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

RESPONDENT'S RESPONSE TO CLAIMANTS' ANSWERS TO THE TRIBUNAL'S QUESTIONS IN PROCEDURAL ORDER NO. 27

13 July 2020

LALIVE

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TABLE OF CONTENTS

1 INTRODUCTION

1 This submission provides the Respondent's replies to the Tribunal's questions in Procedural Order No. 27 and the Claimants' answers to those questions, submitted on 11 May 2020.

2 In Procedural Order No. 27, the Tribunal sought clarifications from the Claimants regarding fundamental aspects of their claims, including the precise measures that the Claimants complain of, the timing and date of the alleged breach, and the timing of the Claimants' alleged losses.

3 More than five months after the main hearing in this case, the Claimants' case remains as unclear and confused as it was in their Memorial, filed some three years ago. The Claimants have thus not only failed to meet their burden of proof; they have also failed to meet their burden of pleading.

4 After having repeatedly refused at the Hearing to identify the date on which the alleged treaty breaches were committed,[1] the Claimants have finally attempted to identify that date. They now argue, for the first time, that the alleged treaty breaches occurred "on or about 9 September 2013"[2] – a date that they had only mentioned in passing in their Memorial and Reply.

5 The Claimants' belated attempt to restate their case calls for three preliminary comments.

6 First, the Claimants do not explain the implications of their newly chosen date – 9 September 2013 – on their jurisdictional case. The Respondent reserves the right to address these issues in its post-hearing submission.

7 Second, the Claimants now effectively acknowledge that they have no claim for a treaty breach prior to 9 September 2013, and that therefore their complaints about events that took place in 2011 and 2012 are irrelevant to their case.

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[1] Transcript of December 2019 Hearing (hereinafter "**Tr. 2019**"), p. 293:16-18 (Claimants' Opening) ("The exact date in which the breach ultimately occurs, no, I don't think you need to know…"); see also generally **Tr. 2019**, p. 288:2-294:17.

[2] Cl. PO27 Answers, p. 36 (para. 56).

8 Third, despite this fundamental change in their case theory, the Claimants continue to rely on a valuation date – in July 2011 – that is more than two years before the alleged treaty breaches were purportedly committed (in September 2013). This is untenable.

9 The scope of this submission is determined by Procedural Order No. 27. As recalled above, the Tribunal's questions in Procedural Order No. 27 were directed to the Claimants, which were asked to respond first. The Respondent was asked in turn to comment on the Claimants' answers. In this submission, the Respondent therefore only addresses the timing of the alleged breaches and losses, as well as the legal characterization of its conduct, in response to the Claimants' answers. The Respondent has already demonstrated at length why the claims should, more generally, be dismissed.

10 In Procedural Order No. 27, the Tribunal also granted the Respondent's request, made in its letter dated 9 January 2020, for a page limit for these submissions, to ensure that they responded to the Tribunal's questions and were not inappropriately converted into full-fledged post-hearing submissions.[3] The Tribunal also made clear that there would be no post-hearing briefs at this stage of the proceedings.[4]

11 The Claimants have disregarded the Tribunal's directions and for all intents and purposes submitted a post-hearing brief which not only fails to answer the Tribunal's questions, but also selectively summarizes hearing testimony that is not directly relevant to the Tribunal's questions.

12 In this submission, the Respondent will address only those arguments on the part of the Claimants that are relevant to the Tribunal's questions. The Respondent reserves the right to respond further to the Claimants' answers in oral closing statements or written post-hearing submissions.

[3] **PO 27**, p. 3 (para. 10).

[4] *Id.* at p. 2 (para. 6).

2 QUESTION A

At Question A, the Tribunal asked two questions:

"*For each of Claimants' BIT claims, at what exact point in time was the breach consummated?*

What precise measure attributable to Respondent resulted in the alleged breach for each claim?"

The Claimants' answers in summary:

The Claimants argue that Romania breached ten obligations under the two BITs "on or about" 9 September 2013. The precise measure attributable to the Respondent that resulted in the alleged breaches is the same: an alleged "political rejection" of the Project.

Romania's answers in summary:

Romania has not breached any of its treaty obligations – on 9 September 2013 or at any other point in time.

The Claimants do not identify a precise measure attributable to Romania that resulted in the alleged breaches. The alleged "political rejection" of the Project is not a "measure." In any event, it did not and could not have breached the Respondent's treaty obligations, let alone simultaneously on the same date.

2.1 Romania Did Not Breach Its Obligations at any Point in Time, Including "on or about" 9 September 2013

13 The Claimants allege that Romania has breached ten obligations under the BITs:

- the obligation not to expropriate under the Canada-Romania BIT;
- the obligation not to expropriate under the UK-Romania BIT;
- the obligation to provide fair and equitable treatment ("**FET**") under the Canada-Romania BIT;
- the obligation to provide FET under the UK-Romania BIT;

- the obligation to provide full protection and security ("**FPS**") under the Canada-Romania BIT;
- the obligation to provide FPS under the UK-Romania BIT;
- the obligation not to impair investments under the UK-Romania BIT;
- the obligation not to discriminate under the Canada-Romania BIT;
- the obligation not to discriminate under the UK-Romania BIT;
- the umbrella clause obligations under the UK-Romania BIT.[5]

14 The Claimants argue, with reference to Article 15 of the International Law Commission's Articles on State Responsibility (the "**ILC Articles**"), that Romania's conduct qualifies as a composite act.[6] The Respondent allegedly consummated all ten breaches through a single measure – a purported "political rejection" of the Project – that occurred "on or about" 9 September 2013.[7] According to the Claimants, the conduct leading to each breach started already in August 2011, which therefore should serve as a basis for the valuation date (29 July 2011).[8]

15 The Claimants' new position is as untenable as the earlier ones.

16 The rules of international responsibility set out in Chapter III of the ILC Articles are relevant to the Tribunal's Questions A, B and C:

Art. 12: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."	
Intertemporal principle **Art. 13**	"An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."
Instantaneous acts time of the breach **Art. 14(1)**	"The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."
Continuing acts time of the breach and extension of the breach in time	"The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and

[5] Reply, p. 315 (para. 750); Memorial, p. 416 (para. 931).

[6] Cl. PO27 Answers, p. 51 (para. 88).

[7] *Id.* at p. 41 *et seq.* (para. 71).

[8] *Id.*

Art. 14(2)	remains not in conformity with the international obligation."
Composite acts – time of the breach **Arts. 15(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."
Composite acts – extension of the breach in time **Arts. 15(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"

18 Under Article 12 of the ILC Articles, a breach of an international obligation occurs or is consummated[9] when an act of the State is not in conformity with what is required of it; this is the date when a claim arises. This rule applies to any act of the State, regardless of whether it qualifies as an instantaneous, continuing or composite act.[10] Articles 13, 14 and 15 of the ILC Articles build on this definition in Article 12.[11]

19 A composite act requires a systematic policy or practice to allow a series of actions or omissions to be defined in aggregate as wrongful (see **Section 4** below). Accordingly, a composite breach can only occur when a series of actions or omissions, when grouped together, cumulatively amount to a breach of an obligation – and not at any earlier point in time,

[9] Like the Tribunal, Romania uses the two terms interchangeably in this submission.

[10] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), at **Exhibit RLA-33**, p. 54 ("It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration.").

[11] *Id.* ("Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, **the other provisions of the chapter are devoted to specifying how this concept applies to various situations**.") (emphasis added).

as the Claimants wrongly assert.[12] Conduct that can be characterized as composite is subject to the rule of Article 12 of the ILC Articles, as reflected in Article 15(1) – a composite breach "occurs when the action … is sufficient to constitute the wrongful act."[13]

20 Nor is the date of breach determined on the basis of when the Claimants allege to have understood that a breach occurred, as they repeatedly suggested at the hearing.[14] The determination of when a breach occurred is a matter of fact and evidence, not belief.

21 Thus, the first question under Question A – "For each of Claimants' BIT claims, at what exact point in time was the breach consummated?" – should be answered on the basis of Article 12 of the ILC Articles: Romania could only have breached a treaty obligation on a date when its conduct has been proven not to be in conformity with that obligation.

22 The Claimants' allegation that Romania breached simultaneously ten obligations under two BITs makes no sense given the diversity of the obligations at issue. The Claimants thoroughly failed to link each obligation that Romania is alleged to have breached and the relevant facts.

[12] Cl. PO27 Answers, p. 41 *et seq*. (para. 71) ("Because all of Respondent's multiple breaches of the BITs arise from the same composite act, each breach has 'occurred' over the same period of time through September 9, 2013…").

[13] ILC Articles, at **Exhibit RLA-33**, p. 63 ("Similar considerations apply as for completed and continuous wrongful acts in determining when a breach of international law exists;").

[14] **Tr. 2019**, p. 288:02-09 (Claimants' Opening) ("ARBITRATOR DOUGLAS: … What date do you assign the breach? MS. COHEN SMUTNY: Well, you know, it's very hard to--with hindsight, **the company recognized**, as reflected by the company's decision making, at the beginning of 2015, that it was all over."); **Tr. 2019**, p. 293:5-13 ("[The Claimants] were still trying. **They still thought maybe**. I mean, at some point I think with the passage of time and further action and further action, and **they just at some point realized** they are where they are. But where exactly was the definitive point? Perhaps the Tribunal will consider that important to its assessment. We submit it's not important to your assessment.") (emphasis added); see more generally **Tr. 2019**, p. 288:2-294:17 (Claimants' Opening).

2.1.1 There Could Not Have Been an Expropriation on 9 September 2013

23 To prove the consummation of an indirect expropriation on 9 September 2013, Gabriel Canada needed to establish *inter alia* that Romania enacted by that date "a measure or series of measures" that had "an effect equivalent to direct expropriation without formal transfer of title or outright seizure", as required under Article VIII and Annex B of the Canada-Romania BIT.[15] A "measure" is defined in Article I(i) of the BIT as including "any law, regulation, procedure, requirement, or practice."[16] The same requirement of a "measure" with expropriatory effect applies to the claims of Gabriel Jersey: under the UK-Romania BIT, an indirect expropriation is only consummated when investments are "subjected to **measures** having effect equivalent to nationalization or expropriation."[17]

24 The expropriatory effect must also be proven in the case of a creeping expropriation, [18] which is how the Claimants describe Romania's conduct.[19] With a creeping expropriation the date of consummation of the breach must always be when **the last step necessary to create an effect equivalent to expropriation** takes place because "[i]f the process stops before it reaches that point, then expropriation would not occur." [20] Accordingly, the claim arises when the creeping expropriation takes effect:

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[15] Canada-Romania BIT, at **Exhibit C-1**, p. 10 *et seq.* (Art. VIII(1); Annex B, para. (a)); Rejoinder, p. 289 *et seq.* (paras. 904-925); Counter-Memorial, p. 212 *et seq.* (paras. 555-587).

[16] Canada-Romania BIT, at **Exhibit C-1**, p. 3 (Art. I(i)).

[17] UK-Romania BIT, at **Exhibit C-3**, p. 5 (Art. 5(1)) (emphasis added); Rejoinder, p. 301 (paras. 938-940); Counter-Memorial, p. 225 *et seq.* (paras. 588-592).

[18] *Generation Ukraine, Inc. v. Ukraine*, Award, ICSID Case No. ARB/00/9, 16 September 2003, at **Exhibit CLA-135**, p. 87 (para. 20.22) ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.").

[19] Cl. PO27 Answers, p. 37 (para. 58).

[20] *Siemens A.G. v. Argentine Republic*, Award, ICSID Case No. ARB/02/8, 6 February 2007, at **Exhibit CLA-102**, p. 81 (para. 263); see also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/11/2, 4 April 2016, at **Exhibit CLA-62**, p. 184 (para. 671); *Tradex Hellas S.A. v. Republic of Albania*, Award, ICSID Case No. ARB/94/2, 29 April 1999, at **Exhibit RLA-207**, p. 232 (para. 134).

> "Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events."[21]

25 The Claimants do not refer to any expropriatory effect on Gabriel Canada or Gabriel Jersey on 9 September 2013. They do not allege, let alone demonstrate, that on 9 September 2013 Gabriel Jersey's shares in RMGC (and Gabriel Canada's shares in Gabriel Jersey) were "substantially or completely deprived of the attributes of property."[22]

26 The Claimants' allegation that the "shares in RMGC" owned by Gabriel Jersey "**are** worth nothing" does not refer to the date of 9 September 2013 but presumably to the alleged *current* value of the shares.[23] (The shares that Gabriel Canada owns in Gabriel Jersey are not mentioned.[24]) The Claimants have therefore failed to show that Romania's conduct amounted to a creeping expropriation that "eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation" on 9 September 2013.[25]

27 The Claimants also argue that they suffered a "political repudiation of rights on September 9, 2013" and that their "investments made in and through RMGC were fully expropriated."[26] Again, they show no expropriatory effect, even assuming that the Respondent enacted a

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[21] *International Technical Products Corporation and ITP Export Corporation v. The Government of the Islamic Republic of Iran et al.*, Final Award, Iran-US Claims Tribunal Case No. 196-302-3, 28 October 1985, p. 21, quoted in W. M. Reisman & R. D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, (2003) 74 British Yearbook of International Law 115, at **Exhibit CLA-123**, p. 140.

[22] Reply, p. 159 (para. 352).

[23] Cl. PO27 Answers, p. 38 (para. 59) (emphasis added); Rejoinder, p. 361 *et seq.* (paras. 1086-1091).

[24] *Id.* at p. 45 *et seq.* (para. 79).

[25] *Generation Ukraine v. Ukraine*, Award, 16 September 2003, at **Exhibit CLA-135**, p. 89 (para. 20.26).

[26] Cl. PO27 Answers, p. 37 (para. 59).

"measure" on that date (which is denied). The allegation that "the licenses issued to RMGC for the Projects have no value"[27] is unproven and unfounded,[28] as shown *inter alia* by the five-year extension of the Roşia Montană License in June 2019.[29] Moreover, although the Claimants refer to a plurality of "licenses," RMGC's only license as of September 2013 was the Roşia Montană License.[30]

28 The Claimants' failure to show an expropriatory effect over RMGC's shares (and a consequential expropriatory effect up the ownership chain) is dispositive of the allegation of expropriation.

2.1.2 There Could Not Have Been a Breach of FET on 9 September 2013

29 To prove the consummation of a breach of FET on 9 September 2013 under Article II(2) of the Canada-Romania BIT, Gabriel Canada needed to establish that Romania's treatment of Gabriel Canada's investment was egregious, thus falling short of "the customary international law minimum standard of treatment of aliens."[31] In turn, a breach of the standard under

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[27] *Id.*

[28] Rejoinder, p. 363 *et seq.* (paras. 1092-1095); Counter-Memorial, p. 275 *et seq.* (paras. 724-725).

[29] [redacted], at **Exhibit R-666**; [redacted], at **Exhibit C-2957**; **Tr. 2019**, p. 358:17-359:4 (Respondent's Opening).

[30] The Bucium exploration license expired in 2007 and RMGC did not own any other license in the Bucium perimeter after that date, see Rejoinder, p. 298 *et seq.* (paras. 932-937) and Counter-Memorial, p. 163 (para. 424); the Băişoara exploration license was owned by Rom Aur SRL and expired in July 2011, see Gabriel Canada 2011 Annual Information Form, at **Exhibit C-1809**, p. 6 ("The Company used to hold, through its wholly-owned subsidiary Rom Aur SRL, an exploration concession for the Baisoara property in Western Romania. The license was for an initial term of five (5) years and expired in July 2011. The Company decided not to request an extension of such exploration concession."). Neither license existed when the Canada-Romania BIT entered into force in November 2011, see *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, ICSID Case No. ARB/11/33, 3 November 2015, at **Exhibit RLA-44**, p. 123 (para. 354).

[31] Canada-Romania BIT, at **Exhibit C-1**, p. 4 (Art. II(2)(a)); Rejoinder, p. 63 *et seq.* (paras. 137-152); Counter-Memorial, p. 232 *et seq.* (paras. 613-631).

Article 2(2) of the UK-Romania BIT could only occur if Romania's treatment of an investment were deemed unfair and inequitable.[32]

30 There could not have been a consummation of a breach of either standard on 9 September 2013, because there was no conduct attributable to Romania affecting the Claimants' investments on that date (see below **Section 2.2.1**). The Claimants refer to two speeches of two individuals (Senator Antonescu and Prime Minister Ponta) on 9 September 2013. It appears that the Claimants either (i) accept that no conduct took place on 9 September 2013 (but allege that these two speeches anticipated Romania's future conduct) or (ii) refer to an alleged "rejection" and "repudiation" of rights of Gabriel Canada and Gabriel Jersey on that date but do not designate the perpetrator(s) of such actions. Either way, the Claimants have failed to prove any conduct or "treatment" by Romania on that date, let alone treatment below the international law minimum standard of treatment.

31 The Claimants' characterization of the alleged breaches as "creeping" does not change the fate of their FET claims,[33] as there cannot be any such breach without "a series of cumulative **acts and omissions**".[34] On 9 September 2013 there needed to be at least conduct of Romania creating a "'watershed' moment"[35] for an otherwise immaterial series of previous acts to convert the interference on 9 September 2013 into one with more

[32] UK-Romania BIT, at **Exhibit C-3**, p. 4 (Art. 2(1)); Rejoinder, p. 48 *et seq.* (paras. 158-193); Counter-Memorial, p. 239 *et seq.* (paras. 632-638).

[33] Cl. PO27 Answers, p. 55 *et seq.* (paras. 97-102).

[34] *Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, Award, 1 July 2009, at **Exhibit CLA-255**, p. 140 (para. 12.43) (emphasis added).

[35] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, Award, ICSID Case No. ARB/15/44, 21 January 2020, at **Exhibit CLA-323**, p. 200 (para. 679); *Azurix Corp. v. Argentine Republic*, Award, ICSID Case No. ARB/01/12, 14 July 2006, at **Exhibit CLA-85,** p. 150 (para. 418); see also *El Paso Energy International Company v. Argentine Republic*, Award, ICSID Case No. ARB/03/15, 31 October 2011, at **Exhibit CLA-152**, p. 189 (para. 518) ("… a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result.").

or less irreversible effect.[36] Here, there was no effect on 9 September 2013, let alone irreversible effect.

2.1.3 There Could Not Have Been a Breach of the Other Six Obligations on 9 September 2013

32 The Claimants seem to have abandoned their six other claims since they do not attempt to present a coherent argument in support of a common date of breach on 9 September 2013.[37] In any event, they seek no remedy other than a declaration of breach in relation to those claims.[38]

33 To establish that on 9 September 2013 Romania consummated a breach of FPS under Article II(2) of the Canada-Romania BIT, Gabriel Canada was required to prove that as of that date Romania did not maintain the "level of police protection required under the customary international law minimum standard of treatment of aliens" or otherwise failed to exercise due diligence in the prevention of physical harm suffered by Gabriel Canada's investments in breach of the minimum standard of treatment of aliens.[39] Gabriel Canada does not allege any physical harm on 9 September 2013 (or indeed at any point in time); thus, Romania did not breach this standard. That conclusion applies *mutatis mutandis* to Romania's obligation of due diligence in the physical protection of Gabriel Jersey's investments under Article 2(2) of the UK-Romania BIT.[40]

34 The Claimants' arguments as to the date of breach of the FPS standards under the treaties repeat the same arguments as for FET, repackaged as a "denial of procedural justice."[41] To the extent that the arguments are not

[36] The Claimants agree, as set out *infra* in Section 3.3.

[37] Cl. PO27 Answers, p. 39 *et seq.* (paras. 63-70).

[38] Rejoinder, p. 397 *et seq.* (paras. 1175-1177); Counter-Memorial, p. 305 *et seq.* (paras. 792-796).

[39] Rejoinder, p. 240 *et seq.* (paras. 751-754) and p. 247 *et seq.* (paras. 776-779); Counter-Memorial, p. 241 *et seq.* (paras. 641-649).

[40] Rejoinder, p. 241 *et seq.* (paras. 755-779); Counter-Memorial, p. 245 *et seq.* (paras. 650-654).

[41] Cl. PO27 Answers, p. 39 (para. 63).

materially distinguishable, the reasons justifying a rejection of the date of breach of FET apply to FPS too.

35 The Claimants repeat the same allegations of breach of FPS when discussing the alleged breach on 9 September 2013 of the non-impairment standard under the UK-Romania BIT. Nonetheless, to establish the consummation of a breach of the non-impairment standard under Article 2(2) of the UK-Romania BIT on 9 September 2013, the Claimants needed to prove that Gabriel Jersey suffered on that date an impairment of its protected investment in Romania as to the management, maintenance, use, enjoyment or disposal thereof. They must also show that the impairment was caused by a "measure" of Romania, and that such measure was unreasonable or discriminatory.[42] The Claimants do not allege (let alone prove) an impairment affecting any rights of Gabriel Jersey on 9 September 2013. Accordingly, the claim fails.

36 The Claimants have also failed to identify a measure occurring on that date (and, thus *a fortiori* an unreasonable or discriminatory measure) and the reasons justifying a rejection of the date of breach of FET on this date apply to the non-impairment standard under Article 2(2) of the UK-Romania BIT as well. That applies to both the Project and the Bucium perimeter, which the Claimants now allege was similarly affected on that date.[43]

37 As to the latter, Romania could not have breached the non-impairment standard on 9 September 2013 for the additional reason that, on that date, Gabriel Jersey did not own a protected investment in the Bucium perimeter;[44] to the extent that they refer to the Bucium Exploration License owned by RMGC (not Gabriel Jersey), that license lapsed in 2007. RMGC's alleged "right to obtain exploitation licenses for the Rodu-Frasin

[42] Rejoinder, p. 249 *et seq.* (paras. 782-793); Counter-Memorial, p. 250 *et seq.* (paras. 665-669).

[43] Cl. PO27 Answers, p. 40 (para. 66).

[44] Rejoinder, p. 28 *et seq.* (paras. 94-96); Counter-Memorial, p. 195 *et seq.* (para. 505) and p. 222 *et seq*. (paras. 580-583).

and Tarniţa deposits"[45] could not have been impaired on 9 September 2013, even if such right had existed (which is denied).[46]

38 To establish that on 9 September 2013 Romania consummated a breach of Article 2(2) of the UK-Romania BIT through discriminatory treatment, the Claimants were required to prove that on that date there was another company in like circumstances as compared to RMGC, which received different treatment, and that no rational justification existed for that different treatment.[47] The Claimants allege that "the Certej, Roşia Poieni, and Cernavodă projects were treated in accordance with the law in relation to their applications for environmental permits,"[48] but they do not show that any discriminatory act occurred, let alone on 9 September 2013.[49] Their allegation of breach of Article III(3) of the Canada-Romania BIT on 9 September 2013 must thus be rejected.[50]

39 Finally, to establish that on 9 September 2013 Romania consummated a breach of the Umbrella Clause under the UK-Romania BIT (Article 2(2)), the Claimants needed to prove that on that date an underlying contract existed between Romania and Gabriel Jersey. No such contract ever existed and thus there was no "repudiation" thereof under Romanian law, let alone one that could have been elevated to a breach of the UK-Romania BIT. The Claimants refer to RMGC's Articles of Association but Romania is not a party thereto.[51] They also refer to the Roşia Montană License, but the Claimants are not a party thereto (and neither is Romania).[52] They refer to the "Bucium License", presumably as a reference to the Bucium

[45] Cl. PO27 Answers, p. 40 (para. 66).

[46] Rejoinder, p. 256 *et seq.* (para. 804); Counter-Memorial, p. 165 *et seq.* (paras. 428-433).

[47] Rejoinder, p. 253 *et seq.* (paras. 794-802); Counter-Memorial, p. 250 *et seq.* (paras. 665-696).

[48] Cl. PO27 Answers, p. 40 (para. 68) (references omitted).

[49] *Id.* at p. 39 *et seq.* (paras. 64-69); the same is true for the allegations that other applications for exploitation licenses were processed by NAMR including the "exploitation license for the Rovina project"; *Id.* at p. 40 (para. 68).

[50] Rejoinder, p. 253 *et seq.* (paras. 794-802); Counter-Memorial, p. 247 *et seq.* (paras. 658-664).

[51] RMGC Articles of Association, at **Exhibit C-188**; Rejoinder, p. 266 (para. 832).

[52] Roşia Montană License, at **Exhibit C-403**; Rejoinder, p. 266 *et seq.* (paras. 831-832).

Exploration License,[53] but that license expired in 2007 and thus did not exist on the critical date.[54] Also, neither Romania, nor the Claimants are party thereto under Romanian law (only RMGC and NAMR are).[55]

2.2 The Claimants Do Not Identify a Precise Measure Attributable to Respondent that Resulted in an Alleged Breach on 9 September 2013

40 The Claimants do not identify a precise measure attributable to the Respondent that resulted in an alleged expropriation or breach of FET on 9 September 2013 (**Section 2.2.1**). In any event, there was no expropriation or breach of FET as at 9 September 2013 (**Sections 2.2.2** and **2.2.3**).

2.2.1 The Claimants Do Not Identify a Precise Measure Attributable to Romania on 9 September 2013

41 Throughout this arbitration, the Claimants have evaded their burden of allegation (and proof) as to what exact conduct breached which of Romania's obligations under the BITs.[56] They use the ubiquitous notion of "composite" act to avoid describing with any specificity which conduct generated which effect and when, as well as what relationship exists between those allegations and Romania's obligations. The Claimants do not and indeed cannot answer the second question under Question A ("[w]hat precise measure attributable to Respondent resulted in the alleged breach for each claim?") because no such measure or breach exists.

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[53] Bucium Exploration License, at **Exhibit C-397**.

[54] Rejoinder, p. 298 *et seq.* (paras. 932-937); Counter-Memorial, p. 163 (para. 424); it also did not exist on the date of entry into force of the Canada-Romania BIT, which excludes its qualification as a protected investment at the relevant date, see *e.g. Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, ICSID Case No. ARB/11/33, 3 November 2015, at **Exhibit RLA-44**, p. 100 (para. 283).

[55] Rejoinder, p. 266 *et seq.* (paras. 831-832).

[56] See *e.g.* Rejoinder, p. 60 *et seq.* (paras. 195-199), p. 247 *et seq.* (paras. 776-779), p. 256 *et seq.* (paras. 803-804), p. 267 (paras. 834-835), p. 271 (paras. 846-847) and p. 277 *et seq.* (paras. 870-871); Counter-Memorial, p. 197 (para. 509), p. 226 *et seq*. (paras. 593-596), p. 241 (para. 639), p. 247 *et seq. (paras.* 659-660) and p. 251 *et seq*. (paras. 670-674).

