INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

CLAIMANTS' SECOND POST-HEARING BRIEF

April 23, 2021

Ţuca Zbârcea & Asociaţii

WHITE & CASE LLP

Counsel for Claimants

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I. INTRODUCTION

1. Claimants hereby respond to arguments Respondent raises in its first post-hearing brief in the order Respondent presents them.[1] Nothing Respondent has said changes the essential facts, which are as follows.

2. Claimants agreed to joint-venture with the State to explore and, if feasible, develop through a public concession the Roşia Montană and Bucium mining perimeters. Claimants raised and invested ~US$760 million to develop the Projects with leading industry experts in accordance with applicable legal and regulatory requirements. Claimants legitimately expected Romania to assess and permit the Projects in like manner. Claimants upheld their end of the bargain; Romania did not.

3. With Claimants' substantial investment, RMGC succeeded in establishing the bases to receive the permits to develop the Projects' world-class mineral assets. The significant value of the rights to do so is confirmed by: (i) Gabriel's market capitalization (which reflected a non-speculative, contemporaneous, fair market value measure of those rights from a minority shareholder perspective); (ii) Gabriel's core group of sophisticated sector shareholders, including Newmont, that not only held, but increased shareholdings over time; (iii) significant premia routinely paid in transactions to acquire control of such project rights; and (iv) Romania's contemporaneous acknowledgment that rejecting Gabriel's investments on a "political criterion" meant the State would be liable to pay billions in compensation.

4. The evidence of Romania's unlawful conduct beginning in August 2011 and culminating in the political rejection of the Project in September 2013 is overwhelming and undeniable. The Roşia Montană Project met all requirements for the critical EP, and under the law should have been permitted; RMGC likewise was entitled to the Bucium exploitation licenses. These projects were eventually *de facto* terminated because the Government and coalition leaders prioritized personal and party political interest over Gabriel's and RMGC's legal rights.

[1] References to prior submissions include all testimony, exhibits, and authorities referenced therein.

5. Starting in 2006 as Mayor of Cluj, a university town with a strong anti-mining constituency, Mr. Boc publicly opposed the Project before and regardless of any technical assessment of the Project. Ministers Hunor and Borbély towed Prime Minister Boc's coalition line regarding the Project and, as leaders of the ethnic Hungarian party, considered Hungary's opposition to the Project, also announced before any technical assessment. Per their public statements, Messrs. Boc, Hunor and Borbély clearly conditioned the Project unlawfully on a new economic deal and a final favorable political decision. Whether they would ever have risen above parochial political interests and allowed the projects to proceed as application of legal standards required is unknown and irrelevant.

6. Mr. Ponta also lacked any legitimate basis to oppose the Project. He admittedly did so because his political opponent President Basescu supported it, and he scored political points by baselessly accusing Basescu and other Project supporters of corruption. Like Mr. Boc, Mr. Ponta had painted himself into a political corner and could not be seen as approving the Project no matter how meritorious. Prime Minister Ponta's Government continued the unlawful Boc policy (which had remained unchanged under Prime Minister Ungureanu's Government), and arranged for the political decision on the Project to be taken by Parliament through a vote on a special law. Mr. Ponta subverted the process further by instructing the ruling coalition members with Senator Antonescu to reject the Special Law and thus the Project. This act of political self-preservation for those in office was intended to quell the public anti-Government furor that erupted over the perceived special treatment for a Project the Prime Minister called corrupt when in opposition through a law the Prime Minister endorsed but refused to vote for. It was the death-knell of the Project and the joint-venture with Gabriel.

7. Respondent's case is at war with the contemporaneous record and otherwise meritless. Respondent cannot overcome this ineluctable conclusion regardless of how many arguments it attempts to raise or how many times it repeats them. This becomes clear upon examination, even though Respondent has tried to limit its case from scrutiny by presenting the bulk of it with and after its Rejoinder.

8. Respondent repeats a number of jurisdictional questions in the introduction to its post-hearing brief. Claimants have addressed those issues as follows: (a) whether Gabriel

Canada's claims are "time-barred" – they are not;[2] (b) whether the Tribunal has jurisdiction to consider facts that post-date the notice of dispute – it does;[3] (c) whether the Tribunal has jurisdiction to address Gabriel Jersey's claims under the UK BIT in view of the *Achmea* Decision – it does.[4]

9. The record is undeniable that Romania treated Gabriel's investment unlawfully and caused Claimants to suffer enormous loss. Claimants request this Tribunal to award compensation accordingly.

II. RESPONDENT'S EP ARGUMENTS LACK MERIT

10. The evidence shows conditions for the EP were met, but the Government did not issue the permit because it rejected the Project and joint-venture with Gabriel. Respondent's arguments about the Ministry's discretion and the margin of appreciation are irrelevant.

11. The evidence shows the EP requirements were met,[5] including:

a. the November 2011 TAC transcript (C-486),

b. December 2011 public statements of Minister of Environment Borbely (C-633, C-1505, C-637) and Minister of Culture Hunor (C-439),

c. public statements of TAC President Anton (C-438, C-778, C-436),

d. internal Government analyses in 2012-2013 (R-406, C-1903),

e. the Inter-Ministerial Commission transcripts (C-471, C-482) and Government-approved report (C-2162),

f. the Government's May 2013 Aarhus submission (C-2907),

g. the May and July 2013 TAC transcripts (C-484, C-485, C-480),

[2] C-PHB ¶¶30-37.

[3] C-PHB ¶¶26-27; C-PO27 ¶¶204-225.

[4] C-PHB ¶23.

[5] C-PHB §IV; C-Opening-2019 vol.4; C-PO27 ¶¶11-33.

h. the draft EP conditions published in July 2013 (C-555),

i. the draft Decision accepting the EIA Report and recommending EP issuance (C-2075), and

j. repeated attestations the EP requirements were met including by Prime Minister Ponta (C-460.2, C-437), Minister of Environment Plumb (C-556, C-510, C-557, C-506, C-1529), Minister of Culture Barbu (C-1511, C-929), and Minister Şova (C-643, C-507, C-1531).

12. This evidence demonstrates the Ministry of Environment completed its EIA review at the November 2011 TAC meeting and should have recommended EP issuance by early 2012, and then again in July 2013. It did not do so because the Government conditioned the EP (and the Project itself) on a political decision.

A. Basis for EP Decision

13. Respondent contends the Ministry of Environment may "request information and clarifications" and recommend issuing the EP "subject to conditions" or "against issuance of the permit if it concluded that the adverse environmental consequences of the Project could not be addressed by conditions." These observations are irrelevant.

14. The Ministry of Environment determined the Project met EP requirements, consulted the TAC about EP conditions, published a 58-page Note proposing EP conditions, and prepared a Draft Decision accepting the EIA Report, including the published EP conditions, and proposing EP issuance. The authorities empowered to recommend (Minister of Environment) and approve (Prime Minister by endorsing a Government Decision) the EP, repeatedly acknowledged the EP requirements were met.

15. Respondent's argument that authorities have a "margin of appreciation" to deny an EP application "even when they meet the relevant requirements" is meritless:[6]

[6] C-PHB ¶¶93-94; C-PO27 ¶¶8-10, 122-124.

a. Under Administrative Litigation Law No.554/2004, "exercising the right of appreciation of the public authorities by violating the limits of competence provided by law" is an "excess of power."[7]

b. Romania's High Court of Cassation holds "[t]he power of discretion may not be regarded, under the rule of law, as an absolute or as an unlimited power," and that any administrative decision "must be motivated" under Law No.554/2004 to ensure "its compliance with the boundaries between the power of discretion and the arbitrary," and to enable the court "to verify the factual and legal aspects which grounded the issuance of the administrative deed."[8]

c. The Government has recognized, it is "beyond doubt that the legal nature of the [EP] approval is that of an administrative deed subject to judicial review within the administrative court procedure provided by the Administrative Litigation Law No.554/2004."[9]

d. Professors Tofan and Dragoş accept the margin of appreciation is limited and that deciding based on political factors is an excess of power.[10]

e. Minister of Environment Plumb testified to Parliament that the Ministry of Environment must recommend issuing the EP if the legal requirements are met.[11]

16. Respondent did not cross-examine Professor Mihai about any of these legal principles. Respondent instead attacked him personally.[12]

a. Respondent observes Professor Mihai has not "been involved in any EIA Procedure." None of the legal experts has.[13]

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[7] (C-1767) Art.2(1)(n).

[8] (C-1778).

[9] (C-1749); (C-1766) Art.11(3)(requiring decision to issue or reject EP "with motivation"); (C-1774) Art.29(5)(requiring "issuance or motivated rejection" of EP).

[10] C-PO27 ¶124.

[11] Mihai-I ¶416; (C-506), 45.

[12] Tr.(Dec.10, 2019)2291:19-2297:22 (Mihai-Cross).

b. Respondent contends Professor Mihai is only an expert in "civil (private) law" "and not qualified to provide opinions on administrative law matters." Professor Mihai was President of Romania's Constitutional Court, "which is the highest legal position in the country and ranked as the fifth public position."[14] Professor Mihai thus ruled on the constitutionality of legislative and administrative acts, which is public (not private) law. He served as Secretary-General of Parliament where his "main task was to enforce administrative law."[15] He has handled "many administrative law litigations,"[16] and testified "convincingly" in the *EDF* ICSID arbitration on both public law and private law matters.[17]

c. [redacted]

d. [redacted]

[13] Tr.(Dec.10, 2019)2279:5-2281:1 (Mihai-Cross); Tr.(Dec.11, 2019)2602:21-2603:9 (Tofan-Tribunal)("I'm not aware of the details of the activity of a committee or body except from some discussions with people working in the system or from what I've read.").

[14] Mihai-I ¶9.

[15] Tr.(Dec.10, 2019)2248:10-2249:16 (Mihai-Tribunal).

[16] Tr.(Dec.10, 2019)2276:17-20 (Mihai-Cross).

[17] (CL-103) ¶¶195, 281-283, 311-312.

[18] Tr.(Dec.10, 2019)2290:16-2291:18 (Mihai-Cross).

[19] Mihai-I ¶8.

e. [redacted]

17. Respondent seeks to minimize Mr. Avram's knowledge regarding the EIA, stating "he did not prepare the EIA Report himself." Indeed, Romanian law requires experts authorized by the Ministry of Environment to prepare the EIA. Mr. Avram, who has significant expertise in environmental permitting matters, oversaw the team of authorized experts who prepared the Report.[21] The TAC Vice-President confirmed in May 2013, "each domain, each chapter was endorsed by a Romanian institution, so professionalism is not in question here."[22]

18. Seeking to elevate Ms. Mocanu's knowledge, Respondent observes she was involved in the EIA Process "since 2004" – although not from June 2012 to June 2014.[23] Her area of "expertise" is air quality[24] – an issue not raised in this arbitration. While Respondent argues she "is intimately familiar with the applicable legal framework," she has no legal training. Respondent failed to present any witness with decision-making authority on environmental permitting, or on the water, waste management, urbanism, cyanide transport, and cultural heritage issues it raises.[25]

[20] Analogously, the IBA guidelines on conflicts of interest for arbitrators provide (Standard 4) that a party waives any objection not raised within 30 days of learning the facts constituting a potential conflict.

[21] Avram-II ¶¶109-112.

[22] (C-485), 19.

[23] Mocanu-I ¶¶11-13; Mocanu-II ¶228.

[24] Mocanu-I ¶16.

[25] C-PHB ¶68.

B. The Ministry of Environment Completed Its EIA Review at the November 2011 TAC Meeting

19. Respondent's arguments about 2007-2010 are irrelevant and incorrect.[26]

20. Respondent's claim that "the Ministry of Environment was nowhere near deciding" on the EP in November 2011 is refuted by numerous indicia of finality.[27]

21. Many of Respondent's arguments are at best trivial.

a. Respondent argues the TAC's September 2011 letter does not say its questions are "final" and "refers to future 'meetings'." Earlier in September 2011 Minister of Environment Borbély and TAC President Anton both made clear the Ministry would raise "all the remaining issues,"[28] which it then did. Whether the Ministry then considered it might take more than one meeting to complete all remaining tasks, including the EIA checklist,[29] is immaterial.

b. Respondent argues the November 2011 meeting agendas do not say "final TAC meeting." The agendas included all remaining issues.[30] RMGC therefore reasonably expected it would be "the last TAC meeting."[31]

c. Respondent argues the TAC's October 2011 site-visit minutes do not mention the EP. At the November 2011 TAC meeting, however, Ms. Mocanu asked "whether

[26] Respondent argues the suspension of the EIA Process in 2007-2010 was "justified and lawful." Minister of Environment Korodi called on activists to lobby urgently for a cyanide ban in July 2007 because the EIA Process was "expected to be concluded at the end of summer or in autumn." Memorial ¶¶251-260; (C-545). He then suspended the EIA Process and withheld Dam Safety Permits on the pretext of an alleged lack of an urbanism certificate. Memorial ¶¶262-279. Respondent produced documents showing the Ministry of Environment's legal department advised this was legally groundless. [redacted]. The Inter-Ministerial Commission and High Court of Cassation confirmed that conclusion. C-PHB ¶¶96-97; Podaru ¶66 n.92; (C-2454).

[27] C-PHB ¶63; C-Opening-2019 vol.4:2-31.

[28] C-Opening-2019 vol.4:4-5.

[29] (R-215), 14.

[30] (C-835); (C-790). The Ministry of Environment also requested the TAC's views on RMGC's answers before the TAC meeting. (R-476).

[31] C-PHB ¶63(a); (C-2637).

we should put in the site visit report the conditions that I am going to put in the Environmental Permit."[32]

d. Respondent argues TAC President Anton did not tell PETI "the TAC was about to have a final meeting." The Ministry of Environment favorably described the Project to PETI.[33] Mr. Anton informed RMGC, "I hope they left happy with the answers we gave them" which "were already given by you during the TAC meetings…"[34]

22. Respondent contends the Ministry of Environment's September 26, 2011 letter "does not represent the views of the different directorates" because TAC President Anton "unilaterally deleted a request for a water management permit and an ADC for Orlea" from a version sent four days earlier. The evidence uniformly shows this contention is baseless. The same Ministry of Environment official (Ms. Hintea) emailed both the initial and corrected versions copying Ms. Mocanu, there is no record of any objection to this letter, and the Ministry of Environment confirmed in many contemporaneous communications that the operative version was sent September 26.[35] Ms. Mocanu's reliance on a late-submitted document that obviously is not the "original" in an attempt to undermine the September 26 letter is not credible.[36]

23. Respondent asserts questions "were outstanding" and "not necessarily answered to the TAC's satisfaction" at the November 2011 TAC meeting and repeats criticisms of TAC President Anton (first raised in its Rejoinder), which Claimants have rebutted.[37]

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[32] (C-486), 48.

[33] Avram-II ¶26; (C-2240), 1-2, 4; (C-2244), 5-7.

[34] (C-486), 45.

[35] C-PHB ¶¶120-123.

[36] C-PHB n.264.

[37] Respondent argues TAC President Anton was "not a technical expert," handled clerical tasks, and would not "participate in the TAC's decision." In fact, he was the Ministry of Environment's authorized TAC representative and a trained chemical engineer. Ms. Mocanu's department handled TAC clerical tasks. C-PHB n.106.

a. The minutes demonstrate the EIA review was completed; each TAC member agreed with RMGC's answers and/or raised no further questions; officials discussed drafting the EP conditions.[38]

b. The minutes show TAC President Anton did not act unilaterally. He stated, "all technical discussions, all the questions, all the solutions were discussed within the TAC; and *if any of the TAC members, of those in the TAC, still have issues to raise, let's raise them now, in this moment…. All issues must be clarified now*."[39] As no TAC member raised additional issues, he confirmed "there are no more issues," the EIA checklist would be circulated that day, the technical assessment was "finalized," and the TAC would soon meet "for a final decision" on the EP after "three details" were addressed.[40]

c. There is no record of any disagreement with TAC President Anton's statements.

d. Respondent contends TAC President Anton's statements are "at odds with" a Ministry of Environment letter he signed in January 2012 referring to "the stage of quality analysis" of the EIA Report and to a request for "additional information, clarifications regarding the submitted documentation." The "phase of analyzing the quality" of the EIA Report is how the regulations define the last stage of the procedure.[41] Other contemporaneous letters confirm the "last information request" was in September 2011.[42] TAC President Anton stated repeatedly in early 2012 that the process was in "the final stage."[43]

e. Minister of Environment Borbély confirmed in December 2011 the TAC had "clarified" the technical issues and likely would meet only one more time. He repeatedly said a decision on the EP would be taken in 1-2 months "maximum,"

[38] C-PHB ¶63(b).

[39] C-Opening-2019 vol.4:20; (C-486), 47.

[40] C-Opening-2019 vol.4:21-23; (C-486), 48, 51.

[41] (C-1766) Art. 3(4)(c).

[42] (R-469), 3; (R-470), 2.

[43] C-PHB ¶63(g).

although he and Minister of Culture Hunor emphasized the Government first had to decide politically.[44]

f. Government officials repeatedly acknowledged the technical assessment was completed and a decision on the EP had to be taken.[45] E.g., the Ministry of Environment confirmed that at the November 2011 meeting TAC members "concluded that the technical issues were clarified"[46] and "confirm[ed] that no questions with regard to technical aspects are outstanding."[47]

24. Respondent's examples of unresolved questions collapse upon scrutiny.

a. Respondent contends the National Institute of Hydrology "requested clarifications" on surface-water issues in a letter dated November 30, 2011. That institute is not a TAC member, was not competent to opine on TMF design, and concluded "specialists in the field can make a decision concerning which sealing is the most effective."[48] The Ministry of Environment concluded the most effective solution was a natural clay (not synthetic) liner.[49] After studying geotechnical, hydrological, and monitoring data and performing fieldwork, testing, and structural mapping, on December 9, 2011 the Geological Institute favorably endorsed the EP including the TMF proposal.[50]

b. Respondent argues the Ministry of Health was "not satisfied" and had technical questions. Respondent does not identify any unresolved question. The audio recordings of the meeting confirm TAC President Anton asked the Ministry of

[44] C-PHB ¶63(f); C-PO27 ¶¶12(l), 25.

[45] C-PHB ¶63(h); C-PO27 ¶32.

[46] C-PO27 ¶32(d); (C-471), 20.

[47] C-PO27 ¶32(h); (C-2907), 3.

[48] C-PHB n.315.

[49] C-PHB ¶¶153, 155; (C-2240), 4; (C-2244), 7.

[50] C-PHB ¶154; (C-636).

Health (Ms. Carlan) if she was "[s]atisfied" with RMGC's answers. She responded, "Yes."[51]

c. Respondent relies on Ms. Mocanu's new contention that the Ministry of Environment Biodiversity Department (Ms. Frim) was not satisfied and said "a management plan must be drafted and issued" for Piatra Despicata. At the November 2011 TAC meeting, Ms. Frim stated RMGC's documentation was "satisfactory," "sufficient" and "we don't have further observations" except as to Piatra Despicata.[52] Ms. Mocanu acknowledged the Piatra Despicata management plan "was submitted shortly after that meeting."[53] The Romanian Geological Society endorsed relocating Piatra Despicata on December 8, 2011, which was one of the "three details" to be resolved before the EP decision.[54] At the May 10, 2013 TAC meeting, the Biodiversity representative (Ms. Juganaru) confirmed again, "As far as biodiversity and nature protection are concerned, we have managed to find all the necessary solutions, so, if there are still … issues, they belong to entirely different fields."[55]

25. Respondent repeats Ms. Mocanu's unsupported assertion in direct examination that after the November 2011 TAC meeting, "the Ministry of Environment was waiting for RMGC to provide" an approved PUZ, Orlea ADC, and Water Management Permit. The contemporaneous documents show otherwise.[56]

26. Respondent's arguments about the EIA checklist and the alleged requirement of TAC "consensus" are groundless.

a. Respondent's assertion Ms. Hintea's draft "personal" EIA checklist indicates "RMGC had not provided many of the requisite items" is wrong. Respondent did

[51] Avram-II ¶23(vii); C-Opening-2019 vol.4:12.

[52] Avram-II ¶23(ix); (C-486), 28.

[53] Tr.(Dec.9, 2019)2041:16-19 (Mocanu-Cross).

[54] C-Opening-2019 vol.4:26; (C-634); (C-635).

[55] (C-484), 2.

[56] C-PHB ¶¶101-103, 117-126, 130-131.

not proffer Ms. Hintea to testify about her draft checklist. Ms. Mocanu explained Ms. Hintea prepared her draft checklist "in parallel" with the TAC questions sent on September 26, 2011 and thus it did not reflect RMGC's answers or the discussions at the November 2011 TAC meeting or the Ministry of Environment's views at that time.[57] RMGC answered all those questions to the TAC's satisfaction. No alleged inadequacies were notified to RMGC.

b. Respondent refers to Ms. Mocanu's testimony that there was "no intent … to have an official checklist because [it] had not got to that point…." The September 2011 letter confirms the TAC intended to address "the Checklist for analyzing the quality of the [EIA Report]."[58] Ms. Mocanu and TAC President Anton discussed the checklist early in the November 2011 meeting and clearly intended to address it at that meeting.[59] TAC President Anton later said – without objection – he would circulate the checklist that day.[60] The Ministry of Environment indicated in a 2012 memorandum that the checklist was [redacted][61]

c. Respondent refers to Ms. Mocanu's vague testimony about "consensus." Professor Mihai demonstrates TAC members' views are merely consultative and unanimity is unnecessary.[62] The EIA Rules of Procedure provide for a conciliation meeting to consider divergent views;[63] the TAC resolved members "can have dissenting opinions that will be recorded."[64]

[57] Mocanu-II ¶86; C-PHB ¶161, n.331.

[58] (R-215), 14.

[59] C-Opening-2019 vol.4:10.

[60] C-Opening-2019 vol.4:22; (C-486), 48.

[61] (R-472), 5. The Tribunal ordered Respondent to produce the checklist prepared on or after November 29, 2011, all communications with the TAC, and any responses or analyses. PO10 Annex-A (Request-5). Despite a 2012 Ministry document indicating the checklist was under review, Respondent produced only Ms. Hintea's early draft, but no checklist prepared on or after the November 2011 meeting or any communications or analyses.

[62] C-PHB n.121.

[63] (C-1774) Art.30(3).

[64] (C-565), 2.

27. Respondent contends incorrectly [redacted] could not recall any contemporaneous evidence" of RMGC's understanding that the EIA Process was finalized. [redacted] RMGC sent emails after the meeting,[65] which rebuttal documents confirm.[66]

1. Ministry of Culture's Endorsement

28. The Ministry of Culture's 2011 Point of View was its endorsement.[67] It refused to confirm that only due to political blockage through 2012, and waited until 2013 to issue another endorsement.[68]

29. The Ministry of Culture admitted it failed to confirm its endorsement in 2011-2012 for political reasons,[69] which Respondent simply ignores.

30. The 2011 Point of View was the same in substance as the 2013 endorsement.[70] That the documents have different labels and only the latter says "favourably endorse" is irrelevant under Romanian law.[71]

31. Respondent's observation that endorsements and points of view have "distinct legal bases" is irrelevant because the 2011 Point of View is based expressly on the legal provision requiring the Ministry of Culture's endorsement.[72] The 2011 Point of View does not even mention the regulation Respondent argues is the legal basis for a point of view.[73]

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[65] [redacted]

[66] C-PHB ¶63(c); (C-2958); (C-2959); (C-2960).

[67] C-PHB ¶72(b).

[68] C-PHB ¶¶72-75.

[69] C-PHB ¶72(e); (C-472), 6-7.

[70] C-PHB ¶72(b).

[71] Mihai-I ¶¶368-369; Schiau-II ¶¶268-270.

[72] C-Opening-2019 vol.4:28; (C-446), 2; (C-1701) Art.2(10).

[73] (C-564) Art.13.

32. Respondent's argument that the Ministry of Culture could not have issued its endorsement until March 2013 because it needed the repackaged Orlea research report is wrong.[74] Its other arguments are irrelevant, erroneous, or both.

a. Respondent asserts "the endorsement must be based on preventive archaeological research." The law requires "*[p]reliminary* archaeological research."[75]

b. Respondent contends the Ministry of Culture "conditioned its endorsement." Neither endorsement is conditional; each proposes conditions to include *in the EP*.[76]

c. Respondent argues the Ministry of Culture may require "ADCs before it will issue its endorsement." This is wrong[77] and irrelevant because the Ministry of Culture and the Ministry of Environment consistently confirmed the EP could be issued with the condition that an ADC be obtained *before construction at Orlea*.[78]

d. The evidence refutes Respondent's contention that TAC President Anton "unilaterally deleted" a request for the Orlea ADC in the September 2011 letter and that the Ministry of Environment "repeatedly requested" the ADC "both before and after that letter."[79]

e. Respondent wrongly criticizes RMGC for the status of Orlea. The Ministry of Culture terminated the research program in 2006 and refused to allow preventive archaeological research at Orlea until the Ministry of Environment endorsed the EP.[80] In 2013, it approved a multi-year phased program with preventive

[74] C-PHB ¶¶73-75.

