INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

GABRIEL RESOURCES LTD.

AND GABRIEL RESOURCES (JERSEY) LTD.

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

RESPONDENT'S POST HEARING BRIEF

18 FEBRUARY 2021

LALIVE

LDDP
LEAUA DAMCALI DEACONU PAUNESCU
Attorneys & Counselors

TABLE OF CONTENTS

…

1 INTRODUCTION

1 After more than five years of proceedings, thousands of pages of submissions, tens of thousands of pages of evidence, two hearings, and interim proceedings and decisions of various kinds, the issues that the Tribunal will have to decide in this arbitration, and how it will have to decide them, have crystallized.

2 The Claimants' case must fail. In a nutshell, the Project stalled, not because of anything that the Romanian State or authorities did, but because of RMGC's failure to overcome the social opposition and to secure the social license for the Project. In legal terms, this means that the Claimants' claims fail, in particular, for failure to establish Romania's liability for the alleged treaty breaches and any causal link between the alleged breaches and the claimed loss; but they also fail on all other counts, including for lack of jurisdiction and for failure to show and properly quantify the alleged loss.

3 Under international law, it is for the Tribunal to choose the basis of its decision, and accordingly, the purpose of this submission is to assist the Tribunal in this task and to set out Romania's position in full, on all of the issues raised by the Claimants' case that are outcome-determinative. This is done in a format agreed with the Tribunal at the 2020 hearing, that is, in the format of propositions. This is indeed the most appropriate way to state the Parties' positions in circumstances where the Tribunal has heard the evidence in two lengthy hearings, and where the Parties have already, more than once, stated their positions in comprehensive written submissions and in their opening statements.

4 Nonetheless, the Respondent requests that the Tribunal refer, where appropriate, to the Respondent's earlier submissions, in particular the Counter-Memorial, Rejoinder, and Response to the Claimants' Answers to the Tribunal's Questions in PO 27, for a full argument in support of the Respondent's position and analysis of the evidence, in particular on the issue of social opposition, which for obvious reasons does not form part of the Claimants' case.

5 The Respondent also refers the Tribunal to the Respondent's earlier submissions concerning its **jurisdictional objections** as the oral evidence heard at the two hearings has not affected the Respondent's position. The Respondent, however, recalls that, remarkably, after being unable to pinpoint a date of breach at the 2019 hearing, after more than five years of proceedings, the Claimants argued for the first time in their Answers to the Tribunal's Questions that the alleged treaty breaches occurred "on or about 9 September 2013." The Respondent noted at the time that the Claimants had not explained the implications of this newly-chosen date for their jurisdictional case. The Claimants still have not done so and the Respondent must assume that their position remains unchanged.

6 To assess its **jurisdiction**, the Tribunal must thus answer the following main questions:

Question 1: Are Gabriel Canada's claims time-barred under the Canada-Romania BIT?

- **Romania's position**: Under the Canada-Romania BIT, claims are time-barred if more than three years have elapsed from the date of the alleged breach which, on the Claimants' own case, was the beginning of August 2011. This date is more than three years prior to the registration of the Request for Arbitration on 30 July 2015. Gabriel Canada's claims therefore stand to be dismissed. The claims arising out of RMGC's 2007 application for exploitation licenses for the Bucium area are equally time-barred. Rejoinder, 17 *et seq.* (Section 2.1.3).

Question 2: Does the Tribunal have jurisdiction over claims arising out of events that took place in 2015 and 2016?

- **Romania's position**: The Claimants notified Romania of claims in a Notice of Dispute on 20 January 2015 and waived their right to initiate or continue parallel litigation on 17 July 2015. Although they have since also brought claims based on events in 2015 and 2016, these claims were never notified to Romania and were never subject to negotiations between the Parties; the Claimants also never waived their rights to initiate or continue parallel proceedings in relation to these 2015-2016 claims. The claims therefore fall outside the Tribunal's

jurisdiction or are inadmissible. Rejoinder, 12 *et seq.* (Sections 2.1.2 and 2.2.2).

Question 3: Following the CJEU's 2018 decision in *Slovak Republic v. Achmea BV*, does the Tribunal have jurisdiction over Gabriel Jersey's claims under the UK-Romania BIT?

- **Romania's position**: The CJEU held that arbitration clauses in intra-EU BITs adversely affect the autonomy of EU law; consequently, EU law must be interpreted as precluding a provision in an intra-EU BIT under which an investor from a Member State may bring proceedings against another Member State before an arbitral tribunal. The Tribunal must thus dismiss Gabriel Jersey's claims for lack of jurisdiction under Article 7 of the UK-Romania BIT. Also, as demonstrated in the Respondent's written submissions, Gabriel Jersey has failed to show that it has made any qualifying investment in Romania. Respondent's Additional Preliminary Objection; Rejoinder, 26 *et seq.* (Sections 2.2.1 and 2.2.3).

7 Should it ever reach that stage, the Tribunal has four main issues to decide in terms of **liability**:

Question 1: Was the Ministry of Environment required to issue the environmental permit in January 2012 and was its not doing so a breach of Romanian law and, by extension, a BIT breach?

- **Romania's position**: The Ministry's non-issuance of the permit was manifestly lawful as RMGC had not met the permitting requirements. Contemporaneous evidence reflects an understanding on the part of State authorities and the Claimants that the permitting process was ongoing at the time (below, **Section 2.1**).

Question 2: Did State authorities improperly coerce the Claimants between 2011 and 2013 – by threatening to withhold the environmental permit unless RMGC agreed to increase the Minvest's shareholding in RMGC and the royalty rate – and thereby breach the BITs?

- **Romania's position**: If the Tribunal's answer to **Question 1** is "no" (*i.e.* it concludes that the Ministry of Environment did not withhold the environmental permit), the Tribunal need not address this question; it

becomes moot and the claim stands to be dismissed. In any event, the Claimants' coercion theory is untenable. The evidence shows that their representatives freely and willingly negotiated with State representatives and, by late 2011, the Claimants' representatives had agreed to increase the State's benefits from the Project. The argument that the Government continued to coerce RMGC into 2012 and 2013, to allegedly force RMGC to agree to something to which it had already agreed defies logic. Furthermore, none other than the former Prime Minister of Romania, Emil Boc, and two former Ministers of Economy, Mr. Ion Ariton and Mr. Lucian Bode, confirmed on the stand that there was no coercion or improper interference in the permitting process by State authorities (below, **Section 2.2**).

Question 3: Did the Government's submission of the Roşia Montană Law to Parliament or Parliament's rejection of the law breach Romanian law and the BITs?

- **Romania's position**: The Claimants' simultaneous complaints that the Roşia Montană Law was foisted on them and that Parliament improperly rejected the law again defy logic. The Claimants wanted the Roşia Montană Law, which reflected their October 2011 requests for legislative amendments and permit guarantees, and was seen by them as the most effective way of overcoming the social opposition to the Project. Mr. Jonathan Henry (CEO and Chairman of Gabriel Canada) beamed at the time that they were "extremely encouraged" by the "Government's decision to approve a law specific to the Roşia Montană Project." Although the Claimants now criticize the Parliamentary review process, they voiced no criticisms at the time and have failed to show that the process was improper. It would indeed be bold for the Claimants to argue that a fundamentally democratic process – Parliament's review of a draft law – would amount to a breach of an investment treaty (below, **Section 2.3**).

Question 4: Following Parliament's rejection of the Roşia Montană Law, did the Government's non-issuance of the environmental permit and declaration of the Project Area as a historical monument breach Romanian law and, by extension, the BITs?

- **Romania's position**: The Ministry of Environment's (and thus the Government's) alleged failure to issue the environmental permit since 2014 is lawful as RMGC has manifestly still not met the permitting requirements. Notwithstanding Parliament's vote and the massive street protests in 2013, RMGC did not seek to revise the Project or recommence efforts to secure permits and surface rights. As for the claim relating to the 2015 LHM, the Tribunal does not have jurisdiction to hear it. In any event, the Claimants have not demonstrated that the list blocks the Project or gives rise to a breach of Romanian law, and even less, of an investment treaty. Below, paras. 152-153, 200-205; Rejoinder, 168 *et seq.* (Section 3.6).

8 Should the Tribunal provisionally find that Romania may have committed a treaty breach, it must next ask itself, in terms of **causation**: Have the Claimants demonstrated that, but for Romania's breach, RMGC would have obtained all necessary permits and managed to operate the Project profitably? In particular, had the environmental permit been issued in early 2012 or thereafter, have the Claimants demonstrated that:

Question 1: RMGC would have been able to comply with the environmental permits' conditions and have a technically feasible and economically viable Project?

- **Romania's position**: Had the environmental permit been issued in early 2012 or thereafter, the TAC would necessarily have imposed numerous conditions on RMGC, including, very likely, securing an ADC for Orlea, envisaging a geomembrane liner for the tailings management facility, implementing blasting mitigation measures and a restricted blasting schedule, and defining its cyanide transportation route and method. The Claimants have not shown that, had one or more of these conditions been imposed, the Project would have remained technically feasible and economically viable (below, **Sections 4.2.1** and **4.2.4.3**).

Question 2: RMGC would have overcome the social opposition to the Project, secured the necessary surface rights, obtained and maintained a building permit, and secured the necessary financing to build and operate the Project?

- **Romania's position**: The Claimants cannot make this showing. It is undisputed that RMGC needs the surface rights to secure the building permit. However, many Roşia Montană residents, some of whom are witnesses in these proceedings, have refused to sell their properties to RMGC. The Claimants have not demonstrated that RMGC would have been able to secure the properties of those residents – through expropriation or otherwise. More generally, the social opposition to the Project has never waned and was even palpable on the last day of the 2019 hearing. To date, there have been dozens of court challenges to virtually every permit for the Project and protracted court proceedings. Thus, even if RMGC had secured the building permit, Project opponents would have undoubtedly challenged that permit in court (as they would have done with other permits for the Project), which might have been cancelled. The Claimants thus have not shown that RMGC would have been able to maintain a building permit and, throughout and despite all of these hurdles, secure the necessary financing to build and operate the Project (below, **Sections 4.2.2 - 4.2.5**).

9 Should it ever reach the stage of **quantum**, the Tribunal must ask itself the following question:

Question: Have the Claimants demonstrated their entitlement to the compensation claimed?

- **Romania's position**: The claim of USD 3.2 billion (excluding interest) is divorced from reality. RMGC never broke ground to construct its mining site – let alone commenced operations. The claim is based on neither the costs it incurred in Romania on the Project, nor an estimate of the revenues and costs the Project would have generated, based on the proven reserves.
- Gabriel Canada has rather valued its alleged losses based on its own company value on the Toronto Stock Exchange and, more specifically, its average market capitalization over a three-month period in 2011. The market value of Gabriel Canada as of the alleged Valuation Date is not a valid proxy for the quantum of the purported damage since nothing happened at the time that could conceivably constitute a breach of either BIT. The Claimants' pick of July 2011 can only be explained by greed since gold prices were at their highest in 40 years at that point

in time. It would in any event be contrary to the most basic legal principles to award damages to the Claimants based on a Valuation Date that precedes by two years their newly-identified date of breach (in 2013). The market value of Gabriel Canada is also not a valid proxy for quantum [redacted]. Moreover, RMGC still holds assets, including the mining license, real estate and other assets in Roşia Montană, which on any view have not been expropriated and which it can and could sell at any time (below, **Section 5**).

2 ROMANIA HAS AT ALL TIMES ACCORDED FAIR AND EQUITABLE TREATMENT TO THE CLAIMANTS' INVESTMENTS

10 The Claimants' claim for breach of the FET standard fails since the allegedly impugned acts of Romanian authorities do not rise to the level of a breach of the BITs, even assuming the Claimants had proven them, which is not the case. **Respondent's Opening 2019**, 14 *et seq.*; Rejoinder, 41 (para. 134).

- The Canada-Romania BIT does not require Romania to provide more than the customary international law minimum standard of treatment. Thus, only egregious conduct can amount to a breach of FET. **Respondent's Opening 2019**, 13; Rejoinder, 45 *et seq.* (paras. 145-151); and,
- The standards in the two BITs – the customary international law minimum standard of treatment of the Canada BIT and the standard set out in the UK BIT – are similar. There is no bright-line distinction between the two standards.

11 The Claimants could not have had a **legitimate expectation** based on the mining license alone that RMGC would be able to secure all permits for the Project (as well as the surface rights) and the social license. **Tr. 2019**, 392:2-15 (R. Op.).

- The Claimants have not explained which legitimate expectations were frustrated or which of Romania's purported acts frustrated those legitimate expectations. They knew from the outset that RMGC needed to successfully move residents and secure permits in accordance with Romanian law and with the approval of stakeholders. **Respondent's Opening 2019**, 16; **RLA-162**, 176 (paras. 653-655).

12 There cannot be a **composite act** without a systematic State policy or practice. The conduct that the Claimants attribute to Romania does not equate to a systematic State policy or practice. Accordingly, Romania's conduct may not be characterized as a composite act, let alone a composite breach. R. PO27 Reply, 84 *et seq.*

2.1 The Ministry of Environment's Non-Issuance of the Environmental Permit Does Not Amount to Failure to Provide Fair and Equitable Treatment

2.1.1 The TAC and the Ministry of Environment Had Discretion in Deciding Whether to Issue the Permit and in Deciding the Conditions to Be Attached to the Permit

13 Under international law, Romanian state authorities enjoy and are entitled to a **margin of appreciation** in finding that RMGC has not met the requirements for the environmental permit. Investment tribunals and scholars have recognized the principle of margin of appreciation, which requires arbitrators to treat decisions by State authorities with deference. **Respondent's Opening 2019**, 17 *et seq.*

14 The margin of appreciation gives the permitting authorities – in this case, the TAC – the opportunity to add conditions (the mitigation measures) that they deem appropriate. The determination of the relevant conditions is a matter of discretion. The conditions reflect the TAC's concerns and ensure compliance with the requirements for environmental protection. Through the conditions, the TAC can manage and minimize the adverse environmental consequences that a project of this type and size will inevitably have. **Tofan LO**, 86 *et seq.* (paras. 279-318); **Dragos LO I**, 8 (para. 46); **Tofan Presentation**, 23 *et seq*; **Tr. 2019**, 2520:9-2521:1 (Tofan).

15 Granting an environmental permit for a project of this nature is not – in Romania nor elsewhere in Europe – a yes or no question. If the TAC concludes that the environmental permit can be granted, it then considers the conditions for the permit, in other words the **mitigation measures**. The more complex the project, the more detailed the list of conditions. **Tr. 2020**, 166:21-167:19 (R. Op.).

16 RMGC never met the requirements for the environmental permit but, in any event, the TAC had the discretion (i) to recommend issuance of the permit and subject to conditions or (ii) to recommend against issuance of the permit if it concluded that the adverse environmental consequences of the Project could not be addressed by conditions. **Respondent's Opening**

2019, 34; Rejoinder, 57 *et seq.* (paras. 188-189); Counter-Memorial, 148 (para. 391).

17 Although certain TAC members had provided input regarding possible conditions for the environmental permit, the TAC had not yet discussed the specific and mandatory conditions. **Respondent's Opening 2020**, 61; **Tr. 2020**, 190:12-16 (R. Op.); Rejoinder, 199 (para. 639).

18 Under Romanian law, administrative authorities enjoy a margin of discretion when assessing whether an applicant for an administrative act has complied with the requirements. The Ministry of Environment and the TAC enjoyed a margin of discretion as to whether the Project's documentation and environmental impacts warranted the issuance of the permit. **Tofan LO**, 93 *et seq.* (paras. 306, 316-318).

19 The flip side of the authorities' margin of discretion is that an applicant – in this case RMGC – has no **subjective legal right** to an administrative permit such as the environmental permit, even when they meet the relevant requirements. Rejoinder, 57 *et seq.* (para. 188); **Tr. 2019**, 399:16-19 (R. Op.).

20 Prof. Dana Tofan testified that "[t]his quality element [*i.e.* the quality of the EIA Report as assessed by the authorities] is subjective and is at the discretion of the public authorities and the issuing authority beyond the appreciations that all the legal conditions have been satisfied by the applicant from its perspective." **Tr. 2019**, 2520:9-13.

- As she explained, the exercise of the discretion of the authorities cannot be abused. The Claimants have not, however, argued that the TAC abused its discretionary powers. **Tofan LO**, 87 *et seq.* (paras. 284-290).

21 Ms. Dorina Mocanu, who has been with the Ministry of Environment since 2000 and largely responsible for EIA Procedures since 2009, explained that [redacted]:

"[redacted]" **Tr. 2019**, 2003:11-21 (emphasis added), 2001:1-6 and 2008:18-2009:13.[1]

22 Dr. Amalia Şerban, Deputy Director of Medical Assistance and Public Health Directorate at the Ministry of Health, testified that [redacted]. **Tr. 2019**, 2064:6-11.

23 The witnesses' testimony regarding the EIA Review Process must be measured against their respective backgrounds:

- **Ms. Mocanu** [redacted]. **Tr. 2019**, 1955:1-19 and 2000:10-19;
- By contrast, **Mr. Horea Avram**, the head of RMGC's Permitting Department for many years, [redacted]. **Tr. 2019**, 1099:2-10 and 1255:4-20;

[1] [redacted] Prof. Dragoş explains that, according to the precautionary principle, "where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." **Dragos LO I**, 8 (para. 44).

- [redacted]. **Tr. 2019**, 1099:20-1100:12 and 1102:12-1103:9;
- Even though he discusses the organization, functioning and scope of competence of the TAC at length in his legal opinions, **Prof. Lucian Mihai** confirmed that he had no practical experience with TAC proceedings. **Tr. 2019**, 2277:19-2278:1. More generally, he had never been involved in any EIA Procedure. **Tr. 2019**, 2279:2-22;
- Besides lacking the practical understanding of the TAC and EIA Review Processes, Prof. Mihai is specialized in intellectual property law and not qualified to provide opinions on administrative law matters (which represent the bulk of his two opinions). **Mihai LO I**, 132 *et seq*. (Prof. Mihai's CV);
- Prof. Mihai recognized that his area of specialization is civil (private) law. **Tr. 2019**, 2246:19-2247:6; **Mihai LO I**, 5 (para. 3). President Tercier asked Prof. Mihai how he could reconcile being a "professor of contracts" with giving an opinion on administrative law. **Tr. 2019**, 2248:10-15. Prof. Mihai's limited experience as an attorney-at-law and his position of Secretary General of the Parliament[2] do not make him an expert in administrative law; and,
- By contrast, **Prof. Dacian Dragoș** and **Prof. Tofan** are specialized in administrative law. **Dragos LO I**, 14 (paras. 2-4, 8, 10); **Tofan LO**, 4 (paras. 3-5).

[2] Prof. Mihai's statement that this position is not political, but rather legal (**Tr. 2019**, 2249:5-7), is not accurate. The Secretary General is appointed (and can be removed) by the Chamber of Deputies (or the Senate) through a vote at the proposal of the Permanent Office of that chamber.

24 Under ICSID Rule 44, Prof. Mihai's evidence – both his legal opinions and his oral testimony – must be stricken from the record or, in any event, disregarded for the following reasons:

- [redacted]. **Tr. 2019**, 2290:1-18;
- [redacted]. **Tr. 2019**, 2292:3-13;
- [redacted] **Tr. 2019**, 2293:2-20;
- [redacted] **Tr. 2019**, 2294:9-2295:9;
- [redacted] **Tr. 2019**, 2294:14-17;
- [redacted] **Mihai LO I**, 6 (para. 18); **Tr. 2019**, 2250:15-2251:1 and 2280:12-18; and,
- [redacted] **Tr. 2019**, 2294:9-2295:9.

25 [redacted] **Tr. 2019**, 1958:7-1959:20 (Mocanu). Although the Cernavodă project is less complex than the present one (it concerned the extension of an existing facility), thirty pages of mitigation measures

and conditions were included in the environmental permit. **R-113**, 23 *et seq.* (Chapters III and IV).

26 Environmental permits at the local (rather than national) level also include numerous mitigation measures and conditions, as Ms. Larraine Wilde confirmed. **CMA - Wilde Report II**, 39 *et seq.* (paras. 136-137 and 173-174); **CMA-133**, 9 (Kronochem project); **C-2256**, 165 *et seq.* (Deva project).

2.1.2 By November 2011, the Ministry of Environment Was Nowhere Near Deciding on the Environmental Permit

27 The Claimants' allegation that, by the end of 2011, Romanian authorities had delayed since 2004 in issuing the permit is highly misleading. **Tr. 2019**, 401:12-404:22 (R. Op.); **Respondent's Opening 2019**, 21 *et seq.*

- By the end of 2011, the EIA Review Process had only been active for 15 months between May 2006 and September 2007 and then for 14 months between September 2010 and November 2011. **Respondent's Opening 2019**, 21 *et seq.*; Rejoinder, 65 (para. 211); **Tr. 2019**, 2004:5-10 (Mocanu) ("[redacted]");
- The **interruption in the EIA Review Process** between September 2007 and June 2010 was justified and lawful. In July 2007, RMGC's second urban certificate was both suspended by a court and then expired shortly thereafter. In September, the courts annulled it. The additional problem was that RMGC's third urban certificate was virtually identical to the one that had been annulled. The Ministry of Environment informed RMGC that it needed to address the issue and to submit a new urban certificate. RMGC did not do so until 2010. Counter-Memorial, 58 *et seq.* (paras.151-161); **Tofan LO**, 30 *et seq.* (Section II.2); **Dragos LO II**, 34 *et seq.* (Section III.3.2.2); **Tr. 2019**, 2515:12-2517:1 (Tofan). The EIA Review Process recommenced immediately thereafter. **Respondent's Opening 2019**, 21 *et seq.*

28 During the **March 2011 meeting**, the TAC discussed comments from the public obtained in 2006; another public consultation took place between

March and May 2011 and RMGC submitted a new EIA Report chapter in response to those new public questions in late August 2011. **Tr. 2019**, 405:19-406:15 (R. Op.); see also **Respondent's Opening 2019**, 22; Rejoinder, 65 (para. 212).

29 As Ms. Mocanu testified, [redacted]. **Tr. 2019**, 1963:1-10; see also **Respondent's Opening 2019**, 22.

30 Following a meeting between RMGC and the Ministry of Environment in **September 2011**, the Ministry sent to RMGC **a letter with 102 questions** regarding the EIA Report chapters reviewed to date and requesting further documents. The letter is detailed, shows many outstanding issues, and refers to future "meeting**s**". **Respondent's Opening 2019**, 23; **C-575**, 14 *et seq.*; **Tr. 2019**, 1138:9-1139:2 (Avram).

- Exhibit R-215 is a modified version of the letter, in which then TAC President, Mr. Marin Anton, unilaterally deleted a request for a water management permit and an ADC for Orlea and which did not go through the standard approval procedures within the Ministry. It does not represent the views of the different directorates and Ms. Mocanu and her colleagues did not agree with the removal of this language. **Tr. 2019**, 1966:4-1967:9 and 1992:6-10 (Mocanu) and 407:5-408:19 (R. Op.); see also **Respondent's Opening 2019**, 23.

31 By 2011, the EIA Report was extremely voluminous. It comprised ten chapters, as well as baseline reports, management plans, updates and studies, totaling nearly 25,000 pages. **Respondent's Opening 2019**, 25; **Tr. 2019**, 409:2-9 (R. Op.).

32 Romanian law (Order 863) provides for an **EIA Procedure checklist** which comprises 151 questions, many of which are technical. The Ministry reviews an EIA Report against this checklist. **R-466**, 56 *et seq.*; see also **Tr. 2019**, 1177:1-15 (Avram).

- By 2011, the Ministry had "[redacted]" **Tr. 2019**, 1978:7-1979:5 (Mocanu);

- [redacted] **Tr. 2019**, 1179:16-1180:6;
- [redacted] **Mocanu II**, 21 *et seq.* (paras. 59-75); **C-2272**; **Tr. 2019**, 1975:9-10 and 2047:16-21 (Mocanu) ([redacted]); and,
- [redacted] **Tr. 2019**, 1174:2-1175:8. [redacted]

33 [redacted] **Tr. 2019**, 1123:1-15. A review of those minutes shows, however, that the TAC had many technical questions and its review was ongoing. See *e.g.* **C-476**, 25 (regarding pond permeability) and 37-38 (regarding mercury emissions); see also Counter-Memorial, 73 *et seq.* (paras. 189-190).

34 In advance of the November 2011 TAC meeting, the Ministry of Environment did not indicate to RMGC that this would be the final meeting. (As noted above, on the contrary, in September 2011, it had referred to the need for future meetings in the plural.) Neither letter from the Ministry to RMGC inviting it to meet on 29 November referred to any questions as being "final". The TAC planned to discuss RMGC's responses to the 102 questions and other issues. **Respondent's Opening 2019**, 26; **Tr. 2019**, 409:10-19 (R. Op.); **C-575**; see above para. 30; **C-835**; **C-790**.

35 [redacted]

[redacted] **Tr. 2019**, 1141:7-1142:6; **C-631**; see also **Mocanu II**, 42 (paras. 115-116).

- [redacted] **Tr. 2019**, 1142:7-22; **C-631**; and,
- [redacted] **R-686**; **Tr. 2019**, 1145:14-1146:21.

36 The report of the **visit of a delegation from the EU Parliament** (the PETI), which took place on 24-25 November 2011, prepared based on discussions with the Ministry of Environment and RMGC representatives, does not suggest that the EIA Review Process was near completion. **Tr. 2019**, 410:4-8 (R. Op.); **R-204**; Counter-Memorial, 69 *et seq.* (para. 182).

- [redacted]

  Tr. 2019, 1150:10-1153:2; 1155:14-17; **C-2240**.

2.1.3 The November 2011 TAC Meeting Did Not Mark the End of the EIA Review Process

37 Five main topics were discussed at the November 2011 TAC meeting: chapters 8 and 9 of the EIA Report, RMGC's October 2011 answers to the Ministry of Environment's 102 questions, the IGIE Report, the TAC's site visit, and the PETI's visit just days earlier. Throughout the meeting, TAC officials asked technical questions. The TAC took note of RMGC's responses without taking a view on whether they endorsed or agreed with them. **C-486**; **Respondent's Opening 2019**, 28; **Tr. 2019**, 401:8-18 and

409:10-415:17 (R. Op.); **Tr. 2019**, 1964:7-9 and 1964:16-1965:6 (Mocanu).

38 The TAC president never asked the TAC members to **vote** on whether to issue the environmental permit. **Tr. 2019**, 411:20-412:4 (R. Op.); **C-486**.

- The TAC never voted – at the November 2011 meeting or otherwise – on whether to issue the environmental permit because it never reached that point and because it needed additional information. **Tr. 2019**, 411:20-412:4 (R. Op.) and 2017:11-14 (Mocanu);
- Nor did the TAC indicate – at the November 2011 meeting or otherwise – that it agreed that the environmental permit could be issued. **Respondent's Opening 2019**, 28; Rejoinder, 69 (para. 228);
- [redacted] **Tr. 2019**, 1161:7-16; and,
- When Mr. Anton went through the 29 November agenda items, he asked certain TAC members whether they had questions or comments regarding **that agenda item** and, in that context, certain TAC members said that they had no questions or comments. **Tr. 2019**, 412:5-9 (R. Op.) and 1164:2-10 (Avram); see also **Respondent's Opening 2019**, 28; see *e.g.* **C-486**, 6 *et seq.* and 45 *et seq*.

39 The **agenda** (sent in two letters prior to the meeting) did not indicate that a vote on the environmental permit would take place or that a decision would be taken and, as Mr. Avram confirmed, the letters did not say that the TAC had completed its review. **Respondent's Opening 2019**, 26; **Tr. 2019**, 411:22-412:4 (R. Op.) and 1160:11-14 (Avram); **C-835**; **C-790**.

- [redacted] **Tr. 2019**, 1158:20-1159:3.

40 The TAC did not discuss the **EIA Procedure checklist** during the November 2011 TAC meeting. [redacted] **Tr. 2019**, 1979:18-1980:10; see also above para. 32.

41 Romanian law requires that the TAC reach a **consensus**. In Ms. Mocanu's view, this means "[redacted]". **Tr. 2019**, 1961:13-20; see also **Tr. 2019**, 2740:8-16 (Dragoş) and 2631:20-2632:13 (Tofan); **C-1770**, 3 (Art. 4(2)(g)); **C-1772**, 3 (Art. 4(2)(g)).

- [redacted]

  Tr. 2019, 2054:19-2055:11.

42 Discussion of an EIA Report chapter within the TAC did not mean that review and analysis of the issues raised in that chapter were closed. Nor did it mean that the TAC could not subsequently ask questions about a chapter discussed in a previous TAC meeting. For instance:

- In September 2011, the Ministry of Environment sent a list of 102 questions about Chapters 1 to 7, which had been discussed by the TAC in December 2010. **Tr. 2019**, 407:5-22; 408:1-22, 409:2-9 (R. Op.); **C-575**; see also above para. 30;

- [redacted] **Tr. 2019**, 1129:19-1133:13;

- Indeed, the Ministry of Health asked technical questions at TAC meetings in November 2011 and thereafter. **C-486**, 26 *et seq.* (Cârlan); **C-485**, 14 *et seq.* (Pârvu); **C-481**, 4 *et seq.* (Pârvu); **C-473**, 8 *et seq*. (Şerban); and,
- The fact that, by the end of the 29 November meeting, the TAC and RMGC had discussed Chapters 1 to 9 of the EIA Report did not mean that the TAC's review and consideration of the EIA Report was complete. **Tr. 2019**, 412:19-413:2 (R. Op.).

43 The Claimants mischaracterize statements by certain TAC members during the November 2011 meeting, including a statement by Ms. Alina Frim, the TAC representative responsible for biodiversity issues, to the effect that "we don't have further observations". [redacted]

[redacted] **Tr. 2019**, 2040:3-2041:15.

44 The November 2011 meeting transcript demonstrates that TAC members were still reviewing the EIA Report. **Respondent's Opening 2019**, 28; **Tr. 2019**, 413:3-13 (R. Op.); **C-486**.

45 As Ms. Mocanu testified, [redacted] **Tr. 2019**, 1964:20-1965:6.

46 RMGC knew, based on the discussions that day, that the TAC was still considering the EIA Report and related documents and that additional issues were outstanding even if the TAC did not mention them again at that meeting. **Tr. 2019**, 413:3-13 (R. Op.).

47 Mr. Anton's comment at the end of the meeting that "things are finalized" may reflect a commendable desire to move things along but it was at odds with (i) the fact that questions had been raised during this meeting and not necessarily answered to the TAC's satisfaction and (ii) other issues and questions that had not been mentioned during this meeting were outstanding. **Tr. 2019**, 413:20-414:15 (R. Op.).

- Ms. Mocanu recalled that [redacted] **Tr. 2019**, 1992:18-1993:11;
- Although the Claimants rely heavily on Mr. Anton's statements, he was a **political appointee**, not a technical expert. He was not one of the civil servants within the Ministry reviewing the thousands of pages of

the EIA Report. His job was to schedule and coordinate the TAC meetings. He was also not going to participate in the TAC's decision as to whether to issue the permit. **Tr. 2019**, 414:12-15 (R. Op.), 1981:9-11 (Mocanu) and 1992:12-21 (Mocanu); and,

- His comments to the TAC are also at odds with his contemporaneous position, articulated in a **January 2012** letter, in which he stated that the Project was "currently in the [EIA] procedure, more specifically at the stage of quality analysis of the project environmental impact report" and that the TAC had "requested from [RMGC], additional information, clarifications regarding the submitted documentation." **Respondent's Opening 2019**, 30; **Tr. 2019**, 415:6-15 (R. Op.); **R-471**.

48 [redacted] **Tr. 2019**, 1168:14-1170:20.

49 [redacted] **Tr. 2019**, 1172:17-22.

2.1.4 RMGC Failed to Meet (or Delayed in Meeting) Environmental Permit Requirements

2.1.4.1 RMGC Did Not Secure the Ministry of Culture Endorsement until 2013

50 The Ministry of Culture was required to endorse the Project. **Respondent's Opening 2019**, 37; **Tr. 2019**, 144:6-8 (Cl. Op.) and 2364:6-9 (Schiau); **C-1701**.

51 It did so in April 2013. **Respondent's Opening 2019**, 36; **Tr. 2019**, 156:1-5 (Cl. Op.) and 2366:10-11 (Schiau); **C-655**.

52 Although the law does not spell out the criteria the Ministry should consider when deciding to endorse a project, the endorsement must be based on preventive archaeological research. **C-704**, 4; **Tr. 2019**, 421:18-422:3 (R. Op.) and 2391:4-15 (Schiau); Rejoinder, 173 *et seq.* (para. 549).

53 The Ministry of Culture may require the developer to secure ADCs before it will issue its endorsement. **Tr. 2019**, 422:4-13 (R. Op.) and 2698:13-2706:8 (Dragoș).

54 Contrary to the Claimants' allegations, the Ministry did not endorse the Project in December 2011. At that time, there was uncertainty surrounding Orlea and Cârnic, two of the four massifs within the Project Area. **Respondent's Opening 2019**, 39; **Tr. 2019**, 422:14-423:6 (R. Op.); **C-483**, 44 *et seq.* (Pineta); **C-476**, 67 (Hegeduș); **Tr. 2019**, 154:6-156:15 (Cl. Op.).

55 Separately from the requirement for an endorsement, the Ministry of Culture was required, following the meeting of November 2011, to provide a point of view to the TAC, which it did on 7 December 2011. **C-446**; **C-444** (last para.); Rejoinder, 71 (para. 233).

- Prof. Dragoș explained the differences between the 2011 point of view ("*punctul de vedere*" in Romanian) and the 2013 endorsement ("a*viz*"), including in particular the authorities' expression of will to "favourably endorse" the Project which only appears in the 2013 document. **Tr. 2019**, 2707:12-2712:1; see also **Dragos LO II**, 59 *et seq.* (paras. 227-229 and 231-248); Rejoinder, 70 (paras. 231-232);
- The Claimants' legal expert, Prof. Ion Schiau, confirmed that there are two distinct legal bases for an endorsement and a point of view in the TAC. **Tr. 2019**, 2393:9 and 2397:3-16 (referring respectively to **C-1701**, 3 (Art. 2(10)) and **C-564**, 7 (Art. 13)).

56 Although RMGC had secured an ADC for Cârnic in 2004, Alburnus Maior had successfully challenged that ADC in court. When RMGC secured a second ADC in 2011, Alburnus Maior again challenged it. **Respondent's Opening 2019**, 40 *et seq.*; **Tr. 2019**, 95:3-12 (Cl. Op.) and 545:8-22 (R. Op.); see also **CMA - Claughton Report II**, 11 *et seq.* (paras. 39-41) (explaining that the Cârnic galleries were not fully investigated).

57 As for Orlea, RMGC had not, and still today has not, applied for an ADC. It has not even carried out preventive archaeological research at Orlea. **Respondent's Opening 2019**, 42; **Tr. 2019**, 94:18-20 (Cl. Op.) and

423:18-424:2 and 546:3-16 (R. Op.); see also **CMA - Claughton Report II**, 15 *et seq.* (Section 3.2) (summarizing the research done in Orlea).

- RMGC submitted to the authorities in August 2011 an Archaeological Assessment Study of Orlea, which set out the results of field surveys and other preliminary assessments. Based on this study, a report proposed the research to be carried out in Orlea, in view of applying for an ADC. **Respondent's Opening 2019**, 43; **Tr. 2019**, 424:1-12 (R. Op.); **C-1484**; **R-221**, 10; see also **CMA - Claughton Report I**, 26 *et seq.* (paras. 73-77);
- When the Ministry endorsed the Project in April 2013, it did so following receipt of, and in part based on, the 2013 Orlea Research Report which the National Archaeological Commission had approved in March 2013. **C-655**, 2 (point 11); **Tr. 2019**, 424:13-17 (R. Op.); **Respondent's Opening 2019**, 43; **CMA - Claughton Report II**, 39 (paras. 129-130); Rejoinder, 173 *et seq.* (para. 549);
- The Ministry also conditioned its endorsement on RMGC's securing of an ADC for Orlea and, more generally, on RMGC's obtaining "all the endorsements, approvals, authorizations, and certificates necessary" to realize the constructions, which would include an ADC for Cârnic. **C-655**, 4 (points 2 *in fine* and 4); **Tr. 2019**, 424:18-21 (R. Op.); Rejoinder, 174 (paras. 550-551); see also **CMA - Claughton Report I**, 27 (para. 78); and,
- The Claimants place undue reliance on the non-official version of the September 2011 letter in which Mr. Anton unilaterally deleted a request for the ADC for Orlea, not only because that letter had not been approved by the TAC, but also because the Ministry of Environment repeatedly requested that RMGC provide an ADC for Orlea, both before and after that letter and the November 2011 TAC meeting. **Tr. 2019**, 2052:2-15 (Mocanu); Rejoinder, 72 *et seq.* (paras. 239-242 and 313); see above para. 30 and below para. 157; **C-575**, 14.

2.1.4.2 RMGC Did Not Secure the Approval of the Waste Management Plan until May 2013

58 In January 2012, RMGC had not yet secured the approval of its Waste Management Plan, which was a pre-requisite to securing the environmental permit. **Respondent's Opening 2019**, 45 *et seq.*; **Tr. 2019**, 425:14-20 (R. Op.); **R-216**, 3 (Art. 7).

- The Claimants argue that, because the Waste Management Plan was not discussed at the November 2011 TAC meeting, it was not required for the environmental permit. However, even if the plan was not mentioned during that meeting, that does not mean that it was not required. The law is clear. **Tr. 2019**, 425:21-426:4 (R. Op.); **R-216**, 3 (Art. 7); Rejoinder, 75 (para. 247).

59 RMGC did not even submit an updated version of the plan to the NAMR and the Ministry of Environment until December 2011 and March 2012, respectively. **Respondent's Opening 2019**, 48; **Tr. 2019**, 426:5-11 (R. Op.) and 1262:2-5 (Avram).

60 Authorities had requested an updated version of the Waste Management Plan on many occasions, including in September 2011. **Respondent's Opening 2019**, 47; **Tr. 2019**, 427:2-8 (R. Op.); **R-491**, 5 (Senzaconi); **C-574**, 5; **C-575**, 12 (para. 75); **Tr. 2019**, 1137:21-1138:8 (Avram).

61 It is undisputed that authorities approved the plan in May 2013. **Tr. 2019**, 427:2-8 (R. Op.); Rejoinder, 171 *et seq.* (para. 541); **C-656; C-657; C-658**.

62 Romanian authorities did not delay in approving the plan. In 2012, the authorities raised several questions regarding the plan. **Respondent's Opening 2019**, 48.

