INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

*Applicants*

**V.**

**ROMANIA**

*Respondent*

ICSID CASE NO. ARB/15/31

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# APPLICANTS' REPLY ON ANNULMENT

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September 1, 2025

WHITE & CASE LLP

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TABLE OF CONTENTS

# I. INTRODUCTION

1. Applicants submit this Reply in response to the Counter-Memorial on Annulment in accordance with the Procedural Calendar set forth in Annex B to Procedural Order No. 1 dated February 11, 2025.[1]

2. The evidence shows that Prof. Douglas undertook undisclosed client work during the arbitration for Friends of the Earth, one of the main organizations both fighting to stop the Roşia Montană Project and lobbying specifically against Gabriel's arbitration claims. That undisclosed client advocacy while Prof. Douglas served on the Tribunal, as well as additional undisclosed factors, cast doubt on Prof. Douglas' appearance of independence and impartiality and fatally undermined the proper constitution of the Tribunal.

3. The necessary conclusion is that the Award must be annulled in its entirety on the grounds set forth in Articles 52(1)(a) and 52(1)(d) of the ICSID Convention.

4. Respondent's principal argument in response, that the circumstances relating to Prof. Douglas were known to Claimants, is false and unfounded. Prof. Douglas failed to disclose material facts and circumstances that were unknown to Claimants. Respondent's arguments incorrectly assume that parties have an obligation to continuously investigate members of a tribunal, a duty that does not exist. The ICSID system does not impose such an unworkable requirement on the parties and instead obligates arbitrators to investigate and disclose circumstances that the parties might consider relevant. Particularly where an arbitrator elects to maintain a practice working as counsel, it is incumbent upon the arbitrator to disclose so that the parties may raise any potential doubts about independence or impartiality.

5. In this case, the circumstances relating to Prof. Douglas seriously undermined the integrity of the arbitration and must lead to annulment. As such, the Committee need not reach Applicants' application for partial annulment.

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[1] Abbreviations and terms used in the Memorial on Annulment dated April 3, 2025 ("Memorial on Annulment") have the same meaning in this Reply.

6. Nevertheless, the majority's liability decision suffers from multiple serious defects that warrant annulment on the grounds set forth in Articles 52(1)(b), 52(1)(d), and 52(1)(e). Nothing in Respondent's Counter-Memorial demonstrates otherwise.

7. Respondent argues that the number of defects identified indicates that the grounds are not serious. To the contrary, the grounds for annulment are numerous because the defects in the Award are manifold. To streamline this proceeding and to assist the Committee, Applicants have deliberately focused their pleadings on the most critical defects.

8. Respondent has sought to respond on all points, including those Applicants did not carry forward from their Application to the Memorial. For the avoidance of doubt, Applicants reject Respondent's characterizations of the record in doing so as well as Respondent's submissions on each of those points. Applicants, however, will continue to focus on the most fundamental defects that mandate annulment, as detailed in the Memorial on Annulment and in this Reply.

9. Respondent points to the duration of the arbitration, the size of the record, and the number of pages in the Award as evidence of the integrity of the process. Such observations, however, are no response to the failures of the majority to comply with its mandate, or to the flaws in the process that undermined the integrity of the arbitration, and provide no excuse for the majority depriving Gabriel of fair consideration of its claims.

10. Applicants described the background to this case in their Application and in the Memorial on Annulment.[2] Applicants respond below to the several background comments made by Respondent in the Counter-Memorial.

11. First, Applicants observed that Gabriel invested over US$760 million advancing development of the Roşia Montană and Bucium mining projects. Respondent contends that fact was "unsubstantiated," but that is not so.[3] Respondent is correct, however, that

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[2] Annulment Application ¶¶ 16-40; Memorial on Annulment ¶¶ 113-131.

[3] The evidence of Gabriel's expenditures was detailed in Gabriel Canada's financial statements, analyzed in the expert report of Compass Lexecon, and addressed by Respondent's expert CRA. *E.g.*, Compass Lexecon ¶ 24 ("Gabriel Canada has provided all of the funding for RMGC's activities since RMGC's incorporation in 1997, and has invested approximately US$ 760 million through the end of 2016."); CRA Report dated

this point, remarkably, is not mentioned in the Award, other than where the majority recognized that Claimants "made substantial investments in this Project that regrettably did not materialize."[4]

12. Second, among the serious departures from fundamental rules of procedure that undermined the integrity of the majority's liability decision, the majority failed to address key evidence relied upon by Claimants, including the video-taped admission of Prime Minister Ponta, the head of Government who stated on its behalf that, by rejecting mining at Roşia Montană, the State was "basically performing a nationalization."[5] Respondent argues that Claimants misinterpret the Prime Minister's meaning.[6] There is, however, no mistaking Mr. Ponta's statements; they are clear and are memorialized in the full videotape and transcript of his interview exhibited in the arbitration.[7] On annulment, however, the issue is not what Mr. Ponta meant (although his meaning was clear), but rather the fact that Claimants relied on his statement as significant evidence and it was not even mentioned let alone addressed by the majority.

13. Third, Applicants address briefly below and further in this Reply what Respondent describes as four "themes" relating to the dispute.

    a. The first is the permitting procedure or "EIA Process" that by law should have led to a decision on the Environmental Permit for the Roşia Montană Project. Indeed, a major defect in the liability decision is the majority's failure to address the fundamental basis of the claims presented – Romania's failure to issue any decision in the environmental permitting procedure for the Roşia Montană Project or any

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Feb. 22, 2018 ¶¶ 166-169. Romania itself acknowledged on national television in 2013 that RMGC, Gabriel's joint venture with the State, invested US$550 million to develop the Project. Claimants' Post-Hearing Brief dated Feb. 18, 2021 ¶ 442 (quoting **C-643**, video of a press conference on national television in 2013 where Prime Minister Ponta states RMGC invested "about 550 million" to develop the Project and Minister Sova states, "The investments carried out and certified by the investor Roşia Montană Gold Corporation together with Gabriel Resources amount to 550 million dollars.").

4 Award ¶ 1320.

5 Memorial on Annulment ¶ 213.

6 Counter-Memorial on Annulment ¶ 22.

7 *See infra* ¶¶ 241-242; *Interview with Prime Minister Victor Ponta* Antena 3 dated Sept. 11, 2013 (**C-437**).

decision on RMGC's Bucium Applications. Respondent argues that the majority addressed the issue by finding that the conditions were not met to issue such decisions.[8] That is incorrect – the majority framed the issue as requiring it to consider only whether the debates in the TAC meetings conducted during the EIA Process were reasonable. The result was that the majority failed to address the fact that the State abandoned the pending procedures without ever completing them and without taking any decision, thereby denying Claimants due process on a fundamental aspect of their claim and failing to apply the applicable law – both serious failures warranting annulment.

b. The second relates to the evidence presented, that the State coercively linked issuance of the Environmental Permit for the Roşia Montană Project to the State's demand to revise the Project economics in favor of the State. While Respondent observes that the majority found there was no coercion,[9] the issue that should lead to annulment is that the majority's conclusion was predicated upon its disregard of the law applicable to Gabriel's investment, according to which Gabriel's established rights in the Project economics were not open to be renegotiated. The majority also failed to engage with key evidence relied upon by Gabriel in support of this significant aspect of the case, materially depriving Claimants of due process.

c. The third relates to the Draft Law that the Government submitted to Parliament with numerous public statements that Parliament's vote on the Draft Law would decide whether the Roşia Montană Project would be done. Respondent observes that the Draft Law included provisions that would have assisted the Project and that the majority found Parliament's rejection of the Draft Law did not mandate rejection of the Project or breach the BITs, asserting that "discussions" continued thereafter "in accordance with Romanian law."[10] In fact, however, the majority did not state anywhere that the several subsequent TAC meetings held following rejection of the

[8] Counter-Memorial on Annulment ¶¶ 25-29.

[9] Counter-Memorial on Annulment ¶¶ 30-31.

[10] Counter-Memorial on Annulment ¶¶ 32-33.

Draft Law were "in accordance with Romanian law." In any event, the issue requiring annulment is that, notwithstanding the above, the majority failed to address Claimants' claim, which was based in significant part on the fact that the Government simply stopped the permitting process without issuing any decision at all.

d. The fourth theme relates to what the majority addressed in the category of "post-2013 events." Respondent observes that the majority addressed certain cultural heritage protection issues, including listing the entire Roşia Montană Project site on Romania's List of Historical Monuments, and the inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site.[11] The issue requiring annulment, however, is the majority's failure to state reasons for its conclusion that the inscription of the Roşia Montană Mining Landscape as a protected UNESCO site would not impact the ability to do the Project, as well as the majority's failure, in considering "post-2013" events, to address Claimants' claim that the post-2013 events included the ongoing failure to issue any administrative decision in the EIA Process for Roşia Montană or to take any decision on the Bucium Applications.

14. There is no dispute that the finality of awards is an essential feature of ICSID arbitration and that the annulment procedure is not an appeal. There also, however, can be no dispute that annulment is a necessary remedy included in the ICSID Convention to safeguard the fundamental fairness and integrity of the underlying arbitration.[12] As such, there is no basis to argue that the grounds set forth in Article 52 should be restrictively interpreted as Respondent seems to argue. Rather, they must be interpreted in good faith consistent with their object and purpose.[13]

15. ICSID Convention Article 52 is a control mechanism that performs an essential function in the system of ICSID arbitration. As the *Perenco v. Ecuador* committee observed, "the degree of inquiry and analysis that an *ad hoc* committee must undertake to determine if

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[11] Counter-Memorial on Annulment ¶ 34.

[12] *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment dated May 28, 2021 ("*Perenco Ecuador v. Ecuador"*) (**AL-80**) ¶ 59.

[13] *Perenco Ecuador v. Ecuador* (**AL-80**) ¶ 57.

one or more of the annulment grounds have been engaged is not merely a superficial or formal one."[14]

16. The grounds supporting annulment of the Award in this case are substantial and serious. For the reasons set out in this Reply and in the Memorial, Respondent's observations do not detract from the inevitable conclusion that the Award must be annulled.

## II. THE ENTIRE AWARD MUST BE ANNULLED ON THE GROUNDS OF ICSID CONVENTION ARTICLES 52(1)(A) AND 52(1)(D)

17. The entire Award must be annulled under Articles 52(1)(a) and 52(1)(d) of the ICSID Convention because the Tribunal was not properly constituted and because the lack of a properly constituted Tribunal was a serious departure from fundamental rules of procedure.[15]

### A. The Tribunal Was Not Properly Constituted Because a Reasonable and Informed Third Party Could Justifiably Doubt Prof. Douglas' Impartiality and Independence

18. A reasonable and informed third party could justifiably doubt Prof. Douglas possessed the requisite impartiality and independence for five separate reasons.

a. While he sat as arbitrator deciding Gabriel's claims against Romania in this case, Prof. Douglas simultaneously acted as lead counsel for Friends of the Earth, a zealous and long-standing public opponent of Gabriel and its arbitration claims against Romania. Prof. Douglas thus took on a client that made repeated (false) public accusations against Gabriel, that petitioned Government officials in Romania, Hungary, Canada, and the United Kingdom to withdraw support for the Roşia Montană Project and to intervene in this arbitration against Gabriel, and that advocated that this arbitration exemplified the need to end all investor-State arbitration.[16] Prof. Douglas never disclosed he had taken on

[14] *Perenco Ecuador v. Ecuador* (**AL-80**) ¶ 62.

[15] Memorial on Annulment § II.

[16] Memorial on Annulment ¶¶ 27-37, 51-58.

Friends of the Earth as a client and thus deprived Claimants and the other Tribunal members of any opportunity to address it.[17]

b. While Prof. Douglas represented Friends of the Earth, and while he sat on the Tribunal in this arbitration, Prof. Douglas' Matrix Chambers colleagues, led by Jessica Simor KC, his co-lead counsel in the Friends of the Earth case, also represented Friends of the Earth together with ClientEarth, one of the entities that intervened in this arbitration to make a Non-Disputing Parties' Submission urging the Tribunal to dismiss Gabriel's claims.[18] Prof. Douglas failed to disclose that representation even though Matrix Chambers markets itself by emphasizing its teamwork and cooperation in delivering legal services and that all its members work together equally to run Matrix Chambers.[19]

c. During the arbitration, Respondent's arbitration counsel LALIVE provided material and financial support as a principal sponsor and partner of the MIDS program that Prof. Douglas administers, including by contributing the "LALIVE Scholarship" that pays the full tuition and expenses for MIDS students.[20] Prof. Douglas failed to disclose any of the material and financial support that LALIVE provided to MIDS.[21]

d. Prof. Douglas applied for and obtained Swiss nationality during the arbitration, creating an imbalance among the Tribunal members and undermining the appearance of neutrality on the Tribunal. Prof. Douglas failed to disclose his application for or acquisition of Swiss nationality.[22]

e. By failing to disclose these matters, Prof. Douglas repeatedly breached his obligation of disclosure under ICSID Arbitration Rule 6(2). His multiple

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17 Memorial on Annulment ¶¶ 59-72.

18 Memorial on Annulment ¶¶ 38-58.

19 Memorial on Annulment ¶¶ 59-72.

20 Memorial on Annulment ¶¶ 74-86.

21 Memorial on Annulment ¶¶ 87-94.

22 Memorial on Annulment ¶¶ 95-100.

> failures to comply with his disclosure obligations are an alternative ground for annulment and must be assessed cumulatively as they were all in circumstances that could be perceived as adverse to Claimants.[23]

19. Thus, the central question on annulment is whether a reasonable and informed third party could justifiably doubt that Prof. Douglas lacked the requisite appearance of independence and impartiality for any of these reasons, either individually or cumulatively.

20. Respondent argues that "all of the issues of which the Applicants now complain were either known or should have been known to them at the time."[24] That is false. Applicants had no knowledge during the arbitration of the relevant facts and circumstances because Prof. Douglas repeatedly breached his disclosure obligations under ICSID Arbitration Rule 6(2).

21. Rule 6(2) puts the burden on the arbitrators – not the Parties – to investigate and disclose facts and circumstances that may appear relevant to a Party.[25] Applicants reasonably relied on the disclosure made by Prof. Douglas and had no obligation or reason to spend resources and time throughout the arbitration investigating him.[26] The facts and circumstances now at issue were not known by Applicants until after the Award revealed that Prof. Douglas had acquired Swiss nationality – a revelation that plainly showed material disclosures had not been made and that additional investigation was required.[27]

22. Respondent asserts that this ground for annulment is "a disguised appeal on the merits."[28] That is wrong for the same reasons described by the *Rockhopper v. Italy* committee:

> When, as here, an arbitrator's disclosure and qualifications are said to be called into question by newly discovered facts, however, there is no risk of second guessing the tribunal to be guarded against. There is nothing to second guess. In a case like this one, annulment is not an appeal in an even

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23 Memorial on Annulment ¶¶ 101-102.

24 Counter-Memorial on Annulment ¶ 59. *Id.* ¶ 5 (asserting Applicants' objections "are based on facts that they have known for years").

25 Memorial on Annulment ¶¶ 59-66; *infra* ¶¶ 43-53.

26 *See* Memorial on Annulment ¶¶ 89-92.

27 Application for Annulment ¶ 70; Memorial on Annulment ¶ 68.

28 Counter-Memorial on Annulment § 4.

> more fundamental sense than in most annulment proceedings – with respect to the Article 52(1)(a) request, it is not just that the tribunal's decision is not to be reviewed for its substantive correctness. There is no decision in the underlying arbitration to be reviewed at all.[29]

23. Applicants first address below Respondent's comments on the legal standard and then turn to each reason that the Tribunal was not properly constituted in this case.

### 1. The Legal Standard Is Whether a Reasonable and Informed Third Party Could Justifiably Doubt the Arbitrator's Independence or Impartiality at Any Point During the Arbitration

24. A Tribunal is not properly constituted where a reasonable and informed third party could justifiably doubt an arbitrator's impartiality or independence at any point during the arbitration.[30] Respondent argues that Applicants purportedly "omitted to address" "key aspects of the legal standard."[31] Respondent, however, seriously mischaracterizes the applicable standard.

#### a. All Arbitrators Must Be – and Must Appear to Be – Impartial and Independent Throughout the Arbitration

25. It is common ground between the Parties that the ICSID Convention "requires both independence and impartiality" for all arbitrators.[32] Those qualities are not assessed generally or in the abstract, but "case by case, taking account of any relationships and other circumstances pertinent for each particular case," as all arbitrators "must be free from favoritism, or animus, that could bear upon the decision making in the case, whether due

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[29] *Rockhopper et al. v. Italy*, ICSID Case No. ARB/17/14, Decision on Annulment of June 2, 2025 ("*Rockhopper v. Italy*") (**RAL-30**) ¶ 359.

[30] Memorial on Annulment ¶¶ 14-23.

[31] Counter-Memorial on Annulment ¶ 66; *id.* ¶¶ 67-84.

[32] Counter-Memorial on Annulment n.86 ("Reading the Spanish and English texts of the ICSID Convention together, Article 14(1) requires both independence and impartiality."). Article 14(1) applies to arbitrators appointed from the ICSID Panel of Arbitrators, and Article 40(2) extends that requirement to arbitrators appointed from outside the Panel. Memorial on Annulment ¶ 16, n.9. *See also, e.g.*, *Rockhopper v. Italy* (**RAL-30**) ¶ 205 (observing that "the general practice for disputes under the ICSID Convention has been to require that all arbitrators may be relied upon to exercise independent judgment and inspire full confidence in their impartiality").

to the arbitrator's relationship with a party or some other circumstance giving rise to concern about possible bias or pre-disposition."[33]

26. Arbitrators must not only be independent and impartial, but also must *appear* independent and impartial, as the integrity of the process requires that justice is not only done but is seen to be done.[34]

27. A tribunal must remain properly constituted for the full duration of the arbitration and therefore "review under Article 52(1)(a) extends to situations where an arbitrator is alleged to have lacked impartiality and independence at any time during the arbitration."[35] Respondent does not dispute that point. It simply ignores it.

### b. The Standard Is Objective and Does Not Require Proof of Actual Bias or Dependence

28. Respondent argues that Applicants must show that Prof. Douglas was "influenced by factors other than the merits of the case and thus had a conflict of interest."[36] That is not the standard. The Chairman of ICSID's Administrative Council established in *Blue Bank v. Venezuela* that there is no requirement to show proof of actual bias or dependence:

> Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.
>
> The applicable legal standard is an "*objective standard based on a reasonable evaluation of the evidence by a third party*".[37]

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[33] *Rockhopper v. Italy* (**RAL-30**) ¶¶ 204, 206-207; *id.* ¶¶ 245, 363. *See, e.g.*, *EDF v. Argentina* (**AL-12**) ¶ 126 (concluding that if an arbitrator does not possess those qualities for that specific case, "then, in the view of the Committee, the tribunal has not been properly constituted").

[34] *See infra* ¶¶ 28-35.

[35] *Eiser v. Spain* (**AL-18**) ¶¶ 158, 178; *id.* ¶¶ 167-168. *See also, e.g.*, Memorial ¶¶ 19-23, nn.14-20; *EDF v. Argentina* (**AL-12**) ¶ 125.

[36] Counter-Memorial on Annulment ¶ 84(v).

[37] *Blue Bank v. Venezuela* (**AL-14**) ¶¶ 59, 60 (emphasis in original).

29. Respondent acknowledges that numerous ICSID annulment committees have adopted the standard set out in *Blue Bank*.[38]

30. Respondent also acknowledges that the annulment committee in *EDF v. Argentina* "formulated the standard" as "whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality."[39] Thus, the standard does not turn on a showing that there was a "conflict of interest" as asserted by Respondent.

31. ICSID annulment decisions consistently have adopted the *EDF* committee's formulation of the standard. For example, the committee in *Suez v. Argentina* stated it "fully agrees with this finding of the *EDF* committee because to demand the *actual* proof of bias would establish an unrealistic burden on the party requesting annulment."[40]

32. The *Eiser* committee also "agree[d] with the approach taken by the *EDF* committee" and held that "[a]rbitrators should either not sit in cases or be prepared to be challenged and/or disqualified where, on an objective assessment of things, assessed by a fair minded and informed third party observer, they may not be perceived as independent and impartial."[41]

33. In *Rockhopper*, the committee reaffirmed this standard:

> In the Committee's view, when annulment is requested on the ground of Article 52(1)(a) based on facts that came to light only following the rendering of an award, the tribunal should be considered to have been not properly constituted if an objective third party, knowing all the facts, would consider there to be reasonable grounds for doubt that an arbitrator possessed the qualities that paragraph (1) of Article 40 requires. This

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[38] Counter-Memorial on Annulment ¶ 63, n.87 (citing decisions that "have applied the test set out in *Blue Bank v. Venezuela*"). *See also, e.g.*, *EDF v. Argentina* (**AL-12**) ¶ 109; *Suez v. Argentina* (**AL-16**) ¶ 78; *Eiser v. Spain* (**AL-18**) ¶ 206 ("The Committee agrees that the appropriate standard is the one adopted by the Chairman of the ICSID Administrative Council in *Blue Bank* and numerous other cases…."); *Rockhopper v. Italy* (**RAL-30**) ¶ 217.

[39] Counter-Memorial on Annulment ¶ 64; *EDF v. Argentina* (**AL-12**) ¶ 111.

[40] *Suez v. Argentina* (**AL-16**) ¶ 78 (emphasis in original).

[41] *Eiser v. Spain* (**AL-18**) ¶¶ 180, 219 (further observing that it "matters not" that the arbitrator "may not even have been conscious of the insidious effects" of the relationship, as "[w]hat matters is that an independent observer, on an objective assessment of the facts, would conclude that there was a manifest appearance of bias" on the arbitrator's part).

> standard of appraisal is in substance the same as the *EDF* committee articulated and the *Eiser* committee also used.[42]

34. The *Rockhopper* committee specifically rejected the argument "that the appearance of bias is merely a proxy for actual bias and that the appearance of bias does not matter in and of itself."[43] The committee emphasized "the rule that an arbitrator may not sit in a case when there is justifiable reason for the arbitrator's impartiality to be questioned," and that the appearance of dependence or bias is and must be a ground for annulling the award under Article 52(1)(a) to preserve confidence in the integrity of the ICSID system:

> [T]he appearance of independence and impartiality of arbitrators also matters in and of itself and must be maintained if there is to be confidence in arbitration. …
>
> It is particularly important for arbitrators in ICSID cases not only to possess, but also to be seen by others to possess, the quality of judgement necessary to rule fairly on the facts and law…. The architects of the ICSID system incorporated language from the Statute of the International Court of Justice to articulate the qualities to be required of members of the ICSID Panel of Arbitrators and, by virtue of Article 40, every arbitrator in every ICSID arbitration. Because tribunals in cases that are brought pursuant to the ICSID Convention rule on matters of public importance and effectively allocate public funds when States are ordered to pay damages, the ICSID Convention requires every arbitrator to be seen to have the independence and impartiality that are required for there to be public confidence in the awards of ICSID tribunals.[44]

35. In short, if a reasonable third party, knowing all the facts, could justifiably doubt an arbitrator's impartiality or independence to decide the Parties' dispute, then the Tribunal was not properly constituted and the Award must be annulled.

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42 *Rockhopper v. Italy* (**RAL-30**) ¶ 356.

43 *Rockhopper v. Italy* (**RAL-30**) ¶ 373 (stating that "[t]he Committee does not agree" with that argument).

44 *Rockhopper v. Italy* (**RAL-30**) ¶¶ 376, 377.

### c. Respondent's Argument That the Standard Is "Extremely High" Is Baseless

36. Respondent argues that the standard is "high," "extremely high," and "is *a fortiori* higher in the context of annulment proceedings" than for disqualification proposals made during the arbitration.[45] Respondent fails to present any authority for these assertions. None of its proffered adjectives or adverbs changes the content of the standard, which is as described above.

37. Respondent argues that Article 57 of the ICSID Convention refers to "a manifest lack of the qualities required" and that the term "manifest" means "'evident' or 'obvious.'"[46] In the *Blue Bank* decision Respondent cites,[47] the Chairman of the Administrative Council clarified that "manifest" in this context "relates to the ease with which the alleged lack of the qualities can be perceived."[48] Respondent skips over that statement from *Blue Bank* even though both Parties' authorities show it is widely applied in almost every case.[49]

38. Respondent refers multiple times to the earlier disqualification decision of the challenged arbitrators in *Nations Energy v. Panama* to argue that Applicants must prove "facts that make it evident and highly probable, and not merely possible, that [the arbitrator] cannot be relied upon to render an independent and impartial decision."[50] That observation is a relic from 14 years ago. No recent annulment decision refers to any alleged requirement to establish that a lack of independence or impartiality is "highly probable."[51]

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45 Counter-Memorial on Annulment § 4.1.1 (heading), ¶ 75.

46 Counter-Memorial on Annulment ¶ 67.

47 Counter-Memorial on Annulment ¶ 67, n.94.

48 *Blue Bank v. Venezuela* (**AL-14**) ¶ 61.

49 *See, e.g.*, *Burlington v. Republic of Ecuador* (**AL-15**) ¶ 68; *Total v. Argentina Republic*, ICSID Case No. ARB/04/1, Decision on Disqualification Proposal of Aug. 26, 2015 (**RAL-16**) ¶ 101; *Fábrica de Vidrios Los Andes et al. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/21, Decision on Disqualification Proposal of Mar. 28, 2016 (**RAL-22**) ¶ 30; *Eiser v. Spain* (**AL-18**) ¶ 206; *Rockhopper v. Italian Republic* (**RAL-30**) ¶ 218.

50 Counter-Memorial on Annulment ¶ 75, n.107; *id.* ¶¶ 84(ii), 172 ("evident and highly probable"); *id.* nn.92, 97 (additional references to *Nations Energy v. Panama*).

51 *See, e.g.*, *EDF v. Argentina* (**AL-12**) (only mentions *Nations Energy v. Panama* at ¶ 69, n.63 one time in a different context – no alleged requirement to show lack of impartiality or independence is "highly probable"); *Suez v. Argentina* (**AL-16**) (no reference to *Nations Energy* or to an alleged requirement to show

39. Recent decisions instead confirm that "manifest" should be understood the way it is described in *Blue Bank*. For example, after quoting *Blue Bank*, the *Eiser* committee referred to "a manifest appearance of bias" which it explained as follows:

> The Committee is conscious of the fact that the jurisprudence on the subject uses different labels. Sometimes interchangeably. Some of these are 'manifest appearance of bias', 'real likelihood of bias', 'real danger of bias', and 'giving rise to justifiable doubts'. The Committee is of the view that the applicable standard is that on an objective assessment of the facts it would manifestly appear to a third party that justice was either not done or not seen to be done. Or, in other words, justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is in this sense that the expression has been used by the Committee.[52]

40. The *Rockhopper* committee similarly held that "manifest" "has been understood to mean that the lack of qualification must be capable of being perceived, not that the lack of qualification must be egregious, for an application to disqualify an arbitrator to be granted."[53]

41. Respondent quotes the statement in *SGS v. Pakistan* that "inferences cannot 'themselves rest merely on other inferences.'"[54] Respondent omits the part of that same paragraph, however, where the unchallenged arbitrators explained that the analysis "of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established."[55] Respondent's observation has no relevance in any event because all the grounds raised by Applicants rest on facts that are not disputed.

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lack of impartiality or independence is "highly probable"); *Eiser v. Spain* (**AL-18**) (only mentions *Nations Energy v. Panama* at ¶ 90, n.77 in its summary of the parties' arguments – no reference to an alleged requirement to show lack of impartiality or independence is "highly probable"); *Rockhopper v. Italy* (**RAL-30**) (no reference to *Nations Energy* or to an alleged requirement to show lack of impartiality or independence is "highly probable").

52 *Eiser v. Spain* (**AL-18**) ¶¶ 206-207, n.294.

53 *Rockhopper v. Italy* (**RAL-30**) ¶ 218.

54 Counter-Memorial on Annulment ¶ 70; *id.* ¶¶ 68-69.

55 *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Proposal to Disqualify of Dec. 19, 2002 (**RAL-19**) ¶ 20.

42. Respondent notes that only two committees have annulled awards under Article 52(1)(a), but that does not imply a higher standard as Respondent wrongly contends.[56] Rather, it shows most arbitrators comply with their disclosure obligations and that it is rare for evidence to come to light after the arbitration, as happened in this case, rather than through disclosure. For that reason, only four annulment committees – in *Vivendi II*, *EDF*, *Eiser*, and *Rockhopper* – have considered applications under Article 52(1)(a) based on evidence that came to light after the award.[57] The two most recent of those four decisions, in *Eiser* and *Rockhopper*, annulled the awards on the ground that the tribunals were not properly constituted. The architects of the ICSID Convention thus gave annulment committees the tools needed under Article 52(1)(a) to preserve the integrity of the ICSID process where, as in this case, an arbitrator falls short of the requisite standard.

**d. An Arbitrator's Disclosure Obligation Encompasses Any Fact or Circumstance That a Disputing Party Might Consider Relevant**

43. ICSID Arbitration Rule 6(2) (2006) requires every arbitrator to make a declaration and to attach "a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party." Rule 6(2) also requires every arbitrator to acknowledge that by signing the declaration, they "assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

44. Prof. Douglas accepted those obligations in a declaration that notably did not attach any statement of any professional, business, or other relationships or of any other circumstance

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56 *See* Counter-Memorial on Annulment ¶ 75.

57 *See Rockhopper v. Italy* (**RAL-30**) ¶ 247 (noting that "[t]he decisions in *Eiser*, *EDF* and the earlier *Vivendi II* are the only ones in which an *ad hoc* committee has considered an Article 52(1)(a) request based on evidence that came to light after the award was issued," and that the three other committees presented with an application under Article 52(1)(a) based on facts not put forward in the underlying arbitration either found that the request was waived or was inadmissible and "did not proceed to consideration of the facts") (emphasis in original). *Id.* ¶ 219.

that might cause his reliability for independent judgment to be questioned by a Party.[58] He also failed to disclose any of the material facts that developed during this arbitration.

45. Respondent argues that arbitrators "need only disclose facts and circumstances that are likely to give rise to justifiable doubts as to their independence or impartiality" and that such "'justifiable doubts' arise where a reasonable third person, having knowledge of the relevant facts and circumstances, would conclude that there is a likelihood that the arbitrator 'may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.'"[59] This wrongly elevates the IBA Guidelines over the ICSID Arbitration Rules and conflates the standard for disqualifying an arbitrator, which is an objective standard based on a reasonable and informed third person, with an arbitrator's disclosure obligation under ICSID Arbitration Rule 6(2), which is broader and must be considered from the perspective of the Parties.[60]

46. It is well established and clear from its text that Rule 6(2) puts the burden on the arbitrators – not the Parties – to investigate and disclose facts and circumstances that may appear relevant **to a Party**. The *Rockhopper* committee explained the difference between the disqualification standard and the disclosure standard as follows:

> Although … an 'objective' – or reasonable third party – assessment is called for when an application for disqualification is decided pursuant to Article 57, the standard according to which an arbitrator must make the disclosure necessary for an ICSID tribunal to be properly constituted is different and broader. Rule 6 requires not only that the arbitrator must sign a Declaration in a specified form but also that a Statement be attached to disclose (a) any past and present professional, business and other relationships, if any, with the parties, and (b) 'any other circumstance that **might cause** my reliability for independent judgement **to be questioned by a party** (emphasis added). Because the perspective to be adopted in making disclosure is that of a party, the arbitrator must go beyond the arbitrator's own perspective. Disclosure must be of what 'might cause' a party to question the arbitrator's reliability for independent judgment, which entails that the arbitrator may

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58 Letter from ICSID to the Parties dated Nov. 20, 2015 (**A-62**) (Prof. Douglas' declaration noting "No statement attached").