[75] (C-1701) Arts.2(9)-(10); Schiau-II ¶¶274-281.

[76] C-PHB n.143.

[77] Mihai-II ¶¶216-244; Schiau-II ¶¶274-281.

[78] C-PHB ¶¶119(a)-(h).

[79] C-PHB ¶¶120-126.

[80] C-PHB ¶373; C-Opening-2019 vol.2:58.

archaeological research beginning in July 2014.[81] By then, the Government had politically repudiated the entire joint-venture.

2. Waste Management Plan

33. In May 2013, the Ministry of Environment approved RMGC's Waste Management Plan and confirmed it "complie[d] with all the requirements and standards" and "best available techniques."[82] But for the improper political hold-up, the Ministry of Environment would have approved RMGC's Plan in early 2012.[83]

34. Respondent misrepresents that [redacted] a named official in the Waste and Hazardous Substances Department said he was ordered for political reasons not to approve the Plan and that RMGC should not resubmit it.[84] Although identified in the Memorial, Respondent declined to proffer testimony from this official, the Director who gave the order, or anyone in the Waste and Hazardous Substances Department.

35. Respondent pretends "RMGC did not complain at the time" or argue that the requests "were unreasonable." Respondent ignores RMGC's contemporaneous report to the US Embassy that the requested information was already provided and [redacted] Several irrefutable facts confirm this.

a. The December 2011 Plan consisted almost entirely of information that had been analyzed and accepted in the EIA Process.[86]

[81] C-PHB ¶374; (R-221), 13.

[82] C-PHB ¶76(g); (C-658); (C-484), 11.

[83] C-PHB ¶¶76-78.

[84] C-PHB ¶76(e); [redacted]

[85] C-PHB ¶¶77-78; (C-650), 1.

[86] Reply ¶81.

b. NAMR endorsed the December 2011 Plan, confirming it met applicable requirements.[87]

c. The Plan submitted in December 2011 was substantially identical to the Plan approved in May 2013.[88]

d. Respondent has not identified any substantive reason justifying approval in 2013, but not in 2012.

e. Respondent has not explained why the Ministry of Environment made piecemeal requests in April and July 2012 that each time restarted the three-level approval process.[89]

f. RMGC promptly provided all information requested by the Ministry of Environment in April 2012.[90]

g. RMGC wanted the EP and had no reason to wait to resubmit its Plan other than it was told to do so by the Ministry.

36. Respondent's reference to RMGC's 2012 annual report to NAMR is pointless as it simply noted the correspondence and did not "admit[]" anything.

3. PUZ

37. The PUZ is not required for the EP so the lack of an updated PUZ was not an obstacle to completing the EIA Process and issuing the EP.[91]

38. Claimants do not maintain the 2002 PUZ "was sufficient." An updated PUZ was needed – *for construction permits*.

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[87] C-PHB ¶76(b); (C-644); (C-645). RMGC did not delay submitting the Plan as Respondent contends. RMGC submitted it promptly in response to the request made in September 2011. C-PHB ¶76(a), n.153.

[88] C-Opening-2019 vol.4:61; Avram-II ¶60.

[89] (R-216) Arts.4(3)-(11).

[90] C-PHB ¶76(c); (C-647); (C-648).

[91] C-PHB ¶¶99-108.

39. Respondent argues the law is "clear" the PUZ is needed to finalize the EIA Process. No legal provision states or implies such a requirement.[92]

40. Respondent argues a PUZ establishes "environmental conditions" for the area that the EP "cannot disregard." An urbanism plan is not an environmental permit; it regulates what activities may be undertaken in different areas.

41. Respondent misrepresents that Professor Podaru "implicitly recognized that, in the hierarchy of administrative acts, the PUZ is ranked higher" and "must be finalized before the [EP]." To the contrary, Professor Podaru explained that, under the principle of "hierarchical subordination," the EP "is approved at a higher level" based on a "much more detailed" EIA Report, so the EP should be issued first and the PUZ must take it into account.[93]

42. Respondent's description of [redacted]

43. Respondent refers to various exhibits without quoting them or providing relevant context. Claimants have fully addressed all exhibits from 2011-2013.[97] The record is clear that while certain officials at times expressed the view that the PUZ should be approved before the EP, the evidence overwhelmingly shows the procedures were separate and the EP could be issued before approval of the updated PUZ, including:

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[92] C-PHB ¶99 n.210.

[93] Tr.(Dec.11, 2019)2492:8-2494:13 (Podaru-Redirect); *id.* 2454:12-2455:13 (Podaru-Cross)(testifying "the Construction Permit must comply with the PUZ," but the EP "has another procedure."); Podaru ¶¶10, 154.

[94] [redacted]

[95] Memorial ¶¶306-307; (C-598); (C-623).

[96] [redacted]

[97] C-PHB ¶¶101-108.

a. TAC President Anton, Ms. Mocanu, and the Ministry of Development at the November 2011 TAC meeting;[98]

b. Mr. Găman's note to Minister Bode in April 2012;[99]

c. the Ministry of Development at the March 2013 Inter-Ministerial Commission meeting;[100]

d. the Inter-Ministerial Commission report approved by the Government;[101]

e. the May 2013 TAC meeting;[102]

f. the Government's May 2013 Aarhus submission;[103] and

g. the Ministry of Environment's Draft Decision on issuing the EP.[104]

44. Respondent wrongly asserts "RMGC knew" it "needed" PUZ approval before the EP due to "the risk that changes to the PUZ would require changes to the EIA Report and a new EIA Review Process." TAC President Anton confirmed at the November 2011 TAC meeting that this hypothetical risk was very low as further EIA review would be unnecessary unless there were a severe change such as moving a pit or the TMF.[105]

45. Respondent contends RMGC still needed to apply for missing PUZ endorsements. RMGC repeatedly explained it needed the endorsement of the Commission on Historical

[98] C-PHB ¶¶101-102; (C-486), 40-41, 43-44.

[99] C-PHB ¶103; (R-406), 4.

[100] C-PHB ¶105; (C-472), 18-22.

[101] C-PHB ¶106; (C-2162), 8-9.

[102] C-PHB ¶107; (C-484), 20-21.

[103] C-PHB ¶108; (C-2907), 6.

[104] C-PHB ¶108; (C-2075), 2.

[105] C-PHB n.220; Podaru ¶¶156-169; (C-486), 43.

Monuments before it could obtain the final two endorsements.[106] Only political blockage prevented RMGC from obtaining these endorsements.[107]

a. The Ministry of Culture favorably endorsed the updated PUZ in 2010 as part of the SEA Endorsement procedure.[108]

b. Minister of Culture Hunor made clear from August 2011 onward, however, that updating the LHM was politically blocked, which in turn blocked the PUZ endorsement process as the PUZ had to align with the LHM in effect.[109]

c. The Urbanism and Protected Areas Division of the National Commission for Historical Monuments reviewed the PUZ documentation in 2013 and prepared favorable draft PUZ endorsements, which it did not finalize pending Parliament's vote on the Special Law.[110]

46. Respondent argues RMGC "failed to maintain" the SEA Endorsement for the PUZ. The courts annulled the SEA Endorsement only in May 2016 as an impact of the wrongful conduct. The SEA Endorsement was annulled because it had relied on the description of the historical monuments in the 2004 LHM rather than as reflected in the 2010 LHM, which the culture authorities previously admitted required correction. Starting in 2015 the culture authorities defended the 2010 LHM as purportedly necessary to correct the prior "abusive" 2004 LHM,[111] which in turn led to annulment of the SEA Endorsement.

47. Respondent baselessly criticizes Claimants for not examining Ms. Mocanu who allegedly "explained in her witness statement that a PUZ was necessary before the Ministry of

[106] C-PHB ¶111 n.238; (C-486), 43; (C-1404.2) [redacted] (C-1117), [redacted]

[107] C-PHB ¶¶109-116.

[108] C-PHB ¶112; (C-1901).

[109] C-PHB ¶¶112-114.

[110] C-PHB ¶115; (C-2578); (C-2579).

[111] C-PHB ¶116 n.247.

Environment could issue an [EP] (and responded to Mr. Avram's statements in that regard)." In her witness statement, Ms. Mocanu actually stated she was "not competent to opine" on this subject, did "not accept Mr. Avram's indirect invitation to engage in this debate," and "will refrain from addressing specifically the impact of urban planning documents (including urban certificates, PUZ and PUG) on the continuation of the EIA Procedure."[112] Her new hearing testimony is both unsupported and refuted by the record.[113]

4. Urbanism Certificates

48. Respondent wrongly contends Gabriel's disclosure in 2003 about obtaining an urbanism certificate to *start* the EIA Process shows it needed to *maintain* a valid UC to *continue* the EIA Process. The Government confirmed an urbanism certificate is not required to continue the EIA Process or issue the EP.[114]

49. The issue is moot because Respondent acknowledged RMGC had an urbanism certificate at all times between 2010-2018.[115] Respondent's description of NGO challenges on this issue is inaccurate.

a. Respondent contends challenges to UC 87/2010 "were pending" throughout 2011-2012. UC 87 was valid from April 2010 until it expired in April 2013.[116] The court rejected a challenge to it in September 2010.[117] The Court of Appeal affirmed and held a UC is not an administrative deed subject to challenge and is not relevant to continuing the EIA Process.[118] In December 2011, the court

[112] Mocanu-II ¶¶24-25.

[113] C-PHB ¶101.

[114] C-PHB ¶96; (C-2167), 7.

[115] C-PHB ¶97; R-Opening-2019 slide-65.

[116] Podaru ¶¶105-111; Mihai-II ¶¶134-142; R-Opening-2019 slide-65.

[117] (R-187).

[118] (C-2425), 6.

rejected another challenge on the same grounds.[119] The Court of Appeal affirmed again.[120] A final challenge was rejected in April 2012 as untimely.[121]

b. Respondent contends UC 47/2013 was annulled. UC 47 was valid from April 2013 until it expired in April 2016.[122] It was annulled in October 2016 after its expiry and a year into this arbitration, which is irrelevant.

c. Before that annulment, UC 98/2016 was issued in April 2016. It was valid until it expired in April 2018.[123] The only court challenge was rejected.[124]

50. Respondent's contention Claimants did not cross-examine Ms. Mocanu, a non-lawyer, on this subject is baseless for the same reason described above regarding the PUZ.[125]

5. Compliance with Waters Law and Water Framework Directive

51. Respondent concedes "[t]he law does not provide from whom" a public interest declaration should be made.[126] Its criticisms of Professor Mihai on this subject are baseless.[127]

52. Respondent asserts falsely "[n]either the TAC, nor the Ministry of Environment ever accepted the Alba County Council declaration or confirmed that it met the requirements of the Directive." In fact, the Government repeatedly accepted it, including at the November 2011 TAC meeting and at the Inter-Ministerial Commission.[128]

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[119] (C-2426).

[120] (C-2430).

[121] (R-210).

[122] Podaru ¶¶112-115; Mihai-II ¶¶143-145; R-Opening-2019 slide-65.

[123] Podaru ¶¶116-118; Mihai-II ¶¶146-147; R-Opening-2019 slide-65.

[124] (R-291).

[125] *Supra* ¶47.

[126] R-PHB ¶91.

[127] Respondent wrongly contends Professor Mihai "admitted that he held no qualification in environmental law or EU law." He said none of the books he authored was on environmental law. Tr.(Dec.10, 2019)2274:19-2275:12 (Mihai-Cross). Nor did he say the Water Framework Directive "was only transposed in 2018." He said a Water Management Permit was not required for the EP until 2018. Mihai slide-18; (C-2937).

[128] C-PHB ¶¶79-80.

a. Respondent contends [redacted]

b. Respondent argues "RMGC knew" it needed and "push[ed] for" a Government declaration of outstanding public interest "throughout the fall of 2011." It did not. Gabriel's "offers" in 2011-2012 reflect the Project is of [redacted] which relate to expropriation (not water issues).[131]

c. Respondent notes certain authorities advised issuing a Government Decision in early 2012 and RMGC proposed such Government Decision in an April 2012 email. RMGC maintained consistently that the Ministry of Environment asked for and accepted the County Council Decision, and if it so desired, the Government could issue a declaration of outstanding public interest in the Government Decision issuing the EP.[132]

d. Respondent ignores that the Ministry of Environment confirmed "we agreed with … the Decision of the County Council,"[133] the Inter-Ministerial Commission determined the County Council Decision was sufficient,[134] and the Government approved that assessment.[135]

53. Even assuming a Government Decision were needed, the only reason it was not issued is political blockage. Respondent fails to address the numerous ministerial and

[129] [redacted] (C-486), 24-25, 38-39; C-PHB ¶80(b), n.167.

[130] (C-2919) [redacted]; (C-2921) [redacted] (C-2923) [redacted]; (C-876.2) [redacted].

[131] Bîrsan-I ¶¶238-253; Bîrsan-II ¶¶102-134; Bîrsan slide-23.

[132] C-PHB ¶¶80(d), 88-89, nn.170, 187-188.

[133] C-PHB ¶80(d); (C-472), 10.

[134] C-PHB ¶¶80(e)-(f); (C-472), 14-15; (C-2162), 6.

[135] C-PHB ¶80(g).

governmental confirmations in 2011-2013 – as well as the testimony of its own officials – that the Project was of outstanding public interest and met applicable requirements.[136]

54. While Respondent refers to Water Framework Directive compliance "more broadly," the Ministry of Environment confirmed the only question was who should issue the outstanding public interest declaration, not whether the Project met the standard.[137]

55. Respondent conflates issues by referring to the Water Management Permit, which the authorities acknowledged was not required for the EP.[138]

a. Respondent refers to the sentence in the September 2011 letter requesting a Water Management Permit that the Ministry of Environment specifically deleted.[139]

b. Respondent argues that a Water Management Permit was requested "before and after that letter and at the November 2011 TAC meeting." At the November 2011 TAC meeting, the TAC including ANAR accepted RMGC's answers, confirmed there were no additional issues (besides providing the County Council Decision), and did not mention a Water Management Permit.[140]

c. Respondent repeats its misleading description of the May 31, 2013 TAC meeting. While ANAR noted RMGC needed to submit documentation to obtain a Water Management Permit, it did *not* say it needed to do so to obtain the EP. On the contrary, ANAR proposed EP conditions (which Respondent fails to acknowledge), and confirmed the Water Management Permit could be addressed at a later stage.[141] The Ministry of Environment considered ANAR's proposed

[136] C-PHB ¶¶81-90.

[137] C-PHB ¶¶82-83; (R-473); (R-413).

[138] C-PHB ¶¶127-134.

[139] C-PHB ¶¶120-123, 129.

[140] C-PHB ¶¶80(b), 131.

[141] C-PHB ¶134; (C-2252).

conditions and confirmed in its Draft Decision the Project complied with the Waters Law and the Water Framework Directive.[142]

d. Respondent asserts that EU Commissioner Potocnik stated "the Project did not comply with the directive." That is false – moreover Minister of Environment Plumb assured him it complied with all environmental acquis.[143]

e. Respondent refers to an inter-ministerial letter sent in 2014, which was not sent to RMGC.[144] The letter (R-545) refers to a meeting with the European Commission and notes additional documentation was required to obtain a Water Management Permit. It does not say such documentation or permit is needed for the EP.

f. Respondent contends Professor Mihai "could not deny" a water management permit for Cernavoda "was requested … and obtained" before the EP. Professor Mihai said he was "not aware of that."[145] The record on Cernavoda (which neither party briefed in this context) shows the Ministry of Environment completed the EIA checklist and took a decision in 2008 requiring Cernavoda "to supplement" and "redo" the EIA Report to address inadequacies,[146] *before* Cernavoda obtained a water management permit.[147] The lack of a water management permit therefore did not prevent the Ministry of Environment from completing the EIA checklist and taking its decision.[148] Thus, even assuming the Ministry of Environment considered RMGC needed a Water Management Permit to obtain the EP (which it did not), the law required it to complete the EIA checklist and notify RMGC of that alleged inadequacy.[149] It is undisputed the

[142] C-PHB ¶89; (C-2075), 3.

[143] C-PHB ¶91.

[144] Tr.(Dec.5, 2019)1257:20-1260:4 (Avram-Cross).

[145] Tr.(Dec.10, 2019)2323:18-2324:8 (Mihai-Cross).

[146] C-PHB n.406; (C-2416).

[147] (R-113), 60(Cernavoda EP referring to water management endorsements issued in 2011 and 2013).

[148] The record does not indicate whether the inadequacies notified to Cernavoda in 2008 included the lack of a water management permit. Nor is there evidence of any request for such permit.

[149] C-PHB ¶196.

Ministry never did so and responsible officials instead repeatedly said all requirements were met.

6. Surface Rights

56. Surface rights were not needed for the EP, but for construction permits.[150] RMGC was reasonably confident it would have been able to acquire the surface rights needed for the Project through negotiation; expropriation was available if needed.[151]

57. To develop the Project, RMGC would have had to acquire surface rights in areas requiring a construction permit.[152] That did not include the Roşia Montană historical area, buffer zone, or other protected areas.[153]

58. Respondent wrongly argues [redacted] first raised this issue during the 2019 hearing.[154] The EIA Report, urbanism plans, and public consultations made clear RMGC had to acquire properties in the industrial zone (where mining activities were planned), referred to as Zone 1, but not in Zones 2-4, which included the historical areas and buffer zone.[155] [redacted] already understood that fact and readily confirmed it.[156]

59. Respondent argues RMGC's purchase of some properties in the historical areas and buffer zone is evidence it was required to do so. That is not so. As the RMGC presentation cited by Dr. Thompson shows, [redacted], RMGC purchased such properties only where owners insisted on selling properties in the industrial zone together with other properties outside it.[157] Respondent mischaracterizes the same RMGC presentation when it claims RMGC "acknowledges the need to acquire" properties in the historical center. The

[150] C-PHB ¶¶135-136.

[151] C-PHB ¶¶337-341; *infra* ¶¶177-189.

[152] Podaru ¶42.

[153] C-PHB ¶¶340, 382.

[154] [redacted]

[155] C-Opening-2020 vol.5:36; Podaru ¶¶230, 247. RMGC would be liable for any damage it caused to properties in the protected areas, but it did not need to acquire rights to those properties. C-PHB ¶382; C-Opening-2020 vol.5:34-43.

[156] C-Opening-2020 vol.5:40; [redacted]).

[157] (Thomson-86), 8; [redacted].

presentation is clear that RMGC was required to acquire properties in Zone 1, but that "[t]here are a number of owners that have land outside of the project footprint that condition the sale of properties in area 1 with the purchase of properties in zones 2,3,4."[158]

60. Respondent contends Gabriel's disclosures stated otherwise by referring to the Project's "footprint," and purported to demonstrate this by showing these disclosure documents to [redacted] Gabriel never said RMGC needed to acquire surface rights in protected areas. Gabriel repeatedly specified surface rights were needed only "over the footprint of the new mine."[160] Gabriel made clear the footprint of the mine must be zoned for industrial use, and discussed ADCs and land use regulations (PUZ/PUGs) with reference to "the footprint of the mine," which it specifically distinguished from the protected areas.[161]

61. [redacted]

[158] (Thomson-86), 8. Similarly, Respondent's assertion that "[a]ccording to an RMGC 2013 report, it still needs to acquire over 1,000 private properties within the Project footprint" misrepresents what the presentation shows.

[159] [redacted]

[160] (R-302), 18("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."); (R-302), 33("Gabriel must acquire all necessary surface rights over the footprint of the new mine in order to apply for its construction permits and to obtain financing for construction of the new mine at Rosia Montana."); (C-1811), PDF-27("The Company must acquire all necessary surface rights over the footprint of the proposed new mine in order to apply for the construction permits."); (C-1811), PDF-42("Gabriel must acquire all necessary surface rights over the footprint of the new mine in order to apply for the requisite construction permits.").

[161] (R-302), 19("All land situated under the footprint of the proposed new mine must be zoned and/or classified for industrial uses including mining.… Gabriel has updated the design of the proposed mine, reduced the size of the footprint, expanded the protected area…); (R-302), 21("Gabriel must obtain archaeological discharge certificates for the footprint of the proposed new mine."); (C-1811), PDF-27("All land situated under the footprint of the proposed new mine at Rosia Montana must be zoned and/or classified for industrial uses including mining."). A graphic shows the PUZs "which designate the industrial zones under the footprint of the proposed new mine" and which differentiate the "industrial zone" in grey from "protected areas" in green. (C-1811), PDF-27.

[162] [redacted]

[163] [redacted]

62. Respondent questions the date of the list, stating that although [redacted] Respondent's argument is misleading because although construction of Piatra Albă was halted in 2007, the possibility of developing it was not abandoned.[164] The [redacted].[165]

63. Respondent points to witness statements it obtained from seven Roşia Montană residents. Respondent's proffering of those witnesses only in its Rejoinder limited Claimants' ability to respond. Nonetheless, [redacted] why these statements do not undermine RMGC's contemporaneous assessments.

a. Sorin Jurca: Mr. Jurca confirmed RMGC did not need to purchase his house in the historical center.[167] He had two uninhabited properties in the buffer zone,[168] which RMGC did not need.[169] His other property (which is located in the area of the planned low-grade stockpile), was not needed until year 7 of operations.[170]

b. Zeno Cornea: Two of Mr. Cornea's houses were located in the historical center.[171] RMGC therefore did not need to acquire them.[172] Mr. Cornea's other

[164] [redacted]

[165] (Thompson-86), 12, 26.

[166] [redacted]

[167] C-Opening-2020 vol.5:40.

[168] Jurca-I ¶12; Tr.(Dec.10, 2019)2150:15-2151:19 (Jurca-Cross).

[169] C-Opening 2020 vol.5:42. RMGC previously acquired one he does not mention. *Id.*

[170] [redacted]

[171] Cornea ¶10.

house is outside the historical center, did not overlap with industrial operations, and also was not needed.[173] He does not contend otherwise – and it is not mentioned in Mr. McLoughlin's report.

c. Ioan Petri: RMGC did not need to acquire Mr. Petri's house in the historical center and Mr. Petri did not refuse to sell his other property,[174] which would not have been needed until year 7 of operations.

64. [redacted] supported by contemporaneous documents, that Respondent's other witnesses wanted to sell to RMGC despite their denials at the time and in this proceeding.

a. Niculina Jeflea: In two written questionnaires, Ms. Jeflea's family [redacted].[175] Ms. Jeflea also signed a signed Confidentiality Agreement with RMGC.[176] That Ms. Jeflea requested the Confidentiality Agreement to keep villagers from knowing she was negotiating with RMGC provides context for assessing her views in 2013.[177]

b. Augustin Golgot: While Mr. Golgot claims in his witness statement he would never sell, he also claimed he never participated in RMGC surveys. In two written surveys, [redacted].[178]

c. Constantin Cămărăşan: RMGC's contemporaneous documents[179] record [redacted]

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[172] C-Opening-2020 vol.5:41; [redacted] (C-387.3), 97(Ministry of Health study confirming adjacent property is in protected area and may be inhabited).

[173] Mr. Cornea's empty plots of land also were not needed.

[174] [redacted]

[175] (C-2044.RO), 261-264; (C-2053.RO), 79-82.

[176] (C-2929).

[177] [redacted]

[178] (C-2053), 7-8; (C-2044), 197-198; [redacted]

[179] (C-2083), 1.

[redacted]

d. Petru Devian: Mr. Devian's arbitration statements about his unwillingness to sell his share of certain properties should be viewed together with his speculation that his brother, Dumitru Devian, also would not sell his share of those properties. [redacted][181]

65. Seeking to demonstrate RMGC had to acquire some of the properties at issue in an earlier phase of Project development, [redacted] Respondent sought to show the properties were in the "normal operating pond limit" or would have been crossed by planned water channels. [redacted] Respondent was mistaken and that Respondent's maps were not to scale.[182]

66. Respondent's arguments that some owners are today unwilling to sell is irrelevant because the inquiry is what likely would have been the case absent Respondent's wrongful conduct.[183]

7. Reforestation

67. Respondent contends "RMGC did not provide" reforestation plans or information requested in the September 2011 letter (questions 2-3) and in January 2012.

a. RMGC committed to reforest 1,000 hectares and provided detailed answers to the TAC's questions including maps of the impacted areas.[184]

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[180] [redacted]

[181] (C-2044), 171-172; (C-2053), 61-62; [redacted]

[182] [redacted]

[183] *See also infra* ¶¶177-189.

b. The Ministry of Environment's Forestry Department accepted RMGC's answers at the November 2011 TAC meeting and agreed land could be removed from the forestry circuit after EP issuance.[185]

c. In February 2012, RMGC provided the information requested in January 2012 relating to ownership of land to be removed from the forestry circuit.[186]

d. Contrary to her new hearing testimony, Ms. Mocanu admitted in her statement RMGC provided the requested information and all questions "were clarified."[187]

e. The Government repeatedly confirmed in 2012-2013 that removal of land from the forestry circuit follows EP issuance.[188]

f. Ms. Mocanu admitted the same in cross-examination.[189]

C. Technical Issues Did Not Prevent EP Issuance

68. Respondent's contention technical issues prevented EP issuance is meritless.[190] Respondent's suggestion Claimants' experts who worked on the Project are not reliable also is without merit.[191]

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[184] C-PHB ¶137; Avram-II ¶105; (C-429), 13-17.

