INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

*Claimants*

**V.**

**ROMANIA**

*Respondent*

ICSID CASE NO. ARB/15/31

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# CLAIMANTS' REPLY AND COUNTER-MEMORIAL ON JURISDICTION

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November 2, 2018

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CLAIMANTS' REPLY
AND COUNTER-MEMORIAL ON JURISDICTION

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# I. INTRODUCTION

1. Gabriel Resources Ltd. ("Gabriel Canada") and Gabriel Resources (Jersey) Ltd. ("Gabriel Jersey") (collectively "Gabriel" or "Claimants") submit this Reply and Counter-Memorial on Respondent's Jurisdictional Objection in accordance with the schedule established in this case.[1]

2. As set forth in the Memorial, and supported by detailed witness statements and contemporaneous communications from participants in the relevant underlying events, technical reports from renowned independent technical experts whose work was contemporaneously reviewed favorably by the State, numerous contemporaneous statements from responsible Romanian officials made to the press, during official meetings with RMGC or before Parliament, and rigorous, scholarly opinions on relevant aspects of Romanian law from among the most respected and accomplished professors in Romania, the primary acts and omissions of Respondent comprising the core course of conduct underlying Claimants' case may be summarized as follows:[2]

a) Claimants, lawfully incorporated and organized respectively in Canada and Jersey, agreed to enter into a joint venture with the State to develop the State's mineral resources in accordance with and in furtherance of the State's policy decision to issue the Roşia Montană License and the Bucium Exploration License.

b) The agreement, as amended, provided that the State through Minvest would own 19.31% of RMGC and Gabriel would own the remainder. Gabriel was required to finance all of RMGC's activities. RMGC became the titleholder of the Roşia Montană License and the Bucium Exploration License. The State was entitled to a 4% royalty under the terms of the Roşia Montană License.

c) RMGC was obligated to develop the mineral resources within the Roşia Montană license perimeter and to conduct exploration activities within the Bucium license

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[1] Abbreviations and terms used in Claimants' Memorial will have the same meaning in this Reply. *See* Memorial Annex A Glossary of Terms.

[2] By providing this summary and overview Claimants do not intend to waive reliance on the more detailed exposition of their case in their submissions and accompanying evidence.

perimeter. RMGC also was obligated to fund archaeological research to inform decisions the State would take regarding discharge of the Roşia Montană Project area.

d) Working with RMGC and a team of Romanian and international experts and consultants, Claimants spent approximately US$ 760 million developing the Projects. Development of the Roşia Montană Project demonstrated that it hosted a world class deposit with proven and probable mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver. Exploration conducted within the Bucium License perimeter demonstrated two promising mineral deposits one at Rodu-Frasin and one at Tarniţa both feasible for exploitation.

e) RMGC advanced the Roşia Montană Project to meet and favorably exceed Romania's requirements to obtain the key Environmental Permit, and otherwise to reflect industry best practice and Best Available Techniques under European Union standards. Claimants reasonably and legitimately expected the State to review and assess the Project on its merits and in accordance with the applicable law and, if it met applicable requirements (which it did), to issue the Environmental Permit through the lawful administrative process, namely through a Government Decision upon the endorsement of the Ministry of Environment following review by and consultation with the TAC.

f) Following resumption of the EIA process in September 2010, the TAC by March 2011 had favorably reviewed all but two minor chapters of the EIA Report, and the Project appeared poised for permitting after what Claimants reasonably expected would be one more TAC meeting, eventually scheduled for November 29, 2011.

g) Beginning in August 2011, however, the Government, through numerous statements of senior Romanian Government officials, including the President, the Prime Minister, the Minister of Culture, and the Minister of Environment, rejected the State's existing agreement with RMGC and made it clear that, unless Claimants and RMGC renegotiated and increased the State's shareholding in

RMGC and royalty (eventually specifying to 25% and 6%, respectively), the Environmental Permit would not be issued and the Project would not proceed. Claimants had no real alternative if the Project were to move forward than to try to meet the Government's coercive, unconditional demands.

h) The Ministry of Environment completed its technical review of the Project, which was positive, at the November 29, 2011 TAC meeting. This fact is evident from the transcript of the meeting and was also later acknowledged and confirmed in 2013 in an internal Government note produced by Respondent, by the Inter-Ministerial Commission, and in subsequent TAC meetings. Contemporaneous communications show that Claimants reasonably expected the November 29, 2011 TAC meeting would be, and should have been, the last such meeting before issuance of the Environmental Permit. Because Claimants and RMGC had not yet presented an offer that the Government considered satisfactory, however, the Ministry of Environment did not have the TAC members complete the checklist on the EIA Report that would have formally closed the EIA procedure and put the Ministry of Environment in a position to take a decision on the Environmental Permit after the few follow up items noted at the meeting were addressed.

i) Although these follow up items were promptly addressed within 10 days of the November 29, 2011 TAC meeting, the permitting process remained politically blocked because the Ministry of Culture refused to acknowledge that its positive written "point of view" about the Environmental Permit submitted to the Ministry of Environment constituted its "endorsement" required for issuance of the Permit. Because all permitting conditions were nonetheless met, the Government were it acting lawfully should have issued the Environmental Permit by early 2012, but it did not. In this context, and with the Minister of Environment reiterating publicly in December 2011 that he would not recommend issuance of the Environmental Permit unless the State obtained a more advantageous financial deal, Claimants authorized an additional financial offer by RMGC to the Government in January 2012 that they believed would meet the Government's essential demands. Before

the Government responded to the offer, however, massive anti-government street protests unrelated to the Project toppled the Boc Government.

j) The caretaker Ponta Government that assumed office in May 2012 refused to act on and thus further improperly blocked permitting until after national elections at year's end. Nonetheless, despite a change in personnel there was a continuity of approach by the Government with respect to the Project. Like the Boc Government before it, Prime Minister Ponta also made clear soon after taking office that one condition for the Project to proceed under his Government was the renegotiation and increase of the State's economic interest.

k) Beginning in early 2013, the then newly-elected Ponta Government established another condition for the Project to proceed, namely that Parliament must vote to approve a special law that the Government was going to introduce in relation to the Project after the Government was satisfied with the renegotiated economic terms and that the Project met all requirements for issuance of the Environmental Permit. The Government communicated this condition both privately to RMGC and in numerous public statements of senior Romanian officials, including Prime Minister Ponta. The Government's insistence on making Parliament's vote on a special law (which Claimants did not need or request) determinative of whether the Environmental Permit would be issued and the Project would proceed supplanted, unlawfully and arbitrarily, the legally required administrative permitting process.

l) An Inter-Ministerial Commission confirmed in March 2013 that there were no legal impediments to proceeding with the Project, specifically rejecting the same arguments Respondent now advances in this arbitration as to why the Project was purportedly not eligible for the Environmental Permit. A 2013 internal Government note also acknowledged that, although the TAC had completed its review in November 2011, the Government had not taken any steps since then to advance Project permitting.

m) In several TAC meetings held between May and July 2013, the Ministry of Environment again confirmed that its review of the EIA Report for the Project was complete, with all TAC members other than the ideologically opposed Romanian Academy and Geological Institute of Romania commenting favorably on the Project. Reflecting and confirming that the Project remained permit ready, the Ministry of Environment published for public comment conditions and measures that it proposed including in the Environmental Permit, when issued.

n) Although in the circumstances the Government was once again, as it had been after the November 29, 2011 TAC meeting, obligated under the law to issue the Environmental Permit according to the applicable administrative process, the Government did not do so, but instead proceeded along the Parliamentary path it had dictated. With limited input from RMGC, the Government prepared the Draft Law and Draft Agreement for submission to Parliament. RMGC made clear in contemporaneous communications to the Government that it did not want a special law for the Project and that it did want the Environmental Permit to be approved and issued in accordance with the applicable legal procedure by Government Decision before any law was presented to Parliament. The Government rejected RMGC's approach.

o) On August 27, 2013 the Government approved the Draft Law and Draft Agreement and sent them to Parliament. In view of the Government's position that it would not present the Draft Law to Parliament unless the Project satisfied all requirements for the Environmental Permit, the very act of sending the Draft Law to Parliament was a further confirmation of this fact.

p) Emblematic of the arbitrariness that characterized the Government's treatment of the Project, however, within days of endorsing the Draft Law and hence the Project on behalf of the Government, Prime Minister Ponta announced publicly that he would vote against the Law as a member of Parliament. In so doing, he was going to act to ensure the non-fulfillment of the very condition he and his Government had established for issuing the Environmental Permit and allowing

the Project to proceed, namely Parliamentary approval of the Draft Law. His statements also underscored the politicization of the decision-making process being applied to the Project. Street protests began the next day.

q) Within days, and before Parliamentary hearings even began, the political leaders of the ruling coalition, Senator Antonescu (specifically referring to the protests) and Prime Minister Ponta, publicly stated that the Draft Law should be rejected swiftly and decisively by Parliament. In recorded television interviews, Prime Minister Ponta left no doubt that the Draft Law and the Project would be politically dead on arrival before the Senate committees slated to consider it, and confirmed that he would instruct his fellow party members to vote against the Law. Messrs. Antonescu and Ponta issued similar political instructions to reject the Draft Law immediately before the Special Commission voted.

r) Despite uniform testimony from responsible Ministers and other senior Government officials that the Project met all requirements for the Environmental Permit, and that it would help clean the environment, preserve cultural heritage, and boost the Romanian economy, first Senate committees and later the Special Commission heeded the political call to recommend rejecting the Draft Law and hence the Project. Parliament as a whole later marched in lock step.

s) Reflecting the dichotomy between the lawful merits-based, administrative review of the Project that should have resulted in the Environmental Permit being issued and the Project proceeding, and the political Parliamentary process the Government used as proxy not to issue the Environmental Permit and to reject the Project, Ministers (in addition to the Prime Minister) who endorsed the Project's merits and supported it as part of the administrative process said in the same breath that they would not vote for the Draft Law in Parliament if their political parties decided to oppose the Law/Project.

t) While mentioned as part of this summary for context, the street protests that arose in response to the Government's submission of the Draft Law to Parliament are not legally relevant because they do not provide a legal excuse or justification for

the Government's failure to issue the critical Environmental Permit and to allow the Project to proceed, without compensation to Claimants, even if the Protests were, as Respondent contends, truly anti-Project. But they were not.

u) As elaborated in the expert report of Dr. Robert Boutilier, a renowned expert in stakeholder engagement in relation to sustainable development, though some protestors were motivated for ideological or other reasons to turn out due to anti-Project views, research shows that what mainly precipitated the protests were not concerns about the Project as such, but broader and deeper fundamental societal dissatisfaction with the Government itself, which was perceived by large numbers of citizens, particularly in larger cities, as corrupt, untrustworthy, arbitrary, and non-transparent. Sending a "special law" to Parliament for Roşia Montană magnified and exacerbated these concerns, particularly as political opponents for years had baselessly accused each other of corruption if they supported the Project. That the protests continued even as minister after minister stated to the press and in testimony before Parliament that the Project met all permitting standards, was safe and even beneficial for the environment, would preserve and enhance cultural heritage, and would contribute substantially to Romania's economy, illustrates the underlying distrust of and lack of confidence in the Government that animated, magnified, and sustained the protests.

v) Thus, for many in this environment, they were motivated to protest because they were protesting the Government itself. This same kind of outpouring of anti-Government discontent was seen previously in, for example, the mass street protests that toppled the Boc Government, and has been seen since in even larger and sometimes violent protests against the Government, for example, in 2015 that forced the resignation of the Ponta Government, and in 2017-2018 in connection with the Government's attempt to amend the Penal Code to repeal anti-corruption laws.

w) That the Government's sending the Draft Law to Parliament was indeed the catalyst for the protests is also evident from the unassailable fact that, although

the Project was primed for permitting following the November 29, 2011 TAC meeting, a fact recognized by Government officials and Project opponents alike, there were no mass protests. Indeed, even Project opponents, notably including the main anti-Project NGO Alburnus Maior, were resigned in public statements to the apparent reality that the Environmental Permit would soon issue and the Project would proceed. Likewise, there were no protests when the draft Environmental Permit was published for public comment and the Project was included in the National Plan of Strategic Investment and Job Creation, both in July 2013. Protests began when the Government endorsed and presented the Draft Law to Parliament. Thus the departure from the lawful permitting process created the ideal conditions for and gave rise to the protests that followed. Having created these circumstances through its own unlawful acts, Respondent cannot legitimately rely on them in its defense.

x) Although Parliament rejected the Draft Law, there was no legal impediment to issuing the Environment Permit and allowing the Project to proceed. On the contrary, given the numerous admissions from Romanian officials that the Project met all permitting requirements, the Government was legally required to issue the Permit. The Government did not do so, however, because it acted in accordance with its previously stated intent not to permit the Project if Parliament rejected the Draft Law. Thus, although the Mining License and Claimants' associated acquired rights still exist, they do so in name only as they have been nullified and taken in substance and in fact as Respondent clearly has no intention of ever permitting the Project. It is not credible to argue otherwise.

y) For example, the Ministry of Environment arranged TAC meetings in 2014 and 2015 that were both unlawful and pointless because, although they were called purportedly to resolve alleged concerns by Parliament regarding the planned location of the TMF, they ultimately led nowhere as the envisioned study was never commissioned. More perniciously, the Government took affirmative steps in complete disregard of RMGC's Mining License and archaeological discharge

decisions taken in the Project area to prevent any industrial development in the Project area.

z) For example, despite multiple admissions from responsible Romanian authorities that the 2010 LHM contained errors that improperly extended protection from development in the Project area beyond the individual historical monuments specifically identified in the 2004 LHM (which were accommodated in Project plans), the Ministry of Culture not only failed to correct these errors, but then issued the 2015 LHM that sought to negate the archaeological discharge decisions that had been issued in view of the Project. In so doing, Respondent sought to sterilize the Project area from development with legal effect. Relatedly, in litigation commenced by RMGC (but later discontinued following commencement of this arbitration) challenging the Ministry's failure to correct the 2010 LHM, the Ministry argued that the 2004 LHM – which it had issued and never questioned before Parliament's rejection of the Draft Law and effectively the Project – was suddenly considered unlawful, "abusive," and in need of correction through the 2010 LHM. Rejecting its own prior admissions that the 2010 LHM had errors that needed to be corrected, the Ministry of Culture executed a shameless about-face, defended the 2010 LHM and also the 2015 LHM as curative instruments.

aa) To the same effect, Respondent applied to UNESCO to have the "cultural landscape" of Roşia Montană declared a World Heritage site. Under Romanian law, the very act of applying to UNESCO for this designation is incompatible with, and a fundamental rejection of, Claimants' rights to develop the Project because the application alone entitles the subject area to protection against development as, obviously, would a decision accepting the application. Respondent recognized after the fact the negative implications for its position in this arbitration of its UNESCO bid, but only sought to postpone, not withdraw, its bid, thus further confirming its intent never to allow the Project to be developed.

bb) For the same reasons, Respondent's unlawful conduct also has destroyed Claimants' rights in the promising Bucium properties. The Rodu-Frasin property was to be developed together with and as part of the Project, not on a stand-alone basis. Although in theory the Tarnţta property could be developed separately, it is abundantly clear that the State has no intention of allowing this project to proceed either. Not only is this a natural consequence of the State's treatment of the Project and RMGC, but, in a further manifestation of this reality, the State has failed to act on RMGC's application for an exploitation license on either property for years without any legitimate justification or excuse despite RMGC's legal entitlement to these licenses and despite processing the applications of a similar project in a fraction of the time.

cc) As a final observation, while unlawfully turning Claimants' planned modern and environmentally sound Roşia Montană and Bucium Projects into dead men walking, Respondent continues to issue environmental operating permits to the aging, highly-polluting, accident-prone blight that is the State-owned Roşia Poieni copper mine bordering the Project area. Respondent cannot justify, or avoid the consequences of, this differential treatment on the basis that the older Roşia Poieni mine was not subject to the same pre-construction EIA review process as the Project. Both Roşia Poieni and Roşia Montană need environmental authorizations issued by the State. Respondent has admitted the Roşia Montană Project meets the requirements for its Environmental Permit and one can assume for the sake of argument that the same is true for Roşia Poieni. The result is that there are two mining projects that met applicable environmental permitting criteria but only one was given the green light from the State, while the other was not. That is unlawful discrimination at its most basic level.

3. The foregoing series of related acts and omissions unquestionably establish that Respondent has violated the protections of the UK and Canada BITs, entitling Claimants to compensation for the loss they incurred, consisting principally of the lost value of the rights previously enjoyed to develop the Projects. As Gabriel's sole business focus was the development of the Projects, that lost value is measured in a non-speculative manner by

reference to the actual market capitalization of the publicly traded Gabriel Resources Ltd. as of July 29, 2011, immediately before the commencement of the series of acts and omissions described above that unlawfully deprived Claimants of the use, value, and enjoyment of their investments.

4. Respondent's effort to impugn the reliability of Gabriel's market capitalization [REDACTED] is as desperate and as it is baseless. [REDACTED] The resulting market capitalization is accordingly a reliable, independent, objective, and readily observable basis for assessing the quantum of Gabriel's losses. [REDACTED] is further confirmation that Respondent is once again shooting blanks.

5. In its response, in addition to its meritless jurisdictional objections, Respondent does not meaningfully rebut and cannot overcome the abundant, contemporaneous evidence establishing the State's liability-creating conduct. This failure is not surprising because, in addition to the detailed and documented statements of Claimants' witnesses, much of the evidence of Respondent's misconduct resides in contemporaneous reported or recorded statements of, and documents authored by, relevant Government ministers and other senior officials. The limited scope, carefully crafted statements from Mr. Găman and Ms. Mocanu offer about as much cover to Respondent as an umbrella in a hurricane. Respondent's efforts to minimize the effect of clear admissions from various ministers by claiming they were uninformed, speaking in their personal capacities, or some variation on such themes, are similarly unavailing.

6. Respondent's effort to cast doubt on the technical merits of the Project by engaging a platoon of outside technical experts from CMA and Behre Dolbear to pour over the voluminous technical reports supporting the Project and TAC transcripts in search of any basis to criticize the Project's merits, suffers from similar infirmities. Significantly, these experts do not

conclude that the Project failed to meet applicable technical requirements to obtain the Environmental Permit. Instead, they purport to identify areas where the EIA Report fell short of best practices and/or issues they suggest remain open and unresolved. Here too, however, Respondent cannot credibly get traction. Its limited, *post hoc* technical critiques are rebutted by the favorable evaluation of the Project contemporaneously by Respondent's own specialized personnel and/or by the extensive underlying technical reports and analyses addressing the issues Respondent now seeks to raise. For this reason, perhaps, Respondent chose to retain outside experts for the arbitration rather than use its own numerous specialists who reviewed and endorsed the Project at the time.

7. Lacking factual or technical defenses to liability, Respondent strains to stitch together a defense to its liability-creating course of conduct elaborated above through five main lawyer-driven arguments, none of which withstands scrutiny.

8. First, Respondent alleges that there was not any link between the Government's successfully renegotiating the State's financial interest in the Project and its willingness to issue the Environmental Permit and allow the Project to proceed. This allegation quickly collapses under the weight of numerous contemporaneous statements of Government ministers that the Project would not receive the Environmental Permit and be allowed to proceed unless Claimants agreed to increase the State's shareholding in RMGC and its royalty. This demand first arose under the Boc administration and was repeated by the subsequent Ponta administration with a repeated demand for the same 25% shareholding and 6% royalty.

9. Second, Respondent argues that the Project did not satisfy the criteria necessary for issuance of the Environmental Permit following either the November 2011 or July 2013 TAC meetings as there were purportedly a number of open issues (e.g., approval of urbanism plans) that needed to be resolved before the Project could qualify for the Permit. This argument is thoroughly refuted not only by the rigorous legal opinions of Professor Lucian Mihai, Professor Ovidiu Podaru, and Professor Ioan Schiau, but also by the 2013 report of the Government's own Inter-Ministerial Commission that was convened specifically to assess whether there were any such impediments to issuing the Environmental Permit, and by contemporaneous statements of numerous Government officials that the Project met all requirements for the Permit.

10. Third, although it did not do so contemporaneously, Respondent now alleges that RMGC needed and was solely responsible for obtaining a "social license" for the Project, and that it did not have one since at least the mid-2000s, if ever. According to Respondent, this lack of a social license is what led to the protests in 2013 following the Government's presentation of the Draft Law to Parliament. This arbitration-inspired argument fails on both legal and factual grounds.

11. Romanian law does not require an applicant for an Environmental Permit, or for any permit, to have a "social license." The term "social license" is nothing more than a sociological concept and metaphor for the level of social acceptance a company or project enjoys among a set of "stakeholders" in the subject undertaking. Thus, contrary to Respondent's wishful argumentation, the presence or absence of a "social license" is not relevant to the Project's entitlement to an Environmental Permit or to any other permit or authorization necessary for the Project to have proceeded.

12. That being said, the EIA review process does require public consultation about a proposed project. In this case, the public consultation about the Project was extensive, which Respondent acknowledges, and was undertaken with the approval and active participation of the Ministry of Environment in all 16 public consultations (14 in Romania and two in Hungary) without any objection or criticism. RMGC answered the questions posed by the public about the Project; the Ministry favorably reviewed RMGC's answers during the TAC process in 2011 and did not identify the quantity or nature of the questions as a reason not to approve the Environmental Permit. Respondent's effort to concoct arbitration defenses thus founders once again on the rocks of its contemporaneous conduct.

13. Respondent's purported "social license" defense also fails because it rests on the unreliable conclusions of its social license expert Dr. Ian Thomson. Dr. Thomson bases his conclusion that RMGC lacked a social license on (i) a gross misunderstanding and mischaracterization of RMGC's community engagement and resulting community support; (ii) interviews of six people in 2018, long after the relevant events, who moreover clearly are not a representative sample of Project stakeholders; and (iii) his review and purported interpretation of various third party papers, notably including three papers authored by Romanian graduate

students, one of which predates the relevant time period and the remaining two of which were authored by admitted Project opponents. Not only is this information insufficient to support the extrapolated conclusions he draws but, emblematic of the unreliability of his opinions, a key study he relies upon to support his conclusion that RMGC lacked a social license in the communities surrounding the Project in 2011 in fact shows exactly the opposite, concluding that 85% of those surveyed in Roşia Montană and over 75% of those surveyed in the surrounding communities supported the Project.

14. In contrast to Dr. Thomson's flimsy *post-hoc* effort, Claimants' witness Professor Witold Henisz, Deloitte & Touche Professor of Management at The Wharton School, University of Pennsylvania, undertook extensive independent field research in July 2007 and December 2011 by interviewing a broad cross section of people from among Project supporters, opponents, and Government officials. As reflected in his witness statement submitted with the Reply, based on his extensive, contemporaneous interviews of a broad cross-section of stakeholders, Professor Henisz independently concluded long before this arbitration commenced that RMGC had a social license for the Project when he visited Romania in late 2011. Other surveys and published research papers looking specifically at Roşia Montană and the Project in the relevant time period reached the same conclusion.

15. In addition to Professor Henisz, Dr. Robert Boutilier, a leading expert in the concept of the social license to operate and a leading author, sometimes with Dr. Thomson, on the subject, has separately concluded that RMGC enjoyed a social license for the Project at both the local and national level at all relevant times, notably including in early 2012 when the Environmental Permit would have been issued if Respondent had not coercively blocked the permitting process at that time. The level of social license held by RMGC at the national level (referred to as "acceptance" in the literature) is in fact the same level enjoyed by most operating mining companies in the world today; the level of RMGC's social license was materially higher (referred to as "approval") in Roşia Montană, which overwhelmingly supported the Project. Dr. Boutilier, a professional colleague and frequent co-author with Dr. Thomson, also firmly, but respectfully, takes Dr. Thomson's report to task on multiple grounds, including, but not limited to, Dr. Thomson's: (i) cramped, apparently binary interpretation of the very concept of a social license, which ignores and departs from the tiered "Thomson-Boutilier" social license model

they jointly developed; (ii) reliance on an increasingly outdated social license model focusing only on the conduct of a project sponsor, and his related failure to acknowledge or appreciate the significant role the government has in theory, and had in practice in this case, on the level of social license the Project could achieve (here suppressing it); and (iii) superficial, unwarranted dismissal of the results of the county-wide referendum held in December 2012.

16. Fourth, proceeding from the false premise that RMGC lacked a social license for the Project and recognizing the abject unlawfulness of the Government's derailing the administrative permitting process by making Project permitting contingent on Parliament adopting a special law for the Project, Respondent ignores the real origin of and reason for the path to Parliament and presents a fictional set of "alternative facts" more to its liking.

17. In Respondent's retelling, because RMGC was confronting relentless opposition to the Project in early 2013, it desperately and affirmatively sought the Government's help in the form of a special law (eventually the Draft Law) that would give RMGC and the Project preferential treatment, which the Government allegedly was willing to do because of its desire to obtain a greater financial return. In essence, Respondent claims that Claimants' alleged need for a special law led to Parliament's involvement, and they should not be heard to complain about it. Respondent's narrative is false.

18. Respondent's speculative account not only lacks evidentiary support, but it is directly contradicted by the detailed witness statement of [redacted], who explains it was the Government that insisted on Parliamentary approval of a special law as the only path forward for the Project. Numerous statements by Government ministers confirm that Parliament's approval of the Draft Law was a condition imposed by the Government for issuance of the Environmental Permit and for the Project to proceed. That RMGC and Gabriel did not seek and in fact opposed this approach is confirmed in contemporaneous statements of RMGC where the company made clear it did not want a special law and it did want the Environmental Permit issued according to the applicable administrative procedures before the Government sent the law to Parliament. It is obvious that had Claimants and RMGC asked for a special law as Respondent contends, they would not have opposed it after the Government agreed to propose it.

19. Fifth and finally, Respondent contends that the permitting process for the Project remains open to this day but that, in the aftermath of Parliament's rejection of the Draft Law, Claimants and RMGC chose to abandon the Project and commence arbitration rather than propose modifications to the Project to obtain the social license and find a path forward. This "blame the victim" argument is baseless.

20. As explained above, various ministers, including the Prime Minister, said in no uncertain terms both before and after Parliament's rejection of the Draft Law that a "no" vote on the Draft Law meant "no" on the Project. The Government's subsequent acts and omissions reflect and confirm its stated intent. Thus, for example, because the Government admitted the Project met the requirements for the Environmental Permit, there was nothing for RMGC to modify and the Government should have without more and in accordance with the law issued the Environmental Permit. It did not, but instead held several pointless TAC meetings, and then did nothing. The Government similarly ignored Claimants' and RMGC's repeated written requests to discuss the Project and a way forward.

21. In addition to failing to act as required by law, the Government acted in an arbitrary manner by taking positions in litigation and adopting measures (e.g., the 2015 LHM and the UNESCO application) designed to undermine RMGC's rights and that are flatly inconsistent with Claimants' existing rights in the Project under the Mining License and related archaeological discharge decisions, and also entirely consistent with the reality that the Government considers the Project politically dead and buried. In these circumstances, Respondent's assertions that the permitting process for the Project is open and that it is continuing after years to evaluate RMGC's license applications for the Bucium properties are a frontal assault on common sense and credibility in equal measure.

22. This Reply is supported and accompanied by statements and reports from the following individuals:

- *Jonathan Henry*,[3] Consultant to Gabriel Resources Ltd., formerly President and Chief Executive Officer of Gabriel Resources Ltd., formerly Chairman of the Board of Directors of RMGC;
- *Dragoş Tănase*,[4] President and Chief Executive Officer of Gabriel Resources Ltd., General Manager of RMGC;
- *Horea Avram*,[5] Environmental Director of RMGC;
- *Adrian Gligor, Ph.D.*,[6] Patrimony and Sustainable Development Director of RMGC;
- *Cecilia Szentesy*,[7] Technical Design Director of RMGC;
- *Elena Lorincz*,[8] Community Relations Director of RMGC;
- *Professor Lucian Mihai*,[9] Professor and Head of the Private Law Department of the Faculty of Law of the University of Bucharest, Of Counsel in the law firm of Allen & Overy LLP, formerly President of the Romanian Constitutional Court (the highest legal position in Romania), President of the drafting committee for the Romanian Civil Code and the law to enforce the Civil Code, and formerly Secretary General of the Chamber of Deputies of the Romanian Parliament, on issues of Romanian law relating to the EIA process;

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[3] Second Statement of Jonathan Henry dated Oct. 31, 2018 ("Henry II").

[4] Third Statement of Dragoş Tănase dated Nov. 2, 2018 ("Tănase III").

[5] Second Statement of Horea Avram dated Oct. 31, 2018 ("Avram II").

[6] Second Statement of Adrian Gligor dated Oct. 30, 2018 ("Gligor II").

[7] Second Statement of Cecilia Szentesy dated Oct. 30, 2018 ("Szentesy II").

[8] Second Statement of Elena Lorincz dated Oct. 30, 2018 ("Lorincz II").

[9] Supplemental Legal Opinion of Professor Lucian Mihai dated Nov. 2, 2018 ("Mihai II").

- *Professor Corneliu Bîrsan, Ph.D.*,[10] Professor and formerly Dean of the Faculty of Law of the University of Bucharest, formerly Judge of the European Court of Human Rights, Member of the drafting committee for the Romanian Civil Code, and Arbitrator at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, on issues of Romanian law relating to mining licenses and Minvest as a shareholder of RMGC;

- *Professor Ioan Schiau, Ph.D.*,[11] Professor at the Faculty of Law of the Transilvania University of Braşov, Managing Partner in the law firm of Schiau, Prescure & Associates Law Offices, and Arbitrator at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, on issues of Romanian law relating to the protection of cultural heritage;

- *Professor Ovidiu Podaru*, *Ph.D.*,[12] Professor at the Faculty of Law of Babeş-Bolyai University in Cluj-Napoca, Managing Partner in the law firm SCPA Podaru & Buciuman, Member of the Examination Commission for the promotion of judges to the highest court in Romania, the High Court of Cassation and Justice (Administrative and Fiscal Disputes Division), on issues of Romanian law relating to construction permits and urbanism plans;

- *Robert Boutilier*, *Ph.D.*,[13] Independent Community Relations Consultant, Associate of the Simon Fraser University Centre for Sustainable Development, on the social license to operate;

[10] Supplemental Legal Opinion of Professor Corneliu Bîrsan dated Nov. 2, 2018 ("Bîrsan II").

[11] Supplemental Legal Opinion on Heritage Law Issues Related to Roșia Montană Project of Professor Ioan Schiau dated Nov. 2, 2018 ("Schiau II").

[12] Legal Opinion on Construction Law and Urbanism Law of Professor Ovidiu Podaru dated Nov. 2, 2018 ("Podaru").

[13] Expert Opinion of Robert Boutilier in the matter of the Social License to Operate dated Nov. 1, 2018 ("Boutilier").

- *Professor Witold Henisz*, *Ph.D*.,[14] Deloitte & Touche Professor of Management at the Wharton School of the University of Pennsylvania, Co-Principal of PRIMA LLC, on his academic study of stakeholder engagement in relation to the Roşia Montană Project;

- *John Lambert*,[15] Principal Consultant, Ramboll Environ Canada, Inc., Approved Lead and Technical Auditor for the International Cyanide Management Institute ("ICMI"), on RMGC's pre-operational compliance with the Cyanide Code and the Project's emergency response plans;

- *Dr. Christian Kunze*,[16] Partner at IAF-Radioökologie GmbH, on RMGC's environmental management plans to address historic pollution in the Project area, deal with extractive wastes, prepare sound closure and rehabilitation, provide comprehensive environmental financial guarantees, and to consider the downstream impact of contaminants other than cyanide;

- *Patrick G. Corser, P.E.*,[17] Senior Vice President at MWH Global, now part of Stantec, on the design of the Tailings Management Facility ("TMF");

- *David Jennings*,[18] Chief Executive Officer of the York Archaeological Trust, on the cultural heritage issues relating to Roşia Montană and the Roşia Montană Project;

- *Barry Cooper*,[19] Formerly Stock Market Analyst at the Canadian Imperial Bank of Commerce ("CIBC") and Managing Director at CIBC's Research Department, on issues relating to analyst coverage of gold mining companies and the valuation of Gabriel Resources Ltd.;

[14] Statement of Professor Witold Henisz dated Oct. 21, 2018 ("Henisz").

[15] Expert Report of John Lambert dated Oct. 26, 2018 ("Lambert").

[16] Second Expert Report of Dr. Christian Kunze dated Oct. 26, 2018 ("Kunze II").

[17] Second Expert Report of Patrick G. Corser dated Oct. 26, 2018 ("Corser II").

[18] Second Expert Report of David Jennings dated Oct. 26, 2018 ("Jennings II").

[19] Statement of Barry Cooper dated Oct. 30, 2018 ("Cooper").

- *Charles Jeannes*,[20] Independent Director of Wheaton Precious Metals Corp., Independent Director of Tahoe Resources Inc., Non-Executive Chair and Director of Orla Mining Ltd., Formerly President and Chief Executive Officer of Goldcorp Inc., on issues relating to acquisitions in the gold mining sector and the valuation of Gabriel Resources Ltd.;

- *Dr. Mike Armitage, B.Sc., M.I.M.M.M., F.G.S., C.Eng., C.Geol., and Nick Fox, B.A., M.Sc., A.C.A.*,[21] Corporate Consultant at SRK Consulting (UK) Ltd. and formerly Chairman of the SRK Group (Armitage) and Principal Consultant at SRK Consulting (UK) Ltd. (Fox), on the technical and certain economic aspects of the Roşia Montană Project and the Bucium Projects; and

- Dr. *Pablo T. Spiller, Ph.D. and Santiago Dellepiane A.*,[22] Senior Consultant at Compass Lexecon and Jeffrey A. Jacobs Distinguished Professor (Emeritus) of Business and Technology and Professor of Graduate Studies, University of California, Berkeley (Spiller) and Managing Director at Berkeley Research Group and Co-Chair of its Economics & Damages Community, formerly Executive Vice President at Compass Lexecon (Dellepiane), on the assessment of damages sustained by Claimants caused by the measures at issue in this case.

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## II. THE GOVERNMENT COERCIVELY CONDITIONED ITS WILLINGNESS TO ISSUE THE CRITICAL ENVIRONMENTAL PERMIT AND ALLOW THE PROJECT TO PROCEED ON INCREASING ITS SHAREHOLDING IN RMGC AND ITS ROYALTY

23. Claimants showed in the Memorial that commencing in August 2011 and continuing through 2013, the Government – first in the Boc administration and then in the Ponta administration – conditioned issuance of the pivotal Environmental Permit and continuation of

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[20] Statement of Charles Jeannes dated Oct. 23, 2018 ("Jeannes").

[21] Second Expert Report of Dr. Mike Armitage and Nick Fox dated Nov. 2, 2018 ("SRK Report II").

[22] Second Expert Report on Damages of Dr. Pablo T. Spiller and Santiago Dellepiane A. dated Nov. 2, 2018 ("Compass Lexecon II").

the Project on successfully renegotiating the State's financial interest by increasing its shareholding in RMGC and increasing its royalty.[23] In the period August 2011 to December 2011, this linkage between renegotiation and permitting is established through numerous unequivocal public statements by Prime Minister Emil Boc, President Traian Băsescu, Minister of Culture Kelemen Hunor, and Minister of Environment László Borbély.[24]

24. In addition, [redacted] in the days before, during, and after the November 29, 2011 TAC meeting, [redacted] each made it clear that, unless the State's shareholding were increased from 19.31% to 25% and its royalty from 4% to 6%, the Project would not proceed.[25] Because these issues were not resolved by the time of the November 29 meeting, the Ministry of Environment did not conclude the TAC process that day and kept matters open in order to maintain the coercive pressure on Claimants to meet the Government's economic demands.[26]

25. Ignoring the repeated, clear, and conclusive statements of its own officials, Respondent makes a variety of half-hearted attempts to deny the obvious link the Government made between renegotiation and Project permitting and progress, thus enshrining itself in the evidentiary equivalent of the Flat Earth Society. Respondent does so through a combination of selectively discussing or simply ignoring the statements of the referenced officials, minimizing the influence of the President on the permitting process, invoking the testimony of Mr. Sorin Găman that he does not recall hearing any official make such a link and, finally, asserting that there is no evidence that the Ministry of Environment refrained from acting on the Environmental Permit in late 2011 because of the unfinished renegotiations.[27] Each of these arguments is meritless.

[23] Memorial ¶¶ 335-390, 402-413, 449-66.

[24] Memorial ¶¶ 337-343, 378.

[25] Memorial ¶¶ 355-357, 367-369.

[26] Memorial ¶¶ 352-364, 367-380.

[27] Counter-Memorial ¶¶ 231-241, 515, 521, 576-77; Witness Statement of Sorin Mihai Găman dated Feb. 21, 2018 ("Găman") ¶¶ 29-31.

26. First, rather than repeat the numerous statements here, we draw the Tribunal's attention to , which catalogues in a convenient bullet point format the numerous public and private statements of the responsible Romanian officials that establish beyond peradventure the coercive, unlawful link between successfully renegotiating and increasing the State's economic interest and permitting the Project and allowing it to proceed.[28] also address and conclusively rebut each of the subsidiary arguments raised by Respondent in an effort to evade the clear import of these admissions.[29]

27. Second, Mr. Găman's testimony also offers Respondent no solace. By his own account, he did not attend all meetings at which renegotiations were discussed.[30] [31] [32]

28. In addition to Mr. Găman's faulty memory of meetings he did attend, he was not part of and thus cannot speak to the series of communications between November 25 and December 1, 2011, in the days leading up, during, and immediately after the November 29 TAC meeting, when , stated that the Project would not be done unless RMGC and Gabriel met the Government's demand of a 25%

[28] (detailing public and private statements by Prime Minister Boc, President Băsescu, Minister of Culture Kelemen Hunor, Minister of Environment Borbély, and Minister of Economy Ariton between August-December 2011).

[29]

[30] Găman ¶¶ 19-31 (recalling only two meetings in late 2011 at which renegotiations were discussed).

[31]

[32]

shareholding and a 6% royalty.[33] [34]

29. Third, contrary to Respondent's denial, the Minister of Environment plainly recognized and acknowledged the link between the Government's renegotiating its financial stake and his willingness to endorse issuance of the Environment Permit before the Government.[35] Thus, for example, on December 27, 2011, at a time when Claimants had not yet submitted a financial offer that the Government considered met its unconditional demand for "25 and 6", Minister Borbély stated in response to interview questions about the status of the Project, that the contract "is disadvantageous to the Romanian State," that "we have had discussions in the Government and with the President," and that "*I know that there is another area that pertains not to the [environmental] endorsement, but it is important, related to the renegotiation of the agreement. They are under renegotiation. So, I say, if the Romanian State manages to get a more advantageous contract, if these environmental conditions are fulfilled, I will propose the endorsement to the Government.*"[36]

30. As discussed in the Memorial and further below, all requirements for issuance of the Environmental Permit had been met well before this statement by Minister Borbély.[37] As a result, under the law, the Ministry was required to recommend and should have recommended issuance of, and the Government was required to issue and should have issued, the Environmental Permit.[38] That the Ministry and the Government did not do so is consistent with

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[36] Tănase III ¶ 16.l; *Interview of László Borbély*, TVR, dated Dec. 27, 2011 (Exh. C-637) at 1-2 (Minister of Environment László Borbély) (emphasis added). *See also* Memorial ¶ 378.

[37] Memorial ¶¶ 352-366; *infra* § III.A.

[38] Mihai § VIII; Mihai II § VI.

and inescapably follows from the failure at that time to have satisfied the Government's "25 and 6" ransom demand to unblock the permitting process.[39] The absurd game of "hot potato" evident in the back and forth between the Ministry of Environment and Ministry of Culture over whether the Ministry of Culture's December 7, 2011 written "point of view" regarding permitting conditions satisfied the legal requirement of an "endorsement" from the Ministry of Culture to support issuance of the Environmental Permit is emblematic of the Government's effort to keep the permitting process open pending receipt of an acceptable financial offer from RMGC and Gabriel.[40]

31. The unlawfully required, but still missing, link in the permitting chain, however, was a financial offer satisfactory to the Government. In view of Minister of Environment Borbély's statement quoted above confirming that nothing would happen regarding the Environmental Permit until the State successfully renegotiated its financial interest, Gabriel and RMGC presented the Government with a new offer in late January 2012 that they believed met its essential demands.[41] Before the Boc Government could evaluate and respond to the offer, however, it fell in February 2012 following anti-Government street protests in response to austerity measures and other issues wholly unrelated to the Project.[42]

32. As discussed in the Memorial, the interim Ponta Government took office in May 2012 following the short-lived Ungureanu Government.[43] Soon after taking office, Prime Minister Ponta announced that his Government would not consider permitting related to the Project until 2013, after national elections scheduled for later in 2012.[44] Like the Boc Government, however, Prime Minister Ponta also stated in May 2012 that his Government would

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[40] Memorial ¶¶ 365, 370-385, 417; . *See also* ; Mihai II § VI.A.1; Schiau II § VI.A.

[41] Memorial ¶¶ 379-380; .

[42] Memorial ¶ 380; Tănase III ¶ 63; Henry II ¶ 17.

[43] Memorial ¶¶ 386-387; Henry ¶¶ 61-64.

[44] Memorial ¶¶ 388-390.

condition Project permitting on "a re-negotiation" of the State's economic interest.[45] In so doing, Prime Minister Ponta continued the State's coercive, unlawful condition on the Project advancing.

33. Consistent with the Prime Minister's statement, the Ministry of Environment took no action on the Environment Permit and did not convene a TAC meeting in 2012.[46] Because all legitimate conditions for issuing the Environment Permit were met, however, the Ponta Government's refusal to do so perpetuated the unlawful treatment of the Boc Government in this regard as well.[47] Notably, had RMGC's EIA Report been found inadequate, which it was not, the Ministry of Environment should have requested revisions to the EIA Report and so advised RMGC, but it did not.[48]

34. Just as the Ponta Government did not act on the Environmental Permit in 2012, it also did not act on its unlawful precondition for issuance of the Permit, namely renegotiation of the State's economic interest. Respondent seeks to excuse this inaction on the January 2012 financial offer (and, relatedly, on the Environmental Permit), by claiming that the interim Ponta Government lacked a "political mandate" to pursue renegotiations with RMGC.[49] Respondent meets itself coming with this arbitration-inspired argument.

35. In raising this political excuse for its inaction, which Romanian law does not countenance in any event,[50] Respondent effectively admits both the improper politicization of the permitting process and the unlawful connection it established between economic renegotiation and permitting. One may also observe the inherent irrationality in Respondent's position. As discussed above, soon after taking office, Prime Minister Ponta adopted and announced the same pre-condition for permitting the Project as did Prime Minister Boc, namely renegotiating the

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[45] Tănase III ¶ 25.a; *The decisions related to Roşia Montană have nothing to do with elections, says Prime Minister Ponta*, Agerpres, dated May 10, 2012 (Exh. C-1481) (Prime Minister Victor Ponta). *See also* Tănase III ¶¶ 25-26; Henry II ¶¶ 17-18.

[46] Memorial ¶ 390. *See also* Mihai § VI.B.2.

[47] Mihai § VIII.A.3. *See also id.* § VIII.B.

[48] Mihai ¶¶ 122-124, 345, 377. *See also* Mihai II ¶¶ 300-301, 314.

[49] Counter-Memorial ¶ 274.

[50] Mihai §§ VI.B.2. *See also id.* ¶¶ 407, 411, 489-492.

State's financial interest. The Ponta Government presumably believed it had a sufficient "political mandate" to establish this condition. It is therefore irrational to contend that the Government lacked a "political mandate" to ensure the condition it had just established was satisfied.

## III. RMGC MET ALL OF THE REQUIREMENTS TO OBTAIN THE ENVIRONMENTAL PERMIT

36. In support of its extortionist economic demands described above,[51] the Government unlawfully blocked the permitting process for the Project and held the critical Environmental Permit hostage, making clear that the Project would not proceed unless Gabriel/RMGC agreed to renegotiate and increase the State's shareholding in RMGC to 25% and its royalty to 6%. As discussed in the Memorial, upon completing the technical review of the merits of the Project through the EIA procedure administered in consultation with the TAC, the Ministry of Environment was legally obligated to take a decision on whether the Project met the requirements for issuing the Environmental Permit and submit its proposal to the Government to issue the Permit through a Government Decision.[52] The Ministry of Environment completed its technical review of the EIA Report and of the Project at the TAC meeting on November 29, 2011, and the TAC members provided points of view that supported issuance of the Environmental Permit.[53] The Ministry of Environment therefore was legally obligated to issue its decision regarding the Permit within 30 working days, by January 31, 2012.[54]

37. In disregard of the laws governing the EIA procedure and of RMGC's right to a decision on its Environmental Permit application, which has been pending since December 2004, the Ministry of Environment failed to take any decision on the Permit.[55]

38. The Ministry of Environment reconfirmed in 2013 that RMGC met all of the requirements for the Environmental Permit and even published for public consultation a draft

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[51] *See supra* § II.

[52] Memorial ¶¶ 190-200; Mihai §§ IV, VIII.

[53] Memorial ¶¶ 352-365.

[54] Memorial ¶ 366 (explaining that the Ministry of Environment also was required by law to publish the decision within five working days thereafter, *i.e.*, by February 8, 2012).

[55] Memorial ¶¶ 366-378.

Environmental Permit in July 2013, but it again failed to take a decision on the Permit and formally convey its endorsement to the Government and, to date, has still not done so.[56]

39. In its Counter-Memorial, Respondent cannot and does not deny that RMGC's Environmental Permit application has been pending without a decision for nearly 14 years. Respondent instead argues that the EIA review was not finalized at the November 29, 2011 TAC meeting and that the Ministry of Environment was not in a position to take a decision on the Environmental Permit in January 2012, July 2013, or at any time thereafter.[57]

40. Respondent's assertions are demonstrably false and are not even supported by the carefully crafted statement of its own witness, Dorina Mocanu, who was the Director of the Ministry of Environment's Pollution Control and Impact Assessment Directorate. Contrary to Respondent's assertions in this arbitration, the contemporaneous evidence from the TAC proceedings, the Government's own internal analyses produced in this arbitration, and the public statements and testimony of Respondent's own officials demonstrate that RMGC met the requirements to obtain the Environmental Permit, and that there were no legal or technical impediments to issuing the Permit in 2012, 2013, or any time thereafter.[58]

### A. RMGC Met the Requirements to Obtain the Environmental Permit Following the November 29, 2011 TAC Meeting

41. The evidence submitted with and described in the Memorial and discussed more fully in [redacted], as well as in the expert legal opinions of Professor Mihai, establishes that the Ministry of Environment completed its exhaustive technical assessment of the EIA Report and of the Project at the November 29, 2011 TAC meeting and therefore was obligated to take and convey to the Government a decision on the Environmental Permit, which it unlawfully failed to do.[59] In particular, the evidence submitted with the Memorial shows:

[56] Memorial ¶¶ 414-448.

[57] Counter-Memorial ¶¶ 221-230, 242-258, 327-331.

[58] [redacted]; Mihai II §§ V-VI.

[59] Memorial ¶¶ 358-366.

a) RMGC applied for the Environmental Permit in December 2004 and, in accordance with Terms of Reference issued by the Ministry of Environment, it retained a team of renowned external Romanian and international technical experts to prepare, at great expense and effort, a comprehensive, professional EIA Report that addressed all relevant aspects of Project design and development, and submitted it in May 2006 to the Ministry of Environment for review.[60]

b) In consultation with various Government Ministries and institutions comprising the TAC, the Ministry of Environment administered a technical review of the EIA Report and of the Project from 2006-2007 and, following an unlawful suspension of that review process, again from 2010-2011.[61] As part of this review process, RMGC participated in an extensive public consultation procedure with the approval of and in close coordination with the Ministry of Environment in 2006 and again in 2011.[62]

c) By the end of the TAC meeting held in March 2011, the Ministry of Environment had completed its review of RMGC's answers to questions received from the public and all but two chapters of the EIA Report remained for review (both of which were minor and consisted, respectively, of a two-page summary of

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[60] Memorial ¶¶ 188-189, 201-243; Avram II ¶¶ 108-121.

[61] Memorial ¶¶ 254-279, 292-307, 352-362.

[62] Memorial ¶¶ 251-255, 353 (describing 14 public consultations in Romania and two in Hungary in 2006 and further public consultations in 2011); Avram II ¶¶ 129-134. The Ministry of Environment of Romania and the Ministry of Environment of Hungary also commissioned an independent group of international experts ("IGIE") to review the EIA Report, which issued a favorable report confirming that the EIA Report and the Project were well developed. Memorial ¶¶ 244-250; Avram II ¶¶ 122-128. Respondent's retained expert for this arbitration, Ms. Larraine Wilde, wrongly contends the IGIE's review was narrow in scope and did not consider potential transboundary impacts, and that its limited recommendations and concerns were not addressed by RMGC. Technical Report by Larraine Wilde dated Feb. 22, 2018 ("Wilde") ¶¶ 203-212; Counter-Memorial ¶¶ 123-124. As Mr. Avram explains, Romania and Hungary created the IGIE to review the EIA Report for the Project, Hungary's sole interest in creating the IGIE was to assess potential transboundary impacts, no such transboundary impacts were identified by the IGIE (or by the TAC), RMGC submitted an entire volume of responses addressing the IGIE's comments, the TAC analyzed RMGC's responses at the November 29, 2011 TAC meeting, and none of the TAC members raised any concerns regarding those responses. Avram II ¶¶ 122-128. Moreover, as Mr. Avram explains, in 2013 the State issued an environmental permit for the Certej gold and silver mining project after specifically accepting the conclusions of a cumulative environmental impact assessment previously commissioned by RMGC that showed there would be no transboundary effects in the worst-case scenarios for both the Roşia Montană Project and the Certej mining project. Avram II ¶ 127.

difficulties encountered during the EIA and of a non-technical summary of the EIA Report).[63]

d) At a meeting with RMGC in September 2011, Minister of Environment Borbély directed the Ministry's technical team "to list their last issues" with the Project, and Ministry representatives informed RMGC it would "get an official letter soon with all outstanding requests" and would "need to answer in writing."[64]

e) Following that meeting, the Ministry of Environment, under the signature of State Secretary Marin Anton, the TAC President, sent RMGC its final questions.[65]

f) In October 2011, RMGC submitted its answers to the Ministry of Environment's final questions.[66] The Ministry of Environment and many of the TAC members also visited Roșia Montană that month, gained a better appreciation of the issues discussed in the TAC meetings, and left convinced of the Project's environmental, social, and cultural benefits and ready to recommend issuing the Environmental Permit.[67]

g) Following the site visit, the Ministry of Environment convened a TAC meeting for November 29, 2011, and included on the agenda review of the final two EIA Report Chapters, RMGC's answers to the Ministry of Environment's final questions, and every other remaining pending issue.[68]

h) According to the audio recordings of the November 29, 2011 TAC meeting, prior to the meeting the Ministry of Environment's technical team in charge of the TAC

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[63] Avram II ¶¶ 2-7; Tănase III ¶ 30.

[64] Avram II ¶¶ 8-10; RMGC Minutes of Experts' Meeting dated Sept. 13, 2011 (Exh. C-574) at 4.

[65] Avram II ¶ 10.

[66] Avram II ¶ 10.

[67] Memorial ¶ 353; Avram II ¶¶ 11, 27.

[68] Memorial ¶ 354; Avram II ¶¶ 5, 12; Tănase III ¶ 30.

requested written points of view from the TAC members, which is consistent with and reflects an intent to finalize the EIA procedure during that meeting.[69]

i) Early in the November 29, 2011 TAC meeting, the TAC President, Ministry of Environment State Secretary Anton, and Ms. Mocanu made numerous statements consistent with and reflecting an intent to finalize the EIA procedure at that meeting: (i) Ms. Mocanu said she told the Ministry of Culture to bring the endorsement required to issue the Environmental Permit to the TAC meeting;[70] (ii) TAC President Anton made an apparent reference to the amount of time ("5 days") he intended to provide any absent TAC members to submit their "point of view" on the EIA Report;[71] (iii) TAC President Anton and Ms. Mocanu discussed the "checklist" (which the Ministry must complete to record formally the TAC members' views on the adequacy of the EIA Report after the Report is reviewed in its entirety) and stated "We will get there" by the end of the TAC meeting;[72] and (iv) TAC President Anton stated, "We stay here until we finalize."[73]

j) Throughout the November 29 TAC meeting, representatives of the Ministry of Environment and other TAC members also made no fewer than 10 statements about drafting the conditions to include in the Environmental Permit,[74] including

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[69] Avram II ¶ 22; Tănase III ¶ 35. *See also* Mihai ¶ 128, 138, 371 (explaining that the Ministry of Environment was obligated to take its decision on the Environmental Permit within 10 working days of receiving the TAC members' points of view). Respondent has not produced any such written points of view; the absence of points of view qualifies as no objection to Project implementation. Mihai ¶¶ 91, 133, 372.

[70] Avram II ¶ 16; Tănase III ¶ 31.

[71] Avram II ¶ 17; Tănase III ¶ 32; Ministry of Environment Audio Recording No. 1 of TAC meeting dated Nov. 29, 2011 (Exh. C-486.01.mp3) at 9:43. *See also* Mihai ¶ 209 (noting the EIA Rules of Procedure approved in 2010 provide TAC members 5 days after review of the EIA Report is completed to provide a final point of view or be deemed to have no objections); Avram II ¶ 17 (noting that in May 2013, the acting TAC President also allotted 5 days for the TAC members to submit their final points of view).

[72] Avram II ¶ 19; Tănase III ¶ 33; Ministry of Environment Audio Recording No. 1 of TAC meeting dated Nov. 29, 2011 (Exh. C-486.01.mp3) at 23:40. *See also* Mihai ¶¶ 116-125 (explaining that the checklist records the TAC members' views as to whether the EIA Report contains "adequate" information and that the Ministry of Environment is solely responsible for making scientific or technical conclusions on the EIA Report).

[73] Avram II ¶ 22; Tănase III ¶ 34; Ministry of Environment Audio Recording No. 1 of TAC meeting dated Nov. 29, 2011 (Exh. C-486.01.mp3) at 1:15:14.

[74] Avram II ¶¶ 13-34; Tănase III ¶¶ 29-38.

with respect to cyanide levels,[75] TMF protections against seepage,[76] water and biodiversity issues,[77] cyanide transport,[78] and the financial guarantee for environmental liability.[79] Consistent with and reflecting the end of the EIA review process and her own readiness to complete the EIA procedure and draft the Environmental Permit, Ms. Mocanu asked whether the minutes of the TAC site visit to Roşia Montană should include "the conditions that I am going to put in the Environmental Permit."[80]

k) During the November 29, 2011 TAC meeting, the TAC President confirmed that the TAC had completed its review of all of the EIA Report chapters.[81] The TAC President also called upon the TAC members to state their point of view regarding RMGC's answers to the final questions, and the TAC members commended RMGC and its experts and confirmed that the Project was technically sound and that they had no further questions and no objections to the Ministry of Environment deciding to issue the Environmental Permit.[82]

l) After obtaining the TAC members' views, TAC President Anton announced at the November 29 TAC meeting that "*all technical discussions, all the questions, all the solutions were discussed within the TAC*," that any further issues needed to be raised "now, in this moment . . . so that we can clarify them," and, following silence, that "[t]here are no more issues."[83] TAC President Anton also said that he would convene "*a meeting for making the decision related to Rosia, whether it's being granted [the Environmental Permit] or not*," that the Ministry of

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[75] Avram II ¶ 21; Tănase III ¶ 37.a.

[76] Avram II ¶ 22; Tănase III ¶ 37.b.

[77] Avram II ¶¶ 23.x, 23.ix, n.65, 44; Tănase III ¶ 37.f.

[78] Avram II ¶ 25; Tănase III ¶ 37.g-h.

[79] Avram II ¶ 28; Tănase III ¶ 37.j.

[80] Avram II ¶ 28; Tănase III ¶ 37.i; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 48.

[81] Avram II ¶¶ 19, 29; Tănase III ¶ 34.

[82] Memorial ¶ 359; Avram II ¶ 23.i-xiv; Tănase III ¶ 40.

[83] Memorial ¶ 361; Tănase III ¶ 43; Avram II ¶ 29; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 47 (TAC President Marin Anton) (emphasis added).

Environment would "prepare a checklist for today" to assess the quality of the EIA Report, and that he "will need those answers. *And, with this, the technical discussions about the Roşia Montană Project come to an end*. Please expect a TAC meeting in the near future."[84] TAC President Anton closed the meeting by announcing again that "*[t]hings are finalized in the TAC*," and that after RMGC sorted out "three details," he would "*convene another TAC meeting for a final decision*."[85]

42. This unassailable record of the events leading up to and taking place during the November 29, 2011 TAC meeting proves false Respondent's assertions that "[t]he TAC's work was far from done in late 2011."[86] Respondent's further contention that TAC President Anton "made clear that the TAC would need to convene again" is both misleading and beside the point.[87] As set out immediately above, that next meeting was "for a final decision" on the Environmental Permit, not to continue the technical assessment which plainly had "come to an end."[88]

43. As Claimants demonstrated in the Memorial, having repeatedly confirmed that the technical assessment was complete, the Ministry of Environment was obligated to close the EIA procedure by recording the TAC members' views in the EIA checklist and did not have legal grounds to call for another TAC meeting.[89] The Ministry nonetheless clearly did so.

[84] Memorial ¶ 362; Tănase III ¶ 44; Avram II ¶ 29; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 48 (TAC President Marin Anton) (emphasis added).

[85] Tănase III ¶ 44; Avram II ¶ 29; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 50-51 (TAC President Marin Anton) (emphasis added).

[86] Counter-Memorial ¶ 228. *See also generally id.* ¶¶ 221-230.

[87] Counter-Memorial ¶ 230.

[88] Tănase III ¶ 44; Avram II ¶ 29.

[89] Memorial ¶ 363.

[90] [91] The Government therefore derailed the permitting process and unlawfully abused its power to maintain pressure on and coerce financial concessions from Gabriel and RMGC as discussed above.[92]

44. Respondent denies that the Minister of Environment or the Prime Minister interfered in the November 29 TAC meeting and contends have "no evidentiary value."[93] Respondent's witness, Ms. Mocanu, states she "sat directly next to Mr. Anton" and does "not recall interruptions in the TAC meeting for purposes of Mr. Anton speaking on the phone, nor do I recall seeing him reading text messages."[94]

45. Contrary to Ms. Mocanu's apparently limited recollection, the audio recordings of the November 29, 2011 TAC meeting demonstrate TAC President Anton answered his phone at least 20 times during the TAC meeting and told a number of people that he would call them back.[95] There also were three lengthy breaks in the TAC meeting that lasted one hour and forty five minutes in total, and TAC President Anton could have made any number of calls during those breaks.[96]

46. In addition, and as the audio recordings of the November 29 TAC meeting confirm, Ms. Mocanu herself left the TAC meeting twice late in the meeting to speak by phone with a representative of the General Secretariat of the Government ("SGG"), which is subordinated to the Prime Minister and is located in the government building

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[90] Memorial ¶ 364; .

[91] Memorial ¶ 364; .

[92] *See supra* § II; Memorial ¶ 364; (quoting statements of Minister of Economy Ariton, Prime Minister Boc, Minister of Environment Borbély, and Minister of Culture Kelemen Hunor on and the days and several weeks thereafter).

[93] Counter-Memorial ¶¶ 221-224.

[94] Mocanu ¶ 68.

[95] Annex A (listing the 20 calls answered by TAC President Anton during the November 29, 2011 TAC meeting); .

[96]

that houses the Prime Minister and his cabinet.[97] Correspondence produced by Respondent weeks before the filing of this Reply, as ordered by the Tribunal, show the SGG issued the "mandate" to Minister of Economy Ariton to negotiate with RMGC "to increase the benefits for the Romanian State" and to "submit the results of these negotiations to the Government."[98]

47. Upon Ms. Mocanu's return from that second call with the SGG, TAC President Anton called for a break and he and Ms. Mocanu left the room.[99] When he returned from the break 26 minutes later, TAC President Anton closed the meeting without recording the TAC members' points of view in the checklist, which was not legally justified and was contrary to his and Ms. Mocanu's earlier stated intent to finish that process.[100]

48. In her witness statement, Ms. Mocanu fails to acknowledge, let alone explain, either of her phone calls with the SGG, why she left the TAC meeting to take those calls, what if anything she and TAC President Anton discussed during the final break in the TAC meeting, or why such a long break was even necessary when all of the agenda items already had been completed.

49. The evidence of what occurred at the November 29 TAC meeting is entirely consistent with what [REDACTED]. But even if the Tribunal were not to credit [REDACTED], it remains the case that, in failing to conclude matters with the TAC at or soon after the November 29 meeting and to proceed to issue the Environmental Permit, the Government acted in violation of law and maintained pressure on RMGC and Gabriel to meet the State's economic demands for "25 and 6" it had established as a condition for Project

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[97] [REDACTED]

[98] [REDACTED] *See also* Letter No. 20 from the General Secretariat of the Government to Minister of Economy Ariton dated Sept. 23, 2011 enclosing Tasks established at the Government meeting on Sept. 21, 2011 (Exh. C-2635). In 2013 the Department for Infrastructure Projects of National Interest and Foreign Investments, which was then responsible for administering the State's interest in the Project, similarly reported to the SGG about analysis of Gabriel's financial offer. *See* Letter No. 3127 from the Department of Infrastructure Projects to the General Secretariat of the Government dated July 9, 2013 (Exh. C-2200).

[99] [REDACTED]

[100] Memorial ¶ 363; [REDACTED] (discussing Ministry of Environment's intention to discuss and complete the EIA checklist during the November 29 TAC meeting).

progress, which terms were reinforced and linked to the Project both before and during the TAC meeting, and again almost immediately thereafter.[101]

50. As shown in the Memorial, the few open issues (which TAC President Anton described as "details") were promptly addressed within 10 days of the November 29 TAC meeting.[102] Given the resolution of those issues and the fact that none of the TAC members submitted written objections, the Ministry of Environment was legally obligated to take its decision on the Environmental Permit within 30 working days of the TAC meeting, i.e., by January 31, 2012.[103] Not only was no decision taken, but the Ministry of Environment apparently did not communicate at all with the TAC members about preparing the EIA checklist despite TAC President Anton's statement at the conclusion of the November 29 TAC meeting that he would do so.[104] The Ministry of Environment's failure to take a decision on the Environmental Permit therefore was a manifest violation of law and RMGC's rights to a decision.[105]

51. As described above, because the Government was not going to act until its economic demands were met, Gabriel and RMGC eventually succumbed to the pressure and

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[101] *See supra* § II; [REDACTED].

[102] Memorial ¶ 365; Tănase III ¶ 52; Avram II ¶ 38; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 50-51 (TAC President Anton).

[103] Memorial ¶ 366.

[104] The Tribunal ordered Respondent to produce "[t]he checklist prepared by the Ministry of Environment at or about the time of the TAC meeting on November 29, 2011; all communications between the Ministry of Environment and the TAC members between November 29, 2011 and April 27, 2012 with regard to the checklist; and any responses or analyses prepared by the TAC members between November 29, 2011 and April 27, 2012 for purposes of completing the checklist." Procedural Order No. 10, Annex A, Request No. 5. Respondent did not produce any communications with regard to the checklist or any responses or analyses prepared for purposes of completing the checklist. In response to Claimants' request for the checklist, Respondent produced what it claimed is "an undated document" that "may have been drafted 'at or about the time of the TAC meeting on November 29, 2011.'" Letter from Respondent to Claimants dated June 22, 2018 (Exh. C-2216). That document of uncertain origin is unsigned as well as undated, and it did not reflect the views of the Ministry of Environment or the TAC members at the November 29, 2011 TAC meeting. *See* Mihai II ¶¶ 296-302; [REDACTED]. Given the discussions during the November 29 TAC meeting about completing the checklist and the significance of doing so to the permitting process, the fact that this did not occur during the meeting and nothing apparently was done in that regard after the meeting despite the Ministry of Environment having completed its technical review in consultation with the TAC, is entirely consistent with political interference having prevented completion of the permitting process.

[105] Mihai ¶¶ 245, 371-374. *See also id.* at ¶¶ 396-398.

attempted to meet those demands in late January 2012.[106] Soon thereafter, however, Prime Minister Boc resigned in early February 2012, the next Prime Minister and the entire Government quickly fell two months later, and the interim Prime Minister, Mr. Ponta, declared publicly that his Government would maintain the unlawful condition of demanding a greater financial interest in the Project and, in the meantime, would not resume consideration of the Environmental Permit or, more broadly, of the Project, until after national elections, which froze the permitting process for all of 2012.[107]

52. Respondent now argues "the Ministry of Environment was far from taking a decision on the environmental permit in January 2012" due to four alleged impediments: (i) Ministry of Culture endorsement, (ii) approval of the PUZ, (iii) approval of the Waste Management Plan, and (iv) declaration of "outstanding public interest."[108] Respondent's argument is meritless, not only for the reasons cogently and rigorously explained by Professor Mihai,[109] but also as explained contemporaneously by Respondent itself through its own 2013 Inter-Ministerial Commission, which rejected each of the arguments Respondent now raises in this arbitration.

53. Before turning to the four alleged impediments to issuing the Environmental Permit raised by Respondent, Claimants note that the Tribunal ordered Respondent to produce "[a]ll documents identifying legal requirements that RMGC allegedly failed to meet that allegedly prevented the Ministry of Environment from taking any decision regarding the Environmental Permit following the TAC meetings on November 29, 2011 and July 26,

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[106] *See* Memorial ¶¶ 367-379; [redacted].

[107] *See* Memorial ¶¶ 380-394; [redacted]. Respondent argues that the Government took a "key" permitting decision by renewing the Dam Safety Permits and that it responded "promptly" regarding the Waste Management Plan. Counter-Memorial ¶ 275. As described above, it is undeniable that Prime Minister Ponta stated publicly that the Project would not be considered until 2013. [redacted] Considering the Ministry of Environment previously had withheld the Dam Safety Permits unlawfully from 2007-2010 until Romania's High Court of Cassation and Justice ordered it to issue those permits, the renewal of those permits does not evidence willingness to advance Project permitting. [redacted] *See also* Memorial ¶¶ 273-279; [redacted]. Nor, contrary to Respondent's assertions, does the Ministry of Environment's abusive stonewalling of RMGC's Waste Management Plan. [redacted]

[108] Counter-Memorial ¶¶ 245-257.

[109] Mihai II §§ V, VI. *See also* Podaru § II.B; Schiau II § VI.A.

2013."[110] The Tribunal also ordered Respondent to produce "[a]ll documents reflecting the Ministry of Environment's, Ministry of Culture's, or TAC's conclusions in 2011-2013 that the EIA Report failed to meet Romanian standards with regard to: (i) the use of cyanide to process the ore at Roşia Montană; (ii) the design and proposed siting of the [TMF]; (iii) the potential transboundary effects of the Project for Hungary; (iv) the remediation of historical pollution; (v) the mine closure and rehabilitation plans and the environmental guarantees for the Project; or (vi) the preservation of cultural heritage."[111]

54. Respondent failed to produce *any* documents in response to these requests,[112] which lays completely bare its *post hoc* assertions in this arbitration. Respondent's inability to find any contemporaneous evidence to support its assertions demonstrates and further confirms that the Ministry of Environment, the Ministry of Culture, and the TAC considered the EIA Report met the applicable permitting standards and that there were no legal impediments preventing the Ministry of Environment from taking a decision on the Environmental Permit. Indeed, the only contemporaneous evidence shows that, contrary to Respondent's made-for-arbitration narrative, the Project was eligible to receive and should have received the Environmental Permit from March 8, 2012 forward, but was politically blocked.[113]

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[110] Procedural Order No. 10, Annex A, Request No. 3.

[111] Procedural Order No. 10, Annex A, Request No. 4.

[112] Letter from Respondent to Claimants dated June 22, 2018 (Exh. C-2216). In its response, Respondent acknowledges that it bears the burden of proof and suggests that it has already submitted "all the evidence" that is responsive to these requests "with its Counter-Memorial." Letter from Respondent to Claimants dated June 22, 2018 (Exh. C-2216) at 1. As demonstrated in Claimants' Reply and the accompanying statements and reports submitted herewith, none of the documents relied upon by Respondent shows that RMGC failed to meet legal requirements or Romanian standards that would prevent the Ministry of Environment from taking a decision regarding the Environmental Permit. Indeed, no such document could exist. According to the EIA Rules of Procedure, had the Ministry of Environment determined that RMGC failed to meet the applicable standards or legal requirements to obtain the Environmental Permit following the completion of the TAC's review of the EIA Report at either the November 29, 2011 or the July 26, 2013 TAC meeting, the Ministry of Environment would have been required to issue a reasoned decision notifying RMGC that the EIA Report was found to be inadequate and the Permit could not be issued and requesting it to amend or supplement the EIA Report in order to remedy the deficiency, which did not happen. Mihai II ¶¶ 300-301. *See also* Avram II ¶ 30.

[113] As Professor Mihai explained in his first expert legal opinion, the Ministry of Environment was legally obligated to take its Permit decision by January 31, 2012, it had 5 working days to publish that decision by February 8, 2012, and the Government then had 20 additional working days to issue the Permit to RMGC by March 8, 2012. Mihai ¶¶ 373-374.

55. When the Government finally returned its attention to the Project in 2013 following Prime Minister Ponta's election, the Government presented a Note on the Project at a Government meeting on March 6, 2013, which the Tribunal ordered Respondent to produce over its strenuous objections.[114] In that Note, which was prepared by Minister Delegate Şova, the Government acknowledged that in 2010-2011 the Ministry of Environment held five TAC meetings and three other technical meetings, and "*[a]t the end of these meetings it was concluded that all technical aspects related to the Roşia Montană project had been clarified*."[115] Under a heading on "The current state of the Roşia Montană project," the Government further observed that "[c]urrently, *as far as the authorization process for the Roşia Montană mining project is concerned, the authorities have not taken any measures since November 2011*."[116] The Government concluded that the Ministry of Environment therefore needed to take its decision on the Environmental Permit:

> [The] TAC started its activity in 2007, and in 2007-2010 the analysis of the Roşia Montană project was interrupted. TAC resumed its analysis of the EIA report in 2010, and by the end of 2011 all the EIA Report chapters, additional documentation required, and all TAC questions were answered. *In the last TAC meeting, which took place in November 2011, TAC members concluded that all technical issues were clarified and that there were no further questions. Consequently, according to the procedure, the final meeting of TAC must be held for the adoption of the recommendation for the issuance of the Environmental Permit, which is the last step in the procedure before TAC*.[117]

56. This Note confirms what TAC President Anton said at the end of the November 29, 2011 TAC meeting about there being one final decisional meeting of the TAC and the Ministry would then make its recommendation for issuance of the Environmental Permit.

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[114] Procedural Order No. 10, Annex A, Request No. 9(i) (ordering Respondent to produce over its objections "the 'Note' on the Project presented by the Government in its meeting of March 6, 2013").

[115] [redacted]; Government Note on the Roşia Montană Mining Project from Minister Delegate Dan Şova dated Mar. 6, 2013 (Exh. C-1903) at 4 (emphasis added).

[116] [redacted]; Government Note on the Roşia Montană Mining Project from Minister Delegate Dan Şova dated Mar. 6, 2013 (Exh. C-1903) at 31 (emphasis added).

[117] [redacted]; Government Note on the Roşia Montană Mining Project from Minister Delegate Dan Şova dated Mar. 6, 2013 (Exh. C-1903) at 32 (emphasis added).

57. Ministry of Environment officials including both the TAC President and the TAC Vice President likewise subsequently confirmed that the Ministry completed its technical assessment at the November 29, 2011 TAC meeting and determined in consultation with the TAC members that the EIA Report complied with the applicable permitting requirements.[118] In addition, as described in the Memorial and referenced above, the Government established an Inter-Ministerial Commission that assessed each of the issues now raised by Respondent and determined there were no legal or technical impediments to issuing the Environmental Permit.[119] In a final report approved by the Government at its meeting on March 27, 2013, the Inter-Ministerial Commission concluded that all of the issues "were discussed and clarified" and that the Ministry of Environment "*can issue the Environmental Permit and any other details can be solved along the way*."[120]

58. Thus, contrary to Respondent's assertions in this arbitration, the Government repeatedly acknowledged that the Ministry of Environment clarified and positively resolved all of the technical issues at the November 29, 2011 TAC meeting, failed to take any action in the year and a half thereafter despite lacking any legitimate basis for doing so, and therefore needed to close the EIA procedure and take a decision on issuing the Environmental Permit.

59. Recognizing that its own Inter-Ministerial Commission's findings render its arbitration defenses meritless and conclusively show that there were no legal or technical impediments preventing permitting and that the Ministry of Environment's conduct in 2011-2012 therefore was unlawful, Respondent desperately and wrongly attacks the work of its own Commission. Respondent contends the Inter-Ministerial Commission's conclusions should be disregarded because it purportedly relied "on both limited and partially inaccurate information" and was "misinformed" and misled by RMGC, including because it purportedly did not have

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[118] Tănase III ¶¶ 68-72.

[119] Memorial ¶¶ 414-418; Tănase III ¶¶ 73-85.

[120] Tănase III ¶ 75; Letter No. 5338 from Minister Delegate Şova to the General Secretariat of the Government dated Mar. 26, 2013 enclosing Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană Mining Project (Exh. C-1903) at 9-10 (emphasis added).

lawyers representing the State in the discussions while RMGC did.[121] For the reasons Mr. Tănase discusses, Respondent's criticisms are entirely unfounded.[122]

60. In sum, as Mr. Tănase explains, the Inter-Ministerial Commission was not relying on limited information, but in fact included most of the same Government authorities represented by a number of the same individuals who previously had participated in the November 29, 2011 TAC meeting. In addition, RMGC's statements to the Commission were accurate and included the specific information Respondent wrongly contends was not provided.[123] Finally, far from having no lawyers to aid it, the Commission if anything was over-lawyered. Thus, the Commission was chaired by a highly accomplished lawyer who has since served as a judge on Romania's Constitutional Court, four separate Ministry of Justice lawyers participated, and the Ministry of Environment's external legal counsel (now Respondent's legal counsel in this arbitration) also participated in a meeting on March 25, 2013, a fact not mentioned by Respondent.[124] As the Inter-Ministerial Commission observed in its final report approved by the Government, during the meeting with external legal counsel "the conclusions were the same, namely that the legal team of the Ministry of Environment and Climate Change could not provide the legal grounds" supporting its assertions regarding the "outstanding public interest" declaration, but instead made suggestions that "would be a good idea for the future . . . even though this aspect cannot prevent further development of the project."[125]

61. The Government's contemporaneous acknowledgements that there were no legal impediments to issuing the Environmental Permit, which are confirmed by Respondent's failure to identify any documents in response to Claimants' document requests that support its current assertions regarding alleged legal impediments to issuing the Environmental Permit, should alone be sufficient reason to reject Respondent's *post hoc* contrary arguments in this arbitration.

[121] Counter-Memorial ¶¶ 293-299.

[122] Tănase III ¶¶ 76-85.

[123] Tănase III ¶¶ 73-82.

[124] Tănase III ¶¶ 83-84.

[125] Tănase III ¶¶ 84-85 (noting Government approval of the Inter-Ministerial Commission's report on March 27, 2013); Final Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project dated Mar. 26, 2013 (Exh. C-1903) at 6.

Were the Tribunal to consider the issues now raised by Respondent, however, each of them fails for the reasons summarized below.

62. First, as noted above, Respondent argues that "the Ministry of Environment was far from taking a decision" in January 2012 because "the Ministry of Culture had not yet endorsed the Project."[126] This is not true.

63. As discussed in the Memorial, on December 7, 2011 the Ministry of Culture submitted a letter to the Ministry of Environment that (i) was signed by the Ministry of Culture's representative in the TAC, State Secretary Vasile Timiş, (ii) referred to the specific provision of Romanian law requiring the Ministry's endorsement to issue the Environmental Permit, (iii) set forth the Ministry's "point of view about the issuance of the environmental permit," and (iv) proposed the conditions and measures that the Ministry considered were necessary "[i]n connection to the issuance of the environmental permit for the Roşia Montană mining exploitation project."[127] This letter proposed the same conditions and measures and was essentially identical in content to a document that was later relabeled "endorsement" by the Ministry of Culture in April 2013,[128] which Respondent acknowledges was the required endorsement.[129] For these and other reasons discussed by Professor Mihai and Professor Schiau in their respective expert legal opinions, the Ministry of Culture's December 7, 2011 letter also qualified as the "endorsement" required by law to issue the Environmental Permit.[130]

64. As further discussed in the Memorial, however, the Ministry of Environment claimed it could not take a decision on the Environmental Permit until the Ministry of Culture confirmed that its December 7, 2011 letter was the required endorsement, and the Ministry of

[126] Counter-Memorial ¶¶ 245-246.

[127] Memorial ¶¶ 370-374; Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446) at 1-2.

[128] Memorial ¶ 374.

[129] Counter-Memorial ¶ 291 (acknowledging that "the Ministry of Culture issued its endorsement for the Project in April 2013").

[130] Memorial ¶¶ 372-374; Mihai ¶¶ 366-370 (explaining that "endorsements may take a variety of forms and names, from 'point of view' to 'approval,'" and that "where the special legislation does not regulate a specific procedure or form for an endorsement, then the respective endorsement is valid irrespective of its form"). *See also* Mihai II § VI.A.1; Schiau II § VI.A.

Culture unreasonably refused to respond to the Ministry of Environment's requests for such confirmation.[131] Thus, consistent with the public statements of Minister of Environment Borbély and Minister of Culture Kelemen Hunor that their Ministries would not act until the Government's economic demands were met,[132] the Ministry of Environment and the Ministry of Culture blocked the permitting process through a protracted Ministerial *pas de deux*.[133]

65. In its Counter-Memorial, Respondent claims that the Ministry of Culture's December 7, 2011 letter "did not qualify as the requisite 'endorsement'" and that it was "logical and reasonable" for the Ministry of Culture to refuse to confirm its endorsement until April 2013.[134] According to Respondent, the Ministry of Culture could not endorse the Project in 2011-2012 due to "the lack of (confirmed) ADCs" for Cârnic and Orlea,[135] and because it also required the National Archaeological Commission ("NAC") to endorse a preliminary archaeological assessment of Orlea and a project for further research of Orlea, which allegedly occurred in March 2013.[136] Respondent's *post hoc* contrivances are unavailing.

66. Respondent's assertions were not raised contemporaneously, are not supported by any witness testimony or evidence, lack any legal basis, and are demonstrably wrong.[137] As Professor Schiau and Professor Mihai explain, ADCs are not legally required for the Ministry of Culture to issue its endorsement or for the Government to issue the Environmental Permit.[138] Moreover, in both December 2011 and in April 2013 when the Ministry of Culture wrote to the Ministry of Environment setting forth its views on and conditions for the Environmental Permit, the ADC for Cârnic was subject to a then-pending legal challenge and an ADC had not yet been issued for Orlea. It is therefore clear that, unlike Respondent's position for purposes of the arbitration, the pendency of a legal challenge to an ADC was not viewed contemporaneously as a

[131] Memorial ¶¶ 370-371, 377, 381-385.

[132] Memorial ¶ 378; *supra* § II; [redacted].

[133] Memorial ¶¶ 371, 377.

[134] Counter-Memorial ¶¶ 246-247.

[135] Counter-Memorial ¶ 247.

[136] Counter-Memorial ¶ 251.

[137] Mihai II ¶¶ 264-269; Schiau II § VI.A.2; [redacted].

