

**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 SECOND POST-HEARING BRIEF
23 APRIL 2021

LALIVE

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1 INTRODUCTION

- 1 The Respondent submits this Second Post-Hearing Brief in response to the Claimants' Post-Hearing Brief in accordance with the timetable agreed by the Parties and approved by the Tribunal on 6 October 2020 and as amended, with the Tribunal's approval, on 27 January 2021.
- 2 Romania's position on the facts and the law has been consistent throughout the arbitration, as a review of its pleadings up to and including this brief, demonstrates. Its position has been rooted in the evidence, including the oral evidence given at the hearings in 2019 and 2020. By contrast, the Claimants' case has continuously shifted as they have searched for new ways to state their case – and it has again shifted in the Claimants' Post-Hearing Brief. Their most recent reiteration of their case relies on a remarkably selective reading of the evidence and disregards Romania's evidence, as demonstrated in this submission.
- 3 This dispute arises out of a mining project that has failed to materialize, because of the Claimants' own failures, and not because of anything that Romania did or did not do. Contrary to what the Claimants allege, Romania did not block or delay the Project, nor did it have any interest in doing so. The Parties were partners, and Romania had a strong interest in the Project succeeding.
- 4 The Project has stalled first and foremost because of RMGC's failure to meet the permitting requirements, which in turn is a consequence of RMGC's failure to secure the social license for the Project. RMGC faced significant hurdles to begin with, given the sheer scale and complexity of the Project, and the resulting, unsurprising need for numerous permits that were often interdependent. The Project was not only challenging because of its remote location and the resulting logistical difficulties; it was also invasive, involving the destruction of four mountains and unique, over 2,000 years old Roman galleries lying within, as well as the relocation of some 2,000 residents of the Roșia Montană village. There have been very few, if any, mining projects that have faced similar logistical, regulatory, environmental, social and cultural challenges. RMGC failed to overcome those challenges.

- 5 To date, RMGC has failed to complete the EIA stage of the permitting process and thus to secure the environmental permit, primarily due to its failure to propose and secure the approval of the urban plans that should have served as the blueprint for the Project; its failure to undertake the requested archaeological research and to secure and maintain the requisite ADCs; its failure to buy all of the land on which the Project was to be built; and its failure to address a host of technical questions, such as those relating to the EU Water Framework Directive and the Project's envisaged use of cyanide.
- 6 RMGC failed in the permitting process largely because of its failure to secure the social license to operate – its failure to convince the residents of Roşia Montană, as well as the general public, that the Project was worth the social and environmental costs, and the loss of cultural heritage. Opposition to the Project was palpable at the outset and became entrenched, before spreading from the local to the national, and even international level. The opposition's relentless determination to “save” Roşia Montană propelled the name of a Transylvanian village into the consciousness of a nation and beyond.
- 7 RMGC's lack of a social license is evidenced in particular by the incessant NGO litigation and its impact on the Project. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- 8 The Claimants' case is that Romania's alleged breaches started in August 2011, some two months before the Canada BIT entered into force. Nothing of any relevance happened in August 2011 but, as of September 2011, RMGC's challenges continued to pile up. First, RMGC received a letter from the Ministry of Environment listing over 100 issues, many of which RMGC concluded it could not or did not want to address. Second, NGOs

¹ Counter-Memorial, 105 (para. 276); *Tr. 2020*, 262:7-21 (R. Op.).

commenced proceedings seeking the annulment of the latest Cârnic ADC (secured in July 2011) and the environmental endorsement for the amended PUZ (secured in March 2011). To secure an approved PUZ, RMGC needed a valid environmental endorsement and other endorsements. RMGC in turn needed an approved PUZ to commence expropriation proceedings and to secure the environmental and building permits. RMGC also needed valid ADCs for the environmental and building permits.

- 9 Faced with these significant hurdles, RMGC sought, starting in the fall of 2011, to negotiate a customized agreement with the Government and to procure a special law for the Project. In 2013, the Government sought to support RMGC and to facilitate the Project by submitting the Roșia Montană Law to Parliament. The law's rejection by Parliament, in response to the mass protests that continued for months, is exhibit one of democratic decision-making at work, not a treaty breach. Parliament could not impose on the general public a law that fundamentally lacked social legitimacy.
- 10 This brief is not a final summary of Romania's position or of the relevant evidence from the 2019 and 2020 hearings. It is a response to the key points of the Claimants' Post-Hearing Brief, starting with the following introductory remarks.
- 11 The Claimants have not submitted a post-hearing brief in any proper sense, that is, a brief that summarizes the relevant evidence that came out of the two hearings. They have barely referred to the oral evidence that unfolded at the hearing at all. Whereas Romania cited over 920 times to the hearing transcripts in its First Post-Hearing Brief, the Claimants did so only 196 times. The Claimants' Post-Hearing Brief instead contains extensive argument – and, in many cases, new argument – not evidence.² The Claimants' quasi-silence regarding the hearing testimony demonstrates how unhelpful and devastating that evidence was to their claims.
- 12 The Claimants are heavily and improperly selective of the evidence – hearing and other evidence – to which they do cite and ignore or

² It is also for this reason that Romania's First Post-Hearing Brief was more heavily redacted than the Claimants' Post-Hearing Brief.

mischaracterize evidence that undermines their newly-developed narrative.

- 13 Because of the word limit for this submission, Romania cannot respond to every argument or address each instance in which the Claimants give a misleading presentation of the evidence. Romania thus respectfully requests that the Tribunal not rely on the Claimants' selective narrative and that it make its own independent analysis of the evidence.
- 14 The Claimants also systematically mischaracterize Romania's position; this is facilitated by the Claimants' failure to provide references to Romania's submissions. The Tribunal thus also cannot rely on the Claimants' purported descriptions of Romania's position.
- 15 Romania has produced key evidence on all main claims and defenses, including – as must be unprecedented in investment treaty arbitration – from two former Prime Ministers and two former Ministers of Economy. The Claimants' complaint that Romania did not put forward certain other individuals as witnesses and their speculation as to the reasons for Romania not doing so are thus not only irrelevant but incorrect.³ In any event, much of the Claimants' case can be rebutted by documentary evidence alone and does not require any additional witness evidence.
- 16 The Claimants falsely argue for the first time that Romania's witness on behalf of the Ministry of Environment, Ms. Dorina Mocanu, did not have decision-making authority.⁴ She of course did – she was the Director of the Pollution Control and Impact Assessment Directorate between September 2009 and June 2012 (and from June 2014 to today) and thus oversaw the EIA Review Process during her tenure.⁵ Unlike the State Secretaries who presided over the TAC meetings who were transitory political appointees,

³ PHB-Cl., 32 (para. 68) and 72 (para. 163).

⁴ PHB-Cl., 32 *et seq* (para. 68).

⁵ The Claimants reproach Romania for not presenting as a witness “anyone from the Ministry of Environment department responsible for the water, waste management, or other issues raises in this arbitration.” As head of the EIA Directorate, Ms. Mocanu had, however, in-depth knowledge about these issues and the technical requirements for the Project and was responsible for their integrated coordination. Nothing prevented the Claimants from asking her questions on these topics.

she was a member of the TAC, who would have voted, had the permitting process reached that stage.

- 17 At this late stage of the proceedings, the Claimants still equivocate as to how precisely – and when – Romania committed a treaty breach. Remarkably, they concede throughout the Claimants' Post-Hearing Brief that the Claimants and their top management were unaware of any breach of treaty at the time and openly acknowledge that Romania's alleged breaches became clear “[o]nly after the passage of time and viewed in hindsight”.⁶
- 18 If the Claimants were unaware of any treaty breach at the time, so must have been Romania – in which case there could not have been any treaty breach. The Claimants' case is like the proverbial case of a tree falling in a forest without anyone seeing or hearing it. Their case does not pass the straight-face test. It is simply not credible – let alone legally tenable – for a party to seek close to USD 5 billion in damages for a treaty breach to which it was oblivious both at the time and in the years that followed. Indeed, it was not until after the 2019 hearing, in May 2020, that the Claimants finally came up with the conjecture that a treaty breach must have occurred “on or about 9 September 2013.”
- 19 Instead of summarizing the hearing evidence, the Claimants have used their Post-Hearing Brief to once again reformulate their case. They argue that if “conduct commencing in August 2011” did not give rise to a BIT breach on or about 9 September 2013, alternatively, a breach occurred subsequently.⁷ This new, alternative claim must fail not only because it is late (and as such inadmissible), but also because the Claimants have not articulated how and when Romania allegedly breached the treaty. When directed to identify the alleged breach at and after the 2019 hearing, they did not argue – either at the hearing or in their PO 27 brief – that, in the alternative, a breach occurred at any particular date “after September 2013.”

⁶ PHB-Cl., 95 (para. 222); see also *e.g. id.* at 12 (para. 33) (“The State's conduct viewed as of July 30, 2012 and not in hindsight, although improper, would not have been considered sufficiently improper so as to constitute a breach of the Canada BIT.”).

⁷ PHB-Cl., 106 (Section VIII.C).

- 20 The Claimants also attempt to raise a new, inadmissible claim by suggesting that, in the alternative, the Tribunal can award them their allegedly sunk costs.⁸ However, the Claimants never made such a claim in this arbitration, nor have they produced any evidence in support. Conversely, Romania has not had the opportunity to address such a claim or to present evidence (including expert evidence) in response. Although Romania requested evidence of the Claimants' sunk costs during document production, the Claimants indicated that the requested documents were not relevant to any of the claims (and the Tribunal did not order them to produce) – in other words, the documents were not relevant to any of the claims because there was no claim for sunk costs.
- 21 The Claimants have made their bed and must lie in it. They cannot at the eleventh hour present a new claim without evidence and attempt trial by ambush, without affording Romania a full opportunity to submit evidence on this issue.
- 22 For these and the many other reasons demonstrated in Romania's earlier submissions, the claims stand to be dismissed in their entirety.

⁸ PHB-C1., 180 (para. 440).

2 THE PROJECT HAS STALLED DUE TO RMGC'S FAILURE TO SECURE THE SOCIAL LICENSE (AND TO MEET THE PERMITTING REQUIREMENTS)

- 23 The Claimants are virtually silent in their Post-Hearing Brief regarding the social opposition to the Project and RMGC's failure to secure the social license.
- 24 They continue to mischaracterize Romania's position. Romania is not arguing that "the Government's conduct was reasonable because the Project attracted opposition," nor is it arguing that its purported conduct is justified or should be "excused" because of social opposition. PHB-C1., 86 (paras. 201, 212 and 260).
- The Claimants ignore Romania's explanations, further to the Tribunal's questions, regarding the relevance of "negative public opinion" vis-à-vis the Project, to the Tribunal's assessment of liability as well as causation and damages (should the Tribunal ever need to consider these issues). R. PO27 Reply, 88 (Section 5);
 - Romania's position is that the Project stalled because of RMGC's failure to secure the social license and permits, not because of the State's purported actions or omissions.
- 25 A social license is not a legal concept; it refers to the social legitimacy of a mining project and thus is a factual rather than a legal matter. It is the mining company's task to secure the social license and to ensure that the project is acceptable to the stakeholders, or at least that they tolerate it and refrain from taking action to block it.
- Drs. Boutilier and Thomson have jointly written, "the social license can be defined as the level of tolerance, acceptance, or approval of an organization's activities by the stakeholders with the greatest concern about the activity." Rejoinder, 305 (paras. 951 *et seq.*);
 - Dr. Boutilier has written "social acceptance of mining is as important as its legal licensing". C-2824; see also C-2774, 3.
- 26 The Claimants do not deny that RMGC, not the State, needed to secure the social license for the Project. PHB-Resp., 116 (paras. 428-431).

- The tribunal in the *Bear Creek Mining* case found that the company, not the State, must secure the social license. **RLA-53**, 77 (paras. 266, 508 and 562). As Prof. Philippe Sands QC added in his dissenting opinion: “It is for the investor to obtain a ‘social license’, and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.” Rejoinder, 311 (para. 964); PHB-Resp., 117 (paras. 430-431).

2.1 RMGC Manifestly Failed to Secure the Social License

27 The Claimants argue that RMGC “maintained a ‘social license’ at least from 2011 onward...”. PHB-Cl., 86 (para. 202). They thus ignore the overwhelming evidence to the contrary, including:

- the incessant NGO litigation against the Project for over ten years. PHB-Resp., 113 (paras. 409-422 and 559-562);
- the refusal of many Roşia Montană residents to sell their properties to RMGC. PHB-Resp., 38 (paras. 108-117 and 567);
- countless protests for many years. PHB-Resp., 135 (para. 493);
- numerous testimonials of Project opponents, whether through witness statements in this arbitration, open letters to the Government, press reports, studies, and publications;
- testimonials of RMGC’s own representatives describing the company’s failure to manage the opposition. PHB-Resp., 121 (para. 445);
- the concerns of the PETI in November 2011 as to the “many [Project] opponents”. **R-204**, 5;
- the expert evidence of Drs. Pop, Stoica, and Thomson;
- contemporaneous evidence, including from 2012-2013, that RMGC representatives were monitoring Project opponents. See Rejoinder, 330 (paras. 1016 and 1022);
- the 2007 and 2011 notes of Prof. Henisz (see Rejoinder, 343 (paras. 1046-1053, n. 1308)), including those from December 2011 stating:

- the Project “still lack[s] majority of permits”;
 - the NGOs’ “legal strategy [is] to attack every illegal permit;”
 - that an RMGC spokesperson said the Project needs social support;
 - the petition signed by 100,000 Romanians against the Project, submitted to Parliament in November 2011. **R-231**;
 - the market’s reaction (a sharp drop) to Gabriel Canada’s spring 2012 disclosure that RMGC had lost litigation in connection with its efforts to secure a PUZ. See below paras. 214-215;
 - the conclusions of an October 2013 study that, “to increase support for the project”, RMGC needed to launch a “grass-roots campaign to reassure people in the project area against their fears concerning project risks and to explain the project again” and a “negative campaign to reduce opponents’ credibility.” See Rejoinder, 333 (para. 1022);
 - RMGC’s massive PR campaign and lobbying efforts. See below para. 36;
 - the continued opposition to the Project, as confirmed by the amicus curiae submissions in this case and demonstrations outside the ICSID building during the December 2019 hearing;
 - See generally PHB-Resp., 120 (Section 2.4.4); Counter-Memorial, 106 (Sections 5.2, 5.11 and 5.13); Rejoinder, 305 (Section 8.2); R. PO27 Reply, 89 (Section 5.1 and 5.2).
- 28 Social opposition has to date blocked the Project in that:
- Project opponents have refused to sell their properties to RMGC, thereby preventing it from acquiring the surface rights; the Ministry of Environment could not issue the environmental permit without confirmation that RMGC had secured the surface rights to the Project area. See below paras. 94-95;
 - Project opponents challenged in court key permits and endorsements, which were prerequisites to the environmental permit (and building permit), including ADCs, urban certificates, and the environmental endorsement of the amended PUZ;

- See generally R. PO27 Reply, 94 (paras. 230-237 and 243-244); PHB-Resp., 112 (paras. 405-424 and 480-484), 143 (para. 528) and 147 (paras. 556-582). **Tr. 2019**, 376:2-4 (R. Op.).
- 29 Social opposition also affected the EIA Review Process as Project opponents raised an unprecedented number of comments and objections during the EIA public consultations, meaning that the Ministry of Environment, the TAC, and RMGC had more documentation to consider. By the fall of 2011, the EIA Report comprised some 25,000 pages. PHB-Resp., 113 (para. 408); R. PO27 Reply, 93 (paras. 227-229).
- 30 The question before the Tribunal is whether RMGC could overcome the social opposition and secured the social license. The answer is patently “no.” During the period 2011-2013:
- To secure the environmental permit and then the building permit, RMGC needed to secure the surface rights; however, it stopped acquiring properties in 2008 and the outstanding surface rights relate to properties of Project opponents; to secure those properties, RMGC needed to initiate expropriation proceedings, whose duration would be lengthy and outcome uncertain;
 - To secure and maintain the environmental permit and then the building permit, RMGC would have needed (and would still need) to secure and maintain valid ADCs, an urban certificate, and a PUZ; all of these acts have been challenged in court for years. Counter-Memorial, 363 (Annex IV);
 - Given the NGOs’ strategy of challenging all permits for the Project, they would have undoubtedly challenged any environmental permit for the Project; such court proceedings, including appeals, could last years, with an uncertain outcome;
 - The same risk applies to the building permit.
- 31 It is therefore irrelevant that the Project may have occasionally benefitted from arguably “strong support” (*quod non*). Even a minority of opponents can block a project and thus deprive it of a social license; the issue is whether they choose to act – and they did in this case. PHB-Resp., 132 (paras. 480-484).

- An E&Y 2018 study regarding the mining sector noted that “[u]nderestimating the power of even a single stakeholder would be a mistake.” **R-575**, 2.
- 32 It is manifest based on the record, including Dr. Thomson’s evidence, that RMGC had no social license at the relevant time, in particular during the period 2011-2013. Contrary to what the Claimants suggest, the Tribunal does not need a contemporaneous quantitative expert assessment to conclude that the lack of social license during the relevant period was manifest, and that RMGC never had a stable or meaningful social license, as Dr. Thomson testified.⁹
- 33 Investment arbitration tribunals have similarly found that projects lacked a social license, on the basis of the factual evidence on record, without referring to the Thomson-Boutilier model or expert evidence. See Rejoinder, 307 (para. 955 *et seq.*).
- The *Copper Mesa* tribunal observed that the social license was “required” and held that, as a result of social conflict, the prospect of the concessions being developed was uncertain and that the claimant was co-responsible for the social conflict, which prevented the completion of the environmental permitting. See Rejoinder, 308 (para. 959); R. PO27 Reply, 105 (para. 263);
 - The *Bear Creek* Mining tribunal found that:
“the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed. On the basis of the evidence before it, the Tribunal concludes that there was little prospect for the Project to obtain the necessary social license to allow it to proceed to

⁹ Dr. Thomson’s remark at the hearing that “if you’re trying to suggest that the Company did not have a Social License, that is not what I’ve said” must be understood in light of his testimony as a whole. He has consistently concluded that RMGC never secured a stable, meaningful, or unconditional social license. Thus, when making this remark, he meant that the Project might have had a social license at some points in time, but never a stable or unconditional one and in particular not in 2013. PHB-Resp., 132 (para. 481); **Tr. 2019**, 3022:13-3023:20 (Thomson); PHB-Cl., 87 (para. 203).

operation, even assuming it had received all necessary environmental and other permits.” See Rejoinder, 310 (para. 962).

34 That RMGC was aware it did not have the social license is also evidenced by its massive and costly PR campaign. See Rejoinder, 325 (paras. 1003-1004). Put simply, RMGC’s PR campaign was a campaign for a social license. **Thomson Opinion II**, 35 (paras. 94-95 and 168).

- [REDACTED]
- By 2011, RMGC was the third most largely advertised brand in print media advertising in Romania. **R-280**;
- [REDACTED]
- [REDACTED]
- [REDACTED]

35 As Dr. Pop notes, “[i]n the absence of the opposition to the Project, the mining company would not have needed to defend and promote its Project publicly.” See Rejoinder, 324 (para. 1002).

36 RMGC’s media campaigns were not successful in placating the opposition.

- The advertisements backfired and were considered misleading and, in some cases, in breach of Romanian law. **R-622**; **R-615**; Rejoinder, 326 (paras. 1005-1006);
- In April 2012, Mindbomb (a group of artists, architects, journalists and writers) launched a campaign to “raise public awareness ... about the

toxic propaganda used in [RMGC's] media campaign". **Pop-45; Pop Opinion**, 32 (para. 81).

