
INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

v.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

CLAIMANTS' MEMORIAL

JUNE 30, 2017

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CLAIMANTS' MEMORIAL

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I. INTRODUCTION

1. Gabriel Resources Ltd. (“Gabriel Canada”), a publicly-traded gold mining company listed on the Toronto Stock Exchange, and its wholly-owned subsidiary Gabriel Resources (Jersey) Ltd. (“Gabriel Jersey”) (collectively “Gabriel” or “Claimants”), submit this Memorial in support of their claims against Romania (“Respondent” or the “State”) under (i) the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (“Canada-Romania BIT”),¹ and (ii) the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (“UK-Romania BIT”).²

2. Gabriel’s claims are based on, and the evidence demonstrates, an unlawful course of conduct by Romania comprising a series of coercive, arbitrary, and unlawful acts and omissions beginning in August 2011 that were taken in disregard of Gabriel’s acquired rights and legitimate expectations and that, over a number of years, combined to result in the effective expropriation and complete deprivation and loss of the entire value of Gabriel’s substantial investments in Romania, including in Roșia Montană Gold Corporation S.A. (“RMGC”), in violation of the Canada-Romania BIT and the UK-Romania BIT (together, the “BITs”).

3. Gabriel’s compensable losses, with interest up through the date of this Memorial, are US\$ 4.377 billion.

4. With the support of one of the world’s leading gold producing companies, Newmont Mining, a major shareholder, as well as several other highly experienced global natural resources investors as shareholders, including Electrum, Paulson & Co., BSG, and Baupost, Gabriel has invested approximately US\$ 760 million to develop and implement in partnership with the State a modern mining project to exploit the world class gold and silver deposits at Roșia Montană, a mining town in Transylvania (“Roșia Montană Project” or “Project”), and thus continue Roșia Montană’s 2000-year history of mining dating back to Roman times.

¹ Canada-Romania BIT (Exh. C-1).

² UK-Romania BIT (Exh. C-3).

5. With proven and probable reserves of 10.1 million ounces of gold and 47.6 million ounces of silver, the Roșia Montană Project represented one of the largest undeveloped gold projects in the world.³ Gabriel's investments also were directed at developing and implementing in partnership with the State mining projects to exploit substantial gold, silver, and copper resources in the neighboring Bucium license area ("Bucium Projects").

6. The relevant facts giving rise to Romania's liability may be summarized as follows.

7. As Romania transitioned to a market economy after the fall of Communism, it recognized that it needed, and thus actively sought, foreign investment to help modernize its aging, polluting, under-funded, and loss-making mining industry, including at Roșia Montană. In this context, with the approval and participation of the State, Gabriel established RMGC in 1997 as a joint venture to develop and exploit the mineral resources at Roșia Montană through what became the Project, and to explore and, if feasible, to develop and exploit the mineral resources at Bucium. Per the agreement with Gabriel reflected in RMGC's Articles of Association, and as a result of amendments thereto, the State's shareholding in RMGC by 1999 stood at 19.31%. Gabriel Jersey owns the other 80.69% of RMGC's shares.

8. In 1999-2000, RMGC became the Titleholder under each of the Roșia Montană Exploitation Concession License ("Roșia Montană License" or "License") and the Bucium Exploration License. Per the terms of the Roșia Montană License, as amended, the State was entitled to a 4% royalty on the gross revenue from eventual production. The License, a concession agreement, gave RMGC rights and created the legitimate expectations that Gabriel would be able to develop and implement the Project in partnership with the State and in accordance with, as governed by, law.

9. Gabriel thereafter proceeded to develop the Roșia Montană Project, which Gabriel through RMGC demonstrated to be feasible. In view of its history as a mining center,

³ The Roșia Montană deposit includes measured and indicated mineral resources containing approximately 17.1 million ounces of gold and 81.1 million ounces of silver (inclusive of mineral reserves) and further inferred mineral resources containing approximately 1.4 million ounces of gold and 4.1 million ounces of silver, meaning that the deposit has the potential to yield a significantly greater output than the current measure of reserves suggests.

and particularly as a result of mining activities by the State from the 1960s through 2006 that were destructive both to the environment and to cultural heritage, Roșia Montană's landscape is physically scarred and its rivers and streams are severely polluted. Government Ministers have described the area as having "landscapes from the Moon" and as an ecological "disaster." The decline of the State-run mining industry, combined with the lack of investment in the area, also left Roșia Montană with substantial unemployment, crushing poverty, failing or non-existent infrastructure, and progressive depopulation.

10. Working with a team of renowned Romanian and international external experts, Gabriel, through RMGC, designed the Project to be both a sound investment for their respective shareholders (including the State through its shareholding in RMGC), and also a model of modern, responsible mining that would substantially benefit Romania and the people of Roșia Montană and the surrounding region.

11. Designed to meet or favorably exceed applicable Romanian and European Union ("EU") regulations using conventional and proven mining methods implemented through industry best practices, the Project reflected an integrated and well-funded plan that would have provided economic returns to the State, jobs for the local community, remediated historical pollution at Roșia Montană (which was the State's obligation under the Roșia Montană License), preserved and promoted cultural and architectural heritage, and created or enhanced the area's infrastructure, all of which would have laid the foundation for the long-term sustainable economic development of Roșia Montană and its environs and thereby leave the community far better off than before. Recognizing the substantial benefits the Project offered, the local community and local authorities overwhelmingly and passionately supported the Project.

12. At all relevant times, the State through the National Agency for Mineral Resources ("NAMR"), the State mining authority, reviewed and consistently approved RMGC's annual work plans. NAMR also verified and registered the resources and reserves established by RMGC for the Project. In addition, through review of periodic reports submitted by RMGC and through site inspections, NAMR consistently verified that the Project was being developed in accordance with the License and with applicable legal requirements. NAMR did the same with respect to RMGC's exploration activities in relation to the Bucium Projects.

13. Likewise, to ensure that the Project would be designed and developed in a manner consistent with preserving cultural heritage, Gabriel resourced and funded through RMGC at Roşia Montană from 2001-2006 the largest program of privately-funded professional archaeological research ever undertaken in Romania. The purpose of this research program, which the Ministry of Culture organized and directed, was to determine whether there were any sites or artifacts worthy of preservation *in situ* that would need to be accommodated in the Project design and development. This research showed only a few such sites in the numerous areas studied, which the Project's design, following modification, accommodated and protected. In accordance with the findings and recommendations of the leading Romanian and international experts retained by the Ministry of Culture to oversee the research program, the Ministry of Culture between 2001 and 2008 and again in 2011 issued archaeological discharge certificates that cleared the way for mining activity.

14. As in most mining and infrastructure projects, the critical permit for the Project was the environmental permit. To obtain this permit, Romanian law required RMGC to prepare an Environmental Impact Assessment ("EIA") Report and submit it to the Ministry of Environment for technical review. This administrative process entailed review by the Ministry of Environment of the merits of the Project as presented in the EIA Report in consultation with a committee (the Technical Assessment Committee or "TAC") comprised of representatives of Ministries and State agencies with expertise relevant to various technical aspects of the Project and other State bodies invited by the Ministry of Environment to participate. Upon completion of a positive technical review of the Project through this administrative process, the Ministry of Environment is to recommend issuance of the environmental permit to the Government, which must implement that recommendation and issue the permit through a Government Decision.

15. Gabriel through RMGC engaged a team of independent Romanian experts certified by the Ministry of Environment who, in consultation with international experts and consultants, prepared a comprehensive, rigorous EIA Report comprising thousands of pages and addressing all aspects of Project design and development in accordance with terms of reference established by the Ministry of Environment. Among other things, the EIA Report demonstrated that (i) the Project's planned use of an industry-standard mineral processing method employing cyanide (a chemical used in various industrial applications, including at approximately 90% of

gold mines worldwide, and the only effective and commercially feasible way to process the ore at Roșia Montană) was safe for both human health and the environment, and would operate with maximum cyanide levels well below the stringent EU/Romanian threshold; (ii) its approach to tailings (waste) management was responsible, conservative, and in line with applicable standards; (iii) the Project would not endanger but, on the contrary, would improve the environment; and (iv) it posed no transboundary risk, including to neighboring Hungary.

16. In connection with the EIA Report, RMGC also developed a Cultural Heritage Management Plan aimed at drawing on and valorizing Roșia Montană's cultural heritage in all its forms – archaeological, architectural, and historical. Developed in accordance with Romanian and EU legislation and with World Bank and other international guidelines, the Cultural Heritage Management Plan presented an integrated approach to sustainable development for Roșia Montană and the surrounding area through cultural heritage-based tourism that included restoration of historic buildings, development of a circuit of mining museums, and restoration of historically significant portions of underground mining galleries to permit safe access by tourists.

17. In addition, RMGC designed and implemented an extensive and compassionate community development and community relations program, relocated and resettled families from the Project-impacted area in accordance with World Bank guidelines and international best practices, and undertook to acquire the surface rights necessary to implement the Project.

18. In accordance with the requirements of Romanian law, RMGC submitted the EIA Report for the Project to the Ministry of Environment in 2006 following, and in support of, its application in 2004 for the environmental permit. Although the State unjustifiably and unlawfully delayed the permitting process for the Project, notably including by suspending review of the EIA Report from 2007-2010, Gabriel overcame these delays and, by July 2011, the Project was well on track to receive the environmental permit. Gold prices were also steadily increasing at that time, enhancing the value of the Project and giving Gabriel a market value of over \$C 3 billion. The quality of the Project, its world class mineral deposits, its then positive permitting trajectory, and overall strong economics combined to make it a trophy asset and Gabriel an attractive investment for major mining companies. Given the demonstrated merits of the Project, had the Government followed the permitting procedure established by law, the

Project should have promptly received the all-important environmental permit and proceeded apace to construction and operation.

19. Unfortunately for Gabriel and the people of Roșia Montană, the State began in August 2011 an unlawful course of conduct involving coercion and an arbitrary disregard of law and administrative process that eventually led to the evisceration of Gabriel's acquired rights, the unlawful rejection of the Project, and the complete effective taking of Gabriel's investments.

20. The increasing value of RMGC's development rights, including in the Project, did not escape the State's notice. Beginning in August 2011, the Prime Minister, the President, the Minister of Environment, and the Minister of Culture, all publicly criticized the State's level of economic participation in the Project as too low and demanded that it be increased as a condition for the Project to proceed. As but one example, specifically referencing the rise in gold prices over the previous five years and projected increases for the future, the President stated that "the Roșia Montană project must be done," but only "provided the terms for the sharing of benefits from the exploitation of the gold and silver deposits in the area are renegotiated."

21. Soon after making its desires manifest, the Government in word and deed blocked all permitting processes for the Project and made clear that the Project would not proceed unless Gabriel met unconditionally the Government's demands for an increased share ownership of 25% of RMGC's shares and an increased royalty rate of 6%. Coercively and opportunistically holding permitting hostage in this manner to squeeze Gabriel for a new deal as the Project had risen in value and was poised to be permitted was abusive and unlawful. In thus rejecting the arrangement to which it previously had agreed and was legally bound and upon which Gabriel had relied in making investments, the Government disregarded the lawful permitting process, Gabriel's rights acquired through the License and other agreements with and approvals from the State, and Gabriel's legitimate expectations flowing therefrom.

22. The Government's blatant interference in what otherwise should have been the final TAC meeting on November 29, 2011 preceding issuance of the environmental permit is illustrative of the State's malfeasance. The contemporaneous evidence shows that as the meeting started, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

23. To ensure the Government maintained maximum leverage over Gabriel, the Prime Minister and the Minister of Environment both abusively intervened in the administrative permitting process and instructed the Ministry of Environment State Secretary and TAC President during the meeting not to conclude the EIA procedure that day, but to find a way to keep matters open, which he did. The TAC meeting nonetheless concluded positively, with representatives of the various authorities commenting favorably on the EIA Report and the Project and the TAC President announcing that “the technical discussions about the Roșia Montană project come to an end.” The several issues kept open at the meeting were promptly addressed soon thereafter.

24. Following the positive completion of the technical review, the Ministry of Environment was obligated under the law to promptly recommend issuance of the environmental permit, which the Government then had an obligation to issue. In violation of law and procedure, however, neither happened. Indeed, the Ministry of Environment did not make, and has never made, a recommendation to the Government concerning issuance of the environmental permit for the Project. To this day, over 11 years since the EIA Report was submitted to the Ministry of Environment for review, there has not been any formal legal decision taken by the State regarding issuance of the environmental permit for the Project.

25. The day after the November 29, 2011 TAC meeting ended, to drive the point home with Gabriel and RMGC about the need to increase the State’s economic take to a 25% shareholding and 6% royalty rate and nothing less, [REDACTED]

[REDACTED]

[REDACTED] The message was clear: Gabriel and RMGC had to sacrifice more if they wanted the Project to survive.

26. Faced with the coercive taking of its License rights and all of its investments made to develop RMGC and the Project, Gabriel succumbed to the Government’s pressure and made an economic offer in January 2012 that Gabriel believed met the Government’s essential

demands. Although the Government changed in February 2012 and again in May 2012, its unlawful approach to the Project did not as the permitting procedure for the environmental permit and other permits remained politically and unlawfully blocked. Indeed, new interim Prime Minister Victor Ponta, who assumed office in May 2012 and who had been a vocal Project critic as a member of the opposition, publicly stated that the Government would not even consider permitting for the Project until 2013 after national elections were held.

27. Following those elections, which kept Prime Minister Ponta's ruling coalition in power, the Prime Minister in January 2013 identified the Government's conditions to allow the Project to proceed: (i) increasing the State's shareholding in RMGC, (ii) increasing its royalties under the License, and (iii) the Project's satisfaction of all requirements to receive the environmental permit. The first two conditions confirmed the State's continued rejection of the State's prior agreements with Gabriel in relation to RMGC and the Project, and thus perpetuated the State's disregard and unlawful violation of Gabriel's acquired rights and legitimate expectations. The third condition, compliance with the legal requirements to obtain the environmental permit, was already met.

28. As was clear from the November 2011 TAC meeting and as was repeatedly confirmed in subsequent TAC meetings and by senior Government officials, including by the Minister of Environment, the Project met all legally applicable requirements to receive the environmental permit. Notwithstanding this fact and that Gabriel had offered to meet the State's extortionist demand for a greater financial interest in RMGC and in the Project, the Ministry of Environment failed to take a decision regarding the environmental permit, and the process remained unlawfully blocked.

29. In meetings and public statements in early 2013, the Government made clear that, even after ensuring that the State's increased economic stake was satisfactory and that the Project satisfied permitting conditions, the Government still would not issue the environmental permit, but instead would present the matter to Parliament via a draft law and, only if Parliament were to approve the law, would the Government then issue the environmental permit and allow the Project to proceed. In so doing, the Government arbitrarily jettisoned the lawful permitting process (which did not provide any role for Parliament or any consideration of political factors),

and abdicated its legally-mandated decision-making responsibility in favor of a quasi-plebiscite on the Project to be effectuated through a parliamentary review and vote.

30. The Government thereafter proceeded on a dual track throughout the spring and summer of 2013: the first was to confirm that there were no legal or administrative impediments to permitting and to reconfirm that the Project met all legally applicable requirements for the environmental permit, and the second was to continue to coercively renegotiate and increase the State's economic interest to be reflected, among other things, in a new agreement to be concluded between the State, Gabriel, and RMGC.

31. With respect to its review of the EIA Report, the Ministry of Environment State Secretary and acting TAC President confirmed in May 2013 that "each chapter [of the EIA Report] was endorsed by a Romanian institution" and, in July 2013, noted that "the analysis on the quality and conclusions of the EIA Report has been finalized." The Ministry of Environment even went a step further than it had in 2011 and published for public comment conditions that would be placed on the environmental permit when issued.

32. While the Project was thus primed for permitting, the Government disregarded the law and did not issue the environmental permit. Instead, consistent with its arbitrary political decision to effectively toss the permitting decision to Parliament, the Government prepared and endorsed a draft "Law on Certain Measures Regarding the Mining of Gold-Silver Ores in the Roşia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania" ("Draft Law"), and an accompanying draft "Agreement on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roşia Montană Perimeter" ("Draft Agreement") as an attachment, and issued a Government Decision signed by the Prime Minister sending the package to Parliament for enactment. Although in form Parliament was only to review and vote on the Draft Law, in substance the Government made clear that Parliament's vote on the Draft Law would be a proxy for whether the Government would issue the environmental permit and allow the Project to proceed at all.

33. Already unlawful in concept from inception in view of the permitting process the law mandated, the process actually followed in Parliament verged on the surreal and

underscored the arbitrary and capricious treatment of Gabriel's investments meted out by Romania.

34. Within days of and despite the Government's submitting the Draft Law to Parliament with the endorsement of the Project that doing so entailed, the Prime Minister announced publicly on August 31, 2013 that, as a member of Parliament, he did not support the Project and would vote against it in Parliament.

35. Underscoring the dichotomy between what the law required of the Government in the permitting process and what the Government did as a matter of political expediency, Prime Minister Ponta took to the airwaves in a televised address on September 5, 2013 to explain why he sent the Draft Law to Parliament, stating: "I was obligated, under the law . . . under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law. Precisely because I considered that I should not do this, I sent the law to Parliament . . . That's the situation and this is why, had I done absolutely nothing, I would have then had to pay I don't know how many billions in compensation to the company in question." The Prime Minister's statements, however, are an admission of, not a shield from, liability.

36. Other Government Ministers confirmed both the merits of the Project and the Government's wholesale abandonment of applicable law and procedure. For example, on September 7, 2013, Minister of Environment Rovana Plumb publicly declared that the Project would be "the safest project of Europe," but then noted that the environmental permit would be granted not based on the acknowledged technical merits of the Project as the law required, but "depending on the decision taken by the Parliament of Romania after public debates" on the Draft Law.

37. Having set Parliament up as the final word on the Project's future, and the Prime Minister having announced his opposition to the Project as a member of Parliament almost immediately upon sending Parliament the Draft Law for consideration, the Government created inviting circumstances for NGOs and other political activists ideologically opposed to mining and to the Project to organize and focus protests to influence Parliament's vote. Protests thus began and increased in size and frequency in the lead-up to the parliamentary hearings.

38. Against this backdrop, and despite the strong and sustained support for the Project among the people in Roșia Montană and its environs who would be most affected and helped by it, the leaders of the ruling coalition, Prime Minister Ponta and Senate President Crin Antonescu, launched a pre-emptive political strike against the Project and called on Parliament on September 9, 2013 to reject the Draft Law and hence the Project before hearings even began.

39. Senator Antonescu explained that “even though the talks in Parliament haven’t even started,” his “firm and final point of view” on the Roșia Montană Project was that “it should be rejected . . . not for technical reasons” but because one “cannot govern ignoring the street.” Noting the apparent lack of political support for the Project in Parliament, Prime Minister Ponta announced that the Draft Law “will be debated and rejected” in Parliament so “we know it very clearly that this Project will not be done.”

40. Despite testimony presented the next day, September 10, 2013, by the Minister of Environment, the Minister of Culture, and the President of NAMR all uniformly endorsing the merits of the Project, the Senate committees considering the Draft Law voted unanimously that same day to reject it, thus heeding the political call from the coalition leaders to quickly reject the Draft Law.

41. This parliamentary version of a kangaroo court for the Project would soon be repeated. In early September 2013, thousands of people protested in Roșia Montană in support of mining and of the Project. Following the Senate committees’ unanimous rejection of the Draft Law in accordance with the views expressed by the Prime Minister and Senate leader, and feeling that the significant need for and support of the Project was being ignored by officials in Bucharest, more than 30 miners took the desperate step of barricading themselves in old underground mine tunnels at Roșia Montană and vowed to remain there until the country’s leaders addressed their plight. In response, Prime Minister Ponta visited the miners and promised to organize a parliamentary special commission (“Special Commission”) to consider the Project.

42. Although a Special Commission was then created, and the resulting nationally televised hearings in September and October 2013 lasted longer and involved many more witnesses than the perfunctory Senate process that preceded it, the result was the same: a

politically-motivated rejection of the Draft Law that ignored the parade of positive testimony by Government officials representing all relevant ministries and agencies endorsing the merits of the Project and, additionally, similar testimony from RMGC and the renowned team of external independent experts who designed the Project to meet and positively exceed all permitting requirements. The Special Commission nevertheless unanimously voted in November 2013 to recommend rejection of the Draft Law.

43. In so doing, the Special Commission not only ignored the overwhelming evidence of the Project's merits, but also disregarded the testimony of the Minister Delegate in charge of the Department of Infrastructure Projects of National Interest and Foreign Investments responsible for the Project (and also a trained lawyer), who warned that if "we still decide, for whatever reason, objective, subjective, related to political decisions, not to do this project, I am telling you that we will be in breach of several agreements on the promotion and mutual protection of foreign investments."

44. Asked what he would say to other foreign investors thinking of investing in Romania if Parliament rejected the Draft Law and with it the Project, the Prime Minister said he would "tell them that this, only this project was rejected on a political criterion but that Romania remains a country open to investments."

45. In accord with the Special Commission's recommendation, the Senate voted in November 2013 to reject the Draft Law. The Chamber of Deputies followed suit, but not until June 2014.

46. Although Parliament clearly had rejected the Draft Law, which the Government had stated would mean the Project would not be done, the Ministry of Environment still did not take a decision on the environmental permit, apparently believing that by avoiding a formal "No" it could avoid liability for its unlawful treatment of the project permitting. As if to appear to provide more process, however, the Ministry of Environment convened additional TAC meetings purporting to commission a further study to analyze aspects of the Project, although doing so was arbitrary as the Ministry had already twice announced its technical review was complete.

47. Because the Government did not issue a formal decision rejecting the Project, however, and in view of the hundreds of millions of dollars and substantial time and effort Gabriel and RMGC had invested in the Project, Gabriel held out some small hope that the Project would still be permitted. Rejection of the Draft Law legally did not preclude permitting the Project, and the Government repeatedly had acknowledged that the Project met all legally applicable permitting requirements.

48. Over time, however, through various additional acts and omissions that disregarded and were fundamentally incompatible with Gabriel's acquired rights, the Government confirmed that the Project and the exploitation of the Bucium Projects were rejected and effectively cancelled, albeit still without any formal decision rejecting them, without due process, and without any compensation whatsoever to Gabriel. In the circumstances, Gabriel filed its Request for Arbitration in July 2015.

49. The State's subsequent course of conduct has been consistent with and confirmatory of the complete taking and cancellation of Gabriel's acquired development rights in the Roşia Montană Project and in the Bucium Projects. Among other things, in late December 2015, the Ministry of Culture issued the State's 2015 List of Historical Monuments ("LHM") that declared "the entire locality" of Roşia Montană within a "2 km radius" to be a protected historical monument where no industrial activities may be undertaken. This designation was arbitrary and unlawful as it ignored and contradicted: (i) the results of the substantial professional archaeological research overseen by the Ministry of Culture in this same area showing only a few sites worthy of protection, and (ii) the valid archaeological discharge certificates issued by the State through the Ministry of Culture that allowed for mining in the same area the Ministry now claimed to be a protected historical monument.

50. Soon thereafter, in February 2016, the State, through the Ministry of Culture, applied to UNESCO to have the entire "Roşia Montană Mining Cultural Landscape" declared a UNESCO World Heritage Site. The application makes clear that the State will not allow the Project to proceed as it would disturb the same "Cultural Landscape" the State is now seeking to preserve.

51. While taking steps to sterilize permanently from development the same area in Roşia Montană for which it authorized mining pursuant to the exploitation and development License RMGC holds and where Gabriel planned to implement the modern, environmentally responsible Project with all of its attendant benefits, the State recently renewed the environmental permit for and continues to operate the massively polluting, neighboring Roşia Poieni copper mine, which just enjoyed a year of record production.

52. It is now clear from the one-two punch leveled at Gabriel's legal rights by the State through the 2015 LHM and related 2016 UNESCO filing that, having rejected the Project politically, it was now seeking to reject it with legal effect as well, although notably still without due process, without transparency, and without any compensation.

53. Once Gabriel commenced this arbitration, the Romanian State activated abusive audits and investigations of RMGC. As of the filing of this Memorial, the State continues its aggressive pursuit of a [REDACTED] anti-fraud audit and a VAT assessment of RMGC that are baseless and retaliatory in equal measure.

54. Romania's treatment of Gabriel's investments violates multiple provisions of both BITs. The series of wrongful acts and omissions in aggregation constitute (i) a failure to accord fair and equitable treatment, (ii) a failure to provide full protection and security, (iii) an impairment of the use and enjoyment of Gabriel's investments by unreasonable and discriminatory measures, (iv) a failure to observe obligations entered into with regard to Gabriel's investments, and (v) measures having an effect equivalent to expropriation. Each of these treaty violations individually and collectively has caused the complete deprivation of the value of Gabriel's investments. Gabriel thus has suffered the complete loss of what were highly valuable investments, and seeks compensation accordingly.

55. This Memorial is supported and accompanied by witness statements and expert reports from the following individuals:

- *Jonathan Henry*,⁴ President and Chief Executive Officer of Gabriel Resources Ltd. and Chairman of the Board of Directors of RMGC;
- *Dragoș Tănase*,⁵ General Manager of RMGC;
- *Horea Avram*,⁶ Environmental Director of RMGC;
- *Adrian Gligor, Ph.D.*,⁷ Patrimony and Sustainable Development Director of RMGC;
- *Cecilia Szentesy*,⁸ Technical Design Director of RMGC;
- *Elena Lorincz*,⁹ Community Relations Director of RMGC;
- *Professor Lucian Mihai*,¹⁰ Professor and Head of the Private Law Department of the Faculty of Law of the University of Bucharest, Of Counsel in the law firm of Allen & Overy LLP, formerly President of the Romanian Constitutional Court (the highest legal position in Romania), President of the drafting committee for the Romanian Civil Code and the law to enforce the Civil Code, and formerly Secretary General of the Chamber of Deputies of the Romanian Parliament, on issues of Romanian law relating to the EIA process;
- *Professor Corneliu Bîrsan, Ph.D.*,¹¹ Professor and formerly Dean of the Faculty of Law of the University of Bucharest, formerly Judge of the European Court of Human Rights, Member of the drafting committee for

⁴ Witness Statement of Jonathan Henry dated June 30, 2017 (“Henry”).

⁵ Second Witness Statement of Dragoș Tănase dated June 30, 2017 (“Tănase II”).

⁶ Witness Statement of Horea Avram dated June 30, 2017 (“Avram”).

⁷ Witness Statement of Adrian Gligor dated June 30, 2017 (“Gligor”).

⁸ Witness Statement of Cecilia Szentesy dated June 30, 2017 (“Szentesy”).

⁹ Witness Statement of Elena Lorincz dated June 30, 2017 (“Lorincz”).

¹⁰ Expert Legal Opinion of Professor Lucian Mihai dated June 30, 2017 (“Mihai”).

¹¹ Expert Legal Opinion of Professor Corneliu Bîrsan dated June 28, 2017 (“Bîrsan”).

the Romanian Civil Code, and Arbitrator at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, on issues of Romanian law relating to mining licenses;

- *Professor Ioan Schiau, Ph.D.*,¹² Professor at the Faculty of Law of the Transilvania University of Brasov, Managing Partner in the law firm of Schiau, Prescure & Associates Law Offices, and Arbitrator at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, on issues of Romanian law relating to the protection of cultural heritage;
- *Dr. Mike Armitage, B.Sc., M.I.M.M.M., F.G.S., C.Eng., C.Geol., and Nick Fox, B.A., M.Sc., A.C.A.*,¹³ Corporate Consultant/former Global Chairman (Armitage) and Principal Consultant (Fox) at SRK Consulting Group, on the technical and certain economic aspects of the Roşia Montană Project and the Bucium Projects;
- *Patrick G. Corser, P.E.*,¹⁴ Senior Vice President at MWH Global, now part of Stantec, on the design and siting of the tailings management facility (“TMF”);
- *David Jennings*,¹⁵ Chief Executive Officer of the York Archaeological Trust, on the cultural heritage work undertaken by RMGC with respect to Roşia Montană;
- *Dr. Christian Kunze*,¹⁶ Partner at IAF-Radioökologie GmbH, on RMGC’s environmental management plans to address historic pollution in the

¹² Expert Legal Opinion of Professor Ioan Schiau dated June 30, 2017 (“Schiau”).

¹³ Expert Report of Dr. Mike Armitage and Nick Fox dated June 30, 2017 (“SRK Report”).

¹⁴ Expert Report of Patrick G. Corser dated June 30, 2017 (“Corser”).

¹⁵ Expert Report of David Jennings dated June 30, 2017 (“Jennings”).

¹⁶ Expert Report of Dr. Christian Kunze dated June 30, 2017 (“Kunze”).

Project area, deal with extractive wastes, prepare for successful closure and rehabilitation, and provide robust environmental financial guarantees;

- *Professor Dirk van Zyl, Ph.D.,*¹⁷ Professor and Chair of Mining and the Environment at the Norman B. Keevil Institute of Mining Engineering of the University of British Columbia and a Board Member of the International Cyanide Management Institute, on the safety and suitability of using cyanide to process the ores extracted at Roşia Montană; and
- *Dr. Pablo T. Spiller, Ph.D., and Santiago Dellepiane A.,*¹⁸ Senior Consultant at Compass Lexecon and Jeffrey A. Jacobs Distinguished Professor (Emeritus) of Business and Technology and Professor of Graduate Studies, University of California, Berkeley (Spiller) and Executive Vice President at Compass Lexecon (Dellepiane), on the measure of damages sustained by Claimants caused by the measures at issue in this case.

II. GABRIEL RESPONDED TO THE STATE’S CALL FOR FOREIGN INVESTMENT IN THE AILING MINING SECTOR

A. Gabriel Invested More Than US\$ 700 Million to Develop the Prized Roşia Montană Project and the Bucium Projects

56. Gabriel is a publicly-traded company with shares listed on the Toronto Stock Exchange, the world’s leading stock exchange for mining companies.¹⁹ Gabriel’s major shareholders include Newmont Mining, the largest gold producer in the world at the time of its investment in Gabriel (now the second largest gold producer in the world), as well as other highly experienced global investors in natural resources including Electrum, Paulson & Co., BSG, and Baupost.²⁰

¹⁷ Expert Report of Professor Dirk van Zyl dated June 30, 2017 (“van Zyl”).

¹⁸ Expert Report of Dr. Pablo T. Spiller and Santiago Dellepiane A. dated June 30, 2017 (“Compass Lexecon”).

¹⁹ Henry ¶ 3; Compass Lexecon ¶ 43.

²⁰ Henry ¶¶ 11, 31.

57. Gabriel is joint-venture partners with the Romanian State in RMGC, a Romanian joint stock company established in August 1997.²¹ By agreement of the parties and as set out in the RMGC Articles of Association, as amended, Gabriel Jersey owns 80.69% of RMGC's shares and the State through Minvest Roșia Montană S.A. ("Minvest") owns the other 19.31%.²²

58. As discussed below, RMGC is the Titleholder of the Roșia Montană License, an exploitation concession license issued by the State in June 1999 with respect to the mineral resources and reserves at Roșia Montană, Romania.²³ Gabriel thus holds the majority interest in a concession to develop and exploit the mineral resources and reserves within the Roșia Montană License perimeter through the Roșia Montană Project.²⁴

59. As designed and developed by Gabriel and RMGC, the Roșia Montană Project has proven and probable mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver.²⁵ The feasibility of the Project was analyzed and confirmed by Washington Group International, a US-based provider of engineering, construction, and management services, which prepared the Final Feasibility Study for the Project in August 2006.²⁶ The feasibility of the Project also was analyzed and confirmed by S.C. Ipromin S.A., a Romanian design specialist,

²¹ See *infra* § II.C.1; Tănase II ¶¶ 7-18. See also Henry ¶¶ 14-15 (discussing Gabriel's support for RMGC). At the time of its establishment, RMGC was called Euro Gold Resources S.A. See Tănase II n.2; Euro Gold Resources S.A. Certificate of Registration dated Aug. 25, 1997 (Exh. C-821).

²² Henry ¶ 1; Tănase II ¶ 7. The State previously held its shares in RMGC through Régie Autonome of Copper Deva and its successor, National Company of Gold, Copper and Iron "Minvest" S.A. Deva. In 2013 that entity transferred the State's shares of RMGC to a new wholly State-owned entity, namely "Minvest Roșia Montană S.A." For ease of reference, unless noted otherwise, both of these State entities are referred to herein simply as "Minvest."

²³ See *infra* §§ II.C.2, III.A.2; Exploitation Concession License No. 47/1999 approved by Government Decision No. 458/1999, published in the Official Gazette of Romania, Part I, No. 285 dated June 21, 1999 and in force as of same date ("Roșia Montană License") (Exh. C-403-C); Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410-C).

²⁴ Henry ¶ 6; Tănase II ¶ 7. See also Bîrsan § II.D.2.

²⁵ SRK Report §§ 3-4. The Roșia Montană deposit includes measured and indicated mineral resources containing approximately 17.1 million ounces of gold and 81.1 million ounces of silver (inclusive of mineral reserves) and further inferred mineral resources containing approximately 1.4 million ounces of gold and 4.1 million ounces of silver, meaning that the deposit has the potential to yield a significantly greater output than the current measure of reserves suggests. See SRK Report ¶ 2.

²⁶ Washington Group International, Inc., Roșia Montană Project Final Feasibility Study dated Aug. 2006 (Exh. C-140-C) § 4. See also SRK Report ¶ 35. Washington Group International was acquired by URS Corp. in 2007.

which prepared the Feasibility Study and Technical Documentation (as well as updates thereto) that RMGC submitted to the State mining authority, NAMR, in compliance with Romanian legal requirements.²⁷ Following comprehensive independent audits prepared in 2009 and 2012 in accordance with the Toronto Stock Exchange's stringent compliance and disclosure obligations, leading independent mining consultants, including SRK Consulting, verified the mineral resources and reserves for the Project and certified that the Project was "both technically feasible and economically viable."²⁸

60. In addition, as discussed below, the State's main mining regulator, NAMR, also verified and registered the resources and reserves for the Project in March 2013.²⁹ SRK Consulting confirms in its expert report submitted with this Memorial that the Roșia Montană Project ranks among the top 20 undeveloped gold projects globally, and is the largest undeveloped gold project in Europe (excluding Russia).³⁰

61. Gabriel also holds the majority interest through RMGC in the concession for the Bucium Projects relating to the Rodu-Frasin and Tarnița deposits, located in the vicinity of Roșia Montană, under the Bucium Exploration License.³¹ As discussed below and in Professor Corneliu Bîrsan's legal opinion submitted with this Memorial, under the Bucium Exploration License, the State granted RMGC the right to explore the area and to obtain exploitation licenses

²⁷ See *infra* §§ III.A.3, IV.A.2.b, V.D.2. See also Szentesy ¶¶ 36-52.

²⁸ SRK Report §§ 3, 5-6; Technical Report on the Roșia Montană Gold Project, Transylvania, Romania dated Mar. 4, 2009 (Exh. C-127) at 188; SRK Consulting, Technical Report on the Roșia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128) at 91. The 2009 audit was jointly conducted by an international team of experts from MWH, Coffey Mining Pty. Ltd., Micon International Limited, Independent Mining Consultants, Inc., and Aurifex, Pty. Ltd.

²⁹ See *infra* § VIII.A.2; Szentesy ¶¶ 102-106; NAMR Decision No. 11-13 of Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roșia Montană deposit, Alba County dated Jan. 1, 2013 (Exh. C-1012-C). See also Bîrsan § IV.B.2.

³⁰ SRK Report §§ 3-4 (noting that the Project is within the top five undeveloped gold projects in Europe, including Russia). See also Henry ¶ 31 (stating that "our assets included the largest investable gold project outside the hands of the majors"); Tănase II ¶ 8.

³¹ Henry ¶ 6; Tănase II ¶ 9; Szentesy ¶¶ 115-123 (also showing location of deposits); Bîrsan § V. See also *infra* § II.C.3; Exploration Concession License No. 218/1999 approved by NAMR Order No. 60/1999, published in the Official Gazette of Romania, Part I, No. 222 of May 20, 1999 and in force as of same date ("Bucium License") (Exh. C-397-C); Addendum No. 1 to Bucium License dated July 28, 1999 (Exh. C-398-C).

for mineral resources discovered and demonstrated to be feasible for exploitation, which included both the Rodu-Frasin and Tarnița deposits.³²

62. [REDACTED]

63. Gabriel has invested approximately US\$ 760 million to finance RMGC's activities and, both directly and through RMGC, to develop the Roșia Montană Project and the Bucium Projects.³⁴ As Gabriel CEO Jonathan Henry explains, prior to the State's actions giving rise to this arbitration, the development rights to the Roșia Montană Project were seen as trophy assets in the industry and the rights to develop the Bucium Projects also had significant value.³⁵

64. In developing the Roșia Montană Project, Gabriel retained highly experienced and reputable external technical experts and consultants acknowledged by the Government to be "the best specialists in the world."³⁶ Among many others,³⁷ leading external specialists for the Project included:

³² See *infra* § II.C.3; Bîrsan § V.

³³ SRK Report § 7; Szentesy ¶¶ 115-123. See also Henry ¶¶ 29-32, 143; Tănase II ¶¶ 8-9, 234.

³⁴ Compass Lexecon ¶ 24, n.18; Henry ¶ 6. Gabriel's investments include more than US\$ 570 million invested through RMGC. *Id.* at n.1. See also Tănase II ¶ 13.

³⁵ Henry ¶ 31.

³⁶ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 19 (Minister Delegate of Infrastructure Projects Dan Șova).

³⁷ EIA Report, Ch. 1 (Exh. C-193) at 7-9; EIA Ch. 2 (Exh. C-196) at 67; EIA Report, Ch. 9 (Exh. C-239) iii-vii, 71. See also SRK Report ¶ 35, § 5; Avram ¶¶ 35-38, 68-70.

- AMEC, an internationally recognized UK-based engineering and project management consultancy in mining, energy, environment, and infrastructure;³⁸
- Ammtec Ltd., an Australia-based metallurgical and mineral testing consultancy company;³⁹
- Amdel Ltd., an Australia-based provider of mineral testing services;⁴⁰
- ALS, an Australia-based provider of testing, inspection, certification, and verification services for the global mining industry;
- Ausenco, an Australia-based engineering consultancy and designer of hydrometallurgy and refining processes;
- CyPlus GmbH, a Germany-based company with expertise in the safe and responsible management of cyanide production, transport, handling, and usage;
- Independent Mining Consultants, Inc., a US-based mining consulting firm specializing in mine evaluation, planning, exploration, and operations that developed the Project's mine pits and mining schedule;
- Knight Piésold Ltd., the Canada-based operation of the mining engineering and environmental consulting firm;
- MWH, a US-based global provider of engineering, construction, and management services that designed the tailings management facility ("TMF") and water management dams for the Project;⁴¹
- RSG Global, an Australia-based mining engineering and consulting company that managed the exploration program for the Project;⁴²

³⁸ AMEC acquired Foster Wheeler in 2014 and is now called Amec Foster Wheeler.

³⁹ Ammtec Ltd. was acquired by ALS in 2010.

⁴⁰ Amdel Ltd. was acquired by Bureau Veritas in 2008.

⁴¹ Patrick Corser, who led the MWH team, has submitted an expert report addressing issues relating to the safe siting and design of the TMF. *See generally* Corser. In 2016, MWH was acquired by Stantec.

- SGS, a Switzerland-based inspection, verification, testing, and certification company;
- SNC-Lavalin, a Canada-based engineering company that developed the processing plant and other aspects of the Project and also served as the initial engineering, procurement, and construction management contractor for the Project;
- Stantec, a Canada-based international firm with expertise in engineering, architectural, environmental, and sustainability design and consulting services;
- Washington Group International, which as noted above was a US-based provider of engineering, construction, and management services that prepared the Final Feasibility Study for the Project in August 2006; and
- WISUTEC Umwelttechnik GmbH, a Germany-based firm with expertise in mine closure, treatment of mine water and waste, and environmental monitoring that prepared the mine rehabilitation and closure plans and the estimates for the environmental financial guarantees for the Project.⁴³

65. Together with its team of highly experienced external specialists, Gabriel designed the Project to use established and proven mining, processing, and water and waste management methods and technologies, and to utilize a compact and efficient layout to minimize the Project's footprint and environmental impacts.⁴⁴ The Project included two open pits called Cârnic and Cetate containing most of the mineral resources and two smaller open pits called Jig

⁴² RSG Global was acquired by Coffey International Ltd. in 2006.

⁴³ Dr. Christian Kunze of IAF-Radioökologie GmbH, formerly of WISUTEC, has submitted an expert report addressing issues relating to the environmental remediation, closure, and financial guarantees for the Project. *See generally* Kunze.

⁴⁴ SRK Report §§ 3, 5 (noting that “all major elements of the Project, such as the open pits, waste rock stockpiles, the processing plant and the tailings management facility,” would be “in close proximity to each other”). This approach stands in stark contrast to the sprawling, inefficient, and heavily polluting approach following by the State in its mining activities at Roşia Montană. *See* Avram ¶¶ 10-17.

and Orlea, all of which were located in close proximity to each other.⁴⁵ According to the mine production schedule endorsed by SRK, mining activities were planned for 16 years with mining starting at the Cârnic and Cetate pits and then continuing at Orlea (in year 7) and Jig (in year 9).⁴⁶ As discussed below, Gabriel and its external experts developed a comprehensive plan to close and rehabilitate the mine site in a staged approach that ensured that RMGC could commence the rehabilitation process even before the end of mining operations.⁴⁷

66. Gabriel designed the Project to comply with or outperform international best practices and all requirements of Romanian and EU legislation, including the use of best available techniques (“BAT”).⁴⁸ Gabriel further committed to comply with voluntary initiatives over and above the applicable legal requirements, including the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the International Council on Mining and Metals’ 10 Principles for Sustainable Development, the International Cyanide Management Code (of which Gabriel was among the first signatories), the IFC’s performance indicators for environmental and social protection, the International Labour Organization’s Declaration on Fundamental Principles and Rights to Work, the Intergovernmental Panel on Climate Change – Best Available Techniques for the Mining Field, and the World Bank and IFC guidelines for resettlement and relocation activities.⁴⁹

⁴⁵ SRK Report § 5. *See also* Szentesy ¶¶ 46-52; EIA Report, Ch. 9 (Exh. C-239) at 28 (showing graphic layout of Project).

⁴⁶ SRK Consulting, Technical Report on the Roşia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128) at 1-3; Feasibility Study for the Recovery of Gold and Silver Resources within the Roşia Montană Perimeter, Alba County dated Jan. 2010 (Exh. C-976-C). Actual mining was planned for 14 years. A low-grade stockpile also was planned to be developed during the first six years of operation and processed after the conclusion of mining, finishing in year 16. *See* EIA Report, Ch. 9 (Exh. C-239) at 28. Development of the deposits within the Bucium Exploration License perimeter, *i.e.*, the Rodu-Frasin deposits and the Târniţa deposit, represented an opportunity for RMGC to continue mining operations in the area and develop further as a profitable mining company in partnership with the State. *See* SRK Report § 7; Tănase II ¶ 18.

⁴⁷ *See infra* § IV.B.1.d. *See also* Kunze § VIII; Avram ¶¶ 29-30 (observing that RMGC’s plan for closure and rehabilitation “met the high standards established in international best practice and would have resulted in a far more diversified, ecologically viable, and attractive local environment after it ceased mining than exists today”).

⁴⁸ SRK Report §§ 3, 5; Henry ¶ 10; Tănase II ¶¶ 12-13; Avram ¶¶ 35-38.

⁴⁹ Henry ¶ 10.

67. In sum, as elaborated further below, in partnership with the State, Gabriel made enormous investments developing a first-class, modern, environmentally responsible mining project that would have provided substantial economic, socio-cultural, environmental, and sustainable benefits to the people of Roșia Montană and to Romania as a whole.⁵⁰

B. Roșia Montană Is an Historic Mining Town Ravaged by Unemployment and Poverty, and by Pollution from Decades of State-Run Mining

1. Roșia Montană Has a Long History and Tradition of Mining

68. Roșia Montană is a small rural mining town located in Alba County, in the historic region of Transylvania in west-central Romania known as the “Golden Quadrilateral” in the Apuseni and Metaliferi mountains, one of Europe’s most well-known and important precious metals producing regions.⁵¹ This area and Roșia Montană itself has been well known as a center of gold mining for approximately 2,000 years, since the times of the Romans, and thereafter throughout the centuries that followed.⁵²

69. Gold mining has shaped and defined Roșia Montană’s history and people and has been the life blood of its economy for two millennia. Underground gold mining was first practiced by the Romans at Roșia Montană, and with some interruptions continued through the Middle Ages and into the Modern era, leaving its mountains carved up by miles of underground tunnels.⁵³

70. The State during the Communist era continued this tradition of underground mining at Roșia Montană, and began “open pit” mining in the 1970s on a large scale at the

⁵⁰ Henry ¶ 7; Tănase II ¶¶ 14-17; Avram ¶¶ 5-7, 18-30; Gligor ¶¶ 50-60, 80-84. *See also* Lorincz ¶¶ 10-11, 38-45, 59-64.

⁵¹ *See generally* EIA Report, Ch. 9 (Exh. C-239) § 1.1 (background of Roșia Montană); Szentesy ¶ 3 (map of “Golden Quadrilateral” mining region); Tanase II Annex A (photographs showing the existing conditions at Roșia Montană). *See also* Resettlement and Relocation Action Plan Vol. 1 (Exh. C-463) at 10 (showing Roșia Montană’s location on map of Romania). Roșia Montană is actually one of the 16 villages in a commune bearing the same name.

⁵² *See* Lorincz ¶¶ 6-7; Gligor ¶ 8; Jennings ¶ 3.

⁵³ *See generally* EIA Report - Cultural Heritage Baseline Report (Exh. C-225) §§ 1.4 (history of Roșia Montană), 5.5 (describing past mining works, including 140km of underground galleries).

“Cetate” massif and later on a smaller scale at the “Cârnic” massif, both of which were and are rich in mineral resources.

71. Throughout the Communist era, mining was an important sector for Romania’s economy. Hundreds of State-run mines employed many hundreds of thousands of people. Generations of people at Roșia Montană and the surrounding communities became essentially entirely dependent economically upon mining. Unfortunately, the State-run mining operations were inefficient, heavily subsidized, and used outdated, highly polluting mining methods.

2. Roșia Montană Is a Community in Sharp Economic Decline

72. The transition to a market economy beginning with the fall of Communism in 1989 resulted in the closure of hundreds of uneconomic mines, causing severe unemployment in mining districts and the steady depopulation of mining communities, most of which had been mono-industrial towns or villages.

73. Roșia Montană is emblematic of the suffering caused by the decline of the State-run mining industry,⁵⁴ and its plight became even more difficult when the State-owned mining company Minvest laid off almost 50% of the employees at its Roșia Montană mine between 1990 and 2000, and when it eventually stopped mining in Roșia Montană altogether in 2006.⁵⁵

74. Roșia Montană today is impoverished, with over 80% unemployment, mostly dilapidated buildings, and underdeveloped and decaying infrastructure.⁵⁶ As RMGC’s Community Relations Director, Ms. Elena Lorincz explains, “[m]any buildings are dilapidated, many houses in the area are not connected to a water supply network, electricity networks are

⁵⁴ See generally Lorincz ¶¶ 7-9; Tănase II ¶¶ 10-11. See also EIA Report, Ch. 9 (Exh. C-239) at 2 (“Economically Roșia Montană owes its origins to mining and therefore became almost exclusively dependent on it for its income.”); EIA Report - Cultural Heritage Baseline Report (Exh. C-225) at 25 (according to the 1992 census, 57% of the active population in Roșia Montană worked in the extraction and processing industry).

⁵⁵ See Resettlement and Relocation Action Plan Vol. 2 (Exh. C-464) at 10 (1,500 employees in 1990; 797 employees in 2000); Szentesy ¶¶ 53-56; Lorincz ¶ 10, 13.

⁵⁶ Tănase II ¶ 10. See also EIA Report, Ch. 9 (Exh. C-239) § 10.5 (noting that in order to attract investment to the area, the State declared the mining area of Apuseni, Alba county a “depressed area” in accordance with Government Decision No. 24/1998, which applied to mono-industrial areas, where 25% of the workforce has been made redundant, unemployment exceeds the national average by more than 30%, and/or that are isolated and under-developed).

poorly developed, waste collection and treatment is inadequate (many households use pit latrines or discharge waste directly into the Roșia Valley), and there is no public heating system or gas distribution network (the majority of households still use firewood for heating).⁵⁷

3. Roșia Montană Suffers from Severe Pollution Caused by Past Mining

75. The unremediated effects of mining, particularly by the State, are evident today. A drive up the main road into Roșia Montană shows a landscape deeply scarred and heavily contaminated by pollution due to uncontrolled and/or unregulated historical mining, including most notably from the early 1960s to 2006 by the Romanian State, which used outdated, inefficient, and environmentally unfriendly technologies.⁵⁸ The open pits, tailings ponds, waste dumps, and waste rock piled indiscriminately around mine sites rather than in segregated and managed areas, give Roșia Montană's landscape a stripped and barren lunar-like topography.⁵⁹

76. Toxic waste water resulting from the State's mining operations has severely contaminated Roșia Montană's waters. For decades, rain water has washed through the miles of historic mining tunnels and over the State-created waste dumps, causing highly acidic water including heavy metals ("Acid Rock Drainage" or "ARD") to flow into the local river system.⁶⁰ Pollution levels in the local rivers greatly exceed the maximum permissible levels for arsenic,

⁵⁷ Lorincz ¶ 9 (including photograph of Roșia Montană's historical center in 2006 following the decline and closure of mining in the area and photographs of old buildings in Roșia Montană, many of which were abandoned due to migration caused by poverty and unemployment).

⁵⁸ See Avram ¶¶ 10-17; Lorincz ¶ 9 (including photographs of site of former State-run mining in Roșia Montană without remediation or closure); Kunze ¶¶ 12-13, 25-38. See also, e.g., Independent Group of International Experts ("IGIE") Report dated Nov. 30, 2006 (Exh. C-502) at 35 (reporting that Roșia Montană "suffers from considerable pollution" and has "circa 400 hectares of disturbed ground with large scars from open pit mining, tailings and waste rock deposits, dams, waste dumps, and abandoned equipment"); EIA Report, Ch. 9 (Exh. C-239) at 2 (noting "serious problems including pollution of soils and streams, landscape scarring, and impact on land use and biodiversity" and that "no significant attempts at environmental rehabilitation and no effective environmental controls to reduce the impacts" have been made).

⁵⁹ Avram ¶¶ 11-12, 15-16 (including photos of some of the unremediated State mine pits); Kunze ¶¶ 26-27. See also Avram Annex A - RMGC Compilation of Photographs Showing Historical Pollution at Roșia Montană, at 2-4 (photographs of waste dump and open pits).