[185] C-PHB ¶139; Avram-II ¶106; (C-486), 27.

[186] Avram-II n.276; (C-2242).

[187] Mocanu-II ¶¶221-222.

[188] C-PHB ¶139, n.291.

[189] C-PHB n.292; Tr.(Dec.9, 2019)2042:7-12 (Mocanu-Cross).

[190] C-PHB ¶¶140-161.

[191] Whereas Respondent's experts were engaged in an adversarial context to try to identify bases to question the Project's merits, the prior technical analyses Claimants' experts describe were prepared with the expectation they would form the basis of an actual Project subject to intensive regulatory and investor scrutiny. It is telling that Romania has failed to present testimony of any of the many Government specialists who reviewed Claimants' experts' work contemporaneously. That is because their expert analyses were technically sound and the Project met all EP requirements.

1. Cyanide Management and Transportation

69. Cyanide management and transportation issues did not prevent issuance of the EP,[192] and Respondent's contention RMGC did not demonstrate to stakeholders it would manage cyanide responsibly does not withstand scrutiny. As Respondent's experts acknowledged, RMGC:

a. designed a TMF materially different from and "more robust" than Baia Mare;[193]

b. committed to cyanide levels far below EU limits;[194]

c. prepared cyanide management and transportation plans aligned with the International Cyanide Management Code;[195] and

d. engaged stakeholders "over an extended period and through a number of media and fora."[196]

70. There is no evidence any issues identified by Respondent in the arbitration was identified contemporaneously as an impediment to permitting.

71. The IGIE did not "request" an update to RMGC's Cyanide Management Plan or "warn" the public was not sufficiently informed about associated risks.[197] The IGIE recommended its comments should be "where applicable included in the ensuing design and operational steps for the project."[198]

72. Respondent argues RMGC failed to identify the cyanide transportation company in the EIA Report. The Ministry of Environment, however, accepted RMGC would identify and

[192] C-PHB ¶¶141-150.

[193] Wilde-I ¶50; C-Opening-2020 vol.5:26-27.

[194] C-Opening-2020 vol.5:16.

[195] Reichardt ¶109.

[196] Reichardt ¶147.

[197] C-PHB ¶142 n.301, ¶266(b).

[198] (C-376), PDF-56, PDF-98; *id.* PDF-48(noting the "remarks" and "recommendations" to which Respondent refers "generally require no action" or "are observations which may bring improvement … but it is not considered an absolute requirement that they should be implemented"); Memorial ¶¶246-250.

engage the transporter at the construction phase.[199] Both Parties' experts agree it would have been unusual to have transport contracts in place before permitting.[200]

73. Regarding the cyanide transportation route, RMGC conducted numerous studies to assess possible transport routes,[201] responded to the TAC and public's questions about cyanide transport,[202] and the Ministry of Environment acknowledged cyanide transport would be "strictly controlled with maximum safety" and the final route would be established "at the end of the construction period."[203]

74. Although the TAC discussed transporting cyanide by rail to Zlatna,[204] Respondent incorrectly suggests Mr. Tănase acknowledged in 2013 that RMGC "needed" to build a storage facility there. RMGC was considering the "possibility" of a storage facility at Zlatna and had the option of on-site storage.[205] The record refutes Respondent's characterization of Claimants' explanation that it did not need to store cyanide at Zlatna as "last minute." It is Respondent who raised this argument only with its Rejoinder.[206] As the draft EP conditions confirm, the Ministry of Environment knew the Project design envisioned cyanide storage at the Project site.[207]

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[199] (C-486), 32-33; (C-555), 45.

[200] Lambert ¶¶42-44; Reichardt ¶58; Blackmore ¶124. Claimants maintain Ms. Reichardt's opinion should be struck from the record as she provided no good reason for not appearing for cross-examination. Tr.(Sept.28, 2020)124:7-125:12 (Claimants' Opening); Letter to Tribunal June 19, 2020. Alternatively, adverse inferences concerning the content of her report are warranted.

[201] Avram-II ¶¶89-95; Lambert ¶¶51-57; (C-229).

[202] (C-258); (C-593), 45-49.

[203] (C-506), 3; (C-555), 45-46; (C-2075), 35.

[204] Avram-II ¶90 n.234.

[205] C-PHB ¶145; (C-258), 5("There will be enough storage capacity at the Roşia Montană site to guarantee continuous operation and also allow flexibility of delivery to avoid unusual hazards such as poor road or weather conditions.").

[206] Ms. Wilde lacks the expertise to opine on Romanian permitting requirements for a storage facility at Zlatna, and Minister Gavrilescu was unwilling to be examined on this topic. C-PHB n.307.

[207] (C-555), 3("Cyanide discharge and storage facilities will be located far from the surface waters, within a fenced and access-restricted area within the processing plant."); *id.* 45("The storage capacity for cyanides within Roşia Montană site is going to be dimensioned in such a measure to continuously ensure the necessary of product for the activities developed by the Titleholder and to avoid transports when the conditions are not favorable.").

75. Respondent seeks to create the misimpression RMGC delayed verifying its compliance with the Cyanide Code, although it is not disputed mining companies verify compliance with the Code during operations.[208] Respondent's suggestion Claimants may have alleviated concerns regarding cyanide use by obtaining "pre-operational" certification under the Cyanide Code is speculative.[209] Claimants' signatory status and commitment to comply with the Cyanide Code were repeatedly confirmed publicly.[210]

2. Emergency Plan

76. Respondent wrongly argues there was a "lack of detail in the EIA Report on emergency response." RMGC's Emergency Preparedness and Spill Contingency Plan was comprehensive and outlined a sound approach to emergency response as Romania's General Inspectorate for Emergency Situations (Mr. Senzaconi) repeatedly confirmed in the TAC.[211] Respondent asserts Dr. Şerban confirmed the "capacities of the medical units in the Roşia Montană area in case of a cyanide spill were limited." On cross-examination, Dr. Şerban admitted she was not aware RMGC had committed to improve health facilities in the Project area, including by developing a private dispensary and health clinic in Piatra Alba, upgrading a wing of Abrud hospital, and improving the mobile emergency medical system in the area (SMURD).[212] Dr. Şerban also confirmed the Târgu Mureș County Emergency Clinical Hospital has a call center integrated into Romania's "911" system that informs first responders and hospitals how to stabilize victims of cyanide poisoning.[213]

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[208] Blackmore ¶58; Lambert ¶¶20-22.

[209] C-PHB ¶266(c).

[210] (C-1809)-(C-1812); (C-194); (C-258); (C-555), 45-46; (C-506), 4; (C-2139); (C-947); (C-558), 46-49.

[211] Lambert ¶¶77-84, 93-115; (C-486), 25; (C-485), 10-11.

[212] Tr.(Dec.9, 2019)2076:2077:8 (Şerban-Cross); (C-338), 7.

[213] *Id.* 2073:9-2075:13.

3. Tailings Management

77. Respondent argues the TAC and the public raised concerns about a possible TMF dam failure. RMGC addressed questions presented.[214] Government authorities and Romanian and international experts repeatedly endorsed the TMF design, and the Ministry of Environment issued multiple dam safety permits.[215] Respondent's technical experts acknowledge the TMF design was sound.[216]

78. Respondent argues RMGC should have added a geomembrane liner to the TMF design or used dry-stack tailings. Claimants' expert Patrick Corser explains a geomembrane liner was considered, but given the site conditions, a compacted clay liner was consistent with the EU's Best Available Techniques,[217] and that dry-stack tailings, also considered, were not practical.[218] The Ministry of Environment agreed.[219] Respondent's suggestion such changes would have alleviated Project opposition also is speculative.[220]

4. Orlea

79. Respondent repeats a number of arguments regarding Orlea that are incorrect.[221] The evidence shows:

a. the Ministry of Culture from 2006 maintained it would authorize preventive archaeological research for Orlea as needed to make a discharge decision only *after* the Ministry of Environment endorsed issuance of the EP;

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[214] C-Opening-2020 vol.5:27; C-PHB ¶¶151-155; (C-265). Respondent argues the TAC requested information about the lining of the tailings pond, but disregards that RMGC responded to the TAC's questions. (C-429), 58-60, 126-129.

[215] C-Opening-2020 vol.5:23-24; C-PHB ¶¶151-155.

[216] C-Opening-2020 vol.5:25.

[217] Corser-II ¶¶37-48.

[218] Corser-II ¶¶77-82; C-PHB ¶¶156-157.

[219] C-PHB ¶¶151-155.

[220] C-PHB ¶211.

[221] C-PHB ¶¶117-126, n.735, ¶¶372-378; *supra* ¶¶22, 25, 32; *infra* ¶172(e).

b. the Ministry of Culture endorsed the EP with the understanding a *construction permit* would not be issued for Orlea before obtaining an ADC for that area;

c. in view of the substantial *preliminary* research already completed for Orlea, the NHMR's 2013 preventive research proposal for Orlea contemplated a "preservation by record" approach, reflecting that a positive discharge decision was reasonably expected;

d. following issuance of an ADC, the Chance Finds Protocol contemplated preserving "by record" any relic found during operations and did not create a risk a later find would be preserved *in situ*.

5. Post-mining Land Use

80. Respondent's arguments regarding post-mining land use mischaracterize the record (including Dr. Kunze's reports and the record before the TAC), are incorrect, and did not prevent EP issuance.[222]

D. The EIA Process Was Blocked Throughout 2012

81. Respondent argues the EIA Process "was ongoing in 2012." The evidence demonstrates it was politically blocked.[223]

82. Respondent contends [redacted] refused to answer questions about a classified report to NAMR dated November 30, 2011 that Respondent represents reflects RMGC's "understanding that the EIA Review Process [was] ongoing." It requests adverse inferences.

83. Respondent's arguments are baseless.

84. Mr. Avram never read the lengthy classified report. Romanian law prohibited him from seeing it contemporaneously, and Respondent failed to show him the relevant section on permitting that contradicts Respondent's representation about the document's contents.[224]

[222] C-PHB ¶¶158-161.

[223] C-PHB §IV.

[224] C-PO27 n.45.

85. Contrary to Respondent's representation, the report states, "*Technical consultations were completed in the last TAC meeting and a decision with regard to the environmental agreement for Roşia Montană mining project was to be made*."[225] Respondent avoids that passage.

86. [redacted] further confirm [redacted] that RMGC understood the technical assessment had been completed and it expected a prompt decision on the EP.[226] Respondent addresses none of them.[227]

87. The few internal documents Respondent mentions do not support its case.

88. Respondent refers to Ministry of Environment letters to Parliament in December 2011. These letters do not identify any alleged open issue or any need for further information. They say the "last" request was sent to RMGC in September 2011 and the EIA Process "will be finalized after a complete, careful and thorough analysis of all documentation by all decision-makers."[228] At that time, Minister of Environment Borbély repeatedly said this would take 1-2 months "maximum" and that the issues had been "clarified,"[229] facts Respondent ignores.

89. Respondent refers to an April 2012 Ministry of Environment memorandum stating certain issues were "currently under analysis." There is no evidence of analysis of these issues, however, until the Inter-Ministerial Commission in March 2013.[230] Respondent also omits the first issue was the EIA checklist, which is the last step before the EP decision.[231]

[225] (C-1236), 18.

[226] C-Opening-2020 vol.4:25; (C-2958); (C-2959); (C-2960), 3.

[227] RMGC's annual reports summarily list the steps in the procedure without characterizing them. They in no way reflect an understanding the EIA Process was "ongoing."

[228] C-PHB n.139.

[229] C-PHB ¶63(f); C-PO27 ¶¶12(l), 25.

[230] The letters refusing to approve the Waste Management Plan were pretextual and are not analyses.

[231] C-PHB n.139; (R-472), 5.

90. Respondent contends [redacted][232]

91. Respondent argues Gabriel disclosed "outstanding issues" in May 2012. Gabriel disclosed, "[u]ntil recently, it was Management's understanding that the TAC had concluded that all technical aspects have been clarified to its satisfaction, although the Company has been awaiting formal feedback from the TAC as to whether further meetings or documentation will be requested."[233] It noted new issues were raised only through officials' public statements "[i]n recent weeks," and "consequently the Company will seek further clarification from the new Government and the TAC as to the next steps in its review process."[234]

92. Prime Minister Ponta then announced a political moratorium on Project-related decision-making until after the year-end Parliamentary elections.[235] When it returned its attention to the Project in 2013, the Government confirmed there were no impediments to issuing the EP and repeatedly acknowledged the delays since the November 2011 TAC meeting were due to political blockage.[236]

E. In 2013, the Ministry of Environment Swiftly Resolved All Alleged Issues and Confirmed All EP Requirements Were Met, but Withheld the EP Pending Parliament's Vote on the Special Law

93. In 2013 the Government repeatedly confirmed RMGC met the requirements for the EP,[237] but withheld the EP pending Parliament's vote on the Special Law before deciding to reject the Project.[238]

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[232] [redacted]

[233] (R-507), 4; (R-489), 4.

[234] (R-507), 4; (R-489), 4-5.

[235] C-PHB ¶64; (C-641).

[236] C-PHB ¶¶63(h), 65(a); (C-1903), 4, 35-36; (C-472), 6-7; (C-2162), 2, 9.

[237] C-PHB ¶65.

[238] *Infra* ¶¶119-132; C-PHB ¶¶162-200.

94. Respondent tries to discredit the Inter-Ministerial Commission's determination that there were no impediments to issuing the EP,[239] arguing it had "limited information." The Commission included many of the same Government authorities represented by many of the same officials who participated in the TAC.[240] Its task was "to obtain a complete picture of the current situation" considering the permitting process "stagnates since November 2011."[241] In addition to meeting twice with RMGC, the Commission met internally, consulted the Ministry of Environment's legal counsel and the Department for European Affairs on "the transposition of the *acquis communautaire* in this domain (EU laws on waters etc.)," and requested each institution first "to present all the issues, comments and matters falling under their respective competence" and subsequently "to provide a final viewpoint on the project."[242] Thus, the TAC observed at the start of its next meeting on May 10, 2013, "As you all know very well, many of the issues regarding the Rosia Montana Project have already been debated within the Inter-Ministerial Working Group…"[243]

95. Respondent contends Gabriel disclosed in March 2013 it hoped to discuss "compliance with environmental standards." Gabriel disclosed the TAC had not met since November 2011 when it concluded "that all technical aspects had been clarified to its satisfaction" and that Gabriel "still awaits formal feedback" and for the process to "be re-initiated."[244]

96. Respondent refers to a statement at the May 10, 2013 TAC meeting that certain issues were "left uncertain" in 2011. Respondent ignores that at the same meeting, the Ministry of Environment twice confirmed it had completed its technical assessment in November 2011 and, within two hours, it further confirmed it had resolved all issues.[245] At the next TAC

[239] C-PHB ¶65(a).

[240] C-PHB n.116.

[241] (C-2162), PDF-2.

[242] (C-2162), PDF-2-3, 6.

[243] (C-484), 2.

[244] (C-1810), PDF-21.

[245] C-PHB ¶65(b), n.117; C-Opening-2019 vol.4:78-82.

meetings, the Ministry of Environment declared again that the EIA review "has been finalized" and the next meeting would be for "taking the decision."[246]

97. Respondent attempts to minimize the 58-page draft EP conditions the Ministry of Environment published in July 2013 based on the proposals of each TAC member.[247] The Ministry of Environment confirmed this public consultation was done to "[c]omplete the decision-making phase," accept the EIA Report, and "[e]laborat[e] the Decision for the issuance" of the EP.[248] While Respondent speculates it "could yield additional observations that the TAC may have needed to review," the Ministry of Environment did not identify any comments requiring further discussion.[249]

98. Respondent tries but fails to discredit the Ministry of Environment's Draft EP Decision.[250]

a. While Respondent objects to calling it "a draft decision," the document itself states it is a draft decision. Respondent produced it in response to the Tribunal's order to produce "All draft decisions or recommendations of the Ministry of Environment or the [TAC] with regard to issuing or denying" the EP.[251]

b. Claimants previously rebutted Ms. Mocanu's baseless speculation that Mr. Avram and Mr. Patrascu prepared the Draft Decision.[252]

c. Respondent's attempt to dismiss Mr. Patrascu as "TAC President and thus, a political appointee" is inaccurate. Mr. Patrascu represented the National EPA in the TAC in 2011.[253] He was Director of the Ministry of Environment's Impact

[246] C-PHB ¶65(c); (C-485), 18-19; (C-480), 15.

[247] C-PHB ¶65(c), n.120; (C-555).

[248] C-PHB n.120; (C-555), 2; (C-1751), 6.

[249] C-PHB n.121.

[250] C-PHB ¶65(c); (C-2075).

[251] PO10 Annex-A (Request-1); Reply ¶94 n.217.

[252] C-PO27 n.129.

[253] (C-486).

Assessment and Pollution Control Department; he served as *acting* TAC President because Ms. Dumitru was in Geneva.[254] Minister of Environment Plumb asked Mr. Patrascu to testify to Parliament, describing him as "a specialist."[255]

d. The Draft Decision includes the "elements" Ms. Mocanu contends are missing. Its 40+ pages of EP conditions are consistent with the draft conditions published on the Ministry's website.[256]

99. Respondent ignores the repeated confirmations of Prime Minister Ponta,[257] Minister of Environment Plumb,[258] Minister of Culture Barbu,[259] Minister of Large Projects Şova,[260] and other officials that the Project met the EP requirements. Ms. Mocanu's contrary testimony is not credible. She never held a decision-making role and was not involved at all in 2013. The responsible senior Government officials repeatedly and unequivocally admitted RMGC met the EP requirements but that the EP would not be issued and the Project would not proceed unless Parliament approved the Special Law on which the Government had insisted.

100. Finally, contrary to Respondent's argument the EIA Process was ongoing in 2014, Minister of Environment Plumb confirmed "Parliament's decision means the last word for us and we will observe it."[261] Prime Minister Ponta repeated the same point.[262] All that occurred in 2014-2015 were several pretextual TAC meetings when there was no legitimate basis to do anything other than issue the EP.[263]

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[254] (C-484), 3.

[255] (C-506), 8-9.

[256] C-PHB ¶255.

[257] C-PHB ¶65(d).

[258] C-PHB ¶¶65(e), 65(h), nn.126, 129.

[259] C-PHB ¶¶65(f), 65(h), nn.127, 130

[260] C-PHB ¶65(g).

[261] C-PHB ¶193; (C-828).

[262] C-PHB ¶193; (C-416).

[263] C-PHB ¶195.

III. BEGINNING IN AUGUST 2011, THE GOVERNMENT ANNOUNCED AND THEREAFTER FOLLOWED A POLICY NOT TO ADVANCE PROJECT PERMITTING UNLESS RMGC AND GABRIEL IMPROVED THE STATE'S ECONOMIC INTEREST AND THE GOVERNMENT POLITICALLY APPROVED THE PROJECT

A. Respondent's Further Arguments on the EP

101. Respondent maintains throughout its pleading that the EIA Process was "not held up." The evidence shows it was.

102. Respondent asserts (without citation) "eight witnesses," [redacted] "confirmed" at the hearing "that the various Governments did not hold up the permitting process." That is false.

a. [redacted] that the Government required Gabriel to meet its coercive demands and blocked the EIA Process.[264]

b. Many official statements from 2011-2013 confirm that reality.

c. [redacted].

d. Claimants' witnesses identified officials with whom they interacted in their respective areas of responsibility who either participated in or described politically-motivated blocking of Project permitting. Respondent did not proffer those officials as witnesses and did not question Claimants' witnesses about those interactions.[266]

e. Ms. Mocanu's testimony alleging a failure to meet permitting requirements and a lack of political interference is refuted by the contemporaneous evidence. She

[264] *E.g.*, C-PO27 nn.28, 30, 32, 40, 47, 66; *supra* ¶34.

[265] [redacted].

[266] C-PHB ¶68.

was never a decision-maker, and while she purports to describe instructions given by Minister of Environment Plumb among others, Ms. Mocanu was not involved in the EIA Process from June 2012 to June 2014.[267]

f. Mr. Găman confirmed he presented the Ministry of Economy's view at the first post-Parliament TAC meeting in April 2014 that there was nothing to do but take the long-overdue decision on the EP.[268]

g. Messrs. Ariton, Bode, and Boc disclaimed knowledge of permitting and/or were not credible. Mr. Ponta refused to appear for examination.

B. Boc Government

103. Respondent argues the Government "did not link" Project permitting to increased economic benefits for the State and, therefore, "did not coerce RMGC or the Claimants" to renegotiate. Numerous repeated statements of Prime Minister Boc, Minister Borbély and Minister Hunor from August-December 2011 unequivocally show the State linked Project permitting to and conditioned it on a renegotiated deal and a positive political decision.[269] Moreover, as reflected in Minister Hunor's statements regarding his refusal to remove Cârnic from the LHM, the Government so conditioned not only environmental permitting, but Project permitting more generally.[270]

104. Respondent's repeated arguments these senior officials' statements on matters within the scope of their official duties do not mean what they say, or otherwise are not evidence of State measures, are meritless.[271]

105. Respondent relies heavily on Mr. Boc's testimony seeking to avoid the plain meaning and effect of those statements and of the contemporaneous correspondence between RMGC and Gabriel at the time of the November 2011 TAC meeting detailing Prime Minister

[267] C-PHB ¶68.

[268] C-PHB n.402.

[269] C-PO27 ¶¶11-27; C-PHB ¶¶45-56.

[270] C-PO27 ¶¶12, 25; C-PHB ¶¶113, 198, 233; Reply ¶¶258-261.

[271] C-PHB ¶¶39-47; Reply ¶¶23-29.

Boc's ultimatums, delivered through Minister Ariton, linking Project advancement to Gabriel's meeting the Government's economic demands. Mr. Boc's testimony was shown to be contrived and incredible.[272]

106. Respondent's argument that "Claimants have not produced any contemporaneous internal document or email complaining or even suggesting that the Government was holding up the permitting process," is wrong. [redacted]

107. [redacted] This evidence of coercion is unassailable.[277]

[272] C-PO27 ¶¶11, 12(g)-(h), 13, 15-19, 22-23; C-PHB ¶¶46-47, 54-56. Equally incredible is Respondent's contention that Prime Minister Boc did not fight against the Project. The evidence to the contrary is compelling. In addition to his public statements in 2011 and his direction of the "negotiations" with Gabriel and RMGC, Mr. Boc publicly stated in 2006 while Mayor of Cluj he would not endorse the Project if it were up to him, and three people who knew him well – his wife, President Basescu, and Minister Videanu – all stated publicly that Mr. Boc opposed and fought against the Project as Prime Minister. C-PO27 ¶11; C-PHB ¶62(a).

[273] C-PO27 ¶16.

[274] C-PO27 ¶¶18-19; C-PHB ¶¶52-55.

[275] (C-841).

[276] (C-797).

108. Respondent's version of events relating to the "renegotiations" with the Boc Government is not reality.

109. First, RMGC and Gabriel did not invite themselves to the Ministry of Economy in September 2011 to make a general project presentation and then volunteer to renegotiate and increase the State's economic interest.[278] Instead, the Government summoned RMGC and Gabriel to renegotiations, an invitation they could not refuse if they wanted the Project given the link between renegotiations and Project permitting the Government made.[279]

110. Second, Respondent's denial the Government linked renegotiations with permitting is unavailing. That Minister Ariton and Mr. Găman handled renegotiations while Ministers Hunor and Borbély handled permitting is irrelevant. The Government through statements of Prime Minister Boc and Ministers Hunor and Borbély publicly and unmistakably linked Project advancement to a renegotiated deal and a subsequent favorable political decision, which forced RMGC and Gabriel to the table. As their public statements reflect, Ministers Hunor and Borbély plainly were aware of the renegotiations, conditioned permitting on the Government improving its economic stake, and as members of the Government and political leaders of their party, would have known if an acceptable increase were obtained.[280] The resulting "negotiations" were not free and voluntary commercial negotiations, but were a coerced

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[277] [redacted]

[278] C-PO27 ¶13; C-Opening-2019 vol.3:20-33; C-PHB ¶¶44-50. [redacted]

[279] C-PHB ¶49 n.60; [redacted]

[280] C-PO27 ¶¶12, 25; C-PHB ¶¶45, 55; Reply ¶29.

exchange in which RMGC and Gabriel bid against themselves under penalty of not having the Project in an ultimately failed effort to satisfy Prime Minister Boc's demands.[281]

111. Third, RMGC/Gabriel did not seek permitting guarantees, exemptions from legal requirements, or other special treatment. This fact is evident in the terms of their initial proposal on October 5, 2011,[282] in [redacted].