2.2 The Social Opposition to the Project Resulted from RMGC's Early Mismanagement, Not from the State's Actions

- 37 The Claimants argue that the 2000 Baia Mare accident provided “fertile ground for Project opponents to try to equate improperly the environmentally-sound Project ... with the uninformed practices of a by-gone era.” PHB-Cl., 2 (para. 4).
- These statements show that the Claimants and RMGC have to this day failed to appreciate and address the concerns of stakeholders and to engage with them;
 - The Baia Mare tragedy was not “fertile ground” for improper NGO advocacy against the Project; it should have been at the heart of RMGC's engagement strategy.
- 38 The Claimants wrongly argue that Government authorities “delayed making decisions ..., including by halting archaeological research in 2006 and suspending the EIA Process in 2007” and “thus emboldened the NGOs and aggravated the controversies they sought to generate.” PHB-Cl., 2 (para. 5). However:
- The opposition to the Project had nothing to do with and was not caused or fueled by purported permitting delays since it originated long before RMGC even applied for the environmental permit;
 - Government authorities did not delay making decisions required by law;
 - They did not improperly halt archaeological research in 2006 and subsequently authorized preventive research for Orlea. Rejoinder, 76 (para. 252);
 - The Ministry of Environment's announcement in 2007 that the EIA Review Process could not continue only came about because RMGC did not have a valid urban certificate that was not subject to court challenges. It was entirely lawful. PHB-Resp., 14 (para. 27);

- As reported in the press and as the Claimants recognize, State representatives, including Government representatives, promoted the Project on numerous occasions; social opposition to the Project cannot be linked to public statements about the Project by State representatives. See below **Section 2.5**;
 - As also widely reported in the press, the State supported the Project through its actions and systematically defended the decisions taken in RMGC's favor when challenged by NGOs. See below **Section 2.5**.
- 39 RMGC did not apply for the environmental permit until December 2004. There is ample evidence that the opposition to the Project was entrenched by then:
- The local association, Alburnus Maior, was created in 2000 and its representatives expressed their opposition to the Project in correspondence, declarations, and protests. PHB-Resp., 110 (paras. 398-402 and 445);
 - RMGC's contemporaneous documents describe opposition to the Project. Rejoinder, 316 (paras. 978, 984, 987 and 991);
 - A 2003 petition against the Project was signed by over 20,000 persons. **R-635**;
 - Gabriel Canada contemporaneous documents describe opposition to the Project. **C-1801**, 25 (describing "continued opposition to the Rosia Montana project"); **R-112**, 2; **R-120**, 23 (same quote);
 - Press reports pre-dating December 2004 describe opposition to the Project. See *e.g.* **C-2019**; **C-2593**; **Pop-27**; **Thomson-78**; **R-129**; **R-596**;
 - Other documents pre-dating December 2004 describe opposition. See *e.g.* **Thomson-25**; **Pop-13**; **Pop-18**, 6; **R-135**; **R-598**; **R-594**, 1;
 - [REDACTED]
 - Dr. Thomson, Dr. Pop, Messrs. Jurca, Petri and Cornea, and Ms. Jeflea describe opposition to the Project prior to December 2004;
 - RMGC's representatives recognized that RMGC had failed in the early years to manage the opposition to the Project;

- See *e.g.* **Thomson-75**, 8; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- According to Prof. Hennisz, Mr. John Aston, RMGC's environmental manager between 2002 and 2005, concluded in 2007 that "[u]ltimately, Roşia Montană shows the failure of a defensive mining company against well-organized opposition." See Rejoinder, 346 (para. 1050);
- Mr. Aston acknowledges that he faced "significant challenges [that] came from a corporate mindset that we can control information and we do not need to engage with people who have different views to our own as to what should be developed in Roşia Montană." See Rejoinder, 319 (para. 985);

- [REDACTED]
[REDACTED]

40 [REDACTED]
[REDACTED]
[REDACTED]

41 The evidence of early opposition to the Project flies in the face of the Claimants' argument that "[t]he small minority opposition stemmed from a general lack of trust in Government institutions as much as any other factor." PHB-Cl., 112 (para. 266(a)).

2.3 RMGC Subsequently Failed to Manage the Social Opposition to the Project

42 The Claimants argue that "opposition to mining projects is common and is an aspect that many projects must and do manage. Indeed, opposition, including protests and property holdouts, is consistent with the acceptance or tolerance level of social license at which most mining projects **operate...**" PHB-Cl., 87 (para. 204).

- They fail to distinguish between operational mining projects and mining projects that have not yet secured the necessary permits and commenced production. It is undisputed that operational projects are in

a better position to withstand some opposition. However, the Project was not yet operational, and this was the case because of the social opposition. RMGC therefore evidently could not manage or overcome the opposition. PHB-Resp., 148 (para. 557);

- Many mining projects have been blocked or delayed because of social opposition. See *e.g.* **Thomson Opinion II**, 18 (para. 35); Rejoinder, 307 (paras. 957-968).

43 The Claimants argue that “RMGC responded diligently to the questions and concerns raised by the public as well as those raised in the TAC” and refers to steps it allegedly took to “ensure the Project met the needs of the local community”. PHB-Cl., 89 (paras. 209-210). However:

- RMGC ignored early concerns about Project size and, in 2004, increased the size from twelve to 24 km²; Counter-Memorial, 16 (para. 55);
- The reduction in Project footprint to which the Claimants refer was minimal and did not quell concerns that the Project was too big as one of Gabriel’s initial investors explained in 2010 (“Stephen Roman’s view is that Gabriel got greedy after his departure and went too big too fast, proposing a mine that stunned local residents with its sheer, destructive size. ‘All [Gabriel] saw was the dollars,’ he said. ‘They should have started with a small operation and added on to it as they gained the trust and confidence of the residents.’”) **Thomson-75**, 8;
- The restoration of buildings in the historical center and of 200 meters of the underground mining galleries was irrelevant when 100 kilometers of those galleries, including seven kilometers of exceptional Roman galleries, would be destroyed;
- RMGC did not address concerns about the Project’s impact on cultural heritage and archaeological treasures. As a result, opposition remained manifest between 2011 and 2015, including through NGO litigation challenging the Cărnic ADC. PHB-Resp., 115 (paras. 420-422);
- RMGC’s construction of a water pilot treatment facility in December 2011 and its commitment in September 2011 to decrease the TMF cyanide levels were minimal steps and insufficient to quell public concerns about RMGC’s envisaged use of cyanide and waste

management, which remained manifest between 2011 and 2015. **C-1618**;

- RMGC did not take the more important steps to try to address these concerns, namely conducting a cyanide audit or committing to put in place a geomembrane liner or dry stack tailings facility. See PHB-Resp., 50 (paras. 153-154 and 202);
- The sufficiency of a company's efforts to secure the social license is not measured by the number of steps it takes to engage, but rather by the quality of its efforts and their result.

44 When mentioning the steps that RMGC allegedly took to purportedly “meet the needs of the local community”, the Claimants do not mention RMGC's failure to secure the surface rights. They baselessly maintain that RMGC “reasonably expected to acquire all remaining affected properties when it recommenced its acquisition program once the EP was issued.” PHB-Cl., 88 (para. 207) and 140 (para. 338). However:

- It is undisputed that RMGC has failed to secure the surface rights;
- Members of Alburnus Maior and other residents, including Romania's witnesses in this arbitration, have been determined for years not to sell their land. PHB-Resp., 38 (paras. 109-116 and 446); **R-450**;
- Apart from Mr. Jurca, the Claimants do not mention once in their PHB the testimony of those witnesses – evidencing the Claimants' continued arrogance vis-à-vis the local residents and their opinions;

- [REDACTED]

45 The Claimants' proposition that “[p]roperty holdouts and opposition are commonplace in mining projects and thus not a material impediment to project implementation” is misguided. PHB-Cl., 142 (para. 341).

- Dr. Armitage's purported involvement in projects with property hold-outs must be contrasted with the testimony of Dr. Boutilier, Dr. Thomson, and Behre Dolbear that they have witnessed projects that were temporarily or permanently blocked by a minority. PHB-Cl., 142 (para. 341); PHB-Resp., 133 (para. 483);
 - What matters is whether the project opponents are in a position to block the project. **Tr. 2019**, 3006:2-16 (Thomson).
- 46 The insinuation that RMGC addressed concerns about the impact of the Project is manifestly rebutted by the protests against the Roşia Montană Law and the Project, and the concerns expressed by protesters at the time.
- Protesters in 2013 carried banners demonstrating the environmental character of the protests and the opposition to the Project, as observed by Dr. Stoica and Ms. Blackmore. **Stoica Opinion**, 44 (paras. 84-85 and 93) (referring to the “environment-related main theme of the 2013 protest”) and 60 (paras. 115-116); **CMA - Blackmore Report**, 19 (para. 76, n. 65) (“Some protesters were voicing their concerns precisely against the use of cyanide at Roşia Montană.”);
 - Dr. Claughton also observed the 2013 protests evidenced concerns about the protection of cultural heritage at Roşia Montană. **CMA - Claughton Report II**, 39 (para. 131);
 - Reports prepared for RMGC indicated the public's unease regarding the Roşia Montană Law, including in relation with its expropriation regime. **Thomson-88**, 23; **Thomson Opinion II**, 58 (para. 177).

2.4 The 2013 Protests Were the Culmination of the Social Opposition to the Project

- 47 The Claimants argue that “the subject of the [2013] protests was the perception, fueled by the Prime Minister himself, that the Special Law was a sweetheart deal for a project the Prime Minister claimed was engaged in corrupt dealings and that he did not support, but nevertheless submitted to Parliament for a vote.” PHB-Cl., 88 (para. 205). The Claimants' argument is as tortured as it is nonsensical.
- The Government submitted the Roşia Montană Law to support the Project and promoted the Project to the Parliament and the general

public when doing so. It was in RMGC's interest for the law to pass and it welcomed the law. The Government had a political interest in the law passing, as does any government which proposes a law to Parliament;

- As contemporaneous evidence (including the Claimants' own emails, press articles, and photographs) shows, the 2013 protests were directed against the Roşia Montană Law and the Project, not purportedly corrupt dealings on the part of the Government. Rejoinder, 332 (paras. 1018-1022);
- Contemporaneous evidence (including, again, the Claimants' documents) and expert evidence shows that the 2013 protests were coordinated by Alburnus Maior and other NGOs opposed to the Project. **Thomson Opinion II**, 55 (paras. 170, 181, and 194); **Stoica Opinion**, 41 (paras. 79, 81-82, 97-114 and Annex I); **Pop Opinion**, 36 (para. 87); PHB-Resp., 136 (para. 496);
- Dr. Boutilier's evidence to the contrary was amply rebutted by Drs. Stoica, Pop, and Thomson, whose hearing evidence the Claimants almost entirely ignore.

48 The Claimants wrongly suggest that there were no significant protests before the fall of 2013. PHB-Cl., 87 (para. 205):

- Many protests took place previously, including between 2011 and September 2013. **Pop Opinion**, 28 (paras. 65-72) and 22 (n. 91); **Stoica Opinion**, 33 (paras. 63-64 and 86); **Pop-43**;
- Those protests were significant as they reflected the continuing controversy around the Project. As Dr. Stoica explains, "the [2013] protests were the expression of a pro-environmental social movement and an eleven-year-old opposition to the Project." See Rejoinder, 332 (para. 1018).

49 RMGC failed to address the social opposition following the rejection of the Roşia Montană Law. PHB-Resp., 136 (para. 497); Rejoinder, 211 (670-671).

2.5 The State Supported the Project and Therefore the Social Opposition to the Project Is Not Attributable to the State

50 The Claimants' argument that the State blocked the Project for political reasons is contradicted by the State's issuance of dozens of permits for the Project and its defense of those permits in court. The permits included:

- **December 2001 – February 2006:**
 - ten ADCs (Ministry of Culture). **C-669 to C-673;**
- **2002:**
 - environmental endorsements for the (old) PUG and PUZ (Ministry of Environment). **C-2484; C-2485;**
- **2004:**
 - UC 68/2004 (Alba County Council). **C-525.04;**
- **2006:**
 - UC 78/2006. **R-166;**
- **2007:**
 - dam safety permits and endorsements (Ministry of Environment). **C-964; C-524;**
 - UC 105/2007. **C-1764;**
- **2008**
 - ADC 486/2008. **C-679;**
- **2010:**
 - dam safety permits and endorsements (Ministry of Environment). **C-955; C-509; C-810; C-954;**
 - UC 87/2010. **C-808;**
 - water management permit for the PUZ (ANAR). **C-620;**
- **2011:**
 - environmental endorsement for the amended PUZ (Sibiu EPA). **C-598; C-2494;**

- approval to elaborate the Historical Area PUZ (Roşia Montană Local Council). **C-2509**;
- endorsement of the amended PUZ (Electrica S.A.). **C-2761**;
- ADC 9/2011. **C-680**;
- endorsement of the general exploitation program for 2012 (NAMR). **C-1038**;
- **2012:**
 - endorsement of the Waste Management Plan (NAMR). **C-645**;
 - dam safety endorsements and permits (Ministry of Environment). **C-511**; **C-809**;
 - endorsement of Waste Management Plan (NAMR). **C-648**;
 - endorsement of the general exploitation program for 2013 (NAMR). **C-1039**;
- **2013:**
 - endorsement (Ministry of Culture). **C-655**;
 - endorsement of Waste Management Plan (NAMR). **C-657**;
 - UC 47/2013. **C-924**;
 - approval of Waste Management Plan (Ministry of Environment). **C-658**;
 - endorsement of the annual exploitation program for 2014 (NAMR). **C-1040**;
- **2014:**
 - endorsement for clearing the location and power supply for the Project (Electrica S.A.). **C-2761**;
 - dam safety endorsements and permits (Ministry of Environment). **C-433**;
 - endorsement of the general exploitation program for 2015 (NAMR). **C-1041**;
- **Post 2015 (January 2015: Notice of Dispute):**
 - April 2016: UC 98/2016. **R-290**;

- October 2017: dam safety permits (Ministry of Environment). **C-2213**;
 - June 2019: renewal of mining license (NAMR). **R-666**.
- 51 For years, State authorities defended many of these permits in court. At least 83 NGO petitions and lawsuits against State authorities, regarding mainly the ADCs, urban certificates, and the urban plans are detailed at Counter-Memorial, 363 (Annex IV). Between 2004 and today, State authorities, including the Ministry of Environment and Ministry of Culture (both their central and local emanations), have opposed these challenges and defended the permits.
- 52 The issuance of permits and the relating litigation were reported in the press, by State authorities, Gabriel Canada, and RMGC. It was thus a matter of public knowledge that the Project permitting was proceeding in accordance with the law and that the State was not blocking it.
- 53 The Claimants argue that purportedly negative statements by State officials fueled opposition to the Project. PHB-Cl., 87 (para. 205). However:
- The statements are often misquoted, taken out of context, and generally not reliable; at most, they merely acknowledged the controversial nature of the Project, and the continuing opposition. See below paras. 113-117;
 - The Claimants recognize the many positive statements about the Project by State officials. See below para. 116;
 - These include statements by Minister of Economy Videanu in 2009 (**R-662**), President Băsescu in 2011 (**R-401**), Minister of Environment Borbély in January 2012 (**R-633**), and those made prior to and at the time of the submission of the Roşia Montană Law to Parliament. See below para. 116;
 - Mr. Borbély confirmed his necessary neutrality about the Project in June 2010: “At the journalists’ question whether he has become a supporter of the investment in Rosia Montana, Borbely denied it, saying that all he was doing was to comply with the law. ‘All I do is to comply with the legislation in force, which is consistent with the European law.’” **R-189**, 2;

- Positive or neutral statements by State officials about the Project would have, if anything, reduced opposition and increased support for the Project.
- 54 The Claimants argue that “political reasons ... prevented updates of the LHM and final approval of the updated PUZ, which in turn fuelled NGO litigation that eventually led to the annulment of the SEA endorsement in 2016.” PHB-C1., 53 (para. 116). This is false. See below para. 126.

3 THE CLAIMS FALL OUTSIDE THE TRIBUNAL'S JURISDICTION

55 The Claimants have failed to meet their burden of proving that the Tribunal has jurisdiction over the Claimants' claims. Counter-Memorial, 169 (Section 8); Respondent's Additional Preliminary Objection; Rejoinder, 11 (Section 2). Although the Claimants have raised new arguments on jurisdiction, they fail to address the flaws in their case, including regarding the date of the alleged breach. PHB-Cl., 5 (paras. 14-38); **Tr. 2019**, 288:2-310:15 (Cl. Op.).

56 As to the objection that Gabriel Canada cannot base its claims on Romania's conduct that took place prior to the entry into force of the Canada-Romania BIT in November 2011:

- The Claimants now accept that conduct preceding 23 November 2011 (the date of entry into force of the Canada-Romania BIT) "cannot give rise to liability". PHB-Cl., 101, (para. 238(b), n. 502), 120 (para. 287) and 175 (para. 427, n. 877);
- It follows that the alleged composite act in breach of the Canada-Romania BIT could not have started on 1 August 2011 and the valuation date could not be 31 July 2011. See below **Section 6.1**.

57 As to the objection that Gabriel Jersey has not made a qualifying investment, the Claimants claim that "[REDACTED]". PHB-Cl., 9 (para. 20(d)). This is incorrect.

- [REDACTED]

¹⁰ Unless otherwise specified, all emphasis in quotes in this submission is added.

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- The Claimants allege that the level of “control exercised by Gabriel Jersey in relation to RMGC” is not relevant “to address any issue relevant to the Tribunal’s jurisdiction under the UK BIT.” PHB-Cl., 9 (para. 21). This is incorrect:
 - Gabriel Jersey’s lack of involvement – [REDACTED] – is dispositive of the Claimants’ allegation that Gabriel Jersey has made an “investment” within the meaning of Article 1(a) of the UK BIT;
 - The only (known) case, *SCB v. Tanzania*, in which the same definition of investment of the UK BIT was applied (under the UK-Tanzania BIT) confirms as much. The tribunal concluded that, as a result of the wording of the treaty, a claimant must demonstrate that (i) the investment was made at the claimant’s direction, (ii) the claimant funded the investment or that (iii) the claimant controlled the investment in an active and direct manner;
 - The Claimants try to apply this test to establish that Gabriel Jersey made an investment and claim that there is no “basis to dispute that Gabriel Jersey made the investment in RMGC in the sense understood by the Standard Chartered Bank tribunal.” PHB-Cl., 7 (para. 19). They point to five documents from the 1990s (preceding the establishment of RMGC and Minvest’s transfer of the License). However, those documents – along with the absence of other evidence – show that there was no investment made by Gabriel Jersey within the meaning of Article 1(a) of the UK BIT.

4 ROMANIA DID NOT BREACH THE BITS

58 The Claimants allege that “between 2011 and 2013, Romania’s political and governmental leaders chose to support a **policy of arbitrary political expediency** in disregard of Gabriel’s legal rights and legitimate expectations.” PHB-Cl., 25 (para. 62(d)). Their allegation makes no sense, and there is no evidence to support it.

59 The Claimants complain of acts and omissions purportedly committed by dozens of individuals and organs over the course of many years, but they fail to demonstrate any sort of “policy” behind those purported acts and omissions.