- [redacted] **Tr. 2019**, 1267:4-13; **C-649**; see also **Respondent's Opening 2019**, 48; **Tr. 2019**, 427:18-428:3 (R. Op.);

- [redacted] **Tr. 2019**, 1265:19-1266:6 (Avram); and,
- The Claimants have not argued that the requests for information contravened Romanian law or were unreasonable. **Tr. 2019**, 428:4-9 (R. Op.); Rejoinder, 172 (para. 544).

63 In its 2012 Annual Report released in January 2013, RMGC admitted that it needed to provide State authorities clarifications regarding its Waste Management Plan. **Respondent's Opening 2019**, 49; **Tr. 2019**, 428:14-429:1 (R. Op.); **R-492**, 89.

2.1.4.3 RMGC Did Not Have (Approved) Urban Plans

64 In January 2012, RMGC had not secured from the Roşia Montană and neighboring municipalities the approval of the PUZs for the Industrial Area and the Historical Area (which included the historical center). **Respondent's Opening 2019**, 51; **Tr. 2019**, 430:2-10 (R. Op.); **C-484**, 20 (Tănase).

65 As of late 2011 and early 2012, RMGC needed to secure three endorsements for the Industrial Area PUZ and three endorsements for the Historical Area PUZ. **Respondent's Opening 2019**, 53; **Tr. 2019**, 432:18-434:6 (R. Op.); **R-315**, 4.

66 RMGC recognized during the November 2011 TAC meeting that it still needed to secure "a series of endorsements … for each of them [the PUZs]". **Respondent's Opening 2019**, 52; **C-486**, 42 *et seq.* (Tănase).

67 [redacted] **Tr. 2019**, 1125:5-7.

68 The Claimants cannot argue that RMGC had secured the approval of the PUZ in 2002 and that this was sufficient:

- First, residents, through Alburnus Maior, successfully challenged the Local Council decision approving that PUZ in court for years.

Respondent's Opening 2019, 54; **Tr. 2019**, 436:18-437:1 (R. Op.) and 1217:13-18 (Avram); and,

- Second, as RMGC's 2004 urban certificate recorded, RMGC in any event needed to amend that 2002 PUZ. **Respondent's Opening 2019**, 55; **Tr. 2019**, 437:2-9 (R. Op.) and 1217:13-18 (Avram); **C-525.04**, 6 *et seq.*

69 The PUZ is a zoning plan that establishes the geographic limits and other parameters of the Project Area such as area density, the height and type of constructions, use of land, and the organization of the street and water networks and how they will feed and fit into the Project. The PUZ also establishes the environmental conditions for the development of the area. Without a PUZ, the TAC and the Ministry of Environment cannot finalize their assessment of the impact of the Project. **Tr. 2019**, 435:6-11 (R. Op.), 2517:2-17 (Tofan), 2601:16-2602:8 (Tofan) and 2661:20-2663:18 (Dragoș); **Mocanu II**, 8 (para. 26); **Tofan LO**, 47 *et seq.* (Section III.2), **Dragos LO II**, 41 *et seq.* (Section III.3.3).

70 The Claimants rely on the express requirement in Romanian law that a PUZ be in place prior to issuance of the building permit. This is undisputed. However, other provisions of Romanian law, which are based on the EU Strategic Environmental Assessment and EIA directives transposed into Romanian law, make clear that a PUZ must also be in place prior to issuance of an environmental permit. **Respondent's Opening 2019**, 51 *et seq*; **Dragos Presentation**, 10 *et seq*.; **Tr. 2019**, 430:2-435:15 (R. Op.) and 2596:22-2597:18 (Dragoș); **Mocanu II**, 8 (para. 26); **Dragos LO II**, 41 *et seq.* (Section III.3.3), **Tr. 2019,** 2661:20-2663:18 (Dragoș); Rejoinder, 77 *et seq.* (para. 254).

71 The Claimants' legal expert, Prof. Ovidiu Podaru, admitted that the PUZ is a normative administrative act which applies on all persons ("to whom the regulations and the Urbanism Plan imposes conditions"), whereas the environmental permit is an individual administrative act. **Tr. 2019**, 2453:13-22.

- He could in turn not deny that an individual act such as an environmental permit cannot disregard the conditions and requirements of the PUZ. **Tr. 2019**, 2454:7-2455:13; and,

- He thus implicitly recognized that, in the hierarchy of administrative acts, the PUZ is ranked higher than an environmental permit and accordingly the PUZ must be finalized before the environmental permit. It is the logical conclusion of the systematic interpretation of the laws, as Prof. Tofan has explained. **Tofan LO**, 47 *et seq.* (Section III.2).

72 [redacted] **Tr. 2019**, 1205:12-22, 1208:21-1209:4 and 1211:8-1216:6; see also **Respondent's Opening 2019**, 56; **Tr. 2019**, 437:10-439:14 (R. Op.); **R-188**, 2; **C-592**, 7; **C-486**, 41 (Pineta) and 41 *et seq.* (Mocanu), **C-482**, 7 and 13 (A man's voice, MDLPL); **C-487**, 16 *et seq.* (Ginavar, Pineta).

73 [redacted] **Respondent's Opening 2019**, 57; **R-472**, 5.

74 The Ministry's need for the PUZ is evidenced in **March 2013**, when an interministerial commission confirmed (i) that RMGC must provide the "entire relevant [PUZ] documentation … so that the Ministry … can decide in full awareness" and (ii) that the Ministry "indicated that it is important for the [PUZ] to be approved in view of the issuance of the Environmental Permit." **C-2162**, 8; see also **Tr. 2019**, 1222:5-20 (Avram); **Respondent's Opening 2019**, 58.

75 RMGC knew that it needed to secure the approval of its PUZ to secure the environmental permit since, otherwise, it would face the risk that changes to the PUZ would require changes to the EIA Report and a new EIA Review Process. **C-472**, 21 (Damian); **Tr. 2019**, 439:10-14 (R. Op.) and 2685:5-19 (Dragoș); **Mocanu II**, 8 (para. 26, n. 17); Rejoinder, 78 (para. 257).

76 Throughout 2013, Gabriel Canada and RMGC recognized that RMGC needed to apply for missing endorsements for the PUZs. **Respondent's Opening 2019**, 59 *et seq.*; **Tr. 2019**, 439:15-22 (R. Op.); **R-541**, 8; **C-1117**, 121 *et seq.*

- RMGC had for instance failed to maintain the environmental endorsement of the PUZ, which Alburnus Maior had challenged in court. As of late 2011, those challenges were pending (and continued through 2016). **Respondent's Opening 2019**, 61; **Tr. 2019**, 437:18-22 (R. Op.); **C-598**; **R-211**; Rejoinder, 176 (para. 558, n. 754); Counter-Memorial, 21 *et seq.* (para. 67, 76) (explaining the difference between the EIA environmental permit and the environmental endorsement of the PUZ); and,

- [redacted] **Tr. 2019**, 1225:2-7.

77 Even though Ms. Mocanu explained in her witness statement that a PUZ was necessary before the Ministry of Environment could issue an environmental permit (and responded to [redacted] statements in that regard), the Claimants did not ask her a single question about this critical issue, instead preferring to ask questions about [redacted]. **Avram II**, 28 *et seq.* (paras. 51-53); **Mocanu II**, 7 *et seq.* (paras. 25-26); **Tr. 2019**, 1997 *et seq.*

2.1.4.4 RMGC Did Not Have a Valid Urban Certificate

78 RMGC needed to obtain and maintain a valid urban certificate throughout the EIA Procedure. **Tr. 2019**, 441:2-11 (R. Op.); **Tr. 2019**, 2655:3-19 and 2656:15-19 (Dragoș); **Tofan LO**, 32 *et seq.* (Section II, 2.3-2.4), **Tr. 2019**, 2515:21-2516:17 and 2611:11-22 (Tofan); see also **Respondent's Opening 2019**, 63 *et seq.*; Rejoinder, 79 (paras. 259, 261).

79 The Claimants were aware of this requirement. In 2003, Gabriel Canada stated that the "submission of the EIA to the Minister of Environment ha[d] been delayed pending receipt of the final confirmation of applicable land use zoning, **being the urbanism certificate**." **Respondent's Opening 2019**, 67 (emphasis added); **Tr. 2019**, 442:11-16 (R. Op.); **R-112**, 1.

80 RMGC submitted its (first) urban certificate to Romanian authorities in December 2004, together with its application for the environmental permit. **Respondent's Opening 2019**, 68; **C-525.01**, 1.

81 The Ministry of Environment made it clear to RMGC that the EIA Procedure was tied to the urban certificate and its underlying technical sheet. **Respondent's Opening 2019**, 69; **Tr. 2019**, 442:20-443:1 (R. Op.); **C-475**, 4 (Filipaș); **Dragoș LO I**, 32 (paras. 165-167); **Tofan LO**, 37 *et seq.* (paras. 115-128).

82 It is undisputed that RMGC secured six urban certificates in connection with the Project. **Respondent's Opening 2019**, 65; **Tr. 2019**, 441:18-19 (R. Op.).

83 It is also undisputed that Alburnus Maior and other NGOs challenged those urban certificates in court for years. As of late 2011, court proceedings regarding the urban certificate then in force, *i.e.* UC 87/2010, were pending. **Respondent's Opening 2019**, 66; **Tr. 2019**, 441:19-442:3 (R. Op.); see Counter-Memorial, 368 (Annex IV) (row No. 63).

- Alburnus Maior and other NGOs continued to attack RMGC's urban certificates **throughout 2012** (starting with an appeal of a 21 December 2011 Bucharest Tribunal ruling). **Respondent's Opening 2019**, 70; **Tr. 2019**, 443:12-20 (R. Op.);
- Shortly after RMGC obtained a new urban certificate in **April 2013**, Alburnus Maior applied to the Cluj Tribunal to annul that certificate. That litigation resulted in the certificate's annulment in October 2016. Counter-Memorial, 368 (Annex IV) (row Nos. 63 and 74); **C-2430**; **R-210**, 4; **R-255**; and,
- Although Prof. Podaru denies that an urban certificate is an administrative act subject to challenges, RMGC's urban certificates were repeatedly challenged, suspended, and annulled. **Podaru LO**, 20 *et seq.* (Section II. B.1); **Tr. 2019**, 2419:21-2420:12; **Tofan LO**, 16-24; 28 *et seq.* (Sections 1.2, 1.4).

84 Prof. Tofan explains why the urban certificate is an administrative act and required for both the EIA Review Process and the issuance of the environmental permit. **Tofan LO**, 8 *et seq.* (Section II, 1.1), 32 *et seq.* (Section II, 2.3-2.4), **Tr. 2019**, 2509:14-19; 2515:21-2516:17; 2601:10-12; 2611:11-22.

- Prof. Podaru fails to recognize that the procedure for the authorization of building works (which commences with and is based on an urban certificate) and the EIA Procedure are closely connected and integrated; and,
- Like the procedure for the authorization of building works, the EIA Procedure is based on the urban certificate (and its underlying technical sheet). The correlation between the building permit and environmental permit procedures means that a valid urban certificate is also required for the EIA Procedure. **Tofan LO**, 35 (paras. 107-109) and see also, for other reasons for the need for the urban certificate, **Tofan LO**, 31 *et seq.* (Section II, 2.2-2.4).

85 Prof. Podaru implied that somehow the state courts (with focus on the Cluj Court of Appeal) "suddenly" and "in principle only in this situation" (meaning the Roșia Montană court cases) changed their prior rulings that the urban certificates were not administrative acts. **Tr. 2019**, 2488:7-2489:11. His opinion is at odds with RMGC's position in these cases that these were administrative acts. See **Tofan LO**, 28 *et seq*. (Section 1.4); **Tr. 2019**, 2515:3-9 (Tofan).

86 Although Ms. Mocanu had explained the need for RMGC to have a valid urban certificate before the Ministry of Environment could issue the environmental permit (and although the Claimants dispute this fact), the Claimants did not ask her about this issue at the hearing. **Mocanu II**, 7 *et seq.* (paras. 25-26); **Avram II**, 29 (n. 141); **Mihai LO I**, 81 *et seq.* (Section C.1); **Mihai LO II**, 42 *et seq.* (Section V.C).

2.1.4.5 RMGC Did Not Comply with the Water Framework Directive

87 The Project involved the diversion of water streams both in the Roşia and Corna valleys, which would deteriorate their ecological and chemical qualities. **Respondent's Opening 2019**, 72 *et seq.*; **Tr. 2019**, 444:7-11 (R. Op.); Rejoinder, 83 (para. 274); **C-380.02**, 27 *et seq.*; **C-197**, 86 *et seq*.

88 RMGC needed permission to derogate from the European Water Framework Directive. Under Art. 4(7) of the directive, which had been transposed into Romanian law (1996 Waters Law), these derogations are

granted only in exceptional cases, for purposes of overriding public interest. **Respondent's Opening 2019**, 74; **Tr. 2019**, 444:20-445:4 (R. Op.); **R-83**, 11.

89 Although Prof. Mihai purported to discuss at length the directive and its transposition into Romanian law, he admitted that he held no qualification in environmental law or EU law. **Tr. 2019**, 2274:8-2277:11. He was also unable to confirm the date of transposition, going as far as alleging it was only transposed in 2018, before being corrected by the President of the Tribunal that it was in 2004. **Tr. 2019**, 2328:11-2333:2; **Mihai LO I**, 53 *et seq.* (paras. 212-214, n. 141); **Mihai LO II**, 82 *et seq.* (paras. 274-295).

90 [redacted] **C-574**, 4; **Respondent's Opening 2019**, 75.

91 The Claimants incorrectly argue that the only issue was that RMGC needed to secure a **declaration of public interest** and that RMGC secured that declaration in September 2011 from the Alba County Council. **Tr. 2019**, 447:2-7 (R. Op.).

- The law does not provide from whom that declaration of public interest must come. Neither the TAC, nor the Ministry of Environment ever accepted the Alba County Council declaration or confirmed that it met the requirements of the directive. **Tr. 2019**, 447:8-15 (R. Op.);
- [redacted] **C-574**; **C-575**; **Tr. 2019**, 1228:14-16 (Avram);
- [redacted] **C-486**;
- Given the significance of the Project, State authorities considered that the declaration of overriding public interest needed to come from a central government authority. **Respondent's Opening 2019**, 76; **Tr. 2019**, 447:16-19 (R. Op.); **R-225**, 3; **R-226**, 1; and,

- [redacted]

  Respondent's Opening 2019, 77 *et seq.*; **Tr. 2019**, 449:2-9 (R. Op.); **R-683**, 1 *et seq.*; **R-403**, 8; Rejoinder, 87 *et seq.* (paras. 288, 463); see also **R-507**, 1.

92 Correspondence – both internal State correspondence and correspondence with RMGC – from 2011 to 2014 reflects the Project's lack of compliance more broadly with the directive. **Respondent's Opening 2019**, 79; **Tr. 2019**, 450:2-8 (R. Op.); see *e.g.* **R-474**; **C-883**; **R-542**, **R-546**; **R-545**. For instance:

- In its September 2011 letter, the Ministry of Environment asked RMGC in at least three instances about compliance with the directive. **Tr. 2019**, 1137:21-1138:4 (Avram); **C-575**, 4 *et seq*. (paras. 10, 39, and 41);
- At the 31 May 2013 TAC meeting, ANAR's representative noted that RMGC still needed to submit the documentation to comply with the directive and therefore to secure the water management permit and warned that the documentation needed to "meet all legal provisions in force in the field of water management." **C-485**, 16 and 21; **Respondent's Opening 2019**, 80;
- In October 2013, the EU Commissioner for Environment noted to the Romanian Minister of Environment that the Project did not comply with the directive. **Tr. 2019**, 2333:3-19 (R. Op.); **Respondent's Opening 2019**, 81; **C-2909**, 5; and,
- As of 2014, RMGC still had not submitted the requisite documentation, as the Ministry of Environment explained in a 25 February 2014 letter to the Ministry of External Affairs: "no documentation for issuing the water management permit for the Roşia Montană project has been submitted… we deem that, in order to issue the Water Management Permit, an analysis as regards following the conditions for the implementation of Art. 4(7) and Art. 4(8) is necessary." **R-545**, 1; **Respondent's Opening 2019**, 82.

93 To this day, the Project does not comply with the Water Framework Directive. Rejoinder, 209 (para. 665).

94 The Claimants again improperly rely on the non-official version of the September 2011 letter in which Mr. Anton unilaterally deleted a request for a water management permit, not only because that letter had not been approved by the TAC, but also because the Ministry of Environment repeatedly requested that RMGC secure the water management permit, both before and after that letter and at the November 2011 TAC meeting. **Tr. 2019**, 2047:22-2051:21 (Mocanu); Rejoinder, 83 *et seq.* (paras. 275-290); **R-473**, 1; **R-542**; **C-486**, 24 *et seq.* (Cazan); **C-485**, 16 *et seq.* (Cazan); **R-546**, 1 *et seq*.; see above para. 30.

95 Lastly, Prof. Mihai, while suggesting a water management permit was not required for the Project, could not deny that a water management permit was requested for and obtained prior to the issuance of the environmental permit for the Cernavodă project. **Tr. 2019**, 2323:18-2324:8.

2.1.4.6 RMGC Failed to Secure the Surface Rights

RMGC Needed the Surface Rights for the EIA Review Process

96 As Prof. Dragoş confirmed, under Romanian law, surface rights are a "very important element" of the EIA Procedure:

> "even though there's no express legal obligation to have surface rights before issuing the environmental permit, the systematic interpretation of the law leads to the conclusion that in the EIA … the surface rights are very important.
>
> … Because EIA is looking at the soil, land occupation, the human beings, relocation of population, how, … they will, for instance, lead to deforestation, to other impacts on the environment.
>
> So, yes, surface rights and the way in which the developer will deal with surface rights and how it will obtain these surface rights, it's a very important element of the Environmental Impact.

> The fact that you have to expropriate a large number of people for the project, that's an environmental concern. That should be assessed during the EIA Procedure.
>
> So, of course, nowhere you will find all these requirements in writing explicitly saying this because no laws are working like that. They cannot regulate everything for every situation.
>
> But in looking at the sources of law and the legal provisions applicable to this procedure, from the point of view of national law and European law, one can draw the conclusion in good faith that the surface rights were an important element of the assessment on the environment. That's why I said it's recommendable to be before the environmental permit, but definitely secured before the building permit because you cannot build something over the houses of people that you have to relocate, or you have to expropriate, and so on." **Tr. 2019**, 2690:22-2693:6.

97 The surface rights were necessary for the EIA Review Process because, otherwise, if even a minority of residents refused to move, RMGC would need to redesign the Project around those properties (and thus restart the EIA Procedure) and/or resort to expropriation proceedings with an uncertain outcome. **Tr. 2019**, 453:9-21 (R. Op.); **R-497** (Article 22); Rejoinder, 88 *et seq.* (paras. 291, 302 and 309).

98 RMGC knew from the outset that a failure to acquire the surface rights could derail the Project. **Respondent's Opening 2019**, 85; **Tr. 2019**, 455:16-456:1 (R. Op.); **R-498**, 4; Rejoinder, 89 *et seq.* (para. 298).

99 The TAC expressed concern regarding the risk that Roşia Montană residents would not be willing to leave. **Tr. 2019**, 456:2-11 (R. Op.); **Respondent's Opening 2019**, 86; **C-475**, 32 (Mereuţă).

100 In addition to private homes and land in Roşia Montană, RMGC needed to acquire forestland, church property, and property belonging to mining companies such as Remin and Minvest and public entities. All needed to be acquired in accordance with the procedures set out in Romanian Law. **Tr. 2020**, 234:1-9 (R. Op.); **Respondent's Opening 2019**, 119 *et seq*.

RMGC Needed the Surface Rights to the Project Area, the Buffer Zone, and the Historical Center

101 [redacted] **Tr. 2019**, 1401:7-11; **R-302**, 18; see also Rejoinder, 90 (para. 299).

- [redacted] **Tr. 2019**, 1402:3-1403:22; **C-1811**, 27; see also Counter-Memorial, 90 (para. 299); and,
- [redacted] **Tr. 2019**, 1438:6-1439:20; **R-514**, 33.

102 [redacted] **Tr. 2019**, 1355:2-4.

- [redacted] **Tr. 2019**, 1351:13-19 and 1373:10-1374:8.

103 Following [redacted] Mr. Michael McLoughlin, an expert in mining blasting techniques (of Behre Dolbear) who was not called for cross-examination by the Claimants, opined that

the historical center would have been **uninhabitable** during the Project construction and operations.

- He explains that the **blasting mitigation measures** developed by RMGC's consultant, Ipromin, to safeguard Roşia Montană's historical monuments were not incorporated into the EIA Report. **BD Report III**, 3 (para. 12(g));
- Even if these mitigation measures had been incorporated into the EIA Report, they were insufficient to ensure the habitability of the historical center during the construction and operation phases of the Project. **BD Report III**, 3 (para. 12(h)); and,
- He concludes that, for instance, the houses of Messrs. Sorin Jurca and Zeno Cornea, two Roşia Montană residents who have submitted witness statements, "would be subject to significant damage and risk of injury and should accordingly be considered uninhabitable." (**BD Report III**, 2 (para. 7)). Stated differently, RMGC needed to acquire those properties.

104 [redacted] **Tr. 2019**, 2144:16-2145:15.

- [redacted] **Tr. 2019**, 2151:18-2152:4 and 2166:13-2167:11.

105 [redacted] **Tr. 2019**, 1420-21.

106 [redacted] **Tr. 2020**, 227:2-15 (R. Op.); **Respondent's Opening 2019**, 119 *et seq*.

107 [redacted] **Thomson-86**, 7.

RMGC Needed the Surface Rights of Certain Recalcitrant Landowners to Start the Project (and thus Could not Defer the Acquisition of those Surface Rights)

108 [redacted] **Tr. 2019**, 1432:1-1434:4. However, to start the Project and for the reasons explained below, RMGC needed the surface rights of all persons refusing to sell their property.

109 [redacted] **Tr. 2019**, 1446:22-1447:20; **C-196**, 226; Rejoinder, 355 (para. 1071).

110 [redacted]. **Thomson-86**, 7.

RMGC Failed to Secure the Surface Rights

111 It is undisputed that RMGC has not acquired the requisite surface rights.

- [redacted] **Tr. 2019**, 1355:12-18;

- As of 2011, according to the official and most recent Romanian census, there were over 600 people still living in Roşia Montană village. **Tr. 2019**, 455:1-15 (R. Op.) (describing map at **R-102**); **Respondent's Opening 2019**, 84; see also **Tr. 2019**, 2086:10-17 ([redacted]);

- Many residents, including seven of Romania's witnesses, were then, and remain today, opposed to the Project and unwilling to move. **Jurca II**, 47 *et seq.* (paras. 202-221); **Golgot I**, 2 (para. 4); **Jeflea I**, 2 (paras. 7-10); **Petri**, 3 (para. 8); **Cornea**, 3 *et seq.* (paras. 10, 11, and 26); **Devian I**, 2 (para. 4); **Camarasan I**, 3 (para. 7); **R-449** (2013 video entitled "Roşia Montană exists because of you"); **R-450** (English transcript of R-449) (The version shown at the hearing included the subtitles and showed the list of persons appearing on this video, including the witnesses not called at the hearing. **R. Dem. (Opening Slides)**, 2);

- The Claimants recognize that by 2012, RMGC had not acquired all necessary properties: approximately 22% of the affected households and 40% of the land owned by the State, various other institutions, and private owners, remained to be acquired. **Tr. 2019**, 81:7-11 (Cl. Op. St) and 1403:2-8 (Lorincz); **C-1811**, 27; Rejoinder, 90 (para. 300); and,

- [redacted] **Thomson-86**, 7.

112 [redacted] **Lorincz II**, 61 (para. 124); **C-2083**:

- [redacted] **Tr. 2019**, 1357:2-5;

- [redacted] **Tr. 2019**, 1405:2-8;

- [redacted] **Tr. 2019**, 1405:16-1406:6; and,
- [redacted].

113 [redacted] **Tr. 2019**, 1410:11-13.

114 [redacted]

- [redacted] **Tr. 2019**, 1410:14-1411:5; **Camarasan I**, 2 *et seq.* (paras. 4-6);
- [redacted] **Tr. 2019**, 1413:10-18; **Devian I**, 2 (paras. 3-4); see also **Devian II**, 2 (para. 3). [redacted] **Tr. 2019**, 1413:22-1414:10; and,
- [redacted] **Tr. 2019**, 1415:6-20 and 2083:9-16 (Jurca); **Jurca I**, 15 *et seq.* (paras. 68 and 77).

115 [redacted] **Tr. 2019**, 1416:2-1420:2.

116 [redacted]

- [redacted] **Tr. 2019**, 1420:3-1421:8; **Petri**, 4 (para. 15); **Cornea**, 3 (paras. 10-12);
- [redacted] **Tr. 2019**, 1421:14-1422:16; **Golgot I**; **Golgot II**;
- [redacted] **Tr. 2019**, 1422:13-16. [redacted]
- [redacted] **Tr. 2019**, 1422:10-1425:6; **Jeflea I**, 2 (para. 10); **Jeflea II**, 2 (paras. 4 and 6-7).

117 [redacted] **Tr. 2019**, 1425:11-1426:2.

2.1.4.7 RMGC Did Not Provide Information Regarding Reforestation

118 To make way for the Project, RMGC planned to deforest 256 hectares of land. **Mocanu II**, 75 *et seq.* (paras. 219-226); Rejoinder, 91 (para. 302).

119 By law, to compensate, it was required to reforest an equivalent area. Given the size of the envisaged deforestation, RMGC needed to secure a Government decision confirming and authorizing both the deforestation and the reforestation. **Mocanu II**, 77 (para. 225); Rejoinder, 98 (para. 323); **R-501**; **R-117**; see below **Section 4.2.2.1**.

120 The TAC and Ministry of Environment requested, including in a meeting in January 2012, that RMGC provide its reforestation plans. **Tr. 2019**, 1196:15-1197:18 (Avram); **C-575**, 1 (Requests 2 and 3).

121 [redacted] **Tr. 2019**, 2042:17-22 (Mocanu).

122 [redacted] **Tr. 2019**, 2042:12-16; see also **Tr. 2019**, 2691:13-2692:4 (Dragoş).

2.1.4.8 RMGC Failed to Address Critical Technical Issues

123 RMGC also failed to address key technical issues relevant to the EIA Review Process. Accordingly, the Ministry of Environment was not in a position to issue the permit and its non-issuance of the permit cannot amount to a breach of the BITs. **Respondent's Opening 2020**, 15; **Tr. 2020**, 163:22-164:14 (R. Op.).

124 When assessing the technical expert evidence, the Tribunal should bear in mind that three of the Claimants' technical experts, who did not testify at the hearings, were working for and paid by the Claimants and/or RMGC for years. They are therefore not independent. **Respondent's Opening 2020**, 79; **Tr. 2020**, 201:20-202:5 (R. Op.). Further to RMGC's request, Mr. Patrick Corser (RMGC's TMF advisor) and Dr. Christian Kunze (RMGC's advisor on waste management and mine closure) attended TAC meetings between 2007 and 2011. Furthermore, Mr. David Jennings has been advising RMGC since 2011 on cultural issues. All three appeared before the Romanian Parliament in the fall of 2013. In this arbitration, they are thus defending their work of many years and their reports do not contain statements of independence. By contrast, Romania's technical experts have not been previously involved with the Project. **Respondent's Opening 2020**, 79; **Tr. 2020**, 202:5-9 (R. Op.).

Cyanide Transportation and Management

125 It is undisputed that the use of cyanide would have been necessary to extract the gold at Roşia Montană. The Project, however, stalled in part because of public perception relating to the envisaged use of cyanide. **Respondent's Opening 2020**, 18; **Tr. 2020**, 168:3-9 (R. Op.).

126 As Ms. Christine Blackmore, Romania's cyanide expert and a Cyanide Code auditor, has written, "preparing information on the management of cyanide for the stakeholders is vitally important for environmental and social acceptance." In this case, the question was not "should cyanide be used" but rather "can RMGC demonstrate to stakeholders that it is capable of managing cyanide responsibly"? **Respondent's Opening 2020**, 18; **Tr. 2020**, 168:10-169:2 (R. Op.).

127 The disaster at Baia Mare in 2000 greatly impacted public perception about the Project. Many concerns about the Project stemmed from what had happened at Baia Mare. **Respondent's Opening 2020**, 19 *et seq.*; **Tr. 2020**, 169:3-170:2 (R. Op.); **R-430**; **CMA-61**; **CMA-2**; **Tr. 2019**, 361:4-20 (R. Op.); Counter-Memorial, 37 *et seq.* (paras. 100-101).

- In response to the Baia Mare disaster, the international community established a Cyanide Code. From that point forward, good practice for

mining companies meant compliance with the Code. **Respondent's Opening 2020**, 19; **Tr. 2020**, 169:13-17 (R. Op.); **CMA-18**; **CMA - Blackmore Report**, 10 *et seq.* (paras. 29-30); and,

- Also as a result of the Baia Mare disaster, in 2009, Romania was found to have breached the European Convention on Human Rights by failing to protect the right of the plaintiffs, a father and son who lived near Baia Mare, to a healthy and safe environment. The Romanian Government understandably wanted to avoid another adverse ruling and required assurances that this type of accident would not occur again. **Respondent's Opening 2020**, 19; **Tr. 2020**, 169:13-170:2 (R. Op.); **DD-69**.

128 Although RMGC announced in March 2006, just before submitting the EIA Report to the authorities, that it had become a signatory to the Cyanide Code and that it intended to be certified in the Code, it never secured that certification. **Respondent's Opening 2020**, 21; **Tr. 2020**, 170:11-17 (R. Op.); **C-194**, 12.

129 In May 2006, RMGC submitted its Cyanide Management Plan (part of the EIA Report) to the authorities. **Respondent's Opening 2020**, 22; **Tr. 2020**, 170:20-171:1 (R. Op.); **Tr. 2019**, 1112:22-1113:7 (Avram); **C-194**.

130 In late 2006, the IGIE requested more information regarding RMGC's Cyanide Management Plan and warned that, based on that plan and the EIA Report more generally, the public was not sufficiently informed about the risks of the Project relating to cyanide use. **Respondent's Opening 2020**, 23 *et seq*; **Tr. 2020**, 171:4-14 (R. Op.); **Tr. 2019**, 1108:5-1109:7, 1111:1-6 and 1121:16-18 (Avram).

- [redacted] despite the IGIE's requests, RMGC never amended its Cyanide Management Plan. **Respondent's Opening 2020**, 26; **Tr. 2020**, 171:20-172:3 (R. Op.); **Tr. 2019**, 1112:22-1113:7.

131 The IGIE noted that RMGC did not propose a transportation route in the Cyanide Management Plan; it hinted towards multiple alternatives in the Transportation chapter of the EIA Report but did not select a specific route. **Respondent's Opening 2020**, 24 *et seq.*; **Tr. 2020**, 172:4-173:12 (R. Op.); **Tr. 2019**, 1116:15-18 (Avram); **C-229**, 14.

- Although the IGIE recommended that RMGC identify the name of the cyanide transportation company and the transportation route and that it do so **in the EIA Report** (*i.e.* in advance of and for the purposes of the Ministry issuing the environmental permit), RMGC never did so. **Respondent's Opening 2020**, 26; **Tr. 2020**, 172:4-173:12 (R. Op.); **Tr. 2019**, 1113:10-1114:17 (Avram); see also **Tr. 2019**, 1117:1-18 (Avram); **C-229**, 14; and,
- The **route and method of transportation** would have affected the quantities of cyanide transported and the form in which it was transported (*i.e.* solid or liquid form). Under one of RMGC's possible routes, the cyanide would have arrived in Constanţa, gone by train going close by Bucharest, through the Apuseni Mountains, all the way to Zlatna, the train station closest to Roşia Montană. It would then have been transported by truck to Roșia Montană. **Respondent's Opening 2020**, 25; **Tr. 2020**, 172:22-173:6 (R. Op.).

132 [redacted] **Tr. 2019**, 1121:16-19 and 1113:10-1114:17; see also **Tr. 2019**, 1117:1-18; **Avram II**, 69 *et seq.* (para. 122).

133 The requirement under Romanian law for a cyanide transportation route during the operational phase does not mean that authorities may not ask for that information earlier on and during the EIA Review Process, especially when there are multiple possible routes and they involve crossing the country and potentially using different forms of transportation (ship, rail, and/or truck). **Respondent's Opening 2020**, 30 *et seq.*; **Tr. 2020**, 174:4-20 (R. Op.).

- Without a defined route, it is not possible to conduct a meaningful EIA since with the stakeholders who are potentially affected by the cyanide transportation cannot be identified and engaged, whether they be in Constanţa, near Bucharest, or elsewhere. **Respondent's Opening 2020**, 32; **Tr. 2020**, 180:7-12 (R. Op.); **CMA - Blackmore Report**, 26 (para. 106); and,

- Although the Claimants argue that RMGC was not required to define the cyanide transportation route (or to give further details regarding its planned use of cyanide) for purposes of the environmental permit, Ms. Blackmore explains that companies are often in practice required to give more information to State authorities than expressly provided for in the Cyanide Code or the law. **Respondent's Opening 2020**, 34 *et seq*.; **Tr. 2020**, 174:21-175:14 (R. Op.); **CMA - Blackmore Report**, 18 *et seq.* (paras. 70-75).

134 In addition to the IGIE, over the years, the public also raised questions about the Project's plans for cyanide transportation and management. **Respondent's Opening 2020**, 29; **Tr. 2020**, 175:19-21 (R. Op.); **C-258**, 5 *et seq.*; **C-286**, 151.

135 The TAC also raised such questions on many occasions. **Respondent's Opening 2020**, 30 *et seq.*; **Tr. 2020**, 175:22-177:9 (R. Op.); **C-475**, 36 *et seq*. (Irimia); **C-487**, 40 (Lungoci); **C-592**, 9; **C-486**, 33 (Cristea); **C-484**, 12 (Buică).

136 Notwithstanding the TAC's requests, including in 2013, RMGC never amended its Cyanide Management Plan and never specified the transportation route. **Respondent's Opening 2020**, 40.

137 The TAC never approved RMGC's Cyanide Management Plan. **CMA - Reichardt Report**, 13 *et seq.* (paras. 56-102); **CMA - Blackmore Report**, 29 *et seq.* (paras. 120-134). Approval of the plan would have been provided if and when the environmental permit had been issued.

138 Ms. Blackmore confirms that RMGC's Cyanide Management Plan lacked information regarding transportation. **Respondent's Opening 2020**, 34 *et seq.*; **Tr. 2020**, 177:20-178:5 (R. Op.).

139 Ms. Blackmore also notes that information was lacking regarding the road from Zlatna to Roşia Montană, which RMGC's own consultant, AMEC, had designated as high risk. **Respondent's Opening 2020**, 36; **Tr. 2020**, 179:2-5 (R. Op.).

140 [redacted]

[redacted] **Tr. 2020**, 127:5-16 (Cl. Op.).

141 [redacted] **Tr. 2020**, 127:16-19 (Cl. Op.). The analyses of transportation routes that the Claimants refer to were either never presented to the TAC or never endorsed by RMGC. **Respondent's Opening 2020**, 22; **Tr. 2020**, 180:4-12; **CMA - Wilde Report II**, 38 (para. 132).

142 Determining the transportation route was important for permitting and planning reasons. RMGC in the EIA Report and in discussions with the TAC repeatedly suggested that the cyanide might be transported by rail to **Zlatna**. But the requisite facilities did not exist at Zlatna and would have needed to be built, as Mr. Dragoş Tănase (General Manager of RMGC) acknowledged to the TAC in 2013. **Respondent's Opening 2020**, 38; **Tr. 2020**, 180:13-181:14 (R. Op.); **CMA - Blackmore Report**, 32 (paras. 133-135); **C-484**, 13 (Tănase); **C-258**, 5.

- [redacted] **Tr. 2020**, 126:10-11 (Cl. Op.); see above para. 142.

143 [redacted] **Tr. 2019**, 2310:22-2316:17.

- When assessing Prof. Mihai's evidence, the Tribunal should consider not only [redacted] and lack of qualifications in environmental law, but also his explanations that an unidentified team helped him draft his opinions (**Tr. 2019**, 2250:8-14) and his superficial understanding and recollection of his opinions. **Tr. 2019**, 2286:13-18, 2287:2-5, 2303:14-17 and 2307:13-18.

144 Ms. Wilde, Romania's expert on EIA Review Processes, who in her 30 years' experience has overseen or contributed to such processes in more than 50 countries, opined that an EIA Procedure would have been needed for the Zlatna hub. She also confirmed that this would have delayed production of gold at Roşia Montană, delay which RMGC never accounted for or analyzed. The Claimants did not call Ms. Wilde for cross-examination. **CMA - Wilde Report II**, 36 *et seq.* (paras. 125-144).

145 RMGC explained in the Cyanide Management Plan in May 2006 that "[c]ompanies demonstrate their compliance [with the Cyanide Code] by having their operations inspected by independent third-party auditors ...." **C-194**, 12 (emphasis added); **Respondent's Opening 2020**, 39; **Tr. 2020**, 181:15-21 (R. Op.).

- RMGC could have but did not commission a **pre-operational audit**. Had RMGC obtained a positive result, it could have confirmed this publicly, which would have signaled to stakeholders that the Project complied with the Cyanide Code and likely helped to alleviate concerns about the Project's use of cyanide. **Tr. 2020**, 182:1-9 (R. Op.); **CMA - Blackmore Report**, 17 (paras. 63-65); see also **Respondent's Opening 2020**, 41 *et seq.*; **C-946**, 1 *et seq.*; **C-944**, 2 *et seq*;
- The president of the International Cyanide Management Institute informed Mr. Henry in the summer of 2013 that securing pre-operational certification helped companies with their social license to operate. Mr. Henry agreed that this would be "very helpful for us." **Respondent's Opening 2020**, 42; **Tr. 2020**, 182:10-183:1 (R. Op.); **C-946**, 3;
- In the summer of 2013, RMGC contacted both AMEC and Wardell Armstrong about doing a pre-operational audit but either never went through with the audit or did the audit but did not secure a positive result and thus made no public announcements. **Respondent's Opening 2020**, 43 *et seq.*; **Tr. 2020**, 183:2-184:12 (R. Op.); **C-944**, 2 *et seq.*; **C-945**; and,
- The Claimants were thus aware that they needed more support for the Project, and that at least part of the opposition stemmed from concerns regarding cyanide. They were also aware, and agreed, that an audit

would help bolster support. **Respondent's Opening 2020**, 42; **Tr. 2020**, 183:17-21 (R. Op.).

146 Following its review of the Roşia Montană Law, in November 2013, the Joint Special Committee of Parliament recommended, based in part on the views of the representatives of civil society, that the ministries consider further "the potential risks associated with the cyanide use in mining operation." **Respondent's Opening 2020**, 33; **Tr. 2020**, 177:14-19 (R. Op.); **C-557**, 67.