112. Although Gabriel sought to condition increases in the State's financial interest on the occurrence of milestones, it did so in an attempt to meet its fiduciary duties to its shareholders; even Minister Ariton recognized Gabriel could not simply give away value to the State.[285] One milestone in the initial proposal was Parliament enacting long-pending draft general legislation to modernize and improve Romania's Mining Law, which the Senate had approved in 2009. RMGC together with over 25 other mining companies comprising the Patromin trade association supported these amendments.[286] Contrary to Respondent's

[281] C-PO27 ¶¶15-27; C-PHB ¶¶50-56. That RMGC and Gabriel had to memorialize their coerced proposals to the Government does not mean they "drove the negotiations." C-PHB ¶49 n.60.

[282] (C-2919).

[283] [redacted] Such misrepresentations, evidently made in the hope the Tribunal will accept without examination its assertions about what the voluminous testimonial and documentary record says, pervade Respondent's case.

[284] C-PHB ¶52 n.67. *Id.* ¶¶49-52.

[285] C-PHB ¶51.

[286] Tănase-III ¶¶10-15, 143-44; Tr.(Dec.6, 2019)1605:8-11 (Găman-Cross).

characterization and as reflected in its broad-based support, the pending proposed amendment to the Mining Law was not "specifically for the Project."[287]

113. Fourth, RMGC/Gabriel were not desperate for a legislative lifeline "to exempt RMGC from the remaining environmental requirements that it did not meet." RMGC/Gabriel were confident they met applicable permitting requirements and could implement the Project under existing law, and thus did not run to the Government in September 2011 (or anytime thereafter) offering to renegotiate at all, let alone to secure support for this legislation.[288] This issue arose only because Gabriel was forced to renegotiate and sought to condition an increase in the State's interest on milestones that would signal progress for the Project.[289] Prime Minister Boc rejected such conditionality, and because the Government had made clear the Project would not advance without meeting Prime Minister Boc's demands, in their next proposal RMGC/Gabriel dropped all of the conditions to which the Prime Minister had objected.

114. Fifth, the Government was not prepared to accept the economic *status quo* and allow the Project to advance. This is evident not only in the repeated public statements discussed above, but also in the course of the "negotiations." Mr. Boc rejected as too low the proposal in early November 2011 to increase the State's shareholding to 22.5% that contained none of the conditions he found unacceptable, and also rejected the subsequent November 30/December 5, 2011 conditional proposal of "25 and 6," instead further demanding a 50/50 profit split.[290]

115. Sixth, [redacted] unequivocal testimony on cross-examination and the parties' contemporaneous conduct and communications show they did not reach agreement on a

[287] Tr.(Dec.6, 2019)1602:18-21 (Găman-Cross)(stating pending legislation to amend the Mining Law "was not applied specifically to that Project."). Respondent also mischaracterizes the effect of these proposed amendments. E.g., contrary to Respondent's contention that the draft legislation "would have allowed the development of mining projects without a valid PUZ (Art.43)," the text says no such thing. (C-2419).

[288] C-PHB ¶¶172-174; Reply ¶¶180-185. [redacted] Minister Şova expressed the same view. C-PHB ¶174.

[289] C-PHB ¶¶49, 52.

[290] C-PO27 ¶¶16-23; C-PHB ¶¶53-54.

renegotiated economic deal on November 30, December 1, December 5, or anytime in 2011-2012.[291]

116. Finally, Respondent's arguments the Boc Government did not act on its threats to block permitting are meritless.

a. Respondent wrongly contends [redacted] First, the evidence is consistent with the political interference [redacted] Second, all permitting issues were resolved promptly,[293] and political blockage is the only reason the EP decision was not taken and other permitting steps were not completed by early 2012.[294] Third, the political interference [redacted] is manifestly not the "sole link" between the previous public statements and subsequent events. After the November 2011 TAC meeting and continuously thereafter until Parliament's rejection of the Special Law, numerous statements by

[291] [redacted]

[292] C-PHB n.105.

[293] C-PHB ¶63(d).

[294] These include steps to finalize the EIA Process (e.g., completing the checklist, confirming the Ministry of Culture's "endorsement," approving the Waste Management Plan, issuing a Government Decision if desired to confirm the outstanding public interest) and other steps more generally (e.g., correcting the LHM and approving the updated PUZ).

senior Government officials consistently reflected the Government was following the policy adopted since August 2011 of not issuing the EP and allowing the Project to proceed without a renegotiated deal and a favorable political decision.

b. Respondent argues incorrectly that "on the Claimants' own case, the Boc Government … did not hold up the environmental permitting," purportedly because the Government fell on February 6, 2012 before a Government Decision on the EP had to be issued. The Ministry of Environment had to take its decision on the EP by January 2012 (while Prime Minister Boc remained in office),[295] which Minister Borbély repeatedly confirmed it would do.[296] Moreover, as discussed below, Ministers Borbély and Hunor remained in their positions under Prime Minister Ungureanu and continued to block permitting adhering to the same Government policy.

c. [redacted]

[295] Memorial ¶366.

[296] C-PHB ¶63(f).

[297] In August 2011, Mr. Henry stated publicly, "Recent statements from senior politicians suggest that they need to show the country is getting a better deal… We anticipate going to the table." (C-1441). Gabriel later disclosed it "has been, and remains, involved in an ongoing dialogue" on "questions raised on ownership of the Project, royalty rates … and the route to successful permitting of the Project." (C-2573), 3. Several analysts reported on these discussions and noted the potential economic costs. C-Opening-2020 vol.4:19, 26, 32. At least one reported that meeting these demands [redacted] (C-2975), 2. In 2012, Gabriel disclosed (and analysts repeated) Prime Minister Ponta's statements that the Government maintained its demands on "Project ownership and royalty rates" and "will not make any key decisions on the Project until after the national elections." C-Opening-2020 vol. 4:46-47.

d. Respondent contends contemporaneous documents including "those prepared by RMGC … confirm that permitting was held up because of RMGC's inability to meet the requirements." There is no truth to this assertion.[298]

C. Ungureanu Government

117. After the Boc Government fell in February 2012, the short-lived Ungureanu Government, which rested on the same political coalition as the Boc Government and counted among its Cabinet members Ministers Hunor and Borbély, maintained the unlawful conditions to Project permitting and advancement established in August 2011.[299] The Ungureanu Government did not accept or respond to the last proposal RMGC/Gabriel made in January 2012.[300]

118. Respondent's effort to distance the Ungureanu Government from these facts is unavailing. Whether Minister Bode engaged in renegotiations is irrelevant. As Mr. Găman testified on *direct* examination, he helped prepare a memorandum in April 2012 to provide background and status information about the Project to Minister Bode "*who wanted to know the status of the negotiations and to be able to continue them*."[301] It is apparent from the testimony of Mr. Găman that the only reason further renegotiations did not occur is because the Ungureanu Government was not in office long enough, not because the Government dropped the renegotiation requirement.

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[298] Respondent refers to [redacted]

[299] C-PO27 ¶28; C-PHB ¶57.

[300] *Id*.

[301] Tr.(Dec.6, 2019)1511:4-9 (Găman-Direct).

D. Ponta Government

119. Picking up where its predecessor Governments left off, numerous print and video statements from Prime Minister Ponta, Minister of Large Projects Şova, and Minister of Environment Plumb, among others, and [redacted], prove the Ponta Government also required economic renegotiations and a favorable political decision – which the Ponta Government defined as Parliamentary approval of a special law that it insisted was the only path forward for the Project – before the Government would permit the Project and allow it to advance.[302] Respondent tries but fails to avoid this reality.

120. First, Respondent relies on Mr. Ponta's unexamined and unreliable arbitration "statement" to deny that Prime Minister Ponta required economic renegotiation as one condition of Project permitting and advancement. The chasm between the version of events in Mr. Ponta's arbitration "statement" and the truth reflected in his and other officials' contemporaneous statements, explains why Mr. Ponta declined to subject himself to cross-examination.

121. Second, Respondent's arguments that the repeated, clear, contemporaneous statements by numerous Ponta Government officials do not mean what they say regarding conditioning EP issuance and the Project on Parliament's adoption of the Special Law are meritless.[303] In addition to their many public statements, the Government unequivocally conveyed its policy at TAC and Negotiation Commission meetings and in Minister Plumb's testimony and written answers to Parliament.[304]

122. Third, RMGC/Gabriel did not want, need, or ask for a special law. In public statements and testimony before Parliament, the Ponta Government made clear the Special Law was envisaged by the Government and introduced at its behest.[305] Mr. Găman and Minister Şova each agreed that RMGC did not need legislative amendments to implement the Project.

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[302] C-PO27 ¶¶29-30, 34-45; C-PHB ¶¶58-59, 162-171.

[303] C-PHB ¶¶39-59.

[304] C-PHB ¶¶167-170; (C-485), 20; (C-1536), 64; (C-510), 2-3; (C-1529), 2.

[305] C-PO27 ¶¶36-40; C-PHB ¶¶166-170, 174; Reply ¶¶183-184.

123. Fourth, RMGC/Gabriel did not seek a special law in "renegotiations" or otherwise. RMGC opposed a special law for the Project, and tried unsuccessfully to convince the Government to support general legislative amendments instead.[306] None of the areas for improvement or clarification of existing legislation that RMGC identified in response to a specific request to do so from the Negotiation Commission in July 2013 required a special law to address.[307] RMGC also opposed conditioning EP issuance on the outcome of Parliament's approval of the Special Law and instead wanted the EP issued via Government Decision (as the law provided) before the Government submitted any legislative proposal to Parliament.[308]

124. Fifth, RMGC/Gabriel were not willing partners with, but captive to, the Government on the Parliamentary path it dictated as the only way forward for the Project. Neither RMGC's support for general legislative amendments to the Mining Law, nor Gabriel's efforts to condition coerced increases in the State's financial interest on enactment of long-pending amendments to general legislation, meant RMGC/Gabriel wanted or sought the Special Law. As Gabriel explained contemporaneously, and as Mr. Henry testified, Gabriel's officers and directors had fiduciary duties to Gabriel's shareholders not to give away significant value to the State and obtain nothing in return that could have facilitated the Project.[309] When Prime Minister Boc objected to these conditions in 2011, Gabriel dropped them.

125. When still forced to renegotiate by the Ponta Government in 2013, and further reflecting no deal had been reached in 2011 on "25 and 6," [redacted]

[306] C-PHB ¶¶175-179; C-PO27 ¶39; Reply ¶185. Given the politically motivated allegations of corruption hurled by e.g., Mr. Ponta at President Basescu and other political opponents who supported the Project, it is not surprising RMGC and Gabriel consistently did not want anything that smacked of special treatment.

[307] Tănase-III ¶¶129-150; C-PHB ¶¶162-185.

[308] C-PHB ¶175; C-PO27 ¶¶39-41; Reply ¶185.

[309] C-PHB ¶¶51, 173; (C-775.02) [redacted]

[310] (C-873); Tănase-III ¶139; Henry ¶86.

[redacted].[311] That the Government in 2013 saw fit to include in its Special Law various provisions to amend and improve aspects of the Mining Law to facilitate the development of large mining projects and revitalize the mining industry does not mean that RMCG/Gabriel wanted or sought the Special Law.[312] Indeed, as Mr. Găman testified, aside from seeking certain discrete modifications, the Boc Government also supported general legislation aimed at amending the Mining Law.[313]

IV. THE GOVERNMENT AND ITS RULING COALITION DEFINITIVELY REJECTED THE PROJECT POLITICALLY AND EFFECTUATED THEIR DECISION BY ENGINEERING PARLIAMENT'S REJECTION OF THE SPECIAL LAW

126. Numerous clear and unequivocal contemporaneous statements of Prime Minister Ponta and Senator Antonescu demonstrate that on September 9, 2013, before any Parliamentary hearing, they decided and instructed politically members of their ruling coalition in Parliament to reject the Special Law and with it the Project.[314] Respondent's arguments in response are meritless.

127. First, Respondent argues Prime Minister Ponta and Senator Antonescu "were merely expressing their view that the law would likely be rejected by Parliament." Their numerous previously cited statements, with which the Tribunal is familiar, shows that is not the case.[315]

128. Second, stooping to new lows, Respondent accuses counsel of "evidence tampering" during the 2019 hearing based on a slide presented in Opening showing excerpted

[311] (C-781); Tănase-III ¶¶139-140, 144-145; Henry ¶¶86-89.

[312] Tănase-III ¶¶148-149. Respondent also misstates the effect of the Special Law were it to have been adopted. C-PHB ¶¶172-184. Contrary to Respondent's arguments, public statements by Gabriel following the Government's endorsement and transmission of the Special Law to Parliament expressing hope and support for its passage do not mean RMGC and Gabriel requested it. Indeed, the Government had made clear that was the only path forward for the Project. Henry-II ¶45. Equally meritless is Respondent's argument that Gabriel should have objected to the Special Law and commenced this arbitration sooner.

[313] Tr.(Dec.6, 2019)1608:6-14 (Găman-Cross).

[314] C-PO27 ¶¶46-52; C-PHB ¶¶186-88.

[315] C-PHB ¶¶187-188.

quotes from Senator Antonescu that inadvertently omitted an ellipsis after the first quote.[316] The slide included the cite to the full source for review by the Tribunal, and counsel quoted the omitted text referring to a "significant breach in the Romanian society" in other submissions.[317] It is obvious counsel did not "tamper" with anything. Respondent's accusation is unfounded and exceeds the boundary of appropriate advocacy.

129. Third, Respondent asserts "[o]n September 9, 2013, the Government did not call for rejection of the Roşia Montană Law. Given the ongoing protests against the Project, Prime Minister Ponta called on MPs to vote their conscience." The quoted sentence suggests that on September 9 Prime Minister Ponta called on MPs to vote their conscience on the Special Law. He did not. Prime Minister Ponta confirmed on September 9 that he "of course" would instruct members of his party in Parliament to implement the political decision to reject the Special Law and the Project.[318]

130. The document cited by Respondent in support of its argument, C-1483, is a transcript of an interview with Prime Minister Ponta on September 15, 2013, conducted after he convinced miners at Roşia Montană to end their hunger strike in response to the Senate committees' political rejection of the draft Special Law that he and Senator Antonescu had engineered. Prime Minister Ponta persuaded the miners to leave the mine by promising them that a special Parliamentary commission would review the draft Special Law anew, an approach he rejected on September 9 as a waste of time in view of the political decision to reject the law.[319] During that September 15 interview, he said he "hope[d] that [Parliament] will not decide based on an automatic political vote" but would "decide by themselves how to vote."[320]

131. Any hope members of Parliament would be allowed to vote their conscience was short-lived and foundered on the hard rocks of politics and party discipline as once again Senator Antonescu and Prime Minister intervened before the Special Commission voted to ensure its

[316] C-Opening-2019 vol.5:57.

[317] C-PO27 n.145.

[318] C-PO27 ¶¶47-48.

[319] C-PO27 ¶¶49, 50(c).

[320] (C-1483), 2.

members would reject the Special Law, with Prime Minister Ponta announcing, "We have negotiated it politically."[321]

132. Finally, Parliament's rejection of the Special Law, as multiple statements of senior governmental officials confirmed, meant the EP to which RMGC was legally entitled would not be issued, the Project and related Bucium projects would not be done, and the State's joint-venture with Gabriel would not continue.[322] Thus, the State's course of treatment begun in August 2011 breached multiple provisions of both BITs and caused Claimants to incur massive losses, a consequence Prime Minister Ponta repeatedly acknowledged and accepted.[323]

V. RESPONDENT'S SOCIAL LICENSE NARRATIVE IS LEGALLY IRRELEVANT AND CONTRARY TO THE EVIDENCE

133. Respondent's "social license" arguments are legally irrelevant and meritless.[324]

a. "Social license" is not a legal concept or requirement.[325]

b. Permitting decisions may *not* be based on political factors, including public opinion or the existence or level of social license.[326] The Government could have terminated its agreements with Gabriel and RMGC lawfully and paid compensation, but it did not do so.[327] No amount of alleged opposition could excuse the Government's failure to treat the Project in accordance with law.[328]

[321] C-PO27 ¶¶50(c)-(d).

[322] C-PO27 ¶¶51-53.

[323] C-PHB ¶¶39, 162, 185, 258; C-PO27 ¶¶5, 191.

[324] C-PO27 ¶¶119-174; C-PHB ¶¶201-212.

[325] C-PO27 ¶127.

[326] C-PO27 ¶¶121-124, 127; C-PHB ¶212.

[327] C-PO27 ¶¶121, 127.

[328] *Id.*

c. Not only do the experts agree it is possible to operate without social license,[329] but RMGC earned a social license, which Respondent's expert Dr. Thomson does not deny.[330]

A. Alburnus Maior

134. Respondent argues Alburnus Maior's early activities reflect "fiercely entrenched" local opposition. The vast majority of local residents strongly supported the Project and opposed Alburnus Maior.[331] Respondent does not deny only 10-15 families belong to Alburnus Maior.[332]

135. Respondent argues opposition "grew." That is false. Support for the Project increased considerably over time.[333] Dr. Thomson conceded RMGC provided significant support to the local community and "[t]he quality of the relationship improved substantially."[334]

a. Respondent refers to a cultural foundation established "against the Project" in 2009. That organization consisted of Mr. Jurca, his wife, Mr. Cornea, and six others "not from Roşia Montană."[335]

b. Respondent argues "[d]emonstrations still take place against the Project as the Tribunal experienced first-hand at the 2019 hearing." That micro-event with a

[329] C-PO27 ¶128.

[330] C-PO27 ¶¶129-141; C-PHB ¶¶202-204.

[331] [redacted]

[332] R-PHB ¶398; [redacted]

[333] C-PO27 ¶¶129-133.

[334] C-PO27 ¶136; Tr.(Dec.12, 2019)3119:10-14 (Thomson-Cross).

[335] Tr.(Dec.9, 2019)2095:13-20 (Jurca-Cross). Respondent complains Claimants did not examine Mr. Cornea. Mr. Cornea does not own any property needed for the Project. C-PHB n.701; *supra* ¶63(b). Nor does he testify to anything Mr. Jurca does not address. Cross-examination of Mr. Jurca established they are relatives. Tr.(Dec.9, 2019)2094:7-10 (Jurca-Cross). Respondent waited until after Claimants called witnesses based on the then-scheduled 2-week hearing to request to bifurcate and prolong it.

few people holding signs – many against ISDS generally[336] – was indeed similar in scale to other demonstrations against the Project from 2000-2012.[337]

B. Alleged Opposition

136. Respondent's arguments about alleged "social opposition" are misguided. Opposition, including protests, property holdouts, and NGO litigation, is consistent with the acceptance level of social license at which most mining projects operate, with few attaining greater support; it is a common feature of modern mining that companies must and do manage.[338]

137. Respondent's assertions that opposition "disrupted" permitting are incorrect.

a. EIA consultation: Respondent objects to the form, not the substance, of RMGC's answers to EIA public consultations. The Ministry of Environment approved RMGC's public consultation plan, evaluated RMGC's responses within the EIA Process, and determined RMGC answered each question to its satisfaction.[339]

b. Litigation: Respondent contends litigation prevented ADCs, UCs, and the PUZ. None of these was required for the EP.[340] In addition, RMGC had a valid UC from 2010-2018[341] and all ADCs except Orlea.[342] Local authorities are obligated to approve urbanism plans, but Respondent politically blocked their approval.[343] Absent the Government's wrongful conduct, litigation did not block permitting. The courts rejected challenges to UCs in 2010-2018 and held (consistent with the Inter-Ministerial Commission) that a UC is irrelevant to the EP.[344] Respondent's

[336] Photographs show the same people with the same signs submitting the amicus submission. (C-2869). Their organizations (CIEL, ClientEarth, and ECCHR) campaign to "#endISDS." (C-2871).

[337] C-PO27 ¶144 n.357.

[338] C-PO27 ¶¶138-139; C-PHB ¶¶204, 341.

[339] C-PO27 ¶¶125-126; C-PHB ¶210. Respondent wrongly contends [redacted]

[340] *Supra* ¶32(c)(ADCs), ¶¶37-44(PUZ), ¶48(UC).

[341] *Supra* ¶49.

[342] C-PHB ¶117.

[343] *Supra* ¶45.

[344] *Supra* ¶49.

arguments about the suspension of the Cârnic ADC in 2014 and the annulment of the SEA Endorsement in 2016 include the impacts of its own wrongful acts.[345] Gabriel also disclosed information about NGO litigations and associated risks, which are reflected in the market measure of the Project Rights.[346]

c. Surface rights: Respondent asserts "[c]ertain residents" refuse to sell property "to this day." This is misleading because RMGC suspended its land acquisition program in February 2008, to be continued upon issuance of the EP. But for the wrongful acts, RMGC was well-positioned to acquire surface rights and disclosed the attendant risks.[347]

d. PETI: The PETI petition in 2011 had no impact as Romania's authorities assured PETI they had taken measures to ensure full compliance with EU legislation.[348]

C. Government's Role/Impact

138. Respondent argues RMGC needed to address social issues "itself" and the State had no "role or responsibility to assist." That ignores the Government's role as grantor of the public mining concession, as a regulator, and as a partner in the RMGC joint-venture. Dr. Boutilier describes the more recent commentary that emphasizes the Government's role as a stakeholder and its influence over social license.[349] Dr. Thomson acknowledges the Government's influence observing that "Government can both help and hinder gaining an SLO" and "Social License has a dark side, and that is when politics and politicians take over."[350]

139. Respondent focuses on "two points in time," 2007 and 2013, and tries but fails to justify and excuse its conduct.

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[345] *Infra* ¶¶176(a), 176(c).

[346] *Infra* ¶¶176, 244-245.

[347] *Supra* ¶¶56-66; *infra* ¶¶177-189, 246-249.

[348] C-PHB ¶265(c); (R-205), 4.

[349] C-PO27 ¶140 n.347.

[350] C-PO27 ¶141; (Thomson-46), 3, 25.

a. While Respondent argues the 2007-2010 EIA suspension was lawful, Minister Korodi blocked the Project on pretextual grounds, without legal basis, as the Inter-Ministerial Commission report and subsequent court decisions on UCs confirm.[351]

b. Respondent argues it intended the Special Law "to facilitate the Project" and to "increas[e] the Project's social legitimacy." The Government insisted unlawfully on the Special Law to decide politically whether to do the Project.[352] Gabriel/RMGC made clear they did not want a Special Law – as "special" treatment from a deeply mistrusted Government, against a backdrop of baseless allegations of corruption, could only undermine (not enhance) social legitimacy.[353]

140. Respondent does not address other State acts that undermined social legitimacy.

a. Government authorities continually delayed permitting decisions the law required, as officials contemporaneously acknowledged.[354] These failures to act aggravated and sustained whatever controversies existed and frustrated RMGC's ability to provide benefits that would enhance Project support.[355]

b. Successive Prime Ministers publicly disparaged the Project and contended the agreed financial terms harmed the State.[356]

c. Political leaders made numerous baseless outrageous statements accusing each other of taking bribes from RMGC, which amplified public distrust.[357]

[351] *Supra* ¶19 n.26, ¶¶48-49.

[352] *Supra* ¶¶119-125.

[353] *Supra* ¶¶122-125.

[354] Memorial ¶¶296, 346, n.797 (Videanu, Borbély, Hunor, Basescu, Şova).

[355] C-PHB ¶262.

[356] *Supra* §III.

[357] C-PO27 ¶¶145-147.

d. While Respondent argues the State defended permits in court, after the political rejection, the Ministry of Culture falsely accused RMGC of seeking to mine without an ADC and argued its earlier administrative acts were "abusive."[358] Political blockage also allowed NGO litigation to gain traction with arguments that approvals were incompatible with the 2010 LHM.[359]

D. Evidence of SLO

141. Respondent wrongly argues disclosures describing a commitment to win social license "admitted" not achieving it.[360] Respondent argues the same disclosures overstate support and understate opposition.[361] Such internally contradictory arguments reveal the inaccuracy in Respondent's position.

142. Respondent wrongly asserts RMGC did not engage with opponents or address concerns. RMGC worked diligently with professional guidance to consult the community and design responsive policies,[362] including significant outreach to Alburnus Maior.[363]

143. In response to early public consultations, RMGC, among other things, reduced the Project footprint and increased protected areas, reducing gold reserves by ~500,000 ounces;[364] adjusted its approach to compensating property owners;[365] adjusted its hiring policy;[366] and implemented a Community Sustainable Development Program in line with World Bank

[358] C-PO27 ¶212; C-PHB ¶344.

[359] *Id.*

[360] Boutilier ¶117(g); Henry-II ¶¶79-80.

[361] Henry-II ¶80.

[362] C-PHB ¶¶208, 266(a).

[363] Lorincz-II ¶¶15-24.

[364] C-PHB ¶209(a).

[365] C-PHB ¶209(b).

[366] Lorincz-II ¶¶45-50.

standards.[367] RMGC thereafter invested significantly to address the environment, cultural heritage preservation, resettlement, tourism, and sustainable development.[368]

144. The evidence conclusively refutes Respondent's argument RMGC did "too little too late" and "never overcame the opposition."[369] Respondent accordingly tries to discredit all contemporaneous evidence of social license. Its rejection of the entire record in this context is meritless and not credible.