59 Counter-Memorial on Annulment ¶ 79 (quoting the 2014 IBA Guidelines).

60 Memorial on Annulment ¶ 60.

> not limit disclosure to what the arbitrator believes appropriately *should* give rise to questions by a party.[61]

47. The *Rockhopper* committee further observed that "Rule 6 is express that the arbitrator's duty of disclosure is a continuing obligation," and it is "all encompassing" and extends to matters in the public domain.[62] The standard of disclosure required in Rule 6 allows parties "to exercise their rights to propose disqualification of arbitrators pursuant to Article 57, and that right is important for the integrity of ICSID arbitrations irrespective of the outcome of a challenge in a particular instance."[63] The rule allocates the burden of investigation and disclosure to the arbitrators rather than the parties because "arbitrators are in the best position to know about their own relationships and to assess the circumstances of their personal and professional lives that may appear to be relevant to a party," and must "relieve parties of the need to investigate what arbitrators readily know."[64]

48. The *Eiser* committee similarly observed that Rule 6 imposes an "ongoing obligation" to disclose "virtually any kind of relationship, interest or contact with anything or anyone that is in some degree related to the case," and that obligation "cannot be construed narrowly in favor of the arbitrator. It must be approached from the point of view of a party."[65] The committee concluded, "Annulment committees are guardians of the ICSID system and must set the bar high with regard to disclosure obligations, in particular, and, in general, with respect to addressing conflict of interest of arbitrators who also choose to act as counsel in investment disputes."[66]

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[61] *Rockhopper v. Italy* (**RAL-30**) ¶ 211 (emphasis in original). *Id.* ¶ 333 ("Rule 6(2) broadly requires disclosure" and imposes "a standard requiring the arbitrator to take into account the perspective of a party").

[62] *Rockhopper v. Italy* (**RAL-30**) ¶¶ 212-213 (the continuing disclosure obligation under Rule 6(2) "is consistent with the requirement of the ICSID Convention that arbitrators must continue to possess the qualities required by paragraph (1) of Article 40 over the entire durations of the arbitrations in which they serve").

[63] *Rockhopper v. Italy* (**RAL-30**) ¶ 343.

[64] *Rockhopper v. Italy* (**RAL-30**) ¶ 349 ("Rule 6 is distinctive in the specific form of the declaration required, but the substance of the disclosure it requires is standard in the practice of arbitration").

[65] *Eiser v. Spain* (**AL-18**) ¶¶ 222-223, n.313.

[66] *Eiser v. Spain* (**AL-18**) ¶ 255.

49. Respondent argues that under the IBA Guidelines, "nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so."[67] The IBA Guidelines, however, are not binding in ICSID cases as Respondent also points out.[68] Moreover, the standard on annulment does not require demonstration of partiality or a lack of independence, but rather circumstances in which a reasonable and informed third party may have doubts.

50. For that reason, Respondent's argument is misguided, as a breach of disclosure obligations is itself a material problem that can warrant annulment in certain circumstances because it deprives a party of its procedural right to challenge as the *Rockhopper* committee emphasized:

> These considerations regarding Rule 6 have been relevant for the Committee's determination that the Article 52(1)(a) annulment standard has been satisfied because the terms of the Convention do not expressly require disclosure by arbitrators. In the Committee's view, however, *disclosure is a usual and necessary requirement for the arbitral system, as Rule 6 exemplifies. For that reason, a tribunal is not properly constituted when an arbitrator's disclosure is made in such a way that the parties' reasonable expectations are frustrated, with the result that they are effectively deprived of procedural rights to challenge the arbitrator*. This conclusion is reinforced by the fact that rules requiring arbitrators to disclose the relationships and other circumstances of their backgrounds are in substance duties to warn. It is a bedrock principle in many areas of law such as freedom of navigation and environmental and climate law that the party with greater access to knowledge of perils has a duty to inquire and to warn. That principle is applicable in the circumstances of this case. In the Committee's view, the defectiveness of [the arbitrator's] disclosure provides a basis for annulment.
>
> In ICSID arbitrations, the requirement of the Convention that arbitrators must be persons of high moral character also reinforces this understanding of what is required of members for a tribunal to be properly constituted. *The qualities specified in paragraph (1) of Article 14 have to entail that the interests of parties will be considered and put before an arbitrator's own interest when an appointment is accepted. For this reason, parties to ICSID arbitrations have a right to expect that an individual who accepts an*

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67 Counter-Memorial on Annulment ¶ 83.

68 *See, e.g.*, *Eiser v. Spain* (**AL-18**) ¶ 226; *Rockhopper v. Italy* (**RAL-30**) ¶ 347. *See also* Counter-Memorial on Annulment ¶ 78, n.114 ("these Guidelines are merely indicative and not binding").

*appointment to serve as an arbitrator will fully disclose relationships and circumstances to ensure the integrity of the proceedings.*[69]

51. Applicants have demonstrated that, while not binding, the IBA Guidelines likewise impose on arbitrators a continuous obligation of investigation and of broad disclosure that "rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view," and so "[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."[70] Applicants also established that the UNCITRAL Code of Conduct describes the same duties of investigation and disclosure in similar terms.[71]

52. Respondent "accepts" that, "while not binding," the 2014 IBA Guidelines "broadly represent prevailing practices and can provide guidance," but it contends the 2024 version of the Guidelines referenced by Applicants and the UNCITRAL Code of Conduct were not finalized until "after the proceedings were closed" and "thus could not have provided guidance to the arbitrators in this case."[72] That is a meaningless observation. All the referenced standards and commentary in the 2024 IBA Guidelines were already part of the 2014 Guidelines, with only minor word differences, if any.[73]

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69 *Rockhopper v. Italy* (**RAL-30**) ¶¶ 350-351 (emphasis added).

70 Memorial on Annulment ¶¶ 61, 65; IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 7-8, 12-13 (General Standards 3(a), 3(d), 7(d), and commentary). *See also, e.g.*, *Rockhopper v. Italy* (**RAL-30**) ¶ 347 (while not binding, "General Standard 3 nonetheless may be useful in informing the understandings of ICSID arbitrations about the expectations that parties are likely to have for disclosure provided by arbitrators").

71 Memorial on Annulment ¶¶ 62, 66; UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) at 5-6, 29-32 (Article 11 and commentary).

72 Counter-Memorial on Annulment ¶¶ 77-78.

73 *Compare* IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (**RAL-31**) at 4-7, 13, 15 (General Standards 1, 2(b), 3(a), 3(d), 6(a), 7(d), and commentary); IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 6-7, 10, 12-13 (same standards and commentary with minor word differences such as changing "he or she" to "the arbitrator," "his or her" to "the arbitrator's," "his or her law firm" to "the arbitrator's law firm or employer," etc.).

53. Respondent also refers to "the so-called Red, Orange, and Green Lists" of the IBA Guidelines.[74] These lists are merely indicative and are not exhaustive.[75] Indeed, the *Eiser* and *Rockhopper* committees both annulled the awards in those cases even though neither involved a circumstance appearing on any of the IBA's lists.[76]

### e. There Can Be No Waiver Where Applicants Did Not Learn the Facts Undermining Impartiality and Independence Until After the Arbitration

54. It is not disputed that a party must raise a disqualification proposal "promptly" under ICSID Arbitration Rule 9(1) or it waives that objection under Rule 27.[77] Annulment committees accordingly have considered arguments about waiver as part of their analysis.[78]

55. Respondent argues that waiver applies "*where it can be shown* that the party previously had actual or constructive knowledge of the issue, or reasonably ought to have been aware of it had it been vigilant…."[79] Respondent thus accepts that it has the burden of proof to establish waiver. In addition, a review of recent decisions shows that waiver would only be appropriate in rare circumstances where it is established that the party knew all the relevant facts and withheld the objection in bad faith for tactical reasons.[80]

56. Thus, for example, the ICSID Deputy Secretary-General rejected the argument in *Vito Gallo v. Canada* that the claimant had "constructive knowledge" of public facts as doing so would "relieve the arbitrator of the continuing duty to disclose" and "would unfairly

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74 Counter-Memorial on Annulment ¶ 78.

75 IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (**RAL-31**) at 3, 17-19 (stating that the lists are "non-exhaustive" and that "they do not purport to be exhaustive, nor could they be").

76 *See Eiser v. Spain* (**AL-18**) ¶ 226 (finding that the IBA Guidelines did not list the relationship at issue, but "the IBA Guidelines' list is not exhaustive" and "these are 'guidelines' and cannot be treated as a set of binding and exhaustive rules with respect to conflicts"); *Rockhopper v. Italy* (**RAL-30**) ¶ 344 ("There is no inconsistency between Rule 6 and the IBA Guidelines in this respect. The IBA Guidelines do not purport to be exhaustive. They are useful in the types of situations that are likely to come up involving arbitrators. [The arbitrator's] situation in this case did not fall into that category.").

77 Counter-Memorial on Annulment ¶ 72.

78 *See, e.g.*, *EDF v. Argentina* (**AL-12**) ¶¶ 131-132, 136, 173; *Eiser v. Spain* (**AL-18**) ¶¶ 144, 180, 188-190; *Rockhopper v. Italy* (**RAL-30**) ¶¶ 244, 386-402.

79 Counter-Memorial on Annulment ¶ 73 (emphasis added, internal quotations omitted).

80 Memorial on Annulment ¶¶ 70-71.

place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator."[81] The ICSID Deputy Secretary-General also rejected the argument that the claimant's counsel was "almost certainly aware" of the relevant facts, finding that "[s]uch speculative statements cannot replace proof of actual knowledge."[82]

57. The annulment committee in *Eiser v. Spain* also rejected the argument that Spain knew or should have known of the contested relationship based on public materials:

> There is nothing on the record to prove that Spain had such knowledge, the burden has not been discharged by the Eiser Parties. *The existence of the information in the public domain does not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts. A clear and unequivocal waiver of a right so fundamental as to challenge the impartiality and independence of an arbitrator, goes to the very root of the proper constitution of a tribunal. Such a waiver cannot be established without proof that the party concerned had actual or constructive knowledge of all the facts*.[83]

58. In *VC Holding v. Italy*, where Italy challenged an arbitrator for failing to disclose that Italy's district court and court of appeal had convicted him of an alleged crime that the Court of Cassation later annulled due to a statute of limitations, the unchallenged arbitrators observed that they were "not persuaded by the propositions advanced by the Claimants that the Respondent should have known about these matters, that these were all readily discernible from the public domain, or that the Respondent should have been shut out *in limine* from making the Proposal. *The duty of disclosure rests on the arbitrator nominated by one Party, and there is no duty of due diligence on the shoulders of the other Party*."[84]

59. In its decision annulling an award based on the same facts involving the same arbitrator, the *Rockhopper* committee rejected the argument that Italy had constructive notice:

> Of course, within the abstraction that is a State, knowledge of whatever has occurred and been a matter of public record within it since the mid-1990s

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81 *Vito Gallo v. Canada* (**AL-8**) ¶ 24.

82 *Vito Gallo v. Canada* (**AL-8**) ¶ 24. *Id.* ¶ 25.

83 *Eiser v. Spain* (**AL-18**) ¶ 190 (emphasis added).

84 *VC Holding II S.a.r.l., and others v. Italian Republic*, ICSID Case No. ARB/16/39, Decision on the Proposal for Disqualification of Arbitrator Dr. Charles Poncet of Apr. 21, 2023 (**AL-81**) ¶ 52 (emphasis added).

> must exist and, in that sense, all such facts are known to the State. But, as a party to an arbitration brought by a foreign investor, a State may act by and through the individuals having responsibility for its defense. This is why Rule 6 of the ICSID Arbitration Rules makes it incumbent upon arbitrators to include relevant information in their disclosures, whether or not the information is public….[85]

60. The committee further observed that the *VC Holding* decision "articulated the view that disclosure is a duty of arbitrators and that neither party has a duty of diligence regarding the arbitrator appointed by the other side."[86] The committee confirmed it "agrees with these propositions as matters of principle."[87]

61. Applicants did not hold a known objection against Prof. Douglas "in reserve" as a ground for annulment. Applicants did not learn the relevant facts and circumstances about Prof. Douglas until after the arbitration because he breached his duty to disclose. Applicants thus did not and could not waive any of their objections.

### f. The Possible Material Effect of an Improperly Constituted Tribunal Is Evident When the Award Was Decided by a Majority Including the Compromised Arbitrator

62. A party seeking annulment is not required to prove that a failure to properly constitute the tribunal "*did* have a material effect on the award but it must establish that it *could* have done so."[88]

63. This question often arises in the context of a unanimous award. In *EDF*, for example, the committee found that doubts about the impartiality or independence of one arbitrator could materially impact a unanimous award and that "[i]t is impossible to tell what degree of

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85 *Rockhopper v. Italy* (**RAL-30**) ¶ 399.

86 *Rockhopper v. Italy* (**RAL-30**) ¶ 400.

87 *Rockhopper v. Italy* (**RAL-30**) ¶ 400; *id.* ¶ 402 ("the Committee does not accept Rockhopper's submission that a failure of investigation on the part of the Italian Republic should operate as waiver of its right to seek annulment on the basis of omissions in Dr. Poncet's Rule 6(2) statement and his unsuitability as an arbitrator for a case against Italy").

88 *EDF v. Argentina* (**AL-12**) ¶ 134 (emphasis in original). *See also, e.g.*, *Eiser v. Spain* (**AL-18**) ¶ 252.

influence on one or both colleagues an arbitrator might have had in the course of what are necessarily confidential deliberations."[89]

64. In *Eiser*, the committee similarly observed that

> unanimity does not impede annulment. This is axiomatic because it is impossible for an annulment committee to pierce the veil of a tribunal's deliberations or poll arbitrators. Irrespective of the independence and impartiality of the two other arbitrators on the Tribunal, each member of the Tribunal … is expected to have influenced the other two with his views and analysis, during the course of the deliberations. It is in the very nature of deliberations that arbitrators exchange opinions and are persuaded or influenced by the opinions of their colleagues. That makes us conclude that it would be unsafe to hold that [the arbitrator's] views and analysis could not have had any material bearing on the opinions of his fellow arbitrators. It is not improbable that they had such effect and, therefore, excluding this possibility from consideration would go against the nature of deliberations.[90]

65. The *Eiser* committee annulled the unanimous award in that case because it was "impossible to conclude" that disclosure "would have had no material effect on the arbitrators, their deliberations and the ultimate outcome," and because the applicant in any event "lost the possibility of a different award."[91]

66. The *Rockhopper* committee likewise found "that there is no way for an *ad hoc* committee to know with any confidence what may have been the effect on the other arbitrators of a disclosure that was never made, and thus that there is no excluding the possibility that a decision of the tribunal might have been different had disclosures been made. In all but the rarest cases, how could it be otherwise?"[92] The committee thus annulled the unanimous award in that case while emphasizing that a failure to properly constitute the tribunal taints the whole dispute resolution process and thus the entire award:

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89 *EDF v. Argentina* (**AL-12**) ¶ 135.

90 *Eiser v. Spain* (**AL-18**) ¶ 246.

91 *Eiser v. Spain* (**AL-18**) ¶¶ 249, 251; *id.* ¶¶ 248-253.

92 *Rockhopper v. Italy* (**RAL-30**) ¶ 254. *Id.* ¶ 405 (finding that "[t]he possibility cannot be excluded … that the Award might have been different had the Tribunal been properly constituted without [one of the arbitrators] as a member").

> The Committee's opinion is that the Award should be annulled because the entire proceeding is affected when, as in this case, a tribunal is not properly constituted due to justifiable concerns about the independence and impartiality of a member. When, as in this case, there is good reason to question the reliability for the exercise of independent judgment of a member of an ICSID tribunal, the award, inescapably, is tainted.[93]

67. In this case, the possible material impact on the Award is even clearer because Prof. Douglas decided liability by majority with Prof. Tercier over Prof. Grigera Naon's dissent.[94] Respondent replies with an irrelevant argument that "there is nothing in the dissent to suggest, even indirectly," that Prof. Douglas lacked independence or impartiality or that it had a material impact on the Award.[95] That trifling comment misses the point. As the Committee is not presented with a unanimous award, it does not need to consider whether Prof. Douglas might have influenced the other arbitrators during their confidential deliberations, although that is a possibility one cannot disregard. In this case, it is indisputable that, without Prof. Douglas, the resulting Award would be entirely unknown.

### 2. Prof. Douglas Took on Friends of the Earth, a Long-Standing and Prominent Public Opponent of the Roşia Montană Project, as a Client During the Arbitration

68. While he sat as an arbitrator in this case, Prof. Douglas took on a role that he failed to disclose as lead counsel for Friends of the Earth, an NGO that waged a sustained and active public campaign to block the Roşia Montană Project and to oppose Gabriel's claims in this arbitration.[96] Friends of the Earth, among other things, made repeated public accusations against Gabriel;[97] lobbied Government officials in at least four countries to withdraw support for the Project or to intervene in this arbitration to oppose Gabriel's claims;[98]

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93 *Rockhopper v. Italy* (**RAL-30**) ¶ 406. *Id.* ¶ 403 ("A request for annulment on the ground of Article 52(1)(a) is a claim that the dispute resolution process as a whole was flawed, and the award is tainted for that reason.").

94 Memorial on Annulment ¶ 109.

95 Counter-Memorial on Annulment ¶¶ 183-184.

96 Memorial on Annulment ¶¶ 27-37, Annex 1.

97 *See generally* Memorial on Annulment ¶ 34, Annex 1.

98 Memorial on Annulment ¶¶ 34(a), 34(g), 34(h), 34(i), 34(k), 34(l); **A-152**, **A-59, A-116, A-120**, **A-121**, **A-122**, **A-123**, **A-157**, **A-158**, **A-170**, **A-171**, **Thomson-17** at 172.

pressured international financial institutions to withhold Project financing;[99] urged investors and shareholders to divest from Gabriel;[100] and showcased this arbitration as the posterchild for the alleged problems with investor-State arbitration generally.[101]

69. In the arbitration, Respondent relied on local and international opposition to the Roşia Montană Project as the heart of its defense to Claimants' claims.[102] Respondent thus began its opening argument at the hearing by asserting, "This case is effectively about one single issue: Why did the Roşia Montană Project stall?"[103] Respondent answered that rhetorical question by arguing that the Project lacked "social legitimacy" because opposition "escalated" from the local level to the international level:

> The simple answer to the question of why the Project stalled is that it fundamentally lacked social legitimacy. The Claimants and RMGC never secured the social license to operate. RMGC, of course, also lacked a number of administrative and regulatory permits and approvals, including the Environmental Permit, but its inability to obtain these permits and approvals, or to maintain them, was also a result and a consequence of the social opposition.
>
> There was local opposition to this Project, effectively, from the very beginning. And over the years, this opposition escalated to the national and even international level.[104]

Respondent also argued in the arbitration that the critical moment for the Project was when international entities joined the opposition campaign in 2002, as anything Gabriel did after that to try to gain social acceptance was "too little too late."[105]

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99 Memorial on Annulment ¶ 34(b); **A-116, A-117** at 9, **Pop-29** at 3, **Thomson-3** at 4, **A-168**, **A-169**, **A-170**, **Thomson-16** at 180, **C-2391** at 51, **R-137**. *See also, e.g.*, Counter-Memorial ¶ 106.

100 Memorial on Annulment ¶¶ 34(c), 34(d), 34(f); **A-118**, **R-597** at 16-17, **Thomson-85** at 16-17, **A-156** at 1-3.

101 Memorial on Annulment ¶ 34(n); **A-60** at 14-19, **A-198** at 2, **A-199** at 2-3.

102 Memorial on Annulment ¶¶ 31-32.

103 Tr. Dec. 3, 2019 358:10-12 (Respondent's Opening).

104 Tr. Dec. 3, 2019 359:20-360:11 (Respondent's Opening). *See also* Respondent's Opening Slides 2-7.

105 Thomson Report Feb. 19, 2018 at 1 (executive summary), ¶ 108 (conclusion). *See also* Thomson Report May 6, 2019 ¶¶ 168, 216, 222-223 (concluding RMGC's revised stakeholder strategies from 2006 onward were "too little too late," because "[w]ith the rise of an organized opposition in 2002 and attacks on RMGC's

70. The evidence submitted on this issue of central importance to Respondent's defense indisputably establishes that Friends of the Earth was one of the most active international organizations fighting to block the Project from the inception of the "Save Roşia Montană" campaign in 2002:

a. Respondent's social license experts, Dr. Ian Thomson and Dr. Alina Pop, both identified only a few international groups campaigning against the Project back in 2002, prominently including Friends of the Earth.[106]

b. In his first expert report, Dr. Thomson drew "on the work of three Romanian academic researchers" as key "Sources of Information."[107] One researcher, Mr. Alexandrescu, stated, "In 2002, the Roşia Montană-based opposition was joined by international environmental movement organizations (Greenpeace and **Friends of the Earth**) and a few international activists moved to Roşia Montană to help the resident organization achieve greater visibility and effectiveness in its opposition against the plans of Gabriel Resources."[108] He also emphasized that "[t]he first victory of the growing campaign – and actor network of AM [Alburnus Maior] came in October 2002 when **Friends of the Earth** (2002) flew two campaigners to Washington DC 'to directly challenge World Bank President James Wolfensohn at a town hall meeting to review the

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credibility, the question of social license shifted from that of the perceptions and opinions of the local population to the perceptions and opinions of the stakeholder network at the national and international level. The social license was never available from this source."); Thomson Hearing Presentation Slide 21 ("[e]arly failure to build a positive relationship with key local stakeholders" and "[f]ormation of a grass-roots organization in opposition to the Project and assembly of a network of civil society organizations" when Alburnus Maior "links up with a national and international network"); Pop Report May 7, 2019 ¶¶ 6-7, 34-35; Pop Hearing Presentation Slide 15 ("In 2002 the local opposition to the Project got the support of extra-local actors (national and international NGOs, academics, public personalities, etc.) that subsequently built the Save Roşia Montană movement. Most of its actions took place outside the Roşia Montană area (in Bucharest, Cluj-Napoca, Alba Iulia and other big cities and even abroad.").

106 *See* Pop Report May 7, 2019 ¶ 35 (singling out "Greenpeace, **Friends of Earth**, Mining Watch Canada, and Bankwatch Canada"); *id.* ¶ 47 ("international organizations such as Greenpeace, **Friends of the Earth**, Mining Watch Canada, etc"); Thomson Report May 6, 2019 ¶ 70 (opponents "met with network of BankWatch," and "contacted Greenpeace, World Wildlife Federation, **Friends of the Earth**").

107 Thomson Report Feb. 19, 2018 § 4.1, ¶ 25, nn.21-23 (citing **Thomson-16**, **Thomson-17**, **Thomson-18**).

108 Filip Alexandrescu, *Human Agency in the Interstices of Structure: Choice and Contingency in the Conflict over Roşia Montană, Romania*, 2012 (**Thomson-16**) at 6.

project' (**FoE** 2002)."[109] The two other researchers relied on by Dr. Thomson made similar observations about Friends of the Earth's opposition in 2002 while identifying a few other international organizations.[110]

c. Respondent's expert, Dr. Pop, also commented in her own PhD thesis that in 2002, "the Swiss-born activist Stephanie Roth moved to Roşia Montană and started to coordinate the actions of the Alburnus Maior association, actions that had been rather modest until then," but which expanded "to international levels (international environmental organizations like Greenpeace, **Friends of the Earth**, Mining Watch Canada, Bankwatch CEE, to name but a few; celebrities like the actress Vanessa Redgrave gave their support for the Save Roşia Montană campaign)…."[111] In "a chronological overview of the 'Save Roşia Montană' campaign," Dr. Pop pointed again to "mobilization in important Romanian cities (Bucharest, Alba Iulia, Cluj-Napoca), as well as the participation of international organizations such as Greenpeace, **Friends of the**

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[109] Filip Alexandrescu, *Human Agency in the Interstices of Structure: Choice and Contingency in the Conflict over Roşia Montană, Romania*, 2012 (**Thomson-16**) at 180. *See also id.* at 227 (citing Friends of the Earth, 2002, "Roşia Montană Gold Mine: October 2002 Victory"); Wayback Machine - Friends of the Earth, "October 2002 Campaign Victory!" (**A-168**) (linking to the Save Roşia Montană website at www.rosiamontana.org and to a "two-page fact sheet" on the Project) (last archived Sept. 28, 2011); Wayback Machine - Friends of the Earth Fact Sheet on Roşia Montană Gold Mine (**A-169**) (last archived Nov. 28, 2008).

[110] *See* Irina Velicu, *To Sell or Not to Sell: Resistance to Neo-Liberal Globalization and the Aesthetic Post-Communist Subject*, 2011 (**Thomson-18**) at 111-113 (activist Stephanie Roth "came to Rosia in 2002" and "managed to create a transnational dimension of the local movement: the Rosienii and the Roşia Montană village were supported by Greenpeace, **Friends of the Earth**, CEE Bank-Watch, Mining Watch, Earth Works, OSI, etc."); Cristina Parau, *The Interplay Between Domestic Politics and Europe: How Romanian Civil Society and Government Contested Europe Before EU Accession*, 2006 (**Thomson-17**) at 152 (in 2002 Hungarian NGOs "including CEE BankWatch and **Friends of the Earth, Hungary**" lobbied Hungary's "Environment Ministry to 'activate the Espoo Convention on Environmental Impact Assessment in a Transboundary Context'," and "[w]hether or not because of this lobbying, the Hungarian government did become more actively involved in the Roşia Montană case after 2003").

[111] Alina Pop, *Roşia Montană: Social Representations Around an Environmental Controversy in Romania*, 2014 (**Thomson-2**) at 7.

**Earth**, Mining Watch Canada, etc."[112] Dr. Pop and Dr. Thomson both relied extensively on Dr. Pop's thesis in their evidence given in the arbitration.[113]

d. Dr. Thomson also exhibited a case study on the Project done by Prof. Witold Henisz of the University of Pennsylvania's Wharton School of Business.[114] Prof. Henisz observed in that case study that in 2002 Alburnus Maior "attracted the attention and support" of international NGOs such as MiningWatch, Greenpeace, Earthworks, and **Friends of the Earth**.[115]

e. Prof. Henisz provided a witness statement with Claimants' Reply that exhibited his interview notes from his site visit to Romania in 2007.[116] In one interview, a Project opponent told Prof. Henisz about initial efforts in 2002 "to mobilize international links" that included meeting with the "network of BankWatch" about how to stop the World Bank (IFC) from financing the Project, and after that "Stephanie Roth came from her success stopping Dracula Par[k] to build the team. Also contacted Greenpeace, World Wildlife Federation, **Friends of the Earth**. All mobilized their members. Generated discussion at WB [World Bank] meeting in Budapest then at annual meetings in DC. World Bank announced they didn't want to invest."[117] Dr. Thomson quoted that interview and many other excerpts from Prof. Henisz's interview notes in his second expert report and in his presentation at the hearing.[118]

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[112] Alina Pop, *Roşia Montană: Social Representations Around an Environmental Controversy in Romania*, 2014 (**Thomson-2**) at 39, 41.

[113] Thomson Report Feb. 19, 2018 nn.2, 40, 52, 104, 111, 112, 114; Thomson Report May 6, 2019 ¶¶ 91, 94, nn. 140, 144, 145, 147, 148, 149, 150, 151, 206 (information "based on the work by Dr. Pop"); Pop Report May 7, 2019 ¶¶ 11-15, 23, nn.1, 10, 24, 39, 182; Pop Hearing Presentation Slides 2, 15-16.

[114] Thomson Report Feb. 19, 2018 nn.25, 26, 27, 39, 80, 106, 110 (**Thomson-19** and **Thomson-20**).

[115] Witold Henisz, *Roşia Montană: Political and Social Risk Management in the Land of Dracula (B)*, 2009 (**Thomson-20**) at 5.

[116] Henisz Statement Nov. 2, 2018 ¶¶ 8-22; Henisz 2007 Interview Notes (**C-2391**).

[117] Henisz 2007 Interview Notes (**C-2391**) at 51 (Interviewee 19).

[118] Thomson Report May 6, 2019 ¶ 70; *id.* ¶¶ 51-74, 82-88, 91 ("the interviews conducted by Prof. Henisz in 2007 provide a first-person perspective on events"). *See also* Thomson Hearing Presentation Slides 21-22.

f. Dr. Thomson and Dr. Pop also both separately exhibited an article by Stephanie Roth about the Save Roşia Montană campaign that stated, "Their first actions involved removing immediate threats and enlarging the support base of the campaign to reflect not only the environmental but also the social, economic and heritage concerns. In autumn 2002 Alburnus Maior and groups such as **Friends of the Earth International**, BothEnds, Urgewald and Bank Watch CEE convinced the World Bank's IFC or lender of last resort to keep away from Gabriel Resources' murky venture."[119] Dr. Pop testified in response to a question from Prof. Tercier that one of the main sources for the chronology in her PhD thesis and in her expert report was this article "which was authored by Ms. Stephanie Roth, one of the main activists, actually, and also by Mr. [Maier], in which they described the history of this campaign."[120]

g. Dr. Thomson also exhibited with his second expert report Gabriel's internal assessment in 2002 of Alburnus Maior's strengths and weaknesses, which noted that two perceived strengths were "the implication of Stephanie Roth – she is the connection with international media and organisations," and "the relationship with '**Friends of the Earth**' (and possible other organisations)."[121]

71. In sum, numerous exhibits submitted in the arbitration by Respondent's own social license experts, Dr. Thomson and Dr. Pop, show that everyone involved – Gabriel, leaders of the opposition such as Stephanie Roth, Romanian academic researchers, Claimants' witness Prof. Henisz, and Dr. Thomson and Dr. Pop themselves – viewed Friends of the Earth as one of the most important international organizations actively trying to block Gabriel's Roşia Montană Project from 2002 onward.[122]

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[119] Stephanie Roth and Jurgen Maier, *Silence is Golden*, 2016 (**Thomson-3**) at 4, **(Pop-29**) at 3.

[120] Tr. Dec. 13, 2019 3398:13-3399:7 (Dr. Pop describing **Pop-29** cited in footnote 53 of her expert report).

[121] Gabriel Resources Email from Bruce Marsh dated Sept. 18, 2002 enclosing Analysis of Alburnus Maior (**Thomson-83**) at 3.