42 The Claimants do not describe any measure enacted on 9 September 2013, let alone a precise measure attributable to Romania. They mention two televised speeches on that date by Prime Minister Ponta and Senator Antonescu regarding the Roşia Montană Law,[57] and an "announcement" of a political decision:

> "Claimants' principal case thus is that Respondent's conduct culminating in the political rejection of the State's joint venture agreement with Gabriel in RMGC together with the Roşia Montană and Bucium Projects, albeit without any formal decision rejecting them, without due process, and without compensation, was a breach of multiple articles of the BITs, as of the date that the political rejection **was announced on September 9, 2013**."[58]

43 Yet, speeches are not in and of themselves measures, as the *Waste Management v. Mexico II* tribunal has noted:

> "Individual statements of this kind made by local political figures in the heat of public debate may or may 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."[59]

44 A breach cannot occur without specific act or omission,[60] and even threats of expropriation (which, in any event, the Ponta and Antonescu speeches

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[57] Cl. PO27 Answers, p. 30 *et seq.* (paras. 46-47).

[58] *Id.* at p. 105 (para. 204) (emphasis added).

[59] *Waste Management, Inc. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/3, 30 April 2004, at **Exhibit CLA-139**, p. 61 (para. 161) (emphasis added).

[60] *Tradex Hellas S.A. v. Republic of Albania*, Award, ICSID Case No. ARB/94/2, 29 April 1999, at **Exhibit RLA-207**, p. 237 (paras. 155-157) ("Tradex … gives great importance to the speech of [President of Albania] of 27 October 1992 which was widely reported in the press and television, as an indication that the government intended to fulfill its pre-election promises and policies. … But the [President of Albania's] speech was neither a legislative or executive act nor did it change the situation … Therefore, the Berisha speech cannot be considered to be an expropriation, by itself or together with Decision 452."); *Ronald S. Lauder v. Czech Republic*, Final Award, UNCITRAL, 3 September 2001, at **Exhibit RLA-52**, p. 64 (paras. 282-283) ("Although the statement … might be viewed as a change of the previous position of the Media Council … the Arbitral Tribunal considers that it does not constitute a 'measure' within the

did not amount to) are not *per se* measures capable of breaching a BIT.[61] Also, even if proven, a mere motive or intent is not capable of breaching Romania's obligations under the BITs, as "practical impact is required to produce a breach."[62] Thus, the BITs refer to "treatment", a "measure" or "series of measures" in defining each substantive obligation.[63]

45 Also, public comments of individual politicians cannot be "legitimately treated as evidence of the intent of the Legislature as a whole, let alone of the State itself".[64] Were the personal opinions of each of the many persons involved in framing governmental policy in Romania susceptible on their own of creating a measure by Romania, then all different policy objectives, partisan political factors or career concerns underlying such statements could become Romania's own. That is an untenable proposition.[65]

46 Even assuming the two speeches had translated into conduct as the Claimants now allege (without any evidentiary support), only the subsequent conduct could qualify as a "precise measure" attributable to Romania.[66] The Claimants refer repeatedly (42 times) to an alleged "political rejection" of the Project, but such a "measure" was never taken.

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meaning of the Treaty, but merely expresses the general opinion of a regulatory body… This letter was not aimed at having, and could not have, any legal effect.").

[61] *Glamis Gold Limited v. United States of America*, Award, 8 June 2009, at **Exhibit CLA-7**, p. 147 (para. 328); *Enkev Beheer B.V. v. Republic of Poland*, First Partial Award, PCA Case No. 2013-01, 29 April 2014, at **Exhibit RLA-48**, p. 91 *et seq.* (para. 326); *Achmea B.V. v. Slovak Republic* (II), Award on Jurisdiction and Admissibility, PCA Case No. 2013-12, 20 May 2014, at **Exhibit RLA-208**, p. 73 *et seq.* (para. 251).

[62] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 63 (para. 254).

[63] See *supra* Sections 2.1.1, 2.1.2 and 2.1.3.

[64] *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/01, 15 January 2008, at **Exhibit RLA-59**, p. 63 *et seq.* (para. 137); see also *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, at **Exhibit CLA-30**, p. 214 *et seq.* (Part III - Chapter B (1), para. 8).

[65] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, at **Exhibit RLA-51**, p. 35 (para. 161).

[66] *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. 38 (para. 112).

Romania has not rejected the Project at any point in time, including as from 9 September 2013.

2.2.2 There Was No Expropriation as at 9 September 2013

47 The Claimants allege that Romania adopted a "politicized approach" to the permitting process from August 2011 onwards. Leaving aside the previous governments, the eleven successive governments of Romania in the period 2011-2020 are apparently charged with a common "political" intention to "block" the Project's environmental permitting. Among the key cabinets responsible for the alleged "creeping" expropriation, the Claimants single out the second Emil Boc government, the Mihai Răzvan Ungureanu government and the first and second Victor Ponta governments. The first three are charged with blocking the environmental permitting of the Project and the fourth is too, along with the responsibility for "repudiating" the Project. The Government's actions are, however, not alleged to be unlawful until 9 September 2013 when they allegedly turned into a breach and their effects became irreversible, causing an expropriation.[67]

48 The Claimants remain silent as to what sinister goal could conceivably have been pursued and united governments of diverse political persuasions and a vast number of State organs for close to a decade against RMGC, a company in which the State holds an indirect interest. There is no evidence of a common organized and deliberate campaign against RMGC, let alone of a "political" interference in the permitting of the Project. The expropriation claims fail, as do the allegations that Romania's conduct amounts to a coordinated attack against RMGC.

49 Since the Respondent did not wrongfully withhold the environmental permit, the Claimants' allegations regarding the so-called "blocking", "politicized approach" to permitting and the purported "rejection" of the Project are immaterial. The environmental permitting of the Project is discussed below in the context of the FET claims (**Section 2.2.3**). This Section only recalls, where appropriate, that the Claimants' failure to prove

[67] Cl. PO27 Answers, p. 37 *et seq.* (paras. 58-59).

that RMGC met the requirements for the environmental permit is also dispositive of the expropriation claims.

50 The three types of conduct that allegedly amount to a creeping expropriation are addressed in turn: (i) the Government's alleged efforts to increase the State's benefits from the Project (**Section 2.2.2.1**); (ii) the Government's submission of the Roşia Montană Law to Parliament (**Section 2.2.2.2**); and (iii) the Parliament's rejection of the Roşia Montană Law (**Section 2.2.2.3**). None of these events or actions adversely affected the Claimants' investments. The Claimants have not proven that the attributes of the property over the relevant shares – the shares that Gabriel Canada indirectly holds in Gabriel Jersey and that Gabriel Jersey owns in RMGC – ceased to exist as of 9 September 2013 or on any other date.

2.2.2.1 The Government's Alleged Efforts to Increase the State's Benefits from the Project Did Not Impact the Claimants' Investments

51 The Claimants have abandoned their argument that State authorities withheld the environmental permit from August 2011 onwards, so as to coerce RMGC and the Claimants into agreeing to more favorable economic terms for the Respondent.[68] This spurious accusation – based on self-serving allegations of [redacted] – was refuted by Prime Minister Boc, Minister Ariton, Minister Bode, and Prime Minister Ponta.[69] Given

[68] *Id.* at p. 9 (para. 14) ("the economics ultimately would **only be a factor** in a political decision that the Government intended to make as to whether it would allow the Project to be implemented at all"); see Reply, p. 20 *et seq.* (para. 23) ("conditioned issuance of the pivotal Environmental Permit and continuation of the Project on successfully renegotiating the State's financial interest by increasing its shareholding in RMGC and increasing its royalty.") and Memorial, p. 6 (para. 21) ("the Government in word and deed blocked all permitting processes for the Project and made clear that the Project would not proceed unless Gabriel met unconditionally the Government's demands for an increased share ownership of 25% of RMGC's shares and an increased royalty rate of 6%.").

[69] **Boc**, p. 4 *et seq.* (paras. 13-24); **Ariton**, p. 4 (para. 17) and p. 7 *et seq.* (paras. 25-30); **Bode**, p. 2 *et seq.* (paras. 7-10); **Ponta**, p. 8 *et seq.* (paras. 31-35).

Mr. Găman's involvement in discussions with the Claimants between 2011 and 2013, his evidence linked the evidence of the four other witnesses.[70]

52 Romania exposed the many evidentiary flaws of the Claimants' theory of coercion. The non-issuance of the environmental permit after RMGC agreed, in 2011, 2012 and 2013, to extend additional benefits from the Project to Romania, demonstrates the lack of relationship between the negotiations and the alleged withholding of the permit.[71]

53 As a result of the collapse of the Claimants' narrative regarding an alleged coercion of the Claimants in and throughout 2011, the Claimants have now adopted a new position. They have abandoned their allegations of political interference in the permitting of the Project in November 2011 to obtain economic concessions.[72] The new narrative is that "the Boc Government conditioned the permitting process *on political considerations* in violation of the applicable legal framework".[73] The Claimants further make the specious contention that "[t]he demand to increase the economic benefits for the State was intended *to extract political advantage* for those then in office."[74] The Claimants do not say **who** within the Government "conditioned" the permitting process, **how** that alleged conditioning occurred and **what** were the political considerations justifying that conduct. These allegations have no merit.

The Period August 2011-February 2012

54 In support of their new theory of "political rejection", the Claimants refer to statements by Romanian politicians about the Project between August

[70] See **Gaman II**, p. 2 *et seq*. (paras. 5-7).

[71] See Rejoinder, p. 134 (paras. 436-439).

[72] **Tr. 2019**, p. 136:8-17 (Claimants' Opening) (ARBITRATOR DOUGLAS: Does it say anything about this link between the renegotiation and the Environmental Permit? Because, again, if the renegotiation, as you say, is tied to the issuance and the Government's whole benefit is dependent upon that stage being reached, why was it withheld then? MS. COHEN SMUTNY: Well, I think it's not just about the money for this Government. It was about getting political comfort."); Cl. PO27 Answers, p. 8 *et seq*. (para. 14).

[73] Cl. PO27 Answers, p. 4 (para. 12). (emphasis added)

[74] *Id.* at p. 8 (para. 14). (emphasis added)

and November 2011, to which they had previously referred in support of the coercion theory.[75] Many politicians made statements about the Project over the years and, although the Claimants do not explain why only the statements from August 2011 onwards are relevant,[76] it is evident that they attempt to create the impression that something happened around that time – an event that coincides with the moment when the market capitalization of Gabriel Canada in the Toronto Stock Exchange was at its highest.[77]

55 The Claimants do not allege (or prove) that those statements amount to conduct by Romania or that they adversely affected the value of Gabriel Jersey's shares in RMGC. Those statements are therefore not relevant to the expropriation claims. The only alleged consequence of the statements is that they brought the Claimants and RMGC to the negotiation table.[78]

56 In the context of the economic hardship that Romania was facing in the period 2009-2011,[79] as well as the social opposition to the Project and its

[75] *Id.* at p. 4 (para. 12).

[76] For a chronological summary of statements in the period 2006-2012, see Respondent's Opening Presentation, p. 100.

[77] *Id*. at p. 96.

[78] Cl. PO27 Answers, p. 7 *et seq.* (para. 13). Indeed, the Claimants wanted to negotiate with the Government from the outset to obtain guarantees of legal reform and permitting making it a "win-win" negotiation, Antena 3 – "Saptamana Financiara" – 27.08.2011, quoted in National Audio-Visual Council, TV Monitoring Service Report (Excerpt) dated 1 September 2011, at **Exhibit R-671**, p. 4 ("We are open to any discussion where everyone can win. This is a principle we have assumed, not only from an economic point of view, but also from the point of view of the environment or heritage. We want win-win situations for everyone."); [redacted], p. 34 (para. 92) ("[redacted]"). Thus, the Claimants were the driving force throughout the negotiations, see **Tr. 2019**, p. 1938:1-6 (Ariton) ("[redacted]"); **Tr. 2019**, p. 1509:22-1510:6 (Găman). The Claimants sought to negotiate from the outset, see [redacted], at **Exhibit C-2915**, p. 1 ("[redacted]"), **Tr. 2019**, p. 906:22-909:17 ([redacted]); **Tr. 2019**, p. 1883:14-1884:2 (Ariton); **Tr. 2019**, p. 1565:3-1566:18 (Găman).

[79] **Boc**, p. 1 *et seq.* (paras. 5-8) and p. 5 (para. 15); **Ariton**, p. 6 *et seq.* (paras. 20-26); **Gaman II**, p. 6 *et seq.* (para. 14).

blocking effect on the Project during the same period,[80] the Government sought to address these challenges by proposing to renegotiate, with RMGC and the Claimants, aspects of the Project's contractual framework.[81] Thus, it considered requesting of RMGC a reduction of the levels of cyanide, an increase in the financial guarantees for environmental rehabilitation,[82] and an increase in Romania's share of the economic benefits from the Project.[83] As to the latter, the Claimants were forced to concede at the hearing that they "**did not incur loss** due to the State's demand for a greater share of the Project because the demand itself did not cause loss."[84] Romania agrees: the Government's renegotiation proposal cannot be the first act of the alleged creeping expropriation.

57 Both aspects of the issue – environmental and economic – called for amendments to the contracts and therefore required RMGC's and Gabriel Jersey's consent.[85] All parties agreed that a renegotiation was justified, as both parties had an incentive to change the *status quo*.[86]

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[80] See *infra* Section 5.1.

[81] **Boc**, p. 8 *et seq.* (paras. 25-27); **Ariton**, p. 6 *et seq.* (paras. 20-26); **Gaman II**, p. 4 *et seq.* (paras. 8-14); **Tr. 2019**, p. 1714:13-1715:4 (Boc); **Tr. 2019**, p. 1503:13-1504:4 (Găman).

[82] RMGC Minutes of Experts' Meeting dated 13 September 2011, at **Exhibit C-574**, p. 1-2; **Avram I**, p. 21 *et seq.* (para. 30), p. 42 *et seq.* (paras. 88-92); [redacted], p. 31 *et seq.* (paras. 82-87); **Mocanu II**, p. 51 (para. 144); Letter from Ministry of Environment to RMGC dated 18 August 2011, at **Exhibit C-440**; **Mocanu II**, p. 51 (para. 144).

[83] **Boc**, p. 8 (para. 25); **Ariton**, p. 9 *et seq.* (paras. 30-34); **Gaman II**, p. 12 *et seq.* (paras. 30-32); **Tr. 2019**, p. 1716:12-18 and 1718:5-19 (Boc).

[84] **Tr. 2019**, p. 307:19-22 (Claimants' Opening) (emphasis added).

[85] [redacted], at **Exhibit C-403**, p. 8, 11 and 19 ([redacted]); p. 12 and 14 ([redacted]); [redacted]7, at **Exhibit C-143**, p. ([redacted]); see also [redacted], at **Exhibit R-403**, p. 11 *et seq.* ([redacted]) and p. 9 *et seq.* ([redacted]).

[86] 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**, p. 2-3; 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**, p. 1; "Roşia Montană Gold Corporation Considers Decreasing the Cyanide

58 The cyanide levels and environmental guarantees were discussed separately between the Claimants' representatives and the Ministry of Environment in the summer of 2011. By late September, there was an agreement of principle: 3ppm as a maximum cyanide level and a more robust environmental rehabilitation guarantee.[87]

59 The Claimants had understood already by that time that the Project would not comply with the applicable environmental legal framework.[88] [redacted][89] [redacted][90] [redacted][91]

Concentration", *Adevarul*, 8 Sept. 2011, at **Exhibit R-395**; "Exclusively: Increase of the State's Share in Roşia Montană Conditionned by the Investor to Operator-friendly Laws", *Mediafax*, 30 Oct. 2011, at **Exhibit R-399**, p. 1; 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**, p. 4; Antena 3 – "Saptamana Financiara" – 27.08.2011, quoted in National Audio-Visual Council, TV Monitoring Service Report (Excerpt) dated 1 September 2011, at **Exhibit R-671**, p. 4; **Boc**, p. 9 (paras. 27-28); **Ariton**, p. 16 (para. 50); **Gaman II**, p. 12 (para. 29).

[87] 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**, p. 2; "Roşia Montană Gold Corporation Considers Decreasing the Cyanide Concentration", *Adevarul*, 8 Sept. 2011, at **Exhibit R-395**; RMGC Minutes of Experts' Meeting dated 13 September 2011, at **Exhibit C-574**, p. 1-2; **Avram I**, p. 21 *et seq.* (para. 30), p. 42 *et seq.* (paras. 88-92); [redacted], p. 31 *et seq.* (paras. 82-87); **Mocanu II**, p. 51 (para. 144); [redacted], at **Exhibit C-440**.

[88] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**; see *infra* Section 2.2.3.3.

[89] See [redacted], at **Exhibit R-403**, p. 8 *et seq.* ([redacted]); **Gaman II**, p. 41 *et seq.* (paras. 114-118); **Tr. 2019**, p. 1511:22-1512:9 (Găman).

[90] **Gaman II**, p. 70 (para. 188), p. 73 (para. 200); **Tr. 2019**, p. 1513:2-1515:9 (Găman).

[91] See *e.g.* [redacted], at **Exhibit R-403**, p. 8 *et seq.* ([redacted])

60 [redacted][92] [redacted][93] [redacted][94] [redacted][95] [redacted][96] [redacted][97] The

[redacted], at **Exhibit C-2920**, p. 2 ("[redacted]"); [redacted], at **Exhibit R-680**, p. 1 ([redacted], at **Exhibit C-775.02** ([redacted]); **Gaman II**, p. 46 *et seq.* (paras. 125-145); **Tr. 2019**, p. 1507:17-1508:15 (Găman); **Tr. 2019**, p. 1864:9-1865:9 (Ariton).

[92] [redacted], at **Exhibit R-403**, p. 3.

[93] **Tr. 2019**, p. 1869:8-13 (Ariton).

[94] **Tr. 2019**, p. 922:6-11 ([redacted]); see also *e.g.* **Tr. 2019**, p. 922:12-932:22 ([redacted]); **Tr. 2019**, p. 1903:8-1938:16 (Ariton).

[95] [redacted], at **Exhibit R-680**, p. 2.

[96] [redacted], p. 43 (para. 117); **Tr. 2019**, p. 865:5-18 ([redacted]) ("[redacted]"); **Boc**, p. 11 (paras. 33-37); **Tr. 2019**, p. 1725:21-1726:16 and 1815-8:1816:4 (Boc); **Ariton**, p. 31 (para. 99); **Tr. 2019**, p. 1870:15-10 (Ariton); **Gaman II**, p. 65 *et seq.* (para. 176) ("[redacted]"); [redacted], at **Exhibit C-2925** ([redacted]).

[97] [redacted], p. 62 (para. 166); Letter from Department of Infrastructure Projects to RMGC dated June 5, 2013, at **Exhibit C-814**.

Claimants' suggestion that this deal held up environmental permitting is thus non-sensical.

The Period February 2012-September 2013

61 The Claimants argue that the Ungureanu Government "maintained the political position that improved economic terms for the State were expected before the Project would be permitted."[98] The Claimants proffer no evidence to support this allegation, relying instead on the **absence** of action from the Ungureanu Government.[99]

62 This unsupported allegation is contradicted by the witness statement of Minister Bode.[100] Furthermore, at the hearing, the Claimants did not [redacted]. There is indeed no record of the Ungureanu Government ever having requested improved economic terms for the Project, let alone as a condition for allowing the Project to proceed. Minister Bode confirmed that "[redacted]"[101] He clarified that:

"[redacted]"[102]

[98] Cl. PO27 Answers, p. 19 (para. 28).

[99] *Id.* ([redacted]).

[100] **Bode**, p. 2 *et seq*. (paras. 8-10). See also *id.*, p. 4 (para. 12) ("I recall that Mr. Ungureanu also supported the implementation of the Project if the legal conditions for its permitting were met."); p. 7 (para. 23) ("I did not call for a meeting with [redacted], raise the issue of economic negotiations or insist that the draft agreement be concluded. Nor did I link 'permitting of the Project to a requirement to renegotiate both in principle and under the same economic terms demanded by Prime Minister Boc'.").

[101] **Tr. 2019**, p. 2548:7-10 (Bode).

[102] *Id.*, p. 2563:3-6 (Bode).

63 The Claimants' contemporaneous conduct further discredits their case theory. During the hearing, Minister Bode confirmed [redacted][103] Minister Bode also stated that [redacted].[104] [redacted].[105]

64 There is thus no basis to conclude that the Ungureanu Government sought to coerce RMGC into agreeing to increase the State's interest in the Project, for political purposes or otherwise, nor is there any basis to conclude that the negotiations adversely impacted the Claimants' investments. Such coercion would have been non-sensical, since an agreement had already been reached in 2011 on the increased financial benefits sought by the Boc Government.

65 Finally, the Claimants allege that, in 2012, the Ponta Government sought to block the environmental permitting process for the Project until it obtained greater economic benefits and "made a political assessment as to whether it would permit the Project to proceed at all."[106] They further allege that the Government delayed the negotiations for these benefits until after the Parliamentary elections in late 2012.[107] These allegations are

[103] **Tr. 2019**, p. 2561:13-17 (Bode) ("[redacted]").

[104] **Tr. 2019**, p. 2531:14-2532:2 (Bode) ("[redacted]") (emphasis added).

[105] **Bode**, p. 2 *et seq*. (para. 8).

[106] Cl. PO27 Answers, p. 21 (para. 31).

[107] *Id.*

based exclusively on public statements,[108] and are inconsistent with the agreement reached in 2011 on the increased financial benefits for the State.

66 Furthermore, the Claimants' contemporaneous statements show that there was no link between the negotiations and the environmental permit. In 2012, Gabriel Canada did not attribute RMGC's failure to secure the permit to political motives or to a coercive demand for negotiations, but rather to "additional considerations [that] may delay or otherwise have a bearing on the TAC process," specifically (i) the need for a declaration of public interest for the diversion of a stream in the Corna valley, (ii) the need for the Ministry of Culture's approval pending the granting of an ADC for Orlea, (iii) the need for the appointment of a new TAC President, and (iv) the implementation of the new EU waste management directive requiring an updated industrial waste management plan.[109]

67 The Claimants argue that, in 2013, "the Ponta Government maintained the treatment of requiring improved economic benefits for the State and a political decision as conditions for whether permitting would move forward and the Project would be implemented."[110] Yet the economic benefits requested by the Government in 2013 were the same as the ones previously agreed in 2011 so there would have been no need to condition the Project's progress on that basis.[111]

68 In fact, the negotiations with the Ponta Government did not adversely affect the Claimants' investments. The Claimants' allegations rely on their self-serving witness statements and on public statements made by Prime Minister Ponta and other members of his Government.[112] However, the Claimants do not explain how these statements translated into a lack of progress in permitting. Conversely, Gabriel Canada's disclosures reflect the Claimants' contemporaneous understanding of the "key to progression" on the Environmental Permit:

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[108] Cl. PO27 Answers, p. 19 *et seq*. (paras. 29-30).

[109] Gabriel Canada MD&A, Second Quarter 2012, at **Exhibit C-2161**, p. 5.

[110] Cl. PO27 Answers, p. 35 (para. 55).

[111] Rejoinder, p. 275 (paras. 863-864).

[112] Cl. PO27 Answers, p. 19 *et seq*. (paras. 29-30, 34-35).

> "The permitting progress of the Project relies heavily on Government approval of the environmental permit ('EP') and the issuance, in accordance with due process and Romanian law, of various permits and approvals at local, county and federal levels of Government. Statements, reported in the Romanian media in 2013, from both the Prime Minister and Minister for Environment on the status of permitting of the Project, have specifically focused on compliance with European Directives as key to its progression. The **Company is confident that it can, and will, comply with its environmental obligations** and looks forward to concluding its discussions with the TAC and relevant Ministries on this topic and to a successful process through Parliament of the Project specific legislation noted by Mr. Ponta."[113]

69 The Claimants' contemporaneous views are consistent with the witness statement of Prime Minister Ponta, who explains that his Government's attempt to secure increased benefits for the State was not premised on withholding or delaying the issuance of permits.[114] It was rather "part of an effort to obtain more support for the Project", since "[o]ne of the traditional criticisms of the Project was that the State's envisaged returns from the Project were too low" and by "securing an increase in the State's indirect interest in the Project, our hope was thus also to render the Project more palatable *vis-à-vis* its opponents."[115]

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[113] Gabriel Canada MD&A, Second Quarter 2013, at **Exhibit R-251**, p. 2 *et seq*. (emphasis added). Gabriel Resources did note that the "Prime Minister has maintained a view that progress on the permitting status of the Project needs to be aligned with an increase in the State's participation in the Project, through both ownership interest and royalty." Gabriel Canada MD&A, Second Quarter 2013, at **Exhibit R-251**, p. 2. However, far from suggesting that coercion was occurring, Gabriel Resources further stated that the "Company is currently in negotiation with the Government on these aspects, along with other long-term commitments on environment, cultural heritage and a defined route to successful permitting to underpin the Project's status as a world-class, long-term investment." *Ibid.*

[114] **Ponta**, p. 8 *et seq*. (para. 33).

[115] *Id.*, p. 11 *et seq*. (para. 42).

2.2.2.2 The Government's Submission of the Roşia Montană Law to Parliament Did Not Impact the Claimants' Investments

70 The Claimants argue that the Ponta Government improperly tied progress on the Project's permitting to the submission of a special law to Parliament.[116] As demonstrated in the subsections below, this argument (i) incorrectly presupposes that the Government was wrongfully withholding the environmental permit in the first place; (ii) is inconsistent with the genesis of the Roşia Montană Law, which was to facilitate the Project by providing an alternate path forward, thereby circumventing RMGC's inability to meet permitting requirements and the obstacles posed by NGO opposition; and (iii) falsely portrays the process of conceiving, drafting and submitting the Roşia Montană Law to Parliament as a unilateral exercise imposed on RMGC.[117]

71 More generally, the Claimants disregard RMGC's willing cooperation in this process, and that the Roşia Montană Law was specifically designed to facilitate the implementation of the Project based on the legislative changes expressly requested by RMGC and the Claimants.[118] The Claimants also do not provide evidence of a measure conditioning the issuance of the permit on Parliament's approval of the Roşia Montană Law, relying instead on public statements by the Ponta Government.[119]

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[116] Cl. PO27 Answers, p. 24 *et seq*. (Section (a)(F)).

[117] *Id.*, p. 61 *et seq*. (paras. 112-115).