⁶⁰ Avram ¶¶ 11-12, 14-16 (including photos of toxic waters in the area); Kunze ¶¶ 27-38 (same); EIA Report, Ch. 9 (Exh. C-239) § 6.1. See also Avram Annex A - RMGC Compilation of Photographs Showing Historical Pollution at Roșia Montană, at 4-25 (photographs of ARD-contaminated open pit, mining tunnels, Roșia Valley, Abrud River, Arieș River, and Corna River).

cadmium, mercury, lead, selenium, and sulphates, among other pollutants.⁶¹ The local waterways in the Roşia Montană area and the downstream Abrud River are so polluted that they no longer support fish or aquatic life, and are unusable by the local communities.⁶²

77. Claimants' expert Christian Kunze, who has more than 20 years professional experience in environmental assessment and remediation for mining projects internationally, including in Romania, Russia, Kyrgyzstan, and Germany, and who visited the site as one of the large team of independent experts who, among other things, worked to prepare the EIA Report for the Project, notes that “[t]he size and scope of the historical mine workings at Roşia Montană and the sustained failure to use modern environmental prevention, mitigation, and remediation techniques have resulted in site conditions with some of the most severe water quality degradation that I have observed anywhere in the world.”⁶³

⁶¹ Avram ¶¶ 14-15; Kunze ¶¶ 28-29, 36 (citing an article published in 2016 by researchers from the Environmental Health Center in Romania and the US Environmental Protection Agency examining contamination in the Roşia Montană area as a result of historical mining activity based on data collected in 2007, as part of larger environmental study performed for Romanian governmental authorities, which confirmed that concentrations of a number of metals, including arsenic (the most dangerous chemical on the US Government's toxic substances list), cadmium, mercury, and lead exceeded Romanian regulatory limits and that high metal concentrations were found in surface waters downstream from the mining area). *See also* Reading University Water Modeling Study dated Apr. 2007 (Exh. C-339) at 5, 58 (finding that “the current situation at Roşia Montană is that the old mines are discharging high concentrations of metals,” and that “historic Acid Rock Drainage . . . currently pollute[s] the rivers systems with metals such as cadmium, lead, zinc, arsenic, copper, chromium and manganese”).

⁶² Avram ¶¶ 14-15. *See also* EIA Report, Ch. 9 (Exh. C-239) at 20-21 (noting that Roşia Montană's “groundwater quality is below several Romanian and EU drinking water quality standards and may be of concern for public health with respect to heavy metal content,” that acid rock drainage “can kill aquatic plants, fish, and other aquatic life” and, further, that dissolved heavy metals “can pollute drinking water, and seriously affect aquatic wildlife and habitat as well as rendering the water unfit for human and animal consumption without relatively complex treatment”). In addition, the majority of households in Roşia Montană lack indoor plumbing and their solid waste is discharged directly into the Roşia Valley due to the lack of a formal domestic waste collection system. *See* Lorincz ¶ 9; Resettlement and Relocation Action Plan Vol. 2 (Exh. C-464) Annex 11, § 11.2 (at 58), Annex 12, §§ 12.1.1-12.1.6 (at 60-61).

⁶³ Kunze ¶ 38; *id.* ¶ 12 (“Among other things, due to a lack of effective mine closure measures or any meaningful attempt at rehabilitation by prior operations, the Roşia Montană Project area suffers from an extremely high level of toxic metal contamination and acid rock drainage (‘ARD’). This contamination has been allowed to accumulate for decades, including since the State's mining operations ceased in 2006.”).

78. Senior Romanian Government officials also repeatedly have acknowledged that the State created an unmitigated ecological disaster at Roșia Montană.⁶⁴

4. Roșia Montană's Cultural Heritage Has Been Degraded by the State's Prior Indiscriminate Mining and Neglect

79. Interest in Roșia Montană's mining history can be traced back to the 15th century when Roman artifacts were discovered, and to the 18th and 19th centuries when wax-coated tablets dating from the 2nd century A.D., which preserved Roman legal texts, were discovered in several underground mine galleries.⁶⁵

80. Past approaches to mining, including notably by the State, were not sensitive to the effects their methods had on cultural heritage and thus severely damaged the archaeological value of historical sites at Roșia Montană, including due to the indiscriminate dumping of mine waste and the corrosive effects of the highly acidic waters left coursing through the underground mine tunnels and galleries. By 1999, the combination of destructive State mining activities and indifference had left the area's landscape and archaeological heritage in a severe and advanced state of degradation.⁶⁶

⁶⁴ See, e.g., *Traian Băsescu heats the spirits in Roșia Montană*, Jurnalul ro, dated Aug. 29, 2011 (Exh. C-470) at 1 (President Traian Băsescu acknowledging “the severe environmental pollution and damage caused by the state exploitation”); *The senators of the Administrative Commission voted against the Roșia Montană Project*, Agerpres ro, dated Sept. 10, 2013 (Exh. C-1482) at 3 (Minister of Culture Daniel Barbu describing Roșia Montană as “ecological disaster” and stating: “We are not talking about a paradise on idyllic pastures! We are talking about four excavated mountains, there are abandoned installations at Gura Roșie, scrap metal . . . Does anyone want to go on a family weekend in Roșia Montană?”); *Interview with Prime Minister Victor Ponta*, Antena 3, dated Sept. 11, 2013 (Exh. C-437) at 6, 8 (Prime Minister Victor Ponta explaining that Roșia Montană “is now a lunar landscape” and a “destroyed area”); Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 27 (Minister Delegate of Infrastructure Projects Șova observing that “[t]he historical pollution is very severe” and “[t]he landscapes are not as everybody depicts them, they are more like landscapes from the Moon than from the Earth”); Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 2-3 (Minister of Environment Rovana Plumb acknowledging that historical pollution at Roșia Montană was “severely affecting 40 kilometers downstream [of the] Aries River” and included “18 abandoned non-rehabilitated stockpiles, two pits abandoned without rehabilitation, a network of 140 kilometers of underground galleries that produce acid water, with an average of 80 cubic meters per hour of acid water being discharged in the river by only one single adit – adit 714”).

⁶⁵ Gligor ¶ 9. See also generally EIA Report - Cultural Heritage Baseline Report (Exh. C-225) at 13-18; Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587) at 21-37, 175-186.

⁶⁶ Gligor ¶¶ 10-15; Jennings ¶¶ 6, 64-66. See also Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587) at 28-29 (“The mining industry at

81. In Roșia Montană's town center, buildings also had been demolished and modified by the State without regard to their historical significance.⁶⁷ The declining population also contributed to the decay of the town center, whose historic buildings and churches were increasingly abandoned and derelict.⁶⁸

5. Substantial Investment Is Needed to Remediate Historical Pollution, Restore Cultural Heritage Assets, and Revitalize the Area

82. Given Roșia Montană's remote location, scarred landscape, polluted waterways, and poor infrastructure, a significant mining project offered the only realistic means of attracting the capital to address the remediation needs of the area.⁶⁹ Given the significant decline in the State-run mining industry and the lack of State resources to modernize the mining industry, such an undertaking of necessity had to involve foreign investment and capital.

83. As described below, such was the origin and high promise of the Roșia Montană Project. What became the Roșia Montană Project would have represented a sharp break with Romania's mining past by introducing modern, environmentally responsible mining that would have honored the community's mining past, uplifted and improved its present, and served as the path to a post-mining future of sustainable development.

Roșia Montană functioned during the communist regime with no legislation on heritage or environment. ... The communist authorities' indifference towards the support and protection of the settlement/heritage was the cause for the disastrous situation Roșia Montană was in at the moment the Eastern-European communist block collapsed. ... [After 1989] the mining industry at Roșia Montană continued in the shape promoted by the communists, with no special attention for archaeological vestiges.”); NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375) at 10 (“[T]he entire archaeological area Roșia Montană was significantly affected before 2000.”).

⁶⁷ Jennings ¶¶ 6, 64; Gligor ¶ 13; Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587), at 28, 99.

⁶⁸ Lorincz ¶¶ 8-9; Jennings ¶ 66; EIA Report - Cultural Heritage Baseline Report (Exh. C-225) at 24, 57; Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587) at 29, 99.

⁶⁹ Tănase II ¶¶ 10-18. *See also* EIA Report, Ch. 9 (Exh. C-239) at 2 (“Rosia Montană remains, despite its touristic potential, an isolated location that does not attract investments capable of reinvigorating the whole commune, with the exception of the potential for mining.”); Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587) at 10 (noting that “collateral investments that will be generated by the resumption of the mining exploitation in the area ... are essential for its survival and the valorization of the heritage objectives” and that that “the very bad shape of the local transport infrastructure, the almost total absence of communal utilities, as well as the environment and landscape altered by decades of mining exploitation” hindered alternative development).

84. Importantly, this thoroughly modern mining operation was planned to address and remediate the historic pollution that preceded it and to set new standards for responsible mining not seen before in Romania, based on the highest environmental standards.⁷⁰

85. The Roșia Montană Project also would have restored numerous well-paying mining jobs, boosted the local economy, financed the creation of new infrastructure including roads, bridges, and waste, water, power, and communications networks, and improved the quality of life in the area.⁷¹

86. The Roșia Montană Project also would have brought with it significant investment to preserve and restore Roșia Montană's cultural heritage which, together with related massive investment in infrastructure and environmental rehabilitation, would have created the foundation and conditions for Roșia Montană's heritage to drive the area's long-term sustainable development through tourism.⁷²

87. Years before the exact contours of the Project were conceived, however, the State realized that the future of mining at Roșia Montană and its environs depended on attracting foreign investment to explore and exploit the vast mineral resources of the area.

⁷⁰ Avram ¶¶ 5-7, 18-30, 35-46, 93-95, 109, 153-164; Kunze ¶¶ 14-21, 39-76; Report on the "Zero" (No Project) Alternative for the Roșia Montană Project, 2006 (Exh. C-231) § 1.1. *See also* Lorincz ¶ 10; Tănase II ¶¶ 16-17.

⁷¹ *See* Tănase II ¶¶ 13-17, 30-34; Lorincz ¶ 33-45.

⁷² *See* Tănase II ¶¶ 13-17; Jennings ¶¶ 11-12, 43-62, 67-112; Gligor ¶¶ 5, 16-37, 48, 50-60, 64, 80-84. *See also* Independent Group for Heritage Monitoring at Roșia Montană, Report on Patrimony in Roșia Montană dated 2011 (Exh. C-587) at 10 (noting that "a massive financial intervention" would be needed).

C. Gabriel Invested in Mining Projects in Partnership with the State and Obtained Important License Rights through RMGC

1. Gabriel Responded to Romania's Need for Foreign Capital to Develop and Implement Mining Projects at Roșia Montană and Bucium

a. Gabriel Jersey Entered Into a Cooperation Agreement with RAC Deva/Minvest to Assess Potentially Feasible Projects

88. As Romania began transitioning from a centrally-planned Communist-era economy to a market economy in the 1990s, it grappled with how to modernize and transform its aging mining industry, which was significantly loss-making, heavily subsidized by the State, highly inefficient, and using outdated, severely polluting technologies and mining practices.

89. The Government established a State enterprise, Regia Autonomă a Cuprului Deva ("RAC Deva"), under the subordination of the Ministry of Industry, to manage various mineral deposits where the State had been conducting mining operations, including those at Roșia Montană and Bucium, under a regime of public administration.⁷³ The Ministry of Industry identified certain priority projects for RAC Deva, including a project to improve RAC Deva's mining operations at Roșia Montană. Under the Ministry of Industry's supervision, RAC Deva accordingly took steps to attract foreign investment partners with the aim of enhancing the efficiency and profitability of those identified existing operations, and received interest from Gabriel Resources NL (Australia) ("Gabriel Australia"), including for a project to process gold from tailings from RAC Deva's mining operations at Roșia Montană. RAC Deva proposed to negotiate terms for establishing a joint venture agreement with Gabriel Australia to realize the described projects; the proposal was approved by RAC Deva's Board of Directors.⁷⁴

90. On September 4, 1995, RAC Deva and Gabriel Australia therefore concluded a Cooperation Agreement with respect to, among other things, Roșia Montană.⁷⁵ That Agreement envisioned two stages of work: in stage one, Gabriel Australia was to evaluate through drilling, testing, and preparation of a feasibility study and an engineering study, the viability of the

⁷³ See generally Bîrsan § II.A.

⁷⁴ See generally RAC Deva Presentation Note dated Aug. 28, 1995 with approval by RAC Deva Board of Directors dated Aug. 30, 1995 (Exh. C-1094). See also Bîrsan § II.B (discussing early cooperation between RAC Deva and Gabriel as part of State strategy to attract foreign investment to mining sector); Szentesy ¶ 7.

⁷⁵ Cooperation Agreement dated Sept. 4, 1995 (Exh. C-1645).

project to process tailings and gold ore produced by the existing Roșia Montană mine operated by RAC Deva; if viable, and subject to the approval of relevant authorities, the parties would proceed to stage two, to implement the project through a joint venture company.⁷⁶

91. After initial results revealed that processing tailings alone would not be profitable, that limited project was not pursued, and the possibility of completing a feasibility study for the exploitation of all the mineralized areas in Roșia Montană and other potential projects was considered instead.⁷⁷

92. In the meantime, in June 1996, Gabriel Australia assigned its rights and obligations under the Cooperation Agreement with RAC Deva to Gabriel Jersey,⁷⁸ and in October 1996 RAC Deva and Gabriel Jersey concluded an addendum to the Cooperation Agreement reflecting their expanded agreement.⁷⁹ All aspects of the parties' agreement were implemented with the support and approval of the Ministry of Industry, which stated in a contemporaneous Note that it "consider[ed] that this collaboration is beneficial for the Romanian state,"⁸⁰ and of the State mining authority NAMR.⁸¹

⁷⁶ Cooperation Agreement dated Sept. 4, 1995 (Exh. C-1645) Art. 3.2 (describing two-stage cooperation), Art. 4 (describing establishment of joint venture company). *See also* Bîrsan ¶¶ 33-35, 40-45 (explaining that the Cooperation Agreement was a protocol in principle that did not convey concession rights for exploration or exploitation to Gabriel); Szentesy ¶ 11.

⁷⁷ *See* Ministry of Industry Informative Memorandum dated Jan. 13, 1997 (Exh. C-1626) (describing the early cooperation noting, *inter alia*, that Gabriel Jersey would finance the pre-feasibility study and, if the project proved uneconomic, Gabriel Jersey would withdraw without any obligation on the Romanian party).

⁷⁸ Agreement for Sale and Assignment dated June 1, 1996 (Exh. C-1625).

⁷⁹ Addendum to Cooperation Agreement dated Oct. 17, 1996 (Exh. C-1646); Bîrsan ¶¶ 36-38; Szentesy ¶ 11.

⁸⁰ Ministry of Industry Informative Memorandum dated Jan. 13, 1997 (Exh. C-1626).

⁸¹ *See* Letter No. 180021 from Ministry of Industry to Gabriel Resources NL (Australia) dated Mar. 22, 1996 (Exh. C-1655) (approving Gabriel taking samples from tailings ponds for testing); Letter No. 190349 from Ministry of Industry to RAC Deva dated Apr. 24, 1996 (Exh. C-1666) (approving collaboration with Gabriel Australia to conduct drilling and sampling of tailings ponds); Fax. No. 3427 from RAC Deva to Ministry of Industry dated Nov. 20, 1996 (Exh. C-1659) (requesting approval to make data available to Gabriel for preparation of feasibility studies); Letter No. 192387 from Ministry of Industry to Romanian Development Agency dated Nov. 22, 1996 (Exh. C-1667) (referring to the Cooperation Agreement and requesting Romanian Development Agency to provide technical assistance to provide access to the data regarding mineral reserves as needed to establish a joint venture between RAC Deva and Gabriel); Letter No. 37 from NAMR to RAC Deva dated Jan. 20, 1997 (Exh. C-1656) (referring to May 6-7, 1996 approvals of earlier research conducted in relation to tailings ponds). *See also* Bîrsan ¶¶ 34-35 (noting approvals received).

93. In April 1997, the parties amended the Cooperation Agreement further, agreeing to form a joint venture company upon the completion of “pre-feasibility studies, provided these studies are satisfactory.”⁸² RAC Deva sought and obtained the approval of its Board of Directors, the Romanian Development Agency, the Ministry of Industry, and NAMR to form a joint venture company with Gabriel Jersey.⁸³

b. Gabriel Jersey and RAC Deva/Minvest Formed RMGC for the Purpose of Developing and Implementing Mining Projects at Roşia Montană and Bucium

94. Euro Gold Resources S.A., later renamed RMGC, was established and registered with the Trade Registry on August 25, 1997 with the object of activity the development and exploitation of mining projects in Roşia Montană and Bucium.⁸⁴

95. As the Companies Law then required a minimum number of five shareholders for a joint stock company, the founding shareholders of RMGC included not only Gabriel Jersey

⁸² Second Addendum to Cooperation Agreement dated Apr. 1, 1997 (Exh. C-1647) Art. 3.1; Bîrsan ¶ 39.

⁸³ Bîrsan § II.C (explaining that RAC Deva’s Board, the Ministry of Industry, NAMR, and the Romanian Development Agency endorsed RAC Deva’s establishment of joint venture company with Gabriel); Fax from Romanian Development Agency to RAC Deva dated Jan. 24, 1997 (Exh. C-1649) (noting the favorable opinion of Ministry of Industry and of NAMR and additionally approving the establishment of a joint venture company between RAC Deva and Gabriel Jersey for the exploitation of ore under RAC Deva’s administration with a view to establishing a profitable enterprise and the social and economic development of the region); Letter No. 1324 from RAC Deva to NAMR dated June 4, 1997 with approval by NAMR dated June 4, 1997 (Exh. C-1662) (requesting approval to establish joint venture company with Gabriel Jersey, which NAMR approves); Letter No. 130377 from Ministry of Industry to RAC Deva dated June 7, 1997 (Exh. C-1664) (approving establishment of joint venture company with Gabriel Jersey). *See also* Bîrsan ¶ 42 (explaining that Cooperation Agreement, and its addenda, were promissory undertakings that only became effective if the authorities gave their required approvals).

⁸⁴ *See generally* Bîrsan § II.D. *See also* Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143); Addendum No.1 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 1444 dated Aug. 8, 1997 (Exh. C-144); Trade Registry Registration Certificate No. J20/768/1997 issued Aug. 25, 1997 (Exh. C-821); Trade Registry Registration Certificate No. J/01/443 issued Feb. 2, 2000 (Exh. C-1259).

(65% of share capital)⁸⁵ and RAC Deva (33.8% of share capital), but also three other companies that collectively held 1.2% of the company's share capital.⁸⁶

96. RMGC's Articles of Association specifically contemplated the implementation of a "Project" defined as "the research, exploration, exploitation and trading of mineral resources in the PERIMETERS," in turn defined as:

The prospection, exploration and/or exploitation perimeters of ROȘIA MONTANĂ and BUCIUM COMPLEX comprising Bucium Tarnița, Bucium Izbița, Bucium Rodu and Bucium Corabia ... managed by [RAC Deva]⁸⁷

RMGC's Articles of Association envisioned the Project being carried out in two stages:

- Stage 1: research and development by RMGC of potential mineral resources in the two perimeters, resulting in a feasibility study at the end of Stage 1;
- Stage 2: provided that the feasibility study confirmed the operation was feasible, the exploitation, processing and sale of the mineral resources in the perimeters.⁸⁸

97. The Articles of Association further contemplated that RAC Deva would cooperate with Gabriel Jersey and RMGC "in order to obtain the rights for the exploration and exploitation of the mineral resources within the PERIMETERS in favor of the COMPANY [RMGC]."⁸⁹

⁸⁵ Also, on April 11, 1997, Gabriel Canada acquired all of the issued and outstanding shares of Gabriel Jersey with the result that Gabriel Jersey became the wholly-owned subsidiary of Gabriel Canada. Gabriel Resources Ltd. Annual Information Form dated Apr. 17, 2000 (Exh. C-1797) at 7.

⁸⁶ Bîrsan ¶¶ 53-54. These additional shareholders were Cartel Bau S.A. (0.4%), Foricon S.A. (0.4%), and Comat-Trading S.A. (0.4%). Addendum No.1 to Articles of Association and Bylaws of Euro Gold, authenticated under No.1444 dated Aug. 8, 1997 (Exh. C-144) at 1-3.

⁸⁷ Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143) at 2-3; Bîrsan ¶¶ 57-58; Szentesy ¶ 12. As Professor Bîrsan explains, the RMGC Articles of Association fully replaced the earlier Cooperation Agreement described above. Bîrsan ¶ 51.

⁸⁸ Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143) at 3; Bîrsan ¶ 59; Szentesy ¶ 12.

⁸⁹ Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143) at 3. When RMGC was established, a draft mining law was under debate in Parliament, and its adoption was anticipated. Bîrsan ¶¶ 52, 84-85. Until then, RMGC would carry out its activities in the Roșia Montană and Bucium perimeters as approved by NAMR. Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143) Art. 5.1.1; Bîrsan ¶ 60. RAC Deva agreed to request and obtain, in accordance with the mining law once in effect, exploration and exploitation licenses for the perimeters; the licenses thereafter were to be transferred to RMGC in accordance with that law.

98. In October 1997, in view of anticipated changes to RAC Deva's organizational structure, RMGC and RAC Deva concluded a Cooperation Contract indicating that their agreement and obligations would be maintained following any such reorganization and delineating their respective responsibilities concerning the envisioned projects in the Roşia Montană and Bucium perimeters. With respect to the activities described in Stage 1 above, the parties agreed that RAC Deva would be responsible for obtaining the approvals necessary to undertake exploration programs in Roşia Montană and Bucium, and that RMGC would be responsible for the expenses associated with the exploration programs.⁹⁰

99. RMGC thereafter conducted preliminary exploration in Roşia Montană pursuant to a program approved by NAMR and the Ministry of Industry.⁹¹ As early exploration work was successful and indicated that a significant investment would be needed to support a full feasibility study for Roşia Montană, the parties agreed that RMGC first would complete a pre-feasibility study, which, if promising, would facilitate raising the capital needed for a feasibility study.⁹²

Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143) Art. 5.3; Bîrsan ¶ 61.

⁹⁰ Cooperation Contract dated Oct. 30, 1997 (Exh. C-415) at 1-3; Bîrsan ¶ 62. RAC Deva also reaffirmed its commitment to obtain the "Exploration and Exploitation License for the defined areas" and to transfer the License to RMGC in accordance with law. Cooperation Contract dated Oct. 30, 1997 (Exh. C-415) at 3.

⁹¹ See Szentesy ¶ 21. [REDACTED]

[REDACTED] Geological Project Concerning the Exploration Program Performed by Drillings in Roşia Montană Area dated Nov. 1997 (Exh. C-1650-C) at 2. It was approved by NAMR and the Ministry of Industry in November 1997 and thereafter implemented. Letter from NAMR to RAC Deva dated Nov. 10, 1997 (Exh. C-1658); Letter No. 182715 from Ministry of Industry to RAC Deva dated Nov. 10, 1997 (Exh. C-1530); Euro Gold 1998 Annual Report, Volume I, dated Feb. 1999 (Exh. C-1405-C); Euro Gold 1999 Annual Report, Volume I, dated Dec. 1999 (Exh. C-1598-C).

[REDACTED] Geological Project Concerning the Exploration Programme from Bucium Area - Alba County dated May 1998 (Exh. C-1651-C) at 4. [REDACTED]

[REDACTED] Letter No. 180153 from Ministry of Industry to NAMR dated May 28, 1998 (Exh. C-1462-C); NAMR Endorsement No. 891 dated Oct. 19, 1998 (Exh. C-1463-C) [REDACTED]

[REDACTED] However, RMGC did not conduct exploration activities in the Bucium area until after the issuance of the Bucium Exploration License.

⁹² See Szentesy ¶ 20.

100. In October 1998, RAC Deva and Gabriel Jersey amended RMGC's Articles of Association to provide, among other things, for the preparation of a pre-feasibility study that would "analyze whether economically viable mining operations are possible in relation to the projects (exploitation perimeters) included in the object of activity of the Company [RMGC]."⁹³ The Articles of Association were thus amended, *inter alia*, to reflect three stages of project development and implementation:

- Stage 1: a program of research and exploration resulting in a pre-feasibility study, which would determine the viability of proceeding to the next stage;
- Stage 2: additional analyses resulting in a feasibility study, which would certify the viability of proceeding to the next stage;
- Stage 3: the construction of the mine for production.⁹⁴

101. The amended Articles of Association provided that upon delivery to RMGC of the pre-feasibility study, RMGC would issue new shares so that, as compensation for the investments made by Gabriel Jersey up through the delivery of the pre-feasibility study, Gabriel Jersey would hold not less than 80% of the share capital of RMGC and would be responsible for financing the further stages of RMGC's activities as well.⁹⁵

102. The amended Articles of Association continued to provide that RAC Deva would obtain the licenses for the exploration and exploitation of the Roșia Montană and Bucium mining perimeters and that, in accordance with law, those licenses would be transferred to RMGC to further explore, develop, and exploit economically viable mining projects at Roșia Montană and Bucium.⁹⁶

⁹³ Addendum No. 3 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 2541 dated Oct. 27, 1998 (Exh. C-147) at 2.

⁹⁴ Addendum No. 3 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 2541 dated Oct. 27, 1998 (Exh. C-147) at 2-3.

⁹⁵ Addendum No. 3 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 2541 dated Oct. 27, 1998 (Exh. C-147) at 5-6 (referring to Arts.6.5 and 6.8).

⁹⁶ Addendum No. 3 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 2541 dated Oct. 27, 1998 (Exh. C-147) at 3 (referring to Art. 5.3).

2. NAMR Issued and the Government Approved the Roșia Montană License

103. The new Mining Law was enacted in March 1998 and entered into force on June 14, 1998.⁹⁷ The law required that national mining companies were to conduct mining activities only subject to concession, or license, from the State.⁹⁸ In view of its planned reorganization as a national company, RAC Deva had an obligation under the new Mining Law to apply for licenses within 90 days or forfeit its right to continue its mining activities.⁹⁹ RAC Deva therefore applied to NAMR for an exploitation license for the Roșia Montană perimeter (and, as discussed below, also for an exploration license for the Bucium perimeter).¹⁰⁰ Following its application, but prior to the issuance of the requested licenses, the State reorganized RAC Deva into a wholly State-owned commercial company called Minvest. Minvest succeeded to the rights and obligations of RAC Deva, including with respect to the pending license applications.¹⁰¹

104. On December 21, 1998, NAMR, Minvest, and RMGC concluded Exploitation Concession License No. 47/1999, i.e. the Roșia Montană License.¹⁰² The Roșia Montană

⁹⁷ Mining Law No. 61/1998, published in the Official Gazette of Romania, Part I, No. 113 dated Mar. 16, 1998 (“1998 Mining Law”) (Exh. C-1629).

⁹⁸ See generally Bîrsan § III.A; 1998 Mining Law (Exh. C-1629) Art. 46 (requiring national mining companies to obtain licenses for carrying out mining activities previously under their administration). See also Letter No. 161 from NAMR to RAC Deva dated Mar. 10, 1998 (Exh. C-1668) (referring to RAC Deva’s preemption right for obtaining mining licenses, which may be transferred to another company as permitted by law).

⁹⁹ Bîrsan ¶ 90.

¹⁰⁰ Bîrsan ¶¶ 89-97. See also Letter No. 2970 from RAC Deva to NAMR dated June 12, 1998 (Exh. C-1465) (listing mining perimeters for which application being made including Roșia Montană and Bucium, the latter for exploration); Letter No. 2939 from NAMR to RAC Deva dated Aug. 11, 1998 attaching NAMR Report No. 2 dated July 20, 1998 (Exh. C-1411) (acknowledging RAC Deva’s right to apply for Roșia Montană license). See also Bîrsan ¶¶ 91-96

Szentesy ¶ 15.

¹⁰¹ See generally Bîrsan § II.E. See also Szentesy ¶ 13. The Ministry of Industry and later the Ministry of Economy exercised the rights of the State as shareholder of Minvest.

¹⁰² Roșia Montană License (Exh. C-403-C); Szentesy ¶ 14. In addition to the concession license contract signed by the parties, nine annexes initially formed a part of the Roșia Montană License, to which seven addenda have since been added. See Bîrsan § IV.A.1; Roșia Montană License Annex A: Documentation of Resources and Reserves (Exh. C-404-C); Roșia Montană License Annex B: Description of License Perimeter (Exh. C-403-C) at 27-29; Roșia Montană License Annex C: Feasibility Study (Exh. C-405-C); Roșia Montană License Annex D: Exploitation Development Plan (Exh. C-406-C); Roșia Montană License Annex E: Environmental Impact Study and Environmental Rehabilitation Program (Exh. C-407-C); Roșia Montană License Annex F: List of Technological Outbuildings and Accessories (Exh. C-403-C) at 30; Roșia Montană

License was subsequently approved by Government Decision and came into force on June 21, 1999.¹⁰³

105. [REDACTED]

a. The License Was Issued to Minvest as the Titleholder and RMGC as an Affiliated Company and Contemplated Transfer to RMGC

106. Under the Roșia Montană License, Minvest was the initial “Titleholder” and RMGC was the “Affiliated Company.”¹⁰⁶ Consistent with the State’s goal of attracting investment and modern mining technology and know-how, as reflected in the agreements

License Annex G: List of Customs Exempted Personnel Goods (Exh. C-403-C) at 31-32; Roșia Montană License Annex H: List of Customs Exempted Mining Equipment (Exh. C-403-C) at 33-34; Roșia Montană License Annex I: List of Customs Exempted Rehabilitation Equipment (Exh. C-403-C) at 35; Addendum No. 1 to Roșia Montană License dated Oct. 29, 1999 (Exh. C-408-C); Addendum No. 2 to Roșia Montană License dated Apr. 14, 2000 (Exh. C-409-C); Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410-C); Addendum No. 4 to Roșia Montană License dated May 8, 2000 (Exh. C-411-C); Addendum No. 5 to Roșia Montană License dated Apr. 27, 2001 (Exh. C-412-C); Addendum No. 6 to Roșia Montană License dated June 21, 2004 (Exh. C-413-C); Addendum No. 7 to Roșia Montană License dated Oct. 14, 2009 (Exh. C-414-C).

¹⁰³ Government Decision No. 458/1999 on the Approval of the Concession License for the Exploitation of Gold-Silver Ores in the Roșia Montană Perimeter, Alba County, Concluded between the National Agency for Mineral Resources and the National Company of Copper, Gold and Iron “Minvest” - S.A., published in the Official Gazette of Romania, Part I, No. 285 dated June 21, 1999 (Exh. C-982). *See also* Bîrsan ¶ 99; 1998 Mining Law (Exh. C-1629) Art. 11 (“The license is concluded in written form; for exploitation, the license comes into force after its approval by the Government.”).

¹⁰⁴ Roșia Montană License (Exh. C-403-C) Preamble.

¹⁰⁵ Roșia Montană License (Exh. C-403-C) Art. 3.1.1.

¹⁰⁶ Roșia Montană License (Exh. C-403-C) Preamble. *See also* 1998 Mining Law (Exh. C-1629) Art 28(e) (providing that the titleholder of a mining license has the right “to become associated with other legal entities in view of executing the mining activities provided in the license, with the approval of the competent authority”); Bîrsan ¶¶ 95-104 (noting that Minvest and RMGC were initially associated within the Roșia Montană and Bucium licenses, in addition to Minvest’s association with Gabriel as shareholders of RMGC); *id.* ¶¶ 11-17 (explaining that, like privatization, this form of association was one of the strategies adopted by the State for modernizing and developing State-owned mining operations with private capital).

described above between RAC Deva and Gabriel, the Roşia Montană License was intended from the beginning to be transferred to RMGC to develop and exploit the Roşia Montană Project if that larger project were shown to be economically viable.¹⁰⁷ [REDACTED]

107. [REDACTED]

¹⁰⁷ Roşia Montană License (Exh. C-403-C) Art. 17. *See also* Bîrsan §§ III.B (observing that the Mining Law “expressly permitted the ‘transfer’ of mining licenses by the titleholder to a third party,” subject only to the conditions “that all of the mining activities provided for in the license were to be carried out and that NAMR approved the transfer in writing,” which would effectuate a “novation” of license obligations), IV.A.2 (discussing conditions and effects of Roşia Montană License transfer); Szentesy ¶¶ 18, 24.

¹⁰⁸ Roşia Montană License (Exh. C-403-C) Arts. 7.1.1-7.1.2 [REDACTED] 6.1.1-6.1.2 [REDACTED], 16.1.4-16.1.5 [REDACTED].

¹⁰⁹ *See* Roşia Montană License (Exh. C-403-C) Arts. 3.1.1, 5.1.2, 6.1.1. *See also* Szentesy ¶ 15 [REDACTED]

[REDACTED]; Bîrsan ¶¶ 96-97. [REDACTED]
See generally Bîrsan § IV.B.2.2.

¹¹⁰ Roşia Montană License (Exh C-403-C) Arts. 4.1.2, 4.3.3, 17.1.4. *See also* Bîrsan ¶¶ 147, 286.

¹¹¹ Roşia Montană License (Exh. C-403-C) Arts. 5.1.2, 5.2, 6.1.1; Roşia Montană License Annex D: Exploitation Development Plan (Exh. C-406-C) at 60-65; Szentesy ¶¶ 16-17.

¹¹² Roşia Montană License (Exh. C-403-C) Arts. 5.1.2, 5.2, 6.1.1; Roşia Montană License Annex D: Exploitation Development Plan (Exh. C-406-C) at 64; Szentesy ¶¶ 16-17. *See also* Bîrsan ¶ 171.

108. [REDACTED]

b. The License Established Rights and Obligations upon the Presentation of a Positive Feasibility Study to Develop the Roșia Montană Project

109. The Roșia Montană License enumerates the rights and obligations of the Titleholder.¹¹⁸ The Titleholder's rights under the License include the following:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹¹³ Roșia Montană License (Exh. C-403-C) Arts. 4.1.2, 4.3.3, 17.1.4. *See also* Bîrsan ¶¶ 147, 155, 286; Szentesy ¶ 18.

¹¹⁴ Roșia Montană License (Exh. C-403-C) Art. 17.1.4. *See also* Bîrsan ¶¶ 161-164; Szentesy ¶ 18.

¹¹⁵ Roșia Montană License (Exh. C-403-C) Art. 17.1.5. *See also* Szentesy ¶ 18.

¹¹⁶ Roșia Montană License (Exh. C-403-C) Art. 6.1.2.

¹¹⁷ Roșia Montană License (Exh. C-403-C) Art. 4.3.3.

¹¹⁸ *See generally* Bîrsan §§ IV.B – IV.D.

¹¹⁹ Roșia Montană License (Exh. C-403-C) Art. 8.1.1.

¹²⁰ Roșia Montană License (Exh. C-403-C) Art. 8.1.2. Under Romanian law the Titleholder has the right to exploit all resources in the license perimeter following the determination by the Titleholder, and validation and registration by NAMR, of the resources and reserves in the perimeter. *See* Bîrsan ¶¶ 206-211, 214.

¹²¹ Roșia Montană License (Exh. C-403-C) Art. 8.1.8.

110. The Titleholder’s obligations under the License include the following:

- [REDACTED]
- [REDACTED]
- [REDACTED] and
- [REDACTED]

111. Professor Bîrsan further elaborates and explains the rights and obligations of the Titleholder under Romanian law.¹²⁹ Among other things, Professor Bîrsan observes that the Roșia Montană License (and the Bucium Exploration License discussed below) can only be amended by an addendum signed by the parties, which underscores the contractual stability of the license regime.¹³⁰ Notably, the License obligates the Titleholder to pay the State a royalty

¹²² *Id.* Art. 8.1.4.

¹²³ *Id.* Art. 8.2.1.

¹²⁴ *Id.* Art. 8.2.8.

¹²⁵ *Id.* Art. 8.2.14.

¹²⁶ *Id.* Art. 8.3.2.

¹²⁷ *Id.* Art. 8.2.9. Transfer of the License would not relieve the State of the obligation to clean up the massive amounts of pollution caused by its historical mining activities at Roșia Montană. [REDACTED]

[REDACTED] Bîrsan ¶ 184 (observing that this obligation was “in line with the principle ‘the polluter pays’”). As discussed *infra*, Gabriel later agreed as part of the Project to remediate historical pollution at Roșia Montană and in that sense relieved the State of its obligation.

¹²⁸ Roșia Montană License (Exh. C-403-C) Art. 8.2.10.

¹²⁹ Bîrsan §§ IV.B – IV.C.

¹³⁰ Bîrsan § III.C. *See also* Roșia Montană License (Exh. C-403-C) Art. 22.1 [REDACTED]

based on the value of annual mining production which is the price of the concession offered by the State and which can only be modified with the written approval of the Titleholder.¹³¹

112. Professor Bîrsan explains that additional rights and obligations fall on both the Titleholder and the Romanian authorities because, by its terms, the Roşia Montană License is a concession agreement and, as such, is subject to the legal regime governing concessions.¹³² Among other things, the Titleholder is legally obligated to maximally and efficiently exploit the object of the concession, here the mineral resources in the subject perimeter.¹³³ To that end, the Titleholder has both a right and an obligation to conduct development activities, including exploration, to identify the resources and commercially exploitable reserves in the license perimeter.¹³⁴

113. As the authority granting the concession, NAMR also has certain obligations towards the Titleholder.¹³⁵ In addition to the obligation to act efficiently and within a reasonable time period on requests or applications related to the concession, NAMR also must, among other things, “ensure the necessary conditions for the performance of the contract” and “immediately notify the concessionaire of a situation that might affect its rights under the contract.”¹³⁶

114. The License has an initial duration of 20 years and may be extended for additional five-year periods as may be needed to ensure rational exploitation of the mineral resources and reserves identified and approved by NAMR.¹³⁷

¹³¹ Bîrsan § IV.C.2. *See also* Roşia Montană License (Exh. C-403-C) Art. 10.1.2; Szentesy ¶¶ 27-35 (referring to various obligations under the License).

¹³² *See generally* Bîrsan § III.D. These same considerations apply to the Bucium Exploration License. Bîrsan ¶¶ 350-351.

¹³³ *See* Bîrsan ¶¶ 125-127, 203.

¹³⁴ *See* Bîrsan ¶¶ 188-194, 203.

¹³⁵ Bîrsan ¶¶ 134-137.

¹³⁶ Bîrsan ¶ 135.

¹³⁷ Roşia Montană License (Exh. C-403-C) Art. 4.1.1; Bîrsan § IV.D.

3. NAMR Also Issued the Bucium Exploration License

115. As noted above, following enactment of the Mining Law, RAC Deva applied to NAMR for an exploration license for the Bucium perimeter.¹³⁸ [REDACTED]

[REDACTED]¹³⁹ Minvest soon thereafter succeeded to RAC Deva's rights and obligations in relation to the Bucium license application.¹⁴⁰

116. Thus, on April 6, 1999, NAMR, Minvest, and RMGC concluded Exploration Concession License No. 218/1999, i.e. the Bucium Exploration License.¹⁴¹ The Bucium Exploration License was subsequently approved by order of NAMR, which was published in the Official Gazette of Romania and thus entered into force on May 20, 1999.¹⁴²

¹³⁸ See *supra* § II.C.2; Letter No. 2970 from RAC Deva to NAMR dated June 12, 1998 (Exh. C-1465) (listing mining perimeters for which application being made including Roșia Montană and Bucium, the latter for exploration); Szentesy ¶¶ 115-116; Bîrsan § III.A.

¹³⁹ NAMR Endorsement No. 891 dated Oct. 19, 1998 (Exh. C-1463-C) [REDACTED]

¹⁴⁰ Bîrsan § II.E. See also Szentesy ¶ 13.

¹⁴¹ Bucium License (Exh. C-397-C). In addition to the concession license contract signed by the parties, seven annexes initially formed a part of the Bucium Exploration License, to which five addenda were later added. See Bîrsan § V.A.2; Bucium License Annex A: Allocation Sheet for the Bucium Perimeter (Exh. C-397-C) at 24; Bucium License Annex B: Exploration Program and Budget for the Bucium Area April 1999 to April 2004 (Exh. C-397-C) at 25-30; Bucium License Annex C: Environmental Impact Assessment Study and Compliance Program (Exh. C-397-C) at 31; Bucium License Annex D: List of Customs Exempted Personnel Goods (Exh. C-397-C) at 32-33; Bucium License Annex E: List of Equipment and Installations Within the Bucium Perimeter That Shall Transfer to the State Upon Termination of the License (Exh. C-397-C) at 34; Bucium License Annex F: List of Customs Exempted Mining Equipment (Exh. C-397-C) at 35; Bucium License Annex G: List of Customs Exempted Rehabilitation Equipment (Exh. C-397-C) at 36; Addendum No. 1 to Bucium License dated July 28, 1999 (Exh. C-398-C); Addendum No. 2 to Bucium License dated Apr. 14, 2000 (Exh. C-399-C); Addendum No. 3 to Bucium License dated June 28, 2002 (Exh. C-400-C); Addendum No. 4 to Bucium License dated May 18, 2004 (Exh. C-401-C); Addendum No. 5 to Bucium License dated July 13, 2006 (Exh. C-402-C).

¹⁴² NAMR Order No. 60/1999 on the Approval of the Concession License for the Exploration of Bucium Perimeter, Concluded Between the National Agency for Mineral Resources and the National Company of Copper, Gold and Iron "Minvest" - S.A., published in the Official Gazette of Romania, Part I, No. 222 dated May 20, 1999 (Exh. C-1090). See also Bîrsan ¶ 307.

a. The Bucium Exploration License Was Transferred to RMGC

117. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁴ The transfer was promptly requested, was endorsed by the Ministry of Industry and was approved by order of NAMR published in the Official Gazette and thus becoming effective on August 12, 1999.¹⁴⁵

118. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁶

119. The Bucium Exploration License grants the Titleholder [REDACTED]

[REDACTED]¹⁴⁷ and the obligation to [REDACTED]

[REDACTED]¹⁴⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁹

¹⁴³ Bucium License (Exh. C-397-C) Preamble. *See also* Bîrsan ¶¶ 11-17, 95-104.

¹⁴⁴ Bucium License (Exh. C-397-C) Art. 15; Bîrsan § V.A.3.

¹⁴⁵ Letter No. 1637 from Minvest and RMGC to NAMR dated June 23, 1999 (Exh. C-1010) (requesting transfer); NAMR Order No. 123/1999 on the Transfer of the Concession License for the Exploration of Bucium Perimeter, Concluded with the National Company of Copper, Gold and Iron “Minvest” - S.A., published in the Official Gazette of Romania, Part I, No. 383, dated Aug. 12, 1999 (Exh. C-1088);(NAMR approving transfer and also citing endorsement dated July 28, 1999 of the Ministry of Industry). *See also* Bîrsan ¶¶ 334-336; Szentesy ¶ 117.

¹⁴⁶ Addendum No. 1 to Bucium License dated July 28, 1999 (Exh. C-398-C); Bîrsan ¶¶ 17, 336.

¹⁴⁷ Bucium License (Exh. C-397-C) Art. 3.1.1.

¹⁴⁸ Bucium License (Exh. C-397-C) Arts. 4.1.4, 5.1, 5.2; Bucium License Annex B: Exploration Program and Budget for the Bucium Area April 1999 to April 2004 (Exh. C-397-C) at 25-30. *See also* Bîrsan ¶¶ 326-327; Szentesy ¶ 118.

¹⁴⁹ Bucium License Annex B: Exploration Program and Budget for the Bucium Area April 1999 to April 2004 (Exh. C-397-C) at 25-30. *See also* Bîrsan ¶¶ 326-327; Szentesy ¶ 118. [REDACTED]

[REDACTED] Bucium License (Exh. C-397-C) Art. 8.2.

120. While the initial duration of the Bucium Exploration License was five years, the Titleholder had a right to extend it a further three years on the basis of a supplemental work program approved by NAMR.¹⁵⁰

b. RMGC Thus Acquired the Right to Obtain Exploitation Licenses for Deposits at Bucium Demonstrated to Be Feasible

121. As Professor Bîrsan explains, an exploration license gives the titleholder an exclusive and direct right to an exploitation license in respect of mineral resources discovered and demonstrated to be feasible to exploit.¹⁵¹ [REDACTED]

122. RMGC thus acquired the right to obtain exploitation licenses for deposits within the Bucium perimeter that its exploration works demonstrated to be feasible to exploit.¹⁵³

¹⁵⁰ Bucium License (Exh. C-397-C) Art. 4.1. See Bîrsan ¶ 308; Szentesy ¶ 118.

¹⁵¹ See generally Bîrsan §§ V.A.1, V.B.

¹⁵² Bucium License (Exh. C-397-C) Art. 3.1.4. See also *id.* Art. 10.1 [REDACTED]

[REDACTED] Szentesy ¶ 124.

¹⁵³ See Bîrsan § V.A.1 (observing that “the mining regulations grant the titleholder of an exploration license a special and exclusive right to obtain, without contest, exploitation rights over the resources/reserves discovered in the perimeter”); *id.* § V.B.1-V.B.2 (concluding that the Bucium Exploration License grants the Titleholder an exclusive right to obtain exploitation licenses, directly and without contest, for the resources it discovered during the exploration phase). See also *id.* § V.C (the existence of the exclusive right imposes on NAMR an obligation to grant exploitation licenses for the resources discovered, and NAMR may not refuse to do so for discretionary reasons).

III. GABRIEL MADE SIGNIFICANT INVESTMENTS IN PARTNERSHIP WITH THE STATE TO DEVELOP WHAT WAS DEMONSTRATED TO BE ONE OF THE LARGEST UNDEVELOPED GOLD DEPOSITS GLOBALLY

A. RMGC Completed the Initial Development-Exploitation Period Contemplated in the License and Became the Titleholder of the Roşia Montană License

1. RMGC Completed a Pre-Feasibility Study Demonstrating the Existence of Economically Exploitable Reserves at Roşia Montană

123. As noted previously, [REDACTED]

[REDACTED]

124. RMGC had begun conducting preliminary exploration in Roşia Montană pursuant to exploration programs approved by NAMR,¹⁵⁶ and following issuance of the License, [REDACTED]

[REDACTED]¹⁵⁷

125. Thus in 1998, RMGC engaged leading mining engineering consulting company RSG Global to conduct an intensive program of exploration, including drilling and sampling, in close consultation with RMGC field staff and management.¹⁵⁸ Ore samples were assayed for metal content at an on-site, custom-built laboratory managed by internationally accredited laboratory group SGS and independently verified by laboratories in Canada and Australia.¹⁵⁹ RSG Global reviewed and validated the resulting data; used the data to prepare a three-

¹⁵⁴ See *supra* ¶ 109.

¹⁵⁵ See *supra* ¶ 109.

¹⁵⁶ See *supra* ¶ 101.

¹⁵⁷ Szentesy ¶¶ 19-30, 36-45.

¹⁵⁸ Szentesy ¶ 21; SRK Report ¶ 47.

¹⁵⁹ SRK Report ¶¶ 48-49.

dimensional electronic block model of the mineralization (known as a “block model”) from which initial resource estimates were prepared.¹⁶⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶¹

126. Gabriel therefore engaged the international consulting and engineering firm Pincock, Allen & Holt to prepare a pre-feasibility study.¹⁶² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶³

127. In November 1999, as anticipated by RMGC’s Articles of Association,¹⁶⁴ Gabriel Jersey increased its share participation in RMGC to 80%.¹⁶⁵

128. In January 2000, RMGC delivered the pre-feasibility study to Minvest, which in turn delivered the executive summary of the study to NAMR.¹⁶⁶ RMGC thus had discharged its obligation [REDACTED] first to prepare a pre-feasibility study.

¹⁶⁰ SRK Report ¶¶ 40, 50; Szentesy ¶ 21.

¹⁶¹ Szentesy ¶¶ 21-22.

¹⁶² Szentesy ¶ 22.

¹⁶³ Szentesy ¶ 23; Pincock, Allen & Holt, Pre-Feasibility Study of the Rosia Montana Project, Romania: Executive Summary dated Jan. 11, 2000 (Exh. C-1093-C) §§ 1.1, 1.4, 1.5, 1.15, 1.17.

¹⁶⁴ See *supra* ¶ 103; Addendum No. 3 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 2541 dated Oct. 27, 1998 (Exh. C-147) at 6 (providing that, after Gabriel notified RMGC and its other shareholders of the completion of a pre-feasibility study, new shares would be issued so that Gabriel would hold 80% of RMGC’s share capital); Addendum No. 4 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 130 dated Feb. 2, 1999 (Exh. C-148) at 4 (same).

¹⁶⁵ See Euro Gold General Shareholders’ Meeting Minutes dated Nov. 11, 1999 (Exh. C-1577); Addendum No. 8 to Articles of Association and Bylaws of Euro Gold, authenticated under No. 1687 dated Nov. 11, 1999 (Exh. C-152) at 2; Minvest General Shareholders’ Decision No. 14 dated Dec. 14, 2000 (Exh. C-1515). Gabriel’s new share capital contribution was made in cash, not by the debt for equity swap contemplated in Addendum No. 3 to RMGC’s Articles of Association. See Proof of Payment by Gabriel of the contribution in cash via bank transfer (Exh. C-1508).

¹⁶⁶ Szentesy ¶ 23.

2. NAMR Approved the Transfer of the Roşia Montană License to RMGC on the Basis of the Pre-Feasibility Study

129. As noted above, the License contemplated that [REDACTED]

[REDACTED]¹⁶⁷

130. The work done up through that time indicated that a significant project would be viable and so to facilitate Gabriel's efforts to raise the capital needed to advance further development, Gabriel informed Minvest that the License should be transferred to RMGC on the basis of the completed pre-feasibility study.¹⁶⁸

131. Minvest accordingly requested the transfer of the License to RMGC.¹⁶⁹ The Ministry of Industry endorsed the transfer,¹⁷⁰ which NAMR then approved by Order No. 310/2000; the transfer thus became effective upon publication in the Official Gazette of Romania on October 13, 2000.¹⁷¹

132. [REDACTED]

¹⁶⁷ See *supra* ¶ 110; Roşia Montană License (Exh. C-403-C) Art. 17.1.4; Bîrsan ¶ 161 [REDACTED] See generally Bîrsan § IV.A.2. See also *id.* § III.B.

¹⁶⁸ Szentesy ¶¶ 23-24.

¹⁶⁹ Szentesy ¶ 25.

¹⁷⁰ Ministry of Industry Note No. 2443 dated Oct. 9, 2000 (Exh. C-1007).

¹⁷¹ NAMR Order No. 310/2000 on the Transfer of the Concession License for Exploitation No. 47/1999, published in the Official Gazette of Romania, Part I, No. 504 dated Oct. 13, 2000 (Exh. C-1089). See also Szentesy ¶ 25; Bîrsan ¶ 174.

¹⁷² Addendum No. 3 to Roşia Montană License dated Oct. 14, 2000 (Exh. C-410-C). See also Bîrsan ¶¶ 160, 173; Szentesy ¶ 26.

[REDACTED]¹⁷³ with the result that RMGC became the Titleholder of the License,¹⁷⁴ and Minvest became the Affiliated Company.¹⁷⁵

133. RMGC thus obtained all the rights and obligations of the Titleholder, as described above, including the right to exploit the mineral resources in the Roșia Montană License perimeter,¹⁷⁶ and Minvest was permitted to continue its open pit mining operations of the Cetate deposit.¹⁷⁷

3. RMGC Thereafter Prepared a Feasibility Study for the Roșia Montană Project and Thus Completed the Initial Development-Exploitation Period Contemplated in the License

134. [REDACTED]

[REDACTED]¹⁷⁸ The feasibility study was to include annexed documentation for the evaluation of resources and reserves.¹⁷⁹

135. Thus, while Minvest continued its open pit mining operations in Roșia Montană, RMGC carried out extensive surface and underground drilling and sampling to further delineate resources at Roșia Montană and its exploration program resulted in large, progressive increases in the resource and reserve estimates for the Cetate, Cârnic, Jig, and Orlea deposits.¹⁸⁰ RMGC performed its work each year in accordance with annual work plans submitted to and approved by NAMR and reported regularly on its activities and its progress as required by [REDACTED]

¹⁷³ Bîrsan § IV.A.2.2.

¹⁷⁴ Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410-C) Art. 1.1. *See also* Bîrsan ¶¶ 175-179.

¹⁷⁵ Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410-C) Art. 1.2. *See also* Bîrsan ¶¶ 180-184.

¹⁷⁶ *See supra* § II.C.2.b.

¹⁷⁷ *See also* Szentesy ¶ 26; Bîrsan ¶¶ 181-183.

¹⁷⁸ Roșia Montană License Annex D: Exploitation Development Plan (Exh. C-406-C), Chapter IX; Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410-C) Art. 2.11 [REDACTED]; Szentesy ¶¶ 26, 36-45; Bîrsan ¶ 201. *See also* Bîrsan § IV.B.1.1.