[122] The NGOs made the same point. *See, e.g.*, Alburnus Maior, CEE Bankwatch Network, Friends of the Earth International, Greenpeace CEE, Mineral Policy Center, MiningWatch Canada Press Release dated Oct. 10, 2002 (**A-116**) at 2 (in addition to MiningWatch, "members of the international coalition include CEE Bankwatch Network (Prague), Mineral Policy Center (Washington, DC), **Friends of the Earth**

72. The Parties presented these and other exhibits about Friends of the Earth's activism against the Project in the examination bundles of multiple witnesses and experts and asked many questions about those exhibits during the hearing.[123] Indeed, the first witness to testify was Gabriel's former CEO Jonathan Henry, and the very first document Respondent showed him during cross-examination (at Tab 1 of his cross bundle) was a *Wall Street Journal* article from 2002 called "Romanian Gold-Mine Loan Blocked by World Bank Chief."[124] Respondent displayed the one-page article on the hearing room screens and directed Mr. Henry to review statements in the article saying "World Bank President James Wolfensohn has killed agency participation in a $250 million loan for a Canada gold-mining investment in Romania that drew fire from environmental groups," and "The bank has come under heavy criticism for backing environmentally dubious projects around the world."[125] The same page of that article also states, "Carol Welch, deputy international director at the environmental group **Friends of the Earth**, said the decision is 'definitely a victory,' but added that it also shows how much pressure the bank faces to stay out of big mining projects."[126]

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**International** (Amsterdam) and Greenpeace CEE (Vienna)"); MiningWatch Press Release dated Nov. 30, 2002 (**A-170**) ("In addition to Mining Watch Canada, coalition members include Alburnus Maior (a local community group), CEE Bankwatch Network, Mineral Policy Center (Washington, DC), **Friends of the Earth International** (Amsterdam), Greenpeace CEE (Vienna), and the Halifax Initiative (Ottawa)."); MiningWatch Press Release dated Sept. 7, 2005 (**A-171**) (international NGOs include CEE Bankwatch, Greenpeace CEE, **Friends of the Earth International**, and FIAN International).

123 *See, e.g.*, Henry Cross Bundle (Tab 1 **R-137**); Tanase Cross Bundle (Tab 37 **R-597**); Lorincz Cross Bundle (Tab 31 **C-2391**, Tab 56 **Thomson-20**); Henisz Cross Bundle (Tab 2 **Thomson-20**, Tab 6 **C-2391**); Pop Cross Bundle (Tab 2 **Thomson-2**); Thomson Cross Bundle (Tab 7 **Thomson-2**, Tab 15 **Thomson-16**, Tab 16 **Thomson-17**, Tab 17 **Thomson-18**, Tab 21 **C-2391**); Tr. Dec. 3, 2019 604:11-606 (Henry cross on **R-137**); Tr. Dec. 12, 2019 2774:3-2775:5, 2780:17-2792:10 (Henisz cross on **Thomson-20** and **C-2391**); Tr. Dec. 12, 2019 2830:11-2831:7 (Henisz redirect on **C-2391**); Tr. Dec. 12, 2019 3052:14-3054:1, 3081:14-3089:8 (Thomson cross on **Thomson-2**, **Thomson-16**, **Thomson-17**, **Thomson-18**); Tr. Dec. 13, 2019 3145:12-3147:10 (Thomson redirect on **Thomson-16**, **Thomson-17**, **Thomson-18**); Tr. Dec. 13, 2019 3372:3-3379:21 (Pop cross on table in **Thomson-2** and her report); Tr. Dec. 13, 2019 3397:6-3398:12 (Pop redirect on table in **Thomson-2** and her report); Tr. Dec. 13, 2019 Dec. 13, 2019 3398:13-3399:17 (Pop questions from Prof. Tercier on table in **Thomson-2** and her report).

124 Tr. Dec. 3, 2019 604:11-605:8 (Henry cross on **R-137**).

125 Tr. Dec. 3, 2019 605:1-19 (Henry cross on **R-137**).

126 Romanian Gold-Mine Loan Blocked by World Bank Chief, *The Wall Street Journal*, Oct. 11, 2002 (**R-137**).

73. The Tribunal majority did not overlook or misapprehend Respondent's emphasis of these opposition activities,[127] and in any event the public record of Friends of the Earth's activism over the next two decades to block the Roşia Montană Project and to lobby against Gabriel's claims in this arbitration is overwhelming.[128]

74. In these circumstances, given the duty of loyalty lawyers owe their clients, a reasonable third party, knowing all the facts, would have a justifiable basis to doubt that Prof. Douglas could impartially and independently decide this dispute while he acted as lead counsel for Friends of the Earth.[129] The Tribunal thus was not properly constituted, and the Award must be annulled under Article 52(1)(a). Applicants and the other Tribunal members could not address this situation during the arbitration because Prof. Douglas failed to disclose his client advocacy for Friends of the Earth in breach of his disclosure obligations.[130]

75. None of Respondent's arguments in any way dispels the justifiable doubts about impartiality and independence that result from Prof. Douglas' client advocacy for Friends of the Earth.

76. First, Respondent contends in a footnote that it is "not known when Prof. Douglas was instructed, for how long he worked on the case, nor what the scope of his involvement was."[131] That is not correct or the least bit relevant. While the arbitration was ongoing, Prof. Douglas made submissions on behalf of Friends of the Earth in 2022 to the UK Court of Appeal and again in 2023 to the UK Supreme Court.[132] The work was significant to

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[127] Memorial on Annulment ¶ 32; Award ¶¶ 26, 92, 99-100, 103, 109, 176, 178, 783, 856, 947, 979-980, 1004, 1018, 1022, 1024-1025, 1027, 1035, 1038, 1045, 1052, 1055, 1069, 1077, 1080, 1086-1088, 1100, 1141, 1249, 1255-1256, 1262, 1264, 1269, 1271, 1301, 1312 (Tribunal majority referring to NGO legal challenges and opposition activities and finding that "many internal and external stakeholders" influenced permitting including because of "the negative public perception of the Project").

[128] *See generally* Memorial on Annulment ¶ 34, Annex 1.

[129] Memorial on Annulment ¶¶ 51-58.

[130] Memorial on Annulment ¶¶ 59-72.

[131] Counter-Memorial on Annulment n.139.

[132] *See Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Appellant's Supplementary Skeleton Argument dated Nov. 8, 2022 (**A-67**) at 24; Friends of the Earth Post on X dated Dec. 7, 2022 (**A-54**); *Friends of the Earth v. UKEF*, Court of Appeal Judgment dated Jan. 13, 2023 (**A-55**); *Friends of the Earth v. UKEF*, Information about the Decision Being Appealed and Proposed Grounds of Appeal dated Feb. 20, 2023 (**A-115**) at 20; *Friends of the Earth v. Secretary of State*

Prof. Douglas, as he made clear by listing it as one of only seven public and private international law cases where he has acted as "lead counsel."[133]

77. Second, Respondent contends Prof. Douglas represented Friends of the Earth when the arbitration "was at an advanced stage" and "the Tribunal was discussing with the Parties the schedule for the filing of their cost submissions."[134] Respondent's speculation about the stage of the Tribunal's deliberation is misguided,[135] although, in fact, the timing was problematic as the Tribunal advised the Parties that it held multiple deliberations during the precise period while Prof. Douglas was engaged in client advocacy for Friends of the Earth.[136] In any event, the timing of the representation is not relevant as the Tribunal must remain properly constituted for its entire existence until it is *functus officio*.[137]

78. Third, Respondent argues that Prof. Douglas represented "Friends of the Earth UK," which Respondent describes as "an autonomous, independent entity" that is "affiliated with Friends of the Earth International" alongside "over 70 other chapters."[138] Respondent further argues that Prof. Douglas' client, Friends of the Earth UK, "did not engage in public activism against Gabriel Resources Canada or Gabriel Resources UK or their claims in the Arbitration" – only "other chapters" did.[139] The obvious fallacy in Respondent's argument, if taken to its logical conclusion, is that it would allow an arbitrator to sit in an arbitration

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*for International Trade/UKEF and another*, UKSC 2023/0026, Judgment dated June 12, 2023 (**A-172**); Friends of the Earth Press Release dated June 23, 2023 (**A-174**) (stating the Supreme Court rejected its appeal and that "The Friends of the Earth legal team consists of: Jessica Simor KC, Prof. Zachary Douglas KC, Kate Cook, Anita Davies, Gayatri Sarathy, Leigh Day LLP and its own in-house legal specialists.").

133 Prof. Zachary Douglas KC Bio at 3VB (**A-57)** at 5.

134 Counter-Memorial on Annulment ¶ 98.

135 *See* ICSID Arb. Rule 15(1) ("The deliberations of the Tribunal shall take place in private and remain secret.").

136 Award ¶ 545; Email from Tribunal to Parties dated Apr. 6, 2023 (**A-173**) ("The Tribunal informs the Parties that its latest (and two of several) deliberations took place on 13 December 2022 and 13 March 2023."). Moreover, as noted above, the Tribunal received three additional "amicus" or non-disputing party submissions in 2022 and 2023. *See* Award ¶¶ 540-542, 546-547.

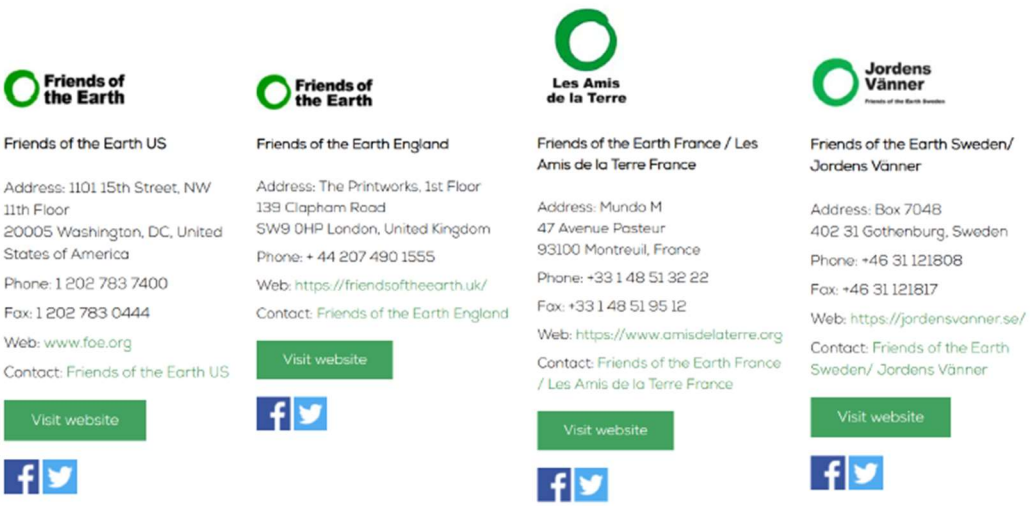
137 Memorial on Annulment ¶¶ 19-22; *EDF v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 125; *Eiser v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶¶ 158, 167-168, 178.

138 Counter-Memorial on Annulment ¶ 93.

139 Counter-Memorial on Annulment ¶¶ 101, 103.

brought by one Friends of the Earth entity while simultaneously acting as counsel for an affiliated Friends of the Earth entity in another matter. No reasonable third person would have confidence in the arbitrator's ability to remain impartial and independent in those circumstances.

79. Respondent's efforts to parse Friends of the Earth's organizational structure cannot insulate Prof. Douglas from Friends of the Earth's decadeslong public activism against Gabriel, the Roşia Montană Project, and Gabriel's claims in this arbitration. While Friends of the Earth has local operating entities organized in jurisdictions around the world that permit it to engage in fundraising, comply with tax obligations, and appear in court, all the entities within the structure share a common identity, brand, and mission, as the images below from Friends of the Earth's website unmistakably show.




80. Friends of the Earth International serves as an umbrella organization through which it coordinates policy centrally and provides funding for its member groups.

a. Friends of the Earth holds "a general meeting every two years to decide the federation's policies and activities" and to develop a joint framework for how to achieve key objectives. [140] An executive committee provides "governance of

[140] Friends of the Earth International Organisation (**RA-27**) at 1 (stating "all members have an equal say"); Friends of the Earth International 2023 Financial Statements (**A-185**) at 4 ("FoEI's [Friends of the Earth International's] five-year plan was discussed at our BGM [Biennial General Meeting], where members

the federation" and employs an "International Secretariat based in Amsterdam to support Friends of the Earth International's work and member groups."[141]

b. International program coordinators and a program steering committee oversee Friends of the Earth's international work in four areas, including "climate justice and energy" and "economic justice and resisting neoliberalism."[142]

c. Regional structures coordinate Friends of the Earth's decision-making and activities at the regional level.[143] "Friends of the Earth Europe" describes itself as "the European arm of Friends of the Earth International" and has an office in Brussels that "coordinates our network's joint campaigns" in the region.[144]

d. Friends of the Earth has an "internationalist solidarity system" to mobilize "internationalist support for threatened peoples and communities" with focal points in each region, while communication work also is coordinated at the international level and through a global online radio station.[145]

e. Friends of the Earth collects fees from its national member groups.[146] It also funds international and regional coordination and activities and contributes financial support to national member groups for priority projects.[147]

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evaluated our progress in achieving the plan's objectives. As a joint framework for how we will achieve our long-term vision, the plan is central to our work allows us to prioritise and ensure that we are working towards our key objectives and goals, making adjustments as necessary.").

141 Friends of the Earth International Organisation (**RA-27**) at 1.

142 Friends of the Earth International Organisation (**RA-27**) at 1; Friends of the Earth International Programme Coordinators (**A-186**).

143 Friends of the Earth International Organisation (**RA-27**) at 2.

144 Friends of the Earth Europe, Who We Are (**A-187**).

145 Friends of the Earth International Organisation (**RA-27**) at 2.

146 *See* Friends of the Earth International 2023 Financial Statements (**A-185**) at 6, 10-11 (reporting membership fees for 2023 and stating, "In March 2020 the ExCom adopted a Reserves Policy that aims to build up an amount of reserves that, supplemented by membership fees, can cover 150% of a basic operating budget of 1 million euros. The ExCom assesses and revises the numbers annually. We currently set the costs of a basic operating budget at 1,5 million.").

147 *See* Friends of the Earth International 2023 Financial Statements (**A-185**) at 4, 6, 9 (reporting expenditures including payments for "Support to member group projects," listing debts and credits with national member

In short, the Friends of the Earth member groups coordinate their policy and key objectives and collectively pool resources and work together to implement priority projects that align with the organization's overarching mission, which includes opposition to projects such as Roşia Montană.

81. Friends of the Earth Limited, the UK member entity, is one of the four original members that founded Friends of the Earth International in 1971 along with its sister entities in the United States, France, and Sweden.[148] Five decades later, it boasts that it "continues to be an active and influential contributor to the work of both our European and international bodies, with staff holding posts on boards and committees,"[149] and it promotes "solidarity" to "support Friends of the Earth International colleagues" in "our sister organisations across the globe…."[150]

82. The facts of this case show that Friends of the Earth campaigned for over 20 years against the Roşia Montană Project and later against Gabriel's arbitration claims, both through the collective activism of its international and European structures and through its national member groups mobilizing opposition and lobbying governments in their respective territories.

    a. At the international and European levels, Friends of the Earth helped form the "Save Roşia Montană" campaign, pressured international financial institutions

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groups including Friends of the Earth England, Wales & Northern Ireland, and describing plans "to invest more deeply in our member groups, structures and digital infrastructure in 2024").

[148] Friends of the Earth UK was incorporated in 1971, the same year it founded Friends of the Earth International. Friends of the Earth Limited Overview (**RA-26**); Friends of the Earth International Website, Our History (**A-188**).

[149] Friends of the Earth Limited Annual Report and Accounts for year ended May 31, 2017 (**A-189**) at 5 (also noting its "key role within the Friends of the Earth International federation to ensure strategic interventions and mobilisation on crucial issues"); Friends of the Earth Limited Annual Report and Accounts for year ended June 30, 2019 (**A-190**) at 8 ("During the year, Friends of the Earth continued to make an active and influential contribution to the Friends of the Europe and International networks, with staff holding critical roles, providing expert support and benefiting from shared learning.").

[150] Friends of the Earth Limited Annual Report and Accounts for year ended June 30, 2021 (**A-191**) at 13; (Friends of the Earth Limited Annual Report and Accounts for year ended June 30, 2022 (**A-192**) at 14 (highlighting work "[a]longside our international sister organisations" to deliver "a wide range of impactful solidarity interventions," and "We've trialled new ways for our grassroots network to support our international allies and have run sessions on the importance of solidarity.").

not to finance the Roşia Montană Project, petitioned Gabriel's shareholders to divest, featured Gabriel's claims against Romania in its attacks on investor-State arbitration, provided solidarity and support to local opposition, and celebrated the dismissal of Gabriel's arbitration claims on social media.[151]

b. At the UK national level, Friends of the Earth's UK branch lobbied the Prime Minister to investigate the Claimant Gabriel (Jersey) and to intervene to stop it from presenting claims against Romania under the UK BIT,[152] and it held a conference during this arbitration about the "Save Roşia Montană campaign" to "show solidarity with local communities from all over the world, fighting against destructive mining and extractivism."[153]

c. Friends of the Earth's Canadian branch petitioned fund managers investing in Gabriel Canada (which is listed on the Toronto Stock Exchange) and Canada's Minister of Foreign Affairs and Parliament to withdraw support for the Roşia Montană Project.[154]

d. Friends of the Earth's Hungarian branch similarly lobbied government officials in Hungary to assert transboundary objections, and it lobbied Romanian government officials in the ethnic Hungarian political party (which controlled

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[151] Memorial ¶¶ 34(a), 34(b), 34(e), 34(f), 34(g), 34(j), 34(o), 34(r), Annex 1 at 1-3; **Pop-29** at 3**, A-152, A-116**, **A-117** at 9, **R-137**, **A-119**, **Pop-15**, **A-156** at 1-3, **A-59**, **C-2889**, **C-2391** at 51, **A-60** at 14-19, **A-56**, **A-168**, **A-169**, **A-170**, **A-171**, **Thomson-2** at 7, 39, 41, **Thomson-3** at 4, **Thomson-16** at 6, 180, **Thomson-18** at 111-113, **Thomson-85** at 9, 16-17.

[152] Memorial on Annulment ¶ 34(k), Annex 1 at 2; **A-123**. Respondent contends this was done "in the context of the protests around the proposed TransAtlantic Trade and Investment Partnership." Counter-Memorial on Annulment n.157. The letter to UK Prime Minister David Cameron was published after ICSID registered Gabriel's Request for Arbitration, and its subject line is "Request for intervention to prevent a Canadian company using British investment treaty to sue Romania."

[153] Memorial on Annulment ¶ 34(m), Annex 1 at 2; **A-153**. Respondent attributes this activism to "Friends of the Earth Northern Ireland." Counter-Memorial on Annulment n.158. Friends of the Earth Limited, the UK entity, calls itself Friends of the Earth England, Wales and Northern Ireland and includes the "country team" in Northern Ireland. Friends of the Earth UK website, About us (**RA-29**).

[154] Memorial on Annulment ¶¶ 34(c), 34(h), 34(i), Annex 1 at 1; **A-118**, **A-120**, **A-121**, **A-122**, **A-171**.

the Ministry of Environment and the Ministry of Culture) not to permit the Project and instead to list it as a UNESCO World Heritage site.[155]

83. At every level, this activism served Friends of the Earth's overriding objective of seeking to block a largescale extractive project that it viewed as harmful to the environment and as favoring corrupt corporate interests.

84. Fourth, Respondent seeks to diminish Friends of the Earth's activism by arguing it was "one of many NGOs that supported local NGOs" opposed to the Project.[156] To observe that there were many NGOs expressing support, however, is irrelevant. What matters is Friends of the Earth's role, which Respondent understates. As detailed above, Respondent's experts Dr. Thomson and Dr. Pop identified only a few international groups campaigning against the Project back in 2002, prominently including Friends of the Earth.[157] Gabriel's management, the coalition of NGOs in the opposition campaign, campaign leaders like Stephanie Roth, and academic researchers in Romania and abroad likewise uniformly observed that Friends of the Earth was one of the main international NGOs fighting alongside peer organizations such as MiningWatch, Greenpeace, and Bankwatch.[158]

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[155] Memorial on Annulment ¶¶ 34(a), 34(d), 34(e), 34(f), 34(g), 34(l), 34(p), Annex 1 at 1-3; **A-152**, **R-597**, **Pop-15**, **A-156** at 1-3, **A-59**, **A-157**, **A-158**, **A-159**, **A-160**, **Thomson-17** at 152. Friend of the Earth refers to this entity interchangeably as "Friends of the Earth Hungary / Magyar Termeszetvedok Szovetsege" and as "Magyar Termeszetvedok Szovetsege / National Society of Conservationists (NSC)." Friends of the Earth International, Hungary (**A-193**).

[156] Counter-Memorial on Annulment ¶ 102; *id.* ¶ 103 ("scores of other NGOs").

[157] *See* Pop Report May 7, 2019 ¶ 35 ("Greenpeace, **Friends of Earth**, Mining Watch Canada, and Bankwatch Canada"); *id.* ¶ 47 ("Greenpeace, **Friends of the Earth**, Mining Watch Canada, etc"); Thomson Report May 6, 2019 ¶ 70 (BankWatch, Greenpeace, World Wildlife Federation, **Friends of the Earth**).

[158] *See, e.g.*, Gabriel Resources Email from Bruce Marsh dated Sept. 18, 2002 enclosing Analysis of Alburnus Maior (**Thomson-83**) at 3 ("'**Friends of the Earth**' (and possible other organisations)"); Alburnus Maior, CEE Bankwatch Network, Friends of the Earth International, Greenpeace CEE, Mineral Policy Center, MiningWatch Canada Press Release dated Oct. 10, 2002 (**A-116**) at 2 ("international coalition" included MiningWatch, CEE Bankwatch Network, Mineral Policy Center, **Friends of the Earth International**, and Greenpeace CEE); MiningWatch Press Release dated Nov. 30, 2002 (**A-170**) (Mining Watch Canada, CEE Bankwatch Network, Mineral Policy Center, **Friends of the Earth International**, Greenpeace CEE, and the Halifax Initiative); MiningWatch Press Release dated Sept. 7, 2005 (**A-171**) (international NGOs include CEE Bankwatch, Greenpeace CEE, **Friends of the Earth International**, and FIAN International); Stephanie Roth and Jurgen Maier, *Silence is Golden*, 2016 (**Thomson-3**) at 4, **(Pop-29**) at 3 ("groups such as **Friends of the Earth International**, BothEnds, Urgewald and Bank Wank CEE"); Alina Pop, *Roşia*

85. Fifth, Respondent argues that Friends of the Earth's advocacy against the Project would have targeted Respondent too, because RMGC was a joint venture between Gabriel and the State and because State authorities defended Project permits in litigation in Romania's courts.[159] To the extent that Respondent here argues that Friends of the Earth's interest in the dispute was neutral as between the Parties, its argument is disingenuous and does not withstand even the most basic scrutiny. Friends of the Earth consistently directed its sustained campaign – spanning public accusations and lobbying against the Project and opposition to Gabriel's claims in this arbitration – exclusively against Gabriel, aligning squarely with Romania's position in this case.

86. Sixth, Respondent contends the link between Friends of the Earth's views on investor-State dispute settlement and this arbitration or how it "could have possibly influenced Prof. Douglas" is "obscure."[160] The connection, however, is obvious. Friends of the Earth's stance against "ISDS" is an opposition to allowing corporate investors to bring arbitration claims against States.[161] As soon as Gabriel commenced this arbitration, Friends of the

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*Montană: Social Representations Around an Environmental Controversy in Romania*, 2014 (**Thomson-2**) at 7, 41 ("international environmental organizations like Greenpeace, **Friends of the Earth**, Mining Watch Canada, Bankwatch CEE"); Filip Alexandrescu, *Human Agency in the Interstices of Structure: Choice and Contingency in the Conflict over Roşia Montană, Romania*, 2012 (**Thomson-16**) at 6, 180, 227 ("international environmental movement organizations (Greenpeace and **Friends of the Earth**)"); Irina Velicu, *To Sell or Not to Sell: Resistance to Neo-Liberal Globalization and the Aesthetic Post-Communist Subject*, 2011 (**Thomson-18**) at 111-113 ("Greenpeace, **Friends of the Earth**, CEE Bank-Watch, Mining Watch, Earth Works, OSI, etc."); Witold Henisz, *Roşia Montană: Political and Social Risk Management in the Land of Dracula (B)*, 2009 (**Thomson-20**) at 5 (MiningWatch, Greenpeace, Earthworks, **Friends of the Earth**); Henisz 2007 Interview Notes (**C-2391**) at 51 (BankWatch, Greenpeace, World Wildlife Federation, **Friends of the Earth**).

159 Counter-Memorial on Annulment ¶¶ 104-105.

160 Counter-Memorial on Annulment ¶ 106.

161 *See, e.g.*, Friends of the Earth International 2010 Annual Report (**A-194**) at 8 (raising "increasing concern" about ICSID, "as transnational companies use it to challenge national laws and governments,"); Friends of the Earth International 2012 Annual Report (**A-195**) at 19 (TPP is "a massive trade agreement that would threaten essential environmental protections and allow companies to avoid accountability and even sue governments for taking measures to protect the health and well-being of their citizens"); Friends of the Earth International 2013 Annual Report (**A-196**) at 19 ("alarmed" over TTIP negotiations "especially if TTIP allows foreign investors to sue governments," and "similarly" about TPP); Friends of the Earth International 2014 Annual Report (**A-197**) at 10-11 (describing "extensive media work, actions, presentations at public events, and lobbying and advocacy on TTIP and the ISDS issue"); Friends of the Earth Tweet dated Nov. 7, 2018 (**C-2871**) at 13 (image of protesters with a sign declaring "NO CORPORATE COURT -- NO ISDS!" under a tweet saying, "The #ISDS system enables private investment lawyers to sue a country in a secret

Earth not only lobbied public officials in the United Kingdom and in Canada to disallow Gabriel's claim,[162] but it repeatedly pointed to Gabriel's claims against Romania as a prime example of how ISDS allows corporate interests to challenge States for "doing the right thing."[163]

87. Seventh, Respondent notes that "Friends of the Earth did not participate or seek to participate" as an *amicus* in the arbitration.[164] That is a red herring. Friends of the Earth demonstrated an active interest in the subject of the arbitration over a long period by publicly opposing the Roşia Montană Project and by publicly advocating against Gabriel's claims in this arbitration. Friends of the Earth thus had standing to seek to intervene as a non-disputing party in this arbitration under Part III, Annex C of the Canada BIT and under ICSID Arbitration Rule 37(2).[165] Friends of the Earth also regularly partnered with the entities that did intervene as non-disputing parties in this arbitration, including Greenpeace, ClientEarth, and CIEL.[166] Indeed, just two days after Prof. Douglas made his first written

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#trade tribunal for protecting the environment. Such a system cannot be tweaked. It needs a complete overhaul.").

162 Memorial on Annulment ¶¶ 34(i), 34(k), Annex 1 at 1-2 (**A-122**, **A-123**).

163 *See, e.g.*, Friends of the Earth, "The Trans Pacific Trade Deal Stumbled. Now Is the Time to Walk Away," Aug. 5, 2015 (**A-198**) at 2 ("Just last week, Canadian mining giant Gabriel Resources announced that it would seek arbitration against Romania for not allowing a gold mine that would have destroyed four mountains and created a giant cyanide pool. Romania is now facing the prospect of hundreds of millions of dollars in fines for doing the right thing, protecting its people and its environment."); "Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice," June 2019 (**A-60**) at 14-19 ("Suing to Force Through a Toxic Goldmine, Gabriel Resources vs Romania" with subheadings "Corporate harassment, vigilant courts," "Gabriel's true goldmine: ISDS," and "Wall Street money funding corporate lawsuits"); Friends of the Earth, "Corporations 'hijack justice' through RCEP trade deal," July 4, 2019 (**A-199**) at 3 ("Romania is defending itself from a shocking US$5.7 billion claim by Canadian mining company Gabriel Resources, after the country's courts declared the company's proposed toxic Roşia Montană gold mine illegal.").

164 Counter-Memorial on Annulment ¶ 92.

165 *See* Procedural Order No. 19 dated Dec. 7, 2018 (**A-147**) ¶¶ 47-57 (Tribunal criteria for accepting non-disputing party submissions under the BIT and the ICSID Arbitration Rules).

166 *See, e.g.*, Memorial on Annulment ¶¶ 25, 30, 34(a), 34(d), 34(h), 34(l), 34(q), 38, 48, nn. 25, 27, 31, 32, 37, 50, 58, 62, 88 (citing *inter alia* A-61, A-70, A-71, A-72, A-116, A-119, A-120, A-121, A-149, A-152, A-155, A-157, R-597, Pop-15); Thomson Second Expert Opinion ¶ 70; Pop Expert Opinion ¶ 47. Respondent contends CIEL and ClientEarth were not *amici*, but submitted an *amicus* brief on behalf of Alburnus Maior, Greenpeace CEE Romania, and ICDER. Counter-Memorial on Annulment ¶ 177, n.140. That makes no difference as CIEL and ClientEarth (together with ECCHR) corresponded directly with the Tribunal over several years; prepared and filed the "amicus curiae" application and submission; made joint press statements immediately upon filing that submission; and celebrated "victory" upon issuance of the Award.

submission for Friends of the Earth, CIEL intervened to support Friends of the Earth in that litigation.[167]

88. Moreover, while Prof. Douglas was acting as counsel for Friends of the Earth, it remained open to Friends of the Earth to seek to intervene as a non-disputing party and there could have been no assurance that it would not seek to do so. In fact, the Tribunal received three additional non-disputing party submissions in 2022 and 2023, one of which it admitted into the record.[168]

89. Eighth, Respondent argues that Prof. Douglas' representation of Friends of the Earth did not "overlap" with this arbitration in the "parties, factual or legal issues," so it "could not have provided" access to information that might "create an imbalance within the Tribunal" or have "caused him to be influenced by factors other than the merits" of this arbitration.[169] Respondent's premise is wrong because, as set out above, the legal standard is whether a reasonable third party, knowing all the facts, could justifiably doubt the arbitrator's impartiality and independence. There is no requirement to show that an arbitrator's client representation involved the same parties, facts, or legal claims or that it gave rise to actual bias or dependence or to inside information or to a "conflict of interest."[170] Put differently, the inquiry is not limited to what Prof. Douglas was strictly prohibited from doing by rules of professional responsibility governing his law practice. In this case, a reasonable third party knowing all the facts could justifiably doubt Prof. Douglas' impartiality and independence in this arbitration while he simultaneously represented Friends of the Earth

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*See* Memorial on Annulment ¶¶ 42-46 (citing *inter alia* A-124 – A-148); Procedural Order No. 19 dated Dec. 7, 2018 (**A-147**) ¶ 58 (acknowledging CIEL, ClientEarth and ECCHR submitted the Application, that the Application "does not contain any contact details of the Applicants," and that "the Submission itself is not signed by the Applicants"); CIEL Press Release dated Nov. 5, 2018 (**C-2866**); ClientEarth Press Release dated Nov. 5, 2018 (**C-2870**); ClientEarth Press Release, last accessed Mar. 21, 2025 (**A-148**); CIEL Press Release dated Mar. 11, 2024 (**A-184**).

167 Memorial on Annulment ¶ 30; *Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Written Submission on Behalf of the Proposed Intervener Center for International Environmental Law dated Nov. 10, 2022 (**A-155**).

168 *See* Award ¶¶ 540-542, 546-547 ("Second *Amici* Application and Submission" in September 2022, "Third *Amici* Application and Submission" in May 2023, and fourth non-disputing party application in July 2023).

