

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

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

Applicants

VS.

ROMANIA

Respondent

**ICSID CASE NO. ARB/15/31 – ANNULMENT
PROCEEDINGS**

**RESPONDENT'S COMMENTS
ON APPLICANTS' REQUEST
FOR CONTINUATION OF STAY OF ENFORCEMENT**
1 NOVEMBER 2024

LALIVE

LDDP
LEAUA DAMCALI DEACONU PAUNESCU
Attorneys & Counselors

TABLE OF CONTENTS

1	INTRODUCTION	1
2	THE COMMITTEE SHOULD LIFT THE STAY OF ENFORCEMENT	2
2.1	Legal Standard to Assess a Request to Stay Enforcement of an ICSID Award	3
2.2	The Circumstances of the Case Require Lifting the Stay of Enforcement	5
2.2.1	The Applicants have confirmed the existence of a high risk (if not the certainty) of non-payment of the Award if the Annulment Application is rejected	5
2.2.2	The Applicants bear no risk of non-recoupment should the stay be lifted and the Award annulled.....	8
2.2.3	Looking at the balance of hardships, the Stay should be lifted.....	9
3	IN THE ALTERNATIVE, ANY CONTINUATION OF THE STAY MUST BE CONDITIONED ON THE APPLICANTS' POSTING OF SECURITY	13
4	PRAYERS FOR RELIEF	17
	RESPONDENT'S LIST OF FACTUAL EXHIBITS	18
	RESPONDENT'S LIST OF LEGAL AUTHORITIES	18

1 INTRODUCTION

- 1 On 8 March 2024, an international arbitral tribunal dismissed all of the claims brought by Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. (together “**Gabriel**” or the “**Applicants**”) against Romania in ICSID Case No. ARB/15/31 (the “**Award**”). It also ordered Gabriel to pay Romania’s arbitration costs as well as a portion of its legal costs.
- 2 Gabriel did not respond to Romania’s request for payment of the amounts awarded (plus interest).¹ Romania was therefore required to take steps to enforce the Award, which is binding under Article 53(1) of the ICSID Convention.²
- 3 On 5 July 2024, Gabriel filed an application with ICSID to annul the Award and requested that ICSID stay its enforcement pursuant to Article 52(5) of the ICSID Convention (the “**Annulment Application**”).³
- 4 On 12 July 2024, pursuant to Article 54(2) of the ICSID Rules, the ICSID Secretary General provisionally granted Gabriel’s stay request pending a ruling of the *ad hoc* Annulment Committee (the “**Committee**”) still to be constituted at the time. This is therefore the first time that Romania is heard on the question of a stay. For the reasons explained below, Romania respectfully requests that the stay not be prolonged.
- 5 On 9 October 2024, following the constitution of the Committee, Gabriel applied to continue the stay of enforcement of the Award (the “**Stay Request**”).
- 6 Further to correspondence exchanged with the Committee and the Applicants between 12 and 29 October 2024, Romania hereby responds to the Stay Request.

¹ Letter from Romania to Gabriel dated 21 March 2024, at **Exhibit A-0107**.

² This provision states: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. **Each party shall abide by and comply with the terms of the award** except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.” (emphasis added).

³ Annulment Application, p. 56 (paras. 160-161).

- 7 As explained below, Romania should no longer be prevented from enforcing the Award (**Section 2**). In the alternative, the Committee should at a minimum condition any continuation of the stay on the Applicants' provision of security in the amount of the underlying Award (plus interest), bearing in mind that this would not even cover the costs that Romania will incur in connection with these annulment proceedings (**Section 3**).

2 THE COMMITTEE SHOULD LIFT THE STAY OF ENFORCEMENT

- 8 The Parties agree that neither the ICSID Convention nor the ICSID Arbitration Rules specify the factors that *ad hoc* annulment committees should consider when assessing whether to maintain or lift a stay of enforcement of the underlying award pending their decision on annulment. Article 52(5) of the ICSID Convention merely states that committees must determine whether “the circumstances so require”.⁴ It is uncontroversial that committees enjoy a wide discretion to do so.⁵
- 9 What is clear, however, is that Article 54 of the ICSID Convention expresses the “pro-enforcement policy of the Convention”.⁶
- 10 Romania recalls below the scope of the legal standard to be applied by the Committee to decide on the Stay Request (**Section 2.1**), before turning to the circumstances of the case which require a lifting of the stay (**Section 2.2**).

⁴ See Stay Request, p. 2 (paras. 6-7).

⁵ Stay Request, p. 2 (para. 6); ICSID Background Paper on Annulment 2024, at **Exhibit AL-0021**, p. 20 (para. 59).

⁶ This provision states in relevant part: “Each Contracting **State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award** within its territories as if it were a final judgment of a court in that State.” (emphasis added). See, e.g., *Churchill Mining Plc and Planet Mining Pty Ltd v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Stay of Enforcement dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (para. 38).

