

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES**

**GABRIEL RESOURCES LTD.  
AND GABRIEL RESOURCES (JERSEY) LTD.**

Claimants

**VS.**

**ROMANIA**

Respondent

**ICSID CASE NO. ARB/15/31**

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**RESPONDENT'S REJOINDER**

24 MAY 2019

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**LALIVE**

**LDDP**  
LEAUA DAMCALI DEACONU PAUNESCU  
Attorneys & Counselors

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Term	Definition
1998 Mining Law	Mining Law 61/1998 ( <b>Exhibit C-1629</b> )
2003 Mining Law	Mining Law 85/2003 ( <b>Exhibit C-11</b> )
Achmea Decision	Judgment of the CJEU (Grand Chamber) in the case of <i>Slovak Republic v. Achmea BV</i> , Case C-284/16, dated 6 March 2018 ( <b>Exhibit R-363</b> )
ADC	Archaeological Discharge Certificate
Alba Directorate	Alba Cultural Directorate ( <i>Direcția Județeană pentru Cultură Alba</i> )
Alburnus Maior	<i>Asociația Aurarilor Alburnus Maior Roșia Montană</i> , an NGO established by Roșia Montană residents in September 2000 to represent the interests of families in Roșia Montană and Bucium <i>vis-à-vis</i> the Project
ANAF	Romanian National Agency of Fiscal Administration ( <i>Agenția Națională de Administrare Fiscală</i> )
ANAR	National Administration of Romanian Waters ( <i>Administrația Națională Apele Române</i> )
BGH	German Supreme Court or “ <i>Bundesgerichtshof</i> ”
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

<b>Term</b>	<b>Definition</b>
Bucium Exploration License	Concession License for Exploration within the "Bucium Complex" Perimeter No. 218/1999 ( <b>Exhibit C-397</b> )
Canada-Romania BIT	Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments dated 8 May 2009 and effective since 23 November 2011 ( <b>Exhibit C-1</b> )
CJEU	Court of Justice of the European Union
Claimants	Gabriel Canada and Gabriel Jersey
CNA	National Council for Audiovisual ( <i>Consiliul Național Al Audiovizualului</i> )
County Council	Deliberative authority of the local public administration of a county
Counter-Memorial	Respondent's Counter-Memorial dated 22 February 2018
Cultural Management Plan	RMGC's proposed mitigation measures for the cultural heritage, as set out in the EIA Report.
Cuprumin	S.C. Cupru Min S.A.
DCF	Discounted cash flow analysis
Department for Infrastructure Projects	Department for Infrastructure Projects of National Interest and Foreign Investments
DGAF	Fiscal Antifraud Directorate General of ANAF (" <i>Direcția Generală Antifraudă Fiscală</i> ")
EIA	Environmental Impact Assessment

<b>Term</b>	<b>Definition</b>
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
EIA Review Process	Review of the EIA Report for Project
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
EU Treaties	Treaty on the European Union dated 7 February 1992 and effective since 1 November 1993 ( <b>Exhibit RLA-92</b> ) and Treaty on the Functioning of the European Union dated 13 December 2007 and effective since 1 December 2009 ( <b>Exhibit RLA-93</b> )
FET	Fair and equitable treatment
FPS	Full protection and security

<b>Term</b>	<b>Definition</b>
FTC	Free Trade Commission
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 ( <i>Centrul Independent pentru Dezvoltarea Resurselor de Mediu</i> )
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites
IGIE Report	Report of the Independent Group of International Experts dated 15 November 2006 ( <b>Exhibit C-502</b> )
IFC	International Finance Corporation
IGIE	Independent Group of International Experts
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ( <b>Exhibit RLA-33</b> )
Intra-EU BITs	Bilateral investment treaties between EU Member States
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

<b>Term</b>	<b>Definition</b>
	the debate in the plenary sessions of each chamber
License	Roșia Montană exploitation license No. 47/1999 ( <b>Exhibit R-403</b> )
License Area	Area within the License perimeter also corresponding to the industrial area of Roșia Montană
Local Council	The deliberative authority of the municipality
MD&A	Management's Discussion and Analysis
Memorial	Claimants' Memorial dated 30 June 2017
MFN clause	Most Favored Nation clause
Minvest	<i>Regia Autonomă a Cuprului Deva</i> (which became <i>Companiei Nationale a Cuprului, Aurului si Fierului</i> "Minvest" S.A. in 1998)
Minvest RM	S.C. Minvest Roșia Montană S.A.
NAMR	National Agency for Mineral Resources ( <i>Agentia Nationala pentru Resurse Minerale</i> )
Negotiation commission	Governmental commission was established in May 2013 to negotiate with RMGC the implementation of the Project
NIH	The National Institute of Heritage ( <i>Institutul Național al Patrimoniului</i> )
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
PETI	EU Parliament Committee on Petitions

<b>Term</b>	<b>Definition</b>
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 ( <i>planul urbanistic de detaliu</i> )
PUG	General Urban Plan ( <i>planul urbanistic general</i> )
PUZ	Zonal Urban Plan ( <i>planul urbanistic zonal</i> )
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 ( <b>Exhibit R-123</b> )
RMGC	S.C. Roşia Montană Gold Corporation S.A.
Romanian Supreme Court	Romanian High Court of Cassation and Justice ( <i>Înalta Curte de Casaţie şi Justiţie</i> ), formerly Supreme Court of Justice ( <i>Curtea Supremă de Justiţie</i> )
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 ( <b>Exhibit C-2434</b> )
RRAP	Resettlement and Relocation Action Plan ( <b>Exhibits C-463 and C-464</b> )
SEA	Strategic Environmental Assessment

<b>Term</b>	<b>Definition</b>
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 ( <b>Exhibit RLA-36</b> )
SEA Procedure	Procedure for the environmental impact assessments of urban plans (such as a PUZ)
TAC	Technical Advisory Committee
TMF	Tailings Management Facility
UC	Urban Certificate
UK-Romania BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments dated 13 July 1995 and effective since 10 January 1996 ( <b>Exhibit C-3</b> )
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties ( <b>Exhibit RLA-1</b> )
Waste Management Directive	Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC ( <b>Exhibit RLA-38</b> )

## **1 INTRODUCTION**

- 1 The Respondent submits this Rejoinder in response to the Claimants' Reply pursuant to Procedural Order No. 22 dated 3 May 2019.
- 2 In their Reply, the Claimants maintain a complex and sprawling web of accusations involving multiple State authorities, central and local, and spanning over many years. Tellingly, for nearly all of their claims, they depend on the purported existence of a composite breach of the BITs. However, they fail to demonstrate that the alleged State acts and omissions of which they complain were driven by a deliberate campaign or an underlying pattern, policy, or purpose. Nor can they, given the vast scope – in both time and place – of their claims.
- 3 Romania never had any conceivable reason to undermine the Claimants' investments. The Romanian State is indirectly, through Minvest (until the end of 2013) and Minvest RM (after 2013), two State-owned companies, a partner in the Project, and it was in Romania's interest for the Project to succeed. Romania has also suffered economically, and continues to suffer economically, from the Claimants' failure to implement the Project. This is not to deny that the Project has also raised, and continues to raise, significant environmental and other public policy concerns. Indeed, an intensifying and expanding tension and eventually a conflict, over the course of the Project, between economic and commercial interest, on the one hand, and environmental and other public policy concerns, on the other, is what this case is in substance all about. But this conflict – the real conflict – is not one between the Claimants and the Romanian State, but between the Claimants and the local community and other stakeholders of the Project – a conflict which the Claimants in this arbitration seek to convert, unsuccessfully, into a conflict between the Claimants and the State.
- 4 The verbosity of the Claimants' Reply submission – over 1,400 pages of witness statements and expert reports alone – speaks to the artificiality as well as weakness of their claims. The multitude of allegations – many

of which are irrelevant to the claims before the Tribunal<sup>1</sup> – may be distilled into four principal allegations each of which purportedly supports the Claimants' main claim that Romania failed to provide their investments with fair and equitable treatment and thereby breached the BITs. These allegations are unfounded as summarized below.

- 5 First, the core allegation is that the Ministry of Environment failed to grant RMGC an environmental permit in late 2011, which was allegedly due to be issued under Romanian law as, on the Claimants' case, the permitting process had been concluded.
- 6 The Ministry's alleged failure to issue the permit was, however, manifestly lawful as RMGC had not met the permitting requirements and the permit therefore was not due to be issued. Contemporaneous evidence reflects an understanding on the part of both State authorities and the Claimants that the permitting process was ongoing.
- 7 Second, the Claimants contend that State authorities purportedly threatened to withhold the environmental permit unless and until RMGC agreed to increase the State's shareholding in RMGC (via Minvest) and the royalty rate. The Claimants argue that this purported coercion continued into 2013.
- 8 The Claimants' coercion theory does not pass the straight-face test. As former Minister of Economy Mr. Ion Arition and his advisor Mr. Sorin Găman testify, and as the Claimants communicated to the press and in public disclosures at the time, the Claimants' representatives freely and willingly negotiated with State representatives. By late 2011, they had agreed to the Government's proposal to increase the State's benefits from the development of the Project.
- 9 Put simply, RMGC freely and willingly gave the Government what it sought.

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<sup>1</sup> The Claimants for instance complain of certain court decisions without formulating a claim of denial of justice, and of alleged actions of the Romanian State that took place before the entry into force of the Canada-Romania BIT in November 2011.

- 10 The argument that the Government continued to coerce RMGC over a period of two years, into 2012 and 2013, to allegedly force it to agree to something to which it had already agreed (by late 2011) defies credulity as well as logic.
- 11 The former Prime Minister of Romania from December 2008 to February 2012, Mr. Emil Boc, testifies that neither he nor his Government threatened or coerced RMGC into agreeing to increase the State's shareholding (through Minvest) in RMGC or the royalty rate. He also rejects the allegation that he interfered in the EIA Review Process, including by purportedly interfering in the TAC's work in November 2011.
- 12 The evidence on record, including contemporaneous evidence, is starkly at odds with the Claimants' story to the Tribunal. In the fall of 2011, RMGC sought to take advantage of the Government's request to increase the State's benefits from the development of the Project [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>2</sup>
- 13 As to the surface rights, by February 2008, RMGC had given up trying to purchase the necessary properties. It still needed to acquire, among other types of property, around 22% of the residential properties. It had hit, however, a brick wall – relentless social opposition to the Project. Several Roșia Montană residents have provided statements in support of this Rejoinder to confirm their refusal to sell their homes to RMGC and their opposition to the Project. As one resident has warned: “We will never leave this place, no matter what they offer us.”<sup>3</sup> The local resistance subsequently expanded and grew into a regional and nation-wide social movement, with international dimensions.
- 14 In their Reply, the Claimants are silent regarding the protracted local litigation concerning the Project. Their blanket, default defense that the litigation – whether it concerned the ADCs, the PUZ, or the urban certificate – did not impact the permitting process is unavailing. Every challenge –

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<sup>2</sup> See [Counter-Memorial](#), p. 354 *et seq.* (Annex IV) (listing the main NGO challenges).

<sup>3</sup> [Jeflea](#), p. 2 (para. 10).

let alone every suspension or annulment of a permit – impacted the Project, by causing delays and affecting possibly other permits. The litigation reflected and indeed was one of the main tools of the expanding social opposition.

- 15 Faced with these hurdles, in the fall of 2011, RMGC thus requested that, in exchange of an increase in the State's benefits from the development of the Project, [REDACTED]

- 16 The Government refused. [REDACTED] It made clear to the Claimants that the economic negotiations were not and could not be linked to permitting issues. But what the Government could do was to draft a law and submit it to Parliament for its approval – and this is exactly what it did, by preparing the Roșia Montană Law and submitting it to Parliament for consideration and approval.

- 17 Third, somewhat ironically, the Claimants also complain about the Government's efforts to support the Project – the Roșia Montană Law. Indeed the Claimants simultaneously argue that the Roșia Montană Law was foisted on them while at the same time contending that Parliament improperly rejected the law – thus suggesting, rather preposterously, that a decision taken by a democratically elected legislator after full deliberation could amount to a breach of the BITs. The Claimants' complaints are both contradictory and unsupported by the evidence. The law was not imposed on the Claimants and there was no coercion, nor did Parliament do anything improper when rejecting the Roșia Montană Law, in particular as massive street protests prompted by the submission of the draft law to Parliament made it manifestly clear that the Claimants had failed to secure the social license to operate the Project, as summarized below.

- 18 For much of 2013, Government and RMGC representatives negotiated the Roșia Montană Law, which was designed to facilitate and expedite the Project. It envisaged the amendment of several laws and the issuance of over 45 permits and endorsements for the Project by June 2014. [REDACTED]

[REDACTED]  
[REDACTED] The Claimants' representatives lauded the submission of the Roşia Montană Law to Parliament. Mr. Henry beamed that they were "extremely encouraged" by the "Government's decision to approve a law specific to the Roşia Montană Project."

- 19 The Prime Minister of Romania from May 2012 to November 2015, Mr. Victor Ponta, confirms in a declaration submitted in support of this Rejoinder, that the Roşia Montană Law was designed to support the Project. He rejects the contention that his Government withheld permits for the Project (including the environmental permit) in an effort to arm-wrangle RMGC into agreeing to increase the State's benefits from the development of the Project. He confirms his understanding that the negotiations of the draft law were at arms-length and that RMGC was pleased with the draft law that was subsequently submitted to Parliament.
- 20 Although the Claimants now criticize the Parliamentary review process, including the work of an *ad hoc* bicameral committee, they voiced no such criticisms at the time and have in any event failed to show that the process was contrary to Romanian law or otherwise improper. When the committee recommended in November 2013 the rejection of the Roşia Montană Law, Mr. Henry observed that it had not rejected the Project (just the law) and seemed to have no issue with the committee's findings: "The report of the Special Committee is a first step in defining the next phase of developing Roşia Montană."
- 21 Fourth, the Claimants contend that, following Parliament's rejection of the Roşia Montană Law, the Government improperly failed to issue the environmental permit and improperly declared the Project area a historical monument. However, RMGC has still not met all of the requirements for the environmental permit. Moreover, when the Parliament virtually unanimously followed the committee's recommendation and rejected the Roşia Montană Law in June 2014, RMGC did not prepare "the next phase," contrary to what Mr. Henry had indicated.
- 22 Notwithstanding Parliament's vote and the massive street protests that had lasted months and have come to be known as the "Romanian autumn" – about which the Claimants do not breathe word in their Reply – RMGC did not seek to revise the Project. It refused to go back to the drawing board

and the normal permitting procedure. Instead of recommencing efforts to secure permits and surface rights, RMGC threw in the towel and cynically started to build a paper-trail for this arbitration, by writing letters to the President, Prime Minister, and Government in an attempt to shift the blame for the Project's alleged failure.

- 23 Although the Claimants complain at length in their Reply about the list of historical monuments' reference to Roşia Montană (both in its 2010 and 2015 versions), the Ministry of Culture endorsed the Project in the spring of 2013 and thus did not consider the 2010 list an impediment to doing so. Nor did it withdraw its endorsement following the 2015 list. Although the Claimants complain in the same vein about the Ministry of Culture's application for Roşia Montană to become a UNESCO World Heritage site, Romania has suspended that application pending the outcome of this arbitration.
- 24 For these and other reasons detailed in this Rejoinder, the Tribunal should reject the claim that Romania failed to provide the Claimants' investments with fair and equitable treatment under the BITs. Insofar as the remaining claims are based on the very same facts as the claim of breach of fair and equitable treatment, they too fall to be dismissed.
- 25 The Project failed due to RMGC's own conduct – its failure to secure the necessary permits, surface rights, and at least the acceptance, if not the approval, of the Project by stakeholders, *i.e.* its failure to secure the social license to operate. Dr. Augustin Stoica and Dr. Alina Pop document in their expert opinions the over ten-year “Save Roşia Montană” campaign and social movement that took numerous forms, including court challenges, street protests, petitions, open letters, flash mobs, theater plays, video documentaries, and festivals such as the annual Roşia Montană “Hay Festival” (or “Fânfest”). As they explain, this opposition culminated in September 2013 with the submission of the Roşia Montană Law to Parliament and the resulting massive street protests.
- 26 Ultimately, a State cannot impose a mining project on its people. If NGOs contest permits for the project before courts or otherwise, in the streets, the State, in a democracy, cannot prevent them from doing so. It can defend its actions and permits in court, just as State authorities have done in this case for over fifteen years, but it cannot direct its courts to disregard the appli-

cable laws and procedures – and even less, to disregard itself the decisions taken by the courts. As Dr. Ian Thomson explains, it is incumbent on not the State, but the investor to secure the social license for its project. In his second opinion, he details why, contrary to the Claimants' allegations, RMGC failed to do so.

- 27 The most tangible evidence of RMGC's failure to secure the social license is embodied in the living and breathing forms of the Roșia Montană residents who have and continue to refuse to leave their homes to make way for the Project. It is also evident in the persistent and protracted local litigation by NGOs to challenge each permit and other authorizations and documents issued by State authorities, including the ADCs, the PUZ, and the urban certificate.
- 28 The Claimants' quantification of their alleged damage is also fundamentally flawed. Contrary to what the Claimants suggest, the market value of Gabriel Canada as of the alleged Valuation Date is not a valid proxy for the quantum of the purported damage. Moreover, even assuming market capitalization were a valid proxy (*quod non*), [REDACTED]  
[REDACTED]  
[REDACTED] Other, more appropriate valuation methods should have been considered, which the Claimants have failed to do, and thus have effectively put all their eggs in one basket. If the Tribunal rejects the Claimants' valuation method, it must dismiss the claims in their entirety, even assuming they were found to have some limited merit (which is denied).
- 29 Finally, as these proceedings have not been bifurcated, it should be recalled that, as demonstrated by the Respondent in its Counter-Memorial, the claims also fall out of the Tribunal's jurisdiction, primarily because Gabriel Canada's claims are time-barred under the Canada-Romania BIT as the purported composite breach took place more than three years before the commencement of this arbitration (*i.e.* before 30 July 2012). The claims therefore stand to be dismissed on this preliminary basis as well. To the extent the Claimants have attempted to respond in their Reply to the Respondent's demonstration in the Counter-Memorial, this Rejoinder addresses the Claimants' arguments and concludes that they do not cause the Respondent to adjust its position on the issue.

- 30 Accordingly, the Respondent respectfully reiterates its request that the Tribunal dismiss the Claimants' claims in their entirety and award the Respondent the costs it has incurred in defending the unfounded claims brought against it.
- 31 In support of this Rejoinder, Romania submits statements from the following witnesses:
- Mr. Emil Boc: former Prime Minister of Romania (from December 2008 to February 2012);
  - Mr. Ion Ariton: former Minister of Economy (from September 2010 to February 2012) who participated in economic negotiations with the Claimants' representatives in 2011;
  - Mr. Lucian Nicolae Bode: former Minister of Economy (from February to May 2012) who participated in a meeting with the Claimants' representatives during his tenure;
  - Mr. Sorin Mihai Găman: 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 economic negotiations with the Claimants' representatives in 2011 and in 2013;
  - Mr. Ioan "Sorin" Jurecă: a lifelong Roșia Montană resident and former Alburnus Maior member who has devoted much of the past twenty years to opposing the Project;
  - 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,
  - Six additional Roșia Montană residents (Mr. Constantin Cămărășan, Mr. Eugen "Zeno" Cornea, Mr. Petru Devian, Mr. Augustin Golgoț, Ms. Niculina Jeflea, and Mr. Ioan Petri): lifelong Roșia Montană residents who oppose the Project and refuse to leave.
- 32 This Rejoinder is also accompanied by a declaration from Mr. Victor Ponta, Prime Minister of Romania from May 2012 to November 2015.

33 In contrast to the Claimants, who have submitted reports on behalf of parties who worked for and represented RMGC,<sup>4</sup> Romania submits reports by the following independent experts:

- A team of experts from Chris Morgan Associates, including Ms. Lorraine Wilde, who has authored a rebuttal report regarding the EIA Review Process and the EIA Report in general, as well as Ms. Christine Blackmore, Mr. Dermot Claffey, Mr. Mark Dodds-Smith, and Dr. Peter Claughton, who have authored four rebuttal reports regarding controversial aspects of the Project and/or that they have deemed not in line with industry practice, concerning the TMF, cyanide use and management, waste management and the mine closure plan, and cultural heritage issues;
- Dr. Ian Thomson: principal of SCI-Shinglespit Consultants Inc., who has authored a second opinion regarding RMGC's failure to obtain a social license for the Project;
- Dr. Augustin Stoica: Associate Professor of Sociology in the Department of Sociology, Faculty of Political Sciences, the National University for Political and Administrative Studies in Bucharest, who has authored an opinion regarding the causes of the 2013 protests in Romania and related issues;
- Dr. Alina Pop: Senior Lecturer in Communication Psychology within the Department of Communication Science of the *Dimitrie Cantemir* Christian University of Bucharest, who has submitted an opinion regarding the media campaigns surrounding the Project;
- Mr. Karr McCurdy: principal of McCurdy Advisory Services LLC who has submitted a report regarding the feasibility of financing the Project;
- Dr. James C. Burrows: Vice-Chairman of Charles River Associates, who has authored a second report assessing the quantum of the claims; and,

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- A team of experts from Dolbear & Company (USA), Inc.: including Mr. Bernard J. Guarnera, Director, Senior Associate, and Principal Valuator of the Behre Dolbear Group Inc., Dr. Robert E. Cameron, Senior Associate of the Behre Dolbear Group Inc., and Mr. Mark K. Jorgensen, Consultant of Behre Dolbear Group Inc., who have authored a second report regarding the feasibility and costs of the Project.
- 34 Finally, Romania submits opinions by the following Romanian legal experts:
- Prof. Dacian Dragos: 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 second opinion regarding the procedure to obtain environmental and building permits in Romania;
  - Prof. Dana Tofan: a professor at the Bucharest Law Faculty specialized in administrative law and urban planning laws, who has authored a legal opinion regarding the urban certificates and plans for the Project and the discretionary power of public authorities; and,
  - Profs. Irina Sferdian and Lucian Bojin: respectively the Chair of the Private Law Department and Professor of Civil Law and Insurance Law at the Law Faculty of the West University of Timișoara, and an Associate Professor of International Law and Human Rights Law at the Law Faculty of the West University of Timișoara, who have submitted a legal opinion regarding the legal regime governing land within the perimeter of a mining exploitation license and expropriation laws and procedures in Romania.

## 2 THE CLAIMS FALL OUTSIDE THE TRIBUNAL'S JURISDICTION

- 35 Gabriel Canada's claims do not fall within the Tribunal's jurisdiction (**Section 2.1**). First, Gabriel Canada cannot claim both on its own behalf and that of RMGC (**Section 2.1.1**). Second, Gabriel Canada's claims fail to comply with Articles XIII(2) and (3)(b) of the Canada-Romania BIT (**Section 2.1.2**). Third, Gabriel Canada's claims arise out of measures taken prior to 30 July 2012 and are time-barred (**Section 2.1.3**). Fourth, Gabriel Canada has no standing to bring its umbrella clause claim (**Section 2.1.4**). Fifth, Gabriel Canada's claims relating to environmental and taxation measures are governed by a special regime (**Section 2.1.5**).
- 36 The Claimants have also failed to prove that Gabriel Jersey's claims fall within the Tribunal's jurisdiction (**Section 2.2**). First, Gabriel Jersey has not proven that it has made any investments (**Section 2.2.1**). Second, its claims do not satisfy the notice provision under Article 7(1) of the UK-Romania BIT (**Section 2.2.2**). Third, the Tribunal does not have jurisdiction as a result of the Achmea Decision (**Section 2.2.3**).
- 37 Finally, 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.<sup>5</sup>

### 2.1 Gabriel Canada's Claims Fall Outside the Tribunal's Jurisdiction

#### 2.1.1 Gabriel Canada Cannot Claim Both on Its Own Behalf and on Behalf of RMGC

- 38 In its Counter-Memorial, the Respondent showed how the Canada-Romania BIT establishes two separate jurisdictional regimes based on the legal interest of the Claimant:

“a Canadian investor that owns or controls a local subsidiary in Romania must choose between bringing a claim on its own behalf under Ar-

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<sup>5</sup> [Counter-Memorial](#), p. 192 (para. 497).

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.”<sup>6</sup>

39 Accordingly, Gabriel Canada can only claim compensation for alleged loss or damage to the value of its shareholding in Gabriel Jersey. It has no standing to claim compensation for loss or damage sustained by Gabriel Jersey and, even less, by RMGC.<sup>7</sup>

40 In response, the Claimants confirm that they do “not present a claim under Article XIII(12) of the Canada BIT on behalf of RMGC.”<sup>8</sup> They state:

“There should be no confusion, however, that the loss that Gabriel Canada incurred is the **loss of the value of the shares it has held in its subsidiaries**, including Gabriel Jersey, which it held indirectly and continuously from 1997 to date.”<sup>9</sup>

41 It is thus now undisputed that Gabriel Canada is only making a claim for the alleged loss in the value of its shares in its subsidiaries.<sup>10</sup>

### **2.1.2 Gabriel Canada’s Claims Fall Outside the Tribunal’s Jurisdiction to the Extent They Fail to Comply with Articles XIII(2) and (3)(b) of the Canada-Romania BIT**

42 As demonstrated in the Counter-Memorial, “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.”<sup>11</sup> Insofar as Gabriel Canada’s claims are based on events that took

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<sup>6</sup> *Id.* at p. 172 (para. 443) and p. 175 (para. 448).

<sup>7</sup> *Id.* at p. 175 (para. 448).

<sup>8</sup> [Reply](#), p. 148 (para. 326).

<sup>9</sup> *Id.* at p. 149 (para. 327) (emphasis added).

<sup>10</sup> See *infra* Section 7.

<sup>11</sup> [Counter-Memorial](#), p. 177 (para. 453).

place after Gabriel Canada notified Romania of its claims, they fall outside the Tribunal's jurisdiction.<sup>12</sup>

43 The Respondent also noted that Gabriel Canada had failed to waive its right to initiate or continue parallel proceedings relating to multiple claims in the present case. Accordingly, in light of Article XIII(3)(b) of the BIT, those claims fall outside the Tribunal's jurisdiction or are inadmissible.<sup>13</sup>

44 In response, the Claimants argue that Gabriel Canada's notification and waiver were both sufficient for the purposes of establishing jurisdiction over the whole dispute.<sup>14</sup> Gabriel Canada further purported to make:

“an additional waiver that expressly extends to its right to initiate or continue other proceedings in relation to the measures that are alleged by Gabriel Canada in any of its written or oral submissions in the course of the conduct of this arbitration to be in breach of the BIT.”<sup>15</sup>

45 The Claimants' arguments fail upon observance of the legal requirements in the Canada-Romania BIT. The test in Article XIII(2) is clear: only claims arising out of measures “taken or not taken by” Romania that allegedly caused damage to an investor adequately notified to Romania can be submitted to arbitration.

46 Gabriel Canada's claims do not respect Article XIII(2). The Claimants complain about an array of alleged actions and omissions of Romania that occurred well after Gabriel Canada's Notice of Dispute of January 2015 and that thus cannot have been included in the notification. They include:

- the issuance of an updated list of historical monuments in December 2015;<sup>16</sup>

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<sup>12</sup> *Id.* at p. 177 *et seq.* (para. 456).

<sup>13</sup> *Id.* at p. 177 (para. 454).

<sup>14</sup> [Reply](#), p. 151 (para. 332).

<sup>15</sup> *Id.* at p. 158 (para. 348).

<sup>16</sup> *Id.* at p. 9 (para. 2 z)).

- the Ministry of Culture's application in December 2015 for Roșia Montană to become a UNESCO World Heritage site;<sup>17</sup>
- the Government's alleged proposal in December 2016 to enact a 10-year moratorium on the use of cyanide in gold and silver mining projects in Romania;<sup>18</sup>
- various acts of ANAF and other Romanian tax entities of 2016-2017 and ensuing litigation before Romanian courts;<sup>19</sup> and,
- the acts of Minvest in 2016-2017 in relation to a share capital increase and ensuing litigation before Romanian courts.<sup>20</sup>

47 The Claimants allege that these acts fall within the Tribunal's jurisdiction because they are parts of a single "continuing practice"<sup>21</sup> and that therefore they are "a mere factual extension of the dispute submitted to arbitration."<sup>22</sup> The success of Gabriel Canada's claim thus hinges on the Tribunal finding that the disparate facts above form part of the same "practice" together with the earlier acts. To the extent that Gabriel Canada has failed to prove that these actions are part of the same "measure" that was notified to Romania through its Notice of Dispute, the Claimants have failed to comply with the provisions of Article XIII(2).

48 The Claimants' approach is impermissible, because it defeats Romania's rights under Article XIII(2) of the Canada-Romania BIT to make an informed decision as to whether it should remedy the alleged breach, negotiate with the investor, or defend the claims in the arbitration. That right cannot be meaningfully exercised when all allegations of breach have not been raised in the Notice of Dispute. As the *Burlington v. Ecuador* tribunal reasoned:

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<sup>17</sup> *Id.* at p. 9 (para. 2 aa)).

<sup>18</sup> *Id.* at p. 248 *et seq.* (para. 586).

<sup>19</sup> *Id.* at p. 136 *et seq.* (para. 290).

<sup>20</sup> *Id.* at p. 136 (para. 289, n. 633).

<sup>21</sup> *Id.* at p. 153 (para. 337).

<sup>22</sup> *Id.* at p. 155 (para. 342).

“as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI. This requirement makes sense as it gives the state **an opportunity to remedy a possible Treaty breach and thereby avoid arbitration proceedings under BIT, which would not be possible without knowledge of an allegation of Treaty breach.**”<sup>23</sup>

- 49 In conclusion, insofar as the Claimants do not prove that Gabriel Canada’s claims relate to breaches and damage specifically notified to Romania in Gabriel Canada’s Notice of Dispute, the Claimants fail to establish jurisdiction over Gabriel Canada’s claims under Article XIII(2).
- 50 Moreover, the notice requirement under Article XIII(2) is linked to Article XIII(3)(b), which conditions Romania’s consent to arbitrate disputes over measures in relation to which the investor has waived the right to pursue parallel remedies in other fora, including before the host State courts.
- 51 The Claimants have effectively acknowledged the validity of the Respondent’s objection to the sufficiency of the waiver in the Request for Arbitration and have produced a new purported waiver for all measures alleged both in the Memorial and the Reply.<sup>24</sup> This new waiver is insufficient.
- 52 First, Article XIII(3)(b) sets an additional bar which the investor must pass to establish jurisdiction over its claims. As the *Infinito Gold v. Costa Rica* tribunal confirmed by reference to an identical provision in another Canadian BIT:

“Article XII(3)(b) is also jurisdictional in nature: **the host State has not consented to arbitrate** if the investor has not waived its right to

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<sup>23</sup> [Burlington Resources Inc. v. Republic of Ecuador, Decision on Jurisdiction, ICSID Case No. ARB/08/5, 2 June 2010, at Exhibit RLA-120](#), p. 70 (para. 335) (emphasis added); see also [Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia, Award, PCA Case No. 2011-17, 31 January 2014, at Exhibit CLA-42](#), p. 144 *et seq.* (para. 389).

<sup>24</sup> [Reply](#), p. 158 (para. 348).

initiate or continue other proceedings before the courts of the host State.”<sup>25</sup>

- 53 Through Article XIII(3)(b), Romania expressed its interest in not having to defend parallel claims relating to the same conduct before different fora and conditioned its consent to arbitration accordingly in the Canada-Romania BIT. As the tribunal explained in *Renco v. Peru*:

**“The inevitable conclusion, therefore, is that no arbitration agreement ever came into existence. In the Tribunal’s opinion, given the unequivocal language of [provision on waiver of claims], this is not a trivial defect which can be easily brushed aside—the defective waiver goes to the heart of the Tribunal’s jurisdiction.”**<sup>26</sup>

- 54 Second, the new waiver comes too late to expand Romania’s consent and this Tribunal’s jurisdiction, not least considering that RMGC continues to litigate before Romanian courts.<sup>27</sup> As a general principle of international law, jurisdiction must exist on the date when the arbitration is commenced and cannot be later unilaterally amended.<sup>28</sup> This has also been endorsed in investment treaty arbitration. In *RDC v. Guatemala*, the tribunal stated that:

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<sup>25</sup> [Infinito Gold Ltd. v. Republic of Costa Rica, Decision on Jurisdiction, ICSID Case No. ARB/14/5, 4 December 2017, at Exhibit RLA-121](#), p. 49 (para. 173) (emphasis added).

<sup>26</sup> [The Renco Group Inc. v. Republic of Peru, Partial Award on Jurisdiction, ICSID Case No. UNCT/13/1, 15 July 2016, at Exhibit RLA-122](#), p. 34 (para. 138) (emphasis added); see also [Railroad Development Corporation v. Republic of Guatemala, Decision on Jurisdiction, ICSID Case No. ARB/07/23, 17 November 2008, at Exhibit RLA-123](#), p. 26 (para. 61); [Commerce Group Corp and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, Award, ICSID Case No. ARB/09/17, 14 March 2011, at Exhibit RLA-124](#), p. 39 (para. 115); [Waste Management, Inc. v. United Mexican States, Award, ICSID Case No. ARB\(AF\)/98/2, 2 June 2000, at Exhibit RLA-125](#), p. 234 *et seq.* (paras. 27-31).

<sup>27</sup> See [Gabriel Canada MD&A, First Quarter 2019, at Exhibit R-481](#), p. 4; [Gabriel Canada MD&A, Fourth Quarter 2018, at Exhibit R-482](#), p. 4.

<sup>28</sup> See e.g. [Arrest Warrant of 11 April 2002 \(Democratic Republic of the Congo v. Belgium\) \(Judgment\) \[2002\] ICJ Rep 75, at Exhibit RLA-126](#), p. 12 *et seq.* (para. 26); [Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie \(Libyan Arab Jamahiriya v. United States of America\) \(Preliminary Objections\) \[1998\] ICJ Rep 115, at Exhibit RLA-127](#), p. 130 *et seq.* (paras. 43-44); see also [Convention on the settlement of investment disputes between States and nationals of other States \(adopted on 18 March 1965, entered into force on 14 October 1966\) 575 UNTS 159, at Exhibit RLA-116](#), p. 174 *et seq.* (Art. 25).

“[The adequacy of the Claimant’s waiver] being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied”<sup>29</sup>

55 The waiver is therefore late and cannot cure the jurisdictional defect that existed when this arbitration was commenced.

### **2.1.3 Gabriel Canada’s Claims Fall Outside the Tribunal’s Jurisdiction Since They Arise Out of Measures Taken Prior to 30 July 2012**

56 As already demonstrated, in accordance with the three-year time limit established by Article XIII(3)(d) of the Canada-Romania BIT, the Tribunal’s jurisdiction is limited to claims based on alleged breaches that occurred after 30 July 2012, the Claimants having submitted the present dispute to arbitration on 30 July 2015.<sup>30</sup> In response, the Claimants argue that three conditions in Article XIII(3)(d) must be fulfilled:

“(i) the alleged breach must have occurred, (ii) the resulting loss or damage must have been incurred, and (iii) the investor must have acquired, or reasonably been in a position to acquire, knowledge of both the breach and the loss.”<sup>31</sup>

57 It is the Claimants’ position that they neither incurred nor acquired knowledge of loss prior to 30 July 2012.<sup>32</sup> Thus, they argue that the third condition was not fulfilled before 30 July 2012 and the Tribunal has jurisdiction over all of Gabriel Canada’s claims.

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<sup>29</sup> [RDC v. Guatemala, Decision on Jurisdiction, 17 November 2008, at Exhibit RLA-123](#), p. 26 (para. 61); see also [Commerce v. El Salvador, Award, 14 March 2011, at Exhibit RLA-124](#), p. 32 *et seq.* (paras. 96-97) and p. 39 (para. 115).

<sup>30</sup> [Counter-Memorial](#), p. 179 (paras. 458-459).

<sup>31</sup> [Reply](#), p. 159 (para. 351).

<sup>32</sup> *Id.* at p. 161 (para. 358).

- 58 The Claimants' position is untenable.
- 59 Throughout their Memorial and Reply, the Claimants refer to measures allegedly taken by the State from August 2011 and which allegedly amount to a composite breach of the Canada-Romania BIT.<sup>33</sup> However, they make no effort to identify those measures or to explain how they amount to a composite act in accordance with Article 15 of the International Law Commission's Articles on State Responsibility (the "**ILC Articles**"). This demonstration is particularly important given the three-year limitation period established in Article XIII(3)(d) of the Canada-Romania BIT.
- 60 Article 15 of the ILC Articles reads as follows:

"1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."<sup>34</sup>

- 61 Thus, as confirmed by the commentary to the ILC Articles, if the alleged breaches of the BIT are caused by a composite act, the first measure identified by the Claimants as the "beginning of the end" is the effective date of breach of the BIT.<sup>35</sup> As elaborated by Judge Crawford:

"Once a sufficient number of actions or omissions have occurred to produce the composite act, **the breach is in effect backdated to the first of the acts in the series.**"<sup>36</sup>

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<sup>33</sup> See, e.g., [Memorial](#), p. 399 *et seq.* (para. 896); Reply, p. 262 (para. 627).

<sup>34</sup> [International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries \(2001\)](#), at [Exhibit RLA-33](#), p. 62.

<sup>35</sup> *Id.* at p. 63 (para. 10); [Memorial](#), p. 388 (para. 866).

<sup>36</sup> [J. Crawford, State Responsibility: the general part \(1st edition, Cambridge University Press, 2013\) \(excerpt\)](#), at [Exhibit RLA-128](#), p. 269 (emphasis added).

62 The Claimants admit that the Government allegedly “blocked Project permitting and demanded to renegotiate the Project economics” prior to 30 July 2012 and that allegedly this “was the beginning of the measure.”<sup>37</sup> This is also the only date on which the Claimants quantify their damage.<sup>38</sup> As such, the first measure of the composite act took place before 30 July 2012, which means that the Tribunal has no jurisdiction over the alleged composite act under Article 15(2) of the ILC Articles.

63 In any event, the Claimants have failed to prove that the alleged acts form part of an aggregate of conduct which culminated in a breach of the BIT. As established in the commentary to the ILC’s Articles:

“Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is ‘a series of acts or omissions defined in aggregate as wrongful.’”<sup>39</sup>

64 Thus, for a composite act to have occurred, the individual components must together amount to more than the sum of the parts. Indeed, one of the main characteristics of a composite act is that “[i]t implies that the responsible entity (including a State) will have adopted a systematic policy or practice.”<sup>40</sup> An example in investment law is provided by *Pac Rim v. El Salvador*, where the claimant alleged that the State’s actions, including the President’s announcement that he opposed the granting of any mining licenses, constituted a composite act evidencing a “practice” of not granting permits. The tribunal rejected this allegation:

“it is impossible, in the Tribunal’s view, to characterise the ban as a different legal animal from the several acts that comprise it, i.e. as a composite act. ... These are similar acts the aggregation of which does not produce a different composite act under international law. The Tri-

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<sup>37</sup> [Reply](#), p. 162 (para. 360).

<sup>38</sup> *Id.* at p. 315 (para. 750 c)). See *infra* Section 9.

<sup>39</sup> [ILC Articles, at Exhibit RLA-33](#), p. 62 (para. 2).

<sup>40</sup> *Id.* at p. 62 (para. 3).



68 As the *Berkowitz v. Costa Rica* tribunal concluded, a claimant is not entitled to wait and see if a breach and/or the damage become more significant. The limitation period will start from the first appreciation of a breach and damage:

“the limitation clause does not require full or precise knowledge of the loss or damage ... such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.”<sup>47</sup>

69 Concerning the exploitation licenses for the Bucium Project, the Claimants submitted their applications in October 2007 and claim that it was only in 2013 that they realized that NAMR was allegedly refusing to issue the licenses.<sup>48</sup> According to Prof. Bîrsan, NAMR should have concluded an exploitation license contract and submitted it to the Government within 90 days after the application (*i.e.* in January 2008).<sup>49</sup> Thus, the Claimants clearly had or should have had knowledge of the alleged breaches concerning Bucium by January 2008 and by September 2011 in the case of the Project, when they considered bringing legal action against the State.<sup>50</sup> Accordingly, the Tribunal does not have jurisdiction over the claims due to the time bar in Article XIII(3) of the Canada-Romania BIT.

#### 2.1.4 Gabriel Canada's Umbrella Clause Claim Falls Outside the Tribunal's Jurisdiction

70 As previously explained, 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” such as an umbrella clause.<sup>51</sup> The Claimants do not address this argument in the jurisdictional section of their Reply. Accordingly, the Respondent addresses the

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<sup>47</sup> [Aaron C. Berkowitz et al. \(formerly Spence International Investments LLC et al.\) v. Republic of Costa Rica, Interim Award \(Corrected\), ICSID Case No. UNCT/13/2, 30 May 2017, at Exhibit CLA-236](#), p. 128 (para. 213).

<sup>48</sup> [Reply](#), p. 166 *et seq.* (para. 372).

<sup>49</sup> [Bîrsan LO I](#), p. 89 (para. 403).

<sup>50</sup> See also [Counter-Memorial](#), p. 182 (para. 465).

<sup>51</sup> *Id.* at p. 199 (para. 467).

Tribunal's lack of jurisdiction over this claim together with the claim's lack of merit in **Section 6.1** below.

### **2.1.5 Gabriel Canada's Claims Are Limited by the Substantive Provisions of the BIT**

- 71 The Canada-Romania BIT contains specific provisions dealing with environmental and taxation measures. In the Respondent's submission, the relevant provisions deprive the Tribunal of jurisdiction to hear claims arising from measures that fulfil the criteria by constraining the ability of investors to bring claims based on such measures.<sup>52</sup> Alternatively, they preclude such measures from amounting to breaches of the BIT.
- 72 The Claimants argue that the measures at issue were not undertaken in good faith to address environmental or taxation concerns.<sup>53</sup> As demonstrated below, this is the case neither in relation to environmental measures (**Section 2.1.5.1**) nor in relation to taxation measures (**Section 2.1.5.2**).

#### **2.1.5.1 Claims Relating to Environmental Measures Are Governed by a Special Regime**

- 73 Gabriel Canada's principal claims arise out of the environmental permitting process conducted by the Ministry of Environment.<sup>54</sup> Because the underlying allegations fall within the meaning of Articles XVII(2) and (3) of the Canada-Romania BIT, this Tribunal has no jurisdiction over the claims.
- 74 The Claimants have noted that Articles XVII (2) and (3) expressly refer to:

“measures ‘otherwise consistent with this Agreement,’ making clear that measures meant ‘to ensure that investment activity...is undertaken in a manner sensitive to environmental concerns’ also must be consistent with the investment protections set forth in the BIT.”<sup>55</sup>

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<sup>52</sup> *Id.* at p. 186 (para. 478).

<sup>53</sup> [Reply](#), p. 173 (para. 390).

<sup>54</sup> [Counter-Memorial](#), p. 187 (para. 480).

<sup>55</sup> [Reply](#), p. 170 *et seq.* (para. 383).

75 They have argued that:

“the record overwhelmingly demonstrates that Romania did not refuse to issue the environmental permit for the Roşia Montană Project because it considered that doing so was ‘necessary’ to protect ‘human, animal or plant life or health.’”<sup>56</sup>

76 Accordingly, the Claimants contend that the environmental carve-out does not apply to Gabriel Canada’s claims. These contentions are misguided.

77 The Claimants’ interpretation deprives Article XVII(2) of meaning.<sup>57</sup> Any measure by the State must comply with the other protections in the BIT or it will constitute a breach. The key question is whether the measures are discriminatory under Article XVII(3). If they are not, they are unlikely to constitute a breach in light of the wide margin of discretion that Article XVII(2) affords to the States Parties to the BIT in relation to environmental measures. If this is not the case, and environmental measures are measured against the same yardstick as others in determining whether they breach the BIT, Article XVII(2) becomes mere verbiage.

78 Article XVII(3) reads as follows:

“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;

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<sup>56</sup> *Id.* at p. 172 (para. 385).

<sup>57</sup> The article reads: “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.” [Canada-Romania BIT, at Exhibit C-1](#), p. 19 (Art. XVII(2)).

(b) to protect human, animal or plant life or health; or

(c) for the conservation of living or non-living exhaustible natural resources.”<sup>58</sup>

79 The measures that the Claimants complain about fall within this definition and, as long as the Respondent applied them in a non-discriminatory manner, there is no breach of Romania’s obligations under the BIT.

80 When considering whether the measures at issue were enacted pursuant to environmental concerns, it is relevant to note that States enjoy a wide margin of appreciation. As the tribunal in *Al Tamimi v. Oman* explained:

“The very existence of Chapter 17 [on environmental protection] exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws – indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws. Article 17.2.1(b), moreover, acknowledges that environmental law enforcement is not inherently consistent in its application ... The Tribunal in *SD Myers v. Canada* acknowledged that tribunals ‘do not have an open-ended mandate to second-guess government decision-making’, and this must particularly be the case in light of the express terms of the present Treaty relating to environmental enforcement. When it comes to determining any breach ..., the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.”<sup>59</sup>

81 Accordingly, the Tribunal should examine the challenged State measures with a high degree of deference given the State’s right to adopt environmental measures it deems necessary.

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<sup>58</sup> *Id.* at p. 19 *et seq.* (Art. XVII(3)).

<sup>59</sup> [Adel A Hamadi Al Tamimi v. Sultanate of Oman, Award, ICSID Case No. ARB/11/33, 3 November 2015, at Exhibit RLA-44](#), p. 136 *et seq.* (para. 389).

82 The Claimants argue that Article XVII(2) is irrelevant as they are not seeking to prevent Romania from taking any environmental measures, but rather compensation for losses caused by such measures.<sup>60</sup> This argument is not serious. If it were to be followed to its logical conclusion, the Canada-Romania BIT would not prevent Romania from taking any action, including expropriating Canadian investors' property and treating them unfairly and inequitably. Yet this is exactly the conduct prohibited by the BIT. The same applies to environmental measures under Article XVII(2) and (3): if they comply with those provisions, they do not breach the BIT.

### 2.1.5.2 Claims Relating to Taxation Measures are Governed by a Special Regime

83 Certain claims relate to tax fraud investigations into the Kadok companies and RMGC, the VAT Assessment, the ANAF audits and the ANAF investigations.<sup>61</sup> As previously noted, given that Article XII(1) of the Canada-Romania BIT establishes that "[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures," these claims manifestly fall outside the Tribunal's jurisdiction.<sup>62</sup>

84 In response, the Claimants state that the tax claims "'carve out' may apply to *bona fide* taxation measures, but not to abuses of the State's tax powers"<sup>63</sup> and add that:

"Romania has abused its tax authority to seek to harass and intimidate RMGC employees, to seek in bad faith to gain advantage for the State in the arbitration, and to use its authority in relation to alleged 'anti-fraud' investigations of matters not even purporting to relate to taxation."<sup>64</sup>

85 The Respondent's actions must be presumed to have been undertaken in good faith in the absence of clear and convincing evidence to the contrary,

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<sup>60</sup> [Reply](#), p. 169 (para. 381).

<sup>61</sup> See [Counter-Memorial](#), p. 189 (para. 484).

<sup>62</sup> *Id.* at p. 188 (para. 483).

<sup>63</sup> [Reply](#), p. 174 (para. 393).

<sup>64</sup> *Id.*

which is not present here.<sup>65</sup> Gabriel Canada's claims arising from taxation measures thus fall outside the Tribunal's jurisdiction,<sup>66</sup> or, alternatively, cannot be considered to breach the Canada-Romania BIT.

## 2.2 Gabriel Jersey's Claims Fall Outside the Tribunal's Jurisdiction

### 2.2.1 Gabriel Jersey Does Not Have Covered Investments

- 86 As to jurisdiction *ratione materiae*, the Respondent previously noted that the Claimants had failed to establish 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."<sup>67</sup>
- 87 In response, the Claimants merely state that "the broad definition of investment and the general references throughout the treaty as relating to investments 'of' covered companies, without limitation, is interpreted as including investments that are indirectly held."<sup>68</sup> They refer to cases that discuss the "genuine link" and "management" tests, neither of which the Respondent had raised.<sup>69</sup>
- 88 The Claimants' argument is inaccurate. Under Article 1(a) of the UK-Romania BIT, the term "investment" is defined as "every kind of asset admitted in accordance with the laws and regulations in force in the territory of the Contracting Party in which the investment **is made**."<sup>70</sup> Protection is

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<sup>65</sup> [Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain, Award, SCC V2013/153, 6 July 2016, at Exhibit RLA-129](#), p. 194 *et seq.* (paras. 729-734) and p. 196 *et seq.* (paras. 739-741); [Tza Yap Shum v. Republic of Peru, Award, ICSID Case No. ARB/07/6, 7 July 2011, at Exhibit RLA-130](#), p. 31 (para. 95).

<sup>66</sup> [Counter-Memorial](#), p. 189 (para. 484).

<sup>67</sup> *Id.* at p. 191 (para. 490).

<sup>68</sup> [Reply](#), p. 177 *et seq.* (para. 401).

<sup>69</sup> *Id.* at p. 179 *et seq.* (paras. 403-406).

<sup>70</sup> [UK-Romania BIT, at Exhibit C-3](#), p. 3. (Art. 1(a)) (emphasis added).

afforded, in accordance with Article 2(2), to “[i]nvestments **of** nationals or companies of each Contracting Party.”<sup>71</sup>

- 89 The definition of investment of the UK-Romania BIT was applied in only one (known) case, *SCB v. Tanzania*, brought under the UK-Tanzania BIT.<sup>72</sup> The tribunal analyzed the terms employed throughout the BIT (the same terms employed in the UK-Romania BIT) and concluded that mere passive ownership of company shares did not qualify as an investment:

“the treaty repeatedly uses a verb to address the relationship between investor and protected investments. Article 1(a) of the BIT defines the term ‘investment’ for purposes of the treaty. In its first paragraph, it refers to the ‘territory of the Contracting State in which the investment is made.’ [T]he verb ‘made’ implies some action in bringing about the investment, rather than purely passive ownership ...

For the Tribunal, the text of the BIT reveals that the treaty protects investments ‘made’ by an investor in some active way, rather than simple passive ownership.”<sup>73</sup>

- 90 The tribunal added that that a protected investment exists to the extent that something of value is transferred from one treaty country to another:

“The Tribunal is not persuaded that an ‘investment of’ a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.

Rather, for an investment to be ‘of’ an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.”<sup>74</sup>

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<sup>71</sup> *Id.* at p. 4 (Art. 2(2)) (emphasis added).

<sup>72</sup> [Standard Chartered Bank v. United Republic of Tanzania, Award, ICSID Case No. ARB/10/12, 2 November 2012, at Exhibit RLA-131.](#)

<sup>73</sup> *Id.* at p. 51 (para. 222) and p. 52 (para. 225).

<sup>74</sup> *Id.* at p. 53 (paras. 231-232).

- 91 The tribunal concluded that, as a result of the wording of the treaty, a claimant must demonstrate that (i) the investment was made at the claimant's direction, (ii) that the claimant funded the investment or that (iii) the claimant controlled the investment in an active and direct manner.<sup>75</sup>
- 92 The *SCB v. Tanzania* tribunal's interpretation of the specific terms in the UK-Tanzania BIT was cited with approval in the *Flemingo v. Poland* case.<sup>76</sup> The reasoning has also been followed in *Alapli v. Turkey*, in which the tribunal did not consider a protected investment the contributions by entities other than the Dutch investor.<sup>77</sup> In the same vein, tribunals such as the *Toto v. Lebanon* tribunal have concluded that making an investment requires the investor to use its own means and to incur its own risk:
- “[T]he underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.”<sup>78</sup>
- 93 Here, the rationale and the conclusions of these various tribunals, in particular of *SCB v. Tanzania*, are instructive: Gabriel Jersey cannot claim, as its own, investments “made” by Gabriel Canada or Minvest.
- 94 The same reasons apply *mutatis mutandis* to the claims of Gabriel Jersey in relation to the License and Bucium Exploration License: neither is a protected asset of Gabriel Jersey as under Romanian law only RMGC has rights under them. The License and Bucium Exploration License involved no international transfer: Minvest, a Romanian company, obtained and

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<sup>75</sup> *Id.* at p. 53 (para. 230).

<sup>76</sup> *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, Award, 12 August 2016, at [Exhibit RLA-132](#), p. 63 *et seq.* (para. 323) and p. 66 (para. 335).

<sup>77</sup> *Alapli Elektrik B.V. v. Republic of Turkey*, Excerpts of Award, ICSID Case No. ARB/08/13, 12 July 2012, at [Exhibit RLA-133](#), p. 30 *et seq.* (paras. 360-362); see also *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Award, PCA Case No. 2015-30, 20 May 2014, at [Exhibit RLA-134](#), p. 177 *et seq.* (paras. 800-801), p. 179 (paras. 804-805) and p. 186 *et seq.* (paras. 831-835).

<sup>78</sup> *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12, 11 September 2009, at [Exhibit RLA-135](#), p. 27 (para. 84).

transferred those assets to RMGC. Gabriel Jersey was not responsible for that contribution. They are not “an investment of the former,” but rather an investment of Minvest and subsequently, of RMGC.

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[REDACTED]

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In conclusion, Gabriel Jersey does not have covered investments under the UK-Romania BIT and, accordingly, the Tribunal does not have jurisdiction *ratione materiae* over Gabriel Jersey's claims.

### **2.2.2 Gabriel Jersey's Claims Do Not Satisfy the Notice Provision under Article 7(1) of the UK-Romania BIT**

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Romania's position concerning the notice provision in Article 7(1) of the UK-Romania BIT is identical to that relating to the Canada-Romania BIT. Thus, the Respondent respectfully refers the Tribunal to **Section 2.1.2**.

### **2.2.3 In Any Event, the Tribunal Does Not Have Jurisdiction Due to the Effects of the Achmea Decision**

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As the Respondent noted in its Additional Preliminary Objection, the Tribunal does not have jurisdiction over Gabriel Jersey's claims under the UK-Romania BIT due to the decision of the Court of Justice of the European Union (the “CJEU”) in *Slovak Republic v. Achmea BV* (the “**Achmea Decision**”).<sup>80</sup>

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As the Claimants admit, the CJEU held that arbitration clauses in investment treaties between EU Member States adversely affect the autonomy of EU law.<sup>81</sup> Thus, EU law must be interpreted as precluding a provision in an intra-EU BIT under which an investor from a Member State may

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<sup>79</sup> [CL Report I](#), p. 14 (para. 24) (“Gabriel Canada has provided all of the funding for RMGC's activities since RMGC's incorporation in 1997”).

<sup>80</sup> [Respondent's Additional Preliminary Objection](#), p. 2 (para. 6).

<sup>81</sup> [Reply](#), p. 183 (paras. 415-416).

bring proceedings against another Member State before an arbitral tribunal.

- 100 The Claimants mainly argue that the effects of the Achmea Decision do not apply to Gabriel Jersey because the company is not incorporated in the UK but in the Bailiwick of Jersey (“**Jersey**”).<sup>82</sup> In the alternative, the Claimants argue that Gabriel Jersey did not lose its right to consent to arbitration after the entry into force of the Treaty on the Functioning of the European Union (“**TFEU**”).<sup>83</sup> Finally, the Claimants argue that Romania’s consent to arbitration did not become inapplicable because Article 30(3) of the VCLT applies in limited circumstances which are not met.<sup>84</sup>
- 101 The Claimants effectively argue that the Achmea Decision has no legal consequences on the arbitration clauses in intra-EU BITs or their claims. They have chosen to close their eyes to the reality, that the Achmea Decision deprives this Tribunal of jurisdiction, just as it deprived the Achmea tribunal of jurisdiction.

### **2.2.3.1 Gabriel Jersey Must Be Equated to an Investor from an EU Member State and It is Thus Affected by the Achmea Decision**

- 102 The Respondent does not dispute the Claimants’ assertion that “[t]he Bailiwick of Jersey is not part of the United Kingdom and is not an EU Member State. Rather, ... the Bailiwick of Jersey has a limited relationship with the European Union.”<sup>85</sup> This relationship is established in Article 355(5)(c) of the TFEU and Protocol 3 of the UK’s 1972 Accession Treaty.<sup>86</sup> Article 355(5)(c) of the TFEU states:

“the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the ac-

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<sup>82</sup> *Id.* at p. 183 *et seq.* (paras. 417-423).

<sup>83</sup> *Id.* at p. 186 *et seq.* (paras. 424-432).

<sup>84</sup> *Id.* at p. 189 *et seq.* (paras. 434-455).

<sup>85</sup> *Id.* at p. 185 (para. 419).

<sup>86</sup> *Id.* at p. 186 (para. 423).

cession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.”<sup>87</sup>

103 However, the Claimants fail to address the extent of Jersey’s “limited” relationship with the EU and whether Jersey is bound by Articles 267 and 344 of the TFEU in light of Protocol 3 of the UK’s 1972 Accession Treaty and, consequently, the Achmea Decision.

104 Article 267(2) TFEU states:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”<sup>88</sup>

105 Thus, under Article 267(2) TFEU, only a court or tribunal of a Member State can request a preliminary ruling on the interpretation of EU law from

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<sup>87</sup> [Treaty on the Functioning of the European Union \(adopted on 25 March 1957, entered into effect on 1 January 1958, version consolidated on 26 October 2012\)](#), at **Exhibit RLA-93**, p. 164 (Art. 355(5)(c)).

<sup>88</sup> *Id.* at p. 188 (Art. 267).

the CJEU. Presumably, “only a judicial organ whose jurisdiction covers a whole Member State or parts thereof will qualify as a court or tribunal of ‘a Member State.’”<sup>89</sup>

106 As courts of part of a Member State (the UK) for the purposes of interpretation of EU law, the Royal Courts of Jersey have the right to refer preliminary questions to the CJEU and they have done so on at least two occasions.<sup>90</sup> Jersey tribunals would not have such a right if EU law (outside of the provisions concerning customs, as the Claimants argue) did not apply to Jersey.<sup>91</sup> As Advocate General Jacobs summarized in a case concerning the Isle of Man (which has the same legal status as Jersey):

“[Article 267 TFEU] should be interpreted broadly as extending to courts situated in any territory to which the EC Treaty applies, even if only partially, by virtue of Article 355 TFEU. **Otherwise, courts or tribunals in such territories that are responsible for applying [EU] law would be deprived of any means of seeking the guidance of [the CJEU], which would pose a serious threat to the proper functioning of [EU] legal order.**”<sup>92</sup>

107 In a separate case, the CJEU further held that:

“for the purposes of the application of Articles 23, 25, 28 and 29 EC [which were the articles the Royal Courts of Jersey had requested in-

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<sup>89</sup> [M. Broberg, “Access to the European Court of Justice by Courts in Overseas Countries and Territories” in D. Kochenov \(ed.\), \*EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis\* \(1st edition, Wolters Kluwer, 2011\) \(excerpt\), at \[Exhibit RLA-136\]\(#\), p. 139.](#)

<sup>90</sup> [Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board et al.](#), Case C-293/02, Judgment of the Court of 8 November 2005, at [Exhibit RLA-137](#), p. 1; [Rui Alberto Pereira Roque and His Excellency the Lieutenant Governor of Jersey](#), Case C-171/96, Judgment of the Court of 16 July 1998, at [Exhibit RLA-138](#), p. 1.

<sup>91</sup> [Reply](#), p. 186 (para. 423).

<sup>92</sup> [Department of Health and Social Security and Christopher Stewart Barr and Montrose Holdings Limited](#), Case C-355/89, Opinion of Advocate General Jacobs of 10 January 1991, at [Exhibit RLA-139](#), p. 3493 (para. 18) (emphasis added). The opinion was mirrored in the Court’s decision in [Department of Health and Social Security and Christopher Stewart Barr, Montrose Holdings Limited](#), Case C-355/89, Judgment of the Court of 3 July 1991, at [Exhibit RLA-140](#), p. 3501 (paras. 9-10).

terpretation about], **the Channel Islands, of which the Bailiwick of Jersey forms part, the Isle of Man and the United Kingdom must be treated as a single Member State**, notwithstanding the fact that those islands do not form part of the United Kingdom.”<sup>93</sup>

108 In conclusion, Jersey can be equated to “a Member State” alongside the UK for the purpose of the application and interpretation of EU law. Given that Article 267 TFEU is at the center of the Achmea Decision and that Jersey courts are bound by this article as evidenced by Jersey’s previous referrals to the CJEU, the Achmea Decision affects Jersey and companies incorporated there, including Gabriel Jersey.

109 The Claimants argue that the Achmea Decision does not support the conclusion that the use of Article 7 of the UK-Romania BIT by a company from a non-Member State is incompatible with EU law.<sup>94</sup> However, EU law partially applies in and to Jersey and Jersey courts can refer preliminary questions to the CJEU by virtue of Article 267 of the TFEU. Even though Jersey is not an EU Member State, its status as a Crown Dependency as well as the provisions of Protocol 3 imply at least a partial application of EU law. Given that the Achmea Decision is partly due to the CJEU’s concerns over the application and interpretation of EU law as a whole, it includes EU law as applicable in Jersey and to Jersey nationals.

### **2.2.3.2 Gabriel Jersey Lost the Right to Consent to Arbitrate under the UK-Romania BIT at the Latest when the TFEU Came into Force**

110 The Claimants argue that “[u]nless the BIT itself provides that the right to submit a dispute to arbitration must be consistent with the law of the home

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<sup>93</sup> [The Gibraltar Betting and Gaming Association Limited v. Commissioners for Her Majesty's Revenue and Customs, Case C-591/15, Judgment of the Court of 13 June 2017, at Exhibit RLA-141](#), p. 6 (para. 36) (emphasis added); see also [Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board et al., Case C-293/02, Judgment of the Court of 8 November 2005, at Exhibit RLA-137](#), p. 9598 (para. 54).

<sup>94</sup> [Reply](#), p. 195. (paras. 450-451).

State of the company, the *lex societatis* is not relevant to that inquiry.”<sup>95</sup>  
This approach is incorrect.

- 111 Contrary to the Claimants’ suggestion, it must be first ascertained that they could have validly consented under the law applicable to their capacity. Only after this step can the Tribunal see whether it is empowered under the ICSID Convention and the UK-Romania BIT to hear the dispute.
- 112 The Achmea Decision is not about the application of an EU Treaty directly by an individual against Member States or other EU subjects. Instead, it provides for a limitation on a right belonging to EU citizens and corporations, which stems from intra-EU BITs, to preserve EU law. As the CJEU noted, a private party’s rights can be limited if the act in question undermines a fundamental aspect of EU law.<sup>96</sup>
- 113 As demonstrated in the Respondent’s Additional Preliminary Objection, the CJEU made clear that Articles 267 and 344 of the TFEU should be interpreted as precluding a provision “in an international agreement concluded between Member States” – i.e. in any intra-EU BIT – with a dispute resolution clause similar to Article 8 of the Netherlands-Slovakia BIT. The Achmea Decision thus affects the dispute resolution provisions of all intra-EU BITs, including the UK-Romania BIT.<sup>97</sup>
- 114 Accordingly, an investor of an EU Member State can invoke the consent to arbitrate of another EU Member State under an intra-EU BIT only insofar as they have the capacity to do so under their own law, which in this case includes EU law. EU law has direct effect under the laws of the Member States, which in this instance also extends to Jersey, as described in **Section 2.2.3.1** above.
- 115 The Claimants can only bring an international claim if Article 7 of the BIT, as interpreted in light of EU law, allows them to do so. The competent court in this case, the CJEU, has decided that it does not.

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<sup>95</sup> *Id.* at p. 187 (para. 428).

<sup>96</sup> [International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, Judgment of the Court dated 11 December 2007, at Exhibit RLA-142](#), p. 22 (para. 44) and p. 26 *et seq.* (paras. 64-66).

<sup>97</sup> [Respondent’s Additional Preliminary Objection](#), p. 33 (para. 100).

116 When considering whether the Claimants' consent is valid, this Tribunal must apply international law. The TFEU is a treaty within the meaning of the VCLT. EU law is therefore international law because it is rooted in international treaties, which are the main source of international law. Investment treaty tribunals, including the *Electrabel* tribunal,<sup>98</sup> have established this principle:

“there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law.”<sup>99</sup>

117 When considering the relevance of a preliminary ruling on the interpretation of the EU Treaties, the *Vattenfall* tribunal also made clear that interpretations of EU law by the CJEU are part of international law: “the Tribunal considers the [CJEU] Judgment's interpretation of the EU Treaties likewise to constitute a part of the relevant international law.”<sup>100</sup>

118 Thus, the dispute resolution clause in the UK-Romania BIT is not compatible with Articles 267 and 344 of the TFEU, as the CJEU held. Accordingly, Gabriel Jersey cannot validly invoke Article 7 of the UK-Romania BIT to arbitrate this dispute because it lost the right to consent to arbitration at the latest when the TFEU came into force in 2009.<sup>101</sup> Thus, the Tribunal was deprived of jurisdiction as a result of the *Achmea* Decision, retroactively effective at the date of entry into force of the TFEU.

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<sup>98</sup> [Electrabel S.A. v. Republic of Hungary, Award, ICSID Case No. ARB/07/19, 25 November 2015, at Exhibit RLA-49](#), p. 175 *et seq.* (paras. 4.120-4.122) (hard copy: Part IV, p. 37).

<sup>99</sup> *Id.* at p. 177 (para. 4.126) (hard copy: Part IV, p. 39).

<sup>100</sup> [Vattenfall AB et al. v. Federal Republic of Germany, Decision on the Achmea Issue, ICSID Case No. ARB/12/12, 31 August 2018, at Exhibit CLA-216](#), p. 48 (para. 148).

<sup>101</sup> [Respondent's Additional Preliminary Objection](#), p. 34 *et seq.* (paras. 104-113).

### 2.2.3.3 Romania's Consent to Arbitrate in Article 7 of the UK-Romania BIT Is Incompatible with the TFEU and Accordingly the Provision Does Not Apply

119 The Claimants argue that the TFEU and the BIT are not incompatible since they do not relate to the same subject matter. Thus, they state that the conditions for the application of Article 30(3) of the VCLT do not apply.<sup>102</sup>

120 As noted in earlier pleadings, Article 30(3) of the VCLT provides for situations where two successive treaties that relate to the same subject matter are incompatible:

“[w]hen all the parties to the earlier treaty are parties also to the later treaty ..., the earlier treaty applies **only to the extent that its provisions are compatible** with those of the later treaty.”<sup>103</sup>

121 Thus, Article 30(3) deals with the situation when a subsequent treaty between the same Member States is incompatible with an earlier treaty. In this case, this article applies, because the UK-Romania BIT has not yet been terminated. The UK and Romania entered, subsequent to the BIT, into a new treaty, the TFEU, which contains provisions which are incompatible with the BIT, notably in Articles 267 and 344, but also in the provisions dealing with the delegation of the exclusive competence by the Member States to the European Union to regulate foreign investment. These provisions make Article 7 of the BIT incompatible with the later treaty, and Article 7 therefore does not apply; not the other provisions of the BIT, but Article 7 exclusively.

122 While the CJEU in its Achmea Decision did not examine Article 30(3) of the VCLT, it did hold that the arbitration clause contained in one such intra-EU BIT was incompatible with Articles 267 and 344 of the TFEU. Regardless of the reasoning behind the incompatibility, this Tribunal should not ignore the true meaning of Articles 344 and 267 of the TFEU, as interpreted

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<sup>102</sup> [Reply](#), p. 193 *et seq.* (paras. 444-455).

<sup>103</sup> [Vienna Convention on the Law of Treaties, 1155 UNTS 331, at Exhibit RLA-1](#), p. 339 (Art. 30(3)).

by the institution granted the power by the EU Member States to resolve any such question.

- 123 As stated above, when examining the relevance of the decision of the CJEU, this Tribunal should consider that EU law, despite forming its own specific subsection of international law, is still part of the international legal order. EU law is based on a series of treaties, which is the clearest source of international law.
- 124 Accordingly, despite not being bound by EU law *per se*, this Tribunal should apply international law (which includes EU law) and acknowledge that the court tasked with the interpretation of one of the two relevant treaties at issue in this arbitration is incompatible with these arbitration proceedings. It is not a matter of opinion, it is a fact. This was clearly accepted by EU Member States, including the UK and Romania, in a series of declarations dated 15 and 16 January 2019.<sup>104</sup> Concerning the Achmea Decision, EU Member States have agreed that:

“Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. ... An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.”<sup>105</sup>

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<sup>104</sup> [EU Member States' Declaration on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU dated 15 January 2019, at Exhibit R-484](#); [EU Member States' Declaration on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU dated 16 January 2019, at Exhibit R-485](#); [Declaration of Hungary on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU dated 16 January 2019, at Exhibit R-486](#).

<sup>105</sup> [Achmea Majority Opinion, at Exhibit R-484](#), p. 1 (emphasis added); see also [Achmea Minority Opinion, at Exhibit R-485](#), p. 1 *et seq.*; [Achmea Hungary Opinion, at Exhibit R-486](#), p. 1.

125 Therefore, the parties to the UK-Romania BIT, namely the UK and Romania, have held that Article 7 is inapplicable due to its incompatibility with EU law. Such an agreement on the interpretation of a treaty by the parties is provided for in Article 31(3)(a) of the VCLT, quoted below, as well as customary international law:<sup>106</sup>

“There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.”<sup>107</sup>

126 According to the commentary of the ILC on early (but identical) drafts of Article 31(3) of the VCLT:

“an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”<sup>108</sup>

127 Scholars have also acknowledged:

“the parties’ authentic interpretation of the treaty terms is not only particularly reliable, it is also endowed with binding force. It provides *ex hypothesi* the ‘correct’ interpretation among the parties in that it determines which of the various ordinary meanings shall apply. ... Article 31, para. 1 does not permit the interpreter to legislate or to revise the treaty. Authentic interpretation presents a different situation, since the parties to the treaty are their own masters. Thus, the parties may by

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<sup>106</sup> [Achmea Majority Opinion, at Exhibit R-484](#), p. 1 (n. 1).

<sup>107</sup> [VCLT, at Exhibit RLA-1](#), p. 340 (Art. 31(3)).

<sup>108</sup> [International Law Commission, “Draft Articles on the Law of Treaties” \(1966\) Yearbook of the International Law Commission Vol. II, at Exhibit RLA-143](#), p. 221 (para. 14).

means of the instruments, agreements or practice mentioned in para. 2 and subparas. 3(a) and (b) not only give a special meaning to the term at issue but also amend, extend or delete a text.”<sup>109</sup>

- 128 In this instance, in a subsequent agreement between Romania and the UK, they effectively “delete” Article 7 of the BIT due to the incompatibility with EU law, by which both countries are bound. As the creators of the treaty, it is their prerogative to agree on the interpretation of the treaty provisions or their deletion, even years after its conclusion as Article 31(3) of the VCLT recognized.<sup>110</sup>
- 129 The Tribunal should consider these declarations persuasive. Accordingly, the Tribunal should follow the example of the *Bundesgerichtshof* (“BGH”). As anticipated in the Respondent’s Additional Preliminary Objection, the BGH considered itself bound by the Achmea Decision and annulled the arbitration award in *Achmea v. Slovak Republic*.<sup>111</sup> The Tribunal should recognize the Contracting Parties’ interpretation of the treaty and apply the effects of the Achmea Decision, and thus find that the arbitration clause in the UK-Romania BIT does not apply.
- 130 The Claimants argue that the TFEU is not the later treaty as provided for in Article 30(3) of the VCLT, because the relevant articles pre-dated the current TFEU and date back to 1958. According to the Claimants, the adoption of Articles 267 and 344 of the TFEU does not postdate the adoption of Article 7 of the UK-Romania BIT, and therefore it would not be possible to apply Article 30(3) of the VCLT in the present case.<sup>112</sup>

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<sup>109</sup> [M. E. Villiger, \*Commentary on the 1969 Vienna Convention on the Law of Treaties\* \(1st edition, Martinus Nijhoff Publishers, 2009\) \(excerpt\), at Exhibit RLA-144](#), p. 429 (para. 16).

<sup>110</sup> Although BITs “may confer some rights on investors, the source of these rights (as well as the obligations of States thereunder) lies in the will and consent of the States parties. As such, the States parties have the freedoms granted to them within the confines of public international law to modify or terminate their treaty obligations.” [T. Voon, A. Mitchell and J. Munro, “Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights” \(2014\) 29\(2\) ICSID Review 451, at Exhibit RLA-145](#), p. 458 *et seq.*

<sup>111</sup> [L. Bohmer, “In now-public decision, reasoning of German Federal Supreme Court on set aside of BIT award is clarified”, \*IAR Reporter\*, 11 Nov. 2018, at Exhibit R-487](#), p. 1.

<sup>112</sup> [Reply](#), p. 196 (para. 452).

- 131 However, the Claimants disregard the fact that foreign investment between Member States became a matter of EU law with the enactment of the TFEU in 2009.<sup>113</sup> Accordingly, the competency of EU institutions as determined under Articles 267 and 344 of the TFEU started to conflict with the competency of investment tribunals under intra-EU BITs only after the enactment of the TFEU. There was no conflict between EU Treaties and intra-EU BITs before then.
- 132 In addition, Romania became a party to the EU Treaties on 1 January 2007 when it became an EU Member State and the obligations stemming from the EU Treaties started to apply between the UK and Romania only after that point. This also postdates the adoption of the UK-Romania BIT, making the TFEU the later treaty since it was the latest to come into force between the parties.
- 133 Finally, the Claimants argue that, since the UK is withdrawing from the EU, any objections related to the effects of the Achmea Decision should be disregarded, because EU law will cease to apply to the UK. The Claimants' position is disingenuous. First, anything relating to the UK's future relationship with the EU seems less than certain. Second, and in any event, both the UK and Romania have agreed that Article 7 of the UK-Romania does not apply due to the Achmea Decision. Thus, regardless of when and how the UK leaves the EU, the Respondent's jurisdictional objection on this matter stands.

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<sup>113</sup> [TFEU](#), at [Exhibit RLA-93](#), p. 140 *et seq.* (Art. 207).

### 3 ROMANIA HAS ACCORDED FAIR AND EQUITABLE TREATMENT TO THE CLAIMANTS' INVESTMENTS

- 134 The Claimants' core claim remains that Romania failed to provide their alleged investments fair and equitable treatment ("FET") and thereby breached the BITs.<sup>114</sup> These claims fail since, even if the allegedly impugned acts of State authorities were true (*quod non*), they would not rise to the level of breaches of the BITs. In particular, the Claimants disregard the high standard of proof required to demonstrate a breach of the FET standard under the Canada-Romania BIT (**Section 3.1**).
- 135 Cognizant of the weakness of their FET claims, the Claimants argue that those claims, taken together, amount to a composite breach. In **Section 3.2**, the Respondent demonstrates that the impugned acts and omissions of State officials, even if true, do not amount to a composite breach. In **Sections 3.3 to 3.7**, the Respondent demonstrates why the claims, taken individually, do not amount to breaches of the FET standards of the BITs.

#### 3.1 The Claimants Are Required to Demonstrate Egregious Conduct to Prevail on Their Claim

- 136 The Claimants continue to misinterpret the Canada-Romania BIT FET clause, which does not require Romania to provide more than the customary international law minimum standard of treatment (**Section 3.1.1**). Moreover, they fail to show that Article 2(2) of the UK-Romania BIT imposes a less demanding standard than Article II(2) of the Canada-Romania BIT. Even if that were the case, the Claimants cannot use Article III(1) of the Canada-Romania BIT to import a less demanding standard into the Canada-Romania BIT (**Section 3.1.2**). In any event, even under the Claimants' broad interpretation of the FET standard, Romania has discharged its duties (**Section 3.1.3**).

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<sup>114</sup> References to the "Claimants' investments" are without prejudice to the Respondent's position that the Claimants have not made investments under the BITs.

### 3.1.1 The Claimants Ignore the Formulation of the FET Standard in the Canada-Romania BIT

137 Article II(2) of the Canada-Romania BIT requires the State parties to accord investors a standard of treatment, which amounts to the customary international law minimum standard of treatment under which only egregious conduct can amount to a breach of FET:<sup>115</sup>

“(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.

(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.”<sup>116</sup>

138 The Claimants submit that “[t]here is no dispute that the Contracting Parties’ reference to the customary international law standard is meaningful.”<sup>117</sup> They, however, argue that this standard is “as found in international law,”<sup>118</sup> and disregard the phrase “minimum standard of treatment.” The Tribunal should reject the Claimants’ call for an extensive interpretation of the FET standard for the following reasons.

139 First, as Romania has demonstrated, under the rules of treaty interpretation, the terms of the BIT must be interpreted in accordance with the *effet utile* principle.<sup>119</sup> The BIT refers three times to “the customary international law

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<sup>115</sup> [Counter-Memorial](#), p. 234 *et seq.* (paras. 621-626).

<sup>116</sup> [Canada-Romania BIT, at Exhibit C-1](#) (emphasis added).

<sup>117</sup> [Reply](#), p. 199 (para. 465).

<sup>118</sup> *Id.*

<sup>119</sup> [Counter-Memorial](#), p. 234 *et seq.* (paras. 620-621).

minimum standard of treatment.” Canada and Romania could have referred instead merely to “international law.”<sup>120</sup>

140 On 31 July 2001, the NAFTA FTC issued a binding interpretation of NAFTA Article 1105(1) stating *inter alia* that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>121</sup> Canada chose this wording in its BITs from then on, including in 2009, in Article II(2) of the Canada-Romania BIT.<sup>122</sup>

141 Prof. Leben’s views on the impact of the NAFTA FTC’s clarification are of particular interest:

“It is very remarkable that in recent conventional practice, one can observe a marked trend to clarify the link between the [FET] standard and the sources external to the treaty, be it custom, or more widely, international law principles. **These precisions introduced by States manifest an intention to negate any independence to the treaty standard, certainly to limit the interpretative power of the arbitrators.**”<sup>123</sup>

142 In their BIT, Canada and Romania must also have aimed at limiting “the interpretative power” of arbitral tribunals constituted under BITs that included that wording.<sup>124</sup> The Claimants’ interpretation thus runs afoul of the Contracting State Parties’ intent and denies an *effet utile* to Article II(2).

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<sup>120</sup> See e.g. [France-Mexico BIT](#), at [Exhibit RLA-146](#) (Art 4: “Either Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law.”).

<sup>121</sup> [NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001](#), at [Exhibit RLA-147](#), p. 1.

<sup>122</sup> [Canada-Costa Rica BIT](#), at [Exhibit RLA-148](#) (requiring the Contracting States to provide investors FET “in accordance with principles of international law” and representing the last BIT Canada signed which included such a formulation in its FET clause).

<sup>123</sup> [C. Leben, \*Droit International des Investissements et de l'Arbitrage Transnational\* \(1st edition, A. Pedone, 2015\) \(excerpt\)](#), at [Exhibit RLA-149](#), p. 307 (emphasis added).

<sup>124</sup> [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 4 (Art. II(2)(C)) (“A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement,

- 143 Second, the Claimants' extensive interpretation is based on the supposed evolution of the minimum standard of treatment.<sup>125</sup> Yet, in accordance with the principle of contemporaneity, the Tribunal must rather ascertain, at the time of the conclusion of the BIT (on 8 March 2009), the Contracting State Parties' understanding of the phrase "customary international law minimum standard of treatment," in light of the contemporaneous meaning of the terms then prevailing.<sup>126</sup>
- 144 Two NAFTA decisions addressing this issue were handed down by investment tribunals in 2009: the *Glamis Gold v. U.S.A.* and *Cargill v. Mexico* decisions.<sup>127</sup> These decisions involved disputes brought under NAFTA Chapter 11. *Glamis Gold*, the claimant in the first case, was a Canadian company. The parties' submissions in both cases were public, except for confidential information identified by the parties. Canada was thus aware

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does not establish that there has been a breach of this paragraph."); see also [NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, at Exhibit RLA-147](#), p. 1 ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

<sup>125</sup> [Reply](#), p. 200 (para. 466).

<sup>126</sup> [Rights of Nationals of the United States of America in Morocco \(France v. United States of America\) \(Judgment\) \[1952\] ICJ Rep 176, at Exhibit RLA-150](#), p. 189; see also [Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, 8 December 2008, at Exhibit RLA-151](#), p. 76 *et seq.* (paras. 128-129) ("It is the text of **this** treaty that has to be interpreted; and interpreted in the light of the 1969 Vienna Convention, **as well as on the principle of contemporaneity** (sic). ... [O]n 'the principle of contemporaneity (sic)': viz. that the terms of a treaty have to be interpreted according to the meaning they possessed (and in the circumstances prevailing), at the time the treaty was concluded.") (first emphasis in the original; second emphasis added); [ICS Inspection and Control Services Limited v. Argentine Republic, Award on Jurisdiction, PCA Case No. 2010-9, 10 February 2012, at Exhibit RLA-152](#), p. 96 (para. 289) (the principle of contemporaneity "requires that the meaning and scope of this term be ascertained as of the time when [the Contracting Parties] negotiated their BIT"); [The Ambatielos Claim \(Greece, United Kingdom of Great Britain and Northern Ireland\), Award, 6 March 1956, at Exhibit RLA-153](#), p. 108-109; I. Brownlie, *Principles of Public International Law* (7th edition, Oxford University Press, 2008) (excerpt), at [Exhibit RLA-154](#), p. 633 ("the language of the treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion, and also in the light of the contemporaneous meaning of the terms.").

<sup>127</sup> [Glamis Gold Limited v. United States of America, Award, 8 June 2009, at Exhibit CLA-7](#); [Cargill, Incorporated v. United Mexican States, Award, ICSID Case No. ARB\(AF\)/05/2, 18 September 2009, at Exhibit CLA-163](#).

of the arguments made by the US and Mexico in these cases in relation to NAFTA Article 1105, which formed the basis of Article II(2) of the Canada-Romania BIT.

145 The tribunal in *Glamis Gold v. U.S.A.* held that “the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in *Neer*.”<sup>128</sup> The tribunal further held that the “fundamentals of the *Neer* standard thus still apply today” and that:

“to violate the customary international law minimum standard of treatment ... an act must be sufficiently **egregious and shocking**—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).”<sup>129</sup>

146 Similarly, the *Cargill v. Mexico* tribunal held that, while some NAFTA tribunals may have “adapt[ed] the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today,” “[k]ey to this adaptation is that, even as more situations are addressed, **the required severity of the conduct as held in *Neer* is maintained.**”<sup>130</sup>

147 In other words, for the *Cargill* tribunal, the *Neer* standard might have evolved, but the requisite severity of the acts remained: for conduct to breach the minimum standard of treatment, it must be egregious.

148 The *Glamis Gold* and *Cargill* tribunals thus underlined that the NAFTA Parties were in no doubt that the NAFTA FET standard was based on the *Neer* case interpretation. As a result, when Canada negotiated the BIT with Romania in 2009, it aimed to align the meaning and scope of Article II(2) of the BIT with those of NAFTA Article 1105.

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<sup>128</sup> [Glamis v. U.S.A., Award, 8 June 2009, at Exhibit CLA-7](#), p. 262 (para. 612).

<sup>129</sup> *Id.* at p. 262 (para. 612) (emphasis added).

<sup>130</sup> [Cargill v. Mexico, Award, 18 September 2009, at Exhibit CLA-163](#), p. 79 (para. 284) (emphasis added).

- 149 Furthermore, by adopting a formulation of the FET standard that referred to customary international law (“customary international law minimum standard of treatment”), Romania agreed to adopt a formulation different from that of other previous and subsequent Romanian BITs.<sup>131</sup>
- 150 Even if the Tribunal considered that the FET standard in the Canada-Romania BIT should be interpreted in light of the “standard of fair and equitable treatment applied by investment treaty tribunals today,”<sup>132</sup> tribunals still regard the *Neer* case formulation – limiting the potential liability of a State under the FET standard to egregious conduct – as relevant to inform the contents of the FET standards.<sup>133</sup>
- 151 Recently, the tribunal in *Berkowitz v. Costa Rica* endorsed the *Glamis* holding that “a violation of the customary international law minimum standard of treatment requires an act that is sufficiently **egregious and shocking** so as to fall below accepted international standards.”<sup>134</sup>
- 152 In sum, Romania’s interpretation of Article II(2) of the Canada-Romania BIT should prevail and, as shown in **Sections 3.3 to 3.7**, the Claimants have failed to show any egregious conduct on Romania’s part.

### 3.1.2 The Claimants Cannot Rely on Article III of the Canada-Romania BIT to Import Article 2(2) of the UK-Romania BIT

- 153 Realizing the weakness of their FET claim under the limited standard in Article II(2) of the Canada-Romania BIT, the Claimants try to import the

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<sup>131</sup> See the other FET formulation traditionally used by Romania in the [Nigeria-Romania BIT, at Exhibit RLA-155](#); the [Latvia-Romania BIT, at Exhibit RLA-156](#); the [Azerbaijan-Romania BIT, at Exhibit RLA-157](#); the [Sweden-Romania BIT, at Exhibit RLA-158](#); the [Turkey-Romania BIT, at Exhibit RLA-159](#); or, the [Kazakhstan-Romania BIT, at Exhibit RLA-160](#) (In 2010, Romania entered into a BIT with Kazakhstan which re-used the previous formulations of the FET standard used by Romania, and not Article II(2)’s formulation).

<sup>132</sup> [Reply](#), p. 199 (para. 464).

<sup>133</sup> [Al Tamimi v. Oman, Award, 3 November 2015, at Exhibit RLA-44](#), p. 137 (para. 390).

<sup>134</sup> [Berkowitz v. Costa Rica, Interim Award, 30 May 2017, at Exhibit CLA-236](#), p. 149 (para. 282) (emphasis added). The Claimants are also wrong in relying on the *Bilcon v. Canada* NAFTA award, in which the claimant had been refused the relevant permit, which is not the case here. ([Reply](#), p. 205 *et seq.* (paras. 476-478)).

UK-Romania BIT FET standard into the Canada-Romania BIT, via the Most Favored Nation (“MFN”) clause, Article III(1), which states:

“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.”<sup>135</sup>

- 154 In their Reply, the Claimants spend only three paragraphs on (i) the interpretation of this clause; and (ii) Romania’s position as to its limited scope.<sup>136</sup> Indeed, as Romania has already demonstrated, Article III(1) provides for a substantive obligation for the Contracting Parties to prevent discriminatory treatment.<sup>137</sup> It is not, as the Claimants would have it, just a tool to import provisions from other Romanian treaties.
- 155 Romania has demonstrated that the inclusion of the terms “in like circumstances” restricts the scope of the MFN clause and only protects against differential or discriminatory treatment of investments that are, as a matter of fact, “in like circumstances.”<sup>138</sup> As a result, Gabriel Canada must demonstrate that (i) its investment is “in like circumstances” to those of Gabriel Jersey’s investment; and (ii) it received treatment less favorable than Gabriel Jersey.<sup>139</sup>
- 156 Although the Claimants do not challenge the application of this two-pronged standard, they do not attempt to demonstrate that they meet its requirements. They only state, without any demonstration, that “to the extent the Tribunal interprets the Canada BIT more narrowly than the UK BIT, Romania grants in like circumstances more favorable treatment to Gabriel Jersey, thus triggering Article III(1)-(2) of the Canada BIT.”<sup>140</sup>

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<sup>135</sup> [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 5 (Art. III(1)).

<sup>136</sup> [Reply](#), p. 206 *et seq.* (paras. 479-481).

<sup>137</sup> [Counter-Memorial](#), p. 183 *et seq.* (paras. 467-468); *Id.* at p. 239 (para. 630).

<sup>138</sup> *Id.* at p. 239 (para. 630).

<sup>139</sup> See [Cargill v. Mexico](#), Award, 18 September 2009, at [Exhibit CLA-163](#), p. 61 (para. 228); [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 (para. 8.4) (hard copy: Part VIII, p. 1).

<sup>140</sup> [Reply](#), p. 207 (para. 480).

157 The Claimants thus fail to show that Gabriel Canada and Gabriel Jersey are “in like circumstances,” and that Gabriel Jersey is receiving more favorable treatment under the Romania-UK BIT than Gabriel Canada under the Canada-Romania BIT. Accordingly, the Claimants’ attempt to use Article III(1) of the Canada-Romania BIT should be rejected.

**3.1.3 Even Assuming the Claimants’ Extensive Interpretation of the FET standard of the UK-Romania BIT Were Correct, the Claimants Have Failed to Demonstrate Any Breach Thereof**

158 Even if the Tribunal adopted Claimants’ extensive interpretation of the FET standard under the UK-Romania BIT, the Claimants have failed to demonstrate a breach. In their Memorial, the Claimants argued that a breach of the FET standard involves:

- arbitrary modifications to the legal framework on which the investor reasonably relied;<sup>141</sup>
- arbitrary modifications to the standards and criteria that apply to permitting decisions not grounded in the applicable laws;<sup>142</sup>
- administrative decisions, including permitting, that do not respect basic principles of due process;<sup>143</sup>
- maladministration or feckless regulatory conduct;<sup>144</sup> and
- coercive actions aimed at forcing a renegotiation of contract terms.<sup>145</sup>

159 In their Reply, the Claimants have not deigned to define or elaborate which legal standards of review should be applied to ascertain whether these alleged breaches occurred. They loosely refer to “unlawful and arbitrary course of conduct,”<sup>146</sup> “reasonabl[e] and legitimate[e] expect[at]ions”<sup>147</sup>

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<sup>141</sup> [Memorial](#), p. 286 (para. 657).

<sup>142</sup> *Id.* at p. 288 (para. 660).

<sup>143</sup> *Id.* at p. 291 (para. 666).

<sup>144</sup> *Id.* at p. 293 (para. 670).

<sup>145</sup> *Id.* at p. 295 (para. 674).

<sup>146</sup> [Reply](#), p. 210 (para. 487).

<sup>147</sup> *Id.* at p. 211 (para. 490).

or “lack of transparency and lack of due process.”<sup>148</sup> Their formulations to describe Romania’s alleged treaty breaches, however, refer to specific international law standards, of which they have failed to show any breach.

160 Romania did not act arbitrarily, did not violate the Claimants’ legitimate expectations, did not fail to act transparently, and did not breach due process with respect to the Claimants (**Sections 3.1.3.1 to 3.1.3.4**). In assessing if Romania’s alleged conduct breached the BITs’ FET standards, the Tribunal should have regard to the margin of appreciation under which Romanian State organs legitimately operated (**Section 3.1.3.5**).

### 3.1.3.1 Romania Did Not Act Arbitrarily

161 The Claimants argue that “Romania embarked on an unlawful and arbitrary course of conduct with respect to the administrative permitting and approval process associated with Gabriel’s investments that Claimants had reasonably expected would be conducted according to law”<sup>149</sup> They, however, fail to articulate the standard of arbitrariness under international law to which Romania allegedly should be held.

162 In *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, the International Court of Justice (the “**ICJ**”) defined arbitrariness as “not something opposed to a rule of law,” but as “something opposed to **the rule of law** .... It is a **willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.**”<sup>150</sup>

163 The ICJ’s definition of arbitrariness remains the most authoritative and applies equally in investment arbitration.<sup>151</sup> Relying on the *ELSI* case, the

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<sup>148</sup> *Id.* at p. 212 (para. 495).

<sup>149</sup> *Id.* at p. 210 (para. 487).

<sup>150</sup> [Elettronica Sicula S.p.A. \(ELSI\) \(United States of America v. Italy\) \(Judgment\) \[1989\] ICJ Rep 15, at Exhibit CLA-100](#), p. 65 (para. 128) (emphasis added).

<sup>151</sup> See [Siemens A.G. v. Argentine Republic, Award, ICSID Case No. ARB/02/8, 6 February 2007, at Exhibit CLA-102](#), p. 101 (para. 318) (“the definition in *ELSI* is ... close to the ordinary meaning of the term emphasizing the willful disregard of the law.”); [Noble Ventures, Inc. v. Romania, Award, ICSID Case No. ARB/01/11, 12 October 2005, at Exhibit CLA-101](#), p. 109 *et seq.* (para. 176); [El Paso Energy International Company v. Argentine Republic, Award, ICSID Case No. ARB/03/15, 31 October 2011, at Exhibit CLA-152](#), p. 111 (para. 319); [Duke](#)

tribunal in *Cargill v. Mexico* observed that the fact that “governments make many potentially controversial choices and, in doing so, may appear to have made mistakes, to have misjudged the facts” is not enough to meet the test of arbitrariness.<sup>152</sup> The *Cargill* tribunal concluded that “an actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.”<sup>153</sup> Conduct becomes arbitrary “only when the State’s actions move **beyond a merely inconsistent or questionable application of administrative or legal policy or procedure** to the point where the action constitutes an **unexpected and shocking repudiation of a policy’s very purpose** and goals, or **otherwise grossly subverts** a domestic law or policy **for an ulterior motive.**”<sup>154</sup> The Claimants have failed to meet this bar.

### 3.1.3.2 Romania Did Not Frustrate the Claimants’ Alleged Legitimate Expectations

164 The Claimants’ argument that Romania frustrated their legitimate expectations fares no better. They allege that “the course of treatment meted out by Romania reflects gross and fundamental departures from Claimants’ legitimate expectations of lawful treatment, due process, transparency, and good faith, and establishes a violation of the BITs’ guarantee of fair and equitable treatment.”<sup>155</sup> Yet, they have not identified (let alone evidenced) their purportedly legitimate expectations, nor have they demonstrated how those expectations may have been frustrated.

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[Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador](#), Award, ICSID Case No. ARB/04/19, 18 August 2008, at [Exhibit CLA-94](#), p. 102 (para. 378); [Philip Morris Brand Sàrl et al. v. Oriental Republic of Uruguay](#), Award, ICSID Case No. ARB/10/7, 18 July 2016, at [Exhibit CLA-288](#), p. 112 (para. 390).

<sup>152</sup> [Cargill v. Mexico](#), Award, 18 September 2009, at [Exhibit CLA-163](#), p. 82 (para. 292).

<sup>153</sup> *Id.* (emphasis added).

<sup>154</sup> *Id.* (para. 293) (emphasis added); see also [El Paso v. Argentina](#), Award, 31 October 2011, at [Exhibit CLA-152](#), p. 111 (paras. 319-320).

<sup>155</sup> [Reply](#), p. 214 *et seq.* (para. 502).

- 165 The Claimants have failed to demonstrate that their expectations arose out of specific representations that Romania made to induce their investment, and accordingly their claims should be dismissed.<sup>156</sup>
- 166 Instructive in this regard is *EDF v. Romania*, an award rejecting claims based on frustration of legitimate expectations under the same UK-Romania BIT. In that case, the investor asserted that it had been invited by Romania to invest in the country.<sup>157</sup> Pursuant to that alleged invitation, the investor entered into joint venture agreements with Romanian State-owned entities.<sup>158</sup> When the joint venture partners later refused to renew those agreements, the investor complained that its legitimate expectations had been frustrated.<sup>159</sup> The tribunal dismissed the claim, holding that “[e]xcept where **specific promises or representations** are made by the State to the investor, the latter **may not rely on a bilateral investment treaty as a kind of insurance policy** against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.”<sup>160</sup>
- 167 Likewise, in *White Industries v. India*, a case on which the Claimants rely, the tribunal rejected the FET claim and held that “[investment treaty] jurisprudence highlights that, to create legitimate expectations... [t]here

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<sup>156</sup> [Glamis v. U.S.A., Award, 8 June 2009, at Exhibit CLA-7](#), p. 266 (para. 620); [PSEG Global, Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, Award, ICSID Case No. ARB/02/5, 19 January 2007, at Exhibit CLA-175](#), p. 63 (para. 241) (“Legitimate expectations by definition **require a promise** of the administration on which the Claimants rely to assert a right that needs to be observed.”) (emphasis added); [Duke v. Ecuador, Award, 18 August 2008, at Exhibit CLA-94](#), p. 96 (para. 351) (“[T]he expectation could only have been deemed reasonable if it had been based on **clear assurances from the Government.**”) (emphasis added); M. Malik, “Fair and Equitable Treatment” (2009) [International Institute for Sustainable Development, Best Practices Series, Bulletin No. 3, at Exhibit RLA-161](#), p. 13 (“The making of specific representations has been a material factor in the decision in favor of the investor in a number of the recent cases. Conversely, the absence of specific representations can be an important factor in leading to a finding that the standard has not been breached.”).