[138] Schiau II § VI.A.2; Mihai II § V.E.1. *See also* Podaru § II. B.2.

reason for the Ministry of Culture to withhold its endorsement for the Environmental Permit.[139] Thus, as Professor Mihai observes, Respondent's attempt to link ADCs for Cârnic and Orlea to the Ministry of Culture's differing approaches in December 2011 and April 2013 "is both wrong legally and not logical or credible factually."[140]

67. Respondent's other purported justification for the Ministry of Culture's refusal to confirm its endorsement in 2011-2012 is equally baseless. While preliminary archaeological research for Orlea (the only area not discharged through an ADC) was required for the Ministry of Culture to issue its endorsement, RMGC submitted a preliminary archaeological research report for Orlea in August 2011 and the Ministry of Culture acknowledged that report in its December 7, 2011 letter to the Ministry of Environment.[141] As Professor Schiau confirms, NAC approval of that preliminary report was not legally required for the Ministry of Culture to issue its endorsement.[142] In addition to Professor Schiau's opinion, Respondent's arbitration arguments are once again conclusively rebutted by its own contemporaneous conduct. When the Ministry of Culture issued its endorsement in April 2013, it neither sought nor secured NAC approval of the preliminary research for Orlea. As Professor Schiau explains, the NAC did not approve the preliminary archaeological research report for Orlea in 2013, but merely took note of it.[143]

68. As with the NAC endorsement, prior to this arbitration, Respondent through its Ministry of Culture also did not claim it needed ADCs for Orlea or to await the result of the litigation regarding the Cârnic ADC in order to issue or to confirm its endorsement of the Environmental Permit. On the contrary, for example, the Ministry of Culture stated expressly in its December 7, 2011 letter – when there was no ADC for Orlea – that the Ministry of

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[139] Mihai II ¶ 269. As described in the Memorial and in [redacted], the Ministry of Culture arbitrarily terminated the Alburnus Maior National Research Program in 2006 and thereafter denied RMGC's requests to conduct the preventive archaeological research needed to support the archaeological discharge of Orlea. Nonetheless, RMGC's mine plan did not contemplate mining at Orlea until year 8 of mining operations, leaving ample time to complete preventive archaeological research of Orlea and to apply for archaeological discharge. Memorial ¶¶ 162-169; [redacted].

[140] Mihai II ¶ 269. *See also* Schiau II § VI.A.2

[141] Gligor ¶¶ 122-130; Gligor II ¶¶ 79-101; Schiau II §§ VI.A.2, VI.A.3.

[142] Schiau II § VI.A.4.

[143] Schiau II ¶¶ 296-300.

Environment could decide to issue the Environmental Permit.[144] The Minister of Culture likewise stated publicly that the Ministry of Culture had sent the required documentation for the Ministry of Environment to take a "final decision."[145] The Ministry of Culture's statements acknowledging that the Ministry of Environment could decide to issue the Environmental Permit further show that the December 7, 2011 letter was the Ministry of Culture endorsement required by law.[146]

69. Respondent asserts that "the Ministry of Culture explained" in a letter to the Inter-Ministerial Commission dated March 18, 2013 "that it was only following the receipt" of the alleged NAC endorsement "that the Ministry of Culture itself was in a position to endorse the Project."[147] That assertion is false. In that letter, the Ministry of Culture did not claim it could only issue its endorsement of the Environmental Permit following the NAC's endorsement.[148] Rather, the Ministry of Culture described the status of the Project's treatment of cultural heritage assets and confirmed there were "no obstacles" to issuing "a favourable endorsement" of the Environmental Permit "when this is requested from us by the Ministry of Environment. . . ."[149]

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[144] Memorial ¶ 373.

[145] Memorial ¶ 373; Tănase III ¶ 57.b; Gligor II ¶ 91; Interview of Minister of Culture Hunor, Debate of the Midday Journal, dated Dec. 19, 2011 (Exh. C-439) at 1 (Minister of Culture Kelemen Hunor: "We have sent to the TAC, the Technical Assessment Committee, a point of view on the projects, the problems and responses to these problems in terms of cultural and archaeological heritage. This file, this documentation is at the Ministry of Environment, they need all the endorsements or points of view, all the documents from all the institutions, but it all lies with the assessment of the Commission of the Ministry of Environment. I don't know when they will make a final decision.").

[146] Memorial ¶ 373.

[147] Counter-Memorial ¶ 251.

[148] Schiau II ¶ 288, n.416 (noting that "indeed the law does not impose any such condition"). *See also* Gligor II ¶¶ 97-99.

[149] Schiau II ¶ 288, n.416; Gligor ¶ 125; Letter No. 536 from the Ministry of Culture to the Department for Infrastructure Projects and Foreign Investments dated Mar. 18, 2013 (Exh. C-1360) at 2. In the penultimate paragraph of the letter, the Ministry of Culture explained that "there was approved the project for the preventive archaeological research that conditions the issuance of an endorsement or of an archaeological discharge certificate by the completion of this preventive research and by the presentation of the final report within the National Archaeological Commission." *Id.* As Professor Schiau explains, that reference was not to the Ministry of Culture's endorsement of the Environmental Permit, but rather to the NAC's mandatory endorsement of any future decision to discharge Orlea. Schiau II ¶ 288, n.416. Indeed, the Orlea research project (Exh. R-221) does not mention the Ministry of Culture's endorsement of the Environmental Permit, let alone set any conditions for its issuance, and the Ministry of Culture issued that endorsement even though

70. Four days later, the Ministry of Culture's representatives confirmed again during the Inter-Ministerial Commission meeting on March 22, 2013 that there was "no impediment in issuing the endorsement" and that they were merely "waiting for a written request" from the Ministry of Environment.[150] When the Ministry of Environment noted that it had "already submitted a written request" in 2011-2012, the Ministry of Culture representatives did not raise either of the reasons now asserted by Respondent in this arbitration as a reason for not responding to the Ministry of Environment and confirming the Ministry of Culture's endorsement, but instead stated, "*You submitted a request under another government, other state secretaries in office and you received different answers. In short, if you ask for it now, you will receive it*."[151]

71. Moreover, in response to Claimants' document request for "the Ministry of Culture's response, if any, to the Ministry of Environment's requests in December 2011 and March 2012 for the Ministry of Culture to clarify that its December 7, 2011 'point of view' letter was its 'endorsement' to issue the Environmental Permit," Respondent confirmed there are no such documents.[152] Similarly, the Tribunal ordered Respondent to produce all documents reflecting "the Ministry of Culture's reasons for failing to finalize" either of the draft documents that were labeled "endorsements" in 2011-2012.[153] Respondent again produced nothing.[154] It

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preventive archaeological research for Orlea was not authorized, much less conducted or presented to the NAC in a final report. Gligor II ¶¶ 93-99, 101.

[150] Memorial ¶ 417; Tănase III ¶ 74.a; Gligor II ¶ 99; Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 6 (Ministry of Culture Director of Patrimony Mircea Angelescu).

[151] Memorial ¶ 417; Tănase III ¶ 74.a; Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 7 (Ministry of Culture Director of Patrimony Mircea Angelescu) (emphasis added).

[152] Procedural Order No. 10, Annex A, Request No. 8(i) (Tribunal taking note of "Respondent's statement that it does not have any responsive documents in its possession, custody or control").

[153] Procedural Order No. 10, Annex A, Request No. 8(iii). Ministry of Culture representatives signed two draft "endorsements" in January and February 2012 that were not finalized and stated publicly that there were no technical objections and they were quite willing to relabel the December 7, 2011 letter an "endorsement," if needed, but Minister Kelemen Hunor blocked them from doing so. Memorial ¶¶ 383-385; [redacted] . *See also, e.g.*, Judeca Tu!, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 11 (Ministry of Culture State Secretary Vasile Timiş stating, "We issued some points of view and we discussed with our colleagues from the Environment. There is also a documentation prepared by me and by the colleagues from Heritage and it provides certain condition[s] and also what the colleagues from Gold [RMGC] should do and, obviously, afterward, also the other competent institutions; it is submitted to the office of the minister and we hope you will have a decision as soon as possible," and adding that "it is about a political decision"); *Green light for Roşia Montană, on the last hundred miles*, Evz.ro, dated Apr. 12, 2012 (Exh. C-436) ("Sources from the Ministry of Culture have explained, for EVZ, that the situation was blocked because of this endorsement:

therefore is clear that the Ministry of Culture refused to confirm its endorsement in 2011-2012 for political reasons to block the Project, not for the reasons invented by Respondent for this arbitration.[155]

72. As noted above, Respondent raises three additional alleged unfulfilled requirements that prevented issuance of the Environmental Permit, namely the purported need for: (i) approval of the amended PUZ, (ii) approval of the amended Waste Management Plan, and (iii) a declaration of "outstanding public interest."[156]

73. As [redacted] explain, until Mr. Korodi resurfaced for a four-week stint as Minister of Environment in April-May 2012 during which time he again sought to shut down the EIA process on the same unlawful grounds he used to suspend it from 2007-2010,[157] none of the issues now raised by Respondent was raised contemporaneously as an impediment to issuing the Environmental Permit.[158]

74. On the contrary, from December 2011 to April 2012 Minister of Environment Borbély and TAC President Anton made no fewer than five public statements that the only hold-up to taking a decision on the Environmental Permit was the Ministry of Culture confirming that its written point of view was also its endorsement.[159] Thus, Minister Borbély stated publicly in December 2011 that permitting was "in a final stage," that the Environmental Permit might be granted "*by the end of January*" 2012, that the Ministry of Environment was "still expecting an answer from the Ministry of Culture," and that "*[w]e can have a verdict at the end of January*"

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'We have sent a point of view to the Ministry of Environment, and they asked for clarifications. In the coming period we will issue a new endorsement.'").

[154] Letter from Respondent to Claimants dated June 22, 2018 (Exh. C-2216). As discussed above, none of the documents relied upon by Respondent justify the Ministry of Culture's failure to confirm its endorsement in 2011-2012.

[155] [redacted] *See also* Mihai II ¶¶ 264-269.

[156] Counter-Memorial ¶¶ 254-257.

[157] Memorial ¶¶ 255-272; Mihai ¶¶ 307-338; Mihai II ¶¶ 171-178. *See also* [redacted] (describing unlawful withholding of Dam Safety Permits on same pretextual basis).

[158] [redacted]

[159] Tănase III ¶¶ 57.a, 56.c-f (quoting public statements of Minister of Environment Borbély on December 18 and December 27, 2011 and of TAC President Anton on February 23, March 8, and April 12, 2012).

2012.[160] TAC President Anton likewise made multiple public statements that the Ministry of Environment was "waiting now for an opinion from the Ministry of Culture," that "depending on it the environmental permit will be issued or not," and that he believed "the environmental permit will be issued" within "[a] month or two."[161]

75. Respondent's attempts to come up with additional alleged impediments to taking a decision on the Environmental Permit also lack any legal or factual basis.[162]

76. First, with respect to the alleged need for a declaration of "outstanding public interest," at the Ministry of Environment and ANAR's request, on November 30, 2011 – the day after the November 29 TAC meeting – RMGC submitted the Alba County Council's declaration of "outstanding public interest," which satisfied the Romanian law requirements relating to the Water Framework Directive.[163]

77. Respondent wrongly contends RMGC's compliance "was still at issue" and that neither the TAC nor the Ministry of Environment had notified RMGC that the Alba County Council declaration "would suffice."[164] In July 2011, the Ministry of Environment and ANAR

[160] Tănase III ¶¶ 57.a, 57.c; Interview of László Borbély, ProTV, dated Dec. 18, 2011 (Exh. C-633) at 1-2 (Minister of Environment László Borbély); Interview of László Borbély, TVR, dated Dec. 27, 2011 (Exh. C-637) at 3 (Minister of Environment László Borbély) (emphasis added).

[161] Tănase III ¶ 57.e; *Marin Anton: [T]he environmental permit will be issued ... [in] a month or two*, Incisive TV Show, dated Mar. 8, 2012 (Exh. C-778) at 5 (TAC President Marin Anton). *See also* Tănase III ¶¶ 57.d, 57.f; Judeca Tu!, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 9-10 (TAC President Marin Anton stating that "[a]ll the required chapters for receiving the environmental permit were analyzed," "we have covered all chapters," and "[w]e are now studying the answers of the TAC members and we are waiting for a response from the Ministry of Culture," and further noting that the EIA review process "is in the final stage" and would conclude in "a few months"); *Green light for Roşia Montană, on the last hundred miles*, Evz.ro, dated Apr. 12, 2012 (Exh. C-436) at 1 (TAC President Marin Anton: "We cannot make a decision yet, because we are waiting for an endorsement from the Ministry of Culture. We have analyzed the papers and after the document arrives we will be able to make a decision.").

[162] Mihai II ¶¶ 179-215, 270-295; [redacted].

[163] Memorial ¶¶ 353, 365, 417; Avram II ¶¶ 40-50; Tănase III ¶¶ 52.a, 55-56; Mihai II ¶¶ 274-295. Respondent wrongly contends that the law required "a declaration of 'overriding public interest' ('*interes public superior*')," that "the Alba County Council's declaration referred to 'special public interest' ('*interes public deosebit*')," and that Claimants "inaccurately translated these terms as 'outstanding public interest.'" Counter-Memorial n. 469. Romania transposed the Water Framework Directive through Waters Law No. 107/1996, which requires a declaration of "outstanding public interest" ("*interes public deosebit*"), the same term used in the Alba County Council declaration. Mihai II ¶¶ 275.b, 277, 279, 286-295.

[164] Counter-Memorial ¶ 257.

requested RMGC to obtain the "outstanding public interest" declaration either from the three local councils or from the Alba County Council; RMGC did as requested and obtained the requested declaration from the Alba County Council.[165] During the November 29, 2011 TAC meeting, Ms. Mocanu voiced no objection to RMGC having done so, but noted it "must be written down," and TAC President Anton accordingly instructed RMGC to "complete" its answer by providing "the Decision of the County Council."[166] Later in the meeting, Ms. Mocanu again took note of RMGC's answer that it had satisfied the applicable requirements and reiterated, "With the amendment that you'll have to submit the Decision of the County Council which you did not submit."[167]

78. Following the TAC meeting, TAC President Anton stated publicly that the Alba County Council declaration was sufficient.[168] During the Inter-Ministerial Commission meeting on March 22, 2013, the Ministry of Environment also confirmed that it previously agreed with either a decision of the County Council or even the Local Council.[169] The Inter-Ministerial Commission President, who as noted is a judge on Romania's Constitutional Court, also agreed that the County Council decision was sufficient, and rejected the suggestion that more was needed.[170] The TAC President and the Ministry of Environment's external legal counsel (now Respondent's arbitration counsel) also both accepted that a further declaration of outstanding

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[165] Memorial ¶¶ 353. Ms. Mocanu's recollection that the meeting on July 18, 2011 related to biodiversity and Piatra Despicată is not correct. [redacted]; *cf.* Mocanu ¶ 59.

[166] Avram II ¶¶ 43-44; Tănase III ¶ 54; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 24-25.

[167] Avram II ¶ 45; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 38-39. Prior to the TAC meeting, RMGC submitted a copy of the Alba County Council decision to Ms. Mocanu in late October 2011 and she did not object to RMGC's approach then either. [redacted]

[168] Avram II ¶ 48; Tănase III ¶ 56; *Marin Anton: [T]he environmental permit will be issued ... [in] a month or two*, Incisive TV Show, dated Mar. 8, 2012 (Exh. C-778) at 6 (TAC President Anton responding to an interview question asking whether, "for diverting this river, the approval from the county council is sufficient," and answering, "In my opinion, yes, it's sufficient, because it is a work of local importance.").

[169] Tănase III ¶ 74.b; Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 10 (Ministry of Environment representative Gheorghe Constantin confirming that "in the previous discussions we agreed with . . . the Decision of the County Council, the Decision of the Local Council").

[170] Memorial ¶ 417; Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 4-5 (Inter-Ministerial Commission President Maya Teodoroiu stating, "I cannot see the legal ground based on which we should change . . . the issues that were finalized or agreed in 2011, when you had that Decision not of the Local Council, actually of the County Council, whereby the project was declared a project of outstanding public interest," and adding that the interest "may be outstanding at the local level").

public interest was not required.[171] The Inter-Ministerial Commission therefore determined that the Alba County Council's decision established that the Project was of "outstanding public interest,"[172] and the Ministry of Environment subsequently acknowledged that the Project met the applicable legal requirements.[173]

79. Second, with respect to the alleged need for approval of an amended PUZ, as Professor Mihai and Professor Podaru demonstrate, approval of town planning documentation is not required for the Environmental Permit and, as such, the lack of approval of an amended PUZ corresponding to the Project industrial area could not lawfully delay the EIA procedure or the issuance of the Permit.[174]

80. Seeking to raise the specter of an issue, Respondent contends that "[t]he representatives of the Ministry of Environment stressed to RMGC" at the November 29, 2011 TAC meeting "that the environmental permit could not be issued unless and until it secured the approval of its PUZ" for the industrial area.[175] This contention is completely misleading and wrong. While one of the Ministry of Environment representatives suggested the PUZ would need to be approved before the Permit was issued, following further discussion TAC President Anton, a State Secretary within the Ministry of Environment, confirmed that the PUZ approval process "is not related to the environment procedure" and that "they are two different

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171 [redacted] Summary of meeting with Ministry of Environment's legal counsel dated Mar. 25, 2013 (Exh. C-2246) (TAC President Elena Dumitru stating "[n]o one said it would be an impediment," and Crenguţa Leaua, external legal counsel, confirming that "[n]othing in this conversation has the potential to generate an impairment in the TAC," that "the Government would deem it useful to clarify this matter and classify the project of overriding public interest" and seeking clarification of whether RMGC would "be against it").

172 Memorial ¶ 417; Tănase III ¶ 74.b; Avram II ¶ 53; Final Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project dated Mar. 26, 2013 (Exh. C-2162) at 6 ("In our opinion, *de lege lata*, there is no legal ground for a need to pass a special amendment with a view to classifying the Roşia Montană Project in the category of works of outstanding public interest, and the decision of the Alba County Council is sufficient.").

173 Avram II ¶ 53; Ministry of Environment Draft Decision concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 3 ("The mining Project observes the provisions of the Waters Law no. 107/1996 and the Waters Framework Directive (Directive 2000/60/EC)").

174 Mihai II ¶¶ 179-215; Podaru § II.B.3. RMGC was well positioned to obtain approval of the PUZ and the associated surface rights for the phased construction of the Project following issuance of the Environmental Permit. *See infra* § XIII.A.2; Lorincz II ¶¶ 121-141 (discussing surface rights acquisition).

175 Counter-Memorial ¶ 229.

procedures."[176] Ms. Mocanu and a representative of the Ministry of Development also agreed that the Environmental Permit may be issued without an approved PUZ, and merely noted the risk that if there were significant amendments to the PUZ prior to its approval, the environmental impact may have to be reassessed.[177] The Government thereafter repeatedly confirmed that approval of amended town planning documentation was not required for issuance of the Environmental Permit.[178]

81. Third, with respect to the alleged need for approval of an amended Waste Management Plan, contrary to Respondent's assertion,[179] Romanian law does not require approval of the Waste Management Plan for issuance of the Environmental Permit,[180] and, in any event, RMGC submitted an updated Waste Management Plan in December 2011.[181] RMGC reasonably expected the approval process would be relatively brief and straightforward because, as Mr. Avram states, the Plan consisted almost entirely of information that had been submitted previously in the EIA procedure and thus already had been thoroughly analyzed and accepted by the TAC members, including by NAMR and the Ministry of Environment.[182]

82. Although NAMR twice endorsed the updated Waste Management Plan, the Ministry of Environment twice refused to approve the Plan in 2012,

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[176] Tănase III ¶ 56; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 42 (TAC President Anton).

[177] Tănase III ¶ 56, n.184; Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 42-43.

[178] Avram II ¶ 53; Tănase III ¶¶ 74.c, 80, n.251; Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 17-22 (Ministry of Development representative Anca Ginavar describing "the risk of having to reconfirm the environmental permit, at least in theory," if the PUZ were subsequently amended, Inter-Ministerial Commission President Maya Teodoroiu observing that "the Ministry of Development tried to draw our attention not on . . . any violation of the law, but on some risks," and Ms. Ginavar confirming again "on some risks"); Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project dated Mar. 26, 2013 (Exh. C-2162) at 7; Ministry of Environment Draft Decision concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 2.

[179] Counter-Memorial ¶ 227.

[180] Mihai II ¶ 271. *See also* Mihai ¶¶ 390-395; Avram II ¶ 57 (noting that approval of the Waste Management Plan was not mentioned by TAC President Anton at the November 29, 2011 TAC meeting as one of the open items that needed to be addressed prior to taking a decision on the Environmental Permit).

[181] Avram II ¶ 58.

[182] Avram II ¶¶ 56-57; Mihai II ¶ 271.

[183] In 2013, following discussions in the Inter-Ministerial Commission, NAMR and the Ministry of Environment both approved a Waste Management Plan, which did not materially differ from the Plan previously discussed during the EIA and as submitted in December 2011.[184] Thus, approval of the Waste Management Plan was not a legitimate impediment to issuing the Environmental Permit, but instead was held up for the same reason that the Permit itself was not issued in 2012, namely the Government politically blocked the Project from proceeding. Respondent obviously cannot have improperly blocked and delayed a formal approval for political reasons and then rely on the lack of such an approval in defense.

83. Finally, Respondent contends the Ministry of Environment "was hardly in any position" to take its decision in January 2012 because it purportedly had not begun discussing or drafting the specific conditions and measures to include in the Environmental Permit.[185]

84. As Professor Mihai explains, the EIA Rules of Procedure require the TAC members to issue their points of view and for the Ministry of Environment to take a decision in consultation with the TAC on whether to issue the Environmental Permit and what conditions and measures to include therein.[186] There is no legal requirement for the TAC members to have met and discussed in detail the conditions and measures to include in the Environmental Permit.[187]

85. Moreover, the Ministry of Environment's assessment of the Environmental Permit conditions and measures in 2013 shows this process could and should have been completed expeditiously following the November 29, 2011 TAC meeting had Respondent not been intent on politically blocking completion of the environmental permitting process. Within less than

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[183] Memorial ¶ 392;

[184] Memorial ¶¶ 427-428; Avram II ¶¶ 60; Mihai II ¶ 272.

[185] Counter-Memorial ¶ 258. *See also id.* ¶ 228.

[186] Mihai ¶¶ 127, 133, 138; Mihai II ¶ 311.

[187] Mihai ¶¶ 371-374; Mihai II ¶ 311.

five weeks from June 10 to July 11, 2013, the Ministry of Environment requested the TAC members to propose conditions and measures to include in the Environmental Permit; the TAC members submitted their proposals; and the Ministry of Environment assessed those proposals and published a draft Environmental Permit.[188]

86. The Ministry of Environment had ample time and was well positioned to complete this process by January 31, 2012. As discussed above, the Ministry of Culture proposed conditions and measures to include in the Environmental Permit,[189] and other TAC members based on contemporaneous evidence also submitted written points of view (which Respondent has not submitted in the arbitration).[190] Further reflecting their contemporaneous ability and readiness to prepare conditions for and recommend issuance of the Environmental Permit, the Ministry of Environment and other TAC members made no fewer than 10 statements at the November 29, 2011 TAC meeting about drafting the conditions to include in the Environmental Permit.[191] While Ms. Mocanu now seeks to excuse the clear import of her words by claiming she was "joking" when she made one such comment,[192] she does not explain the meaning of her alleged joke (which is not apparent in context), [redacted] confirm that no one laughed in response to what she said, and Ms. Mocanu does not acknowledge or explain the numerous other statements made by her and other TAC members during the November 29 TAC meeting about drafting the Environmental Permit conditions.[193]

87. For these reasons, there was no impediment to the Ministry of Environment taking its decision to issue the Environmental Permit by January 31, 2012 and its failure to do so was a willful and unlawful abuse of power.

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[188] Memorial ¶¶ 432-437; [redacted].

[189] Memorial ¶¶ 370-374; Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446) at 2-4.

[190] [redacted]

[191] [redacted]

[192] Mocanu ¶ 69.

[193] [redacted]

### B. RMGC Met the Requirements to Obtain the Environmental Permit Following the July 26, 2013 TAC Reconciliation Meeting

88. As discussed above, the Ministry of Environment was legally obligated to take a decision to issue the Environmental Permit by January 31, 2012 and its failure to do so was unlawful.[194] Because none of the technical aspects of the Project changed after the events described above and all open issues identified by the TAC President were promptly addressed, the failure to do anything between November 2011 and May 2013 (when the first TAC meeting was convened since November 2011) was a *de facto* suspension of the EIA procedure and also was unlawful.[195]

89. When the TAC reconvened in May 2013, it merely re-confirmed that the requirements for the Environmental Permit were met and that the Ministry of Environment was prepared to recommend issuance of the Permit.

90. The Ministry of Environment thus reconfirmed that its technical assessment was complete, consulted the TAC members about the conditions and measures to include in the Environmental Permit, rejected the dissenting views of the Romanian Academy and Geological Institute, and published for public comment a draft Environmental Permit.[196] As summarized below, the contemporaneous evidence submitted with the Memorial and produced by Respondent in document production shows beyond peradventure that, after holding a final TAC conciliation meeting on July 26, 2013, the Ministry was legally obligated to take its decision and did not even have a legal pretense for its abusive failure to do so:

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[194] *See supra* § III.A.

[195] Memorial ¶ 390. *See also* Mihai ¶¶ 295-306, 371-374; Mihai II ¶¶ 258-260, 262-295. Respondent denies that the EIA procedure was *de facto* suspended from November 2011 to May 2013 and claims that "the absence of TAC meetings during that time was hardly surprising." Counter-Memorial ¶ 308. The purported justifications now raised by Respondent concerning the Ministry of Culture endorsement, approval of the amended PUZ, and pending court proceedings relating to the town planning documentation and the Cârnic ADC, were not raised contemporaneously, were considered and rejected by the Inter-Ministerial Commission, and/or were otherwise meritless for the reasons addressed above in responding to Respondent's baseless arguments regarding the Ministry of Environment's failure to take its decision on the Environmental Permit in 2012. *See supra* § III.A; Mihai II ¶ 197; Final Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project dated Mar. 26, 2013 (Exh. C-2162) at 3, 9.

[196] Memorial ¶¶ 425-438.

a. While not necessary for the Environmental Permit, in March 2013 NAMR issued a long overdue verification and approval of the resource and reserve calculations for the Project.[197]

b. In April 2013, as discussed above, the Ministry of Culture reissued its endorsement of the Environmental Permit (relabeled "endorsement").[198]

c. At the TAC meeting on May 10, 2013, the Ministry of Environment approved RMGC's Waste Management Plan.[199]

d. Also during the May 10, 2013 TAC meeting, the TAC Vice President (and acting TAC President) reconfirmed that the TAC members had completed the analysis of the EIA Report and determined it complied with the applicable requirements at the last TAC meeting on November 29, 2011,[200] and he closed the May 10

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[197] Memorial ¶¶ 419-424; [redacted]; NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roşia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C).

[198] *See supra* § III.A; Memorial ¶ 417; Letter No. 750 from Ministry of Culture to Ministry of Environment dated Apr. 10, 2013 (Exh. C-644).

[199] Memorial ¶¶ 427-428; Avram II ¶¶ 60-61; Tănase III ¶ 153; Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 3-4, 9 (Ministry of Environment Head of Waste and Hazardous Substances Management Department Ana Nistorescu stating that the Waste Management Plan "complies with all the requirements and standards" and "the best available techniques" set out in the EU Mining Waste Directive, and that "implementation of the plan will prevent and minimize the impact on all the environmental factors and on public health, and consequently, would ensure, on the medium and long term, the safe removal of wastes generated by the operations carried out in the Roşia Montană mining perimeter"). *See also* Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 4-20 (Ministry of Environment Waste and Hazardous Substances Management department representative Mihai Bizomescu stating that the TAC meeting "clarified the last issues that could have been discussed with respect to the Waste Management Plan").

[200] Memorial ¶ 426; Avram II ¶ 33; Tănase III ¶ 71; Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 3-4, 9 (acting TAC President Octavian Pătraşcu "remind[ing] the Technical Assessment Committee that the last meeting took place on November 29, 2011, and the conclusion of the representative was that the Environmental Impact Assessment Report complies with the requirements from a technical point of view," and repeating later in the meeting that in November 2011 the TAC "analyzed the last chapters of the EIA Report" and, "as I told you from the start, the [TAC] concluded that, from a technical point of view, the EIA Report complies with the substantial and structural requirements").

meeting by further confirming that the few issues purportedly requiring clarification had been "analyzed point by point" and had been addressed.[201]

e. At the next TAC meeting on May 31, 2013, the acting TAC President confirmed again that the TAC had analyzed "each and every point from . . . all the chapters in the Environmental Impact Assessment Report" and therefore had achieved its "objectives," that the technical assessment of the EIA Report was "completed," and that the quality of the EIA Report was "not in question here."[202]

f. In June 2013, the Ministry of Environment requested each TAC member to "present the conditions, measures and monitoring indicators" from its area of competence to "be included in the final decision and in the environmental permit."[203] The TAC members submitted written responses to this request and a TAC meeting was held on June 14, 2013 to discuss these proposals.[204]

g. Having considered the points of view and recommendations of the TAC members, on July 11, 2013 the Ministry of Environment published for public comment the "conditions and measures which need to be included in the Environmental Permit for Roşia Montană Project."[205] The Ministry of Environment did not include, and

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[201] Memorial ¶ 429; Avram ¶ 133; Avram II ¶ 64; Tănase III ¶¶ 159-163; Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 22 (acting TAC President Octavian Pătraşcu).

[202] Memorial ¶¶ 430-431; Avram II ¶ 64; Tănase III ¶ 164; Transcript of TAC meeting dated May 10, 2013 (Exh. C-485) at 18-19 (acting TAC President Octavian Pătraşcu). As Mr. Avram further observes, during the May 31, 2013 TAC meeting numerous TAC members, including representatives of the Ministry of Environment, Ministry of Culture, NAMR, the Department for Infrastructure Projects and Foreign Investments, and the Ministry of Internal Affairs, expressed their satisfaction with the answers provided by RMGC and with the quality of the EIA Report. Avram II ¶ 65.i-v (listing statements in bullet points).

[203] Memorial ¶ 432; Avram ¶ 138; Avram II ¶ 66; Tănase III ¶ 165; Letter No. 22149 from Ministry of Environment to TAC members dated June 10, 2013 (Exh. C-554).

[204] Memorial ¶¶ 432-435; Avram II ¶ 66.

[205] Memorial ¶¶ 436-437; Avram II ¶ 67; Tănase III ¶¶ 165-168; Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555).

thus rejected, the Geological Institute's proposals.[206] The Romanian Academy did not submit any proposals.[207]

h. In support of its publication of the draft Environmental Permit, the Ministry of Environment also prepared a draft Decision, which Respondent produced in document production. The draft Decision "ACCEPTS" the EIA Report submitted by RMGC "and *PROPOSES the issuance by the Government of Romania of the environmental permit*."[208] The draft Decision also includes the proposed Permit conditions and measures published by the Ministry of Environment for public comment and lists numerous "[r]easons substantiating taking of the decision."[209]

i. In view of objections raised by the Romanian Academy and the Geological Institute and pursuant to established procedures, the Ministry of Environment convened a TAC conciliation meeting on July 26, 2013 to allow them to reconsider their views.[210] The Romanian Academy did not even attend the meeting, and the unsupported, minority views of the Academy and the Geological Institute were rejected.[211] Following discussion, the acting TAC President thus concluded once again "that *the analysis on the quality and conclusions of the EIA*

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[206] Memorial ¶ 436; [redacted]. The Geological Institute's proposals included conducting "a complex geological study for the entire area" of the TMF site at the Corna Valley, which the Ministry of Environment rejected. [redacted] Parliament later recommended that this same discredited and rejected proposal be pursued, which the Ministry of Environment purported to pursue during TAC meetings in 2014-2015 but in fact abandoned while lying to RMGC about the reasons for not conducting the study. *See infra* § V.A; [redacted].

[207] Avram II ¶ 67, n. 179 (noting that the Romanian Academy did not propose any measures or conditions to include in the Environmental Permit, but instead first requested an extension of 5 working days to submit its proposals and then simply reiterated its opposition to the Project).

[208] Avram II ¶ 69; Tănase III ¶ 170; Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 2 (emphasis added).

[209] Avram II ¶ 70.i-x; Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 2-4 (stating reasons justifying decision); *id.* at 5-44 (listing conditions and measures to include in the Environmental Permit).

[210] Memorial ¶¶ 438-445.

[211] Memorial ¶¶ 439-444; [redacted].

*Report has been finalized* during all these TAC meeting[s] this year," and he confirmed that a "final decision" "must be adopted for this mining project."[212]

91. As described in the Memorial and in Professor Mihai's expert legal opinions, having held this TAC conciliation meeting on July 26, 2013 and having reconfirmed that its technical assessment was complete, the Ministry of Environment was legally obligated to take its decision on the Environmental Permit within 10 working days, i.e. by August 12, 2013.[213]

92. Ignoring the events described above and repeating its baseless arguments that the Ministry of Environment could not take a decision to issue the Environmental Permit in 2012, Respondent asserts that the Ministry of Environment *still* was not in a position to take its decision and allegedly "was far from issuance of an environmental permit in July 2013."[214]

93. Before addressing the contrived grounds Respondent now proffers in support of that assertion, it bears repeating that Respondent failed to produce any documents showing contemporaneous identification of or discussion about any alleged impediments to the Ministry of Environment's taking its decision after the July 26, 2013 meeting to recommend issuance of the Environmental Permit, which further confirms there were none.[215]

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[212] Memorial ¶ 445; Avram ¶¶ 147-148; Avram II ¶ 68; Tănase II ¶ 176, n.234; Tănase III ¶ 169, n.455; Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 15 (acting TAC President Octavian Pătraşcu also notifying the TAC members "that you will be informed in due time about the meeting for the taking of the decision and then, according to the regulatory procedure, all the TAC members must be present and have mandates.") (emphasis added).

[213] Memorial ¶ 446; Mihai ¶¶ 396-397; Mihai II ¶¶ 215, 303.

[214] Counter-Memorial ¶¶ 327-331.

[215] *See supra* § III.A; Procedural Order No. 10, Annex A, Request No. 3.

[216] Ms. Mocanu, who is a witness for Respondent in this arbitration, does not deny making this statement to RMGC. Nor does she deny that the EIA procedure was complete and the Ministry of Environment was simply waiting for authorization from the Government to make its recommendation. Nor could she credibly make such a denial in view of the evidence set forth above. Indeed, contrary to Respondent's trumped up assertion that the Ministry "was far from" doing so, the draft Decision produced by Respondent over its objections and at the order of the Tribunal demonstrates that the Ministry of Environment was ready to take its decision recommending issuance of the Environmental Permit.[217]

95. Respondent's purported justifications for the Ministry of Environment's failure to take its decision were not raised contemporaneously and are neither tethered to, nor constrained by, fact or law.[218]

96. First, Respondent asserts that "RMGC and the Government had agreed months before to prepare and submit to Parliament a special law and agreement for the Project" and "had been working together to that end."[219] This is false.

97. As discussed further below and more fully in , RMGC and Gabriel did not need or request a "special law" for the Project, but the Government did not give them an alternative path forward.[220] As further state and as the contemporaneous record confirms, RMGC did not agree with the Government's conditioning the Environmental Permit on Parliament's approval of the Draft Law, but instead urged the Government to issue the Environmental Permit by a Government

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[216] ; Memorial ¶ 437.

[217] ; Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075). *See also* Procedural Order No. 10, Annex A, Request No. 1 (ordering Respondent to produce all such draft decisions over Respondent's objections); Mihai II ¶ 319 (concluding that "all the legal conditions were met for the Ministry of Environment to take its decision on the Environmental Permit immediately after the 26 July 2013 TAC meeting," and that "the contents of the Draft EP, and its publication, are proof in support of my view").

[218] Mihai II § VI.B; .

[219] Counter-Memorial ¶ 328.

[220] *See infra* § IV.B; .

Decision in accordance with the applicable legal procedures before submitting any general legislative amendments to Parliament.[221] The Government disregarded RMGC's requests and refused to issue the Environmental Permit without Parliamentary approval of the Draft Law,[222] which was an unlawful abuse of power that allowed undue political inference in the EIA procedure and "ultimately negated the EIA Process entirely."[223]

98. Second, Respondent wrongly contends that "[a] number of issues were pending," namely the purported need for approval of the amended PUZ and pending court challenges to the SEA Endorsement, the Urbanism Certificate, and the Cârnic ADC, that had to be resolved before the Ministry of Environment could recommend issuance of the Environmental Permit.[224] These issues were not raised contemporaneously, were considered and rejected by the Inter-Ministerial Commission before the EIA procedure resumed in May 2013, and lack any legal or factual basis for the reasons discussed above in response to Respondent's meritless *post hoc* explanations for the Ministry of Environment's failure to take its decision in January 2012.[225]

99. Moreover, here again Respondent gets caught in its own tangled web of fabricated arguments. Respondent simultaneously argues that these alleged open issues (all but one of which remained open from Respondent's perspective as of May 2013) both justified the Ministry of Environment's not calling a TAC meeting between November 2011 and May 2013 and prevented the Ministry of Environment from deciding to recommend issuance of the Environmental Permit following the July 2013 TAC meeting.[226] The very fact that the TAC met in 2013 when these purported hurdles remained shows that they were neither an impediment to the TAC meeting nor to the Ministry of Environment acting on the Environmental Permit.

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[221] *See infra* § IV.B; [redacted].

[222] *See infra* § IV.B; [redacted].

[223] Mihai II ¶¶ 320-325. *See also* Mihai ¶¶ 272-291.

[224] Counter-Memorial ¶ 330.

[225] *See supra* § III.A; Final Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project dated Mar. 26, 2013 (Exh. C-2162) at 3. *See also* Mihai II §§ V, VI; Podaru § II.B; Schiau II § VI.A.2 .

[226] Counter-Memorial ¶¶ 308, 330.

100. Third, Respondent asserts that "RMGC still needed to provide clarifications to the Ministry of Agriculture and to the National Water Agency."[227] This assertion also is wrong.[228] As [redacted] explains, Respondent refers to a June 2013 letter from the Negotiation Commission and thus improperly conflates the Government's unlawful demand to negotiate an increase in its financial stake with the administrative EIA review process.[229] As [redacted] discusses more fully, not only was that June 2013 letter sent outside the context of the EIA procedure, but the clarifications were in fact provided and the responsible Ministries, including both the Ministry of Agriculture and the Ministry of Environment, as well as the Government more broadly, accepted RMGC's approach to the issues raised in that letter.[230]

101. Fourth, Respondent asserts that although the TAC members had provided points of view on the conditions and measures to include in the Environmental Permit, "the TAC had not yet discussed in detail the specific and mandatory conditions and mitigation measures" and "would then need to reach a consensus regarding the conditions to be attached to the environmental permit, in order to issue a favorable recommendation to the Ministry of Environment."[231]

102. Respondent does not provide any support for these bald assertions, which are wrong as a matter of Romanian law.[232] As Professor Mihai explains, under the applicable EIA Rules of Procedure, there was no legal requirement for the Ministry of Environment to meet and discuss in detail the conditions and measures proposed to be included in the Environmental Permit.[233]

[227] Counter-Memorial ¶ 330.

[228] [redacted]

[229] [redacted]

[230] [redacted]

[231] Counter-Memorial ¶ 329.

[232] Mihai II ¶¶ 305-311. *See also* Mihai ¶¶ 377, 397.

[233] Mihai II ¶¶ 309-311.

103. Nor, contrary to Respondent's assertions, was there any requirement for the TAC members to reach "consensus," which Respondent equates with unanimity.[234] On the contrary, the EIA Rules of Procedure contemplate and allow for the possibility of "discordant" views among TAC members,[235] and the Ministry of Environment acknowledged prior to resuming the EIA procedure for the Project in 2010 that TAC members "can have dissenting opinions that will be recorded."[236] Moreover and in any event, as Professor Mihai confirms, the laws regulating the EIA procedure made clear that "the Ministry of Environment alone takes the decision on the [Environmental Permit],"[237] while the TAC "is merely a consultative committee, without legal personality, that takes no decisions, and only offers an organized venue for its members to offer their opinions to the Ministry of Environment."[238]

104. For these reasons, while the Ministry of Environment had to obtain and consider the views of the TAC members, those views were only consultative, not binding on the Ministry, and did not need to be unanimous.[239] In both its draft Environmental Permit and its draft Decision, the Ministry of Environment confirmed that it discharged its obligation to consult the TAC members and obtain and record their points of views in preparation to take its decision.[240]

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[234] Mihai II ¶ 312 (explaining that "any reference to 'consensus' (which existed briefly in inferior legislation but never in the EIA Rules of Procedure or superior enactments and was, therefore, inapplicable) was removed by Order 405/2010, which applied to the EIA Process"). *See also* Mihai ¶¶ 93-94, 382.

[235] Mihai II ¶ 313 (quoting Article 30 paragraph (3) of the EIA Rules of Procedure approved by Order 860/2002 which provides, "Where the conclusion of the authorities involved in the technical assessment committee as regards the possibility of the project to be developed are discordant, the competent environmental protection public authority [Ministry of Environment], before issuing the final decision, invites the interested parties to a meeting for the reconsideration of their opinion").

[236] Minutes of the TAC meeting dated June 23, 2010 (Exh. C-565) at 2.

[237] Mihai ¶ 135 (emphasis in original); *see also id.* ¶ 136. *See also* Mihai II ¶ 261 ("The law clearly provides that the EIA Procedure is conducted by the Ministry of Environment directly, which must however consult with the members of the TAC in its review of the EIA Report and in taking its decision, the opinions of the TAC members being, however, consultative, not mandatory.") (emphasis in original); *id.* ¶¶ 312-315.

[238] Mihai II ¶ 275.a.

[239] Memorial ¶¶ 190-195; Mihai II ¶¶ 313-315.

[240] Mihai II ¶¶ 306-307. *See also* Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555) at 1 (stating that the Ministry of Environment elaborated the proposed measures and conditions in the Environmental Permit, among other things, "further to consulting and writing down the opinions of the Technical Assessment Committee (TAC)"); *id.* at 2 (providing that the Ministry of Environment considered the "opinions, observations and points of view expressed by TAC members during the Technical Assessment Committee meetings held for Roşia Montană mining project from May 2006 to June 2013," and "the points of

105. Thus, in light of the EIA Rules of Procedure, Respondent's discussion of the dissenting views of the Romanian Academy and the Geological Institute and its observation that neither institution "changed its position" after the TAC conciliation meeting on July 26, 2013 are misguided and irrelevant.[241] The Ministry of Environment was legally obligated to take its decision within 10 days of that meeting even if the attempted conciliation did not succeed.[242] The Romanian Academy accordingly did not even attend the conciliation meeting, but instead acknowledged in a letter to the Ministry of Environment that its "*consultative role established by law was fulfilled and our presence at the TAC meeting . . . is no longer justified, the role and responsibility for making the decisions being with the competent persons*."[243]

106. Respondent therefore has it backwards: the issue is not whether the two dissenting TAC members changed their views, but rather whether they convinced the Ministry of Environment or the Ministry of Culture to do so. This did not happen. The Ministry of Culture observed that the Romanian Academy's observations were "delusional,"[244] and the acting TAC President criticized the Geological Institute for failing to provide any support for its objections when it previously endorsed the issuance of the Environmental Permit in December 2011 based on analyses and verifications it made on site.[245]

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view, measures and conditioned transmitted to MECC [the Ministry of Environment], as well as the final conclusions of the regulat[ory] institutions represented within TAC as follows: National Agency for Mineral Resources, Ministry of Regional Development and Public Administration, Ministry of Agriculture and Rural Development, Ministry of Culture, Ministry of Health, Ministry of Transportation, Ministry of Economy, Inspectorate for Emergencies, Geological Institute of Romania, Romania[n] Academy, National Administration of Romanian Waters"); Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 1 (noting "the points of view and the final conclusions of the regulatory institutions represented in TAC").

[241] Counter-Memorial ¶¶ 321-326.

[242] Mihai ¶¶ 138, 397; Mihai II ¶¶ 313-315.

[243] Memorial ¶ 439; Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 10 (emphasis added). *See also* Letter from the Romanian Academy to the Ministry of Environment dated July 25, 2013 (Exh. C-2708).

[244] Memorial ¶ 443; Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 14 (Ministry of Culture State Secretary Radu Boroianu stating that "[t]he things that are said in the report from the Academy, which denies the project, are delusional" and also "contradict the statements of the most important professionals of the Romanian Academy").

[245] Memorial ¶¶ 441-442; Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 3-4 (acting TAC President Octavian Pătrașcu recalling, "[a]s everybody knows," that in 2011 "the Geological Institute of Romania went on site, made certain verifications, certain analyses, and expressed a favorable point of view," and concluding that "we, the TAC members, are not called upon to solve the internal issues of the Geological

107. Finally, while Respondent appears to disagree with Claimants that the Ministry of Environment "could not reach any conclusion other than to approve the Project,"[246] no other lawful decision was possible because, as Professor Mihai explains, had the Ministry of Environment found the EIA Report to be inadequate in any respect, it would have been legally obligated to ask RMGC to redo or supplement the EIA Report, which it did not do after either the November 29, 2011 or the July 26, 2013 TAC meetings.[247]

108. In addition, the records of the TAC meetings, the draft Environmental Permit published by the Ministry of Environment, and the draft Decision produced by Respondent undeniably establish that the Ministry's technical specialists supported issuing the Environmental Permit. This is not and could not credibly be contested by Respondent. For all its belabored and meritless arguments about alleged legal impediments preventing the Ministry of Environment from taking its decision, Respondent does not suggest anywhere in its Counter-Memorial that the Ministry of Environment disagreed with recommending that the Permit be issued.[248]

109. Moreover, as previously discussed, senior Government officials including the Prime Minister made numerous public statements from May to July 2013 that RMGC and Gabriel would have to satisfy all requirements related to the environment and culture (as well as the State's economic demands) *before* the Government would submit any draft law to Parliament.[249] Thus, as [REDACTED] observes, the Government's submission of the Draft Law to Parliament in August 2013 "confirmed the Project met all the Government's demands and all applicable legal standards and was eligible to receive the Environmental Permit."[250]

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Institute of Romania."). *See also id.* at 13-14 (Ministry of Culture State Secretary Radu Boroianu criticizing the Geological Institute for "great distortions").

[246] Counter-Memorial ¶ 322.

[247] Mihai II ¶¶ 300-301. *See also* Memorial ¶ 193; Mihai ¶¶ 122-124.

[248] As discussed above, Respondent also failed to produce any documents from 2011-2013 reflecting that the EIA Report failed to meet Romanian standards with regard to any of the technical aspects of the Project, which demonstrates and further confirms that the EIA Report met those standards. *See supra* § III.A; Procedural Order No. 10, Annex A, Request No. 4. *See also* Letter from Respondent to Claimants dated June 22, 2018 (Exh. C-2216) (response to Request No. 4).

[249] Memorial ¶¶ 449, 452, 468; [REDACTED] (quoting public statements of Minister Delegate Șova on May 12, May 13, and June 8, 2013 and of Prime Minister Ponta on July 11, 2013).

[250] [REDACTED]

110. Further, as also previously discussed, after submitting the Draft Law to Parliament, Prime Minister Ponta, Minister of Environment Plumb, Minister of Culture Barbu, and Minister Delegate Şova each made public statements confirming the Project met all applicable requirements.[251] In an explicit acknowledgement that the Project met the applicable requirements and had to be permitted under the law, Prime Minister Ponta stated, "*I was obligated under the law . . . under the current law I had to give approval and the Roşia Montană Project had to start*."[252] Minister of Environment Plumb similarly stated that the Project would be "the safest project of Europe," and that the Ministry of Environment had "negotiated in such a manner so as to secure a permit that, from my point of view, as Minister of Environment, may address all requirements under the European and not only, international environmental standards."[253]

111. Minister of Environment Plumb, Minister of Culture Barbu, Minister Delegate Şova, and numerous other senior Government officials also confirmed again in sworn testimony to Parliament that the Project met all applicable legal requirements and standards for issuance of the Environmental Permit.[254] In the clearest terms, Minister of Environment Plumb testified to the Special Commission on September 24, 2013 that the Project met "*all environmental standards – the highest possible*," and that "*the entire team in the Ministry of Environment is sure that . . . we have secured all conditions for environmental protection*."[255]

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[251] Memorial ¶¶ 447, 478-479; Tănase III ¶ 173.a-d; Avram II ¶ 71.i-ii. *See also* Henry II ¶ 52.i-k.

[252] Tănase III ¶ 173.a; *Ponta: I sent the Roşia Montană Project to the Parliament so we could not be sued*, Stiri.tvr.ro, dated Sept. 5, 2013 (Exh. C-460) (Prime Minister Victor Ponta) (emphasis added).

[253] Tănase III ¶ 173.b; *Rovana Plumb: The approval of Ministry of Environment for Roşia Montană, depending on the decision of Parliament*, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) (Minister of Environment Rovana Plumb).

[254] Memorial ¶¶ 483, 503, 509; Tănase III ¶¶ 174, 190, 197; Avram II ¶ 71.iii-vi. *See also* Henry II ¶ 52.j-k; Counter-Memorial ¶ 359 (acknowledging that "numerous government ministers, including the Ministers of Environment and Culture, testified at length in favor of the [Draft Law]").

[255] Memorial ¶ 503; Avram II ¶ 71.iv; Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 42 (Minister of Environment Rovana Plumb) (emphasis added). *See also, e.g.*, Avram II ¶ 71.vi; Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-776) (stating that the Project met "the strictest standards demanded by the European legislation").

112. In light of the Government's numerous acknowledgements that RMGC met the requirements for obtaining the Environmental Permit, the Ministry of Environment's failure to recommend issuing the Permit was abusive and unlawful.[256]

### C. Having a "Social License" Is Not a Requirement under Romanian Law and Is Irrelevant to Project Permitting

113. In view of Respondent's repeated references to the concept of a social license (discussed at length below), it is important to understand as a threshold matter that, as Professor Mihai explains, Romanian law neither recognizes the concept of a "social license" nor requires an applicant for an Environmental Permit, or any permit necessary to implement a mining project, to have a "social license."[257] Indeed, a "social license" is not even a legal concept, but is instead simply a metaphor for the level of social support a project or sponsor has at any given point in time among self-selected "stakeholders."[258] The concept of a social license is therefore irrelevant to and "cannot be invoked by the authorities as a condition in the permitting process."[259] Respondent's Romanian legal expert Professor Dragoş does not contend otherwise. Consistent with this reality, neither the Ministry of Environment nor any TAC member contemporaneously identified during the EIA process RMGC's or the Project's level of social license as in any way relevant to the review of the EIA Report or to the issuance of the Environmental Permit.[260] In these circumstances, Respondent's suggestions to the contrary

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[256] Memorial ¶¶ 447-448; Mihai § VIII; Mihai II §§ VI, VII.

[257] Mihai II § V.G.

[258] Boutilier ¶¶ 1, 9; § 2. Respondent's expert similarly describes the "social license" in his expert report as a "metaphor" and a "management tool." Expert Report of Dr. Ian Thomson dated Feb. 19, 2018 ("Thomson") §§ 2.1, 2.2. *See also* Transcript of Remarks by Dr. Ian Thomson from the First MIREU SLO Workshop, May 2018 (Exh. C-2839) (Dr. Thomson stating, "It's a metaphor for crying out loud. It's a metaphor.").

[259] Mihai II ¶ 249. Respondent refers to statements by Gabriel Canada about its "commitment to win the 'social license'" and to a statement by Mr. Tănase that "if the community doesn't want the project, we don't make it," and from these statements it concludes that RMGC "needed the social license for the Project." Counter-Memorial ¶ 98; *id. generally* § 2.3.7. As a matter of sound business practice and corporate social responsibility, RMGC and Gabriel did strive to earn, maintain, and grow support for the Project, particularly within the communities that would be most impacted by the Project. Tănase III ¶¶ 86-128; Henry II ¶¶ 77-82; Lorincz II ¶¶ 2-33. That unremarkable fact does not transform the company's socially responsible practices into a legal requirement as Respondent erroneously suggests. Moreover, as described below and more fully in Dr. Boutilier's expert report, RMGC in fact earned a "social license" at both the local and national levels. *See* infra § IV.A; Boutilier §3. *See also* Lorincz II ¶¶ 91-120; Tănase III ¶¶ 86-128.

[260] [redacted]

notwithstanding, the Government could not and indeed did not refuse to issue the Environment Permit or any permit based on its assessment of RMGC's or the Project's level of social license.[261] Respondent instead raises its "social license" defense for the first time in this arbitration.

114. Despite the irrelevance of the social license concept to Project permitting, the EIA process does allow for and indeed requires public consultation with respect to a proposed project.[262] As explained in the Memorial and further by Mr. Avram, with the approval and active participation of the Ministry of Environment, RMGC completed extensive public consultations through 16 public hearings (14 in Romania and 2 in Hungary).[263] As Mr. Avram explains, "Ministry representatives participated in all stages of the public consultation process and attended all of the public consultation meetings."[264] These consultations were substantive and meaningful.[265]

115. As part of and following the consultation process, the public presented questions and comments to the Ministry, which the Ministry forwarded to RMGC and RMGC answered to the satisfaction of the Ministry.[266] Although Respondent now suggests that the number of questions "revealed strong and widespread concern,"[267] the Ministry with the benefit of its intimate familiarity with and front row seat during the consultation process did not characterize the consultation process this way contemporaneously, criticize the consultation process, or even suggest that the public's questions or RMGC's answers provided any basis not to issue the Environmental Permit.[268]

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[261] Mihai II ¶¶ 249, 253-255.

[262] Memorial ¶¶ 192, 251-53.

[263] Memorial ¶ 251; Avram II ¶¶ 129-134.

[264] Avram II ¶ 129.

[265] Avram II ¶ 132.

[266] Memorial ¶¶ 251-53.

[267] Counter-Memorial ¶ 127.

[268] Avram II ¶¶ 129-134 (noting that, when the Ministry of Environment in consultation with the TAC reviewed RMGC's answers to the public consultations at the March 9, 2011 TAC meeting, it was apparent that the vast majority of TAC representatives were satisfied with RMGC's approach to managing key environmental issues in the EIA Report).

116. Contrary to the suggestion of Respondent's social license expert Dr. Thomson, RMGC was not only talking and "defending", but was also listening during the consultation process.[269] Indeed, in response to what it learned from its earlier community engagement efforts, RMGC had modified the Project design to respond to what it heard even though doing so reduced available reserves by 500,000 ounces of gold.[270] Following the consultation process, particularly starting in 2008 under Mr. Tănase's management, RMGC also systematically addressed through tangible action the key issues raised by stakeholders, including with regard to environmental protection and treatment, cultural heritage preservation, and resettlement.[271]

### D. None of the Technical Issues Now Raised by Respondent's Experts Was Considered an Impediment to Project Permitting by the Government Contemporaneously and, in Fact, All Issues Were Satisfactorily Addressed

117. As demonstrated above, despite completing the technical assessment of the EIA Report and the Government repeatedly acknowledging that the Project met all requirements for the Environmental Permit, the Ministry of Environment failed to make a decision regarding the issuance of the Permit.

118. For purposes of the arbitration, Respondent relies on a team of technical experts it hired from CMA to argue that there are aspects of the Project that "did not comply with best practice and/or required further investigation or clarification."[272] Seeking to cloak these post-hoc observations with a veneer of credibility, Respondent claims that the "issues identified by CMA were essentially the same as those identified by TAC members at the time."[273] As discussed below, Respondent's effort to create the illusion of technical uncertainty for the Project fails for one or more of several reasons.

119. As a threshold matter, although Respondent's team of experts clearly were tasked with scouring the entire technical record to look for any toe hold to argue that there is some technical issue or impediment that might prevent issuance of the Environmental Permit or

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[269] Thomson ¶ 69.

[270] Avram II ¶ 134; Szentesy II ¶ 22, n. 41.

[271] *See infra* § IV.A; Henisz ¶¶ 23-44; Tănase III ¶¶ 86-128. *See also* Lorincz II ¶¶ 2-44; 51-71; 79-90.

[272] Counter-Memorial ¶ 331.

[273] Counter-Memorial ¶ 331.

eventual implementation of the Project, they came up empty. Most significantly, they do not identify any legal or technical requirement for the Environment Permit that was not met. Nor do they identify any technical flaw with the Project that would prevent its implementation or materially impede progress. In many instances, Respondent's experts confirm that RMGC's designs and plans for the Project met or favorably exceeded applicable Romanian, European, and international standards.[274]

120. In their apparent zeal to identify any purported open technical issues, the CMA team frequently bases its contentions on isolated comments taken out of context or early comments that were later overtaken by events and/or thereafter rejected,[275] or seeks to assess aspects of the Project at the environmental permitting stage by reference to standards and expectations applicable to later stages of a project.[276]

121. Neither Respondent nor CMA can escape the fact that, contemporaneously, Respondent's team of technical experts in the TAC process exhaustively reviewed the Project. Based on that review, Respondent repeatedly confirmed that all requirements were met to issue

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[274] *See, e.g.*, Technical Expert Report of Dermot Claffey dated Feb. 13, 2018 ("Claffey") ¶¶ 23-24 (stating that the Project TMF was "developed by internationally recognised engineering companies, with a track record in TMF and dam design, over an extended period of time," and that it is "supported by an extensive range of studies and investigations" and "broadly consistent with regulatory requirements and generally accepted good practice"); Technical Expert Report of Cathy Reichardt dated Feb. 20, 2018 ("Reichardt") ¶ 109 (observing that RMGCs Cyanide Management Plan is "a comprehensive and systematic document whose structure is aligned to that of the Cyanide Code" and that it "addresses the requirements of the Principles and Standards of Practice of the Cyanide Code in a sequential and detailed manner and demonstrates that Code compliance was a core consideration in project design"); Technical Experts Report: Appendix C – Waste Management & Mine Closure Plan by Dr. Mark Dodds-Smith dated Feb. 12, 2018 ("Dodds-Smith") ¶¶ 56-57 (acknowledging that "many aspects of the mine waste management and closure planning for Roşia Montană are broadly compatible with international best practice" and that "the approach to mine waste management and closure planning and the documentation submitted by RMGC complied with Romanian regulatory requirements").

[275] *See, e.g.*, Technical Report by Larraine Wilde dated February 22, 2018 ("Wilde") ¶¶ 107-119 (relying on certain statements by TAC members to demonstrate alleged deficiencies in the organization of the EIA Report and in RMGC's assessment of cyanide transport, while disregarding the completion of the technical assessment of the Report in 2011 and 2013); Reichardt ¶¶ 183-184 (emphasizing certain recommendations and concerns identified by the Independent Group of Independent Experts ("IGIE"), while disregarding the TAC's favorable review of RMGC's responses to the recommendations and concerns of the IGIE). *See also* Avram ¶¶ 13-34, 54-62, 88-121, 125.

[276] *See, e.g.*, Lambert § 6 (observing that Ms. Reichardt fails to apply the correct standards and criteria in evaluating the Project's compliance with the International Cyanide Management Code); Corser § 3 (noting that many of the questions raised by Respondent's experts would have been appropriately addressed prior to or at the detailed design phase).

the Environmental Permit. Issues CMA purports to identify in this arbitration as being of concern were not so considered contemporaneously as impediments to Project permitting. This reality further demonstrates that CMA's criticisms are irrelevant and without merit. For this reason, Claimants treat these matters summarily below and refer the Tribunal, should it have further interest, to Claimants' witness statements and expert reports, which conclusively rebut Respondent's post-hoc effort to identify issues none of which contributed to the reason the Government failed to issue the Environmental Permit.[277]

122. Use and Management of Cyanide: CMA Expert Ms. Cathy Reichardt acknowledges that the Roşia Montană Project was "substantially compliant with the majority of requirements of the International Cyanide Management Code,"[278] but that there were a number of areas where the Project was not compliant.[279] As explained by John Lambert, a lead and/or technical auditor in over 50 Cyanide Code certification audits,[280] Ms. Reichardt is incorrect both because she consistently applies standards applicable to projects set to commence operations (as opposed to the pre-permitting phase),[281] and also because the Project was in fact compliant with the Cyanide Code's Principles and Standards of Practice.[282]

123. Both Ms. Larraine Wilde and Ms. Cathy Reichardt contend that RMGC failed to address the TAC's concerns regarding the selection of the final route for transporting cyanide and that, "[a]s the route was not known, impacts could not be fully assessed."[283] As explained by Mr. Horea Avram and Mr. John Lambert (and acknowledged by Ms. Reichardt), it would have been unusual prior to permitting for RMGC to have the supplier or transport contracts in place to finalize the cyanide transport route, because the route needs to be assessed together with the selected supplier and/or transporter.[284] Mr. Lambert confirms that "studies of the route option

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[277] *See* Avram II ¶¶ 13-34, 54-62, 88-121; Gligor II ¶¶ 17-54, 102-125. *See generally* Corser II; Jennings II; Kunze II; Lambert.

[278] Reichardt ¶ 149.

[279] Reichardt § 3.

[280] Lambert ¶ 3.

[281] *See* Lambert § 6.

[282] *See* Lambert § 8.

[283] Wilde ¶¶ 121-137; Reichardt ¶¶ 56-107, 121-139, 143-149.

[284] Avram II ¶ 50. *See also* Lambert ¶¶ 41-57; Reichardt ¶¶ 55, 58, 106.

selection process were substantially completed, pending detailed risk review as well as risk reduction and mitigation planning, which would normally be part of detailed design and procedure development."[285]

124. Both the Ministry of Environment's draft Environmental Permit and the testimony of Minister of Environment Plumb before the Special Commission confirm the Ministry of Environment's contemporaneous understanding that the final cyanide transport route would be established "at the end of the construction period," that cyanide transport for the Project would be "strictly controlled with maximum safety," and that "[e]verything that is related to cyanide management is in accordance with the International Cyanide Management Code."[286] Thus, contemporaneously, the issues Respondent and CMA now allege were of concern were addressed in a manner that was satisfactory to the Ministry of Environment.[287]

125. <u>Design, Soundness, and Location of the Tailings Management Facility</u>: CMA experts Mr. Dermot Claffey and Ms. Reichardt essentially reprise baseless complaints of the Geological Institute under the leadership of Mr. Ştefan Marincea, which the Ministry of Environment contemporaneously rejected, to now argue that RMGC did not adequately address the TAC's concerns regarding potential seepage under the TMF or faults in the Corna Valley.[288] As explained by Mr. Patrick Corser and [redacted], in claiming that these issues remained open and of concern, Respondent ignores the findings of the extensive geotechnical, geological, and hydrogeological studies and the Government's own repeated review and

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[285] Lambert ¶ 54. *See also id.* §§ 5-9 (demonstrating RMGC's compliance with the Cyanide Code and the adequacy of the Project's emergency response plans).

[286] Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 35; Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555) at 45; Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 3-4.

[287] Ms. Reichardt also criticizes RMGC's emergency response plans, as well as assessment of downstream impacts of mining-related contaminants other than cyanide. *See* Reichardt §§ 6, 7. These issues are fully addressed in the expert reports of Christian Kunze and John Lambert. *See* Kunze II § VI (explaining how the Project properly considered the potential downstream impacts of contaminants other than cyanide); Lambert § 9 (rebutting Ms. Reichardt's critique of RMGC's emergency response plans).

[288] Claffey ¶¶ 32-41; Reichardt ¶¶ 136-139, 159-202. *See also* Assessment of Technical Viability: Roşia Montană Gold Project, Transylvania, Romania dated Feb. 10, 2018 ("Behre Dolbear") ¶¶ 56, 91, 98.

approval of the TMF design and location during its review of the Project.[289] Respondent also ignores the TAC's failure to follow through on commissioning a further study on this very issue, which further confirms that these criticisms are completely unfounded.[290]

126. In another TMF-related issue, Behre Dolbear wrongly suggests that dry stack tailings disposal was not considered by RMGC.[291] A TMF was determined to be the optimal design for the Corna Valley after a review of alternative tailings disposal technologies, including dry stack tailings.[292] As discussed by Mr. Corser, even if dry stack tailings disposal would have been suitable for the Project, a wet disposal facility likely would have been required due to site conditions.[293] Numerous documents and statements from Romanian officials confirm the Government's endorsement of RMGC's plan to "design and build a tailings management facility . . . located in Corna Valley" whereby the "tailings dam basin will be sealed by compacting colluvium for water-proofing according to BAT [best available techniques]."[294]

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[289] ████████ (demonstrating that the TMF was sited appropriately and designed to operate safely at its proposed location in the Corna Valley in accordance with applicable regulations and standards); Corser II § 6 (noting that numerous geotechnical investigations confirmed the appropriateness of a natural liner in the TMF basin). *See also* Lambert § 8.5 (observing that RMGC adequately presented water management measures to manage seepage and to protect beneficial uses of groundwater).

[290] ████████

[291] Behre Dolbear ¶ 95. In its report, Behre Dolbear makes a number of other observations regarding purported technical shortcomings of the Roşia Montană Project, including relating to the 2006 Feasibility Study; estimates of mineral resources and reserves; gold and silver recoveries; infrastructure requirements; estimates of capital, operating, and closure costs; and ramp up times. All of these points are rebutted in the second expert report of SRK, who explain that these purported issues are "generally speculative and devoid of analysis, contradicted by the work and reports of multiple highly respected mining and engineering consultants who developed or independently reviewed and endorsed the relevant aspects of the Roşia Montană Project, are at odds with industry practices, and/or are incorrect for other reasons." SRK Report II ¶ 2(d). *See also generally* SRK Report II §§ 1-9.

[292] Szentesy II ¶ 48; Corser II § 10. *See also* EIA Report Ch. 5: Alternative Analyses (Exh. C-230) at 78-79; MWH Engineering Review Report dated June 2012 (Exh. C-715) at 7-6; SRK II § 6.5 (noting that, "[a]s part of its audit of the Roşia Montană Project for the 2012 NI 43-101 Technical Report, SRK reviewed the TMF and did not identify the purported issues presented by Behre Dolbear," and it "concluded overall that it 'considers the design of the tailings impoundment to be robust and construction to be feasible'").

[293] Corser II § 10.

[294] Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit (Exh. C-2075) at 5, 14. *See also* Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555) at 4, 16; Confidential Note on the Roșia Montană Mining Project dated Mar. 6, 2013 (Exh. C-1903) at 20-22.

127. Cultural Heritage: CMA expert Dr. Peter Claughton wrongly criticizes both the Alburnus Maior archaeological research program, which was designed and conducted by the State itself and financed, as legally required by RMGC as developer, to research, record, conserve, rehabilitate and display the cultural heritage of Roşia Montană,[295] and the various protective measures that RMGC proposed to mitigate the Project's impacts on cultural heritage.[296]

128. As explained by Mr. Adrian Gligor and Mr. David Jennings, indeed it was the State, not RMGC, that directed and approved the scope and findings of the research program (based on the recommendations of the experts selected by the Ministry of Culture), and it also was the State that approved the preservation *in situ* of the most representative sites and the archaeological discharge of approximately 90% of the Project impacted area, thus allowing mining activities to be undertaken in the vast majority of the Project area.[297] In any case, all time periods were exhaustively investigated as part of the Alburnus Maior National Research Program, which used best archaeological practices to obtain a good understanding of areas even with limited access.[298] Moreover, Mr. Gligor and Mr. Jennings confirm that the various protective measures that were implemented to protect the cultural heritage of the Project area were beyond what was legally required and in line with best practices.[299] The Ministry of Culture contemporaneously commended the archaeological research, which was conducted with

[295] Technical Expert Report of Dr. Peter Claughton dated Feb. 19, 2018 ("Claughton") § 2. *See also* Jennings II § 2. *See also generally* Jennings II § III.

[296] Claughton § 3. Dr. Claughton also asserts, incorrectly, that the future development of the Project was subject to uncertainty due to the need for preventive archaeological research in Orlea. Claughton ¶ 79. As explained by Mr. Jennings and Mr. Gligor, the preliminary research undertaken in Orlea was thorough and complete and RMGC was reasonably expected to obtain the archaeological discharge of the area in due course. Gligor II ¶¶ 102-109; Jennings II ¶¶ 30-31. Dr. Claughton is also wrong in contending that it was not clear how RMGC's sizeable investment in cultural heritage would have been spent or how it would have contributed to the long term sustainable development of the area. *See* Jennings II § V.

[297] Gligor II ¶¶ 12, 14, 17-19; Jennings II ¶ 2-3, 21.

[298] Gligor II ¶¶ 17-30; Jennings II § III.

[299] Gligor ¶¶ 31-69; Jennings II § IV.

RMGC's financial support, as well as RMGC's plan to preserve Roşia Montană's cultural heritage, and confirmed that the work complied with national and international standards.[300]

129. Dr. Claughton further claims that "the actions of RMGC have contributed to an acceleration of the deterioration in the urban landscape."[301] As discussed by Mr. Gligor and Mr. Jennings, RMGC worked to ensure that the renovation of historic buildings was completed following best practices for conservation.[302] To the extent that certain buildings were demolished as part of this process, this was done due to reasons of health and safety due to the state of disrepair of the buildings.[303]

130. Waste Management: CMA expert Dr. Mark Dodds-Smith raises a number of critiques with respect to the Project's Waste Management Plan[304] and considers that there are certain aspects of the Project that place in "doubt" RMGC's commitment to meet or exceed local and international standards of care, such as RMGC's plans to segregate and encapsulate potentially acid generating ("PAG") waste rock.[305] As Dr. Christian Kunze explains, "none of the areas now identified by Dr. Dodds-Smith for purposes of this arbitration were of significant debate or concern during the EIA review process," and all of the issues raised are addressed in the EIA Report "in full compliance with local regulations and international standards."[306]

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[300] Gligor II ¶¶ 23, 36. *See also* Letter No. 536 from the Ministry of Culture to the Ministry for Infrastructure Projects and Foreign Investment dated Mar. 18, 2013 (Exh. C-1360).

[301] Claughton ¶ 54.

[302] Jennings II § IV.C; Gligor II ¶¶ 46-54. *See also* [redacted] (responding also to Respondent's unfounded criticisms regarding potential vibration impacts of blasting on historic structures); Gligor II ¶¶ 51-54 (establishing that the effects of blasting were extensively studied and addressed).

[303] Jennings II § 50. Dr. Jennings also rebuts the criticisms raised by Dr. Claughton in connection with the Statement of Significance authored by Wilson, Mattingly, and Dawson assessing the significance of Roşia Montană in light of UNESCO World Heritage Site criteria. *See generally* Jennings II § VI.

[304] *See generally* Dodds-Smith §§ 4, 7, 8.

[305] Dodds-Smith ¶¶ 30, 57.

[306] Kunze II ¶ 3. *See generally* Kunze (establishing that RMGC did not deviate from best practice in any of the areas identified by Dr. Dodds-Smith, including waste management, mine rehabilitation and closure, and financial guarantees).

Romanian authorities confirmed that RMGC's Waste Management Plan complied with national legislation and best available techniques.[307]

131. Mine Closure and Environmental Guarantees: While Dr. Dodds-Smith acknowledges that "many aspects of closure planning for Roşia Montană are compliant with Romanian regulatory requirements and many aspects are compatible with international good practice,"[308] he posits that "there are a number of areas that do not conform to established good practice."[309] These areas of alleged non-compliance with good practice are thoroughly addressed by Dr. Kunze, who confirms that RMGC's closure objectives were well defined, advanced (particularly given the stage of the Project), and developed according to best practices.[310] He also explains that RMGC had prepared comprehensive and robust environmental guarantees in case of accident or in the event of premature cessation of mining activities, which already conservatively incorporated contingency sums within the cost estimates.[311] The Romanian Government contemporaneously confirmed that the Project "involves a shutdown and/or rehabilitation corresponding to the world's best practices."[312]

132. Biodiversity: Ms. Wilde claims that the EIA Report inadequately describes the Project's impacts on bat species and RMGC's reforestation of impacted areas.[313] These criticisms too are misplaced. As Mr. Avram explains, RMGC conducted numerous updates to the biodiversity chapter of the EIA Report, including with respect to protected bat species and forestry.[314] The Government favorably completed the technical assessment of the Project in both 2011 and 2013, and recognized in a draft decision proposing the issuance of the Environmental Permit that the Project complied with legislation on conservation of natural habitats and of wild

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[307] Confidential Note on the Roșia Montană Mining Project dated Mar. 6, 2013 (Exh. C-1903) at 9-10. *See also* Avram II ¶ 61; Kunze II ¶ 15.

[308] Dodds-Smith ¶ 36.

[309] Dodds-Smith ¶ 36.

[310] Kunze II § IV.

[311] Kunze II § V.

[312] Confidential Note on the Roșia Montană Mining Project dated Mar. 6, 2013 (Exh. C-1903) at 9-10.

[313] Wilde ¶¶ 175-200.

[314] Avram II ¶¶ 109-111.

fauna and flora.[315] Ms. Wilde fails to acknowledge these facts that conclusively show her criticism to be meritless.

133. EIA Report: Ms. Wilde contends that the EIA process was managed in-house by RMGC, rather than by independent experts, which reflects an alleged departure from "typical" practice of mining companies.[316] As Mr. Avram explains and is clearly shown in the EIA Report, RMGC retained two highly qualified lead consultants to prepare a "world class" EIA Report in line with European and Romanian regulations and best practice.[317] RMGC played a facilitating role by coordinating work between EIA experts and consultants commissioned by RMGC, but did not take a lead role in preparing the EIA, as Ms. Wilde erroneously speculates.[318]

134. Ms. Wilde also wrongly claims that RMGC failed to integrate updates to the EIA Report in an organized manner.[319] Following a three-year suspension of the EIA procedure, the Ministry of Environment confirmed its understanding that RMGC would update the EIA Report to address any changes in legal requirements that had occurred since May 2006, which it did with the aid of lead consultants.[320] The few isolated comments seized upon by Romania's experts that the EIA documentation was complex and required cross-referencing hardly reflect the contemporaneous view of the Government, which repeatedly acknowledged that the Project met all applicable requirements for permitting.[321] Moreover, no further requests were made to RMGC to provide an updated EIA Report after consolidated, easy-to-navigate versions were prepared.[322] Questions related to the organization of the EIA Report, as well as technical aspects of the Project, were thus resolved to the satisfaction of representatives of the Romanian Government.

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[315] *See* Avram II ¶¶ 13-34, 63-78, 104, 107.

[316] Wilde ¶¶ 97-101.

[317] Avram II ¶¶ 105-110.

[318] Avram II ¶ 112.

[319] Wilde ¶¶ 93-96, 102-119.

[320] Avram II ¶¶ 115-116.

[321] *See* Avram ¶¶ 36, 153-156, 169, n.314.

[322] Avram II ¶¶ 118.

135. Planned Cleanup of Historical Pollution: Dr. Dodds-Smith observes that, while RMGC committed to remediate the environmental impacts caused by historical mining activities and "probably a significant degree would be realised," "some sources of historical contamination and areas of contaminated land and water lie outside the RMGC site area," and "these would have been unaffected by the proposed project and the envisaged remedial measures."[323] As Dr. Kunze and Mr. Avram explain, even if RMGC had the right to work outside of its licensed area (which it did not), Government officials repeatedly acknowledged that it is the Government's responsibility to remove sources of historical pollution outside of the Project area and that the environmental benefits of RMGC's remediation to surface water would be substantial.[324] Indeed, the Government also was obligated to remediate historical pollution within the Project area, but RMGC agreed to do so as part of developing the Project and thus would have relieved the State of this costly burden. In addition, RMGC's commitment to positively impact the local and regional environment by cleaning up historical pollution caused by decades of uncontrolled State mining contrasts sharply with the State-owned Roşia Poieni mine, located in close proximity to the Project, which continues to freely discharge mine water contaminated with heavy metals and other contaminants directly into the environment.[325]

## IV. THE GOVERNMENT IMPOSED THE PARLIAMENTARY ROUTE ON CLAIMANTS AND RMGC IN EARLY 2013 AS THE ONLY WAY FORWARD FOR THE PROJECT

136. In their Memorial, Claimants demonstrated that, not only did the Ponta Government again coercively condition issuance of the Environmental Permit on Claimants' meeting the State's economic demands, but the Government also imposed another unlawful condition whereby the Government would issue the Environmental Permit and allow the Project to proceed only if Parliament were to vote to adopt a special law for the Project, which the Government would submit to Parliament only after determining that the Project met the requirements for the Environmental Permit and met the State's extortionate demand for "25 and

[323] Dodds-Smith ¶ 49.

[324] Kunze II § II; Avram ¶¶ 136-137.

[325] [redacted] (describing the Government's lenient, regulatory approach toward the outdated, polluting methods at Roşia Poieni); Kunze II ¶ 8 (same).

6."[326] Claimants further showed that, once Parliament rejected the Draft Law in line with the political direction and wishes of the Government, the Government acted in conformity with its stated intent in both words and deeds, thus rejecting the Project in substance and in fact.[327]

137. Unable to rebut Claimants' detailed, evidence-based explanation regarding the Project's path to Parliament dictated and followed by the Government, or the fatal consequences portended for the Project if Parliament rejected the Draft Law as it did and seeking to avoid liability for abandoning the lawful, merits-based administrative permitting process that should have resulted in issuance of the Environmental Permit and advancement of the Project, in favor of a political process through Parliamentary proxy that did not, Respondent relies on the speculation of counsel and the unreliable conclusions of its social license expert Dr. Thomson to conjure a narrative more to its liking. The major elements of Respondent's fictional version of events and supporting arguments appear to be as follows:

- By early 2013 the Project was facing mounting opposition and lacked the necessary social license, which it was solely responsible to obtain. As a result, Claimants were motivated to seek (through RMGC) a legislative fix from the Government via a special law, which the Government was all too willing to accommodate in exchange for more shares and a higher royalty. Claimants thus asked the Government for a special law that only Parliament could adopt.[328]

- Claimants should not be heard to complain when Parliament failed to adopt the law in view of the anti-Project street protests that erupted following the Government's presentation of the Draft Law to Parliament. These protests are the result of Claimants' sole failure to obtain a social license. Neither Prime Minister Ponta nor Senator Antonescu precipitated or procured for political reasons Parliament's rejection of the Draft Law.[329]

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[326] Memorial ¶¶ 402-413.

[327] Memorial ¶¶ 582-613.

[328] Counter-Memorial ¶¶ 98-108, 264, 281-289.

[329] Counter-Memorial ¶¶ 18-21, 264, 266, 284-89, 334-36, 357-62.

138. For the reasons explained in the Memorial and set forth below, each element and associated argument of Respondent's narrative is meritless.

### A. Claimants and RMGC Believed at All Relevant Times That the Project Enjoyed Strong Support, Particularly in the Local Community But Also Nationally and Thus Had a Social License, Which Contemporaneous Evidence Supports

139. Although there was not a legal requirement for RMGC to have a "social license" as set forth above,[330] Claimants demonstrated in the Memorial and through the first statement of RMGC's Community Relations Director, Elena Lorincz, that the vast majority of people who would be most affected by the Project unquestionably supported it.[331] In the parlance of the mining industry, as elaborated below, RMGC therefore earned a "social license to operate" or "SLO."

140. Respondent's expert retained for this arbitration, Dr. Ian Thomson, contends RMGC never obtained "a stable social license, even at the local level."[332] Relying on Dr. Thomson's conclusions, Respondent asserts numerous times throughout the Counter-Memorial that RMGC "failed to obtain the social license for the Project,"[333] which it raises like a shield to defend against, among other things, its unlawful failure to take any decision on RMGC's application for the Environmental Permit,[334] its unlawful derailing of the administrative permitting process established by law in favor of the political vagaries of Parliament,[335] its *de facto* rejection of the Project through and following Parliament's hearings and negative votes rejecting the Draft Law,[336] and issues of causation and quantum.[337]

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[330] *See supra* § III.C.