2.1 Legal Standard to Assess a Request to Stay Enforcement of an ICSID Award

- 11 The Stay Request is brought pursuant to Article 52(5) of the ICSID Convention and Article 54 of the ICSID Arbitration Rules.⁷ These provisions should be interpreted in light of Article 31 of the Vienna Convention on the Law of Treaties, and thus considered “in their context and in the light of [the treaty’s] object and purpose”, which includes the pro-enforcement policy of the Convention, as noted above. Of particular relevance in that regard is the binding nature of awards under Article 53(1) of the ICSID Convention.⁸
- 12 The *Churchill Mining v. Indonesia ad hoc* annulment committee⁹ recalled:

“under the Convention, **the award creditor has a right to enforcement.** Indeed, Article 53(1) of the Convention makes particularly clear that awards have *res judicata* effect and are immediately enforceable from the date on which the certified copies are dispatched to the parties. The award creditor needs to take no further step to secure the award’s enforceability besides what is stated at Article 54(2) of the Convention. **The award debtor must comply with the award.**”¹⁰
- 13 That committee further held that “[a] stay of enforcement (...) must remain **exceptional**”¹¹ and only granted “in very specific cases where the

⁷ Stay Request, p. 1 *et seq.* (paras. 1, 4, and 6-7); see, e.g., *Caratube International Oil Company LLP and Devinci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Stay of Enforcement dated 12 December 2019, at **Exhibit AL-0026**, p. 17 *et seq.* (paras. 63-66).

⁸ See *supra* footnote 2 and para. 9; see also, e.g., *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **Exhibit AL-0026**, p. 18 (paras. 67-68).

⁹ In that case, the investors had lost in the arbitration and sought to annul the award. Referring to their “dire financial condition” they requested an unconditional continuation of the stay of enforcement pending the annulment proceedings. The committee granted the stay but on condition of security in the form of a pledge.

¹⁰ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 4 (para. 34) (emphasis added, internal references omitted).

¹¹ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 4 (para. 34) (emphasis added).

circumstances so require”.¹² Similarly, the *Fuchs v. Georgia ad hoc* annulment committee stated: “[c]onsonant with the extraordinary nature of the annulment remedy, the stay of the enforcement is an **exception** to the ICSID enforcement regime.”¹³

- 14 If the party requesting the stay does not discharge its burden of proving the existence of such exceptional circumstances that warrant the continuation of the stay,¹⁴ “the award would not be stayed and is therefore enforceable.”¹⁵ It is moreover not for the respondent “to show circumstances that require the lifting of the stay.”¹⁶
- 15 *Ad hoc* annulment committees have considered the following cumulative circumstances, when deciding to grant or lift a stay of enforcement: (1) the risk of non-payment of the award if the annulment application is rejected,

¹² *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award, ICSID Case No. ARB/07/29, 22 March 2013, at **Exhibit RLA-221**, p. 26 (para. 85); see also, *Total S.A. v. Argentine Republic*, Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/04/1, 4 December 2014, at **Exhibit RLA-222**, p. 19 *et seq.* (paras. 76-80).

¹³ *Ron Fuchs v. The Republic of Georgia*, Decision of the ad hoc Committee on the Stay of Enforcement of the Award, ICSID Case No. ARB/07/15, 12 November 2010, at **Exhibit RLA-223**, p. 12 (para. 26) (emphasis added); see also, *SGS v. Paraguay*, Decision on Stay dated 22 March 2013, at **Exhibit RLA-221**, p. 26 (para. 85); *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/08/5, 31 August 2017, at **Exhibit RLA-224**, p. 22 (para. 73).

¹⁴ *Fuchs v. Georgia*, Decision on Stay dated 12 November 2010, at **Exhibit RLA-223**, p. 12 (para. 26) (“Stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant.”); see also, *Total v. Argentina*, Decision on Stay dated 4 December 2014, at **Exhibit RLA-222**, p. 20 (para. 80); *SGS v. Paraguay*, Decision on Stay dated 22 March 2013, at **Exhibit RLA-221**, p. 26 (para. 86); S.W. Schill *et al.*, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), 3rd Edition, at **Exhibit RLA-225**, p. 1413 *et seq.* (para. 740).

¹⁵ *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **Exhibit AL-0026**, p. 18 *et seq.* (paras. 69 and 76).

¹⁶ *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/14/11, 6 April 2020, at **Exhibit RLA-226**, p. 23 *et seq.* (para. 80).