<sup>157</sup> [EDF \(Services\) Limited v. Romania, Award, ICSID Case No. ARB/05/13, 8 October 2009, at Exhibit CLA-103](#), p. 15 (para. 66).

<sup>158</sup> *Id.* at p. 10 (para. 46).

<sup>159</sup> *Id.* at p. 46 (para. 177).

<sup>160</sup> *Id.* at p. 62 (para. 217) (emphasis added).

must be an ‘**unambiguous affirmation**’ or a ‘**definitive, unambiguous and repeated assurances**.’”<sup>161</sup>

168 The *White Industries v. India* rationale was also endorsed by the *Crystallex v. Venezuela* tribunal which held:

“Laws are general and impersonal in nature; they will usually leave some degree of discretion to the state agencies for the making of their case-specific decisions and, in fact, are rarely unconditional in their provisions so that the investor would have difficulty founding an actual expectation akin to a vested right.”<sup>162</sup>

169 Here, the Claimants have not pointed to any commitment by Romania that RMGC would be issued an environmental permit (and/or other permits).

170 The only argument the Claimants can muster is that they “reasonably and legitimately expected” the “administrative process” to apply.<sup>163</sup> Romania, however, followed administrative procedures in accordance with the law and only briefly sought to “depart” from those procedures in 2013 in an effort to facilitate the Project via the Roşia Montană Law.

171 In any event, as the *EDF v. Romania* tribunal held, “[I]egitimate expectations cannot be solely the subjective expectations of the investor.”<sup>164</sup> The *Crystallex v. Venezuela* tribunal held:

“a simple general ‘expectation’ of the state’s compliance with its laws may not always and as such form the basis of a successful FET claim. It would form such a basis if evidence is given that a specific representation as to a substantive benefit has been frustrated, or there is proof of arbitrary, or non-transparent conduct in the application of the

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<sup>161</sup> [White Industries Australia Limited v. Republic of India, Final Award, 30 November 2011, at Exhibit CLA-259](#), p. 94 (para. 10.3.7) (emphasis added); see also *id.* at p. 97 (para. 10.3.17).

<sup>162</sup> [Crystallex International Corporation v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB\(AF\)/11/2, 4 April 2016, at Exhibit CLA-62](#), p. 145 (para. 552).

<sup>163</sup> [Reply](#), p. 211 (para. 490).

<sup>164</sup> [EDF v. Romania, Award, 8 October 2009, at Exhibit CLA-103](#), p. 63 (para. 219) (emphasis added); see also [Saluka Investments B.V. \(The Netherlands\) v. Czech Republic, Partial Award, 17 March 2006, at Exhibit CLA-97](#), p. 66 (paras. 304-305).

laws in question or some form of abuse of power. Otherwise, it is necessary for the investor to take into consideration that, in the administrative decision-making process, considerations of public interest or going to the specific circumstances of the case may counterbalance what the investor would view as an expectation.”<sup>165</sup>

- 172 Recently, in another mining case, *South American Silver v. Bolivia*, the tribunal dismissed the claimant’s FET claim in part because the claimant “ha[d] not explained exactly which legitimate expectations were frustrated due to conduct attributable to the State or which of Bolivia’s specific acts violated those legitimate expectations.”<sup>166</sup> It held that a tribunal should assess the legitimacy of the investor’s expectations, taking into account the circumstances of the case, including the investor’s own conduct and due diligence.<sup>167</sup> It found that the claimant knew or should have known that the mining project was “in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions.”<sup>168</sup>
- 173 Like in *South American Silver*, the Claimants have not explained which legitimate expectations were frustrated due to conduct attributable to the State or which of Romania’s specific acts frustrated those legitimate expectations. As Romania has established, the Claimants knew from the outset that the Project was set in an area with specific social and cultural conditions at play. The Project was possible only if (i) RMGC successfully moved local residents and (ii) obtained the consent of residents in the surrounding area. It also entailed the destruction or relocation of underground archaeological vestiges. RMGC also needed to secure permits in accordance with Romanian law and with the approval of stakeholders.<sup>169</sup>

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<sup>165</sup> [Crystallex v. Venezuela](#), Award, 4 April 2016, at [Exhibit CLA-62](#), p. 145 (para. 552) (emphasis added).

<sup>166</sup> [South American Silver Limited \(Bermuda\) v. Plurinational State of Bolivia](#), Award, PCA Case No. 2013-15, 22 November 2018, at [Exhibit RLA-162](#), p. 176 (para. 653).

<sup>167</sup> *Id.* at p. 177 (para. 655); see also *id.* at p. 175 (para. 648).

<sup>168</sup> *Id.* at p. 177 (para. 655).

<sup>169</sup> See [Counter-Memorial](#), p. 14 *et seq.* (Section 2.3).

174 The Claimants therefore have not identified, let alone demonstrated, a violation of any allegedly legitimate expectation on their part; their FET claim on this ground should be dismissed.

### 3.1.3.3 Romania Has Not Failed to Act Transparently

175 The Claimants allege that “with a complete lack of transparency,” Romania “failed to issue a decision memorializing its decision not to proceed with the Project, choosing instead to proceed with a pretense of process and other acts wholly incompatible with RMGC’s rights and with the very notion of the Project creating, as in *Bilcon*, a ‘no go’ zone for the Project.”<sup>170</sup> However, the Claimants fail to identify any instance where Romanian authorities were not transparent and it is not sufficient to allege a general lack of transparency or a “pretense of process.” As Romania has and will demonstrate below, State authorities acted in accordance with Romanian law and with transparency, providing reasons for their actions and decisions to RMGC or the Claimants.

### 3.1.3.4 Romania Has Not Failed to Accord Due Process

176 The Claimants’ argument that Romania denied them due process rests solely on strained allegations involving the conduct of executive organs.<sup>171</sup>

177 The *Genin v. Estonia* tribunal, applying a similar FET standard as the one in the UK-Romania BIT, held that while the conduct of the relevant regulator “[could] be characterized as being contrary to generally accepted banking and regulatory practice” and even “invited criticism,” it did not “amount to a denial of due process,”<sup>172</sup> because “[a]cts that would violate this minimum standard would include acts showing a **wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.**”<sup>173</sup>

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<sup>170</sup> [Reply](#), p. 212 (para. 495).

<sup>171</sup> *Id.* at p. 155 *et seq.* (paras. 342, 356).

<sup>172</sup> [Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia, Award, ICSID Case No. ARB/99/2, 18 June 2001, at Exhibit RLA-163](#), p. 90 *et seq.* (paras. 364-365).

<sup>173</sup> *Id.* at p. 91 (para. 367) (emphasis added).

178 The Claimants have failed to make such a showing with regard to Romanian governmental or other State organs. As a result, their allegations of lack of due process together with their claim under the UK-Romania FET standard should be dismissed.

### 3.1.3.5 Romanian State Organs are Entitled to a Margin of Appreciation in Their Decision-Making

179 A separate but related question is the standard of review that the Tribunal should apply when considering the State's actions and, in particular, the Ministry of Environment's alleged failure to issue the permit. The Claimants have not addressed this issue.

180 Under international law, Romanian state authorities enjoy and are entitled to a margin of appreciation in finding that RMGC has not yet met the requirements for issuance of the environmental permit.

181 Investment tribunals have recognized the doctrine of margin of appreciation, which requires arbitrators to treat decisions by State authorities with a degree of deference.<sup>174</sup> Several scholars have advocated for the application of the doctrine, applied for many years by the European Court of Human Rights, in the context of international investment adjudication.<sup>175</sup>

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<sup>174</sup> See [Continental Casualty Company v. Argentine Republic, Award, ICSID Case No. ARB/03/9, 5 September 2008, at Exhibit CLA-84](#), p. 80 (para. 181); [Frontier Petroleum Services Ltd. v. Czech Republic, Final Award, 12 November 2010, at Exhibit CLA-271](#), p. 182 *et seq.* (para. 527); [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 CLA-109](#), p. 180 (para. 6.92) (hard copy: Part VI, p. 30); see also [Saluka v. Czech Republic, Partial Award, 17 March 2006, at Exhibit CLA-97](#), p. 58 *et seq.* (para. 272) (invoking the respondent's "margin of discretion"); [Ioan Micula et al. v. Romania, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008, at Exhibit RLA-164](#), p. 29 *et seq.* (para. 94) (invoking the margin of appreciation in reviewing the validity of a non-disputing party's conferral of nationality on the claimant); [Mercer International Inc. v. Canada, Award, ICSID Case No. ARB\(AF\)/12/3, 6 March 2018, at Exhibit RLA-165](#), p. 105 (para. 7.42) ("The Tribunal also accepts as a general legal principle, in the absence of bad faith, that a measure of deference is owed to a State's regulatory policies.").

<sup>175</sup> [Y. Shany, "Towards a General Margin of Appreciation Doctrine in International Law?" \(2005\) 16 European Journal of International Law 907, at Exhibit RLA-166.](#)

182 In *Electrabel v. Hungary*, the claimant alleged that the State's termination of a power purchase agreement, following Hungary's accession to the EU and further to an order of the European Commission, constituted a breach of FET and an indirect expropriation in violation of the ECT. First, the tribunal held that the respondent State's failure to challenge the European Commission's decision before the EU courts did not amount to a violation of the ECT since "Hungary was entitled to a modest margin of appreciation in arriving at its own discretionary decision in regard to such proceedings."<sup>176</sup> Second, the tribunal rejected the claimant's argument that Hungary's reintroduction of regulated electricity pricing in 2006 flew in the face of its legitimate expectations and thus amounted to a failure to provide FET. It held that Hungary enjoyed "a reasonable margin of appreciation in taking such measures before being held to account under the ECT's standards of protection."<sup>177</sup> Furthermore, it found that its "task" was not "to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards [the power plant operator] at the relevant time."<sup>178</sup>

183 The tribunal in *Un glaube et al. v. Costa Rica* held:

"because governments are accorded a **considerable degree of deference** regarding the regulation/administration of matters within their borders, such differences [in judicial treatment between what the investors were accustomed to in Germany and what the Costa Rican courts applied] are not significant, insofar as this Tribunal is concerned, unless they involve or condone arbitrariness, discriminatory behavior, lack of due process or other characteristics that shock the conscience, are clearly 'improper or discreditable' or which otherwise **blatantly defy logic or elemental fairness**."<sup>179</sup>

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<sup>176</sup> [Electrabel v. Hungary, Decision on Jurisdiction, 30 November 2012, at Exhibit CLA-109](#), p. 180 (para. 6.92) (hard copy: Part VI, p. 30).

<sup>177</sup> *Id.* at p. 247 (para. 8.35) (hard copy: Part VIII, p. 10).

<sup>178</sup> *Id.*

<sup>179</sup> [Marion Un glaube and Reinhard Un glaube v. Republic of Costa Rica, Awards, ICSID Case No. ARB/08/1 and ARB/09/20, 16 May 2012, at Exhibit RLA-167](#), p. 84 *et seq.* (para. 258) (emphasis added).

- 184 The tribunals thus rejected the FET claim since the above standard had not “been approached, much less surpassed.”<sup>180</sup>
- 185 Here too, the Tribunal should defer to the actions of the Romanian State authorities which, in any event, do not approach the realm of “arbitrariness, discriminatory behavior, lack of due process or other characteristics that shock the conscience, are clearly ‘improper or discreditable’ or which otherwise blatantly defy logic or elemental fairness.”<sup>181</sup>
- 186 The Claimants refer to the allegedly “hundreds of millions of dollars [spent in] designing and developing the Project to meet and favorably exceed applicable permitting requirements”<sup>182</sup> and complain that the EIA Review Process was “arbitrary.”<sup>183</sup> They furthermore observe that they had reasonably expected the permitting process to be conducted according to law.<sup>184</sup>
- 187 First, however, the EIA Review Process has been conducted lawfully.<sup>185</sup>
- 188 Second, the Claimants wrongly suggest that RMGC was automatically entitled to the environmental permit, almost from the moment of the signature of the License. However, no State official ever warranted that RMGC would automatically receive the environmental permit. Furthermore, as Prof. Tofan explains, RMGC had no subjective legal right to obtain the environmental permit. Instead, she explains that, under Romanian law, administrative authorities enjoy a margin of discretion when assessing whether an applicant to any administrative act has complied with the conditions for this act to be issued.<sup>186</sup> In particular, with respect to the permitting procedure, she opines that the Ministry of Environment and the TAC

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<sup>180</sup> *Id.*

<sup>181</sup> See *supra* Section. 2.1.5.1. (describing high degree of deference given the State’s right to adopt environmental measures under Canada-Romania BIT).

<sup>182</sup> The Claimants have provided no evidence of the sums spent on the Project. Although the Respondent requested during the document production phase evidence of the Claimants’ alleged expenditures in the Project, the Tribunal rejected the Respondent’s request.

<sup>183</sup> [Reply](#), p. 210 (para. 487).

<sup>184</sup> *Id.*

<sup>185</sup> [Counter-Memorial](#), p. 147 *et seq.* (Section 6.2).

<sup>186</sup> See [Tofan LO](#), p. 86 *et seq.* (Section V).

enjoyed a margin of discretion as to whether the Project's documentation and overall features warranted the issuance the permit.<sup>187</sup>

189 Even if the Claimants were right in arguing that the Project "satisfied all conditions in law for issuance of the Environmental Permit" (*quod non*), the administrative authorities involved in the Project's environmental permitting process were entitled to assess, within the limits explained by Prof. Tofan, the Project's compliance in light of the legal margin of discretion afforded to them under Romanian law and to attach any necessary and appropriate conditions to the permit, if and when issued.<sup>188</sup>

190 Relatedly, the Claimants, and their expert Prof. Mihai, dispute the relevance of the precautionary principle to the conduct of the Romanian authorities during the EIA Review Process.<sup>189</sup> Prof. Dragoş explains why Prof. Mihai's views are misguided.<sup>190</sup>

191 Prof. Mihai's demonstration stands on his conclusion that "the precautionary principle is connected to the notion of scientific uncertainty."<sup>191</sup> However, even if his conclusion might be correct *a priori*, the "meaning of 'uncertainty' is ... more complex than might be apparent. ... Uncertainty might also exist in the form of indeterminacy (where we don't know all the factors influencing the causal chains), ambiguity (where there are contradictory certainties), and ignorance (where we don't know what we don't know)."<sup>192</sup> RMGC repeatedly failed to alleviate concerns raised by the TAC, State authorities, and the public about the Project's potential negative environmental impact.<sup>193</sup> Thus, Prof. Mihai's understanding that there was "no question of uncertainty or lack of scientific data as regards the Project"

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<sup>187</sup> *Id.*

<sup>188</sup> [Reply](#), p. 224 (para. 524); [Tofan LO](#), p. 86 *et seq.* (Section V).

<sup>189</sup> [Reply](#), p. 223 (para. 522); [Mihai LO II](#), p. 21 *et seq.* (paras. 65-80).

<sup>190</sup> [Dragos LO II](#), p. 15 (paras. 49-55).

<sup>191</sup> [Mihai LO II](#), p. 21 (para. 65).

<sup>192</sup> [Science for Environment Policy, The Precautionary Principle: decision-making under uncertainty, European Commission Future Brief 18 dated Sept. 2017, at Exhibit C-2451](#), p. 5.

<sup>193</sup> See *e.g.* [CMA - Wilde Report II](#), p. 59 *et seq.* (paras. 210-218); [CMA - Blackmore Report](#), p. 48 *et Seq.* (paras. 208-211).

and that the precautionary principle thus “is not relevant in this case” is flawed.<sup>194</sup>

192 As the EU Commission indicates, “there is no single approach to the precautionary principle” and “the principle is about considering carefully whether a technology or activity is safe or not.”<sup>195</sup> The precautionary principle is thus deeply intertwined with the margin of discretion enjoyed by decision-makers in the field of environmental protection: as the EU Commission notes, as regards the precautionary principle “a core principle of sustainable development,” “it is ultimately for decision-makers and the courts to flesh out the details.”<sup>196</sup>

193 Romania has demonstrated that international law has recognized the State’s right to use their regulatory powers, on the basis of the precautionary principle, to achieve environmental protection objectives, even if only a risk and no certainty of environmental harm exists.<sup>197</sup>

### **3.2 The Impugned Acts and Omissions of Romania Do Not Taken Together as a Composite Act Amount to a Failure to Provide Fair and Equitable Treatment to the Claimants’ Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

194 The Claimants formulate their FET claim in the following interminable monologue:

“As Claimants detailed in the Memorial and further elaborated above and in the evidence supporting this submission, Romania’s treatment of Gabriel’s investments, in particular, starting in August 2011 when the Government began to signal that renegotiation of the State’s economic interest was mandatory for the Project to proceed and relatedly to then hold up Project permitting for political reasons not tied to the

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<sup>194</sup> [Mihai LO II](#), p. 21 *et seq.* (paras. 66, 68).

<sup>195</sup> [Science for Environment Policy, The Precautionary Principle: decision-making under uncertainty, European Commission Future Brief 18 dated Sept. 2017, at Exhibit C-2451](#), p. 5 *et seq.*; see also [Dragos LO II](#), p. 13 *et seq.* (paras. 41-55) (discussing precautionary principle).

<sup>196</sup> *Id.* at p. 4.

<sup>197</sup> [Counter-Memorial](#), p. 250 *et seq.* (para. 669).

applicable legal permitting rules, through the time it dictated that Project permitting be effectively decided by a Parliamentary process through a vote on the Draft Law, and then issued political instructions to Parliament to reject the Draft Law, which it stated was a proxy vote on whether the Project would be done, and thereafter when the Government confirmed by its actions and omissions that indeed it had rejected the Project on political grounds as well as its joint-venture with Gabriel in RMGC together with the Bucium Projects, constitutes, as a **composite act**, a denial of fair and equitable treatment.”<sup>198</sup>

- 195 The Claimants’ inability to succinctly express their claims is a testament to their weakness.<sup>199</sup> Significantly, they do not identify the State’s alleged acts and omissions which they consider, taken individually, amount to a failure to provide to FET in breach of the BITs.
- 196 In **Sections 3.3 to 3.7**, the Respondent has sought to parse out the Claimants’ allegations and to identify what appear to be the impugned State actions amounting in the Claimants’ view to breaches of the FET standard.
- 197 The Claimants depend on the notion of composite breach in this arbitration, for not only their FET claim, but also their other claims of breach of the BITs since, taken individually, the State’s impugned actions do not amount to breaches of the BITs.<sup>200</sup>
- 198 The concept of a composite act in international law of state responsibility was explained in the Commentary to the ILC Articles in the following terms:

“Composite acts ... are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is ‘a series of acts or omissions defined in aggregate as wrongful.’ Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of ra-

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<sup>198</sup> [Reply](#), p. 209 (para. 486) (emphasis added).

<sup>199</sup> *Id.* at p. 209 *et seq.* (paras. 486-495).

<sup>200</sup> See also *e.g. id.* at p. 160 *et seq.* (paras. 356, 362, 363, 370, 502, and 589) (referring to “Romania’s course of treatment” as amounting to a breach of the BITs).

cial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.”<sup>201</sup>

199 Thus, as noted above, for a composite act to have occurred, the individual components must together amount to more than the sum of the parts.<sup>202</sup> In particular, the individual acts cannot themselves constitute the same international wrong as the composite act.<sup>203</sup> A single act may be an unlawful killing, and a single act of racial discrimination may be prohibited, but they cannot constitute genocide and apartheid, respectively. Only when they are combined with other individual acts can they become elements in the composite act of genocide or apartheid.

200 The tribunal in *El Paso v. Argentina* defined a creeping (*i.e.* composite) breach in the context of the FET obligation as:

“a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.”<sup>204</sup>

201 The Respondent does not dispute the notion that a breach of FET may result from a combination of measures. However, it is not sufficient to create an aura or impression of malfeasance or breach. Significantly, tribunals that have found that a series of measures amounted to a breach of FET have found that those measures were “part of a **State policy** aimed at gaining control of the object of investment,” a conspiracy, an underlying pattern or purpose, or a campaign against the foreign investor.<sup>205</sup>

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<sup>201</sup> [ILC Articles, at Exhibit RLA-33](#), p. 62 (para. 2).

<sup>202</sup> See *supra* para. 64.

<sup>203</sup> [ILC Articles, at Exhibit RLA-33](#), p. 63 (para. 9); [International Law Commission, “Report of the International Law Commission on the Work of its 30th Session” \(8 May - 28 July 1978\) UN Doc. A/33/10 \(excerpt\), at Exhibit RLA-168](#), p. 92 *et seq.* (para. 9); [J. Crawford, \*State Responsibility: the general part\* \(1st edition, Cambridge University Press, 2013\) \(excerpt\), at Exhibit RLA-128](#), p. 266 *et seq.*; [J. Pauwelyn, “The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems” \(1995\) \*British Yearbook of International Law\* 415, at Exhibit RLA-169](#), p. 427 *et seq.*

<sup>204</sup> [El Paso v. Argentina, Award, 31 October 2011, at Exhibit CLA-152](#), p. 189 (para. 518).

<sup>205</sup> [Gold Reserve Inc. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB\(AF\)/09/1, 22 September 2014, at Exhibit CLA-81](#), p. 139 (para. 566) and p. 149 (para.

- 202 For instance, the Claimants rely on the observation in the *Bayindir v. Pakistan* award that a breach “can result from a series of circumstances.”<sup>206</sup> However, that tribunal concluded “that the existence of a **conspiracy** to expel Bayindir for reasons unrelated to the latter’s contract performance is not established” and rejected the claims that the respondent had failed to provide FET to the claimant.<sup>207</sup>
- 203 The Claimants also refer to the finding in *Rompetrol v. Romania* that “the cumulative effect of a succession of impugned actions by the State of the investment can together amount to failure to accord [FET].”<sup>208</sup> They, however, fail to refer to the very next sentence of the award: “**But this would only be so** where 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.”<sup>209</sup>
- 204 In *Gavrilovic v. Croatia*, the claimants alleged that, through various actions taken together, the respondent State had acted unfairly and inequitably toward the claimants.<sup>210</sup> The respondent counterargued that the claimants had not demonstrated a “**common and coordinated purpose** linking the actions of the Croatian courts and other State organs.”<sup>211</sup> The tribunal agreed and found that, even taken together, the Claimants had not proven

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590) (referring to the change of policy regarding mineral exploitation under President Chavez, as evidenced by numerous statements) (emphasis added).

<sup>206</sup> [Memorial](#), p. 281 *et seq.* (para. 651). The *Bayindir* tribunal, however, did not refer to the notion of “composite breach.”

<sup>207</sup> [Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, ICSID Case No. ARB/03/29, 27 August 2009, at Exhibit CLA-87](#), p. 74 (para. 258) (emphasis added).

<sup>208</sup> [Memorial](#), p. 281 *et seq.* (para. 651) (citing [The Rompetrol Group N.V. v. Romania, Award, ICSID Case No. ARB/06/3, 6 May 2013, at Exhibit CLA-151](#)).

<sup>209</sup> [Rompetrol v. Romania, Award, 6 May 2013, at Exhibit CLA-151](#), p. 146 (para. 271) (emphasis added).

<sup>210</sup> [Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia, Award, ICSID Case No. ARB/12/39, 26 July 2018, at Exhibit RLA-170](#), p. 309 *et seq.* (para. 1131).

<sup>211</sup> *Id.* at p. 309 *et seq.* (para. 1133).

the existence of a “**deliberate campaign** on the part of the Respondent” in violation of the FET standard.<sup>212</sup>

- 205 The Claimants refer to the finding in *El Paso v. Argentina* that State measures “by their cumulative effect” may amount to a breach of FET.<sup>213</sup> The claimants contended that a series of measures taken by the Argentinean government during the 2001-2002 financial crisis in the hydrocarbon and electricity sectors cumulatively violated the FET standard; the tribunal agreed.<sup>214</sup> The facts of that case are markedly different from the facts here. In *El Paso*, solely the actions of one Government, taken over the course of one year, were found to cumulatively breach the FET standard.<sup>215</sup>
- 206 Here, by contrast, the claims target the alleged actions and omissions of President Traian Băsescu, multiple Governments – at least, the Boc Government (from August 2011 to February 2012), the Ungureanu Government (from February 2012 to May 2012), the Ponta Government (from May 2012 to November 2015) – and of multiple Prime Ministers (Messrs. Boc, Ungureanu, and Ponta), individual Ministers (including Ministers László Borbély, Kelemen Hunor, and Rovana Plumb) and civil servants of multiple ministries and State agencies (including the Ministries of Environment and Culture, NAMR, the prosecutors’ office, and tax authorities). The claims target alleged actions and omissions “starting in August 2011” and ending apparently in 2017.<sup>216</sup> The Claimants would have the Tribunal find that certain alleged acts and omissions of all of these organs and individuals over the course of some four years should be examined and taken cumulatively to amount to a breach of FET.

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<sup>212</sup> *Id.* at p. 309 *et seq.* (para. 1135) (emphasis added).

<sup>213</sup> [Memorial](#), p. 282 (n. 1306) (referring to [El Paso v. Argentina, Award, 31 October 2011, at Exhibit CLA-152](#), p. 190 (para. 519)).

<sup>214</sup> [El Paso v. Argentina, Award, 31 October 2011, at Exhibit CLA-152](#), p. 23 *et seq.* (paras. 94-113) and p. 190 (para. 519).

<sup>215</sup> In *Tecmed v. Mexico*, to which the Claimants also refer, the actions at issue were solely those of the state agency in charge of environmental protection. [Reply](#), p. 209 (n. 954) (citing [Técnicas Medioambientales Tecmed S.A. v. United Mexican States, Award, ICSID Case No. ARB\(AF\)/00/2, 29 May 2003, at Exhibit CLA-122](#), p. 70 (para. 172)). In any event, the *Tecmed* tribunal did not refer to the notion of “composite act” and just evoked the notion of “one and the same course of conduct characterized by its ambiguity and uncertainty.” *Id.*

<sup>216</sup> See *supra* para. 194.

207 The Claimants have, however, failed to demonstrate that the alleged acts and omissions of which they complain were “part of a State policy aimed at gaining control of the object of investment” or that they were driven by a conspiracy, a deliberate campaign, or an underlying pattern or purpose. Nor can the Claimants make such a claim given the material scope of their claims, the time span of those claims, and the breadth of State actors at which they are directed. The Claimants have not demonstrated a link between the alleged acts and omissions of which they complain. Thus, their request that the Tribunal find a composite breach must be dismissed.

### **3.3 The Ministry of Environment’s Alleged Failure to Issue the Environmental Permit in 2012 Does Not Amount to a Failure to Provide Fair and Equitable Treatment to the Claimants’ Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

208 The key FET claim remains that the Ministry of Environment completed its review of the EIA Report on 29 November 2011 and that it was required to issue its decision regarding the environmental permit by 31 January 2012.<sup>217</sup> The Claimants allege that, in 2012, the Ministry of Environment “fail[ed] and refus[ed] to move forward the environmental permitting process for political reasons...”<sup>218</sup> As demonstrated in the Counter-Memorial and this **Section 3.3**, this claim is without merit.

209 The related claim that the Government purportedly coerced RMGC into agreeing to increase the State’s level of participation in the Project and held the environmental permit hostage is addressed in **Section 3.4**.

210 The EIA Review Process leading up to the summer of 2011 has been summarized in the Respondent’s Counter-Memorial.<sup>219</sup> Although the facts are largely undisputed, three aspects of the Claimants’ account in their Reply of the EIA Review Process up to September 2011 are misleading.<sup>220</sup>

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<sup>217</sup> [Reply](#), p. 210 (paras. 487-488); see also *id.* at para. 36.

<sup>218</sup> *Id.* at p. 211 (para. 490).

<sup>219</sup> See [Counter-Memorial](#), p. 41 *et seq.* (Section 3).

<sup>220</sup> [Reply](#), p. 28 *et seq.* (paras. 41(a) to (f)).

- 211 First, the Claimants make false statements to the effect that the “decision [on the environmental permit] ... has been pending **since December 2004**” and that the “application has been pending without a decision for **nearly 14 years**.”<sup>221</sup> These statements are wrong, since RMGC did not even submit its EIA Report until May 2006.<sup>222</sup> Furthermore, the EIA Review Process was interrupted between September 2007 and June 2010 due to problems with RMGC’s urban certificate.<sup>223</sup> The Claimants have not claimed that the Ministry of Environment’s announcement in September 2007 – that the EIA Review Process could not, in the circumstances, continue – amounted to a breach of the BITs. The very suggestion that there has been “14 years of delay” is thus shockingly disconnected from reality.
- 212 Second, the Claimants assert that, at the March 2011 TAC meeting, “the Ministry of Environment had completed its review of RMGC’s answers to questions received from the public and all but two chapters of the EIA Report remained for review.”<sup>224</sup> This assertion is misleading. The Claimants do not mention the public consultation between March and May 2011 (generating some 500 questions from the public) and RMGC’s submission of a new EIA Report chapter in response in August 2011.<sup>225</sup> Nor do they consider that not just two, but three, chapters of the EIA Report (Chapters 8 to 10) remained to be discussed.
- 213 Third, the Claimants refer to a meeting of representatives of the Ministry of Environment and RMGC in September 2011 and minimize the extent of the concerns and issues raised both during that meeting and in a letter to RMGC shortly thereafter.<sup>226</sup> [REDACTED]  
[REDACTED]  
[REDACTED] The letter concluded by referring to “the next TAC **meetings**”

<sup>221</sup> *Id.* at p. 26 (para. 37) and p. 27 (para. 39) (emphasis added).

<sup>222</sup> [Counter-Memorial](#), p. 41 (para. 111).

<sup>223</sup> See *id.* at p. 61 *et seq.* (paras. 161-162).

<sup>224</sup> [Reply](#), p. 28 (para. 41(c)); [REDACTED]

<sup>225</sup> [Counter-Memorial](#), p. 74 (para. 191); [Mocanu II](#), p. 12 *et seq.* (paras. 38-39, 49-50, 78).

<sup>226</sup> [Reply](#), p. 29 (para. 41(d)).

<sup>227</sup> [REDACTED], p. 4 *et seq.*; [Letter from Ministry of Environment to RMGC, at Exhibit C-575](#); see also [Mocanu II](#), p. 12 *et seq.* (paras. 37, 86-87).

and the need to analyze not only the remainder of the EIA Report, but also the IGIE Report, a safety report, and the checklist for the EIA Report.<sup>228</sup> Although the Claimants describe the letter as containing the Ministry's "final questions," nowhere does the letter suggest as much. If anything, the letter shows the number of complex issues outstanding at the time.<sup>229</sup>

- 214 Contrary to the Claimants' allegations and as detailed below, the Ministry of Environment's alleged failure to issue the environmental permit in early 2012 does not amount to a failure to provide FET in breach of the BITs.<sup>230</sup>
- 215 First, the EIA Review Process was not finalized by 29 November 2011 (**Section 3.3.1**).
- 216 Second, as of January 2012 and throughout 2012, RMGC had not met the conditions for the environmental permit (**Section 3.3.2**).<sup>231</sup>
- 217 Third, the Claimants' argument that State officials contemporaneously recognized that the Ministry of Environment could issue the environmental permit is unfounded (**Section 3.3.3**).
- 218 Fourth, the Claimants' and RMGC's contemporaneous public disclosures and annual reports recognized that the environmental permitting process was ongoing (**Section 3.3.4**).
- 219 Fifth, notwithstanding the Claimants' complaints in this arbitration, RMGC did not complain in early 2012 to State officials regarding the alleged failure to issue the permit (**Section 3.3.5**).

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<sup>228</sup> [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#), p. 14 (emphasis added); see also [2010 Update to EIA Report, Safety Report dated October 2010, at Exhibit C-392.04](#); see [Counter-Memorial](#), p. 75 (para. 193).

<sup>229</sup> [Reply](#), p. 29 (para. 41(e)).

<sup>230</sup> *Id.* at p. 210 (paras. 487-488).

<sup>231</sup> [Counter-Memorial](#), p. 92 *et seq.* (paras. 242-257).

### 3.3.1 The EIA Review Process Was Not Finalized by 29 November 2011

- 220 The Claimants continue to contend that the EIA Review Process was completed by 29 November 2011 and that the Ministry of Environment was required to issue the environmental permit by 31 January 2012.<sup>232</sup>
- 221 They allege that the Ministry of Environment convened the TAC to meet on 29 November 2011 to discuss “RMGC’s answers to the Ministry of Environment’s **final** questions.”<sup>233</sup> However, neither letter from the Ministry of Environment to RMGC inviting it to meet on 29 November referred to those questions as being “final” nor did they suggest that this meeting would be the last TAC meeting. As indicated by letter to RMGC, the TAC planned to discuss not only RMGC’s responses to the 102 questions, but also Chapters 8 and 9 of the EIA Report, the IGIE report, and the recent visits of the TAC and the European delegation of the PETI.<sup>234</sup> (It had yet to plan to discuss, among other things, Chapter 10 of the EIA Report.)
- 222 In the days and weeks preceding the meeting, neither RMGC nor Gabriel Canada indicated, in public statements or otherwise, that they expected the TAC to complete its review in late 2011 and that they considered the requirements for the environmental permit to be met.
- 223 The content of the discussions at the 29 November TAC meeting is largely undisputed insofar as the meeting was recorded. The TAC president, Mr. Marin Anton, announced the agenda at the start of the meeting, which corresponded to the issues raised in advance.<sup>235</sup> Mr. Anton did not indicate that the EIA Review Process was complete and that the Ministry of Environment was in a position to issue the permit.

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<sup>232</sup> [Reply](#), p. 52 (paras. 86-87).

<sup>233</sup> *Id.* at p. 29 (para. 41(g)) (emphasis added).

<sup>234</sup> [Letter from Ministry of Environment to RMGC dated 4 November 2011, at Exhibit C-790; Letter from Ministry of Environment to RMGC dated 28 October 2011, at Exhibit C-835; Counter-Memorial](#), p. 75 (para. 196); see also *id.* at para. 182; [Mocanu II](#), p. 35 (paras. 93-94).

<sup>235</sup> [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 2; [Counter-Memorial](#), p. 84 *et seq.* (para. 222).

- 224 The Parties disagree, first, regarding the meaning and significance of certain statements at the 29 November meeting. The Claimants make much of statements by Mr. Anton as well as certain TAC members indicating that they had no or few outstanding questions regarding the EIA Report.<sup>236</sup> However, those statements must be put in context.
- 225 The Claimants stress Ms. Mocanu's question to the TAC president about whether the report regarding the TAC's site visit to Roșia Montană should include the "conditions that I am going to put in the Environmental Permit."<sup>237</sup> Ms. Mocanu explains in her witness statement that this question came about because she considered that the site visit report should not refer to potential conditions for issuance of the environmental permit; it should not, however, be interpreted to mean that the Ministry of Environment was on the verge of preparing the permit.<sup>238</sup>
- 226 The Claimants continue to refer to Mr. Anton's statements at the end of the meeting that "the technical discussions about the Roșia Montană Project [had] come to an end," "[t]hings [we]re finalized in the TAC," and that he would "convene another TAC meeting for a final decision."<sup>239</sup> Although the Claimants attach importance to these statements, the TAC President is not a member of the TAC and does not issue opinions or participate in the decision-making process; he merely organizes and presides the meetings.<sup>240</sup> More importantly, Mr. Anton made clear that another TAC meeting would be necessary.<sup>241</sup> Many issues were outstanding, as discussed in **Sec-**

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<sup>236</sup> [Reply](#), p. 29 *et seq.* (para. 41(h)-(l)).

<sup>237</sup> *Id.* at p. 31 (para. 41(j)).

<sup>238</sup> [Mocanu II](#), p. 52 *et seq.* (para. 148); see also *id.* at p. 50 *et seq.* (paras. 142 and 146).

<sup>239</sup> See [Reply](#), p. 31 *et seq.* (para. 41(l)).

<sup>240</sup> See [Ministry of Environment Order 405/2010 on establishing and functioning of central level TAC](#), at [Exhibit C-1771](#), p. 2 (Art. 3); see also [Counter-Memorial](#), p. 88 (para. 230); [Mocanu II](#), p. 17 (para. 46).

<sup>241</sup> [TAC meeting transcript dated 29 November 2011](#), at [Exhibit C-486](#), p. 48 *et seq.* (where Mr. Anton indicated that RMGC should "expect a next TAC meeting in the near future").

**tion 3.3.2**, and the allegation that those outstanding issues “were promptly addressed within 10 days of the November 29 TAC meeting” is false.<sup>242</sup>

227 Second, the Parties disagree regarding the existence and nature of phone calls allegedly made to Mr. Anton and Ms. Mocanu during the TAC meeting. The Claimants’ allegations that certain officials improperly contacted Mr. Anton and Ms. Mocanu and asked them to delay or interrupt the meeting are rejected.<sup>243</sup>

228 In any event, RMGC representatives did not indicate before or after the meeting that they thought that the EIA Review Process was complete and that the environmental permit should be issued. Nor did they challenge Mr. Anton’s references to outstanding issues and future TAC meetings.<sup>244</sup>

### **3.3.2 In 2012, RMGC Had Not Met Permitting Requirements and the Ministry of Environment Was Not in a Position to Issue the Environmental Permit**

229 To substantiate their composite FET claim, the Claimants invoke the Government’s “fail[ure] and refus[al] to move forward the environmental permitting process for political reasons” even though “the Project met the permitting requirements” in 2011 and in 2012.<sup>245</sup> They allege that the Ministry of Environment’s failure to issue the permit by 31 January 2012 “was a willful and unlawful abuse of power.”<sup>246</sup> However, as explained in the Counter-Memorial, as of January 2012, RMGC had not met the requirements to obtain the environmental permit.<sup>247</sup>

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<sup>242</sup> [Reply](#), p. 35 (para. 50); see also [Counter-Memorial](#), p. 86 (paras. 226-229); [Mocanu II](#), p. 11 (para. 34) and p. 62 *et seq.* (paras. 177-226) (commenting on outstanding issues in detail).

<sup>243</sup> See *infra* para. 416.

<sup>244</sup> [Mocanu II](#), p. 42 *et seq.* (paras. 116-119 and 137).

<sup>245</sup> [Reply](#), p. 210 *et seq.* (paras. 487 and 490).

<sup>246</sup> *Id.* at p. 52 (para. 87).

<sup>247</sup> [Counter-Memorial](#), p. 92 *et seq.* (paras. 242-258); see also [UAB E Energija \(Lithuania\) v. Republic of Latvia, Award, ICSID Case No. ARB/12/33, 22 December 2017, at Exhibit CLA-252](#), p. 264 *et seq.* (paras. 902-903), p. 268 *et seq.* (paras. 915-917) (rejecting claim that State officials had committed breach of due process amounting to a breach of FET since the refusal

230 The Claimants argue that the fact that, within five weeks in June and July 2013, the Ministry of Environment requested the TAC to propose measures to include in the permit and allegedly published a draft permit demonstrates that it was feasible for the Ministry to do so in late 2011 and that the only reason for the delay was political.<sup>248</sup> This argument is flawed on multiple levels. First, RMGC had not met permitting requirements in late 2011 and comparisons with 2013 – when certain permitting issues were resolved – are misplaced. Second, the Ministry did not publish a “draft permit” in July 2013, but rather a note for public consultation.<sup>249</sup>

### 3.3.2.1 RMGC Needed, But Had Not Yet Obtained, the Ministry of Culture's Endorsement of the Project

231 As RMGC was well aware, the Ministry of Culture was required both to issue a point of view (*punct de vedere*) and an endorsement (*aviz*) for the Project before the Ministry of Environment could issue the environmental permit.<sup>250</sup> On 7 December 2011, the Ministry of Culture sent a letter to the Ministry of Environment that the Claimants continue to wrongly insist constituted the required endorsement.<sup>251</sup>

232 Nowhere in the 2011 letter do the words “endorse,” “endorsement,” or “approval” appear, and nowhere does the Ministry of Culture express its will to “favorably endorse” the Project. By contrast, the endorsement issued in April 2013 by the Ministry of Culture expressly described itself as such.<sup>252</sup>

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to approve a new tariff was in part due to the claimant's failure to observe its duty to provide the required information in accordance with the Latvian law).

<sup>248</sup> [Reply](#), p. 52 (para. 86).

<sup>249</sup> [Counter-Memorial](#), p. 121 (para. 319); see also *infra* para. 634.

<sup>250</sup> [REDACTED] see also [Dragos LO II](#), p. 58 *et seq.* (paras. 227-229 and 231-248) (notably explaining the difference between conformity and consultative endorsements); [Mocanu II](#), p. 38 (para. 102).

<sup>251</sup> [Reply](#), p. 41 (para. 63); see also [Mihai LO II](#), p. 80 *et seq.* (paras. 264-269); [Schiau LO II](#), p. 78 *et seq.* (paras. 267-271).

<sup>252</sup> [Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at Exhibit C-655](#), p. 1; see also [Dragos LO II](#), p. 64 *et seq.* (paras. 251, 256 and 258).

- 233 In fact, the Ministry of Environment requested a point of view from the Ministry of Culture following RMGC's responses to the TAC's questions of September 2011 and again after the 29 November 2011 TAC meeting.<sup>253</sup> The Ministry of Culture sent its point of view on 7 December 2011.<sup>254</sup>
- 234 The Claimants' contemporaneous statements fly in the face of their current position. Gabriel Canada noted in mid-2012 that the Ministry of Culture had not yet endorsed the Project and that RMGC "will be seeking clarification from the new Minister of Culture."<sup>255</sup> Similarly, in early 2013, RMGC representatives recognized that the endorsement was pending.<sup>256</sup>
- 235 Contemporaneous statements of the Minister of Environment and the TAC President also confirm that the Claimants did not view the December 2011 letter as an endorsement.<sup>257</sup> In an April 2012 letter to [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Also,  
as Mr. Găman explains, [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>253</sup> [Letter from Ministry of Environment to TAC members dated 15 November 2011, at Exhibit R-476](#); [Letter from Ministry of Environment to Ministry of Culture dated 6 December 2011, at Exhibit C-444](#), p. 1 (3<sup>rd</sup> para.) ("Also, please submit your point of view..."). In the latter correspondence, the Ministry of Environment separately asked for the Ministry of Culture's endorsement. *Id.* at 1<sup>st</sup> para. ("please communicate the endorsement").

<sup>254</sup> [Letter from Ministry of Culture to Ministry of Environment dated 7 December 2011, at Exhibit C-446](#); see also [Mocanu II](#), p. 33 *et seq.* (paras. 88, 107-108, 207-208); [Dragos LO II](#), p. 58 *et seq.* (Section 3.4.1.2).

<sup>255</sup> [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 5.

<sup>256</sup> [Interministerial commission meeting transcript dated 11 March 2013, at Exhibit C-471](#), p. 22; see *id.* at p. 20 ("There remain to be solved ... [t]he endorsement issued by the Ministry of Culture"); [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 4 *et seq.*;

[REDACTED]; [Letter from RMGC to Department for Infrastructure Projects dated 15 March 2013, at Exhibit C-885](#).

<sup>257</sup> [Interview of László Borbély, TVR Info, 27 Dec. 2011, at Exhibit C-637](#), p. 3 ("I am still expecting an answer from the Ministry of Culture").

<sup>258</sup> [REDACTED]  
[REDACTED].

- [REDACTED]
- 236 The Claimants attach importance to a statement by the Minister of Culture in December 2011 that the Ministry of Environment was in possession of the documents required for the taking of a final decision.<sup>260</sup> During the radio interview in question, however, the Minister stated that “we have sent to the TAC ... a point of view on the projects,” *i.e.* he did not refer to an endorsement.<sup>261</sup> In April 2012, the Minister of Culture again indicated that “the **avi[z]** for the entire Roșia Montană perimeter **cannot** be issued.”<sup>262</sup>
- 237 The Claimants continue to argue that the Ministry of Culture refused to endorse the Project for political reasons.<sup>263</sup> However, in December 2011, questions relating to the cultural aspects of the site and Project remained, including with regard to archaeological research at Cârnic and Orlea.<sup>264</sup>
- 238 The Claimants argue that the absence of an ADC for Orlea and the litigation around the Cârnic ADC could not hinder the Ministry of Culture from issuing an endorsement for purposes of the environmental permit.<sup>265</sup> Their reading of the legal framework is, however, inapposite.
- 239 First, the authorities and RMGC had discussed the archaeological research and the need for ADCs. The representative of the Ministry of Environment at the TAC meeting of 9 March 2011 warned that the environmental permit

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<sup>259</sup> [Gaman II](#), p. 18 *et seq.* (para. 47); [REDACTED]

<sup>260</sup> [Reply](#), p. 45 (para. 68).

<sup>261</sup> [Interview of Minister Hunor, Radio Romania Actualități, 19 Dec. 2011, at Exhibit C-439](#), p. 1.

<sup>262</sup> See [Alburnus Maior press release “The Roșia Montană project cannot receive approval in its current form” dated 12 April 2012, at Exhibit R-240](#) (emphasis added).

<sup>263</sup> [Reply](#), p. 42 *et seq.* (paras. 64 and 71).

<sup>264</sup> [Counter-Memorial](#), p. 94 *et seq.* (paras. 247-253). Whereas the Orlea mining pit would cover some 37.5 ha, research undertaken over the years in Orlea was performed in smaller or neighboring areas (notably Țarina). See Rejoinder Annex, Orlea Research Map; see also [Project Presentation Report 2004, at Exhibit C-525.03](#), p. 24.

<sup>265</sup> [Reply](#), p. 42 (para. 66) and p. 46 (para. 71); [Mihai LO II](#), p. 68 *et seq.* (paras. 217-244); [Schiau LO II](#), p. 80 *et seq.* (paras. 274-281).

“cannot be issued if you do not have a clear situation from the Ministry of Culture for the Orlea and Cârnic pits,” a warning RMGC did not dispute.<sup>266</sup>

- 240 Second, when RMGC highlighted to the TAC (in 2014) that ADCs were needed only for the building permit (and not for the environmental permit), the TAC President responded that it had “the right to be informed.”<sup>267</sup> As Dr. Claughton explains, there was at the time increased awareness and scrutiny of archaeological practice in Romania and the Roşia Montană site specifically.<sup>268</sup>
- 241 Third, when the Ministry of Environment sought the Ministry of Culture’s endorsement, it simultaneously requested information on the “regulatory situation of Orlea massif” and asked for “the permit issued for this massif” thus highlighting the relevance of the ADC.<sup>269</sup> Likewise, the Minister of Culture explained to the media in April 2012 that an endorsement could not be issued because of the lack of research and ADC for Orlea.<sup>270</sup>
- 242 It must therefore have been clear to RMGC that the status of the areas with archaeological heritage would determine the Ministry of Culture’s endorsement. The 2011 point of view was not the required endorsement and, as discussed in **Section 3.6.1.2**, it was reasonable for the Ministry of Culture not to endorse the Project until April 2013.

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<sup>266</sup> [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 45 (Pineta, RMGC lawyer); [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 67 (Hegedus, Gligor); see also [TAC meeting transcript dated 2 April 2014, at Exhibit R-490](#), p. 1 and p. 20 *et seq.* (RMGC lawyer); [Mihai LO I](#), p. 59 (para. 230b).

<sup>267</sup> [TAC meeting transcript dated 2 April 2014, at Exhibit R-490](#), p. 21.

<sup>268</sup> [CMA - Claughton Report II](#), p. 38 (para. 127).

<sup>269</sup> [Letter from Ministry of Environment to Ministry of Culture dated 1 April 2013, at Exhibit C-1350](#); [Letter from Ministry of Environment to Ministry of Culture dated 6 December 2011, at Exhibit C-444](#) (“please specify in a clear manner the regulatory status of Orlea...and, consequently, ...communicate the endorsement”); [Letter from Ministry of Environment to Ministry of Culture dated 5 August 2011, at Exhibit C-1382](#).

<sup>270</sup> [Alburnus Maior press release “The Roşia Montană project cannot receive approval in its current form” dated 12 April 2012, at Exhibit R-240](#) (“[i]f we are to talk only from the perspective of the Ministry for Culture ... for Orlea, the [aviz] cannot be issued.”).

### 3.3.2.2 RMGC Had Not Secured the Approval of the Waste Management Plan

- 243 As Romania demonstrated in its Counter-Memorial, in January 2012, RMGC had not yet secured the approval of its Waste Management Plan, which was a pre-requisite to securing the environmental permit.<sup>271</sup>
- 244 The Claimants dispute that the Waste Management Plan was required and argue that, in any event, RMGC had submitted an updated plan in December 2011 that State authorities should have promptly approved.<sup>272</sup> They argue that the plan compiled information that the TAC had already “analyzed and accepted,” and that it “was not mentioned [on 29 November 2011] by TAC President Anton as one of the remaining outstanding items that needed to be addressed to complete the TAC’s review.”<sup>273</sup>
- 245 The Claimants omit to indicate that, on 22 September 2010, State authorities had requested an update to the Waste Management Plan (submitted in 2006).<sup>274</sup> Although authorities twice reiterated these requests in September 2011,<sup>275</sup> RMGC did not submit an updated version of the plan until December 2011.<sup>276</sup> Hence, in November 2011, neither the TAC, NAMR, or the Ministry of Environment could have approved it.<sup>277</sup>
- 246 The Claimants suggest that the TAC members waived their right to express an opinion on the Waste Management Plan, since they did not object during the 29 November 2011 meeting to the late delivery of the updated plan.<sup>278</sup>

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<sup>271</sup> [Counter-Memorial](#), p. 86 *et seq.* (para. 227).

<sup>272</sup> [Reply](#), p. 50 (para. 81).

<sup>273</sup> *Id.* at p. 50 (para. 81); [REDACTED]

<sup>274</sup> [TAC meeting transcript dated 22 September 2010, at Exhibit C-487](#), p. 43; [TAC meeting minutes dated 22 September 2010, at Exhibit R-491](#), p. 5.

<sup>275</sup> [REDACTED]; [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit R-215](#), p. 12 (referring at question 75 to need for Waste Management Plan).

<sup>276</sup> [Reply](#), p. 50 (para. 81); [Avram II](#), p. 31 (para. 58).

<sup>277</sup> [Mihai LO II](#), p. 82 (para. 271).

<sup>278</sup> [Reply](#), p. 50 (para. 81).

However, by law, both NAMR and the Ministry of Environment were required to approve the plan.<sup>279</sup>

- 247 The Claimants' argument that the approval of the Waste Management Plan is not required for obtaining the environmental permit flies in the face of not only the law itself, but also the Claimants' own legal expert's opinion.<sup>280</sup> Under Romanian law, "[t]he approval of the management plan for waste from extractive industries shall take place during the procedure for the assessment of environment impact."<sup>281</sup> Prof. Mihai confirms that "the Waste Management Plan is to be approved during the EIA procedure."<sup>282</sup>
- 248 The Claimants argue that State authorities withheld approval of the plan for reasons linked to the State's alleged demands for renegotiation of the License.<sup>283</sup> However, the economic negotiations took place in October and November 2011, at a time when RMGC had not yet submitted its revised Waste Management Plan.<sup>284</sup>
- 249 Thus, as of 31 January 2012, RMGC had submitted its revised plan only to NAMR (which endorsed it on 18 January 2012).<sup>285</sup> RMGC had not yet submitted its revised plan to the Ministry of Environment (and did not do so until 15 March 2012).<sup>286</sup>

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<sup>279</sup> [Ministry of Environment Order 2042/2010 on mining waste management dated 22 November 2010, at Exhibit R-216](#), p. 1 *et seq.* (Art. 4).

<sup>280</sup> [Reply](#), p. 50 (para. 81).

<sup>281</sup> [Ministry of Environment Order 2042/2010 on mining waste management dated 22 November 2010, at Exhibit R-216](#), p. 3 (Art. 7); [Counter-Memorial](#), p. 86 *et seq.* (para. 227).

<sup>282</sup> [Mihai LO II](#), p. 82 (para. 271).

<sup>283</sup> [REDACTED]

<sup>284</sup> [Ministry of Environment Order 2042/2010 on mining waste management dated 22 November 2010, at Exhibit R-216](#); see also [GD 856/2008 on Management of Waste from Extractive Industries, at Exhibit C-1610](#).

<sup>285</sup> [NAMR endorsement dated 14 March 2012, at Exhibit C-645](#).

<sup>286</sup> [Letter from RMGC to Ministry of Environment dated 15 March 2012, at Exhibit C-2243; Mocanu II](#), p. 74 (para. 212).

- 250 Issues and concerns regarding the Waste Management Plan remained outstanding throughout 2012.<sup>287</sup> On 18 April 2012, the Ministry of Environment sent a letter with 21 queries.<sup>288</sup> On 31 May 2012, RMGC submitted another version of the Waste Management Plan to the Ministry of Environment.<sup>289</sup> On 4 July 2012, the Ministry of Environment requested corrections and clarifications.<sup>290</sup> The Claimants take issue with the Ministry of Environment's requests, portraying them as a [REDACTED]  
[REDACTED]<sup>291</sup> They, however, fail to show that such requests contravened Romanian law or were unreasonable, let alone egregious or shocking. On the contrary, the Ministry reasonably exercised its discretion in ensuring that the Waste Management Plan complied with Romanian and EU law standards.<sup>292</sup>
- 251 Significantly, although the Claimants today complain of delay on the part of authorities, RMGC did not even submit a revised plan until eleven months after the Ministry's request for corrections. (As described in **Section 3.6.1.1**, the Ministry of Environment promptly thereafter approved RMGC's revised plan.<sup>293</sup>) Had the Ministry's questions in July 2012 been easy to address as the Claimants currently suggest, RMGC could and should have promptly addressed them.

### 3.3.2.3 RMGC Needed, but Did Not Have in Place, Valid Urban Plans

- 252 As Romania demonstrated in its Counter-Memorial, the Ministry of Environment was not in a position to issue the environmental permit in January

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<sup>287</sup> In its 2012 Annual Report, RMGC stated that it still needed to provide State authorities further clarifications regarding its Waste Management Plan. [REDACTED]  
[REDACTED]; see *supra* Section 3.3.2.2.

<sup>288</sup> [Letter from Ministry of Environment to RMGC, at Exhibit C-646](#).

<sup>289</sup> [REDACTED]  
<sup>290</sup> [Letter from Ministry of Environment to RMGC, at Exhibit C-649](#); [Mocanu II](#), p. 74 (para. 214).

<sup>291</sup> [REDACTED]  
<sup>292</sup> [CMA - Dodds-Smith Report II](#), p. 6 *et seq.* (paras. 15-24).

<sup>293</sup> *Id.* at p. 6 (paras. 13-14).

2012, because RMGC had not yet secured<sup>294</sup> from the Roşia Montană Municipality the approval of the PUZs for the Project industrial area and the surrounding protected areas (including the historical center).<sup>295</sup> As of late 2011, RMGC needed to secure four endorsements for the Industrial Area PUZ and three endorsements for the Historical Area PUZ.<sup>296</sup>

253 The Claimants contend that RMGC was not required to secure the approval of its PUZ prior to obtaining the environmental permit (and that it only needed this approval for the building permit).<sup>297</sup> This contention is, however, without merit.

254 The EIA Procedure is concerned with the assessment of the environmental impact of a project. It is undisputed that the PUZ establishes the geographical and substantive parameters with which a project must comply in terms of, for example, area density, height of constructions, use of land, organization of street networks, water networks, etc.<sup>298</sup> The PUZ is therefore a framework document within which a project must fit.<sup>299</sup> It is only once the PUZ is in place that the location, proportion, and directions of the installations can be finalized. Thus, without a final PUZ, the TAC cannot finalize

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<sup>294</sup> RMGC repeatedly admitted that it needed to secure the required endorsements to secure in turn the approval of the PUZs. See e.g. [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 4 *et seq.* (Tănase) and 73 (Zbârcea); [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 42 *et seq.* (Tănase) (“We have to take these two PUZs to the final approval stage, there is a series of endorsements to be obtained for each of them; about 14 or over 20 endorsements to obtain, ... we will have the PUZs submitted to the Roşia Montană Local Council for approval – this will most probably happen in the next months.”).

<sup>295</sup> [Counter-Memorial](#), p. 18 *et seq.* (paras. 58-62) and p. 87 (para. 229); see also [Dragos LO I](#), p. 13 (para. 70), p. 51 *et seq.* (paras. 272-290); [Mocanu II](#), p. 8 (para. 26).

<sup>296</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 4. Furthermore, the litigation concerning the validity of the 2009 Local Council decision re-approving the 2002 PUZ was pending. See [Counter-Memorial](#), p. 77 (n. 353).

<sup>297</sup> [Counter-Memorial](#), p. 145 (para. 383); [Reply](#), p. 49 *et seq.* (paras. 79-80); [Mihai LO II](#), p. 59 *et seq.* (Sections V.D.2 and V.D.3).

<sup>298</sup> [Counter-Memorial](#), p. 18 (para. 59).

<sup>299</sup> [REDACTED]; [Dragos LO II](#), p. 41 *et seq.* (paras. 162-169); [Tofan LO](#), p. 52 (para. 170).

its assessment of the impact of the Project, as Profs. Tofan and Dragoş also explain in their legal opinions.<sup>300</sup>

- 255 Even if the Claimants were correct that Romanian law only expressly requires the approval of the PUZ for purposes of issuing the building permit (*quod non*), it does not follow that the Ministry of Environment does not have discretion to ensure that the PUZ has been approved before it issues the environmental permit.<sup>301</sup>
- 256 RMGC was furthermore well aware of the Ministry of Environment's position. For instance, on 26 May 2010, the Ministry requested that RMGC submit the PUZ "to allow the performance of [the EIA Review Process], and also to verify the compliance between the Mining Site referred to in the Technical Memorandum ... submitted by RMGC on 14 December 2004 and [as] ... referred to in UC No 87/2010."<sup>302</sup> RMGC did not do so.<sup>303</sup>
- 257 During the 29 November 2011 TAC meeting, a representative from the Ministry of Environment, Ms. Daniela Pineta, reminded that "[t]he PUZs must first be approved and then the [environmental] permit is issued."<sup>304</sup> Ms. Mocanu similarly warned that "if the PUZ is changed or it's not approved in the form we took into consideration during this stage of [the Project EIA Review Process], any amendment to the PUZ will turn us back."<sup>305</sup> RMGC's representatives did not contradict these statements.<sup>306</sup>

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<sup>300</sup> [Tofan LO](#), p. 55 *et seq.* (paras. 177-180); [Dragos LO II](#), p. 41 *et seq.* (paras. 162-200).

<sup>301</sup> [Tofan LO](#), p. 93 *et seq.* (paras. 307-314); see *supra* paras. 179-185; [Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica, Awards, ICSID Case No. ARB/08/1 and ARB/09/20, 16 May 2012, at Exhibit RLA-167](#), p. 84 *et seq.* (para. 258) (regarding margin of appreciation).

<sup>302</sup> [Letter from Ministry of Environment to RMGC dated 26 May 2010, at Exhibit R-188](#), p. 2.

<sup>303</sup> [Letter from RMGC to Sibiu Regional Environmental Protection Agency dated 15 February 2011, at Exhibit C-2493](#) (submitting the proposed amended PUZ).

<sup>304</sup> [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 41 (Pineta).

<sup>305</sup> *Id.* at p. 42 (Mocanu).

<sup>306</sup> [Counter-Memorial](#), p. 87 *et seq.* (para. 229).

258 The absence of a PUZ for the Project remained an outstanding issue in 2012.<sup>307</sup>

### 3.3.2.4 RMGC Needed, but Did Not Have in Place, a Valid Urban Certificate

259 As demonstrated in the Counter-Memorial, RMGC needed to obtain and maintain a valid urban certificate throughout the EIA Procedure.<sup>308</sup> However, over the years, NGOs initiated numerous court challenges against the various urban certificates relating to the Project.<sup>309</sup>

260 The Claimants, however, argue that the existence of a valid urban certificate is not a prerequisite for the issuance of the environmental permit and that, in any event, it held a valid urban certificate between 2010 and 2018.<sup>310</sup> Moreover, the NGO challenges against RMGC's urban certificates purportedly did not impact their validity.<sup>311</sup> The Claimants' legal experts also argue that urban certificates are not administrative acts, and thus, could not be challenged in court.<sup>312</sup>

261 The Claimants' legal experts are wrong in this respect. As Profs. Dragoş and Tofan explain, under Romanian law, an urban certificate must be obtained at the start and kept valid throughout the EIA Procedure.<sup>313</sup>

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307 [REDACTED]

308 [Dragos LO I](#), p. 31 *et seq.* (paras. 160-168); [Counter-Memorial](#), p. 23 (para. 72).

309 [Counter-Memorial](#), p. 54 *et seq.* (paras. 141-145) and p. 380 *et seq.* (Annex IV) (rows Nos. 13-14 (UC 68/2004), No. 32 (UC 78/2006), Nos. 34-38 and 41 (UC 105/2007), Nos. 46-47, 54, 60 and 63 (UC 87/2010)); [REDACTED]

[REDACTED]; [Podaru LO](#), p. 32 *et seq.* (paras. 93-94, 98 and 104).

310 [Reply](#), p. 268 (paras. 644-645); [Podaru LO](#), p. 29 (para. 80).

311 [Reply](#), p. 268 (para. 645).

312 *Id.* at p. 268 (para. 645); [Podaru LO](#), p. 21 *et seq.* (paras. 58-73).

313 [Tofan LO](#), p. 32 *et seq.* (paras. 100-150); see also [Mocanu II](#), p. 8 (para. 26).

- 262 Crucially, as demonstrated below, the Claimants have failed to show that the Ministry of Environment's alleged failure to issue the environmental permit in January 2012, insofar as it was motivated by concerns regarding RMGC's then urban certificate (UC 87/2010), was unlawful.
- 263 RMGC was aware of the need to obtain and maintain a valid urban certificate throughout the EIA Procedure. In 2003, Gabriel Canada indicated that the "submission of the EIA to the Minister of Environment ha[d] been delayed pending receipt of the final confirmation of applicable land use zoning, being the urbanism certificate."<sup>314</sup> RMGC thus included UC 68/2004 in its December 2004 application for the environmental permit.<sup>315</sup>
- 264 The TAC made clear to RMGC that the EIA Procedure was tied to the urban certificate and its underlying technical sheet. Ms. Angela Filipaș of the Ministry of Environment indicated on 9 August 2007:
- "The procedure for the issuance of the environmental permit is based on the technical sheet which is attached to an [UC]. In case that, during performing the procedure, at the analyses stage, you don't have a valid deed, such as the case of the urbanism certificate, it means that we don't have a complete documentation necessary for issuing the regulatory deed [*i.e.* the environmental permit]."<sup>316</sup>
- 265 In response, RMGC's lawyers agreed that the Project was reviewed "based on the technical sheet which is submitted [with the certificate]."<sup>317</sup>
- 266 As Prof. Dragoș has opined, if the urban certificate on the basis of which the technical sheet was submitted were annulled, the technical sheet, on the basis of which the project was to be reviewed during the EIA Review Process, would also be impacted.<sup>318</sup>

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<sup>314</sup> [Gabriel Canada press release dated 28 August 2003](#), at [Exhibit R-112](#), p. 1.

<sup>315</sup> [Letter from RMGC to Alba EPA dated 14 December 2004](#), at [Exhibit C-525.01](#), p. 1.

<sup>316</sup> [TAC meeting transcript dated 9 August 2007](#), at [Exhibit C-475](#), p. 4 (Filipaș).

<sup>317</sup> *Id.* at p. 4 (RMGC's lawyer).

<sup>318</sup> [Dragos LO I](#), p. 32 (paras. 165-167); [Tofan LO](#), p. 37 *et seq.* (paras. 115-128).

- 267 UC 87/2010 dated 30 April 2010 was RMGC's fourth urban certificate for the Project. On 5 May 2010, immediately after its issuance, it was challenged by NGOs.<sup>319</sup> On 23 June 2010, these NGOs publicly noted that the first three certificates (UCs 68/2004, 78/2006 and 105/2007) had been annulled by the competent courts.<sup>320</sup>
- 268 At the TAC meeting on 22 December 2010, Mr. Tănase was misleading regarding the status of the Project's urban certificate. Referring to a prior certificate, he indicated that RMGC had "won definitively and irrevocably this case seeking cancelation of the Urbanism Certificate 68/2004."<sup>321</sup> He omitted to mention that the effects of UC 68/2004 had been suspended since 15 June 2006.<sup>322</sup> Mr. Tănase continued by stating that "in September 2010 [RMGC] won the case for Urbanism Certificate 87/2010; in the same month, we won a Technical Report, also through a definitive and irrevocable ruling."<sup>323</sup>
- 269 Mr. Tănase did not indicate to the TAC that the 29 September 2010 ruling he identified as a "Technical Report" had been appealed four days earlier by the NGOs.<sup>324</sup> Likewise, he omitted to mention that the NGOs had also just moved to annul UC 87/2010 before the Bucharest Tribunal.<sup>325</sup>

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<sup>319</sup> [Greenpeace Romania et al. Preliminary complaint dated 5 May 2010, at Exhibit R-191.](#)

<sup>320</sup> [Alburnus Maior et al. Joint press release dated 23 June 2010, at Exhibit R-190; Counter-Memorial](#), p. 62 (para. 163); see [Counter-Memorial](#), p. 354 *et seq.* (Annex IV).

<sup>321</sup> [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 4 (Tănase).

<sup>322</sup> [REDACTED]

<sup>323</sup> [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 4. Mr. Tănase refers to case No. 4506/2005, in which Alburnus Maior sought to stay the EIA procedure until RMGC supplemented the Technical Memorandum for the Project (submitted in December 2004). Alburnus Maior's application was dismissed. [REDACTED]

[REDACTED]; [Excerpt from website of HCCJ re Case 174.1/57/2005, at Exhibit R-340](#). This litigation thus did not relate to issues of urbanism certificates.

<sup>324</sup> [REDACTED]; [REDACTED].

<sup>325</sup> [Statement of administrative claim submitted by Greenpeace and the Centre for Legal Resources in Bucharest Tribunal case file No. 61273/3/2010 dated Dec. 16, 2010, at Exhibit C-2469.](#)

- 270 RMGC did not mention to the TAC court challenges against its urban certificates until May 2013.<sup>326</sup> Yet, as Prof. Podaru has acknowledged,<sup>327</sup> UC 87/2010 was repeatedly attacked by the NGOs and led to court decisions throughout 2011 and 2012. As the Claimants know, the NGOs lodged a challenge against the urban certificate before the Cluj Tribunal in July 2011.<sup>328</sup> Thus, in December 2011, the status of UC 87/2010, on the basis of which the Project was being reviewed, was in doubt.
- 271 The issue was not resolved, as the Claimants would have it, “with finality in April 2012.”<sup>329</sup> Indeed, the 17 April 2012 decision of the Cluj Tribunal which ruled on the admissibility of the NGOs’ challenge against UC 87/2010 was not final.<sup>330</sup> In parallel, the NGOs’ appeal against the 21 December 2011 Bucharest Tribunal ruling on their request to annul UC 87/2010 was pending (and would only be resolved on 15 October 2012).<sup>331</sup>
- 272 As a result, as at 31 January 2012 and throughout 2012, the Ministry of Environment was not in a position to make a decision on RMGC’s environmental permit application. So, the Ministry’s alleged failure to issue the environmental permit in that period, insofar as it was based on the uncertain situation with RMGC’s urban certificate, did not amount to a failure to provide the Claimants fair and equitable treatment.

### 3.3.2.5 RMGC Was Not in Compliance with the Water Framework Directive

- 273 As Romania established in its Counter-Memorial, in September 2011, RMGC still needed to obtain a declaration that the Project was of overriding public interest in order to comply with the Water Framework Di-

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<sup>326</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20.

<sup>327</sup> [Podaru LO](#), p. 34 *et seq.* (paras. 105-111).

<sup>328</sup> [Excerpt from website of Cluj Tribunal re Case 5534/117/2011, at Exhibit R-351](#); see [Counter-Memorial](#), p. 384 (Annex IV) (row No. 63).

<sup>329</sup> [Podaru LO](#), p. 35 (para. 109).

<sup>330</sup> [REDACTED]

<sup>331</sup> [Bucharest Court of Appeal Decision dated 15 October 2012, at Exhibit C-2430](#).

rective.<sup>332</sup> RMGC needed to receive in turn from the National Water Authority (the “ANAR”) a so-called “water management permit.”<sup>333</sup> As RMGC knew, without the Water Management Permit, it could not obtain the environmental permit.<sup>334</sup>

- 274 The Project involved the diversion of water streams both in the Roşia and Corna valleys,<sup>335</sup> which would deteriorate their ecological and chemical qualities.<sup>336</sup> As a result, RMGC needed permission to derogate from the Water Framework Directive.<sup>337</sup> But, as the Claimants do not dispute,<sup>338</sup> derogations are granted only in exceptional cases and only for purposes of overriding public interest.<sup>339</sup>
- 275 Obtaining a derogation under the Water Framework Directive was thus crucial. A whole chapter of the EIA Report addressed the Project’s impact on local water, as did the Water Management and Erosion Control Plan and

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<sup>332</sup> [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#).

<sup>333</sup> RMGC also needed a water management permit from local authorities as one of the endorsements of its PUZ. See [Ministry of Environment Order No. 662 on water management authorisations dated 28 June 2006, at Exhibit R-495](#), p. 23 (Annex 1 referring to (i) the categories of works for which a water management permit is mandatory (PUZ being mentioned at (m)); and (ii) the issuing authority at (c) (referring to local water authority); see also [Water Law 107 excerpt \(resubmitted\) dated 25 September 1996, at Exhibit R-81](#), p. 12 *et seq.*

<sup>334</sup> [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#), p. 14.

<sup>335</sup> [2006 EIA Report, Ch. 04.01 Water Management and Erosion Control Plan, at Exhibit C-206](#), p. 31. *Et seq.*; [2006 EIA Report, Ch. 02 Technological Processes, at Exhibit C-196](#), p. 226 *et seq.*

<sup>336</sup> See [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#), p. 8.

<sup>337</sup> [Counter-Memorial](#), p. 86 (para. 226).

<sup>338</sup> [Reply](#), p. 47 (para. 76).

<sup>339</sup> [Water Framework Directive \(without annexes\), at Exhibit R-83](#), p. 11 (Art. 4.7) (including among other derogation requirements that “all practicable steps are taken to mitigate the adverse impact on the status of the body of water;” that “the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;” and that “the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.”).

the chapter on waste.<sup>340</sup> During a TAC meeting on 19 July 2007, Mr. Constantin (Ministry of Environment) stressed the importance of compliance with the directive: “a very important issue related to the water refers to how this Project will comply with the Water Framework Directive.”<sup>341</sup>

276 On 13 September 2011 during a meeting with the Ministry of Environment,  
[REDACTED]<sup>342</sup>

277 The Claimants do not dispute that, as at 29 November 2011, they had not yet submitted to the Ministry of Environment a declaration of overriding public interest.<sup>343</sup> During the meeting, RMGC declared that it had obtained a declaration of public interest from the Alba County Council. In response, the TAC requested RMGC to include a reference to the declaration in the EIA Report.<sup>344</sup> Ms. Mocanu indicated that RMGC should “include details in the EIA [Report] demonstrating compliance with the provisions of this directive,” and that RMGC should “submit the Decision of the County Council” with the “amendment that [RMGC would need to] submit.”<sup>345</sup> Mr. Avram acknowledged that RMGC needed to submit the amendment.<sup>346</sup>

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<sup>340</sup> [2006 EIA Report, Ch. 04.01 Water](#), at [Exhibit C-207](#), p. 26; [2006 EIA Report, Ch. 04.01 Water Management and Erosion Control Plan](#), at [Exhibit C-206](#); [2006 EIA Report, Ch. 03 Waste](#), at [Exhibit C-199](#), p. 21 (for example considering the impact of the TMF on Corna river).

<sup>341</sup> [TAC meeting transcript dated 19 July 2007](#), at [Exhibit C-478](#), p. 3 (Constantin); see also [Letter from Romanian Waters to RMGC dated 26 May 2008](#), at [Exhibit R-496](#), p. 2 *et seq.*; [Letter from ANAR to RMGC dated Mar. 15, 2011](#), at [Exhibit C-777](#), p. 1; [Letter from Ministry of Environment to RMGC dated 22 September 2011](#), at [Exhibit C-575](#), p. 8 (para. 41).

<sup>342</sup> [REDACTED]

<sup>343</sup> [Reply](#), p. 47 (para. 76).

<sup>344</sup> [TAC meeting transcript dated 29 November 2011](#), at [Exhibit C-486](#), p. 24 *et seq.*

<sup>345</sup> *Id.* at p. 38 *et seq.* Ms. Pineta also expected that the reference to the decision of the Alba County Council decision be included in “Chapter 4.10 ... analyzed by the water departments.” (p. 24). Similarly, later on in the meeting, TAC President Mr. Anton referred to “Chapter 4.1-Water”, which he asked RMGC to “[c]omplete with the decision of the County Council.” (p. 24); [Mocanu II](#), p. 65 (para. 189).

<sup>346</sup> [TAC meeting transcript dated 29 November 2011](#), at [Exhibit C-486](#), p. 39. In his second statement, Mr. Avram does not dispute that TAC members never indicated the Alba County Council declaration would be sufficient ([Avram II](#), p. 24 *et seq.* (para. 43)).

- 278 However, RMGC failed to provide the requested EIA Report amendment and merely forwarded the Alba County Council declaration to the TAC President.<sup>347</sup>
- 279 Mr. Avram wrongly concludes that “the TAC accepted that the County Council decision would suffice for purposes of complying with the requirements of the Waters Law transposing the Water Framework Directive.”<sup>348</sup>
- 280 The Parties indeed disagree regarding which authority was competent to issue the public interest declaration. Romania showed in its Counter-Memorial that this declaration needed to be issued at a national level, *i.e.* by the central authorities.<sup>349</sup> The Claimants continue to insist that the Alba County Council declaration of public interest was sufficient.<sup>350</sup> As further explained below, the Claimants’ allegation is without merit.
- 281 At no point during the 29 November 2011 meeting, did any TAC member indicate to RMGC that the Alba County Council declaration of public interest would suffice to derogate from the Water Framework Directive.<sup>351</sup>
- 282 Contemporaneous Ministry of Environment documents evidence their understanding that the Alba County Council declaration was not sufficient. In a January 2012 letter to ANAR, the Ministry of Environment referred to “compliance with the provisions of Art. 4.7 of the Water Framework Directive” as an outstanding issue.<sup>352</sup> Likewise, in a 15 February 2012 letter



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<sup>347</sup> [Letter from RMGC to the Ministry of Environment attaching Alba County Council Decision on the Application of Certain Provisions of the Waters Law No. 107/1996, at Exhibit C-632](#); see also [Mocanu II](#), p. 65 (para. 190); [CMA - Wilde Report I](#), p. 34 (para. 118) and [CMA - Wilde Report II](#), p. 24 (paras. 81-84) (describing inappropriateness of RMGC piecemeal approach to EIA procedure).

<sup>348</sup> [Avram II](#), p. 26 (para. 46); [Mocanu II](#), p. 63 *et seq.* (paras. 183 and 192).

<sup>349</sup> [Counter-Memorial](#), p. 98 (para. 257) and p. 102 (para. 268).

<sup>350</sup> [Reply](#), p. 47 *et seq.* (paras. 76-78); [Letter from RMGC to the Ministry of Environment dated 30 November 2011, at Exhibit C-632](#); [Avram II](#), p. 23 *et seq.* (paras. 41-42).

<sup>351</sup> See also [Counter-Memorial](#), p. 98 (para. 257).

<sup>352</sup> [Letter from Ministry of Environment to ANAR dated 18 January 2012, at Exhibit R-473](#), p. 1.

[REDACTED]

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[REDACTED]

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The Claimants argue that RMGC had relied on statements by State officials to the effect that the Alba County decision sufficed.<sup>356</sup> RMGC, however, knew that the Alba County declaration was not sufficient since, in late 2011, it was seeking to conclude an agreement with the Government that would declare the Project of outstanding public interest.<sup>357</sup>

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The Claimants also contend that (i) they did as they were told during a July 2011 meeting, where Ministry of Environment officials allegedly requested RMGC “to obtain the ‘outstanding public interest’ declaration either from the three local councils or from the Alba County Council;”<sup>358</sup> and (ii) Mr. Anton allegedly indicated that the “Alba County Council declaration was sufficient” during a TV debate on 8 March 2012, as did several other individuals during meetings of the interministerial commission in

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[REDACTED]

; see also [Mocanu II](#), p. 67 *et seq.* (para. 196).

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[REDACTED]

; [Mocanu II](#), p. 68 (para. 197).

<sup>355</sup> Given that ANAR, a central State authority, is to issue the water management permit, it is logical that it would be based on a national declaration of public interest.

<sup>356</sup> [Reply](#), p. 47 *et seq.* (paras. 77-78).

<sup>357</sup> See [Gaman II](#), p. 11 *et seq.* (paras. 22-25, 31-44); [Bode](#), p. 7 (para. 24); see also *infra* para. 409.

<sup>358</sup> [Reply](#), p. 48 (para. 77).

2013.<sup>359</sup> The Claimants conclude that these views were aligned with those of the Ministry of Environment, as purportedly evidenced by an undated draft decision to issue the permit.<sup>360</sup>

286 However, Ms. Mocanu, whom the Claimants allege was present at the July 2011 meeting, denies that the Water Framework Directive was discussed with RMGC representatives in her presence.<sup>361</sup>

287 The Claimants' reliance on statements by Mr. Anton in a March 2012 TV debate to conclude that he "stated publicly that the Alba County Council declaration was sufficient" is misplaced.<sup>362</sup> First, Mr. Anton's statements represented his personal opinion which, as he noted, was different from that of the Minister of Environment.<sup>363</sup> Thus, given the content and context of these statements, the Claimants' argument that they understood that the Alba County Council decision was sufficient is absurd. In any event, Mr. Anton's statements did not affect RMGC's obligation to obtain a declaration of public interest to derogate from the directive.<sup>364</sup>

288 RMGC was well aware of the Project's need for that declaration throughout 2012. As Mr. Găman recalls, this was one of the issues that Mr. Suciu listed as outstanding in March 2012.<sup>365</sup> Then Minister of Economy, Mr. Lucian Bode, similarly testifies that the initiation of a procedure for the Government to declare the Project of outstanding public interest was discussed in April 2012 with Mr. Tănase.<sup>366</sup> Mr. Găman testifies that the documents that he prepared during the 2011-2012 negotiations reflected his understanding of RMGC's view that it needed such a declaration.<sup>367</sup>

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<sup>359</sup> *Id.* at p. 48 (para. 78).

<sup>360</sup> *Id.*

<sup>361</sup> [Mocanu I](#), p. 13 (para. 59-61); [Mocanu II](#), p. 29 (para. 77).

<sup>362</sup> [Reply](#), p. 49 (para. 78); [Interview with M. Anton on 8 March 2012, at Exhibit C-778](#), p. 6.

<sup>363</sup> [Interview with M. Anton on 8 March 2012, at Exhibit C-778](#), p. 6.

<sup>364</sup> [Mocanu II](#), p. 69 *et seq.* (paras. 199-200).

<sup>365</sup> [Gaman II](#), p. 16 *et seq.* (paras. 42-43).

<sup>366</sup> [Bode](#), p. 2 (para. 8).

<sup>367</sup> [Gaman II](#), p. 69 *et seq.* (paras. 187-193).

289 The reference to the findings of an interministerial commission more than one year later in March 2013 do not help the Claimants, as the commission concluded that “[the] powers to decide in this matter [*i.e.* whether a County Council declaration of public interest was sufficient to derogate from the Water Framework Directive] belong exclusively to the ... the Ministry of Environment.”<sup>368</sup>

290 In sum, as at January 2012 (and throughout 2012), RMGC had not secured a Governmental declaration of overriding public interest nor had it secured the Water Management Permit. Insofar as the Ministry of Environment considered that it could not issue the environmental permit at least in part on that basis, its assessment was lawful and far from egregious or unfair.

### **3.3.2.6 RMGC Needed, but Did Not Have, the Surface Rights to the Project Area**

291 It is undisputed that RMGC needed to acquire the surface rights to the Project Area before it could obtain the building permit.<sup>369</sup> Romania also showed in its Counter-Memorial that, given the number of residents to be relocated, RMGC ran an important risk if it did not acquire these rights earlier on and during the EIA Review Process.<sup>370</sup> In case residents in the Project Area refused to move, RMGC would need to (i) redesign the Project around those properties (and thus in all likelihood restart the EIA Procedure);<sup>371</sup> or (ii) resort to expropriation proceedings with an uncertain outcome.<sup>372</sup>

292 RMGC faced two hurdles: (i) many Roşia Montană property owners were not willing to sell; and (ii) RMGC would need a declaration that the Project

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<sup>368</sup> [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013 dated 26 March 2013, at Exhibit C-2162](#), p. 6.

<sup>369</sup> See [Counter-Memorial](#), p. 26 (para. 78).

<sup>370</sup> *Id.* at p. 26 (para. 78); [2006 \(Stantec\) RRAP, at Exhibit C-463](#).

<sup>371</sup> [GD 445/2009 on EIA procedure \(Art. 22\)](#), at [Exhibit R-497](#) (providing that, in cases of change to a project after the issuance of an environmental permit, the permit may be revised, or a new permit may be issued or rejected).

<sup>372</sup> That option would not have been any less risky, as described in Section 8.4.

was of public utility to start potential expropriation proceedings.<sup>373</sup>  
RMGC's ability to acquire the Project Area surface rights was thus uncertain and subject to factors over which State authorities had no control.<sup>374</sup>

293 The Claimants, in their Reply, make four main arguments. First, they contend that RMGC had acquired the majority of the land required by 2011 and that allegedly, [REDACTED]

294 Second, they contend that the acquisition of the surface rights was only a requirement for the building permit, not for the environmental permit.<sup>376</sup>

295 Third, RMGC would have allegedly been able to expropriate properties owned by unwilling sellers, because the Project would have been declared of public utility.<sup>377</sup>

296 Fourth, the Claimants argue that the Project was to be built in phases and that the properties that would need to be expropriated were only relevant to later phases of the Project's construction. As a result, the Project would not have been hindered by these expropriation procedures.<sup>378</sup>

297 The Claimants' arguments are incorrect as a matter of both law and fact. The second argument will be addressed in this section, while the first, third and fourth arguments will be addressed in **Section 8.3** below.

298 RMGC knew from the outset that a failure to acquire the surface rights could derail the Project. [REDACTED]

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<sup>373</sup> [Counter-Memorial](#), p. 26 *et seq.* (paras. 79-89).

<sup>374</sup> *Id.* at p. 29 *et seq.* (paras. 86-88).

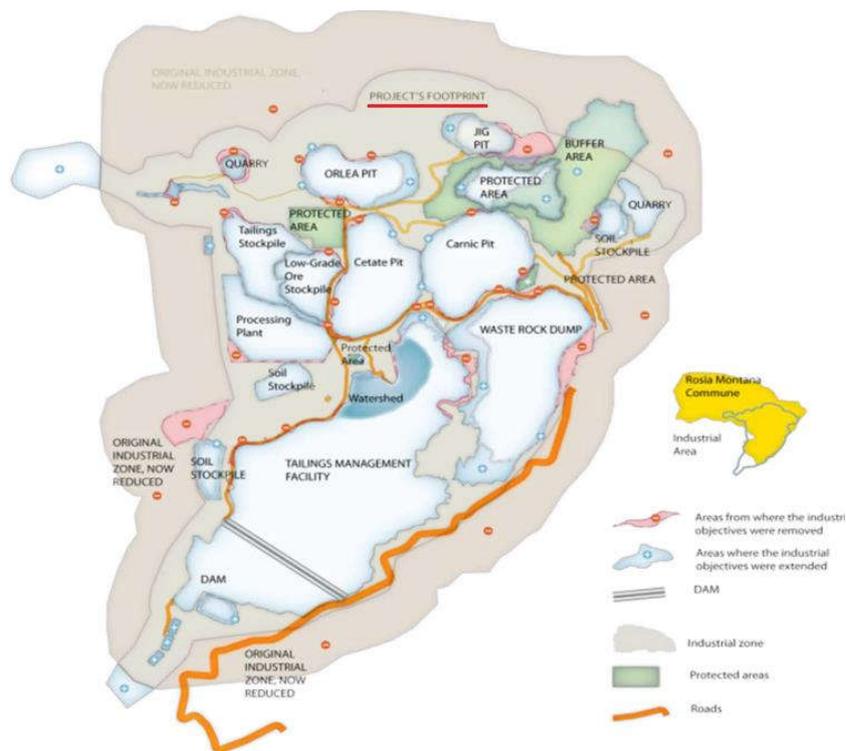
<sup>375</sup> [REDACTED]  
<sup>376</sup> [Reply](#), p. 227 (para. 664).

<sup>377</sup> *Id.* at p. 272 *et seq.* (paras. 655-656); [REDACTED].

<sup>378</sup> [Reply](#), p. 227 (para. 664).



299 RMGC knew that it needed “surface rights to all of the land under the footprint of the proposed new mine in order to apply for a construction permit.”<sup>380</sup> According to RMGC, the Project’s footprint, as shown below and in the Rejoinder Annex, included “the industrial zone [*i.e.* covered by the industrial PUZ], the protected area and the buffer zone.”<sup>381</sup>



300 By RMGC’s admission, in 2008, when it stopped its acquisition program, it had only acquired around 77% of the required surface rights.<sup>382</sup> It had

379 [Redacted]

380 [Gabriel Canada 2007 Annual Information Form, at Exhibit R-302](#), p. 18.

381 [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 29 and 34.

382 [Gabriel Canada press release dated 6 March 2008, at Exhibit R-499](#), p. 3; see also [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 53 (Tănase); [Resettlement and Relocation Action Plan Vol. 2, at Exhibit C-464](#), p. 166.

only acquired “approximately 78% of households in the Project area, which represented “60 % of the land by area in the Project footprint.”<sup>383</sup>

301 RMGC’s cessation of the purchase of properties runs counter to its argument that it was confident that it would have been able to acquire the outstanding properties.<sup>384</sup>

302 Moreover, contrary to the Claimants’ allegations, acquiring the Project Area surface rights was paramount to the EIA Review Process because, without them, the EIA Report and the Project design were, as noted above, at risk of requiring amendment (in terms of size, location of installations, etc.).<sup>385</sup> Also, as Ms. Mocanu testifies, the EIA Procedure required as assessment of the impact of deforestation and how the required reforestation would be implemented. That assessment required RMGC’s proof of surface rights to areas to be reforested.<sup>386</sup>

303 As RMGC indicated in the EIA Report, the EIA Review Process was to consider the Project “[s]ocio-economic impacts related with land acquisition (physical and economic displacement).”<sup>387</sup> RMGC also indicated to the TAC that the “acquisition of land (*i.e.* of surface rights) for purposes of mining operations” was covered by no less than three different plans: the Resettlement and Relocation Action Plan, the Community Sustainable Development Plan, and the Cultural patrimony protection plan.<sup>388</sup>

304 In particular, the Resettlement and Relocation Action Plan, submitted with the EIA Report and presented to the TAC, addressed the impact of the necessary “land acquisition” on “people and livelihoods” and techniques that

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<sup>383</sup> [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 34; [Memorial](#), p. 67 (para. 179); [REDACTED].

<sup>384</sup> [REDACTED]

<sup>385</sup> [Counter-Memorial](#), p. 26 *et seq.* (para. 79).

<sup>386</sup> [Mocanu II](#), p. 77 (paras. 225-226).

<sup>387</sup> [2006 EIA Report, Ch. 04.08 The Social and Economic Environment of Roşia Montană, at Exhibit C-223](#), p. 4.

<sup>388</sup> [Resettlement and Relocation Action Plan Vol. 1, at Exhibit C-463; Resettlement and Relocation Action Plan Vol. 2, at Exhibit C-464; 2006 EIA Report, Ch. 04.08 The Social and Economic Environment of Roşia Montană, at Exhibit C-223](#), p. 5.

would be used by RMGC to achieve these acquisitions.<sup>389</sup> RMGC could not have made the link between this Plan, the surface rights and the EIA Review Process clearer: it indicated that “[w]hen the property purchasing process is resumed, RMGC will present to the public a new version of the Relocation and Resettlement Action Plan.”<sup>390</sup> RMGC thus represented to the TAC that a new version of the Relocation and Resettlement Action Plan would be submitted once it resumed the property purchasing process.

305 The TAC stated several times that the resettlement of Roșia Montană residents and the potential expropriations of homeowners were of concern. For example, Mr. Mereuță, of the Ministry of Environment, asked during the 9 August 2008 TAC meeting:

“What will happen with those households that refuse to be resettled and are situated in sites without absolutely no alternative, as the tailings management facility is? **This is a very serious issue. At least when I was in the area, there were at least three households that refused to leave and were situated exactly on the tailings management facility’s site.** I don’t know if you convinced them, but **what will happen if you do not convince them?**”<sup>391</sup>

306 At the 9 March 2011 TAC meeting, Mr. Anton relayed the following questions from the public consultations to RMGC:

“What will happen if one single person from Corna does not want to move? There is no law providing for the forced resettlement of the local inhabitants from there. How will the households of those in [Corna Valley] who will not be resettled be protected? What will be

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<sup>389</sup> See *inter alia* [TAC meeting transcript dated 9 August 2007, at Exhibit C-475](#), p. 29 (Popa) or [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 49 (Tănase); [Resettlement and Relocation Action Plan Vol. 1, at Exhibit C-463](#), p. 9.

<sup>390</sup> [Resettlement and Relocation Action Plan Vol. 2, at Exhibit C-464](#), p. 188.

<sup>391</sup> [TAC meeting transcript dated 9 August 2007, at Exhibit C-475](#), p. 32 (Mereuță) (emphasis added).

the solution for the situation of the people holding land in the middle of the future tailings management facility?”<sup>392</sup>

307 Mr. Anton also asked “RMGC ... currently holds only 17% of the land in Roşia Montană... What will the company do with the people who do not want to resettle?”<sup>393</sup>

308 RMGC’s response to Mr. Anton’s questions at this meeting reflects its lack of confidence with regard to the acquisition of surface rights. Mr. Tănase vaguely indicated that RMGC’s relocation program would “resume ... at some point” with RMGC “hop[ing]” they would “be able to acquire all properties by the end of it.”<sup>394</sup>

309 In sum, if an environmental permit is issued for a project where the investor has not acquired the necessary surface rights and fails to subsequently acquire them, the investor not only will fail to secure the building permit, but also will likely need to amend the project, the PUZ, and the EIA Report (and thus undergo an additional EIA Review Process) – assuming that the project remains feasible at all.<sup>395</sup> For these reasons, the investor should secure the surface rights early on. Thus, the Claimants’ overly formalistic argument that RMGC did not need the necessary surface rights to secure the environmental permit is misplaced and unreasonable, including in light of its contemporaneous definition of the EIA Review Process.<sup>396</sup>

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<sup>392</sup> [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 2 (Anton); *id.* at p. 37 *et seq.* (Anton) (emphasis added).

<sup>393</sup> *Id.* at p. 38 (Anton) (emphasis added).

<sup>394</sup> *Id.* at p. 52 *et seq.* (Tănase) (emphasis added); see also [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 29 (“[t]here can be no assurance that Gabriel will acquire all necessary surface rights, or acquire such rights at prices which are acceptable to the Company”).

<sup>395</sup> See *supra* para. 291.

<sup>396</sup> [Reply](#), p. 277 (para. 664).

### 3.3.2.7 RMGC Needed, but Had Not Obtained, all Archaeological Discharge Certificates

- 310 The Claimants accept that the Project Area was an archaeological site,<sup>397</sup> that RMGC had always known it needed ADCs before it could use the land<sup>398</sup> and that, in 2012, there was no ADC for Orlea and the ADC for Cârnic was being litigated.<sup>399</sup>
- 311 However, the Claimants continue to argue that the ADCs were not required during the EIA Review Process<sup>400</sup> and, in any event, that the “Ministry of Culture issued [ADCs] for the vast majority of the Project area.”<sup>401</sup> [REDACTED]
- 312 First, RMGC was aware that ADCs impact the determination of a project’s boundaries, as it had modified the Project in 2006 to allow for the *in situ* protection of certain archaeological finds.<sup>403</sup>
- 313 Second, the TAC repeatedly expressed its interest in the archaeological research, notably in the areas of the envisaged mining pits.<sup>404</sup> RMGC sought

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<sup>397</sup> *Id.* at, p. 116 (paras. 236-237).

<sup>398</sup> *Id.* at p. 119 (para. 245); [Counter-Memorial](#), p. 31 *et seq.* (Section 2.3.6).

<sup>399</sup> [Reply](#), p. 42 (paras. 66-67); [Counter-Memorial](#), p. 81 (para. 212); see also [Reply](#), p. 119 (para. 246, n. 549) and p. 121 (para. 251, n. 557) (recognizing the absence of ADC for Orlea).

<sup>400</sup> [Reply](#), p. 42 (para. 66); [Podaru LO](#), p. 38 (Section II.B.2); [Mihai LO II](#), p. 68 (Section V. E).

<sup>401</sup> [Reply](#), p. 72 (para. 128), p. 115 (para. 233), p. 116 (title of section), p. 118 (para. 242), p. 119 (para. 246); [Memorial](#), p. 60 (para. 160); [Gligor I](#), p. 15 (para. 39); [Schiau LO I](#), p. 25 (para. 92); [Jennings II](#), p. 1 *et seq.* (paras. 3 and 17); see also [Reply](#), p. 117 (para. 240).

<sup>402</sup> See *e.g.* [REDACTED]

<sup>403</sup> [Summary of Changes to Roşia Montană Project Design, at Exhibit C-467](#); [Gligor I](#), p. 16 (para. 40); [Jennings II](#), p. 1 *et seq.* (paras. 4, 17 and 33); [2006 EIA Report, Ch. 04.09 Cultural Heritage Baseline Report, at Exhibit C-225](#), p. 36 (“early commencement of the archaeological programme was required for site development plans to be altered.”).

<sup>404</sup> See *supra* paras. 239 and 241; [GO 43/2000 \(consolidated up to Nov. 2006\), at Exhibit C-1700](#), p. 5 (Art. 2(9)); see also [E. O’Hara, Roşia Montană Information Report, Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, 21 Dec. 2004, at Exhibit C-681](#), p. 4 (para. 12) (“the condition must clearly be imposed of

to brush the issue aside in a December 2010 TAC meeting when it explained that Orlea would not be affected by the works until several years down the mine life. The Ministry of Environment rightly interjected that the TAC needed clarity on the issue since the environmental permit was to cover the entire area.<sup>405</sup> Moreover, the TAC and the Ministry expressly asked RMGC to submit the ADC for Orlea in September 2011.<sup>406</sup>

314 Third, an ADC for Orlea was in any event required to remove the protected status of the area.

315 Although the Claimant minimize RMGC's role in the archaeological research to be performed, RMGC knew that it was the driving force behind the research to be performed.<sup>407</sup> This is standard for cases of rescue archaeology in advance of industrial works.<sup>408</sup>

316 The Claimants maintain that the authorities failed to permit the research that was necessary for Orlea.<sup>409</sup> This is incorrect as already explained in

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continued archaeological excavation..."); [Reply](#), p. 118 *et seq.* (para. 244) (excluding this condition from their quote of the O'Hara report).

<sup>405</sup> [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 59 (Pineta, Timiș, RMGC lawyer).

<sup>406</sup> [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#), p. 14; [Counter-Memorial](#), p. 75 (para. 193, n. 346); [Letter from Ministry of Environment to Ministry of Culture dated 1 April 2013, at Exhibit C-1350](#); [Letter from Ministry of Environment to Ministry of Culture dated 6 December 2011, at Exhibit C-444](#); [Letter from Ministry of Environment to Ministry of Culture dated 5 August 2011, at Exhibit C-1382](#) (requesting the endorsement and information on the Orlea ADC).

