 While some tribunals have considered that the *Neer* standard, as originally formulated, may have evolved over time, the Claimants have not offered any evidence of an *opinio juris* rejecting the notion that minimum standard of treatment equates to a protection against egregious State conduct.[1003] Nor is the function of arbitral tribunals to hold State parties to a standard of conduct to which they have not agreed, as noted by the *Mobil v. Canada* tribunal:

[1001] *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, at **Exhibit CL-107**, p. 52 *et seq.* (para. 253).

[1002] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Reports of International Arbitral Awards, Volume IV, 15 October 1926, at **Exhibit RLA-65**, p. 61 *et seq.* (para. 4).

[1003] See *Glamis v. U.S.A.*, Award, 8 June 2009, at **Exhibit CLA-7**, p. 262 (para. 612); *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006, at **Exhibit RLA-66**, p. 65 (para. 200); *GAMI v. Mexico*, Final Award, 15 November 2004, at **Exhibit CL-165**, p. 40 (para. 103); *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, Decision on Liability and on Principles of Quantum, ICSID Case No. ARB(AF)/07/4, 22 May 2012, at **Exhibit CL-154**, p. 72 (para. 153); *Mesa Power Group, LLC v. Government of Canada*, Award, PCA Case No. 2012-17, 24 March 2016, at **Exhibit RLA-67**, p. 119 (para. 502). Even the *Waste Management II* tribunal to which the Claimants refer (Memorial, p. 283 *et seq.* (para. 654)) did not depart from the threshold of egregious conduct. See *Waste Management, Inc. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at **Exhibit CL-139**, p. 35 *et seq.* (para. 98).

> "Those standards are set, as we have noted above, at a level which protects against **egregious** behavior. It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law."[1004]

624 The *Neer* standard has been reaffirmed most recently in the *Al Tamimi v. Oman* case. In this case, which also involved a claim arising out of environmental regulation of a mining project, the tribunal interpreted a provision in the US-Oman FTA that is very similar to Article II(2) of the Canada-Romania BIT. The tribunal stated:

> "In the Tribunal's view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard. That is particularly so, in a context such as the US-Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment."[1005]

625 The *Neer* standard was also reaffirmed in *Mesa Power v. Canada*, where the tribunal also stressed that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of minimum standard of treatment of aliens:

[1004] *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, 22 May 2012, at **Exhibit CL-154**, p. 72 (para. 153) (emphasis added).

[1005] *Al Tamimi v. Oman*, Award, 3 November 2015, at **Exhibit RLA-44**, p. 137 (para. 390).

> "On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; 'gross' unfairness; discrimination; 'complete' lack of transparency and candor in an administrative process; lack of due process 'leading to an outcome which offends judicial propriety'; and 'manifest failure' of natural justice in judicial proceedings. Further, the Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached."[1006]

626 Here, the Claimants have not even attempted to establish any egregious conduct on the part of Romania, and accordingly Gabriel Canada has failed to establish a breach of Article II(2) – even assuming the Claimants' case on the facts were to be accepted.

627 Recognizing the weakness of their legal position on the applicable legal standard, the Claimants seek to import the FET standard of the UK-Romania BIT by invoking the MFN clause in Article III(1) of the Canada-Romania BIT.[1007] The Claimants' alternative argument is equally flawed.

628 First, as demonstrated below in **Section 9.2.3**, the Respondent' conduct did not breach the FET standard of the UK-Romania BIT, and accordingly Gabriel Canada's attempt to import this standard does not assist it.

629 Second, the Claimants attempt to import the FET standard from the UK-Romania BIT fails in any event in light of the narrow language of the MFN clause in Article III(1) of the BIT. This clause only applies to investments that are "in like circumstances:"

[1006] *Mesa Power Group, LLC v. Government of Canada*, Award, PCA Case No. 2012-17, 24 March 2016, at **Exhibit RLA-67**, p. 119 (para. 502); see also *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, 22 May 2012, at **Exhibit CL-154**, p. 71 *et seq.* (para. 152).

[1007] Art. III(1), Canada-Romania BIT, at **Exhibit C-1**, p. 5.

> "Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third state."[1008]

630 As demonstrated above in **Section 8.1.5**, Article III(1) therefore only applies to investments that are in "like circumstances," and consequently it serves to protect investments against discriminatory treatment, but does not allow importation of treaty standards from other treaties not contained in the basic treaty.

631 Consequently, in view of the restrictive language of the MFN clause in the Canada-Romania BIT, Gabriel Canada's attempt to "import" the FET clause of the UK-Romania BIT cannot succeed.

9.2.3 Romania Has Not Breached Article 2(2) of the UK-Romania BIT

632 The Claimants allege that Romania's conduct allegedly "cumulatively" breached Article 2(2) of the UK-Canada BIT.

633 The claim fails both on the facts as well as on the law. First, as demonstrated above, the Claimants have failed to establish the factual basis of their claim; and second, they misstate the applicable legal standard.

634 Article 2(2) of the UK-Romania BIT provides, in the relevant part:

> "Investments of nationals or companies of each Contracting Party shall at all times be accorded **fair and equitable treatment** … in the territory of the other Contracting Party."[1009]

635 The term "fair and equitable treatment" is not defined in the treaty. However, instead of making their case on the basis of the terms actually used – "fair" and "equitable" – the Claimants seek to replace them with other

[1008] *Id*.

[1009] Art. 2(2), UK-Romania BIT, at **Exhibit C-3**, p. 4 (emphasis added).

words.[1010] This is not the proper approach; the Tribunal's task is to determine whether the Respondent's conduct has been incompatible with the FET standard – that is, whether Gabriel Jersey has been able to show that the Respondent's conduct was unfair or inequitable – and not whether its conduct has been compatible with another standard, described in entirely different words.

636 According to the Claimants, a breach of the FET standard involves:

a) arbitrary modifications to the legal framework on which the investor reasonably relied; [1011]

b) arbitrary modifications to the standards and criteria that apply to permitting decisions not grounded in the applicable laws; [1012]

c) administrative decisions, including permitting, that do not respect basic principles of due process;[1013]

d) maladministration or feckless regulatory conduct;[1014] and

e) coercive actions aimed at forcing a renegotiation of contract terms.[1015]

637 While investment treaty tribunals may have used the type of language cited by the Claimants in their reasoning, as noted above, the determination of whether the FET standard has been breached is a particularly fact-sensitive determination which does not depend on the words used to describe the breach. It depends on the facts themselves, which must compel the conclusion that the respondent State's conduct has been unfair and inequitable.

638 In the present case, even assuming the content of the FET standard in Article 2(2) of the BIT was to be described with the language used by the Claimants, the facts of the case do not justify the determination that the

[1010] Memorial, p. 279 *et seq*. (paras. 645-651).

[1011] Memorial, p. 286 (para. 657).

[1012] *Id*. at p. 288 (para. 660).

[1013] *Id*. at p. 291 (para. 666).

[1014] *Id*. at p. 293 (para. 670).

[1015] *Id*. at p. 295 (para. 674).

standard has been breached. The facts certainly do not justify the conclusion that the Respondent's conduct has been unfair and inequitable.

9.3 Romania Has Accorded Full Protection and Security to the Claimants' Alleged Investments

639 The Claimants also make a claim for an alleged breach of the FPS standards.[1016] Again, although the Claimants do not state this clearly, it appears that the Claimants' FPS claims, like their expropriation and FET claims, are based on a composite act theory.[1017]

640 The Respondent has complied at all times with its obligation to provide FPS to the Claimants' alleged investments under the Canada-Romania BIT and under the UK-Romania BIT (**Sections 9.3.1** and **9.3.2**).

9.3.1 The Claimants Have Not Established the Factual and Legal Basis of their FPS claim under Article II(2) of the Canada-Romania BIT

641 Gabriel Canada's FPS claim is based on Article II(2) of the Canada-Romania BIT. Article II(2)(a) provides:

> "(a) Each Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including … full protection and security."[1018]

642 Subparagraph (b) further provides that:

> "(b) The concept of … 'full protection and security' in subparagraph (a) do[es] not require treatment in addition to or beyond that

[1016] *Id*. at p. 316 (para. 708).

[1017] Memorial, p. 322 (para. 713) ("have cumulatively caused the complete deprivation of the use, value, and enjoyment of Gabriel's investments").

[1018] Art. II(2)(a), Canada-Romania BIT, at **Exhibit C-1**, p. 4.

> which is required by the customary international law minimum standard of treatment of aliens."[1019]

643 The Explanatory Note in Annex D of the Treaty further clarifies that:

> "For greater certainty, … 'full protection and security' requires the level of police protection required under the customary international law minimum standard of treatment of aliens."[1020]

644 The BIT thus makes it clear that the FPS standard in Article II(2)(a) of the BIT (1) covers police protection and does not provide for broader "legal security;" but (2) does not require treatment beyond that which is required under the customary international law minimum standard of treatment of aliens. It is also well established, as stated in the seminal *Noyes* case, that the customary international law standard requires the State to maintain an adequate system of police protection, but does not create an obligation to prevent crimes or other, lesser violations of the law:

> "The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals."[1021]

645 The Claimants reiterate the unsupported allegations they also raise in connection with their expropriation and FET claims: the alleged attempt to

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[1019] *Id*. at Art. II(2)(b), p. 4 (emphasis added).

[1020] Annex D, Canada-Romania BIT, at **Exhibit C-1**, p. 30 (emphasis added).

[1021] *Walter A. Noyes (United States) v. Panama*, Award, 22 May 1933, General Claims Commission (United States and Panama) constituted under the Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932 (22 May 1933-29 June 1933), Reports of International Arbitral Awards, Volume VI, at **Exhibit RLA-68**, p. 311.

"coercively" renegotiate the terms of the agreements with the Claimants and RMGC; the alleged "refusal" to take administrative decisions, including to issue the environmental permit; the alleged "refusal" to take an administrative decision in regard to the Bucium Applications; the alleged "arbitrary" amendment of the 2004 list of historical monuments in 2010; the alleged failure to update the 2010 list and the enactment of the 2015 list; and the alleged "retaliatory" ANAF investigations.[1022] None of these allegations has any factual basis as demonstrated above in **Sections 9.1.1** and **9.2.1**, and, in any event, even if the Claimants had managed to prove any of them (which is denied), none of the alleged actions or omissions would amount to a breach of the FPS standard.

646 The Claimants further allege that civil society activists "inundated" [redacted] with threats of violence and were afraid of being "physically assaulted."[1023] However, the Claimants provide no evidence that either the representatives in question, or their families, informed the Romanian authorities, including the police, of such alleged threats, and that the authorities failed to protect them. The Respondent's obligation of due diligence to protect RMGC representatives and their families does not go as far as to having to prevent threats made by unknown individuals, in particular if they have not even been informed of such threats. As the tribunal held in *El Paso v. Argentina*:

> "the obligation to show 'due diligence' does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is 'reasonable' or 'due', depends in part on the circumstances."[1024]

[1022] Memorial, p. 318 *et seq*. (para. 712).

[1023] [redacted].

[1024] *El Paso Energy International Co. v. The Argentine Republic*, Award, ICSID Case No. ARB/03/15, 31 October 2011, at **Exhibit CL-152**, p. 193 (para. 523); see also *Mamidoil v. Albania*, Award, 30 March 2015, at **Exhibit RLA-69**, p. 157 (para. 821); *Electrabel v. Hungary*,

647 The Claimants also allege that "the Government created an environment that fostered and focused the ability of activists not only to organize and orchestrate street protests, but also to employ aggressive, threatening, and sometimes violent tactics against the Project with seeming impunity."[1025] These are serious allegations, however the Claimants have not produced a shred of evidence to support them, and any in any event, Romania has no obligation to protect an investor against "street protests" and demonstrations. The Claimants appeared to have shared this view at the time as they failed to file any complaints, criminal or otherwise.

648 [redacted][1026] [redacted][1027] However, the Claimants have not proven that the publications in question were illegal,[1028] and in any event, there is no evidence that RMGC ever filed a criminal complaint, or that the Respondent failed to act on such complaint.

649 Finally, the Claimants contend that, if the Tribunal considers the FPS standard in the Canada-Romania BIT is "limited in substance," Gabriel Canada is entitled to invoke the FPS standard in the UK-Romania BIT through the MFN clause in Article III(1) of the Canada-Romania BIT.[1029]

Award, 25 November 2015, at **Exhibit RLA-49**, p. 286 (hard copy: Part VII – 23) (para. 7.83); *Hesham T. M. Al Warraq v. Republic of Indonesia*, Final Award, 15 December 2014, at **Exhibit RLA-70**, p. 196 (para. 625). In *Convial v. Peru*, the tribunal similarly rejected that an investor can expect police authorities to permanently accompany the investor as that goes much beyond the limits of its obligation of due diligence. *Convial Callao S.A. and CCI Compa¶²a de Concesiones de Infraestructura S.A. v. Republic of Peru*, Final Award, ICSID Case No. ARB/10/2, 21 May 2013, at **Exhibit RLA-71**, p. 189 (para. 659).

[1025] Memorial, p. 317 (para. 710).

[1026] [redacted].

[1027] [redacted].

[1028] See *supra* paras. 409-411.

[1029] Memorial, p. 316. (para. 707, n. 1424).

This attempt fails for the same reasons as Gabriel Canada's attempt to import the umbrella clause and the FET standard from the UK-Romania BIT, as demonstrated above in **Sections 8.1.5** and **9.2.2**.

9.3.2 The Claimants Have Not Established the Factual and Legal Basis of their FPS claim under Article 2(2) of the UK-Romania BIT

650 Gabriel Jersey's FPS claim is based on Article 2(2) of the UK-Romania BIT, which provides, in the relevant part:

> "Investments of nationals or companies of each Contracting Party shall at all times … enjoy full protection and security in the territory of the other Contracting Party."[1030]

651 The terms "full protection and security" are not defined in the Treaty. The Claimants allege that the FPS standard "requires the State to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments; in that sense, it is said to be a standard of due diligence."[1031]

652 The Claimants' formulation misstates the scope of the FPS standard since while it is indeed a standard of due diligence, it only requires (as is inherent in the concept of due diligence) the State to protect the investors *vis-¨-vis* the conduct of third parties and not *vis-¨-vis* the State's own conduct; this latter obligation falls within the scope of other investment protection standards such as the prohibition of unlawful expropriation and FET.[1032]

[1030] Art. 2(2), UK-Romania BIT, at **Exhibit C-3**, p. 4.

[1031] Memorial, p. 311 (para. 695).

[1032] *Oxus Gold v. Uzbekistan*, Final Award, 17 December 2015, at **Exhibit RLA-62**, p. 164 *et seq.* (paras. 353-354); *El Paso v. Argentina*, Award, 31 October 2011, at **Exhibit CL-152**, p. 192 *et seq.* (para. 522); see also *Paushok v. Mongolia*, Award on Jurisdiction and Liability, 11 April 2011, at **Exhibit RLA-63**, p. 73 (para. 326); *Electrabel v. Hungary*, Award, 25 November 2015, at **Exhibit RLA-49**, p. 286 (hard copy: Part VII – 23) (para. 7.83); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/04/6, 16 January

653 Finally, the Claimants contend that "upon analysis, the UK-Romania BIT and the Canada-Romania BIT contain the same standard and thus the same obligation for Romania to provide full protection and security."[1033] The Respondent agrees, insofar as the FPS standard in Article 2(2) of the UK-Romania BIT "is no more than the traditional obligation to protect aliens under international customary law."[1034]

654 Consequently, Gabriel Jersey's FPS claim under the UK-Romania BIT fails for the same reasons as Gabriel Canada's FPS claim under the Canada-Romania BIT.

9.4 Romania Has Not Impaired the Claimants' Alleged Investments by Unreasonable or Discriminatory Measures and Has Not Breached the National Treatment Standard

655 The Claimants allege that Romania breached Article 2 of the UK-Romania BIT by impairing the Claimants' alleged investments by unreasonable and discriminatory measures. The same allegations of discrimination are invoked in support of an alleged breach of the national treatment standard in Article III(3) of the Canada-Romania BIT.[1035]

656 On the facts, these claims are essentially based on the repetition of the allegations made in support of the Claimants' claims of expropriation and for breach of the FET and FPS standards, mixed with allegations of unjustified discriminatory treatment of RMGC compared to Cuprumin, and alleged enrichment of the Respondent as a result of the monies spent by the Claimants, *inter alia*, on cultural heritage research.[1036]

2013, at **Exhibit RLA-72**, p. 69 (para. 223); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, Decision on Jurisdiction, ICSID Case No. ARB/13/2, 15 December 2014, at **Exhibit RLA-73**, p. 85 (para. 367).

[1033] Memorial, p. 316 (para. 707).

[1034] *El Paso v. Argentina*, Award, 31 October 2011, at **Exhibit CL-152**, p. 192 *et seq.* (para. 522); see also *Joseph Houben v. Republic of Burundi*, Award, ICSID Case No. ARB/13/7, 12 January 2016, at **Exhibit RLA-74**, p. 40 *et seq*. (para. 159); *Oxus Gold v. Uzbekistan*, Final Award, 17 December 2015, at **Exhibit RLA-62**, p. 164 *et seq*. (para. 353).

[1035] Memorial, p. 329 *et seq*. (paras. 734-737).

[1036] *Id*.

657 To the extent that these allegations overlap with those made in support of the claims for breach of other treaty standards, they are unfounded as demonstrated above in **Sections 9.1**, **9.2** and **9.3**. Consequently, the Respondent will address below only the additional allegations made specifically in support of the alleged breach of national treatment (**Section 9.4.1**) and impairment claims (**Section 9.4.2**).

9.4.1 The Claimants Have Not Established the Factual and Legal Basis of their National Treatment Claim under Article III(3) of the Canada-Romania BIT

658 Similar to the MFN clause, the national treatment clause in Article III(3) of the Canada-Romania BIT is narrowly worded and only provides for protection of investments that are in "like circumstances."[1037] The Article provides:

> "Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, **in like circumstances**, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments."[1038]

659 The Claimants allege that the Respondent breached Article III(3) by providing less favourable treatment to Gabriel Canada's alleged investments than to Cuprumin, a Romanian State-owned mining company operating "adjacent" to Roşia Montană. According to the Claimants, the Respondent has allowed Cuprumin to operate in "clear" violation of the EU Mining Waste Directive, while "refusing" to issue an environmental permit for the Project."[1039]

[1037] Memorial, p. 323 (para. 716).

[1038] Art. III(3), Canada-Romania BIT, at **Exhibit C-1**, p. 5 (emphasis added).

[1039] Memorial, p. 333 (para. 736).