[331] Memorial ¶¶ 395-401; Lorincz ¶¶ 72-83. *See also* Tănase II ¶¶ 128-135; Henry ¶¶ 64-70.

[332] Thomson ¶ 108.

[333] *E.g.*, Counter-Memorial § 5.13.

[334] Counter-Memorial ¶ 328.

[335] Counter-Memorial ¶¶ 259-289.

[336] Counter-Memorial ¶¶ 363-367, 381-387.

[337] Counter-Memorial ¶¶ 693-695, 715.

141. Contrary to Respondent's assertions, which it did not raise contemporaneously as a basis for failing to issue the Environmental Permit, the contemporaneous evidence demonstrates that RMGC had a social license at all relevant times at both the local level and the national level.[338] As discussed below and more fully in the expert report of Dr. Thomson's colleague and frequent co-author, Dr. Robert Boutilier, Dr. Thomson's conclusions to the contrary are demonstrably wrong, unsupported by reliable evidence, and are not faithful to the methodology he and Dr. Boutilier jointly developed outside this arbitration.[339]

142. By way of background, Dr. Thomson and Dr. Boutilier jointly developed a model depicting four levels of social license, which Dr. Thomson aptly describes in his expert report as "the Thomson Boutilier 'dynamic' model for the SLO."[340] The lowest level of the Thomson-Boutilier model is "withheld/withdrawn," which reflects a lack of social license.[341] By contrast, a company has a social license if it reaches any of the three levels above "withheld/withdrawn," the first being "acceptance/tolerance."[342] As Dr. Boutilier explains, an acceptance level of social license for a project exists among members of a community only "as long as they can see net benefits"; while they may complain about things, they tolerate and "accept the continued operation of these projects."[343]

143. While not discussed by Dr. Thomson in his expert report, the Thomson-Boutilier model "is wider at the level of 'acceptance' in order to indicate that most mining projects operate with a low level of social license."[344] The higher level of "approval/support" (reflecting positive

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[338] Boutilier § 3 (discussing RMGC's social license at the local and national levels). *See also* Henisz ¶ 42; [redacted].

[339] Boutilier § 5.1 (discussing point-by-point rebuttal to Dr. Thomson's report).

[340] Thomson ¶¶ 16-17, Figure 3; Boutilier ¶ 10, Figure 2-1.

[341] Boutilier ¶ 11, Figure 2-1.

[342] Boutilier ¶ 11.

[343] Boutilier ¶ 11.

[344] Boutilier ¶ 11. *See also* Robert Boutilier and Ian Thomson, Modelling and Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice, 2011 (Thomson Exh. 11) at 2 (explaining that the acceptance level "covers the greatest area in order to indicate that it is the common level of social license granted"); Ian Thomson and Robert Boutilier, Social License to Operate, Chapter 17.2 in SME Mining Engineering Handbook, 2011 (Thomson Exh. 10) at 1784 (explaining that the model depicts the "withheld or withdrawn" level as being narrow to reflect the fact that "more projects are accepted than rejected.").

agreement) is less common, and the highest level of "psychological identification" (where the community considers itself a co-owner of a project), is rarely attained.[345]

144. As Dr. Thomson has acknowledged in his public remarks and writings, the concept of social license was "introduced" and is "broadly understood" within the mining industry to refer to the level of acceptance by the local community.[346] Dr. Thomson elaborated this view in remarks published two years ago:

> The real use of social license, as we use it within the social license community, is about very specific relationships between those who are immediately affected or impacted by a particular activity. People at a distance saying 'Ooh, I don't like that activity, it's not for me' is not really social license.
>
> That's more part of a broader social phenomenon where the activist groups or politicians seize on a certain aspect of an industry and they say 'that particular practice is bad and therefore the whole industry has got to go'. It's a very selective use of social license and in my opinion not a particularly healthy use of the term social license.[347]

145. Dr. Thomson further noted that the term social license is a metaphor, but that "since the language is relatively loose and it is strongly emotional, it can be open to misuse by a small minority of people."[348] He warned against such "misuse of the phrase social license" by politicians, activist groups, and others as "a kind of political slogan," which he said was a "slap in the face" to sectors like mining being challenged by groups that fundamentally oppose their

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[345] Boutilier ¶ 11. *See also* Transcript and video of Ian Thomson's Remarks from the 1st MIREU SLO Workshop (2018) (Exh. C-2839) at 4 (Dr. Thomson acknowledging that the highest level of psychological self-identification is rarely achieved, "[e]very now and again," but he has "seen it happen").

[346] Transcript and video of Ian Thomson's Remarks from the 1st MIREU SLO Workshop (2018) (Exh. C-2839) at 2. *See also, e.g.*, Transcript and video of Ian Thomson's Remarks from the 8th Risk Mitigation and CSR Seminar (2012) (Exh. C-2838) at 1 ("So for us the social license is something that is granted by the local community; it's their perceptions of whether they're willing to accept or reject the project, or whether this project is acceptable."); Ian Thomson & Susan Joyce, The Social Licence to Operate: What it is and why does it seem so difficult to obtain?, PDAC Convention Toronto, Canada, Mar. 2008 (Thomson Exh. 9) at 3 (social license is "granted by the local community"); Ian Thomson, Robert Boutilier, and Leeora Black, The Social License to operate: normative elements and metrics, SR Mining 2011 Santiago Chile Presentation (Exh. C-2850) at 3 (same); Ian Thomson & Susan Joyce, Social License: *What it is and its role in Risk Mitigation Across All Stages of the Mine Life Cycle*, Presentation at the 8th CSR & Risk Mitigation Seminar, Oct. 16, 2012 (Exh. C-2851) at 3 (same).

[347] *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 3.

[348] *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 2.

core business activity, or a particular aspect of it.[349] Dr. Thomson therefore concluded that the focus should be on the local community that is actually impacted, observing that "[u]se of social license by people who have no 'skin in the game' is the material difference between the term being used in a political, emotional and manipulative way as opposed to being used in the sense that responsible practitioners would use it when we look at the relationship between the people who do have skin in the game and the actual activity."[350]

146. Claimants and RMGC shared this understanding and designed the Project to benefit most the community of residents in and around Roşia Montană who would be directly impacted by the Project, and then more broadly other mining communities in the surrounding Apuseni Mountains region.[351] The local communities overwhelmingly have supported the Project, particularly since 2011,[352] which to Claimants and RMGC "means RMGC had a 'social license' to operate."[353]

147. Based on his analysis of extensive surveys, polling data, and other contemporaneous measures of RMGC's social license in Roşia Montană and the surrounding mining communities from 2004-2013, Dr. Boutilier determined that RMGC not only held a social license at the local level throughout that time period, but it generally fluctuated between high acceptance and high approval in Roşia Montană and the nearby mining communities of Abrud, Bucium, Zlatna, and Baia de Arieş, and between low and high acceptance in Alba County

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[349] *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 2-4 (Dr. Thomson cautioning against "misuse of the phrase social license and how it came into existence and is used responsibly by social practitioners and by people in the various industries where they are actually genuinely working to obtain a social license for a specific activity in a specific physical location"). In this arbitration, Dr. Thomson criticizes RMGC for purportedly "refus[ing] to dialog with Alburnus Maior," the main opposition group. Thomson ¶ 39. As [redacted] discusses, RMGC did seek dialogue with Alburnus Maior, but "Alburnus Maior generally refused RMGC's invitations to learn about the Project or to engage in dialogue, preferring instead to attack RMGC and the Project in the media and on the internet." [redacted] In his public remarks, Dr. Thomson acknowledged that activists groups often do not want to dialogue constructively and seek to attract media and political attention to their cause. *See Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 5 (Dr. Thomson stating that "Some activist groups you cannot engage with because they don't want to engage and it is not in their interests to engage because they would lose their credibility as being the advocates for change.").

[350] *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 4.

[351] Tănase III ¶ 90; Tănase II ¶ 15; Lorincz II ¶¶ 2-33; 45-62; Henry II ¶¶ 80-83.

[352] Tănase III ¶¶ 88, 93-105; Lorincz II ¶¶ 3, 91-116; Henry II ¶¶ 38, 78-81.

[353] Tănase III ¶ 88.

outside the Project area.[354] Dr. Boutilier further determined that RMGC substantially increased the level of its social license in the local communities. Thus, the majority of the surveys in 2009-2010 show RMGC had an "approval" level social license that surpassed the mean social license level found in his database of 59 studies of mining and infrastructure projects, and by late 2011 RMGC had a "high approval" level social license in Roşia Montană and an approval level more broadly in the Project region.[355]

148. Moreover, based on his review of external polling data at the national level from 2005-2006 and from 2008-2014, Dr. Boutilier determined that RMGC also held a social license at the national level throughout this time with the possible exception of 2008.[356] Dr. Boutilier concludes that the data from 2009-2014 show an upward progression and that by late 2011 RMGC achieved a "high acceptance" level national social license.[357] Dr. Boutilier further observes that RMGC's national social license thereafter stayed near the border between high acceptance and low acceptance in 2012, increased to high acceptance from late 2012 through August 2013, briefly declined to low acceptance (still a valid social license) from September 2013 to January 2014 during the protests against the Draft Law discussed further below, and then recovered by February 2014 and remained in the high acceptance range for the rest of the year.[358]

149. In addition to Dr. Boutilier's quantitative analysis, Professor Witold Henisz, the Deloitte & Touche Professor of Management at the Wharton School, traveled to Romania in July 2007 and in December 2011 to do field work related to his teaching endeavors, funded entirely by academic sources, and during both trips he conducted dozens of independent interviews with

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[354] Boutilier ¶¶ 3.f, 69-78.

[355] Boutilier ¶¶ 71, 117.j.iv.

[356] Boutilier ¶¶ 32-65. Dr. Boutilier notes that there is no data for 2007 and that one outlier poll conducted in December 2008 shows "the possibility of a dip to the red zone" following the unlawful suspension of the EIA procedure in September 2007 and the corresponding layoffs and cessation of the company's land acquisition program. Boutilier ¶¶ 58, 117.e.iv (discussing the predictable negative efforts that result from significant permitting delays and the delay and thus effective denial of benefits).

[357] Boutilier ¶¶ 3.e-g, 41, 117.j.iv, Figure 3-2. *See also* [REDACTED] (discussing the polling results and concluding that, "despite constant misinformation about the Project and false accusations of wrongdoing raised in the media by both Project opponents and by leading Romanian politicians . . . RMGC developed a good corporate image and gained nationwide acceptance that far exceeded the favorability of Romania's political leaders and institutions such as the Government or Parliament").

[358] Boutilier ¶¶ 3.e-g, 41, 117.j.iv, Figure 3-2.

RMGC management, leaders of the opposition, local residents, numerous Government officials, and other key stakeholders throughout the country.[359] Based on these broad-based, contemporaneous stakeholder interviews, for reasons elaborated more fully below and in his witness statement submitted with the Reply, Professor Henisz determined "with confidence" in December 2011 that RMGC "had earned the social license to operate."[360]

150. Dr. Thomson's contrary conclusions in his expert report prepared for this arbitration are unreliable for the reasons discussed by Dr. Boutilier and summarized immediately below.[361]

151. First, in contrast to Dr. Boutilier, Dr. Thomson does not attempt to quantify or assess the level of RMGC's social license at any point in time, either locally or nationally, essentially presenting it as a binary determination in contrast to the several levels of social license a project may enjoy under the Thomson-Boutilier model.

152. Second, based solely on one "external study," Dr. Thomson draws the sweeping conclusion that there was "a complete absence of social license" in 2011.[362] Dr. Thomson does not submit that study with his expert report, but refers instead to an academic paper that refers to another academic paper that refers to the study. Upon examination, the study shows exactly the opposite of what Dr. Thomson claims.[363] In fact, the December 2011 study shows that over 75% of the residents of four traditional Romanian mining towns, Zlatna, Baia de Arieş, Abrud, and Roşia Montană, supported development of the Project, and that in Roşia Montană "*the overwhelming majority of the population surveyed – 84.6% – is in favour of the RMGC project development*."[364] Therefore, as Dr. Boutilier observes, "[i]ronically, the empirical evidence

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[359] Henisz ¶¶ 8-22 (discussing July 2007 interviews); *id.* ¶¶ 23-41 (discussing December 2011 interviews).

[360] Henisz ¶ 42. *See also* Tănase III ¶¶ 88, 106-128 (discussing support for the Project at the national level).

[361] Boutilier § 5.

[362] Thomson ¶ 71.

[363] Boutilier ¶ 117.e.vii; Lorincz II ¶¶104-105; Tănase III ¶ 100; Henry II ¶ 81.

[364] "Muntii Apuseni" Association for Socio-Economic Research and Development Center, Report regarding the impact of economic development on the quality of life in Zlatna, Baia de Arieş, Abrud, and Roşia Montană, dated Dec. 2011 (Exh. C-2050) at 86 (emphasis added).

against Thomson's conclusion that there was no social license comes from the very study he indirectly cited."[365]

153. Third, Dr. Thomson does not discuss any other contemporaneous surveys or studies assessing the level of support for the Project after 2006.[366]

154. Fourth, in the absence of any verifiable data, Dr. Thomson relies mainly on the doctoral theses of three Romanian PhD candidates,[367] each of which has a decidedly anti-Project bent and reflects Dr. Thomson's results-oriented approach. Indeed, in two of the three academic papers he selected, the authors openly acknowledge their hostility to the Project.[368] The third doctoral thesis was published in 2006 and thus cannot provide any insight into the relevant time period in dispute, which starts five years later in 2011.[369]

155. Fifth, Dr. Thomson claims he undertook a site visit in January 2018 "to talk to local residents and former community leaders," purportedly to validate his conclusions,[370] but his interviews further underscore his evident bias. While retrospective interviews conducted more than six years after the relevant events in the context of an arbitration dispute would have doubtful, if any, evidentiary value in any circumstance,[371] Dr. Thomson's sparse interview notes,

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[365] Boutilier ¶¶ 66, 117.e.vii (observing that "[a] support level of 85% is extremely high" and that "[s]uch high support levels are seldom achieved and indicate at least an approval level of social license, if not higher").

[366] Dr. Thomson mentions a survey from 2009 regarding the socioeconomic state of the Roşia Montană village, but that survey does not address support for the Project. Thomson ¶ 70.

[367] Thomson ¶ 25.

[368] *See, e.g.*, Filip Alexandrescu, Human Agency in the Interstices of Structure: Choice and Contingency in the Conflict over Roşia Montană, Romania. Ph.D. Thesis, University of Toronto, 2012 (Thomson Exh. 16) at 49 (describing his "sort of armchair activism" and feeling "that it was my scholarly duty to develop a critical argument with regard to the Roşia Montană project"); *id.* at 144-145 (stating that "my research in Roşia Montană cannot lay claim to any sort of statistical representativeness" and that "I cannot claim to offer an unbiased picture of these network"); *id.* at 216 (stating that "[m]y work on the Roşia Montană case started . . . from a moderate sense of academic activism in which I saw my work as contributing to the intellectual ammunition for the critics of destructive development projects"); Irina Velicu, To sell or not to sell: resistance neo-liberal globalization and the aesthetic post-communist subject. Ph.D. Thesis, University of Hawaii, 2011 (Thomson Exh. 18) at 49 (stating that she made her "solidarity explicit" with Project opponents).

[369] *See supra* § III.

[370] Thomson ¶ 26.

[371] Boutilier ¶ 119 (observing that the retrospective nature of statements about the past "warrants caution in any event about placing too much faith in the statements").

ordered produced over Respondent's objections, show he interviewed only six people, A to F, including a former disgruntled employee (Mr. A),[372] two longtime Project opponents (Mr. B and Mr. C),[373] and a member of the opposition group Alburnus Maior (Mr. D).[374]

156. Dr. Thomson accordingly did not interview a comprehensive or representative sample of stakeholders generally, let alone in the local community, but instead apparently chose to meet with a handful of Project opponents.[375] This limited, slanted, *post hoc* selection of interviewees contrasts starkly with Professor Henisz's contemporaneous and independent interviews of dozens of stakeholders representing the full spectrum of views in both July 2007 and December 2011.

157. Sixth, in describing his methodology, Dr. Thomson says he focused solely on interactions between the company and stakeholders.[376] As Dr. Boutilier observes, Dr. Thomson's analysis in this arbitration therefore rests on "an unspoken but pervasive and incorrect assumption" that "the sole influence on the level of social license granted to a project is the behavior of the company," which "ignores the influence of government."[377]

158. While adopting this cramped approach obviously suits Respondent's position in this arbitration that "it was the Claimants', and not the Government's responsibility to secure the required social license,"[378] in so doing Dr. Thomson here too departs from his academic and consulting work outside this arbitration, where he plainly acknowledges that the "Government can both help and hinder gaining a SLO."[379] In his public remarks, Dr. Thomson has observed

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[372] Thomson Interview Notes (Exh. C-1961) at 2 ( ).

[373] Thomson Interview Notes (Exh. C-1961) at 4 ).

[374] Thomson Interview Notes (Exh. C-1961) at 6 ( ).

[375] Not only were Dr. Thomson's interviews retrospective, limited in number, and biased against Claimants, but they in any event do not support his conclusions. Boutilier § 5.3.

[376] Thomson ¶ 27.

[377] Boutilier ¶ 3.i.

[378] Counter-Memorial ¶ 359. *See also, e.g.*, *id.* ¶ 23 (claiming that the Government was not "responsible for obtaining the social license," and that "this obligation remained, and still remains, the Claimants' own").

[379] Ian Thomson, The Social License to Operate: Reality, Myths and the Dark Side, 2015/6 (Thomson Exh. 46) Slide 3; *id.* Slide 17 (describing "The Dark Side" as "When Politics and Politicians take over!"). *See also*

that "[p]oliticians are very, very skilled at manipulating public opinion" and "are all part of a game and it can be a horrible game, but politicians at their worst are trying to curry favour and worrying about their own personal social license."[380] For that reason, contemporary analyses of the social license do not focus solely on the company's conduct, but instead recognize that the Government also can affect the level of social license.[381]

159. For example, the Government's unlawful suspension of the EIA procedure in September 2007 prevented RMGC from fulfilling its promises to generate jobs and deliver other promised benefits, which had "predictable negative effects" on the level of support for the Project.[382] The Government took numerous further unlawful measures that are the subject of this arbitration and rival senior politicians also falsely accused each other of accepting bribes from RMGC, all of which "necessarily had a negative effect on the company's ability to improve its social license."[383] Dr. Boutilier therefore takes Dr. Thomson to task for the "limited scope of his report" and for failing to consider "any evidence relevant to the government's role in events and responsibility for the consequences of its conduct that also affect the social license."[384]

160. Seventh, in addition to these methodological flaws, Dr. Thomson's core argument is that RMGC's fate was sealed by mistakes it allegedly made early in the process,[385] which is

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Robert Boutilier and Ian Thomson, Modelling and Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice, 2011 (Thomson Exh. 11) at 4 (explaining that "[t]he task of achieving socio-political legitimacy is much less under the company's direct control, much less familiar, and much more complex," and that "there are many parties implicated, including several levels of government").

[380] *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 3.

[381] Boutilier ¶¶ 1-2.

[382] Boutilier ¶¶ 117.e.iv (explaining that, "[f]rom a social license perspective, promised benefits delayed are eventually viewed as promised benefits denied").

[383] Boutilier ¶ 117.j.iii.

[384] Boutilier ¶ 117.c.

[385] Thomson at 2; *id.* ¶¶ 107-108. Dr. Thomson refers to statements of Claimants and RMGC from 2006-2014 about their "commitment to win" or "gain" or "earn" or "get" the social license, and concludes that "the company knew that it lacked a stable, meaningful social license from the local population during that period." Thomson ¶¶ 80-87. Dr. Thomson is not correct. In describing various initiatives "to win the social license," Claimants understood that people's opinions can change over time and therefore constantly sought to build, maintain, and strengthen support for the Project. Mr. Henry confirms, however, that none of Claimants' disclosures was intended or should be understood to mean that Claimants believed the Project lacked local support or a social license. Henry II ¶ 80. *See also* Boutilier ¶ 117.g (observing that the more reasonable interpretation is "not to say they believed [social license] to be absent, but rather, that they saw the advantages

both demonstrably wrong and evokes the notion of "original sin" that is at odds with the fundamental precept of the Thomson-Boutilier "dynamic" model, namely that the level of social license is "[n]ot static, but variable continuously through time."[386]

161. In making his case that "RMGC missed the opportunity to gain a social license early in the life of the Project," Dr. Thomson contends he has "not seen any evidence of meaningful direct interaction between RMGC and the local population . . . through to late 2002."[387] In fact, RMGC's interactions with the local community were extensive and meaningful during those early years as described by Ms. Lorincz, who provides a chronological summary of the public consultation, engagement, and sustainable development activities undertaken by the company in the local communities starting in 2000.

162. As Ms. Lorincz explains, from 2000-2002 alone RMGC:

- established five community relations and information centers with permanent staff in Roşia Montană, Corna, Abrud, and Bucium;
- conducted a face-to-face opinion survey of 110 Roşia Montană residents in August 2000;
- invited local residents to visit and comment on the "model house" designed for the resettlement sites;
- arranged for 483 local residents to take all-day trips with RMGC staff from January to March 2001 to visit the site of a resettled village;
- conducted door-to-door consultations with 755 local households from May to June 2001;

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of aiming higher").

[386] Boutilier ¶ 10.c; Thomson ¶ 16, Figure 3.

[387] Thomson at 2, ¶¶ 30, 107.

- organized numerous workshops, public meetings, and consultations with local residents, local Government officials, community religious leaders, and NGOs, including Alburnus Maior, in relation to the resettlement sites, land acquisition, and the urbanism plans (the PUZ and PUG); and

- organized numerous social and cultural activities and events for the local community and provided financial support to the local municipalities, churches, sports teams, and environmental, youth, and educational partnerships.[388]

163. Thus, RMGC worked with external specialists and consultants at an early stage to develop socially responsible policies and to guide the company through the process of consulting the local community, and whatever missteps may have occurred along the way, it thereafter adjusted and improved its approach over time to respond to issues raised and to ensure it remained responsive to the needs of the community.[389]

164. Dr. Thomson acknowledges that "the company revised its strategies and, from 2006 onward," implemented various initiatives that "include[d] extensive support for the local communities and ongoing engagement with the population."[390] He concludes, however, that it was "too little too late to gain a stable social license even at the local level."[391]

165. Dr. Thomson's contention that it was "too late" for RMGC to earn a social license does not square with the quantitative data assessed by Dr. Boutilier showing the company already had a social license at both the local and national levels in 2006.[392]

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[388] Lorincz II ¶¶ 6-44. *See also* Boutilier ¶ 117.d.ii. While Dr. Thomson claims he has not seen any of this evidence, a number of the documents described by Ms. Lorincz are attachments to the RAP prepared in 2001, which Dr. Thomson submitted as Thomson Exh. 22.

[389] Lorincz II ¶¶ 6, 33, 50-62.

[390] Thomson ¶¶ 62, 64-65, 108 (acknowledging that "[t]he Community Sustainable Development Program was implemented almost immediately by the company" and that "[t]he various investments and activities are documented in the Annual Action Plan Evaluation Report and are also very well described" by Ms. Lorincz).

[391] Thomson at 2; *id.* ¶ 108.

[392] Boutilier ¶¶ 56-61, 69-78 (discussing data from 2005-2006 at the local and national levels). *See also* Lorincz II ¶¶ 65-71 (discussing surveys of the local community from 2004-2006).

166. Moreover, while apparently not minded to consider the possibility that RMGC could raise the level of its social license after 2006, Dr. Thomson's "significant observation" from studying the level of social license at the San Cristobal mine in Bolivia was "that the quality of the SLO is dynamic, varying over time, and that the change in quality of the SLO could be tied to specific events and personalities."[393] At that mine, which he studied on a bi-annual basis not for purposes of preparing an expert report in arbitration, Dr. Thomson found that the level of social license "went very high, collapsed, recovered, collapsed again, recovered, and now over the last 10 years, has gently been getting better and better."[394] It therefore is not credible to claim and conclude that RMGC had no hope of improving its own circumstances even if they were as Dr. Thomson contends, which they were not.

167. In fact, RMGC made significant efforts to increase support for the Project as Professor Henisz observed during his site visit in December 2011.[395] Among the many actions undertaken in response to feedback received from the community, RMGC:

- changed its management structure so that the General Manager and each department head was Romanian rather than Canadian;[396]
- hired hundreds of workers and became the largest employer in the region;[397]
- constructed the new Recea residential neighborhood in Alba Iulia;[398]
- restored and repaired numerous historical buildings in Roşia Montană's town center, including a new permanent mining exhibition opened to the public;[399]

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[393] Thomson ¶ 16.

[394] Transcript and video of Ian Thomson's Remarks from the 1st MIREU SLO Workshop (2018) at 4. *See also* Thomson Figure 2 (depicting the San Cristobal social license from 1994-2008); Ian Thomson, The Social License to Operate: Reality, Myths and the Dark Side, 2015/6 (Thomson Exh. 46) Slide 17.

[395] Tănase III ¶¶ 88-92; Lorincz II ¶¶ 2-14, 34-44, 63-71, 84-120; Henisz ¶¶ 26-34.

[396] Tănase III ¶ 88.a; Henisz ¶ 33 (observing that "[t]he 'face' of the company in media and with external stakeholders was unquestionably Romanian").

[397] Tănase III ¶ 91; Lorincz II ¶¶ 45-50; Henisz ¶ 29.

[398] Memorial ¶¶ 180, 282; Henisz ¶¶ 24, 27 (explaining that he "visited the site" in Recea "and met with residents preparing for traditional holiday meals in their new homes adjoining new churches"); Lorincz II ¶¶ 79-83.

- rehabilitated and made accessible to the public more than 200 meters of underground Roman mining galleries at Cătălina-Monuleşti, which RMGC still maintains even today;[400]

- built a pilot water treatment facility at the outlet of the main adit to the Roşia River, which showed that, if the Project were implemented, polluted water flowing from the old mining area and any wastewater generated by the Project would be successfully cleaned and treated;[401] and

- restored the "Old City Hall" and renovated the "Old School" to accommodate the only 4 star hotel in the Apuseni Mountains and another 3 star hotel, and opened a modern canteen restaurant that was a popular local attraction.[402]

168. Through these various efforts, as Professor Henisz observes, RMGC "succeeded in systematically addressing the key issues of concern raised by the opposition," including with regard to foreign exploitation of Romanian resources, environmental protection and treatment, cultural heritage preservation, resettlement, job creation, and tourism.[403] As Professor Henisz further explains, RMGC "did this not only with words and emotions" but also by investing "time and resources to produce observable, tangible developments on the ground."[404]

169. RMGC also undertook numerous initiatives to engage more directly with a wide range of stakeholders.[405] Professor Henisz confirms that, during his interviews in December 2011, supporters and opponents of the Project alike informed him of "a very different and much more successful stakeholder engagement strategy" that was occurring "at a much richer level

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[399] Memorial ¶¶ 169, 240; Henisz ¶¶ 24, 29 (explaining that he observed the rehabilitation works "and spoke with the architects and archaeologists who were leading this initiative").

[400] Memorial ¶¶ 16, 169, 240; Henisz ¶ 30 (stating he was "able to visit this impressive site after a tour of the restoration project much as future tourists would see them").

[401] Memorial ¶¶ 228-230; Henisz ¶ 28 (confirming he visited the pilot water treaty facility).

[402] Tănase III ¶ 88.f (explaining that RMGC also published and distributed free of charge 15,000 tourist booklets that described the local sites, history, and culture of Roşia Montană).

[403] Henisz ¶¶ 38, 42. *See also* Tănase III ¶ 88; Lorincz II ¶¶ 2-14.

[404] Henisz ¶¶ 38, 42.

[405] Tănase III ¶¶ 108-114; Henisz ¶¶ 25-26, 31-32.

with a focus on the issues of primary concern to stakeholders."[406] Quoting from his contemporaneous interview notes, Professor Henisz lists statements of multiple external stakeholders who became advocates of the company in 2009-2010,[407] and he observes that the opposition seemed resigned to defeat.[408] Professor Henisz therefore concludes that RMGC's "shift in strategy was matched with a shift in attitude" by stakeholders, and that the company won "the support of numerous external stakeholders of high status and credibility who recounted to us a process of effective engagement by the company that demonstrated respect, understanding and a desire to help the stakeholders achieve their desired goals for themselves and their constituents."[409] Other contemporaneous studies were consistent with Professor Henisz's contemporaneous observations.[410]

170. For example, in April 2011 the University of Exeter's Camborne School of Mines completed a comprehensive external survey funded by the European Commission of seven mining projects in five European countries, including the Roşia Montană Project.[411] Based on their interviews of Roşia Montană residents, the University of Exeter researchers determined that "the community had a very strong level of support for mining to restart in the area," and that when asked what percentage of people from Roşia Montană supported the Project, "people were typically quoting that they thought 90 - 95% of the population supported the project."[412] The

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[406] Henisz ¶ 25.

[407] Henisz ¶¶ 36.a-p.

[408] Henisz ¶¶ 38-40 (explaining that Stephanie Roth, the lead strategist of Alburnus Maior, had left Romania to pursue an anti-GMO campaign in Great Britain, that local opposition leaders Eugen David and Zeno Cornea had a falling out that left the remaining opposition divided "into small bitter factions," and that "[m]embers of the opposition spoke openly of the 'victory' of the company"). *See also* Tănase III ¶¶ 119-128 (discussing the low-level opposition activity in 2011-2012).

[409] Henisz ¶¶ 35, 38.

[410] Boutilier ¶¶ 41-55, 66-78 (discussing surveys, studies, and polling regarding the level of RMGC's social license in 2010-2012); Lorincz II ¶¶ 92-97 (discussing same at local level); Tănase III ¶¶ 94-97, 116-118 (discussing same at both local and national levels).

[411] Boutilier ¶¶ 44-49; Lorincz II ¶¶ 98-102; Tănase III ¶¶ 96-97.

[412] Boutilier ¶ 46; Lorincz II ¶ 100; Tănase III ¶ 97; Impact Monitoring of Mineral Resources Exploitation, Report on the Study of Mining and Society and Its Implications, Apr. 2011 (Exh. C-2045) at 23, 25. *See also id.* at 56, 85, 87 (finding that over 95% of survey respondents in Roşia Montană felt positive about mining, and "that much of the opposition against the mine reopening comes from outside of the community and even outside of Romania").

University of Exeter researchers further determined that the Roşia Montană Project outperformed all of the other mining projects surveyed in terms of local support, trust, and engagement:

> Roşia Montană has the highest percentage of respondents who had positive views about mining compared to all the other sites (Figure 16). Roşia Montană also stands out compared to other demo sites, as they had the highest percentage of respondents saying mining companies were meeting public expectations (Figure 17), the highest percentage of respondents feeling mining was an important part of their identity / heritage / tradition (Figure 18) and the highest number of responses indicating that people perceived that RMGC and the local government were sufficiently engaging local people (Figure 19).[413]

171. Moreover, as discussed above, in December 2011 the "Munţii Apuseni" Association for Socio-Economic Research and Development Center determined that an "overwhelming majority" (~ 85%) of Roşia Montană residents and over 75% of those surveyed in Zlatna, Baia de Arieş, Abrud, and Roşia Montană supported development of the Project.[414]

172. Similarly, in the referendum held in Roşia Montană and 34 other communities in Alba County one year later on December 9, 2012, the day of national elections, a strong majority of the voters in Roşia Montană (79%) and the areas with mining traditions, *i.e.*, Abrud, Baia de Aries, Bucium, Roşia Montană, and Zlatna (71%) voted to restart mining in the area and to implement the Project.[415] Overall, in the 35 communities in Alba County that held the referendum, nearly two-thirds of the total voters (63%) voted to restart mining and to implement

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[413] Impact Monitoring of Mineral Resources Exploitation, Report on the Study of Mining and Society and Its Implications, Apr. 2011 (Exh. C-2045) at 76. *See also id.* at 4 ("Out of all the demo sites, it is only in Roşia Montană where the majority of survey respondents felt sufficiently engaged by their local mining company / the local government. This reflects the high level of consultation that Roşia Montană Gold Corporation (RMGC) have had with stakeholders and in particular with the local community."); *id.* at 59 ("Nearly 80% of survey respondents in Roşia Montană feel sufficiently engaged by mining companies and / or the local government regarding potential mine developments or expansion (Figure 19). The other sites have very low levels of people feeling they are 'sufficiently' engaged (Figure 19).").

[414] "Munţii Apuseni" Association for Socio-Economic Research and Development Center, Report regarding the impact of economic development on the quality of life in Zlatna, Baia de Aries, Abrud, and Roşia Montană, dated Dec. 2011 (Exh. C-2050) at 86. *See also id.* at 10 (finding that, "in Roşia Montană, an overwhelming majority of the investigated population – 81% – says that the reopening of the mine is the main opportunity for economic development of the town, at a great distance being tourism (5.2%) and animal husbandry (3.6%)").

[415] Memorial ¶ 400.

the Project.[416] The referendum results therefore were consistent with the survey conducted one year earlier by the "Munţii Apuseni" Association.[417]

173. In his expert report, Dr. Thomson claims the referendum was flawed and "offers no insight on the social license."[418] Dr. Boutilier and [redacted] provide a point-by-point rebuttal to each of Dr. Thomson's criticisms of the referendum, in which Dr. Thomson mainly parrots the unfounded assertions of Project opponents.[419]

174. Dr. Thomson's main criticism is that voters were asked whether they agreed with restarting mining in the Apuseni Mountains and with exploitation of Roşia Montană.[420] While the question was "double-barreled," Dr. Boutilier explains that in the circumstances the problem raised by Dr. Thomson "is more apparent than real" and that it is "highly unlikely" that people misunderstood the question.[421] In fact, the Mayors of the 35 localities that held the referendum promoted it as a referendum on the Project, supporters and opponents of the Project both organized media and public relations efforts to vote for or against the Project in the referendum, and national TV stations reported that the highest voting percentage in the country early on the morning of the referendum and the national elections was in Roşia Montană.[422] Thus, as RMGC's witnesses who lived through the referendum explain, "everyone understood that the referendum was specifically about the Roşia Montană Project."[423]

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[416] Memorial ¶ 400.

[417] While the referendum turnout (43% of all registered voters) was less than the 50% threshold then required to be validated by law, more than 30,000 people voted in the referendum, the turnout exceeded the participation level of 41.6% in the national parliamentary elections, the turnout in Roşia Montană was 66%, and the threshold was lowered to 30% in 2014. Tănase III ¶ 103; Lorincz II ¶ 113. In addition, the Mayors of the 35 communities that held the referendum explained in a memorandum endorsed by the Alba County Council that a massive snowstorm and outdated and overstated voter registration rolls reduced the turnout and did not reflect the actual level of support for the Project, and that in normal conditions turnout would easily have been 60% and more than 70% of the total votes would have been cast in favor of the Project. Memorial ¶ 400.

[418] Thomson ¶¶ 100-105.

[419] Boutilier ¶ 117.i.i-xiv; [redacted].

[420] Thomson ¶ 101 (describing the question asked as the "most significant flaw").

[421] Boutilier ¶ 117.i.ii.

[422] Lorincz II ¶¶ 110-112; Tănase III ¶ 104.

[423] [redacted]

175. Moreover, prior to this arbitration, the Government did not contest and indeed acknowledged that the referendum demonstrated strong local and regional support for the Project.[424] For example, the Mayor of Roşia Montană stated publicly that the result was "overwhelming" and "ended the lie" that the local community opposed the Project.[425] The Alba County Council endorsed a memorandum from the Mayors of the 35 communities that held the referendum, concluding that "the results of the referendum and the vote of the people from these communities provide a decisive argument for the restart of mining and for the start of the Roşia Montană mining project."[426] The Government took note of that memorandum, acknowledged that "the vast majority" of voters in the referendum voted "yes," and concluded that a "decision on the Roşia Montană project and other mining projects in the country is extremely important for local communities." [427] And Prime Minister Ponta declared publicly in 2013 that "you know very well in Alba County, there is strong support for the project."[428]

176. Furthermore, based on his analysis of monthly public opinion polls conducted nationally by the external company IMAS Marketing and Polls, Dr. Boutilier concludes that, generally, "support grew while the opposition declined," and in particular from late 2011 to January 2012 there was "a sharp rise in support and a modest decrease in opposition."[429]

177. For these reasons, Dr. Thomson's conclusions that RMGC could not and did not obtain a social license even at the local level are unsupported and simply wrong. Indeed, contrary to Respondent's false narrative that opposition purportedly increased and intensified

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[424] Lorincz II ¶¶ 113-115; Tănase III ¶ 105.

[425] Lorincz II ¶ 113.

[426] Memorandum on Job Creation by the Restart of Mining in the Apuseni Mountains and Especially in Roşia Montană adopted by local mayors and endorsed by the Alba County Local Council submitted to the President of Romania, Parliament of Romania, and Government of Romania on Dec. 28, 2012 (Exh. C-794) at 6 (stating that "this mining project has an overwhelming importance in the long-term development of the area" and "it is high time a decision was made as quickly as possible with regard to the restart of the mine at Roşia Montană").

[427] Government Note on the Roşia Montană Mining Project dated Mar. 6, 2013 (Exh. C-1903) at 34-35.

[428] Statements made by Prime Minister Victor Ponta, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 2 (Prime Minister Victor Ponta).

[429] Boutilier ¶ 35. *Id.* ¶ 40-41 (concluding based on the IMAS national polling data from 2008-2014 that "the social license for the Roşia Montană project, viewed nationally from 2008 to 2014, could best be described as being at the moderate acceptance level," that "like all mines, it also had periods of lower and higher social license levels," and that "[f]rom around October 2011 to January 2012, it took a sudden step upward and entered the 'high' acceptance level").

from 2010-2012 and allegedly motivated RMGC to ask for a "special agreement" and then a "special law,"[430] the evidence set out above and discussed more fully by Dr. Boutilier demonstrates that RMGC substantially raised the level of its social license both nationally and locally during that time, "despite adversities imposed on the social license by government."[431]

178. Finally and in any event, RMGC's internal records further show it genuinely believed based on its own assessments and the external polling data that support for the Project was increasing in 2011.[432] Contrary to Respondent's speculation, therefore, RMGC was not motivated to ask the Government for a "special agreement" or a "special law" and did not do so, as discussed below.

### B. Claimants and RMGC Did Not Need or Ask for a Special Law; the Government Imposed That Requirement on Them and Conditioned Issuance of the Environmental Permit and Advancement of the Project on Parliament's Approving the Draft Law

179. Proceeding from the false premise that RMGC was "facing relentless social opposition" in early 2013, Respondent baldly asserts that "RMGC sought the assistance of the State and the State was prepared to negotiate and increase its stake, given the financial hardship it found itself in, in the aftermath of the global financial crisis."[433] This requested and purportedly necessary "assistance" came in the form of a special law, which Respondent further asserts "the Government and RMGC had agreed to submit to Parliament."[434] Respondent's spin on the facts is baseless.

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[430] *See supra* § III; Counter-Memorial ¶¶ 259-289.

[431] Boutilier ¶ 117.j.iv (concluding that, despite these adversities imposed by the Government on its level of social license, by late 2011 RMGC "nonetheless did establish a high acceptance level social license nationally, an approval level in the Project region, and a high approval level in Roşia Montană").

[432] *See, e.g.*, RMGC Participatory Diagnosis of Community Relations, Community Relations Barometer No. 3, dated May-June 2011 (Exh. C-2047) at 4 (finding support for the Project "has grown constantly" in Roşia Montană from 81% to 90% in 2010-2011, and "in the next circle of localities the support is 79%, increasing by 10% compared to November 2010"); Email from Zoran Vuxanovici to Dragoş Tănase and others dated Dec. 23, 2011 (Exh. C-2671) at 1 (reporting "a very large increase . . . in the percentage of those who entirely or to a large extent agree with the project implementation" and a "steady decrease in those who are entirely against the project – from 39% 3 years ago to 20-23% over the past few months," and concluding that "the Romanian people have offered us a beautiful gift, by giving us more confidence in the Project").

[433] Counter-Memorial ¶ 264.

[434] Counter-Memorial ¶ 264.

180. First, purported social opposition to the Project did not drive Claimants or RMGC to seek a special law. For the reasons set forth above, the evidence shows and RMGC and Claimants believed that, contrary to Respondent's contention about significant and mounting public resistance compelling Claimants to seek the Government's help through a special law, there was in early 2013 strong support for the Project.[435] Their belief was supported by RMGC's abundant polling data, by the highly positive results of the December 2012 referendum, by RMGC's interactions with the local community, and by the rather small scale nature of protests that did occur.[436]

181. As a result, as [REDACTED] testifies, "anti-Project protest activity in the relevant time period was simply not as Romania describes, and certainly was not driving Gabriel and RMGC to try to 'get around the issue by way of a special law.'"[437] [REDACTED] further testifies that "[c]ontrary to Romania's speculation, Gabriel and RMGC did not therefore enter 2013 feeling under siege by mounting social protests and seeking a legislative lifeline through a special law from Parliament."[438] [REDACTED] concurs.[439] Thus, regardless of Respondent's dim *post hoc* views on the Project's social license in the early 2012/early 2013 timeframe asserted for the first time in this arbitration, it is clear that Gabriel and RMGC did not share that view then or now, and there is thus no evidence that Claimants were motivated to act, or did act, as Respondent speculates.

182. Second, the testimony of [REDACTED] and the contemporaneous conduct and statements of the parties prove Respondent's narrative to be false that RMGC approached and willingly partnered with the Government to obtain a special law for the Project.

183. [REDACTED]

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[435] Tănase III ¶¶ 86-128; Henry II ¶¶ 34-38, 60-64.

[436] Tănase III ¶¶ 86-128; Henry II ¶¶ 34-38, 60-64.

[437] [REDACTED]

[438] [REDACTED]

[439] [REDACTED]

[440]

[441]

[442]

[443]

184. As explained by , a combination of Prime Minister Ponta, Minister Delegate Şova, and Minister of Economy Plumb confirmed in no fewer than nine unequivocal public statements between March and July 2013 that the Government (not RMGC or Gabriel) required Parliament's approval of a special law in order for the Project to proceed and, if Parliament were to reject the Draft Law, the Project would not proceed.[444] Put differently, the Government wanted the special law/Parliamentary route for its own political purposes to avoid responsibility for issuing the Environmental Permit (to which the Project was clearly entitled) and allowing the Project to advance.

185. The contemporaneous evidence further shows that RMGC and Gabriel did not need or ask for a special law, and did not want issuance of the Environmental Permit to turn on any action by Parliament.[445] As explains, although RMGC supported long-pending proposed legislation in Parliament to amend and improve the general mining law to facilitate implementation of all mining projects, RMGC told the Government's Negotiation Commission

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[440] Memorial ¶ 404.

[441] Memorial ¶¶ 405-413.

[442] Memorial ¶ 410, n.814; .

[443] (stating that the Parliamentary path was presented to RMGC by the Government as the only path forward; it was not described as optional or negotiable").

[444]

[445] *See* Transcript of Negotiation Commission meeting dated June 14, 2013 (Exh. C-1536) at 53 ( "It woul[d] be ideal to not adopt legislative provisions that are specific to RM [Roșia Montană]; ideally, it would be to repair the legislative framework, both for Roșia Montană and for any other mining investment to be made in Romania. This would be ideal. And that's why it would be ideal to push as much as possible from a Roșia Montană-specific legislation to a general legislation.").

that it did not support the idea of a special law for the Project.[446] RMGC also specifically told both the TAC and the Negotiation Commission that the Environmental Permit should be issued by Government Decision, and told the Negotiation Commission the Permit should be issued before any law was sent to Parliament.[447] The Government refused to accept RMGC's position.[448]

186. This refusal reflects the fact that, as explained in the Memorial and contrary to Respondent's characterization, RMGC's interaction with the Negotiation Commission was not a real negotiation. Not only did the Government fail to issue the Environmental Permit as required by law and insist on a special law, but it presented RMGC with near final drafts of the Draft Law and Draft Agreement with little room for changes.[449] Minister-Delegate Şova confirmed the one-sided nature of the relationship, telling Parliament "[t]he representatives of RMGC were not called to a negotiation, they were called to be informed that they have to give these things to the Romanian State."[450]

187. Not only did Gabriel and RMGC not ask for a special law, but as described in section II above, it is a blatant mischaracterization to suggest that Gabriel willingly offered the Government "25 and 6" to get one. The financial offer was the coerced response to an

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[446] Respondent does not contest this fact and acknowledges that the Project can be implemented "pursuant to the existing legal framework." Counter-Memorial ¶ 369. Notably, but because it was apparent from statements of Government officials that Parliament would be involved, . Memorial ¶¶ 454-455. As noted, the Government prepared the resulting Draft Agreement as it saw fit.

[447] *See also* Mihai II § VII.C (explaining that neither the Draft Law nor the attached Draft Agreement was necessary to implement the Project).

[448] *See* Transcript of Parliamentary Special Commission hearing dated Oct. 15, 2013 (Exh.C-1531) at 6 (Minister Delegate of Infrastructure Projects Dan Şova: "Of course [RMGC] does not need this, as the current situation is convenient for them. The law was made for the Romanian state, not for them.").

[449] Memorial ¶¶ 453-60.

[450] Memorial ¶ 465; Tănase III ¶¶ 142, n.403; Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 23 (Minister Delegate of Infrastructure Projects Şova).

extortionate demand and abuse of State power to condition the future of the Project on revising the parties then existing economic agreement.

188. Respondent's arbitration narrative seeking to characterize RMGC as a willing co-venturer and partner that sought a special law in exchange for an increased economic stake for the Government is false.

### C. The Government's Submission of the Draft Law to Parliament Triggered Street Protests That Were Fueled by and Part of the Growing Social Movement Against a Perceived Corrupt and Entrenched Political Class and Government

189. Respondent claims that the Government's sending the Draft Law to Parliament "unleashed a social movement of unprecedented scale in modern, post-Communist Romania,"[451] which Respondent characterizes as "against the Project"[452] and, further, as emblematic of and caused by the sole failure of RMGC and Gabriel to secure a social license for the Project.[453] Respondent naturally disclaims any responsibility for causing the protests, which it contends left Parliament with no choice but to reject the Draft Law.[454] For the reasons explained above and in greater detail by Dr. Boutilier, Respondent's exculpatory narrative is simplistic and wrong. Fully understood, the protests were at bottom anti-Government, did not reflect a seismic shift in Romanian civic activism but were part of a broader, decades-long post-Communist social movement against political corruption and for democracy and the rule of law, and were triggered by the Government's unlawful conduct in politicizing the permitting process by insisting on submitting the Draft Law to Parliament, making Parliament's political vote on the Law determinative of whether the Project would be done, and then publicly calling for the Law's rejection.[455]

190. As a threshold matter, to the extent Respondent suggests that terminating the Project for political reasons due to the protests against the Draft Law provides it a defense in this

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[451] Counter-Memorial ¶ 20; *see also* Counter-Memorial ¶ 266.

[452] Counter-Memorial ¶ 20.

[453] Counter-Memorial ¶¶ 359, 363, 367; *see also* Counter-Memorial ¶¶ 342-356.

[454] Counter-Memorial ¶¶ 21-23, 363.

[455] *See generally* Boutilier ¶ 3(h), 79-115; Memorial ¶¶ 475-76; [redacted].

arbitration, Respondent is wrong. First, because the Government's unlawful derailing and politicization of the permitting process precipitated, magnified, and sustained the protests, the Government cannot rely in defense on the very protests its unlawful conduct provoked. Second, and more fundamentally, while the Government could decide not to proceed with the Project in order to fulfill another public purpose objective, it could not do so lawfully without compensating Claimants for taking RMGC's project development rights.[456]

191. As Dr. Boutilier observes in his report, which Claimants urge the Tribunal to read in its entirety, fully understood and contrary to Respondent's characterization, the 2013 protests were not the start of a social movement, but instead were part of and fit comfortably within the existing decades-long post-Communist movement in Romania toward democracy, for the rule of law, and against perceived endemic political corruption and cronyism.[457] These various motivations are broadly grouped under the banner of "anti-corruption," and reflect diminishing trust in and skepticism of the political class and institutions of government generally.[458]

192. Summarizing the history of major civic protests from 1990 to the present, which often drew tens to hundreds of thousands of protestors, Dr. Boutilier explains that the protests, including those in 2013, followed a familiar pattern: the protests were triggered by a particular event – such as fiscal or other austerity measures (the protests against which led to the downfall of the Boc government in 2012), a fire in a nightclub and the perceived maladministration and corruption that created the conditions for it (the protests against which led to the downfall of the Ponta government in 2015), an attempt to amend and weaken anti-corruption laws, or as here a special law for a mining project – but then were sustained and motivated by far broader, deeper, more powerful and fundamental societal concerns about government corruption, incompetence, and the lack of rule of law.[459]

193. In this context, it is no wonder that the Government's insistence on a special law for the Project, with its aura of preferential treatment and its abandonment of the lawful

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[456] *E.g.*, Memorial ¶¶ 758-759.

[457] Boutilier ¶¶ 80-99; 111-115.

[458] Boutilier ¶¶ 80-99.

[459] Boutilier ¶¶ 80-99.

permitting process and effective deputizing of Parliament to decide the future of the Project as a political matter, triggered protests.

194. As if that were not enough, leading politicians, including Prime Minister Ponta and President Băsescu, fueled negative perceptions and suspicions about the Project and the Government's treatment of it by publicly accusing each other of corruption for supporting the Project.[460] Although the DNA investigated allegations of corruption surrounding the Project and found none,[461] the fact that bribes were not paid did not stop such politically-motivated accusations or prevent the negative associations they caused. The concerns of protestors over the Government-sponsored Draft Law were acknowledged, echoed, and exacerbated by still other comments from leading politicians questioning the need for and legality of the Draft Law, and criticizing the Government for submitting it to Parliament in the first place.[462]

195. For these reasons, the protests in 2013 that followed the Government's submission of the Draft Law to Parliament were as much or more about concerns over the legitimacy of the Government itself and its treatment of the Project as they were about the Project. As Dr. Boutilier observes:

> Whatever the number of protestors whose main concerns had related to the Project as such, the evidence indicates that they were swallowed and overtaken by much broader, deeper, more powerful, and enduring societal forces directed at the perceived failure of government, the rule of law, and the political class as a whole. Although RMGC was able to improve issues related to heritage preservation and environmental protection, it obviously had no control over who formed the government, how they behaved, or the public's reaction to their words and deeds.[463]

196. While there certainly were protestors who carried signs to "Save Roşia Montană," as [redacted] also observes, in this environment, protesting the Project was often a shorthand for protesting the Government itself.[464] This observation is also consistent with Dr. Boutilier's

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[460] Boutilier ¶¶ 100-109; [redacted].

[461] Boutilier ¶ 100; [redacted].

[462] Boutilier ¶ 110; [redacted].

[463] Boutilier ¶ 115.

[464] [redacted]

analysis, which shows that the majority of issues animating the 2013 protests were about the Government's own actions, not about the Project.[465]

197. In this regard, Dr. Boutilier observes that academic commentators and leading political figures alike recognized that the primary motivations for the protests were not concerns about the environment, culture or mining generally, but concerns about and mistrust of the Government and its adherence to the rule of law.[466]

198. Thus, for example, as Senator Crin Antonescu, the leader of the Senate and co-leader of the ruling coalition,[467] was calling for rejection of the Draft Law and the Project in September 2013, he observed that there was "a great amount of suspicion that political decision-makers in this matter would not act according to the legitimate national public interests," and that "the feeling of a great part of the public opinion in Romania" is that officials "have been bought," noting that "the top politicians have thrown accusations that deepened or amplified this feeling."[468]

199. Reflecting on the protests in October 2013, Senator Antonescu further stated:

> If we have protests, in University Square as well as in other places, they have only one thing in common, which is not ecology, it's not some economic ultra-nationalism ..., it's the dissatisfaction with and suspicion against those who govern, those of today and of yesterday, which risks becoming [an] anti-system [movement].[469]

200. President Traian Băsescu likewise stated in an interview in September 2013 that [t]his is one of the biggest mistakes of the Government, trying to transfer an executive

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465 Boutilier ¶¶ 111-115.

466 Boutilier ¶¶ 80-115.

467 As President of the Senate, Senator Antonescu was first in the line of succession to the presidency. He served as interim President of Romania during the suspension and attempted impeachment of President Băsescu in July 2012.

468 Boutilier ¶ 105; *VIDEO Crin Antonescu's surprise-statement: The Roşia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) at 1-2; Interview with Crin Antonescu, B1TV, dated Sept. 9, 2013 (Exh. C-2690).

469 *Crin Antonescu: Mistrust in the Government motivates the University Square protests*, Digi24.ro, dated Oct. 23, 2013 (Exh. C-2692).

responsibility to the Parliament," and that "sending the draft law in the Parliament was the spark that started these protests, which are not only related to Roşia Montană."[470]

201. That the Government's submission of the Draft Law and related abandonment of the lawful permitting process caused and sustained the protests is confirmed by the unassailable fact that, after the TAC finished its review in 2011 and the Project should have been permitted in early 2012 in accordance with the law, there were not mass street protests against the Project. On the contrary, opposition leader Stephanie Roth had left and the lead anti-Project NGO was, with an air of resignation, lamenting the inevitable permitting of the Project.[471] Indeed, the only mass protests in January 2012 were directed against the Government and led to the fall of the Boc government.[472]

202. Further confirmation of the protestors' fundamental distrust of the Government is also evident in the fact that the protests continued even as a parade of responsible ministers and other senior government officials testified in unison before Parliament that, based on the comprehensive review of the Project by Government specialists, the Project would not harm but clean the environment, would not destroy but preserve important cultural artifacts, and would not impede but boost sustainable economic development in Roşia Montană and its environs, as well as contribute to the Romanian economy as whole.[473]

203. Thus, with history as a guide, had the Government issued the Environmental Permit as it should have in 2012 according to the law and not thereafter unlawfully abdicated its decision-making role in the administrative permitting process in favor of an unlawful political one involving Parliament, the 2013 protests in all likelihood would not have happened. That they did happen is more clearly the result of the Government's own misconduct and politicization of the Project and its permitting than a rebuke to the Project itself. At all events,

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[470] Interview of Traian Băsescu, Pro TV, dated Sept. 29, 2013 (Exh. C- 2864) at 2.

[471] *See supra* § IV.A; [redacted].

[472] Tănase III ¶¶ 92, 182; Memorial ¶ 380.

[473] *See also*, Boutilier, R., 2017, *A Measure of the Social License to Operate for Infrastructure and Extractive Projects* (Thomson Exh. 12) at 3 (noting that "where government has real legitimacy and sovereignty, measurements of impacts would determine the legal license and the social license would be irrelevant," but that stakeholders will assert themselves when they do not trust the government or view it as a legitimate and impartial regulator, which is precisely what occurred here).

neither the protests nor the rejection of the Draft Law excused or justified the Government's subsequent and unlawful failure to issue the Environmental Permit and allow the Project to proceed.

### D. Having Created the Arbitrary Condition of Parliamentary Approval of the Draft Law, Government Leaders Decided for Political Reasons to Reject the Draft Law and Hence the Project before Parliamentary Hearings Even Started, and Parliament Responded to Their Political Call

204. As set forth in the Memorial, almost immediately after sending the Draft Law to Parliament pursuant to the unlawful condition for Project permitting and advancement that he and his Government imposed, Prime Minister Ponta publicly stated on August 31, 2013 he would vote against the Draft Law as a member of Parliament.[474] In so doing, he was thus working to prevent fulfillment of the very condition his Government had created.

205. The Prime Minister also publicly admitted on September 5, 2013 that, because the Project met all permitting requirements, the Government would have needed to issue the Environmental Permit according to the law had he not sent the Draft Law to Parliament.[475] The Minister of Environment publicly confirmed on September 7 that, although the Project would be the "safest [in] Europe," the decision of Parliament would determine if the Environmental Permit would be issued.[476] This series of events clearly illustrated the chasm created by the Government between the rule of law pursuant to which the Project on its merits should have been permitted, and the departure from law in favor of self-interested individual/party political preference, which led to the Law's rejection and the Project's demise.[477]

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[474] Memorial ¶¶ 473-475.

[475] Memorial ¶ 478; *Ponta: I sent the Roşia Montană Project to the Parliament so we could not be sued*, Stiri.tvr ro, dated Sept. 5, 2013 (Exh. C-460) (Prime Minister Victor Ponta) ("*I was obligated, under the law . . . under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law.* Precisely because I considered that I should not do this, I sent the law to Parliament . . . . *That's the situation and this is why, had I done absolutely nothing, I would have then had to pay I don't know how many billions in compensation to the company in question.* I don't want to pay from your money, from the taxpayer's money, compensation for contracts starting with 1998. I want the decision to be made by the Parliament.") (emphasis added).

[476] Memorial ¶ 479.

[477] Memorial ¶¶ 475-481; [redacted].

206. As street protests began following and triggered by the Government's submission of the Draft Law to Parliament, the leaders of the ruling Parliamentary coalition Senator Antonescu and Prime Minister Ponta on September 9 publicly called on Parliament – before hearings began – to reject the Draft Law swiftly and decisively, which would mean in the words of the Prime Minister that "this project will not be done" and that "this project is closed."[478]

207. As further explained in the Memorial, despite the uniformly positive testimony before the Senate Committee for Public Administration and Land Management on September 10 from the Ministers of Environment and Culture and the President of NAMR, members of this Senate committee heeded the political call to reject the Draft Law, voting that same day unanimously to recommend doing so.[479] Two days later, on September 12, Prime Minister Ponta confirmed, consistent with the condition the Government had imposed, that "as a result of the law being rejected, the project will not be implemented."[480]

208. As also elaborated in the Memorial, the creation of the Special Commission in Parliament following, and in reaction to, the miners' underground protest in Roşia Montană served only as a stay of the Project's political execution. The Senate committee proceedings were a portent of things to come before the Special Commission – uniformly positive testimony from a parade of ministers and senior Government officials confirming the requirements for the Environmental Permit had been met and highlighting the Project's manifold benefits for environmental clean-up, cultural preservation, and economic growth and development, followed by another unanimous recommendation to reject the Draft Law. Parliament voted along political party lines almost unanimously, and consistent with the political wishes of the Government, to reject the Draft Law.[481] Moreover, Professor Mihai describes the Parliamentary review process

[478] Memorial ¶¶ 480-481. *See also* Tănase III ¶¶ 180-196; Henry II ¶ 50.

[479] Memorial ¶¶ 483-485. As explained further by Professor Mihai, the Draft Law was presented to two committees in addition to the Committee for Public Administration (which Professor Mihai translates from the Romanian as "Commission for Public Administration and Territorial Organization"). There are available records for only one of those two committees, which show that, as did the Committee for Public Administration, it too voted unanimously the same day to recommend rejection of the Draft Law without providing any reasoning for such decision. Mihai II ¶¶ 391-92.

[480] Memorial ¶ 489.

[481] Memorial ¶¶ 495-521; [redacted]. For the reasons explained in the Memorial and elaborated further by Professor Mihai, in contrast to Respondent's assertion that the Special Commission acted lawfully, the Special Commission's review and report on the Draft Law were unlawful in numerous respects, including

and shows how it served to delegitimize the Government's ability to complete the process of permitting for the Project.[482]

209. Respondent struggles to come up with anything to say in response to the clear and unequivocal statements of Senator Antonescu (leader with Prime Minister Ponta of the ruling coalition) and Prime Minister Ponta showing they called on Parliament to reject the Draft Law and the Project not for "technical" reasons, but for political ones. With respect to Senator Antonescu, Respondent musters the following: he did not call on Parliament to reject the law and was in any event only speaking in his personal capacity.[483] With respect to Prime Minister Ponta, Respondent simply denies he called on Parliament to reject the law.[484] Respondent cannot square the circle here.

210. As for Senator Antonescu, he stated that the "project should either be withdrawn, which is probably not the case since the government decided to send it, or I think it should be rejected."[485] As explained by Mr. Tănase, in addition to being the leader of the Senate and co-leader of the ruling coalition, Senator Antonescu was also considered a leading candidate for President in the 2014 election.[486] Because of his "status as a potential presidential candidate" he said he needed "to take a position" on the Draft Law.[487] In addition to his official status, he did not make his statement standing in his front yard, but at a public press conference at PNL political party headquarters, noting during his press conference that PNL would meet and "take a

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the lack of proper justification for its report recommending rejection of the Draft Law, acting in excess of its constitutive mandate and authority by criticizing the technical merits of the Project in its report, effectively supplanting Parliament's own review, and directing or recommending further environmental studies related to the TMF in connection with the EIA process that was overseen by the Ministry of Environment, which itself found the existing studies adequate and the relevant requirements met. Mihai II ¶¶ 410-432.

[482] *See* Mihai II § VII.B.5.

[483] Counter-Memorial ¶ 345.

[484] Counter-Memorial ¶ 346.

[485] Memorial ¶ 480; *VIDEO Crin Antonescu's surprise-statement: The Roşia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) at 1 (Senate President Crin Antonescu). *See also* Tănase III ¶¶ 191-192.

[486] Tănase III ¶ 193.

[487] Tănase III ¶ 193; *VIDEO Crin Antonescu's surprise-statement: The Roşia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) at 2 (Senate President Crin Antonescu).

decision as regards this project."[488] In the circumstances, it is absurd to suggest that Senator Antonescu was speaking in his "personal" capacity.

211. Respondent fares no better in its efforts to deny that the Prime Minister contemporaneously called for the political rejection of the Draft Law. Prime Minister Ponta's own words during his television interview on September 9 show Respondent's denial to be false. Thus, as Mr. Tănase explains, in the interview (a transcript and sub-titled video of which was provided as an exhibit to the Memorial and was thus available for Respondent to review): "A reporter directly asked Prime Minister Ponta whether he would speak at this time to PSD [the political party he led] members of the Parliament so that they clearly vote, politically 'no' and Prime Minister Ponta replied 'Of course, as long as this is the majority decision, yes.'"[489] Prime Minister Ponta acknowledged that some members of his party might vote "yes," but then stated "it is very clear that the decision has now been made, then let's go to the Senate and close the project as soon as possible."[490] The Prime Minister also stated in another interview that day that "we know it very clearly that this project will not be done" and that "[t]he project, I repeat, taking into account it is a parliamentary majority for rejection, will be rejected."[491]

212. In addition to its baseless denial of what Prime Minister Ponta said, Respondent simply ignores the results of the Senate committee hearing the day after Senator Antonescu and Prime Minister Ponta handed down their political death sentence on the Draft Law and hence the Project. As discussed above, despite the uniformly positive testimony about the Project from the key Ministers in the environmental permitting process (Minister of Environment Plumb and Minister of Culture Barbu) and senior staff members at NAMR (General Director Ştefan Hârşu),

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[488] Tănase III ¶ 193.

[489] Tănase III ¶ 196 (internal citations omitted); Interview of Prime Minister Victor Ponta, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 2-3 (Prime Minister Ponta).

[490] Tănase III ¶ 196; Interview of Prime Minister Victor Ponta, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 3 (Prime Minister Ponta).

[491] Tănase III ¶ 195; Henry II ¶ 50; Statements made by Prime Minister Victor Ponta, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 1-2 (Prime Minister Ponta).

the Senate committee voted unanimously that same day to recommend rejection of the Draft Law.[492]

213. Thereafter, the Project was the equivalent of a dead man walking as the Draft Law was "considered" by the Special Commission, which not surprisingly reached the same political conclusion as the Senate committee that preceded it. Significantly, the day the Special Commission voted unanimously to recommend rejection of the Draft Law, Senator Antonescu and Prime Minister Ponta held a USL (the ruling coalition) press conference and indicated that USL members of the Special Commission (comprising 13 of 19 members) had been instructed to vote against the Draft Law and hence the Project.[493] Just as they had done prior to the unanimous "no" vote of the Senate committees, the leaders of the ruling coalition had once again taken steps to ensure through party discipline that the Special Commission also voted to reject the Draft Law. The full Parliament officially and decisively finished the job through party line votes rejecting the Draft Law.

## V. AFTER PARLIAMENT REJECTED THE DRAFT LAW, THE GOVERNMENT ACTED IN ACCORDANCE WITH ITS STATED INTENT NOT TO DO THE PROJECT

214. As elaborated in the Memorial, above, and by [redacted], in the lead-up to the Parliamentary proceedings, and before and after the votes of the Senate Committee, the Special Commission, and the full Parliament to reject the Draft Law and the Project, the Government made unmistakably clear through numerous statements of the Prime Minister, the Minister of Environment, and other senior officials that a "no" vote in Parliament would mean the Project would not be done.[494] The Government kept its word and, through numerous acts and omissions that reflected and were consistent with its evident determination to reject the Project in substance and in fact, the Government confirmed that the Project would not be implemented.[495]

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[492] Memorial ¶¶ 483-485.

[493] Tănase III ¶ 203 & n. 544.

[494] Memorial ¶¶ 487-494, 507, 517, 519, 521; [redacted].

[495] Memorial ¶¶ 522-638.

215. Respondent disagrees that it has rejected the Project and claims that it has acted lawfully in all respects. According to Respondent, the permitting process remains entirely open for both the Roşia Montană and Bucium Projects, but after Parliament rejected the Draft Law, RMGC failed to address the shortcomings of the Project that deprived them of a social license and Claimants abandoned the Projects and left Romania to seek their fortunes in arbitration.[496] Respondent's narrative ignores reality.

### A. The Government Failed to Issue the Environmental Permit Despite Admitting Repeatedly the Project Met All Permitting Requirements

216. As explained in the Memorial, perhaps the most glaring demonstration of the State's unlawful conduct regarding the Project in the immediate post Special Commission/Parliament period was the Government's continuing failure to issue the Environmental Permit despite the prior manifold and manifest official statements that the TAC's review was over and all permitting requirements were met. The Ministry of Environment also acted unlawfully by convening additional TAC proceedings ostensibly to commission a technical study to address questions raised by the Special Commission (*ultra vires* the Special Commission's authority) on the basis of Mr. Marincea's empty allegations about the TMF design/site in the Corna Valley – allegations previously presented to the TAC and rejected by the Ministry of Environment in light of the voluminous expert technical studies and reports establishing the contrary.[497]

217. In response, Respondent raises a host of arguments that do not withstand scrutiny.[498]

218. First, Respondent repeats like a mantra its baseless claim that the Project did not meet the requirements for issuance of the Environmental Permit in the apparent belief that doing so often enough will make its assertion true.[499]

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[496] Counter-Memorial ¶¶ 369-80.

[497] Memorial ¶¶ 515, 522-534; [redacted].

[498] Counter-Memorial ¶¶ 368-394.

219. Second, Respondent acknowledges as it must that Parliament's rejection of the Draft Law is irrelevant to the EIA process. But for the State's political rejection of the Project, Respondent also recognizes that "RMGC could and still can implement its Project pursuant to the existing legal framework."[500] From this, Respondent then declares that "the EIA Review Process was and remains open,"[501] and as purported confirmation of this alleged fact and its self-described good faith, Respondent points to the TAC meetings it called in 2014 and 2015.[502]

220. For the reasons explained in the Memorial, these TAC meetings were without legal foundation and a sham.[503] The meetings were without legal foundation because the TAC had already completed its review; specifically, it had considered and the Ministry of Environment had previously rejected the same empty criticisms of the TMF that Mr. Marincea later repeated to the Special Commission and that purportedly gave rise to the alleged need for another study.[504]

221. The meetings were a sham because the TAC did not even proceed to commission the study that it purportedly intended to conduct and that apparently was necessary in order to issue the Environmental Permit.[505] Respondent's Counter-Memorial confirms rather than dispels the illegal nature of these TAC meetings, and underscores that the political fix was in. The meetings merely created the illusion of a real permitting process when the Project was in fact

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[499] Counter-Memorial ¶ 371. For the reasons explained above in section § III, however, all requirements for issuing the environmental permit had been met such that the Environmental Permit should have been issued by early 2012.

[500] Counter-Memorial ¶ 369.

[501] Counter-Memorial ¶ 374.

[502] Counter-Memorial ¶ 373.

[503] Memorial ¶¶ 522-534.

[504] Respondent simply asserts without authority that the TAC had "discretion" to commission whatever additional studies it wanted. *See* Counter-Memorial ¶ 375. This *ipse dixit* argument is refuted by the opinion of Professor Mihai, which Respondent simply ignores. *See* Mihai ¶¶ 283-291. For the reasons explained by Professor Mihai, Respondent's references to general principles of EU law are simply irrelevant and cannot justify its unlawful treatment of the Project. Mihai II ¶¶ 53-105. Respondent otherwise broadly asserts that it conducted the EIA process lawfully. Counter-Memorial ¶¶ 3-93. Not only is Respondent wrong for the reasons cogently explained by Professor Mihai, but the issues on which Respondent chooses to focus (e.g., whether law allows more than one TAC meeting in a particular phase of the EIA process), are not even the bases of Claimants' claims. *See* Mihai §§ VI-VIII; Mihai II § VI. Indeed, although the EIA process was delayed unlawfully, that delay is not the basis of Claimants' claims.

[505] Memorial ¶¶ 522-534

already rejected, in the apparent misguided belief that doing so could help avoid the consequences of its unlawful treatment of Claimants' investments.

222. Significantly, the reason given at the April 2015 TAC meeting by the TAC President (a Ministry of Environment State Secretary) for not pursuing the TMF study was that TAC members did not provide conditions in writing to the Ministry of Environment for the study.[506] Claimants were therefore surprised to see a footnote in Respondent's Counter Memorial with the following statement: "[t]he TAC members communicated in mid-2014 their tentative conditions for a possible study," with citations to letters from five TAC members.[507] Respondent does not even acknowledge that, much less explain why, the TAC President – to whom these letters were addressed – plainly misrepresented the reasons for not conducting the study, or why none of the representatives of the TAC members that sent letters to the Ministry of Environment (or Ms. Mocanu, whose office's stamp appears on many of the letters confirming receipt), spoke up to correct this obvious misrepresentation to RMGC.[508] It seems apparent that the Ministry of Environment was simply looking for an excuse not to do a study it knew from the previous extensive assessment of the TMF issues would only confirm the soundness of the TMF design and location and remove the last excuse for not issuing the Environmental Permit.[509]

223. Notably, as explained in Memorial, after this meeting, [510] [511]

224. The evident misrepresentation to RMGC discussed above regarding why the TMF study was not being done and Ms. Mocanu's complicit silence are alone, and certainly together,

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[506] Memorial ¶¶ 530-531.

[507] Counter-Memorial ¶ 375, n.683.

[508] *See also* Memorial ¶¶ 522-534.

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[510] Memorial ¶ 533;

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225. Third, from the flawed premise that the EIA process remains open despite the progressive rejection of the Draft Law in Parliament, Respondent blames RMGC for the lack of permitting progress, claiming that RMGC "should have proposed a plan to State authorities to revise the Project and to obtain the necessary social support. It was not the Government's role or duty to propose a plan to RMGC."[514] Instead, Respondent asserts, "[t]he State's only role was to conduct the permitting process in accordance with the law."[515]

226. Taking these assertions in reverse order, while Claimants applaud the State's recognition that it should have acted in accordance with the law, they regret that it failed to do so. Had the State done so generally with respect to the Project, and specifically with respect to the EIA review process, the Government would have issued the critical Environmental Permit according to the lawful administrative process in early 2012 and also issued the exploitation licenses for Bucium, and we would not be here today.[516]

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514 Counter-Memorial ¶ 374; *see also* Counter-Memorial ¶¶ 368-369, 376.

515 Counter-Memorial ¶ 370.

516 ; *see infra* § XIII.A.2.

227. As for Respondent's first assertion, there was not any reason to "revise" the Project because, for the reasons discussed in the Memorial and above, it already had met all legal requirements for the Environmental Permit.[517] Moreover, for the reasons also discussed above, a particular level of "social support" or a "social license" is not a legal requirement for permitting and, in any event, the Project had a social license at all relevant times for issuance of the Environmental Permit, including in early 2012. Notably, neither the Ministry of Environment nor any of the other participants in the sham TAC proceedings in 2014 and 2015 said that the Project needed to be revised, or that the Project needed more social support for the Environmental Permit to be issued. The absence of such contemporaneous commentary following the events of 2013 further underscores the meritless nature of Respondent's arguments.

228. Finally, capping off its foregoing arguments, Respondent trots out the tired and equally baseless claim that Claimants "abandoned" the Project and Romania to seek their fortunes in arbitration.[518]

229. For the reasons explained by Messrs. Tănase and Henry, it is absurd to suggest that Claimants abandoned the Project.[519] Not only did Claimants endure the sham TAC proceedings in 2014 and 2015 in the faint but eventually dashed hope that the Government would change its mind and issue the Permit, but RMGC and Gabriel also sent letters to multiple ministers, the Prime Minister and the President imploring the Government to meet to try to find a way forward for the Project; Gabriel wrote again to the President after the filing of the Notice of Dispute in January 2015.[520] Indeed, since the commencement of this arbitration, Gabriel has continued to convey its ongoing interest in working with the Government to resolve the dispute amicably and move forward with the Project.[521] These overtures have been futile.

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[517] Memorial ¶¶ 352-366, 414-448; *see supra* § III; Tănase III ¶ 223; Henry II ¶¶ 54-59.

[518] Counter-Memorial ¶ 377.

[519] Tănase III ¶¶ 224-226; Henry II ¶¶ 54-59.

[520] [redacted]

[521] Henry II ¶ 57, n.144. *See also* Szentesy II ¶¶ 77-78.

230. Apparently as an additional indication of its self-proclaimed good faith in calling what amounted to sham TAC meetings, Respondent boasts that it did so in April 2015 "even after Gabriel Canada had sent its notices of dispute on 20 January 2015."[522] Almost in the same breath, however, Respondent then seeks to justify not holding further TAC meetings after April 2015 "in light of the notices of dispute, and then the Request for Arbitration."[523] Although it is axiomatic that the filing of a notice of or request for arbitration does not equate to abandonment of an investment or relieve the State of its obligation to treat an investment lawfully, it is apparent (and ironic in view of its arguments) that Respondent wrongly thinks otherwise. Perhaps due to this mistaken belief and because of the Government's evident political decision not to do the Project in view of Parliament's rejection of the Draft Law, which the Government politically procured, the State has acted in numerous other ways described below in disregard of RMGC's mining license and acquired rights. At all events, therefore, the permitting process for the Projects most definitely is not open.

### B. Actions Taken by the Ministry of Culture Reflect and Confirm the Political Rejection of the Project

231. As explained in the Memorial, following the Parliamentary rejection of the Project, the State in 2015 issued a new List of Historical Monuments that expanded the descriptions of historical monuments in the Project area with the express intention of blocking the Project, and presented an application nominating the Roşia Montană "Cultural Landscape" as a UNESCO World Heritage site where any future mining would be prohibited.[524]

232. In response, Respondent first presents a flawed jurisdictional objection hoping to avoid any consideration of these events in this arbitration.[525] On the merits, Respondent is left to defend a revisionist narrative to the effect that notwithstanding that the Government issued a decision in 1999 approving the State's grant by NAMR of a mining license in this area,[526] the

[522] Counter-Memorial ¶ 373.

[523] Counter-Memorial ¶ 379.

[524] Memorial §§ IX.D.1, IX.D.2.

[525] *See infra* § VII.A.4.

[526] *See* Government Decision No. 458 dated June 10, 1999 on the approval of the concession license for the exploitation of gold-silver ores in the Roşia Montană perimeter (Exh. C-982). *See also* Bîrsan II § III.A.2.

area was subject to cultural heritage protections that were put in place in 1992 and could not be overcome. The State purportedly discovered that this insurmountable obstacle to the Project existed only after the Parliamentary rejection of the Project and after years of contrary official conduct. Respondent's narrative once again does not withstand scrutiny.

233. In short, after issuing the Roşia Montană License, the State itself conducted extensive archaeological research, funded by RMGC, and decided to issue archaeological discharge certificates for the vast majority of the Project area. In 2004, the Government also issued a list of historical monuments that reflected the results of its research and that was compatible with the Project. For years, and while RMGC worked to develop the Project and to obtain the Environmental Permit, the Government maintained that the 2004 LHM was accurate.

234. When changes to the list of historical monuments were introduced on the 2010 LHM that expanded protected areas without basis, although the competent authorities acknowledged repeatedly in writing that the changes were in error, the Ministry of Culture failed to take steps to correct the list as the Government by then had decided to hold up the Project's permitting generally. Then, after the Parliamentary rejection of the Project and in reply to legal actions commenced by RMGC to correct the 2010 LHM, in January 2015, the Government for the first time took the position that its prior administrative acts, including the 2004 LHM, were abusive, that it was not bound by such acts, and indeed that the entirety of Roşia Montană was an historical monument that celebrated past mining and prohibited future mining.

235. The Government's shifted legal characterization of the site is not supported by a good faith application of the law and simply tracks its shifted political view as to whether it would permit the Roşia Montană Project. Its decisions to issue the 2015 LHM and to submit the UNESCO application have the legal effect of blocking the zoning decisions that would be needed to support any construction permits for the Project. Together with the refusal to issue the Environmental Permit, these decisions doubly ensure that the Project will not be allowed.

### 1. On the Basis of Extensive Archaeological Research Conducted by the State, and Funded as Legally Required by RMGC, the Ministry of Culture Issued ADCs for the Majority of the Project Area

236. As described in the Memorial,[527] and generally in the witness statements of Adrian Gligor,[528] the legal opinions of Professor Schiau,[529] and the expert opinions of David Jennings,[530] in 1999, when the Roşia Montană License was issued, the area within the license perimeter was known to be one in which chance archaeological discoveries had been made over the years, although no archaeological research had been conducted and many decades of mining by the State was known to have destroyed much of the area's possible archaeological value.

237. With the issuance of GO 43/2000, Romanian law categorized the area of Roşia Montană as an archeological site with "traced archaeological potential" and with "archaeological potential evidenced by chance."[531] As such, before any mining exploitation activities could be undertaken in the area, the law required that cultural heritage preservation issues be fully considered. In order to develop the Project, RMGC thus was required by law to fund archaeological research to evaluate the area. If warranted based on the results of the research, the Ministry of Culture would issue archaeological discharge certificates that would remove the area's status as a protected archaeological site and clear the area for mining or other construction or industrial activities.[532]

238. Although RMGC as the developer was required to fund the research, the research itself was to be supervised and conducted by the Ministry of Culture through its designated State

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[527] Memorial §§ III.B – C.

[528] Gligor ¶¶ 8-41; Gligor II ¶¶ 4-45.

[529] Schiau § II; Schiau II §§ III.B, III.D.

[530] Jennings ¶¶ 4-8, 43-62; Jennings II ¶¶ 19-53.

[531] Schiau ¶¶ 34-35, 47-56; Schiau II ¶ 68.a.

[532] *See generally* Gligor ¶¶ 16, 27, 34, 38-39; Gligor II ¶¶ 12-14; Schiau ¶ 4.b, §§ II-III; Schiau II § III; Jennings ¶¶ 8, 58-59; Jennings II ¶¶ 3, 21, 36. Notably, although the State, through Minvest, was already mining within the License perimeter, and notwithstanding the archaeological potential of the site and the changes in the law, Minvest continued to mine on the Cetate and Cârnic massifs without having conducted any research and without having obtained an archaeological discharge certificate. Schiau ¶¶ 219, 384; Schiau II ¶¶ 160, 163-164.

institutions.[533] Thus, RMGC funded first an archaeological feasibility study prepared by the Design Centre for National Cultural Heritage ("CPPCN") (later reorganized as the National Institute for Heritage ("NIH")).[534] Thereafter, RMGC funded and provided logistical support to, *inter alia*, the Alburnus Maior National Research Program, which is the name of the research program the Ministry of Culture organized specifically to complete the research needed to be done in advance of the Roşia Montană Project.[535]

239. The Ministry of Culture was entirely responsible for the archaeological research conducted. The Ministry empowered the National History Museum of Romania ("NHMR") to organize the work, which the Ministry of Culture supervised, and designated the National Archaeology Commission ("NAC") as scientific coordinator of the program. The NHMR organized a team of expert Romanian and international specialists, including one of the world's leading experts in mining archaeology, Dr. Béatrice Cauuet of Toulouse University in France, to lead the effort.[536]

240. Research was conducted in each year from 2001 to 2006. It was intensive, rigorous and thorough, and a number of important findings were made.[537] Based on the archaeologists' research and findings, recommendations were made to preserve several specific sites *in situ*.[538]

241. For areas where the expert NHMR team of archaeologists concluded there was "no archaeological value," or "ordinary archaeological value" from which artifacts were collected but no significant immovable assets were found, the NHMR team prepared a report

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[533] Gligor ¶¶ 16, 21, 25-26, 28-31; Gligor II ¶¶ 10-12, 18-19. Respondent wrongly describes the research as having been done or directed by RMGC. *E.g.* Counter-Memorial ¶ 93.