169 Counter-Memorial on Annulment ¶ 95.

170 *See supra* ¶¶ 28-42.

in another contentious matter. Indeed, while it tries to elide the issue, Respondent does not even deny that an arbitrator's impartiality and independence may justifiably be doubted when he acts for a client that is engaged in public activism against one of the disputing parties and its claims in the arbitration.[171]

90. Moreover, the purported differences Respondent points out do not detract from the overwhelming similarities between the two matters. For example, while Respondent notes that Prof. Douglas represented Friends of the Earth in challenging the UK Government's decision to approve financing for a liquified natural gas project in Mozambique rather than "the non-issuance of an environmental permit for a mining project in Romania,"[172] Friends of the Earth relied upon the same arguments to stop both projects.

a. Friends of the Earth asserted that the gas industry in Mozambique – "[l]ike all extractive industries" – was fueling "human rights abuses, poverty, corruption, violence, and social injustice," "ravaging" the region "as transnational corporations and elites pillage its resources and devastate communities" by taking "their homes, territories, lands, and livelihoods," and causing "the destruction of the environment and exacerbation of the climate crisis."[173]

b. Friends of the Earth likewise repeatedly accused Gabriel of "illegalities," "corruption," and "egregious human rights and environmental abuses" over a "toxic goldmine" project it claimed would have "forcibly evicted" residents and "destroyed their homes and the surrounding environment."[174]

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171 *See* Counter-Memorial on Annulment ¶ 99 (referring to Applicants' argument without disputing it).

172 Counter-Memorial on Annulment ¶ 91.

173 Friends of the Earth, "Gas Rush, Human Rights Abuses, Climate Devastation, Insurgent Attacks, Covid Hotspot," June 4, 2020 (**A-175**). *See also, e.g.*, Friends of the Earth International 2021 Annual Report (**A-176**) at 30 ("The fossil fuel industry is peddling a lie that gas can be part of the clean energy transition. In reality, this so-called transition in Mozambique has meant a shift from freedom to human rights' violations, from peace to conflict, from communities living well through farming and fishing to starving populations deprived of their livelihoods. The gas rush, which is exacerbating the climate crisis and benefiting only transnational corporations and corrupt elites, must stop.").

174 Memorial on Annulment ¶ 34, Annex 1. *See, e.g.*, Open Letter from Friends of the Earth and others to Canada's Minister of Foreign Affairs dated Dec. 5, 2013 (**A-120**); Friends of the Earth, Red Carpet Courts:

91. Friends of the Earth also employed the same strategies to oppose both projects. This included mobilizing local and global opposition; disseminating films and other materials; sending public petitions to the project funders, to the government of the host country (Mozambique), and to the governments of sponsoring countries (France and the United Kingdom); and pursuing litigation, including in the case against the UK Government where Prof. Douglas acted as Friends of the Earth's lead counsel.[175]

92. Ninth, Respondent argues unconvincingly that authorities such as *Grand River v. United States*, *RSE v. Latvia*, and *Vito Gallo v. Canada* are "inapposite."[176] These cases establish that client advocacy on the part of an arbitrator may preclude continuing service on the Tribunal, even where the scope of work involved was small, unpaid, or provided to non-parties.[177]

a. In *Grand River*, ICSID's Secretary-General found that representing or assisting clients in procedures before the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination would be incompatible with simultaneously serving as arbitrator in that NAFTA arbitration given their "basic similarity."[178] Such a "basic similarity" exists in this case as well because Prof. Douglas acted for Friends of the Earth to block a largescale investment project in the extractive industry with similar underlying factual themes in dispute. It is significant that the challenged arbitrator in *Grand River* disclosed his client matters and agreed to cease his

10 Stories of How the Rich and Powerful Hijacked Justice, June 2019 (**A-60**) at 14-19 ("Suing to Force Through a Toxic Goldmine, Gabriel Resources vs Romania").

[175] *See, e.g.*, Friends of the Earth International 2017 Annual Report at (**A-177**) at 6, 9; Friends of the Earth International 2018 Annual Report (**A-178**) at 6, 9; Friends of the Earth International 2019 Annual Report (**A-179**) at 8; Friends of the Earth International, "Gas in Mozambique: A windfall for the industry, a curse for the country," June 15, 2020 (**A-180**); Friends of the Earth International 2020 Annual Report (**A-181**) at 14-15, 23, 31, 37; Friends of the Earth International 2021 Annual Report (**A-176**) at 30; Friends of the Earth International 2022 Annual Report (**A-182**) at 7, 21; Friends of the Earth International, Our struggles, Mozambique (**A-183**). *See also* Memorial on Annulment ¶ 34, Annex 1 (discussing same tactics for the Roşia Montană Project).

[176] Counter-Memorial on Annulment ¶ 96.

[177] Memorial on Annulment ¶¶ 51-56.

[178] *Grand River v. United States* (**AL-6**) at 1, 4; Memorial on Annulment ¶ 52.

advocacy in those other fora.[179] By contrast, Prof. Douglas never disclosed his client work for Friends of the Earth and thus did not provide any opportunity to address the issue.[180]

b. In *RSE*, the appointing authority found the challenged arbitrator's counsel work for investors in other ECT cases would "seed justifiable doubts in the mind of a reasonable and informed third person as to whether [her] consideration of the present case will be influenced by her duty to defend the interests of her investor claimant clients in disputes arising under the ECT."[181] Respondent notably omits all the statements in that decision emphasizing that it was irrelevant that the other ECT cases involved different parties and different disputed measures.[182]

c. In *Vito Gallo*, Mexico was a non-party with a right to intervene in the arbitration under NAFTA Article 1128, but had not expressed any interest in doing so, and the challenged arbitrator had done "a small amount of work" advising Mexico on international trade and investment law matters that did not involve NAFTA Chapter 11 or its bilateral investment treaties.[183] ICSID's Deputy Secretary-General observed, "Where arbitral functions are concerned, any paid or *gratis* service provided to a third party with a right to intervene can create a perception

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179 *Grand River v. United States* (**AL-6**) at 1-2.

180 Memorial on Annulment ¶ 56, § II(A)(2)(d).

181 *RSE v. Republic of Latvia* (**AL-52**) ¶¶ 46, 48 (concluding that "from the perspective of an objective, reasonable, and informed third party, Ms. Frey's role as counsel in other arbitrations under the ECT gives rise to justifiable doubts as to her impartiality and independence in the present arbitration under Article 10(1) of the UNCITRAL Rules").

182 Respondent asserts that "The challenge decision held that the [sic] 'the sheer number of cases generates a serious risk that overlapping questions of interpretation and application of the ECT will arise in this case as in those other arbitrations under the same treaty.'" Counter-Memorial on Annulment ¶ 96(i). Respondent fails to indicate with an ellipsis that the quoted statement is incomplete and that the rest of the sentence states, "notwithstanding the difference in factual matrix as between the cases." *RSE v. Republic of Latvia* (**AL-52**) ¶ 46. *See also id.* ¶ 44 ("It is common ground that the ECT cases in which Ms. Frey acted or acts as counsel do not involve the same Parties and do not specifically concern the impact of the modifications to the Latvian regulations on cogeneration power plants, which forms the principal subject matter of the present dispute.").

183 *Vito Gallo v. Canada* (**AL-8**) ¶¶ 30, 34.

of a lack of impartiality. The amount of work done makes no difference. What matters is the mere fact that work is being performed."[184] The ICSID Deputy Secretary-General also pointed out that, "[e]ven if Mexico were not in the end to intervene, the arbitration would have had to proceed under the shadow of this possibility," and it "would be next to impossible" for the arbitrator to avoid "the appearance of an inability to distance himself fully from the interests of Mexico, the advised NAFTA State Party and a potential participant in the present case."[185] In this case, Friends of the Earth also was in a position to intervene, and unlike in *Vito Gallo* where Mexico had shown no potential interest, Friends of the Earth publicly had expressed a strong interest in opposing Gabriel's arbitration claims. It is also significant that the challenged arbitrator in *Vito Gallo* disclosed his work for Mexico and resigned as arbitrator so he could continue his client work,[186] whereas Prof. Douglas failed to disclose his client work for Friends of the Earth.

93. *Eiser* is another case where counsel work caused justifiable doubts about an arbitrator's independence and impartiality. In that case, Mr. Lapuerta of the Brattle Group was an expert for the claimant, and one of the arbitrators served as counsel in other past or pending cases where his clients retained the Brattle Group, including in three cases where Mr. Lapuerta was the testifying expert.[187] The annulment committee found that in view of the arbitrator's professional "connections" and "relationship" as counsel to the claimant's expert, an independent observer objectively assessing all the facts would conclude that there was a manifest appearance of bias on the arbitrator's part.[188]

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184 *Vito Gallo v. Canada* (**AL-8**) ¶ 32.

185 *Vito Gallo v. Canada* (**AL-8**) ¶ 35; *id.* ¶ 36 (concluding a reasonable and informed third party would justifiably doubt the arbitrator's impartiality and independence "if he were not to discontinue his advisory services to Mexico for the remainder of the arbitration").

186 *Vito Gallo v. Canada* (**AL-8**) ¶¶ 8-11, 36; Arbitrator Thomas' Resignation Letter in *Vito Gallo v. Canada* dated Oct. 21, 2009 (**AL-55**).

187 *Eiser v. Spain* (**AL-18**) ¶ 205(f). The arbitrator's law firm, Sidley Austin, also engaged the Brattle Group as expert in two other arbitrations, and Mr. Lapuerta was the testifying expert in one of those cases. *Id.* ¶ 205(g).

188 *Eiser v. Spain* (**AL-18**) ¶¶ 217-220.

94. The same conclusion applies equally in this case as it could appear to a reasonable and informed third party that Prof. Douglas lacked the requisite impartiality and independence given his undisclosed work for Friends of the Earth while this arbitration was ongoing.

95. Tenth and finally, Respondent argues that "Prof. Douglas was under no obligation to disclose" his advocacy for Friends of the Earth as the situation is not a conflict that appears on the Red or Orange Lists of the IBA Guidelines.[189] As discussed above, however, those lists are merely indicative and are not binding or exhaustive, and the test for disclosure is what might cause one of the disputing parties to question the arbitrator's independence and impartiality.[190] At least two annulment committees have annulled awards where, as in this case, the undisclosed relationship or circumstance was not on any of the IBA's lists.[191]

96. Thus, Respondent's argument that its pleadings and the Award do not mention Friends of the Earth is irrelevant.[192] Prof. Douglas had a duty to investigate before taking on a new client engagement – a situation that dictates a heightened level of care and caution given the inherent risks in double-hatting.[193] Based on Friends of the Earth's campaign against Gabriel, which was well-documented in the public record,[194] and which included a documentary listed among the reading materials for the 2020-2021 MIDS course on International Investment Law,[195] Prof. Douglas should have known that acting as counsel for Friends of the Earth could give rise to doubts about his independence and impartiality.[196] At a minimum, knowing the issues in dispute in the arbitration and the arguments presented about the role of NGOs opposing the Project, which included

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189 Counter-Memorial on Annulment ¶ 98.

190 *See supra* ¶¶ 43-53.

191 *See Eiser v. Spain* (**AL-18**) ¶ 226; *Rockhopper v. Italy* (**RAL-30**) ¶ 344.

192 Counter-Memorial on Annulment ¶¶ 108-111.

193 Memorial on Annulment ¶¶ 63-66; *Eiser v. Spain* (**AL-18**) ¶ 223.

194 *See*, *e.g.*, Screenshots of Google Search for Friends of the Earth and Gabriel Resources (**A-151**).

195 Geneva Graduate Institute of International and Development Studies, Prof. Joost Pauwelyn, Course Description for International Investment Law in Academic year 2020-2021 (**A-154**) at 5 (including among the course materials "ISDS Stories: Save Roşia Montană, Friends of the Earth Europe 2019 (concerns *Gabriel Resources v. Romania*)").

196 Memorial on Annulment ¶¶ 36-37.

references to Friends of the Earth's campaign in the reports of Respondent's social license experts, Prof. Douglas had a duty to disclose the engagement before he took it on and to inquire about it with the Parties. His failure to make any disclosure irreparably undermined the appearance of impartiality and independence on the Tribunal and requires annulment of the Award.

### 3. Prof. Douglas' Matrix Chambers Colleagues and Friends of the Earth Co-Counsel Took on ClientEarth, a Non-Disputing Party, as a Client During the Arbitration

97. While Prof. Douglas represented Friends of the Earth as lead counsel during the arbitration, Prof. Douglas' colleagues at Matrix Chambers, who served with him as co-counsel for Friends of the Earth, took on ClientEarth, a Non-Disputing Party in the arbitration, as a client.[197]

98. ClientEarth communicated directly and repeatedly for years with the Tribunal about its strong interest in intervening in this arbitration, and the Tribunal allowed ClientEarth and other entities to make a Non-Disputing Parties' Submission urging the dismissal of Gabriel's claims.[198]

99. Prof. Douglas maintained a close working relationship with the Matrix Chambers colleagues who represented ClientEarth, including through his work with them on the matter for Friends of the Earth, and he also collaborated directly with the spouse of ClientEarth's CEO, who also was a fellow member of Matrix Chambers.[199] Prof. Douglas breached his disclosure obligations by failing to disclose that during the arbitration his Matrix Chambers colleagues with whom he worked on the Friends of the Earth matter, also took on ClientEarth, a Non-Disputing Party, as a client.[200] In these circumstances, a reasonable third party knowing all the facts could doubt Prof. Douglas' ability to rule

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197 Memorial on Annulment ¶ 38 (**A-70**, **A-71**, **A-72**).

198 Memorial on Annulment ¶¶ 40-46, Annex 1 at 2-3 (**A-124**, **A-125**, **A-126**, **A-127**, **A-128**, **A-129** at 18-20, **A-130**, **A-131**, **A-132**, **A-133**, **A-134**, **A-135**, **A-136**, **A-137**, **A-138**, **A-139**, **A-140**, **A-141**, **A-142**, **A-143**, **A-144**, **C-2867**, **A-145**, **C-2870**, **A-147**, **A-161**, **A-148**).

199 Memorial on Annulment ¶ 39 (**A-69**, **A-101**, **A-102**, **A-103**, **A-104**).

200 Memorial on Annulment ¶¶ 59-72.

independently and impartially on Gabriel's claims where the evidentiary record included ClientEarth's Non-Disputing Party Submission.[201]

100. Respondent raises several unfounded arguments in response.

101. First, Respondent tries to distance Prof. Douglas from his colleagues who represented ClientEarth by referring to them as his "former co-tenants."[202] That mischaracterizes the close working relationship between Prof. Douglas and his Matrix Chambers colleagues in connection with their legal work for ClientEarth.[203]

a. Matrix Chambers itself emphasizes that its members do not merely share a lease in the same building. Maxtrix Chambers promotes itself as having "core values" that include a "democratic structure" and "working together," where all its members "have an equal say" in running the organization and "are committed to teamwork and co-operation in delivering legal services, including through sharing legal knowledge and experience."[204] Respondent ignores these facts.

b. Matrix's founding member, Ms. Simor, led the Matrix team that represented ClientEarth on a matter together with Friends of the Earth,[205] while at the same time serving as co-counsel with Prof. Douglas to represent Friends of the Earth.[206] Thus, Prof. Douglas worked together with Ms. Simor, the founding member of Matrix Chambers, who served as lead counsel for ClientEarth, to represent Friends of the Earth, while Ms. Simor represented ClientEarth jointly with Friends of the Earth on another matter. The inter-connected nature of the legal work done for these entities and the overlap of the legal team are together

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201 Memorial on Annulment ¶¶ 47-58.

202 Counter-Memorial on Annulment ¶¶ 115, 119, 123.

203 Memorial on Annulment ¶ 39.

204 Matrix Chambers - Core Values (A-69) (emphasis omitted); Memorial on Annulment ¶ 39(a).

205 Memorial on Annulment ¶¶ 38(a), 39(b), n.62 (**A-70**, **A-71**, **A-72**). *See also* Matrix Chambers - Jessica Simor KC (**A-64**) at 1 ("founding Member of Matrix chambers").

206 Memorial on Annulment ¶¶ 27(a), 39(b), n.23 (**A-67**, **A-54**, **A-55**, **A-115**).

another link between Prof. Douglas and the client work his colleagues undertook for ClientEarth.

c. Reflecting an evidently close working relationship, Prof. Douglas also collaborated with the spouse of ClientEarth's CEO, a fellow member of Matrix Chambers, to submit a joint expert opinion in another matter.[207]

These collaborations are an important factor when assessing Prof. Douglas' failure to disclose in the Gabriel arbitration, where ClientEarth was a Non-Disputing Party, that his Matrix Chambers colleagues had undertaken client work for ClientEarth.[208]

102. Second, Respondent argues that at the time of the ClientEarth litigation, "the Arbitration was at an advanced stage."[209] As demonstrated above, the timing of the representation is not relevant as the Tribunal must remain properly constituted for the full duration of the arbitration.[210] Respondent's argument has no factual basis in any event because Matrix Chambers started its work for ClientEarth in January 2022.[211] At that stage the arbitration was far from over, as during that same month the Tribunal notified the Parties that it would revert in due course about whether it had further questions for the Parties or whether it

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[207] Memorial on Annulment ¶¶ 39(c), 39(d), nn.64, 65 (**A-101**, **A-102**, **A-104**, **A-89**) (showing Matrix member Toby Fisher submitted joint expert opinion with Prof. Douglas and is married to ClientEarth's CEO Laura Clarke). It is irrelevant whether Prof. Douglas was "aware that Mr. Fisher was married or of his wife's position." Counter-Memorial on Annulment ¶ 122. The standard is an objective test from the perspective of a reasonable third person – it is not based on what Prof. Douglas knew or did not know. In any event, Ms. Clarke's position as CEO of ClientEarth and her marriage to Mr. Fisher are public facts recorded in their social media posts, on the UK government website, and even on Wikipedia. *See, e.g.*, Wikipedia - Laura Clarke (**A-200**); Gov.UK - Laura Clarke OBE (**A-201**); Laura Clarke Post on X dated Dec. 21, 2021 (**A-202**); Toby Fisher Post on LinkedIn dated Sept. 6, 2022 (**A-101**). Respondent's suggestion that Prof. Douglas might have been unaware of those facts is highly implausible.

[208] Memorial on Annulment n.63; IBA 2014 Guidelines (**RAL-31**) (General Standard 6(a) and commentary) (stating that an arbitrator "is in principle considered to bear the identity" of his or her law firm or employer, and that "although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel").

[209] Counter-Memorial on Annulment ¶ 116.

[210] *See supra* ¶ 27.

[211] ClientEarth Press Release dated Jan. 12, 2022 (**A-203**).

might hold another hearing.[212] The Tribunal subsequently did direct the Parties to address additional questions in further written submissions.[213] The Parties also addressed three more "amicus" applications in 2022-2023, one of which the Tribunal admitted into the record.[214] The Tribunal did not issue the Award until more than two years after the ClientEarth litigation began.

103. Third, Respondent argues that there was "no overlap in parties, factual or legal issues between the Arbitration and Matrix Chambers' ClientEarth case," which according to Respondent shows Prof. Douglas did not have access to information that would create an imbalance within the Tribunal or cause him to be influenced by factors other than the merits of the arbitration.[215] This is the same false premise addressed above in the context of Prof. Douglas' client work for Friends of the Earth. There is no requirement to show that the parties, facts, or legal claims were the same or that it resulted in actual bias or dependence or access to inside information or a conflict of interest. The legal standard is whether a reasonable third party, knowing all the facts, could have grounds to doubt the arbitrator's impartiality and independence. Respondent's argument therefore is again based on an incorrect characterization of the relevant standard.[216]

104. Moreover, ClientEarth had applied to and had obtained leave from the Tribunal, including Prof. Douglas, to make a Non-Disputing Party Submission in the arbitration, and thus Prof. Douglas was aware of this significant fact when his Matrix Chambers colleagues took on ClientEarth as a client – although not disclosed by Prof. Douglas.

105. Fourth, Respondent asserts that "ClientEarth was not an *amicus* to the Tribunal in the Arbitration," that it "assisted three *amici* in filing their submission," and that the *amicus*

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[212] Award ¶ 530; Email from Tribunal Secretary to Parties dated Jan. 10, 2022 (**A-204**). The Tribunal had expressly reserved the possibility of asking additional questions or organizing another hearing. Email from Tribunal Secretary to Parties dated June 1, 2021 (**A-205**).

[213] Award ¶¶ 531-537, 539. *See also* Letter from Tribunal to Parties dated Apr. 12, 2022 (**A-206**).

[214] Award ¶¶ 538, 540-543, 546-547.

[215] Counter-Memorial on Annulment ¶¶ 115-121.

[216] *See supra* ¶¶ 28-42 (legal standard); *supra* ¶ 89 (rebutting same argument for Friends of the Earth).

submission does not indicate opposition by ClientEarth to Gabriel's claims.[217] Respondent misrepresents ClientEarth's involvement and interest in the arbitration. The record shows that ClientEarth was not a mere filing agent as Respondent wrongly seeks to portray and that ClientEarth maintained a substantive position as a non-disputing party that made its interest clear from the outset of the arbitration.

a. While purportedly acting on behalf of three Romanian NGOs, the three international NGOs, ClientEarth, along with CIEL and ECCHR, communicated repeatedly with the Tribunal over several years about their collective intention to make a submission – even before the Tribunal's First Session with the Parties.[218]

b. Reflecting that the submissions made are substantively those of ClientEarth, CIEL, and ECCHR, their interventions in this case repeat the same content and structure, including verbatim passages, as submissions they have made to tribunals in other investor-State arbitrations expressly on their own behalf.[219]

c. The Non-Disputing Party application was made on the letterhead of CIEL, ClientEarth, and ECCHR.[220] It states that "ClientEarth, CIEL, and ECCHR have a long history of supporting communities in various legal forums, including in supporting groups submitting *amicus* briefs in similar arbitration proceedings."[221] As originally filed in November 2018, the application stated that it was submitted by CIEL, ClientEarth, and ECCHR, purportedly on behalf

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217 Counter-Memorial on Annulment ¶ 117.

218 Memorial on Annulment ¶¶ 42-43, Annex 1 at 2-3 (**A-124**, **A-125**, **A-126**, **A-127**, **A-128**, **A-129** at 18-20, **A-130**, **A-131**, **A-132**, **A-133**, **A-134**, **A-135**, **A-136**, **A-137**, **A-138**, **A-139**, **A-140**, **A-141**, **A-142**, **A-143**, **A-144**).

219 Memorial on Annulment n. 88. *Compare, e.g.*, Letter from CIEL, ClientEarth, and ECCHR to Tribunal President dated July 15, 2016 (**A-124**) *to RWE v. Kingdom of Netherlands*, ICSID Case No. ARB/21/4, Letter from ClientEarth, ECCHR, Greenpeace Netherlands, Milieudefensie (Friends of the Earth Netherlands), SOMO, and Urgenda to Tribunal dated July 19, 2021 (**A-149**).

220 "Amicus" Petition dated Nov. 2, 2018 (**A-207.1**) at 1.

221 "Amicus" Petition dated Nov. 2, 2018 (**A-207.1**) at 5.

of the three prospective *amici*, although the signatures of Alburnus Maior and ICDER were simply electronic stamps.[222]

d. The "*amicus* submission" that ClientEarth, CIEL and ECCHR prepared and submitted in November 2018 did not include letterhead, a heading, any signatures, or any contact information for the alleged *amici*.[223] It consisted of 20 pages of argument much of which had nothing to do with the interests of the alleged *amici* representing the Romanian local community, *i.e.*, it argued that the Tribunal lacked jurisdiction due to the Court of Justice of the European Union's judgment in *Achmea* and that Gabriel's alleged "failure to comply with applicable domestic and EU law, as well as investor responsibilities under international law, necessitates a rejection of the claims."[224]

e. Upon filing the submission, ClientEarth, CIEL, and ECCHR issued press releases describing the Roşia Montană Project as "an illegal gold mine project" and accusing Gabriel of "human rights violations."[225]

f. ClientEarth publicized their press release in a series of social media posts declaring, "#SaveRosiaMontana voices to be heard in illegal Romanian gold mine litigation" and "#EndISDS."[226]

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[222] *Compare* "Amicus" Petition dated Nov. 2, 2018 (**A-207.1**) at 5. *to* Letter from CIEL, ClientEarth, and ECCHR to Tribunal President dated July 15, 2016 (**A-124**) at 3.

[223] "Amicus" Submission dated Nov. 2, 2018 (**A-207.2**) at 1, 20. *See also* Procedural Order No. 19 dated Dec. 7, 2018 (**A-147**) ¶ 58 (acknowledging that the application was "submitted by representatives of CIEL, Client Earth and ECCHR on behalf of the Applicants and not the Applicants themselves," did "not contain any contact details of the Applicants," and that "the Submission itself [was] not signed by the Applicants").

[224] "Amicus" Submission dated Nov. 2, 2018 (**A-207.2**) at 18, 19 (headings A and B).

[225] Client Earth Press Release dated Nov. 5, 2018 (**C-2870**) at 1-2; CIEL Press Release dated Nov. 5, 2018 (**C-2866**) at 1-2; ECCHR Press Release dated Nov. 5, 2018 (**C-2865**) at 1-2.

[226] ClientEarth Posts on X dated Nov. 5, 11, and 12, 2018 (**C-2871**) at 9, 14-15.


g. The Tribunal granted the application over Claimants' objection and admitted the submission in large part, subject to rectifying "formal defects identified."[227]

Thus, the submission revealed the substantive role of ClientEarth and its position against Gabriel – although the particular position it chose to advocate in the arbitration is not what is relevant. The issue clearly presented to Prof. Douglas for disclosure was ClientEarth's substantive role as an intervenor in the arbitration and as a client of Prof. Douglas' Matrix Chambers' colleagues, which he did not disclose.

[227] *See* Procedural Order No. 19 dated Dec. 7, 2018 (**A-147**) ¶ 75(1). A revised Application thereafter was submitted along with a revised Submission that included a new header at the top of the first page and signatures at the bottom of the last page (copied from the application) stating that the submission was by and submitted by Alburnus Maior, ICDER, and Greenpeace Romania. *See* Revised Amicus Application and Submission submitted Dec. 20, 2018 (**A-145**) at 5-6, 25.

106. In these circumstances, a reasonable and informed third party could have justifiable doubts as to whether Prof. Douglas could impartially and independently consider the content of ClientEarth's submission and rule more generally in the arbitration.

107. Fifth and finally, while Respondent argues that Prof. Douglas did not have to disclose Matrix Chambers's advocacy for ClientEarth because it is not listed on the IBA's Red or Orange Lists,[228] that argument is wrong for the reasons discussed above.[229] The arbitrator's duty under ICSID Arbitration Rule 6(2) is to disclose any circumstance that might cause his or her reliability for independent judgment to be questioned by a party. Prof. Douglas had to know his colleagues' work for ClientEarth might cause Claimants to question his reliability for independent judgment, not as a theoretical or hypothetical matter, but because Claimants already had objected to ClientEarth's intervention in the arbitration.[230]

### 4. Respondent's Counsel Provided Financial and Material Support to Prof. Douglas' Academic Program During the Arbitration

108. For many years, Prof. Douglas has administered the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program that is the main platform for his research and academic activities.[231] During the arbitration, Respondent's arbitration counsel LALIVE partnered with and provided undisclosed material financial and sponsorship support to the MIDS program, as LALIVE and MIDS both prominently advertise on their websites and in their marketing materials.[232]

109. Even if LALIVE's financial and material support did not involve direct financial compensation to Prof. Douglas, it supported the MIDS program he administers and thus could be perceived to have contributed a material benefit to Prof. Douglas.[233] While law

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228 Counter-Memorial on Annulment ¶¶ 123-124.

229 *See supra* ¶¶ 51-53 (explaining that the IBA Guidelines are not binding, that the Guidelines expressly state that the lists are merely indicative and are not exhaustive, and that annulment committees have annulled awards even where the undisclosed circumstances at issue did not fall on any of the lists).

230 *See* Claimants' Comments on the Non-Disputing Parties' Application dated Nov. 23, 2018 (**A-208**).

231 Memorial on Annulment ¶¶ 73-75 (**A-47**, **A-57**, **A-76**, **A-77**, **A-78**, **A-150**).

232 Memorial on Annulment ¶¶ 76-79 (**A-78**, **A-83**, **A-84**, **A-85**, **A-86**).

233 Memorial on Annulment ¶¶ 73, 85.

firms may support and collaborate with academic institutions, doing so may lead to justifiable doubts about an arbitrator's impartiality and independence if he or she benefits directly or indirectly without informed consent about that collaboration and support. Prof. Douglas failed to disclose the financial and material support LALIVE provided to MIDS, and he understated his connections to LALIVE through the MIDS program.[234] The undisclosed material and financial support that Respondent's counsel provided to Prof. Douglas' academic and research platform accordingly could provide grounds for a reasonable and informed third party to doubt Prof. Douglas' independence and impartiality in this arbitration.[235]

110. Respondent's several arguments in response are incorrect and misleading.

111. First, Respondent argues that this ground is "untimely" because LALIVE's support of the MIDS program allegedly has "been public for years."[236] That is incorrect. While Respondent refers to MIDS annual reports and program brochures dating back to "at least … 2010,"[237] the CIDS/MIDS annual reports available at the time of Prof. Douglas' appointment in 2016 do *not* mention any scholarships, internships, or financial assistance from LALIVE to MIDS, but rather refer only to the LALIVE Lecture and to LALIVE hosting and participating in other conferences and events.[238] Applicants accordingly could not have known or raised the facts now at issue when Respondent appointed Prof. Douglas.

112. Although not disclosed in the arbitration, LALIVE materially increased the nature and level of its support for MIDS during the arbitration, as LALIVE began providing scholarships to MIDS students in 2019. At that time, LALIVE issued a press release called "LALIVE provides strong support to the Graduate Institute's MIDS Programme" that states,

> Building on its strong relationship with the Graduate Institute of International and Development Studies and the University of Geneva,

234 Memorial on Annulment ¶¶ 80, 87-94.

235 Memorial on Annulment ¶¶ 81-86.

236 Counter-Memorial on Annulment ¶ 126.

237 Counter-Memorial on Annulment n.192.

238 *See, e.g.*, MIDS Annual Report 2014-2015 (**A-209**) at 5, 15, 17, 19, 20, 24; CIDS/MIDS Annual Report 2015-2016 (**A-210**) at 5, 17, 19, 20, 24.

> LALIVE is proud to support the Graduate Institute's MIDS- Geneva LL.M. in International Dispute Settlement. *Starting this year, the firm provides a full scholarship, covering the full tuition fees and living expenses of one student for the duration of the one year programme.*[239]

LALIVE then also announced that "the firm will offer a half-day seminar on the practice of international arbitration" that "aims to provide practical training to students wishing to pursue a career this [sic] field of law, including by spending time with LALIVE partners and counsel, who will offer first-hand experience and advice."[240] Thus, LALIVE introduced a scholarship program and a seminar for MIDS students in 2019, three years after Respondent appointed Prof. Douglas as arbitrator in this case, without any disclosure from Prof. Douglas.