[118] [redacted] at **Exhibit R-529**; [redacted], at **Exhibit R-521**; [redacted], at **Exhibit R-522**; [redacted] at **Exhibit R-488**; [redacted], at **Exhibit C-781**; [redacted] at **Exhibit C-826.02**; [redacted], at **Exhibit C-2433**.

[119] Cl. PO27 Answers, p. 24 *et seq*. (paras. 34-37).

Romania Did Not Condition the Issuance of the Environmental Permit on Parliament's Approval of the Roşia Montană Law

72 As discussed in **Section 2.2.3.2**, RMGC's failure to meet the regulatory requirements prevented the issuance of the environmental permit.[120] However, even assuming the permit was improperly withheld, the Claimants' revised case does not add up. If the Ponta Government had been withholding the permit to extract additional financial benefits, there would have been no reason to continue to withhold the permit once the Claimants had agreed to provide those benefits.[121] There would also be no reason for the Government to withhold a permit pending a "political decision".[122]

73 The Claimants point to public statements from various government officials as evidence of the purported condition.[123] However, these statements do not establish that the issuance of the environmental permit was being conditioned on Parliament's approval of the Roşia Montană Law, let alone a systematic State policy or practice of doing so. Neither the Ministry of Environment nor the TAC ever informed RMGC that the environmental permit would not be issued unless Parliament approved the Roşia Montană Law.[124] On the contrary, the Roşia Montană Law was

[120] See also Rejoinder, p. 69 *et seq*. (Section 3.3.2).

[121] See *id.*, p. 273 *et seq*. (paras. 855-856).

[122] Reply, p. 76 *et seq*. (Section IV.A).

[123] Cl. PO27 Answers, p. 25 (para. 37).

[124] The Claimants point to the statement of State Secretary Năstase at the 31 May 2013 TAC meeting that "all the conditions in the environmental permit and all the agreements" resulting from the "financial-economic negotiation" "will be part of the law that will be submitted to the Parliament for approval as the final deciding factor whether this project will be done or not." Cl. PO27 Answers, p. 26 (para. 37(f) (citing TAC meeting transcript, at **Exhibit C-485**, p. 20). This statement was made in error and did not reflect the policy of the Government. Indeed, while the Agreement that accompanied the Roşia Montană Law did encompass the results of the "financial-economic negotiation" between the Claimants and the Government, it is undisputed that the "conditions in the environmental permit" were not incorporated into the Roşia Montană Law, nor did the Roşia Montană Law provide for the approval or issuance of the environmental permit. Similarly, the Roşia Montană Law did not include any provision approving of the Project, nor was it the policy of the Government that the rejection of the Roşia Montană Law would result in the rejection of the Project. As Prime Minister Ponta explains, it is rather that without the modification of the legislative framework provided by the Roşia Montană Law, it was very unlikely that the Project could overcome the regulatory and legal roadblocks that it faced. **Ponta**, p. 23 (para. 80).

designed to assist the Project, by moving it past RMGC's inability to satisfy the environmental permit's requirements and by trying to minimize the impact of litigation by Project opponents.[125]

74 In conclusion, the process leading to the submission of the Roşia Montană Law to Parliament did not adversely affect the Claimants' investments. Nor did it form part of a systematic State policy or practice.

The Purpose of the "Parliamentary Route" Was to Facilitate the Project

75 As RMGC failed to meet the requirements for the environmental permit, and in response to potential litigation from NGOs and RMGC stemming from RMGC's permitting difficulties, the [redacted]. [126] As [redacted] confirmed at the hearing: "[redacted]".[127] [redacted] also agreed that [redacted][128] [redacted][129] Given the difficulties they were facing with the classical route, the Claimants opted for the parliamentary route and willingly participated in the conception, drafting and submission of the Roşia Montană Law to Parliament.[130]

[125] Rejoinder, p. 138 *et seq*. (Section 3.5.1.).

[126] [redacted], at **Exhibit C-779**, p. 2 *et seq*.

[127] **Tr. 2019**, p. 1058:18-19 ([redacted]).

[128] *Id.*, p. 1058:11-17 ([redacted]) ("[redacted]").

[129] [redacted], at **Exhibit C-779**, p. 2 *et seq*.

[130] Respondent's Opening Presentation, p. 217 *et seq*.

The Roşia Montană Law Was Not Imposed on the Claimants

76 Despite the Claimants' unsupported claims to the contrary, neither RMGC nor the Claimants ever objected to the so-called "parliamentary route", on the contrary. Their allegation that they "objected to a special law" is demonstrably misplaced. [redacted][131] [redacted][132] [redacted]. Moreover, after the law was drafted, at no point did the Claimants ever indicate that they disagreed with the submission of the draft law to Parliament.

77 [redacted][133]

[131] See **Tr. 2019**, p. 1047:13-1050:7 ([redacted]). ([redacted]); [redacted], at **Exhibit C-1536**, p. 64, "[redacted]"; *id.* at p. 65.

[132] **Tr. 2019**, p. 1036:5-1037:1 ([redacted]).

[133] See [redacted], at **Exhibit C-1536**, p. 31 *et seq.*; see also [redacted], at **Exhibit C-826.02**, p. 1 ([redacted]) (emphasis added); see also Rejoinder, p. 140 (paras. 458-459, n. 596, 597).

[redacted].[134] [redacted]

[redacted].[135]

78 Indeed, the argument that the Roşia Montană Law was imposed upon the Claimants is nonsensical, as a core component of the Law was the Agreement between Gabriel Canada and the Government, which required the Claimants' consent.[136] Therefore, without the Claimants' consent, the "parliamentary route" could not even be pursued. The Claimants could have stopped the "parliamentary route" at any time, up to the submission of the Roşia Montană Law to Parliament.

79 [redacted].[137] If RMGC (erroneously) considered that it had met the requirements for the environmental permit, it could have sought redress from the Romanian courts, much as it did in 2007 when it sought to compel the resumption of the TAC process.[138] To the contrary, the contemporaneous evidence shows that the Claimants fully and enthusiastically supported the draft law.[139]

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[134] See **Tr. 2019**, p. 537:11-538:6. See also Respondent's Opening Presentation, p. 201 *et seq*.; [redacted], at **Exhibit C-826.02**, p. 6 ([redacted]); Roşia Montană Law and Agreement (resubmitted), at **Exhibit C-519**, p. 2 (Article 4(1)(a) of the Roşia Montană Law) (directing NAMR to execute an addendum to the Mining License extending its validity by a period not to exceed 20 years).

[135] Respondent's Opening Presentation, p. 200 *et seq*.

[136] Roşia Montană Law and Agreement (resubmitted), at **Exhibit C-519**, p. 12 *et seq*.; Respondent's Opening Presentation, p. 179; **Tr. 2019**, p. 523:13-525:10 (Respondent's Opening).

[137] **Tr. 2019**, p. 1005:3-1006:14 ([redacted]).

[138] Rejoinder, p. 157 (para. 497).

[139] See Gabriel Canada press release dated 28 August 2013, at **Exhibit C-1436**; "Romania gold project at Roşia Montană back on track", *BBC*, 28 Aug. 2013, at **Exhibit R-523**; Gabriel Canada press release dated 5 September 2013, at **Exhibit R-256**.

2.2.2.3 Parliament's Rejection of the Roşia Montană Law Did Not Adversely Affect the Claimants' Investments

80 The Claimants refer to statements by Prime Minister Ponta and Senator Antonescu in support of their argument that there was a "political decision" to reject the Project in September 2013.[140] However, Prime Minister Ponta and Senator Antonescu were merely expressing their view that the law would likely be rejected by Parliament (given the massive street protests).[141] During this time Prime Minister Ponta made many statements in support of the Project, as did other ministers of his Government.[142]

81 Nor did the Government call for the rejection of the Roşia Montană Law on 9 September 2013.[143] In an interview dated 15 September 2013, just a few days after the purported "political rejection" of the Project, Prime Minister Ponta called on MPs to vote according to their conscience.[144]

82 On 12 November 2013, the Joint Special Committee of the Chamber of Deputies and the Senate issued its report on the Roşia Montană Law.[145] While this report recommended the rejection of the Roşia Montană Law, as Gabriel Canada stated in its contemporaneous press release, the "**conclusions of the Report do not propose a rejection of the Project by the Romanian Parliament**."[146] Indeed, on 19 November 2013, the Senate voted to reject the Roşia Montană Law (not the Project).

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[140] Cl. PO27 Answers, p. 30 *et seq*. (paras. 46-49).

[141] Senator Antonescu made clear that his statement on 9 September 2013 expressed his personal point of view and were made in a personal capacity. Rejoinder, p. 161 (para. 509).

[142] **Ponta**, p. 14 (para. 53).

[143] Rejoinder, p. 160 *et seq.* (Section 3.5.4).

[144] Transcript of *Interview of Victor Ponta*, B1 TV dated 15 September 2013, at **Exhibit C-1483**, p. 2 ("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 Băsescu 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.").

[145] Parliamentary Special Commission Report dated November 2013, at **Exhibit C-557**.

[146] Gabriel Canada press release dated 12 November 2013, at **Exhibit R-538** (emphasis in original).

83 Without the Roşia Montană Law, the Project would need to follow the normal regulatory route. As Prime Minister Ponta has explained,

> "the rejection of the Roşia Montană Law did not mean that the Project would not be permitted; the rejection did not amount to a refusal to issue the environmental permit, nor could it (since, by law, the Ministry of Environment and in turn the Government were required to take the decision to issue the environmental permit). In making these statements, I meant that, were the Parliament to reject the law, the Project would not benefit from any permitting facilitation as provided under the Roşia Montană Law."[147]

84 The Claimants improperly equate the rejection of the Roşia Montană Law with the rejection of the Project. While the submission of the Roşia Montană Law to Parliament became a focal point for the Project's opponents, thereby triggering an unprecedented reaction against the Project by Romanian civil society, the rejection of the law did not result in an expropriation of the Claimants' investment.

85 The Government, and more specifically, the Ministry of Environment, continued with the EIA Review Process after the rejection of the Roşia Montană Law.[148] The Claimants also did not inform their investors of any purported "political rejection" of the Project (which would have been a material fact requiring disclosure), but rather confirmed that the EIA Review Process was ongoing.[149] Gabriel Canada did not record any impairment of its assets at the end of 2013, reporting instead an **increase** in the value of its consolidated assets from USD 467.2 million to USD 553.9 million.[150] After Gabriel Canada impaired its assets in late 2015 (*i.e.* after the filing of its Request for Arbitration), it informed its shareholders that an assessment of future prospects for the Project "may lead to a **reversal of part or all of the impairment** that has been

[147] **Ponta**, p. 23 (para. 80).

[148] Rejoinder, p. 204 *et seq*. (Section 3.6.1.12).

[149] *Id.*, p. 202 *et seq*. (Section 3.6.1.11).

[150] *Id.*, p. 290 *et seq*. (paras. 909-915).

recognized in the current year."[151] Finally, in 2019, RMGC applied for, and obtained, a renewal the License.[152]

86 In conclusion, there is no contemporaneous evidence of permanent destruction of the economic value of the Claimants' investment.

2.2.3 There Was No Breach of FET as at 9 September 2013

87 The Claimants contend that the same course of conduct that allegedly gave rise to an expropriation also breached the FET standard.[153] The evidence does not support the Claimants' case.

88 According to the Claimants, Romania breached the FET standard "as of the date of the political rejection and repudiation of rights" and that "[p]rior to that date, the ultimate treatment that Gabriel's investments would receive remained uncertain, as Romania could either have changed course and followed the law or, alternatively, its political assessment could have resulted in a decision to approve, rather than, reject the Project."[154]

89 The Claimants' case falls short of articulating their case of FET breach with the required clarity.

90 For the same reasons as with the expropriation claims and contrary to the Claimants' allegations:

- the Government's efforts to increase the State's benefits from the Project do not amount to a failure to provide the Claimants' alleged investments with FET (see **Section 2.2.2.1**); and,
- the Government's submission and the Parliament's rejection of the Roşia Montană Law in 2013 do not amount to a failure to provide FET (see **Sections 2.2.2.2** and **2.2.2.3**).

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[151] Gabriel Canada MD&A, Fourth Quarter 2015 dated 29 March 2016, at **Exhibit R-24**, p. 20 (emphasis added).

[152] [redacted], at **Exhibit R-570**. [redacted], at **Exhibit R-666**.

[153] Cl. PO27 Answers, p. 38 (para. 61).

[154] *Id.*, p. 38 *et seq.* (para. 62).

91 Nor does the Ministry of Environment's non-issuance by 9 September 2013 of the environmental permit for the Project amount to a failure to provide FET.[155] There was no interference with the EIA Review Process (**Section 2.2.3.1**); RMGC simply never met the permitting requirements (**Section 2.2.3.2**). Thus, the Claimants' allegation that the EIA Review Process was reaching its conclusion with the November 2011 TAC meeting is without merit (**Section 2.2.3.3**). Likewise, the Claimants' position that Ministry of Environment failed to allow permitting to advance after the November 2011 TAC meeting is without merit (**Section 2.2.3.4**). In any event, throughout the EIA Review Process, the TAC and the Ministry of Environment were entitled to make reasonable use of their discretion to ensure a proper assessment of the Project (**Section 2.2.3.5**).

2.2.3.1 There Had Been No Political Interference with the EIA Review Process as at 9 September 2013

92 The word "political" appears 297 times in the Claimants' 120-page submission. They repeatedly refer to a "politicized treatment of RMGC's application for the Environmental Permit," a "politicized decision-making process" and to a "political rejection" of the Project. However, saying that something is "political" does not make it so. The Claimants provide no evidence that the Romanian authorities ever decided to reject the Project, let alone that there was a "political" decision to that effect.

93 While Romanian politicians (quite understandably) have made political statements about the Project, the Claimant have provided no evidence that such statements impacted the Project. Nor have they provided evidence that politicians interfered with the permitting procedure.

94 The Claimants make two main allegations of political interference by Romanian politicians before or by 9 September 2013.

[155] For the same reasons, the Ministry's non-issuance by that date of the environmental permit cannot be considered to give rise to an expropriation in breach of the BITs.

95 First, they wrongly allege that Romanian politicians improperly linked the economic negotiations in late 2011 with the EIA Review Process. For reasons explained at **Section 2.2.2** above, these allegations are baseless.

96 Second, the Claimants wrongly allege that in 2013 the Government bypassed the EIA Review Process, deferring the decision to permit the Project to Parliament.[156] As explained above in **Section 2.2.2.2**, the Government did not bypass the permitting process; by submitting the law to Parliament, it rather sought to facilitate the Project.[157] In the absence of the law being passed pursuant to the parliamentary route, the Project remained on the classic route.

97 The Claimants also alleged in their written submissions prior to the hearing, that Prime Minister Boc and Minister Borbély interfered with the November 2011 TAC meeting, including through calls to Ms. Mocanu, and through calls and texts to the TAC president which somehow allegedly resulted in stalling the decision making in the meeting.[158] In its Rejoinder the Respondent noted that these allegations were neither supported nor coherent.[159] It also proffered the testimony of Ms. Mocanu and Prime Minister Boc, who both rejected the accusations.[160]

98 Notwithstanding the gravity of these accusations and the importance the Claimants attached to them in their written submissions, the Claimants failed to mention them during their Opening Statement at the hearing. Nor did they put any questions to Ms. Mocanu or Prime Minister Boc about the alleged interruptions in the November 2011 TAC meeting or otherwise question their testimony. The Claimants also remain silent on these alleged calls and text messages in their PO27 Answers.

99 The Claimants have thus effectively withdrawn their claims of political interference with the TAC's work during the November 2011 meeting. In any event, they have failed to meet their burden of proof in this regard.

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[156] Cl. PO27 Answers, p. 1 (para. 3).

[157] Rejoinder, p. 135 *et seq.* (Section 3.5).

[158] See Reply, p. 239 *et seq.* (paras. 566-568).

[159] Rejoinder, p. 126 *et seq.* (paras. 415-416); see also Counter-Memorial, p. 85 (paras. 223-224).

[160] **Mocanu II**, p. 4 (paras. 13-14); **Boc**, p. 13 (para. 42).

[redacted]

"[redacted]" [161]

100 [redacted]

"[redacted]

[161] **Tr. 2019**, p. 2044:17-2045:9 (Mocanu) (emphasis added).

> [redacted]"[162]

101 [redacted]

> "[redacted]" [163]

102 [redacted][164] [redacted]

> "[redacted]"[165]

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[162] **Tr. 2019**, p. 2045:10-21 (Mocanu) (emphasis added).

[163] *Id.* at p. 2010:2-15 (Mocanu) (emphasis added).

[164] *Id.* at p. 1744:17-1745:1 (Boc) ([redacted]); p. 1793:11-13 (Boc) ([redacted]); p. 1819:20-22 (Boc) ([redacted]) (emphasis added).

[165] **Tr. 2019**, p. 1789:4-7 (Boc).

103 [redacted][166] [redacted][167] [redacted].

2.2.3.2 RMGC Had Not Met the Requirements for the Environmental Permit as at 9 September 2013

104 The Claimants allege that "[t]he State's acts and omissions occurring prior to [9 September 2013] were in breach of the applicable legal framework established in Romanian law for Project permitting, particularly insofar as the State delayed […]" the permitting process.[168] However, as at 9 September 2013, RMGC had not met the environmental permitting requirements, nor has it met those requirements since then.[169]

105 First, [redacted], RMGC had not and still has not secured the PUZ for the Project Area (as well as for the historical

[166] **Tr. 2019**, p. 1864:2-8 (Ariton) ("[redacted]") (emphasis added); see also p. 1798:15-20 (Boc) ("[redacted]") (emphasis added) and p. 1760:4-8 ("[redacted]").

[167] **Tr. 2019**, p. 1864:9-20 (Ariton) ("[redacted]").

[168] Cl. PO27 Answers, p. 36 (para. 56).

[169] See Counter-Memorial, p. 84 *et seq.* (Section 4.6); Rejoinder, p. 67 *et seq.* (Sections 3.3.1-3.3.3).

area of Roşia Montană).[170] Prior to September 2013, the Ministry of Environment had repeatedly requested that RMGC provide the PUZ, including at the November 2011 TAC meeting.[171]

106 As Romania's legal experts confirmed, the Ministry of Environment needed the PUZ and related reports and studies, and the approvals of the plan by local officials (including the SEA environmental endorsement of that plan) before it could in turn issue the (EIA) environmental permit.[172] As Prof. Tofan confirmed at the hearing:

> "undoubtedly **there should have been an approved modified PUZ at the moment when they would have reached the moment of the issuance of the EP**… the Ministry of the Environment accepted to start, to initiate the [EIA] procedure, but … obviously **it wouldn't have finalized it if they didn't have the … approved modified PUZ approved** by the … competent local authority **at the moment of taking a decision on the EP**."[173]

107 Second, RMGC has been unable to maintain urban certificates that were not challenged in court, suspended, and/or annulled.[174] RMGC was aware that obtaining and maintaining a valid urban certificate throughout the EIA Review Process was a requirement for the environmental permit.[175] In September 2007, the Ministry of Environment had announced that it could not continue the EIA Review Process because of problems with RMGC's

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[170] **Tr. 2019**, p. 1204:14-1211:7 and p. 1217:16-1225:7 ([redacted]); see also **Tr. 2019**, p. 432:18-434:3 (Respondent's Opening), p. 2035:11-2036:6 (Mocanu); Rejoinder, p. 76 *et seq.* (paras. 252-258, 554-568).

[171] Letter from Ministry of Environment to RMGC dated 26 May 2010, at **Exhibit R-188**, p. 2; Transcript of TAC meeting dated 29 November 2011, at **Exhibit C-486**, p. 41 *et seq*. (Pineta, Mocanu); Letter No. 15466 from Ministry of Environment to RMGC dated 15 October 2010, at **Exhibit C-591**, p. 5, 13; Letter No. 3946 from RMGC to Ministry of Environment dated 26 October 2010, at **Exhibit C-592**, p. 7 *et seq*.

[172] **Tofan LO**, p. 47 *et seq.* (paras. 152-197); **Dragos LO I**, p. 41 *et seq.* (paras. 206-218); **Dragos LO II**, p. 41 *et seq.* (paras. 161-200).

[173] **Tr. 2019**, p. 2597:5-18 (Tofan) (emphasis added).

[174] Rejoinder, p. 79 *et seq.* (paras. 259-272, 569-578).

[175] See Letter from RMGC to Alba EPA dated 14 December 2004, at **Exhibit C-525.01** (submitting RMGC's application for an environmental permit and attaching UC 68/2004); see also Transcript of TAC meeting dated 9 August 2007, at **Exhibit C-475**, p. 4 (Filipaş).

urban certificates.[176] For years, including between 2011 and 2013, NGOs challenged – and State authorities defended the issuance of – urban certificates to RMGC.[177] Romania's legal experts also confirmed at the hearing that urban certificates were necessary for the EIA Review Process.[178]

108 Third, RMGC has not demonstrated that the Project complies with the Water Framework Directive, and thus has not secured the water management permit.[179] The Ministry of Environment repeatedly requested that RMGC demonstrate compliance with the directive, including in its September 2011 letter.[180] TAC members' requests, including those of the Ministry of Environment and the ANAR, are still outstanding.[181]

109 Throughout 2013, State officials raised these issues with RMGC.[182] In September 2013, Minister Plumb testified before the Joint Special Committee that the EIA Review Process was ongoing and that the TAC had yet to decide on RMGC's application.[183] As their 2013 public disclosures and internal documents show, Gabriel Canada and RMGC were well aware that RMGC had not yet met the requirements for the environmental permit.[184]

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[176] See Rejoinder, p. 79 *et seq.* (paras. 259-272); **Tr. 2019**, p. 403:2-20 and p. 441:2-444:5 (Respondent's Opening).

[177] Rejoinder, p. 81 *et seq.* (paras. 267-272, 569-580).

[178] **Tr. 2019**, p. 2515:12-2516:17 (Tofan); 2655:3-2656:19 (Dragos).

[179] Rejoinder, p. 82 *et seq.* (paras. 273-290); **Tr. 2019**, p. 444:6-448-1 (Respondent's Opening); p. 1226:12-1231-1 ([redacted]).

[180] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 4 *et seq.*

[181] **Tr. 2019**, p. 1226:12-1231-1 ([redacted]); Rejoinder, p. 184 *et seq.* (paras. 586-603); Respondent's Opening Presentation, p. 71-82; **Tr. 2019**, p. 444:6-451:22 (Respondent's Opening).

[182] See *e.g.* Transcript of TAC meeting dated 31 May 2013, at **Exhibit C-485**, p. 21 (Cazan on the water framework directive compliance); p. 14 *et seq.* (Pârvu on information requested by the Ministry of Health); see also TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 4 *et seq.* (Pârvu on information requested by the Ministry of Health).

[183] Parliamentary Special Commission hearing transcript dated 24 September 2013, at **Exhibit C-506**, p. 25 *et seq*.

[184] See Rejoinder, p. 202 *et seq.* (paras. 647-652).

110 The Claimants' vague allegation that State authorities delayed the permitting process is not supported by evidence. As demonstrated in the Respondent's written submissions, for each of the issues outlined above, State officials timely put RMGC on notice of the requirement, requested information, and followed up with RMGC when they considered that RMGC's answer was incomplete or unsatisfactory. RMGC invariably did not respond to or delayed in responding to these requests.

111 The Claimants argue that the Ministry of Environment and the Ministry of Culture were wrong in not confirming that the Ministry of Culture's December 2011 point of view qualified as an endorsement.[185] They also reproach the Ministry of Environment for its alleged delay in approving RMGC's Waste Management Plan.[186]

112 As of the spring of 2013, the TAC had last met on 29 November 2011. As explained below, the TAC had not met in 2012 in part because (i) RMGC had delayed in providing its updated and revised Waste Management Plan and in answering the Ministry of Environment's requests for clarification; and, (ii) the Ministry of Culture had not yet endorsed the Project.

113 The TAC had requested an updated version of RMGC's (2006) Waste Management Plan on 22 September 2010 and reiterated this request twice in September 2011.[187] RMGC submitted a new version of the plan only in December 2011.[188] RMGC then failed to respond to the Ministry's requests for clarification in 2012.[189] When it finally responded in the spring of 2013,

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[185] Cl. PO27 Answers, p. 104 (para. 202(d)).

[186] *Id.* at p. 104 (para. 202(d)).

[187] TAC meeting minutes dated 22 September 2010, at **Exhibit R-491**, p. 5; Transcript of TAC meeting dated 22 September 2010, at **Exhibit C-487**, p. 43 (Pătruti); see also Rejoinder, p. 74 *et seq.* (paras. 243-251 and 538-546); RMGC Minutes of Experts' Meeting dated 13 September 2011, at **Exhibit C-574**, p. 5; Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit R-215**, p. 12.

[188] See **Avram II**, p. 31 (para. 58).

[189] See Rejoinder, p. 75 *et seq.* (paras. 249-250); Respondent's Opening Presentation, p. 48.

the TAC convened again and NAMR and the Ministry of Environment promptly approved the plan.[190]

114 The Ministry of Culture also did not delay its decision to endorse the Project. Before the November 2011 TAC meeting, the Ministry of Culture had stressed that the Project must comply with Romanian law[191] and the Ministry of Environment had specifically requested that RMGC secure the ADCs for Orlea and Cârnic.[192] To this day, RMGC has not even applied for an ADC for Orlea, and the ADC for Cârnic has been the subject of protracted court litigation (including between 2011 and 2013).[193]

115 The ADCs were relevant to the Ministry of Culture's decision regarding the Project. The Ministry thus ultimately decided to endorse the Project (in April 2013) – notwithstanding the absence of ADC for Orlea and notwithstanding the litigation surrounding the ADC for Cârnic – but made its endorsement conditional on RMGC's securing and maintaining valid ADCs.[194] In addition, between 2011 and 2013, the cultural authorities reviewed the Orlea Archaeological Assessment Report and the resultant Orlea Research Report, which were also relevant to its decision.[195]

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[190] See Rejoinder, p. 67 *et seq.* (Sections 3.3.1-3.3.3) and p. 171 *et seq.* (paras. 538-546); **Tr. 2019**, p. 419:5-11 (Respondent's Opening); see also **Tr. 2019**, p. 1261:2-1267:10 ([redacted]).

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

[192] **Tr. 2019**, p. 422:22-423:6 (Respondent's Opening) and p. 408:15-19; Respondent's Opening Presentation, p. 39 (quoting **C-483**, p. 44-45 and other TAC meetings where the issue was raised); see also Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 14 (requesting the ADC for Orlea).

