
INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

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

Claimants

v.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/___

REQUEST FOR ARBITRATION

July 21, 2015

WHITE & CASE^{LLP}

Counsel for Claimants

REQUEST FOR ARBITRATION

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PARTIES TO THE ARBITRATION	4
III.	BACKGROUND TO THE DISPUTE.....	5
	A. Gabriel Invests in Romania.....	5
	B. Romania Frustrates and Effectively Expropriates Gabriel’s Investments	10
IV.	ROMANIA’S ACTIONS ARE IN BREACH OF THE BITS.....	14
	A. Canadian BIT	15
	B. UK BIT.....	16
V.	GABRIEL HAS INCURRED SIZABLE RESULTING LOSSES AND DAMAGE	17
VI.	BASIS FOR JURISDICTION	18
	A. Gabriel Canada May Submit This Dispute to Arbitration under Article XIII of the Canadian BIT	18
	B. Gabriel Jersey May Submit This Dispute to Arbitration by under Article 7 of the UK BIT	22
	C. This Dispute Satisfies the Requirements of the ICSID Convention	24
VII.	CONSTITUTION OF THE TRIBUNAL	25
VIII.	ACCESS TO DOCUMENTS.....	25
IX.	REQUEST FOR RELIEF	26
X.	CONCLUSION	27

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

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

Claimants

v.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/___

REQUEST FOR ARBITRATION

I. INTRODUCTION

1. Gabriel Resources Ltd. (“Gabriel Canada”) and Gabriel Resources (Jersey) Ltd. (“Gabriel Jersey”) (collectively “Gabriel” or the “Claimants”), in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “ICSID Institution Rules”), and, respectively, Article XIII of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the “Canadian BIT”)¹ and Article 7 of the

¹ Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, done at Bucharest on May 8, 2009, entered into force on Nov. 23, 2011 (as corrected by an Exchange of Notes dated Apr. 12 and 29, 2011) (Exh. C-1). *See* Materials evidencing the Canadian BIT’s entry into force (Exh. C-2) (comprising Romania’s Official Gazette No. 808 dated Nov. 26, 2009, publishing Romania’s ratification of the Canadian BIT; Official Gazette No. 487 dated July 7, 2011, publishing the Exchange of Notes correcting the Canadian BIT; and website of Government of Canada, Foreign Investment Promotion and Protection (FIPAs), www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx, listing the Canadian BIT as having entered into force on November

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the “UK BIT”),² hereby request arbitration of the dispute with Romania (“Romania” or “Respondent”) described below.

2. This dispute arises out of acts and omissions of Romania in violation of the Canadian and UK BITs that have resulted in the effective expropriation of Gabriel’s sizable investments in Romania.

3. Gabriel, through its 80.69 percent-owned Romanian subsidiary Roșia Montană Gold Corporation S.A. (“RMGC”), has been engaged in the exploration and development of precious metal mineral properties in Romania, including the Roșia Montană gold and silver project (the “Roșia Montană Project” or the “Project”). The remaining 19.31 percent of RMGC is held by the Romanian State through Minvest Roșia Montană S.A. (together with its legal predecessors, “Minvest”). Since RMGC’s incorporation in 1997, Gabriel has provided all of the funding for RMGC’s activities.

4. The Project is situated in an area known as the Golden Quadrilateral in the South Apuseni Mountains of Transylvania, Romania, an historic and prolific mining district that since pre-Roman times has been mined intermittently for over a period of at least 2,000 years. The Project encompasses one of the largest gold deposits in Europe, containing proven and probable mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver.

5. Gabriel’s rights to the Project stem from, *inter alia*, a mining license issued by a decision of the Romanian Government, in effect as from June 21, 1999. For over fifteen years,

23, 2011). The Canadian BIT was concluded in English, French, and Romanian. All references to the Canadian BIT in this Request are to the English text.

² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments, done at London on July 13, 1995, entered into force on Jan. 10, 1996, and extended to the Bailiwick of Jersey by an Exchange of Notes in force as from Mar. 22, 1999 (Exh. C-3). *See* Materials evidencing the UK BIT’s entry into force (Romania’s Official Gazette No. 273 dated Nov. 23, 1995, publishing Romania’s ratification of the UK BIT) (Exh. C-4); UK BIT, UK Treaty Series No. 84 (1996) (indicating that the UK BIT entered into force on Jan. 10, 1996) and Exchange of Notes relating to the UK BIT, UK Treaty Series No. 54 (1999) (indicating that the UK BIT was extended to the Bailiwick of Jersey effective Mar. 22, 1999) (Exh. C-3). The UK BIT was concluded in English and Romanian. All references to the UK BIT in this Request are to the English text.

in reliance on numerous representations made and actions taken by the Romanian authorities, Gabriel invested over US\$ 650 million to develop the Project in accordance with all applicable laws, regulations, licenses, and permits. Gabriel developed the Project as a productive, high-quality, sustainable, and environmentally responsible mining project utilizing state-of-the-art technologies and in accordance with European Union guidelines, international mining best practices, and sustainable development guidelines. The Project would contribute billions of dollars to the Romanian economy, stimulate development of the economically disadvantaged region in which the Project is located, identify and safeguard the rich cultural heritage of mining in the region, and enable and accelerate remediation of the severely polluted environment of the surrounding area caused by decades of environmentally unsound mining practices conducted by the Romanian State.