113. In 2019, LALIVE also publicized that the firm "offers an average of five internship positions to MIDS students for a duration of six months," that many of "these interns have joined the firm as associates," and that LALIVE "currently counts ten lawyers, including four partners, who trained at the Graduate Institute, nine of them practicing exclusively in international arbitration."[241] Prof. Douglas did not disclose those facts. While earlier MIDS reports stated that MIDS graduates obtained employment at various arbitral institutions, government divisions, and law firms, including at LALIVE,[242] earlier reports do not refer to LALIVE committing to provide internships to MIDS students.

114. In or around July 2020, LALIVE created a dedicated landing page on its website called "LALIVE and the MIDS" .[243] LALIVE emphasized its "strong relationship with" and

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239 LALIVE Press Release dated Sept. 25, 2019, "LALIVE provides strong support to the Graduate Institute's MIDS Programme" (**A-211**) (emphasis added). *See also* Counter-Memorial on Annulment ¶ 131 ("Since 2019, LALIVE has provided a scholarship to one student at the MIDS to cover tuition fees and living expenses for the duration of the program.").

240 LALIVE Press Release dated Sept. 25, 2019, "LALIVE provides strong support to the Graduate Institute's MIDS Programme" (**A-211**).

241 LALIVE Press Release dated Sept. 25, 2019, "LALIVE provides strong support to the Graduate Institute's MIDS Programme" (**A-211**).

242 *See, e.g.*, MIDS Annual Report 2014-2015 (**A-209**) at 8-9, 36; CIDS/MIDS Annual Report 2015-2016 (**A-210**) at 8-9, 36.

243 *Compare* LALIVE website, LALIVE and the MIDS (**A-212**) *to* LALIVE Press Release dated Sept. 25, 2019, "LALIVE provides strong support to the Graduate Institute's MIDS Programme" (**A-211**). The earliest date

"support" for MIDS that includes giving a "full scholarship" with "full tuition fees and living expenses," conducting a half-day seminar for MIDS students, offering an "average of five internship positions to MIDS students," and having ten lawyers and four partners who trained at the Graduate Institute.[244] Earlier, LALIVE's website only mentioned co-hosting the LALIVE Lecture along with several academic positions and journal publications of the firm's attorneys.[245]

115. Likewise, it was only later that MIDS began marketing LALIVE's support as a selling point for its program. MIDS's website featured the LALIVE Scholarship and the firm's training seminar only in 2019,[246] and its "partnerships" with LALIVE and other law firms in 2022.[247]

116. Notably, while Prof. Douglas did not disclose any of these connections between MIDS and LALIVE at any time, contrary to Respondent's assertions, it was only during this arbitration that LALIVE's financial support of MIDS increased and began to be promoted publicly.

117. Second, Respondent complains that Applicants do not provide "any evidence" that MIDS was Prof. Douglas' "main platform" for his academic and research activities.[248] There is, however, no serious basis to dispute that fact. In 2011, Prof. Douglas left his teaching position at the University of Cambridge to join MIDS.[249] It is undisputed that for the past

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identified for the "LALIVE and the MIDS" website through the Wayback Machine is July 9, 2020. *See* Wayback Machine - LALIVE and the MIDS, July 9, 2020 (**A-213**).

244 LALIVE website, LALIVE and the MIDS (**A-212**).

245 Wayback Machine - LALIVE website, Academia, March 24, 2014 (**A-214**).

246 *Compare* Wayback Machine - MIDS website, Scholarships, July 25, 2019 (**A-215**) (scholarships from law firms including LALIVE) *to* Wayback Machine - MIDS website, Scholarships, Sept. 5, 2018 (**A-216**) (no law firm scholarships mentioned).

247 *Compare* Wayback Machine - MIDS website, Partnerships, Apr. 21, 2022 (**A-217**) (partners include LALIVE) *to* Wayback Machine - MIDS website, Partnerships, Nov. 28, 2021 (**A-218**) (no law firm partners mentioned); *compare* CIDS Annual Report 2021 (**A-219**) (no partners mentioned); CIDS Annual Report 2022 (**A-220**) at 28-30 (section on "Partnerships" included for the first time).

248 Counter-Memorial on Annulment ¶¶ 127-128.

249 MIDS Profile for Prof. Zachary Douglas (**A-150**). *See also* Prof. Zachary Douglas KC 3VB Biography (**A-57**) at 1.

14 years he has been a full-time faculty member and professor at MIDS.[250] From the time of its establishment as a joint research center of the Graduate Institute and the University of Geneva in 2012 at least until 2018,[251] Prof. Douglas led the CIDS as one of its two directors, along with Prof. Kaufmann-Kohler; Prof. Douglas then took on a governance position on the new CIDS Council that is "the overarching body supervising both the CIDS and the MIDS."[252] Since at least 2012, Prof. Douglas also has served on the MIDS Committee that is "the ruling body of the MIDS" and that "oversees all matters regarding the structure and functioning of the program."[253] Thus, while Respondent observes that Prof. Douglas became MIDS Program Director in 2024 after the Award was rendered,[254] throughout the arbitration, Prof. Douglas was one of the principal administrators leading the CIDS and overseeing all aspects of the MIDS program.

118. Third, Respondent contends that LALIVE is only "one of many" partners and supporters of MIDS and not a "principal" partner and financial supporter. [255] That misrepresents

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[250] Memorial on Annulment ¶ 74. *See also* Counter-Memorial on Annulment ¶ 128.

[251] MIDS Annual Report 2013-2014 (**A-221**) at 9, ("this academic year has witnessed the establishment of the CIDS," which "is placed under the leadership of Prof. Gabrielle Kaufmann-Kohler and Prof. Zachary Douglas"); MIDS Annual Report 2014-2015 (**A-209**) at 44 ("The CIDS is placed under the leadership of Prof. Zachary Douglas and Prof. Gabrielle Kaufmann-Kohler."); CIDS/MIDS Annual Report 2015-2016 (**A-210**) at 44 (same). Applicants have not located MIDS or CIDS annual reports from 2017 to 2019, but archived pages from the CIDS website show Prof. Douglas and Prof. Kaufmann-Kohler remained its directors at least until 2018. *See* Wayback Machine - CIDS Website, About the CIDS, Apr. 30, 2018 (**A-222**).

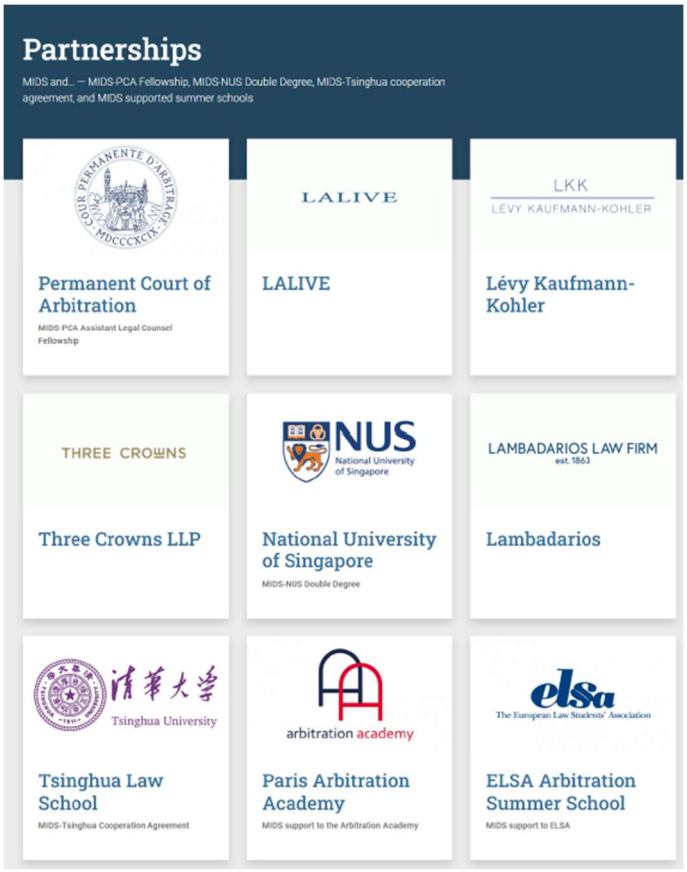
[252] Memorial on Annulment ¶ 75. *See also* Wayback Machine - CIDS Website, Governance, July 10, 2018 (**A-223**) (earliest archived CIDS governance page showing Prof. Douglas was on the CIDS Council); CIDS Annual Report 2020 (**A-224**) at 4; CIDS Annual Report 2021 (**A-219**) at 4; CIDS Annual Report 2022 (**A-220**) at 3; CIDS Annual Report 2023 (**A-225**) at 3; CIDS Website, Governance (**A-76**) at 1 (Prof. Douglas still on CIDS Council).

[253] Memorial on Annulment ¶ 75. MIDS referred to this body as the Program Committee and then as the Board of Directors before rebranding it the MIDS Committee. *See* MIDS Annual Report 2012-2013 (**A-226**) at 6; (Prof. Douglas on MIDS "Program Committee"); Wayback Machine - MIDS Website, Directors and Staff, Feb. 7, 2013 (**A-227**) (Prof. Douglas on MIDS "Board of Directors"); Wayback Machine - MIDS Website, Governance, Oct. 22, 2019 (**A-228**) (earliest archived reference to MIDS Committee includes Prof. Douglas); CIDS Website, MIDS Governance (**A-77**) (Prof. Douglas still on MIDS Committee).

[254] Counter-Memorial on Annulment ¶ 128.

[255] Counter-Memorial on Annulment ¶ 129.

LALIVE's support for MIDS. When MIDS added law firms to its "Partnerships" page, it prominently featured LALIVE.[256]




MIDS also emphasized that "MIDS and LALIVE have a long-standing partnership, dating back to almost the beginning of the MIDS program," including a training seminar, "[a] commitment on the part of LALIVE to engage as interns around 5 MIDS students each year," and "[a] full scholarship, covering both the MIDS tuition fees and living expenses in Geneva for one student, for the duration of the one-year program."[257] Support at that level was not offered by any other law firm, nor were there "many" law firm partners.

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256 Wayback Machine - MIDS website, Partnerships, Apr. 21, 2022 (**A-217**).

257 MIDS Website - Partnership MIDS & LALIVE (**A-85**). *See also* CIDS Annual Report 2022 (**A-220**) at 28; CIDS Annual Report 2023 (**A-225**) at 28. After Applicants filed their Annulment Application, CIDS changed the main page of its website and it removed the links to individual partners, including the "MIDS & LALIVE" page.

119. Fourth, Respondent asserts that LALIVE's financial support to MIDS is "like that of other law firms,"[258] but that assertion is baseless. For example, Respondent contends that LALIVE is "not alone" in offering internships to MIDS students and that White & Case along with many other firms do as well.[259] Respondent here, however, incorrectly refers to the MIDS program brochure sections that describe where MIDS graduates "have found positions" after completing the program, which is how White & Case, for example, is listed.[260] MIDS clearly states in its annual reports that only two law firms commit to offering internships – LALIVE, which "commits to offering internships to approximately four or five MIDS students each year," and Levy Kaufmann-Kohler, which offers two.[261]

120. Similarly, Respondent also contends that "other law firms" provided "similar scholarships" to MIDS,[262] but there is no support for that. From 2019 through the issuance of the Award in 2024, MIDS listed only two law firms that awarded full scholarships covering all the tuition fees and living expenses – LALIVE and Levy Kaufmann-Kohler.[263]

121. Fifth, Respondent argues that LALIVE's financial support to MIDS students does not amount to a "commercial relationship" between LALIVE and Prof. Douglas.[264] Whether LALIVE's financial support of MIDS is characterized as a "commercial relationship" is not relevant. The only relevant inquiry is whether LALIVE's financial support of MIDS would provide a basis for a reasonable and informed third party to doubt Prof. Douglas' independence or impartiality in the circumstances of this case.

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258 Counter-Memorial on Annulment ¶¶ 131, 137.

259 Counter-Memorial on Annulment ¶ 131.

260 MIDS 2022-2023 Program Brochure (**A-78**) at 11.

261 CIDS Annual Report 2022 (**A-220**) at 3.

262 Counter-Memorial on Annulment ¶ 131.

263 Wayback Machine - MIDS Website, Scholarships, July 25, 2019 (**A-215**) (thanking the two law firms for their "generous" support); Wayback Machine - MIDS Website, Scholarships, May 21, 2024 (**A-229**) (LALIVE and Levy Kaufmann-Kohler continued to provide full scholarships, while Three Crowns and the Lambadarios law firm awarded partial scholarships in an unspecified amount).

264 Counter-Memorial on Annulment ¶¶ 133-135.

122. Here it plainly does, as the degree of LALIVE's financial support is sizable. Tuition fees for the MIDS program are CHF 28,000 (~ US$ 35,000),[265] and, as MIDS notes, reflecting Geneva's "high cost of living," the Swiss authorities will not grant a student visa without proof of financial means, generally requiring CHF 2,500 (~ U$ 3,100) per month to pay estimated living expenses.[266] A single scholarship that covers "full tuition and living expenses" is worth tens of thousands of dollars. Thus, MIDS rightly describes LALIVE's support as "a valuable investment" and "a significant commitment."[267] As priority in awarding scholarships is given to "*students who would not be able to undertake the program without financial assistance*,"[268] LALIVE's support materially enhances the MIDS program and reasonably could be perceived as providing a benefit to Prof. Douglas.[269]

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265 MIDS Website, Tuition & Financial Planning (**A-230**) at 1.

266 MIDS Website, Tuition & Financial Planning (**A-230**) at 4.

267 MIDS Website, Tuition & Financial Planning (**A-230**) 1.

268 Wayback Machine - MIDS Website, Scholarships, May 21, 2024 (**A-229**) (emphasis added).

269 Yuliia Pavlova Linked Post dated Oct. 9, 2024 (**A-231**) (LALIVE scholarship recipient emphasizing that "*[w]ithout it I would have not been able to attend to the MIDS*.").


Prof. Douglas with Lalive Scholar at MIDS graduation ceremony[270]

123. Sixth, Respondent seeks to distinguish the *Vento Motorcycles* case,[271] but fails to do so. The *Vento Motorcyles* case is instructive as Mexico invited Mexico's party-appointed arbitrator to apply for appointment to its panel of arbitrators for two treaties, and the arbitrator did so.[272] The Ontario Court of Appeal set aside the tribunal's unanimous award finding that "[a]lthough appointment to the roster of panelists eligible to hear disputes did not involve any direct financial compensation or amount to an actual appointment to a tribunal, it was still a valuable professional opportunity that enhanced [the arbitrator's] professional reputation" and thus could give rise "to a reasonable apprehension of bias."[273]

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[270] Yuliia Pavlova Linked Post dated Oct. 9, 2024 (**A-231**) (LALIVE scholarship recipient posing with Prof. Douglas).

[271] Counter-Memorial on Annulment ¶ 136 (referring to *Vento Motorcycles v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**)).

[272] Memorial on Annulment ¶ 84; *Vento Motorcycles v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶¶ 3, 10-11.

[273] *Vento Motorcycles v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶ 13 (internal quotation marks and brackets omitted). *Id.* ¶ 42 (concluding that "a reasonable

124. Respondent argues that the case shows that the applicable legal standard is "high."[274] The court decision is based on the UNCITRAL Model Law on International Arbitration adopted into Ontario law by its International Commercial Arbitration Act.[275] The court does not refer to the standard as "high," but regardless it supports the conclusion that an arbitrator need not receive a direct financial benefit to give rise to a basis to doubt his or her independence or impartiality.

125. Seventh and finally, Respondent argues that it is "normal" for law firms to engage with and in some cases to provide support to academic institutions.[276] That is not disputed.[277]

126. Rather, it is the nature and extent of support that in some cases may give rise to an obligation of disclosure and that may give rise to reasonable doubts about impartiality and independence in a particular case involving the law firm. The fact that current and former White & Case lawyers along with lawyers from many other firms have served as mentors, faculty, and members of the advisory board for the American University Center for International Commercial Arbitration where Prof. Grigera Naon serves as Director is not comparable to LALIVE's large, multi-year financial support and partnership with MIDS. White & Case has not had a partnership analogous to the LALIVE/MIDS partnership with the Center for International Commercial Arbitration at American University.[278]

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apprehension of bias" "is a finding that the integrity and legitimacy of an adjudicative process have been compromised irreparably").

274 Counter-Memorial on Annulment ¶ 136.

275 *Vento Motorcycles v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶ 12.

276 Counter-Memorial on Annulment ¶ 139.

277 Memorial on Annulment ¶ 82.

278 *See* Counter-Memorial on Annulment ¶ 139, nn.216-218. Respondent argues that Prof. Douglas did not have to disclose his participation at the LALIVE Lecture in 2022 or 2023, and that Applicants did not object when he disclosed his intention to attend the LALIVE Lecture in 2019. Counter-Memorial on Annulment ¶¶ 140-141. In 2019, however, Prof. Douglas did not disclose that the Graduate Institute was a co-organizer and co-sponsor of the event; his disclosure was only that he was going to attend the lecture and a dinner where LALIVE lawyers may be present. *See* Email from Tribunal Secretary to Parties dated Apr. 30, 2019 (**A-14**). Even if MIDS' role was in the public domain then, that information was not known to Applicants or to their counsel team. In 2022 and 2023, Prof. Douglas introduced the jointly-organized program together with LALIVE founding partner Michael Schneider. Memorial on Annulment ¶ 91.

### 5. Prof. Douglas Applied for and Obtained Swiss Nationality, Upending Tribunal Neutrality During the Arbitration

127. Prof. Douglas applied for and obtained Swiss nationality during the arbitration – a fact revealed to the Parties only in the Award.[279] Prof. Douglas' undisclosed application for and acquisition of Swiss nationality undermined the appearance of neutrality on the Tribunal because, in addition to the significant one-sided connections that already existed among Prof. Tercier, Prof. Douglas, and Respondent's Geneva-based counsel at LALIVE, it improperly constituted the Tribunal with a President who shared the nationality of only one of the party-appointed arbitrators.[280]

128. Importantly, acquiring Swiss nationality as a foreign citizen is a lengthy process that takes at least 10 years and requires approvals at multiple levels under both cantonal (local) and federal legislation.[281] Prof. Douglas thus already had taken steps toward acquiring Swiss citizenship *before* Respondent appointed him as arbitrator in this case and *before* the ICSID Secretary-General appointed Prof. Tercier as President over Claimants' objection. Had Prof. Douglas disclosed his intention to acquire Swiss nationality during the arbitration, the ICSID Secretary-General would not have selected Prof. Tercier, a Swiss national, as President without party agreement.[282]

129. Respondent raises four arguments in response. First, Respondent argues that Prof. Douglas' acquisition of Swiss nationality is "irrelevant" because the ICSID Convention and the ICSID Arbitration Rules do not prohibit the Tribunal President and a co-arbitrator from sharing the same nationality.[283] The lack of any express prohibition allows parties to

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279 Memorial on Annulment ¶ 95; Award ¶¶ 210, 259, 553, 555.

280 Memorial on Annulment ¶¶ 96-100.

281 Memorial on Annulment n.142; Switzerland State Secretariat for Migration (SEM), *How do I become a Swiss citizen?* (last modified Jan. 31, 2024) (**A-53**) (explaining that ordinary naturalization requires living for at least 10 years in Switzerland); Switzerland State Secretariat for Migration (SEM), *Ordinary naturalization* (last modified Dec. 17, 2020) (**A-232**) (describing requirements under Swiss federal law and under cantonal law).

282 Memorial on Annulment ¶ 99.

283 Counter-Memorial on Annulment § 4.1.2.3 (heading), ¶¶ 142-144.

appoint co-arbitrators of the same nationality and to have a tribunal where all three arbitrators share the same nationality.

130. Nationality nonetheless is important to maintaining the appearance of neutrality required to properly constitute the Tribunal. For that reason, the ICSID Convention prohibits arbitrators from having the same nationality as any disputing party without party agreement, and it prohibits annulment committee members from having the same nationality as any disputing party or as any arbitrator.[284] Thus, ICSID's Background Paper on Annulment explains that the nationality restrictions for annulment committee members "serve as a crucial safeguard against potential biases and conflicts of interest" and "maintain the integrity and impartiality of the proceedings."[285] Similarly, in his commentary on the ICSID Convention, Prof. Schreuer observes that those nationality restrictions are "prompted by the desire to avoid any appearance of lack of objectivity" given "that the small group of individuals from one country who qualify as arbitrators and members of *ad hoc* committees will be linked by close professional affinity so as to impair dispassionate judgment."[286]

131. The same reasoning applies where the Tribunal President has the same nationality as only one co-arbitrator without party agreement. In that circumstance, disclosure of that fact will be important as it may appear to a reasonable third person that the Tribunal lacks neutrality because the Tribunal President will be more likely linked through close professional affinity to the co-arbitrator who has the same nationality.

132. Second, Respondent asserts that it is "pure speculation" that ICSID would not have appointed Prof. Tercier if Prof. Douglas had disclosed his application for Swiss nationality given that "there is no such rule" prohibiting two arbitrators from sharing the same

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284 *See* ICSID Convention Arts. 39, 52(3). *See also* ICSID Arbitration Rules 1(3), 3(1),

285 ICSID Background Paper on Annulment 2024 (**AL-21**) ¶ 45.

286 C. H. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION (3rd ed., Cambridge University Press, 2022) (**AL-62**) ¶¶ 583-584 (further noting issues may arise where arbitrators or members of *ad hoc* committees have "multiple nationalities," and that "it is advisable to clarify all nationalities of the persons concerned").

nationality.[287] It is not speculation. Arbitral practice shows that, even where no express prohibition applies, appointing authorities will not appoint a tribunal president with the same nationality as only one party-appointed arbitrator, unless both parties agree, to avoid the appearance of a lack of neutrality.

133. For example, arbitral institutions such as the ICC mandate that, in confirming or appointing arbitrators, the ICC International Court of Arbitration "shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals…."[288] The Secretariat's Guide to ICC Arbitration states, "The concept of neutrality has traditionally included an arbitrator's nationality. While the concept may be outmoded in certain contexts, parties often still attach importance to it in international arbitration as a factor affecting an arbitrator's perceived neutrality."[289] While the ICC Rules, like ICSID, prevent the Court from appointing a tribunal president or a sole arbitrator with the same nationality as a party, the ICC Court extends that prohibition in practice and "likewise rarely appoints as president an arbitrator who holds the same nationality as one of the party-nominated co-arbitrators, unless the parties are agreeable to this."[290]

134. Although not expressly prohibited in the rules, other arbitral institutions follow the same practice to ensure neutrality in fact as well as the equally important appearance of neutrality. Thus, Gary Born observes, "in practice, many leading arbitral institutions are reluctant to select as presiding arbitrator a person with the nationality of one, but not the

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[287] Counter-Memorial on Annulment ¶ 146.

[288] ICC Arbitration Rules (2021) (**AL-83**) Art. 13(1). *See also, e.g.*, BVI International Arbitration Centre Rules (2021) (**AL-84**) Art. 7(5) (the CEO of the Secretariat "shall have regard to such considerations as are likely to secure the appointment or confirmation of an independent and impartial arbitrator" and shall, inter alia, consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other members of the arbitral tribunal (if any) are nationals….").

[289] The Secretariat's Guide to ICC Arbitration - 2012, Chapter 3: Commentary on the 2012 Rules (2022) (**AL-85**) at 3-495.

[290] The Secretariat's Guide to ICC Arbitration - 2012, Chapter 3: Commentary on the 2012 Rules (2022) (**AL-85**) at 3-496 (further observing that, accordingly, "the Court's practice is not to decide on the appointment of the president until both co-arbitrators have been confirmed").

other, of the co-arbitrators."[291] Doak Bishop makes the same observation that "it is unlikely that the chair will be from the same country" as either party-appointed arbitrator because "the appointing authority will not want to appear to 'stack' the tribunal with two arbitrators from the same country. Thus, if a party wishes to have a chair from a particular jurisdiction, it would be well-advised not to appoint or nominate a party-appointed arbitrator from that particular jurisdiction."[292]

135. Third, Respondent argues that Prof. Douglas acquired Swiss nationality in August 2023, one month before the Tribunal declared the proceedings closed.[293] Respondent's argument improperly speculates as to when deliberations were completed – indeed, the Award was not issued until nearly a year later. In any event, the timing is irrelevant because, as discussed above, a tribunal must remain properly constituted for the entire duration of the arbitration until it is *functus officio*,[294] which here happened only upon issuing the Award in March 2024. Moreover, as already noted, acquiring Swiss nationality is a lengthy process that would have required Prof. Douglas to start the application process many years earlier.

136. Fourth and finally, Respondent argues that at the time of Prof. Tercier's appointment in 2018, Prof. Douglas was already living in Geneva and teaching on the MIDS faculty since 2011, and that acquiring Swiss citizenship did not make a material difference in the neutrality of the Tribunal.[295] Prof. Douglas and Prof. Tercier indeed did have too many connections and a close personal and professional affinity with each other and with Respondent's Geneva-based counsel at LALIVE, which is why Claimants objected when the Secretary-General proposed appointing Prof. Tercier.[296] Be that as it may, nationality

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[291] Gary Born, Challenge and Replacement of Arbitrators in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION § 12.03[B][2] (2021) (**AL-86**) at 20.

[292] R. Doak Bishop et al., Composition of the Arbitral Tribunal, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (2023) (**AL-87**) ¶ 31.3.1.8.

[293] Counter-Memorial on Annulment ¶ 148.

[294] *See supra* ¶ 27; *supra* ¶ 102 (rebutting same argument about ClientEarth representation).

[295] Counter-Memorial ¶ 149.

[296] Letter from Claimants to ICSID Secretary-General dated Mar. 5, 2018 (**A-6**); Letter from Claimants to ICSID Secretary-General dated Mar. 16, 2018 (**A-8**); Annulment Application § III.A.1.

is a more permanent attachment than a place of residence or teaching position, and it is recognized as a factor that may undermine the appearance of impartiality and independence, including as reflected in the ICSID Convention and Arbitration Rules.

137. Prof. Douglas accordingly should have disclosed his application for and acquisition of Swiss nationality, as those factors were obviously relevant to Claimants in view of their earlier objections. His failure to do so could justifiably undermine the appearance of neutrality of the Tribunal to a reasonable and informed third-party observer and thus is another reason the Tribunal was not properly constituted.

### 6. Alternatively, the Entire Award Should Be Annulled Because Prof. Douglas Breached His Disclosure Obligations Repeatedly

138. Alternatively, if the Committee is not persuaded that any of the above reasons mandates annulment (which they must), Prof. Douglas repeatedly breached his continuing disclosure obligations under ICSID Arbitration Rule 6(2) when he failed during the arbitration to disclose facts and circumstances that might cause a party in Claimants' position to question his reliability to exercise independent and impartial judgment, including that (i) he took on a long-standing public opponent of the Roşia Montană Project as a client; (ii) his Matrix Chambers colleagues and co-counsel took on a non-disputing party as a client; (iii) the MIDS program received financial and material support from Respondent's counsel LALIVE; and (iv) he applied for and obtained Swiss nationality. Prof. Douglas' repeated breaches of his disclosure obligation provide a further alternative reason why a reasonable and informed third party could justifiably doubt his impartiality and independence.[297]

139. Arguing that "[z]ero plus zero remains zero," Respondent contends disclosure breaches cannot be considered cumulatively.[298] Respondent, however, cites as support inapposite decisions finding that there was no failure to disclose.[299]

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297 Memorial on Annulment ¶¶ 101-102.

298 Counter-Memorial on Annulment ¶¶ 81-82, 171.

299 Counter-Memorial on Annulment ¶¶ 81-82, nn.124-125; *cf.*, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Disqualification Decision dated Feb. 25, 2008 (**RAL-33**) ¶¶ 38, 43 (rejecting criticism of arbitrator's disclosures and finding "[i]f we were to consider separately these individual factors (a) to (g), there would in our view be nothing left to the Claimant's complaint"); *ConocoPhillips v. Venezuela* (**AL-**

140. Respondent also refers to a book chapter on standards for disqualification,[300] but that authority supports Applicants' position. The author cites the challenge decision in *Amco Asia* stating the "right view" is that "a combination of facts may have a greater impact than just their summing up," "provided each fact has a minimum bearing on its own…."[301] The same book chapter also quotes a challenge decision in an UNCITRAL arbitration that disqualified the arbitrator based on one ground, but found "'it was also clear that an accumulation of circumstances may have spawned justifiable doubts, where each circumstance, viewed in isolation, might have been insufficient to do so.'"[302]

141. Moreover, while Respondent argues that under the IBA Guidelines and the UNCITRAL Code of Conduct, a disclosure breach should not "automatically" result in annulment of the Award,[303] Respondent omits the following statement from the UNCITRAL Code of Conduct's commentary to that provision,

> Paragraph 8 should, however, not be understood as an invitation or permission to not comply with the disclosure requirements in article 11. Indeed, a failure to disclose may be factually relevant when establishing a breach of the obligation to be independent and impartial, taking into account the information that was not disclosed as well as any other relevant circumstances.[304]

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**51**) ¶¶ 365-378 (finding arbitrator disclosed the facts at issue and resigned from his law firm before its merger to avoid potential conflicts).

300 Counter-Memorial on Annulment n.125.

301 K. Daele, Standards for Disqualification, Chapter 5 in CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, Kluwer International Law (2012) (**AL-39**) ¶ 5-074 (quoting the *Amco Asia* challenge decision of June 24, 1982) (internal brackets omitted).

302 K. Daele, Standards for Disqualification, Chapter 5 in CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, Kluwer International Law (2012) (**AL-39**) ¶ 5-081 (quoting LCIA Reference No. UN3490, Decision of Oct. 21, 2005, digest in 23(2) *Arb. Int.* (2011), 377, ¶ 6.1).

303 Counter-Memorial on Annulment ¶ 83, nn.126-127; 2014 IBA Guidelines (RAL-31) Part II ¶ 5; UNCITRAL Code of Conduct (**AL-53**) Art. 11.8 ("The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality.").

304 UNCITRAL Code of Conduct (**AL-53**) at 34 ¶ 96 (commentary to Art. 11(8)).

142. In this case, Prof. Douglas' multiple breaches of his disclosure obligations – repeatedly withholding information that could be perceived as adverse to Claimants – together are a further alternative ground for finding that the Tribunal was not properly constituted.

143. For this reason, and for each of the reasons set out above, annulment of the entire Award is warranted under Article 52(1)(a) of the Convention.

### B. Prof. Douglas' Apparent Lack of Impartiality and Independence to a Reasonable and Informed Third Person Resulted in Serious Departures from Fundamental Rules of Procedure That Require Annulment of the Award

144. As described above, a reasonable and informed third person could justifiably doubt Prof. Douglas' impartiality and independence for at least five separate reasons. All the same reasons that compel that conclusion also deprived Claimants of equal treatment and of the right to be heard, and as such resulted in serious departures from several fundamental rules of procedure that require annulment under Article 52(1)(d) of the Convention.[305]

145. It is undisputed that the right to be heard and the principle of equal treatment of the parties are fundamental rules of procedure.[306] Respondent also does not deny that the right to an independent and impartial tribunal is itself another fundamental rule of procedure – as the *Eiser* committee emphasized, the right to an independent and impartial tribunal is "one of the most basic requirements of justice," and when it "is disregarded, an award cannot stand and must be annulled in its entirety."[307]

146. Respondent presents four arguments on this ground for annulment, each of which is unfounded.

147. First, Respondent argues that there was no departure from a fundamental rule of procedure because the Tribunal did not lack impartiality or independence.[308] The evidence described above, which demonstrates that a reasonable and informed third party could justifiably

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305 Memorial on Annulment § II.B.