660 The Claimants further contend that in 2016 the Minister of Culture published on his personal Facebook page a map allegedly reflecting the 2015 list of historical monuments which "appeared to encroach upon the perimeter of the Roşia Poieni mine."[1040] The Claimants allege that the Government "quickly made clear, however, that Roşia Poieni's operations could continue unaffected."[1041]

661 As to the alleged preferential treatment of Cuprumin, the Claimants must demonstrate that Cuprumin and RMGC are "in like circumstances." They have failed to do so. As explained above in **Section 6.3.4**, while both Cuprumin and RMGC are mining companies, Cuprumin has been operating in Roşia Poieni for decades, and as a pre-existing mining operation is not subject to the EIA review process under Romanian or EU law. Cuprumin and RMGC therefore are manifestly not "in like circumstances," and Gabriel Canada's claim fails on this basis alone. As the tribunal confirmed in *Bayindir v. Pakistan*:

> "The Claimant is right that the project and business sectors are the same. This may be relevant in a trade law context. Under a free-standing test, however, such as the one applied here,[1042] that degree of identity does not suffice to displace the differences between the two contractual relationships."[1043]

662 The Claimants' allegation of preferential treatment is also inconsistent with the position they adopted previously. Indeed, in its contemporaneous dis-

[1040] Memorial, p. 333 *et seq*. (para. 737).

[1041] *Id*.

[1042] The "free-standing test" refers to the tribunal's prior conclusion that the national treatment obligation under the Turkey-Pakistan BIT was to be interpreted independently from trade law considerations. *Bayindir v. Pakistan*, Award, 27 August 2009, at **Exhibit CL-87**, p. 114 (para. 389) ("the Tribunal considers that the national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations.").

[1043] *Bayindir v. Pakistan*, Award, 27 August 2009, at **Exhibit CL-87**, p. 118 (para. 402).

closures to its shareholders, Gabriel Canada has consistently taken the position that the Project is subject to a more demanding regulatory regime than pre-existing mining operations in Romania:

> "No modern mine has ever been permitted, constructed or operated in Romania. The existing EU and Romanian laws relating to the permitting of a large-scale industrial project like Roşia Montană are being applied for the first time in Romania in this case. As the first company to attempt to permit a modern mine in Romania …"[1044]

663 As to the Claimants' suggestion that the Minister of Culture breached the national treatment standard by designating the entirety of Roşia Montană as a historical monument (with a 2 kilometer radius), while "quickly" confirming that Roşia Poieni's operations would not be affected by the 2015 list of historical monuments,[1045] is hardly worth a comment. In any event, it is based on a misunderstanding of the effect of listing of a monument in the list of historical monuments: when an operator or developer (such as RMGC) obtains an ADC relating to a listed site, such a site may be delisted. As explained above in **Sections 3.4.2** and **4.5.2**, RMGC has in fact secured a number of such ADCs.

664 Finally, the Claimants' attempt (in a footnote) to import the non-impairment obligation in the UK-Romania BIT through the MFN clause in the Canada-Romania BIT[1046] fails for reasons explained in **Sections 8.1.5** and **9.2.2**. In any event, the claim also has no merit as the Respondent has not taken any measures that would have "impaired" the Claimants' alleged investments.

[1044] Gabriel Canada 2009 Annual Information Form, dated 10 March 2010, at **Exhibit C-1807**, p. 32; Gabriel Canada 2011 Annual Information Form, dated 14 March 2012, at **Exhibit C-1809**, p. 25; RMGC press release dated 15 July 2012, at **Exhibit C-767**, p. 3; Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 32; Gabriel Canada 2013 Annual Information Form, at **Exhibit C-1811**, p. 38; Gabriel Canada 2014 Annual Information Form, at **Exhibit C-1812**, p. 43.

[1045] Memorial, p. 333 *et seq*. (para. 737).

[1046] Memorial, p. 323 (para. 716, n. 1445).

9.4.2 The Claimants Have Not Established the Factual and Legal Basis of their Impairment Claim under Article 2(2) of the UK-Romania BIT

665 Gabriel Jersey's impairment claim is based on Article 2(2) of the UK-Romania BIT, which provides, in relevant part:

> "Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party."[1047]

666 In order to meet the requirements of Article 2(2), Gabriel Jersey must therefore show that the alleged measures (1) impaired the management, maintenance, use, enjoyment or disposal of a protected investment and (2) were unreasonable or discriminatory.[1048]

667 The Claimants contend that the Respondent has impaired Gabriel Jersey's alleged investments in Romania by unreasonable or discriminatory measures "in many of the same ways that it denied fair and equitable treatment and full protection and security."[1049] Consequently, as noted above, to the extent that the Claimants' claims are based on the same facts as the FET and FPS claims, they are unfounded as demonstrated above in **Sections 9.2** and **9.3**.

668 As to Gabriel Jersey's allegations relating to the alleged discriminatory treatment, the claim fails for the same reasons as Gabriel Canada's national treatment claim under the Canada-Romania BIT, see **Section 9.4.1** above.

669 As to Gabriel Jersey's allegations relating to the alleged unreasonable measures, the Claimants have failed to demonstrate any impairment of their alleged investments as a result of any of the measures invoked. As demonstrated in the context of the Claimants' expropriation claims above,

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[1047] Art. 2(2), UK-Romania BIT, at **Exhibit C-3**, p. 4.

[1048] *Electrabel v. Hungary*, Award, 25 November 2015, at **Exhibit RLA-49**, p. 308 (hard copy: Part VII – page 45 (para. 7.152).

[1049] Memorial, p. 323 (para. 717).

their investments have not been affected in any way. Nor has Gabriel Jersey been able to demonstrate that any of the measures invoked were unreasonable. They were all taken in the context of a legitimate environmental permitting process, and as demonstrated above in **Section 8.1.6.1**, the Claimants bear a particularly high burden of proving that any measures taken in the context of such a process should be considered "unreasonable." It is well established in international law that, based on the precautionary principle, the State is entitled to take regulatory and other action in the interest of protecting the environment, even if there is only a risk but no certainty of any environmental damage.[1050] The questions raised, and the further information required, by TAC in the context of the EIA review process were therefore entirely justified and reasonable, and the Claimants have utterly failed to show the contrary.

9.5 Romania Has Not Breached the Umbrella Clause of the UK-Romania BIT

670 The Claimants claim that the Respondent has failed to observe its obligations under the Roşia Montană License, the Bucium Exploration License and RMGC's Articles of Association,[1051] and as a result, is in breach of the umbrella clause in Article 2(2) of the UK-Romania BIT.[1052]

671 As demonstrated above in **Section 8.2**, the Tribunal has no jurisdiction over this claim because Gabriel Jersey is not a party to the two mining licenses and therefore cannot invoke Article 2(2) and moreover, as to the claim relating to RMGC's Articles of Association, the State of Romania is not a party to the agreement.

[1050] P. Sands, *Principles of International Environmental Law* (2nd edition, Cambridge University Press, 2003), at **Exhibit RLA-75**, p. 266 *et seq*.; see also **Dragos**, p. 8 (para. 44) and p. 5 (paras. 31-35). For the application of the principle by investment treaty tribunals, see *e.g. Emilio Agust²n Maffezini v. Kingdom of Spain*, Award, ICSID Case No. ARB/97/7, 13 November 2000, at **Exhibit RLA-76**, p. 22 (para. 67); *Chemtura Corp. v. Government of Canada*, Award, 2 August 2010, at **Exhibit CL-162**, p. 35 *et seq.* (para. 135).

[1051] Memorial, p. 337 *et seq.* (para. 748).

[1052] *Id*. at p. 334 (paras. 738-739).

672 The claims also fail on the facts. As demonstrated in **Sections 6.3.1** and **9.1.1** above, Minvest has always acted in good faith as a shareholder of RMGC.[1053] Romania has never "declared" that it would not honor the Roşia Montană License,[1054] as explained above.[1055] Also, as demonstrated above in **Sections 9.1.1** and **9.2.1**, Romania has not "coerced" RMGC to "offer to submit to the State's economic demands".[1056] Nor has Romania refused to act on the Bucium Applications, as explained above in **Sections 7** and **9.1.1**.[1057]

673 [redacted][1058] Consequently, as these provisions have not been invoked, Gabriel Jersey's claims are in any event inadmissible, even assuming the Tribunal had jurisdiction over them, which is not the case.[1059]

674 Finally, to the extent that Gabriel Canada seeks to invoke the umbrella clause in Article 2(2) of the UK-Romania BIT through the MFN clause in the Canada-Romania BIT,[1060] its claim fails, as demonstrated above in **Section 8.1.5**. Gabriel Canada's claim is also inadmissible and fails on the merits, for the same reasons as the claim of Gabriel Jersey.

[1053] Memorial, p. 341 (para. 753 f)).

[1054] *Id*. at p. 340 *et seq.* (paras. 753, a), d) and e)).

[1055] See *supra* Sections 4.4, 5.1, 5.10 and 9.1.1.

[1056] *Id*. at p. 340 *et seq.* (para. 753 b)).

[1057] *Id*. at p. 342 (para. 753 g).

[1058] Articles of Association of Euro Gold Resources dated 11 June 1997, at **Exhibit C-143**, p. 12 (Art. 22); [redacted].

[1059] *SGS Soci®®G®n®rale de Surveillance SA v. Republic of the Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, at **Exhibit RLA-77**, p. 66 *et seq.* (paras. 175-176); *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/9, 29 May 2009, at **Exhibit CL-197**, p. 63 (paras. 159-161).

[1060] Memorial, p. 334 (para. 740, n. 1488).

10 THE CLAIMANTS HAVE FAILED TO ESTABLISH CAUSATION

675 A claimant bringing an international claim must establish that there is a causal link between the alleged breach and the alleged loss or damage. However, the Claimants make virtually no attempt in their Memorial to prove a causal link between the allegedly complete deprivation of the entire value of their shareholding in RMGC and Romania's alleged breach of the BITs. Indeed, no such causal link exists.

676 This Section first sets out the requirement under international law for a claimant to establish both factual and legal causation, and in particular the absence of entitlement to compensation if the alleged harm would have occurred in the absence of the internationally wrongful act (**Section 10.1**).

677 The Claimants cannot meet their burden of proving the causal link between the alleged breach and the alleged damage to their investment, as the evidence on the record establishes that, regardless of the alleged breaches of the BITs, RMGC would have been unable to progress the Project for lack of a social license and its inability to obtain the requisite plans, permits, and surface rights (**Section 10.2**).

10.1 The Claimants Must Establish a Causal Link Between Their Alleged Loss and Romania's Alleged Breaches

678 The ILC Articles confirm the well-established principle that the international responsibility of a State does not exist in the absence of an "internationally wrongful act."[1061] The term "internationally wrongful act" is defined in Article 2 of the ILC Articles as an act or omission that (i) is attributable to the State under international law and that (ii) constitutes a breach of an international obligation of the State.[1062]

[1061] ILC Articles, at **Exhibit CL-61**, p. 32 (Art. 1).

[1062] *Id.* at p. 34 (Art. 2).

679 Pursuant to Article 31 of the ILC Articles, a State must make full reparation for any loss or damage "**caused by**" an internationally wrongful act.[1063] Commentary 9 to Article 31 of the ILC Articles explains that

> "it is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that 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."[1064]

680 Commentary 10 to Article 31 clarifies that "[t]he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process."[1065] Indeed, "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 'consequential' to be the subject of reparation."[1066] The criterion of "directness" "or "proximity" can be used to assess remoteness, since "in international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula.'"[1067]

681 Accordingly, the requirement of a causal link in international law has two main elements, namely (1) "factual" causation, or the requirement that there be a "sufficient link" between the wrongful act and the alleged damage,[1068] and (2) "legal" causation, or the requirement that the damage not be "too remote" of the alleged breach.[1069]

[1063] ILC Articles, at **Exhibit CL-61**, p. 91 (Art. 31) (emphasis added).

[1064] *Id.* at p. 92 (Commentary 9 to Art. 31) (alterations in original).

[1065] *Id.* at p. 92 (Commentary 10 to Art. 31).

[1066] *Id.*

[1067] *Id.*

[1068] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008, at **Exhibit CL-106**, p. 232 (para. 785).

[1069] ILC Articles, at **Exhibit CL-61**, p. 92 *et seq.* (Art. 31, para. 10). See also *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit CL-106**, p. 232 (para. 785).

682 As to factual causation, the tribunal in *Biwater v. Tanzania* made clear that a claimant must prove that the actions it complains of were "**the actual** … causes of the loss and damage for which [it] seeks compensation."[1070]

683 It is not sufficient for a claimant seeking to establish factual causation to show that a breach was one among several causes of loss. This was confirmed by the ICJ in the *ELSI* case, in which the Court ruled that even though the breach at issue "[n]o doubt … might have been one of the factors" that had led to the loss, "there were several causes acting together that led to the disaster to ELSI."[1071] It went on to apply an "underlying" or "dominant" cause test,[1072] finding that the "underlying cause" was not the breach, but rather the other causes it had identified.[1073]

684 The tribunal in *Lauder v. Czech Republic* adopted a similar approach and ruled that:

> "[e]ven if the breach … constitutes one of several '*sine qua non*' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause … did not become the superseding cause and thereby the proximate cause."[1074]

685 The distinction between the dominant and intervening cause was explained by the tribunal in *Lemire v. Ukraine* in the following terms:

> "The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and

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[1070] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit CL-106**, p. 233 *et seq.* (paras. 787, 798) (emphasis added).

[1071] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Rep 15, at **Exhibit CL-100**, p. 62 (para. 101).

[1072] See *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit CL-106**, p. 233 (para. 786).

[1073] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Rep 15, at **Exhibit CL-100**, p. 62 (para. 101).

[1074] *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, at **Exhibit RLA-52**, p. 52 (para. 234).

> proximate logical chain leads from the initial cause … to the final effect …; while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible…"[1075]

686 The tribunal in *Micula v. Romania* explained that an intervening cause may interrupt the causal link between the breach and the damage and become the cause for all (or at least a severable portion) of the damage:

> "With respect to the concept of directness, the Tribunal notes that under the ILC Articles not every event subsequent to the wrongful act and antecedent to the occurrence of the injury will necessarily break the chain of causation and qualify as an intervening cause. Indeed, the commentary to the ILC Articles explains that, in cases where 'the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault' (Comment 12 to Article 31 of the ILC Articles). The only other exception seems to be cases 'where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone', '[b]ut unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct' (Commentary 13 to Article 31 of the ILC Articles. Emphasis added).
>
> Thus, an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote. Unless they fall under either of these

[1075] *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CL-70**, p. 50 *et seq*. (para. 163).

> categories, cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation.
>
> Therefore, the question seems to be whether the intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote. Accordingly, when assessing the impact of an intervening cause, the Tribunal will first focus on whether the damage can be properly attributed to the cause cited by the Claimants, or rather to the intervening cause."[1076]

687 With respect to who bears the burden of proving the causal link, the answer depends on whether the positive aspect or the negative aspect of causation is at issue. The claimant bears the burden of proving the positive aspect of causation by demonstrating that, but for the breach, its injury would not have occurred.[1077] If the claimant is able to meet this burden, then the negative aspect of causation comes into play and the burden shifts to the respondent to prove that causation was broken by an intervening cause that in part or completely superseded the effects of its internationally wrongful

[1076] *Ioan Micula, Viorel Micula, and others v. Romania*, Award, ICSID Case No. ARB/05/20, 11 December 2013, at **Exhibit CL-174**, p. 245 *et seq*. (paras. 923-927). See also *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, at **Exhibit RLA-52**, p. 52 (para. 234) ("Even if the breach therefore constitutes one of several "s*ine qua non*" acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage.").

[1077] *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, Award, ICSID Case Nos. ARB/05/18 and ARB/07/15, 3 March 2010, at **Exhibit CL-68**, p. 146 (para. 453) ("the Claimants hold the burden of proving their loss in accordance with international law principles of causation."). *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CL-70**, p. 48 (para. 155) ("it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (*i.e.* not 'too remote'). The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act.").

act into a severable injury, as opposed to other concurrent events that contributed to or amplified the claimant's injury.[1078]

688 The requirement of legal causation in international law is described as a limitation of the scope of compensable loss to injury that is not too "remote."[1079] For instance, in *The Trail Smelter Case*, the tribunal found that the damages for lost business allegedly caused by fumes from a smelter were "too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded."[1080] The requirement of legal causation has also been described as a requirement that the loss must be the "natural and normal consequence" of the breach,[1081] and that it must not be "speculative."[1082]

689 In the case of a breach of a BIT, whether in the context of unlawful expropriation (direct or indirect) or the breach of any other treaty standard, compensation will therefore only be due if the claimant proves a sufficient causal link between the breach of the treaty and the loss sustained by the investor.[1083] Accordingly, even if a State's liability for a breach of a BIT is established, it does not owe compensation unless the investor establishes

[1078] *Anatolie Stati, Gabriel Stati, Ascom Group S.A., and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, Award, SCC Case No. V (116/2010), 19 December 2013, at **Exhibit CL-182**, p. 290 (para. 1327).

[1079] ILC Articles, at **Exhibit CL-61**, p. 92 *et seq.* (Art. 31, para. 10). See also *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit CL-106**, p. 232 (para. 785).

[1080] *The Trail Smelter Case (US v. Canada)*, Awards, III RIAA 1905, 16 April 1938 and 11 March 1941, at **Exhibit RLA-78**, p. 1931 (para. 5).

[1081] *Provident Mutual Life Insurance Company and Others v. Germany (Life-Insurance Claims)*, Decision, United States-Germany Mixed Claims Commission, VII RIAA 91, 18 September 1924, at **Exhibit RLA-79**, p. 113.

[1082] *BG Group plc. v. The Argentine Republic*, Final Award, 24 December 2007, at **Exhibit CL-148**, p. 128 *et seq.* (para. 428).

[1083] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit CL-106**, p. 230 (para. 779). Put another way, the claimant must show a link between the wrongful act and the damages, or rather must prove that the "value of its investment was diminished or eliminated … and that the [alleged breaches of the BIT] were the actual and proximate cause of such diminution…" *Id*. at p. 233 (para. 787).

the causal link between the wrongful act and the alleged injury.[1084] Moreover, while the causal link between the breach and the harm is normally not an issue in the context of a direct expropriation (since the taking of property or a contractual right usually presupposes some harm), it remains pertinent in instances of indirect expropriation, since interference with a protected right does not necessarily result in an economically quantifiable loss.[1085]

690 In summary, and as the Claimants acknowledge, the award of reparations in international law is designed to "reestablish the situation which would, *in all probability*, have existed if [the internationally wrongful] act had not been committed."[1086] For the Claimants to establish the required causal link between the alleged breaches of the BITs and their claimed injury, they must demonstrate that, but for Romania's allegedly internationally wrongful acts, they would not have been permanently deprived of the entire value of their investment. However, even if the Claimants are able to establish the requisite causal link, Romania cannot be held liable if it can establish

[1084] *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CL-70**, p. 48 (para. 155) ("The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act.") See also *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, Award, ICSID Case No. ARB(AF)/12/8, 4 May 2016, at **Exhibit RLA-80**, p. 122 (para. 356) (finding that while Montenegro breached its obligations under Article 3(1) of the Netherlands-Yugoslavia BIT, because the claimants failed to show that they suffered damage as a result of the Montenegro's actions, there was no basis for an award of damages).