(2) the risk of non-recovery if the stay is lifted and the award is annulled, and (3) the balance of hardship between the parties.¹⁷

- 16 The Applicants note that a decision to grant a stay of enforcement “should in no way be based on an assessment or prejudgment of what will be the final outcome of the annulment proceeding”.¹⁸ Romania nevertheless strongly rejects the Applicants’ assertion that their Annulment Application is “based on serious grounds”.¹⁹

2.2 The Circumstances of the Case Require Lifting the Stay of Enforcement

- 17 As described below, Romania bears a high risk of not being able to enforce the Award should the stay be maintained (**Section 2.2.1**), while Gabriel bears no risk of non-recoupment should the Award be annulled (**Section 2.2.2**). This is a fundamentally unfair situation, which should not be compounded by granting a stay, even less so a stay without security.
- 18 Upon balancing the Parties’ interests, including their ability to pursue respectively enforcement and annulment proceedings, the Committee should conclude that the stay should be lifted (**Section 2.2.3**).

2.2.1 The Applicants have confirmed the existence of a high risk (if not the certainty) of non-payment of the Award if the Annulment Application is rejected

- 19 One of the circumstances that *ad hoc* annulment committees have considered when deciding on a stay of enforcement is the risk that the party

¹⁷ *Raymond Charles Eyre and Montrose Developments (Private) Ltd. v. Sri Lanka*, ICSID Case No. ARB/16/25, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14); *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement dated 21 February 2020, at **Exhibit AL-0027**, p. 27 (para. 73); *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **Exhibit AL-0026**, p. 19 *et seq.* (para. 74); S.W. Schill *et al.*, *Schreuer’s Commentary on the ICSID Convention* (Cambridge, 2022), 3rd Edition, at **Exhibit RLA-225**, p. 1412 (paras. 738-739).

¹⁸ Stay Request, p. 3 (para. 10).

¹⁹ Stay Request, p. 3 (paras. 11-12).

that prevailed in the arbitration will ultimately not be able to enforce the award. As one committee stated:

“the attitude of the debtor is one of the reasons that can give rise to **legitimate fears of non-compliance** that would **weigh in favor of lifting the stay**.”²⁰

- 20 The risk of non-payment “must be objective and supported with evidence”.²¹ In this case, the fear is legitimate and the risk real, in particular in light of the Applicants’ conduct and statements.
- 21 The Applicants have confirmed that they do “**not have funds sufficient to satisfy the Cost Award**”.²² They allege that they have “no revenue generating assets” and have “relied entirely on [their] ability to raise capital from investors”.²³ According to the Applicants, they expected that the USD 2 million they had available as of March 2024 would be exhausted in the normal course of business by May 2024 and that the USD 3.25 million additional funds they raised subsequently would only be sufficient “through to September 2024.”²⁴
- 22 The Applicants publicly announced that “[t]here can be no assurance that additional financing will be available to the Company at any time” and stressed in their Stay Request that “there is no basis to assume that additional funding will be possible”.²⁵
- 23 The Applicants’ past conduct does not alleviate Romania’s concerns. First, as noted above, they did not even respond to Romania’s request for

²⁰ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Decision on the Applicant's Request to Continue the Stay of Enforcement of the Award, ICSID Case No. ARB/07/30, 2 November 2020, at **Exhibit RLA-227**, p. 9 (para. 45) (emphasis added).

²¹ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14); *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **Exhibit AL-0026**, p. 21 (para. 80).

²² Stay Request, p. 1 (para. 5) (emphasis added); see also p. 6 (para. 21) (“Gabriel’s lack of sufficient available funds”).

²³ Stay Request, p. 4 (para. 16).

²⁴ Stay Request, p. 5 (para. 17).

²⁵ Stay Request, p. 5 (para. 17) (quoting **A-0106**) and p. 6 *et seq.* (para. 21).

payment following the issuance of the Award.²⁶ Given the lack of voluntary compliance with the Award, and since the only identified assets of Gabriel (Jersey) in Romania were their shares in RMGC, Romania was compelled to take precautionary measures in accordance with the Romanian Fiscal Procedure Code, as it would do in the normal course of dealing with any other natural or legal person.²⁷

- 24 The Applicants allege that those measures were “unnecessary and inconsistent with applicable legal requirements.”²⁸ The Applicants do not even bother to explain why this would be the case (which they are not). Indeed, the allegation is self-serving. On 11 July 2024, the Bucharest Court of Appeal, which was seized with deciding on the action for annulment of the decision instituting the precautionary measures, dismissed Gabriel (Jersey)’s action as ungrounded.²⁹ This decision, which benefits from provisional *res judicata*, being subject to an appeal, effectively confirmed that the attachment over the shares complied with Romanian law.
- 25 Romania is thus faced with self-described and unproven impecunious award debtors with seemingly unlimited resources to challenge the Award and prevent its enforcement, which have never given any assurance that they will ultimately comply with the Award. If anything, they seem to have

²⁶ See *supra*, para. 2.