[534] Gligor ¶¶ 17-24.

[535] Gligor ¶¶ 25-34.

[536] Gligor ¶ 26; Gligor II ¶ 12; Jennings ¶¶ 7, 46, 53; Jennings II ¶ 21.

[537] Gligor ¶¶ 31-33. Jennings ¶¶ 46-55; Jennings II ¶¶ 19-32.

[538] Gligor ¶ 34; Jennings ¶¶ 56-57. Other significant findings were preserved by record in a number of important scientific publications, artifacts were gathered, inventoried, and preserved, and archaeological knowledge was greatly enhanced. Gligor ¶¶ 32-33; Gligor II ¶¶ 24-25, 117, n.222; Jennings ¶ 58; Jennings II ¶¶ 39, 47.

recommending that the area may be discharged.[539] If the NAC agreed, it endorsed the decision to discharge and the Ministry of Culture thereafter issued its decision in the form of an archaeological discharge certificate.[540]

242. Between 2001 and 2008, while several areas were designated based on the research for preservation *in situ*, the Ministry of Culture issued archaeological discharge certificates for the vast majority of the Project area.[541]

243. In this arbitration Respondent criticizes the thoroughness of the archaeological research that the State undertook and the Ministry of Culture's decisions to discharge areas to allow mining.[542] Not only are these criticisms without merit, as both Mr. Jennings and Mr. Gligor demonstrate, but they again reflect the fact that Respondent's arguments in this arbitration are at war with its own contemporaneous conduct and decisions.[543]

244. Respondent's arbitration criticisms are also at odds with the contemporaneous conclusions of a delegation from the Parliamentary Assembly of the Council of Europe ("PACE") led by Mr. Eddie O'Hara, General Rapporteur on Cultural Heritage and Christopher Grayson, Head of the Secretariat for Culture, Science and Education, who visited the area and reviewed the approach being taken by the Romanian authorities in Roşia Montană.[544] While observing that "[c]oncern has been expressed by critics," the PACE delegation concluded that the "concern does not appear to be entirely justified. The reworked galleries in the areas of the main pits Cârnic and Cetate appear empty of any archaeologically interesting remains."[545] The PACE delegation also noted that "[r]esearch does not necessarily imply the need for everything

[539] Gligor ¶ 34. *See also* Schiau §§ III.C, III.D.

[540] Gligor ¶ 34; Schiau ¶¶ 81-82.

[541] Gligor ¶¶ 38-41; Gligor II ¶ 14; Schiau § III.D. *See also* Memorial ¶¶ 157, 160.

[542] *See generally* CMA Report, Appendix D - Cultural Heritage, by Dr. Peter Claughton, dated Feb. 19, 2018 ("Claughton").

[543] Jennings II ¶¶ 2-3, 21-36; Gligor II ¶¶ 17-32.

[544] *See* Information Report of the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, dated Dec. 21, 2004 (Exh. C-681). *See also* Gligor ¶¶ 46-49; Jennings II ¶ 35, n.57.

[545] Information Report of the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, dated Dec. 21, 2004 (Exh. C-681) ¶ 12.

found to be preserved and the academic ideal of total *in situ* preservation is perhaps not always and altogether appropriate in a situation of rescue archaeology and a commercial world. This is certainly so in the case of *in situ* preservation of the Roman galleries at Roşia Montană."[546]

245. Respondent argues that there were risks to Project development because the Project area was designated as a legally protected archaeological site.[547] In so arguing, Respondent merely restates the obvious, namely that the Project area was an archaeological site that had to be researched and discharged before industrial activities could be undertaken.

246. First, as Professor Schiau demonstrates, Respondent's expert Professor Dragoş significantly mischaracterizes the basis for and nature of the legal protections that applied to the Project area as of 2000.[548] Second, and more importantly, Respondent ignores that any uncertainty was resolved when, having completed extensive research, the Ministry of Culture issued archaeological discharge certificates for the vast majority of the Project area.[549]

### 2. The Ministry of Culture Issued the 2004 LHM Reflecting the Knowledge Acquired from the Archaeological Research and Consistent with the ADCs

247. With the issuance of Law 422/2001, the concept of an "historical monument" was incorporated into the law, defined as an asset of remarkable cultural significance, which may include, *inter alia*, particularly significant archaeological sites.[550] Law 422/2001 established the procedure for classifying an immovable asset as an historical monument and provided that the Ministry of Culture is to inventory and approve a List of Historical Monuments ("LHM") to be updated every five years.[551]

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[546] Information Report of the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, dated Dec. 21, 2004 (Exh. C-681) ¶ 17. *See generally* Jennings II § II.

[547] *See* Counter-Memorial ¶¶ 47, 93.

[548] Schiau II § III. *See also* Gligor II ¶¶ 4-16. *See generally* Schiau II § II.

[549] Memorial ¶¶ 159-160; Gligor ¶ 39; Schiau § III.D. While the Project still required an ADC for Orlea (Memorial ¶¶ 162-169), there is no reasonable basis in fact to question that an ADC in due course would have been obtained for Orlea had the Government not rejected the Project. *See* [redacted] Jennings ¶¶ 30-31, 41-47.

[550] Schiau ¶¶ 23-28, § IV.

[551] Schiau § IV.

248. As Professor Schiau explains, Law 422/2001 provided that the list containing historical monuments, ensembles and sites that was prepared by the National Commission of Historical Monuments, Ensembles and Sites in 1991-1992 (the "1992 Draft LHM") would remain in force and produce effects (whatever these effects were as the 1992 Draft LHM was never properly approved) for a maximum of three years, during which time it was to be updated in accordance with provisions of Law 422/2001 in order to establish the first legally binding list of historical monuments recognized as such by law.[552]

249. Thus, in accordance with the provisions of Law 422/2001, the updated list, the 2004 LHM, was elaborated by the National Institute for Historical Monuments, endorsed by the National Commission for Historical Monuments, approved by an order of the Minister of Culture, and published in the Official Gazette.[553] As Professor Schiau explains, the 2004 LHM was the first legally binding LHM and listed those monuments so formally designated by law.[554]

250. The 2004 LHM also was the first LHM that was based on the definition of historical monument set forth in Law 422/2001, because the earlier 1992 Draft LHM included cultural heritage assets based on a more expansive definition of the notion of historical monument that was included in the draft law that was prepared at that time.[555]

251. While the 1992 Draft LHM had included several generally described archaeological sites in and around Roşia Montană,[556] the extensive procedures that led to the 2004 LHM took into account both the more narrow definition of historical monument set forth in

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[552] Schiau § V.B.2.

[553] Schiau ¶ 223.

[554] Schiau ¶ 204. Ministry of Culture Order no. 2314/2004 approving the List of Historical Monuments (Exh. C-1265). *See also* Ziua-Cultura, *The first List of Historical Monuments in Romania*, Jul. 14, 2004 (Exh. C-1393); Gligor ¶ 42.

[555] Schiau ¶¶ 157-158; Schiau II ¶¶ 69.b. As Professor Schiau explains, the Draft 1992 LHM was a list prepared to accompany a draft law on historical monuments, also prepared at that time, that included a more expansive definition of historical monuments than was eventually adopted in Law 422/2001. Thus, the Draft 1992 LHM listed archaeological sites that did not necessarily meet the definition of historical monuments later adopted. Schiau § V.A.2. For that reason, Law 422/2001 envisioned that the Draft 1992 LHM would be reviewed and updated in accordance with the provisions of Law 422/2001 within three years, which it was in the form of the 2004 LHM, *i.e.*, the first list of historical monuments approved according to the law and the only one able to classify the monuments so listed. Schiau § V.B.2; Schiau II § IV.C.

[556] Schiau § V.A. *See generally* Schiau II § IV.A-B.

Law 422/2001 as well as, for the sites in and around Roşia Montană, the knowledge accumulated from the extensive archaeological research that the Ministry of Culture had undertaken in the context of the Alburnus Maior National Research Program which was had not been conducted when the 1992 Draft LHM was prepared. The historical monuments in Roşia Montană and their location as listed in the 2004 LHM therefore were precisely defined and were consistent with the archaeological discharge certificates that had been issued in the area based on the referenced archaeological research.[557]

252. Law 422/2001 provided that thereafter subsequent updates to the LHM, *i.e.*, after the 2004 LHM, could only be made following either a process of classification of new historical monuments or declassification of existing historical monuments.[558]

### 3. The 2010 LHM Was Issued With Erroneous, Overbroad Descriptions of the Historical Monuments in Roşia Montană

253. As [redacted] and Professor Schiau describe, when the Ministry of Culture issued its 2010 LHM, it had changed the descriptions of the historical monuments listed in the area of Roşia Montană, enlarging them in effect without legal basis.[559] In particular, as Professor Schiau explains, while the 2010 LHM was meant to update the 2004 LHM, such updates could only be made following a procedure of classification or declassification of the historical monument in question.[560] It is not disputed that the Ministry of Culture did not follow any classification or declassification procedure to support the changes to the descriptions of the historical monuments for Roşia Montană that were introduced in the 2010 LHM.[561]

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[557] Schiau § V.B.1; Gligor ¶¶ 43-44. The only exception was for the Orlea sites which had not been subject to archaeological research and therefore their inclusion in the list is lacking in grounds under the law. Schiau ¶ 213; Schiau II ¶ 169.

[558] Schiau ¶¶ 261, 295, 312.

[559] Ministry of Culture Order No. 2361/2010 approving the List of Historical Monuments (Exh. C-1266); [redacted]; Schiau § V.C.2.2; Schiau II § IV.D.

[560] Schiau ¶¶ 262, 289, 294-297.

[561] Respondent did not produce any relevant documents in response to Claimants' document request no. 38 that called for documentation and decisions relating to the 2010 LHM in relation to Roşia Montană. *See also* Schiau II ¶ 179, n.277.

254. As explained in the Memorial and by Professors Podaru and Schiau, the most significant changes on the 2010 LHM for Roşia Montană were that (a) the sites on Orlea were described as having an "address" of "*Orlea, the entire locality with a 2km radius*," which could be interpreted to mean that the entire area of a 2 km radius was to be treated as an historical monument, and (b) the special site of "Piatra Corbului Point" was replaced with a more general reference to Cârnic, effectively describing the entire Cârnic massif as an historical monument.[562] The areas thus described as historical monuments overlapped nearly the entire Project area.[563] As the changes were contrary to ADCs that had been issued, they also were clearly without basis because an area cannot at the same time be both archaeologically discharged based on the results of archaeological research and newly listed as an historical monument based on recognized remarkable cultural significance.[564]

255. When issuing the 2010 LHM, the Ministry of Culture did not state that it had recognized "abuse" in the 2004 LHM or that it intended to take a decision contrary to the ADCs already issued for Roşia Montană and so, as [redacted] explains, RMGC considered that the changes were the result of oversight or drafting error.[565]

256. Respondent says nothing about the unjustified expanded description of the Orlea site on the 2010 LHM, but tries to defend the listing of the Cârnic massif as an historical monument. Respondent argues that it was not wrong to so designate the Cârnic massif on the 2010 LHM because at the time the 2010 LHM was issued, the first ADC issued for Cârnic had been annulled and the second one had not yet been issued.[566] Respondent's analysis is flawed. As Professor Schiau explains, when an ADC is annulled, the site reverts to its previous status, and although the Cârnic massif previously was an archaeological site, it was never an historical monument.[567]

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[562] Podaru ¶ 276; Schiau ¶¶ 249-259.

[563] 2010 LHM Map (Exh. C-1284) (showing impact of 2010 LHM on the Project area).

[564] Schiau ¶¶ 300, 389.

[565] [redacted] *See also* Podaru ¶¶ 280-282, 300, 304, 307.

[566] *See* Counter-Memorial ¶ 215.

[567] Schiau ¶¶ 195-196. *See also* Schiau II § IV.D.1. Thus, following the annulment of the first ADC for Cârnic and prior to the issuance of the second ADC, Cârnic reverted to its status as an archaeological site, but

257. Respondent also argues that when the National Archeology Commission approved the reissued Cârnic ADC in July 2011, it approved the initiation of the declassification procedure to remove Cârnic from the List of Historical Monuments,[568] but that the Ministry of Culture did not proceed to complete the declassification for Cârnic because NGOs commenced a legal challenge against the reissued ADC. Respondent's argument is not supported.

258. It is true that immediately following the decision to reissue the Cârnic ADC, Minister of Culture Kelemen Hunor stated that this would be followed by removal of the Cârnic massif from the List of Historical Monuments.[569] Respondent, however, offers no support for its contention that this procedure was not completed due to a legal challenge against the second Cârnic ADC. Indeed, the evidence shows otherwise. The Minister of Culture himself clearly explained why the declassification step was not being taken – and he did not say anything about pending litigation. Rather, in August 2011 he said that he would not authorize the removal of Cârnic from the List of Historical Monuments until the economic renegotiation with Gabriel and RMGC was resolved:

> I was not the one who signed the Archeological Discharge Notice; it is indeed the first step regarding the responsibility of the Ministry of Culture. The National Archaeology Commission unanimously approved and, under these conditions, I provided the judicial, legal, financial framework to save 80 per cent, or as much as we can, from the cultural and archaeological heritage, because that is my responsibility. But I have not taken the next step, I have not signed, and the removal of the Cârnic Mountain from the List of Historical Monuments is something that I have to sign, not the Director from Alba ….
>
> I have not signed the order yet because there are many aspects that need to be discussed. First of all, the level of participation of the Romanian state in that company, and I am not going further until this aspect is clarified, and the Minister of Environment cannot go further either; this must be

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as it was not listed as a historical monument on the 2004 LHM, it was not thereby legally classified as such and so it could not revert to a status it did not earlier have. There was no legal basis to claim it should be considered as an historical monument as reflected in the 1992 Draft LHM as that ignores, *inter alia*, the effects of the 2004 LHM. Schiau II ¶ 184.

[568] Counter-Memorial ¶ 216 (*citing* NAC meeting minutes of Jul. 12, 2011 (Exh. C-1377) at 4).

[569] *Kelemen on the Archaeological Discharge Certificate for Roşia Montană: a legal procedure*, Mediafax.ro, dated July 14, 2011 (Exh. C-1345).

decided at the governmental level. The Minister of Environment or the Minister of Culture are not the ones to start this Project.[570]

259. As the Ministry of Culture refused to take the legal steps required by law, in particular to remove from the 2010 LHM the listing of the Cârnic massif as an historical monument, a number of NGO Project opponents seized on the overbroad and erroneous references to protected historical monuments in the 2010 LHM to support a challenge against the reissued ADC for Cârnic. Thus, several NGOs commenced an action against the competent State authorities within the Ministry of Culture, including the Alba County Culture Directorate, seeking the annulment of the second Cârnic ADC, including on the ground that the Ministry of Culture's discharge of an area designated as an historical monument (as evidenced by the listing in the 2010 LHM) was improper.[571]

260. The record shows that the institutions within the Ministry of Culture recognized and admitted contemporaneously that the 2010 LHM descriptions of the historical monuments for Roşia Montană were made in error and also that the List of Historical Monuments should be updated to remove the Cârnic massif in view of the reissued ADC. In fact, correspondence shows repeated acknowledgements and requests for these corrections to be made.[572]

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[570] *See Roşia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein Kovacs*, Ecomagazin.ro, dated Aug. 24, 2011 (Exh. C-1310) at 1-2.

[571] *See* Schiau § VI; Gligor ¶ 97. *See also*, *e.g.*, Preliminary complaint dated Aug. 18, 2011 of several NGOs against Alba County Culture Directorate (Exh. C-1734) (challenging the reissued Cârnic ADC including due to the descriptions of the historical monument as listed on the 2010 LHM); Challenge dated Sept. 23, 2011 of several NGOs against Alba County Culture Directorate (Exh. C-1719) (same); Request for suspension of ADC 9/2011 dated Jan. 20, 2012 (Exh. C-1735) (requesting of suspension of Cârnic ADC including due to the descriptions of the historical monument as listed on the 2010 LHM).

[572] *See* Draft letter from the NIH to Minister Hunor undated (Exh. C-1336) (requesting correction of the errors in the 2010 LHM relating to Roşia Montană and the declassification of the sites subject to an ADC, including Cârnic, signed by some but not all Ministry of Culture officials); NIH Letter No. 2675 to Alba Culture Directorate dated May 31, 2012 (Exh. C-1325) (reference to 2012 LHM likely a typographical error as there is no 2012 LHM); NIH Letter No. 2748 to the Ministry of Culture Directorate and to the Alba County Directorate dated June 1, 2012 (Exh. C-1324); Letter No. 546 from Alba Culture Directorate to NIH dated June 29, 2012 (Exh. C-1327); NIH Letter No. 3316 to Alba Culture Directorate dated July 30, 2012 (Exh. C-1331); Letter No. 1185 from Alba Culture Directorate to NIH dated Nov. 6, 2012 (Exh. C-1332); Letter No. 2698 from the Department for Infrastructure Projects and Foreign Investments to RMGC dated June 12, 2013 (Exh. C-1001) at 2 (noting Ministry of Culture's view); NIH Letter No. 2872 to RMGC dated July 8, 2014 (Exh. C-1333); NIH Letter No. 2871 to RMGC dated July 8, 2014 (Exh. C-1330); NIH Letter No. 39541 to Ministry of Culture dated Aug. 11, 2014 (Exh. C-2359); Letter No. 783 from Alba Culture Directorate to

261. The record also shows that these corrective efforts were blocked at the political level.[573] As a letter from the National Institute for Heritage (the institution within the Ministry of Culture responsible for drafting the List of Historical Monuments) to RMGC in July 2014 states:

> The clerical error you have highlighted has been proposed for correction by NIH in the List of Historical Monuments 2010 – amendments and supplementations being forwarded to the specialized department within the Ministry of Culture on repeated occasions, the latest by letter no. 6308/22 November 2012, without being included in the working agenda of the National Commission for Historical Monuments.[574]

Similarly, in a letter dated September 4, 2014, the Alba County Culture Directorate repeated that the 2010 LHM included errors in its descriptions of the historical monuments in Roşia Montană, including in relation to the Cârnic massif, but that these errors could only be corrected by an order of the Minister of Culture upon the request of the NIH.[575]

#### 4. In 2015, Consistent with the Political Rejection of the Project, the Ministry of Culture Took the Position That the 2004 LHM Had Been an Abuse, and That All of Roşia Montană Was an Historical Monument

262. RMGC filed administrative complaints in August 2014[576] and thereafter commenced a judicial action in December 2014 seeking rectification of the 2010 LHM.[577]

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RMGC dated Sept. 4, 2014 (Exh. C-1335). *See also* Memorial ¶¶ 329-333; Gligor ¶¶ 119-120; Podaru ¶¶ 280-287.

[573] *See*, *e.g.*, Draft letter from the NIH to Minister Hunor undated (Exh. C-1336) (requesting correction of the errors in the 2010 LHM relating to Roşia Montană and the declassification of the sites subject to an ADC, including Cârnic, signed by some but not all Ministry of Culture officials).

[574] NIH Letter No. 2871 to RMGC dated July 8, 2014 (Exh. C-1330). *See also* NIH Letter No. 2872 to RMGC dated July 8, 2014 (Exh. C-1333); NIH Letter No. 39541 to Ministry of Culture dated Aug. 11, 2014 (Exh. C-2359).

[575] Letter No. 783 from Alba Culture Directorate to RMGC dated Sept. 4, 2014 (Exh. C-1335).

[576] RMGC administrative complaint to NIH dated Aug. 5, 2014 (Exh. C-1342); RMGC administrative complaint to Ministry of Culture dated Aug. 5, 2014 (Exh. C-1343). Notably, among the documents produced by Respondent following the document production phase is a "point of view" prepared by an architect within the NIH purporting to set out a *post hoc* legal justification for the entries in the 2010 LHM, but also noting that the entries relating to Orlea were mistakes caused by a software error. NIH Point of View dated Sept. 2, 2014 (Exh. C-2361). Notwithstanding the conclusion that the Orlea reference was due to a software error, the State did not acknowledge the error to the court, did not correct the error, and indeed repeated it in the 2015 LHM.

263. RMGC also challenged the 2010 LHM as being unlawful in the context of intervening in the defense of the environmental (SEA) endorsement by State authorities of the local urbanism plan (PUZ) that had been challenged by NGOs for, *inter alia*, failing to take account of the historical monuments as described in the 2010 LHM.[578]

264. Reflecting and consistent with the Government's political rejection of the Project following Parliament's rejection of the Draft Law, the NIH responded in court in January 2015 by taking the position, for the first time and contrary to numerous prior acknowledgements to the contrary, that the 2010 LHM did not contain errors but rather was a correction of the "abusive" 2004 LHM, and that the soon-to-be-issued 2015 LHM would "reinstate" the 1992 Draft LHM pursuant to which, it contended, all of Roşia Montană was designated as an historical monument.[579] The NIH also represented to the court that Roşia Montană "comprises hundreds of km of mining galleries from the Roman era,"[580] although the Ministry of Culture's own extensive research demonstrated that was a false statement.[581]

265. Then, in blatant disregard of the Ministry of Culture's extensive research and the valid and existing ADCs that the Ministry of Culture had issued, but then unlawfully failed to reflect in the List of Historical Monuments, the NIH falsely and in bad faith accused RMGC of trying to obtain the right to mine in the area without obtaining ADCs, representing to the court as follows:

> Last but not least, we wish to point out that the modifications to the LHM asked by the plaintiff [RMGC] seek in fact to change identification data for the historical monuments included under items 141.142 and 146, so as to be able to start the mining exploitation works in the area without first

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[577] RMGC Statement of claim dated Dec. 10, 2014 against NIH and Ministry of Culture seeking rectification of the 2010 LHM (Exh. C-1349).

[578] Objection of unlawfulness raised by RMGC dated Nov. 1, 2014 (Exh. C-1347). *See also* Podaru ¶¶ 267-268, § IV.B.2; Schiau II §§ IV.D.3, IV.D.4.

[579] NIH Statement of Defense dated Jan. 8, 2015 related to rectification of 2010 LHM (Exh. C-1740). *See also* Schiau § VI.B; Schiau II § IV.D.3; Podaru § IV.B.2. *See also* Schiau II § IV.F.

[580] NIH Statement of Defense dated Jan. 8, 2015 related to rectification of 2010 LHM (Exh. C-1740) at 3.

[581] In fact, as the NHMR Summary Report on the Alburnus Maior Research Program conducted between 2001-2006 (Exh. C-1375) concluded, the entire area contains around seven kilometers of Roman galleries, although these are not continuous, but are in a number of fragments. *See also* Gligor II ¶¶ 22, 33; Béatrice Cauuet, Roşia Montană: Due Diligence Review of the Mining Archaeological Research Works (Exh. C-1926) at 1.

> archaeologically discharging the area, and without obtaining the endorsements from the competent culture institutions.[582]

The NIH presented the same arguments both in the action in which RMGC sought rectification of the 2010 LHM and in the action in which RMGC challenged the 2010 LHM as unlawful in the context of the defense of the SEA endorsement of the local urbanism plan.[583] The Ministry of Culture argued similarly.[584]

266. The positions taken by the NIH and the Ministry of Culture were improper, highly misleading and contrary to their own prior positions in multiple fundamental respects, including those discussed in the opinions of Professor Schiau and Professor Podaru.[585]

267. They also were entirely unsupportable, including because the NIH falsely accused RMGC of seeking the right to mine without obtaining archaeological discharge and because there was no basis in law to claim that the 2004 LHM, drafted by the NIH and endorsed and issued by order of the Ministry of Culture, was incorrect let alone "abusive," or that it could be disregarded merely by saying so.[586] Notably, the 2010 LHM was not accompanied by any contemporaneously reasoned analysis to justify an intentional departure from the 2004 LHM.

268. In the case ruling on RMGC's objection that the 2010 LHM was unlawful, after a lengthy discussion as to whether the claim was admissible, the court issued a cursory ruling rejecting the claim of unlawfulness on the basis of the court's finding that the 2010 LHM was issued by the competent authority with relevant endorsements.[587] Respondent trumpets the "detailed and reasoned decision" which "rejected RMGC's objection of unlawfulness."[588] The court's ruling, however, cannot be viewed without reference to the blatantly false, incomplete,

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[582] NIH Statement of Defense dated Jan. 8, 2015 related to rectification of 2010 LHM (Exh. C-1740) at 3.

[583] *See also* NIH Closing Statement related to unlawfulness of 2010 LHM in case no. 28/64/15 before Braşov Court of Appeal dated Mar. 30, 2015 (Exh. C-1724) at 3.

[584] *See* Podaru ¶¶ 296, 309; Schiau II ¶¶ 211-212. Schiau ¶¶ 351, 363.

[585] *See* Schiau § VI.B.3; Podaru ¶¶ 294-313.

[586] Schiau ¶¶ 368, 370-371; Schiau II ¶¶ 210, 213-214; Podaru ¶¶ 298-307.

[587] Braşov Court of Appeals case no. 28/64/2015, Judgment No. 54F/May 28, 2015 (Exh. C-1737). *See also* Schiau II ¶¶ 218-219.

[588] Counter-Memorial ¶ 217.

and misleading arguments presented to it by those very same competent authorities. Indeed, the court reasoned that "[i]t must not be forgotten that Roşia Montană is a protected site," and (citing to the court decision that annulled the first Cârnic ADC but disregarding that the Ministry of Culture had since issued a second ADC for Cârnic) that "exploiting a part of the Cârnic massif is incompatible with the obligation to protect the Roman mining galleries … and therefore issuing archaeological discharge certificates for part of the massif cannot be justified…"[589] As such considerations should have had no bearing on the issue presented to the court, the court also manifestly exceeded its powers by ruling that the 2010 LHM was lawful on that basis.[590]

269. Very shortly after that decision was issued, the 2010 LHM became moot due to the issuance of the 2015 LHM. Indeed, in the case ruling on the request for rectification of the 2010 LHM, the court did not reach a decision because once the 2015 LHM was issued,[591] the 2010 rectification case was dismissed as being without object.[592]

#### 5. The Ministry of Culture Issued the 2015 LHM and Delineated the Declared Roşia Montană Historical Monument in an Arbitrary and Unlawful Manner

270. As discussed in the Memorial,[593] in December 2015, the Ministry of Culture issued the 2015 LHM, which declared the entirety of Roşia Montană as an historical monument. The issuance by the Ministry of Culture of the 2015 LHM was arbitrary, contrary to law (as it disregarded the legal regime governing the issuance of the 2004 LHM and its effects), and contrary to fact (as it disregarded the detailed information provided to it by the Alba County Culture Directorate).[594]

271. The announcements by senior Minister of Culture officials upon the issuance of the 2015 LHM, including by the Minister himself on Facebook (also tagging anti-Project NGOs),

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[589] Braşov Court of Appeals case no. 28/64/2015, Judgment No. 54F/May 28, 2015 (Exh. C-1737).

[590] Schiau II ¶¶ 220-223. RMGC did not appeal from that judgment. *See* Henry ¶ 146, n.173.

[591] *See* Memorial § IX.D.1. *See also* Podaru ¶ 291.

[592] Certificate dated Mar. 21, 2016 of the Bucharest Court of Appeal in case relating to rectification of 2010 LHM (Exh. C-1722).

[593] Memorial § IX.D.1.

[594] *Id. See also* Schiau II § IV.E.

and by a senior adviser to the Minister proclaiming that "[a]t such a site, all mining activity is prohibited," leave no doubt that as it related to Roşia Montană, the 2015 LHM was motivated solely by the political rejection of the Project and the intention to prevent it from ever being implemented.[595]

272. Moreover, as demonstrated by documents produced by Respondent during the document production phase, the procedure followed by the Ministry of Culture to finalize and issue the 2015 LHM was also arbitrary and improper. The 2015 LHM, which declared Roşia Montană "the entire locality within a 2km radius" as an historical monument, was not only contrary to Law No. 422/2001 as it disregarded the effects of the 2004 LHM, but also was issued immediately following a meeting with the Minister of Culture in which changes to the description of the Roşia Montană historical monument to be included on the list were agreed without any classification documentation and without obtaining the mandatory endorsements required by law for such a change.[596]

273. Although the Ministry of Culture had refused in 2011 to take the step of declassifying historical monuments in accordance with the ADCs it had issued, in December 2016, the Ministry of Culture directed the NIH to prepare detailed documentation to delineate the boundaries of the area declared on the 2015 LHM to be the historical monument of Roşia Montană and its protection area for purposes of developing new urbanism plans for the area.[597] That documentation shows the entire Project area falling within the boundaries of the delineated historical monument.[598] In so doing, the documentation likewise disregards entirely the precise delineation that was done for the historical monuments listed in the 2004 LHM and the ADCs that were issued covering most of the area.[599]

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[595] Memorial ¶¶ 596-598. *See also* 2015 LHM Map (Exh. C-1285) (showing impact of 2015 LHM on the Project area).

[596] Schiau II ¶¶ 231-233.

[597] *See* Letter No. 7288 from Ministry of Culture to Mayoralty of Roşia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370); Ministry of Culture Endorsement No. 475 dated Dec. 14, 2016 of the delineation documentation (Exh. C-2369).

[598] *See* Letter No. 7288 from Ministry of Culture to Mayoralty of Roşia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370), map of boundary at 34.

[599] *See* Schiau II ¶¶ 234-243.

274. Indeed, the delineation documentation expressly purports to dismiss the effects of the ADCs, stating that they were issued on the basis of a "localized perspective," did not "take into account an integrating approach to the area," and that the archaeologically discharged areas "still have a great value for the ancient topography," which is preserved in the delineated historical monument.[600] The delineation documentation also states incorrectly with regard to the ADCs that one "has been annulled in court" (as if the currently pending judicial challenge to the second Cârnic ADC already had been accepted),[601] and that as declassification procedures were not followed the area remains as an historical monument (without acknowledging that the failure to follow such procedures is contrary to law).[602]

275. As Professor Schiau explains, such delineation documentation normally is prepared by the local authorities as it is designed to establish protection areas for historical monuments to be incorporated into local urbanism plans.[603] In this case, however, as described in the delineation documentation, the NIH prepared the delineation at the request of the Ministry of Culture as the NIH also was preparing the file to nominate the "Roşia Montană Mining Cultural Landscape for inclusion on the UNESCO World Heritage List."[604]

276. The delineation of the Roşia Montană historical monument and the preparation of the supporting delineation documentation and its endorsement by the Ministry of Culture elicited a sharp and lengthy rebuke from the Alba County Culture Directorate. Writing to the Minister of Culture and the Director of the NIH, the Alba Culture Directorate states:

> [W]e express our surprise and profound disagreement with the interpretations that NIH, through its leadership, gives to the definition and effects of the archaeological discharge certificate. Such approach and such interpretation are not only outside the law, but dangerous from a

[600] Letter No. 7288 from Ministry of Culture to Mayoralty of Roşia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370) at 32.

[601] Schiau II ¶ 239, n.357 ("Although the Cârnic ADC 9/2011 is subject to judicial challenge, the Ministry of Culture's pronouncement here that its annulment is a *fait accompli* is telling.").

[602] Schiau II ¶ 240.

[603] Schiau II ¶ 241. *See also* Podaru ¶¶ 338, 340, § III.C.

[604] Letter No. 7288 from Ministry of Culture to Mayoralty of Roşia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370) at 4; Schiau II ¶¶ 242-243.

> legal perspective, in that it is an incorrect and illegal comeback on an archaeological discharge certificate, once issued, and, implicitly, on the legal effects it produces.[605]

The Alba County Directorate's letter concluded that "Alba CCD believes that this conduct of the National Institute for Heritage can be assimilated to an abuse of office, reason why we request you to take measures. The absence of a reply from the Ministry of Culture – the Cultural Heritage Directorate to Alba CCD's Letter no. 1371/6 December 2016 may also be considered an abuse of office."[606]

#### 6. After Applying to Have the Roşia Montană Mining Cultural Landscape Listed as a UNESCO World Heritage Site Romania Requested a Postponement of Its Application Pending Completion of This Arbitration

277. As described in Claimants' Memorial,[607] in February 2016 Romania submitted an application to add what it described as the "Roşia Montană Mining Cultural Landscape" to UNESCO's "Tentative List" to be declared a World Heritage site; and on January 4, 2017 Romania submitted the full application to nominate the "Roşia Montană Mining Cultural Landscape" as a World Heritage site. The applications leave no doubt that the State decided to terminate the Roşia Montană Project and that it has done so.

278. Since Claimants filed their Memorial, as Mr. Gligor describes,[608] the application process progressed. ICOMOS, an advisory body to the World Heritage Committee, issued a report in April 2018 stating that Roşia Montană contains the world's pre-eminent example of an underground Roman gold mine, that "[t]he main threat to the property remains the intention of the mining company to resume large scale mining," and that "a desired state of conservation for

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[605] Letter No. 6 from Alba County Culture Department to Ministry of Culture and NIH dated Jan. 5, 2017 (Exh. C-2372) at 4.

[606] Letter No. 6 from Alba County Culture Department to Ministry of Culture and NIH dated Jan. 5, 2017 (Exh. C-2372) at 6.

[607] Memorial ¶¶ 599-613.

[608] Gligor II ¶¶ 110-125. *See also* Jennings II § VII.

Roşia Montană must include provisions to end the threats facing the property as regards the resuming of the mining activity."[609]

279. The World Heritage Committee issued its draft decision on May 14, 2018 placing Roşia Montană on the agenda for the 42nd session of the World Heritage Committee to be held June 24-July 4, 2018 in Manama, Bahrain, and proposing to inscribe the Roşia Montană site onto the World Heritage List as well as onto the World Heritage List in Danger, to rename the site the "Roman Gold Mines of Roşia Montană," and to recommend that Romania implement a plan for protective measures and a conservation strategy for the site.[610]

280. The Romanian Government then decided, extraordinarily, in view of this ICSID arbitration, to request that consideration of Romania's application be postponed during the pendency of this arbitration, but not withdrawn.[611] At its session on July 2, 2018, the World Heritage Committee granted the request for postponement "due to the ongoing international arbitration," and called on Romania to implement protection measures accordingly.[612]

281. Romania's Minister of Culture George Ivaşcu described the decision as follows:

> The Government of Romania . . . decided that we should postpone the decision, which means that nothing will happen for three years, until the end of the action. With just one simple request we may reenter at any moment on that UNESCO list. Of note is also that Law no. 5 of 2000, as well as Law 422 of 2001 classified this site as a historic monument of national and universal importance. Therefore, we are also protected by our laws and there can be no exploitation there, as you very well know, because in order to obtain an exploitation permit you need approvals from the Ministry of Environment, the National Agency for Mineral Resources and, most definitely, from the Ministry of Culture, and this will not happen. So, no exploitation is allowed there throughout this period,

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[609] ICOMOS Report for the World Heritage Committee 42nd Ordinary Session, 2018 Evaluation of Nominations of Cultural and Mixed Properties, WHC-18/42.COM/INF.8B1, dated Apr. 2018 (excerpt) (Exh. C-1919) at 24.

[610] World Heritage Draft Decision WHC 42 COM 8B.32, Paris dated May 14, 2018 (Exh. C-1912) at 25-26.

[611] [redacted] *See also* Jennings II ¶ 73.

[612] World Heritage Committee, WHC/18/42.COM/18, Decisions adopted by the 42nd Session of the World Heritage Committee, Manama, Bahrain, dated July 4, 2018 (excerpt) (Exh. C-1920) at 5-6. *See also* Jennings II ¶¶ 74-75.

> nothing will happen, except for Romania potentially losing 4.4 billion dollars.[613]

The Roşia Montană Mining Cultural Landscape thus remains on the Tentative List for World Heritage site nomination.[614] As David Jennings observes, sites added to the Tentative List, which reflects the State's decision that the listed site should be given World Heritage status, fall under the protection of the World Heritage Convention.[615]

#### 7. The 2015 LHM and the State's UNESCO Application Render Any Construction Permit for the Project Legally Impossible

282. As Professor Podaru explains, and the Minister of Culture's comments cited above confirm, urbanism plans (which are governed by Law 5/2000) are required to include protection areas for historical monuments listed on the List of Historical Monuments (governed by Law 422/2001).[616] Thus, the uncorrected 2010 LHM and, subsequently, the 2015 LHM have blocked entirely by operation of law any possibility that the area of the Project could be zoned to permit mining, notwithstanding the existence of the Roşia Montană License. The State's refusal to recognize and take account of the ADCs issued in the area of Project, notwithstanding that the law requires the Ministry of Culture to do so,[617] is thus a substantial and unlawful deprivation of RMGC's rights and legitimate expectations after RMGC invested many years and millions of dollars to fund and support the archaeological research undertaken in the area as developer of the Project.

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[613] *Ivaşcu on Roşia Montană: We are, in any case, protected by our laws and no one can exploit there*, Agerpres.ro, dated July 5, 2018 (Exh. C-1921) at 2.

[614] *See* Roşia Montană Mining Cultural Landscape listing on Romania's World Heritage Tentative List, *available* at https://whc.unesco.org/en/tentativelists/state=ro (Exh. C-2707).

[615] *See* Jennings II ¶¶ 76-77. *See also* Jennings ¶ 137; Operational Guidelines for the Implementation of the World Heritage Convention, WHC.16/01, Oct. 26, 2016 (Exh. C-707) §§ II.C, II.F; World Heritage Committee Decision 27 COM 13.3 adopted by the 27th session of the World Heritage Committee, WHC-03/27COM/24, Dec. 10, 2003 (Exh. C-708) at 134-135 ("Articles 11 and 12 of the Convention, considers that the status of the tentative lists should be enhanced so that the inclusion of properties on this list would already entail, for the State Party, a form of international recognition"). This is also valid under Romanian law. Schiau II ¶¶ 257-259.

[616] Podaru §§ IV.C.1, IV.C.3, IV.C.4.

[617] Schiau ¶¶ 31-32; Schiau II ¶¶ 239-240. *See also* Schiau II § V.

283. In addition, as Professor Podaru also explains, even Romania's *application* to list Roşia Montană as a World Heritage site triggers protections under Romanian law that are fundamentally incompatible with the notion of the Project. Romanian law requires that a program for the protection and management of sites included on the World Heritage List and "for which Romania has submitted to the UNESCO World Heritage Committee the file for their inclusion on the World Heritage List," must be reflected in the urbanism plans for the respective area.[618] In other words, the UNESCO application, which although postponed has not been withdrawn, remains, as a matter of Romanian law, as a blockage, in addition to the 2015 LHM that does not take account of ADCs, and renders the Project impossible under Romanian law. That is because urbanism plans must account for cultural heritage protection areas with priority over mining licenses, and without an urbanism plan that allows for and accommodates the Project, the local authorities cannot issue any construction permit required for the Project.

284. Respondent proffers the disingenuous argument that "irrespective of the list of historical monuments and the UNESCO application … [i]f and when RMGC meets the permitting requirements… the Ministry of Culture would at that point address any requests to declassify Roşia Montană and take the appropriate steps in accordance with the law."[619] In fact, however, RMGC did meet the permitting requirements and the Ministry of Culture simply refused "to declassify Roşia Montană" as required by law. The notion that the Ministry of Culture, like the Ministry of Environment, has just been waiting for RMGC to fulfill non-existent additional requirements cannot be credited.

### C. At the State's Direction and in Breach of its Obligations as a Shareholder of RMGC, Minvest Stopped Cooperating in Recapitalizing RMGC and Refused to Contribute to Maintaining RMGC's Share Capital

285. As detailed in Claimants' Memorial, following the Special Commission's vote in November 2013 to recommend rejection of the Draft Law and the Government's political rejection of the Roşia Montană Project, the Bucium Projects, and thus of RMGC that followed, the Ministry of Economy refused to allow Minvest to participate as a shareholder in the

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[618] Podaru ¶¶ 349-351.

[619] Counter-Memorial ¶ 417.

recapitalization of RMGC that was needed to prevent the risk of RMGC's dissolution.[620] The Ministry of Economy instead demanded that Gabriel "donate" to Minvest the funds needed to purchase its portion of the new shares that needed to be issued to comply with the law.[621] Gabriel was left with no choice but to make an exceptional, one-time donation to Minvest of shares in RMGC with a value of nearly US$ 20 million to prevent the risk of RMGC's dissolution.[622]

286. In its Counter-Memorial, Respondent argues that Minvest was not obligated to participate or cooperate in RMGC's recapitalization,[623] and denies that there was a risk of dissolution.[624] Respondent also argues that Minvest acted independently of the State.[625] Respondent's arguments are neither correct nor credible.

287. As Professor Bîrsan demonstrates, under the terms of RMGC's Articles of Association, Minvest was obligated to participate in RMGC's recapitalization as it consistently had done prior to the Government's political rejection of the Project.[626] The Ministry of Economy's demand was an abuse of minority rights contrary to Minvest's obligations to exercise its shareholder rights in good faith and to actively prevent the risk of RMGC's dissolution.[627]

288. Contrary to Respondent's argument, Minvest's refusal to do so did put RMGC at risk of dissolution [redacted] [redacted].[628] Respondent also wrongly suggests that reducing RMGC's share capital was an option to address the Asset Capital Ratio in 2013;

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[620] Memorial ¶¶ 537-544; Henry ¶¶ 130-136; Tănase II ¶¶ 220-227.

[621] Memorial ¶ 541; [redacted]; Henry ¶ 135; Tănase II ¶ 225.

[622] Memorial ¶ 544; Henry ¶ 136; Tănase II ¶ 227.

[623] Counter-Memorial ¶ 396-399, 403-404.

[624] Counter-Memorial ¶¶ 400-404.

[625] *See*, e.g., Counter-Memorial ¶¶ 400, 403, 476.

[626] Bîrsan II § V.B.

[627] Bîrsan II § V.B.4. *See also id.* ¶¶ 311-313 (explaining that resisting a share capital increase needed to prevent RMGC's dissolution was contrary to Minvest's obligations as shareholder).

[628] Bîrsan II § V.B.3.1.

this was not the case, because [629] [630]

289. Respondent's effort to divorce itself from Minvest is also meritless. The record demonstrates that both in the exercise of its rights and obligations as shareholder of RMGC, and indeed in all of its contractual dealings with Gabriel, the State specifically directed Minvest through Ministry-issued "mandates" as to each and every decision.[631] The Ministry specifically continued to exercise control over Minvest's actions after 2013 when the Ministry of Economy spun off Minvest's shares in RMGC into a special purpose vehicle, Minvest RM, for purposes of holding the State's shares in RMGC.[632] Thereafter, in dealing with the need for recapitalization of RMGC in order for RMGC to remain compliant with the requirements of the Companies Law, the Ministry of Economy continued to direct every specific decision to be taken by Minvest, including by addressing communications directly to RMGC.[633]

### D. The State Launched Retaliatory and Abusive Investigations That Are Still On-Going

290. In the Memorial, Claimants explained why the timing, bases, and handling of the criminal investigation launched against RMGC in November 2013 on the heels of the Special Commission's politically-motivated unanimous recommendation to reject the Draft Law and on the day of the Senate's voting to do so bespoke a retaliatory animus.[634] Claimants further

[629] Bîrsan II § V.B.3.2; Tănase III ¶ 211 n. 570.

[630] Memorial ¶ 541.

[631] Bîrsan II §V.A. Minvest has acted only pursuant to Ministry-issued "mandates" with respect to all of its dealings with RMGC, including as to the proposed share capital changes. *See* Bîrsan II §§ V.A.2.1-V.A.2.7 (discussing Ministry of Economy's orders with respect to 2004, 2009, 2011, 2013, 2014, 2015, and 2016 proposed share capital increases and decreases). *See also* Tănase II ¶¶ 21, 227 n.327; Henry ¶ 136 n.160.

[632] *See* Bîrsan ¶ 18, § II.F.

[633]

[634] Memorial ¶¶ 558-564.

explained how only after the filing of this arbitration did the State [redacted] initiate ANAF's purported "anti-fraud" investigation in October 2015, which has been carried out in an abusive and harassing manner, including by demanding information relevant only to the issues in the arbitration.[635] Finally, Claimants showed how ANAF's equally abusive and retaliatory VAT re-assessment not only largely re-imposed the same unlawful VAT assessment that had been administratively overturned on the eve of the provisional measures hearing, but did so by [redacted].[636]

291. With respect to the criminal investigation, Respondent points to a document [redacted] that does nothing more than confirm Claimants' observation that the State commenced the criminal investigation against RMGC in November 2013 almost immediately after the Special Commission and the Senate carried out the political directive of the leaders of the governing coalition, Prime Minister Ponta and Senator Antonescu, to reject the Draft Law and hence the Project.[637] It is clearly not an "a-ha" moment that this document does not reveal what Claimants believe is the retaliatory intent underlying both this investigation and the [redacted] ANAF investigation.[638]

292. Respondent also quotes the Tribunal's determination that the evidence of retaliation was not sufficient to justify the imposition of provisional measures.[639] That determination, however, does not prevent the Tribunal now from appreciating the facts previously elicited as well as developments since that determination, namely that (i) these investigations, particularly the anti-fraud investigation undertaken by ANAF have continued

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[635] Memorial ¶¶ 572-581.

[636] Memorial ¶¶ 577-581.

[637] Counter-Memorial ¶¶ 405-408.

[638] [redacted] In addition, as described by [redacted], it bears mention that not only has the Ploieşti prosecutor who initiated the criminal investigation of RMGC reportedly been subject to discipline and suspended from office for a number of instances of professional and ethical misconduct (though not necessarily related to conduct on the RMGC investigation), but the Ploesti prosecutor who [redacted] has been linked in sworn testimony to the SRI (secret police) which, if true, calls into question the independence of prosecutorial decision-making. [redacted]

[639] Counter-Memorial ¶ 413.

unabated, providing a convenient and seemingly perpetual tool for the State to harass RMGC, and (ii) ANAF's VAT re-assessment, which unmistakably reveals direct connections to the arbitration that did not exist at the time of the provisional measures hearing.[640] Respondent does not even try to justify ANAF's blatant reliance on the views and information of Project opponents or its discussion of issues in dispute in the arbitration that have nothing to do with a proper VAT assessment.[641] Such misconduct necessarily calls into question the *bona fides* of ANAF's other actions vis-à-vis RMGC and fuels RMGC's and Claimants' reasonable concerns about the motives behind and purpose of these investigations, and what they might portend for the future.

293. In addition to having virtually nothing to say in defense of ANAF's patently biased and arbitration-inspired re-assessment, Respondent also misrepresents the status of RMGC's challenge to enforcement of that assessment. According to Respondent, "RMGC's challenges to the enforcement proceedings have been dismissed."[642] As Mr. Tănase explains, however, contrary to Respondent's assertion, the Alba Iulia Court of Appeal granted RMGC's request for a judicial stay of enforcement of the VAT assessment on October 2, 2017.[643]

## VI. NAMR FAILED TO ACT ON RMGC'S REQUESTS FOR EXPLOITATION LICENSES FOR THE BUCIUM DEPOSITS

294. As detailed in Claimants' Memorial,[644] between 1999 and 2007 RMGC conducted extensive exploration works in accordance with its Bucium Exploration License that demonstrated the feasibility of exploiting the Rodu-Frasin (gold and silver) and Tarniţa (copper, gold, and silver) deposits, which gave RMGC the right to obtain exploitation licenses for those

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[640] [redacted] Memorial ¶ 581, n.1184. [redacted] Counter-Memorial ¶ 409. [redacted]

[641] Respondent casts aspersions on [redacted] "layman opinions" that the documents requested by ANAF are unrelated to the purposes of ANAF's investigations, but Respondent does not rebut Claimants' arguments in substance. Counter-Memorial ¶ 414, n.741. *See also* Memorial ¶¶ 573-577, 579-580.

[642] Counter-Memorial ¶ 415.

[643] Tănase III ¶¶ 216-217.

[644] Memorial ¶¶ 61-63, 88-102, 115-122, 286-291; Bîrsan § V.

deposits.

[645]

[646]

Professor Bîrsan confirms that RMGC had the right under the Bucium License to obtain exploitation licenses for the exploitation demonstrated to be feasible.[647]

295. When RMGC completed its exploration program, which demonstrated the feasibility of exploiting two deposits, RMGC advised NAMR of its intent to obtain two exploitation licenses and to submit the needed documentation within the deadlines provided by law in order "to exercise its right to directly obtain the exploitation licenses for the mineral resources discovered."[648]

296. Shortly thereafter, RMGC submitted the Final Report containing the results of the exploration program and the documentation needed for NAMR to evaluate the resources identified,[649] and on October 11, 2007, RMGC submitted the documentation required to obtain the exploitation licenses for the two perimeters (Rodu-Frasin and Tarniţa), which included for

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[645] Bucium License (Exh. C-397-C) Art. 3.1.4.

[646] Bucium License (Exh. C-397-C) Art. 10.1.

[647] Bîrsan II § IV.B.

[648] *See* Letter No. 70 from RMGC to NAMR dated May 15, 2007, including letter of intent from RMGC to NAMR dated May 16, 2007 (Exh. C-2836).

[649] RMGC Letter No. 1590 to NAMR dated July 16, 2007 (Exh. C-1126).

each the feasibility study and other needed studies and assessments.[650] Having thus submitted all necessary documentation, RMGC requested "to be directly granted 2 exploitation licenses for the mineral resources identified in the Bucium perimeter."[651]

297. As Professor Bîrsan confirms, pursuant to [redacted] and the provisions of the Mining Law, RMGC had an exclusive right *to obtain* exploitation licenses for the resources discovered and demonstrated to be feasible in the Bucium perimeter.[652] The exercise of that right was conditioned only on the submission of the documentation set out in law and regulation within the required deadline.[653] There is no dispute that RMGC submitted the documentation required.[654]

298. Respondent argues that NAMR must approve the Final Report submitted for Bucium "before the application for the exploitation licenses can be made."[655] Professor Bîrsan demonstrates, however, that NAMR accepted the Final Report as the law contemplates.[656] In any event, the fact that Respondent states that NAMR is still considering RMGC's applications confirms NAMR's acceptance of the Final Report.[657]

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[650] RMGC Letter No. 1845 to NAMR dated Oct. 11, 2007 (Exh. C-1131).

[651] RMGC Letter No. 1845 to NAMR dated Oct. 11, 2007 (Exh. C-1131).

[652] Bîrsan II § IV.B (noting that this right is the consideration for RMGC's performance of its obligations [redacted] to invest significant time, efforts and money to explore the resources in the License perimeter and that the *raison d'être* of an exploration license is the future exploitation of the resources/reserves that the titleholder discovers); Bîrsan §§ V.A.1, V.B.1-V.B.2, V.C.

[653] Professor Bîrsan notes that RMGC satisfied the conditions precedent for obtaining the exploitation licenses, *inter alia*, by submitting to NAMR a Final Report for the Bucium License in July 2007 which NAMR accepted prior to RMGC's submission of its license applications within the required term. Bîrsan § V.B.3. *See also* Szentesy ¶ 124; Bîrsan II § IV.B.

[654] *See* Counter-Memorial ¶ 427.

[655] Counter-Memorial ¶ 425.

[656] Bîrsan II § IV.A. *See also* NAMR Findings Report dated Sept. 27, 2007 Regarding the status of geological exploration works conducted by RMGC based on the Exploration License no. 218/1999 in the Bucium Perimeter between May 1999-May 2007 (Exh. C-1052-C); NAMR Findings Note dated Oct. 7, 2008 Regarding RMGC activities in the Bucium perimeter (Exh. C-1056-C) (taking note that [redacted]).

[657] Bîrsan II § IV.A. *See also* Counter-Memorial ¶¶ 433, 554.

299. Respondent also argues that NAMR was required to complete "the homologation process of the resources and reserves" before it could grant the exploitation license.[658] Professor Bîrsan demonstrates, however, that there is no legal basis for such an argument and nothing prevents NAMR from granting the exploitation license while homologation remains pending.[659]

300. Respondent also argues that granting the license requires negotiation.[660] In fact, as Professor Bîrsan demonstrates, the scope of such negotiations is very limited because the terms of an exploitation license are derived from the technical documentation submitted with the license application and by the Mining Law and its regulations.[661] In addition, NAMR is obligated to negotiate in good faith and may not impose conditions not set forth in the Mining Law.[662] Negotiations, therefore, cannot impose an impediment to the right of a holder of an exploration license to obtain an exploitation license where exploitation is demonstrated to be feasible.

301. Thus, while Respondent claims that the terms that must be negotiated are the "royalties, the surface of the exploitation perimeter, the duration of the license, and the financial guarantee,"[663] Professor Bîrsan demonstrates that, in fact, these issues are effectively established by law and applicable regulation.[664] Thus, the royalties are not individually negotiated, but are set at the level provided by law at that time; the exploitation perimeter is determined by reference to the location of the resources and of the proposed mining activities and is based on documentation prepared pursuant to NAMR technical instructions; the duration of the license is based on the Mining Law's maximum initial duration of 20 years and for Bucium is established

[658] Counter-Memorial ¶ 427.

[659] Bîrsan II ¶¶ 184-191.

[660] Counter-Memorial ¶ 430.

[661] Bîrsan II § IV.B.2; Bîrsan §§ V.B.4, V.C.1.

[662] *See* Bîrsan II ¶ 208; Bîrsan § V.C.1.

[663] Counter-Memorial ¶ 430.

[664] Bîrsan II ¶¶ 198-200.

in advance [redacted] and the financial guarantee also is established pursuant to NAMR technical instructions.[665]

302. Although RMGC submitted the documentation needed to obtain the exploitation licenses for Bucium and for NAMR to homologate and register the reserves in 2007, Respondent contends that the applications "are still pending" and review "is still underway."[666] Respondent's contention is not credible.[667]

303. As [redacted] explains, although NAMR's delay in acting on the Bucium applications was improper, as the feasibility of the Rodu-Frasin exploitation was dependent upon implementation of the Roşia Montană Project, and RMGC expected that NAMR would address the Tarniţa exploitation license together with the Rodu Frasin license, RMGC expected that NAMR finally would issue the Bucium exploitation licenses once it issued its homologation decision for Roşia Montană.[668] Accordingly, in July 2014 RMGC requested that NAMR complete the process for Rodu-Frasin and Tarniţa.[669]

304. As Ms. Szentesy explains, NAMR responded to RMGC's request and the technical staff clearly undertook to review the Bucium documentation, and over the next few months met with RMGC to clarify various technical questions with the goal of completing the process.[670] This culminated in March 2015, when NAMR General Director Mr. Stefan Hârşu shared with RMGC very advanced draft homologation reports for Rodu-Frasin and Tarniţa, which confirmed that NAMR had the information it needed, and directed RMGC to prepare presentations for a meeting with the NAMR commission responsible for verifying and

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[665] Bîrsan II ¶ 199. *See also* Bucium License (Exh. C-397-C) Art. 10.1 ([redacted]).

[666] Counter-Memorial ¶¶ 428-429, 433.

[667] Although Respondent was called upon to produce all documents reflecting NAMR's assessment of the resources and reserves for Rodu-Frasin and Tarniţa, the only documents it produced prior to 2015 were two letters from RMGC that do not reflect any analysis by NAMR and two one-page internal NAMR notes prepared in February 2009 which were never communicated to RMGC. [redacted]

[668] [redacted]

[669] Szentesy II ¶¶ 70-71.

[670] Szentesy II ¶¶ 72-73. *See also* Szentesy ¶ 130.

registering the resources and reserves, which he said would take place within two weeks.[671] RMGC therefore understood that NAMR's approval and registration of the resources and reserves was imminent.[672]

305. RMGC's meeting with the NAMR commission, however, never took place, and NAMR never notified RMGC of any further action taken to complete the homologation process or any other action relating to Bucium.[673]

306. Given that another three and half years have passed with no further word from NAMR or Respondent regarding the Bucium applications, it is not credible for Respondent to claim that it is still reviewing RMGC's Bucium applications.

307. Respondent misleadingly suggests that RMGC's submission of updated environmental documentation in early March 2015 has delayed NAMR's assessment.[674] In fact, those updates were requested by NAMR in February 2015 due to an intervening change in legislation (not for any technical reason), and RMGC promptly submitted the revised documentation within a few weeks.[675] Such updated documentation is not relevant to and could not have affected and did not affect the resource and reserve calculations, which RMGC notably submitted *before* Mr. Hârşu directed RMGC to prepare its presentation to the NAMR commission that would have resulted in the registration of the Rodu-Frasin and Tarniţa resources and reserves.[676]

308. NAMR's failure to act on RMGC's applications for exploitation licenses for Rodu-Frasin and Tarniţa also notably contrasts with its prompt response to the exploitation

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[671] [redacted] (describing RMGC's presentation before the homologation meeting with the NAMR commission on March 14, 2013, following which, at the recommendation of the commission, NAMR registered the Roșia Montană Project's resources and reserves). Respondent has produced draft homologation reports for both Rodu-Frasin and Tarniţa prepared by Mr. Hârşu, which [redacted] recognizes as being are substantially similar to the drafts she recalls reviewing. [redacted]

[672] [redacted]

[673] [redacted]

[674] Counter-Memorial ¶ 554.

[675] Szentesy II ¶ 73 n. 162; Bîrsan II ¶¶ 213-215.

[676] Szentesy II ¶ 73 n. 162.

license application by Samax Romania following the completion of its exploration program in the Rovina Valley.[677] Samax Romania filed its application in August 2012, and NAMR verified and registered the resources and reserves for the Rovina Valley copper-gold project within seven months and issued the requested exploitation license by May 2015.[678]

309. It is evident by comparison that NAMR is blocked politically and will not act on RMGC's applications due to the State's rejection of the Roşia Montană Project and political pressures that prevent approval of any additional license for RMGC.[679]

# VII. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

310. Respondent challenges the Tribunal's jurisdiction over the claims presented by Gabriel Canada and Gabriel Jersey on several grounds.[680] Each of Respondent's jurisdictional objections must be rejected because each of Gabriel Canada and Gabriel Jersey is a covered "investor" within the meaning of the Canada BIT and the UK BIT respectively, and each has presented claims that fall within the terms set forth in the respective BIT.

## A. The Tribunal Has Jurisdiction over the Claims Presented by Gabriel Canada

311. Respondent objects on several grounds to the Tribunal's jurisdiction in relation to Gabriel Canada's claims.[681] As demonstrated below, Respondent's objections are without merit.

### 1. Gabriel Canada Is an "Investor" Within the Meaning of the Canada BIT

312. Respondent challenges whether Gabriel Canada qualifies as an investor under the Canada BIT.[682]

313. Indeed, the facts regarding Gabriel Canada's legal status and its ownership of RMGC through Gabriel Jersey have been clear and continuously a matter of public record and

[677] [redacted]; Bîrsan II ¶¶ 216-218.

[678] [redacted]; Bîrsan II ¶ 218.

[679] [redacted]

[680] Counter-Memorial § 8.

[681] Counter-Memorial § 8.1.

[682] Counter-Memorial § 8.1.1.

thus known to Respondent since the filing of the Request for Arbitration. If Respondent considered there was any basis to question these facts, it had an obligation to raise this jurisdictional objection pursuant to ICSID Arbitration Rules, Article 41(1) "as early as possible" and not wait to raise the objection with the Counter-Memorial. Respondent's objection on this ground thus is not timely and Gabriel Canada therefore reserves the right to respond further if Respondent maintains an objection on this ground with its Rejoinder.

314. Indeed, Gabriel Canada without question qualifies as a covered investor.

315. Article I(h)(ii) of the BIT defines "investor" as an "enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Romania;" and Article I(b)(i) defines an "enterprise" as "any entity constituted or organized under applicable law ... including any corporation."[683]

316. As Respondent well knows both from numerous securities filings in the public domain (on which Respondent has relied to support other aspects of its defense) and from the evidence filed with the Memorial, Gabriel Canada qualifies as an investor under the Canada BIT. As observed in the Memorial, Gabriel Canada is a corporation duly constituted under the laws of the Yukon Territory, Canada, has been a Canadian company ever since its incorporation on July 18, 1986,[684] and at all relevant times has been the indirect majority shareholder of RMGC, through its 100% indirect ownership of Gabriel Jersey.[685]

317. Respondent argues that such evidence is "woefully inadequate" and denies that it has any "evidentiary value," because such documents were "apparently generated by Gabriel Canada itself."[686] Respondent's argument seriously mischaracterizes and fails to appreciate the nature of the evidence presented.

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683 Canada-Romania BIT (Exh. C-1) Art. I(h)(ii) and Art. I(b)(i).

684 Memorial ¶ 834 n.1654 (*citing* Gabriel Resources Ltd. 1999 Annual Information Form dated April 17, 2000 (Exh. C-1797) at 7).

685 Memorial ¶ 836 n.1659 (*citing*, *e.g.*, Gabriel Canada 2010 Annual Information Form (Exh. C-1808) at 4, 5 (showing ownership chart of Gabriel's business organization structure).

686 Counter-Memorial ¶ 441.

318. Not only are such contemporaneous business records maintained in the ordinary course of business reasonably presumed to be reliable, but such mandatory public filings are regulated by Canadian securities law, which imposes obligations of truthful disclosure subject to sanction for failure of compliance, and such filings are personally signed and certified by Gabriel management, further demonstrating their reliability.[687]

319. Gabriel Canada's securities filings submitted together with the Memorial make clear that, since 1997 and continuously through year-end 2016, Gabriel Canada has existed as a company incorporated in Canada and has been the indirect majority shareholder of RMGC, through its 100% indirect ownership of Gabriel Jersey.[688] This state of affairs has remained the case to date, as reflected in Gabriel Canada's securities filings following the Memorial.[689]

320. In addition, and also as reflected in the evidence submitted with the Memorial, Gabriel Canada's legal status and indirect majority ownership of RMGC has been verified through annual independent audits by Coopers & Lybrand, and in later years by PricewaterhouseCoopers LLP, of its consolidated financial statements, which also are publicly

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[687] *See*, *e.g.*, Certifications Accompanying Quarterly Management's Discussion and Analyses and Interim Consolidated Financial Statements 2004-2018 (Exh. C-1960); Certifications Accompanying Annual Information Forms and Annual Management's Discussion and Analyses 2005-2018 (Exh. C-1959). *See also generally* Cooper ¶ 20 (discussing the public securities documents and information that companies publicly-traded on the Toronto Stock Exchange are required to file).

[688] *See* Gabriel Resources Ltd. 2000 Revised Annual Information Form dated May 8, 2001 (Exh. C-1798) at 5-6; Gabriel Resources Ltd. 2001 Renewal Annual Information Form dated Apr. 15, 2002 (Exh. C-1799) at 5-6; Gabriel Resources Ltd. 2002 Renewal Annual Information Form dated May 16, 2003 (Exh. C-1800) at 5-6; Gabriel Resources Ltd. 2003 Renewal Annual Information Form dated Apr. 1, 2004 (Exh. C-1801) at 5-6; Gabriel Resources Ltd. 2004 Renewal Annual Information Form dated Mar. 8, 2005 (Exh. C-1802) at 5-6; Gabriel Resources Ltd. 2005 Renewal Annual Information Form dated Mar. 27, 2006 (Exh. C-1803) at 5-6; Gabriel Resources Ltd. 2006 Renewal Annual Information Form dated Mar. 5, 2007 (Exh. C-1804) at 5-6; Gabriel Resources Ltd. 2007 Renewal Annual Information Form dated Mar. 26, 2008 (Exh. C-1805) at 5-6; Gabriel Resources Ltd. 2008 Annual Information Form dated Mar. 6, 2009 (Exh. C-1806) at 5-6; Gabriel Resources Ltd. 2009 Annual Information Form dated Mar. 10, 2010 (Exh. C-1807) at 5-6; Gabriel Resources Ltd. 2010 Annual Information Form dated Mar. 9, 2011 (Exh. C-1808) at 5-6; Gabriel Resources Ltd. 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 4-5; Gabriel Resources Ltd. 2012 Annual Information Form dated Mar. 14, 2013 (Exh. C-1810) at 4-5; Gabriel Resources Ltd. 2013 Annual Information Form dated Mar. 12, 2014 (Exh. C-1811) at 6-7; Gabriel Resources Ltd. 2014 Annual Information Form dated Mar. 12, 2015 (Exh. C-1812) at 6-7; Gabriel Resources Ltd. 2015 Annual Information Form dated Mar. 29, 2016 (Exh. C-1813) at 4-5; Gabriel Resources Ltd. 2016 Annual Information Form dated Mar. 29, 2017 (Exh. C-1814) at 5-6.

[689] Gabriel Resources Ltd., 2017 Annual Information Form dated Apr. 30, 2018 (Exh. C-1932) at 5-6.

filed annually.[690] Gabriel Canada's independently audited financial statement for the year 2017, filed in early 2018, is similar.[691]

321. Gabriel Canada remains today a Canadian corporation in good standing, as readily verifiable as a matter of public record and recently certified by the Government of Yukon's Department of Community Services.[692]

322. Gabriel Canada, moreover, made investments in Romania within the meaning of Article I (g) of the Canada BIT, which defines "investment" as "any kind of asset owned or controlled either directly, or indirectly through an investor of a third state … and, in particular, though not exclusively, includes …" not only "shares, stock, bonds and debentures or any other

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[690] Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1997 (Exh. C-1815) at 1 ("The consolidated financial statements include the accounts of the Company and the following subsidiaries: Gabriel Jersey (incorporated in Jersey, Channel Island) 100% owned [and] Euro Gold Resources S.A. (incorporated in Romania) 65% owned . . . ."); *id.* at 3 ("On April 11, 1997, the Company issued 15,000,000 shares to acquire 100% of the issued and outstanding shares of Gabriel Jersey."); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1998 (Exh. C-1816) at 1, 3 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1999 (Exh. C-1817) at 1, 3 (updated to reflect the increase to 80% ownership through Gabriel Resources (Jersey) Limited of RMGC); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2000 (Exh. C-1818) at 1 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2001 (Exh. C-1819) at 1 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2002 (Exh. C-1820) at 6 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2003 (Exh. C-1821) at 1 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2004 (Exh. C-1822) at 1 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2005 (Exh. C-1823) at 1 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2006 (Exh. C-1824) at 6-7 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2007 (Exh. C-1825) at 6, 8 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2008 (Exh. C-1826) at 6, 8 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2009 (Exh. C-1827) at 7, 9 (updated to reflect 80.46% ownership in RMGC); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2010 (Exh. C-1828) at 8-9 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2011 (Exh. C-1829) at 8, 10 (updated to reflect 80.69% ownership in RMGC); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2012 (Exh. C-1830) at 8-9 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2013 (Exh. C-1831) at 8-9 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2014 (Exh. C-1832) at 8-9 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2015 (Exh. C-1833) at 8-9 (same); Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2016 (Exh. C-1834) at 8-9 (same).

[691] Gabriel Resources Ltd., Consolidated Financial Statements for the year ended Dec. 31, 2017 dated Mar. 14, 2018 (Exh. C-1933) at 8-9.

[692] *See* Government of Yukon Department of Community Services, Certificate of Status for Gabriel Resources Ltd. dated July 25, 2018 (Exh. C-1934).

form of participation in a company," but also "claims to performance under contract having a financial value," "intellectual property rights," "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," as well as "movable and immovable property," as long as acquired "in the expectation or used for the purpose of economic benefit or other business purposes."[693]

323. Gabriel Canada's investments thus include the contract rights held by Gabriel Canada's 100% subsidiary, Gabriel Jersey, arising from agreements with Minvest in relation to RMGC; the shares in RMGC and loans to Minvest held through Gabriel Jersey; RMGC's rights conferred by law and under contract to develop the Roşia Montană and Bucium Projects; substantial intellectual property rights, including in technical and engineering know-how relating to and developed in connecton with the Roşia Montană and Bucium Projects; and assets acquired by RMGC in connection with the development of the Projects.[694]

324. There is no reasonable question therefore that Gabriel Canada is an investor within the meaning of the Canada BIT.

### 2. Gabriel Canada Presents Claims on Its Own Behalf and Seeks Compensation for Its Own Losses

325. Respondent observes that Gabriel Canada presents claims on its own behalf, as it is entitled to do under the Canada BIT, and accordingly seeks compensation for its own losses.[695] Respondent argues that Gabriel Canada cannot present a claim on behalf of RMGC for losses incurred by RMGC, as such a claim would fall under Article XIII(12) of the Canada BIT, which has not been invoked.[696]

326. There is no dispute that Gabriel Canada presents a claim for losses that it incurred and does not present a claim under Article XIII(12) of the Canada BIT on behalf of RMGC.

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[693] Canada-Romania BIT (Exh. C-1) Art. I(g).

[694] *See also infra* § VII.B.1.

[695] Counter-Memorial ¶ 449 ("In the present case, Gabriel Canada invokes Article XIII(1) of the BIT, that is, it claims on its own behalf for loss or damage allegedly incurred by Gabriel Canada itself.").

[696] *See* Counter-Memorial § 8.1.2.

327. Respondent argues that this is not clear because the Memorial states that "Gabriel Canada's losses entail, most prominently, the loss of the value of the rights to develop the Roşia Montană Project and the Bucium Projects, the rights to which it enjoyed through its indirect ownership interest in RMGC."[697] There should be no confusion, however, that the loss that Gabriel Canada incurred is the loss of the value of the shares it has held in its subsidiaries, including Gabriel Jersey, which it held indirectly and continuously from 1997 to date.[698] For the entire relevant time period, including immediately prior to August 2011 through the date of the Request for Arbitration,[699] Gabriel Canada's sole business objective and activity has been to develop the Roşia Montană Project and the Bucium Projects through its indirect ownership interest in RMGC.[700]

328. As Compass Lexecon observes, the value of a company's shareholding is derived from the value of the company's assets.[701] Thus, contrary to Respondent's suggestion, there is no inconsistency in describing Gabriel's loss (the value of shareholding in Gabriel's subsidiaries) in terms of the fact that the value of the underlying assets owned directly by RMGC has been lost.

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[697] Counter-Memorial ¶ 449 (*quoting* Memorial ¶ 836).

[698] *See supra* §§ VII.A.1-VII.A.2.

[699] *See* Memorial ¶ 897 (Gabriel seeks "compensation in the amount of the fair market value of Gabriel's investments on the date immediately prior to the treaty breaches at issue, *i.e.*, July 29, 2011."); Request for Arbitration dated July 21, 2015.

[700] Compass Lexecon ¶ 5 and n.6. *See also* Gabriel Resources Ltd. 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 5 ("The Company, through its 80.69% owned Romanian incorporated subsidiary Roşia Montană Gold Corporation S.A. ('RMGC'), is engaged in the exploration and development of precious metal mineral properties in Romania. At the present time, Gabriel has two mineral projects located in Romania. The Company is currently at the permitting stage in the process to develop, construct and operate the Roşia Montană Project, one of the largest undeveloped gold deposits in Europe. The Company's second project, the Bucium project, comprises of the Rodu-Frasin and Tarniţa deposits which can be considered as advanced and early stage exploration, respectively (the 'Bucium Project')."); *id.* at 4, 10, 37; Gabriel Resources Ltd. 2012 Annual Information Form dated Mar. 14, 2013 (Exh. C-1810) at 5-6, 15, 45; Gabriel Resources Ltd. 2013 Annual Information Form dated Mar. 12, 2014 (Exh. C-1811) at 7-8, 20, 51; Gabriel Resources Ltd. 2014 Annual Information Form dated Mar. 12, 2015 (Exh. C-1812) at 7-8, 24, 56; Gabriel Resources Ltd. 2015 Annual Information Form dated Mar. 29, 2016 (Exh. C-1813) at 5-7, 15.

[701] Compass Lexecon ¶ 5 (describing that under normal conditions the price of a company's shares reflects the value of the company's underlying assets).

329. As investment treaty tribunals repeatedly have recognized, an investor may suffer losses to the value of its shareholding as a result of measures that impair the value of the assets of the investor's subsidiary.[702]

330. In short, there is no basis to question that Gabriel Canada has presented claims within the scope of Article XIII(1) of the Canada BIT that Romania breached the BIT and that Gabriel Canada incurred loss or damage by reason of or arising out of those breaches in form of the loss of the value of Gabriel Canada's shareholdings in its subsidiaries, whose sole business objective and activity was the development of the Roşia Montană Project and the Bucium Projects.

### 3. The Dispute Submitted to Arbitration by Gabriel Canada Complies with Article XIII(2) and (3) of the Canada BIT

331. Respondent argues that Gabriel Canada's claims fall outside the Tribunal's jurisdiction, or in the alternative are inadmissible,[703] to the extent that Gabriel Canada's claims "are based on facts and events" that took place (i) after Gabriel notified Romania of the dispute

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[702] *See, e.g.*, *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability dated Apr. 28, 2011 (RLA-63) ¶ 202 ("Claimants' investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares."); *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction dated July 18, 2013 (CL-223) ¶¶ 282, 285 ("[A]n investor can . . . claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares. . . . [I]f it could be proven by the Claimant that the Bulgarian authorities expropriated the Property belonging to LIDI-R, the Claimant could present a claim for the loss of value of its shares in that company resulting from such expropriation . . . ."); *Poštová banka, a.s. & ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award dated Apr. 9, 2015 (CL-224) ¶ 245 ("[A] shareholder of a company incorporated in the host State may assert claims based on measures taken against such company's assets that impair the value of the claimant's shares."); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated Sept. 13, 2001 ("*CME v. Czech Republic*") (CL-116) ¶ 392 (holding that the tribunal must examine whether the Czech Republic expropriated the claimant's project company because the expropriation of the project company's assets and rights could affect the value of the claimant's shares in the project company); *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V (079-2005), Final Award dated Sept. 12, 2010 ("*RosInvestCo. v. Russia*") (CL-51) ¶ 608 ("[M]odern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own rights, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company [in which the shareholder holds shares].").

[703] Counter-Memorial § 8.1.3.

by letter dated January 20, 2015[704] and (ii) after Gabriel Canada waived its right to initiate or continue parallel proceedings in relation to the measures alleged to be in breach of the BIT as referenced in the Request for Arbitration on July 17, 2015.[705]

332. Respondent's objection on these grounds is without merit. As demonstrated below, Gabriel's notification to Romania of the dispute was sufficient for purposes of Article XIII(2) of the Canada BIT to permit arbitration of the dispute submitted by Gabriel Canada. Likewise, Gabriel Canada's waiver satisfied the condition set forth in Article XIII(3) of the Canada BIT as it fully covers the claims presented.

#### a. The Notice Required by Article XIII(2) Was Satisfied

333. The Canada BIT provides that investment disputes should be settled amicably to the extent possible. To that end, Article XIII(1) of the Canada BIT provides that "[a]ny dispute … relating to a claim by the investor that a measure taken or not taken … 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."[706] On January 20, 2015, Claimants accordingly sent a "Formal Notice Requesting Consultation"[707] to Romania. In that letter, Claimants advised that they were "ready to engage at a senior level with the Government and other authorities in Romania, at the earliest possible opportunity, in a process of consultation focused on resolving amicably the issues at dispute to the benefit of all stakeholders in the Project."[708] Claimants sent a further letter on April 22, 2015, "implor[ing] the Government to engage immediately in a formal and transparent consultative process directly with Gabriel

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

[705] Gabriel Canada's Waiver in Support of Its Request for Arbitration dated July 17, 2015 (Exh. C-6).

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

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

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

Resources and RMGC in order to resolve amicably the issues at dispute."[709] Romania did not respond to either letter.

334. Article XIII(2) of the BIT provides that "[i]f a dispute has not been settled amicably with a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration…," and that "a dispute is considered to be initiated when the investor … has delivered notice in writing … alleging that a measure taken or not taken … is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[710]

335. Claimants' notice of dispute included the following description of the "measure taken or not taken" and the resulting loss:

> [T]he Romanian authorities have prevented the Project from advancing and proceeding to implementation. The Investors are able to evidence a substantial number of persistent delays in permitting activities erroneously instituted by the Romanian authorities. Ultimately, the Project is no longer the subject of routine, regulatory analysis set out by the competent administrative bodies charged with its assessment; instead it has become hostage to conflicts between rival political factions and misinformation that has further unnecessarily damaged the ability for development of the Project.
>
> In view of the substantial losses that the Investors will incur if the Project is not permitted to proceed in accordance with all applicable laws, the Investors have been left with no alternative but to file this notice which requests the Romanian State to engage formally in a process of consultation as contemplated by the relevant investment treaties to which Romania is a party . . .
>
> [T]o protect their interests, the Investors are formally issuing this notice pursuant to the provisions of the previously mentioned international bilateral investment protection treaties entered into by Romania . . .

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

[710] Canada-Romania BIT (Exh. C-1) Art. XIII(2).

> [T]he Investors are prepared to present their claims to international arbitration in order to compensate fully for their rights to develop the Project that have been denied by Romania's treaty violations.[711]

336. The Canada BIT defines a "measure" as "includ[ing] any law, regulation, procedure, requirement, or practice."[712] As several investment treaty tribunals have observed, the term "measure," so defined, need not to be understood in a limited manner as a "fact" or an "event," as Respondent argues, but may be an identified course of conduct in relation to an investment.

337. Thus, for example, in *Pac Rim v. El Salvador*, the tribunal considered that a "measure," likewise defined as including a "practice," may be a continuing practice of withholding permits:

> The relevant measure here at issue is not a specific and identifiable governmental measure that effectively terminated the investor's rights at a particular moment in time (i.e. the termination of a permit or license, denial of an application, etc.), but, rather the alleged continuing practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments.[713]

Similarly, in *Detroit International Bridge Company v. Canada*,[714] the tribunal considered that a measure, likewise defined in the NAFTA, may be the practice of alleged discriminatory and inequitable conduct toward the claimant's investment.[715]

338. In this case, the measure the Claimants alleged was in breach of the treaties was the practice of the Romanian authorities to prevent the Roşia Montană Project from advancing and proceeding to implementation and of denying Claimants' rights to develop the Project.

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[711] Letter from Gabriel addressed to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 (Exh. C-8) at 2.

[712] Canada-Romania BIT (Exh. C-1) Art. I(i).

[713] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections dated June 1, 2012 ("*Pac Rim v. El. Salvador*") (CL-225) ¶ 3.43.

[714] *Detroit International Bridge Company v. Government of Canada*, UNCITRAL PCA Case No. 2012-25 UNCITRAL, Award on Jurisdiction dated Apr. 2, 2015 (CL-226) ¶¶ 302, 307, 324-325.

[715] *Id.* ¶ 324.

339. Respondent's objection is that "claims" as to "facts" and "events" that post-date the January 2015 notification of a dispute fall outside the tribunal's jurisdiction or are inadmissible. Respondent's objection, however, is not framed in the terms of Article XIII of the BIT. Article XIII provides that a "*dispute ...relating* to a claim …that a measure …is in breach" may be submitted to arbitration if the dispute has not been settled within a period of six months after notice alleging that a measure is in breach was given. That is, when following such notification an amicable resolution is not reached, the investor may submit to arbitration and the tribunal has jurisdiction over the *dispute related* to the claim that a measure is in breach. Thus, the terms of the reference to arbitration set forth in the BIT are broader than Respondent's argument misleadingly suggests.