<sup>407</sup> See *e.g.* [Orlea Research Project \(2013\), at Exhibit R-221](#), p. 7 (showing RMGC approached the National Museum of History and Dr. Cauuet's team to prepare the Orlea Research Project); [Gabriel Canada 2003 Annual Information Form, at Exhibit C-1801](#), p. 18 ("Gabriel must conduct an extensive program of archaeological investigations ... Gabriel conducted archaeological discharge programs..."); [Gabriel Canada 2011 Annual Information Form, at Exhibit C-1809](#), p. 17 ("RMGC has commenced further detailed archaeological work in the old underground mining galleries... ('Protected Area'.)"); contrast with *e.g.* [Gligor II](#), p. 6 (para. 18) (limiting RMGC's role to logistical and funding support).

<sup>408</sup> [CMA - Cloughton Report II](#), p. 23 (para. 80); [Reply](#), p. 116 (paras. 237-238); [Jennings II](#), p. 12 (para. 34) (commending RMGC's undertakings "in the context of European development-led archaeology"); [Letter from Alba Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at Exhibit R-221](#), p. 8.

<sup>409</sup> [Jennings II](#), p. 10 *et seq.* (paras. 31-32); [REDACTED]; [Reply](#), p. 43 (n. 139).

the Counter-Memorial and further detailed by Prof. Dragoș.<sup>410</sup> The Claimants wrongly downplay the scope of the research allowed under field survey permits delivered in 2007; thereafter, nothing prevented RMGC from instructing the next phase of the preventive archaeological research (as it indeed did in 2011 and 2013).<sup>411</sup>

### 3.3.3 Contemporaneous Evidence Demonstrates that State Officials Considered that the EIA Review Process was Ongoing

317 The Claimants assert that the “Respondent’s argument [that the Ministry was far from taking a decision on the permit in January 2012] is meritless ... as explained **contemporaneously** by Respondent itself through its own 2013 Interministerial commission.”<sup>412</sup> This assertion is inherently flawed since the interministerial commission met over one year later, in March 2013. Its views were thus not contemporaneous with those of the Ministry of Environment in January 2012.<sup>413</sup> Furthermore, if the permitting requirements had been met in 2012, the State would have had no reason to set up such a commission one year later.

318 Contrary to the Claimants’ allegations, the contemporaneous evidence demonstrates that, as of late 2011 and early 2012, State officials considered that the EIA Review Process was ongoing.

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[REDACTED]

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<sup>410</sup> [Counter-Memorial](#), p. 96 (para. 252, n. 461); [Dragos LO II](#), p. 70 (para. 281) and p. 73 (paras. 291-296).

<sup>411</sup> [Letter from Alba Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at Exhibit R-221](#), p. 9 (“the first stage of such preventive archaeological research project, in particular the desk and on-site assessment, was conducted in reliance upon the preliminary authorization issued by the Ministry of Culture and Religious Affairs for the campaigns of 2003, 2004, 2005, 2006, and 2007”); see e.g. [Field Survey Permit dated 25 June 2007, at Exhibit C-1352](#); [CMA - Claughton Report II](#), p. 15 *et seq.* (Section 3.2 and notably para. 54).

<sup>412</sup> [Reply](#), p. 36 (para. 52) (emphasis added).

<sup>413</sup> See *infra* paras. 608 *et seq.* (discussing conclusions of the interministerial commission).

<sup>414</sup> [REDACTED]



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320 In letters dated 16 and 28 December 2011 to members of Parliament, the Minister of Environment, Mr. Borbély, responded to questions regarding the status of the EIA Review Process. He explained that the EIA Review Process was underway:

**“the project owner has been asked to clarify some aspects** raised by the public during the environmental impact assessment procedure. The last request for information from the Romanian authorities to the project owner took place in September 2011.

**Therefore, the Environmental Impact Assessment Procedure for the Roșia Montană Project is underway** and will be finalized after a complete, careful and thorough analysis of all documentation by all decision-makers.”<sup>416</sup>

321 Minister Borbély went on to refer to the public distrust of the Project:

“The decision to issue a regulation or to reject the project belongs to the Romanian authorities and it is therefore necessary to make the decision in a fully justified manner. In support of this statement, we are

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<sup>415</sup> [Mocanu II](#), p. 25 *et seq.* (paras. 67-73).

<sup>416</sup> [Letter from Minister of Environment to Parliament of Romania dated 28 December 2011, at Exhibit R-470](#), p. 2 (emphasis added); [Letter from Ministry of Environment to Chamber of Deputies dated 16 December 2011, at Exhibit R-469](#); see *supra* paras. 213 and 233 (describing clarifications requested by the Ministry of Environment in September 2011).

also repeat [sic] that **such a project in Romania, after the accident in Baia Mare is viewed with distrust.**<sup>417</sup>

322 By letter dated 13 January 2012, the TAC president, Mr. Anton, responded to questions from an association regarding the Project and wrote that it was “currently in the [EIA] procedure, more specifically at the stage of quality analysis of the project environmental impact report” and the following:

“Given the project complexity and the multitude of legal requirements in force, which must be followed, the ...TAC has requested from the project Titleholder, ... RMGC, additional information, clarifications regarding the submitted documentation.”<sup>418</sup>

323 Internal correspondence from the Ministry of Environment also demonstrates that, as at January 2012, the EIA Review Process was ongoing. By letter dated 25 January 2012, the directorate within the Ministry of Environment responsible for forests wrote to the EIA directorate that RMGC needed to identify the areas to be deforested. It further noted that such areas and their owners should be identified in an environmental permit, “if such an agreement is issued.”<sup>419</sup>

324 In February 2012, Prime Minister Boc resigned and was succeeded by Mr. Mihai Răzvan Ungureanu. [REDACTED]

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<sup>417</sup> [Letter from Minister of Environment to Parliament of Romania dated 28 December 2011, at Exhibit R-470](#), p. 3; see also [Letter from Ministry of Environment to Chamber of Deputies dated 16 December 2011, at Exhibit R-469](#).

<sup>418</sup> [Letter from Ministry of Environment to Group for the Salvation of Roşia Montană dated 13 January 2012, at Exhibit R-471](#).

<sup>419</sup> [Letter from Ministry of Environment to Pollution Control and Impact Assessment Department dated 25 January 2012, at Exhibit C-2241](#); see also [Methodology regarding the value of land removed from the National Forest Fund dated 25 January 2012, at Exhibit R-501; Mocanu II](#), p. 76 (paras. 221-225); [2008 Forest Code \(excerpts\) dated 27 March 2008, at Exhibit R-117](#).

<sup>420</sup> [REDACTED]



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- 325 The Claimants argue the Government “failed to take any action in the year and a half thereafter [the 29 November 2011 meeting].”<sup>423</sup> In support of this argument, they refer to a March 2013 memorandum by the minister responsible for large projects, Mr. Dan Şova, which stated that “at the end of those [November 2011] meetings it was concluded that all technical aspects related to the Roşia Montană project had been clarified” and that “[c]urrently, as far as the authorization process for the Roşia Montană mining project is concerned, the authorities have not taken any measures since November 2011.”<sup>424</sup>
- 326 It is not clear how Minister Şova, who had been appointed two months earlier, drafted this note in March 2013 and based on which information, since he does not mention the issues that were outstanding as of November 2011 (and March 2013). As RMGC was aware at the time and as the Claimants are aware today, the quoted statements do not mention the State actions taken throughout 2012,<sup>425</sup> including continued review of and exchange with RMGC concerning its Waste Management Plan (by NAMR and the Ministry of Environment),<sup>426</sup> continued review of the status of Or-

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<sup>421</sup> *Id.* at p. 5.

<sup>422</sup> *Id.* at p. 5 *et seq.*

<sup>423</sup> [Reply](#), p. 39 (para. 58).

<sup>424</sup> *Id.* at p. 38 (para. 55) (referring to [Note from Minister Delegate Şova dated 6 March 2013, at Exhibit C-1903](#), p. 4, 32, and 35).

<sup>425</sup> Minister Şova correctly notes that RMGC has not yet obtained all required endorsements for the Industrial Area PUZ and Historical Area PUZ and that “[n]umerous permits and endorsements will have to be obtained from government agencies, such as the Alba Environmental Protection Agency, the Romanian Waters Administration, Cluj ITRSV [the Territorial Inspectorates for Forestry and Hunting] and others.” He also notes that RMGC must still obtain the surface rights. [Note from Minister Delegate Şova dated 6 March 2013, at Exhibit C-1903](#), p. 37.

<sup>426</sup> See *supra* paras. 243 *et seq.*; see also [Counter-Memorial](#), p. 97 (para. 255) (describing State measures taken regarding the Project in 2012).

lea (by the Ministry of Culture),<sup>427</sup> issuance of dam safety permits (by a committee within the Ministry of Environment)<sup>428</sup> – all of which were necessary for the environmental permit<sup>429</sup> – as well as defense in court of administrative acts for the Project.<sup>430</sup>

### 3.3.4 Gabriel Canada's Public Disclosures and RMGC's Annual Reports from Late 2011 and 2012 Show that the EIA Review Process Was Ongoing

327 Gabriel Canada and RMGC documents confirm their understanding in 2011 and 2012 that the EIA Review Process was underway. A 29 December 2011 Gabriel Canada press release stated:

“A further meeting of the TAC took place on November 29, 2011 to discuss technical and other issues in respect of the Project. The Company is encouraged by the constructive nature of the discussions held and is awaiting formal feedback from the TAC as to whether further meetings or documentation will be requested.”<sup>431</sup>

328 Nothing in the above statement suggests that Gabriel Canada considered that the TAC had completed its review or that the Ministry of Environment was now required to issue the environmental permit. (As noted above, in November 2011, the TAC president had referred to future meetings.)<sup>432</sup>

329 In January 2012, RMGC published [REDACTED]

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<sup>427</sup> See *supra* paras. 231 *et seq.*

<sup>428</sup> See *infra* paras. 873-877.

<sup>429</sup> The Roşia Montană Local Council sought to support RMGC by seeking to re-approve the 2002 PUZ and PUG, notwithstanding court decisions declaring the Local Council's earlier decisions (regarding those urban planning documents) illegal. See [Counter-Memorial](#), p. 106 (para. 278).

<sup>430</sup> See [Counter-Memorial](#), p. 354 *et seq.* (Annex IV).

<sup>431</sup> [Gabriel Press Release dated 29 December 2011, at Exhibit C-1437](#).

<sup>432</sup> See *supra* para. 226.

[REDACTED]  
[REDACTED]  
[REDACTED] 433

330 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

331 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 436

332 Nothing in RMGC's and Gabriel Canada's documents and disclosures from the remainder of 2012 presents a different understanding of the EIA Review Process.

333 In January 2012, [REDACTED]  
[REDACTED]  
[REDACTED] 437

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433 [REDACTED]; see also [REDACTED].

434 [REDACTED]; see also [REDACTED]; see *infra* Section 3.6.1.6.

435 [REDACTED]; see also [REDACTED].

436 [REDACTED]; see also [REDACTED].

437 [REDACTED].

334 Gabriel Canada's disclosures from March 2012 note that RMGC may be required to provide further information to the TAC:

"It is Management's understanding that the TAC concluded that all technical aspects have been clarified. However, the Company is awaiting formal feedback from the TAC as to whether further meetings or documentation will be requested. The Company is unable to provide guidance on the time that it might take the TAC to vote on the EIA or to release its recommendation to Government."<sup>438</sup>

335 On 18 April 2012, Gabriel Canada announced that it "**continue[d] to advance** the Project through the Technical Assessment Committee ('TAC') process to complete the ...[EIA]."<sup>439</sup>

336 In May 2012, Gabriel Canada noted that public officials had referred to outstanding issues in the EIA Review Process, including the need for a Government decision that the Project was of public interest, the need for an ADC for Orlea, and the need for an approved Waste Management Plan.<sup>440</sup>

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[REDACTED]  
[REDACTED]  
[REDACTED]<sup>441</sup>

338 In August 2012, Gabriel Canada reported that "[s]ince its appointment in May 2012, the new Government has stated that it will not make any key

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<sup>438</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 4; see also *e.g.* [Gabriel Canada MD&A, First Quarter 2013, at Exhibit R-504](#), p. 4 ("The Company awaits clarification on how the TAC review will be progressed including whether further meetings or documentation will be requested").

<sup>439</sup> [Gabriel Canada press release dated 18 April 2012, at Exhibit R-505](#); see also [Gabriel Canada press release dated 9 April 2012, at Exhibit R-506](#), p. 2.

<sup>440</sup> [Gabriel Canada press release dated 10 May 2012, at Exhibit R-507](#), p. 1 and p. 4; see also [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 5.

<sup>441</sup>

[REDACTED]  
[REDACTED]  
[REDACTED]; see also *id.* at p. 80.

decisions on the Project until after the national elections, currently anticipated to be held in November 2012.”<sup>442</sup> It also indicated that it would seek clarification from the Government and the TAC regarding next steps.<sup>443</sup>

339 In November 2012, Gabriel Canada reported that “[t]his [EIA] process remains ongoing, although there has been no meeting of the TAC since November 2011 and the Company is waiting to engage with the USL Government in order to take the TAC review forward.”<sup>444</sup> It further noted that “there w[ould] be no material dialogue with the USL Government on the Project permitting for the remainder of the year” given the upcoming parliamentary elections in December 2012.<sup>445</sup>

340 In January 2013, RMGC issued [REDACTED]<sup>446</sup>

### 3.3.5 RMGC Did Not File an Administrative or Court Complaint Concerning the Ministry of Environment’s Alleged Failure to Issue the Environmental Permit

341 Although the Claimants complain that the Ministry of Environment should have but did not make a decision regarding the environmental permit in 2012, they have provided no evidence that RMGC sent a single letter or other communication at that time to either the Ministry or the Government to say that it had met the conditions for and was therefore entitled to the permit or to complain of the absence of decision.

342 Furthermore, RMGC could have but did not file either an administrative complaint with the Ministry of Environment<sup>447</sup> or suit in court, as it had

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<sup>442</sup> [Gabriel Canada press release dated 2 August 2012, at Exhibit R-509](#); [Gabriel Canada MD&A, Fourth Quarter 2012, at Exhibit R-510](#), p. 3 (“the Company’s expectations for meaningful dialogue were very low for much of 2012.”).

<sup>443</sup> [Gabriel Canada press release dated 2 August 2012, at Exhibit R-509](#); [Gabriel Canada press release dated 2 August 2012, at Exhibit R-509](#).

<sup>444</sup> [Gabriel Canada MD&A, Third Quarter 2012, at Exhibit R-511](#), p. 4 (emphasis added).

<sup>445</sup> *Id.* at p. 2; see also [Gabriel Press Release, at Exhibit C-1439](#).

<sup>446</sup> [REDACTED]

<sup>447</sup> [Law 554/2004 on administrative litigation \(as amended in 2007\) \(excerpts\), at Exhibit C-1767](#), p. 1 *et seq.* (Arts. 2(1) (i) and 8(1)).

done in late 2007.<sup>448</sup> RMGC thus did not believe at the time that it had met the requirements for the permit.

343 Moreover, to bring an international claim, an investor must make at least some kind of complaint at the local level, even if it is not required to exhaust local remedies. The local authorities must be given a fair chance to redress a potential international claim.

344 In *Generation Ukraine v. Ukraine*, a U.S. company had invested in commercial property in Ukraine and claimed that local authorities had interfered with its project. It claimed that the respondent had expropriated its investments in part by failing to produce revised land lease agreements with valid site drawings. The tribunal noted that the investor never challenged the authorities' impugned errors before the domestic courts and did not attempt to compel them to rectify their alleged omissions.<sup>449</sup> It dismissed the claim and held that "an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction."<sup>450</sup>

345 In *Cervin and Rhone v. Costa Rica*, the investor claimed that Costa Rica had made a series of regulatory changes concerning liquid petroleum gas sales which had an alleged negative impact on claimants' gas distribution business. The tribunal found it critical that the claimants had not made efforts to seek clarifications in the Costa Rican courts.<sup>451</sup> While acknowledging that the BIT did not require the claimants to exhaust local remedies,

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<sup>448</sup> See [Counter-Memorial](#), p. 59 *et seq.* (para. 155); see also [Dragos LO I](#), p. 66 *et seq.* (paras. 366-372); [Tofan LO](#), p. 83 *et seq.* (paras. 264-278).

<sup>449</sup> [Generation Ukraine, Inc. v. Ukraine, Award, ICSID Case No. ARB/00/9, 16 September 2003, at Exhibit CLA-135](#), p. 92 (para. 20.33).

<sup>450</sup> See *id.* at p. 91 (para. 20.30).

<sup>451</sup> [Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, Award, ICSID Case No. ARB/13/2, 7 March 2017, at Exhibit RLA-171](#), p. 127 *et seq.* (paras. 501, 503, 504).

the tribunal observed that the claimant could have pursued certain remedies in the Costa Rican courts.<sup>452</sup>

346 In *South American Silver v. Bolivia*, the tribunal found that the respondent had expropriated the claimant's investment. In examining the lawfulness of the expropriation, the tribunal considered whether the respondent had complied with due process. Significantly, it found that "the exercise of legal actions in Bolivia to challenge the lawfulness of the Reversion Decree is not a precondition to pursue arbitration. However, the Claimant cannot claim a violation of due process when it decided not to exercise the remedies available under the national law of Bolivia."<sup>453</sup>

347 As in *Cervin* and *South American Silver*, the claim that, because of its actions during the permitting process, Romania violated due process and thus breached its FET obligations to the Claimants, is without merit. The Claimants cannot allege a failure to comply with due process when they had remedies available to them locally. RMGC's failure to send a complaint letter to the Ministry or Government or to file either an administrative action or civil suit in 2012 demonstrates its understanding that the EIA Review Process was underway, contrary to the Claimants' allegations in this arbitration.

### **3.4 The Government's Allegedly Coercive Attempt to Amend the State's Level of Participation in the Project Does Not Amount to Failure to Provide Fair and Equitable Treatment to the Claimants' Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

348 The Claimants continue to falsely allege that, "commencing in August 2011 and continuing through 2013," the Government coerced RMGC into renegotiating the State's financial interest in RMGC and the State's future royalties as a condition to issuance of the environmental permit.<sup>454</sup>

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<sup>452</sup> *Id.* at p. 129 (paras. 506 and 508).

<sup>453</sup> [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 156 (para. 585).

<sup>454</sup> [Reply](#), p. 20 (para. 23); see also *id.* at paras. 480 and 490.

349 Black's Law Dictionary defines the term "coercion," which the Claimants use twenty times in their Reply, as follows:

"Compulsion; force; duress. It may be either actual, (direct or positive.) where physical force is put upon a man to compel him to do an act against his will, or implied, (legal or constructive.) where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse."<sup>455</sup>

350 There cannot be coercion when there is no proof of "the kind of compulsion that can be created by a superior force in a hostile environment, where the scales of justice have been manifestly compromised."<sup>456</sup> As the tribunal recalled in the seminal *Aminoil v. Kuwait* case, the test for coercion requires proof that the actions of the victim were constrained to the point of leaving it no freedom to act in any other possible way:

"There must be a constraint invested with particular characteristics, which the legal systems of all countries have been at pains to define in terms either of **the absence of any other possible course** than that to which the consent was given, or of the illegal nature of the object in view, or of the means employed."<sup>457</sup>

351 In that case, the tribunal addressed allegations of threat of termination in the context of renegotiations of a concession agreement between Aminoil and the Government of Kuwait. Aminoil argued that it could not be bound by the amended agreement given the expropriation threats to which it was subject prior to and during the negotiations. The tribunal dismissed those allegations, noting Aminoil's failure to prove the illicit character of the threats of the Government of Kuwait. It added that, even if it were proven that the Government of Kuwait had made illicit threats, Aminoil's failure to protest during or after the negotiations as well as its unreserved partici-

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<sup>455</sup> [Definition of "coercion", Law Dictionary, at Exhibit R-512.](#)

<sup>456</sup> [Walter Bau Ag \(In Liquidation\) v. Kingdom of Thailand, Award, 1 July 2009, at Exhibit CLA-255](#), p. 84 (para. 155).

<sup>457</sup> [Govt. of the State of Kuwait v. The American Independent Oil Company \(AMINOIL\), Award, 24 May 1982, at Exhibit RLA-172](#), p. 3 (para. 43) (emphasis added).

pation in the negotiations was irreconcilable with the allegation of coercion:

“[t]he illicit character of the threats directed against Aminoil has not been fully proved.

Supposing however that there were such threats, Aminoil gave way without even making the qualification that the Company was conscious that something illicit was being imposed upon it. It is understandable that it avoided resort to arbitration because of the delays, risks and costs of arbitral proceedings – but Aminoil entered neither reservations of position nor protests. In truth, the Company made a choice; disagreeable as certain demands might be, it considered that it was better to accede to them because it was still possible to live with them. The whole conduct of the Company shows that the pressure it was under was not of a kind to inhibit its freedom of choice. The absence of protests during the years following upon 1973 confirms the non-existence, or else the abandonment, of this ground of complaint.”<sup>458</sup>

352 The Claimants do not allege in the Reply that the Government has threatened to terminate the License or interfere with the joint venture agreements between Minvest and Gabriel Jersey. Neither do they argue that a new agreement was signed with the Government as a result of threats.

353 Despite these differences, the test for coercion formulated in *Aminoil* is authoritative and its application to the allegations presented in the Reply leads to the rejection of the coercion claims. As demonstrated below, at no time did State officials exert compulsion, force, or duress upon RMGC’s representatives nor were those representatives constrained to do what their free will would refuse.<sup>459</sup>

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<sup>458</sup> *Id.* at p. 3 (paras. 43-44).

<sup>459</sup> See also [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 180 *et seq.* (paras. 668-669) (finding that claimant had not shown that State authorities “had demanded a stake in the Project as a condition for its viability,” that the proposal was presented “as an option to ensure the continuation of the Project” “in the context of the conflict with the community members,” and that the claimant had not shown that “**this proposal – not**

- 354 First, the Claimants rely heavily on public statements by State officials between August and December 2011 to argue that the Government was conditioning the issuance of the environmental permit on a renegotiation of the State's level of participation in RMGC and its level of future royalties. However, the Claimants distort the content of those statements and ignore other statements which provide meaningful context for the summer 2011 public debate regarding the Project. Significantly, former Prime Minister Emil Boc and former Minister of Economy Ion Ariton explain that their Government never sought to coerce RMGC into amending the State's level of participation in the Project (**Sections 3.4.1 and 3.4.3**).
- 355 Second, the Claimants' representatives freely and willingly negotiated with State officials, as Messrs. Găman and Ariton describe in their respective witness statements in response to the testimony of ██████████. The existence of several offers on the part of RMGC (who represented the Claimants in those negotiations) in late 2011 and January 2012 show RMGC's willingness to negotiate with the State. Furthermore, those offers demonstrate that RMGC sought to take advantage of the Government's interest to increase the State's level of participation in the benefits of the Project if it were implemented, by obtaining more favorable terms for RMGC and the Project (**Section 3.4.2**).
- 356 Third, the non-formalization of the deal reached between the Ministry of Economy and RMGC by January 2012 had no link with the EIA Review Process conducted by the Ministry of Environment. RMGC had since 30 November 2011 confirmed its agreement in principle with the Government's negotiation position that the applicable royalty rate should be increased to 6% and Minvest's stake in RMGC should increase to 25%. RMGC's agreement with the Government's position was further reiterated in December 2011 and in January 2012. The Government obtained what it sought to obtain in those negotiations long before 31 January 2012, which is the date when the Claimants allege that the Ministry of Environment should have issued the environmental permit (**Section 3.4.4**).

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**demand** – had an ulterior motive or undermined SAS's rights over the Mining Concessions") (emphasis added).

### 3.4.1 State Officials' Public Statements between August 2011 and December 2011 Did Not Reflect an Intent to Coerce RMGC into Amending the Existing Contracts

- 357 The Claimants allege that the purported link between an attempted renegotiation of the State's level of participation in the Project and the permitting process is evidenced by public statements between August and December 2011 by President Băsescu, Prime Minister Boc, Minister of Culture Hunor, and Minister of Environment Borbély.<sup>460</sup>
- 358 This allegation is without merit, as demonstrated in the Counter-Memorial and throughout this section.<sup>461</sup> First, the Claimants' characterization of the public statements at issue is incomplete and misleading. Second, the statements do not evidence an intent on the part of State authorities to deprive the Claimants' investments of FET.
- 359 In any event, the statements in and of themselves (unlike State conduct) cannot amount to a breach of FET. For instance, in the case of *UAB v. Latvia*, the tribunal found that public statements by a mayor displayed an utter lack of even-handedness towards the investor but did not amount to compelling proof that the municipality was looking to remove the investor.<sup>462</sup> Here too, no such proof exists.

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<sup>460</sup> [Reply](#), p. 21 (para. 23).

<sup>461</sup> See [Counter-Memorial](#), p. 88 *et seq.* (paras. 231-235) (discussing "[Boc: I am not a fan of the Roşia Montană Project, the contract is not advantageous and it should be re-discussed.](#)" [Mediafax](#), 1 Aug. 2011, at [Exhibit R-513](#); [Interview of Emil Boc, TVRI](#), at [Exhibit C-537](#); [Emil Boc: The decision on the Roşia Montană mining project must be substantiated based on documents, not stories](#), [Agerpres.ro](#), at [Exhibit C-791](#); [Emil Boc: The Roşia Montană Project must be addressed in full responsibility](#), [Agerpres.ro](#), at [Exhibit C-1430](#); [Traian Băsescu: Romania needs the Roşia Montană Project, provided the terms for sharing of benefits are renegotiated](#), [Agerpres.ro](#), at [Exhibit C-628](#); "[Interview with Traian Băsescu](#)", [TVRI](#), Aug. 2011, at [Exhibit C-1479](#); [Laszlo Borbély: The Romanian State could've negotiated the Roşia Montană Contract in much better terms](#), [Business24.ro](#), at [Exhibit C-629](#)); [REDACTED]

<sup>462</sup> [UAB v. Latvia](#), Award, 22 December 2017, at [Exhibit CLA-252](#), p. 276 *et seq.* (paras. 941-946); see also [Waste Management, Inc. v. United Mexican States](#), Award, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at [Exhibit CLA-139](#), p. 60 (para. 161) (finding that "Individual statements of this kind made by local political figures in the heat of public debate may or may

360 [REDACTED] takes issue with statements by President Băsescu on 18 and 29 August 2011, including during a site visit to Roșia Montană in which he was accompanied by [REDACTED] to the effect that “the Rosia Montana project must be done... provided the terms for the sharing of benefits ... are renegotiated” and that “it was mandatory to renegotiate.”<sup>463</sup>

361 [REDACTED] fails to recall the context of those statements, *i.e.* that the State’s shareholding in RMGC, via Minvest, had over the years decreased from 33.8% to 19.31%.<sup>464</sup> In response to this decrease, in 2009 the Government had included in the Government’s Program the idea of reconsidering the State’s benefits from the development of the Project,<sup>465</sup> as Prime Minister Boc and Minister Ariton recall in their respective witness statements.<sup>466</sup> In November 2010, RMGC had written to [REDACTED]

[REDACTED].<sup>467</sup>

362 Throughout 2010-2011, certain State officials suggested that the State should renegotiate the Project’s benefits for Romania, while legislative initiatives in the mining sector were also proposed in the same spirit.<sup>468</sup> Thus,

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not be wise or appropriate, but they are not tantamount to expropriation unless they are acted on in such a way as to negate the rights concerned without any remedy.”).

<sup>463</sup> [REDACTED] (referring to “[Boc: I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed](#),” *Mediafax*, 1 Aug. 2011, at [Exhibit R-513](#) and [Transcript of statements by President Băsescu during visit to Roșia Montană dated 29 August 2011, at Exhibit C-1503.02 \(resubmitted\)](#); see also [Counter-Memorial](#), p. 90 (para. 235); see also [Jurca](#), p. 29 (para. 144).

<sup>464</sup> See [Gaman II](#), p. 5 (paras. 11-13) (referring to [Articles of Association of Euro Gold Resources, at Exhibit C-143](#); [Gabriel Canada, Interim Consolidated Financial Statements \(Unaudited\) for the period ended June 30, 2011, at Exhibit C-1885](#); [Euro Gold Articles of Association and Bylaws, Addendum No. 8, at Exhibit C-152](#)).

<sup>465</sup> [Excerpt of Government’s Program 2009-2012 dated 23 December 2009, at Exhibit R-460](#), p. 8.

<sup>466</sup> [Ariton](#), p. 6 (paras. 20-21); [Boc](#), p. 2 (para. 7).

<sup>467</sup> [REDACTED]

<sup>468</sup> [Interview of Minister of Economy A. Videanu on 25 March 2010, at Exhibit C-874](#); “[Ariton Supports the Project at Roșia Montană](#)”, *Business24*, 29 Oct. 2010, at [Exhibit R-384](#); C. Deacu, “[Exclusive: Dragoș Tănase, RMGC: We Want to Start Building the Mine in 2012](#)”, *Ziarul Bursa*, 26 Jan. 2011, at [Exhibit R-385](#); [Statement of Reasons in support of PI-x nr. 36/2011, Legislative Proposal for Supplementing Mining Law no. 85/2003, Chamber of Deputies dated 15 February 2011, at Exhibit R-386](#); [Draft Government Ordinance regulating certain financial](#)

when President Băsescu made these comments in August 2011, the issue of Minvest's share in RMGC was not new.<sup>469</sup>

363 These statements, like similar statements by members of Government in the weeks that followed, constituted an invitation to RMGC to negotiate. The President did not specify what the State might wish to obtain out of the renegotiation and what the State might wish for RMGC to concede. No specific terms were mentioned. The President did not indicate that the proposed renegotiation would benefit only the State and not RMGC.

364 Although the President said that the negotiation was "mandatory," he was ostensibly sending a message to the Government as to what he thought was a legitimate objective for the Government to pursue during a period of financial crisis. In any event, he did not indicate that there would be any consequence should RMGC refuse to sit at the negotiation table. Thus, although the Claimants paint these and similar statements in sinister terms, they were no more than political statements at a time of financial hardship for Romania, when its leaders were facing enormous pressure to address the situation.<sup>470</sup>

365 The President's statements were in no way detrimental to RMGC or critical of the Project. On the contrary, ██████ omits to mention President Băsescu's ringing endorsement of the Project during their joint site visit:

"The project is really impressive"<sup>471</sup>

"Indeed this area can benefit so much from such a project"<sup>472</sup>

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[and tax measures dated 19 August 2011, at Exhibit R-387; Explanatory Note to Draft Government Ordinance Regulating Certain Financial and Tax Measures dated 19 August 2011, at Exhibit R-388.](#)

<sup>469</sup> [Gaman II](#), p. 7 (para. 14); [Boc](#), p. 7 (para. 23).

<sup>470</sup> [Boc](#), p. 7 (para. 23) (explaining that President Băsescu was not involved in the permitting of the Project); see also *id.* at paras. 5 and 15 (describing the financial crisis).

<sup>471</sup> [Traian Băsescu – visit to Roșia Montană, at Exhibit C-1503.01 \(resubmitted\)](#), p. 2.

<sup>472</sup> *Id.* at p. 2.

“I am a supporter of the project, not since today or yesterday; in the campaign I visited Rosia Montana and I said that I supported the project, and also long before. I believe in it.”<sup>473</sup>

366 At the time, the statements of which [REDACTED] now complains indeed did not alarm Gabriel Canada, which described with enthusiasm President Băsescu’s visit to Roşia Montană and his support of the Project:

“President Băsescu visited Rosia Montana on August 29, 2011 where he stated his belief in the Project and the exploitation of Romania’s gold, copper, and silver on the basis of modern technologies without subsidies. **The President has since publicly stated his support for the Project** and the need for jobs in Romania, together with the need for a Government decision in respect of authorizing the environmental permit (‘EP’) for the Project as soon as possible in the best interests of Romania.”<sup>474</sup>

367 Gabriel Canada stated repeatedly that the President supported the Project, and indeed, on numerous occasions during his tenure, President Băsescu expressed support for the Project.<sup>475</sup>

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<sup>473</sup> *Id.* at p. 5; see also *id.* at p. 4 (noting that the “project also needs public support,” that “there is deep ignorance about the project,” and that this is the “fault” of RMGC’s representatives).

<sup>474</sup> [Gabriel Canada MD&A, Third Quarter 2011 dated 2 November 2011, at Exhibit R-314](#), p. 2 (emphasis added); see also [Gabriel Canada Third Quarter Report dated 2 November 2011, at Exhibit C-2573](#), p. 1; see also [Counter-Memorial](#), p. 90 (para. 235).

<sup>475</sup> [Gabriel Canada MD&A, First Quarter, at Exhibit R-514](#); [Gabriel Canada press release dated 17 May 2010, at Exhibit R-515](#); [Gabriel Canada MD&A, Second Quarter 2010, at Exhibit R-516](#); [Gabriel Canada press release dated 2 November 2011, at Exhibit R-517](#); [Gabriel Canada Third Quarter Report dated 2 November 2011, at Exhibit C-2573](#); [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#); [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 2; [Gabriel Canada press release dated 10 May 2012, at Exhibit R-507](#), p. 1 (“statements by the President, Prime Minister and other ministers in the Government reflected very positively on the desire to ... progress the Project”); see also *id.* at p. 3 (“the President, former Prime Minister [Ungureanu] and former Minister of Culture [Hunor] all made encouraging statements regarding ... their support for any project which adheres to environmental guidelines”); [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 2; “The Gold March or Gold for the President”, [rosiamontana.org](#), Sept. 2011, at [Exhibit R-234](#); [Pop Opinion](#), p. 26 (para. 58).

- 368 [REDACTED] complains of three press statements attributed to Prime Minister Boc between 1 August and 2 September 2011, mainly to the effect that he was “not a fan of the project” and that the existing contracts “should be **re-discussed**.”<sup>476</sup> Notably though, Mr. Boc did not state or imply that the permitting of the Project would be blocked failing such negotiation as he explains in his witness statement.<sup>477</sup>
- 369 With respect to permitting, Mr. Boc made clear that he was waiting for “the experts to give their opinion” and that it was “premature for him to give an opinion.”<sup>478</sup> Mr. Boc’s position was entirely legitimate since, at that point in time, the TAC was still in the process of reviewing the EIA Report and awaiting RMGC’s feedback regarding, among other things, the most recent public consultation.<sup>479</sup>
- 370 In his witness statement, Mr. Boc explains that his public statements to the effect that he was “not a fan of the Project” were personal and did not describe the position of the Government. They were furthermore irrelevant insofar as he never let his personal views for the Project or any other matter interfere with legal procedures.<sup>480</sup>
- 371 In any event, on none of these three occasions did Mr. Boc threaten to withhold the environmental or other permits; he expressed a desire for a “discussion” regarding RMGC’s and the State’s participation in the Project.<sup>481</sup> Furthermore, if Gabriel Canada had been concerned by the 1 Au-

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<sup>476</sup> [REDACTED] (referring to [“Boc: I am not a fan of the Roşia Montană Project, the contract is not advantageous and it should be re-discussed,” Mediafax, 1 Aug. 2011, at Exhibit R-513](#); [Emil Boc: The decision on the Roşia Montană mining project must be substantiated based on documents, not stories, Agerpres.ro, at Exhibit C-791](#) and [Emil Boc: The Roşia Montană Project must be addressed in full responsibility, Agerpres.ro, at Exhibit C-1430](#)) (emphasis added).

<sup>477</sup> [Boc](#), p. 8 (para. 24).

<sup>478</sup> [“Boc: I am not a fan of the Roşia Montană Project, the contract is not advantageous and it should be re-discussed,” Mediafax, 1 Aug. 2011, at Exhibit R-513](#), p. 1; see also [Boc](#), p. 5 (para. 17).

<sup>479</sup> See *supra* para. 212.

<sup>480</sup> [Boc](#), p. 6 (paras. 19-20); see also *id.* at p. 14 (para. 48).

<sup>481</sup> *Id.* at p. 5 *et seq.* (paras. 17-18); see also [Counter-Memorial](#), p. 89 (para. 234).

gust 2011 statements, it would and should have mentioned them in its press release of 3 August 2011, which it did not.<sup>482</sup>

372 [REDACTED] points to statements that Minister of Environment Borbély made to the press between 23 August and 5 September 2011 to the effect that “the Romanian State, when it negotiated this contract, it could have negotiated better.”<sup>483</sup> As with Mr. Boc’s statements, at no point did Mr. Borbély suggest that a renegotiation was a prerequisite to the Ministry of Environment’s issuance of the environmental permit. On the contrary, he made clear that any possible renegotiation was not within his remit, but that of the Ministry of Economy. He further made clear that his Ministry’s focus was verifying that the Project complied with EU environmental regulations; conversely, the only reason he gave for possibly not issuing the environmental permit related to non-compliance with environmental regulations.<sup>484</sup>

373 As Ms. Mocanu testifies in her second witness statement, [REDACTED] met with Minister Borbély and her just some days after those statements to discuss how to progress the EIA Review Process. [REDACTED] did not protest against his public statements or suggest that he had understood that Minister Borbély had decided to block the permitting of the Project.<sup>485</sup>

374 Finally, [REDACTED] refers to statements attributed to Minister of Culture Hunor on 24 August and 17 September 2011.<sup>486</sup> Mr. Hunor reportedly

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<sup>482</sup> See [Gabriel Canada press release dated 3 August 2011, at Exhibit R-218](#); see also [Gabriel Canada MD&A, Second Quarter 2011, at Exhibit C-1888](#).

<sup>483</sup> [REDACTED] (citing [Laszlo Borbély: The Romanian State could’ve negotiated the Roşia Montană Contract in much better terms, Business24.ro, at Exhibit C-629](#)); see also [Interview with László Borbély, Realitatea TV, at Exhibit C-2632.01](#) and [Interview with Environment Minister L. Borbély, Radio România Actualităţi, at Exhibit C-2155](#).

<sup>484</sup> See e.g. [Interview with Environment Minister L. Borbély, Radio România Actualităţi, 5 Sept. 2011, at Exhibit C-2155](#), p. 3 (“I cannot sign off a project unless I am convinced, 101% if you will, that this project will not be harmful to the environment.”).

<sup>485</sup> [Mocanu II](#), p. 30 *et seq.* (paras. 79-82).

<sup>486</sup> [REDACTED] (referring to [Roşia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs, Ecomagazin.ro, at Exhibit C-508](#), and “Peter Eckstein Kovacs asks UDMR to reject cyanide mining. / Kelemen Hunor: The Roşia Montană issue must be debated with clear mind,” [Hotnews.ro, 17 Sept. 2011, at Exhibit C-2634](#)).

stated he had not yet signed the declassification order for Cărnic Massif because “many aspects needs to be discussed,” the “first” of which he described as being “the level of participation of the Romanian state in that company”; he added that he was “not going further until this aspect is clarified... and [that] this must be decided at the governmental level.”<sup>487</sup>

375 Mr. Hunor did not suggest that he might have any involvement in possible negotiations with RMGC concerning the State’s indirect participation in either RMGC or the Project. Furthermore, he made clear that “many aspects” were to be discussed, of which these possible negotiations were one element. In any event, Mr. Hunor did not refer to the requirement that the Ministry of Culture endorse the Project or express a view in that regard. Nor did he threaten RMGC that the Ministry of Culture would not issue the requisite endorsement unless RMGC agreed to increase the State’s level of participation in the Project. He merely noted that the level of the State’s participation should be “clarified” and not saying that it must be “amended” in any particular way.

376 As to the statements of Messrs. Borbély and Hunor, Mr. Boc observes that none of his ministers “ever indicated to [him] that they intended to withhold or delay issuance of permits for the project. If they had done so, [he] would have told them that was not a legal or appropriate course of action.”<sup>488</sup> Mr. Ariton’s testimony confirms that of Mr. Boc in this respect.<sup>489</sup>

377 The Claimants did not at the time understand these public statements to amount to threats to increase the State’s level of participation in the Project, failing which the Project would not go forward. Based on their public statements at the time, RMGC’s representatives were in no way intimidated or concerned that, unless they agreed to increase the State’s level of participation, RMGC would not obtain the requisite permits. Mr. Tănase surprisingly omits to mention his own repeated statements to the press in August 2011 to the effect that “[w]e will be glad to participate

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<sup>487</sup> [“Roșia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs.” \*Ecomagazin.ro\*, at \*\*Exhibit C-508\*\*](#), p. 1.

<sup>488</sup> [Boc](#), p. 8 (para. 24).

<sup>489</sup> [Ariton](#), p. 37 *et seq.* (para. 120).

in the discussion [*i.e.* a possible negotiation with the Government].”<sup>490</sup>  
When asked about a possible link between permitting and the negotiations,  
he stated “[w]e have never been suggested that environmental assessment  
would be conditional on the renegotiation of the contract.”<sup>491</sup>

378 That same month, Mr. Henry expressed understanding *vis-à-vis* the various  
statements of political leaders, given the financial crisis, as well as will-  
ingness to sit down at the table with State authorities. He further expressed  
his confidence in the Government’s good faith regarding RMGC and the  
Project: “If the Romanian Government had not wanted this project, we  
would have found out by now.”<sup>492</sup>

379 Ms. Szentesy made similar public statements at the time, including at a  
conference at which Mr. Găman and she were co-panelists,<sup>493</sup> but she does  
not refer to them in her statements.

380 None of Gabriel Canada’s public disclosures or press releases between Au-  
gust 2011 and March 2012 reflect concern regarding the President’s or the  
Government’s conduct or statements *vis-à-vis* the Project. Those disclo-  
sures and press releases – dated 3 August 2011, 2 November 2011, 29 De-

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<sup>490</sup> See [Gaman II](#), p. 9 *et seq.* (paras. 21-24) (referring to [O. Vanghele](#), “RMGC: The Romanian State’s Gains Are Competitive in the Current Form of the Roşia Mining Project”, [Mediafax](#), 23 Aug. 2011, at [Exhibit R-391](#); [M. Mitan](#), “Gabriel Resources President: If the Romanian Government Had Not Wanted This Project We Would Have Found Out”, [Ziare](#), 29 Aug. 2011, at [Exhibit R-392](#); “The General Manager of RMGC Hopes the First Gold Ingot to Be Cast in 2014-2015”, [ZiarMM](#), 30 Aug. 2011, at [Exhibit R-393](#); see also *id.* at p. 12 (para. 28) (referring to [D. Boboc](#), “The Ministry of Economy Wants to Continue the Roşia Montană Project”, [EVZ](#), 8 Sept. 2011, at [Exhibit R-398](#) and [C. Pantazi](#), “Dragoş Tănase, RMGC General Manager: The Specific Level of the Royalty to Be Discussed with the Government”, [Hotnews](#), 12 Apr. 2012, at [Exhibit R-400](#)).

<sup>491</sup> See [Gaman II](#), p. 9 (para. 19) (referring to [O. Vanghele](#), “RMGC: The Romanian State’s Gains Are Competitive in the Current Form of the Roşia Mining Project”, [Mediafax](#), 23 Aug. 2011, at [Exhibit R-391](#)).

<sup>492</sup> See *id.* at p. 10 (para. 22) (referring to [M. Mitan](#), “Gabriel Resources President: If the Romanian Government Had Not Wanted This Project We Would Have Found Out”, [Ziare](#), 29 Aug. 2011, at [Exhibit R-392](#)).

<sup>493</sup> See [Gaman II](#), p. 11 (para. 24) (referring to “Roşia Montană Gold Corporation Considers Decreasing the Cyanide Concentration”, [Adevarul](#), 8 Sept. 2011, at [Exhibit R-395](#) and “The Ministry of Economy Wants the Roşia Montană Operation to Operate”, [Green Report](#), 8 Sept. 2011, at [Exhibit R-396](#)).

cember 2011, and 14 March 2012<sup>494</sup> – make no reference to the State officials' statements of which the Claimants complain today.

381 Gabriel Canada noted the “high profile” nature of the Project and the attention thereto from “leaders of all major political parties” but made no reference to negative or harmful comments or conduct by State authorities:

“Since the visit by President Băsescu, the Project has become a higher profile issue for the Government, with wide coverage in television debates, on the internet and in print media, as well as being the subject of comment from leaders of all major political parties in Romania.”<sup>495</sup>

382 [REDACTED]

383 The Claimants, however, never complained of any illegality in any of their contemporaneous disclosures. On the contrary, the statements of the representatives of RMGC and Gabriel Canada show that they embraced the comments of political leaders suggesting a renegotiation of the economic terms of the Project. These representatives indeed could have protested, rejected the idea of a negotiation, or never come to the negotiation table.<sup>496</sup> As discussed below, they did none of those things.

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<sup>494</sup> [Gabriel Canada Third Quarter Report dated 2 November 2011, at Exhibit C-2573](#), p. 1; [Gabriel Canada press release dated 3 August 2011, at Exhibit R-218](#); [Gabriel Canada MD&A, Second Quarter 2011, at Exhibit C-1888](#); [Gabriel Press Release dated 29 December 2011, at Exhibit C-1437](#); [Gabriel Canada press release dated 14 March 2012, at Exhibit R-219](#).

<sup>495</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 3; [Gabriel Canada 2011 Annual Report, at Exhibit R-518](#), p. 3; see also [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#); [Gabriel Canada press release dated 2 August 2012, at Exhibit R-509](#); [Gabriel Canada MD&A, Third Quarter 2012, at Exhibit R-511](#); [Gabriel Canada MD&A, Fourth Quarter 2012, at Exhibit R-510](#).

<sup>496</sup> [Gaman II](#), p. 34 (para. 98); [Ariton](#), p. 9 (para. 27).

### 3.4.2 The Claimants' Representatives Freely and Willingly Negotiated with the Ministry of Economy in Late 2011

- 384 The Claimants complain that, based on the public statements described above, they felt that they had “no real choice... other than to try to meet the Government’s demand” and thus met with the Minister of Economy, Mr. Ion Ariton, and Mr. Găman, on 27 September 2011.<sup>497</sup> They contend that they felt that, unless they agreed to increase the State shareholding in RMGC from 19% to 25% and the royalty rate from 4% to 6%, the Project would not go forward.<sup>498</sup>
- 385 It is undisputed that, in the fall of 2011, several meetings took place between Mr. Ariton and other representatives of the Ministry of Economy, including Mr. Găman, and RMGC regarding a possible amendment of the State’s level of participation in the Project.
- 386 The Parties, however, dispute the content and nature of those discussions.
- 387 Significantly, Messrs. Ariton and Găman reject the Claimants’ allegation that State officials threatened RMGC’s representatives or intimated that the Project would not go forward unless RMGC agreed to increase the State’s level of participation.<sup>499</sup> They do not believe that RMGC participated in discussions with the Ministry of Economy or made offers under threat or coercion and Mr. Găman confirms that he would not have otherwise accepted to participate in the discussions.<sup>500</sup>
- 388 As noted above, representatives of RMGC and Gabriel Canada on multiple occasions expressed their willingness to sit at the table with State representatives.<sup>501</sup> Furthermore, at the commencement of the negotiations, the

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<sup>497</sup> [REDACTED]

<sup>498</sup> *Id.* at p. 11 *et seq.* (para. 16).

<sup>499</sup> [Reply](#), p. 21 (para. 24); [REDACTED]; see also [Counter-Memorial](#), p. 90 (para. 236); [Gaman I](#), p. 7 (para. 30); [Gaman II](#), p. 3 (para. 4); see also *id.* at p. 20 (para. 52) (noting that the very notion that the State would envisage withholding permits for the Project makes no sense since the State would derive no benefit from the Project not going forward); [Ariton](#), p. 16 (para. 49); see also [Boc](#), p. 14 (para. 45).

<sup>500</sup> [Gaman II](#), p. 3 (para. 4) and p. 12 (para. 28).

<sup>501</sup> See *supra* paras. 377-379.

Ministry of Economy published on its website various documents relating to the joint venture, out of a desire of transparency *vis-à-vis* the public.<sup>502</sup> These actions hardly suggested any desire to conduct a clandestine and improper negotiation.

389 At no time did State authorities send the Claimants a letter requesting an increase in the State's level of participation in the Project, let alone threatening not to issue the environmental or other permits for the Project. Rather, RMGC offered to increase the State's level of participation in the Project and sought significant benefits in exchange, as explained in the Counter-Memorial and further detailed below.

390 The negotiations were balanced and at arm's length. They were jointly conducted by two sophisticated parties each seeking to obtain improved terms and conditions. Both sides made and both accepted and rejected proposals. For instance, [REDACTED]

[REDACTED].<sup>503</sup>  
As Mr. Găman recalls, the discussions were "cordial and professional and there was a willingness of all of those involved to list and consider the positions expressed."<sup>504</sup>

391 The Claimants' coercion theory fails for the following five additional key reasons.

392 First, from the Government's perspective, the scope and purpose of the negotiations was limited. The Ministry of Economy alone was mandated to negotiate with RMGC. Although the Ministry of Economy initially proposed to involve other ministries, the Government rejected this proposal. Furthermore, its mandate was solely to "conduct negotiations with [RMGC]... to increase the benefits for the Romanian State and [to]... submit the results of these negotiations to the Government."<sup>505</sup>

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<sup>502</sup> [Gaman II](#), p. 14 (para. 36).

<sup>503</sup> *Id.* at p. 31 (para. 89).

<sup>504</sup> *Id.* at p. 29 (para. 83).

<sup>505</sup> [Letter from the Government Secretariat to Minister of Economy Ariton dated 23 September 2011 \(enclosing tasks established at the Government meeting on 21 September 2011\)](#), at

- 393 Although the Claimants seek to link the environmental permitting process and these negotiations, the Ministry of Environment was not involved.<sup>506</sup> The Ministry of Economy reported on the negotiations to the Government as a whole, not to the Ministry of Environment. Its mandate in no way referred to the environmental permit or other permits that RMGC still needed, as at September 2011. Furthermore, the mandate to the Ministry of Economy did not specify the desired result of these negotiations, nor did it specify the possible consequence of the Ministry of Economy not achieving that result (including possible repercussions for RMGC). The Claimants' argument that the Government intended to withhold issuance of the environmental permit unless and until RMGC agreed to increase the State's level of participation in the Project is thus not supported by the Government's mandate to the Ministry of Economy.
- 394 Second, as Messrs. Găman, Ariton and Boc recall, RMGC's representatives freely and willingly met with representatives of the Ministry of Economy several times in the fall of 2011.<sup>507</sup> In addition to their statements from August and September 2011, RMGC's representatives subsequently reiterated their willingness to negotiate with State authorities.<sup>508</sup> For instance, in October 2011, Mr. Tănase stated that RMGC was "always open to discuss any aspect of the mining project with the government's representatives."<sup>509</sup>
- 395 Mr. Găman notes that, as members of the RMGC Board, he has had a cordial and ongoing relationship with Messrs. Henry and Tănase for some

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[Exhibit C-2635](#), p. 2; [Boc](#), p. 8 (para. 25); [Gaman II](#), p. 20 *et seq.* (paras. 55-57) and p. 29 (para. 82); see also *id.* at p. 23 (paras. 66-67) (describing negotiation commission mandate and referring to [Ministry of Economy Order No. 2610 dated 29 September 2011](#), at [Exhibit C-2730](#)); [Ariton](#), p. 11 *et seq.* (para. 34).

<sup>506</sup> See also [Letter from Ministry of Environment to Group for the Salvation of Roşia Montană dated 13 January 2012](#), at [Exhibit R-471](#), p. 2 ("Regarding the aspects of an economic nature, we are informing you that the Ministry of Environment and Forests does not hold competence in this regard, in the environmental impact assessment procedure, environmental protection and human health prevail, the economic aspects not being part of the respective assessment.").

<sup>507</sup> [Boc](#), p. 14 (para. 45); [Ariton](#), p. 38 (para. 120); [Gaman II](#), p. 2. (para. 4).

<sup>508</sup> See *supra* paras. 355 and 378.

<sup>509</sup> See [Gaman II](#), p. 35 (para. 100) (referring to, at [Exhibit R-399](#)); see also *id.* at para. 109 (referring to statements made in April 2012 and [REDACTED]).

twelve years. Since 2011, neither Mr. Henry nor Mr. Tănase has complained to Mr. Găman that he or other State representatives, including the Prime Minister and representatives of the Ministry of Economy, behaved improperly.<sup>510</sup>

396 Significantly, between November and December 2011, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

397 Third, the Claimants, not State authorities, raised permitting issues during these negotiations. The evidence belies the Claimants' argument that the Government sought and threatened to make issuance of the environmental permit conditional on the outcome of the negotiations. On the contrary, the evidence demonstrates that RMGC saw an opportunity in the State's desire to increase its level of participation in the Project and sought to seize that opportunity to obtain significant benefits for itself.<sup>512</sup>

398 In October 2011, RMGC submitted to the Ministry of Economy an offer to [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>510</sup> *Id.* at p. 3 (para. 6).

<sup>511</sup> [REDACTED] (emphasis added).

<sup>512</sup> [Boc](#), p. 9 (para. 28); [Ariton](#), p. 34 *et seq.* (para. 110); [Gaman II](#), p. 57 (para. 155). [REDACTED]  
[REDACTED]  
[REDACTED]

- [REDACTED];
- [REDACTED]  
[REDACTED]  
[REDACTED];
- [REDACTED]  
[REDACTED]  
[REDACTED];”
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED] 513.

399

[REDACTED]  
[REDACTED]  
[REDACTED] 514 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>513</sup> See [Gaman II](#), p. 38 *et seq.* (para. 109) ([REDACTED]); see also *id.* at p. 57 (para. 154) (describing how one-sided RMGC’s proposal was) and p. 57 *et seq.* (para. 159) [REDACTED]; [Boc](#), p. 9 *et seq.* (para. 28-29); [Ariton](#), p. 18 (para. 56).

<sup>514</sup> [REDACTED]; [Gaman II](#), p. 61 *et seq.* (paras. 159-164) (discussing said email).

<sup>515</sup> See [Gaman II](#), p. 46 *et seq.* (paras. 124-140) ([REDACTED]).

[REDACTED]  
[REDACTED] 516

400 Fourth, the Government declined RMGC's offer, which it discussed at the end of October 2011. As Mr. Boc recalls, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 518

401 The Government's position was in line with statements by a state secretary with the Ministry of Economy responsible for shareholder matters of Mininvest,<sup>519</sup> Mr. Claudiu Stafie, at a conference in September 2011, where he shared a panel with both Mr. Găman and Ms. Szentesy. When asked about permitting issues, Mr. Stafie responded: "We analyse the situation in economic terms. We do not interfere with those from the Ministry of Environment, the environmental permit is strictly their issue."<sup>520</sup>

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<sup>516</sup> *Id.* at p. 55 (para. 149); [Ariton](#), p. 18 (para. 58).

<sup>517</sup> [Boc](#), p. 10 (para. 30); [Ariton](#), p. 22 (para. 70); [Gaman II](#), p. 22 (paras. 60-61); see also *id.* at paras. 140, 149, and 154; [Ministry of Economy Order No. 2610 dated 29 September 2011, at Exhibit C-2730](#).

<sup>518</sup> [Boc](#), p. 10 (para. 31) [REDACTED]; see also [Gaman II](#), p. 21 (para. 68).

<sup>519</sup> [Minister of Economy Order No. 3107 dated 29 November 2011, at Exhibit C-898 \(resubmitted\)](#).

<sup>520</sup> [Gaman II](#), p. 11 (para. 26) (referring to "XIII Focus Energetic Conference - Focus Minier Pictures", *Mediafax*, 8 Sept. 2011, at [Exhibit R-397](#) and [D. Boboc](#), "The Ministry of Economy Wants to Continue the Roşia Montană Project", *EVZ*, 8 Sept. 2011, at [Exhibit R-398](#)).

402

[REDACTED]  
[REDACTED]  
[REDACTED] 521

403

According to the Claimants' concocted story, State authorities pressured RMGC representatives into agreeing to amend the State's participation in the Project prior to the TAC meeting of 29 November 2011 and for the Ministry of Environment to issue the environmental permit.<sup>522</sup>

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However, the evidence again shows no trace of threats or coercion in November 2011 in connection with the negotiations or the environmental permit. RMGC willingly submitted a revised proposed agreement to the Ministry of Economy, which the Government discussed at the end of November 2011, just a few days before the scheduled TAC meeting.<sup>523</sup> [REDACTED]

[REDACTED]  
[REDACTED] 524

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The Government rejected the offer and encouraged Mr. Ariton to seek to increase the State's level of participation to 25% and the royalty rate to 6%.<sup>525</sup> As Mr. Boc confirms, the Government discussed neither the upcoming TAC meeting, nor permitting issues (including the environmental permit) of which neither Mr. Boc nor Mr. Ariton were aware.<sup>526</sup>

406

On 27 November 2011, Mr. Henry sent Mr. Ariton a [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>521</sup> See [Gaman II](#), p. 40 *et seq.* (paras. 111-123) ([REDACTED]); see also *id.* at p. 55 *et seq.* (paras. 141-152) ([REDACTED]).

<sup>522</sup> [Reply](#), p. 32 *et seq.* (para. 43).

<sup>523</sup> [Gaman II](#), p. 60 (para. 164); [Ariton](#), p. 25 (para. 78).

<sup>524</sup> See [Gaman II](#), p. 61 (para. 165); [REDACTED]

<sup>525</sup> [Gaman II](#), p. 11 (para. 33); [Ariton](#), p. 25 *et seq.* (para. 80).

<sup>526</sup> [Boc](#), p. 12 (para. 40); [Ariton](#), p. 28 (para. 90).

<sup>527</sup> [REDACTED];  
[Counter-Memorial](#), p. 91 (para. 237); see also [Gaman II](#), p. 29 (para. 92).

[REDACTED]

[REDACTED]<sup>529</sup> This letter does not refer to the TAC meeting scheduled two days later, nor does it reflect a perception that RMGC's representatives feel bound to make such an offer or else the Project will not proceed.

407 [REDACTED] refers to a message from Mr. Ariton the morning of the TAC meeting. [REDACTED]

[REDACTED]

530

[REDACTED] In any event, had RMGC understood this as a threat and part of an attempt to coerce RMGC, Gabriel Canada should have publicly disclosed the event – which it did not.

408 Mr. Ariton confirms that [REDACTED] but he never said that, if there was no agreement, RMGC would not “do the project.” It would have made no sense to make that threat since the negotiations were always premised on the assumption that the Project could and would be permitted. If the Project was not permitted, there was nothing to negotiate in the first place.<sup>531</sup> Mr. Ariton did request a prompt response as to whether there would be a deal, given how close the parties were to reaching an agreement and that Mr. Ariton wanted to inform the Government at the Government meeting of the following day. Mr. Ariton was not aware of the existence of meetings regarding the environmental permitting of the Pro-

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528 [REDACTED]

529 *Id.* at p. 2.

530 See [Counter-Memorial](#), p. 145 (para. 357); [Reply](#), p. 22 (para. 28); [REDACTED]; [REDACTED].

531 [Ariton](#), p. 30 (para. 96).

ject. He was, however, aware that Minvest was in the process of deliberating on the transfer of lands to RMGC in exchange for an increase in its stake in the company, which was similarly an urgent issue that affected the negotiations.<sup>532</sup>

409 Fifth, contrary to the Claimants' allegations, the Government did not interfere in the EIA Review Process and, more specifically, the TAC meeting of 29 November 2011.

410 The Claimants' fictitious story indeed culminates in the wild accusations surrounding the TAC meeting on 29 November 2011. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>533</sup>

411 These allegations are unsupported by the evidence.

412 First, as noted in the Counter-Memorial, these allegations rest on hearsay and non-contemporaneous evidence, [REDACTED]

[REDACTED].<sup>534</sup>

413 Second, as Mr. Boc confirms, he "[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>536</sup>

414 Third, these alleged instructions from higher up do not make sense given that the TAC met for several hours that day. Had these alleged instructions been given, one would have expected the meeting to be short.

415 In a new twist on their prior arguments, [REDACTED]

[REDACTED]

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<sup>532</sup> *Id.* at p. 29 (para. 91).

<sup>533</sup> [Reply](#), p. 32 *et seq.* (para. 43).

<sup>534</sup> [Counter-Memorial](#), p. 85 (para. 224) and p. 200 (para. 519); [REDACTED].

<sup>535</sup> [Boc](#), p. 12 (para. 40) ; see also [Mocanu II](#), p. 59 (para. 168).

<sup>536</sup> [Boc](#), p. 8 (para. 24); see also [Mocanu II](#), p. 3 (para. 11).

[REDACTED]<sup>537</sup> However, as Ms. Mocanu explains, [REDACTED], but to a piece of legislation that she was working on at the time.<sup>538</sup> [REDACTED]

[REDACTED]<sup>539</sup>  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>540</sup>

416 The TAC discussed several topics on 29 November 2011 and Mr. Anton concluded by referring to the next meeting. Neither the audio recording, nor the transcript suggest that the meeting was improperly interrupted or cut short.<sup>541</sup> Notwithstanding the Claimants' lengthy complaints in this arbitration, RMGC's representatives did not complain at the time about breaks or interruptions, or about the manner in which the meeting ended. There was no mention of the negotiations between RMGC and the Ministry of Environment during the TAC meeting, which demonstrates both that RMGC knew that the negotiations were a separate matter and that the TAC representatives were not privy to or concerned with those negotiations.

417 Sixth, the parties' conduct in the weeks following the 29 November 2011 TAC meeting belies the Claimants' coercion theory. Indeed, in the weeks that followed, the parties continued to negotiate in good faith.

418 On 30 November, RMGC confirmed in writing that [REDACTED]  
[REDACTED]<sup>542</sup> Based on

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<sup>537</sup> [Reply](#), p. 33 (para. 46).

<sup>538</sup> [Mocanu II](#), p. 60 (paras. 171-172); see also *id.* at p. 3 (paras. 9-10) and p. 56 (para. 157) ("I do not understand why I would be referring to a potential environmental permit at the end of the meeting if we had been instructed to block that process").

<sup>539</sup> [Boc](#), p. 13 (para. 42); see also [Mocanu II](#), p. 3 *et seq.* (paras. 11-14).

<sup>540</sup> [Mocanu II](#), p. 4 (para. 14).

<sup>541</sup> [Counter-Memorial](#), p. 85 (para. 223); [Mocanu II](#), p. 56 (para. 158); [Mocanu I](#), p. 15 (para. 68).

<sup>542</sup> [REDACTED]

this communication, Messrs. Ariton and Găman testify that they understood there to be an agreement in principle with RMGC as from this date and the contemporaneous evidence reflects this.<sup>543</sup> Mr. Boc also confirms that he understood from Mr. Ariton that a deal had been reached, subject to finalization of the details.<sup>544</sup> The offer of that day

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>545</sup>

RMGC made no mention of the TAC meeting that had taken place the prior day or suggest that it was making this offer because it felt forced to do so for the Ministry of Environment to issue the environmental permit.

419 On 1 December, [REDACTED]

[REDACTED]  
[REDACTED]<sup>546</sup> As Mr. Boc explains in his witness statement, 1 December is the Romanian national holiday, which many State officials celebrate in Alba Iulia, where the unification and independence of Romania was proclaimed in 1918. Mr. Boc participated that day in the celebrations and a military parade, surrounded by crowds of spectators. Mr. Boc was accompanied by Mr. Ariton that day and both comment on their interaction of a few seconds with [REDACTED]<sup>547</sup> Essentially, based on both Mr. Boc and Mr. Ariton's recollection, that was a friendly interaction and there was no threat or ultimatum.<sup>548</sup>

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<sup>543</sup> [Ariton](#), p. 30 *et seq.* (para. 98); [Gaman II](#), p. 63 (para. 170).

<sup>544</sup> [Boc](#), p. 13 (para. 43); [Counter-Memorial](#), p. 91 (para. 239); [Memorial](#), p. 152 (para. 368).

<sup>545</sup> [REDACTED]; see also [REDACTED]; see also [Gaman II](#), p. 61 (para. 170).

<sup>546</sup> [Counter-Memorial](#), p. 92 (para. 240); [Memorial](#), p. 152 (para. 369); [REDACTED].

<sup>547</sup> [Boc](#), p. 11 (paras. 35-37); see also [Video showing Alba Iulia parade on 1 December 2011, at Exhibit R-519](#).

<sup>548</sup> [Boc](#), p. 11 (para. 37); [Ariton](#), p. 31 *et seq.* (paras. 101-102).

- 420 [REDACTED]  
[REDACTED]<sup>549</sup> This statement reflects  
[REDACTED] that State officials had rejected RMGC's attempts  
to condition an increase in the State's interests on a guarantee of issuance  
of permits by a certain date, as Messrs. Ariton and Găman recall.<sup>550</sup>
- 421 That the Government was not trying to block the permitting of the Project  
is further evidenced by Minvest's decision to transfer all its lands in Roșia  
Montană (without which the building permit could not be issued) that same  
week as reiterated on 19 December 2011.<sup>551</sup>
- 422 On or shortly after 19 December 2011, RMGC sent to the Ministry of  
Economy a draft agreement [REDACTED]  
[REDACTED]<sup>552</sup> [REDACTED]  
[REDACTED]  
[REDACTED] It sent a revised offer one month later, on  
27 January 2012.<sup>553</sup>
- 423 As Mr. Ariton testifies, neither of the proposals could be accepted insofar  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>554</sup> Provided that those clauses were reformulated, the agreement  
would have been signed as the Government and Gabriel were in agreement

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<sup>549</sup> [REDACTED]  
[REDACTED]; see also [Gaman II](#), p. 64 (para. 173).

<sup>550</sup> [Gaman II](#), p. 64 (para. 173); [Ariton](#), p. 32 *et seq.* (para. 105).

<sup>551</sup> [Extraordinary General Meeting of the Shareholders of Minvest Decision No. 89 dated 30 November 2011, at Exhibit R-461; RMGC Extraordinary General Meeting of Shareholders Decision No. 1 dated 19 December 2011, at Exhibit C-2302.](#)

<sup>552</sup> See [Gaman II](#), p. 65 *et seq.* (paras. 174-176) (referring to [REDACTED]

[REDACTED] and [REDACTED]);  
[Ariton](#), p. 34 (para. 110).

<sup>553</sup> [Ariton](#), p. 34 *et seq.* (para. 110).

<sup>554</sup> *Id.* at p. 35 (paras. 111-112).

since 30 November on the essence of the deal.<sup>555</sup> In any event, neither proposal suggests that RMGC felt pressured, let alone forced, to submit them.

424 Following the resignation of Mr. Boc in February 2012, on 2 April 2012, RMGC wrote to the new Prime Minister, Mr. Ungureanu, and [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>556</sup>

425 RMGC did not refer to any coercion on the part of the Government or complain of the Government's alleged failure to issue the environmental permit. Mr. Lucian Bode, who was the Ministry of Economy between February and April 2012, testifies that Mr. Ungureanu indicated to him that he should accept to meet with RMGC's representatives and he had a meeting with [REDACTED] in April 2012.<sup>557</sup> It was [REDACTED] who drew Mr. Bode's attention to RMGC's draft agreement.<sup>558</sup> The Government did not demand the signature of a draft agreement prepared by RMGC.

426 Mr. Bode testifies that the Ministry of Economy continued to support RMGC with the permitting problems it was facing, namely by considering a declaration of outstanding public interest of the Project to assist with the environmental permitting of the Project.<sup>559</sup> That assistance was not conditional on the finalization of the deal reached in November 2011 with Minister Ariton.<sup>560</sup>

427 The Claimants allege that the Minister of Environment "acknowledged the link between the Government's renegotiating its financial stake and his willingness to endorse issuance of the Environment Permit before the Government." They refer to statements by Mr. Borbély on TV on 27 December 2011 that "if the Romanian State manages to get a more advantageous con-

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<sup>555</sup> *Id.* at p. 30 (para. 98); [Boc](#), p. 11 (para. 34).

<sup>556</sup> [REDACTED]; [Counter-Memorial](#), p. 103 (para. 271).

<sup>557</sup> [Bode](#), p. 5 *et seq.* (para. 18).

<sup>558</sup> *Id.* at p. 7 (para. 22).

<sup>559</sup> *Id.* at p. 7 (paras. 24-25).

<sup>560</sup> *Id.* at p. 7 (paras. 24-25).

tract, if these environmental conditions are fulfilled, I will propose the endorsement to the Government.”<sup>561</sup> However, RMGC, not the Government, tried to link the permitting and the economic negotiations.<sup>562</sup> Mr. Borbély made clear then and subsequently that he was not involved in the economic negotiations and that the EIA Review Process was underway.<sup>563</sup>

### 3.4.3 Gabriel Canada's Public Disclosures from Late 2011 and 2012 Confirm that RMGC's Representatives Freely and Willingly Negotiated with the Ministry of Economy

- 428 On 2 November 2011, Gabriel Canada disclosed that “[m]anagement continues to engage with stakeholders, including directly with ministries of the Government, to understand their issues and concerns and to explain the benefits and impacts of the Project.”<sup>564</sup> This statement reflects Gabriel Canada's understanding that various Ministries had concerns regarding the Project, that the permitting process was ongoing, and that Government officials were “engaging” with RMGC – not threatening or coercing them.
- 429 Gabriel Canada noted that it “[had] entered into discussions with the Government regarding ownership of the Project and the route to its successful permitting.”<sup>565</sup> It made the following observations:

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<sup>561</sup> Reply, p. 23 (para. 29) (referring to [Interview of László Borbély, TVR Info, 27 Dec. 2011, at Exhibit C-637](#)).

<sup>562</sup> See *supra* paras. 393, 397-399, and 423.

<sup>563</sup> See [Exhibit C-637](#), p. 2 (“I will not grant this endorsement unless I am 100% convinced that it corresponds to the provisions of the European Union, which are the highest standards, and that it will not harm the environment.”); see also *supra* para. 324.

<sup>564</sup> [Gabriel Canada MD&A, Third Quarter 2011 dated 2 November 2011, at Exhibit R-314](#), p. 2 (emphasis added); see also [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 2; [Gabriel Canada press release dated 10 May 2012, at Exhibit R-507](#), p. 3; see also [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 3.

<sup>565</sup> [Gabriel Canada Third Quarter Report dated 2 November 2011, at Exhibit C-2573](#), p. 1 (emphasis added); see also *id.* (where Mr. Henry stated: “We remain focused on our partnership with the Romanian Government to permit and build Romania's first modern mine. In this pioneering endeavour, where all decisions are ‘firsts’, the process is time consuming and extensive in the detail required and the questions asked in the assessment of the Rosia Montana project's substantial economic, social and environmental benefits. We look forward to the coming months with optimism for all stakeholders.”).

“Gabriel and RMGC have been and remain involved in an ongoing dialogue with a number of ministries of the Romanian Government in respect of questions raised on ownership of the Project, royalty rates for gold and silver and the route to successful permitting of the Project. These discussions encompass a wide range of issues relevant to the interests of all stakeholders in a project to build a world class and modern mine, including the priority need for investors to see a stable fiscal regime throughout construction and operation phases of the Project, together with the advantages of the current ownership structure of RMGC as exclusive licence holder for the Project. Detailed information has been provided to the Romanian Government on the positive economic, environmental and social impacts of the Project for Ro-sia Montana and Romania as a whole. The Company will provide a further update as and when appropriate.”<sup>566</sup>

430 These statements beg two comments. First, Gabriel Canada’s references to an “ongoing dialogue” and “discussion” with State officials fly in the face of their current “coercion theory” concocted *a posteriori* for this arbitration. Nowhere did Gabriel Canada intimate pressure, coercion, harassment, or unreasonable demands on the part of State officials.

431 Second, Gabriel Canada’s references to discussions regarding a “wide range of issues,” including the State’s participation and royalty rate as well as the “the route to successful permitting” and RMGC’s desire for a “stable fiscal regime” reflects the concessions that it was hoping to obtain.<sup>567</sup>

432 On 29 December 2011, Gabriel Canada issued a press release that stated in relevant part:

“The Company confirms that it **continues to work together** with the Romanian Government in respect of potentially amending the owner-

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<sup>566</sup> [Gabriel Canada MD&A, Third Quarter 2011 dated 2 November 2011, at Exhibit R-314](#), p. 3 (emphasis added).

<sup>567</sup> See *supra* para. 398; see also *e.g.* [Gabriel Canada MD&A, First Quarter 2013, at Exhibit R-504](#), p. 3 (“The Company has **held discussions** with a number of ministries of previous Governments on the potential for a revised ownership interest in the Project, royalty rates for gold and silver production and the route to successful permitting of the Project.”) (emphasis added).

ship of the Project and royalty rates payable by it, in the context of the overall expected returns to Romania **as well as to Gabriel shareholders** from the Project. A proposal in this regard is currently with the Romanian Government for consideration. These **discussions remain ongoing** and Gabriel awaits a response from the Romanian Government on its proposal.”<sup>568</sup>

433 Gabriel Canada made similar statements in press releases in March and May 2012.<sup>569</sup> In March, it confirmed that it remained “involved in an ongoing dialogue” with the Government regarding the License and the permitting of the Project and expressed the need for its shareholders “to see a stable fiscal regime.” It further confirmed that it had made a proposal to the Government, for which it awaited a response:

“In late 2011, a proposal on these matters was submitted to the Government for consideration and a revised proposal was made by Gabriel in late January 2012. Whilst there has been a subsequent change in Government, **the discussions with relevant ministries remain ongoing**. The Company will provide further updates as and when matters are concluded.”<sup>570</sup>

434

[REDACTED]

<sup>571</sup>

435 In sum, at no point between August 2011 and July 2012 did either RMGC or Gabriel Canada complain in press releases, annual reports, or public disclosures, of threats or acts of coercion by State officials. At no point did they complain in public disclosures, in correspondence with the Govern-

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<sup>568</sup> [Gabriel Press Release dated 29 December 2011, at Exhibit C-1437](#) (emphasis added).

<sup>569</sup> [Gabriel Canada press release dated 14 March 2012, at Exhibit R-219](#); [Gabriel Canada press release dated 10 May 2012, at Exhibit R-507](#), p. 2; see also [Gabriel Canada MD&A, First Quarter 2012, at Exhibit R-489](#), p. 3; [Gabriel Canada 2011 Annual Report, at Exhibit R-518](#), p. 2.

<sup>570</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 3 (emphasis added); [Gabriel Canada MD&A, Third Quarter 2011 dated 2 November 2011, at Exhibit R-314](#), p. 3.

<sup>571</sup> [REDACTED]

ment or the Ministry of Environment, that the Government or Ministry of Environment was improperly withholding the environmental permit. None of their public statements reflect any sign of coercion with regard to the negotiations with the Ministry of Economy. They do not reflect any concern on the part of RMGC that, unless RMGC consents to modify the royalty rate and State participation rate through Minvest, the Government will not issue the environmental permit for the Project.

#### **3.4.4 The Government's Alleged Failure to Issue the Environmental Permit following RMGC's January 2012 Offer Confirms that the EIA Review Process Was Ongoing and that It Was Separate from the Economic Negotiations**

436 The final nail in the coffin for the Claimants' coercion theory lies in the fact that, although RMGC acceded to the Ministry of Economy's requests (to increase the State's participation rate to 25% and the royalty rate to 6%), the environmental permit was not issued.

437 The Claimants try to argue that the alleged failure to issue the environmental permit was the result of not meeting the Government's economic requests in the negotiations; however, that allegation is ostensibly not true. Messrs. Boc, Ariton, and Găman confirm their understanding that an agreement had been reached in principle long before January 2012.<sup>572</sup>

438 Thus, the Government had no reason to interfere in the environmental permitting of the Project let alone block it. It was seeking to increase the economic benefits of the Project for the Romania, not destroy the benefits it had prior to the negotiations or nullify the additional benefits that it secured after months of negotiations with RMGC. The environmental permit was not issued in January 2012 for one reason: the conditions for its issuance were not met.

439 There was never any link between the economic negotiations between the Ministry of Economy and RMGC and the environmental permitting of the Project, except to the extent that [REDACTED].

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<sup>572</sup> [Gaman II](#), p. 63 (para. 170); [Ariton](#), p. 30 *et seq.* (para. 98); [Boc](#), p. 11 (para. 34).

### 3.5 The Government's Submission and Parliament's Rejection of the Roşia Montană Law to Parliament Does Not Amount to Failure to Provide Fair and Equitable Treatment to the Claimants' Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT

- 440 The FET claim rests in part on the allegation that “the Government jettisoned the lawful administrative environmental permitting process completely in 2013 in favor of a political one” and that the Government “conditioned the Project on Parliament’s adopting a special law that Claimants did not need or request.”<sup>573</sup> The Claimants further contend that the Government “wanted the special law/Parliamentary route for its own political purposes to avoid responsibility for issuing the Environmental Permit ... and allowing the Project to advance.”<sup>574</sup>
- 441 As demonstrated above, Romania never conditioned the issuance of the Project’s regulatory approvals on the Claimants’ agreement to revise the economic terms of the Project. RMGC had simply failed to secure the necessary permits for the Project.
- 442 As a result, during negotiations with the Government (now led by Prime Minister Ponta) in 2013, RMGC repeatedly sought measures that could only be implemented by legislation (**Section 3.5.1**). To facilitate the Project, the Government attempted to implement these requested legislative changes by submitting the Roşia Montană Law to Parliament in August 2013 (**Section 3.5.2**). Far from objecting to this legislative route, the Claimants contemporaneously supported it (**Section 3.5.3**).
- 443 For these reasons, the Claimants’ allegations of a breach of FET as a result of the Government’s submission of the Roşia Montană Law are unavailing. The Claimants’ attempt to draw a parallel with the *Bilcon* case is misguided.<sup>575</sup> In contrast to that case, the Claimants agreed with the measure at issue (here the submission of the Roşia Montană Law to Parliament), which was premised on legislative amendments that they had requested

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<sup>573</sup> [Reply](#), p. 211 (paras. 490-491); see also *id.* at Section IV.B.

<sup>574</sup> *Id.* at p. 97 (para. 184).

<sup>575</sup> *Id.* at p. 212 (para. 495).

and whose purpose was to facilitate the implementation of the Project. Far from breaching FET, Romania went beyond its obligations in its efforts to support the Project.

444 Nor did the submission of the law constitute an impediment to the ongoing administrative approval process. As Mr. Henry recognized prior to the submission of the Roşia Montană Law to Parliament, the Claimants were “encouraged by the recent momentum within the [TAC] review process and look forward to the positive completion of the parliamentary debate on the Project in the near future.”<sup>576</sup>

445 The FET claim further rests on the unusual allegation that Parliament’s review and rejection of the Roşia Montană Law was improper. The Claimants argue that “the leaders of the ruling coalition exercised their political influence and power to ensure Parliament would reject the law” and describe the review process in the following terms:

“Moreover, the Parliamentary review process, which went well beyond consideration of the legislative advisability of the Draft Law presented, consistent with the political reality of the issue actually presented, not only improperly usurped the role of the Government and purported to review the advisability of the Project itself, but set about to delegitimize the decision of the Government to support the Project.”<sup>577</sup>

446 The Claimants’ case on this issue is hard to fathom as it contradicts the other leg of their case, namely that the Roşia Montană Law was imposed on them by the Government. If the Roşia Montană Law was indeed imposed on the Claimants, why should they complain if Parliament rejected it? This is of course because there was no coercion, and the Roşia Montană Law was designed to promote the Project.

447 The Claimants’ case is also fundamentally unfounded.

448 The allegation that “the leaders of the ruling coalition exercised their political influence and power to ensure Parliament would reject the law” is

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<sup>576</sup> [Gabriel Canada press release dated 2 August 2013, at Exhibit R-520](#), p. 2.

<sup>577</sup> [Reply](#), p. 211 (paras. 491-492).

nonsensical. The “leaders” to which the Claimants refer are Senator Crin Antonescu (president of the Senate and leader with Prime Minister Ponta of the ruling coalition) and Prime Minister Ponta. There is no evidence that that they exercised any influence with an aim to secure the rejection of the law. There would have been no purpose to doing so. Mr. Ponta had no personal or political motivation to support the submission of a law to Parliament – and in thus exerting and leading a tremendous effort in creating commissions and negotiating with the Claimants for months – and then, on the Claimants’ case, to sabotage that law. No prime minister wishes to see his own Government-sponsored law rejected. Had Mr. Ponta been against the Project as the Claimants suggest, he would not have submitted the law to Parliament.<sup>578</sup>

449 Furthermore, Mr. Ponta would not have submitted the law to Parliament unless he knew in advance that he had the political support to do so and to see the law through successfully. He thus assured himself that he had the support of his political ally, Mr. Antonescu.<sup>579</sup>

450 In describing the events of late August and early September 2013, the Claimants continue to bury their proverbial head in the sand and mischaracterize the street protests that commenced on 1 September 2013 and that took place for months. Tens of thousands of people from all walks of life protested in Bucharest and around the country against the Project and the Roşia Montană Law. These protests, which are discussed further in **Section 8.2.2.6** below, are important not only because they explain the contemporaneous statements of political leaders, including those leaders who withdrew their support of the law as a result, but also because they provide the background to Parliament’s rejection of the law. The Claimants, however, prefer to take those statements out of context and to minimize the impact of the protests.

451 The Claimants do not dispute that the Government’s submission of the Roşia Montană Law triggered the unprecedented protests that started in

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<sup>578</sup> [Ponta](#), p. 12 *et seq.* (paras. 46 and 55).

<sup>579</sup> *Id.* at p. 14 (paras. 54-55); [Interview with Prime Minister Victor Ponta, Antena3, 11 Sept. 2013, at Exhibit C-437](#), p. 11 (quoting Mr. Antonescu as referring to the support of the Social Democrat Party (“PSD”) for the Project).

September 2013. Contrary to their allegations, however, the Government did not call on Parliament to reject the law, nor was Parliamentary review process unlawful (Sections 3.5.4 and 3.5.5).

### 3.5.1 RMGC Actively Sought the Legislative Changes Included in the Roşia Montană Law

- 452 The Claimants argue that RMGC was not “a willing coventurer and partner that sought a special law in exchange for an increased economic stake for the Government.”<sup>580</sup> They further argue that RMGC “did not need or ask for a special law, and did not want issuance of the Environmental Permit to turn on any action by Parliament.”<sup>581</sup>
- 453 The Claimants’ argument ignores the Project-specific legislative changes that were sought by RMGC and is premised on a contrived distinction between their requested implementation of “long-pending proposed legislation in Parliament to amend and improve the general mining law to facilitate implementation of all mining projects”<sup>582</sup> and the same measures as included in the Roşia Montană Law.
- 454 The Respondent showed in its Counter-Memorial how the Project’s lack of social license manifested itself in the permitting process through incessant litigation and in RMGC’s inability to obtain the requisite surface rights.<sup>583</sup> The litigation contributed to the delays in the administrative permitting process,<sup>584</sup> whereas the inability to secure the surface rights constituted an impediment to the issuance of the water management permits<sup>585</sup> (for the PUZ and for the Project) and would ultimately constitute an impediment to the issuance of the building permit.<sup>586</sup>

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<sup>580</sup> [Reply](#), p. 99 (para. 188).

<sup>581</sup> *Id.* at p. 97 (para. 185); see also [REDACTED].

<sup>582</sup> [Reply](#), p. 97 (para. 185).

<sup>583</sup> [Counter-Memorial](#), p. 54 *et seq.* (Section 3.4).

<sup>584</sup> See *supra* Section 3.3.

<sup>585</sup> See *infra* Section 3.6.1.6.

<sup>586</sup> [Counter-Memorial](#), p. 26 *et seq.* (Section 2.3.5); see also [Counter-Memorial](#), p. 282 *et seq.*

- 455 The cumulative effect of these issues was to bring the Project to an almost complete standstill. While in theory no legislative changes were required for the Project to be implemented (since RMGC could also obtain the necessary surface rights and resolve the Project's zoning issues), RMGC had been unable to secure the surface rights or meet the requirements of the existing permitting process.
- 456 RMGC sought to circumvent these obstacles by requesting legislative changes.<sup>587</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>588</sup> However, as Mr. Găman explains, the Government did not agree to [REDACTED]  
[REDACTED], and its participation in RMGC did not increase and the requested [REDACTED] were not implemented.<sup>589</sup> These [REDACTED]  
[REDACTED] were reiterated in March 2012 in a meeting between Mr. Găman and [REDACTED].<sup>590</sup>
- 457 After the negotiations with the Government resumed in January 2013, a commission charged with negotiating with RMGC picked up where the prior negotiations had left off.<sup>591</sup> During those negotiations, [REDACTED]  
[REDACTED]

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<sup>587</sup> See *supra* para. 398.

<sup>588</sup> See *supra* paras. 398 and 402.

<sup>589</sup> [Gaman I](#), p. 27 *et seq.* (Section 2).

<sup>590</sup> *Id.* at p. 70 (para. 188).

<sup>591</sup> *Id.* at p. 72 (paras. 197-198); see [Counter-Memorial](#), p. 109 (paras. 290-291).



460 A month later, RMGC suggested using a “[s]pecial normative act (law or emergency ordinance) referring to the RM project”<sup>598</sup> as a possible “[m]ethod of implementation of the proposed amendments.”<sup>599</sup> [REDACTED] acknowledges this in [REDACTED], although [REDACTED] misleadingly suggests that RMGC had made clear that amendments to the existing Mining Law was its “preferred approach.”<sup>600</sup> RMGC did not express any such preference at the time. Indeed, upon submission of the Roşia Montană Law to Parliament, Mr. Henry publicly stated that Gabriel Canada was “extremely encouraged” by the “Romanian Government’s decision to approve **a law specific to the Roşia Montană Project.**”<sup>601</sup> As discussed below in **Section 3.5.3**, the Claimants supported the Roşia Montană Law.

461 Contrary to the Claimants’ suggestion,<sup>602</sup> the contemporaneous evidence shows that [REDACTED] upon which the Roşia Montană Law was hoisted, but [REDACTED]

[REDACTED]

[REDACTED]

598 [REDACTED]

599 [REDACTED]

600 [REDACTED]

601 [Gabriel Canada press release dated 28 March 2013, at Exhibit C-1436](#) (emphasis added); see also [“Romania gold project at Roşia Montană back on track”, BBC, 28 Aug. 2013, at Exhibit R-523.](#)

602 [Reply](#), p. 98 *et seq.* (paras. 186-187); [REDACTED]

[REDACTED]

462 The Claimants attempt to downplay their eagerness for the legislative changes by arguing that they merely “supported long-pending proposed legislation in Parliament to amend and improve the general mining law to facilitate implementation of all mining projects.”<sup>605</sup> However, the terms of Gabriel’s [REDACTED]  
[REDACTED]  
[REDACTED]:

[REDACTED]

463 Indeed, many of the legislative measures requested by RMGC/Gabriel would be of no benefit to “general mining law” or “facilitate the implementation of all mining projects,” as they were specific to the Project. These include:

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603 [REDACTED]  
[REDACTED]  
[REDACTED] [Comments provided on 23 July 2013](#)  
[by RMGC on the draft Roşia Montană Law, at Exhibit R-528.](#)

604 [Reply](#), p. 98 (para. 186).

605 *Id.* at p. 97 (para. 185).

606 [REDACTED]  
[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

464 [REDACTED]

[REDACTED]

465 RMGC requested the following categories of systemic changes:

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607 [REDACTED]

608 [REDACTED]

609 [REDACTED]

610 [REDACTED]

611 [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

466 By proposing these legislative changes, RMGC sought to resurrect (and supplement) the changes proposed by draft law PLX 549/2009,<sup>616</sup> whose “legislative process ... had stagnated.”<sup>617</sup>

467 As discussed below, many of these requests were accepted by the Government and incorporated into the draft Roșia Montană Law.

### **3.5.2 By Introducing the Roșia Montană Law, the Government Was Implementing the Legislative Amendments that the Claimants Had Requested**

468 The Claimants allege that “the Government wanted the special law/Parliamentary route for its own political purposes to avoid responsibility for issuing the Environmental Permit ... and allowing the Project to advance.”<sup>618</sup> In fact, the Government introduced the Roșia Montană Law to implement the legislative amendments requested by RMGC as consideration for their agreement to amend the financial terms of Romania’s participation in the Project. Beginning in March 2013, the Government’s internal correspondence leaves no doubt that the primary purpose of the Roșia

[REDACTED]

<sup>617</sup> [Mihai LO II](#), p. 111 (para. 366, n. 455); see also [Summary of the legislative process for draft law for amending the Mining Law - PLX 549/2009, at Exhibit C-2344](#).

<sup>618</sup> [Reply](#), p. 97 (para. 184).

Montană Law was “the expedited implementation of the Roşia Montană mining project.”<sup>619</sup>

469 In the days before the draft Roşia Montană Law, the Government listed the legislative amendments necessary for the Project, thereby demonstrating that the primary purpose of the law was to facilitate the Project, as reflected in both the title of the document and the statement that ‘

[REDACTED]

470

[REDACTED]

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<sup>619</sup> [Note from Minister Delegate Şova dated 6 March 2013, at Exhibit C-1903](#), p. 38.

[REDACTED]

[REDACTED]

471

[REDACTED]

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[REDACTED]

473

The intent of the Government was somewhat veiled in the Explanatory Memorandum that it drafted for the Roşia Montană Law,<sup>627</sup> which was mirrored in the Exposition of Reasons submitted to Parliament the next day.<sup>628</sup> In an effort to “sell” the law to Parliament, the Government included language to increase the attractiveness of the Romanian business environment

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[REDACTED]

624 *Id.*

[REDACTED]

626 See e.g.,

[REDACTED]; [Letter from Ministry of Agriculture to Department for Infrastructure Projects with comments on draft Roşia Montană Law dated 6 August 2013, at Exhibit R-531.](#)

627 [Explanatory Memorandum to the Roşia Montană Law dated 26 August 2013, at Exhibit R-532.](#)

628 [Government Exposition of Reasons dated 27 August 2013, at Exhibit C-817 \(resubmitted\).](#)

through the adoption of legislative measures,<sup>629</sup> but still made clear that a primary purpose of the law was to facilitate the Project:

“This draft law also concerns the adoption of provisions on the conditions for the implementation of the Mining Project. The need for special regulation of the Mining Project derives from the fact that previous experiences and signals from the business environment show that the process of authorizing such a project is extremely long and difficult because of an excess of regulation that generates a bureaucratic normative framework, often incoherent and uncorrelated to the needs of business development.

The current legislative framework does not take into account the specificity of the largescale projects of the Mining Project, which involves complex works that are being performed and phased in over many years.”<sup>630</sup>

- 474 To place these statements into context, at the time no other mining projects in the permitting phase in Romania would have been in a position to benefit from the Roşia Montană Law.<sup>631</sup> Much like in 2011, RMGC was the only company in Romania that was simultaneously affected by local opposition to the sale of land necessary for the project and by challenges to the validity of urban planning documents.<sup>632</sup> It was also the only company that would benefit from tax deductions relating to expenses in relation to cultural heritage and social relations with the local community.<sup>633</sup>
- 475 Notwithstanding the legislative amendments tailored to the Project, and the Government’s stated intent to facilitate the implementation of the Pro-

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<sup>629</sup> [Explanatory Memorandum to the Roşia Montană Law dated 26 August 2013, at Exhibit R-532](#), p. 1; [Government Exposition of Reasons, at Exhibit C-817](#), p. 1. The Government sought to minimize the perception that the Roşia Montană Law was providing RMGC and Gabriel with preferential treatment (which was an evident effect of the draft law) by introducing language that was more general in its applicability.

<sup>630</sup> [Explanatory Memorandum to the Roşia Montană Law dated 26 August 2013, at Exhibit R-532](#), p. 2.

<sup>631</sup> [Gaman II](#), p. 44 (para. 118).

<sup>632</sup> *Id.* at p. 44 (para. 117).

<sup>633</sup> *Id.* at p. 44 (para. 119).

ject, Prof. Mihai disagrees “with Respondent’s repeated argument that the Draft Law was both necessary and a proposed special privilege for the Project.”<sup>634</sup> Prof. Mihai is wrong for two reasons.

- 476 First, contrary to Prof. Mihai’s claims, the Respondent has not argued that the Roşia Montană Law was necessary for the implementation of the Project. Rather, the paragraphs cited by Prof. Mihai for this allegation establish that the Roşia Montană Law “sought to facilitate and accelerate the development of the Project,”<sup>635</sup> that “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,”<sup>636</sup> and that “the Roşia Montană Law was effectively an attempt to obtain, with the help of the State, the social license that [RMGC] had failed to secure itself.”<sup>637</sup>
- 477 Second, it is evident that the Roşia Montană Law provided “special privilege for the Project.” Prof. Mihai dismisses the Project-specific articles as “either merely restated rights or obligations already existing in law in relation to the Project or granted enhanced benefits for the State,”<sup>638</sup> whereas he claims that generally applicable provisions were “legislative proposals that had been presented by the Government both prior to and following the

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<sup>634</sup> [Mihai LO II](#), p. 147 (para. 496) (citing [Counter-Memorial](#), p. 5 *et seq.* (paras. 18, 528-529, 575, and 610)); see also [Mihai LO II](#), p. 106 (para. 351) (“Finally, although not necessary for the Company in order to implement the Project, I do not agree with Respondent’s contention that the Draft Law granted the Company preferential or privileged treatment (even if members of the public may have perceived it as such and questioned or disapproved of the Government’s doing so), or that it risked being declared unconstitutional or being found to be in breach of EU law on State aid.”).

<sup>635</sup> [Counter-Memorial](#), p. 5 (para. 18); see also *id.* at p. 231 *et seq.* (para. 610) (“RMGC stood to 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.”).

<sup>636</sup> [Counter-Memorial](#), p. 203 (para. 528).

<sup>637</sup> *Id.* at p. 220 (para. 575).

<sup>638</sup> [Mihai LO II](#), p. 132 (para. 436).

proposed [Roşia Montană Law].”<sup>639</sup> For the following reasons, Prof. Mihai is mistaken.

478 Prof. Mihai determines whether “special privilege for the Project” was being provided based on his analysis of whether the Project-specific articles of the Roşia Montană Law “were required for the Project’s implementation.”<sup>640</sup> However, whether those articles were necessary for the Project is not dispositive of whether or not the Project was being provided “special privilege.” The existence of “special privilege” is rather determined by whether the provisions of the Roşia Montană Law extended a benefit to the Project that would not be available to others in the industry. This is exactly what happened with the Roşia Montană Law.

479 The most obvious example of this “special privilege” is found in Article 3 of the Roşia Montană Law, which declared the Project to be of public utility and of outstanding national public interest.<sup>641</sup> In contrast to the amendments to the law proposed by Draft Law 549/2009,<sup>642</sup> the Roşia Montană Law **did not** declare all mining projects to be works of public utility. This means that prior to benefiting from many of the amendments proposed by the Roşia Montană Law,<sup>643</sup> license holders would have to

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<sup>639</sup> *Id.* at p. 147 (para. 496).

<sup>640</sup> See *e.g. id.* at p. 135 (para. 446).

<sup>641</sup> [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 1 (Art. 3).

<sup>642</sup> [Draft law for the amendment and supplication of the Mining law no. 85/2003 adopted by the Senate on 27 October 2009, at Exhibit C-2419](#), p. 2 (Art. I.3) (“After article 10, sixteen new articles shall be introduced, namely art. 10<sup>1</sup>-10<sup>16</sup>, having the following content. Art. 10<sup>1</sup>. – By way of derogation from the provisions of art. 6 of Law no. 33/1994 on the expropriation for public utility cause, the legal framework regulating the measures for the provision of the lands necessary to the performance of mining activities for the exploitation of useful minerals is that provided by art. 102-1017. Art. 10<sup>2</sup>. – The mining works for the exploitation of useful minerals, that are performed based on a mining license are declared as works of public utility.”).