306 Counter-Memorial on Annulment ¶ 176 (confirming these points are "undisputed").

307 *Eiser v. Spain* (**AL-18**) ¶ 254.

308 Counter-Memorial on Annulment ¶¶ 176-177.

doubt Prof. Douglas' impartiality or independence, establishes that the Tribunal thus lacked the appearance of impartiality or independence required to comply with this most fundamental rule.[309] Moreover, the standard does not require proof of an actual lack of impartiality or independence, and failures to disclose material circumstances undermine the requisite appearance of impartiality and independence.[310]

148. Second, Respondent argues that Claimants purportedly "were afforded multiple opportunities to present their case" such that their "right to be heard and treated fairly were not encroached upon in the Arbitration."[311] Applicants reject that characterization. Respondent's argument, however, is misguided because the right to be heard in a fair trial is violated where, as in this case, a reasonable and informed third party could justifiably doubt the Tribunal's impartiality and independence. Indeed, even repeated opportunities to present one's case are no benefit where the tribunal lacks impartiality and independence. The *Eiser* tribunal accordingly explained,

> In the Committee's view, independence and impartiality of an arbitrator is a fundamental rule of procedure. This means that the arbitrator has a duty not only to be impartial and independent but also to be perceived as such by an independent and objective third party observer. This duty includes the duty to disclose any circumstance that might cause his reliability for independent judgment to be reasonably questioned by a party. In this respect, *this Committee subscribes to the EDF committee's views that '[i]t is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal.' There can be no right to a fair trial or a right of defense without an independent and impartial tribunal.*[312]

149. Third, Respondent argues that if Applicants believed there was a serious departure from a fundamental rule of procedure during the arbitration because of a lack of independence and impartiality of the Tribunal, Applicants "should have raised that at the time" but "did not

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309 *Supra* ¶¶ 68-143.

310 *Supra* ¶¶ 24-53.

311 Counter-Memorial on Annulment ¶ 178.

312 *Eiser v. Spain* (**AL-18**) ¶ 239 (emphasis added). *See also id.* ¶¶ 241-243 (concluding that the "lack of independence and impartiality, whether actual or manifestly apparent, by even one arbitrator, in a three-member tribunal, constitutes a departure from a fundamental rule of procedure"); *EDF v. Argentina* (**AL-12**) ¶ 123.

and thus waived the right to do so now."[313] That argument is obviously without merit because Applicants could not have raised a challenge based on information they did not have and that Prof. Douglas failed to disclose.

150. Fourth and finally, Respondent argues that a departure from a fundamental rule of procedure must be "serious," which according to Respondent means it "may have made a difference on a critical issue of the Tribunal's decision" or there is "a distinct possibility" the result would have been "substantially different" had the rule been observed.[314] In this case, liability was decided by a majority that included Prof. Douglas. As such, it is indisputable that there is a real possibility that the outcome would have been different had the Tribunal not included Prof. Douglas and instead been composed of three impartial and independent arbitrators.[315]

## III. ALTERNATIVELY, MULTIPLE SERIOUS FLAWS IN THE MAJORITY'S LIABILITY DECISION MANDATE ITS ANNULMENT

151. If the Award is not annulled in its entirety (which it must be), the part of the Award comprising the majority's liability decision must be annulled under Articles 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention. Applicants first address the applicable legal standards and then turn to the multiple fundamental defects mandating annulment of the majority's liability decision.

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313 Counter-Memorial on Annulment ¶ 179.

314 Counter-Memorial on Annulment ¶¶ 180-182. Respondent argues that Prof. Grigera Naon's dissent says "nothing" about Prof. Douglas lacking independent and impartiality or that it had "material impacts on the Award." *Id.* ¶¶ 183-184. That argument is equally flawed as Prof. Douglas' failures to disclose deprived the other members of the Tribunal of such information.

315 *See supra* ¶ 67.

## A. Further Observations as to the Annulment Standards

### 1. Manifest Excess of Powers by Failing to Apply the Applicable Law

152. Multiple *ad hoc committees* have confirmed that an award is subject to annulment when the tribunal manifestly exceeds its powers, including by failing to apply the applicable law or by deciding a dispute *ex aequo et bono* in the absence of Party agreement.[316]

153. Respondent does not have any basis to dispute that observation. Yet Respondent argues,[317] contrary to authority, that Applicants "wrongly" request the Committee to conduct its own substantive analysis of the Tribunal's reasoning, notwithstanding that is precisely what the Committee must do to fulfill its Article 52 mandate.[318]

### 2. Serious Departures from Fundamental Rules of Procedure

154. The right of a party to have its claim addressed, to have key evidence that it relied upon duly considered, and to confront the evidence presented by the opposing party, are fundamental rules of procedure within the scope of Article 52(1)(d).[319] While a departure from such a rule must be serious to warrant annulment, that does not mean that the result must have been different but for the departure, but rather that it had the *potential* to impact the award.[320] There is no dispute about those basic principles.[321]

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316 Memorial on Annulment ¶¶ 133-138.

317 Counter-Memorial on Annulment ¶ 192.

318 *EDF International v. Argentina* (**AL-12**) ¶ 193 ("The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being 'manifest.'"). *See also* Memorial on Annulment ¶ 134.

319 Memorial on Annulment ¶¶ 192-197.

320 Memorial on Annulment ¶ 193. *See also TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶ 135 ("The Committee wishes to point out that it cannot determine whether the evidence that was ignored by the Tribunal would have had an impact on the Award or not. What can be ascertained at the annulment stage is that the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case.").

321 Counter-Memorial on Annulment ¶ 273 *et seq*.

### 3. Failure to State Reasons

155. Decisions of *ad hoc* committees confirm that annulment may be warranted on this ground where reasons given are "insufficient from a logical point of view to justify the tribunal's conclusion," and where the reasons "cannot logically explain the decision they are purportedly supporting."[322]

156. While Respondent recalls the majority's statement that it did not consider it necessary "to repeat" "all arguments and evidence presented by the parties in the course of the proceedings,"[323] that boilerplate statement did not relieve the majority of the requirement to state the reasons for its decisions as required by Article 48(3) of the ICSID Convention.

## B. The Majority's Decision on the Link Between Permitting and Economics Disregarded the Legal Basis of Gabriel's Investment and Ignored Key Evidence Without Providing Reasons

157. In its liability decision, the majority first addressed Claimants' submission "that the Government linked the issue of the economics of the Project or, in other words, the financial benefits for the State from the implementation of the Project, with the permitting process itself."[324] This issue was central to Claimants' claims. The majority in fact acknowledged it was "[o]ne of the main factual issues relied upon by Claimants to establish unlawful conduct by Romania under international law, and as part of a composite act…."[325]

158. The majority's assessment of this crucial issue warrants annulment of its liability decision for multiple reasons. First, the majority manifestly exceeded its powers because it disregarded the legal basis of Gabriel's investment and its established rights under the applicable Romanian law by starting from the unexplained premise that the State "needed to revisit" its shareholding and the level of royalties. Second, the majority ignored important testimonial and contemporaneous email evidence on which Claimants relied, thus depriving Claimants of the right to be heard and to equal treatment. And third, the

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322 *TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶¶ 249, 250.

323 Counter-Memorial on Annulment ¶ 324.

324 Award ¶ 948.

325 Award ¶ 946. *See also* Award ¶¶ 1181, 1188 (noting "same facts" raised in "first alternative claim").

majority failed to state any reasons for why it disregarded Claimants' contract rights under Romanian law and for whether or why it did not consider Claimants' evidence persuasive.

### 1. The Majority Disregarded the Law Applicable to Claimants' Investment When It Started from the Unexplained Premise That the State "Needed to Revisit" Project Economics

159. The majority disregarded the legal basis of Gabriel's investment in its assessment of liability, manifestly exceeding its powers by disregarding the applicable law.[326]

160. The legal basis of Gabriel's investment prominently included the agreement it concluded with the State that established RMGC, *i.e.,* RMGC's Articles of Incorporation, and the concession agreement that authorized RMGC to undertake to develop and exploit the Roşia Montană Project, *i.e.*, the Roşia Montană License.[327] The majority found that, as of August 2011, pursuant to RMGC's Articles of Incorporation, the State held 19.31% of RMGC's shares and Gabriel held the remaining 80.69%; and pursuant to the Roşia Montană License, as amended, the royalty on the gross revenue from eventual production of the Roşia Montană Project was 4%.[328] Both the Roşia Montană License and RMGC's Articles of Incorporation, by which the royalties to be paid and the parties' shareholdings in RMGC were established respectively, were governed by Romanian law.[329]

161. The majority acknowledged that there was "a consistent line of public statements from the government side that pertained to the economic terms of the Project and the need to revisit them in light of the situation," and that these statements came from Romania's heads of State and from the Minister of Environment and the Minister of Culture responsible for permitting the Project.[330] The majority concluded that the State's demand for revised economic terms for the Roşia Montană Project did not implicate the protections of the

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326 Memorial on Annulment ¶¶ 152-160.

327 Award ¶¶ 9-16; RMGC Articles of Incorporation dated July 22, 2011 (**C-184**); Rosia Montana Exploitation Concession License No. 47/1999 (**C-403-C**); Gabriel's investment also included RMGC's Bucium Exploration License. *See* Award ¶ 17; Bucium Exploration Concession License No. 218/1999 (**C-397-C**).

328 Award ¶¶ 120, 947.

329 Award ¶¶ 11, 120, 947 n.580. This was undisputed. *See* Counter-Memorial on Annulment ¶ 222.

330 Award ¶¶ 947-949.

BITs, however, based on its assessment, *inter alia*, that "[e]conomics, in addition to environmental or legal permitting issues" were among the "various open or pending issues," that given the increased price of gold, "the State needed to revisit the issue," that "this was one aspect that had to be clarified," and that "outstanding issues relating to the Project" included "the economic issues."[331]

162. In making that assessment, the majority did not refer to Romanian law or to the terms of the relevant Romanian law agreements establishing the legal basis of Gabriel's investment, which notably do not include any provision that could support the conclusion that the economic issues were "open," "pending," "outstanding," or needed to be "revisited" or "clarified."[332] Rather, the majority reached its decision on this essential aspect of the claim without any application of the law governing the legal basis of Gabriel's investment, *i.e.*, Gabriel and RMGC's contract rights. There is no discussion in the majority's analysis of this key liability issue either of the terms of the operative agreements or of any statutory or regulatory provision of Romanian law.[333]

163. It is undisputed that the Tribunal's mandate required the application of Romanian law as an essential aspect of its assessment of liability. Respondent acknowledges that the Tribunal was "to assess the claims under international law, but by reference to domestic law,"[334] and that "Romanian law was relevant to and governed issues relating to the 'existence or scope' of the Applicants' property rights."[335]

164. Determining whether the State's treatment of Gabriel's investment breached the standards of treatment set forth in the BITs required the Tribunal to apply Romanian law to assess

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331 Award ¶¶ 951, 954, 955.

332 *See* Memorial on Annulment ¶¶ 157, 160.

333 *See* Addendum No. 7 to Roşia Montană License dated Oct. 14, 2009 (**C-414-C**) Art. II; RMGC Articles of Incorporation dated July 22, 2011 (**C-184**) (as amended). *See also* Bîrsan Legal Opinion dated June 30, 2017 §§ II.D, III, IV.

334 Counter-Memorial on Annulment ¶ 201 *citing TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶ 319.

335 Counter-Memorial on Annulment ¶ 203. *See also* Memorial on Annulment ¶¶ 146-148; Counter-Memorial on Annulment ¶¶ 201, 197-198. *See also* Venezuela Holdings (**AL-71**) ¶ 173 ("The Committee does not see that there can be any reasonable basis for contesting that the bundle of rights constituting the Cerro Negro investment was created by or under Venezuelan law and, having been so created, was then a type of property recognized and protected by international law in the form of the BIT.").

the nature and scope of Gabriel and RMGC's rights and expectations derived from their contracts. That is, assessment of liability in the case required consideration of the impact of the State's conduct on Gabriel's investment in RMGC, but in this case the majority disregarded the applicable law governing the contracts that formed the legal basis of Gabriel's investment.[336]

165. Respondent argues that the majority observed that the permitting process continued after the Government demanded revised Project economics in 2011 and that this "implies" that the majority considered that the contractual framework "remained operative," and that it "follows" that the majority thus considered "the content and effect" of the agreements.[337] Respondent's argument is unsound.

166. The fact that the majority observed that the permitting process did not come to an end after 2011 does not imply or support a conclusion that the majority applied the applicable law to assess the effect of the State's conduct on the contractual framework that formed the basis of Gabriel's investment. Rather, the majority's liability decision was based on its assessment that permitting procedures continued with several elements remaining to be decided by the Government, which in the majority's view included the economics – *i.e.*, an assessment that, as far as the economic terms were concerned, was not premised on any plausible application of the applicable law.

167. Respondent argues that the Applicants have not identified what law the majority disregarded.[338] The majority failed to apply the law applicable to the Roşia Montană License, identified by both Parties as Romania's Mining Law,[339] which stabilized the terms of the License for their entire duration and thus made the royalty a civil law (contractual) obligation that could only be modified by mutual agreement of the parties, subjecting it to

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336 Memorial on Annulment ¶¶ 152-160.

337 Counter-Memorial on Annulment ¶ 229.

338 Counter-Memorial on Annulment ¶ 226.

339 The Parties agreed that the License was governed by Mining Law 61/1998, although Respondent contended certain Addenda were governed by Mining Law 85/2003. Respondent's Counter-Memorial dated Feb. 22, 2018 ¶ 56. The difference is not material because both laws stabilized the License terms, including as to the royalty rate. Bîrsan Legal Opinion dated Nov. 2, 2018 ¶¶ 10-25.

RMGC's consent as the Titleholder.[340] The majority also failed to apply the law applicable to RMGC's Articles of Incorporation, identified by both Parties as Romania's Companies Law,[341] under which shareholders (in this case RMGC and the State through Minvest) "must exercise their rights in good faith in full observance of the rights and legitimate interests of the company and the other shareholders."[342] The majority failed to apply those provisions of Romanian law, which gave force and effect to the terms of RMGC's Articles of Incorporation, which established the percentage shareholdings of Gabriel and the State in RMGC, and to the Roşia Montană License, a concession agreement, which established the royalties payable to the State.[343] Furthermore, the majority failed to reference any provision of Romanian law to support its characterization of the State's shareholding and royalties as being "open," "pending," "outstanding," or as needing to be "revisited" or "clarified."[344]

168. Having failed to apply the applicable Romanian law in its assessment of the agreements forming the legal basis of Gabriel's investment, the majority had no basis to apply, and thus could not have applied, the BIT standards to assess the effects of the State's treatment on Gabriel's investment, including on those contract rights.[345]

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340 Bîrsan Legal Opinion dated Nov. 2, 2018 ¶¶ 10-25; Mining Law 61/1998 (**C-1629**) Art. 11(2) (The provisions of the license remain valid throughout its duration as established at the time of its conclusion."); Mining Law 85/2003 (**C-11**) Art. 21(2) ("The legal provisions applicable at the time the license enters into force remain valid throughout the duration of the license, except for the potential intervention of legal provisions favorable to the titleholder."); *id.* Art. 60(1) ("The provisions of the licenses in force remain valid for their entire duration under the terms existing at the time of their conclusion.").

341 Bîrsan Legal Opinion dated June 30, 2017 § D.1; Respondent's Counter-Memorial dated Feb. 22, 2018 ¶ 397, 402.

342 Bîrsan Legal Opinion dated Nov. 2, 2018 fn. 321 (quoting Art. 136 of the Companies Law).

343 Claimants' Memorial dated June 30, 2017 ¶ 345 ("The royalty term was a contractual one, which the State could not alter without RMGC's agreement."); Bîrsan Legal Opinion dated June 30, 2017 ¶¶ 264-73 (describing that under Romania law the obligation to pay royalties is a contractual provision not alterable by the State without agreement of the concessionaire).

344 *See* Award ¶¶ 951, 954, 955.

345 *See* Memorial on Annulment ¶¶ 146-148. *See Venezuela Holdings v. Venezuela* (**AL-71**) ¶ 175 (observing that the tribunal decided that the question was governed by the BIT but concluding the tribunal exceeding its authority by failing to apply the law by the way in which the tribunal put that decision into effect disregarding Venezuelan law).

### 2. The Majority Ignored Claimants' Testimonial and Email Evidence That the Government Linked Permitting Decisions to Its Economic Demands

169. It is undisputed that a failure to consider the evidence presented by a party may provide grounds for annulment.[346] In this case, the majority addressed Claimants' arguments about the link between the permitting process and the economic renegotiations in a discrete section of the Award that is limited to a one-sentence introduction, two paragraphs of facts, and a few pages of analysis.[347] The majority ignored important evidence on this key issue as it did not engage at all with the principal testimonial and contemporaneous email evidence that Claimants presented.[348] Instead, the majority discussed only a series of public statements made by Government officials from August 2011 through December 2011,[349] and then the majority concluded that there was "no evidence" linking permitting decisions to the State's economic demands.[350]

170. Respondent maintains that the majority did address Claimants' evidence. Other than the several paragraphs in the Award that address the public statements, however, Respondent points only to one footnote in the Award.[351] Although that one footnote in the Award includes a string-cite to some witness testimony and more than two dozen exhibits, it does not include a description of that evidence, let alone any discussion of its relevance or credibility, and it omits significant additional testimonial evidence relied upon by Claimants.[352]

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346 *See supra* ¶ 154; Counter-Memorial on Annulment ¶ 282.

347 *See* Award ¶¶ 946-960. *See also* Award ¶¶ 1191 (reiterating its conclusion on this issue without further analysis in the context of Claimants' first alternative claim).

348 *See, e.g.*, Claimants' Opening Presentation Dec. 2, 2019 vol. 3 "Romania's Coercive Demand to Renegotiate" Slides 20-30, 33-65, 72-78; Claimants' Opening Presentation Dec. 2, 2019 vol. 5 "The Political Assessment of the Project" Slides 2-45.

349 Award ¶ 947. *See also* Memorial on Annulment ¶ 211.

350 Award ¶ 958. *See also* Memorial on Annulment ¶¶ 210-214.

351 Counter-Memorial on Annulment ¶ 298 (*citing* Award ¶¶ 946-960 and "notably fn 597").

352 *See*, *e.g.*, Second Dragoş Tănase Witness Statement dated June 30, 2017 ¶¶ 96-105, 120, 222 (describing conversations with State Secretary Anton and with the Prime Minister's Economic Councilor indicating that permitting would not be completed without revised economics); Horea Avram Witness Statement dated June

171. Respondent refers to the *Tulip v. Turkey ad hoc* committee's observation that a tribunal need not discuss every piece of evidence presented.[353] That is not disputed, but due process requires the Tribunal to address the evidence relied upon by a party for significant issues in the case. Simply burying all the evidence in one long string-cite in a footnote without any discussion is not sufficient.

172. The majority also failed to address the evidence presented that the Government's demands for revised economics as a condition for issuing the Environmental Permit were not limited to 2011 and January 2012, but extended through 2013.[354]

173. Respondent argues that the majority did refer to such evidence, but it can identify only two short footnotes in the Award that briefly cite to some witness testimony without any description or discussion.[355] Moreover, these two footnotes are not relevant, because they do not relate to this aspect of the majority's decision. Rather, they appear in the section of the majority's liability decision addressing the Draft Law,[356] which the majority describes as presenting the issue whether there was "illegitimate political influence over the decisions of the Parliament."[357] By that point in the Award, the majority already had concluded in a previous section that there was no evidence linking the economic negotiation to issuance of the Environmental Permit, without making any reference to the evidence cited in those two footnotes identified by Respondent.[358]

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30, 2017 ¶¶ 108, 115-118, 125, 178 (describing other conversations with State officials regarding directions given not to act on permitting); Claimants' Memorial §VII; Claimants' Reply ¶¶ 44-50, 82.

353 Counter-Memorial on Annulment ¶ 300 (referring to *Tulip v. Turkey* (**AL-59**) ¶ 82).

354 Memorial on Annulment ¶ 212; Claimants' Opening Presentation Dec. 2, 2019 vol. 3 "Romania's Coercive Demand to Renegotiate" Slides 75-78; Claimants' Opening Presentation Dec. 2, 2019 vol. 4 "The Political Assessment of the Project" Slides 2-45.

355 Counter-Memorial on Annulment ¶ 298 (*citing* Award ¶¶ 1100 and 1102 and "notably fns 763 and 767").

356 Award ¶¶ 1095-1148.

357 Award ¶ 1095.

358 Award ¶ 959.

### 3. The Majority Failed to State Reasons in Assessing the Link Between Project Permitting and Renegotiations

174. The majority's liability decision is subject to annulment also because the majority failed to provide understandable reasons for its conclusion that the Roşia Montană Project economics was an open issue that needed to be addressed before permitting could be completed, and because it failed to state any reasons for disregarding Claimants' testimonial and email evidence when it found "no evidence" improperly linking permitting to renegotiations.[359]

#### a. The Majority Failed to State Reasons for Its Consequential Conclusion that Project Economics Was an Open Issue

175. Respondent offers speculation as to what the majority might have meant when it concluded the Project economics were open and needed to be revisited,[360] but Respondent's speculations are not supported by the Award and therefore cannot cure its lack of reasoning. Respondent argues that the majority was "recording the views of some of the ministers,"[361] however, that is not what the Award says. Rather, the majority addressed the Project economics as an "outstanding" issue about which the Ministers considered there needed to be a Government decision.[362]

176. Thus, although the majority concluded that the Ministers' statements were not evidence of a link with the permitting process,[363] that conclusion is based on the majority's unexplained assertion that economics were an open matter that needed to be addressed for Project implementation.

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359 Memorial on Annulment ¶¶ 228-232.

360 Counter-Memorial on Annulment ¶¶ 328-336.

361 Counter-Memorial on Annulment ¶ 330.

362 Award ¶ 955.

363 Award ¶ 949.

177. Respondent argues that one cannot challenge the majority's assessment of the evidence.[364] There is no dispute on that point. Rather, the issue on annulment is that the majority failed to state reasons for its conclusion.

178. The majority likewise did not explain what it meant when it concluded that the Project economics and permitting were two issues "where the status of one could affect the other."[365] Respondent offers observations about other findings made by the majority,[366] but cannot clarify the majority's reasoning.

179. The majority's failure to state reasons on such a fundamental issue mandates annulment of the majority's liability decision.[367]

### b. The Majority Failed to State Reasons for Finding "No Evidence" Linking Project Permitting to Renegotiations

180. As the *TECO v. Guatemala* committee emphasized, "a tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[368] The committee explained that "while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding, but one of non-existence. Taking the Tribunal's words at face value, the Committee can only conclude that the Tribunal ignored this evidence."[369]

181. As discussed above, the majority concluded there was "no evidence" of an improper link between permitting and renegotiations, but it failed to engage with the testimonial and contemporaneous email evidence that Claimants emphasized in detail in their written

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364 Counter-Memorial on Annulment ¶ 331.

365 Memorial on Annulment ¶ 231.

366 Counter-Memorial on Annulment ¶ 335.

367 Memorial on Annulment ¶ 232.

368 *TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶ 131.

369 *TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶ 133 (footnotes omitted). *See also Suez et al v. Argentina* (**AL-16**) ¶ 303 (recognizing that a tribunal must address the evidence that is "highly relevant" with the potential to have an impact on the outcome of the award).

pleadings and at the hearing to address this foundational issue. The majority did not explain why Claimants' evidence was insufficient, unpersuasive, or unsatisfactory to establish an improper link. It gave conclusions rather than reasons together with one string-cite to multiple witness statements and to more than two dozen exhibits in a single footnote.[370] That is inadequate to state reasons and requires annulment.

### C. The Majority Failed to Address That There Was Never Any Decision Issued in the Environmental Permitting Procedure for the Roşia Montană Project and No Decision Issued on the Bucium Applications

182. A central aspect of Claimants' case was that Romania breached the BITs by omission because the Government abandoned the legal framework that governed the administrative permitting procedures for Roşia Montană and for Bucium as most notably shown through the State's failure to take any decision in the environmental permitting procedure for the Roşia Montană Project and its failure to take any decision on the Bucium Applications. Thus, there was never a decision denying RMGC's application for the Environmental Permit or requiring it to cure any alleged defects, nor was there any decision closing the EIA procedure. The same is true for the Bucium Applications.

[370] Award ¶ 958, n.597. The only document the majority bothered to mention says the opposite of what the majority contends. *See* Award ¶ 958, n.598 (stating "one need only look at Gabriel's detailed offer to the Government about improving the economic terms for the State sent on 10 June 2013 where there is no suggestion in this letter that it is made under duress or coercion or that Gabriel reserves its rights"); *cf.* Letter No. 35559 from RMGC to Department of Infrastructure Projects dated June 10, 2013 (**C-1286**) at 2 (objecting that "we have faced great difficulty because of the actions of the relevant authorities … including but not limited to … a refusal to follow the procedures laid down in legislation, delays in the issuance of permits outside timelines provided by the law and the creation by the relevant authorities of numerous delays or additional obligations which have been imposed solely on RMGC / the Project"); *id.* at 5 ("Accordingly, this Offer is without prejudice to any rights, which RMGC, Gabriel Resources, or any of its affiliated companies, may have ….); *id.* at 16 ("If the Offer is not accepted prior to such withdrawal or should the Agreement not be signed within 90 days following acceptance of the Offer, or the Offer is rejected by the Romanian Government or the approval procedure is not re-launched and is not progressing in an agreed upon timeframe, in accordance with the legal procedures in force, we reserve the right to seek other remedies, including international arbitration, to achieve specific performance and/or recover the losses and damages suffered."); Claimants' Opening Presentation Dec. 2, 2019 vol. 5 Slide 34 (describing same letter with additional transmittal page submitted as **C-781**); Dissent ¶ 68 (explaining that Gabriel's letter of June 11, 2013 proposed an agreement with the State that "would include a claw-back provision in favor of Gabriel with disputes to be resolved by international arbitration, such provision to operate in case the permitting timeline set forth in the proposal not be attained for reasons attributable to Romania or its instrumentalities").

183. Claimants repeatedly presented the liability issue in this case as including the undisputed fact that the Government did not complete the Roşia Montană environmental permitting process and did not take any decision, without any explanation. Thus, in response to the Tribunal's questions after the first hearing, Claimants explained as follows:

> *The primary basis of liability in this case* is that having issued mining concessions to RMGC, a joint venture with the State, reflecting the State's public policy decision to develop mining in the licensed areas in accordance with its laws, *the State, years later, effectively terminated the concessions and repudiated its joint venture, including by failing to complete the environmental permitting process and to issue the Environmental Permit for the Roşia Montană Project, notwithstanding that the competent authorities concluded repeatedly that the legal grounds for issuing the permit were met. It is essential to recall that there was no executive, administrative, or judicial decision terminating, rescinding, or withdrawing RMGC's mining concessions. Similarly, there was no executive, administrative, or judicial decision declining to issue the Environmental Permit. There is only a failure to act when there was an obligation to do so. Thus, there was no legal decision taken, whether on the basis of public opinion or indeed on any basis.*[371]

[371] Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶ 121 (emphasis added); *id.* ¶ 220 ("Romania's continued failure to complete the environmental permitting process for the Rosia Montana Project is a continuing wrong that deprives Claimants of the benefit, use and enjoyment of their investment without due process. That failure alone is a measure having an effect equivalent to expropriation of RMGC's project development rights in the Rosia Montana Project … in breach of Article 5 of the UK BIT and Article VIII(1) of the Canada BIT. It is also a failure to accord fair and equitable treatment to Gabriel's investment in RMGC, in breach of Article 2 of the UK BIT and Article II of the Canada BIT."); ¶¶ 162, 209. *See also, e.g.*, Claimants' Memorial dated June 30, 2017 ¶ 735(a) ("Despite admitting its legal obligation to permit the Project, the Government nevertheless refused without legal basis to act and has not taken any decision on the environmental permit application that RMGC filed over 12 years ago."); *id.* ¶¶ 534, 629, 712(b), 735(i), 815; Claimants' Reply dated Nov. 2, 2018 ¶¶ 387, 580-581 (emphasizing the lack of due process and failure to apply law "as notably, for example, the Government never actually issued any decision denying the environmental permit, let alone on grounds that the Project failed to comply with applicable environmental norms," and responding to Respondent's "fictional narrative, claiming that the permitting process remains open," when "the notion that the permitting process for the Project remains open is 'utterly preposterous'"); *id.* ¶¶ 20-21, 610, 625; Claimants' First Post-Hearing Brief dated Feb. 18, 2021 ¶¶ 195-196 (observing that Respondent's argument that Ministry of Environment is "still looking at" question from 2014-2015 TAC meetings "is neither credible nor reasonable," and that "[e]ven assuming that the Ministry of Environment had identified through the EIA Process some alleged failure to meet applicable permitting requirements (which it did not as responsible officials repeatedly said all requirements were met), the law required the Ministry to issue a reasoned decision denying the EP so that RMGC could either bring an administrative challenge or seek to cure any alleged deficiency"); *id.* ¶¶ 225, 240, 252; Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 13(a), 40, 49, 62.

184. Claimants emphasized the same point about the Bucium Applications:

> Similarly, the State's continued refusal to act on RMGC's Bucium exploitation license applications over the nearly seven years since Parliament's rejection of the Draft Law, notwithstanding that there is no dispute that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarnița deposits, wrongfully denies RMGC the benefit, use, and enjoyment of those rights and leaves no room for any conclusion other than that RMGC, the State's joint venture with Gabriel, having itself been effectively abandoned, has been deprived of those rights as well. Romania's disregard of RMGC's rights in respect of Bucium is a measure with effect equivalent to expropriation and a denial of fair and equitable treatment in breach of the respective BITs as well as a breach of the other treaty provisions as detailed above.[372]

185. The majority's liability decision remarkably fails to say anything about the undisputed lack of any decision on the Environmental Permit, or of any decision on the Bucium Applications, or of any decision ending either of those administrative procedures. Thus, the majority failed to consider the totality of the State's conduct, which included not only the Government's statements announcing that Parliament's rejection of the Draft Law would mean (and, later, that it did mean) that the Roşia Montană Project would not be done, but also the fact that the administrative procedures simply stopped without any decision. The majority's total disregard of the core omissions at the heart of Claimants' case, *i.e.*, the lack of decision either for the Roşia Montană Environmental Permit or for the Bucium Applications, (i) manifestly exceeded its power by failing to apply the

[372] Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶ 224; *id.* ¶¶ 200, 204, 206(d), 210. *See also, e.g.*, Claimants' Memorial dated June 30, 2017 ¶ 552 ("As holder of the Bucium Exploration Licenses, RMGC had a direct and exclusive legal right to receive the requested exploitation licenses, and NAMR had a non-discretionary obligation to grant RMGC's applications in a reasonable period of time. NAMR, however, did not act on these applications (and indeed still has not acted on these applications notwithstanding the passage of almost 10 years)."); *id.* ¶¶ 555-557, 735(h), 799(h); Claimants' Reply dated Nov. 2, 2018 ¶¶ 2(bb), 21, 305-306, 515(i), 528, 562, 583; Claimants' First Post Hearing Brief dated Feb. 18, 2021 ¶ 196 ("With regard to the Bucium Projects, the evidence is clear that notwithstanding RMGC's contractual and legal rights to obtain exploitation licenses for the valuable Rodu Frasin and Tarnița Bucium deposits, the State is unwilling to issue those licenses to RMGC, has repudiated RMGC's rights in that regard, and thus has effectively expropriated RMGC's legal entitlement to the Bucium exploitation licenses. While NAMR's failure to act leaves no written decision for the Tribunal to review, the State's repudiation of RMGC's rights in relation to the Bucium licenses is no less real. The fact that *six years* now have passed with no word from NAMR regarding the Bucium exploitation licenses for Rodu Frasin and Tarnița cannot be disregarded.") (emphasis in original); *id.* ¶¶ 240, 252; Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 13(d), 40, 44, 61-62.

applicable law, (ii) seriously departed from a fundamental rule of procedure as it denied Claimants due process by failing to address the claims presented, and (iii) failed to state reasons on a central aspect of the claims.