6. Romania's acts and omissions have frustrated and prevented implementation of the Project, including by imposing unjustified administrative delays in the permitting process, imposing shifting and non-transparent legal requirements, politicizing applicable legal and administrative processes, and ultimately abdicating the responsibility to make decisions on the permitting of the Project in contravention of the applicable legal framework. At the same time, Romania has required Gabriel to expend significant amounts through RMGC on mining activities and fees and taxes in relation to the mining license and associated property rights.

7. Through its actions and failures to act Romania has blocked and prevented implementation of the Project without due process and without compensation, effectively depriving Gabriel entirely of the value of its investments. Romania thus has subjected Gabriel and its investments to treatment in breach of Romania's obligations in the Canadian BIT and in breach of Romania's obligations in the UK BIT, causing very significant losses to Gabriel as further detailed below.

II. PARTIES TO THE ARBITRATION

8. Gabriel Canada is a Canadian company publicly traded on the Toronto Stock Exchange (TSX: GBU) and incorporated under the laws of the Yukon Territory, Canada, registration number 525786, with a registered office at Suite 200 – 204 Lambert Street, Whitehorse, Yukon Territory, Y1A 3T2, Canada.

9. Gabriel Jersey is a Jersey company incorporated under the laws of the Bailiwick of Jersey, with a registered office at 15 Esplanade Street, St Helier, Jersey JE1 1RB, registered with the Jersey Companies Registry under registration number 65278. Gabriel Jersey was registered on May 28, 1996 and has been an indirectly wholly owned subsidiary of Gabriel Canada since April 1997.

10. As required by Rule 2(1)(f) of the ICSID Institution Rules, Claimants have taken all necessary internal actions to authorize this Request.³

11. Gabriel Canada and Gabriel Jersey are represented by White & Case LLP in this proceeding.⁴ Correspondence for this matter should be addressed as follows:

Abby Cohen Smutny
Darryl S. Lew
Petr Polášek
White & Case LLP
701 Thirteenth Street NW
Washington, DC 20005
USA

Tel: +1 202 626 3600

asmutny@whitecase.com
dlew@whitecase.com
ppolasek@whitecase.com

³ Gabriel's Consents and Authorizations to Commence Arbitration of Bilateral Investment Treaty Dispute (Exh. C-5); Gabriel Canada's Waiver in Support of Its Request for Arbitration (Exh. C-6).

⁴ Powers of Attorney Authorizing Counsel (Exh. C-7).

12. Pending other notification from Romania, correspondence to Respondent may be addressed as follows:

The Honorable Victor-Viorel Ponta
Prime Minister of Romania
Palatul Victoria
Piața Victoriei nr. 1
Sector 1, 011791 Bucharest
Romania

Tel: +40 21 314 3400
drp@gov.ro

The Honorable Iulian Buga
Romanian Ambassador to the United States
1607 23rd Street NW
Washington, DC 20008
USA

Tel: +1 202 332 4846
office@roembus.org

III. BACKGROUND TO THE DISPUTE

A. Gabriel Invests in Romania

13. As part of the transition from a communist planned economy to a market economy, in 1990 Romania established various public sector enterprises referred to as “autonomous companies” (in Romanian, “regie autonomă”) through which various sectors of the economy were administered by the State. In the mining sector, by Government Decision No. 1287/1990, Romania established Regia Autonomă a Cuprului din Deva (“RACD”), a State enterprise tasked with the exploitation of copper, gold, silver, and other non-ferrous metal deposits and the upgrading of existing mines. The mine at Roșia Montană, which at that time still was in operation, was among the State assets put under RACD’s administration.

14. Burdened with inefficient operating structures, outdated technologies, and a lack of access to financing, RACD was unable to operate profitably. For that reason, in July 1994, the Ministry of Industry included the modernization of the mining operations at Roșia Montană on a list of priority projects to be implemented by RACD in cooperation with a foreign partner.

15. Following an initial Cooperation Agreement concluded between RACD and Gabriel Jersey to develop and reprocess tailings⁵ at the Roșia Montană site, in August 1997 RACD and Gabriel Jersey established, with the approval of the National Agency for Mineral Resources (“NAMR”) and the Ministry of Industry, a joint venture company, Euro Gold Resources S.A., later renamed (and referred to herein as) RMGC, with the object of conducting mining activities.