60 Furthermore, many of the acts and omissions of which they complain were upheld by the Romanian courts in decisions which RMGC did not contest and which the Claimants have not challenged in this arbitration.

4.1 RMGC Failed to Meet the Environmental Permit Requirements

61 The Claimants allege that the Ministry of Environment delayed the approval of the Waste Management Plan and that the Ministry of Culture delayed its endorsement of the Project. These allegations are baseless.

62 The Claimants also deny the existence of several requirements for the environmental permit. PHB-Cl., 45 (paras. 92-95). Denial of their existence is more convenient than compliance, but this does not assist the Claimants.

63 The Claimants [REDACTED] shortly after receiving the Ministry of Environment’s September 2011 letter with 102 requests, including its request for:

- compliance with the Water Framework Directive and a water management permit. C-575, 2 (Q. 9-10, 14, 18, 32, 35, 37-39 and 41);
- an ADC for Orlea (which meant RMGC needed to carry out further research). *Id.* at 14;
- information on the impact of deforestation and on the area to be reforested. *Id.* at 1 (Q. 1-3, 6 and 33);
- an urban certificate. *Id.* at 7 (Q. 36);

- an updated waste management plan (*id.* at 12 (Q. 75)) and clarifications on waste management. *Id.* at 10 (Q. 13, 16-17, 19-20, 23, 27, 34, 45, 49, 54-55, 71-81 and 85-86);
- information regarding cyanide use. *Id.* at 2 (Q. 9, 23, 27-31, 40, 52-53 and 61);
- information regarding the risk of seepage and the TMF. *Id.* at 1 (Q. 1, 8-9, 14, 20-21, 25-27, 29, 36-38, 41, 46-47 and 53-69);
- information regarding post-closure. *Id.* at 2 (Q. 16, 23-24, 44, 48, 58, 61, 65, 72-73, 80, 84, 86, 88 and 101-102); see also PHB-Resp., 9 (paras. 13-26).

64 Unable and/or unwilling to comply with these and other requirements, in part due to NGO litigation, RMGC's representatives sought to circumvent the TAC and its requirements, to involve high-ranking officials in the permitting process, and to push for a law that would overcome these hurdles.

- RMGC never contested or complained about the Ministry's September 2011 letter and the requests therein;
- RMGC, however, sought to have the letter reissued without the references to the water management permit and the Orlea ADC. **Tr. 2019**, 1966:4-1967:9 and 1992:6-10 (Mocanu) and 407:5-408:19 (R. Op.);
- Rather than contest the Ministry's requests, RMGC purported to comply with them but failed to do so;
- Indeed, the same requests were reiterated in 2012 and 2013. **Respondent's Opening 2019**, 34 *et seq.*;
- [REDACTED]

4.1.1 Ministry of Culture Endorsement

65 The Ministry of Culture endorsed the Project in April 2013. **C-655**.

- 66 The Claimants wrongly maintain that a letter from December 2011 amounted to an endorsement. PHB-Cl., 34 (para. 72):
- The Claimants continue to ignore the distinction between a point of view (*punctul de vedere* – which all TAC members needed to provide. **C-564**, 2 *et seq.*) and an endorsement (*aviz* – specifically required from the Ministry of Culture. **C-1701**, 3);
 - The Ministry of Culture representative indicated at the TAC meeting of November 2011 that it would provide a “point of view” shortly thereafter, which it did. **C-486**, 29 (Hegedus); **C-446**;
 - The 2011 point of view did not “satisf[y] the legal requirement for an endorsement”. PHB-Cl., 34 (para. 72(b)); Rejoinder, 70 (para. 232);
 - The Claimants’ position is contrary to their contemporaneous understanding. The record shows that State officials understood and RMGC knew in 2011, 2012, and early 2013 that the Ministry of Culture had not endorsed the Project. Rejoinder, 70 (paras. 231 and 233-235); **C-444** (Ministry of Environment requesting both approvals); **C-445**; **C-637**, 3 (in December 2011, the Minister of Environment notes that he is “still expecting an answer from the Ministry of Culture”); **C-1381**;
[REDACTED]
[REDACTED] **C-885**, 2 (in March 2013, RMGC refers to the need for the endorsement).
- 67 The Ministry of Culture did not “[wait] until 2013” before issuing the endorsement, nor was there any political blockage. PHB-Cl., 34 (paras. 72-73); PHB-Resp., 22 (paras. 50-57). The Ministry of Culture could not have endorsed the Project earlier given that:
- Contrary to the Claimants’ argument (PHB-Cl., 54 (para. 118)), preventive archaeological research was necessary before issuance of the environmental permit. This research was completed in 2013. PHB-Resp., 22 (paras. 52, 55 and 57); **Dragos LO II**, 71 (paras. 281-295) and 78 (paras. 311-312);
 - There was continued uncertainty surrounding the litigation over the Cârnic ADC. Rejoinder, 72 (para. 239); **C-483**, 45; **Respondent’s Opening 2019**, 41.

- 68 The Claimants complain of the purported lack of contemporaneous evidence that research was necessary at Orlea before the Ministry of Culture could issue its endorsement. PHB-Cl., 36 (para. 74). However:
- An ADC could not be issued for Orlea (which the Ministry of Environment expressly requested in its September 2011 letter. **C-575**, 14) before the necessary research was completed;
 - The Claimants wrongly maintain that the cultural authorities blocked any further research at Orlea by refusing to permit such research. PHB-Cl., 155 (para. 373). Rather, RMGC never applied for such permits and never instructed the next phase of the preventive archaeological research. Rejoinder, 95 (para. 316);
 - RMGC had been aware since 2006 that this research was required. NHMR indicated:

“Taking into account the reports in literature, the existence of Roman underground mine sections ..., in the following years the **[Orlea] area should be investigated through preventive surface and underground archaeology. Only after completing these, can the development intention expressed by the mining company be discussed**, with the mention that the Orlea area is currently included in the List of Historical Monuments.” **C-1375**, 17 *et seq.*
 - Contrary to the Claimants’ allegation, the TAC did request an ADC for Orlea on several occasions. PHB-Cl., 54 (paras. 119 and 124-125); **Respondent’s Opening 2019**, 39; see below para. 171.
- 69 The Claimants wrongly allege that the Orlea Research Report was used as a “pretext” for the purported delay in issuing the endorsement. PHB-Cl., 35 (paras. 73-75). However:
- The documentation submitted to the cultural authorities in August 2011 was not a “research proposal” on the basis of which the endorsement could have been issued; it constituted the basis for the Orlea Research Project. PHB-Cl., 36 (para. 75); see also *id.* at 156 (para. 374) (when referring to the documentation provided to the Ministry of Culture’s request for a research proposal, the Claimants refer to the NHMR’s Orlea Research Project, not the 2011 assessment report);

- When it submitted the Orlea Research Project for approval in February 2013, the NHMR noted that “the preventive archaeological research is required as a necessity in the context of implementing a research procedure prior to the implementation of Rosia Montana mining project.” **R-222**, 1.
- 70 The Claimants complain about the Ministry of Culture’s purported failure to respond to the Ministry of Environment’s requests to confirm the endorsement in 2011-2012. PHB-Cl., 35 (paras. 72(c) and (d)). However, the Ministry of Culture could not confirm that it had issued an endorsement when it had not done so. It could not endorse the Project because it did not have all requisite elements at hand. Rejoinder, 174 (para. 552).
- 71 The Claimants criticize Ms. Mocanu for referring to a draft endorsement. PHB-Cl., 35 (para. 72(c), n. 145). However, they did not cross-examine her on this issue. That this document was not signed by all required authorities precisely shows that the approval process was not finalized. **C-638**, 4 compare with 9 (missing signature of the Legal Service); **Mocanu II**, 72 (para. 208).
- 72 Contrary to the Claimants’ allegations, the Ministry of Culture’s endorsement of the Project was **conditional** upon having valid ADCs for Cârnic and Orlea. PHB-Cl., 34 (para. 72(b), n. 143); **C-655**, 1 (listing the ADCs among the documents on the basis of which the endorsement was issued) and 3 *et seq.* (point 1(a), conditioning the endorsement on the completion of the ADC procedure prior to the application for the building permit, and point 2 referring specifically to an ADC for Orlea); Rejoinder, 174 (paras. 550-551); **Schiau LO II**, 86 (para. 301).
- For Cârnic, this condition implied that the litigation around that ADC needed to conclude with a finding that the ADC was valid.

4.1.2 Waste Management Plan

- 73 The Ministry of Environment approved the Waste Management Plan in May 2013.
- 74 The Claimants continue to allege that the approval of the Waste Management Plan was delayed for political reasons. They maintain that the Ministry of Environment approved the Waste Management Plan in May

2013 (and not earlier) due to “political wind changes.” PHB-Cl., 37 (para. 76(e)). This allegation is baseless.

- First, the Claimants do not deny that their conduct constituted the main source of delay of the approval: RMGC delayed for 9 months before responding to the Ministry of Environment’s July 2012 information request. PHB-Resp., 25 (para. 62); PHB-Cl., 38 (para. 77);
- Second, the timing of the approval had nothing to do with “political wind changes”. Ms. Plumb was Minister of Environment from May 2012 until March 2014, a period covering not only the Ministry’s July 2012 request, but also the approval of the plan in May 2013. **C-649**; **C-658**; PHB-Resp., 83 (para. 289). The staff working on these issues also did not change during this time. PHB-Resp., 81 (para. 278);
- Third, the Claimants provide no evidence of political delays in approving the Waste Management Plan. They made no contemporaneous complaints;

- They only refer to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

This is not contemporaneous evidence of those purported comments. It is also immaterial since, even if Mr. Bizomescu had made the comments in question, RMGC should not have relied on and given credence to them – and indeed it did not do so. RMGC resubmitted the plan the following month. Rejoinder, 171 (para. 541).

75 The Ministry of Environment’s approval of the Waste Management Plan is further evidence that the permitting process was not “blocked” in 2013.

4.1.3 Water Framework Directive and Water Management Permit

76 The Claimants wrongly distinguish in the Claimants’ Post-Hearing Brief compliance with the Water Framework Directive (and the Waters Law) from the water management permit for the Project. These go hand in hand. A company obtains a water management permit once it has demonstrated compliance with the Water Framework Directive. **R-81**, 12; **R-495**, 3 *et*

seq.; **R-239**, 2. As the Ministry of Environment explained to RMGC, ANAR could only issue a water management permit if RMGC complied with the Water Framework Directive. **R-545**, 1; Rejoinder, 185 (para. 593).

77 The Claimants repeat their argument that the water management permit was not needed for the environmental permit. PHB-Cl., 59 (para. 127) and 61 (para. 134). This is incorrect:

- The environmental permit sets out, based on the water management permit, the measures related to water that must be observed. **R-495**, 2 *et seq.*; **R-239**, 2 *et seq.*; **R-466**; **DD-5**, 3 *et seq.*; **R-83**;
- The Claimants mischaracterize the ANAR's comment at the 31 May 2013 TAC meeting about the relevance of the water management permit to the environmental permit. The discussion about the water management permit at the meeting confirms the TAC's view that that permit was necessary: RMGC was again told by authorities reviewing their environmental permit application that it needed to secure the water management permit. **C-485**, 21 (Cazan);
- The need for a water management permit was repeated to RMGC on multiple occasions, including in connection with the Water Framework Directive and in September 2011. **C-575**, 14; **Respondent's Opening 2019**, 79;
- Ms. Mocanu's hearing testimony was thus not "the first time" the Ministry indicated to RMGC that it was waiting for and that RMGC needed to secure a water management permit. PHB-Cl., 60 (para. 130);
- RMGC knew that it would need to demonstrate compliance with the Water Framework Directive before the Ministry of Environment could issue the environmental permit, as for instance acknowledged in May 2013. **C-485**, 18 (Tănase);
- On the issue of the importance of the water management permit to the issuance of the environmental permit, the Claimants dispute the relevance of a 16 May 2013 letter, whereas ANAR sent this letter to the TAC to inquire about Water Framework Directive compliance issues raised within the TAC procedure, *i.e.* the procedure precisely designed to assess applications for environmental permits. PHB-Cl., 60 (para. 132); **R-542**, 1 *et seq.*;

- As Prof. Mihai conceded, during the Cernavodă EIA Procedure, which Ms. Mocanu oversaw, a water management permit was obtained before the environmental permit was issued. **Tr. 2019**, 2322:13-2323:3.

78 The Claimants incorrectly maintain that the sole outstanding requirement under the Water Framework Directive related to the declaration that the Project was of outstanding public interest. PHB-Cl., 42 (para. 86). This allegation is wrong as demonstrated by extensive, contemporaneous evidence.

- ANAR and the Ministry of Environment repeatedly raised questions about the Project's compliance with the other requirements under the Water Framework Directive, including in 2008 (**R-496**, 2), 2011 (**C-777**; **C-575**, 4), in 2012 (**R-473**; **R-413**; **R-472**), 2013 (**R-542**; **C-1001**, 3; **R-546**, 2 *et seq.*) and 2014 (**C-473**, 14 (Săcuiu); **R-545**);
- The topic was discussed at the November 2011 TAC meeting, with the Ministry of Environment requesting clarifications from RMGC. **C-486**, 38 (Mocanu);
- These issues were not solved during or after the November 2011 TAC meeting. PHB-Cl., 39 (para. 80(b)). ANAR confirmed in a letter to the TAC on that same day its concerns about RMGC's compliance with the Water Framework Directive. **R-214**;
- Ms. Mocanu highlighted during the meeting that compliance with the Water Framework Directive would be achieved if and when the four conditions were met. **C-486**, 25;
- The Claimants rely on an interview given in 2012 by Mr. Anton where he commented that the Alba County Council declaration of public interest was sufficient for purposes of the Water Framework Directive. PHB-Cl., 40 (para. 80(c)). However, he acknowledged that his opinion was at odds with that of Mr. Borbély. **C-778**, 6;
- Neither the TAC, nor the Ministry of Environment accepted RMGC's argument in this regard. RMGC thus pushed for a Governmental declaration of public interest in the commercial negotiations. **Respondent's Opening 2019**, 77 *et seq.*;
- [REDACTED]

[REDACTED]

■

- [REDACTED]

- The Claimants misrepresent the comments of Mr. Constantin from the Ministry of Environment at the 22 March 2013 meeting of the Interministerial Commission. PHB-Cl., 40 (para. 80(d)). He did not confirm that the Ministry of Environment accepted the Alba county council decision. On the contrary, he explained that “not everyone [in the TAC] was convinced, when they saw this decision, that it was the right way to do when one declares...” C-472, 10;
- The Claimants repeat in the same breath their misguided assertion that the Government “approved the Inter-Ministerial Commission report” and its alleged conclusion on the Alba County Council decision. PHB-Cl., 41 (para. 80(g)). The document was an informative note, not a binding decision producing legal effects, and based on limited information. The Government stamp on that note reflected its acknowledgement of the commission’s work, not an endorsement of its considerations. C-451, 2; Rejoinder, 192 (para. 617);
- The Claimants also do not deny that RMGC ignored a letter of the Department for Infrastructure Projects sent on 12 June 2013, raising issues about compliance with the Water Framework Directive and asking for a detailed response. C-1001; Rejoinder, 186 (para. 595).

- 79 The Claimants rely on an undated draft decision to issue the environmental permit as evidence that RMGC purportedly complied with the Water Framework Directive. PHB-Cl., 43 (para. 89); **C-2075**.
- However, this document is a draft, which in itself shows that the requirements were not yet met, and it was never endorsed by the Ministry of Environment. It thus cannot be relied on, and certainly not as purported evidence of compliance with the Water Framework Directive. Rejoinder, 199 (para. 638).
- 80 Lastly, the Claimants deny that the EU Commissioner Janez Potočnik raised issues of compliance with the Water Framework Directive during a meeting with Ms. Plumb on 3 October 2013. PHB-Cl., 44 (para. 91).
- The Claimants cannot dispute that the report prepared for Commissioner Potočnik was focused on Water Framework Directive compliance. **C-2909**, 5; see also **C-485**, 16 *et seq.* (Cazan); **R-204**, 7;
 - The minutes of the meeting refer to a European Commission request made under the PILOT project, a communication mechanism between the Commission and the Member States on issues of potential infringement of EU law. The launching of this PILOT request pertained to potential non-compliance with the Water Framework Directive. **C-2909**, 5 and 11;
 - Unsurprisingly, the European Commission raised these non-compliance issues again in February 2014. **R-545**.

4.1.4 Urban Plans

- 81 Romania has demonstrated that a PUZ is required for the issuance of an environmental permit. Rejoinder, 77 (para. 254).
- 82 RMGC was always aware of this requirement. Rejoinder, 78 (paras. 256-257).
- 83 The Claimants assert that the Project benefitted from the 2002 PUZ being valid “at all relevant times”. PHB-Cl., 47 (para. 98). This is incorrect.

- First, as RMGC was aware, the first urban certificate it obtained in 2004 required it to redo the 2002 PUZ. **Respondent's Opening 2019, 55; C-525.04, 7;**
- Second, the Local Council decision that approved the 2002 PUZ was declared illegal in 2008 (and the urban plan was annulled in 2016). **Respondent's Opening 2019, 54; R-163;**
- State authorities repeatedly informed RMGC that an amended PUZ was necessary for the environmental permit. **Respondent's Opening 2019, 56 et seq.;**
- For instance, following the April 2012 court decision regarding the PUZ, the Minister of Environment announced that the TAC would not reconvene until RMGC submitted a valid PUZ and urban certificate. Counter-Memorial, 105 (para. 276).

84 The Claimants' argument that political blockage prevented RMGC from obtaining the remaining endorsements needed for the updated PUZ is meritless. PHB-Cl., 47 (paras. 99 and 111).

- [REDACTED]
- [REDACTED]
- [REDACTED]

85 The Claimants incorrectly allege that Ms. Mocanu's hearing testimony about RMGC's failure to provide an amended PUZ after the November 2011 TAC meeting was made "for the first time" and was "unsupported". PHB-Cl., 48 (para. 101).

- Ms. Mocanu had previously testified that the PUZ “constantly raised questions within the Ministry of Environment”. **Mocanu II**, 7 (paras. 24 and 179);
- The Ministry of Environment had noted the need for the PUZ within the TAC or in correspondence in 2007 (**C-482**, 7 *et seq.*; **C-475**, 4 *et seq.*), in 2010 (**R-188**, 2; **C-591**, 4 *et seq.*; **C-592**, 7 *et seq.*; **C-487**, 33 *et seq.*; **C-476**, 72 *et seq.*), at the November 2011 TAC meeting (**C-486**, 41 *et seq.*), in 2012 (**R-472**, 5; **C-430**), and 2013 (**C-2162**, 8).

86 The Claimants misrepresent the November 2011 TAC meeting discussions on this issue. PHB-Cl., 48 (para. 102).

- They omit to quote Ms. Daniela Pineta’s comment that “[t]he PUZs must first be approved and then the [environmental] permit is issued”. **C-486**, 41;
- Ms. Mocanu had explained that a PUZ is needed for the EIA Review Process because otherwise, in theory, the developer and State authorities run the risk of having to redo the EIA Review Process. **C-486**, 42 *et seq.*;
- Ms. Pineta and, contrary to the Claimants’ allegations (PHB-Cl., 32 (para. 68)), Ms. Mocanu, both present at this meeting, were very much decision-makers within the Ministry of Environment and the TAC, as RMGC knew. In November 2011, Ms. Pineta was Head of Division within the Pollution Control and Impact Assessment Directorate and Ms. Mocanu was the Director of the Pollution Control and Impact Assessment Directorate. **Mocanu II**, 21 (para. 59);
- RMGC should thus have taken heed of Ms. Pineta’s and Ms. Mocanu’s instructions in relation to urban plans, instead of ignoring them;
- Mr. Anton’s comments about the PUZ were irrelevant as he was not a decision-maker within the TAC, not reviewing the EIA Report or going to review the PUZ and had never done so.