### 1. The Majority Failed to Apply the Law Applicable to the Roşia Montană Environmental Permitting Procedure and the Bucium Applications

186. The majority failed to apply the applicable law in its assessment of Claimants' claims about the Environmental Permit and the Bucium Applications. It failed to do so in multiple respects. First, the majority disregarded the entire legal framework applicable to the environmental permitting process for the Roşia Montană Project; it concluded without any legal basis that the permitting decision could be based on politics; and it disregarded the legal requirement for the Government to issue a decision based on specific criteria and within a timeframe established by law. Second, the majority disregarded the legal provisions that gave RMGC a non-discretionary entitlement to the Bucium exploitation licenses and, in any event, disregarded the legal requirement to issue a decision on the Bucium Applications. Third, as to both Projects, the majority disregarded the applicable rule of international law that the BIT standards may be breached by a failure to act (omission).[373]

#### a. The Majority Failed to Apply the Law Relating to the EIA Permitting Process for Roşia Montană

187. The majority emphasized in its analysis of the EIA Process that it did not need to consider "whether the prerequisites for obtaining the Environmental Permit were met at different points in time such that the non-issuance would expose Romania to international liability," but that "[i]nstead" it "must focus on whether the process met the minimum standards under international law as set out in the [BITs]."[374]

188. Framed in this manner, the majority disregarded the need for any analysis of the Romanian law requirements that governed the environmental permitting procedure.[375] The majority

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373 Memorial on Annulment ¶¶ 152-179.

374 Award ¶ 965.

375 *See* Memorial on Annulment ¶¶ 146-148 and authorities in fn 195 (describing the essential role of municipal law to assess liability in accordance with investment treaty standards). It was undisputed that the EIA

therefore failed to consider the law that governed the environmental permitting procedure,[376] which significantly included a legal framework that required issuance – within a given timeframe – of a decision on whether or not to grant the Environmental Permit.[377] The majority concluded that it did not need to consider the Romanian law requirements in order to assess the significance of the State's conduct, which included its failure to issue a decision in the EIA Process. The majority therefore did not consider whether the Romanian administrative law required that some decision be taken and did not engage with the legal expert opinions that outlined the requirements of Romanian administrative law. The majority thus did not evaluate whether the BIT standards were implicated by that omission by the State.

189. Likewise, although the majority acknowledged that "Claimants could expect that the process …, including the issuance of the Environmental Permit for the Project, would be fair, just, and in accordance with the law,"[378] the majority did not consider whether the State conducted the EIA procedure in accordance with the applicable law. Thus, the majority failed to apply the applicable law to evaluate whether the lack of decision was consistent with Romania's obligations to treat Gabriel's investment consistent with the BIT standards.[379]

190. In addition to its failure to address the lack of any decision on the Environmental Permit, the majority concluded without any legal basis that the State's permitting decision (had one

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Process was governed by and had to be carried out in accordance with Romanian law. Award ¶ 783, 2d bullet.

376 *See* Mihai Legal Opinion dated June 30, 2017 ¶ 51 (listing laws, ordinances, Government decisions, orders, EIA Rules of Procedure, and EIA Methodological Guidelines governing the EIA Process); Mihai Legal Opinion dated Nov. 2, 2018 § IV (addressing the role of international and EU law in Romania's legal order).

377 *See* Mihai Legal Opinion dated June 30, 2017 ¶¶ 134-172 (describing the Romanian administrative procedures relating to the issuance of a decision whether or not to issue the Environmental Permit); Mihai Supplemental Legal Opinion dated Nov. 2, 2018 ¶¶ 97-105, 303-340 (describing the Romanian administrative law relating to the requirement to issue a decision in the context of the EIA Process).

378 Award ¶ 944.

379 Memorial on Annulment ¶ 172. *See also Venezuela Holdings v. Venezuela* (**AL-71**) ¶ 180 ("in incidentally disposing of peripheral arguments… [the tribunal] appears to have committed itself to general propositions about the relationship between 'national law' and 'international law' which appear in turn to have foreclosed in advance the proper application of the BIT to the case.").

ever been made) could be based on politics. Thus, without any reference in its liability assessment to the extensive evidence submitted by the Parties regarding the Romanian legal and administrative framework governing the EIA Process, which it acknowledged Claimants could expect would be applied, the majority concluded that the EIA Process "was intrinsically linked to ***politics***; politics that were driven by the positions of the political representatives and their constituents,"[380] and that "the preparation of the EIA was therefore a complex process … touching not only on environmental, social and cultural issues, but also on legal, economic and political ones."[381] The majority did not cite or refer to anything as the source of those statements.

191. Assessing whether Romania breached the BIT standards by treating Gabriel's investment in a manner that "intrinsically linked" permitting to politics, required the Tribunal to apply Romanian law to assess the administrative law governing the permitting and licensing procedures that were the subject of the dispute.[382] The majority did not do that.

192. It was undisputed that political factors were not part of the EIA Process in the applicable Romanian law.[383] The majority thus failed to apply the applicable law in this respect as well, as the majority did not consider the legal impact of the State's conduct on Claimants' expectations of treatment in accordance with law as the BIT standards require.[384]

193. Respondent argues that the majority described the EIA Process in its Award.[385] Reciting the law or describing a procedure, however, is not sufficient for a tribunal to fulfill its

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380 Memorial on Annulment ¶ 169 (*quoting* Award ¶ 783 (emphasis in original)).

381 Memorial on Annulment ¶ 169 (*quoting* Award ¶ 784). *See also* Award ¶ 1196 (in relation to the first alternative claim repeating its earlier findings that "[p]olitics were at play here, as this was a complex project with national and transboundary implications, touching on environmental, social, legal, and economics issues").

382 *See* Counter-Memorial on Annulment ¶ 203 (agreeing that Romanian law was relevant to and governed issues relating to the permitting process). *See also* Memorial on Annulment ¶¶ 146-148.

383 Memorial on Annulment ¶¶ 165-166.

384 Memorial on Annulment ¶¶ 161-173.

385 Counter-Memorial on Annulment ¶¶ 234-235, 238 n. 391, 239.

mandate; it must apply the law to make its actual decision,[386] which in this case, the majority did not do.

194. Respondent points to the fact that the Award describes other permits addressed in the EIA Process.[387] The majority's reference to those permits, however, does not correct for the majority's failure to apply the applicable law in its assessment of the EIA Process for the Environmental Permit. Likewise, while Respondent argued that the requirements for issuing the Environmental Permit were not met, the majority did not rule on that issue.

195. Respondent also observes that the majority considered that the permitting process was not unreasonable as far as it went.[388] That observation is irrelevant, however, because the majority did not apply the applicable law to assess the fact that no decision was ever made on whether to issue the Environmental Permit and that the procedure instead simply stopped. Thus, Respondent's argument that the majority "implicitly" considered the applicable Romanian law[389] is not supported by the Award.

196. Respondent argues that "a key question" for the majority was whether the EIA Process was "conducted professionally."[390] This, however, does not respond to the majority's failure to consider the Romanian law provisions requiring the competent authority to issue a decision when assessing whether the State's treatment complied with the BIT standards.

197. Respondent's reference to the majority's finding that it could not conclude that "matters were resolved" such that "Romania should have issued the Environmental Permit but did not,"[391] is highly misleading and incorrect. In the referenced passage, the majority made

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386 See *Venezuela Holdings v. Venezuela* (**AL-71**) ¶¶ 155-158 (observing that the provisions of the applicable law were duly reflected in the award but that this was not dispositive to the question whether the tribunal applied the applicable law in reaching its decision, in that case as to the quantum of compensation owed).

387 Counter-Memorial on Annulment ¶ 237.

388 Counter-Memorial on Annulment ¶ 238.

389 Counter-Memorial on Annulment ¶ 238, ii. Similarly, the fact that the majority included a quote in the Award from the Minister of Culture that refers to certain Romanian law provisions does not detract from the majority's failure to apply the applicable law in its assessment of Claimants' claim. *Id.* ¶ 238 n 391.

390 Counter-Memorial on Annulment ¶ 241.

391 Counter-Memorial on Annulment ¶ 242.

two points. First, the majority concluded that the evidence did not establish that matters were resolved as of the date of the *November 29, 2011 TAC meeting*, and second, the majority stated that there was no impropriety "during this and the subsequent meetings."[392] Those "subsequent" TAC meetings were held in 2013, 2014 and 2015, and the Parties debated their reasonableness. The majority's finding that the Government was not ready to issue the Environmental Permit at the end of 2011 did not address later points in time, and the majority's finding that there was no impropriety during the later TAC meetings did not address the significance of the lack of any decision or explanation after the last TAC meeting in 2015.[393] The majority never applied the applicable law to assess the significance of the lack of decision at any of those times or thereafter.

198. Finally, Respondent argues that these are complaints about an erroneous application of Romanian law.[394] That is not so. As described above, the majority framed the issue to avoid consideration of the Romanian law that governed the EIA Process, and in so doing failed to apply the BIT standards in its assessment of the State's conduct of that procedure. The majority's decision in this respect was neither a "plausible" nor "tenable" application of law as Respondent maintains – it was an express disregard of the applicable law.

### b. The Majority Disregarded the Legal Requirement to Issue a Decision on the Bucium Applications

199. The majority disregarded the applicable Romanian law that governed the substance and procedure relating to the Bucium Applications and thus failed to assess the impact of the State's failure to act on RMGC's Bucium Applications as required to assess liability based on the BIT standards.[395] In support of their claims relating to the Bucium Applications, Claimants relied upon the legal opinion of Professor Corneliu Bîrsan, who described the

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[392] Award ¶ 981. *Id.* ¶ 982 (concluding "the 29 November 2011 meeting was not the last TAC meeting such that matters were resolved *at that time*," and that there was "no impropriety" "during this and subsequent meetings") (emphasis added).

[393] As the majority acknowledged, the Ministry of Environment is the competent authority that takes the decision on the Environmental Permit, while the TAC is composed of representatives of various public authorities to provide consultation to the Ministry. *See* Award ¶ 19 (citing *inter alia* the legal opinions of Claimants' expert Prof. Mihai as well as Claimants' Memorial ¶¶ 190, 192-195-199).

[394] Counter-Memorial on Annulment ¶ 243.

[395] Memorial on Annulment ¶¶ 174-176.

Romanian legal regime governing NAMR's obligation to render a decision, which included a non-discretionary obligation to issue exploitation licenses within a timeframe set by law where the titleholder of exploration licenses demonstrated the feasibility of the deposit, as indisputably happened in this case with the Rodu-Frasin and Tarnița deposits in Bucium.[396]

200. The majority assessed the claims related to the Bucium Applications in a few short paragraphs that do not cite or refer to any aspect of the applicable Romanian legal regime governing the applications.[397] As such, there also was no basis to assess how the State's treatment of the applications affected Gabriel's rights and reasonable expectations and thus whether that treatment complied with the BIT standards.[398]

201. Respondent argues in response that the majority described the Bucium Applications in the fact section of the Award.[399] The majority's factual description of the Bucium concession and the applications, and its observation that the applications are still pending, however, did not include any assessment of liability and did not mention the applicable law. Those sections of the Award therefore do not remedy the failure to apply law in the assessment of liability.

202. Respondent argues that the majority "implicitly" considered compliance with Romanian law and the Bucium Exploration License.[400] There is, however, no indication in the majority's decision that the applicable law was the basis for its decision. The majority's

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396 *See* Claimants' Memorial dated June 30, 2017 ¶¶ 551-557 (referring to Professor Bîrsan's Legal Opinion and authorities referenced therein relating to NAMR's obligation to act on the Bucium applications); Reply ¶¶ 294-309 (referring to Professor Bîrsan's Supplemental Legal Opinion and authorities referenced therein relating to NAMR's obligation to act on the Bucium applications). *See also* Bîrsan Legal Opinion dated June 30, 2017 § V.C; Bîrsan Supplemental Legal Opinion dated Nov. 2, 2018 § IV.C.

397 *See* Award ¶¶ 1161-1163 (assessing liability in the context of the "primary claim"); *id.* ¶ 1192 (assessing liability in the context of the "first alternative claim" by referring back to ¶ 1163) and ¶¶ 1197 last bullet - 1198 (referring back to the earlier finding in ¶ 1164); *id.* ¶ 1215 (assessing liability in the context of the "second alternative claim" by referring back to its analysis in ¶¶ 1160-1161 "et seq").

398 *See* Memorial on Annulment ¶¶ 146-148.

399 Counter-Memorial on Annulment ¶ 246.

400 Counter-Memorial on Annulment ¶¶ 249, 346.

decision includes no reference to the applicable law and consequently there is no basis to conclude that the majority applied any law to its assessment.

203. There is therefore no basis to conclude that such a decision, manifestly lacking in any reference to any applicable legal principle, is a "plausible" or "tenable" decision based on the applicable law as Respondent unconvincingly maintains.

### c. The Majority Failed to Apply the Rule That a Failure to Act May Breach the BITs

204. Although the majority acknowledged that a State may breach the BITs through a failure to act (omission),[401] the majority failed to apply that rule of international law in regard to the basic omissions in the case – the lack of any decision in the EIA Process for Roşia Montană and the lack of any decision on the Bucium Applications.[402] The majority did not address the impact of those omissions anywhere in the Award.

205. Respondent wrongly contends that the Applicants' observation about the majority's failure to apply the law "presupposes" that the record supported the conclusion that the Roşia Montană EIA Process was ripe for decision while the majority found that it was not.[403]

206. As noted above, Respondent's argument is misleading and incorrect because it refers to the majority's finding that it could not conclude that the Environmental Permit should have been issued at the time of the November 2011 TAC meeting, and to the majority's conclusion that it could not point to any "impropriety" during the subsequent meetings held in 2013, 2014, and 2015.[404] The majority never addressed the fact that after the one TAC meeting held in 2015 the process simply stopped without any explanation or decision.[405] The majority never addressed that omission/failure to act.

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401 Award ¶¶ 820, 826, 828, 852, 892, 929.

402 Memorial on Annulment ¶¶ 177-179.

403 Counter-Memorial on Annulment ¶¶ 259-260.

404 *See supra* ¶ 197.

405 *See*, *e.g.*, Legal Opinion of Lucian Mihai dated June 30, 2017 ¶¶ 211-235 (observing that no TAC meetings were held in 2012 and summarizing the several meetings held in 2013, 2014, and 2015).

207. Respondent also refers to the majority's findings about Bucium in a misleading manner, stating that the majority "concluded that 'there was no evidence of any delay or misconduct on the part of NAMR.'"[406] The quoted reference, however, is to a paragraph where the majority described TAC meetings (in the context of the Roşia Montană EIA Process) only through 2014.[407] The majority *never* addressed the fact that there was never any decision taken on the Bucium Applications, whether following a delay or otherwise.

208. Thus, Respondent is incorrect when it states that the majority "considered the reasons why no decision was issued with regard to [the Roşia Montană Environmental Permit and the Bucium Applications]."[408] The majority never did so.

### 2. The Majority Failed to Address the Claims Presented and Denied Claimants Due Process by Failing to Address the Lack of Any Decision on the Environmental Permit or on the Bucium Applications

209. As shown above, Gabriel argued that a central basis for liability in this case was that the Government never took any decision on the Environmental Permit and abandoned without ever completing the environmental permitting procedure, and it likewise failed to act and never took any decision on the Bucium Applications.[409] By failing to address these undisputed facts that Claimants relied on as key omissions in breach of the protections of the BITs, the majority failed to address an essential aspect of the claims presented.[410]

210. A failure to address an essential aspect of the claim presented is a serious denial of due process and, as such, a ground for annulment.[411] Respondent does not argue otherwise.

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406 *See* Counter-Memorial on Annulment ¶ 260 (ii) (citing Award ¶¶ 1162-1163).

407 Award ¶ 1163 n. 828 (listing several TAC meeting transcripts).

408 Counter-Memorial on Annulment ¶ 261.

409 *See supra* ¶¶ 182-184, fns. 372-373.

410 Memorial on Annulment ¶¶ 198-209.

411 *See analogously Republic of Kazakhstan v. World Wide Minerals Ltd. et al.*, Case No. CL-2024000236, 2025 EWHC 452 (**AL-74**) (English High Court concluding that the arbitral tribunal's failure to address an essential issue in an UNCITRAL Rules-based investment treaty case was a serious irregularity supporting set aside).

211. Rather, Respondent argues that the majority found the claims presented unclear.[412] That is not, however, a basis to excuse a serious denial of due process. As Respondent notes, to the extent that the Tribunal had questions, it posed them to the Parties. Indeed, the dissenting arbitrator had no difficulty understanding the claims presented.

212. Respondent argues that the claims were "constantly evolving."[413] Claimants consistently based their claims on the same facts throughout the arbitration. In all their submissions, Claimants claimed that, notwithstanding that Gabriel's Project Rights were established in license concessions and other contracts with the State, the Government announced that it would take a political decision on whether to do the Roşia Montană Project; it maintained that political approach to decision-making in disregard of Gabriel's Project Rights through successive governments; it decided contrary to law to reject the Project and its joint venture with Gabriel for political reasons and pursued a UNESCO inscription as an alternative; and the Government thus repudiated Gabriel's investment without compensation or due process, failing to take any decision on the Environmental Permit or the Bucium Applications and instead simply abandoning those administrative procedures.[414] Claimants amended the facts pled only to address the additional fact that, during the arbitration, Romania renewed its UNESCO application (which it previously had suspended) and in 2021 obtained a UNESCO World Heritage inscription for the Roşia Montană Mining Landscape.[415]

213. Based on these facts set out in the Memorial and all subsequent pleadings, Claimants claimed that Respondent breached the protections of the BITs. In response to Tribunal questions, Claimants addressed the timing of the State's breaches as follows:

- first, that Romania's treatment of Gabriel's investment, beginning in August 2011 and culminating in the Government's announcement of its political repudiation of

412 Counter-Memorial on Annulment ¶ 271.

413 Counter-Memorial on Annulment ¶ 40.

414 *See, e.g.*, Claimants' Memorial dated June 30, 2017 ¶¶ 335-638; Claimants' Reply dated Nov. 2, 2018 ¶¶ 2, 23-309; Claimants' Opening Presentation Dec. 2, 2019 vols. 3-7.

415 *See* Award ¶¶ 1286-1293.

the Roşia Montană Project and the State's joint venture with Gabriel (*i.e.*, RMGC) on or about September 9, 2013, was a "composite act" in breach of the BITs, as the State's subsequent conduct implemented its political rejection and confirmed it was definitive and permanent (the "principal claim");[416]

- second, alternatively, even if not considered as a "composite act," Romania's treatment of Gabriel's investment breached the same provisions of the BITs as of September 9, 2013, the date the State announced the political repudiation of the Roşia Montană Project and RMGC that the State implemented through its subsequent conduct (the "first alternative claim");[417] and

- third, and in the further alternative, that Romania repudiated the Roşia Montană Project and RMGC in breach of the BITs through its conduct culminating in the inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site on July 27, 2021 (the "second alternative claim").[418]

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[416] *See* Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶ 50 ("[O]n September 9, 2013, the political decision was taken to reject the Roşia Montană Project and thereby to repudiate RMGC's project development rights including the Roşia Montană Mining License without due process and without compensation. Subsequent events, as elaborated further below in response to question (f), implemented the political rejection announced that day and confirmed that it was permanent and definitive, and moreover that it extended to the entirety of the State's joint venture with Gabriel in RMGC, thus including the Bucium Projects"); *id.* ¶¶ 51-70, 88-118, 204-207 (explaining that "Claimants' principal case" is that the State breached the BITs through a composite act that started in August 2011 and crossed the threshold of breach when the Government announced the political rejection of the Project on September 9, 2013, and emphasizing conduct confirming that announcement was definitive and permanent including "Arbitrarily failing, even to this day, to issue the Environmental Permit for the Roşia Montană Project (or take any decision on it) despite the Government's repeated acknowledgements that the technical assessment was completed and all permitting requirements were met" and "Refusing to act on RMGC's Bucium exploitation license applications, even to this day, notwithstanding that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarnița deposits and acquired the right to obtain the exploitation licenses"); Claimants' First Post Hearing Brief dated Feb. 18, 2021 ¶¶ 186-200, 231-246; Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 2, 4-45.

[417] *See* Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶¶ 178-203; Claimants' First Post Hearing Brief dated Feb. 18, 2021 ¶¶ 247-249; Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 3-45.

[418] *See* Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶¶ 208-225 (identifying alternative dates that could be considered while emphasizing again in this context "Romania's continued failure to complete the environmental permitting process for the Roşia Montană Project" and "the State's continued refusal to act on RMGC's Bucium exploitation license applications"); Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 74-76 (arguing as the "second alternative

None of the alternative arguments addressing the Tribunal's questions about the timing of the breach in any way changed the basis for Claimants' claims. Claimants consistently maintained that the Government made a political decision not to proceed with the Roşia Montană Project and the State's joint venture with Gabriel and this was made evident prominently by the fact that permitting procedures were simply abandoned without decision. Thus, other than to address the evolving developments relating to Romania's decision to pursue, suspend, and reactivate the UNESCO World Heritage application and inscription, the basis of Claimants' claims remained the same throughout the case.

214. The majority described "the principal claim" as "whether the alleged politicized treatment of RMGC's application for the Environmental Permit which led, according to Claimants, to the rejection of the Project and the effective termination of the State's joint venture with Gabriel, was a composite act that breached the provisions of the … BITs on or about September 2013."[419]

215. When assessing the facts supporting that claim, the majority stated that "[t]he decisive factor for assessing the international liability … is not the outcome, i.e., whether or not the Permit should have been granted or whether the Project should have gone ahead, but rather the process itself."[420] Thus, the majority focused its liability decision on what it considered to be the process, which it characterized as the reasonableness of the debates that occurred during TAC meetings that were held. The majority did not consider the significance of the fact that the process did not reach any conclusion or that it simply stopped without explanation or decision.

216. The majority stated that its "mandate is not to review the merits of a State's decision."[421] The majority thus failed to account for the fact that this case was not about a State's decision, but rather the State's failure to issue any decision. The Tribunal's mandate indeed

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claim" that the State's conduct culminated in a breach by July 27, 2021, the date of the UNESCO inscription).

419 Award ¶ 786.

420 Award ¶ 944.

421 Award ¶ 945.

was not to review the merits of a decision (there was none), but it was to address the fact that there was no decision – not in 2013 and not thereafter – and whether that circumstance was lawful – on this, however, the majority's liability decision is silent.

217. The Parties disputed why those administrative procedures were never completed. Claimants maintained it was because, contrary to Gabriel and RMGC's right to a decision based on law, the Government decided based on political criteria, *i.e.*, that Parliament's vote on the Draft Law (which was negative) would determine whether the Government would permit the Roşia Montană Project and whether it would proceed further in joint venture with Gabriel, *i.e.*, to develop Bucium or otherwise. Respondent argued a different theory. The fact that the administrative procedures were not completed, however, was not in dispute. The issue for the Tribunal to decide was whether the State's failure to complete the applicable administrative procedures and take any decision on the Environmental Permit for Roşia Montană or on the Bucium Applications complied with the BIT standards.

218. Respondent argues that the premise of Applicants' argument is wrong because the majority concluded as to Roşia Montană that "there was no evidence that all 'matters were resolved' such that 'Romania should have issued the Environmental Permit but did not.'"[422] Respondent's argument is not supported and misleading for the reasons explained above. The majority concluded that the evidence did not establish that matters were resolved as of the date of the November 29, 2011 TAC meeting and that there was no impropriety "during this and the subsequent meetings,"[423] but it made no finding as to whether the Government should have taken a decision on the Environmental Permit after November 2011 and did not address the significance of the lack of any decision or explanation after the last TAC meeting held in 2015.

219. Thus, the majority failed to consider Claimants' claim that the State's various actions taken after 2013, including prominently its failures ever to take any decision on the Environmental Permit for Roşia Montană or on the Bucium Applications, showed that there had been a definitive and permanent rejection of the Projects in 2013, and that the State's

[422] Counter-Memorial on Annulment ¶ 287 (*citing* Award ¶¶ 965, 981).

[423] Award ¶ 981.

conduct thus accorded with and implemented the numerous public statements from Government leaders announcing the political rejection.[424] Indeed, the majority explained that it was not considering those aspects of the claim when it stated, for example with regard to the "first alternative claim," that the several "post-2013" allegations were "outside the scope of the first alternative claim,"[425] notwithstanding that Claimants consistently claimed that the "post-2013" events were relevant to show that Romania had rejected and abandoned the Projects precisely as the Government leaders announced in September 2013 and repeatedly explained confirmed after that. The majority simply never addressed this aspect of the claim.

220. The majority described the issue raised by the "second alternative claim" as "whether the conduct that followed the rejection of the Draft Law in September 2013 demonstrates a repudiation of the Project in breach of the two BITs."[426] As described above, Claimants had claimed that this conduct included "[t]he failure since March 2015 to take any action on RMGC's Bucium exploitation license applications and the failure by the Government to complete the EP process for Roşia Montană."[427]

221. Respondent argues that the majority addressed the post-2013 events because the majority noted that "certain issues remained unsolved" at the time of the 2014-2015 TAC meetings.[428] The majority gave one example from the first TAC meeting in 2014 of an issue raised in the Parliamentary Special Commission's report following the debates on the "Draft Law."[429] One cannot conclude from that, however, that the majority addressed the claim because the majority never addressed why the administrative procedure never dealt

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424 *See, e.g.*, Claimants' Memorial dated June 30, 2017 ¶¶ 522-638; Claimants' Reply dated Nov. 2, 2018 ¶¶ 214-309; Claimants' Opening Presentation Dec. 2, 2019 vol. 7; Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶¶ 50-52, 204-224; Claimants' First Post Hearing Brief dated Feb. 18, 2021 ¶ 235; Claimants' Response to Tribunal Questions on Post-2013 Events dated June 14, 2022 ¶¶ 5-45.

425 *See* Award ¶¶ 1193-1194.

426 Award ¶ 1202.

427 Claimants' First Post-Hearing Brief dated Feb. 18, 2021 ¶ 252. *See also supra* ¶¶ 182-184, fns. 372-373.

428 Counter-Memorial on Annulment ¶ 287 (*citing* Award ¶ 1235).

429 Award ¶ 1235.

with such allegedly unsolved issues, whether during the TAC meeting held in 2015 or at any time after that, and why the procedure did not result in any decision, whether positive or negative, but instead simply stopped without explanation.

222. As to the Bucium Applications, Respondent argues that the majority concluded that it did not find any evidence that the Government "mishandled" the applications, or that there was any "delay or misconduct."[430] Respondent, however, references the section of the Award in which the majority considered the primary claim, for which the majority improperly considered only conduct leading up to September 9, 2013. The majority failed to address the lack of decision in respect of the Bucium Applications in the context of the second alternative claim, in which the majority purported to consider whether conduct after September 2013 breached the BITs and as to which Claimants emphasized the sustained ongoing failure to act on the Bucium Applications.

223. Thus, also as to the "second alternative claim," the majority failed to address Claimants' claim that the lack of any decision on the Environmental Permit or on the Bucium Applications breached the BITs. The majority moreover failed to consider the post-2013 events discussed in Claimants' second alternative claim together with all the prior conduct, rather than in isolation, and thus did not address the totality of circumstances raised for any of Claimants' claims.

224. Finally, Respondent seeks to distinguish the dissent's statement that the majority's failure to consider "State conduct adversely affecting the carrying out or the finalization of the process leading to granting the environmental permit" would constitute a due process breach.[431] As Applicants observed in the Memorial,[432] and as the dissent itself plainly states, the failure to consider such conduct was a due process breach as "Claimants' FET rights under the …BITs were breached by the failure of Romania, predominantly for

[430] Counter-Memorial on Annulment ¶¶ 288-289 (referring to Award ¶¶ 1162-1163).

[431] Counter-Memorial on Annulment ¶ 290.

[432] Memorial on Annulment ¶ 202.

political reasons, to complete the process for obtaining the environmental permit without fault attributable to the Claimants."[433]

225. Indeed, the majority's liability decision, which does not address in any way the lack of any decision in either administrative procedure, *i.e.*, the environmental permitting process for Roşia Montană or the Bucium Applications, denied Claimants due process by failing to address this essential aspect of the claims presented.

### 3. The Majority Failed to State Reasons for Disregarding the Lack of Any Decision on the Roşia Montană Environmental Permit or on the Bucium Applications

226. The majority's failure to address the lack of any decision in the environmental permitting procedure for Roşia Montană and the lack of any decision on the Bucium Applications is a defect that warrants annulment on the further basis that it was also a complete absence of reasoning on a central aspect of the claims presented.[434]

227. As to the failure to state reasons for the lack of a decision on the Environmental Permit for the Roşia Montană Project, Respondent contends incorrectly that Applicants here argue that the majority "should have 'reviewed the merits of the State's decision' by assessing whether the permitting requirements were met."[435] There was no decision by the State and so there was no basis to review the merits of any decision. What the majority failed to do was to address the undisputed fact that there was no decision and so to consider whether the failure to issue a decision breached the BIT standards. To assess liability, the majority did not need to decide whether the permitting requirements were met, but it did need to consider whether the applicable administrative permitting process could, consistent with the BIT standards, simply stop without any notice, explanation, decision, or further direction.

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[433] Note of Dissent ¶¶ 6-7.

[434] Memorial on Annulment ¶¶ 233-236 (Rosia Montana Environmental Permit), ¶¶ 237-241 (Bucium Applications).

[435] Counter-Memorial on Annulment ¶ 340.

228. Respondent contends that the majority did address the issue,[436] but that is not correct as explained above.[437] Respondent can only observe that the majority found that a decision on the Environmental Permit was not due at the time of the TAC meeting in November 2011 and that there was nothing objectionable from the international perspective in the TAC meetings held, *as far as they went*. That finding was based on a failure to apply the applicable law,[438] but in any event, it leaves entirely unaddressed, *without any explanation or reasoning*, the undisputed fact that the permitting procedure then just stopped, without any decision, action, or explanation.