147 Another critical issue related to RMGC's cyanide management strategy (which was in part included in the Cyanide Management Plan) was the lack of detail in the EIA Report on emergency response. **CMA - Blackmore Report**, 44 (Section 5). [redacted] **Tr. 2019**, 2066:6-15.

148 Finally, although the Claimants complained about the unavailability of Ms. Cathy Reichardt, Romania's other cyanide expert, Ms. Blackmore endorsed Ms. Reichardt's expert evidence and was available for examination. The Claimants did not, however, call Ms. Blackmore for cross-examination. Both experts had confirmed in their reports that RMGC's strategy for the management, handling and transportation of cyanide was deficient which (i) resulted in RMGC being unable to alleviate the TAC's and the public's recurrent concerns about its ability to use cyanide safely and securely; and (ii) would have led to its likely failure to comply with the Cyanide Code. **CMA - Reichardt Report**, 59 *et seq.* (paras. 243-256); **CMA - Blackmore Report**, 51 *et seq.* (paras. 222-225).

Risk of Tailings Management Facility Dam Failure and Pond Seepage

149 The TAC and the public repeatedly expressed concerns about a possible dam failure at Roşia Montană. **Respondent's Opening 2020**, 47 *et seq.*; **Tr. 2020**, 185:15-186:10 (R. Op.); **C-280**, 1; **C-270**, 2; **C-318**, 169; **C-615**, 5; **C-477**, 27 (Cadariu); **C-486**, 3 (Pineta); **C-1763**, 5.

150 Similarly, the Ministry of Environment and the TAC raised concerns about the risk of seepage into the ground of toxic substances from the tailings

pond. **Respondent's Opening 2020**, 51 *et seq.*; **Tr. 2020**, 186:11-17 (R. Op.); **C-533**, 10 *et seq.*

151 The public had also evoked this concern for seepage. **Respondent's Opening 2020**, 56; **Tr. 2020**, 188:18-189:1 (R. Op.); **C-318**, 1 and 23; **C-270**, 2; **C-242**, 58; **C-616**, 3.

152 The TAC repeatedly signaled the need for a man-made, **geomembrane or HDPE liner**, in addition to or instead of a natural liner composed of compacted clay (also called a colluvium liner). **Respondent's Opening 2020**, 53; **Tr. 2020**, 186:18-187:21 (R. Op.); **CMA - Reichardt Report**, 40 (paras. 166-167); **CMA - Claffey Report I**, 15 (para. 54); **C-477**, 31 *et seq.* (Bălărie); **C-480**, 4 (Bindea).

- In September 2011, in its list of 102 questions to RMGC, the Ministry of Environment requested information and documentation about an HDPE liner for the TMF dam and basin. **Respondent's Opening 2020**, 54 *et seq.*; **Tr. 2020**, 187:22-188:17 (R. Op.); **C-575**, 2 *et seq.* (paras. 9, 55-57, 59, 79); see above para. 30; and,
- The Joint Special Committee of Parliament recommended that State authorities consider commissioning a study in response to concerns regarding the location of the envisaged TMF and the risk of seepage of toxic substances in the groundwater. **C-557**, 69; **Respondent's Opening 2020**, 57.

153 Notwithstanding these requests, RMGC did not propose a geomembrane liner (or a dry-stack tailings TMF).

- The Respondent's TMF expert, Mr. Dermot Claffey, observed that a significant number of mines have geomembrane liners and opined that, given the repeated concerns, RMGC could and should have proposed a geomembrane liner to address the concerns of the public and to respond to the social opposition to the Project. **Respondent's Opening 2020**, 58 *et seq.*; **Tr. 2020**, 189:15-19 (R. Op.); **CMA - Claffey Report II**, 6 *et seq.* (paras. 11 and 35). Mr. Claffey is a renowned expert in designing and operating TMFs with over 30 years of experience. The Claimants did not call Mr. Claffey for cross-examination; and,

- Mr. Claffey opined that RMGC's evaluation of this question was high-level and its decision (not to add a geomembrane liner) likely motivated by cost. **Respondent's Opening 2020**, 62; **CMA - Claffey Report II**, 8 (para. 16).

154 Alternatively, RMGC could have opted for a filtered, **dry-stack tailings management facility**, thereby doing away with the need for a pond and dam altogether. This technology permits the disposal of tailings in a dewatered state. **Tr. 2020**, 191:5-20 (R. Op.); **Tr. 2020**, 537:8-538:15 (Jorgensen); **BD Report I**, 32 *et seq.* (paras. 94-97); **BD Report II**, 30 *et seq.* (paras. 116-120).

- While a dry-stack facility is more expensive, it would have likely assuaged the TAC's and the public's concerns about the risk of a dam failure and the risk of seepage of toxic substances. Behre Dolbear also opined that dry-stack represents better available technology for the Project. **Tr. 2020**, 191:5-20 (R. Op.); **Tr. 2020**, 537:8-17 and 680:11-683:16 (Jorgensen);
- In their 2020 hearing opening arguments, the Claimants argued that RMGC did not entertain the dry-stack tailings option because of the cold, wet climate at Roşia Montană. **Tr. 2020**, 131:22-133:2 (Cl. Op.);
- RMGC had, however, never previously explained to State authorities during the EIA Review Process that it had considered but rejected dry-stack tailings and for this reason; and,
- In any event, Mr. Mark Jorgensen from Behre Dolbear, the only person with expertise in TMFs at the 2020 hearing, explained that dry-stack tailings can be done in cold, wet climates and he could "not imagine a better scenario than Roșia Montană for a dry-stack tailings system." **Tr. 2020**, 611:4-19 and 683:15-16; **BD-13**, 8 *et seq.*

155 The Claimants cannot rely on the issuance of the dam safety permits to argue that Romanian authorities had approved the TMF (without a geomembrane liner or dry-stack installation). **Tr. 2020**, 129:1-8 (Cl. Op.). The dam safety permits did not address questions of seepage or pond lining. These aspects would have been addressed separately by way of conditions imposed as part of the project permitting process.

Respondent's Opening 2020, 60 *et seq.*; **Tr. 2020**, 190:17-22 (R. Op.); **CMA - Claffey Report II**, 7 *et seq.* (para. 15).

The Lack of Sufficient Research at Orlea

156 There have only been initial investigations at Orlea, and RMGC has not yet applied for an ADC for the area. **Respondent's Opening 2020**, 64; **Tr. 2020**, 192:10-18 (R. Op.); see above para. 57.

157 The TAC repeatedly raised questions about the lack of research at Orlea and requested throughout 2011 that RMGC provide an ADC. **Respondent's Opening 2020**, 64 *et seq.*; **Tr. 2020**, 192:19-193:19 (R. Op.); **C-483**, 45 (Pineta); **C-575**, 14 (last sentence); **C-444** (first para.); see also **C-1350** (first para.); **C-476**, 59 (Timiş); see above para. 57; Rejoinder, 94 *et seq.* (para. 313).

158 The public expressed concerns regarding the Project's destruction of the Roman galleries, including in Orlea. **Respondent's Opening 2020**, 67; **Tr. 2020**, 193:19-194:8 (R. Op.); **C-252**, 21 *et seq.*; see also **CMA - Claughton Report II**, 38 *et seq.* (paras. 127-128 and 131-132).

159 The Claimants argue that, because works at Orlea would only start a few years into the Project, RMGC had time to obtain the ADC. **Tr. 2019**, 171:7-20 (Cl. Op.); **Tr. 2020**, 194:8-11 (R. Op.).

160 First, however, representatives of the Ministry of Environment told RMGC at the time that they needed the ADC for Orlea for purposes of deciding whether to issue the environmental permit. See above para. 57; **Respondent's Opening 2019**, 39; **C-476**, 59 (Pineta, Timiş); **C-483**, 44 *et seq.* (Pineta).

161 Second, experts have opined that significant archaeological discoveries at Orlea were likely, leading Dr. Peter Claughton, Romania's expert on cultural heritage issues (not called for cross-examination), to emphasize the "significant uncertainty as to what might be found". **Respondent's Opening 2020**, 68-69; **Tr. 2020**, 194:11-195:15 (R. Op.); **CMA - Claughton Report II**, 15 *et seq.* (Section 3.2) and 27 *et seq.* (paras. 92-93); **CMA-54**, 44 *et seq.* (paras. 3.37-3.38); **R-221**, 6 *et seq.,* 11 and 22.

162 [redacted] **Tr. 2020**, 134:21-135:19 (Cl. Op.).

- [redacted] **Tr. 2020**, 134:14-20 (Cl. Op.) [redacted]

163 Discoveries during the EIA Review Process might have affected the Project. For instance, if archaeologists discovered vestiges requiring *in situ* preservation, authorities might have required RMGC to modify the Project (by for instance modifying the geographic limits of the Project Area) and to submit an amended EIA Report. This is why the Ministry of Environment requested the ADC during the EIA Review Process and needed the authorizations from cultural experts for RMGC to operate in the area in question. **C-476**, 56 (Timiş) (addressing the discovery of the "Temple of Apollo"); Rejoinder, 94 *et seq.* (paras. 312-313); **CMA - Claughton Report II**, 28 (paras. 94-95).

164 The Claimants note that following the Alburnus Maior Research Program, the authorities recommended that some sites be preserved *in situ*. **Tr. 2020**, 133:18-22 (Cl. Op.). As a consequence, RMGC needed to amend the footprint of the Project. Rejoinder, 94 (para. 312). Depending on its outcome, similar requirements could have been imposed once the research at Orlea was carried out.

165 If archaeological discoveries were made at Orlea during the construction or operational phases, they could result in stopping the works, causing delay and costs. **Tr. 2020**, 249:19-250:6 (R. Op.); Rejoinder, 375 (para. 1120); see also **Respondent's Opening 2020**, 160-163; **CMA - Claughton Report II**, 28 *et seq.* (paras. 96-110); **CMA - Claughton Report I**, 27 (para. 79); **BD Presentation**, 22; **BD Report II**, 21 *et seq.* (Section 3.5).

166 It was also important for the Ministry of Culture (and not just for the Ministry of Environment) that RMGC secure the ADC for Orlea since the Ministry's 2013 endorsement of the Project was contingent thereon. **Tr.**

2019, 424:18-425:13 (R. Op.) and 2705:21-2706:8 (Dragoş); **C-655**, 4; see above para. 57.

Absence of Information Regarding Post-Closure Land Use

167 The post-closure land use (or "after-use") of the mine site is a stage in a mining project that follows the rehabilitation of the land. It may entail re-establishment of the pre-existing land use, establishment of a new land use, or a combination of both. **Tr. 2020**, 196:9-16 (R. Op.).

168 RMGC submitted in 2006 as part of its EIA Report a Mine Rehabilitation and Closure Plan. **C-195**.

169 Under Romanian law, RMGC was required to describe the after-use of the site. **Respondent's Opening 2020**, 71; **C-538**, 6 and 33 (Section IV of Standard Contents); **R-466**, 6 and 58; **C-2460**, 5.

170 Likewise, the 1999 United Nations Environmental Guidelines for Mining Operations states that "[f]inancial assurance assumes that the costs of reclaiming and restoring mined land to subsequent uses … are ultimately the responsibility of the owner or operator of the mine." See **Respondent's Opening 2020**, 75.

171 EU Directive 2006/21/EC states that "[t]he **calculation of the guarantee** … shall be made on the basis of (a) the likely environmental impact of the waste facility, taking into account in particular … the **future use** of the rehabilitated land." **CMA-46**, 13 (emphasis added); see also **Respondent's Opening 2020**, 75.

172 The EIA Report checklist that the TAC and Ministry of Environment are required to review includes the following question: "Is the reinstatement and subsequent use of lands… described?" **Respondent's Opening 2020**, 71; **C-2460**, 5; see above paras. 32 and 40.

173 [redacted] **Respondent's Opening 2020**, 71; **Tr. 2020**, 198:8-12 (R. Op.); **C-2460**, 5; see above para. 32.

174 The TAC repeatedly asked RMGC about the after-use of the site and the responsibility for bearing the relating costs. **Respondent's Opening 2020**, 72; **Tr. 2020**, 199:2-5 (R. Op.); **C-487**, 21 (Haiduc); **C-483**, 53 (Anton); **C-486**, 50 (Hârșu).

175 The public raised questions about the after-use of the site. **Respondent's Opening 2020**, 73; **Tr. 2020**, 199:5-11 (R. Op.); **C-242**, 8 and 57.

176 Notwithstanding the questions and comments, RMGC never revised its Mine Rehabilitation and Closure Plan.

177 Dr. Mark Dodds-Smith, Romania's expert on waste management and mine closure, who has been involved in over 150 mining projects, opines that the Closure Plan did not conform to good practice mainly because it did not identify the after-use and only included a summary of "predicted closure costs". Good practice is to identify the after-use at an early stage and to include that cost estimate and a breakdown in the Closure Plan. **Tr. 2020**, 199:12-20 (R. Op.); **CMA - Dodds-Smith Report II**, para. 22 *et seq.* The Claimants did not call Dr. Dodds-Smith for cross-examination.

178 Dr. Kunze admits that the Closure Plan did not include funding of after-uses but opines that it did not need to do so – an opinion that Dr. Dodds-Smith rejects. **Kunze II**, 37 (para. 64); **Respondent's Opening 2020**, 74 *et seq*.; **Tr. 2020**, 199:21-200:4 (R. Op.).

- Dr. Kunze's opinion contradicts statements in a presentation he gave to the TAC in November 2011, that "calculation [of the guarantee was] based on the likely impact, waste characteristics and after use." **Respondent's Opening 2020**, 76; **Tr. 2020**, 200:5-20 (R. Op.); **C-1609**, 5; and,
- Dr. Dodds-Smith notes that he "did not see anywhere that [Dr. Kunze] had advised the TAC members that someone else [other than RMGC] was going to have to fund the final post-mining land-use including commitments made in, for example, the EIA Report and the Biodiversity Management Plan". **CMA - Dodds-Smith Report II**, 23 (para. 80); **Respondent's Opening 2020**, 77; **Tr. 2020**, 200:21-201:4 (R. Op.).

179 The environmental permit would have comprised mitigation measures in connection with mine closure that the Ministry of Environment would have considered appropriate. **CMA - Dodds-Smith Report II**, 9 (para. 23); **Respondent's Opening 2020**, 78; **Tr. 2020**, 201:5-10 (R. Op.).

2.1.5 The EIA Review Process Was Ongoing in 2012

180 In letters from **December 2011** responding to questions from the Parliament, the Minister of Environment, Mr. Laszlo Borbély, explained that the EIA Review Process was underway. **Respondent's Opening 2019**, 29; **Tr. 2019**, 414:19-415:5 (R. Op.); **R-470**; **R-469**.

181 [redacted]

Respondent's Opening 2019, 31; **Tr. 2019**, 416:5-10 (R. Op.); **R-472**, 5.

182 [redacted] **Tr. 2019**, 1199:11-1200:16; **R-472**.

183 In January 2012, RMGC published its **2011 Annual Report**, which did not refer to the 29 November meeting as being the final TAC meeting. Nor did the report suggest that the TAC had finished its review and that RMGC expected it to decide. This report refers to outstanding issues and permits. **Respondent's Opening 2019**, 32; **Tr. 2019**, 416:11-22 (R. Op.); **C-1115**, 68; see also **R-502**, 44; **R-508**, 63.

184 [redacted] **C-1236**, 6 *et seq.*; see also Rejoinder, 101 *et seq.* (paras. 327-332).

185 [redacted]

Tr. 2019, 1182:5 *et seq.*; **C-1236**, 6 *et seq.* [redacted]

- [redacted]
- [redacted]
- [redacted] **Tr. 2019**, 1192:20-1193:3.[3]

186 [redacted]

[3] [redacted]. See **Tr. 2019**, 1982:9-1985:16.

[redacted] **Tr. 2019**, 1185:22-1187:3; **C-1236**, 6 *et seq.*

187 [redacted] **Tr. 2019**, 1182-1191:22; **C-1236**, 6 *et seq.*

188 [redacted] **Tr. 2019**, 1193:13-1194:13; **C-1115**, 67.

189 [redacted]

190 In **May 2012**, Gabriel Canada noted that public officials had referred to outstanding issues in the EIA Review Process, including the need for a Government decision that the Project was of public interest, the need for an ADC for Orlea, and the need for a Waste Management Plan. **Respondent's Opening 2019**, 33; **Tr. 2019**, 420:6-11 (R. Op.); **R-507**, 1; see also **R-489**, 5.

2.1.6 The EIA Review Process Was Ongoing in 2013-2014

191 The TAC met four times in 2013: on 10 and 31 May, 14 June, and 26 July. **Respondent's Opening 2019**, 87; **Tr. 2019**, 458:13-17 (R. Op.); **C-484**; **C-485**; **C-481**; **C-480**; Rejoinder, 194 (para. 622).

192 At those meetings, the TAC raised issues such as:

- RMGC's lack of compliance with the Water Framework Directive. **Tr. 2019**, 450:9-19 (R. Op.); **C-484**, 18 *et seq.* (Pătraşcu, Constantin, Gabor, and Tănase); **C-485**, 16 (Pătraşcu, Cazan, and Tănase); see also above **Section 2.1.4.5**; and,
- The route by which cyanide would be transported to Roşia Montană. The Ministry of Transport's representative observed "nobody in the Constanţa Port was contacted, nobody knows about this potential transport." RMGC's representatives vaguely responded that the final route would be decided "when the time comes." **C-484**, 12 *et seq.* (Buică, Avram and Tănase); **Respondent's Opening 2019**, 90; **Tr. 2019**, 459:8-460:8 (R. Op.); Rejoinder, 194 *et seq.* (paras. 624-625); see also above **Section 2.1.4.8**.

193 The Claimants argue that the TAC's meetings in 2013 re-confirmed that the requirements for the permit were met and that the Ministry of Environment was prepared to recommend issuance of the permit. However, on 30 May 2013, the TAC president, Mr. Pătraşcu, indicated that there "were … things left uncertain after the last discussions, which took place in 2011, at the end of 2011." **C-485**, 18; Rejoinder, 195 (para. 626); R. PO27 Reply, 57 *et seq.* (paras. 143-145). And, as demonstrated above, the TAC discussed numerous technical issues in 2013, demonstrating that the EIA Review Process was ongoing. See above *e.g.* paras. 61, 92-92, 136, 142, and 192.

194 During these meetings, RMGC did not apprise the TAC of the status of the litigation regarding the urban certificates. See Rejoinder, 179 *et seq.* (paras. 570-571); see also above para. 83.

195 Gabriel Canada's 2013 and 2014 public disclosures confirm its understanding that the EIA Review Process was ongoing. **Respondent's Opening 2019**, 88 *et seq.*; **Tr. 2019**, 459:1-5 (R. Op.); **R-549**, 4; **R-251**, 3; **C-1810**, 7; see also **R-510**, 3; **R-520**, 2; **R-539**, 5 *et seq.*; **C-1118**, 101; **R-541**, 6; Rejoinder, 202 *et seq.* (paras. 647-652).

196 In March 2013, Gabriel Canada disclosed that it was "confident that it **c[ould]**, and **w[ould], comply** with its environmental obligations", reflecting that this was an ongoing effort. **R-549**, 2 (Mr. Henry stating: "**we will continue the dialogue** with the new Romanian Government regarding

the economic, social, cultural and environmental benefits that the Project will bring to Romania. We look forward to finalising the environmental permitting process...") (emphasis added).

197 Also, in March 2013, Gabriel Canada reported that it "**look[ed] forward to furthering discussions** with the relevant Ministries" regarding compliance with environmental standards. **Respondent's Opening 2019**, 91; **Tr. 2019**, 460:9-14 (R. Op.); **C-1810**, 7.

198 The Claimants rely on the conclusions of an **interministerial commission** that met in March 2013 and its statement that the Ministry of Environment "can issue the Environmental Permit and any other details can be solved along the way." **C-2162**.

- The views of that commission are of little relevance as a matter of law and fact. The commission was not a decision-making body and its views took the form of an **informative note** addressed to the Government. Its views, which total eight pages, were based on limited information, namely two two-hour meetings on 11 and 22 March 2013 and they were issued just two weeks after the first meeting (on 25 March 2013). Furthermore, contrary to the Claimants' insinuations, the note did describe outstanding issues, for instance, relating to the PUZ. **C-2162**, 8 (n. 3); **Tr. 2019**, 457:19-458:12 (R. Op.); R. PO27 Reply, 55 (para. 137 f); Rejoinder, 192 *et seq.* (paras. 616 and 618-621).

199 The Claimants refer to the Ministry of Environment's publication on 11 July 2013 of a **note for public consultation** as evidence that the Ministry was allegedly ready to issue the permit. They refer erroneously to this document as a "draft environmental permit." The document's title was "note for public consultation", not "draft permit", to reflect the Ministry's view that the EIA Review Process had not reached the stage of the procedure where the decision on the issuance of the permit could be made. Moreover, the public consultation to which the document referred could yield additional observations that the TAC may have needed to review. **Respondent's Opening 2019**, 92 *et seq.*; **Tr. 2019**, 460:15-461:2 (R. Op.); R. PO27 Reply, 58 *et seq.* (paras. 146-147); **C-555**.

200 A **2014 RMGC management report** confirms its understanding that the note was not a draft permit, that the EIA Review Process was underway,

that the TAC was still to make a decision, and that there will then be a public consultation and preparation of a draft environmental permit. **Respondent's Opening 2019**, 93; **Tr. 2019**, 461:3-6 (R. Op.); **C-1570.03**, 6; **Mocanu II**, 78 (para. 228); Rejoinder, 198 *et seq.* (para. 637).

201 The Claimants place undue reliance on an undated document that they describe as a draft decision to issue the environmental permit.

- The document was, however, prepared by Mr. Avram and Mr. Pătraşcu (who was then TAC President and thus, a political appointee, and not a member of the TAC who would be participating in the decision regarding the Project), not by the EIA Directorate of the Ministry of Environment (or the TAC). **Tr. 2019**, 1984:5-1985:2 and 1986:7-12 (Mocanu); Rejoinder, 199 (para. 639); **Mocanu II**, 24 (para. 65); **C-2075**; and,
- [redacted] **Tr. 2019**, 1985:3-16; **CMA - Wilde Report II**, 49 (para. 172).

202 RMGC could and should have addressed the **requests and concerns of the TAC and the public**, by defining its cyanide transportation route and transporter, proposing to implement a geomembrane liner, and/or undertaking the necessary archaeological research at Orlea. All of these issues were relevant to the Project's permitting and feasibility. **Respondent's Opening 2020**, 86; **Tr. 2020**, 203:9-16 (R. Op.).

203 All of these issues were objective and legitimate issues which TAC members raised as neutral civil servants. [redacted]

[redacted] **Tr. 2019**, 2044:4-17.

204 RMGC chose not to address these issues and, by not doing so, it fueled the social opposition to the Project. **Tr. 2020**, 203:17-204:1 (R. Op.).

205 The Claimants preferred to seek to shift the blame to Romania and to try their luck in arbitration proceedings. **Tr. 2020**, 204:2-5 (R. Op.); Rejoinder, 211 (para. 671).

2.2 The Government Did Not Coerce RMGC or the Claimants and Thus Did Not Fail to Provide Fair and Equitable Treatment to the Claimants' Investments

206 The Claimants allege that the non-issuance of the environmental permit was the result of the Government's failure to force the Claimants to grant additional economic benefits from the Project to the Romanian State. Reply, 20 *et seq.* (paras. 23, 43-51); Memorial, 148 *et seq.* (paras. 364, 682 and 799).

207 The Claimants initially argued that, after the Government began to criticize the State's economic take from the Project, it held the Project's permitting hostage. They further alleged that the Government affirmatively acted on that decision in November 2011 when it abusively intervened in the permitting process to prevent its completion and with it the issuance of the environmental permit. Memorial, 360 *et seq.* (para. 799, (c) and (d)).

208 The Claimants' allegations of Governmental interference in November 2011, however, collapsed during the 2019 hearing, and the Claimants were compelled to change their position. See below paras. 249-256.

209 The Claimants now allege that the Government "prevent[ed] the environmental permitting process from being completed". Cl. PO27 Answers, 9 (para. 15). Without explaining who, how and when, they argue that the successive Governments:

- "held up the permitting process";
- did so because of "political considerations" such as an "increase [of] the State's economic interest in the Project"; and
- "would not allow [the permitting process] to reach a conclusion" because they did not accept the Claimants' economic offers. Cl. PO27 Answers, 4 *et seq.* (paras. 12, 16 and 23).

210 These contentions lack any merit, as demonstrated below.

2.2.1 The Various Governments Did Not Hold Up Permitting

211 The evidence shows that the four Governments in power between 1 August 2011 and 9 September 2013 did not hold up the permitting process. Instead, they sought to support RMGC in its efforts to overcome the permitting difficulties and ultimately prepared the Roşia Montană Law, which was aimed at expediting permitting of the Project; see **Section 2.3** below. **Tr. 2019**, 504:2-505:8; 532:2-26 (R. Op.); Rejoinder, 145 *et seq.* (paras. 468-495); Counter-Memorial, 107 *et seq.* (paras. 284-289).

212 **Eight witnesses**, including two of the Claimants' witnesses, confirmed at the 2019 hearing that the various Governments did not hold up the permitting process. The key evidence comes from:

- [redacted]
- [redacted]

- [redacted]
- [redacted],
- [redacted]

2.2.1.1 The EIA Review Process Was Not Held Up by the Various Governments

213 [redacted] **Tr. 2019**, 2001:7-17.

214 RMGC was frequently late in providing requested information. [redacted] **Tr. 2019**, 2004:9-10.

215 [redacted]

[redacted]

[redacted]

[redacted] **Tr. 2019**, 2045:1-21

216 [redacted]

[redacted] **Tr. 2019**, 2010:3-15.

217 [redacted] **Tr. 2019**, 2010:3-15.

218 [redacted] **Tr. 2019**, 2018:2-15 and 2019:21-2020:9; see also *e.g.* **Respondent's Opening 2019**, 48, 79.

219 [redacted] **Tr. 2019**, 2020:12-17.

2.2.1.2 The Boc Governments Did Not Hold Up the Permitting Process (between 1 August 2011 and 6 February 2012)

220 The Claimants recognize that RMGC was not entitled to a Government decision on the environmental permit before **8 March 2012** (or to a decision from the Ministry of Environment before 31 January 2012):

> "the Ministry had to take a decision on the Environmental Permit by January 31, 2012, and a Government Decision consistent with that proposal had to be issued by March 8, 2012". Cl. PO27 Answers, 14 *et seq.* (para. 24 and n. 57); Reply, 37 (para. 54).

221 Thus, on the Claimants' own case, the Boc Government (in place until **6 February 2012**) did not hold up the environmental permitting. **Tr. 2019**, 508:2-509:2 (R. Op.); **Respondent's Opening 2019**, 168.

222 [redacted] **Tr. 2019**, 1294:9-1296:1.

There Was No Political Interference in the Permitting Process During the Boc Governments

223 Prime Minister Boc did not oppose the Project or its permitting. His Government on the contrary included the Project in the Government program. **R-460**, 64; **Tr. 2019**, 1708:6-9; 1711:9-14; 1718:9-19; 1818:9-21 (Boc).

224 [redacted] **Tr. 2019**, 1761:7-10; 1764:12-14; 1765:8-20; 1789:4-7; 1819:15-1820:4.

225 [redacted] **Tr. 2019**, 1723:8-14; 1758:18-21.

226 [redacted] **Tr. 2019**, 1744:17-1745:1; 1764:15-18; 1766:15-18.

227 [redacted] **Tr. 2019**, 891:17-895:13. However, the Claimants have not produced **any contemporaneous internal document or email** complaining or even suggesting that the Government was holding up the permitting process.

228 There is also no evidence of **external communications** between RMGC or the Claimants and the Romanian authorities, complaining about coercion or blockage.

229 The Claimants had numerous occasions to complain about an alleged blockage (in meetings or in writing) to the following individuals, but have not provided any evidence of such complaints:

- President Băsescu. **R-394**; **C-799**, 7;
- Prime Minister Boc. **C-799**, 4; **C-915**; **C-2641**, 1;
- Minister Borbély. **C-574**, 1;
- Minister Ariton. **Tr. 2019**, 871:2-7 (Tănase); **C-877**; **C-775.01**; **C-2923**, 1; **C-876.01**;
- Mr. Găman. **C-2915**; **R-680**; **C-2919**, 1; **C-2920**, 1; **C-2921**, 1; and,
- Ms. Mocanu and other officials of the Ministry of Environment. **C-574**, 1; **C-441**; **C-483**, 1.

230 [redacted]

- [redacted] **C-915**; **Tr. 2019**, 914:11-14;
- [redacted] **Tr. 2019**, 749:14-21;
- [redacted] **C-915**; **Tr. 2019**, 832:13-834:3;
- [redacted] **Tr. 2019**, 832:4-12; and,
- [redacted] **Tr. 2019**, 837:14-838:7.

231 [redacted] **Tr. 2019**, 853:8-875:13.

232 [redacted] **Tr. 2019**, 2532:14-2533:2 (Bode).

233 [redacted] **Tr. 2019**, 835:19-836:17. [redacted] (**Tr. 2019**, 846:9-12) [redacted] **Tr. 2019**, 848:6-849:19.

234 Gabriel Canada's disclosures to the market relating to the period August and December 2011 do not contain any indication of a permitting hold-up. **R-517**; **R-314**; **C-1809**. [redacted] **Henry II**, 37 *et seq.* (para. 68).

235 Contemporaneous documents prepared by the Ministry of Environment in 2011-2012 (see above **Section 2.1.5**) [redacted] (**C-2919**, 3; **R-404**, 14 (Clause 3.1.1); **R-683**, 2) confirm that permitting was held up because of RMGC's inability to meet the requirements.

236 Just days after the Ministry of Environment's September 2011 letter with 102 questions (**C-575**; see above para. 30), [redacted] (**C-2919**, 3; **R-404**, 14 [redacted]) [redacted] (**C-2919**, 3; **R-404**, 14 [redacted]), [redacted].

- [redacted] **Gaman II**, 38 *et seq.* (paras. 109-145); and,

- [redacted]

237 [redacted] **C-2919**; **R-404**, 14 [redacted].

238 [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Respondent's Opening 2019, 162-165.

239 [redacted] (**Tr. 2019**, 741:21-743:15), [redacted] **Tr. 2019**, 1601:1-1602:11 (Găman).

240 [redacted] (**R-683**, 2), [redacted] (*e.g.* **R-488**, 2), [redacted] **Tr. 2019**, 1510:7-1515:9.

241 [redacted]

- [redacted] **Tr. 2019**, 819:15-18;
- [redacted] **Tr. 2019**, 821:11-822:17;
- [redacted] **Tr. 2019**, 940:3-22; and,
- [redacted] **Tr. 2019**, 1054:1-7.

242 [redacted] **R-683**. [redacted] **Tr. 2019**, 1662:6-9 (Găman); 1654:15-21 (Găman).

243 [redacted] **Tr. 2019**, 1510:7-1511:21 (Găman); 1664:1-1665:6 (Găman). [redacted]

- [redacted] **Respondent's Opening 2019**, 174; 163 *et seq*.; and,
- [redacted].

244 Although the Claimants portray a December 2011 letter from the Ministry of Culture as an endorsement of the Project (see above paras. 50-57),

[redacted].

245 [redacted] **Tr. 2019**, 1662:6-14.

246 [redacted] **Gaman II**, 16 (paras. 41-42).

247 [redacted].

- [redacted] **Tr. 2019**, 864:8. [redacted] **C-2911**; **C-2915**; **C-2921**, 1; **C-2923**, 1; **C-2195**. [redacted]
- [redacted] (**C-2915**; **C-2916**; **C-2920**, 1; **C-2637**, 1; **C-2921**; **C-2923**, 1) [redacted] (**C-476**, 3; **C-2233**; **C-486**, 1) [redacted]

[redacted]

248 The Tribunal should infer from the Claimants' failure to proffer as witnesses [redacted] and [redacted], both of whom have been with RMGC since [redacted], that their evidence would have undermined the Claimants' allegations that the Government held up the permitting process. This is also demonstrated by key documents that they prepared contemporaneously.

There Was No Political Interference During the November 2011 TAC Meeting

249 The Claimants have effectively abandoned their allegations of political interference during the November 2011 TAC meeting:

- In their opening statements at the 2019 and 2020 hearings and in their Answers to the Tribunal's PO27 Questions, the Claimants only once mentioned their allegations of Governmental interference. **Tr. 2019**, 152:10-16; and,
- The Claimants **failed to ask the Respondent's witnesses** any questions about the alleged events during the November 2011 TAC meeting of which the Claimants complain at length in their submissions. The Tribunal should draw an adverse inference that the Claimants have withdrawn their allegation that the Government held up permitting to extract greater financial benefits from the Project.

250 The Claimants' allegations of Governmental interference in the November 2011 TAC meeting have always been unsupported. **Tr. 2019**, 509:3-17 (R. Op.); Rejoinder, 126 *et seq.* (paras. 409-416); Counter-Memorial, 200 *et seq.* (paras. 518-523).

251 [redacted]

252 [redacted],

- [redacted] **Boc**, 12 (paras. 39-42); **Mocanu I**, 14 *et seq.* (paras. 67-68); **Mocanu II**, 55 *et seq.* (Section 2.1.2.4);
- [redacted] **Tr. 2019**, 1726:17-1727:6;
- [redacted] **Mocanu II**, 59 (para. 168);
- [redacted] **Tr. 2019**, 1294:9-1296:1;
- [redacted]
- [redacted] **Tr. 2019**, 955:15-962:19;
- [redacted]

[redacted]

- [redacted] **Tr. 2019**, 819:19-821:3. [redacted] **Tr. 2019**, 820:19-21; 954:11-956:2;
- [redacted] **Tr. 2019**, 820:19-21;
- [redacted] **R-672**;
- [redacted] **R-413**, 2; **C-574**, 2: [redacted]
- [redacted] **Tr. 2019**, 947: 1-22 and 957:10-21; and,
- [redacted] **Tr. 2019**, 957:8-9: [redacted]

253 [redacted]

- [redacted] **Tr. 2019**, 951:3-14;
- [redacted] (**Tr. 2019**, 951:3-6) [redacted]
- Although the Claimants allege that Minister Ariton threatened to block the Project presumably by intervening in the work of the Ministry of Environment on 29 November 2011 (**Tr. 2019**, 152:7-20 (Cl. Op.)), [redacted] **Tr. 2019**, 1865:10-18;
- [redacted] **Tr. 2019**, 1863:19-1864:8, 1893:2-9, 1899:8-10 and 1902:13-19. [redacted]

  [redacted] **Tr. 2019**, 1888:17-1889:4;
- [redacted] **Tr. 2019**, 1889:20-1890:2 (Ariton);

- [redacted] **Tr. 2019**, 948:1-950:2 (Tănase);
- [redacted] **Ariton**, 27 *et seq.* (paras. 85-96); **Tr. 2019**, 1915:16-1923:14;
- [redacted]
- [redacted] **C-2958**; and,
- [redacted].

254 [redacted],

- [redacted] **C-775.01**. [redacted] **Tr. 2019**, 916:2-917:3;
- [redacted] **C-915**;
- [redacted]

[redacted]. **Boc**, 12 (para. 38);

- [redacted] **Ariton**, 4 *et seq.* (paras. 17, 120);
- [redacted] **Tr. 2019**, 865:5-9, 16-18 and 866:8-10; and,
- [redacted] (**C-915**) [redacted] **C-2925**: [redacted]

255 Moreover, as Romania has repeatedly demonstrated, the Claimants' narrative of political interference in November 2011 was rife with other evidentiary flaws. **Tr. 2019**, 507:19-510:5 (R. Op.); Rejoinder, 126 *et seq.* (paras. 409-416); Counter-Memorial, 200 *et seq.* (paras. 518-524):

- First, the TAC had throughout the November 2011 meeting (and before, see above paras. 30-36) signaled that there were **outstanding issues** such that any "interference" aimed at prolonging the EIA Review Process beyond that meeting would have had no effect since the process was ongoing. **Mocanu II**, 59 (para. 168); and,
- Second, the Government had no reason to try to interfere with the TAC's work. Even if the Government had wanted to delay or block the EIA Review Process, it would not have needed to delay or block the TAC's work, since, by law, the Government was to decide whether to issue (i) permits in the critical path for the building permit, including (ii) the environmental permit; the Claimants recognized as much *inter alia* in the preparation of the Roşia Montană Law and in the RMGC 2012 permitting timeline. **C-519**; **R-683**. See above para. 220 and below paras. 533-539.

256 The Government's alleged interference during the TAC meeting of November 2011 was the **sole link** between the previous public statements in 2011 (discussed below) with the subsequent events of 2012 and 2013 that together were alleged to form a composite act and breach. Reply, 20

et seq. (paras. 23-33); Memorial, 360 *et seq.* (para. 799 (a) to (d)). The Claimants have made no other allegations of interference, let alone demonstrated them. There is thus no case of interference, no case of coercion and no composite act.

Public Statements to the Press During the Boc Governments Are Not Measures and Cannot Amount to Governmental Interference in Permitting

257 The Claimants' remaining case on coercion during the Boc Governments is based on public statements and the Claimants' post-hoc misinterpretation thereof. **Tr. 2019**, 468:9-483:12 (R. Op.); Rejoinder, 109 *et seq.* (Section 3.4.1); Counter-Memorial, 88 *et seq.* (Section 4.7).

258 [redacted] **Tr. 2019**, 695:1-697:14. [redacted] **Tr. 2019**, 606:11-12: [redacted]

259 [redacted] **Tr. 2019**, 843:1-5.

260 Individual statements did not reflect the views of the Government. [redacted] **Tr. 2019**, 1795:17-1799:21.

261 [redacted] (**Tr. 2019**, 1798:15-1799:20), [redacted] **Tr. 2019**, 1725:10-20.

262 The Claimants have argued that press articles could only reflect "**statements of intent** about how [officials are] going to exercise or not exercise their authority". **Tr. 2019**, 105:6-8 (Cl. Op.). Even if the Claimants' systematic misconstruction of the statements were accepted, they still needed to prove that those statements were followed by a concrete interference in the permitting process attributable to Romania.

263 [redacted] **Tr. 2019**, 17516-1756:14; 1798:11-1799:21; 1800:13-18 (Boc); 1896:8-1903:3 (Ariton); 1506:9-16 (Găman); 2044:17-2045:21 (Mocanu).

264 In any event, statements of individual politicians do not qualify as measures of Romania. **RLA-207**, 237 (paras. 155-157); **RLA-52**, 64 (paras. 282-283); **CLA-7**, 147 (para. 328); **RLA-48**, 91 (para. 326); **RLA-208**, 73 (para. 251), **RLA-51**, 35 (para. 161), **CLA-30**, 214 (para. 8); **CLA-139**, 60 (para. 161); **RLA-59**, 63 (para. 137).