[193] See **Tr. 2019**, p. 423:7-17 (Respondent's Opening); Respondent's Opening Presentation, p. 41.

[194] See Rejoinder, p. 70 *et seq.* (paras. 231-242); Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 1; see also *id.*, p. 3 *et seq.* (items 1 and 4) (requiring compliance with the legal provisions for the protection of archaeological sites and historical monuments).

[195] See *infra* para. 137e).

2.2.3.3 The Claimants' Allegations that the EIA Review Process Was Reaching Its Conclusion with the November 2011 TAC Meeting Are Without Merit

116 The Claimants continue to allege that they expected the November 2011 TAC meeting to be the last and that review of the EIA Report was expected to be completed on that date.[196] However, in the weeks and months leading up to the November 2011 TAC meeting, the EIA Review Process was underway and neither the Ministry nor the TAC indicated to RMGC that the TAC had completed its review of the EIA Report, had no more questions, or that the November meeting would be the final meeting.[197]

117 Going back three months, contrary to the Claimants' arguments, the EIA Review Process was nowhere near "positive completion" in August 2011.[198] RMGC did not even submit to the Ministry of Environment its comments to the questions and comments from the public (from the second public consultation) until late August 2011.[199] As Ms. Mocanu confirmed at the hearing that, during 2011, the TAC and the Ministry of Environment worked "intense[ly]" especially "with respect to data collection, questions raised by the TAC members, questions coming from the public."[200]

118 The Claimants' allegation that the review process was near "positive completion" in August 2011 is also belied by the [redacted][201] Their allegation is also belied by the Ministry of Environment's letter to RMGC of September 2011, listing 102 questions and requests for information in connection with the

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196 Cl. PO27 Answers, p. 9 *et seq.* (paras. 16, 20).

197 See **Tr. 2019**, p. 407:5-415:5 (Respondent's Opening) (summarizing EIA Procedure between September and November 2011); see also Respondent's Opening Presentation, p. 21-22.

198 Cl. PO27 Answers, p. 4 (para. 11).

199 See **Tr. 2019**, p. 407:5-409-9 (summarizing EIA Procedure up until September 2011); see also Respondent's Opening Presentation, p. 21 *et seq*.

200 **Tr. 2019**, p. 1963:1-13 (Mocanu).

201 [redacted], at **Exhibit C-574**, p. 1 *et seq.*; see also Rejoinder, p. 65 *et seq.* (para. 213).

EIA Review Process. The Claimants delayed in addressing certain requests (for instance regarding the Waste Management Plan) [202] and never addressed others, including the requests for ADCs,[203] the requests that RMGC secure the water management permit,[204] and that it prepares a Health Risk Assessment Study.[205] At the hearing, [redacted]. [206]

119 Conversely, Ms. Mocanu [redacted]. [207] [redacted]. [208] [redacted] [209]

[202] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 12 (question 75); see also Rejoinder, p. 74 (para. 245).

[203] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 14; see also Rejoinder, p. 94 *et seq.* (paras. 313-316); Respondent's Opening Presentation, p. 23, 40-43.

[204] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 14; see also Rejoinder, p. 82 *et seq.* (paras. 273-290); Respondent's Opening Presentation, p. 23, 71-79.

[205] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**, p. 9 (question 52); see also Transcript of TAC meeting dated 29 November 2011, at **Exhibit C-486**, p. 26 (Cârlan).

[206] **Tr. 2019**, p. 1138:9-1139:2 ([redacted]).

[207] *Id.* at p. 1966:4-1967:9 (Mocanu); see also Respondent's Opening Presentation, p. 39 (quoting TAC meetings of 2010, 2011 and 2014 where the situation at Cârnic and/or Orlea was discussed); see also Respondent's Opening Presentation, p. 79 (listing all correspondence from 2007 to 2014 addressing the issue of the Project's compliance with the Water Framework Directive).

[208] **Tr. 2019**, p. 1997:2-2000:8 (Mocanu).

[209] See **Mocanu I**, p. 12 (paras. 56-66); **Mocanu II**, p. 63 (paras. 181-202).

2.2.3.4 The Claimants' Allegation that the Ministry of Environment Failed to Allow Permitting to Advance After the 29 November 2011 TAC Meeting Is Without Merit

120 The Claimants reproach the Ministry of Environment for its:

> "[alleged] failure to allow permitting to advance and thereafter to recommend issuance of the Environmental Permit after all lawful permitting conditions were met following the 29 November 2011 TAC meeting, and the Government's failure to issue the Environmental Permit through a Government decision at the latest in 2012."[210]

121 The Respondent has demonstrated in its written submissions that this allegation is not correct.[211]

122 At the hearing, [redacted][212] [redacted][213] [redacted][214]

123 [redacted][215]

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[210] Cl. PO27 Answers, p. 104 (para. 202(c)).

[211] Rejoinder, p. 168 *et seq.* (Section 3.6.1); Counter-Memorial, p. 145 *et seq.* (Sections 6.1, 6.2, and 6.3).

[212] **Mocanu I**, p. 1 *et seq.* (paras. 4-13); see also **Tr. 2019**, p. 1954:21-1955:19 (Mocanu).

[213] **Tr. 2019**, p. 1995:18-1997:1 (Mocanu).

[214] *Id.* at p. 1997:2-2000:8 (Mocanu).

[215] [redacted]

[redacted][216] [redacted]
[redacted][217]

The 29 November 2011 TAC Meeting

124 As regards the TAC meeting itself, the Claimants wrongly allege that "each TAC member provided favorable points of view on RMGC's written answers to the TAC's final questions and/or raised no objections to issuing the Environmental Permit."[218]

125 First, at no point in time did the TAC communicate to RMGC a list of questions that it considered as "final."[219]

126 Second, it is manifest from the record that the TAC meeting itself was not "final." Thus, during the meeting, the TAC president never asked TAC members to vote for or against the issuance of the permit, although he did ask for their points of view regarding Chapters 8 and 9 of the EIA Report and "the analysis of the answers submitted by the Titleholder in response to the questions raised by the Ministry of Environment … [in] … September 2011."[220]

127 [redacted]:

"[redacted]

[redacted]; **Tr. 2019**, p. 2039:4-2041:22 (Mocanu). [redacted]

[216] **Mocanu II**, p. 62 *et seq.* (Section 2.1.3); see also Rejoinder, p. 69 *et seq.* (Section 3.3.2).

[217] **Tr. 2019**, p. 149:2-153:17 (Respondent's Opening).

[218] Cl. PO27 Answers, p. 12 (para. 20).

[219] **Tr. 2019**, p. 1136:7-15 ([redacted]).

[220] Transcript of TAC meeting dated 29 November 2011, at **Exhibit C-486**, p. 2 (Anton); see also **Tr. 2019**, p. 1162:6-1164:10 ([redacted]).

[redacted]"[221]

128 [redacted]

129 Third, the transcript of the November 2011 TAC meeting records requests to RMGC representatives for additional information.[222] For instance, the representative of ANAR, Mr. Cazan stressed that he "could not find the answer for Question 10 – related to the compliance with Article 4.7 of the Water Framework Directive."[223] In many cases, instead of addressing the authorities' requests and concerns, RMGC ignored them.

130 The representative of the Ministry of Health, Ms. Cârlan, did not comment on the issuance of the permit, but stated that the Ministry needed "clarifications/details in writing from [RMGC] in relation with the observations we included in the site visit report and within the previous discussions."[224] RMGC did not respond to this request other than to say that it had already provided the information.[225] The Ministry of Health

[221] **Tr. 2019**, p. 2039:13-2040:13 (Mocanu) (emphasis added); see also Transcript of TAC meeting dated 29 November 2011, at **Exhibit C-486**, p. 28 (Frim).

[222] Respondent's Opening Presentation, p. 28 and transcript references therein.

[223] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 24 (Cazan); see also **Tr. 2019**, p. 1232:13-1234:5 (Avram).

[224] TAC meeting transcript dated 29 November 2011, at **Exhibit C-486**, p. 47 (Cârlan).

[225] *Id.* at p. 47 ([redacted]).

considered that RMGC had not provided this information since it reiterated similar requests at later TAC meetings.[226]

131 When asked to confirm that, "[w]hen [it] got to November 2011, the Ministry of Environment did not accept or reject the EIA Report," [redacted][227] Her evidence is consistent with RMGC's contemporaneous understanding before and after the November 2011 TAC meeting.[228]

132 Although the Claimants continue to rely on Mr. Anton's statements at the TAC meeting,[229] as Ms. Mocanu and Prof. Tofan explained, Mr. Anton's role was limited to that of coordinator. He was not responsible for [redacted],[230] or deciding whether to issue the permit.[231]

133 Thus, it is clear from the record that no decision was taken at the 29 November 2011 TAC meeting. [redacted]:

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[226] Transcript of TAC meeting dated 31 May 2013, at **Exhibit C-485**, p. 20 (Pârvu); TAC meeting transcript dated 14 June 2013, at **Exhibit C-481**, p. 4 (Pârvu); Transcript of TAC meeting dated 2 April 2014, at **Exhibit C-473**, p. 8 *et seq.* (Şerban).

[227] **Tr. 2019**, p. 2017:7-14 (Mocanu) (emphasis added).

[228] See Rejoinder, p. 67 *et seq.* (Section 3.3.1); see also RMGC Work Program and Budget for Roşia Montană for the Year 2012 (annexes omitted), at **Exhibit C-1236**, p. 7 ("The permitting procedure for the purpose of obtaining the environmental agreement will continue in 2012.").

[229] Cl. PO27 Answers, p. 12 (para. 20).

[230] **Tr. 2019**, p. 1992:12-1993:2 (Mocanu) ("[redacted]").

[231] **Tr. 2019**, p. 2631:19-2632:13 (Tofan) ("Even if the President [of the TAC] says all criteria are met, the TAC being a collective body, decisions are taken by consensus within the Committee. It cannot be only one member that believes that the permit must be issued. As peers, they're supposed to reach consensus, it is a collective body. … There are several specialists making up that TAC, and they make a decision that is grounded and based on the information that is gathered from specialists in several fields that make up the TAC.").

"[redacted]"[232]

134 [redacted][233] [redacted]:

"[redacted]"[234]

The Aftermath of the 29 November 2011 TAC Meeting

135 Contrary to the Claimants' allegations, RMGC did not "promptly [address]" all of the issues that were raised during the 29 November 2011

[232] **Tr. 2019**, p. 1964:16-1965:6 (Mocanu) (emphasis added).

[233] *Id.* at p. 2053:6-15 (Mocanu).

[234] *Id.* at p. 2055:3-8 (Mocanu) (emphasis added).

TAC meeting, or indeed earlier.[235] Thus, RMGC did not secure the Ministry of Culture's endorsement, nor did it obtain the approval of its Waste Management Plan until the spring of 2013.[236] Also, RMGC has not demonstrated that it complies with the Water Framework Directive and has not secured the water management permit.[237] RMGC has also failed to secure the ADC for Orlea.

136 At the hearing, [redacted][238] [redacted][239]

137 The Claimants further assert that the Romanian Government "did not allow the environmental permitting process for the Project to be completed" until it obtained "the greater economic interest it demanded…"[240] They claim that "Government officials repeatedly acknowledged in 2012 and 2013…that the technical assessment of the Environmental Permit had been

[235] Cl. PO27 Answers, p. 14 (para. 24).

[236] See Counter-Memorial, p. 109 *et seq.* (para. 291); Rejoinder, p. 171 *et seq.* (Sections 3.6.1.1 and 3.6.1.2); see also Alba NAMR Endorsement No. 189, at **Exhibit C-656**, p. 1; NAMR Endorsement No. 4320, at **Exhibit C-657**, p. 7; Letter from Ministry of Environment to RMGC, at **Exhibit C-658**, p. 3; Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 1.

[237] See *e.g.* Letter from Romanian Waters to TAC dated 16 May 2013, at **Exhibit R-542**, p. 3 (requesting that RMGC obtain a water management permit); see also **Tr. 2019**, p. 2051:6-14 (Mocanu) [redacted]; Observations and Questions Raised by Ministry of Environment dated 14 March 2013, at **Exhibit C-834**, p. 1.

[238] **Tr. 2019**, p. 1105:4-7.; see also [redacted], p. 69 *et seq.* (para. 122).

[239] **Tr. 2019**, p. 1112:12-113:7 ([redacted]), p. 1110:4-9 ([redacted]); p. 1112:12-1113:21 ([redacted]), p. 1115:5-1117:18 ([redacted]).

[240] Cl. PO27 Answers, p. 20 (para. 31).

completed at the November 29, 2011 TAC meeting…" and refer to eight purported acknowledgements.[241] The Claimants' reading of the evidence is selective, as demonstrated below.

a) The Claimants refer to the following statement in a letter from Mr. Găman to Mr. Bode in April 2012:

> "The last CAT meeting was in November 2011 and a complete analysis of the chapters of the [EIA Report] was presented before the RMGC company representatives, answering all the questions of the Commission."[242]

Mr. Găman was not present at the November 2011 meeting and was relying on the input of RMGC's representative (Mr. Suciu) regarding the meeting and his views as to what transpired at the meeting. [243] In any event, he does not say that "all the questions of the TAC" in general regarding the permit application – versus all of the questions that the TAC raised during that meeting – were answered during that meeting. The Claimants conveniently fail to mention that, in the same letter, Mr. Găman notes that the Ministry of Culture's endorsement is still needed, that the Project must be declared of outstanding public interest to comply with the Water Framework Directive, and that the PUZ and PUG must still be approved.

b) The Claimants note that Mr. Anton stated in early 2012 that the Ministry of Environment was waiting for the Ministry of Culture to confirm its endorsement. Those statements should, however, be interpreted neither to mean that the Ministry of Culture was ready in early 2012 to endorse the Project or that that endorsement was the only outstanding issue. Indeed, the Claimants fail to mention that Mr. Anton had also stated in early 2012 that the Project was "currently in the [EIA] procedure," "at the stage of the quality analysis of the project [EIA] report" and that "[g]iven the project complexity and the multitude of

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[241] Cl. PO27 Answers, p. 21 (para. 32).

[242] Ministry of Economy Note on the status of the Project, March 2012, at **Exhibit R-406**, p. 7.

[243] **Gaman II**, p. 70 (para. 189).

legal requirements in force, the [TAC] has requested … additional information, clarifications regarding the submitted documentation."[244]

c) The Claimants refer to a March 2013 internal note of Mr. Şova, then Minister of Large Projects (not Minister of Environment), indicating that "all TAC questions were answered." However, it is not clear how Mr. Şova, who had been appointed two months earlier, drafted this note and based on which information, since he did not mention the issues that were outstanding as of November 2011 (and March 2013).[245]

d) The Claimants refer to statements by the Minister of Environment in a March 2013 meeting that "in late November [2011], TAC members concluded that the technical issues were clarified." They fail to mention her statements made practically in the same breath (and on the same page of the minutes) regarding issues that "remain[ed] to be solved", including the Ministry of Culture's endorsement, RMGC's lack of compliance with the Water Framework Directive, the need for a new urban certificate, and the absence of environmental endorsement for the PUZ (and thus the absence of PUZ for the Project Area).[246]

e) The Claimants refer to a statement by an official of the Ministry of Culture to the effect that RMGC requested the endorsement under a prior administration and needed to reiterate the request. This is irrelevant since the Ministry of Culture had in any event valid reasons for not issuing the endorsement before April 2013. After receiving from RMGC a preliminary report on the archaeological situation at Orlea in August 2011, the cultural authorities (upon instruction of RMGC) worked on the detailed preventive archaeological research report for this area, setting out the research goals and exact location where it was to be carried out.[247] Following the approval of the research project by

[244] Letter from Ministry of Environment to Group for the Salvation of Roşia Montană dated 13 January 2012, at **Exhibit R-471**, p. 1.

[245] See Rejoinder, p. 99 *et seq.* (para. 326).

[246] Interministerial commission meeting transcript dated 11 March 2013, at **Exhibit C-471**, p. 20; see also Observations and Questions Raised by Ministry of Environment dated 14 March 2013, at **Exhibit C-834**, p. 1 *et seq.* (items 1, 3, 5, 6).

[247] Respondent's Opening Presentation, p. 43 (referring to **R-221** and **C-1484**).

the National Archaeological Commission in March 2013, the Ministry of Culture was in a position to issue the endorsement.[248] Furthermore, because the Project still faced hurdles with regard to its cultural aspects (lack of ADC for Orlea and lack of secure ADC for Cârnic), the Ministry of Culture issued only a conditional endorsement.[249]

f) The Claimants refer to the conclusions of an interministerial commission in March 2013, including its conclusion that the Ministry of Environment "can issue the environmental permit and any other details can be solved along the way." However, as explained at length, those conclusions have little relevance as a matter of law since they were rendered in the form of a non-binding informative note.[250] They also have little relevance as a matter of fact since they were rendered based on limited information. The commission also instructed RMGC to provide the Ministry of Environment with information regarding the Industrial Area PUZ and related litigation so that the Ministry could in its discretion decide how to proceed.[251]

g) The Claimants contend that at the 10 May 2013 TAC meeting, the TAC president confirmed that the TAC had determined in November 2011 that the EIA Report met the requirements. This is not correct. The record shows that at that meeting, the TAC discussed the Waste Management Plan, the updated version of which RMGC had only sent in March 2013; RMGC's lack of PUZ; the need for a declaration of public interest for the Project; and the lack of an identified cyanide transportation route and plan.[252]

h) The Claimants point to statements in a letter from the Ministry of Environment to the Aarhus Compliance Committee from May 2013 to

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[248] See Counter-Memorial, p. 94 (paras. 249-253); and Rejoinder, p. 173 (para. 549) and p. 189 (para. 605).

[249] Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 5 (item 7).

[250] **Tr. 2019**, p. 457:22-458:1; see also Rejoinder, p. 191 *et seq*. (paras. 608-621).

[251] Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at **Exhibit C-2162**, p. 8 (n. 3).

[252] See Rejoinder, p. 194 *et seq.* (paras. 624-625, 626-630) (referring to TAC meeting).

> the effect that, in November 2011, "members of the [TAC] confirm[ed] that no question with regard to technical aspects are outstanding."[253] However, the Claimants fail to mention that the Ministry also explains that "[t]he next steps of the EIA process are the following: completion of the Technical Assessment Committee activity;…"[254]

138 The Claimants not only mischaracterize the exhibits they cite (as shown above), but also omit to mention other statements by State officials shortly after the November 2011 TAC meeting and in the years that followed which make clear RMGC needed to address various issues before it could obtain the environmental permit.[255]

139 Apart from a statement in a footnote dealing with the Waste Management Plan, the Claimants do not even attempt to argue – let alone demonstrate – that RMGC had addressed the issues that Romania raised contemporaneously (and in this arbitration).[256] The Claimants contend that:

> "the Government did not approve the Waste Management Plan in 2012 (which was not identified at the November 29, 2011 TAC

[253] Romanian Government, Response to Information Request by Aarhus Convention Compliance Committee (ACCC/C/2012/69) dated 22 May 2013, at **Exhibit C-2907**, p. 3.

[254] *Id.* at p. 6.

[255] Respondent's Opening Presentation, p. 29 *et seq.*; see also *e.g.* Letter from Ministry of Environment to Chamber of Deputies dated 16 December 2011, at **Exhibit R-469**; Letter from Minister of Environment to Parliament of Romania dated 28 December 2011, at **Exhibit R-470**; Memorandum from Minister of Environment to Prime Minister dated 11 April 2012, at **Exhibit R-472**, p. 5; Letter from the Ministry of Environment to RMGC dated 17 April 2012, at **Exhibit C-646**; Letter from Department for Infrastructure Projects to Government Secretariat dated 26 March 2013, at **Exhibit C-2162**, p. 2; Transcript of TAC meeting dated 10 May 2013, at **Exhibit C-484**, p. 11 *et seq.* (Nistorescu discussing issues with the Waste Management Plan, Buica discussing uncertainties about transportation of cyanide, etc.); Transcript of TAC meeting dated 31 May 2013, at **Exhibit C-485**, p. 21 (Cazan discussing unsubmitted documentation regarding waters).

[256] Cl. PO27 Answers, p. 23 (para. 33).

meeting as necessary or missing), solely because of political blockage."[257]

140 However, first, the TAC's lack of mention of the Waste Management Plan during the November 2011 meeting did not mean that the plan was not required. There was no reason to mention it since the Ministry had already repeatedly requested the plan and made clear that it needed the plan before it could issue the environmental permit.[258]

141 Second, the Claimants' sole evidence of "political blockage" rests on a 2013 internal RMGC email referring to a vague comment allegedly made in passing in 2012 by a Ministry official. In the months preceding that alleged incident and at the time of the incident, the Ministry was requesting that RMGC provide specific information and documentation. RMGC initially failed to react, but once it provided the information in 2013, the Ministry approved the plan.[259]

142 Furthermore, the Claimants cannot allege that the Waste Management Plan was not approved for political reasons (and thus conversely that it was approved simply because the Minister changed). Indeed, Minister Plumb, who was minister when the Waste Management Plan was approved in May 2013, had been Minister since early May 2012.

143 The Claimants mischaracterize the evolution of the EIA Review Process between May and July 2013 and wrongly suggest that the Ministry of Environment, through its actions, "confirmed that the legal conditions for issuing the Environmental Permit were met."[260]

144 First, contrary to the Claimants' allegations, it was clear from the 31 May TAC meeting that issues were outstanding and had been outstanding since 2011. The TAC President, Mr. Pătraşcu, indicated that there "were …

[257] The Claimants often confuse the role of Government and other State officials. See Cl. PO27 Answers, p. 23 (para. 33, n. 97). NAMR and the Ministry of Environment were required to approve the Waste Management Plan, not the Government.

[258] TAC meeting minutes dated 22 September 2010, at **Exhibit R-491**, p. 5.

[259] See Rejoinder, p. 171 *et seq.* (paras. 539-541).

[260] Cl. PO27 Answers, p. 27 (para. 40); see also p. 64 (para. 121) ("competent authorities concluded repeatedly that the legal grounds for issuing the permit were met").

things left uncertain after the last discussions, which took place in 2011, at the end of 2011"[261] including issues relating to Waste Management Plan and the environmental guarantees. [262] For instance, Mr. Tănase acknowledged that RMGC needed to acquire the surface rights to the Corna River bed to obtain the water management permit, and ANAR's representative, Mr. Cazan, indicated that RMGC still needed to submit the necessary documentation for that permit.[263]

145 Second, when the Ministry of Environment asked TAC members in June 2013 to draft possible conditions for issuance of the environmental permit, ANAR immediately responded that RMGC still needed to comply with the Water Framework Directive and to provide:

> "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 … project."[264]

146 Third, contrary to the Claimants' allegation, the Ministry did not "publish[] draft Permit conditions" in July 2013, but rather "a note for public consultation" regarding possible conditions.[265] Romanian law envisages a milestone for publication of the decision for the issuance of the permit.[266] Calling this document a "note for public consultation" reflected the

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[261] Transcript of TAC meeting dated 31 May 2013, at **Exhibit C-485**, p. 18 (Pătrașcu).

[262] *Id.*

[263] *Id.* at p. 17 (Tănase) and p. 21 (Cazan); see also *id.* at p. 16 (Cazan expressing concern over compliance with WFD).

[264] 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.

[265] Ministry of Environment Note for Public Consultation dated 11 July 2013, at **Exhibit C-555**, p. 1.

[266] Order No. 860/2002 of the Ministry of Water and Environmental Protection on the approval of the environmental impact assessment procedure and the issuance of the environmental permit, at **Exhibit C-1774**, p. 15 *et seq.* (Article 46); Government Decision No.918/2002 on establishing a framework procedure for the environmental impact assessment and for the approval of the list of public or private projects subject to this procedure, at **Exhibit C-1766**, p. 6 *et seq.* (Article 15).

Ministry's intent to make clear that it was not a draft decision (or draft permit) and that the EIA Review Process had not reached that stage of the procedure.

147 Fourth, notwithstanding Mr. Pătrașcu's statement at the conciliation meeting in late July 2013 that the analysis of the EIA Report had been finalized, he also noted that the ongoing public consultation could result in observations from the public that would need to be reviewed.[267]

148 Furthermore, the issues previously raised with RMGC remained outstanding in and after July 2013.[268] Thus, although that conciliation meeting was focused on the Geological Institute and the Romanian Academy, which had expressed negative views regarding the environmental impact of the Project, there had been no TAC vote to issue the environmental permit.[269] Perhaps the most important TAC member, the Ministry of Environment itself, still awaited, in particular, documents demonstrating compliance with the Water Framework Directive and the PUZ for the Project Area, before it could consider recommending issuance of the permit.

149 [redacted][270] [redacted]:

"… [redacted]

[267] Transcript of TAC meeting dated 26 July 2013, at **Exhibit C-480**, p. 15 (Patrascu).

[268] See *e.g.* [redacted], at **Exhibit C-826.02**, p. 39 ([redacted]); EU Commissioner Janez Potočnik Memorandum dated 3 October 2013, at **Exhibit C-2909**, p. 5 *et seq.*; Letter from Ministry of Environment to Department for Waters, Forests and Pisciculture dated 19 November 2013, at **Exhibit R-548**, p. 1; Letter from Ministry of Environment to Ministry of Foreign Affairs dated 25 February 2014, at **Exhibit R-545**, p. 1.

[269] See also **Tr. 2019**, p. 2631:19-2632:3 (Tofan).

[270] **Tr. 2019**, p. 1983:21-1984:14 (Mocanu).

[redacted][271]

150 The Claimants also cannot argue that they believed that the conditions for the environmental permit had been met in July 2013 in light of their own contemporaneous documents.[272]

151 The Claimants refer to Mr. Ponta's statements in a press conference in early September 2013 to the effect that the Government was "obligated under the law… to give approval and the Roşia Montană Project had to start" and that RMGC "had met all the conditions required by the law."[273] However, as Mr. Ponta has explained, he was not aware of the status of the EIA Review Process, which was being handled by the Ministry of Environment, which had not yet submitted a draft decision to the Government. In making these statements, he was trying to "sell" the Project by explaining that the Roşia Montană Law did not change the situation that already existed as to environmental permitting.[274]

152 The Claimants refer to an early September 2013 press article reporting alleged statements by Ms. Plumb to the effect that "[t]he Environmental Permit for Rosia Montana will be granted depending on the decision taken by the Parliament of Romania after public debates…"[275] Shortly thereafter, however, Ms. Plumb made clear to the Joint Special Committee that the TAC still needed to provide its views: "when the environmental permit

[271] **Tr. 2019**, p. 1985:3-16 (emphasis added).