145. Thank-you letters: Hundreds of "thank-you" letters commend RMGC for its contributions to the community,[370] which Respondent does not deny. Respondent argues, however, some were done by template in return for support. This criticism is misguided as most mining companies operate with "a social license based on transactional relationships."[371]

146. RMGC surveys: RMGC monitored families who sold property; the large majority considered their living conditions had improved.[372] Respondent mischaracterizes these monitoring reports as "polls" and contends "willingness to move is not evidence of support for the Project." This misrepresents RMGC's findings and is wrong.[373]

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[367] Lorincz-I ¶¶59-64; Lorincz-II ¶¶51-62. Respondent wrongly contends [redacted]

[368] C-PHB ¶209(c)-(g). Respondent falsely asserts [redacted] Professor Henisz confirmed RMGC "had focused its efforts on addressing the core claims argued by the opposition" and "had invested time and resources to produce observable, tangible developments on the ground." Henisz ¶¶25-38.

[369] Respondent refers to cases like *SAS v. Bolivia* that bear no resemblance. C-PO27 ¶¶170-174.

[370] [redacted]

[371] Boutilier ¶117(d)(3).

[372] [redacted]

[373] Boutilier ¶117(f).

147. RMGC's 2010-2013 surveys demonstrated extremely high (and rising) Project support and that the vast majority of those remaining in the impacted area were eager to sell.[374] Respondent criticizes RMGC's methodology and argues [redacted] These arguments are baseless and misguided. RMGC wanted an accurate assessment of the situation; it had no reason to deceive itself.

148. External surveys/polls (Boutilier assessment): External surveys demonstrate deep local support and significant national support that improved substantially after 2009.[375]

a. Respondent wrongly contends Dr. Thomson did not rely on surveys/polls because of alleged "flaws." Dr. Thomson relied selectively on surveys in his first report.[376] Respondent also requested all "surveys, reports, and/or studies" on "public awareness and support," which it argued were "highly relevant."[377] Respondent and Dr. Thomson turned heel and ignored the thousands of pages of requested surveys because the data do not support their fabricated narrative.

b. Dr. Stoica's methodological critiques are erroneous.[378] Dr. Thomson acknowledged "Dr. Boutilier has successfully appraised popular opinion."[379]

c. Respondent asserts "RMGC was sanctioned for misleading advertisements," which is false.[380]

d. Respondent misrepresents that "Dr. Boutilier admitted having disregarded the opposition's actions." Dr. Boutilier testified survey/polling data is "the closest

[374] [redacted]

[375] C-PO27 ¶¶129-130.

[376] C-PO27 ¶135 n.332.

[377] C-PO27 ¶135 n.333; PO10 Annex-B (Requests-26-27).

[378] E.g., IMAS appropriately screened-out respondents who had not heard of the Project. Tr.(Dec.12, 2019)2874:11-22 (Boutilier-Direct). As to the "asymmetrical" response choices, Dr. Boutilier included all responses and determined the mean consistent with the Thomson-Boutilier model. Boutilier ¶¶52-53; Tr.(Dec.12, 2019)2875:2-18 (Boutilier-Direct). IMAS's margin-of-error was ±3.18%. Boutilier ¶32.

[379] Thomson-II ¶218; *id.* ¶137 ("the data provide a measure of popular support" and "are consistently positive in term[s] of support for the project").

[380] C-PHB ¶265(a); Tănase-III n.327.

information we have about the Social License."[381] He explained that evidence "point[ed] to a pretty clear Social License," but he responded point-by-point to Dr. Thomson's report, including on opposition activities.[382]

e. Respondent's argument that Dr. Boutilier "did not travel to Roşia Montană" is seriously misguided. Dr. Thomson agreed retrospective interviews conducted years after relevant events in the context of a dispute would not be useful even if done properly.[383] Dr. Thomson admitted he interviewed a few opponents who were not representative of the community and that his site-visit "failed."[384]

149. Henisz assessment: Respondent baselessly contends Professor Henisz's assessment is "not contemporaneous" or "independent." Professor Henisz did extensive independent field-research for academic purposes, funded from academic sources.[385] He concluded in December 2011, years before this arbitration, that RMGC "had earned the social license."[386]

150. Respondent contends Professor Henisz "did not explain the basis for his conclusion" and "admitted not having considered the totality of the evidence, including the statements from the Project opponents."[387] That is false. Professor Henisz detailed the reasons for his conclusion.[388] He confirmed his interviews of opponents "certainly informed my

[381] Tr.(Dec.12, 2019)2874:4-8 (Boutilier-Direct).

[382] *Id.* 2981:12-2983:11 (Boutilier-Tribunal); Boutilier §5.

[383] C-PO27 ¶134.

[384] *Id.*

[385] Henisz ¶11.

[386] C-PO27 ¶131; Tr.(Dec.12, 2019)2806:14-2807:5 (Henisz-Cross)("That was my conclusion at the time, yes."). Respondent contends Dr. Boutilier "contradict[ed]" Professor Henisz because he testified "we would need better measures that weren't taken at the time." That statement had nothing to do with Professor Henisz. Dr. Boutilier responded to a question about whether he could "be sure that there was no other cause" for changes in public opinion. Tr.(Dec.12, 2019)2985:18-2986:10 (Boutilier-Tribunal).

[387] Respondent complains he did not submit meeting "transcripts" or the "media corpus." Professor Henisz submitted detailed interview notes. (C-2391); (C-2462). Expanding the record with thousands more pages of public media would serve no purpose; reviewing such "secondary materials" is "part of the standard process of developing a case." Tr.(Dec.12, 2019)2797:8-22 (Henisz-Cross).

[388] Henisz ¶¶25-42; Tr.(Dec.12, 2019)2766:20-2769:3 (Henisz-Direct).

judgment."[389] As he explained, "[o]pponents of the mine acknowledged the shift in corporate strategy and its positive impact," and their leaders "seemed resigned to defeat" and divided "into small bitter factions."[390] Professor Henisz's interview notes confirm his assessment.[391]

151. University of Exeter: Respondent argues the University of Exeter's 2011 study of seven mining projects only addressed engagement, did "not consider" opposition, and "does not say that RMGC had acquired a social license." In fact, based on lengthy on-site interviews, that EC-funded study found RMGC outperformed all other projects on local support and trust as well as engagement, and "that much of the opposition against the mine reopening comes from outside of the community and even outside of Romania."[392] The lead author, Dr. Adey, concluded "in relation to the SLO question, 80% felt that RMGC and the local government were engaging them sufficiently in existing or future mine developments."[393] Dr. Thomson accepted this assessment: "I don't dispute it. I have not disputed in any way at all that the situation at Roşia Montană improved substantially from 2006 onwards."[394]

152. "Muntii Apuseni" assessment: This December 2011 study determined an "overwhelming majority" (~85%) of Roşia Montană residents and over 75% of those in Zlatna, Baia de Aries, Abrud, and Roşia Montană supported the Project.[395] Dr. Thomson purported to rely on this study in his first report. Claimants pointed out the study demonstrates the opposite of what he claimed.[396] Respondent now argues the study is "unreliable."[397]

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[389] Tr.(Dec.12, 2019)2843:4-2844:1 (Henisz-Tribunal).

[390] Henisz ¶¶35, 38-41.

[391] (C-2462.2), [redacted].

[392] C-PO27 ¶132, n.318; (C-2045), 56, 76, 85, 87.

[393] C-PO27 n.318; (Thomson-77), 2.

[394] C-PO27 ¶136; Tr.(Dec.12, 2019)3100:20-22 (Thomson-Cross).

[395] C-PO27 ¶133; (C-2050), 86.

[396] C-PO27 n.332.

[397] The study's margin-of-error was ±3%. Boutilier ¶66.

153. Referendum: In December 2012, 79% of voters in Roşia Montană, 71% in mining areas, and 63% in total voted to restart mining and implement the Project.[398]

a. Respondent argues the referendum "reveals a lack of support." The Mayors of the referendum communities, the County Council, Minister Şova, and Prime Minister Ponta all contemporaneously acknowledged the referendum demonstrated strong local and regional support for the Project.[399]

b. Respondent argues "turn-out was low" "and the referendum invalidated." The 50% threshold to validate referenda was too high as Romania acknowledged by lowering it to 30% in 2014 – turnout (43%) easily exceeded that threshold.[400]

c. Dr. Boutilier rebutted Dr. Thomson's critiques and demonstrated there is no credible evidence of a "boycott."[401]

d. The Mayors and County Council explained that a massive snowstorm stranded ~15,000 voters in their homes, which together with outdated and overstated voter-registration rolls, reduced turnout and the reported level of support.[402]

e. Respondent argues it is "not plausible" a snowstorm reduced turnout. The Government contemporaneously agreed that it did.[403] Dr. Thomson stated that, as a result of a snowstorm during his site-visit, people "were either not there or they were inaccessible."[404] His refusal to consider the same explanation in the context of the referendum reveals his bias.

f. While not put to Dr. Boutilier, Respondent argues a slightly higher turnout for the Parliamentary election (45%) is indicative of a referendum boycott. That ignores

[398] C-PO27 ¶133; (C-794), 6.

[399] Reply ¶175.

[400] Tănase-III ¶¶102-103; Boutilier ¶¶67-68, 177(i)(xi)-(xiv).

[401] Boutilier ¶117(i).

[402] C-PO27 n.327; (C-794), 5-6.

[403] Lorincz-II ¶¶113-115; (C-1903), 34-35.

[404] C-PO27 ¶134 n.327.

the effect of holding the referendum in many places that Mr. Jurca acknowledged are "not mining communities."[405] Turnout for the referendum was highest in Roşia Montană (66%),[406] which had the longest voting lines in the country.[407]

154. As the evidence debunks Respondent's argument that RMGC lacked a social license, Respondent abandons that keystone of its earlier submissions and implores the Tribunal to "not make a determination" on social license.

155. Respondent's new argument that "even a small minority" "can derail a mining project" is exaggerated and based on misleading and inaccurate references to testimony of Messrs. Jeannes,[408] Boutilier,[409] Guarnera,[410] and Thomson.[411] It is irrelevant in context because, contrary to Respondent's false assertion, neither litigation nor property holdouts "blocked the Project." But for Romania's wrongful treatment of Gabriel's investment, RMGC was well-positioned to acquire surface rights and implement the Project.[412] In addition, Gabriel fully disclosed the risks to Project development relating to surface rights, NGO litigation, and social opposition. There is no basis to conclude in a scenario absent Respondent's wrongful conduct

[405] Jurca ¶147.

[406] Boutilier Table 3-2; (C-794), 6; (C-2859).

[407] Lorincz-II ¶112; (C-2052).

[408] Respondent misrepresents Mr. Jeannes "confirmed" from his experience at Glamis "that social opposition can kill a project." Mr. Jeannes testified "there is always social opposition to mining" and managing it is "part of our jobs." Tr.(Oct.1, 2020)907:5-20 (Jeannes-Cross). He disagreed social opposition stopped the Glamis project, attributing it to "the entire political structure of California." *Id.* 907:21-908:18 (Jeannes-Cross).

[409] Dr. Boutilier testified access to mine-sites may be blockaded, it depends "very much on the context," "[a] lot of mines are in places where the rule of law … is very thin." Tr.(Dec.12, 2019)2901:13-2903:3 (Boutilier-Cross). This is irrelevant where rule of law is assumed to apply.

[410] During direct examination, Mr. Guarnera asserted for the first time one holdout "can kill a mining project" and "[a] very good example" is the Glamis project. Tr.(Sept.30, 2020)531:2-14 (Behre Dolbear-Direct). That is inaccurate. *Glamis* did not involve land acquisition, but a backfilling requirement that rendered the project uneconomic. C-PHB n.706.

[411] Dr. Thomson's new assertion one property holdout blocked a highway project for 10 years is unsupported, and in view of the phased construction of the Roşia Montană Project, irrelevant.

[412] *Supra* ¶¶56-66; *infra* ¶¶175-189.

that a hypothetical buyer would have assessed these risks differently than the market, including Newmont and Gabriel's other sophisticated shareholders.[413]

E. Attribution

156. Respondent argues opposition activities "are not attributable to the State." That is not disputed. To the extent social opposition is considered, one cannot overlook the fact that key Government decision-makers undermined the Project repeatedly and sustained the opposition's activities through false accusations of corruption and a failure to issue permits and take other action the law required (e.g., removing Cârnic from the 2010 LHM).

F. Protests

157. Respondent wrongly argues the protests "evidence strong social opposition to the Project." The evidence demonstrates the protests were caused by and directed at the Special Law as the latest manifestation of a corrupt, entrenched political class; this perception was fueled by Prime Minister Ponta, who repeatedly accused the Project of corruption and stated he would vote against the law his government endorsed.[414] This conclusion is confirmed by, among other things:

a. a long history of massive anti-corruption protests against the Government;[415]

b. Dr. Stoica's writings on Romanians' deep distrust of political institutions and entrenched societal concerns about corruption, economic inequality, and lack of rule of law;[416]

c. contemporaneous research of a team led by Dr. Stoica concluding that, "[e]ven though nominally they were attributed to … the mining facility at Roşia Montană

[413] *Infra* ¶¶175-189.

[414] C-PO27 ¶¶142-164; C-PHB ¶¶205-206. It is undisputed submission of the Special Law to Parliament "was the spark that triggered the 2013 protests." R-PHB ¶439.

[415] Boutilier ¶¶86-98.

[416] C-PO27 ¶¶142-143.

in 2013, these protests had constantly a political attitude directed in particular to anti-establishment;"[417]

d. contemporaneous research and writings of activist Dr. Stoiciu concluding that "[w]hat was at stake in every protest" in 2012-2017 "was the opposition against the political establishment as a whole, against the political system in place;"[418]

e. contemporaneous statements of Senator Antonescu and President Basescu;[419]

f. the banners and signs carried by the protesters themselves;[420] and

g. the absence of any large-scale protests involving the Project when the EP was expected in December 2011, July 2013, or any other time.[421]

158. Respondent says nothing about any of this evidence.[422]

VI. RESPONDENT BREACHED BOTH BITS

159. Regarding Claimant's fair and equitable treatment claim, Respondent argues the standard in the Canada BIT does not require more than the customary international law minimum standard and the standard incorporated into the UK BIT is "similar." Claimants demonstrate Respondent's description of the standard is incomplete and misleading.[423]

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[417] C-PO27 ¶¶151, 158; (C-2931), 131.

[418] C-PO27 ¶¶153, 158; (Stoica-30), 5.

[419] C-PO27 ¶¶149-150.

[420] C-PO27 ¶148.

[421] C-PO27 ¶144.

[422] Respondent argues Wikipedia is not a reliable source. That is incorrect, Tr.(Dec.12, 2019)2965:7-2966:16 (Boutilier-Cross), and irrelevant considering the irrefutable record. Respondent also accuses [redacted] and speculates "RMGC monitored the protests out of concern for what these protests meant for the Project." That has no bearing on the subject-matter or cause of the protests. Whatever concern the company had was well-founded as the Government insisted on the Special Law that triggered the protests and had made unequivocally clear the Project would not advance unless Parliament approved it.

[423] Memorial ¶¶642-676; Reply ¶¶462-478, 482-484. *See also* Reply ¶¶479-481 and C-PHB ¶230(regarding MFN treatment).

160. The record overwhelmingly demonstrates Respondent failed to accord fair and equitable treatment to Claimants' investment.[424] Respondent avoids addressing Claimants' case by ignoring the mountain of facts that contradict its false narrative that RMGC had not met the EP permitting criteria and that the competent authorities are to this day reviewing the file. In reality, as the evidence shows, the competent authorities were satisfied RMGC had met the EP permitting requirements. This case arises because notwithstanding legal permitting requirements, the Government effectively terminated RMGC's Projects without due process and without compensation for reasons of political convenience for those in office. Thus, Respondent's argument Claimants could not have had a legitimate expectation "based on the mining license alone" that RMGC would be able to secure permits for the Project is misconceived, both because that is not what Claimants argue, and because Claimants did have a legitimate expectation that permitting decisions would be based on legal criteria. Moreover, Respondent's treatment of Claimants' investment was a composite act that breached Respondent's obligations under both BITs.[425]

161. Respondent offers various arguments why there was not an expropriation of Claimants' investment, although its arguments have no merit.

162. That the Roşia Montană License remains in effect and was extended does not detract from the reality that Respondent will not permit the Roşia Montană Project to be developed.[426] Likewise, that Respondent did not confiscate RMGC's assets, including the real estate that RMGC acquired to develop the Roşia Montană Project, also does not detract from that reality. Respondent's conduct constituted an effective taking of the Project Rights, which caused Claimants to suffer the total loss of the value of those rights. That Claimants maintain certain

[424] C-PHB ¶¶223-225; C-PO27 ¶¶61-62; Memorial ¶¶677-688; Reply ¶¶485-502.

[425] C-PHB ¶¶232-246.

[426] Reply ¶589; C-PHB ¶215; Memorial ¶¶569, 762-765. The fact Respondent in the future might elect to reach an amicable resolution of this dispute and remedy its conduct does nothing to alter the conclusion that it deprived Claimants entirely of the Project Rights.

property of negligible value through RMGC does not detract from the conclusion that the Project Rights were frustrated in their entirety and Claimants lost the value of those rights.[427]

163. Respondent argues Gabriel's engagement of SRK in November 2014 to prepare updated cost analyses shows there had not been an expropriation. Respondent cannot claim any defense from the fact that, absent any formal decision, and due to its lack of transparency and failure to accord due process to RMGC or Gabriel, it became clear only with the passage of time the Projects would not be permitted.[428] Indeed, following rejection of the Draft Law in fall 2013, Gabriel continued to hope the Government would complete the EP permitting process for Roşia Montană and so participated in three further TAC meetings (the minutes of which demonstrate their pretextual nature).[429] However, not only did the Government fail to complete the EP administrative process, among other things, while RMGC continued to seek correction of the 2010 LHM,[430] in 2015, the State culture authorities pronounced their own earlier administrative decisions regarding cultural heritage in the Project area "abusive," and, without any basis, accused RMGC of seeking to mine the area without proper permits.[431] Thus, only after several overtures seeking to discuss the status of the Project with the Government were ignored, and after giving notice of a dispute in January 2015, Gabriel commenced this arbitration in July 2015.[432]

164. Finally, while Respondent seeks to deny the relevance of the State's different treatment of Gabriel's investments and of the neighboring openly polluting State-operated Roşia Poeini copper mine by arguing it is subject to different legal rules, the fact is Roşia Poeini continues to receive environmental permitting, presumably in accordance with applicable legal

[427] C-PHB ¶333; Tr.(Oct.4, 2020)1376:2-1377:8 (Burrows-Cross)(confirming that value of the real estate held by RMGC is premised on the possibility that the Roşia Montană Project would be permitted).

[428] C-PHB ¶236; Memorial §IX; Reply §§V, VI; C-PO27 ¶204.

[429] Memorial ¶¶528-534; Reply ¶¶219-223.

[430] Gligor-I ¶¶91-98, 116-121, 156-160; Schiau-I ¶¶349-350.

[431] Schiau-I ¶¶351-359.

[432] Henry-I ¶145.

rules, while, as Prime Minister Ponta described the process for Roşia Montană, "only this project was rejected on a political criterion."[433]

VII. CAUSATION

165. Having decided to terminate the Roşia Montană Project and to end the State's joint-venture with Gabriel in RMGC without transparency, due process, or compensation in breach of the BITs, Romania's conduct unquestionably caused Gabriel and RMGC to lose the value of the rights to develop the Roşia Montană and Bucium Projects. The Tribunal does not have to speculate about the market value of those rights or how the risks and uncertainties associated with Project development impacted that value because the publicly traded value of Gabriel Canada immediately before Romania commenced its wrongful conduct reflects the market value of those rights (from a minority shareholder perspective) taking into account robust information regarding the full range of development risks.[434]

166. Respondent refers to *Bilcon* where the tribunal concluded the environmental permitting process was unfair and had not considered the project on its merits.[435] The *Bilcon* claimants claimed their injury was the loss of profits from the project.[436] The tribunal, however, concluded that the claimants' injury was the loss of the opportunity to have the project assessed on its merits,[437] because the evidence did not establish "in all probability" or with "a sufficient degree of certainty" that the project would have been approved.[438] The tribunal concluded claimants were "entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner."[439]

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[433] C-PO27 ¶50(c).

[434] C-PHB §§X.C, X.E. This case is factually distinct from the vast majority of cases because usually there is no publicly traded market value available or the only publicly-traded market value was materially impacted e.g. by the market's anticipation of the wrongful conduct.

[435] C-PHB ¶¶254-255.

[436] (RLA-198) ¶¶276, 278, 311.

[437] (RLA-198) ¶¶132-133.

[438] (RLA-198) ¶168.

[439] (RLA-198) ¶¶175-176.

167. In line with other investment tribunals,[440] the *Bilcon* tribunal distinguished between the fact/nature of the injury, as to which it held there must be reasonable certainty, and the quantum/measure of the loss, which requires "less certainty," and as to which the tribunal required only a basis to estimate with "reasonable confidence."[441]

168. The *Bilcon* tribunal rejected claimants' DCF measure of lost profits, which was not based on the market's assessment of the risks inherent in project development, preferring instead evidence of the value derived from actual transactions. Thus, the tribunal concluded the amounts claimants had invested represented the "minimum value" of the opportunity to develop the project.[442] The tribunal observed, however, that a reasonable businessperson would not invest without an expectation of exceeding those amounts by some reasonable margin, and that the prospects of future earnings on amounts invested must inform the value of the opportunity lost.[443] The tribunal also considered "certain past transactions" relating to the project.[444] The tribunal assessed this evidence of value "on the balance of probabilities,"[445] weighing the value that market players placed on the opportunity in view of the risks.[446]

169. Here, the evidence shows that Romania's treaty breaches deprived Claimants of the value of the Project Rights, *i.e.*, the right (or opportunity) to develop the Projects taking into account attendant risks.[447] The evidence of the Project Rights' value on the record takes project development risk into account, including permitting risk (assuming no wrongful State conduct).[448] That is, the evidence of value on the record reflects the market's assessment of the

[440] Memorial ¶885.

[441] (RLA-198) ¶113.

[442] (RLA-198) ¶287.

[443] (RLA-198) ¶288.

[444] (RLA-198) ¶¶289, 297.

[445] (RLA-198) ¶301.

[446] (RLA-198) ¶302.

[447] C-PHB ¶¶255-256.

[448] *E.g.*, C-PHB ¶¶354-369.

value of the Project Rights through millions of transactions taking account of all the risks associated with developing the Projects.[449]

170. Respondent's arguments that Claimants allegedly "failed to prove" that RMGC would have obtained requisite approvals, that approvals would not have been subject to uneconomic conditions, or that social opposition would not have interfered with development, are misguided because the risks associated with those issues were factored into the evidence of market value.[450] That is because the risks associated with permitting and social opposition were prominently disclosed to market participants or otherwise based on publicly available information.[451] Moreover, Respondent's description of those risks is exaggerated and frequently contradicted by the evidence.[452]

171. For these reasons, Respondent's various causation arguments are meritless.

A. Respondent's List of Hypothetical EP Conditions

172. Respondent argues it is not demonstrated that RMGC would have been able to comply with EP conditions Respondent speculates "would have been imposed." Because risks associated with permitting are reflected in the value of the Project Rights, Respondent's argument does not provide a basis for decreasing the measure of damages caused by the wrongful conduct. The record also shows that, after consulting each TAC member, the Ministry of Environment published draft conditions for the EP for public comment – Respondent ignores that document and instead speculates about other hypothetical conditions imagined for purposes of this arbitration.[453] The evidence shows that the additional conditions Respondent postulates either likely would not have been imposed or would not have added to the risks already accounted for.

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[449] Compass slide-8.

[450] *E.g.*, C-PHB ¶¶334-361.

[451] *E.g.*, C-PHB ¶¶354-358.

[452] *E.g.*, C-PHB ¶¶71-139, 201-207.

[453] C-PHB ¶65(c), n.120.

a. Regarding the cyanide transportation route, the Ministry of Environment's published draft conditions included that the route would be established at the end of the construction period.[454] This issue was being addressed on schedule and did not present any difficulties.[455]

b. Regarding a pre-operational cyanide audit, Respondent's argument disregards that Gabriel had taken the extraordinary step of volunteering to obtain such an audit.[456]

c. Regarding a cyanide storage facility at Zlatna, Respondent's argument lacks credibility as Respondent first wrongly mischaracterizes and then exaggerates the significance of what was a possible cyanide storage facility, and Minister of Environment Gavrilescu was unwilling to be examined on this subject.[457]

d. Regarding a geomembrane liner, Respondent disregards that the Ministry of Environment's published draft decision recommending issuance of the EP reflected the Ministry's acceptance that the TMF basin would be sealed with compacted colluvium according to BAT.[458]

e. Regarding an ADC for Orlea, Respondent's argument disregards that the Ministry of Environment's published draft EP conditions confirmed that an ADC for Orlea would have to be obtained as a condition for obtaining a construction permit for that area.[459]

f. Regarding site after-use, Respondent's argument mischaracterizes the record, and as Claimants have demonstrated, there is no basis to conclude that EP conditions

[454] (C-555), 2, 45; (C-2075), 1, 34-35.