²⁷ ANAF Decision dated 29 March 2024 and Protocol of Attachment of Property, at **Exhibit A-0108** (instituting a precautionary attachment over Gabriel (Jersey)’s shares in RMGC); Letter from ANAF to RMGC dated 3 April 2024, at **Exhibit A-0111** (notifying RMGC and the Romanian Trade Registry of the precautionary attachment measure. RMGC was requested to reflect the measure in the company’s shareholder registry); Resolution No. 3442 of the Trade Registry Office attached to the Alba County Court dated 1 April 2024, at **Exhibit R-695** (ordering the publication of the precautionary attachment measure in the Trade Registry); Excerpt from website of Alba County Court re Case 1706/107/2024 dated 8 October 2024, at **Exhibit R-696** (showing the pending challenge of Gabriel (Jersey) and RMGC of the Romanian Trade Registry Resolution before the Alba County Court); Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024, at **Exhibit R-697** (dismissing as ungrounded Gabriel (Jersey)’s request to annul ANAF’s decision to institute the precautionary attachment over its shares in RMGC).

²⁸ Stay Request, p. 6 (paras. 18-20).

²⁹ Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024, at **Exhibit R-697**.

no intention of paying a penny to Romania and plan to take any and all measures to avoid payment.

2.2.2 The Applicants bear no risk of non-recoupment should the stay be lifted and the Award annulled

- 26 A second factor that *ad hoc* annulment committees have considered, as the Applicants note, is “the risk of legal uncertainty for a party having to seek recoupment of sums collected if the award is annulled.”³⁰ Here again, the risk of non-recoupment must be analyzed objectively in light of the circumstances of this case and must be supported by evidence,³¹ which the Applicants have failed to provide.
- 27 The Applicants merely allege that “there are no evident means available to the Applicants to recover from Romania monies or assets taken in the event enforcement of the Cost Award is not stayed and the Award thereafter is annulled”.³² However, the Applicants have provided no evidence that Romania would not reconstitute the funds, in the event the Award is annulled (which, in any case, would be entirely unjustified as Romania will demonstrate in these proceedings).
- 28 The Applicants do not face any risk of non-recoupment should the stay be lifted and the Award annulled.
- 29 The Applicants are obviously well acquainted with Romanian enforcement law, which regulates situations where the enforcement title (here, the Award) is annulled subsequent to the commencement of enforcement.
- 30 The relevant provisions are contained in the Romanian Code of Civil Procedure, Book V (“On Enforcement”), Chapter VII (“Unwinding of Enforcement”).
- 31 Pursuant to these provisions, in all cases where the enforcement title is annulled, the concerned person is entitled to apply to the enforcement

³⁰ Stay Request, p. 8 (para. 26).

³¹ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14).

³² Stay Request, p. 8 *et seq.* (para. 27).

court to have the enforcement unwound and the situation restored as it was before the enforcement. Restoration of the situation prior to enforcement is governed by the rule of *restitutio in integrum*.³³

- 32 The Applicants are therefore entitled under Romanian enforcement law to restitution in full in the event that the stay is lifted and the Award annulled.

2.2.3 Looking at the balance of hardships, the Stay should be lifted

- 33 In deciding on the continuation or lifting of a stay, *ad hoc* annulment committees must “balance the potential prejudice that each party would suffer if the stay is maintained or terminated.”³⁴ In other words, they must:

“balanc[e] the consequences of the enforcement of the Award on the Applicants’ situation and those of the postponement of the Respondent’s right to payment of the Award.”³⁵

- 34 The Respondent strongly disagrees with the Applicants’ proposition that the “[b]alance of [i]nterests [s]trongly [s]upport [c]ontinuation of the [s]tay”.³⁶ Romania is the party at risk of being most prejudiced.
- 35 The Applicants rely on *Eyre v. Sri Lanka*, in which the *ad hoc* annulment committee maintained the stay, to argue that applicants which “lack[] sufficient funds to satisfy the award” have a clear interest to a continued stay when “enforcement would cause **significant financial harm**.”³⁷ However, the “non-availability of funds” was not the only element considered by that committee, which also noted that the “prejudice [would

³³ Article 723 of the Romanian Code of Civil Procedure dated 1 July 2010, at **Exhibit R-698**.

³⁴ *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **Exhibit AL-0026**, p. 25 (para. 96).

³⁵ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 5 *et seq.* (para. 36).

³⁶ Stay Request, p. 7 *et seq.* (Section II.C).

