INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

CLAIMANTS' COSTS SUBMISSION

December 16, 2022

Ţuca Zbârcea & Asociaţii

WHITE & CASE LLP

Counsel for Claimants

CLAIMANTS' COSTS SUBMISSION

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1. Claimants make this Costs Submission as the Tribunal directed on December 2 and 8, 2022. Claimants request that the Tribunal order that Romania bear all the costs of this arbitration under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 28(1).[1]

A. Respondent Should Bear All the Costs of This Proceeding

2. Article 61(2) of the ICSID Convention provides that the Tribunal must assess the parties' expenses and must decide how to allocate those expenses and the fees and expenses of the Tribunal and ICSID. ICSID Arbitration Rule 28(1) provides that the Tribunal may decide that these costs "shall be borne entirely or in a particular share by one of the parties." Many ICSID tribunals have recognized that they have broad discretion under the ICSID Convention and Rules to award a party some or all of its costs.[2]

3. The Canada BIT confirms that the Tribunal may "award costs in accordance with the applicable arbitration rules."[3] The UK BIT does not address costs for investor-State arbitrations. The Tribunal therefore may decide how to allocate the costs of this proceeding.

4. ICSID tribunals often apply the principle of "costs follow the event" to award the successful party its costs.[4] This principle is widely recognized as both the UNCITRAL Arbitration Rules and the new ICSID Arbitration Rules reflect. Many ICSID tribunals observe that awarding costs to the successful party follows the *Chorzow Factory* general principle that reparation must wipe out all consequences of the treaty breach.[5]

5. Thus, the tribunal in *Gemplus v. Mexico* explained that "compensation should include a claimant's reasonable costs . . . in successfully and necessarily asserting its disputed legal rights in arbitration proceedings against an unsuccessful respondent."[6] The tribunal in *ADC*

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[1] *See* Memorial ¶¶ 927-930.

[2] Memorial ¶ 928; *Hrvatska v. Slovenia* (CL-80) ¶ 598; *von Pezold v. Zimbabwe* (CL-63) ¶ 1001.

[3] Canada-Romania BIT (Exh. C-1) Art. XIII(9).

[4] Memorial ¶ 929. *See also von Pezold v. Zimbabwe* (CL-63) ¶¶ 1002, 1023 (observing that "in a number of ICSID precedents, the tribunal, in the exercise of its discretion, has ruled that ... if a party has clearly prevailed, there is no reason in principle why that party should not be paid his costs by the unsuccessful party").

[5] *See, e.g.*, *Hrvatska v. Slovenia* (CL-80) ¶ 599; *Karkey Karadeniz v. Pakistan* (CL-250) ¶ 1060.

[6] *Gemplus v. Mexico* (CL-156) ¶¶ 17-21.

v. Hungary similarly observed that if the claimants were not awarded their costs, "it could not be said that they were being made whole."[7]

6. The record establishes that Romania breached the BITs and caused tremendous losses to Claimants. Claimants accordingly should not only prevail in this arbitration, but as the successful party, Claimants should receive the costs they reasonably incurred for this arbitration. Claimants' costs are reasonable as described below.

B. Claimants' Costs in This Case Are Reasonable

7. When assessing the reasonableness of claimed costs, tribunals have considered factors such as the length of the proceedings, the volume of the evidentiary record, the complexity of the disputed issues, and the amount of compensation requested.[8]

8. Applying these factors, Claimants' costs listed in detail in the table further below are reasonable. This arbitration has been long and contentious. Claimants notified this dispute to Romania eight years ago, and ICSID registered this case back in July 2015. Since then, the parties have submitted 34 pleadings totaling over 3,300 pages together with 40 witness statements, 35 expert reports, and 11 legal opinions. These submissions have included a vast amount of evidence including 4,645 factual exhibits totaling 254,044 pages, plus 113 electronic video and 95 Excel files. The Tribunal also has held three hearings comprising 19 hearing days and has issued 35 procedural orders. In sum, the case record is massive, a fact the parties and the Tribunal both have acknowledged.