[455] C-PHB ¶¶141-147; *supra* ¶¶69-73.

[456] C-PHB ¶266(c); *supra* ¶75.

[457] C-PHB ¶145; *supra* ¶74.

[458] C-PHB ¶¶153-155; *supra* ¶¶77-78.

[459] C-PHB ¶¶117-126; *supra* ¶32(c).

concerning post-closure land use would present any difficulties for RMGC or the Project.[460]

B. Other Project Permits

173. Respondent argues it is not demonstrated that RMGC would have secured other permits for the Project. This argument does not provide any basis for reducing damages because the Project's permitting status was well understood by the market, as large mining projects routinely require many permits, and the risks associated with Project development, including permitting risks, were incorporated into the market value of the Project Rights.[461] Moreover, compensation must be assessed absent the impacts of wrongful conduct, which in this case included failing to take permitting steps, which in turn facilitated NGO litigation.[462] But for the wrongful conduct, RMGC was proceeding successfully to obtain necessary permits.

174. For these reasons, none of the examples of other permits Respondent highlights provides a basis to lower damages. Respondent's arguments suggesting that there was some aspect of additional permitting that was both material and not accounted for in the market value are without merit.

a. A Government Decision to permit removal of certain impacted land from the national forestry fund was discussed within the TAC and reflected in the draft EP conditions,[463] and the process to obtain the necessary approval had been commenced.[464] As the National Forest Administration already had endorsed the urbanism plan for the Project area, there is no basis to conclude that this issue, or the related process of obtaining approval to remove certain land from the

[460] C-PHB ¶¶158-161; *supra* ¶80.

[461] C-PHB ¶¶354-358, 342-346.

[462] *E.g.*, C-PHB ¶¶113-116, 233, n.535, ¶344; Reply ¶489.

[463] (C-555), 9, 12.

[464] C-PHB ¶¶137-139; Avram-II n.267; (C-2241); (C-2242); (C-1115), 70; Bîrsan-II ¶¶79-80; *supra* ¶67.

agricultural circuit, presented a material risk not reflected in the value of the Project Rights.[465]

b. The evidence shows a Water Management Permit to certify compliance with the Water Framework Directive was not required for the EP.[466] While a Water Management Permit was required before a construction permit, that was well understood and much discussed, and there is nothing to suggest that there would have been any obstacle to obtaining the Water Management Permit in due course.[467]

c. The law required local authorities to issue urbanism plans that took account of the mining project before a construction permit could be issued.[468] A PUZ was not needed for the EP.[469] While steps had been taken to update the PUZ in the area of the Project, beginning in August 2011, the competent culture authorities blocked updating of the LHM and necessary endorsements of the updated PUZ, as Minister Hunor announced the Ministry of Culture would not take further steps to advance the Project while the economic terms were being renegotiated.[470] Thus, RMGC's 2011 Annual Report shows that 19 of the 22 endorsements needed for the updated PUZ were obtained and that endorsement by the Commission on Historical Monuments of the Ministry of Culture was next.[471] As the Ministry of Culture would not advance Project permitting during 2012, that situation remained stagnant throughout 2012.[472] In 2013, the Ministry of Culture drafted

[465] *E.g.*, (C-1115), [redacted]

[466] C-PHB ¶¶127-134; *supra* ¶55.

[467] (C-485), 16-18; *supra* ¶55.

[468] Memorial ¶¶185-187; Podaru ¶¶160-164, §III.

[469] C-PHB ¶¶98-108; Podaru ¶¶132-159.

[470] C-PHB ¶¶109-116, 233, n.535, ¶344. This also facilitated litigation to annul the SEA Endorsement of the PUZ which also had relied on the description of the historical monuments reflected in the 2004 LHM. *Supra* ¶¶46, 137(b); *infra* ¶176(a).

[471] (C-1115), 68-70.

[472] (C-1116), 95-97; C-PHB ¶¶72-75.

favorable endorsements for the updated PUZ,[473] but those endorsements were abandoned with the rejection of the Draft Law and the Project. Following the rejection of the Project, the Ministry of Culture declared its earlier administrative actions abusive, enacted the 2015 LHM declaring the entire Roşia Montană area an historical monument where there can be no mining, and filed a UNESCO application for World Heritage status that prevents adoption of any urbanism plan that would permit mining in the area of the Project.[474] Absent impacts of the wrongful conduct that blocked adoption of urbanism plans consistent with the Government-issued Roşia Montană License and the ADCs issued, there is no basis to conclude risks associated with adoption of urbanism plans were not fully reflected in the value of the Project Rights.

d. A permit for a cyanide storage facility at Zlatna, which Respondent speculates could be time-consuming to obtain, was not required for the Project.[475] However, if wanted, there was no reason that a permit, if needed, could not be obtained in parallel with other construction activity before the commencement of operations.[476] There is no basis to conclude that the possible need for such a permit would materially impact the value of the Project Rights, which already took substantial delay risk into account.[477]

C. Social Opposition

175. Respondent's argument that social opposition caused Claimants' loss is contradicted by the evidence. But for the State's wrongful treatment of Gabriel's investment in RMGC, the Project was on track to generate tremendous social and economic benefits for Romania and Gabriel. The Project enjoyed strong support from local communities and had achieved strong support nationally at least from 2011 onward when the Project should have

[473] (C-1117), 122-123 (§5.13.8); (C-2578), (C-2579); Podaru n.417.

[474] C-PO27 ¶¶206(g)-(h); Reply ¶273.

[475] *Supra* ¶¶74, 172(c).

[476] C-PHB ¶145.

[477] C-PHB ¶¶354-356.

received the EP.[478] As has happened repeatedly at various points in time, in 2013, Romanians came to the streets by the thousands to protest government conduct.[479] The catalyst was the Government's introduction of the Special Law, which was seen as favored treatment of a company the Prime Minister repeatedly (and without basis) had accused of corrupt dealings with his political opponents, and which was promoted but not supported by the Prime Minister.[480]

176. Respondent refers to NGOs that continued to challenge permits for the Project. The threat of NGO litigation is not what caused Gabriel's loss. While some Project opponents would be expected to continue to file court challenges to permits, the value of the Project Rights incorporates the risk (principally delay) associated with such actions.[481] Respondent's descriptions of these issues moreover is exaggerated, as Respondent improperly includes impacts of its own wrongful acts.[482]

a. Respondent cites the litigation relating to the SEA Endorsement of the PUZ, resulting in its annulment. That litigation was commenced due to and was facilitated by Respondent's wrongful conduct. NGOs seized on the Ministry of Culture's refusal beginning in 2011 to update and correct the 2010 LHM, which provided a basis to challenge the SEA Endorsement, as the SEA had relied on the description of historical monuments contained in the 2004 LHM, and after 2015, still in the context of that same litigation, the Ministry of Culture defended the 2010 LHM in court on the grounds that the 2004 LHM was "abusive," thus leading to the annulment in 2016 of the SEA.[483]

b. Respondent refers to court challenges of the UCs issued by the local authorities. Threats of further litigation on that topic, however, would not have been the cause of loss. Putting aside the unlawful posture of the Ministry of Environment from

[478] C-PHB ¶¶202-212.

[479] Boutilier §4; Boutilier slides-43-58.

[480] C-PO27 ¶¶3, 29-30, 37(e), 37(h), 41-43.

[481] C-PHB ¶¶343, 355-356.

[482] C-PHB ¶¶342-346.

[483] C-PHB ¶¶112-116, 198, 344.

2007-2010 relating to an allegedly invalid UC,[484] and the fact that the Government's Inter-Ministerial Commission confirmed in 2013 that a UC did not need to remain in effect during the EIA procedure,[485] Romania's High Court of Cassation and Justice has confirmed that where a UC is to be followed by a construction permit, as here, the UC is not subject to judicial challenge.[486]

c. Respondent refers to the litigation challenging the second Cârnic ADC. That litigation, however, is a further impact of Respondent's wrongful conduct in failing to correct the 2010 LHM, as NGOs challenged the second discharge of Cârnic on the ground that it was designated as an historical monument.[487] While it was left to the Ministry of Culture to defend its ADC against that challenge, the Ministry of Culture appears to have disavowed the ADCs,[488] and Respondent submitted expert testimony in this arbitration questioning their justification, contrary to the contemporaneous expert determinations on which the Ministry of Culture based its discharge decision.[489] Thus, there is no reason to conclude that in a scenario absent Respondent's wrongful conduct the threat of a challenge to an ADC would be greater than already taken into account in the value of the Project Rights.[490]

[484] C-PHB ¶265(b).

[485] C-PHB ¶¶96-97.

[486] Podaru ¶66 n.92; (C-2454) ¶47.

[487] Reply ¶¶259, 261.

[488] Reply ¶274; C-Opening-2019 vol.7:30-31.

[489] Reply ¶¶649-650.

[490] C-PO27 ¶218(d) n.518; C-PHB ¶416, n.855.

D. Surface Rights

177. Respondent refers to the need to complete the acquisition of surface rights and exaggerates the associated risks.[491] The need to complete the acquisition of surface rights was not the cause of Gabriel's losses.[492] The risks associated with surface rights acquisition were both manageable and already incorporated into the value of the Project Rights.[493]

178. RMGC had successfully acquired the properties needed from nearly 80% of the affected households, but stopped property acquisitions in 2008 with the intention to recommence once the EP was issued.[494] As [redacted], the vast majority of households remained eager to sell, and with RMGC offering above-market compensation, once the EP was issued, most owners would act in their financial self-interest.[495] Respondent's arguments on this issue are principally predicated on a few property owners who maintain that they would not have agreed to sell if the EP had been issued and RMGC had recommenced property acquisitions. Those individuals, however, either own properties that RMGC did not need for the Project or offer testimony that is not credible in view of contemporaneous evidence indicating they would have sold.[496]

179. Respondent asserts "it is likely" the Ministry of Environment would have conditioned the EP upon RMGC's acquisition of surface rights. There is no basis for that position.[497] As Professor Mihai explains, while administrative authorities may assess whether the legal conditions for a permit have been met, administrative authorities cannot decide to add legal requirements not set out in law as doing so would be arbitrary.[498]

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[491] C-PHB ¶¶337-341.

[492] C-PHB ¶207; Reply ¶¶651-666.

[493] C-Opening-2020 vol.2:2-4, 7-8.

[494] C-Opening-2019 vol.2:25.

[495] C-Opening-2019 vol.2:26, 30; C-PHB ¶341 nn.705-706.

[496] *Supra* ¶¶56-66.

[497] C-PHB ¶¶135-136.

[498] Mihai slide-14; Mihai-I ¶¶246-254, 406-413; C-Opening-2019 2:8-10, 14; *supra* ¶15.

180. RMGC had to obtain surface rights for areas for which it needed a construction permit, *i.e.*, the Project's industrial footprint.[499] RMGC reasonably believed expropriation would not be necessary.[500]

181. Respondent argues that Romania had "no obligation" to expropriate property if needed for the Project. That is not correct. The State determines the perimeter of the mining license that it issues,[501] the law grants the license holder the right to access the land necessary for performance of the mining activities, and the law requires urbanism plans to limit permissible land use subject to a mining license.[502] The law regulates the manner in which the license holder may acquire surface rights, to include, among other means, voluntary sale/purchase and expropriation according to law.[503] While there was some debate as to whether a local or national declaration of public utility was preferable for Roşia Montană, there is no basis to question the public utility of the Project.[504] Indeed, NAMR homologated the resources and reserves for the Roşia Montană Project in an administrative decision based on the feasibility study and technical documentation presented, which described the areas of mining activity, thereby further confirming the perimeter to be mined under the concession.[505]

182. Respondent mischaracterizes descriptions in the RRAP submitted with the EIA Report and passages from Gabriel's securities disclosures to suggest these are not consistent with what Professor Bîrsan describes in this arbitration. The RRAP, however, only says that the means for acquiring properties are those provided by law. Gabriel's securities disclosures also state that there are not expropriation provisions in the law specially applicable to mining projects, which is true. This is explained because it stands in contrast to special expropriation laws that exist for other sectors.[506] The RRAP also expressly states "expropriation might be

[499] C-PHB ¶340; *supra* ¶¶56-60.

[500] C-Opening-2020 vol.2:35-39; C-Opening-2019 vol.2:20, 22-26, 30; *supra* ¶¶61-66.

[501] Bîrsan-II ¶¶34-81.

[502] C-Opening-2019 vol.2:17-19.

[503] C-Opening-2019 vol.2:20-21, 27.

[504] C-Opening-2019 vol.2:27-29; Reply ¶662.

[505] Memorial ¶¶423-424; C-PHB ¶370(c).

[506] Bîrsan-I n.206.

considered in the future as a last resort in situations where no amicable agreement can be reached."[507]

183. Respondent tries but fails to discredit Professor Bîrsan's expert reports, claiming, without basis, that he "admitted" a "lack of independence." While Professor Bîrsan readily acknowledged that, not unusually, he had assistance drafting his reports and hearing presentation, he emphasized that he reviewed and read the documents referenced, he "discussed about what they comprised and whether they should be discussed in drafting [his] opinion or not," he "gave the instructions based on what I – what we discussed about what the contents of this – of the opinions should be," that he did not receive a "briefing memorandum," that it was "not I the one that received instructions, I discussed what should be comprised on the opinions, and the opinions were agreed on the contents, and then I examined to see whether it is – it was exactly what we discussed," that he "never personally discussed with the Claimants in this arbitration, only with the counsels," that he confirmed that "everything" in his First Opinion and "everything" in his Second Opinion "represent[s] my profound convictions," and that "[w]hen I signed a document – and these two documents bear my signature – I totally undertake to what they say."[508]

184. Respondent argues that if expropriation were needed for any properties, there would have to be a public utility declaration regarding the Project and it was not clear one would be forthcoming. Professor Bîrsan's opinions,[509] as well as the plain text of the law,[510] however, make clear that a mining project developed pursuant to a Government-issued license, where resources and reserves have been confirmed and registered by the State mining authority, is of public utility within the meaning of the law governing expropriation, and whether there would have been a Governmental or local council decision declaring it so, there is no reasonable basis to conclude it was uncertain whether such a declaration, if needed, would have been made.[511]

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[507] (C-463), PDF-35.

[508] Tr.(Dec.10, 2019)2205:13-2212:14 (Bîrsan-Cross).

[509] Bîrsan-I ¶¶238-248; Bîrsan-II ¶¶102-134.

[510] (C-1628) Art.6("Works concerning the following are of public utility: …extraction and processing of useful mineral substances….").

[511] Reply ¶662; C-Opening-2019 vol.2:27-29.

185. Respondent argues Professor Bîrsan "admitted" that the reason a declaration of public utility was not needed was that the Special Law would have included such a declaration. That argument seriously mischaracterizes Professor Bîrsan's testimony. He clearly explains that the law contemplates a public utility declaration, but that for a mining concession such a declaration would be significant only insofar as it would indicate the public interest level as being either national or local,[512] and that the Government's position, as stated in the Draft Law, is both to the same effect and confirmed that the Government necessarily considered the mining Project to be of public utility and therefore would have so declared even in another context.[513]

186. Respondent references Mr. Găman's testimony concerning proposed legislative amendments and stating that the Government should reserve the right to consider whether there is a public utility in mining a particular area. Respondent, however, omits the context in which Mr. Găman gives the example of there being clay in someone's backyard and then says that "[i]f an area is not intended for a mining project and it is not of public utility in view of expropriation, then it is up to the Government to decide which project is of such interest."[514] Mr. Găman's comment does not refer to a circumstance in which the Government issued a mining license and NAMR homologated the resource and reserves found within the license perimeter.[515]

187. Relying on Professors Sferdian and Bojin, Respondent argues if expropriation were necessary, it might have resulted in 5-7 years of delay. Professors Sferdian and Bojin also agree with Professor Bîrsan that expropriation also could last approximately one year.[516] Given the planned phased Project construction and the location of the few properties that might have required expropriation,[517] there was little risk of material difficulty/delay for the Project.

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[512] Bîrsan-I ¶¶242, 248; Bîrsan-II ¶¶102, 106, 132.

[513] Bîrsan-II ¶111.

[514] Tr.(Dec.6, 2109)1612:12-1613:7 (Găman-Cross).

[515] Mr. Găman confirmed that his contemporaneous view and that of other senior Government officials was that construction of the Project likely could be commenced within a year of receiving the EP. C-Opening-2020 vol.2:22-28.

[516] C-Opening-2020 vol.2:39.

[517] C-Opening-2020 vol.2:37-38; Reply ¶664.

188. Seeking to demonstrate expropriation proceedings could be longer still, Respondent referred Professor Bîrsan to the possibility of presenting a claim before the ECtHR. Respondent's argument is based upon the mistaken notion that presenting a claim under the ECHR would delay completion of the national expropriation procedure. While a party may present a claim to the ECtHR claiming an expropriation breached the ECHR, doing so would not delay completion of the domestic procedure. Professor Bîrsan therefore disagreed with counsel's erroneous questions and explained that an ECHR claim would be a separate procedure that would not extend the duration of the domestic process.[518]

189. While Respondent states that following an expropriation the State would own the property, the expropriated property would be expected to be made available to the Project via public concession. Indeed, in an expropriation scenario, putting the property to that use would have been the legal justification for the expropriation and, as such, the only lawful result.[519] Thus, Respondent's claim that this issue motivated Claimants to request the Special Law is without basis.

E. The Economic Viability of the Projects

190. The market value of the Project Rights reflects the market's assessment of the opportunities and risks associated with the economic viability of the Projects. Respondent's argument that Claimants have not demonstrated the Projects would have been economically viable is misguided because even a project for which economic viability has not been established may have significant market value.[520]

191. The Project was developed by expert international and Romanian engineering firms and its technical and economic feasibility was confirmed repeatedly, including by Newmont when it conducted due diligence on the Project,[521] by NAMR as reflected in its

[518] Tr.(Dec.10, 2019)2198:5-2201:22 (Bîrsan-Cross).

[519] C-Opening-2019 vol.2:32-37.

[520] C-PHB ¶¶323-326(describing significant value of mineral resources, for which, by definition, as compared to mineral reserves, economic viability is not established).

[521] (C-127) §16.4; (C-128) §17.2.3; (BD-8), PDF-25; (C-2178)([redacted]); Tr.(Oct.2, 2020)1057:2-1058:16 (Brady-Cross).

homologation decision, and by other experts engaged to advise the State.[522] The feasibility and significant technical and economic potential of the Bucium deposits likewise was expertly confirmed.[523] There was thus a sound basis for the market's assessments of the value of the Project Rights.

192. Starting in its Rejoinder, Respondent purported to identify reasons to question the conclusions reached contemporaneously by so many independent experts. Upon examination, however, Respondent's arguments fail.

193. Respondent claims SRK is "not independent in these proceedings" because Dr. Armitage has spoken with Mr. Henry on social occasions.[524] Such claims are misleading because there is no question of SRK's independence from Gabriel and that SRK has no financial interest in the outcome of this arbitration. Respondent asserts that SRK's 2012 NI-43-101 report was "subject to Gabriel's influence," but Respondent's argument is misinformed because, as Dr. Armitage explains,[525] the company's review of the report is a necessary feature of the process. The company (or "issuer" under the NI 43-101 guidelines) ensures that information in the report is complete; and, as Dr. Armitage personally certified, he was independent from Gabriel and accepted professional responsibility for the report as a whole.[526] While Respondent suggested Dr. Armitage's certification was inaccurate because it stated he had no prior involvement with the Project, that certification was correct when made as prior assignments were limited to independent audits conducted for potential lenders and the references to a geotechnical study for Gabriel related to work completed in parallel as an extension of the NI 43-101 review.[527]

[522] C-Opening-2020 vol.5:2-7; SRK slide-14.

[523] C-Opening-2020 vol.5:8; (C-1101), 7([redacted]).

[524] Tr.(Sept.29, 2020)455:20-456:20 (SRK-Cross).

[525] Tr.(Sept.29, 2020)369:19-373:2 (SRK-Cross).

[526] (C-137); (C-129).

[527] SRK-I ¶15; (C-128) §16.2.2; (R-478), PDF-21.

1. Assessment of Mineral Reserves Was Sound

194. Respondent contends [redacted] Respondent simply rehashes several of its debunked arguments regarding project permitting, social issues and cultural heritage.

a. In its Rejoinder report, Behre Dolbear states the Chance Finds Protocol "increases the uncertainty" of the reserves measure.[528] This statement is based on Respondent's repeated, incorrect argument regarding the effect of the protocol.[529] The terms of the protocol clearly do not create uncertainty regarding the mineral reserves.[530] While Respondent seeks to create the mistaken impression that the archaeological supervision envisioned for certain areas of the Project gave rise to peculiar challenges, in reality there was nothing even unusual about the Chance Finds Protocol, which is a typical mitigation measure incorporated routinely into mining and gravel extraction projects around the world.[531] Respondent moreover misleads the Tribunal when it states Dr. Armitage "did not know" about the need for archaeological supervision – to the contrary, Dr. Armitage confirmed the SRK team was well aware of those facts.[532]

b. Although SRK referred to the status of surface rights acquisition,[533] Respondent argues SRK did not take the need to complete acquisition of surface rights sufficiently into account as a Modifying Factor. It argues SRK was "unaware" that RMGC allegedly took the position that "forced relocation was not possible." Here Respondent distorts the record, as expropriation was possible and RMGC's

[528] The Behre Dolbear team that prepared its expert reports did not include an archaeologist. Tr.(Sept.30, 2020)554:14-18 (Behre Dolbear-Cross).

[529] The Tribunal is encouraged to review the evidence on this issue. C-Opening-2020 vol.5:33; Schiau-II ¶¶302-313; Jennings-II ¶¶54-58; Gligor-II ¶¶55-69; (C-388.03); Tr.(Dec.5, 2019)1327:12-1344:17 (Gligor-Cross). *Infra* ¶¶250-257.

[530] (C-388.03).

[531] Jennings-II ¶¶56-58.

[532] Tr.(Sept.29, 2020)438:8-440:6 (SRK-Cross).

[533] *E.g.*, (C-128), 62, 91.

public statement, as noted above, was that there was not a special expropriation procedure relating to mining.[534] Respondent argues it was not reasonable for SRK to assume necessary properties could be acquired within one year following issuance of the EP, although Respondent itself accepted that a one-year timeline was possible.[535] Respondent asserts SRK did not investigate the status of "institutional properties" needed, although these were mainly State-owned properties, including some held by Minvest, as to which there was no question they would be made available.[536] Respondent refers to what it claims were "RMGC's longstanding but unsuccessful efforts" to acquire surface rights, disregarding that Claimants suspended property acquisitions in February 2008 to be resumed once the EP was issued.[537]

c. Although SRK referred to delays due to NGO litigation, Respondent argues SRK did not take the need for a PUZ and the associated NGO litigation specifically into account. Respondent's argument is particularly misguided as its own wrongful conduct blocked endorsement of the PUZ, its failure to correct and update the 2010 LHM facilitated NGO litigation challenging the SEA Endorsement of the PUZ, and its subsequent disavowal of its prior administrative decisions relating to the Roşia Montană Project led to the SEA's annulment.[538] But for Respondent's wrongful conduct, which blocked the PUZ, there would not have been any reasonable basis to expect that adoption of urbanism plans would present an obstacle for the Project.

d. Respondent's argument that SRK did not take litigation regarding the second Cârnic ADC sufficiently into account is similarly misguided. That is so because that legal challenge is a further impact of Respondent's wrongful conduct,[539] and

[534] *Supra* ¶182.

[535] C-Opening-2020 vol.2:22-28, 39; C-PHB ¶341 n.703.

[536] Lorincz-I ¶¶54-58; Găman-II ¶11; Tr.(Dec.6, 2019)1632:22-1633:20 (Găman-Cross).

[537] Lorincz-I ¶¶48-53.

[538] *Supra* ¶¶45-46, 137(b), 174(c), 176(a).

[539] *Supra* ¶¶137(b), 176(c).

because there is no basis to conclude, absent the wrongful conduct, that the culture authorities would not defend their discharge decision. Likewise, Respondent's reference to alleged risks regarding a UC is without basis.[540]

2. Reserves Were Not Overstated

195. Respondent contends three factors suggest that SRK overstated reserves. As addressed further below, Respondent's arguments are unavailing.[541] Among other reasons, Romania's own competent authority in March 2013 issued its homologation decision, NAMR Decision No. 11-13, confirming the resource and reserve measure.[542] That decision was the outcome of a "detailed technical review," as Respondent acknowledges,[543] and as NAMR's technical report substantiating the decision confirms.[544] Ms. Szentesy, whom Respondent did not call for examination, describes the homologation review undertaken by NAMR.[545] NAMR's homologation decision both verified the resources and reserves and registered them in Romania's inventory of mineral resources, the National Fund for Resources/Reserves.[546] The State's interest in the accuracy of the information was significant, as its entitlement to royalties from production and profit-sharing with RMGC were expected to provide material financial benefit.