¹⁷⁹ Bîrsan ¶ 209; 1998 Norms to the Mining Law (Exh. C-1635) Art. 26.

¹⁸⁰ Szentesy ¶ 36. *See also* SRK Report ¶¶ 46-51.

██████ and applicable laws.¹⁸¹ That RMGC's operations remained in full compliance with its License and related regulatory obligations was verified regularly by NAMR in its periodic inspections and confirmed in its inspection reports and findings notes.¹⁸²

136. To support its development work, RMGC engaged leading specialist mining and engineering firms to conduct the further exploration, testing, and analyses needed to evaluate, design and engineer a mine plan in order to prepare a feasibility study for the Roșia Montană Project.¹⁸³ Among others, RMGC contracted with GRD Minproc Ltd., a leading Australian engineering and development company, to develop a definitive feasibility study for the Project, RSG Global to prepare calculations of resources and reserves and to prepare mine designs, Knight Piésold Ltd., an engineering and consulting company, to perform, *inter alia*, geotechnical analyses and to support the environmental impact assessment work, and SNC-Lavalin, an internationally recognized engineering company, to complete the basic engineering and design for the Project's mine, processing plant, and tailings dam.¹⁸⁴

137. RMGC also engaged Romanian technical design firm S.C. Ipromin S.A. to prepare a feasibility study incorporating the work performed by the several other firms to conform to the content and specifications for feasibility studies set out in Romania's mining legislation and NAMR's technical instructions.¹⁸⁵

138. RMGC provided to NAMR regular updates of its resources and reserves analyses as well as of the other technical documentation it was preparing.¹⁸⁶ NAMR confirmed that the exploration methodology RMGC was employing was appropriate, that the methods of exploration and calculation of resources and reserves were in accordance with applicable Romanian technical instructions, and that "the method of calculation of the quantity and quality

¹⁸¹ See generally Szentesy ¶¶ 27-31.

¹⁸² Szentesy ¶¶ 32-35. See also SRK Report ¶ 35.

¹⁸³ Szentesy ¶¶ 37-40.

¹⁸⁴ Szentesy ¶¶ 37-39.

¹⁸⁵ Szentesy ¶ 40.

¹⁸⁶ Szentesy ¶¶ 41-43.

of the mineral resources ... [was] well-founded.”¹⁸⁷ NAMR also advised that it would proceed to register RMGC’s resource and reserve calculations after the submission of the feasibility study for the Project together with the supporting technical documentation.¹⁸⁸

139. On June 15 and 16, 2004, RMGC delivered to NAMR a feasibility study for the Project prepared by Ipromin (“Feasibility Study”), together with the supporting technical documentation required by NAMR (“Technical Documentation”).¹⁸⁹ [REDACTED]

[REDACTED]

[REDACTED]¹⁹⁰ [REDACTED]

[REDACTED]¹⁹¹

140. [REDACTED]

[REDACTED]¹⁹²

B. Gabriel Funded Extensive Archaeological Research in the Project Area

141. In parallel with its exploration and development activities, RMGC funded extensive archaeological research at Roşia Montană. As explained by RMGC’s Director of Patrimony and Sustainable Development, Adrian Gligor, and by archaeology expert David Jennings, as a result of chance discoveries as early as the 15th century and also in the 18th and 19th centuries, Roşia Montană’s history and the area’s archaeological potential were well known long before the License was issued in 1999.¹⁹³ Despite this known potential, over the decades of extensive underground and surface mining at Roşia Montană by the Romanian State, the State

¹⁸⁷ Szentesy ¶ 42 (citing correspondence with NAMR).

¹⁸⁸ Szentesy ¶ 42.

¹⁸⁹ Szentesy ¶ 44.

¹⁹⁰ Szentesy ¶ 44.

¹⁹¹ Szentesy ¶ 45. *See also* Bîrsan ¶ 201.

¹⁹² Addendum No. 6 to Roşia Montană License dated June 21, 2004 (Exh. C-413-C) Art. I. *See also* Bîrsan ¶¶ 147, 286.

¹⁹³ Gligor ¶¶ 8-10; Jennings ¶¶ 3-6.

failed to conduct systematic research of, or to adopt measures to identify and preserve, Roșia Montană's cultural heritage.¹⁹⁴

142. Indeed, the State operated in virtually total disregard of cultural heritage and engaged in mining practices from the 1960s to 2006 that destroyed or severely degraded Roșia Montană's landscape and archaeological heritage both above ground and below it.¹⁹⁵ The State also demolished historic buildings in Roșia Montană's historical village center.¹⁹⁶

143. As explained in the legal opinion of Professor Ioan Schiau, as a result of Romanian legal requirements first adopted in 2000, a party seeking to develop an industrial project in an area where archaeological heritage has been identified must fund archaeological research in the area to be impacted by the proposed development.¹⁹⁷ Broadly speaking, the primary purpose of such research is to assess whether the area includes sites of such significant archaeological value that they should be preserved *in situ*, or whether the area may be archaeologically "discharged" so as to permit industrial development, including mining.¹⁹⁸ In the case of Roșia Montană, such research was undertaken under the auspices of, and was coordinated and directed by, the Ministry of Culture, both directly and through constituent departments and entities.¹⁹⁹

144. Through funding provided by Gabriel, RMGC therefore financed and provided logistical support for a significant two-stage research program planned and directed by the Ministry of Culture: (i) an archaeological feasibility study to evaluate areas of archaeological potential in the planned Project area, and (ii) based on the results of that study, a subsequent

¹⁹⁴ Gligor ¶¶ 11-15. *See also* Jennings § VI.A (describing the damage caused by historical mining to Roșia Montană's cultural heritage). Research had been undertaken on only one limited area in the 1980s. *See* Schiau ¶ 193.

¹⁹⁵ Gligor ¶¶ 11-15. *See also* Jennings § VI.A. Emblematic of the State's lack of concern for cultural heritage, the State affirmatively, and apparently without proper research, removed from protected status a natural monument that was home to a significant Roman mining site (Curțile Cetății) to enable the State-owned mining company to undertake open pit mining of the Cetate deposit. Gligor ¶ 12; Jennings ¶ 64.

¹⁹⁶ Gligor ¶ 13; Jennings ¶¶ 6, 64.

¹⁹⁷ Schiau § III.B.2. *See also* Gligor ¶¶ 16, 25; Jennings ¶¶ 7, 43.

¹⁹⁸ Schiau § III.B.1. *See also* Gligor ¶ 27; Jennings § V.B-C (discussing the archaeological research team's recommendations based on the sites' archaeological value).

¹⁹⁹ Gligor ¶¶ 17-31; Schiau ¶ 87.

extensive archaeological research program.²⁰⁰ This “preventive” archaeological research was undertaken by expert public and private institutions and teams, including a highly specialized French team from the University of Toulouse with extensive experience in mining archaeology, a discipline then undeveloped in Romania.²⁰¹

145. The archaeological feasibility study developed under the direction of the Ministry of Culture was conducted in 2000.²⁰² The study determined, among other things, that most Roman and later-period sites had been destroyed or degraded by past mining practices, that conservation measures were necessary to protect remaining sites from further degradation, and that further research was warranted in certain limited areas.²⁰³

146. Following completion of the archaeological feasibility study, the Ministry of Culture directly or through constituent entities and departments organized, supervised, and approved an extensive program of archeological research in the Project area known as the “Alburnus Maior National Research Program.”²⁰⁴ This research program, which involved intensive surface and underground archaeological investigations each year from 2001-2006, covered the majority of the Project area, far exceeding the scope recommended in the archaeological feasibility study or required for purposes of permitting Project development.²⁰⁵

²⁰⁰ Gligor ¶¶ 17-31. *See also* Jennings § V.A (discussing the archaeological research program undertaken in Roşia Montană with RMGC’s support).

²⁰¹ Gligor ¶ 26. *See* Gligor ¶ 18.

²⁰² The feasibility study was coordinated by the Design Centre for National Cultural Heritage (“CPPCN”), a state institution operating under the Ministry of Culture. Gligor ¶¶ 17-19; Schiau ¶ 69. In addition to the archaeological feasibility study, RMGC also funded a study on the architecture of the historical buildings in Roşia Montană. Historical Buildings Study dated 2000 (Exh. C-1409) (report entitled “Settlement Record”); Gligor ¶ 24.

²⁰³ Gligor ¶¶ 22-23. *See also* Roşia Montană Feasibility Study – Archaeological Inventory dated Sept. 2000 (Exh. C-1412) Vol. I, at 99-101.

²⁰⁴ Gligor ¶¶ 25-34. *See also* Ministry of Culture Order No. 2504 dated Mar. 7, 2001 (Exh. C-1306); Jennings § V.A. The National Museum of Romanian History organized the work, which was supervised by the Department of Historical Monuments and by the Archaeology Service of the Ministry of Culture. *See* Gligor ¶ 25. The archaeological research program was subject to annual review and approval by the National Archaeology Commission of the Ministry of Culture. *See* Gligor ¶ 28.

²⁰⁵ Gligor ¶ 28. As discussed *infra* at § III.C.2, the 2001-2006 preventive archaeological research program did not include Orlea. *See also* Gligor ¶¶ 66-79.

147. A Romanian-international team of over 40 institutions and over 400 individual specialists collectively researched 13 archaeological sites and discovered over 15,000 artifacts that were catalogued, preserved, and archived;²⁰⁶ as part of this effort, the French-led team of international mining archaeologists surveyed over 70 kilometers of underground mining works.²⁰⁷

148. Gabriel, through RMGC, invested approximately US\$ 10.5 million to finance this extensive research program, as required by the Ministry of Culture, provided necessary logistical support and equipment, and employed over 1,200 temporary workers from the local community to assist the specialist teams.²⁰⁸

149. As explained by Mr. David Jennings, CEO of the York Archaeological Trust, in his expert opinion submitted with this Memorial, the archaeological research program financed and supported by Gabriel and RMGC in connection with the Project was “rigorous, systematic, and professional,”²⁰⁹ and represented “the largest cultural heritage programme in the history of Romania and one of the largest ever proposed in the history of developer-funded archaeology.”²¹⁰ The National History Museum of Romania, which directed the research program on behalf of the Ministry of Culture, also stated that this program was “the largest and most important preventive archaeological research program conducted in Romania over the past 3 decades” and covered “a vast area, over 2,000 ha.”²¹¹

²⁰⁶ Gligor ¶¶ 26-34; Jennings ¶¶ 46-53. In addition to archaeology, the Alburnus Maior program also covered the study and inventory of historic buildings in Roşia Montană and an ethnographic study and oral history of Rosia Montana and neighboring villages of Corna and Bucium. *See* Gligor ¶¶ 35-37; Jennings ¶¶ 50-51.

²⁰⁷ Jennings ¶ 53.

²⁰⁸ Gligor ¶ 29; Ministry of Culture Order No. 2504 dated Mar. 7, 2001 (Exh. C-1306) (“The funds necessary for this program shall be ensured, according to applicable legislation, by Roşia Montană Gold Corporation, as the investor.”); NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375) at 49-54 (detailing the amounts spent by RMGC in funding the research from 2001-2006, totaling approximately US\$ 10.5 million). *See also* Jennings ¶ 61.

²⁰⁹ Jennings ¶¶ 52, 144.

²¹⁰ Jennings ¶¶ 7, 79.

²¹¹ NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375) § 1.4; Gligor ¶ 67. *See also* Gligor ¶ 31.

150. This research, which was undertaken in accord with the requirements of Romanian law and best practices, significantly enhanced understanding of the cultural heritage of Roşia Montană, led to numerous scientific publications, and resulted in the creation of a large database (which is now an important cultural resource) identifying the thousands of artifacts discovered.²¹² According to Mr. Jennings, this “multi-disciplinary research programme created one of the richest cultural heritage data-sets that exist for any part of Romania.”²¹³

151. As Mr. Jennings explains, however, because there “already is extensive evidence of Roman mining across the former Roman empire, with more than 500 mining sites known from Roman Spain and more than 40 sites in Romania,” the true significance of the archaeological research at Roşia Montană lies not in the archaeological uniqueness or rarity of the resources, but in the very scope and depth of research itself.²¹⁴

152. As for the primary purpose of the archaeological research program, while perhaps not unique, several discoveries deemed significant were nonetheless made, including a circular Roman funerary monument (at Hop Găuri), Roman underground hydraulic wheels (at Păru-Carpeni and the Cătălina Monuleşti galleries), preserved foundations of Roman buildings (Carpeni), and certain Roman mining areas (Piatra Corbului); the archaeological research team recommended these sites for *in situ* preservation and protection.²¹⁵ RMGC adjusted its mine plan accordingly and proposed protected zones around these and other sites where no mining or industrial operations would be performed.²¹⁶

153. Due to the extensive heritage destruction and degradation caused by past mining practices, however, notably including by State-run mining operations in the Communist-era and the succeeding 15-year period, most areas researched did not yield significant discoveries

²¹² Gligor ¶¶ 32-37. *See also* Jennings § V.A (discussing the research program funded by RMGC).

²¹³ Jennings ¶ 61.

²¹⁴ Jennings ¶ 62.

²¹⁵ Gligor ¶¶ 31-34, Gligor Annex A, Slides 2-9, 19-28, 30-53 (showing photos of archaeological assets discovered, uncovered, and reopened as a result of the excavations performed during the archaeological research campaigns financed by RMGC); Jennings § V.B.

²¹⁶ Gligor ¶¶ 40-41 (showing satellite view image of the Project area including the areas established to protect important cultural heritage sites where no industrial activities would occur); Jennings § V.D, ¶ 145 (discussing the archaeological research team’s recommendations to preserve certain areas *in situ*).

warranting *in situ* preservation.²¹⁷ For discoveries in these areas, the archaeological research team recommended “preservation by record” (that is, in a location other than the original one), and the “discharge” of these areas for industrial development activities, including mining.²¹⁸ As Mr. Jennings observes, “[t]he conclusion that certain other areas of the Project should be discharged for industrial use was supported by the results of the archaeological research, consistent with widely accepted archaeological best practices and principles, and approved by the relevant Romanian authorities.”²¹⁹

154. In addition to identifying and categorizing the archaeological heritage at Roșia Montană, the archaeological research team also underscored the urgent need to adopt measures to conserve and restore the cultural heritage that did remain to prevent its further deterioration and to minimize the risk being lost to future generations.²²⁰

155. RMGC intended to address this need through an extensive and well-funded cultural heritage program developed with leading Romanian and international experts that was formalized into an integrated Cultural Heritage Management Plan for the sustainable development of Roșia Montană.²²¹ The Cultural Heritage Management Plan was submitted to the Romanian authorities as part of its EIA Report and is discussed further below.²²² In the meantime, in view of the deteriorating state of the cultural heritage assets in Roșia Montană, RMGC did not await permitting and the commencement of mining operations to begin investing

²¹⁷ See Gligor ¶¶ 11-15, 22-23, 34, 66-69. See also Jennings ¶¶ 56-57, 61-62; NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375) § 5 (observing that “the entire archaeological area Roșia Montană was significantly affected before 2000,” including by reason of “the ample underground mining and open pit works during the Communist era and in the past fifteen years.”).

²¹⁸ See Gligor ¶ 34; Jennings § V.C (discussing the archaeological research team’s recommendations to preserve sites of no archaeological value by record).

²¹⁹ Jennings ¶ 144.

²²⁰ NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375) § 8; Gligor ¶ 70.

²²¹ Gligor ¶¶ 53-55; Jennings § VI.B, ¶ 146 (discussing RMGC’s plans to remediate the harm caused by historical mining to cultural patrimony and rehabilitate the area’s cultural heritage).

²²² See *infra* § IV.B.2; Gligor ¶¶ 50-53; Jennings ¶ 67.

in heritage conservation, restoration and maintenance, but proactively did so in the course of Project development.²²³

C. The Results of the Extensive Archaeological Research Supported the Archaeological Discharge of Most of the Project Area, But the Ministry of Culture Declined to Allow the Further Research Necessary to Complete the Remaining Discharge Decisions

1. Extensive Research Supported and Resulted in the Archaeological Discharge of Most of the Project Area

156. As discussed above, the extensive preventive archaeological research undertaken pursuant to the Alburnus Maior National Research Program directed by the Ministry of Culture and funded by Gabriel through RMGC showed that, apart from a few sites worthy of *in situ* protection, the areas studied within the proposed Project footprint did not contain sites of significant or remarkable archaeological value and thus did not warrant such protection.²²⁴

157. As a result, the expert archaeological team recommended to the Romanian authorities that, other than the few sites to be preserved *in situ*, the areas researched be “archaeologically discharge[d]” so as to permit industrial development, here implementation of the Project.²²⁵ As explained further below, the authorities accepted these expert recommendations and the Ministry of Culture issued archaeological discharge certificates covering the majority of the Project area.²²⁶

158. In his expert legal opinion submitted with this Memorial, Professor Schiau describes the legal regime under Romanian law governing cultural heritage assets.²²⁷

- a) In brief, “archaeological heritage” consists of various categories of archeological sites defined by reference to their level of significance and/or the manner in which

²²³ In total, RMGC spent more than US\$ 30 million preserving cultural heritage at Roşia Montană. See Jennings ¶ 11 n. 2.

²²⁴ See *supra* § III.B.

²²⁵ Gligor ¶¶ 38-41; Jennings §§ V.B-C (discussing the archaeological research team’s recommendations to preserve certain areas *in situ* or by record based on their archaeological value).

²²⁶ Gligor ¶ 39; Jennings ¶ 59; Schiau § III.D (describing the archaeological discharge certificates granted by the Ministry of Culture based on the research funded by RMGC in the Roşia Montană area).

²²⁷ Schiau §§ II-IV.

they were identified, which in turn determines the type of protection to which a given site is entitled.²²⁸ Unless archaeologically discharged, areas with sites of archaeological value cannot be used for activities that might affect such sites.²²⁹

- b) Areas shown by research not to contain sites of archaeological significance may be archaeologically discharged based on the approval of the National Commission of Archaeology and the issuance of an archaeological discharge certificate by the Ministry of Culture.²³⁰ The issuance of an archaeological discharge certificate is an administrative act that removes the protections previously afforded to the site as an area with archaeological value, and allows the area to be used for industrial activities, such as mining.²³¹
- c) As noted above, only a site with “significant” or “remarkable” archaeological value as determined through appropriate research warrants *in situ* protection; an archaeological site of determined significance also may be classified additionally through an order of the Ministry of Culture as an “historical monument” and included on a List of Historical Monuments (or “LHM”), thus benefiting from the legal protection regime afforded such monuments.²³²
- d) From this, it is evident that a site lacking sufficient archaeological value cannot lawfully be classified as an historical monument.²³³ A researched area that has been archaeologically discharged through an archaeological discharge certificate necessarily lacks significant archaeological value. It is therefore not legally

²²⁸ Schiau § III.A (discussing archaeological sites and their legal protection regimes).

²²⁹ Schiau §§ II.1-2, III.C (explaining the prohibition to perform activities that may affect cultural heritage assets and the removal of such prohibition through the archaeological discharge process).

²³⁰ Schiau §§ II.2, III.C (describing the archaeological discharge process).

²³¹ Schiau ¶¶ 77-80 (explaining that even an archaeological site classified as an historical monument may be archaeologically discharged upon the approval of the National Archaeology Commission and the decision of the Ministry of Culture to issue an archaeological discharge certificate, with the result that the historical monument must be declassified).

²³² Schiau §§ II.3, IV.A-B (discussing the legal protection regime that applies to significant sites classified as historical monuments).

²³³ Schiau § II.3, ¶ 43.

possible for a site to have been archaeologically discharged and for it to remain classified as an historical monument.²³⁴ For this reason, if a site classified as an historical monument has been archaeologically discharged, the Ministry of Culture is obligated to institute procedures to declassify the monument consistent with the archaeological discharge certificate and thereby remove it from the List of Historical Monuments.²³⁵

- e) The List of Historical Monuments was first issued by the Ministry of Culture in 2004 (“2004 LHM”),²³⁶ and is subject to being updated every five years based on orders issued by the Ministry of Culture to classify (add) or declassify (remove) sites from the list.²³⁷

159. In accordance with the recommendations of the archaeological research team researching the area of Roșia Montană, the National History Museum of Romania, as coordinator of the research program, submitted applications to the National Archaeology Commission of the Ministry of Culture requesting archaeological discharge of the areas researched (other than the few sites recommended for *in situ* preservation). The National Archaeology Commission approved these applications.²³⁸

160. Between 2001 and 2008, based on the approvals of the National Archaeology Commission, the Ministry of Culture issued archaeological discharge certificates for designated

²³⁴ Schiau §§ II.3-4, III.C (discussing the legal obligation to declassify archaeologically discharged sites).

²³⁵ Schiau ¶¶ 32, 79, 115-118.

²³⁶ Schiau ¶¶ 122-124, § V.B; Gligor ¶ 42. As Professor Schiau explains, the 2004 LHM was created as a result of verifying, completing, and correcting an earlier draft list of historical monuments (the “draft 1992 LHM”), that had been created as an annex to a draft historical monuments law prepared in 1990-1991 that was never adopted. See Schiau ¶¶ 123, 202-204, § V.B. Although the draft 1992 LHM served as a basis for the eventual elaboration of the first LHM in 2004, the draft 1992 LHM was without legal effect and thus was not an act that legally classified sites or objects as historical monuments. Schiau ¶¶ 123, 179-180, §§ V.A.A1-A2. Indeed, the first Historical Monuments Law was not enacted until 2001. Schiau ¶ 149.

²³⁷ Schiau § IV.C. See also Schiau § IV.B (discussing the process to classify or declassify archaeological sites as historical monuments). As is further discussed *infra* at §§ VI.A.2 and IX.D.1, the 2004 LHM has been updated twice, once in 2010 and again in 2015, in ways that were arbitrary and unlawful.

²³⁸ Gligor ¶ 39.

areas covering approximately 90% of the Project footprint.²³⁹ The areas discharged covered the most important areas for Project development, including three of the four pits (Cârnic, Cetate, and Jig), and the Corna Valley tailings dam.²⁴⁰

161. The 2004 LHM issued by the Ministry of Culture reflected the results of the archaeological research that had been conducted in the area of Roșia Montană up through that time. The several sites recommended for *in situ* preservation were also listed as historical monuments; and no area that had been archaeologically discharged was included on the 2004 LHM.²⁴¹

2. The Ministry of Culture without Explanation Terminated the Alburnus Maior National Research Program Before the Remainder of the Project Area Could Be Fully Researched

162. Responding to a request from the Ministry of Culture, the National History Museum presented to the Ministry in October 2006 a report on the Alburnus Maior National Research Program. The report described the program's objectives, funding, and results, and

²³⁹ Gligor ¶ 39; Schiau § III.D (describing the archaeological discharge certificates granted by the Ministry of Culture based on the research funded by RMGC in the Roșia Montană area). As often happened during the course of Project development, whenever the Romanian authorities made decisions to advance the Project, anti-Project activists would challenge those decisions. In response to the activists' reflexive reaction against the initial archaeological discharge certificates issued, a delegation from the Parliamentary Assembly of the Council of Europe ("PACE") was invited by a member of the Romanian PACE delegation to visit Romania and assess the approach to cultural heritage at Roșia Montană. Gligor ¶¶ 46-47. The PACE delegation report issued in December 2004 was supportive of the Project and its approach to cultural heritage preservation noting, among other things, that "[f]rom the cultural heritage point of view it might be seen as an exemplary project of responsible development." Gligor ¶ 48 (quoting PACE report ¶ 11). Characterizing opposition to the Project as "fueled by outside bodies, presumably well-meaning but possibly counterproductively," the PACE report rejected the activists' criticism of the decisions to issue archaeological discharge certificates as allowing the "programmed destruction of Roman galleries"; the PACE report stated, among other things, that consistent with the extensive research conducted, "the areas of the main pits Cârnic and Cetate appear empty of any archaeologically interesting remains." Gligor ¶ 49 (quoting PACE report ¶¶ 12, 16).

²⁴⁰ Gligor ¶ 39; Jennings ¶ 59; Schiau ¶ 91. As discussed *infra* at VI.A.3, anti-Project NGOs successfully challenged ADC 4/2004 covering the Carnic Massif underground area. Schiau ¶ 331. This same area was again discharged, however, through ADC 9/2011. This later archaeological discharge certificate was subsequently challenged by anti-Project NGOs in reliance on the flawed 2010 LHM. See *infra* §§ VI.A.2, IX.D.1.

²⁴¹ Schiau ¶ 210; Gligor ¶ 44; Jennings ¶ 57 n. 22. The 2004 LHM also included two Roman sites at "Orlea." See Schiau ¶ 206; Gligor ¶ 43. As Professor Schiau observes, however, because the Orlea mountain area had not been subject to preventive archaeological research at the time the 2004 LHM was issued, there was no legal basis to add the Orlea sites as historical monuments, as such a designation presumes that the site has "significant" or "remarkable" value. Schiau ¶¶ 213-214.

recommended, among other things, extending the preventive archaeological research program to Orlea, where the Project's plans included mining (beginning in year 7 of operations), and to the neighboring Bucium property.²⁴² As with the three other planned Project mine pits at Cârnic, Cetate, and Jig, archaeological discharge could not be obtained for Orlea without prior preventive archaeological research, as approved by the Ministry of Culture.²⁴³

163. Two days after receiving the National History Museum's report, the Ministry of Culture without explanation terminated via internal order the Alburnus Maior National Research Program.²⁴⁴ RMGC was not advised of the order contemporaneously, although it had been funding the program as the Project sponsor since 2001, but was instead informed by National History Museum that the research program had been "suspended," again without explanation.²⁴⁵

164. In February 2007, four months after terminating the research program, the Ministry of Culture issued a press release stating without elaboration that it would "no longer issue administrative acts in its field of competence, concerning the documentations for the Roşia Montană area, until the Ministry of Environment and Water Management endorses the environmental impact assessment study."²⁴⁶

165. Despite this proclamation, given the need to conduct preventive archaeology in Orlea to complete the full archaeological assessment of the remaining Project footprint and to support the eventual archaeological discharge thereof, the National History Museum applied in March 2007, on behalf of RMGC, for permits to perform preventive archaeological research in the Orlea area, as well as some additional preventive archaeological research in the Țarina area and the neighboring Păru Carpeni area.²⁴⁷ Rather than grant the requested permit which would have permitted research to be conducted in those areas funded by RMGC, however, the Ministry

²⁴² Gligor ¶¶ 66-70; NHMR Summary Report on the Alburnus Maior National Research Program conducted between 2001 – 2006 dated Oct. 2, 2006 (Exh. C-1375).

²⁴³ Gligor ¶ 74. *See also* Schiau § III.B.1 (discussing the obligation to perform archaeological research in order to obtain archaeological discharge of the area).

²⁴⁴ Gligor ¶ 71; Minister of Culture Order No. 2407 dated Oct. 4, 2006 (Exh. C-1373).

²⁴⁵ Gligor ¶ 71.

²⁴⁶ Ministry of Culture Press release dated Feb. 28, 2007 (Exh. C-911); Gligor ¶ 72.

²⁴⁷ Gligor ¶ 75.

of Culture authorized a more limited “field survey,” which permitted some research to be done, but did not permit the level of research needed to support an archaeological discharge decision.²⁴⁸

166. There was no rational explanation, and none given, for the Ministry of Culture’s refusal to authorize preventive archaeological research at Orlea and instead to allow only a field survey. This was particularly so since the archaeological potential of Orlea had already been preliminarily assessed in the 2000 archaeological feasibility study, which had determined, among other things, that the Orlea area was “covered by old waste stockpiles and open-pit workings along the veins.”²⁴⁹ That feasibility study was a sufficient basis for the Ministry of Culture to have authorized preventive research in the rest of the Project area, and should have been sufficient to authorize the extension of the Alburnus Maior National Research Program to Orlea. Moreover, some earlier preventive archaeological research already had been undertaken in the Țarina and in the Păru Carpeni areas (the latter area to be preserved *in situ*) on the basis of permits issued by the Ministry of Culture, and thus the decision then to allow only a “survey” of those areas also made no sense.²⁵⁰

167. Whether influenced by anti-Project NGOs or others who for political reasons sought to prevent or delay Project permitting and implementation,²⁵¹ the Ministry of Culture’s refusal to authorize this research at Orlea was arbitrary.

168. In any event, the field work authorized by the Ministry of Culture and funded by RMGC eventually proceeded at Orlea under the expert guidance of the leading French mining archaeologist who led the Alburnus Maior National Research Program.²⁵² As Mr. Gligor explains, the field work confirmed that the archaeological vestiges in Orlea were in a “relatively poor state of conservation” as a result of the “constant development of mining operations and the Modern Age settlement of a residential area and the implementation of primary ore processing

²⁴⁸ Gligor ¶ 75.

²⁴⁹ Roșia Montană Feasibility Study – Archaeological Inventory dated Sept. 2000 (Exh. C-1412) Vol. I, at 92; Gligor ¶ 76.

²⁵⁰ Gligor ¶ 76

²⁵¹ [REDACTED]

²⁵² Gligor ¶ 77.

installations.”²⁵³ Consistent with the findings in the earlier archaeological feasibility study, the expert team confirmed for Orlea that “a significant part of the site area is covered by old waste rock piles, partly re-vegetated, partly exposed and crossed by many ravines,” and that underground Roman galleries were “reopened and extended during the 18th - 20th centuries” and some of these “ancient wo[r]ks complexes are now no more than partial vestiges of ancient works disfigured by intensive modern re-mining and/or by slides and cut.”²⁵⁴ On the basis of their findings, the expert team identified a limited number of sites on Orlea with archaeological potential where preventive archaeological research was recommended to be performed.²⁵⁵

169. Although preventive archaeology was not conducted for Orlea, RMGC’s mine plan did not contemplate mining at Orlea until year 7 of mining operations, leaving ample time to complete preventive archaeological research of Orlea and to apply for archaeological discharge.²⁵⁶ In light of the results of the two assessments that were completed for Orlea, however, and the few sites of significant archaeological value identified in the rest of the Project area, it was unlikely that preventive archaeological research at Orlea would identify sites of significant value that would justify a decision to reject an application for archaeological discharge of Orlea.²⁵⁷

²⁵³ Gligor ¶ 77; Archaeological Assessment Report on the Surface and Underground Archaeological Remains within the Orlea Massif Area by Romanian National Museum of History and University of Toulouse Le Mirail dated 2011 (Exh. C-1484) at 124-125.

²⁵⁴ Gligor ¶ 77; Archaeological Assessment Report on the Surface and Underground Archaeological Remains within the Orlea Massif Area by Romanian National Museum of History and University of Toulouse Le Mirail dated 2011 (Exh. C-1484) at 124-125.

²⁵⁵ Gligor ¶ 77; Archaeological Assessment Report on the Surface and Underground Archaeological Remains within the Orlea Massif Area by Romanian National Museum of History and University of Toulouse Le Mirail dated 2011 (Exh. C-1484) at 125-126.

²⁵⁶ Gligor ¶ 78. Although the Ministry of Culture in 2013 eventually authorized preventive archaeological research for Orlea, this research was never conducted, because the Project was soon thereafter unlawfully rejected by the State. *See infra* § VIII.B.

²⁵⁷ Gligor ¶ 79; Gligor Annex A, Slide 29 (showing photo of Orlea area covered in waste dumps). Although the Orlea area contained a relatively small underground Roman/modern gallery as part of a modest mining museum overseen by the State-owned RoşiaMin mining company, the existence of this gallery would not have prevented the eventual archaeological discharge of Orlea. In its EIA Report, RMGC explained that the State’s preserved gallery and museum at Orlea would be lost during Project implementation, and RMGC was working with the expert archaeological team to find a suitable replacement for the gallery and an appropriate location to move the museum’s artifacts. *See* Gligor ¶ 57; EIA Report - Chapter 4.9 Cultural and Ethnical Conditions, Cultural Heritage (Exh. C-224) at 26-27, 46-47; EIA Report – Chapter 9 Non-Technical Summary (Exh. C-

D. RMGC Invested in the Local Community and Worked to Acquire the Surface Rights Needed for the Project

170. As explained in the statement of Elena Lorincz, Community Relations Director of RMGC, RMGC engaged with the local community at Roșia Montană in two principal ways: through RMGC's extensive economic and social development activities and as part of its obligation to obtain surface rights to implement the Project.²⁵⁸ Through its implementation of the Project, RMGC sought to create the conditions necessary for the revitalization and long-term sustainable development of Roșia Montană and the surrounding area, and thereby to overcome and reverse the poverty, pollution, depopulation, and sense of hopelessness that afflicted the community, especially since the cessation of State mining operations at Roșia Montană by Mininvest in 2006.²⁵⁹

171. RMGC worked with experienced independent Romanian and international experts to undertake extensive socio-economic assessments of the local community and its way of life (including through surveys, interviews, and over 100 public consultations), in order to understand and effectively mitigate the social impacts of the Project.²⁶⁰ In addition to this structured approach, RMGC personnel (including Ms. Lorincz and other members of her team,

239) at 62 (“The existing RoșiaMin museum will be replaced by a new, modern museum. The new museum will have regular hours of operation, regular staff and will include a programme of other cultural heritage features in Roșia Montană, all contributing to forming a picture of the nearly 2000 years of mining history in the locality. The entire open air exhibition of the existing mining museum will be relocated in the Protected Zone, according to legal provisions. Public access to certain areas of the Roman-era mining networks will be developed and promoted. An example is the Cătălina-Monulești, located in the Protected Zone that will be dewatered and supported to allow safe public access. The opening of this gallery will offer the advantage of complying with modern safety requirements not entirely present in the gallery under the Orlea Massif. In addition, the Cătălina-Monulești is of particular historical significance as it is the location where most of the Roman waxed tablets were found during the late-18th and mid-19th centuries.”). To this end among others, under the expert guidance of the French mining archaeology team, RMGC proceeded to excavate, restore, and conserve the Cătălina-Monulești galleries in Roșia Montană's historic center, which were far more extensive and archaeologically rich and complex than the Orlea gallery. *See* Gligor ¶ 57; Gligor Annex A, Slides 30-53 (showing photos of the extensive restoration works undertaken by RMGC to reopen and rehabilitate the Cătălina-Monulești gallery complex). As also discussed with the TAC, artifacts from the Orlea museum would be relocated to the planned new museum at Roșia Montană. *See* Gligor ¶ 57, n. 89. *See also* EIA Report - Chapter 4.9 Cultural and Ethnical Conditions, Cultural Heritage (Exh. C-224), at 26-27, 46-47.

²⁵⁸ *See generally* Lorincz.

²⁵⁹ Lorincz ¶¶ 6-11, 59-64. *See also* Lorincz ¶ 9 (showing photos of Roșia Montană's historical center in 2006 following the decline and closure of mining in the area, including houses abandoned due to migration caused by poverty and unemployment).

²⁶⁰ Lorincz ¶¶ 15-20, 30-31.

many of whom were originally from the area) lived and worked in Roșia Montană [REDACTED] [REDACTED]²⁶¹ This informed RMGC's approach to community and social development and to the resettlement and relocation of families who would be displaced by Project implementation.²⁶²

172. With respect to community and social development, RMGC and its dedicated personnel sought to improve the daily lives of people in Roșia Montană through a variety of initiatives, including prioritizing local residents for employment and local suppliers during Project development, which resulted in hundreds of jobs and millions of dollars in investment locally; establishing a micro-credit facility to support the development of local businesses; sponsoring local sports teams and social events for the communities; establishing numerous educational, vocational, and cultural programs; and helping meet the daily needs of the area's most disadvantaged and vulnerable citizens by providing food, transportation, and other assistance.²⁶³

173. RMGC intended to support the development of cultural heritage tourism as the cornerstone of long-term sustainable development for Roșia Montană and the surrounding communities by making significant investments to preserve and develop cultural heritage, to clean-up historical pollution, and to develop modern infrastructure where none before existed.²⁶⁴

174. With respect to the acquisition of surface rights, while a mining license provides the titleholder with the right to develop and exploit the subject resources within a given perimeter, it does not in and of itself provide the titleholder with the right to access the lands necessary to do so.²⁶⁵ Rather, the Mining Law prescribes the means for the titleholder to acquire

²⁶¹ Lorincz ¶¶ 3, 59; Lorincz Annex A, Slide 4 (depicting religious celebration in Corna to which RMGC was invited as a member of the local community).

²⁶² Lorincz ¶¶ 21-29.

²⁶³ Lorincz ¶¶ 59-61; Lorincz Annex A, Slides 10-18 (showing photos of local community events sponsored by RMGC and attended by the members of the communities in the Roșia Montană area); Tănase II ¶¶ 14-15; Community Sustainable Development Programme (Exh. C-221) §§ 8-9, Annex 3 §§ A.3.2.1.-A.3.2.2. *See also generally* 2006 Gabriel Responsibility Report (Exh. C-763); 2009 Gabriel Responsibility Report (Exh. C-764).

²⁶⁴ Lorincz ¶ 64; Gligor ¶¶ 54-60; Community Sustainable Development Programme (Exh. C-221) ¶ 8.8.2, Annex 3 § A.3.2.1.- A.3.2.2.

²⁶⁵ Bîrsan ¶¶ 238-240. *See also* Lorincz ¶ 12.

such rights, including purchase, exchange, rent, and expropriation.²⁶⁶ To commence mining operations, the titleholder must demonstrate it has the rights of access needed for the first year of activity, and then for each year of activity thereafter.²⁶⁷

175. RMGC therefore undertook to acquire surface rights as necessary to implement the Project, much of which was privately owned, and to relocate or resettle affected households, as well as a number of small businesses, public facilities, churches and cemeteries.²⁶⁸

176. With the assistance of highly-qualified independent experts and in accordance with prevailing national and international standards and guidelines, RMGC developed and updated as necessary a Resettlement and Relocation Action Plan to guide the company's approach to resettle and/or relocate affected households and businesses.²⁶⁹ The Resettlement and Relocation Action Plan established, among other things, parameters for compensation to acquire properties (which RMGC committed to purchase on a "willing seller-willing buyer" basis where possible) and for financial support and other assistance to the relocated population.²⁷⁰

177. The Resettlement and Relocation Action Plan reflected a key principle of the World Bank Group's Operational Directive on Involuntary Resettlement and other best practice standards, namely, that affected persons and communities should be made "not worse off and preferably better off" following Project development.²⁷¹ RMGC undertook to ensure that people who needed to resettle and relocate as a result of the Project would be assisted in improving their livelihoods and standards of living.²⁷²

²⁶⁶ Mining Law (Exh. C-11), Art. 6(1).

²⁶⁷ Birsan ¶ 251; Mining Law (Exh. C-11), Arts. 6(1); Mining Law Norms (Exh. C-12), Art. 29.

²⁶⁸ Lorincz ¶¶ 14, 34. *See* Resettlement and Relocation Action Plan Vol. 1 dated Feb. 2006 (Exh. C-463) ¶ 4.1, Table 3 (setting out various figures relating to surface rights acquisition, which, however, were updated after 2006 following refinements of the Project designed to reduce the impacted Project area as well as changes in the legal status of the properties).

²⁶⁹ Lorincz ¶¶ 21-22, 24.

²⁷⁰ Resettlement and Relocation Action Plan Vol. 1 (Exh. C-463); Resettlement and Relocation Action Plan Vol. 2 (Exh. C-464); Lorincz ¶¶ 22-26.

²⁷¹ Lorincz ¶ 26.

²⁷² Resettlement and Relocation Action Plan Vol. 1 (Exh. C-463) ¶¶ 0.3, 3.4.1, 3.59; Lorincz ¶ 26.

178. To ensure maximum reasonable mobility to people who would be displaced by the Project, the Resettlement and Relocation Action Plan eventually determined the replacement value for homes purchased by reference to housing costs in an area of 250 kilometers surrounding Roșia Montană.²⁷³ As housing costs outside of Roșia Montană were generally far higher than within Roșia Montană, the prices RMGC paid for properties in Roșia Montană generally exceeded significantly their local market value.²⁷⁴ In addition to the purchase of properties, RMGC also provided various forms of assistance to families and certain businesses that relocated to ease and facilitate their transition.²⁷⁵

179. From the time RMGC began purchasing properties in Roșia Montană in 2002 until it suspended its surface rights acquisition program in 2008 following the unlawful suspension by the Ministry of Environment of the environmental permitting process,²⁷⁶ RMGC purchased properties owned by 794 households, acquiring on a willing seller-willing buyer basis properties from approximately 78% of households in the Project area.²⁷⁷ As discussed below, RMGC was confident it would have been successful in acquiring the remaining surface rights necessary to implement the Project.²⁷⁸

180. While most households chose to relocate, some preferred to be resettled.²⁷⁹ RMGC devoted considerable resources to designing and successfully developing an inviting, modern community at Recea near the city of Alba Iulia, the capital of Alba County and site of

²⁷³ Lorincz ¶ 52.

²⁷⁴ Lorincz ¶ 52.

²⁷⁵ Lorincz ¶¶ 62-63 Lorincz Annex A, Slide 3 (depicting community debate organized by RMGC to inform, assist, and engage with the local communities); Resettlement and Relocation Action Plan Vol. 1 (Exh. C-463) ¶¶ 5.5, 5.76-7.93.

²⁷⁶ See *infra* § V.A.1.

²⁷⁷ Lorincz ¶¶ 23, 49-50.

²⁷⁸ See *infra* § V.B; Lorincz ¶¶ 54-58. An independent study in 2007 by experts from University December 1, 1918 of Alba Iulia highlighted the economic and social benefits of the Project and related community and sustainable development initiatives concluding, among other things, that the families who had sold their property to RMGC and relocated had improved their standard of living. See University ‘December 1, 1918’ of Alba Iulia – Economic and Social Impact of the Roșia Montană Project, dated 2007 (Exh. C-749) at 11, 82. See also Resettlement and Relocation Action Plan Vol. 2 (Exh. C-464) Annex 26, § 26.8 (noting also that a Monitoring Report prepared by S.C. Promeso Consulting S.R.L in February 2007 concluded that 89% of the relocated families reported their living conditions had improved).

²⁷⁹ Lorincz ¶ 49.

the annual National Union Day celebration, that became the destination of choice for 132 families from Roșia Montană whose homes RMGC purchased.²⁸⁰

181. RMGC's approach to community sustainable development was favorably reviewed by, among other independent entities, the United Nations Development Programme ("UNDP").²⁸¹ As explained by Mr. Gligor and Ms. Lorincz, UNDP sustainable development experts came to Roșia Montană in June 2006 to assess initiating a community development program in the area in partnership with RMGC.²⁸² The UNDP summarized its conclusions in a draft report that was highly supportive of the Project.²⁸³

182. The UNDP draft report highlighted that RMGC had established a Community Relations Department and prepared a community resettlement plan in line with the World Bank's involuntary resettlement recommendations, Romanian laws, and EU directives.²⁸⁴ The UNDP draft report commended RMGC's sustainable development initiatives and its Community Sustainable Development Program, noting that the program had "most of the elements to provide the necessary basis for the sustainable development of the community and even constitute a model of corporate social responsibility in Romania," including "the features of the Area Based Development approach that UNDP advocates and supports."²⁸⁵ In addition, the UNDP draft report noted that without the Project and "[i]n the absence of funding, the future of Roșia

²⁸⁰ As discussed below, RMGC's development of the 22-hectare residential neighborhood at Recea was a major undertaking and a major success involving the construction of more than 130 modern homes as well as new infrastructure that RMGC donated to the Alba Iulia mayoralty. *See infra* § V.B; Lorincz ¶¶ 38-42. *See also generally* Lorincz Annex B (showing photos of the development of the Recea neighborhood). In addition to designing with the assistance of urban planners and architects, and eventually building the urban Recea development, RMGC also similarly designed a settlement called Piatra Albă in Roșia Montană that was intended to evoke a mountain village. *See* Lorincz ¶ 43 (showing architectural renderings of the Piatra Albă resettlement site central area). Unfortunately, after an access road built at the site collapsed (following a number of days of very heavy rainfall prior to the completion of the work) and further geotechnical testing, RMGC took steps to identify another suitable site for this kind of development. *See* Lorincz ¶¶ 43-45.

²⁸¹ Lorincz ¶¶ 65-68.

²⁸² Lorincz ¶¶ 65-68; Gligor ¶¶ 63-65.

²⁸³ *See generally* UNDP/BRC Draft Fact Finding Mission Report on Sustainable Development Pathways for Roșia Montană dated July 2006 (Exh. C-503); Lorincz ¶¶ 66-67.

²⁸⁴ UNDP/BRC Draft Fact Finding Mission Report on Sustainable Development Pathways for Roșia Montană dated July 2006 (Exh. C-503), at 13; Lorincz ¶ 67.

²⁸⁵ UNDP/BRC Draft Fact Finding Mission Report on Sustainable Development Pathways for Roșia Montană dated July 2006 (Exh. C-503), at 14-15, 25-26; Lorincz ¶ 67.

Montană appears to be one of gradual desertion and the eventual disappearance of much of the cultural and historical heritage that the opponents of the project seek to preserve.”²⁸⁶

183. [REDACTED] when the positive UNDP draft report was made public, anti-mining activist NGOs, prominently including the Soros Foundation and Greenpeace, organized a campaign of opposition against the UNDP and descended upon and organized protests in front of UNDP’s regional headquarters in Bratislava.²⁸⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 288 [REDACTED]

[REDACTED]

[REDACTED] 289

184. The opposition of such NGO activists was zealous and misguided in equal measure. Fueled and blinded by ideological opposition to mining and similar infrastructure development, these NGOs only succeeded in harming the people of Roșia Montană whose interests they falsely claimed to represent and defend.²⁹⁰ Ironically, while flying the banner and trumpeting the call to “Save Roșia Montană,” the only thing they succeeded in doing in opposing the Project with their tactics of misinformation, intimidation, and coercion was to save the

²⁸⁶ UNDP/BRC Draft Fact Finding Mission Report on Sustainable Development Pathways for Roșia Montană dated July 2006 (Exh. C-503), at 36; Gligor ¶ 64.

²⁸⁷ [REDACTED] See also Open Letter from Chair of the Board of Soros Foundation to UN Resident Coordinator & UNDP Resident Representative dated Mar. 6, 2007 (Exh. C-1272); *Greenpeace* website article, “UNDP Cannot Support the Destruction of the Environment” dated Feb. 27, 2007 (Exh. C-1271) (Greenpeace and Save Roșia Montană activists protesting in front of the UNDP building in Bratislava); *Greenpeace* website article, “Not Digging It: Greenpeace advocates stand their ground in Bratislava” dated May 25, 2007 (Exh. C-1270).

²⁸⁸ [REDACTED]

²⁸⁹ [REDACTED] See also UNDP Press Release dated Mar. 20, 2007 (Exh. C-1289) (“UNDP does not interfere or seek to influence the decisions of sovereign governments. Any decision taken regarding the future mining activities in Alba County (e.g. Roșia Montană) or the role of any particular commercial actor lies entirely with the Romanian authorities.”).

²⁹⁰ [REDACTED] The real representatives of the local community at Roșia Montană through letters to the central government and otherwise repeatedly and unequivocally rejected the fiction that such foreign-funded NGOs organized to block the Project represented the views of the people of Roșia Montană. On the contrary, the overwhelming majority of the local population strongly supported the continuation of mining in the area, including notably through the Project. [REDACTED]

impoverished people of Roșia Montană from a preserved cultural heritage, a clean environment, a viable path to sustainable development, and hope for the future.²⁹¹

E. Romanian Law Required That Local Zoning Decisions Align So As to Allow Mining Activities That Have Been Authorized by the State

185. Before a mining project may be built, the project area must be zoned for industrial use in the applicable zoning, or “urbanism,” plans. Such plans are issued by decisions of the relevant local authorities, *i.e.*, the commune or town council as the case may be. General urbanism plans (“PUGs”) are applied at the town or commune level, and zonal urbanism plans (“PUZs”) are applied to specific zones therein, such as may relate to a mining project.

186. The Mining Law includes special provisions regarding the approval of urbanism plans for mining perimeters in its Article 41:

(1) Within 10 days from the entry into force of the exploitation licenses, the competent authority will notify, in writing, the county councils, the local councils and the county prefectures competent in the area where the granted perimeters are located, about the mining activities and the perimeters granted under such licenses.

(2) Within 90 days from receiving the notification provided under paragraph (1), the county councils and the local councils will modify and/or update the existing territorial management plans and the town-planning documentation so as to allow the carrying out of all the operations necessary to the performance of the mining activities granted under concession.²⁹²

Thus, the Mining Law expressly requires NAMR to advise the local authorities as to the mining activities that have been authorized and the local authorities are directed to modify or update the relevant urbanism plans and documentation accordingly.

187. There were a number of PUGs relevant to the Project, most significantly including the PUG for the Roșia Montană commune (approved in 2002) and the PUG for Abrud

²⁹¹ See, e.g., Open Letter from Gabriel to Open Society Institute dated Sept. 5, 2007 (Exh. C-1499) (enclosing more than 20-page rebuttal to false statements published by the Soros Foundation Romania website).

²⁹² Mining Law (Exh. C-11), Art. 41; Bîrsan ¶ 253.

(approved in 2002).²⁹³ The Roșia Montană and the Abrud local councils both also issued decisions approving the “Zonal Urbanism Plan for the industrial development area Roșia Montană Gold Corporation S.A.,” *i.e.*, the PUZ for the Project.²⁹⁴ As RMGC updated the design of the Project in a number of respects after 2002, it initiated the process of requesting an updated PUZ for the Project’s industrial area. In addition, the local authorities are obligated periodically to update their PUGs. That process of updating relevant urbanism plans as it related to the Project was well-advanced when the Government began blocking the Project.²⁹⁵

IV. RMGC ENGAGED INDEPENDENT EXPERTS TO PREPARE AN ENVIRONMENTAL IMPACT ASSESSMENT REPORT AND APPLIED FOR KEY ENVIRONMENTAL PERMIT

A. RMGC Applied for the Environmental Permit and the Ministry of Environment Commenced an EIA Procedure

188. In December 2004, Gabriel and RMGC applied for the environmental permit that would have been the crucial permitting milestone for the Project.²⁹⁶ RMGC’s submission in support of its environmental permit application included an overview of the engineering plans and designs for the Project in a nearly 200-page “Project Presentation Report.”²⁹⁷

²⁹³ See Letter from RMGC to the Department of Infrastructure Projects and Foreign Investments dated Mar. 18, 2013 (Exh. C-1413) (summarizing the zoning decisions relevant to the Project). See also Roșia Montană Local Council Decision No. 45/2002 dated July 19, 2002 (Exh. C-1414) (approving PUG); Abrud Local Council Decision No.43/ 2002 dated July 18, 2002 (Exh. C-1418) (approving PUG).

²⁹⁴ Roșia Montană Local Council Decision No. 46 dated July 19, 2002 (Exh. C-1419); Abrud Local Council Decision No. 43/2002 dated July 18, 2002 (Exh. C-1418). See also Roșia Montană Local Council Decision No. 14 dated May 31, 2012 (Exh. C-1420); Roșia Montană Local Council Decision No. 17 dated Jul. 16, 2014 (Exh. C-1421).

²⁹⁵ See Letter from RMGC to the Department of Infrastructure Projects and Foreign Investments dated Mar. 18, 2013 (Exh. C-1413) (summarizing the zoning decisions relevant to the Project and their status). Although NGO anti-Project activists brought legal actions seeking to nullify the local council decisions that had approved the urbanism plans that were relevant to the Project, as the local authorities were obligated by law to align their urbanism plans with licensed mining activities, RMGC reasonably expected that the urbanism plans would be modified as needed accordingly.

²⁹⁶ Avram ¶¶ 31-34; Tănase II ¶ 25; Henry ¶¶ 12, 30-31 (explaining that the environmental permit was “pivotal”); Mihai § V.A. See also generally Mihai § II (discussing overview of permitting generally), § V (discussing overview of the EIA procedure carried out for the Project).

²⁹⁷ Avram ¶ 32; Szentesy ¶ 47.