9. The dispute in this case is over Romania's taking of Claimants' Project Rights in several large mining projects. The disputed facts span multiple decades from the 1990s all the way to the UNESCO inscription in July 2021. Many of the issues are complex and technical and

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[7] *ADC v. Hungary* (CL-138) ¶ 533.

[8] *See, e.g.*, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Award dated July 18, 2014 (excerpt on costs) ("*Hulley v. Russia*") (CL-341) ¶¶ 1876-1882; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award dated Mar. 8, 2019 (excerpt on costs) ("*ConocoPhillips v. Venezuela*") (CL-342) ¶¶ 982, 989; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated July 12, 2019 (excerpt on costs) ("*Tethyan Copper v. Pakistan*") (CL-343) ¶ 1850; *Rusoro v. Venezuela* (CL-149) ¶ 872; *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability dated Dec. 29, 2014 (RL-85) ¶ 331.

are the subject of lengthy expert reports and opinions. Claimants also are two separate juridical entities with separate claims subject to separate defenses each under a different treaty.

10. The stakes also are high. It is undisputed that Claimants invested hundreds of millions of dollars to develop the projects. Claimants request billions of dollars from Romania to compensate for the losses that it caused. For these reasons, the substantial costs expended by the Claimants to present their claims in this arbitration rigorously and to respond to the many arguments Respondent and its experts raised are reasonable.

11. In other large complex cases lasting many years, tribunals have awarded substantial costs to successful claimants. For example, in *Tethyan Copper v. Pakistan*, although the claimant did not succeed on its provisional measures request and did not receive the full amount of compensation it requested, the claimant prevailed on jurisdiction and liability and established that its project rights had "substantial value."[9] The tribunal therefore ordered Pakistan to pay all the claimant's costs totaling USD 62,047,596.83.[10]

12. In *Hulley v. Russia*, the claimants requested USD 79,628,055.56 and GBP 1,066,462.10 in fees and expenses and EUR 4,240,000 paid to the PCA.[11] The tribunal found that both parties "litigated vigorously" and that it was "unsurprising" that their costs "should reflect the very considerable work which each Party was required to expend in order to, on the one hand, press its claims and, on the other hand, defend itself."[12] The tribunal also found that it was "not surprising" that the claimants' costs "should be higher" than Russia's costs "since they bore the burden of proof" and produced many fact witnesses.[13] The tribunal further observed that the claimants succeeded on jurisdiction and liability and received an "immense"

[9] *Tethyan Copper v. Pakistan* (CL-343) ¶¶ 1852-1853.

[10] *Tethyan Copper v. Pakistan* (CL-343) ¶¶ 1849, 1855 (ordering Pakistan to reimburse claimant's payments to ICSID of USD 2,533,277.08 and all of claimant's fees and expenses totaling USD 59,447,596.60).

[11] *Hulley v. Russia* (CL-341) ¶¶ 1830, 1859, 1873.

[12] *Hulley v. Russia* (CL-341) ¶¶ 1880-1881; *id.* ¶ 1879 (describing the voluminous evidentiary record).

[13] *Hulley v. Russia* (CL-341) ¶ 1882. *See also, e.g.*, *Gemplus v. Mexico* (CL-156) ¶ 17-25 ("It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty."); *ADC v. Hungary* (CL-138) ¶ 535; *Siag v. Egypt* (CL-108) ¶ 624.

damages award even though the claimants' experts "were of limited assistance" to determining damages.[14] For that reason the *Hulley* tribunal ordered Russia to pay all the claimants' payments to the PCA totaling EUR 4,240,000 and approximately 75% of their fees and expenses totaling USD 60 million.[15]

13. In *ConocoPhillips v. Venezuela*, the claimants requested USD 69,735,245.57 in costs.[16] The tribunal observed that although these costs "appear high" compared to other ICSID cases, it had "no reason to inquire about their substance in light of the long duration of this arbitral proceeding, the size of the record and the complexity of a great number of questions raised."[17] The tribunal further observed that unless there is an abuse of process, bad faith, or harassing litigation, tribunals should not second-guess a party's strategic decision to incur costs that they deemed necessary to present their case:

> The Tribunal does not put particular weight on the manner in which the Parties have conducted the case, keeping in mind the complexity of the case, the enormous size of the evidentiary documentation and the profound analyses provided by the economic and technical experts. Each Party is at liberty in the choice of its strategy in the litigation and the way it considers the most appropriate to assemble and present its evidence. Such choice of methodology should not become a factor of judgment by the Tribunal . . . unless a particular behavior during trial shows signs of abuse of process, bad faith or reflects harassing litigation. . . .[18]

14. The *ConocoPhillips* tribunal accordingly awarded costs to the claimant as the prevailing party in the arbitration. The tribunal noted, however, that it rejected the claimants'

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[14] *Hulley v. Russia* (CL-341) ¶¶ 1884-1885.