196. Respondent's purported disavowal of NAMR's decision, which was taken in fulfillment of its role as the administrator of this National Fund, one of NAMR's central responsibilities,[547] should not be credited as it apparently is done solely for purposes of this arbitration. Substantial significance is attached to NAMR's responsibility in the administration of the National Fund and its verification of the data and information pertaining to the fund; these data and information belong to the State, are highly regulated, are a source of substantial public

[540] *Supra* ¶¶48-49, 137(b), 176(b).

[541] Reply ¶727.

[542] (C-1012); (C-2198).

[543] Counter-Memorial ¶292.

[544] (C-2197); (C-506), 59(NAMR President Gheorghe Duţu testifying to Parliament as to the reserves for the Project, explaining they were derived "[f]rom the feasibility study presented and analyzed by our agency").

[545] Szentesy-II ¶¶7-15.

[546] (C-2198). *See also* Mining Law (C-11) Arts.3(13)-(14).

[547] (C-11) Art.55(1).

revenues, and benefit from a protected, classified status.[548] The Tribunal will recall the first provisional measures phase of this arbitration arose due to the protected, classified status of this very data. NAMR's registration of the resources and reserves in the National Fund signals their compliance with applicable laws and regulations.[549] Notably, while Respondent challenges the reserve measure in this arbitration, it has not taken steps to remove the reserves from the National Fund.

197. While Behre Dolbear points to [redacted], its observations are speculative.[550] Although in this arbitration Respondent called for and was provided access to the block model used to develop the mineral resources and reserves calculation, the sampling database used to generate the block model, and the DXF files used for the final pit design and known voids,[551] it did not present a re-estimation of the Project's resources or reserves or *any* Project-specific analysis.[552]

198. Channel samples: In its Rejoinder report, Behre Dolbear referred to 1,838 channel samples collected 2006-2008 that were not incorporated into the resource model, suggesting this was a material omission. From 2000-2008 channel samples were collected from the tunnels where high-grade veins had been mined historically.[553] Behre Dolbear acknowledged that extensive samples collected through 2005 were incorporated,[554] that the 2006-2008 samples were assayed for metal content, and that Micon (in 2009) concluded they were "not considered to materially impact the resource quantum."[555] [redacted]

[548] *Id.*; GD-1208/2003 (C-12) Arts.3-10 *et seq*.

[549] (C-11) Art.3(14).

[550] SRK-II ¶2(c).

[551] PO10 Annex-B (Requests-49-52) PDF-78-82.

[552] Tr.(Sept.29, 2020)324:1-7 (SRK-Direct).

[553] (C-127), 50-59.

[554] [redacted]

[555] BD-II ¶¶78-79.

[redacted]

199. Surveyed voids: [redacted] Behre Dolbear offers no specific analysis or reason to conclude otherwise. As SRK observes, in its NI 43-101 Technical Report on the Rio Tinto project, where underground voids from historic mining were known to exist but were not mapped, Behre Dolbear did not express any uncertainty as to the reserve measure on that basis.[561]

200. Pit slope: Respondent falsely asserts SRK failed to consider revised pit slopes that it recommended in its analysis of the Project's economic viability and that SRK concluded without meaningful assessment that no adjustments were needed. As explained in its NI 43-101, SRK conducted a qualitative assessment of the impact of the revised pit slope angles on the

[556] Tr.(Sept.30, 2020)694:1-22 (Behre Dolbear-Tribunal). Mr. Guarnera also stated incorrectly at the hearing that samples collected between 2000-2008 were not included.

[557] *See* R-PHB ¶654([redacted]

[558] SRK-II ¶¶21-25; (C-1247) (also BD-8), PDF-64, 90.

[559] (C-1247), PDF-64, 90.

[560] (BD-8), PDF-90-91, 105, 255; SRK slide-24.

[561] SRK slide-25.

reserves.[562] Based on its "detailed slope criteria assessment," SRK concluded it was "confident" the existing pit designs developed earlier by IMC were a reliable basis upon which to evaluate the Project economics.[563] Behre Dolbear does not offer any reason to question this conclusion.

201. Dilution: Respondent acknowledges SRK considered dilution and mining losses in assessing the Project, but argues SRK made insufficient deductions. SRK explains that based on its in-depth assessment, the mineral reserves adequately account for dilution and mining losses.[564] Behre Dolbear's assertions in contrast are superficial and speculative. As Dr. Armitage observed, Behre Dolbear provides "no backup to the numbers they're assuming, there's no reporting of any analysis of the block model. And it's not possible to just look at a project and judgmentally decide what the dilution should be. It's got to be the subject of a significant amount of work."[565] Behre Dolbear acknowledges "there is no single formula for what the dilution is at a mine" and that the assessment must be project-specific.[566] Moreover, Behre Dolbear misleadingly refers to possible losses on an undiscounted basis, thus significantly overstating the significance of this issue.[567]

3. Respondent's Late-Conceived Blasting Argument Is Erroneous

202. Respondent sought to develop a new argument during the 2020 hearing suggesting that mitigation measures, designed by Romanian engineering firm Ipromin,[568] and proposed by RMGC in relation to blasting, were incompatible with and would fundamentally undermine the mine plan upon which Project economics were based. Respondent's argument is erroneous as it is premised on a mistaken reading of the relevant technical reports.[569] It also is premised on the implausible contention that leading Romanian engineering firm, Ipromin, assembled fundamentally incompetent reports and NAMR, the State's mining authority and a

[562] (C-128) §16.2.4; SRK slide-29.

[563] (C-128) §16.2.4.

[564] SRK-II ¶¶26-33.

[565] SRK slide-26; Tr.(Sept.29, 2020)331:6-332:12 (SRK-Direct).

[566] Tr.(Sept.30, 2020)528:8-14 (Behre Dolbear-Cross).

[567] SRK-II ¶32.

[568] *E.g.*, Szentesy ¶¶40, 49, 50 n.122, ¶52. 2007 EIA Update (C-341); 2010 EIA Update (C-382).

[569] C-PHB ¶¶385-389.

member of the TAC, in reviewing those reports with a view to assessing, *inter alia*, what was expected to be the basis for the State's royalties, incompetently failed to identify that incompetence.

203. Respondent first contends RMGC was limited to a maximum of ten blasts per week. That is wrong. Referring to the blasting schedule of one blast per pit per workday, Respondent asserts blasting was prohibited on weekends and holidays although the mine plan assumed mining 360 days a year. This is based on Respondent's mis-translation in R-174 of "*zi de lucru*," which means "working day," as "business day," which Respondent purports to interpret as weekday.[570] Respondent's mistake is obvious in context. RMGC's public consultation document (R-174) merely repeats the description set forth in the EIA, which Respondent acknowledges refers to workday.[571]

204. Respondent repeats Ms. Wilde's criticism that although RMGC submitted supplementary reports relating to blasting as updates to the TAC,[572] it did not "rewrite" the noise and vibration chapter of the EIA to incorporate these studies into one document. Respondent does not contend the treatment of this issue was unclear and indeed concludes by stating the EP conditions would take the blasting mitigation measures into account. This last point is undisputed.[573]

205. Respondent sought to demonstrate through cross-examination of SRK that, via changes in the manner of blasting designed to maintain seismic vibrations at low levels near protected areas, Ipromin had made it impossible to achieve the overall mine plan schedule, including a daily production average of ~98,600 tonnes of ore. Counsel's questions, which were not directed to blasting experts on SRK's team,[574] were based on isolated references from Ipromin's reports and erroneous extrapolations in relation to the overall mine plan.[575]

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[570] (R-174), PDF-220.

[571] EIA Ch.4.03 (C-213), 104.

[572] (C-341); (C-382).

[573] C-PHB ¶387.

[574] C-PHB ¶385.

[575] (C-341); (C-382).

206. Among other misleading aspects of Respondent's argument, it is based on an incorrect notion of what constitutes a "blast."[576] The technical documentation shows that "blast" refers to a blast period or sequence, which may encompass multiple rows of blast holes on multiple working faces of the pits.[577]

207. Respondent contends Ipromin failed to take into account the average daily volume of material that had to be displaced to maintain the production schedule envisioned by the mine plan. Respondent minimizes that smaller blast holes would apply only to 15% of the total volume of material to be extracted and disregards that Ipromin itself expressly states that blasting, including with the smaller diameter blast holes, would be configured to achieve the 98,600t average daily displacement needed.[578] Ipromin's reports explain that necessary material displacement can be achieved by using a larger number of smaller blast holes (each with a smaller explosive load) detonated with nano-second delays over a longer time-period while still maintaining the desired lower seismic vibration.[579] Ipromin thus clearly considered the need to achieve scheduled production when proposing blasting mitigation measures.[580]

208. That Ipromin's blasting mitigation measures were compatible with the overall mine plan schedule is confirmed by reference to Ipromin's 2010 Feasibility Study and 2010 Mine Plan, both of which consider the use of smaller diameter blast holes for certain areas and provide a detailed description of the overall mine production schedule, including blasting over a 14-year period.[581] Respondent's contrary contention is false.[582]

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[576] C-PHB ¶387.

[577] *Id.* n.799.

[578] (C-341), 28-30(stating using smaller 125mm diameter blast holes where needed allows 98600t average displacement capacity to be achieved depending on the position of the dacite or breccia blocks, showing a schedule over 14 years of the annual number of rows of blast holes and the lengths of the working face, and observing smaller blasting holes would be used for 15% of the total volume); (C-382), PDF-50-52(explaining also that "[a]pprox. 7-8 mining panels are to be blasted to achieve the daily production requirements (waste and ore material)").

[579] *E.g.*, (C-382), PDF-55.

[580] (C-382), PDF-55-59.

[581] (C-976), 60-62; (C-1004), 40-42; C-PHB ¶389.

[582] R-PHB ¶719.

209. As Ms. Szentesy explains, Ipromin prepared an updated Feasibility Study in 2006 that took into account a number of changes to the mine plan following the results of public consultation, and that confirmed mineral reserves in amounts equivalent to 10.1 million ounces of gold and 47.6 million ounces of silver.[583] She explains Ipromin's 2006 Feasibility Study built on and incorporated data from the 2005 RSG resource model and IMC's 2006 Mine Feasibility Study.[584] To incorporate responses to questions presented by NAMR and raised during TAC meetings, Ipromin prepared a further update that was presented to NAMR – the 2010 Feasibility and Mine Plan[585] – which, as noted above, took the blasting mitigation measures into account.

210. NAMR's homologation decision was based on the updated 2010 Ipromin reports.[586] Ms. Szentesy observes that the resource and reserve calculations in Ipromin's 2010 reports had remained as established in the 2006 Ipromin reports.[587] Thus, Ms. Szentesy's comment that NAMR's homologation decision accepted the reserve calculations that were submitted in 2006[588] simply refers to that fact, and does not mean, as Respondent wrongly states, that NAMR disregarded the 2010 updates.

211. The production schedules in IMC's 2006 Mine Feasibility Study, Ipromin's 2006 Feasibility Study, and Ipromin's 2010 Feasibility Study overall remain the same. , Ipromin thus took the blasting mitigation measures into account in its 2010 Feasibility Study, without material change to the Project's 16-year production schedule[589] or the 14-year blasting and excavation schedule[590] first reflected in IMC's 2006 Mine Feasibility Study.[591]

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[583] Szentesy-I ¶¶48-50.

[584] Szentesy-I n.122.

[585] Szentesy-I ¶¶51-52.

[586] (C-2198); (C-1012); Szentesy-I ¶¶103-105; C-PHB ¶389; Szentesy-II ¶¶7-15.

[587] Szentesy-I ¶52.

[588] Szentesy-I ¶104.

[589] *Compare* (C-977), 59 *with* (C-976), 97.

[590] *Compare* (C-341), 28-29 *with* (C-976), 61.

[591] *Compare* (C-984), PDF-48 (Table 6-3).

212. The Mineral Reserve Statement presented in the 2012 NI 43-101 prepared by SRK was based on the production schedule developed by IMC.[592] Because IMC does not refer in its reports to the blasting mitigation measures developed by Ipromin, Respondent argues this means SRK relied on an inaccurate production schedule. Respondent's argument is flawed because it is premised on the incorrect assumption that Ipromin's blasting mitigation measures dictated a material change to the overall production schedule. Moreover, as noted above, Respondent's contentions regarding the blasting mitigation measures are erroneous.

213. Thus, Behre Dolbear's assertion [redacted] has no basis, and is contradicted by contemporaneous reports.

214. Respondent's assertion that blasting mitigation also would result in "increased costs and loss of productivity," is not supported by any analysis. Mr. McLoughlin simply assumes using smaller diameter holes would increase costs.[593] Even if it did result in a cost increase, there is no evidence to suggest this would be material to the overall Project operating costs, as a greater number of smaller diameter holes would have been needed for only 15% of the total ore volume to be blasted and blasting was only one item in the overall cost of mining operations. Thus, Respondent's argument that SRK's economic assessment is unreliable is not supported.

F. Financing

215. Respondent argues Claimants have not demonstrated Gabriel could have financed the Project. This argument, like the other causation arguments presented, is misguided because the relevant inquiry is not how Gabriel would have developed the Project, but what was the fair market value of the right to do so as reflected in value of the shares held by Claimants.[594] That analysis does not involve Gabriel's intentions or abilities, but rather what the market value of the rights held by RMGC and Gabriel Jersey were worth in a hypothetical sale. Thus, the question is

[592] (C-128), 5.

[593] Behre Dolbear-III ¶44.

[594] C-PHB ¶¶268-269.

whether the Project could have attracted the capital required for its development; the evidence shows the answer is unequivocally yes.

216. While Respondent chose to raise financeability and submit an accompanying expert opinion only with its Rejoinder thus limiting Claimants' ability to respond, it is nevertheless evident upon examination that Respondent's arguments regarding Gabriel's ability to finance the Project are unavailing.[595] Indeed, putting aside that a major would be likely to finance the Project from its own capital sources,[596] in support of Respondent's Counter-Memorial, Dr. Burrows observed the evidence indicated Gabriel had several financing alternatives in a "go it alone" strategy.[597]

217. Seeking to demonstrate financing would have been difficult, Respondent argues that contemporaneous Project designs were inadequate and required costly additions. These arguments, however, do not improve with repetition. Respondent's arguments regarding dry stack tailings,[598] additional equipment,[599] cost contingency,[600] and post-closure costs[601] lack merit. Nor is there evidence that risks of increased Project costs would have hindered financing. Likewise, Respondent's arguments regarding the economic viability of the Project, being groundless,[602] would not have presented a risk to financing.

218. Although the evidence shows non-recourse project finance as described by Mr. McCurdy would not have been relevant for the Roşia Montană Project,[603] Mr. McCurdy's opinion does not provide a basis to conclude such financing would have been unavailable.[604] Any assessment of whether such financing would have been available must be based on a

[595] C-PHB ¶¶347-353.

[596] C-PHB ¶¶348-349.

[597] Burrows-I ¶61, n.69.

[598] C-PHB ¶¶155-156.

[599] SRK-II ¶¶60-62, 91.

[600] SRK-II ¶¶87-90.

[601] C-PHB ¶¶160-161; Kunze-II §IV.

[602] *Supra* ¶¶190-214.

[603] C-PHB ¶¶347-349.

[604] C-PHB ¶¶350-353.

hypothetical scenario absent the impacts of the wrongful acts. Mr. McCurdy did not make such an assessment. Moreover, he was instructed to assume facts not supported by evidence.

219. Referring to interactions with the IFC in 2002, Respondent speculates that multilateral development bank financing would not have been available. The evidence shows, however, that the Project was being developed in line with World Bank/IFC guidelines.[605] From the outset, in 2000-2001, RMGC engaged leading international experts to prepare the first RRAP to conform with World Bank resettlement directives.[606] Working with Dr. Kerry Connor, co-author of the IFC Resettlement Manual, following consultations with the local community, RMGC and its expert consultants in 2005-2006 updated the RRAP, including to conform with IFC Equator Principles, which only had just been launched in 2003.[607] In its 2012 technical report, SRK confirmed the Project complied with the Equator Principles,[608] a point Respondent avoided in crossing SRK.

220. Respondent asserts, as an alleged obstacle to any EU funds, that the European Commission stated the Project did not comply with the EU Water Framework Directive. Respondent's characterization of the Commission's position is false and, as previously observed, is based on a material mischaracterization of the cited exhibit.[609]

221. Respondent refers to a July 2013 Gabriel memorandum describing a range of financing options. Respondent mischaracterizes the memorandum, which does not state that the maximum possible new equity was USD 300-400 million.[610] Respondent also failed to show Mr. McCurdy, and fails to mention, that [redacted]

[605] C-PHB ¶266(d); (R-302), PDF-19.

[606] Lorincz-I ¶¶22-27; Szentesy-I ¶37; (C-1008), PDF-119.

[607] Lorincz-I ¶24; (C-463).

[608] (C-128), PDF-69.

[609] C-PHB ¶91.

[610] (C-825.02).

[611] C-PHB ¶350.

[redacted]

222. Risks Respondent lists that allegedly would have deterred lenders are variously speculative, groundless, an impact of the wrongful conduct, and/or greatly exaggerated.[613] [redacted]

223. Respondent argues there is no evidence a major mining company was interested in acquiring Gabriel. That ignores the sustained investor interest in the Project Rights, [redacted] and Gabriel's other major shareholders who held and increased their holdings in Gabriel throughout this time-period.[615] Moreover, as Dr. Spiller explained, one would not expect to see an acquisition of Gabriel just before the EP was expected.[616] Respondent also ignores [redacted][617]

224. Respondent's argument that the "go it alone" finance strategy was a "last-minute allegation" made at the hearing is not only incorrect,[618] but it is ill-conceived, as Respondent first

[612] (C-2165), 10.

[613] *E.g.*, an ADC reasonably was expected to be issued in due course for Orlea. *Supra* ¶79; C-PHB ¶¶117-126. Respondent's assertion that Orlea held approximately 18% of the gold reserves moreover must be counter-balanced by the fact that Orlea was expected to be mined in the later years of the Project, reducing the present value of expected Orlea cash flows. *Id.*

[614] *E.g.*, (C-2165), 25.

[615] C-PHB ¶304.

[616] C-PHB ¶305; *infra* ¶276.

[617] (C-1875), 25-31.

[618] Burrows-I ¶61 n.69.

raised financing issues in its Rejoinder.[619] Respondent also mischaracterizes the point, which is that bank lending would not be necessary in view of the many other sources of capital.[620]

225. Finally, Respondent's argument about whether a third party could have replaced RMGC and/or Gabriel Jersey under the License and shareholder agreements is misguided. Gabriel Canada's shareholding interest could be transferred without any change to the licenses and shareholder agreements; nor is there any requirement of the State's consent to a transfer by Gabriel Jersey of its shareholder and/or contract rights relating to RMGC.[621]

VIII. COMPENSATION

226. Claimants have shown that Respondent's conduct was in breach of several provisions of the BIT, including those regarding expropriation, as Respondent effectively terminated the Roşia Montană and Bucium Projects without transparency, due process, or any compensation. While the complete frustration of property rights may be characterized as a measure tantamount to expropriation, investment tribunals have recognized that wrongful conduct having that effect also may be viewed as a breach of fair and equitable treatment and other standards.[622] Respondent therefore is wrong to argue that Claimants only quantify damages in relation to the expropriation claim.

A. Valuation Date

227. Claimants have addressed the several arguments Respondent repeats regarding the valuation date.[623]

228. Claimants did not select the July 29, 2011 valuation date based on the gold price. That is the date when the full value of the Project Rights was reflected in a readily observable market measure, immediately prior to the commencement of the conduct that both gave rise to breaches of the BIT and impaired over time that measure of market value. Respondent chose

[619] Tr.(Oct.2, 2020)969:9-971:19 (McCurdy-Cross)(establishing that his opinion responds to issues raised in Claimants' Memorial).

[620] (C-1875), 32-39.

[621] (C-184).

[622] Memorial ¶861, including n.1695.

[623] C-PHB ¶¶270-289.

August 2011 to initiate its course of conduct, motivated as it was by the advanced stage of the EIA review and the prevailing gold price.[624]

229. Although not an issue for Gabriel Jersey's claim, there is no dispute that the Canada BIT did not enter into force until November 23, 2011. For Gabriel Canada's claim, the State's conduct before November 23, 2011 cannot be considered as a basis for liability, but the value of Gabriel's investment immediately prior to August 2011 may be considered as part of the factual basis for the claim based on conduct commencing as of November 23, 2011.[625] The evidence shows that even if a valuation date in late November 2011 is considered for Gabriel Canada, the fair market value of the Project Rights based on Gabriel's average market capitalization over the entire year of 2011 did not materially change.[626]

230. Respondent argues that the valuation date must be the date immediately prior to the last act in the series of acts that gives rise to a breach. Respondent is wrong.[627]

B. Subject of Valuation

231. Respondent's conduct deprived Claimants of the value of the Project Rights reflected in their direct and indirect equity interest in RMGC and associated contract rights.[628]

232. Respondent argues that RMGC still maintains a number of assets that were not formally, legally and physically taken. The evidence shows, however, that these assets, *i.e.*, the formal legal title to licenses, engineering studies, various real properties, etc., either no longer have any material value because the State will not allow the Projects to be developed, or only ever had negligible impact on the measures of value assigned to the Project Rights, *e.g.*, mining equipment.[629] Similarly, it is no defense for Respondent that Gabriel did not commence this

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[624] C-PHB ¶¶45-49, 288.

[625] C-PO27 ¶57 and e.g., ¶¶18-25(describing conduct following November 23, 2011).

[626] C-PHB ¶¶287, 293, 427 n.877.

[627] C-PHB ¶¶276-286; ILC Articles (CL-61)Art.15 cmt.(10).

[628] Reply ¶¶ 628-634; C-Opening-2020 vol.1:4.

[629] C-PHB ¶¶222, 333. Compass deducted from Gabriel's market capitalization cash that Compass could not link to the Projects, but not the value of other assets that were part of the Project. Tr.(Oct.3, 2020)1157:16-1159:13, 1165:16-1166:13 (Spiller-Cross)(deducting cash); Tr.(Oct.3, 2020)1162:3-1163:5 (not deducting

arbitration and write down its assets until 2015; rather, due to the lack of transparency and due process, it became clear only after the passage of time that the State's political repudiation of Gabriel's investments was definitive.[630]

233. Once it was clear that the Projects were definitely terminated in effect, Gabriel's auditors recorded an impairment of Gabriel's assets that same year following its annual impairment analysis.[631] The fact that Gabriel did not do so earlier is due only to the fact that the impact of Respondent's unlawful conduct was not fully evident in real time.[632]

C. Gabriel's Market Capitalization Is a Reliable Measure

234. Gabriel's stock market capitalization is a contemporaneous, non-speculative, reliable measure of the fair market value of a minority interest in Gabriel's Project Rights.[633]

235. The evidence shows that Gabriel's share price was not materially impacted by other assets.[634] Respondent's argument that all was not lost because some assets were not expropriated, such as various real properties, is unavailing, because the value of those assets depended upon the Project's development.[635]

236. [redacted]

other assets). The State owns all the data regarding the resource and reserves although it can be used by the license holder for purposes of Project development. Memorial ¶¶625-632; Reply ¶628.

[630] C-PHB ¶215 n.456, ¶¶222, 444.

[631] (C-1833), PDF-9, 11, 17. These financial statements indicate that the value of the subject mineral properties was impaired to zero. *Id.* PDF-11; Tr.(Oct.3, 2020)1166:8-13 (Spiller-Cross). Project equipment, which Gabriel had not then been able to sell, was impaired C$33 million to C$19.64 million. (C-1833), PDF-17.

[632] *Supra* ¶163.

[633] C-PHB ¶¶290-369; C-Opening-2020 vol.1:13-28.

[634] C-PHB ¶333.

[635] *E.g.*, Tr.(Oct.4, 2020)1376:9-1377:8 (Burrows-Cross)(acknowledging that for RMGC to obtain economic value from the surface rights it acquired the State would have to allow development of the Project).

237. Respondent's assertion that [redacted]

238. Respondent seeks to demonstrate that market analyst reports provide unreliable information, challenging observations made by Mr. Cooper, a professional with 40 years of relevant industry experience first as an exploration geologist and later as a leading precious metals equity analyst.[638]

239. Respondent argues that Mr. Cooper "admitted" that "he was not the analyst at CIBC responsible for assessing the value of Gabriel Canada's stock." In fact, Mr. Cooper's witness statement clearly described his role in the preparation of CIBC's reports on Gabriel as "prepared under my supervision" and stated he was "generally familiar" with Gabriel.[639]

240. Respondent contends that analysts "lack … independence towards the institutions they rank," and are motivated to curry favor with the mining companies. In reality, analysts compete with each other to develop a reputation as the most reliable source of information in the market. They are motivated to provide accurate information to investors who value the market intelligence contained in their reports. The institutions that rank the analysts are the institutional equity investors that purchase the reports, not the mining companies that are the subject of analysis.[640]

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[636] Tr.(Oct.3, 2020)1193:11-1196:15 (Spiller-Cross).