[272] See Respondent's Opening Presentation, p. 93 (citing **C-1570.03**, p. 6).

[273] See Cl. PO27 Answers, p. 30 (para. 44).

[274] **Ponta**, p. 21 *et seq.* (para. 74).

[275] See Cl. PO27 Answers, p. 30 (para. 45).

procedure is finalized in the TAC, then we will know the viewpoints of the specialists."[276] She also noted that the Project still did not comply with the Water Framework Directive, at least in part because it had not yet been declared by law a project of overriding public interest.[277]

153 [redacted][278]

2.2.3.5 The TAC and the Ministry of Environment Have Discretion in their Decision-Making Process

154 The Claimants contend that the State authorities have no discretion and margin of appreciation in the decision-making process to issue the environmental permit. They allege, for instance that:

> "[T]he decision whether to issue the Environmental Permit must be based strictly on whether the applicable legal standards have been met; the authorities do not have discretion to impose additional requirements or to decide based on factors not expressly set forth as applicable under the law."[279]

155 The Respondent agrees that the decision whether or not to issue the environmental permit must be based on the applicable legal standards, however, this does mean that they do not have a measure of discretion. This is particularly because laws – including environmental and urban planning laws – use flexible standards and cannot address every detail and

[276] Parliamentary Special Commission hearing transcript dated 24 September 2013, at **Exhibit C-506**, p. 25 (Plumb) (also saying "We are waiting for the public debates and for the specialists' points of view on the environmental permit.").

[277] *Id.* at p. 39 (Plumb); see also EU Commissioner Janez Potočnik Memorandum dated 3 October 2013, at **Exhibit C-2909**, p. 5.

[278] **Tr. 2019**, p. 2044:17-2045:21 (Mocanu); see *supra* para. 100.

[279] Cl. PO27 Answers, p. 65 (para. 123).

scenario; this is also why, for instance, best practices are relevant to the preparation and review of an EIA Report.[280]

The TAC and the Ministry of Environment's Discretion in Requesting that RMGC Meet Certain Requirements Prior to Issuance of the Environmental Permit

156 At the hearing, the Claimants again argued that the Respondent had come up with "additional requirements" for the environmental permit, not required contemporaneously.[281] However, each of the issues raised by the Respondent in this arbitration were also raised by the TAC and/or the Ministry of Environment contemporaneously.[282]

157 The Claimants also argue that the issues that the Respondent has invoked in this arbitration pertain to "issuance of the construction permit" and that "[n]one of these issues justify the non-issuance of the Environmental Permit."[283] This is not correct; many of the issues that the Respondent has raised in this arbitration were expressly required by law for the environmental permit.[284] Furthermore, the same requirement may exist for both a building permit and a (preceding) environmental permit. Stated

[280] **Mocanu II**, p. 5 (para. 17) ("Specifically, when considering the conditions for an environmental permit, the Ministry of Environment applies the principle of precaution and may impose strict conditions aligned with best European and international practice, irrespective of a promoter's wishes."); see also **Tr. 2019**, p. 2519:11-20: (Tofan) ("Discretionary power is the right of any public administration body to make an appreciation when the text of the Law does not show the way to follow. The administration is vast in its functioning. Neither the primary nor the secondary nor the tertiary legal enactors can reflect in the Law all the problems issued from the dynamics of everyday social life. So, there is right of appreciation of the administration."); see also **CMA - Blackmore Report**, p. 5 (para. 11) (describing relevance of good practice) and p. 12 (para. 36) (explaining that developers are sometimes required to provide information as part of its EIA permit application that would more normally only be required later on).

[281] **Tr. 2019**, p. 78:8-14 (Claimants' Opening).

[282] See Rejoinder, p. 71 *et seq.* (paras. 235 and 239-241), p. 76 (para. 250); p. 171 (para. 539-540), p. 184 (paras. 588, 593), p. 194 (para. 624); see also Respondent's Opening Presentation, p. 39 *et seq.* (p. 47, p. 56, p. 58 and p. 79).

[283] **Tr. 2019**, p. 78:19-22 (Claimants' Opening).

[284] Rejoinder, p. 173 (para. 547) (re requirement of Ministry of Culture endorsement) and p. 74 *et seq.* (paras. 243 and 247) (re requirement of Waste Management Plan).

differently, the fact that the law imposes a requirement for a building permit does not mean that the same requirement cannot also exist for an environmental permit.[285]

158 Consequently, even assuming the Tribunal were to find that the law did not expressly require for a PUZ, a water management permit, or the acquisition of surface rights prior to issuance of an environmental permit, it can be inferred from the applicable laws that they were required and, in any event, the TAC and the Ministry of Environment had the discretion to require them.[286]

The TAC and the Ministry of Environment's Discretion in Drafting and Issuing the Environmental Permit, Including the Attached Conditions and Mitigation Measures

159 Each TAC member ultimately would have had – if the TAC had reached that stage in this case, which it did not – discretion in deciding which conditions to attach to its possible recommendation to issue the environmental permit.[287] While the decision whether to recommend issuance of an environmental permit is a binary decision, granting the permit would in practice be conditional upon the developer meeting certain requirements and taking mitigation measures. The drafting of the permit

[285] For instance, a PUZ is expressly required for a building permit but it also results from various laws that it is a prerequisite to issuance of an environmental permit. See **Tr. 2019**, p. 2689:21-2690:7 (Dragoş) ("Because you said that this PUZ is very important for the procedure. Do you accept that an important document for a procedure should be expressly provided by the procedural law? A: No. The procedural law cannot state everything. It's impossible to state everything and every document that proves something within the procedure."); see also **Tr. 2019**, p. 2663: 5-22; p. 2666:5-22; p. 2667:1-7 (Dragoş); **Tr. 2019**, p. 2518:3-21; p. 2602: 16-22; p. 2603: 1-4; 14-22; p. 2604: 1-9 (Tofan); **Tofan LO**, p. 49 *et seq*. (Sections 2.2-2.4); **Dragos LO I**, p. 51 *et seq.* (paras. 271-290), **Dragos LO II**, p. 41 *et seq.* (Section 2); with regard to the requirement for the water management permit, see **Tr. 2019**, p. 434:7-436:5 (Respondent's Opening); Rejoinder p. 82 *et seq.* (paras. 273-275); Counter-Memorial, p. 24 *et seq*. (paras. 74 and 226).

[286] See **Tr. 2019** p. 453:9 – 454: 18 (Respondent's Opening).

[287] **Tr. 2019**, p. 419:5-15 (Respondent's Opening); see also **Mocanu II**, p. 12 (para. 17).

and deciding on the relevant conditions thus necessarily entails an element of discretion.[288]

The Ministry of Environment's Discretion and, in Turn, the Government's Discretion in Deciding Whether to Issue the Environmental Permit

160 The Claimants argue that neither the Ministry of Environment, nor the Government could "refuse to issue the Environmental Permit based on political factors or on public opinion."[289] However, as explained above, RMGC never met the permitting requirements and thus the TAC never issued a recommendation for the permit and the Ministry of Environment in turn never made a decision regarding the permit. Thus, neither the Ministry, nor the Government "refused" to issue the permit, let alone because of public opinion or for political reasons. Furthermore, the hypothetical question of whether the Government would have the discretion not to issue the permit – in a situation where both the TAC and the Ministry of Environment favor issuance of the permit – is irrelevant.[290]

161 Nevertheless, the following, related argument on the part of the Claimants is misplaced:

> "Romanian law requires the Ministry of Environment to make a proposal to the Government on the Environmental Permit based on

[288] See **Mocanu II**, p. 5 (para. 17) ("Specifically, when considering the conditions for an environmental permit, the Ministry of Environment applies the principle of precaution and may impose strict conditions aligned with best European and international practice, irrespective of a promoter's wishes."); see also **Tr. 2019**, p. 1985:5-10 (Mocanu) ("[redacted]").

[289] Cl. PO27 Answers, p. 65 (para. 123); see also *id*. at paras. 106 and 122.

[290] The Claimants refer to Prof. Tofan's testimony that the Minister of Environment would not have the discretion to not issue the permit in a situation where the TAC recommends issuance (Cl. PO27 Answers, p. 66 (para. 124)). Again, this testimony is not directly relevant since the TAC never recommended issuance of the permit.

technical conclusions and legal standards, not based on political factors or on public opinion."[291]

162 Again, here the Ministry never reached the stage of making a proposal to the Government. In any event though, the Claimants wrongly separate the notion of "public opinion" from the "legal standards" as State authorities are by law required to consult the public and to consider their reasonably-grounded questions and comments. Public opinion is expressed through the public consultation process during the EIA Review Process both prior to[292] and after the Ministry of Environment's publication of the decision to issue the permit (and thus considered by both the TAC and the Ministry of Environment).[293] The public consultation is not just a formality; the public's views are considered when drafting the conditions and mitigation measures to be attached to the environmental permit. Furthermore, by law, after the draft decision to issue the permit is published for consultation, depending on the comments received from the public, the Ministry of Environment may go back to the TAC and request that the TAC resume the procedure and request reasonable supplementary information from the developer.[294] The issuance of the environmental permit is thus based on technical requirements and legal standards which may in part be based on the public opinion.

163 In conclusion, the Claimants have failed to show that Romania breached the FET standards in the BITs. Furthermore, because the Claimants allege

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[291] Cl. PO27 Answers, p. 64 (para. 122).

[292] Order No. 860/2002 of the Ministry of Water and Environmental Protection on the approval of the environmental impact assessment procedure and the issuance of the environmental permit, at **Exhibit C-1774**, p. 10 *et seq.* (Arts. 27(1), 37(2) and (3), 38(1)), 40 and 44); Government Decision No.918/2002 on establishing a framework procedure for the environmental impact assessment and for the approval of the list of public or private projects subject to this procedure, at **Exhibit C-1766**, p. 6 (Art. 14).

[293] Order No. 860/2002 of the Ministry of Water and Environmental Protection on the approval of the environmental impact assessment procedure and the issuance of the environmental permit, at **Exhibit C-1774**, p. 12 (Art. 31).

[294] *Id.* at p. 12, (Art. 31 (1) and (3)); see also **Tr. 2019**, p. 2053:9-22, p. 2054:1-9 (Mocanu) ([redacted]).

that "the same course of conduct" breached the FPS standards in the BITs, those claims must also fail.[295] The Claimants' remaining claims fail for the reasons already set out in the Respondent's prior submissions.[296]

[295] Cl. PO27 Answers, p. 39 (para. 63).

[296] See *Id.* at p. 39 *et seq.* (paras. 64-70).

3 QUESTION B

At Question B, the Tribunal asked three questions:

"*Did Claimants' alleged losses occur (or begin to occur) at the same point in time that the breach is said to have been consummated in respect of each claim?*

Should Claimants' alleged losses be quantified on the date upon which each breach is alleged to have occurred?

If not, is the point in time when Claimants' alleged losses occurred relevant to establishing liability for a breach in respect of each claim?"

The Claimants' answers in summary:

The Claimants fail to indicate when their alleged losses occurred (or began to occur).

They argue that their alleged losses should not be quantified on the date on which each breach is alleged to have been consummated, which they distinguish from the date when each breach "occurred"; they suggest that each breach "has 'occurred' over the same period of time" from an undefined day in "August 2011" and "through September 9, 2013".

The Claimants allege that "the point in time when Claimants' losses became permanent is relevant to establishing liability."

Romania's answers in summary:

The Claimants value their purported losses as of July 2011 and assert that the breaches were consummated on or about 9 September 2013. Their alleged losses therefore could not have occurred (or begun to occur) as a result the alleged breach. Loss or damage cannot occur before the breach has been consummated.

Losses should be quantified on the date when the breach is alleged to have occurred. The Claimants have not followed this basic principle.

The point in time when the alleged losses occur is relevant to establishing liability for a breach.

3.1 The Claimants Do Not Allege that Their Purported Losses Occurred (or Began to Occur) at the Time of the Alleged Breach

164 While the Claimants indicate the date when the alleged breaches were purportedly consummated (9 September 2013), they do not indicate when their alleged losses occurred (or began to occur). They thus avoid answering the Tribunal's first question. The Claimants had similarly avoided answering the same question during the hearing, although they did accept that they had not suffered any loss or damage in 2011:

> "I want to just make the point here that stated that **Gabriel did not incur loss** due to the State's demand for a greater share of the Project because the demand itself did not cause loss, and there was no agreement. I think we just said that. But I also want to emphasize that one could not conclude prior to July 30, 2012, that Gabriel had incurred loss even in the form of delay because it was uncertain at that point whether ultimately there would be delay materially going forward."[297]

165 The Claimants suggested that "expectations were starting to become depressed," allegedly because of Romania's conduct in 2011 and until some unspecified date in the second semester of 2013,[298] however, the Claimants did not sustain any losses as a result:

> "And so, it seems to me the answer to your question is **it's not always the case that one is necessarily feeling a loss every day until everything is gone**. What one sees is a development of facts and circumstances that are setting things up **to eventually lose everything**. So, perhaps that's partly your answer to the question. **Weren't they losing a little bit all along the way? No**, I think there was a threat for sure that they were losing **but they didn't actually lose**. It wasn't over until it was over."[299]

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[297] **Tr. 2019**, p. 307:18-308:6 (Claimants' Opening) (emphasis added).

[298] **Tr. 2019**, p. 307:6-307:7 (Claimants' Opening) ("expectations were starting to become depressed ...").

[299] **Tr. 2019**, p. 305:11-305:21 (Claimants' Opening) (emphasis added).

166 The Claimants are entirely unclear regarding the moment when their losses allegedly occurred (or began to occur). They suggest that Romania's conduct "starting in August 2011 significantly depressed the market value" of Gabriel Canada. They go on to argue that "Gabriel Canada's publicly traded value during the period leading up to September 9, 2013" is the same as "the project development rights." But they do not argue that the alleged depreciation amounts to a "loss" resulting from a treaty breach.[300]

167 To the extent that all breaches require an irreversible damage for consummation – and the Claimants agree as much (see **Section 3.3** below) – the date of a breach is also the date when the alleged losses occurred or started to occur. By valuing the losses as of July 2011 and asserting that the breaches were consummated on 9 September 2013, the Claimants put forward a date of breach that differs from the date of loss.

168 The Claimants erroneously distinguish between the date when a breach is consummated and the date when a breach occurs, at least in the case of a "composite" breach:

> "each breach has 'occurred' over the same period of time through September 9, 2013 and each breach was 'consummated' (in the sense of having ripened into what in hindsight unmistakably is a violation of Respondent's BIT obligations) on the same date, i.e., September 9, 2013."[301]

169 However, as shown in **Section 2.1** above, under Article 12 of the ILC Articles the date when a breach occurs is the date when a breach is consummated, irrespective of whether the breach is composite, continuous or instantaneous. A composite breach does not "occur" as of the first act of the series of systematic acts of a State, as stated in Article 15(1) of the ILC

[300] Cl. PO27 Answers, p. 46 (para. 80) ("the diminution in Gabriel Canada's publicly traded value during the period from August 2011 to September 9, 2013 **could not and does not reflect** the full extent of the damages caused by Respondent's treaty violations as of that date") (emphasis added).

[301] *Id.* at p. 41 *et seq.* (para. 71).

Articles.[302] As the International Court of Justice has confirmed in the *Case concerning the Gabčíkovo-Nagymaros Project*:

> "A wrongful act or offense is frequently preceded by preparatory actions which are not to be confused with the act or offense itself. It is well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of preparatory character and which 'does not qualify as a wrongful act'."[303]

170 Thus, conduct that precedes a wrongful act cannot trigger a right to compensation.[304] The only "measure" that Romania allegedly took was a "political rejection" of the Project starting on 9 September 2013 (see above **Section 2.2.1**). Thus, on the Claimants' own case, there was no breach (or loss) at any point in time before 9 September 2013.

171 Finally, the Claimants have not identified or quantified any losses stemming from any of the alleged breaches of treaty standards other than expropriation. Consequently, as compensation has not been claimed for those other non-expropriatory breaches, the issue as to the date on which they occurred is of no relevance.[305] The following two sub-sections will therefore focus on the Claimants' expropriation claims only.

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[302] ILC Articles, at **Exhibit RLA-33**, p. 62 (Art. 15.1) ("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.").

[303] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ Rep 7, p. 54 (para. 79) cited in ILC Articles, at **Exhibit RLA-33**, p. 61 (para. 13).

[304] ILC Articles, at **Exhibit RLA-33**, p. 92 *et seq.* (paras. 9-10) ("the subject matter of reparation is, globally, the **injury resulting from and ascribable to the wrongful act**…") (emphasis added); *Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, Award, 1 July 2009, at **Exhibit CLA-255**, p. 142 (para. 13.1).

[305] Rejoinder, p. 397 *et seq.* (paras. 1175-1177); Counter-Memorial, p. 305 *et seq.* (paras. 792-796).

3.2 Losses Should Be Quantified on the Date upon Which a Breach Is Alleged to Have Been Consummated

172 The Tribunal's next question is whether the Claimants' alleged losses should "be quantified on the date upon which each breach is alleged to have occurred?" The answer is obviously that they must be.

173 This general rule, which apples regardless of the characterization of the breach, is reflected in the two BITs. Article VIII(1) of the Canada-Romania BIT and Article 5(2) of the UK-Romania BIT are controlling for Gabriel Canada's and Gabriel Jersey's claims respectively, together with Articles 12 and 31 of the ILC Articles.

174 The Claimants fail to properly apply these applicable rules. They argue that their investments were expropriated on 9 September 2013 but acknowledge that they did not suffer any loss before 2013 (see above **Section 3.1**).[306] However, the compensation sought for expropriation is valued as of 29 July 2011, that is, more than two years before the alleged loss. Interest is also being claimed from the same date, 29 July 2011.[307]

175 At the hearing the Tribunal asked the Claimants to explain the legal basis for this backdating, which has an effect of increasing the quantum of the Claimants' claims by over USD 4 billion (including interest) according to the Claimants' method of valuation. The Claimants were unable to answer the question.[308]

176 The Claimants argue that under international law, a State must make full reparation for any loss or damage "caused by" an internationally wrongful act.[309] However, a State is not under an obligation to pay compensation for

[306] Although the exact moment of the first alleged losses in 2013 are not mentioned as shown *supra* in Section 3.1.

[307] **CL Report I**, p. 4 (para. 2) and p. 55 (para. 99); Memorial, p. 413 *et seq.* (paras. 924-926).

[308] **Tr. 2019**, 304:8-307:16 (Claimant's Opening).

[309] Cl. PO27 Answers, p. 42 (para. 72), p. 43 (para. 75) and p. 88 (para. 165); Rejoinder, p. 302 *et seq.* (paras. 943-948) and p. 360 *et seq*. (paras. 1083-1084); Counter-Memorial, p. 253 *et seq.* (paras. 679-690).

losses *not caused* by a wrongful act. These two basic rules of international law are set out in Article 31 of the ILC Articles:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[310]

177 As the Claimants acknowledge that Romania did not commit a breach of the BITs before 9 September 2013, under Articles 12 and 31 of the ILC Articles, Romania could not have caused any loss or damage to the Claimants before 9 September 2013.

178 The BITs do not support the Claimants' backdating either. An expropriation gives rise to an obligation to pay compensation "payable from the date of expropriation" under Article VIII(1) of the Canada-Romania BIT. Such compensation is to be valued "based on the genuine value of the investment or returns expropriated immediately before the expropriation." Article 5(2) of the UK-Romania BIT (which applies the standard of Article 5(1) to expropriation of shares in a company) similarly provides that "[s]uch compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation".

179 The Claimants suggest that these provisions do not apply to unlawful expropriations,[311] but there is no support in either provision for such a distinction, which is in any event of no relevance since Article 31 of the ILC Articles establishes a secondary obligation of compensation identical to that created under the BITs in case of expropriation.

180 Arbitral case law has consistently followed the rule that compensation for expropriation should amount to the genuine value of the investment expropriated immediately before the date of expropriation, including in

[310] ILC Articles, at **Exhibit RLA-33**, p. 91 (Art. 31).

[311] Cl. PO27 Answers, p. 43 *et seq.* (para. 75).

cases of unlawful expropriation (creeping or not).[312] The *Azurix v. Argentina* tribunal explained why the date when the expropriation is consummated is a fair choice for a valuation date in cases of creeping expropriation:

> "It has been sometimes argued that applying this formula would lead to an inequitable situation where the investment's value would be assessed at the time when the cumulative actions of the State would have led to a dramatic devaluation of the investment. However, such a view does not take into account that, in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such maneuvers but would have fully respected the provisions of the treaty and the contract concerned."[313]

181 The Claimants' suggestion that in *Crystallex v. Venezuela* the tribunal held that "the most appropriate valuation date for assessing compensation was **the day before the first act** in the series" of measures of the creeping

[312] The cases invoked by the Claimants all follow this approach: *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. 265 *et seq.* (paras. 12.43-12.45) (valuation date corresponded to the "first completed breach" date); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, ICSID Case No. ARB/97/3, 20 August 2007, at **Exhibit CLA-113**, p. 253 (para. 8.3.19) (valuation date corresponded to the date when the expropriation was consummated); *Siemens v. Argentina*, Award, 6 February 2007, at **Exhibit CLA-102**, p. 121 (para. 377) (valuation date corresponded to the date when the expropriation was consummated); *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. 77 (para. 192) (valuation date corresponded to the date when the expropriation was consummated); , p. 178 *et seq.* (paras. 554, 556) (valuation date corresponded to the date when the expropriation was consummated); *El Paso Energy International Company v. Argentine Republic*, Award, ICSID Case No. ARB/03/15, 31 October 2011, at **Exhibit CLA-152**, p. 260 (para. 706) (valuation date corresponded to the date of the award); *Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, Award, 1 July 2009, at **Exhibit CLA-255**, p. 142 (para. 13.2) (valuation date did not correspond to the first acts in the series but to the date when the first wrongful act was deemed to have been committed); *Swisslion DOO Skopje v. the Former Yugoslav Republic of Macedonia*, Award, ICSID Case No. ARB/09/16, 6 July 2012, at **Exhibit CLA-53**, p. 118 (para. 359) (no valuation date as only costs awarded for FET breach).

[313] *Azurix Corp. v. Argentine Republic*, Award, ICSID Case No. ARB/01/12, 14 July 2006, at **Exhibit CLA-85**, p. 150 (para. 417).

expropriation,[314] is a gross misrepresentation. The tribunal did not choose the "first act" in the series as the valuation date but the moment when the Respondent's interference with the environmental permitting process "made Crystallex's rights practically useless," which corresponded to the moment when its environmental permit application was rejected. That rejection was already the culmination of a long series of acts, which were deemed to breach FET.[315] The tribunal needed to decide whether the moment of consummation of the FET breach was the same as that when the expropriation was consummated and when it should value the two breaches.

182 The tribunal found that the expropriation was not consummated on the same date as the FET breach because the claimant had no subjective right to a permit under Venezuelan law. However, the rejection of the permit was irreversible such that it was the "first important" measure "giving rise to" the expropriation. The later acts leading to the formal termination of the mine operation contract merely eroded what was left of the investment. The *Crystallex* tribunal's choice of a valuation date thus excludes a valuation on the day before the first act even in case of a creeping expropriation or composite breach. It is also consistent with the approach of valuing assets as of the date of breach, because *a wrongful act* occurring on the valuation date (breach of FET) had substantially affected the investment and made the claimants' rights practically useless.

183 The Claimants do not cite any other support for choosing a valuation date on the day before the first act.[316] While arbitral tribunals have considered

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[314] Cl. PO27 Answers, p. 45 (para. 77) (emphasis added).

[315] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/11/2, 4 April 2016, at **Exhibit CLA-62**, p. 236 (para. 855) ("both a self-standing breach of FET and the first important act giving rise to the creeping expropriation").

[316] The Claimants refer extensively to W. M. Reisman & R. D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, (2003) 74 British Yearbook of International Law 115, at **Exhibit CLA-123**. First, this academic article does not support the allegation that the first act in a creeping expropriation should be selected as an appropriate valuation date. Second, to the extent that the article suggests that a choice of the *last* act in a creeping expropriation as date of valuation could undermine the principle of full compensation, that is well accepted by case law consistently reiterating that the valuation date in cases of creeping breaches should correspond to the date of the act which consummates the breach and not the last act in a series

a choice of a valuation date *subsequent to* the date of the breach to ensure the application of the principle of full reparation, there is no reported case of an arbitral tribunal backdating a valuation date to the first act in a case of a creeping expropriation.[317]

184 If a tribunal selects a moment of valuation earlier on in the series of acts, then the investor may receive a windfall.[318] Backdating the valuation date to the first act in a case of creeping expropriation thus ignores the principle of causation that underlies Article 31 of the ILC Articles, along with the principle of full reparation.

185 The Claimants disregard these principles. Calculating compensation by reference to a factual situation occurring two years before the alleged consummation of the breach shifts to Romania the entire responsibility for all worldwide events that might have affected the value of the Claimants' investments after 29 July 2011 and until the loss allegedly became irreversible (9 September 2013). That means making Romania liable for

(see *supra* n. 312). Third, to the extent that the article argues more broadly that the date of consummation of an expropriation does not have to coincide with the date of valuation (p. 147), that suggestion has not been reflected in investment treaties and has not been followed in case law as the authors recognize (p. 148: "the approach we suggest has yet to be adopted expressly…"). Fourth, to the extent that the Claimants allege that the article suggests that "moment of valuation should be 'a point in time before the host state's conduct occasioned the depreciation in the value of the foreign investment,'" the Claimants misunderstand the passage in question where the authors are discussing consequential expropriations and the relevance of an expropriation intent (130-131). Fifth, that passage (and the article overall) does not select the choice of a valuation date coinciding with the first act, not least where a party confirms (like the Claimants do in this case) that it has not suffered any loss as of the first act of the alleged creeping expropriation.

[317] See the comprehensive review of valuation date choices in I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edition, Oxford University Press, 2017), at **Exhibit RLA-84**, p. 147 (para. 3.321) ("The practice of investment tribunals shows that the determination of an expropriation date in cases of indirect expropriation is a challenging task…Both the claimant, who has a **choice between the expropriation date and the date of the award**, and the tribunal, need to know the value at the expropriation date in order to compare the two values and to decide which one is higher.") (emphasis added).