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 - The Claimants complain that this letter was not communicated to RMGC. PHB-Cl., 49 (para. 104). However, this issue was raised on multiple occasions with RMGC from 2007 to 2013. See above para. 85.
- 88 As regards the 2013 Interministerial Commission, the Claimants state that “[t]he Ministry of Development noted as it had previously that approval of an updated PUZ was not required for the EP...” PHB-Cl., 50 (para. 105). This is misleading.
- The Ministry of Environment stated that an approved PUZ was needed for purposes of the EIA Review Process. **C-472**, 21; **C-2162**, 8;
 - The Ministry of Development representative at the start of his intervention stated that “We [*i.e.* the Ministry of Development] do not intend to replace the Ministry of Environment, **it is up to them to decide on the chronology** [regarding the need to have a PUZ approved **before** the issuance of the environmental permit].” **C-472**, 18.
- 89 The Claimants wrongly assert that, in line with the Commission’s request, RMGC provided the Ministry of Environment with information regarding the litigation over the PUZ. PHB-Cl., 50 (para. 107, n. 228).
- RMGC had agreed to provide “the legal team of the Ministry of Environment and Climate Change with the **entire relevant documentation (including court decisions)**...” **C-2162**, 8 (n. 3);
 - Instead, it provided one court decision to the Ministry of Environment. **C-2247**, 5;
 - Yet, at that time, the PUZs and PUG for Roşia Montană had been the subject of at least four decisions (spanning many years) and litigation was still pending. **Respondent’s Opening 2019**, 54 *et seq*;
 - Thus, neither the Commission nor the Ministry received the pleadings or knew of the full extent of the litigation.
- 90 The Claimants wrongly assert that “Minister of Environment Plumb confirmed to the Aarhus Compliance Committee in May 2013 that PUZ approval is not required to issue the EP”. PHB-Cl., 51 (para. 108).

However, their reliance on a response submitted by the Ministry of Environment in the context of an enquiry about Romania's compliance with the Aarhus Convention (*i.e.* on access to information and public participation in decision-making) is misplaced. **C-2907**.

- This document is not meant to set out the position of the Ministry of Environment regarding the PUZ. Rather, the Ministry was asked about the requirements for the building permit and broadly lists those requirements;
- RMGC did not have access to this document at the time and thus cannot argue that it relied on it at the time, especially since the Ministry consistently asked RMGC to provide the PUZ (see above para. 85), including in the spring of 2012 when the Minister publicly stated “the lack of a valid ... (PUZ) is an obstacle in the continuation of the procedure”. Counter-Memorial, 105 (para. 276, n. 499).

4.1.5 Urban Certificate

- 91 As the TAC outlined at the outset, RMGC was required to have a valid urban certificate for the EIA Review Process. **C-475**, 4 (Filipaş); Rejoinder, 80 (paras. 263-265).
- 92 The Claimants allege that Romania has acknowledged that “RMGC had a valid urbanism certificate at all times between 2010-2018”. PHB-Cl., 46 (para. 97). This is incorrect.
- RMGC's urban certificates were all at all times **challenged** between 2010-2018 by NGOs in court. **Respondent's Opening 2019**, 66 and 70;
 - Thus, since a valid urban certificate was required for the issuance of the environmental permit and the validity of RMGC's urban certificates was always challenged (with several such documents annulled over the years), the Ministry of Environment was entitled to insist that RMGC produce an urban certificate that was definitively valid. Rejoinder, 82 (paras. 271-272); **Tofan LO**, 43 (paras. 141-150);
 - The NGOs won five out of nine cases lodged against five of RMGC's six urban certificates. The validity of three of the six urban certificates

was suspended (UC 68/2004, 78/2006 and 105/2007) and three urban certificates were annulled (UC 78/2006, 105/2007 and UC 47/2013).
Respondent's Opening 2019, 66.

4.1.6 Surface Rights

- 93 The Claimants wrongly allege that RMGC needed the surface rights to secure the building permit and that it did not need them for the environmental permit. PHB-Cl., 62 (para. 135).
- 94 They wrongly conflate the different types of surface rights, some of which were expressly required by law for the environmental permit:
- RMGC needed the surface rights in connection with forest land before it could obtain the environmental permit. Rejoinder, 91 (para. 302); **R-466**. Although the Claimants mischaracterize her testimony, Ms. Mocanu confirmed this requirement: “[t]he Government Decision concerning the deforestation or, rather, the delisting of those lands from the forest circuit is a document required to obtain the Building--the Construction Permit. **But to get to that Government Decision, it is necessary that potential impact of deforestation on the environment be analysed** [within the EIA Review Process].” **Tr. 2019**, 2042:9-15; PHB-Resp., 143 (paras. 529-539); PHB-Cl., 62 (para. 138); **C-575**, 1 (Q. 1);
 - The law expressly required RMGC to acquire the surface rights to the areas covered by the water management permit for the Project (*i.e.* the rights to the Corna and Roşia riverbeds) and for the PUZ before issuance of the environmental permit. PHB-Resp., 145 (paras. 540-543); **C-652**.
- 95 As to the remaining types of surface rights, including for instance private residential property, although the law only expressly requires them for purposes of the building permit, this does not mean that they were not required for the environmental permit or that the Ministry of Environment did not have discretion to require them for purposes of issuing the environmental permit. **Dragos LO II**, 22 (paras. 78-82). As Prof. Dragoş explained:

“[S]urface rights and the way in which the developer will deal with surface rights and how it will obtain these surface rights, it’s a very important element of the Environmental Impact. The fact that you have to expropriate a large number of people for the project, that’s an environmental concern. That should be assessed during the EIA Procedure. So, of course, nowhere you will find all these requirements in writing explicitly saying this because no laws are working like that. They cannot regulate everything for every situation.” Tr. 2019, 2691:13-2692:22.

4.1.7 Cyanide Transportation and Management

- 96 The TAC had repeatedly requested that RMGC indicate by which manner and route it would transport cyanide to the Project site. RMGC never did so. This failure in and of itself would justify the TAC’s non-issuance of the permit.
- 97 Even assuming the Ministry’s non-issuance of the environmental permit amounted to a BIT breach (which is denied), the TAC would have likely issued the permit upon the condition that RMGC identify the cyanide transporter and route. This would have required RMGC also to explain where and how it planned to store cyanide, which would have forced it to explain that it needed to build a cyanide storage facility at Zlatna. The Claimants fail to prove that RMGC would have been able to operate the Project profitably even if it had been required to build such a facility and notwithstanding the time that would have taken.
- 98 The Claimants’ newest argument is that a cyanide transportation and storage facility in Zlatna was not needed since “RMGC had the option of on-site cyanide storage”. PHB-Cl., 65 (para. 145). This argument is contradicted by the Claimants’ contemporaneous evidence:
- The 2012 AMEC report commissioned by RMGC *inter alia* “to confirm that the existing transport and logistics planning [were] sufficient to meet the requirements of the Project” indicated that 640 tons of cyanide would need to be stored at a “consolidation hub and interim storage location” in Zlatna, with that facility being part of the “preferred option for supplying dangerous goods to the Project site.”

████████████████████; **CMA - Blackmore Report**, 32 (paras. 133-149);

- Romania did not “mischaracterize” Mr. Tănase’s comment at the 10 May 2013 TAC meeting about RMGC “consider[ing] the possibility of building a ... transport and storage solution in Zlatna ... an investment of several tens of million dollars in that area.” **C-484**, 13; PHB-Cl., 65 (para. 145);
- Mr. Tănase’s comments were based on information from RMGC’s experts (AMEC, Ocon and Cyplus), commissioned to review transportation risks associated with RMGC’s plans. **C-943**;
- RMGC should have but never disclosed the plans for the Zlatna facility in its EIA Report or to the TAC. Rejoinder, 358 (para. 1079); **Mocanu II**, 9 (para. 30).

99 The Claimants take issue with a map which Romania produced to show the most likely route by which cyanide would be transported to the Project site. They claim that the route is inconsistent with those in the EIA Report and that Romania “inaccurately lengthened the route and exaggerated the risks associated with cyanide transport.” PHB-Cl., 65 (para. 144, n. 305). This is incorrect.

- Romania, relying on RMGC’s responses to public consultation, its comments to the TAC, and the transportation risk studies it commissioned, created a map showing the likely route for the transportation of cyanide considering RMGC’s consultants’ recommendations and its intent to favor rail over road. **Respondent’s Opening 2020**, 25; **C-258**, 1 (“Plans [were] to maximize the use of rail for transportation, to a rail depot near the project site.”);
- Romania created this map because RMGC has never provided a map identifying its definitive, chosen cyanide route;
- At the 2020 hearing and in their Post-Hearing Brief, the Claimants referred to another (2007) map, which was in the EIA Report and which they tried to portray as more accurately showing the route for cyanide transportation by rail. **Tr. 2020**, 673:2-674:2 (Polasek);
- However, the Claimants’ map is from a report that considered the transportation **by road** of large equipment (cargo) “during the

construction phase of the project” (*i.e.* not of cyanide and not during the operational phase of the mine). **C-389**, 9. That map is thus wholly irrelevant.

100 Lastly, the Claimants’ allegation that Ms. Mocanu did not indicate that “cyanide transportation issues were an impediment to permitting” is misplaced. PHB-Cl., 67 (para. 150). TAC members over the years raised concerns about cyanide transportation. **Respondent’s Opening 2020**, 31 *et seq.*

4.1.8 TMF Dam Failure and Pond Seepage

101 The Claimants reiterate various arguments about the allegedly sound design of the TMF. However, since 2005 and throughout the EIA Review Process, the TAC, Romanian authorities and the public raised concerns about the need for a geomembrane liner for the TMF – concerns which RMGC ignored. **Respondent’s Opening 2020**, 51 *et seq.*

102 To address the risk of seepage from the pond, RMGC could have either installed a geomembrane liner (in addition to or instead of the natural clay liner), as authorities repeatedly suggested (and as Romania’s expert Mr. Claffey explained) or put in place a dry-stack tailings facility (as Behre Dolbear explained).

103 The Claimants speculate that Mr. Claffey “does not support Behre Dolbear’s suggestion” to implement a dry-stack tailings facility. PHB-Cl., 69 (para. 157).

- Mr. Claffey was not, however, instructed to opine on this issue. He opined that RMGC should have proposed a geomembrane liner under the tailings pond, a solution Mr. Corser agreed could have been made a condition to the environmental permit. **CMA - Claffey Report II**, 6 (para. 11); **Corser II**, 14 (para. 47).

104 The Claimants refer to a 2017 study to argue that a dry-stack tailings facility is not suitable in climates like that of Roşia Montană. PHB-Cl., 69 (para. 157). However, Mr. Jorgensen’s testimony in this regard was based on Behre Dolbear’s review of currently operating mines using dry-stack tailings facilities in comparable climates. **Tr. 2020**, 611:4-19, 680:20-681-1 and 683:15-16; **BD Report I**, 33 (para. 96).

4.1.9 Post-Closure Land Use

- 105 The after-use of the mine was another recurring concern for the public and the TAC, which RMGC ignored. The issue was not just about “financial guarantees” as the Claimants argue; it was about “how the area [would] look after mining”, *i.e.* once the Claimants had completed the Project and left Roşia Montană. **Respondent’s Opening 2020**, 72 *et seq.*
- 106 Dr. Kunze’s comment that “it is not the financial responsibility of the mining company to fund and/or implement the final after-use plan”, was characterized by Dr. Dodds-Smith as “not just a deviation from ‘best practice’, it is not even generally accepted practice”. **CMA - Dodds-Smith Report II**, 23 (para. 80).
- 107 The Claimants argue that Dr. Kunze’s comment does not mean that “RMGC would not fund works associated with enabling particular land”, only that it would not “fund after-uses such as restaurants and boat rentals”. PHB-Cl., 70 (para. 160). RMGC’s closure costs estimate, however, did not cover the cost of any of the different after uses contemplated in the EIA Report. **CMA - Dodds-Smith Report II**, 22 (para. 74).
- 108 In particular, the Claimants are wrong to claim that the allowance for “erosion control (seeding)” in RMGC’s closure cost breakdown, would cover the possible after-uses discussed in public consultations; it also would not cover the measures in RMGC’s Biodiversity Management Plan, *i.e.* “ecological corridors including meadow belts and scrub (woodland) belts”. PHB-Cl., 71 (para. 160, n. 329).
- 109 Establishing “such ... ecological corridors including meadow belts and scrub (woodland) belts” may have required more than just seeding, and Dr. Kunze did not suggest in his reports that these costs were included in RMGC’s closure costs calculation, as the Claimants argue now for the first time. **CMA - Dodds-Smith Report II**, 22 (para. 74).

- 110 [REDACTED]
- [REDACTED]

- [REDACTED]

111 RMGC's failure to specify the after-use of the mine and to provide proper funding for its implementation would in and of itself justify the TAC's non-issuance of the permit.

112 Even assuming the Ministry's non-issuance of the environmental permit amounted to a BIT breach (which is denied), the TAC would have likely issued the permit upon the condition that RMGC provide this information. The Claimants fail to prove that RMGC would have been able to operate the Project profitably even if it had been required to provide proper funding for the after-use of the mine. **Respondent's Opening 2020**, 78.

4.1.10 The Claimants Improperly Rely on Selected Statements by State Officials to Argue That the Environmental Permit Should Have Been Issued

113 The Claimants rely on statements by Minister of Environment Borbély in late 2011 to argue that he "repeatedly confirmed" that a decision on the environmental permit would be taken in one or two months. PHB-Cl., 27 (para. 63(f)). However,

- The Claimants selectively quote (oral) statements made by Minister Borbély in two November and December 2011 TV interviews;
- In the selected excerpt from November 2011 (of just a few seconds), Mr. Borbély only expressed "hope" that a decision would be made within two months. **C-2639.01**. The decision though belonged to the TAC, not Mr. Borbély. He did not have a say as to when the TAC would or should issue its decision. Mr. Borbély was not a member of the TAC and not involved in and aware of all technical issues being discussed within the TAC;
- The Claimants selectively quote the December 2011 interview. Mr. Borbély expressed uncertainty as to when the TAC might render its decision, saying it "may be until the end of January [2012]". He made clear though that the EIA Review Process was ongoing, saying that he would not issue the permit unless he was "100% persuaded that it will not harm the environment," that he was "not convinced yet", that he

was “observ[ing] the European law in force”, that “technical issues must be clarified”, and that the TAC had not yet issued its “report”. C-633;

- The Claimants omit to mention that, in December 2011, Mr. Borbély publicly noted twice (in writing) that the EIA Review Process was ongoing. R-469; R-470. [REDACTED]
- They omit to mention that at the end of January 2012, he commented: “The documentation is under study at the [TAC]. There are still some issues to be clarified, and this commission will complete the analysis.” R-633.

114 The Claimants allege that Mr. Anton repeatedly confirmed in early 2012 that the Ministry was simply waiting for the Ministry of Culture’s endorsement. PHB-Cl., 28 (para. 63(g)). However,

- Mr. Anton was not a decision-maker with the TAC or the Ministry of Environment with regard to the environmental permit. PHB-Resp., 21 (para. 47);
- The Claimants selectively quote and misrepresent the exhibits on which they rely. Mr. Anton in fact stated during the February 2012 TV show that “all the documentation submitted by the titleholder, the one wishing to do this project in Rosia Montana, is in the assessment stage”, that “[t]he TAC has not yet made any decision,” and that “we will analyze the project thoroughly from a technical point of view. We will consider all opinions, for and against, and the solution will be made based on technical grounds and arguments.” Mr. Anton also referred to RMGC’s difficulty in securing the surface rights: “[r]egarding the situation of the properties, it is a problem the project owner has with the people there.” C-438, 9 *et seq.*;
- In the March 2012 TV show, Mr. Anton stated that the “technical analysis is ongoing”, that the Ministry of Culture’s endorsement was outstanding, and that there were questions regarding compliance with the Water Framework Directive. C-778, 5 *et seq.*;
- The Claimants omit to recall the January 2012 letter in which Mr. Anton wrote that the Project was “currently in the [EIA] procedure,

more specifically at the stage of quality analysis of the project environmental impact report” and that “[g]iven the project complexity and the multitude of legal requirements in force, which must be followed, the [TAC] has requested from the project Titleholder, [RMGC], additional information, clarifications regarding the submitted documentation.” **R-471**, 1.

115 The Claimants allege that “Government officials thereafter repeatedly acknowledged that the technical assessment had been completed at the November 2011 TAC meeting ... and that the only reason the Ministry of Culture failed to confirm its endorsement before 2013 was political blockage.” PHB-Cl., 28 (para. 63(h)). The allegation is incorrect, including for the following reasons:

- The Ministry of Culture did not issue its endorsement until the spring of 2013 due to concerns regarding litigation over the Cârnic ADC and the lack of research at Orlea, not for political reasons. Even though a Ministry of Culture official orally encouraged RMGC to resubmit its application in the spring of 2013 because of a change of administration and even though the Ministry issued the endorsement shortly thereafter, the Ministry of Culture’s position was consistent throughout. Although it issued the endorsement, it did so conditionally and subject to resolution of the hurdles surrounding Cârnic and Orlea. There was thus no change of approach – notwithstanding a change of administration – between 2011 and 2013;
- The 2013 Interministerial Commission said nothing about political or improper blockage of the permitting process. It said the process had “stagnate[d]” since 2011 but did not attribute delay to State authorities. Its confirmation that there were no “impediments” legislative or institutional to issuance of permits does not support the Claimants’ case. PHB-Cl., 29 (para. 65(a)). The Project has always been possible under the Romanian legal framework. There has never been any legislative, institutional, or political blockage. RMGC just has not met the requirements. The commission’s considerations generally are of limited relevance, given that they were based on limited information. PHB-Resp., 60 (para. 198);

- Minister Şova's comment in a March 2013 note that, at the November 2011 TAC meeting, "all technical issues were clarified and that there were no further questions" was inaccurate. Mr. Şova was not at the TAC meeting, was never Minister of Environment, and had only just been made minister for large projects. Rejoinder, 99 (para. 326). In the same note, he recognized that "next steps" included "[c]ontinuation of permitting efforts by RMGC" and "[c]ontinuation of the TAC assessment" which meant that there were outstanding questions. **C-1903**, 36 *et seq.* He also noted the many permits that RMGC still needed;
- The Claimants refer to an oral statement by Ministry of Environment official Ms. Dumitru in March 2013 to the effect that in November 2011 "TAC members concluded that the technical issues were clarified." However, in her very next statement (in the meeting transcript), Ms. Dumitru described the issues that "remained to be solved" and referred to the Water Framework Directive, the urban certificate, the PUZ, and the Ministry of Culture's endorsement. **C-471**, 20;
- The Claimants omit to recall contemporaneous letters (from March 2013) from the Ministry of Environment describing outstanding issues. **C-883**; **C-834** (according to Mr. Tănase, dated 14 March 2013. **Tănase II**, 56 (para. 153, n. 196));
- The Claimants selectively quote from the 10 May 2013 TAC meeting transcript and omit to recall that the TAC raised various issues at both May 2013 meetings. PHB-Cl., 29 (para. 65(b)); Rejoinder, 194 (paras. 623-627);

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116 The Claimants allege that Government officials publicly stated in 2013 that the Project met all legal requirements. PHB-Cl., 31 (paras. 65 (d)-(h)). However, such statements must each be put in context:

- These Government officials were expressing their **support** for the Project, which is noteworthy since the Claimants complain that State officials were critical of the Project. Officials praised the benefits of

the Project. The many sweeping statements of support for the Project by Government officials, coupled with the submission of the Roşia Montană Law to Parliament, undercut the Claimants' arguments that the Government intended to harm their investment. These statements reflect an intention to help the Claimants, not harm them. **Claimants' Opening - Volume 6, 36;**

- The statements to which the Claimants refer were made by Government officials with the evident goal of promoting the law to Parliament (and to the public). In that sense, they were political statements. The Government wanted the Roşia Montană Law to succeed. Adoption of the Roşia Montană Law would have been a political success for the Ponta Government. **Ponta**, 21 (paras. 73-74);
- When making these statements, State officials often downplayed or omitted to mention the outstanding technical issues that were still pending before the TAC (and which would have been to a certain extent addressed by the Roşia Montană Law);
- State officials also sought to quell public concerns. For instance, in one intervention (on 10 September), Minister Plumb was trying to reassure the public regarding the Project's envisaged use of cyanide. **C-510**;
- These same Government officials often made more tempered statements during the same public interventions, which the Claimants have not quoted and in which those officials recognized that, notwithstanding their (sometimes personal) views, the Project could only go forward if the technical experts (*i.e.* the TAC) concluded that the Project meets the requirements. Rejoinder, 187 (para. 599), 200 (para. 641) and 204 (paras. 654 and 656).