16. In April 1997, Gabriel Canada had become the 100 percent equity shareholder of Gabriel Jersey. Gabriel Jersey has remained a wholly-owned subsidiary of Gabriel Canada since that time.

17. Initially, RMGC’s equity was held by five shareholders, the minimum number of shareholders required by the then applicable law, in the following proportions – 65 percent by Gabriel Jersey, 33.8 percent by RACD and 1.2 percent by three other Romanian companies. As contemplated in RMGC’s constitutive agreements, Gabriel Jersey’s interest in RMGC was to increase to 80 percent upon the completion and delivery to RMGC of a pre-feasibility study on the development of Roșia Montană Project. RACD subsequently was reorganized and reconstituted as Minvest S.A., a state-owned enterprise, and later, as noted above, Minvest Roșia Montană S.A. became the State shareholder of RMGC.

18. In 1998, after Romania enacted a new mining law that established the regime of mining licenses, NAMR issued an exploitation license for the Roșia Montană Project to Minvest as the titleholder and to RMGC as an affiliated company. The license was approved by Government Decision No. 458/1999 as License No. 47/1999 and entered into effect as from June 21, 1999 (the “License”). The License has an initial term of twenty years with a right of renewal for successive five-year periods. The License carries the right as well as the obligation to develop the mineral resource within the license perimeter to the maximum extent feasible.

19. In December 1999, Gabriel completed a pre-feasibility study for the Roșia Montană Project, which it delivered to RMGC. Gabriel Jersey thereafter executed its right to

⁵ Tailings are leftover materials from the processing of ore; tailings may contain valuable metals not recovered in prior inefficient operations.

increase its equity shareholding in RMGC to approximately 80 percent, and Minvest's ownership interest decreased to approximately 20 percent. These equity shareholdings have remained essentially unchanged since December 1999. In 2009 and 2011, Gabriel acquired the interests of the three Romanian minority shareholders, who collectively held less than 1% of the issued share capital of RMGC.

20. In October 2000, with the approval of NAMR, Minvest transferred title to the License to RMGC. Since then, RMGC has remained the License titleholder.

21. In addition, by NAMR Order No. 60/1999, in force as from May 20, 1999, NAMR granted an exploration license No. 218/1999 to Minvest as the titleholder and to RMGC as an affiliated company, covering the Bucium area located in the vicinity of Roșia Montană. With NAMR's approval, Minvest subsequently transferred the title to the Bucium license to RMGC. Following exploration work that defined mineral deposits at the Rodu-Frasin and Tarnița locations within the Bucium area, in order to implement projects for the exploitation of these deposits (the "Bucium Rodu-Frasin and Tarnița Projects"), in May 2007 RMGC submitted an application to the NAMR for the conversion of the Bucium license into two exploitation concessions.

22. Since RMGC's obtaining the rights to the Roșia Montană Project, including but not limited to rights under the License, both directly and through RMGC, Gabriel worked to develop the Roșia Montană Project as a productive, high-quality, sustainable, and environmentally responsible mining project in accordance with all applicable laws, regulations, licenses, permits, as well as European Union guidelines, international mining best practices, and international sustainable development guidelines. Both directly and through RMGC, Gabriel engaged leading global mining, engineering, and environmental consultants and experts to assist in the development of all major aspects of the Project including:

- Undertaking extensive exploration activities within the Project area, including an extensive drilling and assaying program, which confirmed the existence of significant mineral deposits within the Project area.

- Undertaking extensive and updated feasibility studies and development plans for extraction of gold and silver from the Project.
- Developing the technical design of the Project.
- Purchasing and storing mining and other equipment necessary to implement the Project, such as large-scale equipment for the processing plant.
- Undertaking wide-ranging environmental impact assessments.
- Undertaking and financing extensive corporate social responsibility programs in the Project area, including education and training programs, improvements to infrastructure, renovation of historical buildings and monuments, and other projects enhancing sustainability and social progress.
- Acquiring surface rights to land within the Project's footprint and, following public consultations and in accordance with World Bank principles, relocating and resettling members of the local community affected by the Project. This process has included, among other things, construction of a new modern neighborhood in the city of Alba Iulia for members of the local community who chose to move to that location.
- Undertaking and financing extensive programs of exploratory and preventive archaeology to identify and preserve sites and artefacts of historical importance in the Project and surrounding area.
- Diligently pursuing applications for and acquiring permits and authorizations required to implement the Project and defending the same against various legal challenges by, *inter alia*, anti-mining non-governmental organizations (NGOs).

23. As thus developed by Gabriel, the Roşia Montană Project encompasses one of the largest gold deposits in Europe, including proven and probable mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver, contained within 215 million tonnes of ore at average grades of 1.46 grams of gold per tonne of ore and 6.88 grams of silver per tonne of ore.