[1085] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008, at **Exhibit CL-106**, p. 136 (para. 464) ("A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation. In other words, the fact that the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test.") (emphasis in original). See also *id*. at p. 231 (para. 781) ("Whether any economic loss has in fact been caused by the 'taking' in question is a matter to be considered in the context of a claim for compensation, rather than being a necessary ingredient in the cause of action of unlawful expropriation itself.").

[1086] Memorial, p. 395 (para. 884) (emphasis in original) (citing *Chorz· w Factory (Germ. v. Pol.)*, Judgment No. 13 (Merits), P.C.I.J. (ser. A) No. 17, 13 September 1928, at **Exhibit CL-172**, p. 47).

that intervening or superseding causes not attributable to Romania were the dominant causes of the Claimants' alleged injury.

10.2 Romania's Alleged Breaches of the BITs Did Not Cause the Claimants' Alleged Loss

691 While the Claimants argue that the cumulative effect of a multitude of alleged measures breached the BITs[1087] and damaged their investment in the Project,[1088] they have utterly failed to prove how these alleged measures, whether individually or cumulatively, proximately caused the damage that they claim. On this basis alone, the Claimants' compensation claim should be rejected due to the Claimants' failure to demonstrate that the alleged damage was caused by Romania's allegedly internationally wrongful acts.

692 The Claimants contend, nonetheless, that there is a causal link between their alleged damage and Romania's purported failure to issue the environmental permit.[1089] However, the Claimants have failed to prove that, had

[1087] See Memorial, p. 300 *et seq*. (para. 682), p. 318 *et seq.* (para. 712), p. 329 *et seq.* (para. 735), p. 339 *et seq*. (para. 754), p. 359 *et seq*. (para. 799).

[1088] *Id*. at p. 397 (para. 889) ("Romania's treaty violations arose from the cumulative effects of the State's conduct over time, causing ultimately the complete deprivation of the use, benefit, and value of Gabriel's investments, including the rights to develop the Roşia Montană Project and the Bucium Projects.")

[1089] *Id*. at p. 329 (para. 735(a)) ("The Government repeatedly refused to complete the EIA procedure and issue the environmental permit as required by law."); *id.* at p. 329 *et seq*. (para. 735(b)) ("Having refused to take the administrative decision on the environmental permit required by law, the State through a continuous course of conduct blocked permitting, renounced its earlier agreements with Gabriel and RMGC in reliance upon which Gabriel had invested hundreds of millions of dollars, and coercively demanded in 2011 and again in 2013 a different financial arrangement to extract greater financial benefits for the State as a condition to permitting the Project. Specifically, the State held the crucial environmental hostage and blocked other permitting decisions starting in August 2011 and indefinitely thereafter, and made clear that it would not permit the Project unless Gabriel agreed to increase the State's shareholding in RMGC and the royalty payable to the State under the License."); *id.* at p. 361 (para. 799(d)) ("The Government then affirmatively acted on that decision in November 2011 when the Government in a concerted manner abusively intervened in the administrative permitting process to prevent its completion and with it the issuance of the environmental permit. … Rather than

the environmental permit been issued, and assuming no further breaches of the BITs, the Project would have been gone forward. In other words, the Claimants were required (but failed) to prove that, in the absence of Romania's allegedly internationally wrongful acts, RMGC would have been able to obtain a social license for the Project as well as secure all necessary discharges, urban plans, surface rights and building permits.[1090] Notwithstanding the Claimants' failure to prove causation, the Project would nonetheless have been blocked by RMCG's failure to obtain a social license (**Section 10.2.1**), and by RMGC's inability able to obtain all requisite surface rights (**Section 10.2.2**).

10.2.1 Any Loss Incurred by the Claimants Was Caused by RMGC's Lack of a Social License

693 It is undeniable that the social opposition to the Project pre-dates the measures that allegedly breached the BITs.[1091] Moreover, as discussed above, it is generally accepted in the mining industry that, in order to succeed, a mining project requires not only the necessary legal permits, but also a social license.[1092] In this case, as demonstrated above, as of the supposed date of expropriation, 31 July 2011, the Project was substantially hampered by its lack of a social license,[1093] and this social opposition intensified thereafter.[1094] The "underlying" or "dominant" cause of the alleged damage was therefore the Project's lack of a social license.

issue the environmental permit and allow the Project to proceed as the law required, the Government simply refused to do so and instead put the Project's future in Parliament's hands through the proxy of the Draft Law…")

[1090] As discussed *supra* in Section 9.2.

[1091] See *supra* Sections 3.2, 3.4, 4.2, 5.11, 5.12 and 6.1.

[1092] See *supra* Section 2.3.7.

[1093] *See supra* para. 261. **Thomson**, p. 22 (paras. 70-71), p. 24 et seq. (paras. 80-85) (statements from RMGC and Gabriel Canada indicating their awareness of the lack of social license), p. 28 (para. 95), and p. 31 et seq. (setting out Mr. Thomson's conclusions).

[1094] See *supra* Section 5.11.

694 One manifestation of the social opposition to the Project was the systematic legal challenges brought by Alburnus Maior (representing local residents) and other NGOs to almost every single administrative act necessary for the construction of the Project,[1095] to the point that RMGC attempted to circumvent the paralysis caused by the litigation campaign with the Roşia Montană bill.[1096] Even in the absence of Romania's alleged breaches of the BITs, the litigation campaign would have continued resulting in the continued paralysis of the Project.[1097]

695 In summary, on the assumption that the Claimants have been permanently deprived of the entire value of their investment (*quod non*), the underlying and dominant cause of this injury was the Project's lack of a social license. The Claimants have not demonstrated that, in the absence of the alleged breaches of the BITs, they would in all likelihood have been able to overcome the host of impediments caused by its lack of social license.

10.2.2 RMGC Would Not Have Been Able to Obtain the Requisite Surface Rights

696 As demonstrated in **Section 2.3** above, securing the License did not guarantee RMGC the right to build and develop the Project, and RMGC assumed the risk of obtaining all requisite permits and surface rights. Notably, the Claimants have not demonstrated that, in the absence of the alleged

[1095] Starting in 2005, NGOs had been successfully challenging the urban certificates, urban plans, and ADCs that needed to be in place prior to the Ministry of Environment issuing the environmental permit. See *supra* Section 3.4. While the Claimants argue that some of these plans, certificates and discharges were not required for the environmental permit to be issued, they acknowledge that the Project could not be built without them. Memorial, p. 70 *et seq*. (Section III.E). See also Annex IV.

[1096] See *supra* Section 5.10. The Project's lack of a social license ultimately prevented the passage of the Roşia Montană bill, following the Romanian Autumn social movement.

[1097] See Transcript of TV show Judeca Tu!, *TV R1*, dated 23 February 2012, at **Exhibit C-438**, p. 32 (Simion – legal advisor of Alburnus Maior) ("We are there to stay and however long it will last from now, we will appeal absolutely all environmental agreement or certificate issued by the relevant ministries").

breaches of the BITs, they would have been able to secure the necessary surface rights to the Project Area.

697 The Claimants recognize that RMGC never secured all the surface rights it required to obtain a building permit,[1098] [redacted] [1099] The Claimants were aware, at least as far back as July 2007, that unless RMGC could convince recalcitrant landowners to sell, the Project would likely fail, given that the only way out would be recourse to expropriation proceedings. As mentioned above in **Section 2.3.5**, expropriation proceedings require as a first (administrative) step that the Project be declared of public utility, which declaration RMGC could not take for granted. It is for this very reason that RMGC insisted on including in the Roşia Montană Law a provision that the Project would be declared of public utility.[1100]

698 Notwithstanding this uncertainty, and the fact that the Roşia Montană Law was not approved, the Claimants claim that "RMGC was confident that had the Project received its critical environmental permit and not been unlawfully derailed by the State, RMGC would have succeeded in acquiring

[1098] As discussed above at paragraph 79, by not securing the requisite surface rights before applying for the environmental permit, RMGC took on an important risk, as an inability to obtain all surface rights could force RMGC to (i) change its Project (if even possible) to work around those pockets of residents who refused to move (and of needing to redo an EIA on that basis) or (ii) try to have the Project declared of public utility and complete an expropriation process, which as discussed below was very difficult. See also **Dragos**, p. 68 *et seq*. (Section V.4.B).

[1099] [redacted] Contrary to what the Claimants [redacted] imply, many residents of Rosia Montana have publicly and repeatedly stated that they would not sell their property to RMGC under any circumstances. See *e.g*. TAC meeting transcript dated 9 August 2007, at **Exhibit C-475**, p. 32 (noting that there were at least three households that refused to leave and were situated exactly on the tailings management facility's site).

[1100] See *supra* Section 5.5.

all surface rights necessary to implement the Project."[1101] [redacted][1102]

699 The Claimants' false assumption is in turn based upon Prof. Bîrsan's erroneous analysis of the provisions of Romanian law pertaining to expropriation.[1103] Specifically, Prof. Bîrsan argues that activities involving "the extraction and processing of useful mineral substances" are defined by Expropriation Law 33/1994 (the **"Expropriation Law**") as works of "'public utility' that may warrant expropriation."[1104] On this basis he concludes that "[a]s the public utility of a project for exploitation of mineral resources is expressly recognized in the Expropriation Law 33/1994, a declaration to be made by the Government or by a local council decision of the public utility of a particular project is therefore only necessary to identify the level at which public interests are served by that project: national or local."[1105] For the following reasons, Prof. Bîrsan's conclusion is not correct.

700 Contrary to Prof. Bîrsan's opinion, Article 6 of the Expropriation Law does not "expressly recognize[] certain works to be of public utility, among

[1101] Memorial, p. 113 (para. 285).

[1102] [redacted]

[1103] **Bîrsan**, p. 57 *et seq*. (Section C.1).

[1104] *Id*. at p. 59 (para. 247) ("The Expropriation Law 33/1994 expressly defines several activities, including 'the extraction and processing of useful mineral substances', as works of 'public utility' that may warrant expropriation. Such works may be of 'national interest', in which case the public utility of a specific project is declared by Government decision, or of 'local interest' (*i.e.* benefiting mainly local communities), in which case the public utility is to be acknowledged by decision of the relevant local authorities (*e.g*., local council, county council)."). See also *id.* at p. 58 (para. 242) ("The law expressly recognizes certain works to be of public utility, among them 'the extraction and processing of useful mineral substances'.").

[1105] *Id*. at p. 59 (para. 248).

them the extraction and processing of useful mineral substances."[1106] Rather, Article 6 lists the types of activities that **could be** declared by the Government (or the county council) to be of public utility.[1107] This is clear from the provisions of Article 7(1) of the Expropriation Law, which states that "[t]he **public utility** is declared by the Government for the works of national interest and by the county councils and the General Council of Bucharest for the works of local interest."[1108] Similarly, Article 2 of Government Decision 583/1994[1109] provides in the relevant part that "[c]ommissions to perform the preliminary investigation **in view of declaring the public utility** for works of national interest shall be set up by the Government …"[1110] If, as Prof. Bîrsan incorrectly posits, works involving the extraction of and processing of useful mineral substances were automatically deemed to be of public utility, then there would be no need for a declaration to that effect, and the declaration would instead pertain solely to whether the project was of national or local interest. As Prof. Dragoș explains:

> "Art. 6 of Law no. 33/1994 provides certain works to be of public utility, among which: '…the extraction and processing of usable

[1106] **Bîrsan**, p. 58 (para. 242).

[1107] Law No. 33/1994 on Expropriation for Public Utility Cause, published in the Official Gazette of Romania, Part I, No. 139 of 2 Jun. 1994, republished in the Official Gazette of Romania, Part I, No.472, 5 Jul. 2011, at **Exhibit C-1628**, p. 2 (Art. 6). While projects whose activities are included in Article 6 of the Expropriation Law must still go through an administrative process before being declared of public utility, they do not require a law to that effect. See *id*. at p. 2 (Article 7(4)) ("For any works, other than those provided under Article 6, the public utility is declared, for each individual ease, by law.").

[1108] *Id*. at p. 2 (Art. 7(1)) (emphasis added).

[1109] GD 583/1994 with Regulation on the procedure of commissions for public utility declarations dated 31 August 1994, at **Exhibit R-123**. Prof. Bîrsan apparently failed to review this Government Decision for the purposes of his legal opinion. See **Bîrsan**, p. 104 *et seq*. (Annex 3 – List of Reviewed Legal Enactments and Administrative Deeds).

[1110] GD 583/1994 on commissions for public utility declarations, at **Exhibit R-123**, p. 1 (Art. 2) (emphasis added). See also *id.* at p. 1 (Art. 3) ("Commissions to perform the preliminary investigation **in view of declaring the public utility** for works of local interest, carried out on the territory of one single county or of the Bucharest municipality, shall be appointed by the decision of the standing delegation of the county council or by the decision of the mayor general of the Bucharest municipality, based on the request of the initiators of the work.") (emphasis added).

> mineral substances…' … It should not be interpreted that any and all projects of extraction or processing of mineral substances are *per se of* public utility, leading to the interpretation that the commission's role would be limited to the identification of the national or local interest of the respective project. The commission is called to make an assessment on whether it recommends or not for a specific work to be declared to be of public utility (process in which it does analyze the national or local interest involved, but its analysis in not limited to this matter)."[1111]

701 Prof. Bîrsan takes a contrary view, stating that the "procedure requires that the works be formally declared, on a case by case basis, as being of national interest or local interest, following a preliminary research phase carried out by a commission formed at the level of the Government or at a local level."[1112] However, Prof. Bîrsan's view is inconsistent with Article 7(1) of the Expropriation Law, which provides that it is the "public utility" of the works that is formally declared, rather than its being of "national" or "local" interest.[1113] Any doubt on this point is dispelled by the clear language of Article 8 of the Expropriation Law, which states that

> "The **public utility** is declared only after a preliminary research is carried out, and subject to the inclusion of the work into the urbanism and land management plans, approved according to the law, for localities or areas where such is intended to be carried out."[1114]

702 Furthermore, pursuant to Article 10 of the Expropriation Law, "whether there are elements to justify the national or local interest" is "determined" by the preliminary research – as opposed to "declared" – and this determination is "recorded" in minutes submitted to the Government (or the country council). Public interest is therefore also subject to a "determination," based on "research" of the relevant factors.

[1111] **Dragos**, p. 70 (para. 388).

[1112] **Bîrsan**, p. 58 (para. 242).

[1113] Law 33/1994 on expropriation, at **Exhibit C-1628**, p. 2 (Art. 7(1)).

[1114] *Id*. at p. 2 (Art. 8) (emphasis added).

703 As to the Regulation on the working procedure of commissions set up to conduct the prior assessment of the public utility declaration (the **"Regulations**") (as approved by GD 583/1994), they conclusively contradict Prof. Bîrsan's opinion that the Government's decision of the public utility of a mining project only identifies the level at which the public interest is served by that project:

> "At the final meeting, the members of the Commission shall debate, after performing the preliminary investigation, upon the decision to propose that the work **should be declared or not of public utility** and the result of the preliminary investigation shall be recorded in the protocol drafted according to Appendix no. 2 hereto."[1115]

704 An examination of Appendix 2 of the Regulations reveals that the determination of national or local interest is just one of many criteria to be taken into account for the decision on whether to declare a project public utility. These other criteria include the determination that the "[e]conomic-social, ecologic or any other advantages of any type support the necessity of the work," and the reasons "due to which the work cannot be accomplished by means other than expropriation."[1116]

705 It is therefore not a foregone conclusion that a project is of public utility simply because its activity is listed in Article 6 of the Expropriation Law. There is accordingly no basis whatsoever to the Claimants' assumption that Romania would, by law, be required to expropriate private landowners "in furtherance of RMGC's License rights."

706 [redacted]

[1115] GD 583/1994 with Regulation on the procedure of commissions for public utility declarations dated 31 August 1994, at **Exhibit R-123**, p. 4 *et seq*. (Art. 19) (emphasis added).

[1116] *Id.* at p. 7 (Appendix 2). See **Dragos**, p. 70 *et seq.* (para. 390) ("The commission performs an analysis meant to establish on one hand whether there are elements justifying national or local interest, whether there are economical-social advantages, ecological or of any kind in support of the works to be carried on the expropriated property, whether or not the works may be performed in other ways than through expropriation, whether the works are included in the approved urban planning documentation for the respective territory.").

[redacted][1117] The development of the Project necessarily includes the acquisition of all the surface rights within the exploitation perimeter, and therefore the titleholder assumes the risk that the owners of these surface rights will refuse to sell them. In essence, it was for RMGC to convince the landowners to sell their rights, and there was no guarantee whatsoever that the State would expropriate their land on behalf of a private project.

707 The Claimants have not attempted to show that, in the absence of Romania's alleged breaches of the BITs, Romania would have been able to expropriate the surface rights that RMGC required. For this reason alone, the Claimants are unable to establish that Romania's alleged breaches of the BITs proximately caused the loss that they claim.

708 In fact, there are serious doubts that the Project would ever have been declared of public utility.

709 First, the Claimants have not shown that they would have met the prerequisites for requesting an expropriation in the first place. Pursuant to Article 8 of the Expropriation Law,[1118] the expropriation of the required surface rights could not have begun prior to the PUZ being in place, which itself was the subject (and, so long as RMGC did not have the required social license, would likely continue to be the subject) of numerous legal challenges.[1119] Even assuming that the environmental permit for the Project had been issued in April of 2012,[1120] the expropriation process could

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[1117] [redacted].

[1118] Law 33/1994 on expropriation, at **Exhibit C-1628**, p. 2 (Art. 8).

[1119] See *supra* Section 4.5.1.

[1120] This date is based on the further assumptions that, shortly after what the Claimants allege "should have been the final TAC meeting on November 29, 2011 preceding issuance of the environmental permit", the TAC would have issued, in January 2012, a recommendation to the Ministry of Environment that the environmental permit be issued. Memorial, p. 6 (para. 22). The Ministry of Environment would have issued an environmental permit to RMGC in February 2012, and following a public comments period, the permit would have been approved by decision of the Government in April 2012.

not have begun before March 2017 at the very earliest, due to the invalidation of the PUZ in March 2016.[1121] Following the adoption of a new PUZ and the initiation of proceedings before the commission, these would likely have been stayed pending the results of likely challenges filed against the new PUZ.