117 The Claimants argue that the “Respondent ... asks the Tribunal to believe that all of the Romanian officials who stated repeatedly that all issues were addressed and/or that the Project met permitting requirements were either uninformed, misinformed, or acted beyond their competence.” PHB-Cl., 32 (para. 67). Romania in fact asks the Tribunal to consider each statement on which the Claimants rely in context and:

- To look at the evidence, not the Claimants' summary thereof; invariably, as shown in the examples above, the Claimants mischaracterize the evidence;

- To look at other contemporaneous statements by the same individuals that often belie the Claimants' arguments;
- To consider that oral statements (or press reports summarizing purportedly oral statements) are inherently less meaningful, relevant, or reliable than written statements;
- To recall that the permitting process had not reached the stage of the Ministry of Environment (let alone, the Government) rendering a decision; the decision belonged and still belongs to the TAC;
- To consider that the comments of members of Government to the effect that the Project met the permitting requirements were political statements in support of the Project and not based on the TAC's views (and the members of Government were not themselves technical experts in that regard);
- To consider the evidence that the TAC had raised concerns with RMGC before, during, and after the November 2011 meeting, including in 2013 and 2014;
- To consider that these statements are not relevant because the Claimants cannot argue that they or RMGC relied on them at the time; they have known all along that, even though Government officials praised the Project in the summer of 2013, the TAC had continued concerns; the Claimants cannot argue that RMGC was not aware of these issues; they just sought to find a way to circumvent them, including by way of the Roşia Montană Law;
- To consider that these statements are also not relevant as any sort of admission of wrongdoing, for the same reasons;
- To consider that a State must be judged according to its acts, not the statements of politicians (and that also do not reflect intent or motive). See below para. 151.

4.2 The Government Did Not Block Permitting Pending Improved Economic Terms and a Positive Political Decision

118 Because RMGC failed to meet the permitting requirements, the Claimants' allegations of coercion through a "permitting blockage" collapse. They

have indeed effectively abandoned their allegations of coercion. PHB-Resp., 72 (para. 249).

119 In any event, the lack of merit of the Claimants' allegations of coercion was confirmed at the 2019 hearing, including through the testimony of their own witnesses. PHB-Resp., 63 (paras. 211-341). The Claimants ignore that evidence and adopt yet another narrative, which is equally baseless and unsupported.

120 The Claimants now allege that from August 2011, the Government adopted "a policy" not to advance the Project's permitting. They contend that they "are not required to prove the State's motive" for that policy as "regardless of the State's motivations, it is the impact that is decisive." PHB-Cl., 75 (para. 171). However:

- The Claimants must prove Romania's motive because there cannot be coercion without proof that Romania's conduct was undertaken to extract **a concrete benefit** from the Claimants. **R-512**;
- Allegations of coercion require "clear proof" and the Claimants cannot meet the burden of proof. **RLA-88**, 40 (para. 153). They have not presented any contemporaneous evidence of coercion, whereas Romania has produced extensive contemporaneous evidence and the witness evidence of **six governmental officials, including two former Prime Ministers and two former Ministers of Economy which confirms that there was no coercion**. PHB-Resp., 63 (para. 212);
- The Claimants still fail to say what Romania purportedly failed to obtain from the Claimants between August 2011 and September 2013 (or today) that could cause it purportedly to adopt a "policy" of blocking the Project. [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

121 They allege that the policy was driven by personal political interest, suggesting that Prime Minister Boc wanted to guarantee his political future in Cluj, and that allowing the Project to proceed would have been incompatible with that objective. PHB-Cl., 22 (para. 62(a)). However:

- The Claimants did not confront Prime Minister Boc with this allegation during his cross-examination and have not provided any evidence to support it;
- Prime Minister Boc confirmed during his testimony that:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

- 125 The Claimants allege that the alleged policy “clearly affected permitting decisions by the Ministry of Environment and the Ministry of Culture”. PHB-Cl., 14 (para. 39). They add that “each significant permitting decision required political support at the ministerial level and could not be decided by technical staff”. PHB-Cl., 103 (para. 241). Nonetheless the Claimants:
- Have not provided any support for their allegations and ignore the evidence of Ms. Mocanu and about which they did not cross-examine her. **Mocanu I**, 16 (para. 71); **Mocanu II**, 2 (paras. 8-14). Prime Minister Boc, Minister Bode and Prime Minister Ponta also denied those allegations. **Boc**, 12 (paras. 39-40); **Tr. 2019**, 2563:3-6 (Bode); **Ponta**, 8 (paras. 31-46);
 - Do not indicate **which decisions** were to be issued by either Ministry in August 2011 or shortly thereafter and were blocked further to the alleged policy;
 - Ignore Minister Hunor’s confirmation on 1 August 2011 that the decision to permit the Project would be “based on the opinions of experts and not on political arguments.” **C-627**, 2. His ministry indeed issued the ADC for Cârnic (**C-680**) just days before the alleged “policy” started on 1 August 2011. There was nothing that the Ministry of Culture could have done to expedite the Project’s permitting on 1 August 2011 or thereafter; the Claimants do not claim otherwise. PHB-Cl., 99 (para. 233);
 - Omit to mention that the only measure of the two Ministries that they refer to is the alleged *convening* of the last TAC meeting in November 2011 (PHB-Cl., 19 (para. 53)) and the alleged *positive endorsement* of the Project in December 2011 (PHB-Cl., 34 (para. 72)) by the Ministry of Environment and Ministry of Culture respectively. Both allegations are, on any view, irreconcilable with the claim of political blockage of permitting; they are also wrong as the TAC meeting of November 2011 did not complete the EIA Review Process (PHB-Resp., 17 (paras. 37-49)) and the Ministry of Culture did not endorse the Project. See above paras. 65-66.
- 126 The Claimants contend that the “policy” prevented “the correction and update of the 2010 List of Historical Monuments”. PHB-Cl., 14 (para. 39). However:

- [REDACTED]
- The description of Orlea in the 2010 LHM reflected the absence of ADCs for this area and the Cârnic massif entry was in line with the ADCs for this area. Rejoinder, 213 (paras. 678-683);
- As the list was published on **12 July 2010** and thus before the introduction of the alleged “policy” in August 2011 (**C-1266**), the alleged policy could not explain that list; there is also no evidence that the Government adopted a different approach to the 2010 LHM after August 2011;
- The Claimants’ allegation that on 17 July 2011 Minister Hunor “confirmed that Cârnic would ... be removed from the 2010 LHM” (PHB-Cl., 85 (para. 198)) is false; Minister Hunor confirmed publicly that the issuance of the ADC for Cârnic would *not* automatically lead to the removal of Cârnic from the 2010 LHM (“The endorsement ... is followed, **if that is the case**, by the removal from the List of Historic Monuments of a part of Cârnic Massif”. **C-1345**);
- [REDACTED]
- The Claimants seek to infer from Minister Hunor’s public statements about the LHM a permit blocking (PHB-Cl., 85 (para. 198)), but he and his Ministry had no juncture at which they could block the Project through the LHM; the 2010 LHM could not block the Project in August 2011 or thereafter and never had any impact on the permitting of the Project; the claim that it “spawned and supported NGO litigation” (PHB-Cl., 14 (para. 39)) is unsupported. Rejoinder, 221 (paras. 696-701).

127 The Claimants contend that the alleged “policy” prevented “issuance in early 2012 and thereafter of the critical EP”. PHB-Cl., 14 (para. 39). This is incorrect; RMGC failed to meet the permitting requirements in August 2011, in early 2012 and thereafter. [REDACTED]

[REDACTED]

128 Having failed to show any conduct of Romania in August 2011 or thereafter implementing the alleged “policy,” the Claimants have now changed their position regarding the public statements of Romanian officials:

- The Claimants had argued that the press articles could only reflect “statements of intent about how [officials are] going to exercise or not exercise their authority”. **Tr. 2019**, 105:7-8 (Cl. Op.). They now claim that the statements “can be considered as part of a course of conduct in breach of treaty obligations.” PHB-Cl., 16 (para. 43). Yet, they provide no support for their position that statements alone can breach a treaty. All authorities cited refer to instances where statements translated into specific acts or omissions that breached the treaty;
- The Claimants allege that statements “can be evidence of a measure.” PHB-Cl., 15 (para. 42). However, as the authorities that they cite show, a measure can only be proven with *conduct* attributable to the State. The tribunal in *Commerce Group v. Salvador* concluded that a “de facto” ban on mining activities of the claimant inferred from public statements of government officials was not an actionable “measure”. **RLA-124**, 38 (para. 112). Without government conduct there cannot be any measure, and without any measure there cannot be a breach. **RLA-48**, 91 (para. 326); **RLA-208**, 73 (para. 251). Here, the Claimants have failed to identify any act or omission of the Romanian Government that would have amounted to a breach of a treaty. The Claimants’ reference to the “absence of formal signposts marking the Government’s decisions” (PHB-Cl., 100 (para. 236)) amounts to an acknowledgement of the lack of a measure.

129 The Claimants assert that public statements after August 2011 “delivered the message” that the Project would not proceed, “absent a better economic deal and a favorable political assessment by the Government and its ruling coalition.” PHB-Cl., 16 (para. 45). They suggest that “Minister of Environment Borbély and Minister of Culture Hunor underscored the lack,

and continuing importance, of a renegotiated economic agreement to moving forward with the EP and the Project.” PHB-Cl., 20 (para. 55). The Claimants conclude that “[g]iven the public pronouncements by the Boc Government and the continuing service of Ministers Borbély and Hunor in the Ungureanu Government, the Ungureanu Government clearly did not depart from the course set in August 2011.” PHB-Cl., 21 (para. 57).

130 **Not one** press article published during the Boc and Ungureanu governments contained any such statement. As Mr. Tănase explained to the press on 23 August 2011: “We have never been suggested that environmental assessment would be conditional on the renegotiation of the contract.” **R-391**.

131 Neither of the press articles referred to by the Claimants states otherwise and at the hearing ██████████ could not identify any such statement. **Tr. 2019**, 843:1-5. In fact:

- Minister of Environment Borbély stated:
 - On 11 August 2011 that that environmental permitting would only be successful “if he is convinced that the investors take EU requirements into consideration to the fullest extent and do not pose a threat to the environment.” **C-2912**;
 - On 23 August 2011 that the Ministry of Environment “will propose the endorsement of the Rosia Montana project to the Government only if the investor will comply with the best mining practices.” **C-629**, 2;
 - On 26 August that he “would not propose a Government Decision on the environmental authorization unless [he is] certain that this authorization observes the best practices in the European Union ... and it does not cause damage to the environment either.” He added that “we have not reached a final phase ... at the level of the technical commission”. **C-2632.01**, 2;
 - On 5 September 2011 that he “will not propose a Government Resolution for the issuance of the Environmental Permit before [he is] convinced that this project is in line 100% with best practices in the EU, and that it will not pollute the environment. ... [he will] not bring about this Government Resolution unless [he is] certain that the

- environmental aspects are on par with the best practices in the EU.” **C-2155**, 1 *et seq.*;
- On 17 September 2011 that “he would not propose any government decision regarding the environmental permit, unless he is certain that this mining project in Roșia Montană is safe for the environment and the highest EU standards are applied.” **C-2633.01**;
 - On 29 November 2011 that “the project would not receive his approval if it is proven that it would pollute the region.” **C-2639.01**;
 - On 18 December 2011 that as Minister of Environment, his concern was that of “observ[ing] the European law in force.” **C-633**, 2;
 - On 21 December 2011 that he “will not issue this endorsement unless [he is] 100% convinced that the project meets all the European criteria. From the technical point of view, we must still receive certain explanations.” **C-1505**, 1;
 - On 27 December 2011 that he had “to take a stand from the point of view of the environment, and ... [he] will not grant this endorsement unless [he is] 100% convinced that it corresponds to the provisions of the European Union, which are the highest standards, and that it will not harm the environment.” **C-637**, 2;
 - On 31 January 2012 that “I will not propose any kind of environmental permit until I am 100% convinced that it does not harm the environment and does observe the best practices”; he added that the “documentation is under study at the Technical Committee” and that there were “still some issues to be clarified”. **R-633**;
 - Minister Hunor stated:
 - On 17 September 2011 that his Ministry’s main concern was “trying to ensure the framework making possible the protection of archaeological remains in the area”. **C-2634**;
 - On 18 April 2012 that his view that Romania should renegotiate the economic terms of the Project expressed “my personal viewpoint - I do not speak on behalf of the Government or for the Coalition”; he added that his understanding was that from a permitting standpoint “the file is still under analysis with the Technical Analysis Committee” and that

mining should be the solution to protect the Roşia Montană patrimony.
C-566, 1 *et seq.*;

- These statements match those of other government officials:
 - Prime Minister Boc stated on 26 August 2011 that he was “waiting, as the leader of the Government, for the official position of the experts. ... I will wait to see what the official position of the experts will be, as I am not an expert in the field.” **C-791.02**;
 - Prime Minister Boc stated on 2 September 2011: “as the leader of the government, I am waiting for the official position of the specialists.” **C-791**;
 - State Secretary of Economy Claudiu Stăfăie stated on 8 September 2011 that “it would be good if the project were to obtain the environmental permit” but that the Ministry of Economy does not interfere with “the Ministry of Environment, the environmental permit is strictly their issue”. **R-398**, 1;
 - When questioned “Is Roşia Montană an emergency? Is it on the list of priorities?”, on 19 April 2012 Prime Minister Ungureanu stated “Of course.” **C-811**, 1;
 - Minister of Environment Attila Korodi stated on 26 April 2012 “Currently, assessment is in progress. ... An endorsement is also needed from the Culture Minister, and then the Ministry of Environment will also decide.” He added that “the investor in Roşia has to submit some documents” including the waste management plan and in relation to the TMF. **C-431**, 1 *et seq.*

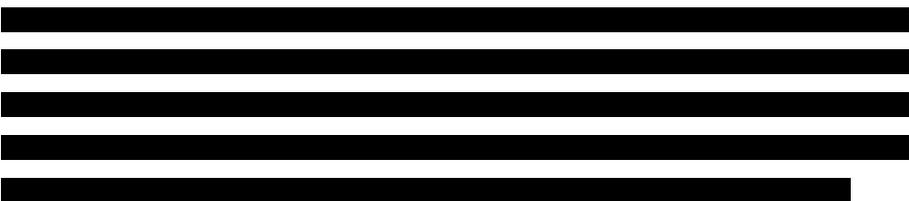
4.3 [REDACTED]

- 132 The Claimants cynically focus on the Government’s unsuccessful effort to help the Project as the basis of the alleged breach, alleging that the Government abandoned the regular administrative permitting procedure by conditioning the issuance of the environmental permit on a commercial negotiation and Parliament’s approval of the Roşia Montană Law. PHB-Cl., 71 (Section V). The evidence shows that the “parliamentary route” provided an alternate path forward and constituted an attempt to assist

RMGC to meet the permitting requirements. PHB-Resp., 99 (Section 2.3.1).

133 The Claimants allege – but fail to prove – that the Ponta Government maintained a policy that the Project would not proceed unless Parliament approved the Roşia Montană Law. They now argue that the increase of the State's economic benefits was only a pre-condition to Parliament's political approval of the Project. PHB-Cl., 71 (para. 162). However:

- The Claimants erroneously assume that the Government withheld the environmental permit, whereas RMGC failed to meet the requirements for its issuance and the TAC had thus not reached the stage of making a decision. PHB-Resp., 9 (Sections 2.1 and 2.2.1); R. PO27 Reply, 17 (paras. 47-49);
- The Claimants rely on statements of State officials taken out of context and provide no evidence of any alleged measure to block the Project.

134 

135 The Claimants rely on public statements of Prime Minister Ponta and Minister Plumb in 2012 to argue that the approval of the Project was contingent upon increasing the State's economic benefits. PHB-Cl., 72 (para. 165). However:

- The Claimants' argument is belied by Gabriel Canada's contemporaneous statements. The Claimants never stated at the time that RMGC was unable to secure the environmental permit due to political motives or coercion. R. PO27 Reply, 26 (para. 66);
- Prime Minister Ponta explains that his Government's attempt to secure increased benefits for the State was not premised on withholding or delaying the issuance of permits. R. PO27 Reply, 27 (para. 69);
- These statements are taken out of context, and in any event, political statements commenting on a socially controversial project do not

constitute “measures” attributable to Romania. R. PO27 Reply, 15 (paras. 43-45).

136 The Claimants rely on statements to the press by members of the Ponta Government to argue that issuance of the environmental permit was contingent upon Parliament’s approval of the Roşia Montană Law. PHB-Cl., 73 (para. 166). They also point to Minister Plumb’s statement that the “environmental agreement will only be issued provided the Parliament’s approval of this draft law”. PHB-Cl., 75 (para. 170); see also PHB-Cl., 83 (para. 193).

- The Claimants cite these statements out of context, while ignoring other statements by members of the Government which reflect their understanding that a possible rejection of the Roşia Montană Law would not prevent the permit from being issued (should RMGC satisfy the requirements);
- Minister Plumb testified before the Joint Special Committee in September that the EIA Review Process was ongoing and that the TAC had yet to come to a decision:

“Mr. Deputy, the Ministry of Environment is not asking the Romanian Parliament to issue the environmental permit.

The questions you asked fall **under the sole responsibility** of the [TAC], in view of initiating and proposing the environmental permit. ...

What I can tell you now is that the environmental permit is subject to this analysis carried out by the [TAC] and that, by asking the Parliament to make a decision in respect to this Draft Law, we are not asking it to issue the environmental permit.” **C-506**, 31;

- When asked whether the environmental permit would be issued if the Roşia Montană Law were rejected, Minister Plumb explained that, without the benefit of the law, RMGC’s failure to comply with the Water Framework Directive (among other issues) would prevent the issuance of the environmental permit. **C-506**, 39. At no point did Minister Plumb state that the EIA Review Process would terminate upon rejection of the law.