<sup>643</sup> See *e.g.* [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 7 (Art. 5.II.2) (“At article 20, a new paragraph (21) shall be introduced after paragraph (2) and shall read as follows: ‘(21) For mining projects declared of outstanding national public interest, the mining license may be extended for consecutive periods of time of up to 20 years each.’”); p. 8 (Art. 5.II.4) (“After Art. 42, two new articles, Art. 42 1 - 422, shall be introduced and shall read as follows: ‘Art. 421 - (1) In case of mining projects declared of outstanding national public interest, the endorsements, agreements and construction permits issued for the mining operations which are to be implemented and/or commissioned in phases shall remain valid until all works for which they were issued have been completed.’”).

complete the administrative procedure mandated by Law No. 33/1994<sup>644</sup> and GD 583/1994,<sup>645</sup> by applying to a commission for projects for a preliminary recommendation determining that their project is of public utility.<sup>646</sup>

480 The declaration that the Project was of public utility therefore dispensed RMGC from this procedure and allowed the Project to directly benefit from the provisions of the Roșia Montană Law extending benefits to those types of projects, including “from the provisions of the special Expropriation Law 255/2010 which provides for expedited expropriation procedures for a variety of major projects.”<sup>647</sup>

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<sup>644</sup> [Law 33/1994 on expropriation, at Exhibit C-1628 \(resubmitted\)](#), p. 3 (Arts. 8-10) (“Article 8 – The public utility is declared only after the carrying out of a preliminary research, and subject to the inclusion of the work in the urbanism and land management plans approved according to the law, for localities or areas where such is intended to be carried out. Article 9 – ... (4) The work procedure of the commissions for performing the preliminary research is established by Government approved regulation. Article 10 – (1) Preliminary research will determine whether there are elements to justify the national or local interest, the economic and social or ecological benefits or of any other kind, supporting the necessity of works that cannot be achieved by other means than by expropriation, as well as the inclusion in the urbanism and land management plans, approved in accordance with the law.”).

<sup>645</sup> [GD 583/1994 with Regulation on the procedure of commissions for public utility declarations dated 31 August 1994, at Exhibit R-123](#).

<sup>646</sup> Should this commission determine that the Project is of public utility this recommendation would then need to be approved by the competent public authorities. [Counter-Memorial](#), p. 262 *et seq.* (Section 10.2.2). As discussed further in Section 8.3, and explained by Profs. Sferdian and Bojin, the administrative assessment is not “a mere formality” as erroneously alleged by Prof. Bîrsan, but consists rather of an assessment of “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” culminating in “the decision to propose that the work should be declared **or not** of public utility.” [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).

<sup>647</sup> [Mihai LO II](#), p. 133 (para. 440). Prof. Mihai tries to minimize this special benefit extended to the Project by erroneously arguing that “the changes proposed in the Draft Law would have enabled all large mining projects, not only the Company’s Project, to have benefitted from the provisions of the special Expropriation Law 255/2010.” In fact, it is only “[i]n the case of **mining projects of public utility and outstanding national public interest**” that “the expropriation of immovable assets which are necessary for the development of these projects shall be performed in compliance with Law no. 255/2010 on the expropriation for public utility cause.” [Roșia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 5 (Art. 5.II.1) (emphasis added). As explained above, large mining projects that do not obtain declarations of

481 Prof. Mihai concludes correctly (albeit for erroneous reasons) that Article 3 of the Roşia Montană Law was not required for the Project.<sup>648</sup> Indeed, RMGC could, at least in theory, have completed the administrative procedure required for obtaining a declaration of public utility.<sup>649</sup> However, by virtue of Article 3, RMGC was dispensed from this administrative assessment, which, by itself, is sufficient to constitute “special privilege.”

482 [REDACTED]

483 [REDACTED] This purpose becomes apparent when comparing Draft Law 549/2009 to the Roşia Montană Law.

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public utility outstanding national public interest would not benefit from the provisions of Law 255/2010. Prof. Mihai also tries to banalize this special benefit by observing that “it is not uncommon in Romania for large projects to be declared of public utility for expropriation purposes”, since “[t]he Romanian Parliament has passed multiple laws declaring various works as being of public utility to facilitate submission to expedited expropriation procedures.” [Mihai LO II](#), p. 134 (para. 441). This argument is a *non-sequitur*: the fact that special privilege may have been extended to other projects does not mean that special privilege is not being granted to the Project.

<sup>648</sup> [Mihai LO II](#), p. 147 (para. 496).

<sup>649</sup> Although the Government in 2013 was proposing to declare the Project to be of public utility, this proposal does not render the decision of the preliminary investigation commission tasked with examining the public utility of the Project a foregone conclusion. [Sferdian and Bojin LO](#), p. 41 *et seq.* (Section IV.1.6).

484 For example, the new Articles 10<sup>4</sup> and 10<sup>5</sup> proposed by Article I.3 of Draft Law 549/2009 required the license titleholder “to draft the technical and economic documentation for the mining works” which would then serve as the basis for commencement of the expropriation procedure and the amount of compensation to be awarded.<sup>650</sup>

485 In contrast, in the Roşia Montană Law the applicability of such a condition was explicitly removed, at the Claimants’ request:

“The application of expropriation procedures in the case of immovable assets included in the mining projects perimeter ... shall be conducted **without the need to secure approval of the technical-economic indicators of the respective mining projects.**”<sup>651</sup>

486 Likewise, [REDACTED], the Roşia Montană Law included a provision requiring the Government to approve the launch of an expropriation procedure for immovable assets within 30 days since the date of the request by the titleholder of a mining license.<sup>652</sup> Such a deadline did not exist in Draft Law 549/2009 and was designed to streamline existing expropriation procedures.<sup>653</sup>

487 In fact, the Roşia Montană Law incorporated [REDACTED]. For example, the Roşia Montană Law included a provision which provided in relevant part that:

“the costs related to the sustainable development consisting of research, conservation, restoration, museum development and tourist development projects for cultural heritage items, the development and

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<sup>650</sup> [Draft law for the amendment and supplication of the Mining law no. 85/2003 adopted by the Senate on 27 October 2009, at Exhibit C-2419](#), p. 2 (Articles 10<sup>4</sup> and 10<sup>5</sup>).

<sup>651</sup> [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 6 (Art. 5.II.1) (emphasis added); see also [RMGC and the Ministry of Regional Development and Public Administration meeting minutes dated 23 July 2013, at Exhibit R-527](#), p. 7 (Art. 5.III).

<sup>652</sup> [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 6 (Art. 5. II.1); see also [RMGC and the Ministry of Regional Development and Public Administration meeting minutes dated 23 July 2013, at Exhibit R-527](#)), p. 7 *et seq.* (Art. 5.III).

<sup>653</sup> [Draft law for the amendment and supplication of the Mining law no. 85/2003 adopted by the Senate on 27 October 2009, at Exhibit C-2419](#), p. 2 (Article 10<sup>5</sup>(1)).

rehabilitation of local infrastructure, and the contributions/investments on cultural heritage, local infrastructure, schools, hospitals, local social costs, including sponsorships and donations for the same purpose, shall be considered expenses made in order to achieve taxable income.”<sup>654</sup>

488 Given the nature of the Project, this provision would obviously financially benefit RMGC, [REDACTED]. There are multiple other examples, all of which were introduced in the Roşia Montană Law at the Claimants' request.<sup>656</sup>

489 Disregarding these facts, Prof. Mihai concludes, based on the Exposition of Reasons accompanying the Roşia Montană Law and various public statements of public officials, that “the main beneficiary of the Draft Law and its Agreement was the Romanian State, not [RMGC] as the Respondent contends.”<sup>657</sup>

490 As a preliminary matter, whether Romania would have derived a benefit from the adoption of the Roşia Montană Law is not mutually exclusive with special privilege being extended to RMGC and the Project. Indeed, the Exposition of Reasons explicitly notes the “necessity and the interest in creating a specific legal framework to the Roşia Montană Mining

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<sup>654</sup> [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 5 (Art. 5.I).

[REDACTED]

<sup>656</sup> For example, the Roşia Montană Law includes a provision stating that “In order to perform mining activities of public utility and outstanding national public interest, the licensee of the mining license has the right to use and change the purpose of [places of worship, monuments, ensembles and historic sites, cemeteries, other establishments of outstanding national value or urban or rural localities as a whole], located in the perimeter of the respective mining projects, provided that immovable assets with a similar purpose are developed in other sites, on its expense, in full compliance with the approved urbanism documentations.” [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 7 (Art. 5.II.1); see also [RMGC and the Ministry of Regional Development and Public Administration meeting minutes dated 23 July 2013, at Exhibit R-527](#), p. 9 *et seq.* (Art. 5.III).

<sup>657</sup> [Mihai LO II](#), p. 104 *et seq.* (para. 344).

Project”<sup>658</sup> and repeatedly mentions the proposal for “special regulation for the Mining Project.”<sup>659</sup>

491 Moreover, the language in the Exposition of Reasons and the public statements to which Prof. Mihai points<sup>660</sup> were nothing more than efforts to “sell” the Roşia Montană Law to Parliament. In his Declaration, former Prime Minister Ponta confirms that the “Roşia Montană Law envisaged the amendment of several laws and other measures, which were designed to facilitate the Project’s implementation.”<sup>661</sup> He explains that “unlike my predecessors, I was prepared to try to change certain laws to promote the Project,” and that while “we could not promise to Gabriel/RMGC that the Parliament would act or vote a certain way, I was prepared to try to help and to make a proposal to Parliament.”<sup>662</sup>

492 The manner in which the Roşia Montană Law was drafted also undermines Prof. Mihai’s conclusion. As explained above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Had the Roşia Montană Law truly “reflected the Government’s policy proposals for the mining sector” as Prof. Mihai contends,<sup>663</sup> [REDACTED]

493 In fact, the Government’s policy proposals for the mining sector had already been submitted in another draft law, just a few weeks prior to the

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<sup>658</sup> [Government Exposition of Reasons dated 27 August 2013, at Exhibit C-817 \(resubmitted\)](#), p. 3.

<sup>659</sup> *Id.* at p. 2 *et seq.* (“The need for a special regulation for the Mining Project derives from the fact that previous experiences, as well as signals received from the business environment show that the process of authorizing such a project is extremely long and cumbersome because of an over-regulation which creates a bureaucratic legal framework, often incoherent and not aligned with business development needs.”); *id.* at p. 3 (“The main inadequacies in the current legislative framework, which impose the necessity of adopting a special regulation that is adapted to the specifics of the Mining Project, particularly relate to the following aspects”);

<sup>660</sup> [Mihai LO II](#), p. 104 *et seq.* (paras. 344-345).

<sup>661</sup> [Ponta](#), p. 11 (para. 41).

<sup>662</sup> *Id.* at p. 12 (para. 45).

<sup>663</sup> [Mihai LO II](#), p. 130 *et seq.* (VII.C.1).

submission of the Roşia Montană Law to Parliament. As Mr. Găman explains in his second witness statement,<sup>664</sup> in June 2013 the Government submitted to Parliament a draft law necessary for the modernization of the mining sector in Romania.<sup>665</sup> Mr. Găman explains that:

“Unlike the Roşia Montană Law, the June 2013 proposal to amend the Mining Law was not addressing issues relating to facilitation of permitting, expropriation, protection of culture or fiscal terms of development of any mining project. The substantive aspects addressed by the June 2013 proposal to amend the Mining Law did not overlap with those addressed by the Roşia Montană Law. The June 2013 proposal to amend the Mining Law entailed an extensive overhaul of the existing framework, addressing issues such as the procedure for awarding new mining concessions through a competitive and transparent system, environmental guarantees and environmental rehabilitation, all in line with European Union law.”<sup>666</sup>

- 494 Regarding the difference between the Government’s June 2013 draft law and the Roşia Montană Law, Mr. Găman is unequivocal, confirming that “the first was a draft law necessary for the modernization of the mining sector in Romania (on which I was involved as a representative of the Ministry of Economy), while the latter was a draft law containing the legal changes that Gabriel wanted to see implemented specifically to facilitate the permitting and implementation of the Project.”<sup>667</sup>
- 495 For all of these reasons, it is clear that the purpose of the Roşia Montană Law was to implement the legislative changes requested by RMGC.

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<sup>664</sup> [Gaman II](#), p. 75 *et seq.* (Section 4).

<sup>665</sup> [Summary of the legislative process for draft law for amending the Mining Law - PLX 573/2013, at Exhibit C-2459; PL-x nr. 573/2013, Legislative proposal for supplementing 2003 Mining Law dated 26 June 2013, at Exhibit R-417.](#)

<sup>666</sup> [Gaman II](#), p. 77 (para. 209).

<sup>667</sup> *Id.* at p. 76 (para. 206).

### 3.5.3 The Claimants Supported the Roşia Montană Law and Never Contemporaneously Objected to Its Introduction

496 Attempting to explain away the Claimants' contemporaneous support for the Roşia Montană Law, [REDACTED]

497 [REDACTED] argument disregards RMGC's past willingness to sue the Government when RMGC considered that that its rights were being violated. Indeed, in November 2007 RMGC commenced legal action against the Ministry of Environment in an attempt to compel it to resume the EIA Review Process.<sup>669</sup> Similarly, in 2009 RMGC obtained a judicial order compelling the Ministry of Environment to issue two dam safety permits.<sup>670</sup> This prior litigation, and the absence of any Government attempt to "kill the Project" in retaliation, exposes [REDACTED] alleged concerns as a thin justification for the Claimants' decision to willingly move forward with the Roşia Montană Law.

498 [REDACTED]

499 However, [REDACTED] fails to provide any evidence of a contemporaneous objection to the submission of the Roşia Montană Law to Parliament.<sup>672</sup> In

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[REDACTED]  
<sup>669</sup> See [Gabriel Canada 2013 Annual Information Form, at Exhibit C-1811](#), p. 32. In January 2013 RMGC supported a motion for lack interest on the basis that the TAC process had reconvened in 2010, and the matter was accordingly discontinued.

<sup>670</sup> [Bucharest Court of Appeal decision dated 3 February 2009, at Exhibit C-951](#), p. 4 (ordering the Ministry of Environment to issue the safety permits); [REDACTED]  
[REDACTED] See [Dam Safety Permit No. 27 dated 29 June 2010, at Exhibit C-955](#); [Dam Safety Permit No. 28 dated 29 June 2010, at Exhibit C-954](#).

[REDACTED]  
<sup>672</sup> The evidence provided by [REDACTED] for this claim does not pertain to the submission of the Roşia Montană Law to Parliament (*i.e.* the so-called "parliamentary route") but rather to

fact, RMGC did not contemporaneously object or raise any alleged violations of its rights stemming from the submission of the Roşia Montană Law to Parliament, and instead fully cooperated with the Government in its drafting and submission.<sup>673</sup> It did so because there was no violation of its rights, and because it determined that the law provided the best opportunity for expediting the implementation of the Project.

500 Gabriel Canada's regulatory filings for the first half of 2013, which were certified by its CFO as not "omit[ting] to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings,"<sup>674</sup> do not mention any coercion, or any violation of Gabriel Canada's rights as a result of the submission of the Roşia Montană Law to Parliament.<sup>675</sup> [REDACTED]

[REDACTED] The absence of any such contemporaneous disclosure therefore conclusively discredits the Claimants' opportunistic arguments.

501 Far from disclosing any violation or duress, Gabriel Canada's Second Quarter filing for 2013, after noting that "Mr. Ponta has also recently been quoted as stating that any Government decision to proceed with the Project would be subject to a Romanian Parliament vote, and that a new law relating to the Project will be drafted for debate in the Parliament in September 2013," stated that Gabriel Canada looked forward "to a

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RMGC's concern regarding the Project-specific nature of draft law, as expressed during a single meeting with the Negotiation Commission. See [REDACTED]

[REDACTED] As discussed above in Section 3.5.1, RMGC also expressed support for a special law during this same meeting, and subsequently acknowledged a special law as a possible method for implementing the legislative amendments that it had requested.

<sup>673</sup> [Ponta](#), p. 9 *et seq.* (paras. 34-45) (describing arms-length negotiations with RMGC).

<sup>674</sup> [Gabriel Canada certification of interim filings dated 15 May 2013, at Exhibit R-533; Gabriel Canada certification of interim filings dated 2 August 2013, at Exhibit R-534.](#)

<sup>675</sup> [Gabriel Canada MD&A, First Quarter 2013, at Exhibit R-504; Gabriel Canada MD&A, Second Quarter 2013, at Exhibit R-251.](#)

successful process through Parliament of the Project specific legislation noted by Mr. Ponta.”<sup>676</sup>

502 Gabriel Canada’s other contemporaneous public statements also indicated its unqualified support for the law. As the Respondent showed in its Counter-Memorial, Gabriel Canada publicly stated at the time that it looked “forward to the Romanian Parliament’s review of the ... Project.”<sup>677</sup>

503 Moreover, RMGC acknowledged the possibility of [REDACTED] [REDACTED] with respect to the Government Decision that it requested to approve the environmental permit.<sup>678</sup> Similarly, none of the contemporaneous public statements from RMGC or Gabriel Canada ever expressed objections over the Roşia Montană Law, but instead voiced steadfast support. During the negotiations, RMGC stated to the press that it was “particularly encouraged” and that it “hopes for a conclusion of the negotiations before long, including issues such as environmental guarantees, an extension of the mining license and other long-term legal and tax provisions that the company would like to see adopted.”<sup>679</sup>

504 Nor did the Claimants’ ever complain of any violation of their rights or duress during their meetings with the Government. Quite the opposite, meetings between the Government and RMGC on the subject occurred in a cordial environment.<sup>680</sup>

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<sup>676</sup> [Gabriel Canada MD&A, Second Quarter 2013](#), at [Exhibit R-251](#), p. 2 *et seq.*

<sup>677</sup> [Counter-Memorial](#), p. 204 (para. 529) (citing [Gabriel Canada press release dated 5 September 2013](#), at [Exhibit R-256](#) (emphasis in original)).

<sup>678</sup> [REDACTED]

<sup>679</sup> [M. Oncu, “Government Negotiates Share Increase in Roşia Montană and a Royalty Increase”, \*Mediafax\*, 12 Jul. 2013](#), at [Exhibit R-415](#), p. 2.

<sup>680</sup> [Gaman II](#), p. 74 (para. 201).

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[REDACTED]

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In view of the Claimants' public statements and disclosures, the truth becomes clear: the Claimants saw the Roşia Montană Law as a legislative shortcut that could move the Project past its administrative and social license hurdles. Having willingly participated in that process, the Claimants now raise alleged breaches that they did not voice contemporaneously and seek to obtain through arbitration the economic benefits from the Project that in all likelihood would not have materialized without the enactment of the Roşia Montană Law. In view of RMGC's involvement in the drafting of the law and its willing cooperation with the submission of the law to Parliament, there is no conceivable breach of FET that results from the submission of the law to Parliament.

#### **3.5.4 The Government Did Not Call on Parliament to Reject the Roşia Montană Law**

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The Claimants paint Mr. Ponta's statements on 9 September 2013 as a "call" to Parliament to reject the Roşia Montană Law: "I want to make sure that the President of the Senate, Mr. Antonescu, will quickly include the draft law on the agenda of the Senate and this will be rejected, as it will at the Chamber, and thus this project is closed."<sup>682</sup>

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However, none of Mr. Ponta's comments that day amounted to a call on Parliament to reject the law. Rather, they resounded of defeat in the face of the street protests taking place at the same time and resulting loss of political support. Mr. Ponta first asked that the law be "quickly" included

[REDACTED]

<sup>682</sup> [Interview of Prime Minister Victor Ponta, B1TV, at Exhibit C-872](#), p. 1; see also [Reply](#), p. 107 (para. 211) (referring to [Statements by Prime Minister Ponta, 9 Sep. 2013, at Exhibit C-793](#)).

on the agenda of the Senate and, second, expressed his view that the law was likely to be rejected. He was understandably skeptical that, despite his efforts, the law would be accepted given the magnitude of the street protests taking place since 1 September and Mr. Antonescu's announcement that same day that he would vote against the law.<sup>683</sup> Mr. Ponta was realizing that Parliament could not and would not go against the will of the streets.<sup>684</sup>

509 On 9 September, Mr. Antonescu declared that "the project should either be withdrawn, which is probably not the case since the government decided to send it, or I think it should be rejected."<sup>685</sup> Significantly, he made clear that he was expressing "a personal point of view," and that "he did not speak as president of the party, or as president of the Senate or as 'probable presidential candidate.'"<sup>686</sup> He explained that he planned to vote against the law "not for technical reasons," "but because there are major consequences and realities that prevent implementing this project at this time," in circumstances where "the project produces a significant schism within the Romanian society."<sup>687</sup> He further declared:

"[W]e do not legislate depending on the street protests, obviously a government must not make decisions based on one protest or another, but there are protests and there are protests, there are public signals that have a weight that cannot be ignored. One cannot govern according to the street, but one cannot govern ignoring the street either."<sup>688</sup>

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<sup>683</sup> [Counter-Memorial](#), p. 130 (paras. 343-344) (describing protests on 1 and 9 Sept.); [Ponta](#), p. 15 (paras. 56-58).

<sup>684</sup> [Ponta](#), p. 22, para. 78; see also *id.* at p. 20 (para. 68); [Counter-Memorial](#), p. 131 (para. 346).

<sup>685</sup> See [Reply](#), p. 106 (para. 210).

<sup>686</sup> [Article regarding Crin Antonescu statements, 9 Sept. 2013, at Exhibit C-832](#), p. 1.

<sup>687</sup> *Id.*

<sup>688</sup> *Id.* at p. 2; see also [Interview of Prime Minister Victor Ponta, B1TV, at Exhibit C-872](#), p. 1 ("Reporter: Did the protests in the country have any role in the decision made by president Crin Antonescu, by you after all? Victor Ponta: Of course, the protests are very important"); [Ponta](#), p. 16 *et seq.* (paras. 58 and 63).

- 510 The Claimants' argument that, via these statements, Mr. Antonescu "called on Parliament to reject the law" does not have legs to stand on.<sup>689</sup>
- 511 The Claimants point to statements by Prime Minister Ponta on 12 September that "as a result of the law being rejected, the project will not be implemented."<sup>690</sup> Mr. Ponta was, however, taking act of, first, RMGC's need for the law to facilitate the permitting of the Project and to circumvent the litigation that had delayed and jeopardized the Project; second, the social opposition, which signaled that Parliament would reject the law;<sup>691</sup> and third, the infeasibility of the Project – in the absence of the necessary social support or of a law that could circumvent the effects of that lack of social support.<sup>692</sup>
- 512 As evidence of their theory that Mr. Ponta sought to sabotage the law, the Claimants continue to point to his statement on 31 August 2013 – following the Government's submission of the law to Parliament and preceding the first major street protest that took place on 1 September 2013 – that he would vote against the law.<sup>693</sup> However, Mr. Ponta distinguished between his role as Prime Minister to lead the effort to submit the law to Parliament and his personal decision to abstain or vote against.<sup>694</sup> These statements were not a call to arms or any sort of instruction to his party or Parliament; on the contrary, Mr. Ponta made clear that everyone "will vote

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<sup>689</sup> [Reply](#), p. 106 (para. 209); see also [Counter-Memorial](#), p. 131 (para. 345).

<sup>690</sup> [Reply](#), p. 105 (para. 207); [Press conference with Victor Ponta and Dan Șova, Antena3, 12 Sep. 2013, at Exhibit C-643](#), p. 1.

<sup>691</sup> In an interview the previous day, the reporter commented that he had "not seen such social tension for a long time." He added that the fact that the "Government takes this draft law, submits it to the Parliament to be voted, negotiates it, increases the state participation, but submits it to the Parliament... meant for many people... that the Victor Ponta Government, the Social Liberal Union (USL) Government, supports this project." [Interview with Prime Minister Victor Ponta, Antena3, 11 Sept. 2013, at Exhibit C-437](#), p. 1.

<sup>692</sup> [Ponta](#), p. 23 (paras. 79-81).

<sup>693</sup> [Reply](#), p. 104 (para. 204).

<sup>694</sup> [Ponta](#), p. 13 *et seq.* (paras. 49-52); [Counter-Memorial](#), p. 129 (para. 341).

according to his own conscience, as everyone thinks is best for his constituents.”<sup>695</sup>

- 513 Mr. Ponta's statements were not critical of RMGC or the Project; he did not specify the reasons for his decision. As in *UAB v. Latvia*, these statements do not amount to compelling proof that Mr. Ponta was trying to harm the Claimants or their investments.<sup>696</sup>

### 3.5.5 Parliament's Review and Rejection of the Roșia Montană Law Complied with Romanian law

- 514 The Claimants case is patently contradictory in terms of the Government's alleged actions *vis-à-vis* Parliament during its review of the law. On the one hand, the Claimants allege that Prime Minister Ponta called on Parliament to reject the law and that Parliament followed suit. On the other hand, they suggest that the Government and other senior officials supported the Project and the law<sup>697</sup> and then criticize Parliament for going against the Government. The Claimants thus apparently seek to distinguish between Prime Minister Ponta (arguing that he was against the law) and his Government (suggesting that they supported the law).

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<sup>695</sup> [Article entitled "Ponta: 'I will vote against Roșia Montană project'."](#) *Adevarul ro*, 31 Aug. 2013, at [Exhibit C-789](#); [Ponta](#), p. 16 (para. 59); [Interview with Prime Minister Victor Ponta, Antena3](#), 11 Sept. 2013, at [Exhibit C-437](#), p. 12 (where Mr. Ponta stated “first we debate [in Parliament], we present all these figures, then we make a decision.”); [Interview of Victor Ponta, BI TV](#), 15 Sep. 2013, at [Exhibit C-1483](#) (“I want this debate to be held in the Parliament and via a public debate and people to decide by themselves how to vote, not because B&scescu is in favor or against it, or because Ponta is in favor or against it, but simply based on what each MP believes is good for Romania in the years to come.”); see also [Interview with Prime Minister Victor Ponta, Antena3](#), 5 Oct. 2013, at [Exhibit C-1504](#), p. 5 (suggesting hope that parliamentary commission reviews the law favorably and that the project move forward); [Counter-Memorial](#), p. 132 (para. 347).

<sup>696</sup> See *supra* para. 359; [UAB v. Latvia, Award, 22 December 2017](#), at [Exhibit CLA-252](#), p. 276 *et seq.* (paras. 941-946).

<sup>697</sup> [Reply](#), p. 105 (paras. 207-208) (referring to “the uniformly positive testimony before the Senate Committee for Public Administration and Land Management on September 10 from the Ministers of Environment and Culture and the President of NAMR” and from “ministers and senior Government officials ... highlighting the Project's manifold benefits for environmental clean-up, cultural preservation, and economic growth”); see also *id.* at paras. 202 and 212.

- 515 In reality, both Prime Minister Ponta and his Government supported the law until the massive protests made it clear that the law was not the right way to promote the Project.<sup>698</sup>
- 516 The Claimants suggest that the Prime Minister instructed the Joint Special Committee, a bicameral, *ad hoc* parliamentary commission entrusted with reviewing the law, to vote against it. They refer to a press conference given by Messrs. Ponta and Antonescu on 11 November 2013 on behalf of the USL (the ruling coalition), arguing that the “USL members of the [Joint Special Committee]... had been instructed to vote against the Draft Law and hence the Project.”<sup>699</sup> However, Messrs. Ponta and Antonescu did not refer to any “instruction” given to the USL on the issue, nor did they express opposition to the Project.<sup>700</sup> On the contrary, they made clear that,

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<sup>698</sup> [Ponta](#), p. 13 *et seq.* (paras. 48, 53, 67, and 84); see [Government Exposition of Reasons dated 27 August 2013, at Exhibit C-817 \(resubmitted\)](#); [Interview with Prime Minister Victor Ponta, Antena3, 11 Sept. 2013, at Exhibit C-437](#), p. 2 (“I thought, when I submitted the draft law to the Parliament, that there are many benefits for Romania”); *id.* at p. 3 (“Reporter: The perception of many is that if the Government takes a draft law and submits it to the Parliament to be voted, renegotiates it and submits it to the Parliament to be voted, it means that the Government supports it. V.P.: This perception is also correct.”); *id.* at p. 7 (explaining that “there is no other technology” other than cyanide-based technology); [Press conference with Victor Ponta and Dan Şova, Antena3, 12 Sep. 2013, at Exhibit C-643](#), p. 6 (where the Minister of Large Projects, Mr. Şova, expresses support for the Project); [Interview of Victor Ponta, BI TV, 15 Sep. 2013, at Exhibit C-1483](#), p. 2 (“I did something that honestly many people do. I was against a project without knowing it. And now I wish that all MPs be smarter than I was, that they get to know the project, to listen, to find out something that I didn’t know before coming to Roşia Montană ... I want MPs not to be in favor or against this project because their party leader told them to, but to think by themselves based on all the available elements and to vote like that.”); [Interview with Prime Minister Victor Ponta, Antena3, 5 Oct. 2013, at Exhibit C-1504](#), p. 4 (favorably comparing the Project with existing mining projects in other countries); [Joint Special Committee report dated November 2013, at Exhibit C-557](#), p. 5.

<sup>699</sup> [Reply](#), p. 108 (para. 213); [USL press conference, 11 Nov. 2013, at Exhibit C-2441](#).

<sup>700</sup> [USL press conference, 11 Nov. 2013, at Exhibit C-2441](#), p. 2 (with Mr. Ponta stating, “I could not possibly ask them [members of Parliament] to be against a law providing for a mining project. But the common position of the Social Liberal Union [USL] is to reject the draft law, but to send a very clear message that Romania, the Government and the USL support the large scale economic projects for the mining of all our resources”).

if the Project complied with the law (including a possible amended mining law), it could go forward.<sup>701</sup>

- 517 Prof. Mihai argues that the Joint Special Committee's Report was not properly justified.<sup>702</sup> However, the report, which covers a total of 88 pages, contains, first, a summary of the hearings and, second, "the viewpoints of the Commission on several relevant aspects of the Draft Law."<sup>703</sup> Prof. Mihai's assertion that the report's negative endorsement "did not actually refer to the Draft Law" is puzzling since the second part of the report (containing the Committee's viewpoints) is over forty pages long and addresses at length the law.<sup>704</sup>
- 518 Prof. Mihai criticizes the report in that "it did not identify any breach of the Draft Law of any imperative legal provisions."<sup>705</sup> However, the Joint Special Committee was not required to "identify a breach" of an "imperative legal provision" to recommend the rejection of the law.
- 519 Prof. Mihai also criticizes the Joint Special Committee for exceeding its mandate by allegedly acting like an investigation commission and reviewing the Project and not simply the law.<sup>706</sup> Prof. Mihai's comment is, however, overly formalistic. The law was inextricably linked to the Project itself and the Committee's approach was thus fully justified. Parliament could only assess the reasonableness of the benefits extended to RMGC under the Roşia Montană Law by considering the merits of the Project.

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<sup>701</sup> Mr. Ponta made clear that, notwithstanding the possible rejection of the Roşia Montană Law, he was considering a possible general mining law (that would benefit RMGC and other mining companies) and deemed that the Project could still go forward as long as it met the legal requirements. *Id.* at p. 2 ("Reporter: Under these conditions, what is currently happening with the Roşia Montană mining project? Victor Ponta: Based on the framework law, if it complies with it, it will be done, if not, no. It's simple. But the framework law needs to be done.").

<sup>702</sup> [Mihai LO II](#), p. 124 (paras. 411-412).

<sup>703</sup> [Joint Special Committee report dated November 2013, at Exhibit C-557](#), p. 41; [Counter-Memorial](#), p. 137 *et seq.* (paras. 358-360).

<sup>704</sup> [Mihai LO II](#), p. 124 (para. 413); see *e.g.* [Joint Special Committee report dated November 2013, at Exhibit C-557](#), p. 46, p. 41 *et seq.*, p. 55-57, and p. 76.

<sup>705</sup> [Mihai LO II](#), p. 124 (para. 412).

<sup>706</sup> *Id.* at p. 123 (para. 407) and p. 125 (paras. 414-416).

- 520 Although Prof. Mihai criticizes the Joint Special Committee for publicizing the debates, the committee's decision to do so was lawful and again not surprising given the scale of the public protests against the Project and the draft law that had been ongoing since September.<sup>707</sup> By law, the sessions of a joint special committee of this nature are public unless otherwise decided by the plenum of the Commission by majority of the votes of members present.<sup>708</sup> Their sessions may be publicly broadcast if approved by the majority of the members of Parliament which were present.<sup>709</sup>
- 521 Prof. Mihai goes so far as saying that the Joint Special Committee unconstitutionally took over the decisional role of Parliament.<sup>710</sup> The committee was, however, not deciding the fate of the law, nor did it purport to do so. Its report comprised, as Prof. Mihai admits, a recommendation – not a binding instruction. In accordance with the law, its report was made available to both houses of Parliament, which in turn voted on the proposed law.
- 522 Notwithstanding the Claimants' complaints in this arbitration regarding the Joint Special Committee's review of the Roșia Montană Law and its report, Mr. Henry reacted positively at the time: "The report of the Special Committee is a first step in defining the next phase of developing Roșia Montană." He emphasized that the report did not "propose the rejection of the Project," but rather of the Roșia Montană Law.<sup>711</sup> Gabriel Canada noted, without reproach, that "given the interest of Romanian society in the Project, the Special Committee considered it necessary to undertake a wider debate and analysis of the Project and, accordingly, issued numerous and wide-ranging conclusions and recommendations in the Report."<sup>712</sup> It

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<sup>707</sup> See *id.* at p. 127 (para. 420).

<sup>708</sup> [Decision of the Parliament to create a Joint Special Committee to review the Roșia Montană Law dated 17 September 2013, at Exhibit C-909](#), p. 2 (Art. 6); see also *id.*, p. 1 (Art. 2(3)).

<sup>709</sup> [Regulation for the joint activities of the Chamber of Deputies and the Senate \(excerpt\), at Exhibit R-537](#).

<sup>710</sup> See [Mihai LO II](#), p. 126 (paras. 418-419).

<sup>711</sup> [Gabriel Canada press release dated 12 November 2013, at Exhibit R-538](#), p. 1.

<sup>712</sup> [Gabriel Canada MD&A, Third Quarter 2013, at Exhibit R-539](#), p. 3.

also did not criticize the public broadcasting of the sessions or the manner in which they had been conducted.

- 523 Gabriel Canada expressed its commitment “to working with the relevant ministries and Government institutions, as appropriate, to clarify the ... issues ... raised in the Report.”<sup>713</sup> It, however, made no effort to revise the Project in light of the report, nor is there evidence that it ever approached the relevant ministries to discuss the report’s findings. It did the opposite: at the following TAC meeting, RMGC opposed a discussion of technical issues regarding the Project raised by the report.<sup>714</sup>
- 524 The Claimants’ comment that, in rejecting the law, Parliament “voted along party lines” is misleading. Both houses of Parliament rejected the law almost unanimously. The Senate vote (of 19 November 2013) resulted in 119 votes against, three in favor, and six abstentions; the Chamber of Deputies vote (of 3 June 2014) resulted in 302 votes against, one in favor, and one abstention.<sup>715</sup>
- 525 The Claimants go on to say that “Parliament’s rejection of the Draft Law was clearly determinative in the Government’s decision to reject the Project and not permit it.”<sup>716</sup> Similarly, Prof. Mihai evokes the notion that the Joint Special Committee “publicly delegitimized a decision that by law was for the Government to make.”<sup>717</sup> These statements are remarkable given that no such decision exists – the Government has not taken a “decision to reject the Project and not permit it.” Neither Parliament, nor the Joint Special Committee purported to make a decision for the Government. RMGC continues to hold and has requested a renewal of the License (the first step for that renewal was concluded in May 2019) and the EIA Review Process remains open.<sup>718</sup>

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<sup>713</sup> *Id.* at p. 4.

<sup>714</sup> [TAC meeting transcript dated 2 April 2014, at Exhibit C-473](#), p. 6 *et seq.*

<sup>715</sup> See [Counter-Memorial](#), p. 138 *et seq.* (paras. 361-362).

<sup>716</sup> [Reply](#), p. 211 (para. 491); see also *id.* at p. 99 (para. 190) (referring to the State purportedly “terminating” the Project).

<sup>717</sup> [Mihai LO II](#), p. 127 (paras. 421).

<sup>718</sup> [Counter-Memorial](#), p. 143 (para. 374); see *infra* para. 900.

526 For all of these reasons, Parliament's review and consideration of a special law for the Project cannot conceivably amount to a failure to provide FET to the Claimants' investments in breach of the BITs.

**3.6 Following the Rejection of the Roşia Montană Law, the State Did Not Fail to Provide Fair and Equitable Treatment to the Claimants' Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

527 Referring to Parliament's rejection of the Roşia Montană Law, the Claimants make the following allegation as part of their FET claim:

“Thereafter, rather than issue the Environmental Permit, the requirements for which the Government admitted were met, or issue a decision transparently explaining it was not doing so, the Government instead acted consistent with its determination that it would not permit the Project to proceed following Parliament's rejection by, among other things, declaring, without legal justification, the entire area of the Project as an historical monument and then subsequently nominating the Project area as a World Heritage site, acts which were fully incompatible with RMGC's License and other acquired rights and ensuring also that no construction permits could be issued to support the Project.”<sup>719</sup>

528 This claim is without merit. First, the Ministry of Environment's alleged failure to issue the permit in 2013 or after the rejection of the Roşia Montană Law was reasonable and justified (**Section 3.6.1**). Second, the Ministry of Culture's actions did not block the Project or otherwise affect RMGC's rights under the License (**Section 3.6.2**).

**3.6.1 The Ministry of Environment Was under No Obligation to Issue the Environmental Permit**

529 The FET claim rests in part on the allegation that, in 2013, although “the Project met all of the requirements for issuance of the key Environmental

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<sup>719</sup> [Reply](#), p. 211 *et seq.* (para. 493).

Permit..., the Government failed to issue the Permit.”<sup>720</sup> The Claimants argue that, following a TAC meeting on 26 July 2013, the Ministry of Environment was obligated and should have issued the permit.<sup>721</sup>

530 This argument *prima facie* fails given that the Roşia Montană Law, submitted to Parliament on 27 August 2013, did not envisage the possible issuance of the environmental permit until September 2013 at the earliest.<sup>722</sup> Moreover, in November 2013, Gabriel Canada noted:

“[t]hrough a decision of August 27, 2013, the Government deferred the substantive, in-principle decision affecting the environmental permitting of the Project until **after the conclusion of the Parliamentary Review and the recommendation of the Ministry of Environment.**”<sup>723</sup>

531 In any event, irrespective of Parliament’s review of the law, several obstacles still hindered the Ministry of Environment’s possible issuance of the environmental permit as detailed throughout this section.

532 The Ministry of Environment could not have issued the environmental permit prior to April 2013 because RMGC had not even submitted its Waste Management Plan until March 2013 (**Section 3.6.1.1**) and the Ministry of Culture did not endorse the Project until April 2013 (**Section 3.6.1.2**).

533 The Ministry of Environment’s alleged failure to issue the environmental permit thereafter in 2013 was justified and lawful because the requirements were not met (**Sections 3.6.1.3 to 3.6.1.7**).<sup>724</sup> The discussions at the TAC

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<sup>720</sup> *Id.* at p. 211 (para. 490).

<sup>721</sup> *Id.* at p. 53 (paras. 88-90).

<sup>722</sup> [Roşia Montană Law and Agreement, at Exhibit C-519 \(resubmitted\)](#), p. 28.

<sup>723</sup> [Gabriel Canada MD&A, Third Quarter 2013, at Exhibit R-539](#) (emphasis added); see also [Gabriel Canada press release dated 12 March 2014, at Exhibit R-540](#), p. 2 (noting that the Government deferred decision on the environmental permit until after Parliament’s review).

<sup>724</sup> The Claimants argue that the fact that the TAC met in 2013, notwithstanding these issues, shows that the issues were “neither an impediment to the TAC meeting nor to the Ministry of Environment acting on the Environmental Permit.” They furthermore argue that the Respondent contradicts itself by invoking these issues as a justification for the TAC not meeting between

meetings between May and July 2013 demonstrate outstanding issues and that the EIA Review Process was ongoing (**Section 3.6.1.9**).

- 534 The Claimants continue to accord undue importance and to mischaracterize the findings of an interministerial commission in March 2013. Contrary to their allegations, the commission did not conclude that the Ministry of Environment was required to issue the permit (**Section 3.6.1.8**).
- 535 Furthermore, the Ministry of Environment's publication of a note for public consultation in July 2013 did not imply that the Ministry had decided to issue the environmental permit (**Section 3.6.1.10**).
- 536 On the contrary, Gabriel Canada's and RMGC's reports confirm an understanding that the EIA Review Process was ongoing in 2013 and 2014 (**Section 3.6.1.11**).
- 537 Finally, as noted above, the Claimants reproach the Ministry of Environment for not issuing the environmental permit following the rejection of the Roşia Montană Law.<sup>725</sup> The Ministry of Environment's alleged failure to issue the permit after Parliament's rejection of the law was, however, lawful and justified and does not amount to a failure to provide fair and equitable treatment to the Claimants' investments in breach of the BITs (**Section 3.6.1.12**).

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November 2011 and May 2013. [Reply](#), p. 59 (para. 99). However, putting aside the issues pertaining to, for instance, RMGC's urban certificate and plans, and ADCs, the Ministry of Environment's decision not to convene the TAC between November 2011 and May 2013 was not surprising given RMGC's failure to submit an updated Waste Management Plan (until March 2013) and the absence of endorsement of the Project by the Ministry of Culture (until April 2013); *a fortiori* the Ministry of Environment could not issue the environmental permit during this time period. Following the approval of RMGC's Waste Management Plan and the Ministry of Culture's endorsement, other issues were outstanding, including RMGC's failure to secure an urban certificate and plans, all ADCs, and its Water Management Permits. The Ministry of Environment demonstrated its good faith *vis-à-vis* RMGC by convening the TAC between May and July 2013, notwithstanding these issues. See also [Counter-Memorial](#), p. 116 *et seq.* (para. 308) and p. 125 (para. 330).

<sup>725</sup> [Reply](#), p. 211 (para. 493); see *supra* para. 527.

### 3.6.1.1 RMGC Did Not Submit the Requisite Waste Management Plan until March 2013

- 538 The Claimants' insistence that the Project met "all the requirements for issuance of the key Environmental Permit" in 2012 is false at least in part because RMGC did not comply with the requirement of submitting an updated and compliant Waste Management Plan until March 2013.<sup>726</sup>
- 539 It is undisputed that RMGC had submitted its Waste Management Plan in March 2012 to the Ministry of Environment, which had promptly reviewed it and sought clarifications in April 2012.<sup>727</sup> The Ministry had further requested that, given these issues, RMGC resubmit its plan.<sup>728</sup>
- 540 On 31 May 2012, RMGC resubmitted its Waste Management Plan (a 140-page technical document) and, on 4 July 2012, the Ministry of Environment requested six further clarifications from RMGC.<sup>729</sup> The Ministry's request also relayed comments from the Sibiu and Alba EPAs.<sup>730</sup>
- 541 RMGC did not respond for nine months, until March 2013, when it submitted an updated plan. This delay thus had nothing to do with the

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<sup>726</sup> See *id.* at p. 211 (para. 490).

<sup>727</sup> [Letter from the Ministry of Environment to RMGC dated 17 April 2012, at Exhibit C-646; Counter-Memorial](#), p. 110 (para. 291).

<sup>728</sup> [Letter from the Ministry of Environment to RMGC dated 17 April 2012, at Exhibit C-646](#), p. 1.

<sup>729</sup> [Letter from Ministry of Environment to RMGC dated 4 July 2012, at Exhibit C-649; Letter from RMGC to Ministry of Environment dated 31 May 2012, at Exhibit R-475; Counter-Memorial](#), p. 105 (para. 275).

<sup>730</sup> [Letter from Ministry of Environment to RMGC dated 4 July 2012, at Exhibit C-649](#), p. 3 *et seq.*

Romanian authorities. ■ NAMR promptly endorsed the plan, as did the Ministry of Environment on 7 May 2013.<sup>732</sup>

542 RMGC knew that the approval of the Waste Management Plan was a prerequisite for the environmental permit. During the 10 May 2013 TAC meeting, Mr. Pătrașcu, the TAC vice president, stated:

“I propose we come back to what we were talking about – the Waste Management Plan ... It must exist, it must be approved and its approval is done by the analysis we conduct here today, and, when a final decision is reached, this plan becomes part and parcel of the documentation that substantiate the Environmental Permit.”<sup>733</sup>

543 RMGC did not object to the TAC vice president's comments.

544 The Claimants argue that the Ministry of Environment's approval of the Waste Management Plan was unduly delayed given that the 2013 version did not materially differ from the 2011 version of the plan.<sup>734</sup> They, however, ignore the Ministry of Environment's right to request additions or changes to the plan and, in any event, RMGC did not complain at the time of the Ministry's alleged delay.<sup>735</sup>

545 Thus, the Romanian authorities properly addressed RMGC's application for approval of its Waste Management Plan in accordance with Romanian law. Notwithstanding their complaints, the Claimants do not argue the contrary. Nor do they allege that the Ministry's alleged delay in approving



<sup>732</sup> [Alba NAMR Endorsement No. 189, at Exhibit C-656; NAMR Endorsement No. 4320, at Exhibit C-657; Letter from Ministry of Environment to RMGC, at Exhibit C-658; Counter-Memorial](#), p. 110 (para. 291).

<sup>733</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 13 (Pătrașcu).

<sup>734</sup> [Reply](#), p. 50 (para. 81); ■

<sup>735</sup> [Ministry of Environment Order 2042/2010 on mining waste management dated 22 November 2010, at Exhibit R-216; Counter-Memorial](#), p. 86 *et seq.* (para. 227).

the Waste Management Plan was unequitable or unfair, let alone egregious.<sup>736</sup>

546 Irrespective of other permitting issues, the Ministry of Environment's non-issuance of the environmental permit prior to March 2013 was justified by RMGC's failure to submit a revised Waste Management Plan.

### **3.6.1.2 The Ministry of Culture did Not Endorse (Albeit Conditionally) the Project until April 2013**

547 It is undisputed that, under Romanian law, the Ministry of Environment could not issue the environmental permit unless and until the Ministry of Culture endorsed the Project.<sup>737</sup> The Ministry of Culture did not endorse the Project (albeit conditionally) until 10 April 2013.<sup>738</sup> Accordingly, the Ministry of Environment could not have issued the permit prior to that date. (The Claimants incorrectly argue that the Ministry of Culture had already endorsed the Project in December 2011, as explained above in **Section 3.3.2.1**).

548 Moreover, the Ministry of Culture's non-endorsement of the Project until April 2013 was justified under Romanian law for the following reasons.

549 First, the Claimants accept that the Ministry of Culture's endorsement was to be based in part on "preliminary archaeological research" pursuant to Article 2(9) of GO 43/2000.<sup>739</sup> Prof. Dragoş explains why this requirement was met not in August 2011 (when RMGC submitted the archaeological assessment report to the Ministry of Culture) but rather in March 2013, once the National Archaeology Commission approved the Orlea Research

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<sup>736</sup> Furthermore, Dr. Mark Dodds-Smith opines that, in various regards, in his view, the Waste Management Plan did not comply with best practices, notwithstanding the Ministry's ultimate endorsement of the plan. [CMA - Dodds-Smith Report I](#), p. 6 (paras. 25-34); [CMA - Dodds-Smith Report II](#), p. 8 *et seq.* (paras. 21-23).

<sup>737</sup> [Counter-Memorial](#), p. 48 (para. 92); [Mihai LO II](#), p. 70 (para. 229). [Dragos LO II](#), p. 58 *et seq.* (paras. 227-230); [GO 43/2000 \(consolidated up to Nov. 2006\)](#), at [Exhibit C-1700](#), p. 5 (Art. 2(10)).

<sup>738</sup> [Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013](#), at [Exhibit C-655](#); [Dragos LO II](#), p. 60 *et seq.* (Section 3.4.1.1).

<sup>739</sup> [Reply](#), p. 43 (para. 67).

Project (a report prepared by the National Museum of History on instruction of RMGC).<sup>740</sup>

- 550 Second, the Claimants suggest that the reference in the Ministry of Culture's endorsement to ADC 9/2011 demonstrates that the pendency of judicial challenges to that ADC did not hinder the issuance of the endorsement.<sup>741</sup> However, this reference to ADC 9/2011 underscored the risk that an annulment of that ADC would impact the endorsement.
- 551 Third, they similarly argue that the fact that the Ministry of Culture issued the endorsement, notwithstanding the absence of ADC for Orlea, demonstrates that that ADC was not required.<sup>742</sup> However, the Ministry of Culture's endorsement was conditional upon RMGC's securing the ADC for Orlea.<sup>743</sup> Moreover, Prof. Dragoş explains that the Ministry's decision to issue the endorsement at that time, *i.e.* notwithstanding the absence of ADCs for the entire Project area, stood within the Ministry's discretion in the circumstances.<sup>744</sup>
- 552 Fourth, the Claimants complain that in early 2012, a Ministry of Culture representative reportedly indicated that the draft endorsement was ready to be signed by the Minister.<sup>745</sup> These drafts were, at best, just that – mere drafts. They do not imply that the Minister of Culture was, at that time, in a position to issue the endorsement. Even assuming the Ministry of Culture could have issued its endorsement more swiftly, this would not help the

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<sup>740</sup> [Dragos LO II](#), p. 71 (paras. 281-295) (interpreting the concept of “preliminary archaeological research”) and p. 78 (paras. 311-312); see also [Counter-Memorial](#), p. 94 *et seq.* (paras. 249-251); [CMA - Cloughton Report II](#), p. 33 *et seq.* (Section 7 and notably para. 116); see also [Letter from Ministry of Culture to National Museum of History and Alba Directorate dated 12 March 2013, at Exhibit C-1305](#) (referring to Art. 2(9) when informing the National Commission of Historical Monuments and the Alba Directorate of the National Archaeology Commission's approval).

<sup>741</sup> [Reply](#), p. 42 (para. 66); [Mihai LO II](#), p. 81 (para. 269).

<sup>742</sup> [Reply](#), p. 42 (para. 66).

<sup>743</sup> [Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at Exhibit C-655](#), p. 3 *et seq.* (Art. 2).

<sup>744</sup> [Dragos LO II](#), p. 78 *et seq.* (Section 3.4.2 and notably para. 313).

<sup>745</sup> [Reply](#), p. 45 (n. 153); [Memorial](#), p. 159 (n. 756).

Claimants. In *South American Silver*, the tribunal noted that the “lack of efficiency” did not suffice to amount to a breach of the FET standard:

“It is true, as the Claimant asserts, that in some situations and during the conflict, some of the Respondent’s officials could have had a more efficient and prompt action. It is also true that the area is characterized by poverty and insufficient infrastructure that could have contributed to the unrest generated by the Project and CMMK’s presence. However, on the one hand, **the lack of opportunity or efficiency in some actions is not, in this case, sufficient to qualify as a violation of the fair and equitable treatment standard and, much less, to conclude that Bolivia acted with premeditation** and under a plan to gain control of the Project. Such an allegation requires a high standard of proof as it entails establishing an act of the State in bad faith or intolerable negligence, and such evidence is inexistent in this case.”<sup>746</sup>

553 In sum, the Ministry of Culture’s alleged failure to endorse the Project until April 2013 was entirely justified and lawful.

### 3.6.1.3 RMGC Did Not Secure the Approval of Its Urban Plans

554 In 2013, the Ministry of Environment was not in a position to issue the permit because RMGC still did not have the Industrial Area PUZ in place.<sup>747</sup> As shown above in **Section 3.3.2.3**, State authorities had made clear the importance of the PUZ to the EIA Review Process.

555 The interministerial commission confirmed on 26 March 2013 that “the Ministry of Environment... indicated that it is important for the [PUZ] to be approved in view of the issuance of the Environmental Permit.”<sup>748</sup> It also noted RMGC’s agreement to “provide the legal team of the Ministry of Environment and Climate Change with the entire relevant

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<sup>746</sup> [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 182 (para. 673) (emphasis added).

<sup>747</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20 (Tănase); [Counter-Memorial](#), p. 145 (para. 383).

<sup>748</sup> [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 8.

documentation (including court decisions) [relating to the PUZ], so that the Ministry of Environment and Climate Change can decide in full awareness.”<sup>749</sup>

556 RMGC knew that it needed to secure the approval of its PUZ to secure in turn the environmental permit since, otherwise, it faced the risk that changes to the PUZ would require a new EIA Review Process.<sup>750</sup>

557 By the end of 2013, by its own admission, RMGC had only obtained 19 of the 23 endorsements necessary for the approval of the Industrial Area PUZ.<sup>751</sup> RMGC had also recognized that it was required to apply for and obtain the required endorsements.<sup>752</sup> In particular, RMGC had failed to secure both the environmental endorsement (which was being challenged in court) and the water management permit (which had not been renewed due to RMGC's failure to provide the necessary documentation).

*The Environmental Endorsement for the Industrial Area PUZ*

558 The Claimants minimize the judicial challenges against the Sibiu EPA's decision to issue the environmental endorsement for the Industrial Area PUZ (dated 7 March 2011), which NGOs commenced on 26 September 2011. [REDACTED] These lawsuits remained pending in 2013.<sup>754</sup>

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<sup>749</sup> *Id.* at p. 8 (n. 3).

<sup>750</sup> [Interministerial Commission meeting transcript, at Exhibit C-472](#), p. 21 (Damian) (“[u]nfortunately, if the [PUZ] will provide for other measures that [sic] those we applied for, then we will return to the environmental authority, and you are aware of this procedure, in order to reassess the environmental permit”); [Avram II](#), p. 3; [Avram II](#), p. 28 (para. 53); [Counter-Memorial](#), p. 22 (para. 69).

<sup>751</sup> [Gabriel Canada MD&A, Fourth Quarter 2013, at Exhibit R-541](#), p. 8.

<sup>752</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20; [REDACTED]

<sup>754</sup> These actions ultimately led on 10 March 2016 to the annulment of the Sibiu EPA's environmental endorsement by the Braşov Court of Appeal. [REDACTED]



were based on several factors, [REDACTED].<sup>760</sup>

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

564 In any event, the Claimants do not allege that the conduct and decisions of the Romanian courts regarding the challenges against the EPA's environmental endorsement ran afoul of the FET standards in the relevant BITs.

*Water Management Permit for the Industrial Area PUZ*

565 In its Counter-Memorial, Romania showed that RMGC did not have a valid water management permit for its PUZ past August 2012. This permit was one of the several endorsements that RMGC needed to obtain for its PUZ to be approved.<sup>762</sup> Romania also showed that, contrary to the Claimants' allegations, State authorities did not renew the water management permit (obtained by RMGC in 2010) not for political reasons but because RMGC had failed to provide information requested by State authorities.<sup>763</sup>

566 In their Reply, the Claimants do not refer to the non-renewal of the PUZ water management permit in 2012 and thus appear to have abandoned their allegations that State authorities acted wrongfully in that regard.

567 The Claimants indeed cannot escape RMGC's failure to provide information requested by the Mureş Water Basin Administration in June

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<sup>760</sup> *Id.* at p. 81 (paras. 269-270).

[REDACTED]  
[REDACTED]

<sup>762</sup> [Counter-Memorial](#), p. 75 (para. 193) and [Letter from Ministry of Environment to RMGC dated 22 September 2011, at Exhibit C-575](#), p. 14.

<sup>763</sup> [Counter-Memorial](#), p. 104 (para. 275); [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](#); [Ministry of Environment Order 799/2012 on documentation for water management permits dated 6 February 2012, at Exhibit R-239](#).

2012 regarding RMGC's surface rights.<sup>764</sup> RMGC disregarded the request.<sup>765</sup> [REDACTED]

568 In sum, the Ministry of Environment's alleged failure to issue the permit in 2013 was justified and lawful given RMGC's failure to secure an approved PUZ.<sup>767</sup>

#### 3.6.1.4 RMGC Did Not Have an Urban Certificate that Was Not the Subject of Court Challenges

569 As explained in the Counter-Memorial, RMGC's urban certificate for the Project remained illusory in 2013. It is undisputed that, as litigation concerning its prior urban certificates continued, RMGC obtained a new urban certificate on 23 April 2013: UC 47/2013.<sup>768</sup> On 10 July 2013, NGOs applied to the Cluj Tribunal to annul the certificate. [REDACTED]

570 As also explained in the Counter-Memorial, RMGC failed to accurately inform the TAC regarding the litigation concerning its urban certificates. At the 10 May 2013 meeting, Mr. Tănase stated that RMGC "currently

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<sup>764</sup> [Letter from Mureș Water Basin Administration to RMGC dated 7 June 2012, at Exhibit C-652](#) (requesting RMGC to provide "the document based on which [RMGC] acquired a right on the lands in the minor riverbeds of the water courses, which lands will be occupied by elements of the assembly of your project."); [Ministry of Environment Order 799/2012 on documentation for water management permits dated 6 February 2012, at Exhibit R-239](#).

<sup>765</sup> [Letter from RMGC to Mureș Water Basin Administration dated 3 July 2012, at Exhibit C-567](#), p. 1 (acknowledging that it had "not concluded any agreements based on which it could have acquired any right on the lands from the minor riverbeds of the watercourses [*i.e.* lands on which the Project was supposed to be built]").

<sup>767</sup> The Ministry of Environment's stance in 2013 was also in line with internal advice received on 14 March 2013 from the Ministry of Regional Development indicating that RMGC was still to obtain several "legal permits" for the "urban planning documentation" for the Project. [Letter from Ministry of Regional Development to Department for Infrastructure Projects dated 14 March 2013, at Exhibit R-245](#).

<sup>768</sup> [Counter-Memorial](#), p. 145 *et seq.* (para. 384).

ha[d] valid ... urbanism certificates, moreover – confirmed by final and irrevocable court decisions.”<sup>770</sup> In his third statement, he does not deny that he, however, failed to mention the litigation relating to RMGC’s prior urban certificates.<sup>771</sup> He was also wrong to suggest that RMGC’s last and current UC 47/2013 had been “confirmed by final and irrevocable court decisions,” given that the certificate had only just been issued (and would soon be challenged).<sup>772</sup>

- 571 When the TAC next met (and at later meetings in 2014 and 2015), RMGC failed to mention that NGOs had in the meantime, unsurprisingly, challenged UC 47/2013.<sup>773</sup>
- 572 As RMGC knew, the Ministry of Environment could not issue the environmental permit in the absence of a valid urban certificate.<sup>774</sup>
- 573 Prof. Podaru opines that, given that the “Company had litigated these issues for three years with the Ministry of Environment on the ground that maintaining a valid UC throughout the duration of the EIA Procedure was not a legal requirement” and that the Ministry of Environment was “presumably ... well aware of these developments,”<sup>775</sup> RMGC did not need to report accurately about the ongoing litigation to the Ministry of Environment. Prof. Podaru’s opinion in this regard is misplaced.
- 574 First, it is precisely because RMGC had been embroiled, for years, in litigation regarding its urban certificates and plans (and because of these documents’ relationships with the EIA Review Process) that it held a heightened duty to inform the authorities about the litigation.
- 575 Second, as RMGC knew, the nature of an urban certificate had been the subject of legal debate for many years amongst Romanian scholars and

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<sup>770</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20 (Tănase); [Counter-Memorial](#), p. 119 (para. 313).

<sup>771</sup> [Counter-Memorial](#), p. 119 *et seq.* (para. 315).

<sup>772</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20 (Tănase).

<sup>773</sup> [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#).

<sup>774</sup> [Observations and Questions Raised by Ministry of Environment dated 14 March 2013, at Exhibit C-834](#), p. 1; see also [Counter-Memorial](#), p. 109 *et seq.* (paras. 290-299).

<sup>775</sup> [Podaru LO](#), p. 36 (para. 113).

courts.<sup>776</sup> In that regard, Prof. Podaru's position that "UCs are not administrative acts subject to judicial suspension or annulment" is contradicted by RMGC's contemporaneous statements before the TAC and in court.<sup>777</sup>

576 Prof. Podaru also refers to the note for public consultation issued on 11 July 2013 and argues that "notwithstanding the pending litigation [relating to UC 47/2013], the Ministry of Environment published the Draft EP."<sup>778</sup> However, first, as explained above, it is unclear to what extent the TAC and the Ministry of Environment even knew about that litigation which had commenced the previous day.<sup>779</sup> Second, the note for public consultation was not a draft environmental permit.<sup>780</sup> On the contrary, it was, as its title indicated, a public consultation document.<sup>781</sup>

577 Prof. Podaru takes issue with Romania's observation that [REDACTED]

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<sup>776</sup> In fact, as Prof. Tofan explains, the legal nature of a UC largely depends (i) on the scope of the Project for which it was issued; and (ii) its contents (notably the list of endorsements it contains). [Tofan LO](#), p. 8 *et seq.* (para. 25).

<sup>777</sup> [Podaru LO](#), p. 36 (para. 113); see also [Tofan LO](#), p. 8 *et seq.* (Section II.1.1); [Dragos LO II](#), p. 31 (paras. 122-127); [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 20 (Tănase).

<sup>778</sup> *Id.* at p. 36 (para. 115).

<sup>779</sup> [Counter-Memorial](#), p. 120 (para. 315).

<sup>780</sup> [Podaru LO](#), p. 36 *et seq.* (para. 115).

<sup>781</sup> [Ministry of Environment Note for Public Consultation dated 11 July 2013 dated 11 July 2013, at Exhibit C-555](#), p. 58; [CMA - Wilde Report II](#), p. 49 *et seq.* (paras. 172-174).

<sup>782</sup> [Podaru LO](#), p. 36 (para. 114); [Counter-Memorial](#), p. 145 (para. 385).

<sup>783</sup> [REDACTED]

[REDACTED]

578 The Bistrița-Năsăud Tribunal held:

[REDACTED]

[REDACTED]

579 RMGC did not challenge the Bistrița-Năsăud Tribunal's decision. [REDACTED]

[REDACTED]

580 In sum, the Ministry of Environment's alleged failure to issue the environmental permit in 2013, insofar as it was in part driven by the uncertainty surrounding RMGC's urban certificate, was justified and lawful.

### 3.6.1.5 RMGC Did Not Have the Surface Rights to the Project Area

581 It is undisputed that RMGC stopped its property acquisition program in September 2008, purportedly due to "the suspension of the environmental permitting process ... in the fall of 2007."<sup>786</sup>

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<sup>784</sup> See [Counter-Memorial](#), p. 354 *et seq.* (Annex IV).

[REDACTED]

<sup>786</sup> [Gabriel Canada 2008 Annual Information Form](#), at [Exhibit C-1806](#), p. 6; see also [Counter-Memorial](#), p. 62 (para. 164).

- 582 Notwithstanding the resumption of the EIA Review Process in 2010, RMGC never resumed the property acquisition program. Thus, by the end of 2013, RMGC still only owned “78% of the homes and approximately 60% of the land by area in the Project footprint, comprising the industrial zone, the protected area and the buffer zone.”<sup>787</sup>
- 583 As demonstrated above in **Section 3.3.2.6**, as RMGC knew, acquiring the necessary surface rights was paramount to the EIA procedure.
- 584 RMGC also knew in 2013 that the only surface rights remaining to be acquired belonged to property owners unwilling to sell to RMGC. It also evidently knew, in stark contrast with ██████████ current position, that without the Roșia Montană Law’s provisions facilitating recourse to expropriation, it was unlikely RMGC would acquire these surface rights.<sup>788</sup> Indeed, as Prof. Mihai describes, the Roșia Montană Law was “meant to simplify or accelerate the implementation of mining projects” by providing for, *inter alia*, “simplified expropriation procedures to facilitate access to the lands that cannot be acquired by voluntary agreement.”<sup>789</sup> RMGC thus sought to facilitate its upcoming compulsory acquisition, since it could not complete its “policy ... to acquire surface rights through voluntary negotiations.”<sup>790</sup> It knew that it needed the Government’s assistance in acquiring the outstanding surface rights and that the scope of any possible assistance was limited under the existing law.
- 585 In sum, the Ministry of Environment’s alleged failure to issue the environmental permit, insofar as it was based on RMGC’s failure to acquire the necessary surface rights, was justified and lawful.

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<sup>787</sup> [Gabriel Canada 2013 Annual Information Form, at Exhibit C-1811](#), p. 27; see also [Resettlement and Relocation Action Plan Vol. 2, at Exhibit C-464](#), p. 177.

<sup>788</sup> See *infra* Section 3.7, and [Counter-Memorial](#), p. 102 *et seq.* (paras. 267-362).

<sup>789</sup> [Mihai LO II](#), p. 130 *et seq.* (para. 433); see also [Birsan LO II](#), p. 27 *et seq.* (para. 101).

<sup>790</sup> ██████████.

### 3.6.1.6 RMGC Did Not Have Its Water Management Permit

- 586 As explained in the Counter-Memorial, in 2013, the Project still did not comply with the Water Framework Directive and thus did not have a Water Management Permit.<sup>791</sup>
- 587 As demonstrated below, the Project's non-compliance with the Water Framework Directive was a recurring concern for the Ministry of Environment throughout 2013, even though the Ministry had raised the issue numerous times with RMGC.<sup>792</sup>
- 588 On 14 March 2013, the Ministry of Environment identified compliance with the Water Framework Directive as an outstanding issue.<sup>793</sup> Indeed, the Ministry of Environment indicated that the "Decision of [the] Alba County Council, stating that 'Roşia Montană mining project' is of overriding public interest ... cannot represent a basis for declaring the overriding public interest, and ... a legislative act with a higher ranking is needed, such as a Government Decision."<sup>794</sup>
- 589 Later that month, the interministerial commission confirmed that the "powers to decide in this matter belong exclusively to the national central authority on environment (namely the Ministry of Environment)."<sup>795</sup>

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<sup>791</sup> [Counter-Memorial](#), p. 112 *et seq.* (para. 298).

<sup>792</sup> See *supra* Section 3.3.2.5; [Reply](#), p. 211 (para. 490).

<sup>793</sup> [Observations and Questions Raised by Ministry of Environment dated 14 March 2013, at Exhibit C-834; Mocanu II](#), p. 70 (para. 201).

<sup>794</sup> *Id.* at p. 1.

<sup>795</sup> [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 6. Given that this was the conclusion reached by the Interministerial Commission, ██████'s statement that "in March 2013 the Interministerial Commission confirmed, consistent with the prior indications from the TAC, that the Alba County Council's decision was alone sufficient to comply with the requirements of the Water Framework Directive" was disingenuous, at best ██████, p. 27 (para. 48).

- 590 At the 10 May 2013 TAC meeting, Mr. Tănase acknowledged that the issue of the necessity for a national authority to declare the project of outstanding public interest was still unsettled.<sup>796</sup>
- 591 In a letter to the TAC on 16 May 2013, ANAR sought clarification regarding RMGC's compliance with the Water Framework Directive.<sup>797</sup> As in a letter to the Ministry of Environment the following day, ANAR made clear that only the Government could declare the Project of public interest for purposes of compliance with the directive.<sup>798</sup>
- 592 On 30 May 2013, RMGC responded to ANAR's letter to the TAC.<sup>799</sup> RMGC's responses showed that many Water Framework Directive issues were evidently unsettled.<sup>800</sup> RMGC also repeated its argument that the declaration of the Alba County Council declaration of public interest was sufficient under the Water Framework Directive.<sup>801</sup>
- 593 During the 31 May 2013 TAC meeting, RMGC's representative recognized that RMGC needed to acquire the surface rights to the Corna River bed to obtain the Water Management Permit, even though RMGC had stopped its land acquisition program five years earlier.<sup>802</sup> Separately, ANAR's representative, Mr. Cazan, indicated that RMGC still needed to submit the necessary documentation for the permit.<sup>803</sup> (As of 2014, the Ministry of Environment still had not received the documentation).<sup>804</sup>

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<sup>796</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 19 (Tănase) (also discussing risks relating to acquisition of surface rights to the Corna river); see also [Letter from Ministry of Environment to RMGC, at Exhibit C-1759](#), p. 1 (referring to Water Framework Directive); [Counter-Memorial](#), p. 118 (para. 310).

<sup>797</sup> [Letter from Romanian Waters to TAC dated 16 May 2013, at Exhibit R-542](#).

<sup>798</sup> *Id.* at p. 3; [Letter from Romanian Waters to Ministry of Environment dated 17 May 2013, at Exhibit R-543](#), p. 2.

<sup>799</sup> [Letter from RMGC to Romanian Waters dated 30 May 2013, at Exhibit R-544](#).

<sup>800</sup> *Id.* at p. 2.

<sup>801</sup> *Id.* at p. 7.

<sup>802</sup> [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 17 (Tănase).

<sup>803</sup> *Id.* at p. 21 (Cazan).

<sup>804</sup> [Letter from Ministry of Environment to Ministry of Foreign Affairs dated 25 February 2014, at Exhibit R-545](#), p. 1.

- 594 With regards to the Project's compliance with the Water Framework Directive, Mr. Cazan also warned: **“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.”<sup>805</sup> RMGC did not question ANAR's stance. Nor could it have done so: ANAR's rational objective was only to comply with the applicable legal framework.<sup>806</sup>
- 595 On 12 June 2013, the Department for Infrastructure Project wrote to RMGC seeking clarifications regarding the Project, including regarding “the observance of [the] Water Framework Directive and on the administration rights over Corna Valley.”<sup>807</sup> RMGC did not respond, as [REDACTED] concedes.<sup>808</sup>
- 596 On 13 June 2013, ANAR responded to RMGC's 30 May 2013 letter.<sup>809</sup> Notably, ANAR maintained its position that only the Government could

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<sup>805</sup> [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 16 *et seq.* (Cazan) (emphasis added); see also [Counter-Memorial](#), p. 118 (para. 311).

<sup>806</sup> [REDACTED] in his second statement conveniently omits to mention Mr. Cazan's concern when he asserts that “numerous TAC members expressed their satisfaction with the answers provided by RMGC and with the quality of the EIA Report” because it does not suit his argumentation that the “technical assessment was complete.” [REDACTED] p. 34 *et seq.* (paras. 65-66).

<sup>807</sup> [Letter from Department for Infrastructure Projects to RMGC dated 12 June 2013, at Exhibit C-1001](#), p. 3.

<sup>808</sup> As shown in the Counter-Memorial, this letter showed that the Claimants were still to provide several clarifications to the Ministry of Environment, ANAR, and the Department of Infrastructure in June 2013 ([Counter-Memorial](#), p. 125 (para. 330)). The Claimants take issue with Romania's characterization of this letter, arguing (i) that the letter, which allegedly came from the “Inter-Ministerial Commission”, was sent outside of the EIA Review Process; and (ii) that the “clarifications [requested] were in fact provided” ([Reply](#), p. 60 (para. 100) and [REDACTED])

[REDACTED] That belief was evidently erroneous, and, in any event, did not justify RMGC's failure to respond to the requests in the June 2013 communication.

<sup>809</sup> [Letter from Romanian Waters to TAC dated 13 June 2013, at Exhibit R-546](#).

issue the requisite declaration of public interest.<sup>810</sup> It also reiterated the need for an assessment of the status of the water in the two relevant rivers to be undertaken “as a whole, and not on sectors.”<sup>811</sup> It further stated that “[as] **we explained in each and every reply sent to RMGC, the good status of the water in the context of the Water Framework Directive implies the application of a specific methodology to the bodies of water, and in no condition just a comparison between the values of the concentrations analysed against the values provided by the legislation.**”<sup>812</sup>

597 In a letter to the Ministry of Environment of the same day, ANAR listed as the first condition “for the implementation of the project” that RMGC “[draw] up ... a document that would serve to justify in front of the European Commission that the requirements of art. 4.7 of the Water Framework Directive, namely art. [2.7] para. (2) of the Water Law, as subsequently amended and supplemented, have been met for the Roşia Montană mining project.”<sup>813</sup>

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[REDACTED]

599 On 24 September 2013, the Minister of Environment, Ms. Plumb, addressed the Joint Special Committee and stated that “we cannot go on with the environmental permit if the law does not clearly state that this is a project of outstanding public interest. Why: because, as you know, we transposed the Water Directive in our national legislation, which states that one cannot shift the course of a river unless the project is of outstanding public interest.”<sup>815</sup>

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<sup>810</sup> *Id.* at p. 1.

<sup>811</sup> *Id.* at p. 2.

<sup>812</sup> *Id.* at p. 2 (emphasis added).

<sup>813</sup> [Letter from Romanian Waters to Ministry of Environment dated 13 June 2013, at Exhibit R-547](#), p. 1; see also [Letter from Ministry of Environment to TAC members dated 10 June 2013, at Exhibit C-554](#), p. 1.

<sup>815</sup> [Parliamentary Special Commission hearing transcript dated 24 September 2013, at Exhibit C-506](#), p. 39.

600 Mr. Cazan's concern that Romania might be "accused [of] errors" by the European Commission was also in line with the message conveyed to Ms. Plumb, by the EU Commissioner for Environment, Mr. Janez Potočnik, on 3 October 2013. Commissioner Potočnik's memorandum regarding this meeting indicated:

"the project involves the diversion of 2 rivers. This clearly involves a deterioration of these water bodies. In that case, the project should only go ahead if all the conditions under the Water Framework Directive article 4(7) are fulfilled. The project being of 'overriding public interest' is only one condition. The project should have also been included in the river basin management plan and therefore subject to a public consultation. And this was not the case... In addition there is a need to include all practicable mitigation measures and to make the appropriate assessments to ensure that there are not better environmental options."<sup>816</sup>

601 The Commissioner validated ANAR's concerns by urging Romania to "pay due attention to the EU environmental standards and to put in place appropriate supervision that no accident can occur."<sup>817</sup> Mr. Tănase's assertion at the 31 May 2013 TAC meeting that the risk of the Commission starting an infringement procedure was "inexistent" was thus misplaced.<sup>818</sup>

602 In short, in 2013, the Project did not comply with the Water Framework Directive. Neither ANAR, nor the EU Commission were convinced that the multiple river diversions envisaged for the Project would meet the requirements for a derogation under the directive. It was thus entirely justified and lawful for the Ministry of Environment not to issue the environmental permit until RMGC addressed concerns and demonstrated the Project's compliance with the directive.

603 The EU Commission continued to inquire about the Project's compliance with the Water Framework Directive in a 14 February 2014 meeting, which

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<sup>816</sup> [EU Commissioner Janez Potočnik Memorandum dated 3 October 2013, at Exhibit C-2909](#), p. 5 (emphasis added).

<sup>817</sup> *Id.*; see also [Letter from Ministry of Environment to Department for Waters, Forests and Pisciculture dated 19 November 2013, at Exhibit R-548](#).

<sup>818</sup> [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 17 (Tănase).

representatives of its Infringement Unit attended. On 25 February 2014, the Ministry of Environment sent to the Ministry of External Affairs responses to the EU Commission's queries about the Project, stating both that "no documentation for issuing the water management permit for the Roşia Montană project has been submitted" and that "we deem that, in order to issue the Water Management Permit, an analysis as regards following the conditions for the implementation of [Water Framework Directive] Art. 4(7) and Art. 4(8) is necessary."<sup>819</sup>

### 3.6.1.7 RMGC Did Not Obtain All Archaeological Discharge Certificates

- 604 By July 2013, the archaeological sites within the Project Area had not all been discharged, in particular at Orlea, and the administrative and judicial challenges relating to ADC 9/2011 for Cârnic were ongoing.<sup>820</sup> Essentially, the situation had not changed since 2012 (see **Section 3.3.2.7** above).
- 605 The main development was the National Archaeology Commission's approval, in early 2013, of the Orlea Research Project, which set out the research RMGC needed to instruct the National Museum of History to perform "to acquire the [ADC] for the entire location of the future open pit of Orlea, namely to protect and valorize the ancient mining remains in the Păru-Carpeni sector."<sup>821</sup> It is undisputed that no such research was subsequently performed. Furthermore, the research performed to date at Orlea had consisted in only initial investigations, including a desk and on-site assessment, prior to 2007.<sup>822</sup>

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<sup>819</sup> [Letter from Ministry of Environment to Ministry of Foreign Affairs dated 25 February 2014, at Exhibit R-545](#), p. 2.

<sup>820</sup> [Reply](#), p. 43 (para. 67); [Counter-Memorial](#), p. 81 *et seq.* (Section 4.5.2).

<sup>821</sup> [Letter from Alba Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at Exhibit R-221](#), p. 7; [NAC meeting minutes \(excerpt attached to Letter dated 14 March 2013\) dated 1 March 2013, at Exhibit R-223; Dragos LO II](#), p. 74 *et seq.* (paras. 292-296).

<sup>822</sup> [Counter-Memorial](#), p. 34 (para. 94); [Memorial](#), p. 63 (para. 169); [Orlea Research Project \(2013\), at Exhibit R-221](#), p. 9; [2011 Archaeological Assessment Report of Orlea, at Exhibit C-1484](#), p. 5 *et seq.*; see also [CMA - Claughton Report II](#), p. 34 *et seq.* (Section 7); *supra* para. 316; see Rejoinder Annex, Orlea Research Map.

- 606 The Claimants downplay the importance of Orlea and argue that, because works at Orlea would only start a few years into the Project, RMGC had time to obtain the ADC at an unspecified point in the future.<sup>823</sup> The uncertainty concerning Orlea could, however, have wide ranging repercussions (as addressed in **Section 8** below) and relying notably on the results of the preliminary investigations undertaken, Dr. Cloughton describes the likelihood of significant discoveries in this area.<sup>824</sup>
- 607 The Claimants boast that RMGC aimed “to meet and favorably exceed applicable permitting requirements” [REDACTED].<sup>825</sup> Had RMGC wished to assuage the concerns of Project opponents concerning the destruction of cultural heritage, it could have instructed the research set out in the Orlea Research Project.<sup>826</sup> RMGC’s failure to conduct this research suggests that it feared it would make discoveries that would delay or block the Project.

### **3.6.1.8 The Claimants Continue to Mischaracterize and Accord Undue Weight to the March 2013 Note of an Interministerial Commission**

- 608 In their Reply, the Claimants dismiss the relevance of the issues set out in **Sections 3.6.1.1 to 3.6.1.7** above. They argue that the Respondent has invented *post hoc* excuses to justify the Ministry of Environment’s alleged failure to issue the permit. In support of this argument, they refer to an interministerial commission’s informative note of March 2013.

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<sup>823</sup> [Reply](#), p. 43 (para. 66, n. 139); see also [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#), p. 59.

<sup>824</sup> [CMA - Cloughton Report II](#), p. 15 *et seq.* (Section 3.2) and p. 26 *et seq.* (paras. 91-93); see also [Letter from Alba Directorate to Ministry of Culture dated 13 February 2013 with Orlea Research Project, at Exhibit R-221](#), p. 6 *et seq.* and p. 11 (“potential traces of a settlement dating back to the Roman Era ... but also a Roman incineration burial site” and ancient Roman mining works were identified in the underground, including a “wide descending gallery near the surface and a potential wheel room” as well as a “disposal gallery system”, which are characterized as “remarkable indications on underground sectors where the archaeological potential is considerable.”).

<sup>825</sup> [Reply](#), p. 210 (para. 487); [Jennings II](#), p. 24 (para. 59).

<sup>826</sup> [CMA - Cloughton Report II](#), p. 39 *et seq.* (paras. 131-133).

- 609 Before addressing the Claimants' arguments, it should be recalled that the Government's initiative to create the commission reflects its efforts to support the Project.<sup>827</sup> The purpose of the commission was to "identify potential solutions for the future development of the mining project."<sup>828</sup> Furthermore, its findings run counter to the Claimants' argument that the Project was blocked for political reasons or ill-will. It concluded that "there [we]re no impediments or significant obstacles, legislative or institutional to hinder a possible future development of the [Project]" and that the State institutions present "did not raise any objections against the development of the [Project]."<sup>829</sup> Stated differently, the existing legal framework did not impede and State authorities did not object to the Project.
- 610 The commission suggested in its findings that "solving certain aspects" of the Project might benefit from legislative amendments, which the Department for Infrastructure Projects would consider – as it did, together with RMGC in the ensuing months.<sup>830</sup>
- 611 The Claimants argue that the issues set out in **Sections 3.6.1.1 to 3.6.1.7** were dismissed by the Commission which stated that "[t]he aspects raised by the institutions participating in the Working Group were discussed and clarified" and that the Ministry of Environment "can issue the Environmental Permit and any other details can be solved along the way."<sup>831</sup>
- 612 These arguments beg several observations.
- 613 First, the Claimants cannot both reproach the Respondent for allegedly not raising issues contemporaneously and at the same time argue that the

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<sup>827</sup> [Counter-Memorial](#), p. 109 *et seq.* (Section 5.4); [Ponta](#), p. 12 (para. 46).

<sup>828</sup> [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 2.

<sup>829</sup> *Id.* at p. 9.

<sup>830</sup> *Id.* at p. 10; see *supra* Section 3.7.

<sup>831</sup> [Reply](#), p. 39 (para. 57); see also *id.* at paras. 61 and 98; [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 9 *et seq.*

Respondent did raise these issues contemporaneously but argue that the interministerial commission dismissed them.<sup>832</sup>

- 614 As shown throughout **Sections 3.6.1.1 to 3.6.1.7**, these issues had been raised with RMGC prior to March 2013 and were discussed during the two meetings of the interministerial commission. With the exception of the lack of Waste Management Plan and Project endorsement from the Ministry of Culture, those issues remain outstanding.
- 615 Second, the note concluded that there were no impediments to the Ministry of Environment issuing the permit; it did not say that the Ministry should or was required to issue the permit or that all legal requirements were met.
- 616 Contrary to the Claimants' insinuations, the note described outstanding issues.<sup>833</sup> The note for instance stated that "RMGC's representatives **must** provide ... the Ministry of Environment and Climate Change with the entire relevant documentation (including court decisions), so that [it] can decide in full awareness [whether the existing PUZ is valid]."<sup>834</sup> The commission thus recognized that, regardless of its conclusions, the Ministry of Environment had discretion and would need to assess, once it received the relevant documentation from RMGC, whether there was a valid PUZ.
- 617 Third, although ██████ argues that the informative note was approved by the Government,<sup>835</sup> that approval did not mean that the Government endorsed the note's conclusions; rather, it simply acknowledged the conclusion of the commission's work. It is not in the Government's attributions to approve the views of a commission in an informative note.

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<sup>832</sup> See [Reply](#), p. 59 (para. 98) ("These issues were not raised contemporaneously, were considered and rejected by the Inter-Ministerial Commission").

<sup>833</sup> It confirmed that RMGC had submitted the Waste Management Plan just three days earlier. [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 5; see also *supra* Section 3.3.2.2.

<sup>834</sup> [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#), p. 8 (n. 3) (emphasis added); see *supra* para. 555.

<sup>835</sup> [Tanase III](#), p. 52 (para. 85); see also [Counter-Memorial](#), p. 113 (para. 299).

- 618 Fourth, although the commission discounted the relevance of certain issues (namely, the need for a valid urban certificate and the litigation concerning the environmental permit for the PUZ), the Claimants accord undue importance to those conclusions in light of the manner in which the note was prepared.<sup>836</sup> Contrary to the Claimants' allegations, the note, which totals eight pages, was based on limited information.<sup>837</sup> [REDACTED]
- 619 The Claimants contest the Respondent's prior observation that, unlike the TAC representatives, RMGC had external legal counsel present and actively involved in the two meetings.<sup>839</sup> They point to the presence of Ms. Maya Teodoriu, the president of the commission (who, both before and after her tenure as State Secretary, has served as judge), Ministry of Justice lawyers and, at one meeting on 25 March 2013, the Ministry of Environment's external legal counsel.<sup>840</sup>
- 620 These remarks are, however, misleading. Neither Ms. Teodoriu nor the Ministry of Justice lawyers were present to advise the ministries regarding the EIA Review Process or permitting requirements.<sup>841</sup> Furthermore, the alleged meeting of 25 March 2013 took place on the same day the commission submitted its note and thus did not affect its findings.<sup>842</sup>

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<sup>836</sup> See also [Counter-Memorial](#), p. 113 (para. 299).

<sup>837</sup> [Reply](#), p. 39 *et seq.* (paras. 59-60).

<sup>839</sup> [Reply](#), p. 40 (para. 60); [Counter-Memorial](#), p. 113 (para. 299); [Interministerial commission meeting transcript dated 11 March 2013, at Exhibit C-471](#), p. 24 *et seq.*; [REDACTED]

<sup>840</sup> See [REDACTED], p. 50 *et seq.* (para. 83).

<sup>841</sup> [REDACTED] see also [Interministerial commission meeting transcript dated 11 March 2013, at Exhibit C-471](#).

<sup>842</sup> See [REDACTED], p. 51 (para. 84); [Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roşia Montană mining project attached to email from \[REDACTED\], at Exhibit C-553.02](#).

621 Finally, the commission's note was based on limited and at times misleading statements by RMGC's representatives.<sup>843</sup> ██████ disputes these observations. For instance, he alleges that he accurately described the status of the PUZ to the commission by noting that the PUZ had been approved in 2002 and then amended and updated in 2006 and 2010.<sup>844</sup> These statements remain misleading. Although the Roșia Montană Local Council had approved the PUZ in 2002, NGOs had contested its validity for years.<sup>845</sup> Although RMGC had proposed amendments to the PUZ in 2006 and 2010, the Local Council had not and could not approve that PUZ since, as RMGC admits, it had not secured the requisite endorsements, at least one of which was the subject of litigation.<sup>846</sup>

### **3.6.1.9 The TAC Meetings between May and July 2013 Demonstrate that the EIA Review Process Was Ongoing**

622 As explained in the Counter-Memorial, the TAC met four times between May and July 2013.<sup>847</sup> In their Reply, the Claimants argue that the Ministry of Environment's "technical assessment was complete" in May 2013,<sup>848</sup> and that the TAC meetings "merely re-confirmed that the requirements for the Environmental Permit were met and that the Ministry of Environment was prepared to recommend issuance of the Permit."<sup>849</sup>

623 At each of those TAC meetings, however, State authorities raised issues or made requests that RMGC ignored or failed to properly address.

624 On 10 May 2013, the TAC focused on RMGC's recently-submitted Waste Management Plan.<sup>850</sup> The Ministry of Transport's representative also raised the issue of the transportation of cyanide from Constanța to Roșia

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<sup>843</sup> [Counter-Memorial](#), p. 110 *et seq.* (paras. 293-299).

<sup>844</sup> ██████, p. 48 (para. 78).

<sup>845</sup> [Counter-Memorial](#), p. 54 (Section 3.4.1) and p. 380 *et seq.* (Annex IV) (rows Nos. 16, 21, 29, and 31).

<sup>846</sup> See *id.* at p. 21 *et seq.* (paras. 66-68, 141, 200, 211, and 256).

<sup>847</sup> [Counter-Memorial](#), p. 116 *et seq.* (paras. 307-317).

<sup>848</sup> [Reply](#), p. 53 (para. 90).

<sup>849</sup> [Reply](#), p. 53 (para. 89).

<sup>850</sup> [TAC meeting transcript dated 10 May 2013](#), at [Exhibit C-484](#), p. 10.

Montană.<sup>851</sup> He observed “nobody in the Constanța Port was contacted, nobody knows about this potential transport.”<sup>852</sup> He then directly asked Mr. Avram, “Have you contacted anybody, is there a special storage area for such thing?”<sup>853</sup>

625 In response, both Mr. Avram and Mr. Tănase merely indicated that “several alternative routes” had been studied, “the preferred route [being] by railway” but that, in any event, the final “optimum” route would “have to [be] establish[ed] with the producer – be it by train or by sea or by road ... when the time comes.”<sup>854</sup> This vague response did not address the question.<sup>855</sup> In any event, at the close of the discussion, the TAC president referred to the need for another meeting.<sup>856</sup>

626 The TAC met again on 30 May 2013.<sup>857</sup> Mr. Pătrașcu indicated, contrary to the Claimants’ misleading account,<sup>858</sup> that there “were ... things left uncertain after the last discussions, which took place in 2011, at the end of 2011,”<sup>859</sup> including issues relating to Waste Management Plan and the environmental guarantees.<sup>860</sup> He then asked each TAC member to express its point of view on these issues, requested that RMGC send its answers to the relevant ministries, and referred to the next meeting.<sup>861</sup> The TAC vice-president thus made clear that the EIA Review Process was not

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<sup>851</sup> See [CMA - Reichardt Report](#), p. 13 *et seq.* (paras. 56-102); [CMA - Blackmore Report](#), p. 28 *et seq.* (paras. 116-118).

<sup>852</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 12.

<sup>853</sup> *Id.*

<sup>854</sup> *Id.*

<sup>855</sup> [CMA - Reichardt Report](#), p. 13 *et seq.* (paras. 56-102); [CMA - Blackmore Report](#), p. 29 *et seq.* (paras. 120-134).

<sup>856</sup> [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 22 (Pătrașcu) (inviting all participants to the next TAC meeting).

<sup>857</sup> [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#).

<sup>858</sup> [Reply](#), p. 55 (para. 90(e)).

<sup>859</sup> [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 18 (Pătrașcu).

<sup>860</sup> *Id.* at p. 18 (Pătrașcu).

<sup>861</sup> *Id.* at p. 19 and p. 22 *et seq.* (Pătrașcu).

“complete.” RMGC did not protest or object to a next meeting being convened.

627 Thus, contrary to the Claimants’ allegations, the TAC’s review was not complete in May 2013.

628 On 10 June 2013, the Ministry of Environment sent a letter to the TAC members inviting them to attend a 14 June 2013 TAC meeting.<sup>862</sup> As discussed above, the letter also includes a request to submit “in writing, on 14 June 2013, the conditions for project implementation, the measures for diminishing the impact according to your field of competence, as well as the monitoring indicators, which are mandatory for the purpose of project implementation.”<sup>863</sup> Contrary to the Claimants’ allegations,<sup>864</sup> nothing in this letter signals that the EIA Review Process was “complete.”

629 On 14 June 2013, the TAC discussed possible conditions.<sup>865</sup> The TAC president then asked each TAC member to “send ... [their] conditions within 5 working days, so as to have your opinions in writing.”<sup>866</sup> Again, neither the TAC President, nor any other TAC member indicated that the EIA Review Process was complete.

630 The TAC reconvened on 26 July 2013 to discuss divergent views of the Romanian Academy and the Geological Institute.<sup>867</sup> The Claimants wrongly characterize this meeting as another example of the completion of the EIA Review Process by quoting the TAC’s vice president, Mr. Pătrașcu’s following opinion: “I think we can conclude that the analysis on the quality and conclusions of the EIA Report has been finalized during

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<sup>862</sup> [Letter from Ministry of Environment to TAC members dated 10 June 2013, at Exhibit C-554](#), p. 1.

<sup>863</sup> *Id.* at p. 1 (emphasis in the original).

<sup>864</sup> [Reply](#), p. 53 (para. 90).

<sup>865</sup> [TAC meeting transcript dated 14 June 2013, at Exhibit C-481](#).

<sup>866</sup> *Id.* at p. 11.

<sup>867</sup> [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#), p. 1; [Counter-Memorial](#), p. 124 (para. 326).

all these TAC meeting this year.”<sup>868</sup> Mr. Pătrașcu, however, also reminded the TAC of the ongoing public consultation, which could result in observations from the public that would need to be reviewed.<sup>869</sup>

631 Gabriel Canada’s contemporaneous representations to investors reflect an understanding that, at least in part because of the public consultation, the EIA Review Process was ongoing:

“[O]n July 11, 2013 the MoE (the Ministry that co-ordinates the TAC) launched a public consultation process on the main conditions and measures which need to be included in the final decision process of issuing and the EP. **The Company views this as a positive procedural development and awaits clarification on the conclusion of the TAC process** and how the results of the public consultation will be incorporated in the EP decision process. **The Company is unable to provide guidance on the related timeframes to a final decision from the TAC, MoE or the Government.**”<sup>870</sup>

632 Gabriel Canada also asserted that there was “no precedent or regulatory timeline in Romania for permitting a mining operation on the scale of the Project.”<sup>871</sup> The Claimants’ contemporaneous comprehension was hence in line with the TAC’s: the EIA Review Process was not complete.

633 Likewise, in August 2013, Gabriel Canada commented that it was “encouraged by the recent momentum with the [TAC] review process and look[ed] forward to the positive completion of the parliamentary debate on the Project in the near future, together with finalisation of the environmental permitting process.”<sup>872</sup>

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<sup>868</sup> [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#), p. 15 and [Reply](#), p. 56 *et seq.* (para. 90(i)).

<sup>869</sup> [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#), p. 15. ██████’s view that this meeting was the last “conciliation meeting” that needed to be convened for the Ministry of Environment to make a decision is thus incorrect, and likely the result of his uneducated interpretation of the “rules governing the EIA procedure” (██████, p. 37 (para. 68)).

<sup>870</sup> [Gabriel Canada MD&A, Second Quarter 2013, at Exhibit R-251](#), p. 3 (emphasis added).

<sup>871</sup> *Id.* at p. 4.

<sup>872</sup> [Gabriel Canada press release dated 2 August 2013, at Exhibit R-520](#), p. 2.

**3.6.1.10 The Ministry of Environment's Publication in July 2013 of a Note for Public Consultation Did Not Mean that the Ministry of Environment Had Decided to Issue the Environmental Permit**

- 634 The Claimants continue to refer to the Ministry of Environment's publication on 11 July 2013 of a note for public consultation as evidence that the Ministry of Environment was allegedly ready and thus required to issue the environmental permit.<sup>873</sup> They continue to refer erroneously to this document as a "draft environmental permit."<sup>874</sup> It was not.
- 635 The name of the document was "Note for Public Consultation on the Maximization of the Environmental Benefits Brought by the Roșia Montană Project, as Well as the Implementation of a Set of Conditions and Measures to Ensure the Integral Rehabilitation of Environmental Factors and Removal of the Current Pollution Within the Roșia Montană Perimeter."
- 636 It was, as its name indicated, a note, that contained draft "conditions and measures," which could then have later been incorporated into a draft permit. Had the Ministry of Environment deemed that the conditions were met and that it was in a position to publish a draft environmental permit, it could and would have done so. In accordance with the law, the Ministry of Environment has for other mining and other projects published draft permits which are indeed called "draft environmental permit," not "draft conditions and measures."<sup>875</sup>
- 637 The 2014 RMGC management report confirms its understanding that the note was not a draft permit and that the TAC and the Ministry of Environment still needed to each make a decision and to draft a permit, which would then be the subject of a public consultation:

**"After the completion of the environmental impact assessment procedure, the [TAC] is to make a (consultative) decision. Based on this decision and on the Assessment report, the Ministry of**

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<sup>873</sup> [Reply](#), p. 55 (para. 90(g)).

<sup>874</sup> *Id.* at p. 56 (para. 90(h)); see also [Counter-Memorial](#), p. 121 (paras. 318-320).

<sup>875</sup> See [CMA - Wilde Report II](#), p. 49 *et seq.* (paras. 172-174).

Environment **will decide** about the granting / rejecting the environmental permit. The decision of the Ministry of Environment and Climate Change together with an environmental permit draft **will be subject** to a public consultation. At the end of the consultation period, the Ministry of Environment and Climate Change **will draw up the environmental permit** draft to be subject to the subsequent approval of the Romanian Government and to become valid once it is published in the Official Journal.”<sup>876</sup>

638 The Claimants make much of a draft, undated decision to issue the permit.<sup>877</sup> However, this document is just that: a draft. Neither its existence nor its content evidence a finding by the Ministry of Environment that the requirements were met.<sup>878</sup>

639 As explained in the Counter-Memorial and notwithstanding the Claimants’ objections, although certain TAC members had provided input for purposes of the note for public consultation regarding possible conditions and measures to be included in a draft environmental permit, the TAC had not yet discussed in detail the specific and mandatory conditions and mitigation measures.<sup>879</sup> The TAC and Ministry of Environment still needed to reach a consensus regarding the conditions and mitigation measures to issue a favorable recommendation for the environmental permit.<sup>880</sup>

640 Prof. Mihai retorts that there was no legal requirement for the Ministry of Environment to discuss in detail the conditions and measures proposed to be included in the environmental permit.<sup>881</sup> This response is remarkable given the size (nearly 24 square kilometers) and complexity of the Project

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<sup>876</sup> These statements undermine the allegation of ██████████ that Ms. Mocanu and Mr. Patrascu indicated in July 2013 that the permit would be issued “as soon as the Government gives the green light.” Ms. Mocanu explains that she was not even in the Directorate in 2013. [Reply](#), p. 58 (para. 94); [2014 RMGC Annual Management Report, at Exhibit C-1570.03 \(resubmitted\)](#) (emphasis added); [Mocanu II](#), p. 78 (para. 228).

<sup>877</sup> [Reply](#), p. 56 (para. 90(h)) and p. 58 (para. 94); [Ministry of Environment draft decision \(undated\)](#), at [Exhibit C-2075](#).

<sup>878</sup> See also [CMA - Wilde Report II](#), p. 49 *et seq.* (paras. 172-174).