[15] *Hulley v. Russia* (CL-341) ¶¶ 1869, 1887.

[16] *ConocoPhillips v. Venezuela* (CL-342) ¶ 966.

[17] *ConocoPhillips v. Venezuela* (CL-342) ¶ 982.

[18] *ConocoPhillips v. Venezuela* (CL-342) ¶¶ 989, 996. *See also ADC v. Hungary* (CL-138) ¶ 534 ("Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness."); *Gemplus v. Mexico* (CL-156) ¶¶ 17-25–17-26 ("The Tribunal also here bears much in mind the point made in the *ADC* and *Sylvania* awards … as to the 'pragmatic fact' that the Claimants' legal bills had first to be presented to and paid by the Claimants at a time when the Claimants could not know whether or not the Tribunal would reimburse the Claimants. In this case, the Tribunal sees no good reason to second-guess, with the advantage of hindsight, the Claimants' amount of costs….").

"ancillary" tax claim of nearly USD 10 billion due to a lack of jurisdiction and that it awarded approximately 40% of the claimants' "main claim" for approximately USD 21 billion.[19] The tribunal therefore excluded part of the claimants' costs for the tax claim and awarded 40% of the rest of their costs in a total amount of USD 20,461,000.[20]

15. In this case, there can be no question that Claimants presented their claims vigorously and in good faith thus justifying an award of their costs as incurred.

16. Moreover, a number of additional factors at issue in this case aggravated Claimants' costs, which likewise should be taken into account when assessing the reasonableness of Claimants' claim in this respect, as follows.

a) Access to Classified and Confidential Documents: Many core documents in this case, including the License, technical studies, and reports, are the State's property and were strictly classified under Romanian law. Claimants therefore could not access these documents for this arbitration without the State's consent. Claimants raised this issue repeatedly including in their Request for Arbitration and directly with Respondent, but Respondent declined to cooperate.[21] Only after waiting almost a full year, in June 2016 Claimants had to request that the Tribunal order provisional measures to direct Respondent to permit access to the classified and confidential documents associated with RMGC's mining licenses. Respondent did not engage with Claimants' requests until after Claimants sought provisional measures, even then opposing Claimants' requests and maintaining that it required more than six months merely to make a decision about whether it would permit access to these essential documents.[22] Even as late as the hearing convened by the Tribunal, Respondent had not taken steps to permit access to a

[19] *ConocoPhillips v. Venezuela* (CL-342) ¶¶ 1002-1004.

[20] *ConocoPhillips v. Venezuela* (CL-342) ¶ 1004 (finding that the parties primarily addressed the merits of the main claim "and its numerous factual and legal elements, independently from the amount of damages," and that the claimant "overwhelmingly" prevailed on those issues).

[21] *See* Request for Arbitration ¶¶ 62-63; Claimants' First Provisional Measures Request ¶¶ 3, 11-12; Claimants' Reply on First Provisional Measures Request ¶¶ 2-3, 7, 19-24, 72-74.