2.2.1.3 The Ungureanu Government Did Not Hold Up the Permitting Process (between 9 February and 7 May 2012)

265 The Claimants allege that the Ungureanu Government continued the permitting hold-up initiated during the Boc Government. Cl. PO27 Answers, 19 (para. 28).

266 Minister Bode, Minister of Economy of the Ungureanu Government, flatly denied this allegation in his witness statement. **Bode**, 2 *et seq.* (paras. 7-10).

267 Ignoring Minister Bode's evidence, in their opening statement at the 2019 hearing, the Claimants alleged that "[t]he Ungureanu Government did not withdraw the renegotiation demand. The new Minister of Economy, Mr. Bode, was briefed on the status of renegotiations and permitting and met once with RMGC but took no action". **Tr. 2019**, 133:3-7 (Cl. Op.).

268 [redacted] **Tr. 2019**, 2531:14-2532:2. [redacted]

[redacted]

Tr. 2019, 2563:3-6.

269 [redacted]

[redacted] **Tr. 2019**, 2538:15-19.

270 The Claimants did not confront Minister Bode with their allegation that his Government was blocking permitting. His evidence stands unrebutted.

271 The Ministry of Environment, including Minister Borbély, had been supporting RMGC in that context (**R-413**, 2) [redacted] **Tr. 2019**, 2527:22-2528:17 (Bode).

272 Mr. Găman confirmed the same in his witness statement and was not cross-examined on this matter. **Gaman II**, 69 (para. 185).

273 [redacted] **Tr. 2019**, 1292:15-20. [redacted] **Tr. 2019**, 1266:2-9. However:

- the then Prime Minister (Mr. Mihai-Răzvan Ungureanu) stated the opposite. On 19 April 2012, he stated publicly that he wanted the Project's permitting to progress. **C-811**, 1;
- the then Minister of Environment (Mr. Attila Korodi) also stated the opposite. In April 2012 he made clear that there were several open issues, including the Waste Management Plan. **C-431**, 2: "Currently, we have a procedure to implement the new waste management directive for which the company has to come up with a management plan."; see above para. 58-62; and,

- Minister Bode expressed his support for the Project (**R-465**, 2), [redacted]. **Tr. 2019**, 2536:7-2538:4.

274 The only thing blocking the Project was RMGC's non-compliance with the law, which Mr. Suciu specifically requested in April 2012 be changed (as RMGC had also requested in October 2011). [redacted] **R-683**, 2.

275 The approval or rejection of the Waste Management Plan thus did not decide the outcome of the application for the environmental permit; indeed the approval of the Waste Management Plan in May 2013 (**C-658**) did not conclude the work of the TAC or the EIA Review Process.

276 The Ministry of Environment renewed two dam safety permits for the Project (**C-511**; **C-809**) on 18 April 2012 and, on that same date, raised questions on RMGC's waste management plan. **C-646**. The renewal of the dam safety permits shows that the Ministry of Environment was not blocking the Project.

277 [redacted] **R-414**. [redacted] **Tr. 2019**, 2532:14-2533:2 (Bode). [redacted]

> [redacted] **Tr. 2019**, 2561:3-17.

278 [redacted] **Tr. 2019**, 1295:3-5. However,

- There were no political "changes" between 15 March (when the Waste Management Plan was submitted – **C-2243**) and 18 April 2012 (when the Ministry raised questions in relation thereto – **C-646**) as the

Ungureanu Government had been in power since 9 February (and continued in power until 7 May 2012);

- [redacted] **Tr. 2019**, 2533:22-2535:5 (Bode);
- The Ministry of Environment's staff working on these issues – including the civil servants and the TAC president, Mr. Anton – also did not change during this period. **Mocanu II**, 73 *et seq.* (paras. 210-218); and,
- Ms. Mocanu was not asked any questions about the alleged political changes affecting the work of the Ministry.

279 [redacted] **R-475**; **Mocanu II**, 74 (para. 214); **Respondent's Opening 2019**, 48.

280 [redacted]

281 While the Claimants make much of Mr. Bizomescu's purported comments, Ms. Mocanu, who **oversaw his work**, was not asked any questions about this alleged blockage in 2012, even though she had previously testified that the Government did not interfere in the work of her Ministry, including in the period March-June 2012 and in relation to Waste Management Plan issues. **Mocanu I**, 16 (para. 71); **Mocanu II**, 2 *et seq.* (paras. 8-14) and 73 *et seq.* (210-218).

282 The Claimants' assertion that Mr. Avram's allegation of political blocking during the Ungureanu Government based on Mr. Bizomescu's statements "is unrebutted" (**Tr. 2019**, 175:18-19 (Cl. Op.)) thus disregards Ms. Mocanu's evidence.

283 There is also no evidence of contemporaneous complaints by RMGC against the alleged blockage. Nor is there any mention of political

interference in the EIA Review Process in Gabriel Canada's contemporaneous disclosures. **R-507**.

284 [redacted] **Tr. 2019**, 1266:2-6 (Avram).

285 The Claimants' expert on waste management, Dr. Kunze, did not support Mr. Avram's allegations that [redacted]. **Kunze II**, 15.

286 In his reports, Dr. Dodds-Smith referred to the Ministry's requests starting in April 2012 and confirmed that the timing until the approval of the Waste Management Plan in May 2013 was normal in the circumstances, in particular given changes in the regulatory regime. The Claimants failed to call Dr. Dodds-Smith for cross-examination and his evidence remains unchallenged. **CMA - Dodds-Smith Report II**, 6 (paras. 12-13).

2.2.1.4 The Ponta Governments Did Not Hold Up the Permitting Process (between 7 May 2012 and 9 September 2013)

287 The Claimants allege that "the Ponta Government, when it took over after the Ungureanu Government, maintained the same approach" of holding up the Project's permitting. **Tr. 2019**, 134:1-4 (Cl. Op.).

288 [redacted] **Tr. 2019**, 1265:19-1267:13.

289 [redacted] The Minister of Environment and Prime Minister in April 2013 were respectively Mr. Ponta and Ms. Plumb. The **same individuals had continuously held the same posts since 7 May 2012. R-489**, 3.

290 As shown in paras. 213-219 above, there is no evidence of any Governmental interference with the work of the TAC and the Ministry of Environment between 7 May 2012 and 9 September 2013 (the date when

the Project was allegedly rejected by the Government, see below para. 388).

291 Prime Minister Ponta confirmed in his witness statement that his public statements about deferral of consideration of the Project in 2012 did not relate to the Project's permitting. **Ponta**, 6 (para. 25).

- He clarified that the deferral did not "apply to decisions pertaining to permitting." He "did not instruct any of [his] ministers (including the Minister of Environment) or advisors to stop doing their work relating to the Project or permitting." **Ponta**, 6 (para. 25); and,
- There was nothing for the Government to defer as the EIA Review Process never reached the stage of a Government decision. **Respondent's Opening 2019**, 24.

292 Prime Minister Ponta was not aware of the permitting situation of the Project and confirmed that he "never instructed any of [his] Ministers to withhold or delay the issuance of the environmental or any other permit." **Ponta**, 2 *et seq.* (paras. 6 and 21).

293 Prime Minister Ponta testified that Ministers Korodi and Plumb never suggested "that they were withholding issuance of the environmental permit. Had they done so, I would have indicated that that was not appropriate and instructed them to follow the law". **Ponta**, 22 (para. 76).

294 [redacted] **Tr. 2019**, 2045:1-19; see above paras. 215-216.

295 As shown above, during the Ponta Governments, the permitting advanced substantially, with NAMR's homologation of the Project's resources (**C-1012**), the TAC meeting four times in 2013 (**C-484**; **C-485**; **C-481**; **C-480** – see above para. 191), the approval of the Waste Management Plan (**C-657** – see above para. 61) and the conditional endorsement of the Project by the Ministry of Culture. **C-655**; see above paras. 50-51. **Respondent's Opening 2019**, 87.

296 As demonstrated in para. 198 above, the Ponta Governments also established an interministerial commission in early 2013 to advance the Project's permitting.

- [redacted] **R-403**, 4. [redacted] **Gaman II**, 72 (para. 198); and,
- Prime Minister Ponta in turn confirmed that the commission was established "to identify potential solutions for the future development of the Project." Along with the creation of a ministry to oversee and assist with the implementation of large projects and the preparation of the Roşia Montană Law, these measures sought to move the Project forward. **Ponta**, 12 *et seq.* (para. 46).

2.2.2 The Various Governments Did Not Demand an "Increase [of] the State's Economic Interest in the Project" Coercively or Otherwise

297 While during their opening statement at the 2019 hearing the Claimants repeatedly referred to an increase of economic benefits from the Project as the sole motive for the Project's alleged permitting block since 2011 (**Tr. 2019**, 100:18-134:4 (Cl. Op.)), after being pressed on the subject by the Tribunal, the Claimants abandoned that narrative during the hearing. **Tr. 2019**, 136:8-17 (Cl. Op.). They now claim that economics ultimately "would only be a factor" for the Government's decision. Cl. PO27 Answers, 9 (para. 14).

298 Despite this change of position, the Claimants continue to assert that the purpose of the Government's alleged interference in the work of the TAC in November 2011 was to secure an increase in the State's economic interest in the Project:

> "as of the last TAC meeting on November 29, 2011, there still was no agreement on improved economic terms for the State, the Government prevented the environmental permitting process from being completed." Cl. PO27 Answers, 9 (para. 15).

299 The alleged economic motive has also not been proven. There is no contemporaneous evidence that the Governments sought to link the commercial renegotiation with the permitting process. On the contrary, the Claimants sought to make such a link and the Governments declined.

300 Moreover, a party's failure to protest during or after the negotiations as well as its unreserved participation in negotiations is irreconcilable with that party's allegation that it was the victim of coercion. **RLA-172**, 3 (paras. 43-44).

2.2.2.1 The Governments Did Not Link the Commercial Negotiations with the Permitting

The Claimants Negotiated Freely with the Boc Government

301 [redacted] **Tr. 2019**, 1835:3-18 (Boc).

302 [redacted]. **Tr. 2019**, 1552:1-13 (Găman); 1874:9-15 (Ariton); 1716:6-1718:2 (Boc).

303 The proposal:

- [redacted] **C-2156**, 3, [redacted]
- [redacted] **C-2156**, 3, [redacted]

304 The Ministry of Public Finance suggested that the Ministry of Environment become involved in the negotiations. **C-2858**. The

Government, however, mandated exclusively the Ministry of Economy to negotiate with the Claimants and did not include permitting issues in the scope of the mandate. **C-2635**, 2.

305 Based on the mandate, the Ministry of Economy established a negotiation commission. There is no mention in the instrument that defined the commission's mandate of any authority to discuss permitting issues with the Claimants. **C-2730**.

306 The negotiation commission was composed of economists, lawyers and one mining engineer (Mr. Găman); none of the members of the commission had any competence or link to permitting, including environmental permitting. **C-2730**, 2; **Gaman II**, 24 (para. 66); **Tr. 2019**, 1505:19-21 (Găman); **Ariton**, 12 (paras. 36-37); **Tr. 2019**, 1863:10-16 (Ariton);

307 [redacted] **Tr. 2019**, 1862:2-15 (Ariton). [redacted] **Tr. 2019**, 1502:19-1503:5; (Găman).

308 [redacted] **C-877**, 1[redacted]

309 [redacted] **Tr. 2019**, 1718:8-19 (Boc); **Tr. 2019**, 1866:11-18, 1917:3-7, 1918:1-7 and 1922:8-13 (Ariton).

310 [redacted] **Tr. 2019**, 1826:13-16 (Boc); 1920:1-9 (Ariton); 1588:2-12 (Găman). [redacted]

[redacted]

[redacted] **Tr. 2019**, 904:8-12.

311 [redacted] **Tr. 2019**, 1862:18-22.

312 Seeking to negotiate the two issues was appropriate for the following reasons:

- [redacted] (**Tr. 2019**, 119:12-15 (Cl. Op. St); 1912:19-22 (Ariton)), [redacted] **C-414**; **R-666**.
- Minvest and various public entities owned extensive lands in Roşia Montană that were required for the Project. **Thomson-86**, 3 and 7. See above para. 100. RMGC requested that Minvest make that contribution in kind (**R-461**, 1) [redacted]. **R-462**, 1; and,
- The Government wanted Minvest to increase its shareholding in RMGC through that contribution (**Tr. 2019**, 1637:3-17 (Găman)) and that was publicly discussed. **R-389**, 1: "either through agreement of the parties or by increasing the share capital. But the increase of the capital cannot be done without the agreement of majority shareholders".

313 [redacted] (**Tr. 2019**, 582:15-20; 583:8-11; 587:2-15; 588:13-19) [redacted]

- the Claimants repeated publicly before, during and after the negotiations that they wanted to negotiate with the Government. **R-391**, 3; **R-392**, 1; **R-393**, 1; **R-671**, 4; **R-395**, 1; **R-400**, 5; and,

- [redacted] **Tr. 2019**, 1883:14-1884:2 (Ariton); **Tr. 2019**, 1565:3-1566:18 (Găman).

314 The Claimants wanted to negotiate with the Government:

- [redacted]

- to secure legislation that would eliminate RMGC's permitting problems. See above paras. 237-240;

- [redacted] **C-2919/R-404**, 15 [redacted] **C-2200**, 2 [redacted],

- [redacted] **C-2919/R-404**, 14 [redacted] **C-2200**, 2 [redacted].

315 [redacted] (**Tr. 2019**, 582:4-9) [redacted]

- [redacted] **Tr. 2019**, 1881:9-1884:2; [redacted] **Tr. 2019**, 906:22-909:17 (Tănase); **C-2916**;

- [redacted] **Tr. 2019**, 1564:21-1565:18;

- [redacted] **C-2915**, 1[redacted]

- [redacted] (**Ariton**, 14 *et seq.* (paras. 40-43)) [redacted]

[redacted] **C-2642**, 1 [redacted]; **C-799**, 1.

316 The Claimants not only negotiated freely, but also drove the negotiations:

- [redacted]. **Tr. 2019**, 1938:1-6 (Ariton); 1509:22-1510:6 (Găman);
- [redacted] **Tr. 2019**, 828:20-829:2;
- [redacted] **Tr. 2019**, 898:5-901:20 (Tănase);
- [redacted] **Tr. 2019**, 912:20-921:17;
- [redacted] **C-2671**, 149, 275-282; and,
- [redacted] **Tr. 2019**, 1867:14-16.

317 [redacted]

[redacted] **Tr. 2019**, 1909:6-15; 1913:1-7 (Ariton); 1819:10-20 (Boc).

318 [redacted] **Tr. 2019**, 1911:10-14; 1918:8-10 (Ariton); 1617:5-9; 1626:11-18 (Găman); 1830:21-1832:8 (Boc).

319 After numerous exchanges, proposals and counter-proposals, as shown in **Section 2.2.3** below, those two terms were agreed.

320 The Claimants' allegation that those offers were extracted through coercion as a result of a permitting hold-up are not supported by any contemporaneous evidence. Cl. PO27 Answers, 9 (para. 16).

The Boc Government Did Not Link the Commercial Renegotiation with the Permitting

321 [redacted] **Tr. 2019**, 1644:2-4; 1645:7-20; 1507:2-1508:12. [redacted]

[redacted]

[redacted] **Tr. 2019**, 1649:5-10.

322 [redacted] **Tr. 2019**, 1864:2-8.

323 Moreover, permitting of the Project did not depend on the negotiations:

- [redacted] (**Tr. 2019**, 1788:12-15) [redacted]

[redacted]. **Tr. 2019**, 1917:3-7, 1918:1-7 and 1922:8-13;

- [redacted] **Tr. 2019**, 1807:7-12: [redacted] **Tr. 2019**, 1865:1-9 (Ariton); 1715:7-1716:3 (Boc);
- [redacted] **Tr. 2019**, 1824:7-11;
- [redacted] **Tr. 2019**, 1902:13-19; and,
- Ms. Mocanu testified in her witness statement that Mr. Borbély never mentioned economic negotiations as a factor in the Ministry's decision-making process. She was not cross-examined on that evidence. **Mocanu II**, 30 (para. 80).

324 [redacted] **C-2637**. [redacted]

- [redacted]. **Tr. 2019**, 1896:8-1903:3. [redacted] **Ariton**, 20 *et seq.* (paras. 65-77);
- [redacted] **Gaman II**, 59 (para. 162); **Ariton**, 20 (para. 65). [redacted]

[redacted] **Tr. 2019**, 1647:2-1648:4;

- [redacted]
- [redacted] (**C-2921** and **R-404/C-2159**) [redacted]

325 [redacted] (**Tr. 2019**, 1711:20-1712:12, 1743:11-15, 1769:16-21, and 1818:15-1819:2 (Boc); 1857:16-1858:3, 1862:4-8 and 1891:9-13 (Ariton)), [redacted]

- Since 2009 Romania was undergoing one of the worst final crises of its modern history. **R-387**; **C-1506**;
- In the fall of 2011, the Government was anxiously trying to secure new foreign investment (**R-677**; **R-678**), [redacted] **C-799**, 1 *et seq.*; and,
- [redacted] **Tr. 2019**, 942:1-5 (Tănase).

The Ungureanu and Ponta Governments Did Not Link the Commercial Renegotiation with the Permitting

326 The Claimants' allegation that the Ungureanu Government "maintained the political position that improved economic terms for the State were expected before the Project would be permitted" is unsupported. Cl. PO27 Answers, 19 (para. 28).

327 There is no evidence that during the Ungureanu Government, any public official made any request to change the economic terms.

328 [redacted] **Tr. 2019**, 2558:3-2559:12; 2542:16-2544:2.

329 [redacted] **Tr. 2019**, 2563:3-6.

330 [redacted] **Tr. 2019**, 2549:12-2551:15.

331 After the Ungureanu Government, the Claimants allege that Prime Minister Ponta confirmed that "whether the Project would be permitted at all would depend not only on the obligations of the environmental law, but on renegotiation of the economic terms". Cl. PO27 Answers, 19 *et seq.* (para. 29). Prime Minister Ponta confirmed nothing of the sort, as is clear from his witness statement:

> "Insofar as the economic terms were concerned, I did not know the specifics of the existing joint venture structure and envisaged costs and returns from the Project; I did not formulate the specific terms that would need to be amended. I thus did not mean or say that the Project would not go forward if Gabriel/RMGC did not agree to renegotiate." **Ponta**, 4 (para. 19).

332 Referring to the 2013 negotiations, the Claimants allege that "the Government did not accept and finalize the offer, but included it as part of the Draft Agreement that would only be accepted and implemented if Parliament were to approve the special Draft Law". Cl. PO27 Answers, 29 (para. 42). However:

- [redacted] **Tr. 2019**, 1024:10-18;
- The Claimants stated publicly that they pushed for the legal reform in the Roșia Montană Law. **R-415**, 2: "Gabriel hopes for a conclusion of

the negotiations before long, including issues such as environmental guarantees, an extension of the mining license and other long-term legal and tax provisions that the company would like to see adopted.";

- [redacted]. **Gaman II**, 73 (paras. 199-200); **C-2681**, 3. [redacted] **C-2200**, 2. [redacted],
- The Claimants could have refused the draft agreement and the permitting issues addressed in the Roșia Montană Law and instead threatened to sue Romania if it did not accept the proposed draft agreement. See below para. 361.

2.2.2.2 The Claimants Sought, but the Government Declined, to Link the Commercial Negotiations with the Permitting

333 While the Government separated the permitting of the Project and the commercial negotiations, the Claimants from their very first draft agreement to the last insisted on conditioning any change in the commercial terms of the Project to a written guarantee of issuance of the building permit. **Respondent's Opening 2019**, 145-153.

334 [redacted] **R-403**, 8; **C-2920**, 2; **R-680**, 2; **C-877**; and **C-775.02**.

335 [redacted]. **Tr. 2019**, 589:7-12 (Henry); 942:20-943:7, 996:6-998:8 (Tănase).

336 [redacted]

- [redacted] **R-403**, 3; and,

- [redacted] **C-2637**, 1.

2.2.3 The Various Governments Did Not Reject the Claimants' Offers

337 The Claimants argue that the various Governments would not allow the permitting process to reach a conclusion because they did not accept the Claimants' economic offers. Cl. PO27 Answers, 14 (para. 23).

338 [redacted].

339 [redacted]

- [redacted] **C-775.02**;
- [redacted] **Tr. 2019**, 1725:4-1726:16 (Boc); **Ariton**, 28 (para. 89). [redacted]
- [redacted]

[redacted] **Tr. 2019**, 1726:4-16;

- [redacted]

  [redacted] **Tr. 2019**, 865:5-9, 16-18; 866:8-10;

- [redacted] **Tr. 2019**, 1815:8-18;

- [redacted] (**Tr. 2019**, 1870:5-10; 1885:7-18; 1918:8-10), [redacted]. **C-877**, 2;

- [redacted] **C-2925**: [redacted]

- [redacted]

  [redacted] **Henry I**, 22 (para. 59); see also **Tanase II**, 43 (para. 117);

- [redacted] (**Gaman II**, 65 (para. 176)) [redacted] (**R-405**, 2; **R-406**, 1; **R-463**, 2), [redacted]

- [redacted] **Tr. 2019**, 1829:8-13;
- [redacted] **C-2642**, 1; and,
- [redacted] (**Gaman II**, 73 (paras. 199-200); **C-2681**, 3.)[redacted]

340 [redacted] **Tr. 2019**, 2543:3-2544:2; 2548:7-2552:6; 2559:19-22; 2569:7-2571:4.

341 The Ponta Government did not reject the Claimants' offer of 25 and 6. It accepted the offer unconditionally and submitted the Roşia Montană Law to Parliament including the draft agreement providing for such shareholding and royalty rate. See below para. 361.

2.3 The Submission of the Roşia Montană Law to Parliament and Its Rejection by Parliament Do Not Amount to a Failure to Provide Fair and Equitable Treatment

342 The Government's submission of the Roşia Montană Law to Parliament did not breach the BITs, nor did Parliament's rejection of the law. The purpose of the Roșia Montană Law was to facilitate the Project by providing an alternate path forward, thereby mitigating RMGC's inability to meet permitting requirements and to overcome the social opposition. **Respondent's Opening 2019**, 178; Rejoinder, 145 *et seq*. (Section 3.5.2); **Ponta**, 10 (para. 41).

343 The Claimants' argument that the Government's submission of the Roșia Montană Law to Parliament, and Parliament's subsequent rejection of the law, breached the BITs is based on the presumption that the Government was wrongfully withholding the environmental permit. Cl. PO27 Answers, 93 *et seq*. (Section (e)). As shown above, this presumption is false. See above **Sections 2.1** and **2.2.1**.

344 Instead, it was RMGC's failure to meet the regulatory requirements that prevented the issuance of the environmental permit. See above **Section 2.1.4**; **Respondent's Opening 2019**, 50 *et seq*.; see also Rejoinder, 168 *et seq*. (Section 3.6.1); R. PO27 Reply, 34 *et seq*. (Section 2.2.3.1).

345 Accordingly, the submission of the Roşia Montană Law to Parliament, and its rejection by Parliament, did not supplant the regular administrative process or deprive RMGC of a permit that it was otherwise entitled to receive. They therefore could not have breached the BITs. On the contrary, the Government sought to support RMGC by facilitating and fast-tracking the permitting process. Rejoinder, 135 *et seq*. (paras. 440-451); R. PO27 Reply, 28 *et seq*. (Sections 2.2.2.2 and 2.2.2.3).

2.3.1 The Submission of the Roșia Montană Law to Parliament Did Not Breach the Fair and Equitable Treatment Provisions of the BITs

346 The submission of the Roșia Montană Law to Parliament did not breach FET as (i) the purpose of the law was to facilitate the Project by mitigating RMGC's inability to meet the requirements of the ordinary permitting process, (ii) the Government did not impose the law on the Claimants, (iii) quite the opposite, the Roșia Montană Law was conceived and drafted with the Claimants' willing cooperation, and (iv) the law would have provided special treatment to the Project.

2.3.1.1 The Roșia Montană Law Was an Attempt to Facilitate the Project by Mitigating RMGC's Inability to Meet Permitting Requirements

347 Given RMGC's failure to meet the requirements for the environmental permit, and given the pending and likely future legal challenges by NGOs to the Project's permits, the Claimants sought in 2011 and 2012 legislative amendments to facilitate the Project. [redacted] **C-779**, 2 (para. 4(e)); **Tr. 2019**, 517:10-20 (R. Op.); **Respondent's Opening 2019**, 178.

348 The "parliamentary route" provided an alternate path forward and constituted an attempt to overcome, with the help of the State, the social opposition to the Project. **Tr. 2019**, 370:5-15 (R. Op.); **Tr. 2020**, 154:12-155:2 (R. Op.).

349 [redacted] **Tr. 2019**, 1058:18-19. [redacted] **Tr. 2019**, 1058:11-17.

350 As discussed below, many of the provisions in the Roșia Montană Law requested by the Claimants would have helped RMGC address the challenges that the Project was facing.

2.3.1.2 The Respondent Did Not Impose the Roşia Montană Law as a Condition of the Project's Progress

351 The Claimants argue that the Government conditioned the issuance of the environmental permit and the execution of the Project on Parliament's approval of a special law for the Project. Cl. PO27 Answers, 104 (para. 202(g)). As discussed in **Section 2.2.1** above, the evidence on the record establishes that there was no such condition. See also Rejoinder, 136 (para. 444); **Ponta**, 8 (para. 33).

352 The Claimants never objected to any such purported condition, recognizing to the contrary that in 2013 the permitting process was ongoing. **R-251**, 2 *et seq*. See also **Tr. 2019**, 551:15-552:2 (R. Op.).

353 The Claimants point to public statements of Romanian politicians as evidence of the purported condition. However, the statements do not show that there was any such condition. In any event, public statements, in and of themselves, do not constitute measures and therefore cannot amount to a breach of FET. Rejoinder, 109 (para. 359). R. PO27 Reply, 15 *et seq*. (paras. 43-46).

354 [redacted]

[redacted] **Tr. 2019**, 983:14-20. [redacted] **Tr. 2019**, 1003:21-1004:6.

- Indeed, RMGC had previously (and successfully) sought redress from Romanian courts to compel the issuance of a permit, as it did in 2009 for the dam safety permit. Rejoinder, 157 (para. 497); and,
- The Claimants also at the time did not refer in their public disclosures to the adoption of the Roşia Montană Law as a condition of the Project's progress, even though it would have indisputably constituted a material event. Gabriel Canada's contemporaneous disclosure of the "key to progression" on the environmental permit does not mention the Roşia Montană Law. **R-251**, 2 *et seq.* Rejoinder, 158 *et seq*. (paras. 500-504).

355 [redacted]. See *e.g.* **Tr. 2019**, 973:18-21; 985:13-14; 1053:3.

- [redacted] **Tr. 2019**, 986:12-13;
- [redacted]. **Tr. 2019**, 985:12-987:8; and,
- [redacted] See R. PO27 Reply, 31 (para. 76) (citing **C-1536**, 65); **Tr. 2019**, 1047:13-1050:7 (Tănase). [redacted]

356 [redacted]

Rejoinder, 140 (para. 458); 142 (para. 463).

357 After its submission to Parliament, Gabriel Canada publicly embraced the Roșia Montană Law, stating that it "look[ed] forward" to "a successful process through Parliament" of this "Project specific legislation". **Respondent's Opening 2019**, 217 (citing **R-251**, 2 *et seq*.).

- In another contemporaneous press release, Gabriel Canada stated that it was "pleased to announce" the Government's approval of the draft law and that it was "highly encouraged" by the "development of the Agreement and Draft Law." **C-1436**, 1; and,
- The press release quotes Mr. Henry's statement that Gabriel Canada was "extremely encouraged" by the "Government's decision to approve a law specific to the Roșia Montană Project", describing it as a "major step toward progression of the permitting process." **C-1436**, 2. See also **Tr. 2019**, 551:15-554:22 (R. Op.); **Respondent's Opening 2019**, 218 *et seq*.

2.3.1.3 The Roşia Montană Law Was Prepared and Drafted with the Claimants' Willing Cooperation

358 The Claimants improperly focus on public statements by Romanian politicians to support their argument that the Roșia Montană Law was imposed upon them, while disregarding the documentary record of their involvement in conceiving and drafting the Roșia Montană Law.

359 The permitting process advanced significantly during the first half of 2013 with the Ministry of Culture issuing its endorsement in April 2013 and RMGC obtaining approval of the Waste Management Plan in May 2013. Rejoinder, 171 *et seq*. (Sections 3.6.1.1 and 3.6.1.2); **Respondent's Opening 2019**, 35 *et seq*., 44 *et seq*., and 89 *et seq*.

360 [redacted] **Tr. 2019**, 527:4-529:16 (R.

Op.); **Respondent's Opening 2019**, 182 *et seq*. (citing **R-521**, **R-522**, **R-488**, **C-1286**, **C-1536**, **C-826.02**, **C-2433**).

- [redacted]. **Tr. 2019**, 530:11-21 (R. Op.); **Respondent's Opening 2019**, 192 *et seq*.

361 The Roșia Montană Law could not have been submitted to Parliament without the Claimants' consent, since a core component of the law was the draft Agreement between Gabriel Canada and the Government. R. PO27 Reply, 32 (para. 78); **C-519**, 12 *et seq*.; **Tr. 2019**, 523:13-525:10 (R. Op.); **Respondent's Opening 2019**, 179.

- The Claimants could have blocked the submission of the Roșia Montană Law to Parliament by rejecting the terms of the draft Agreement.

362 In view of RMGC's participation in the drafting of the Roşia Montană Law, the submission of the law to Parliament does not amount to a breach of FET.

2.3.1.4 The Roșia Montană Law Would Have Helped RMGC Overcome the Issues that the Project Was Facing

363 As discussed below, many of the legislative changes included in the Roșia Montană Law pertained to permitting issues that RMGC had encountered, including the acquisition of surface rights, compliance with deforestation regulations, the need to secure archaeological discharge certificates, compliance with the Water Framework Directive, and the need to obtain a PUZ prior to the issuance of the environmental permit. See above **Section 2.1.4**.

364 **As to surface rights,** as discussed in **Section 2.1.4.6** above, RMGC needed to secure all the surface rights within the Project footprint to obtain the environmental permit. See above para. 101.

365 Because many residents did not want to move, RMGC requested and obtained that the Roșia Montană Law declare the Project to be of "public

utility", a prerequisite for an expropriation procedure. **Tr. 2019**, 536:2-539:7. **Respondent's Opening 2019**, 196 *et seq*. (citing **R-488**, **C-2433**, **R-529**, **R-524**, **R-528**, and **C-519**); see below **Section 2.4.2.3** (discussing residents' refusal to move).

366 Further to RMGC's request, the Roșia Montană Law would have changed the expropriation procedure applicable to mining projects declared to be of public utility from that of Law 33/1994 to that of Law 255/2010. **Tr. 2019**, 536:7-14, 539:11-21 (R. Op.). **Respondent's Opening 2019**, 197 (citing **C-2433**), 205 (citing **C-519**).

367 The expropriations would have been conducted directly by the Ministry of Economy, rather than by courts as required by Law 33/1994. **R-122**, 1 (Art. 1). **C-519**, 5 (Art. 5.II.1). See **Tr. 2019**, 2228:14-2230:7 (Bîrsan).

368 [redacted] the Roșia Montană Law would have created a mechanism for payment by RMGC of the expropriated surface rights and a mechanism for conveyance of the expropriated surface rights from the State to RMGC. **C-2433**, 5; **C-519**, 6 (Art. 5.II.1).

369 The Roșia Montană Law also specifically provides that the Ministry of Economy shall launch the expropriation procedure within 30 days of a request by the licensee of a mining project declared to be of public utility and national public interest. **C-519**, 6 (Art. 5.II.1).

370 More generally, the Roșia Montană Law directed local and central government authorities with "ownership rights on the immovable assets necessary for the exploitation within the Rosia Montana mining perimeter" to "conclude concession agreements for the immovable assets they manage or … own in the Rosia Montana mining perimeter" within 45 days of a request from RMGC. **C-519**, 3 (Art. 4(7)).

371 In response to questions from the Tribunal, Prof. Corneliu Bîrsan admitted that the Roșia Montană Law would have simplified the expropriation procedure for the Project. **Tr. 2019**, 2234:14-2235:7. In fact, the Roșia Montană Law would have done much more than merely simplify the expropriation procedure.

372 By declaring the Project to be of public utility, the Roșia Montană Law would have exempted the Project from the administrative procedure required by GD 583/1994 for a declaration of public utility, which RMGC was otherwise unable to initiate as there was no valid PUZ for the Project. **Sferdian and Bojin LO**, 41 (para. 169); Rejoinder, 353 *et seq*. (paras. 1066-1067).

373 This also meant that the Claimants could initiate expropriations prior to securing a PUZ. The Roșia Montană Law would therefore have also prevented NGOs and landowners from undermining the legal foundation of the expropriation procedure by challenging the PUZ upon which a declaration of public utility was based. See **Sferdian and Bojin LO**, 38 *et seq*. (Section 1.5).

374 By virtue of Article 9 of Law 255/2010, the Roșia Montană Law would have granted RMGC the use of the expropriated land while the expropriation process was contested, thereby effectively eliminating an important source of delay and uncertainty for the Project. **R-532**, 11 *et seq.*; **Tr. 2019**, 540:9-541:6 (R. Op.).

375 By changing the entity declaring the expropriation from a judicial organ to an executive organ (namely the Ministry of Economy), the Roșia Montană law would have also drastically accelerated the administrative process of expropriation. **C-519**, 5 (Article 5.II.1). See **Tr. 2019**, 2228:14-2230:7 (Bîrsan).

376 The law would have prevented NGOs from interfering in the tender process that would otherwise have been required to transfer the expropriated surface rights from the State to RMGC. **C-519**, 6 (Article 5.II.1) (assigning to the licensee of a mining license a concession right over expropriated property); Rejoinder, 356 *et seq*. (paras. 1072-1073) (citing **C-1810**, 22).

377 **As to deforestation regulations,** as discussed above in **Section 2.1.4.7**, the EIA Procedure required an assessment of the impact of deforestation and how the required reforestation would be implemented, which in turn required RMGC's proof of surface rights to areas to be reforested. See above para. 121.

378 Article 4(8) of the Roșia Montană Law expressly authorized the Ministry of Environment to "initiate Government decisions for the final removal from the national forestry fund, in compliance with the law, of areas up to 255 hectares of woods in the Roșia Montană perimeter." **C-519**, 3. This change would have facilitated the fulfilment of the requirements for issuance of the environmental permit, as well as have facilitated the transfer of State-owned surface rights to RMGC.

379 **As to ADCs**, [redacted] the Roșia Montană Law would have required the competent authorities to issue building permits for the Project upon submission of the relevant archaeological research reports, thereby removing the requirement for obtaining an ADC prior to applying for a building permit. **Tr. 2019**, 545:2-550:21 (R. Op.). **Respondent's Opening 2019**, 207 *et seq*. **C-519**, 10 (Art. 7(3)).

380 This provision would have prevented the NGOs from interrupting the Project by obtaining the annulment of the ADCs in court. This risk of further interruption and delay was a significant concern for RMGC as the ADC for Cârnic was being and had been challenged in court for years and RMGC had yet to apply for the ADC for Orlea. **Respondent's Opening 2019**, 39 *et seq*.

381 **As to the Water Framework Directive**, as discussed in **Section 2.1.4.5** above, RMGC needed permission to derogate from the Water Framework Directive. One of the requirements for that derogation, which was granted only in exceptional circumstances, was that the Project be declared of outstanding or overriding *national* public interest. The Roșia Montană Law's declaration that the Project was of "outstanding national public interest" would have satisfied an important requirement for the Water Framework Directive. **C-519**, 1 (Art. 3).

382 The cumulative impact of these changes would have transformed the permitting process for the Project, by both facilitating RMGC's ability to meet the requirements of the outstanding permits and constraining the ability of NGOs and Project opponents to disrupt or block it. The Roșia Montană Law would therefore have greatly benefitted the Project by providing a legislative solution to problems caused by the social opposition to the Project. Rejoinder, 138 *et seq*. (paras. 454-456).

383 [redacted] *See* **Tr. 2019**, 1051:6-1055:8. [redacted] **Tr. 2019**, 1054:1-7.

384 The Claimants saw the Roşia Montană Law as a legislative shortcut that could move the Project past its administrative hurdles and overcome the social opposition. They cynically raise objections in these proceedings that they did not voice contemporaneously and seek to obtain through arbitration the economic benefits from the Project that, in all likelihood, would not have materialized without the Roşia Montană Law (and, as it turned out, could not be materialized even through the Roşia Montană Law).

2.3.2 Parliament's Rejection of the Roşia Montană Law Did Not Breach the Fair and Equitable Treatment Provisions of the BITs

385 The Ponta Government did not take a "political decision" to reject the Project in September 2013. Disregarding the Government's statements in support of the Project, the Claimants' only evidence for this purported "political decision" are the public statements of Prime Minister Ponta and Senator Antonescu, who were merely expressing their view that the law would likely be rejected by Parliament. R. PO27 Reply, 33 (para. 80). **Tr. 2019**, 372:20-374:14 (R. Op.) (citing **C-789** and **C-872**).

386 These statements are taken out of context and disregard the numerous expressions of support for the Project by members of the Government. **Tr. 2019**, 372:2-12 (R. Op.) (citing **C-1504**, **C-416**, and **C-437**); Rejoinder, 164 *et seq*. (paras. 515-516); R. PO27 Reply, 33 (para. 80). The Claimants acknowledged "the uniformly positive testimony before the Senate Committee for Public Administration and Land Management on

September 10 from the Ministers of Environment and Culture and the President of NAMR" and from "ministers and senior Government officials … highlighting the Project's manifold benefits for environmental clean-up, cultural preservation, and economic growth." Reply, 105 (paras. 207-208).

387 During the hearing, the Claimants resorted to evidence tampering when they presented selectively quoted passages of a statement by Mr. Antonescu in a manner that made these quotes appear contiguous, thereby mischaracterizing the contents of Mr. Antonescu's statement. **Tr. 2019**, 382:5-383:10. The Respondent objected to the Claimants' slide, which misleadingly excerpted the following paragraph:

> "When talking about a project involving important natural resources of a nation, it is very important to have a public support. This is more important than the technical data of that project. First of all, today we discover, as I was saying, that the project, the debate on it, is producing a significant breach in the Romanian society." **C-2690.01**, 1; compare to **Claimants' Opening - Volume 5**, 57.

388 On 9 September 2013, the Government did not call for the rejection of the Roșia Montană Law. Given the ongoing protests against the Project, Prime Minister Ponta called on MPs to vote their conscience. **C-1483**, 2; **Tr. 2019**, 372:20-373:8 (R. Op.); R. PO27 Reply, 33 (paras. 80-82); see also Rejoinder, 163 *et seq*. (paras. 514-516).