<sup>879</sup> [Counter-Memorial](#), p. 125 (para. 329); [Reply](#), p. 60 (paras. 101-103).

<sup>880</sup> [Counter-Memorial](#), p. 125 (para. 329).

<sup>881</sup> [Reply](#), p. 60 (para. 102) (referring to [Mihai LO II](#), p. 93 *et seq.* (paras. 309-311)).

and which, by the Claimants' own admission, was to become the largest mining site in Europe; which still entailed the displacement of many local residents; the construction of a mining project on a site that was known to have archaeological vestiges and that had only been partially discharged.

641 In September 2013, Ms. Plumb testified to the Joint Special Committee, "when the environmental permit procedure is finalized in the TAC, then we will know the viewpoints of the specialists."<sup>882</sup> She further stated that "[a]ll the methods and measures related to this activity will be detailed ... in the environmental permit; the [TAC] will include specialists and those conditions will be enforced by closely following with the legislation."<sup>883</sup>

642 The Claimants make much of the Respondent's non-production of documents in response to the following requests:

- their request for "[a]ll documents identifying legal requirements that RMGC allegedly failed to meet that allegedly prevented the Ministry of Environment from taking any decision regarding the Environmental Permit following the TAC meetings on November 29, 2011 and July 26, 2013;" and
- their request for "[a]ll documents reflecting the Ministry of Environment's, Ministry of Culture's, or TAC's conclusions in 2011-2013 that the EIA Report failed to meet Romanian standards with regard to: (i) the use of cyanide to process the ore at Roşia Montană; (ii) the design and proposed siting of the [TMF]; (iii) the potential transboundary effects of the Project for Hungary; (iv) the remediation of historical pollution; (v) the mine closure and rehabilitation plans and the environmental guarantees for the Project; or (vi) the preservation of cultural heritage."<sup>884</sup>

643 The Claimants exclaim the absence of documents produced in response to these requests which, they say, "lays completely bare [the Respondent's]

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<sup>882</sup> [Parliamentary Special Commission hearing transcript dated 24 September 2013, at Exhibit C-506](#), p. 25 (also saying "We are waiting for the public debates and for the specialists' points of view on the environmental permit.").

<sup>883</sup> *Id.* at p. 42.

<sup>884</sup> [Reply](#), p. 36 *et seq.* (para. 53).

*post hoc* assertions in this arbitration.”<sup>885</sup> This attempted “got ‘ya!” argument may be easily dismissed.

- 644 First, as already explained, the TAC had not reached the stage of setting out the specific conditions to be attached to the possible environmental permit in either 2012<sup>886</sup> or July 2013. The Respondent has described at length why the Ministry of Environment did not issue a decision regarding the permit in either 2012<sup>887</sup> or 2013.<sup>888</sup>
- 645 Second, the Claimants already have in their possession documents responsive to the first request above.<sup>889</sup>
- 646 Regarding the second request above, the Respondent has already explained, and RMGC has been aware of the TAC’s concerns regarding these issues which were discussed in meetings between 2007 and 2014,<sup>890</sup> including in 2011<sup>891</sup> and 2013.<sup>892</sup>

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<sup>885</sup> *Id.* at p. 36 (para. 54).

<sup>886</sup> See also [Counter-Memorial](#), p. 92 *et seq.* (paras. 242-258); [PO 10 Annex A](#), p. 12 (Response to Req. 3).

<sup>887</sup> See [Counter-Memorial](#), p. 92 *et seq.* (Sections 4.8 and 5.9); see *supra* paras. 220-316.

<sup>888</sup> See [Counter-Memorial](#), p. 124 (Section 5.9); see *supra* paras. 529-607.

<sup>889</sup> See *e.g.* TAC meeting minutes from 2011 to 2013 at [Exhibits C-483 to C-486](#) and [C-481](#); [Letter from Ministry of Environment to RMGC, at Exhibit C-646](#); [Letter from Ministry of European Affairs to Ministry of Environment dated 16 February 2012, at Exhibit R-225](#); [Letter from ANAR to Ministry of Environment dated 24 January 2012, at Exhibit R-226](#); [Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at Exhibit C-2162](#).

<sup>890</sup> See [Counter-Memorial](#), p. 73 *et seq.* (paras. 189, 196, 310-311 and 316).

<sup>891</sup> See *e.g.* [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 2 *et seq.* (discussing cyanide); [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 3 (discussing design and proposed siting of the [TMF] together with emergency plans); [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 30 *et seq.* (discussing potential transboundary effects of the Project); *id.* at p. 54 *et seq.* (discussing mine closure and rehabilitation plans and the environmental guarantees for the Project); *id.* at p. 38 *et seq.* (discussing the preservation of cultural heritage).

<sup>892</sup> See *e.g.* [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 12 *et seq.* (discussing cyanide); [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 14 *et seq.* (discussing design and proposed siting of the [TMF]); [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#), p. 8 *et seq.* (discussing potential transboundary effects of the Project); [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 12 *et seq.* (discussing

### 3.6.1.11 Gabriel Canada's Public Disclosures and RMGC's Annual Report from 2013 and 2014 Confirmed that the EIA Review Process was Ongoing

- 647 As noted above, the 2014 RMGC management report confirmed the understanding that the EIA Review Process was ongoing.<sup>893</sup> Gabriel Canada's public disclosures and RMGC's Annual Report from 2013 and 2014 reflect this same understanding.
- 648 In March 2013, Gabriel Canada reported that "[d]uring 2013" it would "focus on ... (ii) completing the EIA process for the Project and, ultimately, receipt of the Environmental Permit ..."<sup>894</sup> It also declared that it was "confident that it **c[ould]**, and **w[ould]**, **comply** with its environmental obligations and **look[ed] forward to furthering discussions** with the relevant Ministries on this topic."<sup>895</sup> It reiterated these same statements in May 2013 and viewed the Government's creation of the Department for Infrastructure Projects and "recent dialogue across Government ministries as a positive basis for enduring engagement on the ... Project."<sup>896</sup>
- 649 Referring to the TAC meeting of 10 May 2013, Gabriel Canada noted that it "await[ed] clarification on how the TAC review w[ould] be progressed including whether further meetings or documentation w[ould] be requested." Although the Claimants complain about the 2013 TAC

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the remediation of historical pollution); *id.* at p. 6 (discussing mine closure and rehabilitation plans and the environmental guarantees); *id.* at p. 20; [TAC meeting transcript dated 14 June 2013, at Exhibit C-481](#), p. 2 (discussing the preservation of cultural heritage).

<sup>893</sup> See *supra* para. 637.

<sup>894</sup> [Gabriel Canada 2012 Annual Information Form, at Exhibit C-1810](#), p. 7 (also noting that it planned to "progress[] substantially the endorsement approval processes" for the PUZs, to obtain a new UC, continue land acquisition, and intervene in court cases against Project).

<sup>895</sup> [Gabriel Canada MD&A, Fourth Quarter 2012, at Exhibit R-510](#), p. 3; see also [Gabriel Canada press release dated 14 March 2013, at Exhibit R-549](#), p. 2 (Mr. Henry stating: "**we will continue the dialogue** with the new Romanian Government regarding the economic, social, cultural and environmental benefits that the Project will bring to Romania. We look forward to finalising the environmental permitting process...") (emphasis added); see also [Gabriel Canada MD&A, Second Quarter 2013, at Exhibit R-251](#), p. 3.

<sup>896</sup> *Id.* at p. 1.

meetings, at the time, Mr. Henry spoke in positive terms about those meetings and about the interactions with the Government:

**“We are pleased with the recommencement of the [TAC] review process** and encouraged by the interaction between RMGC and Government so far this year. We will maintain dialogue with the Government regarding the economic, social, cultural and environmental benefits that the Project will bring to Romania and we look forward to finalising the environmental permitting process.”<sup>897</sup>

650 Similarly, on 2 August 2013, Gabriel Canada announced:

“Since the USL Government secured its long-term position at the end of 2012, the Company’s dialogue with the relevant ministries and departments has steadily increased. **This improved momentum has been demonstrated through three formal meetings of the Technical Assessment Committee (“TAC”) during Q2 2013, and since the end of the quarter a further TAC meeting has been held.** The Company awaits clarification on the conclusion of the TAC process and how the results of the public consultation will be incorporated in the EP decision process.”<sup>898</sup>

651 Similar to its previous statements, on 2 August 2013, Gabriel Canada reported that it was “confident that it **c[ould]**, and **w[ould]**, comply with its environmental obligations and look[ed] forward to concluding its discussions with the TAC and relevant Ministries on this topic and to a successful process through Parliament of the Project.”<sup>899</sup> It made similar comments in subsequent public disclosures.<sup>900</sup>

652 In sum, Gabriel Canada and RMGC’s contemporaneous statements reflect their understanding that the EIA Review Process was ongoing, satisfaction

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<sup>897</sup> *Id.* at p. 1 (emphasis added).

<sup>898</sup> [Gabriel Canada press release dated 2 August 2013, at Exhibit R-520](#), p. 1 (emphasis added).

<sup>899</sup> [Gabriel Canada MD&A, Second Quarter 2013, at Exhibit R-251](#) (emphasis added).

<sup>900</sup> [Gabriel Canada MD&A, Third Quarter 2013, at Exhibit R-539](#), p. 5; [Gabriel Canada MD&A, Third Quarter 2013, at Exhibit R-539](#), p. 6; [REDACTED]

[REDACTED] [Gabriel Canada MD&A, Fourth Quarter 2013, at Exhibit R-541](#), p. 6.

that the TAC was continuing its work, and uncertainty as to whether RMGC had, as of then, complied with all environmental obligations. None of the complaints the Claimants voice in this arbitration regarding the existence and content of the TAC meetings or the Ministry of Environment's alleged failure to issue the environmental permit in 2013 appear in those documents. Their contemporaneous statements furthermore annihilate their *post hoc* allegations in this arbitration of State coercion. They *a fortiori* belie the claim that, through the actions of the Ministry of Environment in connection with the EIA Review Process in 2013, Romania failed to provide the Claimants' investments with fair and equitable treatment.

**3.6.1.12 The Ministry of Environment's Alleged Failure to Issue the Environmental Permit Since Parliament's Rejection of the Roșia Montană Law Does Not Amount to Failure to Provide Fair and Equitable Treatment to the Claimants' Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

653 The Claimants continue to complain of the Ministry of Environment's alleged failure to issue the environmental permit in the aftermath and notwithstanding Parliament's rejection of the Roșia Montană Law.<sup>901</sup>

654 The Claimants recognize that Parliament's review of the Roșia Montană Law was separate from the EIA Review Process and argue that, irrespective of the Roșia Montană Law, it remained incumbent on the Ministry of Environment to make a decision on the environmental permit.<sup>902</sup> The Respondent agrees – it remained incumbent on the Ministry of Environment to make a decision once the requirements were met and, in its discretion, it deemed that it could do so, as Ms. Plumb testified before the Joint Special Committee in the fall of 2013:

“[t]he Ministry of Environment is not asking the Romanian Parliament to issue the environmental permit. The questions you asked fall under the sole responsibility of the [TAC] in view of initiating and proposing

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<sup>901</sup> [Reply](#), p. 211 (para. 493).

<sup>902</sup> *Id.* at p. 110 (para. 219).

the environmental permit. Of course, the Ministry of Environment will provide all this information in writing, because there are many questions. They are all related to the field of exclusive specialty. What I can tell you now is that the environmental permit is subject to this analysis carried out by the [TAC] and that, by asking the Parliament to make a decision in respect to this Draft Law, we are not asking it to issue the environmental permit.”<sup>903</sup>

655 At the same time, the Claimants contend that Parliament “usurped” the Government’s role by deciding the fate of the environmental permit.<sup>904</sup> This contention is unfounded. The Roşia Montană Law would have facilitated the Project. Its rejection did not amount to a decision to reject the environmental permit – or the other permits and endorsements that RMGC still needed to secure. Parliament’s rejection of the proposed law meant that RMGC was required to fall back on the regular permitting procedures.

656 In November 2013, Ms. Plumb had made clear to the Joint Special Committee that, if the Roşia Montană Law were rejected, RMGC still needed to *inter alia* secure a law declaring the Project of outstanding public interest, for purposes of the Water Framework Directive, and to provide the agreed environmental, financial guarantees.<sup>905</sup>

657 The Claimants continue to criticize the Ministry of Environment for allegedly unlawfully convening the TAC in April 2014 (still during the parliamentary review of the Roşia Montană Law), July 2014, and April 2015, notwithstanding “official statements that TAC’s review was over and all permitting requirements were met.”<sup>906</sup> However, the Ministry of Environment convened these TAC meetings in the ordinary course of its business and, in the case of the April 2015 meeting, notwithstanding the

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<sup>903</sup> [Parliamentary Special Commission hearing transcript dated 24 September 2013, at Exhibit C-506](#), p. 31.

<sup>904</sup> [Reply](#), p. 211 (paras. 491-492); [Mihai LO II](#), p. 107 *et seq.*

<sup>905</sup> [Parliamentary Special Commission hearing transcript dated 24 September 2013, at Exhibit C-506](#), p. 39.

<sup>906</sup> [Reply](#), p. 109 (para. 216); ██████████ p. 46 (para. 79).

Claimants' Notice of Dispute sent in January 2015.<sup>907</sup> At these meetings, the TAC noted that the environmental permitting process had continued throughout 2013<sup>908</sup> and, as detailed below, considered commissioning a study regarding the TMF.<sup>909</sup> In April 2014, it discussed the need for clarification regarding the storage of hazardous substances through the port of Constanța,<sup>910</sup> the need for information relating to compliance with the Water Framework Directive,<sup>911</sup> and the lawsuits relating to ADC 9/2011.<sup>912</sup>

658 The Claimants argue that the TAC meetings were unlawful because the TAC had purportedly already completed its review.<sup>913</sup> However, the EIA Review Process was not yet completed at the time, and the Ministry was within its discretion to convene the meetings.<sup>914</sup>

659 In March 2015, the Minister of Environment, Ms. Gratiela Leocadia Gavrilescu, confirmed that the EIA Review Process was underway: “[t]he final decision on the Project, which may be the issuance of the environmental agreement or the rejection of the environmental approval

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<sup>907</sup> See [Counter-Memorial](#), p. 142 *et seq.* (para. 373); [Notice of Dispute requesting consultation dated 20 January 2015, at Exhibit C-8](#); [TAC meeting transcript dated 27 April 2015, at Exhibit C-474](#), p. 6 (Făcă) (“our position is to ... make the procedure as predictable as possible. This is why we organised the today’s TAC meeting because, indeed, our opinion is also to not stand still and wait for suggestions”) and (“Their [the TAC’s] role is...to make sure that this investment is made in very good conditions both for the environment and for the Investor...”).

<sup>908</sup> [TAC meeting transcript dated 2 April 2014, at Exhibit C-473](#), p. 2 (Pătrașcu) (“throughout 2013 we held several TAC meetings where we continued the [EIA] Procedure, as well as the procedure for the analysis of the quality of the [EIA] Report, including the analysis of the financial guarantees, the analysis of the environmental liability, risk scenarios.”).

<sup>909</sup> See *infra* paras. 660-661; [TAC meeting transcript dated 27 April 2015, at Exhibit C-474](#), p. 3 (Făcă) (“we will see if the Ministry will carry on with this study or not”).

<sup>910</sup> [TAC meeting transcript dated 2 April 2014, at Exhibit C-473](#), p. 10 (MT) (“there should be a pertinent discussion with the Harbor Administration so that things will be arranged in proper conditions as far as the environment is concerned.”).

<sup>911</sup> *Id.* at p. 13 *et seq.* (Săcuiu).

<sup>912</sup> *Id.* at p. 16 (Hegeduș) (noting that it is necessary to wait until the end of the litigation).

<sup>913</sup> [Reply](#), p. 110 (para. 220).

<sup>914</sup> See [Additional information on the evaluation of the RMGC EU Pilot, 2014, at Exhibit R-550](#), p. 2.

request will be taken at the meetings of the [TAC].”<sup>915</sup> When asked “in what phase” was the project, she responded that it was “currently under the [EIA] procedure, notably at the quality assessment stage of the [EIA] Report.”<sup>916</sup>

660 The Claimants criticize the TAC both for considering the possible commissioning of an expert study regarding the TMF and then not following through.<sup>917</sup> Following its review of the Roşia Montană Law in the fall of 2013, the Joint Special Committee had recommended that the Ministry of Environment consider commissioning such a study in response to concerns regarding the location of the envisaged TMF and the risk of seepage of toxic substances in the groundwater beneath.<sup>918</sup> Although the Claimants suggest that this concern came solely from the head of the Geological Institute, different members of the TAC<sup>919</sup> and the public<sup>920</sup> had evoked this concern for years. The TAC had suggested a possible solution, namely that RMGC put in place an additional liner (called a geomembrane liner) for the TMF pond.<sup>921</sup> RMGC had refused and insisted that its envisaged natural clay liner sufficed.<sup>922</sup> Even if RMGC did not deem the geomembrane liner necessary, it could have assuaged the TAC’s and the

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<sup>915</sup> [Letter from Minister of Environment to Member of Parliament dated 11 March 2015, at Exhibit R-551](#), p. 3.

<sup>916</sup> *Id.*

<sup>917</sup> [Reply](#), p. 110 (paras. 220-221); [REDACTED] p. 46 *et seq.* (paras. 80-87).

<sup>918</sup> [Joint Special Committee report dated November 2013, at Exhibit C-557](#), p. 69.

<sup>919</sup> [CMA - Reichardt Report](#), p. 40 (paras. 166-167); [CMA - Claffey Report I](#), p. 15 (para. 54); [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 18; [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#), p. 4.

<sup>920</sup> See *e.g.* [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 *et seq.*; [Minutes of Public Consultation in Câmpeni dated 26 July 2006, at Exhibit C-277](#), p. 7; [2007 Update to EIA Report, Public Consultations Vol. 33, at Exhibit C-318](#), p. 1 *et seq.*; [2007 Update to EIA Report, Public Consultations Vol. 25, at Exhibit C-310](#), p. 1 *et seq.*; [Minutes of Public Consultation in Câmpeni dated 31 March 2009, at Exhibit C-615](#), p. 5; [Minutes of Public Consultation in Bucium dated Apr. 2, 2009, at Exhibit C-616](#), p. 3.

<sup>921</sup> [CMA - Reichardt Report](#), p. 38 *et seq.* (paras. 163-168).

<sup>922</sup> *Id.* at p. 38 *et seq.* (paras. 163-168); [Corser II](#), p. 12 (para. 39).

public's concerns by agreeing to the additional liner.<sup>923</sup> RMGC could *a fortiori* have made this proposal following the Joint Special Committee's recommendation in 2013 and the TAC's consideration of such a study in 2014. As RMGC had evidently already decided to commence arbitration proceedings, it chose not to do so.

661 The Claimants make much of the circumstances surrounding the Ministry of Environment's non-pursuit of the TMF study. They note that the TAC president asked TAC members to indicate their conditions for the possible terms of reference for the study and that he later announced that the Ministry was not commissioning the study because it had not received the necessary input.<sup>924</sup> While, as the Claimants note, several TAC members had responded to the TAC president's request, the Ministry decided not to pursue the study, at least in part because it considered that the input had been insufficient. The Ministry was not bound to follow the recommendations of the Joint Special Committee and can hardly be criticized for considering the possible commissioning of a study regarding the TMF.

662 The Claimants remain fixated on the notion that the Ministry of Environment did not issue the environmental permit in 2014 or 2015 for political reasons.<sup>925</sup> Although Ms. Mocanu confirms having said after the April 2015 meeting that the TAC was "paralyzed," she denies having said that this was for political reasons; rather, the TAC had not reached a consensus regarding the issuance of a recommendation to the Ministry.<sup>926</sup>

663 The Claimants do not explain what they think those political reasons would have been. They do not say, let alone demonstrate, who within the Ministry of Environment and/or the Government allegedly unlawfully withheld the environmental permit for political reasons.

664 Neither the Ministry of Environment, nor the Government had any reason to oppose RMGC or the Project. The Claimants have not pointed to any

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<sup>923</sup> [CMA - Reichardt Report](#), p. 40 (para. 168); [CMA - Claffev Report I](#), p. 11 *et seq.* (paras. 32-41); [CMA - Claffev Report II](#), p. 6 (para. 11).

<sup>924</sup> [Reply](#), p. 111 (para. 222).

<sup>925</sup> *Id.* at p. 110 *et seq.* (paras. 221 and paras. 223-224).

<sup>926</sup> [Mocanu II](#), p. 81 (para. 239).

motive they would have had to oppose RMGC or the Project. The Government had demonstrated its willingness to help RMGC by submitting the Roşia Montană Law to Parliament. Had the Ministry of Environment or Government deemed – as the Claimants argue – that there was no obstacle to issuing the environmental permit, they would have done so. They would have no interest in unlawfully withholding a permit.

- 665 The Claimants nit-pick at the Ministry of Environment's each and every move in 2014 and 2015 and disregard the elephant in the room: RMGC still faced numerous obstacles to securing its environmental permit.<sup>927</sup> It was embroiled in litigation concerning its urban certificates and urban planning documentation,<sup>928</sup> as well as the ADC for Cârnic.<sup>929</sup> It lacked the Water Management Permit<sup>930</sup> and surface rights to the Project Area.<sup>931</sup> After the rejection of the law, it was incumbent upon RMGC to overcome these hurdles, to resume and complete the regular permitting process, and to find ways to secure the social license.<sup>932</sup>
- 666 Had the Ministry of Environment issued a decision on the environmental permit in 2014 or 2015, it would have been required to reject RMGC's application for the environmental permit. It, however, preferred to continue to give RMGC a chance to resolve these many issues.
- 667 RMGC's insipid letters to the President, Prime Minister and other State authorities in 2014 and 2015 noting for instance its "availability to dialogue" reflect a cynical effort to build a paper trail for this arbitration

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<sup>927</sup> The Claimants rely on statements of in particular the Minister of Environment, Ms. Rovana Plumb, in 2013 to argue that RMGC had met all requirements for the environmental permit. [Reply](#), p. 64 (para. 110). These political statements were part of an effort to support RMGC, the Project, and the Roşia Montană Law. They did not, however, mean that RMGC had met all permitting requirements and that the Ministry of Environment deemed that it could issue the environmental permit and had decided to do so.

<sup>928</sup> See *supra* paras. 569, 571, and 577-579; [Counter-Memorial](#), p. 145 *et seq.* (paras. 384-385).

<sup>929</sup> See *supra* and *infra* paras. 310, 604, 697, 707, and 717; [Counter-Memorial](#), p. 146 (para. 385).

<sup>930</sup> See *supra* para. 602; see also [Counter-Memorial](#), p. 118 (para. 311, n. 571).

<sup>931</sup> See *supra* para. 581; [Counter-Memorial](#), p. 146 *et seq.* (para. 387).

<sup>932</sup> [Gabriel Canada press release dated 12 March 2014, at Exhibit R-540](#), p. 1 (noting that ministers do not believe that the next steps to the permitting fall under their responsibility).

but are irrelevant.<sup>933</sup> The Claimants had indeed already threatened to sue in mid-2013 and were raising funds in 2014 to that purpose.<sup>934</sup> In a letter dated 5 December 2014 to Prime Minister Ponta, RMGC requested “clear guidance as to the next steps that will be taken by the Government, including the competent authorities, in regard to the open and pending administrative proceedings relating to the Roşia Montană Project” as well as “clarification from the Government as to ... the timeline that will be followed in regard to the remaining permitting procedures for the Roşia Montană Project.”<sup>935</sup> RMGC was manifestly attempting to shift the blame for its failures to the Government, in a build-up of this arbitration. Indeed, RMGC served the Notice of Dispute only a few weeks later.

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[REDACTED]  
[REDACTED]  
[REDACTED] Insofar as its permits were being challenged in court, RMGC (together with the State authorities that had issued those permits) needed to defeat those challenges. It was not up to the President, Prime Minister or Government to take these measures for RMGC. It was *a fortiori* not the Government’s responsibility to indicate the “timeline that w[ould] be followed” for the issuance of outstanding permits, nor did it have the power to do so. Any such timeline – instructing central and local authorities to issue permits by a certain date (and apparently irrespective of RMGC’s fulfilment of the requirements) – would have been illegal.

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Even assuming that the Ministry of Environment could have issued the environmental permit in 2014 or 2015, it would have been futile for the Ministry of Environment to do so. Given the NGOs’ track record of

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<sup>933</sup> [REDACTED] paras. 224-255 (referring to [Letter from RMGC to Prime Minister dated 5 December 2014, at Exhibit C-1461](#)).

<sup>934</sup> [REDACTED] [Gabriel Canada press release dated 26 May 2014, at Exhibit R-288](#) (announcing private placement in view of possible arbitration).

<sup>935</sup> [Letter from RMGC to Prime Minister dated 5 December 2014, at Exhibit C-1461](#), p. 1.

<sup>936</sup> [REDACTED]  
[REDACTED]

challenging every administrative deed and permit for the Project for more than ten years, there can be no doubt that the same NGOs would have immediately challenged any environmental permit issued in 2014 or 2015.<sup>937</sup> It is all the more evident that NGOs would have challenged any environmental permit given the massive protests against the Project and Roşia Montană Law in late 2013 and early 2014.

670 Remarkably, the Claimants now argue that neither the protests nor the rejection of the Roşia Montană Law provided any reason for RMGC to reconsider the implementation of the Project or to take steps to secure the social license. They assert that “there was not any reason to ‘revise’ the Project because, for the reasons discussed in the Memorial and above, it already had met all legal requirements for the environmental permit.”<sup>938</sup>

671 However, it must have been clear to RMGC and the Claimant at the time that the Project would not be feasible without the social license, and that it was their task to secure it.<sup>939</sup> While a Government and other State authorities can issue permits, they cannot, and have no authority to force a project upon a population that does not accept it. A reasonable mining company in the same position as RMGC and genuinely wishing to find a solution to develop its project would have studied and proposed ways to make the Project more socially acceptable, such as implementing a geomembrane liner and reconsidering the size, location, and technical features of the Project.<sup>940</sup> RMGC could and should have considered a way forward for the Project. RMGC and the Claimants chose not to do so and preferred to seek to shift the blame to the Government and try their luck in arbitration proceedings instead.

672 Consequently, as it is clear from the evidence that the Ministry of Environment was not in a position to issue the environmental permit in

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<sup>937</sup> See [Counter-Memorial](#), p. 354 *et seq.* (Annex IV) (listing main NGO court actions).

<sup>938</sup> [Reply](#), p. 113 (para. 227).

<sup>939</sup> The Claimants’ expert Mr. Jeannes asserts that “even significant social opposition can be successfully managed.” See [Jeannes](#), p. 11 (para. 32). However, as Dr. Thomson explains, that is only the case when a mining project has all permits and is operational. [Thomson Opinion I](#), p. 17 *et seq.* (paras. 29-38).

<sup>940</sup> [CMA - Blackmore Report](#), p. 35 *et seq.* (paras. 150, 192-193); [CMA - Claffey Report II](#), p. 6 (para. 11); [CMA - Dodds-Smith Report II](#), p. 13 (para. 42).

2014 or 2015, its alleged failure not to issue the permit cannot amount to a failure to provide fair and equitable treatment to the Claimants' investments in violation of the BITs.

### 3.6.2 The Ministry of Culture Did Not Block or Reject the Project

673 As part of their FET claim, the Claimants complain of the State authorities' alleged failure to amend the 2010 LHM and declassify the Cârnic massif:

“Consistent with its refusal to issue the Environmental Permit, the Government also refused to correct errors in the 2010 LHM or take steps to remove the Cârnic massif from the List of Historical Monuments as it was legally obliged to do. This in turn facilitated litigations pursued by Project opponents to challenge local urbanism decisions and the reissued Cârnic ADC on the basis of admitted errors in the 2010 LHM that the Government arbitrarily refused to correct while the Project was being held up to force contractual renegotiations.”<sup>941</sup>

674 These arguments are without merit. As demonstrated below, the Ministry of Culture took steps to amend the 2010 LHM and declassify the Cârnic massif. Furthermore, the 2010 LHM was not maintained to facilitate judicial challenges by Project opponents (**Section 3.6.2.1**).

675 As noted above, the Claimants also argue that the Ministry of Culture's actions, following Parliament's rejection of the Roşia Montană Law, confirmed an alleged political rejection of the Project:

“Thereafter, rather than issue the Environmental Permit, the requirements for which the Government admitted were met, or issue a decision transparently explaining it was not doing so, the Government instead acted consistent with its determination that it would not permit the Project to proceed following Parliament's rejection by, among other things, declaring, without legal justification, the entire area of the Project as an historical monument and then subsequently nominating the Project area as a World Heritage site, acts which were

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<sup>941</sup> [Reply](#), p. 210 (para. 489).

fully incompatible with RMGC's License and other acquired rights and ensuring also that no construction permits could be issued to support the Project."<sup>942</sup>

676 However, neither the 2015 LHM nor the UNESCO application, both post-dating the initiation of the arbitration, reflect a determination not to permit the Project (**Sections 3.6.2.2 and 3.6.2.3**). Furthermore, RMGC only has itself to blame for any alleged impediment to obtain the delivery of building permits for the Project (**Section 3.6.2.4**). In any event, as discussed in **Section 3.6.1.2** above, the Ministry of Culture endorsed the Project in April 2013 and the Claimants do not dispute the validity of that endorsement.

### **3.6.2.1 The Ministry of Culture Did Not Arbitrarily Refuse to Correct Errors in the 2010 List of Historical Monuments or to Declassify the Cârnic Massif and Did Not Therefore Facilitate Litigation Pursued by Project Opponents**

677 According to the Claimants, although the authorities recognized the need to modify the Orlea and Cârnic entries in the 2010 LHM, they failed to do so, thereby facilitating NGO court challenges.<sup>943</sup> The Respondent maintains its position that these complaints can be swiftly dismissed.<sup>944</sup>

#### *The Descriptions of the Roșia Montană Historical Monuments in the 2010 LHM Were Consistent with the ADCs Issued at the Time*

678 As shown below, the description of Orlea in the 2010 LHM reflected the absence of ADCs for this area and the Cârnic massif entry was in line with the status of the ADCs issued for this area.

679 Over the years, the delimitation of Orlea in the LHM has been generic. Orlea is located within the two-kilometer area of Roșia Montană that was protected under the 1991 LHM. The 2004 LHM referred generally to the

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<sup>942</sup> *Id.* at p. 211 *et seq.* (para. 493) and p. 114 *et seq.* (Section V.B).

<sup>943</sup> *Id.* at p. 210 (para. 489), p. 115 (para. 234) and p. 121 *et seq.* (Section V.B.3, notably paras. 253 and 259); [Podaru LO](#), p. 82 *et seq.* (paras. 272-287).

<sup>944</sup> [Counter-Memorial](#), p. 81 *et seq.* (paras. 214-219).

“Orlea area,” “Orlea Massif,” and “Orlea”<sup>945</sup> and the 2010 LHM to a two-kilometer radius around Orlea.<sup>946</sup> Prof. Schiau suggests that unresearched sites are described with generic delimitations, which are later replaced with precise localization references following research.<sup>947</sup> The amendments in 2010 thus reflect the lack of research in this area.

680 The re-introduction of the two-kilometer radius in 2010 did not constitute an “insurmountable obstacle” for the Project.<sup>948</sup> RMGC was not precluded from instructing the research, as Dr. Damian noted in 2013:

“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 (LHM code ...).”<sup>949</sup>

681 The Claimants wrongly complain that the 2010 LHM was “contrary to the ADCs already issued” as there was indeed no ADC for Orlea.<sup>950</sup> The areas carved out from the ADCs issued as a result of the Alburnus Maior Research Program (e.g. Carpeni and Hop-Găuri) were precisely

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<sup>945</sup> The Claimants now argue that the inclusion of Orlea in the 2004 LHM “is lacking in grounds under the law,” but RMGC did not complain at the time and it is unclear what consequence (if any) is now drawn. [Reply](#), p. 121 (n. 557); [REDACTED], p. 18 (para. 44).

<sup>946</sup> [1991 LHM, at Exhibit C-1273](#), p. 8 (protecting “the entire locality within a 2 km radius”); [2004 LHM, at Exhibit C-1265](#), p. 3; [\(Claimants’\) 2004 LHM map, at Exhibit C-1283](#) (marking Orlea as a red dot captioned “un-delimited”); [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 33 (referring to the historical monuments “within the Orlea area”); [2010 LHM, at Exhibit C-1266](#), p. 3.

<sup>947</sup> [Schiau LO II](#), p. 23 *et seq.* (para. 68.c) (discussing the 2 km radius recorded in the National Archaeological Repertoire for the archaeological site of Roşia Montană). It flows from Prof. Schiau’s explanation that the removal of the generic 2 km radius in the 2004 LHM was premature as there had been no research undertaken there at the time. Although Romanian laws establish default protection areas of 100, 200 or 500 m, the use of a 2 km radius appears to stem from the 1995 Alba Archaeological Repertoire, which reflects the state of knowledge at the time. [Schiau LO II](#), p. 23 (para. 68, n. 96).

<sup>948</sup> See [Reply](#), p. 114 *et seq.* (para. 232).

<sup>949</sup> [Orlea Research Project \(2013\), at Exhibit R-221](#), p. 8.

<sup>950</sup> [Reply](#), p. 122 (paras. 254-255). The Claimants’ experts’ analysis is thus similarly flawed to the extent that they also relied on this lack of precision. See e.g. [Podaru LO](#), p. 90 (para. 306).

circumscribed in the 2004 List, as the Claimants recognize.<sup>951</sup> It follows that once research is performed at Orlea, the procedure to modify the LHM could be initiated, to ensure that the list only includes the specific areas that must be protected *in situ* and excludes the discharged areas.

682 The Claimants also argue that the 2010 LHM incorrectly included the Cârnic massif. They state that following the annulment of ADC 4/2004 in December 2008, the Cârnic massif reverted to being an archaeological site and not a historical monument and should thus not have been included in the 2010 LHM.<sup>952</sup> This is incorrect; the Cârnic galleries remained a historical monument as they were already part of the Roman mining exploitation of Alburnus Maior protected under the 1991 LHM.<sup>953</sup>

683 Furthermore, the scope of the Cârnic site listed in the 2010 LHM was in line with the situation at the time the list was prepared: the cultural authorities could not include in the Cârnic entry of 2010 any precise delimitation as recorded in an ADC, since the first ADC for that area had been cancelled in December 2008 (and the second ADC was only later issued in 2011).<sup>954</sup>

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<sup>951</sup> [Reply](#), p. 121 (para. 251) (“The historical monuments ... as listed in the 2004 LHM ... were precisely defined and were consistent with the [ADCs] ... based on the referenced archaeological research.”).

<sup>952</sup> [Reply](#), p. 122 (para. 256 and n. 567); [Schiau LO II](#), p. 55 *et seq.* (paras. 178 and 184-185).

<sup>953</sup> [Dragos LO I](#), p. 25 *et seq.* (paras. 125-133); [Dragos LO II](#), p. 115 (paras. 492-493); see also *id.* at para. 419; [Letter from Ministry of Culture to NIH dated 31 August 2010, at Exhibit R-552](#). In any event, the Cârnic massif remains covered by the legal protection regime afforded to areas included in the NAR. Pending completion of the research followed by delivery of an ADC and classification on the LHM, Art. 5(14) corroborated with Art. 5(1) of GO 43/2000 limits the activities allowed in this area and refers back to the application of Law 422/2001. [Dragos LO II](#), p. 102 (para. 425).

<sup>954</sup> Similarly, the replacement of “Roman Era” in the 2004 LHM with “Roman, Medieval, Modern Era” in the 2010 LHM was based on the knowledge of the features existing at the time. See *e.g.* [2006 EIA Report, Ch. 04.09 Cultural Heritage Baseline Report, at Exhibit C-225](#), p. 83; [Jennings II](#), p. 8 (para. 24); [CMA - Claughton Report I](#), p. 3 *et seq.* (paras. 12-13); [CMA - Claughton Report II](#), p. 11 (para. 36).

*The Authorities Took Steps to Declassify the Cârnic Massif and Amend the 2010 LHM*

- 684 According to the Claimants, the “Government” illegally “refused to correct errors in the 2010 LHM or take steps to remove the Cârnic massif.”<sup>955</sup>
- 685 Contrary to the Claimants’ contentions,<sup>956</sup> the cultural authorities initiated the procedure to declassify the Cârnic massif. The Claimants wrongly take issue with a statement of Minister of Culture Mr. Hunor in August 2011 to the effect that he was withholding the declassification of Cârnic “until the economic renegotiation with Gabriel and RMGC was resolved.”<sup>957</sup> Following the approval of ADC 9/2011 in July 2011, the Alba Cultural Directorate (the “**Alba Directorate**”) initiated in November 2012 the procedure to declassify the relevant areas of the Cârnic massif.<sup>958</sup> Moreover, Romanian law provides no deadline within which the authorities must complete the declassification process.
- 686 The above-quoted statement of the Minister of Culture (suggesting he would not sign the order) was premature since the declassification process had not yet even been initiated at the time; it is therefore disingenuous for the Claimants to complain of the Minister’s alleged failure to approve a declassification order immediately upon issuance of the ADC where they make no complaint regarding the timing of the Alba Directorate’s submission of the declassification file in November 2012 and do not explain why RMGC did not ask for the initiation of the process.<sup>959</sup>
- 687 Moreover, the Minister’s statement falls within a wider societal debate among experts and the public relating to the archaeological heritage of the

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<sup>955</sup> [Reply](#), p. 210 (para. 489).

<sup>956</sup> *Id.* at p. 123 (paras. 257-258).

<sup>957</sup> *Id.* at p. 123 (para. 258). [REDACTED]

<sup>958</sup> [Letter from Alba Directorate to NIH dated 6 November 2012, at Exhibit C-1332](#).

<sup>959</sup> [Dragos LO II](#), p. 113 (paras. 485-486) (listing the steps to be taken by various authorities).

Cârnic massif.<sup>960</sup> As Dr. Claughton explains, RMGC could have taken measures, but did not, to alleviate these concerns.<sup>961</sup>

688 The declassification process continued throughout the end of 2012. Following the review of the documentation by the National Commission of Historical Monuments,<sup>962</sup> the Ministry of Culture informed the Alba Directorate that the file lacked an expert historical study.<sup>963</sup> The study underlying ADC 9/2011 sufficed in the view of the Alba Directorate.<sup>964</sup>

689 The authorities could not continue the declassification procedure following the suspension of ADC 9/2011 (on 30 January 2014) and the procedure can only resume if the challenge is dismissed (*i.e.* if the ADC is not annulled); pending the outcome of the litigation, complaints relating to a failure to declassify the Cârnic massif are premature.<sup>965</sup>

690 Furthermore, contrary to the Claimants' allegations, the authorities took steps to amend the 2010 LHM. The Claimants recognize that the Alba Directorate, the National Institute of Heritage (the "NIH"), and the

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<sup>960</sup> See *e.g.* [Kelemen: To include Roşia Montană in UNESCO, impossible without the will of Mayoralty. I have the Archaeologists' Report, \*Mediafax\*, Sept. 24, 2013, at \[Exhibit C-891\]\(#\)](#) (referring to [Wilson, Mattingly and Dawson Statement of Significance, at \[Exhibit CMA-54\]\(#\)](#)); see also [CMA - Claughton Report II](#), p. 38 *et seq.* (paras. 127-128 and 131).

<sup>961</sup> [CMA - Claughton Report II](#), p. 39 *et seq.* (paras. 132-133).

<sup>962</sup> [National Commission of Historical Monuments meeting agenda dated 19 November 2012, at \[Exhibit R-553\]\(#\); Transcript of Special Commission hearing dated 23 September 2013, at \[Exhibit C-929\]\(#\)](#), p. 18 (the Minister of Culture confirmed that the National Commission of Historical Monuments and the National Archaeology Commission "are not subordinated commissions" and noted that "[w]hen such documentations exist for ... Cârnic and Orlea, and the commission makes a decision, ... I shall follow the commission's opinion").

<sup>963</sup> [Letter from Ministry of Culture to Alba Directorate dated 23 November 2012, at \[Exhibit C-1328\]\(#\); Ministry of Culture Order 2260/2008 on classification and inventorying of historical monuments, at \[Exhibit C-1705\]\(#\)](#), p. 7 *et seq.* (Arts. 14(1) and 21).

<sup>964</sup> [Letter from Alba Culture Directorate to Ministry of Culture dated 28 December 2012, at \[Exhibit C-1329\]\(#\); Transcript of Special Commission hearing dated 23 September 2013, at \[Exhibit C-929\]\(#\)](#), p. 17 (Minister of Culture stating "Orlea, Cârnic, I will approve, I will issue an order, if there will be a documentation, but there is none at the moment").

<sup>965</sup> See [TAC meeting transcript dated 2 April 2014, at \[Exhibit C-473\]\(#\)](#), p. 16 (Hegedus) ("any Decision ... related [to ADC 9/2011], should be postponed until definitive and irrevocable resolution").

Ministry of Culture discussed in 2012-2014 the amendment of the 2010 LHM.<sup>966</sup>

691 Contrary to the Claimants' accusations of a political hold-up,<sup>967</sup> the authorities were exchanging as to the possible methods of amending the LHM<sup>968</sup> and the possible amendments themselves.<sup>969</sup> In their description of the authorities' corrective efforts of the 2010 LHM, the Claimants remain silent regarding events in 2013.<sup>970</sup> On 26 March 2013, the Alba Directorate reiterated its request to declassify Cârnic and to correct the Orlea entries.<sup>971</sup> The NIH in turn submitted an errata list, which included the NIH's modifications to the 2010 LHM, to the National Commission of

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<sup>966</sup> [Reply](#), p. 115 *et seq.* (paras. 234, 257-258 and 260-261).

<sup>967</sup> The Claimants rely on a draft letter to allege that the authorities blocked the corrective efforts at the political level, which letter is now produced as signed by the NIH. [Reply](#), p. 125 (para. 261); [██████████](#), p. 52 (n. 193); [Letter from NIH to Ministry of Culture dated 26 July 2011, at Exhibit R-554](#).

<sup>968</sup> [Letter from NIH to Ministry of Culture dated 26 July 2011, at Exhibit R-554](#) (proposing the amendment of the Orlea entries pursuant to Art. 19(4) of Law 422/2001, namely the deletion of the text "the entire locality on a range of 2 km" as the NIH noted that these archaeological sites covered smaller surfaces); [Letter from NIH to Alba Directorate dated 30 July 2012, at Exhibit C-1331](#), p. 2 (noting that in May 2012 the National Commission of Historical Monuments discussed an errata list); [National Commission of Historical Monuments meeting agenda dated 21 May 2012, at Exhibit R-555](#); [Letter from NIH to Alba Directorate dated 1 June 2012, at Exhibit C-1324](#) (suggesting, in light of the absence of legal basis to modify the 2010 LHM via an errata list, instead, an emergency classification pursuant to Arts. 13 and 21 of Law 422/2001); [Letter from Alba Directorate to NIH dated 1 June 2012, at Exhibit C-1326](#) (noting that emergency classifications are only appropriate where an imminent danger of destruction existed).

<sup>969</sup> [Letter from NIH to Alba Directorate dated 31 May 2012, at Exhibit C-1325](#) (requesting the analytical sheets of the listed monuments); [Letter from Alba Directorate to NIH dated 29 June 2012, at Exhibit C-1327](#) (paras. b, c and e) (proposing the deletion of one of the Orlea entries and the insertion in the two other entries of the coordinates identified in the 2011 Assessment Report and ADC 9/2011); [Letter from NIH to Alba Directorate dated 30 July 2012, at Exhibit C-1331](#) (advocating for the re-introduction of the descriptions of the 1991 LHM); [Letter from NIH to Ministry of Culture dated 30 July 2012, at Exhibit R-556](#), p. 3 (items 7, 8 and 10).

<sup>970</sup> [Reply](#), p. 124 *et seq.* (n. 572) (listing a sole letter of June 2013 within correspondence from 2012 and 2014); [██████████](#), p. 51 *et seq.* (paras. 120-121) and p. 65 (para. 157).

<sup>971</sup> [Letter from Alba Directorate to Ministry of Culture dated 26 March 2013, at Exhibit R-557](#).

Historical Monuments for endorsement.<sup>972</sup> In its letter, the NIH referred to the need to correct clerical errors in the names and addresses of monuments, which it did by supplementing the address of the Roșia Montană site (entry No. 140) with the wording “the entire locality on 2 km radius” and removing this language from the Orlea entries.

692 On 28 May 2013, [REDACTED]  
[REDACTED].<sup>973</sup> The Ministry of Culture invited RMGC to address a written request for information on the status of these procedures.<sup>974</sup> RMGC waited a full year to request from the NIH the classification files, endorsements, and classification orders in relation with the Orlea and Cârnic entries in the 2010 LHM.<sup>975</sup> The NIH responded that the changes in these entries, as compared to the 2004 LHM, were “clerical in nature” and thus “not subject to classification files.”<sup>976</sup> RMGC did not complain at the time.

693 On 30 May 2013, the NIH explained to the Alba Directorate why it had included in the 2012 errata list only some of the changes the Directorate had suggested. These explanations are relevant because the Claimants hail the Alba Directorate’s view as being the correct one at the expense of different interpretations of other authorities.<sup>977</sup>

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<sup>972</sup> [Letter from NIH to National Commission of Historical Monuments dated 17 April 2013, at Exhibit R-558](#); [Letter from NIH to Eco Ruralis et al. dated 13 June 2013, at Exhibit R-559](#), p. 3 (errata list).

<sup>973</sup> [REDACTED], p. 2; see also [REDACTED], p. 56 (para. 132); [REDACTED], p. 12 *et seq.*

<sup>974</sup> See also [Letter from Department for Infrastructure Projects to RMGC dated 12 June 2013, at Exhibit C-1001](#), p. 2. The first time RMGC disclosed any issue in relation with the 2010 LHM was in 2015. [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 32.

<sup>975</sup> [Letter from RMGC to NIH dated 10 June 2014, at Exhibit C-1389](#). During document production, the Claimants again requested these documents. The Tribunal rightly rejected this request. [PO 10 Annex A](#), p. 71 (Req. 36).

<sup>976</sup> [Letter from NIH to RMGC dated 8 July 2014, at Exhibit C-1333](#).

<sup>977</sup> [Letter from NIH to Alba Directorate dated 30 May 2013, at Exhibit R-560](#).

694 In June 2013, the NIH responded to an NGO request for information regarding Cârnic and Orlea in the 2010 LHM by providing the draft 2012 errata list and explained the absence of changes in the Cârnic entry.<sup>978</sup> In this letter, the NIH articulated its interpretation of Article 19 of Law 422/2001 which, it noted, differed from the Alba Directorate's position. The authorities thus acted transparently and swiftly in responding to requests for information from interested parties.

695 A year later, in June 2014, RMGC and the NIH discussed corrections to the 2010 LHM.<sup>979</sup> In August 2014, RMGC filed preliminary administrative complaints and then initiated judicial proceedings against the NIH and the Ministry of Culture. This led the Ministry of Culture to request a point of view from the NIH, which the Claimants describe as "purporting to set out a *post hoc* legal justification for the entries in the 2010 LHM."<sup>980</sup> This document, rather, summarizes the position consistently maintained by the NIH in its exchanges with other authorities and, specifically, in the preparation of the 2012 errata list.<sup>981</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>982</sup>

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<sup>978</sup> [Request for Information from Eco Ruralis et al. to NIH dated 17 May 2013, at Exhibit R-561](#); [Letter from NIH to Eco Ruralis et al. dated 13 June 2013, at Exhibit R-559](#), p. 1 *et seq.* (point 3) (noting the reinsertion of the address of the site as found in the 1991 LHM).

<sup>979</sup> [Letter from RMGC to NIH dated 10 June 2014, at Exhibit C-1388](#) (RMGC did not follow the advice to file the request with the National Commission of Historical Monuments directly); [Letter from NIH to RMGC dated 8 July 2014, at Exhibit C-1333](#); [Letter from NIH to RMGC dated 8 July 2014, at Exhibit C-1330](#) (noting that the corrections had already been forwarded to the specialized departments within the Ministry of Culture and that it was now working on the 2015 version).

<sup>980</sup> [Reply](#), p. 125 (para. 262 and n. 576); [Schiau LO II](#), p. 62 (para. 206).

<sup>981</sup> [NIH point of view dated 2 September 2014, at Exhibit C-2361](#), p. 15. The Claimants improperly select some of the NIH's proposed corrections with which they agree (removal of the reference "to the entire locality within a 2km radius" in the two Orlea entries) while disregarding other corrections with which they disagree (including for *e.g.* the re-introduction in entry No. 140 of the two kilometer radius from the 1991 LHM).

<sup>982</sup> [Counter-Memorial](#), p. 99 (para. 218).

*The Courts Validate the Authorities' Position Regarding the 2010 LHM by Dismissing RMGC's Objection of Unlawfulness of the LHM*

696 Starting in 2011, NGOs challenged two critical administrative deeds obtained by RMGC, namely ADC 9/2011 and the Sibiu EPA environmental endorsement.<sup>983</sup> The Claimants contend that these challenges were facilitated by the authorities' failure to correct the 2010 LHM.<sup>984</sup>

697 This contention is unfounded because the 2010 LHM was grounded both in law and fact, and, in any event, the authorities took steps to amend it and declassify the Cârnic massif, as demonstrated above. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>985</sup>

698 [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
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[REDACTED]  
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[REDACTED]  
[REDACTED]

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<sup>983</sup> *Id.* at p. 80 (Section 4.5) (discussing the challenges against ADC 9/2011 and the Sibiu EPA endorsement); see *supra* Section 3.6.1.3.

<sup>984</sup> [Reply](#), p. 210 (para. 489) and p. 126 (para. 263).

<sup>985</sup> [REDACTED]  
[REDACTED]  
[REDACTED].

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>986</sup>

699 The Claimants complain about the timing and substance of the arguments the NIH and Ministry of Culture allegedly raised for the first time and in bad faith in these proceedings.<sup>987</sup> These complaints are unfounded.

700 First, the Ministry of Culture and NIH's arguments relating to the 2010 LHM were consistent with the authorities' views expressed over the years. Second, neither the Claimants nor Prof. Schiau have shown what prevented RMGC, a party in the proceedings, to correct the factual and legal record if it considered the authorities' position to be incorrect, misleading, or incomplete (*quod non*).<sup>988</sup> Third, Prof. Podaru's statement that the authorities' interpretation "affected the Company's rights most concretely" is misguided;<sup>989</sup> only the ensuing decision of the court can affect a party's rights. Moreover, the authorities were within their margin of discretion, as discussed in **Section 3.1.3.5** above, in setting out their legal and factual interpretation of the relevant acts.

701 Finally, although the Claimants maintain their disagreement with this decision, they do not argue that it amounted to a breach of the BITS.<sup>990</sup>

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<sup>986</sup> [Counter-Memorial](#), p. 82 (para. 217); [REDACTED], p. 8; [Dragos LO II](#), p. 113 (paras. 479-480).

<sup>987</sup> [Reply](#), p. 126 *et seq.* (paras. 263-268 and n. 581); [Podaru LO](#), p. 90 (para. 307); [Schiau LO II](#), p. 64 *et seq.* (paras. 214-215).

<sup>988</sup> [Schiau LO II](#), p. 66 (para. 223).

<sup>989</sup> [Podaru LO](#), p. 90 (para. 307).

<sup>990</sup> The Claimants have not brought a denial of justice claim. See [Robert Azinian et al. v. United Mexican States, Award, ICSID Case No. ARB\(AF\)/97/2, 1 November 1999, at Exhibit RLA-173](#), p. 29 (para. 99) ("Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show ... a denial of justice.").

### 3.6.2.2 The 2015 LHM Did Not Block the Project

- 702 The Claimants complain that the “Government” declared “without legal justification, the entire area of the Project as an historical monument” in the 2015 LHM and that the issuance of the 2015 LHM was arbitrary and contrary to both law and fact.<sup>991</sup>
- 703 The Claimants’ allegations are baseless. The 2015 LHM was not arbitrary. It contained corrections the NIH had included in the 2012 draft errata list, including the wording “the entire locality within a 2km radius” in the address field of the Alburnus Maior archaeological site. The grounds for this inclusion are discussed in **Section 3.6.2.1** above. As noted for the 2010 LHM, the authorities’ differing views cannot by any reading of the FET standard imply bad faith.<sup>992</sup>
- 704 The 2015 LHM was not contrary to law and it did not “disregard[] the effects of the 2004 LHM.”<sup>993</sup> As shown by Prof. Dragoș, the Claimants’ criticism disregards the 1991 LHM which classified the whole site.<sup>994</sup>
- 705 Nor was the procedure prior to the publication of the 2015 LHM in any way improper.<sup>995</sup> The suggestion that the National Archaeology Commission did not review the list relies on the Claimants’ misinterpretation of the minutes of a meeting in December 2015 during which the updated 2015 draft LHM was presented to the Minister of Culture and which contained the phrase “the decision was made to return to the 1991-1992 wording.”<sup>996</sup> This refers to the decision of the NIH to include the wording “the entire locality within a 2 km radius” in the draft

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<sup>991</sup> [Reply](#), p. 211 (para. 493) and p. 128 *et seq.* (Section V.B.5); [2015 LHM](#), at [Exhibit C-1267](#).

<sup>992</sup> [Letter from Alba Directorate to NIH and Ministry of Culture dated 22 December 2014](#), at [Exhibit C-1376](#), p. 8 (expressing its disagreement with the draft 2015 LHM and highlighting the “radical[] different point of views” held by the two institutions).

<sup>993</sup> [Reply](#), p. 128 *et seq.* (paras. 270 and 276); [Schiau LO II](#), p. 72 (para. 240b).

<sup>994</sup> See [Dragos LO II](#), p. 111 (Section IV.4.3); see also [Counter-Memorial](#), p. 208 (para. 543).

<sup>995</sup> [Reply](#), p. 129 (para. 272); [Schiau LO II](#), p. 68 *et seq.* (paras. 231-233).

<sup>996</sup> [Ministry of Culture meeting minutes dated 23 December 2015](#), at [Exhibit C-2379](#).

LHM of early 2015.<sup>997</sup> There is a similar reference in the Ministry of Culture's approval report.<sup>998</sup>

706 There is therefore no basis for Prof. Schiau's accusations that "decisions on major changes to the LHM [were taken] by groups of officials in off-procedure meetings ... outside the regulated procedure."<sup>999</sup> Since the discussions relating to the 2015 LHM took place after the commencement of the arbitration,<sup>1000</sup> it is not surprising that the Ministry of Culture would specifically discuss the "Roşia Montană case" before approving the order and request clarification regarding the changes. As the minutes show, the Minister was assured that the NIH's decision to revert to the wording of the 1991 LHM was in compliance with the law.<sup>1001</sup>

707 The Claimants wrongly complain that the 2015 LHM disregarded the existing ADCs.<sup>1002</sup> As explained above, this misconstrues the separate entries of the list and corresponding ADCs.<sup>1003</sup> The Claimants make a misleading shortcut when alleging that the 2015 LHM "disregarded the detailed information provided to [the Ministry of Culture] by the Alba County Culture Directorate."<sup>1004</sup> Most importantly, in 2015, RMGC could have avoided this situation by instructing the research for Orlea (although this research had been recommended in 2011 and approved in 2013). This research could have allowed the amendment (or even deletion, upon

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<sup>997</sup> [Schiau LO II](#), p. 68 (para. 230); [NIH Draft 2015 LHM for Alba County dated 9 January 2015, at Exhibit C-2364](#), p. 1; [Letter from NIH to Ministry of Culture dated 1 April 2015, at Exhibit R-562](#) (sending the draft to the Ministry of Culture for transmission to the National Museum of History and National Archaeology Commission).

<sup>998</sup> [Ministry of Culture Approval Report of the 2015 LHM dated 24 December 2015, at Exhibit C-2377](#), p. 2.

<sup>999</sup> [Schiau LO II](#), p. 69 (para. 233).

<sup>1000</sup> See [Notice of Dispute requesting consultation dated 20 January 2015, at Exhibit C-8](#) (noting that the Project would "safeguard the cultural heritage of the region" and that the Claimants/RMGC had "financ[ed] and undert[aken] extensive programs of exploratory and preventive archaeology to identify and preserve, for the benefit of future generations, sites and artefacts of historical importance.").

<sup>1001</sup> [Ministry of Culture meeting minutes dated 23 December 2015, at Exhibit C-2379](#).

<sup>1002</sup> [Reply](#), p. 129 *et seq.* (paras. 273-274); [Schiau LO II](#), p. 66 *et seq.* (paras. 224 and 234).

<sup>1003</sup> See *supra* para. 682.

<sup>1004</sup> [Reply](#), p. 128 (para. 270).

completion of a successful declassification procedure) of the entries in the 2015 LHM. As for the Cârnic entry, at the time the 2015 LHM was published, ADC 9/2011 was suspended and the annulment proceedings were pending.<sup>1005</sup>

708 The Claimants wrongly complain about the removal of the coordinates in the 2015 LHM.<sup>1006</sup> In the draft LHM, since only Roşia Montană sites were described using coordinates, the cultural authorities decided to ensure consistency throughout the list and not to include any coordinates, thus explaining why coordinates were not re-inserted for Cârnic and removed for Hop-Găuri and Carpeni.<sup>1007</sup>

### 3.6.2.3 The UNESCO Application Cannot Have Any Impact on the Project

709 As demonstrated in the Counter-Memorial, the Claimants' position on the effects of the UNESCO application on the Project is misconceived.<sup>1008</sup>

710 The Claimants describe how Romania secured, on 2 July 2018, the postponement (or rather the "referral") of the UNESCO application "due to ongoing international arbitration."<sup>1009</sup> This request precisely sought to ensure that the UNESCO application would not affect this arbitration and it is startling that the Claimants find this to be "extraordinar[y]."<sup>1010</sup>

711 Prof. Podaru explains that, under Romanian law, an application for UNESCO coverage triggers a protection regime for the site, under which various conservation measures must be implemented and included within urbanism documents (such as the PUZ and PUG). He argues that this

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<sup>1005</sup> See *supra* paras. 682-683.

<sup>1006</sup> [Schiau LO II](#), p. 67 (para. 226).

<sup>1007</sup> [National Archaeology Commission meeting minutes dated 10 December 2015, at Exhibit R-563](#); [Ministry of Culture meeting minutes dated 23 December 2015, at Exhibit C-2379](#).

<sup>1008</sup> [Counter-Memorial](#), p. 176 *et seq.* (Section 6.3.3); [Reply](#), p. 131 *et seq.* (Section V.B.6).

<sup>1009</sup> [UNESCO World Heritage Committee decision on Roşia Montană, Working Document No. WHC/18/42.COM/18 \(excerpt\) dated 4 July 2018, at Exhibit C-1920](#), p. 6; [Reply](#), p. 132 (paras. 279-280).

<sup>1010</sup> [Reply](#), p. 132 (para. 280).

regime also applies in the present case, where the application has been “postponed” and not “withdrawn.”<sup>1011</sup> This interpretation of GO 43/2000 relies on a misconceived understanding of the UNESCO World Heritage Committee’s decision that “refer[red] the nomination ... back to the State Party” pursuant to Article 159 of the Operational Guidelines. As such, the file is no longer “submitted to the UNESCO World Heritage Committee” (which would trigger the application of Article 15 GO 15/2000 on which Prof. Podaru relies) but is now in the hands of Romania.<sup>1012</sup>

712 The site thus remains subject to the legal protection regimes applicable to archaeological sites and to historical monuments, which RMGC knew were a cause of risk for the Project, especially where the Project was devised without first completing the site’s full archaeological research.<sup>1013</sup> Prof. Podaru’s analysis fails to take this fact into account.<sup>1014</sup>

713 As indicated in the Counter-Memorial, if it becomes apparent that the UNESCO file may adversely affect RMGC’s rights, the Government will take the necessary measures at the appropriate time and in accordance with the law.<sup>1015</sup>

#### **3.6.2.4 RMGC Only Has Itself to Blame for Its Failure to Obtain the Building Permit for the Project**

714 As noted, the Claimants complain that the Government’s actions, notably the 2010 LHM, 2015 LHM and UNESCO application, “ensur[ed] that no construction permits could be issued to support the Project.”<sup>1016</sup> Prof. Podaru specifies that these three acts have made it impossible “under Romanian law for the urbanism plans for the area to accommodate the

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<sup>1011</sup> [Podaru LO](#), p. 102 *et seq.* (paras. 345-348).

<sup>1012</sup> [UNESCO Operational Guidelines for the Implementation of the World Heritage Convention, at Exhibit C-707](#), p. 34 (para. 159); [GO 47/2000, at Exhibit C-2350](#), p. 5 (Art. 15).

<sup>1013</sup> [CMA - Cloughton Report II](#), p. 11 *et seq.* (Section 3.1).

<sup>1014</sup> See [Podaru LO](#), p. 103 *et seq.* (Section C.4) (referring to the 2006 PUZ as being in conformity with the Project but not taking into account that Orlea was a protected archaeological site which had not been fully researched and was listed on the 2004 LHM).

<sup>1015</sup> [Counter-Memorial](#), p. 176 (para. 417).

<sup>1016</sup> [Reply](#), p. 211 *et seq.* (para. 493), p. 115 (para. 235) and p. 133 *et seq.* (paras. 282-283).

Project.”<sup>1017</sup> The complaint is two-fold. RMGC could allegedly not successfully complete the approval process of the 2006 PUZ, nor could it obtain a new PUZ that correlated with the protected area delineated under the 2015 LHM and UNESCO application.<sup>1018</sup>

715 First, regarding the termination of the approval process of the 2006 PUZ, RMGC was unable to secure all the required permits and endorsements, including the Sibiu EPA’s environmental endorsement which was challenged by NGOs, as discussed above. In these proceedings, NGOs also relied on the lack of correlation between the 2006 PUZ and the PUZs for each of the protected areas, which Prof. Podaru considers to be one of “the main reason[s] that led to the annulment of the SEA Endorsement.”<sup>1019</sup>

716 The Claimants incorrectly blame the local authorities for having failed to timely approve the Historical Area PUZ.<sup>1020</sup> Prof. Podaru refers to the local authorities’ “sole responsibility” to initiate and approve this PUZ under Law 350/2001<sup>1021</sup> without taking into account that the Ministry of Culture had put RMGC on notice already in 2002 that RMGC needed to prepare the Historical Area PUZ.<sup>1022</sup> In fact, RMGC did finance and contract the elaboration of this PUZ and was the driving force behind the process to obtain their endorsement.<sup>1023</sup>

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<sup>1017</sup> [Podaru LO](#), p. 95 *et seq.* (Section IV.C).

<sup>1018</sup> *Id.* at p. 95 *et seq.* (paras. 325, 328-329, 331, 337 and 349).

<sup>1019</sup> *Id.* at p. 93 (para. 317). This contrasts with RMGC’s position at the time, when it considered that the Historical Area PUZ was not a requirement for the SEA or EIA procedures. [RMGC Statement of intervention dated 23 March 2012, at Exhibit C-2496](#), p. 4; [Gabriel Canada MD&A, Fourth Quarter 2011, at Exhibit R-315](#), p. 3 *et seq.*; [Tofan LO](#), p. 69 (Sections III.4.1 and III.4.2).

<sup>1020</sup> [Podaru LO](#), p. 93 (para. 317), p. 65 *et seq.* (para. 222, n. 339) and p. 93 (para. 315, n. 521).

<sup>1021</sup> *Id.* at p. 92 (para. 314), p. 58 *et seq.* (para. 198), p. 77 (para. 252); [Tofan LO](#), p. 81 (Section III.4.4).

<sup>1022</sup> [Ministry of Culture Endorsement dated 20 June 2002, at Exhibit C-1895](#), p. 2; [Podaru LO](#), p. 72 *et seq.* (paras. 239 and 252) (incorrectly noting that the local authorities were to prepare the Historical Area PUZ).

<sup>1023</sup> [REDACTED]

[REDACTED] [Roşia Montană Local Council Decision dated 21 March 2011, at Exhibit C-2509](#), p. 3 (Art. 5) (referring to RMGC sponsoring the preparation of the

- 717 Second, the Claimants' complaints regarding the alleged blocking effect of the 2015 LHM and UNESCO application on RMGC's ability to obtain a building permit fails to take into account the intrinsically evolving nature of the relevant protection regimes – as Prof. Podaru rightly notes<sup>1024</sup> – which will evolve at the pace of the research done and to reflect the results achieved. Again, RMGC has not obtained any ADC for Orlea and the Cârnic ADC is subject to litigation.
- 718 In addition, the documentation was prepared by the NIH in coordination with Dr. Damian of the National Museum of History (the coordinator of the Alburnus Maior Research Program), archaeologists who had participated in that program and that had prepared the reports on the basis of which the ADCs had been issued, and the scientific consultancy of Ms. Cauuet for the mining archaeology area. The authors of this documentation were thus eminently familiar with the Project, the discharge procedures and, more generally, the overall research performed.<sup>1025</sup>
- 719 The real issues that impede RMGC from applying for a building permit, including RMGC's failure to secure the environmental permit and failure to secure a social license, have been addressed in the Counter-Memorial and are further detailed in **Section 3.3** above and **Section 8.2** below.

**3.7 NAMR's Alleged Failure to Issue the Exploitation License for the Bucium Project Does Not Amount to a Failure to Provide Fair and Equitable Treatment to the Claimants' Investments in Breach of Either Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

- 720 The Claimants repeat in the Reply their allegation that Romania failed to accord FET to their investments by allegedly blocking RMGC's Bucium Applications for political reasons and in breach of Romanian law, and by

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PUZs); [REDACTED]

<sup>1024</sup> [Podaru LO](#), p. 61 (para. 206) (emphasis added).

<sup>1025</sup> [Letter from Ministry of Culture to Mayor and Local Council of Roşia Montană dated 28 December 2016 attaching Documentation for the Delineation of the Archaeological Site Alburnus Maior](#), at [Exhibit C-2370](#), p. 3.

failing to respect RMGC's rights under the Bucium Exploration License and its alleged rights in relation to the Rodu Frasin (gold and silver) and Tarnița (copper, gold and silver) deposits.<sup>1026</sup>

721 The Claimants' argument fails on both counts: there was no political interference and there has been no breach of Romanian law. The Bucium Applications are pending and will be decided when NAMR concludes the process of homologation of the resources of each of the areas, in accordance with the applicable law and regulations.<sup>1027</sup>

722 The Claimants seek to portray the time it is taking NAMR to review the documentation and to make a decision first on the homologation and then on the Bucium Applications as being "[REDACTED]  
[REDACTED]  
[REDACTED]"<sup>1028</sup> As noted in the Counter-Memorial, the Claimants' theory of an alleged political blocking of the Bucium Applications is no more coherent than the other parts of their conspiracy theory against RMGC that the Claimants have sought but failed to prove.<sup>1029</sup> The claim also fails for lack of evidence of any governmental interference (political or otherwise) in the activities of NAMR.

723 NAMR has repeatedly expressed its support for the Roșia Montană Project and RMGC.<sup>1030</sup> NAMR has no reason for, nor conceivable interest in,

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<sup>1026</sup> [Reply](#), p. 212 (para. 494) and p. 138 *et seq.* (Section VI).

<sup>1027</sup> [Counter-Memorial](#), p. 168 (para. 433).

<sup>1028</sup> [REDACTED], p. 40 (para. 76); [REDACTED], p. 89 *et seq.* (para. 234).

<sup>1029</sup> [Counter-Memorial](#), p. 195 (paras. 505-506).

<sup>1030</sup> See *e.g.* [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#), p. 25 (Hârșu, NAMR: "we are happy and we have always said, from the beginning, as geologists and as the people who manage the country's resources, that we agree with this Project."); [Letter from NAMR to the Ministry of Public Finance dated 15 March 2012, at Exhibit C-2196](#), p. 1 ("NAMR as a competent authority in the field of mining and geology believes that this project is viable, justified and timely at this time and that its completion brings benefits"); [REDACTED]; [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#), p. 19 (Hârșu, NAMR: "I have to say that this project is one of the ... no, it is the best project that I had the honor to verify, to analyze, considering, as I said, that we identified the resources/reserves and we had to analyze, to verify all the documentations for this issue"); [The senators of the Administrative Committee voted against the Roșia Montană Project, Agerpres.ro, 10 Sept. 2013, at Exhibit C-1482](#), p. 2 (referring to a statement of Mr. Hârșu,

blocking the Bucium Applications (or the Roşia Montană Project). There is also no evidence of any ulterior motive informing NAMR's conduct. NAMR is still in the process of reviewing the Bucium Applications and therefore has not yet been able to take a decision on the Bucium Applications. This much seems to be agreed.<sup>1031</sup>

724 The Claimants' complaints about the Bucium Applications are essentially about two issues: (1) whether NAMR needed to decide the Bucium Applications within a specific deadline; and (2) whether NAMR should have rendered a decision on the Bucium Applications separately from the homologation process, both being questions of Romanian law.<sup>1032</sup> As demonstrated in the Counter-Memorial, the answer to both questions is a resounding no.<sup>1033</sup> In any event, even if there had been a breach of Romanian law, this would not suffice, without more, to give rise to a breach of FET.<sup>1034</sup>

725 As to the first question, the Claimants argue that the Bucium Applications should have been decided "within a reasonable time period" following RMGC's submission of the Bucium Applications on 11 October 2007. Prof. Bîrsan suggests that a reasonable period would amount to 90 days, *i.e.* NAMR should have completed its review by January 2008.<sup>1035</sup> The Respondent demonstrated in the Counter-Memorial that, if this were true,

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NAMR: "It is one of the best projects in Romania"); [Parliamentary Special Commission Report dated Nov. 2013, at Exhibit C-557](#), p. 7 ("After analyzing all the information at its disposal, NAMR issued a favorable opinion in respect to the mining exploitation project in Roşia Montană"); [NAMR endorsement dated 14 March 2012, at Exhibit C-645](#); [Alba NAMR endorsement dated 2 May 2012, at Exhibit C-647](#); [NAMR endorsement dated 10 May 2012, at Exhibit C-648](#); [Alba NAMR endorsement dated 4 April 2013, at Exhibit C-656](#); [NAMR endorsement dated 11 April 2013, at Exhibit C-657](#); [Alba NAMR Endorsement No. 192 dated 21 March 2018, at Exhibit C-2266](#); [NAMR Endorsement No. 6523 dated 26 May 2018, at Exhibit C-2268](#).

<sup>1031</sup> [REDACTED], p. 60 (para. 132 and n. 281).

<sup>1032</sup> [Reply](#), p. 141 *et seq.* (paras. 298-303).

<sup>1033</sup> [Counter-Memorial](#), p. 165 *et seq.* (paras. 429-431).

<sup>1034</sup> See *supra* Section 3.1.1.

<sup>1035</sup> [Bîrsan LOI](#), p. 88 *et seq.* (paras. 399-406, notably para. 403).

the claim would be time-barred.<sup>1036</sup> The Claimants have now sought to adjust their position to avoid the time bar issue through a convoluted explanation, which results essentially in arguing that NAMR in fact needed to decide the applications in March 2013,<sup>1037</sup> [REDACTED]  
[REDACTED]<sup>1038</sup>

726 The Claimants' change of tack does not help them because the law does not provide for a deadline within which NAMR had to take a decision on the Bucium Applications.<sup>1039</sup> The Claimants' expert, Prof. Bîrsan, accepts this.<sup>1040</sup> To the extent that the Claimants consider that the Bucium Exploration License was breached by the delay in addressing the Bucium Applications, it was for RMGC (and not the Claimants) to prove the alleged breaches in the competent forum, in accordance with the dispute resolution terms agreed in the Bucium Exploration License, as demonstrated below in **Section 6**.

727 As to the second question, the Claimants argue that the law does not require the completion of the homologation of the reserves prior to taking a decision on the Bucium Applications, and accordingly a decision on the Bucium Applications should have been taken without first proceeding to homologation.<sup>1041</sup>

728 The Claimants' position is based on a misunderstanding of the legal nature of mineral license under Romanian law.

729 A decision on an exploitation license cannot be taken in the abstract; it is an award of mining rights that is by definition associated with a specific set of mineral resources that have been verified and homologated by

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<sup>1036</sup> [Counter-Memorial](#), p. 179 (paras. 458-459). The alleged breach would also have occurred before the entry into force of the Canada- Romania BIT (on 23 November 2011). *Id.* at p. 182 (para. 465).

<sup>1037</sup> [Reply](#), p. 166 (para. 372); *id.* at p. 142 (para. 303).

<sup>1038</sup> [REDACTED].

<sup>1039</sup> [Counter-Memorial](#), p. 165 (para. 428).

<sup>1040</sup> [Bîrsan LO I](#), p. 88 (para. 399).

<sup>1041</sup> [Reply](#), p. 141 (para. 299).

NAMR.<sup>1042</sup> This was well understood by the Claimants and RMGC, as the evidence, reviewed below, shows.

730 Exploitation rights can only be awarded in relation to resources that have been verified and homologated by NAMR. As Prof. Bîrsan explained in his first opinion, an exploitation license grants rights of exploitation over those resources which have been “identified and calculated by the titleholder and **approved by NAMR.**”<sup>1043</sup>

731 RMGC also understood that the homologation process comes first: when summarizing the chronology of events, ██████████ notes that RMGC followed up on the Bucium Applications by asking NAMR to verify and register the resources and reserves, *i.e.* it first sought completion of the homologation process.<sup>1044</sup> RMGC never suggested to NAMR that it should first take a decision on the Bucium Applications, before completing the homologation process. Indeed, the contemporaneous evidence shows that RMGC clearly understood that the homologation process had to be completed before NAMR could act on the Bucium Applications.<sup>1045</sup>

732 The Claimants misleadingly suggest, on the basis of documents provided during document production, that NAMR failed to make any assessment of the Bucium Applications prior to 2015.<sup>1046</sup> ██████████ confirms however that the Applications were being internally reviewed within

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<sup>1042</sup> [Bîrsan LO I](#), p. 50 *et seq.* (paras. 210-211).

<sup>1043</sup> *Id.* (emphasis added).

<sup>1044</sup> ██████████, p. 59 (para. 128). This makes sense as the amount of resources and reserves is a fundamental element of an exploitation license. See *e.g.* [2003 Mining Law, at Exhibit C-11 \(resubmitted\)](#), p. 13 (Art. 31) (the exhaustion of the exploitable reserves constitutes a cause for cessation of the license); ██████████

<sup>1045</sup> This is also what happened at Roşia Montană. ██████████  
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██████████. See also [Bîrsan LO I](#), p. 52 (para. 218).

<sup>1046</sup> [Reply](#), p. 142 (para. 302, n. 667).

various departments of NAMR as shown by the comments handwritten on the documentation in 2007, 2014, 2015 and 2017.<sup>1047</sup>

733 RMGC raised no complaints about the Bucium Applications during the period between April 2009 and July 2014, although representatives of RMGC and NAMR met personally at least on eleven occasions in this period, as both participated in TAC meetings regarding the Roșia Montană Project.<sup>1048</sup> The Bucium Applications were addressed in the TAC meetings several years after RMGC had submitted them; thus, at the March 2011 TAC meeting Mr. Tănase stated in no unclear terms:

“RMGC does indeed hold two exploration licenses in Bucium area. We have an exploration program there and, **at the end of the exploration program 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.**

We are talking only about the Roșia Montană project today. This is the project under discussion, it does not have anything to do with the licenses for Bucium, those licenses will be discussed separately and **we do not even know whether the deposits there are exploitable or not from a commercial point of view.**

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<sup>1047</sup> [Letter from RMGC to NAMR dated 11 October 2007, at Exhibit C-2180](#); [Letter from RMGC to NAMR dated 23 July 2014, at Exhibit C-2203](#) (notably the handwritten comments on the first pages); [REDACTED]; [REDACTED]; [REDACTED], p. 39 (para. 74, n. 163).

<sup>1048</sup> [Minutes of TAC meeting dated 23 June 2010, at Exhibit C-565](#); [TAC meeting transcript dated 22 September 2010, at Exhibit C-487](#); [TAC meeting transcript dated 22 December 2010, at Exhibit C-476](#); [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#); [TAC meeting transcript dated 29 November 2011, at Exhibit C-486](#); [TAC meeting transcript dated 10 May 2013, at Exhibit C-484](#); [TAC meeting transcript dated 31 May 2013, at Exhibit C-485](#); [TAC meeting transcript dated 14 June 2013, at Exhibit C-481](#); [TAC meeting transcript dated 2 April 2014, at Exhibit C-473](#); [TAC meeting transcript dated 26 July 2013, at Exhibit C-480](#); [TAC meeting transcript, at Exhibit C-479](#).

**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 Roșia Montană did.”<sup>1049</sup>

- 734 At the same meeting, the representative of NAMR (Mr. Ștefan Hârșu, the person responsible for the Bucium Applications) explained that RMGC had no exploitation rights in the Bucium perimeter as the Bucium Exploration License had expired. RMGC did not challenge his assessment, nor did it complain about the way in which NAMR had handled the Bucium Applications, let alone allege that NAMR's conduct had been somehow improper or illegal.<sup>1050</sup>
- 735 The Claimants do not deny that RMGC remained inactive throughout the period between April 2009 and July 2014 but suggest that RMGC remained silent because it was purportedly waiting for NAMR to approve the updated homologation for Roșia Montană, after which it expected NAMR to turn to the Bucium Applications.<sup>1051</sup> The Claimants' *ex post facto* attempt to defend RMGC's inaction in order to bolster their claim lacks any credibility. Indeed, Mr. Tănase's statements at the March 2011 TAC meeting reveal RMGC's true position.
- 736 The facts simply do not fit with the Claimants' new case theory. NAMR issued the approval of resources and reserves for Roșia Montană on 14 March 2013.<sup>1052</sup> If this had indeed been the blocking point, the Claimants have provided no explanation why ██████████ “follow[ed] up” on the Bucium Applications over a year later, in July 2014.<sup>1053</sup> RMGC's conduct at the time therefore shows that there was no link or dependency between the homologation of the resources of the Roșia Montană Project and the Bucium Applications.

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<sup>1049</sup> [TAC meeting transcript dated 9 March 2011, at Exhibit C-483](#), p. 66 (Tănase) (emphasis added).

<sup>1050</sup> *Id.* at p. 79 (Hârșu).

<sup>1051</sup> ██████████, p. 37 (para. 69); Reply, p. 142 (para. 303).

<sup>1052</sup> [NAMR decision dated 14 March 2013, at Exhibit C-1012](#).

<sup>1053</sup> ██████████, p. 59 (para. 128); Reply, p. 142 (para. 303); ██████████, p. 37 (para. 71).





[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>1064</sup>

742 First, [REDACTED]'s evidence cannot be reconciled with the Claimants' allegation that NAMR had decided to block the Bucium Applications for political reasons since the rejection of the Roşia Montană Law. If there had been a political decision to block the advancement of the Bucium Applications because of the rejection of the Roşia Montană Law (*i.e.* in November 2013), why would Mr. Hârşu allegedly start the review work for the homologation of resources in July 2014 and be working on "very advanced drafts" of the homologation decisions in March 2015? The purported link between the rejection of the Roşia Montană Law and the Bucium Applications makes no sense.

743 Second, whether or not [REDACTED] had such an "understanding" at the time is not evidence of the status of the process. The evidence shows that Mr. Hârşu, who was the person responsible for all matters regarding the Bucium perimeter within NAMR, made substantial progress on the process leading to a possible homologation of the resources of the Bucium perimeter prior to his retirement in March 2015;<sup>1065</sup> however, his work had not yet been completed by the time he retired and indeed it remains to be completed today by NAMR's staff who took over Mr. Hârşu's work on the Bucium Applications. When the review will be completed, NAMR will issue a decision pursuant to the applicable law and regulations.

744 [REDACTED]  
[REDACTED].<sup>1066</sup> Yet,

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<sup>1064</sup> [REDACTED], p. 39 (paras. 73-75 and n. 162).

<sup>1065</sup> [REDACTED]; [REDACTED]  
[REDACTED]; [REDACTED].

<sup>1066</sup> [REDACTED], p. 60 (para. 131); [REDACTED], p. 39 (para. 74); see also [Letter from RMGC to NAMR dated 11 October 2007, at Exhibit C-2180](#), p. 1. The handwritten note reads "please verify the document for the purpose of [illegible]." [REDACTED]  
[REDACTED], p. 39 (para. 74, n. 163). NAMR was therefore not in a position to issue any decision before completing the

■ does not explain why RMGC took no action at the time or in the intervening “three and half years,” for instance to encourage NAMR to set up a meeting or generally raise its concerns with NAMR.<sup>1067</sup>

745 To the extent that RMGC never sought any recourse in relation to the Bucium Applications, despite the alleged expiry of the deadline for a decision, its inaction would be fatal to its FET claim. As the *Helnan v. Egypt* tribunal held:

**“HELNAN never attempted to challenge the downgrading before the competent Egyptian administrative courts. It wrote several times to the Ministry of Tourism. At least on three occasions the Ministry of Tourism refused to change its decision on the ground that the four stars rating should be maintained until the necessary improvements and renovation of the hotel was achieved. ... The Arbitral Tribunal has to take note of this conduct of HELNAN. ... The ministerial decision to downgrade the hotel, not challenged in the Egyptian administrative courts, cannot be seen as a breach of the Treaty by EGYPT. It needs more to become an international delict for which EGYPT would be held responsible under the Treaty.”**<sup>1068</sup>

746 Similarly, in *M.C.I. Power v. Ecuador*, the claimants alleged that the revocation of an operating permit amounted to a breach of FET. The tribunal noted that the claimants’ Ecuadorean subsidiary had not challenged the revocation and took this into account when rejecting the FET claim.<sup>1069</sup> These findings are directly relevant in this case.

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analysis of this documentation, which includes the environmental documentation that subsequently had to be updated following a legislative change in 2013.

<sup>1067</sup> [Reply](#), p. 143 (paras. 305-306).

<sup>1068</sup> [Helnan International Hotels A/S v. Arab Republic of Egypt, Award, ICSID Case No. ARB/05/19, 3 July 2008, at Exhibit RLA-114](#), p. 54 *et seq.* (para. 148); see also [Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB/10/19, 18 November 2014, at Exhibit RLA-174](#), p. 120 (para. 595).

<sup>1069</sup> [M.C.I Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, Award, ICSID Case No. ARB/03/6, 31 July 2007, at Exhibit RLA-175](#), p. 76 (para. 349) (“The Tribunal holds that the alleged legitimate expectations of an investor with respect to the behavior required of a host State cannot include merely subjective assessments as to the impossibility of achieving a viable solution through the State’s domestic judicial remedies, when those remedies have not been properly pursued.”).

#### 4 ROMANIA ACCORDED AT ALL TIMES FULL PROTECTION AND SECURITY TO THE CLAIMANTS' INVESTMENTS

- 747 As demonstrated in the Counter-Memorial, Romania has accorded FPS to the Claimants' investments under both Article II(2) of the Canada-Romania BIT and Article 2(2) of the UK-Romania BIT. Under both provisions, Romania must only abide by an obligation of due diligence to provide protection and security to foreign investors' qualifying investments against physical harm perpetrated by third parties.<sup>1070</sup>
- 748 The Claimants argue that the standard of treatment extends to not only physical but also legal protection and against harm by third parties and State actors alike.<sup>1071</sup> For the Claimants, the FPS standard, regardless of its formulation, must be interpreted as providing an all-encompassing form of insurance against any interference with an investment. This cannot be right. As demonstrated below, the Claimants' extensive interpretation runs afoul of the specific formulation included in the Canada-Romania BIT, which clearly limits the FPS standard to "the level of police protection required under the customary international law minimum standard of treatment of aliens" (**Section 4.1**).<sup>1072</sup>
- 749 Further, under the UK-Romania BIT, Romania was only required to provide full protection and security against physical harm perpetrated by third parties. Even assuming the Claimants' extensive interpretation of the FPS standard in the relevant BITs were correct (which is denied), Romania was only required to provide a functioning legal system to RMGC to discharge its due diligence obligation (**Section 4.2**).
- 750 Finally, the Claimants have failed to show the alleged acts and omissions of State authorities taken together as a "composite act" amount to a failure to provide full protection and security (**Section 4.3**).

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<sup>1070</sup> See [Counter-Memorial](#), p. 241 *et seq.* (paras. 641-654).

<sup>1071</sup> [Reply](#), p. 216 *et seq.* (para. 508).

<sup>1072</sup> [Canada-Romania BIT, at Exhibit C-1](#), p. 4.

#### 4.1 The Claimants Misstate the FPS Standard in the Canada-Romania BIT

- 751 Under Article II(2)(a) of the Canada-Romania BIT, Romania must “accord investments ... treatment in accordance with the customary international minimum standard of treatment of aliens, including ... full protection and security.” This formulation was clarified in two instances: first, in Article II(2)(b) which provides that the concept of FPS does “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”; and second, in Annex D to the BIT, which provides that the FPS standard “requires the level of police protection required under the customary international law minimum standard of treatment of aliens.”<sup>1073</sup>
- 752 These references to the “level of police protection” and “customary international law minimum standard” demonstrate the Contracting States’ intent to limit the scope of their obligations to the protection of investments against physical harm (as established in the *Noyes* case).<sup>1074</sup>
- 753 In their Reply, the Claimants simply ignore the specific formulation used in the Canada-Romania BIT standard. They also fail to address Romania’s definition of the customary international law standard for FPS. Instead, they rely on an “extensive study” of the origins of the FPS standard by one single author.<sup>1075</sup> The author himself recognizes that his view that “the FPS standard has also related to legal protection since its origin in the treaties of ancient Greece” runs “contrary to the traditional view that the FPS standard has exclusively applied to physical security.”<sup>1076</sup>

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<sup>1073</sup> [Counter-Memorial](#), p. 241 *et seq.* (paras. 641-649).

<sup>1074</sup> [Walter A. Noyes \(United States\) v. Panama, Award, 22 May 1933](#), at [Exhibit RLA-68](#), p. 311; see also [Counter-Memorial](#), p. 242 *et seq.* (paras. 644-645).

<sup>1075</sup> [Reply](#), p. 216 (para. 507) (referring to [N. Junngam, “The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully\[?\] Protected and Secured From?” \(2018\) 7 American University Business Law Review 1](#), at [Exhibit CLA-268](#)).

<sup>1076</sup> The author also opines that: “[i]n the present context of international investment in which investment treaties purposely protect investment, legal protection is even more secured and can be wider in its scope.” Yet, he bases this conclusion on a single investment arbitration decision, “Ancient Rome’s *jus gentium*” (without particularizing and referencing which part) and the

754 Since the Claimants are no longer alleging any physical harm towards their investments, their claim under Article II(2)(a) of the Canada-Romania BIT should be dismissed by the Tribunal.

#### **4.2 Under the UK-Romania BIT, Romania Was Only Obligated to Provide Protection and Security against Physical Harm Perpetrated by Third Parties**

755 The Claimants also allege that Romania breached Article 2(2) of the UK-Romania BIT, which provides that Romania shall accord to “[i]nvestments of nationals or companies” “full protection and security in the territory of the other Contracting Party.”<sup>1077</sup> They misstate the applicable FPS legal standard in the UK-Romania BIT on two levels.

756 First, they continue to misinterpret the FPS standard as providing for Romania’s obligation to protect their investment against any kind of harm. As demonstrated in **Section 4.2.1**, this interpretation is flawed, since the FPS standard only provides for an obligation to accord protection and security against physical harm.

757 Second, the Claimants also misinterpret the FPS standard as applying to instances of harm by any kind of actor (including State actors). As demonstrated in **Section 4.2.2**, their position is erroneous, given that this interpretation would simply result in conflating the FET and the FPS standards.

758 Third, contrary to the Claimants’ erroneous view, the FPS standard solely affords protection against physical harm by third parties (**Section 4.2.3**).

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explanatory convention to the 1832 Treaty of Peace, Amity, Commerce and Navigation., [N. Jungam](#), “[The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully\[?\] Protected and Secured From?](#)” (2018) 7 *American University Business Law Review* 1, at **Exhibit CLA-268**, p. 90.

<sup>1077</sup> [UK-Romania BIT](#), at **Exhibit C-3**.

#### 4.2.1 The FPS Standard in the UK-Romania BIT Only Provides for Protection and Security against Physical Harm

- 759 In their Reply, the Claimants argue that there is “significant authority recognizing the full protection and security standard as obligating States to provide legal security as well as physical security for investments.”<sup>1078</sup> They thus appear to backtrack from the peremptory statement in their Memorial that the standard “**always** has been centrally [sic] focused on the host State’s obligation to provide legal security for foreign persons as well as their property.”<sup>1079</sup>
- 760 This change of position is telling. It betrays the Claimants’ knowledge that neither the historical construction of the FPS standard, nor the interpretation of the standard by investment tribunals over the years supports their interpretation.
- 761 The Claimants confuse two distinct notions: that of “protection” and that of “harm.”<sup>1080</sup> The FPS standard only provides for protection and security (physical or legal) against **physical harm**. The notion of protection, on the other hand is only qualified by the due diligence obligation incumbent upon the State, *i.e.* the protection to be afforded is limited to what a diligent State can be expected to afford given the “circumstances and with the resources of the state in question.”<sup>1081</sup>
- 762 Over the years, a majority of investment tribunals has found that the protection to be afforded under the FPS standard is limited to protection against physical harm. Indeed, the tribunals in *Rumeli v. Kazakhstan*, *Suez, Vivendi, AWG Group et al. v. Argentina*, *BG Group v. Argentina*, *Gold Reserve v. Venezuela*, *PSEG v. Turkey*, *OI European Group v. Venezuela*, *Houben v. Burundi*, and *Roussalis v. Romania* have all held that the

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<sup>1078</sup> [Reply](#), p. 215 (para. 505).

<sup>1079</sup> [Memorial](#), p. 310 (para. 689) (emphasis added).

<sup>1080</sup> The Claimants’ confusion is evident when they argue that the “customary international law standard includes police protection against physical harms [and] requires legal protection and security.” [Reply](#), p. 216 (para. 507).

<sup>1081</sup> [Pantechniki S.A. Contractors & Engineers \(Greece\) v. Republic of Albania, Award, ICSID Case No. ARB/07/21, 30 July 2009, at Exhibit RLA-176](#), p. 20 (para. 81).

standard of full protection and security is limited to protection against physical harm and does not extend to other kinds of interference.<sup>1082</sup>

763 Historically, the standard of FPS was developed in international law in relation to States' duty to employ their police powers to protect foreign nationals from physical harm.<sup>1083</sup> This duty is most often understood to apply to situations of insurrection, civil unrest and other public disturbances. The due diligence requirement is relevant precisely because of the circumstances – the obligation is not to prevent physical harm, but to exercise due diligence.<sup>1084</sup>

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<sup>1082</sup> [Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, Award, ICSID Case No. ARB/05/16, Award, 29 July 2008, at Exhibit CLA-140](#), p. 177 *et seq.* (para. 668) (“the [FPS] standard in ... the UK-Kazakhstan BIT must be construed [as] oblig[ing] the State to provide a certain level of protection to foreign investment from physical damage.”); [Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, at Exhibit RLA-177](#), p. 62 *et seq.* (paras. 162, 173-179) (“Traditionally, courts and tribunals have interpreted the content of this [FPS] standard of treatment as imposing a positive obligation ... to protect the investor and his property from physical threats and injuries, ... the stability of the business environment and legal security are more characteristic of the standard of [FET]”); [BG Group Plc. v. Argentine Republic, Final Award, 24 December 2007, at Exhibit CLA-148](#), p. 100 *et seq.* (paras. 323-326) (rejecting departure from the “originally understood standard of ‘protection and constant security’” which was “traditionally ... associated with situations where the physical security of the investor or its investment is compromised.”); [Gold Reserve v. Venezuela, Award, 22 September 2014, at Exhibit CLA-81](#), p. 158 *et seq.* (paras. 622-623) (“[FPS] refers to protection against physical harm to persons and property.”); [PSEG and Konya v. Turkey, Award, 19 January 2007, at Exhibit CLA-175](#), p. 67 *et seq.* (paras. 258-259); [OI European Group B.V. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB/11/25, 10 March 2015, at Exhibit RLA-178](#), p. 125 (paras. 573-574); [Joseph Houben v. Republic of Burundi, Award, ICSID Case No. ARB/13/7, 12 January 2016 \(resubmitted\), at Exhibit RLA-74](#), p. 40 (para. 157); [Spyridon Roussalis v. Romania, Award, ICSID Case No. ARB/06/1, 7 December 2011, at Exhibit RLA-179](#), p. 55 *et seq.* (para. 321) (The *Roussalis* tribunal disagreed with the *Biwater*, *Siemens* and *Azurix* decisions (upon which the Claimants rely) extending the FPS standard “beyond safeguard from physical violence”).

<sup>1083</sup> [G. Cordero-Moss, “Full Protection and Security” in A. Reinisch, \*Standards of Investment Protection\* \(1st edition, Oxford University Press, 2008\) \(excerpt\), at Exhibit RLA-180](#), p. 131.

<sup>1084</sup> [Z. Douglas, “Property, Investment and the Scope of Investment Protection Obligations” in Z. Douglas et al. \(eds.\) \*The Foundation of International Investment Law: Bringing Theory into Practice\* \(1st edition, Oxford University Press, 2014\) \(excerpt\), at Exhibit RLA-181](#), p. 379 *et seq.* (“[s]ome tribunals have asserted that the full protection and security obligation extends to the legal or commercial environment for the investment. This is clearly wrong: states cannot be under a general obligation of due diligence in respect of the acts of third parties that might

- 764 The *Suez/AWG* tribunal disagreed with the *CME* and *Azurix* decisions – two decisions on which the Claimants rely –<sup>1085</sup> precisely because neither decision “provide[s] a historical analysis of the concept of full protection and security or give[s] any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.”<sup>1086</sup>
- 765 Thus, the Claimants’ interpretation stands as an outlier when examined against the majority of investment tribunal decisions and scholarly work on this issue. The Tribunal should instead espouse the traditional interpretation of the FPS standard, *i.e.* which provides for protection and security against physical harm, in accordance with due diligence.

#### **4.2.2 Even if Article 2(2) of the UK-Romania BIT Provided for Protection and Security against Legal Harm, Romania Complied with This Standard**

- 766 Even assuming the Claimants’ extensive interpretation of the FPS standard (as covering instances of legal harm) were correct, the Tribunal should still conclude that the FPS standard would require the State only to make available a functioning court system to foreign investors.<sup>1087</sup> Romania

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impact upon the legal or commercial environment for foreign investments ... [n]o state would have the capacity in terms of available resources to ensure that no third party inflicts damage upon a foreign investment in contravention with the letter and spirit of the local laws or in bad faith commercially.”); see also [A. de Nanteuil, \*Droit international de l’investissement\* \(2nd edition, A. Pedone, 2017\) \(excerpt\), at Exhibit RLA-182](#), p. 388 (concurring: “the interpretation that should be applied is indeed that of a clause whose protections are limited to physical harm caused by third parties, in the absence of any more specific reference in the applicable text, which can naturally include one. Any conclusion that the FPS clause covers in principle legal harm would lead to encroachment on the scope of the FET standard, which is obviously undesirable.”); [A. Diehl, \*The Core Standard of International Investment Protection\* \(1st edition, Wolters Kluwer, 2012\) \(excerpt\), at Exhibit RLA-183](#), p. 529 *et seq.* (noting that “under the [FPS] standard, the due diligence obligation ... relates first and foremost to physical protection... This limitation to physical harm is necessary to correctly and clearly distinguish the [FPS] standard from the FET standard.”).

<sup>1085</sup> [Memorial](#), p. 312 *et seq.* (paras. 699, 702).

<sup>1086</sup> [Suez and Vivendi v. Argentina, Decision on Liability, 30 July 2010, at Exhibit RLA-177](#), p. 67 (para. 177).

<sup>1087</sup> [D. French and T. Stephens, “ILA Study Group on Due Diligence in International Law - First Report”, 7 March 2014, at Exhibit RLA-184](#), p. 8; see also [Frontier Petroleum v. Czech](#)

diligently discharged any such duty by providing a functioning court system to the Claimants, which they never claim was defective.