710 Second, the Claimants have not shown that the commission would have recommended that the Project be declared of public utility. [redacted].[1122] Moreover, even under the best of circumstances, it would have been highly contentious for Romania to expropriate the private property of residents of Roşia Montană for the benefit of a private mining project. The contentious nature of such an expropriation was raised by Hungary in a 2006 letter to Romania:

> "[The] expropriation procedure can only be applied for a cause of public utility. Involuntary resettlement only for private profit would be against the [European Convention for the Protection of Human Rights and Fundamental Freedoms], which is binding law in Romania."[1123]

711 In view of the large-scale social opposition that the Project has encountered, and the Project's relatively short period of exploitation, it cannot be excluded that the Commission would have determined, following an examination of all relevant economic, social, environmental and legal criteria, that the Project is not of public utility.

[1121] As discussed in Section 4.5.1 above, the environmental permit issued by the Sibiu EPA was annulled in March 2016, thereby invalidating the PUZ. The date of March 2017 is based on the very optimistic assumption that it would only have taken RMGC a year to obtain a new PUZ.

[1122] See *supra* Section 5.4. [redacted]. Draft Roşia Montană Law and Agreement dated 27 August 2013, at **Exhibit C-519**, p. 1 (Art. 3).

[1123] Letter from Hungarian Ministry of Environment to Romanian Ministry of Environment dated 18 August 2006, at **Exhibit R-127**, p. 6.

712 Third, even assuming that Romania would have declared the Project of public utility upon the Commission's recommendation, the Claimants have not shown that the expropriation would have survived judicial scrutiny. In view of the large-scale social opposition, it is virtually certain that the expropriation procedure would have been challenged in courts, which, assuming the Government prevailed, could have easily caused many years of delay to the Project, as the various court decisions were appealed. When the likely delays in securing an approved PUZ are added to the likely delays in obtaining the surface rights, there is no realistic prospect that the Project could obtain a building permit in the foreseeable future.

713 In summary, the Project's lack of a social license and RMGC's inability to obtain the requisite surface rights are the underlying and dominant causes of the Claimants' alleged injury.[1124] When the effects of these two causes are combined, there remains no doubt that there is no causal link between Romania's alleged breaches of the BITs and the alleged complete deprivation of the entire value of the Claimants' investment. Furthermore, to the extent that Romania's alleged failure to issue an environmental permit caused damage to the Claimants' investment, such damage is severable from the complete deprivation of the total value of the Claimants' investment. Should the Claimants establish that Romania's alleged breaches of the BIT were the factual and legal cause of some damage to their investment, this injury would, at most, stem from the consequential delay in constructing the Project.[1125]

[1124] To the extent that such an injury exists.

[1125] See *infra* Section 11.2.

11 THE CLAIMANTS HAVE FAILED TO PROVE THE QUANTUM OF THE ALLEGED DAMAGE

714 Even assuming the Claimants had been able to establish causation, their case on quantum remains fundamentally flawed (**Section 11.1**). Moreover, the alleged breaches of the two BITs by Romania could only have at most delayed the Project's progress, and the quantum of the Claimants' injury should be assessed accordingly (**Section 11.2**). Finally, both pre-award and post-award interest should be calculated using simple interest at the risk-free rate (**Section 11.3**).

11.1 The Claimants Grossly Overstate the Quantum of the Alleged Damage

715 As noted above, the Claimants' quantification of their alleged damage is fundamentally flawed, because the market value of Gabriel Canada as of the Claimants' alleged Valuation Date is not a valid proxy for the quantum of such damage (**Section 11.1.1)**. Moreover, the Claimants grossly overstate the fair market value of Gabriel Canada as of the alleged Valuation Date (**Section 11.1.2**). The Respondent's expert, Dr. Burrows, finds that any valuation of the so-called Project Rights is inherently speculative, since the Project was many years from production, and has no historical record of revenues or profits. Notwithstanding these critical shortcomings, by using "best-case" assumptions, and by disregarding the significant discounts that would be applied as a result of the lack of social license, Dr. Burrows provides an assessment of the quantum of the Claimants' alleged injury (**Section 11.1.3**).

11.1.1 The Claimants Do Not Assess the Quantum of the Alleged Damage

716 The Claimants allege that "Gabriel's damages entail the lost fair market value of the rights to develop the Roşia Montană Project and the Bucium

Projects (referred to here as the 'Project Rights') as of July 29, 2011 (referred to here as the 'Valuation Date')."[1126] In furtherance of this assessment, counsel for the Claimants instructed Compass Lexecon to conduct their analysis of the value of the so-called Project Rights using the fair market value standard[1127] as of the alleged Valuation Date.[1128]

717 On the basis of these instructions, Compass Lexecon determined that since "the Project Rights were Gabriel Canada's sole prospective income-producing assets, Gabriel Canada's stock price through the Valuation Date reflects, from a minority shareholders' perspective, the market's assessment of the Project Rights. We thus base our damages assessment primarily on this stock market information."[1129]

718 Compass Lexecon's determination is based on a series of underlying assumptions, namely that Gabriel Canada's market capitalization is equivalent to the value of Gabriel Jersey, that the value of Gabriel Jersey is equivalent to the value of its shareholding in RMGC, and that the value of Gabriel Jersey's shareholding in RMGC is equivalent to the value of the alleged Project Rights. These assumptions are incorrect for two reasons. First, the market value of Gabriel Canada is distinct from the value of the Claimants' direct and indirect shareholding in RMGC (**Section 11.1.1.1**). Second, even if there were no such distinction, the Claimants' injury does not amount to the entire market value of the Claimants' shareholding in RMGC (**Section 11.1.1.2**).

[1126] Memorial, p. 403 (para. 904). Compass Lexecon defines "Project Rights" as the "Claimants' directly and indirectly held rights … related to the development of certain mining projects in Romania, including the Roşia Montană gold and silver project …, the Rodu-Frasin gold and silver project, and the Tarniţa copper and gold project." **CL Report**, p. 4 (para. 1). For the avoidance of doubt, assuming the Bucium Applications were successful, RMGC merely held the right to negotiate exploitation licenses over the Bucium perimeter, and as such it is inaccurate to refer to "projects" when discussing the fair market value of potential exploitation concessions in the Bucium perimeter, or potential mining activities in Rodu-Frasin and Tarniţa. See *supra*, paras. 505, 580-583.

[1127] **CL Report**, p. 22 (para. 37).

[1128] *Id.* at p. 4 (para. 2).

[1129] *Id.* at p. 23 (para. 42).

11.1.1.1 The Alleged Market Value of Gabriel Canada Is Irrelevant in this Case

719 Under international law, "the function of compensation is to address the **actual losses** incurred as a result of the internationally wrongful act."[1130] As confirmed in the *Lusitania* case:

> "The fundamental concept of 'damages' is … reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be **commensurate with the loss, so that the injured party may be made whole**."[1131]

720 In the words of the PCIJ in the *Ch· rzow Factory* case, compensation must "reestablish the situation which would, in all probability, have existed if [the illegal] act had not been committed."[1132] Therefore, a claimant is only entitled to the compensation necessary to remedy the actual loss it incurred,[1133] which it must prove. As the tribunal in *LG&E v. Argentina* stated, "the issue that the Tribunal has to address is that of the identification of the 'actual loss' suffered by the investor 'as a result' of [the host State's] conduct …: what did the investor lose by reason of the unlawful acts?"[1134]

[1130] ILC Articles, at **Exhibit CL-61**, p. 99 (Commentary 4 to Article 36) (emphasis added).

[1131] *Provident Mutual Life Insurance Company and Others v. Germany (Life-Insurance Claims)*, Decision, United States-Germany Mixed Claims Commission, VII RIAA 91, 18 September 1924, at **Exhibit RLA-79**, p. 39 (emphasis omitted and added), quoted in ILC Articles, at **Exhibit CL-61**, p. 99.

[1132] *Chorz· w Factory (Germ. v. Pol.)*, Judgment No. 13 (Merits), P.C.I.J. (ser. A) No. 17, 13 September 1928, at **Exhibit CL-172**, p. 47.

[1133] See *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, 16 December 2002, at **Exhibit CL-136**, p. 80 *et seq.* (para. 194) ("if loss or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of the loss or damage **actually incurred**.") (emphasis added).

[1134] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, at **Exhibit RLA-81**, p. 12 (para. 45). (emphasis omitted).

721 As noted above, the Claimants allege that their damage amounts to the fair market value of the Project Rights as of the alleged Valuation Date.[1135] However, the right to develop the Roşia Montană Project and the right to negotiate licenses over the Bucium perimeter are not rights that belong to Gabriel Canada or Gabriel Jersey; they are rights that belong to RMGC. RMGC has its own assets and the right to pursue claims in relation to those.[1136] The Claimants state that they are claiming compensation on their own behalf and not on behalf of RMGC – the regimes being separate for one and the other type of claims under the Canada-Romania BIT. If this is so, they can only claim losses affecting the value of their shareholding in RMGC.[1137] The quantum of the Claimants' alleged injury is therefore not the value of the allegedly expropriated Project Rights, but rather the decrease in the value of their direct and indirect shareholding in RMGC as a result of this alleged expropriation.

722 Moreover, by assuming that the market capitalization of Gabriel Canada is equivalent to the value of the Claimants' shareholding in RMGC, Compass Lexecon overstates the value of the Claimants' stake in RMGC.[1138] As Dr. Burrows explains:

> "In addition to the Project Rights and other assets of the Projects, Gabriel Canada's public market capitalization reflected other assets in addition to cash and financial assets, including the value of moveable and immovable property it held (directly or indirectly) in

[1135] Memorial, p. 403 (para. 904).

[1136] See *supra* para. 450.

[1137] Specifically, pursuant to Article XIII(1) of the Canada-Romania BIT, Gabriel Canada can only claim compensation for alleged loss or damage to the value of its alleged shareholding in Gabriel Jersey; it has no standing to claim any compensation for any loss or damage sustained by Gabriel Jersey (which has indeed brought its own claim) and, even less, by RMGC. See *supra* Section 8.1.2.

[1138] Besides its erroneous application of an acquisition premium, Compass Lexecon only made one adjustment to Gabriel Canada's 90-day volume weighted average market capitalization, by deducting from its valuation [redacted] in cash and short-term investments which as of the Valuation Date were held by Gabriel Canada apart from its assets in Romania. **CL Report**, p. 27 (para. 46).

> Romania or elsewhere, the value of the Băişoara property in Romania and the value investors may have placed on Gabriel Canada's management, its strategic position in Romania, and its backing by Newmont."[1139]

723 For example, as of the alleged Valuation Date, Gabriel Canada's market capitalization included the value of the Băişoara exploration license in Romania, which Gabriel Canada owned "through a wholly owned Romanian subsidiary, Rom Aur."[1140] However, Compass Lexecon failed to adjust Gabriel Canada's market capitalization for the value of the Băişoara exploration license, or for any other value that Gabriel Canada held in addition to its indirect shareholding in RMGC.

11.1.1.2 The Quantum of the Claimants' Alleged Damage Is Less Than the Entire Market Value of Their Shareholding In RMGC

724 Even assuming the Claimants could establish that Romania had indirectly expropriated the so-called Project Rights, they have not proven – nor could they – that all of RMGC's assets have been indirectly expropriated. The fact that RMGC still retains assets contradicts the Claimants' unsupported allegation that Romania's measures deprived them "of the entire value of [their] investments in Romania."[1141] Since RMGC's assets retained some value as of the Valuation Date, the quantum of the Claimants' damage cannot constitute the entire value of their shareholding in RMGC.

[1139] **CRA Report**, p. 11 *et seq*. (para. 26).

[1140] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 29. While Gabriel Canada later reported that it decided not to seek extension of the license for the exploration of Băişoara and that the license had expired in July 2011, it did not disclose this information until March 2012. Gabriel Canada 2011 Annual Information Form, dated 14 March 2012, at **Exhibit C-1809**, p. 6. Dr. Burrows states that [redacted].

[1141] Memorial, p. 379 (para. 842).

725 Neither the Claimants nor Compass Lexecon make any attempt to account for the value of RMGC's retained assets, thereby overstating the quantum of the Claimants' alleged injury.

11.1.2 Compass Lexecon Overstates the Fair Market Value of Gabriel Canada

726 Even if Gabriel Canada's market capitalization could conceptually be considered a proxy for the decrease in the value of the Claimants' shareholding in RMGC caused by Romania's alleged expropriation of the Project Rights (*quod non*, see above **Section 11.1.1**), Gabriel Canada's market capitalization does not reflect the value that a willing buyer would have paid for the Project Rights on the Valuation Date. Dr. Burrows explains that, [redacted] (**Section 11.1.2.1**), [redacted] (**Section 11.1.2.2**), and that a speculative bubble in the price of gold was inflating Gabriel Canada's share price (**Section 11.1.2.3**), none of which would have affected an informed buyer of the Project Rights.

727 Dr. Burrows further explains in his expert report that the disconnect between the market capitalization of Gabriel Canada and the fair market value of the Project Rights is compounded by the baseless acquisition premium applied by Compass Lexecon (**Section 11.1.2.4**). Finally, the alternative valuations provided by Compass Lexecon suffer from significant flaws, rendering them as unreliable as Gabriel Canada's market capitalization (**Section 11.1.2.5**).

11.1.2.1 [redacted]

728 Compass Lexecon's opinion that "Gabriel Canada's stock price through the Valuation Date reflects, from a minority shareholders' perspective, the

market's assessment of the Project Rights"[1142] is premised on its assessment that "the stock market incorporates all available information and expectations on production, costs and prices, as well as the market's perception of risk"[1143] and that

> "Gabriel Canada was covered by several analysts, [redacted]. This coverage, in addition to Gabriel's own dissemination of information via regulatory filings and press releases, means that the market was informed of the company's development prospects, opportunities, and risks."[1144]

729 [redacted] Shortly before the alleged Valuation Date, Gabriel Canada identified the development risks to the Project as follows:

> "There are significant risks that the commencement of construction of the new mine could be delayed due to circumstances beyond Gabriel's control. Such risks include delays in acquiring all necessary surface rights, delays in completing the acquisition, permitting and construction of a secondary resettlement site, delays in obtaining all zoning, land use regulations, environmental, construction and other required permits, approvals and authorizations required to construct and operate the new mine, delays in finalizing detailed engineering and a definitive construction contract, construction cost overruns, availability of all necessary process plant and mining equipment, availability of all necessary engineering services, technical trades and operating personnel, as well as unforeseen difficulties encoun-

[1142] **CL Report**, p. 23 (para. 42).
[1143] *Id.* at p. 23 (para. 41).
[1144] *Id.* at p. 24 (para. 43).

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SURJUDPV L´QDQFLQJ WKDW ZRXOG UHGXFH OHQGLQJ UDWHV OKLS ZLWK
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FRQWUDVW *[redacted] RI LWV KHDYLHU SRUWIROLR DQG HIIH
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&DQDGD $QQXDO ,QIRUPDWLRQ [illegible] DW
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734 [redacted] As Mr. Thomson explains:

> "An external study of the area in 2011, looked at 'the degree of confidence the community had in the revival of surface exploration and mining. Almost 2/3 of the respondents had little or very little confidence in the investors, and 1/3 stated they had strong confidence in the company,' which suggests a complete absence of social license."[1150]

735 [redacted]

736 While Gabriel Canada disclosed that litigation was frequently initiated against the Project,[1151] and that the "publicly stated objective of the NGOs in initiating and maintaining these legal challenges is to use the Romanian court system not only to delay as much as possible, but to ultimately stop the development of the Roşia Montană Project,"[1152] [redacted]

[1150] **Thomson**, p. 22 (para. 71).

[1151] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 21 *et seq*. (summarizing some of the more significant cases of "the approximately 140 separate litigation files regarding the Rosia Montana Project initiated by the NGOs since 2004"). Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 3 ("Over the years a number of foreign funded and Romanian NGOs have initiated a multitude of legal challenges against local, regional and national Romanian regulatory authorities that have the administrative authority to grant permits, authorizations and approvals for many aspects of the exploration and development of the Project.").

[1152] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 22. See also *id* at p. 35 ("Gabriel faces a number of legal challenges initiated by NGOs with respect to the development of the Rosia Montana Project. The publicly stated objective of these legal challenges is to suspend, annul, terminate, or prevent the issuance of, each of the licenses,

[redacted]

> "There are significant risks that the success of these legal challenges could result in the suspension, annulment, or termination, or prevent the issuance, of such licenses, permits, approvals, authorizations, or could result in a court decision ordering the dissolution of RMGC which could negatively impact Gabriel's development plans, result in additional expenses on its part, or prevent the development of the Rosia Montana Project."[1153]

737 When Gabriel Canada addressed the possible consequences of litigation, [redacted] with respect to litigation involving the urban certificate, Gabriel Canada stated that:

> "if future urbanism certificates are annulled by Romanian courts, it is not possible to assess what impact these court decisions will have on the Romanian authorities' actions with respect to ongoing permitting activities, and specifically the ongoing TAC review process of the EIA for the Rosia Montana Project. In addition, it is not possible to estimate how long it will take for any legal challenges to be resolved."[1154]

permits, approvals and authorizations required by Gabriel to develop and operate the Rosia Montana Project. In addition legal challenges also target the corporate activities of RMGC in Romania and seek declarations annulling certain activities, and in fact the dissolution of the company itself.").

[1153] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 35. See also Gabriel Canada Management's Discussion & Analysis, First Quarter 2011, at **Exhibit R-311**, p. 4 ("While the Company has designed the Project to follow all applicable laws to protect against permitting delays of the Project, legal challenges brought forward by NGOs or other parties in Romania – those currently ongoing and those that may be introduced in the future - may continue to cause potential setbacks to the Project timeline.").

[1154] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 24.

738 Given the TAC's previously stated position on this issue,[1155] and the possibility to estimate the duration of court proceedings in Romania with some broad degree of accuracy, [redacted]

739 [redacted], with respect to litigation involving the ADCs, Gabriel Canada stated that "any further successful legal challenges to the validity of any archaeological discharge certificate could negatively impact Gabriel's development plans, require additional work and re-application for discharge certificates, result in additional delays and expenses for the Company, or prevent the development of the Rosia Montana Project."[1156]

740 [redacted]

741 As explained above in **Section 10.2.2**, it is unlikely that RMGC would have been able to obtain all required surface rights on its own, and it therefore would have needed to request that Romania expropriate the missing rights on RMGC's behalf. While [redacted][1157]

[1155] See *supra* Section 3.5.

[1156] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 33. See also Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 25.