The foregoing mineral reserves were certified by an independent “Qualified Person” under Canadian National Instrument 43-101 as part of Gabriel’s securities reporting to the investing public. In addition, the Project has a significant amount of additional gold and silver mineral resources, also certified by a “Qualified Person.”

24. The Project envisages the exploitation of the gold and silver deposits at Roşia Montană using a conventional open pit mine and ore processing plant producing bars of gold and silver doré (a semi-pure alloy), a tailings management facility for depositing leftover material from the processing of ore, and stockpiles for storing waste rock from the mine. The Project is designed to use state-of-the-art technology, including technology compliant with the European Commission’s Best Available Techniques Reference documentation, and including cyanide-based technology in a closed system at the processing plant, commonly used in the gold mining industry around the world. The expected initial mine life of the Project is sixteen years.

25. Gabriel invested over US\$ 650 million in developing the Project. As envisioned, the Project was one of the largest proposed foreign direct investments in Romania, with the potential to contribute billions of dollars to the Romanian economy. The Project also has the potential to stimulate growth and badly needed development in the Apuseni region, which has been suffering from poverty, underdevelopment, and structural unemployment, as well as from severe pollution caused by decades of the environmentally unsound mining techniques and deficient mine closure practices of the State-run mining operations (unrelated to Gabriel).

26. In the context of fulfilling its obligations to advance the Roşia Montană Project, in accordance with the License, as well as in furtherance of its other license rights and obligations, RMGC submitted on a regular basis annual work plans, reports, and updated technical studies to the competent Romanian authorities for their review and approval. The Romanian authorities consistently granted all such approvals, which validated and encouraged Gabriel’s continued development of the Project and its legitimate expectations that the Project would be reviewed and evaluated in accordance with the law and reasonable technical standards.

B. Romania Frustrates and Effectively Expropriates Gabriel's Investments

27. Gabriel worked diligently through RMGC to obtain the various permits and approvals needed to advance the Roșia Montană Project into production. These include land use, archaeological, and environmental authorizations as well as the acquisition of surface rights in the area of the Project footprint.

28. The most significant permit required is the Environmental Permit. After completing the intensive study and analysis of the environmental and social impacts of the Project and the appropriate corresponding mitigations, following terms of reference established by the Ministry of Environment, RMGC prepared and in May 2006 submitted the Environmental Impact Assessment for the Roșia Montană Project (the "EIA") to the Ministry of Environment. The EIA addresses comprehensively all environmental and socio-economic aspects of the construction, operation, and ultimate closure and rehabilitation of the proposed mine and forms the basis upon which the Government is to evaluate the Project's impacts and to issue the Environmental Permit. Under the applicable legal regime, the Environmental Permit is to be issued by Government decision upon the recommendation of a Technical Assessment Committee ("TAC"), convened by the Ministry of Environment for the purpose of reviewing the EIA.

29. After holding several meetings, the TAC review process was suspended in 2007 for an indefinite time period without valid legal basis by the Ministry of Environment during the tenure of an Environment Minister who publicly opposed the Project.

30. Once the TAC process was resumed in 2010, and following review of an updated EIA, the TAC Chairman announced at the end of a TAC meeting in 2011 that the TAC had completed its review of all technical aspects of the process and was ready to issue a recommendation. The TAC, however, failed to do so. After a number of further meetings, convened to a random timetable and agenda, the TAC Chairman announced again at a TAC meeting in 2013 that the TAC had completed its review and was ready to issue a recommendation. The TAC again failed to do so and the Government also failed to act in relation to the Project's permitting.

31. The TAC met twice in 2014 during which no meaningful business was conducted. Following issuance by Gabriel of the notices of treaty dispute referenced further below, the TAC

met once in 2015, but still failed to issue any recommendation on the Environmental Permit or otherwise take steps to complete the process. The Government has failed to act on the Environmental Permit, thus making it impossible for the Project to proceed.

32. While the Government thus has prevented the Project from progressing to construction and exploitation, at the same time, RMGC as titleholder to the License has been obligated to conduct a costly annual work and exploration drilling program, which the competent mining authority has continued to require as a condition of maintaining the License. Gabriel also has had to fund the payment of significant license fees and taxes associated with maintaining rights to the Project, including the costs of maintaining RMGC's corporate status.

33. Moreover, as detailed further below, the Government has acted to block the Project's implementation without providing any due process or compensation to Gabriel.

34. Specifically, after having issued licenses granting rights and imposing obligations on RMGC to develop the Project and thus encouraging Gabriel's investment of hundreds of millions of dollars and fostering reasonable expectations that the Project would be evaluated on its merits and permitted to be realized, Romania frustrated advancement of the Project into production in an unfair and non-transparent manner in response to vacillating political considerations.