[318] That would practically have the same effect of backdating the date of expropriation, which could mean enabling "foreign investors to obtain a windfall by identifying an unreasonably early stage as the relevant date of expropriation," W. M. Reisman & R. D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, (2003) 74 British Yearbook of International Law 115, at **Exhibit CLA-123**, p. 144.

general business risk, including the significant decrease of the price of gold which affected all gold mining companies worldwide during that period,[319] which is an unacceptable proposition.[320]

186 The Claimants allege that the treatment to which Respondent allegedly subjected their investment starting in August 2011 significantly depressed the market value of the Project development rights as reflected in Gabriel Canada's publicly traded value during the period from 1 August 2011 to 9 September 2013. Even if the value of Gabriel Canada's publicly traded value had any relevance to value the Claimants' investment (which it does not), that depreciation cannot be attributed to Romania's actions.

187 The Claimants allege that "the State's malfeasance and nonfeasance" eroded the fair market value of Gabriel Canada's shareholding and "the measure of Gabriel's loss must be quantified with reference to the market value of its shareholding before the acts and omissions in question began."[321] Because there was no "malfeasance" or "nonfeasance" on the Claimants' own case before 9 September 2013, Romania cannot be held responsible for any such depreciation.

188 The Claimants add that, even if there were concurrent causes explaining wholly or in part the devaluation of Gabriel Canada's shares from 1 August 2011 to 9 September 2013, Romania must be held responsible for the reduction unless there is proof of contributory negligence of the

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[319] **CRA Report II**, p. 45 (para. 92).

[320] Thus *e.g.* in *CME v. Czech Republic* the tribunal, citing the jurisprudence of the Iran-United States Claims Tribunal, emphasized that "[t]he purpose of an investment treaty is not to put the investor into a more favourable position than he would have been in the normal development of his investment within the circumstances provided by the host country" such that the business risk must not be compensated to the investor. The tribunal added that "it is not the Respondent's duty to make good this general risk, which may have many reasons outside the control of the parties." *CME Czech Republic B.V. v. Czech Republic*, Final Award, 14 March 2003, at **Exhibit CLA-147**, p. 132 (paras. 561-562); see also *The PV Investors v. The Kingdom of Spain*, Final Award, PCA Case No. 2012-14, 28 February 2020, at **Exhibit CLA-325**, p. 228 (para. 721) ("a valuation at the time of the breach, i.e. ex ante, appears particularly appropriate when the consequences of a later evolution of prices, interest rates, or other inputs are unrelated to the impugned measures and the (higher) harm can thus not be deemed to derive from the measures.").

[321] Cl. PO27 Answers, p. 48 (para. 84).

Claimants.[322] As a matter of fact, the Claimants' conduct *is* the cause of the Project's failure (see below **Section 5.3**). The Claimants' allegations about the applicable standard of causation are also unfounded,[323] even if Gabriel Canada's publicly traded value had any relevance to value the Claimants' investment (which is denied) and such depreciation could be attributed to Romania's conduct.

189 The valuation date must be fixed based on the date of consummation of the breach, irrespective of whether it is composite or instantaneous. The only exception to that rule occurs when an expropriation is preceded by a public announcement that the expropriation is going to take place. Thus, as the Claimants note, in those instances the Canada-Romania BIT and the UK-Romania BIT recognize that compensation shall be based on the genuine value of the investment expropriated "at the time the proposed expropriation became public knowledge",[324] or "before the impending expropriation became public knowledge."[325] The exception is not relevant as on the Claimants' own case Romania did not make the alleged expropriation public knowledge at any point in time, let alone more than two years before.

190 Finally, the Claimants' novel characterization of Romania's conduct at the hearing as a "continuing" breach since August 2011 in support of the choice of the valuation date in July 2011 has no merit.[326] The Claimants have now made clear that Romania did not breach any obligation under the BITs until, allegedly, 9 September 2013.

3.3 The Point in Time When Losses Occur Is Relevant to Establish Liability

191 The Tribunal's alternative question ("If not, is the point in time when Claimants' alleged losses occurred relevant to establishing liability for a breach in respect of each claim?") does not require an answer as the

[322] *Id.* at p. 49 *et seq.* (para. 85).

[323] Rejoinder, p. 302 *et seq.* (paras. 943-948); Counter-Memorial, p. 253 (paras. 678-690).

[324] Canada-Romania BIT, at **Exhibit C-1**, p. 10 (Art. VIII(1)).

[325] UK-Romania BIT, at **Exhibit C-3**, p. 5 (Art. 5(1)).

[326] **Tr. 2019**, 294:18-295-18 (Claimant's Opening).

Claimants' alleged losses must be quantified as of the date on which each breach is alleged to have been consummated. Nonetheless, Romania has answered this question indirectly above: an expropriation requires an expropriatory effect and an FET breach requires interference with rights with irreversible effect. Whether or not committed in a "creeping" form, the point in time when a loss occurs is relevant because the effect of the measure is a condition to establish liability.[327] This much appears to be agreed.[328]

192 The Claimants' failure to prove any loss, let alone loss equating to "substantially or completely depriv[ing] the attributes of property,"[329] excludes an expropriation on 9 September 2013. The inexistence of any loss also excludes a breach of FET on 9 September 2013 or of any other obligation under the BITs.

[327] See *supra* Sections 2.1.1 and 3.1.

[328] Cl. PO27 Answers, p. 51 (para. 87) ("The point in time when Claimants' losses became permanent is relevant to establishing liability because it was the State's ultimate repudiation of the project development rights that was simultaneously the cause of Claimants' certain and irreversible losses and thus the basis of liability in respect of each claim.").

[329] Reply, p. 159 (para. 352).

4 QUESTION C

While inviting specific references to commentary on the law of State responsibility, at Question C, the Tribunal asked:

"*Does conduct attributed to Respondent equate to a systematic State policy or practice that may be characterized as a composite act in breach of the relevant BIT pursuant to Article 15 of the Articles of Responsibility of States for Internationally Wrongful Acts? …*"

The Claimants' answer in summary:

Although the Claimants do not discuss the notion of systematic policy or practice, they characterize Romania's conduct as a composite act in breach of the BITs pursuant to Article 15 of the ILC Articles.

Romania's answer in summary:

There cannot be a composite act without a systematic State policy or practice. Furthermore, the conduct that the Claimants attribute to Romania does not equate to a systematic State policy or practice. Accordingly, Romania's conduct may not be characterized as a composite act, let alone a composite breach.

193 The Claimants invoke the notion of composite breach to try to circumvent the three-year limitation period of the Canada-Romania BIT,[330] to apply that treaty retroactively to conduct occurring prior to its entry into force in November 2011[331] and to claim that their losses should be valued at a date (July 2011) more than two years prior to the date when they allege

[330] Canada-Romania BIT, at **Exhibit C-1**, p. 15 (Art. XIII, 3, (d)).

[331] The Canada-Romania BIT was signed on 8 May 2009 and ratified by Romania on 26 November 2009. See Canada-Romania BIT dated 8 May 2009, at **Exhibit C-1**, p. 23. Thereafter, on 7 December 2009, Romania informed Canada of the completion of the procedures required in Romania for the entry into force of the treaty. See Note from Romania to Canada dated 7 December 2009, at **Exhibit R-304**. However, it was not until **23 November 2011** that Canada notified Romania of the completion of the procedures required in its territory for the entry into force of the treaty. See Note from Canada to Romania dated 23 November 2011, at **Exhibit R-305**. Accordingly, as the Claimants acknowledged in their RfA, the treaty only "entered into force on Nov. 23, 2011…" See Claimants' Request for Arbitration, p. 1 (para. 1, n. 1); Counter-Memorial, p. 182 (para. 465, n. 825).

Romania breached its obligations (September 2013).[332] The Claimants also rely on the same argument to avoid identifying specific acts or omissions allegedly giving rise to a breach of the BITs (**Section 2.1** above).

194 Notwithstanding the importance that the Claimants attach to the notion of composite breach, they do not answer Question C. They skirt the Tribunal's question in the over twelve pages dedicated to the topic and answer both "yay" and "nay."[333]

195 Romania's conduct cannot be characterized as a composite act, let alone a composite breach. In the absence of any systematic State policy or practice *vis-à-vis* the Claimants' investments, Romania's conduct cannot be defined in aggregate as wrongful under Article 15 of the ILC Articles.

4.1 There Cannot Be a Composite Act Under Article 15 of the ILC Articles if There Is No Systematic State Policy or Practice

196 The Claimants purport to distinguish between "a 'series of acts or omissions defined in aggregate as wrongful'" and "a 'systematic State policy or practice' in breach of an obligation" under the law of State responsibility. They imply that the first is all that Article 15 of the ILC Articles requires for State conduct to qualify as a composite act and allege that the latter "could be" a subtype of the first.[334]

197 There is no such distinction. Rather, a series of acts or omissions can be defined in aggregate as wrongful under Article 15(1) of the ILC Articles *when* there is a systematic State policy or practice that justifies treating that

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[332] Cl. PO27 Answers, p. 48 *et seq.* (para. 84).

[333] *Id.* at p. 58 (paras. 103-104) ("while a 'systematic State policy or practice' in breach of an obligation as referenced by the tribunal's question **could be** characterized as a composite act, the commentary to Article 15 of the ILC Articles refers more broadly to a "series of acts or omissions defined in aggregate as wrongful…. In this case, there is an undeniable link of pattern and purpose – that also **may be** considered as a systematic State policy or practice … The acts and omissions that form this composite act were in no sense disparate, isolated, or unrelated, but instead comprised a course of treatment undertaken by the Government with the object and purpose of assessing whether allowing the Project to be permitted and implemented was politically acceptable to the Government.") (emphasis added).

[334] *Id.*

systematic conduct as more than the sum of its individual parts. State conduct can be "defined in aggregate as wrongful" if composed of "systematic policy or practice."

198 The notion of "composite" act in Article 15(1) of the ILC Articles derives from Article 18(4) of the draft articles of 1976 which applied to "an act consisting of a **systematic repetition** of actions or omissions relating to separate cases (composite act)."[335] Article 18(4) also gave rise to another article (draft Article 25(2)) specific to composite acts in the subsequent drafts,[336] later merged into what became Article 15.[337]

199 A "composite act" was deemed to exist only where primary rules define the wrongful conduct in systematic terms such as in genocide, apartheid, or crimes against humanity:

> "the Special Rapporteur is provisionally in favour of retaining the notion of 'composite wrongful acts'… but of **limiting it to what might be termed 'systematic obligations'**. These are obligations arising under primary rules which define the wrongful conduct in

[335] International Law Commission, "Report of the International Law Commission on the Work of its 28th Session" (3 May - 23 July 1976) UN Doc. A/31/10, at **Exhibit RLA-209**, p. 88 (para. 5); see also p. 93 (para. 22) ("The distinctive characteristic of such an act of the State is thus the systematic repetition of actions having the same purpose, content and effect, but relating to specific cases which are independent of one another."); 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, at **Exhibit RLA-210**, p. 92 *et seq.* (para. 9).

[336] International Law Commission, "Report of the International Law Commission on the Work of its 31th Session" (14 May - 3 August 1979) UN Doc. A/34/10, at **Exhibit RLA-211**, p. 93; International Law Commission, "Report of the International Law Commission on the Work of its 32th Session" (5 May - 25 July 1980) UN Doc. A/35/10, at **Exhibit RLA-212**, p. 32-33; International Law Commission, "Seventh report on State responsibility, by Mr. Willem Riphagen" (4 March - 23 April 1986) UN Doc. A/CN.4/397, at **Exhibit RLA-213**, p. 16; International Law Commission, "Report of the International Law Commission on the Work of its 38th Session" (6 May - 26 July 1996) UN Doc. A/51/10, at **Exhibit RLA-214**, p. 61.

[337] International Law Commission, "Second Report on State responsibility, by Mr. James Crawford, Special Rapporteur" (17 March - 19 July 1999), UN Doc. A/CN.4/498, at **Exhibit RLA-215**, p. 39 (para. 137) ("For these reasons, it is recommended that articles 18, paragraphs 3–5, and 24–26 be replaced by two articles, one dealing with the distinction between completed and continuing wrongful acts, the other dealing with breach of certain obligations of a systematic or composite character.").

> composite or systematic terms (as in the case of genocide or crimes against humanity)" [338]

200 The Special Rapporteur (Prof. Crawford) opined that the breach of any primary obligation that does not require the cumulative character of the conduct as constituting the essence of the wrongful act does not justify treating it as a "composite act":

> "[I]f composite acts are to be dealt with, a distinction needs to be drawn between simple and composite or systematic obligations. **Just because a simple obligation is breached by a composite act seems no reason for treating the breach as different in kind**. … The position is different, however, where the obligation itself (and thus the underlying primary rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically motivated killing."[339]

201 The view of the ILC became that only systematic obligations should be deemed subject to the regime of composite breach.[340] The ILC used interchangeably "systematic" and "composite" in the commentary to what became draft Article 15 of the ILC Articles.[341]

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[338] *Id.* at p. 37 (para. 126) (emphasis added).

[339] *Id.* at p. 36 (para. 124) (emphasis added).

[340] *Id.* at p. 37 (para. 126) ("… the Special Rapporteur is provisionally in favour of retaining the notion of 'composite wrongful acts', as spelled out in articles 18, paragraph 4, and 25, paragraph 2, but of **limiting it to what might be termed 'systematic obligations'**. … As to obligations under other primary rules, these issues can be adequately dealt with through the interpretation and application of the particular rule.") (emphasis added).

[341] *Id.*, at 39 (para. 137) ("For these reasons, it is recommended that articles 18, paragraphs 3–5, and 24–26 be replaced by two articles, one dealing with the distinction between completed and continuing wrongful acts, the other dealing with breach of certain **obligations of a systematic or composite character**") (emphasis added); see *e.g.* International Law Commission, "Summary record of the 2703rd meeting" (6 August 2001) UN Doc. A/CN.4/SR.2703, at **Exhibit RLA-216**, p. 248 (paras. 9, 11) ("Mr. PELLET said he failed to see what was meant by a "systematic" obligation. Why use "systematic" if "complex" or, simply, "composite" was meant?... Mr. CRAWFORD (Special Rapporteur) said that… He had introduced the word "systematic" in an attempt to elaborate on the concept of an international

202 This restricted notion of "composite" act explains the choice of words "series of acts or omissions defined in aggregate as wrongful" first proposed in 1999 as the test for a composite breach,[342] which was adopted without modification in the final draft of Article 15. Prof. Crawford's commentary confirms that this provision "deals with breaches consisting of a composite of acts, which is significant in the context of breaches of obligations involving **systematic conduct**…"[343]

203 The ILC commentary to the article makes the same point. All of the ILC examples of composite acts refer to conduct that will give rise to a new type of wrongful act if committed systematically, either wrongful acts that cannot be completed without a systematic practice or policy ("genocide, apartheid or crimes against humanity") or acts whose systematic repetition generate a more serious wrong ("systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement"). As also noted in the commentary, a "special treatment in article 15" is justified, because they correspond to some "of the most serious wrongful acts in international law." The full portion of the commentary reads:

> "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'. Examples include the **obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination** prohibited by a trade agreement, etc. Some of the most serious wrongful acts in

obligation that defined certain conduct in aggregate as wrongful, but he would be glad to produce some alternative wording for approval by the Commission.").

[342] International Law Commission, "Summary record of the 2605rd meeting" (19 July 1999) UN Doc. A/CN.4/SR.2605, at **Exhibit RLA-217**, p. 278 (para. 18) ("The text proposed by the Drafting Committee limited the notion of composite acts to when the primary norm defined the wrong by reference to a systematic or composite character."); see also International Law Commission, "Titles and texts of draft articles adopted by the Drafting Committee during the 2605rd meeting" (19 July 1999) UN Doc. A/CN.4/L.574, at **Exhibit RLA-218**.

[343] J. Crawford, "State Responsibility", *Max Planck Encyclopedia of Public International Law*, Oxford University Press, September 2006, at **Exhibit RLA-219**, p. 6 (para. 19) (emphasis added).

> international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15."[344]

204 The systematic practice required for a composite act stands in contrast to simple repeated acts, which may form a practice but remain unconnected by a systematic policy. "A practice does not of itself constitute a violation separate from such breaches."[345] In that case, there is no basis under international law to cumulate the effect of the conduct,[346] as there is not "a different legal animal from the several acts that comprise it."[347]

205 The Claimants argue that a creeping expropriation or breach of FET could result from a composite act.[348] The argument is beside the point and does not answer the Tribunal's question. A creeping expropriation can generate a composite breach *only if* there is systematic violation carried out in an organized and deliberate way. The *Marfin v. Cyprus* tribunal is one of many tribunals articulating this point with clarity:

> "the Tribunal finds that the evidentiary record does not support a conclusion that Respondent **conceived and then executed a plan** to nationalize the Bank.
>
> In light of Claimants' position that it was the pursuit of the plan to nationalize the Bank that connects the seemingly disparate acts challenged in this arbitration into a composite act that breaches the Treaty, and of the Tribunal's finding that **the record does not**

[344] ILC Articles, at **Exhibit RLA-33**, p. 62 (emphasis added).

[345] *Ireland v. the United Kingdom*, ECtHR (plenary), Application 5310/71, 18 January 1978, quoted in ILC Articles, at **Exhibit RLA-33**, p. 63.

[346] 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, at **Exhibit RLA-210**, p. 92 *et seq.* (para. 9).

[347] *Pac Rim Cayman LLC v. Republic of El Salvador*, Decision on Respondent's Jurisdictional Objections, ICSID Case No. ARB/09/12, 1 June 2012, at **Exhibit CLA-225**, p. 52 (para. 2.88); J. Crawford, *State Responsibility: The General Part* (1st edition, Cambridge University Press, 2013) (excerpt), at **Exhibit RLA-128**, p. 266 ("Thus a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts.").

[348] Cl. PO27 Answers, p. 52 *et seq.* (paras. 91-102).

> **support a finding that such a plan ever existed, the Tribunal concludes that Respondent's acts do not constitute a composite act** that is capable of breaching the Treaty's Article 4."[349]

206 Referring to *Rompetrol v. Romania,* the Claimants allege that for a combination of acts to be considered a composite act, "there must be 'some link of underlying pattern or purpose between them' in contrast to a 'scattered collection of disjointed harms.'"[350] They, however, omit to mention that the tribunal also addressed Romania's position that diverse conduct by a wide variety of State agents over a prolonged period of time, across various Governments could not constitute a composite act:

> "There is much force in the Respondent's argument. The Tribunal starts from the proposition that, whether the conduct in question is stigmatized as 'conspiracy' or as 'organized harassment,' some proof is required, even if all of the actors have the status of State agencies, **that different actions pursued on different paths by different actors are linked together by a common and coordinated purpose**. This was clearly the view taken by the Rosinvest tribunal, a view which the present Tribunal shares."[351]

207 The *Rompetrol* tribunal's standard of "common and coordinated purpose" is identical to the ILC's requirement that "[t]o be regarded as systematic, a violation would have to be carried out in an **organized and deliberate way**."[352] Irrespective of the words used to describe the requirement of orchestration, a systematic policy or practice linking all disjointed conduct is a condition *sine qua non* to establish a composite act under Article 15.

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[349] *Marfin Investment Group Holdings S.A. et al. v. Republic of Cyprus*, Award, ICSID Case No. ARB/13/27, 26 July 2018, at **Exhibit CLA-294**, p. 212 (para. 864) (emphasis added).

[350] Cl. PO27 Answers, p. 57 (para. 102).

[351] *The Rompetrol Group N.V. v. Romania*, Award, ICSID Case No. ARB/06/3, 6 May 2013, at **Exhibit CLA-151**, p. 147 (para. 273) (emphasis added); see also *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. 1135) ("… the Tribunal remains of the view that there is no violation of any legitimate expectation. The Claimants have not made out an 'illegitimate' or 'deliberate' campaign on the part of the Respondent against the Claimants.").

[352] ILC Articles, at **Exhibit RLA-33**, p. 113 (emphasis added).

4.2 The Conduct Attributed to Romania Does Not Involve a Systematic State Policy or Practice and Therefore Cannot Be Characterized as a Composite Act

208 The Claimants allege that "[t]he acts and omissions that form this composite act were in no sense disparate, isolated, or unrelated." They refer to:

> "a course of treatment undertaken by the Government with the object and purpose of assessing whether allowing the Project to be permitted and implemented was politically acceptable to the Government".[353]

209 The allegation is unproven and in any event, even if proven, does not amount to a systematic policy under Article 15 of the ILC Articles. If the Claimants' position was correct, any accumulation of State conduct in relation to one investment would amount to a composite act.

210 The Claimants repeat the same allegations that they made in response to Question A. As demonstrated above in **Section 2.2**, the evidence does not support the Claimants' allegation that the actions and omissions of *inter alia* 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), all members of Parliament, and civil servants of multiple ministries and State agencies (including the Ministries of Environment, Economy, Culture and NAMR) – were part of a systematic State policy or practice.

211 The Claimants have also failed to show any interference in the conduct of the Ministry of Environment and of the TAC by officials of any other Ministry, Prime-Minister, President or other senior official throughout the period 2011-2013 (see above **Section 2.2.3.1**). This undermines the

[353] Cl. PO27 Answers, p. 58 (para. 104).

Claimants' theory of an organized and deliberate State campaign targeting RMGC during this period.

212 Accordingly, Romania's conduct cannot be characterized as a composite act.

5 QUESTION D

At Question D, the Tribunal asked the following question:

"How and to what extent should public opinion and its impact upon the political situation in Romania be factored into the assessment of liability and damages under the relevant BIT?"

The Claimants' answer in summary:

The Claimants argue that public opinion should have no relevance for the Tribunal's assessment of the case.

Romania's answer in summary:

The negative public opinion of the Project is **relevant** to the assessment of liability as well as causation and damages (should the Tribunal ever need to consider these issues).

The possible "impact [of public opinion] upon the political situation in Romania" is, however, **not relevant** as the reasons why the Project has not materialized to date are not political.

213 The Claimants mischaracterize the Respondent's position by alleging that:

> "[p]ublic opinion and its impact upon the political situation in Romania arises in this case as a result of **Respondent's defenses**, claiming that … [the 2013 protests] **justified the political decisions** of the political leaders to reject the Project…"[354]

214 This is not Romania's position. Romania has not "rejected" the Project and there has been no "decision," let alone a "political decision" on the issue. The Claimants' case is belied by their failure to identify the alleged decision was taken, when it was taken and by whom, and when it was communicated to the Claimants. Romania has not made a decision to reject the Project in 2013 or at any other time. Romania is *a fortiori* not arguing that the 2013 protests justified such a decision.

[354] Cl. PO27 Answers, p. 63 *et seq.* (para. 119) (emphasis added).

215 The Claimants further mischaracterize the Respondent's position by suggesting that "[t]here also is no basis to conclude that the Government lawfully withheld the Environmental Permit for Rosia Montana because of any alleged lack of a 'social license.'"[355] The Respondent is not requesting the Tribunal to draw this conclusion. The Ministry of Environment did not "withhold" the environmental permit, let alone because of a lack of social license. The Ministry has to date not issued the environment permit, because RMGC has not met the requirements. The question of the social license (or lack thereof) is relevant mainly to the assessment of causation (although Romania considers that the Tribunal need not reach that stage in its decision-making).

216 In this Section, the Respondent summarizes the ways in which the negative public opinion of the Project manifested itself (**Section 5.1**) and explains its relevance to the Tribunal's assessment of liability, causation and damages (**Sections 5.2** to **5.4**).

5.1 There Was Strong Social Opposition to the Project

217 The Tribunal has asked about the relevance of "public opinion" in this case. Public opinion may be measured and assessed in different ways and the "public" may be defined in different ways, including geographically – whether it be locally, regionally, nationally, or indeed internationally. In this case, by any measure, significant portions of the public viewed the Project negatively, including at all geographic levels. It is thus also appropriate to speak of strong "social opposition" or "public opposition" to the Project – expressions which may be used interchangeably to designate manifestations of negative public opinion.

218 Portions of the public who opposed the Project had more than just the democratic right to voice their opinion. Portions of the public were stakeholders (*i.e.*, they were directly affected by the Project) and thus had the power to act and the right to take lawful measures against the Project.

[355] Cl. PO27 Answers, p. 67 (para. 127) and p. 64 *et seq.* (para. 122, n. 285).

They had, and still have, the power to (legally) block or delay the Project. The notion of social license here enters the stage.[356]

219 Although the Claimants continue to argue that there is no legal requirement for a social license,[357] this is entirely beside the point. Whether or not a mining company has a social license is a matter of fact and not law. It refers to the relationship between the mining company and the stakeholders.[358] If a mining company obtains and maintains the necessary support of stakeholders for its project, then it has obtained the social license for that project. In this case, because stakeholders have to date blocked the Project, RMGC has failed to secure the social license for the Project.

220 The Claimants posit that Romanian law provides a role for public opinion only during the public consultation process of the EIA Procedure.[359] The Claimants miss the point; whether or not a social license exists is in the first place a matter for the stakeholders, not the general public (although it may also become a matter of interest for the general public, which is what happened in this case). The public is not limited to expressing its views during a phase of the EIA Procedure. Nor does the existence of an EIA public consultation phase mean that views expressed outside of that framework could not, or did not, impact the Project. The public can, and in this case has, expressed its views about the Project at various times over the years and through various means.

221 RMGC has been confronted from the start with social opposition to the Project. Manifestations of that opposition include:

- administrative and judicial challenges against key permits delivered to RMGC (including urban certificates and ADCs), leading to litigation

[356] **Tr. 2019**, p. 365:6-22 (Respondent's Opening); **Tr. 2019**, p. 2938:10-17 (Boutilier) ([redacted].

[357] Cl. PO27 Answers, p. 64 *et seq.* (para. 122).

[358] **Tr. 2019**, p. 2998:20-2999:14 (Thomson); **Thomson Opinion II**, p. 10 *et seq.* (paras. 18-20).

[359] Cl. PO27 Answers, p. 66 (para. 125).

in Romanian courts lasting several years and spanning all instances (from first instance courts to the high court of cassation);[360]

- refusal to sell properties to RMGC and thus blocking RMGC from obtaining the surface rights to the Project area;[361]
- participation in the actions of Alburnus Maior, which led the Save Roşia Montană campaign;[362]
- street protests, marches, and public actions, gathering participants throughout Romania and internationally especially in 2002-2005, 2009, and 2011-2013;[363]
- publication of video clips and press articles, and more generally use of social media, to express negative views of the Project, including its (at least perceived) dangers for the environment and human health, as well as its social and economic downsides;[364] and,
- participation in polls and referenda to voice opposition to the Project.[365]

[360] Counter-Memorial, p. 378 *et seq.* (Annex IV) (main NGO court and administrative petitions against the Project); see also Rejoinder, p. 94 *et seq.* (paras. 310 (ADC), 558-564 (PUZ), and 569-580 (UC)); **Tofan LO**, p. 16 *et seq.* (Sections II.1.2-3 (UC) and III.4 (PUZ)); **Dragos LO II**, p. 114 *et seq.* (Sections 4.4.2-4.4.3 (ADC)).