389 The report of Parliament's Joint Special Committee dated 13 November 2013 recommended the rejection of the Roșia Montană Law but did not recommend a rejection of the Project. **C-557**, 44; see also Rejoinder, 164 *et seq*. (paras. 516-521). Far from suggesting that this heralded the end of the Project, Mr. Henry stated at that time that the "report of the Special Committee is a first step in defining the next phase of developing Roșia Montană." **R-538**.

390 The lack of any rejection of the Project was further confirmed by Gabriel Canada's contemporaneous reaction to the rejection of the Roșia Montană Law, which emphasized that the report did not "propose the rejection of

the Project," but rather of the Roşia Montană Law. **R-538**; see also Rejoinder, 166 *et seq*. (paras. 522-523).

391 The Senate's rejection of the Roșia Montană Law on 19 November 2013 does not constitute a rejection of the Project. The rejection of the law meant that the "parliamentary route" was not available, but it did not affect the "classical [permitting] route". **Ponta**, 23 (para. 80); **Tr. 2019**, 379:2-380:15 (R. Op.).

392 After the rejection of the Roșia Montană Law, Gabriel Canada's contemporaneous regulatory filings did not disclose any rejection of the Project (political or otherwise), but rather confirmed that the EIA Review Process was ongoing. Rejoinder, 202 *et seq*. (paras. 647-652).

393 Gabriel Canada similarly did not impair its assets until after the filing of this arbitration. Rejoinder, 290 *et seq*. (paras. 909-915).

394 The rejection of the Roșia Montană Law however meant that RMGC's inability to meet the requirements for the environmental permit prevented any further progress for the Project.

2.4 RMGC Never Overcame the Social Opposition to the Project

395 The issue of the social opposition to the Project was mostly discussed during the 2019 hearing. The Claimants did not dispute that RMGC needed to resolve the social opposition, but mainly sought to show the allegedly high level of support for the Project and to blame the Government for purportedly adversely affecting their social license. The former misses the point and the latter is factually wrong.

396 The opposition to the Project escalated over the years to the national and international levels, while remaining fiercely entrenched locally, where residents, including several of the Respondent's witnesses, refused and continue to refuse to sell their properties to RMGC. This social opposition, over which no democratic State has control, used the legal means at its disposal to strongly voice, in the streets and courts of Romania, its opposition to the Project.

397 RMGC failed to engage with stakeholders and never managed, let alone overcame, the social opposition, which remains an obstacle for the Project. This social opposition is also fatal for the Claimants' case (see also below **Section 4.2.3**).

2.4.1 From the Outset, RMGC Has Faced Social Opposition

398 The **association Alburnus Maior** was created on 8 September 2000 by Roșia Montană residents in reaction and opposition to the Project. **Cornea**, 2 *et seq.* (paras. 9 and 12-14); **Jurca I**, 19 (para. 92); **Petri**, 2 (paras. 6-7); **Tr. 2019**, 364:1-5 (R. Op.); Rejoinder, 315 (para. 976); see also **C-2001** (attaching a memo on Alburnus Maior); **Jeflea I**, 3 (para. 13).

- The Claimants did not call for cross-examination **Mr. Cornea**, a lifelong Roșia Montană resident and founder of Alburnus Maior, who testified about the reasons for, and scope of, his engagement against the Project, including his concerns about its environmental and social impact. His testimony is thus highly relevant to this dispute. **Cornea**, 2 *et seq.* (paras. 8-26);
- [redacted] **Tr. 2019**, 1376:5-17. [redacted]
- **Mr. Sorin Jurca**, another lifelong Roșia Montană resident whom the Tribunal heard at the 2019 hearing, joined Alburnus Maior in 2002 and has been a member to this day. **Tr. 2019**, 2099:14-22; **Jurca I**, 20 (para. 94);
- [redacted] **Tr. 2019**, 1374:20-1375:20; and,

- [redacted] **Tr. 2019**, 1374:11-1375:20.

399 Alburnus Maior was determined to use all legal means to block the Project. Rejoinder, 345 *et seq.* (para. 1048) (quoting **C-2391**).

400 [redacted] **Tr. 2019**, 2083:19-21; see also **Tr. 2019**, 2093:4-6.

401 On 28 July 2002, 25 NGOs gathered in Roșia Montană to establish a coalition against the Project and signed the "**Roșia Montană Declaration**", which proclaimed its support to Alburnus Maior against the Project, explained how the Project was "in utter contradiction with the requirements of sustainable development", and announced its intention to request support at the national and international levels. **Pop-13**; see **Thomson Opinion I**, 17 (para. 49).

- Although Mr. Jurca testified in his witness statement that he participated in this protest together with roughly 50-60 locals, he was not questioned on this topic at the hearing. **Jurca I**, 42 (para. 191);
- [redacted] **Tr. 2019**, 1449:22-1450:16; and,
- Dr. Ian Thomson, Romania's social license expert, explains that the legitimacy of the opposition flows from the presence in Roșia Montană of a local dissident group who refuses to sell its property. **Tr. 2019**, 3012:19-3013:6.

402 Over the years, the social opposition against the Project grew:

- The creation of Alburnus Maior triggered a local grassroots movement that developed into the national Save Roșia Montană campaign and involved NGOs, private citizens, unorganized groups, etc., as confirmed by Dr. Alina Pop, Romania's expert on media campaigns. **Tr. 2019**, 364:1-365:1 (R. Op.); **Tr. 2019**, 3009:14-3012:18 (Thomson), 3323:2-3324:1, 3333:11-3335:12 and 3372:11-16 (Pop); **Pop Opinion**, 10 *et seq.* (Section 4.1.1); Counter-Memorial, 38 (para.

103) (listing influential NGOs); see also **Tr. 2019**, 3348:9-3349:22 (Pop) (clarifying the terminology to describe the social opposition);

- The social opposition took many forms, including local and nationwide demonstrations and marches, residents' refusal to relocate, and the NGOs' extensive litigation campaign. **Tr. 2019**, 364:12-365:5 and 385:5-386:15 (R. Op.); **R-262** (video-photo montage of 2013 protests); **R. Dem. (Opening Slides)**, 2 (including a sub-titled version of **R-449**; see above para. 111); **Tr. 2019**, 3171:2-16 (Stoica) (referring to **R-451**); and,
- It escalated from the local to the national and eventually to the international level. **Tr. 2019**, 360:8-14 and 369:14-20 (R. Op.).

403 [redacted] **Tr. 2019**, 2083:17-18 and 2094:14-16.

404 Demonstrations still take place against the Project as the Tribunal experienced first-hand at the 2019 hearing. **Tr. 2019**, 3305:4-17 (Tercier).

2.4.2 Social Opposition Disrupted the Permitting Process

405 RMGC's inability to obtain and maintain valid all the administrative and regulatory permits and approvals for the Project – primarily the ADCs, urban certificates, and an approved PUZ – was caused by the substantial and systematic social opposition to the Project. **Tr. 2019**, 359:20-361:7 (R. Op.); **Tr. 2020**, 152:9-18 and 162:9-16 (R. Op.).

2.4.2.1 Social Opposition Disrupted the EIA Review Process

406 Both within and outside the EIA Review Process, Project opponents have raised concerns regarding the displacement of the population and its social, environmental and cultural impact, the Project's large scale and short lifespan, and the limited number of jobs created. **Tr. 2019**, 360:11-363:22 (R. Op.) and 3014:18-3015:12 (Thomson); **Thomson Presentation**, 23. The concerns stem in particular from:

- The use of cyanide-based technologies. See above para. 125;

- The risk of dam failure considering the construction of a 185-meters high TMF dam overlooking the town of Abrud and its 5,000 inhabitants. **Respondent's Opening 2019**, 2; see above para. 149; see also **CMA - Claffey Report I**, 16 (worldwide list of tailings dam failures);
- The Baia Mare catastrophe that took place in 2001 some 250 kilometers from Roșia Montană. **Respondent's Opening 2020**, 19-20 (demonstrative exhibit – video sent by email on 26 September 2020, also showing Mr. Cornea); Counter-Memorial, 50 *et seq.* (paras. 134-135) (concerns based on past dam failures and cyanide leaks); see above para. 127; and,
- The destruction of extraordinary cultural heritage. See above para. 158.

407 [redacted] **Tr. 2019**, 1381:10-1382:9; **Respondent's Opening 2019**, 21-22; Counter-Memorial, 47 (para. 127); Rejoinder, 65 (para. 212).

408 RMGC was required to address the unprecedented number of comments and questions received from the public, but failed to present its responses in a complete, updated and manageable format, such that the TAC was required to navigate a voluminous amount of information scattered across various documents. **Tr. 2019**, 405:1-14 (R. Op.); **Respondent's Opening 2019**, 25; see Rejoinder, 321 (para. 993).

2.4.2.2 The NGOs' Litigation Campaign Disrupted the Permitting Process

409 Since 2000, NGOs have systematically filed administrative and judicial challenges against the permits and approvals issued to RMGC for the Project. **Tr. 2019**, 364:17-365:5; Counter-Memorial, 362 (Annex IV); Rejoinder, 322 (paras. 994-996).

410 RMGC was aware that the NGO litigation could delay or block the Project. Rejoinder, 323 (paras. 997-999); **C-1536**, 13 (Leaua) and 17 (Tănase); **C-1808**, 21-22, and 24; see below **Section 4.2.3.1**.

Legal Challenges Related to Urban Plans

411 Before it could obtain an environmental permit, RMGC needed to secure the approval of the PUZs for the Industrial Area and for the Historical Area. See above **Section 2.1.4.3**.

412 RMGC could not rely on an Industrial Area PUZ issued in 2002 after NGOs successfully challenged the Local Council decision approving it. **Respondent's Opening 2019**, 54; **Tr. 2019**, 436:13-437:1 (R. Op.); Counter-Memorial, 54 *et seq.* (paras. 141, 143, 165, 276-278 and 294).

- [redacted] **Tr. 2019**, 1448:1-1452:2; see above para. 401.

413 [redacted] **Tr. 2019**, 1210:1-1211:7; see also **Respondent's Opening 2019**, 55; **Tr. 2019**, 437:2-9 (R. Op.); Counter-Memorial, 19 *et seq.* (paras. 61-69); **C-525.04**, 4.

414 NGOs successfully challenged the Sibiu EPA's decision of March 2011 to issue the environmental endorsement for the Industrial Area PUZ. **Respondent's Opening 2019**, 61; **Tr. 2019**, 439:17-22; Rejoinder, 176 (para. 558); Counter-Memorial, 80 (para. 210).

Legal Challenges to Urban Certificates

415 Throughout the EIA Review Process, RMGC needed to obtain and maintain a valid urban certificate. See above **Section 2.1.4.4**.

416 Over the years, RMGC obtained six urban certificates, which NGOs challenged. The courts either suspended or annulled four of these certificates. **Respondent's Opening 2019**, 66 and 70; R. PO27 Reply, 41 *et seq.* (para. 107); Counter-Memorial, 54 *et seq.* (paras. 142, 144 and 384).

- [redacted] **Tr. 2019**, 1379:3-16 and 1380:5-1381:9.

417 The NGO challenges to UC 78/2006 (that led to its suspension in July 2007 and its annulment in March 2008) and to UC 105/2007 (that led to its irrevocable suspension in March 2009 and its annulment in November 2009) contributed to the Ministry of Environment's determination in September 2007 that the EIA Review Process could not continue until RMGC submitted a new urban certificate. **Respondent's Opening 2019**, 21-22; **C-548**; Counter-Memorial, 62 (paras. 162-163).

418 RMGC submitted a new urban certificate only three years later, in May 2010 and once it did so, the EIA Review Process resumed. NGOs immediately challenged the urban certificate. Counter-Memorial, 62 (paras. 162-164); **R-188**; **R-191**.

419 RMGC failed to keep the TAC informed of the NGO litigation. Rejoinder, 81 *et seq.* (paras. 268-270).

Legal Challenges to ADCs

420 Because the Project Area overlapped with protected archaeological sites, RMGC needed to obtain ADCs covering its entire footprint. Rejoinder, 94 (para. 310); Counter-Memorial, 31 *et seq.* (paras. 90-97); see also above **Section 2.1.4.1**.

421 After NGOs successfully challenged ADC 4/2004 (covering the proposed Cârnic pit), RMGC obtained a new ADC 9/2011 for this area, which NGOs again immediately challenged. **Respondent's Opening 2019**, 40 and 41; Counter-Memorial, 56 *et seq.* (paras. 146-150, 212 and 385).

422 Following the judicial suspension of ADC 9/2011 in January 2014 and pending the outcome of the annulment proceedings, the cultural authorities could not continue the declassification procedure of the Cârnic massif from the List of Historical Monuments. Rejoinder, 217 (para. 689).

2.4.2.3 Social Opposition Prevented RMGC from Obtaining the Surface Rights

423 [redacted] **Tr. 2019**, 2083:12-14 and 2086:5-9.

424 Certain residents have persistently and to this day refused to sell their properties to RMGC, thus demonstrating their opposition to the Project. See above **Section 2.1.4.6**.

2.4.2.4 Project Opponents Petitioned the European Parliament

425 Mr. Jurca and other Project opponents petitioned the European Parliament as they considered that the Project breached European environmental directives. **Jurca I**, 28 (Section 10); **R-205**; R. PO27 Reply, 103 *et seq.* (para. 260); Counter-Memorial, 69 *et seq.* (para. 182).

426 The PETI came to Romania to discuss the Project with stakeholders in November 2011 and has since monitored the Project. **R-204**; **R-205**; see above para. 36.

427 [redacted] **Tr. 2019**, 1383:15-1384:1; **Jurca I**, 28 (para. 136).

2.4.3 RMGC, Not the State, Was Responsible for Managing the Social Opposition

2.4.3.1 RMGC Was Responsible for Obtaining the Social License

428 [redacted] **Tr. 2019**, 2916:3-8; see also **Tr. 2019**, 3004:8-3006:16 (Thomson); **Thomson Presentation**,

15; **Thomson Opinion I**, 5 *et seq.* (paras. 12, 16 and 21-22); Rejoinder, 306 (paras. 952-953).

429 It is undisputed that social opposition, including from a minority, can derail a mining project. See below **Section 2.4.4.3**.

430 It was not the State's role or responsibility to assist RMGC in managing, let alone resolving, the social opposition.

- RMGC has always known that it needed to handle this itself. **Tr. 2019**, 366:16-20 (R. Op.); Rejoinder, 305 (paras. 950, 952 and 954); see also below **Section 2.4.4**; and,
- [redacted] **Tr. 2019**, 728:17-733:6; see also **Tanase III**, 53 *et seq.* (paras. 89-92); **Tr. 2019**, 192:21-193:1 (Cl. Op.).

431 States issue legal licenses for mining projects without guaranteeing their success or feasibility.

- In a democratic society, like Romania today, a Government cannot impose a mining project on people who are willing and able to block it, if the opposition uses legal means, as it did here. **Tr. 2019**, 368:2-13 and 371:11-17 (R. Op.); see also **Tr. 2019**, 2902:22-2903:1 and 2940:22-2941:9 (Boutilier) [redacted] **Tr. 2019**, 3045:12 (Thomson) [redacted]
- The mining license alone did not create any legitimate expectation for RMGC that it would be able to execute the Project. Rather, RMGC bore the risk of meeting the regulatory requirements and of obtaining the social license. Its own failure to do either does not make Romania liable. **Tr. 2019**, 375:18-379:1 (R. Op.) and 392:2-22 (R. Op.); see also Rejoinder, 310 (para. 964); **RLA-53**, 297 (para. 37).

2.4.3.2 The State Did Not Interfere with RMGC's Attempts to Manage the Social Opposition

432 [redacted] **Tr. 2019**, 2957:8-2958:9; Rejoinder, 376 (para. 1054).

- The Government's determination in 2007 that RMGC needed to submit a new urban certificate for the EIA Review Process to continue was not unlawful and resulted directly from RMGC's failure to address the challenges by NGOs to its urban certificates. See above para. 417; and,
- Over the years, the State expressed its support for the Project, including by submitting the law to Parliament. **Tr. 2019**, 372:2-19 (R. Op.); Rejoinder, 348 (para. 1056); see also above **Section 2.3.1** and below **Section 2.4.3.4**.

433 Dr. Augustin Stoica, Associate Professor of Sociology at the National University of Political Studies and Public Administration in Bucharest, confirmed his view that the Government supported the Project in the lead-up to the submission of the law to Parliament. **Tr. 2019**, 3302:19-3303:2.

2.4.3.3 The State Defended in Court the Approvals and Permits for the Project

434 In response to the widespread social opposition to the Project, between 2004 and 2016, State authorities defended in court the permits and approvals, often alongside RMGC, in over 80 court actions (including first instance and appeals). **Tr. 2019**, 365:11-18 (R. Op.); Rejoinder, 322 (para. 995); Counter-Memorial, 362 (Annex IV).

435 [redacted] **Tr. 2019**, 1379:3-16 and 1380:14-1381:5.

2.4.3.4 The Roșia Montană Law Would Have Mitigated the Project's Lack of Social Legitimacy

436 The Project was controversial, and the permitting was blocked due to RMGC's inability to secure the necessary permits, in part because of NGO litigation. The Government proactively sought to facilitate the Project by providing a legislative solution to RMGC's problems. The submission of a Project-specific law to Parliament, the state organ best placed to determine issues of social legitimacy as it directly represents the people, had the additional benefit of increasing the Project's social legitimacy. **Tr. 2019**, 370:5-15 and 370:22-371:4 (R. Op.); see above **Section 2.3.1**.

437 The legislative changes that would have been achieved through the law were not imposed on RMGC, but rather reflected RMGC's needs and incorporated RMGC's requests. These changes would have greatly reduced the Project opponents' ability to legally obstruct the Project. See above **Sections 2.3.1.3** and **2.3.1.4**; **C-779**, 2 (para. 4(e)) [redacted]

438 In the latest iteration of the Claimants' case, they criticize the Government for seeking a "political decision" from Parliament on the Project but fail to acknowledge the socially controversial nature of the Project. Cl. PO27 Answers, 28 (para. 41); see also **Tr. 2019**, 218:19-219:6 (Cl. Op.) and 370:16-21 (R. Op.); **C-462**, 8 (quoting Mr. Ponta as saying "I believe the final decision in such a controversial project, with advantages and disadvantages, may only be made by the Parliament.").

439 The submission of the law to Parliament was the spark that triggered the 2013 protests. **Tr. 2019**, 371:5-10 (R. Op.) and 3234:10-19 (Stoica); **Boutilier Presentation**, 46.

- These protests demonstrated that the Project was not socially legitimate. See below **Section 2.4.6**.

440 [redacted] **Tr. 2019**, 2908:1-6.

- Mr. Ponta explained that the "pressure from the street was massive" and caused some parliamentarians to change their minds and vote against the law. **Ponta**, 18 (para. 63); see also **Tr. 2019**, 381:5-15 (R. Op.) (quoting Mr. Antonescu's statement, at **C-832**, 1, that "there are major … realities that prevent implementing this Project at this time", referring to the social opposition) and 381:16-383:10 (R. Op.) (quoting **C-2690.01**, 1 and noting the Claimants' misleading presentation of the content of Mr. Antonescu's statement, that "when talking about a project involving important natural resources…, it is very important to have a public support."). Mr. Antonescu explained his position by pointing to the "significant breach in the Romanian society" caused by the Project. **C-2690.01**, 1.

441 The Parliament's rejection of the Roșia Montană Law is a manifestation of the lack of social legitimacy of the law and is perfectly legitimate and legal under international law and thus cannot constitute a breach of the BITs. **Tr. 2019**, 383:16-384:4 (R. Op.).

2.4.4 RMGC Failed to Manage the Social Opposition

442 [redacted] See **Tr. 2019**, 3017:10-3019:1 (Thomson); **Thomson Presentation**, 21 and 26.

2.4.4.1 RMGC Failed to Engage with Project Opponents and Address Their Concerns

443 The nature of mining projects requires stakeholder engagement, including with the local community. **Thomson Opinion I**, 5 (para. 12).

444 [redacted] **Tr. 2019**, 369:8-13 (R. Op.); **Thomson Opinion II**, 69 (para. 222); see also **Thomson Presentation**, 24.

- [redacted] **Tr. 2019**, 730:10-732:12;
- [redacted]
- This and other evidence on record shows RMGC did not effectively engage with Project opponents or concerned residents. See Rejoinder, 319 *et seq.* (paras. 985-992) (listing concerns known to RMGC at the time).

445 RMGC lost the ability to influence its social license by failing to engage with the opposition in the early years of the Project. **Tr. 2019**, 368:14-369:7 (R. Op.) and 3013:17-3014:16 (Thomson); **Thomson Opinion II**, 22 (para. 49); see also **Thomson Presentation**, 22; Rejoinder, 343 *et seq.* (para. 1047 quoting **C-2391**) (examples from Prof. Witold Henisz' 2007 notes showing the failed engagement with local opponents).

- Early on, RMGC did not effectively engage with Alburnus Maior and the local community. Rejoinder, 315 *et seq.* (paras. 976, 978 and 984); see above **Section 2.4.1**;
- [redacted] **Tr. 2019**, 733:8-18;
- [redacted] **Tr. 2019**, 730:14-731:18;
- [redacted] **Tr. 2019**, 2799:16-2802:6 (Henisz) [redacted]

[redacted]; **C-2432**, 2 *et seq.*; **Thomson-20**, 5; **C-2391**, 45 (interview 17); **Thomson Opinion II**, 23 *et seq.* (paras. 51-57), Rejoinder, 319 (para. 985 and n. 1368) and 346 (para. 1050); Counter-Memorial, 48 *et seq.* (paras. 129 and 364); and,

- Project opponents were concerned that RMGC was creating and buying the appearance of support at the time of the public meetings relating to the Project. Rejoinder, 317 *et seq.* (para. 983); see also **Jurca I**, 23 (para. 109) (recalling "thinking that people who supported the Project were bused in for the event").

446 [redacted] **Tr. 2019**, 1453:1-1456:21; **C-2069**, 4.

- The issue is evidently not closed since these people (and others) still oppose the Project. See above **Section 2.4.1** and below **Section 4.2.3.2**; and,
- [redacted]

447 The level of opposition to a mining project, including the early community relations, was an issue taken into account by other investment arbitration tribunals, for example the *SAS v. Bolivia* tribunal assessed the implementation of the claimant's community relations program and its contribution to the social conflict. Rejoinder, 312 (referring to **RLA-162**, 132 (para. 507)).

2.4.4.2 The Claimants Inflate and Mischaracterize the Evidence of Support for the Project

448 While RMGC may have gained some support over the years (the level of which the Claimants overstate), it never overcame the opposition to the Project. **Tr. 2019**, 369:8-13 (R. Op.) and 3015:14-3016:13 (Thomson); Rejoinder, 327 (paras. 1007-1012).

"Thank You" Letters Sent to RMGC Do Not Demonstrate Support

449 Thanking RMGC for a financial contribution is not the same as demonstrating support for the Project. **Jurca I**, 34 *et seq.* (paras. 166-167).

450 [redacted] **Tr. 2019**, 2100:12-18, 2103:2-5, 2109:14-18 and 2169:17-2170:1 and 2171:5-14; **C-2736**.

RMGC's Polls and Surveys Are Not Reliable Evidence of Support

451 RMGC polls reflecting the **satisfaction** of former residents who sold their homes to RMGC and moved are irrelevant.

- Dr. Thomson explained that willingness to move is not evidence of support for the Project. **Thomson Opinion II**, 63 *et seq.* (paras. 196-210);
- Mr. Jurca had previously testified that many people, including his friend Mr. Dandea, regretfully left Roșia Montană and their departures did not mean that they supported the Project. **Jurca I**, 19 (paras. 88-90); see also **Cornea**, 4 (para. 16) (testifying that many residents eventually agreed to sell to RMGC even though they opposed the Project);
- [redacted] **Tr.**

2019, 2116:17-2117:7; **C-2066**, 493 of the Romanian version (question 26); and,

- In any event, even if all Roșia Montană residents who sold their properties to RMGC were happy to have done so, there still are Project opponents who do not wish to sell. See **Jurca I**, 47 (para. 202); see also below **Section 4.2.3.2**.

452 [redacted]

- [redacted] **Tr. 2019**, 1350:6-9 and 1367:8-12; and,
- [redacted] **Tr. 2019**, 1369:1-17.

453 [redacted]

- [redacted] **Tr. 2019**, 1370:1-17; and,
- [redacted] **Tr. 2019**, 1467:10-11. [redacted]

454 [redacted] **Tr. 2019**, 1468:7-11.

455 [redacted]

- [redacted] **Tr. 2019**, 1468:7-11; see also Rejoinder, 341 *et seq.* (para. 1042);
- [redacted] **Tr. 2019**, 1465:18-21 and 1467:17-20;
- [redacted] **Tr. 2019**, 1469:11-1471:5;
- [redacted] **Tr. 2019**, 1468:13-1471:18; see also Rejoinder, 342 (para. 1043);
- [redacted]

  [redacted] **Tr. 2019**, 1472:16-1473:18;

- [redacted] **Tr. 2019**, 1474:4-1475:14; and,
- [redacted] **Tr. 2019**, 1471:9-21 (Tercier).

456 [redacted]

[redacted] **Tr. 2019**, 1362:4-15.

- [redacted] **Tr. 2019**, 1362:16-22; **Camarasan II**, 1; see also **Jurca I**, 38 (paras. 178-179); **Golgot I**, 2, (para. 6); **Jeflea I**, 3 (para. 16); **Petri**, 3 (para. 9); **Devian I**, 2 (para. 7); **Cornea**, 6 (para. 25).

Polls Commissioned by RMGC Are Not Reliable Evidence of Support

457 [redacted] **Tr. 2019**, 778:7-779:1; **C-2175**; see also **Henry II**, 18 (para. 36); **Stoica Presentation**, 29; **Stoica Opinion**, 84 *et seq.* (para. 158) (explaining the shortcomings of this exhibit).

458 [redacted] **Tr. 2019**, 785:21-786:20 and 787:18-791:22; **R-625**, 30 [redacted]

459 Dr. Stoica explained why the polls on which the Claimants rely do not provide sufficient information to assess their results and degree of representativeness. **Stoica Presentation**, 29 *et seq.*; **Stoica Opinion**, 91 (paras. 169-184). He was not questioned on poll methodology at the hearing.

RMGC's Advertisements Were Sanctioned for Being Misleading

460 RMGC expended considerable sums on advertisement to influence public opinion and increase support for the Project. **Tr. 2019**, 783:13-785:20 (Tănase), 3326:11-3327:1 and 3331:2-3333:10 (Pop); **R-605**, 20-22.

461 RMGC was sanctioned for misleading advertisements. Rejoinder, 325 (paras. 1004-1006); **R-277**; **R-619** to **R-624**.

Dr. Boutilier's Reliance on Public Opinion Polls is Misguided

462 Dr. Boutilier failed to review data from all stakeholder groups and to consider the entrenched opposition to the Project. Rejoinder, 314 *et seq.* (para. 974) (referring to **Thomson Opinion II**, 5 (para. 2).

- [redacted] **Tr. 2019**, 2981:12-2983:08; and,
- [redacted] **Tr. 2019**, 3115:2-18 (Thomson); see also **Tr. 2019**, 2937:12-2938:2 (Boutilier) [redacted]

463 Dr. Stoica identified flaws in the way RMGC (and RMGC-commissioned third parties) conducted, prepared or presented polls and surveys relating to the Project. **Tr. 2019**, 3174:13-3177:6; **Stoica Presentation**, 29-35; **Stoica Opinion**, 82 *et seq.* (Section 6); Rejoinder, 337 *et seq.* (paras. 1031-1045).

464 Dr. Thomson considered those polls and surveys irrelevant because of those flaws and because they did not consider the Project opponents. **Thomson Opinion II**, 42 *et seq.* (paras. 126, 134, 138 and 139).

465 [redacted] **Tr. 2019**, 2923:7-12; **C-2805**.

- [redacted] **Tr. 2019**, 2924:7-2927:6; and,
- [redacted] **Tr. 2019**, 2929:10-16 and 2931:5-12; **C-2823**; **Boutilier**, 12 (para. 26).

466 [redacted]

Tr. 2019, 2887:3-6 and 2888:8-20.

The Claimants Draw Misguided Conclusions from Various Assessments

467 The Claimants continue to improperly rely on four purportedly "contemporaneous independent assessments" that allegedly corroborate Dr. Boutilier's conclusion that RMGC earned a social license in 2011-2013, despite the shortcomings identified at the 2019 hearing. Cl. PO27 Answers, 68 *et seq.* (paras. 129-133); see also **Tr. 2019**, 193:19-198:10 (Cl. Op.) (relying on the same examples).

468 [redacted] **Tr. 2019**, 3028:1-3029:7.

469 [redacted] **Henisz**, 18 (dated 21 October 2018).

- [redacted] **Henisz**, 3 *et seq.* (paras. 7, 11 and 19); **C-2462.01**; **C-2462.02**; **C-2391**;
- [redacted] **Tr. 2019**, 2986:05-10 (Boutilier) [redacted] see also **Thomson Opinion II**, 21 (para. 44); and,

- This opinion contradicts the Claimants' statement that Prof. Henisz had researched and concluded that RMGC had earned a social license. **Tr. 2019**, 193:19-195:7 (Cl. Op.).

470 Second, Prof. Henisz did **not** make an **independent** assessment.

- [redacted] **Tr. 2019**, 2770:5-14 and 2779:5-10 (Henisz); see **Henisz**, 18 (para. 44); and,
- [redacted] **Tr. 2019**, 2843:6-2844:01 [redacted]

471 Third, Prof. Henisz' witness statement is proffered **without underlying evidence**.

- He did not explain the basis for his conclusion and did not submit any transcripts of meetings, or at least the questions put to interviewees. Rejoinder, 346 (para. 1052);
- [redacted] **Tr. 2019**, 2765:3-9 [redacted] *e.g.* **Tr. 2019**, 2798:6-2799:15 and 2807:6-14 [redacted] **Tr. 2019**, 2838:14-2843:3 (Henisz); and,
- [redacted] **Tr. 2019**, 3028:1-3029:7 and 2776:22-2777:4 (Henisz).

472 The University of Exeter's April 2011 study (**C-2045**) is not a contemporaneous independent assessment of whether RMGC had acquired a social license.

- The study does not say that RMGC had acquired a social license;
- [redacted]

[redacted] **Tr. 2019**, 3016:15-3017:8, 3094:10-13, 3096:14-22, and 3097:11-18 (Thomson); **Thomson Presentation**, 25; and,

- [redacted] Cl. PO27 Answers, 73 (para. 136); **Tr. 2019**, 196:16-197:2 (Cl. Op.). [redacted].

473 The Muntii Apuseni study of December 2011 (**C-2050**) does not provide evidence of an "overwhelming" and "strong" majority of local Project supporters. **Claimants' PO27 Responses**, 70 *et seq.* (para. 133).

- Dr. Stoica showed how unreliable this study was as it notably fails to specify how sample units (households) were allocated, how respondents were selected within this unit, and whether the interviewers were professionals and impartial. **Tr. 2019**, 3177:8-3179:13; **Stoica Presentation**, 35.

474 Contrary to the Claimants' allegations, the 2012 referendum reveals a lack of support for the Project. **Tr. 2019**, 197:18-198:6 (Cl. Op.); **C-2859**; **C-794**.

- [redacted] **Tr. 2019**, 1457:10-1458:19 (Lorincz);
- [redacted] **Tr. 2019**, 1461:2-20;
- [redacted] **Tr. 2019**, 2163:1-7 (Jurca); **Jurca I**, 30 (paras. 148 and 150); **Petri**, 3 (para. 11); **Jeflea I**, 3 (para. 17);
- [redacted]. **Tr. 2019**, 3019:3-3021:3 (Thomson); **Thomson Presentation**, 28; Rejoinder, 334 *et seq.* (paras. 1024-1030); and,

- [redacted] **Tr. 2019**, 2162:1-22; **Jurca I**, 30 (para. 147).

475 [redacted] **Tr. 2019**, 1460:8-14; **C-2853**, 19; see also **Tr. 2019**, 3020:1-12 (Thomson) [redacted] **Jurca I**, 30 (para. 149) (describing RMGC's campaign in advance of the referendum).

- [redacted]
  See **Tr. 2019**, 2162:15-22 (Jurca).

2.4.4.3 The Level of Support for the Project Is Irrelevant Given the Social Opposition

476 The Claimants' attempt to minimize the opposition is unavailing. Cl. PO27 Answers, 74 (para. 138); **Tr. 2020**, 162:22-163:3 (R. Op.).

Social Opposition Can Derail a Mining Project

477 [redacted] **Tr. 2019**, 2896:10-20 (Boutilier) and 3005:4-8 (Thomson); **Thomson Presentation**, 15; **Thomson-47**, 42; see also **Tr. 2019**, 2889:20-22 (Boutilier) [redacted] **C-2824**, 1.

478 [redacted] **Tr. 2019**, 2939:15-22 (Boutilier) (quoting **Thomson-10**, 1781); **Thomson Presentation**, 15.

- [redacted] **Tr. 2019**, 2894:12-22 (Boutilier) and 3005:10-19 (Thomson); **Thomson-10**, 1779; **Thomson Presentation**, 16. The NGOs involved in the Save Roşia Montană campaign are therefore stakeholders;

- [redacted] **Tr. 2019**, 2908:7-10 and 2909:4-6; and,
- [redacted] **Tr. 2020**, 907:5-909:14.

479 Whether many Project opponents are locals as the Claimants emphasize (see *e.g.* above para. 401, second point), is irrelevant.

- [redacted] **Tr. 2019**, 2895:1-18; and,
- [redacted] **Tr. 2019**, 2917:1-17.

A Minority Can Derail a Mining Project

480 [redacted] **Tr. 2019**, 3006:10-16 and 3053:17-18 [redacted] and 3116:6-16; **Thomson Presentation**, 17; see also **Tr. 2019**, 3054:2-18, 3074:22-3075:3 and 3097:1-2 (Thomson).

481 [redacted] **Tr. 2019**, 2897:15-22 and 2939:3-7 (Boutilier) and 3006:10-16 (Thomson); **Thomson Presentation**, 17; see also **Tr. 2019**, 3152:1-3155:11 (Thomson).

482 When the TAC asked RMGC to explain what would happen if a single person in Corna refused to move and raised the issue of expropriation, Mr. Tănase remained evasive and referred to RMGC's "hope … to acquire all properties". **C-483**, 37 (Anton) and 53 (Tănase); Rejoinder, 92 *et seq.* (paras. 306-308).

483 [redacted] **Tr. 2019**, 3043:20-3044:7 (Thomson).

- [redacted] **Tr. 2019**, 2901:15-16;
- Mr. Bernard Guarnera, Director at Behre Dolbear, confirmed that a single project opponent can block a project. **Tr. 2020**, 531:2-7; and,
- [redacted] **Tr. 2019**, 3103:18-3104:22.

484 To avoid being temporarily or permanently blocked, RMGC needed to address the social opposition [redacted] **Tr. 2019**, 3101:1-3102:22 (Thomson); **Thomson Presentation**, 21; **Thomson Opinion II**, 55 (para. 169).

Irrespective of the Support on which the Claimants Rely, Project Opponents Took Action to Derail the Project

485 [redacted] **Tr. 2019**, 366:21-367:22 (R. Op.) and 3052:1-4 (Thomson).

486 [redacted] **Tr. 2019**, 2097:14-2098:10.

487 Gabriel Canada and RMGC knew the opposition could delay or prevent the Project. See **Thomson-88**, **Thomson-90**, **Thomson-91**; **Thomson-92**; **Thomson Presentation**, 29; **Thomson Opinion II**, 61 *et seq.* (para. 191).

488 By taking legal action and delaying the Project, Alburnus Maior and other NGOs had the ultimate control over RMGC's social license. **Thomson Opinion II**, 69 (para. 220); Rejoinder, 322 *et seq.* (para. 996).

489 [redacted]

[redacted] See **Tr. 2019**, 2940 (Boutilier cross).

490 [redacted] **Tr. 2019**, 3009:6-17 (Thomson); **Thomson Presentation**, 20; **Thomson Opinion II**, 5 (para. 2).

- [redacted] **Tr. 2019**, 2922:14-17 (Boutilier) and 3009:1-5 (Thomson); see also 3003:9-22 (Thomson) [redacted] and,
- [redacted] **Tr. 2019**, 3148:14-3150:9 and 3152:1-3155:11 (Thomson).

491 The Tribunal need not make a technical determination on the precise level of the social license. The relevant point in this case is that stakeholders have persistently taken action against and thereby blocked the Project. In this sense, there was no social license.

2.4.5 The Actions of Project Opponents Are Not Attributable to the State

492 The actions of residents and NGOs are not attributable to the State; they were actions of non-State actors. See Rejoinder, 177 (para. 560).

2.4.6 Social Opposition Culminated in the 2013 Protests

493 The street demonstrations in 2011-2013 and the nationwide protests of late 2013 and 2014 (the "Romanian Autumn") evidence strong social opposition to the Project. **Tr. 2019**, 371:5-10 (R. Op.) and 3337:17-3338:11 (Pop); **Pop Presentation**, 17; **Pop Opinion**, 28 *et seq.* (paras. 66-91).

- [redacted] **Tr. 2019**, 3021:5-15 (Thomson);
- The protests took place at the local, national, and international level. **Tr. 2019**, 369:14-20 (R. Op.), 3303:8-3305:17 (Stoica) and 3316:18-3317:22 (Pop); Counter-Memorial, 338 (Annex III); and,
- Local opponents to the Project protested both locally and in big cities. **Jurca I**, 45 (para. 191 last bullet point); **Petri**, 3 *et seq.* (paras. 12-13); **Cornea**, 6 (para. 24); **Devian I**, 2 (para. 6); **Jeflea I**, 3 (paras. 14-15); **Golgot I**, 2, (para. 7).

494 The 2013 protests were "an expression of a pre-existent social movement that opposed the mining project since early 2002." **Tr. 2019**, 3161:19-22, 3169:19-3171:1, 3173:8-3174:12, 3193:20-3196:7 (Stoica); **Stoica Presentation**, 20-28; **Tr. 2019**, 3366:17-3367:2, 3400:6-3401:7 (Pop), and 3406:18-3408:9 (Pop).

- Contrary to the Claimants' view, the 2013 demonstrations were against the Project, not about Government corruption. The demonstrators accused the Government of being corrupt because of its support of the Project. **Tr. 2019**, 384:8-386:16 (R. Op.); **Respondent's Opening 2019**, 5-7; **R-262** (see above para. 402); **R-449** and **R-450** (see above paras. 111 and 402); and,
- [redacted] **Tr. 2019**, 2964:9-2972:6 (Boutilier); **C-2833**; **Stoica-4**; **Stoica-6**; **Stoica Presentation**, 8-13; **Tr. 2019**, 3162:6-3165:12 (Stoica).