340. Later facts or events, including following commencement of the arbitration, may form part of or extend the dispute. Other tribunals accordingly have recognized the notice of dispute as encompassing later events that are mere factual extensions or continuations of the same dispute, particularly when the same course of conduct giving rise to the dispute continues following the commencement of the arbitration. Thus, in *RREEF v. Spain*, the tribunal concluded:

> [T]he core issue is whether the additional claims change the character of the case …. If this is not the case, the objection must be dismissed since (i) it can be admitted that the cooling-off period will have elapsed at the time the Tribunal's decision is taken and (ii) it would be totally artificial and unreasonably heavy to request the Claimant to lodge new applications directed against facts which are but the continuation of those at stake in the initial Application. In this respect, this Tribunal shares the opinion expressed by the *Enron* tribunal: "*…the filing of multiple, subsequent and related actions [in such cases] would lead to a superlative degree of inefficiency and inequity*."[716]

In that case, the tribunal held that several events that post-dated the claimant's memorial fell within the tribunal's jurisdiction and were admissible because they "do not change the general character of the case submitted to the Tribunal . . . [b]eing mere factual extensions of the same

[716] *RREEF Infrastructure (G.P.) Ltd. & RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction dated June 6, 2016 (CL-211) ("*RREEF v. Spain*") ¶ 226 (*citing Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated Jan. 14, 2004 (CL-272) ¶ 87).

dispute already before the Tribunal."[717] The tribunal noted that "it would be of no avail and would impose an unreasonable burden on both Parties to oblige the Claimants to request amicable settlement anew and to start new proceedings against the Respondent in relation to these further measures which are a mere factual extension of those initially challenged by the Claimants."[718]

341. Similarly in *Pope & Talbot v. Canada*, where the respondent objected to the jurisdiction of the tribunal to consider the impacts of a "super fee" to be applied to Canadian exports of softwood lumber that came into existence only after the claimant filed its statement of claim and that was addressed for the first time in the claimant's memorial,[719] the tribunal held that arguments regarding the "super fee" were "not a 'new' claim, but relate instead to a new element that has recently been grafted onto the overall Regime."[720]

342. Likewise here, the continuation of Romania's conduct following the commencement of this arbitration is a mere factual extension of the dispute submitted to arbitration and has not altered its general character. That dispute is the one related to the claim that, in breach of its investment treaty obligations, Romania has acted to prevent implementation of the Roşia Montană Project and finally to deny RMGC's rights to develop the Project arbitrarily, without due process, and without compensation, but also consequentially to deny RMGC's rights in relation to the Bucium Projects and to reject and abandon the State's joint venture with Gabriel in RMGC itself.[721]

343. Also relevant analogously, the ICSID Arbitration Rules permit a party to present incidental or additional claims during the course of the arbitration provided such claims "aris[e] directly out of the subject-matter of the dispute" and fall within the scope of consent of the

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[717] *RREEF v. Spain* (CL-211) ¶¶ 223, 231.

[718] *RREEF v. Spain* (CL-211) ¶ 230.

[719] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" dated Aug. 7, 2000 (CL-227) ("*Pope & Talbot v. Canada*") ¶¶ 1, 4, 7.

[720] *Pope & Talbot v. Canada* (CL-227) ¶¶ 24-25; *id*. ¶ 28 (also observing that Canada would not suffer "serious prejudice" because "the issue has been on the table since . . . the Memorial was filed . . . [and] Canada delivered a substantial response in its own Counter Memorial").

[721] Memorial §§ X.-XIV.

parties.[722] Notably, when referring to the possibility of ICSID arbitration, the Canada BIT does not provide any exceptions in relation to potential ancillary claims, as might be expected if the rule permitting such claims was not to be applied. Indeed, a conclusion that additional claims based on subsequent facts arising directly out the subject-matter of the dispute should be accepted is well supported, including by the decisions of the International Court of Justice regarding its own jurisdiction over such claims.[723]

344. Finally, as several tribunals have observed, the purpose of the notice requirement is to inform the State of the existence of the dispute and provide the opportunity to try to settle it amicably. Where it is evident that further notice and opportunity to engage in amicable discussions would have been futile, it is not a good faith or reasonable interpretation of the treaty to conclude that it requires an additional notification and commencement of a new arbitration.[724]

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[722] ICSID Arbitration Rule 40.

[723] For a detailed discussion of the considerations supporting this conclusion and the rule accepted by the International Court of Justice in this regard see *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated Aug. 30, 2018 (*Chevron v. Ecuador*) (CL-228) ¶¶ 7.155 - 7.178 (confirming that additional claims relating to developments that post-date the commencement of the arbitration that arose from the same evolving dispute between the parties should be accepted as consistent with the UNCITRAL Arbitration Rules as well as the principles applied by the International Court of Justice in determining its own jurisdiction in relation to such claims).

[724] *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award dated Apr. 29, 2014 (RLA-48) ¶ 321 (in light of the object and purpose of the treaty "the over-strict meaning . . . is too semantic in its approach and unduly harsh in its result . . . particularly so where the Claimant's non-compliance is only formalistic and where the Respondent has suffered no prejudice which could not be compensated by an appropriate order by this Tribunal for legal and arbitration costs"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated Nov. 14, 2005 (CL-229) ("*Bayindir v. Pakistan*") ¶ 100 ("Contrary to Pakistan's position, the non-fulfilment of this requirement is not 'fatal to the case of the claimant' . . . [T]o require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage."); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated Aug. 6, 2003 (CL-230) ¶ 184 ("[I]t does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal."); *Ronald S. Lauder v. Czech Republic*, Final Award dated Sept. 3, 2001 (RLA-52) ¶ 190 ("To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties."). *See also Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated Oct. 11, 2002 (CL-145) ("*Mondev v. USA*") ¶ 44 ("Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope."); *Ethyl Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction dated June 24, 1998 (CL-231) ¶¶ 77, 84 ("It is difficult to credit the possibility . . . that Canada would through consultation or negotiation desist from a course which, according to Claimant's allegations, was determined on

In this case, it is not credible to suggest, and Respondent does not, that Respondent was not effectively put on notice as to the dispute with Gabriel or that it was deprived of the opportunity to engage in settlement discussions.

#### b. The Waiver Required by Article XIII(3) Was Satisfied

345. Article XIII(3) of the Canada BIT provides that an investor may submit a dispute to arbitration only if it also 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."[725]

346. Gabriel Canada did so and submitted its waiver together with its Request for Arbitration.[726] Gabriel Canada waived "its right to initiate or continue other proceedings in relation to the measures alleged to be in breach of the BIT referred to in the Request for Arbitration."[727] The Request for Arbitration described the measures that breached the Canada BIT robustly as relating to Romania's practice of refusing to permit the Roşia Montană Project and of taking RMGC's license rights, including in relation to Bucium, without compensation, including by failing to take action and by rendering implementation impossible [728]

347. Thus, Gabriel Canada's waiver extended to any other proceedings in relation to the measures alleged to be in breach in this arbitration.

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and persisted in by the Canadian Government through two Parliaments as a matter of important national policy. Certainly, Canada has given no indication that it would have relented and the Tribunal discerns none."); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/ 00/9, Award dated Sept. 16, 2003 (CL-135) ¶ 14.5 ("There is no doubt that the subject matter of the two mediations was the Claimant's Parkview Project and the conduct of Ukrainian authorities in respect thereto. This is sufficient for the purposes of the [notice] requirement in Article VI(2) of the BIT."); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.À.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility dated July 29, 2008 (CL-232) ¶ 107; *Link-Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL, Award on Jurisdiction dated Feb. 16, 2001 (CL-233) ¶ 8.6.4.

[725] Canada-Romania BIT (Exh. C-1) Art. XIII(3)(b) (emphasis added).

[726] *See* Gabriel Canada's Waiver in Support of Its Request for Arbitration dated July 17, 2015 (Exh. C-6).

[727] *Id*.

[728] *See, e.g.*, Request for Arbitration ¶¶ 35-36.

348. Nevertheless, and without accepting Respondent's objection on this ground, Gabriel Canada herewith through counsel submits an additional waiver that expressly extends to its right to initiate or continue other proceedings in relation to the measures that are alleged by Gabriel Canada in any of its written or oral submissions in the course of the conduct of this arbitration to be in breach of the BIT.[729] Other tribunals have accepted a later filed waiver submitted during the course of the arbitration as satisfying the waiver requirement.[730]

### 4. Gabriel Canada's Claims Arose Within the Three-Year Limitations Period Set Forth in Article XIII(3)(d) of the Canada BIT

349. Respondent argues that Gabriel Canada's claims fall outside the temporal limitations of the Canada BIT and thus outside the Tribunal's jurisdiction.[731] As demonstrated below, Respondent is incorrect.

#### a. The Three-Year Period Is Triggered by Knowledge of Both the Breach and the Resulting Loss

350. Article XIII(3)(d) of the Canada BIT provides that an investor may submit a dispute to arbitration only if, *inter alia*:

> Not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the

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[729] Gabriel Canada's Waiver in Support of the Dispute Submitted to Arbitration in ICSID Case No. ARB/15/31 dated Oct. 10, 2018 (Exh. C-1935).

[730] *See International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award dated Jan. 26, 2006 (RLA-66) ¶ 117 (where relevant waivers filed only later with statement of claim, tribunal accepted them, "as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers . . . a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings," observing that the treaty "should not be construed in an excessively technical manner"); *Ethyl Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction dated June 24, 1998 (CL-231) ¶ 91 (regarding the similar waiver requirement under NAFTA Ch. 11, where the claimant did not file the waiver when it commenced the arbitration but later with its Statement of Claim, the tribunal observed as the treaty does not state when the waiver must be filed it had "little trouble deciding the Claimant's unexplained delay in complying with Article 1121 is not of significance for jurisdiction in this case"). *See also Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Partial Award dated Aug. 7, 2002 (CL-30) ¶ 93 (parties agreed that a supplemental waiver filed by the claimant without prejudice after respondent raised an objection as to the sufficiency of the waiver satisfied the jurisdictional requirement).

[731] Counter-Memorial § 8.1.4.

> alleged breach and knowledge that the investor has incurred loss or damage.[732]

351. Article XIII(3)(d) requires the investor to commence arbitration within three years from the date that three conditions are fulfilled: (i) the alleged breach must have occurred, (ii) the resulting loss or damage must have been incurred, and (iii) the investor must have acquired, or reasonably been in a position to acquire, knowledge of both the breach and the loss. While in some cases these conditions may be fulfilled at once, that is not necessarily so.[733]

352. As to the alleged breach, "one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur…. There may thus be a difference between the date of different breaches arising from a given course of governmental conduct."[734] For example, whereas a failure to accord fair and equitable treatment occurs when the State acts or fails to act in the offending manner, an expropriation does not occur until there is the loss of the property in question.[735] Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation.[736]

353. As regards the loss or damage, although the full extent or quantification of the loss or damage may yet be unclear, Article XIII(3)(d) refers to knowledge of consequential loss or damage that has been incurred, thus referring to actual loss or damage that in fact already has been sustained. As the tribunal in *Mobil Investments v. Canada*, observed, "[i]t is impossible to

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

[733] *Mobil Investments Canada, Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated Jul. 13, 2018 (CL-234) ¶ 153 ("The date on which an investor . . . first acquires (or ought to have acquired) knowledge that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage.").

[734] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated Jan. 30, 2018 (CL-235) ¶ 154.

[735] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated Jan. 30, 2018 (CL-235) ¶ 161 (observing that a claim of expropriation only arises "when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe . . . the government act must have directly or indirectly taken a property interest resulting in actual present harm to an investor").

[736] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated Jan. 30, 2018 (CL-235) ¶ 154.

know that loss or damage *has been* incurred until that loss or damage actually has been incurred."[737] A threat or fear of loss or damage does not trigger the limitation period.[738]

354. As regards when the investor first acquires knowledge, Article XIII(3)(d) refers to knowledge both of the alleged breach and of the loss resulting from that breach; the limitation period therefore runs from the later of these events when knowledge of both is not simultaneous.[739]

355. There is no dispute in this case that as Claimants' Request for Arbitration was registered by ICSID on July 30, 2015, the relevant date for purposes of Article XIII(3)(d) of the BIT is July 30, 2012.[740]

#### b. Gabriel Did Not Incur and In Any Event Did Not Acquire Knowledge of Loss Prior to July 30, 2012

356. Gabriel Canada's claims in this arbitration are based on a course of treatment of its investments that began in August 2011 and, following the Parliamentary rejection of the Draft Law in late 2013, culminated in the political rejection and effective arbitrary termination of the Roşia Montană Project, ultimately encompassing the rejection of the Bucium Projects and of

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[737] *Mobil Investments Canada, Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated Jul. 13, 2018 (CL-234) ¶ 154.

[738] *See Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated Jan. 30, 2018 (CL-235) ¶¶ 153, 165; *Mobil Investments Canada, Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated Jul. 13, 2018 (CL-234) ¶ 155 ("To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.").

[739] *See Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated Aug. 22, 2016 (CL-149) ¶ 213 (observing that the question is when the Claimant obtained actual or constructive knowledge of the measures and of their consequences for its investment); *Mobil Investments Canada, Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated Jul. 13, 2018 (CL-234) ¶ 148 ("It is . . . important to identify precisely what it is of which the investor . . . must acquire knowledge in order for the limitation period . . . to begin to run. First, there must be knowledge of the alleged breach. Secondly, there must be knowledge that the investor . . . has suffered loss or damage as a result of that alleged breach."); *id.* ¶ 153 ("[T]he limitation period starts to run only when the investor . . . has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result.").

[740] *See* Counter-Memorial ¶ 459.

RMGC itself, thus resulting in the complete deprivation of the value of Gabriel's investments, contrary to law, without due process, and without compensation.[741]

357. Respondent argues that "Claimants' most serious allegations" relate to the acts to block the environmental permitting process while demanding the renegotiations of the Project economics "that took place well before 30 July 2012, in the second half of 2011."[742] Thus, Respondent argues the claims fall outside the Tribunal's jurisdiction. Respondent's argument is wrong.

358. Although the unlawful treatment began prior to July 30, 2012, it was not clear then that Gabriel Canada had incurred any actual loss. Prior to July 30, 2012, while the Government held up Project permitting insisting on renegotiation and then demanding that it be given "25 and 6",[743] Gabriel reasonably considered that if it could reach an agreement with the Government, the Project would be permitted to continue, and indeed, the parties engaged in "negotiations."[744] Indeed, soon after taking office, while indicating that renegotiating the State's economic deal remained a condition for the Project proceeding, Prime Minister Ponta made clear in May 2012 that the Government would not take further action regarding the Project pending the outcome of elections scheduled for the end of the year, thus effectively extending the period of re-negotiation. Thus, there was no basis to conclude prior to July 30, 2012 that Gabriel had acquired knowledge that it had incurred losses because, at that time, Gabriel had not yet actually incurred losses and it remained uncertain whether ultimately it would suffer loss.[745]

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[741] Memorial §§ VII.-IX., XVI(C)(1).

[742] Counter-Memorial ¶ 464.

[743] Memorial ¶¶ 355-357, 367-369.

[744] Memorial ¶¶ 347-351, 367-370, 378-380; Henry ¶¶ 44-50, 55-60; Henry II ¶¶ 11-18, 27-29. Notably, as Reisman and Sloane observe, "In hindsight, managers (or their critics) may come to believe that they should have seen the events in a more ominous light, as the first in a series of actions that would culminate in a consequential expropriation. But hindsight, of course, is notoriously lucid." W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 (2003) (CL- 123) at 132.

[745] Indeed, even if one were to conclude that prior to July 30, 2012 Gabriel Canada knew that it had incurred the loss associated with RMGC having to make higher royalty payments and Gabriel Jersey having to give up some equity, because no agreement had yet been reached on such issues, it remained unclear whether Gabriel Canada would be able to obtain other benefits in exchange for such concessions, e.g., in the form of a

### c. Gabriel Acquired Knowledge of the Breach at Issue and Resulting Loss after July 30, 2012

359. Article XIII(1) of the BIT refers to a "dispute… relating to a claim … that a measure …. is in breach of [the BIT], and that the investor has incurred loss or damage by reason of… that breach…."[746] The three year limitation requirement in Article XIII(3)(d) thus relates to knowledge that the measure that is the subject of the dispute is in breach of the BIT and that it has caused loss.

360. Prior to the critical date, July 30, 2012, the Government blocked Project permitting and demanded to renegotiate the Project economics. Although that conduct was in breach of Respondent's obligations under the BIT, that conduct, without more, is not the measure to which the dispute submitted to arbitration relates; it was the beginning of the measure.

361. Starting in August 2011, the Government engaged in course of conduct that blocked the permitting process and demanded renegotiation of the agreements relating to the Roşia Montană Project. That conduct was unlawful, but it was not clear at that time that it had caused loss to Gabriel or its investments.[747] Although Gabriel was coerced to do so, Gabriel engaged in "negotiations" seeking to reach agreement that would prevent loss and damage to its investments.[748] Those "negotiations" did not lead to an agreement in 2011 or in early 2012, and permitting therefore remained blocked, including during the remainder of 2012 while, as noted above, the Government effectively put negotiations on hold while it focused its attention on elections.[749] It was clear, however, that during 2012 the Government considered that renegotiation was an open and ongoing requirement for the Project to proceed.[750] Consistent with this approach, the Government resumed direct dealings with Gabriel in early 2013,

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potentially expedited permit process to accelerate Project development that might have offset the economic impacts for Gabriel's investments.

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

[747] [redacted]

[748] *See* Memorial ¶¶ 347-351, 367-370, 378-380. *See supra* § II.

[749] *See* Memorial ¶¶ 379-390. *See supra* § II.

[750] *See* Memorial ¶¶ 378-380, 403; [redacted]

including, [redacted] [751] This led to the Draft Agreement and Draft Law and the Parliament's rejection of the Draft Law, which in turn led to the political rejection and effective termination of the Project.[752]

362. Gabriel Canada claims that this course of treatment, taken as a whole, was the measure that constituted (i) a breach of Article II(2) of the Canada BIT,[753] (ii) a breach of Article III of the Canada BIT,[754] and (iii) a breach of Article VIII of the Canada BIT.[755] Gabriel Canada claims that this course of treatment resulted in the loss of the value and enjoyment of its investments.[756]

363. The dispute Gabriel Canada submitted to arbitration is the dispute relating to the claim that this measure, which was Romania's practice starting in August 2011 of denying RMGC's project development rights through a course of treatment that breached Articles II(2), III, and VIII of the Canada BIT and caused consequential losses.

364. As it was not evident until after the Parliamentary rejection of the Draft Law in 2013 that Romania would entirely reject and effectively terminate the Roşia Montană Project, Gabriel could not have acquired knowledge of the breaches until after that time. That is especially so in relation to Romania's breach of Article VIII of the BIT, which could not have occurred until Gabriel was in fact substantially deprived of the value and enjoyment of its investment.

365. For the same reason, Gabriel could not have acquired knowledge that it had incurred loss associated with these breaches until it actually incurred the loss of the project development rights following the Parliamentary rejection of the Draft Law in 2013.

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[751] [redacted]

[752] *See* Memorial §§ VIII.A.5., VIII.B.4., IX.B. *See supra* §§ IV.B, IV.D, V.

[753] Memorial §§ X.B., XI.B. *See infra* § VIII.

[754] Memorial § XII.B. *See supra* § X.

[755] Memorial § XIV.B.-XIV.C. *See supra* § XII.

[756] Memorial § XVI.C. *See supra* § XIII.

366. Respondent cites to the fact that during the "negotiations" in June 2013 (one year *after* the critical date), [redacted] [757] This general reference, which does not state or imply that Gabriel had knowledge that the Project had been rejected in its entirety in violation of treaty obligations or that Gabriel already incurred losses as a result, does not support Respondent's argument that Gabriel had knowledge prior to July 30, 2012 of the treaty breaches and consequential losses that are the subject of this dispute. Even if Gabriel feared that Romania's conduct would lead to a complete rejection and thus to the loss of the Roşia Montană Project,[758] it is not possible to say that Gabriel had acquired knowledge earlier than July 30, 2012 of the reality that the Project was not to be permitted under any circumstance.

#### d. Prior Conduct Is Not Claimed as a Stand-Alone Breach

367. Even if the Tribunal were to find (which it should not) that Gabriel acquired knowledge prior to July 30, 2012 both that Romania's conduct was in breach of the Canada BIT and that Gabriel incurred some loss as a result, that would not defeat the Tribunal's jurisdiction over the claims presented in this arbitration.

368. That is because such a finding would mean only that the Tribunal would not have jurisdiction in relation to claims based on the prior conduct as a stand-alone breach. Even if the Tribunal were to conclude that it cannot consider the pre-July 30, 2012 conduct as stand-alone breaches of Article II(2), III, and VII of the Canada BIT, the Tribunal nevertheless may consider whether the pre-July 30, 2012 conduct contributed to and was part of the conduct that gave rise to breaches that arose thereafter. Indeed, Gabriel does not present a claim based solely on the pre-July 30, 2012 conduct.

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[757] Counter-Memorial ¶ 462 (*citing* to [redacted] [redacted]).

[758] In fact, it was not until the fall of 2013 that Gabriel feared that the Government's treatment of its investment was leading to a complete rejection of the Project. *See* Gabriel Press Release dated Sept. 9, 2013 (Exh. C-1936) (Gabriel Canada taking note of public statements made that day by the Prime Minister and other members of the Government stating that the Draft Law is to be rejected before debate, and stating, "[i]f the draft legislation is rejected then the Company will assess all possible actions open to it, including the formal notification of its intentions to commence litigation for multiple breaches of international investment treaties").

369. As many tribunals have recognized, conduct that takes place prior to the entry into force of an obligation may be relevant as part of a wrongful act that ripens into a breach following the entry into force of the obligation, and generally in determining whether the State's conduct thereafter gives rise to a breach of the obligation.[759] *A fortiori*, and by analogy, the tribunal may consider how conduct that takes place outside of the three-year limitations period but while the BIT was in force, contributed to later breaches of the BIT.

370. Thus, there is no jurisdictional impediment to the Tribunal's consideration of whether the course of treatment of Gabriel Canada's investments that commenced in August 2011 and that developed over time, culminating in the complete rejection of RMGC's project development rights in an arbitrary manner, without due process, and without compensation,

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[759] *See, e.g.*, *Aaron C. Berkowitz, Brett E. Berkowitz & Trevor B. Berkowitz (formerly Spence Int'l Investments & others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) dated May 30, 2017 (CL-236) ¶ 217 ("[T]he Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation . . . Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc."); *RosInvestCo. v. Russia* (CL-51) ¶¶ 407-408 (annulled on other grounds) ("Certain tax assessments and related acts and conduct of Respondent that are material to Claimant's claim occurred prior to Claimant becoming an investor. The Tribunal considers that it is not prevented from reviewing those acts and the conduct of Respondent in order to inform its decision on whether Respondent breached the IPPA and damaged Claimant's investment during the period Claimant owned the shares and qualified as an investor. The alleged acts (YNG auction and bankruptcy auctions) that occurred during the period Claimant was an investor under the IPPA were inextricably linked to the taxation assessments and audit reports that occurred prior to Claimant becoming an investor. The tax assessments, audits and enforcement actions may therefore be taken into account when considering the YNG auction and bankruptcy auctions. The Tribunal, therefore, considers that it is able to review factual matters and legal steps that occurred prior to Claimant's purchase of Yukos shares in order to inform its investigation of the alleged acts . . . ."); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated Aug. 27, 2009 (CL-87) ("*Bayindir v. Pakistan*") ¶¶ 132, 283 (explaining that "acts pre-dating the entry into force can be taken into account to the extent that they may assist in understating the significance of acts which do fall within the scope of the Treaty *ratione temporis*" and holding that political pressures and tit-for-tat political dynamics that "occurred prior to the entry into force of the Treaty . . . are thus not susceptible of founding a treaty breach in these proceedings. They can merely be taken into account for a better understanding of the relevant facts."); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated May 29, 2003 (CL-122) ("*Tecmed v. Mexico*") ¶ 68 (observing that acts or omissions that occurred prior to the entry into force of the BIT may be considered as constituting a part, a concurrent factor or an aggravating or mitigating element of conduct that took place following that date); *Mondev v. USA* (CL-145) ¶ 70 ("[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation.").

taken as a whole, constituted as a composite act,[760] a breach of Article II(2), Article III, and Article VIII of the Canada BIT.

#### e. The Temporal Considerations Are the Same in Relation to Gabriel's Claims Relating to Bucium

371. The jurisdictional considerations are similar in regard to Gabriel Canada's claims arising from Romania's refusal to issue exploitation licenses to RMGC in relation to the Bucium deposits,[761] as Gabriel Canada acquired knowledge of the breaches and of its consequential losses after July 30, 2012.

372. In accordance with its right under the Bucium Exploration License, in 2007 RMGC had applied for two exploitation licenses, one for the Rodu-Frasin deposit and one for the Tarniţa deposit.[762] As [REDACTED] explains, although NAMR was slow to act on these applications, RMGC and Gabriel expected that NAMR would act on the Bucium applications after NAMR issued its March 2013 homologation decision for Roşia Montană.[763] The feasibility of the Rodu-Frasin exploitation was dependent upon implementation of the Roşia Montană Project, as it was envisioned the projects would share processing facilities, and RMGC expected that NAMR would act on the two exploitation license applications together, as they both derived from the same Bucium Exploration License.[764] Thus, it was only after NAMR issued its homologation decision for Roşia Montană in March 2013[765] that RMGC and Gabriel Canada came to see that NAMR actually was refusing to issue the exploitation licenses for the Bucium Projects.[766] Indeed, NAMR appeared to be taking the required action in 2014 and in early 2015, but then plainly refused to complete the process and to issue the licenses in view of the State's

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[760] *See* ILC Articles on State Responsibility (CL-61) Art. 15(1) ("The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act").

[761] Memorial ¶¶ 551-557. *See also supra* § VI and *infra* § XIII.A.1.

[762] Szentesy II ¶ 68.

[763] [REDACTED]

[764] Szentesy II ¶ 68. *See also* Henry ¶ 143; Henry II ¶ 66.

[765] [REDACTED]

[766] [REDACTED]

rejection of the Roşia Montană Project and its refusal to issue any additional license to RMGC.[767]

373. Thus, Gabriel Canada acquired knowledge of the breaches and of its consequential losses associated with Bucium well after July 30, 2012. Respondent's argument that the claims relating to Bucium fall outside the jurisdiction of the Canada BIT therefore is without merit.[768]

374. Similarly, Respondent's argument regarding the Bucium claims based on Article XVIII(6) of the Canada BIT to the effect that there could be no jurisdiction for claims that "relate to facts or events that took place prior to 23 November 2008"[769] is incorrect. In fact, Article XVIII(6) of the Canada BIT does not refer to "facts or events," but rather states that "this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force."[770] In any event, the dispute regarding Bucium did not arise prior to November 23, 2008.

375. Nor, however, is Respondent correct to suggest that the Tribunal cannot consider "facts or events" prior to the entry into force of the BIT or prior to November 23, 2008. As noted above, it is well-established that conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. Such facts and events thus may be relevant in determining whether Respondent's conduct that post-dates July 30, 2012 ripened into treaty violations that caused Gabriel Canada to incur loss or damage.

#### 5. The Tribunal Has Jurisdiction over Gabriel Canada's MFN Claims under Article III(1) of the BIT

376. Respondent presents as a jurisdictional objection its argument responding to the merits of Gabriel Canada's claim that Romania breached Article III(1) of the BIT in relation to

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767 [redacted]

768 Counter-Memorial ¶ 465.

769 Counter-Memorial ¶ 465.

770 Canada-Romania BIT (Exh. C-1) Art. XVIII(6). There is no dispute that the Canada BIT entered into force on November 23, 2011.

Romania's failures to observe obligations it entered into with regard to Gabriel Canada's investments.[771] Respondent's argument relates to whether the MFN provision in Article III(1) of the Canada BIT permits Gabriel Canada to claim the more favorable treatment Romania extends to investors covered by the UK BIT in Article 2(2) of the UK BIT.[772]

377. This is not a jurisdictional objection, but an argument on the merits, and as such it is addressed below.[773]

#### 6. Gabriel Canada's Claims Fall within the Substantive Protections of the BIT

378. Respondent argues that Gabriel Canada's claims are constrained by the provisions of the Canada BIT relating to environmental and tax measures.[774] As demonstrated below, those provisions do not present an obstacle to Gabriel Canada's claims.

##### a. Environmental Measures

379. With regard to environmental measures, Respondent refers to Article XVII (2) and (3) of the Canada BIT, which provides as follows.

> 2. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> 3. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting party from adopting or enforcing measures necessary:
>
> (a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

[771] Counter-Memorial § 8.1.5.

[772] *See* Memorial § XIII.

[773] *See infra* § VIII.A.2.

[774] Counter-Memorial § 8.1.6.

(b) to protect human, animal or plant life or health; or

(c) for the conservation of living or non-living exhaustible natural resources.[775]

380. Respondent argues that because Gabriel Canada's "principal claims" and "principal allegations" arise out of the environmental permitting process, which Respondent argues is a measure that falls within Articles XVII(2) and (3) of the Canada BIT, Gabriel Canada bears "an additional burden – indeed a heightened burden" of proving that "such measures" amount to a breach of the treaty.[776] Notably, although Respondent includes this argument in the jurisdictional section of its Counter-Memorial, it does not contend that Articles XVII (2) and (3) deprive the Tribunal of jurisdiction over Gabriel Canada's claims. In any event, Respondent's argument is without merit.

381. As a preliminary observation, one may question the relevance of Articles XVII (2) and (3) to the claims presented in this arbitration because the power of an arbitral tribunal constituted under Article XIII of the Canada BIT is limited to awarding monetary damages and so cannot prevent a Contracting Party from adopting, maintaining, or enforcing measures relating to the environment.[777] In this light, there is no basis to argue that these provisions bear on the questions presented to this Tribunal. That is, Gabriel Canada does not seek to enjoin Romania's measures and indeed nothing about the adjudication of Gabriel Canada's claims can prevent Romania from adopting, maintaining, or enforcing any of the measures at issue.

382. Even if these treaty provisions were considered as relevant to this arbitration, which they should not be, nothing in Articles XVII(2) and (3) supports the conclusion that there is an "additional" or "heightened" "burden" of proving that measures relating to the environment may be in breach of Articles II(2), III, and/or VIII of the BIT. In support of its argument that there is an additional burden, Respondent relies on *Al Tamimi v. Oman*, an arbitration brought

[775] Canada-Romania BIT (Exh. C-1) Arts. XVII (2), (3).

[776] Counter-Memorial ¶ 480.

[777] *See* Canada-Romania BIT (Exh. C-1) Arts. XIII(8), XIII (9). This is not necessarily so in relation to a tribunal constituted under Article XV of the BIT for Disputes between the Contracting States.

under the U.S.-Oman Free Trade Agreement.[778] The tribunal's decision in *Al Tamimi v. Oman*, however, does not refer to any additional or heightened burden of proving a treaty breach in relation to environmental measures. The tribunal in that case considered the treaty's provisions recognizing the importance of environmental measures as context in interpreting the State Parties' obligations, and that the States enjoyed a "margin of discretion" in relation to the enforcement of their environmental laws. There is no basis to conclude, however, that the tribunal considered that the treaty's references to environmental measures suggested there should greater deference in matters relating to the environment than the deference due generally to States in relation to their domestic regulatory affairs.[779] Notably, the *Al Tamimi v. Oman* tribunal also observed that "even an express provision such as Article 10.10 will not protect a State from liability for measures that are carried out in bad faith, or in violation of the expected standards of basic fairness or due process."[780]

383. Respondent characterizes Articles XVII(2) and (3) of the Canada BIT as creating a "special regime" for environmental measures.[781] That characterization, however, in the context of the BIT, is not correct; these provisions do not actually create a "special regime." Indeed, Article XVII (2) expressly refers to measures "otherwise consistent with this Agreement," making clear that measures meant "to ensure that investment activity … is undertaken in a manner sensitive to environmental concerns" also must be consistent with the investment protections set forth in the BIT.[782] Similarly, Article XVII (3) describes circumstances that would not give rise to liability under other provisions of the BIT even in its absence, as it relates

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[778] Counter-Memorial ¶ 480 and n.839 (*citing Adel A Hamadi Al Tamimi v. Sultante of Oman*, ICSID Case No. ARB/11/33, Award dated Nov. 3, 2015 (RLA-44) ("*Al Tamimi v. Oman*")). Respondent also cites several cases in which investment tribunals applied a heightened standard of proof in the context of allegations of corruption and fraud. *Id.* Such cases do not support Respondent's argument.

[779] *See Al Tamimi v. Oman* (RLA-44) ¶ 389 (referring in this respect to the well-established principle that investment treaty tribunals "do not have an open-ended mandate to second-guess government decision-making").

[780] *Al Tamimi v. Oman* (RLA-44) ¶ 445.

[781] Counter-Memorial ¶ 480.

[782] Canada-Romania BIT (Exh. C-1) Art. XVII (2). *See also William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Decision on Jurisdiction and Liability dated Mar. 17, 2015 (CL-69) ("*Bilcon v. Canada*") ¶ 597 (confirming, notwithstanding the identical reference in NAFTA, Ch. 11, that "[t]he mere fact that environmental regulation is involved does not make investor protection inapplicable").

solely to measures that are "necessary" (a) to ensure compliance with laws and regulations "that are not inconsistent with the provisions of this Agreement," (b) to protect human, animal or plant life or health, or (c) for the conservation of living or non-living exhaustible natural resources" and that are not unlawfully discriminatory or a pretext to restrict trade or investment.[783] Thus understood, it is difficult to see how this provision creates an exception from liability that would arise under any other provision of the BIT.

384. Article XVII (3) is modeled largely on Article XX of the General Agreement on Tariffs and Trade ("GATT")[784] and therefore the WTO Appellate Body's seminal decision interpreting Article XX in the *Shrimp Case* is of interest.[785] In that case, the WTO Appellate Body considered whether an import ban of shrimp caught without a turtle excluder device imposed by the United States as a measure to protect sea turtles fell within the scope of Article XX of the GATT. The Appellate Body held that the language of Article XX providing that measures are not to be applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade is "but one expression of the principle of good faith …[which] controls the exercise of rights by states;" and that one application of this general principle "widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on a field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[786] In that case the Appellate Body held that the U.S. import ban lacked transparency[787] and failed to offer basic guarantees of "fairness and due process,"[788] and therefore although the measure served "an

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[783] Canada-Romania BIT (Exh. C-1) Art. XVII (3).

[784] *See* General Agreement on Tariffs and Trade (CL-237) Art. XX (providing that subject "to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption").

[785] *See U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report 1998-4 dated Oct. 12, 1998 (CL-238).

[786] *Id.* ¶ 158.

[787] *Id.* ¶ 180.

[788] *Id.* ¶ 181; *see also id.* ¶ 182.

environmental objective that is recognized as legitimate under paragraph (g) of Article XX," it was applied "in a manner which constitutes arbitrary and unjustifiable discrimination."[789]

385. In any event, in this case, although there was an administrative process relating to environmental permitting, the record overwhelmingly demonstrates that Romania did not refuse to issue the environmental permit for the Roşia Montană Project because it considered that doing so was "necessary" to protect "human, animal or plant life or health," or for any other reason listed in Article XVII (3) of the BIT. Nor is there any basis to conclude that Romania refused permitting due to a concern that the Project was not being undertaken in a manner sensitive to environmental concerns as referenced in Article XVII (2) of the BIT. Indeed, the Government repeatedly and unequivocally stated that the Project met all applicable environmental standards and satisfied all substantive conditions to obtain the environmental permit.[790]

386. Similarly, although Respondent argues that Article II(5) of the Canada BIT is an "interpretation element" in relation to Articles XVII(2) and (3) of the BIT,[791] that provision does nothing to alter the analysis. There is no basis to claim that Romania has in any way "relaxed domestic health, safety, or environmental measures" to encourage Gabriel Canada's investments, nor does Respondent claim otherwise.

387. In the face of the evidence that the Government rejected the Project without due process and contrary to 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), it is Respondent that bears the burden, pursuant to the principle of *onus probandi actori incumbit*, of demonstrating that it did not issue the environmental permit and that it otherwise blocked the Project for reasons relating to environmental protection. Merely observing that there was an environmental permitting process in place is not sufficient to invoke Article XVII (2) or (3) (although as noted above, doing so would not assist Respondent).

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[789] *Id.* ¶ 186.

[790] *See supra* § III.

[791] Counter-Memorial ¶ 480 and n.838. Article II(5) provides in relevant part that "[t]he Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." Canada-Romania BIT (Exh. C-1) Art. II(5).

388. That is, even if Romania's treatment of Gabriel Canada's investments were a measure that, contrary to the evidence, Romania considered appropriate to ensure investment activity in its territory is undertaken in a manner sensitive to environmental concerns as contemplated in Article XVII (2) of the BIT, Romania's measure was not "otherwise consistent with [the BIT]."[792]

389. Likewise, even if the measures taken by Romania in relation to Gabriel Canada's investments were considered, contrary to the evidence, necessary to protect human, animal or plant life or health as contemplated in Article XVII (3) of the BIT, those measures were applied in a manner constituting arbitrary or unjustifiable discrimination between investments or investors or as a pretextual and disguised restriction on investment.[793]

390. In short, there is no basis in this case for Respondent to claim that Romania's rejection and effective termination of the Roşia Montană Project, and ultimately of all of Gabriel Canada's investments, was a measure taken in good faith to address environmental concerns.

**b. Tax Measures**

391. Respondent refers to Gabriel Canada's "allegations in relation to the tax fraud investigations into the Kadok group of companies (which were extended to RMGC in November 2013), the VAT Assessment, the ANAF audits and the ANAF investigations," and argues that these "claims fall outside the Tribunal's jurisdiction" on the basis of Article XII(1) of the Canada BIT.[794]

392. Claimants have demonstrated that following the commencement of this arbitration, ANAF launched a purported "anti-fraud" audit/investigation of RMGC and an audit of VAT payments leading to a VAT assessment of about US$ 6.7 million plus interest and penalties; and after the VAT assessment was administratively quashed, ANAF made a second

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[792] *See* Memorial §§ X.B., XI.B., XII.B., XIII.B., XIV.B.-XIV.C.; *infra* §§ VIII.B, IX.B, X.B, XII.B.

[793] *See* Memorial §§ X.A.2.d., XII.B.; *infra* § X.

[794] Counter-Memorial § 8.1.6.2. Article XII(1) of the Canada BIT provides that "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." Canada-Romania BIT (Exh. C-1) Art. XII(1).

assessment of nearly the same amount.[795] The State has continued its aggressive pursuit of the anti-fraud audit/investigation and VAT assessments, which are baseless, retaliatory and designed to harass and gain some perceived advantage for the State in the arbitration.[796]

393. As several investment treaty tribunals have recognized, treaty provisions that "carve out" tax claims may apply to *bona fide* taxation measures, but not to abuses of the State's tax powers.[797] Here, Gabriel Canada does not contest the substance of any of Romania's tax laws, but rather that Romania has abused its tax authority to seek to harass and intimidate RMGC employees, to seek in bad faith to gain advantage for the State in the arbitration, and to use its authority in relation to alleged "anti-fraud" investigations of matters not even purporting to relate to taxation.[798] Thus, Article XII(1) of the BIT does not bar Gabriel Canada's claims in regard to ANAF and does not prevent the Tribunal from considering the allegations relating to ANAF's activities as part of the wrongful treatment by Romania of Gabriel Canada's investments.

## B. The Tribunal Has Jurisdiction over the Claims Presented by Gabriel Jersey

394. Respondent objects on several grounds to the Tribunal's jurisdiction in relation to Gabriel Jersey's claims.[799] As demonstrated below, Respondent's objections are without merit.

### 1. Gabriel Jersey Is a Covered Company with Covered Investments

395. Respondent contends that it is not demonstrated that Gabriel Jersey qualifies as a company as defined by the UK BIT as eligible to invoke its Article 7(1).[800]

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[795] Memorial § IX.C.3.

[796] Memorial § IX.C.3. *See supra* § V.D.

[797] *See EnCana Corp. v. Ecuador*, LCIA Case No. UN3481, Award dated Feb. 3, 2006 (RLA-13) ¶ 142 (stating "an arbitrary demand [of taxes] unsupported by any provision of the law of the host State would not qualify for exemption under Article XII"); *Renta 4 S.V.S.A. v. Russian Federation*, SCC Case No. V (024/2007), Award on Preliminary Objections dated Mar. 20, 2009 (CL-50) ¶ 74 (holding in relation to a similar "tax carve out" that "abuse of the power to tax" fell within the scope of treaty protection) (annulled on other grounds). *See also Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Final Award dated July 18, 2014 (RLA-21) ¶ 1407 (holding that "actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose" are not subject to the tax "carve out" of the ECT) (annulled on other grounds).

[798] *See supra* § V.D; Memorial ¶ 712(g).

[799] Counter-Memorial § 8.2.

396. As detailed below, the facts regarding Gabriel Jersey's legal status, its position as a subsidiary of Gabriel Canada, and the fact that its principal business activity is as its role as shareholder of RMGC have been clear, a matter of public record, and known to Respondent since the filing of the Request for Arbitration. If Respondent considered there was any basis to question these facts, it had an obligation to raise this jurisdictional objection pursuant to ICSID Arbitration Rules, Article 41(1) "as early as possible" and not wait to raise the objection with the Counter-Memorial. Respondent's objection as to Gabriel Jersey's qualification as a covered investor thus is not timely and Gabriel Jersey therefore reserves the right to respond further if Respondent maintains an objection on this ground with its Rejoinder.

397. In the Memorial Claimants demonstrated that, as a company incorporated in 1996 under the laws of the Bailiwick of Jersey, Gabriel Jersey qualifies as a "company" within the meaning of Article 1(d) of the UK BIT, which defines "companies" in respect of the United Kingdom as "corporations … 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," and that the UK BIT was extended to the Bailiwick of Jersey by an exchange of notes dated March 22, 1999.[801]

398. Respondent argues that the "allegation" regarding Gabriel Jersey is not supported by "reliable evidence" and does not include the "critical jurisdictional dates," including on the date of the Request for Arbitration and on the date ICSID registered the dispute in July 2015.[802]

399. In fact, continuously, since its incorporation in the Bailiwick of Jersey in 1996, and thus at all times relevant to its claims and to this arbitration, and as a matter of readily accessible public record, Gabriel Jersey has been a company in good standing. This is reflected not only in the publicly filed consolidated financial statements verified by Gabriel Canada's independent auditors in compliance with Canadian securities disclosure rules and submitted with

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[800] Counter-Memorial ¶¶ 486-489. *See also* UK BIT (Exh. C-3) Art. 7(1) (covering disputes between a company of one Contracting Party and the other Contracting Party).

[801] Memorial ¶ 839 (*citing* Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec.31, 1997 (Exh. C-1815) at 2-3). *See also* UK-Romania BIT (Exh. C-3) Art. 1(d)(i) and accompanying Exchange of Notes.

[802] *See* Counter-Memorial ¶ 489.

the Memorial,[803] but also by the public records of the Jersey Companies Registry, including the annual filings made to the Jersey Financial Services Commission,[804] as well as by records filed in

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[803] *See*, *e.g.*, Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1997 (Exh. C-1815) at 2 ("On December 17, 1996, the Company entered into an agreement ('Share Exchange Agreement') with Gabriel Resources Limited ('Gabriel Jersey'), a company incorporated on May 28, 1996 pursuant to the laws of Jersey, Channel Islands, and the selling shareholders of Gabriel Jersey."). *See also* Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1998 (Exh. C-1816) at 3; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1999 (Exh. C-1817) at 1; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2000 (Exh. C-1818) at 1; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2001 (Exh. C-1819) at 1; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2002 (Exh. C-1820) at 6; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2003 (Exh. C-1821) at 1; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2004 (Exh. C-1822) at 1; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2005 (Exh. C-1823) at 24; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2006 (Exh. C-1824) at 7; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2007 (Exh. C-1825) at 8; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2008 (Exh. C-1826) at 8; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2009 (Exh. C-1827) at 9; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2010 (Exh. C-1828) at 9; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2011 (Exh. C-1829) at 10; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2012 (Exh. C-1830) at 9; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2013 (Exh. C-1831) at 9; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2014 (Exh. C-1832) at 9; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2015 (Exh. C-1833) at 10; Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 2016 (Exh. C-1834) at 9. *See also* Gabriel Resources Ltd., Consolidated Financial Statements for the year ended Dec. 31, 2017 dated Mar. 14, 2018 (Exh. C-1933) at 9.

[804] *See* Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 1998 (Exh. C-1937); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 1999 (Exh. C-1938); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2000 (Exh. C-1939); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2001 (Exh. C-1940); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2002 (Exh. C-1941); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2003 (Exh. C-1942); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2004 (Exh. C-1943); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2005 (Exh. C-1944); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2006 (Exh. C-1945); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2007 (Exh. C-1946); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2008 (Exh. C-1947); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2009 (Exh. C-1948); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2010 (Exh. C-1949); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2011 (Exh. C-1950); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2012 (Exh. C-1951); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2013 (Exh. C-1952); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2014 (Exh. C-1953); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2015 (Exh. C-1954); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2016 (Exh. C-1955); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2017 (Exh. C-1956); Annual Return of Gabriel Resources (Jersey) Limited Made up to 1 January 2018 (Exh. C-1957).

connection with RMGC with the Romanian trade registry.[805] Gabriel Jersey remains a company in good standing.[806]

400. At all times relevant to its claims and to this arbitration, and as a matter of public record, Gabriel Jersey has been the majority shareholder in RMGC.[807] Thus, Gabriel Jersey's covered investments include its shares in RMGC.[808]

401. Indeed, Gabriel Jersey's covered investments include contract rights under RMGC's Articles of Association and rights under loan agreements with Minvest;[809] substantial intellectual property rights, including in technical and engineering know-how relating to and developed in connection with the Roşia Montană Project and the Bucium Projects;[810] mining

[805] *See* Jersey Financial Services Department Certification Company Registry, Declaration dated June 24, 1997, as filed with the Romanian Trade Registry (Exh. C-1958) (certifying that Gabriel Jersey was incorporated in Jersey under the Companies (Jersey) Law 1991 on May 28, 1996).

[806] Jersey Financial Services Commission Companies Registry, Certificate of Good Standing dated Jul. 22, 2018 of Gabriel Resources (Jersey) Limited (Exh. C-1928) (certifying that Gabriel Jersey was incorporated in Jersey under the Companies (Jersey) Law 1991 on May 28, 1996 and that it is on the Register of Jersey companies).

[807] *See* Counter-Memorial ¶ 490 (acknowledging that Gabriel Jersey holds shares in RMGC). *See also* RMGC Articles of Association and Addenda dated June 11, 1997 as amended over time through Jan. 5, 2016 (Exhs. C-143 – C-192) (including RMGC Articles of Association and Addenda filed with the Romanian Trade Registry over time and listing Gabriel Jersey as the majority shareholder of RMGC); Agreement for Sale and Assignment dated June 1, 1996 (Exh. C-1625) (agreement for sale and assignment dated June 1, 1996 transferring Gabriel Australia's rights under obligations under the Cooperation Agreement with Minvest to Gabriel Jersey); Addendum to Cooperation Agreement dated Oct. 17, 1996 (Exh. C-1646) (first addendum to the Cooperation Agreement between Gabriel Jersey and Minvest); Second Addendum to Cooperation Agreement dated Apr. 1, 1997 (Exh. C-1647) (second addendum to the Cooperation Agreement between Gabriel Jersey and Minvest).

[808] UK-Romania BIT (Exh. C-3) Art. 1(a)(ii) (defining investment as including, *inter alia*, "shares in . . . a company and any other form of participation in a company").

[809] *See* UK-Romania BIT (Exh. C-3) Art. 1(a)(iii) (defining investment as including "claims to money or to any performance under contract having a financial value"). *See also* RMGC Articles of Association and Addenda dated June 11, 1997 as amended over time through Jan. 5, 2016 (Exhs. C-143 – C-192) (Gabriel's contract rights include rights to percentage share ownership of RMGC and rights to management fees); Loan Agreement between Gabriel Jersey and Minvest dated Dec. 13, 2004 (Exh. C-86); Loan Agreement between Gabriel Jersey and Minvest dated Dec. 16, 2009 (Exh. C-91); and Compass Lexecon § IV.5 (discussing loans granted by Gabriel to RMGC and rights to management fees per RMGC's Articles of Association).

[810] *See*, *e.g.*, Szentesy ¶¶ 133-137. *See also* UK-Romania BIT (Exh. C-3) Art. 1(a)(iv) (defining investment as including "intellectual property rights, goodwill, technical processes and know-how").

licenses and associated project development rights held by RMGC;[811] and assets acquired by RMGC in connection with the development of the Projects.[812] Moreover, although the UK BIT does not define investment expressly as including investments held "indirectly," the broad definition of investment and the general references throughout the treaty as relating to investments "of" covered companies,[813] without limitation, is interpreted as including investments that are indirectly held.[814]

402. Respondent, however, argues, without reference to any authority, that Gabriel Jersey "appears to be merely a mailbox company, passively holding shares in RMGC," that it is "not established" that such shareholding is "a legitimate 'investment' in any substantive sense," or that it is "worthy of protection under the BIT."[815] This line of argument is without merit and has been rejected by investment treaty tribunals each time it has been raised.

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[811] *See generally* Bîrsan. *See also* UK-Romania BIT (Exh. C-3) Art. 1(a)(v) (defining investment as including "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources").

[812] UK-Romania BIT (Exh. C-3) Art. 1(a)(i) (defining investment as including "movable and immovable property").

[813] *See, e.g.*, UK-Romania BIT (Exh. C-3) Art. 3(2) (providing fair and equitable treatment to "[i]nvestments of nationals or companies"); Art. 5(1) (referring in relation to expropriation to "[i]nvestments of nationals or companies").

[814] *See, e.g.*, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated Aug. 3, 2004 (CL-239) ¶ 137 (ruling that where "there is no explicit reference to direct or indirect investment such as in the Treaty," and "the definition of 'investment' is very broad," covered investment includes investments indirectly held); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction dated July 6, 2007 (CL-240) ¶¶ 123-124 (agreeing with the *Siemens* tribunal that when a BIT "is silent" on the issue, the treaty reasonably is interpreted as covering investments that are held indirectly); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence dated June 19, 2009 (English Translation) (CL-241) ¶ 111 ("[T]he Tribunal considers that the BIT protects indirect investments . . . in the absence of express wording in the BIT, it cannot be presumed that the intention of the Treaty was to exclude indirect investments . . . ."); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction dated Dec. 30, 2010 (CL-242) ¶¶ 140-158 (rejecting Venezuela's objection that Dutch companies with indirect investments in Venezuela were not the "proper parties to this proceeding" brought under the Dutch-Venezuela BIT). *See also* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES (2009) (CL-143) ("NEWCOMBE & PARADELL") at 65-66 ("IIAs usually provide a definition of what constitutes an investment protected by the treaty in their initial clauses. Definitions are broad, often referring to 'every kind of asset' or 'every kind of investment in the territory,' and then adding a specific non-exhaustive list of examples . . . With small variations, similar definitions bringing into the scope of treaties almost all possible forms of investment are found in most IIAs. These definitions cover direct, as well as indirect, investments and modern contractual and other transactions having economic value.").

[815] Counter-Memorial ¶ 490.

403. For example, in *Gold Reserve v. Venezuela*, in response to the Respondent's objection that the claimant was a "shell company," the tribunal rejected the argument holding that "[t]he Canada-Venezuela BIT is clear – the criterion an investor must satisfy involves the place of incorporation: 'any enterprise incorporated or duly constituted in accordance with applicable laws of Canada'. The Parties could have chosen to include a 'genuine link' test or a 'management' test, but did not. The Tribunal cannot read these criteria into the BIT and is therefore satisfied that Claimant falls within the definition of 'investor', so far as it is a company incorporated in Canada."[816] Likewise, the UK BIT defines covered "companies" with regard solely to their place of incorporation without more.

404. A similar objection was rejected in *ADC v. Hungary*, where the respondent objected to claims presented by the Cypriot claimants under the Cyprus-Hungary BIT on the basis that the Cypriot companies were subsidiaries of a Canadian parent that was the "source of funds and the control."[817] The tribunal rejected the objection on the ground that it was based on the notion that there must be a "genuine link" with Cyprus, which was not a requirement set forth in the applicable BIT, observing that "[t]he Tribunal cannot find a 'genuine link' requirement in the Cyprus-Hungary BIT," and "[t]he Tribunal cannot read more into the BIT than one can discern from its plain text."[818]

405. In *Saluka v. Czech Republic*, the respondent argued that the claimant's purchase of IPB's shares was not an "investment" because the claimant "itself invested nothing in IPB but was merely a conduit for the investment made by [its parent company]."[819] The tribunal rejected this argument:

> [T]his argument seeks to replace the definition of an "investment" in Article 2 of the Treaty with a definition which looks more to the economic processes involved in the making of investments. However, the Tribunal's

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[816] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case. No. ARB(AF)/09/1, Award dated Sept. 22, 2014 (CL-81) ("*Gold Reserve v. Venezuela*") ¶ 252.

[817] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award dated Oct. 2, 2006 (CL-138) ("*ADC v. Hungary*") ¶ 355.

[818] *ADC v. Hungary* (CL-138) ¶ 359.

[819] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award dated Mar. 17, 2006 ("*Saluka v. Czech Republic*") (CL-97) ¶ 210.

> jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of "investment" the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the wellbeing of a company operating within it.[820]

406. In *Yukos v. Russia*, the respondent contended that "simple legal ownership of shares does not qualify as an investment under . . . the ECT."[821] Referencing Article 31 of the Vienna Convention on the Law of Treaties, the tribunal found "no support in the text of the Treaty" for Respondent's position, reasoning that the ECT "contain[s] the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to 'beneficial' ownership."[822] The tribunal concluded that "the ECT, by its terms, applies to an 'Investment' owned nominally by a qualifying 'Investor.'"[823]

407. Here, the UK BIT defines what is a covered "company" without regard to its level of activity in the home State, and defines covered investment without regard to the source of capital. In short, Respondent's objection on these grounds must be rejected.

#### 2. Gabriel Jersey's Claims Satisfy the Notice Provision and Otherwise Fall within the Tribunal's Jurisdiction under the UK BIT

408. Respondent argues that insofar as Gabriel Jersey raises "claims and allegations based on measures that were taken after the service of the Notice of Dispute on 20 January 2015," its claims "fall outside the Tribunal's jurisdiction or, alternatively, are inadmissible."[824] Respondent bases its objection on the terms of Article 7(1) of the UK BIT, which provides:

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[820] *Saluka v. Czech Republic* (CL-97) ¶ 211.

[821] *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility dated Nov. 30, 2009 (CL-243) ("*Hulley Enterprises v. Russia*") ¶ 429 (annulled on other grounds).

[822] *Hulley Enterprises v. Russia* (CL-243) ¶ 429 (annulled on other grounds).

[823] *Hulley Enterprises v. Russia* (CL-243) ¶ 429 (annulled on other grounds). A similar line of argument also was rejected in *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility dated Apr. 18, 2008 (CL-244) ¶¶ 101-110.

[824] Counter-Memorial ¶¶ 491-493.

> 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.[825]

409. Respondent's argument regarding an alleged inadequacy of notification of dispute regarding Romania's treatment of Gabriel and its investments following the commencement of this arbitration is without merit. Article 7 of the UK BIT provides that disputes concerning treaty breaches "in relation to an investment" shall be submitted to international arbitration if the "company concerned so wishes" if they have not been amicably settled "after a period of three months from written notification of a claim." As described above, Romania received notice of claims in January 2015 and again in April 2015 and did not respond to either.[826] That fact is sufficient to reject Romania's jurisdictional objection on this ground because there is no requirement in the UK BIT to provide advance written notification of all claims and allegations that may be presented in the arbitration. In any event, the additional considerations and authorities discussed above in relation to the similar objection presented in relation to Gabriel Canada's claim apply here as well and lead to the conclusion that this objection must be rejected.[827]

410. Respondent also presents as a jurisdictional objection an argument relating to Gabriel Jersey's umbrella clause claims under Article 2(2) of the UK BIT.[828] As Respondent's argument relates to the merits of Gabriel Jersey's claims, it is addressed below.[829]

### 3. The Achmea Judgment Does Not Nullify this Tribunal's Jurisdiction

411. Following the judgment of the Court of Justice of the European Union ("CJEU") in *Slovak Republic v. Achmea BV* (the "*Achmea* Judgment"),[830] Respondent presents two

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[825] UK-Romania BIT (Exh. C-3) Art. 7(1).

[826] Respondent's objection, therefore, that these claims have not been subject to "settlement negotiations" (Counter-Memorial ¶ 492) rings hollow. *See also* Henry ¶ 145.

[827] *See supra* § VII.A.3.

[828] Counter-Memorial ¶¶ 494-495.

[829] *See supra* § XI.

additional objections to the Tribunal's jurisdiction in relation to the dispute submitted in this arbitration by Gabriel Jersey under the UK BIT.[831] Respondent argues that, as a consequence of the *Achmea* Judgment, (i) Gabriel Jersey "lost the right to consent" to arbitration under Article 7 of the UK BIT;[832] and (ii) Romania's consent to arbitrate under Article 7 of the UK BIT "became inapplicable;"[833] both, "at the latest" when the TFEU came into force.[834]

412. These arguments are without merit.

**a. The Achmea Judgment Is a Decision on the Interpretation of the TFEU**

413. The *Achmea* Judgment arose out of an action brought by Slovakia before the German Federal Court of Justice to set-aside an arbitral award issued in an UNCITRAL Arbitration Rules arbitration seated in Germany of claims arising under the Netherlands-Slovakia BIT. The German court referred certain questions relating to the interpretation of Articles 267 and 344 of the TFEU to the CJEU for a preliminary ruling.[835]

414. In addressing the questions presented, the CJEU considered the following. First, it concluded that an investment treaty tribunal "may be called on to interpret or indeed to apply EU law," and in this respect emphasized that the Netherlands-Slovakia BIT directed the tribunal, in rendering its decision, to take into account Slovak law, and that EU law constituted part of Slovak law.[836] Second, the CJEU observed that an investment treaty tribunal "cannot be

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[830] *Slovak Republic v. Achmea BV*, Case C-284/16, EU:C:2018:158, Judgment (Grand Chamber) dated Mar. 6, 2018 (Exh. R-363) ("*Achmea* Judgment").

[831] Respondent's Additional Preliminary Objection dated May 25, 2018 ("*Achmea* Objection").

[832] *Achmea* Objection ¶ 103, § 6.1.

[833] *Achmea* Objection § 6.2.

[834] Treaty on the Functioning of the European Union dated Dec. 13, 2007 and effective since Dec. 1, 2009 (RLA-93) ("TFEU").

[835] *Achmea* Judgment (Exh. R-363) ¶ 23. TFEU Articles 267 and 344 provide, respectively, that (1) the CJEU has "jurisdiction to give preliminary rulings concerning . . . the interpretation of the [TFEU]," and (2) "Member States undertake not to submit a dispute concerning the interpretation or application of the [TFEU] to any method of settlement other than those provided for therein." *See* TFEU (RLA-93).

[836] *Achmea* Judgment (Exh. R-363) ¶¶ 40-42. *See* Netherlands-Slovakia BIT (RLA-109) Art. 8(6) ("The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant

regarded as a 'court or tribunal of a Member State'" and therefore such a tribunal cannot refer questions of EU law to the CJEU for a preliminary ruling.[837]

415. The CJEU concluded further that investor-State arbitration provisions such as Article 8 of the Netherlands-Slovakia BIT constitute an agreement by Member States "to remove from the … the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires [Member States] to establish in the fields covered by EU law … disputes which may concern the application or interpretation of EU law."[838] The CJEU held such an agreement is not compatible with the obligation of EU Member States "to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure … to ensure the fulfillment of the obligations arising out of the [TFEU]."[839]

416. On that basis, the CJEU held that:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which *an investor from one of those Member States* may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[840]

**b. Gabriel Jersey Is Not an Investor from an EU Member State**

417. Respondent's *Achmea* Objection is premised on an incorrect characterization of Gabriel Jersey as a company incorporated in the United Kingdom.[841] As set forth in the Request

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Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.").

[837] *Achmea* Judgment (Exh. R-363) ¶ 49.

[838] *Achmea* Judgment (Exh. R-363) ¶ 55.

[839] *Achmea* Judgment (Exh. R-363) ¶ 58.

[840] *Achmea* Judgment (Exh. R-363), ruling following ¶ 62. By its terms, the *Achmea* Judgment is limited to the investor-State arbitration provisions of intra-EU investment treaties and does not encompass their other provisions.

[841] *See, e.g.*, *Achmea* Objection ¶¶ 97, 103 *et seq*.

for Arbitration,[842] and as detailed above, Gabriel Jersey is a company incorporated under the laws of the Bailiwick of Jersey pursuant to the Companies (Jersey) Law 1991.

418. Gabriel Jersey is eligible to claim the protections of the UK BIT not by virtue of being incorporated in the United Kingdom (which it is not) but because it is a company incorporated in the Bailiwick of Jersey, a "territory" to which the UK BIT was extended by an Exchange of Notes between the Contracting Parties.[843] Article 1(d)(i) of the UK BIT defines "companies" in respect of the UK as:

> 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*.[844]

By its plain terms, Article 1(d)(i) thus provides for two distinct categories of "companies," *i.e.*, those qualifying as such by virtue of their incorporation in "any part of the United Kingdom," and those qualifying by way of their incorporation in "any territory" to which the UK BIT is extended. Article 1(e)(i) of the UK BIT defines "territory" in respect of the United Kingdom as follows:

> Great Britain and Northern Ireland, including . . . any territory for whose international relations the Government of the United Kingdom is responsible and to which this Agreement is extended after its entry into force by an Exchange of Notes between the Contracting Parties[.][845]

Thus, the protections of the UK BIT extend both to companies incorporated in the United Kingdom *and* to companies incorporated in a territory to which the UK BIT is extended by an Exchange of Notes.[846]

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[842] Request for Arbitration ¶ 9.

[843] By Exchange of Notes dated February 25 and March 22, 1999, the UK and Romania agreed to extend the UK BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey. UK BIT (Exh. C-3) at 15-17.

[844] UK BIT (Exh. C-3) Art. 1(d)(i) (emphasis added).

[845] UK BIT (Exh. C-3) Art. 1(e)(i).

[846] UK BIT (Exh. C-3) at 15-17.

419. The Bailiwick of Jersey is not part of the United Kingdom and is not an EU Member State. Rather, as described below the Bailiwick of Jersey has a limited relationship with the European Union.

420. The Bailiwick of Jersey and the Bailiwick of Guernsey, also known as the Channel Islands, and the Isle of Man, are British Crown Dependencies.[847] The British Crown Dependencies are not part of the United Kingdom, but are self-governing dependencies of the British Crown.[848] They have their own directly elected legislatures, administrative, fiscal, and legal systems and their own courts of law.[849] UK legislation rarely extends to the Crown Dependencies and is not extended to them without their consent.[850]

421. While the British Nationality Act 1981 confers British citizenship on natural persons with close connections to the Channel Islands,[851] that designation does not apply to companies. Companies incorporated in Jersey are subject to the laws of Jersey, *i.e.*, Companies (Jersey) Law 1991.[852] Thus, Respondent's references to Gabriel Jersey as a company "incorporated in the UK" and as a "UK investor" are mistaken.[853]

422. Although the United Kingdom is responsible for the international relations of the Crown Dependencies,[854] the Crown Dependencies are seeking to develop independent international identities. In 2007-2008, the UK Secretary of State for Constitutional Affairs signed an agreement with the Chief Ministers of each of the Crown Dependencies stating that the UK would not act internationally on their behalf without prior consultation and "recognizing that

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[847] UK Ministry of Justice, *Fact sheet on the UK's relationship with the Crown Dependencies* (Apr. 12, 2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564373/factsheet-on-the-uks-relationship-with-the-crown-dependencies.pdf (Exh. C-1927) ("Ministry of Justice Fact Sheet").

[848] Ministry of Justice Fact Sheet (Exh. C-1927).

[849] Ministry of Justice Fact Sheet (Exh. C-1927).

[850] Ministry of Justice Fact Sheet (Exh. C-1927) at 2.

[851] Ministry of Justice Fact Sheet (Exh. C-1927) at 2.

[852] *See, e.g.*, Jersey Financial Services Commission Companies Registry, Certificate of Good Standing dated Jul. 22, 2018 of Gabriel Resources (Jersey) Limited (Exh. C-1928) (certifying that Gabriel Jersey was incorporated in Jersey under the Companies (Jersey) Law 1991 on May 28, 1996 and that it is on the Register of Jersey companies).

[853] *See, e.g.*, *Achmea* Objection ¶¶ 97, 103.

[854] Ministry of Justice Fact Sheet (Exh. C-1927).

in international matters, particularly in relation to the EU, UK and Crown Dependency interests may differ."[855]

423. The British Crown Dependencies, including the Bailiwick of Jersey, have a limited relationship with the European Union, which is set forth in Article 355(5)(c) of the TFEU, as follows:

> [T]his Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements of those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.[856]

The arrangement for the Channel Islands is set out in Protocol 3 of the United Kingdom's 1972 Accession Treaty, which provides that the Channel Islands are part of the EU customs union for purposes of trade in goods, but are third countries (*i.e.*, outside the European Union) in all other respects.[857] Thus, although the Bailiwick of Jersey is part of the customs territory of the EU, other European Union Rules do not apply to it.[858]

#### c. Respondent's Objection in Relation to Gabriel Jersey's Eligibility to Consent Is without Basis

424. Respondent's argument that, as a result of the *Achmea* Judgment, Gabriel Jersey "lost the right" to consent to arbitration under the UK BIT is incorrect for a number of reasons.

425. First, it is based on the mistaken assumption that Gabriel Jersey is a UK company, incorporated in the United Kingdom, and as such a company incorporated in an EU Member State. As explained above, that is incorrect.

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[855] Ministry of Justice Fact Sheet (Exh. C-1927); Framework for developing the international identity of Jersey, signed May 1, 2007, *available at* https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20InternationalIdentityFramework%2020070502.pdf (Exh. C-1929).

[856] TFEU (RLA-93) Art. 355(5)(c).

[857] *See Jersey's relationship with the UK and EU, available at https://www.gov.je/Government/Departments/JerseyWorld/pages/relationshipeuanduk.aspx#anchor-2* (Exh. C-1930); The Channel Islands and the European Union – Channel Islands Brussels Office, Mar. 28, 2018, *available at* https://www.channelislands.eu/eu-and-the-channel-islands/ (Exh. C-1931). *See also* Treaty on the Accession of Denmark, Ireland, and the United Kingdom (1972) OJ L 73, 27.3.1972 (CL-200) at 164-165 (Protocol 3 on the Channel Islands and the Isle of Man).

[858] *See* Ministry of Justice Fact Sheet (Exh. C1927) at 3.

426. Second, it is based on the incorrect argument that "[i]nvestors become entitled to invoke the host State's consent to arbitrate, contained in a BIT, only after the relevant BIT has been ratified and has become part of the home State's law," and that "consent of the investor is always given under the law of its own home State."[859] Notably, Respondent offers no authority for this wrong proposition.

427. While it is correct that the relevant BIT must be in force, so that the host State's obligation to submit covered disputes to arbitration is in effect, unless the BIT contains a further condition regarding the reception of the BIT's provisions into the law of the other Contracting Party, there is no such requirement. The terms of the relevant BIT establish who may submit a dispute to arbitration and under what conditions. Nothing in the UK BIT establishes a condition that the treaty must be received or incorporated into the internal law of the Contracting States.

428. Respondent refers to the *lex societatis* of a legal entity that may seek to invoke a BIT.[860] Here Respondent conflates concepts. The *lex societatis* may be relevant to questions such as whether a company exists, has been incorporated, has been dissolved, and whether the act of expressing consent and commencing arbitration was done in a manner so as to bind the company (e.g. as permitted in its articles of association). Unless the BIT itself provides that the right to submit a dispute to arbitration must be consistent with the law of the home State of the company, the *lex societatis* is not relevant to that inquiry.

429. In addition, whether parties have effectively consented to submit a dispute to arbitration pursuant to the ICSID Convention, whether on the basis of the terms of a BIT or otherwise, is governed by Article 25(1) of the ICSID Convention, and as is well established, "[t]he question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention."[861]

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[859] *Achmea* Objection ¶ 104.

[860] *Achmea* Objection ¶ 105.

[861] *Československá Obchodní banka, A.S.. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated May 24, 1999 (CL-201) ("*ČSOB v. Slovakia*") ¶ 35 (notably this is so even where the reference to ICSID arbitration was contained in contract governed by a national law). *See also*, *e.g.*, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and

430. Third, although not relevant, as noted above, Respondent fails to demonstrate that the *Achmea Judgment* is directly applicable to persons in the United Kingdom, let alone to persons in the Bailiwick of Jersey.[862]

431. While Respondent argues that the *Achmea* Judgment applies directly to "EU investors"[863] and suggests this follows from the *erga omnes* effect of the CJEU's judgments within the EU,[864] Respondent's argument is neither supported nor correct. The binding effect of a judgment *erga omnes* by way of a preliminary ruling means the effect is not limited *inter partes*. It does not, however, refer to the separate question whether the rule at issue has direct effect on persons or whether it is addressed only to Member States. Respondent's theory that the *Achmea* Judgment applies directly to EU investors – and serves to invalidate their consent to arbitrate against EU Member States – is without basis. Indeed, the principal provision at issue in the *Achmea* Judgment is an undertaking by *Member States*.[865] The judgment is premised on the obligations placed on *Member States* in relation to the EU legal order and the onus is on Member States, not on individual investors, to take any actions that may be required to comply with the *Achmea* Judgment.

432. Thus, there is no basis for Respondent's argument[866] that Gabriel Jersey "lost the right" to invoke and accept Romania's consent to arbitrate contained in Article 7 of the UK BIT.

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Admissibility dated Aug. 4, 2011 (CL-202) ¶ 430 ("It is widely acknowledged that the question of the existence and validity of consent in the sense of Article 25(1) ICSID Convention is not subject to the law applicable to the merits designated in Article 42 ICSID Convention, but rather to Article 25 ICSID Convention itself and the instruments expressing such consent. This is also the view of the present Tribunal, which considers that questions of consent under Article 25 ICSID Convention are subject to principles of international law, and not pursuant to any particular national law.").

[862] As noted above, UK law rarely extends to the Bailiwick of Jersey, and the TFEU applies to the Bailiwick of Jersey only to a limited extent.

[863] *Achmea* Objection ¶ 109.

[864] *Achmea* Objection ¶ 109, n.157 (*citing* n.81 referring to the fact that the *Achmea* Judgment applies *erga omnes*).

[865] TFEU (RLA-93) Art. 344 ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.").

[866] *Achmea* Objection ¶ 111.

### d. Respondent's Objection that Romania's Consent Became Inapplicable Is without Merit

433. Respondent argues that as a result of the *Achmea* Judgment, Romania's "consent to arbitrate contained in Article 7 of the UK-Romania BIT became inapplicable – at the latest – when the TFEU took effect on 1 December 2009."[867] Respondent argues this follows from the principle set forth in Article 30(3) of the Vienna Convention on the Law of Treaties ("VCLT")[868] on the basis that the TFEU (alleged to be the later treaty) is claimed to cover the same subject matter and to be incompatible with the UK BIT (alleged to be the earlier treaty).[869] Romania's argument should be rejected as discussed below.

#### i. VCLT Article 30(3) Applies in Very Limited Circumstances

434. VCLT Article 30 sets out the residual rule reflecting customary international law[870] for addressing conflicts arising from successive treaties that relate to the same subject matter. Article 30 provides in relevant part:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> …
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[871]

The principle set forth in Article 30(3) applies where two successive treaties (i) relate to the same subject matter, and (ii) the provisions of the earlier treaty are not compatible with the later.

[867] *Achmea* Objection ¶ 114.

[868] Vienna Convention on the Law of Treaties ("VCLT") (RLA-1).

[869] *Achmea* Objection ¶¶ 115-116.

[870] The VCLT, as such, does not apply to the treaty relations between Romania and the United Kingdom, as Romania is not a party to the VCLT. The principles set forth in the VCLT, however, are accepted as generally reflecting customary international law.

[871] VCLT (RLA-1) Art. 30(1)(3).

435. This rule of interpretation reflects the principle that "States entering into a new agreement are presumed to intend that its provisions shall apply, rather than those of any earlier agreement between them regarding the same matter,"[872] and thus is to be applied when one concludes this is the result intended. When considering the temporal order of the two treaties for purposes of this rule, the relevant date is the date of adoption of the respective treaties, not their entry into force.[873]

436. The rule, however, applies only when there is a determination both that the two treaties relate to the same subject matter and that their provisions are incompatible; and these are two separate requirements. As Judge Villiger has observed in his commentary on the VCLT, "the mere conclusion of a subsequent inconsistent treaty does not raise an issue under Article 30," the two successive treaties must relate to the same subject matter.[874]

437. Given that the principle reflected in VCLT Article 30(3) applies when the two treaties both remain in force and when there is no expressly agreed provision addressing the relationship between them, incompatibility is not to be lightly assumed. This is in keeping with the most basic principle of the law of treaties, set forth in Article 26 of the VCLT, of *pacta sunt servanda*, providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[875]

438. As the latest edition of Professor Brownlie's classic treatise observes, "[t]he VCLT entails a certain presumption as to the validity and continuance in force" of treaties, which are "enduring instruments, not easily disposed of."[876] In his commentary on the Vienna

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[872] MARK. E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009) (CL-203) ("VILLIGER") at 406.

[873] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2d ed. 2007) ("AUST") (CL-208) at 229 ("In determining which treaty is the earlier and whch the later, the relevant date is the date of adoption, not entry into force . . . ."); VILLIGER (CL-203) at 402 ("[W]hen establishing the conflict in time, the relevant date is that of the adoption of the respective treaties, not of their entry into force.").

[874] VILLIGER (CL-203) at 402.

[875] VCLT (RLA-1) Art. 26.

[876] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed. 2012) (CL-204) at 377. *See also* ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION (2016) (CL-205) at 4 ("The treaty guarantees . . . a superior degree of stability and legal certainty to any other source of international law. The stability of treaties is a fundamental tenet of the law of treaties; it runs through the whole VCLT.").

Convention, Judge Villiger similarly observes that the principle of *pacta sunt servanda* "lies at the heart of the [Vienna] Convention", "applies without exception to every treaty including its annexes and appendices", and "holds good at all stages in a treaty's life, *e.g.*, in respect of its entry into force, interpretation, application, and termination."[877]

439. Therefore, Judge Villiger explains, "[w]hen confronted with successive treaties and before attempting to resolve a conflict, the starting point must be to aim at attaining a harmonising interpretation at the various treaty provisions," and "[w]herever possible, a meaning avoiding conflict between the successive treaties should be found and given to the provisions concerned."[878] Accordingly, as the *travaux préparatoires* to the VCLT makes clear, the phrase "relating to the same subject-matter" "should be construed strictly and should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty."[879]

440. In short, there is a presumption against incompatibility of treaties.[880] The ICSID tribunal in *RREEF v. Spain* accordingly emphasized that "to the extent possible, in case two treaties are, equally or unequally, applicable, they must be interpreted in such a way as not to contradict each other."[881]

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[877] VILLIGER (CL-203) at 365.

[878] VILLIGER (CL-203) at 402.

[879] UN Conference on the Law of Treaties, Second Session ("UNCLOT II"), 85th Meeting, UN Doc. A/CONF.39/C.1/SR.85 (Apr. 10, 1969) 222 (CL-206) ¶ 41; *accord* UNCLOT II, 91st Meeting, UN Doc. A/CONF.39/C.1/SR.91 (16 April 1969) 253 (CL-207) ¶ 38 (Special Consultant Waldock: "[T]he words 'relating to the same subject matter' […] should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involved such principles as generalia specialibus non derogant."). *See also* AUST (CL-208) at 229 ("The meaning of the expression 'relation to the same subject-matter' is not clear but should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.").

[880] *See, e.g.*, CHRISTOPHER J. BORGEN, *Treaty Conflicts and Normative Fragmentation*, *in* THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed. 2014) (CL-209) at 460 (referring to the "'generally accepted' presumption against a conflict of norms"); KERSTIN VON DER DECKEN, *Article 30*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018) (CL-210) at 545 (regarding VCLT Article 30 and noting that "[m]any apparent conflicts, however, can be solved by interpretation. If the apparently conflicting treaty provisions can be interpreted in such a way that they are compatible with each other, this approach is the first to be chosen").

[881] *RREEF v. Spain* (CL-211) ¶ 76.

#### ii. The Achmea Judgment Did Not Rule that the Conditions for Applying VCLT Article 30(3) Were Met

441. The *Achmea* Judgment is not a decision based on VCLT Article 30(3), nor does the CJEU even address the VCLT. The CJEU did not interpret or consider the UK BIT. It did not rule that the UK BIT and the TFEU relate to the same subject matter, nor did it rule that the Slovakia-Netherlands BIT and the TFEU relate to the same subject matter. Rather, the *Achmea* Judgment is a ruling interpreting Articles 267 and 344 of the TFEU.

442. The CJEU did not declare that intra-EU BITs are nullified, nor did it declare investor-State arbitration clauses in intra-EU investment treaties as null or void.[882] There is no dispute that the UK BIT remains in effect.[883]

443. In any event, and regardless of the *Achmea* Judgment, this Tribunal must be the judge of its own competence. As Article 41(1) of the ICSID Convention requires, "[t]he Tribunal shall be the judge of its own competence."[884] This basic obligation has been recognized by many ICSID tribunals[885] and is not disputed by Respondent.[886] Accordingly, this Tribunal must evaluate for itself whether each of the elements establishing its jurisdiction is fulfilled.[887]

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[882] Respondent's argument that following the Achmea Judgement some EU Member States are taking steps to terminate their intra-EU BITs is irrelevant, but, if anything, suggests that Respondent's objection is without merit, as such action would be unnecessary if the *Achmea* Judgment had the effect of rendering such BITs inoperative in whole or in part.

[883] *See supra* § VII.B.1.

[884] ICSID Convention, Art. 41(1).

[885] *See, e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award dated Oct. 14, 2016 (CL-212) ¶ 5.33 ("International tribunals, including this Tribunal, possess full and inherent authority to determine their own competence. As confirmed by Article 41(1) of the ICSID Convention, the Tribunal 'shall be the judge of its own competence.'"); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award dated May 5, 2015 (CL-213) ¶ 242 ("According to well-established principles of international arbitration and Article 41(1) of the ICSID Convention, this Tribunal is 'the judge of its own competence.' This basic rule of competence-competence applies to all international tribunals and is confirmed by Article 41(1).").

[886] *See Achmea* Objection ¶ 95 ("The Tribunal must therefore consider and rule on the impact of the Decision on its jurisdiction in its future award.").

[887] *See Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated Aug. 2, 2006 (CL-214) ¶¶ 148-150 (English translation of Award rendered in Spanish) ("Article 41 of the ICSID Convention is clear when it indicates that 'The Tribunal shall be the judge of its own competence.' Consequently, the ICSID Convention recognizes the 'Kompetenz-Kompetenz' principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject. . . . It is obvious that because the

### iii. The TFEU and the UK BIT Do Not Relate to the Same Subject Matter

444. Before considering whether Article 7 of the UK BIT is incompatible with the TFEU, the Tribunal must consider whether the UK BIT and the TFEU relate to the same subject matter.