[361] **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); **Camarasan**, p. 3 (para. 7); see also **Thomson Opinion II**, p. 38 *et seq.* (paras. 105-108) and p. 63 *et seq.* (Section 5); Counter-Memorial, p. 26 *et seq.* (Section 2.3.5); Rejoinder, p. 88 *et seq.* (Section 3.3.2.6) and p. 182 *et seq.* (Section 3.6.1.5).

[362] **Jurca**, p. 19 *et seq.* (Section 6); see also **Pop Opinion**, p. 10 (Section 4.1.1); Counter-Memorial, p. 38 (para. 102).

[363] Rejoinder, p. 329 *et seq.* (Section 8.2.2.6); Counter-Memorial, p. 354 *et seq.* (Annex III) and p. 130 *et seq.* (Section 5.11); **Pop Opinion**, p. 15 *et seq.* (para. 47 and table 1); **Stoica Opinion**, p. 38 *et seq.* (Sections 4 and 5); **Thomson Opinion II**, p. 55 *et seq.* (Section 4); **Tr. 2019**, p. 3193:20-3194:8 and p. 3303:08-3305:15 (Stoica).

[364] **Pop Opinion**, p. 10 *et seq.* (Section 4.1).

[365] **Jurca**, p. 37 *et seq.* (Section 13.2); see also Rejoinder, p. 334 *et seq.* (Section 8.2.2.7); **Thomson Opinion I**, p. 29 *et seq.* (Section 5.6).

5.2 The Relevance of the Negative Public Opinion of the Project to the Tribunal's Assessment of Liability

222 The negative public opinion of the Project is first and foremost relevant as a factual matter. It thus provides the context to the Tribunal's assessment of liability.

223 From the start of the Project, many Roşia Montană residents were opposed to or at least had concerns regarding the Project and its impact on their lives. Many of these residents did not want to sell to RMGC or otherwise leave their homes. They formed Alburnus Maior, which grew over the years and joined forces with national and international NGOs. From the early years, Alburnus Maior raised its concerns with RMGC and expressed its opposition to the Project. RMGC did not address those concerns. In some instances, addressing those concerns would have meant considerably revising the Project and rendering it less profitable. RMGC was not prepared to consider this possibility.

224 Alburnus Maior has played a pivotal role in this dispute and has expressed its continued opposition to the Project, including through its third-party submission in this arbitration. If anyone has delayed or blocked the Project, it is Alburnus Maior and its affiliates, not State authorities. From as early as 2004, Alburnus Maior exercised its legal rights by filing lawsuits in Romanian courts against permits that Romanian central and local authorities had issued for the Project, including the urban certificate (issued by the Alba County Council) and the ADCs (issued by the cultural authorities).[366] In those lawsuits, State authorities defended the legality of the permits that they had issued, thereby supporting the Project and RMGC. Over the years, the NGO challenges were sometimes successful, sometimes not, but, regardless, they had the overall effect of blocking the Project. One of these legal proceedings is still pending.[367]

225 From their written pleadings to their opening statement at the December 2019 hearing, the Claimants have taken an ostrich-in-the-sand approach

[366] See Counter-Memorial, p. 378 *et seq.* (Annex IV).

[367] See Rejoinder, p. 217 (para. 689); Counter-Memorial, p. 146 (para. 385) (discussing the Cârnic ADC litigation before Buzau Tribunal).

and been remarkably silent regarding Alburnus Maior. They have downplayed the negative public opinion of the Project and the magnitude of the 2013 protests. The Claimants' disregard of the voices of Alburnus Maior representatives, Roşia Montană residents, and other Project opponents is consistent with RMGC's conduct throughout the Project. The desire to shut out these voices was also illustrated by the Claimants' decision not to call five of the Respondent's witnesses, all Roşia Montană residents and Project opponents, to testify at the hearing. The Claimants prefer to designate the State as the culprit in this affair and, in so doing, misrepresents the facts.

226 The Claimants only have themselves to blame: the acts and omissions of RMGC, not State authorities, caused the negative public opinion and opposition to the Project, which in turn paralyzed the Project's progress and ultimately prevented its completion to date.

227 The negative public opinion should be taken into account when considering the Claimants' argument that the EIA Procedure was effectively complete at the end of 2011.[368] The negative public opinion had by that point in time affected the EIA Procedure in two ways.

228 First, the general public, including the project opponents, had voiced their views regarding the EIA Report in 2006-2007 and in 2011. By law, the EIA Procedure involved public consultation. In 2006, fourteen debates took place around Romania and Hungary and the Ministry of Environment received an unprecedented number of comments – **5,610 questions** and 93 contestations from over 6,000 people[369] – many of which were negative. The Ministry reviewed the comments from the public as well as RMGC's comments in response as expeditiously as possible. The Ministry opened a further public consultation phase in 2011 (again with RMGC's consent) following RMGC's submission of a new urban certificate in mid-2010 and then of updates to the EIA Report in the fall of 2011. This consultation phase again involved review by the Ministry of Environment of the

[368] Cl. PO27 Answers, p. 64 (para. 121); see also *supra* Sections 2.2.3.3 and 2.2.3.4.

[369] Letter from Ministry of Environment to RMGC dated 31 January 2007, at **Exhibit C-539**; see also Counter-Memorial, p. 47 (para. 127).

public's over 500 comments and questions, RMGC's submission of comments to the public's comments (in late August 2011), and the Ministry's review thereafter of RMGC's comments.[370] Contrary to the Claimants' misleading allegation that "the Ministry determined that RMGC answered each question and comment to the satisfaction of the Ministry",[371] the Respondent has shown that many of the concerns raised over the years remained outstanding for some time and, in some cases, remain outstanding to this day.[372]

229 Second, the negative public opinion of the Project had indirectly caused the interruption of the EIA Procedure between September 2007 and June 2010. Alburnus Maior had successfully challenged RMGC's UC 78/2006 in court (and RMGC's UC 105/2007 had also expired).[373] As a result, State authorities requested that RMGC produce a valid urban certificate – which it did not do until June 2010. Once it did so, the EIA Procedure resumed.[374]

230 The negative public opinion of the Project is also relevant to the Tribunal's assessment of the Claimants' allegations that, in August and September 2011, for some unexplained reason, State authorities started to make negative statements about the Project and commenced actions that culminated in a breach of the BITs in September 2013.[375]

231 It appears that it was at that point in time that RMGC threw in the towel on the Project for at least three reasons. First, in September 2011, RMGC received a letter from the Ministry of Environment listing outstanding

[370] **Tr. 2019**, p. 406:4-407:9 (Respondent's Opening); Respondent's Opening Presentation, p. 22 (showing EIA Review Process Timeline in March-September 2011).

[371] Cl. PO27 Answers, p. 67 (para. 126).

[372] See *supra* paras. 109-110, 135-136 and 148.

[373] See Respondent's Opening Presentation, p. 66 (chronology of the UC litigation); see also Counter-Memorial, p. 54 *et seq.* (paras. 141-142 and 144).

[374] Counter-Memorial, p. 62 (paras. 162-164).

[375] Cl. PO27 Answers, p. 1 *et seq.* (paras. 2-3, 12) and p. 59 *et seq.* (paras. 106-118).

issues and questions that RMGC evidently did not feel able to address or overcome.[376]

232 The two additional reasons related to the negative public opinion of the Project. First, RMGC had given up trying to acquire properties in Roşia Montană since February 2008 and was stuck with recalcitrant landowners who refused to sell. It knew that the only way to deal with them would be to attempt lengthy expropriation procedures, for which a valid PUZ for the Project needed to be (but was not) in place, and whose outcome was far from certain.[377]

233 Second, RMGC also needed to secure the PUZ to obtain the environmental permit and the building permit, for which it also lacked ADCs. [redacted][378] [redacted][379]

234 Because of this opposition blocking the Project, and because of RMGC's failure to meet the permitting requirements, RMGC sought in the fall of 2011 and thereafter to negotiate a customized agreement with the Government and to procure a special law for the Project. RMGC was seeking an arrangement whereby it would be granted outstanding permits and secure the PUZ for the Project Area in exchange of a slightly higher interest in the Project for the State.[380] The advantages to RMGC were

[376] Letter from Ministry of Environment to RMGC dated 22 September 2011, at **Exhibit C-575**.

[377] Rejoinder, p. 349 *et seq*. (paras. 1059 and 1067).

[378] [redacted], at **Exhibit R-163** (re PUZ); [redacted], at **Exhibit C-1348** (re ADC).

[379] [redacted], at **Exhibit C-1719** (re ADC); [redacted], at **Exhibit C-1407** (re PUZ).

[380] [redacted], at **Exhibit C-779**.

numerous and substantial, as explained above. These measures, if implemented, would have allowed RMGC to circumvent the impact of the negative public opinion of the Project. There was no other reason for RMGC to seek these benefits.

235 The Claimants suggest that the Respondent's position is that it did not issue the environmental permit and/or adopt the Roşia Montană Law because of the negative public opinion, including more specifically as a result of the negative public opinion expressed through the 2013 protests.[381] This is not the Respondent's position.

236 The 2013 protests represented a culmination in the social opposition to the Project, as embodied in the Roşia Montană Law.[382]

237 However, those protests were not the reason why Romanian authorities did not issue the environmental permit in 2013. The permit was not issued simply because RMGC had not met the requirements. The Claimants' negotiations with the Government leading ultimately to the submission of the Roşia Montană Law to Parliament route always remained separate and independent from the permitting track. The Claimants recognized this absence of link at the time[383] and did not challenge it at the hearing.[384] Parliament's rejection of the Roşia Montană Law did not affect the EIA permitting procedure, which remains open to this day.

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[381] Cl. PO27 Answers, p. 67 (para. 127) ("[t]here also is no basis to conclude that the Government lawfully withheld the Environmental Permit for Rosia Montana because of any alleged lack of a 'social license.'"), p. 86 (para. 161) ("there is no basis in law why the failure of that legislation to gain support should have meant the termination in effect of the Roşia Montană Project."), p. 88 (para. 164) ("[the] public opinion cannot be a defense to Romania's liability"), and p. 105 (para. 204) ("the rejection of the Draft Law by Parliament… meant the permanent rejection of the Project.").

[382] See *e.g.* Video entitled "Roşia Montană exists because of you" (2013), at **Exhibit R-449** (in which Roşia Montană residents thank the protestors); Respondent's Opening Presentation, p. 7; **Tr. 2019**, p. 386:1-15 (Respondent's Opening).

[383] Gabriel Canada MD&A, First Quarter 2013, at **Exhibit R-504**; Gabriel Canada MD&A, Second Quarter 2013, at **Exhibit R-251**; see also **Tr. 2019**, p. 386:17-22 (Respondent's Opening).

[384] See *supra* para. 62.

5.3 The Relevance of the Negative Public Opinion of the Project to the Tribunal's Assessment of Causation

238 The negative public opinion of the Project would be fundamental to the Tribunal's assessment of causation, were the Tribunal ever to reach that stage of analysis.

239 The Claimants do not deny that their burden of proof for causation is high. They do not dispute that, even assuming that Romania had breached the BITs (which is denied), they are still required to prove that the alleged breach has caused the total and permanent loss of their investment, failing which they are not entitled to any compensation. Nor do they dispute that they must prove that, but for Romania's allegedly internationally wrongful acts, they would have been able to execute the Project.[385]

240 The Claimants are silent regarding the *Bilcon v. Canada* award of January 2019, which is directly on point regarding the test for causation.[386] In that case, although the tribunal found that the respondent had breached the BIT, it found that claimant had not established a causal link between the breach and the alleged loss since it could not be said that the project would have occurred "in all probability" or with "a sufficient degree of certainty". The tribunal thus denied the claimant's claim for damages.[387]

241 The Claimants do not dispute that the *Bilcon* standard applies. They do not dispute that, as to their principal claim regarding the environmental permit, they must show 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 could have been executed profitably. In other words, it is not enough for the Tribunal to conclude that Romania

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[385] Rejoinder, p. 302 (para. 942).

[386] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit RLA-198**; Rejoinder, p. 303 *et seq.* (paras. 945-948).

[387] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit RLA-198**, p. 18 (para. 87). The tribunal only awarded damages in the amount of USD 7 million (*i.e.* less than 2% of the claimed amount) for the "injury that is substantially uncontroversial between the Parties …, namely that the Investors were deprived of an opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner." *Id*. at **RLA-198**, p. 120 (para. 400).

breached a BIT and that that breach caused the Claimants to suffer a loss. The Tribunal must also find that, but for that alleged breach, the Project "in all probability" would have gone forward and operated profitably; furthermore, the Tribunal must have a "a sufficient degree of certainty" regarding that finding.[388]

242 The Tribunal cannot reach that conclusion because, but for Romania's alleged breaches, RMGC would in any event have not met the permitting requirements. It had failed – or chose not (because this was not realistic) – to meet them.

243 RMGC also could not meet the permitting requirements as project opponents continuously foiled its plans. It could not secure the necessary social support for the Project, could not convince certain stakeholders, including certain Roşia Montană residents and Alburnus Maior representatives, of the benefits of the Project. In a nutshell, it was unable to acquire the social license for the Project.

244 Even if RMGC had met all technical requirements and had obtained the environmental permit in 2011, 2012 or 2013, it still – in all likelihood – would not have been able at that time to secure the surface rights because of the strong social opposition. This in turn would have prevented RMGC from obtaining financing for the construction of the mine.[389] The surface rights issue was a major thorn for RMGC considering some of the residents' categorical refusal to leave. RMGC would have needed to modify the Project layout or initiate expropriation proceedings. Indeed, some of the properties of the owners who refused to sell would have been affected by the surface water diversion channels or the new mine roads, such that RMGC could not have proceeded with the construction works without them.[390] Profs. Sferdian and Bojin, whom the Claimants did not

[388] Rejoinder, p. 302 (para. 942).

[389] **McCurdy Report**, p. 14 (para. 35); Rejoinder, p. 354 *et seq.* (para. 1070).

[390] Rejoinder, p. 355 *et seq.* (para. 1071 and figure 1); **Tr. 2019**, p. 1447:18-20 ([redacted]) ([redacted]) **Tr. 2019**, p. 2151:3-2152:4 (Jurcă) ("[redacted]

call for cross-examination and whose report stands unchallenged, explain that the likely duration of the expropriation process would have led to a delay of at least five years.[391]

245 In sum, the Claimants ignore the impact of social opposition (which underpins the need for expropriation proceedings) on the layout, timeline, and financing of the Project.

5.4 The Relevance of the Negative Public Opinion of the Project to the Tribunal's Assessment of Damages

246 The relevance of the social opposition goes beyond the issue of causation. Thus, even assuming that Romania had breached either of the BITs, that the *Bilcon* standard did not apply, and that a causal link existed between that breach and the Claimants' alleged loss, the social opposition to the Project is relevant to the Tribunal's assessment of damages, in two respects.

247 [redacted][392][redacted][393][redacted][394]

[redacted]") and p. 2152:5-2153:16 (Jurcă).

391 **Sferdian and Bojin LO**, p. 50 *et seq.* (paras. 209 and 231); Rejoinder, p. 372 (para. 1112).

392 [redacted].

393 [redacted].

394 [redacted].

248 Furthermore, and in any event, because of the Claimants' and RMGC's mismanagement of the social opposition to the Project, the Tribunal should decrease any award of damages based on the principle of contributory fault.

249 The Claimants recognize that "international law does not support the reduction of reparation for concurrent causes, **except in cases of contributory fault on the part of the injured party**…" but deny any responsibility for their alleged injury.[395]

250 They wrongly argue that they are not at fault because, first, the Project had a social license during the 2011-2013 time period. As previously explained, that argument flies in the face of the evidence.[396]

251 Second, they argue that "there were no mass protests when the Project was due to be permitted."[397] This argument is unfounded and misses the point. Leaving aside that Romania does not accept that "the Project was due to be permitted" at a particular point in time, protests against the Project occurred prior to September 2013 and, in particular, in 2011 and 2012 (in addition to continued opposition in the form of lawsuits, petitions, *etc*.). That these protests and opposition amplified and culminated into "**mass** protests" when the Government submitted the Roşia Montană Law, with RMGC's support, to Parliament in August 2013 does not mean that, up until that point, social opposition had not created a major problem for RMGC or that RMGC had enjoyed the necessary support for the Project.[398]

252 Third, the Claimants deny any fault by arguing that the 2013 protests "were a response to the Government's promotion of a special law for the Project considered by the public to be a corrupt corporate handout."[399] They again

[395] Cl. PO27 Answers, p. 88 (para. 165) (emphasis added).

[396] Rejoinder, p. 314 *et seq.* (Section 8.2.2).

[397] Cl. PO27 Answers, p. 89 (para. 166).

[398] *Id.* (emphasis added); see also Rejoinder, p. 330 *et seq.* (para. 1016) ([redacted]).

[399] Cl. PO27 Answers, p. 89 (para. 166). The Claimants discuss over some ten pages the 2013 protests. Cl. PO27 Answers, p. 76 *et seq.* (paras. 142-160). These comments are irrelevant for this submission and will be addressed as appropriate in a post hearing brief, for the time being

wash their hands of any role in the elaboration of the Roşia Montană Law. This argument is, however, belied by the evidence that RMGC supported and was involved in the preparation of the Roşia Montană Law, which was advantageous to it, and publicly welcomed its submission to Parliament.

253 The Claimants allege that a contributory fault argument fails, because neither RMGC nor they failed to fulfil a legal obligation. They claim that the "notion of contributory fault, which is addressed in Article 39 of the ILC Articles, is limited to circumstances where the injured party has breached a **legal obligation**…".[400]

254 However, nowhere does Article 39 pose this requirement:

> "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[401]

255 Nowhere does Article 39 require the breach of a "legal obligation;" it only requires "contribution to the injury," which is a matter of fact. The commentary to Article 39 further defines the relevant "action or omission" as those "which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights" and specify that "the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case."[402]

256 The Claimants and RMGC manifested a lack of due care *vis-à-vis* the Project and their rights therein by not addressing the concerns and objections of stakeholders. They apparently considered that they could force their Project through regardless of the social opposition. They did not make any material changes to their Project, notwithstanding the complaints

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the Respondent respectfully refers to Rejoinder, p. 329 *et seq.* (Section 8.2.2.6) and p. 347 *et seq.* (Section 8.2.2.9).

[400] Cl. PO27 Answers, p. 89 (para. 167) (emphasis added).

[401] ILC Articles, at **Exhibit RLA-33**, p. 109 (Art. 39).

[402] *Id.* at p. 110 (para. 5).

made through the EIA public consultation and otherwise.[403] They even sought to override the social opposition by seeking through the Roşia Montană Law a guarantee of permits, including the building permit.

257 The Claimants cite case law that does not support their position. Contrary to their suggestion, the *Gemplus v. Mexico* tribunal did not find that the respondent needed to show the breach of a legal obligation to find contributory fault.[404] Referring to Article 39 of the ILC Articles, it then found an absence of contributory fault.[405] The facts of that case can also be distinguished from those here. There, the allegedly faulty act was the claimants' hire of a manager of a company, who later faced accusations for past misconduct, but there was no evidence of fault on the part of the claimant – let alone of a breach of a legal obligation – insofar as the claimant had not been aware of the manager's misconduct at the time of hiring him.[406]

258 In *Caratube v. Kazakstan*, to which the Claimants also refer, the tribunal considered that the respondent could not invoke a contributory fault defense since the respondent had, in its view, tolerated the allegedly negligent behavior of which it was then complaining in the arbitration.[407]

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[403] See Rejoinder, p. 320 *et seq.* (paras. 987 and 993); **Tr. 2019**, p. 1269:6-1270:3 (Avram).

[404] Cl. PO27 Answers, p. 89 (para. 167).

[405] *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. 231 (paras. 11.11-11.15).

[406] The Claimants also say that, in *Bear Creek Mining v. Peru,* "there was no basis for a finding of contributory fault by the claimant as the claimant complies with all legal requirements." Cl. PO27 Answers, p. 92 (para. 173). This is misleading since the tribunal more precisely held that "… Respondent has the burden of proof that its breaches of the FTA … were to some extent caused by Claimant … Respondent has not met that burden." The tribunal did not specifically hold that a breach of a legal obligation was required. *Bear Creek v. Peru*, Award, 30 November 2017, at **Exhibit RLA-53**, p. 251 *et seq.* (paras. 667-668).

[407] Cl. PO27 Answers, p. 89 (para. 167); *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, Award, ICSID Case No. ARB/13/13, 27 September 2017, at **Exhibit CLA-246**, p. 367 (para. 1194) ("the Respondent – who, in the majority view, engaged in inconsistent behavior by tolerating CIOC's sub-standard performance to the extent of granting an extension of the Contract and accepting (albeit with certain corrections and reformatting) the 3D seismic study, shortly before unilaterally terminating that same Contract for alleged non-compliance with unspecified contractual obligations – cannot now invoke a contributory fault…").

259 Various tribunals have made a finding of contributory fault on the part of the claimant by referring to its misconduct without specifically identifying a breach of a legal obligation. For instance, in *Yukos v. Russia*, the tribunal found that as a result of the claimants' and Yukos' misconduct, the claimants had contributed to the extent of 25% to the prejudice which they had suffered as a result of the Respondent's destruction of Yukos.[408]

260 Even assuming that, to find contributory fault, Romania is required to demonstrate that the Claimants and/or RMGC breached a legal obligation (*quod non*), RMGC has failed to comply with Romanian and international laws, all of which have contributed to the Project's failure to date:

- RMGC promoted media campaigns which the CNA found to be in breach of the Broadcasting Law and of the Audio-visual Content Regulatory Code.[409]
- RMGC failed to submit a valid urban certificate to the Ministry of Environment, notwithstanding its requests (thereby triggering what it claims to be the unlawful suspension of the EIA Review Process).[410]
- NGOs raised concerns regarding RMGC's compliance with EU law, leading the PETI to "invite[] the Company to properly observe the provisions of Directive 2006/21/EC on the management of waste from

[408] *Yukos Universal Limited v. Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014, at **Exhibit RLA-21**, p. 191 *et seq.* (para. 1637).

[409] CNA decision dated 15 October 2013, at **Exhibit R-277** (finding *e.g.* "the information displayed by the commercials … is not such as to provide objective information to the audience, as it gives rise to the idea that there are "thousands and thousands" of specific and actual workplaces … such message is obviously delusive"); 2013 RMGC Annual Financial Statements (resubmitted), at **Exhibit C-1569.03**, p. 10 (referring to this decision of the CNA); CNA Decision dated 23 June 2009, at **Exhibit Pop-36**, p. 1 ("the information provided to the audience are not correct, … they are essentially different from those provided by [RMGC] on its website."); see also **Pop Opinion**, p. 27 *et seq.* (paras. 62, 125, 132 and 137) (describing complaints filed with CNA) and p. 47 *et seq.* (paras. 108-148) (describing the media campaigns for the Project); CNA decision dated 6 December 2012, at **Exhibit R-656**; Counter-Memorial, p. 136 (para. 354); Rejoinder, p. 326 *et seq.* (paras. 1005-1006).

[410] See also **Dragos LO I**, p. 39 (para. 193) ("I thus conclude that the allegedly "unlawful three-year suspension" (as Prof. Mihai calls it) was in fact caused by RMGC's failure to submit, despite the Ministry's request, a new, valid UC.").

extractive industries with respect to the use of best available techniques," which concerns were shared by Dr. Dodds-Smith.[411]

261 In addition, the Claimants and RMGC have failed to comply with certain best practices in their development of the Project:[412]

- Independent third-party reviews, such as the UNDP Report of 2006, noted concerns regarding RMGC's management of the relations with stakeholders.[413] Dr. Thomson describes this early lack of effective engagement with the local community as a fatal mistake for RMGC.[414]
- The IGIE concluded that RMGC failed to transparently and to sufficiently inform the public on cyanide use and transportation,[415]

[411] See PETI Report on fact-finding mission to Romania dated 17 July 2012, at **Exhibit R-204**, p. 14; see also PETI Notice to Members dated 29 May 2015, at **Exhibit R-205**; **CMA - Dodds-Smith Report II**, p. 7 *et seq.* (paras. 18 and 76-77) (highlighting the lack of compliance of RMGC's waste management and mine closure plans with EU Directive 2006/21/EC, UN Environmental Guidelines and general best practice); Counter-Memorial, p. 69 *et seq.* (para. 182).

[412] It is undisputed that RMGC was required to comply with Romanian and EU law and that RMGC also committed to comply with international best practices. See *e.g.* Memorial, p. 23 (para. 66); see also **CMA - Wilde Report I**, p. 24 *et seq.* (paras. 85-92).

[413] UNDP/BRC Fact Finding Mission Provisional Report on Sustainable Development Pathways for Roşia Montană, dated July 2006, at **Exhibit C-503**, p. 19 ("RMGC does not appear to have a good image with a number of stakeholder groups in Roşia Montană. As acknowledged by staff of RMGC themselves, the company must bear much of the blame for this. They point to the poor way in which relations with the local population have been handled in the past."); see also [redacted], at **Exhibit C-726**, p. 29 *et seq.* ([redacted]).

[414] **Thomson Opinion II**, p. 22 *et seq.* (paras. 49-57) (quoting notably Henisz 2007 Notes, at **Exhibit C-2391**); **Thomson Opinion I**, p. 12 *et seq.* (paras. 30, 34 and 42); see also Rejoinder, p. 317 *et seq.* (paras. 983-985); **Tr. 2019**, p.368:20-369:13 (Respondent's Opening).