229. Referring to the majority's cryptic final statement that the nature of the Project ultimately "explained how things turned out, for better or worse,"[439] Respondent argues that this was dicta and so did not require any reasoning.[440] While it is true that the statement was made in dicta, it nevertheless further demonstrates the lack of understandable reasoning about the State's failure to complete or continue the environmental permitting process.

230. As to the failure to state reasons for the lack of a decision on the Bucium Applications, Respondent argues that the majority provided the reasons for its decision on the Bucium Applications in the context of its decision on Claimants' principal claim.[441] It is correct that the majority concluded that Romania's treatment of Gabriel's investment through September 9, 2013, including its failure to act on the Bucium Applications up until that date, could not be considered a composite act in breach of the BITs and on that basis rejected the principal claim. That, however, does not dispose of the issue on annulment.

231. In considering the first alternative claim, which was not based on a composite act theory, the majority's composite act reasoning did not apply. Yet, in considering the first

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436 Counter-Memorial on Annulment ¶ 341.

437 *See supra* ¶ 197.

438 Memorial on Annulment ¶¶ 161-176.

439 *See* Memorial on Annulment ¶ 236 (referring to Award ¶ 1312).

440 Counter-Memorial on Annulment ¶¶ 343-344.

441 Counter-Memorial on Annulment ¶¶ 348-349.

alternative claim, the majority's reasoning was limited to citing back to its finding on the principal claim.[442]

232. The majority's lack of reasoning on the second alternative claim, which focused on conduct after September 9, 2013,[443] is even more stark and even more obviously fatally defective. There again, the majority's reasoning is limited to a reference back to its finding for the first alternative claim.[444] The reasoning for the earlier claim, that there was no evidence as of September 9, 2013 that Romania "mishandled" the Bucium Applications, could not apply to Romania's continued failure to act on the Bucium Applications after that date.[445] There is thus a complete absence of reasoning in the majority's liability decision relating to the Bucium Applications for the second alternative claim.

### D. In a Serious Denial of Due Process, the Majority Failed to Address Prime Minister Ponta's Videotaped Admission of Liability and Allowed Respondent to Submit a Witness Statement for Him without Cross-Examination

233. The central figure in Claimants' liability case was Prime Minister Victor Ponta, the head of Romania's Government from 2012-2015, who according to Claimants made a political decision to repudiate Gabriel's Project Rights and the RMGC joint venture on or about September 9, 2013. The majority indeed mentioned Prime Minister Ponta no less than 70 times in the Award, not counting its discussion of the procedural treatment of his declaration/witness statement. The majority, however, flagrantly denied Claimants due process and seriously departed from fundamental rules of procedure in the way it approached Mr. Ponta's evidence in the case. First, the majority failed to engage with or even mention Prime Minister Ponta's video-recorded admission of liability on national television in September 2013 that the State was "nationalizing the resources," and second,

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442 Award ¶ 1192.

443 Award ¶ 1202.

444 Award ¶ 1215 (stating that the Tribunal refers to its findings in relation to Claimants' first alternative claim but citing to the paragraphs of the Award, ¶¶ 1160-1161 *et seq.*, where the Tribunal discusses the principal claim). *See also supra* ¶¶ 220-223.

445 *See Perenco Ecuador v. Ecuador* (**AL-80**) ¶ 167 ("the Committee is of the view that irrelevant or absurd arguments apparently supporting a conclusion do not amount to reasons"); *Soufraki v. UAE*, ICSID Case No. ARB/02/7, Decision on Annulment dated June 5, 2007 (**AL-60**) ¶ 128 (explaining that reasons must make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award).

the Tribunal admitted into the record a lengthy witness statement that Respondent proffered on behalf of Prime Minister Ponta, notwithstanding that Claimants were deprived of the opportunity to cross-examine him with no reasons given for his refusal to be examined.[446]

234. This also was a failure to state reasons warranting annulment because the majority did not explain whether or why Prime Minister Ponta's videotaped admission was unpersuasive or insufficient to establish Claimants' claims about the *de facto* taking of Gabriel's investment, nor did it indicate anywhere in the record how it assessed the evidentiary value of Mr. Ponta's unexamined witness testimony.[447]

### 1. The Majority Failed to Engage with and Did Not Even Mention Prime Minister Ponta's Crucial Videotaped Admission That the State Was "Nationalizing the Resources"

235. As described above, while Respondent refers to the *Tulip v. Turkey ad hoc* committee's observation that a tribunal need not discuss every piece of evidence presented,[448] due process requires a tribunal to address the key evidence relied upon by a party for significant issues in the case.[449] Indeed, it is undisputed that a failure to consider the evidence presented by a party may provide grounds for annulment as a serious departure from a fundamental rule of procedure.[450]

236. Similarly, as also discussed above,[451] annulment may be warranted where a tribunal fails to address a party's important evidence because, as the *TECO v. Guatemala* committee emphasized, "a tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[452]

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446 Memorial on Annulment ¶¶ 127-128, 213-220.

447 Memorial on Annulment ¶¶ 257-260.

448 Counter-Memorial on Annulment ¶ 300 (referring to *Tulip v. Turkey* (**AL-59**) ¶ 82).

449 *Supra* ¶¶ 154, 171.

450 Counter-Memorial on Annulment ¶ 282.

451 *Supra* ¶ 180.

452 *TECO Guatemala Holdings v. Guatemala* (**AL-65**) ¶ 131. *Id.* ¶ 133 (explaining that "while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make

237. In this case, the majority failed to engage with key evidence relied upon by Claimants for principal aspects of their claims, most prominently including Prime Minister Ponta's video-taped admission in a nationally televised interview on September 11, 2013 that by rejecting mining in Roşia Montană, the State was "basically performing a nationalization, we are nationalizing the resources."[453] Respondent cannot dispute that the statement is not mentioned anywhere in the Award. Given the sea of quotations included in the Award, the majority's eliding the nationalization statement – a powerful admission by the Prime Minister, a trained lawyer[454] – is itself remarkable and a testament to the failure of the majority to engage with the evidence presented by Claimants as due process required.

238. Respondent argues that the majority referred to and quoted other statements made by the Prime Minister during that video-taped interview.[455] The fact that the majority failed to address the admission relied upon by Claimants, however, is a failure warranting annulment, and references to other statements in the record are no cure. If anything, the fact that the majority relied on other statements in that interview, but ignored the material admission relied upon by Claimants, is an even more glaring failure to engage with Claimants' evidentiary case.

239. Respondent argues that Claimants "mischaracterize" Mr. Ponta's statements.[456] There is no mistaking Mr. Ponta's statements – a subtitled videotape of the interview and a full transcript are submitted as exhibits in the case.[457] How Mr. Ponta's statement should be understood, however, is not an issue for this Committee. The relevant point on annulment is that the majority failed to refer to or acknowledge this evidence, which Claimants described as an admission of liability, anywhere in its Award – even though Claimants

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any such finding, but one of non-existence. Taking the Tribunal's words at face value, the Committee can only conclude that the Tribunal ignored this evidence") (footnotes omitted); *Suez et al v. Argentina* (**AL-16**) ¶ 303 (recognizing that a tribunal must address the evidence that is "highly relevant" with the potential to have an impact on the outcome of the award).

453 Memorial on Annulment ¶ 213.

454 Ponta ¶ 7 ("I am a lawyer by training.").

455 Counter-Memorial on Annulment ¶ 299.

456 Counter-Memorial on Annulment ¶ 22.

457 *Interview with Prime Minister Victor Ponta*, Antena3 dated Sept. 11, 2013 (**C-437**).

showcased the subtitled video during the hearing, embedded it in their opening presentation, and quoted it repeatedly in their written submissions including five separate times in their first post-hearing brief and four separate times in a submission made directly in response to the Tribunal's questions after the hearing.[458]

240. Moreover, as described below, Mr. Ponta was permitted to submit a witness statement in the arbitration that spoke to centrally relevant issues, while Claimants were denied the opportunity – without Mr. Ponta giving any reasons – to cross-examine him on precisely those matters. Indeed, in its last post-hearing brief, Respondent relied upon Mr. Ponta's unexamined witness statement to present arguments about how his videotaped statements should be understood,[459] underscoring precisely the material due process violation that arose from the fact that Claimants were denied the opportunity to examine Mr. Ponta.

241. In any event, Respondent's argument about the meaning of Mr. Ponta's statements do not withstand scrutiny. The full quote from the interview where Mr. Ponta addresses why he insisted on submitting a Draft Law to Parliament to decide whether the Roşia Montană Project should be pursued, including the first excerpt referenced by Claimants, is as follows:

> *There's something more,* ***under the current laws and according to the endorsement,*** *you've probably seen that there was a statement by the European Commissioner on an environmental policy,* ***we should, under current laws, issue the environmental permit and the exploitation should begin.*** *It was a huge responsibility, which I do not run away from, but which cannot be assumed by a minister or a prime minister, but by the representative forum of this people, namely the Parliament.*

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458 Memorial on Annulment ¶ 213; Tr. Dec. 2, 2019 (**A-166**) 235:14-236:22 (showing the video of Prime Minister Ponta and repeatedly emphasizing his statement that by not permitting the Project as the law required, the State was effectively "nationalizing the resources"); Claimants' Opening Presentation Dec. 2, 2019 vol. 6 (**A-164**) Slides 24-26; Claimants' First Post-Hearing Brief dated Feb. 18, 2021¶¶ 10, 39, 185-186, 258; Claimants' Response to Tribunal Questions in PO27 dated May 11, 2020 ¶¶ 5, 50.b, 58, 191.

459 *See* Respondent's Second Post Hearing Brief ¶ 146 (*citing* Ponta Statement ¶¶ 65-70 and C-437).

> *Otherwise, normally, under current laws, I should issue the permit, as should have done the other governments*.[460]

Respondent argues that when stating that under the law his Government should issue the Environmental Permit, Mr. Ponta was referring to the "statement by the European Commissioner."[461] Respondent's interpretation, however, is not supportable, as the statement of the European Commissioner (which was an exhibit in the arbitration) says nothing of the sort.[462] It also is not a finding made by the Tribunal majority in any event.

242. The full quote that includes Mr. Ponta's statement explaining that the Government granted a license to RMGC to develop the Project and that consequences would follow if mining there was to be rejected is as follows:

> *The Governments since then, in 99' the Radu Vasile Government, in 2000 the Isărescu Government, through the competent ministers, approved the mining license, for a company in which Minvest, a Romania company, has a participation of 19%, by negotiation we have reached 25%, and the company Gabriel Resources has 80%. This is the first thing. This license exists. As there is license in other 4 areas of Romania. The second thing, more important,* ***by rejecting the mining we are basically performing a nationalization, we are nationalizing the resources***.[463]

Respondent argues that Mr. Ponta's statement "does not comprise any recognition that a nationalization had occurred in the specific case."[464] What Mr. Ponta is saying, however, is perfectly clear – and Respondent here denies the obvious.

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460 *Interview with Prime Minister Victor Ponta*, Antena3 dated Sept. 11, 2013 (**C-437.EN**), p.3 of 23 (emphasis added).

461 Counter-Memorial on Annulment ¶ 22.

462 *See EC says no breach of EU legislation so far by Roşia Montană mining project*, actmedia, Sept. 6, 2013 (**C-515**) (reporting that the spokesperson for the European Commissioner for environment Janez Potocnik stated that the EC was closely following the Roşia Montană project and that there was no breach of EU legislation so far). *See also* Dissent ¶ 42 (discussing Commissioner Potocnik's statement).

463 *Interview with Prime Minister Victor Ponta*, Antena3 dated Sept. 11, 2013 (**C-437.EN**), p.7 of 23 (emphasis added).

464 Counter-Memorial on Annulment ¶ 22.

243. The majority's failure to engage with this crucial admission of liability or to indicate whether or why it was unpersuasive or insufficient, was a serious departure from a fundamental rule of procedure and a failure to state reasons warranting annulment.

### 2. In a Further Denial of Due Process, Claimants Were Deprived of an Opportunity to Cross-Examine Mr. Ponta about the Lengthy Witness Statement Respondent Submitted on His Behalf

244. In a further denial of due process, the Tribunal failed to exclude from the record a 24-page witness statement from former Prime Minister Ponta – the principal actor whose conduct formed a significant basis of the claims in the case and whose witness statement addressed many of the central issues in dispute – notwithstanding that Claimants were denied the opportunity to cross-examine him. This failure was a serious due process violation warranting annulment of the majority's liability decision.[465] The majority also never indicated what if any evidentiary value it accorded to Mr. Ponta's unexamined witness testimony, thus failing to state reasons.[466]

245. There can be no dispute about Prime Minister Ponta's centrality to the issues that formed the basis of the claims in the case – as noted above, he is mentioned no less than 70 times in the Award, not counting the discussion of the procedural treatment of his declaration/witness statement. Among the issues that Claimants had no opportunity to address through cross-examination was Mr. Ponta's critical admission that by rejecting the Roşia Montană Project, the State was effectively performing a nationalization – evidence that the majority also failed to address.[467]

246. Respondent submitted with its Rejoinder the declaration from Mr. Ponta, later resubmitted and restyled as a witness statement, stating that for undisclosed reasons Mr. Ponta would not be available for cross-examination.[468] In response to Claimants' objection, the Tribunal directed that Claimants would have the right to call Mr. Ponta for cross-

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465 Memorial on Annulment ¶¶ 128, 215-220.

466 Memorial on Annulment ¶¶ 259-260.

467 Memorial on Annulment ¶¶ 127, 190, 213, 219, 257. *See also supra* ¶¶ 235-243.

468 Memorial on Annulment ¶¶ 216-217.

examination and if Mr. Ponta was still unable to testify at that time, the Tribunal "only then" would determine the admissibility and probative value of Mr. Ponta's statement.[469] When Claimants called Mr. Ponta for cross-examination, Respondent again indicated his unavailability. At that point, the Tribunal decided his statement was admissible but "it would need to assess the evidentiary value of this statement at a later stage in the proceedings and in light of the entire record."[470] The majority, however, did not assess the evidentiary value of Mr. Ponta's statement anywhere in the Award or any other place in the record.

247. It is commonly accepted that it is a basic due process violation to accept testimony into the record when it cannot be examined by the opposing party.[471]

248. The Tribunal itself recognized the importance of the opportunity to cross-examine witnesses whose testimony has been accepted. The Tribunal specifically required that Respondent redesignate Mr. Ponta's "declaration" as a witness statement as a condition to allow it into the record in order to make clear that it would be subject to cross-examination,

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469 Procedural Order No. 23 (**A-167**) ¶¶ 42-46.

470 Award ¶¶ 342-345; Letter from the Tribunal to the Parties dated Sept. 24, 2019.

471 IBA Rules on the Taking of Evidence in International Arbitration (2010) (**AL-88**), Article 4(7) ("If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise."); Mauro Rubino-Sammartano, *Breach of Due Process*, International Arbitration Law and Practice (3rd ed. 2014) (**AL-89**) at 1106 ("Indisputably there can be no right to prove one's case if there is no right to call witnesses and to examine them, or to cross-examine the witnesses of the opposite party."); Nathan O'Malley, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION (2012) ¶ 5.32 (**AL-90**) (observing that where a witness fails to appear for questioning, the established rules is that the statement "is excluded from the proceedings"); Matti S. Kurkela and Santu Turnunen, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2010) ¶ 6.8.6 (**AL-91**) ("[T]he right to cross-examine a witness is in principle a part of due process"); *Metalpar S.A. and Buen Aire S.A. v. Argentina*, ICSID Case No. ARB/03/5, Award dated June 6, 2008 (**AL-92**) ¶ 153 (excluding the statements of witnesses and experts who failed to appear at the hearing, observing that to proceed differently would imply causing a serious procedural inequality); *ECE Projektmanagement et al. v. Czech Republic*, PCA Case No. 2010-5 (UNCITRAL), Award dated Sept. 19, 2013 (**AL-93**) ¶ 4.870 (deciding that the witness statements of a witness who would not testify at the hearing "should be struck from the record"); *Gemplus S.A., et al. v. Mexico*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award dated June 16, 2010 (**AL-94**) ¶¶ 1-27 (observing that, because a witness was not made available for cross-examination as requested, "the Tribunal has placed no reliance upon" that witness's statement "for the purpose of the decisions recorded in the Award"); LG&E Energy Corp., et al. v. Argentina, ICSID Case No. ARB/02/1, Award dated July 25, 2007 (**AL-95**) ¶¶ 92-95 (refusing to consider a witness statement submitted after the hearing because "[r]espect for due process obliges this Tribunal to only consider evidence that the other side has been able to test").

emphasizing that the Tribunal had excluded witness declarations that had been proffered by non-disputing parties "because such testimonies cannot be considered or evaluated as 'witness statements' which would require their testing via cross-examination."[472] The Tribunal underscored the same point when, over Claimants' objection, the Tribunal allowed Respondent to produce additional documents after the Rejoinder on the ground that "the production of these documents is necessary for the meaningful examination of [the witness] during the Hearing,"[473] and again when deciding, at Respondent's request, to add an additional week of hearings "to ensure that the Parties have sufficient time to conduct a proper examination of witnesses and experts."[474]

249. While the Tribunal had the power to decide whether Mr. Ponta's witness statement should be admitted, the issue on annulment is whether it was consistent with basic norms of due process to admit the statement of such an important witness on the issues that were most central to the dispute in circumstances where the witness refused to appear for cross-examination, moreover without providing any reason.

250. Respondent argues that the admission of a witness statement without the opportunity for cross-examination does not "in and of itself" constitute a breach of due process, citing the 2012 annulment decision in the *Pey Casado* arbitration.[475] It is possible that in some circumstances the testimony at issue might not be so central to the dispute, such that being denied the opportunity to cross-examine might not materially prejudice the opposing party, or that in some cases there may be other mitigating factors.[476] In the *Pey Casado* case, during the hearing the tribunal accepted certain oral explanations on limited points with relevance to jurisdiction from the party representative, Mr. Pey Casado, without treating him as a witness and thus without a procedure permitting cross-examination. The *ad hoc*

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472 Procedural Order No. 23 (**A-167**) ¶ 45.

473 Letter from the Tribunal to the Parties dated Sept. 24, 2019.

474 Award ¶¶ 346, 360.

475 Counter-Memorial on Annulment ¶ 280 (*citing Pey Casado v. Chile* (**AL-11**) ¶ 307).

476 For example, the majority also admitted the expert report of Ms. Cathy Reichardt who also refused to make herself available for examination for "unspecified personal reasons." PO23 ¶¶ 55-56; Award ¶ 463. As her expert report would have been relevant, if at all, only to the damages claim, however, the decision to maintain her report in the record was not material to the majority's liability decision.

committee concluded that this did not provide grounds for annulment because the tribunal's decision on jurisdiction did not depend on his statements.

251. The same cannot be said in this case where the subject of Mr. Ponta's witness statement went to the heart of the issues in dispute in the case.

### E. The Majority's Liability Decision Impermissibly Substitutes Equitable Considerations for Legal Analysis

252. The majority's liability decision is based on subjective notions of equity contrary to the Tribunal's obligation to apply the law.[477] As discussed below, the majority premised its liability decision on the equitable, extra-legal notion that there was supposedly no overarching intention to harm Gabriel's investment and that the State supposedly did not benefit.[478] The majority also failed to consider the cumulative effects of Romania's acts and omissions as required by the applicable law and, having fundamentally disregarded the applicable law, the majority failed to state reasons for its conclusions.[479]

#### 1. The Majority Decided *ex Aequo et Bono*, Emphasizing an Alleged Lack of Intention to Harm Gabriel's Investment or to Benefit the State

253. The majority repeatedly framed the issue to be decided as whether Romania's actions were taken with the intent to harm Gabriel's investment or to benefit the State, notwithstanding that the majority acknowledged that the BIT standards do not require a showing of intent – a failure emphasized in the Note of Dissent.[480]

254. Respondent argues that the majority's references to intent relate to the requirement of showing a "pattern or purpose," which the majority considered was necessary to establish a composite act.[481] Respondent's argument, however, does not resolve the issue. Even if a "purpose" refers to intention, a "pattern" does not.

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[477] Memorial on Annulment ¶¶ 186-187.

[478] Memorial on Annulment ¶¶ 184-185.

[479] Memorial on Annulment ¶¶ 180-182, 252-256.

[480] Memorial on Annulment ¶¶ 183-185, 186.c. *See also* Note of Dissent ¶ 15.

[481] Counter-Memorial on Annulment ¶¶ 265-266.

255. In any event, neither the first alternative claim nor the second alternative claim was based on a theory of composite act. Thus, the concept of "pattern or purpose" had no plausible relevance to those claims, yet the majority based its decision on those claims on the alleged lack of intention to harm the investment, thus manifestly exceeding its powers by failing to apply the law that an intention is not required to breach the BITs.

256. Moreover, it is undisputed that the Tribunal did not have a mandate to decide the dispute *ex aequo et bono*.[482] While Respondent observes in response that there should be a "high threshold" for finding that a tribunal's decision was rendered *ex aequo et bono*,[483] the majority's failure to apply the applicable law, its recasting of the issues so as to avoid addressing the claims presented, its avoidance of key evidence relied upon by Claimants, and its focus on the alleged lack of intention to harm Gabriel's investment or to benefit the State, together cross that threshold as Applicants have shown.[484]

### 2. The Majority Failed to Consider the Cumulative Effects of Romania's Acts and Omissions

257. The majority failed to apply the rule of international law that conduct considered cumulatively may give rise to a breach even where individual acts and omissions considered individually do not – another failure emphasized in the Note of Dissent.[485]

258. Respondent argues in response that the majority's decision was based "on a separate line of reasoning," *i.e.*, whether there was a "pattern or purpose" to the individual acts and/or omissions.[486] Even if one were to conclude, as Respondent argues, that in deciding the "primary claim" the majority intended to equate the inquiry with the question whether there

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482 Counter-Memorial on Annulment ¶ 199.

483 Counter-Memorial on Annulment ¶ 212.

484 *See also* Memorial on Annulment ¶ 186.

485 Memorial on Annulment ¶¶ 180-182 (referring to the majority's decision in Award ¶¶ 1166, 1187, 1198); Note of Dissent ¶ 15. It is well established that even where individual acts considered in isolation do not rise to the level of a breach of a BIT, considered cumulatively, they may do so. *E.g. Bayindir Insaat Turizm Ticaret v Sanayi AS v. Pakistan*, ICSID Case No, ARB/03/29, Award dated Aug. 27, 2009 (**CL-87**) ¶ 181; *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated Sept. 22, 2014 (**CL-81**) ¶ 566; *El Paso Energy Int'l v. Argentina*, ICSID Case No. ARB/03/15, Award dated oct. 31, 2011 (**CL-152**) ¶¶ 459, 518-519.

486 Counter-Memorial on Annulment ¶¶ 263-264.

was a "clearly cohesive pattern or purpose" in the context of assessing whether the conduct could be considered as a composite act,[487] that would not dispose of the issue.

259. As the majority recognized, the "first alternative claim" was not based on a theory of "composite act," and deciding that claim called upon the Tribunal to assess the State's conduct collectively, *i.e.*, whether there was a series of acts or omissions over time constituting a "creeping" violation.[488] Rather than do that, however, the majority concluded that there was "no evidence of a connection between" the several acts it described and therefore that "the culminative effect of these disparate acts" did not rise to the level of a breach.[489] The majority thus emphasized that it assessed only whether there was a connection between the acts, *i.e.*, a course of conduct that was intentionally aimed at achieving a goal, which was a failure to apply the law regarding cumulative effect.[490]

### 3. Having Disregarded the Applicable Law, the Majority Failed to State Reasons for Its Conclusions

260. As Applicants have shown, the majority failed to apply the applicable BIT standards to its assessment of Gabriel's claims, as required.[491] The majority thus also failed to state reasons for its conclusions that the State's conduct did not breach the BIT standards.[492]

261. In response, Respondent argues that the Award is lengthy.[493] The length of the Award, however, is not the point – what matters is what the Award contains or fails to contain. In this case, the majority failed to support the conclusions reached with sufficiently pertinent reasons. Such reasons necessarily must include, most basically, reasons grounded in the

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487 *See* Award ¶ 1166.

488 Award ¶ 1187.

489 Award ¶ 1198 (emphasis in original).

490 *See* Dissent ¶ 15 (describing that a connection between acts is not needed for assessing cumulative effect).

491 Memorial on Annulment ¶¶ 143-145, 150-176, 178-179, 183-185.

492 Memorial on Annulment ¶¶ 252-256.

493 Counter-Memorial on Annulment ¶ 361. Respondent also refers to its argument regarding the majority's failure to apply the law, which as demonstrated above is without merit. *See supra* ¶¶ 159-168 (failure to apply the law in assessing the alleged improper link between permitting and renegotiations), ¶¶ 186-208 (failure to apply the law by disregarding Romania's failure to take a decision on the Environmental Permit or on the Bucium Applications).

applicable law and an application of that law to the facts at issue. As demonstrated in the Memorial and above, the majority's liability decision fails in this fundamental respect.

### F. The Majority's Liability Decision Contains Additional Fatal Defects, Including on the Effects of the UNESCO Description

262. The majority's liability decision is fatally defective in other respects, including because the majority failed to state reasons for its conclusion on whether the UNESCO inscription made it impossible to implement the Roşia Montană Project.[494]

263. Claimants claimed that the UNESCO inscription of the Roşia Montană Mining Landscape triggered protections under Romanian law that made obtaining the necessary construction permit for the project legally impossible.[495] The majority addressed the claim by observing that archaeological discharge certificates issued in the Project area remained in effect.[496] The majority's reasoning is a *non-sequitor* and not responsive to the claim presented because the UNESCO inscription was not premised on the archaeological features of the site, but on the cultural value of the landscape itself.[497]

264. Respondent observes that the majority provided some reasons for rejecting the claim.[498] That, however, does not address the defect on annulment because it is not enough to give some reasons – the reasons given must at least be relevant to the claim presented.[499] Here, they were not. The majority failed to provide any pertinent reason for rejecting the claim presented.

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494 Memorial on Annulment ¶¶ 242-251.

495 Memorial on Annulment ¶¶ 243-245.

496 Memorial on Annulment ¶¶ 248-249.

497 Memorial on Annulment ¶¶ 249-250.

498 Counter-Memorial on Annulment ¶¶ 352-359.

499 *See Soufraki v. UAE* (**AL-60**) ¶ 123 (observing that *ad hoc* committees have explained that reasons given must be "sufficiently relevant" or "sufficiently pertinent"), and ¶ 126 (explaining that where there are reasons given, annulment nevertheless will be warranted on this ground where there is "a total failure to state reasons for a particular point, which is material for the solution").

265. The majority's failure to state reasons for rejecting the claim presented on the issue of the UNESCO inscription of the Roşia Montană Mining Landscape is another ground for annulment.[500]

## IV. RESPONDENT SHOULD BEAR THE COSTS OF THESE PROCEEDINGS

266. Applicants request that the Committee order Respondent to bear all costs incurred by Applicants in connection with this proceeding, including Applicants' legal fees and expenses, the fees and expenses of the members of the Committee, as well as the fees and expenses of the Centre.

267. Article 61(2) of the ICSID Convention grants tribunals broad discretion to allocate the costs of the arbitration:

> [T]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.[501]

Pursuant to Article 52(4) of the ICSID Convention, Article 61(2) applies *mutatis mutandis* to annulment proceedings.[502]

268. Multiple annulment committees have applied the costs follow the event principle and have ordered the respondent to pay costs upon annulment of the award.[503] The *Sempra v. Argentina* committee observed that this approach "is in line with equitable principles."[504]

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500 Memorial on Annulment ¶¶ 242-251.

501 ICSID Convention Art. 61(2).

502 ICSID Convention Art. 52(4) ("The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.").

503 *See, e.g.*, *Eiser Infrastructure v. Spain* (**AL-18**) ¶¶ 267-272 (applying the costs follow the event principle and ordering the respondents to pay the costs of the annulment proceeding in its decision to annul the award); *Sempra Energy v. Argentina* (**AL-9**) ¶¶ 227-228 (same); *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment of April 16, 2009 (**AL-82**) ¶ 82 (same).

504 *Sempra Energy v. Argentina* (**AL-9**) ¶ 227 ("[I]t is in line with equitable principles to let the rule that the costs-follow-the-event apply to those costs of the annulment proceeding that have been incurred by the Centre, *i.e.* in respect of the fees and expenses of the members of the *ad hoc* Committee and the charges, fees, and out-of-pocket expenses incurred by the Centre.").

The *Eiser v. Spain* committee considered that as "the Award was annulled in its entirety for improper constitution of the Tribunal and serious departure from a fundamental rule of procedure," the costs follow the event principle applied, and it therefore ordered respondent to pay the applicants' costs in addition to their legal fees and expenses.[505]

269. Directing Respondent to cover the costs incurred by Applicants in connection with this annulment proceeding is justified because Applicants have shown the Award must be annulled. Moreover, as Applicants consistently have maintained, interest on a compound basis should be included as a necessary component of compensation to Gabriel.[506]

270. In relation to interest, Respondent argued strongly throughout the arbitration against an award of compound interest, insisting there was "no reason" for compound interest "either pre-award or post award."[507] Following Respondent's argument, the majority awarded "simple interest at a risk-free rate."[508] In this case, there should be no basis for a cost order in Respondent's favor. In any event, in view of Respondent's consistent position on the issue of interest, there is no basis for Respondent's request for a cost order in its favor to carry compound interest at a commercial interest rate.[509]

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[505] *Eiser Infrastructure v. Spain* (**AL-18**) ¶¶ 267, 272. *See id.* ¶¶ 268-271.

[506] Memorial ¶ 924; Reply ¶ 735.

[507] Counter-Memorial ¶ 816. Respondent argued that "[t]here is no prevailing rule under international law that interest must be paid on a compound basis. Quite the opposite, as confirmed in the Commentary to the ILC Articles, '[t]he general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest,'" that "[t]his was notably confirmed by the Iran-United States Claims Tribunal, which 'consistently denied claims for compound interest,'" and that "the Tribunal stated in one judgment that '[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable.'" Counter-Memorial ¶ 814. *See also* Rejoinder ¶ 1183. Indeed, regarding the prevailing practice among investment tribunals relating to awards of interest, Respondent insisted that "the Tribunal is not bound to follow any trends, recent or otherwise." Rejoinder ¶ 1185.

[508] Award ¶ 1358(2)(c).

[509] Counter-Memorial on Annulment ¶ 375.

## V. REQUEST FOR RELIEF

271. For the reasons set forth in the Memorial on Annulment and above, Applicants respectfully request that the Committee:

a. annul the Award in its entirety on the grounds set forth in Section II above;

b. alternatively, on the grounds set forth in Section III above, annul the Award in the parts containing the majority's decisions on liability and on costs in Sections IV and V of the Award (paragraphs 767-1357) together with the majority's decision at paragraph 1358.2, except for the unanimous decisions at Award paragraphs 1183-1185 and 1220-1223; and

c. order Respondent to pay all of Applicants' costs associated with this annulment proceeding, including Applicants' legal fees and expenses, the fees and expenses of the members of the Committee, as well as the charges for the use of the facilities of the Centre, together with interest running from the date of the Committee's decision until the date of payment.

Respectfully submitted,

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