³⁷ Stay Request, p. 7 (para. 24) (referring to *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14) (emphasis added)).

go] **beyond the inherent or normal effects of an adverse ICSID award** subject to/pending annulment proceedings.”³⁸

- 36 In this case, the two reasons that the Applicants invoke to argue that they would “be seriously prejudiced without a continued stay of enforcement”³⁹ do not establish such a high level of harm.
- 37 As a preliminary comment, the Applicants refer to the “size of the Cost Award and Gabriel’s lack of sufficient available funds”. To recall, Gabriel was ordered to pay Romania approximately USD 10 million to cover Romania’s share of the arbitration costs and a portion of its legal fees.⁴⁰ This figure represents a fraction of the professional fees (attorneys, witness, and expert fees) that Gabriel apparently had at its disposal for the arbitration, namely over USD 60 million.⁴¹
- 38 **The first argument** that the Applicants make is that enforcement “risks undermining [their] ability to pursue the annulment remedy” and thus frustrating their right of “access to justice”.⁴²
- 39 Yet, the Applicants do not explain how their right of access to justice would be frustrated by Romania’s enforcement measures. They have already paid the advance on the ICSID fees (USD 200,000) and confirmed having set aside an undisclosed amount of “legal fees” purportedly required for the Annulment Application. Furthermore, they made these payments prior to the stay of enforcement. Stated differently, they did not need the stay to be able to allocate funds to their Annulment Application.

³⁸ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 5 *et seq.* (para. 14) (quoting para. 94 of the decision on the stay of enforcement) (emphasis added). This test was also applied by other *ad hoc* annulment committees: *Perenco v. Ecuador*, Decision on Stay dated 21 February 2020, at **Exhibit AL-0027**, p. 27 *et seq.* (para. 76); see also, *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 5 (para. 35) (“The financial situation of the award debtor is a circumstance which may justify a stay **if enforcement would have manifestly excessive consequences.**”) (emphasis added).

³⁹ Stay Request, p. 6 (para. 21).

⁴⁰ See Stay Request, p. 1 (para. 3) (listing the amounts awarded under the Award) (converted at the rate applicable on 8 March 2024); Award, p. 359 (para. 1357).

⁴¹ Award, p. 359 (para. 1355).

⁴² Stay Request, p. 8 (para. 25) (referring to *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (para. 38)).

The same financing sources which funded Gabriel to the tune of USD 60 million will continue to do so. This comes at great cost not only to Gabriel, but also to Romania which must defend itself in these annulment proceedings. The most recent example is their motion of 30 October 2024 to remove one of the Committee Members, Prof. Dr. Maxi Scherer.

- 40 The Applicants then note that “assuming a stay”, they would have “sufficient cash to (...) advanc[e] the ICSID annulment proceedings through to September 2024.”⁴³ They do not explain what happens thereafter, other than questioning their ability to raise more funds.⁴⁴
- 41 Nevertheless, the Applicants recognize that they have the ability to raise funds and that they “will continue [their] efforts to raise further funding.”⁴⁵ In any event, it is not for Romania to show how the Applicants can access funds.
- 42 Moreover, the Applicants do not explain how the enforcement actions taken against RMGC in Romania, including as regards the land, bears any impact on the Applicants or their ability to proceed with their Annulment Application.
- 43 **The second argument** raised by the Applicants is that “enforcement of the Cost Award risks placing the Applicants into insolvency”, which

⁴³ Stay Request, p. 5 (para. 17) (quoting A-0106).

⁴⁴ See *supra*, paras. 21 and 22 above.

⁴⁵ Stay Request, p. 5 *et seq.* (paras. 17 and 21). Romania also recalls that Gabriel had sought third party funding from Tenor Capital in the arbitration, and that Tenor Capital entered Gabriel Canada’s capital as a shareholder. See, *e.g.*, Gabriel Resources Press Release, 2016 *Second Quarter Report* dated 29 July 2016, at **Exhibit C-2847**, p. 1 (noting that “[o]n July 14, 2016, the Company completed the previously announced non-brokered private placement financing to raise \$40.625 million (‘Private Placement’). The proceeds from the Private Placement will be used for the ICSID Arbitration and for general working capital requirements. Mr. David Kay has been appointed to the Board of the Company with effect from July 29, 2016 as a nominee of Tenor International & Commercial Arbitration Fund (‘Tenor’), associated with the principal investor in the Private Placement.”). See also Letter from Claimants to ICSID dated 20 February 2018, at **Exhibit A-0003**, p. 2 (noting that “Tenor Capital Management LP is also a major investor in Gabriel”).