[637] C-PHB ¶357; Henry-II ¶¶67-70.

[638] Cooper ¶1, Annex A.

[639] Cooper ¶¶2, 8.

[640] Cooper ¶28. *Compare* Tr.(Oct.1, 2020)733:11-12 (Cooper-Direct)(reports prepared for "institutional investors") and 751:16-753:4 (Cooper-Cross)(discussing analyst ranking process and "institutions" on the Brendon Woods panel), *with* 771:7-772:10 (Cooper-Cross)(discussing site visits to mining projects and the Gabriel site visit, which Mr. Cooper did not attend).

241. Respondent criticizes analysts for what it alleges was "over-reliance on information provided by Gabriel." Respondent cites as one example of such alleged "over-reliance" Annex B to Mr. Cooper's witness statement, which Respondent wrongly suggests reflects the documents considered by the authors of analyst reports about Gabriel. Annex B contains documents on which Mr. Cooper relied in preparing his witness statement.[641]

242. Respondent criticizes the analyst reports for not reflecting, *inter alia*, the alleged "need for an expropriation procedure," the alleged "uncertainty" and "impact on Project economics" purportedly created by the Chance Finds Protocol, and the alleged time it would take to build a cyanide storage facility. Respondent argues that the analyst reports are deficient in effect for not incorporating Respondent's arbitration arguments. As these arguments lack foundation, they do not provide a basis to disregard the reliability of the information presented by analysts.[642]

243. Likewise, as Respondent's contentions regarding the blasting mitigation measures are erroneous, its argument that the market capitalization fails to account for the alleged impacts of those measures fails.

244. Respondent contends [redacted] Respondent conveniently avoids engaging with Gabriel's detailed disclosures, which alone amply informed the market about the fact of, and Project risks associated with, NGO opposition and related litigation.[643] The NGOs' own press and related media and analyst reporting added to the total mix of information available to investors.[644]

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[641] Cooper ¶4. While Mr. Cooper at one point appeared to agree with Respondent's counsel that the documents on Annex B represented "all of the documents you relied on at the time in making your analyst assessments," Tr.(Oct.1, 2020)775:1-14 (Cooper-Cross), he later clarified that Annex B contained documents supporting his witness statement, not CIBC's reports about Gabriel he admittedly did not author. *Id.* 777:1-7.

[642] Cooper ¶26; Tr.(Oct.1, 2020)733:9-734:16 (Cooper-Direct)(describing the purpose of analyst reports and the information used and process typically followed to create them).

[643] C-PHB ¶355. [redacted]

[644] C-PHB ¶356.

245. [redacted] Mr. Cooper observed, correctly, that RMGC had won most of the litigations NGOs had filed, and shared his view that after the EP was issued, Project opposition and litigation would diminish.[645] Mr. Cooper's assessment was consistent with Professor Henisz's contemporaneous interviews and NGO press that supported the view that Project opponents were resigned to defeat when it appeared the pivotal EP would be issued.[646] Analysts were not uniform in this view, however, with some concluding that opponents would certainly challenge the EP and litigation would continue.[647] This diversity of views was available to the market and reflected in Gabriel's share price.

246. Respondent argues Gabriel [redacted] This argument is meritless.

247. Respondent fails to address [redacted].[648] In addition to Gabriel's disclosures, Project opponents and press coverage informed the market of Project risks, including property holdouts and social opposition, and thus contributed to the total mix of information available to investors.[649]

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[645] Tr.(Oct.1, 2020)815:7-816:3 (Cooper-Cross).

[646] C-Opening-2020 vol.4:27; C-PO27 n.312.

[647] C-PHB ¶356, n.738(discussing [redacted] report).

[648] C-PHB ¶355; Henry-II ¶¶89-94.

[649] C-PHB ¶356. For this reason, Respondent is wrong to assert [redacted] C-PHB ¶341 n.705.

248. The premise of Respondent's argument – that expropriation was "necessary" [redacted] is false. RMGC had reasonable grounds to believe it would succeed in negotiating the acquisition of all necessary surface rights through a combination of attractive economic offers and community lobbying.[650]

249. Even assuming expropriation were necessary, the weight of the evidence shows that, contrary to Respondent's contentions, due to the phased nature of construction, the absence of problematic landowners in early phases, and expropriation procedures not nearly as onerous and uncertain as Respondent asserts, Project implementation would not have been materially delayed.[651]

250. Respondent argues [redacted] For the reasons explained by Professor Schiau, Mr. Jennings, and Mr. Gligor, the premise of Respondent's argument, that the Chance Finds Protocol envisaged potential *in situ* preservation of artifacts [redacted] is incorrect.[652]

[650] *Supra* ¶¶56-66, 177-180; C-PHB ¶¶337-341.

[651] *Supra* ¶¶181-189. [redacted] laimants have repeatedly explained RMGC's planned approach to acquiring surface rights, and the Government repeatedly accepted that the Project would be implemented through phased construction, including the Ministry of Culture's endorsements and the draft EP conditions published by the Ministry of Environment. C-PHB ¶119. Respondent's assertion that this explanation is not "anywhere on the record" is false.

[652] Schiau-II ¶¶302-313; Jennings-II ¶¶54-58; Gligor-II ¶¶55-69; Tr.(Dec.5, 2019)1327:12-1344:17 (Gligor-Cross); Tr.(Dec.10, 2019)2368:17-2372:8 (Schiau-Direct).

251. The evidence, including text of the Chance Finds Protocol, demonstrates that the Protocol: (i) applies only in areas subject to archaeological discharge and thus cleared for mining activities, (ii) is designed to work in parallel with and cause "minimal disturbance" to the Project,[653] and (iii) thus contemplates archaeological surveillance and potential preservation only by study and record, not *in situ* preservation.[654]

252. Unable to sustain its argument based on the text of the Chance Finds Protocol or on a fair engagement with the opinion of Professor Schiau, Mr. Jennings, and the testimony of Mr. Gligor, Respondent resorts to assertions that are baseless, misleading, and irrelevant.

253. Respondent asserts, for example, "Professor Schiau explained that ADCs had been issued for areas that had not yet been researched" and "these 'risk areas' were covered by" the Protocol. This assertion is incorrect. ADCs had been issued based on extensive archaeological research and the responsible expert authorities were satisfied, based on the research done, that the subject areas should be discharged. As Professor Schiau explained, these ADC decisions of "advisability" are not subject to review and reversal based on a subsequent find, which indeed would not be entirely unexpected, and, any subsequent find would be preserved by record or preserved in a museum or similar.[655]

254. Respondent contends Professor Schiau's hearing testimony contradicted his opinion that the Protocol did not contemplate *in situ* preservation. According to Respondent, Professor Schiau stated "that RMGC must modify the Project as necessary to protect chance discoveries," which Respondent claims means modifications "precisely to adjust for areas to be preserved *in situ*." Respondent's argument is misleading and wrong.

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[653] (C-388.03), 31. The Protocol lists as one of its animating principles to "research and adequately record chance finds, considering the work schedule for mine construction and operation, as provided in the Project permits." *Id.* 34. [redacted] therefore did not agree with Respondent's counsel's suggestion that the Protocol would have a material impact on the Project's timeline. [redacted]. Respondent mischaracterizes [redacted]

[654] Schiau-II ¶¶308-313. Although the Chance Finds Protocol did not create material risk for the Project, Gabriel was not hiding the Protocol from investors and, indeed, published it on its website. C-Opening-2020 vol.5:33; Compass-II ¶28 n.65.

[655] Tr.(Dec.10, 2019)2368:12-2372:8 (Schiau-Direct); Schiau-II ¶¶302-313.

255. In his written opinion, Professor Schiau addressed the Ministry of Culture's 2013 endorsement of the Chance Finds Protocol that provided, among other things, RMGC "shall bring any modification to the mining project that is needed to protect chance archaeological discoveries, whenever this may be necessary according to the legal provisions." Professor Schiau then explained that the only "modification" to the Project that could arise under the Protocol and the law could be to "the schedule of works" as "under the terms of the Protocol, the mining works were to be temporarily stopped in the area with a chance discovery (and continued elsewhere)."[656] Mr. Gligor shared this interpretation.[657] Contrary to Respondent's suggestion, Professor Schiau said nothing to suggest *in situ* preservation was contemplated or possible, let alone that it would cause a Project "modification." Indeed, in the very next paragraph of his opinion, Professor Schiau underscored again the unavailability of *in situ* preservation under the Protocol.

256. Rather than refer the Tribunal to the Ministry of Culture's Protocol endorsement and to Professor Schiau's related opinion explaining the "modification" language, Respondent instead cites to the end of his hearing presentation during which Professor Schiau quoted the "modification" passage from the Ministry's endorsement.[658] Without that context, Respondent misrepresents his opinion which is that *in situ* preservation is not available and the only "modification" could be to the operations schedule.

257. Rather than address substance, Respondent attacks Professor Schiau's professional integrity claiming his purported "admission that he did not draft his legal opinion" and "failure to disclose his instructions." Professor Schiau rejected counsel's baseless suggestion that his written opinions were not his own and that he was instructed by Claimants what to say, testimony Respondent ignores.[659] Professor Schiau made clear his instructions

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[656] Schiau-II ¶313.

[657] Gligor-II ¶¶55-62. *See also* Jennings-II ¶58.

[658] Tr.(Dec.10, 2019)2371:14-2372:8 (Schiau-Direct).

[659] Tr.(Dec.10, 2019)2386:5-2387:10 (Schiau-Direct). Respondent instead cites to Professor Schiau's response to Professor Tercier's question of how he worked with Claimants' counsel, which consisted of English language assistance and identification of topics to address in his opinions. Tr.(Dec.10, 2019)2352:11-20 (Schiau-Tribunal).

comprised guidance on what topics to address,[660] not what the answers should be. Respondent's contention that Professor Schiau's opinions are "highly questionable" because he did not confirm that documents provided to him by Claimants "included all relevant documents submitted by Respondent," is baseless. Among other things, Respondent has not identified any document it contends he should have but did not consider.

258. [redacted] Claimants have shown how Gabriel's disclosures properly informed investors about risks to Project development, including specifically concerning management's estimated Project timeline, arising from, among other things, NGO litigation, land use and surface rights issues, and environmental permitting; the resulting market price thus incorporated and reflected these risks.[661] Respondent's repeated assertions about estimated Project timing [redacted] and remain baseless.[662]

259. Respondent repeats its arguments based on Dr. Burrows' testimony [redacted]. Claimants explained why Dr. Burrows' analysis, even as corrected at the hearing and reproduced in Respondent's brief, is fundamentally flawed and misleading.[663]

260. Respondent gives short shrift to Dr. Burrows' theory that a gold bubble could have inflated Gabriel's market capitalization, which is speculative and baseless.[664]

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[660] Tr.(Dec.10, 2019)2352:11-20 (Schiau-Tribunal); *id.* 2375:5-12 (Schiau-Cross).

[661] C-PHB ¶¶354-358; C-Opening-2020 vol.1:21-27, vol.2.

[662] As but one example, [redacted] *Supra* ¶¶177-189, C-PHB ¶¶337-341(surface rights); *supra* ¶¶74, 172(c), 174(d), C-PHB ¶145(Zlatna).

[663] C-PHB ¶¶359-361; C-Opening-2020 vol.1:28, vol.3.

[664] C-PHB ¶¶362-366; C-Opening-2020 vol.1:22.

261. Finally, Respondent's contention that Dr. Burrows' "naïve DCF" proves [redacted] does not withstand scrutiny. Dr. Burrows' DCF analysis, which is overly conservative in a number of significant respects, actually is consistent with and supports the reliability of Gabriel's market capitalization as well as Claimants' other measures of value.[665]

D. Additional Measures of Value

262. Claimants' market multiples[666] and P/NAV[667] measures reliably validate the market capitalization measure of the fair market value of a minority interest in Gabriel. Although not addressed by Respondent, Behre Dolbear's "rule of thumb," developed and applied outside of the arbitration context, also is consistent with and supports Claimants' valuation.[668]

263. Respondent summarily repeats Dr. Burrows' criticisms of and subjective, *ad hoc* adjustments to Compass's market-based multiples analysis. Dr. Burrows' criticisms are not only misguided but ultimately irrelevant as they do not materially change the resulting valuations.[669]

264. Respondent's criticisms of Compass's P/NAV based on its erroneous challenges to SRK's report are baseless.[670] Its argument that the NAV determination is flawed because it does not reflect the longer "Counterfactual" timeline Respondent's counsel instructed Dr. Burrows to assume cannot be accepted because it rests on invalid assumptions,[671] including regarding the acquisition of surface rights.[672] Respondent's related arguments that Compass failed to account for additional Project costs about which Behre Dolbear speculated, and

[665] C-PHB ¶¶314-331.

[666] C-PHB ¶¶314-16.

[667] C-PHB ¶¶317-19.

[668] C-PHB ¶¶320-21.

[669] C-PHB ¶316.

[670] *Supra* ¶¶190-214.

[671] C-PHB ¶¶334 *et seq*.

[672] *Supra* ¶¶56-66, 177-189.

assumed a too low cost of capital, are equally baseless.[673] Its criticisms of Compass's P/NAV sample are meritless for the reasons previously explained.[674]

E. Premium over Market Capitalization

265. The evidence shows that whereas Gabriel's share price, and hence its market capitalization, reflects the fair market value of the rights enjoyed by a minority shareholder in the Project Rights, the market values a controlling interest in the underlying assets at a premium over the share price of a company that owns those assets. That is because gold deposits the size and quality of Roşia Montană are rare and control over them is in great demand by producing gold companies.[675]

266. Respondent cannot and so does not contest that control over projects held by publicly traded junior mining companies to develop large gold deposits command market prices at a substantial premium over the target's market capitalizations. Respondent only debates the reasons for the higher prices and whether Gabriel's Projects would have attracted a price higher than Gabriel's market capitalization but for the wrongful conduct. Respondent's arguments are without merit.

267. Dr. Burrows' theoretical justifications for premia and objections to a premium in this case due to the alleged absence of these justifications are misguided because they are based only on general business valuation literature that are not focused on the characteristics of gold/precious metal company acquisitions.[676] Where assets like the Project Rights are at issue, premia are typical and are "paid to unlock shareholder value by providing financing and execution capabilities to a development program, to replenish and expand a mineral resource base, or to own a scarce natural resource."[677] This is evident in the many real-world acquisitions

[673] C-PHB ¶¶390-94(addressing these criticisms in the context of Dr. Burrows' DCF).

[674] Compass-II ¶¶79-84.

[675] C-PHB ¶¶295-313.

[676] Compass-II ¶47.

[677] Compass-I ¶50.

Mr. Jeannes described or Compass identified where premia were paid and none of Dr. Burrows' theoretical reasons for premia applied.[678]

268. Respondent criticizes Compass's purported reliance on inapt references to valuation textbooks to support its opinion that a 35% premium is required to be added to Gabriel's market capitalization to arrive at the fair market value of the Project Rights. This criticism is misplaced. While noting the general existence of control premia in public company acquisitions,[679] Compass based its premium analysis primarily on the median premium paid as reflected in large empirical studies of actual mining company control acquisition transactions that consistently included the payment of significant premia, and on analyst projections of a similar premium in an acquisition of Gabriel.[680] Only in response to Dr. Burrows' assertion in his first report that the general valuation texts he cited did not support a premium did Compass comment on those texts in its second report[681] and at the hearing,[682] revealing Dr. Burrows' accompanying misinterpretations.

269. Respondent misleadingly asserts that Compass "relies upon [Damodaran] to support [its] contention that an acquisition premium should be paid." Although Compass cited Damodaran in its initial report, it did not do so regarding premia, but for an unrelated point about "historical liquidation" value.[683] Compass only discussed this text in connection with premia in response to Dr. Burrows. Compass distinguished the texts cited by Dr. Burrows because they only "discuss general valuation theory and not the valuation practices or specific empirical

[678] C-PHB ¶¶308-13; Compass-II ¶¶45-46; Tr.(Oct.3, 2020)1261:3-1262:15 (Spiller-Cross)(explaining why control premia paid in competitive bidding situations like those for junior mining companies cannot be justified or explained by synergies but instead by the need and desire for the underlying resources). Underscoring their irrelevance to the present inquiry, when Respondent's counsel told Professor Spiller he failed to mention synergies in a quotation cited in rebuttal to Dr. Burrows, Professor Spiller simply responded "Oh, that's fine. Including 'synergy,' sure, that's fine." Tr.(Oct.3, 2020)1271:10-19.

[679] Compass-I ¶47. The authority Compass cited regarding control premia was not among those Dr. Burrows cited on which Compass commented.

[680] Compass-I ¶¶47-53; Compass-II ¶¶43-46, 48-51.

[681] Compass-II ¶47.

[682] Compass slide-19.

[683] Compass-I ¶91 n.121.

observation of transactions in the mining sector."[684] Compass explained that these "texts confirm that acquisition premiums are the norm in merger and acquisition (M&A) transactions."[685]

270. Further, contrary to Respondent's suggestion, Professor Spiller disagreed with Respondent's counsel (based on Damodaran) that the premium would be zero in the acquisition of a well-managed target.[686]

271. Respondent wrongly asserts that applying a premium "is inconsistent with the efficient market's hypothesis relied upon by Compass" because the market price should already reflect any expected premium. Respondent fails to cite Professor Spiller's testimony addressing this issue, including in response to questions from the Tribunal President. Professor Spiller clearly explained that there is no inconsistency because the share price and the resulting market capitalization reflect the value of owning a minority interest in the shares of the company, whereas the premium reflects the additional value derived from controlling the company's underlying asset(s), here the underlying valuable mineral assets.[687] Thus, while the stock market efficiently captures the value of the minority interest, the stock market is not a market for control of the underlying assets held by the company.

272. The evidence in the record (most notably from Mr. Jeannes, the only witness who personally led acquisitions of precisely the types of assets at issue) confirms that these assets command prices above market capitalizations because they are rare and because there is a demand among producing mining companies (majors) to replenish their stocks of mineral resources.[688]

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[684] Compass-II ¶¶47, 47(c).

[685] *Id*.

[686] Tr.(Oct.3, 2020)1267:14-1270:4 (Spiller-Cross). Respondent's observation that Dr. Burrows' views align with the general valuation text he cites is irrelevant because such texts do not address control acquisitions in the mining sector or the reasons premia are routinely paid in them.

[687] Tr.(Oct.3, 2020)1259:13-1260:18, 1299:16-1302:19 (Spiller-Cross).

[688] C-PHB ¶¶295-302; Compass-II ¶¶44-46, 51.

273. Respondent argues that a fair market value analysis "does not contemplate a need to convince the seller to sell, nor a competition among buyers." That is a gross error. The very notion of the hypothetical price a willing buyer *and a willing seller* would agree means that *both*, being fully aware of the supply and demand for the asset at issue, accept the price. This necessarily means both parties are aware of and take account of whether another buyer/seller would accept a higher/lower price. This is the essence of a competitive and free market, neither party being under compulsion.[689] Thus, basic rules of supply and demand in an open and unrestricted market result in higher prices for rare assets that are in demand.

274. Respondent points to the *Crystallex* case where the Tribunal did not apply a control premium. That tribunal concluded that the evidence presented did not show that it was likely that the project rights at issue would command a price in a hypothetical sale higher than the stock market capitalization measure.[690] In addition, unlike that case, here, there is no restriction on Claimants' ability to sell their interests in the Project Rights.[691]

275. The evidence regarding the value of the Project Rights at issue in this case is materially different. Indeed, the evidence in this case is uniform that control over sought-after gold project assets routinely commands a market price above the market capitalization of a single asset junior mining company owner. The evidence also shows that but for the wrongful conduct, the Project Rights at issue would have been highly sought-after,[692] and the control over those rights that Gabriel enjoyed through its investment in and through RMGC would have commanded a price well above Gabriel's market capitalization.

276. That Gabriel was not in negotiations as of the Valuation Date does not detract from this conclusion. As Professor Spiller explained, one would not expect to see a sale when the EP was expected to be issued shortly – potential sellers would prefer to await its issuance and

[689] Compass-I ¶¶37-39.

[690] (CL-62) ¶893.

[691] *Supra* ¶225; (C-184).

[692] C-PHB ¶¶303-304; *supra* ¶¶221, 223.

the resulting higher acquisition price and potential buyers would prefer to wait for the resulting de-risking of the Project.[693] Dr. Burrows offered no response to this evidence.

277. Finally, Respondent also wrongly contends that Professor Spiller improperly applied a control premium to the market multiples and P/NAV methodologies such that "these two valuations provide no corroboration" for Compass's market capitalization measure. As discussed above, these two methodologies validate the market capitalization measure of the fair market value of a minority interest in Gabriel. Because Compass added a control premium to the market capitalization to arrive at a fair market value of the Project Rights, Compass added the same premium to the outcome of the two methodologies that validate the market capitalization to present an apples-to-apples comparison of the total compensation amount.

F. Dr. Burrows' Other Assessments Are Not Indicators of FMV

278. Respondent refers to the distressed Foricon sale, shown by contemporaneous documents to be far below Gabriel's valuation of the shares at that time. Dr. Burrows contends it is a "useful data point" because, in theory, Foricon could have found a better offer and used that to get a higher price from Gabriel. As previously explained,[694] this data point is not useful because Foricon was in distress with limited resources to locate another buyer and in reality it would be difficult to find one willing to pay the market price with the obligation to make capital contributions when it could buy shares of GBU with no such obligation instead. Moreover, Gabriel had the right to match the price and acquire the shares. The fair market value standard does not include a transaction with these conditions. Moreover, and significantly, Respondent raised this issue only with the Rejoinder limiting Claimants' ability to provide more evidence regarding the real circumstances of this transaction.

279. Dr. Burrows' other assessments are unreliable or irrelevant for the reasons previously explained.[695]

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[693] Tr.(Oct.3, 2020)1296:6-1298:10 (Spiller-Tribunal).

[694] C-PHB ¶¶398-403.

[695] C-PHB ¶¶390-97(DCF/market multiples); Reply ¶¶730-34(delay).

G. Interest

280. To ensure full compensation to Claimants, compensation must include compound interest at a normal commercial rate, *i.e.*, LIBOR+ or U.S.Prime+, as investment treaty tribunals routinely recognize.[696]

H. The Tribunal May Decide to Award Damages on a Different Basis

281. Respondent refers to PO34, which notes that Claimants' arguments concerning the valuation date are admissible and that the Tribunal has discretion to consider them.[697]

282. Respondent argues the Tribunal "could not use the evidence on the record in support of an alternative valuation because the Parties and their witnesses have never discussed the application of any of the valuation methods to a date other than 29 July 2011." Respondent does not argue the record evidence is insufficient to support the determination of compensation using another valuation date. Nor could it. As Claimants have demonstrated, the Tribunal can use the record evidence of Gabriel's market capitalization and adjust it through indexing from any "last clean date" to the date the breach is consummated to remove the effects (as it must) of Respondent's wrongful acts.[698] Dr. Burrows and other tribunals have used such indexing in other cases.[699]

283. Respondent's suggestion that it did not have an opportunity to address this approach is without basis. Dr. Burrows used this method in his second report,[700] and Claimants identified this issue as a rebuttal subject starting in November 2019 as permitted by the Tribunal's orders.[701] During his presentation, Dr. Burrows endorsed as appropriate such indexing to extrapolate the value of Gabriel from July 29, 2011 to September 6, 2013.[702]

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[696] Reply ¶746 n.1464; (CL-251) ¶12.5; (CL-246) ¶1268; (RLA-62) ¶1046; (CL-78) ¶626; (CL-63) ¶¶1022-1024; (CL-77) ¶451; (CL-152) ¶752; (CL-161) ¶283; (CL-84) ¶320; (CL-140) ¶819; (CL-93) ¶486; (CL-92) ¶453; (CL-159) ¶780.

[697] C-PHB ¶439 n.898.

[698] *Id.* n.897.

[699] C-PHB ¶¶427-36.

[700] Burrows-II ¶¶86-92.

[701] Claimants' Letter to Tribunal Sept.30, 2020.

[702] C-PHB ¶437.

Respondent also specifically requested to address the issue in post-hearing briefs rather than brief it separately or in a phase after a determination on liability.

284. Respondent erroneously contends Compass confirmed it did not prepare the calculations on Claimants' demonstratives. Mr. Dellepiane in fact confirmed just the opposite.[703] All of the underlying data is in the record without objection and there is no question of its accuracy.

285. Claimants maintain that the correct valuation date is July 29, 2011 and the best evidence of the fair market value of the Project Rights is Gabriel's market capitalization as of that date plus a control premium. Should the Tribunal, however, determine another date is appropriate, it has the discretion, tools, and evidence at its disposal to assess damages.

* * * *

Respectfully submitted,

White & Case LLP

Ţuca Zbârcea & Asociaţii
Victoriei Square
4-8 Nicolae Titulescu Ave.
Sector 1, Bucharest 011141
Romania

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

April 23, 2021

Counsel for Claimants

[703] C-PHB ¶435 n.891.