35. In short, after among other things (i) granting the License, which carries not only the right, but the obligation to develop the mineral resource within the license perimeter to the maximum extent feasible, and (ii) consistently approving annual work plans, updated reports and studies leading to the current Project, Romania failed to address Project permitting in a reasonable and transparent manner in accordance with standards of due process, including:

- In 2005, Romania changed the applicable legal framework by adopting Government Emergency Ordinance No. 195/22.12.2005, which required that the environmental permit decision be issued by means of a Governmental decision upon the recommendation of a TAC. Romania then proceeded to politicize the permitting process in an arbitrary manner and in violation of basic principles of

due process, including by suspending the TAC procedure without legal basis from 2007 to 2010.

- Without addressing the consequences for the License in a transparent manner, the Government improperly included and then maintained an area of the Project on a 2010 List of Historical Monuments, which prohibits Project development for that area, thus creating significant legal uncertainty for the Project.
- The Government imposed arbitrary and discriminatory requirements regarding the use of cyanide (a process safely and commonly used in gold mining projects worldwide) for the Project, while at the same time permitting its use in other mining projects, further contributing to legal uncertainty for the Project.
- Following the resumption of the TAC process in 2010, the TAC Chairman concluded in November 2011 that the technical review of the environmental impact assessment was complete and that the TAC should proceed to issue a recommendation to the Government. The TAC, however, failed to do so.
- Following further delay and limited meetings, the TAC Chairman repeated in July 2013 that the review process was completed and that the TAC should issue its recommendation to the Government. The TAC, however, again failed to do so, and instead took no further action for several months, whereupon, as noted above, it resumed holding sporadic meetings (two in 2014, one in 2015), at which it discussed inconclusively various matters that had been addressed previously and again failed to issue any recommendation.
- Rather than issue a decision on the merits of an Environment Permit in accordance with the applicable legal framework and Gabriel's legitimate expectations, the Government supplanted the legal and administrative technical assessment with a political one, including by forming various "commissions" not contemplated in the law, to evaluate whether and on what basis the Project should be permitted.

- In disregard of the economic terms already established in the License and the agreements establishing RMGC, the Government demanded increased royalties and other economic concessions from Gabriel as a condition for permitting the Project.
- By way of a unilateral measure (Government Emergency Ordinance No. 102/2013) the Government also purported to further increase the royalties applicable to the Project.
- As Gabriel indicated that it was prepared to agree to revised economic terms on condition that the Government would abide by its obligations vis-à-vis the legal and administrative review of the Project and, ultimately, expedite completion of the Project permitting, the Government negotiated with Gabriel and subsequently approved terms of an agreement (the “Roșia Montană Agreement”), which it then decided to submit to Parliament together with a proposed law designed to implement such agreement (the “Roșia Montană Law”).
- Reflecting the arbitrary treatment then accorded to the Project and the complete disregard of Gabriel’s substantial investments and RMGC’s vested legal rights in the License, Prime Minister Ponta stated publicly that although the Project had met all the conditions required by law and that the Government was required to permit it, he did not consider this should be done, that his Government approved the Roșia Montană Law and submitted it to Parliament as a way to avoid having to pay “I do not know how many billion in compensation to this company;” and that although as Prime Minister he was sending the Roșia Montană Law to Parliament, as a member of Parliament he would vote against it, conveying in clear terms a political rejection of the Project.
- In 2013, the Romanian Parliament considered and rejected the Roșia Montană Law and declined to consider the Roșia Montană Agreement. A special parliamentary committee (lacking any specific industry knowledge), which was established expressly for the limited purpose of reviewing the Roșia Montană Law, issued a report (well beyond its mandate) on the Project as a whole.

Without legal or factual basis, the committee directed competent Ministries to revisit the technical and administrative review of the Project that already had been completed, and urged a reconsideration (disregarding and indeed supplanting basic principles of administrative due process) of matters that already had been addressed thoroughly in the many years of permitting review that by then already had been completed.

- Romanian Government officials, including variously the Minister of Environment, the Prime Minister, and the President, subsequently made statements to the press and on television that the Project will not be permitted to proceed, underscoring again the political rejection of the Project and the abdication of responsibility by the competent authorities to issue a permitting decision on the merits of the Project within the existing legal framework, thus entirely disregarding the continued validity of the License and its associated rights and obligations and Gabriel's rights to compensation.

36. As a result of Romania's conduct, the Project has been stymied and the License rights effectively have been taken without compensation in contravention of the applicable legal and administrative processes and requirements. Consequently, the implementation of the Project has been rendered impossible and frustrated in its entirety. The massive amounts that Gabriel responsibly invested in the Project and in RMGC's other license and property rights have been wasted, as the competent authorities also failed to act on the conversion of the Bucium license. The value of the Project and other license and property rights thus have been effectively taken and destroyed.