495 [redacted]**r. 2019**, 2917:12-17.

- [redacted] **Tr. 2019**, 2915:6-2916:11. Accordingly, the scope of the 2013 protests demonstrates that the social opposite was nation-wide, and that the Project lacked the social license.

496 [redacted] **Tr. 2019**, 3022:5-11 (Thomson); see **Thomson Presentation**, 29.

- [redacted] **Tr. 2019**, 804:14-816:8 (Tănase); **R-642**; **R-644**; **R-649**; **R-650**; see also **Tr. 2019**, 796:2-798:1 (Tănase); **C-2676** [redacted]
- [redacted] **Tr. 2019**, 816:9-817:19; and,
- [redacted] **Tr. 2019**, 800:20-802:10. [redacted] **Tr. 2019**, 802:12-17.

497 RMGC did not (contrary to what it stated at the time) take any remedial action to address this social opposition. See **R-539**, 5 ("In the immediate future, the Company will continue to pursue a strategy of engagement with all stakeholders, to explain the critical importance of the Project as part of the sustained economic development for Romania").

- Rather, it abandoned the Project and started preparing for arbitration. **Tr. 2019**, 387:1-388:8 (R. Op.); **C-1442**; see also **C-781**, 16 (threatening arbitration in case the Government did not accept RMGC's final offer).

3 ROMANIA DID NOT OTHERWISE BREACH THE INVESTMENT TREATIES

498 The Claimants recognize that their remaining claims are based on the same facts and same theory of composite breach of the BITs as their FET claim. Because the FET claim fails, so too should their remaining claims. **Tr. 2019**, 391:1-392:22 (R. Op.); Rejoinder, 6 (para. 24).

499 The Respondent thus refers the Tribunal to its written submissions on the remaining claims. As demonstrated in its Answers to the Tribunal's Questions following the 2019 hearing, Romania did not breach its obligations at any point in time, including "on or about" 9 September 2013. There could not have been an expropriation or other BIT breach on or about 9 September 2013. R. PO27 Reply, 3 *et seq.* (para. 13 *et seq.*). The Respondent simply makes the following observations.

500 First, it is undisputed that RMGC's mining license is valid and has been extended. **Tr. 2020**, 358:16-19 (R. Op.). Also, as the Claimants' quantum expert Mr. Spiller recognized, RMGC is still in possession of its assets, including real estate, in Roşia Montană. There has therefore been no expropriation. See below para. 753 *et seq*.

501 [redacted] **Tr. 2020**, 366:6-367:18. [redacted]

502 Second, although the Claimants referred in their 2019 opening to the neighboring Roșia Poeini copper mine, these projects are not in like circumstances mainly because Roșia Poeini is a longstanding operational mine, which is therefore not subject to the same laws, including the EIA Procedure laws, as the Roşia Montană Project. Rejoinder, 253 *et seq.* (paras. 796-799); **CMA - Wilde Report II**, 71 *et seq*. (Section 8).

4 THE CLAIMANTS HAVE FAILED TO ESTABLISH CAUSATION

503 The Claimants seek compensation for the "effective expropriation and complete deprivation and loss of the entire value of the Claimants' substantial investments in Romania," purportedly caused by Romania's alleged breaches of the BITs. Memorial, 1 (para. 2).

504 However, the Claimants have not only failed to prove a breach; they have also failed to establish a causal link between a breach and the purported loss. They have failed to prove that, but for Romania's internationally unlawful acts, RMGC would "in all probability" or "with a sufficient degree of certainty" have obtained all necessary approvals and the Project would be operating profitably.

505 The evidence establishes that, had the environmental permit been issued in early 2012, the Project could not have been profitably operated and would have been unable to obtain financing or a building permit due to RMGC's inability to overcome the social opposition, to secure the surface rights, and to meet the permitting requirements.

4.1 The Claimants Must Establish a Causal Link Between Romania's Alleged BIT Breach and the Claimants' Alleged Loss

506 Compensation is only due if the Claimants prove that the alleged breach caused the claimed loss, both factually and legally. Counter-Memorial, 254 (paras. 680-681); **Tr. 2020**, 156:18-157:8; **Respondent's Opening 2020**, 6 *et seq*.

507 Establishing factual causation requires a demonstration that the alleged breach constituted the underlying or dominant cause of the claimed loss; it does not suffice to show that a breach was one among several causes of loss. Counter-Memorial, 255 (paras. 682-684); **Tr. 2020**, 157:9-15; **Respondent's Opening 2020**, 8 *et seq*.

508 Establishing legal causation requires a demonstration that the claimed loss is not too remote from the alleged breach: the Claimants must show that the breach is the proximate cause of the loss and that the loss is not too "speculative". Counter-Memorial, 258 (para. 688); **Tr. 2020**, 157:16-19.

509 Moreover, the Claimants bear the burden of establishing the causal link between the alleged BIT breach and the claimed loss. Counter-Memorial, 257 *et seq*. (para. 687).

510 The Tribunal should be guided by *Bilcon v. Canada*, in which the tribunal formulated the relevant test for causation as

> "whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA." **RLA-198**, 26 (para. 114).

511 Accordingly, the Tribunal should determine the situation that would have prevailed "'in all probability' or 'with a sufficient degree of certainty'", had the alleged breach not occurred. Rejoinder, 303 *et seq*. (para. 946); **Tr. 2020**, 160:2-161:18.

512 The Claimants are therefore required to prove that, but for the alleged breach, "'in all probability' or 'with a sufficient degree of certainty' the … Project would have obtained all necessary approvals and would be operating profitably." **RLA-198**, 46 (para. 175); **Respondent's Opening 2020**, 10 *et seq*.

513 Should the Tribunal determine that a causal link exists, it should assess the extent to which the Claimants contributed to their loss through their own fault and negligence, and then reduce the compensation accordingly. **Tr. 2020**, 157:9-15; **Respondent's Opening 2020**, 12.

4.2 Romania's Alleged BIT Breach Did Not Cause the Claimed Loss

514 Much like in the *Bilcon* case, the Claimants have failed to prove that, in all likelihood, RMGC would have obtained the requisite approvals, or that "serious socio-economic adverse effects, which are not capable of mitigation" would not have prevented the issuance of said approvals. Even if RMGC had somehow been able to obtain the required approvals, in all likelihood these approvals would have been subject to conditions that would have rendered the Project economically unfeasible. Rejoinder, 304 *et seq*. (paras. 947-948).

515 Without the Roșia Montană Law, RMGC would have been unable to comply with the conditions that would have been imposed through the environmental permit, nor could it have met the other legal requirements for the Project.

516 Furthermore, RMGC's failure to overcome the social opposition would have likely resulted in the cancellation of permits and a failure to obtain the surface rights.

517 In addition, the financial viability of the Project is questionable because its production schedule failed to incorporate mitigation measures to which RMGC had committed.

518 Finally, these issues would have compromised Gabriel Canada's ability to obtain financing for the Project.

4.2.1 The Claimants Have Not Demonstrated that RMGC Could Have Complied with the Conditions that Would Have Been Imposed in an Environmental Permit

519 As noted above, even if RMGC had obtained the environmental permit in 2012 or thereafter, it is likely that it would have included conditions. The Claimants have not demonstrated that RMGC would have been able to meet those conditions – many of which pertained to issues that RMGC had ignored for years – and if so, that compliance with those conditions would not have affected the technical and financial viability of the Project. **Respondent's Opening 2020**, 15; **Tr. 2020**, 167:11-168:2 (R. Op.); see above paras. 21 and 25 *et seq.*

520 Even assuming the Ministry's non-issuance of the environmental permit amounted to a BIT breach (which is denied), the TAC would have likely (**Respondent's Opening 2020**, 86):

- issued the permit upon condition that RMGC determine its **cyanide transportation route and transporter**. The Claimants need but fail to prove that RMGC would have been able to operate the Project profitably even it had been required to determine its cyanide transportation route and transporter – something it had been requested to do for years but had ignored. See above paras. 131 *et seq.*;

- issued the permit upon condition that RMGC undertake a **pre-operational cyanide audit**. The Claimants must but fail to prove that, had the environmental permit been issued in 2012 or thereafter, RMGC would in all probability have obtained an environmental permit that did not comprise this condition. The Claimants need but fail to prove that RMGC would have been able to operate the Project profitably even it had been required to undertake a pre-operational cyanide audit and notwithstanding the findings of that audit – which it had considered doing but either did not do (or did but with a negative result). See above paras. 145 *et seq.*;
- issued the permit upon condition that RMGC secure the necessary permits for the **Zlatna cyanide facility**. The Claimants need but fail to prove that RMGC would have been able to operate the Project profitably even it had been required to prepare urban plans for the Zlatna site, secure the approval of those plans, carry out an EIA Procedure for that site, and ensure the construction of the requisite facilities. See above paras. 142-144 and below paras. 546-555;
- issued the permit upon the condition that RMGC envisage a **geomembrane liner**. The Claimants must but fail to prove that, had the environmental permit been issued in 2012 or thereafter, RMGC would in all probability have obtained an environmental permit that did not comprise such a condition. The Claimants need but fail to prove that RMGC would have been able to operate the Project profitably even it had been required to put in place a geomembrane liner. See above paras. 152-155;
- issued the permit upon condition of an **ADC for Orlea**. The Claimants must but fail to prove that, had the environmental permit been issued in 2012 or thereafter, in all probability, that permit would not have required an ADC for Orlea. Indeed in 2012, even less was known about Orlea than in the spring of 2013 and it is thus likely that the Ministry of Environment would have made this a condition. **Tr. 2020**, 195:16-196:1 (R. Op.). They also fail to prove that, had RMGC been required in 2012 to carry out the Orlea research, the results of that research would not have impacted the Project. See above paras. 57, 156 *et seq.*; and,

- issued the permit upon condition of RMGC envisaging the **site after-use**. The Claimants must but fail to prove that, had the environmental permit been issued in 2012 or thereafter, that permit would in all probability not have required RMGC to provide more information regarding the after-use. They would further need to prove that, had the Ministry of Environment required RMGC, as a condition of the environmental permit, to propose an after-use for the site, this would not have impacted the feasibility or viability of the Project. See above **Section 2.1.4.8**.

4.2.2 The Claimants Have Not Demonstrated that RMGC Would Have Secured the Other Permits for the Project

521 The Project was massive, spreading over four localities and 1,250 hectares. **Tr. 2020**, 206:12-14; **R-169**, 32. It would have been the largest gold mine in Europe and in the middle of a populated area.

522 [redacted] **Tr. 2019**, 910:7-11, 926:3-13.

523 There is no dispute regarding the permits, approvals, and endorsements that RMGC required for the building permit.

524 These permits, approvals, and endorsements were listed, *inter alia*, in the urban certificates. RMGC obtained its first urban certificate in 2004 and therefore knew from the beginning that, besides the environmental permit, it needed dozens of other permits. **Respondent's Opening 2020**, 90 *et seq.*; **C-808**, 21; **C-924**, 25.

- [redacted] **Respondent's Opening 2020**, 92; **Tr. 2020**, 210:19-211:5 (R. Op.); **Tr. 2019**, 1545:17-22 (Gaman); **R-464**, 65;
- [redacted] **Respondent's Opening 2020**, 93, **Tr. 2020**, 211:6-17 (R. Op.); **C-1842**, 2 (para. 2);

- In April 2012, RMGC prepared a permitting timeline and each of the milestones therein required other permits. **Respondent's Opening 2020**, 92, **Tr. 2019**, 512:8-513:7 (R. Op.); **Tr. 2020**, 211:18-21 (R. Op.); **R-683**; and,
- In mid-2013, the Roșia Montană Law provided for an expedited route that would facilitate the Project. Appendix 2 to the law listed outstanding permits, some of which were on the critical path. **Respondent's Opening 2020**, 95-98; **Tr. 2020**, 213:2-13 (R. Op.); **C-519** resubmitted, para. 2.

525 As explained below, RMGC needed but failed to obtain, *inter alia*:

- a Governmental Decision on the removal of lands from the national forestry fund;
- Water Management Permit;
- approval of the Industrial Area PUZ; and,
- permits for a cyanide storage facility at Zlatna.

526 In sum, even if RMGC had obtained the environmental permit in 2012 or thereafter, it lacked many other permits that it needed before it could even apply for the building permit.

527 Thus, even assuming the Ministry's non-issuance of the environmental permit amounted to a BIT breach (which is denied), the Claimants have failed to prove that RMGC would have obtained all of the other requisite permits and, finally, the building permit.

528 Furthermore, the Claimants have failed to demonstrate that RMGC would have **maintained** all requisite permits. Indeed, most of the permits that RMGC needed to secure before the building permit are administrative acts. Given their track record, it is likely that NGOs would have filed suit against these permits (including the building permit).

4.2.2.1 The Government Decision Regarding the Removal of Land from the National Forestry Fund

529 RMGC never initiated the steps for the removal of land from the national forestry fund for the Project. See above **Section 2.1.4.7**.

530 RMGC needed to secure the surface rights for the Project and the steps to do so depended on the nature and ownership of the land. These lands, spreading over several localities, belonged either to entities, private and public, or to private individuals. These lands are diverse and include grasslands and forests, agricultural lands, water streams, roads, and others. **Tr. 2020**, 215:11-21 (R. Op.); **C-1255**, 13 *et seq.*, **R-114.**

531 According to the EIA Report, RMGC planned to deforest 256 hectares of land. **Tr. 2020**, 216:3-7 (R. Op.); **Respondent's Opening 2020**, 100.

532 Under Romanian law, forest lands are protected and managed through a national forestry fund. **R-116**, **R-117**.

533 They can be removed only through a special procedure involving a Government decision issued based on the agreement of the owner, favorably endorsed by the forestry body and in exchange of other lands. The Government decision is required in this case because of the significance of the area to be deforested. **R-116**, **R-117**, **R-118**, **R-119**.

534 Prior to the Government decision, the Alba Forestry Directorate and the National Regia of Forests must give their approval. **Respondent's Opening 2020**, 101; **Tr. 2020**, 216:17-19 (R. Op.).

535 By law, the titleholder must acquire the surface rights of both the land to be deforested and the land to be reforested. **Respondent's Opening 2020**, 102; **Tr. 2020**, 216:16-217:16 (R. Op.); **R-501**, 3-4 (Art. 19).

536 Under this law, the title holder has the obligation to reforest another area at least three times greater. **Respondent's Opening 2020**, 103; **Tr. 2020**, 216:19-217:6 (R. Op.).

537 If the forest is on private land (either private individual, private entity or private property of communes, cities or counties), the approval of the owner is required and in case of refusal, an expropriation procedure may be commenced if the Project is deemed of public utility. Counter-Memorial, 29 *et seq.* (paras. 82-83); **Sferdian and Bojin LO**, 26 *et seq.* (paras. 110 and 117).

538 [redacted]

Respondent's Opening 2020, 104; **Tr. 2020**, 217:17-21 (R. Op.); **C-2242**, 2.

539 The removal of agricultural lands from the agricultural circuit for a new purpose (mining) would also have required a Government decision. **Respondent's Opening 2020**, 105; **Tr. 2020**, 217:22-218:6 (R. Op.).

4.2.2.2 Water Management Permit

540 The tailing management facility was designed to be built on the Corna and Roșia Montană rivers.

541 RMGC was required but failed to secure the Water Management Permit to certify compliance with the Water Framework Directive. **Respondent's Opening 2020**, 106; **Tr. 2020**, 218:7-14 (R. Op.); Rejoinder, 83 *et seq.* (Sections 3.3.2.5 and 3.6.1.6); see above paras. 45 and 87-95.

542 As it follows from Appendix 2 to the Roşia Montană Law, one of the core requirements was (and still is) the transfer of the property right over the Corna and Roşia Montană riverbeds to RMGC. The transfer (by a concession contract) was in the competence of the then Water Forests and Fisheries Department (which operated under the auspices of the Ministry of Environment). **Respondent's Opening 2020**, 107; **Tr. 2020**, 218:14-219:1 (R. Op.). To this day, RMGC has not initiated the proceedings for obtaining these surface rights. **Tr. 2020**, 219:1-3 (R. Op.).

543 RMGC needed to meet the requirements for the Project to be declared of overriding public interest and other technical requirements to comply with the Water Framework Directive, as shown in contemporary correspondence. **Tr. 2020**, 219:7-12 (R. Op.); **R-81** resubmitted; see above para. 92.

4.2.2.3 Urban Plans

544 As acknowledged in RMGC's annual reports of 2011-2015, around 22 permits were required before it could apply to the Roşia Montană Local Council for its approval of the Industrial Area PUZ. Out of these 22 permits, RMGC has never applied for the endorsements from the Ministry

of Regional Development and Public Administration, and the Chief Architect of Alba County Council. **Tr. 2020**, 219:13-21 (R. Op.); **C-1115**, 68 *et seq.* (Table 15); **C-1116**, 95 *et seq.* (Table 15); **C-1117**, 121 *et seq.*; **C-1118**, 103 *et seq.*; **C-1119**, 65 *et seq.*

545 In 2013, as per Appendix 2 to the Roşia Montană Law, for the approval of the Industrial Area PUZ, RMGC still needed to apply to obtain the endorsements from the Ministry of Culture, Ministry of Regional Development and Public Administration, Ministry of Agriculture and Rural Development and the Chief Architect of Alba County Council. **Respondent's Opening 2020**, 108; **Tr. 2020**, 219:22-220:8 (R. Op.); **C-519** – resubmitted, 28 (Appendix 2).

4.2.2.4 The Permits for a Cyanide Storage Facility at Zlatna

546 Although RMGC never determined its cyanide transportation route, it appeared to privilege a route by which it would transport cyanide by rail from Constanţa to Zlatna (and then by truck to Roşia Montană). Its consultant, AMEC, had indeed proposed in July 2012 the Zlatna Ampellum Industrial Area as the preferred site to store cyanide and other hazardous substances for the Project. **Tr. 2020**, 221:1-6 (R. Op.); **C-943**.

547 There are, however, no unloading or storage facilities at Zlatna that can accommodate cyanide and other hazardous substances. As Mr. Tănase acknowledged to the TAC in 2013, RMGC thus needed to plan and build a cyanide storage facility at Zlatna. **Tr. 2020**, 180:13-181:8 (R. Op.); **C-484.**

548 In line with the AMEC 2012 report and the findings of Romania's cyanide expert, Ms. Blackmore, RMGC would need a facility with, at least, new spur lines, an off/up-loading facility for the railcars and an interim storage space for the cyanide. **Respondent's Opening 2020**, 110; **Tr. 2020**, 221:12-17 (R. Op.); **CMA - Blackmore Report**, 33 (paras. 133-134).

549 As with the Project, RMGC would need several permits before it could even apply for the building permit of this cyanide transportation and storage facility, including an urban certificate, a PUZ, an environmental permit (following an EIA Procedure, entailing also a risk assessment under

the Seveso Directive, given the presence of dangerous substances) and the surface rights for the area in question. **Respondent's Opening 2020**, 111; **Tr. 2020**, 221:18-222:12 (R. Op.); **CMA - Wilde Report I**, 35 *et seq.* (paras. 125-128) and 36 *et seq*. (paras. 130-137).

550 In terms of the Project timeline, Gabriel Canada assumed in its Management's Analysis of 9 March 2011 (the latest prior to the Valuation Date) that it would take 42 months from the environmental permit until the completion of the mine. **Respondent's Opening 2020**, 111; **Tr. 2020**, 788:19-789:22 (Cooper); **R-307**, 7.

551 The Claimants, however, omitted to consider the time both to secure the permits for Zlatna and to build the facility.

552 Ms. Wilde opines that this timeline is optimistic and provides an example of another project in Romania, the Kronochem project, also involving dangerous substances like the ones that would need to be stored at Zlatna. There, the investor applied for an environmental permit for the expansion of an existing plant. Ms. Wilde notes that the whole procedure took almost six years from the commencement of the SEA for the urban planning until the environmental permit. **Respondent's Opening 2020**, 113; **Tr. 2020**, 223:5-11 (R. Op.); **CMA - Wilde Report II**, 39 (para. 137).

553 Ms. Blackmore estimated that the construction of this facility would take from 18 to 24 months. **Respondent's Opening 2020**, 114, **Tr. 2020**, 223:12-14 (R. Op.); **CMA - Wilde Report II**, 33 (para. 134).

554 Ms. Blackmore's estimations do not consider the impact of likely NGO lawsuits (before and/or after the issuance of the building permit for Zlatna).

555 The Claimants have made no attempt to prove that there is a reasonable degree of certainty that RMGC would have secured the building permit for the Zlatna cyanide facility.

4.2.3 Any Loss Incurred by the Claimants Was Caused by RMGC's Failure to Overcome the Social Opposition

556 The dominant clause of the claimed loss in this case was the social opposition to the Project, not any measures taken or not taken by the

Government. **Tr. 2020**, 162:22-163:3 (R. Op.); see also above **Section 2.4.4.3** (explaining that social opposition can derail a mining project).

557 As the Project was in the permitting phase, it was particularly vulnerable to adverse stakeholder action, including challenges to its acquisition of permits and surface rights. Operational projects are less vulnerable to adverse stakeholder actions. **Tr. 2019**, 365:6-10 (R. Op.), 2898:2-2903:8 (Boutilier), 3004:1-7 and 3006:17-3008:22 (Thomson); **Thomson Presentation**, 18; see also **RLA-53**, 226 (para. 600).

558 When assessing causation, investment tribunals have recognized that social opposition can block a mining project and render it "uncertain" or with "little prospect". **Tr. 2019**, 366:1-15; Rejoinder, 308 *et seq.* (paras. 958-964); **RLA-54**, 223 (para. 6.90); **RLA-53**, 226 (paras. 599-600).

4.2.3.1 NGOs Continuously Challenged Key Permits

559 Through administrative and court proceedings, NGOs have continuously challenged critical permits that RMGC needed for purposes of the environmental permit and in turn the building permit. Rejoinder, 322 (para. 994); Counter-Memorial, 362 (Annex IV); see also **Section 2.4.2.2** above.

560 Since 2011, these challenges have included the following:

- Between September 2011 and March 2016, courts heard the NGOs' annulment request regarding the **Sibiu environmental endorsement of the Industrial Area PUZ**. The first instance court granted the annulment in April 2014 and the appellate court confirmed the decision in March 2016. **Respondent's Opening 2019**, 61; Rejoinder, 176 *et seq.* (paras. 558-564); see also Counter-Memorial, 80 *et seq.* (paras. 210-211, and 755) (explaining the nature of the environmental endorsement of the PUZ); see above paras. 411-414;
- Between July 2011 and October 2016, courts heard challenges against **RMGC's urban certificates**, namely UC 87/2010 and then UC 47/2013, with the latter being annulled in October 2016. **Respondent's Opening 2019**, 66; Rejoinder, 82 (paras. 271-272) and 179 *et seq.* (paras. 569-580); see above paras. 415-419; and,

- Since September 2011, the courts have heard the NGOs' annulment request concerning **ADC 9/2011**, which was suspended in April 2014. **Respondent's Opening 2019**, 41; Rejoinder, 94 (para. 310) and 189 (para. 604); see above paras. 420-422.

561 Given the NGOs' track record of contesting key permits, even if RMGC had obtained the environmental permit in 2012 or thereafter, the same NGOs would have immediately challenged that permit as well as any ADC for Orlea, any new environmental endorsement for the PUZ and in turn any Local Council decision approving that PUZ (and/or the Historical Area PUZ), and any building permits. See Rejoinder, 210 (para. 669); **Tr. 2019**, 546:17-21 (R. Op.).

562 Even assuming the Ministry's non-issuance of the environmental permit amounted to a BIT breach (which is denied), the Claimants need but fail to prove that NGOs would not have been able to successfully challenge it (and/or other key permits necessary for the Project to become operational). They have not even attempted to make such a demonstration.

4.2.3.2 RMGC Failed to Acquire the Surface Rights

563 As explained above, RMGC needed the surface rights to the Project Area to obtain the environmental permit. See above paras. 96 *et seq*.

564 Thus, even assuming RMGC had managed to obtain the environmental permit in 2012 or thereafter, it is likely that the Ministry of Environment would have made its decision conditional upon RMGC securing the surface rights.

565 Even if the environmental permit had not been made conditional upon RMGC securing the surface rights, RMGC could not have obtained the building permit for the Project without the surface rights. See above **Section 2.1.4.6**. Mr. Guarnera observed that if RMGC "could not get all of the surface rights, you need to redesign the Project or abandon the Project, and even one person, one single person, can kill a mining project." **Tr. 2020**, 531:4-7.

566 Therefore, even assuming the Ministry's non-issuance of the environmental permit amounted to a BIT breach (which is denied), the

Claimants need but fail to prove that, in all probability, RMGC would have been able to secure the surface rights.

567 As demonstrated above, many residents refused to sell their property to RMGC, meaning that RMGC could not acquire the requisite surface rights without a compulsory acquisition process conducted on its behalf. See above paras. 108 *et seq*. Romania had no obligation to conduct such an expropriation, as RMGC understood and recognized in contemporaneous documents. Rejoinder, 349 *et seq.* (paras. 1060-1061).

568 Specifically, the RRAP submitted as part of the EIA Report states that the "Mining Law does not provide for any preferential mechanisms in obtaining access to surface rights, but conforms to generally applicable legal provisions in order to acquire these rights (*i.e*. conclusion of sale-purchase agreements, etc.)." **C-463**, 28.

569 Gabriel Canada disclosed that there are no specific mechanisms under the Mining Law to allow a governmental authority to expropriate land under a mining concession on behalf of a private company. **R-315**, 29.

570 Similarly, Gabriel Canada's disclosures explained that the right to acquire surface rights does not "provide exploitation concession holders with the ability to compulsorily acquire land directly, nor are there specific legal mechanisms under Romanian Law to allow a governmental authority to compulsorily acquire land under a mining Concession." **Tr. 2019**, 1404:3-18 (Lorincz); **C-1811**, 27.

571 Contradicting their contemporaneous position, the Claimants rely on Prof. Bîrsan's erroneous interpretation of article 6 of Law 33 of 1994 to argue that expropriation on behalf of the Project would have been readily available because all mining projects are of public utility. Reply, 271 *et seq*. (paras. 654-660). [redacted]

- [redacted] (**Tr. 2019**, 2210, 4-6) [redacted]

- [redacted] (**Tr. 2019**, 2205:13-22) [redacted]

572 West University of Timişoara Profs. Irina Sferdian and Lucian Bojin demonstrate in their report that article 6 of Law 33 does not establish the public utility of mining projects, but instead provides for an assessment of their public utility by an administrative procedure, thereby dispensing these projects from the requirement that public utility be declared by a law. **Sferdian and Bojin LO**, 29 *et seq*. (paras. 122-139). This interpretation of article 6 of the Expropriation law was confirmed by Prof. Dragoş during his examination. **Tr. 2019**, 2743:5-2744:3; see also **Gaman II**, 48 *et seq*. (paras. 130-135).

573 [redacted]

Tr. 2019, 1612:1-1613:1.

574 The expropriation of the requisite surface rights would have first required an administrative procedure assessing the public utility of the Project, as prescribed by Government Decision 583/1994. **Sferdian and Bojin LO**, 26 *et seq*. (paras. 108-119). [redacted] **Tr. 2019**, 2213:15-2214:21.

575 In his second report, Prof. Bîrsan erroneously dismisses this administrative procedure as a "mere formality," intended only to determine whether the works are of national or local interest, and argues that, in any event, this

public utility had been established in other instances. Rejoinder, 351 *et seq*. (paras. 1063-1067). [redacted] **Tr. 2019**, 2196:4-7.

576 The fact that [redacted] the Roșia Montană Law would have exempted RMGC from obtaining a declaration of public utility does not establish that the Project could have otherwise obtained such a declaration.

- Quite the opposite, it evidences RMGC's well-founded concerns that it would have been unable to meet the requirements of this administrative procedure. Indeed, prior to weighing the economic, social, and ecological benefits of the Project against the economic, social, and ecological costs of the expropriations, the preliminary investigation commission tasked with assessing the Project's public utility would first verify that the Project was included in the PUG and PUZ. **Sferdian and Bojin LO**, 27 *et seq*. (Section 1.1).
- As further discussed above in **Section 2.3.1.4**, RMGC could not have satisfied this initial requirement due to the lack of a PUZ, meaning that it could not even initiate the expropriation procedure without the Roșia Montană Law.

577 In any event, the preliminary investigation commission's assessment of the Project's public utility is not a foregone conclusion and its outcome cannot be assumed based on public utility determinations in other contexts and by other authorities. **Sferdian and Bojin LO**, 41 *et seq*. (Section IV.1.6); **Gaman II**, 50 *et seq*. (paras. 136-138). The Project's RRAP acknowledged this uncertainty, noting that the Mining Law "specifically refers to geological exploration and exploitation of mineral resources as **potentially** being of public interest." **C-463**, 32 (emphasis added).

578 Moreover, even assuming the Project could have obtained a declaration of public utility, both the administrative procedure and the court's declaration of expropriation would have been vulnerable to legal challenges, including

by NGOs. **Tr. 2019**, 2744:13-2745:17 (Dragoş). Professors Sferdian and Bojin demonstrated that, with respect to the duration of such domestic litigation, the "more realistic scenario involves a period longer than five years." **Sferdian and Bojin LO**, 56 (para. 231).

579 [redacted] **Tr. 2019**, 2198:5-20. [redacted] **Tr. 2019**, 2198:21-2199:11.

580 Therefore, when adding the likely duration of the domestic litigation to the likely duration of the challenge before the ECtHR, there is a strong likelihood that the litigation pertaining to the expropriation of the surface rights on behalf of the Project **would last more than ten years**. Even assuming the expropriation could successfully survive these challenges, the Claimants need but fail to prove that, in all probability, RMGC would have been able to finance, implement, and profitably operate the Project notwithstanding these extensive delays.

581 In addition, even if it survived the litigation, the expropriation procedure would not lead to an automatic transfer of the expropriated property to RMGC. As Prof. Dragoş explains, after completion of the expropriation procedure, the expropriated property becomes public property of the State, at which point a competitive procedure must occur before the surface rights can be transferred to third parties. **Tr. 2019**, 2745:19-2746:7. Indeed, Claimants' contemporaneous disclosure caution that

> "[u]nder the current legal framework, a distinct and competitive concession bidding procedure has to be conducted in order to grant any rights of use on the real estate that has been compulsorily acquired, which triggers both time constraints and uncertainties with regard to the ultimate holder of the compulsorily acquired rights." **C-1810**, 22.

582 [redacted]

4.2.4 The Claimants Have Not Demonstrated that the Project Would Have Been Economically Viable

583 The Claimants primarily rely on the two expert reports submitted by SRK in this arbitration and on SRK's 2012 NI 43-101 report to argue that the Project would have been economically viable. **Claimants' Opening Presentation (Second Hearing) - Vol. 5**, 3 *et seq*. Memorial, 18 *et seq.* (para. 59); Reply, 282 (n. 1303). The two reports submitted by SRK in this arbitration extensively rely on its 2012 NI 43-101 report, as Dr. Mike Armitage confirmed. **Tr. 2020**, 352:3-7. The Claimants' contention that the Project was financially viable thus depends on whether SRK's conclusions are robust and supported by the facts.

584 SRK is not independent in these proceedings as its two reports largely consist in defending its own NI 43-101 report. **BD Report II**, 8 (para. 29). SRK's lack of independence was further confirmed when Dr. Armitage, the co-author of SRK's two expert reports, described his personal relationship with Mr. Henry, Gabriel Canada's CEO from 2010 to 2018. **Tr. 2020**, 455:13-456:20.

585 SRK's 2012 NI 43-101 report was also subject to the Claimants' influence: contrary to statements in the NI 43-101 report, SRK had been previously retained by the Gabriel Canada and acted as its advisor. **Tr. 2020**, 363:7-19 (Armitage); **C-128**, 10. [redacted] **Tr. 2020**, 369:16-371:17 (Armitage); **R-478**, p, 7 *et seq*.

586 As to their substance, all of these reports were premised on [redacted] and on an overly optimistic production schedules.

4.2.4.1 [redacted]

587 As Gabriel Canada acknowledged in its regulatory disclosures, material changes in reserve estimates can affect the economic viability of the Project. **Respondent's Opening 2020**, 144 (citing **R-315**, 37 *et seq*.).

588 SRK defined Mineral Reserves as the "material, mineralization in the ground – that has potential to be mined economically", which broadly corresponds to the CIM definition. **Tr. 2020***,* 309:18-20 (Dr. Armitage); **C-134**, 5 ("A Mineral Reserve is the economically mineable part of a Measured and/or Indicated Mineral Resource").

589 In contrast, a Mineral Resource is "a concentration or occurrence of solid material of economic interest in or on the earth's crust in such form, grade or quality and quantity that there are reasonable prospects for eventual economic extraction." **C-134**, 3.

590 "Mineral Reserves" differ from "Mineral Resources" in precisely such an assessment of the potential for economic mining. As the Behre Dolbear points out:

> "Mineral Reserves are those portions of Mineral Resources which, after the application of all mining factors, result in an estimated tonnage and grade which, in the opinion of the Competent Person making the estimates, can be the basis of a viable project, after taking account of all relevant Modifying Factors." **BD Report II**, 35 (para. 134) (citing **BD-7**, 16).

591 The assessment of the potential for being mined economically is accordingly conducted by a Competent (or "Qualified") Person based upon the application of Modifying Factors. **BD Presentation**, 14 (citing **C-134**, 5); **Respondent's Opening 2020**, 147. The Qualified Person for SRK's 2012 NI 43-101 report was Dr. Armitage. **C-128**, 1, 9.

592 SRK confirmed that these Modifying Factors, which are considerations of the mining, processing, metallurgical, environmental, infrastructure, social and government factors, are used to convert Mineral Reserves into Mineral

Resources. **Tr. 2020**, 352:8-11. See also **BD Presentation**, 15 *et seq*. (citing **C-134**, 5); **Tr. 2020***,* 244:11-246:4 (R. Op.).

593 Behre Dolbear explained that the declaration of a Mineral Reserve "need not necessarily signify that … all governmental approvals have been received" but "does signify that there are reasonable expectations of such approvals." **BD Presentation**, 17 (citing **C-134**, 5).

594 SRK also confirmed that, if a project is unlikely to secure a building permit, then it could not be described as having a Mineral Reserve. **Tr. 2020**, 352:17-353:11.

595 In its 2012 NI 43-101 report, SRK declared Mineral Reserves for the Project. **C-128**, 3 *et seq*. (Section 1.2). [redacted]

[redacted] **BD Report II**, 2 (para. 8); see also **BD Presentation**, 18 *et seq*.

596 [redacted]

SRK Omitted Relevant Information from the Resource Model

597 Behre Dolbear noted there were 1,838 channel samples that SRK did not incorporate into its resource model. **BD Report II**, 20 (paras. 78-80). Behre Dolbear explained at the hearing that a "channel sample is a sample

that is extracted over an extended distance either by power saw or by hammer and chisel to then be assayed to determine the grade of the mineralization." **Tr. 2020**, 524:20-525:1.

598 As Behre Dolbear made clear in response to the Tribunal's questions, SRK provided no explanation for why it did not consider this information to be material. **Tr. 2020**, 693:10-694:22. The failure to incorporate these channel samples in an updated resource estimate increases the risk to mine planning and gold production for the Project and would be of concern to potential financing entities. **BD Report II**, 20 (para. 80).

SRK Fails to Consider the Impact of the Required Archaeological Supervision or the Risks Posed by Archaeological Chance Finds

599 The Parties agree that, in the event of a chance find, the works in the vicinity would be stopped pending an assessment of the significance of the find and of the appropriate measures to be implemented, in accordance with the Chance Find Protocol. **Claimants' Opening Presentation (Second Hearing) - Vol. 5**, 33. However, the Claimants contend that such work stoppage is necessarily temporarily, as *in situ* preservation would not be possible. *Id*; **Tr. 2020**, 137:13-18 (Cl. Op.).

600 The Claimants contest the potential for *in situ* preservation of chance finds because RMGC would have previously obtained ADCs for the areas covered by the Chance Find Protocol. Reply, 291 (para. 690). An ADC, however, is based on the known state of the archaeology in the area in question. Since chance finds are unknown prior to their discovery, they are not covered by ADCs and require their own independent archaeological assessment. Rejoinder, 373 *et seq*. (paras. 1115-1119).

601 The Chance Finds Protocol accordingly provides:

> "Based on the nature of such discoveries, on the assessment conducted by the independent archaeological surveillance team, and on the decision of the Ministry of Culture … and of the County Directorate for Culture, Religions and Cultural Heritage Alba, the Operations Manager may decide to suspend the mining activities on a certain site." **C-388.03**, 59.

602 As Dr. Claughton explained, the reference in the Chance Finds Protocol to Article 5 of the Valetta Convention and the mention of "the *in situ* conservation of some finds, as necessary – depending on the characteristics, state of preservation, significance and importance" establishes that *in situ* preservation of chance finds may be required. **CMA - Claughton Report II**, 29 (para. 97).

603 This potential for *in situ* preservation is also reflected in the Ministry of Culture's endorsement of the Project, which required RMGC to "bring **any modification to the mining project** that is necessary to protect **chance archaeological discoveries** whenever this may be necessary according to the legal provisions." **C-655**, 3 (para. 1(c)) (emphasis added).

604 As to those legal provisions, Prof. Dragoș explained:

> "[t]here are provisions in the Law saying that if Chance Finds occurs, then the project stops, the competent authorities are announced, a proper investigation and the research is conducted, and the decision is made on whether to preserve the vestiges, if they are found in situ or removed or so on." **Tr. 2019**, 2704:1-6.

605 Therefore, whether through operation of the Chance Find Protocol or due to the requirements imposed by the law, there remains a possibility that a chance find of sufficient archaeological significance could require *in situ* preservation, thereby foreclosing mining operations in its vicinity and potentially jeopardizing the financial viability of the Project.

606 Even when they do not require *in situ* preservation, there is extensive evidence that construction projects can be substantially delayed as a result of archaeological finds. **Respondent's Opening 2020**, 161; **Tr. 2020**, 249:2-12 (R. Op.).

607 SRK acknowledged that its assessment of the financial viability of the Project did not account for potential delays associated with the Chance Find Protocol, relying instead on the Claimants' pleadings to challenge the significance of the Chance Find Protocol. **SRK Report II**, 20 *et seq*. (paras. 44-45). Dr. Armitage even admitted that he did not review the Chance Find Protocol before drafting the 2012 NI 43-101 report. **Tr. 2020**, 435:18-436:1.