- [REDACTED]

137 The Claimants point to the statements of State Secretary Năstase at the 31 May 2013 TAC meeting as evidence that the Government would withhold the environmental permit unless Parliament approved the Roșia Montană Law. PHB-Cl., 73 (paras. 167-168).

- This statement was obviously made in error and did not reflect the policy of the Government. The Claimants admit that the “conditions in the environmental permit” were not incorporated into the Roșia Montană Law, nor did the Roșia Montană Law provide for the approval or issuance of the environmental permit. PHB-Cl., 74 (para. 168, n. 345);
- The Roșia Montană Law did not include any provision approving the Project;
- It was never the policy of the Government that the rejection of the Roșia Montană Law would result in the rejection of the Project. The rejection of the Roșia Montană Law only meant that RMGC would not benefit from measures aimed at facilitating the Project. **Ponta**, 23 (para. 80).

138 [REDACTED]

- [REDACTED]
- [REDACTED]

139 The Claimants claim that Gabriel “objected to a ‘Special Law’”. PHB-Cl., 71 (para. 162) and 76 (para. 175).

- [REDACTED];
- [REDACTED]
- [REDACTED]

140 Contrary to the Claimants' allegation, RMGC never tried to persuade the Government to "give up a Project-specific Special Law". PHB-Cl., 77 (para. 178).

- At no point did RMGC or the Claimants ever suggest eliminating all Project-specific provisions from the Roşia Montană Law. Quite the opposite, Gabriel Canada was "pleased to announce that the [Government] has approved draft legislating relating to the [Project]." C-1436, 1. Mr. Henry beamed that:

"The Romanian Government's decision to approve a **law specific to the Rosia Montana Project** represents a significant milestone for all stakeholders. We are extremely encouraged by this major step towards progression of the permitting process and consider it to be a clear sign of endorsement by the Government for investment into Romania." C-1436, 2;

- [REDACTED]

141 The Claimants argue that Project-specific legislation was not necessary to extend the License, as RMGC had only requested a general legislative change followed by an addendum to the License. PHB-Cl., 78 (para. 180).

- [REDACTED]

- [REDACTED]

142 [REDACTED]

- [REDACTED]

- The Claimants point to the Government's Exposition of Reasons to argue that the exploitation of mineral resources is defined in the Expropriation Law "as public utility activities". PHB-Cl., 78 (para. 181). However, the reference to "public utility activities" does not establish that all mining projects are of public utility, but rather that mining projects are exempt from the requirement that their public utility be declared by legislation. Instead, they must initiate an administrative procedure for obtaining a declaration of public utility. Rejoinder, 351 (paras. 1063-1067); PHB-Resp., 151 (paras. 572-577).

143 The Claimants argue that RMGC did not seek a "guarantee of permits", PHB-Cl., 78 (para. 182). However:

- [REDACTED]

- The Government did not reject the Project, politically or otherwise, as evidenced by the permitting process that continued after the rejection of the Roșia Montană Law. Rejoinder, 202 (Section 3.6.1.11);
- The Claimants distort Prime Minister Ponta's statements and take them out of context, as he explained in his witness statement. **Ponta**, 18 (paras. 65-70);
- In the first excerpt cited by the Claimants, Prime Minister Ponta did not recognize that a nationalization of resources had occurred. Instead, after being asked why a Romanian company was not exploiting the area, he explained that a hypothetical cancellation of the License would amount to nationalization. **C-437**, 7;
- Likewise, in the second excerpt cited by the Claimants, Mr. Ponta was speaking of a hypothetical nationalization of the Project (which he opposed) as was made clear by his statement that "everyone should be asked and this decision must be assumed". **C-437**, 12. There would be no point in seeking consensus for a measure that had already occurred.

4.4 The Government Did Not Repudiate the Project and the Joint-Venture

- 147 After the Government's attempt to facilitate the Project's permitting failed due to widespread social opposition to the Project, the Claimants seek to impute the non-issuance of the environmental permit to some alleged block by Romania, when it is RMGC's failure to obtain the social license and to satisfy the requirements of the "classical route" that has prevented the permit's issuance. PHB-Resp., 107 (Section 2.3.2).
- 148 Instead of providing evidence of purported interference, the Claimants only point to political statements, taken out of context, thus constructing their case on supposition. Their case is inconsistent with Gabriel Canada's contemporaneous understanding that the Government did not reject the Project following Parliament's rejection of the Roșia Montană Law and that the EIA process was ongoing. **R-539**, 3 *et seq.*; Rejoinder, 202 (Section 3.6.1.11).
- 149 The Claimants argue that, on 9 September 2013, Prime Minister Ponta and Senator Antonescu called on Parliament to reject the Special Law and

“made clear that a political decision had been taken that the Roşia Montană Project would not be done.” They point to statements by Senator Antonescu that the Project “cannot be supported” and statements by Prime Minister Ponta that allegedly demonstrate the rejection of the Roşia Montană Law and the Project. PHB-Cl., 80 (paras. 186-188).

- The Claimants’ allegation that a political decision had been taken as to the fate of the Project is false and unsupported. PHB-Resp., 107 (Section 2.3.2);
- The Claimants misrepresent the statement of Senator Antonescu, who was speaking about the “significant breach in the Romanian society” caused by the Project’s lack of social legitimacy as the primary obstacle to the Project, rather than any “political decision”. PHB-Resp., 108 (para. 387); **C-2690.01**, 1. In any event, he was not a member of the Government, and his statements are not measures attributable to Romania;
- The statements of Prime Minister Ponta, made in a charged political environment, did not call for the rejection of the Roşia Montană Law; rather he acknowledged that the law might not survive in the face of overwhelming social opposition. Rejoinder, 160 (Section 3.5.4). In any event, his statements do not constitute measures.

150 The Claimants argue that “the Government insisted on presenting a Special Law to Parliament and emphasized that it would not issue the EP or allow the Project to proceed unless Parliament approved the Special Law.” PHB-Cl., 81 (para. 189).

- There is no evidence that Parliament’s rejection of the Roşia Montană Law affected permitting decisions;
- The non-issuance of the environmental permit was not the manifestation of an allegedly political rejection of the Project. The permit was not issued because of RMGC’s inability to meet the requirements. The Government was never in a position to block the issuance of the permit as the TAC had not issued its recommendation. See above **Section 4.1**.

151 Regarding Gabriel Canada’s failure to contemporaneously disclose the allegedly political rejection of the Project, the Claimants argue that

investors were warned about senior Government officials' statements pertaining to rejection of the Roşia Montană Law, and that arbitration would be initiated if Parliament rejected the law. They then argue that because "there had been no formal legal act of rejection" it was only with the passage of time that the nature and effect of the repudiation became undeniable. PHB-Cl., 82 (paras. 190-191).

- The Claimants acknowledge that their case on political rejection is a *post-hoc* construction developed for this arbitration; there is no contemporaneous evidence of the Claimants considering the statements of Prime Minister Ponta or other politicians as a "political rejection" or any kind of rejection of the Project;
- Gabriel Canada informed investors in September 2013 of Parliament's possible rejection of the law, but did not suggest that this was due to the Government's purported rejection of the Project. **C-1440**;
- As Mr. Henry publicly acknowledged in November 2013, the Joint Special Committee recommended the rejection of the Roşia Montană Law, not the Project. Gabriel Canada did not disclose any rejection of the Project by Parliament. PHB-Resp., 108 (paras. 389-390).

152

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

153

[REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

154 The Claimants argue that the environmental permit should have been issued following the rejection of the Roşia Montană Law. PHB-Cl., 83 (para. 195). However:

- The TAC never confirmed that RMGC had met the requirements for the permit and the draft permit conditions had never been published (only a “note for public consultation” about a possible permit). Rejoinder, 198 (Section 3.6.1.10);
- The undated, unsigned draft decision to issue the permit is not evidence of a decision to issue an environmental permit. See above para. 79; PHB-Resp., 60 (para. 199); Rejoinder, 199 (para. 638);
- Although State officials had praised the Project and in certain instances said that the Project complied with the requirements, those statements were made in the context of promoting the Roşia Montană Law and

generally coupled with statements to the effect that the TAC still needed to render its recommendation. See above para. 116;

- The TAC had no reason to make a decision on the permit in 2014 or 2015 – let alone to recommend issuance of the permit – since RMGC still had not met the requirements: in particular, it still had not secured the water management permit (as recalled in correspondence in 2014 – see above para. 78), had not secured a PUZ (as Mr. Avram recognized at the hearing (**Tr. 2019**, 1125:5-7)), still had not secured the surface rights (**R-314**, 6; **R-25**, 8); and still had an ADC, urban certificates, and the environmental endorsement of its PUZ being challenged in court. Counter-Memorial, 362 (Annex IV);
- RMGC had made no progress in addressing the hurdles that had existed prior to the submission of the Roşia Montană Law;
- As the Claimants note, the TAC meetings in 2014 and 2015 were focused on possibly commissioning a study regarding the permeability of the TMF pond; the TAC and the public had for years expressed their concern regarding the risk of seepage from the pond and requested that RMGC install a geomembrane liner or otherwise address the issue – a concern which it continued to ignore even when the Joint Special Committee also expressed the concern. The possible commission of a study by the Ministry of Environment is a red herring. Parliament had a concern about the Project – which the TAC and the public had expressed for years; RMGC should have addressed this and the other concerns raised by the TAC and the public, to secure both the environmental permit and the social license. **Respondent's Opening 2020**, 51 and 86; Rejoinder, 207 (paras. 660-661);
- When the Joint Special Committee recommended in November 2013 that the law be rejected, Mr. Henry stated, “The report of the Special Committee is a first step in defining the next phase of developing Roşia Montană.” **R-538**. Evidently, the Claimants subsequently decided to throw in the towel and try their luck in arbitration instead, rather than try to progress the Project or to sell it to another developer who was willing and able to secure the social license and the relevant permits.

155 The Claimants suggest that the EIA Review Process was followed for Cernavodă because the Ministry “notified deficiencies that were remedied.” PHB-Cl., 84 (para. 196).

- However, the Ministry followed the law in both cases;
- As with the Roșia Montană Project, the TAC requested further information from the developer. Based on receipt of that information, it was able to make a decision. **Tr. 2019**, 2013:12-2015:15 (Mocanu).

156 The Claimants maintain that the 2010 and 2015 LHMs as well as the UNESCO application evidence Romania’s purported repudiation of the Claimants’ investment. PHB-Cl., 84 (paras. 197-200). However:

- A Romanian court reviewed RMGC’s criticisms of the 2010 LHM (which mirror those now raised against the 2015 LHM) and upheld the lawfulness of the 2010 LHM. **C-1737**; R. PO27 Reply, 116 (para. 285); Rejoinder, 221 (696-698). The Claimants do not allege that the court’s decision breached the BITs. Rejoinder, 222 (699-701). Ignoring this fact, they argue without basis that Romania “cannot legitimately rely” on this decision. PHB-Cl., 85 (para. 198, n. 410);
- The Claimants confuse the protection regime afforded by the LHM (to historically protected buildings) and that applicable to archaeological sites, which protection regime is removed through the issuance of an ADC. R. PO27 Reply, 116 (para. 287). Prof. Schiau confirmed that the issuance of an ADC triggers the initiation of the declassification procedure, not the declassification itself. **Tr. 2019**, 2357:19-2358:11 (Schiau); see also **Respondent’s Opening 2019**, 226;
- The procedure to amend the 2010 LHM and declassify Cârnic was initiated in 2012 but not finalized, including considering the litigation relating to the Cârnic ADC. The 2015 LHM then corrected errors identified by the cultural authorities over the years. Rejoinder, 214 (paras. 682-695); **Respondent’s Opening 2019**, 225;
- The other entry of the 2015 LHM with which the Claimants take issue is that of Orlea, as it includes a generic 2-km radius. The Claimants do not consider that this radius already appeared in the 2010 LHM which, as noted above, underwent judicial scrutiny. Moreover, this entry relates to the area where RMGC did not carry out the required

archaeological research, which may have allowed a more precise delimitation of the archaeological site. Rejoinder, 213 (paras. 679-681); see also *id.* at 95 (para. 315) and 190 (para. 607).

4.5 Romania Did Not Breach Any of the Treaty Standards

157 The Claimants misrepresent and confuse the standards under the BITs and fail to apply them to the facts. Insofar as the Claimants' Post-Hearing Brief repeats prior arguments, the Tribunal is referred to Romania's prior submissions. R. PO27 Reply, 7 (paras. 23-50); Rejoinder, 41 (paras. 134-207, 747-779, 782-793, 805-835 and 903-940); Counter-Memorial, 212 (paras. 555-592, 613-638, 641-644, 658, 655-656 and 670-673).

158 The Claimants present a few new arguments regarding Romania's alleged breaches, which fare no better:

- [REDACTED]
- Regarding FET, the claim that "Romania's treatment of Gabriel's investment is nothing short of egregious and shocking" (PHB-Cl., 95 (paras. 223-225)) must fail. RMGC did not have a subjective right to the environmental permit under Romanian law and its non-issuance was neither egregious nor shocking. PHB-Resp., 9 (paras. 13-205);
- Regarding FPS, the Claimants now allege that Romania failed "to exercise the basic due diligence". They do not, however, refer to evidence supporting the alleged failure to exercise due diligence on the alleged date of the breach in September 2013 (or at any other date)

(PHB-Cl., 96 (para. 226)); there was no such failure. Rejoinder, 244 (paras. 766-769); Counter-Memorial, 243 (paras. 646-648);

- Regarding the impairment and discrimination claims, the Claimants allege that only RMGC's projects were not treated in accordance with the law and that Prime Minister Ponta stated that the Project was rejected because of political reasons. PHB-Cl., 96 (para. 227). However:
 - RMGC's projects were treated in accordance with the law and Prime Minister Ponta never said the opposite; in the interview that the Claimants cite, Mr. Ponta referred to the rejection of the expedited project as envisaged under the Roşia Montană Law;
 - The allegation is in any event irrelevant as it does not establish a breach of the non-impairment standard or amount to discrimination. R. PO27 Reply, 12 (paras. 37-38);
- Regarding the Umbrella Clause, the Claimants refer to three contracts to which Romania is not a party and alleges that Romania "repudiated" its obligations thereunder. PHB-Cl., 97 (paras. 228-230). Romania could not have repudiated obligations to which it was not bound, and thus could not have breached the Umbrella Clause under the UK BIT. The Claimants' new allegation that Romania is a party to the mining licenses is false (Rejoinder, 266 (paras. 831-832)) and in any event irrelevant as Gabriel Jersey is not a party to the License and was not a party to the Bucium Exploration License either. The Claimants' allegation that Romania "repeatedly acknowledged that it was party" is entirely unsupported.

5 THE CLAIMANTS HAVE FAILED TO ESTABLISH CAUSATION

- 159 The Claimants make no attempt to establish a causal link between the alleged breach and the claimed loss; rather they seek to shift to Romania the burden of disproving causation by repeating their allegations of treaty breach and the allegation that they are not responsible for the Project's stalling. PHB-Cl., 114 (para. 267). This does not help the Claimants discharge their burden.
- 160 As to the standard, after referring to the *Bilcon* case in support of their claims, the Claimants now seek to distinguish *Bilcon*. PHB-Cl., 107 (paras. 253-256). However:
- They do not challenge the standard of causation applied by that tribunal. PHB-Cl., 109 (para. 259);
 - The standard of causation will not differ depending on the facts in dispute. **Respondent's Opening 2020**, 6-11.
- 161 The Claimants argue there are no "serious questions about RMGC's ability, absent Romania's wrongful conduct, to have obtained" all the requisite permits. PHB-Cl., 108 (para. 257). However:
- While the Claimants are quick to dismiss every inconvenient legal requirement as only required for the building permit, none of their witnesses has begun to explain how RMGC intended to obtain the permits required for the Project's implementation (including all aspects discussed under **Section 4.1** above that the Claimants admit RMGC did not satisfy);
 - There is every reason to question RMGC's ability to obtain the permits required for the Project implementation when RMGC failed for years to respond to the TAC's requests in relation to the same issues and where the Claimants have no successful track record of development of any project, let alone a mining project of the Project's complexity;
 - There is even more reason to question RMGC's ability to maintain any permit valid, given the history of litigation surrounding each permit since the early 2000s;

- [REDACTED]

162 The Claimants suggest that causation is established because Prime Minister Ponta and Minister Şova discussed publicly the possibility of the Claimants bringing a lawsuit against Romania. PHB-Cl., 108 (para. 258). However:

- The truncated quotes do not help the Claimants as neither Prime Minister Ponta nor Minister Şova discussed the likelihood of success of the possible claims;
- Rather, they expressed their concern over Romania having to address a possible multibillion-dollar lawsuit. **C-643; C-793;**
- Prime Minister Ponta and Minister Şova's concern regarding a possible lawsuit was legitimate because on 9 and 11 September 2013, on the days of their statements, Mr. Henry and Gabriel Canada had shamelessly threatened to bring a multibillion-dollar lawsuit if Parliament did not approve the Roşia Montană Law. **C-1440; C-1442;**
- Prime Minister Ponta explained this in his witness statement, but the Claimants continue to ignore his explanations. **Ponta**, 18 (paras. 65-70).

163 The Claimants address RMGC's inability to secure the surface rights in the context of their arguments on quantum, whereas the issue goes primarily to the absence of a causal link between the alleged breach of the BITs and the claimed loss. PHB-Cl., 140 (paras. 337-341). RMGC's failure to secure the surface rights severs this link because:

- RMGC must secure the surface rights to obtain a building permit.¹¹ PHB-Resp., 38 (paras. 108-110);

¹¹ RMGC also needs the surface rights for the environmental permit. See above para. 94.

- Residents steadfastly refused to sell their property to RMGC, meaning that RMGC could not acquire the surface rights without a compulsory acquisition process. PHB-Resp., 38 (paras. 111-117);
- As Gabriel Canada repeatedly recognized in its regulatory filings, RMGC had no right to have the properties expropriated. Rejoinder, 349 (paras. 1060-1061);
- RMGC did not meet the prerequisites for the expropriation process, which would have been lengthy and the outcome uncertain. PHB-Resp., 150 (paras. 567-582).

164 It is thus speculative to assume that RMGC would have obtained the needed surface rights within the foreseeable future. Accordingly, the Claimants cannot show that, but for the alleged breach, the Project would have proceeded “in all probability” or “with a sufficient degree of certainty”.

165 The Claimants nevertheless contend that RMGC had acquired 78% “of the affected properties”, that “expropriation was not inevitable and it was available to the extent needed”, and that RMGC reasonably expected to acquire all remaining properties once it recommenced acquisitions. PHB-Cl., 140 (paras. 337-338).

- RMGC could not reasonably expect to acquire all surface rights without expropriation given the refusal of certain residents to sell their property. PHB-Resp., 38 (paras. 111-117);
- The alleged availability of expropriation is based on the reports submitted in Prof. Bîrsan’s name (but which he did not draft), which have been discredited. PHB-Resp., 150 (paras. 571-582);
- RMGC has only acquired approximately 60% of the land by area in the Project footprint. **C-1812**, 34.

166 The Claimants argue that, had expropriation been required, the phases of the Project would have given RMGC the time to complete the expropriation procedure because “the land of potential holdouts was only implicated in later phases.” PHB-Cl., 140 (para. 339). This is incorrect.