189. As Professor Lucian Mihai explains in his expert legal opinion, which provides an overview of the legal framework relating to the environmental permitting process,²⁹⁸ the environmental permit establishes the environmental protection measures and conditions that must be observed during the construction, exploitation, and closure of a project.²⁹⁹

1. The Ministry of Environment Must Conduct an EIA Procedure and Make a Decision on the Environmental Permit to Be Issued in the Form of a Government Decision

a. The Ministry of Environment Conducts the EIA Procedure

190. For larger-scale mining projects, including the Roşia Montană Project, applications for the environmental permit are directed by the local environmental authority to the Ministry of Environment, and the Ministry organizes an EIA (environmental impact assessment) procedure.³⁰⁰ The Ministry of Environment conducts the EIA procedure in consultation with a Technical Assessment Committee or TAC, a consultative body that is chaired by a Ministry of Environment State Secretary who serves as TAC President.³⁰¹ The TAC is composed of a number of central public authorities (mainly ministries) with responsibilities relating to different aspects of environmental protection, and other members that the Ministry of Environment may invite, depending upon the characteristics of the project under review.³⁰²

191. Under the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”), neighboring States also may request to participate in the EIA procedure in which case transboundary public consultations also are held.³⁰³

192. The developer must retain experts certified by the Ministry of Environment to conduct independent studies of the potential environmental impacts of the project and to prepare

²⁹⁸ Mihai §§ III-IV.

²⁹⁹ Mihai §§ IV.B.1-2, IV.C.3.1.

³⁰⁰ Mihai §§ IV.C.1, IV.C.3.

³⁰¹ Mihai § IV.C.2.

³⁰² Mihai § IV.C.2.1. *See also id.* § IV.C.2.2 (explaining that the members of the TAC are represented at the level of state secretary, general director, or director).

³⁰³ Mihai § IV.C.3.1. The views of neighboring States are consultative, not binding. *Id.* ¶ 101. As discussed further *infra*, Hungary requested to participate in the EIA procedure. *See infra* § IV.B.4.

an EIA Report according to Terms of Reference issued by the Ministry.³⁰⁴ The EIA Report is submitted to the Ministry of Environment and is made public, and the public is given the opportunity to comment on the project impacts during a prescribed public consultation procedure.³⁰⁵ The Ministry of Environment must instruct the developer to address in an Annex to the EIA Report relevant comments received from the public.³⁰⁶

193. The Ministry of Environment then must convene a TAC meeting to present its conclusions on the EIA Report and the Annex,³⁰⁷ and to obtain the views of the TAC members as to whether the EIA Report and Annex contain adequate information, based on the EIA Methodological Guidelines, to allow a proper assessment of the potential impacts in order to provide an appropriate basis for a decision on the environmental permit.³⁰⁸ The Ministry of Environment must decide whether the EIA Report is adequate, and if not, it must allow the developer to correct or modify the EIA Report.³⁰⁹

194. If no revision of the EIA Report is requested, the Ministry of Environment must request the TAC members' views, within their areas of expertise and on the basis of the EIA Report, on the development of the project at issue.³¹⁰ Any TAC member that fails to provide its point of view at the TAC meeting or in writing within 30 working days of the meeting is deemed to have no objections.³¹¹

195. If the TAC members' views are divergent, the Ministry of Environment may convene one additional "conciliation" meeting for the TAC members to reconsider their

³⁰⁴ Mihai § IV.C.3.2.

³⁰⁵ Mihai § IV.C.3.3.1.

³⁰⁶ Mihai ¶ 110(d). *See also id.* § IV.C.3.3.1.

³⁰⁷ Mihai § IV.C.3.3.2.1 (explaining that the law "requires the Ministry of Environment to analyze the EIA report and the Public Debate Annex prior to this TAC meeting" and "to be sufficiently well-aware of the information in the EIA report to be able to present its own conclusions to the TAC members") (emphasis in original).

³⁰⁸ Mihai § IV.C.3.3.2.2.

³⁰⁹ Mihai § IV.C.3.3.2.2.

³¹⁰ Mihai §§ IV.C.2.3-4, IV.C.3.3.2.2.

³¹¹ Mihai ¶ 133(c).

views.³¹² Although mandatory for the Ministry of Environment to obtain and consider, the views of the TAC members are only consultative, need not be unanimous, and are not binding on the Ministry of Environment; the Ministry of Environment is required to decide on the issuance or motivated rejection of the environmental permit.³¹³ As Professor Mihai explains, the laws regulating the EIA procedure make clear that “the Ministry of Environment alone takes the decision on the environmental permit, while the role of the TAC is merely consultative.”³¹⁴

b. The Ministry of Environment Makes a Decision Based on an Assessment of Environmental Impacts; When Archaeological Sites Are Located in the Area, the Ministry of Culture’s Endorsement Is Required

196. The Ministry of Environment’s decision on the environmental permit must be grounded in its expert analysis of the technical and scientific studies regarding environmental impacts contained in the EIA Report and based on considerations of environmental protection.³¹⁵ As Professor Mihai observes, “if the information is ‘adequate’ and the solutions under review comply with the law, by law, the Ministry must approve the EP [environmental permit]”;³¹⁶ the Ministry of Environment’s discretion lies in its professional assessment as to the adequacies of the measures offered to address environmental impacts.³¹⁷

197. The EIA Rules of Procedure provide that the Ministry of Environment is to take its decision on the environmental permit promptly following its consultation with the TAC, specifically within 10 working days of whichever is later: (a) the TAC meeting at which the TAC members express their points of view, (b) the expiry of the term of 30 working days for

³¹² Mihai ¶ 133(d). *See also id.* § IV.C.3.3.2.3 (discussing the number of TAC meetings that may be held).

³¹³ Mihai § IV.C.3.3.3.1.

³¹⁴ Mihai ¶ 135 (emphasis in original); *id.* ¶ 83 (concluding that “the decision whether or not to permit the project rests entirely with the Ministry of Environment”). *See also id.* § IV.3.3.3.1 (same).

³¹⁵ Mihai § VIII.C.1-2. *See also id.* § VIII.B.2 (noting that “there is no legal requirement for all the TAC members to agree on the implementation of a project; the Ministry of Environment is only obligated to organize a conciliation meeting”).

³¹⁶ Mihai ¶ 412. *See also id.* § VIII.C.1 (explaining that the Ministry of Environment’s decision is an administrative decision that must be based on legal standards and not be abusive).

³¹⁷ Mihai § VIII.C.1; *id.* ¶ 410 (noting that “where permits are concerned . . . the authority is strictly bound by the laws governing the permit application, and no other factors can come into play”).

TAC members to submit their views in writing, or (c) the conciliation meeting.³¹⁸ The Ministry of Environment must publish its decision (together with its reasons) within five working days of taking the decision and allow the public to comment on the decision.³¹⁹ If the Ministry's decision is to issue the environmental permit, the permit must be issued within 20 working days of publication unless the Ministry has grounds to resume the EIA procedure based on comments received from the public.³²⁰

198. In cases where archaeological sites are located in the area under EIA review, such as this case, the environmental permit can only be issued after the Ministry of Culture issues its endorsement.³²¹

c. For Larger Projects, the Government Must Issue the Decision on the Environmental Permit Following the Ministry of Environment's Proposal

199. For certain larger projects,³²² such as the Roşia Montană Project, the Ministry of Environment makes its decision on the environmental permit in the form of a proposal to the Government which then issues or rejects the environmental permit, following and in accordance with the Ministry of Environment's proposal, by Government Decision.³²³ As Professor Mihai explains, for such projects the Ministry of Environment's proposal on the environmental permit binds the Government not only as to the decision to issue the environmental permit, but also as to its content (i.e. the conditions and measures that are proposed to be included in the environmental permit).³²⁴ Thus, while the Government is called upon to give legal effect to the Ministry of Environment's proposal on the environmental permit by issuing a Government

³¹⁸ Mihai ¶ 138.

³¹⁹ Mihai ¶ 139.

³²⁰ Mihai ¶ 142. *See also id.* § IV.C.3.3.3.2 (explaining timeline for the Ministry of Environment's decision).

³²¹ Mihai § VIII.A.2.2.1.

³²² This applies to mining projects with a production capacity of more than 5 million tonnes per year and/or an exploitation perimeter of more than 1,000 hectares. *See* Mihai §§ IV.B.4, IV.C.3.4.

³²³ Mihai ¶ 32 (noting that in the Romanian legal system a Government Decision is an administrative deed subject to judicial review that is issued by the Government as a body further to a proposal made by a minister or by the Prime Minister). *See also id.* §§ IV.B.4, IV.C.3.4 (describing the procedure for issuing a Government Decision).

³²⁴ *See generally* Mihai § VIII.D.2.

Decision, the decision remains a technical decision to be taken by the Ministry of Environment as a specialized body in a manner that serves the purpose of the environmental protection laws; the Government's failure to follow the Ministry's proposal in issuing a Government Decision on the environmental permit would be unlawful and an abuse of power.³²⁵

200. Throughout the EIA procedure, successive Ministers of Environment and other senior Ministry of Environment officials confirmed that the decision on permitting the Project was to be made on technical, not political, grounds.³²⁶ As discussed below, however, although the Ministry of Environment completed the technical assessment of the Project in 2011 (following an unlawful three-year suspension of the EIA procedure in 2007-2010) and affirmed its completion again in 2013, and although senior Ministry officials repeatedly confirmed that the Project met the applicable standards to be permitted, the Government hijacked the permitting process for political and other ungrounded reasons and blocked the Ministry of Environment from taking any decision on the environmental permit.³²⁷ Professor Mihai observes that the Ministry of Environment's failure to take a decision in the more than 12 years since RMGC submitted its environmental permit application is "unprecedented in Romania," a flagrant violation of and departure from the applicable administrative process, and a manifest disregard of legal obligations set out in Romanian law.³²⁸

³²⁵ Mihai § VIII.D.2.4.

³²⁶ See, e.g., Interview of Sulfina Barbu, Realitatea TV, dated May 28, 2009 (Exh. C-900) at 8 (former Minister of Environment Sulfina Barbu stating that "it is not a political project, it is a project that must be technically evaluated and to be said: yes or no depending on the result"); *Rosia Montana dwellers to be moved, while one hundred hold on until the very last moment*, Kronika Online, dated June 3, 2009 (Exh. C-1501) at 2 (Ministry of Environment spokesperson Dragoș Năcuță: "I can assure anyone that the decision will be based strictly on technical criteria, and no political considerations would be made, and all legal requirements will be met."); Interview of László Borbély, dated Jan. 14, 2010 (Exh. C-851) at 2 (Minister of Environment László Borbély: "[Roșia Montană] has nothing to do with politics . . . it's a technical decision."); *Judeca Tu!*, TVR1, dated Feb. 23, 2012 (Exh. C-438) at 32 (Ministry of Environment State Secretary and TAC President Marin Anton stating that the Ministry of Environment would "consider all opinions, for and against, and the solution will be made based on technical grounds and arguments"); Interview of Rovana Plumb, BITV, dated Feb. 8, 2013 (Exh. C-1478) at 2-4 (Minister of Environment Rovana Plumb stating that the environmental permit decision "will be made based on compliance with the law," "has nothing to do with the political part," and "must be disconnected from any political lobby").

³²⁷ See *infra* §§ VII-VIII (explaining how Prime Minister Emil Boc and subsequently Prime Minister Victor Ponta blocked the Ministry of Environment from taking any decision on the environmental permit despite the Ministry of Environment having completed its technical assessment of the Project in 2011 and 2013).

³²⁸ Mihai ¶¶ 239-242, 256-258, 261-269. See also generally *id.* §§ VI-VIII.

2. RMGC Assembled a Team of Certified Romanian EIA Experts to Develop the EIA Report in Coordination with International Experts and Consultancies

a. The EIA Report Presented a Thorough Assessment of the Environmental Impacts of the Project

201. The Ministry of Environment convened the TAC and provided RMGC in May 2005 with Terms of Reference for the EIA Report.³²⁹ Based on the Terms of Reference, RMGC assembled a team of Romanian experts certified by the Ministry of Environment to prepare the EIA Report in coordination with its team of leading international experts in mine design, construction, operation, closure, archaeological exploration, cultural preservation, and sustainable development.³³⁰

202. In preparing the EIA Report on behalf of RMGC, the EIA experts coordinated with the Project designers to ensure the Project fully complied with all requirements of Romanian and EU legislation as well as industry best practices.³³¹ RMGC's experts also prepared the EIA Report taking into account new and emerging international standards set forth, for example, in the EU's Directive on the Management of Waste from Extractive Industries ("Mining Waste Directive") and the EU's Best Available Techniques ("BAT") Reference Document for the Management of Tailings and Waste-Rock in Mining Activities ("Reference Document"), both of which took effect after the EIA Report was completed.³³²

203. RMGC submitted the completed EIA Report to the Ministry of Environment in May 2006.³³³ The EIA Report consisted of multiple volumes and 10 separate chapters covering each of the topics prescribed in the Terms of Reference to fully assess Project impacts.³³⁴ These chapters included comprehensive descriptions and analyses of the following topics:

³²⁹ Avram ¶¶ 35-36; Gligor ¶ 50; Szentesy ¶ 47; Mihai § V.B.

³³⁰ Avram ¶¶ 36-37; Gligor ¶¶ 50-55; Lorincz ¶¶ 24-29. *See also supra* § II.A (identifying the team of external experts supporting Project design and development).

³³¹ Avram ¶¶ 36-37; Tănase II ¶¶ 11-18; Henry ¶¶ 7-11.

³³² The Mining Waste Directive was published in April 2006 and entered into force in May 2006. The BAT Reference Document was published in draft in July 2004 and was approved in 2009. *See* Avram ¶ 37.

³³³ Avram ¶ 38.

³³⁴ Avram ¶ 38.

- technological processes employed in the Project, including the use of cyanide as a chemical to process the ore (Chapter 2);
- waste management, including the storage of tailings in the tailings management facility (“TMF”) designed for the Project (Chapter 3);
- potential impacts of the Project (Chapter 4), including separate sub-chapters (4.1 through 4.10) addressing the potential impacts on water, air, noise and vibrations, soil, geology, biodiversity, landscape, social and economic environment, culture and heritage, and transportation;
- potential alternatives to development of the Project (Chapter 5);
- environmental monitoring during all phases of the Project (Chapter 6);
- risk assessment and management (Chapter 7); and
- potential cross-border impact in view of Hungary’s participation in the EIA procedure (Chapter 10).

The EIA Report also included general information about the Project (Chapter 1), a description of challenges in preparing the EIA Report (Chapter 8), and a non-technical summary of the EIA Report (Chapter 9) to facilitate public access to and understanding of the technical information and analysis contained in the full Report.³³⁵

204. The EIA Report also included 14 detailed management plans describing RMGC’s undertakings in respect of cyanide use, mine rehabilitation and closure, the TMF, waste, water and erosion control, air quality, noise and vibration, biodiversity, community sustainable development, cultural heritage, environmental and social impacts and monitoring, and emergency preparedness and spill contingency.³³⁶ The EIA Report was based on 11 different rigorous baseline studies consisting of six volumes of analyses prepared to assess the pertinent

³³⁵ Avram ¶ 38.

³³⁶ Avram ¶ 38.

environmental, economic, social, and cultural conditions existing in Roșia Montană from 2000-2006.³³⁷

205. In total, the EIA Report, including supporting documentation, submitted to the Ministry of Environment exceeded 4,500 pages.³³⁸ The EIA Report was one of the most – if not the most – comprehensive impact assessments ever prepared in Romania.³³⁹

b. RMGC Developed a Final Feasibility Study to International Standards and Updated the Romanian Project Feasibility Study and Technical Documentation to Reflect Design Changes Implemented to Mitigate Project Impacts

206. Based on the work done in connection with the EIA procedure, RMGC and its team of external experts made a number of changes to the Project plans and designs to mitigate Project impacts, including to account for the results of archeological research that had been undertaken in the area.³⁴⁰ As Ms. Cecilia Szentesy, RMGC's Technical Design Director, observes, the main changes included reducing the size of the Jig pit and reconfiguring the Cetate, Cârnic, and Orlea pits in order to increase the buffer area between the mining activities and the Roșia Montană historical town center and certain archaeological sites that were protected areas, and reducing the size of the waste dumps by backfilling three of the pits.³⁴¹

207. As discussed above, RMGC retained Washington Group International to prepare the Final Feasibility Study for the Project consistent with the changes made during the EIA procedure.³⁴² The Final Feasibility Study developed by Washington Group confirmed the technical feasibility and economic viability of the Project, in accordance with internationally

³³⁷ Avram ¶¶ 31, 38. The results of these baselines studies showing the deplorable environmental, social, economic, and cultural conditions existing at that time are discussed in the statements of Mr. Avram, Ms. Lorincz, and Mr. Gligor. See Avram ¶¶ 10-17, 26-28 (environmental conditions); Lorincz ¶¶ 6-11 (social and economic conditions); Gligor ¶¶ 11-37 (archaeological and cultural heritage conditions).

³³⁸ Avram ¶ 38.

³³⁹ Avram ¶ 38.

³⁴⁰ Szentesy ¶¶ 46-49; Avram ¶¶ 35-38; Gligor ¶¶ 38-41, 50-60.

³⁴¹ Szentesy ¶¶ 48-49.

³⁴² SRK Report ¶ 35; Washington Group International, Inc., Roșia Montană Project Final Feasibility Study dated Aug. 2006 (Exh. C-140-C).

industry accepted standards, as well as proven and probable reserves of 10.1 million ounces of gold and 47.6 million ounces of silver.³⁴³

208. RMGC engaged its Romanian Project designer, Ipromin, to update the Feasibility Study and Technical Documentation that had been submitted to NAMR in 2004, which Ipromin had prepared taking into account applicable Romanian rules and regulations.³⁴⁴ Ipromin updated its earlier Feasibility Study consistent with Romanian legal requirements to incorporate changes to the Project design, updated the Project's Exploitation Development Plan and other Technical Documentation, and also updated its verification of resources and reserves. RMGC submitted these updated Ipromin studies to NAMR on October 2, 2006.³⁴⁵ Consistent with the Washington Group's findings in the Final Feasibility Study, the updated 2006 Feasibility Study prepared by Ipromin confirmed proven reserves [REDACTED]

[REDACTED]³⁴⁶

209. As discussed further below, NAMR had the obligation to verify and register the resources and reserves subject to exploitation under the License, but unlawfully delayed doing so for nearly seven years. Eventually, in March 2013 NAMR approved and registered the resource and reserve calculations that are derived from the Feasibility Study and Technical Documentation submitted to NAMR in October 2006.³⁴⁷

³⁴³ Washington Group International, Inc., Roşia Montană Project Final Feasibility Study dated Aug. 2006 (Exh. C-140-C) at 1-47 (confirming proven and probable reserves [REDACTED])

³⁴⁴ Szentesy ¶¶ 47-50.

³⁴⁵ Szentesy ¶¶ 46-50.

³⁴⁶ Szentesy ¶ 50. *See also* Feasibility Study dated Oct. 2006 (Exh. C-977-C) at 41.

³⁴⁷ *See infra* § VIII.A.2 (in 2013 NAMR approved and registered the resource and reserve calculations after a seven year delay); [REDACTED]; Birsan § IV.B.2.1.

B. The EIA Report Reflected Gabriel and RMGC’s Approach to Implementing Industry Best Practices for the Project

1. Key Environmental Considerations Were Expertly Addressed

210. As explained by Mr. Horea Avram, RMGC’s Environmental Director, and as reflected in the EIA Report, a number of key environmental issues were considered at great depth by RMGC and the independent experts who worked with RMGC and Gabriel on the Project design, including, as described below: (i) the use of cyanide to process the ore at Roşia Montană; (ii) the design of the tailings management facility (or TMF) and the suitability of its proposed site in the Corna Valley; (iii) the potential transboundary effects of the Project, notably for Hungary; (iv) the remediation of historical pollution; and (v) the mine closure and rehabilitation plans and the environmental guarantees for the Project.³⁴⁸

a. The Project Was Designed to Ensure the Safe Use of Cyanide

211. The Roşia Montană Project was designed to use a process of cyanide leaching to process the ore. Cyanide is used safely in many industries and applications in ways that most people do not appreciate, including the production of plastics, pharmaceuticals, table and road salt, and fire retardants.³⁴⁹

212. Cyanide also is safely used in most gold mining operations and is a conventional and proven leaching agent. Approximately 90% of all gold extracted through mining today employs cyanide for processing because, for most gold deposits, it is the only proven, safe, efficient, and economically viable way of doing so.³⁵⁰ Extensive testing and analyses confirmed that “cyanidation” was the optimal processing technology for the Project.³⁵¹

³⁴⁸ Avram ¶¶ 18-30.

³⁴⁹ Terry I. Mudder Environmental Services Ltd., Technical Statement Regarding Cyanide dated Sept. 27, 2013 (Exh. C-501) at 7, 9. *See also* van Zyl § III (explaining the many beneficial uses of cyanide and that it is widely used and can be safely managed).

³⁵⁰ van Zyl § III.

³⁵¹ EIA Report, Ch. 5 (Exh. C-230) at 48-51. *See also* van Zyl § IV.C (observing that cyanidation is a conventional, proven technology and that the “test work program, which was designed, conducted, supervised, and verified by highly regarded mineral testing and processing and engineering firms, tested at least twelve variations of cyanide leaching, gravity, and flotation processes at various grind sizes on ore samples taken from the Project site”); Avram ¶ 19. The EU’s Reference Document sets out BAT for gold leaching using cyanide. van Zyl § III.B; Avram ¶ 20.

213. The Project was designed conservatively to include a cyanide detoxification plant that would reduce cyanide concentrations to maximum 5-7 parts per million (“ppm”) at the point of discharge to the tailings management facility and average 3 ppm in the tailings pond,³⁵² well below the stringent 10 ppm level required by the European Union and the 50 ppm level accepted in major gold-producing countries such as the United States, Canada, and Australia.³⁵³

214. Gabriel was one of the first signatories to the 2005 International Cyanide Management Code, a voluntary certification program intended to promote responsible cyanide management practices in mining, and RMGC developed a Cyanide Management Plan that fully complied with the requirements of the International Cyanide Management Code and detailed all of the measures that RMGC would have taken to protect employees, neighboring communities, and the environment from cyanide-related harms. RMGC committed, among other things, to purchase and transport cyanide exclusively in solid form and to contract only with Cyanide Code signatories and companies subject to similar rigorous auditing criteria.³⁵⁴

215. Dr. Terry Mudder, one of the foremost experts on the environmental aspects of the use of cyanide in mining, confirmed in regard to the Project’s use of cyanide that it “would in some instances surpass the requirements of the Cyanide Code” and that RMGC had “demonstrated an appropriate level of care and due diligence with respect to the management of cyanide for this project.”³⁵⁵ Stephan Theben of AMEC, the former European Commission representative on the Steering Committee for the development of the Cyanide Code, also

³⁵² van Zyl ¶¶ 37-38, 50. *See also* van Zyl § IV.B (noting that RMGC was committed to operating below already stringent international standards and reducing cyanide-related risks to lowest possible levels); Avram ¶ 20.

³⁵³ van Zyl ¶ 26. *See also* Avram ¶ 20.

³⁵⁴ Cyanide Management Plan (Exh. C-194); van Zyl § IV; Avram ¶ 21. *See also* Independent Group of International Experts (“IGIE”) Report dated Nov. 30, 2006 (Exh. C-502) at 6 (observing that the cyanide processing technology selected for the Project was developed by “well recognized engineering design houses” and the Project “strictly follows the recommendations of the International Cyanide Management Code”).

³⁵⁵ Terry I. Mudder Environmental Services Ltd., Technical Statement Regarding Cyanide dated Sept. 27, 2013 (Exh. C-501).

confirmed that the Project “complies with the best cyanide management practices and the best standard, which is the International Cyanide Management Code.”³⁵⁶

216. Professor Dirk van Zyl, a distinguished professor of mining and the environment and a Board Member of the International Cyanide Management Institute, similarly observes in his expert report submitted with this Memorial that cyanide processes in mining are proven and well-understood, that the protective standards and guidelines for the industry when applied properly reduce the risks of cyanide to negligible levels, and that RMGC’s cyanide management plans provide “generous coverage with regard to cyanide management protections at every stage of the Project” and “adhere to or surpass international standards and best practices.”³⁵⁷

217. As Mr. Avram explains and Professor van Zyl confirms, many other processing technologies were considered and assessed; other technologies, however, would not have been effective for the ores at Roşia Montană and in certain instances could only have been used in combination with leaching, which would have required the use of additional chemical reagents and would have been less environmentally safe.³⁵⁸

218. As Mr. Avram also explains, competent Government authorities repeatedly acknowledged that RMGC’s cyanide management plans met or favorably exceeded European and international standards and that cyanidation was the only safe, efficient, and economically viable technology to process the ore at Roşia Montană.³⁵⁹

³⁵⁶ Transcript of Parliamentary Special Commission hearing dated Oct. 3, 2013 (Exh. C-558) at 45-47. Stephan Theben also led the European Commission’s technical working group that developed the EU’s Reference Document and was one of the drafters of the EU Mining Waste Directive. *Id.*

³⁵⁷ van Zyl ¶¶ 3, 32. *See generally id.*

³⁵⁸ Avram ¶ 19; van Zyl § IV.C (observing that “[t]here are characteristics unique to Roşia Montană that make many alternative technologies inappropriate, more environmentally harmful, or not economically viable”).

³⁵⁹ Avram ¶¶ 55-57, 153-164, n.142. *See also* Tănase II ¶¶ 190-201, 207-213; *infra* § VIII.B (explaining that Government authorities, including the Minister of Environment and the NAMR President, acknowledged in public statements and in testimony to Parliament that RMGC’s cyanide management plans met or favorably exceeded European and international standards, that cyanidation was the only safe, efficient, and economically viable technology to process the ore at Roşia Montană, and that “no other technology in the world” was appropriate).

b. The TMF Was Properly Sited and Well Designed

219. The Roşia Montană Project design included a tailing management facility, or TMF, to store and manage tailings (the byproduct of the mineral recovery process including a mixture of finely ground rock and water) that was to be sited in the Corna Valley.³⁶⁰ As Patrick Corser, an engineer with extensive experience in TMF design and construction, confirms in his expert report submitted with this Memorial, RMGC ensured both that the TMF was sited appropriately to avoid environmental impacts and that it was well designed to avoid any possible breach.³⁶¹

220. As Mr. Avram and Ms. Szentesy both explain, RMGC selected the Corna Valley as the location for the TMF after a rigorous assessment as to the suitability of 13 potential locations in four valleys.³⁶² RMGC retained internationally recognized engineering and consulting firms Knight Piésold, SNC-Lavalin, and MWH to conduct thorough investigations in the Corna Valley and to confirm the location was safe and appropriate.³⁶³ The investigations confirmed highly favorable geological and hydrogeological conditions that provide a high degree of safety and environmental protection.

221. Mr. Corser confirms that the Corna Valley location was selected considering a wide range of environmental, social, technical, and economic factors.³⁶⁴ Multiple geotechnical investigations were conducted in the area of the TMF to thoroughly understand and characterize site conditions and support the TMF design studies.³⁶⁵ Mr. Corser explains that these investigations were comprehensive and did not reveal any geologic features that would raise valid concerns about the siting of the TMF in the Corna Valley.³⁶⁶ As Mr. Corser also explains, the Corna Valley is characterized by a natural inward gradient that focuses groundwater to the

³⁶⁰ See Contingency Planning and Redundant Systems Presentation dated Apr. 12, 2015 (Exh C-716) at 10-11.

³⁶¹ See generally Corser.

³⁶² Avram ¶ 22; Szentesy ¶¶ 89-90.

³⁶³ Avram ¶ 23. See also Corser §§ 3.1, 3.3 (explaining that the site investigations were comprehensive and “provided the basis to characterize site conditions reliably and with a high degree of confidence that the Corna Valley met design objectives for safety”).

³⁶⁴ Corser § 3.3.

³⁶⁵ Corser § 3.1.

³⁶⁶ Corser § 3.3.

center of the valley, allowing for easy collection of any seepage under the TMF dam in a secondary containment system, and benefits from protective subsurface layers that line the TMF basin and minimize the risks of environmental impact.³⁶⁷

222. As Ms. Szentesy observes, the Geological Institute of Romania reached a similar conclusion following its own site observations, electrometrical research, and assessment of the geological data.³⁶⁸ The suitability of the location also was confirmed by statements and testimony of the competent Government authorities noting the thoroughness of the investigations, the favorable conditions of the Corna Valley site, and its appropriateness for the TMF.³⁶⁹

223. Mr. Corser confirms that the TMF itself was designed to meet or favorably exceed Romanian, European, and international standards and included several important environmental safeguards, including:

- a storage volume twice the capacity recommended by industry best practice;
- a tailings dam conservatively designed to resist the largest earthquake that could conceivably occur at the Project site;
- a spillway constructed with each dam raise to assist in the controlled release of emergency flood waters;
- a secondary containment system designed immediately downstream of the tailings dam to capture and contain any seepage or runoff traveling through the TMF; and

³⁶⁷ Corser ¶¶ 24-25, 39. *See also* Avram ¶¶ 22-23; van Zyl ¶ 62.

³⁶⁸ Szentesy ¶¶ 82-83; Point of view of the Geological Institute of Romania regarding the geological data presented in the EIA report for the Roşia Montană Project dated Dec. 9, 2011 (Exh. C-636).

³⁶⁹ Avram ¶¶ 153-164, n.142. *See also* Tănase II ¶¶ 190-201; *infra* § VIII.B (explaining that Government officials, including the Minister of Environment and the TAC Vice President, confirmed that the Corna Valley was a suitable location for the TMF).

- comprehensive groundwater monitoring systems to confirm that the containment systems are effective.³⁷⁰

224. Numerous international and Romanian experts reviewed the TMF as designed and concluded it complied with, or favorably exceeded, applicable standards and guidelines for TMF safety.³⁷¹ A risk assessment conducted by highly regarded geosciences experts demonstrated an estimated one in one million year probability of nonperformance of the TMF dam, “about 100 times lower than what is used as criteria for dams and other containment structures around the world and lower than the probabilities of non-performance for most other engineered structures.”³⁷² As discussed below, water modeling conducted by internationally recognized experts also showed that any impact on the river system from any accidental spill would be minimal and temporary and, even then, only would occur in low flow conditions (a probability of one in four million years).³⁷³

225. The Ministry of Environment certified the safe operation of the TMF dam in the form of a Dam Safety Permit that was ultimately issued for the TMF. The permit was issued on the basis of a favorable endorsement by the Romanian Central Commission for Endorsement of the Assessment Documentation of Dams Safety (“Central Commission”), a consultative body of the Ministry of Environment.³⁷⁴

³⁷⁰ Corser § 3.2 (explaining that the Roşia Montană TMF was designed in accordance with BAT and “featured a number of design components that were more conservative and environmentally protective than required under Romanian regulations”).

³⁷¹ Corser § 4. *See also* van Zyl § V (finding the TMF to be “safely designed, compliant with international standards and best practices, and highly protective against any cyanide related hazards”).

³⁷² Hazard Assessment of Corna Dam in Tailings Management Facility by Norwegian Geotechnical Institute dated May 18, 2009 (Exh. C-392) at 22-23. *See also* Corser ¶ 56; Avram ¶ 23.

³⁷³ Prof. Paul Whitehead, Dr. Suzanne Lacasse, and Patrick Corser, Clean-up Strategy, Risk Assessment and Analysis of Accidental Pollution at Roşia Montană, dated Apr. 2009 (Exh. C-394) at 10-11. *See also* Avram ¶ 25.

³⁷⁴ *See* Szentesy ¶¶ 61-73; Avram ¶ 24; Tănase II ¶ 49; Dam Safety Permit No. 27 dated June 29, 2010 (Exh. C-509); Dam Safety Permit No. 27/2 dated Apr. 18, 2012 (Exh. C-511); Dam Safety Permit No. 27/3 dated Dec. 2, 2014 (Exh. C-433).

c. The Project Did Not Present Risk of Transboundary Impacts

226. As Mr. Avram explains, RMGC demonstrated that the Project did not present any material transboundary environmental impacts.³⁷⁵ In view of Hungary's participation in the EIA procedure, RMGC commissioned renowned independent water modeling experts to assess the impact of any accidental pollution on the river system from the Project site to the Hungarian border. Professor Paul Whitehead from the University of Reading, UK and Professor Steven Chapra from Tufts University, USA concluded that the risk of an accident at the TMF was "extremely small," and that even in the event of an accident, the scale of toxic discharge was "limited and temporary" and "[u]nder most conditions, the river water quality [would] remain[] superior to both surface and drinking water standards even at the point of discharge into the river."³⁷⁶ If, however, an accident were to happen during a time of low water flow in the river – a scenario estimated to occur only once in four million years – "the water would have, temporarily and to a limited extent, cyanide concentration levels in excess of the regulated water standard over a distance of some 80 km downstream," i.e., more than 500 kilometers from the Hungarian border.³⁷⁷ The risk of harming the water quality therefore would be immaterial in Romania and non-existent in Hungary.³⁷⁸

³⁷⁵ Avram ¶ 25.

³⁷⁶ Prof. Paul Whitehead, Dr. Suzanne Lacasse, and Patrick Corser, Clean-up Strategy, Risk Assessment and Analysis of Accidental Pollution at Roşia Montană, dated Apr. 2009 (Exh. C-394) at 1. The conclusions of this report were based on water quality modelling studies of Professors Whitehead and Chapra as well as hazard analyses of Dr. Lacasse of the Norwegian Geotechnical Institute. Mr. Corser of MWH also contributed his expertise to both aspects of this work.

³⁷⁷ Prof. Paul Whitehead, Dr. Suzanne Lacasse, and Patrick Corser, Clean-up Strategy, Risk Assessment and Analysis of Accidental Pollution at Roşia Montană, dated Apr. 2009 (Exh. C-394) at 1-2.

³⁷⁸ See, e.g., Prof. Paul Whitehead, Dr. Suzanne Lacasse, and Patrick Corser, Clean-up Strategy, Risk Assessment and Analysis of Accidental Pollution at Roşia Montană, dated Apr. 2009 (Exh. C-394) at 1, 15 (concluding that, "[i]n all cases, [] safe conditions are re-established hundreds of kilometres before the discharged water reaches the Hungarian border," and "[i]n no case will there be adverse impacts anywhere close to the Hungarian border"); Hazard Assessment of Corna Dam in Tailings Management Facility by Norwegian Geotechnical Institute dated May 18, 2009 (Exh. C-392) at 23 (finding that an accident would result only in "some material damage and limited contamination, both only in the vicinity downstream of the dam," and "[t]here would be no trans-boundary effects"); Reading University Water Modeling Study dated Apr. 2007 (Exh. C-339) at 81 (explaining that in all circumstances "the cyanide levels would b[e] in line with the Romanian, EU and Hungarian drinking water standards well before the Mures river crosses into Hungary").

d. The Project Included Remediation of Historical Pollution As Well As Appropriate Environmental Financial Guarantees and Sound Closure Plans

227. As Dr. Christian Kunze, a leading expert in environmental assessments for the mining and other resource-related industries, describes in his expert report submitted with this Memorial, an important benefit of the Project was RMGC's detailed long-term remediation and rehabilitation plans to abate and treat the severe historical pollution at the Project site,³⁷⁹ even though RMGC was not responsible for any of the pre-existing environmental impacts.³⁸⁰ In so doing, RMGC would have relieved the State of its obligation to clean up the historical pollution at Roșia Montană,³⁸¹ which the State was either unwilling or unable to do.³⁸²

228. RMGC planned to construct a water retention dam to collect ARD at a site where it currently drains into the Roșia Valley and from there into the regional watershed. Once retained at this dam, the acid waters would be pumped to a waste-water treatment plant to remove the heavy metals.³⁸³ Pilot plant trials carried out by RMGC and WISUTEC demonstrated RMGC's ability to successfully treat the impacted water from historic underground facilities.³⁸⁴

229. Independent experts confirmed that the "proposed clean-up would achieve an almost complete removal of the current and constant pollution coming from the site, a definite environmental benefit of the project," as well as "significant benefits to the river system

³⁷⁹ Kunze §§ V-VI. *See also* Avram ¶¶ 26-28.

³⁸⁰ *See supra* § II.B.3.

³⁸¹ [REDACTED]
[REDACTED] *See also* Avram ¶ 17; Tănase II ¶¶ 16-18; Henry ¶ 44.

³⁸² *See* Avram ¶ 17 (summarizing media statements of Prime Minister Victor Ponta and testimony of Minister of Environment Rovana Plumb in September 2013 acknowledging the State's inability or unwillingness to make the investments necessary to clean up historical pollution caused by State mining).

³⁸³ Avram ¶¶ 26-27. *See also* Avram Annex C (photographs showing pilot water treatment facility); EIA Report, Ch. 9 (Exh. C-239) at 31.

³⁸⁴ Kunze §§ VI.B, VII.A (explaining that it is "highly unusual for a mine operator to conduct pilot plant trials of water treatment technologies prior to the development phase of a mine as doing so entails a significant investment of time and money").

downstream, including at the Hungarian border, significantly lowering metal concentrations and restoring water quality and ecology that have probably been damaged for over 2000 years.”³⁸⁵

230. As Dr. Kunze confirms, RMGC’s Waste Management Plan for the operation of the Roşia Montană Project was designed to meet or favorably exceed both Romanian and international standards of care, and included well-developed waste rock and tailings management plans as well as water treatment plans.³⁸⁶ RMGC conducted substantial geochemical and other testwork to ensure its plans would be effective in treating the mining waste that would be generated from Project operations, and took steps to ensure that the Project’s Waste Management Plan complied fully with the EU’s Mining Waste Directive.³⁸⁷ NAMR repeatedly endorsed and the Ministry of Environment eventually approved RMGC’s Waste Management Plan.³⁸⁸

231. Dr. Kunze also explains that, consistent with the requirements set out in the EU’s Environmental Liability Directive, RMGC committed to put in place a highly conservative environmental liability financial guarantee to cover expenses that might arise in the improbable event of an accident or other unexpected event were RMGC itself not able to meet its obligations.³⁸⁹

³⁸⁵ Prof. Paul Whitehead, Dr. Suzanne Lacasse, and Patrick Corser, Clean-up Strategy, Risk Assessment and Analysis of Accidental Pollution at Roşia Montană, dated Apr. 2009 (Exh. C-394) at 1, 6. *See also* Reading University Water Modeling Study dated Apr. 2007 (Exh. C-339) at 5 (finding that the Project “will remove the majority of the Roşia Montană and Corna sources of historic Acid Rock Drainage that currently pollute the rivers systems with metals”).

³⁸⁶ Kunze § VII. These plans worked in tandem with the Project’s Cyanide Management Plan and its Tailings Facility Management Plan. Kunze ¶ 16.

³⁸⁷ Kunze § VII. *See also* Avram ¶¶ 114-115, 129-133; Mihai ¶¶ 387-389.

³⁸⁸ *See infra* § VIII.A.3.

³⁸⁹ Kunze § IX.A. *See also* Avram ¶ 30.

232. The Roșia Montană Project also included a comprehensive plan designed with expert consultant WISUTEC to rehabilitate and close the mine site before RMGC concluded its mining operations. As Mr. Avram explains, as it mined, RMGC would have backfilled the open pits at Cârnic, Jig, and Orlea, covered them with soil, and vegetated them with grass and trees. The Cetate pit would have been flooded and transformed into a lake, and one thousand hectares of forest would have been planted to replace the 255 hectares that would have been deforested as a result of mining activities.³⁹⁰

233. RMGC and WISUTEC developed a Mine Rehabilitation and Closure Management Plan with a staged approach that ensured that RMGC could commence the rehabilitation process even before the end of mining operations.³⁹¹

234. Dr. Kunze notes that the Project was exemplary in developing progressive and integrated plans and designs for mine closure.³⁹² The UNDP, in its review of the Project plans, observed in this regard that RMGC's approach with respect to closure and decommissioning is seen as best practice and ensured effective closure.³⁹³

235. RMGC also committed to provide the Ministry of Environment with robust financial guarantees to cover closure and remediation costs in the unlikely event of premature cessation of mining activities.³⁹⁴ RMGC developed detailed estimates for the environmental guarantees to ensure that any costs would be covered and committed to environmental guarantees that Dr. Kunze confirms were comprehensive and conservative.³⁹⁵ As Dr. Kunze explains, "the level of detail and consideration in the closure cost estimates prior to the end of the planned Project mine life far exceeds the standard industry approach" and RMGC's estimates

³⁹⁰ Avram ¶ 29; Avram Annex D (renderings of RMGC's closure plans for Roșia Montană). *See generally* Kunze § VIII.

³⁹¹ Kunze § VIII.C (explaining that, "[b]y starting closure activities earlier, RMGC reduced the potential environmental impact of its mining activities"). *See also* Avram ¶ 29.

³⁹² Kunze §§ VIII.B-C.

³⁹³ UNDP/BRC Fact Finding Mission Provisional Report on Sustainable Development Pathways for Roșia Montană dated July 2006 (Exh. C-503) at 13. *See also* Kunze §§ VIII.B-C.

³⁹⁴ Kunze § IX.B.

³⁹⁵ Kunze § IX.B. *See also* Avram ¶ 30.

“were more comprehensive in their analysis of year-on-year costs during each stage of operation than would be expected for this type of project.”³⁹⁶

2. The Integrated Approach to Preserving Roșia Montană’s Cultural Heritage Was in the “Upper Tier” of International Best Practices

236. As part of the EIA Report, RMGC developed a Cultural Management Plan aimed at drawing on and valorizing Roșia Montană’s cultural heritage in all its forms – archaeological, architectural, and historical – to develop an integrated approach to sustainable development for the area through cultural heritage-based tourism.

237. Developed in accordance with Romanian and EU legislation and with World Bank and other international guidelines, the Cultural Management Plan included the following initiatives, among others:

- developing a mining museum in Roșia Montană’s historic town center;
- restoring the main square in the historic town center;
- creating an underground museum in the Cătălina-Monulești network of mining galleries to showcase Roman mining methods as well as methods from later eras;
- creating an archaeological park in the Carpeni and Hop Găuri areas to showcase preserved foundations of Roman buildings and a Roman funerary monument;
- restoring approximately 300 buildings in the historical town center;
- developing hotels, restaurants, and recreation areas in the town center; and
- developing cultural heritage training and educational and endowment programs and otherwise promoting the involvement of the local community in administering Roșia Montană’s cultural heritage.³⁹⁷

³⁹⁶ Kunze ¶¶ 74-76.

³⁹⁷ Gligor ¶¶ 50-55; Jennings § VI.

238. Implementing this plan to conserve, restore, and maintain Roşia Montană's cultural heritage and create conditions for the successful sustainable development of the area required enormous investment. RMGC ultimately committed to investing US\$ 70 million for cultural investment at Roşia Montană alone, and an additional US\$ 30-50 million for cultural heritage nationally.³⁹⁸ Successive Ministers of Culture praised RMGC's approach, and acknowledged that Roşia Montană's cultural heritage could not be preserved without RMGC's substantial investments because the State lacked the necessary resources.³⁹⁹

239. In addition to conserving and restoring Roşia Montană's deteriorating cultural heritage, RMGC recognized that successful tourism-based sustainable development also required that Roşia Montană's severe historical pollution be cleaned up and its crumbling or non-existent infrastructure be, respectively, fixed or created.⁴⁰⁰ Therefore, in addition to the US\$ 70 million committed for cultural heritage at Roşia Montană, RMGC planned to invest as part of the Project hundreds of millions of dollars for local environmental clean-up, infrastructure, and community development, which also would support and advance the objective of creating optimal conditions for sustainable development at Roşia Montană.⁴⁰¹

240. RMGC's Cultural Management Plan was submitted with the EIA Report and would have been approved through issuance of the environmental permit.⁴⁰² Given the on-going

³⁹⁸ Gligor ¶¶ 131-134, 141-142; Jennings § VII; Tănase II ¶¶ 184-185. In its original EIA submission in 2006, RMGC budgeted approximately US\$ 26 million for cultural heritage preservation at Roşia Montană. Management Plan, Part I for the Archaeological Heritage from Roşia Montană area (Exh. C-226) at 50. RMGC increased this amount to US\$ 35 million in 2010. *See* 2010 EIA - Explanatory Note to Chapter No. 4.9 - Potential impact, Culture and Heritage (Exh. C-388) at 8, 10. As discussed *infra* at §§ VI, VIII.A.5,

See Letter No. 910 from RMGC to Department for Infrastructure Projects of National Interest and Foreign Investments dated Mar. 15, 2013 (Exh C-696)

³⁹⁹ *See infra* §§ VI-VIII (discussing statements about the Project's positive impact on cultural heritage made in 2011-2013 in public, in TAC meetings, and in testimony to Parliament by, *inter alia*, Minister of Culture Kelemen Hunor, Minister of Culture Daniel Barbu, and Ministry of Culture State Secretaries Vasile Timiş and Radu Boroianu). *See also* Gligor ¶¶ 100-104, 143-152 (discussing same); Tănase II ¶¶ 17, 65, 196, 208.

⁴⁰⁰ Jennings § VI.B.

⁴⁰¹ Jennings ¶ 72. *See also generally id.* § VII, ¶ 146.

⁴⁰² Gligor ¶¶ 50-55.

deterioration of the area’s cultural heritage, however, RMGC proactively initiated significant projects to conserve, restore, and/or maintain Roșia Montană’s heritage without awaiting the completion of permitting or the start of mining operations, including:

- restoring, and to this day maintaining, a significant part of the underground Cătălina-Monulești mining galleries and making it accessible for tourism;⁴⁰³
- restoring and rehabilitating over 20 buildings in Roșia Montană, including the old town hall (which was intended to serve as a hotel) and school house in the historic center;⁴⁰⁴
- making emergency repairs at approximately 160 other buildings;⁴⁰⁵ and
- creating a permanent exhibition “Gold of Apuseni” at a large restored house in the historic center to showcase the area’s mining history.⁴⁰⁶

241. As explained by David Jennings in his expert report submitted with this Memorial, RMGC’s integrated and well-funded approach to conserving, restoring, and maintaining Roșia Montană’s cultural heritage not only met applicable standards and guidelines,⁴⁰⁷ but “went far beyond the commitments often seen in other major European

⁴⁰³ Gligor ¶¶ 56-57, 172, Gligor Annex A, Slides 30-53 (showing photos and noting that RMGC’s constant maintenance is necessary to prevent the collapse of the galleries and the loss of prior excavation and restoration works); Jennings ¶ 73 (showing before and after photos of the opening of the Cătălina Monulești underground galleries, including Roman mining galleries). *See also e.g.*, RMGC 2014 Annual Report to NAMR dated Jan. 2015 (Exh. C-1118-C) at 115-125 [REDACTED]; RMGC 2013 Annual Report to NAMR dated Jan. 2014 (Exh. C-1117-C) at 31-48 [REDACTED].

⁴⁰⁴ Gligor ¶ 60, Gligor Annex A, Slides 6-18 (showing before and after photos of examples of restoration works undertaken by RMGC at Roșia Montană); Jennings ¶ 74 (same).

⁴⁰⁵ Gligor ¶ 60; Jennings ¶ 75.

⁴⁰⁶ Gligor ¶ 58, Gligor Annex A, Slides 9-10 (showing before and after photos of the restored house in the Roșia Montană historical center and the exhibition organized there by RMGC); Jennings ¶ 75 (same).

⁴⁰⁷ Jennings ¶ 143.

infrastructure projects” so as to place it “in the upper tier as regards international best practice.”⁴⁰⁸

242. In addition to his own positive expert assessment, Mr. Jennings’ expert report also summarizes the chorus of praise from numerous independent experts for RMGC’s integrated and well-funded approach to preserving Roşia Montană’s cultural heritage and making it the centerpiece of long-term sustainable development for the area.⁴⁰⁹ RMGC retained many of the most highly-regarded international and Romanian experts who extensively reviewed and repeatedly validated the Project’s cultural heritage dimension, including:

- Terrafirma Consulting, a top-ranked UK firm of landscape architects;
- Gifford Ltd., a leading UK archaeology consultancy firm;
- [REDACTED]
- [REDACTED]
- Oxford Archaeology, the largest provider of professional archaeological services in the UK;
- the Independent Group for Heritage Monitoring at Roşia Montană, a group of highly distinguished Romanian patrimony, archaeology, and history experts from the Romanian Academy, prestigious Romanian universities, and other institutions; and
- [REDACTED]

⁴⁰⁸ Jennings ¶¶ 12, 77. *See also id.* ¶¶ 11, 78 (favorably comparing RMGC’s planned cultural heritage investments to those in other large European infrastructure projects).

⁴⁰⁹ Jennings § VIII.

[REDACTED]

243. Thus, as recognized by both independent experts and Romania’s own Ministers of Culture, far from destroying Roşia Montană’s cultural heritage [REDACTED] [REDACTED] implementing the Project and RMGC’s cultural heritage strategy was the only viable and fully-funded way to save it.⁴¹¹

3. The Independent Group of International Experts Commissioned Jointly by Romania and Hungary Issued a Favorable Report Confirming That the EIA Report and the Project Were Well Developed

244. As described above, in accordance with provisions of the Espoo Convention,⁴¹² Romania provided notice of RMGC’s environmental permit application to Hungary, Serbia and Montenegro, Bulgaria, Moldova, Ukraine, and Slovakia and invited them to participate in the EIA procedure.⁴¹³ Hungary was the only neighboring State that requested to participate.⁴¹⁴

⁴¹⁰ Gligor ¶¶ 80-84, 149; Jennings § VIII.

⁴¹¹ [REDACTED] Jennings ¶¶ 80, 111.

⁴¹² See *supra* § IV.A.1; Mihai § V.A.2.

⁴¹³ Avram ¶ 33.

⁴¹⁴ Avram ¶ 34.

245. The region of Transylvania, in which Roşia Montană is located, is within the territory of the former Austro-Hungarian Empire and was controlled by Hungary until the end of World War I, after which Transylvania became part of the Romanian State over Hungary's objection. Whether motivated by a desire to prevent Romania from developing gold in a region that it considered to be part of Hungary's patrimony, or out of concern of possible transboundary impacts on Hungary's rivers (such as resulted from a significant cyanide-contaminated waste water spill caused by heavy rainfall at a poorly managed tailings facility at a gold mine in Baia Mare, in northern Romania in 2000),⁴¹⁵ Hungary announced its opposition to the Project as early as June 2004, two years before RMGC even submitted the EIA Report.⁴¹⁶

246. Following RMGC's submission of the EIA Report in May 2006, and as part of the transboundary consultations with Hungary, Romania and Hungary jointly commissioned a group of experts, selected by the States, to review the EIA Report and to assess the Project's potential transboundary effects, technological processes, and proposed mining and processing facilities.⁴¹⁷ The resulting Independent Group of International Experts ("IGIE") consisted of six highly accomplished technical experts, including two from Romania, two from Hungary, one from Germany, and one from Sweden.⁴¹⁸

⁴¹⁵ UNEP/OCHA Assessment Mission Report on Cyanide Spill at Baia Mare, Romania dated Mar. 2000 (Exh. C-721) at 3. Following the accident at Baia Mare, the EU undertook a comprehensive assessment of best practices in extractive industries. After careful consideration, in 2006 the European Parliament and Council adopted the Mining Waste Directive to regulate the management of waste in extractive industries, including the use of cyanide in the mining industry. The Mining Waste Directive requires mining operators to limit the cyanide concentration of tailings to 10 ppm, a level which the European Commission consistently has found to be safe. *See van Zyl* § III.B. *See also Corser* § 5 (explaining that the design of and environmental plan for the Project were fundamentally different from those at Baia Mare).

⁴¹⁶ Tănase II ¶ 23; Avram ¶ 34.

⁴¹⁷ IGIE Report dated Nov. 30, 2006 (Exh. C-502). *See also Avram* ¶ 39.