445. Respondent impermissibly conflates the question of "same subject matter" with incompatibility when it argues that Article 7 of the UK BIT "deals with the resolution of disputes that may involve the application of the EU Treaties, whereas Article 344 of the TFEU establishes the exclusive obligation of Member States to submit any disputes concerning the interpretation or application of the EU Treaties to the judicial system of the EU."[888] This approach is incorrect.[889]

446. In fact, Article 7 of the UK BIT provides a mechanism for resolving disputes arising under the BIT, i.e., "[d]isputes between a national or company of one and the other Contracting Party *concerning an obligation* of the latter *under this Agreement* in relation to an investment of the former . . . ."[890] Moreover, nothing in the BIT directs that such disputes should

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ICSID Convention obligates the Arbitral Tribunal to decide on its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation. . . . [I]t is possible to affirm that the Arbitral Tribunal has an original and unquestionable competence, which arises from its own constitution and the ICSID Convention, and whose only object is to determine its competence to decide the substantive dispute presented by the parties.").

[888] *Achmea* Objection ¶ 116.

[889] *See European American Investment Bank AG v. Slovak Republic,* PCA Case No. 2010-17, Award on Jurisdiction dated Oct. 22, 2012 (RLA-105) ("*EURAM Bank v. Slovakia*") ¶¶ 174-175 (referring to the same subject matter requirement in VCLT Article 59 and emphasizing that "the Respondent conflates the two requirements" and that "the second question [compatibility] arises only if the first question [same subject matter] has been answered in the affirmative."); *WNC Factoring Ltd. v. Czech Republic*, PCA Case No. 2014-34, Award dated Feb. 22, 2017 (RLA-64) ("*WNC v. Czech Republic*") ¶ 296 (referring to the two separate criterions of "sameness" and "incompatibility" and the respondent's "confusion or conflation" over these two separate elements); *Wirtgen and JSW Solar v. Czech Republic,* PCA 2014-03, Final Award dated Oct. 11, 2017 (CL-215) ("*JSW Solar and Wirtgen v. Czech Republic*") ¶¶ 253, 265 (same subject matter test must be met before VCLT Article 59 and Article 30 can apply).

[890] UK BIT (CL-3) Art. 7(1) (emphasis added).

be resolved by reference to the EU Treaties.[891] Thus, the dispute presented does not involve the application of the EU Treaties and does not relate to the same subject matter.

447. The German Federal Court of Justice, the court that made the preliminary reference at issue in the *Achmea* Judgment[892] as well as CJEU Advocate General Wathelet who issued the legal opinion prior to the *Achmea* Judgment,[893] are in broad agreement on this issue.

448. Indeed, *every* investment treaty tribunal that has addressed this issue has concluded that the same subject matter test is not met as between the EU Treaties and investment treaties, including most recently, the tribunal in *Vattenfall v. Germany*, which held, following the *Achmea* Judgment, that Articles 267 and 344 TFEU "do not have the same subject matter or scope" as Article 26 of the ECT (the investor-State arbitration clause).[894]

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[891] This is in contrast, *e.g.*, with the Slovakia-Netherlands BIT which, as the CJEU observed (*Achmea* Judgment (Exh. R-363) ¶ 40), directed the tribunal to "take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties."

[892] *See Achmea* Judgment (Exh. R-363) ¶ 16 (summarizing the submission of the German federal court in its request for a preliminary ruling: "the subject matter of Article 344 TFEU is confined to disputes relating to the interpretation and application of the Treaties. This dispute in the main proceedings is not such a case, however, as the arbitral award of 7 December 2012 was made on the basis of the BIT alone.").

[893] *Slovak Republic v. Achmea BV*, Case C-284/16, Opinion of Advocate General Wathelet dated Sept. 19, 2017 (Exh. R-376) ("*Achmea v. Slovak Republic* Opinion") ¶ 175 ("The tribunal's role is not to establish whether, by its conduct which is challenged by the investor, the Member State failed to fulfill its obligations under the EU and FEU Treaties or, more generally, EU law. On the contrary, its role is to establish breaches of the BIT by the host State of the investment, EU law being one of the relevant factors to be taken into account when the tribunal assesses the conduct of the State in the light of the BIT."); ¶ 228 (concluding that "a dispute between a Netherlands investor and the Slovak Republic falling under the BIT is not a dispute concerning the interpretation or application of the EU and the FEU Treaties").

[894] *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue dated Aug. 31, 2008 ("*Vattenfall v. Germany*") (CL-216) ¶ 212. *See also WNC v. Czech Republic* (RLA-64) ¶¶ 296-308; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award dated Mar. 27, 2007 (RLA-102) ¶¶ 159-166; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, *ad hoc*, Decision on Jurisdiction dated Apr. 30, 2010 (RLA-104) ¶¶ 79, 102-104; *EURAM Bank v. Slovakia* (RLA-105) ¶¶ 178-185, 236, 279-280; *RREEF v. Spain* (CL-211) ¶¶ 79-80; *JSW Solar and Wirtgen v. Czech Republic* (CL-215) ¶ 265; *I.P. Busta and J.P. Busta v. Czech Republic*, SCC Case No. V2015/014, Final Award dated Mar. 10, 2017 (CL-217); *Anglia Auto Accessories Limited v. Czech Republic*, SCC Case No. V2014/181, Final Award dated Mar. 10, 2017 (CL-218) ¶¶ 115-116; *PL Holdings S.a.rl. v. Republic of Poland*, SCC Case No. V2014/163, Partial Award dated June 28, 2017 (CL-219) ("*PL Holdings v. Poland*") ¶¶ 311-313.

### iv. Article 7 of the UK BIT Is Not Incompatible with the TFEU

449. Every investment treaty tribunal that has considered the issue also has rejected arguments that investor-State arbitration provisions in investment treaties are incompatible with the EU Treaties.[895]

450. In addition, here, there is even less basis to conclude that the TFEU is incompatible with Article 7 of the UK BIT to the extent that its provisions are extended to the territories covered by the Exchange of Notes.[896] That is, there is no basis to conclude that the extension of consent in Article 7 of the UK BIT to companies of the Bailiwick of Jersey, a non-EU Member State, to submit disputes to arbitration is incompatible with the TFEU. Certainly, on its face, the *Achmea* Judgment does *not* support that conclusion, as the Court's judgment was expressly addressed to provisions permitting an investor from one EU Member State to submit disputes to arbitration against another EU Member State.

451. Thus, even if Article 7 of the UK BIT were considered inapplicable to the extent that it permits an investor of the United Kingdom to submit a dispute to arbitration against Romania, that inapplicability would not relate to Article 7 as extended to companies of the territories covered by the UK BIT that are not EU Member States. In this respect it is to be recalled that Article 30(3) of the VCLT provides that the earlier treaty continues to apply to the extent that its provisions are compatible with the later treaty, *i.e.*, the provisions of the earlier treaty are inapplicable only to the extent of the incompatibility.[897]

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[895] *See Vattenfall v. Germany* (CL-216) ¶¶ 166-167, 207-208; *Charanne B.V. and Construction Investments S.À.R.L. v. Kingdom of Spain*, SCC No. 062/2012, Award dated Jan. 21, 2016 (CL-220) ¶¶ 438-439; *RREEF v. Spain* (CL-211) ¶¶ 81-87; *EURAM Bank v. Slovakia* (RLA-105) ¶¶ 213-236; *PL Holdings v. Poland* (CL-219) ¶¶ 311-313; *JSW Solar and Wirtgen v. Czech Republic*(CL-215) ¶ 261; *Rubpert Joseph Binder v. Czech Republic*, UNICTRAL, Award on Jurisdiction dated June 6, 2007 (RLA-103) ¶ 65; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award dated May 4, 2017 (CL-245) ¶¶ 179-207; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award dated Nov. 25, 2015 (RLA-49) ¶ 4.146; *WNC v. Czech Republic* (RLA-64) ¶¶ 309-311; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award dated Feb. 15, 2018 (CL-221) ("*Novenergia v. Spain*") ¶¶ 438-442.

[896] UK BIT (Exh. C-3) at 15-17 of the PDF.

[897] VILLIGER (CL-203) at 406 ("Article 30 […] paragraph 3 aims where possible at 'saving' the earlier treaty.").

452. A further reason supporting the conclusion that the TFEU, and in particular its Articles 267 and 344, is not incompatible with the investor State arbitration provisions in intra-EU investment treaties, is that these same TFEU provisions in substance pre-dated other intra-EU investment treaties with analogous investor-State arbitration provisions, such as Article 26 of the Energy Charter Treaty ("ECT"), which was concluded on December 17, 1994.[898] That is, Articles 267 and 344 of the TFEU existed previously as Articles 234 and 292, respectively, of the Treaty Establishing the European Community effective from November 1, 1993.[899] Thus, the TFEU is an amended and restated version of a treaty that has been in force among EU Members over time, including in relevant part, since 1958, following which, treaties including investor-State arbitration provisions, such as the ECT, which has included EU Member States as well as the European Union itself among its signatories and later among its contracting parties, were concluded. As the tribunal in *Vattenfall v. Germany* thus observed on this point, "it is by no means clear that the EU Treaties are the 'later treaty' under Article 30 VCLT. The current Articles 267 and 344 TFEU have existed in substantively similar form since a time prior to the conclusion of the ECT, and have only been renumbered in the successive versions of the EU Treaties."[900] Thus, as EU Member States became parties to agreements with investor-State arbitration provisions *following* the conclusion of EU treaties containing the same substantive provisions that were later renumbered as Articles 267 and 344 in the TFEU, characterizing the TFEU as the later treaty in this respect is not easily supportable.

453. In other words, there is a distinction between, on the one hand, an organ of the European Union deciding, even with binding effect for EU Members States, that certain

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[898] Notably, this is discussed in *Vattenfall v. Germany* (CL-216) ¶ 218, where the tribunal, considering the impact of the *Achmea* Judgment on its jurisdiction under Article 26 of the ECT, observes (n. 129): "Article 267 TFEU was previously Article 234 of the Treaty Establishing the European Community of 1992 ("TEC"), and prior to that it was originally Article 177 of the Treaty of Rome in 1957. Likewise, Article 344 TFEU was previously Article 292 TEC, and originally Article 219 of the Treaty of Rome."

[899] TFEU, Annex – Table of Equivalences referred to in Art. 5 of the Treaty of Lisbon (RLA-93) at 385, 389. *See also Achmea* Objection ¶ 10 nn.3-4. Indeed, those same provisions existed as Articles 177 and 219, respectively, in the even earlier Treaty Establishing the European Economic Community, effective from Jan. 1, 1958. *See* Treaty of Rome establishing the European Economic Community (1958) (CL-222). *See also Achmea* Objection n.5.

[900] *Vattenfall v. Germany* (CL-216) ¶ 218.

arbitration provisions are precluded by the TFEU,[901] and concluding, on the other hand, as a matter of the principle reflected in Article 30 of the VCLT, that the TFEU is a later treaty relating to the same subject and incompatible with an earlier treaty such that the earlier treaty must be deemed to have been intentially rendered inoperable in part with effect from the date of conclusion or effectiveness of the TFEU.

454. Indeed, as the decisions of numerous prior investment treaty tribunals demonstrate, the conclusion that Article 7 of the UK BIT relates to the same subject matter as the TFEU and that it is moreover incompatible is not supported.

455. Finally, as Respondent confirms, the UK BIT remains in force and "[t]hus far, neither party has served notice of termination."[902] Any incompatibility associated with the UK BIT in relation to the TFEU will be eliminated upon the United Kingdom's withdrawal from the European Union, which is expected, in accordance with Article 50 of the Treaty on European Union, to take effect on March 29, 2019. Thus, even if Article 7 of the UK BIT as extended to the Bailiwick of Jersey were considered as incompatible with the TFEU as of the date of conclusion of the TFEU, that incompatibility is due to be removed before the oral hearings scheduled to take place in this case.

#### e. Romania Gave Its Consent in Article 7 of the UK BIT

456. Article 25(1) of the ICSID Convention provides that "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally."[903] This provision reflects the basic principle of *pacta sunt servanda*.

457. Notwithstanding that the CJEU ruled that certain investor-State arbitration provisions are precluded by the TFEU, the conclusion urged by Respondent that the TFEU should be understood as having supplanted and as making Article 7 of the UK BIT inoperative, including insofar as extended to companies of the Bailiwick of Jersey, is not supported; indeed analogous arguments have been rejected repeatedly.

[901] EU Member States as a result may be obligated to amend or terminate treaties containing such arbitration provisions.

[902] *Achmea* Objection ¶ 106 n.150.

[903] ICSID Convention, Art. 25(1).

458. The *Achmea* Judgment thus does not provide a basis to rule that Romania's consent was not given in Article 7 of the UK BIT, and likewise, does not provide a basis for Romania to withdraw its consent unilaterally.[904]

### C. Claimants' Claims Fall within the Tribunal's Jurisdiction under the ICSID Convention

459. Respondent argues that to the extent that Claimants' claims fall outside of Romania's consent under the respective BITs to submit disputes to ICSID arbitration, jurisdiction is lacking also under the ICSID Convention.[905] There is no dispute as to that proposition. In this case, however, as demonstrated above, Claimants' claims fall squarely within the scope of Romania's consent to submit disputes to ICSID arbitration contained in the respective BITs. Moreover, that consent is valid and not withdrawn or otherwise rendered ineffective by virtue of the Achmea judgment or otherwise.

460. Thus, this Tribunal has jurisdiction pursuant to Article 25 of the ICSID Convention over the dispute submitted by each Claimant.

## VIII. ROMANIA DID NOT ACCORD FAIR AND EQUITABLE TREATMENT

461. In their Memorial, Claimants described the content of the obligation to accord fair and equitable treatment, as contained in both the Canada BIT and the UK BIT, and demonstrated that Romania's treatment of Gabriel's investments was in breach of both BITs.[906] In response, Respondent offers a variety of arguments regarding the content of the standard that are misleading and disregard the record of evidence.

### A. Observations Regarding the Standard

462. Review of investment treaty tribunal decisions shows that there is a significant convergence regarding the content of the fair and equitable treatment standard regardless of

[904] *See also UP and CD Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated Oct. 9, 2018 (CL-247) ("*Le Chèque Déjeuner v. Hungary*") ¶¶ 252-266 (expressly rejecting the argument that the *Achmea* judgment renders the jurisdiction of a tribunal constituted under the ICSID Convention ineffective or inapplicable).

[905] Counter-Memorial § 8.3.

[906] Memorial § X.

whether the standard is expressed as being tied to the customary international law minimum standard of treatment. The range of decisions discussing and describing the application of that standard in various analogous circumstances as set forth in the Memorial demonstrate that Romania's treatment of Gabriel's investment was in breach of the standard, however expressed.

463. While Respondent does not seem to dispute the content of the standard as it relates to the UK BIT, Respondent argues that the Canada BIT incorporates a materially lower standard of treatment as the BIT refers to the customary international law minimum standard of treatment. Respondent argues that the Canada BIT thus incorporates the so-called *Neer* standard and that only conduct considered as "egregious" will be considered as a breach.[907] As demonstrated below, Respondent's argument is not supported and in fact has been repeatedly rejected.

### 1. Respondent Mischaracterizes the Standard under the Canada BIT

464. The Canada BIT requires that the Contracting Parties accord to investments "treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment…."[908] As Claimants noted, and as many tribunals have observed, the content of the customary international law minimum standard of treatment has evolved over time, and as such it is not materially different in practice from the standard of fair and equitable treatment applied by investment treaty tribunals today.[909]

465. Respondent responds to this observation by arguing that the reference to the customary international law standard in the BIT must be interpreted as having a meaning.[910] There is no dispute that the Contracting Parties' reference to the customary international law standard is meaningful. It signals that the obligatory standard of treatment is as found in

[907] Counter-Memorial ¶ 622.

[908] Canada-Romania BIT (Exh. C-1) Art. II.

[909] Memorial ¶¶ 653-654.

[910] Counter-Memorial ¶ 621.

international law and that the treaty does not impose idiosyncratic requirements on the Contracting Parties.[911] The relevant question is what the standard entails.

466. Respondent argues that the standard in the Canada BIT is as reflected in the 1926 *Neer* case,[912] and that conduct must be "egregious" to violate the standard of treatment.[913] Numerous investment treaty decisions addressing the content of the fair and equitable treatment standard when expressly tied to the customary international minimum standard (such as in the NAFTA), however, describe the standard as having evolved and reject the notion that it is limited to egregious conduct as described in the *Neer* case.[914]

467. For example, the distinguished tribunal in *Mondev v. United States*,[915] emphasized that the reference to the *Neer* case as a relevant touchstone for the content of the standard was "unconvincing" and made the following observations:

> [T]here is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.
>
> . . . *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the protection of

[911] *See also OKO Pankki OYJ, VTB Bank (Deutschland) AG, Sampo Bank PLC v. Estonia*, ICSID Case No. ARB/04/5, Award dated Nov. 19, 2007 (CL-47) ¶ 237 ("[The] Contracting Parties intended, by this reference to ensure that their BIT's FET standard was not to be interpreted as a wholly autonomous concept, thereby enabling a tribunal (arguably) to apply its own subjective or impressionistic conclusions as to whether a respondent state had acted 'fairly' or 'equitably', but rather to ensure that their FET standard was a recognized and defined standard in international law.").

[912] Counter-Memorial ¶ 622.

[913] Counter-Memorial ¶¶ 623, 626.

[914] *See also* Judge Stephen M. Schwebel, Remarks at the International Arbitration Club, London: "Is Neer Far From Fair and Equitable?", dated May 5, 2011 (CL-256) (observing *inter alia* that the *Neer* case did not refer to the treatment of investment, it did not involve any interpretation of the concept of fair and equitable treatment, it is an international arbitral award and in that sense no more significant than many international arbitral awards decided regarding the treatment of investment in international law decided since); Jan Paulsson and Georgios Petrochilos, *Neer-ly Misled?*, 22 ICSID REV FILJ 242 (2007) (CL-273) (demonstrating that when used by the United States-Mexico General Claims Commission in 1926, the so-called *Neer* criterion applied only to denial of justice claims and not more generally to constitute an international wrong).

[915] *Mondev v. USA* (CL-145) ("*Mondev v. USA*").

> international investments, were far less developed than they have since come to be. . . . In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable' and 'full protection and security' of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[916]

The *Mondev* tribunal considered that the content of the customary rules of international law in regard to the protection of foreign investment necessarily has been influenced by the "vast number" of bilateral and regional investment treaties currently in force:

> In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different case) meant in 1927.[917]

The *Mondev* tribunal concluded that, in view of the evolving nature of customary international law, "the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s."[918] Referring instead to the description of arbitrary conduct in the *ELSI* case, the tribunal concluded as to the standard with reference to the administration of justice that the question is whether one can conclude, in the light of all the available facts, that an impugned decision "was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."[919]

468. The *Waste Management v. Mexico* tribunal thereafter also described the customary international minimum standard without reference to the *Neer* case or to any requirement of "egregious" or "outrageous" conduct:

[916] *Mondev v. USA* (CL-145) ¶¶ 115-16.

[917] *Mondev v. USA* (CL-145) ¶ 117.

[918] *Mondev v. USA* (CL-145) ¶ 123.

[919] *Mondev v. USA* (CL-145) ¶ 127.

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.
>
> Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.[920]

It is this articulation of what the standard entails that has since been adopted by very many investment treaty tribunals to describe the content of the obligation to accord fair and equitable treatment, regardless whether expressly tied to the customary international law minimum standard, reflecting the significant convergence of views among investment treaty tribunals as to the type of conduct that breaches the obligation to provide fair and equitable treatment.[921]

469. Thereafter, in *Thunderbird v. Mexico*, the tribunal emphasized that "[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."[922] The tribunal noted that there had been evolution since the *Neer* case, although the threshold for a violation of the standard still remains high, and cited with agreement the description of the standard in *Waste Management* and *Mondev*, stating that it views "acts that would give rise to a breach of the minimum standard of treatment … as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[923] The *Thunderbird v. Mexico* tribunal also underscored the relevance in this analysis of the principle of good faith in international law which animates an assessment of when the State's conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance of said

[920] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated Apr. 30, 2004 ("*Waste Management v. Mexico*") (CL-139) ¶¶ 98-99.

[921] *See* Memorial ¶ 654.

[922] *Thunderbird v. Mexico* (RLA-66) ¶ 194.

[923] *Thunderbird v. Mexico* (RLA-66) ¶ 194.

conduct, such that a failure by the [State] to honour those expectations could cause the investor (or investment) to suffer damages."[924]

470. The tribunal in *Merrill & Ring v. Canada*[925] also rejected the notion that the *Neer* case defined the standard, emphasized the evolutionary nature of the law, and concluded that fair and equitable treatment itself "has become part of customary law":

> State practice with respect to the standard for the treatment of aliens in relation to business, trade and investments, while varied and sometimes erratic … shows that the restrictive *Neer* standard has not been endorsed or has been much qualified. . . . The situation is rather one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process.
>
> A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris* . . . . [T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness . . . .
>
> [A]gainst the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law.[926]

On this basis the tribunal emphasized the focus must be on reasonableness:

> [T]he Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law. . . . Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law [for NAFTA], as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.[927]

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[924] *Thunderbird v. Mexico* (RLA-66) ¶ 147.

[925] *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated Mar. 31, 2010 ("*Merrill & Ring v. Canada*") (CL-153).

[926] *Merrill & Ring v. Canada* (CL-153) ¶¶ 209-211. *See also id.* ¶¶ 204-209.

[927] *Merrill & Ring v. Canada* (CL-153) ¶ 213.

471. Likewise, in *Chemtura Corporation v. Canada*, the tribunal confirmed its agreement with the tribunals in *Waste Management II*, *Mondev*, and *ADF* in rejecting "any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the Neer case."[928]

472. The *Bilcon v. Canada* tribunal also affirmed:

> NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.
>
> …[T]here is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but … there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. [929]

473. Respondent's contention[930] that the *Neer* standard was "reaffirmed" in the *Al Tamimi v. Oman* case is not correct. Rather, that tribunal stated regarding *Neer* that "a number of subsequent arbitral decisions have acknowledged that with the passage of time the standard has likely advanced beyond these basic requirements."[931] The passage cited by Respondent does not refer to the *Neer* standard and notably confirms not only that "a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice" will breach the standard, but also as to an investor's expectations that the standard will be breached where there is "a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations."[932]

474. Respondent's contention[933] that the *Neer* standard was "also reaffirmed" in the *Mesa Power v. Canada* case is also not correct. Rather, that tribunal observed that while some

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[928] *Chemtura Corp v. Government of Canada*, UNCITRAL (NAFTA), Award dated Aug. 2, 2010 (CL-162) ("*Chemtura v. Canada*") ¶ 215.

[929] *Bilcon v. Canada* (CL-69) ¶¶ 433, 444.

[930] Counter-Memorial ¶ 624.

[931] *Al Tamimi v. Oman* (RLA-44) ¶ 383.

[932] *Al Tamimi v. Oman* (RLA-44) ¶ 390.

[933] Counter-Memorial ¶ 625.

NAFTA tribunals have rejected *Neer* as a relevant touchstone, others continue to refer to it but with the observation that customary international law has evolved, concluding that:

> In practice, these two approaches have much in common. Most importantly, they both accept that the minimum standard of treatment is an evolutionary notion, which offers greater protection to investors than that contemplated in the *Neer* decision.[934]

475. Thus, Respondent's argument that to breach the standard of fair and equitable treatment in the Canada BIT requires conduct considered "egregious" and as reflected in the *Neer* case is unsupported. Rather, the authorities show, as Claimants have demonstrated, that there is significant convergence in practice today among investment treaty tribunals as to the content of the standard of fair and equitable treatment regardless of whether the standard is expressed as being tied to the customary international law minimum standard of treatment.

476. One illustrative example of the application of this standard is *Bilcon* v. *Canada*.[935] In that case, the tribunal found a breach of the standard of fair and equitable treatment (and thus a breach of NAFTA Article 1105) when the Government rejected a proposed mining project on environmental grounds based on a report prepared by a joint federal-provincial review panel. Rather than apply the legally required permitting criteria in its review of the 17-volume environmental impact statement prepared by the claimant with the assistance of 35 experts at a cost of millions of dollars, the review panel assessed the potential impacts by reference to a new and determinative criterion – the "core values" of the affected community.[936] The panel concluded that the project would result in "sufficiently important changes to th[e] community's core values" to be considered a significant adverse impact that could not be mitigated.[937]

477. In concluding that Canada's imposition of a determinative extra-legal criterion to assess and reject the project breached the FET standard in NAFTA Article 1105, the tribunal took note of, among other things, (i) the investor's expectation "that their project would be

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[934] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated Mar. 24, 2016 (RLA-67) ¶ 500 (*citing with agreement Mondev v. USA*, *Waste Management v. Mexico*, and *Merrill & Ring v. Canada*).

[935] *Bilcon v. Canada* (CL-69).

[936] *Bilcon v. Canada* (CL-69) ¶¶ 20, 452.

[937] *Bilcon v. Canada* (CL-69) ¶¶ 20, 503-504.

assessed on the merits of its environmental soundness in accordance with the same legal standards applied to applicants generally"[938] and (ii) the investor's reliance on various official encouragements "to invest very substantial corporate resources . . . in good faith to obtain and present an Environmental Impact Statement."[939]

478. To the extent that Canada's reliance on "core community values" to reject the project was meant to reflect popular support (or lack of support) for claimant's project, the tribunal rejected that approach as unlawful, stating:

> To the extent that the notion of 'core community values' is construed as representing the level of local support for a project, the Tribunal concludes that there is no mandate in federal Canada's environmental assessment system or the Nova Scotia regime for a review panel to make recommendations on such a basis. The function of a review panel is to gather and evaluate scientific information and input from the community and to assess a project in accordance with the standards prescribed by law, not to conduct a plebiscite.[940]

The tribunal in *Bilcon* found that it was arbitrary for the Government to have "effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law."[941] According to the tribunal, "[t]here was no indication in either the encouragements from the government or in the laws themselves that the [project] area was a 'no go' zone for projects of the kind *Bilcon* was pursuing, regardless of their individual environmental merits, carefully and methodically assessed."[942]

### 2. Romania's Obligation to Grant Gabriel Canada MFN Treatment Applies in Respect of the Obligation to Accord Fair and Equitable Treatment

479. To the extent that the Tribunal interprets Article II(2) of the Canada BIT as being more limited in relation to the fair and equitable treatment standard, Gabriel Canada also is

[938] *Bilcon v. Canada* (CL-69) ¶ 447.

[939] *Bilcon v. Canada* (CL-69) ¶¶ 448-49. *See also id.* ¶¶ 456-57.

[940] *Bilcon v. Canada* (CL-69) ¶ 508.

[941] *Bilcon v. Canada* (CL-69) ¶ 591.

[942] *Bilcon v. Canada* (CL-69) ¶ 589.

entitled to the MFN treatment provided by Article III(1)-(2) of the Canada BIT, which includes the level of treatment provided by Romania in this respect to investors pursuant to the UK BIT.

480. As other tribunals have recognized, provisions, such as the one contained in Article III(1)-(2), ensure that covered investors obtain treatment no less favorable than that which, in like circumstances, the host State grants to investors of any third State.[943] As Newcombe and Paradell observe, "the fact that any third state investors … are or could be entitled to more favourable treaty protections is sufficient to put the investors or investments in like circumstances for the purpose of applying the MFN clause."[944] In any event, here, to the extent the Tribunal interprets the Canada BIT more narrowly than the UK BIT, Romania grants in like circumstances more favorable treatment to Gabriel Jersey, thus triggering Article III(1)-(2) of the Canada BIT.

481. Respondent argues that Article III(1)-(2) only applies to circumstances in which an investor from a third state obtains more favorable treatment in fact.[945] Respondent further argues that Article III(1)-(2) "does not allow importation of investment protection standards from other BITs that are not included in the basic treaty."[946] The authorities cited by Respondent, however, either do not address the issue as to whether more favorable treatment granted in another investment treaty may trigger Article III(1)-(2)[947] or do not support Respondent's

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[943] *See* Memorial ¶ 655, n.1313.

[944] NEWCOMBE & PARADELL (CL-143) § 5.20. *See also* THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON MOST-FAVOURED-NATION CLAUSES WITH COMMENTARIES (2005) (CL-257) at 23 ("[T]he fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause.").

[945] Counter-Memorial § 8.1.5.

[946] Counter-Memorial ¶¶ 630-631.

[947] *See Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award dated Sept. 18, 2009 ("*Cargill v. Mexico*") (CL-163) ¶¶ 227-229 (issue presented was whether investors from third State were receiving more favorable treatment in relation to import permit requirements, without ruling on question whether a more favorable treatment granted to investors of third States in investments treaties could trigger the MFN provision); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated Aug. 25, 2014 ("*Apotex v. USA*") (RL-43) ¶¶ 8.1 et seq. (same).

argument.[948] Indeed, many investment treaty tribunals have concluded, in similar circumstances, that an MFN clause may be invoked to rely upon more favorable treatment granted by the host State to third state investors in other investment treaties.[949]

### 3. Respondent Does Not Dispute the Standard under the UK BIT

482. There does not seem to be any real dispute between the Parties that the content of the standard reflected in the UK BIT is as set forth in the Memorial.[950]

483. Respondent, however, seems to disagree with the approach cited by Claimants and followed in cases, such as *Saluka v. Czech Republic*, in which the tribunal sought to describe the standard using principles of treaty interpretation, referring to the ordinary meaning of the terms fair and equitable treatment in context and in light of the treaty's object and purpose.[951] Respondent argues that this is "not the proper approach" because the term is "not defined in the

[948] *See Bayindir v. Pakistan*, Award (CL-87) ¶¶ 148, 150, 153-160 (ruling that whereas Turkey-Pakistan BIT did not contain an obligation to accord fair and equitable treatment, the MFN provision, which is similar to the one in the instant case, permitted claimant to invoke the fair and equitable treatment provision from other Pakistan BITs).

[949] *See ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award dated May 18, 2010 (CL-157) ¶¶ 73, 125, n.16 (where Turkey-Jordan BIT did not contain an obligation to accord fair and equitable treatment, interpreting a similarly worded MFN provision to permit claimant to invoke such a provision from another BIT); *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award dated Nov. 12, 2008 (CL-258) ¶¶ 150-151 (MFN provision permitting claimant to invoke fair and equitable treatment protections from another BIT); *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award dated Nov. 30, 2011 (CL-259) ¶¶ 11.1.1-11.2.9 (MFN provision permitting claimant to invoke "effective means" clause from another investment treaty); *EDF International S.A., SAUR Int'l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated June 11, 2012 (CL-155) ("*EDF International v. Argentina*") ¶¶ 929-937 (MFN provision permitting claimant to incorporate protections in an "umbrella" clause from another investment treaty); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated Apr. 8, 2013 (RLA-87) ¶¶ 394-397 (MFN provision permitting claimant to incorporate protections in an "umbrella" clause from another investment treaty); *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits dated July 29, 2014 (CL-260) ¶¶ 354, 358, 426 (MFN provision permitting claimant to invoke "effective means" clause from another investment treaty); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award dated Dec. 15, 2014 (RLA-70) ¶¶ 540-555 (MFN provision permitting claimant to invoke fair and equitable treatment protections from another investment treaty).

[950] *See* Memorial ¶¶ 645-676.

[951] *See Saluka v. Czech Republic* (CL-97) ¶¶ 297-309; Memorial ¶ 645.

treaty,"[952] and that the Tribunal's task is to determine whether Romania's conduct "was unfair or inequitable" and not to rely upon "other" or "different words."[953]

484. Claimants agree that the Tribunal must determine whether, in view of the facts of this case, Romania's conduct "was unfair or inequitable." The authorities cited in the Memorial provide meaningful guidance as to what it means to make such a determination, even when using "other words" to provide such guidance.

### B. Romania Failed to Accord Fair and Equitable Treatment to Gabriel's Investments

485. As Claimants observed and many investment treaty tribunals have recognized, a breach of the fair and equitable treatment standard may arise from a series of acts or omissions as a composite act.[954] This is not disputed.[955]

486. As Claimants detailed in the Memorial and further elaborated above and in the evidence supporting this submission, Romania's treatment of Gabriel's investments, in particular, starting in August 2011 when the Government began to signal that renegotiation of the State's economic interest was mandatory for the Project to proceed and relatedly to then hold up Project permitting for political reasons not tied to the applicable legal permitting rules, through the time it dictated that Project permitting be effectively decided by a Parliamentary process through a vote on the Draft Law, and then issued political instructions to Parliament to reject the Draft Law, which it stated was a proxy vote on whether the Project would be done, and thereafter when the Government confirmed by its actions and omissions that indeed it had rejected the Project on political grounds as well as its joint-venture with Gabriel in RMGC together with the Bucium Projects, constitutes, as a composite act, a denial of fair and equitable treatment. In short, through a process that was contrary to law and that was taken in disregard of

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[952] Counter-Memorial ¶ 635.

[953] Counter-Memorial ¶ 635.

[954] Memorial ¶ 651. *See also Tecmed v. Mexico* (CL-122) ¶ 172; *Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, UNCITRAL, Award dated July 1, 2009 (CL-255) ¶ 12.36; *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated July 6, 2012 (CL-53) ¶¶ 275-276.

[955] *See* Counter-Memorial ¶¶ 617-618.

law, Romania denied Gabriel a fair and equitable treatment of its investments as required both by the Canada BIT and the UK BIT.

487. This series of acts and omissions more specifically, but still summarily, can be described as follows. After encouraging and approving Claimants' significant investments and agreeing on the economic terms of the State's participation, Romania embarked on an unlawful and arbitrary course of conduct with respect to the administrative permitting and approval process associated with Gabriel's investments that Claimants had reasonably expected would be conducted according to law, including an assessment of the EIA Report and Project on the merits to ensure it met lawful permitting requirements. To that end, RMGC assembled a team of respected Romanian and international experts and spent hundreds of millions of dollars designing and developing the Project to meet and favorably exceed applicable permitting requirements and submitted the EIA Report for review in accordance with the law and the terms of reference established by the Government.

488. Romania first derailed, and then jettisoned completely, that lawful process. The Government derailed the process in 2011 by holding permitting up while it coercively demanded to renegotiate its economic participation in the Project, making clear the Environmental Permit would not be issued and the Project would not proceed until RMGC and Gabriel met its demand for "25 and 6." The Government's failure to issue the Permit after the Project met the permitting requirements was in disregard of Romanian law.[956]

489. Consistent with its refusal to issue the Environmental Permit, the Government also refused to correct errors in the 2010 LHM or take steps to remove the Cârnic massif from the List of Historical Monuments as it was legally obliged to do.[957] This in turn facilitated litigations pursued by Project opponents to challenge local urbanism decisions and the reissued Cârnic ADC on the basis of admitted errors in the 2010 LHM that the Government arbitrarily refused to correct while the Project was being held up to force contractual renegotiations.[958]

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[956] *See* Mihai § VIII.A; Mihai II § VI.A.

[957] *See supra* § V.B.

[958] *See also* Podaru § IV.B; Schiau § VI.A.

490. While maintaining in 2012 its coercive demand to renegotiate as a condition for the Project proceeding (but alternately failing and refusing to move forward the environmental permitting process for political reasons), the Government jettisoned the lawful administrative environmental permitting process completely in 2013 in favor of a political one. Although admitting the Project met all of the requirements for issuance of the key Environmental Permit under the administrative process Claimants reasonably and legitimately expected would apply, the Government failed to issue the Permit and further conditioned the Project on Parliament's adopting a special law that Claimants did not need or request.[959]

491. After foisting upon Claimants this arbitrary Parliamentary/political permitting requirement, the leaders of the ruling coalition exercised their political influence and power to ensure Parliament would reject the law, thereby seeking to avoid responsibility for the decision it directed the Parliament to take effectively to terminate the Project. Parliament's rejection of the Draft Law was clearly determinative in the Government's decision to reject the Project and not to permit it.

492. Moreover, the Parliamentary review process, which went well beyond consideration of the legislative advisability of the Draft Law presented, consistent with the political reality of the issue actually presented, not only improperly usurped the role of the Government and purported to review the advisability of the Project itself, but set about to delegitimize the decision of the Government to support the Project.[960]

493. Thereafter, rather than issue the Environmental Permit, the requirements for which the Government admitted were met, or issue a decision transparently explaining it was not doing so, the Government instead acted consistent with its determination that it would not permit the Project to proceed following Parliament's rejection by, among other things, declaring, without legal justification, the entire area of the Project as an historical monument and then subsequently nominating the Project area as a World Heritage site, acts which were fully

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[959] *See supra* § IV.B.

[960] Mihai II § VII.B.

incompatible with RMGC's License and other acquired rights and ensuring also that no construction permits could be issued to support the Project.[961]

494. At the same time, RMGC's request to obtain exploitation licenses for the Rodu-Frasin and Tarniţa Bucium Projects obviously have been blocked in clear violation of the law as well, as the State for political reasons has failed to respect RMGC's rights in relation to the Bucium Exploration License, wrongfully denying RMGC and thus Gabriel of the valuable acquired rights in relation to those projects.[962]

495. This conduct falls within the heartland of conduct violating the obligation to provide fair and equitable treatment under the BITs. As in *Bilcon*, Romania arbitrarily abandoned and failed to comply with the lawful permitting process that Claimants reasonably and legitimately expected would apply and rejected the Project in what amounted to a plebiscite on the Project in Parliament. Indeed, Romania's conduct is in many ways even worse. Here, the Government determined that the Project met all lawful permitting requirements, then subjected the Project unlawfully and arbitrarily to a determinative negative political judgment in Parliament, and then, with a complete lack of transparency and lack of due process, failed to issue a decision memorializing its decision not to proceed with the Project, choosing instead to proceed with a pretense of process and other acts wholly incompatible with RMGC's rights and with the very notion of the Project creating, as in *Bilcon*, a "no go" zone for the Project.

496. Respondent denies for a variety of reasons that the facts show it failed to accord Gabriel's investments fair and equitable treatment.[963] Because each of Respondent's arguments has been addressed and thoroughly rebutted above and in the witness statements and legal opinions submitted herewith, we address these issues here only in summary fashion.

497. First, Respondent denies that it linked issuance of the Environmental Permit to its demand for renegotiation, instead characterizing events as RMGC "freely enter[ing] into

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[961] *Supra* § V.B.7. *See also* Podaru § IV.C.

[962] *Supra* § VI.

[963] Counter-Memorial ¶¶ 595-612.

negotiations with the Government to amend the terms of the License."[964] As discussed in the Memorial and above, this characterization is demonstrably false as established in multiple contemporaneous statements from Government officials and RMGC personnel alike that meeting the Government's economic demand was a condition precedent for the Permit to issue and the Project to advance.[965] Respondent's related claim that [redacted] is false as well.[966] There was no need to relax the legal requirements for issuing the Environmental Permit because the Project already met them.[967]

498. Respondent's denial notwithstanding,[968] using the Government's power to withhold the permit to strong-arm a better deal is clearly an abuse of State authority. Similarly, failing to issue the Environmental Permit based on the extra-legal conditions of sweetening the economic pot or obtaining Parliament's approval on the Draft Law also clearly was unlawful and a violation of "the rules" Respondent wrongly claims to have followed.[969]

499. Second, seeking to avoid the consequences of linking progress on permitting to its coercive demand for a better economic deal from the Project, Respondent denies that it blocked issuance of the Environmental Permit. According to Respondent, RMGC did not obtain the Environment Permit in 2012 and 2013 because it allegedly failed "to present the necessary documentation in support of its application" related to surface rights, an amended PUZ, a UC, and an ADC, the absence of which Respondent attributes to RMGC's alleged lack of a social license.[970] Respondent seeks to excuse and justify the absence of TAC meetings between late 2011 and mid 2013 on the same baseless grounds.[971] For the reasons explained in the Memorial

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[964] Counter-Memorial ¶¶ 602-603.

[965] *Supra* § II. [redacted]

[966] Counter-Memorial ¶ 602.

[967] *See also* Mihai II § VI.

[968] Counter-Memorial ¶ 603.

[969] Counter-Memorial ¶ 604.

[970] Counter-Memorial ¶¶ 601, 606.

[971] Counter-Memorial ¶ 605. Respondent also wrongly contends (Counter-Memorial ¶ 605) that despite developing and publishing conditions and measures for the Environmental Permit in July 2013, there was still additional work left to do before the Permit could be issued because all TAC members had not yet discussed the conditions and measures in detail. As Professor Mihai explains (Mihai II ¶¶ 305-311), Respondent's contention finds no support in the law and is incorrect. Respondent's invocation of the TAC's post-Parliament

and above, including as admitted contemporaneously by the Government, none of these allegedly missing items was necessary for the Environmental Permit.[972]

500. Third, in a variation of its argument that RMGC freely and voluntarily offered to renegotiate the Government's economic interest in the Project, Respondent also alleges that the Draft Law was not an illegal departure from the applicable administrative permitting process because RMGC allegedly asked for the special law and "accepted this way of proceeding."[973] For the reasons explained in the Memorial and above, this narrative is false. RMGC and Gabriel did not need or ask for a special law; that coercive and arbitrary condition was imposed by the Government.[974] Indeed, RMGC contemporaneously told the Government it did not want a special law for the Project and did want the Environmental Permit issued according to the lawful administrative process before the Government presented any law to Parliament.[975] The Government refused to proceed that way and instead proceeded its own way.

501. Finally, Respondent claims that the permitting process remains open for RMGC and the Project if and when RMGC can meet all permitting requirements and obtain a social license.[976] As stated previously, RMGC met all permitting requirements and, though it was not a condition of permitting, also had a social license at all relevant times.[977]

502. For the foregoing reasons, the course of treatment meted out by Romania reflects gross and fundamental departures from Claimants' legitimate expectations of lawful treatment,

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meetings in 2014 and 2015 as purported evidence of still open issues in relation to permitting is equally baseless for the reasons previously explained. *Supra* § V.A. *See also* Mihai § VI.B.5; Mihai II § VI.B.2.

[972] *Supra* § III.A. *See also* Mihai II § V; Podaru § II.B.

[973] Counter-Memorial ¶¶ 609-610.

[974] *Supra* § IV.B; Mihai II § VII.C.

[975] *Supra* § IV.B. [redacted]

[976] Counter-Memorial ¶¶ 611-12.

[977] *Supra* § IV.A.

due process, transparency, and good faith, and establishes a violation of the BITs' guarantee of fair and equitable treatment.[978]

# IX. ROMANIA FAILED TO PROVIDE FULL PROTECTION AND SECURITY

503. As Claimants demonstrated in their Memorial,[979] Romania's treatment of Gabriel's investments was in breach of Romania's obligation to provide full protection and security to Gabriel's investments as set forth both in the Canada BIT as well as in the UK BIT. Through its acts and omissions, Romania actively and fundamentally undermined the legal framework for and the legal protection of Gabriel's investments.

504. Respondent seeks to defend its conduct by urging a narrow and limited view of its treaty obligation. As detailed further below, however, there is significant authority supporting the conclusion that the obligation to provide protection and security is not limited as Respondent argues and that Romania's treatment of Gabriel's investments was in breach of Romania's obligations both under the Canada BIT as well as under the UK BIT.

## A. Observations Regarding the Standard of Treatment

505. As detailed in the Memorial, there is significant authority recognizing the full protection and security standard as obligating States to provide legal security as well as physical security for investments.[980]

506. Respondent maintains, with regard to the standard of protection, that the Canada BIT "does not provide for broader legal security," and that it does not require treatment beyond the customary international law standard.[981] Respondent does not appear to dispute that the full protection and security standard included in the UK BIT extends to legal protection, but maintains also that it is an obligation to provide protection and security only from harm caused

[978] *See also* Memorial § XII.A.2 and *infra* § X (both sections addressing authorities relating to the obligation not to impair investments by unreasonable measures which also reflect the standard of treatment required by customary international law).

[979] Memorial § XI.

[980] Memorial ¶¶ 697-704.

[981] Counter-Memorial ¶ 644.

by third parties, and not from harm caused by the State's own conduct.[982] As detailed further below, there is significant authority rejecting these limitations.

507. Claimants demonstrated with reference to the Canada BIT that while the customary international law standard includes police protection against physical harms, it also requires legal protection and security, and that arbitrary action that undermines the legal security of an investment will violate the standard.[983] An additional recent extensive study of the historical origins and development of the full protection and security standard in international law by Professor Nartnirun Junngam further demonstrates that the customary international law standard is not limited to police protection against physical harms.[984] Professor Junngam demonstrates that the standard has not been so limited historically, but has included protection from legal harms.[985] He also concludes that limiting the standard to protection from harms caused either by state organs or by third parties lacks historical support.[986] These authorities demonstrate that it is not correct to conclude that the customary international law obligation to provide full protection and security is limited to the obligation to provide reasonable police protection against physical harm caused by third parties. As the Canada BIT incorporates the obligation as reflected in customary international law, it is not reasonable to interpret the Canada BIT's protections in the limited manner that Respondent suggests.

508. Notably, and particularly with reference to the obligation as set forth in the UK BIT, while some investment treaty tribunal decisions state that the standard is limited to protection from harms caused by third parties, there is significant support for the conclusion that

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[982] Counter-Memorial § 9.3.2.

[983] Memorial ¶¶ 704-707 (discussing GEORGE FOSTER, *Recovering "Protection and Security": The Treaty Stanndard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L. 1095, 1095 (2012) (CL-110)).

[984] NARTNIRUN JUNNGAM, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From?*, 7 AM. U. BUS. L. REV. 1, 1 (2018) (CL-268) ("JUNNGAM").

[985] JUNNGAM (CL-268) at 91.

[986] JUNNGAM (CL-268) at 93-94.

the standard is not so limited and extends to the obligation to protect from harm caused by State actors as well.[987]

509. Indeed, in *CME v. Czech Republic*, the tribunal held with regard to the obligation to provide full protection and security:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[988]

510. In *Biwater Gauff v. Tanzania*, the tribunal also emphasized that the obligation refers to harms caused including by the State itself:

> The Arbitral Tribunal also does not consider that the "full security" standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself. That is also implied by the term "full," as well as the purposes of the BIT and the *Wena* and *AMT* awards.[989]

511. The tribunal in *Ampal-American v. Egypt* concluded similarly:

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[987] *See, e.g.*, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated Feb. 21, 1997 (CL-269) ¶¶ 6.05, 6.08 (protection relating to harm caused by State's armed forces); *Československa Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award dated Dec. 29, 2004 (CL-115) ¶ 170 (State's failure to cover economic losses of state-owned vehicle with economic obligations to ČSOB was a breach of the State's commitment to provide full protection and security to ČSOB's investment); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated Dec. 8, 2000 (CL-82) ¶ 85 (protection relating to State-owned Egyptian Hotels Company seizing the claimant's hotels); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award dated Sept. 11, 2007 (CL-270) ¶ 355 ("A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual."); *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated June 1, 2009 (CL-108) ¶¶ 36, 448 (holding that Egypt violated the full protection and security obligation by allowing the Minister of Tourism to expropriate the claimants' investment by ministerial resolution); *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated Sept. 23, 2010 (CL-193) ¶ 13.3.2 ("[T]he duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors."); *Frontier Petroleum Services Ltd. v. Czech Republic* (CL-271) ¶ 261 ("The wording of these full protection and security clauses suggests that the host state is under an obligation to take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs.").

[988] *CME v. Czech Republic* (CL-116) ¶ 613.

[989] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated July 24, 2008 (CL-106) ¶ 730.

> [T]he Tribunal is of the view that the operation of the standard does not depend upon whether the acts that give rise to the damage to the Claimants' investment are committed by agents of State (which are thus directly attributable to the State) or by third parties.[990]

Professor Schreuer likewise observes that the standard "suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects . . . [which] may stem from private parties … or from actions of the host State and its organs."[991]

512. Thus, the scope of the obligation to provide protection and security to covered investments is neither limited to providing police protection against physical harms nor only to providing protection against harms caused by third parties. This is so for the obligation as set forth in both the Canada BIT and the UK BIT. However, to the extent that the Tribunal interprets Article II(2) of the Canada BIT as being more limited in this respect, Gabriel Canada also is entitled to the MFN treatment provided by Article III(1)-(2) of the Canada BIT, which includes the level of treatment provided by Romania in this respect to investors pursuant to the UK BIT.[992]

### B. Romania's Conduct Breached the Obligation to Provide Full Protection and Security to Gabriel's Investments

513. As shown in the Memorial, Romania's course of arbitrary conduct in respect of RMGC and its project development rights deprived Claimants' investments of full protection and security in violation of the BITs.[993]

514. Indeed, the same course of conduct described above in relation to Romania's failure to accord fair and equitable treatment to Gabriel's investments, as a composite act, also constituted an abject disregard of RMGC's legal, contractual, and other acquired rights and as such constituted a failure to provide full protection and security to Gabriel's investments.

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[990] *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated Feb. 21, 2017 (CL-262) ("*Ampal-American v. Egypt*") ¶ 245.

[991] CHRISTOPH SCHREUER, *Full Protection and Security*, J. INT'L DISP. SETTLEMENT 1, 1 (2010) (CL-112) at 1. *See also id.* at 3 ("[T]he adverse effects of physical violence may stem from private parties or from actions of the host State and its organs."); *id.* at 5 ("The host State's duty is not restricted to preventing damaging acts by private actors. The State's responsibility extends to actions perpetrated by its organs.").

[992] Memorial ¶ 707, n.1424. *See also supra* § VIII.A.2.

[993] Memorial ¶¶ 708-713.

515. This conduct primarily included, but was not limited to:

a) In disregard of RMGC's rights under the Roşia Montană License and of Gabriel Jersey's rights under the Articles of Association agreements regarding RMGC, coercively requiring a renegotiation of the State's economic interest in the Project by linking the State's willingness to allow the Project to obtain the Environment Permit and to advance to RMGC and Gabriel meeting this demand;[994]

b) In disregard of RMGC's acquired right in relation to ADCs and in disregard of applicable legal requirements, arbitrarily failing to correct errors in the 2010 LHM (which contained provisions the State admitted were wrong that were incompatible with the ADCs and the archaeological research conducted by the State and funded by RMGC) and arbitrarily failing to update the List of Historical Monuments as required by law following the issuance of the second Cârnic ADC, which wrongly enabled and facilitated NGO judicial challenges against urbanism plan decisions that accommodated the Project and the second Cârnic ADC and thus created legal uncertainty for the Project where there should not have been any;[995]

c) Abusively and arbitrarily failing to issue the Environmental Permit notwithstanding that the Project met all legal requirements for its issuance;[996]

d) Abandoning the administrative permitting process based on the merits of the Project in favor of a political one via the Draft Law and Parliament that was not and making clear through unequivocal statements of senior Government officials that, unless Parliament approved the Draft Law, the Environmental Permit would not be issued and the Project would not proceed;[997]

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[994] Memorial § VII; s*upra* § II. [redacted]

[995] *See supra* § V.B. *See also* Schiau II § IV.D; Podaru § IV.B.2.

[996] *See supra* § III.A. *See also* Mihai § VIII; Mihai II § VI.

[997] Memorial § VIII.B.2; *supra* § IV.D. *See also* [redacted]; Mihai II § VI.B.2.

e) Ensuring through statements of senior Government officials and political party leaders that the *ad hoc* Parliamentary-approval condition the Government invented would not be met by calling on Parliament to reject the Draft Law, which it did;[998]

f) Presenting the Draft Law to Parliament to avoid issuing, and avoid responsibility for issuing, the Environmental Permit, and thus simultaneously abandoning and politicizing the permitting process and creating conditions that unleashed and sustained street protests that included some anti-Project elements but were decidedly anti-Government and were part of the pro-democracy, pro rule of law, anti-corruption movement that developed and strengthened in Romania since the end of Communism; officials' reciprocal (though baseless) accusations for perceived political gain of bribe-taking in exchange for supporting the Project also fueled protests by eroding faith in the legitimacy of Government conduct, its ability to regulate the Project, and in the Project itself;[999]

g) Conducting the Parliamentary review of the Draft Law in a manner that exceeded the mandate of the Special Commission and violated principles of separation of powers by usurping the role of law and replacing it with an arbitrary nationally-broadcast and biased political examination of the Project's merits that the competent legal authority already had examined and endorsed and thus delegitimizing the decision-making process for the Environmental Permit and the Project as a whole;[1000]

h) Acting in accordance with the Government's stated intent not to do the Project after Parliament rejected the Draft Law and treating the Project as terminated in fact (though failing to do so *de jure* in a written decision that could have been challenged) by not issuing the Environmental Permit despite the Government's

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[998] Memorial § VIII.B.1; *supra* § IV.D.

[999] *See supra* § IV.C. *See also* [redacted]; Mihai II ¶¶ 419-426; Memorial ¶¶ 388-389.

[1000] Mihai II § VII.B.5; [redacted].

repeatedly and unequivocally admitting the Project met all permitting requirements;[1001]

i) By failing to act on RMGC's requests for exploitation licenses for the two Bucium Projects notwithstanding that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarniţa deposits;[1002]

j) By taking further action hostile and antithetical to RMGC and/or its mining licenses, including:

    i) Failing to cooperate to recapitalize RMGC and placing RMGC at risk of dissolution;[1003]

    ii) Maintaining abusive, harassing, and unending investigations of RMGC that create legal uncertainty for RMGC and that are increasingly shown to be tied to and motivated by this arbitration;[1004]

    iii) Taking litigation positions in court defending the 2010 LHM by attacking the State's own 2004 LHM as "abusive," and enacting the 2015 LHM, which did not correct but extended and expanded the admitted errors in the 2010 LHM and further sterilized the Project site from development;[1005] and

    iv) Filing an application for World Heritage status with UNESCO covering Roşia Montană and the entire Project site that even while suspended is wholly incompatible with Claimants' rights to develop the Project and

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[1001] *See supra* § V. *See also* Mihai II § VI.B.2.

[1002] *See supra* § VI.

[1003] *See supra* § V.C.

[1004] *See supra* § V.D.

[1005] *See supra* §§ V.B.2-V.B.5 *See also* Podaru §§ IV.B.2, IV.C.2; Schiau II §§ IV.D-E.

> prevents any development or related construction permitting in the covered area.[1006]

516. These arbitrary and unlawful actions failed to protect and, indeed, eviscerated in fact the legal rights comprising Claimants' investments and robbed those investments of all meaningful value in violation of the obligation to provide full protection and security as required by both BITs properly and reasonably understood and interpreted.

## X. ROMANIA IMPAIRED GABRIEL'S INVESTMENTS BY UNREASONABLE AND DISCRIMINATORY MEASURES

517. As demonstrated in Claimants' Memorial,[1007] Romania impaired Gabriel's investments by unreasonable or discriminatory measures, thereby breaching its obligations under Article 2(2) of the UK BIT and Article III(3) of the Canada BIT.

518. As detailed in the Memorial and further below, the same course of conduct comprised of the acts and omissions described above in relation to Romania's failure to accord fair and equitable treatment and full protection and security to Gabriel's investments, as a composite act, also combined to constitute an unreasonable or discriminatory measure that impaired the maintenance, use, value, and enjoyment of Gabriel's investments.

### A. Romania's Unreasonable Measures

519. The standard of treatment incorporated in Article 2(2) of the UK BIT as regards unreasonable measures reflects the principle of customary international law that the legal rights of aliens must not be impaired arbitrarily.[1008] Thus, the authorities describing the content of this standard are relevant also to the standard of fair and equitable treatment.[1009] Likewise, the unreasonable treatment of Gabriel's investments described in the Memorial[1010] contribute to the

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[1006] *See supra* § V.B.7.

[1007] Memorial § XII.

[1008] Memorial ¶¶ 714-715. As demonstrated in the Memorial, pursuant to the MFN treatment provision in Article III(1)-(2) of the Canada-Romania BIT, Gabriel Canada is entitled to the benefits of the non-impairment obligation in the UK-Romania BIT and to any other more favorable substantive guarantees contained in Romania's BITs with third party States. Memorial ¶ 716 n. 1445. *See also supra* § VIII.A.2.

[1009] Memorial ¶¶ 720-730.

[1010] Memorial ¶¶ 734-735.

conclusion that Romania breached its obligation to provide fair and equitable treatment to Gabriel's investments.

520. Respondent contends that Gabriel's investments have not been impaired and "have not been affected in any way," and that the State's treatment was justified as having been taken in the context of "a legitimate environmental permitting process."[1011] Respondent's contentions are far from reality.

521. In fact, Gabriel's investments have been impaired because Romania decided not to issue the Environmental Permit for the Roşia Montană Project and allow the Project to proceed for reasons not supported in law – without transparency, without due process, and without any compensation.[1012] Consistent with its decision to block the Roşia Montană Project, Romania issued the 2015 LHM and submitted the UNESCO application for Roşia Montană, arbitrarily disregarding the legal effects of the Roşia Montană Mining License and the earlier issued ADCs, with the effect of preventing a zoning plan from being adopted that could possibly accommodate construction permits for the Project.[1013] The State impaired Gabriel's investments in relation to the Bucium properties by refusing to honor RMGC's right to obtain exploitation licenses for the Rodu-Frasin and Tarniţa deposits.[1014] Romania also has arbitrarily repudiated its joint venture with Gabriel in RMGC.[1015]

522. Romania argues that its conduct is justified by the precautionary principle.[1016] It is not. The precautionary principle applies to support decision-making where there is scientific uncertainty about possible environmental harms.[1017] This is not a case involving scientific uncertainty about environmental risks.[1018]

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[1011] Counter-Memorial ¶ 669.

[1012] *See* Memorial ¶¶ 680-688; *supra* § VIII.B.

[1013] *See* Memorial ¶¶ 582-613; *supra* § V.B.

[1014] *See* Memorial ¶¶ 551-557; *supra* § VI.

[1015] *See* Memorial ¶¶ 747-754; *supra* §§ II-III, V.C, VI.

[1016] Counter-Memorial ¶ 669.

[1017] Authorities referenced by Respondent do not provide otherwise. *See Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Nov. 13, 2000 (RLA-76) ¶ 67 (emphasizing that the EIA procedure is used to assess such risks); *Chemtura v. Canada* (CL-162) ¶ 135 (recognizing and giving effect to evidence of

523. Professor Mihai explains that as the European Court of Justice has held, the precautionary principle does not support a purely hypothetical approach to risk, and that one of the ways of giving effect to the precautionary principle is to establish a procedure for the evaluation of such risk, such as the EIA procedure.[1019] Thus, Professor Mihai explains, the Romanian law establishing the EIA procedure gives effect to the precautionary principle and compliance with the legal procedures so established ensures compliance with such principles.[1020]

524. In this case, after following an extensive EIA procedure, the competent State authorities concluded that RMGC had satisfied all conditions in law for issuance of the Environmental Permit.[1021] There is no evidence to support Respondent's argument that the Environmental Permit was not issued due to scientific uncertainty about environmental risks associated with the Project.[1022]

525. Thus, Romania cannot credibly invoke the precautionary principle as the reason it did not issue the Environmental Permit for Roşia Montană. Notably, the European Commission has emphasized that "the precautionary principle can under no circumstances be used to justify the adoption of arbitrary decisions."[1023]

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serious concerns regarding the risks associated with lindane use). *See also* Mihai II § IV.C.2 (discussing the precautionary principle). *See generally* Mihai II §§ III-IV.

[1018] In addition, although referenced in a number of declarations and agreements relating to the environment, the precautionary principle does not have clearly defined parameters as a rule of decision. *See*, *e.g.*, Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 ECOLOGY L. Q. (2011-2) (CL-266).

[1019] Mihai II ¶¶ 66-70.

[1020] Mihai II ¶¶ 71-74.

[1021] *See supra* § III; Mihai § VIII; Mihai II § VI.

[1022] *See supra* §§ III.D; Mihai II ¶¶ 75-79. *See also supra* § V.5 (describing how Ministry of Environment convened further TAC meetings in 2014 purportedly to commission a further study on the TMF only to misrepresent the facts to RMGC about why it was not going to do so).

[1023] Mihai II ¶ 80 (*citing* Commission of the European Communities, *Communication from the Commission on the precautionary principle*, p.13 § 5.1).

## B. Romania's Discriminatory Measures

526. The standards applicable to a claim based on discriminatory treatment are set out in the Memorial[1024] and make clear that such a claim applies when like entities are treated in a different manner in similar circumstances without reasonable or justifiable grounds. As set forth in the Memorial[1025] and further described below, Romania's treatment of Gabriel and its investments was discriminatory.

527. By deciding whether to allow the Roşia Montană Project to proceed based on political rather than on applicable legal criteria, while undertaking to treat other projects according to the law, the Government openly described the discriminatory treatment of Gabriel and its investments, as Prime Minister Ponta stated, "*It's clear that if the Parliament rejects the law, nothing will be done in Roşia Montană*" and explained that he therefore intended "to explain to all national and foreign investors, to all those which are involved in large projects, gas, offshore, submarine cable, uranium mines, to *tell them that this, only this project was rejected on a political criterion*, but that Romania remains a country open to investments, to major projects."[1026]

528. Thus, while Romania has failed to act on RMGC's applications for exploitation licenses for the Bucium Projects,[1027] Romania evidently has acted in 2015 on the application for an exploitation license for the SAMAX Romania SRL mining company owned by Euro Sun Mining for the Rovina gold and copper project, and a report of the Romanian Court of Accounts shows that between 2011 and 2015 NAMR finalized 109 exploitation licenses following finalization of exploration results under exploration licenses.[1028] These facts demonstrate that NAMR has the capacity to move such applications forward and the failure to do so with regard to RMGC's Bucium applications has been a deliberate and discriminatory refusal to do so.

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[1024] Memorial ¶¶ 716, 718-719, 731-733.

[1025] Memorial ¶¶ 734-737.

[1026] Interview with Prime Minister Victor Ponta, Antena 3, dated Oct. 5, 2013 (Exh. C-1504) at 6-7 (emphasis added).

[1027] *See supra* § VI. *See also* [redacted]; Bîrsan II § IV.C.

[1028] [redacted]; Bîrsan II ¶¶ 216-218.

529. Likewise, while Romania issued an environmental permit for the Certej project (a gold and silver mining project approximately 35 kilometers from Roşia Montană), accepting specifically even the conclusions of a cumulative environmental impact assessment previously commissioned by RMGC that showed there would be no transboundary effects in the worst-case scenarios for both the Roşia Montană Project and the Certej mining project,[1029] the Government did not issue the Environmental Permit for the Roşia Montană Project.

530. In addition, seeking to distinguish the heavily polluting neighboring Roşia Poieni copper project owned and operated by the State-owned CupruMin, which continues to be permitted by Romania's environmental authorities, from the Roşia Montană Project, Respondent argues that the two are not in like circumstances because the Roşia Poieni mine was pre-existing.[1030] In fact, as [redacted] demonstrates,[1031] Romania has applied its environmental laws in a lax manner when it comes to Roşia Poieni, while purporting to hold the Roşia Montană Project to the strictest standards, which RMGC plainly met. In any event, the real discrimination follows from the unassailable and basic fact that Roşia Poieni evidently receives an environmental permit when it satisfies the applicable legal requirements, while the Roşia Montană Project does not.[1032]

531. Similarly, with regard to the State's operations at Roşia Poieni, while the Government was quick to correct the arbitrary designation of the two-kilometer radius historical monument at Roşia Montană when it risked interference with CupruMin's established rights,[1033] it has designated historical monuments in blatant disregard of RMGC's acquired rights in existing ADCs.[1034]

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[1029] [redacted]; Certej Environmental Permit No. 8 dated July 5, 2012, reviewed on Nov. 28, 2013 (Exh. C-2256).

[1030] Counter-Memorial ¶ 661.

[1031] [redacted]; Kunze II ¶¶ 7-8.

[1032] *See supra* § III.

[1033] Memorial ¶¶ 597 n. 1221, 737.

[1034] Memorial ¶¶ 582-598; *supra* § V.B; Schiau II §§ IV.D, IV.E; Podaru § IV.C.

## XI. ROMANIA FAILED TO OBSERVE ITS OBLIGATIONS

532. As Claimants demonstrated in their Memorial,[1035] Romania failed to observe obligations entered into with regard to Gabriel's investments in breach of Article 2(2) of the UK BIT. These obligations include the obligations of the State with regard to the Roşiă Montană License and the Bucium Exploration License, as well as the obligations entered into by the State through Minvest with regard to the RMGC Articles of Association.

533. By committing to afford MFN treatment to Canadian investors, Romania committed to afford Canadian investors the more favorable treament it extends to UK investors. Thus, Romania's more favorable treatment in relation to the obligations it enters into with regard to investments of UK investors applies also to Gabriel Canada by virtue of Article III(1)-(2) (MFN) of the Canada BIT.[1036]

534. As Claimants review below, Romania failed to observe obligations it entered into with regard to Gabriel's investments and Gabriel incurred losses as a consequence of those failures. Respondent presents several familiar arguments seeking to avoid the consequences of this straightforward treaty obligation. Upon examination, however, as increasingly tribunals have recognized, it is evident that these arguments are without merit and should be rejected.

### A. Respondent's Umbrella Clause Defenses Are Unavailing

535. Respondent argues,[1037] that the UK BIT "does not allow" Gabriel Jersey to present a claim for breach of its Article 2(2) because (i) Gabriel is not a party to the Roşia Montană License and the Bucium Exploration License; (ii) Minvest is the named party to RMGC's Articles of Association; and (iii) [redacted] the Articles of Association has an arbitration clause for disputes arising thereunder. Each of these arguments should be rejected.[1038]

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[1035] Memorial § XIII.

[1036] Memorial ¶ 740 n. 1488. *See also supra* § VIII.A.2.

[1037] Counter-Memorial ¶¶ 476, 495, 671, 673.

[1038] These arguments are to be rejected also in relation to Gabriel Canada's associated claims under Articles III(1) and III(2) (MFN) of the Canada BIT.

### 1. Gabriel Need Not Be a Party to the Contract Pursuant to Which the State Entered Into Obligations With Regard to Gabriel's Investments

536. Respondent argues that because Gabriel is not a party to the mining licenses at issue, it cannot present a claim for losses it incurred as a result of Romania's breach of the last sentence of Article 2(2) of the UK BIT. Gabriel, however, is not here seeking to present a claim under the licenses themselves and there is no basis in the treaty to state that Gabriel cannot present a claim for losses incurred as a consequence of Romania's breaches Article 2(2) resulting from its failure to observe obligations it entered into with regard to Gabriel's investments, which by definition include obligations entered into by virtue of the mining licenses that are the heart of Gabriel's investment (which notably include the licenses themselves).

537. Article 2(2) of the UK BIT by its terms refers to any obligation the State "may have entered into with regard to investments of nationals or companies of the other Contracting Party."[1039] It is not limited to obligations entered into with nationals or companies themselves. On the basis of the ordinary meaning of the terms of the BIT, Respondent's argument that Article 2(2) could only apply to obligations entered into by the State with Gabriel itself must be rejected. Article 2(2) by its terms applies to obligations entered into by Romania "with regard to" Gabriel's investments. This includes the obligations entered into in the Roşia Montană License, the Bucium Exploration License, as well as RMGC's Articles of Association.

538. In addition, characterizing Gabriel as not having "standing" to present such claims is misguided as that argument is based on the conception of the claim as arising under the contract, which it does not.[1040] Claims under Article 2(2) of the UK BIT are not contract claims. As a company covered by the UK BIT, Gabriel Jersey has standing to present a claim relating to breaches of the BIT relating to its investments, including a failure in breach of Article 2(2) to observe undertakings entered into in relation to Gabriel's investments.

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[1039] UK-Romania BIT (Exh. C-3) Art. 2(2).

[1040] *See* Counter-Memorial ¶ 495 (arguing that Gabriel "has no standing to make claims under a contract to which it is not a party").

539. Other investment treaty tribunals accordingly have recognized in regard to similarly worded "umbrella clauses," that they refer to obligations entered into by the State including in contracts concluded with a company into which the claimant has invested.

540. For example, in *Continental Casualty v. Argentina*, the tribunal held that the umbrella clause applied to obligations entered into with the claimant's subsidiary, explaining that:

> provided that these obligations have been entered 'with regard' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.[1041]

Similarly, in *Enron v. Argentina*, the tribunal accepted that obligations entered into with a company in which the claimant was a minority shareholder was an obligation that was assumed "with regard to" the claimant's investment.[1042]

541. Thus, the tribunal in *EDF International v. Argentina* also held that a similarly worded umbrella clause covered obligations in a contract with a company in which the claimant was a majority shareholder:

> The "umbrella clauses" in question are broadly worded. A clear and ordinary reading of these dispositions covers commitments undertaken with respect to investors, or undertaken in connection with investments. The Tribunal notes that Article 10(2) of the Argentina-Luxemburg BIT covers commitments "undertaken *with respect to investors*" while Article 7(2) of the German BIT, even broader in scope, covers "commitment *undertaken in connection with the investments*."[1043]

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[1041] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award dated Sept. 5, 2008 (CL-84) ¶ 297.

[1042] *Enron Corp. and Poderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated May 22, 2007 (CL-92) (annulled on other grounds) ¶ 275. *See also Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated Sept. 28, 2007 (CL-93) ("*Sempra v. Argentina*") ¶¶ 308, 312 (finding umbrella clause applies to license granted to local company in which claimant invested); *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated Oct. 3, 2006 (CL-91) ¶ 175 (concluding umbrella clause applies to obligations set forth in license held by company in which claimant was a shareholder).

[1043] *EDF International v. Argentina* (CL-155) ¶¶ 938-939.

542. Notably, the Energy Charter Treaty, to which Romania is a party, and which includes a similarly worded umbrella clause,[1044] is described authoritatively by the Energy Charter Treaty Secretariat as follows:

> According to Article 10 (1), last sentence, each CP shall observe any obligations it has entered into with an investor or an investment of any other CP. This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary.[1045]

543. Moreover, obligations falling under "the umbrella" of Article 2(2) may include those undertaken in relation to investments contained in laws.[1046]

544. In short, it is not a defense for Respondent that Gabriel is not the party to the Roşia Montană License and the Bucium Exploration License.

#### 2. Whether Minvest Is Named as the Party to the RMGC Articles of Association Is Not Dispositive as to Whether the Associated Obligations Were Entered into by the State

545. Respondent's argues that Minvest, not the State, is the party to the RMGC Articles of Association. This, however, is not an effective defense to Gabriel's claim that Romania failed to observe the obligations it undertook vis-à-vis RMGC as reflected in the Articles of Association.

546. Indeed, whether the State entered into a joint venture with Gabriel and thereby entered into obligations within the meaning of Article 2(2) of the UK BIT in relation to Gabriel's investments, reflected in the RMGC Articles of Association, is not determined solely by

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[1044] Energy Charter Treaty, Article 10(1) last sentence provides: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." Energy Charter Treaty, Art. 10(1) (RLA-23).

[1045] The Energy Charter Treaty, A Reader's Guide (CL-261) at 26.

[1046] Memorial ¶¶ 744-746.

reference to the fact that Minvest was established as a separate juridical person under Romanian law.[1047]

547. In this respect the decision of the tribunal in *Garanti Koza v. Turkmenistan*[1048] is illustrative. In that case, claimant Garanti Koza concluded a contract with a State entity, TAY, which had a separate legal personality under the law of Turkmenistan. The contract was entered into on behalf of the State, was approved by the Government, and the evidence showed that implementation of the contract was undertaken on the instructions of and as directed by the Government.[1049] In these circumstances, the tribunal concluded:

> It is not necessary to find TAY to be an organ of the State in order to conclude that the obligations it undertook in the Contract were obligations entered into on behalf of Turkmenistan with regard to Garanti Koza's investment in Turkmenistan within the meaning of Article 2(2) of the BIT.[1050]

In that case, the tribunal concluded that the State breached the umbrella clause of the BIT by directing TAY to manage payments due in a manner that breached the contract and "deprived Garanti Koza of the benefit of its bargain with TAY…"[1051]

548. The Decision in *Ampal-American v. Egypt*[1052] is similar. In that case, the evidence showed that Egyptian State entities, EGPC and EGAS, although both separate corporate entities, were found to have acted entirely under State direction and control in the sense of Article 8 of the ILC Articles on State Responsibility.[1053] The tribunal also found that

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[1047] *See* Memorial ¶ 743 (*citing Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award dated Aug. 19, 2005 (CL-89) ("*Eureko v. Poland*") ¶¶ 119, 129, 134, 245 (finding umbrella clause applies to obligations entered into by the State through its State Treasury notwithstanding that as a matter of Polish law, the Treasury is a juridical person separate from the State)).

[1048] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated Dec. 19, 2016 (CL-96).

[1049] *See id.* ¶¶ 334-335.

[1050] *See id.* ¶ 352.

[1051] *See id.* ¶¶ 346, 354. *See also id.* ¶¶ 331-332 (while recognizing whether an obligation was created was governed by the law of the contract, stating whether the actions taken by the State constituted or caused a failure to observe obligations the State entered into with regard to an investment was a question arising under international law governing the BIT).

[1052] *Ampal-American v. Egypt* (CL-262).

[1053] *Ampal-American v. Egypt* (CL-262) ¶140.

the evidence showed that the decisions of EGPC and EGAS, both to conclude and to terminate the gas supply contract at issue, were taken upon the instructions of or under the direction or control of the Egyptian Government; moreover the tribunal found that the Government thereafter adopted the decision to terminate the contract "as its own."[1054] On this basis, the tribunal held that the actions taken by EGPC/EGAS constituting a breach of the contract were attributable to the State in accordance with Article 8 and Article 11 of the ILC Articles on State Responsibility.[1055]

549. Similarly, in *Karkey Karadeniz v. Pakistan*,[1056] noting that "[i]nvestment tribunals have recognized that sovereign instructions, directions or control in contractual relations with an investor constitute cogent evidence of sovereign interference."[1057] In that case, where the tribunal found the State directed the conclusion and performance of a contract concluded by an independent entity, it held:

> [E]ven if the Tribunal were to find that Lakhra was an entity independent of the State, the Tribunal concludes that Lakhra's actions and decisions with respect to the Contract (notably the decision to enter into the contract and amendments thereto, decision not to pay Karkey under the Contract, and the filing of proceedings against Karkey requesting the arrest of Karkey's Vessels) were made under the instructions, direction and control of Pakistan, and are therefore attributable to Pakistan.[1058]

550. In this case, the record shows that the State instructed and directed the State entity that later became Minvest specifically to enter into the agreements with Gabriel that formed RMGC, which the State, *i.e.*, the Ministry of Industry and NAMR, also specifically approved.[1059]

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[1054] *Ampal-American v. Egypt* (CL-262) ¶146.

[1055] *Ampal-American v. Egypt* (CL-262) ¶¶ 146-147. *See also* ILC Articles on State Responsibility (CL-61), Art. 8 ("The conduct of a person … shall be considered an act of a State under international law if the person … is in fact acting on the instructions of, or under the direction or control of, that State in carrying out that conduct.") and Art. 11 ("Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.").

[1056] *Karkey Karadeniz Elekrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated Aug. 22, 2017 (CL-250) ("*Karkey Karadeniz v. Pakistan*").

[1057] *Karkey Karadeniz v. Pakistan* (CL-250) ¶ 570.

[1058] *Karkey Karadeniz v. Pakistan* (CL-250) ¶ 593.

[1059] *See generally* Bîrsan § II. *See also* Bîrsan § II.C (describing the specific approvals of the Ministry of Industry and of NAMR).

Thus it cannot be stated that the State itself did not enter into obligations with Gabriel in the form of the agreements establishing RMGC.

551. The record also shows that both in the exercise of its rights and obligations as shareholder of RMGC and in all of its contractual dealings with Gabriel, the State specifically directed Minvest through Ministry-issued "mandates" as to each and every decision, often overstepping the role of a shareholder and directing even Minvest's management as to decisions to be taken, including through the issuance of mandatory administrative orders that exceed the role of a shareholder in a commercial enterprise.[1060] Moreover, once the State spun off the Minvest shares in RMGC in 2013 to a new company Minvest RM, which moreover had no other assets, Minvest RM's status solely as a special purpose holding vehicle for the State's RMGC shares is even more evident.[1061] Thus, it cannot credibly be maintained that it was Minvest as an independent commercial enterprise that acted as shareholder of RMGC. Rather, the State acted as the shareholder, holding up Minvest, but barely, as a thin veil.

552. Finally, the record shows plainly that the State dropped the pretense of any veil when it came to its demand for renegotiation, including to change the shareholding structure for the State's equity stake in RMGC.[1062] Thus the State directly renegotiated the terms of Gabriel's joint venture agreement with the State in the form of RMGC.[1063] And then, in 2013 and thereafter, in dealing with the need for recapitalization of RMGC in order for RMGC to remain compliant with the requirements of the Companies Law, the Ministry of Economy directed every

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[1060] *See* Bîrsan II § V.A.2. *See also generally* Bîrsan II § V.A; Memorial ¶ 544 n.1122; [redacted] ; Găman ¶¶ 7-10. In 2003, the State transferred authority to exercise its rights and obligations as sole shareholder of Minvest from the Ministry of Industry to the Ministry of Economy. Since then, it has been the Ministry of Economy that has appointed and removed the members of Minvest's "corporate" bodies, *i.e.*, its General Meeting of Shareholders, Board of Directors, and General Manager. Minvest's General Meeting of Shareholders was not a genuinely deliberative body, however, as it usually consisted of one member who required a special prior mandate from the Ministry of Economy in order to vote, and such mandates indicated the decision to be taken in the General Meeting of Shareholders. Bîrsan §§ II.E-II.F.

[1061] Bîrsan ¶ 18, § II.F. Bîrsan II ¶ 223 n.204. The Government approved the spin-off, among other things, due to "[t]he State's interest in having direct corporate control over RMGC." Substantiation Note to Government Decision No. 275/2013 dated May 15, 2013 (Exh. C-94).

[1062] [redacted]

[1063] *See, e.g.*, Bîrsan II ¶ 288 (*citing* Draft Agreement with Gabriel, "[t]he Parties agree that the Romanian State shall maintain its interest in RMGC's share capital at 25% throughout the entire validity term of the Mining License" (Exh. C-519)). *See also* Counter-Memorial ¶¶ 267, 270.

specific decision to be taken in regard to the matter, including by addressing communications directly.[1064] Indeed, even in this arbitration, Respondent has referred to itself as the shareholder of RMGC.[1065]

553. Thus, Respondent cannot fairly advance a position that the State did not act as the shareholder in relation to RMGC and its corporate affairs and should be estopped from arguing otherwise.[1066]

### 3. Whether the Obligations Are Also Subject to Contractual Arbitration Clauses Is Not Relevant

554. Respondent presents as a defense to Gabriel's claim under Article 2(2) of the UK BIT that the mining licenses contain a dispute resolution clause referring contract disputes to international arbitration. The fact that an obligation entered into by a State may be expressed in a contract that includes an arbitration agreement, or other dispute resolution clause for resolving disputes arising under that contract, however, is not a bar to presenting a claim for breach of the separate treaty obligation to observe obligations entered into in regard to an investment. Disputes arising from a breach of the treaty obligation are properly addressed in accordance with the procedures set forth in the treaty. In addition, nothing in the UK BIT requires that a breach of a contract first be established in accordance with the contract provisions as a precondition for addressing disputes as to the treaty obligation.

555. This has been recognized by several investment treaty tribunals.[1067] For example, in *Eureko v. Poland*¸ taking note of the fact that the contract at issue in that case referred contract

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[1064] *See* [redacted]; Bîrsan II ¶¶ 244-251 (describing Ministry of Economy's intervention in the decisions regarding the 2013 recapitalization of RMGC); Letter from Ministry of Economy to RMGC dated Nov. 28, 2013 (Exh. C-1453); Letter from Ministry of Economy to Gabriel dated Nov. 16, 2016 (Exh. C-1452). *See also* Bîrsan II ¶¶ 266-267 (describing the Ministry of Economy direct control of the process regarding the 2016 failed recapitalization of RMGC). *See generally* Bîrsan II § V.A.