“would have catastrophic, immediate, and irreparable effects on RMGC.”⁴⁶

- 44 First, as a matter of Romanian law, RMGC would not be affected in the event of Gabriel Jersey’s (or Gabriel Canada’s) insolvency. RMGC is a separate entity from its shareholders. The Applicants do not put forth any reason to question the financial solvency of RMGC or the allegation that RMGC would benefit from no other source of funding than Gabriel.⁴⁷
- 45 Second, as a matter of funding the future activities of RMGC, the prospect of such funding coming from Gabriel cannot be “irreparably lost”,⁴⁸ since such a prospect does not appear to even exist. On the Applicants’ own public statements, “[t]here can be no assurance that additional financing will be available to the Company at any time”,⁴⁹ irrespectively of whether the stay is lifted or not.
- 46 The Applicants have thus not met the burden of proving how Romania’s enforcement of the Award would cause the Applicants to incur “harm beyond the inherent or normal effects of an adverse ICSID award”.⁵⁰ Quite the contrary, the Applicants’ position underscores the Respondent’s concerns.⁵¹ The Applicants allege that if the Award is upheld, “Romania will not suffer any harm or prejudice from a continued stay” because it will be entitled to the interest accrued during the duration of the annulment proceedings.⁵² However, that entitlement in principle to compensation does not provide any meaningful comfort in the present circumstances, also considering the costs that Romania will incur in connection with these proceedings.
- 47 The continuation of the stay pending the annulment proceedings would unduly advantage the Applicants, as their payment obligations under the Award would be postponed until the Committee decides whether to uphold

⁴⁶ Stay Request, p. 7 (paras. 22-23).

⁴⁷ Stay Request, p. 7 (para. 23).

⁴⁸ Stay Request, p. 7 (para. 23).

⁴⁹ Gabriel Resources Ltd. Press Release dated 8 July 2024, at **Exhibit A-0106**.

⁵⁰ See footnote 38 above.

⁵¹ See **Section 2.2.1** above.

⁵² Stay Request, p. 9 (para. 28).

the Award. Romania, on the other hand, would incur costs in opposing the Annulment Application and any procedural motion the Applicants may come up with during the process (the latest example being the attack on Committee Member Prof. Dr. Maxi Scherer), with no clear avenues ever to enforce the Award.

- 48 **Finally, the Applicants do not try to explain their failure to date to comply with the Award, nor do they commit to doing so voluntarily, promptly and in full should the Committee uphold the Award.** The Applicants' failure to even acknowledge the risk that Romania may not be able to enforce the Award, after having incurred further costs relating to these annulment proceedings, further illustrates the disproportionate effects of a continued stay on Romania. The parties' acknowledgment of the risk of non-compliance with the award (including the award debtors' lack of intention to voluntarily comply with the award) was a circumstance considered by *ad hoc* annulment committees when deciding whether a stay is required.⁵³
- 49 As a result, upon balancing the considerations put forward by the Parties, the Committee should lift the stay.

3 IN THE ALTERNATIVE, ANY CONTINUATION OF THE STAY MUST BE CONDITIONED ON THE APPLICANTS' POSTING OF SECURITY

- 50 Should the Committee decide to further stay enforcement of the Award, it should condition the stay on the Applicants posting financial security.

⁵³ *Perenco v. Ecuador*, Decision on Stay dated 21 February 2020, at **Exhibit AL-0027**, p. 28 (paras. 77-78) ("securing voluntary compliance by Ecuador if the stay is maintained and the Award is not annulled, and securing reimbursement by Perenco if the award is annulled, **are elements that have a serious bearing on the circumstances it must weigh to determine if the stay shall be maintained**") (emphasis added); see also, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, ICSID Case No. ARB/12/23, 23 February 2018, at **Exhibit RLA-228**, p. 42 (para. 143) ("Given these circumstances and past conduct, the Committee would distort the balance of the Parties' interests as established in the ICSID Convention if it granted a continuation of the stay, in light of the prognosis on future conduct of non-compliance in the eventuality of the rejection of the annulment application.").

- 51 An *ad hoc* annulment committee’s power to order security “follows from the inherent powers of *ad hoc* committees to conduct the proceedings.”⁵⁴ Furthermore, ICSID statistics show that when committees granted a stay of enforcement, it was usually under provision of “some type of security or written undertaking”.⁵⁵
- 52 The power to order security is in line with the above-mentioned “pro-enforcement policy of the [ICSID] Convention”.⁵⁶ In the words of the *Churchill v. Indonesia ad hoc* annulment committee, “[t]he need for posting security must be ascertained in relation to **securing an effective enforcement of the award**.”⁵⁷
- 53 To decide whether to condition a stay, *ad hoc* annulment committees have assessed two factors, namely (i) the legitimate risk of non-enforcement of the award, and (ii) the applicant’s access to justice.⁵⁸ More specifically, committees have considered the same factual circumstances as when deciding on a stay of enforcement, such as:
- the risk of non-payment of the award⁵⁹ (addressed in **Section 2.2.1** above);

⁵⁴ *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement dated 21 February 2020, at **Exhibit AL-0027**, p. 28 *et seq.* (para. 79). Rule 73(4) introduced in the 2022 ICSID Arbitration Rules expressly provides that “If a (...) Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.”

⁵⁵ ICSID Background Paper on Annulment 2024, at **Exhibit AL-0021**, p. 21 (paras. 60 and 63) and p. 23 (table listing the decisions on the stay of enforcement of awards including an indication of the condition for stay).