767 As mentioned above, only one of their legal experts, Prof. Schiau, opines that at least three court decisions in relation to ADC 4/2004 were “an obvious excess of judicial power.”<sup>1088</sup> His criticism is not formalized by the Claimants in a claim for failure to afford FPS, even by their own extensive interpretation of this standard.

768 Further, tribunals have repeatedly held that, in assessing whether a State complied with the FPS standard, the question is whether the State took reasonable measures to protect the relevant investors or investments “in the circumstances and with the resources of the state in question.”<sup>1089</sup>

769 Since the Claimants do not go as far as making any claim that the Romanian court system made available to them does not meet the standard, their claim under an extensively interpreted Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT must be dismissed.

#### **4.2.3 The FPS Standard Only Provides for Protection and Security against Physical Harm Perpetrated by Third Parties**

770 In their Reply, the Claimants allege that for the first time that Romania, under the FPS standard in the UK-Romania BIT, should protect their investment against any harm perpetrated by third parties or “State

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[Republic](#), Final Award, 12 November 2010, at [Exhibit CLA-271](#), p. 91 (para. 273); [Fouad Alghanim et al. v. Hashemite Kingdom of Jordan](#), Award, ICSID Case No. ARB/13/38, 14 December 2017, at [Exhibit RLA-185](#), p. 90 (para. 318) (“a governmental authority cannot be faulted for acting in a manner validated by its courts, unless the conduct of the courts themselves constitutes a breach of treaty.”).

<sup>1088</sup> [Schiau LO II](#), p. 59 *et seq.* (paras. 192-202); see [Counter-Memorial](#), p. 56 *et seq.* (paras. 146-150) (discussing NGO’s successful challenge of ADC 4/2004).

<sup>1089</sup> [A. Newcombe and L. Paradell, Law and Practice of Investment Treaties \(1st edition, Wolters Kluwer, 2009\) \(excerpt\)](#), at [Exhibit RLA-186](#), p. 310 (“[i]n practice, tribunals will likely consider the state’s level of development and stability as relevant circumstances in determining whether there has been due diligence.”); [Houben v. Burundi](#), Award, 12 January 2016 (resubmitted), at [Exhibit RLA-74](#), p. 41 *et seq.* (paras. 161, 163).

actors.”<sup>1090</sup> The Claimants’ position is once again at odds with the very logic of the inclusion of FPS clauses in investment treaties.

771 The standard of protection which Romania must provide under the relevant FPS clauses is limited to physical harm perpetrated by **third parties**, *i.e.*, private, non-State actors.

772 As Prof. de Nanteuil highlights “[t]he full protection and security clause covers above all harm suffered by the investment perpetrated by third parties. This is very logical: **harm perpetrated by the State itself is already covered by the other clauses examined above** [*i.e.*, expropriation and FET clauses].”<sup>1091</sup> Thus, the FPS clause is included in the BIT to cover harm caused by actors over which the State has no control, which result in this obligation being assessed solely against a standard of due diligence (*i.e.* which provides that the State’s compliance with its obligations under the FPS standard must be viewed in light of the circumstances and, in particular, the resources available to the relevant State).

773 Romania has already demonstrated that this position is supported by a plethora of investment tribunal decisions.<sup>1092</sup> In their Reply, the Claimants have not addressed those decisions.

774 Instead, they have cited several decisions which overextended the scope of the relevant FPS clauses to harm perpetrated by State actors. Reaching the same conclusion in this case would lead the Tribunal to disregard the Contracting Parties’ choice to include two standards in their BIT, *i.e.* the FET and the FPS standards. This issue is not addressed by the Claimants in their Reply.

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<sup>1090</sup> [Reply](#), p. 216 *et seq.* (para. 508).

<sup>1091</sup> [A. de Nanteuil, \*Droit international de l’investissement\* \(2nd edition, A. Pedone, 2017\) \(excerpt\), at \[Exhibit RLA-182\]\(#\)](#), p. 385 (emphasis added); see also [Counter-Memorial](#), p. 245 (para. 652).

<sup>1092</sup> [Counter-Memorial](#), p. 245 (para. 652); [Gemplus S.A. et al. v. United Mexican States, Award, ICSID Case Nos. ARB\(AF\)/04/3 and ARB\(AF\)/04/4, 16 June 2010, at \[Exhibit CLA-156\]\(#\)](#), p. 219 *et seq.* (hard copy: Part IX, p. 7 *et seq.*); [Houben v. Burundi, Award, 12 January 2016 \(resubmitted\), at \[Exhibit RLA-74\]\(#\)](#), p. 41 (para. 161).

775 Thus, to ensure that both provisions are given full *effet utile*, the Tribunal should reject the Claimants' interpretation.<sup>1093</sup>

#### **4.3 The Impugned Acts and Omissions of State Officials Do Not Taken Together as a "Composite Act" Amount to a Failure to Provide Full Protection and Security Under Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

776 As the Claimants confirm, their claims under Article II(2) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT relate to the "**same course of conduct** described ... in relation to Romania's failure to accord fair and equitable treatment to Gabriel's investments."<sup>1094</sup> Thus, for the same reasons as for the Claimants' FET claims,<sup>1095</sup> the Tribunal should also dismiss the Claimants' FPS claims.

777 In their Reply, the Claimants have dropped the claims that involved physical acts of third parties, *i.e.* that their investment, or RMGC employees, were physically threatened by activists or that Romania failed to protect them from these threats.<sup>1096</sup>

778 Instead, the Claimants now draw up a litany of non-physical actions and omissions, all allegedly attributable to the State, none of which could conceivably be covered by the correct interpretation of the FPS standard.<sup>1097</sup>

779 In any event, even assuming the Claimants' interpretation of the FPS standard were correct, *i.e.* providing for any kind of protection against any kind of harm, perpetrated by any kind of actor, the specific allegations

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<sup>1093</sup> [C. Leben, \*Droit International des Investissements et de l'Arbitrage Transnational\* \(1st edition, A. Pedone, 2015\) \(excerpt\), at Exhibit RLA-149](#), p. 317.

<sup>1094</sup> [Reply](#), p. 218 (para. 514) (emphasis added).

<sup>1095</sup> See *supra* Sections 3.3 to 3.7.

<sup>1096</sup> [Memorial](#), p. 316 *et seq.* (paras. 709-710). The Claimants maintain their speculative and unsupported allegation that Romania failed to act following the illegal disclosure to the "RISE Project" of "a document issued by the Ploiești prosecutor's office and contained in the Kadok criminal file that mentioned RMGC among dozens of companies and individuals that had done business with Kadok." (██████████, n. 568). Yet, they still fail to show that this publication was made contrary to Romanian Law ([Counter-Memorial](#), p. 155 *et seq.* (paras. 409-410)).

<sup>1097</sup> [Reply](#), p. 219 *et seq.* (para. 515).

made by the Claimants in support their FPS claim are unsupported in facts, as established above in relation to the same allegations made in connection with their FET claim.

**5 ROMANIA HAS NOT IMPAIRED THE CLAIMANTS' INVESTMENTS BY UNREASONABLE OR DISCRIMINATORY MEASURES AND HAS NOT BREACHED THE NATIONAL TREATMENT STANDARD**

780 The Claimants argue that Romania “impaired Gabriel’s investments by unreasonable or discriminatory measures, thereby breaching its obligations under Article 2(2) of the UK BIT and Article III(3) of the Canada BIT.”<sup>1098</sup>

781 The underlying allegations remain the same as for the FET, FPS, and expropriation claims and the Claimants make no effort to apply the different legal standards in the two BITs.<sup>1099</sup> They continue to confuse the standards in the Canada-Romania BIT (national treatment standard) and the UK-Romania BIT (non-impairment standard). These standards are summarized below (**Section 5.1**), before demonstrating that the Claimants have failed to prove that (i) Romania took any discriminatory measures *vis-à-vis* the Claimants in breach of either BIT (**Section 5.2**), or that (iii) Romania took any unreasonable measures that impaired the management, maintenance, use, enjoyment or disposal of Gabriel Jersey’s investments (**Section 5.3**).

**5.1 The Legal Standards under Article III(3) of the Canada-Romania BIT and Article 2(2) of the UK-Romania BIT Are Different**

782 The Claimants continue to fail to establish the legal standards to assess whether the measures complained of amount to breaches of Article III(3) of the Canada-Romania BIT and Article 2(2) of the UK-Romania BIT. As noted in the Counter-Memorial, the standards are not the same.<sup>1100</sup>

783 To demonstrate a breach of the national treatment standard under Article III(3) of the Canada-Romania BIT, or the non-impairment standard by way of discriminatory measures under Article 2(2) of the UK-Romania BIT, the

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<sup>1098</sup> [Reply](#), p. 222 (para. 517).

<sup>1099</sup> [Counter-Memorial](#), p. 246 (para. 656) and p. 247 *et seq.* (paras. 658-669).

<sup>1100</sup> *Id.* at p. 247 *et seq.* (paras. 658 and 666).

Claimants must show, cumulatively, that economic operators that are in like circumstances were subject to differential “treatment” or “measures” (depending on the BIT) without justification. The “treatment” or “measures” must also negatively impact the Claimants’ investments in Romania, in each case depending on the wording of the BIT in question. Gabriel Jersey separately makes a claim for “unreasonable” measures – a claim that is not available to Gabriel Canada.

784 Article III(3) of the Canada-Romania BIT only vests a Canadian investor with the right to national treatment:

“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.”<sup>1101</sup>

785 By contrast, in its relevant part, Article 2(2) of the UK-Romania BIT provides:

“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.”<sup>1102</sup>

786 As the tribunal in the case of *South American Silver Limited v. Bolivia* established, a party claiming under a standard that requires differential treatment, such as one for lack of national treatment or impairment by discriminatory measures, must meet three criteria:

“the Claimant did not establish the presence, much less the cumulation, of any of the elements derived from the standard mentioned above, that is: (i) the existence of another person or company in like

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<sup>1101</sup> [Canada-Romania BIT, at Exhibit C-1](#), p. 5 (Art. III(3)) (emphasis added).

<sup>1102</sup> [UK-Romania BIT, at Exhibit C-3](#), p. 4 (Art. 2(2)).

circumstances, (ii) differential treatment, and (iii) the absence of rational justification for such treatment.”<sup>1103</sup>

787 First, to establish breach of either standard, the Claimants must show that there were other economic operators in “like circumstances.” Under the national treatment standard under the Canada-Romania BIT, the Claimants must further show the presence of a Romanian comparable company.

788 In considering allegations of discrimination by way of executive action, the key question is whether the alleged comparator was subject to the same legal regime as the claimant. The tribunal in *Grand River v. U.S.A.* helpfully analyzed the case law in the context of the NAFTA, which is for all intents and purposes analogous to the treaty standards applicable here:

“NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in ‘like circumstances’ ... While each case involved its own facts, tribunals have assigned important weight to ‘like legal requirements’ in determining whether there were ‘like circumstances.’ The *ADF* tribunal thus emphasized that both the claimant and its U.S. competitors were subject to the same U.S. ‘Buy America’ provisions. *Pope & Talbot* found that the relevant comparators were lumber exporters subject to the same restrictive legal regime as the claimant, so there was no denial of national treatment if exporters in other unregulated provinces were not so limited. *Feldman v. Mexico* found the relevant comparators for purposes of MFN analysis to be a limited group of cigarette exporters subject to the same legal requirements as the claimant. The *Methanex* tribunal (citing *Pope & Talbot*) emphasized the importance of assuring that purported comparators face similar regulatory requirements. Looking at the question from the other direction, *UPS v. Canada* found a key difference between the parties there to be that Canada Post was subject to legal requirements

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<sup>1103</sup> [South American Silver v. Bolivia](#), Award, 22 November 2018, at [Exhibit RLA-162](#), p. 191 (para. 711); see also [Total S.A. v. Argentine Republic](#), Decision on Liability, ICSID Case No. ARB/04/1, 27 December 2010, at [Exhibit CLA-67](#), p. 156 *et seq.* (para. 344); and [Joseph Charles Lemire v. Ukraine](#), Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, at [Exhibit CLA-107](#), p. 54 (para. 261).

under national law and international postal agreements that did not affect UPS.

The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.”<sup>1104</sup>

789 As a second step, for the national treatment standard in Article III(3) of the Canada-Romania BIT, Gabriel Canada must also prove that it was granted less favorable treatment than a Romanian comparator in like circumstances. Under the non-impairment standard in Article 2(2) of the UK-Romania BIT, Gabriel Jersey must show that it was subject to “discriminatory measures.”

790 The third requirement is for the Claimants to show that there was no rational justification for the differential treatment or measures.<sup>1105</sup> As the tribunal in *Electrabel v. Hungary* held, “[a] rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.”<sup>1106</sup>

791 For the national treatment standard, Gabriel Canada must further show that the treatment was granted “with respect to the expansion, management, conduct, operation and sale or disposition” of its investments in Romania.

792 The wording – and thus the standard – in Article 2(2) of the UK-Romania BIT is different. Gabriel Jersey must specifically show that the impugned “measures” “impair[ed]” “the management, maintenance, use, enjoyment or disposal of” its investments in Romania.

793 Gabriel Jersey is not only complaining of alleged “discriminatory” measures, but also of “unreasonable” measures. To succeed on that claim, it needs to demonstrate that the measure does not serve any legitimate

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<sup>1104</sup> [Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, Award, 12 January 2011, at Exhibit RLA-187](#), p. 41 *et seq.* (paras. 166-167) (citations omitted).

<sup>1105</sup> [Electrabel v. Hungary, Award, 25 November 2015, at Exhibit RLA-49](#), p. 52 (para. 179) (“a measure will not be arbitrary if it is reasonably related to a rational policy”).

<sup>1106</sup> *Id.*

purpose, is based on discretion or personal preference, taken for reasons different from those put forward by the decision-maker or taken in willful disregard of due process.<sup>1107</sup>

## **5.2 Romania Took No Measures Amounting to Discriminatory Treatment of the Claimants Under Either Article III(3) of the Canada-Romania BIT or Article 2(2) of the UK-Romania BIT**

- 794 The Claimants allege that the State's "course of conduct" with regard to their investments was discriminatory and that the State based its decisions "on political rather than on applicable legal criteria, while undertaking to treat other projects according to the law."<sup>1108</sup> They, however, refer to three mining companies that are not in like circumstances as compared to the Claimants or RMGC.
- 795 Significantly, as noted above, to claim a breach of the national treatment standard under the Canada-Romania BIT, the Claimants must demonstrate differential treatment as compared to a Romanian company.
- 796 The Claimants continue to complain that the Roşia Poieni copper mine next to Roşia Montană receives treatment more favorable than RMGC because it benefits from environmental authorizations. However, Cuprumin, which operates Roşia Poieni, and RMGC are not in like circumstances.<sup>1109</sup>
- 797 It is undisputed that, unlike Roşia Montană, Roşia Poieni has been an operational mine for decades and that, accordingly, the Project and Roşia Poieni are governed by different legal regimes, including with regards to environmental permitting. The Project is subject to EIA laws and procedures, as for all new projects.<sup>1110</sup> By contrast, Roşia Poieni is subject

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<sup>1107</sup> [EDF v. Romania, Award, 8 October 2009, at Exhibit CLA-103](#), p. 99 (para. 303). On this particular aspect of the legal test, the Parties appear to agree: see [Memorial](#), p. 325 (para. 722).

<sup>1108</sup> [Reply](#), p. 225 (para. 527).

<sup>1109</sup> The Project envisages the extraction of 500,000 ounces of gold per year versus the 11,000 ounces of copper extracted at Roşia Poieni each year.

<sup>1110</sup> See [Counter-Memorial](#), p. 24 (para. 75) (explaining that the Project is governed by Emergency ordinance 195/2005 on environment protection and Ministry of Environment Order

to regulations governing operational industrial sites,<sup>1111</sup> as its environmental authorizations demonstrate.<sup>1112</sup> ██████ wrongly suggests that Roșia Poieni receives preferential treatment because its environmental authorizations should, like for the Project, be subject to Government Decision.<sup>1113</sup> However, the Government need not issue environmental authorizations for operational mining sites that do not use hazardous substances.<sup>1114</sup>

798 The Claimants also argue that State authorities have allegedly allowed the two-kilometer historical monument radius to interfere with the Project, but not the Roșia Poieni site.<sup>1115</sup> This argument is false since the two-kilometer radius pre-dates the Ministry of Culture's endorsement of the Project and thus does not impede the Project.<sup>1116</sup>

799 Although ██████ continues to refer to a tailings pond failure at Roșia Poieni in April 2017, ██████ fails to explain its relevance.<sup>1117</sup> As previously demonstrated, that failure was minor and rapidly resolved.<sup>1118</sup> ██████

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860/2002 on approval of EIA procedure and issuance of environmental permit and that, because of the Project's size, the EIA procedure is coordinated by the Ministry of Environment).

<sup>1111</sup> See [CMA - Wilde Report I](#), p. 21 *et seq.* (para. 68-71) (contrasting the EIA Directive and the IPPC Directive that seeks to prevent and reduce pollution from industrial activities); [CMA - Wilde Report II](#), p. 70 *et seq.* (Section 8) (describing differences in the legal regimes governing Roșia Montană (EIA) and Roșia Poieni (IPPC/Order 1798/2007); [Order 1798/2007 approving the environmental authorization procedure, at Exhibit R-565](#); see also [Law 278/2013 on industrial emissions, at Exhibit R-566](#).

<sup>1112</sup> See [Integrated environmental permit dated 6 January 2009, at Exhibit C-2223](#), p. 3; [Integrated environmental permit dated 1 March 2010, at Exhibit C-2225](#), p. 3; [Environmental authorization dated 16 September 2014, at Exhibit C-419](#), p. 7 and [Environmental authorization dated 30 July 2018, at Exhibit C-2270](#), p. 2 (none of which are EIA permits).

<sup>1113</sup> ██████, p. 82 (para. 144) (n. 381).

<sup>1114</sup> [Government Emergency Ordinance 195/2005 dated 22 December 2005, at Exhibit R-76](#), p. 27 (Art. 19).

<sup>1115</sup> [Reply](#), p. 226 (para. 531).

<sup>1116</sup> See *supra* para. 676; see also Counter-Memorial, p. 160 (para. 417).

<sup>1117</sup> ██████, p. 83 *et seq.* (para. 146).

<sup>1118</sup> [Counter-Memorial](#), p. 161 (para. 420).

provides no support for his suggestions of long-term impact which, even if true, are irrelevant and would not support the claim of discrimination.<sup>1119</sup>

- 800 The Claimants and ██████████ also complain that it is “unfair” that State authorities issued an EIA environmental permit to the Certej project owned by the joint venture between Canadian company Eldorado Gold and Minvest (known as Deva Gold). They complain that State authorities allegedly accepted the conclusions of a report that found there would be no transboundary effects even in the worst-case scenarios for both Roșia Montană and Certej.<sup>1120</sup> However, first, given its much smaller size – some 456 ha versus 2,388 ha for the Roșia Montană Project<sup>1121</sup> – the Certej project is, unlike the Roșia Montană Project, subject to a local permitting procedure.<sup>1122</sup> Second, the Claimants fail to show the relevance of either the report mentioned or the State’s alleged assessment thereof. In any event, the Certej project did not face the level of public opposition during the EIA Procedure that the Roșia Montană project faced<sup>1123</sup> and had valid urban plans and certificates in place.<sup>1124</sup>
- 801 The Claimants also reproach Romania for failing to grant the Bucium exploitation licenses, while granting a license to the Romanian company SAMAX (100% owned by the Canadian company Eurosun Mining) within three years, in 2015.<sup>1125</sup> They further allege that, between 2011 and 2015,

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<sup>1119</sup> [CMA - Wilde Report II](#), p. 76 *et seq.* (paras. 282-286).

<sup>1120</sup> ██████████, p. 73 (para. 127); see also [Reply](#), p. 226 (para. 529).

<sup>1121</sup> [Deva Gold environmental permit dated 28 November 2013, at Exhibit C-2256](#), p. 6 *et seq.*; [Gabriel Canada 2011 Annual Information Form, at Exhibit C-1809](#), p. 37.

<sup>1122</sup> [Counter-Memorial](#), p. 24 *et seq.* (para. 75) (describing local and national EIA procedures); see also [Mocanu II](#), p. 6 (para. 21).

<sup>1123</sup> See [Deva Gold environmental permit dated 28 November 2013, at Exhibit C-2256](#), p. 134 and 225.

<sup>1124</sup> Eldorado secured the approval of the PUZ in 2010. See *id.* at p. 134. The PUZ has since been annulled. See ██████████ [G. Gheorghe, “Cluj court suspends building permission for Eldorado Gold’s Certej mining site”, \*Business Review\*, 22 Jul. 2016, at Exhibit R-568](#), p. 1.

<sup>1125</sup> [Reply](#), p. 225 (para. 528); ██████████, p. 40 (para. 76); see also [Birsan LO II](#), p. 58 *et seq.* (paras. 216-218).

NAMR negotiated and signed 109 exploitation licenses.<sup>1126</sup> However, they do not even attempt to show that these licenses pertain to companies and mining projects in like circumstances to RMGC and the Project.

802 In sum, the Claimants have failed to demonstrate (i) the existence of another company in like circumstances as compared to RMGC (and, more specifically, in the case of the Canada BIT, of a Romanian company in like circumstances), (ii) differential treatment, and (iii) the absence of rational justification for such treatment. Accordingly, their claims under Article 2(2) of the UK BIT and Article III(3) of the Canada BIT must be rejected.

### 5.3 Romania Took No Unreasonable Measures that Impaired the Management, Maintenance, Use, Enjoyment or Disposal of Any Investments of Gabriel Jersey

803 The Claimants allege that:

“the **same course of conduct** comprised of the acts and omissions described above in relation to Romania’s failure to accord fair and equitable treatment and full protection and security to Gabriel’s investments, **as a composite act**, also combined to constitute an **unreasonable** or discriminatory measure that impaired the maintenance, use, value, and enjoyment of Gabriel’s investments.”<sup>1127</sup>

804 Gabriel Jersey claims that Romania breached Article 2(2) of the UK-Romania BIT by taking unreasonable measures that affected Gabriel Jersey’s management, maintenance, use, enjoyment or disposal of its investments. The allegedly unreasonable conduct seemingly comprises the alleged failure to issue the environmental permit; the issuance of the 2015 LHM; the submission of the UNESCO application; and the alleged failure to grant the Bucium exploitation licenses.<sup>1128</sup> However, the Claimants make no attempt to show how these alleged occurrences were

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<sup>1126</sup> [Reply](#), p. 225 (para. 528); see also [Romanian Court of Accounts, “Summary of the Audit Report on the performance concerning the concession of the country’s mineral resources during 2011-2015”, at Exhibit C-1674 \(resubmitted\)](#).

<sup>1127</sup> [Reply](#), p. 222 (para. 518) (emphasis added).

<sup>1128</sup> *Id.* at p. 223 (para. 521).

unreasonable or how they affected Gabriel Jersey's enjoyment of its investments. As with the corresponding FET claims, these claims must also be dismissed.<sup>1129</sup>

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<sup>1129</sup> See *supra* Sections 3.3 and 3.6.1 (addressing alleged failure to issue the environmental permit), Section 3.6.2.2 (addressing the issuance of the 2015 LHM), Section 3.6.2.3 (addressing the submission of the UNESCO application), and Section 3.7 (addressing the alleged failure to grant the Bucium exploitation licenses).

## 6 ROMANIA HAS NOT BREACHED THE UMBRELLA CLAUSE OF THE UK-ROMANIA BIT

- 805 The Claimants argue that “Romania failed to observe obligations entered into with regards to Gabriel’s investments in breach of Article 2(2) of the UK BIT.”<sup>1130</sup> These obligations can allegedly be found in the Roşia Montană License, the Bucium Exploration License as well as the RMGC Articles of Association.<sup>1131</sup>
- 806 In response to Romania’s demonstration that the Claimants could not rely on the umbrella clause, they claim that they need not be a party to the contracts at issue,<sup>1132</sup> and that it is irrelevant whether Minvest is a named party to the RMGC Articles of Association,<sup>1133</sup> as is whether the obligations in question are also subject to contractual arbitration clauses.<sup>1134</sup>
- 807 These legal arguments will be addressed below (**Section 6.2**), before it is demonstrated why, as a matter of fact, Romania has not failed to observe any relevant obligations (**Section 6.3**). First, however, it is briefly recapped why this claim can only be presented by Gabriel Jersey, as there is no “umbrella clause” in the Canada-Romania BIT (**Section 6.1**).

### 6.1 Gabriel Canada Cannot Import the “Umbrella Clause” in Article 2(2) of the UK-Romania BIT by Virtue of the MFN Clause in Article III(1) of the Canada-Romania BIT

- 808 As stated above, the MFN clause in Article III(1) of the Canada-Romania BIT does not allow importation of investment protection standards that are not included in the basic treaty from other BITs, in this case, the “umbrella clause” found in Article 2(2) of the UK-Romania BIT.<sup>1135</sup>

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<sup>1130</sup> [Reply](#), p. 227 (para. 532).

<sup>1131</sup> *Id.*

<sup>1132</sup> *Id.* at p. 228 (heading 1).

<sup>1133</sup> *Id.* at p. 230 (heading 2).

<sup>1134</sup> *Id.* at, p. 234 (heading 3).

<sup>1135</sup> [Counter-Memorial](#), p. 183 (para. 467); see *supra* Section 2.1.4.

- 809 In their Reply, the Claimants assert that many other treaty tribunals have concluded that an MFN clause may be invoked to rely upon more favorable treatment granted by the host State to third state investors in other investment treaties.<sup>1136</sup> This is neither analysis nor reasoning.
- 810 Analysis of whether the MFN at issue covers a specific treatment should begin with the wording of the clause at issue. The Claimants have not even attempted to do this, as they know that the exercise immediately demonstrates why Gabriel Canada's claim must fail.
- 811 Article III(1) of the Canada-Romania BIT promises MFN treatment for "investments, or returns of investors." An umbrella clause does not provide anything additional to the "investment," or "returns." It provides effectively another procedural avenue to the **investor** to enforce its rights. As Prof. Crawford has stated, "[t]he purpose of the umbrella clause is to allow enforcement without internationalization and without transforming the character and content of the underlying obligation."<sup>1137</sup>
- 812 An umbrella clause is thus not covered by the MFN clause in Article III(1) of the Canada-Romania BIT by the very terms of the MFN clause. The contrast with some of the clauses that have been used, as the Claimants highlight, to import umbrella clauses in other cases, is stark. For example, in *Arif v. Moldova*, the tribunal was interpreting a clause in the France-Moldova BIT that provided MFN treatment "to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments."<sup>1138</sup> In *EDF v. Argentina* the clause provided MFN treatment for "investors of the other Party, with respect to their investments and activities associated with such investments."<sup>1139</sup>

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<sup>1136</sup> [Reply](#), p. 207 *et seq.* (paras. 480-481).

<sup>1137</sup> [J. Crawford, "Treaty and Contract in investment Arbitration" \(2008\) 24\(3\) \*Arbitration International\* 351, at Exhibit RLA-188](#), p. 370.

<sup>1138</sup> See [Franck Charles Arif v. Republic of Moldova, Award, ICSID Case No. ARB/11/23, 8 April 2013, at Exhibit RLA-87](#), p. 95 (para. 394).

<sup>1139</sup> [EDF International S.A. et al. v. Argentine Republic, Award, ICSID Case No. ARB/03/23, 11 June 2012, at Exhibit CLA-155](#), p. 49 *et seq.* (para. 207); see also [Hesham Talaat M. Al-Warraq v. Republic of Indonesia, Final Award, 15 December 2014, at Exhibit RLA-70](#), p. 168 (para. 545).

Accordingly, many of the Claimants' own authorities demonstrate why their argument must fail.

- 813 The intention behind MFN clauses, including the one in the Canada-Romania BIT, is not to permit investors to go “clause-shopping” to find the most favorable wording for each issue that might arrive, in order to prepare a “Frankenstein’s monster” of a treaty that cuts and pastes clauses from various treaties to arrive at a result to which no State has ever agreed. MFN clauses have their origin in trade agreements, which make it plain what they were always intended to be about: not to import different treaty standards, but to ensure treatment **factually** as favorable to the covered investors as to investors from third States. If the host State granted a privilege or an exemption to third State investors, it also had to provide it to investors that were protected by an investment treaty with an MFN clause. This becomes obvious when one reviews the early MFN clauses in trade treaties, such as the one in the General Agreement on Tariffs and Trade of 1947:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”<sup>1140</sup>

- 814 The concern of creating new rights that were not contemplated (or were indeed specifically contemplated and excluded) by the treaty parties has also been heard by some other treaty tribunals, leading to the dismissal of claims like the one by Gabriel Canada. For instance, in *Paushok v. Mongolia*, the tribunal also considered whether the BIT at issue allowed

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<sup>1140</sup> [General Agreement on Tariffs and Trade dated July 1986, at Exhibit CLA-237](#), p. 2 (Art. 1.1).

the claimants to import an umbrella clause from other treaties. The tribunal rejected the argument, finding that the claimant “cannot use that MFN clause to introduce into the Treaty **completely new** substantive rights, such as those granted under an umbrella clause.”<sup>1141</sup>

815 Thus, the Respondent submits that Gabriel Canada should not be allowed to rely on the MFN clause in the Canada-Romania BIT to import new standards from the UK-Romania BIT.<sup>1142</sup>

## 6.2 The Governing Law of the Underlying Contract Determines Its Scope

816 An “umbrella clause” does not **create** additional rights or obligations, or **change** existing rights; it merely permits the enforcement at the international level of rights as they exist at the domestic level. As the recent *Gavrilovic v. Croatia* award explained:

“As in *CMS v Argentina*, the Tribunal considers that the effect of the umbrella clause is not to transform the obligation which is relied on into something else. The parties to the obligation (*i.e.* the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.”<sup>1143</sup>

817 The Claimants allege that this is not so, but that in this particular case the text of the umbrella clause in the UK-Romania BIT permits them to make their umbrella clause claim. They first allege that:

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<sup>1141</sup> [Sergei Paushok et. al. v. The Government of Mongolia, Award on Jurisdiction and Liability, 11 April 2011, at Exhibit RLA-63](#), p. 137 *et seq.* (para. 570) (emphasis added); see also *e.g.* [Teinver S.A. et al. v. Argentine Republic, Award, ICSID Case No. ARB/09/1, 21 July 2017, at Exhibit CLA-248](#), p. 307 (para. 884); and [Hochtief AG v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011, at Exhibit RLA-189](#), p. 20 *et seq.* (para. 81).

<sup>1142</sup> This includes the non-impairment standard in Article 2(2) of the UK-Romania BIT. [Reply](#), p. 222 (para. 519, n. 1008).

<sup>1143</sup> [Gavrilovic v. Croatia, Award, 26 July 2018, at Exhibit RLA-170](#), p. 236 (para. 860); see also [CMS Gas Transmission Company v. Argentine Republic, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, 25 September 2007, at Exhibit RLA-190](#), p. 24 *et seq.* (para. 95).

“Article 2(2) of the UK BIT by its terms refers to any obligation the State ‘may have entered into with regard to investments of nationals or companies of the other Contracting Party.’ It is not limited to obligations entered into with nationals or companies themselves.”<sup>1144</sup>

- 818 The Claimants have clarified that their claim is based on shares in subsidiaries, which must mean that their “investment” in Romania is the shareholding in RMGC, as discussed in paragraphs 40-41 above. An obligation entered into with the investment cannot be an obligation “with regard to” that same investment. Such a reading would do violence to the terms of the UK-Romania BIT, contrary to what the Claimants allege.
- 819 Some treaties, by contrast, like the Energy Charter Treaty that the Claimants erroneously cite as including “a similarly worded umbrella clause”, critically specify that they apply to obligations entered into “with an Investor or an Investment of an Investor.”<sup>1145</sup> The textual difference denotes a different meaning, in accordance with the principle of *effet utile*.
- 820 As for the counterparty, the umbrella clause applies to obligations entered into by “each Contracting Party” – in this case that would be Romania. The Claimants’ response is to refer to some cases that have analyzed the issue as a matter of attribution pursuant to Article 8 of the ILC Articles<sup>1146</sup> and conclude that “the State instructed and directed ... Minvest specifically to enter into the agreements with Gabriel ..., which the State, *i.e.*, the Ministry of Industry and NAMR, also specifically approved.”<sup>1147</sup>
- 821 The issue, however, is not one of attribution, as the entry into any of the contracts at issue is not, and is not alleged to be, a breach of an international obligation. International law rules on attribution are intrinsically linked to State responsibility and thus cannot be examined in a vacuum, outside the question of breaches of international law. The tribunal in *Devas v. India* issued a strong reminder of this principle:

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<sup>1144</sup> [Reply](#), p. 228 (para. 537).

<sup>1145</sup> *Id.* at p. 230 (para. 542) (citing to [Energy Charter Treaty and Related Documents, at Exhibit RLA-23](#), p. 54 *et seq.* (Art. 10(1))).

<sup>1146</sup> [Reply](#), p. 231 *et seq.* (paras. 547-549).

<sup>1147</sup> *Id.* at p. 232 *et seq.* (para. 550).

“It is important that international law, and in particular the law of State responsibility, should not be made to do too much. In particular, international law should not be applied to decide issues to which it is not properly applicable and a fortiori, should not be applied to decide issues which, on analysis, are properly governed by a particular system of domestic law. As will be seen, **this is a particular danger with the rules of attribution, which are often prayed in aid in relation to issues which in reality have nothing to do with questions of State responsibility.**”<sup>1148</sup>

822 In the *EDF v. Romania* case, the tribunal applied the same provision of the UK-Romania BIT to claims of a Jersey claimant and dismissed the umbrella clause claim, noting that:

“[a]ttribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it **make Romania party to such contracts.**”<sup>1149</sup>

823 The issue is not governed by rules of attribution, but by the laws governing the contracts themselves.

824 The Claimants specify in the Reply that they are not making claims under the contracts, but under the umbrella clause.<sup>1150</sup> Yet, umbrella clauses do not “create” obligations; they elevate existing obligations to the international plane. The terms of those obligations, in particular the **parties** to them, do not change. They are and remain as they are determined by the law applicable to the underlying obligations themselves, as has been recognized by many previous tribunals. To quote from just one:

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<sup>1148</sup> [CC/Devas \(Mauritius\) Ltd. et al. v. Republic of India, Award on Jurisdiction and Merits, PCA Case No. 2013-09, 25 July 2016, at Exhibit RLA-191](#), p. 76 (para. 284) (emphasis added); see also [Z. Douglas, “Nothing if not critical for investment treaty arbitration: \*Occidental, Eureko and Methanex\*” \(2006\) 22\(1\) \*Arbitration International\* 27, at Exhibit RLA-192](#), p. 42 *et seq.*

<sup>1149</sup> [EDF v. Romania, Award, 8 October 2009, at Exhibit CLA-103](#), p. 105 (para. 319); *id.* at p. 104 (para. 316) and p. 105 (para. 318).

<sup>1150</sup> [Reply](#), p. 228 (para. 538).

“An obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of obligation is used in an international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content. This is not peculiar to ‘obligation’; it applies to other notions found in investment treaties, *e.g.* nationality, property, exhaustion of local remedies to name just these. In this case, the PSCs are governed by Ecuadorian law. It is that law that defines the content of the obligation including the scope of and the parties to the undertaking, *i.e.*, the obligor and the obligee.”<sup>1151</sup>

825 Accordingly, only the party that could enforce the underlying contractual obligation, and only against the party against which the contractual obligation could be so enforced, pursuant to the law applicable to the contract, could enforce the same obligation before an investment arbitration tribunal. Both the claimant and the respondent must be the same at the domestic and the international level.

826 The Claimants further allege that:

“the fact that an obligation entered into by a State may be expressed in a contract that includes an arbitration agreement, or other dispute resolution clause for resolving disputes arising under that contract, however, is not a bar to presenting a claim for breach of the separate

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<sup>1151</sup> [Burlington Resources Inc. v. Republic of Ecuador, Decision on Liability, ICSID Case No. ARB/08/5, 14 December 2012, at Exhibit CLA-187](#), p. 77 *et seq.* (para. 214) (citation omitted); see also *e.g.* [EDF v. Romania, Award, 8 October 2009, at Exhibit CLA-103](#), p. 105 (para. 317); [Limited Liability Company Amto v. Ukraine, Final Award, SCC Case No. 080/2005, 26 March 2008, at Exhibit RLA-193](#), p. 62 (para. 110); [Gustav F. W. Hamester GmbH & Co. KG v. Republic of Ghana, Award, ICSID Case No. ARB/07/24, 24 June 2009, at Exhibit RLA-194](#), p. 98 *et seq.* (paras. 347-348); [Impregilo S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/03/3, 22 April 2005, at Exhibit RLA-195](#), p. 75 (para. 223); [El Paso v. Argentina, Award, 31 October 2011, at Exhibit CLA-152](#), p. 199 (para. 538); [Siemens v. Argentina, Award, 6 February 2007, at Exhibit CLA-102](#), p. 59 (para. 204); [Azurix Corp. v. Argentine Republic, Award, ICSID Case No. ARB/01/12, 14 July 2006, at Exhibit CLA-85](#), p. 138 *et seq.* (para. 384); [Oxus Gold v. Republic of Uzbekistan, Final Award, 17 December 2015, at Exhibit RLA-62](#), p. 342 *et seq.* (paras. 848-860).

treaty obligation to observe obligations entered into in regard to an investment.”<sup>1152</sup>

827 The umbrella clause does not nullify the contractual bargain between the parties to the contract by letting a party selectively choose which clauses it wishes to adhere to – in particular by failing to respect the contractual dispute resolution mechanism. As explained, for example, by the tribunal in *BIVAC v. Paraguay*:

“the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision ... and to ignore others. The obligation that Paraguay entered into with BIVAC was to pay its invoices in a timely way and if it failed to do so to allow any contractual dispute to go to the Tribunals of the City of Asunción. To allow BIVAC to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy. If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so. BIVAC has not identified any reasons at all.”<sup>1153</sup>

828 A State can breach its undertaking to observe its obligations entered into with an investor only if the underlying contract has been breached.<sup>1154</sup> A breach of the underlying contract can only be determined in accordance with the terms of the contract, including any forum clause contained

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<sup>1152</sup> [Reply](#), p. 234 (para. 554).

<sup>1153</sup> [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 CLA-197](#), p. 58 (para. 148) (citation omitted); see also e.g. [SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6, 29 January 2004, at Exhibit RLA-77](#), p. 60 (para. 155); [Toto v. Lebanon, Decision on Jurisdiction, 11 September 2009, at Exhibit RLA-135](#), p. 58 (para. 202); [El Paso Energy International Company v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/15, 27 April 2006, at Exhibit RLA-196](#), p. 24 *et seq.* (para. 76).

<sup>1154</sup> [Noble Ventures v. Romania, Award, 12 October 2005, at Exhibit CLA-101](#), p. 64 (para. 54).



obligations in the licenses can be enforced only against NAMR, not the Ministry of Economy, or the State.<sup>1159</sup>

- 833 The Claimants also do not dispute that the Roşia Montană License and the Bucium Exploration License contain an arbitration clause.<sup>1160</sup> The RMGC Articles of Association also establish that any disputes between shareholders will be resolved via litigation or via arbitration under the International Arbitral Center of the Austrian Federal Economic Chamber.<sup>1161</sup>
- 834 Even if the Tribunal accepted all of the Claimants' legal arguments on the "umbrella clause", their claims would fail, as they continue to fail to specify which specific obligations arising from which contract were breached. In the Reply, the Claimants devote merely three paragraphs to this issue, consisting of nothing but platitudes. The Claimants refer vaguely to the Respondent "reject[ing] the terms of agreements and "fail[ing] to observe [Romania's] obligations in law and in contract," and to "depriv[ing] Gabriel of the benefit of its bargain."<sup>1162</sup> Ultimately their claim amounts to no more than alleging that:

"the very same course of conduct described above in relation to Romania's failure to accord fair and equitable treatment to Gabriel's investments as a composite act also constituted a failure to observe the obligations that Romania entered into with regard to Gabriel's investments."<sup>1163</sup>

- 835 This is not a properly articulated umbrella clause claim. Without establishing a contract breach, there can be no breach of an umbrella clause. The claim must fail.

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<sup>1159</sup> Under Romanian law, NAMR has legal personality and only NAMR is bound by the contracts it concludes, see e.g. [GD 1419/2009 on the organization and functioning of NAMR \(excerpts\), at Exhibit R-569](#), p. 1 (Art. 1); [Chevron Romania Exploration and Production v. National Agency for Mineral Resources, Award, ICC Case No. 21138, 22 January 2018 \(excerpts\), at Exhibit RLA-197](#), p. 5; [Sferdian and Bojin LO](#), p. 24 (paras. 100-101).

<sup>1160</sup> [Reply](#), p. 234 (para. 554).

<sup>1161</sup> [RMGC Articles of Association dated 1 November 2013, at Exhibit C-188](#), p. 27 (Art. 16).

<sup>1162</sup> [Reply](#), p. 236 (paras. 556-557).

<sup>1163</sup> *Id.* at, p. 236 (para. 558).

## 7 ROMANIA HAS NOT EXPROPRIATED THE CLAIMANTS' INVESTMENTS

836 The Claimants allege in their Reply, in an attempt to justify their expropriation claim:

“Romania’s conduct deprived Gabriel’s investments entirely of any economic value, as the value of those investments was derived solely from the right to develop the Roşia Montană Project and the Bucium Projects, which rights were blocked, frustrated and manifestly repudiated... Claimants’ rights unquestionably do not ‘remain intact.’ They exist in form, but Respondent’s course of unlawful conduct has robbed them entirely of substance and value because the evidence establishes beyond doubt that Respondent had decided not to allow the Projects to proceed.”<sup>1164</sup>

837 The Claimants accept that their claims are (and can only be) based on the alleged loss of the value of the shares held by Gabriel Jersey and the shares that Gabriel Canada indirectly holds in Gabriel Jersey, respectively:

“although the wrongful conduct was directed at the level of RMGC, **the claimed losses are those incurred at the shareholder level.** Gabriel Jersey and Gabriel Canada seek compensation for the losses they incurred”<sup>1165</sup>

838 Thus, the Claimants would need to demonstrate that:

- the value of the shares that Gabriel Canada indirectly holds in Gabriel Jersey have been affected by acts of Romania and to an extent that engages with the standard of expropriation under the Canada-Romania BIT; and
- the value of the shares that Gabriel Jersey directly holds in RMGC have been affected by acts of Romania and to an extent that engages with the standard of expropriation under the UK-Romania BIT.

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<sup>1164</sup> [Reply](#), p. 255 (para. 607).

<sup>1165</sup> *Id.* at p. 263 (para. 634).

839 The Claimants have failed to prove either of these assertions. As shown below, Gabriel Jersey owns the same assets it did prior to start of the alleged expropriation. So does Gabriel Canada. Both Claimants can sell their assets to any third-party. To the extent that their shares lost value given the delay in the implementation of the Roşia Montană and Bucium Projects, Romania is not responsible for such delays and, in event, the delay is not sufficient to establish expropriation of any assets owned by the Claimants.

840 As demonstrated below, the expropriation claims lack merit. The factual basis supporting the claims remains unproven (**Section 7.1**). In any event, Romania's alleged conduct did not impair any relevant asset let alone constitute an expropriation thereof. Gabriel Canada's expropriation claim under Article VIII of the Canada-Romania BIT is addressed first, and then Gabriel Jersey's similar claim under Article 5 of the UK-Romania BIT (**Section 7.2**).

### **7.1 The Measures Allegedly Constituting the Expropriation Are Unproven**

841 The expropriation claims refer to an alleged "course of conduct beginning in August 2011 and **continuing up to and past Parliament's rejection of the Draft Law** that reflects a decision by the State first not to do the Project according to the law and the terms to which the State, RMGC, and Gabriel had agreed and then not to do the Project at all."<sup>1166</sup>

842 Yet, according to the Claimants "the Project was *de facto* over as a result of Parliament's successive votes rejecting the Draft Law."<sup>1167</sup> Acts subsequent to November 2013 are presented as mere confirmation of "the Government's stated intention not to do the Project."<sup>1168</sup> This is reiterated in the Claimants' arguments in the jurisdictional section of the Reply:

**"Starting in August 2011**, the Government engaged in [a] course of conduct that blocked the permitting process and demanded

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<sup>1166</sup> *Id.* at p. 250 (para. 590).

<sup>1167</sup> *Id.* at p. 247 (para. 581).

<sup>1168</sup> *Id.* at p. 237 (para. 562).

renegotiation of the agreements relating to the Roşia Montană Project. ... This led to the Draft Agreement and Draft Law and the Parliament's rejection of the Draft Law, which in turn led to the political rejection and **effective termination of the Project**... Gabriel could not have acquired knowledge that it had incurred loss associated with these breaches until it **actually incurred the loss of the project development rights following the Parliamentary rejection of the Draft Law in 2013**”<sup>1169</sup>

- 843 The Claimants' position thus appears to be that the Project was “effectively” terminated on 19 November 2013 upon the rejection of the Roşia Montană Law by Senate and that was the last step in a composite act of expropriation which started on 1 August 2011, when Prime Minister Boc made certain statements regarding the Project.<sup>1170</sup>
- 844 This implies that acts of Romania preceding 1 August 2011 are not and cannot be part of the expropriation claims and measures subsequent to the rejection of the Roşia Montană Law by the Senate on 19 November 2013 also cannot be part of the expropriation claims.<sup>1171</sup>
- 845 Below Romania addresses chronologically the factual allegations regarding the five events apparently constituting the alleged composite act of expropriation between 1 August 2011 and 19 November 2013 (**Section 7.1.1**), followed by a discussion of other factual allegations that the Claimants discuss as part of the expropriation claims but which, as noted, in the Claimants' case do not seem to be and cannot be part of alleged composite act of expropriation (**Section 7.1.2**).

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<sup>1169</sup> *Id.* at p. 162 *et seq.* (paras. 361 and 365).

<sup>1170</sup> *Id.* at p. 160 (para. 356).

<sup>1171</sup> [Generation Ukraine v. Ukraine, Award, 16 September 2003, at Exhibit CLA-135](#), p. 94 (para. 21.2) (“[t]he notion of a ‘second’ or ‘repeat’ expropriation of the same investment poses a daunting conceptual problem.”).

### 7.1.1 The Five Events Allegedly Forming a Composite Act of Expropriation

846 The Claimants refer to five events in the period between 1 August 2011 and 19 November 2013:

- a) August/September 2011: various Statements of State Officials regarding the Project;<sup>1172</sup>
- b) October 2011/January 2012: economic negotiations between the Ministry of Economy and the Claimants/RMGC;<sup>1173</sup>
- c) January 2012: the Ministry of Environment's alleged failure to issue the environmental permit;<sup>1174</sup>
- d) August 2013: the Government's submission of the Roșia Montană Law to Parliament;<sup>1175</sup> and
- e) November 2013: the Senate's rejection of the Roșia Montană Law.<sup>1176</sup>

847 First, these events do not establish a composite act (of expropriation or breach of any other standard) since the Claimants have failed to show how the measures constitute a "pattern" or a "practice" which amount to more than the sum of its parts, for the reasons explained in **Section 3.2**. Second, as shown below in **Section 7.2.1.1**, the Claimants have failed to prove an economic impact of these events equivalent to expropriation.

848 In any event, the factual allegations regarding these events are not borne out by the evidence. These have been addressed in detail in **Sections 3.3 to 3.6** above and are further summarized below.

849 The first event in Gabriel Canada's creeping expropriation claim is a "non-fact": that allegedly in August 2011 there were "numerous contemporaneous statements of Romanian officials conditioning the

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<sup>1172</sup> [Reply](#), p. 239 (para. 565).

<sup>1173</sup> *Id.* at p. 239 (para. 565); *id.* at p. 241 (paras. 569-570).

<sup>1174</sup> *Id.* at p. 241 (para. 569).

<sup>1175</sup> *Id.* at p. 243 *et seq.* (paras. 574-576).

<sup>1176</sup> *Id.* at p. 245 *et seq.* (paras. 577-579).

Permit and/or the Project on meeting the State's demands for more shares and higher royalty."<sup>1177</sup>

850 As shown in **Section 3.4.1** above, the Claimants' contention is not supported by any evidence other than [REDACTED] tortuous reading of the statements of Prime Minister Boc, President Băsescu, Minister Borbély and Minister Hunor in the summer of 2011. Gabriel Canada's contemporaneous disclosures to its shareholders as well as repeated public statements of RMGC's representatives in response to those statements conclusively show that [REDACTED] *post-facto* reading of those statements cannot be given any credit.<sup>1178</sup>

851 The Claimants' attempt to show an allegedly new "policy" which consisted of a deliberate decision to block the Project's permitting in August 2011 is betrayed by the mass of evidence on record showing that the allegation is unfounded. The allegation is also illogical since the Project had not met the permitting requirements in August 2011, on the Claimants' own case.<sup>1179</sup> In any event, as demonstrated in the Counter-Memorial, statements of individual politicians with differing political views and perspectives, partisan political factors or career concerns cannot be fairly used to characterize a State's motivation or intent.<sup>1180</sup>

852 The second event in Gabriel Canada's creeping expropriation claim relates to the period of economic negotiations between the Ministry of Economy and the Claimants during the period from October 2011 to January 2012. According to the Claimants, during this period "RMGC tried to satisfy the Government's illicit condition of an increased economic stake to issue the Environmental Permit and allow the Project to proceed."<sup>1181</sup> The Claimants also allege that "Gabriel had no real choice but to try to satisfy

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<sup>1177</sup> [Reply](#), p. 239 (para. 565).

<sup>1178</sup> See *supra* paras. 357-383 and 428-435.

<sup>1179</sup> [Reply](#), p. 241 (para. 569).

<sup>1180</sup> [Counter-Memorial](#), p. 220 *et seq.* (para. 577).

<sup>1181</sup> [Reply](#), p. 241 (para. 569).

the State's condition for the Project to advance" and that in the negotiations they did not seek "[REDACTED]"<sup>1182</sup>

853 All these contentions are unfounded. As set out in **Section 3.4.2** above, the evidence shows that the Claimants freely and willingly accepted the Ministry of Economy's invitation to negotiate in September 2011.<sup>1183</sup> From the outset of the negotiations the Claimants confirmed their position (already stated by RMGC in November 2010) that they were willing to increase Minvest's shareholding in RMGC against consideration, as Messrs. Găman and Arifton testify.<sup>1184</sup>

854 As the contemporaneous documents show, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>1185</sup>

855 As recalled below, the "motive" for the alleged failure to issue the environmental permit by the Ministry of Environment in January 2012 that the Claimants invoke is the Claimants' alleged non acceptance of the Ministry of Economy's position in the economic negotiations.<sup>1186</sup> The purported "motive" makes no sense given that on 30 November 2011, the Claimants had confirmed in writing their agreement with the '25 and 6' proposal of the Government.<sup>1187</sup>

856 The evidence shows that the Ministry of Economy and the Government understood there to be an agreement of principle between the parties as from 30 November 2011, subject to finalization of the last details.<sup>1188</sup> There was no reason for the Government to seek to undermine the deal reached with the Claimants since 30 November 2011 and which was close

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<sup>1182</sup> *Id.* at p. 242 (para. 571).

<sup>1183</sup> See *supra* paras. 384-427.

<sup>1184</sup> See *supra* paras. 361, 388 and 394.

<sup>1185</sup> See *supra* paras. 397-399.

<sup>1186</sup> [Reply](#), p. 241 (para. 569).

<sup>1187</sup> See *supra* para. 418.

<sup>1188</sup> See *supra* para. 423.

to signature in January 2012, after months of discussions. Nor was there any reason for – and there is no evidence of – any interference by the Government in the Ministry of Environment's environmental permitting of the Project.<sup>1189</sup>

857 The third event in the alleged composite act occurred in January 2012. The Claimants allege that “all legal requirements were met and a decision by the Ministry of Environment to issue the Environmental Permit should have been taken according to the law by January 31, 2012.”<sup>1190</sup> The permit was allegedly not issued “because of the non-fulfilment of the Government's economic demand.”<sup>1191</sup>

858 This is incorrect; there is no evidence of any link between the environmental permitting and the economic negotiations at this point or at any point in time. In any event, the contention makes no sense as by 31 January 2012 the Claimants had for two months accepted the Government's proposal for a ‘25 and 6’ increase, as shown above. The evidence also shows that the permit was not issued because the legal requirements for permitting were not met by 31 January 2012 in light of the numerous outstanding issues that prevented the completion of the environmental permitting process.<sup>1192</sup>

859 The Claimants also allege that Prime Minister Boc intervened during the TAC meeting of 29 November 2011, purportedly to prevent the conclusion of the EIA Review Process. Prime Minister Boc denies this allegation in his witness statement. Ms. Mocanu also denies having received instructions from the Government in respect to the environmental permitting of the Project in her second witness statement.<sup>1193</sup> Again, the allegation also makes no sense as the TAC was far from reaching a consensus for a recommendation to the Ministry of Environment regarding the environmental permit in the period November 2011-January 2012.

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<sup>1189</sup> See *supra* paras. 411-417.

<sup>1190</sup> [Reply](#), p. 241 (para. 569).

<sup>1191</sup> *Id.*

<sup>1192</sup> See *supra* Section 3.3.

<sup>1193</sup> See *supra* paras. 411-417.

- 860 The fourth measure in the purported composite act of expropriation refers to the alleged coercion suffered by the Claimants since the fall of the Boc Government in February 2012 until August 2013, when the Government submitted the Roşia Montană Law to Parliament. According to the Claimants, in this period the successive Governments made “the same economic demand” and this “as a condition to issuing the Environmental Permit and allowing the Project to proceed.”<sup>1194</sup> The Claimants also allege that “RMGC and Gabriel were not willing co-venturers with the Government on the path to Parliament” and were the victims of “the Government’s coercive economic demands.”<sup>1195</sup>
- 861 As shown in **Section 3.4** above, these allegations are unfounded. As to the period immediately after the fall of the Government led by Prime Minister Boc, Mr. Bode testifies that the Ministry of Economy continued to support RMGC with the permitting problems it was facing, [REDACTED]. Such assistance was not conditional on the finalization of the deal reached in November 2011 with Minister Ariton.<sup>1196</sup>
- 862 After the fall of the Government lead by Prime Minister Ungureanu, the subsequent Government (lead by Prime Minister Ponta) continued to discuss with the Claimants the permitting difficulties as from early 2013 and went as far as establishing an interministerial commission, the sole purpose of which was to find ways to facilitate permitting of the Project.
- 863 In parallel, the Government discussed with the Claimants the possibility of making significant legal reforms through special legislation designed to facilitate permitting of the Project. The Claimants try to deny the specific permitting benefits that the Claimants requested in those negotiations in 2013, [REDACTED]. The attempt fails as the record speaks for itself.<sup>1197</sup>

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<sup>1194</sup> [Reply](#), p. 242 *et seq.* (para. 573).

<sup>1195</sup> *Id.* at p. 243 *et seq.* (paras. 574-576).

<sup>1196</sup> See *supra* paras. 425-426.

<sup>1197</sup> See *supra* paras. 452-467.

864 As part of the negotiations, during the first quarter of 2013, the Government did agree with the Claimants on an increase of Minvest's stake in RMGC to 25% and an increase of mining royalties to 6%. These changes reflected a legitimate negotiation position of the Government considering not only that the Claimants/RMGC had already agreed in principle to a deal along those terms [REDACTED]

865 The allegation that "RMGC and Gabriel were not willing co-venturers with the Government on the path to Parliament" also fails. There is a body of evidence showing that the Claimants were satisfied with, if not excited about the submission of the Roşia Montană Law to Parliament and the requests for legislative reform they made in the negotiations (which could only be enacted by Parliament). [REDACTED]

[REDACTED]<sup>1198</sup>

866 The last measure in the alleged composite act of expropriation refers to the rejection of the Roşia Montană Law. According to the Claimants, by November 2013 "the Project was *de facto* over as a result of the Parliament's successive votes rejecting the Draft Law."<sup>1199</sup>

867 The contention is unsupported by any evidence other than the self-serving statements of the Claimants' witnesses.<sup>1200</sup> The Claimants point to "statements" to the press of Romanian officials allegedly supporting their view,<sup>1201</sup> however, the Claimants do not even attempt to demonstrate how such statements could amount to a measure effectively terminating the environmental permitting process, let alone *de facto* terminating the License.

868 RMGC never withdrew its application for an environmental permit, and in addition to the three TAC meetings held since the Senate's rejection of the

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<sup>1198</sup> See *supra* paras. 496-506.

<sup>1199</sup> [Reply](#), p. 247 (para. 581).

<sup>1200</sup> *Id.* at p. 247 (para. 581, n. 1134).

<sup>1201</sup> *Id.* at p. 245 (para. 578).

Roşia Montană Law in November 2013, until March 2018 the Ministry of Environment continued to receive correspondence from RMGC regarding the Waste Management Plan, to which the Ministry promptly responded, as Ms. Mocanu confirms.<sup>1202</sup>

869 Parliament's rejection of the Roşia Montană Law had no impact on the pending permitting procedure, which will be completed if and when RMGC complies with the legal conditions for permitting. In any event, the allegation that the alleged failure to issue an environmental permit for the Project can be equated to a "termination" of RMGC's rights under the License and Romanian law remains entirely unproven, as shown in **Section 3.3.1** above.

### **7.1.2 Other Allegations Preceding or Following the Alleged Composite Act of Expropriation**

870 The Claimants' expropriation claims also include a discussion of other alleged events, preceding and subsequent to the alleged composite act of expropriation.<sup>1203</sup> The Claimants refer specifically to the following:

- a) 2007-2008: the Ministry of Environment's alleged delayed issuance of the dam safety permits for political reasons;<sup>1204</sup>
- b) October 2010: approval of the 2010 LHM;<sup>1205</sup>
- c) November 2013: Romanian officials' investigations into RMGC's activities;<sup>1206</sup>
- d) December 2013: Minvest's alleged decision to stop contributing to RMGC's share capital;<sup>1207</sup>

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<sup>1202</sup> [Mocanu II](#), p. 82 (paras. 240-241).

<sup>1203</sup> [Reply](#), p. 248 (para. 584-589).

<sup>1204</sup> *Id.* at para. 572.

<sup>1205</sup> *Id.* at para. 588.

<sup>1206</sup> *Id.* at para. 584.

<sup>1207</sup> *Id.* at para. 585.

- e) December 2015: UNESCO application and enactment of the 2015 LHM;<sup>1208</sup> and
- f) December 2016: the Government's alleged support of a moratorium on the use of cyanide in mining.<sup>1209</sup>

871 The Claimants' allegations are in any event irrelevant as the Claimants do not argue that these events formed part of the alleged composite act of expropriation.<sup>1210</sup> Moreover, a claim based on these events would fall outside the Tribunal's jurisdiction, as demonstrated above.<sup>1211</sup>

872 In order to set the record straight, Romania will set out below its position regarding these additional allegations, which were not addressed in **Section 3** above as they are not part of the Claimants' FET breach claims (except for events under b) and e)).

873 As to the event set out above under item a), it is undisputed that on 29 June 2010 the Ministry of Environment issued two dam safety permits relating to the Corna and Cetate dams<sup>1212</sup> and that both were renewed in April 2012<sup>1213</sup> and again in December 2014.<sup>1214</sup> As the Claimants cannot reconcile these events with their theory that the Government decided to block the Project since August 2011, they remain silent on the event throughout the Reply. However, when addressing the expropriation claims, they allege that the renewal of the permits in 2012 and 2014 "is hardly cause for celebration" because "the Government was previously judicially

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<sup>1208</sup> *Id.* at paras. 587-588.

<sup>1209</sup> *Id.* at para. 586.

<sup>1210</sup> See *supra* paras. 841-844.

<sup>1211</sup> See *supra* paras. 42-55 and n. 1036 for Gabriel Canada's claims and para. 97 for Gabriel Jersey's claims.

<sup>1212</sup> [Dam Safety Permit No. 27 dated 29 June 2010, at Exhibit C-955](#); [Dam Safety Permit No. 28 dated 29 June 2010, at Exhibit C-954](#).

<sup>1213</sup> [Dam Safety Permit No. 27/2 dated 18 April 2012 \(annexes omitted\), at Exhibit C-511](#); [Dam Safety Permit No. 28/2 dated 18 April 2012, at Exhibit C-809](#).

<sup>1214</sup> [Dam Safety Permit No. 27/3 dated 2 December 2014 \(annexes omitted\), at Exhibit C-433](#); [Dam Safety Permit No. 28/3 dated 2 December 2014, at Exhibit C-590](#).



Mr. Korodi is not even copied on the remaining correspondence, which in any event does not contain any indication of an instruction from the Minister to block the issuance of the permits.<sup>1219</sup>

- 877 Nothing in the documents support ██████████'s allegations. The correspondence in question reflects concerns on the part of Ms. Varga regarding the impact of the litigation on the urban certificate on the validity of the dam safety permits and an internal debate with the Ministry legal department regarding this and other issues.<sup>1220</sup> Those issues were subsequently clarified by the Romanian courts. The matter has been finally resolved in 2010.
- 878 As to the second event, listed in paragraph 870 (b) above (*i.e.*, approval of the 2010 LHM), the Claimants complain of the enactment of the 2010 LHM in October 2010 and the subsequent "failure to correct the admittedly erroneous 2010 LHM."<sup>1221</sup> This contention has no merit and the claim has already been thoroughly litigated before Romanian courts and has been dismissed, as shown above in **Section 3.6.2.1**.
- 879 As to the third event, listed in paragraph 870(c) above (*i.e.*, investigations into RMGC's activities), the Claimants in their Reply largely reiterate the

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[2183](#), [Ministry of Environment Note No. 30679 to Minister of Environment A. Korodi dated Apr. 23, 2008](#), at [Exhibit C-2184](#), [Ministry of Environment Draft Letter to RMGC and Ipromin dated Apr. 25, 2008](#), at [Exhibit C-2185](#), [Ministry of Environment Note No. 30706 dated May 6, 2008](#), at [Exhibit C-2186](#) and [Ministry of Environment Note from State Secretary L.A. Varga to Minister of Environment A. Korodi, undated](#), at [Exhibit C-2217](#).

<sup>1219</sup> See [Ministry of Environment Note dated Apr. 11, 2008](#), at [Exhibit C-2183](#), [Ministry of Environment Note No. 30679 to Minister of Environment A. Korodi dated Apr. 23, 2008](#), at [Exhibit C-2184](#), [Ministry of Environment Draft Letter to RMGC and Ipromin dated Apr. 25, 2008](#), at [Exhibit C-2185](#), [Ministry of Environment Note No. 30706 dated May 6, 2008](#), at [Exhibit C-2186](#) and [Ministry of Environment Note from State Secretary L.A. Varga to Minister of Environment A. Korodi, undated](#), at [Exhibit C-2217](#).

<sup>1220</sup> ██████████ quotes selectively from an internal note from State Secretary Varga to Minister Korodi and omits to mention Ms. Varga's comment that "[t]he suspension of this certificate [the urban certificate] may lead, as in the case of the environmental regulatory procedure [EIA Review Process], to the suspension of the procedure for the issuance of the safe operation permit [dam safety permit]." [Ministry of Environment Note No. 10897 from State Secretary L.A. Varga dated Apr. 8, 2008](#), at [Exhibit C-2181](#), p. 2.

<sup>1221</sup> [Reply](#), p. 249 (para. 587).

speculative and unsupported allegations made in the Memorial,<sup>1222</sup> which had already been previously rejected by the Tribunal in its ruling on the Claimants' requests for provisional measures.<sup>1223</sup> Specifically, the Claimants again suggest that there is a causal link between the rejection of the Roșia Montană Law and the initiation of a criminal investigation and that ANAF's anti-fraud investigation and VAT assessment are somehow "abusive."<sup>1224</sup> However, the Claimants fail to respond to the Respondent's refutation of these claims.

880 For example, the Respondent demonstrated that the Claimants' allegation of a retaliatory investigation by the Ploiești prosecutor's office was not only speculative but also contradicted by documents submitted by the Claimants themselves.<sup>1225</sup> In particular, the documents show that, far from specifically targeting RMGC in November 2013, the Ploiești prosecutor's office, which [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>1226</sup>

881 Rather than conceding the utter lack of evidence suggesting a link between [REDACTED] and Parliament's rejection of the Roșia Montană Law, [REDACTED] and the Claimants attempt to smear the prosecutors who initiated the investigation<sup>1227</sup> and persist in alleging some retaliatory animus based solely on their speculation.<sup>1228</sup> These *ad hominem* attacks have no evidentiary value and seek only to mask the Claimants' inability to meet their burden of proof.

882 The Claimants also persist in alleging that ANAF's anti-fraud investigation is a tool to "harass" RMGC, but fail to provide any new evidence that

<sup>1222</sup> *Id.* at p. 136 *et seq.* (Section V.D).

<sup>1223</sup> [Decision on Claimants' Second request for provisional measures dated 22 November 2016](#).

<sup>1224</sup> [Reply](#), p. 136 *et seq.* (para. 290).

<sup>1225</sup> [Counter-Memorial](#), p. 154 *et seq.* (para. 407).

<sup>1226</sup> *Id.* at p. 154 *et seq.* (para. 407) (citing [REDACTED]).

<sup>1227</sup> [Reply](#), p. 137 (para. 291, n. 638).

<sup>1228</sup> *Id.* at p. 137 (para. 291).

would alter the Tribunal's prior determinations on this issue.<sup>1229</sup> In particular, the Claimants still fail to show that ANAF obtained the documents in an improper manner or were in any way used in these proceedings.

- 883 As to ANAF's VAT assessment, the Claimants now allege that the re-assessment of RMGC's VAT "unmistakably reveals direct connections to the arbitration that did not exist at the time of the provisional measures hearing."<sup>1230</sup> Specifically, the Claimants argued that certain requests were directed at topics that were relevant only to the subject matter of the arbitration.<sup>1231</sup>
- 884 However, as the Respondent previously explained,<sup>1232</sup> the Claimants did not (and still do not) allege that ANAF's method of seeking documents from RMGC deviated from its prior assessment, and in any event provide no evidence that the documents collected by ANAF were in any way communicated to counsel for the Respondent or were otherwise used in these proceedings.
- 885 The Claimants also complain about ANAF's reliance in its assessment on statements from the Project's opponents.<sup>1233</sup> These complaints are all now moot, as [REDACTED]

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<sup>1229</sup> [Decision on Claimants' Second request for provisional measures dated 22 November 2016](#), p. 23 (para. 100-102) ("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 remains unchallenged. There is no allegation that privileged documents such as communications with counsel have been obtained as was in the case of Libananco. Such documents as have been collected by the anti-fraud investigation would therefore be the documents that Claimants could have sight of anyway. The concern regarding the sequencing or timing of the sight or use of such documents is therefore not made out. Furthermore, as has been explained by Respondent, the Romanian laws provide explicitly that no disclosure of information and documents collected during the investigation can be made public or disclosed to any other parties. The Ministry of Finance and ANAF are separate ministries and there is no suggestion that these laws will not be observed and complied with.").

<sup>1230</sup> [Reply](#), p. 138 (para. 292).

<sup>1231</sup> [Memorial](#), p. 250 (para. 573).

<sup>1232</sup> [Counter-Memorial](#), p. 159 (para. 415).

<sup>1233</sup> [Reply](#), p. 138 (para. 292).

Appeal.<sup>1234</sup> In any event, the Claimants fail to explain the relevance ANAF's reliance on these statements in a (since annulled) VAT assessment that post-dates the alleged expropriation by more than three years.

886 As to the third event, listed in paragraph 870(d) above (*i.e.*, Minvest's alleged decision to stop contributing to RMGC's share capital), the Claimants argue that, following the Special Commission's vote in November 2013 to recommend rejection of the Draft Law, the Ministry of Economy refused to allow Minvest to participate as a shareholder in the recapitalization of RMGC that was needed to prevent the risk of RMGC's dissolution, demanding instead that the Claimants donate to Minvest the funds needed to purchase its portion of the new shares that needed to be issued to comply with the law.<sup>1235</sup> They claim that they were "left with no choice" but to donate to Minvest approximately USD 20 million to prevent the risk of RMGC's dissolution.<sup>1236</sup>

887 Relying on the legal opinion of Prof. Birsan, the Claimants argue that Minvest was obligated by the terms of RMGC's Articles of Association to participate in RMGC's recapitalization, as it had previously done, and that the Ministry of Economy's demand for a donation was an abuse of minority rights contrary to Minvest's obligations to exercise its shareholder rights in good faith and to actively prevent the risk of RMGC's dissolution.<sup>1237</sup> According to the Claimants, Minvest's refusal to accept a loan put RMGC at risk of dissolution because [REDACTED]  
[REDACTED].<sup>1238</sup>

888 Setting aside the fact that [REDACTED]  
[REDACTED], the Claimants nevertheless argue that Minvest's alleged failure to cooperate in addressing the recapitalization placed RMGC at risk of

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<sup>1234</sup> [Gabriel Canada MD&A, Fourth Quarter 2018, at Exhibit R-482](#), p. 4 ("On February 6, 2019, the Alba Court of Appeal ruled in favour of RMGC's annulment challenge of the VAT Assessment."). ANAF has appealed this decision, [Gabriel Canada MD&A, First Quarter 2019, at Exhibit R-481](#), p. 4.

<sup>1235</sup> [Reply](#), p. 134 *et seq.* (para. 285).

<sup>1236</sup> *Id.* at p. 135 (para. 285).

<sup>1237</sup> [Reply](#), p. 135 (para. 287).

<sup>1238</sup> *Id.* at p. 135 *et seq.* (para. 288).

dissolution.<sup>1239</sup> Finally, the Claimants argue that, at all relevant times, the Ministry of Economy directed Minvest's behavior, and allege that Minvest's refusal to cooperate was caused by the Government's alleged rejection of the Project following Parliament's "negative treatment" of the Roșia Montană Law.<sup>1240</sup>

889 The Claimants' complaints are misguided. As demonstrated below, the Claimants disregard the following facts:

- It was not Minvest's refusal to accept loans that was at issue in December 2013, but that of Minvest RM, which had never before accepted loans from the Claimants for the purposes of RMGC's recapitalization;
- the [REDACTED];
- [REDACTED]; and
- the Claimants had other means available apart from reducing the share capital or donating shares to Minvest RM to bring RMGC into compliance with the applicable regulations;

890 Prof. Bîrsan also ignores most of these facts, undermining the relevance of his opinion on this issue.

891 First, contrary to what the Claimants suggest,<sup>1241</sup> Minvest RM never accepted any loans from the Claimants for the purposes or RMGC's capitalization, as it was Minvest that agreed to prior loans. Given the different financial situation of Minvest and Minvest RM, the past agreement to loans from the Claimants is not relevant to assessing the reasonableness of Minvest RM's position.<sup>1242</sup>

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<sup>1239</sup> *Id.* at p. 248 (para. 585).

<sup>1240</sup> *Id.* at p. 248 (para. 585).

<sup>1241</sup> *Id.* at p. 135 (para. 287).

<sup>1242</sup> When making this point Prof. Bîrsan disregards the distinction between Minvest and Minvest RM altogether, arguing that "the State agreed two times for Minvest to borrow money from Gabriel to pay for its shares." [Bîrsan LO II](#), p. 74 (para. 296).

892 Second, the Claimants were fully aware of the plan to spin off Minvest RM from Minvest, [REDACTED]

[REDACTED].<sup>1243</sup>

893 Third, the Claimants do not contest that, at all relevant times, [REDACTED]

[REDACTED].<sup>1244</sup> [REDACTED]

[REDACTED]

[REDACTED],<sup>1245</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>1246</sup>

894 Neither the Claimants nor Prof. Bîrsan take account of this fact. As Prof. Bîrsan argues, as a general principle, no right may be exercised in order to injure or damage another person or in an excessive and unreasonable manner, contrary to good faith.<sup>1247</sup> This meant that the Claimants could not insist that [REDACTED]

[REDACTED]. In light of this, and the

undertaking by the Claimants that the State would not need to invest any money in the Project<sup>1248</sup> – [REDACTED]

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<sup>1243</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

<sup>1244</sup> [Reply](#), p. 248 (para. 585).

<sup>1245</sup> As Prof. Bîrsan acknowledges, Minvest RM's statements demonstrate that [REDACTED]. [Bîrsan LO I](#), p. 9 (para. 18, n. 14) (citing [Ministry of Finance records of Minvest RM registration activity through 31 December 2015, at Exhibit C-1653](#)); As such, [REDACTED]. [Trade Registry extended information excerpt regarding Minvest RM, at Exhibit C-1673](#), p. 1.

<sup>1246</sup> [Excerpts of Company Law No. 31/1990, as amended dated 16 November 1990, at Exhibit C-84](#), p. 1 (Art. 153<sup>24</sup>).

<sup>1247</sup> [Bîrsan LO II](#), p. 82 (para. 329).

<sup>1248</sup> [Interministerial commission meeting transcript dated 11 March 2013, at Exhibit C-471](#), p. 13 (“[REDACTED] The funding is provided entirely by Gabriel Resources; although the

Minvest RM was entitled to demand the donation of the shares pursuant to Article 7.7 of the Articles of Association if the Claimants insisted on increasing RMGC's share capital.<sup>1249</sup>

895 Fourth, Prof. Bîrsan's analysis of the issue remains also irrelevant as he fails to recognize that the Claimants could unilaterally correct RMGC's assets/capital ratio and bring it into compliance with the requirements of Article 153<sup>24</sup>.

. This fact distinguishes this case from the Decision No.4199/2010 relied upon by Prof. Bîrsan, in which the court determined that the share capital increase "was the only option available to ensure the company's compliance with Article 153<sup>24</sup> of the Companies Law."<sup>1250</sup> In short, there never was a risk of RMGC's dissolution, as the matter was entirely within the Claimants' control.

896 Consequently, it cannot be said that Minvest RM failed to cooperate in the recapitalization of RMGC. Had Minvest RM's actions been truly prompted by the Government's rejection of the Project, as alleged by the Claimants, Minvest RM would have simply taken on the loans proposed by the Claimants. It is precisely because the Government considered that the Project was still valuable and viable that

897 As to the fourth event, listed in paragraph 870(e) above (*i.e.*, UNESCO application and enactment of the 2015 LHM), the Claimants allege that the UNESCO application has "present, immediate legal effects in the Project area that preclude mining or any other industrial activity" and "reflect an unmistakable intent not to do the Project."<sup>1251</sup> They also contend that, also

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Romanian state owns 19.31% of the shares, the money comes only from Gabriel. The Romanian state does not need to invest any money in this project.").

<sup>1249</sup> See [Counter-Memorial](#), p. 150 (para. 398).

<sup>1250</sup> [Bîrsan LO II](#), p. 83 (para. 330).

<sup>1251</sup> [Reply](#), p. 249 (para. 588).

in December 2015, Romania failed “to correct the admittedly erroneous 2010 LHM.”<sup>1252</sup>

898 The Claimants continue not to respond to Romania’s demonstration that the Project Area has been protected under Romanian law continuously since 1991. As a matter of law, the UNESCO application does not change this as the Project Area was, is and will remain an historically protected area under Romanian law, as shown in **Section 3.6.2**. That protection in itself does not prevent the development of a mining project but the holder of a mining license, such as RMGC, must obtain endorsements (to derogate from the prohibitions contained in the Mining Law and others) and ADCs from the Ministry of Culture for all relevant areas it wishes to develop. The Claimants never obtained an ADC for Orlea and, as for Cârnic, their ADCs were either annulled or suspended by courts. As shown above in **Section 3.6.2.1**, the authorities did not improperly refuse to amend the 2010 LHM and the 2015 LHM is consistent with the status of the ADCs for the Project as of the date of publication.

899 Romania has suspended the UNESCO application and, should there be any inconsistency between the continuation of the procedure and any rights in dispute in the arbitration, Romania will address the situation at that time. The same applies to the 2015 LHM, which will be updated in 2020. If valid ADCs exist for Orlea and Cârnic at the time of the next update, and the declassification process is finalized, the LHM will reflect that situation.

900 For the time being there is no incompatibility between the development of the Project and the UNESCO application and/or the 2015 LHM as further evidenced by RMGC’s request for a five-year extension of the License in March 2019.<sup>1253</sup> RMGC would not have requested the extension if it truly believed that the Project was rejected by Romania or that it cannot be developed or as a result of the UNESCO application and the 2015 LHM, as it now claims. In preparation of the signature of the addendum for

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<sup>1252</sup> *Id.* at p. 249 (para. 588).

<sup>1253</sup> [REDACTED];  
see also [Letter from RMGC to NAMR dated 8 March 2019, at Exhibit R-571](#).

extension of the License, NAMR and RMGC have now agreed to extend the storage contract until May 2023.<sup>1254</sup>

- 901 Finally, as to the fifth event, listed in paragraph 870(f) above (*i.e.* a rejected proposal regarding a moratorium on the use of cyanide in Romania), Romania pointed out in the Counter-Memorial that the proposal was of no consequence as it was not approved.<sup>1255</sup> Moreover, ██████████'s attempt to portray the proposed legislation as being the result of the "the Government propos[al] to Parliament to adopt a 10-year moratorium"<sup>1256</sup> is also factually unfounded as in December 2016, in accordance with the regular procedure for approval of legislation, the Government merely issued an opinion on two draft laws proposed by Senators, which approval was pending before Parliament at the time.<sup>1257</sup>
- 902 In the Reply, the Claimants present no real response and acknowledge that this argument is "not a keystone of Claimants' case."<sup>1258</sup> They assert, however, that "banning the use of cyanide was incompatible with the Project."<sup>1259</sup> The allegation is unproven,<sup>1260</sup> but even if it were true, 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).<sup>1261</sup>

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<sup>1254</sup> [Storage Contract, Addendum 4 dated 6 May 2019, at Exhibit R-572.](#)

<sup>1255</sup> [Counter-Memorial](#), p. 207 *et seq.* (para. 541).

<sup>1256</sup> ██████████, p. 122 (para. 218).

<sup>1257</sup> [Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated 21 December 2016, at Exhibit C-913.](#)

<sup>1258</sup> [Reply](#), p. 248 (para. 586).

<sup>1259</sup> *Id.* at p. 249 (para. 586).

<sup>1260</sup> The Claimants have not proven that use of other alternative technologies would necessarily render the Project economically unfeasible, see [Aurifex, Preliminary Review of Thiosulphate Process dated Oct. 7, 2013, at Exhibit C-942](#) ("Cyanidation is the most effective flowsheet with regard to cost effectively maximising the value of the Roşia Montană resources.").

<sup>1261</sup> See *e.g.* [European Parliament Resolution dated 27 April 2017, at Exhibit R-141](#); [Counter-Memorial](#), p. 207 *et seq.* (para. 541).

## 7.2 The Claimants Have Not Proven a Breach of Article VIII of the Canada-Romania BIT or of Article 5 of the UK-Romania BIT

903 Below Romania applies the tests for expropriation under each of the BITs to the five measures which are alleged to establish a composite act of expropriation. Romania demonstrates that these measures do not constitute an indirect expropriation under Article VIII of the Canada-Romania BIT or under Article 5 of the UK-Romania BIT.

### 7.2.1 Romania Has Not Breached Article VIII of the Canada-Romania BIT

904 The Claimants accept in the Reply that Gabriel Canada's indirect expropriation claim under Annex B and Article VIII of the Canada-Romania BIT can only succeed if they cumulatively establish that (1) the severity of the economic impact of Romania's measures is such that they have an effect equivalent to expropriation; (2) the measures 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. They also accept that they must also (4) rebut the presumption against indirect expropriation set out in Annex B(c) in matters involving environmental measures.<sup>1262</sup>

905 The Claimants have failed to meet the test and accordingly Gabriel Canada's claim fails (**Sections 7.2.1.1 to 7.2.1.4**). Romania also shows that the portion of the claim relating to the alleged rights in Bucium perimeter fails as neither RMGC nor the Claimants had any exploitation rights in the Bucium perimeter capable of being expropriated (**Section 7.2.1.5**).

#### 7.2.1.1 The Claimants Have Failed to Prove an Economic Impact of the Measures Equivalent to Expropriation

906 As demonstrated in the Counter-Memorial, under the first prong of the test for indirect expropriation under the Canada-Romania BIT, the Claimants must prove that the severity of the economic impact of Romania's five

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<sup>1262</sup> [Reply](#), p. 261 (para. 622).

measures is such that they have an effect equivalent to expropriation. An indirect expropriation requires a substantial, radical, severe or fundamental deprivation of rights:

“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.**”<sup>1263</sup>

907 The Claimants apparently agree and state that, there can only be an expropriation when the investor is substantially or completely deprived of the attributes of property in an investment:

“whereas a failure to accord fair and equitable treatment occurs when the State acts or fails to act in the offending manner, an expropriation does not occur until there is the loss of the property in question. Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation.”<sup>1264</sup>

908 To establish a breach of Article VIII of the Canada-Romania BIT, the Claimants would have to prove the effect of actions of Romania on the value of the shares that Gabriel Canada indirectly holds in Gabriel Jersey, and that all the attributes of the property no longer existed as of 19 November 2013. The Claimants have failed to do so.

909 The Claimants' argument seems to be that the shares lost all of their value in November 2013 because the assets and rights of RMGC had lost all of their value:

“as Romania has rejected and will not allow the Roşia Montană Project and the Bucium Projects to be developed, the licenses have no value,

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<sup>1263</sup> [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) (emphasis added).

<sup>1264</sup> [Reply](#), p. 159 (para. 352) (emphasis added).

the loans to Minvest associated with recapitalizations of RMGC and which depend for their repayment on RMGC dividend payments have no value, extensive geological and mining data, engineering studies, and other technical data developed to guide project development have no value, properties acquired solely for purposes of project development have no material value, and the shares in RMGC, whose sole income producing assets were the license rights to develop the Projects, are also worth nothing.”<sup>1265</sup>

910 As shown below, the Claimants’ contention is contradicted by Gabriel Canada’s disclosures to its shareholders of 2013, 2014 and 2015.

911 The Claimants make a reference in passing to Compass Lexecon’s expert report on quantum.<sup>1266</sup> However, the Compass Lexecon’s expert report on quantum is not evidence of the alleged effect of the measures on the assets because it **assumes the existence of an expropriation** of RMGC’s assets to assess the quantum of the loss suffered by Gabriel Canada.<sup>1267</sup>

912 Gabriel Canada performed annually an impairment test to the consolidated assets of the group under the applicable accounting rules and did not report any impairment of assets let alone report a write-off of those assets after the rejection of the Roşia Montană Law. Thus, *e.g.*, in its fourth quarter 2013 disclosures Gabriel Canada stated:

“The Company has determined that the area covered by the Roşia Montană exploitation license contains economically recoverable reserves. The ultimate recoverability of the \$553.9 million carrying value at December 31, 2013 (2012: \$467.2 million) plus related capital assets is dependent upon the Company’s ability to obtain the necessary permits and financing to complete the development and commence profitable production or, alternatively, upon the Company’s ability to dispose of its interest on an advantageous basis. **As part of management’s periodic review process, management reviews all**

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<sup>1265</sup> [Reply](#), p. 252 (para. 597).

<sup>1266</sup> *Id.* at p. 251 *et seq.* (para. 597 and n. 1164).

<sup>1267</sup> [CL Report II](#), p. 12 (para. 10); [CL Report I](#), p. 4 (para. 1).

**aspects of Project advancement issues along with potential indicators of asset impairment when preparing financial statements. When impairment indicators are identified, it is management's policy to perform an impairment test** in accordance with IAS 36 – Impairment of Assets. The impairment test is, at a minimum, performed annually.”<sup>1268</sup>

- 913 Accordingly, as of end 2013, Gabriel Canada reported an **increase** in the value of its consolidated assets from USD 467.2 to USD 553.9 million. No significant impairment was recorded in Gabriel Canada's disclosures then and until months after the filing of the Request for Arbitration of July 2015.<sup>1269</sup> In November 2015, for the first time, Gabriel Canada suggested that it might have to record an impairment to some of its assets,<sup>1270</sup> apparently to support the story presented in the Request for Arbitration, but did not do so.
- 914 It was only in March 2016 that Gabriel Canada informed its shareholders of a significant impairment in some of the assets, while noting that “[i]n the event that the prospects for the development of the Project are enhanced in the future, an assessment of the recoverable amount of the Project will be performed at that time, **which may lead to a reversal of part or all of the impairment that has been recognized** in the current year.”<sup>1271</sup>
- 915 In other words, the Claimants do not record an impairment of Gabriel Canada's assets (including the shares it holds in Gabriel Jersey) on the relevant date or as a result of any act of Romania but years later and only because they have formally presented expropriation claims in the

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<sup>1268</sup> [Gabriel Canada MD&A, Fourth Quarter 2013, at Exhibit R-541](#), p. 25 (emphasis added).

<sup>1269</sup> [Claimants' Request for Arbitration dated 21 July 2015](#).

<sup>1270</sup> [Gabriel Canada MD&A, Third Quarter 2015, at Exhibit R-573](#), p. 20 (“**Following the Request for Arbitration**, the Company has received no formal response from the Romanian State. Should this situation continue and there be no action by the Romanian State in the short-term to evidence that the environmental permit and construction permitting can be progressed on a timely basis, then **the Company will review the carrying value of its mineral properties and related assets reflected in the Company's statement of financial position**. Such a review could lead to a significant, if not a complete, impairment of the assets, in particular mineral properties and property, plant and equipment”) (emphasis added).

<sup>1271</sup> [Gabriel Canada MD&A, Fourth Quarter 2015 dated 29 March 2016, at Exhibit R-24](#), p. 20.

arbitration. Moreover, even on the Claimants' own case, the alleged impairment recorded is conditional and shows that the assets have not been irreversibly lost.

- 916 More importantly, the Claimants' attempt to manufacture an expropriation after the arbitration proceedings had commenced fails also because the impairment that Gabriel Canada declared in March 2016 does not apply the test for impairment that Gabriel Canada repeatedly communicated to its shareholders. That test relied on two alternative scenarios: (1) permitting of the Project and obtaining financing of the Project or (2) sale of the assets:

“The ultimate recoverability of the \$413.6 million carrying value at December 31, 2011 plus related capital assets is dependent upon the Company's ability to obtain the necessary permits and financing to complete the development and commence profitable production – **or alternatively, upon the Company's ability to dispose of its interest on an advantageous basis.**”<sup>1272</sup>

- 917 As for the sales scenario, RMGC holds the License and has recently applied for a five-year extension thereof. It owns dozens of land and other properties in Roşia Montană and has secured promises to acquire other lands in the area and owns multiple moveable assets. RMGC also owns geological and mining data, engineering studies, and other technical data developed to guide project development. There is no evidence of a loss of value of these assets or on a related loss of value of Gabriel Jersey's shares in RMGC. There is no evidence of any loss of value of Gabriel Canada's indirect shareholding in Gabriel Jersey.
- 918 There is also no evidence that Gabriel Canada is unable to sell its shares in Gabriel Jersey on an advantageous basis, let alone that it could not sell those shares on the date of the alleged expropriation in November 2013, as Dr. Burrows confirms in his Second Report:

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<sup>1272</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 24 (emphasis added); see also [Gabriel Canada MD&A, Fourth Quarter 2012, at Exhibit R-510](#), p. 25; [Gabriel Canada MD&A, Fourth Quarter 2013, at Exhibit R-541](#), p. 25.

“As of the end of 2014, RMGC had not impaired the value of its assets (and the Gabriel consolidated financials also show no impairment as of this date). **This confirms that all of RMGC’s value was still intact as of that date**, including the Project Rights, the physical assets, the real estate and surface rights it had acquired, and all of the intellectual property in the form of exploration records, engineering studies, and other information that it had collected on the properties over time.

Gabriel can sell its shares in RMGC, and it would be able to recover its share of the value of RMGC’s assets.”<sup>1273</sup>

- 919 As for the permitting and financing scenario, the Claimants ignore the financing element, that is, the need for “financing to complete the development and commence profitable production,” and focus only on the permitting of the Project. They allege that “[b]ut for Respondent’s unlawful course of conduct and had Respondent instead acted lawfully and in good faith, Claimants **in all probability would have** a successful Project in Roșia Montană.”<sup>1274</sup> The same acknowledgement is then reiterated in a different formulation:

“The evidence in this arbitration thus conclusively shows a course of conduct ... that reflects a decision by the State first not to do the Project according to the law and the terms to which the State, RMGC, and Gabriel had agreed, and then not to do the Project at all. Try as it might to deny it, and **unless Romania completely changes its mind and breathes political life into the Project, that is the reality.**”<sup>1275</sup>

- 920 This highly conditional attempt to establish an impairment is fatal for the expropriation claim.<sup>1276</sup>

- 921 As confirmed in the BIT, “the mere ‘adverse effect on the economic value of an investment does not establish that an indirect expropriation has

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<sup>1273</sup> [CRA Report II](#), p. 103 (paras. 219-220) (emphasis added).

<sup>1274</sup> [Reply](#), p. 255 *et seq.* (para. 608).

<sup>1275</sup> *Id.* at p. 250 (para. 590) (emphasis added).

<sup>1276</sup> The contention about the likelihood of successful implementation of the Project in the “but-for” scenario is also unfounded, as shown *infra* in Section 8.

occurred.”<sup>1277</sup> The Claimants must prove not only an impairment but an economic impact of the measures equivalent to expropriation rather than merely a probable or hypothetical impact. The Claimants cannot assert (let alone prove) with any degree of certainty the cumulative effect of the measures that Gabriel Canada invokes in support of its expropriation claim.

- 922 In summary, Gabriel Canada’s expropriation claim must fail under the first prong of the test for expropriation for five separate reasons. First, there is no evidence that RMGC’s assets were affected by the measures invoked as part of the alleged composite act. Second, there is no evidence that those assets lost value. Third, there is no evidence that RMGC’s assets cannot be sold to a third-party and that it was completely deprived of the attributes of property in relation to the assets. Fourth, the Claimants have failed to prove (as they must for Gabriel Canada to succeed in its claim as it has no standing to bring claims in relation to the assets of RMGC), that Gabriel Jersey was completely deprived of the attributes of property of its shares in RMGC. Fifth, the Claimants have failed to prove that Gabriel Canada’s indirect shareholding in Gabriel Jersey was completely deprived of the attributes of property.

#### **7.2.1.2 The Claimants Have Failed to Prove an Interference with Gabriel Canada’s Distinct, Reasonable, Investment-backed Expectations**

- 923 The Claimants argue that they have “demonstrated the measures substantially interfered with and frustrated entirely Gabriel’s distinct, reasonable, investment-backed expectations, including the most basic expectation that the host country will follow the law.”<sup>1278</sup>
- 924 To the extent that the alleged interference with distinct, reasonable, investment-backed expectations is presented by the Claimants as depending on a showing of breaches of Romanian law, the alleged breaches

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<sup>1277</sup> [Counter-Memorial](#), p. 217 (para. 568) (quoting the [Canada-Romania BIT, at Exhibit C-1](#)).

<sup>1278</sup> [Reply](#), p. 257 (para. 611).

have not been proven as shown above in **Section 3.1.3**. None of the five events listed as part of the composite act of expropriation discussed in **Section 7.1.1** above has been shown to have breached Romanian law. In any event, under a breach of domestic law does not amount, without more, to a breach of international law.<sup>1279</sup>

925 Furthermore, Romania had shown in the Counter-Memorial that the record is rife with contemporaneous evidence showing that the Claimants had no distinct, reasonable, investment-backed expectations of ever being able to overcome the permitting difficulties they were facing or obtaining a social license.<sup>1280</sup> The Claimants have no answer to this demonstration other than downplaying the relevance of the information that they have provided over the years to Gabriel Canada's shareholders. They claim that public disclosures "cannot be understood as or equated with Claimants' legitimate expectations ... that Respondent would treat Claimants' investments in a non-arbitrary, lawful and transparent manner."<sup>1281</sup>

926 Romania disagrees, first because the Claimants' investments were treated in a non-arbitrary, lawful and transparent manner as demonstrated in **Section 3.1.3** above and, second, because Gabriel Canada's distinct, reasonable, investment-backed expectations had to be and were continuously explained to its shareholders. These disclosures constitute unmistakable evidence that the Claimants' had limited expectations of overcoming the permitting difficulties that the Project was facing. Romania's actions did not interfere with the Claimants' expectations, as demonstrated above in **Section 3.1.3**.

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<sup>1279</sup> See e.g. *Elettronica Sicula*, Judgment, 20 July 1989, at [Exhibit CLA-100](#), p. 63 (para. 124) ("it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise."); *GAMI Investments, Inc. v. United Mexican States*, Final Award, 15 November 2004, at [Exhibit CLA-165](#), p. 40 (para. 103). See above Section 3.1.

<sup>1280</sup> [Counter-Memorial](#), p. 212 *et seq.* (paras. 557-567).

<sup>1281</sup> [Reply](#), p. 258 (para. 615).

### **7.2.1.3 The Claimants Have Failed to Prove that the Character of the Measures was Equivalent to Expropriation**

- 927 The Claimants argue that the character of the measures alleged to form the composite act, including their purpose and rationale, is expropriatory because “the subject measures entailed an abandonment of the legally applicable administrative permitting process, repudiation of rights, and manifest abuse of power and abuse of process.”<sup>1282</sup> These contentions have been proven wrong in **Section 3.1.3** above and as far as the allegation of “repudiation of rights” is concerned, the claim is not made out as also explained in **Section 6** above.
- 928 The Claimants’ allegations regarding the purpose and rationale of the alleged measures consists of a repetition of the allegation that that the EIA Review Process “was held up coercively to demand economic renegotiations and then usurped by Parliamentary review of the Government’s Draft Law and Draft Agreement and ultimately effectively abandoned for political reasons.”<sup>1283</sup> The allegation is unfounded, as demonstrated in **Sections 3.4** and **7.1.1** above.
- 929 Romania’s conclusion in the Counter-Memorial that the Claimants have 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 still stands as 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.<sup>1284</sup>

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<sup>1282</sup> [Reply](#), p. 258 (para. 617).

<sup>1283</sup> *Id.* at p. 258 (para. 617).

<sup>1284</sup> [Counter-Memorial](#), p. 220 (para. 576).

#### **7.2.1.4 The Claimants Have Failed to Rebut the Presumption against Indirect Expropriation**

- 930 Romania demonstrated in the Counter-Memorial that the Claimants did not rebut the presumption against indirect expropriation established in the BIT as the alleged wrongful conduct involves environmental measures, namely the alleged failure to issue the environmental permit for the Project.<sup>1285</sup> The Claimants retort with a repetition that there is “no environmental measure at issue” because the “Government rejected the Project and RMGC for political reasons that have nothing to do with environmental protection.”<sup>1286</sup>
- 931 The Claimants’ allegation that RMGC’s failure to conclude the environmental permitting process was based on actions which have “nothing to do with environmental protection” remains unproven and their attempt to rebut the presumption against indirect expropriation consequently fails.

#### **7.2.1.5 NAMR’s Alleged Failure to Issue the Exploitation License for the Bucium Project in 2008 Cannot Amount to an Expropriation**

- 932 The Claimants’ claims for expropriation of mining exploitation rights in the Bucium perimeter fail as a preliminary matter and there is no need to consider whether the claims meet the expropriation test under Annex B and Article VIII of the Canada-Romania BIT. As shown in the Counter-Memorial, RMGC never held exploitation rights in the Bucium perimeter under Romanian law and therefore could not have been expropriated of rights that it does not have, let alone lead to a reflex expropriation of Gabriel Jersey’s shareholding in RMGC or Gabriel Canada’s indirect shareholding in Gabriel Jersey.
- 933 In the Reply, the Claimants essentially repeat their position that “RMGC had a right to the exploitation licenses for the Bucium properties, not

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<sup>1285</sup> *Id.* at p. 221 (para. 578).

<sup>1286</sup> [Reply](#), p. 261 (para. 623).

merely a right to negotiate for them.”<sup>1287</sup> Yet, before the exploitation license is obtained, RMGC does not have a right to exploitation that could have been impaired, let alone expropriated. Prof. Bîrsan confirms this in his Supplemental Legal Opinion:

“before granting the exploitation license, NAMR and the operator negotiate, albeit in a limited manner, the clauses and conditions in the exploitation license as well the technical and economic documentation submitted in accordance Article 20 para.(1) of the Mining Law 85/2003, which include the exploitation development plan, as well as the feasibility study which attaches the estimation of reserves, as proposed by the applicant.