[1065] Respondent's Comments on Claimants' Request for Emergency Temporary Provisional Measures ¶ 77 (stating "Romania is also a shareholder in RMGC"); Respondent's Observations on Claimants' Second Request for Provisional Measures ¶ 99 [redacted]; *id.* ¶ 155 (stating "Romania is a co-shareholder in RMGC"); *id.* ¶ 170 (stating "Romania is also a shareholder in RMGC"); Respondent's Rejoinder to Claimants' Second Request for Provisional Measures ¶ 175 (stating "Claimants' allegation … ignores the fact that Romania is a co-shareholder in RMGC").

[1066] *See Chevron v. Ecuador* (CL-228) ¶¶ 7.98-7.96 (discussing in detail the principle of estoppel in international law).

disputes exclusively to the competent Polish courts, the tribunal, underscoring the difference between contract and treaty claims, held that the tribunal was "indeed require[d] … to consider whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum, constitute breaches of the Treaty."[1068] Similarly, the tribunal in *SGS v. Paraguay* concluded, also in relation to the question whether a contractual forum selection clause must be invoked first before a treaty claim regarding the State's failure to observe obligations in a contract could be heard, as follows:

> [A] decision to decline to hear SGS's claims under Article 11 on the grounds that they should instead be directed ot the courts of Asunción would place the Tribunal at risk of failing to carry out its mandate under the Treaty and the ICSID Convention.[1069]

The *SGS v. Paraguay* tribunal emphasized that to rule otherwise would be to divest the treaty provision of its core purpose and effect. Quoting Professor Gaillard's observations on this point with approval, the tribunal noted that to require a claimant to bring disputes as to whether an obligation was observed solely under the contractual forum selection clause notwithstanding the umbrella clause treaty provision "results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution process of any meaning."[1070] Moreover, the *SGS v. Paraguay* tribunal observed that to require reference to the forum selected for contract disputes would be tantamount to reading in an implied waiver of the right to submit disputes as to claimed treaty violations in accordance with the treaty's provisions.[1071]

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[1067] Memorial ¶ 743.

[1068] *Eureko v. Poland* (CL-89) ¶ 122; *id.* ¶¶ 92-114.

[1069] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated Feb. 12, 2010 (CL-263) ("*SGS v. Paraguay* Decision on Jurisdiction") ¶ 172; *id.* ¶¶ 173-175. Note that the reference in Memorial ¶ 743 n.1494 to CL-90 (the Award dated February 2012 in *SGS v. Paraguay*) is an error – the reference should have been to the Decision on Jurisdiction issued in the *SGS* case submitted here as CL-263.

[1070] *SGS v. Paraguay* Decision on Jurisdiction (CL-263) ¶ 176 (*also citing* Thomas W. Wälde, *Energy Charter Treaty-based Investment Arbitration*, 5 J. WORLD INV. & TRADE 373, 393 (2004) (observing that it is "impractical" to recognize the effects of an "umbrella clause" as a treaty obligation but then in effect to reverse this by creating requirement to submit disputes as to alleged breach to contract forum as pre-condition to presenting treaty claim)).

[1071] *SGS v. Paraguay* Decision on Jurisdiction (CL-263) ¶¶ 177-179 (*also citing Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction dated Oct. 21, 2005 (CL-264) ¶ 115).

### B. Romania Did Not Observe Obligations Entered into with Regard to Gabriel's Investments

556. Claimants demonstrated in their Memorial that Romania failed to observe the obligations it entered into with regard to Gabriel's investments.[1072] As detailed in the Memorial and above,[1073] Romania rejected the terms of its agreements with Gabriel as shareholder of RMGC and failed to observe its obligations in law and in contract in relation to RMGC's mining licenses, *i.e.*, the Roşia Montană Mining License and the Bucium Exploration License.

557. Fundamentally, Romania deprived Gabriel of the benefit of its bargain in which Gabriel would undertake to finance and to devote the very substantial resources needed to develop the Roşia Montană Project and the Bucium Projects, in accordance with the applicable permitting requirements, in exchange for the rights to benefit from the implementation of those Projects, under the terms set forth in the mining licenses and in the law, through its ownership interest in RMGC.

558. In short, the very same course of conduct described above in relation to Romania's failure to accord fair and equitable treatment to Gabriel's investments as a composite act also constituted a failure to observe the obligations that Romania entered into with regard to Gabriel's investments.

## XII. ROMANIA UNLAWFULLY EXPROPRIATED GABRIEL'S INVESTMENTS

559. In the Memorial, Claimants described the legal standards relating to expropriation set forth in the Canada BIT and in the UK BIT and how Romania's conduct effected an expropriation of Gabriel's investments in violation of those standards.[1074]

560. The Parties do not seem to dispute the content of the applicable legal standards or that the expropriation provisions in both BITs extend to measures having an effect equivalent to

[1072] Memorial § XIII.B.

[1073] *See also* Bîrsan II § V.B (demonstrating that the State failed to observe its obligations also in respect of RMGC's capitalization requirements).

[1074] Memorial § XIV.

expropriation, that measures may effect an expropriation incrementally and indirectly, and that a State's intention is not dispositive.[1075]

561. Respondent's argument is that the facts do not support the conclusion that Gabriel's investments have been expropriated. As demonstrated in the Memorial and further below, however, the facts undeniably establish that Romania expropriated Gabriel's investments.[1076]

562. For the reasons explained in the Memorial and above, which need not be repeated again in detail here, it is evident that Romania decided to reject the Roşia Montană Project and not allow it to proceed. It withheld the Environmental Permit unlawfully to wrest a better economic deal from Gabriel and RMGC and then pending Parliament's vote on the Draft Law, notwithstanding that the Project met the legal requirements for obtaining the permit. It thereafter in numerous ways acted consistently with the Government's stated intention not to do the Project, including by declaring the entire area as a protected historical monument and nominating it for World Heritage status, which moreover ensured as a matter of law that the Project area's zoning could not accommodate the Project and no construction permits could be issued.[1077] Romania's political decision to reject the Roşia Montană Project also was a rejection of its joint venture with Gabriel in RMGC, as evidenced by the State's refusal thereafter to participate as a

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[1075] *See generally* Memorial § XIV; Counter-Memorial § 9.

[1076] Respondent wishfully and wrongfully suggests that Claimants do not believe their investments were expropriated. First, Respondent observes that Claimants placed their expropriation claims last in the Memorial. *See* Counter-Memorial ¶ 503. Respondent can take no comfort from the order in which the claims are presented in the Memorial and in this Reply. The expropriatory impacts of Romania's conduct are even more evident following a review of the accumulated effects of Romania's unlawful treatment of Gabriel's investments. Moreover, Romania's conduct simultaneously breached several provisions of both BITs. Second, Respondent asserts (Counter-Memorial ¶ 502) that "Claimants have failed to inform their shareholders of the alleged expropriation." In the very press release it cites, however, Gabriel announces it has filed a request for arbitration and states in relevant part: "[T]hrough its actions and inactions, 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 has thus subjected Gabriel and its investments to treatment in breach of Romania's bilateral investment treaty obligations, causing significant losses to Gabriel. In the Request for Arbitration, Gabriel is seeking the full relief owed to it under the provisions of the Treaties for the deprivation of its rights to develop the Project as a consequence of Romania's treaty violations." Gabriel Press Release dated Jul. 21, 2015 (Exh. R-306). Respondent evidently overlooked this passage which clearly describes and covers Claimants' expropriation claims.

[1077] *See supra* § V.B.7. *See also* Podaru § IV.C.

shareholder in maintaining the minimum capital requirements for RMGC required by law.[1078] Romania's rejection of the Roşia Montană Project and RMGC extended to the Bucium Projects as well, evidenced by the State's failure to act upon RMGC's rights to obtain the exploitation licenses for the Tarniţa and Rodu Frasin deposits, but also due to the fact, at least for the Rodu-Frasin deposit, that its feasibility as a project was dependent upon development of the Roşia Montană Project so that the rejection of the one entailed the rejection of the other as well.[1079]

563. Although the State's rejection of the Roşia Montană Project, its refusal to honor RMGC's acquired rights, and the ruinous effect this unlawful and arbitrary conduct had on Gabriel's investments cannot be reasonably or credibly denied, Respondent attempts to do so. In opposing Claimants' expropriation claim, Respondent asserts with respect to the entire course of conduct comprising the liability-creating composite act, that "none of these allegations has any factual basis."[1080] We respond briefly below to Respondent's gross and serial mischaracterizations of the facts, which are both untethered to and at war with the evidence, including numerous contemporaneous statements of Government officials in meetings, documents, and public statements and Government actions in conformity with those statements, as well as numerous contemporaneous communications from RMGC to Gabriel.[1081] After addressing Respondent's arguments on the facts, we summarize why those facts establish that Respondent expropriated Claimants' investments.

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[1078] *See supra* § V.C.

[1079] *See supra* § VI.

[1080] Counter-Memorial ¶ 645.

[1081] The bases for Claimants' factual narrative are exhaustively set forth in detail and explained in the witness statements, legal opinions, and expert reports submitted herewith and with the Memorial to which the Tribunal is respectfully referred for a full treatment of the issues, which are only summarized below and elsewhere in this Reply.

### A. Respondent's Challenges to the Facts Establishing Claimants' Expropriation Claims Are Baseless

564. For the reasons summarized below, Respondent's challenges to the facts establishing Claimants' expropriation claims are baseless.

565. Respondent first denies that the Government coercively demanded to renegotiate its economic stake in the Project and that the Government linked RMGC and Gabriel's meeting this demand to the Government's willingness to issue the Environmental Permit and thus blocked the Project until this condition was met.[1082] According to Respondent, there is "no evidence" supporting Claimants' claims.[1083] Respondent's denials are conclusively rebutted as explained above in sections II and III and in the witness statements of [REDACTED], which identify and explain the numerous contemporaneous statements of Romanian officials conditioning the Permit and/or the Project on meeting the State's demands for more shares and higher royalty, culminating in the "25 and 6" statements before, during, and after the November 29, 2011 TAC meeting by [REDACTED].[1084] This same condition was continued under the succeeding Ponta government.[1085] Contrary to Respondent's weak retort,[1086] and as the Tribunal will appreciate upon perusing the statements, they are most certainly not taken out of context.

566. Respondent next claims that other than "hearsay," there is no evidence of any improper official "interventions" during the November 29, 2011 TAC meeting, which Respondent contends proceeded in a "regular manner" and that, in any event, the Project was not ready to be permitted because of "outstanding technical issues to be addressed in future meetings."[1087] This argument is essentially a variation on the Respondent's "no harm, no foul"

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[1082] Counter-Memorial ¶¶ 511-525, 559-60.

[1083] Counter-Memorial ¶ 576.

[1084] *See supra* §§ II-III; [REDACTED].

[1085] [REDACTED]

[1086] Counter-Memorial ¶ 577.

[1087] Counter-Memorial ¶ 519.

refrain that at all events, the Project did not meet the legal requirements for issuance of the Environmental Permit.[1088] These arguments do not withstand scrutiny.

567. As explained principally by Messrs. Avram and Tănase and as reflected in the company's contemporaneous communications, RMGC believed reasonably that the November 29, 2011 TAC meeting would be the last substantive meeting before issuance of the Environmental Permit.[1089] Based on the transcript of that meeting, it is clear that TAC President Anton intended to finalize the review of the EIA Report and complete the "checklist" formally recording the TAC members' points of view on the Report as a final step before endorsing issuance of the Environmental Permit to the Government.[1090] Consistent with this evident intent, Ms. Mocanu and others repeatedly referred throughout the meeting to writing conditions for the Environmental Permit.[1091] It is equally evident from the audio recordings and transcript of the meeting, however, that following numerous phone calls to Mr. Anton and two to Ms. Mocanu from the General Secretariat of the Government, TAC President Anton declared the TAC's technical review over but did not complete the checklist and instead noted issues to be addressed despite the closure of the technical review.[1092] None of those issues should have prevented completion of the checklist.[1093]

568. This course of events demonstrated by the recordings of the November 29 meeting is entirely consistent with [redacted].[1094]

[1088] Counter-Memorial ¶¶ 519, 525-526.

[1089] Avram II ¶¶ 2-12; Tănase III ¶¶ 29-30.

[1090] [redacted]

[1091] [redacted]

[1092] [redacted]

[1093] Mihai § VIII.A; Mihai II § VI.A.

[1094] [redacted]

569. Even if the Tribunal were not to credit [redacted], it is nonetheless clear that very soon after the November 29 meeting, even the additional issues identified at the TAC meeting were addressed, including the Ministry of Environment's receiving what in substance was the endorsement from the Ministry of Culture.[1095] For this reason, and contrary to Respondent's contentions, all legal requirements were met and a decision by the Ministry of Environment to issue the Environmental Permit should have been taken according to the law by January 31, 2012.[1096] But it was not, first because of the non-fulfillment of the Government's economic demand and then because of the subsequent resignation of Prime Minister Boc due to anti-austerity street protests unrelated to the Project and Prime Minister Ponta's effective moratorium on the Project during the remainder of 2012 until after national elections.[1097] As a result of these events, the Government also failed to act on RMGC's offer in January 2012 through which RMGC tried to satisfy the Government's illicit condition of an increased economic stake to issue the Environmental Permit and allow the Project to proceed.[1098]

570. Respondent next asserts that Claimants' allegations are a "*non-sequitur*" and their case "is simply not credible" because if the Government had succeeded in having its demands satisfied "in the November 2011 renegotiations," it would not then have blocked permitting.[1099] Whether by accident or design, Respondent misconstrues and misstates matters. Claimants of course do not claim that they satisfied the Government's demands by November 2011. Indeed, that is why [redacted].[1100]

571. Respondent also seeks to portray RMGC as having voluntarily offered [redacted]

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[1095] Mihai § VIII.A.2; Mihai II § VI.A.1; Schiau II § VI.A.

[1096] Memorial ¶ 366; Mihai § VIII.A.3; Mihai II § VI.A.

[1097] *See supra* § II. *See also* Memorial ¶¶ 387-388.

[1098] *See supra* § II. [redacted]

[1099] Counter-Memorial ¶ 523.

[1100] Memorial ¶¶ 369-380; *supra* § II.

[REDACTED].[1101] Respondent's characterization of these events is simply not true, and is the equivalent of saying that someone held up voluntarily parted with his or her wallet. As explained by [REDACTED], RMGC and Gabriel had no real choice but to try to satisfy the State's condition for the Project to advance.[1102] [REDACTED][1103]

572. Respondent likewise asserts that, far from blocking matters, the Government was acting on permitting in good faith in 2012 as shown by its renewal of Dam Safety Permits in April 2012 and by what Respondent describes benignly as the Government's "liais[ing] with RMGC in relation to its updated Waste Management Plan."[1104] First, because the Government was previously judicially ordered to issue the Dam Safety Permits in view of its baseless, politically-motivated failure to do so, its renewal of those permits is hardly cause for celebration and certainly does not establish that the Government was actively advancing Project permitting in 2012, especially in view of its inexcusable and unlawful failure to issue the Environmental Permit.[1105] Similarly, far from helpfully liaising with RMGC as to the Waste Management Plan, approval of that plan was politically blocked within the Ministry of Environment in 2012 as explained in detail by [REDACTED],[1106] which Respondent simply ignores. Moreover, the Ministry's improperly delayed approval of that plan obviously does not provide a legitimate reason for the Government's not issuing the Environmental Permit.[1107]

573. Far from being random or "haphazard" as Respondent suggests,[1108] the same economic demand in the same percentages being made by successive governments as a condition

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[1101] Counter-Memorial ¶¶ 516-517.

[1102] [REDACTED]

[1103] [REDACTED]

[1104] Counter-Memorial ¶ 524.

[1105] Memorial ¶¶ 273-278; [REDACTED].

[1106] [REDACTED] *See also* Memorial ¶ 392.

[1107] [REDACTED]; Mihai II § VI.A.2.

[1108] Counter-Memorial ¶ 559.

to issuing the Environmental Permit and allowing the Project to proceed reflects and establishes coordinated conduct by the Government vis-à-vis the Project. At a more basic level, the evidence also shows that under both Prime Minister Boc and Prime Minister Ponta, the Government was applying a political criterion to permitting the Project that was not sanctioned in law. Whereas this criterion under Boc was reflected in statements by key decision-makers like the Minister of Culture who acknowledged that the ruling coalition would need to take a political decision to proceed (presumably after RMGC and Gabriel paid the desired ransom of more shares and higher royalties),[1109] this political criterion reached its apogee under Prime Minister Ponta with the Government overtly making Parliament's vote on the Draft Law determinative of whether the Project would proceed.[1110]

574. Similar to its effort to rewrite history with respect to the Government's coercive economic demands, Respondent continues its tall tale in describing the circumstances leading to the Draft Law and the Draft Agreement in 2013. According to Respondent, it was RMGC and Gabriel who sought the Government's assistance via a special law and worked cooperatively with the Government thereafter on the Draft Law and the Draft Agreement.[1111] The purported motivation for seeking this assistance was RMGC's and Gabriel's realization that they lacked a social license and needed the Government's assistance to overcome opposition to the Project.[1112]

575. This myth is debunked by the detailed statements of [redacted] which, among other things, explain by reference to [redacted] and to numerous contemporaneous statements of senior Government officials showing that the Government, not RMGC, insisted on a special law and conditioned issuance of the Environmental Permit and doing the Project at all on Parliament's adoption of a special law.[1113]

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[1109] [redacted]

[1110] Memorial § VIII.A.5.

[1111] *See, e.g.*, Counter-Memorial ¶¶ 528, 571-575.

[1112] Counter-Memorial ¶¶ 259-266.

[1113] [redacted] *See also supra* § IV.B.

576. The evidence also establishes that: (i) although RMGC had supported long-pending legislation to effectuate general improvements to the mining law (which the Government also recognized were desirable), [redacted], these improvements were not necessary to do the Project (a view the Government shared[1114]);[1115] (ii) RMGC was not motivated to seek a special law due to the absence of a social license because it had – and believed it had – a social license at all relevant times;[1116] (iii) RMGG did not otherwise need or request a special law, and indeed objected to a special law and also requested that the Environmental Permit be issued through the lawful administrative process before any law were submitted to Parliament;[1117] (iv) RMGC and Gabriel did not engage in meaningful negotiations or have a meaningful opportunity to comment on the draft of the Draft Law and Draft Agreement ultimately prepared and endorsed by the Government and sent to Parliament; and (iv) RMGC and Gabriel were not willing co-venturers with the Government on the path to Parliament.[1118]

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[1114] *See* [redacted]; Transcript of Parliamentary Special Commission hearing dated Oct. 15, 2013 (Exh. C-1531) at 7 (Minister Delegate Dan Şova testifying that, "Of course, [RMGC] does not need this law, as the current situation is convenient for them. The law was made for the Romanian state, not for them."). *See also* Counter-Memorial ¶ 369.

[1115] *See supra* § IV.B. [redacted]

[1116] *See supra* § IV.A.

[1117] Respondent refers multiple times to a statement in a Gabriel March 2010 securities filing to the effect that obtaining the necessary approvals and authorizations "may require amendments to existing legislative or regulatory frameworks by the Romanian Federal, Regional, County, or Local Governments in order to complete the permitting and financing of the Roşia Montană Project." *See, e.g.,* Counter-Memorial ¶¶ 571, 574 (citing Gabriel Resources, 2009 Annual Information Form, dated Mar. 10, 2010 (Exh. C-1807) at 32). Contrary to Respondent's contention, this statement does not reflect the company's "expectations" about the Project or somehow presage a need for a special law. Instead, it is listed under the heading of "Project Approval Risks," one of which as in any mining project was risk related to permitting. Gabriel Resources, 2009 Annual Information Form, dated March 10, 2010 (Exh. C-1807) at 32. As [redacted] explains, the statement reflects the fact that Project opponents like former Minister of Environment Korodi invoked skewed interpretations of the law to delay and obstruct the permitting process, and that, "[i]f such politically-motivated blockages were to continue, one possible solution could have been legislation that would clarify the matter so as not to leave room for abuse." [redacted] As [redacted] further explains, however, "[t]he worst such interpretative abuses were later resolved favourably from the company's perspective by the Inter-Ministerial Commission in March 2013." *Id.*

[1118] *See supra* § IV.B; [redacted]. For the reasons explained by Mr. Henry, Respondent's claim that positive statements by Mr. Henry about Parliament's review of the Draft Law and the Project signaled Gabriel's acceptance of the process the Government had foisted upon it is erroneous. Henry II ¶¶ 44-45. *See also* Counter-Memorial ¶ 529. Furthermore, Mr. Henry's reference to Parliament's review of

577. Respondent's related assertion that the Government never linked issuance of the Environmental Permit to Parliament's vote on the Draft Law is directly refuted by public statements of responsible Romanian officials, which Respondent simply chooses to ignore.[1119] As explained by [redacted],[1120] Respondent ignores numerous statements to the contrary by senior Romanian officials, including Minister of Environment Plumb, who stated on September 7, 2013 to the press that the "Environmental Permit for Roşia Montană will be granted depending on the decision taken by the Parliament of Romania after public debates,"[1121] and then confirmed this position in writing to the Parliament on October 18, 2013, stating "[t]he environmental agreement [i.e., the Permit] will only be issued provided the Parliament's approval of this draft law . . . The decision thus rests with the Parliament of Romania."[1122]

578. In a variation on this theme and emblematic of the extent to which Respondent ignores and distorts the evidence, Respondent accuses Claimants of improperly "linking the fate of the Roşia Montană Law and the fate of the Project," asserting that what was voted on by Parliament "was the [Draft] Law, not RMGC's right to implement the Project under the License."[1123] Once again, Respondent's version of the facts is shown to be baseless and unreliable by the unequivocal statements of numerous senior officials before the Government sent the Draft Law to Parliament linking the fate of the Project to Parliament's vote on the Draft Law, and then later confirming that the Project would not be done once Parliament voted to reject it.[1124] By way of examples only, on September 12, 2013, Prime Minister Ponta confirmed that it was "very clear that as a result of the law being rejected, the project will not be

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the Project reflected the reality that the Government considered Parliament's vote on the Draft Law to be synonymous with and a proxy for a decision on whether to do the Project at all.

[1119] Counter-Memorial ¶ 531.

[1120] [redacted]

[1121] [redacted]; *Rovana Plumb: The approval of Ministry of Environment for Roşia Montană, depending on the decision of Parliament*, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) at 1-2.

[1122] [redacted]; Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-776).

[1123] Counter-Memorial ¶ 532.

[1124] [redacted]

implemented";[1125] Prime Minister Ponta confirmed this fact in a televised interview a little more than a year later on October 19, 2014, stating "the Parliament rejected the law, so the exploitation will not be made."[1126] It is thus clear that the Government combined the fate of the Draft Law and that of the Project, not RMGC or Gabriel.

579. Respondent next argues that Prime Minister Ponta, Senator Antonescu, and other political leaders had an "individual stance" on the Draft Law, but claims these views "had no effect on the Project" or the License.[1127] As apparent proof of this observation, Respondent also observes "the Parliament eventually rejected the Roşia Montană Law nearly unanimously."[1128] As explained by Mr. Tănase, however, Prime Minister Ponta and Senator Antonescu – the political leaders of the ruling coalition – and other party leaders expressed their views prior to the consideration of the Draft Law by the Senate committees and again before the Special Commission voted on the Draft Law, that they did not support the Law and that it should be rejected.[1129] Indeed, Prime Minister Ponta admitted giving such political direction to reject the Law to his fellow PSD members in Parliament.[1130] As a result, it would be surprising if Parliament did not almost unanimously vote to reject the Draft Law.

580. One of the few things Respondent seems to agree with Claimants on is that Parliament's rejection of the Draft Law should not have had any effect on issuance of the Environmental Permit.[1131] Respondent quickly retreats, however, to its fictional narrative, claiming that the permitting process remains open. Referring to TAC meetings in 2014 and 2015, Respondent maintains what it characterizes as its "good faith and willingness to continue to consider the development of the Project" once RMGC offers solutions to address issues with

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[1125] Tănase III ¶ 207.d; Victor Ponta and Dan Şova's statements regarding the bill on the Roşia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 1 (Prime Minister Victor Ponta).

[1126] Tănase III ¶ 207.i; Interview of Prime Minister Ponta, Realitatea TV, dated Oct. 19, 2014 (Exh. C-416) at 5 (Prime Minister Ponta).

[1127] Counter-Memorial ¶ 533

[1128] Counter-Memorial ¶ 533.

[1129] Tănase III ¶¶ 176-200. *See also supra* § IV.D.

[1130] Tănase III ¶ 196.

[1131] Counter-Memorial ¶¶ 531, 535.

the Project that prevented issuance of the Environmental Permit and to obtain the "required" social license.[1132]

581. As [redacted] aptly observes, the notion that the permitting process for the Project remains open is "utterly preposterous."[1133] For the reasons explained above and further in the witness statements of [redacted], the Project was *de facto* over as a result of Parliament's successive votes rejecting the Draft Law.[1134] Far from being evidence of Respondent's good faith, the TAC meetings in 2014 and 2015 were a pretextual pretense to process that confirmed the Government's duplicitous, non-transparent approach to the Project.[1135] Reflecting this duplicity, the documents produced by Respondent in this arbitration confirm that the TAC materially misrepresented to RMGC in 2015 the reason it did not commission a new study related to the TMF, suggesting no TAC members provided conditions for the study when it turns out that many did in writing.[1136]

582. Moreover, as explained above, there was nothing to fix about the Project for it to qualify for the Environmental Permit; a decision to issue the Permit should have been taken in January 31, 2012 and certainly a decision should have been taken after the Parliamentary hearings in 2013 given the chorus of praise heaped on the Project by numerous senior Government officials confirming once again that it met the permitting requirements.[1137] Likewise, as also explained above, a "social license" was not a permitting requirement and, in any event, the Project enjoyed a social license at all relevant times.[1138]

583. With respect to Bucium, Respondent similarly claims that the permitting process is on-going and that it is continuing (for years) to ponder RMGC's applications for exploitation

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[1132] Counter-Memorial ¶¶ 531-532, 534-535.

[1133] [redacted] *See also id.* ¶¶ 53-59.

[1134] *See supra* § V; [redacted].

[1135] *See supra* § V.

[1136] [redacted]

[1137] Mihai §§ VIII.A-B; Mihai II § VI. *See also supra* § III.

[1138] *See supra* §§ III.C, IV.A. *See also* Mihai II § V.G; Boutilier § 3; Henisz ¶¶ 23-43; Tănase III ¶¶ 86-128; Henry II ¶¶ 60-64, 77-81; Lorincz II ¶¶ 91-120.

licenses for Bucium.[1139] For the reasons explained above and in the witness statement of , that claim too is simply not credible.[1140]

584. Respondent's efforts to defend the *bona fides* of the criminal and civil investigations of RMGC also are unavailing for the reasons explained above and in the witness statements of ,[1141] notably including that since the provisional measures hearing, the conduct of ANAF in its VAT re-assessment has shown even more the illicit connection between the actions of Romania's enforcement authorities and this arbitration.[1142]

585. Respondent also seeks to defend Minvest's failure to cooperate in recapitalizing RMGC, claiming that Minvest did not have sufficient resources to do so and, in any event, the State is but a distant commercial owner not responsible for Minvest's decision-making.[1143] For the reasons explained above, regardless of whether or not Minvest had resources to invest in RMGC, it failed to cooperate at all in addressing recapitalization, thus placing RMGC at risk of dissolution.[1144] This indifference arose only after Parliament's negative treatment of the Draft Law and the resulting rejection of the Project by the Government and is the result of that rejection.[1145] Moreover, the Government clearly controls and is responsible for Minvest's actions in all relevant respects.[1146]

586. Although not a keystone of Claimants' case, the Government's support of a moratorium on the use of cyanide in mining was clearly consistent with the Government's evident determination not to do the Project.[1147] As recognized by various Government officials, including successive NAMR Presidents and Minister of Environment Plumb, cyanide processing

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[1139] Counter-Memorial ¶¶ 548-554.

[1140] *See supra* § VI; .

[1141] Counter-Memorial ¶¶ 405-415.

[1142] *See supra* § V.D.

[1143] Counter-Memorial ¶ 540.

[1144] *See supra* § V.C.

[1145] *See supra* § V.C.

[1146] *See supra* § V.C; Bîrsan II § V.

[1147] Counter-Memorial ¶ 541. *See also* Memorial ¶¶ 614-624.

was the only feasible methodology to use in view of the ore body at Roşia Montană.[1148] As a result, banning the use of cyanide was incompatible with the Project.

587. Respondent next tries but fails to explain away its evident use of the 2015 LHM, following its failure to correct the admittedly erroneous 2010 LHM, and its UNESCO application to make the Project area a "no-go" zone for mining, thus rendering useless and valueless RMGC's mining License and the previously issued and still valid and existing ADCs for the Project area.[1149]

588. With respect to its unlawful conduct regarding the LHMs, Respondent basically claims that like the Ministry of Environment, the Ministry of Culture is just waiting to work cooperatively with RMGC once RMGC meets the permitting requirements.[1150] As with the Ministry of Environment, Respondent's conduct belies the notion advanced for purposes of this arbitration that the Ministry of Culture is willing to engage in good faith on the Project with RMGC. Furthermore, as explained above and in the witness statement of [redacted] and the legal opinions of Professors Schiau and Podaru, Claimants and RMGC clearly did not assume the risk of Respondent's unlawful conduct with respect to the 2010 LHM, the 2015 LHM, or the ADCs issued for the Project area.[1151] Nor did they assume the risk that Respondent would completely disregard the years of extensive archaeological research that RMGC funded as required by law and that the State conducted in order for the State to disavow the 2004 LHM in litigation and support the clearly erroneous 2010 LHM and the 2015 LHM. Finally, contrary to Respondent's contention,[1152] in addition to reflecting an unmistakable intent not to do the Project, the UNESCO application has present, immediate legal effects in the Project area that preclude mining or any other industrial activity.[1153]

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[1148] Memorial § VIII.B.

[1149] Counter-Memorial ¶¶ 542-546.

[1150] Counter-Memorial ¶ 545.

[1151] *See supra* § V.B. *See also* [redacted]; Podaru §§ II, IV.C; Schiau II § IV.

[1152] Counter-Memorial ¶ 546.

[1153] *See supra* § V.B.7.

589. Finally, Respondent points to the fact that RMGC's Mining License "continues to be valid and in force" suggesting that Claimants' investments remain protected and unharmed.[1154] For all of the reasons explained above, however, Respondent's unlawful course of treatment of the Project and RMGC has essentially eviscerated the Mining License and associated development rights of all value. Because of the State's evident determination not allow the Project to proceed, these rights exist only in form, not in substance which confirms both the expropriatory intent and effect of the State's course of conduct.

590. The evidence in this arbitration thus conclusively shows a course of conduct beginning in August 2011 and continuing up to and past Parliament's rejection of the Draft Law that reflects a decision by the State first not to do the Project according to the law and the terms to which the State, RMGC, and Gabriel had agreed, and then not to do the Project at all. Try as it might to deny it, and unless Romania completely changes its mind and breathes political life into the Project, that is the reality.

## B. Romania's Measures Constituted an Indirect Expropriation of Gabriel's Investments in Breach of the BITs

591. Both Gabriel Canada and Gabriel Jersey owned or controlled, directly or indirectly, investments as defined by the respective BITs. Gabriel's investments were unlawfully expropriated and as a result, Gabriel incurred very substantial losses.

### 1. The Expropriation Provisions of the Respective BITs Extend to All of Gabriel's Investments

592. The Canada BIT provides that investments of covered investors shall not be expropriated except under the conditions set forth in Article VIII.[1155] The analogous provision in the UK BIT is contained in its Article 5.[1156]

593. Article VIII of the Canada BIT applies to the expropriation of "[i]nvestments or returns of investors."[1157] Similarly, Article 5 of the UK BIT applies to "[i]nvestments of

[1154] Counter-Memorial ¶ 547.

[1155] *See* Canada-Romania BIT (Exh. C-1) Art. VIII.

[1156] *See* UK-Romania BIT (Exh. C-3) Art. 5.

[1157] Canada-Romania BIT (Exh. C-1) Art. VIII.

nationals or companies," and includes the requirement that where the assets of a company are expropriated, the conditions for a lawful expropriation must be applied "to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies … who are owners of those shares."[1158]

594. Investment is a defined term under the Canada BIT and includes any kind of assets "owned or controlled either directly, or indirectly through an investor of a third state."[1159] As described above,[1160] Gabriel Canada's covered investments thus includes (a) the Roşia Montană License; (b) the Bucium Exploration License and associated rights acquired by law; (c) shares in RMGC; (d) Gabriel Jersey's contract rights under RMGC's Articles of Association and rights under loan agreements extended by Gabriel Jersey to Minvest in connection with RMGC's recapitalizations; (e) extensive engineering studies and designs developed for purposes of the Projects; and (f) properties and other assets acquired by RMGC for purposes of Project development.

595. Gabriel Jersey's investments are described similarly and meet the definition of investment set forth in Article 1(a) of the UK BIT.[1161]

596. The value of all of these various investments is tied to the progress made by RMGC in project development and in advancing the permitting process. That these investments have any material value, however, depends entirely upon the prospect of developing the Roşia Montană Project and the Bucium Projects. As noted in the Memorial,[1162] Gabriel's investments made in and through RMGC may be described as a bundle of rights, which derived their value from the prospect that the Project would be developed, and thus also were susceptible to expropriation by indirect means when Romania frustrated those prospects.

597. Romania's rejection of the Roşia Montană Project, RMGC, and the Bucium Projects substantially deprived these assets of any value. In other words, as Romania has

[1158] UK-Romania BIT (Exh. C-3) Art. 5 (2).

[1159] Canada-Romania BIT (Exh. C-1) Art. I(g).

[1160] *See supra* § VII.A.1.

[1161] *See supra* § VII.B.1.

[1162] Memorial ¶¶ 795-796.

rejected and will not allow the Roşia Montană Project and the Bucium Projects to be developed, the licenses have no value, the loans to Minvest associated with recapitalizations of RMGC and which depend for their repayment on RMGC dividend payments have no value, extensive geological and mining data, engineering studies, and other technical data developed to guide project development have no value,[1163] properties acquired solely for purposes of project development have no material value, and the shares in RMGC, whose sole income producing assets were the license rights to develop the Projects, are also worth nothing. The value these assets had collectively immediately prior to the conduct that lead to the effective expropriation is as set forth in Compass Lexecon's reports.[1164]

### 2. Gabriel's Investments Include Acquired Rights Relating to Bucium

598. The basis, nature, and scope of the rights that RMGC had acquired in relation to the Bucium Exploration License are described by Professor Bîrsan.[1165]

599. Respondent contends that under Romanian law RMGC does not "own any mining or other rights" in relation to the Bucium perimeter, and has only "the procedural right to have its applications processed in accordance with the applicable law.[1166] Respondent then argues that such a "procedural right" does not qualify as an investment as defined by the BITs,[1167] and that it cannot be the object of an expropriation.

600. Respondent's characterization of the rights acquired by RMGC in relation to the Bucium Exploration License, however, is incorrect. As explained above and by Professor Bîrsan, having undertaken exploration, determined the exploitation to be feasible, and submitted the necessary documentation, RMGC had a right to the exploitation licenses for the Bucium properties, not merely a right to negotiate for them.[1168]

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[1163] *See* Memorial § IX.E (Romania by contrast has been unjustly enriched).

[1164] *See* Compass Lexecon and Compass Lexecon II.

[1165] *See* Bîrsan II § IV. *See also supra* § VI.

[1166] Counter-Memorial ¶¶ 582, 586.

[1167] Counter-Memorial ¶¶ 586, 591, n.970.

[1168] *See supra* § VI; Bîrsan II § IV.

601. As such, the rights acquired by RMGC are significantly different from those at issue in *Oxus Gold v. Uzbekistan* on which Respondent relies.[1169] In that case, the claimant had acquired a contract right to engage in a process of negotiation to seek agreement with the State on the terms of a joint venture to develop a certain mining property, including as to the percentage of State ownership interest that would be agreed. The contract rights at issue did not include a promise of reaching agreement and indeed the contract included express provisions in the event that terms could not be agreed.[1170] On that basis the tribunal found that the claimant had not secured development rights, only rights to negotiate to seek agreement. Moreover, such negotiations had taken place with the State, but the parties did not reach agreement. Thus, the tribunal held that a right to negotiate with the State, when there is not an obligation as to the outcome, cannot be an object of expropriation by the State when an agreement is not reached.[1171]

602. Respondent cites two other cases,[1172] but neither supports its arguments regarding RMGC's rights in relation to Bucium. In the first, *Emmis v. Hungary*, the claimant argued that by participating in a tender it had acquired rights to a fair procedure, which moreover had been expropriated by the State's alleged unfair process.[1173] The tribunal held that the right to a fair process when agreeing to participate in a tender did not qualify as a property right that could be expropriated.[1174] In the second, *Generation Ukraine v. Ukraine*,[1175] the tribunal found more

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[1169] Counter-Memorial ¶ 584 (*citing Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award dated Dec. 17, 2015 ("*Oxus Gold v. Uzbekistan*") (RLA-62)).

[1170] *Oxus Gold v. Uzbekistan* (RLA-62) ¶ 266, 279.

[1171] *Oxus Gold v. Uzbekistan* (RLA-62) ¶ 301. Notably, the tribunal's ruling related solely to the question whether the subject right to negotiate could be the object of an expropriation. Separately, the tribunal considered that the State was obligated to accord fair and equitable treatment in relation to the right of negotiation and considered on the merits whether the claimant had received such treatment. *See id.* ¶ 325 ("Claimant had a legitimate expectation that it would be granted the right to develop the Khandiza Deposit, provided it would be able to finalize the terms of cooperation with the Uzbak Parties and the State under mutually acceptable terms. … Claimant was entitled to expect that Respondent would act in good faith, according to the law.").

[1172] Counter-Memorial ¶ 585.

[1173] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated Apr. 16, 2014 ("*Emmis v. Hungary*") (RLA-60) ¶ 242.

[1174] *Emmis v. Hungary* (RLA-60) ¶ 253. In that case, the investment treaty at issue limited investor-State arbitration to expropriation claims. The tribunal concluded, therefore, only that a claim of expropriation was not possible in relation to such rights. Notably, the *Emmis v. Hungary* tribunal did not rule that there was not a covered investment and it did not rule out the possibility that the claimant's investment was denied fair and

basically that the right that the Claimant alleged had been expropriated did not exist and for that reason it could not have been expropriated.

603. These cases are therefore simply inapposite to Bucium. In any event, even if the rights to obtain the Bucium exploitation licenses were not themselves expropriated (which they were), Gabriel has incurred losses associated with the value of those rights, from which it can no longer benefit as consequential damage resulting from the unlawful expropriation of its other investments.[1176]

### 3. Romania's Measures Constituted an Indirect Expropriation of Gabriel's Investments

604. Contrary to Respondent's arguments,[1177] Romania's treatment of the Roşia Montană Project, RMGC itself, and the Bucium Projects constituted an indirect expropriation of Gabriel investments in RMGC.

605. With regard to Gabriel Canada's claim, Respondent argues that Romania's conduct does not constitute an indirect expropriation particularly as elaborated in Annex B of the Canada BIT.[1178] In fact, Annex B is nothing more than an elaboration of the principles evident from the many authorities cited by Claimants in support of their expropriation claim in the Memorial[1179] from which it is clear, for the reasons explained in the Memorial, that Romania's conduct constitutes an indirect expropriation of Gabriel's investments. For this reason,

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equitable treatment of its investment. *See id.* ¶ 144 ("Had the Tribunal been granted a broader jurisdiction, it would have been possible to determine whether Claimants' investments in Sláger would benefit from, for example, the Treaties' fair and equitable treatment standard when it came to adjudging the Respondent's conduct of the bid.").

[1175] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated Sept. 16, 2003 (CL-135) ¶ 22.1 ("There cannot be an expropriation of something to which the Claimant never had a legitimate claim).

[1176] *See infra* § XIII.A.1. *See also Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated May 20, 1992 (CL-129) ¶ 165 ("Moreover, it has been long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also 'expropriated the contractual rights' of the operating company.").

[1177] Counter-Memorial ¶¶ 561 et seq., ¶¶ 588 et seq.

[1178] Counter-Memorial ¶ 561 *et seq*.

[1179] Memorial ¶¶ 760-794.

Claimants did not consider it necessary to elaborate these points again by reference to each of the criteria listed in Annex B. Nonetheless, because for Respondent six of one does not seem to be a half a dozen of another, we address below summarily the criteria in Annex B.

606. Annex B of the Canada BIT[1180] states that a determination of whether a measure or series of measures constituted an indirect expropriation "requires a case-by-case, fact-based inquiry" that considers several factors. These factors all support the conclusion that Gabriel's investments were indirectly expropriated within the meaning of the Canada BIT as discussed below. The analysis moreover is the same in respect of Gabriel Jersey's claim under the UK BIT.[1181]

**a. The Impact of the Measures Was Severe as They Deprived Claimants' Investments Entirely of Their Economic Value**

607. For the reasons explained above, Romania's conduct deprived Gabriel's investments entirely of any economic value, as the value of those investments was derived solely from the right to develop the Roşia Montană Project and the Bucium Projects, which rights were blocked, frustrated, and manifestly repudiated. Contrary to Respondent's assertion, Claimants' rights unquestionably do not "remain intact."[1182] They exist in form, but Respondent's course of unlawful conduct has robbed them entirely of substance and value because the evidence establishes beyond doubt that Respondent has decided not to allow the Projects to proceed.

608. Respondent is therefore manifestly wrong to suggest that Claimants would be in the same place today regardless of the challenged conduct and that they have at most suffered permitting delays.[1183] But for Respondent's unlawful course of conduct and had Respondent instead acted lawfully and in good faith, Claimants in all probability would have a successful

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[1180] Canada-Romania BIT (Exh. C-1) Annex B.

[1181] *See* Counter-Memorial ¶ 589 (*citing Starrett Housing Corp. v. Islamic Republic of Iran*, Award No. ITL 32-24-1 of Dec. 19, 1983, *reprinted in* 4 IRAN-U.S. CL. TRIB. 122 (1985) (CL-119) at 154).

[1182] Counter-Memorial ¶ 566.

[1183] Counter-Memorial ¶¶ 567-568.

Project in Roşia Montană and exploitation licenses in hand for the promising Bucium Projects, and would not be pursuing an arbitration claim.[1184]

609. For these reasons, it is therefore irrelevant that RMGC currently still has its License and Claimants have associated and related rights. As in *Vivendi v. Argentina II*,[1185] "the Claimants were radically deprived of the economic use and enjoyment of their investment, the benefit of which … had been effectively neutralized and rendered useless. …[the State] thus expropriated Claimants' right of use and enjoyment of their investment under the Concession Agreement." Similarly, in *UP and CD Holding*, the tribunal held that "[e]ven if shares remain legally held by a claimant, if a State's measures result in the loss of the shares' economic value, this may be considered an indirect expropriation.," and where the State "dispossessed Claimants of the greatest part and the economic heart of their investment, bringing CD Hungary to a standstill," and "[b]y destroying CD Hungary's economic value," the State had "substantially dispossessed Claimants of their investment."[1186]

610. Respondent also wrongly asserts that "[a]t most, the Claimants have suffered from permitting delays."[1187] Not only is that not what Claimants claim, it is not what the facts show. Plainly and simply, Romania has rejected, not merely delayed, the Project. Respondent's claims that the permitting process remains open are simply untrue.

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[1184] [redacted]

[1185] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award dated Aug. 20, 2007, ICSID Case No. ARB/97/3 (CL-113) ("*Vivendi v. Argentina II*") (CL-113) ¶ 7.5.34.

[1186] *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated Oct. 9, 2018 (CL-247) ¶¶ 305, 354.

[1187] Counter-Memorial ¶ 568.

### b. The Measures Substantially Interfered with and Frustrated Entirely Claimants' Distinct, Reasonable, Investment-backed Expectations

611. Contrary to Respondent's suggestion,[1188] Claimants have demonstrated the measures substantially interfered with and frustrated entirely Gabriel's distinct, reasonable, investment-backed expectations, including the most basic expectation that the host country will follow the law.

612. In short, after investing hundreds of millions of dollars in the process of project development and as needed to participate in the administrative permitting process, Gabriel reasonably expected that the environment permit for the Roşia Montană Project would be issued if the Project met the legal requirements for issuance of that permit. Although the competent authorities repeatedly confirmed that the Project met the permitting requirements, the Government did not issue the Environmental Permit. Instead, it abandoned the lawful permitting process and abdicated its decision-making responsibility by making Parliament's vote on a special law determinative as to whether the Government would do the Project. The Government then did not issue the permit and openly rejected the Project contrary to law, without due process, and without compensation.

613. Likewise, after funding extensive archaeological research in the Project area, Gabriel reasonably expected that the ADCs that had been issued by the Ministry of Culture would be given effect in accordance with law. Although the ADCs were not annulled or revoked, the Ministry of Culture refused to correct the 2010 LHM that had been issued in disregard of the ADCs, and thereafter issued the 2015 LHM and nominated the entire Roşia Montană area as a UNESCO World Heritage site in disregard of the still valid and existing ADCs and the still valid and existing Roşia Montană License.

614. Furthermore, after investing in the mining exploration program within the perimeter of the Bucium Exploration License and establishing the feasibility of developing the Rodu-Frasin and Tarniţa deposits, Gabriel reasonably expected that RMGC's right under the Bucium Exploration License and under the law to be granted the respective exploitation permits

[1188] Counter-Memorial ¶ 569.

would be honored. Although NAMR accepted RMGC's final reports for Bucium, it failed to act on RMGC's applications for the exploitation permits and following the political rejection of the Roşia Montană Project and the State's evident repudiation of the joint venture with Gabriel, refused to issue further permits to RMGC. Respondent's argument that Claimants lacked protected rights in Bucium is wrong for the reasons explained above.

615. In response, Respondent selectively cites to passages from several securities disclosures from 2001 to 2010 pointing to risks to permitting and referring to the social license and then seems to conclude that Claimants did not have any expectations with which the challenged measures could have interfered.[1189] This argument is seriously misguided. Claimants' lawfully required risk disclosures cannot be understood as or equated with Claimants' legitimate expectations described above that Respondent would treat Claimants' investments in a non-arbitrary, lawful and transparent manner.

#### c. The Character of the Challenged Measures Is Unquestionably Expropriatory

616. Respondent wrongly contends that Claimants have "failed to establish" that the character of the challenged measures is expropriatory.[1190]

617. As described above, the subject measures entailed an abandonment of the legally applicable administrative permitting process, repudiation of rights, and manifest abuse of power and abuse of process. The claim is not that the EIA Process was unduly delayed, although it was,[1191] it is that it was held up coercively to demand economic renegotiations and then usurped by the Parliamentary review of the Government's Draft Law and Draft Agreement and ultimately effectively abandoned for political reasons. Respondent's contention that there is no evidence of coordinated conduct by the Government to hold up the Project until its economic demands were met[1192] is baseless and wrong for the reasons explained above.

[1189] Counter-Memorial ¶¶ 569-575.

[1190] Counter-Memorial ¶ 576.

[1191] *See*, *e.g.*, Memorial § V.

[1192] Counter-Memorial ¶ 576.

618. For the reasons set forth above, Respondent's claim that the statements of numerous senior Government officials inextricably and unquestionably linking permitting to meeting the Government's economic demands are "personal" and are taken "out of context" and should be disregarded is completely meritless.[1193] The record of statements made in this case, can in no way be characterized as mere statements of "individual politicians" expressing "their personal view."[1194] The statements are of the Prime Minister, the President, and other Government Ministers regarding the very specific matters before them.[1195]

619. The authorities cited by Respondent,[1196] moreover, do not support disregarding such a record of evidence. Notably, in *S.D. Myers v.* Canada, although the tribunal observed that Government decisions may be shaped by many persons with differing perspectives and that the record as a whole must be considered, that observation is immediately followed in the award with a review of many paragraphs describing individual statements of Government officials found in documents, letters, and speeches that supported the tribunal's conclusion as to the intention of the Government.[1197] In *Methanex v. USA*, while the tribunal states, in the passage cited by Respondent, that "statements by individual California politicians … did not reflect California law," the *Methanex* tribunal continued by observing that the claimant did "not cite or quote statements of California *elected politicians* that are on point," and that in addition the statements cited were too general to signify support for the measures at issue.[1198] Similarly, while in *Corn Products v. Mexico*, the tribunal stated that it did not rely on "remarks of individual members of the Mexican Congress" about the purpose of a law at issue, as it had

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[1193] *See* Counter-Memorial ¶¶ 557, 577.

[1194] Counter-Memorial ¶¶ 557, 577.

[1195] *See Vivendi v. Argentina II* (CL-113) ¶¶ 7.4.19-7.4.42, 7.5.22-7.5.25, 7.5.28, 7.5.34 (statements of provisional authorities evidencing the provincial government's unlawful campaign against the claimants' concession); *Gold Reserve v. Venezuela* (CL-81) ¶¶ 580-582, 588-91, 599-600 (finding the reasons for terminating the claimant's concession, which was unlawful, were to be found in the Government's "change of political priorities," "as evidenced by a stream of statements and public announcements" by the President); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated Apr. 4, 2016 (CL-62) ¶¶ 602-610, 614, 675-684, 705 (President's statements "provided the true rationale" for the unlawful termination of the mining contract).

[1196] Counter-Memorial ¶ 577

[1197] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award dated Nov. 13, 2000 (RL-51) ¶¶ 161-194.

[1198] *Methanex v. USA* (CL-30) ¶ 8 (Part III-Chapt. B at 4) (emphasis in original).

doubts about the extent to which the comments can be treated as evidence of the intent of the legislature as a whole,[1199] Claimants do not cite to or rely upon statements of individual Members of Parliament debating proposed legislation.

620. While the State may decide to terminate a project, it must do lawfully, transparently, with due process, and with payment of compensation. That was not done here. The Government's decision to terminate the Project was without regard to law, as indeed the Prime Minister acknowledged when he intended "to explain to all national and foreign investors, to all those which are involved in large projects, gas, offshore, submarine cable, uranium mines, to *tell them that this, only this project was rejected on a political criterion*, but that Romania remains a country open to investments, to major projects."[1200]

621. The Government's decision later to declare the entire area as a protected historical monument and to nominate it as a World Heritage site is a decision within the power of the State to make. Here, however, the Government acted in disregard of earlier valid and effective administrative decisions first to issue a mining license in the area and subsequently, and following extensive archaeological research, to discharge the area for mining. Moreover, the Ministry of Culture's announced decisions were taken with the stated bad faith intention of blocking the Roşia Montană Project.[1201] The measures also include the repudiation of the State's joint venture agreement with Gabriel relating to RMGC and an unlawful failure to act evidencing a repudiation of RMGC's rights in relation to the Bucium Exploration License. Moreover, the State's measures can in no way be justified by Respondent's reference to the notion of social license, as the concept is not legally relevant, but also because RMGC had a social license when the environmental permit should have been issued. Thereafter, in 2013, the Government's own unlawful mishandling and politicization of the permitting process and insistence upon a unpopular special law, contributed materially to the 2013 street protests that at bottom were more anti-Government than anti-Project.

[1199] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility dated Jan. 15, 2008 (RLA-59) ¶ 137.

[1200] Interview with Prime Minister Victor Ponta, Antena 3, dated Oct. 5, 2013 (Exh. C-1504) at 6-7 (emphasis added).

[1201] *E.g.*, Memorial ¶¶ 596-597, 603-604.

#### d. The Measures Were Not Applied to Protect the Environment

622. Finally, Respondent argues that Claimants have failed to rebut the presumption that environmental measures rarely constitute expropriation.[1202] This argument is equally meritless.

623. The competent authorities repeatedly confirmed that the Roşia Montană Project satisfied the applicable requirements for issuance of the Environmental Permit.[1203] The Government rejected the Project and RMGC for political reasons that have nothing to do with environmental protection. There is thus no environmental measure at issue.[1204]

#### e. The Expropriation Was Unlawful

624. For all the reasons set forth in the Memorial and further demonstrated in this Reply, the expropriation moreover was unlawful as it was effected in breach of the provisions both of the Canada BIT and of the UK BIT.[1205]

# XIII. GABRIEL IS ENTITLED TO COMPENSATION IN THE AMOUNT NEEDED TO WIPE OUT THE CONSEQUENCES OF THE TREATY BREACHES

## A. Romania's Wrongful Conduct Caused the Loss of the Entire Value of Gabriel's Investments

### 1. Romania's Treaty Violations Caused Gabriel's Losses

625. Romania effectively terminated the Roşia Montană Project. Respondent's argument that the permitting process is still open and ongoing cannot be accepted as a good faith representation of the facts. The record also shows that Romania has repudiated its shareholder agreement with Gabriel in relation to RMGC and has frustrated RMGC's rights to develop the promising Bucium Projects. Romania's refusal to correct the 2010 LHM, its passage of the 2015 LHM, and its pending application for UNESCO status for Roşia Montană has run roughshod over and eviscerated RMGC's project development rights legally as well as practically.

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[1202] Counter-Memorial ¶ 578.

[1203] Memorial § VIII.A. *See also supra* § III.

[1204] Moreover, as discussed *supra* § VII.A.6.a, nothing in Article XVII(2) and (3) of the Canada BIT detracts from these conclusions.

[1205] Memorial § XIV.C.

626. Romania's conduct thus has deprived RMGC entirely of the use, value, and enjoyment of its contract rights. Romania also has deprived Gabriel of the value of its joint venture agreement with the State through Minvest in relation to RMGC. Gabriel thus has incurred very substantial losses, as the value of its investments in Romania in and through RMGC depended upon RMGC's ability to develop the Roşia Montană Project and the Bucium Projects.

627. The series of unlawful acts and omissions beginning in August 2011 that led progressively to the complete deprivation and frustration of RMGC's project development rights was in breach of several provisions of the UK BIT and of the Canada BIT. Those breaches collectively resulted in Gabriel's loss.

628. Romania's conduct caused losses at several levels. Romania's conduct constituted an unlawful expropriation of RMGC's assets by depriving RMGC of the rights to develop the Projects, particularly insofar as RMGC's assets derived their value from the associated project development rights. Moreover, as Romania failed to compensate RMGC for terminating the Projects without basis in law, Romania also was unjustly enriched.[1206]

629. In addition, the manner in which Romania treated RMGC, ultimately frustrating its ability to develop the Projects, deprived RMGC and its assets of essentially all value.

630. As a consequence of the treatment of RMGC and its rights, Gabriel Jersey's shares in RMGC were themselves indirectly expropriated as they were deprived of essentially all value. Likewise, Gabriel Jersey's contract rights associated with RMGC were indirectly expropriated, as the value of those rights depended entirely on RMGC's project development rights.

631. Gabriel Jersey's equity interest in RMGC, Gabriel Jersey's contract rights associated with RMGC, and RMGC's assets all qualify as Gabriel Jersey's covered investments.[1207] As RMGC's assets were deprived of any value, Gabriel Jersey's shares in

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[1206] *See* Memorial § IX.E.

[1207] *See supra* § VII.B.1.

RMGC and associated contract rights lost their value as well – and thus Gabriel Jersey incurred very substantial losses.

632. Similarly, Gabriel Canada's covered investments include the equity interest in RMGC, Gabriel Jersey's contract rights associated with RMGC, and RMGC's assets.[1208] As RMGC's assets were deprived of any value, and shares in RMGC and associated contract rights lost their value, Gabriel Canada incurred substantial losses to the value of its indirect shareholding in Gabriel Jersey.[1209]

633. Thus, regardless whether the harm inflicted on RMGC, its assets, Gabriel Jersey's shares in RMGC and Gabriel Jersey's contract rights associated with RMGC is characterized as an unlawful expropriation, or as a breach of another treaty obligation, both Gabriel Jersey and Gabriel Canada have incurred very substantial losses.[1210]

634. In other words, although the wrongful conduct was directed at the level of RMGC, the claimed losses are those incurred at the shareholder level. Gabriel Jersey and Gabriel Canada seek compensation for the losses they incurred,[1211] the measure of which is discussed below.

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[1208] *See supra* § VII.B.1.

[1209] As Compass Lexecon confirms, the losses incurred by Gabriel Canada and by Gabriel Jersey are the same, as the value of Gabriel Canada's shares in Gabriel Jersey are derived entirely from the value of Gabriel Jersey's shares in RMGC and the value of Gabriel Jersey's contract rights with Minvest. Moreover, the sole objective of Gabriel was the development of the Projects through RMGC. *See* Compass Lexecon ¶ 5; Compass Lexecon II ¶ 10.

[1210] Several investment treaty tribunals have recognized that a State's failure to accord fair and equitable treatment to an investment may cause the loss of the entire value of that investment. Other treaty breaches likewise may cause such losses. *See* Memorial ¶¶ 859-861. *See also Gold Reserve v. Venezuela* (CL-81) ¶¶ 680-681; *Cryslallex v. Venezuela* (CL-62) ¶¶ 846, 850; *PSEG v. Turkey* (CL-175) ¶ 307; *CMS v. Argentina* (CL-176) ¶ 410; *Vivendi v. Argentina II* (CL-113) ¶ 8.2.10; *Azurix v. Argentina* (CL-85) ¶¶ 424-425, 442; *Gemplus v. Mexico* (CL-156) ¶ 12-52; *Sempra v. Argentina* (CL-93) ¶¶ 403-404; *Rumeli v. Kazakhstan* (CL-140) ¶ 792; *Occidental v. Ecuador* (CL-71) ¶¶ 704-707.

[1211] *See supra* § VII.A.2. *See also RosInvestCo. v. Russia* (CL-51) ¶ 608 ("[R]ecent jurisprudence from investment arbitration tribunals considering other investment treaties has confirmed the ability for shareholders to claim for measures taken against the company in which they hold shares …. [T]he Tribunal notes in this regard the cases *ELSI*, *GAMI*, *CMS Gas Transportation Company* and *Enron & Ponderosa.* These decisions confirm that modern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company.").

### 2. Respondent's Arguments Regarding Causation Are Meritless

635. Respondent argues, contrary to the evidence, that its unlawful treatment of Gabriel's investments did not cause Gabriel's losses because, even apart from Respondent's wrongful treatment, the Project would not have been able to go forward due to an alleged lack of a social license and an alleged inability to obtain all the necessary surface rights.[1212] These arguments are entirely without merit. They are also misguided because it is Claimants' claim that the State effectively terminated the Roşia Montană Project and the Bucium Projects and Respondent's arguments do not relate to whether the State's unlawful conduct terminated the Projects and thus caused losses, but rather they relate to the measure of the value of the project rights underlying the loss.

#### a. The Project Had a Social License the Alleged Lack of Which Did Not Cause Gabriel's Losses in any Event

636. Respondent argues that the Project's alleged lack of a social license caused Gabriel's losses.[1213] That argument is incorrect. As demonstrated above,[1214] the vast majority of the people who would be most affected by the Project unquestionaby supported it and the contemporaneous evidence demonstrates that RMGC had a social license at all relevant times at both the local level and the national level.

637. As Professor Mihai confirms, a social license is not a requirement for an environmental permit.[1215] Respondent therefore cannot be heard to argue that the Government did not issue the Environmental Permit because of an alleged lack of a social license.

638. Although not legally relevant, Dr. Boutilier and Professor Henisz demonstrate that by the end of 2011 and early 2012 the Project had a social license.[1216] Notably, the record shows that when the Project was ready to be permitted at the end of 2011 and early 2012, there were no significant protests against the Project. Indeed, as Mr. Tănase also demonstrates, by late 2011

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[1212] Counter-Memorial § 10.2.

[1213] Counter-Memorial ¶¶ 693-695.

[1214] *See supra* § IV.A.

[1215] Mihai II § V.G.

[1216] *See* Henisz ¶¶ 23-43; Boutilier ¶¶ 32-43, 58.

and early 2012 RMGC had earned a strong social license and did not face significant social opposition.[1217] In fact, from early 2012 through at least August 2013, during which time the Government continuously was legally obligated but failed to issue the Environmental Permit, the Project had overwhelming local support, and strong regional[1218] and national support.[1219]

639. In addition, and contrary to Respondent's submission, Dr. Boutilier authoritatively explains that the notion of a social license as something for which RMGC or Gabriel was solely responsible is entirely misguided. For a project such as the Roşia Montană Project, the Government plays a central role in whether the project can earn and maintain a social license. In this case, the Government primarily through the unfair and improper conduct that is the subject of this arbitration undermined RMGC's efforts to retain and raise the level of social license it achieved, and to earn a strong social license, particularly on the national level.[1220] Still, however, the evidence indicates that RMGC maintained its social license at all relevant times.

640. Respondent argues that "[s]everal tribunals have recognized that the social license is a fundamental requirement for the development of mining projects."[1221] Although Respondent cites to positions taken by the parties in *Pac Rim v. El Salvador* and *Mesa Power v. Canada*, the awards in those cases make no mention of any "social license," and no award or decision on liability or quantum has been rendered in either *South American Silver v. Bolivia* or *Lone Pine v. Canada*. Thus, in none of those cases did the tribunal find that a social license is a "fundamental requirement."

641. In *Bear Creek Mining v. Peru*, to which Respondent refers, the tribunal used the term "social license" to refer to a legal obligation *of the State* to consult indigenous communities

[1217] Tănase III ¶¶ 86-92.

[1218] *See generally* Lorincz II; Tănase III ¶¶ 93-105; Boutilier ¶¶ 44-49, 58, 66-78.

[1219] Tănase III ¶¶ 106-128; Boutilier ¶¶ 32-43, 58, 62.

[1220] *See generally* Boutilier.

[1221] Counter-Memorial n. 954 (*citing Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award dated No. 3, 2017 (RLA-53) and *Copper Mesa Mining v. Ecuador*, PCA Case No. 102-2, Award dated Mar. 15, 2016 (RLA-54)). Respondent also cites to the claimant's memorial in *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Award dated Oct. 14, 2016, the respondent's rejoinder in *South American Silver v. Bolivia*, PCA Case No. 2013-15, a witness statement submitted in *Mesa Power Group v. Canada*, PCA Case No. 2012-17, Award dated Mar. 24, 2016 and the respondent's rejoinder in *Lone Pine v. Canada*, ICSID Case No. UNCT/15/2.

in the project area, in accordance with the International Labor Organization Convention concerning Indigenous and Tribunal Peoples in Independent Countries.[1222] That obligation is not relevant in this case, where in any event there is no question that RMGC complied fully with all Romanian law requirements of public consultation in the course of the EIA process, which the Ministry of Environment administered.[1223] Notably, the *Bear Creek* case involved Peru's termination of certain government authorizations relating to a mine project due to significant social unrest within the local communities regarding the project. The tribunal held that as the claimant had complied with its legal requirements to engage with the local community, the social unrest did not justify the Government's termination.[1224] In addition, having confirmed that the claimant met applicable legal requirements, Peru could not claim that the claimant's community outreach was insufficient or caused or contributed to social unrest that led to Peru's termination of the government's authorizations in breach of its investment treaty obligations.[1225]

642. In *Copper Mesa Mining v. Ecuador*, which Respondent also cites, although the tribunal noted that the question was presented whether the claimant obtained a social license to operate,[1226] the tribunal also noted that it did not consider it necessary to address all the questions listed by the Parties[1227] and did not decide that particular question. In that case, in response to significant protests against the mine project that blocked the claimant's efforts to engage in community consultations, the claimant employed armed men who used tear gas and fired weapons at local villagers and officials, which recklessly escalated violence.[1228] Ecuador's mining authorities thereafter terminated the mining concessions without compensation on the

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[1222] *Bear Creek Mining v. Peru* (RLA-53) ¶¶ 406, 664.

[1223] RMGC engaged in an extensive program of public consultation regarding the Project and its impacts in full coordination with the Ministry of Environment and in full satisfaction of legal requirements. *See supra* §§ III.A-III.C; Avram ¶¶ 129-134. As Professor Mihai observes, Romanian law incorporates the requirements established in the Aarhus Convention for public consultation and there is no basis to claim that the extensive public consultations conducted for the Project failed to comply fully with the requirements of Romanian law. Thus, the consultation requirements set forth in the Aarhus Convention were fully respected in relation to the Project. *See* Mihai II ¶¶ 28, 30-36.

[1224] *Bear Creek Mining v. Peru* (RLA-53) ¶¶ 414-416.

[1225] *Bear Creek Mining v. Peru* (RLA-53) ¶¶ 412, 664, 667-668.

[1226] *Copper Mesa Mining v. Ecuador* (RLA-54) ¶ 2.16.

[1227] *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 2.1, 2.2.

[1228] *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 4.264, 4.265.

ground that community consultations had not been carried out.[1229] The tribunal held that the termination constituted an unlawful expropriation and a breach of fair and equitable treatment. While the tribunal also concluded that the claimant's conduct contributed in part to the losses it suffered, in that case, the claimant acted in a criminally reprehensible manner. According to the tribunal:

> [A] foreign investor … should not resort to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accident or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands. Yet, this is what happened. … Claimant's senior personnel in Quito were guilty of directing violent acts committed on its behalf, in violation of Ecuadorian criminal law. Their resort to subterfuge and mendacity aggravated those acts.[1230]

There is no possible comparison to the facts in this case.[1231]

643. In any event, Respondent's principal contention in this case is that it was Gabriel and RMGC who, due to an alleged lack of social license or otherwise, were compelled to ask the Government to enact the Draft Law, which is demonstrably incorrect.[1232] Nor did Gabriel or RMGC agree that the Parliament's vote on the Draft Law would determine whether the Project would be permitted to proceed – such determination was made by the Government, and the Government alone.

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[1229] *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 4.316-4.317, 6.54.

[1230] *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 6.99-6.100.

[1231] Indeed, as the tribunal observed in *Gemplus v. Mexico* ((CL-156) ¶¶ 11.12, 11.13), "contributory fault" refers to "a form of culpability and *not* any act or omission falling short of such culpability;" and this is reflected in ILC Articles of State Responsibility, Art. 39 cmt. 5. *See also Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated Sept. 27, 2017 (CL-246) ¶ 1192 (tribunal concluding that contributory fault does not apply in the absence of "reproachable behavior . . . materially contributing" to damages); *Abengoa S.A. y Cofides S.A. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award dated Apr. 18, 2013 (CL-160) ¶¶ 668-673 (finding that even if there were some inadequacies in claimant's social communication program, as there was no legal framework to define the claimant's obligations in this respect, there was no basis to conclude that the claimant failed to fulfill a legal obligation and, therefore, the State could not rely on alleged inadequacies to minimize its responsibility). Moreover, it is Respondent who bears the burden of proof as to any claimed defense of contributory fault. *See Gemplus v. Mexico* (CL-156) ¶ 11.16 (where facts show absence of any fault by claimant, the defense, advanced by Respondent fails).

[1232] *See supra* § IV.B. *See also* [redacted]; Mihai II § VII.C.

644. Moreover, there is no good faith basis for Respondent to claim, as it does,[1233] that even if the Government had not effectively and unlawfully terminated the Project and had instead issued the Environmental Permit when it should have, that NGO court challenges to various administrative decisions issued by the State (including urbanism certificates, urbanism plans, and archaeological discharge certificates) would have prevented the Project from proceeding. By taking such a position, Respondent is really arguing, incredibly, that the State was incapable of fulfilling basic administrative functions and issuing administrative decisions in a lawful manner.

645. In any event, as regards the subject of various NGO-driven judicial challenges, Professor Mihai and Professor Podaru show that an urbanism certificate, or UC, was not a requirement for an environmental permit,[1234] and that, moreover, RMGC had a valid UC at all times between 2010 and 2018.[1235] Similarly, both Professor Mihai and Professor Podaru explain that neither archaeological discharge certificates (ADCs) nor urbanism plans (e.g., PUZs) were needed for the environmental permit.[1236]

646. Had the State not terminated the Project unlawfully, the Project would have had to obtain construction permits in due course for which urbanism plans would have to be in place. There is no basis, however, for Respondent to argue, as it does, that the local authorities would not have been able to approve the urbanism plans needed to support the Project. Indeed, as Professor Podaru explains, the fact that the local urbanism plans had not yet been approved was due to failures of the competent authorities to address issues for which they are legally responsible.[1237]

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[1233] Counter-Memorial ¶ 694 n.1095.

[1234] Mihai II § V.C; Podaru § II.B.1.

[1235] Mihai II § V.C.1; Podaru ¶¶ 85-118.

[1236] Mihai II §§ V.D – V.E; Podaru §§ II.B.2 – II.B.3.

[1237] *See* Podaru § IV. Thus, for example, whereas Respondent observes that the environmental endorsement for the local urbanism plan that accomodated the Project was annulled in March 2016 (Counter-Memorial ¶ 210), that annulment was based on the fact that the urbanism plan had not taken into account the description of the historical monuments in the 2010 LHM and the court's rejection of the claim that the 2010 LHM was unlawful after considering the blatantly false and bad faith submissions of the NIH and the Ministry of Culture opposing RMGC's claim. *See supra* § V.B; Podaru § IV.C.1.

647. The only actual obstacles in relation to approval of urbanism plans that would be needed to accommodate the Project are those put in place by the State in blatant disregard of the Roşia Montană License and the valid and existing ADCs issued by the Ministry of Culture. That is, once the State adopted the 2015 LHM[1238] and submitted the UNESCO application,[1239] as Professor Podaru explains, the local authorities were legally prevented from approving an urbanism plan that would accommodate the Project.[1240] This is yet another reason why Respondent cannot escape the conclusion that the only cause of Gabriel's losses is the State's unlawful treatment and effective termination of the Project.[1241]

648. Although there is no basis in fact to do so, Respondent also refers to the need for ADCs, arguing that is a cause for Gabriel's losses. Respondent's line of argument is without merit and is based on pure speculation. While the Project still required an ADC for Orlea, there is no reasonable basis to question, if the Government had not effectively terminated the Project (as it did), that an ADC in due course would have been obtained for Orlea.[1242] Further, it is the Government's own earlier arbitrary conduct that prevented the application for the Orlea ADC.[1243] In any event, the fact that an ADC had not yet been issued for Orlea was well known and publicly disclosed[1244] so that whatever risk there was that an ADC might not be issued was factored into the value reflected in Gabriel's stock price.

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[1238] *See supra* § V.B.5.

[1239] *See supra* §§ V.B.6-V.B.7.

[1240] *See* Podaru §§ IV.C.2-IV.C.4.

[1241] *See supra* § V.B.5-V.B.7, § VIII.B, § XII.B.3.

[1242] [REDACTED] *See also* Jennings ¶¶ 30-31, 41-47. Indeed, NAMR's decision verifying the Project's mineral resources and reserves reflects the expectation of the State's mining authority that the Project would include exploitation in Orlea to the extent permitted. *See* NAMR Decision No. 11-13 of Mar. 14, 2013 (Exh. C-1012-C) at 4-5 (describing resources and reserves from Orlea area). Moreover, the fact that the license perimeter includes Orlea demonstrates the State's expectation that it likely was not impossible to mine in that area.

[1243] *See* Memorial § III.C.2.

[1244] *See*, *e.g.*, Gabriel Resources Ltd., 2010 Annual Information Form dated Mar. 9, 2011 (Exh. C-1808) at 16 (noting that mining at Orlea will begin in year 7 of the mine life), and at 21 (noting the archaeological discharge certificates needed for the first seven years of operations had been obtained).

649. Similarly, any suggestion by Respondent that the archaeological discharge certificate for the Cârnic underground is a cause for Gabriel's losses is particularly misplaced.[1245] The Project had the archaeological discharge certificate needed for the Cârnic underground. Indeed, the Cârnic ADC, which earlier had been annulled, was re-issued in July 2011 by the Ministry of Culture on the basis of the recommendation of the National Archaeological Commission and the expert archaeologists who had performed the research in the field.[1246]

650. Moreover, while Respondent points to the fact that NGOs commenced a legal action to challenge the Ministry of Culture's second ADC decision as well, which action remains pending,[1247] there is no good faith basis for Respondent to invoke as a defense in this arbitration an argument that an eventual court decision conveniently could find the second Cârnic ADC to be unlawful and thereby prevent discharge of the area.[1248] In any event, risk associated with possible future litigation was not a cause of loss. Risk associated with judicial challenges to the ADCs was publicly disclosed and thus was reflected in the market value of Gabriel's stock price as of the valuation date.[1249]

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[1245] *See*, *e.g.*, Counter-Memorial ¶¶ 694 n.1095.

[1246] Gligor ¶¶ 100-102. *See also* Henry II ¶¶ 7-10; Tănase III ¶¶ 3-9.

[1247] Counter-Memorial ¶¶ 212-220.

[1248] *See* Schiau § VI.A.1; [redacted]. *See also* Schiau II § IV.D.2; Jennings II ¶¶ 8, 36-38; [redacted]. The Tribunal must take note of the fact that while Respondent is the defendant in the on-going litigation with the result that it falls solely to it to defend the Ministry of Culture's second Cârnic ADC, in this arbitration Respondent has chosen to submit in its defense the opinion of an expert who presents (misguided) arguments *against* the discharge decision. *See*, *e.g.*, Claughton ¶¶ 6, 45, 52-53, 58, 68, 85. This cynical arbitration-inspired litigation posture recalls the litigation position taken by the Ministry of Culture in 2015 after this dispute arose in which the Ministry defended the lawfulness of its decision to expand the descriptions of the historical monuments in Roşia Montană in the 2010 LHM by, *inter alia*, referring to its prior yet still valid 2004 LHM as "abusive." *See* Schiau II § IV.D.3. *See also Karkey Karadeniz v. Pakistan* (CL-250) ¶¶ 550-551 (*citing* the decision in the *Diallo* case before the International Court of Justice, and observing that, "[e]xceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation."). There is no doubt that the State thus has taken and is continuing to take positions in pending litigation in Romania to shore up its defenses in this arbitration no matter how much it needs to disavow, discredit, and disregard its own contrary positions taken before the State decided not to allow the Project to proceed.

[1249] *See*, *e.g.*, Gabriel 2010 Annual Information Form dated Mar. 2011 (Exh. C-1808) at 21 (noting a number of archaeological discharge certificates previously granted have become subject to legal challenge and in December 2008 one had been annulled and Gabriel had reapplied and referring to the "Risk Factors" associated with Gabriel's operations), at 24 (discussing the annulment of ADC no. 4), at 33 (noting the risks

### b. RMGC Would Have Been Able to Acquire Surface Rights

651. Respondent argues that RMGC would not have been able to acquire the surface rights needed for the Project and that this was the cause of Gabriel's losses.[1250] Respondent's argument is incorrect and is pure conjecture. Risks associated with acquisition of surface rights for the Project were fully disclosed and were reflected in Gabriel's market value as of the valuation date.

652. In any event, as demonstrated below, RMGC had acquired the majority of the surface rights required for Project development, and was well placed to obtain the remainder in time to develop the Project, as Project development would have proceeded in phases such that RMGC could have completed the acquisition of the properties needed in parallel with the commencement of the Project.[1251]

653. Respondent argues with respect to surface rights, in effect, that expropriation of some properties would have been necessary because some Project opponents would not agree to sell voluntarily at any price, and that the Government likely would not have agreed that expropriation of those remaining properties was warranted. Thus, Respondent argues, even if the Government had issued the Environmental Permit and otherwise allowed the Project to proceed, the Government inevitably would have concluded that the Project could not proceed because it would not expropriate any properties needed for the Project and that this was a risk Gabriel accepted. Respondent's argument is misguided.

654. When the Government issues a mining license, it reflects a decision necessarily taken in the public interest and in accordance with strategies adopted by the Government, to mine State-owned resources by public concession.[1252] The issuance of a mining license thus

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associated with challenges to archaeological discharge certificates that could cause possible delays or prevent Project development).

[1250] Counter-Memorial § 10.2.2.

[1251] *See* Memorial ¶¶ 170-180; Lorincz II ¶¶ 121-141. *See also* Bîrsan II § III.

[1252] Bîrsan II ¶ 34, § III.A.2. *See also* Government's Exposition of Reasons Supporting the Draft Law dated Aug. 27, 2013 (Exh. C-817) (stating that "the approval of the license for exploitation of the gold and silver resources in the Roşia Montană mining perimeter by way of Government Decision represents the decision taken by the Romanian State to exploit these resources").

embodies a public interest decision that mining will be permitted in that area, subject to conditions that may be imposed to mitigate environmental impacts set forth in an environmental permit, and subject to exceptions for land subject to special protection, such as archaeological sites (where discharge is required).[1253] As grantor of a public concession, the State has the obligation to cooperate in good faith with the license holder as concessionaire and to ensure the necessary conditions for the performance of the contract.[1254]

655. Although the holder of a mining license does not obtain surface rights directly, the law contemplates that the license holder will obtain the necessary surface rights.[1255] Accordingly, Romanian law provides that when a mining license is issued, the urbanism plans for the industrial area within the license perimeter must be updated to permit mining and to prohibit construction of anything other than what is needed for mining exploitation and processing – in other words, by law, the zoning in the area becomes "mono-industrial" to accommodate the mining license and to restrict any other use.[1256]

656.

[1257]

Article 6 of the Mining Law provides the means by which license holders may acquire such access:[1258]

[1253] *See* Bîrsan II § III.A.1.

[1254] *See* Bîrsan ¶ 135; Bîrsan II ¶ 80. Notably, the Government never stated that expropriation would not be available, even if needed, for the Project.

[1255] Bîrsan ¶¶ 238-241.

[1256] *See* Podaru § III.B; Bîrsan II § III.A.1.

[1257]

[1258] Mining Law 85/2003 (Exh. C-11) Art. 6. *See also* Bîrsan ¶ 239.

> The right to use the lands necessary for carrying out mining activities, as located within the exploration/exploitation perimeter, is obtained in compliance with the law as follows:
>
> a) sale-purchase of the lands and, lands, by legal deeds and at the price agreed between the parties;
>
> b) exchange of lands, together with relocating the affected owner and reconstructing the buildings on the newly granted land, on the expense of the titleholder who benefits of the freed land;
>
> c) renting the land on a determined period, with a determined usufruct, based on contracts concluded between parties;
>
> d) expropriation for public utility cause, in compliance with the law;
>
> e) concession of public property lands;
>
> f) associations between the owner of the land and the holder of the license, by way of contributing the value of the land to the share capital;
>
> g) other procedures provided by the law.

Thus, access to land for a mining concession may be obtained by various means, including by expropriation, as regulated by Law No. 33/1994.[1259]

657. Respondent argues that it is uncertain whether expropriation would be available "on behalf of a private project."[1260] That argument also is misguided. As Professor Bîrsan explains, the object of a mining license is the exploitation of public resources on the basis of a Government decision on terms regulated by the State. It is, by definition, an activity undertaken in the public interest by a private law entity under concession, and the Mining Law does not distinguish on the basis of the ownership of the license holder to the contrary. As Professor Bîrsan explains:

> The preamble to the Mining Law states that the law "ensures … fair competition, without discrimination among forms of property, origin of capital and the nationality of the operators." Indeed, the very nature of a mining concession is that it is an agreement between the State as owner of public property and the license holder or concessionaire, which by

[1259] Bîrsan ¶¶ 241-242; Bîrsan II § III.B.

[1260] *See*, *e.g.*, Counter-Memorial ¶ 706.