[415] 2007 Update to EIA Report, Public Consultations Vol. 91, at **Exhibit C-376**, p. 166 ("… neither Hungarian nor Romanian speaking public has clear information about the potential hazards and benefits of the forthcoming development. … the IGIE urges the release of more understandable explanations of the technologies to be used …. Further it is urged that work is undertaken to inform stakeholders on how will they be involved and how will they be continuously informed. This would certainly help in achieving better public acceptance of the project"); **CMA - Blackmore Report**, p. 25 *et seq.* (paras. 101, 114 and 222); see also **CMA - Wilde Report I**, p. 37 *et seq.* (paras. 134 and 240).

which damaged the Project's social acceptance as Ms. Blackmore also explains.[416]

- In Ms. Wilde's opinion, RMGC's submission of the 2006 EIA Report and 2010 updates disregarded good practice.[417] There is also evidence that the World Bank and IFC withdrew from funding negotiations because of RMGC's failures to abide by best practice standards.[418]

262 The Claimants take issue with the Respondent's reliance on and description of three cases in its Rejoinder – *Copper Mesa v. Ecuador*, *SAS v. Bolivia*, and *Bear Creek Mining v. Peru*.[419] Notwithstanding the Claimants' comments, these cases remain relevant and a source of guidance for the Tribunal, because they also involved mining projects that were affected or prevented by social opposition. As summarized below, in those cases, the tribunals found that the claimants had caused or contributed to the social opposition and that finding in turn affected the tribunals' decisions as to causation and/or damages.

263 In two of those cases, the tribunal expressly invoked the notion of "social license." In *Copper Mesa v. Ecuador*, the tribunal observed that the social license was "required."[420] In *Bear Creek Mining,* the tribunal repeatedly referred to the notion of social license and held that, regardless of a

[416] **CMA - Blackmore Report**, p. 18 (para. 69) (describing Gabriel's intention to undergo a Cyanide Code pre-operational certification audit "to demonstrate to its stakeholders that it will manage cyanide responsibly once in operation.") (quoting **C-944**, p. 3); see also Email from ICMI to Gabriel Resources Ltd. dated 15 July 2013, at **Exhibit C-946**, p. 3 (stating Gabriel's view that "a pre-operational certification would be very helpful for us").

[417] **CMA - Wilde Report I**, p. 26 *et seq.* (paras. 93-96, 100, 118-119, 222 and 241); **CMA - Wilde Report II**, p. 29 (Section 4) (referring to the Equator Principles and IFC/Word Bank Performance Standards).

[418] Mining Weekly article "Gold mine loan blocked by World Bank chief" dated 15 October 2002, at **Exhibit CMA-6**, p. 1; see also Rejoinder, p. 321 (para. 990).

[419] The Respondent rejects the Claimants' contention that other legal authorities that the Respondent had cited are not relevant. The Claimants do not dispute the accuracy of the Respondent's descriptions of those legal authorities. The Respondent leaves it to the Tribunal's discretion to assess their relevance. Cl. PO27 Answers, p. 93 (para. 174); Rejoinder, p. 311 *et seq.* (paras. 965-966 and 969-971).

[420] *Copper Mesa Mining Corporation v. Republic of Ecuador,* Award, PCA Case No. 2012-2, 15 March 2016, at **Exhibit RLA-54**, p. 47 (para. 2.16).

possible breach of the FTA, the lack of a social license would have led to the failure of the mining project.[421]

264 Although the Claimants slate the Respondent's description of the *Copper Mesa v. Ecuador* award as "materially incomplete and misleading,"[422] it is not clear in what way they take issue with that description. In any event, that case bears similarities with this case – a mining project facing social opposition and where the investor's acts and omissions were found to have contributed to that opposition. The main difference with this case was that the public opposition to the project led the Ecuadorean State authorities to cancel the concessions (pursuant to a law), whereas, here, State authorities to this day have given RMGC a chance to develop the Project.[423]

265 That the foreign investor's acts and omissions in that case were particularly heinous – hiring armed men to fire guns at civilians – does not mean that acts and omissions of lesser severity do not give rise to contributory fault. When considering the notion of contributory fault, the severity of the investor's conduct is not relevant; what is relevant is that its conduct contributed to its purported injury.

266 The Respondent agrees with the Claimants that the following conclusion of the *Copper Mesa* tribunal is noteworthy:

> "the general approach taken in all [earlier] decisions, whether treated as causation, contributory fault (based on wilful or negligent act or omission) or unclean hands, is materially the same, deriving from a consistent line of international legal materials."[424]

267 In that case, the tribunal assessed the claimant's contribution to its injury as being at 30% and reduced the amount of damages accordingly.[425]

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[421] Rejoinder, p. 309 *et seq.* (para. 962) (citing **RLA-53**, p. 71 *et seq.* (paras. 257 and 599-600)).

[422] Cl. PO27 Answers, p. 90 *et seq.* (para. 170).

[423] See Rejoinder, p. 308 (paras. 958-959).

[424] Cl. PO27 Answers, p. 91 (para. 171) (citing **RLA-54**, p. 227 (para. 6.97)).

[425] *Copper Mesa Mining Corporation v. Republic of Ecuador,* Award, PCA Case No. 2012-2, 15 March 2016, at **Exhibit RLA-54**, p. 252 (para. 10.7).

268 The Claimants also argue that the claimant's acts and omissions in *SAS v. Bolivia* were graver than here.[426] Again, the argument is beside the point. The tribunal found that the claimant's conduct had caused social opposition to the project.[427] The dispute had unfolded differently since, again, unlike here, State authorities terminated the concession as a result of the social opposition.[428] The Claimants admit that "in this case, Gabriel's investments were not terminated due to social opposition to the Project"[429] – to be clear, those investments have not been terminated at all. The Claimants do not dispute the Respondent's observation that, in *Bear Creek Mining v. Peru*, the notion of social license (or social opposition) was relevant to the tribunal's assessment of damages.[430] Similar to *Copper Mesa* and *SAS v. Bolivia*, the tribunal found that social opposition to the project had caused, but not justified, the Government's adoption of a decree prohibiting mining in the area in question.[431] Again, in this case, there has been no such decree or other measure terminating or cancelling the Roşia Montană License or otherwise preventing the Project.

270 The Claimants allege that the *Bear Creek* tribunal considered the fair market value and viability of the mining project immediately prior to

[426] Cl. PO27 Answers, p. 91 *et seq.* (para. 172).

[427] See Rejoinder, p. 311 *et seq.* (paras. 967 and 968) (referring to relevant portions of **RLA-162**).

[428] The tribunal's assessment of the quantum in that case would not be applicable here. It concluded that there had been an expropriation for a public purpose (because of the social opposition) but noted that State authorities had failed to pay compensation. It thus did not consider it necessary or appropriate to reduce the amount of damages. See **RLA-162**, p. 248 (para. 875) ("The Tribunal has found that the State's sovereign decision to expropriate the Mining Concessions was the result of a severe and prolonged social conflict that originated with the Project. In other words, the Tribunal found that the expropriation complied with the requirements of public purpose and social benefit established in Article 5 of the Treaty. In this case, the violation of the Treaty arose from Bolivia's failure to compensate or offer to provide compensation, a violation that, as established by the Tribunal, is not attributable to the investor nor is based on the conduct that the Respondent attributes to the investor. The Tribunal may not reduce the amount of compensation owed to the investor for a Treaty violation unrelated to its conduct.").

[429] Cl. PO27 Answers, p. 91 *et seq.* (para. 172).

[430] *Id.* at p. 92 *et seq.* (para. 173); see also Rejoinder, p. 309 (para. 961).

[431] See Rejoinder, p. 308 *et seq.* (para. 960).

Peru's termination of the rights of the claimant.[432] The allegation is misleading because the tribunal only awarded sunk costs as compensation. There was no analysis of the fair market value of the project. As in the *Bear Creek* arbitration, in this case, the Project was not viable – in the sense that there was no guarantee that the Project could be implemented for legal and social reasons – at any point in time, including immediately prior to the Claimants' chosen valuation date in July 2011.[433]

271 The Claimants argue that this case is different because, immediately prior to the allegedly wrongful act, the Project "was recognized by the market as being not only capable of being put into operation, but highly valuable."[434] [redacted][435]

272 Second, in *Bear Creek Mining*, the tribunal considered that, because of the lack of evidence that the project was viable (given the social opposition), only sunk costs could be awarded (the same approached was followed in *Copper Mesa v. Ecuador* and in *SAS v. Bolivia*).[436] Prof. Philippe Sands QC issued a separate opinion explaining that, in his view, the tribunal should have diminished the damages by 50% because of the claimant's failure to secure a social license and because it "contributed in

[432] Cl. PO27 Answers, p. 92 *et seq.* (para. 173) (citing **RLA-53**, p. 226 (para. 599)).

[433] See Rejoinder, p. 69 *et seq.* (Section 3.3.2); Counter-Memorial, p. 76 *et seq.* (Section 4.4).

[434] Cl. PO27 Answers, p. 92 *et seq.* (para. 173).

[435] [redacted].

[436] The tribunal thus awarded just over USD 18 million instead of the over USD 500 million requested (*i.e.* only 3% of the claimed amount). *Bear Creek Mining Corporation v. Republic of Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, at **Exhibit RLA-53**, p. 228 (para. 604) and p. 212 (para. 572) and p. 277 (para. 738).

material ways to the events that unfolded and then led to the Project's collapse…"[437]

273 As a result of the lack of evidence of viability of the Project – in part given the continued social opposition to the Project from the start and through September 2013 – the Tribunal should, even if it finds a breach on the part of Romania of either BIT, reject the claims for damages in their entirety.

[437] *Bear Creek Mining Corporation v. Republic of Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, at **Exhibit RLA-53**, p. 281 *et seq.* (paras. 4-6 and 39).

6 QUESTION E

At Question E, the Tribunal asked two questions:

"*Do Claimants maintain that the process leading to the submission of a draft law to Parliament in August 2013 and its subsequent rejection by Parliament was a standalone breach of the relevant BIT or an element of a wider course of conduct that resulted in a breach of the BIT?*

Was there any breach of Romanian law in the process leading to the submission of the draft law and its ultimate rejection by Parliament?"

The Claimants' answers in summary:

The Claimants' primary contention is that the process leading to the submission of the Roşia Montană Law to Parliament in August 2013 and its rejection by Parliament was an element of a wider course of conduct begun by the Government in August 2011 that ultimately resulted in breaches of the BITs. The Claimants contend in the alternative that this conduct may be considered a stand-alone breach of the respective BITs.

Romania's answers in summary:

The submission of the Roşia Montană Law to Parliament in August 2013 and its rejection by Parliament is not an element of a wider course of conduct begun by the Government in August 2011. It furthermore cannot and does not constitute a stand-alone breach of the BITs. Finally, there was no breach of Romanian law in the process leading to the submission of the Roşia Montană Law to Parliament and in its subsequent rejection by Parliament.

274 The Claimants argue that the submission of the Roşia Montană Law to Parliament in August 2013 was part of a wider course of conduct that "entailed subjecting the Roşia Montană Project to a process of unlawful political decision-making as to whether and on what terms the Project would be permitted", ultimately resulting in breaches of the BITs.[438] In the alternative, they argue that the Ponta Government's alleged "political

[438] Cl. PO27 Answers, p. 93 (para. 175).

decision" could "be considered on a stand-alone basis as resulting in breaches of the respective BITs."[439] In either case, the Claimants argue that the submission of the Roşia Montană Law to Parliament breached Romanian law by allegedly failing to allow the administrative process to be completed in a timely manner, and by allegedly conditioning progress in the administrative process on both meeting a demand for changed economic conditions and a political decision as to whether the Project would be permitted.[440]

275 The Claimants' case is premised on the allegedly wrongful withholding of the environmental permit. According to the Claimants, this withholding is how the purported politicization of the permitting process manifested itself.[441] However, because the permit was not wrongfully withheld, as demonstrated above (it was not issued because RMGC failed to satisfy the requirements),[442] the submission of the Roşia Montană Law to Parliament, and its subsequent rejection by Parliament, did not deprive RMGC of a permit that it was otherwise entitled to receive. The submission of the Roşia Montană Law to Parliament therefore could not have breached the BITs.

276 By alleging that the environmental permit was held hostage by three successive governments, the Claimants attempt to devise a wider course of conduct by State authorities against the Project. They argue that the Ponta Government "continued and completed the politicized decision-making process regarding the Project."[443] However, to prove that the Ponta Government's actions were part of an allegedly wider course of conduct, the Claimants must prove (but fail to do so) that the Boc, Ungureanu, and Ponta Governments each interfered in the permitting process (see **Sections 2.2.2.1** and **4.2**). Even if the Claimants could prove that the Ponta Government interfered in the issuance of the permit (*quod non*), the

[439] Cl. PO27 Answers, p. 95 (para. 178).
[440] *Id.* at p. 102 (para. 198).
[441] *Id.* at p. 35 (para. 54).
[442] See *supra* Section 2.2.3.1.
[443] Cl. PO27 Answers, p. 94 (para. 176).

submission of the Roşia Montană Law to Parliament in August 2013 would not constitute part of a wider course of conduct against the Project.

277 Furthermore, as discussed further in **Sections 2.2.2.2** and **2.2.2.3** above, the submission of the Roşia Montană Law to Parliament did not amount to a (standalone) breach of the BITs. This process involved neither the wrongful withholding of the environmental permit, nor any "political decision" purporting to reject the Project. [redacted][444] [redacted][445]

278 Likewise, Parliament's rejection of the Roşia Montană Law did not amount to a decision to reject the Project, the environmental permit, or any of the other permits and endorsements that RMGC still needed to secure. Parliament's rejection meant that RMGC would not benefit from the special treatment that the Government had attempted to extend to the Project through the Roşia Montană Law. Instead, RMGC would need to meet the regular requirements of the permitting procedure.

279 Finally, the Claimants' arguments as to the legality of the submission of the Roşia Montană Law to Parliament are also based on the false premise that the environmental permit was being withheld. Prof. Mihai's conclusion that the Government's submission of the Roşia Montană Law

[444] **Tr. 2019**, p. 1058:11-17 ([redacted]).
[445] [redacted]

to Parliament and Parliament's rejection of the law were in breach of Romanian law is grounded on the erroneous assumption that the process was supplanting the regular administrative route.[446]

280 In fact, by submitting the Roşia Montană Law to Parliament, the Ponta Government sought, through a parallel route, to move the Project past RMGC's inability to meet the permitting requirements.[447]

281 The Claimants have accordingly failed to show how this process breached Romanian law.[448] Even if the Parliament had approved the Roşia Montană Law, RMGC would have still been required to meet the permitting requirements for the environmental permit (albeit as facilitated by the Roşia Montană Law).[449] Similarly, Parliament's rejection of the Roşia Montană Law was also without prejudice to the administrative permitting process since the rejection of the law did not amount to a rejection of the Project by State authorities more generally.[450]

[446] See Rejoinder, p. 205 (paras. 655-656). **Ponta**, p. 19 *et seq*. (para. 67).

[447] See *supra* Section 2.2.2.2; Cl. PO27 Answers, p. 102 (para. 198).

[448] See Rejoinder, p. 163 *et seq*. (Section 3.5.5).

[449] *Id.*, p. 276 *et seq*. (paras. 866-869).

[450] *Id.* at p. 167 *et seq*. (paras. 525-526); **Ponta**, p. 23 (para. 80) ("the rejection of the Roşia Montană Law did not mean that the Project would not be permitted; the rejection did not amount to a refusal to issue the environmental permit, nor could it (since, by law, the Ministry of Environment and in turn the Government were required to take the decision to issue the environmental permit)").

7 QUESTION F

At Question F, the Tribunal asked two questions:

"*Do Claimants maintain that there was a breach of the relevant BIT after the rejection of the draft law by Parliament by reference to acts of Respondent occurring solely during the period after that rejection (i.e., independently of any acts leading up to that rejection)?*

If so, what precise act/s are said to constitute the breach?"

The Claimants' answers in summary:

The Claimants maintain that there was a breach of the BITs after Parliament's rejection of the Roşia Montană Law if the Tribunal concludes that the evidence does not establish that there was a complete and permanent frustration of the Claimants' investments as of 9 September 2013, or as of the formal rejection of the law in November 2013 and June 2014.

The precise acts that are alleged to constitute the breach are (i) in January 2015, the State culture authorities argued that the 2004 LHM was abusive; (ii) in January 2016, the State adopted a 2015 LHM that listed the entirety of Roşia Montană as an historical monument; (iii) in February 2016, Romania submitted the State's application to list "the Roşia Montană Cultural mining landscape" as a World Heritage site; and (iv) the Ministry of Culture directed the NIH to delineate the boundaries in Roşia Montană declared on the 2015 LHM to be a historical monument.

Romania's answers in summary:

The Claimants do not plead their case with sufficient particularity, as it is not clear whether they are alleging that the acts cumulatively resulted in a breach of the BITs, or whether these acts individually breached them. In any event, whether considered individually or cumulatively, the evidence does not establish a breach of the Treaties at any point before November 2013 or thereafter.

282 The Claimants' claims based on measures that were not subject to notification and waiver prior to the Request for Arbitration fall outside the

Tribunal's jurisdiction under both BITs.[451] The Claimants have now effectively accepted this objection by serving Romania with a new Notice of Dispute in relation to the cultural protection measures taken by Romania in the Roşia Montană area after the Request for Arbitration.[452] The Tribunal therefore needs not address the Claimants' claims, whether principal or alternative,[453] relating to these alleged measures.

283 Nonetheless, the Claimants present a laundry list of actions that allegedly demonstrate that the Government acted consistently with its purportedly political rejection of the Project in November 2013.[454] They do not seem to allege that the alleged conduct establishes a "composite" act in breach of the BITs but also do not allege that each of the acts individually breached the BIT. This amounts to a failure to plead a case.[455] In any event, there is no systematic policy of Romania uniting the various measures post-dating November 2013 that could make those measure more than the sum of its parts.[456] Individually, these alleged measures did not breach the BITs and even if, together, they formed a composite act, the allegation of breach would fare no better:

284 In regards to the actions that they enumerate, the Claimants suggest that the cultural protection regimes under the 2015 LHM and following the UNESCO application are incompatible with the Project, as they make it "legally impossible" for RMGC to obtain the permits for mining in the License perimeter, thereby breaching the BITs' expropriation and FET clauses.[457]

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[451] Counter-Memorial, p. 176 *et seq.* (Section 8.1.3 and paras. 492-493); Rejoinder, p. 12 *et seq.* (Section 2.1.2 and para. 97).

[452] Cl. PO27 Answers, p. 117 (para. 225); see http://www.gabrielresources.com/site/documents/GBU_2020_First_Quarter_Report.pdf.

[453] Cl. PO27 Answers, p. 107 *et seq.* (paras. 207-208).

[454] *Id.* at p. 106 *et seq.* (para. 206).

[455] See *e.g. Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012, at **Exhibit RLA-47**, p. 85 (para. 320).

[456] See *supra* Section 4.1.

[457] Cl. PO27 Answers, p. 109 *et seq.* (paras. 211, 213-214, 216-217 and 221-223).

285 However, the Claimants disregard the substantially similar criticism that RMGC levelled against the 2010 LHM (including regarding the 2 kilometer extended protection area around Orlea),[458] [redacted].[459] The Claimants indeed take issue with the inclusion of a 2 kilometer radius around the Roşia Montană site (as found in the 1991 LHM), which they view as an obstacle for RMGC to obtain permits. It is therefore only the additional purported obstacles, when compared to the 2010 LHM, allegedly imposed by the 2015 LHM that need to be considered. However, the Claimants do not specify how these changes breach the BITs. In any event, there are three main issues with the Claimants' position.

286 First, by stating that the protection of cultural heritage takes priority over mining, the Claimants suggest that the existence of a protected area forever precludes mining in this area.[460] However, it is undisputed that the cultural protection regime established over an area in which a mining license has been granted can be lifted by obtaining ADCs for archaeological sites and through declassification of listed historical monuments.[461]

287 Second, on the basis of the ADCs that RMGC had previously obtained, the Claimants criticize both the 2010 and 2015 LHMs, thereby conflating the declassification of historical monuments with the ADC process.[462] As explained by Prof. Dragoș, declassification is a separate administrative

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[458] 2010 LHM, at **Exhibit C-1266**. See (Claimants') 2010 LHM map, at **Exhibit C-1284**.

[459] [redacted], at **Exhibit C-1737**; see also Rejoinder, p. 221 *et seq.* (paras. 696-700); Counter-Memorial, p. 82 (para. 217).

[460] Cl. PO27 Answers, p. 109 *et seq.* (paras. 213 and 216-217) ("no mining activities can be undertaken in the area established as an historical monument," "cultural heritage assets must be given priority over mining" and "urbanism plans…must prioritize cultural heritage protection areas over mining licenses").

[461] GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 5 *et seq.* (Art. 5(2) and 5(3)); Law 422/2001 (as republished on 20 November 2006), at **Exhibit C-1703**, p. 8 (Art. 19). RMGC understood that the prohibition to mine in protected areas did not exclude carrying out archaeological research, on the basis of which it could then apply for ADCs or have to modify the layout of the Project. It is undisputed that ADCs have never been issued for the entire Project area. Cl. PO27 Answers, p. 112 (para. 218.a.).

[462] Cl. PO27 Answers, p. 109 *et seq.* (paras. 212-213).

procedure, which is still required after obtaining an ADC.[463] For example, Cârnic was included in the 2010 LHM because the declassification of this historical monument, which was predicated upon the existence of a valid ADC,[464] was not complete. [redacted].[465] [redacted].[466] The Claimants thus ignore that the descriptions in the LHMs were consistent with the ADCs at the time and that the Ministry of Culture therefore acted reasonably.[467]

288 The Claimants argue that they never accepted the risk that Romania "would decide to prohibit mining in the [Project] area in favour of cultural heritage protection."[468] The Claimants' argument is again premised on the false assumption that mining is forever precluded in this area. RMGC could and can still mine in the Project area, if it first obtains the requisite ADCs and if the declassification process is completed. Conversely, RMGC **has** accepted the risk that the declassification process could adversely affect the Project.[469] The Romanian authorities have continuously highlighted the risk that cultural heritage protections may affect permitting.[470] The Ministry of Culture's endorsement of the Project in

[463] **Dragos LO II**, p. 106 *et seq.* (paras. 446-462 and 482-489); **Tr. 2019**, p. 2734:17-22 and p. 2735:15-2737:2) (Dragos).

[464] **Dragos LO II**, p. 112 (paras. 482-484) (in such cases, the ADC is "a prerequisite for the initiation of the declassification procedure.").

[465] [redacted], at **Exhibit C-1736**; see also **Dragos LO II**, p. 115 (para. 494); Rejoinder, p. 215 (para. 683).

[466] [redacted], at **Exhibit C-1738**; see also **Dragos LO II**, p. 116 (para. 500); Rejoinder, p. 217 (para. 689).

[467] Rejoinder, p. 213 *et seq.* (paras. 677-695 and 707); Counter-Memorial, p. 82 (para. 216).

[468] Cl. PO27 Answers, p. 112 (para. 218).

[469] Rejoinder, p. 226 (para. 712); Counter-Memorial, p. 31 *et seq.* (paras. 90 and 97).

[470] *E.g.* Sibiu EPA Environmental Permit for the PUZ dated 28 March 2011, at **Exhibit C-2494**, p. 19 *et seq.* (conditional on compliance with a series of measures for the protection of the cultural heritage, including "the issuance of necessary permits" for Orlea where archaeological research is to be continued and followed, where appropriate, by "conservation and "in-situ" restoration." The endorsement also refers explicitly to the obligation to maintain the industrial area PUZ compliant with any changes made to the historical area PUZ to ensure that the historical area would not be affected). Moreover, the likelihood of future additional finds (and

April 2013 was conditional on RMGC's compliance with the laws on cultural heritage protection and specifically mentioned the need for an ADC for Orlea and the need to modify the Project, if and as required, to protect any chance archaeological discoveries in accordance with the legal provisions.[471] In any event, the Ministry of Culture has not withdrawn this endorsement which is in effect today.

289 Finally, none of the other alleged measures discussed in passing by the Claimants in the context of Question F have any relevance to the claims, as demonstrated in the Respondent's previous written submissions.[472]

* * *

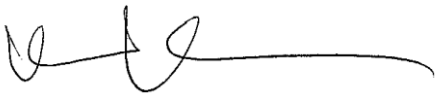
associated potential need to ensure its conservation) had been one of the reasons for the conclusion in 2007 with MNIR of a chance find protocol (amended in 2010) under which RMGC agreed to suspend works to allow further archaeological research if needed, the result of which could in turn require RMGC to amend or terminate the Project. 2010 Update to EIA Report, Ch. 04.09 Culture and Heritage: *MNIR Protocol regarding Chance Finds*, at **Exhibit C-388.03**; see also Counter-Memorial, p. 35 *et seq.* (para. 97). In addition, the protection of cultural heritage, including the need for ADCs, was raised in the TAC and in communications between the Ministries of Environment and of Culture. See *e.g.* TAC meeting transcript dated 9 March 2011, at **Exhibit C-483**, p. 45; TAC meeting transcript dated 22 December 2010, at **Exhibit C-476**, p. 67; Letter from Ministry of Environment to Ministry of Culture dated 5 August 2011, at **Exhibit C-1382**; Letter from Ministry of Environment to Ministry of Culture dated 6 December 2011, at **Exhibit C-444**; Letter from Ministry of Culture to Ministry of Environment dated 7 December 2011, at **Exhibit C-446**; Letter from Ministry of Environment to Ministry of Culture dated 1 April 2013, at **Exhibit C-1350**.

[471] Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 3 *et seq.* (items 1, 1c, 2 and 4).

[472] The Claimants include in their laundry list conduct relating to the Roşia Montană and Bucium permitting, the recapitalization of RMGC, the criminal and tax investigations of RMGC, and the proposal of a moratorium on the use of cyanide. Cl. PO27 Answers, p. 106 (para. 206 a-f). These have already been addressed. For the conduct pertaining to the Roşia Montană License, see *supra* paras. 91 *et seq*.; for the conduct pertaining to the Bucium License, see *supra* paras. 36-39; Counter-Memorial, p. 149 *et seq.* (Section 6.3); Rejoinder, p. 280 *et seq.* (paras. 879-896 and 901-902); for the criminal and tax investigations, see **Tr. 2019**, p. 313:19-314:4 (Claimants' Opening) ("we're not bringing a claim against a VAT investigation or any other tax. We bring it to your attention because we've put it in the record."); for the moratorium, see Reply, p. 248 (para. 586) (the moratorium is "not a keystone of Claimants' case"; Rejoinder, p. 288 (para. 901) (the moratorium "was of no consequence as it was not approved."); for the recapitalization of RMGC, see Counter-Memorial, p. 185 *et seq.* (para. 476) (a contract claim over which the Tribunal does not have jurisdiction). Nothing justifies Romania adjusting its prior position on these issues.

Respectfully submitted,

13 July 2020
For and on behalf of Romania



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