[1157] See *e.g.* Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 18 ("The Romanian mining law provides that the holder of mineral rights has the legal right to acquire the surface rights corresponding to those mineral rights upon negotiation

[redacted]

742 In the last Annual Information Form filed before the Valuation Date, Gabriel Canada stated:

> "Gabriel must acquire all necessary surface rights over the footprint of the new mine in order to apply for its construction permits and to obtain financing for construction of the new mine at Rosia Montana. … There can be no assurance that Gabriel will acquire all necessary surface rights, or acquire such rights at prices currently contemplated. There are significant risks that the acquisition of all necessary surface rights could be delayed due to circumstances beyond Gabriel's control and any such delays could negatively impact Gabriel's development plans, result in additional expenses on its part, or prevent the development of the Rosia Montana Project."[1158]

743 Notwithstanding this disclaimer, Gabriel Canada consistently projected that it would be able to obtain the missing surface rights within a year of obtaining its environmental permit:

> "In the absence of any other extraordinary events, legal or otherwise, the Company expects permitting processes to take approximately one year from the date the EIA and the new archeological discharge certificate for the Cârnic deposit are approved by the Romanian government. The majority of oustanding [sic] surface rights acquisitions and other permits and approvals including initial construction permits for the Project will also be obtained in that period,

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and payment of adequate compensation to the owner of the surface rights. This right under the mining law does not, however, provide exploitation concession holders with the ability to expropriate land directly, **nor are there specific legal mechanisms under Romanian law to allow a governmental authority to expropriate land under a mining concession on behalf of a private company (or having a private company as beneficiary**).") (emphasis added).

[1158] Gabriel Canada 2010 Annual Information Form, dated 9 March 2011, at **Exhibit C-1808**, p. 33.

> although there is no precedent or regulatory timeline against which to judge this estimation."[1159]

744 [redacted]

745 As discussed in **Section 2.3.6** above, RMGC was aware of the likelihood of additional finds during the construction and operation of the mine, and thus concluded in 2007 with the National Museum of History a Protocol for Chance Finds. This protocol provides that, in case of archaeological discoveries during the construction, exploitation or closure works, RMGC would suspend works to allow further archaeological research.[1160] Depending on the discoveries and the required protection measures (ranging from conservation by record to *in situ* preservation), RMGC might have to modify, or even terminate the Project[1161] – a risk that RMGC accepted.[1162]

[1159] Gabriel Canada 2010 Annual Report and Accounts dated 20 May 2011, at **Exhibit R-310**, p. 7. See also Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 3 ("Although there is no precedent or regulatory timeline, in the absence of any other extraordinary events, legal or otherwise, the Company expects permitting processes to obtain the majority of the outstanding surface rights acquisitions and other permits and approvals, including initial construction permits for the Project to take approximately one year from the date the EIA and the new archeological discharge certificate for the Carnic deposit are approved by the Romanian government."); Gabriel Canada Management's Discussion & Analysis, First Quarter 2011, at **Exhibit R-311**, p. 6.

[1160] 2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Chance Find Protocol, at **Exhibit C-388.03**, p. 33; see also GO 43/2000, at **Exhibit C-1699**, p. 7 (Art. 5(6), (9), and (10)); TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 55 *et seq.* (Timiş and Gligor) (discussing the Chance Find Protocol and RMGC's proposed mitigation measures and required budget).

[1161] Law 422/2001, at **Exhibit C-1702** p. 7 (Art. 10 (2)) (now found at Law 422/2001 as republished on 20 November 2006, at **Exhibit C-1703**, p. 5 (Art. 11 (2)); 2003 Mining Law, at **Exhibit C-11 (resubmitted)**, p. 7 (Art. 11); **Schiau**, p. 7 (para. 17).

[1162] See Ministry of Environment Note for public consultation dated 11 July 2013, at **Exhibit C-555**, p. 26 ("Titleholder shall not perform mining activities on land where protection regime

746 [redacted]

747 [redacted][1163]

748 Given the long history of human activity in the Project area, there was a definite risk that an unexpected archeological discovery could be made during the construction of the Project. [redacted]

749 Consistent with its apparent scheme to sell off its interest in RMGC as soon as it obtained the environmental permit,[1164] as of the Claimants' alleged Valuation Date, Gabriel Canada was projecting that the Project would "pour first gold by the end of 2014."[1165]

related to archaeological site is applicable, for as long as for the respective land the protection regime provided by the law is applicable.").

[1163] Gabriel Canada Material Change Report dated 22 July 2011, at **Exhibit R-312**, p. 2.

[1164] **Thomson**, p. 12 (para. 31) ("Furthermore, according to some, RMGC had a business strategy to 'make the discovery and then sell out to a more experienced firm.'").

[1165] Gabriel Canada Management's Discussion & Analysis, First Quarter 2011, at **Exhibit R-311**, p. 6. See also Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 7 (providing the same timeline); Gabriel Canada Management's Discussion & Analysis, Third Quarter 2010, at **Exhibit R-313**, p. 6. Almost immediately after the Claimants' alleged Valuation Date, Gabriel Canada disclosed that "the Project is now expected to pour first gold in 2015." Gabriel Canada, Management Discussion & Analysis, Second Quarter 2011 dated 3 August 2011, at **Exhibit C-1888**, p. 7. See also Gabriel Canada Management's Discussion and Analysis, Third Quarter 2011, at **Exhibit R-314**, p. 10 (projecting to "pour first gold in 2015"). Then, in its first disclosure of 2012, Gabriel Canada projected that "the Project could be expected to pour first gold in 2016." Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2011, at **Exhibit R-315**, p. 11.

750 Gabriel Canada premised its [redacted] timeline on "management's belief that once the EIA for the Project and the new archeological discharge certificate for the Cârnic area are approved by the Romanian Government, in the absence of any other extraordinary events, legal or otherwise…" it would take only one year to (i) obtain all outstanding surface rights, (ii) obtain all the other permits and approvals required for the building permit, and (iii) complete the control estimate and complete initial documentation on any potential third party financing.[1166]

751 Gabriel Canada repeated this [redacted] timeline in its presentations[1167] and press releases.[1168] [redacted] Given the track record of opposition by Alburnus Maior and other NGOs in challenging the various administrative permits necessary for the Project, and the significant delays that this opposition had generated, let alone the significant risks posed by the expropriation procedure and the lack of a social license, [redacted]

752 [redacted],[1169] [redacted]

[1166] Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 7; Gabriel Canada Management's Discussion & Analysis, First Quarter 2011, at **Exhibit R-311**, p. 6. Gabriel Canada also noted that "Ultimately, the Romanian Government determines the timing of issuance of the EIA approval and all other permits and approvals required for the Project, subject to the Romanian courts dealing with litigation from NGOs and any other parties in a timely manner." *Id.*

[1167] Gabriel Presentation to BMO Capital Markets, Global Metals & Mining Conference, Feb. 2011, at **Exhibit C-1434**, p. 14.

[1168] Gabriel Canada press release dated 10 March 2011, at **Exhibit R-308**, p. 3.

[1169] [redacted]

[redacted]:

a) [redacted];[1170]

b) [redacted];[1171]

c) [redacted];[1172] and

[redacted]; [redacted].

[1170] [redacted]; [redacted]; [redacted]; [redacted].

[1171] [redacted];

[1172] [redacted]

d) [redacted].[1173]

753 Ultimately, [redacted] led to an overvaluation of the price of Gabriel Canada's stock as at the alleged Valuation Date.

[redacted] *Resulted in a Substantial Overvaluation of Gabriel Canadaôs Stock Price*

754 It is undeniable that a well-informed and willing buyer on 29 July 2011 would have understood the social opposition that the Project faced and would have assumed, based on the Project's track record, that significant delays would be engendered by litigation. Following due diligence, it would have also understood that the Project would also encounter delays due to the likely expropriation procedure. The buyer would have also made his own assumptions regarding the time that would be needed to finance and construct the project. However, it is very difficult to determine the delays that such a buyer would have assumed for the purposes of determining the purchase price.

755 Yet, in hindsight it is possible to determine the minimum delay that such litigation would have engendered. As discussed in paragraph 209 above, in September 2011, NGOs initiated court proceedings [redacted]

[redacted].

1173 [redacted].

[redacted].[1174] [redacted][1175] Without this endorsement the Project was effectively stalled, as it could not proceed without a valid PUZ.

756 Crucially, **the delay caused by this litigation would have occurred even in the absence of Romania's alleged breaches of the BITs**, as RMGC could not initiate the expropriation procedures without a valid PUZ,[1176] and could not request a building permit without the required surface rights.[1177] As of March 2016, assuming (on the Claimants' case) that the environmental permit would have been approved in April 2012,[1178] the "critical path" for RMGC to obtain a building permit would have been (i) securing the approval of the amended PUZ, (ii) requesting the expropriation of the missing surface rights, (iii) applying for the building permit (described below as the "**Counterfactual Scenario**").

757 Assuming no further litigation from NGOs and third parties, a conservative assumption is that it would have taken approximately one year for RMGC to secure the approval of the amended PUZ.[1179] Further assuming that the commission convened pursuant to Government Decision 583/1994 would

[1174] [redacted].

[1175] [redacted].

[1176] Law 33/1994 on expropriation, at **Exhibit R-122**, p. 2 (Art. 8) ("The declaration of public utility shall be performed only after carrying out a preliminary investigation **and provided the work is registered in the urban planning and territory fit-out designs**...") (emphasis added).

[1177] **Bîrsan**, p. 60 (n. 219) (referring to Article 1 of Law 50/1991); Law 50/1991 on construction works dated 29 July 1991, at **Exhibit R-111**, p. 12 *et seq.* (Art. 7).

[1178] Specifically, the Claimants alleged that the TAC completed the technical review of the Project on 29 November 2011. See Memorial, p. 302 (para. 682(d)). Assuming this is correct (*quod non,* see *supra* Section 4.6), the TAC could not realistically have issued its recommendation to the Ministry of Environment before early January 2012. Assuming further that the Ministry of Environment issued the environmental permit in February 2012, the Government would have, at the earliest, approved the environmental permit in April 2012, following the public comment period.

[1179] This assumption considers both the time it would take RMGC to obtain a new endorsement from the Sibiu EPA and any other requisite endorsements from various authorities, as well as the time to then secure the approval of a new PUZ. See *supra* para. 296.

have proceeded very rapidly,[1180] and that neither the administrative nor the judicial phases of the expropriation procedure would have been delayed by litigation,[1181] it would have taken approximately one year for RMGC to obtain the missing surface rights.[1182] Finally, assuming that RMGC would have applied for its building permit immediately following the conclusion of the expropriation procedure, and further assuming that the building permit would have been approved within 30 days and would not have been challenged in court, RMGC would have received the building permit in **April 2018**. Given that this date is derived by assuming no further litigation from NGOs and third parties, and by assuming a rapid and uneventful expropriation process, it constitutes the earliest point in time RMGC could have obtained its building permit in the absence of Romania's alleged breaches of the BITs.

758 Mr. Bernard Guarnera of Behre Dolbear was instructed to determine the most likely start date for the Project, assuming that RMGC would have obtained the building permit in April 2018.[1183] On the basis of its analysis,[1184] Behre Dolbear determined that the Project could realistically expect to pour "first gold" in **April 2022**.

[1180] Notwithstanding that the "expropriation procedure … is regulated as a complex procedure with both administrative and judicial phases, each of them susceptible of various challenges" and that "it may have a significant length." **Dragos**, p. 72 (para. 399). Romania has never expropriated property on behalf of a private project, and there is therefore no reasonable basis to assume that the administrative portion of this process would conclude rapidly.

[1181] Again, this assumption is unrealistic, as it is almost certain that challenges would arise during both the administrative and judicial portions of the expropriations process.

[1182] This duration equates to the time period that Gabriel Canada was predicting would be required to complete the outstanding surface rights acquisitions. Gabriel Canada Management's Discussion & Analysis, Fourth Quarter and Full Year 2010, at **Exhibit R-307**, p. 3.

[1183] **BD Report**, p. 42 (para. 126) ("Behre Dolbear is to determine, based upon the various technical and economic factors to be assessed, when RMGC could have begun operations at the Project, assuming that the environmental permit and other administrative acts necessary for the Project to proceed had not been challenged in court, and assuming that RMGC would have obtained the Building Permit after the environmental permit had been issued by the Ministry of the Environment.").

[1184] *Id.* at p. 43 *et seq*. (Section 15).

Project Stage	Year -6		Year -5		Year -4		Year -3		Year -2		Year -1		Year 1		Year 2	Year 16	Year 17	Year 26
	Apr 2016-Mar 2017		Apr 2017-Mar 2018		Apr 2018-Mar 2019		Apr 2019-Mar 2020		Apr 2020-Mar 2021		Apr 2021-Mar 2022		Apr 2022-Mar 2023		Apr 2023 - Mar 2024	Apr 2037 - Mar 2038	Apr 2038 - Mar 2039	Apr 2047 - Mar 2048
	1H	2H	1H	2H	1H	2H	1H	2H	1H	2H	1H	2H	1H	2H				
Feasibility Study																		
Building Permit Issued					April													
Financing																		
Preconstruction																		
Final Design																		
Construction																		
Ramp-up																		
Production																		
Closure																		

759 By incorporating the real-world delay caused by litigation (and by assuming no further delays from litigation), and by adopting the realistic production schedule provided by Behre Dolbear, Dr. Burrows is using *ex-post* information in a conservative manner to inform an assumption that an informed buyer would have made in any event.

760 Dr. Ripinsky explains that *ex-post* information can be used to assess fair market value of expropriated property when it provides more specificity to an assumption that would have been made at the Valuation Date, stating that "it seems that subsequent events can play some role in testing the assumptions made by a tribunal at a particular date."[1185]

761 On the basis of his instructions, and upon reviewing Gabriel Canada's regulatory filings close to the alleged Valuation Date, and the contemporaneous analyst reports, Dr. Burrows concludes that:

> "Even the later projected dates for first pour as of late 2015 or early 2016 were very optimistic relative to the best case Counterfactual Scenario in which the Building Permit would have been received in April 2018 and first pour would be have been in April 2022. Investors' assessments of the value of Gabriel Canada would have been

[1185] S. Ripinsky with K. Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), at **Exhibit CL-196**, p. 255 (citing *Starrett Housing v. Iran*, Award, 16 Iran - US CTR 112, 14 August 1987, at **Exhibit RLA-82**, p.8 (para. 18) ("[T]he effect of subsequent events are to be ignored unless they were reasonably foreseeable on the valuation date. Such subsequent events, according to the Expert, may be used only to test assumptions made as to the future.") (emphasis and alterations in original)).

substantially lower if they had known the likely timeline of the Roşia Montană project."[1186]

762 Given that, as at the Valuation Date, an informed buyer would have determined upon performing its due diligence that the Project would not begin operations before April 2022 (if at all), [redacted] Dr. Burrows explains that an informed prudent investor would [redacted][1187] On the other hand, public investors would not have spent significant sums on performing due diligence on a junior mining company, and would have been much more reliant on the [redacted].

11.1.2.2 [redacted]

763 After reviewing Gabriel Canada's disclosures near the alleged Valuation Date, and the contemporaneous analyst reports, Dr. Burrows concludes that [redacted].[1188] His analysis of the capital expenditures and operating costs disclosed by Gabriel Canada near the alleged Valuation Date,[1189] [redacted], is summarized in the table below:

[1186] **CRA Report**, p. 18 (para. 39).

[1187] [redacted].

[1188] **CRA Report**, p. 18 *et seq*. (Section III.C).

[1189] These cost estimates were based on a 2009 NI 43-101 report compiled by Micon International Limited, Coffey Mining Pty. Ltd., MWH Americas, Inc., Independent Mining Consult, Inc, and Aurifex Pty. Ltd. Micon International et al., *Technical Report on the Roκia MontanŁ Gold Project, Transylvania, Romania* dated 4 March 2009, at **Exhibit C-127** (the "**Micon Report**").

[redacted]

764 [redacted][1190] He further states that [redacted][1192]

765 [redacted][1193] [redacted][1194]

766 [redacted][1195] Furthermore, Dr. Burrows explains that, [redacted]

1190 [redacted].

1191 *Id.* at p. 19 *et seq.* (paras. 42-46).

1192 *Id.* at p. 21 *et seq.* (para. 51).

1193 [redacted]).

1194 [redacted].

1195 [redacted].

[redacted][1196]

767 The overestimate in the value of Gabriel Canada, [redacted], constitutes yet another reason for why the market capitalization of Gabriel Canada as at the Valuation Date is not a valid proxy for the Claimants' alleged injury.

11.1.2.3 A Speculative Bubble in the Price of Gold Was Inflating Gabriel Canada's Share Price

768 Another factor that contributed to the overvaluation of Gabriel Canada's stock was the speculative bubble occurring in the 2010-2012 period in the world gold market.[1197] Dr. Burrows confirms that, on the Valuation Date, the price of gold was USD 1,627 per ounce, near its all-time high of USD 1,900 per ounce.[1198] The price has risen dramatically during the previous two years, resulting in a significant divergence between prices in the spot and futures markets for gold, and the price projections of the industrial participants in the gold market, the latter being in the range of USD 1,100 to USD 1,180 per ounce.[1199]

769 Compass Lexecon failed to account for the price distortion that would be caused by buyers and sellers of Gabriel Canada stock who were valuing Gabriel Canada using the high spot prices of gold instead of the much

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[1196] [redacted].

[1197] *Id.* at p. 24 *et seq.* (Section III.D).

[1198] **CRA Report**, p. 24 *et seq.* (para. 54).

[1199] *Id.* at p. 25 (para. 54).

lower expectations of knowledgeable industrial participants in the gold mining business. On the basis of this distortion, Dr. Burrows concludes that it is likely that "Gabriel Canada's public market capitalization was far above what large mining companies would pay for the assets owned by Gabriel Canada."[1200]

11.1.2.4 There Is No Basis for the Acquisition Premium Applied by Compass Lexecon

770 Compass Lexecon compounds its mistaken reliance on Gabriel Canada's market capitalization by applying a 35% acquisition premium to this amount, inflating the Claimants' already grossly overstated claim by an additional USD 852 million.[1201]

771 According to Compass Lexecon, investors generally pay acquisition premiums to protect themselves against potential discriminatory measures by the majority shareholder(s), to exploit synergies, or to seek to influence management.[1202] It argues that acquisition premiums are paid for natural resources acquisitions "to unlock shareholder value by providing financing and execution capabilities to a development program, to replenish and expand a mineral resource base, or to own scarce natural resource projects."[1203] Compass Lexecon contends that non-producing acquisition targets command, on average, higher premiums because "the acquirer may provide technical know-how and financing capabilities that would help those non-producing companies become operational, and hence fully ex-

[1200] *Id.* at p. 25 (para. 54). Dr. Burrows further explains that "[p]otential buyers of the Projects (which were primarily gold mineral assets) would base their valuation of these properties on long-term prices of about $1,100-1,180 per ounce in 2011 dollars, not on the high spot prices of gold prevailing as of the Valuation Date." *Id*.