608 SRK also argues that, should a chance find occur, a temporary suspension of the works would not impact the production schedule as mining operations could be relocated to other areas. **SRK Report II**, 20 *et seq*. (paras. 44-46). However, this argument is speculative as SRK does not provide an analysis of the impact that a chance find would have on the size and proximity of blasting operations. Indeed, as discussed below, SRK takes no account of blasting mitigation measures in its assessment of the Project's production schedule.

609 Behre Dolbear notes that the Chance Find Protocol designates a significant portion of the Project as an archaeological risk area and opines that SRK's NI 43-101 report does not include sufficient allowances or costs for the possibility of a chance find. **BD Report II**, 24 *et seq*. (para. 95); see also **BD Presentation**, 22. Behre Dolbear considers that [redacted]. **BD Report II**, 24 *et seq.* (para. 95).

610 Moreover, even in the absence of chance finds, the Chance Find Protocol imposes a strict archaeological supervisory regime in certain designated areas during the construction and operation of the Project. Rejoinder, 377 *et seq*. (paras. 1128-1130). [redacted] **Tr. 2019**, 1326:10-1327:5.

611 Dr. Claughton explains that this strict regime

> "would entail using methods not generally used in construction and ground clearance work and working to a pace defined by the archaeologists carrying out the watching brief, with a consequent impact on human resources (notably in terms of available archaeologists), costs and time." **CMA - Claughton Report II**, 25 (para. 88).

612 Despite the mandatory implementation of this strict archaeological supervision, SRK did not account for its impact on the Project's production schedule or financial viability. Indeed, as Dr. Armitage confirmed, SRK's

2012 NI 43-101 report does not even mention archaeological supervision. **Tr. 2020**, 440:1-6.

613 It became clear during the hearing that Dr. Armitage did not know that RMGC was required by the Chance Find Protocol to provide archaeological supervision of its construction and operational works within certain designated areas. **Tr. 2020**, 436:6-437:4. Dr. Armitage apparently did not even understand the distinction between the measures to be implemented in the event of a chance find and the archaeological supervision measures that RMGC was required to implement regardless of whether a chance find was made. **Tr. 2020**, 437:17-439:20.

614 SRK's failure to account for the impact of archaeological supervision on the Project's costs and production schedule undermines its assessment of the Project's financial viability. Rejoinder, 379 (para. 1130).

SRK Did Not Consider the Risks Posed by RMGC's Lack of the Requisite Surface Rights or the Impact of an Expropriation Procedure

615 Behre Dolbear explained at the hearing that one of the issues assessed when considering the Modifying Factors is the availability of the requisite surface rights. **Tr. 2020**, 530:7-8; **BD Presentation**, 23.

616 As discussed above in **Section 4.2.3.2**, RMGC lacks the surface necessary to obtain a building permit and cannot obtain the surface rights without a lengthy and difficult expropriation procedure, the outcome of which is uncertain.

617 In its 2012 NI 43-101 report, SRK described the "acquisition of surface rights" as "ongoing" and "expected to take 12 months following issue of the Environmental Permit (EP), but may take longer due to compulsory purchase." **C-128**, 62.

- SRK cautioned in 2012 that RMGC needed to obtain all necessary surface rights within the Project footprint, the attainment and timing of which is subject to third party actions and risk factors not within RMGC's control. **C-128**, 62;

- In its analysis of socio-economic issues, SRK noted that 155 households remain to be acquired. **C-128**, 64.

618 SRK did not otherwise engage in any analysis of RMGC's ability to obtain the requisite surface rights, nor did it review the risks and challenges posed by a compulsory acquisition procedure in Romania. Yet, as SRK confirmed in cross examination, an NI 43-101 report must "describe any significant factors and risks that may affect access, title, or the right or ability to perform work on the property". **Tr. 2020**, 425:20-426:3.

619 Dr. Armitage stated that he was unaware of RMGC's contemporaneous position that forced relocation was not possible, nor could he recall this issue being brought to his attention. **Tr. 2020**, 427:3-14.

620 Dr. Armitage also explained that SRK's expectation that RMGC could acquire the missing surface rights within a year of the environmental permit was based on the opinion of its environmental specialist, Ms. Susan Struthers, who was responsible for assessing permitting issues. **Tr. 2020**, 428:6-13 and 435:18-436:3; see also **C-128**, 9.

621 Dr. Armitage did not know whether Ms. Struthers had ever previously worked on a project in Romania. **Tr. 2020**, 454:4-5. He could not recall whether Ms. Struthers mentioned that several residents of Roşia Montană steadfastly refused to sell their property to RMGC. **Tr. 2020**, 428:14-429:20. Dr. Armitage indicated that Ms. Struthers was not a Romanian lawyer, nor was any other member of SRK's team. **Tr. 2020**, 437:5-8 and 453:19-454:1. He further stated that he had no experience with Romanian law. **Tr. 2020**, 444:18-21.

622 Furthermore, Dr. Armitage admitted that he was not aware of the permitting process for acquiring the "institutional properties" that RMGC needed to obtain, nor did he verify whether it was legally possible for RMGC to obtain those properties. **Tr. 2020**, 431:11-434:8. Dr. Armitage also did not know whether SRK had verified that RMGC had made offers to acquire these institutional properties. **Tr. 2020**, 435:10-14. RMGC has in fact failed to acquire those properties. **R-684**.

623 Behre Dolbear explained that a "key element to declaring Mineral Reserves is that the Project should have rights for use of both the minerals

and the surface of the project, or at least have reasonable expectation of obtaining those rights." **BD Report II**, 31 (para. 122).

624 Behre Dolbear further noted that, should RMGC fail to secure the surface rights for the Project, the Project would need to be significantly redesigned or abandoned, and opined that, given RMGC's longstanding but unsuccessful effort to acquire these surface rights, [redacted] **BD Report II**, 32 (para. 122); *see also* **BD Presentation**, 23.

625 Behre Dolbear explained that a "Declaration of Mineral Reserves requires that the rights for use of both the minerals and the surface of the Project, or at least a reasonable expectation of obtaining those rights, exists". **Tr. 2020**, 530:9-12.

626 SRK could not have had a reasonable expectation that RMGC would acquire the surface rights within twelve months of the environmental permit. Such an expectation would have required, at a minimum, that SRK competently examine the legal and administrative hurdles faced by RMGC in acquiring these surface rights, which SRK did not do given its apparent lack of experience in Romania and the admitted absence of any Romanian legal expertise on its team.

627 Dr. Armitage's responses reveal SRK's woefully inadequate assessment of the social and governmental Modifying Factors as they pertain to surface rights. Issues that should have raised significant concerns, such as the persistent refusals of some Roşia Montană residents to sell their property, and the unavailability of compulsory acquisition, are not even mentioned in SRK's report, nor do they appear to have been given serious consideration.

628 The apparent lack of scrutiny of the permitting procedures required to obtain the "institutional properties" further reveals the superficial nature of SRK's assessment, which merely regurgitates the Claimants' views on the issue of surface rights.

629 SRK's lack of scrutiny of this issue means that SRK could not have a "reasonable expectation" that RMGC would satisfy this essential condition. [redacted]

[redacted] **Tr. 2020**, 532:3-8.

SRK Failed to Account for the Risks in Connection with the Urban Plans

630 In its NI 43-101 report, SRK tersely noted regarding the PUZ that the environmental endorsement for the PUZ had been received, that "17 out of 22" endorsements were obtained, and that approval was expected in 2013. **C-128**, 62 (Table 20-1); see above para. 544.

631 Although he is both the author and the Qualified Person responsible for SRK's NI 43-101 report, Dr. Armitage indicated that he was not aware that the environmental endorsement was a pre-requisite for obtaining the PUZ. **Tr. 2020**, 442:16-443:4. He similarly was not aware that that legal challenges to the environmental endorsement for the PUZ could significantly delay issuance of the building permit for the Project. **Tr. 2020**, 445:5-9.

632 Dr. Armitage did not recall whether he was informed by his team that NGOs had challenged the environmental endorsement for the PUZ in September 2011. **Tr. 2020**, 443:11-14. The likely duration of this litigation was not brought to his attention and he did not know whether precedent had been checked to assess the likely delays that would arise. **Tr. 2020**, 445:10-19. As far as Dr. Armitage remembered, nobody from his team brought to his attention the fact that NGOs had previously challenged the 2002 PUZ. **Tr. 2020**, 446:4-7. He did not know that the litigation regarding the environmental endorsement for the PUZ lasted four-and-a-half years (from September 2011 to March 2016). **Tr. 2020**, 446:12-17; see also **Respondent's Opening 2020**, 201.

633 Dr. Armitage confirmed that SRK's NI 43-101 report does not mention that, at the time, there were pending lawsuits challenging the environmental endorsement for the PUZ. **Tr. 2020**, 443:15-19. More generally, Dr. Armitage could not recall whether, when authoring the NI 43-101 report, he was aware that NGOs were litigating the zoning of the Project at every possible instance. **Tr. 2020**, 447:8-13.

634 In summary, SRK stated in its NI 43-101 report that the PUZ for the Industrial Area was "expected in 2013" without any apparent verification of the impact of the ongoing litigation, which, regardless of its outcome, would have prevented its issuance within that timeframe. Moreover, SRK failed to even mention that RMGC had yet to apply for the three missing endorsements, nor is there any discussion of the likely timeline for obtaining them. **Tr. 2020**, 447:19-21.

635 While SRK's NI 43-101 report states that "legal challenges brought forward by NGOs or other parties – those currently ongoing and those that may be introduced in the future – have the potential to cause significant delays to the Project timeline", this blanket disclaimer cannot substitute for an analysis of the likely consequences of these lawsuits on the relevant permits, especially when precedent is available. **C-128**, 62 (Table 20-1). As Dr. Armitage confirmed, an NI 43-101 report must

> "discuss any significant risks and uncertainties that could reasonably be expected to affect the reliability or confidence in the exploration information, Mineral Resource, or Mineral Reserves estimates or projected economic outcomes and any reasonably foreseeable impacts of these risks and uncertainties to the Project's potential economic viability or continued viability." **Tr. 2020**, 424:14-425:3; **BD-6**, 23 (item 25).

636 Since the risks posed to the permitting process by NGO litigation are material, SRK could not have a "reasonable expectation" that the PUZ would be issued with the specified timeframe, especially given its superficial assessment of the timing and likelihood of the issuance of the environmental endorsement for the PUZ. [redacted]

SRK Failed to Account for the Risks in Connection with the ADC for Cârnic

637 Regarding the ADC for Cârnic, SRK stated in its NI 43-101 report that it was "approved and certificate obtained July 17th 2011." **C-128**, 62. SRK also notes that:

> "Although the archaeological discharge certificates and relevant PUZs required for approval of the EIA have either been secured or are in the final stages of the permitting process, issues related to misinformed public perceptions of the destruction of Romanian heritage could continue to cause delays to the Project." **C-128**, 65.

638 SRK does not otherwise qualify its assessment of this requirement.

639 As Dr. Armitage confirmed, SRK's NI 43-101 report does not mention that, at the time, NGOs had challenged the ADC for Cârnic and requested its suspension. **Tr. 2020**, 448:6-450:11; see also **C-1719**; Counter-Memorial, 81 (para. 212) (citing **C-1734** and **C-1735**).

640 Dr. Armitage stated that he was unaware that this litigation is still ongoing today. **Tr. 2020**, 452:2-4.

641 Dr. Armitage confirmed that SRK's NI 43-101 report does not mention that NGOs had successfully contested the prior ADC for Cârnic in litigation that had lasted four years. **Tr. 2020**, 452:5-9; **R-173**; **C-1348**. Dr. Armitage did not recall whether he was aware of this fact when drafting the report. **Tr. 2020**, 452:10-13.

642 Given SRK's superficial analysis of the permitting risks associated with the ADC for Cârnic, its expectation that the building permit would be issued in "2013/2014" is unfounded, [redacted] **C-128**, 62 (Table 20-1).

SRK Failed to Account for the Risks in Connection with the Urban Certificate

643 With respect to the building permit, SRK's NI 43-101 report states that the "application [is] to be submitted once all studies, approvals and endorsements of the [urban certificate are] obtained", and that it was "expected 2013/2014". **C-128**, 62 (Table 20-1); **Tr. 2020**, 454:6-16 (Armitage).

644 Dr. Armitage confirmed that SRK's NI 43-101 report does not mention that there were lawsuits surrounding the urban certificate at the time. **Tr. 2020**, 454:15-19; see also **R-355**. Nor is there any analysis of the delays that

would result from this litigation, or the consequences of a failure to secure the urban certificate on the Project's permitting.

645 Dr. Armitage indicated that he was not aware that this litigation continued until 2016. **Tr. 2020**, 454:20-455:1; see also **R-362**.

646 SRK "rubber-stamped" the information from the Claimants and RMGC, without assessing the likelihood of obtaining and maintaining the urban certificate. Without a "reasonable expectation" of maintaining an urban certificate, SRK could not reasonably expect the building permit, [redacted]

4.2.4.2 SRK Overstated the Project's Mineral Reserves

647 SRK likely overstates the amount of the Project's Mineral Reserves by (i) failing to account for voids, (ii) failing to account for additional pit slope analysis, and (iii) not properly accounting for mine dilution and mining losses.

SRK Failed to Account for All Surveyed Voids

648 Roşia Montană has been mined since Roman times and a significant quantity of rock has been removed to exploit the gold. **BD Report II**, 21 (para. 83).

649 Unless these mined-out areas, referred to as "voids", are properly accounted for in the block model, the Mineral Resources and Mineral Reserves would be overstated. **BD Report II**, 21 (para. 84).

650 However, the limited archaeological surveys for the Orlea massif create significant uncertainty regarding the volume of the voids in that area. **BD Report II**, 21 (para. 85); see also **CMA - Claughton Report II**, 15 *et seq*. (Section 3.2).

651 [redacted] **BD-8**, 64. [redacted] **SRK Report II**, 13 (para. 24). [redacted]

[redacted] **BD Report II**, 22 (para. 89).

652 Behre Dolbear opined that the Mineral Resource block model should be updated as it "does not reflect sufficient deductions and does not reflect all of the currently available information", and that, accordingly, "the amount of gold and silver certified by SRK is likely overstated." **BD Report II**, 22 (para. 89).

653 [redacted] **Tr. 2020**, 328:5-329:13; **SRK Presentation**, 24 *et seq*. [redacted] **BD Report II**, 21 (para. 84).

654 [redacted] **BD Report II**, 22 (para. 88).

SRK Failed to Account for Its Pit Slope Analysis

655 In its 2012 NI 43-101 report, SRK presents and recommends revised pit slopes for the Project but does not incorporate these recommendations into its analysis of the Project's financial viability. **C-128**, 42 *et seq*.; **BD Report II**, 32 (para. 124).

656 Behre Dolbear explained that, although the pit slope has an impact on the quantum of resources (steeper pit angles yield more reserves, whereas flatter pit angle result in less), SRK's revised pit slopes were not reflected in its reserve estimation. **Tr. 2020**, 525:11-19; **BD Presentation**, 19.

657 SRK confirmed that, although its 2012 analysis called for the modification of the pit slope design, it nevertheless used the pre-existing design for purposes of valuation in its NI 43-101 report. **Tr. 2020**, 335:12-336:13; **SRK Presentation**, 29. SRK explained that it relied on the pre-existing design because, "while the study assumed an overall uniform pit slope angle, there were some areas where the slopes may need to be shallower; while, conversely, this will be balanced where the pits could in places be steeper."

658 SRK thus assumes that the change in pit design would not change the average grade of extracted ore or its overall volume. Behre Dolbear opines that SRK's justification is misleading and should be verified by completing a new pit slope study, a new pit design, and a new production schedule. **BD Report II**, 32 *et seq*. (paras. 124-126). Behre Dolbear considers that the Claimants' failure to do so undercuts the certainty of the Project's purported Mineral Reserves. **BD Report II**, 33 (para. 126).

SRK Did Not Properly Account for Mine Dilution and Mining Losses

659 As SRK explained in its presentation at the hearing, mining dilution occurs when waste material is sent to the processing plant (thereby reducing the efficiency of the process), whereas mining losses occurs when ore material is mistakenly sent to the waste dump. **Tr. 2020**, 330:4-331:5 (Armitage).

660 Behre Dolbear explained that SRK overestimated the efficiency of the Project's operations by only considering dilution and losses within the mining pits. **Tr. 2020**, 525:21-527 (Guarnera).

- SRK did not account for dilution and losses that would occur at the pit walls, at the contact between the waste material and the ore above the four pits. **BD Report II**, 26 (para. 104);
- SRK also failed to account for the effects of misallocation (a form of dilution that occurs when haul trucks are sent to the wrong location), ore control (a reduction in the ounces of gold sent to the concentrator due to the failure to follow good ore control procedures) and over-blasting (unanticipated mixing of ore and waste due to blasting

performed near ore contacts). **Tr. 2020**, 527:10-528:7 (Guarnera); **BD Presentation**, 21; **BD Report II**, 26 *et seq*. (paras. 105-107).

661 Behre Dolbear concluded that SRK's assessment of 3% contact dilution for the first 5 years and 1.5% thereafter was insufficient, finding that 5.5% for the first 5 years of operation and 3% thereafter was a more realistic assessment. **Tr. 2020**, 528:8-20 (Guarnera); **BD Report II**, 27 (paras. 108-109). Behre Dolbear also noted that SRK failed to account for the loss of silver due to dilution and mining losses. **Tr. 2020**, 526:22-527:8 (Guarnera); **BD Presentation**, 20.

4.2.4.3 SRK Did Not Account for the Impact of Blasting Mitigation Measures on the Project's Financial Viability

SRK and Micon's NI 43-101 Reports Incorporated IMC's Production Schedule

662 SRK's NI 43-101 report states that the "production schedule reflected by the valuation presented later in this report is based on that developed in 2005 by Independent Mining Consultants (IMC) as slightly modified for [Micon's] 2009 Technical Report." **C-128**, 5.

663 Mr. Nick Fox (of SRK) confirmed at the hearing that the mining plan and the production schedule were first developed by IMC in 2005 (although IMC's report was only issued in April 2006). **Tr. 2020**, 380:12-22; **C-984**.

664 Dr. Armitage confirmed that the production schedule in SRK's NI 43-101 report provides for a yearly production of approximately 35 million tons of ore per year after Project ramp-up. **Tr. 2020**, 376:3-6; **C-128**, 78 (Figure 22-1).

665 Mr. Fox also confirmed that SRK assumed that the Project would operate 360 days a year. **Tr. 2020**, 376:7-17; **C-128**, 47.

666 Based on the average yearly production output and the number of workdays per year, Mr. Fox agreed that this would amount to a daily average production of 97,200 tons of ore. **Tr. 2020**, 376:18-377:1.

Blasting Parameters Are a Critical Component of a Mine Production Schedule

667 Mr. Fox confirmed that, as part of the blasting process, the mine operator drills blast holes according to a pre-determined pattern, and the diameter and depth of the holes affect how much explosives they can contain. The amount of explosives in turn affects the quantity of ore and waste material generated by the blast. **Tr. 2020**, 378:11-379:1.

668 Mr. Fox confirmed that the blasting pattern is accordingly a critical component of the production schedule, and that it has implications on material and labor costs. **Tr. 2020**, 379:16-380:10.

SRK's Assessment of the Financial Viability of the Project is Premised on IMC's Blasting Pattern

669 [redacted] **C-984**, 72 (Table 7-5); **Tr. 2020**, 381:4-382:2 (Fox).

670 [redacted] **Tr. 2020**, 382:3-16. [redacted] **C-984**.

671 [redacted] **Tr. 2020**, 383:20-385:1. [redacted] **Tr. 2020**, 384:10-16.

672 [redacted] **Tr. 2020**, 384:10-385:1; **C-127**, 3; **C-128**, 46.

673 [redacted] **Tr. 2020**, 382:18-383:19; **C-2650**, 76.

RMGC Committed to a Restricted Blasting Schedule

674 In the chapter of the EIA Report on noise and vibration, RMGC committed to a blasting schedule that prohibited "overlapping/simultaneous blasts in multiple pits and quarries, more than one blast per pit or quarry per workday, or blasting at night." **C-213**, 104.

675 During the public consultation process, RMGC further committed to "restrain blasting to one **per business day**, per pit," thereby prohibiting blasting on weekends and holidays. **R-174**, 7 (emphasis added).

676 In addition to these restrictions, the EIA Report stated that blasting "will be discouraged and postponed where possible during unfavorable atmospheric conditions (*e.g.*, still air, fog or haze, temperature inversions, steady downgradient winds towards receptor locations)." **C-213**, 104.

677 As Mr. Fox confirmed during cross-examination, a maximum of two pits would be operating simultaneously during the life of the Project. **Tr. 2020**, 393:4-19; **C-196**, 22 (Table 2.1).

678 RMGC is required to abide by this restricted schedule which it specified in the EIA Report and during the public consultation process. This means that, **in the best-case scenario**, RMGC could only conduct blasting operations five days per week and a maximum of **ten blasts per week**.

RMGC is Required to Implement Blasting Mitigation Measures Due to the Proximity of the Mining Operations to the Protected Area

679 In their opening to the 2020 Hearing, the Claimants claim that "the impacts on [the historical center] were carefully studied and considered. Romania's Ministry of Public Health and the Timişoara Public Health Institute conducted an extensive health impact study on the Project Area in August 2007 which was included in the EIA Report." **Tr. 2020**, 139:19-140:2

(citing **C-387.03**). However, the report that the Claimants cite in no way considered the impact of blasting on the health and safety of the residents in the historical center. At most, this report considered projected environmental data on noise and vibration, based on information provided by RMGC, which had yet to conduct any detailed analysis on the impact of blasting. **C-387.03**, 27.

680 In fact, the EIA Report does not properly assess the impact of blasting on the protected area. In her expert report, Ms. Wilde explained that:

> "It is assumed in Chapter 4.3 [of the EIA Report] that well managed blasting will be sufficient protection and no consideration is given as to what might happen if blasting tests, building condition surveys and actual monitoring subsequently show that damage to important and protected historic buildings is occurring." **CMA - Wilde Report I**, 41 (para. 155).

681 Ms. Wilde concluded that:

> "the impact assessment and mitigation proposals as presented in the 2006 Noise and Vibration chapters, for the potential adverse effects of vibration of historic structures is not a proper assessment of impacts and the effects on important historic buildings and the mitigation proposals are retrospective." **CMA - Wilde Report I**, 43 (para. 158).

682 During the public consultation process, RMGC apparently became aware of the EIA Report's shortcomings, as mentioned in the 2010 Explanatory Note to Chapter 4.3 of the EIA Report:

> "[A]fter the submission of the EIA Report, as a result of the public consultation on the Project and as part of the procedure, S.C. Ipromin S.A. prepared a 'Geomechanics study aiming to determine the effects of the blasting operations on the structures in the protected zone' which reviews the effects of the excavation technologies to be employed within the Rosia Montana mining site and identifies the technological options to ensure the protection of the structures located in the protected zone or of other heritage structures." **C-382**, 3 (referring to **C-341**).

683 A 2010 update to Ipromin's report was appended to the 2010 Explanatory Note to Chapter 4.3 of the EIA Report (see **C-382**). The purpose of the update was to provide further impact assessment and mitigation proposals for the protection of additional historical monuments and sites outside of the protected area. **C-382**, 6; **CMA - Wilde Report I**, 46 (para. 169).

684 Ms. Wilde notes that the Ipromin studies were prepared in response to concerns raised by the TAC and during the public consultations. **CMA - Wilde Report I**, 44 (para. 160).

685 However, and contrary to what the Claimants stated in their opening at the 2020 hearing, Ipromin's mitigation measures were never incorporated into the EIA Report. **Tr. 2020**, 140:15-20. As Ms. Wilde points out,

> "[i]n addition to the EIA Reports, a series of studies, commissioned by RMGC were carried out by Ipromin SA in 2006 and 2010 that studied blasting and vibration in detail, but the results of the Ipromin studies are not included in an updated version of the EIA Chapter submitted in 2010. Instead they were added as supplementary studies." **CMA - Wilde Report I**, 39 (para. 143).

686 The EIA Report's failure to incorporate these mitigation measures is puzzling, since these measures were presented at public consultations and also in presentations to the TAC. This omission is all the more puzzling given that RMGC had committed in both TAC meetings and during public consultations to meet the vibration limits that were the focus of the mitigation measures developed by Ipromin. **CMA - Wilde Report I**, 44 *et seq*. (paras. 160-174).

687 In essence, RMGC presented an incomplete EIA Report to the TAC, which ignored mitigation measures relating to blasting. **CMA - Wilde Report I**, 47 (para. 173). Considering RMGC's commitments, it is therefore extremely likely that compliance with the blasting mitigation measures specified by Ipromin would have been made a condition of the environmental permit, especially given Ipromin's confirmation of the need for additional mitigation measures:

> "Without the implementation of certain special measures, the use of blasting technologies in areas adjacent to the Rosia Montana

> protected zone or to the heritage structures may cause damage or degradation of the existing structures especially given that many of the heritage structures are very old and in an advanced state of wear, which increases their sensitivity." **C-341**, 2

688 Moreover, and as the Claimants acknowledged, the Ministry of Culture cited Ipromin's reports in endorsing the Project. **Claimants' Opening Presentation (Second Hearing) - Vol. 5**, 38. Since the Ministry of Culture's endorsement was premised on the mitigation measures detailed in those studies, and the environmental permit could not be issued without that endorsement, RMGC is required in any event to implement the blasting mitigation measures specified by Ipromin. **Tr. 2020**, 141:4-5 (R. Op. citing **C-655**, 1 *et seq.* (Recital (7)).

Ipromin's Proposed Blasting Mitigation Measures Were Designed to Safeguard Protected Historical Monuments

689 Ipromin's 2006 report and its subsequent 2010 update specify two primary limitations aimed at reducing the impact of the blasting operations on the historical monuments in the protected area.

690 **First**, Ipromin's analysis assumes that the standard explosive load would be no more than **7,000 kg of TNT per blast**. See **C-341**, 27 (stating that the vibration velocity to the structures requiring protection was calculated using 6,860 kg TNT per blasting operation, as provided in the designed blasting technology) and 40 (stating that the vibration velocity variation graph was calculated as a function of the distance to the protected structure for a maximum load per blasting operation of 7000 kg of TNT); **C-382**, 50; **Tr. 2020**, 398:16-399:5 (Fox) (confirming that the maximum blast size was 6,860 kg of TNT); **CMA - Wilde Report I**, 45 *et seq*. (paras. 167-171).

691 **Second**, Ipromin divided the mining pits into "blasting zones", which increased limitations on blasting depending on the proximity of the blasting site to protected historical monuments. **C-341**, 41; **C-382**, 62.

692 Zone I, intended for blasts occurring at more than 300 meters from a protected monument, would not impose any restrictions on the size of

blasts (aside from the 7,000 kg maximum per blast assumed by Ipromin), whereas Zone II would be divided into three subzones based on the level of mitigation required. **CMA - Wilde Report I**, 46 (para. 171).

693 The most restrictive of these subzones, Zone IIA, is intended for blasting occurring at 100 meters or less from the protected historical monument. **C-341**, 42. It specifies a maximum explosive load of 78-352 kg of TNT (*i.e.* more than 19 times less than the maximum assumed by Ipromin) and requires the use of 125 mm diameter blastholes or mine adits. **C-382**, 54; **C-341**, 42. In similar fashion, Zones IIB and IIC, respectively intended for blasts between 100-200 meters and 200-300 meters, impose restrictions on maximum explosive load (630-2820 kg and 2130-6860 kg) and require the use of 125 mm diameter blastholes where necessary. **C-341**, 42.

694 The volume of ore affected by Zone II restrictions is significant, with Ipromin estimating it at around 15%. **C-382**, 52. In its 2010 update to its report, Ipromin drew up a map of these zones based on the proximity of the protected historical monuments. **C-382**, 260.

695 A cross section of the blasting zones for each pit was also included in the 2011 Urbanism Plans for the protected area, indicating the maximum explosive loads for each of the relevant zones. **C-2477.01**, 205 *et seq*.; **C-2478.01**, 171 *et seq*.; **C-2479.01**, 175 *et seq*.; **C-2480.01**, 238 *et seq*.; **C-2481.01**, 185 *et seq*.

696 While Ipromin's mitigation measures sought to protect the historical monuments that were the focus of its reports, as discussed above in para. 103 *et seq.*, these measures would not guarantee the habitability of the historical center. Mr. McLoughlin states that

> "the suggested operational modifications are insufficient, as the seismic effects will be greater than those predicted by Ipromin at short distances and will require additional steps for mitigation to structures near the pit." **BD Report III**, 8 (para. 12(g)).

697 Mr. McLoughlin also opines that Ipromin's mitigation measures would have insufficiently reduced the risk of flyrock, and that Ipromin did not have a sufficient sample to reach a proper conclusion for vibration propagation. **BD Report III**, 8 *et seq*. (para. 12(h)).

698 Accordingly, Ipromin's mitigation measures constitute the minimum for RMGC to implement. Had RMGC intended to proceed without securing all the surface rights in the historical center, it would have been required to implement much more onerous mitigation measures, which would have exacerbated the impact on the production schedule. See **BD Report III**, 22 (para. 50).

RMGC's Restricted Blasting Schedule and Ipromin's Mitigation Measures Have a Significant Impact on the Production Schedule

699 Ipromin stated that the Project's "high displacement capacity and local conditions require that blasting **be conducted daily** in several working faces in the operational pits." **C-341**, 25 (emphasis added). Assuming that there would be 355 workdays per year available for blasting, Ipromin determined that the Project's production schedule required approximately 98,600 tons of ore to be blasted daily, which in turn would require the daily use of 20,600 kg of TNT equivalent. **C-341**, 21 and 25; **Tr. 2020**, 397:1-399:6 (Fox).

700 Accordingly, to meet its production schedule, RMGC needed to detonate 20,600 kg of TNT equivalent per day, 355 days a year. This equates to detonating approximately 144,200 kg of TNT per week.

701 However, as shown above, Ipromin's blasting mitigation measures assume a maximum of 7,000 kg of TNT equivalent per blast. Moreover, RMGC committed to no more than one blast per pit per day, meaning that it can only set off a maximum of two blasts per workday. Therefore, when accounting for both the maximum blast size specified by Ipromin and RMGC's restricted blasting schedule, RMGC is prohibited from detonating more than 14,000 kg of TNT per day. **Tr. 2020**, 393:3-19; 399:1-399:6 (Fox).

702 To make matters worse, Ipromin did not account for the prohibition of blasting on the weekend. To meet its production schedule, RMGC needed to detonate the weekly requirement of 144,200 kg of TNT equivalent in only five days, which averages to a daily requirement of 28,840 kg of TNT equivalent per day. Given Ipromin's limitation of 7,000 kg of TNT equivalent per blast, RMGC therefore needs a minimum of **four blasts** per

day to meet its production schedule. **C-341**, 21, 25; **Tr. 2020**, 393:3-19 (Fox); 399:1-399:6 (Fox).

703 In other words, compliance with both Ipromin's recommended limit on the size of individual blasts and RMGC's restricted blasting schedule results in a shortfall in the tonnage of ore blasted per week **of at least 50%** when compared to the mining production schedule in SRK's NI 43-101 report, which has grave implications on the Project's financial viability.

704 This best-case scenario does not account for the impact of the blasting zones specified by Ipromin. In addition to increased costs and loss of productivity caused by the specified use of smaller diameter blastholes and less efficient blasting methods like mine adits, the restricted explosive payloads specified in Zone II would have further reduced the achievable volume of ore blasted per week. Due to RMGC's restriction on simultaneous or overlapping blasts, individual blasts occurring in Zone II, although limited to less than the allowable 7,000 kg of TNT equivalent per blast, would nevertheless count towards RMGC's limit of two blasts per day. Blasts in Zone II would accordingly further reduce the achievable volume of blasted ore. **Tr. 2020**, 400:14-401:16 (Fox).

705 Furthermore, Mr. McLoughlin explains that the 125 mm diameter blastholes specified by Ipromin for use in areas adjacent to the protected area will increase the cost of blasting and require additional time and labor. **BD Report III**, 20 (para. 44).

706 As to mine adits, which were specified for use in blasts occurring at less than 100 meters from a historical monument, Ipromin states that the "technology has poor productivity and requires high levels of labor and materials" and that "[t]he only advantage is the possibility of achieving a low oscillation velocity of the particle." **C-382**, 55.

The Assessment of the Project's Financial Viability Did Not Account for Either the Restricted Blasting Schedule or the Blasting Mitigation Measures

707 [redacted]

[redacted] **Tr. 2020**, 382:3-383:19 (Fox).

708 [redacted] **BD Report III**, 8 (para. 12).

709 [redacted] **BD Report III**, 9 (para. 12(i)). He cautions that

> "if best practices are implemented, the mine might become uneconomic, as it would require the use of smaller diameter blast holes, which will slow the drilling and blasting process resulting in reducing the mining production rate. However, even best practices do not ensure that the occupants or structures would be safe or habitable during blasting operations." **BD Report III**, 9 (para. 12(i)); see also **Tr. 2020**, 230:5-12 (R. Op.); **Respondent's Opening 2020**, 124.

710 The absence of any assessment of these blasting mitigation measures is further explained by the fact that IMC's first feasibility study, which was issued in April 2006, **predates** both the May 2006 EIA Report detailing RMGC's restricted blasting schedule and Ipromin's 2006 report. **C-984**; **Avram I**, 24 (para. 38) (stating that RMGC submitted the EIA Report to the Ministry of Environment in May 2006). [redacted] **Tr. 2020**, 382:18-383:19 (Fox); **C-2650**, 76.

711 Mr. Fox stated that he did not know the cost, time and labor implications of the use of 125 mm diameter blastholes or of mine adits. **Tr. 2020**, 414:4-

22. He also admitted that, in its NI 43-101 report, SRK did not consider the impact of the implementation of the blasting zones specified by Ipromin on the production schedule:

> "If this information was not taken into account as part of the IMC work that was used to develop the production schedule, then that isn't information that would add – specific information that SRK would have reviewed. SRK reviewed the information prepared by IMC." **Tr. 2020**, 416:13-18.

712 Given the required use of these mitigation measures for at least 15% of the ore to be blasted, Mr. Fox's admissions invalidate SRK's assessment of the financial viability of the Project.

713 Furthermore, Dr. Armitage "assumed", but could not confirm, that SRK's assessment of the financial viability of the Project had considered RMGC's restricted blasting schedule. **Tr. 2020**, 391:10-22. Mr. Fox confirmed that RMGC's restricted blasting schedule was not mentioned in SRK's NI 43-101 report. **Tr. 2020**, 390:16-391:7.

714 Dr. Armitage's uncertainty as to whether SRK had considered such a critical factor further compromises its assessment of the Project's financial viability. After hearing SRK's testimony, Mr. Guarnera of Behre Dolbear stated:

> "Yesterday, from SRK's testimony, we learned that something that … really verifies the concerns that we expressed in our two reports. Based on what was shown, the production levels at the mine will be **reduced by as much as 70 percent**. … What you're looking at is something that's 70 percent smaller than that due to the constrictions of the zoning and the blasting. That means the economics of the Project will correspondingly be reduced, and it also demonstrates why a new feasibility study is needed." **Tr. 2020**, 544:3-14 (emphasis added); **BD Presentation**, 40.

715 Given the significant impact of the mitigation measures and the restricted blasting schedule on the Project's financial viability, the Claimants are unable to prove the causal link between the alleged breach of the BITs and

the damages claimed, as they cannot show that, in the absence of the alleged breach, the Project would have operated profitably.

716 Moreover, as discussed below in **Section 5.4.1.2**, [redacted] due to Micon's reliance on IMC's production schedule and its lack of assessment of the impact of Ipromin's blasting mitigation measures and RMGC's restricting blasting schedule.

Subsequent Assessments of the Project's Financial Viability Rely on [redacted]

717 Whereas the Claimants primarily rely on SRK's NI 43-101 report and its expert reports, they also point to feasibility studies by Ipromin and the Washington Group, the homologation by NAMR, and analysis by AECOM and China Gold, as purporting to establish the Project's financial viability. **Claimants' Opening Presentation (Second Hearing) - Vol. 5**, 7. Yet, all these documents either rely on [redacted]

718 As to the Washington Group's mine feasibility study, which was issued in 2006, it predates Ipromin's 2006 blasting mitigation measures, so could not possibly assess their impact on the Project's financial viability. **C-140**; **Claimants' Opening Presentation (Second Hearing) - Vol. 5**, 7. This study (and the updates thereto) also does not account for the added time, cost and labor required to implement the mitigation measures specified by Ipromin. **BD Report III**, 9 (para. 12(i))

719 As to the mine feasibility studies by Ipromin, these reports fail to even mention, let alone analyze, the impact of the blasting mitigation measures or the restricted blasting schedule on the Project's financial viability. The absence of this analysis is troubling given that one of the three Ipromin mine feasibility studies cited by the Claimants post-dates Ipromin's development of the blasting mitigation measures. (**C-989.01** (dated June 2004), **C-977** (dated October 2006), and **C-976** (dated January 2010)). Nevertheless, the Ipromin mine feasibility studies only refer to the same blasting parameters as those specified in IMC's reports, namely a 251 mm

diameter blast hole with a bench height of 10 meters, with a spacing of 6-7 meters. **C-977**, 27 *et seq*.; **C-989.01**, 21 *et seq*.; **C-976**, 51 *et seq*.

720 [redacted]

721 The reports by AECOM and [redacted] are deficient and, in any event, premised on SRK's erroneous production schedule. **C-2199**; **C-2166**.

722 After reviewing AECOM's report, Behre Dolbear described it as "very superficial, perfunctory, and flawed" and that it "is not material and does not warrant consideration as a supporting document for the prior work performed at the Project." **BD Report II**, 7 (para. 25). It further noted:

> "[T]he AECOM Report (C-2199) consists of fifteen pages, the first nine discussing AECOM's qualifications. AECOM states that its assessment was based on the Technical Compliance Report NI 43-101 on the Roşia Montană Project, written by SRK Consulting Ltd. in October 2012 and on the final offer made by Gabriel Resources to the Romanian Government on 10 June 2013." **BD Report II**, 18 (para. 68).

723 Mr. Guarnera explained that AECOM's report was written in five days and that "it astounded us, in fact, that how, in a five-day period they could accomplish all that they did." **Tr. 2020**, 563:19-564:2. Behre Dolbear dismissed the report as unreliable. **Tr. 2020**, 564:2-3.

724 [redacted]

[redacted] **BD Report II**, 8 (para. 28).

725 Behre Dolbear opines that "it is obvious from the brevity of their respective reports that neither AECOM nor [redacted] conducted a detailed due diligence study of the Project verifying either the Mineral Resource model or the ore reserve estimation" **BD Report II**, 8 (para. 29). Indeed, neither AECOM nor [redacted] ever mention the blasting restrictions or their impact on the production schedule.