- ██████████ confirmed that the properties of some residents who were refusing to sell would be affected by the surface water diversion

channel and by the maximum operating pond limit, meaning that RMGC must acquire their properties before it could obtain a building permit for the first phase of the Project. PHB-Resp., 38 (para. 109);

- The blasting in the Cetate pit (which was closest and would be exploited in the first phase of the Project) would make the historical center uninhabitable. PHB-Resp., 36 (para. 103); **C-196**, 22;
- Residents affected by blasting, the maximum operating pond limit, or the surface water diversion channel would be “affected person[s]” within the meaning of Article 2(1)(a) of Law No. 554/2004. **C-1767**, 1. Unless RMGC obtained the surface rights relating to these residents, it risked having the environmental permit annulled by a court due to the infringement of a recognized right by a unilateral administrative act. **C-1767**, 3 (Art. 7). Pending the court’s decision, the Project could be shut down as the affected residents would obtain the suspension of the environmental permit. **C-1767**, 5 (Arts. 14 and 15);
- There was no possibility for any phase of the Project to proceed unless RMGC obtained the surface rights of all affected persons.

167 The Claimants argue that RMGC did not need the properties within the historical center. [REDACTED]

[REDACTED] PHB-Cl., 141 (para. 340). This is also incorrect.

- Gabriel Canada’s contemporaneous disclosures recognize that RMGC must acquire properties within the Project footprint, which it defined as “comprising the industrial zone, the **protected area** and the buffer zone.” **C-1811**, 27; PHB-Resp., 36 (paras. 101-105);
- RMGC’s contemporaneous internal documents evidence its understanding that it must acquire these properties. PHB-Resp., 37 (paras. 106-107);

- [REDACTED]
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168 The Claimants argue that the public utility of the Project was not in doubt, that RMGC could have completed the expropriation process within a year,

and that it was sure to acquire a concession over the expropriated property as the sole qualified bidder. They contend that property holdouts would not have blocked the Project because holdouts did not block projects in which their experts and witnesses were involved. PHB-Cl., 142 (para. 341). This is false.

- Leaving aside that RMGC could not initiate the administrative process for declaring the public utility of the Project because it lacked a PUZ, the outcome of this process was not a foregone conclusion as it involved weighing the economic, social, and ecological benefits of the Project against the economic, social, and ecological costs of the expropriation. **Sferdian and Bojin LO**, 27 (Section IV.1.1);
- Based on the expert report of Profs. Sferdian and Bojin and the admissions of Prof. Bîrsan during the hearing, the expropriation process was likely to take several years. PHB-Resp., 152 (paras. 578-580);
- Gabriel Canada contemporaneously recognized that the process of obtaining a concession over expropriated property involved “a distinct and **competitive** concession bidding procedure ... which triggers **both time constraints and uncertainties** with regard to the ultimate holder of the compulsorily acquired rights.” Prof. Dragoş confirmed the accuracy of this disclosure. PHB-Resp., 153 (para. 581);
- The expert evidence of Drs. Thomson and Boutilier and Mr. Guarnera establishes that a minority can temporarily, or even permanently, block a mining project. PHB-Resp., 132 (paras. 480-483). The alleged lack of experience of the Claimants’ witnesses and experts in such situations only speaks to the pertinence of their testimony.

169 The Claimants also address the feasibility of the Project in the context of quantum even though feasibility relates more to causation. They largely repeat their arguments from their pleadings and their Opening, which have already been addressed. PHB-Cl., 154 (paras. 370-371); PHB-Resp., 138 (Section 4).

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- 171 Attempting to challenge the significance of Mr. McLoughlin's conclusion that the Project's blasting would render the historical center uninhabitable, the Claimants argue that, if houses were to become temporarily uninhabitable during Project operations, RMGC would only "be required to compensate such property owners for any damage caused, including the temporary loss of habitability." PHB-Cl., 157 (para. 382). The Claimants' argument is unsupported, cynical, and wrong.
- Residents whose property would be made uninhabitable could obtain the annulment of the environmental permit pursuant to Article 7 of Law No. 554/2004. The Project could not proceed pending disposition of the case, as the environmental permit could be suspended pursuant to Articles 14 and 15. Given the opposition of these residents and the position of Alburnus Maior and other NGOs, the Project was not feasible unless RMGC expropriated the surface rights of all affected persons. See above para. 166.
- 172 The Claimants challenge Mr. McLoughlin's conclusions, arguing that RMGC planned to implement buffer areas and that the effects of blasting were "extensively ... studied" in the EIA and other reports. PHB-Cl., 158 (paras. 383-384).
- The Claimants had the opportunity to cross-examine Mr. McLoughlin on his evidence but avoided doing so;
 - The buffer areas, even with Ipromin's mitigation measures, were insufficient to ensure the habitability of the historical center. PHB-Resp., 175 (paras. 696-698);
 - The exhibits cited by the Claimants do not support their contention. Chapter 4.3 of the EIA Report does not conclude that the historical center would be habitable, but merely assumes that well-managed blasting will be sufficient protection. The Ipromin reports do not examine the Project's effects on residents of the historical center, but rather pertain to its protected monuments. The Ministry of Public Health's report was issued prior to any detailed analysis on the impact of the Project's blasting and did not consider safety issues such as flyrock. PHB-Resp., 171 (paras. 679-687).

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175 [REDACTED]

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176 The Claimants allege that “[w]here the EIA Report speaks of prohibiting ‘more than one blast per pit or quarry per workday,’ this is understood by experts in the industry as referring to a blast time, *i.e.* limiting blasting to one defined period of time (usually 15 to 20 minutes in length).” PHB-Cl., 160 (para. 387). This contention is false and unsupported.

- A blast is a blast, not a “period of time” involving more than one blast, as is evident from the EIA Report:

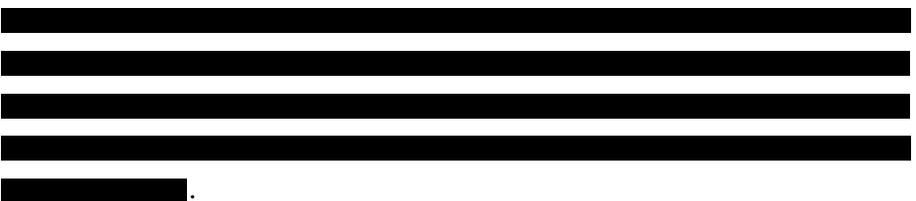
“When a **mine blast** is properly executed, the observer will see the ground rise and settle in a gently propagating wave pattern. ... The effects of **each blast** will be evaluated with regard to any observed structural damage or degradation. ... With regard to noise from blasting, it has long been observed that meteorological conditions have a substantial effect on the perceived intensity of a **blast**, although noise enhancement effects are extremely site specific and subject to significant variability.” C-213, 50;
- If the intended meaning of “one blast” were “one defined period of time” as the Claimants contend, then it would be nonsensical for the EIA Report to further explain that the authorized blasts would be conducted “within a specific time window”. C-213, 104;
- Even if “one blast” were to be understood as “one defined period of time”, RMGC could not meet its production schedule as Ipromin’s

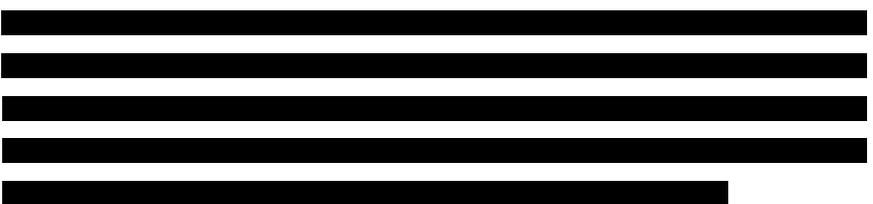
blasting mitigation measures restrict each “blast” to 7,000 kg of TNT equivalent. PHB-Resp., 174 (para. 690);

- Regardless of how “one blast” is construed, the cumulative requirements of the blasting mitigation measures and the restricted blasting schedule prohibit RMGC from detonating from than 14,000 kg of TNT equivalent per day. However, RMGC needed to detonate at least 28,000 kg of TNT per day to meet its production schedule. PHB-Resp., 176 (paras. 701-702).

177 The Claimants argue that, in any event, the zones delineated by Ipromin could be adapted “in accordance with the practical results obtained during the mining operations”. PHB-Cl., 160 (para. 388).

- The Claimants provide no evidence that the mitigation measures would be relaxed;
- Ipromin’s mitigation measures were insufficient, as they did not properly account *inter alia* for the increased propagation of vibration by the numerous old workings at the Project site. **BD Report III**, 14 (paras. 21-25).

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179 As for contributory negligence:

- The Claimants do not deny that their actions can interfere with the chain of causation and justify an exclusion of damages accordingly but

claim that “there is no basis to refer to the doctrine” (PHB-Cl., 110 (para. 264)); in support of that contention, they essentially repeat their allegation that Romania breached the BITs (PHB-Cl., 109 (paras. 260-263)); that is circular and not responsive to the applicable standard. R. PO27 Reply, 101 (paras. 253-273);

- They do not deny that they failed to comply with Romanian law in various ways and instead formulate new excuses for their breaches (PHB-Cl., 111 (para. 265)) which are irrelevant and, in any event, unfounded. Counter-Memorial, 58 (paras. 151-158) and 69 (para. 182);
- They Claimants repeat the allegation that the “evidence shows that Claimants and RMGC diligently incorporated best practices in all aspects of Project development” (PHB-Cl., 112 (para. 266)), but no less than five technical experts have defeated that contention through their reports; the Claimants did not call them for cross-examination (**Respondent’s Opening 2020**, 16 and 80-85) and are thus precluded from maintaining those allegations.

6 THE CLAIMANTS HAVE FAILED TO ESTABLISH THE QUANTUM OF THEIR CLAIMS

6.1 The Claimants' Case on Quantum Is Based on an Incorrect Valuation Date

180 The continuous changes to the Claimants' case on valuation date is one of the prime manifestations of the lack of substance of their claims. They require more than 50 paragraphs to explain their current position (PHB-Cl., 98 (paras. 231-246, 247-249, 250-252, 270-289 and 408-426)) which, as shown below, contradicts itself and their prior arguments.

181 They present **three** alternative claims (PHB-Cl., 98 (para. 231)) in support of an undetermined number of valuation dates since they conclude that the Tribunal could choose one of the three dates put forward by them or "another date". PHB-Cl., 106 (paras. 251-252 and 428)). This is inadmissible since:

- The change of valuation date from 29 July 2011 to any other date is necessarily a new claim as the only claim advanced by the Claimants in these proceedings until September 2020 was premised on a valuation date on 29 July 2011;
- The new claims introduced in the Claimants' Post-Hearing Brief are inadmissible as they breach Rule 40(2) of the ICSID Arbitration Rules. Their admission would amount to a breach of a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention as Romania has not had the opportunity to adduce evidence in response to those new claims;
- The Tribunal does not have the discretion to establish *proprio motu* a valuation date in relation to which Romania was never allowed to adduce evidence.

182 In any event, the three claims lack merit.

183 The claim that quantum should be assessed as of 29 July 2011 is unsustainable.

- The valuation date is determined by Article VIII(1) of the Canada-Romania BIT and Article 5(2) of the UK-Romania BIT, read together with Articles 12 and 31 of the ILC Articles. Under these rules:
 - Compensation is to be quantified on the date upon which each breach is alleged to have occurred. R. PO27 Reply, 71 (paras. 172-190);
 - The legal characterization of the conduct is irrelevant to determine the valuation date; regardless of whether it qualifies as an instantaneous, continuing or composite act, a breach of an international obligation only occurs when an act of the State is not in conformity with what is required of it. R. PO27 Reply, 4 (paras. 16-21);
 - 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. R. PO27 Reply, 80 (paras. 196-207);
 - A composite act requires a systematic policy or practice to allow a series of actions or omissions to be defined in aggregate as wrongful and there are none in this case. R. PO27 Reply, 86 (paras. 208-212);
 - Backdating the valuation date to the first act in a case of creeping breach has never been supported by any authority because it ignores the principle of causation along with the principle of full reparation and shifts to the respondent the responsibility for all worldwide events that might have affected the value of a claimants' investments between the valuation date and the date when the claimed loss allegedly became irreversible. R. PO27 Reply, 74 (paras. 183-189);
- The choice of that valuation date also depends on the success of legal arguments which are entirely lacking in legal support and indefensible under international law, the applicable treaties and the Claimants' own claims. PHB-Cl., 115 (paras. 270-289):
 - The arguments that “full reparation must include compensation for loss incurred due to the risk or threat of the breach”, “the Tribunal must decide based on the facts of the case when the wrongful conduct began”, and “impacts due to the risk or threat of the measure” justify the manipulation of the valuation date, or that actions that are admittedly not wrongful “should be taken into consideration when

assessing damages” (PHB-Cl., 116 (paras. 176, 278 and 283)) have already been thoroughly rebutted. R. PO27 Reply, 71 (paras. 172-190);

- The Claimants explain that the tribunals in *Amoco v. Iran*, *Crystallex v. Venezuela* and *Quasar de Valores v. Russia* **did not** select a valuation date corresponding to the start of the wrongful conduct (PHB-Cl., 176 (paras. 429-432)) and yet cite the same cases along with *Kardassopoulos v. Georgia*, in support of the contention that the valuation date must be fixed as of “when the wrongful conduct began”. PHB-Cl., 117 (paras. 278-283). Neither authority supports that contention as even their (incomplete) summaries of the cases show;
- Even assuming those authorities supported the notion that a claimant can claim compensation irrespective of whether the loss was caused by **wrongful** conduct (which neither does), they would still not support the Claimants’ choice of a valuation date in July 2011. That is because the Claimants acknowledge that **they suffered no damage in July 2011** or even months after that date as “the fair market value of Gabriel’s interest in the Project Rights based on the average market capitalization of Gabriel Canada over the entire year of 2011 did not materially change.” PHB-Cl., 120 (para. 287);
- Even if (*quod non*) the Tribunal were to accept on the facts the Claimants “composite act” (PHB-Cl., 99 (paras. 232-246)) the valuation date could not be 29 July 2011 as:
 - On the Claimants’ own case, conduct preceding 23 November 2011 (the date of entry into force of the Canada-Romania BIT) “cannot give rise to liability”. PHB-Cl., 101 (para. 238(b), n. 502), 120 (para. 287) and 175 (para. 427, n. 877);
 - It follows that the alleged composite breach of the Canada BIT could not have started on 1 August 2011 and the valuation date could not be 31 July 2011.

184 As for the alternative claim that quantum should be assessed as of 9 September 2013. PHB-Cl., 105 (paras. 247-249 and 289):

- The Claimants do not identify any measure attributable to Romania taken on 9 September 2013. R. PO27 Reply, 14 (paras. 41-46);

- While there were two televised speeches on that date by Prime Minister Ponta and Senator Antonescu regarding the Roşia Montană Law, those statements are not alleged to constitute a breach. PHB-Cl., 80 (paras. 186-189);
- There is no evidence supporting quantification of damages as of 9 September 2013 and the Claimants' arguments on indexation are based on an illogical extrapolation to which the Claimants' own experts do not subscribe. PHB-Resp., 221 (paras. 859-861).

185 As for the further alternative claim that quantum should be assessed as of an undetermined date when "conduct that followed" 9 September 2013 took place (PHB-Cl., 106 (paras. 250-252), that claim remains undeveloped and, in any event, there is no evidence in support of any such valuation date.

6.2 The Claimants Have Failed to Prove the Quantum of the Alleged Loss

6.2.1 Gabriel Canada's Stock Market Capitalization Is Not a Valid Proxy for the Value of the Claimants' Alleged Loss

186 Gabriel Canada's stock market capitalization as at the Valuation Date is not a valid proxy for the Claimants' alleged loss, including because

- i) The Project Rights retain significant value after the alleged expropriation. PHB-Resp., 191 (Section 5.3);
- ii) The value of the Claimants' shareholding in RMGC is different from the value of the Project Rights. PHB-Resp., 195 (Section 5.4.1.1);

iii)

iv) A speculative bubble in the price of gold was inflating Gabriel Canada's stock price. PHB-Resp., 210 (Section 5.4.1.3).

187 Moreover, there is no justification for applying an acquisition premium on Gabriel Canada's stock price. PHB-Resp., 214 (Section 5.4.3).

188 Although they acknowledge that the alleged breach did not occur on the Valuation Date, the Claimants argue that the quantum of their alleged loss

corresponds to Gabriel Canada's stock market capitalization as of the Valuation Date (with an acquisition premium). PHB-Cl., 121 (paras. 291-292). They argue that Gabriel Canada's value outside of the Project Rights was "immaterial". PHB-Cl., 139 (para. 333). Their position is unfounded.

- The Claimants do not attempt to quantify their own injury, but purport to value RMGC's alleged losses;
- Compass Lexecon has not quantified the value that investors may have placed on Gabriel Canada independently from the Project. **CRA Report II**, 19 (para. 48). Similarly, the analyst reports do not provide a quantification of Gabriel Canada's value independently of the Project Rights. The Claimants' argument that this value is "immaterial" is therefore unsupported;
- Compass Lexecon stated that, should the Tribunal determine that assets such as land, plant, and equipment were not expropriated, the Tribunal should not include their value in any amount awarded. PHB-Resp., 193 (para. 757). However, the Claimants failed to quantify the residual value of the Project Rights on the date of the alleged expropriation, meaning that Gabriel Canada's stock market capitalization cannot be used as a proxy for the value of the Claimants' alleged loss;
- It is nonsensical to claim the value of a parent company to compensate for the loss of rights and assets owned by a subsidiary of that company. Should the Tribunal dismiss Gabriel Canada's claims for lack of jurisdiction, there is no rational basis to look to Gabriel Canada's value to quantify the loss allegedly incurred by Gabriel Jersey. **Respondent's Opening 2020**, 181; **Tr. 2020**, 265:10-267:13 (R. Op.)

189 The Claimants argue that Dr. Burrows agrees that a market capitalization may be the most reliable indicator of value and has used that method himself in another investment treaty case relating to a gold mining company. PHB-Cl., 123 (para. 294).

- Dr. Burrows stated that a market capitalization would be reliable only if "the market has full information on the Projects." **Tr. 2020**, 1371:11-19. This was not the case with respect to Gabriel Canada. PHB-Resp., 195 (Section 5.4.1.2); Rejoinder, 368 (Sections 9.1.2.1 and 9.1.2.2);

- As the Claimants recognize, when Dr. Burrows performed a valuation using market capitalization, he “assum[ed] in that case that the market had correct information.” PHB-Cl., 123 (para. 294). In contrast to the matter at hand, in Dr. Burrows’ prior case there was no evidence that the market had incorrect information. **Tr. 2020**, 1372:18-20.

190 The Claimants repeat their discredited arguments for an acquisition premium, (PHB-Cl., 123 (paras. 295-313)), which have already been addressed. Rejoinder, 387 (Section 9.1.2.4); PHB-Resp., 214 (Section 5.4.3). However, a few additional observations are pertinent.