There is no particular order in the sequence of the aspects that are negotiated and no legal obligation for NAMR first to approve the estimation of resources and reserves before it may begin negotiation of the technical documentation. Moreover, the law, as described in detail below, does not even imply that the negotiation of the technical documentation would require homologation; instead the parties negotiate the applicant's proposal.

Thus, NAMR will analyze the exploitation development plan and the feasibility study and may ask for amendments to such documentation including analysis showing that the exploitation parameters remain feasible following such amendment. Such amendments may lead to a modification in the estimation of resources/reserves.”<sup>1288</sup>

934 RMGC will hold a right to negotiate exploitation licenses with NAMR when the Bucium Applications are reviewed and approved by NAMR. Until the licenses are agreed between NAMR and RMGC, there is no right of exploitation capable of being expropriated, as Prof. Bîrsan explained in his First Legal Opinion, with which Romania agrees:

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<sup>1287</sup> [Bîrsan LO I](#), p. 252 (para. 600).

<sup>1288</sup> [Bîrsan LO II](#), p. 51 (paras. 187-189) (emphasis added).

“[T]he exclusive right to obtain the exploitation license is deemed fully exercised and exhausted as of the date the exploitation license is obtained.”<sup>1289</sup>

935 As demonstrated in the Counter-Memorial, this situation is indistinguishable from that presented in *Oxus v. Uzbekistan*:

“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.”<sup>1290</sup>

936 Prof. Bîrsan tries to argue in his Supplemental Legal Opinion that RMGC owns more than a right to negotiate. He concludes that “once NAMR has taken a decision to grant an exploration license a process is triggered under the law whereby **the titleholder of the exploration license may apply to obtain exploitation rights in that perimeter**, provided he complies with the legal procedures and that future exploitation is demonstrated to be feasible.”<sup>1291</sup>

937 Romania agrees: RMGC had the right to apply to obtain exploitation rights in that perimeter. It has applied for such rights and the Bucium Applications remain pending. So long as it remains open whether RMGC’s Bucium Applications will be successful and, so long as it remains open whether NAMR and RMGC will after negotiation reach an agreement on the terms of the two exploitation licenses, the Claimants’ claims for expropriation claims are at best premature.<sup>1292</sup>

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<sup>1289</sup> [Bîrsan LO I](#), p. 85 (para. 385).

<sup>1290</sup> [Oxus v. Uzbekistan, Final Award, 17 December 2015, at Exhibit RLA-62](#), p. 152 *et seq.* (para. 301).

<sup>1291</sup> [Bîrsan LO II](#), p. 49 (paras. 181) (emphasis added).

<sup>1292</sup> See *e.g.* [Enkev Beheer v. Poland, First Partial Award, 29 April 2014, at Exhibit RLA-48](#), p. 91 (para. 326) (“the Tribunal’s general approach is necessarily rooted in the wording of Article 8 of the Treaty, limiting the Tribunal’s jurisdiction to a dispute relating to the effects of a measure taken by the Respondent, *i.e.*, a **measure taken in the past and not a future measure as yet untaken.**”) (emphasis added); [Glamis v. U.S.A., Award, 8 June 2009, at Exhibit CLA-7](#), p. 147 (para. 328).

## 7.2.2 Romania Has Not Breached Article 5 of the UK-Romania BIT

938 As noted above, the Claimants have confirmed that Gabriel Jersey's claim is indeed based on the alleged loss of value of its shareholding in RMGC. This is the only claim available to Gabriel Jersey under Article 5(2) of the UK-Romania BIT:

“Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are **owners of those shares.**”<sup>1293</sup>

939 As demonstrated in the Counter-Memorial and conceded by the Claimants in the Reply,<sup>1294</sup> the test for expropriation under the UK-Romania BIT essentially corresponds to the first prong of the test for expropriation under Annex B of the Canada-Romania BIT. Accordingly, Gabriel Jersey had to prove that the severity of the economic impact of the five measures of Romania were such that its shareholding in RMGC was “substantially or completely deprived of the attributes of property,” to quote the Claimants' own words.<sup>1295</sup>

940 Gabriel Jersey has not proven that the shares it holds in RMGC have been substantially or completely deprived of the attributes of property, including that they cannot be sold, as shown in **Section 7.2.1.1**. The Claimants' failure to prove that prong of the test under the Canada-Romania BIT is dispositive of Gabriel Jersey's expropriation claim under Article 5 of the UK-Romania BIT.

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<sup>1293</sup> [UK-Romania BIT, at Exhibit C-3](#) (emphasis added).

<sup>1294</sup> [Counter-Memorial](#), p. 241 *et seq.* (Section 9.3.1); [Reply](#), p. 236 (para. 560).

<sup>1295</sup> [Reply](#), p. 159 (para. 352).

## 8 THE CLAIMANTS HAVE FAILED TO ESTABLISH CAUSATION

941 Even assuming that Romania has breached the BITs (which is denied), the Claimants are still required to prove that such alleged breach has caused the total and permanent loss of their investment, failing which they are not entitled to any compensation whatsoever.

942 Specifically, the Claimants must prove, for instance in relation to what appears to be their principal claim that the State failed to issue the environmental permit that, had the permit been issued, RMGC would “in all probability” or “with a sufficient degree of certainty” have obtained all necessary approvals and the Project would be operating profitably (**Section 8.1**). However, even if RMGC had obtained an environmental permit, the evidence establishes that it would not have obtained financing or a building permit due to its failure to obtain a social license (**Section 8.2**), its inability to secure the necessary surface rights (**Section 8.3**), and its inability to meet the remaining permitting requirements (**Section 8.4**).

### 8.1 The Claimants Must Prove with a Sufficient Degree of Certainty that the Project Would Have Been Successful, but for the Alleged Breaches of the BITs

943 In the Counter-Memorial, the Respondent explained that the Claimants cannot be awarded compensation unless they establish the causal link between Romania’s alleged breaches of the BITs and the alleged injury to their protected investments.<sup>1296</sup> In particular, the Claimants bear the burden of demonstrating that the alleged breaches of the BITs caused the injury for which they claim compensation, and that this injury is not attributable (in whole or in part) to other intervening causes.<sup>1297</sup> Therefore, the Claimants must demonstrate that, but for Romania’s allegedly internationally wrongful acts, they would not have been permanently deprived of the entire value of their investments.

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<sup>1296</sup> [Counter-Memorial](#), p. 253 *et seq.* (Section 10.1).

<sup>1297</sup> *Id.* at p. 255 *et seq.* (paras. 682-686).

944 The Claimants do not contest this requirement.

945 Nevertheless, the recent award on compensation issued in the case of *Bilcon v. Canada* sheds light on the analysis the Tribunal should conduct.<sup>1298</sup> In *Bilcon*, the tribunal found a breach of the standard of fair and equitable treatment (and thus a breach of NAFTA Article 1105) when a joint federal-provincial review panel rejected an application for an environmental permit on the unprecedented and unexpected basis of “community core values.”<sup>1299</sup> In the award on damages, the tribunal described the relevant test for causation as follows:

“whether the Tribunal is ‘able to conclude from the case as a whole and with a sufficient degree of certainty’ that the damage or losses of the Investors ‘would in fact have been averted if the Respondent had acted in compliance with its legal obligations’ under NAFTA.”<sup>1300</sup>

946 The *Bilcon* tribunal accordingly examined “the situation that would have prevailed ‘in all probability’ or ‘with a sufficient degree of certainty’” had the breaches of NAFTA not occurred.<sup>1301</sup> The investors raised the same argument as the Claimants, namely that had they obtained the environmental approval, their applications for all necessary permits to build and operate the project would have been granted by the Government.<sup>1302</sup> However, upon examining the situation, the *Bilcon* tribunal concluded:

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<sup>1298</sup> [William Ralph Clayton et al. v. Government of Canada, Award on Damages, PCA Case No. 2009-04, 10 January 2019, at Exhibit RLA-198.](#)

<sup>1299</sup> [William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada, Award on Jurisdiction and Liability, PCA Case No. 2009-04, 17 March 2015, at Exhibit CLA-69](#), p. 178 *et seq.* (paras. 600-604). The Claimants rely extensively on *Bilcon* in their Reply, citing the award on jurisdiction and liability more than a dozen times.

<sup>1300</sup> [Bilcon v. Canada, Award on Damages, 10 January 2019, at Exhibit RLA-198](#), p. 26 (para. 114).

<sup>1301</sup> *Id.* at p. 32 (para. 133).

<sup>1302</sup> *Id.* at p. 36 (para. 143). *Cf.* [Reply](#), p. 268 (para. 646) (“Had the State not terminated the Project unlawfully, the Project would have had to obtain construction permits in due course for which urbanism plans would have to be in place. There is no basis, however, for Respondent to

“that the causal link between the NAFTA breach and the injury alleged by the Investors has not been established. While the Tribunal has no doubt that there is a realistic possibility that the Whites Point Project would have been approved as a result of a hypothetical NAFTA-compliant JRP Process, it cannot be said that this outcome would have occurred ‘in all probability’ or with ‘a sufficient degree of certainty.’”<sup>1303</sup>

947 In essence, the *Bilcon* tribunal found that there was a reasonable possibility that the investors would not have been able to obtain all requisite approvals, that “serious socio-economic adverse effects, which are not capable of mitigation” could have prevented the issuance of said approvals, or that the project could have been approved but with economic conditions that would render it unviable.<sup>1304</sup> Accordingly, the *Bilcon* tribunal concluded:

“no further injury has been proven beyond the injury ... that the Investors were deprived of an opportunity to have the environmental impact of the ... Project assessed in a fair and non-arbitrary manner. In particular, the Investors have not proven that ‘in all probability’ or ‘with a sufficient degree of certainty’ the ... Project would have obtained all necessary approvals and would be operating profitably.”<sup>1305</sup>

948 In this respect,<sup>1306</sup> the similarity with the present case is undeniable. Indeed, the Claimants have failed to show that, had the environmental permit been issued, and in the absence of further breaches of the BITs, the Project would “in all probability” or “with a sufficient degree of certainty” have obtained all necessary approvals and would have operated profitably. Quite the opposite, the evidence establishes that “in all probability” the

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argue, as it does, that the local authorities would not have been able to approve the urbanism plans needed to support the Project.”).

<sup>1303</sup> [Bilcon v. Canada, Award on Damages, 10 January 2019, at Exhibit RLA-198](#), p. 43 (para. 168).

<sup>1304</sup> *Id.* at p. 44 *et seq.* (paras. 169-172).

<sup>1305</sup> *Id.* at p. 46 (para. 175).

<sup>1306</sup> However, *Bilcon* is distinguishable from the present case in that the Respondent did not breach its obligations under the BITs. See *supra* Section 3.



process.”<sup>1309</sup> His comments are wholly misconceived. Social license is not a legal concept; it refers to the social legitimacy of a mining project and thus is a factual rather than a legal matter.

952 As the Parties’ experts, Dr. Boutilier and Dr. Thomson, have jointly written, “the social license can be defined as the level of tolerance, acceptance, or approval of an organization’s activities by the stakeholders with the greatest concern about the activity.”<sup>1310</sup> It is undisputed that it is incumbent on the mining company – in this case, RMGC – to secure the social license from the local community and other stakeholders who have the capacity to prevent the project; the social license is not a formal permit or “license” issued by the State.

953 Dr. Boutilier and Dr. Thomson agree that the level of a social license – which may range from non-acceptance (*i.e.* withholding of the social license), to mere acceptance, approval or, at best, co-ownership and full trust – for any project is based on a study of the stakeholder perceptions.<sup>1311</sup> The reliability of the measure of the social license will depend on the inclusion of the perceptions of all stakeholders with a known interest in the project, both those affected by the project and those able to affect it.<sup>1312</sup>

954 The Claimants recognize the need for a social license and have submitted an expert report on that topic by Dr. Boutilier, who has repeatedly written, often with Dr. Thomson, about social license, in particular in the context of mining projects.<sup>1313</sup> The Claimants’ witnesses also recognize that RMGC needed to acquire the social license for the Project and argue as to

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<sup>1309</sup> [Mihai LO II](#), p. 76 (para. 249); see also [Reply](#), p. 65 (para. 113).

<sup>1310</sup> See [Thomson Opinion II](#), p. 6 (para. 8); see also *id.* at p. 3 (para. ii), p. 5 *et seq.* (paras. 3 *et seq.*); p. 10 *et seq.* (paras. 18 *et seq.*); [Boutilier](#), p. 1 (para. 1) (defining the social license as a “metaphor for the level of stakeholder acceptance of a project or operations”); [R. Boutilier, “Social Licence to Operate: From the Company Department to the Whole Private Sector,” 22 June 2014, at Exhibit C-2812](#), p. 1.

<sup>1311</sup> [Thomson Opinion II](#), p. 8 (paras. 12-13 and Fig. 1).

<sup>1312</sup> *Id.* at p. 9 (para. 15).

<sup>1313</sup> See *e.g.* [R. Boutilier, “A Measure of the Social License to Operate for Infrastructure and Extractive Projects” \(2017\), at Exhibit C-2824](#) (“social acceptance of mining is as important as its legal licensing.”).

why they believe RMGC had in fact acquired it.<sup>1314</sup> RMGC could not build, let alone operate, the mine, if it did not ensure a minimum level of social acceptance; otherwise, certain stakeholders could block the Project –which is precisely what they did.

- 955 As explained in the Counter-Memorial, several tribunals have recognized that a social license is a fundamental requirement for mining projects.<sup>1315</sup> The Claimants dispute this description of the case law and seek to distinguish the cases to which the Respondent referred.<sup>1316</sup>
- 956 However, the cases that the Respondent previously cited all involve mining projects that were affected or prevented by social opposition.
- 957 As the Claimants note, in *Copper Mesa v. Ecuador*, following opposition to a mining project, Ecuadorian authorities terminated the concessions on the ground that community consultations had not been carried out. The Claimants stress that, in that case, the mining company had hired paramilitaries to overcome the social resistance; the paramilitaries among other things had fired guns and sprayed mace on civilian opponents to the project. They conclude that *Copper Mesa* cannot be compared to this case.<sup>1317</sup>

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<sup>1314</sup> [REDACTED], p. 53 (para. 88) and p. 64 (para. 106); [REDACTED], p. 49 (para. 103); [REDACTED], p. 34 (para. 60); [REDACTED], p. 17 (para. 42); see also [“Corporate Diplomacy: Why Firms Need to Build Ties with External Stakeholders”](#), *Knowledge@Wharton*, 5 May 2014, at [Exhibit R-576](#), p. 5 (“The social license ... can be withdrawn by any stakeholder at a moment in time.”); [W. J. Henisz et al., “Spinning Gold: The Financial Returns to Stakeholder Engagement”](#), *Strategic Management Journal*, (2013), at [Exhibit R-577](#), p. 3 *et seq.* (quoting Gabriel Canada COO as saying “It used to be the case that the value of a gold mine was based on three variables: the amount of gold in the ground, the cost of extraction, and the world price of gold. Today, I can show you two mines identical on these three variables that differ in their valuation by an order of magnitude. Why? Because one has local support and the other doesn’t.”).

<sup>1315</sup> [Counter-Memorial](#), p. 219 (para. 574, n. 954); see also [Dudzile Baleni et al. v. Minister of Mineral Resources, Judgment, High Court of South Africa, 22 November 2018, at Exhibit RLA-199](#), p. 37 (para. 78) (“Multiple international instruments require that communities such as the applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them.”).

<sup>1316</sup> [Reply](#), p. 265 *et seq.* (paras. 640-643).

<sup>1317</sup> *Id.* at p. 267 (para. 642).

- 958 However, in *Copper Mesa*, there had been, as here, gatherings and demonstrations against the project, “divisions within the local communities,” and “increasingly strident” “social conflicts between anti-miners and pro-miners.”<sup>1318</sup> Because of the social resistance, the company could not complete the environmental permitting of the project and develop the concessions, which were ultimately then cancelled pursuant to a general law (the Mining Mandate).<sup>1319</sup>
- 959 The tribunal found that the State resolutions terminating the mining concessions breached the applicable BIT. However, the tribunal asked “[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?”<sup>1320</sup> and answered that question in the award through a combined analysis of causation and contributory negligence.<sup>1321</sup> It held that as a result of the social conflict, the prospect of the concessions being developed was uncertain.<sup>1322</sup> It also held that the claimant was co-responsible for the social conflict, which prevented the completion of the environmental permitting, and that finding had consequences at the level of both causation and quantum.<sup>1323</sup>
- 960 In *Bear Creek Mining v. Peru*, the claimant had secured a mining concession in Peru. Like in this case, the project had not gone beyond the

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<sup>1318</sup> [Copper Mesa Mining Corporation v. Republic of Ecuador, Award, PCA Case No. 2012-2, 15 March 2016, at Exhibit RLA-54](#), p. 154 (para. 4.264) (hard copy: Part 4, p. 82); see e.g. *id.* at paras. 4.87, 4.111, 4.123, 4.136, and 4.141.

<sup>1319</sup> See *id.* at p. 40 (para. 1.110) (hard copy: Part 1, p. 23) (referring to Mining Mandate providing for the termination of certain inactive mining concessions); see also *id.* at p. 47 (para. 2.16) (hard copy: Part 2, p. 2).

<sup>1320</sup> *Id.* at p. 47 (para. 2.16) (hard copy: Part 2, p. 2).

<sup>1321</sup> *Id.* at p. 222 (para. 6.86) (hard copy: Part 6, p. 27) (“Causation: The Tribunal next addresses all issues however broadly related to causation under this single heading, although the Parties have addressed them under several different headings, including causation itself, contributory fault and unclean hands, materially affecting issues of both causation and compensation.”).

<sup>1322</sup> *Id.* at p. 223 (para. 6.90) (hard copy: Part 6, p. 28) (“the Tribunal decides that, even if the EIS had later been successfully completed and accepted by the Ministry, the prospects of the Junín concessions being successfully developed by the Claimant were uncertain”).

<sup>1323</sup> *Id.* at p. 227 *et seq.* (paras. 6.97-6.102) (hard copy: Part 6, p. 32); *id.* at p. 243 *et seq.* (para. 7.30) (hard copy: Part 7, p. 9).

planning phase, had not obtained the necessary permits, and faced opposition. Ultimately, social opposition to the project caused the Government to issue a decree prohibiting mining in the area. The investor filed for arbitration under the Canada-Peru FTA, claiming in part that the respondent had breached its obligation to provide FET and expropriated its investment.<sup>1324</sup> The respondent argued that the claims were inadmissible because the claimants had failed to secure the social license.<sup>1325</sup>

961 While the tribunal found the claims admissible, it considered the question of the social license relevant to the quantification of damages.<sup>1326</sup> It noted the opposition to the project and observed that community outreach “actions beyond those that Claimant undertook would have been possible and feasible.”<sup>1327</sup> The tribunal nevertheless found that the social unrest did not justify the Government’s adoption of the decree at issue and that it thereby committed an indirect expropriation.<sup>1328</sup>

962 The respondent had argued that, even if the tribunal found a breach of the FTA, the lack of a social license alone would have led to the failure of the mining project.<sup>1329</sup> The tribunal agreed:

“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

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<sup>1324</sup> [Bear Creek Mining Corporation v. Republic of Peru, Award, ICSID Case No. ARB/14/21, 30 November 2017, at Exhibit RLA-53](#), p. 19 *et seq.* (para. 115); [J-M. Marcoux and A. Newcombe, “Bear Creek Mining Corporation v. Republic of Peru: Two Sides of a ‘Social License’ to Operate” \(2019\) 33\(3\) ICSID Review 653, at Exhibit RLA-200](#), p. 653 (“The discussion of ‘social license’ in the *Bear Creek v. Peru* is both novel and significant.”).

<sup>1325</sup> *Id.* at p. 103 (para. 328).

<sup>1326</sup> *Id.* at p. 105 (para. 335).

<sup>1327</sup> *Id.* at p. 136 (paras. 404-405).

<sup>1328</sup> In light of this finding, the tribunal concluded that it was not necessary to determine whether the respondent had breached the FET standard. *Id.* at p. 143 (para. 416) and p. 198 (para. 533); see also [Reply](#), p. 265 (para. 641).

<sup>1329</sup> [Bear Creek v. Peru, Award, 30 November 2017, at Exhibit RLA-53](#), p. 71 *et seq.* (para. 257).

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.

The Tribunal notes that the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed. On the basis of the evidence before it, the Tribunal concludes that there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received all necessary environmental and other permits. The Tribunal notes that no similar projects operated in the same area, and there was no evidence to support a track record of successful operation or profitability in the future.”<sup>1330</sup>

- 963 The tribunal thus awarded just over USD 18 million (in sunk costs) instead of the over USD 500 million that the claimant had sought (through a DCF calculation).<sup>1331</sup>
- 964 Prof. Philippe Sands QC issued a dissenting opinion concurring with the majority's findings but considering that the claimant contributed to the social protests and that its damages should have been diminished by 50%.<sup>1332</sup> He found that the evidence showed that the “Claimants’ acts and

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<sup>1330</sup> *Id.* at p. 226 (paras. 599-600); see also Prof. Sands dissenting opinion at p. 280 *et seq.* (para. 3) (“I fully concur – given the Project’s speculative and unlikely prospects in face of serious social unrest, the manifest failure to obtain a ‘social license’, and the many environmental and other regulatory authorisations yet to be obtained – with the conclusion set out in the Award that ‘the calculation of Claimant’s damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method.’”).

<sup>1331</sup> *Id.* at p. 277 (para. 738); see also Prof. Sands’ dissenting opinion at p. 298 (para. 38) (“As set out in the Award, by the time Supreme Decree 032 was adopted, the prospects for the Santa Ana Project were already dismal, if indeed they continued to exist at all. Many environmental and other permits were still to be granted, and the nature and extent of the opposition made it clear that there was no real possibility of the Project soon obtaining the necessary ‘social license.’”).

<sup>1332</sup> *Id.* at p. 281 (para. 4) (“the Respondent has clearly established the Claimant’s contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced”); see also *id.* at p. 298 (para. 39).

omissions ... contributed in material ways to the events that unfolded and then led to the Project's collapse" and "[i]n particular... because of the investor's inability to obtain a 'social license', the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly."<sup>1333</sup> Significantly, he referred to the claimant's responsibility to secure a social license:

"It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention Article 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. It is for the investor to obtain a 'social license', and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license."<sup>1334</sup>

965 The Claimants also dismiss the relevance of *South American Silver v. Bolivia* and *Lone Pine v. Canada* on the grounds that the awards were not yet available at the time of the Reply.

966 However, although the *Lone Pine v. Canada* case is indeed ongoing, social licensing issues are before the tribunal.<sup>1335</sup>

967 Moreover, since the Claimants' submission of their Reply, the August 2018 *South American Silver v. Bolivia* award has become public.<sup>1336</sup> Not only the award, but also the pleadings from that case, which are public, show that social opposition to the mining project was a key issue.<sup>1337</sup> Although

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<sup>1333</sup> *Id.* at p. 282 (para. 6).

<sup>1334</sup> *Id.* at p. 297 (para. 37).

<sup>1335</sup> See [Lone Pine Resources Inc. v. Government of Canada, Respondent's Rejoinder, ICSID Case No. UNCT/15/2, 4 August 2017 \(resubmitted\), at Exhibit RLA-58](#), p. 27 *et seq.* (paras. 70, 118, 245, 334-335, 370, and 448).

<sup>1336</sup> [Reply](#), p. 265 (para. 640).

<sup>1337</sup> See also [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. 11 (describing at Section 2.1 social opposition to project); [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 177 (para. 656).

the tribunal did not refer to the notion of “social license,” it found that social opposition to the project caused State authorities to issue a decree terminating the claimant’s concession.<sup>1338</sup> Significantly, the tribunal found that the claimant’s conduct had contributed to that opposition:

“What is clear for the Tribunal in connection with the Project, is that **the Company undertook certain community relations activities which led to unrest in the communities directly affected** by the Project and which were questioned by its own advisors, and that, as the conflict ensued, the Company adopted a strategy that contributed to increase the divisions among the Indigenous Communities, the radicalization of the opposition groups and the practical impossibility of seeking the consensus that its advisors warned would be necessary in order to operate in the region...

based on the evidence on the record, the Tribunal concludes that: (i) despite having implemented an allegedly appropriate and adequate community relations program, CMMK had **serious failures in its community relations from the outset** which remained uncorrected in spite of BSR’s [a consultant’s] warnings; (ii) there was opposition to the Project and to CMMK’s presence since at least December 2010, expressed through the resolutions of Indigenous Communities government bodies; (iii) starting in 2011, CMMK implemented a strategy for the management of the communities focused mainly on weakening the opposition and consolidating a majority opinion, supposedly represented by COTOA-6A [an indigenous organization allegedly in favor of the project], which contributed to the aggravation of the conflict; and (iv) **at the time the Reversion of the Mining Concessions was decreed, there was a social conflict in the Project area that had been escalating for some time and that resulted in violent clashes between community members in relation to it.**”<sup>1339</sup>

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<sup>1338</sup> [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 37 (para. 169) and p. 177 (para. 656).

<sup>1339</sup> *Id.* at p. 131 *et seq.* (paras. 505 and 507) (emphasis added); *id.* at p. 177 (para. 656).

- 968 The tribunal further held that the “grave social conflict [had been] generated in part by the Company’s conduct, against which the State had to take action to restore public order and thus protect the life and integrity of the population in the area and CMMK’s employees.”<sup>1340</sup>
- 969 The impact of social opposition to a windfarm project in Kenya also gave rise to the dispute of *Kinangop Wind Park v. Kenya*. In that case, the investor had sought to develop a large windfarm project and had received a letter of support from the Kenyan government in 2012, pledging compensation, should the project ever be halted due to “Political Events.” The project never moved beyond a preliminary phase due to local opposition. The investor claimed that two protests against the project, organized by local politicians, were “Political Events” under the Letter of Intent, triggering a right to compensation.<sup>1341</sup>
- 970 In a July 2018 award, the tribunal rejected the claims. It found that, although politicians had made it impossible for the investor to further reach out to locals, this “political event” had been caused by the investor. It noted that the nature of the project (involving the erection of dozens of turbines on agricultural lands owned by poor Kenyans) “required considerable and sensitive engagement with the local community and in particular [the people affected by the project].” It held that the investor had failed to meet this requirement. Because the “political event” invoked by the claimant had been caused by its own failings, the tribunal found that it did not qualify under the Letter of Support.<sup>1342</sup>
- 971 In *Pac Rim v. El Salvador*, the host State had declined to grant Pac Rim an exploitation concession in response to public concerns that the mine could contaminate local drinking water. Pac Rim commenced arbitration and argued that the failure to issue the concession amounted to a breach of Salvadoran and international law. El Salvador argued that Pac Rim had

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<sup>1340</sup> [South American Silver v. Bolivia](#), Award, 22 November 2018, at [Exhibit RLA-162](#), p. 177 (para. 656).

<sup>1341</sup> [D. Charlotin, “Investigation: newly-unearthed ICC award analyses whether local community opposition to project is a political risk for which African state had pledged to indemnify investors”, \*IAReporter\*, 30 Nov. 2018, at \[Exhibit R-578\]\(#\).](#)

<sup>1342</sup> *Id.*

failed to meet the legal requirements and, together with *amicus curiae* (the CIEL), that Pac Rim had failed to secure a social license for the project.<sup>1343</sup> In its October 2016 award, the tribunal agreed that Pac Rim had failed to meet the legal requirements for the license and dismissed the claims.<sup>1344</sup>

### 8.2.2 RMGC Has Failed to Secure a Social License for the Project

- 972 As demonstrated in the Counter-Memorial, RMGC has failed to date to secure a social license for the Project.<sup>1345</sup> The Claimants deny this plain fact and argue that, on the contrary, RMGC enjoyed “a social license at all relevant times at both the local and national level.”<sup>1346</sup>
- 973 Dr. Boutilier, who has never travelled to Roşia Montană and whose opinion is based solely on a quantitative analysis of a limited selection of polls, opines that RMGC enjoyed a social license at the local level between 2004 and 2013.<sup>1347</sup> He further opines that RMGC held a social license at the national level from 2005 to 2014 (with the possible exception of 2008).<sup>1348</sup>
- 974 However, as Dr. Thomson explains in his second expert opinion, a social license is not a matter of quantitative analysis, or counting supporters and opposers, but a qualitative determination; consequently, a minority of stakeholders may prevent an investor from securing a social license. Dr. Boutilier’s approach is misguided as it is not based on data from all stakeholder groups and does not recognize the existence of a well-

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<sup>1343</sup> [Pac Rim Cayman LLC v. Republic of El Salvador, Counter-Memorial on the Merits, ICSID Case No. ARB/09/12, 10 January 2014, at Exhibit RLA-201](#), p. 115 *et seq.* (paras. 237 *et seq.*); [Pac Rim Cayman LLC v. Republic of El Salvador, CIEL Amicus Curiae Submission, ICSID Case No. ARB/09/12, 25 July 2014, at Exhibit RLA-202](#), p. 10.

<sup>1344</sup> [Pac Rim Cayman LLC v. Republic of El Salvador, Award, ICSID Case No. ARB/09/12, 14 October 2016, at Exhibit CLA-212](#), p. 196 (para. 8.44) (hard copy: Part VIII, p. 15).

<sup>1345</sup> [Counter-Memorial](#), p. 99 *et seq.* (paras. 260-262); see also *id.* at paras. 363-367 and 386.

<sup>1346</sup> [Reply](#), p. 79 (para. 141); see also *id.* at para. 146.

<sup>1347</sup> [Boutilier](#), p. 35 (Table 3-2); see also [Reply](#), p. 79 *et seq.* (paras. 142-143) (describing the Thomson-Boutilier levels of social license); *id.* at paras. 147-148.

<sup>1348</sup> [Reply](#), p. 82 (para. 148) (citing [Boutilier](#), p. 14 *et seq.* (paras. 32-65)).

entrenched opposition to the Project.<sup>1349</sup> In Dr. Thomson's view and as demonstrated below, the Project never gained a stable social license.<sup>1350</sup>

### 8.2.2.1 RMGC Failed to Effectively Engage with Alburnus Maior and Members of the Local Community in the Early Years

975 In his first opinion, Dr. Thomson opined that RMGC's lack of effective engagement with the local community prior to 2002 contributed to its failure to secure the social license.<sup>1351</sup> In their Reply, the Claimants disagree and refer to ██████████'s second-hand account of RMGC's public consultation and engagement activities during that period.<sup>1352</sup> Their efforts in this regard are unavailing as Dr. Thomson explains and for the reasons provided below.<sup>1353</sup>

976 First, the Claimants do not dispute that in 2000 the local association Alburnus Maior was created in reaction and opposition to the Project, as Mr. Zeno Cornea, its founder, explains in his witness statement.<sup>1354</sup> Nor do the Claimants dispute the dozens of lawsuits that Alburnus Maior filed together with other NGOs with local courts against administrative deeds pertaining to the Project.<sup>1355</sup> Alburnus Maior has further confirmed its opposition to the Project through its *amicus curiae* submission.

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<sup>1349</sup> [Thomson Opinion II](#), p. 5 (para. 2); see also *id.* at paras. 44-45, 81, 119-120, and 167; see also [Jurca](#), p. 32 (para. 156) (commenting on methods of expressing opposition to the project).

<sup>1350</sup> See [Thomson Opinion II](#), p. 3 (Preamble); see also *id.* at p. 5 (para. ix).

<sup>1351</sup> [Thomson Opinion I](#), p. 12 *et seq.* (para. 30-32); see also *e.g.* "[The Extractive Industries Consultative Review](#)" (Excerpt) dated 30 October 2001, at [Exhibit R-579](#), p. 21 (describing "considerable opposition to the Project").

<sup>1352</sup> [Reply](#), p. 87 (paras. 161-62).

<sup>1353</sup> See [Thomson Opinion II](#), p. 22 *et seq.* (para. 48-57).

<sup>1354</sup> [Cornea](#), p. 2 *et seq.* (paras. 9 and 12-14); [Jurca](#), p. 19 *et seq.* (paras. 92-106); [Thomson Opinion II](#), p. 25 *et seq.* (para. 58 *et seq.*); [Pop Opinion](#), p. 10 (para. 32); [Jeflea](#), p. 3 (para. 13); [Petri](#), p. 2 (paras. 6-7); see also ██████████.

<sup>1355</sup> [Counter-Memorial](#), p. 38 *et seq.* (paras. 102-104) and p. 354 *et seq.* (Annex IV); [Gabriel Canada 2007 Annual Information Form](#), at [Exhibit C-1805](#), p. 22 *et seq.* (referring to "approximately 111 separate litigation files regarding the Rosia Montana project initiated by the NGOs since 2004"); [Gabriel Canada 2011 Annual Information Form](#), at [Exhibit C-1809](#), p. 18 ("approximately 150 separate litigation files").

- 977 Second, ██████████ only joined the company in 2002.<sup>1356</sup> ██████████ description of events prior to that date is thus not based on contemporaneous observation or personal involvement.
- 978 Third, notwithstanding the Respondent's requests, the Claimants produced few documents evidencing engagement with the local community. In response to requests for evidence of meetings between 1999 and 2004 with local Project opponents, the Claimants produced evidence of only three meetings on 23 March 2001, 5 April 2001 and 20 January 2002 with local opposition members and/or Alburnus Maior members.<sup>1357</sup> Furthermore, although the Claimants were ordered to produce reports of complaints and/or questions about the Project from 1998 to 2004 and from 2007 to 2008, they produced only documents post-dating 2007.<sup>1358</sup> Their non-production of documents from earlier years confirms RMGC's lack of attention for many years to the concerns of Project opponents and residents.<sup>1359</sup>
- 979 Fourth, ██████████ lists initiatives on the part of RMGC to engage with the local community including assisting residents with domestic tasks,

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<sup>1356</sup> ██████████; ██████████, p. 1 (para. 1).

<sup>1357</sup> [PO 10 Annex B](#), p. 37 *et seq.* (Request No. 22); [RMGC minutes of meeting in Corna on 20 January 2002](#), at [Exhibit C-1976](#); [Fax from V. Buda to G. Kora dated 8 April 2003](#), at [Exhibit C-2013](#), p. 3; [RMGC minutes of meeting at Roşia Montană City Hall on 5 April 2001](#), at [Exhibit C-1967](#).

<sup>1358</sup> [PO 10 Annex B](#), p. 28 *et seq.* (Request No. 16); see ██████████  
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<sup>1359</sup> See [Bear Creek v. Peru, Award, 30 November 2017](#), at [Exhibit RLA-53](#), p. 296 (Sands dissenting opinion, para. 35) (“the Claimant failed to acknowledge that those events [protests in 2008] were motivated in significant part, by the fact that certain affected (or potentially affected) communities had serious concerns with the Project because of its potential environmental risks, and because they felt themselves to be excluded from its benefits. The Claimant failed to draw the obvious and necessary conclusions from the early indications of opposition in 2008, in particular the need to improve its community outreach and relations.”); see also [Jurca](#), p. 6 *et seq.* (paras. 28-29, and 37).

providing financial assistance, opening an IT center and gym in Roșia Montană, and organizing educational workshops.<sup>1360</sup>

980 However, these initiatives do not evidence effective engagement, let alone community support for the Project. The sufficiency of a company's efforts to secure the social license is not measured by the number of steps it takes to engage, but rather by the quality of the contact and the result.<sup>1361</sup> The number of workshops, festivals, and outreach programs and initiatives cannot substitute for securing a social license. Mr. Jurcă describes at length how RMGC's efforts to engage with the local community, including Project opponents, have been lacking from the start.<sup>1362</sup>

981 The Claimants also allege, in reliance on ██████████'s testimony, to have organized public meetings with residents from 2000 to 2002, including with regard to resettlement and the envisaged modifications to the urbanism plans for the area in view of the Project.<sup>1363</sup>

982 However, as noted above, RMGC organized few meetings with Project opponents during that time.<sup>1364</sup> Furthermore, the mere fact of organizing (or participating in a meeting organized by the Municipality or another party) does not evidence constructive and effective engagement. The Claimants seem to satisfy themselves in a ticking-the-box approach, however, it is the content and outcome of such exchanges that is relevant.

983 The evidence shows residents' concern regarding RMGC's methods of consulting the public. For instance, in July 2002, at the time of the approval of the PUZ and PUG, during a meeting with RMGC, Alburnus Maior representatives criticized RMGC's consultations with the local community, stating that "people employed by the company were put under pressure to attend the public meeting in Roșia Montană on 11 June and threatened that if they did not do so then they would not be paid by the

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<sup>1360</sup> [Reply](#), p. 87 (para. 162 (referring to ██████████, p. 3 *et seq.* (paras. 6, 33, 50-62); [Jurca](#), p. 34 *et seq.* (paras. 163-164) (noting that these initiatives were of little impact).

<sup>1361</sup> [Thomson Opinion II](#), p. 23 (para. 50).

<sup>1362</sup> [Jurca](#), p. 36 (para. 173); see also [Petri](#), p. 4 (para. 14); [Cornea](#), p. 4 (para. 19).

<sup>1363</sup> [Reply](#), p. 88 (para. 162).

<sup>1364</sup> See *supra* para. 978.

company” and that “the public consultations have excluded real owners and only included company employees.”<sup>1365</sup>

984 In a November 2002 letter to RMGC, Alburnus Maior’s president, Mr. Eugen David, described the association as composed of 300 families who “do not want to move out and [who]... fight to preserve [their] land and the environment on which [they] depend.”<sup>1366</sup> Mr. David described RMGC’s lack of engagement with the community:

“Your statements are for us just noncredible promises. You have disappointed us by failing to tell the truth recently, when unexpectedly and without an explicit reason you cancelled a meeting you yourself had suggested. You again disappointed us when, in your last letter, you stated that you are preoccupied with solving the conflicts and problems that affect the local community, but so far you have failed to approach any of the issues raised in the letter dated 14 October 2002. Moreover, on numerous occasions we have raised the issue that we have not been allowed to make photocopies of the Short Project Description and we asked you and your employees for a copy... While you respect the lawfulness of Alburnus Maior when you deem it fit for you and the policies you pretend to adhere to, we have the impression that the external forces that pressurize for this mining project are trying to discredit Alburnus Maior, a Romanian local NGO with legal statutes...

Given these facts, we do not see a reason to discuss the jigsaw pieces of the project while you are unable to solve the endemic inherent problems of this project in general and when you do not manage to solve the issues and our property rights. We are indeed saddened to

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<sup>1365</sup> [RMGC Community Development Report dated July 2002, at Exhibit R-585](#), p. 2; see also [Bear Creek v. Peru, Award, 30 November 2017, at Exhibit RLA-53](#), p. 297 (Sands dissenting opinion, para. 36) (referring to Amicus Curiae submission contending “that Claimant’s failure to engage in proper community relations contributed to the losses it suffered, noting also that members of certain communities felt unable to participate in the public meeting of February 2011, as there was only limited space available.”).

<sup>1366</sup> [Letter from Alburnus Maior to RMGC dated 6 November 2002, at Exhibit C-2006](#).

witness the appearance of certain tactics that some people would call  
'intimidating.'"<sup>1367</sup>

985 RMGC's environmental manager between 2002 and 2005, Mr. John Aston,  
notes on his LinkedIn page that he faced "significant challenges [that]  
came from a corporate mindset that we can control information and **we do  
not need to engage with people who have different views to our own as  
to what should be developed in Roşia Montană.**"<sup>1368</sup>

986 In addition to frustration with RMGC's methods, the local community had  
concerns regarding the Project, including environmental concerns relating  
in particular to the use of cyanide.<sup>1369</sup> In their Reply, the Claimants do not  
dispute the impact of the 2001 Baia Mare environmental disaster on  
attitudes both locally and internationally, and the concerns it triggered  
regarding the use of cyanide in mining and the safety of tailings and other  
dams at mining sites.<sup>1370</sup> Many members of the local community also  
simply did not wish to move, no matter the price offered to them. Local

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<sup>1367</sup> *Id.*

<sup>1368</sup> [J. Aston LinkedIn Page, at Exhibit R-586](#), p. 2 (emphasis added); see also [REDACTED], p. 8 *et seq.* ([REDACTED]); [REDACTED], p. 3 ("[REDACTED]").

<sup>1369</sup> Documents from 2001 reveal the frustration of residents with RMGC's preliminary works. [RMGC minutes of meeting at Roşia Montană City Hall on 5 April 2001, at Exhibit C-1967](#) (describing frustration with the dust and noise caused by drilling near households and damage to access roads); [Jurca](#), p. 3 (para. 18); see also *id.* at paras. 34-35; [Letter from Greenpeace to RMGC \(undated\), at Exhibit R-589](#), p. 2.

<sup>1370</sup> Many of the people whom Prof. Henisz interviewed in 2007 evoked this concern. See [REDACTED], p. 15 ([REDACTED]) and p. 26 ([REDACTED]); [Henisz](#), p. 4 (para. 8); see also [Counter-Memorial](#), p. 37 (paras. 100-101); [Roşia Montană public debate minutes dated 11 June 2002, at Exhibit C-1990](#), p. 6; [Fax from V. Buda to G. Kora dated 8 April 2003, at Exhibit C-2013](#), p. 3 (referring to concern raised in Roşia Montană in March 2001); [REDACTED]; [REDACTED], p. 3 ([REDACTED]); [REDACTED]; [REDACTED], p. 3; [Video documentary entitled "New Eldorado" \(2004\), at Exhibit R-430](#), at 31:00-37:09 (describing Baia Mare accident and impact on community) and at 38:30-38:56 (showing RMGC representative stating that, while the technologies are different, it is "normal" for people to associate the Project with Baia Mare).



1378 [REDACTED]  
[REDACTED]  
[REDACTED]. Had that been the case, one would expect Gabriel Canada's disclosures from the time to clarify that RMGC had requested [REDACTED]; those disclosures, however, make no such mention.<sup>1379</sup>

990 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>1380</sup>

991 In November 2002, the Roşia Montană mayor wrote to RMGC that it was acting contrary to its commitments to engage residents as employees, to rehabilitate the environment in areas where it had drilled, and to carry out negotiations relating to the purchase of homes confidentially.<sup>1381</sup>

992 Thus, by the end of 2002, many residents did not trust RMGC, had concerns regarding the Project, and did not wish to relocate.

993 Over time, the concerns regarding the Project spread through the region and country, as evidenced, among other things, by the overwhelming response during the EIA Review Process public consultations both in 2006 and 2011. As described in the Counter-Memorial and as is undisputed, the number of comments and questions from the public, the majority of which expressed concern, was unprecedented.<sup>1382</sup> The Claimants' retort that

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<sup>1378</sup> A person interviewed by Prof. Henisz in December 2011 indicated, "[REDACTED]  
[REDACTED]  
[REDACTED]" [REDACTED]  
[REDACTED], p. 89 ([REDACTED]).

<sup>1379</sup> See [Gabriel Canada press release dated 11 October 2002, at Exhibit R-100](#).

<sup>1380</sup> [REDACTED].

<sup>1381</sup> [Letter from Roşia Montană Mayor to RMGC dated 29 October 2002, at Exhibit R-591](#); [REDACTED]  
[REDACTED]; [Roşia Montană Local Council Decision dated 5 December 2001, at Exhibit C-1970](#).

<sup>1382</sup> [Counter-Memorial](#), p. 46 *et seq.* (Sections 3.2 and 4.2); see also [Jurca](#), p. 23 (paras. 111-112) (discussing lack of effective engagement during EIA public debate in Roşia Montană);

RMGC took into account public concerns by modifying the Project is weak given how minimal the modifications were and given that public concerns continued for years and continue to this day.<sup>1383</sup> Furthermore, although they argue that the NGOs' and community's concerns were unfounded, it was RMGC's responsibility to educate, rather than to dismiss, what they deemed unfounded concerns.

#### **8.2.2.2 NGO Litigation for Over Ten Years Evidences Strong Opposition to the Project**

994 It is undisputed that, since the early 2000s, Alburnus Maior and other NGOs have brought numerous administrative and court challenges against State authorities that have sought the suspension and annulment of permits issued for the Project.<sup>1384</sup> The NGOs primarily challenged the ADCs, urban certificates, and plans.

995 The commencement of these lawsuits was outside of the control of State authorities. Together with RMGC, which intervened in these proceedings, State authorities have consistently defended the administrative deeds issued for the Project, often going through multiple appeals.

996 Significantly, in assessing the extent to which RMGC had secured a social license, Dr. Boutilier fails to consider the numerous NGO actions against the Project, including the legal challenges which evidence a well-

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[NGO complaint to Ministry of Environment dated 7 December 2006, at Exhibit R-592](#) (demanding greater transparency in public consultation process); [Letter from Alburnus Maior to Ministry of Environment dated 5 January 2005, at Exhibit R-593](#) (noting defects in RMGC's application for environmental permit); [EU report regarding fact-finding visit to Roşia Montană dated 10 March 2004, at Exhibit R-594](#), p. 8 ("the scale of the proposed project and the controversial nature of some of its features mean that the project's future development should continue to be carefully monitored.").

<sup>1383</sup> [Reply](#), p. 67 (para. 116); see also e.g. [Letter from C. Iaschievici to Ministry of Environment dated 15 April 2013, at Exhibit R-595](#) (expressing concerns regarding the Project).

<sup>1384</sup> See [Counter-Memorial](#), p. 354 *et seq.* (Annex IV) and p. 54 *et seq.* (Sections 3.4 and 4.5); [Gabriel Canada 2005 Annual Information Form, at Exhibit C-1803](#), p. 20 (describing Alburnus Maior's "challenges against most local, regional and national ... authorities ... [regarding] permits, authorizations and approvals for any aspect of the ... Rosia Montana project."); [Gabriel Canada 2007 Annual Information Form, at Exhibit C-1805](#), p. 21 *et seq.* (referring to 111 separate cases since 2004); [Gabriel Canada 2011 Annual Information Form, at Exhibit C-1809](#), p. 18 (referring to 150 separate cases).



### 8.2.2.3 Refusal of Residents to Leave Roșia Montană

1000 It is undisputed that, starting in 2002, RMGC had relocated and resettled many Roșia Montană residents but that, by February 2008, it had halted its efforts.<sup>1390</sup> According to the 2012 census, there were at the time 618 residents in Roșia Montană.<sup>1391</sup> Many of those residents were then, and remain today, opposed to the Project and unwilling to move.<sup>1392</sup> As Dr. Thomson notes, Dr. Boutilier's failure to recognize the presence of an organized opposition, including the presence of recalcitrant owners of properties needed for the Project, is a fatal flaw in his assessment.<sup>1393</sup>

### 8.2.2.4 RMGC has Expended Considerable Sums on Advertisement in the Effort to Secure a Social License

1001 Starting in roughly 2005, RMGC launched a massive advertising campaign aimed at securing the social license for the Project.<sup>1394</sup>

1002 As Dr. Pop notes, “[i]n the absence of the opposition to the Project, the mining company would not have needed to defend and promote its Project publicly.”<sup>1395</sup> She describes at length RMGC's advertising campaign from 2005 to 2014, which she describes as “unprecedented” and “unique” in that

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<sup>1390</sup> ██████████, p. 9 *et seq.* (para. 23); ██████████, p. 21 (para. 49).

<sup>1391</sup> [Jurca](#), p. 12 (para. 55).

<sup>1392</sup> See [Jurca](#), p. 47 *et seq.* (paras. 202-221); [Golgot](#), p. 2 (para. 4); [Jeflea](#), p. 2 (paras. 7-10); [Petri](#), p. 3 (para. 8); [Cornea](#), p. 3 *et seq.* (paras. 10, 11, and 26); [Devian](#), p. 2 (para. 4); see also “Gabriel's Roșia Montană gold mining project: An obstacle to EU accession” dated 12 Dec. 2003, at [Exhibit R-596](#), p. 2 (quoting EU Parliament deputy: “The population here would like to stay and I am under the impression that a foreign company is hindering the functioning of local democracy.”); [Alburnus Maior risk study for the Project dated October 2004, at Exhibit R-597](#), p. 8 (“Gabriel is encountering considerable opposition from property owners, which whilst adding to delays, are likely to never be resolved at all.”) and p. 12 (“In addition to Alburnus Maior members there exist further property owners refusing to leave.”); [Alburnus Maior press release dated 16 June 2003, at Exhibit R-598](#) (“we are not for sale, and you should understand that there are things and people that money cannot buy.”).

<sup>1393</sup> [Thomson Opinion II](#), p. 4 (para. vii).

<sup>1394</sup> [Counter-Memorial](#), p. 139 *et seq.* (para. 364); see also [Thomson Opinion II](#), p. 33 *et seq.* (para. 91 *et seq.*); ██████████, p. 65 (para. 113).

<sup>1395</sup> [Pop Opinion](#), p. 41 (para. 100); see also ██████████, p. 83 (██████████).

“[n]ever before in Romania had a company that had not (yet) performed economic and lucrative activities promoted its image or its economic project through publicity at national level.”<sup>1396</sup>

1003 During document production, the Claimants produced [REDACTED] agreements dated between [REDACTED] and [REDACTED] with marketing and public relations companies regarding the Project<sup>1397</sup> as well as [REDACTED] invoices from public relations firms for services provided between [REDACTED] and [REDACTED].<sup>1398</sup> These contracts and amounts expended by RMGC on advertising demonstrate that it knew that it needed, but lacked, a social license for the Project.<sup>1399</sup> In addition to TV commercials and print advertisements, RMGC funded promotional films regarding the Project, some of which Project opponents described as “propaganda.”<sup>1400</sup>

1004 In December 2008, RMGC’s consultant [REDACTED] found that [REDACTED]  
[REDACTED]  
[REDACTED]<sup>1401</sup> In part based on that result, RMGC hired the marketing consultancy firm [REDACTED] to increase the positive perception of the Project. The contract provided that

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<sup>1396</sup> [Pop Opinion](#), p. 41 (para. 100); see also *id.* at Section 4.2 and p. 61 (para. 157).

<sup>1397</sup> [REDACTED]  
[REDACTED].

<sup>1398</sup> [REDACTED].

<sup>1399</sup> RMGC and Gabriel Canada disregarded the fact that a social license cannot be bought. [Thomson Opinion I](#), p. 12 *et seq.* (para. 32-33); see also [REDACTED]  
[REDACTED], p. 49 ([REDACTED]) (“[REDACTED]  
[REDACTED]  
[REDACTED]”); [Deloitte 2019 study: “The top 10 issues transforming the future of mining”](#), at [Exhibit R-574](#); see also [REDACTED] ([REDACTED]  
[REDACTED]).

<sup>1400</sup> [Alburnus Maior press release dated 18 January 2007, at Exhibit R-602](#); see also [REDACTED]  
[REDACTED]; [REDACTED]  
[REDACTED]; [Pop Opinion](#), p. 49 (paras. 114-115).

<sup>1401</sup> [REDACTED], p. 21;  
see also [REDACTED], p. 20.



confirms that the company was behind the sanctioned advertisements.<sup>1407</sup> The Claimants also omit to mention the other decisions finding that either RMGC ads or television programs providing slanted information in favor of the Project were misleading.<sup>1408</sup> As Prof. Henisz recalls from his visit to Romania in 2007, “many stakeholders... were objecting to what they viewed as a Ceaușescu-style propaganda effort” and saw the ads “as just words from a relatively unknown foreign company whose past managers had not always acted transparently in their eyes.”<sup>1409</sup>

#### **8.2.2.5 RMGC’s Efforts to Increase Support for the Project Have Been Unavailing**

1007 The Claimants allege that “RMGC made significant efforts to increase support for the Project and criticize Dr. Thomson for allegedly not recognizing that a social license is dynamic and can vary over time.”<sup>1410</sup>

1008 Although RMGC may have made efforts to increase support, such efforts have not been successful in securing a social license, as Dr. Thomson explains. As a [REDACTED] survey commissioned by RMGC found, “[REDACTED]  
[REDACTED]

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<sup>1407</sup> [2013 RMGC Annual Financial Statements, at Exhibit C-1569.03 \(resubmitted\)](#), p. 10 (“the ...CNA prohibited the adverts of the media campaign promoted by RMGC, arguing that the adverts were not compliant with the Broadcasting Law and with the Audiovisual Content Regulatory Code.”).

<sup>1408</sup> [CNA decision dated 23 June 2009, at Exhibit R-619](#); [Alburnus Maior press release dated 25 June 2009, at Exhibit R-620](#); [CNA meeting minutes dated 19 September 2009, at Exhibit R-621](#) (“ad ... infringes CNA regulations”); [Romanian Advertising Council opinion dated 9 August 2011, at Exhibit R-622](#); [CNA decision dated 22 September 2011, at Exhibit R-623](#); [CNA decision dated 15 October 2013, at Exhibit R-277](#); [CNA decision dated 21 February 2012, at Exhibit R-624](#); see also [REDACTED], p. 87 ([REDACTED]) (“[REDACTED]”); [CNA Decision dated 29 March 2012, at Exhibit C-2669](#) (referring to 26 complaints); [Complaint to CNA regarding TV reporting of referendum dated 27 December 2012, at Exhibit R-617](#); [CNA monitoring report dated 17 April 2012, at Exhibit R-618](#).

<sup>1409</sup> [Henisz](#), p. 7 (para. 18).

<sup>1410</sup> [Reply](#), p. 89 (paras. 166-167).



and another 3 star hotel.”<sup>1415</sup> As Mr. Jurcă explains, however, RMGC only partially renovated these buildings and never opened any hotels.<sup>1416</sup>

1012 Although the Claimants refer to “thank you” notes to RMGC as evidence of alleged support for the Project, expressions of gratitude for good deeds (including financial sponsorships) must be distinguished from expressions of support for the Project.<sup>1417</sup>

### 8.2.2.6 Protests against the Project Reflect Continued Opposition Since 2002

1013 Dozens of protests against the Project have taken place. According to Dr. Stoica, between 2002 and 1 September 2013, there were no fewer than 34 protests.<sup>1418</sup> These included protests in Roșia Montană in April and July 2002;<sup>1419</sup> protests in Bucharest and Cluj in 2002 and 2003,<sup>1420</sup> 2007,<sup>1421</sup> 2010, and 2011;<sup>1422</sup> and protests in Alba Iulia (the Alba County capital) on 1 December 2011 and 2012.<sup>1423</sup> They also included flash mobs and occupy-

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<sup>1415</sup> [Reply](#), p. 89 (para. 167).

<sup>1416</sup> [Jurca](#), p. 34 (para. 165); see also *id.* at para. 143.

<sup>1417</sup> *Id.* at p. 34 (paras. 166-167); see also [Cornea](#), p. 4 (paras. 17-18) (re divided community).

<sup>1418</sup> [Stoica Opinion](#), p. 28 (para. 54) (referring also to 44 other Save Roșia Montană events).

<sup>1419</sup> [Save Roșia Montană campaign chronology \(2002-2013\)](#), at [Exhibit R-451](#), p. 3; [Revised Amici Application dated 2 November 2018](#); [Jurca](#), p. 42 (para. 191); [Pop Opinion](#), p. 11 *et seq.* (paras. 34 and 45).

<sup>1420</sup> [Henisz 2007 Notes](#), at [Exhibit C-2391 \(resubmitted\)](#), p. 63 (Interviewee No. 23); [Article regarding December 2002 protest in Bucharest](#), at [Exhibit R-628](#).

<sup>1421</sup> In September 2007, RMGC was so concerned by local opposition that it moved to transfer the litigation relating to the urban certificate from the court in Cluj to another jurisdiction, arguing that “  
[REDACTED]  
[REDACTED]”  
[REDACTED].

<sup>1422</sup> See [Counter-Memorial](#), p. 99 *et seq.* (para. 261); [Pop Opinion](#), p. 27 *et seq.* (paras. 64, 67-75).

<sup>1423</sup> [Video of protests in Alba Iulia on 1 December 2011](#), at [Exhibit R-630](#); [Video of protests in Alba Iulia on 1 December 2012](#), at [Exhibit R-631](#); [REDACTED].

type actions, including for instance when protesters chained themselves in Minister Borbély's office in the spring of 2012.<sup>1424</sup>

- 1014 For many years, an anti-Project festival took place in Roșia Montană, called *FânFest* and attracted thousands of visitors.<sup>1425</sup> In addition, there have been numerous petitions against the Project, including petitions of 27,000 signatures<sup>1426</sup> and 350,000 signatures in 2004,<sup>1427</sup> an open letter from the Romanian members of the EU Parliament to the Prime Minister,<sup>1428</sup> and a petition of 100,000 signatures in November 2011.<sup>1429</sup>
- 1015 Dr. Pop describes actions against the Project between 2002 and 2014 and opines that the Save Roșia Montană campaign “transform[ed] into the most significant social movement in post-communist Romania.”<sup>1430</sup>
- 1016 The regularity of opposition events, combined with incessant court challenges, evidences their determination and undermines [REDACTED] description of these events as “inconsequential.”<sup>1431</sup> Contemporaneo■

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<sup>1424</sup> [A. Etves, “Protesters chained to heat radiator in the office of the Minister of Environment, Laszlo Borbély”, \*evz.ro\*, 2012, at Exhibit R-633; \[REDACTED\]](#).

<sup>1425</sup> [Video regarding FânFest and Romanian autumn, at Exhibit R-634; Jurca](#), p. 45 *et seq.* (paras. 192-198) (rejecting Claimants' allegations that the festival did not represent local views); [REDACTED], p. 68 (para. 121).

<sup>1426</sup> [“23,000 signatures to stop the works in Roșia Montană,” dated 2 Aug. 2004, at Exhibit R-635.](#)

<sup>1427</sup> [REDACTED], p. 63 ([REDACTED]).

<sup>1428</sup> [V. Boștinaru, “Roșia Montană in the European debate \(Anthology\)” \(2012\), at Exhibit R-636](#), p. 170.

<sup>1429</sup> [Counter-Memorial](#), p. 99 (para. 261) (citing “100,000 against the mine from Roșia Montană”, *stiri.com.ro*, Nov. 2011, at Exhibit R-231).

<sup>1430</sup> [Pop Opinion](#), p. 13 (para. 42); see also *id.* at p. 15 *et seq.* (para. 47, Table 1, and para. 64).

<sup>1431</sup> [REDACTED], p. 73 (para. 128); see also [Letter from Greenpeace to RMGC \(undated\), at Exhibit R-589](#) (saying it will “continue” its “campaign”); [Gabriel Canada 2005 Annual Information Form, at Exhibit C-1803](#), p. 28; [Gabriel Canada 2010 Annual Information Form, at Exhibit C-1808](#), p. 25; [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 39 (“NGOs have maintained to date a consistent and continuous public relations campaign opposing the Project. Such activities have included ... public protests”).

documents show that [REDACTED]

[REDACTED]<sup>1432</sup>

1017 These protests culminated in the fall of 2013, as documented in the Counter-Memorial and by Dr. Thomson and Dr. Stoica.<sup>1433</sup> The Claimants recognize that, as a result of the Government's submission of the Roșia Montană Law to Parliament, massive street protests ensued in Bucharest and around the country.<sup>1434</sup> The day after the Government submitted the law to Parliament, students chained themselves to the fence of a government building in Bucharest in protest.<sup>1435</sup> The protests transformed into tens of thousands of people protesting in the early days and throughout the month of September 2013. They lasted for months and the movement became known as the "Romanian autumn."<sup>1436</sup> Contrary to [REDACTED]

<sup>1432</sup> [REDACTED]  
[REDACTED]; [REDACTED]  
[REDACTED]; [REDACTED]; [REDACTED]  
[REDACTED]; [REDACTED]; [REDACTED]  
[REDACTED]; [REDACTED]; [REDACTED]  
[REDACTED]; [REDACTED]; [REDACTED]  
[REDACTED] ( [REDACTED] ).

<sup>1433</sup> In October 2013, RMGC was well aware that it lacked the necessary support for the Project. See *e.g.* [REDACTED], p. 6 (" [REDACTED]  
[REDACTED]  
[REDACTED] "). [Thomson Opinion II](#), p. 59 *et seq.* (paras. 181-184); [Stoica Opinion](#), p. 6 (para. 8); see also *id.* at paras. 79-81 and paras. 94-97 (recording 34 protests prior to Sept. 2013).

<sup>1434</sup> See [Reply](#), p. 103 (para. 201); [REDACTED], p. 100 (para. 182). [REDACTED]  
[REDACTED], p. 98 *et seq.* (paras. 176-180). However, protests started already the day after the Government submitted the law to Parliament, on 28 August 2013. Furthermore, Mr. Ponta asked each member of Parliament to vote according to his or her own conscience. See *supra* para. 512.

<sup>1435</sup> [Counter-Memorial](#), p. 130 (para. 342) (referring to [Video of protesters chaining themselves to government building in Bucharest dated 28 August 2013, at Exhibit R-258](#)).

<sup>1436</sup> [Counter-Memorial](#), p. 130 *et seq.* (paras. 342-356) and p. 354 (Annex III); [Video of Save Roșia Montană protest in Alba Iulia on 1 December 2013, at Exhibit R-640](#); [Video regarding FânFest and Romanian autumn, at Exhibit R-634](#) (showing protests at 1:20-1:45).

testimony, local opponents to the Project protested both locally and traveling to big cities in hopes of being heard.<sup>1437</sup>

- 1018 Contrary to the opinion of Prof. Boutilier (who relies on Wikipedia as his main source of information), the protests were not general anti-Government protests but embodied opposition to both the law and the Project.<sup>1438</sup> Dr. Stoica and Dr. Thomson explain that the protests were the expression of a pro-environmental social movement and an eleven-year-old opposition to the Project.<sup>1439</sup> The invitations to protest referred expressly to both the law and the Project.<sup>1440</sup> The images and slogans from the protests speak for themselves – the protesters brandished signs saying “Save Roșia Montană” and wore red, green, and yellow – the colors of the campaign.<sup>1441</sup> Dr. Thomson describes the protests as evidence that RMGC had failed to secure a stable social license for the Project.<sup>1442</sup>
- 1019 Because of its support of RMGC and the Project, the Government was perceived as granting RMGC preferential treatment and thus as potentially corrupt.<sup>1443</sup> Mr. Ponta was heavily criticized for the submission of the Roșia Montană Law to Parliament.<sup>1444</sup> Dr. Stoica explains how the protest

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<sup>1437</sup> [REDACTED], p. 58 *et seq.* (paras. 117-120); [Jurca](#), p. 44 (para. 191); [Petri](#), p. 3 (paras. 12-13); [Cornea](#), p. 6 (para. 24); [Devian](#), p. 2 (para. 6); [Jeflea](#), p. 3 (paras. 14-15); [Counter-Memorial](#), p. 133 (paras. 350-351); [Video entitled “Roșia Montană exists because of you” \(2013\), at Exhibit R-449; English transcript of video entitled “Roșia Montană exists because of you”, at Exhibit R-450](#); see also [Golgot](#), p. 2, (para. 7).

<sup>1438</sup> [Boutilier](#), p. 53 *et seq.* (paras. 112-115); [Reply](#), p. 99 (para. 189) and p. 101 *et seq.* (paras. 195-196); see also [Stoica Opinion](#), p. 5 *et seq.* (paras. 6, 10-14, 119-123) (describing unreliability of Wikipedia).

<sup>1439</sup> [Stoica Opinion](#), p. 6 (para. 8); see also *id.* at paras. 79-81 and paras. 94-97 (recording 34 protests prior to Sept. 2013) and Annex I; [Thomson Opinion II](#), p. 5 (para. viii); see *id.* at paras. 167, 176, 190-191, and 222.

<sup>1440</sup> See [Stoica Opinion](#), p. 49 *et seq.* (paras. 98-112).

<sup>1441</sup> See [Counter-Memorial](#), p. 131 (para. 344) and Annex III; [Stoica Opinion](#), p. 6 (para. 8); see also *id.* at paras. 113 and 136-147 and Annex III (with photos of the protests).

<sup>1442</sup> [Thomson Opinion II](#), p. 5 (para. viii); see *id.* at paras. 167, 177, 190-191, and 222.

<sup>1443</sup> [Stoica Opinion](#), p. 61 *et seq.* (paras. 116-117); [Pop Opinion](#), p. 36 (paras. 85-86); [Ponta](#), p. 18 (para. 64).

<sup>1444</sup> [Counter-Memorial](#), p. 129 (para. 340); see also [Reply](#), p. 102 *et seq.* (para. 200); “President Bănescu’s Statements about Roșia Montană”, *Evz.Ro*, 2 Sept. 2013, at [Exhibit C-927](#), p. 2;





or any other large project that enjoys a stable social license. Furthermore, as Dr. Thomson explains, the referendum results were of limited value in assessing the level of support for the Project given an inherent ambiguity in the question posed.<sup>1454</sup>

1025 [REDACTED] disputes Dr. Thomson's conclusion and asserts that, in any event, "[REDACTED]"<sup>1455</sup> Her assertion is, however, not credible in light of polls that RMGC conducted in 2012, which suggest that the question posed at the referendum came from RMGC. [REDACTED]

[REDACTED]

[REDACTED]<sup>1456</sup> [REDACTED]

[REDACTED]<sup>1457</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>1458</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>1459</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>1460</sup>

1026 The question posed in the December 2012 referendum therefore did not mention RMGC or the Project, but was rather whether participants

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citizens we represent, neither it is unconditional") and p. 6 (describing community concerns re the Project); [Jurca](#), p. 29 (para. 145).

<sup>1454</sup> [Thomson Opinion I](#), p. 30 (para. 101); [Thomson Opinion II](#), p. 48 *et seq.* (paras.146-155).

<sup>1455</sup> [REDACTED], p. 53 (para. 110).

<sup>1456</sup> See [REDACTED]  
[REDACTED], p. 8.

<sup>1457</sup> [REDACTED]  
[REDACTED], p. 13 ("[REDACTED]").

<sup>1458</sup> [REDACTED], p. 9; see also *id.* at p. 13 ("[REDACTED]  
[REDACTED]"), p. 23 ("[REDACTED]  
[REDACTED]"), and p. 48 ("[REDACTED]").

<sup>1459</sup> [REDACTED], p. 9.

<sup>1460</sup> *Id.* at p. 50.

“agree[d] with recommencing the mining in the Apuseni Mountains and the exploitation in Roșia Montană?”<sup>1461</sup>

1027 [REDACTED] misleadingly characterizes the referendum result as “overwhelmingly in favor” of the Project.<sup>1462</sup> The question posed did not even mention the Project. Moreover, the referendum was invalidated due to an insufficient turn-out; for those who did vote, a substantial portion (35.90%) voted “no.”<sup>1463</sup> RMGC’s efforts to obtain a high turn-out and overwhelmingly favorable results thus failed.

1028 Both at the time and in their submissions, the Claimants blame the low turn-out on the snowfall that day, which allegedly hindered people’s ability to access polling stations.<sup>1464</sup> However, already in the summer of 2012, RMGC was concerned by the risk of low voter turn-out and concluded that it was important to advertise for the referendum and the Project.<sup>1465</sup> It not only heavily promoted the Project and encouraged voter participation,<sup>1466</sup> but also organized transportation for residents to get to polling stations.<sup>1467</sup>

1029 Furthermore, parliamentary elections were taking place the same day. Thus, in the 35 communes in which the referendum took place, residents

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<sup>1461</sup> [Counter-Memorial](#), p. 140 (para. 365).

<sup>1462</sup> [REDACTED], p. 52 (para. 108).

<sup>1463</sup> See [Reply](#), p. 93 *et seq.* (paras. 172-175); [Counter-Memorial](#), p. 140 (para. 365) (referring to [Alba County Electoral Bureau meeting minutes dated 10 December 2012, at Exhibit R-281](#) and [Alba County Electoral Bureau decision dated 11 December 2012, at Exhibit R-282](#)).

<sup>1464</sup> [Reply](#), p. 93 (n. 417); [Gabriel Canada press release dated 12 December 2012, at Exhibit R-655](#); [REDACTED], p. 52 *et seq.* (paras. 108 and 113-115).

<sup>1465</sup> [REDACTED]  
[REDACTED], p. 19 (“[REDACTED]  
[REDACTED]  
[REDACTED]”).

<sup>1466</sup> [Jurca](#), p. 30 (para. 149); [RMGC 2012 TV advertisement no. 1 dated 3 December 2012, at Exhibit C-2658](#); [RMGC 2012 TV advertisement no. 2, at Exhibit C-2659](#); [RMGC TV advertisement no. 3, at Exhibit C-2660](#). RMGC’s advertisements and referendum press coverage generated complaints with the CNA. See *e.g.* [CNA decision dated 6 December 2012, at Exhibit R-656](#) (finding that RMGC ad re referendum is unclear); [Complaint to CNA dated 19 December 2012, at Exhibit R-657](#) (complaining of false report of “Alba county referendum 74% for Rosia Montana” in terms of percentage and object of referendum).

<sup>1467</sup> [Jurca](#), p. 30 (para. 149).







community who are against the project.”<sup>1484</sup> Separately, although they rely on similar findings of Project support in a study by an NGO called the *Munții Apuseni*, Dr. Stoica notes the study’s failure to explain how it was designed, how respondents were selected, how the interviews were conducted, or how the results were verified.<sup>1485</sup>

1039 Dr. Boutilier’s extrapolation of information from four local polls into graph form is unexplained and unreliable.<sup>1486</sup> He does not attempt to explain which precise findings from these polls he relies on and uses as a basis for his own graphs.<sup>1487</sup> Furthermore, apart from the absence of adequate description of how these polls were conducted, their results are unclear. For instance, one of the four documents that Dr. Boutilier relies on is not the poll itself by [REDACTED] but rather an RMGC summary thereof. Pages four to eight present results relating to [REDACTED]<sup>1488</sup> It is thus unknown whether [REDACTED] posed a question relating [REDACTED]. In the absence of such basic information, the charts and graphs in the document are meaningless.

1040 Another example of a poll result in which the question posed was unclear and on which Dr. Boutilier relies is [REDACTED]. He lists this poll as [REDACTED]<sup>1489</sup> However, the question to which Dr. Boutilier presumably refers was “[REDACTED]

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<sup>1484</sup> [Thomson Opinion II](#), p. 37 (paras. 101-102).

<sup>1485</sup> [Stoica Opinion](#), p. 93 *et seq.* (paras. 175-178); [Reply](#), p. 92 (para. 171); [Muntii Apuseni Study dated December 2011, at Exhibit C-2050](#).

<sup>1486</sup> [Boutilier](#), p. 30 *et seq.* (paras. 69-71 and Figure 3-5); see also *id.* at paras. 72-74.

<sup>1487</sup> Dr. Boutilier provides no page numbers or other references to the results relied on in these documents. *Id.*

<sup>1488</sup> [REDACTED], p. 4 *et seq.*; see also [REDACTED].

<sup>1489</sup> [Boutilier](#), p. 33 (para. 75).

██████████<sup>1490</sup> ██████████  
██████████  
██████████.

Mr. Jurcă comments that ██████████ was not perceived to be an independent news source concerning the Project and that this survey consulted people in a broad geographic area before RMGC had prepared its EIA Report.<sup>1491</sup>

1041 Dr. Boutilier also does not explain his reliance on only certain findings within any given poll. For instance, one of the polls on which he relies shows that ██████████

██████████<sup>1492</sup>.

1042 ██████████ claims that certain surveys that RMGC conducted from late 2011 to early 2013 reflect strong local support for the Project.<sup>1493</sup> In support of this statement, ██████████ provides a compilation of interview forms and graphs that presumably interpret the results of interviews.<sup>1494</sup> ██████████, however, provides no explanation as to how these interviews were conducted (door-to-door, by telephone, and/or at events like Miners' Day),

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<sup>1490</sup> ██████████, p. 4.

<sup>1491</sup> [Jurca](#), p. 42 (paras. 187-190).

<sup>1492</sup> ██████████, p. 40 and p. 45; see also ██████████ (██████████); ██████████); ██████████, p. 45 (██████████); see also *id.* at p. 48-49 and 90; ██████████, p. 57 *et seq.* (para. 94).

<sup>1493</sup> ██████████, p. 55 (para. 113, n. 272). ██████████ refers to three documents in support of ██████████ statement that the community support for the Project was strong in 2012. ██████████, p. 52 (para. 107). ██████████. [Open Letter from Future Mining Union to Minister of Environment dated 7 Apr. 2012, at Exhibit C-1490](#). For the second, ██████████, it is not clear who are the signators or how the signatures were collected. S ██████████. The third appears to be ██████████. It is not clear who are the signators or how the signatures were collected. ██████████.

<sup>1494</sup> ██████████; ██████████.

when,<sup>1495</sup> by whom (RMGC employee or neutral third party), what questions were asked, and how interviewees were selected (and the extent to which they included, for instance, RMGC employees). ■■■ makes no mention of people who may have refused to participate. It is also not clear whether the handwriting on the forms is that of the interviewer or interviewee.

1043 As for the graphs which presumably are meant to summarize the results of the interviews, ■■■ provides no explanation as to how these graphs were prepared, by whom, and when. The graphs raise numerous questions. For instance, ■■■

■■■  
■■■ ■■■  
■■■

■■■ It is thus not clear how whoever prepared the graphs (again someone from RMGC or not) interpreted the results from the interviews and for instance distinguished between a “concerned supporter” versus someone with a “neutral position.”<sup>1496</sup>

1044 The Claimants’ and Dr. Boutilier’s selection of popular opinion polls in any event paints an incomplete picture. For instance, a 2001 IFC report describes the difficulties in conducting a survey about the Project: “while 50 percent of people had refused to express an opinion about the mine proposal, this did not mean they supported it. In Romania, people were still intimidated to speak out and at the time, some people were in the process of contesting property rights for land lost during the Ceaușescu period.”<sup>1497</sup>

1045 Some surveys reflect opposition to the Project. Although the Claimants allege that RMGC held a strong social license between 2011 and 2013, a poll coordinated by Dr. Stoica when he was with the Romanian Center for

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<sup>1495</sup> Many of the forms are undated and those that are dated are not provided in chronological order. ■■■ does not provide a monthly breakdown of the surveys.

<sup>1496</sup> ■■■, p. 1.

<sup>1497</sup> [“The Extractive Industries Consultative Review” \(Excerpt\) dated 30 October 2001, at Exhibit R-579](#), p. 22.

Urban and Regional Sociology dated August-September 2012 shows 60% opposition to the Project.<sup>1498</sup>

**8.2.2.8 Prof. Henisz' site visit notes do not support his conclusion that RMGC had acquired a social license for the Project in December 2011**

1046 Prof. Henisz travelled to Roşia Montană in July 2007 and December 2011 and met with stakeholders, including representatives of RMGC, NGOs, and State authorities. Prof. Henisz and the Claimants seek to distinguish the input received during the two trips and argue that Project support had increased to the point where Prof. Henisz felt that, by December 2011, RMGC had secured the social license for the Project.<sup>1499</sup> However, as demonstrated below, Prof. Henisz' notes from both trips reflect substantial opposition to the Project and RMGC.

1047 Prof. Henisz' notes from 2007 reflect the opposition from various viewpoints. [REDACTED]  
[REDACTED] 1500 [REDACTED]  
[REDACTED]  
[REDACTED] 1501 [REDACTED]  
[REDACTED]  
[REDACTED] 1502  
[REDACTED]

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<sup>1498</sup> See [Stoica Opinion](#), p. 36 *et seq.* (paras. 69-71) (discussing [CURS Nationwide Public Opinion Poll \(Sept. 2012\)](#), at [Exhibit R-660](#), p. 3); see also [Extract from Chamber of Deputies website](#), at [Exhibit R-661](#) (describing opinion poll in which 96% of participants voted against the Project); [Alburnus Maior risk study for the Project dated October 2004](#), at [Exhibit R-597](#), p. 15 (also referring to a newspaper poll that found that 92% of its readers polled considered the Project harmful to the environment, a poll by the TV channel "OTV" that found that "94% of the callers expressed their opposition to Gabriel's project," and June 2004, Greenpeace petition of 25,000 signatures).

<sup>1499</sup> [Henisz](#), p. 16 (para. 38); [Reply](#), p. 83 (para. 149).

1500 [REDACTED], p. 16 ([REDACTED]).

1501 *Id.* at p. 20 ([REDACTED]).

1502 *Id.* at p. 66 ([REDACTED]).

██████████ 1503 ██████████

██████████:

• “██████████  
██████████  
██████████” 1504

• “██████████  
██████████  
██████████” 1505

• “██████████  
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██████████” 1506

• “██████████  
██████████  
██████████  
██████████” 1507

• “██████████  
██████████  
██████████  
██████████” 1508

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1503 *Id.* at p. 56 (██████████).

1504 *Id.* at p. 2 (██████████).

1505 *Id.* at p. 10 (██████████).

1506 *Id.* at p. 13 (██████████).

1507 *Id.* at p. 16 (██████████).

1508 *Id.* at p. 17 (██████████); see also *id.* at p. 31 (██████████) (“██████████”).

- “ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ”1509

- “ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ”1510

- “ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ”1511

1048

[REDACTED]  
[REDACTED]:

- “ [REDACTED]  
[REDACTED] ”1512

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1509 *Id.* at p. 27 ([REDACTED]); see also *id.* at p. 29 ([REDACTED]).

1510 *Id.* at p. 30 ([REDACTED]).

1511 [REDACTED], p. 43 *et seq.* ([REDACTED]).

1512 *Id.* at p. 4 ([REDACTED]); see also p. 54 ([REDACTED]) (“ [REDACTED]  
[REDACTED] ”); see also [W. Hennisz, \*Rosia Montană: Political and Social Risk Management in the Land of Dracula\*, The Wharton School, University of Pennsylvania Case 28 \(2009\), at Exhibit C-2432](#), p. 2 (“In a brief sent to the media and investors, it [Alburnus Maior] said that it and its network of environmental groups and NGOs would continue to file legal challenges to the company’s plans. ‘Any investor hoping that risks attached to the project will conveniently vanish should an environmental agreement be granted has deliberately chosen not to understand the issues at play,’ it said.”).

- “ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ”<sup>1513</sup>

- “ [REDACTED] ”<sup>1514</sup>

1049 [REDACTED]  
[REDACTED]<sup>1515</sup>

1050 According to Prof. Henisz, Mr. Aston concluded in 2007 that “[u]ltimately, Roşia Montană shows the failure of a defensive mining company against well-organized opposition.”<sup>1516</sup>

1051 Following his trip to Romania in December 2011, Prof. Henisz asserts that, “[w]hen he left... the opposition seemed resigned to defeat” and he was “confiden[t] that the mine had earned the social license to operate...”<sup>1517</sup>

1052 Not only does Prof. Henisz not explain the basis for his conclusion, but also his statements are unsupported by his notes, which reflect the determination and strength of opponents to the Project:

- [REDACTED]<sup>1518</sup>
- [REDACTED]<sup>1519</sup>

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<sup>1513</sup> [REDACTED], p. 16 ([REDACTED]).

<sup>1514</sup> *Id.* at p. 16 (Interviewee No. 6).

<sup>1515</sup> *Id.* at p. 5 (Interviewee No. 1) (“I think that all they want is to sell to Newmont”).

<sup>1516</sup> [W. Henisz, \*Roşia Montană: Political and Social Risk Management in the Land of Dracula\*, The Wharton School, University of Pennsylvania Case 28 \(2009\), at Exhibit C-2432](#), p. 3.

<sup>1517</sup> [Henisz](#), p. 16 *et seq.* (paras. 38 and 42).

<sup>1518</sup> [REDACTED], p. 3 ([REDACTED]).

<sup>1519</sup> *Id.* at p. 3 ([REDACTED]); see also p. 9 (“[REDACTED]”); see also *id.* at p. 75 (“[REDACTED]”).

- [REDACTED] 1520
  - [REDACTED] 1521
  - [REDACTED] 1522
  - [REDACTED] 1523
  - [REDACTED] 1524
- and,
- [REDACTED] 1525

1053 [REDACTED] 1526

### 8.2.2.9 The Government has not interfered with RMGC's attempts to secure the social license

1054 While opining that RMGC held a social license at all relevant times, Dr. Boutilier criticizes Dr. Thomson for failing to consider “evidence relevant to the government’s role in events and responsibility for the consequences of its conduct that also affect the social license.”<sup>1527</sup> The

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<sup>1520</sup> *Id.* at p. 19 ([REDACTED]); see also *id.* at p. 37 (“[REDACTED]”); *id.* at p. 41 (“[REDACTED]”).

<sup>1521</sup> *Id.* at p. 30 ([REDACTED]).

<sup>1522</sup> *Id.* at p. 38 ([REDACTED]).

<sup>1523</sup> *Id.* at p. 62 ([REDACTED]).

<sup>1524</sup> *Id.* at p. 63 ([REDACTED]).

<sup>1525</sup> *Id.* at p. 81 ([REDACTED]).

<sup>1526</sup> *Id.* at p. 45 ([REDACTED]).

<sup>1527</sup> [Reply](#), p. 86 (para. 159); [Boutilier](#), p. 55 (para. 117(c)).

Claimants argue that “the Government can affect the level of social license” and thus insinuate that, in the event the Tribunal found that RMGC did not have a social license for the Project, the Government was to blame.<sup>1528</sup> They go on to provide as an “example,” the Government’s allegedly unlawful suspension of the EIA Review Process in September 2007.<sup>1529</sup>

1055 As demonstrated in the Counter-Memorial, the Ministry of Environment’s conclusion in September 2007 that the TAC could not reconvene until RMGC resolved the issues with its urban certificate was lawful.<sup>1530</sup> Dr. Boutilier fails to explain how the Ministry’s position allegedly affected RMGC’s ability to secure or the purported strength of its social license, nor does he consider RMGC’s actions leading to that decision.<sup>1531</sup>

1056 Dr. Boutilier omits to refer to the expressions of State support for the Project over the years, including through their support of RMGC during the EIA public consultation phase and the impact of that support on RMGC’s purported social license.<sup>1532</sup>

1057 In any event, the social license is not something a government can control or issue. It is incumbent upon the investor to secure that license through direct engagement with stakeholders.<sup>1533</sup>

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<sup>1528</sup> [Reply](#), p. 86 (para. 158).

<sup>1529</sup> *Id.* at p. 86 (para. 159).

<sup>1530</sup> [Counter-Memorial](#), p. 58 *et seq.* (Section 3.5).

<sup>1531</sup> Dr. Boutilier refers to senior politicians allegedly falsely accusing each other of accepting bribes from RMGC. [Reply](#), p. 86 (para. 159); [Boutilier](#), p. 69 (para. 117(iii)). However, he provides no evidence of such accusations. In any event, such accusations stemmed from the view that State support for RMGC was too strong.

<sup>1532</sup> See e.g. “[The Gold March or Gold for the President](#)”, [rosiamontana.org](#), Sept. 2011, at [Exhibit R-234](#) (referring to support of President Băsescu); [Gabriel Canada press release dated 17 May 2010, at Exhibit R-515](#), p. 1 (describing “positive reactions from members of Government and officials at all levels”); “[Adriean Videanu wants to include Roşia Montană in the next governing program](#)”, [ziare.com](#), 18 Dec. 2009, at [Exhibit R-662](#); [Gabriel Canada press release dated 17 May 2010, at Exhibit R-515](#), p. 2.

<sup>1533</sup> See also [Thomson Opinion I](#), p. 12 (para. 30); [W. J. Henisz, Corporate Diplomacy: Building Reputations and Relationships with External Stakeholders](#) (1st edition, Greenleaf Publishing, 2014), at [Exhibit R-663](#), p. 85 *et seq.*

### 8.3 RMGC Would Not Have Been Able to Obtain the Requisite Surface Rights

- 1058 The Claimants do not contest that it was very unlikely that RMGC would be able to purchase all the surface rights within the Project area.<sup>1534</sup> Therefore, the successful implementation of the Project would have been dependent upon the outcome of an expropriation procedure that RMGC would have unavoidably needed to initiate.
- 1059 In the Counter-Memorial, Romania explained that it has no obligation to expropriate surface rights on behalf of RMGC, unless and until RMGC requests and obtains a declaration of public utility upon recommendation of a preliminary investigation commission established to assess the public utility of the Project.<sup>1535</sup> Moreover, the outcome of this assessment, which requires an examination of all relevant economic, social, environmental and legal criteria, is not a foregone conclusion.<sup>1536</sup> Finally, the expropriation of private property on behalf of RMGC would have been highly controversial and inevitably challenged by litigation, and the likely duration of this process would have reduced the feasibility of the Project.<sup>1537</sup>
- 1060 In their Reply, the Claimants persist in arguing that Romania had an obligation to expropriate surface rights on behalf of RMGC and that it was a mere formality for Romania to override the constitutionally guaranteed right of private property in doing so.<sup>1538</sup> This argument of convenience is radically inconsistent with the Claimants' and RMGC's own longstanding interpretation of the expropriation process. Indeed, Gabriel Canada's regulatory disclosures provide that

“Whilst the existing Mining Law in Romania provides that the holder of mineral rights has the legal right to acquire the surface rights

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<sup>1534</sup> [Counter-Memorial](#), p. 263 (para. 697); [Reply](#), p. 277 *et seq.* (para. 664).

<sup>1535</sup> [Counter-Memorial](#), p. 264 *et seq.* (paras. 699-709).

<sup>1536</sup> *Id.* at p. 269 *et seq.* (paras. 710-711).

<sup>1537</sup> *Id.* at p. 270 (paras. 712-713).

<sup>1538</sup> [Reply](#), p. 271 *et seq.* (paras. 654-662). See [Romanian Constitution, at Exhibit R-55](#), p. 37 (Article 136.5) (“Private property is inviolable in accordance with the organic law.”).

corresponding to those mineral rights upon negotiation and payment of adequate compensation to the owner of the surface rights, such right does not, however, provide exploitation concession holders with the ability to compulsorily acquire directly, nor are there specific legal mechanisms under Romanian law to allow a governmental authority to compulsorily acquire land under a mining concession on behalf of a private company (or having a private company as beneficiary).”<sup>1539</sup>

1061 Similarly, the RRAP, which RMGC incorporated into its EIA Report,<sup>1540</sup> contradicts the Claimants’ current position, stating that

“The Mining Law does not provide for any preferential mechanisms in obtaining access to surface rights, but conforms to generally applicable legal provisions in order to acquire these rights (*i.e.* conclusion of sale-purchase agreements, etc.).”<sup>1541</sup>

1062 Casually disregarding their *volte-face*, the Claimants now argue that the mere issuance of the License virtually guaranteed RMGC’s access to the requisite surface rights, pointing in particular to the zoning restriction on new construction imposed as a result of the issuance of the License.<sup>1542</sup> However, as Profs. Sferdian and Bojin explain, the legal regime imposed on the land following the issuance of the License is not intended to facilitate (let alone guarantee) RMGC’s access to the land, but is rather intended to stabilize the number of permanent structures within the mining perimeter to avoid jeopardizing the license holder’s access to the land therein.<sup>1543</sup> This important distinction balances the private property rights

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<sup>1539</sup> [Gabriel Canada MD&A, Fourth Quarter 2011 dated 14 March 2012, at Exhibit R-315](#), p. 29; see also [Gabriel Canada 2011 Annual Information Form, at Exhibit C-1809](#), p. 9; [Gabriel Canada 2011 Annual Report, at Exhibit R-518](#), p. 29; [Gabriel Canada 2012 Annual Information Form, at Exhibit C-1810](#), p. 22; [Gabriel Canada 2013 Annual Information Form, at Exhibit C-1811](#), p. 27; [Gabriel Canada 2014 Annual Information Form, at Exhibit C-1812](#), p. 34.

<sup>1540</sup> [2006 EIA Report, Ch. 4.8, at Exhibit C-223](#), p. 13 (“However, various provisions of the Romanian law are relevant to RMGC’s Resettlement and Relocation Action Plan, such as: acquisition of land for mining, expropriation for public interest.”).

<sup>1541</sup> [Resettlement and Relocation Action Plan Vol. 1, at Exhibit C-463](#), p. 28.

<sup>1542</sup> [Reply](#), p. 271 *et seq.* (paras. 654-655).

<sup>1543</sup> [Sferdian and Bojin LO](#), p. 5 *et seq.* (paras. 15-17).

of land owners within the mining perimeter with License holder's right to use the lands necessary to carrying out mining activities.

- 1063 Turning to the expropriation process itself, the Claimants incorrectly claim that the "Respondent argues that it is uncertain whether expropriation would be available 'on behalf of a private project.'"<sup>1544</sup> Then, relying once more on Prof. Bîrsan's misinterpretation of Article 6 of the Expropriation Law (despite his continued inability to reconcile this interpretation with the clear provisions of the regulations governing the declaration of public utility in contemplation of expropriation),<sup>1545</sup> the Claimants argue that all mining projects are necessarily of public utility, as purportedly evidenced by the Government's point of view discussing the 2009 amendment to the Mining Law.<sup>1546</sup> Next, the Claimants (and Prof. Bîrsan) attempt to dismiss the administrative procedure that would assess the public utility of the Project as a mere formality intended only to determine whether the works are of national or local interest, and argue that, in any event, this public utility had been established in other instances.<sup>1547</sup>
- 1064 As a preliminary matter, the Respondent did not speak of the "availability" of expropriation but rather stated that "there was no guarantee whatsoever that the State would expropriate [landowners] on behalf of a private project."<sup>1548</sup> Indeed, whether the State would undertake such an expropriation depends on the outcome of the administrative procedure for declaring the public utility of the Project.<sup>1549</sup> However, this determination of public utility is not a foregone conclusion. By establishing that mining works "are of public utility" (as opposed to being "declared of public utility"),<sup>1550</sup> Article 6 merely dispenses those types of projects from the

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<sup>1544</sup> [Reply](#), p. 273 (paras. 657).

<sup>1545</sup> [Counter-Memorial](#), p. 267 (para. 703).

<sup>1546</sup> [Reply](#), p. 273 *et seq.* (paras. 657-660).

<sup>1547</sup> *Id.* at p. 275 *et seq.* (paras. 661-663).

<sup>1548</sup> [Counter-Memorial](#), p. 268 (para. 706).

<sup>1549</sup> [Sferdian and Bojin LO](#), p. 34 *et seq.* (Section IV.1.3).

<sup>1550</sup> *Id.* at p. 29 *et seq.* (para. 124) ("Art. 5 provides that '*public utility shall be declared for works of national and local interest*'. This article sets the general applicable rule that public utility is declared; Art. 6 that follows, lists wide categories of works that "*are of public utility*." This omission of the word "declared" is not at all accidental, as its purpose is to highlight the

requirements of Article 7(3) of the Expropriation Law, which provides that “[f]or any works, other than those provided under Article 6, the **public utility is declared**, for each individual case, **by law**.”<sup>1551</sup> In other words, projects that fall within the categories listed in Article 6 may avail themselves of an administrative process for obtaining a declaration of public utility, rather than requiring legislation to do so.<sup>1552</sup> This accords with RMGC’s understanding of the expropriation process, as the RRAP it submitted states that the Mining Law “specifically refers to geological exploration and exploitation of mineral resources **as potentially being** of public interest.”<sup>1553</sup>

1065 Moreover, the Government’s point of view regarding the 2009 amendment to the Mining Law does not support Prof. Bîrsan’s interpretation of Article 6, as the Government specifically stated that:

“The proposal to declare all ‘mining works for the exploitation of useful mineral substances’ as works of public utility (Art. 10<sup>2</sup>) needs to be re-analyzed, as it is possible that as a matter of fact not all works have this public utility character, and it is advisable to give the possibility to the State to assess this, on a case to case basis, according to the actual circumstances.”<sup>1554</sup>

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need for a declaration *in concreto* of the public utility for each of the works falling in the categories listed at art. 6. It follows that for each work included in the categories listed at art. 6 as being of public utility, the public utility must be specifically declared. In other words, art. 6 of Law 33/1994 neither declares, nor does it recognize the public utility of specific works which would potentially fall within the scope of the categories listed thereunder, but only puts in place the legal framework for declaration of the public utility for such works under an administrative act, and not under a separate law”) (emphasis in original).

<sup>1551</sup> [Law 33/1994 on expropriation, at Exhibit C-1628 \(resubmitted\)](#), p. 2 (Art. 7(3) (emphasis added)).

<sup>1552</sup> [Sferdian and Bojin LO](#), p. 30 (para. 124(ii)) (“art. 6 of Law 33/1994 neither declares, nor does it recognize the public utility of specific works which would potentially fall within the scope of the categories listed thereunder, but only puts in place the legal framework for declaration of the public utility for such works under an administrative act, and not under a separate law.”).

<sup>1553</sup> [Resettlement and Relocation Action Plan Vol. 1, at Exhibit C-463](#), p. 32 (emphasis added).

<sup>1554</sup> [Point of view No. 1547 issued by the Government regarding the draft law on the amendment and supplementation of Mining Law No. 85/2003 dated 16 June 2010, at Exhibit C-2298](#), p. 3. For the reasons provided by Profs. Sferdian and Bojin, Prof. Bîrsan’s attempt to

- 1066 Consistent with this view, the public utility of the Project would only be assessed upon the request of the initiator of the project for which expropriation is required (in this case RMGC), who must specify in the application whether the project is of local or national public interest.<sup>1555</sup> Upon receipt of the request, the preliminary investigation commission is constituted, its composition depending on the type of public interest (national or local) specified in the application.<sup>1556</sup> Therefore, the commission does not determine whether the project is of “national or local” interest, as suggested by the Claimants. Instead, a commission constituted to determine whether works are of public utility in the national interest will only assess whether such national interest exists or not, whereas one constituted for local interest will do the same for its level.<sup>1557</sup>
- 1067 Provided that the project is properly included in the PUG and PUZ, and that all other methods of acquiring the requisite surface rights have been reasonably exhausted, the preliminary investigation commission then assesses the public utility of the project by weighing its economic, social, and ecologic benefits against the economic social, and ecological disadvantages caused by the expropriation.<sup>1558</sup> Profs. Sferdian and Bojin caution that this procedure is not a “mere formality,”<sup>1559</sup> and that its outcome cannot be assumed on the basis of public utility determinations in other contexts and by other authorities.<sup>1560</sup> Nor could any outcome be presumed on the basis of the prior recommendations of other preliminary investigation commissions, since the analysis is necessarily specific to

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explain away this paragraph is unconvincing. [Bîrsan LO II](#), p. 31 (para. 109, n. 99); [Sferdian and Bojin LO](#), p. 32 *et seq.* (paras. 134-139); see also [Gaman II](#), p. 50 (para. 135).

<sup>1555</sup> [Sferdian and Bojin LO](#), p. 35 *et seq.* (paras. 143-146).

<sup>1556</sup> *Id.* at p. 37 *et seq.* (paras. 153-157).

<sup>1557</sup> [Sferdian and Bojin LO](#), p. 37 *et seq.* (para. 157, n. 121) (“For instance, the commission examining an application for the declaration of public utility for works with an alleged national public interest may not propose the declaration of public utility of local interest, even if, pursuant to the preliminary investigation, it reaches the conclusion that the work is of local and not national interest. This is because the assessment of the local interest does not fall within the scope of its powers.”).

<sup>1558</sup> *Id.* at p. 35 *et seq.* (paras. 145-146, 158).

<sup>1559</sup> *Id.* at p. 27 *et seq.* (Section IV.1.1).

<sup>1560</sup> *Id.* at p. 41 *et seq.* (IV.1.6).

each project. This conclusion is consistent with the decision of the *Bilcon* tribunal, which determined that it should not “draw any specific conclusions for the approvability of the Whites Point Project” based on the argument that all comparable projects had been approved.<sup>1561</sup>

1068 The Claimants then attempt to circumvent the requirement for expropriation altogether by relying on the statement of ██████████, who purports to show that RMGC was well placed to acquire the remaining percentage of privately-owned properties that were needed for the Project.<sup>1562</sup> In ██████ view, the relevant private property owners were (i) willing sellers, if only at the right price and in the right circumstances, and (ii) owned properties that would eventually have been expropriated.<sup>1563</sup> Admitting the possibility that expropriations may be required, the Claimants argue that the process would not have blocked the Project, because the acquisition of surface rights is not a requirement for the environmental permit but for the building permit, which could be obtained in stages allowing surface rights to be obtained as needed.<sup>1564</sup> This argument relies on ██████████ contention that the missing surface rights – such as the property owned by Mr. David – did not present insurmountable obstacles, as they would only be required in the latter stages of the Project’s development.<sup>1565</sup>

1069 The Claimants’ arguments are premised on the omission of material facts.

1070 First, there is no doubt RMGC knew that many landowners were refusing to sell their property, ██████████ ██████████. <sup>1566</sup> However, ██████████ ██████████, several of these land owners never indicated that they

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<sup>1561</sup> [Bilcon v. Canada, Award on Damages, 10 January 2019, at Exhibit RLA-198](#), p. 45 (para. 173).