⁵⁶ See *supra*, para. 9.

⁵⁷ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (paras. 38-39) (emphasis added).

⁵⁸ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (paras. 37-38).

⁵⁹ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (para. 37) (“The conditioning of a stay of enforcement is justified when there are legitimate fears of nonenforcement.”); *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14); *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/15/44, 28 June 2021, at **Exhibit RLA-229**, p. 22 (para. 66).

- the risk of non-recoupment⁶⁰ (addressed in **Section 2.2.2** above);
 - whether the applicant gave any undertakings as to the availability of funds,⁶¹ or provided other forms of assurance of their ability and willingness to comply with the award⁶² (addressed in **Section 2.2.3** above);
 - the amount owed under the award⁶³ (addressed in **Section 2.2.3** above);
and
 - the risk of potential considerable strain (financial or otherwise) on the applicant⁶⁴ (addressed in **Section 2.2.3** above).
- 54 As a condition for staying enforcement, *ad hoc* annulment committees have ordered the posting of financial security for the full amount owed under the underlying award, including interest. Such security was ordered in the form of a security bond or an unconditional and irrevocable bank guarantee issued by an internationally respected bank.⁶⁵

⁶⁰ *Watkins Holdings et al. v. Spain*, Decision on Stay dated 28 June 2021, at **Exhibit RLA-229**, p. 22 (para. 66).

⁶¹ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14).

⁶² *Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania*, Decision on the Applicant's Request for the Continuation of the Provisional Stay of Enforcement of the Award, ICSID Case No. ARB/14/26, 10 August 2021, at **Exhibit RLA-230**, p. 46 *et seq.* (para. 118); *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 *et seq.* (paras. 40-42).

⁶³ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14).

⁶⁴ *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **Exhibit AL-0029**, p. 4 *et seq.* (para. 14); *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **Exhibit AL-0024**, p. 6 (para. 38).

⁶⁵ *E.g., Joseph Charles Lemire v. Ukraine*, Decision on Ukraine's Application for Annulment of the Award, ICSID Case No. ARB/06/18, 8 July 2013, at **Exhibit RLA-231**, p. 11 (paras. 51-52); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, Decision on Applicant's Request for a Continued Stay on Enforcement of the Award, ICSID Case No. ARB/10/20, 12 April 2017, at **Exhibit RLA-232**, p. 26 (para. 88); *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, Decision on Annulment, ICSID Case No. ARB/12/35, 17 September 2020, at **Exhibit RLA-233**, p. 6 *et seq.* (para. 39); see also *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), ICSID Case No. ARB/02/16, 5 March 2009, at **Exhibit RLA-234**, p. 18

- 55 The provision of security is particularly warranted where there is a considerable risk that the applicant will not comply with the award,⁶⁶ such as in the present case. Romania emphasizes that the requested security would not even cover the costs it will have to incur to defend itself in the present proceedings, with no guarantee of ever being able to recover those amounts from the Applicants.
- 56 The Applicants should therefore be required to deposit the amount of the Award, namely USD 1,437,574.01, EUR 1,154,774.34, RON 30,284,053.32, and USD 928,641.70, into an escrow account, under the control of the Committee pending outcome of the annulment proceedings. The amount placed into escrow should also include interest from the date of the Award, calculated to take into account the potential duration of the annulment proceedings. Based on a calculation of USD 46,000 of interest per month (an amount which the Applicants do not dispute),⁶⁷ times 36 months (the potential duration of these proceedings),⁶⁸ this would come to USD 1,156,000.
- 57 Should Gabriel fail to provide the requested security by the date indicated in the Committee’s decision, which should not exceed 30 days from the date of the decision, the continued stay of enforcement should automatically be lifted.⁶⁹

(paras. 110 and 114) (ordering the payment into escrow of two thirds of the amount awarded in the arbitration after considering that this would provide the “appropriate assurances that compliance [with the award] will take place in the future”).

⁶⁶ See *Sempra Energy v. Argentina*, Decision on Stay dated 5 March 2009, at **Exhibit RLA-234**, p. 16 (para. 95).

⁶⁷ Letter from Romania to Gabriel dated 21 March 2024, at **Exhibit A-0107**, p. 2 (noting “interest will continue to accrue as from the date of the Award at the rate of 5.24%, which currently amounts to roughly USD 46,000 per month.”); Stay Request, p. 1 (para. 3) (indicating the same monthly interest figure).

⁶⁸ Out of an abundance of caution, Romania estimates that the present proceedings will last slightly longer than the average duration of ICSID annulment proceedings. ICSID Background Paper on Annulment 2024, at **Exhibit AL-0021**, p. 29 (noting that “The average duration of all annulment proceedings that concluded between April 16, 2016, and December 31, 2023, is 26 months from the date of registration (...”).