[1201] **CL Report**, p. 32 (Table 4). Compass Lexecon also applies this acquisition premium in its additional valuation methods. See *id.* at p. 42 (Table 8) (applying a USD 845 million acquisition premium to the relative market multiples valuation; *id*. at p. 51 (Table 9) (applying a USD 738 million acquisition premium to P/NAV valuation).

[1202] **CL Report**, p. 30 (para. 50).

[1203] *Id.*

ploit the value of the underlying mining assets," concluding that, "[w]hatever reasons there might be for companies to pay acquisition premiums, they are a standard feature of transactions in the gold mining industry so that one cannot assess fair market value without taking this factor into account."[1204]

772 Dr. Burrows explains that there [redacted][1205] specifically (i) acquisition premiums are not "standard features" in assessing fair market values,[1206] (ii) by only looking only at acquisitions, Compass Lexecon provides a statistically-biased view of fair market value because it ignores the valuation information of all the firms or assets that are not acquired, and [redacted].[1207]

773 Dr. Burrows clarifies that the economics literature has identified three reasons why acquirers pay acquisition premiums (synergies, control, overpayment),[1208] [redacted][1209] explains that there is no reason to believe that a potential buyer would pay a premium for obtaining control over Gabriel Canada's assets,[1210] and

[1204] *Id*.
[1205] [redacted].
[1206] *Id.* at p. 33 *et seq*. (Section IV.B).
[1207] [redacted]. See also *id*. at p. 38 *et seq.* (Section IV.C).
[1208] **CRA Report**, p. 27 (para. 59).
[1209] [redacted].
[1210] *Id.* at p. 31 *et seq*. (para. 64).

demonstrates that there is no reason to believe that a potential buyer would overpay for the value of Gabriel Canada's assets.[1211]

774 Based on the above, Dr. Burrows concludes

[redacted][1212]

11.1.2.5 The Claimants' Alternative Valuations Are Also Unreliable

775 In addition to their flawed market capitalization approach, Compass Lexecon applied two "additional valuation methods:" the relative market multiples of publicly traded companies method and the price to net asset value ("**P/NAV**") method.[1213] [redacted][1214] [redacted][1215] [redacted][1216]

[1211] *Id.* at p. 32 *et seq.* (para. 66). In any event, the fair market value standard assumes prudent buyers and sellers and thus precludes a value that includes overpayment by imprudent buyers.
[1212] [redacted].
[1213] **CL Report**, p. 32 (para. 54).
[1214] [redacted].
[1215] [redacted].
[1216] [redacted].

The Relative Market Multiples of Publicly Traded Companies

776 As the Claimants state, the relative market multiple involves (i) determining the quantity of the mineral resources available to the company in question and (ii) multiplying the mineral resources by the relative market multiple of a unit of mineral resources derived from a sample of similar mining companies.[1217] The accuracy of the methodology is therefore "only as good as the comparability of the assets themselves and the ability to adjust the assets for lack of comparability."[1218] Disregarding this crucial criterion, "Compass Lexecon made only token attempts to adjust for differences across deposits, and its valuation conclusions are therefore not reliable."[1219]

777 Moreover, Compass Lexecon's methodology suffers from a number of flaws, including failing to ensure the peer group is appropriately comparable to the subject properties being valued,[1220] and arbitrarily weighting resources based on geologic or economic certainty (rather than empirically determining the effects of such certainty on valuation).[1221]

778 [redacted][1222]

The Price to Net Asset Value (P/NAV)

779 Compass Lexecon's application of the P/NAV method suffers from similar flaws as its valuation using the relative market multiples method. As the

[1217] Memorial, p. 409 (para. 906) (citing **CL Report**, p. 7 *et seq*. (paras. 8, 55-56)).

[1218] **CRA Report**, p. 42 (para. 77).

[1219] *Id.* at p. 43 (para. 77). See also *id*. at p. 43 *et seq*. (Section V.A).

[1220] **CRA Report**, p. 44 *et seq*. (Section V.B).

[1221] *Id.* at p. 52 *et seq*. (Section V.C).

[1222] [redacted].

Claimants recognize, the P/NAV method requires the calculation of a Net Asset Value and the selection of a P/NAV multiple to convert the Net Asset Value to a market value equivalent.[1223]

780 Noting that P/NAV multiples can be derived in different ways, in order to adjust for a variety of factors, such as the limitations in an analyst's NAV calculation,[1224] Dr. Burrows explains that Compass Lexecon's application of the P/NAV method is flawed because:

a) [redacted][1225]

b) [redacted][1226]

c) [redacted][1227]

d) [redacted][1228]

[1223] Memorial, p. 412 (para. 922).

[1224] **CRA Report**, p. 54 *et seq*. (para. 91).

[1225] [redacted].

[1226] [redacted].

[1227] [redacted].

[1228] [redacted].

e) [redacted][1229]

f) [redacted][1230]

781 By way of conclusion, the Claimants have conducted a valuation exercise which (i) does not value the quantum of their alleged damage, but rather purports to assess the fair market value of Gabriel Canada, (ii) improperly relies on the market capitalization of Gabriel Canada at a time when [redacted]; and (iii) is not supported by the flawed and biased alternative valuations provided by Compass Lexecon.

11.1.3 Dr. Burrows Provides a "Best-Case" Assessment of the Value of the Alleged Project Rights as of the Valuation Date

782 There can be no question that, as at the alleged Valuation Date, a willing buyer with an accurate understanding of the social and legal challenges facing the Project would only have been willing to pay a small fraction of Gabriel Canada's market capitalization. However, assessing the fair market value of the Project Rights is especially challenging, since, as discussed above, it is highly sensitive to the assumptions that an informed buyer would make about the likely timeline of the Project, and the discounting that this buyer would apply to account for the risks as to its feasibility. There was no assurance that the Project would have proceeded in accordance with even realistic estimates of costs and production rates, or that the Project would ever have resulted in actual production and profits, even if they had not encountered any delays stemming from litigation or social opposition.

1229 [redacted].
1230 [redacted].

783 In light of this uncertainty, to the extent that the so-called Project Rights could be said to have any value at all, it is difficult to determine the discount that a willing and informed buyer would have applied on the value of the Project as a result of the Project's lack of a social license. However, it may be possible to assess the value that such a buyer would have paid, as at the alleged Valuation Date, on the basis of a "best case" assessment of the Project's likely delays. Dr. Burrows was accordingly instructed to use the assumptions from the Counterfactual Scenario described above in **Section 11.1.2.1**, for the purposes of determining the delay that a knowledgeable and willing buyer would have estimated (as at the Valuation Date) before the Project would begin operations. [redacted][1231]

784 Dr. Burrows assesses the fair market value of the Project Rights based on a discounted cash flow ("**DCF**") analysis of projected cash flows from the Project.[1232] Dr. Burrows takes only into account the delay that an informed buyer would have assumed as at the alleged Valuation Date, and does not apply any discount to account for the uncertainty stemming from possible delays beyond April 2018, nor any discount to value arising from the possibility and the consequences of Chance Finds.[1233]

785 [redacted]

[1231] Although the claims relating to the right to negotiate licenses over the Bucium perimeter are clearly outside the Tribunal's jurisdiction (see *supra* paras. 450, 465, 476-477), Dr. Burrows was also asked, on the basis of these same "best case" assumptions, to assess the value of the exploitation licenses that RMGC was allegedly denied. [redacted].

[1232] **CRA Report**, p. 64 *et seq.* (Section VII).

[1233] *Id.* at p. 7 (para. 14). Dr. Burrows similarly does not apply discount to value to account for the fact that RMGC had yet to obtain an archeological discharge permit for the Orlea Pit, or for the possibility that the resource estimates are overstated because they do not fully take into account prior mining activities or undiscovered voids.

[redacted].[1234]

For the projected timeline of cash flows, Dr. Burrows uses Behre Dolbear's analysis of the likely date of commencement of operations.[1235] Dr. Burrows uses a projected gold price of USD 1,180 in 2011 constant dollars for the duration of the mining life,[1236] and an estimated unlevered equity cost of capital (adjusted for the value of the interest tax shield of debt).[1237]

786 Based on the assumption listed above, Dr. Burrows' DCF estimate of the stand-alone value of the Project as at the alleged Valuation Date is [redacted].[1238]

787 As a check on the results of his DCF analysis, Dr. Burrows infers value by analogy with the values of other properties which are "comparable" to the subject properties.[1239] [redacted][1240] In the case of the Project, the higher valued comparable deposits all had significantly more expansion potential, but as information to quantify this difference is not available, Dr. Burrows was not able to adjust for any over-estimate of value arising from this factor.[1241] [redacted][1242]

1234 [redacted].

1235 *Id.* at p. 67 *et seq.* (Section VII.B). See also **BD Report**, p. 43 *et seq.* (Section 15).

1236 **CRA Report**, p. 69 (Section VII.D).

1237 *Id.* at p. 69 (Section VII.E).

1238 This does not take any account the value of assets still owned by RMGC, including the surface land rights in the Project areas.

1239 **CRA Report**, p. 70 *et seq.* (Section VIII).

1240 [redacted].

1241 *Id.* at p. 77 *et seq.* (Section VIII.B).

1242 [redacted]

788 Dr. Burrows considers the value of the Bucium exploitation licenses to be "totally conjectural in nature, as these properties were early stage exploratory projects."[1243] Nevertheless, he assesses the fair market value of the allegedly withheld exploitation licenses for the Bucium perimeter.[1244] Based on a DCF analysis, Dr. Burrows calculates for the so-called Rodu-Frasin Project a value of [redacted] as of the Valuation Date.[1245] Based on comparable asset values, Dr. Burrows also calculates a value of [redacted] value for the so-called Rodu-Frasin Project and a value of [redacted] for the so-called Tarniţa Project.[1246] However, Dr. Burrows notes that these two

> "values are overstated as they do not take into account the risks of extension (caused, for example, by likely additional NGO litigation) in the Counterfactual and Expropriation Scenarios' timeline, of archeological discoveries in the Bucium area that might result in not being able to receive archeological discharge certificates for some or all of the areas needed for mining, the risks of archeological discoveries during mining, the risks of possible overstatement of resources because of inadequate knowledge of prior mining or voids, or of a lack of a social license to operate."[1247]

11.2 At Most, the Claimants Are Only Entitled to Damages for Delay

789 The Respondent conclusively established in **Section 9.1** above that the Claimants' investment has not been expropriated. Indeed, the Claimants' own evidence does not support their allegations, since Gabriel Jersey's shareholding in RMGC has not been affected, RMGC still today holds the

[redacted].

[1243] *Id.* at p. 8 (para. 17).

[1244] *Id.* at p. 78 *et seq*. (Section IX).

[1245] *Id.* at p. 80 *et seq*. (Section IX.A.1).

[1246] *Id.* at p. 81 *et seq*. (Section IX.A.2 and IX.B).

[1247] **CRA Report**, p. 8 *et seq*. (para. 17).

License and its other assets, and is free to develop the Project if it complies with the legal permitting requirements and secures the social license. The Claimants' apparent loss of interest in the Project as a result of the large-scale social opposition does not constitute an expropriation.

790 However, in addition to claiming that Romania indirectly expropriated their investment,[1248] the Claimants allege that Romania failed to accord FET,[1249] failed to provide FPS,[1250] breached its obligation not to impair the Claimants' investment through unreasonable and discriminatory measures,[1251] and failed to observe the obligations it had undertaken with regard to the Claimants' investment.[1252] Yet, the Claimants' compensation claim presupposes a total loss, that is, an indirect expropriation as a result of the complete deprivation of the use, value, and enjoyment of their investment, rather than damage to the investment as a result of breach of the FET standard or any other treaty standard.

791 Indeed, while the Claimants claim compensation for all of Romania's alleged breaches of the BITs,[1253] they have only attempted to quantify their alleged damage for their case on expropriation. Since the Claimants have not even attempted to prove the quantum of their damage allegedly stemming from non-expropriatory breaches of the BITs, they cannot be awarded any compensation whatsoever for those alleged breaches (**Section 11.2.1**). However, should the Claimants be entitled to compensation, notwithstanding their failure to prove quantum, the Tribunal must assess the damage to the Claimants' investment by comparing the situation in which RMGC would have been, but for Romania's breach of its international obligations, to the situation in which RMGC would find itself solely as a consequence of the alleged breaches of the BITs (**Section 11.2.2**).

[1248] Memorial, p. 342 *et seq*. (Section XIV).

[1249] *Id.* at p. 277 *et seq*. (Section X).

[1250] *Id.* at p. 310 *et seq*. (Section XI).

[1251] *Id.* at p. 322 *et seq*. (Section XII).

[1252] *Id.* at p. 334 *et seq*. (Section XIII).

[1253] Memorial, p. 379 *et seq*. (paras. 842-843).

11.2.1 The Claimants Have Not Attempted to Prove the Quantum of the Damage Allegedly Caused by Romania's Non-Expropriatory Breaches of the BITs

792 The Claimants contend that Romania's acts or omissions have "cumulatively resulted in the total deprivation of the value of [the Claimants'] investments,"[1254] which is, by definition, a claim for compensation as a result of an alleged expropriation.[1255] Consistent with their claim for indirect expropriation, the Claimants claim for "compensation in the amount of the fair market value of [the Claimants'] investments on the date immediately prior to the treaty breaches at issue."[1256]

793 The Claimants accordingly instructed Compass Lexecon to assess the fair market value of the so-called and allegedly expropriated Project Rights.[1257] However, the Claimants did not instruct Compass Lexecon to assess the quantum of the Claimants' alleged damage caused by an alleged unlawful interference with their investment that falls short of expropriation. Specifically, the Claimants fail to quantify the compensation that would be due

[1254] *Id*. at p. 399 *et seq*. (para. 898).

[1255] S. Ripinsky with K. Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), at **Exhibit RLA-83**, p. 64 *et seq*. ("Direct expropriations result in the transfer of title and physical possession of the property or other assets from a foreign investor to the State. Direct expropriations and nationalizations, frequent in the 20th century, have more recently given way to indirect expropriations. Indirect expropriation is deemed .to occur when a measure or measures taken by a State have an effect similar or equivalent to direct expropriation even though the property is not seized and the legal title to the property is not affected."); I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edition, Oxford University Press, 2017), at **Exhibit RLA-84**, p. 65 (para. 3.56) ("International courts and tribunals are frequently confronted with cases of so-called indirect expropriations. Such indirect or de facto expropriations can occur in many different forms which is also reflected in the many different terms used, such as 'disguised', 'regulatory', 'creeping', or 'constructive' expropriations or takings.").

[1256] Memorial, p. 400 (para. 897).

[1257] **CL Report**, p. 22 (para. 37).

if the alleged non-expropriatory breaches caused damage to their investment, but did **not** result in a total and permanent loss of the investment.[1258] Viewed from the perspective of the Claimants' case on quantum, these non-expropriatory breaches of the BITs become therefore entirely superfluous, as the only relevant determination on liability is whether an indirect expropriation has occurred.

794 Accordingly, in the unlikely event that the Claimants prove that Romania breached the BITs by failing to issue the environmental permit (or by some other act or omission), and that this alleged breach has damaged their investment, but cannot prove that this breach caused the total and permanent loss of their investment, then the Claimants are not entitled to any compensation whatsoever due to their failure to prove the quantum of the alleged damage.

795 As the tribunal in *S.D. Myers v. Canada* stated, the burden is on the claimant to prove the quantum of the alleged damage.[1259] Similarly, the tribunal in *Gemplus v. Mexico* held:

> "Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative **or otherwise unproven**, the Tribunal must reject these claims, even if liability is established against the Respondent."[1260]

[1258] Although the Claimants allege that every non-expropriatory breach of the BITs resulted in a complete deprivation of the use, value, and enjoyment of their investment, they fail to demonstrate how these purported breaches — whether by themselves or cumulatively — resulted in an indirect expropriation. See *supra* Section 9.1.

[1259] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 78 (para. 316).

[1260] *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, Award, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, 16 June 2010, at **Exhibit CL-156**, p. 269 (of pdf, p. XII-37 of document) (para. 12-56) (emphasis added); See also *id*, p. 330 (of pdf, p. XIII-58 of document) (para. 13-80) ("It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is '*the broad basic rule to the allocation of the burden of proof in international procedure*'.").

796 The Tribunal should accordingly dismiss the Claimants' claim for compensation as a result of their failure to prove the quantum of their alleged damage.

11.2.2 Should the Claimants Be Entitled to Compensation Notwithstanding Their Failure to Prove the Quantum of the Damage, Then They Are at Most Entitled to Compensation for Delay

797 If, even though the Claimants have not even attempted to prove the quantum of their alleged injury caused by the non-expropriatory breaches of the BITs, the Claimants are nevertheless entitled to compensation, then this compensation cannot equal the fair market value of the Claimants' investment, but should rather reflect the harm caused by a delay to the Project. Using "best case" assumptions for delay, and disregarding the uncertainty stemming from the Project's lack of a social license, Dr. Burrows has calculated the quantum of the injury caused by this delay at approximately [redacted].[1261]

798 The BITs do not provide a standard of compensation for instances of non-expropriatory breach. Similarly, Article 31 of the ILC Articles provides only that a State must make full reparation for any loss or damage caused by an internationally wrongful act, and does not specify how the quantum of any compensation must be assessed.[1262] The *S.D. Myers* tribunal explained that

> "By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. In some non-expropriation cases a tribunal might think it appropriate to adopt the 'fair market value' standard; in other cases it might

[1261] **CRA Report**, p. 84 *et seq.* (Section X.A).

[1262] ILC Articles, at **Exhibit CL-61**, p. 91 (Art. 31).

> not. In this case the Tribunal considers that the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded."[1263]

799 Likewise, the tribunal in *PSEG v. Turkey* found that

> "The Tribunal will accordingly consider first whether the claim to a fair market value of the Project is justified in light of the nature of the investment made. It must be noted in this respect that the BIT, like most treaties of its kind, provides for the fair market value as the measure for compensation only in connection with expropriation. Since the Tribunal has found above that there is no expropriation in this case, either direct or indirect, the fair market value does not appear to be justified as a measure for compensation in these circumstances."[1264]

800 In sum, since the Claimants are unable to prove that an indirect expropriation has occurred, there is no legal basis to award the fair market value of their investment. Instead, and provided they are able to prove causation, the quantum of the damage suffered by the Claimants' investment should be determined by assessing the damage allegedly caused to their investment by the Romania's allegedly internationally wrongful acts.