<sup>1562</sup> [Reply](#), p. 277 (paras. 663-664).

<sup>1563</sup> ██████████, p. 61 *et seq.* (paras. 124-139).

<sup>1564</sup> [Reply](#), p. 277 (para. 664).

<sup>1565</sup> *Id.* at p. 277 (para. 664) (citing ██████████, p. 65 (paras. 137-140)).

<sup>1566</sup> ██████████. See also [Jurca](#), p. 47 *et seq.* (paras. 203-221) (██████████).

would sell upon the fulfilment of certain conditions.<sup>1567</sup> Moreover, while it may have been possible for RMGC to acquire building permits in stages, it is unlikely that the Claimants could have secured funding for any stage of the Project prior to the acquisition of all the surface rights within the Project's footprint. As Gabriel Canada disclosed to its investors, it had to "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."<sup>1568</sup> Mr. McCurdy, the Respondent's financing expert, concurs, explaining that it was unlikely that the Project would obtain financing for even an initial phase unless the Claimants could demonstrate that they had secured all surface rights.<sup>1569</sup>

1071 Second, even if the Claimants could have obtained financing prior to securing all surface rights within the Project footprint,<sup>1570</sup> the location of

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<sup>1567</sup> Based on unidentified conversations and without any documentary support, ██████████ speculates that "Eugen David and his family eventually would have sold their properties to RMGC and simply were holding out for more money." ██████████, p. 64 (para. 133). This claim is not credible given that Mr. David is a fervent opponent of the Project, and Alburnus Maior's president. Several other land owners similarly indicated a refusal to sell to RMGC. See [Jeflea](#), p. 2 (paras. 7-8) ("It is a lot of work, but I love my life in Roşia Montană. I have never lived elsewhere and I would never leave Roşia Montana. I told the same thing to the RMGC employees who came and inquired whether we wanted to sell."); [Camarasan](#), p. 3 (para. 7) ("Many years ago, RMGC employees came to our apartment to measure it. I told them that I did not wish to sell my apartment. Even today, many years later, I would not wish to sell the apartment."); [Cornea](#), p. 6 (para. 26) ("Furthermore, I would never sell my home and leave Roşia Montană."); [Devian](#), p. 2 (para. 3) ("Several years ago, RMGC employees came to our house to ask us whether we wanted to sell. My mother, who was the owner of the house at the time, did not want to sell, so we firmly told the RMGC employees that we did not want to sell and that they should not come back."); [Golgot](#), p. 2 (para. 4) ("I recall that RMGC employees came to our door many years ago, to ask me whether I wanted to sell. I very clearly told them that I was not interested and they should not come back with the same question. I would never sell this house. This house is holy to me because it is the house my parents started building, it is the church of our lives."); [Jurca](#), p. 16 (para. 77) ("I did not want to sell any of my properties to RMGC. I did not want to move or leave Roşia Montană because it was my home, it was where I grew up); [Petri](#), p. 4 (para. 15) ("My wife and I, like others, remain opposed to the Project and refuse to ever sell our properties in Roşia Montană."); see also [Jurca](#), p. 47 *et seq.* (paras. 203-221).

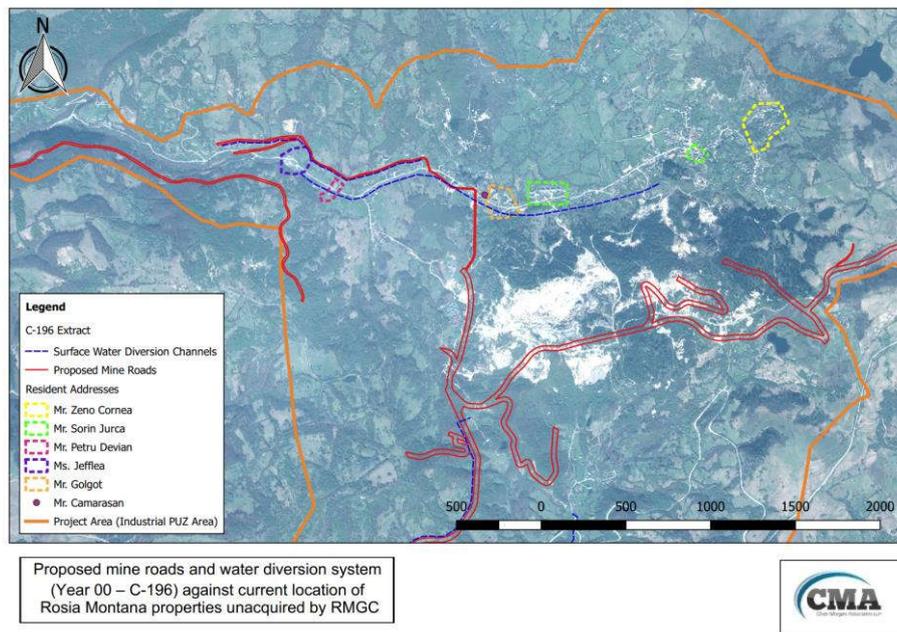
<sup>1568</sup> [Gabriel Canada MD&A, Fourth Quarter 2009](#), at [Exhibit CRA-23](#), p. 33.

<sup>1569</sup> [McCurdy Report](#), p. 14 (para. 35).

<sup>1570</sup> In listing the properties of the David's family, ██████████ admits to their geographical relevance to the Project. Indeed, Eugen David's family owned properties in Orlea which would

the missing surface rights would have prevented even the first phase of the Project's development. As shown in the figure below, no portion of the Project could be constructed without expropriating the properties of Ms. Jeflea, Mr. Cămărășan, Mr. Devian and Mr. Golgoț, as they would be affected by either the surface water diversion channels or the proposed mine roads.

**Figure 1 – Proposed mine roads and water diversion system against current location of Roșia Montană properties unacquired by RMGC<sup>1571</sup>**



1072 Third, even if the State had expropriated the relevant surface rights, there was still a chance RMGC would not obtain them. Leaving aside the outcome of the legal challenges that would have inevitably been raised against these expropriations,

“[u]nder the current legal framework, a distinct and competitive concession bidding procedure has to be conducted in order to grant any rights of use on the real estate that has been compulsorily acquired,

have had to be acquired to start the operation of the Orlea Pit, regardless of the proposed timing of the construction of this pit. [REDACTED], p. 66 (para. 138).

<sup>1571</sup> See Rejoinder Annex.

which triggers both time constraints and uncertainties with regard to the ultimate holder of the compulsorily acquired rights.”<sup>1572</sup>

- 1073 According to Gabriel Canada’s disclosures, even assuming that Romania had expropriated the pertinent surface rights further to a determination of the Project’s public utility, RMGC needed to win a competitive bidding process to acquire them. The Claimants have not proven that RMGC would have prevailed in acquiring these surface rights over other interested parties, including NGOs determined to block the development of the Project.
- 1074 Finally, as to the requirement that the Project be reflected in the PUZ prior to initiating the expropriation procedure, the Claimants argue that “since the Government adopted the 2015 LHM and nominated the Project area as a UNESCO site, the Government has made any urbanism plan that could accommodate the Project impossible in blatant disregard of RMGC’s acquired rights in the License and the existing ADCs,” and that “Respondent thus cannot be heard to claim on this basis that the State’s wrongful acts are not the cause of Gabriel’s losses.”<sup>1573</sup>
- 1075 Even if this were true (which is not the case), the argument is irrelevant. The applicable legal test is whether “in all probability” the Project would have obtained all necessary approvals and would have operated profitably in the absence of any alleged breaches of the BITs. If the adoption of the 2015 LHM and the suspended nomination of the Project area as a UNESCO site were in breach of the BITs, then they must be disregarded in the but-for scenario. Conversely, if these measures do not constitute breaches of the BITs then their effect (if any) on the Project’s ability to

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<sup>1572</sup> [Gabriel Canada 2012 Annual Information Form](#), at [Exhibit C-1810](#), p. 22; see also [Gabriel Canada 2013 Annual Information Form](#), at [Exhibit C-1811](#), p. 27; [Gabriel Canada 2014 Annual Information Form](#), at [Exhibit C-1812](#), p. 34; [Dragos LO II](#), p. 81 (para. 325) (“In order for such land to be transferred into the private property of RMGC, it would need to undergo an administrative procedure provided by law by which it is transferred from the public property of the expropriator into the private property of the State, county or local authorities and only then sold to the Company. Both procedures are subjected to public interest and private interest litigation which may contribute to their length.”).

<sup>1573</sup> [Reply](#), p. 278 (para. 665). Notably, the Claimants do not contest that the expropriation of the required surface rights could not have begun prior to the PUZ being in place. [Counter-Memorial](#), p. 268 (para. 709).

obtain the requisite approvals must be taken into account. In any event, the Claimant's inability to obtain a PUZ is not due to the adoption of the 2015 LHM or the suspended nomination of the Project as a UNESCO site, but is rather due to the reasons discussed in **Section 3.6.1.3** above.

#### **8.4 Even if RMGC Had Obtained the Environmental Permit, It Would Likely Not Have Been Able to Meet the Remaining Permitting Requirements**

- 1076 As discussed above in **Sections 3.3.2** and **3.6.1**, RMGC had not met the requirements for the environmental permit. However, it is indisputable that RMGC would in any event have needed to meet those requirements to obtain a building permit.
- 1077 Therefore, the Claimants cannot establish the causal link between the alleged breach and the alleged injury unless they prove with a sufficient degree of certainty that, in the face of relentless NGO opposition, RMGC would have obtained each and every one of the 30 or so permitting milestones that it needed for a building permit.<sup>1574</sup> Conversely, it is sufficient for the Tribunal to determine that one of these permits or approvals could have been reasonably denied, or that one of them could have been reasonably granted with conditions attached that would render the Project economically unfeasible, for the causal link to be severed.<sup>1575</sup>
- 1078 By way of reminder, these outstanding permits and approvals include (i) approval of the urban plans, (ii) approval of the urban certificate, (iii) compliance with the Water Framework Directive and approval of the Water Management Permit, and (iv) granting of all requisite archeological discharges including for Orlea.
- 1079 In addition, RMGC would have required permits to operate the Project, in particular the environmental permit for the cyanide storage facility at

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<sup>1574</sup> [Gaman II](#), p. 19 (para. 48).

<sup>1575</sup> See [Bilcon v. Canada, Award on Damages, 10 January 2019, at Exhibit RLA-198](#), p. 43 *et seq.* (paras. 168-175).

Zlatna Ampellum.<sup>1576</sup> As Ms. Blackmore explains,<sup>1577</sup> the supply chain for cyanide for the Project would involve the Constanța port, Romanian rail, interim storage facilities Zlatna Ampellum, and road haulage.<sup>1578</sup> Ms. Wilde confirms that an EIA Review Process would be required prior to obtaining a building permit for the facility at Zlatna.<sup>1579</sup> However, the Claimants have made no attempt to prove that this permit would have been granted to a reasonable degree of certainty.

1080 In conclusion, the Claimants cannot establish the causal link between the alleged breaches of the BIT and the alleged injury for which they claim compensation, namely the complete deprivation of the total value of their investment. Furthermore, to the extent that Romania's alleged breaches of the BITs caused damage to the Claimants' investment, such damage would not amount to the complete deprivation of the total value of the Claimants' investment but rather would, at most, amount to consequential delay in constructing the Project.

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<sup>1576</sup> "Zlatna" is the name of the town located 43 km south-east of Roșia Montană where RMGC proposes to bring in cyanide by rail from the port of Constanța, prior to transferring it onto trucks for transport to Roșia Montană. See [CMA - Blackmore Report](#), p. 9 (para. 23). "Zlatna Ampellum" is the name of the industrial area where an unloading and storage facility for cyanide for the Project is proposed to be constructed. *Id.*

<sup>1577</sup> Ms. Cathy Reichardt, who had authored CMA Report Appendix B dated 20 February 2018 (regarding cyanide management issues) is no longer available for personal reasons. Ms. Christine Blackmore, an accredited lead cyanide auditor, has reviewed Ms. Reichardt's report and those of the Claimants' experts, and discusses those reports and other issues related to the Project's envisaged use of cyanide in her report. [CMA - Blackmore Report](#), p. 10 (para. 25).

<sup>1578</sup> [CMA - Blackmore Report](#), p. 20 (para. 78).

<sup>1579</sup> [CMA - Wilde Report II](#), p. 37 *et seq.* (paras. 130-131).

## 9 THE CLAIMANTS HAVE FAILED TO PROVE THE QUANTUM OF THE ALLEGED DAMAGE

1082 The Claimants' case on quantum remains fundamentally flawed, notwithstanding their arguments in the Reply, because it grossly overstates the quantum of the alleged damage (**Section 9.1**). At most, the alleged breaches of the BITs by Romania would have delayed the Project's progress, and the quantum of the Claimants' injury should be assessed accordingly (**Section 9.2**). Finally, both pre-award and post-award interest should be calculated using simple interest at the risk-free rate (**Section 9.3**).

### 9.1 The Claimants Grossly Overstate the Quantum of the Alleged Damage

1083 The analyses performed by the Parties' quantum experts are divorced from reality, given that they reflect both the assumption that the Respondent had breached its obligations under the BIT by expropriating the Claimants' investment, and the assumption that there is a causal link between this alleged breach and the Claimants' alleged injury.<sup>1580</sup> In particular, by assuming causation, these analyses necessarily disregard the impact of many of the issues listed in **Section 8** above, which would have undoubtedly led an informed arm's length buyer to heavily discount the value of the Project Rights. In other words, the assumption of causation requires the further assumption that an informed arm's length buyer, as at the Valuation Date, would have determined that the Project was at least feasible, despite the numerous obstacles to its implementation.

1084 However, the Claimants' case on quantum disregards the fact that, even when assuming causation, a hypothetical buyer would not have ignored that the Project faced significant, albeit surmountable, obstacles. Instead, the Claimants persist in alleging that the quantum of their injury is equal to the market capitalization of Gabriel Canada as at the Valuation Date –

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<sup>1580</sup> [ILC Articles, at Exhibit RLA-33](#), p. 91 (Article 31.1) (The responsible State is under an obligation to make full reparation for the injury **caused** by the internationally wrongful act) (emphasis added); see also *id.* at p. 92 *et seq.* (para. 10) ("Thus, 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.").

despite the fact that the stock price was inflated by a gold bubble and distorted by [REDACTED].

1085 As noted above, the Claimants' quantification of their alleged damage is fundamentally flawed, because the market value of Gabriel Canada as of the alleged Valuation Date is not a valid proxy for the quantum of such damage (**Section 9.1.1**). Moreover, the Claimants grossly overstate the fair market value of Gabriel Canada as of the alleged Valuation Date (**Section 9.1.2**). The Respondent's expert, Dr. Burrows, confirms his finding that any valuation of the Project Rights is inherently speculative, since the Project was many years from production, and has no historical record of revenues or profits.<sup>1581</sup> Notwithstanding these critical shortcomings, by using "best-case" assumptions, and by setting aside the significant discounts that would be applied by an informed buyer, Dr. Burrows provides an independent assessment of the quantum of the Claimants' alleged injury (**Section 9.1.3**).

#### **9.1.1 The Claimants Do Not Assess the Quantum of the Alleged Damage**

1086 Compass Lexecon primarily relies on Gabriel Canada's market capitalization as at the Valuation Date to assess the quantum of the Claimants' alleged damage.<sup>1582</sup> However, the market value of Gabriel Canada is distinct from the value of the Claimants' direct and indirect shareholding in RMGC (plus contract rights and loans) (**Section 9.1.1.1**), and even if there were no such distinction, the Claimants' injury does not amount to the entire market value of the Claimants' shareholding in RMGC (plus contract rights and loans) (**Section 9.1.1.2**).

##### **9.1.1.1 The Alleged Market Value of Gabriel Canada Is Irrelevant**

1087 The Claimants' case on quantum is premised on the argument that the market capitalization of Gabriel Canada is an accurate proxy for the injury that they purportedly incurred as a result of Romania's alleged

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<sup>1581</sup> [CRA Report II](#), p. 12 (para. 27).

<sup>1582</sup> [CL Report II](#), p. 12 *et seq.* (Section II).

expropriation of their investments.<sup>1583</sup> In the Memorial, the Claimants define these allegedly expropriated investments as the “Project Rights” which they vaguely describe as the “the lost fair market value of the rights to develop the Roşia Montană Project and the Bucium Projects.”<sup>1584</sup> However, when read together with their case on jurisdiction and expropriation, the Claimants are specifically claiming for (i) the loss in value of their direct and indirect shareholding in RMGC,<sup>1585</sup> and (ii) the loss in value of their directly and indirectly held contract rights under RMGC’s Articles of Association and rights under loan agreements extended to RMGC and to its other shareholders in connection with RMGC’s recapitalizations.<sup>1586</sup>

1088 As Dr. Burrows points out in his first expert report, Gabriel Canada’s market capitalization is distinguishable from these alleged losses, as the former includes *inter alia* Gabriel Canada’s moveable and immovable property and “the value investors may have placed on Gabriel Canada’s management, its strategic position in Romania, and its backing by Newmont.”<sup>1587</sup>

1089 In response, the Claimants do not contest that Gabriel Canada’s value incorporates these additional elements, but rather rely on Compass Lexecon to argue that their value is “immaterial.”<sup>1588</sup> However, Compass Lexecon concedes that “Gabriel Canada’s moveable and immovable property (as measured by its property, plant and equipment) amounted

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<sup>1583</sup> [Reply](#), p. 298 (para. 705) (“Gabriel Canada’s market capitalization as of the Valuation Date therefore is the most reliable measure of the Project Rights, from a minority shareholder’s perspective.”).

<sup>1584</sup> *Id.* at p. 281 (para. 673).

<sup>1585</sup> *Id.* at p. 149 (para. 327) (“There should be no confusion, however, that the loss that Gabriel Canada incurred is the loss of the value of the shares it has held in its subsidiaries, including Gabriel Jersey, which it held indirectly and continuously from 1997 to date.”).

<sup>1586</sup> *Id.* at p. 262 (para. 630) (“Likewise, Gabriel Jersey’s contract rights associated with RMGC were indirectly expropriated, as the value of those rights depended entirely on RMGC’s project development rights.”).

<sup>1587</sup> [CRA Report I](#), p. 11 *et seq.* (para. 26). Another element identified by Dr. Burrows were the value of the value of the Băișoara property in Romania. *Id.*

<sup>1588</sup> [Reply](#), p. 284 (para. 681) (citing [CL Report II](#), p. 16 *et seq.* (paras. 17-22)).

US\$ 53.2 million as of June 2011.”<sup>1589</sup> While Compass Lexecon argues that USD 50.4 million of the USD 53.2 million “represents long lead-time equipment related to grinding area systems and crusher facilities directly related to the mineral properties required to develop the Project Rights”, it does not contest that this value was in addition to that of the Project Rights.<sup>1590</sup>

1090 Moreover, Compass Lexecon argues that the value of Gabriel Canada’s management, its strategic position in Romania and its backing by Newmont “is entirely dependent on the Project Rights and in particular, on the Roşia Montană Project.”<sup>1591</sup> That is beside the point. Indeed, Dr. Burrows notes that, regardless of whether this is true, this value “is separate from the value of the Project itself. It is a legal issue whether such potential indirect losses are compensable in an expropriation scenario.”<sup>1592</sup>

1091 Therefore, while Compass Lexecon argues that the value placed by investors on Gabriel Canada’s moveable and immovable property, management, its strategic position in Romania and its backing by Newmont is “entirely related to” or “entirely dependent on” the Project Rights, it does not contest that the value placed on these elements is in addition to the value of the Project Rights. Accordingly, Gabriel Canada’s market capitalization is not valid proxy for the value of the Project Rights.

#### **9.1.1.2 The Quantum of the Claimants’ Alleged Damage Is Less than the Entire Market Value of Their Shareholding in RMGC**

1092 As explained in the Respondent’s Counter-Memorial, the quantum of the Claimants’ injury cannot equal the value of their shareholding in RMGC because the assets retained by RMGC still have some value.<sup>1593</sup> In their

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<sup>1589</sup> [CL Report II](#), p. 17 (para. 19).

<sup>1590</sup> [CL Report II](#), p. 17 (para. 19).

<sup>1591</sup> *Id.* at p. 18 (para. 21).

<sup>1592</sup> [CRA Report II](#), p. 19 (para. 48). The Claimants have not claimed for, nor quantified, any consequential damages separate from the value of the Project Rights.

<sup>1593</sup> [Counter-Memorial](#), p. 275 *et seq.* (Section 11.1.1.2).

Reply, the Claimants fail to demonstrate that RMGC has no value, merely arguing that the assets still RMGC's possession "were acquired for purposes of implementing the Projects and have no material value other than in connection with the Project Rights."<sup>1594</sup> The Claimants provide no support whatsoever for this alleged lack of value, meaning that their case on quantum is premised on their own unproven allegation. Indeed, Compass Lexecon was "instructed to assume that Claimants have effectively lost the Project Rights"<sup>1595</sup> and provides no quantification of the value of RMGC's remaining assets. In other words, after being instructed to assume that the Claimants' direct and indirect shareholding in RMGC was worthless, Compass Lexecon then proceeded to quantify the Claimants' alleged damages based on this false assumption.

- 1093 Even assuming that Romania permanently frustrated RMGC's ability to develop the Project, it does not follow that RMGC and all of its assets are devoid of value. The Claimants' unsupported argument that the assets held by RMGC – including the License, real estate, equipment, extensive geological and mining data, engineering studies, and other technical data – were entirely devoid of value after the alleged "political rejection of the Project," does not withstand scrutiny.
- 1094 In his second expert report, Dr. Burrows explains that any estimate of the Claimants' alleged damage should take into account the continuing value of RMGC.<sup>1596</sup> He notes that RMGC estimated in 2013 that it had spent USD 105 million on the purchase of property and USD 55 million on mining equipment.<sup>1597</sup> More to the point, RMGC's balance sheet in the Second Quarter of 2011 identified USD 337,758,601 in non-current assets,

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<sup>1594</sup> [Reply](#), p. 285 (para. 682).

<sup>1595</sup> [CL Report II](#), p. 9 (para. 7, n. 11). This instruction exposes the circular nature of the Claimants' claim of expropriation, as there is no evidence that the Projects Rights have lost all value.

<sup>1596</sup> [CRA Report II](#), p. 102 *et seq.* (Section X).

<sup>1597</sup> *Id.* at p. 102 *et seq.* (para. 217) (citing [Rosia Montană Gold Corporation, "Rosia Montană Mining Project - Presentation for the Renegotiation Meeting" dated 14 June 2013, at Exhibit CRA-184](#), p. 14).

and as of the end of 2014 – *i.e.* more than a year after the alleged expropriation – RMGC had not impaired the value of these assets.<sup>1598</sup>

“This confirms that all of RMGC’s value was still intact as of that date, including the Project Rights, the physical assets, the real estate and surface rights it had acquired, and all of the intellectual property in the form of exploration records, engineering studies, and other information that it had collected on the properties over time.

Gabriel can sell its shares in RMGC, and it would be able to recover its share of the value of RMGC’s assets. Alternatively, if RMGC elects not to continue to try to develop the Projects, RMGC can sell its rights to other parties who are interested in developing the Properties. There is no reason that RMGC or Gabriel would not be able to extract a substantial percentage of the value of the Projects in such a sale.”<sup>1599</sup>

1095 In summary, neither the Claimants nor Compass Lexecon have accounted for the significant value of RMGC’s remaining assets (and therefore of RMGC’s shares), and so persist in overstating the quantum of the Claimants’ alleged injury by claiming the entire value of Gabriel Canada’s market capitalization as at the Valuation Date.

### 9.1.2 Compass Lexecon Overstates the Fair Market Value of Gabriel Canada

1096 Leaving aside that Gabriel Canada’s market capitalization is not a valid proxy for the Claimants’ alleged injury, the Respondent previously demonstrated that this amount far exceeded what an informed arm’s length buyer would have been willing to pay for the Project Rights as at the Valuation Date.<sup>1600</sup> In particular, [REDACTED], and a speculative gold bubble was inflating the value of Gabriel Canada’s share

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<sup>1598</sup> *Id.* at p. 102 *et seq.* (paras. 217-219). As discussed in Section 7.2.1.1 above, Gabriel Canada similarly did not record any significant impair of its consolidated assets until months after the filing for the Request for Arbitration.

<sup>1599</sup> [CRA Report II](#), p. 103 *et seq.* (paras. 219-220).

<sup>1600</sup> [Counter-Memorial](#), p. 276 *et seq.* (Section 11.1.2).

price, neither of which would have affected a buyer that had conducted due diligence.

1097 In such circumstances, use of the market capitalization method is not appropriate. Although the Claimants argue that “Tribunals in investment treaty cases also have found that the stock market capitalization measure is the most reliable measure of damage”,<sup>1601</sup> use of this methodology in investment arbitration is exceedingly rare. Indeed, the Claimants only cite one investment arbitration case in which such a methodology was applied.<sup>1602</sup> In contrast, the market capitalization method was rejected in numerous cases.<sup>1603</sup> While the reasons for these rejections vary, in several cases tribunals set aside this method because of factors affecting the relevant share price which would have made the market capitalization an

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<sup>1601</sup> [Reply](#), p. 283 (para. 678).

<sup>1602</sup> *Id.* at p. 283 *et seq.* (para. 678) (citing [Crystallex v. Venezuela, Award, 4 April 2016, at Exhibit CLA-62](#)). In *Crystallex*, the tribunal applied the stock market methodology in circumstances in which there was no remaining value in *Crystallex*, since its sole asset (the contract with the *Corporación Venezolana de Guayana* in relation to the Las Cristinas project) was extinguished. See [Crystallex v. Venezuela, Award, 4 April 2016, at Exhibit CLA-62](#), p. 244, (para. 890). Thus, it is distinguishable from the present case, where the Claimants’ assets still exist and retain value. The Claimants also cite to *CMS Gas* for the statement that “assessing damages for a claimant whose shares are publicly traded ‘is a fairly easy one, since the price of the shares is determined under conditions meeting the [fair market value] definition.’” [Reply](#), p. 284 (para. 679) (citing [CMS Gas Transmission Company v. Argentine Republic, Award, ICSID Case No. ARB/01/8, 12 May 2005, at Exhibit CLA-176](#), p. 116 (para. 408)). However, this case is also inapposite, as the Tribunal did not apply the stock market methodology to calculate the damage but relied on the DCF approach instead (See [CMS v. Argentina, Award, 12 May 2005, at Exhibit CLA-176](#), p. 120 (para. 416)). Moreover, the tribunal’s abstract statement also presupposes that the damages incurred by the claimant are equal to the entire publicly traded value of the claimant, which, as demonstrated above, is not the case here. Two other cases cited by the Claimants, *INA Corp v. Iran and Khosrowshahi v. Iran*, do not pertain to using the market capitalization of the investor as a proxy for determining the value of the expropriated asset. [Reply](#), p. 284 (para. 679, n. 1309) (citing [INA Corporation v. Islamic Republic of Iran, Award No. 184-161-1, Case No. 161, 12 August 1985, at Exhibit CLA-180](#) and [Faith Lita Khosrowshahi et al. v. Islamic Republic of Iran, Award No. 558-178-2, Case No. 178, 30 June 1994, at Exhibit CLA-265](#))).

<sup>1603</sup> See e.g. [Khan Resources Inc. et al. v. Government of Mongolia, Award on the Merits, PCA Case No. 2011-09, 2 March 2015, at Exhibit CLA-77](#); [Gold Reserve v. Venezuela, Award, 22 September 2014, at Exhibit CLA-81](#); [Copper Mesa v. Ecuador, Award, 15 March 2016, at Exhibit RLA-54](#); [Rusoro v. Venezuela, Award, 22 August 2016, at Exhibit CLA-149](#).

inaccurate reflection of the value of the expropriated investment.<sup>1604</sup> As demonstrated in the Respondent's Counter-Memorial and as explained further below, this is precisely the situation in this case.

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1099 [REDACTED]

1100 [REDACTED]

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<sup>1604</sup> See e.g. [Khan v. Mongolia, Award on the Merits, 2 March 2015, at Exhibit CLA-77](#), p. 104 *et seq.* (paras. 400-409) (rejecting the market capitalization method after examining whether “there were other factors affecting the share price of Khan Canada as at the Valuation Date that would make it an inaccurate reflection of the value of the Dornod Project” and determining that as of that date “the market price of Khan did not reflect the intrinsic value of the Dornod Project.”).

<sup>1605</sup> [Reply](#), p. 285 *et seq.* (paras. 683-696).

<sup>1606</sup> *Id.* at p. 285 (para. 684) (citing [REDACTED] p. 37 *et seq.* (paras. 68-69)).

<sup>1607</sup> See above Section 3.3.5, Section 3.4.1, Section 3.4.2, Section 3.5.3, Section 3.6.1.11, Section 7.1.1, Section 7.1.2, Section 7.2.1.1, and Section 7.2.1.2.

[REDACTED]

1101 As discussed below, and notwithstanding Mr. Henry's arguments to the contrary, the evidence shows that Gabriel Canada [REDACTED] [REDACTED] (Section 9.1.2.1) [REDACTED] (Section 9.1.2.2). Separately, Gabriel Canada's share price was inflated by a speculative bubble in the price of gold (Section 9.1.2.3). Furthermore, Compass Lexecon's valuation further compounds these distortions by adding an unjustified acquisition premium to Gabriel Canada's market capitalization (Section 9.1.2.4). Finally, Compass Lexecon's alternative valuations are deficient in many respects, rendering them as unreliable as Gabriel Canada's market capitalization (Section 9.1.2.5).

9.1.2.1 [REDACTED]  
[REDACTED]  
[REDACTED]

1102 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>1608</sup> [Reply](#), p. 287 *et seq.* (para. 688).

[REDACTED]  
[REDACTED] 1609

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[REDACTED]  
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[REDACTED]  
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[REDACTED]  
[REDACTED]

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<sup>1609</sup> *Id.*

<sup>1610</sup> [Reply](#), p. 289 (para. 690).

<sup>1611</sup> [Counter-Memorial](#), p. 279 (para. 733).

<sup>1612</sup> *Id.* at p. 280 *et seq.* (paras. 736-740).

[REDACTED]

1106 [REDACTED]

1107 [REDACTED]

1108 [REDACTED]

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<sup>1613</sup> [Reply](#), p. 289 *et seq.* (para. 690).

<sup>1614</sup> *Id.*

<sup>1615</sup> [Counter-Memorial](#), p. 288 (para. 754).

<sup>1616</sup> *Id.* at p. 291 (para. 759). [REDACTED]

<sup>1617</sup> [REDACTED]

[REDACTED] See [Counter-Memorial](#), p. 280 *et seq.* (paras. 736-740).

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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1618 [Gabriel Canada MD&A, First Quarter 2011, at Exhibit R-311](#), p. 6.

1619 [Counter-Memorial](#), p. 282 *et seq.* (paras. 741-744).

1620 [Reply](#), p. 290 *et seq.* (para. 690).

1621 [Jeflea](#), p. 2 (paras. 7-8); [Camarasan](#), p. 3 (para. 7); [Cornea](#), p. 6 (para. 26); [Devian](#), p. 2 (para. 3); [Golgot](#), p. 2 (para. 4); [Jurca](#), p. 16 (para. 77); [Petri](#), p. 4 (para. 15).

[REDACTED]

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[REDACTED]

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<sup>1622</sup> See [Counter-Memorial](#), p. 283 (para. 742).

<sup>1623</sup> [Gabriel Canada 2010 Annual Information Form, at Exhibit C-1808](#), p. 18. Similarly, the Resettlement and Relocation Action Plan that was submitted as part of RMGC's EIA Report states in relevant part that the "Mining Law does not provide for any preferential mechanisms in obtaining access to surface rights, but conforms to generally applicable legal provisions in order to acquire these rights (*i.e.* conclusion of sale-purchase agreements, etc.)." [Resettlement and Relocation Action Plan Vol. 1, at Exhibit C-463](#), p. 28.

<sup>1624</sup> [Sferdian and Bojin LO](#), p. 50 (para. 209) ("Considering the terms that the law sets out as well as the estimated length of the court proceedings, we conclude that in the best-case scenario the expropriation process would last approximately one year (and only assuming no opposition from land owners), whereas the more realistic scenario points to **five years or even more** for the entire expropriation procedure") (emphasis added); *id.* at p. 56 (para. 231) ("**The more realistic scenario involves a period longer than five years** (75 days for the stage declaring the public utility, 270 days for the administrative stage, one year and a half for the administrative litigation procedure and three years for the court proceedings). It should be noted that these five years do not include either the period required for more meetings of the commission tasked with the preliminary investigation, nor the period needed to rework the expropriation procedure in the administrative stage or any of the likely delays in the court proceedings beyond the period of one and a half years (for administrative litigations) and of three years (for the court proceedings pertaining to expropriation). Should these likely events occur, **the total length of the procedure could last six or seven years**") (emphasis added).

[REDACTED]

1113 [REDACTED]

[REDACTED]

1114 [REDACTED]

[REDACTED]

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[REDACTED]

1116 [REDACTED]

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<sup>1625</sup> [Sferdian and Bojin LO](#), p. 41 (para. 169).

<sup>1626</sup> [CRA Report II](#), p. 21 (para. 52).

<sup>1627</sup> [Counter-Memorial](#), p. 284 *et seq.* (paras. 745-748).

<sup>1628</sup> [Reply](#), p. 291 (para. 690). [REDACTED]  
[REDACTED]  
[REDACTED], p. 50  
*et seq.* (para. 95).

1117 Specifically, Prof. Schiau argues that, in his opinion, the authorities could not require the *in situ* preservation of any archeological structures or artifacts found during the construction of the Project because the areas envisaged by the Chance Find Protocol were already archeologically discharged.<sup>1629</sup> The flaw in Prof. Schiau's argument is that ADCs are issued on the basis of the information that details the known state of the archeology in the area to be discharged. If a previously unknown archeological discovery is made, such that the basis upon which the ADC was issued is no longer accurate, then the ADC would not be applicable to this new find, whose status would have to be separately determined by the authorities. It is in fact this very process that the Chance Find Protocol aims to duplicate:

“Based on the nature of such discoveries, on the assessment conducted by the independent archaeological surveillance team, and on the decision of the Ministry of Culture ... and of the County Directorate for Culture, Religions and Cultural Heritage Alba, the Operations Manager may decide to suspend the mining activities on a certain site.”<sup>1630</sup>

1118 According to Prof. Schiau's reasoning, if a priceless archeological site were discovered during the construction of the Project (*e.g.* the fabled “Temple of Apollo” referred to during the TAC meeting or, more realistically, the Roman castrum mentioned in the 1995 Archaeological Repertoire),<sup>1631</sup> RMGC's obligations would be limited to recording, duplicating or even relocating the find, but it could ultimately destroy this structure and proceed with construction. This counterintuitive result is obviously wrong.

1119 Indeed, contrary to what Prof. Schiau and Messrs. Gligor and Jennings claim, *in situ* preservation was specifically contemplated by the Chance Find Protocol. Dr. Cloughton explains that while the Chance Find Protocol “was tailored primarily to address those finds that are most likely to be

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<sup>1629</sup> [Schiau LO II](#), p. 88 *et seq.* (paras. 305-307).

<sup>1630</sup> See [2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Protocol regarding Chance Finds, MNIR, updated July 2010, at Exhibit C-388.03](#), p. 59.

<sup>1631</sup> [Schiau LO I](#), p. 16 (para. 55).

made, *i.e.* artefacts, movable items that can easily be preserved by record,” it also expressly provides for determining the approach to be applied in case of chance finds based on the nature of their significance.<sup>1632</sup> Specifically, the protocol provides that archeological relics are to be surveyed and subjected to expert investigation, and expressly contemplates “the *in situ* conservation of some finds, as necessary – depending on the characteristics, state of preservation, significance and importance.”<sup>1633</sup>

1120 Moreover, Messrs. Gligor and Jennings understate the potential for delay even in the absence of a chance find requiring *in situ* conservation. Dr. Cloughton explains that the likelihood of chance finds was material, as the potential for unexpected discoveries was high in the Orlea areas.<sup>1634</sup> Mr. Gligor argues that the potential for delay was not material because “a temporary stop in one location would not necessarily preclude continued work in other areas.”<sup>1635</sup> However, this argument ignores the possibility of work stoppage in an area in the construction schedule’s critical path.

1121 [REDACTED]

[REDACTED]

1122 [REDACTED]

[REDACTED]

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<sup>1632</sup> [CMA - Cloughton Report II](#), p. 28 (para. 96).

<sup>1633</sup> *Id.* at p. 29 (para. 97).

<sup>1634</sup> *Id.* at p. 24 (para. 85), p. 26 *et seq.* (paras. 91-93).

<sup>1635</sup> [Gligor II](#), p. 25 (para. 62).

<sup>1636</sup> [Counter-Memorial](#), p. 285 *et seq.* (paras. 749-753).

- [REDACTED]
- [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

1123 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

1124 [REDACTED]  
[REDACTED]

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<sup>1637</sup> [Gabriel Canada MD&A, Fourth Quarter 2010, at Exhibit R-307](#), p. 7; [Gabriel Canada MD&A, First Quarter 2011, at Exhibit R-311](#), p. 6.  
<sup>1638</sup> *Id.*  
<sup>1639</sup> [Gabriel Canada MD&A, Fourth Quarter 2010, at Exhibit R-307](#), p. 7; [Gabriel Canada MD&A, First Quarter 2011, at Exhibit R-311](#), p. 6.  
<sup>1640</sup> [REDACTED], p. 52 *et seq.* (para. 99).

1125 [REDACTED]

1126 [REDACTED]

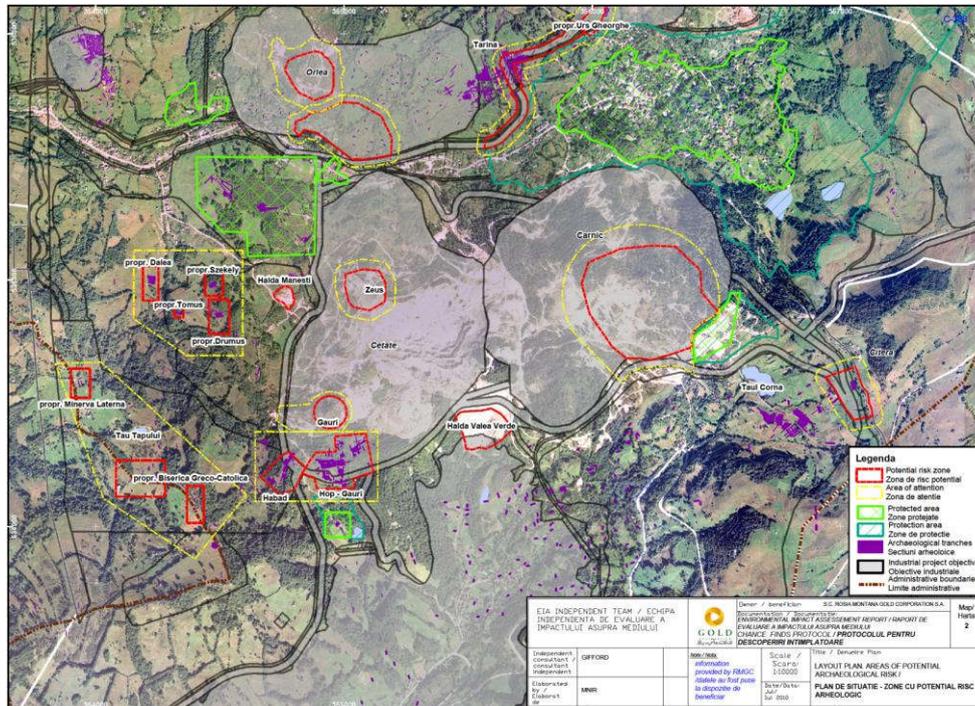
1127 [REDACTED]

1128 [REDACTED] Even in the absence of chance finds, the Chance Find Protocol imposed a supervisory regime during construction of the Project. Dr. Claughton explains that:

“It should also be noted that the Chance Finds Protocol covers the entire area within the footprint of the ... Project, including all the areas subject to ADCs.... That would include any area where the ground is broken for development work, ... for example the area of the processing plant and the areas to be stripped of topsoil to be stored for use in the reinstatement of ground post-mining. ... The removal of top soil in this case would have to be carried out to archaeological standards ..., which I would expect be done by using plain, non-toothed excavator buckets to allow the supervising archaeologists to examine in detail any traces of sub-surface archaeological features. This would entail using methods not generally used in construction and ground clearance work and working to a pace defined by the archaeologists carrying out the watching brief, with a consequent

impact on human resources (notably in terms of available archaeologists), costs and time.”<sup>1641</sup>

**Figure 2 – Map annexed to the Chance Find Protocol delineating the zones of archaeological risk<sup>1642</sup>**



<sup>1641</sup> [CMA - Claughton Report II](#), p. 25 (para. 88); see also [2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Protocol regarding Chance Finds, MNIR, updated July 2010, at Exhibit C-388.03](#), p. 38 (“Project development activities that may have an impact on potential unknown archaeological resources relate to quarry operation, road and other industrial infrastructure building works (dams, process plant), topsoil stripping. Topsoil stripping required for the preparation of the waste rock landfills, TMF, and other industrial facilities, will be based on specific archaeological surveillance and rescue research procedures (of the save by study type) aiming to ensure adequate management of such issues, so as to prevent any loss or destruction of archaeological relics potentially unknown to date.”).

<sup>1642</sup> See Rejoinder Annex; [2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Protocol regarding Chance Finds, MNIR, updated July 2010, at Exhibit C-388.03](#), p. 132.

1129 As shown in Figure 2 above, the Chance Find Protocol designates large  
portions of the Project's footprint as "potential risk zones", in which works  
are to be done under strict archaeological supervision.<sup>1643</sup>

1130 [REDACTED]

1131 [REDACTED]

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<sup>1643</sup> [CMA - Cloughton Report II](#), p. 30 (para. 100). See [2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: 3. Protocol regarding Chance Finds](#), MNIR, updated July 2010, at [Exhibit C-388.03](#), p. 34 ("in all the potential chance find risk areas, the necessary measures for the rescue of the archaeological heritage will be exclusively adopted based on the technical expert report of the archaeologist/research team of the independent archaeologist team including representatives of various professional institutions participating in the implementation of the PNC - AM."). The map also designate buffer "zones of attention" around the "potential risk zones" subject to a lower standard of supervision.

<sup>1644</sup> [REDACTED]

<sup>1645</sup> [CMA - Blackmore Report](#), p. 32 *et seq.* (Section 3.4); [CMA - Wilde Report II](#), p. 37 *et seq.* (Section 4.1 and 4.2).

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

1132 [REDACTED]

1133 [REDACTED]

[REDACTED]

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<sup>1646</sup> [CMA - Wilde Report II](#), p. 38 *et seq.* (para. 134). [REDACTED]  
[REDACTED] [CMA - Blackmore Report](#),  
p. 32 (para. 136).

<sup>1647</sup> [CMA - Wilde Report II](#), p. 39 (paras. 134-135).

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

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<sup>1648</sup> [CRA Report II](#), p. 24 (para. 59) (emphasis in original).

<sup>1649</sup> [Counter-Memorial](#), p. 288 *et seq.* (paras. 754-760).

<sup>1650</sup> *Id.* at p. 291 *et seq.* (para. 761).

<sup>1651</sup> [Reply](#), p. 293 (para. 693) (citing [Cooper](#), p. 9 (para. 26)).

<sup>1652</sup> *Id.* at p. 294 (para. 695).

[REDACTED]. [CRA Report I](#), p. 17 *et seq.* (para. 38).

[REDACTED]

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[REDACTED]

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[REDACTED]

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<sup>1653</sup> [CRA Report II](#), p. 24 (para. 60) (emphasis in original).  
<sup>1654</sup> [CL Report II](#), p. 19 (para. 25).  
<sup>1655</sup> [CRA Report II](#), p. 25 (para. 63).

9.1.2.2

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[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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<sup>1656</sup> [Counter-Memorial](#), p. 292 *et seq.* (Section 11.1.2.2);

<sup>1657</sup> [Reply](#), p. 292 (para. 690).

<sup>1658</sup> [CRA Report II](#), p. 26 *et seq.* (Section III.C).

<sup>1659</sup> *Id.* at p. 29 (para. 71).

<sup>1660</sup> *Id.* at p. 29 (paras. 71-72).

[REDACTED]

[REDACTED]

1142 [REDACTED]

1143 [REDACTED]

1144 [REDACTED]

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<sup>1661</sup> [CL Report II](#), p. 25 (para. 33).

<sup>1662</sup> [CRA Report II](#), p. 30 *et seq.* (para. 74).

<sup>1663</sup> [Reply](#), p. 293 (para. 691).

[REDACTED]

### 9.1.2.3 A Speculative Bubble in the Price of Gold Was Inflating Gabriel Canada's Share Price

1145 In his first expert report, Dr. Burrows demonstrated that, as at the Valuation Date, Gabriel Canada's share price was inflated by a speculative gold bubble.<sup>1664</sup> The price of gold being near its all-time high, Dr. Burrows concluded that "Gabriel Canada's public market capitalization was far above what large mining companies would pay for the assets owned by Gabriel Canada."<sup>1665</sup>

1146 In their Reply, the Claimants argue that it's implausible that the share price of Gabriel Resources was driven by naïve investors, that sophisticated companies evaluating Gabriel Canada as at the Valuation Date would not have been deterred by this speculative bubble, and by the fact that Gabriel Canada's sophisticated mining industry investors did not sell their shareholding in the company during this period but rather increased their stake throughout 2011.<sup>1666</sup>

1147 These arguments are largely premised on the opinion and speculation provided by Messrs. Jeannes and Cooper, neither of whom appears in these

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<sup>1664</sup> [CRA Report I](#), p. 24 *et seq.* (Section III.D).

<sup>1665</sup> *Id.* at p. 25 (para. 54).

<sup>1666</sup> [Reply](#), p. 296 *et seq.* (paras. 698-704) (citing [Jeannes](#), p. 10 *et seq.* (paras. 30, 33-36); [Cooper](#), p. 8 *et seq.* (paras. 22-24, 45-47)).

proceedings as an independent expert. Compass Lexecon limits itself to stating that Gabriel Canada's investors included established mining companies such as Newmont and that the Baupost Group increased its stake in Gabriel Canada during 2011.<sup>1667</sup> However, Compass Lexecon and Messrs. Jeannes and Cooper do not address the empirical basis for Dr. Burrows's conclusion as to the existence of the speculative bubble in gold prices, specifically that, as of mid-2011, the price of gold was near its all-time high and was dramatically higher than the long-term projections of the senior executives of the largest mining companies.<sup>1668</sup>

1148 In his second expert report, Dr. Burrows explains that the hypothetical potential buyer of the Project would almost certainly be a major international mining company and that it is unlikely that it would buy a gold prospect based on the high prices of the gold market in 2011.<sup>1669</sup> In contrast, some analysts were clearly affected by this speculative bubble, such as Mr. Cooper, who indicated in a contemporaneous report that he was using a gold price to value Gabriel that was well above the long-term gold price expectations of industry executives.<sup>1670</sup> Regarding the significance of the Baupost Group increasing its stake, Dr. Burrows notes that this does not establish that Gabriel Canada's investors were sophisticated and [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]<sup>1671</sup>

1149 This speculative bubble in the price of gold, and the failure of some analysts to adjust for it, therefore constitutes another reason why Gabriel Canada's market capitalization as at the Valuation Date is not an inaccurate reflection of the value of the allegedly expropriated Project Rights.

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<sup>1667</sup> [CL Report II](#), p. 26 (paras. 36-37).

<sup>1668</sup> [CRA Report I](#), p. 91 *et seq.* (Appendix X).

<sup>1669</sup> [CRA Report II](#), p. 37 (para. 80).

<sup>1670</sup> *Id.* at p. 38 (para. 81).

<sup>1671</sup> *Id.* at p. 38 (para. 82).

#### 9.1.2.4 There Is No Basis for the Acquisition Premium Applied by Compass Lexecon

1150 The Claimants argue that a 35% acquisition premium should be applied to Gabriel Canada's market capitalization.<sup>1672</sup> The Claimants omit to mention that, although many claimants have argued for its application, investment arbitration tribunals have never accepted to apply an acquisition premium.<sup>1673</sup> They also omit to mention that Mr. Cooper advocated the application of an acquisition premium in one of those cases.<sup>1674</sup> In *Crystallex* – the sole investment arbitration case cited by the Claimants in which the awarded damages were based on market capitalization – the tribunal expressly rejected the 20% acquisition premium requested by the claimant:

“With regard to the control premium, the Tribunal considers that the Claimant and its experts have not sufficiently proven that its application is appropriate in this case. As the Claimant's authorities point out, one of the main reasons for a control premium is that new management will change the business strategy and thereby create value. In the Tribunal's view, the Claimant has not shown this to be the case and in fact it seems to be inapplicable here. ... The Claimant also has not shown that it is appropriate to add a control premium to compensate for an implied minority discount.”<sup>1675</sup>

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<sup>1672</sup> [Reply](#), p. 298 *et seq.* (paras. 705-714).

<sup>1673</sup> See *e.g.*, [Crystallex v. Venezuela, Award, 4 April 2016, at Exhibit CLA-62](#); [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#); [Bear Creek Mining Corporation v. Republic of Peru, Procedural Order No. 2, ICSID case No. ARB/14/21, 19 April 2015, at Exhibit RLA-203](#). The respondent in *Bear Creek* argued that “When acquisitions occur at a premium, it reflects perceived synergies created through the sale. Not only do these not materialize in every sale, but Brattle noted and Prof. Damodaran agrees, the possibility of a synergistic acquisition is already reflected in Claimant's share price, because a buyer of the shares would stand to benefit from an acquisition at a premium. The application of acquisition premiums to any valuation based on share price is controversial among valuation professionals and must take specific circumstances of the valuation target into account.”). *Id.* at p. 246 (para. 652).

<sup>1674</sup> See [South American Silver v. Bolivia, Award, 22 November 2018, at Exhibit RLA-162](#), p. 205 (para. 751).

<sup>1675</sup> [Crystallex v. Venezuela, Award, 4 April 2016, at Exhibit CLA-62](#), p. 246 (para. 893).

- 1151 The reasoning of the *Crystallex* tribunal applies fully in the present circumstances. Indeed, in first expert report, Dr. Burrows demonstrated that acquisition premia are not standard in assessing fair market value,<sup>1676</sup> and that they are applied only in the presence of (i) synergies, (ii) a failure by existing management to maximize firm value, or (iii) overpayment.<sup>1677</sup> Dr. Burrows showed that there was no reason to assume that a potential buyer would achieve synergies, that a buyer would conclude that the Projects were being mismanaged, or that a buyer would overpay for the Project Rights.<sup>1678</sup>
- 1152 Relying on *Compass Lexecon*, and Messrs. Jeannes and Cooper, the Claimants dispute that acquisition premiums are paid only in the presence of the factors enumerated above, argue that the acquisition premia “are the norm”, and claim that most acquisitions in the mining sector around the Valuation Date involved a significant premium.<sup>1679</sup>
- 1153 In his second expert report, Dr. Burrows explains that *Compass Lexecon* does not provide any evidence of a valuation method that recommends the addition of an acquisition premium in absence of the three identified factors and that none of the references cited by *Compass Lexecon* support its methodology.<sup>1680</sup> Moreover, each of the acquisitions identified by *Compass Lexecon* involved identifiable synergies or mismanagement.<sup>1681</sup>
- 1154 As to the transactions involving acquisition premia identified by Mr. Jeannes during his tenure as the former CEO of Goldcorp, Dr. Burrows shows that two of these transactions featured synergies, whereas in a third Goldcorp believed that the resource potential of the project was considerably larger than had been publicly disclosed at the time of the acquisition.<sup>1682</sup> With respect to the acquisition of Glamis Gold, the

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<sup>1676</sup> [CRA Report I](#), p. 33 *et seq.* (Section IV.B).

<sup>1677</sup> *Id.* at p. 27 *et seq.* (Section IV.A).

<sup>1678</sup> [CRA Report I](#), p. 28 *et seq.* (paras. 61-66).

<sup>1679</sup> [Reply](#), p. 299 *et seq.* (paras. 706-714).

<sup>1680</sup> [CRA Report II](#), p. 49 *et seq.* (paras. 97-98).

<sup>1681</sup> *Id.* at p. 51 *et seq.* (para. 100).

<sup>1682</sup> *Id.* at p. 54 *et seq.* (paras. 103-106).

transaction appeared to include some synergies, but most likely was the result of significant overpayment.<sup>1683</sup> Based on an analysis of these transactions, Dr. Burrows concludes that

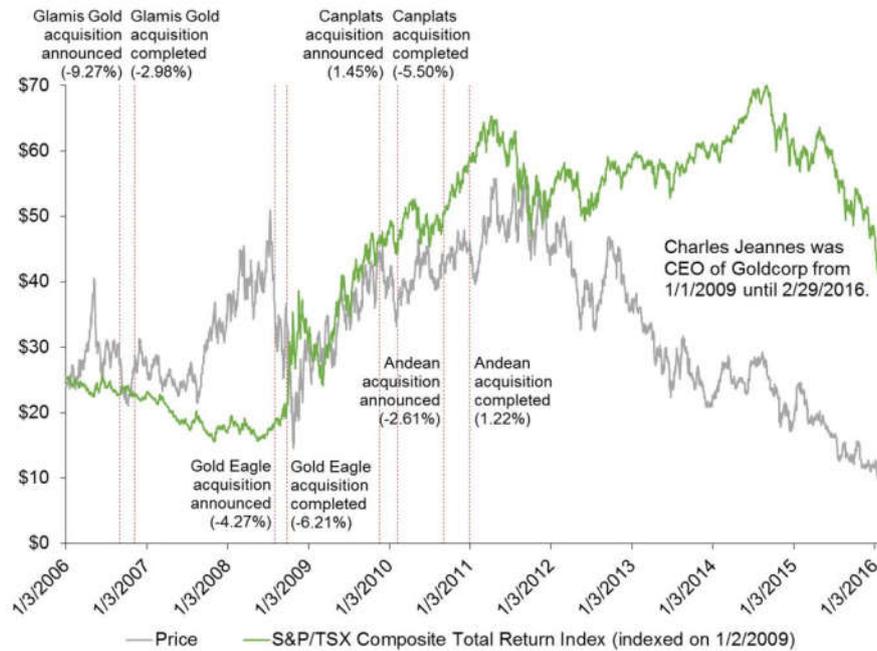
“the acquisition premiums paid for the four Gold Corp acquisitions discussed by Mr. Jeannes may be partially if not entirely attributable to synergies or asymmetric information. There may also have been an element of paying more for assets than they were worth. Goldcorp’s share price declined substantially in the days after three of the acquisitions, although one of the acquisition announcements (for the Gold Eagle acquisition) was on the same day as an earnings release, so the price decline on that day is conflated with the impacts of the earnings release. The fourth acquisition was very small relative to Goldcorp’s value, so any overpayment would not be expected to show up in the value of Goldcorp.”<sup>1684</sup>

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<sup>1683</sup> *Id.* at p. 56 (para. 107).

<sup>1684</sup> [CRA Report II](#), p. 57 (para. 108).

**Figure 3 – Goldcorp's stock price (January 2006 – February 2016)**



Source: Exhibit CRA-214.

- 1155 There is no evidence that Goldcorp benefited from acquiring assets for more than they were worth. As shown by the figure above, the performance of Goldcorp during Mr. Jeannes's tenure as CEO suggests that the third reason identified by Dr. Burrows – overpayment – was primarily involved in Goldcorp's payment of acquisition premia.<sup>1685</sup>
- 1156 There is therefore no reason whatsoever to apply any acquisition premium in the case at hand, let alone a 35% one.

<sup>1685</sup> During Mr. Jeannes' tenure as CEO Goldcorp's share price declined by 74%, from a high of USD 56.07 on September 8, 2011 to USD 14.36 as of February 29, 2016, his last day as CEO. From his first day as CEO on January 1, 2009 until his last day, the share price of Goldcorp declined by 54%. During this same period the S&P/TSX composite price index increased by 59%. [Goldcorp and S&P/TSX Global Gold Total Return Index, at Exhibit CRA-214](#). One would not expect a practice of paying more for assets than they are worth would be rewarded by the stock market, and if this indeed was Mr. Jeannes' practice it could have contributed to the collapse in the Goldcorp share price.

### 9.1.2.5 Compass Lexecon's Alternative Valuations Are Also Unreliable

1157 In their Reply, the Claimants briefly mention Compass Lexecon's alternative valuations, merely reporting the results of its application of the relative market multiples method and the Price to Net Asset Value ("P/NAV") method.<sup>1686</sup> In light of the Claimants' failure to directly address the flaws in these alternative valuations, the Respondent respectfully refers the Tribunal to the relevant sections of Dr. Burrows's second expert report.<sup>1687</sup>

### 9.1.3 Dr. Burrows Provides a "Best-Case" Assessment of the Value of the Alleged Project Rights as of the Valuation Date

1158 Pursuant to the requirement of assuming causation, Dr. Burrows's alternative valuations reflect a "best-case scenario", which incorporates the minimum amount of time, in the absence of the breaches alleged by the Claimants, that would have been required to obtain financing for the Project, expropriate the requisite surface rights, obtain the building permit, and complete construction. As a proxy for the minimum litigation delay that an arm's length buyer would have assumed, Dr. Burrows was instructed to assume four years of delay between the issuance of the environmental permit in April 2012 and the resumption of the process of securing approval of the PUZ, culminating in the issuance of the building permit in April 2018.<sup>1688</sup> This period **does not** incorporate the unavoidable delays that would have been generated by further litigation at all stages of permitting (including for the Zlatna cyanide storage facility and the building permit) and during expropriation, or the delays that would have been encountered by complying with the construction methodology imposed by the Chance Find Protocol. As such, Dr. Burrows's valuations **significantly overstate** what an informed arm's length buyer would have been willing to pay for the Project Rights, as at the Valuation Date.

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<sup>1686</sup> [Reply](#), 302 (paras. 715-716).

<sup>1687</sup> [CRA Report II](#), p. 60 *et seq.* (Sections V and VI).

<sup>1688</sup> [CRA Report II](#), p. 5 (para. 4), p. 20 (para. 51). This delay is based on the time that it took for the Braşov Court of Appeal to annul the PUZ for the Project, which would have paralyzed the Project even in the absence of the Respondent's alleged breaches. See [Counter-Memorial](#), p. 288 *et seq.* (paras. 755-759).

1159 Based on this timeline, Dr. Burrows provides in his second expert report a revised “best-case” assessment of the value of the Project Rights as of the Valuation Date. Dr. Burrows assessed the fair market value of the Project Rights using the DCF method (**Section 9.1.3.2**) and, as a check on his results, determined the value using the market multiples valuation method (**Section 9.1.3.2**).

### 9.1.3.1 DCF Method

1160 In his second expert report, Dr. Burrows’s calculates the revised DCF value to Gabriel Canada<sup>1689</sup> of the Project Rights at ██████████.<sup>1690</sup> Dr. Burrows also rebuts the criticism of his methodology raised by Compass Lexecon and Mr. Cooper.

1161 Specifically, Compass Lexecon and Mr. Cooper argue that the DCF method is not suited for valuing gold mining companies. Compass Lexecon argues that the stocks of gold companies purportedly do not have a clear correlation with the general market, and because the DCF methodology allegedly does not reliably account for the risk factors that relate to gold.<sup>1691</sup> Mr. Cooper claims that, in his experience, practitioners in the gold industry have departed from the DCF employed by Dr. Burrows.<sup>1692</sup>

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<sup>1689</sup> Given that the Claimants have not separately claimed for or quantified Gabriel Jersey’s alleged damages, should the Tribunal find that there has been no expropriation under Article VIII of the Canada-Romania BIT, then the Tribunal should not award any damages. See [Reply](#), p. 315 (para. 750(c)(i)) (requesting that “the Claimants” be awarded compensation); [CL Report II](#), p. 6 (para. 3) (incorrectly assuming that the market capitalization of Gabriel Canada is equal to the value of Gabriel Jersey’s alleged investments).

<sup>1690</sup> In order to show the effect on quantum of some of the criticism raised by Compass Lexecon, Dr. Burrows calculated a DCF value for the Expropriation Scenario using the Compass Lexecon cash flow model (deflated from 2012 dollars to 2011 dollars) and the Compass Lexecon suggested discount rate of 5% (to which he added 3.37% to reflect Romanian country risk), but using the Counterfactual Scenario timeline and his long-term projections of metal prices (USD 1,180 for gold and USD 19.50 for silver), resulting in a DCF value of ██████████. [CRA Report II](#), p. 89 (Table 5).

<sup>1691</sup> [CL Report II](#), p. 52 *et seq.* (paras. 76-78, 98-102).

<sup>1692</sup> [Cooper](#), p. 10 *et seq.* (paras. 29-30).

- 1162 Dr. Burrows notes that the articles cited by Compass Lexecon do not provide any support for its claim that the DCF methodology does not reliably account for the risk factors that relate to gold.<sup>1693</sup> Furthermore, Dr. Burrows explains that while the correlation between a type of stock and the market (referred to as the “beta” of the stock) fluctuates over time, this has not prevented discount rates using betas from being the predominant valuation methodology among practitioners and academics.<sup>1694</sup> In short, the features of an industry do not invalidate the DCF method or the Capital Asset Pricing Model.
- 1163 Regarding Mr. Cooper’s allegation that the gold industry participants have “departed” from the DCF method, Dr. Burrows notes that major international mining companies, such as the types of companies that would be hypothetical buyers of the Project Rights, use DCF as their principal valuation methodology, with other methodologies such as market multiples and P/NAV used as checks.<sup>1695</sup> In contrast, Mr. Cooper provides evidence regarding only the practice of analysts,<sup>1696</sup> which is irrelevant.
- 1164 The Claimants further contend that Dr. Burrows’s DCF valuation contains flawed assumptions, specifically that (i) Dr. Burrows’s gold price assumptions are flawed because they are based on an outdated survey of gold prices and out-of-context references to gold prices, that he builds up his discount rate using the asset capital model which is not reliable for gold companies, and that he double-counts the impact of RMGC’s assumed continuous spend while it awaits permitting;<sup>1697</sup> (ii) that the delays assumed by Dr. Burrows have no merit but for Romania’s wrongful conduct and, in any event, would not reasonably have been assumed by a hypothetical buyer or seller as of the Valuation Date;<sup>1698</sup> and (iii) Dr. Burrows in-

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<sup>1693</sup> [CRA Report I](#), p. 70 (paras. 139-141).

<sup>1694</sup> *Id.* at p. 69 *et seq.* (para. 137-138).

<sup>1695</sup> *Id.* at p. 73 (para. 147).

<sup>1696</sup> [Cooper](#), p. 11 (para. 30).

<sup>1697</sup> [Reply](#), p. 304 (para. 723).

<sup>1698</sup> *Id.* at p. 305 (para. 724).

corporates into his DCF valuation various criticisms provided by Behre Dolbear.<sup>1699</sup>

1165 As discussed below, these criticisms are utterly devoid of merit.

1166 Regarding the first point raised by the Claimants, Dr. Burrows explains that his long-term gold price projections were based on a review of expectations of gold analysts about long-term gold prices and on two surveys of gold mining executives conducted by Price Waterhouse Coopers, and that these sources are neither outdated, nor taken out of context.<sup>1700</sup> Furthermore and as just discussed, there is no merit to the criticism regarding the alleged unsuitability of the asset capital model for the valuation of gold projects. Finally, Dr. Burrows rejects the arguments that he double-counts the impact of RMGC's assumed continuous spend, pointing out that an arm's length buyer would have assumed these expenditures, and that costs actually incurred following the Valuation Date are not relevant for determining the value of the Project Rights.<sup>1701</sup> If the Claimants consider it appropriate to include in the quantum analysis the expenditures that they actually incurred subsequent to the Valuation Date, then to be consistent other subsequent events, such as the decline in the price of gold and the share values of gold companies, must also be taken into account.<sup>1702</sup>

1167 The second point raised by the Claimants betrays a lack of understanding of the timeline used by Dr. Burrows. As the Respondent explains in its Counter-Memorial, and as discussed above, the but-for timeline assumes that the breaches alleged by the Claimants **never occurred**.<sup>1703</sup> This scenario expressly assumes that the environmental permit would have been issued at the earliest conceivable date (April 2012), further assumes that an arm's length buyer would have included a 4-year delay to account for various NGO litigation (using as a proxy the duration of the litigation al-

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<sup>1699</sup> *Id.* at p. 305 *et seq.* (para. 725).

<sup>1700</sup> [CRA Report II](#), p. 79 *et seq.* (Section VII.E).

<sup>1701</sup> *Id.* at p. 78 (para. 158).

<sup>1702</sup> *Id.* In any event, the Claimants have not claimed for any costs incurred after the alleged expropriation of the Project Rights.

<sup>1703</sup> [Counter-Memorial](#), p. 288 (paras. 754-759).

ready initiated in 2011 that resulted in the cancellation of the Project's PUZ), then sequentially assumes that the Project's PUZ would have been obtained within one year, that an additional year would be required to expropriate the missing surface rights, and that the building permit would be obtained shortly thereafter in April 2018.<sup>1704</sup> This timeline then disregards the requirements of the Chance Find Protocol and adopts the construction schedule provided by SRK's 2012 report, as adjusted by Behre Dolbear.<sup>1705</sup> The timeline's assumptions are based on the minimum time required to complete these various stages,<sup>1706</sup> and do not reflect the more realistic permitting and litigation delays that an informed buyer would have assumed as at the Valuation Date.

1168 As to the third point, SRK's criticism of the Behre Dolbear report should be disregarded due to SRK's conflict of interest.<sup>1707</sup> Nevertheless, SRK's criticism is thoroughly rebutted in Behre Dolbear's second expert report, to which the Tribunal is respectfully referred. Regarding the alleged inconsistency between the Behre Dolbear report and the AECOM and China Gold assessments, Behre Dolbear explains that neither of these reports provide a valid assessment of the Project, as they are "superficial, perfunctory, and flawed."<sup>1708</sup>

1169 In conclusion, the Claimants essentially criticize Dr. Burrows for not adopting [REDACTED]

<sup>1704</sup> *Id.* at p. 288 (paras. 754-759).

<sup>1705</sup> *Id.* at p. 289 *et seq.* (paras. 757-759); see also [SRK Report II](#), p. 45 *et seq.* (paras. 108-109) ("Behre Dolbear also incorporates into the Project schedule additional time for a new feasibility study and longer ramp-up. ... Further, Behre Dolbear adds six months for the completion of financing.").

<sup>1706</sup> The Claimants' legal expert, Prof. Birsan, deemed the period assumed for the expropriation process to be "a reasonable estimation." [Birsan LO II](#), p. 41 (para. 141, n. 138).

<sup>1707</sup> [Counter-Memorial](#), p. 289 *et seq.* (paras. 757-759).

<sup>1708</sup> [BD Report II](#), p. 5 *et seq.* (paras. 16, 29).

### 9.1.3.2 Market Multiples Valuation Method

- 1170 Based on Compass Lexecon's report, the Claimants allege that Dr. Burrows's comparable properties analysis suffers from the following flaws: (i) samples of comparable properties are too limited, include non-contemporaneous transactions, and omit companies and properties that are comparable; (ii) Dr. Burrows fails to attribute any value to the Project's mineral resources; and (iii) Dr. Burrows makes unfounded *ad hoc* adjustments to the Project, thereby lowering his valuation.<sup>1709</sup> Dr. Burrows demonstrates in his second expert why each of these criticism is unfounded.
- 1171 While Dr. Burrows agrees that his sample is too small to provide a very reliable basis for valuation, his approach was to favor a smaller but comparable sample over a larger sample of dissimilar properties.<sup>1710</sup> In contrast, Compass Lexecon's approach uses a larger sample in its analysis, but is invalid because it includes many properties that are too different from the Project in key characteristics to be used as comparable properties.<sup>1711</sup> Dr. Burrows then shows why the properties that he has excluded from his sample are not comparable,<sup>1712</sup> and explains that he adjusted the non-contemporaneous transactions comparable to the Rodu-Frasin and Tarnița properties based on changes in the relevant equity index.<sup>1713</sup>
- 1172 Regarding the value of the Project's mineral resources (as opposed to reserves), Dr. Burrows explains *inter alia* that his valuation is not affect by whether he applied an adjustment factor to total Resources or total Reserves, as Reserves/Resources ratio of the comparable properties was equal to Reserves/Resources ratio of the Project.<sup>1714</sup>
- 1173 Finally, Dr. Burrows explains that Compass Lexecon's claim of *ad hoc* adjustments to the sample is "an attempt to deflect attention from the fact that [Compass Lexecon] uses the values of mineral properties which vary

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<sup>1709</sup> [Reply](#), p. 307 (para. 729).

<sup>1710</sup> [CRA Report II](#), p. 91 (para. 182).

<sup>1711</sup> *Id.*

<sup>1712</sup> *Id.* at p. 91 *et seq.* (paras. 184-187).

<sup>1713</sup> *Id.* at p. 98 (paras. 200).

<sup>1714</sup> *Id.* at p. 93 (para. 188).

as a result of disparate characteristics **without any adjustment** other than the total amount of contained ounces of resources.”<sup>1715</sup> The failure to provide these necessary adjustments is equivalent to estimating “the value of a building lot with no building on it based on the value of buildings that have already been built and are in use, even if the land parcels are exactly identical.”<sup>1716</sup>

1174 Further to his revised assessment, Dr. Burrows calculated the total value of the Projects Rights at ██████████ using the market multiples valuation method.<sup>1717</sup>

## 9.2 At Most, the Claimants Are Only Entitled to Damages for Delay

1175 In the Counter-Memorial, the Respondent showed that, while the Claimants claim compensation for all of Romania’s alleged breaches of the BITs, they have only attempted to quantify their alleged damage for their case on expropriation, and therefore cannot be awarded any compensation for non-expropriatory breaches of the BITs.<sup>1718</sup>

1176 In response, the Claimants do not contest the principle that, if the quantum of their claims is unproven, the Tribunal must reject these claims even if liability is established against the Respondent. Instead, the Claimants argue that it does not matter whether the alleged injury to the Project Rights “is characterized as an unlawful expropriation, or as a breach of another treaty obligation, both Gabriel Jersey and Gabriel Canada have incurred very substantial losses.”<sup>1719</sup>

1177 However, the Claimants have not quantified these alleged “substantial losses” for the scenario in which the Tribunal finds that Romania has breached its obligations under the BITs, but further finds that this breach caused an injury that does not amount to the total deprivation of the Claimants’ investments. In other words, unless the Tribunal specifically finds

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<sup>1715</sup> *Id.* at p. 93 *et seq.* (para. 189) (emphasis in original).

<sup>1716</sup> *Id.*

<sup>1717</sup> [CRA Report II](#), p. 95 *et seq.* (para. 192).

<sup>1718</sup> [Counter-Memorial](#), p. 305 *et seq.* (Section 11.2.1).

<sup>1719</sup> [Reply](#), p. 263 (para. 633).

that the Claimants' investments have been fully expropriated in breach of the BITs, the Claimants cannot be awarded any compensation.<sup>1720</sup>

- 1178 The Respondent also showed that, in the unlikely event the Tribunal were to determine that the Claimants were entitled to compensation notwithstanding their failure to prove the quantum of the injury caused by a non-expropriatory breach of the BITs, then the quantum of the Claimants' damage cannot equal the fair market value of their investments, but should rather reflect the harm caused by a delay to the Project.<sup>1721</sup>
- 1179 The Claimants argue that the "delay damages" scenario is "contrary to the principle that damages must 'wipe out the consequences' of the unlawful acts and provide full reparation and that a State may not be allowed to benefit from its own illegal act," because "the Projects have been rejected and blocked, a construction permit has been rendered impossible under Romanian law, and the value of Claimants' investments has been wiped out."<sup>1722</sup>
- 1180 The Claimants' argument is nonsensical. If the Tribunal finds that the Respondent's breached BITs, thereby damaging the Claimants' investments but not expropriating them, it necessarily follows that the Tribunal also determined that the Project is still viable (or that the Project's lack of viability was not caused by any breaches of the BITs). Therefore, by awarding damages for delay in those circumstances, the Tribunal would be fully compensating the Claimants for the injury actually caused by the unlawful act.
- 1181 Regarding the quantification of the delay damages, the Claimants merely reiterate their arguments pertaining to Dr. Burrows DCF methodology and his underlying assumptions.<sup>1723</sup> These arguments have already been addressed above. If it is determined that the delay in the development of the Project was caused by one or more breaches of the BITs, in his second

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<sup>1720</sup> See [Nordzucker AG v. Republic of Poland, Third Partial and Final Award, 23 November 2009, at Exhibit RLA-204](#), p. 15 *et seq.* (paras. 65-66).

<sup>1721</sup> [Counter-Memorial](#), p. 307 *et seq.* (Section 11.2.2).

<sup>1722</sup> [Reply](#), p. 309 (para. 732).

<sup>1723</sup> [Reply](#), p. 309 *et seq.* (para. 733).

expert report Dr. Burrows assesses the compensation stemming from this delay at [REDACTED].<sup>1724</sup>

### 9.3 The Claimants' Claim for Interest Is Overstated

1182 While the Parties agree that compensation must include pre-award interest “at a normal commercial rate of interest” running from the date of the alleged breach, they disagree as to whether interest should be compounded (Section 9.3.1) and on the applicable interest rate (Section 9.3.2).

#### 9.3.1 The Claimants Are Not Entitled to Compound Interest

1183 In the Counter-Memorial, the Respondent demonstrated that there was no prevailing rule under international law that interest must be paid on a compound basis, and that many investment arbitration tribunals had awarded simple interest.<sup>1725</sup>

1184 In their Reply, the Claimants argue *inter alia* that compound interest is widely recognized as a necessary component of compensation based on commercial realities and for that reason is increasingly awarded by arbitration tribunals.<sup>1726</sup>

1185 However, the Tribunal is not bound to follow any trends, recent or otherwise. The general rule of international law remains that the victim of an unlawful act does not have “any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.”<sup>1727</sup>

#### 9.3.2 Pre-Award and Post-Award Interest Should Be Calculated Using a Risk-Free Rate

1186 The Parties agree 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-

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<sup>1724</sup> [CRA Report II](#), p. 90 (para. 180).

<sup>1725</sup> [Counter-Memorial](#), p. 315 (para. 814).

<sup>1726</sup> [Reply](#), p. 310 *et seq.* (Section XIII.F.1).

<sup>1727</sup> [ILC Articles, at Exhibit RLA-33](#), p. 109 (para. 9).

specific assessment.”<sup>1728</sup> Accordingly, Dr. Burrows explains in his first expert report that applying the risk-free rate was appropriate in this case, as there was no justification to apply a rate of interest that would compensate the Claimants for both the time value of money and default risk to which they were not exposed.<sup>1729</sup>

1187 Based on Compass Lexecon’s opinion, the Claimants argue that the Tribunal should apply an interest rate of LIBOR plus 4% as reflecting “normal commercial rate for corporations in the EMEA region.”<sup>1730</sup> The Claimants note that this rate is in line with the decisions of other investment treaty tribunals.<sup>1731</sup>

1188 Dr. Burrows explains that Compass Lexecon incorrectly uses LIBOR as the basis for pre-award interest, as this rate reflects commercial risks to which the Claimants are not exposed.<sup>1732</sup> Indeed, an award of damages by this Tribunal would not be a sum “loaned” on the same risky terms as bank loans. Accordingly, the rate of interest on the award should not compensate Claimants for both the time value of money and default risk.<sup>1733</sup> Finally, Dr. Burrows states that the use of a short-term rate to calculate interest is appropriate in the circumstances because long-term rates include a term premium that would not be warranted here.<sup>1734</sup>

1189 As the Respondent stated in its Counter-Memorial, several investment arbitration tribunals have applied similar risk-free interest rates based on guaranteed, short term United States Treasury bills (or similar risk-free rates).<sup>1735</sup>

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<sup>1728</sup> [Memorial](#), p. 392 (para. 878); [Counter-Memorial](#), p. 316 (para. 817) (citing [ILC Articles, at Exhibit RLA-33](#), p. 109 (para. 10).

<sup>1729</sup> [CRA Report I](#), p. 89 (paras. 174-175).

<sup>1730</sup> [Reply](#), p. 313 (paras. 744-746).

<sup>1731</sup> *Id.* at p. 314 (para. 746). Compass Lexecon compounds this error by adding a 4% premium.

<sup>1732</sup> [CRA Report II](#), p. 103 *et seq.* (Section XI).

<sup>1733</sup> *Id.* at p. 104 (para. 223).

<sup>1734</sup> *Id.* at p. 104 (para. 224).

<sup>1735</sup> [Counter-Memorial](#), p. 317 (para. 819, n. 1290); see also [Yukos Universal Limited v. Russian Federation, Final Award, PCA Case No. AA 227, 18 July 2014, at Exhibit RLA-21](#), p. 195 (paras. 1684-1685); [Anatolie Stati et al. v. Republic of Kazakhstan, Award, SCC Case No.](#)

- 1190 As an apparent argument of last resort, the Claimants falsely argue that “Claimants face very real risks that Romania will seek to avoid full payment of any award.”<sup>1736</sup> Unsurprisingly the Claimants are unable to cite to a single instance in which Romania did not comply in good faith with its obligation to pay an investment arbitration award. The Claimants simply seek to manufacture a risk to justify the application of an interest rate that is not warranted by the circumstances. Indeed, an international tribunal cannot assume that a State would not comply with its international obligations in the event of an adverse judgment or award. As the Permanent Court of International Justice observed in the *Wimbledon case*, “The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency.”<sup>1737</sup>
- 1191 Therefore, in the unlikely event the Claimants are awarded any compensation, it should include pre-award interest at a risk-free rate.

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[V \(116/2010\)](#), 19 December 2013, at [Exhibit CLA-182](#), p. 405 (paras. 1854-1855); [BG Group v. Argentina](#), Award, 24 December 2007, at [Exhibit CLA-148](#), p. 135 (para. 455); [Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States](#), Award, ICSID Case No. ARB(AF)/04/05, 21 November 2007, at [Exhibit RLA-89](#), p. 91 (para. 300).

<sup>1736</sup> [Reply](#), p. 314 (para. 747).

<sup>1737</sup> [Case of the S.S. Wimbledon \(Merits\)](#) PCIJ Rep Series A No. 1, 17 August 1923, at [Exhibit RLA-205](#), p. 32; see also [Factory at Chorzów \(Germany v. Poland\) \(Merits\)](#) PCIJ Rep Series A No. 17, 13 September 1928, at [Exhibit CLA-172](#), p. 63. [Nuclear Tests Case \(Australia v. France\) \(Judgment\)](#) [1974] ICJ Rep 253, at [Exhibit RLA-206](#), p. 23 (“Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it”).

## 10 PRAYER FOR RELIEF

1192 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.

1193 The Respondent reserves its right to further develop its argument and defenses and to present further evidence in the course of the arbitration.

Respectfully submitted,

24 May 2019

For and on behalf of Romania



LALIVE

Veijo Heiskanen  
Matthias Scherer  
Lorraine de Germiny  
Christophe Guibert de Bruet  
David Bonifacio  
Baptiste Rigau  
Emilie McConaughey  
Cláudia Baró Huelmo



LDDP

Crenguta Leaua  
Andreea Simulescu  
Mihaela Maravela  
Liliana Deaconescu  
Andreea Piturca  
Andra Soare-Filatov

**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**

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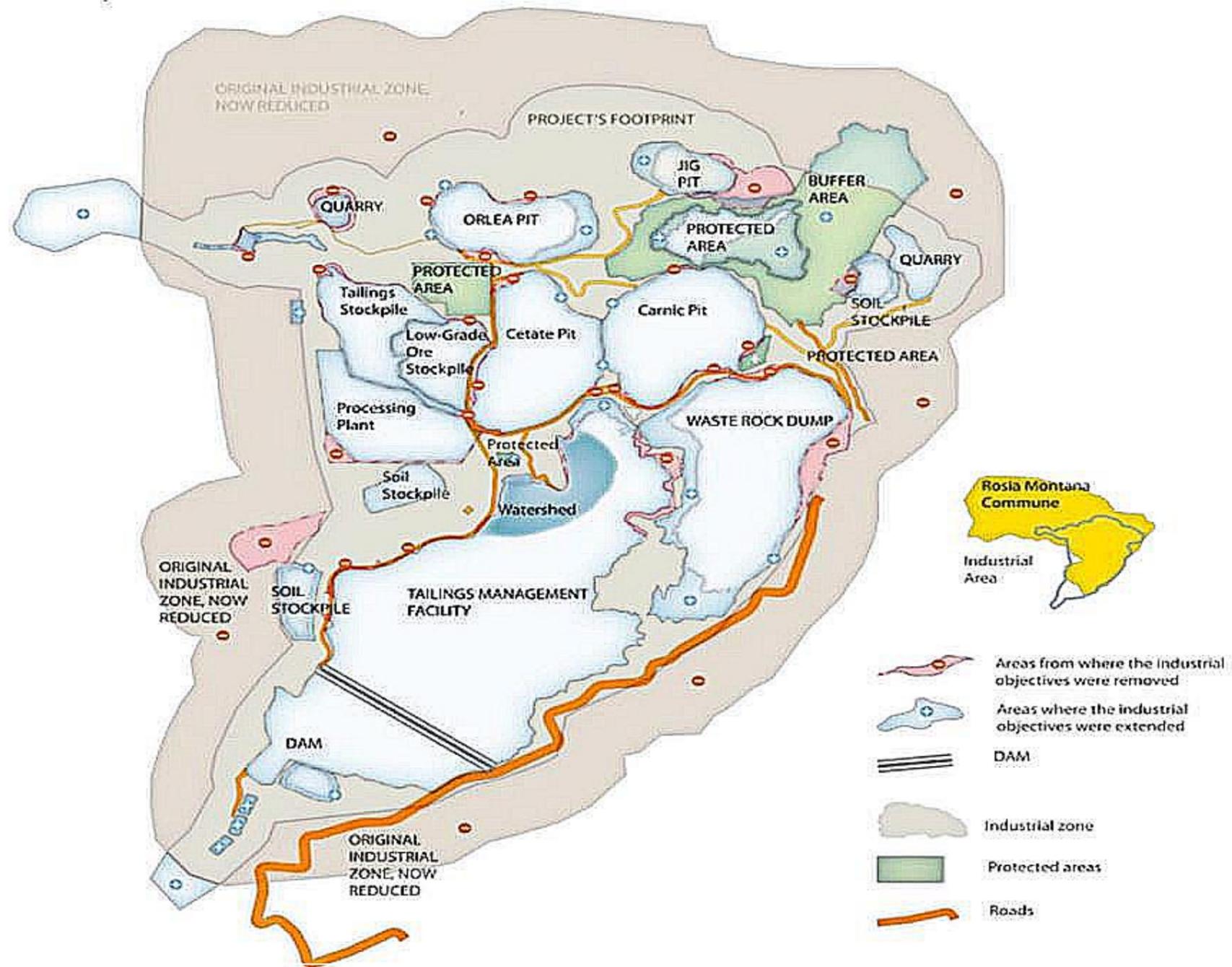
**RESPONDENT'S REJOINDER**

**SELECTION OF MAPS**

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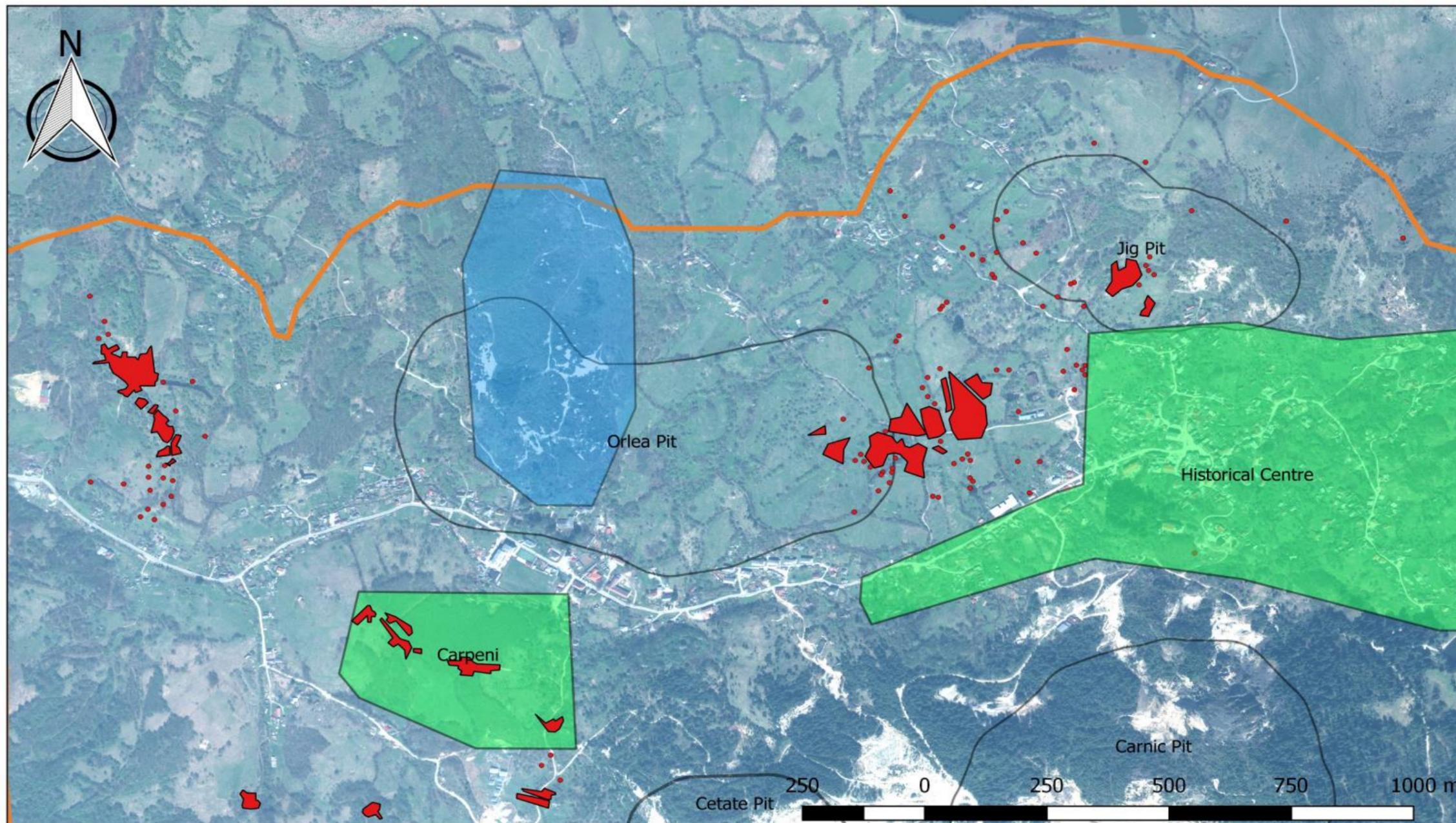
**LALIVE**

**LDDP**  
LEAUA DAMCALI DEACONU PAUNESCU  
Attorneys & Counselors



“illustration showing the zonal urbanism plans which designate the industrial zones under the footprint of the proposed new mine at Roşia Montană”

(Gabriel Canada 2014 Annual Information Form, Exhibit C-1812, p. 29)

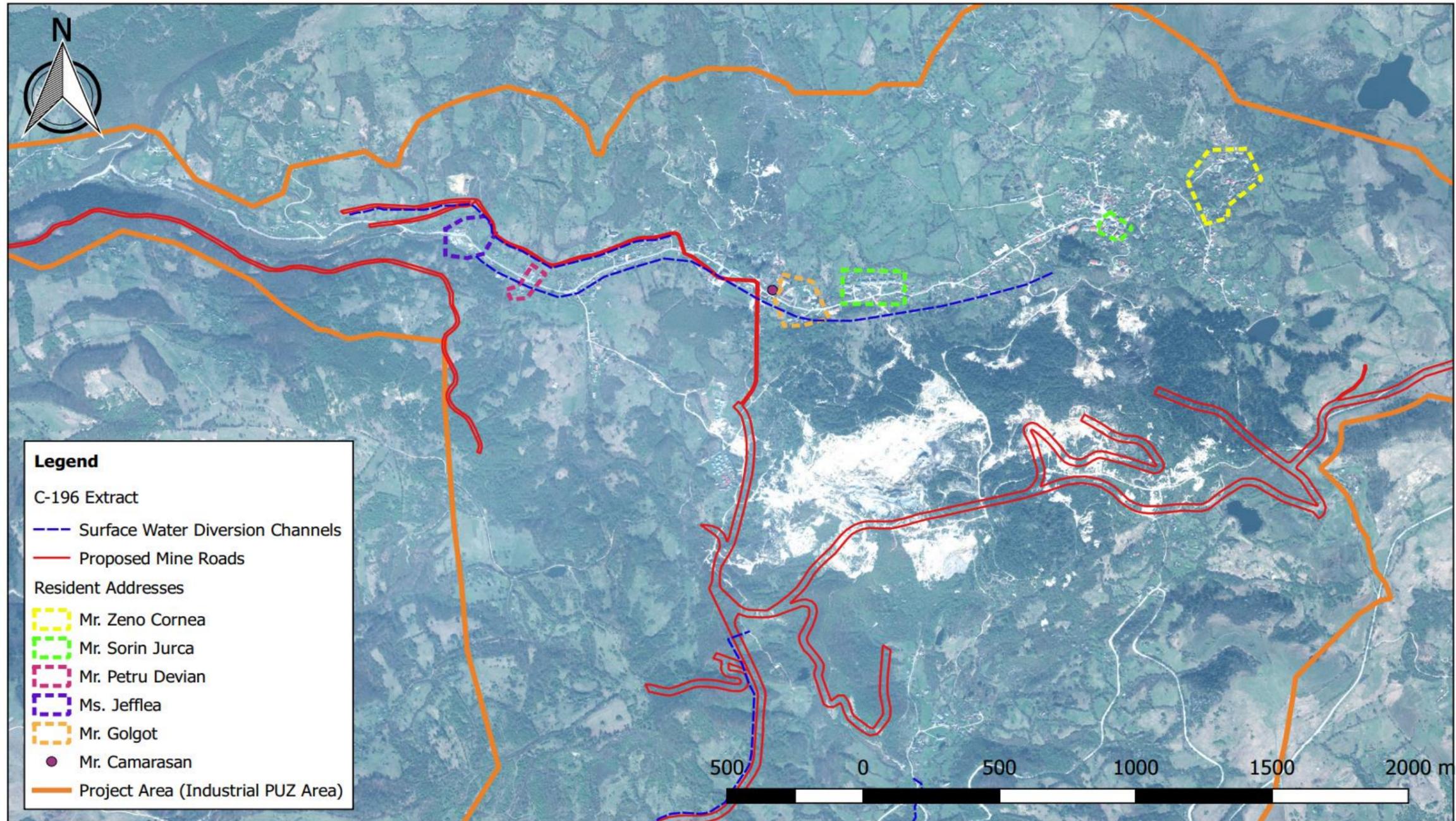


**Legend**

 Orlea area to be researched (R-221)	 Protected Areas
 Areas researched (C-225)	 Envisaged Mining Pit
 Project Area (2006 PUZ Industrial Area)	

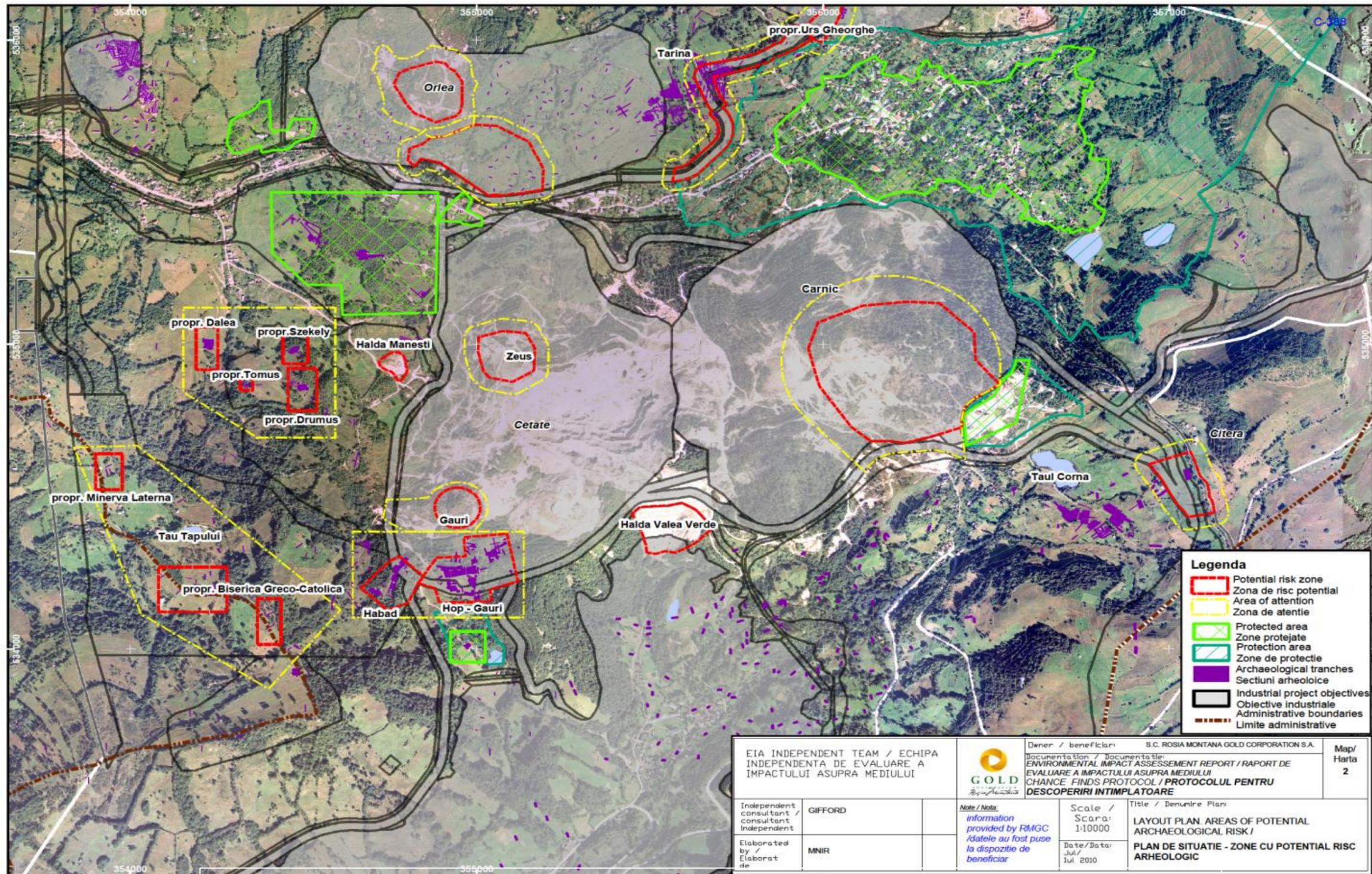
**Overview of the research done / to be done in the Orlea area**





Proposed mine roads and water diversion system (Year 00 – C-196) against current location of Rosia Montana properties unacquired by RMGC





Map annexed to the Chance Find Protocol delineating the zones of archeological risk

(2010 Update to EIA Report, Ch. 04.09 Culture and Heritage, at Exhibit C-388.03, p. 132)