IV. ROMANIA'S ACTIONS ARE IN BREACH OF THE BITS

37. Through Romania's actions described above, Romania has subjected Gabriel's investments to measures equivalent to expropriation without payment of any compensation. Moreover, Romania has done so in an arbitrary and discriminatory manner, without due process of law, and without valid reasons. Romania has failed to treat Gabriel and its investments in accordance with the customary international law minimum standard of treatment of aliens, has undermined and frustrated Gabriel's legitimate expectations, has failed to accord Gabriel's

investments fair and equitable treatment, has failed to maintain a stable and predictable legal regime, has failed to deal with Gabriel and its investments in a reasonable and transparent manner, has subjected Gabriel and its investments to unreasonable, arbitrary and discriminatory treatment, and has failed to accord Gabriel's investments full protection and security. In addition, Romania has failed to grant Gabriel and its investments treatment no less favorable than Romania grants in like circumstances to its own nationals and investors and to investors of other States.

A. Canadian BIT

38. Romania thus has breached the following provisions of the Canadian BIT:

Article II:

2. (a) Each Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

Article III:

1. Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third state.

2. Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third state.

3. Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments.

Article VIII:

1. Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect

equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.⁶

B. UK BIT

39. Romania also has breached the following provisions of the UK BIT:

Article 2:

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

Article 3:

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject national or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less

⁶ Annex B to the Canadian BIT specifies that “[t]he Contracting Parties confirm their shared understanding that: (a) The concept of ‘measures having an effect equivalent to nationalization or expropriation’ can also be termed ‘indirect expropriation.’ Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure[.]”

favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

Article 5:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

V. GABRIEL HAS INCURRED SIZABLE RESULTING LOSSES AND DAMAGE

40. Romania’s violations of the Canadian and UK BITs in its treatment of Gabriel and its investments have caused very substantial losses and damage to Gabriel. These losses and damage are due not only to the enormous wasted costs associated with the Project, but also to the loss of value of Gabriel’s investment in RMGC as Romania has deprived RMGC of the value of its license, contract, and other property rights associated with the Project, as well as in regard to the Bucium Rodu-Frasin and Tarnița Projects.

VI. BASIS FOR JURISDICTION

A. Gabriel Canada May Submit This Dispute to Arbitration under Article XIII of the Canadian BIT

41. Article XIII of the Canadian BIT provides in relevant part:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph 4. For the purposes of this paragraph a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach. It is agreed, subject to the provisions of this Article, that the Contracting Parties encourage investors to make use of domestic courts and tribunals for the resolution of disputes.

3. An investor may submit a dispute as referred to in paragraph 1 to arbitration in accordance with paragraph 4⁷ only if:

(a) the investor has consented in writing thereto;

(b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;

(c) if the matter involves taxation, the conditions specified in paragraph 5 of Article XII (Taxation Measures) have been fulfilled; and

(d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired,

⁷ Article XIII, paragraph 4 of the Canadian BIT provides in relevant part that the dispute may be submitted to arbitration under the ICSID Convention.

knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

4. The dispute may, at the election of the investor concerned, be submitted to arbitration under:

(a) the International Centre for Settlement of Investment Disputes (ICSID) . . . provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention.

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

6.(a) The consent given under paragraph 5, together with . . . the consent given under paragraph 3 ... shall satisfy the requirements for:

(a) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention

42. Gabriel Canada is an “investor” of Canada within the meaning of Article I(h)(ii) of the Canadian BIT, which provides that “‘investor’ means in the case of Canada . . . any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Romania.” Article I(b)(i) of the Canadian BIT in turn provides that “‘enterprise’ means . . . any entity constituted or organized under applicable law . . . including any corporation, trust, partnership, sole proprietorship, joint venture or other association.”

43. Gabriel Canada made an “investment” in Romania, as defined by Article I(g) of the Canadian BIT, which provides:

“investment” means any kind of asset owned or controlled either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws and, in particular, though not exclusively, includes:

(i) movable and immovable property and any related rights, such as mortgages, liens or pledges,

- (ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture,
- (iii) money, claims to money, and claims to performance under contract having a financial value,
- (iv) goodwill,
- (v) intellectual property rights,
- (vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources,

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes;

Any change in the form of an investment does not affect its character as an investment.

44. Gabriel Canada's investments include (a) the rights conferred by the License associated with the Project; (b) the other land-use, mineral, and property rights derived from licenses, authorizations, and permits associated with the development of the Project and as well as other mining projects in Romania; (c) capital contributions, loans, equipment, real estate acquired for use in connection with the Project, and facilities constructed in connection with the Project; (d) Gabriel Canada's indirect equity participation in RMGC and contract rights associated therewith; and (e) the intellectual property rights associated with the extensive studies, data, and plans, including but not limited to technical and geological studies and detailed engineering plans developed in connection with the Project (to the extent such rights are not the property of the Romanian State).

45. As set forth above, there is a dispute between Gabriel Canada and Romania relating to claims that measures taken and not taken by Romania have breached the Canadian BIT and that Gabriel Canada has incurred losses and damage by reason of and arising out of those breaches.