801 The Claimants' injury for a non-expropriatory breach of the BITs would be, at most, a delay to the Project, since, by rejecting the Claimants' case on indirect expropriation, the Tribunal would necessarily have found that Romania has not permanently prevented RMGC from pursuing the Project.[1265] The earliest relevant event that the Claimants characterize as a

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[1263] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 77 (para. 309).

[1264] *PSEG Global, Inc. and Konya Ilgin Elektrik ¦ retim ve Ticaret Ltd. ķirketi v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5, 19 January 2007, at **Exhibit CL-175**, p. 79 (para. 305).

[1265] As discussed above in Section 9.1, such a finding would be consistent with Gabriel Canada's disclosure as late as 2015 that the Projects were still feasible. See Gabriel Canada press release dated 21 July 2015, at **Exhibit R-306**, p. 2.

breach of FET is the alleged failure of the EIA Procedure to proceed to a conclusion following what was purportedly supposed to be the final meeting of the TAC in November 2011.[1266]

802 Therefore, if the Claimants are able to establish that (i) Romania breached its obligations under the BITs, and (ii) this breach was the proximate cause of a compensable damage to the Claimants' investment, then the quantum of the Claimants' damage should be determined by assessing the consequences of Romania's alleged delay in approving the environmental permit.

803 In accordance with the principle that "the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT,"[1267] several international investment treaty tribunals have assessed the harm flowing from a breach of a BIT by comparing a hypothetical "counterfactual" (or "but for") situation to a projected "actual" situation. For example, in *CMS v. Argentina*, the Tribunal assessed the injury to the claimant's investment by comparing the situation the claimant would have been in had "pesification" not occurred, to the situation the claimant would be in as a result of the "pesification" measures.[1268] The analysis of the counterfactual scenario

[1266] See Memorial, p. 302 (para. 682(d)) ("Thus, despite the TAC President clearly stating on the record at the November 2011 meeting that the technical review of the Project was complete, the EIA procedure did not proceed to conclusion in that the Ministry of Environment did not take a decision on the environmental permit and the permit did not issue, all in manifest and deliberate disregard of Romanian law. Derailing and holding the permitting process hostage in this manner to maintain leverage over Gabriel and RMGC to strong-arm financial concessions for the State was a coercive, unlawful abuse of power."). The Claimants also allege that statements made by the Government in August of 2011 constitute a breach of fair and equitable treatment, although they fail to explain how these statements affected the permitting process prior to the November 2011 meeting of the TAC. See Memorial, p. 301 (para. 682(b)).

[1267] *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CL-70**, p. 46 (para. 149). See also *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, at **Exhibit RLA-81**, p. 16 (para. 58).

[1268] *CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, at **Exhibit CL-176**, p. 121 (para. 419) ("This task is all the more challenging in that, in order to arrive at a value loss, it is necessary to evaluate not only what

necessarily involves the use of *ex-post* information, which, as explained by Dr. Ripinsky in his book on damages, is appropriate:

> "Under the non-expropriatory-case analysis, where the aim of compensation is to 're-establish the situation *which would, in all probability, have existed* if that act had not been committed', information changes should logically be taken into account, **both if they are compensation-increasing and compensation-decreasing (compared to the assessment at the time of breach on the basis of *ex-ante* information**). This is because the *ex-post* information is used with a sole aim of increasing the precision of the analysis, and there is no floor-figure, below which compensation cannot fall, as in expropriation cases. There have been several arbitral decisions where the tribunals took account of events subsequent to the valuation date, including compensation reducing factors. They did that without shifting the valuation date forward but by correcting the cash flow projections and other value-affecting factors in light of information available at the time of award."[1269]

804 This principle is confirmed by Prof. Marboe:

> "The fact that subsequent events and developments are included in the valuation may also reduce the amount of damages. This is the consequence of the principle of full reparation on the basis of the restitution approach. If subsequent events led to a diminution of value, the injured party would have suffered this also in the absence

the years 2000 to 2027 would have been like had TGN's license and regulatory environment remained unchanged but also to foresee what the future holds for TGN under the new (and not completely known) regulatory environment.").

[1269] S. Ripinsky with K. Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008), at **Exhibit CL-196**, p. 256 (italics in original) (emphasis added) (citing *CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, at **Exhibit CL-176**, *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, Award, ICSID Case No. ARB/01/3, 22 May 2007, at **Exhibit CL-92**, *Sempra Energy International v. The Argentine Republic*, Award, ICSID Case No. ARB/02/16, 28 September 2007, at **Exhibit CL-93**).

> of the unlawful act. This part of the damage is, therefore, not causally linked to the violation. Only in expropriation cases, is the objective value at the time of the expropriation the guaranteed minimum to be received. In other cases of state responsibility there is no such lower limit. The only measure of damages is the comparison of the financial situations with and without the breach."[1270]

805 In essence, while the absence of a relevant standard of compensation in the BITs does not relieve Romania of its obligation to provide compensation for damage caused by its purported breaches of the BITs, such compensation need not (and in this case cannot) be based on the FMV of the investment. Investment treaty tribunals have rejected FMV as the proper measure of the injury to the claimant's investment where a non-expropriatory breach was found.[1271]

806 In accordance with these principles, Dr. Burrows was instructed to compute the quantum of the damage caused by Romania's alleged failure to approve the environmental permit, as measured by comparing the Counterfactual Scenario described above (which reflects the situation RMGC would have been in "but for" Romania's alleged breached of the BITs) to the Actual Scenario described below.

[1270] I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edition, Oxford University Press, 2017), at **Exhibit RLA-84**, p. 149 *et seq*. (para. 3.331).

[1271] *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CL-70**, p. 46 (para. 148) ("The BIT establishes the rule that compensation for expropriation is to be based on '*fair market valueô* of the investment; this principle, however, is of little use in the present arbitration, because the breach does not amount to the total loss or deprivation of an asset. Gala Radio still exists and Claimant still owns it: compensation thus cannot be based on fair market value of assets expropriated.") (italics in original) (citing *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, at **Exhibit RLA-81**, p. 10 (para. 36) ("For the Tribunal, compensation in this case cannot be determined by the impact on the asset value; it does not reflect the actual damage incurred by Claimants. The measure of compensation has to be different.")).

807 Since in rejecting the Claimants' case on expropriation the Tribunal would have necessarily found that Romania has not prevented RMGC from pursuing the Project, the Actual Scenario assumes that, shortly after the Tribunal issues its Award, Romania would instruct the Ministry of Environment to issue the environmental permit and that the Ministry and Government would approve it following the public comment period.[1272] Furthermore, like the Counterfactual Scenario, the Actual Scenario takes into account the effect of existing litigation but assumes no future litigation. It similarly assumes that the Project would have been declared to be of "public utility", thereby enabling an expropriation of the land use rights that RMGC would otherwise have been unable to obtain. Finally, the Actual Scenario assumes that the same amount of time would be needed for RMGC's regulatory "critical path" as the Counterfactual Scenario.

808 Specifically, the Actual Scenario assumes that:

a) The Tribunal would issue its award in October 2020,[1273] following which, on or about January 2021, the TAC would issue a recommendation to the Ministry of Environment that the environmental permit be issued.

b) The Ministry of Environment would issue an environmental permit to RMGC in February 2021, and following a public comments period, the environmental permit would be approved by decision of the Government in April 2021.

[1272] This assumption is consistent with the principle that a tribunal should reject the claims for the recovery of anticipated losses that may arise after the date of the award, because the tribunal has no reason to suppose that the State will ignore the implications of this decision for its continuing obligations towards the investor. See *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/07/31, 29 December 2014, at **Exhibit RLA-85**, p. 85 para. 327 ("The Tribunal would reject the claims for the recovery of anticipated losses that may arise after the date of the Award, because the Tribunal has no reason to suppose that Respondent will ignore the implications of this Decision for its continuing obligations towards PdL and Claimant.").

[1273] Based on the average time between the last day of a final hearing and an award of 379 days for ICSID arbitrations. See, "How long is too long to wait for an award?", *GAR News*, Feb. 2016, at **Exhibit R-316**, p. 3.

c) The PUG and PUZ would be in place no later than Fall of 2020.

d) Shortly after the issuance of the environmental permit, the Government would establish a commission for projects of national interest, and the Project would be declared to be of public utility. Romania would then initiate an expropriation process to obtain the missing surface rights for RMGC. This expropriation process would successfully conclude on or about April 2022.

e) RMGC would apply for a building permit in April 2022, and would obtain it in **May 2022**.

809 A comparison of the date on which the building permit would have been obtained in the Counterfactual Scenario (April 2018) to the date on which it would be obtained under the Actual Scenario (May 2022), yields a delay of approximately four years and one month.[1274]

810 Based on these assumptions, Dr. Burrows estimates the injury caused by Romania's alleged breach of FET by estimating the present discounted value as of the Valuation Date of the difference between the value of the Project in the Counterfactual Scenario described above and the value of the Project in the Actual Scenario.[1275] In addition, Dr. Burrows accounts for the additional operating and investing costs that RMGC would have incurred as a result of the delay, which he models based on the actual costs that RMGC incurred, for which he uses projections of prices and costs

[1274] It should be noted that, like the Counterfactual Scenario, the Actual Scenario is extremely optimistic. Even under the best of circumstances, it is by no means established that the Claimants would have been able to finance a project that would most likely have encountered another decade of delay stemming from litigation and social opposition. Moreover, Behre Dolbear opines that, in addition to a new feasibility study, a design change in the tailings management facility would likely have been required by any prospective lenders, which likely would have resulted in further delays. See **BD Report**, p. 11 (para. 55) ("it is Behre Dolbear's opinion that a new feasibility study would have been necessary to provide lenders with comfort that their investment would be protected."); see also *id*. at p. 30 *et seq*. (Section 8.6). By disregarding these potential delays, as well as the likely delays from litigation and social opposition, the Actual Scenario only reflects the delays that would be attributable to Romania.

[1275] **CRA Report**, p. 85 (para. 163).

based on current information as of 2017.[1276] He then calculates the present value, as of the Valuation Date, of the injury caused by Romania's alleged non-expropriatory breaches of the BITs, at an amount of approximately [redacted].[1277]

811 It bears emphasizing that, in light of the "best case" assumptions pertaining to delay, and the significant uncertainty about the Project's feasibility stemming from its lack of a social license, Dr. Burrows' assessments considerably overstates the quantum of the alleged damage purportedly caused by Romania's supposed breaches of the BITs.

11.3 The Claimants' Claim for Interest Is Overstated

812 The Claimants argue that, in accordance with the Article 38 of the ILC Articles, as well as the relevant provisions of the BITs, any compensation awarded for a breach of the BITs must include pre-award interest "at a normal commercial rate of interest" running from the date of the breach.[1278] Furthermore, the Claimants argue that the "overwhelming majority of international tribunals award interest on a compound basis."[1279] Finally, the Claimants rely on Compass Lexecon's assessment of a "reasonable commercial rate" from the alleged Valuation Date to 30 June 2017 of "around 5%, reflecting such rates as the 12-month LIBOR plus a 4% premium."[1280] The Claimants accordingly claim both pre and post-award interest at a LIBOR plus 4% rate compounded annually, running from the alleged Valuation until the date of payment of the Award.[1281]

813 While the Claimants correctly state that compensation must include pre-award interest "at a normal commercial rate of interest" running from the

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[1276] *Id*. at p. 85 (paras. 163-164).

[1277] [redacted]. When including the alleged injury stemming from a purported delay in issuing the Bucium exploitation licenses, Dr. Burrows estimated the present value of the Claimants' alleged injury at [redacted].

[1278] Memorial, p. 391 *et seq*. (paras. 875-879).

[1279] *Id*. at p. 393 *et seq*. (paras. 880-882).

[1280] *Id*. at p. 413 (para. 924) (citing **CL Report**, p. 55 (para. 99)).

[1281] Memorial, p. 413 (paras. 924-925). *Id*. at p. 416 (para. 931(c)(i)).

date of the alleged breach, they are however not entitled to compound interest (**Section 11.3.1**), and they significantly overstate the applicable interest rate (**Section 11.3.2**).

11.3.1 The Claimants Are Not Entitled to Compound Interest

814 There is no prevailing rule under international law that interest must be paid on a compound basis. Quite the opposite, as confirmed in the Commentary to the ILC Articles, "[t]he general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest."[1282] This was notably confirmed by the Iran-United States Claims Tribunal, which "consistently denied claims for compound interest."[1283] Indeed, the Tribunal stated in one judgment that "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable."[1284]

815 Many investment treaty tribunals have similarly applied simple interest.[1285] Even commentators who favor the use of compound interest acknowledge

[1282] ILC Articles, at **Exhibit CL-61**, p. 108 *et seq.* (Commentary 8 to Art. 38). The Commentary adds that "given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation", ILC Articles, at **Exhibit CL-61**, p. 109 (Commentary 9 to Art. 38).

[1283] ILC Articles, at **Exhibit CL-61**, p. 108 *et seq.* (Commentary 8 to Art. 38).

[1284] *R. J. Reynolds Tobacco Company v. The Government of Iran and Iranian Tobacco Company*, Award No 145-35-3, 7 USCTR 181, 31 Jul. 1984, at **Exhibit RLA-86**, p. 191 (citation omitted).

[1285] See, *e.g.*, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award, ICSID Case No. ARB/04/19, 18 August 2008, at **Exhibit CL-94**, p. 124 (para. 473) ("In addition, although increasingly common in ICSID practice, the award of compound interest is not a principle of international law."); *Franck Charles Arif v Republic of Moldova*, Award, ICSID Case No ARB/11/23, 8 April 2013, at **Exhibit RLA-87**, p. 165 *et seq.* (paras. 617, 619); *Occidental Exploration and Production Company v. Republic of Ecuador*, Award, UNCITRAL, 1 July 2004, at **Exhibit CL-186**, p. 73 (paras. 8-9); *Desert Line Projects LLC v. The Republic of Yemen*, Award, ICSID Case No. ARB/05/17, 6 February 2008, at **Exhibit RLA-88**, p. 66 (para. 295); *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, 16 December 2002, at **Exhibit CL-136**, p. 86 (para. 206); *CME Czech Republic*

that "[t]here is no real consensus in international arbitration as to whether or not interest should be awarded on a simple or compound basis."[1286]

816 There is therefore no reason to compound either pre-award or post-award interest.

11.3.2 Pre-Award and Post-Award Interest Should Be Calculated Using a Risk-Free Rate

817 The Claimants recognize that the "rate of interest must be set at the level necessary to ensure full reparation in the circumstance and, as such, requires a case-specific assessment."[1287]

818 [redacted].[1288]

> "To the extent the Claimants are awarded any damages, that amount of money is not being "loaned" on the same risky terms as those which banks extend when they make loans. Damages in this proceeding, to the extent any are awarded, would be made pursuant to the Canada-Romania and UK-Romania treaties. Because there is no risk of not collecting a valid damages award, the Claimants are not entitled to a rate of interest that compensates it for both the time value of money and default risk.

B.V. v. Czech Republic, Final Award, UNCITRAL, 14 March 2003, at **Exhibit CL-147**, p. 158 *et seq*. (paras. 642-647); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v The United Mexican States*, Award, ICSID Case No ARB(AF)/04/05, 21 November 2007, at **Exhibit RLA-89**, p. 90 *et seq*. (paras. 296, 298)). In *ADM v. Mexico*, the tribunal distinguished between claims for expropriation and claims for lost profits, finding that simple interest was appropriate in respect of the latter.

[1286] T. J. Sénéchal, *Present Day Valuation In International Arbitration*, in *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Filip de Ly and Laurent Lévy (eds.), ICC Publication No 684, Paris, 2008, at **Exhibit RLA-90**, p. 230.

[1287] Memorial, p. 392 (para. 878) (citing ILC Articles, at **Exhibit CL-61**, p. 109 (Commentary 10 to Article 38).

[1288] [redacted].

> The only default risk that is relevant is that of payment of the arbitral award. There is no instance in which Romania has not paid an ICSID award."[1289]

819 The appropriate interest rate should therefore not reflect any risk premium. In the unlikely event the Claimants are awarded any compensation, it should include pre-award interest at a risk-free rate.[1290]

[1289] *Id*. at p. 89 (paras. 175-176).

[1290] See *e.g.* the following decisions awarding interest at a risk-free rate: *CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, at **Exhibit CL-176**, p. 137 (para. 471); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, Award, ICSID Case No. ARB/02/1, 25 July 2007, at **Exhibit RLA-81**, p. 28 (para. 102) ("The Tribunal disallows the Claimants' expert proposal to use Argentina's borrowing rate as speculative and extemporaneous. The Tribunal notes further that Argentina has supported the use of a pre-judgement interest rate based on short-term U.S. Treasury bills. This is therefore the rate of interest to be applied.").

12 PRAYER FOR RELIEF

820 In view of the above, the Respondent respectfully requests the Tribunal to:

a) Dismiss the claims of Gabriel Canada and Gabriel Jersey for lack of jurisdiction; or

b) Dismiss the claims of Gabriel Canada and Gabriel Jersey as inadmissible; and/or

Should the Tribunal determine that any of the claims of Gabriel Canada or Gabriel Jersey fall within the Tribunal's jurisdiction:

c) Dismiss the claims as unfounded.

And in any event:

d) Order the Claimants to bear, jointly and severally, the Respondent's costs of the arbitration on a full indemnity basis, including attorney's fees and expenses and all fees and other expenses incurred in participating in the arbitration, including internal costs.

821 The Respondent reserves its right to further develop its argument and defences and to present further evidence in the course of the arbitration.