[22] Claimants' Reply on First Provisional Measures Request ¶¶ 3-4, 7, 22-27, 72-74.

great number of documents and refused to provide any assurance that it would do so.[23] While Respondent eventually did provide access to the documents at issue for purposes of this arbitration, it did so only after Claimants incurred all the costs associated with two rounds of briefing and an oral hearing on this issue.[24]

b) VAT Reassessment: Soon after this arbitration began, in early 2016, Respondent notified RMGC of alleged VAT liabilities, altering the manner expenses associated with the Project had been treated in no less than 18 earlier audits [redacted][25] In response, Claimants made a second provisional measures request, leading to two rounds of briefing, presentation of testimony and documentary evidence, and an oral hearing. Two days before the hearing, Respondent's courts quashed the VAT assessment, but this was after Claimants had incurred substantial costs seeking to prevent a material aggravation of the dispute.[26]

c) Protecting RMGC Witnesses from Retaliation: Immediately after the State politically repudiated the Project, in November 2013 Romania commenced a criminal investigation of RMGC.[27] Less than three months after Claimants submitted their Request for Arbitration, Romania launched a sweeping "anti-fraud" investigation.[28] Romanian authorities made extraordinary and oppressive demands for tens of thousands of pages of documents and information, without stating any purpose or justification [redacted]

[23] *See* Tr.(Sept. 23, 2016)181:13-182:9 (R-Opening) (Respondent confirming that "there are 179 documents that have not been declassified yet"); 190:15-193:3 (Respondent noting that it could not undertake that the documents would be declassified). *See also* Letter from Claimants to Tribunal dated Sept. 22, 2016.

[24] *See, e.g.*, Tr.(Sept. 23, 2016)247:8-248:13 (Cl-Closing) (describing Respondent's lack of cooperation).

[25] [redacted]; Claimants' Second Provisional Measures Request ¶¶ 8, 16-33, 47-50.

[26] Tr.(Sept. 23, 2016)126:3-128:11 (Cl-Opening) (explaining that "Claimants learned from Respondent's e-mail yesterday afternoon that … on September 21st … the VAT Assessment was quashed"). *See also* Memorial ¶¶ 572, 578; Reply ¶¶ 290-293.

[27] Reply ¶ 290.

[28] Memorial ¶¶ 563-564, 558-562; Reply ¶ 290.

[redacted][29] Claimants raised these fears repeatedly, not only in their second provisional measures request, but also in their request to redact sensitive witness testimony from the submissions. The Tribunal granted that request over Respondent's objections, and rejected Respondent's cynical request to reclassify parts of Claimants' witness statements and expert reports as not confidential.[30]

d) Document Production: Claimants produced over 45,000 pages of documents to Respondent, responding in good faith at great burden and cost to Respondent's document requests, including as directed by the Tribunal.

e) Respondent's Additional Jurisdictional Objection: After its Counter-Memorial, Respondent introduced a new jurisdictional objection based on the *Achmea* decision, resulting in multiple additional separate written submissions.

f) Respondent's Abusive Rejoinder: Romania withheld the vast majority of its evidence until its Rejoinder in an abusive pleading tactic intended to prevent Claimants from addressing its case. Thus, while the Counter-Memorial included only two short witness statements totaling 23 pages, Respondent loaded its Rejoinder with 13 witness statements totaling 333 pages – including from former Prime Minister Ponta who refused to appear for cross-examination – and with lengthy reports and opinions from seven new experts. Claimants therefore had to request leave to address Respondent's new evidence at the hearing and through rebuttal documents.[31] The Tribunal granted that request.[32]

[29] [redacted] Claimants' Second Provisional Measures Request ¶¶ 34-44; Reply ¶ 290. The criminal and "anti-fraud" investigations remain pending with no findings made all these years later, which confirms that their sole purpose was to tarnish RMGC's reputation and to punish Claimants for this arbitration.

[30] Procedural Order No. 11 dated June 14, 2018 ¶¶ 38-59, 66-75, 86, 107(1)-(2).

[31] Claimants' Application dated July 19, 2019; Letter from Claimants to Tribunal dated Aug. 20, 2019.

[32] Procedural Order No. 23 dated Sept. 6, 2019. *See also* Letter from Tribunal to Parties dated Nov. 21, 2019 (recalling that the rebuttal procedure "arose from Respondent's filing of its Statement of Rejoinder, which was especially comprehensive in comparison to its previous submission").

g) Respondent's Request to Bifurcate the Hearing: After having made the tactical decision to present the majority of its evidence with its Rejoinder, Respondent then waited until shortly before the December 2019 hearing to request to add a third hearing week to the procedural calendar.[33] These late developments resulted in a separate hearing that could not be scheduled until late September and early October 2020, thus prolonging the proceedings by nearly a year and in any event materially adding to the scope of case presentation for the parties.