46. Gabriel Canada delivered written notice of the dispute to Romania by a letter dated January 20, 2015.⁸ In that letter Gabriel Canada requested consultations with Romania with the aim of reaching an amicable settlement of the dispute. Having received no response to its letter, by letter dated April 22, 2015 Gabriel Canada repeated its request to engage in discussions to seek to reach an amicable settlement of the dispute.⁹ Gabriel has not received any response to that letter. As of July 20, 2015, six months has elapsed without an amicable resolution.

47. As indicated in the consent enclosed herewith¹⁰ and in accordance with Article XIII(3)(a) of the Canadian BIT, Gabriel Canada consents to submit this dispute to arbitration. In accordance with Article XIII(3)(b) of the Canadian BIT, Gabriel Canada also has waived its right to initiate or continue any other proceedings in relation to the measures that are in breach of the Canadian BIT before the courts or tribunals of Romania or in a dispute settlement procedure of any kind.¹¹

48. With reference to Article XIII(3)(c) of the Canadian BIT, Gabriel Canada confirms that this matter does not involve taxation.¹²

49. The three-year limitation period contained in Article XIII(3)(d) of the Canadian BIT is satisfied because, in light of the “creeping” nature of Romania’s treaty violations detailed above, the cumulatively unlawful and ultimately destructive effect of Romania’s conduct became apparent only within the last three years. Accordingly, not more than three years have elapsed from the date on which Gabriel Canada first acquired, or should have first acquired, knowledge of the breaches and that Gabriel Canada has incurred losses and damage as a result.

⁸ Letter from Gabriel addressed both to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 (Exh. C-8).

⁹ Letter from Gabriel addressed both to the President of Romania and to the Prime Minister of Romania dated and delivered on Apr. 22, 2015 (Exh. C-9).

¹⁰ See Gabriel Canada’s Consent and Authorization to Commence Arbitration of Bilateral Investment Treaty Dispute (Exh. C-5).

¹¹ See Gabriel Canada’s Waiver in Support of Its Request for Arbitration (Exh. C-6).

¹² Neither does this matter relate to a decision by Romania as to whether or not to permit an acquisition or establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise (Canadian BIT, Arts. II(3), II(4)).

B. Gabriel Jersey May Submit This Dispute to Arbitration by under Article 7 of the UK BIT

50. Article 7 of the UK BIT provides in relevant part:

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

(2) Where the dispute is referred to international arbitration, the national or company concerned may choose to refer the dispute ... to ... the International Centre for the [sic] Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ...).

51. Gabriel Jersey is a “company” of the United Kingdom within the meaning of Article 1(d) of the UK BIT, which provides that the term “‘companies’ means: (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of this Article.”¹³

52. Gabriel Jersey made “investments” in Romania, as defined by Article 1(a) of the UK BIT, which provides:

“investment” means every kind of asset admitted in accordance with the laws and regulations in force in the territory of the Contracting Party in which the investment is made and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other related rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;

¹³ As noted above, the UK BIT was extended to the Bailiwick of Jersey by an exchange of notes on Mar. 22, 1999. *See* Exchange of Notes extending the UK BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey effective Mar. 22, 1999 (Exh. C-3).

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments

53. Gabriel Jersey's investments include its equity participation in RMGC and contract rights associated therewith; its capital contributions to RMGC and loans extended in connection with RMGC and the Project; its interests in the land-use, mineral, and property rights derived from the several licenses, authorizations, and permits issued to RMGC; its interest in equipment and real estate acquired for use in connection with the Project and facilities constructed in connection with the Project; and the intellectual property rights associated with the extensive studies, data, and plans, including but not limited to technical and geological studies and detailed engineering plans developed in connection with the Project (to the extent such rights are not the property of the Romanian State).

54. As set forth above, there is a dispute between Gabriel Jersey and Romania concerning Romania's obligations under the UK BIT in relation to Gabriel Jersey's investments, which has not been settled amicably. The written notifications described above refer also to Gabriel Jersey's claims;¹⁴ thus, more than three months have passed since written notification of Gabriel Jersey's claims without any amicable settlement.

55. As indicated in the consent enclosed herewith¹⁵ and in accordance with Articles 7(1) and 7(2) of the UK BIT, Gabriel Jersey consents to submit this dispute to arbitration.

¹⁴ See Letter from Gabriel addressed both to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 (Exh. C-8) (defining "Investors" as including Gabriel Jersey).

¹⁵ See Gabriel Jersey's Consent and Authorization to Commence Arbitration of Bilateral Investment Treaty Dispute (Exh. C-5).

C. This Dispute Satisfies the Requirements of the ICSID Convention

56. Article 25 of the ICSID Convention provides in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

. . .