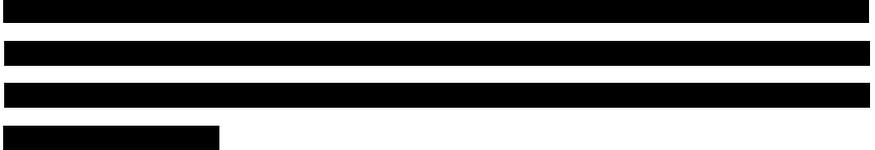
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6.2.2 Other Methods Fail to Validate the Stock Market Capitalization Valuation

195 Compass Lexecon's alternative methodologies (market multiples and P/NAV valuations (PHB-Cl., 132 (paras. 315-319)) do not corroborate their flawed market capitalization valuation:

- Compass Lexecon fails to account for the variation in the economic characteristics of the mineral properties in its sample and does not control for quantifiable differences between those properties and the Project. PHB-Resp., 211 (paras. 821-823);
- [REDACTED]
- There is no justification for the acquisition premium added by Compass Lexecon to its P/NAV valuation, as confirmed by Prof. Spiller: “[o]nly when you are taking stock prices into consideration do you have to incorporate the Control or Acquisition Premium.” PHB-Resp., 216 (paras. 835-836).

196 The Claimants contend (for the first time) that Behre Dolbear's “rule of thumb” provides support for their valuation. PHB-Cl., 133 (paras. 320-321).

- The “rule of thumb” is not a valuation technique, nor have the Claimants provided any evidence that its use is reasonable here. This method can lead to nonsensical results, as a very high-grade gold deposit would be worth the same as a very low-grade deposit;

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- [REDACTED]

- [REDACTED]

- [REDACTED]

198 The Claimants argue that valuations and acquisitions involving the Anglo Asian project, Canplats Resources, Gold Eagle, and Frontier demonstrate that Bucium had significant value. PHB-Cl., 135 (paras. 324-326).

- The value of projects that are distinguishable from Bucium is irrelevant;
- The Anglo Asian project is not comparable to Bucium *inter alia* because the former had an exploitation license whereas the latter only had an exploration license. **C-2588**, 11;

- The Claimants provide no evidence as to the stage of development of the properties they raise, thereby failing to establish that these properties were comparable to Bucium;
- Using values of properties comparable to Bucium, Dr. Burrows demonstrated that its value was USD 48 million (USD 19 million for Rodu-Frasin, and USD 29 million for Tarnița). **CRA Report II**, 95 (paras. 194-202).

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6.2.3 [REDACTED]

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6.2.4 Dr. Burrows' Assessments Are Reliable Indicators of Fair Market Value

210 The Claimants challenge the accuracy of Dr. Burrows' DCF valuation, arguing that it is at "odds with the market measures of value" because it incorporates the impact of Respondent's "wrongful measure", disregards that the "Respondent twice endorsed RMGC's timeline as achievable", "adopts speculative assessments as to cost items imagined for this arbitration", uses an "unrealistically high discount rate", and uses an approach to set gold price that Dr. Brady confirmed would not be used. PHB-Cl., 162 (paras. 390-394). However:

- Romania never conducted an analysis of the feasibility of RMGC's proposed timeline, let alone "twice endorsed" it. See above para. 201;
- [REDACTED]
- [REDACTED]
- The Claimants fail to show how the timeline used by Dr. Burrows incorporates the impact of allegedly wrongful measures. Romania is not responsible for the NGO litigation, which would have been initiated even in the absence of the alleged measures. The Claimants only have themselves to blame for the entrenched social opposition to the Project. See above **Section 2.1 et seq.** Nor is Romania responsible for residents' refusal to sell their surface rights to RMGC. See above para. 203;
- The additional costs incorporated by Dr. Burrows are not "imagined" but were rather identified by Behre Dolbear and Dr. Dodds-Smith (who was not called for cross-examination). **CRA Presentation**, 16;

- The discount rate used by Dr. Burrows is neither high nor unrealistic, as it is based on the sound and widely-accepted CAPM methodology. See above para. 197;
 - The Claimants misrepresent the testimony of Dr. Brady, who did not state that Dr. Burrows' approach was inconsistent. Quite the opposite, Dr. Brady confirmed that gold price forecasts used in acquisitions would be based on "the consensus projection of bankers and also projections by other independent agencies such as Oxford Economics, Murenbeeld and Company and others". **Tr. 2020**, 1067:16-22. The gold price used by Dr. Burrows is correspondingly based on the expectations of gold analysts about long-term gold prices and on two surveys of gold mining executives conducted by PWC. **CRA Presentation**, 20. The Claimants provide no evidence that projections from Oxford Economic or Murenbeeld differed from those used by Dr. Burrows.
- 211 The Claimants also criticize Dr. Burrows' market multiples approach, arguing that he applied *ad hoc* adjustments to his sample, as well as technical assumptions regarding increased costs based on "Respondent's arbitration arguments". PHB-Cl., 163 (paras. 395-397).
- Dr. Burrows' adjustments to his sample are neither subjective nor *ad hoc*. Based on information from the technical reports of the comparator properties (including cash flow projections and operating and capital cost estimates), his adjustments reflect objective differences between the comparator properties and the Project. **CRA Report I**, 77 (paras. 141-142); **CRA Report II**, 14 (paras. 31-34); **CRA Presentation**, 74 *et seq*;
 - Compass Lexecon simply asserts that these adjustments are flawed without providing any explanation. **CL Report II**, 79 (paras. 122-124);
 - As with his DCF, Dr. Burrows' technical assumptions regarding costs are not based on "arbitration arguments" but on independent expert evidence. **CRA Report II**, 94 (para. 190). The Claimants' experts contesting this evidence are defending their prior work and lack independence. PHB-Resp., 43 (para. 124) and 154 (para. 584).
- 212 The Claimants try to discard the significance of the only transaction (Foricon) on record involving the asset to be valued (namely stock in RMGC), arguing that it was distressed sale, that Gabriel Jersey had a pre-

emption right, and that it would have been nearly impossible for Foricon to find a buyer because Gabriel had the right to match the terms of any offer and buyers had the option of buying Gabriel Canada stock instead. PHB-Cl., 164 (paras. 398-404).

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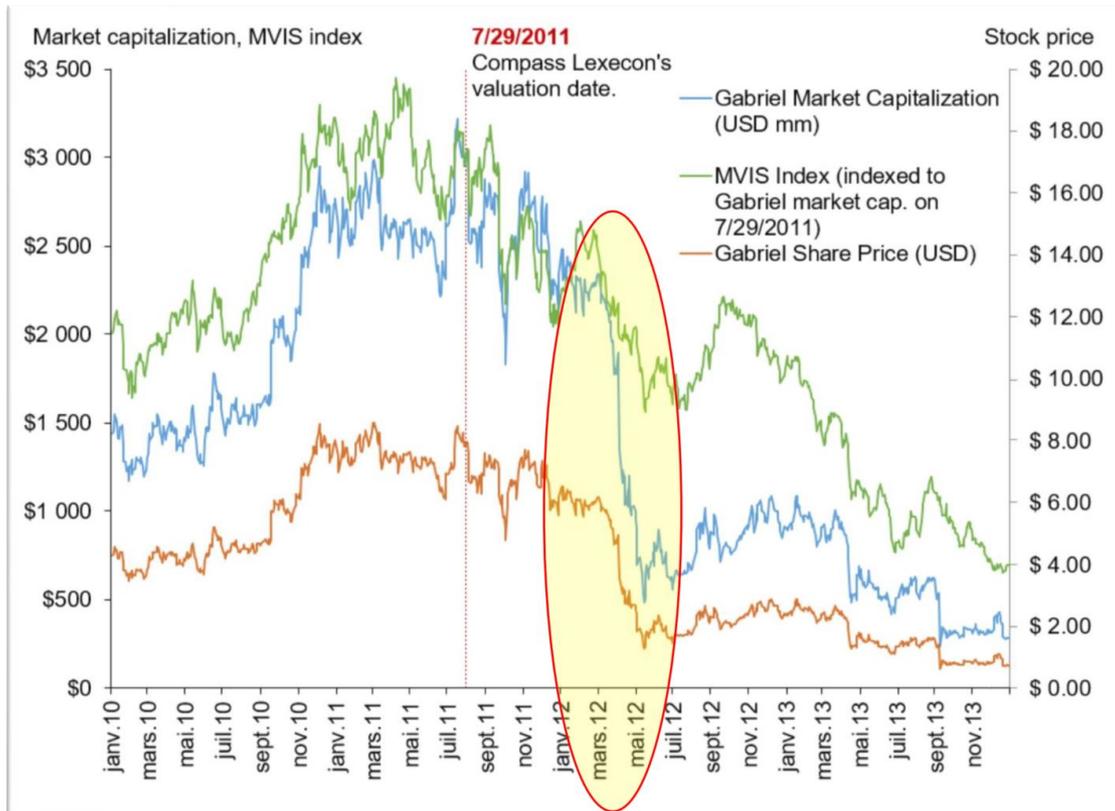
6.2.5 The Decrease in Gabriel Canada's Value Between the Valuation Date and the Date of the Breach Was Not Caused by Romania's Allegedly Wrongful Measures

- 213 The Claimants argue that “wrongful measures” pre-dating the date of breach caused the decrease in Gabriel Canada’s market capitalization. They contend that, had the permitting process followed its lawful course, the decline in Gabriel Canada’s share price would not have occurred. PHB-Cl., 167 (paras. 408-426).
- 214 The Claimants concede that the most important decline in Gabriel Canada’s market capitalization immediately followed the 4 April 2012

decision of the Alba Iulia Court of Appeal (the “**4 April decision**”), which confirmed the annulment of the Roşia Montană Local Council’s attempt to retroactively re-approve the 2002 PUZ and PUG. **R-207**. The Claimants allege that the impact of this decision on Gabriel Canada’s share price would have been “avoided altogether or subsequently corrected had the Ministry of Environment acted as the law required and recommended issuance of the EP.” PHB-Cl., 171 (para. 418). This is false because:

- The issuance of the environmental permit required the PUZ, so the environmental permit could not have been issued prior to the 4 April decision in the first place. See above **Section 4.1.4**;
- Even assuming that the environmental permit had been issued, the 4 April decision would have resulted in the cancellation of the environmental permit;
- In any event, the building permit could not be obtained without the PUZ meaning that the 4 April decision blocked the Project; thus the impact of the 4 April decision would not have been lessened had the environmental permit been issued.

Figure 1 – source: Respondent's Opening 2020, 178.



- 215 The evidence (see Figure 1 above) indisputably shows that it was the 4 April decision, which in turn was a consequence the social opposition to the Project (NGO litigation), that caused the most drastic drop in Gabriel Canada's share price during the relevant period, from 2010 until the end of 2013.
- 216 The Claimants try to minimize the significance of the 4 April decision, arguing that Gabriel Canada's subsequent loss of value also stemmed from other events and that other decreases in value occurred prior to and after the decision. PHB-Cl., 169 (paras. 414-418).
- These arguments are pure speculation. The Claimants do not provide an event study or other expert evidence to establish the purported correlation between the allegedly wrongful measures and the drop in Gabriel Canada's market capitalization (an argument that is also

undermined the evidence on record, which indisputably shows the impact of the 4 April decision);

- [REDACTED]

- [REDACTED]

[REDACTED] This is most dramatically illustrated by the loss of value following the publication of the 4 April decision: Gabriel Canada's share price decreased by **72.4%** in a little more than a month (from USD 4.63 on 4 April 2012 to USD 1.28 on 15 May 2012); during the same period, the MVIS Global Junior Gold Miners index decreased by only 21%. **CRA-215; CRA Report II**, 41 (paras. 87-88).

217 The Claimants introduce a claim in the alternative in which they adjust Gabriel Canada's inflated market capitalization as of the Valuation Date to reflect the evolution of indexes between 29 July 2011 and 9 September 2013. PHB-Cl., 175 (paras. 427-439).

- This new claim is inadmissible. PHB-Resp., 221 (paras. 856-861). Romania respectfully maintains its objections and reserves all of its rights;
- The Claimants fail to discharge their burden of proving the quantum of their alleged injury, as the Claimants' experts have not provided any valuation to a date other than 29 July 2011;

- [REDACTED]

- [REDACTED]
- [REDACTED]
- If indexation were to be used, the MVIS index is the most appropriate. Dr. Burrows explains that adjusting for incorrect information would reduce Gabriel Canada's market capitalization well below the MVIS average value of USD 800 million. **CRA Presentation**, 56.

6.2.6 The Claimants Are Not Entitled to Sunk Costs

- 218 The Claimants have introduced a new alternative compensation claim, requesting that, if the Tribunal does not award them the over USD 3.2 billion claimed in the prayer for relief in their written pleadings, it should, in the alternative, award them USD 760 million in allegedly sunk costs. PHB-Cl., 180 (para. 440). This is a new, alternative request for relief.
- 219 First, the claim is a new claim and as such inadmissible:
- The Respondent has not been allowed to respond or to produce evidence in response to this new claim; accordingly, allowing the claim at this late stage of the proceedings would amount to a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention and be subject to annulment. The annulment decisions in *France Telecom v. Lebanon* and *Pey Casado v. Chile* are on point (Romania's letter to the Tribunal dated 4 October 2020, 5). In the recent *WWM v. Kazakhstan* judgment, the High Court of England annulled an award of sunk costs in similar circumstances;¹²

¹² The case is not on record but it is publicly available, Judgment of the High Court of Justice of England and Wales [2020] EWHC 3068 - 23 nov. 2020 at <https://www.bailii.org/ew/cases/EWHC/Comm/2020/3068.html>

- Romania did not have notice that the Claimants would introduce the new claim. Even if Romania had had such notice, the introduction of the new claim after the Reply would still violate Rule 40(2) of the ICSID Arbitration Rules;
 - The case law above is particularly relevant because Romania sought orders of document production against the Claimants in relation to the allegedly sunk costs:
 - Requesting “[i]temized detail of the expenditures amounting to the USD 760 million allegedly invested by the Claimants in the Roșia Montană Project and the Bucium property between 1997 and 2016, in sufficient detail to identify who paid for them, and to identify the extent to which they directly related to the development of the Roșia Montană Project or the Bucium Property.” **PO 10 Annex B**, 90 (Req. 57);
 - Requesting “[i]temized detail of the expenditures amounting to the USD 550 million allegedly invested by the Claimants in the Roșia Montană Project between 1997 and 2012...” **PO 10 Annex B**, 92 (Req. 58);
 - The Claimants responded that “Respondent does not explain how [a description of] the amounts invested in the Roșia Montană Project between 1997 and 2012, is relevant and material **to the claims in this case.**” **PO 10 Annex B**, 92 (Req. 58). The Claimants thus confirmed that the requested documents were not relevant and material as the Claimants **had not made a claim for sunk costs** in this arbitration;
 - The Tribunal denied Romania’s requests. **PO 10 Annex B**, 90 (Reqs. 57 and 58).
- 220 Second, the record is in any event bereft of any evidence supporting the claim. The allegation that between 1997-2016 Gabriel Canada “invested a total of ~US\$ 760 million to develop the Roșia Montană Project and the Bucium Projects” is baseless. PHB-Cl., 180 (para. 440):
- The Claimants’ refusal to produce documents was coupled with an explanation that there were no contemporaneous records of expenses showing the relationship between the alleged amount and the Roșia Montană Project and the Bucium Project (“[t]o the extent that Respondent is requesting Claimants to generate an overview of their

expenditures, **that is not a request for existing, contemporaneous documents**") and it would be too burdensome to produce underlying documents which would allow an assessment of the link between the expenses and the projects. **PO 10 Annex B**, 91 (Req. 57);

- The Claimants rely on Gabriel Canada's financial statements between 1997 to 2016 (**C-1815 to C-1834**; **CL Report I**, 14 (para. 24, n. 18)) and allege that "tribunals accept audited financial statements as *prima facie* reliable evidence of amounts invested." PHB-Cl., 180 (para. 441). This is misleading:
 - In the cases cited, the costs incurred by the investor had not been challenged by expert evidence as they have been in this arbitration. **CRA Presentation**, 92-93; **CRA Report II**, 15 (paras. 37 and 204-215); **CRA Report I**, 86 (paras. 166-172). The Claimants' allegation that "Dr. Burrows does not deny" their allegedly sunk costs is incomprehensible;
 - Gabriel Canada's financial statements do not indicate the amounts that were spent by Gabriel Canada; they provide only aggregate data, and do not provide any specific data;
 - After reviewing the financial statements, Compass Lexecon does not confirm that all those costs were spent on the Roşia Montană Project and the Bucium Project;
- The Claimants have confirmed that the amount includes costs relating to other mining projects that are not the subject of this arbitration and which were developed by RMGC until 2011 (Baişoara) and 2000 (Certej, Zlatna, Bolcana, and Băiţa Crăciuneşti). **PO 10 Annex B**, 90 (Req. 57, n. 10);
- Since RMGC did not obtain the Roşia Montană License until October 2000, it is unproven that any expenses between 1997 and 2000 relate to the Project. The same is true for the Bucium Exploration License, which was held by RMGC only between August 1999 and May 2007 and expenses outside that period could not possibly relate to that alleged investment;
- Expenses incurred after the Notice of Dispute of January 2015 cannot relate to the development of the projects as the Claimants were not

developing the projects, having decided to invest in the arbitration instead since at the latest May 2014. **Respondent's Opening 2019**, 9 and 95. Moreover, [REDACTED]

[REDACTED] and there were no mining activities in the Bucium perimeter after the expiry of the license on 19 May 2007;

- Even assuming the costs were incurred and related to the Project, the Claimants have made no showing of the reasonableness of the expenses. There is no evidence of any link between the alleged breach and the claimed loss.

221 Third, the Claimants do not point to any legal support for their claim.

- The Claimants assert that the *Khan Resources v. Mongolia* case established that sunk costs are “a ‘bottom line’ below which compensation should not fall”; the Claimants’ truncated quote of *Khan Resources* is manifestly misleading and provides no such support; the Claimants entirely misrepresent the tribunal’s reasoning by **excluding the sentence “both Parties acknowledge that the minimum that the Claimants would be entitled to receive as compensation** for any expropriation is the equivalent of their investment in the Dornod Project to date.” **CLA-77**, 106 (para. 409);
- Awarding a claimant **a multiple** of the FMV of its investments as sunk costs is contrary to the standards of compensation set out in the BITs and international law; the violation of those standards would manifestly occur in this case as the FMV of the Project as of July 2011 was at most USD 156 million (**CRA Presentation**, 30 and 100) and that of the Bucium project USD 48 million (Rodu-Frasin: USD 19 million; Tarnița: USD 29 million. **CRA Presentation**, 80-81);
- Investment treaty awards (including those invoked by the Claimants relating to mining disputes) have only awarded modest amounts in sunk costs, not hundreds of millions of dollars in compensation – less than USD 20 million in *Bear Creek v. Peru* (**RLA-53**), *Copper Mesa v. Ecuador* (**RLA-54**) and *SAS v. Bolivia* (**RLA-162**).

6.2.7 The Claim for Interest Is Overstated

- 222 The Claimants maintain their overstated claim for interest, arguing that the risk-free rate does “not reflect commercial reality for a mining company”. PHB-Cl., 182 (paras. 446-449).
- They fail to revise their claim for interest to reflect their admission that the alleged breach of the BIT occurred in September 2013. They unjustifiably persist in claiming hundreds of millions of dollars in interest for a period preceding the commission of an alleged breach and their alleged awareness thereof. PHB-Cl., 95 (para. 222);
 - As to the new claim for sunk costs, in addition to claiming interest prior to the alleged breach, the Claimants claim interest running from 29 July 2011 on expenditures made after that date;
 - The claim is based on incorrect assumptions. As Dr. Burrows explained, an award to the Claimants would not be “loaned” on the same risky basis as those which banks extend when they make loans. **Tr. 2020**, 1369:3-7; PHB-Resp., 220 (paras. 852-855).

Respectfully submitted,

23 April 2021

For and on behalf of Romania



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