⁴¹⁸ The experts were Prof. Ioan Bica from the Technical University for Constructions in Bucharest (Romania), Prof. Eugeniu Luca from the Land Reclamation and Engineering Faculty at University of Bucharest (Romania), Prof. János Földessy from University of Miskolc (Hungary), Sándor Kisgyörgy from Környezetvédelmi szakértői iroda KFT (Hungary), Dr. Karl Kast from the Baden-Württemberg Chamber of Engineers (Germany), and Assoc. Prof. Philip Peck from University of Lund and UNEP Grid Arendal (Sweden). *See Avram* ¶ 41.

247. As Mr. Avram describes, the IGIE reviewed the EIA Report, visited the Project site, and prepared an independent report commenting favorably on the Project, including with respect to the main environmental issues.⁴¹⁹ As to these issues, the IGIE observed:

- Use of cyanide: The IGIE found that RMGC's proposed use of cyanide to process the ore was "industry standard" and that the Project's Cyanide Management Plan "strictly follows the recommendations of the International Cyanide Management Code."⁴²⁰ The IGIE also observed that the Project's "listed designers – AMMTEC, AMDEL, Minproc, SNC Lavalin, and Cyplus – are well recognized engineering design houses" that selected the processing technology for the Project after conducting "detailed analysis of alternatives."⁴²¹ The IGIE concluded that this process "is BAT. The design guarantees less than 10 mg/l WAD CN concentration in the effluents and tailing coming from the plant," which "meets Mining Waste Directive requirements."⁴²²
- TMF Design and Location: The IGIE confirmed that "the planning of the TMF is based on the BAT," and "[t]he general concept and principal layout of the TMF . . . is in accordance with the existing applicable recommendations and regulations."⁴²³ The IGIE also found "evidence that substantial quantities of geological, hydrogeological and geotechnical data have been collected" from the proposed site of the TMF in the Corna Valley, and "[o]n that basis it can be affirmed here, that a safe performance of the Corna Dam and its related structures can be attained."⁴²⁴
- Closure and Rehabilitation: The IGIE "confirmed that the relevant problems related to the closure and rehabilitation phase have been discussed in the planning

⁴¹⁹ Avram ¶¶ 39-47.

⁴²⁰ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 5-6.

⁴²¹ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 6.

⁴²² IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 6.

⁴²³ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 14.

⁴²⁴ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 15.

documents” and “the undertakings detailed appear to be representative of good practice.”⁴²⁵

- Clean-up of Historical Pollution: The IGIE acknowledged that Roşia Montană “suffers from considerable pollution” as a result of mining activities conducted by the Romanian State since the 1970s “during which few environmental controls were applied . . .”⁴²⁶ The IGIE noted that the Project was designed to intercept runoff from historic mines and from the new mine and treat and clean the polluted acid waters.⁴²⁷ The IGIE concluded that the Project “should result in a very significant improvement in water quality in the local streams compared with the current situation,” which would lead to a “significant contribution to the improvement in water quality in the Abrud River.”⁴²⁸

248. In light of its positive findings on each of these issues, the IGIE remarked that “significant evidence has been found for the planning of a robust project,” and “the detailed Environmental and Social Management Plan (ESMS) that complements the EIA documentation . . . can provide a sound basis for best practice operations after some modifications, development and refinement.”⁴²⁹ The IGIE concluded that the Project was “well developed,” and that if certain “basic principles given above are held to in a diligent manner in all stages of the project life cycle then the projected benefits of the project should accrue and the inherent risks should be drastically reduced (presumably to levels acceptable to stakeholders).”⁴³⁰

249. The IGIE’s positive conclusions on the Project fell on deaf ears in Hungary. Having commissioned a team of international experts with expertise in mine design, operation,

⁴²⁵ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 20, 32.

⁴²⁶ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 35-36 (noting “significant environmental impacts” from historical mining including, among other things, contamination of air quality, contamination of soils, and contamination of surface and underground waters with heavy metals from acid rock drainage as well as process plant discharges and uncontrolled run-off from mined areas and mine dumps).

⁴²⁷ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 36.

⁴²⁸ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 36 (concluding that “the net impact on the water quality of the Abrud River is therefore forecasted to be positive”).

⁴²⁹ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 39.

⁴³⁰ IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 39.

and closure to assess the EIA Report and supporting documentation, Hungary did not even await the outcome of the review and issuance of the IGIE report before publicly reiterating its objection to the Project and urging the Romanian authorities to reject it.⁴³¹ Hungary persistently maintained its objection throughout the EIA procedure despite the consensus of independent experts that there was no possibility of the Project causing *any* negative transboundary effects to water or air quality and despite Hungary itself acknowledging that “the risk of significant contamination for Hungary is very low.”⁴³²

250. Although the Romanian Ministry of Environment did not provide a copy of the report to RMGC or ask RMGC to do anything in relation to the recommendations made in it, as the report had been made public in Hungary, RMGC obtained a copy and proactively addressed in the Annex of responses to the public comments on the EIA Report (discussed below) the IGIE’s recommendations and limited concerns regarding the Project.⁴³³

4. RMGC Completed Extensive Public Consultations on the EIA Report in Coordination with the Ministry of Environment

251. As noted above and described by Professor Mihai, the EIA procedure includes an opportunity for public consultation.⁴³⁴ In coordination with the Ministry of Environment, RMGC developed a Public Consultation and Disclosure Plan which the Ministry of Environment approved to inform the public and interested stakeholders regarding the Project, potential

⁴³¹ Avram ¶¶ 40, 47. *See, e.g., Roșia Montană impact study incomplete and full of errors*, Gondola.hu, dated Oct. 8, 2006 (Exh. C-493) (reporting that the Hungarian Ministry of Environment “recommends Romanian authorities to reject the environment impact assessment for the Roșia Montană gold mine”).

⁴³² Letter from Ministry of Environment to RMGC dated Mar. 30, 2010 enclosing Hungary’s comments dated Feb. 25, 2010 (Exh. C-619) at 2; *id.* at 3 (“[T]he probability of a significant contamination of the Hungarian river section arising [from] this mining activity would be very low.”). *See also* Avram ¶¶ 64-70 (describing the conclusions of Professors Paul Whitehead and Steven Chapra, water modeling experts, and of Westagem SRL, a Romanian air quality expert, as well as Hungary’s conclusions). As Professor Mihai explains and as Romanian authorities acknowledged, Hungary’s negative view was merely advisory. *See* Mihai § IV.C.3.1. *See also infra* § VIII.A.1; Draft Informative Note on the Activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 6-7 (confirming that “Hungary’s negative answer is merely consultative, as the Romanian State has sovereign power to decide on the issuance of an Environmental Permit”); Tănase II ¶ 158.

⁴³³ Avram ¶ 47.

⁴³⁴ Mihai § IV.C.3.3.1.

alternatives, likely impacts, and mitigation measures.⁴³⁵ Further to the approved plan, as Mr. Avram describes, RMGC conducted extensive public consultations in Romania and Hungary that included, among other things:

- publishing on RMGC's website the full EIA Report, including its non-technical summary (Chapter 9), and announcements of public hearings;
- organizing and participating in 14 public hearings in locations in and around Roşia Montană, as well as in Bucharest where the Ministry of Environment held the TAC meetings;
- distributing 6,000 electronic copies (DVDs) and more than 150 printed copies of the full EIA Report, including its non-technical summary, to local, regional, and national authorities as well as to town halls, information centers, libraries, and universities throughout the region and in Bucharest;
- distributing DVDs containing all the EIA documentation and leaflets summarizing information about the Project at the public hearings;
- participating in two public hearings in Budapest and Szeged, Hungary, in accordance with the Espoo Convention requirement for transboundary public consultation; and
- translating into Hungarian and distributing 500 copies of the EIA Report's non-technical summary in furtherance of the public consultations in Hungary.⁴³⁶

252. Following the public consultations, the public submitted 5,610 questions and 93 comments, the vast majority of which were duplicative or referred to issues that were clearly addressed in the EIA Report.⁴³⁷ As required by the Ministry of Environment,⁴³⁸ RMGC prepared

⁴³⁵ Avram ¶¶ 48-49. *See also* Mihai § V.C.1.

⁴³⁶ Avram ¶¶ 48-50. *See also* Gligor ¶¶ 61-62; Lorincz Annex A, Slide 2 (showing a photo of an EIA-related consultation organized by RMGC with the local communities in Brad in 2006).

⁴³⁷ Avram ¶ 51.

written responses in Romanian and English to all of the questions and comments received during the public consultations, including from Hungary, and addressed comments from the IGIE report, and thus submitted in May 2007 a 91-volume EIA Report Annex totaling more than 25,000 pages in which all public comments received were addressed.⁴³⁹

253. RMGC thus completed an extensive public consultation program on the EIA Report that responded to all questions and comments raised concerning the potential Project impacts and, as Professor Mihai confirms, that greatly exceeded the legal requirements for such consultations.⁴⁴⁰

V. THE MINISTRY OF ENVIRONMENT UNLAWFULLY SUSPENDED THE PERMITTING PROCESS IN 2007, BUT THE PROCESS WAS PUT BACK ON TRACK IN 2010

A. After the TAC Members Made Significant Progress Reviewing the EIA Report, the Ministry of Environment Unlawfully Suspended the EIA Procedure and Blocked Project Permitting

254. Following completion of the public consultations and RMGC's submission of the EIA Report Annex, the TAC members reviewed and analyzed significant parts of the EIA Report.⁴⁴¹ In September 2007, however, the Ministry of Environment unlawfully suspended the EIA procedure and blocked other aspects of Project permitting.⁴⁴²

⁴³⁸ Following the applicable EIA Procedure, the Ministry of Environment should have reviewed these public comments and questions and directed RMGC to address only those that were well-grounded, and also should have done so "as reasonably fast as possible." Mihai §§ IV.C.3.3.1, V.C.1. *See also* Avram ¶ 51. However, the Ministry of Environment waited five months after receiving the questions and comments and then simply forwarded all of them to RMGC and insisted that RMGC respond in writing to each question and comment, even if duplicative. As Mr. Avram explains, the Ministry of Environment's failure to filter the questions as required "significantly increased the burden on RMGC and the volume of documentation that RMGC submitted in response." Avram ¶ 51. *See also* Mihai ¶ 185 (concluding in this respect that "the Ministry of Environment did not act in line" with legal requirements).

⁴³⁹ Avram ¶ 52. *See also* Lorincz ¶¶ 30-32.

⁴⁴⁰ *See generally* Mihai § V.C.1. *See also id.* ¶ 182 (noting "the EIA Rules of Procedure expressly contemplate only one public debate session . . . the public consultations carried out in the EIA Process exceeded the legal requirements"); Avram ¶ 52.

⁴⁴¹ Avram ¶¶ 48-52. *See also* Mihai § V.C.2.

⁴⁴² Tănase II ¶¶ 25-26; Avram ¶¶ 53-59. *See also* Mihai §§ V.C.2, VII.C.

1. The Ministry of Environment Unlawfully Suspended the EIA Procedure

255. As Mr. Avram discusses, from June to August 2007, the Ministry of Environment convened four TAC meetings to review and assess the EIA Report and the accompanying Annex of responses to questions and comments from the public consultations.⁴⁴³ During these meetings, RMGC presented information and answered questions regarding the first four chapters of the EIA Report concerning, among other topics, the technological methods to process the ore (including the use of cyanide), waste management (including tailings management and the location and design of the TMF), potential impacts on the water, air, and soil (both within and beyond Romania's borders) and measures taken to mitigate these impacts, and RMGC's rehabilitation and closure plans.⁴⁴⁴ The TAC members therefore reviewed and assessed significant chapters of the EIA Report covering the main environmental issues and associated impacts and mitigation measures.

256. RMGC also participated in two meetings with the Romanian and Hungarian Ministries of Environment in July 2007 that focused mainly on potential cross-border impacts from the Project.⁴⁴⁵ Based on studies prepared by leading water modeling experts, RMGC explained why the Project would not impact water quality at the Hungarian border even if the exceedingly unlikely worst-case accident or overflow scenarios were ever to occur at the proposed TMF.⁴⁴⁶

257. As the EIA review procedure progressed apace, the Minister of Environment, Attila Korodi, stated publicly that "there is a possibility that by the end of this year (2007) Gabriel Resources [will] receive a final response from environmental authorities with regards to the start of the exploitation in Roşia Montană."⁴⁴⁷

⁴⁴³ Avram ¶¶ 53-59. Those TAC meetings were held on June 26, July 10, July 19, and August 9, 2007.

⁴⁴⁴ Avram ¶ 54.

⁴⁴⁵ Avram ¶ 54.

⁴⁴⁶ Avram ¶ 54.

⁴⁴⁷ *Gabriel Resources is waiting for the environmental permit to invest 2.5 billion dollars in the Apuseni Mountains*, Wall-Street ro, dated Apr. 18, 2007 (Exh. C-543) (Minister of Environment Attila Korodi).

258. Minister Korodi was one of the leaders of an influential minority political party, the Democratic Union of Hungarians in Romania (“UDMR”).⁴⁴⁸ As discussed above, Hungary had announced its opposition to the Project as early as June 2004 and had publicly reiterated its objections and urged the Romanian authorities in October 2006 to reject the Project without even awaiting the conclusions of the IGIE report that Romania and Hungary had jointly commissioned.⁴⁴⁹ Echoing Hungary’s views, UDMR’s President, Markó Béla, had announced in December 2005 at a meeting with Hungarian NGOs attended by Mr. Korodi, then a Ministry of Environment State Secretary, that UDMR also opposed the Project.⁴⁵⁰

259. The opposition of Hungary and UDMR intensified as the EIA procedure advanced.⁴⁵¹ Following statements by Hungarian officials that Hungary would “use all legal means to stop Romania from continuing the Roșia Montană project,”⁴⁵² UDMR co-sponsored legislation in the Romanian Parliament in February 2007 to ban the use of cyanide in gold and silver mining projects, although not in other projects or for other uses.⁴⁵³ As Mr. Avram and Professor van Zyl observe, and as numerous Romanian officials confirmed, such a ban would have made it impossible for RMGC to implement the Project because the ore at Roșia Montană can only be processed efficiently and economically using cyanide.⁴⁵⁴

260. Minister Korodi publicly encouraged NGOs opposed to the Project to lobby Romanian politicians to enact the proposed cyanide ban, which he said would force RMGC “to change its technological process, and in this manner the Mining Project shall be blocked.”⁴⁵⁵

⁴⁴⁸ Tănase II ¶ 23; Avram ¶ 55.

⁴⁴⁹ See *supra* § IV.B.3. See also Avram ¶¶ 39-40, 55-57; Tănase II ¶¶ 23-24.

⁴⁵⁰ Tănase II ¶ 23.

⁴⁵¹ Tănase II ¶ 24; Avram ¶¶ 55-57.

⁴⁵² *Hungary will use all legal means to stop the Rosia Montana project*, Actmedia.eu, dated Jan. 11, 2007 (Exh. C-425) (reporting statements Gyula Hegyi, a Hungarian member of the European Parliament).

⁴⁵³ Tănase II ¶ 24; Avram ¶ 56.

⁴⁵⁴ Avram ¶ 56; van Zyl § IV.C. See also *supra* § IV.B.1.a (discussing RMGC’s approach to cyanide use and reasons therefore); *generally infra* § VIII.B (discussing statements and testimony of Government officials regarding cyanide use, including e.g. Minister of Environment Rovana Plumb, TAC Vice President Rovana Plumb, and NAMR President Ștefan Hârșu).

⁴⁵⁵ *The Government tries to ban Roșia Montană through a Law*, 9am.ro, dated June 8, 2007 (Exh. C-544) (Minister of Environment Korodi).

Consistent with the public statements of Hungarian officials,⁴⁵⁶ Minister Korodi stressed that it was “extremely important that a widespread impeachment campaign [against the use of cyanide] should unfold through cooperation of NGOs in August,” and that the draft legislation needed to be enacted urgently because “[t]he authorisation process for Roşia Montană mining project is expected to be concluded at the end of summer or in autumn.”⁴⁵⁷

261. NAMR, the central mining authority, opposed the proposed cyanide ban and the Romanian Parliament eventually rejected it.⁴⁵⁸ NAMR advised Parliament that RMGC’s proposed processing technology for the Project was safe, widely used in gold mines throughout the world, and “the best available techniques (BAT) for the mining industry in Romania,” that there was “no economic efficient alternative” to cyanide, and that the draft legislation would damage the economy and was “obviously intended only to prevent the accomplishment of certain mining projects to be developed in Romania.”⁴⁵⁹

262. On July 30, 2007, the Ministry of Environment informed RMGC that the Ministry was unable to continue the EIA procedure purportedly because one of the urbanism certificates issued to RMGC by the Alba County Council (“UC 78/2006”) had been suspended by a court in Cluj following a challenge by an NGO that opposed the Project.⁴⁶⁰

263. As Professor Mihai explains in his legal opinion, an urbanism certificate is an informative document issued by local authorities in the area where construction activities are proposed to be undertaken that describes the permits and legal endorsements that will be needed

⁴⁵⁶ *Open letter from EP Representative Péter Olajos to Minister Attila Korodi*, erdely.ma, dated June 14, 2007 (Exh. C-458) (Péter Olajos, a Hungarian member of the European Parliament, urging that the proposed cyanide ban “be discussed in an emergency procedure before the summer vacation of the legislature” and proclaiming that “the Romanian Government finally developed a supporting position in this matter!”).

⁴⁵⁷ *The Roşia Montană (Verespatak) project approval process will soon be concluded – Attila Korodi*, MTI.hu, dated July 16, 2007 (Exh. C-545). See also *Interview with Environment Minister Atilla Korodi*, Economic Weekly Capital, July 18, 2007 (Exh. C-546) at 1 (“The Roşia Montană project is subject to a period of assessment which will most likely be completed this summer.”).

⁴⁵⁸ Tănase II ¶ 24; Avram ¶ 57.

⁴⁵⁹ Letter from NAMR to Chairman of Economic, Industries, and Services Commission dated May 8, 2007 (Exh. C-547) at 3-4. The European Commission subsequently rejected a proposed EU-wide ban on cyanide for similar reasons. See Answer given by EU Commissioner of Environment Janez Potočnik on behalf of the Commission dated June 23, 2010 (Exh. C-513).

⁴⁶⁰ Letter No. 12117 from Ministry of Environment to RMGC dated July 30, 2007 (Exh. C-1754).

to obtain a construction permit.⁴⁶¹ An urbanism certificate neither creates rights or obligations for the applicant to obtain the legal endorsements or permits listed, nor affects the rights of third parties; it merely describes, for information purposes, the legal regime applicable to a given proposed project site and must be issued by the local authority to any potential developer upon request.⁴⁶² As the Government acknowledged in March 2013 through an Inter-Ministerial Commission, there is no requirement for an environmental permit applicant to maintain an urbanism certificate throughout the EIA procedure.⁴⁶³ For these reasons, Professor Mihai explains, there was no legal basis for the Ministry of Environment to claim that RMGC needed to maintain an urbanism certificate to continue the EIA procedure.⁴⁶⁴

264. RMGC objected to the Ministry of Environment's claim that an urbanism certificate was required to continue the EIA procedure, but also wished to move forward expeditiously with the EIA review process. In that regard, the Alba County Council already had issued a new urbanism certificate ("UC" 105/2007") to RMGC on July 27, 2007.⁴⁶⁵ RMGC therefore promptly submitted UC 105/2007 to the Ministry of Environment in response to its claim on July 30, 2007 that the EIA procedure could not continue.⁴⁶⁶

265. Also on July 30, 2007, Romania published an amendment to its Administrative Litigation Law, which took effect three days later on August 2, 2007, providing that a newly

⁴⁶¹ Mihai § VII.C.1.

⁴⁶² Mihai § VII.C.1.

⁴⁶³ The Inter-Ministerial Commission was chaired by Ms. Maya Teodoriu, who was then a State Secretary in the Department of Infrastructure Projects and is now a judge on Romania's Constitutional Court. The Commission affirmed that there is no need to maintain an urbanism certificate during the EIA procedure. *See infra* § VIII.A.1; Tănase II ¶¶ 147-156; Draft Informative Note on the Activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 6-7. *See also* Mihai § VII.C.1.

⁴⁶⁴ Mihai § VII.C.1.

⁴⁶⁵ Urbanism certificates must be issued by the authorities upon request; non-issuance of an urbanism certificate is not permitted. *See* Mihai ¶ 317.

⁴⁶⁶ Letter from Gabriel and RMGC to Ministry of Environment dated July 30, 2007 enclosing Urbanism Certificate No. 105/2007 dated July 27, 2007 (Exh. C-1764).

issued administrative deed was suspended *ipso jure* if it had the same contents as an earlier administrative deed that had been suspended by a court.⁴⁶⁷

266. On September 12, 2007, the Ministry of Environment informed RMGC that it had suspended the EIA procedure purportedly on the basis of the new amendment to the Administrative Litigation Law even though that amendment did not take effect until after the new urbanism certificate had been issued by local authorities and submitted to the Ministry of Environment.⁴⁶⁸ Minister Korodi announced the suspension at a press conference on September 13, 2007, and the Hungarian Minister of Environment celebrated the announcement in a parallel press conference the same day.⁴⁶⁹ UDMR's President, Markó Béla, also praised Minister Korodi for suspending the EIA procedure.⁴⁷⁰

267. The Ministry of Environment maintained that the EIA procedure could not continue because, in its view, UC 105/2007 was suspended *ipso jure* as it concerned the same area of land and therefore had the same content as UC 78/2006, which had earlier been suspended.⁴⁷¹

268. Gabriel and RMGC strongly disputed the asserted basis for the suspension of the EIA procedure as clearly pretextual and unlawful.⁴⁷² The President of the Alba County Council, which issued UC 105/2007, stated publicly that in the County Council's view UC 105/2007 was valid, and he objected to the Ministry of Environment's unilateral decision to ignore it.⁴⁷³ The

⁴⁶⁷ Mihai § VII.C.2 (discussing Art. 14 para. (5) of the Administrative Litigation Law as amended on August 2, 2007).

⁴⁶⁸ Letter No. 12371 from Ministry of Environment to RMGC dated Sept. 12, 2007 (Exh. C-548).

⁴⁶⁹ Avram ¶ 59.

⁴⁷⁰ *Sulfina Barbu receives the title of "Citizen of Honor" of Zlatna*, Monitorulej ro, dated Nov. 4, 2007 (Exh. C-452) (former Minister of Environment Sulfina Barbu stating that she "heard Markó Béla, the leader of his political party, praising Attila Korodi for being on the list for the European Parliament "precisely because he opposed the Roșia Montană project").

⁴⁷¹ Letter No. 12371 from Ministry of Environment to RMGC dated Sept. 12, 2007 (Exh. C-548).

⁴⁷² [REDACTED] See also Gabriel Press Release dated Sept. 13, 2007 (Exh. C-1473) (Alan Hill, President and CEO of Gabriel and Chairman of the Board of RMGC at that time, objecting to the suspension as "outrageous" and "seem[ing] to display a total disregard for the rule of law in Romania").

⁴⁷³ *Alba county is battling the minister of Environment for Roșia Montană*, Gandul.info, dated Sept. 14, 2007 (Exh. C-829) (Alba County Council President Ion Dumitrel: "The certificate issued by the Alba County

former Minister of Environment also criticized Minister Korodi for following UDMR's political position and finding a way "to stop the assessment procedure."⁴⁷⁴

269. As Professor Mihai explains, the Ministry of Environment's suspension of the EIA procedure was unlawful and "not even reasonably supportable."⁴⁷⁵ An urbanism certificate is not an administrative deed within the meaning of the Administrative Litigation Law and is not subject to judicial challenge.⁴⁷⁶ The Administrative Litigation Law also was amended *after* UC 105/2007 was issued to RMGC and thus could not be applied retroactively to nullify a pre-existing legal act.⁴⁷⁷ In addition, even assuming *arguendo* that an urbanism certificate were an administrative deed and that the amendment to the Administrative Litigation Law were applicable to UC 105/2007, a decision as to its validity or its *ipso jure* suspension could only be made by a court, not by the Ministry of Environment.⁴⁷⁸ The Ministry of Environment therefore acted without authority or legal basis in treating UC 105/2007 as suspended and in discontinuing the EIA procedure.⁴⁷⁹

270. RMGC filed an administrative complaint against the Ministry of Environment, Minister Korodi, and State Secretary, Silviu Stoica (the TAC President), requesting that the court

Council for Roşia Montană Gold Corporation on July 27th is perfectly legal. Minister Korodi stepped over the authority of the local public administration and acted as the court.").

⁴⁷⁴ *Sulfina Barbu receives the title of "Citizen of Honor" of Zlatna*, Monitorulej ro, dated Nov. 4, 2007 (Exh. C-452) (former Minister of Environment Sulfina Barbu stating that Minister Korodi "has a biased attitude" that he concealed as State Secretary, and that he "simply found a subterfuge to stop the assessment procedure" and follow "UDMR's party line," which "opposes the project"). *See also* [REDACTED] (observing that the Project was continuously blocked whenever Mr. Attila Korodi was Minister of Environment).

⁴⁷⁵ Mihai ¶¶ 259-260, 311. *See also generally id.* § VII.C (explaining that the 2007-2010 suspension was "unlawful and ungrounded").

⁴⁷⁶ Mihai § VII.C.2.

⁴⁷⁷ Mihai § VII.C.2. *See also id.* ¶ 324 (explaining that it is a "basic principle of Romanian law" set forth in its Constitution that "laws do not have retroactive effects").

⁴⁷⁸ Mihai § VII.C.2.

⁴⁷⁹ Mihai § VII.C.2.

order the Ministry of Environment to resume the EIA procedure and order the defendants jointly to pay damages incurred by RMGC as a result of the illegal suspension.⁴⁸⁰

271. As discussed below, while RMGC's complaint was pending, on April 30, 2010 the Alba County Council issued a new urbanism certificate ("UC 87/2010"), which the Ministry of Environment (by then under different leadership) accepted for purposes of restarting the EIA procedure.⁴⁸¹ Although essentially the same circumstances prevailed in 2010 as in 2007 (a new urbanism certificate issued while all prior urbanism certificates were judicially suspended), the Ministry of Environment did not object to the validity of UC 87/2010 or suggest that it was suspended *ipso jure* due to the earlier suspension of urbanism certificates issued to RMGC, "which reveals the arbitrariness of its 2007 decision."⁴⁸²

272. Following the three-year delay from 2007-2010, the Ministry of Environment eventually conditioned restarting the EIA procedure on, among other things, RMGC withdrawing its claims for damages against the Ministry and Messrs. Korodi and Stoica, which RMGC agreed to do.⁴⁸³

2. The Ministry of Environment Unlawfully Withheld Dam Safety Permits for the Project from 2007-2010 Even Though the Ministry's Technical Experts Unanimously and Repeatedly Recommended That the Permits Be Issued

273. [REDACTED] during the suspension of the EIA procedure from 2007-2010, the Ministry of Environment also refused without basis to issue Dam Safety Permits to RMGC for the "Cetate Dam," which was to capture and treat acid rock drainage, and for the

⁴⁸⁰ Tănase II ¶¶ 25-26; Avram ¶ 60; Preliminary Administrative Complaint from Mușat & Asociații on behalf of RMGC to Ministry of Environment dated Sept. 21, 2007 (Exh. C-818); RMGC Administrative Complaint filed with Bucharest Court of Appeal dated Nov. 16, 2007 (Exh. C-918).

⁴⁸¹ See *infra* § V.D.1.

⁴⁸² Mihai § VII.C.3.

⁴⁸³ See *infra* § V.D.1; [REDACTED] Notably, the Ministry of Environment acted abusively and unlawfully by requiring RMGC to give up its legal rights in relation to its claims regarding the unlawful EIA suspension as a condition for recommending the EIA procedure. In any event, in view of the recommencement of the EIA procedure, RMGC's request for the court to order the resumption of that procedure was mooted before the court issued a final ruling on the matter. See Mihai ¶ 310.

“Corna Dam,” which consisted of the tailings management facility starter dam and a secondary containment dam.⁴⁸⁴

274. The Cetate and Corna Dams were designed by a team from MWH, a global leader in technical engineering and dam construction services, and the technical designs were prepared by the Romanian technical design firm Ipromin.⁴⁸⁵ Multiple engineering experts who were certified or appointed by the Ministry of Environment separately reviewed and endorsed the technical designs for both the Cetate and Corna Dams, finding that the designs complied with the best engineering practices in the field and with the safety requirements of Romanian law, and accordingly recommended the issuance of Dam Safety Permits for both dams.⁴⁸⁶ The Executive Committee of the Romanian National Committee for Large Dams, a professional association that specializes in evaluating dam safety, also analyzed the studies and investigations relevant to the safety of the Cetate and Corna Dams and unanimously agreed that the Project was feasible with regard to dam safety.⁴⁸⁷

275. On April 3, 2007, the Central Commission for Endorsement of the Assessment Documentation of Dams Safety (“Central Commission”), a consultative body responsible for issuing a mandatory endorsement (if warranted) that serves as the expert technical basis to substantiate the Ministry of Environment’s decision to issue Dam Safety Permits, voted unanimously to endorse the dam safety assessment documentation for both the Cetate and Corna Dams and to recommend that Dam Safety Permits be issued for both dams.⁴⁸⁸ The Central Commission prepared draft endorsements and draft Dam Safety Permits that it submitted to Ministry of Environment State Secretary Lucia Ana Varga, who was responsible for signing the

⁴⁸⁴ [REDACTED]

⁴⁸⁵ Szentesy ¶ 64. *See also* Corser § 3.1; Tănase II ¶ 27.

⁴⁸⁶ Szentesy ¶¶ 63-66 (discussing the endorsements of Professor Dan Stematiu and Professor Mircea Șelărescu, both of whom were certified as experts by the Ministry of Environment, as well as the technical assessment of Professor Eugeniu Luca, an independent expert appointed by the Ministry of Environment).

⁴⁸⁷ Szentesy ¶ 66.

⁴⁸⁸ [REDACTED] reflecting the Central Commission’s unanimous vote to endorse the dam safety assessment documentation and to recommend that a Dam Safety Permit be issued for the Cetate Dam, [REDACTED]

[REDACTED] *See also* CONSIB Letter No. 138.367/AAA to RMGC dated July 10, 2008 attaching Minutes of Central Commission meeting dated Apr. 3, 2007 (Exh. C-956) at 4.

endorsements and issuing the permits.⁴⁸⁹ In view of the Central Commission’s decision to endorse the Dam Safety Permits, the Ministry of Environment was obligated to sign the endorsements within one week and to issue the Dam Safety Permits to RMGC within 10 days thereafter.⁴⁹⁰ State Secretary Varga, however, refused to sign the endorsements or to issue the Dam Safety Permits as required.⁴⁹¹

276. RMGC filed a preliminary administrative complaint against the Ministry of Environment in March 2008 for refusing to issue the Dam Safety Permits despite the Central Commission’s unanimous endorsement decision and recommendation.⁴⁹² On March 26, 2008, the Central Commission held an “extraordinary meeting” in which it again voted unanimously to endorse and issue the Dam Safety Permits.⁴⁹³ State Secretary Varga again refused to sign the endorsements and the Dam Safety Permits for the Cetate and Corna Dams as the law required.⁴⁹⁴

277. [REDACTED]

⁴⁸⁹ Szentesy ¶ 68; Draft Endorsement of the Central Commission on the documentation of the Corna Dam and Draft Safety Permit for Corna Dam No. 14 dated Apr. 10, 2007 (Exh. C-816); Draft Endorsement of the Central Commission on the documentation of the Cetate Dam and Draft Safety Permit for Cetate Dam No. 15 dated Apr. 10, 2007 (Exh. C-815).

⁴⁹⁰ Mihai ¶ 423, n.270. *See also* Szentesy ¶ 68.

⁴⁹¹ Szentesy ¶ 68. *See also* Mihai ¶ 423, n.270.

⁴⁹² Szentesy ¶ 70; Tănase II ¶ 27.

⁴⁹³ Szentesy ¶ 70; Tănase II ¶ 28; Minutes of Central Commission Meeting dated Mar. 26, 2008 (Exh. C-523) at 3. Soon after the meeting, State Secretary Varga stamped and signed endorsement notes that had been prepared a year earlier by the Vice President and Secretary of the Central Commission in advance of the first endorsement meeting. *See* Szentesy ¶ 70; Endorsement Note No. 111161/AA for Assessment of the Safe Operation of the Corna TMF Technical Design dated Mar. 29, 2007 (Exh. C-524) (signed and stamped by State Secretary Varga); Endorsement Note No. 111161/AA for Assessment of the Safe Operation of the Cetate Acid Waters Dam Technical Design dated Mar. 29, 2007 (Exh. C-964) (signed and stamped by State Secretary Varga). The endorsements were faxed to RMGC on March 27, 2008, one day after the second endorsement meeting.

⁴⁹⁴ Szentesy ¶ 70; Tănase II ¶ 28.

⁴⁹⁵ [REDACTED]

[REDACTED]

278. In September 2008, RMGC filed an administrative complaint against the Ministry of Environment for unlawfully withholding the Dam Safety Permits.⁴⁹⁷ Eventually, the Bucharest Court of Appeal and the High Court of Cassation and Justice both ruled in RMGC's favor and ordered the Ministry of Environment to issue the Dam Safety Permits.⁴⁹⁸ The Ministry of Environment finally issued the permits on June 29, 2010, the same day it also announced its intention to restart the EIA procedure.⁴⁹⁹

279. During the preceding three years, however, the Project remained blocked by high-level political interference.⁵⁰⁰ Due to the significant uncertainty resulting from the suspension of the EIA procedure and the blocking of permitting generally, RMGC implemented necessary and significant cost reductions, as Mr. Tănase discusses.⁵⁰¹

B. Following the Unlawful Suspension of the EIA Procedure, RMGC Had to Suspend Its Land Acquisition Program, but Already Had Acquired Rights to Use the Majority of the Land Needed for Project Development

280. As noted above, RMGC began in 2002 to acquire properties within the Project footprint.⁵⁰² These acquisitions were made on a "willing buyer/willing seller" basis using the compensation guidelines established in the RMGC's Resettlement and Relocation Action Plan.⁵⁰³ By February 2008 when RMGC suspended its land acquisition program due to

⁴⁹⁶ [REDACTED]

⁴⁹⁷ Szentesy ¶ 72; Tănase II ¶ 28; RMGC Administrative Complaint filed with Bucharest Court of Appeal dated Sept. 5, 2008 (Exh. C-845).

⁴⁹⁸ Szentesy ¶¶ 72; Bucharest Court of Appeal decision dated Feb. 3, 2009 (Exh. C-951); Decision No. 2888 of the High Court of Cassation and Justice in File No. 5277/2/2008 dated June 1, 2010 (Exh. C-1600).

⁴⁹⁹ See *infra* § V.D.1; Tănase II ¶ 49; Szentesy ¶ 72.

⁵⁰⁰ [REDACTED]

⁵⁰¹ Tănase II ¶¶ 30-34.

⁵⁰² The process of land acquisition first required RMGC to resource a major project to update the very old land records and establish legally the owners of each affected property. Lorincz ¶¶-46-47 (explaining that this was a massive and time-consuming undertaking).

⁵⁰³ Resettlement and Relocation Action Plan Vol. 1 (Exh. C-463) ¶¶ 0.3, 3.4.1, 3.59; Lorincz ¶ 26.

uncertainties regarding the future of the Project in light of the unlawful suspension of the EIA procedure in September 2007, RMGC already had successfully acquired properties from approximately 78% of the households representing approximately 990 hectares within the Project-impacted area.⁵⁰⁴

281. Of these 794 households, 143 already had left Roșia Montană at the time of purchase, 501 chose to relocate to other areas, and the vast majority of the remaining 150 opted to move to the modern Recea community developed by RMGC in Alba Iulia.⁵⁰⁵

282. As explained by Ms. Lorincz, RMGC broke ground in Recea in 2007 and the first families moved there in April 2009.⁵⁰⁶ Eventually, 132 families moved to the 22-hectare Recea residential neighborhood, which was one of the first real estate development projects in Romania constructed from the beginning with completely modern infrastructure (e.g., underground water, gas, electricity, sewer, and approximately 10km of roads and pavement). In addition to homes, RMGC also built a new church for the Orthodox community in Recea and an accompanying parish house.⁵⁰⁷

283. As of February 2008, surface rights to approximately 500 hectares of land remained to be acquired for Project development.⁵⁰⁸ More than half of this land was owned by

⁵⁰⁴ Resettlement and Relocation Action Plan Vol. 2 (Exh. C-464) Annex 27, ¶ 27.1.1. These numbers also include properties located in the historic area of Roșia Montană owned by private owners [REDACTED]

[REDACTED] See Lorincz ¶¶ 48-50.

⁵⁰⁵ Lorincz ¶ 49.

⁵⁰⁶ Lorincz ¶ 40, Lorincz Annex B, Slide 11 (showing photos of the inauguration ceremony for the Recea resettlement site hosted by RMGC and local authorities and attended by local priests who performed a religious dedication ceremony). Designing and developing the Recea neighborhood was a significant undertaking, involving more than 1500 workers, 12 primary construction and design companies, approximately 30 suppliers of materials, and scores of other local companies to provide various support services. See Lorincz ¶ 39, Lorincz Annex B, Slides 3-5 (showing photos of the early stages of construction of the Recea resettlement site for which RMGC hired local workers and engaged local contractors). Had the Project been implemented, RMGC intended to enhance Recea further with a community center and park, and additional houses as may have been necessary. See Lorincz ¶ 42.

⁵⁰⁷ Lorincz ¶ 41, Lorincz Annex B, Slides 7-10, 12-13, 16-18 (showing photos of the finalized construction of Recea resettlement site featuring single-level and multi-level homes and an Orthodox Church for members of the resettled congregation).

⁵⁰⁸ Lorincz ¶ 51.

private owners.⁵⁰⁹ [REDACTED]

[REDACTED]

284. [REDACTED]

[REDACTED]

285. The remainder of the land that needed to be acquired consisted of properties owned by various churches and municipal entities in Roşia Montană [REDACTED]

[REDACTED]

[REDACTED] For the foregoing reasons, RMGC was confident that had the Project received its critical environmental permit and not been unlawfully derailed by the State, RMGC would have succeeded in acquiring all surface rights necessary to implement the Project.

⁵⁰⁹ Lorincz ¶ 52.

⁵¹⁰ Lorincz ¶¶ 52-53.

⁵¹¹ Lorincz ¶ 53.

⁵¹² See Lorincz ¶ 53.

⁵¹³ [REDACTED]

⁵¹⁴ See Bîrsan § IV.C.1.

⁵¹⁵ Lorincz ¶¶ 56-58. [REDACTED]

[REDACTED] See Lorincz ¶ 55.

deposits at Roşia Montană, the Rodu-Frasin and Tarniţa deposits formed part of and contributed to the valuable rights Gabriel held and investments it made in Romania through RMGC.⁵²²

288. [REDACTED]

[REDACTED]

[REDACTED]⁵²⁵

289. [REDACTED]

[REDACTED]

⁵²² Henry ¶¶ 30-31, 143; Tănase II ¶ 234.

⁵²³ [REDACTED] SRK Report ¶ 112.

⁵²⁴ [REDACTED]; SRK Report ¶ 118 n.137.

⁵²⁵ [REDACTED]; SRK Report ¶¶ 112-113.

⁵²⁶ RSG Global, draft Tarniţa Copper Gold Project, Tarniţa Deposit – Database Review, Geological Modelling, Resource Estimate and Preliminary Mining Study Scoping Study dated Apr. 2007 (Exh. C-131-C); SRK Report ¶ 114.

⁵²⁷ RSG Global, draft Tarniţa Copper Gold Project, Tarniţa Deposit – Database Review, Geological Modelling, Resource Estimate and Preliminary Mining Study Scoping Study dated Apr. 2007 (Exh. C-131-C) Table 1.4_1 at 2; SRK Report ¶¶ 114-115.

[REDACTED]

290. Having completed exploration at Bucium and having thus identified two promising deposits for profitable development and exploitation,⁵²⁹ RMGC timely and properly applied to NAMR for the verification and registration of the resources and reserves at Rodu-Frasin and Tarnița, and for licenses to develop and exploit those deposits.⁵³⁰

291. RMGC reasonably and legitimately expected these applications to be granted promptly.⁵³¹ As Professor Bîrsan explains in detail, as holder of the Bucium Exploration License, RMGC had a direct and exclusive legal right to receive the requested exploitation licenses, and NAMR had a non-discretionary obligation to grant RMGC's applications for them in a reasonable period of time.⁵³² As discussed further below, in violation of RMGC's legal rights and of NAMR's legal obligations, NAMR has failed for the last 10 years to act on RMGC's applications for exploitation licenses for Rodu-Frasin and Tarnița, and similarly has failed to verify and register the associated resources and reserves.⁵³³ NAMR's patently unlawful and unjustified failure to act with respect to Gabriel's investments in the Bucium Projects is clearly the result of the State's more notorious, but equally unlawful and unjustified, failure to permit the Project to proceed at Roșia Montană.

⁵²⁸ RSG Global, draft Tarnița Copper Gold Project, Tarnița Deposit – Database Review, Geological Modelling, Resource Estimate and Preliminary Mining Study Scoping Study dated Apr. 2007. (Exh. C-131-C) at 3; SRK Report ¶ 115.

⁵²⁹ See SRK Report ¶¶ 116-118 (Mike Armitage and Nick Fox of the SRK Consulting Group further reviewed and confirmed the [REDACTED] and RSG analyses of the Bucium Rodu-Frasin and Tarnița deposits. SRK also observed that the contemporaneous assessments of the mineral resources for the two deposits are likely conservative in view of the relatively low metal prices assumed.).

⁵³⁰ Szentesy ¶ 124; Bîrsan § V.B.3. See also Tănase ¶ 9.

⁵³¹ See Bîrsan ¶ 357 (observing that there is “a legitimate expectation for the entity that executed the exploration to obtain exploitation rights in relation to resources discovered, for it is the exploitation of the resources that motivated the exploration efforts in the first place”); *id.* ¶ 401 (“[A]s public authority, NAMR is expected to act within a reasonable timeframe.”).

⁵³² Bîrsan §§ V.A.1, V.B.1-V.B.2, V.C.

⁵³³ See *infra* § IX.B.3.

D. The Ministry of Environment Restarted the EIA Procedure in 2010 and RMGC Made Significant Progress Toward Permitting the Project

1. Following the Three-Year Delay, the Ministry of Environment Restarted the EIA Procedure

292. During the 2007-2010 period of suspension discussed above, and particularly after the replacement of Minister Korodi in December 2008, the local communities and local officials in and around Roșia Montană urged the Government to unblock the permitting process for the Project.⁵³⁴ Economic hardship in the area had become even more severe after Minvest shut down its mining operations in Roșia Montană in 2006, and the Ministry of Environment unlawfully suspended the EIA procedure and blocked RMGC from implementing the Project and providing well-paying mining jobs to the former Minvest workers.⁵³⁵ In open letters to Government officials and appearances on nationally televised programs, local officials noted that local residents were “on the edge of despair” and implored the Government to resume the assessment of the Project.⁵³⁶

293. In July 2009, senior Government officials, including the President of Romania, Traian Băsescu, visited Roșia Montană.⁵³⁷ During his visit, President Băsescu observed the severe environmental damage in the area, and stated that he would work to find solutions to unblock the Project.⁵³⁸

⁵³⁴ Tănase II ¶¶ 35-50.

⁵³⁵ Lorincz ¶¶ 6-11, 59-60, 69-71 (noting that the salaries for the jobs created by RMGC were to be set at a level twice as high as the national average); Tănase II ¶¶ 30-32. Minvest stopped its exploitation activities at Roșia Montană due to its inability to pay its electricity bills. *See* Szentesy ¶¶ 53-56. NAMR approved Minvest’s cessation of mining activities as an affiliate under the License and RMGC’s continuation of its activities as the titleholder under the License. *See* Szentesy ¶¶ 53-56; Bîrsan § IV.A.2.

⁵³⁶ *See, e.g.*, Open Letter from Mayor of Roșia Montană to President Băsescu, Prime Minister Boc, Minister of Environment Nemirschi et al. dated Feb. 20, 2009 (Exh. C-906) at 2 (noting that local residents were “on the edge of despair” and asking to resume the assessment which “was blocked”); *Judetual alba*, Money Channel, dated Apr. 10, 2009 (Exh. C-847) (Roșia Montană Mayor Eugen Furdul stating that, “unfortunately, as the assessment was blocked, they conduct no activity,” and Alba Iulia Mayor Mircea Hava stating that the Project “must be started”).

⁵³⁷ Tănase II ¶ 38.

⁵³⁸ Tănase II ¶ 38; News report of President Băsescu’s visit to Roșia Montană, dated July 19, 2009 (Exh. C-1500) (President Traian Băsescu stating that objections to the Project reflected “a lack of understanding the reality”).

294. Following the President's visit, the Minister of Economy, Adriean Videanu, stated that he wanted the Project "to start as soon as possible."⁵³⁹ During a visit to Roșia Montană on March 25, 2010, Minister of Economy Videanu repeated that the assessment for the Project needed to resume and he criticized the Government for blocking the Project:

I believe the project shouldn't be blocked administratively, namely to start the evaluation for absolutely all the permits necessary . . . But blocking it administratively is in my opinion the most unfavorable thing, for both the respective project and for Romania, overall . . . If I block a project administratively, without having the courage to make a decision, I only weaken the confidence of potential investors in these mineral resources in Romania . . . I believe we should . . . make the assessment and not . . . block it administratively. This is, from the point of view of the Ministry of Economy, which is shareholder in this project through Minvest.⁵⁴⁰

295. Minister Videanu invited RMGC to a meeting of senior Government officials at the Ministry of Economy on April 28, 2010 to discuss moving the Project forward.⁵⁴¹ The meeting was attended by the Prime Minister, the Minister of Economy, the Minister of Culture, the Minister of Environment, the NAMR President, other senior officials in the Ministries of Economy and Environment, and local officials including the President of the Alba County Council and the Mayors of Roșia Montană and Alba Iulia.⁵⁴²

296. During the meeting, the local officials urged the Government to act quickly to resume assessing the Project.⁵⁴³ [REDACTED]

⁵³⁹ *Statement of Minister of Economy Videanu*, Mediafax, dated Dec. 18, 2009 (Exh. C-849) (Acting Minister of Economy Adriean Videanu).

⁵⁴⁰ Interview of Minister of Economy Videanu, dated Mar. 25, 2010 (Exh. C-874) at 3, 5 (Minister of Economy Videanu also stating that "developing the Roșia Montană Project is perfectly in line with the European Directive regulating this sector").

⁵⁴¹ Tănase II ¶ 44.

⁵⁴² Tănase II ¶ 44.

⁵⁴³ [REDACTED]

[REDACTED] Minister Borbély also stated that he would restart the EIA procedure, but only after RMGC submitted a new urbanism certificate.⁵⁴⁵

297. Although RMGC firmly maintained its position that an urbanism certificate was not legally required to continue the EIA procedure, RMGC submitted a new urbanism certificate issued by the Alba County Council following the meeting as it was keen to resume the EIA procedure.⁵⁴⁶ For the same reason, as noted above, RMGC also agreed to the Ministry of Environment's further demand that RMGC withdraw its claims for damages filed against the Ministry and Messrs. Korodi and Stoica for suspending the EIA procedure in 2007.⁵⁴⁷

298. The Ministry of Environment thereafter scheduled a TAC meeting in September 2010 to review the EIA Report, ending the three-year suspension of the EIA procedure.⁵⁴⁸

2. RMGC Submitted Updates to the EIA Report and the Project Feasibility Study and Made Significant Progress Toward Permitting

299. During the months that followed recommencement of the EIA procedure, RMGC made significant progress towards permitting the Project.⁵⁴⁹

300. As discussed above, after Romania's High Court of Cassation and Justice ordered the Ministry of Environment to issue Dam Safety Permits for the Corna Dam and the Cetate Dam following the Ministry of Environment's unlawful refusal in 2007-2008 to do so,⁵⁵⁰ on June 29,

⁵⁴⁴ [REDACTED]

⁵⁴⁵ [REDACTED]

⁵⁴⁶ Tănase II ¶ 46; Urbanism Certificate No. 87 dated Apr. 30, 2010 (Exh. C-808). *See also* Mihai § VII.C.1 (explaining that there is “no basis in the law” for the Ministry of Environment's position that a renewed urbanism certificate was needed to continue the EIA procedure).

⁵⁴⁷ [REDACTED]

⁵⁴⁸ Tănase II ¶ 50; Avram ¶¶ 60-63. *See also* Mihai §§ V.C.3-4.

⁵⁴⁹ Avram ¶¶ 64-84; Tănase II ¶¶ 51-57; Henry ¶¶ 16-19.

⁵⁵⁰ *See supra* § V.A.2; Szentesy ¶¶ 70-73; Tănase II ¶ 49.

2010 the Ministry issued Dam Safety Permits certifying the safety of the structural design for both dam projects and acknowledging their compliance with legal requirements.⁵⁵¹

301. As to the EIA procedure, at the Ministry of Environment's request, RMGC submitted updates to each chapter of the EIA Report as well as studies conducted during the three-year suspension.⁵⁵²

302. RMGC also submitted to NAMR a further update to the Feasibility Study prepared by Ipromin, together with an updated Exploitation Development Plan and other Technical Documentation which did not, however, change the amount of the resource and reserve calculations set forth in the earlier 2006 Feasibility Study and Technical Documentation.⁵⁵³

303. From September 2010 to March 2011, RMGC participated in three Technical Assessment Committee or TAC meetings during which the TAC members made significant progress in reviewing the EIA Report.⁵⁵⁴ As discussed by Messrs. Avram and Tănase, it was apparent during these meetings that the representatives from nearly all of the TAC members, including the Ministry of Environment, responded positively to RMGC's approach to addressing the key environmental and cultural heritage issues, and also to the quality of the underlying studies and analyses prepared by leading internationally recognized external experts in relation to

⁵⁵¹ Dam Safety Permit No. 27 dated June 29, 2010 (Exh. C-955) (Corna Dam); Dam Safety Permit No. 28 dated June 29, 2010 (Exh. C-954) (Cetate Dam). These permits subsequently were re-issued in 2012 and 2014. *See* Dam Safety Permit No. 27/2 dated Apr. 18, 2012 (Exh. C-511); Dam Safety Permit No. 28/2 dated Apr. 18, 2012 (Exh. C-809); Dam Safety Permit No. 27/3 dated Dec. 2, 2014 (Exh. C-433); Dam Safety Permit No. 28/3 dated Dec. 2, 2014 (Exh. C-590).

⁵⁵² Avram ¶¶ 64-70; Tănase II ¶¶ 51-53. *See also* Henry ¶¶ 16-19.

⁵⁵³ As Ms. Szentesy discusses, RMGC retained Ipromin in July 2009 to prepare these updates to address questions raised during the earlier TAC meetings in 2007 and in discussions with NAMR representatives. While RMGC already had responded to these questions in correspondence and technical memoranda submitted to NAMR and in oral responses to questions raised during the TAC meetings, RMGC decided to consolidate its responses in a further update to the Feasibility Study and Technical Documentation, which RMGC submitted to NAMR on February 4, 2010. *See* Szentesy ¶¶ 51-52.