⁶⁹ See, e.g., *Lemire v. Ukraine*, Decision on Annulment dated 8 July 2013, at **Exhibit RLA-231**, p. 12 (paras. 56-57) (“By letter of March 28, 2012, Ukraine manifested that it was not in a

4 PRAYERS FOR RELIEF

- 58 For the foregoing reasons, Romania respectfully requests that the Committee:
- i) Dismiss the Stay Request and terminate the provisional stay of enforcement;
 - ii) In the alternative,
 - condition any further stay of enforcement on the posting of security in the amount of the Award, plus interest as calculated above at paragraph 56;
 - hold that, should the Applicants not comply with this condition within 30 days of the Committee’s decision, the stay on enforcement will be automatically terminated;
 - iii) Order the Applicants to bear the costs related to the Stay Request, including the legal fees Romania incurred to defend it.

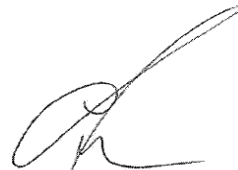
Respectfully submitted,

1 November 2024

For and on behalf of Romania,



Matthias Scherer
Lorraine de Germiny
Emilie McConaughey
Isabel San Martín



Crenguța Leaua
Andreea Simulescu
Liliana Deaconescu
Corina Tănase
Andra Soare-Filatov

position to provide a bond in accordance with the conditions of the Decision on the Stay, within the available time and in light of the relevant legislation (...). On April 2, 2012, the Committee notified Procedural Order No. 2 to the Parties, confirming the termination of the stay.”); *SAUR International v. Argentine Republic*, Decision on the Argentine Republic’s Application for Annulment, ICSID Case No. ARB/04/4, 19 December 2016 (Spanish original with unofficial partial translation), at **Exhibit RLA-235**, p. 1 (para. 13) (“No such declaration having been submitted, the stay of enforcement of the Award was automatically lifted on 1 April 2016”).

RESPONDENT'S LIST OF FACTUAL EXHIBITS

Exhibit No.	Description	Date
R-695	Resolution No. 3442 of the Trade Registry Office attached to the Alba County Court	1 April 2024
R-696	Excerpt from website of Alba County Court re Case 1706/107/2024	8 October 2024
R-697	Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024	
R-698	Article 723 of the Romanian Code of Civil Procedure	1 July 2010

RESPONDENT'S LIST OF LEGAL AUTHORITIES

Exhibit No.	Description
RLA-221	<i>SGS Société Générale de Surveillance S.A. v. Republic of Paraguay</i> , Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award, ICSID Case No. ARB/07/29, 22 March 2013
RLA-222	<i>Total S.A. v. Argentine Republic</i> , Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/04/1, 4 December 2014
RLA-223	<i>Ron Fuchs v. The Republic of Georgia</i> , Decision of the ad hoc Committee on the Stay of Enforcement of the Award, ICSID Case No. ARB/07/15, 12 November 2010
RLA-224	<i>Burlington Resources, Inc. v. Republic of Ecuador</i> , Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/08/5, 31 August 2017
RLA-225	S.W. Schill <i>et al.</i> , <i>Schreuer's Commentary on the ICSID Convention</i> (Cambridge, 2022), 3 rd Edition
RLA-226	<i>NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain</i> , Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/14/11, 6 April 2020

RLA-227	<i>ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela</i> , Decision on the Applicant's Request to Continue the Stay of Enforcement of the Award, ICSID Case No. ARB/07/30, 2 November 2020
RLA-228	<i>Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela</i> , Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, ICSID Case No. ARB/12/23, 23 February 2018
RLA-229	<i>Watkins Holdings S.à r.l. and others v. Kingdom of Spain</i> , Decision on Stay of Enforcement of the Award, ICSID Case No. ARB/15/44, 28 June 2021
RLA-230	<i>Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania</i> , Decision on the Applicant's Request for the Continuation of the Provisional Stay of Enforcement of the Award, ICSID Case No. ARB/14/26, 10 August 2021
RLA-231	<i>Joseph Charles Lemire v. Ukraine</i> , Decision on Ukraine's Application for Annulment of the Award, ICSID Case No. ARB/06/18, 8 July 2013
RLA-232	<i>Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited</i> , Decision on Applicant's Request for a Continued Stay on Enforcement of the Award, ICSID Case No. ARB/10/20, 12 April 2017
RLA-233	<i>Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria</i> , Decision on Annulment, ICSID Case No. ARB/12/35, 17 September 2020
RLA-234	<i>Sempra Energy International v. Argentine Republic</i> , Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), ICSID Case No. ARB/02/16, 5 March 2009

RLA-235	<i>SAUR International v. Argentine Republic</i> , Decision on the Argentine Republic's Application for Annulment, ICSID Case No. ARB/04/4, 19 December 2016 (Spanish original with unofficial partial translation)
---------	--