> definition is an entity of private law. Therefore, Article 6 of the Mining Law applies equally to any license holders, any license holder by definition is an entity of private law, and the Mining Law applies equally regardless of the origin of capital and thus regardless of the identity of the owner of the license holder when the license holder is a legal person.[1261]

In other words, a license holder by definition is a private law entity, and all means set forth in Article 6 of the Mining Law are available to any holder of a mining license, without discrimination that would favor State-owned companies over privately owned companies as license holders. Thus, for example, the provisions of Article 6 of the Mining Law apply to RMGC as a license holder equally and in the same manner as to State-owned Minvest as a license holder.[1262]

658. Expropriation, however, can only be conducted when it meets the conditions set forth in the expropriation law, which provides that expropriation may be carried out for public utility cause, with just compensation, and due process.[1263]

659. The Expropriation Law includes a procedure for declaring the public utility of works for which expropriation may be required.[1264] Respondent argues that it was uncertain that the Roşia Montană Project would be declared as being of public utility pursuant to that process and therefore RMGC needed a special law to make that declaration.[1265] As Professor Bîrsan demonstrates, Respondent's argument is without merit.[1266]

660. The Expropriation Law expressly establishes certain types of works as public utility works, including "the extraction and processing of useful mineral substances."[1267] Thus, it is clear that mining projects involving exploitation and mineral processing are public utility

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[1261] Bîrsan II ¶ 105 (*citing*, *inter alia*, Article 5(2) of Concession Law 219/1998, defining concessionaire as any natural or legal person of private law).

[1262] As Professor Bîrsan explains, when property is expropriated, it becomes the public property of the State, the use of which may be provided to a private entity via concession under terms the State may establish. Bîrsan ¶ 243

[1263] Bîrsan ¶ 242.

[1264] Expropriation Law 33/1994 (Exh. C-1628), Ch. II.

[1265] *See*, *e.g.*, Counter-Memorial ¶ 705.

[1266] Bîrsan II § III.B. *See also* Mihai II § VII.C.2.

[1267] Expropriation Law 33/1994 (Exh. C-1628) Art. 6. *See also* Bîrsan ¶ 242; Bîrsan II ¶¶ 102-106.

works. Indeed, as Professor Bîrsan observes, in 2009 when an amendment to the Mining Law was proposed to declare all mining works for exploitation of mineral resources to be of public utility, the Government's point of view on the amendment was that since the Expropriation Law already provided such a declaration, "we would like to emphasize that declaring through a special law the public utility … is not necessary, if the general law already includes such a provision."[1268]

661. The Expropriation Law provides that the public utility of a project may be declared after "preliminary research" is conducted and if the works are included in approved urbanism plans for the area.[1269] The law also provides that the "preliminary research" will determine whether the works are of "national or local interest," their economic and social or ecological benefits supporting the need for the works, and whether the works can be carried out "by other means than by expropriation," as well as that the works were included in approved urbanism plans.[1270] While commentators observe that "[t]he preliminary research has as its main objective the determination of whether the national or local interest exists," it is clear that the research also must confirm that the public benefit cannot be achieved other than by expropriation.[1271]

662. In the case of the Roşia Montană Project, in view of the fact that it was developed pursuant to a license reflecting the Government's decision that exploitation of those resources was in the public interest, and in view of the overwhelming local support there was for the Project in view of the social and economic benefits it would bring,[1272] it is not credible to maintain that the requisite public national and/or local interest would not be confirmed in the

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[1268] Bîrsan II ¶¶ 108-110. *See also id.* ¶ 111 (noting also that the Government's position on the 2013 Draft Law likewise stated "[t]he activities of exploitation and processing of mineral resources are already defined by Law No. 33/1994 on expropriation for public utility…as public utility activities").

[1269] Expropriation Law 33/1994 (Exh. C-1628) Art. 8.

[1270] Expropriation Law 33/1994 (Exh. C-1628) Art. 10(1); Regulation on declaring public utility (Exh. C-2283), Appendix no. 1. *See also* Expropriation Law 33/1994 (Exh. C-1628) (providing in Article 12(2) that the State is the "expropriator" when the works are undertaken in the national interest, and the counties, municipalities, cities and communes are for works of local interest).

[1271] *See* Bîrsan II ¶¶ 116-121.

[1272] *See*, *e.g.*, Lorincz ¶¶ 72-83; Lorincz II ¶¶ 91-120. *See also* Bîrsan II ¶¶ 126-127.

context of a public utility declaration if necessary.[1273] Indeed, albeit in a different context, the Alba County Council declared the Project was of "outstanding public interest" in view of the social and economic benefits of the Project for Alba County.[1274] Moreover, the fact that the Government itself adopted in the Draft Law an express declaration that the Project was of public utility and outstanding national public interest means that the Government considered that declaration was warranted.[1275]

663. In view of the fact that expropriation is available only when the works demonstrably cannot be carried out otherwise, RMGC developed and carried out plans to acquire properties as far as possible on a voluntary basis.[1276] As demonstrated in detail in Ms. Lorincz's

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[1273] *See* Bîrsan II ¶¶ 129-134. Respondent's reference (Counter-Memorial ¶ 710) to correspondence from the Hungarian Ministry of Environment to Romania's Ministry of Environment, presumably in the context of considering potential transboundary environmental impacts, to the effect that "involuntary resettlement only for private profit" would be prohibited by the European Convention of Human Rights, is not only entirely misplaced and irrelevant, it is also based on fundamentally misguided and incorrect assumptions about the basis of the Romanian Government's decisions relating to the exploitation of its natural resources in its public interest, including by way of concessions. *See also* Bîrsan II ¶ 139.

[1274] Letter from RMGC to Ministry of Environment dated Nov. 30, 2011 (Exh. C-632) (enclosing decision of Alba County Council).

[1275] Draft Law dated Aug. 27, 2013 (Exh. C-519.01), Article 3. *See also* Bîrsan II ¶ 129 ("administrative authorities must act consistently, transparently and in good faith"); Government Memorandum from Minister of Economy Ariton to Prime Minister Boc dated Sept. 21, 2011 (Exh. C-2156) at 1-3 ("The Roşia Montană Mining Project, a mining operation financially advantageous and environmentally sustainable - *project of outstanding public interest*," describing "the major economic and social benefits generated by the implementation of the Project," and concluding that "*due to the medium- and long-term economic and social benefits envisaged, the Project is of outstanding public interest*, subject to the compliance with all relevant legal provisions, the completion of the Project evaluation and authorization is a strategic priority for the Government of Romania.") (emphasis added); Government Memorandum from Minister of Economy Ariton to Prime Minister Boc dated Oct. 25, 2011 (Exh. C-2157) at 1, 5 (same); Government Memorandum from Minister of Economy Ariton to Prime Minister Boc dated Nov. 10, 2011 (Exh. C-2159) at 4, 6-7 (same); Memorandum on the Roşia Montană Project from Minister Delegate Şova to Prime Minister Ponta dated Mar. 6, 2013 (Exh. C-1903) at 42, 45 ("[r]ecognizing the public utility and the outstanding public interest of the Roşia Montană mining project," and that it is "of national interest"); Government Exposition of Reasons dated Aug. 27, 2013 (Exh. C-817) at 2, 4-6 (confirming the Project is of "public utility and of outstanding national public interest"); Exposition of Reasons (Exh. C-2461) at 3-5, 18-22 (same, and signed by all of the responsible Ministers). *See also* Government National Plan for Strategic Investments and Job Creation dated July 11, 2013 (Exh. C-910) at 11 (including the Project).

[1276] *See* Lorincz ¶¶ 15-27. *See also* Bîrsan § IV.B.3. RMGC's resettlement and relocation action plan ("RRAP") clearly stated that expropriation may be used as a last resort in a small number of cases where no agreement otherwise can be reached. The RRAP was included

statements, RMGC worked diligently and responsibly with the aid of external consultants to do so in a manner that was responsive to the needs of the community.[1277] Due to its efforts over the years, RMGC was confident that ultimately it would be able to acquire the surface rights needed, as it already acquired the majority of the property rights needed and the vast majority of remaining property owners were eager to sell.[1278] As [REDACTED] explains, RMGC also was reasonably confident it ultimately would reach agreement even with the few remaining vocal opponents.[1279]

664. While Respondent argues that an expropriation process, if needed, would take years, that process would not have blocked the Project even if true. Acquisition of surface rights is not a requirement for the Environmental Permit, but for the construction permits. As the Roşia Montană Project was to be developed in phases, it was not necessary to obtain all surface rights before construction could begin; rather construction permits would be obtained as needed in phases over time allowing surface rights to be obtained over time in parallel with Project development.[1280] Thus, as [REDACTED] explains, even the several properties owned by the family of lead Project opponent Eugen David did not present insurmountable obstacles, as they were

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in the Project Feasibility Study submitted to NAMR in October 2001, was first made public in 2001, and later was updated and included in 2006 as part of the Project EIA, with annual implementation updates that were made public. *See* Lorincz II ¶ 136; Lorincz ¶¶ 22-27; Szentesy ¶ 37; RRAP, vol. 1 (Exh. C-463) at 32-34; RRAP, vol. 2 (Exh. C-464). Notably, the Government never stated that expropriation would not be available, even if needed, for the Project

[1277] Lorincz II ¶¶ 135-136.

[1278] Lorincz II ¶¶ 121-140.

[1279] [REDACTED]

[1280] Lorincz II ¶ 137. *See also* Podaru ¶¶ 48, 50; Letter No. 750 from Ministry of Culture to Ministry of Environment dated Apr. 10, 2013 (Exh. C-655) at 3-4 (noting archaeological discharge of the area "will be carried out in stages, by reference to the construction stages of the Roşia Montană mining exploitation project," that preventive archaeological research for each area "shall be completed prior to the submission of the documentation for the issuance of the building permit for the corresponding construction phases of the Roşia Montană mining exploitation project, as presented during the environmental impact assessment procedure," that "the industrial facilities will also be built, operated and demolished/decommissioned in stages, across a number of years," and that RMGC "will have to obtain, prior to beginning constructions in each stage . . . all the endorsements, approvals, authorizations and certificates necessary to realize the constructions planned for the stage in question"); Ministry of Environment Draft Decision Concerning the Request for Issuance of the Environmental Permit dated July 2013 (Exh. C-2075) at 20 (discussing "the Project's development in stages, the fact that the mine sites are to be built, operated and decommissioned/closed in stages, during several years, including the fact that in Orlea the construction and exploitation works [are] scheduled for year 8 of the Project").

variously not needed, situated in Orlea, where construction was not planned to start until year 8 of the Project, or consisted of a single 2.2 hectare property on which no one lived that included several micro one-square-meter protest plots.[1281] It is not credible to claim that the need to acquire such property would have been permitted to block the Project.[1282]

665. Respondent also notes that the local authorities must approve urbanism plans that take account of the Project before any expropriation procedure can be effected.[1283] Indeed, as noted above, the fact that the local urbanism plans were challenged and had not yet been approved to accommodate the Project was due to failures of the competent authorities to address issues for which they are responsible.[1284] Moreover, since the Government adopted the 2015 LHM and nominated the Project area as a UNESCO site, the Government has made any urbanism plan that could accommodate the Project impossible in blatant disregard of RMGC's acquired rights in the License and the existing ADCs.[1285] Respondent thus cannot be heard to claim on this basis that the State's wrongful acts are not the cause of Gabriel's losses.

666. Finally, the market value of Gabriel necessarily took into account risks associated with the possibility that expropriation of some properties may have been needed for the Project, as Gabriel's securities disclosures plainly stated that expropriation may be needed and indeed emphasized the risks associated with the mechanics of that process.[1286]

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[1281] [redacted]

[1282] *See* Bîrsan II § III.B.2 (describing the process and the commissions that would decide these issues) and § III.B.3 (describing that the duration of any expropriation procedure for the Project should have been reasonable). *See also* Inter-Ministerial Commission Meeting Minutes (Exh. C-471) at 29 (statement by NAMR representative Ştefan Hârşu, referring not only to Roşia Montană, but also Bucium, "On this project depends in fact the development of mining not only in that area […] in the Apuseni Mountains there are these three major projects: Certej, Rovina, and the Roşia Montană Project. But there are three other exploration projects coming up. Therefore, it is actually about … we all talk about sustainable development. Well, sustainable development, as this is for 16 years, but there are other projects coming up that may extend the life term by another 15-16 years.").

[1283] Counter-Memorial ¶ 709.

[1284] *See* Podaru § IV.

[1285] Podaru § IV.C.

[1286] *E.g.*, Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 18-19, 33 ("Gabriel must acquire surface rights to all of the land under the footprint of the proposed new mine in order to apply for a construction permit. The Romanian mining law provides that the holder of mineral rights has the legal right to acquire the surface rights. … This right under the mining law does not, however, provide

### B. Compensation Should Be Awarded in an Amount Equivalent to the Restitution Value of Gabriel's Investments

667. As demonstrated in the Memorial and this Reply, Romania's treatment of Gabriel's investments was in breach of Articles 2(2) and 5 of the UK BIT as well as Article II(2), III, and VIII of the Canada BIT. Neither treaty sets out the principles applicable for reparation in the event of a breach. As is well established, however, "[r]eparation … is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[1287]

668. As set forth in the Memorial,[1288] the basic principle is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[1289]

669. Restitution thus involves reestablishing the situation that existed prior to the unlawful act. As the commentary to Article 35 of the ILC Articles on State Responsibility explains:

> [B]ecause restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation.[1290]

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exploitation concession holders with the ability to expropriate land directly, nor are there specific legal mechanisms under Romanian law to allow a governmental authority to expropriate land under a mining concession on behalf of a private company (or having a private company as beneficiary). … There can be no assurance that Gabriel will acquire all necessary surface rights, or acquire such rights at prices currently contemplated. There are significant risks that the acquisition of all necessary surface rights could be delayed or prevented due to circumstances beyond Gabriel's control and this could negatively impact Gabriel's development plans, result in additional expenses on its part, or prevent the development of the Roşia Montană Project."); Gabriel Resources Ltd., Management's Discussion and Analysis First Quarter 2011, dated May 5, 2011 (Exh. R-311) at 4 ("Ultimately, the Company's ability to obtain construction permits for the mine and plant is predicated on securing 100 percent of the surface rights within the footprint of the construction permits in the industrial zone, the timing of which is not entirely within the Company's control").

[1287] Memorial ¶ 844 (*citing Chorzów Factory* (Jurisdiction) (CL-114)).

[1288] Memorial § XVI.

[1289] Memorial ¶ 844 (*citing Chorzów Factory* (Merits) (CL-172)).

[1290] ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 35, cmt. (3).

The commentary to Article 35 adopts the definition of restitution as reestablishing the *status quo ante*, the situation that existed prior to the occurrence of the wrongful act, and observes that doing so "has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed."[1291]

670. While the UK BIT is silent on the remedies to be applied in the event of a breach, the Canada BIT provides that:

> A tribunal may award, separately or in combination, only
>
> (a) Monetary damages and any applicable interest;
>
> (b) Restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.[1292]
>
> A tribunal may also award costs in accordance with the applicable arbitration rules.

Thus, the well-established principles directing compensation in an amount sufficient to reestablish the *status quo ante* prior to the breaches of the treaty apply.[1293]

671. These principles do not vary depending upon which article of the treaty has been breached. The same principles apply for any breach of an obligation.[1294]

672. In this case, reestablishing the *status quo ante* means compensation equal to the value that restitution would provide, that is, compensation equal to the value of the rights to develop the Roşia Montană Project and the Bucium Projects as of July 29, 2011, the date immediately prior to the beginning of the series of acts and omissions forming the composite act

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[1291] ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 35, cmt. (2). *See also CMS Gas v. Argentina* (CL-176) ¶ 406 ("Restitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act.").

[1292] Canada-Romania BIT (Exh. C-1) Art. XIII(9).

[1293] *See* Canada-Romania BIT (Exh. C-1) Art. XIII(7) ("A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."). *See also* ICSID Convention, Art. 42(1) (directing the tribunal to apply such rules of international law as may be applicable).

[1294] Memorial ¶¶ 859-861.

that resulted in the unlawful frustration and effective repudiation of those rights. Notably, compensation on this basis is due not only if the Tribunal concludes that Gabriel's assets were subject to measures of expropriation, but also if the Tribunal concludes that the conduct leading to Gabriel's losses was unlawful on another basis.[1295]

### C. The Measure of Gabriel's Losses Is Based upon the Actual Market Value of Gabriel's Investments Prior to the Wrongful Acts

673. As set forth in the Memorial and more fully in Compass Lexecon's expert reports, Claimants' damages entail the lost fair market value of the rights to develop the Roşia Montană Project and the Bucium Projects as of July 29, 2011.[1296] As Gabriel Canada's shares were publicly listed and traded on the TSX at the Valuation Date and its only assets of material value were the Project Rights, Gabriel Canada's market capitalization prior to the onset of Romania's violations of the BITs represents an independent, objective, and directly observable market measure of the value of the lost Project Rights, from a minority shareholder's perspective.[1297] To reflect Claimants' majority position, and overwhelming evidence of analogous transactions in the mining industry, an acquisition premium above the stock market capitalization must be added as of the Valuation Date to accurately reflect a hypothetical sale of a majority stake in the development rights to the world-class deposit at Roşia Montană and the significant Bucium Projects.[1298]

674. Based on Gabriel Canada's 90-day average traded market capitalization prior to the Valuation Date, net of its cash-in-hand, plus an adjustment to reflect the value of Claimants' majority position, Compass Lexecon therefore determined that Claimants' damages based on the

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[1295] Notably, Gabriel does not seek compensation that would be owed in the event of a lawful expropriation in accordance with either Article 5 of the UK BIT or Article VIII of the Canada BIT. *See* Memorial ¶¶ 856-858. *See also* Memorial ¶¶ 822-828, 853-854 (citing authorities confirming that value of property taken unlawfully must be assessed prior to the date the unlawful acts begin as a necessary component of providing full compensation), ¶¶ 868-873 (citing authorities confirming that where a series of acts or omissions constitutes an unlawful act that causes loss, compensation likewise must be assessed so as to restore the *status quo ante*, i.e., prior to the first act in the series).

[1296] Memorial § XVI.C.1; Compass Lexecon § IV; Compass Lexecon II §§ II-III.

[1297] Memorial ¶¶ 904-910; Compass Lexecon ¶¶ 41-46; Compass Lexecon II ¶¶ 35-38.

[1298] Memorial § XVI.C.3.a; Compass Lexecon ¶¶ 47-51; Compass Lexecon II ¶¶ 39-47. *See also* Cooper ¶ 33; Jeannes ¶¶ 15-28; SRK II ¶¶ 117-118 (describing Bucium upside potential).

lost fair market value of the Project Rights as of July 29, 2011 amount to US$ 3.286 billion, which it supported with two additional valuation methods.[1299]

675. Relying on the expert report of Dr. Burrows, Respondent argues that the market capitalization of Gabriel Canada at the Valuation Date is "[i]rrelevant" and that the measure of damages should be less than one-tenth of the market's assessment as of the Valuation Date.[1300] Respondent's criticisms are groundless for the reasons summarized below and set out more fully in Compass Lexecon's second expert report, to which the Tribunal is respectfully referred.[1301]

676. As described in the Memorial, Gabriel Canada's shares were listed and traded on the TSX, the world's leading trading exchange for mining companies, which attracts many generalist institutional and other sophisticated investors.[1302] As a public company listed on the TSX, Gabriel Canada was subject to comprehensive Canadian laws, regulations, and TSX reporting requirements and therefore was required to and did provide regular and comprehensive disclosures to the market concerning the status of risks related to the development of the Projects, including extensive technical reports prepared by independent, certified external experts.[1303] In addition, Gabriel Canada was covered extensively by international media and by

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[1299] Memorial ¶¶ 914-923; Compass Lexecon ¶ 53; Compass Lexecon II ¶ 90.

[1300] *See* Counter-Memorial ¶¶ 786-788. *See also* Expert Report of Dr. James C. Burrows dated Feb. 22, 2018 ("Burrows") § III; Compass Lexecon II ¶ 5.

[1301] Compass Lexecon II § II.

[1302] Memorial ¶ 906; Cooper ¶¶ 14, 18; Jeannes ¶ 30; Compass Lexecon II ¶¶ 2, 3.b. Since January 2018, Gabriel's shares have been traded on the TSX Venture Exchange. Henry II ¶ 68 n.161.

[1303] Memorial ¶ 906; Henry ¶ 4; Henry II ¶ 68; Cooper ¶¶ 14, 18-20; Jeannes ¶ 30. In accordance with the requirements of Canadian National Instrument 43-101 ("NI 43-101"), Gabriel Canada published two technical review reports prepared by independent, certified external experts that both establish that the Roşia Montană Project has measured and indicated mineral resources amounting to 17.1 million ounces of gold and 81.1 million ounces of silver of which those categorized as proven and probable mineral reserves (the highest measure of confidence of economic viability) amount to 10.1 million ounces of gold and 47.6 million ounces of silver. SRK Report § 4; SRK Report II § 3. Behre Dolbear now criticizes those resource and reserve calculations and claims they "need to be re-estimated." Behre Dolbear ¶¶ 5, 53, 56, 68. This suggestion is ill-founded because the resource and reserve calculations were approved by NAMR following a thorough technical assessment, and were independently audited and verified by multiple expert consultants, including advisors to the Government such as AECOM. Szentesy II ¶¶ 7-21; SRK II § 3; Henry II ¶ 109 n.238. *See also* Memorial ¶¶ 419-424; NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roşia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C); AECOM, Preliminary Assessment of the Roşia Montană Project in Romania prepared for the Government of Romania, Department for Infrastructure Projects of National Interest and Foreign Investments, dated June 21, 2013 (Exh. C-2199) at 11 (acknowledging that "the risk associated with reserves is estimated to be low"). In

experienced market analysts who closely follow the gold mining industry, who conduct critical analyses of mining companies and projects as well as external factors affecting the industry and publish their findings in market research reports.[1304]

677. Thus, as Compass Lexecon demonstrates, because Gabriel Canada's sole objective was the development of the Project Rights,[1305] the company's stock market capitalization represents a consensus by informed and sophisticated institutional investors and other stock market participants on the value from a minority interest perspective of the Project Rights.[1306] Mr. Charles Jeannes, who has over 35 years of experience in the gold mining industry and was President and CEO of Goldcorp Inc., one of the world's largest gold mining companies, likewise confirms that in his experience, "the traded stock price of gold mining companies traded on the TSX is an efficient and reliable indicator of their value and that of their projects to minority shareholders," particularly during the period around the Valuation Date, "when the gold mining company segment of the TSX market was highly active with significant trading liquidity."[1307]

678. Tribunals in investment treaty cases also have found that the stock market capitalization measure is the most reliable measure of damage. For example, in a dispute over project development rights for a gold mine in Venezuela, the ICSID tribunal in *Crystallex* concluded that "the stock market methodology reflects the market's assessment of the present value of future profits, discounted for all publicly known or knowable risks (including gold prices, contract extensions, management, country risk, etc.) without the need to make additional

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fact, as SRK discusses, the Roşia Montană deposit has the potential to yield a significantly greater output than the current measure of reserves suggests. SRK Report ¶¶ 2, 30; SRK Report II ¶¶ 113-116.

[1304] Memorial ¶ 906; Henry II ¶¶ 69-70; Cooper ¶¶ 25-28; Jeannes ¶ 30.

[1305] *See* Memorial ¶ 795 (*citing ADC v. Hungary* (CL-138) ¶¶ 303-304 (adopting statement of then Professor James Crawford that what was taken from Claimant "was that bundle of rights and legitimate expectations")).

[1306] Compass Lexecon II ¶ 3; *id.* ¶¶ 10-15, 37 (explaining that Gabriel Canada's stock market capitalization reflects "the actual price at which investors were trading or holding Gabriel Canada's shares"). *See also* Compass Lexecon ¶¶ 11, 41 (observing that the stock market price "reflects the market's assessment, from the point of view of a minority shareholder, of the economic value of a company's underlying assets" and agreeing with Dr. Burrows that a fair market value should "reflect the price at which a hypothetical willing seller (buyer) would voluntarily sell (buy) the business under no compulsion to sell (buy)").

[1307] Jeannes ¶¶ 1, 31. *See also* Cooper ¶ 28 (concluding that the various sources of information available to the market "contributes to the market being able to form a consensus view of a company's value").

assumptions," and that where the claimant's sole material asset was the project development rights that must be valued, "it is obvious that the stock value will reflect that asset valuation."[1308]

679. The ICSID tribunal in *CMS Gas v. Argentina* similarly concluded that the process for assessing damages for a claimant whose shares are publicly traded "is a fairly easy one, since the price of the shares is determined under conditions meeting the [fair market value] definition."[1309]

680. In arguing that Gabriel Canada's market capitalization is not a reliable measure of the lost Project Rights in this case, Respondent first argues that Gabriel Canada's market capitalization purportedly included "value that Gabriel Canada held in addition to its indirect shareholding in RMGC."[1310] This is not correct.

681. In assessing Claimants' damages, Compass Lexecon adjusted for the cash and short-term investments held by Gabriel Canada.[1311] With that exception, as Compass Lexecon demonstrates, the Project rights were Gabriel Canada's only material assets as stated in its annual reports and corporate releases, and by analyst reports covering the company.[1312] Any other assets held by Gabriel Canada as of the Valuation Date were immaterial.[1313]

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[1308] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated Apr. 4, 2016 (CL-62), at ¶ 890 (concluding that "Crystallex's stock was actively and heavily traded on two main stock exchanges for mining companies so that transactions were occurring with sufficient frequency and sufficient volume to provide pricing information on an ongoing basis that reflects the expectations of a multitude of arm's length buyers and sellers on the underlying value of the company").

[1309] *CMS Gas v. Argentina* (CL-176) ¶ 403. *See also, e.g.*, *Faith Lita Khosrowshahi, et al. v. Iran*, Award No. 558-178-2 dated June 30, 1994, 30 Iran-US CTR 76 (CL-265) at 92 (concluding that where the claimants' shares were publicly traded, "a contemporaneous market price is clearly the best available evidence of the value of [the company's] shares"); *INA Corp v. Iran* (CL-180) at 380 (finding that the share price one year prior to the nationalization "is a fair measure of the value of the shares on the date of nationalization").

[1310] Counter-Memorial ¶¶ 716-723. *See also* Burrows § III.A.

[1311] Compass Lexecon ¶ 46 (deducting US$ 183 million representing cash and short-term investments held by Gabriel Canada as of the Valuation Date); Compass Lexecon II ¶ 22.

[1312] *See* Compass Lexecon II ¶¶ 17-22.

[1313] Compass Lexecon II ¶¶ 16, 18 (concluding that the assets listed by Dr. Burrows "are not significant," and that "as of the Valuation Date, the Project Rights had been the driver of value of Gabriel Canada, and, contrary to Dr. Burrows's claims, other minor assets had not"). For example, while Respondent refers to the Băişoara exploration license (Counter-Memorial ¶¶ 722-723), Gabriel Canada disclosed that the Băişoara property "[did] not have resources or reserves" and that its license was expected to expire in July 2011, which it did. Thus, the value of Băişoara was immaterial. Compass Lexecon II ¶ 20; Cooper ¶ 44.

682. Respondent's related argument that "RMGC still retains assets" that have "some value" also is unavailing.[1314] Whatever assets remain in RMGC's possession (which are not identified or quantified by Respondent), were acquired for purposes of implementing the Projects and have no material value other than in connection with the Project Rights. For that reason, those other assets did not impact Gabriel Canada's publicly traded share price other than as part of the Project Rights and thus do not undermine that stock market measure as an accurate, independent, and objective measure of the value of the Project Rights that was lost.[1315]

683. In a desperate and misguided effort to impugn Gabriel Canada's market capitalization as an objective and reliable measure of damages, [1316]

684. For the reasons discussed more fully by Messrs. Henry and Cooper and by Compass Lexecon, Respondent's accusations are utterly baseless.[1317] [1318]

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[1314] Counter-Memorial ¶¶ 724-725. *See also* Burrows § III.A.

[1315] Respondent's argument is misguided because the loss incurred by Claimants is the loss of the value of the Project Rights; the measure of that loss is reflected in the stock market measure based on Gabriel Canada's market capitalization. It is irrelevant that RMGC still retains title to assets because those assets never had any material value absent the Project Rights.

[1316] Counter-Memorial § 11.1.2.1; *id.* ¶¶ 732, 753.

[1317] Henry II ¶¶ 67-113; Compass Lexecon II ¶¶ 3, 16, 23-34; Cooper ¶¶ 34-43.

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688. Gabriel's Annual Information Form dated March 9, 2011 for the year ended December 31, 2010, which spans over 50 pages, :

- cautionary statements that "readers should not place undue reliance on forward looking statements," including with regard to "the expected outcomes of the application processes for or reviews of permits and licenses, including without limitation the ongoing . . . [TAC] review of the . . . [EIA] for the Roşia Montană Project, and other legal challenges associated with the Roşia Montană Project";[1326]

- cautionary statements that "[t]here are significant risks that Gabriel's plans for the current financial year may be adversely affected by delays in one or more of its scheduled activities due to circumstances beyond its control";[1327] and

- nine pages of disclosures regarding "Risk Factors – Risks Related to Gabriel's Operations" regarding various categories of risks (often with sub-topics) including:

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[1326] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808); Henry II ¶ 73. *See also* Cooper ¶ 37 (stating that "investors are typically cautioned in companies' public filings not to place undue reliance on such estimates due to the risk that the estimates can turn out to be wrong").

[1327] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 6; Henry II ¶ 74.

- "Political and Economic Risks of Doing Business in Romania,"[1328]
- "Project Approval Risks,"[1329]
- "Risks Associated with Acquisition of Surface Rights and with Resettlement and Relocation,"[1330]
- "Project Development Risks,"[1331]
- "Risks Associated with Legal Challenges,"[1332] and
- "Risks Relating to the Gold Mining Industry Generally."[1333]

689. As Mr. Henry states, [redacted] [1334] Notably, however, the fact that as a publicly traded company Gabriel was required to disclose a myriad of risk factors to ensure that potential investors were fully informed as to those risks in making investment decisions, including when assigning a value to their shareholding in Gabriel, does not mean that Gabriel "accepted" those risks without recourse and also is not a basis to limit Romania's liability if such risks were realized due to Romania's wrongful conduct.[1335]

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[1328] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 31-32; Henry II ¶ 75.

[1329] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 32-33; Henry II ¶ 75.

[1330] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 33; Henry II ¶ 75.

[1331] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 33-34; Henry II ¶ 75.

[1332] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 35; Henry II ¶ 75.

[1333] Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 37-39; Henry II ¶ 75.

[1334] Henry II ¶ 76. *See also* Compass Lexecon II ¶ 26.

[1335] Indeed, Gabriel also disclosed, for example, "arbitrary decisions by governmental authorities" among the risks it faced. Gabriel Resources Ltd., 2010 Annual Information Form, dated Mar. 9, 2011 (Exh. C-1808) at 2. A State may not invoke its own illegal act or the risks that it would act illegally to diminish its liability, as recognized by the general principle *nullus commodum capere de sua injuria propria*. *See* Memorial ¶ 853.

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691. [redacted] [1358] [redacted] [1359]

692. Furthermore, as discussed above, numerous leading market analysts closely covered the Project in analyst reports on Gabriel's stock price.[1360] Respondent wrongly contends that such market analysts "mostly parroted" Gabriel's assessments.[1361]

693. As Mr. Cooper explains, in preparing their reports, market analysts do not simply accept information published by the company, but also consider their own independent research, site visits, larger market trends, industry databases of costs and production periods, and their own knowledge of the industry and experience.[1362] Mr. Cooper further observes that the market analyst sector is "highly competitive and the reliability of an analyst's reporting over time directly affects the analyst's and their employer's reputation and influence in the marketplace and thus their long-term commercial success," and market analysts "therefore strive to ensure that their analyses of company or project values and predictions regarding future developments are materially accurate, objective, and realistic."[1363]

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[1358] [redacted]

[1359] [redacted]

[1360] Memorial ¶ 906; Henry II ¶ 70; Cooper ¶¶ 35-36.

[1361] Counter-Memorial ¶ 752.

[1362] Cooper ¶ 26.

[1363] Cooper ¶ 28.

694. As Mr. Henry discusses, numerous market analysts who covered the mining industry visited Roşia Montană for several days in April 2011, three months prior to the Valuation Date, and not only met with Gabriel and RMGC personnel in Roşia Montană, but also had opportunities to meet and interact individually with several local mayors "to get their individual and unvarnished views on the Project and its prospects" and, if they so wished, to visit the opposition.[1364] The evidence shows that these experienced industry analysts, many of whom were mining or finance professionals or both, not only were independent of Gabriel, but also formed their own views about the Project, which did not always agree with those of Gabriel or RMGC.[1365]

695. With regard to the Project timeline, for example, while Gabriel estimated in spring of 2011 that a "first pour" of gold would occur in late 2014, the analysts who conducted the site visit projected first pour between late 2014 and early 2016, and also noted the risks of delays when issuing their hold or buy recommendations.[1366] The analysts likewise did not blindly accept Gabriel's costs estimates, but instead provided their own assessments and, in several instances, indicated that they expected the Project costs would be significantly higher than those reported in Gabriel's 2009 NI 43-101 technical report.[1367] Indeed, the reporting of leading market analysts regarding the increased projected costs reflected in the NI 43-101

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[1364] Henry II ¶¶ 104-107.

[1365] Henry II ¶ 107; Compass Lexecon II ¶ 27; Cooper ¶¶ 40-42.

[1366] Compass Lexecon II ¶ 27; Henry II ¶ 107. *See also, e.g.*,

[1367] Henry II ¶¶ 107, 111; Cooper ¶¶ 40-42. *See also, e.g.*, .

technical report prepared by SRK in 2012 indicates that those costs increases "were within the range that had been expected by the market earlier and as such had been reflected in GBU's traded stock price."[1368]

696. For these reasons, as Mr. Henry observes, [1369] The total mix of information in the market, including Gabriel's robust risk disclosures, the independent reporting of market analysts, and also information disclosed by anti-Project activists in statements to the media and in various direct communications to market analysts, allowed investors to make materially informed decisions about investing in Gabriel and thus makes Gabriel Canada's market capitalization a reliable basis for assessing the damages caused by Respondent's breaches of the BITs.[1370]

697. In addition to its , Respondent contends that a "speculative bubble" in the price of gold inflated Gabriel Canada's share price. Respondent asserts that, in contrast to what Respondent characterizes as the "naïve and uninformed" investors who were buying and selling Gabriel Canada's shares on the TSX, "knowledgeable industrial participants in the gold mining business" would have accounted for the "price distortion" and valued Gabriel Canada based on "much lower" expected gold prices in

[1368] Cooper ¶ 43. *See also* Henry II ¶ 112 (observing that "the market evidently had factored in the likelihood that Project costs would increase since the 2009 NI 43-101"). *See also, e.g.*, .

[1369] Henry II ¶ 70.

[1370] Compass Lexecon II ¶¶ 16.b-c, 23 (concluding that, "[a]s of July 29, 2011, the market was provided with substantial information regarding the Roşia Montană Project through disclosures published by Gabriel Canada and through market analyst reports covering Gabriel Canada," and that such information was "appropriate" both with regard with the "Project's expected timeline and risks relevant to the development of the Project" and as to "the Projects' expected costs"). *See also* Henry II ¶¶ 70, 113; Cooper ¶¶ 35-36 .

the future.[1371] For the reasons set out more fully by Compass Lexecon and by Messrs. Cooper and Jeannes, this too is baseless.[1372]

698. First, as discussed above, participants in the gold stock market on the TSX included primarily large institutional and other sophisticated investors who were well informed and had their own significant experience with and comparative perspective of the gold mining sector and individual companies.[1373] It therefore "is implausible," as Mr. Jeannes explains, "that the traded stock price of TSX-traded mining companies such as GBU has been driven by naïve and uniformed investors."[1374]

699. Second, as Mr. Jeannes further explains, in his experience as the CEO of Goldcorp, "major mining companies did not perceive the rising gold prices as a 'speculative bubble.'"[1375] Based on his experience, Mr. Jeannes observes that a sophisticated mining company seriously evaluating an attractive acquisition opportunity, such as Gabriel Canada at the time of the Valuation Date, "would not have walked away from the acquisition on the ground that gold prices were in a 'speculative bubble,'" but instead "would have wanted to lock it in before gold prices and the traded value of the target company's stock increase[d] further."[1376]

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[1371] Counter-Memorial ¶¶ 768-769; Burrows ¶¶ 24-25.

[1372] Compass Lexecon II ¶¶ 35-37; Cooper ¶¶ 22-24, 45-47; Jeannes ¶¶ 30, 33-36.

[1373] Jeannes ¶ 30; Cooper ¶¶ 22-24.

[1374] Jeannes ¶ 30. *See also* Cooper ¶¶ 23-24 (rejecting Dr. Burrows's assertions that investors in GBU's stock were "[n]aïve and [u]ninformed," and explaining that, in the period leading up to the Valuation Date, the gold mining company segment of the TSX attracted (i) a number of generalist institutional investors, managed by professional fund managers, (ii) a number of gold funds established specifically for exposure to bullion, which "typically owned up to 50% of the shares of gold mining companies traded on the TSX," and (iii) private individual investors who "were the smallest group of holders of gold stocks at less than 25% of the TSX market, and in any event were often guided by financial advisors who in turn had access to coverage of the gold sector prepared by research departments of their firms and market analysts").

[1375] Jeannes ¶ 33.

[1376] Jeannes ¶ 33 (noting that it "simply was not possible for market participants, sophisticated or not, to predict with any certainty whether and when the trend towards higher gold prices would end"). *See also* Cooper ¶ 49 (explaining that "GBU and its Roşia Montană and Bucium projects would have been an attractive acquisition target for major companies," and that "Roşia Montană is a large, high-grade, low-cost asset" that would have been "highly desirable for companies seeking to renew their mineral reserves, which are increasingly difficult to find").

700. Third, if Respondent were correct that major mining companies and other sophisticated investors believed the stock prices of junior mining companies were significantly overvalued due to a speculative bubble in the price of gold, major mining companies would have stopped acquiring junior mining companies in 2010-2012, would have required significant discounts to the traded stock price if the transactions took place at all, and would have shorted Gabriel Canada's stock in order to capitalize on what they would have perceived as the inevitable future downward market correction in the stock price.[1377] None of these developments occurred in the marketplace.

701. On the contrary, as Messrs. Cooper and Jeannes confirm, sophisticated gold mining companies continued to acquire junior mining companies throughout the 2010-2012 time period notwithstanding gold prices, and in many instances did so at a significant premium to the traded stock price of the target company, as discussed below.[1378] In addition, short positions on Gabriel Canada's stock during the time period until the Valuation Date were relatively limited and did not materially increase.[1379]

702. Fourth, Gabriel Canada's shareholders included, and still include, several of the world's leading natural resource investors, including industry leader Newmont Mining, the second largest gold producer in the world, which did not seek to sell their shareholdings in Gabriel Canada in view of an alleged speculative gold price bubble or for any other reason.[1380]

703. Fifth, far from selling off their shares, Compass Lexecon observes that Gabriel Canada's institutional investors "were either maintaining or increasing their stakes in Gabriel Canada throughout 2011."[1381] For example, Baupost, a sophisticated investment management advisory firm, acquired a significant stake in Gabriel Canada at a cost of tens of millions of

[1377] Cooper ¶¶ 46-47; Jeannes ¶ 34.

[1378] Cooper ¶ 46; Jeannes ¶ 34.

[1379] Cooper ¶ 47 (noting that a minor increase in the short positions on Gabriel Canada's stock occurred in early 2011 but was covered by April 2011).

[1380] Memorial ¶ 4 (discussing Gabriel's shareholders); Henry ¶ 11; Henry II ¶ 98; Compass Lexecon II ¶ 36.

[1381] Compass Lexecon ¶ 36. *See also* Jeannes ¶¶ 35-36.

dollars in three separate transactions on the stock market in the first nine months of 2011.[1382] As Mr. Jeannes observes, Baupost's increases of its shareholding in Gabriel Canada on the stock market during a time when both the gold prices and Gabriel Canada's stock price were near their historic highs is "a real-life indicator of how investors perceived GBU's [*i.e.*, Gabriel Canada's] value and that of its projects during that time."[1383]

704. For these reasons, as Mr. Jeannes explains, Respondent's assertions regarding a purported speculative gold bubble driving up Gabriel Canada's stock price "are detached from reality."[1384]

705. Gabriel Canada's market capitalization as of the Valuation Date therefore is the most reliable measure of the Project Rights, from a minority shareholder's perspective. As Compass Lexecon demonstrates, and as Messrs. Jeannes and Cooper confirm, a fair market valuation of Gabriel Canada as of the Valuation Date would have included a significant premium above its stock market capitalization to account for the difference between assessing the value of a minority share (*i.e.*, a stock price) and the value of a majority interest, which is captured by an acquisition premium.[1385] Based on the actual acquisition premia paid in historical transactions in the mining industry and contemporaneous reports on expected premia conducted by experienced analysts covering the mining sector and Gabriel Canada as of the Valuation Date, Compass Lexecon concludes that an acquisition premium of 35% should be added to Gabriel Canada's

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[1382] Compass Lexecon II ¶ 36. *See also* Jeannes ¶ 35 (observing that Baupost acquired an 11.37% stake in Gabriel during the period through March 31, 2011, another 4.1 million shares in the public market through the end of May 2011, and a further 4.8 million shares in the public market in the period from June to September 2011, increasing its stake in Gabriel to 12.8%).

[1383] Jeannes ¶ 36 (concluding that it is "highly unlikely that any sophisticated, well-informed investor would have made the foregoing acquisitions of GBU shares on the stock market if it had considered that GBU's stock price was driven by a 'speculative bubble' of gold prices or that it for other reasons exceeded the market value of GBU's projects"). *See also* Compass Lexecon II ¶ 36 (observing that Baupost acquired a significant stake in Gabriel Canada near the Valuation Date).

[1384] Jeannes ¶ 33. *See also* Compass Lexecon II ¶¶ 35-36 (observing that "knowledgeable industry participants" "either maintain[ed] or increase[ed] their stakes in Gabriel Canada throughout 2011," at a time when Dr. Burrows claims that a "speculative bubble" drove up the value of Gabriel Canada's stock).

[1385] Memorial ¶¶ 912-913; Compass Lexecon § IV.2.1; Compass Lexecon II § III; Jeannes ¶¶ 15-28; Cooper ¶ 33.

market capitalization to arrive at the measure of the fair market value of the Project Rights as of the Valuation Date.[1386]

706. Respondent argues that acquisition premia are not standard in assessing fair market value, a conclusion Dr. Burrows purports to draw from his review of several "commonly used valuation texts."[1387] The treatises selected by Dr. Burrows discuss general valuation theory and not the valuation practices or specific empirical observation of transactions in the gold mining sector as of the Valuation Date.[1388] In any event, as Compass Lexecon demonstrates, all of the texts relied upon by Dr. Burrows confirm that in fact acquisition premia "are the norm."[1389]

707. Moreover, Mr. Jeannes, the former CEO of Goldcorp who also previously was Executive Vice President of Administration of Glamis Gold (which itself was acquired by Goldcorp at a premium of approximately 35%), provides multiple examples of those gold mining companies acquiring junior mining companies from 2006-2010, all of which involved a significant acquisition premium of at least 35%.[1390] As Mr. Jeannes explains, "the reality in most acquisitions in the gold mining sector has been that an acquisition premium is necessary in order to induce the majority of the target company's shareholders to sell their shares," and absent such a premium, "there would not be a willing seller or sellers with whom to transact for all or the majority of the target company's shares, especially where the target company has a promising deposit or project."[1391]

708. Mr. Cooper similarly observes that "real-world acquisitions of gold mining companies typically take place at a significant premium to the target company's traded stock

[1386] Memorial ¶ 913; Compass Lexecon ¶¶ 48-53; Compass Lexecon II ¶¶ 43, 47-51.

[1387] Burrows ¶ 69, § IV.B; Counter-Memorial ¶ 772.

[1388] Compass Lexecon II ¶ 47.

[1389] Compass Lexecon II ¶ 47.

[1390] Jeannes ¶¶ 15-19 (discussing Glamis Gold's acquisition of Western Silver Corp. for a premium of approximately 40% in mid-2006, Goldcorp's acquisition of Glamis Gold for a premium of approximately 35% in November 2006, Goldcorp's acquisitions of Gold Eagle for a 36% premium in September 2008, Goldcorp's acquisition of Canplats Resources for a premium in excess of 40% in February 2010, and Goldcorp's acquisition of Andean Resources for a premium in excess of 50% in December 2010).

[1391] Jeannes ¶ 22.

price," and that in his experience, "in order to cause existing shareholders of a company with a promising viable project to agree to its sale, the purchaser usually must pay a premium in excess of 30% to the stock price, and higher in many instances."[1392]

709. While allowing for the possibility of acquisition premia to be paid in some cases, Respondent and Dr. Burrows contend that there are only "three reasons why acquirers pay acquisition premiums (synergies, control, overpayment)," and that an acquisition premium should not apply in this case because of a lack of identifiable synergies and because "there is no reason to believe that a potential buyer would pay a premium for obtaining control over Gabriel Canada's assets" when the company was not mismanaged.[1393] These arguments are also unfounded.[1394]

710. First, as Mr. Jeannes observes, "Dr. Burrows does not purport to demonstrate that his three alleged reasons for an acquisition premium in fact were why most of the numerous acquisitions of junior mining companies and gold projects in the stock market by sophisticated, well-informed gold mining companies took place at a significant premium to the traded stock price."[1395]

711. Second, based on its review of 36 transactions (33 of which included an acquisition premium), Compass Lexecon observes that many of the transactions "did not involve these identifiable synergies or mismanagement and, as a consequence, under Dr. Burrows's reasoning, should not have included a premium—this was not the case."[1396] In fact, as Compass Lexecon explains, the companies involved in the transactions paid acquisition premia for a variety of other reasons.[1397]

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[1392] Cooper ¶ 33.

[1393] Counter-Memorial ¶ 773; Burrows ¶¶ 59-66.

[1394] Notably, in making the argument that the company was not mismanaged, Dr. Burrows and Respondent acknowledge that Gabriel Canada [redacted].

[1395] Jeannes ¶ 26.

[1396] Compass Lexecon II ¶ 46.

[1397] Compass Lexecon II ¶ 46.a-e (discussing the transactions and reasons acquisition premia were paid).

712. Third, contrary to the assertions of Dr. Burrows and Respondent, while synergies arising from geographic proximity of the mining properties and/or mismanagement might be among the factors taken into consideration by an acquirer in particular circumstances when determining what price it is prepared to pay, Mr. Jeannes observes that "these are very rarely the exclusive or even the prevailing factors."[1398] Rather, one of the main reasons to pay an acquisition premium is that mineral reserves such as gold are inherently scarce, there is a finite number of economic gold deposits globally and a finite amount of gold in those deposits, and major mining companies therefore must regularly replace mineral reserves depleted through mining in order to maintain a long-term supply of mineral resources to mine.[1399]

713. Fourth, as Compass Lexecon explains, multiple market analysts reported contemporaneously that Gabriel Canada was an attractive acquisition target that they expected would command a significant premium in a potential acquisition.[1400]

714. Based on their extensive experience in the industry, Messrs. Jeannes and Cooper therefore both confirm Compass Lexecon's application of a 35% acquisition premium to the market capitalization of Gabriel Canada properly reflects the value of the Project Rights held by Gabriel Canada as of the Valuation Date.[1401] Applying this premium, Compass Lexecon determined that Claimants' damages were US$ 3.286 billion as of the Valuation Date.[1402]

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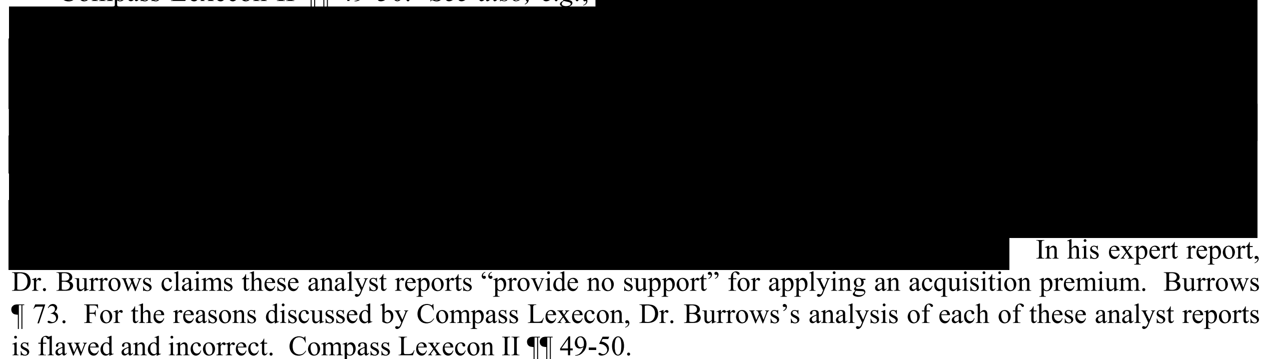
[1398] Jeannes ¶ 23.

[1399] Jeannes ¶¶ 23-24; Compass Lexecon II ¶ 44.

[1400] Compass Lexecon II ¶¶ 49-50. *See also, e.g.*,


In his expert report, Dr. Burrows claims these analyst reports "provide no support" for applying an acquisition premium. Burrows ¶ 73. For the reasons discussed by Compass Lexecon, Dr. Burrows's analysis of each of these analyst reports is flawed and incorrect. Compass Lexecon II ¶¶ 49-50.

[1401] Cooper ¶ 33; Jeannes ¶ 28 (concluding that "a 35% acquisition premium represents a reasonable and indeed conservative premium that I would expect to see in an acquisition of a junior company holding a large gold deposit, such as GBU, as of the valuation date").

[1402] Memorial ¶ 914; Compass Lexecon ¶¶ 6, 53, Table 1, Table 4; Compass Lexecon II ¶ 90, Table 4.

715. Finally, as discussed in the Memorial, Compass Lexecon supported its damages assessment with two additional valuation methods: (i) the relative market multiples method, which yielded the almost identical amount of US$ 3.261 billion in damages; and (ii) the price to net asset value (P/NAV) method, which yielded damages amounting to US$ 2.845 billion.[1403]

716. Respondent argues in its Counter-Memorial that neither of these alternative methods of supporting Claimants' damages calculation is reliable.[1404] For the reasons set out in detail in Compass Lexecon's second expert report, Respondent's assertions are groundless.[1405] Try as Respondent might to avoid the consequences of its unlawful actions, the relative market multiples and P/NAV assessments illustrate and support the reasonableness of Claimants' damages claim based on Gabriel Canada's market capitalization. In contrast, Respondent's proposed measure of damages is unreasonable, unreliable and unsupported as demonstrated below.

### D. Respondent's Alternative Valuations Are Not Reasonable or Reliable

717. Respondent proffers alternative valuations of the Roşia Montană and Bucium Projects calculated by Dr. Burrows that lack credibility being far below the actual observable market value of the project development rights based upon Gabriel Canada's publicly traded stock price. The sharp divergence of his calculated valuation from objective reality is the strongest indication that his approach is fundamentally flawed and designed solely for Respondent's defense in this arbitration.

718. Dr. Burrows uses a discounted cash flow ("DCF") measure of value for the Roşia Montană and Rodu-Frasin Projects and a comparable property measure for the Tarniţa Project.[1406] As implemented by Dr. Burrows, as discussed below, both approaches suffer from significant conceptual flaws and are based on incorrect assumptions. As Compass Lexecon

[1403] Memorial ¶¶ 915-923; Compass Lexecon § IV.3.

[1404] Counter-Memorial ¶¶ 775-781.

[1405] Compass Lexecon II §§ IV, V.

[1406] Dr. Burrows uses a comparable property measure also as a "check" on his DCF results for Roşia Montană and Rodu-Frasin. Burrows ¶¶ 15-17.

demonstrates, Respondent's alternative valuations do not provide a reliable basis upon which to assess Claimants' damages.

### 1. Respondent's Alternative DCF Valuations Are Based on an Unreliable Methodology and Incorrect Assumptions

719. Respondent proffers a DCF valuation of the Roşia Montană Project as calculated by Dr. Burrows.[1407] As Compass Lexecon explains, the DCF method of valuation is not relied upon in the industry to value gold mining companies. That is due to the fact that gold has unique attributes relevant to its value and use in the market as a safe haven and as a store of value, particularly during times of uncertainty. As a consequence gold companies' stocks neither face the same risks nor behave in the same fashion as general equities, and they do not have a clear correlation with the general market. The DCF methodology does not reliably account for the risk factors that relate to gold, in particular due to the manner in which a discount rate is calculated for a DCF measure, and therefore the DCF methodology does not produce reliable results for valuation of gold mining projects or companies.[1408]

720. The fact that the DCF methodology is not relied upon as a valuation method for gold mining companies is further explained by Mr. Cooper, who as noted above is a leading gold market analyst. Based on his extensive experience covering the gold mining sector as an analyst, Mr. Cooper explains that "[w]hile other businesses often are valued using the discounted cash flow ('DCF') method, in the gold mining sector, shares of gold mining companies often trade at higher prices than an application of a DCF calculation of the type presented by Dr. Burrows . . . would imply" and, "[s]imilarly, takeovers of gold mining companies and projects often are implemented at multiples of such DCF valuation."[1409] Accordingly, "[p]ractitioners in the gold industry have, thus, departed from the traditional DCF method relied upon by Dr. Burrows"[1410]

[1407] Counter-Memorial ¶¶ 782-788.

[1408] Compass Lexecon II ¶¶ 76-78, 98-102.

[1409] Cooper ¶ 29.

[1410] Compass Lexecon II ¶ 78.

and "[p]articipants in the gold mining sector . . . tend to rely on other valuation methods than the type of DCF analysis applied by Dr. Burrows."[1411]

721. As noted above, the unreliability of the DCF methodology that Dr. Burrows employs is demonstrated by the fact that it results in valuation measures that are sharply divergent from the actual market measures of the companies he purports to value. This is seen in his comparable property analysis for which Dr. Burrows computes a DCF-based value for each of the companies/properties in his sample resulting in values that are significantly at odds with the actual market valuations of these same publicly traded companies/properties.[1412]

722. In short, the DCF approach is not a reliable method to employ to measure the fair market value the Roşia Montană Project development rights (or the Rodu-Frasin Project, for the same reasons).

723. The particular DCF valuation of the Roşia Montană Project presented by Dr. Burrows moreover incorporates several significantly flawed assumptions. First, as Compass Lexecon demonstrates, Dr. Burrows' gold price assumptions are flawed because they are based on an outdated survey of gold prices used for mine planning purposes and out-of-context references to gold prices used by market analysts in their P/NAV analyses, which contradict actual market expectations concerning future gold prices as reflected in gold futures contracts.[1413] Further, Dr. Burrows builds up the discount rate using the capital asset pricing model, which is not a reliable approach for gold companies.[1414] In addition, Dr. Burrows double-counts the impact of RMGC's assumed continuous spend while it awaits permitting over the

[1411] Cooper ¶ 30.

[1412] Compass Lexecon II ¶¶ 101-102. For example, for Romarco Minerals, Dr. Burrows's DCF calculation indicates a value of US$ 229 million, whereas the company's market capitalization was more than three times *higher* at US$ 755 million; and for Rainy River, Dr. Burrows's DCF calculation indicates a value of US$ 839 million, whereas its enterprise value was almost three times *lower* at US$ 284 million. *Id*. ¶ 102.

[1413] *See* Compass Lexecon II ¶¶ 107-114.

[1414] *See* Compass Lexecon II ¶¶ 76-78, 98-102.

extended time period assumed by Dr. Burrows.[1415] This double-counting is incorrect, as Compass Lexecon demonstrates.[1416]

724. Second, Dr. Burrows based his DCF calculation upon an assumed multi-year delay to complete project permitting based on an instruction by Respondent's counsel.[1417] These assumed permitting delays, however, have no merit but for Romania's wrongful conduct and, in any event, would not reasonably have been assumed by a hypothetical buyer or seller as of the Valuation Date.[1418]

725. Third, Dr. Burrows incorporated into his DCF valuation various criticisms of the Roşia Montană Project presented by Respondent's technical experts in this arbitration.[1419] Dr. Burrows relies in particular upon Behre Dolbear, who appear to agree that the Roşia Montană Project was technically unfeasible and economically viable but purport to identify various potential risks and issues that according to them would need to be addressed before the Roşia Montană Project could obtain debt financing.[1420] These purported issues include, among other things, a reduced rate of recovery of metal from the ore, a slower initial ramp-up of production to full capacity, additional time for pre-construction activities and financing, and increased costs.[1421] These assumptions regarding alleged risks are meritless. They are thoroughly rebutted

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[1415] *See* Burrows ¶ 123.

[1416] Compass Lexecon II ¶ 106.

[1417] *See* Burrows ¶¶ 10, 120.

[1418] The assumed permitting delay has no merit. *See* Mihai § VI (addressing the permitting date); Henry II ¶¶ 82-88 (addressing timing of assumed litigations); Podaru §§ IV.B, IV.C; Bîrsan II § III.B (addressing expropriation timing); Lorincz II ¶¶ 121-140 (addressing acquisition of surface rights). *See also* SRK II ¶¶ 11, 46, 101-105, 109 (rebutting alleged sources of delay presented by Behre Dolbear).

[1419] *See* Burrows ¶¶ 116-119.

[1420] *See* SRK II ¶ 2(b) ("Behre Dolbear appears to agree that the Roşia Montană Project was technically feasible and economically viable and that it had significant, and valuable, mineral resources and mineral reserves of gold and silver."); *id.* ¶ 2(c) ("Behre Dolbear nevertheless purports to identify various outstanding technical issues, shortcomings and potential risks that according to Behre Dolbear would need to be addressed before the Roşia Montană Project could obtain debt financing and proceed to implementation . . . we conclude that the alleged issues presented by Behre Dolbear are generally speculative and devoid of analysis, contradicted by the work and reports of multiple highly respected mining and engineering consultants who developed or independently reviewed and endorsed the relevant aspects of the Roşia Montană Project, are at odds with industry practices, and/or are incorrect for other reasons. Accordingly, we conclude that Behre Dolbear's criticisms of the Roşia Montană Project are not well founded.").

[1421] Burrows ¶¶ 116-123.

by SRK, to whose expert testimony the Tribunal is respectfully referred.[1422] Additionally, Dr. Burrows incorporated into his DCF valuation inflated costs associated with mine closure and remediation,[1423] which, as Dr. Kunze demonstrates, are meritless.[1424]

726. Notably, Dr. Burrows purports to identify other factors that he claims could impact value,[1425] although these likewise do not have merit.[1426]

727. Indeed, the criticisms of the Roşia Montană Project presented by Respondent's experts are inconsistent with the contemporaneous work and conclusions of the multiple reputable specialists who independently reviewed and endorsed the technical aspects of the Roşia Montană Project, including but not limited to the group of experts who authored the 2009 NI 43-101 Technical Report for purposes of Gabriel Canada's reporting under Canadian securities regulations,[1427] SRK in the 2012 NI 43-101 Technical Report,[1428] NAMR as part of the homologation procedure for the Roşia Montană Project's mineral resources and mineral

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[1422] *See generally* SRK II. *See also, e.g.*, Corser I and Corser II (regarding soundness of TMF design); Szentesy ¶¶ 61-73, 82-83 (regarding TMF design and permitting); Szentesy II ¶¶ 33, 44-64 (regarding TMF design and permitting); Jennings II ¶¶ 59-61 (regarding spending on cultural preservation); Podaru ¶ 50 (regarding the timing of construction permits); Bîrsan II § B.3 (regarding the expropriation procedure concerning land); Kunze II ¶¶ 61-63 (regarding closure costs).

[1423] Burrows ¶ 119.

[1424] *See* Kunze II ¶¶ 61-63 (regarding closure costs).

[1425] *See* Burrows ¶ 14 (referring to timing for expropriation, impact of the Chance Finds Protocol, obtaining the ADC for Orlea, alleged uncertainty of resources and reserves measure, and alleged lack of social license); *id.* ¶ 127 (similar); *id.* ¶¶ 117-118 (referring to a number of purported deficiencies of resources and reserves measure and noting that not all of them are reflected in Behre Dolbear's modified mine model spreadsheet); *id.* ¶ 118 n.176 (noting but not implementing Behre Dolbear's contingency factor for capital expenditures).

[1426] *See* Bîrsan II § III.B (addressing expropriation timing); Lorincz II ¶¶ 121-140 (addressing acquisition of surface rights); Gligor II ¶¶ 102-109 (addressing the Orlea ADC); *id.* ¶¶ 55-69 (addressing the Chance Finds Protocol); Schiau II ¶¶ 302-313 (addressing the Chance Finds Protocol); Jennings II ¶¶ 30-32 (discussing RMGC's preliminary research undertaken in Orlea); *id.* ¶¶ 54-58 (addressing the Chance Finds Protocol); Szentesy II ¶¶ 7-21 (addressing resource and reserve calculations); SRK II § 3 (addressing mineral reserves and resources); *supra* § IV.A (demonstrating that RMGC had a social license). Further, Behre Dolbear proffers various additional alleged issues which are not addressed by Dr. Burrows, such as the alleged need to replace the contemporaneous design of the tailings management facility with a dry-stacking facility, at a significant additional cost. *See* Behre Dolbear ¶¶ 89-97, 111. Behre Dolbear's additional assertions also are without merit. *See* Avram II ¶¶ 4, 18, 26, 70-71, 134 (discussing the sufficiency of the tailings management facility); Corser II ¶¶ 77-82 (discussing how dry stack tailings approach would not have been optimal for the Roşia Montană Project). *See also generally* SRK II (responding to Behre Dolbear's report).

[1427] SRK II ¶¶ 4, 18; Memorial ¶ 898 n. 1748.

[1428] SRK II ¶¶ 10, 18; Memorial ¶ 898 n. 1748.

reserves,[1429] the Canadian consulting firm AECOM, hired by the Romanian Government, which issued a report to the Government in June 2013 endorsing the Roşia Montană Project,[1430] and the [redacted].[1431] For these reasons and as explained above in addressing Respondent's other *post hoc* technical challenges, the purported issues presented by Respondent's technical experts are entirely implausible.

728. In conclusion, the flaws in the assumptions underlying Dr. Burrows's DCF valuation of the Roşia Montană Project are another reason why Dr. Burrows's valuation based on his DCF calculation is not accurate and does not provide a reliable basis upon which to assess the losses incurred by Claimants.

### 2. Dr. Burrows's Comparable Property Valuations Are Flawed

729. Respondent proffers valuations of the Roşia Montană, Rodu-Frasin, and Tarniţa Projects based on values of comparable properties, implemented by Dr. Burrows "[a]s a rough check on the DCF analysis"[1432] (in the case of Roşia Montană and Rodu-Frasin) and as the only measure of value (in the case of Tarniţa). As Compass Lexecon explains, Dr. Burrows's comparable property analyses suffer from material flaws, including the following. First, in contrast to the robust, large samples used by Compass Lexecon, Dr. Burrows's samples of comparable properties are too limited to be reliable, include non-contemporaneous transactions from 2009 and 2013, and moreover omit companies and properties that are comparable.[1433]

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[1429] Szentesy II ¶¶ 10-15. *See also generally* NAMR Decision No. 11-13 of 14 March 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roşia Montană deposit, Alba County, as at 1st January 2013 (Exh. C-1012-C); NAMR Report for the verification of the documentation for assessment of the gold/silver resources/reserves in the Roşia Montană Perimeter, Alba County, dated Mar. 12, 2013 (Exh. C-2197).

[1430] Szentesy II ¶ 19; Henry II ¶ 109 n.238; SRK II ¶¶ 49. *See generally* AECOM, The Government of Romania, Department for Infrastructure Projects of National Interest and Foreign Investments, Preliminary Assessment of the Roşia Montană Project in Romania (Exh. C-2199).

[1431] [redacted]

[1432] Burrows ¶ 15. *See also* Counter-Memorial ¶¶ 787-788.

[1433] Compass Lexecon II ¶¶ 119-120, 128, 130.

Second, for the Roşia Montană Project, Dr. Burrows fails to attribute any value to the Roşia Montană Project's mineral resources, which is contrary to the economic reality that in the mining industry mineral resources are considered valuable as they indicate that reserves may be increased over time.[1434] Third, for both the Roşia Montană Project and the Bucium Projects, Dr. Burrows makes various unfounded *ad hoc* adjustments that have the effect of lowering his valuation.[1435] As such, Dr. Burrows's comparable property valuations provide neither a reliable check on his DCF calculations nor a reliable basis to assess Claimants' damages.

### E. Respondent's Alternative Argument for Delay Damages Is Misguided

730. Respondent presents a scenario based on the untenable assumption that Respondent's treaty breaches have not prevented the permitting and implementation of the Roşia Montană Project and the Bucium Projects but "only have at most delayed the Project's progress."[1436] This scenario is based on Respondent meritless contention, contrary to all evidence, that the permitting process remains open for RMGC.[1437] Respondent's "delay damages" scenario fails for several reasons.

731. First, Respondent's "delay damages" scenario is based on a misguided theory of liability that Claimants have not presented. For all of the reasons explained above, the Projects have not been delayed, they have been rejected and effectively terminated. There are numerous demonstrations of that reality, among them, the recent July 5, 2018 statement of Romania's Minister of Culture regarding the postponement during this arbitration (referred to as "the action" in the quotation below) of the State's UNESCO application:

> The Government of Romania . . . decided that we should postpone the decision, which means that nothing will happen for three years, until the end of the action. With just one simple request we may reenter at any moment on that UNESCO list. Of note is also that Law no. 5 of 2000, as well as Law 422 of 2001 classified this site as a historic monument of national and universal importance. Therefore, we are also protected by our laws and there can be no exploitation there, as you very well know,

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[1434] Compass Lexecon II ¶ 121. *See also* Cooper ¶¶ 31-32.

[1435] Compass Lexecon II ¶¶ 122-124, 129, 131.

[1436] Counter-Memorial ¶ 714. *See also id*. § 11.2; Burrows § X.A.

[1437] Counter-Memorial ¶ 808.

> because in order to obtain an exploitation permit you need approvals from the Ministry of Environment, the National Agency for Mineral Resources and, most definitely, from the Ministry of Culture, and this will not happen. So, no exploitation is allowed there throughout this period, nothing will happen, except for Romania potentially losing 4.4 billion dollars.[1438]

732. Second, Respondent's "delay damages" scenario is contrary to the principle that damages must "wipe out the consequences" of the unlawful acts and provide full reparation and that a State may not be allowed to benefit from its own illegal act (*nullus commodum capere de sua injuria propria*).[1439] Specifically, Respondent's "delay damages" scenario is based on the assumption that liability is established on the basis of Respondent's "failure to approve the environmental permit"[1440] and that following the Award Respondent will agree to remedy such failure by issuing the environmental permit at some point in the future.[1441] However, the timing of the issuance of the Award is uncertain and the notion that Romania would be willing to issue the Environmental Permit is highly speculative. This uncertainty is the product of Respondent's treaty violations. Moreover, the issuance of an environmental permit is meaningless when Romania also has made it impossible to obtain a construction permit,[1442] and has demonstrated its intention to negate the ADCs issued.[1443] Thus, what is certain is that as matters stand, the Environmental Permit has not been issued, the Projects have been rejected and blocked, a construction permit has been rendered impossible under Romanian law, and the value of Claimants' investments has been wiped out. Respondent's approach would shift the financial consequences of its treaty breaches onto Claimants.

733. Third, in any event, Respondent's quantification of "delay damages" is based on the same flawed DCF methodology and flawed assumptions regarding factors such as the costs

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[1438] *Ivaşcu on Roşia Montană: We are, in any case, protected by our laws and no one can exploit there*, Agerpres.ro, dated July 5, 2018 (Exh. C-1921) at 2.

[1439] *See* Memorial ¶¶ 853-854.

[1440] *See* Counter-Memorial ¶ 806 (stating that Respondent instructed Dr. Burrows to "compute the quantum of the damage caused by Romania's alleged failure to approve the environmental permit").

[1441] *See* Counter-Memorial ¶ 808.

[1442] *See* Podaru § IV.C.4.

[1443] *See supra* §§ V.B.4-V.B.7.

and metal recoveries of the Roşia Montană Project that Dr. Burrows included in his valuation measure, and as such is equally flawed as a measure of damage.[1444]

734. In short, there are no grounds to award Claimants damages on the basis of Respondent's alternative "delay damages" theory of loss.

### F. Compensation Must Include Compound Interest at an Appropriate Commercial Rate to Ensure Full Reparation

735. As Claimants established in the Memorial,[1445] interest is a necessary element of compensation to ensure full reparation when the principal sum due is quantified as at an earlier date than the date of the award; interest must run to the date of payment; both BITs require that interest should be "at a normal commercial rate;" and interest should be compounded to reflect commercial realities, as the overwhelming majority of international investment tribunals recognize.

736. Respondent disputes (i) whether interest should be compounded, and (ii) the interest rate that should be applied in this case. Each is addressed in turn below.

#### 1. Compound Interest Reflects Commercial Reality and Is Therefore Standardly Awarded

737. Compound interest is widely recognized as a necessary component of compensation based on commercial realities and for that reason is routinely awarded. Respondent does not dispute that fact, but argues that compound interest is not a legal requirement.[1446] One may observe, however, that is because there may be some cases where there was a commercial expectation of simple interest and the law does not rule that out.

[1444] *See* Compass Lexecon II ¶ 7 n.11 (stating that "Dr. Burrows's damages assessment under the delay scenario is based on the same flawed DCF methodology and assumptions as used within his expropriation scenario"). *See also* Burrows ¶ 163 (stating that to estimate the delay damages, Dr. Burrows calculated the "present discounted value as of the Valuation Date (July 29, 2011) of the difference between the value of the Projects in the *Counterfactual Scenario described above* (Exhibit CRA-7) and the value of the Projects in the Actual Scenario (Exhibit CRA-8)) (emphasis added); *id*. ¶¶ 10, 14 (describing the Counterfactual Scenario and its use in Dr. Burrows's primary damages calculation).

[1445] Memorial § XVI.A.3.

[1446] Counter-Memorial ¶¶ 814-815.

738. In fact, however, the *Santa Elena v. Costa Rica* tribunal's influential award in 2000 marked a significant turning point in the recognition that in most circumstances, compound, not simple interest is necessary to award the full compensation required by international law. Since then, investment treaty tribunals have been nearly unanimous in their treatment of this issue.[1447]

739. As Sir Elihu Lauterpacht and Penelope Nevill explained, this decisive shift in favor of compound interest arises from a recognition that an award of simple interest in most cases would be unreasonable, as it would not provide full reparation of a loss suffered:

> [M]odern financial activity, eg in relation to consumer and commercial bank loans and accounts, normally involves compound interest. The reasoning behind this change in approach is that a judgment creditor promptly placed in the possession of the funds due would be able to lend them out or invest them at compound interest rates or, if forced to borrow as a result of the respondent's wrong, will do so at compound rates. It is therefore unreasonable to limit the interest to simple interest.[1448]

Other leading commentators also underscore that compound interest "better reflects actual economic realities … for the purpose of remedying the loss actually incurred by the injured party."[1449]

740. Indeed, even since Claimants filed the Memorial, another ten publicly available investment treaty awards have been released providing for compound interest.[1450] In so doing

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[1447] *See* SERGEY RIPINKSY AND KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) (CL-196) at 383 (noting in 2008 that tribunals have been "unified" in the position that compound interest should be awarded), at 387 (further noting that "as far as international investment law is concerned, there has been a reversal of the presumption of simple interest: a significant number of recent tribunal decisions provide a strong indication that compound interest has come to be treated as the default solution"); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017) (CL-184) ¶ 6.243 ("After [the] changing trend in 2000, compound interest started to be increasingly accepted by international investment tribunals to the extent that compound interest, and not simple interest, became the rule rather than the exception.").

[1448] ELIHU LAUTERPACHT and PENELOPE NEVILL, *The Different Forms of Reparation: Interest*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (2010) (CL-66) at 618.

[1449] *E.g.*, IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017) (CL-184) ¶ 6.248.

[1450] *See Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award dated July 21, 2017 (CL-248) ¶ 1125; *Valores Mundiales, S.L. y Consorcio Andino, S.L.* v. *República Bolivariana de Venezuela*, ICSID Case No. ARB/13/11, Award dated

the *Caratube v. Kazakhstan* tribunal emphasized that "*today compound interest is readily awarded by international investment tribunals* in an effort to provide full compensation to the claimant and place the latter in the position it would have been in had the wrongful act not taken place."[1451] The *Novenergia v. Spain* tribunal observed that "the *compounded basis on interest is in conformity with international law and practice in investment arbitration*;"[1452] the *UP and CD v. Hungary* tribunal awarded compound interest "*[a]ccording with the standard practice in recent investment arbitration*;"[1453] and the *Koch v. Venezuela* tribunal concluded that "in modern times, *it would be 'abnormal' for interest to be limited to simple interest*," and that although "[i]t would be possible to add references to many other decisions to such effect, in addition to doctrinal writings… it is unnecessary to do so here."[1454]

741. Compass Lexecon accordingly opines that "there is no economic basis for using simple interest. When money is invested, interest payments can be 're-invested' to earn interest in subsequent periods … a principle which simple interest disregards."[1455] Compass Lexecon adds that "there should be no disagreement between the experts that economic valuations are conducted in the marketplace at compound interest rates, given that the DCF method employed by Dr. Burrows is based on the principle of compounding interest."[1456]

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July 25, 2017 (CL-249) ¶ 822; *Karkey Karadeniz v. Pakistan* (CL-250) ¶ 999; *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated Sept. 27, 2017 (CL-246) ¶ 1226; *Koch Minerals Sárl and Koch Nitrogen International Sárl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award dated Oct. 30, 2017 (CL-251) ¶ 11.10; *Bear Creek Mining Corporations v. Republic of Perú*, ICSID Case No. ARB/14/21, Award dated Nov. 30, 2017 (RLA-53) ¶ 715; *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award dated Dec. 22, 2017 (CL-252) ¶ 1151; *Novenergia v. Spain* (CL-221) ¶ 846; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award dated May 16, 2018 (CL-254) ¶ 665; *UP and CD Holding v. Hungary* (CL-247) ¶ 600.

[1451] *Caratube v. Kazakhstan* (CL-246) ¶ 1226 (emphasis added).

[1452] *Novenergia v. Spain* (CL-221) ¶ 846 (emphasis added).

[1453] *UP and CD Holding v. Hungary* (CL-247) ¶ 600 (emphasis added).

[1454] *Koch Minerals Sárl and Koch Nitrogen International Sárl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award dated Oct. 30, 2017 (CL-251) ¶ 11.10-11.11 (emphasis added).

[1455] Compass Lexecon II ¶ 88.

[1456] Compass Lexecon II ¶ 88.

742. Notably, Respondent's expert, Dr. Burrows, was "instructed to use simple interest" by Counsel and provides no other explanation.[1457]

743. It clear from the above that compensation awarded to the Claimants should include interest on a compound basis.

### 2. The Level of Interest Must Be Set at a Normal Commercial Rate

744. Both parties recognize that "the rate of interest must be set at the level necessary to ensure full reparation in the circumstance, and as such, requires a case-specific assessment."[1458] Notably, both the UK BIT and the Canada BIT provide that in the event of a lawful expropriation, compensation must include interest at a "normal commercial rate."[1459] An award of compensation for losses incurred due to unlawful acts cannot provide less.[1460]

745. Compass Lexecon explains that "[a] commercial rate is the rate at which private, commercial enterprises are able to obtain financing. A reasonable commercial rate implies that the borrower is neither in financial distress nor a prime borrower."[1461]

746. As Compass Lexecon observes, 12-month LIBOR plus a 4% premium is a normal commercial rate for corporations in the EMEA region.[1462] This is in line with

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[1457] Burrows ¶ 178.

[1458] Memorial ¶ 878; Counter-Memorial ¶ 817 (*citing* Memorial ¶ 878).

[1459] Memorial ¶ 879. *See also* UK-Romania BIT (Exh. C-3) Art. 5; Canada-Romania BIT (Exh. C-1) Art. VIII(1).

[1460] Memorial ¶ 879 (*citing* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017) (CL-184) ¶ 3.81 (noting that it "would not be in the interest of legal justice and [would] run counter to the general preventive function of law" were compensation for unlawful conduct to be set at a level less than for a lawful taking)).

[1461] Compass Lexecon ¶ 98. Marboe similarly noted recently that a risk-free or prime rate is a normal commercial rate because "not all enterprises can borrow money from the banks at the prime rate so that an increase by a few percentage points might be necessary." IRMGARD MARBOE, DAMAGES IN INVESTOR-STATE ARBITRATION: CURRENT ISSUES AND CHALLENGES (2018) (CL-253) at 69.

[1462] Compass Lexecon ¶ 99; Compass Lexecon II ¶ 86. *See also UP and CD Holding v. Hungary* (CL-247) ¶ 597 (noting that interest should be set at a rate so as to give effect to the principle of full reparation, that guidance may be taken from the BIT provision for lawful expropriation directing that an "applicable market rate" should be applied, and finding that EURIBOR plus 6.01% is an "appropriate" rate).

Respondent's expert Dr. Burrows' assessment of Claimant's cost of debt[1463] and with the decisions of other investment treaty tribunals.[1464]

747. Dr. Burrows argues for a risk-free rate, because he argues, there is "no risk" to Claimants of not collecting on an award.[1465] That is simply false. The Claimants face very real risks that Romania will seek to avoid full payment of any award. This will be particularly so if interest on the award is set to create perverse incentives, such as if the interest on the award is materially lower than Romania's cost of borrowing.[1466]

748. In light of the above, the compensation awarded to the Claimants should include interest at the normal commercial rate of interest of LIBOR plus 4 percent.

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[1463] *See* Compass Lexecon II ¶ 86 (noting also that Respondent's expert Dr. Burrows computes Gabriel Canada's cost of debt based on a 4% premium over the 10-year LIBOR swap rate).

[1464] *Rusoro Mining v. Venezuela* (CL-149) ¶ 838 (awarding compound interest at rate of LIBOR plus 4%). *See also Murphy Exploration v. Ecuador* (CL-73) ¶¶ 516-518 (awarding compound interest at a rate of LIBOR plus 4%); *Flughafen Zürich A.G. y Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award dated Nov. 18, 2014 (CL-41) ¶ 965 (awarding compound interest at a rate of LIBOR plus 4%); *Mobil Investments v. Canada* (CL-154) ¶ 170 (awarding compound interest at a rate of LIBOR plus 4%).

[1465] Burrows ¶¶ 175-176.

[1466] Compass Lexecon II ¶ 87 ("Dr. Burrows's risk-free rate (at 0.21%) is not only below the cost of financing of most corporations, but it is also below the Respondent's cost of borrowing of 4.3%, allowing Respondent to shift its own credit risk to the Claimants.").

## XIV. REQUEST FOR RELIEF

749. For all the reasons set forth in the Memorial and above, reserving the right to amend these submissions following further pleadings in this case and in light of such further considerations of fact and law as may be adduced, Claimants respectfully request the following:

a) With respect to the Canada-Romania BIT, that the Tribunal:

i) Hold that Respondent breached its obligations under Article II;

ii) Hold that Respondent breached its obligations under Article III;

iii) Hold that Respondent breached its obligations under Article VIII; and further

b) With respect to the UK-Romania BIT, that the Tribunal:

i) Hold that Respondent breached its obligations under Article 2; and

ii) Hold that Respondent breached its obligations under Article 5; and further

c) That the Tribunal:

i) Award Claimants compensation in the total amount of US$ 3,285,656,649 plus interest compounded annually running from July 29, 2011 up through the date of payment of the Award so established at the rate of 12-month LIBOR + 4 %;

ii) Award Claimants compensation on such other basis as the Tribunal may deem warranted;

iii) Award Claimants the amount of legal fees and costs incurred in these proceedings; and

iv) Award Claimants interest on the amount of legal fees and costs awarded running from the date of the Award up through the date of payment.

Respectfully submitted,

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