Respectfully submitted,

22 February 2018

For and on behalf of

Romania

LALIVE

Veijo Heiskanen
Matthias Scherer
Lorraine de Germiny
Christophe Guibert de Bruet
David Bonifacio
Emilie McConaughey
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Mihaela Afanasov

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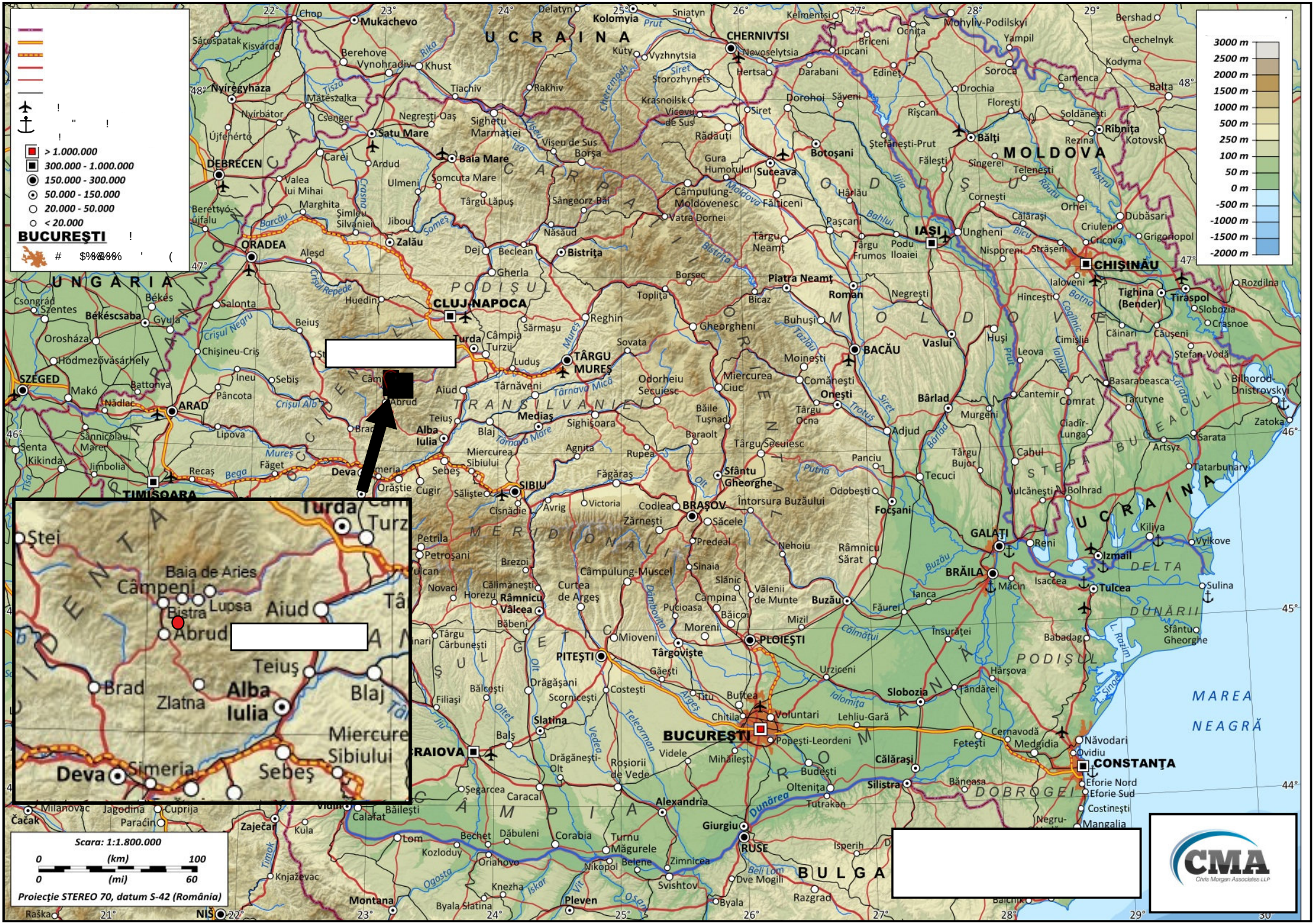
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Eforie Sud
Costineşti
Negru-Vodă
Tighina (Bender)
Tiraspol
Slobozia
Rîbniţa
Dubăsari
Grigoriopol
Criuleni
Cricova
Orhei
Rezina
Soldăneşti
Floreşti
Drochia
Soroca
Camenca
Balta
Edineţ
Briceni
Ocniţa
Mohyliv-Podilskyi
Yampil
Chechelnyk
Bershad
Kodyma
Lipcani
Darabani
Hertsa
Novoselytsia
Storozhynets
Kuty
Vyzhnytsia
Kolomyia
Sniatyn
Delatyn
Chop
Mukachevo
Berehove
Vynohradiv
Khust
Tiachiv
Rakhiv
Sighetu Marmaţiei
Vişeu de Sus
Borşa
Câmpulung-Moldovenesc
Vatra Dornei
Gura Humorului
Rădăuţi
Siret
Dorohoi
Săveni
Rîşcani
Ştefăneşti-Prut
Fălticeni
Hârlău
Târgu Neamţ
Târgu Frumos
Podu Iloaiei
Paşcani
Ungheni
Nisporeni
Străşeni
Călăraşi
Cornești
Orhei
Telenești
Fălești
Sîngerei
Bălți
Ialoveni
Hîncești
Cimișlia
Leova
Cantemir
Comrat
Căinari
Căușeni
Ștefan-Vodă
Basarabeasca
Tarutyne
Bilhorod-Dnistrovskyi
Zatoka
Sarata
Artsyz
Tatarbunary
Bolhrad
Vulcănești
Cahul
Târgu Bujor
Ciadîr-Lunga
Murgeni
Huși
Moinești
Comănești
Onești
Târgu Ocna
Târgu Secuiesc
Adjud
Panciu
Odobești
Întorsura Buzăului
Nehoiu
Râmnicu Sărat
Focșani
Mizil
Ploiești
Urziceni
Lehliu-Gară
Fetești
Videle
Mihăilești
Budești
Oltenița
Tutrakan
Dobrich
Isperih
Razgrad
Dve Mogili
Svishtov
Pleven
Byala
Nikopol
Turnu Măgurele
Zimnicea
Belene
Corabia
Dăbuleni
Bechet
Calafat
Vidin
Montana
Knjaževac
Zaječar
Čačak
Milanovac
Jagodina
Cuprija
Paraćin
Kozloduy
Oriahovo
Knezha
Byala Slatina
Lom
Kula
Raška
NIŠ
Sighișoara
Agnita
Rupea
Făgăraș
Victoria
Codlea
Zărnești
Săcele
Predeal
Sinaia
Câmpina
Ploiești
Buftea
Voluntari
Popești-Leordeni
Chitila
Titu
Găești
Costești
Scornicești
Drăgășani
Filiași
Bălcești
Roșiorii de Vede
Drăgănești-Olt
Scara: 1:1.800.000
0 (km) 100
0 (mi) 60
Proiecţie STEREO 70, datum S-42 (România)
CMA
Chris Morgan Associates LLP

BZ Current County indicative / limit (since 1968)
Roman Former County residence (1926-1950)
Oradea County residence (1926-1950, 1968-present)
Reşiţa County residence (1968-present)
UKRAINE
HUNGARY
SERBIA
BULGARIA
UKRAINE
BLACK SEA
Satu Mare
SM
Baia Mare
MM
Sighetul Marmaţiei
Oradea
BH
Zalău
SJ
Dej
BISTRITA-NASAUD
Bistriţa
Cluj
CLUJ
Turda
Târgu Mureş
MURES
HARGHITA
Odorhei
Miercurea Ciuc
Arad
AR
Blaj
Alba Iulia
Sighişoara
Deva
HUNEDOARA
Sibiu
SIBIU
Făgăraş
BRASOV
Braşov
COVASNA
Sf. Gheorghe
Timişoara
TM
Lugoj
Reşiţa
Oraviţa
CS
Târgu Jiu
GJ
Râmnicu Vâlcea
VL
Câmpulung
AG
Piteşti
Târgovişte
DB
Poieşti
PH
Buzău
BZ
Râmnicu Sărat
Brăila
BR
Galaţi
Ismail
Tulcea
TL
Drobeta Turnu Severin
MH
Craiova
DJ
Slatina
OT
Caracal
Alexandria
Turnu Măgurele
TR
Giurgiu
GR
BUCUREŞTI
IF
IL
Slobozia
CL Călăraşi
Silistra
CT
Constanţa
Bazargic
Rădăuţi
Suceava
SV
Câmpulung Moldovenesc
Dorohoi
BT
Botoşani
Fălticeni
Iaşi
IS
Piatra Neamţ
NT
Roman
Bacău
BC
Vaslui
VS
Huşi
Bârlad
Tecuci
Focşani
VN
GL
Cetatea Albă
Historical provinces:
Maramureş and Sătmar
Crişana
Transilvania
Banat
Oltenia
Muntenia
Dobrogea
Moldova
Bucovina
Basarabia
CMA
Chris Morgan Associates LLP

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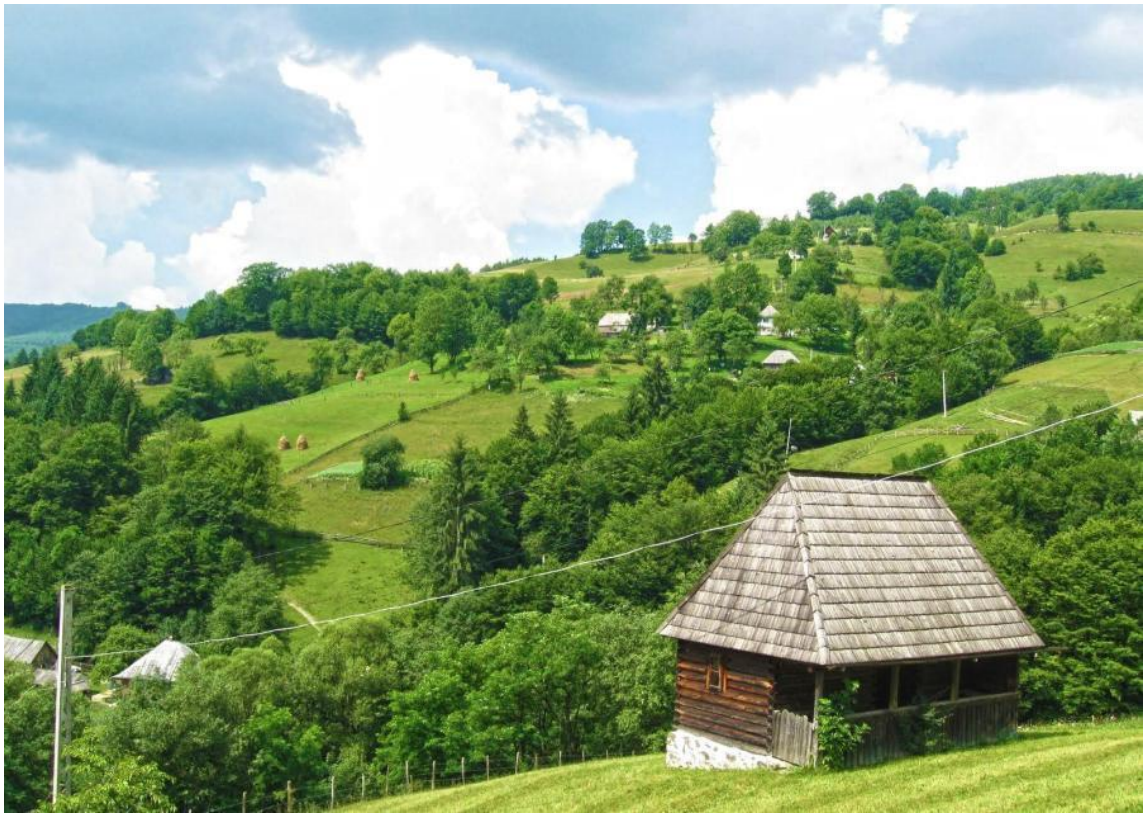
9LHZ RI 5RPDQLDQ DQG VXUURXQGLQJ

6RXUFH WSV EORJ FDXVXHRSRWXQDDXGRVDQD

52,$ 0217$1

³& DDVXL &FDR7UDGLWLRQDO 5XUDO 7HFKQRORJLHV DQG &RQVHUYDWLRQ



6RXUFH SV URPDQLDGDFLD ZRUGSUHVVFRP WUDGLWLRQDO

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6RXUFH: DGHYDQXDSURRQWHVWUDQVFDQGLGXUDLL
DXUXUDXEDVPXQLSDWHQWUWRLGVBLG E F DE FE DD H LQ EHG KWPO SKRWR

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52,$ 0217$1

0DLQ VWUHHW LQ WKH EHJLQQLQJ RI WKH

6RXUFH WWS DUKLYH FWXUDSDVWUDLUPRQWDQLD

0DLQ VWUHHW RGD\

6RXUFH WWS DFWPHGLD HX LPDJHV DUWLFOHV URVLDB

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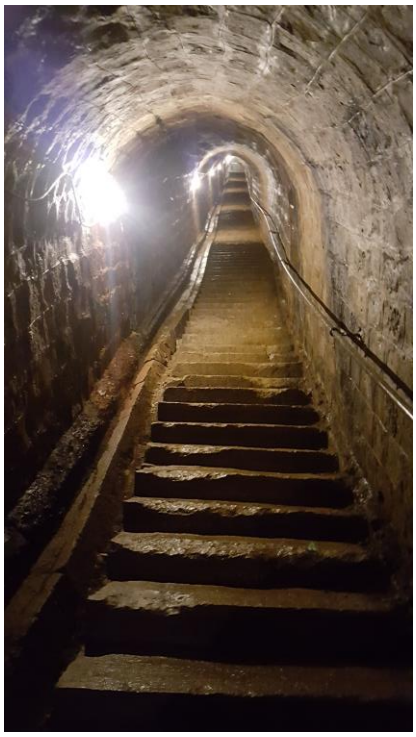
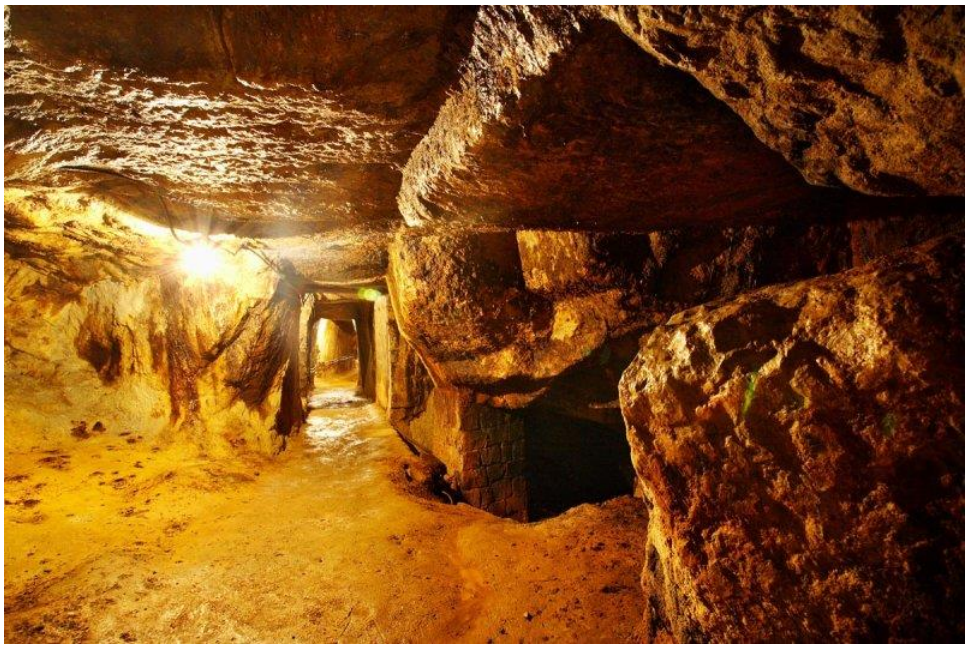


5RPDQ *DOHULHV



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6RXUFH V\QGLFDWLRQ H
KWWS ZZZ LJX URDDXOEXPQUSRPDQLDQ

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K W W S Z Z Z L J X U R D X O E X P Q U S R P D Q L D Q

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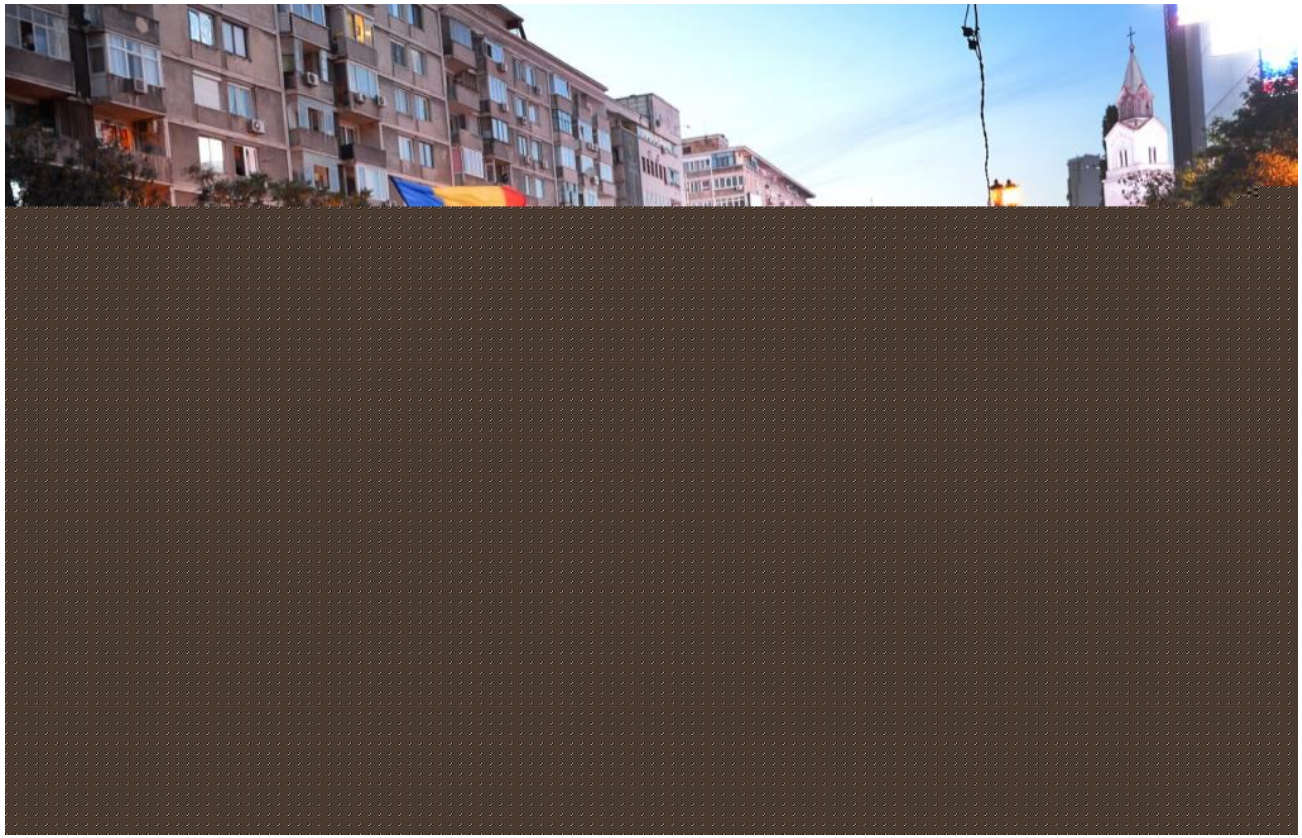

6RXUFH ' 0LKDLOHVFX
,Q & %X]D0DVVLYH SURWHVWV VHHN WR KDOW 5RPDQLDQ JROG PLQLQJ SURMHF