726 The failure of AECOM, [redacted] and others to identify the need to assess the impact of the blasting mitigation measures corroborates Behre Dolbear's concerns regarding the need for a new feasibility study incorporating all relevant documents in one place. **BD Report II**, 11 *et seq*. (paras. 39-42), 32 (para. 124). This failure also highlights the concerns expressed by Ms. Wilde as to the lack of a lead consultant overseeing the EIA Review Process, instead of the "piecemeal" process of pulling together reports by different consultants at different times, without one individual or company with responsibility for overall delivery of the EIA Report. **CMA - Wilde Report I**, 28 *et seq*. (paras. 100-101). Given the breadth and complexity of the Project, the lack of coordinated oversight resulted in IMC and SRK overlooking crucial parameters such as the blasting mitigation measures and the restricted blasting schedule.

4.2.5 The Claimants Have Not Demonstrated that the Project Could Obtain the Necessary Financing

727 Gabriel Canada has never had the financial resources to develop the Project, as it recognized *inter alia* in March 2012:

> "[Gabriel Canada] does not have the financial resources to complete the permitting process, acquire all necessary surface rights, or construct the mine at Rosia Montana. …
>
> Failure to obtain sufficient financing may result in delay or indefinite postponement of the development of Gabriel's projects

including the Rosia Montana Project with the possible loss of such properties." **C-1809**, 30.

728 As for the construction of the mine, SRK estimated such costs at USD 1.4 billion in 2012. **SRK Report II**, 36 (para. 83). Leaving aside the costs of fulfilling the conditions to secure the environmental permit (see paras. 519-520 above), the costs would be closer to USD 2 billion:

- if dry-stack tailings facility were included,
- if equipment, which Messrs. Guarnera and Jorgensen deem necessary, were added;
- if the contingency is adjusted; and,
- if post-closure costs were included. **Respondent's Opening 2019**, 133; **BD Report I**, 35-36 (paras. 105, 111); **CMA - Dodds-Smith Report I**, 12 (para. 45); **CMA - Dodds-Smith Report II**, 22 *et seq.* (paras. 74, 96).

729 [redacted] **C-825.02**, 1. Thus, Article 11(1) of the Agreement accompanying the Roşia Montană Law also required Gabriel Canada to prepare a detailed plan on how the Project would be financed. **C-519**, 21.

730 [redacted] **Respondent's Opening 2019**, 140. [redacted] **Respondent's Opening 2019**, 135; **C-825.02**.

731 Gabriel Canada has not proved that it secured the necessary funding or that it could have done so. It was its burden to do so under the applicable test of causation. See above paras. 511-512.

732 [redacted] **Tr. 2020**, 898:12-899:17. As the Claimants have not demonstrated that the Project would have been economically viable (see above **Section 4.2.4**), Gabriel Canada could not secure funding,

irrespective of the funding sources. **Respondent's Opening 2019**, 144-150.

733 Leaving aside the failure to demonstrate the Project's economic viability, Gabriel Canada would not have secured the necessary funding, whether the amount required was close to USD 2 billion or somewhat below for the following reasons provided by Romania's expert on financing, Mr. Karr McCurdy, (and about which he was not cross-examined):

- Gabriel Canada "did not have an attributable track record building mines or raising financing or the construction of mine projects". **Tr. 2020**, 951:17-20;
- Gabriel Canada "had a high financial risk profile. It was, in essence, a single-asset development company that produced no cash flow." **Tr. 2020**, 956:14-17;
- Gabriel Canada did not have the know-how/qualified staff to implement the Project. **Tr. 2020**, 957:4-8; and,
- Gabriel Canada was not capable of securing "engagement from influential international and government agencies such as the IFC, EBRD, or EDC of Canada to provide either equity or debt support to the Project". **Tr. 2020**, 957:9-13.

734 As for agency debt:

- in 2002, RMGC was actively considering IFC financing (**C-2146**) but the IFC refused to be associated with Gabriel Canada and the Project (**R-417**). [redacted] **Tr. 2019**, 605:20-22; see also Rejoinder, 320 *et seq.* (paras. 988-990); and,
- [redacted] (**R-585**), [redacted] **Tr. 2019**, 604:11-619:5.

735 There is no evidence that EU financing was available, in particular as the European Commission expressed the view in 2014 that the Project did not comply with the EU Water Framework Directive. **C-2909**, 5.

736 As for equity financing:

- Mr. McCurdy confirmed that Gabriel Canada would "have been required to contribute up to 40 percent of the Project's capital budgets as equity, **as new equity**", amounting to some USD 800 million. **Tr. 2020**, 956:18-21;
- [redacted] (**Tr. 2020**, 882:7-15), [redacted] **C-825.02**, 2 *et seq*.; and,
- Even this representation was optimistic because by 2011 Gabriel Canada had already issued equity and warrants in the exercise of share options to the tune of USD 700 million, as Mr. McCurdy confirmed during his cross-examination. **Tr. 2020**, 974:9-14.

737 As for project financing, Mr. McCurdy testified that "it is unlikely that Gabriel Canada would have been able to obtain a loan to build the Roșia Montană mine." **Tr. 2020**, 951:5-7. He explained:

- There was no mining industry precedent for large, long-term Project financing transactions in Romania. **Tr. 2020**, 953:2-4;
- There is no contemporaneous indication of any financial institution's appetite for exposure to the Project, while Gabriel Canada would have had to convince not one, but a syndicate of various such financial institutions to secure funding of the magnitude required. **Tr. 2020**, 955:10-22;
- The mere appearance of local, national, and international opposition to the Project "would have been perceived as a reputational risk factor for lenders at that time." **Tr. 2020**, 953:5-8;
- There is evidence that the Project did not fully adapt to international mining industry best practices, including the Equator Principles as

Ms. Wilde of CMA confirmed in her expert report. **Tr. 2020**, 959:2-8 and 1001:6-1002:5. Ms. Wilde was not called for cross-examination. **CMA - Wilde Report II**, 84 (para. 311); **KM-1**; **KM-12**;

- RMGC had not acquired the surface rights, "denying it significant access and control of the mining concession to build the mine". **Tr. 2020**, 958:10-19. [redacted] **Tr. 2019**, 1438:6-17;
- Litigation affecting or threatening permits excluded access to financing sources. **Tr. 2020**, 962:8-12;
- The feasibility study was "outdated and incomplete" **Tr. 2020**, 951:21-952:4 and as Behre Dolbear confirmed, it was also overstating production by as much as 70%, missing USD 370 million in additional capital and a negative USD 200 million in cash flow. **Tr. 2020**, 543:6-544:14;
- A reduction of reserves, increased capital and operating costs and extended timeline for the most likely start-up date for the Project would have been a matter of concern for lenders. **McCurdy Report**, 14 (para. 33); and,
- The risk of archaeological discovery and delay was present. **Tr. 2020**, 950:19-951:4.

738 Regarding archaeological risk:

- [redacted] **Tr. 2019**, 641:14-642:7;
- However, RMGC had not even applied for an ADC for that area. See above para. 57. The failure to secure an ADC created significant risk and uncertainty for the Project, as RMGC had only conducted a limited archaeological investigation of the area, which presented a strong possibility of containing underground archaeological features. **CMA - Claughton Report II**, 15 *et seq*. (paras. 47-52); and
- [redacted]

[redacted] **Tr. 2019**, 1432:4-8.

739 Lenders would have learned of these risks during due diligence, which the Claimants recognized would be detailed and last several months. **C-825.02**, 4[redacted]

740 Mr. McCurdy confirmed that his opinion did not encompass financing through mergers and acquisitions. **Tr. 2020**, 977:9-12. However, financing the Project by selling Gabriel Canada is a non-issue in this arbitration:

- Mr. McCurdy confirmed that it is implausible that any company other than a major mining company would have interest in developing the Project and [redacted] **Tr. 2020**, 977:22-978:11 (McCurdy) and 883:3-6 (Jeannes);
- Prof. Spiller confirmed that he had not seen any evidence of a mining major interested in acquiring Gabriel Canada. **Tr. 2020**, 1296:1-19.
- [redacted] **Tr. 2020**, 903:4-904:10 (Jeannes). [redacted] **C-1875**, 28, 31; and,
- [redacted] **Henry I**, 12 (para. 31).

741 The Claimants' last-minute allegations at the hearing that Gabriel Canada could "self-finance" have no basis:

- [redacted] **Tr. 2020**, 882:16-17;

- [redacted] **C-1875**, 39;
- The Claimants never told their shareholders that they could fund the Project (exclusively or primarily) through self-finance. **C-1809**, 30;
- [redacted] **Tr. 2020**, 985:12-987:7 (McCurdy); **C-2165**, 10-12;
- [redacted] **C-825.02**, 2 *et seq*.;
- The Claimants' witnesses (including Mr. Henry) have never mentioned the possibility of self-financing;
- The Claimants have not produced expert evidence showing that the Project could be self-financed; and,
- The Claimants have not alleged, let alone proven how a third party could have replaced RMGC and/or the Claimants under Romanian law, the License and the shareholders agreements.

5 THE CLAIMANTS HAVE FAILED TO PROVE THE QUANTUM OF THE ALLEGED LOSS

5.1 The Claimants Only Quantify Their Claim for Expropriation

742 The Claimants' quantum claim presupposes the complete deprivation of the use, value, and enjoyment of their investment, rather than damage to the investment as a result of a breach of the FET standard or any other treaty standard. **Tr. 2020**, 254:12-22 (R. Op.); Reply, 160 *et seq*. (para. 356); 262 (para. 627); Rejoinder, 397 *et seq*. (paras. 1175-1177).

743 In other words, the Claimants fail to quantify the compensation that would be due if the alleged non-expropriatory breaches had harmed the value of

their investments but did not result in their total and permanent loss. Counter-Memorial, 305 *et seq*. (paras. 792-793).

744 Accordingly, if the Tribunal finds there has been no expropriation, it cannot rely on the Claimants' valuation. Counter-Memorial, 306 (paras. 794-795).

5.2 The Claimants' Case on Quantum Is Based on an Incorrect Valuation Date

745 As the Respondent explained in its opening statement at the 2019 hearing, the Claimants chose to backdate the start of the alleged composite act to 29 July 2011 to capitalize on Gabriel Canada's high share price at the time. **Tr. 2019**, 465:17-466:20; **Respondent's Opening 2019**, 96.

746 It is apparent that the Valuation Date was selected for the purpose of inflating the Claimants' claim for compensation, as no Government action or omission took place in the summer of 2011 that could conceivably amount to a treaty breach. **Tr. 2019**, 465:17-466:20 (R. Op.).

- Indeed, at no point prior to the Claimants' Memorial did the Claimants ever allege that Romania had interfered with the Claimants' investments in August 2011 or, indeed, at any point throughout 2011 in connection with the commercial negotiations with the Government. **Tr. 2019**, 467:5:11 (R. Op.).

747 Prior to the hearing, the Claimants tellingly never identified the date of the alleged breach of the BITs. Counsel for the Claimants, when asked by the Tribunal about the alleged date of breach and how it related to the Valuation Date, went as far as asserting that the Tribunal need not worry about the date of the breach to value the Claimants' alleged losses. **Tr. 2019**, 288:2-294:16.

748 During their opening, the Claimants admitted that the Canada-Romania BIT entered into force on 23 November 2011, and therefore Romania's conduct could only be in breach of the Canada-Romania BIT starting from that date. **Tr. 2020**, 23:11-14.

- The Claimants nevertheless argued that the Tribunal could take account of the value of Gabriel Canada's investment prior to that date "in order

to assess the *status quo ante* in relation to Romania's conduct thereafter." **Tr. 2020**, 23:14-18 (Cl. Op.); and,

- However, the Claimants' interpretation – which relies on a misreading of Comment 11 to ILC Article 15 (see Cl. PO27 Answers, 36 *et seq*. (para. 57)) – is inconsistent with the express provisions of Article VIII(1) of the Canada-Romania BIT.

5.2.1 The Claimants Admit That the Alleged Breach Did Not Occur on 29 July 2011

749 In response to the Tribunal's PO27 questions, the Claimants acknowledged the weakness of their case and claimed that the alleged breach did not occur until 9 September 2013. Cl. PO27 Answers, 35 (para. 53).

5.2.2 The Claimants' Alleged Damages Must Be Quantified as of the Date of the Alleged Breach

750 The Valuation Date is both inconsistent with their case and incorrect as a matter of law.

- Both BITs require the Valuation Date to be immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is earlier. **C-1**, 10 (Art. VIII(1)); **C-3**, 5 (Art. 5);
- As evidenced by Gabriel Canada's lack of disclosure of any alleged expropriation prior to 9 September 2013, there was no information in the public domain, in Canada, Romania or anywhere else, of any alleged expropriation before that date; and,
- Therefore, based on the Claimants' own case regarding the alleged breach, the Valuation Date should be 9 September 2013.

751 The fact that the Claimants rely on a theory of composite breach or creeping expropriation does not allow the Claimants to arbitrarily move the Valuation Date from the date of the alleged breach to a prior time of their choosing (and prior to the entry into force of the Canada-Romania BIT).

- ILC Article 15, which addresses composite breach and creeping expropriation, confirms that the breach of an obligation which is the

result of a composite act "occurs when the act or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act." **CLA-61**, 62 (Article 15(1)); and,

- On the Claimants' own case, this date was 9 September 2013.

5.3 Compass Lexecon's Valuation Incorrectly Assumes That the Project Rights Have Lost All Value

752 As Prof. Spiller confirmed, in assessing the quantum of Claimants' alleged loss, Compass Lexecon assumes the complete deprivation of the Claimants' so-called "Project Rights". **Tr. 2020**, 1143:10-14; **CL Report II**, 12 (para. 10).

- Compass Lexecon defines these Project Rights as "Claimants' directly and indirectly held rights … related to the development of certain mining projects in Romania". **CL Report I**, 4 (para. 1); **Tr. 2020**, 1149:6-1151:8 (Spiller);
- At the hearing, Prof. Spiller confirmed that these rights are derived from RMGC's concession licenses. **Tr. 2020**, 1151:12-1152:3 (Spiller); and,
- Prof. Spiller also confirmed that he was aware that the License had been recently renewed. **Tr. 2020**, 1153:1-3.

753 Since RMGC still holds a valid exploitation license, it still retains the exclusive right to develop the mineral resources of Roșia Montană, as well as several other direct and indirect rights related to the Project, including ownership of real property in the area, and the right to use the exploration records, engineering studies, and other information and know-how it collected on the Project. **Tr. 2020**, 256:2-18 (R. Op.).

754 Therefore, even assuming the alleged breach of the BITs had permanently deprived the Claimants of its rights to develop the Project (*quod non*), this would not destroy the entire value of the Project Rights. The evidence on the record establishes that, long after the alleged date of breach, the Claimants' investments related to the Project retained significant value.

- RMGC's Q2 2011 balance sheet identified USD 337,758,601 in non-current assets, which had not been impaired as of the end of 2014 – *i.e.*

more than a year after the alleged expropriation. **CRA Report II**, 102 *et seq*. (paras. 217-219); see also **Respondent's Opening 2020**, 170 *et seq*.;

- Dr. James Burrows, Vice Chairman of CRA, explained in his second report that

  "[t]his confirms that all of RMGC's value was still intact as of that date, including the Project Rights, the physical assets, the real estate and surface rights it had acquired, and all of the intellectual property in the form of exploration records, engineering studies, and other information that it had collected on the properties over time.

  Gabriel can sell its shares in RMGC, and it would be able to recover its share of the value of RMGC's assets. Alternatively, if RMGC elects not to continue to try to develop the Projects, RMGC can sell its rights to other parties who are interested in developing the Properties. There is no reason that RMGC or Gabriel would not be able to extract a substantial percentage of the value of the Projects in such a sale." **CRA Report II**, 103 (paras. 219-220);

- In his hearing presentation, Dr. Burrows expounded on the value of the surface rights still held by RMGC:

  "The value to future developers of the Project of the RMGC Land Rights would be very high. Clearly, the Project could not be developed without control of those land rights. So, if someone else were to try to develop the property later, RMGC would be in a position to demand a very high price for those Land Rights." **Tr. 2020**, 1343:17-1344:1; and,

- Dr. Burrows further explained during his cross-examination that:

  "[a]nother mine development company might decide to, for example, acquire RMGC, even if the State had not given to permission to develop the property, on the expectation that it could get it developed, so another buyer might not necessarily need to have a new set of approvals to decide it wants to buy RMGC and its Land Rights." **Tr. 2020**, 1376:21-1377:5.

755 At the hearing Prof. Spiller explained that his valuations did not deduct value of the assets still retained by RMGC because he considered those assets to be part of the Project. **Tr. 2020**, 1163:6-12.

- Prof. Spiller indicated that his conclusion that these assets were lost was based on his review of the accounting records. **Tr. 2020**, 1163:13-19;
- However, this explanation is nonsensical given that Gabriel Canada did not significantly impair the value of these assets until **March 2016**, months after the beginning of the arbitration and several years after the alleged date of expropriation. **Tr. 2020**, 1173:14-1175:14; Rejoinder, 291 *et seq*. (paras. 912-915);
- As Prof. Spiller confirmed, in March 2015, more than a year and a half after the alleged expropriation, Gabriel Canada reported the value of its consolidated non-current assets at more than CAD 600 million. **Tr. 2020**, 1172:13-1173:13; and,
- The year before, in March 2014 – again, more than half a year after the date of the alleged breach – Gabriel Canada reported an **increase** from CAD 521 million to CAD 613 million (*i.e.* approximately USD 577,028,000 at the time) in its consolidated non-current assets. **C-1831**, 4; **Respondent's Opening 2020**, 173.

756 Prof. Spiller admitted that Gabriel Canada needed to perform an annual impairment test in which it had to impair the value of any expropriated assets, and that the lack of any such impairment reflected the view of Gabriel Canada's auditors as to whether its assets had been affected by any expropriation. **Tr. 2020**, 1167:14-1170:18.

757 Even assuming that the Project Rights had been expropriated, the fair market value ("**FMV**") of the assets still held by the Claimants as at the Valuation Date should have been excluded in any valuation of the Claimants' loss.

- Dr. Burrows explained in his hearing presentation that Compass Lexecon should have adjusted for the non-financial assets owned by Gabriel Canada, including the Company's ownership share of property, plant, and equipment. **Tr. 2020**, 1343:7-15; and,

- On cross-examination, Prof. Spiller agreed that, should the Tribunal determine that assets such as property, plant, and equipment were not expropriated, the Tribunal should not include their value in any amount awarded. **Tr. 2020**, 1165:1-15.

758 Since Compass Lexecon failed to deduct from its valuation the value of the Project Rights that, even on the Claimants' case, RMGC still retains, the Tribunal cannot rely on the valuations performed by Compass Lexecon, as this would impermissibly compensate the Claimants for assets that have not been expropriated.

5.4 Compass Lexecon Overstates the FMV of Gabriel Canada as of the Valuation Date

759 Compass Lexecon computed three valuations of the Projects Rights as at the Valuation Date:

- Its primary valuation methodology is based on Gabriel Canada's 90-day average market capitalization adjusted by an acquisition premium, which yields an alleged value of USD 3.286 billion. **CL Presentation**, 9;
- Compass Lexecon also provides two secondary assessments of the Project Right's FMV, a Market Multiples valuation yielding a value of USD 3.668 billion (**CL Presentation**, 24); and,
- A P/NAV valuation yielding a value of USD 2.720 billion. **CL Presentation**, 38.

760 For the reasons detailed below, these valuations are unreliable and should be rejected.

5.4.1 Gabriel Canada's Market Capitalization Is Not Valid Proxy for the Value of the Project Rights

5.4.1.1 The Claimants and Compass Lexecon Wrongfully Assume that the Value of the Claimants' Shareholding in RMGC Corresponds to the Value of the Project Rights

761 Instead of directly valuing the Claimants' share of RMGC's assets, Compass Lexecon sought to value Gabriel Canada. **Tr. 2020**, 265:10-21 (R. Op.).

762 Compass Lexecon and the Claimants incorrectly assume that 80.69% of the value of RMGC's assets related to the Project equates to the value of Gabriel Canada's market capitalization (adjusted with an acquisition premium). **Tr. 2020**, 1183:18-1184:2 (Spiller); **Respondent's Opening 2020**, 181.

763 Leaving aside that Gabriel Canada's market capitalization includes the value of RMGC's assets that were not expropriated (see above **Section 5.3**), it also includes the value that investors may have placed Gabriel Canada independently from the Project, such as its management, its strategic position in Romania, and its backing by Newmont. **CRA Report II**, 19 (para. 48).

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5.4.1.3 A Speculative Bubble in the Price of Gold Was Inflating Gabriel Canada's Share Price

815 As Dr. Burrows explained, there was a speculative bubble in gold prices in 2011. **Tr. 2020**, 1334:10-21; **CRA Presentation**, 19 *et seq*.

816 He confirmed in cross-examination that this gold bubble was a result of a significant divergence between the prices in the spot and futures market and the price expectations of virtually all industrial participants in the gold market. **Tr. 2020**, 1373:16-21.

817 Accordingly, an informed buyer as at the Valuation Date would not have based its valuation of Gabriel Canada at the prevailing bubble prices but would have rather used more realistic industry forecasts. **Tr. 2020**, 267:14-270:11 (R. Op.); **CRA Report II**, 37 *et seq*. (paras. 80-83).

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5.4.2 The Claimants' Alternative Valuations Also Overstate the Value of the Project Rights

5.4.2.1 Compass Lexecon's Market Multiples Valuation Is Unreliable Because Its Sample of Comparison Properties Is Biased and Does Not Control for Distinguishing Factors That Affect Value

821 Dr. Burrows explained in his opening presentation that the market multiples method has very low reliability for mining projects because the economic characteristics of mineral properties vary enormously from property to property, and even within properties. **Tr. 2020**, 1325:14-18; **CRA Presentation**, 68 *et seq*.

- This makes identifying suitably comparable properties for a mineral property very difficult and often impossible. **Tr. 2020**, 1359:14-18 (Burrows); and,
- Because few properties will be comparable with respect to all relevant factors, using a market multiples approach requires adjustments to allow property values to be compared on an "apples-to-apples" basis. **Tr. 2020**, 1359:18-22 (Burrows).

822 Compass Lexecon's sample of 77 non-producing gold-mining companies includes many properties that are not comparable to the Project. **Tr. 2020**, 1360:7-15 (Burrows); **CRA Presentation**, 70 *et seq*.

- Compass Lexecon includes in its sample properties that are much more advanced than the Project and have already incurred much of their investment costs. **Tr. 2020**, 1360:17-20 (Burrows). Including these properties results in erroneously high market multiples estimates. **CRA Report II**, 60 *et seq*. (paras. 113-117); and,
- Compass Lexecon's sample incorrectly includes many properties that have substantial non-gold production and are therefore not comparable to the Project. **Tr. 2020**, 1360:21-1361:1 (Burrows).

823 Compass Lexecon did not adjust the values of the properties in its sample to control for quantifiable differences between those properties and the Project. **Tr. 2020**, 1361:2-6 (Burrows). Compass Lexecon should have but

did not make adjustments for differences in capital costs per ounces, operating costs per ounce, the time profile of expected production and the risk profile of production. **CRA Report I**, 52 (para. 86).

5.4.2.2 Compass Lexecon's P/NAV Valuation Is Unreliable

Compass Lexecon's P/NAV Valuation Is Tainted by [redacted]

824 Prof. Spiller admitted in his hearing presentation that his analysis is based on Micon's and SRK's NI 43-101 reports, stating that "[i]n our assessment, we look at the Technical Reports, particularly as it relates to Roșia Montană, on the Micon and the SRK Report, as you have heard." **Tr. 2020**, 1094:7-10. Prof. Spiller confirmed on cross-examination that his valuation relies on SRK's assessment of resources and reserves. **Tr. 2020**, 1153:21-1154:9.

825 Prof. Spiller confirmed at the hearing that his P/NAV valuation, which assesses the present value of expected future cash flows from the Project, is based on the production schedule and economic model provided in SRK's 2012 NI 43-101 report. **Tr. 2020**, 1154:13-1155:4.

826 [redacted] **Tr. 2020**, 1326:10-12.

Compass Lexecon's P/NAV Valuation Is Based on an Incorrect Timeline

827 [redacted]

Tr. 2020, 1365:5-19; **CRA Presentation**, 85.

828 Concerning the Project's timeline:

- [redacted]

[redacted] **Tr. 2020**, 1232:18-1233:4. [redacted]. **Tr. 2020**, 1233:5-1234:6;

- [redacted] **Tr. 2020**, 1240:16-1241:9. [redacted] **Tr. 2020**, 1241:11-18. [redacted] **Tr. 2020**, 1242:6-11;
- [redacted] **Tr. 2020**, 531:2-7;
- [redacted] Memorial, 113 (para. 284); and,
- [redacted] **Tr. 2020**, 1242:2-5.

Compass Lexecon's P/NAV Sample Results in Upward-Biased Value Estimates

829 Dr. Burrows explained that Compass Lexecon applies P/NAV ratios calculated by analysts of a number of companies, then calculates the median and applies it to the Roșia Montană NAV or DCF (as calculated by Compass Lexecon). **Tr. 2020**, 1326:1-9.

- This results in a very unreliable valuation because the P/NAV ratios used by Compass Lexecon come from different analysts with different input assumptions and pertain to properties that are not comparable to Roșia Montană. *Id*; see also **CRA Presentation**, 6; **CRA Report II**, 64 *et seq*. (Section VI);
- The sample has an upward-bias because 48 out of 66 of the companies in the sample have producing properties, which are worth a lot more than a development property like the Project. **Tr. 2020**, 1364:2-12 (Burrows). Compass Lexecon only included eight non-producing companies from areas with a country risk comparable to Romania's. **Tr. 2020**, 1364:13-21 (Burrows); **CRA Presentation**, 84; and,
- Many companies included in the sample are distinguishable from the Project in other respects, with seventeen companies having both open-pit and underground deposits, and four companies deriving less than 50% of their production from gold. **Tr. 2020**, 1364:22-1365:4 (Burrows).

5.4.3 There Is No Basis for the Acquisition Premium Applied by Compass Lexecon

830 Compass Lexecon includes a 35% acquisition premium in all three of its valuation methodologies. **CL Report II**, 61 *et seq*. (Tables 4, 5, and 6).

831 Dr. Burrows explained that an acquisition premium is not a standard feature of valuation analysis and is only justified if there is additional value to the buyer, such as synergies. **Tr. 2020**, 1357:9-12. For a buyer to pay a premium above the public market capitalization of an asset, it must perceive a value that is not already incorporated in this value, such as synergy or asymmetric information. **Tr. 2020**, 1358:10-15 (Burrows).

832 Compass Lexecon provides no legal or factual justification for its application of acquisitions premiums. **CRA Report II**, 49 *et seq*. (Section IV). Compass Lexecon's references are all to valuation textbooks that describe the results of transactions and not that companies should be valued by their market capitalization plus an acquisition premium. **Tr. 2020**, 1357:15-19 (Burrows).

- Prof. Spiller confirmed at the hearing that, *Damodaran on Valuation*, which he relies upon to support his contention that an acquisition premium should be paid, states that an acquisition premium should equal the difference between the *status quo* value of a firm and its optimal value, such that the premium would be zero for a firm in which management is already taking the right decisions. **Tr. 2020**, 1267:18-1268:5 (citing **CRA-171**). This supports Dr. Burrows' view that "a control premium in the absence of synergies is only justified if the company is being mismanaged and new management expects to remove inefficiencies." **CRA Report II**, 50 (para. 97);
- When asked whether Gabriel Canada was being poorly managed as at the Valuation Date, Prof. Spiller responded that it was "average", thereby further undercutting his justification for applying an acquisition premium. **Tr. 2020**, 1268:17-1269:1;
- Prof. Spiller disagrees with *Damodaran on Valuation*, which states that "there can be no rule of thumb of control premiums", and that "the notion that control is always 20 to 30 percent of value cannot be right." **Tr. 2020**, 1269:4-1269:20; and,
- Prof. Spiller admitted that his second report had misquoted *Damodaran on Valuation*, by stating that that the premium paid by acquirers has been between 20% and 30% representing an "amalgam of all of the motives behind acquisitions", thereby omitting "including synergy" at end of the sentence. **Tr. 2020**, 1270:8-1271:19; see also **CL Presentation**, 19. Prof. Spiller confirmed that the sentence after the quoted passage, which states that "the premium paid in an acquisition is a composite value of control, synergy, and overpayment", mirrors the reasons provided by Dr. Burrows for the payment of acquisition premiums. **Tr. 2020**, 1271:20-1272:19.

833 Applying a 35% premium to the market capitalization is inconsistent with the efficient markets hypothesis relied on by Compass Lexecon. **Tr. 2020**, 1357:19-1358:5 (Burrows); **CRA Report II**, 51 (para. 99).

834 [redacted] **Tr. 2020**, 858:12-19. [redacted]

[redacted] **Tr. 2020**, 921:12-16.

- However, as the Claimants mentioned in their opening presentation, "the Fair Market Value represents a reasonable price that would normally be paid by a willing buyer and a willing seller of the asset." **Tr. 2020**, 27:22-28:3; and,
- This hypothetical situation does not contemplate a need to convince the seller to sell, nor a competition among buyers. The assessment of the FMV of the Claimants' alleged loss excludes an acquisition premium, especially since there is no evidence that, as at the Valuation Date, several major mining companies would have competed in purchasing Gabriel Canada.

835 Prof. Spiller conceded that he had opined in *Crystallex v. Venezuela* that a control premium should be included but that the tribunal in that had case had declined to do so. **Tr. 2020**, 1273:17-1274:4. Explaining why he had not applied an acquisition or control premium in other cases, Prof. Spiller stated:

> "Well, if we use an Income Approach such as the DCF, we don't include a Control Premium. Only when you are taking stock prices into consideration do you have to incorporate the Control or Acquisition Premium." **Tr. 2020**, 1274:15-19.

836 In response to a question from the Tribunal, Prof. Spiller confirmed that "the P/NAV is an income approach." **Tr. 2020**, 1290:8. Compass Lexecon nevertheless applied a 35% acquisition premium to both its P/NAV and its Market Multiples approaches, neither of which involve taking stock prices into consideration. **CL Report II**, 62 *et seq*. (Tables 5 and 6).

- By Prof. Spiller's own admission, there is no justification to apply an acquisition premium to either of those valuations; and,
- As such, these two valuations provide no corroboration for Compass Lexecon's unreliable market capitalization methodology.

5.4.4 Compass Lexecon's Valuations Are Inconsistent with Gabriel Jersey's Purchase of RMGC Stock in July 2011

837 Dr. Burrows noted that a useful benchmark in assessing Gabriel Canada's FMV is its purchase of Foricon's shares of RMGC in July 2011, which implied a value of the Claimants' shareholding in RMGC of USD 791 million. **Tr. 2020**, 1353:4-7; **CRA Presentation**, 51.

838 [redacted] **Tr. 2019**, 758:11-759:1.

839 When asked about the Foricon transaction by Tribunal, Dr. Spiller tried to minimize the significance of this transaction, based on the understanding that Foricon was in financial distress and that "Gabriel had preemptive rights as a consequence Foricon couldn't sell to anybody but essentially to Gabriel". **Tr. 2020**, 1295:3-22.

840 As Dr. Burrows explained during his cross-examination, both [redacted] and Dr. Spiller are mistaken.

- [redacted] **Tr. 2020**, 1403:3-7;
- Indeed, although the translation of article 10.4 of RMGC's Articles of Organization refers to a "main preemption right", the language of articles 10.4 and 10.8 make clear that Gabriel Jersey in fact has a right of first refusal. **C-183**, 15;
- Article 10.4 provides in relevant part:

  "Should any of the Shareholders decide to transfer in whole or in part the Shares held in the Company, then they shall submit a written notification (the '**Offer**') to Gabriel with regard to their intention, including the sale conditions and the total price. In case Gabriel accepts the conditions and the price, the transferor Shareholder must sell or transfer the shares to Gabriel." **C-183**, 15; and,

- Article 10.8 states in relevant part:

  "If the provisions above have been observed but neither Gabriel, directly or indirectly, nor Minority Shareholders expressed their intention to purchase or rejected the Offer within 30 days following the receipt of the notification, the Shareholder will be entitled to transfer the Shares to any interested entity, according to the provisions of the law." **C-183**, 15.

841 [redacted] **Tr. 2020**, 1403:9-14.

- [redacted] **Tr. 2020**, 1404:8-1405:20; and,
- [redacted],

  [redacted] **Tr. 2020**, 1405:16-20.

5.5 Dr. Burrows Provides a "Best-Case" Assessment of the Value of the Alleged Project Rights as of the Valuation Date

842 Dr. Burrows valued the Project Rights by relying on a DCF analysis, the principal valuation methodology used by major international mining companies. **Tr. 2020**, 866:8-14, 922:5-923:17 (Jeannes); **CRA Presentation**, 5.

843 Dr. Burrows computed this DCF

- Assuming a best-case timeline in which RMGC would have received the environmental permit in April 2012, the building permit in April

2018, would have started production in April 2022, and achieved full production in April 2023. These dates effectively assume no delays from litigation initiated after the Valuation Date or from the requisite expropriation of surface rights. **CRA Report II**, 5 (para. 4);

- Using a cost of capital of 10.2% (which includes a country risk premium of 3.37%). **CRA Presentation**, 12;
- Based on the production schedule, capex, and closure costs provided in SRK's NI 43-101 report, as adjusted by Behre Dolbear and Dr. Dodds-Smith. **CRA Presentation**, 6 and 16; and,
- Using long-term gold and silver prices based on consensus industry projections. **CRA Presentation**, 20.

844 Dr. Burrows computed the DCF value of the Project as of 29 July 2011 at USD 156 million. **CRA Presentation**, 30.

5.6 At Most, the Claimants Are Only Entitled to Damages for Delay

845 As discussed above in **Section 5.1**, the Claimants have not attempted to prove the quantum of the damage allegedly caused by Romania's non-expropriatory breaches of the BITs.

846 Should the Claimants be entitled to compensation notwithstanding their failure to prove the quantum of the damage, then they are at most entitled to compensation for delay. Counter-Memorial, 303 *et seq*. (Section 11.2).

847 To calculate this loss, Dr. Burrows compared an "actual scenario", in the which the Project would have proceeded in absence of the alleged measures, to a "counterfactual scenario" in which the Project would resume after the Tribunal issues its award. **CRA Presentation**, 28; Counter-Memorial, 307 *et seq*. (Section 11.2.2).

- Both the actual and counterfactual scenarios assume no delays from litigation initiated after the Valuation Date or from the requisite expropriation of surface rights. **CRA Presentation**, 28 *et seq*.;
- As Dr. Burrows noted at the hearing, the counterfactual timeline would need to be updated to account for the actual end of the proceedings. **Tr. 2020**, 1341:7-11; and,

- Based on this analysis, Dr. Burrows assessed the Claimants' loss from delay at USD 126 million; **CRA Presentation**, 31 and 100.

5.7 The Claim for Interest Is Overstated

5.7.1 The Accrual Period Must Start on the Date of the Breach and Not Before That Date

848 As discussed above in **Section 5.2.2**, both BITs require the Valuation Date to be immediately before the date of the alleged expropriation. That is also the date from which interest must start to accrue per the express wording of the BITs. **C-1**, 10 (Art. VIII(1)); **C-3**, 5 (Art. 5(1)).

849 The Claimants' erroneous Valuation Date of July 2011 not only allows the Claimants to benefit from market misinformation and the gold price bubble, but also gives the Claimants a much longer interest accrual period. The latest update of the Claimants' interest claim amounts to approximately USD 1.5 billion. **CL Report II**, 64 (Table 7).

5.7.2 The Claimants Are Not Entitled to Compound Interest

850 As noted in the commentary to the ILC Articles, the general rule under international law is that the victim of an unlawful act does not have "any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation." **RLA-33**, 109 (para. 9); see also Counter-Memorial, 315 *et seq*. (paras. 814-816).

851 Given that there are no circumstances justifying any such entitlement, there is no reason to compound either pre-award or post-award interest.

5.7.3 Pre-Award and Post-Award Interest Should Be Calculated Using a Risk-Free Rate

852 Dr. Burrows explained at the hearing that the risk-free rate should be used to calculate interest because any award to the Claimants is not being "loaned" on the same risky basis as those which banks extend when they make loans. **Tr. 2020**, 1369:3-7.

853 There would be no risk associated with collecting any amounts awarded by the Tribunal, as Romania has always complied in good faith with its obligation to pay an investment arbitration award. Rejoinder, 401 (para. 1190).

854 Since the Claimants would not be exposed to an undiversifiable risk inherent in the overall market, they are not entitled to a rate of interest that would that compensate them for both the time value of money and risk. **Tr. 2020**, 1369:8-15 (Burrows); **CRA Presentation**, 95.

855 The time value of money is equal to a risk-free interest rate, best represented by the U.S. Treasury bill rate from the Valuation Date. **Tr. 2020**, 1369:15-18 (Burrows).

5.8 The Claimants' Alternative Claim Is Inadmissible and Manifestly Without Any Merit

856 The Claimants have introduced a new claim during their opening statement at the 2020 hearing. **Tr. 2020**, 145:6-147:7 (Cl. Op.). In their demonstrative exhibits Nos. 8 and 9, Claimants quantified the alternative claim using three alternative gold share price indexes: USD 706 million-USD 1.2 billion.

857 The claim is inadmissible for the reasons indicated in Romania's letters to the Tribunal dated 1 and 4 October 2020. While the Tribunal has ruled in **PO 34** that the claim is admissible as it not a claim but mere argument, Romania has maintained its objections and reserved all its rights.

858 The claim is in any event manifestly without any merit.

859 First, it consists of using all the same bases for the principal claim of damages (valued as of July 2011) but moving that valuation through linear extrapolation to a different date in September 2013. The failure of the principal claim necessarily entails a failure of the alternative claim. **Tr. 2020**, 1353:16-1356:8 (Burrows).

860 Second, in the event it preferred the valuation date of 6 September 2013 and not 29 July 2011, the Tribunal could not use the evidence on record in support of an alternative valuation as the Parties and their witnesses have

never discussed the application of any valuation methods to a date other than 29 July 2011.

861 Third, as Prof. Spiller and Mr. Dellepiane confirmed at the hearing, Compass Lexecon did not prepare the adjusted valuations provided in Claimants' Demonstratives 8 and 9. **Tr. 2020**, 1139:3-1141:9. There is no expert evidence supporting that alternative valuation and the claim must be rejected.

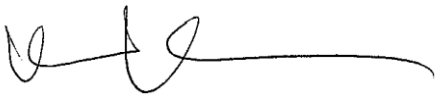
6 PRAYER FOR RELIEF

862 In view of the above and the preceding submissions, the Respondent respectfully requests the Arbitral Tribunal to award the Respondent the relief requested in its Rejoinder.

Respectfully submitted,

18 February 2021

For and on behalf of Romania



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