⁵⁵⁴ Avram ¶¶ 64-77; Tănase II ¶¶ 51-55. *See also* Henry ¶ 18.

the EIA Report and the various aspects of the Project.⁵⁵⁵ None of the Ministries represented in the TAC raised objections to the Project's design or planned implementation.⁵⁵⁶

304. Two State institutions that were invited by the Ministry of Environment to participate as members of the TAC members, the Romanian Academy and the Geological Institute of Romania, opposed the Project on grounds seemingly unrelated to, and that did not reflect any meaningful engagement with, the Project's technical merits addressed in detail in the EIA Report.⁵⁵⁷ As Professor Mihai explains in his legal opinion and as summarized above, however, representatives of these entities could not effectuate the equivalent of a "heckler's veto" because the decision to issue the environmental permit was to be made by the Ministry of Environment, and there was no requirement that all of the TAC members agree with issuing the environmental permit for the Ministry to recommend its issuance.⁵⁵⁸

305. Representatives of other TAC members, including the Ministry of Environment State Secretary who was the TAC President, criticized and grew increasingly exasperated by the Romanian Academy and the Geological Institute of Romania for their repetitive, baseless objections on issues that the TAC members already had addressed, including the use of cyanide to process the ore and the Corna Valley location of the TMF.⁵⁵⁹ Based on these comments and the progress made at the TAC meetings, the TAC members were not only annoyed, but were clearly unpersuaded by the Romanian Academy's and Geological Institute's views. It therefore

⁵⁵⁵ Avram ¶¶ 74; Tănase II ¶ 54.

⁵⁵⁶ Avram ¶¶ 74; Tănase II ¶ 54.

⁵⁵⁷ Avram ¶¶ 74-77; Szentesy ¶¶ 74-79; Tănase II ¶ 55.

⁵⁵⁸ *See supra* § IV.A.1; Mihai §§ IV.C.2.4, IV.C.3.3.3.

⁵⁵⁹ *See, e.g.*, Transcript of TAC meeting dated Mar. 9, 2011 (Exh. C-483) at 6, 12-13 (TAC President Marin Anton responding to repetitive objections of the Romanian Academy representative regarding the use of cyanide to process the ore: "No, well, they [RMGC] have told us last time, very many times. I understood exactly why they have chosen it. So yes, it's ok . . . I understood [a] long time ago . . . I am a chemical engineer and I know what I am talking about. It is really a safe process, and only certain people made the public believe that cyanide is that dangerous. Taking into account how the technology was presented, it is absolutely safe in my opinion."); *id.* at 18-19 (TAC President Anton admonishing the Geological Institute of Romania representative, Ștefan Marincea, to "stop bringing cyanide up for entertainment" and to "[t]urn off the microphone and [keep] strictly to the questions"); *id.* at 24 (TAC President Anton interrupting Mr. Marincea's further comments on cyanide and stating: "[W]e've been discussing it here forever, we can go on and on ad infinitum. If strictly related to the chapter on cyanide management, if the TAC members still have questions – so that we can conclude the topic and move on to the next set of questions in respect to large chapters. No more, thank you.").

appeared that the Ministry of Environment would soon decide to issue the environmental permit.⁵⁶⁰

306. In parallel with the EIA procedure, RMGC participated in a separate Strategic Environmental Assessment procedure that was required in order to obtain the regional environmental authority's endorsement of the proposed updated land planning documentation (the zonal urbanism plan or PUZ) for the Project's industrial area.⁵⁶¹ As Mr. Avram describes, the Strategic Environmental Assessment procedure involved the preparation of an independent report on environmental impact (prepared by the Romanian subsidiary of the global technical consultancy AMEC), public consultations in Roșia Montană and neighboring Abrud, Bucium, and Câmpeni, transboundary consultations with Hungary, and an analysis and assessment of potential impacts and proposed mitigation measures by local and regional representatives of many of the same authorities involved in the EIA procedure.⁵⁶²

307. Following a five-year procedure that lasted several years longer than it should have in view of what is typical for similar industrial projects,⁵⁶³ the regional environmental authority, the Sibiu EPA, issued the Strategic Environmental Assessment Endorsement of the proposed updated PUZ in March 2011.⁵⁶⁴

⁵⁶⁰ Tănase II ¶ 57; Avram ¶ 77.

⁵⁶¹ As discussed above, the zonal urbanism plan, or PUZ, is town planning documentation that must be approved by the local council before the developer applies for the construction permit(s). *See supra* § III.E.

⁵⁶² Avram ¶¶ 78-84. *See also* Tănase II ¶¶ 56-57.

⁵⁶³ Avram ¶ 84 (noting that the Strategic Environmental Assessment procedure for similar industrial projects typically lasted less than one year); Tănase II ¶ 56, n.78.

⁵⁶⁴ Decision No. 2849 of Sibiu EPA regarding issuance of the environmental endorsement dated Mar. 7, 2011 (Exh. C-598); Letter from Sibiu EPA to RMGC dated Mar. 29, 2011 (Exh. C-623).

VI. GABRIEL COMMITTED TO SIGNIFICANTLY INCREASED INVESTMENT IN CULTURAL HERITAGE IN RESPONSE TO THE MINISTRY OF CULTURE'S DEMAND

A. The Ministry of Culture Threatened to Hold Up the Key Archaeological Discharge Certificate for the Project

308. While environmental permitting progressed in 2010-2011, the Ministry of Culture in 2010 began to take steps that threatened to block the Project, which it then used as leverage to extract financial commitments from Gabriel and RMGC to increase investments in cultural heritage preservation. Once Gabriel and RMGC agreed to increase investments significantly, the Ministry of Culture appeared to lift the road blocks, but not fully.

1. The Ministry of Culture Announced It Would Seek to Include Roșia Montană on the UNESCO World Heritage List

309. Following national elections in December 2009, Kelemen Hunor, who was then Vice President (and later President) of the UDMR political party, became the Minister of Culture. By early 2010, the Ministry of Culture began taking steps that threatened to block the Project.

310. At a “Soros Foundation Romania” sponsored event in February 2010, the Minister’s Councilor, Csilla Hegedus, announced that the Ministry of Culture would seek to include Roșia Montană on the UNESCO World Heritage List,⁵⁶⁵ and Romania’s Permanent Parliamentary Commission on UNESCO resolved to support the initiative.⁵⁶⁶ This UNESCO initiative, which was being promoted by anti-Project activists, was fundamentally incompatible with the State’s issuance of the Roșia Montană License and with its earlier administrative decisions, issued through the Ministry of Culture, to archeologically discharge the majority of the Project area.⁵⁶⁷

311. The proposal to include Roșia Montană on the UNESCO World Heritage List triggered resounding opposition from the local communities in the area.⁵⁶⁸ Local community

⁵⁶⁵ Gligor ¶ 86.

⁵⁶⁶ Gligor ¶¶ 85-90; Tănase II ¶ 42.

⁵⁶⁷ [REDACTED]

⁵⁶⁸ Gligor ¶ 89. *See also* Tănase II ¶ 42; Lorincz ¶¶ 74, 81.

organizations submitted approximately 30,000 signatures and numerous letters in favor of the Project and against the UNESCO initiative.⁵⁶⁹

312. RMGC consulted with Mr. Dennis Rodwell, an ICOMOS⁵⁷⁰ member, UNESCO expert, and consultant of the UNESCO World Heritage Centre and Division of Cultural Heritage, regarding the proposal. Mr. Rodwell issued a report concluding that the proposal to place Roșia Montană on the UNESCO World Heritage List was flawed, including because it was clearly motivated by ideological opposition to the Project and was not supported by the local community.⁵⁷¹ The Parliamentary Commission on UNESCO, however, rebuffed Mr. Rodwell's report.⁵⁷² Minister of Culture Hunor stated that the UNESCO documentation for Roșia Montană was being prepared and that “the problems faced would not stop him from searching solutions in order to accept the Roșia Montană area on the UNESCO list, regardless of the different points of view.”⁵⁷³

313. As Mr. Jennings explains in his expert report submitted with this Memorial, the proposal to include Roșia Montană on the UNESCO World Heritage List in fact was not justified because, among other things, the archaeological heritage in Roșia Montană is “not unique” and is “severely degraded, poorly preserved, and heavily impacted by later mining activity,” and it

⁵⁶⁹ Open letter of the communities in Alba County and Roșia Montană dated July 21, 2010 (Exh. C-1291); Letter from Pro-Roșia Montană, Pro Dreptatea NGO and Roșia Montană Partnership for the Environment dated Aug. 31, 2010 (Exh. C-1295); Open Letter from Mayor of Roșia Montană Eugen Furdui to UNESCO Commission dated Dec. 2010 (Exh. C-1399); Open letter of the communities in Alba County and Roșia Montană dated Jan. 19, 2011 (Exh. C-1296); Open Letter from Mayor of Roșia Montană Eugen Furdui to Ministry of Culture dated Jan. 31, 2011 (Exh. C-1297).

⁵⁷⁰ ICOMOS is the International Council on Monuments and Sites. Based in Paris, it is the largest non-governmental organization dedicated to cultural heritage preservation, and is an advisory body of the World Heritage Committee for the implementation of the World Heritage Convention of UNESCO. *See* Gligor n. 74.

⁵⁷¹ Gligor ¶ 89; Dennis G. Rodwell, A Reflection on the Relevance and Suitability of Roșia Montană as a UNESCO World Heritage Site 2010 (Exh. C-689), at 1. *See also* Jennings §§ IX.A-B, ¶ 147 (observing that the UNESCO World Heritage Criteria is not met and that the proposal lacks merit).

⁵⁷² Press statement of the UNESCO Parliamentary Commission dated Nov. 30, 2010 (Exh. C-1269).

⁵⁷³ *Kelemen: the opinions to include Rosia Montana on the UNESCO list are divided, we shall try*, Mediafax.ro, dated Jan. 21, 2011 (Exh. C-1344).

therefore failed to meet the UNESCO requirements of “outstanding universal value” and of integrity.⁵⁷⁴

314. Although the UNESCO proposal did not appear to advance further, it was concerning that the Government would advance such a proposal that was fundamentally incompatible with the Roșia Montană License, the archaeological discharge certificates earlier issued by the Ministry of Culture, and the very notion of a mining project in Roșia Montană.

2. The Minister of Culture Issued the 2010 LHM with Significant, Arbitrary Changes That Enabled Anti-Project Activists to Mount Legal Challenges to Local Zoning Decisions in Support of the Project

315. In July 2010, Minister of Culture Hunor approved the updated List of Historical Monuments (“2010 LHM”), which was published in the Official Gazette on October 1, 2010.⁵⁷⁵ As Professor Schiau explains, the 2010 LHM was an update of the 2004 LHM described above.⁵⁷⁶ The law contemplated that historical monuments newly classified since 2004 were to be added and any monuments previously listed that had since been declassified were to be removed.⁵⁷⁷

316. As described above, the Ministry of Culture issued the 2004 LHM having taken into account, for the archaeological sites in Roșia Montană, the extensive archaeological research that had been performed through the Alburnus Maior National Research Program conducted by the Ministry of Culture and funded by RMGC.⁵⁷⁸ No archaeological research conducted supported any change to the descriptions of Roșia Montană’s historical monuments, nor had

⁵⁷⁴ Jennings ¶¶ 114, 147 § IX.A. *See also, e.g.*, Tănase II Annex A, Slides 11-12 (showing current dilapidated state of Roșia Montană’s historical monuments).

⁵⁷⁵ 2010 List of Historical Monuments approved by Order No. 2361 of the Ministry of Culture published in the Official Gazette 670bis dated Oct. 1, 2010 (Exh. C-1266). *See also* Gligor ¶ 91.

⁵⁷⁶ Schiau ¶¶ 119, 125, 248, n. 207. *See also supra* § III.C.1.

⁵⁷⁷ *See* Schiau §§ IV.A-B, V.C.2 (explaining the legal regime applicable to the 2010 LHM).

⁵⁷⁸ Gligor ¶¶ 42-45; Schiau § V.B.1 (describing the content of the 2004 LHM and the bases for the descriptions listed therein). *See also supra* § III.C.1.

there been any classification or declassification procedures for Roșia Montană sites since 2004. Nonetheless, the Ministry of Culture introduced several significant changes in the 2010 LHM.⁵⁷⁹

317. Specifically, whereas the 2004 LHM listed as an historical monument the “Roman galleries of Cârnic Massif, ‘Piatra Corbului’ Point” and identified its location or “address” by reference to the precise geographical “STEREO” coordinates of the monument, the 2010 LHM broadly listed this site as “Galleries of Cârnic Massif,” listed the period as including “Roman, Medieval, and Modern eras,” and identified the address generally as “Cârnic Massif.”⁵⁸⁰ Thus, the 2010 LHM apparently listed all the mining galleries in Cârnic Massif as the historical monument.

318. The 2010 LHM also changed the “address” of the two historical monuments listed from “Orlea” to “‘Orlea’, the entire locality within a 2 km radius.”⁵⁸¹

319. As Professor Schiau and ██████████ explain, the changes introduced in the 2010 LHM to the descriptions of these historic monuments lacked any legal basis and were arbitrary.⁵⁸² In particular, there had not been any classification procedure that would support listing as an historical monument additional mining galleries in Cârnic Massif.⁵⁸³ Similarly, “Orlea” is not a “locality” and the reference to a 2-km radius encompassed areas for which the Ministry of Culture already had issued archeological discharge decisions.⁵⁸⁴ Thus, the 2010 LHM also was contrary to and legally incompatible with the Ministry of Culture’s own earlier administrative decisions because an area subject to an archaeological discharge certificate cannot at the same time be designated as an historical monument.⁵⁸⁵

⁵⁷⁹ Gligor ¶¶ 92, 95; Schiau § V.C.1 (explaining the changes introduced by the 2010 LHM); *id.* ¶¶ 295-296.

⁵⁸⁰ Schiau § V.C.1; Gligor ¶ 93, n. 143-144.

⁵⁸¹ Schiau § V.C.1; Gligor ¶ 94. *See also* 2010 List of Historical Monuments Map (Exh. C-1284) (showing overlap of 2 km radius from Orlea with Project area).

⁵⁸² Schiau ¶¶ 294-299. ██████████

⁵⁸³ Gligor ¶ 95; Schiau ¶¶ 256-259.

⁵⁸⁴ Gligor ¶¶ 96; Schiau ¶¶ 251-255.

⁵⁸⁵ *See generally supra* § III.C.1; Schiau §§ II.2-3, ¶¶ 79, 116-117, 254, 300. *See also* ██████████

320. Seizing on these new arbitrary and erroneous descriptions in the 2010 LHM of the historical monuments in Roșia Montană, anti-Project activists commenced legal actions to challenge the validity of administrative acts that had been issued in view of Project development. These anti-Project NGOs claimed that administrative acts that failed to take account of the larger protected areas identified in the 2010 LHM should be annulled.⁵⁸⁶

3. The Ministry of Culture Blocked the Decision to Reissue an Archaeological Discharge Certificate for the Cârnic Underground

321. As Mr. Gligor explains, the archaeological discharge certificate that had been granted by the Ministry of Culture for the Cârnic underground area had been annulled by a court decision in 2008 with which RMGC disagreed.⁵⁸⁷ The archaeological discharge certificate for this area was critical for the Project, as the Project likely would not have been economically feasible if Cârnic were to have been removed from the Project footprint.⁵⁸⁸

322. RMGC prepared and submitted a renewed application for the Cârnic archaeological discharge certificate and supplemented it in June and October 2010 with archaeological reports and endorsements, all of which clearly supported issuance of the discharge certificate.⁵⁸⁹ The application was fully supported by Dr. Beatrice Cauuet of the

⁵⁸⁶ [REDACTED] The NGOs brought challenges based on the errors in the 2010 LHM against the strategic environmental assessment endorsement issued in March 2011 and the archaeological discharge certificate for Cârnic issued in July 2011. *See also generally* Schiau § VI (discussing the legal challenges brought relying on the 2010 LHM and RMGC's legal challenges against the 2010 LHM). *See also supra* ¶ 319 n. 564. In view of the legal challenges brought by NGOs in reliance on the 2010 LHM, RMGC submitted administrative complaints to the Ministry of Culture and the National Institute of Heritage over the unjustified refusal to rectify the errors in the 2010 LHM, and also initiated court proceedings seeking the correction of the errors and a declaration that the descriptions in the 2010 LHM were issued in violation of the applicable procedure and that the correct descriptions were found in the 2004 LHM. RMGC later decided to withdraw its legal challenges following the commencement of this arbitration. *See* Gligor ¶ 160.

⁵⁸⁷ [REDACTED]

See also Schiau ¶ 331 (observing that the court's annulment of the archaeological discharge certificate was improper as it was based on a review of the expert evaluation that the National Archaeology Commission and the Ministry of Culture had conducted, which exceeded the court's competence); Henry ¶ 21.

⁵⁸⁸ Henry ¶ 20; Avram ¶ 10.

⁵⁸⁹ Gligor ¶ 100; Tănase II ¶ 59; Henry ¶ 22.

University of Toulouse, one of the world's leading authorities on mining archeology, and Dr. Paul Damian of the National History Museum of Romania, both of whom played leading roles in conducting the Alburnus Maior National Research Program and so were the foremost experts on the subject.⁵⁹⁰

323. Although the Ministry of Culture was required to issue a decision on RMGC's application for the archaeological discharge certificate within three months,⁵⁹¹ the Ministry failed to act on the application and many months passed without decision.⁵⁹²

324. [REDACTED]

[REDACTED]⁹³ Thus, it was clear that the Ministry of Culture accepted that an archaeological discharge decision for Cârnic, consistent with its prior decision,⁵⁹⁴ was supported on the merits, but the Ministry was withholding the decision.

⁵⁹⁰ Tănase II 59; Gligor ¶¶ 100, n. 156. *See also* Gligor ¶¶ 18, 16.

⁵⁹¹ Schiau ¶ 83.

⁵⁹² Gligor ¶¶ 100-104; Tănase II ¶ 59.

⁵⁹³ [REDACTED] *See also* [REDACTED]

⁵⁹⁴ *See* Gligor ¶¶ 100-104. *See also* Schiau ¶¶ 87-92 (discussing issuance of archaeological discharge certificates for the Project, including for the Cârnic Massif).

B. Gabriel and RMGC Committed to Even Greater Investments in Cultural Heritage and Obtained the Critical Cârnic Archaeological Discharge Certificate

1. Rather Than Face Additional Unwarranted Delays Gabriel and RMGC Submitted to the Ministry of Culture's Demand for Increased Investment in Cultural Heritage

325. [REDACTED] to avoid the Project once again becoming blocked as had occurred in 2007-2010, Gabriel and RMGC concluded that the rational commercial approach was to agree to the Ministry of Culture's demand to increase RMGC's cultural heritage investment locally, and to make a significant additional investment nationally.⁵⁹⁵ Given that State officials previously were highly critical of RMGC for bringing claims against the Ministry of Environment and its senior officials for unlawfully suspending the EIA procedure,⁵⁹⁶ Gabriel and RMGC concluded that bringing an administrative challenge in relation to the failure to issue the archaeological discharge certificate or otherwise suing the State was a "nuclear" option of last resort that would destroy any hope of permitting the Project in a reasonable timeframe.⁵⁹⁷ Gabriel therefore directed RMGC to try to find ways, if possible, to address and accommodate the Government's demands regarding the amounts to be invested in preserving cultural heritage.⁵⁹⁸

326. After a period of negotiation, Gabriel authorized RMGC to sign a Cooperation Protocol with the National Institute of Heritage (an academic and research institution under the Ministry of Culture responsible for preparing the List of Historical Monuments), which RMGC did on July 15, 2011.⁵⁹⁹ The Protocol provided that RMGC would invest nearly US\$ 140 million

⁵⁹⁵ Henry ¶¶ 24-25; Tănase II ¶¶ 61-62.

⁵⁹⁶ [REDACTED]

⁵⁹⁷ Henry ¶ 25; Tănase II ¶ 62.

⁵⁹⁸ Henry ¶ 26; Tănase II ¶ 62.

⁵⁹⁹ Henry ¶ 26; Tănase II ¶ 63; Protocol of Cooperation between NIH and RMGC dated July 15, 2011 (Exh. C-695). *See also* Gligor ¶ 103.

to preserve cultural heritage, including nearly US\$ 70 million in the Project area and US\$ 70 million nationally.⁶⁰⁰

327. As David Jennings confirms in his expert report,⁶⁰¹ Gabriel and RMGC already had allocated a highly significant budget to cultural heritage research, restoration, and preservation that compared favorably to that of other major construction and infrastructure undertakings in Europe. With the additional investments agreed with the National Institute of Heritage, in the amounts later confirmed in 2013,⁶⁰² the Roșia Montană Project offered one of the largest ever cultural heritage budgets in the history of developer-funded archaeology. As Mr. Jennings concludes, comparison to other major European projects “shows both RMGC’s earlier proposed budget and its later agreed cultural patrimony budget reflected a truly extraordinary and professional commitment by RMGC to the conservation and management of Roșia Montană’s cultural heritage.”⁶⁰³

328. After RMGC and the Ministry of Culture agreed on July 13, 2011 to the Protocol terms, the National Archaeology Commission unanimously approved issuance of the Cârnic archaeological discharge certificate.⁶⁰⁴ Thus, on July 14, 2011, the Alba County Directorate for Culture and National Heritage (“Alba Cultural Directorate”) issued a new discharge certificate, ADC No. 9/2011, for the Cârnic underground area.⁶⁰⁵

⁶⁰⁰ Protocol of Cooperation between NIH and RMGC dated July 15, 2011 (Exh. C-695) Art. 2.1. These amounts were in addition to the US\$ 20+ million already invested by RMGC from a budget of US\$ 35 million previously allocated to research, restore, and preserve Roșia Montană’s cultural heritage through the Project. See Tănase II ¶ 63; Henry ¶ 26; Gligor ¶ 103.

⁶⁰¹ Jennings § VII.

⁶⁰² See *infra* § VIII.A.5. The national contribution agreed in the Protocol was subject to the conclusion of a subsequent agreement. Protocol of Cooperation between NIH and RMGC dated July 15, 2011 (Exh. C-695) Art. 2.1. The parties did not conclude a subsequent agreement, as this process was overtaken and superseded by later events. Henry ¶ 26; Tănase II ¶ 63. See *infra* §§ VII.A, VIII.A.5.

⁶⁰³ Jennings ¶ 79.

⁶⁰⁴ National Archaeology Commission Meeting Minutes dated July 12, 2011 (Exh. C-1377).

⁶⁰⁵ Archaeological Discharge Certificate No. 9/2011 (Cârnic underground) (Exh. C-680). See also Gligor ¶ 102; Henry ¶ 27; Tănase II ¶ 64.

2. Although the Ministry of Culture Granted the Archaeological Discharge Certificate for the Cârnic Underground, It Did Not Correct the 2010 LHM

329. In a press statement Minister of Culture Hunor emphasized that the decision to grant the archaeological discharge certificate for Cârnic was made according to applicable legal procedures and acknowledged that “removal of a part of the Cârnic Massif from the List of Historic Monuments” was the next step in the process.⁶⁰⁶

330. Minister Hunor also declared that the Ministry of Culture was “victorious” in the negotiations with RMGC, and he acknowledged that RMGC would invest US\$ 140 million, including an amount of US\$ 70 million at Roșia Montană that was “almost five times more” than Romania’s entire budget in 2010 for cultural preservation nationally.⁶⁰⁷ The Minister acknowledged that RMGC’s investments would have an enormous positive impact in preserving cultural heritage, and that the heritage at Roșia Montană would be irreversibly lost without such investments because the State lacked the necessary funds to preserve it:

[T]here is enough money to rescue very important vestiges, assets like mining galleries with a special historic significance, which are located within Piatra Corbului area, the galleries from Cătălina-Monulești area that will be researched, restored and opened to public visits, the Roman funerary enclosure from Tău Găuri, the Roman hydraulic system from Păru-Carpeni mining sector, 41 historic monument buildings from protected area, the revived historic center of the locality and over 100 kilometers of mine galleries that shall be researched by archaeologists to find other vestiges. . . .

⁶⁰⁶ *Kelemen on the Archaeological Discharge Certificate for Roșia Montană: a legal procedure*, Mediafax.ro, dated July 14, 2011 (Exh. C-1345). See also Ministry of Culture Press Release dated July 14, 2011 (Exh. C-1280) (describing issuance of the archaeological discharge certificate as “the first necessary step in the process of ensuring the preservation, conservation and valorization of the archaeological and architectural heritage in Roșia Montană”).

⁶⁰⁷ *INTERVIEW: Kelemen: If Roșia Montană Gold Corporation does not invest US\$ 70 million in heritage I can stop the Project*, Mediafax.ro, dated July 28, 2011 (Exh. C-893) at 1-2 (Minister of Culture Kelemen Hunor comparing RMGC’s undertaking to invest US\$ 69 million at Roșia Montană to the national budget of US\$ 15 million for cultural preservation in 2010). See also Henry ¶ 28.

The problem is that we do not have time: if we do not get involved now, the Roșia Montană Heritage will be irreversibly lost in several years, due to the fact that it is in a continuous degradation from natural causes.⁶⁰⁸

331. As discussed above, the Ministry of Culture unlawfully included Cârnic Massif on the 2010 LHM without instituting classification procedures and despite the absence of archaeological research supporting its inclusion, and thus had a legal obligation to correct its erroneous description of Cârnic in the 2010 LHM.⁶⁰⁹ Moreover, as Professor Schiau explains, once a site has been archaeologically discharged, the Ministry of Culture has a legal obligation arising from the discharge decision to institute procedures to declassify the site and remove it from the list of historical monuments.⁶¹⁰ Thus, there was no valid basis once the new archaeological discharge certificate for the Cârnic underground had been issued not to remove the references in the 2010 LHM to all the mine galleries in the Cârnic Massif and to return the description to the Roman galleries at Piatra Corbului as reflected in the 2004 LHM, but the Ministry of Culture failed to do so.

332. In fact, the Ministry of Culture failed to make any correction to the 2010 LHM, although both the Ministry, as well as the Alba Culture Directorate and the National Institute of Heritage (both of which fall under the authority of the Ministry of Culture), repeatedly

⁶⁰⁸ *INTERVIEW: Kelemen: If Roșia Montană Gold Corporation does not invest US\$ 70 million in heritage I can stop the Project*, Mediafax.ro, dated July 28, 2011 (Exh. C-893) at 2 (Minister of Culture Kelemen Hunor also stating: “In total, there is a sum of US\$ 140 million. US\$ 70 million shall be assigned to rescue major values of Roșia Montană Heritage, a heritage that would irreversibly be lost in several years without a rapid investment. During recent years, a continuous degradation of the heritage occurred due to natural causes, which are not related to mining. Unfortunately, no money existed [in the State budget] for investing in restorations. That was the case until now . . .”). *See also* Interview of Kelemen Hunor, Realitatea TV, dated July 15, 2011 (Exh. C-530) at 1 (Kelemen Hunor: “This [archaeological discharge certificate] endorsement is equivalent to the saving of approximately 80%, as far as I saw it, about 80% from the built and archaeological cultural heritage from Roșia Montană . . . Roman mines, medieval mines and modern galleries will be saved, so no cultural heritage is being destroyed. We have always pursued, and in the case of Roșia Montană also, the saving of the national cultural heritage.”); *Roșia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs*, Ecomagazin.ro, Aug. 24, 2011 (Exh. C-1310) (Minister of Culture Kelemen Hunor: “The National Archaeology Commission unanimously approved and, under these conditions, I provided the judicial, legal, financial framework to save 80 per cent, or as much as we can, from the cultural and archaeological heritage, because that is my responsibility. . . . I can only tell that, if the exploitation project starts, a very, very large portion of the cultural heritage will be saved.”).

⁶⁰⁹ *See supra* § VI.A.2; Schiau § V.C (explaining the reasons why the changes introduced in the 2010 LHM regarding the Cârnic Massif lacked legal basis and were arbitrary).

⁶¹⁰ Schiau § II.4, ¶¶ 22, 79, 116-117. *See also supra* § III.C.1.

acknowledged that the descriptions of the historical monuments in the 2010 LHM were erroneous and required correction.⁶¹¹ These many statements include:

- in June 2012, the National Institute of Heritage acknowledged with respect to the 2010 LHM changes that “none of them accurately reflects the situation on the ground, revealed by the vast archeological researches conducted in the period 1999-2011”;⁶¹²
- the Alba Culture Directorate replied confirming that the changes were “wrong” and requesting that the National Institute of Heritage “correct the clerical errors” in the 2010 LHM;⁶¹³
- the National Institute of Heritage acknowledged that “[t]he use of toponyms to establish the perimeters of the archeological sites is inappropriate, generating confusions and topographic approximations,” and that the use of the phrase “the entire settlement, on a radius of 2 km” for the two Orlea sites and the omission of the phrase “Piatra Corbului” for the Cârnic Massif site were in “error,” but claimed that attempting to resolve these errors generated “controversies”;⁶¹⁴
- in November 2012, the Alba Culture Directorate sent a letter to the National Institute of Heritage requesting the *ex officio* declassification of Cârnic Massif from the 2010 LHM to conform to the archaeological discharge certificate re-issued for that site;⁶¹⁵

⁶¹¹ Gligor ¶¶ 98, 116-121, 156-159; Schiau § V.D, ¶ 360.

⁶¹² Letter No. 2748 from NIH to Alba Culture Directorate dated June 1, 2012 (Exh. C-1324).

⁶¹³ Letter No. 546 from Alba Culture Directorate to NIH dated June 29, 2012 (Exh. C-1327).

⁶¹⁴ Letter No. 3316 from NIH to Alba Culture Directorate dated July 30, 2012 (Exh. C-1331).

⁶¹⁵ Letter No. 1185 from Alba Culture Directorate to NIH dated Nov. 6, 2012 (Exh. C-1332).

- in June 2013, the Ministry of Culture remarked that “declassification of Carnic Massif from List of Historic Monuments is needed, together with the rectification of the material error of 2 Km radius of Orlea”;⁶¹⁶
- in July 2014, the National Institute of Heritage confirmed that it had sought “to correct all clerical errors” in the 2010 LHM and had “repeatedly sent this request to the Ministry of Culture since 2011 onwards,” but the request “was not however included on the working agenda of the National Commission for Historical Monuments”;⁶¹⁷ and
- in September 2014, the Alba Culture Directorate acknowledged that RMGC’s objections to the 2010 LHM were “well-founded” and stated that it would notify the National Institute of Heritage again “with a view to correcting the clerical errors” in the 2010 LHM.⁶¹⁸

333. Despite these repeated confessions of error, the Ministry of Culture maintained the 2010 LHM uncorrected, thus leaving in place the instrument that enabled anti-Project activists to launch and maintain their legal attacks against other administrative decisions relating to the Project by challenging on the grounds that they did not take into account the areas erroneously indicated as historical monuments in the 2010 LHM.⁶¹⁹

⁶¹⁶ Letter No. 2698 from the Department for Infrastructure Projects and Foreign Investments to RMGC dated June 12, 2013 (Exh. C-1001) at 2 (noting the Ministry of Culture’s view).

⁶¹⁷ Letter No. 2872 from the NIH to RMGC dated July 8, 2014 (Exh. C-1331). *See also* Letter No. 2872 from the NIH to RMGC dated July 8, 2014 (Exh. C-1333) (acknowledging that “[t]he clerical error you have highlighted has been proposed for correction by NIH . . . being forwarded to the specialized department within the Ministry of Culture on repeated occasions . . . without being put on the working agenda of the National Commission for Historical Monuments”); Letter No. 2871 from the NIH to RMGC dated July 8, 2014 (Exh. C-1330) (same).

⁶¹⁸ Letter No. 783 from Alba Culture Directorate to RMGC dated Sept. 4, 2014 (Exh. C-1335) at 1, 3 (further acknowledging that “the phrase ‘entire locality, within a 2 km radius’ was wrongfully introduced” in two places with respect to the Orlea sites, and that “the STEREO 70 coordinates of Cârnic Massif – ‘Piatra Corbului’ were wrongfully omitted”).

⁶¹⁹ [REDACTED] *See also* Schiau §§ V.D, VI.A (discussing the Ministry of Culture’s awareness of and refusal to correct the errors in the 2010 LHM, and the legal challenges brought by opposition NGOs on the basis of the 2010 LHM).

334. Not only was the 2010 LHM never corrected, but as discussed further below, following the ultimate and fatal arbitrary and unlawful political rejection of the Project, the Ministry of Culture issued the 2015 LHM, which arbitrarily expanded even further the description of the historical monuments in Roşia Montană so as to engulf, and thus block, the Project entirely.⁶²⁰

VII. DEMANDING A GREATER FINANCIAL STAKE IN THE PROJECT, THE GOVERNMENT RENOUNCED ITS AGREEMENTS WITH GABRIEL AND BLOCKED THE PERMITTING PROCESS

A. The Government Blocked the Project’s Permitting Entirely, Demanding an Increased Financial Interest for the State

1. With the Project Ready to Be Permitted and Its Market Value Reflected in Gabriel’s Traded Value of Well Over C\$ 3 Billion, the Government Blocked the EIA Procedure

335. Based on the progress made in the EIA procedure and having demonstrated the environmental and cultural benefits of the Project as described above, RMGC seemed poised to obtain the pivotal environmental permit for the Project.⁶²¹

336. Meanwhile, gold prices had been steadily increasing, continuing an upward trend that had begun several years earlier.⁶²² Various market analysts covering the mining industry observed that the Project was one of the largest and most robust undeveloped gold projects in the world not held by one of the “major” mining companies, and that Gabriel was a highly attractive investment because its value was expected to increase substantially upon issuance of the environmental permit.⁶²³ The market therefore valued Gabriel at more than C\$ 3 billion in July 2011, [REDACTED]

⁶²⁰ See *infra* § IX.D.1.

⁶²¹ Henry ¶¶ 29-32; Tănase II ¶¶ 51-57.

⁶²² Henry ¶ 29.

⁶²³ Henry ¶ 30.

⁶²⁴ Henry ¶ 31; *id.* ¶ 32 (explaining that Gabriel would have been well placed, once the environmental permit had been issued, to develop the Project [REDACTED]).

337. The Government then evidently made a policy decision that it would not allow the Project to be permitted unless Gabriel agreed to strike a new bargain and cede a greater share of the Project to the State and increase the State's royalty payments. The Government made its position clear in a series of public statements that the Project terms would have to be renegotiated and, to make sure Gabriel would be well-motivated to come to the table, the Government proceeded unlawfully to prevent the EIA procedure from concluding until Gabriel met the Government's demands.⁶²⁵

338. On August 1, 2011, the Prime Minister, Emil Boc, publicly stated that he was "not a fan of this project" and objected that "the contract" concluded by the State was "not in the best form in terms of advantages for the Romanian State and should be re-discussed."⁶²⁶ Later that month, the Prime Minister repeated his public calls for new economic terms, stating that the economic share for the State was "not yet sufficient" and "should be revised," and that one of the "major problems" of the Project was the "low economic benefits for the Romanian State."⁶²⁷ He made clear that his willingness to support Project permitting depended upon Gabriel and RMGC revisiting the previously agreed Project economics.⁶²⁸

339. President Băsescu likewise began publicly urging in August 2011 that "the Roșia Montană project must be done," but only "provided the terms for the sharing of benefits from the exploitation of the gold and silver deposits in the area are renegotiated."⁶²⁹ President Băsescu

⁶²⁵ See Henry ¶¶ 33-39; Tănase II ¶¶ 72-79; Gligor ¶ 105.

⁶²⁶ Boc: *I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed*, Mediafax, dated Aug. 1, 2011 (Exh. C-627) (Prime Minister Emil Boc). See also *Interview of Emil Boc*, TVR1, dated Aug. 1, 2011 (Exh. C-537) at 1 (Prime Minister Emil Boc).

⁶²⁷ Emil Boc: *The decision on the Roșia Montană mining project must be substantiated based on documents, not stories*, Agerpres.ro, dated Sept. 2, 2011 (Exh. C-791) (quoting comments made by Prime Minister Emil Boc several days earlier: "I am not a fan of this project, for several reasons. One of these reasons is also that, in my opinion, the benefit for the State in this project, as the Romanian State negotiated it so far with the investors, is not yet sufficient, and certainly it should be revised," and stating that a "major problem[]" of the Project is the "low economic benefits for the Romanian State.").

⁶²⁸ Emil Boc: *The Roșia Montană Project must be addressed in full responsibility*, Agerpres.ro, dated Sept. 3, 2011 (Exh. C-1430) (Prime Minister Boc stating that the "current formula in the contract should be improved in order to bring additional benefits for the Romanian State" and that, depending upon the answers to these issues, he will formulate his "final point of view").

⁶²⁹ Traian Băsescu: *Romania needs the Roșia Montană Project, provided the terms for sharing of benefits are renegotiated*, Agerpres.ro, dated Aug. 18, 2011 (Exh. C-628) (President Traian Băsescu).

made the point very clearly, explaining, “I was looking at the gold prices in the last five years: five years ago the gold price was 600 dollars per ounce, now it is 1,700 dollars per ounce and could well exceed 2,000-2,500 per ounce by the end of the year.”⁶³⁰ In a televised interview a few days later, the President again made the point stating that prices had increased for gold by “200%” and for silver by “500%,” and that the State’s economic share of the Project both in terms of royalties and in terms of ownership was insufficient.⁶³¹

340. The Minister of Environment, László Borbély, in August 2011 also made clear the Government’s position in regard to the Project, stating to the press, “I think that the Romanian State, when it negotiated this contract, it could’ve negotiated better. There is room for better. It could’ve concluded a more advantageous contract for the Romanian State.”⁶³²

341. At the same time, Minister of Culture, Kelemen Hunor, announced that he and Minister of Environment Borbély would not proceed further to permit the Project until the State’s level of participation in RMGC was “clarified.” More specifically, Minister Hunor stated that although a new archaeological discharge certificate for Cârnic had been granted,⁶³³ he would not “remove” Cârnic from the 2010 LHM, which he was legally required to do,⁶³⁴ until a decision were made regarding the State’s economic participation:

I have not taken the next step, I have not signed, and the removal of the Cârnic Mountain from the List of Historical Monuments is something that I have to sign, not the Director from Alba. . . .

I have not signed the order yet because there are many aspects that need to be discussed. First of all, the level of participation of the Romanian state in that company, and I am not going further until this aspect is clarified, and the Minister of Environment cannot go further either; this must be

⁶³⁰ *Traian Băsescu: Romania needs the Roşia Montană Project, provided the terms for sharing of benefits are renegotiated*, Agerpres.ro, dated Aug. 18, 2011 (Exh. C-628).

⁶³¹ TVR1, Special Edition – interview with Traian Băsescu, TVR1, dated Aug. 22, 2011 (Exh. C-1479).

⁶³² *László Borbély: The Romanian State could’ve negotiated the Roşia Montană Contract in much better terms*, Business24.ro, dated Aug. 23, 2011 (Exh. C-629) (Minister of Environment László Borbély).

⁶³³ *See supra* § VI.

⁶³⁴ *See supra* §§ III.C.1, VI.A.2, VI.B.2; Schiau §§ II.4, III.C (discussing the obligation to declassify archaeologically discharged sites).

decided at the governmental level. It's not the Minister of Environment and the Minister of Culture that give this project the go-ahead.⁶³⁵

342. Later in August 2011, President Băsescu visited Roșia Montană and stated again that he was in favor of the Project, but it was “mandatory to renegotiate.”⁶³⁶ Speaking a few days later to a group of Project protesters who had gathered in front of the President’s official residence in Bucharest, President Băsescu stated that if he had negotiated the contract for Roșia Montană in 1997, “the State would have certainly got more.”⁶³⁷

343. [REDACTED] it was clear from these repeated statements from the Prime Minister, the President, the Minister of Environment, and the Minister of Culture that the Government was holding the Project permitting hostage and would not allow it to progress without a “renegotiation” of economic terms.⁶³⁸

344. The Government’s hold-up of permitting to force a renegotiation of the State’s financial interest in the Project was an abuse of power and unlawful. As Professors Mihai and Schiau both make clear in their respective legal opinions, the Ministry of Environment was obligated by law to conduct the EIA procedure in accordance with law and issue a decision on the environmental permit within prescribed time limits based on the technical assessment of the potential environmental impacts set forth in the EIA Report,⁶³⁹ and the Ministry of Culture was obligated to remove from the 2010 LHM references to historical monuments that had been archaeologically discharged, such as was the case for the Cărnic underground.⁶⁴⁰ In neither case could the Government lawfully refuse to take such administrative decisions in order to force a renegotiation of the Project to benefit the State.⁶⁴¹ Yet this is exactly what it did.

⁶³⁵ *Roșia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs*, Ecomagazin.ro, dated Aug. 24, 2011 (Exh. C-508). See also Gligor ¶ 107.

⁶³⁶ *Traian Băsescu – visit to Roșia Montană*, dated Aug. 29, 2011 (Exh. C-1503) at 2 (President Traian Băsescu: “It is mandatory to renegotiate.”).

⁶³⁷ *Basescu: Had I negotiated the Roșia Montană contract in 1997, the State would have certainly got more*, Ziarul Financiar, dated Aug. 31, 2011 (Exh. C-926) (President Traian Băsescu).

⁶³⁸ [REDACTED]

⁶³⁹ See *supra* § IV.A.1; Mihai § VI.A.

⁶⁴⁰ Schiau § II.4. See *supra* § VI.A.

⁶⁴¹ Mihai § VIII.C.1.

345. As reflected in its agreement with the State through Minvest, Gabriel held rights and interests in the Project protected by law and set forth in RMGC's Articles of Association pursuant to which Gabriel owned 80.69% of RMGC's shares and the State through Minvest owned 19.31% of the shares.⁶⁴² The terms of the Roșia Montană License as amended set forth RMGC's obligation to pay an annual royalty to the State equivalent to 4% of the total revenues from its sales of gold and silver.⁶⁴³ The royalty term was a contractual one, which the State could not alter without RMGC's agreement.⁶⁴⁴

346. [REDACTED] Gabriel and RMGC faced a choice between trying to find a way to accommodate the State's abusive demands to renegotiate Project terms and risking, at a minimum, years of additional delays if it sued the State.⁶⁴⁵ Senior Government officials including President Băsescu, Minister Hunor, and Minister Borbély also had been acknowledging that the Project already had faced improper delays and that the Government had an obligation to make decisions. Minister Hunor, for instance, aptly stated in July 2011:

*If we do not need an investor, the State must say: 'Go home.' If you gave them a mining exploitation license, then you have to observe that decision . . . There is no European State that plays with such matters for 11 years. The Romanian State must take a decision: yes or no. It is unacceptable to keep the investors here for 11 years and say nothing.*⁶⁴⁶

⁶⁴² Bîrsan § III; RMGC Articles of Association dated July 22, 2011 (Exh. C-184) (as amended through present). *See also supra* §§ II.C, III.A.

⁶⁴³ Roșia Montană License (Exh. C-403-C); Addendum No. 7 to Roșia Montană License dated Oct. 14, 2009 (Exh. C-414-C) Art. II [REDACTED].

⁶⁴⁴ *See supra* § II.C.2; Bîrsan § IV.C.2.3. *See also* Roșia Montană License (Exh. C-403-C) Art. 22.1.1 [REDACTED]

[REDACTED] At that time, the Project had been blocked unlawfully for more than two years by the suspension of the EIA procedure. [REDACTED] RMGC and Gabriel concluded that the EIA procedure would not resume if RMGC had objected to the requested royalty increase. [REDACTED] *See also* Henry ¶ 44, n.36.

⁶⁴⁵ [REDACTED]

⁶⁴⁶ *Kelemen: The Romanian State must take a decision on Roșia Montană: either yes or no*, Mediafax, dated July 15, 2011 (Exh. C-892) at 1 (Minister of Culture Kelemen Hunor further stating: "From this point of view, all the governments after 2000 are responsible, as they have not given an answer.") (emphasis added). *See*

347. To avoid further delays, Gabriel concluded that the only practical way forward was to try to negotiate new economic terms with the State.⁶⁴⁷ Gabriel thus submitted to an abusive and unlawful renegotiation demand that irreparably harmed its investments. In fact, as detailed further below, having clearly taken the decision to reject the Project on the economic terms that had been agreed and based upon which Gabriel had invested in RMGC and the Project, the Government never relented. From August 2011 forward, the question became solely whether there were different terms under which the Government would allow the Project to proceed, although all accepted that the Project met all applicable legal standards.

2. The Government Demanded That the State's Financial Interest Be Increased Unconditionally

348. In late September 2011, the Government directly engaged with Gabriel and RMGC regarding its demands for more shares and a higher royalty rate.⁶⁴⁸ [REDACTED]

349. Before this meeting, Gabriel and RMGC prepared a financial forecast based on studies of the Project's economic impact that had been conducted by independent economists from Oxford Policy Management, an international development consulting firm.⁶⁵⁰ Based on these analyses, Gabriel and RMGC explained the significant economic benefits the State already stood to gain from the Project through its 19.31% shareholding and the 4% royalty rate. In

also, e.g., VIDEO Traian Băsescu: PDL is generating pointless delays for Romania, Hotnews.ro, dated Sept. 4, 2011 (Exh. C-833) at 1 (President Traian Băsescu: “[W]e are delaying it [the Project] because of the cowardice of politician men . . . You either start it as it is, or you tell the investors: Go home! And we’re going to exploit Roșia Montană on our own.”); *László Borbély: Roșia Montană Environmental Permit shall be granted only if they convince me that they will not pollute*, Agerpres.ro, dated Sept. 6, 2011 (Exh. C-792) (Minister of Environment László Borbély: “There is a famous story . . . of the red rooster, which never ends . . . And this Roșia Montană is just like the story of the red rooster, which never ends . . . If a state issued a license . . . then allow them to start mining there based on that license, as it has been done for 2000 years.”).

⁶⁴⁷ Henry ¶¶ 38.

⁶⁴⁸ Henry ¶¶ 44-48; Tănase II ¶¶ 88-93.

⁶⁴⁹ [REDACTED].

⁶⁵⁰ Tănase II ¶¶ 14-18, 88-91. *See also* Oxford Policy Management, *The Economic Impact of the Roșia Montană Gold Project in Romania*, Sept. 1, 2009 (Exh. C-907); Oxford Policy Management, *Summary of the Economic Impact of the Roșia Montană Gold Project in Romania*, July 12, 2010 (Exh. C-908).

particular, Gabriel and RMGC explained during the meeting at the Ministry of Economy and in subsequent letters to senior officials that Romania was projected to receive 66% of the total direct economic benefit from the Project, including US\$ 3.2 billion from dividends, royalties, taxes, and duties, and in addition US\$ 2.8 billion paid to Romanian suppliers and workers, as well as substantial additional indirect benefits.⁶⁵¹ Gabriel and RMGC also noted that Gabriel would finance the entire cost of developing the Project, clean up historical pollution caused by the State [REDACTED],⁶⁵² make large investments in social and cultural heritage initiatives, and create jobs.⁶⁵³

350. The Government did not challenge the economic analyses or underlying assumptions.⁶⁵⁴ [REDACTED]

[REDACTED]

351. [REDACTED]

[REDACTED]⁶⁵⁷ The Government demanded, however, that it be given additional shares and royalties free of any conditions, which made it difficult to reach agreement.⁶⁵⁸

⁶⁵¹ Henry ¶¶ 44-45; Tănase II ¶ 89; Letters from RMGC to President Băsescu, Prime Minister Boc, and Minister Udrea dated Sept. 30, 2011 (Exh. C-799) at 2 (estimating additional indirect benefits of US\$ 18.5 billion based on the indirect economic effect calculated by Oxford Policy Management and using a projected gold price of US\$ 1,500 per ounce).

⁶⁵² See Roșia Montană License (Exh. C-403-C) Art. 7.1.2(b). See also Avram ¶¶ 15-17.

⁶⁵³ Henry ¶¶ 44-45; Tănase II ¶¶ 89-91; Letters from RMGC to President Băsescu, Prime Minister Boc, and Minister Udrea dated Sept. 30, 2011 (Exh. C-799) at 3.

⁶⁵⁴ Henry ¶ 45; Tănase II ¶ 89.

⁶⁵⁵ [REDACTED]

⁶⁵⁶ [REDACTED]

⁶⁵⁷ Henry ¶ 47; Tănase II ¶ 92.

⁶⁵⁸ Henry ¶ 48; Tănase II ¶ 93.

3. The EIA Procedure Reached What by Law Should Have Been Its End, but the Prime Minister Stopped the Ministry of Environment from Taking the Decision to Issue the Environmental Permit

352. As summarized below, by November 2011, the TAC members completed the technical review of the EIA Report and provided the Ministry of Environment their points of view, which supported issuance of the environmental permit.⁶⁵⁹ At that point, the Ministry of Environment had a legal obligation to make a prompt decision on issuing the permit.⁶⁶⁰

[REDACTED]

[REDACTED]

[REDACTED]

353. The progression of events related to the EIA procedure are discussed in detail by Mr. Avram and Mr. Tănase and in summary include:

- In March 2011, the Ministry of Environment published RMGC's 2010 updates to the EIA Report and solicited public comments and questions on the updates.⁶⁶² The Ministry forwarded 393 such comments and questions to RMGC in July 2011.⁶⁶³ On August 26, 2011, RMGC submitted an Annex to its EIA Report responding to each comment and question.⁶⁶⁴
- In July 2011, the Ministry of Environment and the water authority, the Romanian Waters National Administration, informed RMGC that, in order to comply with the Romanian Waters Law and the EU Water Framework Directive, the Alba County Council or the Local Councils of Roșia Montană, Abrud, and Câmpeni

⁶⁵⁹ Avram ¶¶ 96-113; Tănase II ¶¶ 96-104, 109-118; Henry ¶¶ 51-58. *See also* Mihai § V.C.5.

⁶⁶⁰ Mihai § VIII.A.3.

⁶⁶¹ [REDACTED] *See also* Mihai § VIII.A.3.

⁶⁶² Avram ¶¶ 85-86 [REDACTED] *See also* Mihai ¶ 202, 270-271 (noting that “[t]here is no legal provision indicating that additional public consultations are to be organized after the submission of an updated EIA Report” and that this process “extended the EIA procedure by almost 6 months”).

⁶⁶³ Avram ¶ 87. *See also* Mihai ¶ 201 (observing that “[t]he Ministry of Environment sent the public comments received to RMGC more than 2 months after expiry of the extended term established for receiving observations from the public”).

⁶⁶⁴ Avram ¶ 87.

would have to make a determination that the Project was of “outstanding public interest.”⁶⁶⁵ At the request of the Mayors of Roșia Montană, Abrud, Cămpeni, and Bucium, the Alba County Council issued a decision on September 29, 2011 noting “the social, economic and environmental benefits” of the Project and concluding it was of “outstanding public interest.”⁶⁶⁶

- In August 2011, Minister of Environment Borbély notified RMGC that although the Project was designed to operate with maximum cyanide concentrations of 5-7 ppm (below the stringent 10 ppm limitation established by the EU and applicable in Romania), he would not allow the permitting process to move forward unless RMGC lowered the cyanide concentration to a level of “maximum 3ppm,” which he arbitrarily selected after visiting a mine in Sweden that was not comparable to Roșia Montană.⁶⁶⁷ [REDACTED]

⁶⁶⁵ Tănase II ¶¶ 66-71. Under the Romanian Waters Law, a protected body of public water could be diverted only if doing so were for a matter of “outstanding public interest.” As Mr. Tănase notes, the Project included plans to construct the TMF and other facilities in the Corna Valley that required the diversion of Corna River, a small and heavily polluted body of surface water running, as well as plans to construct the catchment dam that required the diversion of the Roșia River. *Id.* ¶ 66 (observing that “Corna River is nothing more than a small creek even after heavy rains and is often nothing more than a trickle”). *See also* Avram ¶¶ 12-13 (describing the polluted Corna River); Avram Annex A, at 23-25 (photographs of the Corna River).

⁶⁶⁶ Tănase II ¶ 71; Alba County Council Decision on the Application of Certain Provisions of the Waters Law No. 107/1996 dated Sept. 29, 2011 (Exh. C-632).

⁶⁶⁷ Henry ¶¶ 40-43; [REDACTED] Letter from Minister of Environment to RMGC dated Aug. 18, 2011 (Exh. C-440). *See also* László Borbély: *The Romanian State could’ve negotiated the Roșia Montană Contract in much better terms*, Business24.ro, dated Aug. 23, 2011 (Exh. C-629) at 1 (Minister of Environment László Borbély acknowledging that the Project was designed to operate with cyanide levels of 5 ppm that were “half of the value established by EU,” but claiming he was “not happy with 5” ppm); *László Borbély: Roșia Montană Environmental Permit shall be granted only if they convince me that they will not pollute*, Agerpres.ro, dated Sept. 6, 2011 (Exh. C-792) (Minister of Environment László Borbély stating that the Project would “move forward” only if RMGC were “to lower it even more” and “[i]f they can demonstrate this to me, we are going to move forward”).