h) Respondent's "Rebuttal" Expert Reports: During the second rebuttal phase between the 2019 and 2020 hearings, Respondent introduced expert reports from new experts on new topics, including Dr. Brady's report on Newmont's gold valuation methodologies and Mr. McLoughlin's report on blasting. Claimants had to address these new reports through cross-examination and argument.[34]

i) Respondent's Reactivated UNESCO Application: Within weeks of representing at the 2019 hearing that its application to UNESCO was "no longer submitted,"[35] in January 2020 Romania reactivated its application. UNESCO granted the application in 2021. This development led to further submissions, including in response to Tribunal questions on the issue.[36]

j) Non-Disputing Parties and Transparency: Claimants had to respond to three separate non-disputing party submissions in 2018, 2019, and 2022 and had to expend considerable time addressing redactions to submissions both to comply with the transparency provisions of the Canada BIT and to protect the RMGC witnesses.

[33] Letter from Claimants to Tribunal dated Sept. 30, 2019.

[34] Tr.(Oct. 2, 2020) 1023:16-1072:20 (Brady Cross); Tr.(Sept. 28, 2020)138:8-144:18 (C-Opening); Claimants' Post-hearing Brief ¶¶ 379-389; Claimants' Second Post-hearing Brief ¶¶ 202-214.

[35] Tr.(Dec. 3, 2019)555:19-558:7 (R-Opening).

[36] Letters from Claimants to Tribunal dated Aug. 5 and Sept. 7, 2021; Claimants' Submission on New Evidence dated Oct. 29, 2021; Letter from Claimants to Tribunal dated Dec. 13, 2021; Claimants' Response to Tribunal's Questions Regarding Post-2013 Events dated June 14, 2022.

17. Bearing these considerations in mind, Claimants quantify their costs below.

DESCRIPTION[37]	AMOUNT
ATTORNEYS' FEES	
WHITE & CASE LLP	$47,125,182
ȚUCA ZBÂRCEA & ASOCIAȚII	$9,041,979
WITNESS AND EXPERT FEES	
Romanian law experts[38]	$373,917
Technical witnesses and experts[39]	$1,098,710
Quantum experts[40]	$3,918,073
TOTAL PROFESSIONAL FEES	**US$ 61,557,860**
ADMINISTRATIVE COSTS	
WHITE & CASE LLP	$341,126
ȚUCA ZBÂRCEA & ASOCIAȚII	$57,310
Witness and Party representative expenses[41]	$189,392
Other administrative expenses[42]	$385,151
TOTAL ADMINISTRATIVE COSTS	**US$ 972,979**
ARBITRATION COSTS	
Advances on Fees and Costs Paid to ICSID	$1,275,080
TOTAL ARBITRATION COSTS PAID TO ICSID	**US$ 1,275,080**

[37] Amounts are as of November 30, 2022. Claimants respectfully request that the Tribunal provide the parties an opportunity to update their statements of costs when all submissions, including these costs submissions, are completed. Costs incurred in other currencies were converted to USD at the invoice date exchange rate.

[38] Includes professional fees of Professors Corneliu Bîrsan, Lucian Mihai, Ovidiu Podaru, and Ioan Schiau.

[39] Includes professional fees of Robert Boutilier, Barry Cooper, Patrick Corser, Prof. Witold Henisz, Charles Jeannes, David Jennings, Dr. Christian Kunze, John Lambert, SRK Consulting, and Prof. Dirk van Zyl.

[40] Includes professional fees of Compass Lexecon and Berkeley Research Group (Santiago Dellepiane moved from Compass Lexecon to BRG after the filing of the Memorial).

[41] Includes travel, accommodation, and meal costs associated with preparation of statements and reports and attendance at hearings in Washington, DC.

[42] Includes data hosting charges and document and graphic support for hearings.

C. Request for Relief

18. For all the reasons in Claimants' earlier submissions and above, Claimants respectfully request that the Tribunal:

i) award Claimants their full costs of these proceedings totaling USD 63,805,919; and

ii) award Claimants interest on the amount of costs awarded from the date of the Award up through the date of payment.

Respectfully submitted,

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