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration

57. Each of Canada, the United Kingdom, and Romania are Contracting States to the ICSID Convention.¹⁶ The United Kingdom extended the application of the ICSID Convention to the Bailiwick of Jersey.¹⁷

58. As companies incorporated under the laws of Canada and the Bailiwick of Jersey, respectively, including at the time of their consent to ICSID arbitration, Gabriel Canada and Gabriel Jersey both qualify as nationals of Contracting States other than Romania for purposes of the ICSID Convention.

59. As described above, the dispute is a legal dispute between Gabriel Canada and Gabriel Jersey and Romania that arises directly out of Gabriel’s investments in Romania.

¹⁶ The ICSID Convention entered into force for Canada on Dec. 1, 2013, for United Kingdom on Jan. 18, 1967, and for Romania on Oct. 12, 1975. *See* International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (ICSID/3) at 1, 3, 4, *available at* <https://icsid.worldbank.org>.

¹⁷ *See* International Centre for Settlement of Investment Disputes, Contracting States and Measures Taken by Them for the Purpose of the Convention: Exclusions of Territories by Contracting States (ICSID/8-B) at 8, *available at* <https://icsid.worldbank.org> (indicating that, on depositing its instrument of ratification of the ICSID Convention, the United Kingdom initially excluded the Bailiwick of Jersey from coverage by the ICSID Convention but that, by a notification received on June 27, 1979, the United Kingdom extended the application of the ICSID Convention to the Bailiwick of Jersey as of July 1, 1979).

60. Both Gabriel Canada and Gabriel Jersey have consented to submit this dispute to arbitration before ICSID and have taken all necessary internal actions to authorize this Request.¹⁸ Romania's consent is contained in Article XIII(5) of the Canadian BIT and Articles 7(1) and 7(2) of the UK BIT.

VII. CONSTITUTION OF THE TRIBUNAL

61. With reference to ICSID Arbitration Rule 2(1)(a), Claimants make the following proposal regarding the number of arbitrators and the method of their appointment: (1) following agreement on the number of arbitrators and the method of their appointment, Claimant shall appoint an arbitrator; (2) within 30 days following the arbitrator's acceptance of the appointment, as contemplated by ICSID Arbitration Rule 5, Respondent shall appoint an arbitrator; (3) following the second arbitrator's acceptance of the appointment, the parties shall seek to reach agreement on the appointment of the third arbitrator, who shall serve as President of the Tribunal; (4) if the parties fail to reach agreement within 30 days after the acceptance of the appointment by the second arbitrator, either party may request that the President be appointed by the Secretary-General of ICSID.

VIII. ACCESS TO DOCUMENTS

62. As a matter of Romanian law, many of the core documents relating to the Project and Gabriel's investments in Romania, including the License itself and related information, studies, and correspondence, are subject to a strict, State-imposed, confidentiality/secretcy regime that restricts access to and use of those documents as well as their contents and subjects violators to civil and criminal sanctions. Those restrictions are fundamentally incompatible both with Gabriel's rights to present claims in regard to its investments under the Canada BIT and the UK BIT, as well as with the conduct of these proceedings as, among other things, they prohibit reference to and use of documentary evidence of central relevance to Gabriel's claims.

63. Because these restrictions apply not only to Gabriel, but also to Romania as Respondent, Gabriel trusts that Romania will agree to address this matter promptly upon

¹⁸ See Gabriel's Consents and Authorizations to Commence Arbitration of Bilateral Investment Treaty Dispute (Exh. C-5).

commencement of this arbitration so that the parties, their representatives and counsel can fully and freely access, copy, translate, review, and exhibit in this arbitration documents currently subject to this restrictive confidentiality/secretcy regime as may be relevant and necessary. If not, Gabriel urgently will seek an order of provisional measures from the Tribunal enabling and allowing such access, which is critical to protect Gabriel's most basic due process rights to prepare and present its claims in this arbitration.

IX. REQUEST FOR RELIEF

64. Claimants request an award granting them the following relief:

- (i) a declaration that Romania has breached the Canadian BIT and the UK BIT;
- (ii) an award of compensation to Gabriel Canada and Gabriel Jersey, as appropriate, for all losses and damages suffered, in an amount to be elaborated and quantified in the course of this proceeding;
- (iii) an award of all costs associated with this proceeding, including all professional fees and disbursements incurred in connection with this arbitration;
- (iv) an award of compound interest until the date of Romania's full and final satisfaction of the award; and
- (v) an award of such further or other relief as may be deemed appropriate.

Claimants reserve the right to amend this Request and to assert additional claims as may be warranted and permitted by the ICSID Convention and the applicable rules.

* * *

X. CONCLUSION

65. For all of the reasons set forth above, Claimants respectfully request the Secretary-General to register this Request in accordance with the ICSID Convention and the ICSID Institution Rules.

Respectfully submitted,

WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
USA

Counsel for Claimants