⁶⁶⁸ [REDACTED] RMGC was prepared to change its processing circuitry at a potential additional upfront cost of US\$ 25 million and US\$ 2 million per

- The majority of the TAC members visited Roşia Montană from October 19-21, 2011 and observed the deplorable conditions in the area.⁶⁶⁹ Having gained a better appreciation of the issues discussed in the TAC meetings, the TAC members left Roşia Montană convinced of the environmental, social, and cultural benefits of the Project and ready to recommend issuing the environmental permit.⁶⁷⁰

354. Following the October 2011 site visit, the Ministry of Environment convened a TAC meeting for November 29, 2011 to complete the technical assessment of the EIA Report.⁶⁷¹

355. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁷³

356. [REDACTED]
[REDACTED]
[REDACTED]

year in operating costs, but no changes ultimately were necessary to ensure a maximum average monthly cyanide concentration of 3 ppm in the tailings pond. *See* Avram ¶ 91, n.172; Tănase II ¶ 85, n.110.

⁶⁶⁹ Avram ¶¶ 93-95; Tănase II ¶¶ 94-96.

⁶⁷⁰ Avram ¶ 95 (“Based on my discussions with the TAC members and their reactions during the site visit, it was clear that the TAC members were convinced that the Project should be implemented.”); Tănase II ¶¶ 94-96 (observing that “[i]t was clear that the TAC members left Roşia Montană convinced of the environmental, social, and cultural benefits of the Project and ready to recommend issuing the EP”).

⁶⁷¹ Tănase II ¶¶ 96-104; Henry ¶¶ 51-55; Avram ¶¶ 96-99.

⁶⁷² [REDACTED]
[REDACTED] Ali Erfan was an advisor to Gabriel working for the company Ajami Associates.
[REDACTED]

⁶⁷³ [REDACTED]
[REDACTED]

⁶⁷⁴ [REDACTED]

[REDACTED]

357. The TAC meeting began at 10:00 a.m. the next morning, November 29, 2011.⁶⁷⁶

[REDACTED]

358. The TAC meeting proceeded and many of RMGC's external experts made presentations and answered the TAC's remaining questions.⁶⁷⁸ [REDACTED]

[REDACTED]

359. During the TAC meeting, TAC President Anton asked each TAC member to state final views.⁶⁸¹ Based on their thorough debate and analysis of the EIA Report and of the numerous and voluminous studies and materials submitted throughout the EIA procedure, the TAC members commended RMGC and its experts, and confirmed that the Project was technically sound and that they had no objections to issuing the environmental permit.⁶⁸² The NAMR representative affirmed, for example, that he was "glad to see that things have a finality," and that NAMR had "always said, from the beginning, as geologists and as the people who

⁶⁷⁵ [REDACTED]

⁶⁷⁶ Tănase II ¶ 99; Henry ¶ 53.

⁶⁷⁷ [REDACTED]

⁶⁷⁸ Avram ¶¶ 96-99.

⁶⁷⁹ [REDACTED]

⁶⁸⁰ [REDACTED]

⁶⁸¹ Tănase II ¶ 100; Avram ¶ 98.

⁶⁸² Avram ¶¶ 96-97; Tănase II ¶ 100; Henry ¶ 54.

manage the country's resources, that we agree with this Project.”⁶⁸³ Other TAC members including the National Environmental Guard,⁶⁸⁴ the National EPA,⁶⁸⁵ the Ministry of Environment Biodiversity Department,⁶⁸⁶ the Romanian Waters National Administration,⁶⁸⁷ the Ministry of Agriculture,⁶⁸⁸ the Ministry of Economy,⁶⁸⁹ the Ministry of Transport,⁶⁹⁰ the Ministry of Development,⁶⁹¹ and the General Inspectorate for Emergency Situations in the Ministry of Internal Affairs,⁶⁹² likewise voiced their approval of the Project.

360. Reflecting the Ministry of Environment's views, the Director of the Ministry's Impact Assessment and Pollution Control Department, Dorina Mocanu, stated, “[S]o we may

⁶⁸³ Transcript of TAC meeting dated Nov. 29, 2011 (Exh. C-486) at 26 (NAMR Director Hârșu).

⁶⁸⁴ *Id.* at 24 (National Environmental Guard representative: “We find the answers satisfactory.”).

⁶⁸⁵ *Id.* at 25 (National EPA representative Octavian Pătrașcu: “Mr. Chairman, the National Agency finds the answers very appropriate . . . The National Agency believes that the entity which will perform exploitation in Roșia Montană will continue the previous 2000 years’ experience of the Romans, of the Empire, and will carry the tradition further . . . In conclusion, we believe that, during the requests and during the discussions held for the analysis of the project, all questions were answered.”).

⁶⁸⁶ *Id.* at 29 (Ministry of Environment Biodiversity Department representative Alina Frim: “I said that all supplements to the Biodiversity chapter, what we requested, are sufficient; we don’t have further observations beyond what we received, nothing of interest; just that the issue related to Piatra Despicată remains open.”).

⁶⁸⁷ *Id.* at 41 (ANAR representative Dragoș Cazan: “From the point of view of waters, there aren’t any issues.”).

⁶⁸⁸ *Id.* at 42 (Ministry of Agriculture representative Alexanru Rădulescu: “We don’t have any comments related to the answers, which means I consider them satisfactory related to the lands and the degraded lands.”).

⁶⁸⁹ *Id.* at 24 (Ministry of Economy representative Grigore Pop: “From our point of view, the Project complies with our legislation, and the external, European legislation, and the answers to the questions which were raised by the TAC members today – we consider that they are covering and satisfactory, more than satisfactory, answering to each uncertainty and each request of the members.”).

⁶⁹⁰ *Id.* at 46 (Ministry of Transport representative Iulian Matache: “We agree with this project but, in regard to the cyanide transport, on the roads as well as by train, this should be done in compliance with European legislation in the field of hazardous materials transport.”).

⁶⁹¹ *Id.* at 46 (TAC President Anton: “From the technical stand point, all is clear with the Ministry of Development. It’s ok, alright, good.”).

⁶⁹² *Id.* at 26-27 (Ministry of Internal Affairs representative Francisc Senzaconi: “[W]e had some unclear issues during the previous meetings but they were answered to point by point; we are happy with the answers and we don’t have any unclear issues at the moment.”).

write the environmental permit.”⁶⁹³ None of the TAC members raised objections at the TAC meeting.⁶⁹⁴

361. Having obtained the points of view of the TAC members, TAC President Anton, the Ministry of Environment State Secretary, confirmed at the November 29, 2011 meeting that the technical assessment of the EIA Report and Project was complete and that any remaining issues needed to be raised and clarified at that time:

From my point of view, and I would like to ask one last thing – all technical discussions, all the questions, all the solutions were discussed within the TAC; and if, any of the TAC members, of those in the TAC, still have issues to raise, let’s raise them now, in this moment. Because we can no longer All issues must be clarified now. If there are any issues left please raise them so that we can clarify them. . . . There are no more issues.⁶⁹⁵

362. The TAC President stated that the TAC members would “convene in the following period a meeting for making the decision related to Roșia whether it’s [the permit’s] being granted or not.”⁶⁹⁶ He added that four issues needed to be resolved and “after you sort out those details . . . I will convene another TAC meeting for a final decision.”⁶⁹⁷ The TAC President also stated that the Ministry of Environment would “prepare a checklist for today for the EIA quality report, it will be sent to each Ministry, for you to have it, to analyze.”⁶⁹⁸ He then repeated: “*And, with this, the technical discussions about the Roșia Montană project come to an end. Please expect a next TAC meeting in the near future.*”⁶⁹⁹

⁶⁹³ *Id.* at 25 (Ministry of Environment Impact Assessment and Pollution Control Department Director Dorina Mocanu).

⁶⁹⁴ The Romanian Academy did not attend the TAC meeting. The Geological Institute of Romania indicated that it had only a few points “to clarify in the near future,” but “[t]his won’t take long” – two or three days – and “doesn’t stop the project from moving forward.” *Id.* at 23 (Geological Institute of Romania Director Grigorescu). *See also id.* at 49 (TAC President Marin Anton: “The Institute of Geology has already told us very clearly that in two-three day[s] they will be clarified with the titleholders and everything is alright.”).

⁶⁹⁵ *Id.* at 42 (TAC President Marin Anton).

⁶⁹⁶ *Id.* at 50 (TAC President Marin Anton).

⁶⁹⁷ *Id.* at 53 (TAC President Marin Anton).

⁶⁹⁸ *Id.* at 50-51 (TAC President Marin Anton).

⁶⁹⁹ *Id.* at 51 (TAC President Marin Anton) (emphasis added).

363. As discussed above and as Professor Mihai explains in his legal opinion, the Ministry of Environment must record the TAC members' views on a checklist during the same TAC meeting in which the analysis of the EIA report is finalized, and any TAC member not available to provide its views during that meeting must submit them in writing within 30 working days of the meeting or be deemed to have no objections.⁷⁰⁰ Upon obtaining the views of the TAC members, the Ministry of Environment either must take a decision on the environmental permit within 10 working days or, if there are differing views among the TAC members, must hold one "conciliation" meeting for the TAC members to reconsider any discordant views, after which the Ministry must take a decision on the permit within 10 working days.⁷⁰¹ No further TAC meetings are to be held and there is no decision to be taken collectively by the TAC.⁷⁰² For these reasons, having confirmed repeatedly at the November 29, 2011 TAC meeting that the technical assessment was complete, the TAC President's statement that the Ministry of Environment would convene yet another TAC meeting was not necessary or justified under the applicable legal procedure.⁷⁰³

364. [REDACTED]

⁷⁰⁰ See *supra* § IV.A.1; Mihai § IV.C.3.3.2. See also *id.* § VIII.A.1 (noting that the Ministry of Environment did not prepare the required checklist, and that the Ministry "cannot reasonably invoke its own failure to observe its obligations under the EIA Rules of Procedure in support of a claim that the analysis on the quality of the EIA Report was still pending after the meeting of 29 November 2011 absent the formality of the checklist").

⁷⁰¹ See *supra* § IV.A.1; Mihai § IV.C.3.3.3.

⁷⁰² See *supra* § IV.A.1; Mihai § IV.C.3.3.3.

⁷⁰³ Mihai § VIII.A.3 (explaining that "there was no basis for a further TAC meeting and the TAC Chairman's announced intention to organize another TAC meeting for a decision was out of order").

⁷⁰⁴ [REDACTED]

⁷⁰⁵ [REDACTED]

to Orlea, that mining activities would be conducted only subject to the issuance of archaeological discharge certificates as required by law.⁷⁰⁹

- On December 8, 2011, RMGC submitted an endorsement from the custodian of Piatra Despicată, a volcanic boulder located in the area of the Project that is designated as a natural monument, authorizing RMGC to relocate that monument.⁷¹⁰
- In December 2011, a team of 12 geologists from the Geological Institute of Romania visited Roșia Montană to study the geotechnical, hydrological, and monitoring data for the Corna Valley and to perform surface exploration, testing, and structural mapping.⁷¹¹ Based on the field work and testing conducted by its geologists, on December 9, 2011 the Geological Institute endorsed “the issuance of the environment permit for Roșia Montană project on the proposed location, as per the documentation submitted by the titleholder.”⁷¹² The Geological Institute also submitted a “point of view” on the geological data contained in the EIA Report, together with maps and measurements of the Corna Valley as well as its findings that “there are no fissures, faults or other anomalies showing on this tomography which could determine or facilitate the occurrence of seepage,” and that “[t]he basin on the tailings dam from Corna Valley doesn’t show any faults,

⁷⁰⁹ Gligor ¶¶ 111-112; Avram ¶¶ 103-104; Tănase II ¶¶ 58, 110; Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446). The TAC President previously requested the Ministry of Culture to issue an endorsement decision in August 2011. In response to that request, the Ministry of Culture had informed the Ministry of Environment in September 2011 of its view that its issuance of archaeological discharge certificates, permitting mining activities in the areas discharged, constitutes the endorsement contemplated by law from the Ministry of Culture for the issuance of the environmental permit. *See* Gligor ¶¶ 106-109. *See also* Letter No. 1465 from the Ministry of Culture to the Ministry of Environment dated Sept. 16, 2011 (Exh. C-1380).

⁷¹⁰ Avram ¶ 100; Tănase II ¶ 109; Letter from RMGC to the Ministry of Environment dated Dec. 8, 2011 (Exh. C-634) enclosing SGR Romanian Geological Society Endorsement No. 1 dated Dec. 5, 2011 (Exh. C-635).

⁷¹¹ Szentesy ¶¶ 81-83; Avram ¶ 101; Tănase II ¶ 109.

⁷¹² Point of view of the Romanian Institute of Geology regarding the geological data presented in the EIA report for the Roșia Montană Project dated Dec. 9, 2011 (Exh. C-636) at 5; Szentesy ¶ 83; Avram ¶ 101; Tănase II ¶ 109.

fissures or other anomalies which could trigger or facilitate the occurrence of seepage or could affect the stability of the tailings management facility.”⁷¹³

366. Given the resolution of the issues raised at the November 29, 2011 TAC meeting and the fact that none of the TAC members submitted written objections within 30 working days of that meeting, *i.e.*, by January 16, 2012, the Ministry of Environment was required by law to take a decision on the environmental permit and to communicate it to RMGC within 10 working days from that date, *i.e.*, by January 31, 2012, and to publish the decision within five working days thereafter, *i.e.*, by February 8, 2012.⁷¹⁴ In disregard of the laws governing the EIA procedure and of RMGC’s rights to a decision on its environmental permit application, no such decision was ever taken and none has ever been conveyed to RMGC or Gabriel.⁷¹⁵

4. Although Gabriel Eventually Offered to Submit to the Government’s Demand for a 25% Shareholding and 6% Royalty Rate, the Government Refused to Complete the EIA Procedure

367. While ensuring that the Ministry of Environment would not issue a decision on the environmental permit, the Government continued to press its demands for a 25% shareholding and a 6% royalty.⁷¹⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷¹³ Point of view of the Romanian Institute of Geology regarding the geological data presented in the EIA report for the Roşia Montană Project dated Dec. 9, 2011 (Exh. C-636) at 2; Szentesy ¶ 83.

⁷¹⁴ Mihai § VIII.A.3. *See also id.* ¶¶ 339-341 (observing that “[t]he legal conditions for the Ministry of Environment’s approval for issuing the EP [environmental permit] for the Project were plainly met . . . [a]fter the TAC meeting of 29 November 2011, when the analysis of the EIA Report was declared completed” and “[t]he documents identified as outstanding at the end of that meeting were produced shortly thereafter”).

⁷¹⁵ [REDACTED]

⁷¹⁶ [REDACTED]

⁷¹⁷ [REDACTED]

368. [REDACTED]

369. [REDACTED]

370. As no agreement had been reached, the Government did not take further action in regard to the permitting procedure. On December 19, 2011, the TAC President sent a letter to the Ministry of Culture requesting that the Ministry confirm whether its “point of view” sent on December 7, 2011 was an endorsement of the issuance of the environmental permit, emphasizing the Ministry of Culture’s endorsement was required by law to be taken into account in setting the conditions for the permit.⁷²³ The Ministry of Culture did not respond to this letter.⁷²⁴

⁷¹⁸ [REDACTED]

⁷¹⁹ Henry ¶ 56; Tănase II ¶ 106.

⁷²⁰ Email from Dragoș Tănase to Adriana Slav dated Nov. 30, 2011 attaching Memorandum entitled “Renegotiation Roșia Montană” (Exh. C-775); Henry ¶ 56; Tănase II ¶ 106. Subsequently, Gabriel proposed that the State also pay an amount out of future Project dividends for the additional shares to comply with the legal requirement of consideration, but indicated Gabriel would drop this condition if the overall restructuring could be deemed by a Romanian court to be fair and reasonable for Gabriel and RMGC without such payment. See Henry ¶ 56; Memorandum entitled “The economic impact of the Roșia Montană Project based on the increase of the state-owned sharestock to 25% and royalty to 6%” dated Dec. 19, 2011 (Exh. C-774).

⁷²¹ [REDACTED]

⁷²² [REDACTED]

⁷²³ Letter No. 10857 from Ministry of Environment to Ministry of Culture dated Dec. 19, 2011 (Exh. C-445).

⁷²⁴ Gligor ¶ 113; Tănase II ¶¶ 110-111; Avram ¶¶ 103-105.

371. Whether motivated by a desire to create the appearance of an on-going procedure, or to avoid responsibility for the permitting decision, the Ministry of Environment repeatedly requested the Ministry of Culture to confirm that its “point of view” was an “endorsement,” and the Ministry of Culture persistently failed to respond. This Ministerial *pas de deux* had the effect of preventing permitting from proceeding.

372. As Professor Mihai explains, the Ministry of Culture indeed already had fulfilled the legal requirement of providing its endorsement, as the legal characterization of a deed issued by a public authority must be determined by its substance, not its form.⁷²⁵ In its December 7, 2011 letter, the Ministry of Culture set forth its “point of view about the issuance of the environmental permit” wherein it identified the conditions and measures that it considered necessary for RMGC to observe “[i]n connection to the issuance of the environmental permit for the Roșia Montană mining exploitation project.”⁷²⁶ The Ministry of Culture letter also expressly states that it was submitting its point of view “[t]aking into account,” among other things, the very provision of Romanian law pursuant to which the environmental permit may be issued only after the Ministry of Culture issues its endorsement.⁷²⁷

373. The Ministry of Culture’s December 7, 2011 letter also clearly states that the Ministry of Environment could decide to issue the environmental permit for the Project.⁷²⁸ The Minister of Culture, Kelemen Hunor, also had confirmed that the Ministry of Culture had provided its point of view to the TAC for the Ministry of Environment to make a final decision.⁷²⁹ Given that the Ministry of Culture’s endorsement was a required precondition for

⁷²⁵ Mihai § VIII.A.2.2 (noting, among other things, that endorsements under Romanian law may take a variety of forms). *See also supra* § VII.A.3.

⁷²⁶ Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446) at 1-2; Mihai ¶ 363, n.238.

⁷²⁷ Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446) at 1-2 (referring to Art. 2 par. 10 of GO No. 43/2000); Mihai ¶¶ 366, 369.

⁷²⁸ Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446) at 3 (“If the competent authority will adopt the decision to issue the environmental permit for the Roșia Montană mining exploitation project proposed by [RMGC], we want to be actively involved alongside the competent environmental protection authority in the drafting of the measures and conditions for the protection of the heritage elements to be imposed on the titleholder under the environmental permit.”).

⁷²⁹ Interview of Minister of Culture Hunor, Debate of the Midday Journal dated Dec. 19, 2011 (Exh. C-439) at 1 (Minister of Culture Kelemen Hunor: “We have sent to the TAC, the Technical Assessment Committee, a

the environmental permit to be issued, the Ministry of Culture's statements acknowledging that the Ministry of Environment could decide to issue the permit confirm that the December 7, 2011 letter was the Ministry of Culture endorsement that was required by law.

374. As discussed below, in April 2013, the Ministry of Culture issued a document entitled "endorsement" that was essentially identical in content to the point of view it had issued on December 7, 2011.⁷³⁰ For these reasons, Professor Mihai concludes that the "point of view" submitted by the Ministry of Culture on December 7, 2011 fulfilled the requirement that the Ministry of Culture provide an "endorsement" prior to issuance of the environmental permit.⁷³¹

375. In late December 2011, Minister of Environment Borbély stated publicly that the State granted a License to RMGC "for mining to be done" and that the Project review was "in a final stage."⁷³² The Minister also stated, "I know that there are NGOs and also a part of the population that are against this project. On the other hand, let us be serious, there is no country in the world to sit on 300 tonnes of gold and 1,600 tonnes of silver without exploiting them. How are they exploited is a different matter and it should be done at European standards."⁷³³

376. Leaving no doubt that the Project met those standards, Minister of Environment Borbély acknowledged with regard to the fact that it uses cyanide in processing that the Project would "be the most modern close-circuit installation in Europe, obviously if it will receive the

point of view on the projects, the problems and responses to these problems in terms of cultural and archaeological heritage . . . [T]his documentation is at the Ministry of Environment, they need all the endorsements or points of view, all the documents from all the institutions, but it lies with the assessment of the Commission of the Ministry of Environment. I don't know when they will make a final decision.").

⁷³⁰ Mihai §§ VIII.A.2.2.2, VIII.B.3.1; Gligor ¶ 115. See also *infra* § VI.A.1 (explaining that in April 2013 the Ministry of Culture issued another favorable endorsement in support of the environmental permit which had substantially the same contents as the Ministry's "point of view" issued in December 2011).

⁷³¹ Mihai § VIII.A.2.2.2.

⁷³² Interview of László Borbély, ProTV, dated Dec. 18, 2011 (Exh. C-633) at 1 (Minister of Environment László Borbély: "It is in a final stage . . . In my opinion, the Romanian State should have done it differently. For when you have a license, you grant it so that mining be done there, you don't grant it so that mining is not done. Right? So, when the Romanian State granted the license in 1997 or 1998 [*sic*], it granted it for mining to be done.").

⁷³³ *Laszlo Borbely: "The Rosia Montana Project will be the most modern facility in Europe, if approved"*, Eurourbanism.ro, dated Dec. 21, 2011 (Exh. C-1505) (Minister of Environment Borbély).

green light.”⁷³⁴ He also confirmed that Gabriel and RMGC had accepted all of the Ministry of Environment’s environmental protection conditions, and even had committed to reduce cyanide levels that already complied with the stringent legal standard applicable in Romania and the EU to meet his arbitrary demands:

We will have another technical commission [meeting], 2 at most, but I am thinking one, for we have clarified these problems along the way. . . . I imposed it, they had a higher percentage, which complied with the provisions of the [European] Union, for it is 10 [ppm]. They had 5 to 7 [ppm]. I said no, reduce it below 3 [ppm] or even less, because it is diluted, so that you can prove it to me and so that I can keep my head up high before Hungary . . . Well, that thing has happened . . . These things were accepted by the investors.⁷³⁵

Minister Borbély, a UDMR political appointee, also stated (and TAC President Anton similarly affirmed) that Hungary’s opposition to the Project and to the use of cyanide processing in accordance with EU standards was neither binding nor well-founded given its lack of gold mining, and that the obligation for transboundary consultation under the Espoo Convention was satisfied: “They don’t have 300 tonnes of gold in Hungary. So they cannot reconsider their position. But they did have a set of questions, we answered them again, we covered all the procedures according to the EU provisions, directives.”⁷³⁶

⁷³⁴ *Laszlo Borbely*: “*The Rosia Montana Project will be the most modern facility in Europe, if approved*”, Eurourbanism.ro, dated Dec. 21, 2011 (Exh. C-1505) (Minister of Environment Borbély).

⁷³⁵ Interview of László Borbély, TVR, dated Dec. 27, 2011 (Exh. C-637) at 2 (Minister of Environment László Borbély). *See also* Interview of László Borbély, ProTV, dated Dec. 18, 2011 (Exh. C-633) at 2 (Minister of Environment László Borbély stating with respect to the use of cyanide: “[I]n the United States the maximum accepted is 50[ppm]. In the EU it is 10[ppm]. Here [for the Project] it will be less than 3%, which means it can no longer be measured. This will be the most modern closed installation.”). With respect to cyanide, as discussed above, RMGC committed to ensure a maximum concentration of 5-7 ppm at the point of discharge and a maximum monthly average of 3 ppm in the TMF. *See supra* § VII.A.3.

⁷³⁶ Interview of László Borbély, TVR, dated Dec. 27, 2011 (Exh. C-637) (Minister of Environment Laszlo Borbely). *See also* Interview of László Borbély, TVR1, dated Mar. 9, 2010 (Exh. C-886) at 6 (Minister of Environment László Borbély: “[A] political decision was made in Hungary. As I said to the colleagues in Hungary, it is easier to forbid this type of extraction when you don’t have gold. When you have 300 tons of gold [in Romania], you reconsider forbidding it or not. This was off topic. So, since currently there is no political decision [by the Romanian Parliament to ban the use of cyanide], I, as Minister of Environment, cannot do anything else than observe the legislation, which is European, which means that in Sweden, in Finland there is cyanide-based extraction.”); *Judeca Tu!*, TV R1, Feb. 23, 2012 (Exh. C-438) (TAC President Marin Anton: “It was easy for Hungary to decide, because it has no gold . . . So, the Hungarian state, in what concerns the analysis and the procedure, said that they did not agree in principle with this project, in principle meaning that they practically do not agree with the project, but, according to European standards, the one to

377. Although the Project unquestionably met or exceeded all applicable Romanian and EU standards relevant to permitting, the Ministry of Environment refused to take a decision on the environmental permit and maintained the baseless position that it could not do so until the Ministry of Culture confirmed that its December 7, 2011 point of view was an “endorsement,” which, as noted, the Ministry of Culture unreasonably refused to do. Thus, as Mr. Avram explains, the permitting process was frozen.⁷³⁷

378. It was evident that the Government was not going to act until its economic demands were met.⁷³⁸ In fact, Minister Hunor acknowledged again in December 2011 that the Government expected to have the results of the economic negotiations and then would need to take a decision on the Project “probably somewhere early next year [2012].”⁷³⁹ Minister Borbély similarly stated that another “important” aspect to the Ministry of Environment’s decision on the environmental permit “related to the renegotiation” between RMGC, Gabriel, and the State: “They are under renegotiation. So, I say, if the Romanian State manages to get a more

decide is the State Member, the State member of the European Union and, according to European directives the decision will be made by the Romanian state via the technical committee.”).

⁷³⁷ Avram ¶ 108.

⁷³⁸ Henry ¶ 55; [REDACTED]

[REDACTED] During the holiday period between Christmas and New Year 2011, the Government evidently trying to send a message to Gabriel, announced that the royalty rates for precious metals, including gold and silver, would double nationwide from 4% to 8%. As Professor Bîrsan explains and as discussed above, the Government could not have unilaterally imposed this increase on RMGC. See Bîrsan ¶ 270 (concluding that “any increases in the mining royalty operated by way of the Mining Law 85/2003 cannot affect the Roşia Montană Exploitation License, as this law does not apply to this License”). [REDACTED]

[REDACTED] See Henry ¶ 57; Tănase II ¶ 115. Ultimately, the Government never implemented the announced increase in the royalty rate, [REDACTED] See Tănase II ¶ 115, n.148.

⁷³⁹ Interview of Minister of Culture Hunor, Debate of the Midday Journal, dated Dec. 19, 2011 (Exh. C-439) at 1-2 (Minister of Culture Kelemen Hunor: “There are discussions, because the Minister of Economy, Mr. Ariton went . . . to talk to the representatives of [RMGC] about the State holdings and everything related to that contract that everyone talks about – but very few have read; probably somewhere early next year we will also have the results after these discussions. We also need to make a decision in the Government . . . We discussed in the Government meeting twice, but we discussed only the aspects related [to] the contract.”).

advantageous contract, if these environmental conditions are fulfilled, I will propose the endorsement to the Government.”⁷⁴⁰

379. [REDACTED]

380. The Government never responded to Gabriel and RMGC’s revised proposal.⁷⁴³ On February 6, 2012, Prime Minister Boc resigned as a result of street protests stemming from unpopular austerity measures and other issues unrelated to the Project.⁷⁴⁴ With no conclusion to the Government’s demand for renegotiations, the Government would not allow the permitting process to proceed.⁷⁴⁵

B. Although Gabriel Had Offered to Submit to the Government’s Demands, the Government Refused to Make Any Permitting Decision Concerning the Project Throughout 2012

381. The Government refused to take any decision in 2012 concerning Project permitting; the terms of Gabriel and RMGC’s existing Project rights had effectively been rejected, and with no agreement as to new terms, the permitting process remained blocked.⁷⁴⁶

382. During a televised talk show appearance in February 2012, Marin Anton, the TAC President, confirmed, consistent with discussions during the EIA review, that the Project’s

⁷⁴⁰ Interview of László Borbély, TVR, dated Dec. 27, 2011 (Exh. C-637) at 2 (Minister of Environment László Borbély further observing that, with respect to the environmental permit, “it has been discussed for 11 years” and suggesting “a verdict at the end of January” 2012).

⁷⁴¹ [REDACTED]

⁷⁴² Henry ¶ 59; Tănase II ¶ 117.

⁷⁴³ Henry ¶ 60; Tănase II ¶ 118 .

⁷⁴⁴ Henry ¶ 60; Tănase II ¶ 118.

⁷⁴⁵ Henry ¶ 60; Tănase II ¶ 118.

⁷⁴⁶ Henry ¶¶ 61-65; Tănase II ¶¶ 119-127; Avram ¶¶ 114-118.

tailings management facility or TMF design met safety requirements and that cyanide processing as proposed for the Project “was and it is still used in the world right now” and “is even the most modern [technology] in the EU.”⁷⁴⁷ He also said he would be willing to drink water from the TMF to demonstrate the effectiveness of the detoxification process.⁷⁴⁸ With respect to the issuance of the environmental permit, TAC President Anton stated that “[a]ll the required [EIA Report documentation] for receiving the environmental permit were analyzed” and “[w]e are now studying the answers of the TAC members and we are waiting for a response from the Ministry of Culture for this,” noting that the process “is in the final stage.”⁷⁴⁹

383. Vasile Timiș, the State Secretary who represented the Ministry of Culture in the TAC, said during the same TV program that he had drafted the requested “endorsement” and that it was “submitted to the office of the minister and we hope you will have a decision as soon as possible.”⁷⁵⁰ When asked what “as soon as possible” means, State Secretary Timiș said: “I could not give you a very clear deadline, because I have not been issued a written mandate for it. In other words, I should only say what I can say and things I am sure about and I know very well.”⁷⁵¹

384. The Government refused to unblock the permitting process. In March 2012, the Ministry of Environment sent another letter to the Ministry of Culture requesting it to confirm that the letter sent on December 7, 2011 was an “endorsement” to issue the environmental

⁷⁴⁷ *Judeca Tu!*, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 22-23 (TAC President Anton: “The circuit is a closed one, very well monitored, with a discharge of cyanide in the TMF of 3 PPM, maximum 3 PPM, imposed by the Ministry of Environment and Forestry, 3 PPM, three parts per million – this is what it means – it means virtually nothing. Three parts per million means virtually nothing when it comes to settling.”).

⁷⁴⁸ *Judeca Tu!*, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 28 (TAC President Anton).

⁷⁴⁹ *Judeca Tu!*, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 9-10 (TAC President Anton).

⁷⁵⁰ *Judeca Tu!*, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 11 (Ministry of Culture State Secretary Vasile Timiș).

⁷⁵¹ *Judeca Tu!*, TV R1, dated Feb. 23, 2012 (Exh. C-438) at 11 (Ministry of Culture State Secretary Vasile Timiș).

permit.⁷⁵² To Gabriel and RMGC's knowledge, the Ministry of Culture did not provide any written response to the Ministry of Environment's letter.⁷⁵³

385. TAC President Anton repeated in additional media interviews that a decision to issue the environmental permit was imminent and that the Ministry of Environment was only awaiting the Ministry of Culture's "endorsement."⁷⁵⁴ Meanwhile, Ministry of Culture representatives stated publicly that a "new endorsement" would soon be provided.⁷⁵⁵ In fact, Ministry of Culture representatives signed two draft "endorsements" in January and February 2012 that were not finalized despite the positive views of the technical specialists in the Ministry of Culture who supported implementation of the Project.⁷⁵⁶

386. In April 2012, the Prime Minister appointed long-time Project opponent Attila Korodi to be Minister of Environment.⁷⁵⁷ Minister Korodi promptly demanded TAC President

⁷⁵² Letter No. 10857 from Ministry of Environment to Ministry of Culture dated Mar. 16, 2012 (Exh. C-1381).

⁷⁵³ [REDACTED]

⁷⁵⁴ *Marin Anton: [T]he environmental permit will be issued ... [in] a month or two*, Incisive TV Show, dated Mar. 8, 2012 (Exh. C-778) at 5 (TAC President Anton stating that a decision on the environmental permit would be issued within "[a] month or two"); *Green light for Roşia Montană, on the last hundred miles*, Evz.ro, dated Apr. 12, 2012 (Exh. C-436) at 1 (TAC President Anton: "We cannot make a decision yet, because we are waiting for an endorsement from the Ministry of Culture. We have analyzed the papers and after the document arrives we will be able to make a decision.").

⁷⁵⁵ *Green light for Roşia Montană, on the last hundred miles*, Evz.ro, dated Apr. 12, 2012 (Exh. C-436) ("Sources from the Ministry of Culture have explained, for EVZ, that the situation was blocked because of this endorsement: 'We have sent a point of view to the Ministry of Environment, and they asked for clarifications. In the coming period we will issue a new endorsement.'").

⁷⁵⁶ Draft Letter No. 39 from the Ministry of Culture to the Ministry of Environment dated Jan. 5, 2012 (Exh. C-638) (signed by Ministry of Culture State Secretary Vasile Timiș, but not by the Ministry's legal service); Draft letter from Ministry of Culture to Ministry of Environment dated Feb. 9, 2012 (Exh. C-639) (signed by the Director of Cultural Patrimony and the Ministry's legal service, but not by State Secretary Timiș). *See also* [REDACTED]

⁷⁵⁷ [REDACTED]

Anton's removal from his position as Ministry of Environment State Secretary.⁷⁵⁸ Shortly thereafter, the entire Government, including the Prime Minister and Minister Korodi, was ousted from office following a no-confidence vote by Parliament at the end of April 2012.⁷⁵⁹

387. A new interim Government coalition comprised of the Social Democratic Party ("PSD") and the National Liberal Party ("PNL") entered office in May 2012 under the leadership of a new Prime Minister, PSD party leader Victor Ponta.⁷⁶⁰ Previously, as the main opposition leader, Mr. Ponta had criticized the Project and said that if he were to become Prime Minister after the Government permitted the Project, he would consider canceling the permit.⁷⁶¹

388. Prime Minister Ponta's wife, Daciana Sârbu, also was a vocal opponent of the Project and a member of the European Parliament who previously had sponsored a failed proposed EU-wide ban on cyanide in mining projects.⁷⁶² Soon after he became interim Prime Minister, Mr. Ponta, Ms. Sârbu, and the new Minister of Environment, Rovana Plumb, attended an anti-Project NGO event wearing the protest pins of the so-called "Save Roşia Montană"

⁷⁵⁸ [REDACTED] See also Interview of Prime Minister Ungureanu dated Apr. 19, 2012 (Exh. C-811) at 1-2 (Prime Minister Ungureanu acknowledging that the Project was "stuck" and also acknowledging that "we cannot mock a foreign investor for over 10 years.").

⁷⁵⁹ On his way out of office, Minister Korodi announced he had obtained a legal opinion from Respondent's counsel in this arbitration, the law firm Leaua & Associates, claiming that the EIA procedure should be suspended until RMGC obtained a new urbanism certificate reflecting approval of the industrial area PUZ. Tănase II ¶ 123; Henry ¶ 63, n.58. The views of Minister Korodi and the Leaua law firm were subsequently rejected by the Government's Inter-Ministerial Commission in March 2013. See *infra* § VI.A.1.

⁷⁶⁰ Henry ¶ 64; Tănase II ¶ 124.

⁷⁶¹ Victor Ponta says he is to annul the operating authorization at Roşia Montană if he gets in power, Hotnews.ro, dated Mar. 1, 2012 (Exh. C-859) (Victor Ponta: "Yes, I will definitely reconsider such a decision.").

⁷⁶² [REDACTED] As discussed above, the European Commission rejected the proposed cyanide ban because, in view of the already stringent EU regulations on the use of cyanide, the proposed ban would not provide additional health benefits and would cause significant economic losses. See *supra* § IV.A.2; van Zyl § III.B; Tănase II ¶ 125; Answer given by EU Commissioner of Environment Janez Potočnik on behalf of the Commission dated June 23, 2010 (Exh. C-513).

group.⁷⁶³ At the event, Ms. Sârbu repeated her strong opposition to the Project and criticized the new Minister of Economy for stating that the Project “will start this year.”⁷⁶⁴

389. Prime Minister Ponta announced that his Government would not even consider permitting the Project until 2013, after national elections scheduled for the autumn of 2012 and eventually held in December 2012.⁷⁶⁵

390. The Ministry of Environment therefore did not take any decision on the environmental permit and did not convene the TAC at all in 2012.⁷⁶⁶ As Professor Mihai observes, the Ministry of Environment thus not only failed to issue any decision on RMGC’s environmental permit application within the timeframe required by law, but blatantly disregarded RMGC’s right to administrative process and *de facto* suspended the EIA procedure unlawfully from November 29, 2011 until it convened another TAC meeting more than a year and half later, in May 2013, although there was no legal basis to hold any further TAC meetings.⁷⁶⁷

⁷⁶³ [REDACTED] See also *For whom does Victor Ponta “save Roșia Montană”*, Daciana Sarbu alias Leana Ceausescu, Rovana Plumb and Magor Csibi, in the yard at GDS? *Socialism with a “civilian” face, totalitarianism with cracked teeth*, Roncea.ro, dated June 7, 2012 (Exh. C-1509).

⁷⁶⁴ *Economy Minister Daniel Chitoiu, convinced that the Roșia Montană project will start this year*, Hotnews.ro, dated June 1, 2012 (Exh. C-861) (Minister of Economy Chitoiu: “I am convinced that the project will start this year . . . We plan to make by the end of this year a political decision regarding the beginning of mining both in Roșia Montană and at Cupru Min Abrud.”); *For whom does Victor Ponta “save Roșia Montană”*, Daciana Sarbu alias Leana Ceausescu, Rovana Plumb and Magor Csibi, in the yard at GDS? *Socialism with a “civilian” face, totalitarianism with cracked teeth*, Roncea.ro, dated June 7, 2012 (Exh. C-1509) at 3 (reporting that Daciana Sârbu was “irritated yesterday by the recent statements made by Economy Minister Daniel Chitoiu regarding the investment in Roșia Montană” and that she stated: “From my point of view, the Roșia Montană project should not start. I have said it repeatedly.”).

⁷⁶⁵ *The Government postpones the decisions regarding Roșia Montană and the shale gas until the elections that are going to be organized in autumn*, Realitatea.net, dated June 8, 2012 (Exh. C-641) (Prime Minister Ponta: “I want to discuss this matter in a serious manner next year.”).

⁷⁶⁶ Tănase II ¶ 126; Avram ¶ 113. See also Mihai § V.C.6.

⁷⁶⁷ Mihai §§ VII, VIII.A.3. See also Mihai ¶¶ 296-306 (“[L]acking a basis in law to permit the Ministry of Environment to stay the proceedings . . . these purely *de facto* and unjustified repeated suspensions of procedure were blatantly unlawful.”).

1. The Government Also Blocked Other Project Permits

391. The Government also refused to take any decision with respect to any of RMGC's other permit applications in 2012 thus further depriving without legal basis RMGC's rights to administrative process and treatment in accordance with law.⁷⁶⁸

392. For example, as Mr. Avram explains, in response to a request from the Ministry of Environment in September 2011, RMGC had updated and resubmitted the Waste Management Plan for the Project pursuant to regulations enacted in 2010.⁷⁶⁹ Although NAMR twice had endorsed the Project's Waste Management Plan, the Ministry of Environment twice refused to approve the plan and instead requested additional information.⁷⁷⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

393. Similarly, following RMGC's application to renew its Water Management Permit which had been issued in August 2010 and which was due to expire in August 2012, the Mureş Water Basin Administration (which falls under the authority of the Ministry of Environment) requested additional documents, which RMGC promptly provided, but the authority then failed to renew the permit or otherwise to act on the application.⁷⁷² [REDACTED]

[REDACTED]

⁷⁶⁸ See Tănase II ¶¶ 124-127; Avram ¶¶ 114-118.

⁷⁶⁹ Avram ¶ 114 (noting that RMGC previously had submitted the Waste Management Plan with the EIA Report in 2006 and had undertaken to comply with the then newly-issued EU Mining Waste Directive even before the Directive was implemented in Romania).

⁷⁷⁰ Avram ¶ 114.

⁷⁷¹ [REDACTED]

[REDACTED] As discussed below, the Ministry of Environment eventually approved the Waste Management Plan in May 2013. See *infra* § VIII.A.3; [REDACTED] Letter from Ministry of Environment to RMGC dated May 7, 2013 (Exh. C-658).

⁷⁷² Avram ¶ 116.

results were favorable, he would ask Parliament to make a decision regarding the Project.⁷⁷⁸ [REDACTED]

[REDACTED] it was unclear what Parliament might be asked to decide as Parliament has no role in the permitting process.⁷⁷⁹

397. In any event, in the fall of 2012, the mayors of 35 communities in the area of the Project, within Alba County, proposed that the Alba County Council organize a referendum to ask voters whether they supported restarting mining in the region, including at Roșia Montană through the Project.⁷⁸⁰ The Alba County Council endorsed this proposal and held the referendum on December 9, 2012, the day of national elections.⁷⁸¹

398. Although Gabriel and RMGC understood that there was no legal requirement that a local referendum be held in order to obtain the environmental permit or other permits, they nevertheless welcomed the idea because the local communities overwhelmingly supported the Project.⁷⁸² The communities in and around Roșia Montană recognized that the Project was the only realistic prospect of improving the environmental, cultural, economic, and social conditions in the area, and consistently demonstrated strong support for the Project, and equally strong displeasure over the Government's failure to permit its implementation.⁷⁸³

399. While the local communities consistently supported the Project, [REDACTED] discusses, a number of zealous, mostly foreign-funded activists and NGOs opposed to mining and to the Project, such as the "Save Roșia Montană" group, descended upon Roșia Montană soon after Project development began. They proceeded to orchestrate a professional campaign of false and misleading anti-Project propaganda directed at the local communities, the Romanian

⁷⁷⁸ [REDACTED]

⁷⁷⁹ [REDACTED] See also Mihai § VI.B.5.

⁷⁸⁰ Lorincz ¶ 76; Tănase II ¶ 130; Henry ¶ 68.

⁷⁸¹ Lorincz ¶ 76; Tănase II ¶ 130; Henry ¶ 70.

⁷⁸² Tănase II ¶ 131; Henry ¶ 69.

⁷⁸³ [REDACTED] (describing activities reflecting the local support for the Project and explaining that public opinion surveys undertaken by RMGC through 2012 showed around 95% support for the Project within Roșia Montană and 75-80% support in the surrounding communities); [REDACTED] In one of many clear expressions of local support, more than 40 mayors from Roșia Montană and the surrounding communities, as well as various unions, local non-profit organizations, and universities, joined the Support Group for the Roșia Montană Mining Project. See Lorincz ¶ 75; Tănase II ¶ 131; Support Group for the Roșia Montană Mining Project Brochure (Exh. C-806).

overwhelmingly in favor of restarting mining operations and implementing the Project.⁷⁸⁸ A strong majority of voters in Roșia Montană (79%) and other areas with mining traditions, *i.e.*, Abrud, Baia de Arieș, Bucium, and Zlatna (71%), voted to restart mining in the area and to implement the Project.⁷⁸⁹ Overall, in the 35 communities that held the referendum, nearly two-thirds of the voters (63%) voted to implement the Project, and there is good reason to believe support for the Project was even higher.⁷⁹⁰ Indeed, the Alba County Council determined that the referendum likely significantly understated the percent of voter turnout and local support for the Project, not only due to the severe weather that hit the area, but also because approximately 27% of the households registered on the lists of eligible voters were uninhabited.⁷⁹¹

401. Based on the results of the referendum, the mayors of the 35 communities that held the referendum sent a memorandum endorsed by the Alba County Council to President Băsescu and Prime Minister Ponta, as well as to Parliament, urging a prompt decision to implement the Project:

Considering all of the above, we, the mayors of the 35 communities for which this mining project has an overwhelming importance in the long-term development of the area, consider that it is high time a decision was made as quickly as possible with regard to the restart of the mine at Roșia Montană. We, the representatives of the communities, have repeatedly stated, by open letters and memorandums, the need to restart mining in Apuseni, without however obtaining the expected results. Given the circumstances explained above, we consider that the results of the referendum and the vote of the people from these communities provide a decisive argument for the restart of mining and for the start of the Roșia Montană mining project.⁷⁹²

⁷⁸⁸ Lorincz ¶¶ 76-77; Tănase II ¶¶ 133-135; Henry ¶ 70.

⁷⁸⁹ Tănase II ¶ 133; Lorincz ¶ 76; Henry ¶ 70.

⁷⁹⁰ Tănase II ¶ 133; Lorincz ¶ 76; Henry ¶ 70.

⁷⁹¹ Memorandum on Job Creation by the Restart of Mining at the Apuseni Mountains and Especially in Roșia Montană from Alba County Council to President of Romania, Parliament of Romania, and Government of Romania (Exh. C-794) at 5-6 (estimating that the real participation rate in the referendum was actually above 85% of the total voters living in the area who were not stranded by the snowstorm, and that in normal conditions turnout would easily have been 60% and more than 70% of the total votes would have been cast in favor of the Project). *See also* Tănase II ¶¶ 134-135; Lorincz ¶ 77; Henry ¶ 70.

⁷⁹² Memorandum on Job Creation by the Restart of Mining at the Apuseni Mountains and Especially in Roșia Montană from Alba County Council to President of Romania, Parliament of Romania, and Government of Romania (Exh. C-794) at 5. *See also REFERENDUM - 80% of Roșia Montană locals voted in favor of re-*

VIII. THE STATE UNLAWFULLY REJECTED THE PROJECT OUTRIGHT AND IN EFFECT TERMINATED ALL OF GABRIEL'S CONTRACTUAL AND LEGAL RIGHTS WITHOUT ANY COMPENSATION

A. Following Elections the New Government Maintained the Abusive Position That the Project Would Not Be Permitted Unless Revised Economic Terms Were Agreed but Then, in Complete Abandonment of the Applicable Legal Framework, Added That Parliament Would Decide If the Project Would Proceed Under Any Terms

402. The national elections held on the day of the referendum in December 2012 returned Prime Minister Ponta's USL coalition to power with a significant two-thirds majority.⁷⁹³

403. In late January 2013, Prime Minister Ponta restated the Government's conditions for the Project to proceed, namely, the State's shareholding in RMGC and the royalty rate both would have to be increased, and the Project would have to meet environmental standards.⁷⁹⁴ In fact, however, the Ministry of Environment already had established in November 2011, in consultation with the TAC, that the Project met the applicable environmental standards. As to the other two conditions, here the Prime Minister simply confirmed that the Government already rejected the Project on the terms previously agreed by the State with Gabriel and RMGC and on the basis of which Gabriel had invested, and that the only way forward would be if different economic terms were agreed.⁷⁹⁵

launching mining industry through RMGC's Project during the referendum organized on 9 December 2012, Lujuru, dated Dec. 12, 2012 (Exh. C-890) (Roşia Montană Mayor Eugen Furdui: "[W]e could show to the entire country that once again people from the 16 villages of Roşia Montană Commune want mining. The jobs are the main problem in this area, and people are connecting their future to mining, the only craft that may create thousands of jobs in this area, here, in Apuseni Mountains. The entire opposition to the mining project was based on demagogues, populism and, especially, on lies . . . The vote of Roşia Montană locals, together with the vote of other tens of thousands of Apuseni Mountains locals is a signal sent by these communities to all politicians in Bucharest: we want jobs in [the] mining industry and a future for our families. I hope this signal shall be understood and we will have the support of the politicians in Bucharest for this Mining Project from Roşia Montană to be launched as soon as possible, and thousands of jobs to be created for locals and for people around this area.").

⁷⁹³ Tănase II ¶¶ 136-137; Henry ¶ 71.

⁷⁹⁴ *Victor Ponta: Roşia Montană will move to Large Projects Ministry*, Hotnews.ro, dated Jan. 25, 2013 (Exh. C-831) ("There are three conditions: environmental standards, royalties and participation of the Romanian state. When these three are met, it [the Project] can begin.").

⁷⁹⁵ ██████████ Henry ¶ 71. *See also supra* § VII.

404. The Government assigned responsibility for dealing with the Project to a newly established Department for Infrastructure Projects of National Interest and Foreign Investments (“Department of Infrastructure Projects”), headed by Minister Delegate Dan Şova.⁷⁹⁶ Soon thereafter Minister Delegate Şova announced that a “yes or no” decision on the Project should be made “at once.”⁷⁹⁷ [REDACTED]

[REDACTED]

[REDACTED]⁷⁹⁸

405. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
[REDACTED]

⁷⁹⁶ Tănase II ¶ 138; Henry ¶ 72. The Government also reorganized Minvest through a spin-off procedure that transferred its shareholding in RMGC to a new company, Minvest Roşia Montană. The Government approved the spin-off, among other things, due to “[t]he State’s interest in having direct corporate control over RMGC, considering the importance of the project as regards the exploitation of the resources and the development of the area.” Substantiation Note to Government Decision No. 275/2013 dated May 15, 2013 (Exh. C-94). *See generally* Bîrsan § II.F.

⁷⁹⁷ *A decision has to be taken regarding Roşia Montană!*, Observator.ro, dated Jan. 30, 2013 (Exh. C-905) (Minister Delegate Dan Şova: “In my view, it must be taken a decision for the investment in Roşia Montană! Let it be decided at once: yes or no.”). *See also Dan Şova: Construction of Comarnic – Braşov motorway starts in October; three big construction companies interested in the motorway crossing Transylvania*, Financiarul.ro, dated Mar. 14, 2013 (Exh. C-824) at 7 (Minister Delegate Şova stating that the Roşia Montană Project was one of a number of “projects with regard to which, unfortunately, we have not been able to make a political decision in the past 20 years, to say ‘look, this will be done under these terms’ or ‘it’s not going to be done, full stop’. We were just not capable, we have been delaying a decision.”).

⁷⁹⁸ [REDACTED]

⁷⁹⁹ [REDACTED]

⁸⁰⁰ [REDACTED]

| [REDACTED]
[REDACTED]
[REDACTED]

| [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

| [REDACTED]
[REDACTED]

| [REDACTED]⁸⁰¹

406. [REDACTED]

[REDACTED]⁸⁰² Given the License issued by the State to RMGC and the legal standards and administrative process established in law for permitting, there was no legal basis for the Government first to make a “political decision” whether to proceed with the Project. Moreover, if the Government were to decide not to do the Project for political reasons or for any other reason outside of the lawful permitting process, it needed to do so transparently, in accordance with law, and on payment of full compensation to Gabriel for the losses that would be caused thereby.⁸⁰³ [REDACTED]

[REDACTED]
[REDACTED]⁸⁰⁴

407. Moreover, despite the Ministry of Environment’s completion of the technical assessment of the Project without objections in November 2011,⁸⁰⁵ it was apparent that even a

801 [REDACTED]
[REDACTED]

802 [REDACTED]

803 See Mihai § VIII.C.1; Birsan § III.D.

804 [REDACTED]

805 See *supra* §§ VII.A.3-4.

positive “political” decision by the Government, according to the Government’s announced path forward, would not lead to issuance of the long overdue permits for the Project, but would only tee up another “political” decision by Parliament.⁸⁰⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸⁰⁷

408. The Government’s apparent decision to disregard the legal standards and administrative process established for making permitting decisions and instead to condition permitting on a parliamentary vote departed fundamentally from the legal framework applicable to the Project and that governed Gabriel’s investment, and thus undermined Gabriel and RMGC’s reasonable expectations that their legal rights would be respected and that legal procedures would be followed.⁸⁰⁸ Professor Mihai describes in detail the applicable legal framework, which required the Ministry of Environment to administer the EIA procedure, and to make a decision regarding the issuance of the environmental permit, based on considerations grounded in the applicable environmental standards, and which was to be issued in the form of a Government Decision.⁸⁰⁹ The applicable legal regime did not include either that the Government would take a political decision whether it wanted the Project or that Parliament would take a political decision whether an environmental permit should be issued.⁸¹⁰

409. [REDACTED]

[REDACTED]

[REDACTED]⁸¹¹ No such legislation was enacted.⁸¹² Professor Mihai explains that such legislation would have been unconstitutional because the principle of

⁸⁰⁶ Henry ¶ 78.

⁸⁰⁷ [REDACTED]

⁸⁰⁸ Tănase II ¶ 143; Henry ¶ 78. Mihai § VIII.C.1.

⁸⁰⁹ See generally Mihai §§ IV-V; *supra* § IV.A.1.

⁸¹⁰ Mihai § VIII.C.1.

⁸¹¹ [REDACTED]

⁸¹² Mihai § VI.B.5.

separation of powers in Romania “forbids the Parliament from interfering with acts of public administration performed by the Government and its ministries.”⁸¹³

410. [REDACTED]

[REDACTED]

[REDACTED]⁸¹⁵

411. [REDACTED]

[REDACTED] the fact is that Gabriel and RMGC had no real choice in the matter.⁸¹⁶ From the events of 2011, and the non-action during 2012, [REDACTED]

[REDACTED] Project permitting already had been held hostage for almost 18 months while the Government demanded an increased economic interest and renegotiated financial terms.⁸¹⁷ [REDACTED]

⁸¹³ Mihai ¶¶ 278-280. *See also id.* § VI.B.5. Such a legislative change had been proposed in 2006, but at that time, the Government opposed it and Parliament rejected it on the ground that administrative acts such as an environmental permit must be subject to judicial review and therefore cannot be decided by Parliament. Mihai ¶ 282.

⁸¹⁴ [REDACTED]

⁸¹⁵ [REDACTED]

See also Dan Şova: Construction of Comarnic – Braşov motorway starts in October; three big construction companies interested in the motorway crossing Transylvania, Financiarul.ro, dated Mar. 14, 2013 (Exh. C-824) (Minister Delegate Dan Şova).

⁸¹⁶ Henry ¶¶ 77-78; [REDACTED]

⁸¹⁷ Henry ¶ 77; [REDACTED] *See also supra* § VII.

[REDACTED]

412. Gabriel and RMGC therefore considered that they could either try to work within the framework Minister Delegate Şova presented or refuse to do so and sue the State.⁸¹⁹

413. Gabriel decided it had no real choice but to follow the process outlined by the Government and hope they could reach reasonable agreement with the Government on new economic terms and that this would lead to a favorable “political decision” regarding the Project and a positive outcome in Parliament.⁸²⁰ As Mr. Henry explains, “[t]here was no practical alternative for Gabriel to take the Project further.”⁸²¹

1. The Government’s Inter-Ministerial Commission Confirmed There Were No Legal or Technical Impediments to Implementing the Project and the Ministry of Culture Again Endorsed Issuing the Environmental Permit

414. In March 2013, the Government established an Inter-Ministerial Commission, under the coordination of the Department of Infrastructure Projects, to “mediate an efficient dialogue” between the State and RMGC “considering that the permitting process for the Roşia Montană mining project has been stagnating since November 2011.”⁸²²

415. The Inter-Ministerial Commission included many of the same State authorities involved in the permitting process through the TAC, including the Ministry of Environment (as

⁸¹⁸ Henry ¶ 78; [REDACTED]

⁸¹⁹ Henry ¶¶ 77-78; Tănase II ¶ 145.

⁸²⁰ Henry ¶¶ 77-78; Tănase II ¶ 145.

⁸²¹ [REDACTED]

⁸²² Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roşia Montană mining project [REDACTED] (Exh. C-553) at 1.

well as its Department of Waters, Forests, and Fisheries), Ministry of Culture, Ministry of Agriculture, Ministry of Regional Development, NAMR, and the Romanian Waters National Administration.⁸²³ The Ministry of Public Finance and Ministry of Justice, which were not part of the TAC, also participated.⁸²⁴

416. The Inter-Ministerial Commission met with RMGC on March 11 and 22, 2013.⁸²⁵ During the first meeting, the Ministry of Environment State Secretary, Elena Dumitru, acknowledged that “in the last [TAC] meeting, in late November [2011], TAC members concluded that the technical issues were clarified.”⁸²⁶ Nonetheless, the Inter-Ministerial Commission proceeded to analyze issues already addressed repeatedly and resolved during the EIA procedure.⁸²⁷

417. Upon completing its assessment of the Project, the Inter-Ministerial Commission prepared a report, which was provided in draft to RMGC on March 25, 2013, and that was very favorable.⁸²⁸ The report was approved by the Government two days later, on March 27, 2013.⁸²⁹ In its report, the Inter-Ministerial Commission addressed and dismissed various alleged impediments to implementing the Project, including:

⁸²³ Avram ¶¶ 119-121 (further noting that many of these State institutions were represented by the same individuals in both the Inter-Ministerial Commission and the TAC); Tănase II ¶¶ 147-148; Henry ¶¶ 80-81; Gligor ¶ 122.

⁸²⁴ Henry ¶ 80.

⁸²⁵ Avram ¶ 122; Tănase II ¶ 148; Henry ¶ 81.

⁸²⁶ Transcript of Inter-Ministerial Commission meeting dated Mar. 11, 2013 (Exh. C-471) at 13 (Ministry of Environment State Secretary Elena Dumitru).

⁸²⁷ [REDACTED]

⁸²⁸ Tănase II ¶¶ 149-160; Avram ¶¶ 123-124; Henry ¶¶ 82-83.

⁸²⁹ Information Note attached to Meeting Minutes of the Commission for Negotiation of All Aspects Related to the Implementation of Roșia Montană Mining Project dated Apr. 28, 2013 (Exh. C-451) at 2 (noting that the Inter-Ministerial Commission’s report was “presented and approved in the Government meeting of 27 March 2013”). The Inter-Ministerial Commission’s final report was not made public or provided to RMGC. [REDACTED]

[REDACTED] See Tănase II ¶ 149; Avram ¶ 123; Henry ¶ 83.

- Ministry of Culture Endorsement: As discussed above, on December 7, 2011, the Ministry of Culture provided a “point of view” with conditions and measures to include in the environmental permit, which, as Professor Mihai explains, was the “endorsement” required by law to issue the permit.⁸³⁰ The Ministry of Culture refused, however, to respond to multiple requests from the Ministry of Environment to confirm that its “point of view” was the “endorsement,” which was the Ministry of Environment’s purported basis for failing to issue its decision on the environmental permit in 2011-2012.⁸³¹ During the Inter-Ministerial Commission review, the Ministry of Culture provided uniformly positive comments about the Project,⁸³² and stated that the Ministry “saw no impediment in issuing the endorsement,” that it was simply “waiting for a written request” from the Ministry of Environment, and that the requests made in 2011-2012 were ignored because they were submitted “under another government” but, if the Ministry of Environment were to “ask for it now, you will receive it the same day, because things are clear enough.”⁸³³ On April 10, 2013, the Ministry of Culture issued a document entitled “endorsement” that was substantively identical to the “point of view” issued in December 2011.⁸³⁴ [REDACTED]

⁸³⁰ See *supra* § VII.A.3; Mihai § VII.A.2.2.2.

⁸³¹ See *supra* § VII.A.4.

⁸³² Letter No. 536 from the Ministry of Culture to the Ministry for Infrastructure Projects and Foreign Investment dated Mar. 18, 2013 (Exh. C-1360) (observing, among other things, that RMGC’s restoration works were “obviously beneficial and mandatory for the reviving of the identity of the cultural heritage of the locality,” and that the amounts already expended and budgeted for further restoration works in the area were “unprecedented in Romania” and “sufficient to cover the local needs, according to any international standard”).

⁸³³ Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 2, 5-6 (Ministry of Culture Director of Cultural Patrimony Mircea Angelescu and State Secretary Radu Boroianu, who also confirmed that all issues previously raised by the Ministry of Culture were “solved, in substance”).

⁸³⁴ Letter No. 750 from Ministry of Culture to Ministry of Environment dated Apr. 10, 2013 (Exh. C-644); Mihai § VIII.B.3.1; Gligor ¶¶ 127-130; Avram ¶¶ 125-126; Tănase II ¶¶ 150-152.

- “Outstanding Public Interest” Determination: As discussed above, for purposes of complying with the Romanian Waters Law and the EU Water Framework Directive, the Ministry of Environment and the Romanian Waters National Administration directed RMGC to obtain a determination of “outstanding public interest” from the three local councils or the county council; the Alba County Council issued such a decision in September 2011, and none of the TAC members questioned this approach.⁸³⁶ Contradicting its earlier position, the Ministry of Environment argued to the Inter-Ministerial Commission that the Alba County Council decision was not a sufficient determination of public interest and that a Government Decision was needed.⁸³⁷ The Inter-Ministerial Commission President, Maya Teodoriu, who was then a State Secretary in the Department of Infrastructure Projects and is now a judge on Romania’s Constitutional Court, confirmed that the Alba County Council’s decision was sufficient and rejected the Ministry of Environment’s contention that more was needed.⁸³⁸ The Inter-Ministerial Commission agreed that the Alba County Council’s decision established that the Project was of “outstanding public interest.”⁸³⁹

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⁸³⁶ See *supra* §§ VII.A.3-4.

⁸³⁷ Tănase II ¶ 153.

⁸³⁸ Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 9 (Inter-Ministerial Commission President Maya Teodoriu: “I cannot see the legal ground based on which we should change everything that was finalized or agreed in 2011, when you had that Decision of the Local Council, actually a Decision of the County Council, whereby the project was declared a project of high public interest, so I do not see why, but then I may miss something, why we should complicate the procedure?”).

⁸³⁹ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 4-5 (“We note that a Decision of the Alba County Council ascertaining that the objective ‘Roșia Montană Mining Project’ is of outstanding public interest exists at the time being. In our opinion, *de lege lata*, there is no legal ground calling for a need to pass a special enactment with a view to classifying the Roșia Montană

- Urbanism Certificate and PUZ: As discussed above, in September 2007 Minister of Environment Korodi unlawfully suspended the EIA procedure based on the pretext that the EIA procedure could not continue without a valid urbanism certificate and that UC 105/2007 issued to RMGC was suspended *ipso jure*.⁸⁴⁰ As also noted above, on his way out office in May 2012 following his brief (less than one month) second term as Minister, Minister Korodi had argued that the EIA procedure should be suspended again until RMGC obtained a new urbanism certificate reflecting approval of the industrial area zonal urbanism plan or PUZ.⁸⁴¹ The Ministry of Environment again took this position.⁸⁴² The Inter-Ministerial Commission concluded that “the maintaining of a valid urbanism certificate for the entire duration of the [EIA] procedure is not necessary.”⁸⁴³ The Commission also rejected the Ministry of Environment’s position that the environmental permit could only be issued after RMGC obtained approval of the industrial area PUZ, and concluded that “the Ministry of Environment and Climate Change can issue the Environmental Permit and any other details can be solved along the way.”⁸⁴⁴ This conclusion further demonstrated that the

Project in the category of works of outstanding public interest, and the decision of the Alba County Council is sufficient.”); *id.* at 5 (explaining that “the legal team of the Ministry of Environment and Climate Change could not provide the legal grounds calling for an enactment in order to classify the project as works of outstanding public interest but, as matter of advisability, the Ministry of Environment and Climate Change’s legal team indicated that it would be a good idea for the future to have such enactment passed, even though this aspect cannot prevent further development of the project.”).

⁸⁴⁰ See *supra* § V.A; Mihai § VII.C.

⁸⁴¹ See *supra* § VII.B; Tănase II ¶¶ 123, 155; Henry ¶ 63 n.58. At that time UC 87/2010 issued to RMGC in 2010 was still valid until April 30, 2013. See Urbanism Certificate No. 87 dated Apr. 30, 2010 (Exh. C-808) at 26. The Alba County Council issued a new urbanism certificate to RMGC on April 22, 2013. See Urbanism Certificate No. 47 dated Apr. 22, 2013 (Exh. C-924).

⁸⁴² Tănase II ¶156. In fact, there was no basis to suspend the EIA procedure as indeed it should have been completed shortly after the last TAC meeting in November 29, 2011 when the TAC’s technical review clearly had been completed. See *supra* § VII.A.3. See also Mihai § VII (describing why earlier EIA 2007-2010 EIA suspension was unlawful).

⁸⁴³ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 6.

⁸⁴⁴ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 6.

suspensions of the EIA procedure from 2007-2010 and *de facto* in 2012 were abusive and unlawful.

- Environmental Guarantees: The Ministry of Environment took note of RMGC's proposed financial guarantee for closure and rehabilitation of US\$ 146 million, and requested that RMGC also provide an environmental liability guarantee sufficient to cover the costs of cleaning up pollution from a potential accident and work with the State to finalize the amounts of both guarantees.⁸⁴⁵ When the Inter-Ministerial Commission President asked whether the negotiation of these guarantees could present an impediment to implementing the Project, the Ministry of Environment State Secretary, Elena Dumitru, declared unequivocally, "No, of course not."⁸⁴⁶
- Hungary's Opposition: The Inter-Ministerial Commission rejected the Ministry of Environment's suggestion that the Ministry of Foreign Affairs needed to address Hungary's opposition to the Project, observing that "the transboundary consultation procedure is completed," and that "Hungary's negative answer is merely consultative, as the Romanian State has sovereign power to decide on the issuance of an Environmental Permit."⁸⁴⁷

⁸⁴⁵ Tănase II ¶ 157. *See also* Kunze § IX (explaining that the environmental liability financial guarantee "was designed to be highly conservative, such that it should have been more than sufficient to cover the costs of any accident or other unexpected event," and that "RMGC exceeded the applicable requirements" and "provided Romania with assurance that it would not be required to assume any financial liabilities associated with closure in the event of an early termination of the Roșia Montană Project").

⁸⁴⁶ Transcript of Inter-Ministerial Commission meeting dated Mar. 22, 2013 (Exh. C-472) at 16 (Ministry of Environment State Secretary Elena Dumitru). *See also* Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 5. As discussed below, RMGC and the Government agreed in August 2013 to establish the closure and rehabilitation guarantee and environmental liability guarantee in the amounts of US\$ 146 million and US\$ 25 million, respectively. *See infra* § VIII.A.5; Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roșia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(f).

⁸⁴⁷ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 6-7.

- Legislative Amendments: While certain legislative proposals were discussed that would have facilitated the implementation of the Project, the Inter-Ministerial Commission observed that these proposals were not a condition for the future implementation of the Project, but they “are meant to facilitate the implementation of any mining project in Romania, in the future, by simplifying and rendering the procedures efficient, in line with [European] and international laws and best practices.”⁸⁴⁸ As Mr. Henry states, “[t]his observation was consistent with the view of Gabriel and RMGC that legislative changes would be welcome to expedite and facilitate Project implementation, but were not necessary to implement the Project.”⁸⁴⁹

418. Following its assessment, the Inter-Ministerial Commission observed that there were “no further unclear issues as regards the possible development of the Roșia Montana project” and no “major issues . . . that would cause the termination of the Roșia Montană mining project or would negatively affect the development of such project.”⁸⁵⁰ The Inter-Ministerial Commission also concluded that there were “no significant legislative or institutional obstacles to hinder a possible future development of the Roșia Montană mining project,” and that “[t]he institutions represented in the Working Group did not raise any objections against the development of the Roșia Montană mining project,” as all of the issues raised “were clarified and no other comments were made within the framework of the Working Group, according to the agreed timetable.”⁸⁵¹

⁸⁴⁸ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 8, n.4.

⁸⁴⁹ Henry ¶ 83.

⁸⁵⁰ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 2.

⁸⁵¹ Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roșia Montană mining project [REDACTED] (Exh. C-553) at 8.

2. NAMR Issued a Long Overdue Verification and Approval of the Resources and Reserves for the Project

419. In March 2013 NAMR completed its review of the Feasibility Study, Exploitation Development Plan, and Technical Documentation for the Project, as updated by Ipromin in 2006 and 2010, and approved the resources and reserves for the Project.⁸⁵²

420. As Professor Bîrsan explains, while a titleholder under an exploitation license has the right to exploit all of the mineral resources within a given mining perimeter, the resources subject to exploitation must be validated and registered by NAMR, a process referred to as “homologation.”⁸⁵³ Pursuant to its obligations under the License, RMGC had undertaken extensive exploration and development activities within the Roşia Montană mining perimeter,

[REDACTED]

[REDACTED]⁸⁵⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸⁵⁵

421. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸⁵² Szentesy ¶¶ 102-106; Bîrsan ¶¶ 201, 206-223. *See also* §§ IV.A.2.b, V.D.2 [REDACTED].

⁸⁵³ Bîrsan ¶¶ 206-220.

⁸⁵⁴ Szentesy ¶¶ 19-23, 36-52.

⁸⁵⁵ Szentesy ¶¶ 44, 50. [REDACTED]

[REDACTED] *See supra* §§ II.A, IV.A.2.b (discussing resource and reserve calculations for the Project in the 2006 Feasibility Study). *See also* SRK Report ¶¶ 31, 39-45 (confirming the Roşia Montană deposit contains proven and probable mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver, and explaining that “mineral reserves” refers to that part of a measured or indicated mineral resource which can be economically mined, as demonstrated by a pre-feasibility study or a feasibility study, and taking into account factors such as the mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental, social and government-related aspects of the project).

[REDACTED]

422. As Ms. Szentesy explains, although by 2006 with the submission of RMGC's updated Feasibility Study and Exploitation Development Plan NAMR had the information necessary to review, validate, and register the resource and reserve calculations, NAMR did not do so until early 2013 despite Gabriel and RMGC's reasonable expectation that NAMR would act promptly as the law required.⁸⁵⁷ As Professor Bîrsan explains, NAMR's unexplained delay and failure to act earlier on its approval was a violation of its obligations both as grantor of the License concession and as a public authority.⁸⁵⁸

423. In March 2013, NAMR [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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424. Reflecting the fact that the Feasibility Study and Exploitation Development Plan are integral to, and indeed give rise to, the reported resources and reserves, NAMR's 2013 Approval of Resources/Reserves specifically states that the registered mineral resources and reserves are based on "the conclusions of the feasibility study and the development plan" and further that "[a]ny amendment of [these documents] will lead to a mandatory revaluation of the registered resources and reserves."⁸⁶⁰ As such, as Professor Bîrsan observes, in issuing the 2013

⁸⁵⁶ Szentesy ¶¶ 44-52. *See also supra* § IV.A.2.b (describing the 2010 updates and noting that the resource and reserve calculations did not change after 2006).

⁸⁵⁷ Szentesy ¶¶ 57-60, 102-106.

⁸⁵⁸ Bîrsan ¶¶ 134-137 (explaining that NAMR, as grantor of the License concession, has a duty to act promptly and efficiently, and, as a public authority, has an obligation by law to act within a reasonable term); *id.* ¶¶ 221-223 (concluding that in issuing the Approval only in March 2013, without explanation for its delay of over six years, NAMR violated its obligations).

⁸⁵⁹ Szentesy ¶ 104; NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roşia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C).

⁸⁶⁰ NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roşia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C) at 1-2. *See also* Szentesy ¶¶ 105-106 (explaining that the 2013 Approval of Resources/Reserves relied on the conclusions of the 2010 Updated Feasibility Study and Exploitation Development Plan and that NAMR

Approval of Resources/Reserves and thus approving RMGC's resource and reserve calculations for the Project, NAMR also necessarily approved the company's right to exploit those reserves as defined and elaborated in the Feasibility Study and Exploitation Development Plan on which the approval was based.⁸⁶¹

3. The Ministry of Environment Approved the Waste Management Plan and Reconfirmed the Technical Assessment Was Complete

425. From May to July 2013, the Ministry of Environment convened additional TAC meetings and confirmed again that the technical assessment was complete.⁸⁶²

426. At a TAC meeting held on May 10, 2013, the TAC Vice President (and acting President), Octavian Pătrașcu, who was the Director of the Impact Assessment and Pollution Control Department in the Ministry of Environment, stated:

*I want to remind the Technical Assessment Committee that the last meeting took place on November 29, 2011, and the conclusion of the representatives was that the Environmental Impact Assessment Report complies with the requirements from a technical point of view, and only certain aspects remained to be clarified . . . aspects that we find today on our Agenda*⁸⁶³

approved RMGC's right to exploit the reserves as outlined in the Technical Documentation upon which that approval was based).

⁸⁶¹ Bîrsan ¶¶ 215-220. Indeed, in testimony before Parliament's Special Commission in September 2013, NAMR's President, Gheorghe Duțu, confirmed the amounts of gold and silver to be exploited by RMGC, and when asked by the Special Commission Chairman where he obtained that data, President Duțu stated: "From the feasibility study presented and analyzed by our agency." Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 59 (NAMR President Gheorghe Duțu noting that the "exact figures" were "247,053 kg of gold and 904,883 kg of silver"). He also stated that the exploitation of these amounts "observe the current agreement and the existing License," and suggested that if additional quantities of gold or silver subsequently were found during exploitation, "some elements of the agreement could be negotiated." *Id.* at 60.

⁸⁶² Avram ¶¶ 129-148; Tănase II ¶¶ 169-177; Szentesy ¶¶ 84-90. *See also* Mihai § VIII.A.3 (explaining that as the TAC review already had been completed earlier, there was no legal basis for the Ministry of Environment to reconvene the TAC for a further review).

⁸⁶³ Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 3-4 (Acting TAC President Pătrașcu) (emphasis added); *id.* at 7 (Acting TAC President Octavian Pătrașcu: "In November 2011, [the TAC] assessed the last chapters of the EIA Report. Also, as I told you from the start, the [TAC] concluded that, from a technical point of view, the EIA Report complies with the substantial and structural requirements, and certain aspects which we will debate here today remained to be clarified."). *See also* Henry ¶ 92.

427. The items on the agenda included three issues addressed by the Inter-Ministerial Commission as well as the status of RMGC's Waste Management Plan.⁸⁶⁴ As discussed above, during 2012 the Ministry of Environment had refused improperly to act on the Waste Management Plan for the Project despite NAMR twice endorsing the plan.⁸⁶⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸⁶⁶

428. In March 2013 RMGC resubmitted the Waste Management Plan.⁸⁶⁷ NAMR promptly endorsed the plan for the third time, and on May 7, 2013, the Ministry of Environment approved it.⁸⁶⁸ During the May 10, 2013 TAC meeting, the Head of the Ministry of Environment's Department of Waste Management, Ana Nistorescu, confirmed that the Waste Management Plan "complies with all the requirements and standards" and "the best available techniques" set out in the EU Mining Waste Directive, and that "implementation of the plan will prevent and minimize the impact on all the environmental factors and on public health, and consequently, would ensure, on the medium and long term, the safe removal of wastes generated by the operations carried out in the Roşia Montană mining perimeter."⁸⁶⁹ As Mr. Avram observes, the Ministry of Environment "therefore confirmed that the company's approach to

⁸⁶⁴ The other issues were the financial guarantees, compliance with the Water Framework Directive, and the status of the local urbanism plans (PUZs), all of which had been addressed by the Inter-Ministerial Commission. *See supra* § VIII.A.1. With the exception of the request that RMGC provide a copy of the Alba County Council decision of September 29, 2011 declaring the Project of "outstanding public interest," in reality, none of the items placed on the agenda for the May 10, 2013 meeting was identified at the November 29, 2011 TAC meeting as requiring clarification. *See supra* § VII.A.3.

⁸⁶⁵ *See supra* § VII.B.

⁸⁶⁶ [REDACTED]

⁸⁶⁷ Avram ¶ 127; Alba NAMR Endorsement No. 189 dated Apr. 4, 2013 (Exh. C-656); NAMR Endorsement No. 4320 dated Apr. 11, 2013 (Exh. C-657).

⁸⁶⁸ Avram ¶ 128; Mihai § VIII.B.3.2; Letter No. 21251 from Ministry of Environment to RMGC dated May 7, 2013 (Exh. C-658).

⁸⁶⁹ Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 11 (Ministry of Environment Department of Waste Management Head Ana Nistorescu).

handling, for example, waste generated through cyanide processing met all requirements and would be handled safely for people and the environment.”⁸⁷⁰

429. Following further discussion, the acting TAC President closed the May 10, 2013 meeting by noting that the few issues requiring clarification had been addressed:

*I believe the objective we set for ourselves for today's TAC meeting was achieved. We analyzed point by point the aspects left to be clarified, as I said at the beginning, after the last TAC meeting, held in November 2011. I repeat – and this [is] my kind request to you, if there are any more points of view from the TAC member institutions, please send them within 5 days from this meeting. If there are any more points of view strictly related to the project and strictly related to the specialty of each TAC member institution, please send these points of view to us, at the Secretariat, at the Directorate, at the Ministry of Environment.*⁸⁷¹

430. The Ministry of Environment convened yet another TAC meeting on May 31, 2013.⁸⁷² At this meeting, the Romanian Academy representative repeated that institution's long-held ideological opposition to the Project based on its point of view submitted in 2003, and other TAC members expressed disagreement with the Academy's approach.⁸⁷³ For example, the Director of NAMR noted “with due respect” to “the Academician” that “the assessment of this Project began in 2006,” and that “[f]rom the point of view of the Agency [NAMR] the problem of this project is solved”⁸⁷⁴ The representative of the General Inspectorate of Emergency Situations also responded by observing that “the documentation and the approach that I have seen” for the Project was “among the most professional . . . that we, at the Inspectorate, have ever seen.”⁸⁷⁵ He said that the TAC members understood “very well, that the public and the academia must express such concerns,” but these concerns must be based on concrete evidence and arguments: “[W]hen it is about taking a decision to go on with a project or to stop a project,

⁸⁷⁰ Avram ¶ 131.

⁸⁷¹ Transcript of TAC meeting dated May 10, 2013 (Exh. C-484) at 22 (Acting TAC President Pătrașcu) (emphasis added).

⁸⁷² As Professor Mihai makes clear, there was no legal basis for the Ministry of Environment to convene another TAC meeting. Mihai § VIII.A.3.

⁸⁷³ [REDACTED]

⁸⁷⁴ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 10 (NAMR Director Stefan Harsu).

⁸⁷⁵ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 10-11 (Lt. Col. Senzaconi).

then I find it hard to believe that all the institutions of the state so far looked away or closed their eyes or did not know what to do.”⁸⁷⁶

431. Acting TAC President Pătrașcu stated, ironically as it was the Ministry of Environment that was responsible for directing the EIA procedure and for taking the decisions to convene repeated TAC meetings, that he had the “feeling that we are running in circles . . . we turn around each time and then turn around again and again and turn back to chapters that have already been discussed which have already been presented, chapters that we had left behind us at that time.”⁸⁷⁷ He then declared that there were no issues left to address and once again that the technical assessment was complete:

I think that, by taking and analyzing each and every point from . . . let’s say it, all the chapters of the Environmental Impact Assessment Report, we have reached our objectives. . . . *I would conclude that, from the technical point of view, the part and the chapters included in the Environmental Impact Assessment were completed. The long and the short of it, you know it too, I do not have to repeat it, each domain, each chapter was endorsed by a Romanian institution, so professionalism is not in question here.*⁸⁷⁸

432. Having thus again confirmed the completion of the technical assessment and stated its satisfaction with the quality of the information including in the EIA Report, the Ministry of Environment sent a letter requesting each TAC member to “present the conditions, measures and monitoring indicators” from its area of competence to “be included in the final decision and in the environmental permit.”⁸⁷⁹ The Ministry of Environment also scheduled another TAC meeting for June 14, 2013 to discuss “the conditions for project implementation,

⁸⁷⁶ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 11 (Lt. Col. Senzaconi).

⁸⁷⁷ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 14 (Acting TAC President Pătrașcu).

⁸⁷⁸ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 18-19 (Acting TAC President Pătrașcu) (emphasis added). *See also* Mihai ¶ 377 (observing that at the May 31, 2013 TAC meeting “the TAC Chairman stated again that the analysis of all outstanding issues was complete” and that “[n]one of the TAC members asked for revision or completion of the EIA Report, which evidences they were satisfied with the quality of the information provided by RMGC”).

⁸⁷⁹ Letter No. 22149 from Ministry of Environment to TAC members dated June 10, 2013 (Exh. C-554).

the measures for diminishing the impact according to your field of competence, as well as the monitoring indicators which are mandatory for the purpose of project implementation.”⁸⁸⁰

433. In advance of that TAC meeting, the Geological Institute of Romania raised objections to issuing the environmental permit.⁸⁸¹ As discussed above, in December 2011 the Geological Institute had endorsed the TMF site and the issuance of the environmental permit based on field work, testing, and structural mapping conducted by its geologists.⁸⁸² In 2012, however, longtime Project opponent Ștefan Marincea was reinstated as Director of the Geological Institute, a position from which he had been dismissed in the fall of 2011 (and from which he would be dismissed again in the fall of 2013).⁸⁸³ With Mr. Marincea at the helm, the Geological Institute purported to disavow its earlier December 2011 endorsement claiming that the Institute’s field study of the Project site could not be found in its archives.⁸⁸⁴ The Geological Institute proposed that as a condition for issuing the environmental permit, RMGC should be required to change its processing technology, and also to “[c]arry out a complex geological study for the entire area” of the tailing management facility (TMF) site at the Corna Valley.⁸⁸⁵ In raising these issues again, Mr. Marincea did not explain why the many expert technical studies prepared and submitted by or for RMGC were not adequate.⁸⁸⁶

⁸⁸⁰ Letter No. 22149 from Ministry of Environment to TAC members dated June 10, 2013 (Exh. C-554).

⁸⁸¹ Szentesy ¶¶ 84-85.

⁸⁸² See *supra* § VII.A.3; Point of view of the Romanian Institute of Geology regarding the geological data presented in the EIA report for the Roșia Montană Project dated Dec. 9, 2011 (Exh. C-636).

⁸⁸³ [REDACTED] See also *MEN: Marincea, revoked for the way he spoke about the earthquakes in Galați*, Mediafax ro, dated Oct. 16, 2013 (Exh. C-925) (Ministry of Education stating that it dismissed Mr. Marincea for making speculative public disclosures about the potential causes of seismic activity in the Galați area without authorization, which he did in an “unprofessional manner, dominated by assumptions and uncertainties,” and in such a way as “was likely to generate panic among [the] population and maintain the feeling of fear and uncertainty of the inhabitants in the area”).

⁸⁸⁴ [REDACTED]

⁸⁸⁵ Letter No. 1182 from Geological Institute of Romania to Ministry of Environment dated June 13, 2013 (Exh. C-659).

⁸⁸⁶ [REDACTED]

434. At the TAC meeting held on June 14, 2013, RMGC's Director of Technical Design, Ms. Szentesy, and Environmental Director, Mr. Avram, thoroughly rebutted Mr. Marincea's assertions regarding the processing technology and the TMF location.⁸⁸⁷

435. The Ministry of Environment and other TAC members did not endorse Mr. Marincea's unsupported views.⁸⁸⁸ The TAC President, Ministry of Environment State Secretary Elena Dumitru, observed that the Geological Institute previously had submitted "a favourable endorsement for the development of this Project, based on measurements and analyses conducted within the site in December 2011," which was "accompanied by maps and measurements" but recently the Geological Institute had expressed "concerns" that were not supported by further analysis or data.⁸⁸⁹ The TAC President also observed that the TAC members "were surprised" that the Geological Institute had submitted "two endorsements: one favorable, accompanied by maps, and the second one not favorable."⁸⁹⁰

4. The Ministry of Environment Published Proposed Conditions for the Environmental Permit and Held a Conciliation Meeting After Which It Was Again Obligated by Law to Take a Prompt Decision to Issue the Permit

436. The Ministry of Environment, "further to reviewing the environmental impact assessment report, as amended, the additional information provided by [RMGC], to analyzing the substantiated comments submitted by the public during the environmental impact assessment procedure and further to consulting and writing down the opinions of the Technical Assessment Commission (TAC)," prepared a comprehensive list of proposed "conditions and measures which need to be included in the Environmental Permit for Roşia Montană Project."⁸⁹¹ The Ministry of Environment's proposed conditions and measures adopted the Ministry of Culture's

⁸⁸⁷ [REDACTED] Ms. Szentesy reviewed in detail for the TAC members the geological assessments that RMGC had undertaken in relation to the TMF site in the Corna Valley, which had been guided by both Romanian and international experts. She and Mr. Avram also explained, among other things, that five of the ten largest mines in the world use "the same processing flow as the one proposed by us at Roşia Montană." Transcript of TAC meeting dated June 14, 2013 (Exh. C-481) at 8-11 (RMGC Director of Technical Design Cecilia Szentesy and RMGC Environmental Director Horea Avram).

⁸⁸⁸ [REDACTED]

⁸⁸⁹ Transcript of TAC meeting dated June 14, 2013 (Exh. C-481) at 6 (TAC President Elena Dumitru).

⁸⁹⁰ Transcript of TAC meeting dated June 14, 2013 (Exh. C-481) at 5 (TAC President Elena Dumitru).

⁸⁹¹ Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555).

Culture's endorsement to issue the permit, which already had been provided.⁸⁹⁸ Where TAC members provide differing views, however, the rules governing the EIA procedure require the Ministry of Environment to hold one final "conciliation meeting" before taking its decision so that TAC members have the opportunity to reconsider their views.⁸⁹⁹

439. The Ministry of Environment held such a TAC meeting on July 26, 2013 to allow the Romanian Academy and the Geological Institute of Romania to reconsider their objections.⁹⁰⁰ The Romanian Academy did not even attend the meeting, choosing instead to submit a letter stating that it had maintained its 2003 viewpoint against implementing the Project and that its "consultative role established by law was fulfilled and our presence at the TAC meeting . . . is no longer justified, the role and responsibility for making the decisions being with the competent persons."⁹⁰¹ As Professor Mihai observes, by simply reaffirming a point of view expressed ten years earlier before the EIA Report had even been submitted and the EIA procedure had begun, "the Academy admittedly refused to take into consideration, to any extent, the EIA Report" and "refused to fulfill the role given to it under the law as a member of the TAC."⁹⁰²

440. Although Mr. Marincea did not attend the meeting, his colleagues from the Geological Institute of Romania reiterated his objections as stated in the prior TAC meeting; and Ms. Szentesy again thoroughly rebutted the objections raised.⁹⁰³

441. The Ministry of Environment clearly was not persuaded by the Geological Institute's assertions. The TAC Vice President, Mr. Pătrașcu, emphasized that the Geological

⁸⁹⁸ See *supra* § IV.A.1; Mihai §§ IV.C.2.4, VIII.A.2.2.1

⁸⁹⁹ Mihai § IV.C.3.3.2.3.

⁹⁰⁰ Avram ¶¶ 143-148; Mihai §§ V.C.7, VIII.B.2. See also Letter from Ministry of Environment to TAC dated July 19, 2013 (Exh. C-980); Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 10 (TAC President Elena Dumitru explaining that "today's agenda is the reconsideration by the Geological Institute of Romania and by the Romanian Academy of their points of view"), at 1 (TAC Vice President Octavian Pătrașcu: "We have already gone through these points of view before in this procedure, but, for the sake of clarity, we convened the meeting of today.").

⁹⁰¹ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 10; Avram ¶ 143.

⁹⁰² Mihai ¶ 444. See also *id.* § VIII.C.3.2.a.

⁹⁰³ [REDACTED] See also Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 2-14.

Institute's endorsement in December 2011 was based on analyses and verifications made on site, whereas its objections in 2013 were not grounded in any further study, and were simply repeating the views previously raised by the Geological Institute before it performed those analyses and verifications.⁹⁰⁴ Reflecting the lack of credibility of the Geological Institute's objections, the TAC Vice President also commented that "we, the TAC members, are not called upon to solve the internal issues of the Geological Institute of Romania."⁹⁰⁵

442. The Ministry of Environment invited comments from the TAC members. Radu Boroianu, the State Secretary from the Ministry of Culture, criticized the "great distortions" created by the Geological Institute and observed, "with sadness, that starting from the '70s, Romania makes no progress in mining, even though it boasts mineral resources. We remain slaves to long obsolete technologies, mining research is in collapse."⁹⁰⁶

443. State Secretary Boroianu also declared that "[t]he things that are said in the report from the [Romanian] Academy, which denies the project, are delusional."⁹⁰⁷ He urged that a decision finally be taken on permitting the Project.⁹⁰⁸

⁹⁰⁴ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 3 (TAC Vice President Octavian Pătrașcu: "I would like to underline something, though. As everybody knows, in 2011, due to the same discussions that took place in the Technical Analysis Committee, the Geological Institute of Romania went on site, made certain verifications, certain analyses, and expressed a favorable point of view. This year, when we resumed the discussions in the Technical Analysis Committee, the Institute came back with the same issues they used to express before the 2011 visit on site.").

⁹⁰⁵ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 4 (TAC Vice President Octavian Pătrașcu).

⁹⁰⁶ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 13 (Ministry of Culture State Secretary Boroianu further stating: "The fact that our research institutes do not have the means to carry this research further, is not the TAC members' fault. But it is an alarm signal that must be addressed to the Romanian State, because this is what happens and great distortions are created.").

⁹⁰⁷ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 15 (Ministry of Culture State Secretary Boroianu observing that the objections also "contradict the statements of the most important professionals of Romanian Academy").

⁹⁰⁸ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 15 (Ministry of Culture State Secretary Boroianu: "I am impassioned because I feel we are going too far. We keep turning this project back and forth for too many years. In my opinion, we have to take a decision, one, and fast. Because we only make fools of ourselves with this procrastination . . . But we must once and for all come out of this trap, because I no longer have the strength to accept to come here and meet and try to be serious in all that we do and go on site countless times, see it with our own eyes and the experts' eyes, it's a reality . . . It borders the impossible.").

444. The Director of NAMR was the only other TAC member to comment. He stated for “the third time” that NAMR “identified no impediment in implementing this project.”⁹⁰⁹

445. Notwithstanding the absence of any further comment from the TAC members, the TAC Vice President stated that the TAC members would “probably meet again to discuss the final decision, which must be adopted for this mining project.”⁹¹⁰ He then closed the meeting by reconfirming that the technical assessment for the Project was complete and that a decision needed to be taken:

*I think we can conclude that the analysis on the quality and conclusions of the EIA Report has been finalized during all these TAC meeting[s] this year and, once again I remind you that the deadline for public consultation, as published on the Ministry of Environment’s website, is July 30. I will close by telling you that you will be informed in due time about the meeting for taking of the decision and then, according to the regulatory procedure, all the TAC members must be present and have mandates.*⁹¹¹

446. In fact, the Ministry of Environment failed to take a decision on the environmental permit as the law required following the meeting on November 29, 2011.⁹¹² After reconfirming its technical review was complete and holding a conciliation meeting, as Professor Mihai explains, the Ministry of Environment was required to take its decision on the environmental permit within ten working days of the date of that meeting,⁹¹³ *i.e.*, by August 12, 2013.⁹¹⁴

447. The record of the EIA procedure admitted only one conclusion by the Ministry of Environment, namely that the environmental permit should be issued; the Ministry therefore

⁹⁰⁹ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 15 (NAMR Director Grigore Pop).

⁹¹⁰ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 16 (TAC Vice President Octavian Pătrașcu).

⁹¹¹ Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 16 (TAC Vice President Octavian Pătrașcu) (emphasis added).

⁹¹² Mihai § VIII.A.3. *See also supra* §§ VII.A.3-4 (discussing the Ministry of Environment’s unlawful failure to take the permitting decision as a result of the Government blocking the Project to demand renegotiations of its financial take).

⁹¹³ Mihai § IV.C.3.3.2.3.

⁹¹⁴ Mihai § VIII.B.4. *See also id.* § VIII.B.3 (explaining that all necessary endorsements had been obtained).

should have sent that proposal to the Government, which would have been bound to issue the environmental permit by Government Decision.⁹¹⁵ Not only were the views of the Project by the Ministry of Environment’s technical specialists and other representatives in the TAC positive, but as described further below, the Minister of Environment, Rovana Plumb, repeatedly confirmed in public statements and in testimony to Parliament that the Project met the highest international standards and fulfilled the requirements to be permitted.⁹¹⁶ For these reasons, as Professor Mihai explains, had the Ministry of Environment decided to reject the environmental permit application despite its favorable conclusions on the substance of the Project, or had the Government failed to accept the Ministry of Environment’s recommendation to issue the permit, it would have been an “excess of power” under Romanian law.⁹¹⁷

448. In disregard and hence in violation of law, the Ministry of Environment failed to make its proposal with respect to issuance of the environmental permit, and the Government failed to act on the permit. As explained below, the Ponta Government refused to take responsibility for deciding to issue the environmental permit and for allowing the Project to proceed, disregarding entirely the legal framework governing the permitting process and Gabriel’s investment, choosing instead to present to Parliament a decision as to whether, as a political matter, the Project should proceed at all.⁹¹⁸

⁹¹⁵ Mihai § VIII.C (explaining that the Ministry of Environment’s decision should have been to issue the environmental permit); *id.* § VIII.D (explaining that the Government had to issue the environmental permit according to the proposal made by the Ministry of Environment).

⁹¹⁶ *See infra* § VIII.B (discussing the favorable testimony of Minister of Environment Plumb and other Government officials before Parliament in 2013).

⁹¹⁷ Mihai §§ VIII.C.1, VIII.D.2.4.

⁹¹⁸ Mihai § VI.B.5. *See also id.* ¶¶ 406-407 (explaining that “[c]onducting an administrative procedure, the Ministry of Environment did not have the option to take a decision based on, for instance, political considerations, because such considerations are not included in the standard provided by law”); [REDACTED] Henry ¶¶ 94-95.

5. The Government Endorsed the Project's Substantive Merits, Gabriel Acceded to the Government's Coercive Economic Demands, and the Government Submitted the Project with the Proposed New Terms to Parliament for Decision

449. Following establishment of the Negotiation Commission, Minister Delegate Dan Şova stated during a televised interview on May 12, 2013 that in his view, if the applicable conditions relating to the environment and cultural heritage were met, an economic decision should be made and Parliament should decide whether to implement the Project:

I told you, we cannot discuss a political or economic decision . . . before you determine whether the environmental conditions and those which pertain to the conservation of archaeological sites are met. If experts come and say "Yes, they can be met, the project can go forward", then, of course, it can be considered. As a personal opinion, I say "Yes, I think the most normal way would be to pass a law in the Parliament regarding this project, to have a framework for debate."⁹¹⁹

450. On May 23, 2013, Prime Minister Ponta restated the fact that the Government had rejected the Project on the terms that had been agreed with Gabriel and on the basis of which Gabriel had invested already, and that although the economic terms should be renegotiated and Parliament should decide whether to accept a renegotiated deal, he personally considered the Project should be rejected on any terms:

[T]his is a project on which nobody has been making any official decision for over 12 or so years. We accept it or reject it. Based on our discussions, we have stated our position. *We reject its initial form. This current Government does not agree with its development.* What this means is: it meant some investments in environment which we did not deem satisfactory, it meant the participation of the state to this project and 3, it meant the level of the royalties. So three items in this order. First of all, the warranties for the environment, second of all, the Romanian state participation, through Minvest, and third, the level of the royalties. We set up a negotiation commission which must go and see if it is possible that all environmental conditions we request are met, and that is item number one. Item number two, we should have a more substantial participation of the State and a higher level of royalties. After that, these conclusions will be passed to the Parliament and the Parliament shall decide, because,

⁹¹⁹ Interview of Minister Delegate Şova, Pro TV, dated May 12, 2013 (Exh. C-871) at 2 (Minister Delegate Dan Şova). *See also* Tănase II ¶¶ 161-162.

personally, I vote against the acceptance . . . but here I am talking about my vote as a deputy.⁹²⁰

Thus, although the law was clear that the Government was to issue the environmental permit based on the proposal of the Ministry of Environment following the EIA procedure, Prime Minister Ponta wanted the decision to be made by Parliament.⁹²¹ The Prime Minister emphasized, however, that as a member of the Chamber of Deputies, he would not vote for the Project: “As I have already said, I personally will not take part or vote in favor of this project.”⁹²² [REDACTED] Prime Minister Ponta’s public statement that he would not vote for the Project as a member of Parliament was extremely troubling given the Government’s position that it would be left to Parliament to decide the fate of the Project through a “political” vote.⁹²³

451. The State Secretary from the Department of Infrastructure Projects, Alexandru Năstase, confirmed at the TAC meeting held on May 31, 2013 that Parliament would make the “final decision” on permitting the Project:

⁹²⁰ Interview of Prime Minister Ponta, Talk B1, dated May 23, 2013 (Exh. C-421) at 1 (Prime Minister Victor Ponta) (emphasis added). Although Prime Minister Ponta stated that RMGC’s environmental investments were not satisfactory, in fact RMGC had committed to provide a financial guarantee to cover the costs of closure and rehabilitation which in 2012 it had estimated would total US\$ 146 million; the Government accepted the amount of that guarantee. Separately, RMGC agreed to provide an environmental liability guarantee of US\$ 25 million to cover the cost of cleaning up any pollution accidentally caused by the Project, an amount also accepted by the Government. *See* Avram ¶¶ 29-30; SRK Consulting, Technical Report on the Roşia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128) at 66 (establishing financial guarantee of US\$ 146 million for closure and rehabilitation); Draft Agreement on Certain Measures Regarding the Mining of Gold-Silver Ores in the Roşia Montană Perimeter dated Aug. 27, 2013 (Exh. C-519) Arts. 6(2)(d), (f) (financial guarantees of US\$ 146 million for closure and rehabilitation and of US\$ 25 million for liability). *See also* Kunze §§ IV, IX.A (discussing the financial guarantees).

⁹²¹ Interview of Prime Minister Ponta, Talk B1, dated May 23, 2013 (Exh. C-421) at 2 (Prime Minister Victor Ponta). *See also* Interview of Victor Ponta, Realitatea TV, dated May 13, 2013 (Exh. C-772) at 1 (Prime Minister Victor Ponta: “My power as prime-minister is to present the legal status, the impact assessments, the regulation at European level, and the decision is to be made by the Parliament of Romania . . . In the Government we are only members of the USL (the Social-Liberal Union), in the Parliament there are all the political forces and the people from the USL, who are in favour or against, and in the end the decision to be reached by the Parliament must be assumed by the largest political spectre, whether a decision to accept, or a decision to dismiss, I am excluding neither.”).

⁹²² Interview of Prime Minister Ponta, Talk B1, dated May 23, 2013 (Exh. C-421) at 2 (Prime Minister Victor Ponta).

⁹²³ [REDACTED]

See also supra § VIII.A.

Let us not forget that, *after the Ministry of Environment gives the recommendation on the environmental permit, provided all the drafts are complied with and all the endorsements are obtained, a draft law will be made which will be submitted to debates in the Parliament.*

Together with all the conditions in the environmental permit and all the agreements that must be involved in this Project, leaving aside that we will also make a financial economic negotiation of this Project, not only from the point of view of the royalty and of the State's share in this company [RMGC], but also from the point of view of other economic financial aspects that are of particular relevance for the Romanian State.

*All of these will be part of the law that will be submitted to the Parliament for approval as the final deciding factor whether this project will be done or not. In Parliament it will be possible to make observations and analyses in the commissions and we are certain that, in the end, the Parliament will take the final decision if Romania will make this project or not.*⁹²⁴

452. On June 8, 2013, Minister Delegate Dan Şova stated again that a draft law relating to the Project would be sent to Parliament for approval only if requirements relating to environmental protection and preservation of cultural heritage were met:

We now have very simple issues that are related to the observance of the environmental conditions and the compliance with the conditions imposed by the Ministry of Culture with respect to the conservation of archaeological sites. If it will result from the project that all this may be complied with, then a draft bill would certainly be advanced in the Parliament. . . . *If these prerequisites are not met, these discussions cannot happen.*⁹²⁵

453. As the senior Government officials repeatedly emphasized that Parliament would make the final decision on implementing the Project following submission of a draft law and renegotiated economic terms, the Government informed RMGC that the minimum economic conditions it would accept were [REDACTED]

⁹²⁴ Transcript of TAC meeting dated May 31, 2013 (Exh. C-485) at 20 (Department of Infrastructure Projects State Secretary Alexandru Năstase) (emphasis added). *See also* Interview of Rovana Plumb, Money Channel, dated May 30, 2013 (Exh. C-800) at 2 (Minister of Environment Rovana Plumb: “I can tell you, like the Prime Minister, Victor Ponta said, that there will be debates within the Parliament regarding this project. The environment has a component here, it is one of the components of Roşia Montană project.”).

⁹²⁵ *Interview of Dan Şova*, Adevarul.ro, dated June 8, 2013 (Exh. C-842) (Minister Delegate Dan Şova) (emphasis added).

[REDACTED]

[REDACTED] 926

454. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 928

455. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Given the numerous statements of senior officials

⁹²⁶ [REDACTED] Henry ¶¶ 84-86; Tănase II ¶¶ 165-166. *See also supra* § VII.A.4.

⁹²⁷ Henry ¶¶ 87-89; Tănase II ¶¶ 167-168; [REDACTED]

⁹²⁸ Henry ¶¶ 87-88. *See also* Tănase II ¶ 168.

⁹²⁹ Henry ¶ 88; Tănase II ¶ 167; [REDACTED]

⁹³⁰ [REDACTED]

⁹³¹ *See supra* § VIII.A.1; Draft Informative Note on the activity of the Inter-Ministerial Working Group convened for the Roşia Montană mining project [REDACTED] (Exh. C-553) at 8, n.4.

⁹³² [REDACTED]

concerning a role for Parliament in permitting the Project, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

456. Gabriel through RMGC thereafter participated in discussions with the Negotiation Commission regarding a draft law that would have facilitated a more efficient implementation of the Project (and other mining projects), and a draft agreement of revised economic and other terms to be concluded between RMGC, Gabriel, and the State.⁹³⁵

457. As negotiations progressed, on July 11, 2013 the Government announced its National Plan of Strategic Investment and Job Creation to attract € 10 billion in investments and create 50,000 jobs.⁹³⁶ The plan identified five “key fields of strategic investments,” including mineral resources and, within this field, the Project was included.⁹³⁷

458. During a lengthy public presentation and press conference, Prime Minister Ponta acknowledged that the Project was blocked and said he wanted to make progress in “unblocking”

[REDACTED] Tănase II ¶ 216. *See also, e.g.* [REDACTED]

[REDACTED]

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

⁹³³ [REDACTED]

[REDACTED]

⁹³⁴ Henry ¶¶ 87-89; Tănase II ¶ 168; [REDACTED]

[REDACTED]

⁹³⁵ Tănase II ¶¶ 178-189; Henry ¶¶ 90-91, 96-107.

⁹³⁶ National Plan of Strategic Investment and Job Creation, Romanian Government (Exh. C-910) at 2, 6.

⁹³⁷ National Plan of Strategic Investment and Job Creation, Romanian Government (Exh. C-910) at 6, 12.

it, but reiterated the Government’s view that Parliament would decide whether the Project went ahead.⁹³⁸ The Prime Minister emphasized again that the Government had rejected the Project in its “initial form” and that if new satisfactory terms could be agreed, the Government would prepare a draft law to send to Parliament to decide on the Project:

From the point of view of the Government, the negotiation and the draft law will be completed at the beginning of the parliamentary session. . . .

But, I repeat: we have taken all the measures, first and foremost those regarding the environmental standards, then those regarding the royalty level and the interest of the Romanian State, which we consider all three unsatisfactory, in the initial form of the project. *If satisfactory standards were negotiated and exist, we will send it to the Parliament and Parliament will decide.*⁹³⁹

459. [REDACTED]

[REDACTED]

.⁹⁴¹

460. [REDACTED]

[REDACTED]

⁹³⁸ *Prime Minister Victor Ponta: 2013 targets: Investments of minimum EUR 10 billion and 50,000 jobs*, Government of Romania, dated July 11, 2013 (Exh. C-462) at 4 (Prime Minister Victor Ponta: “I want to make some progress on unblocking the Deva Gold [Certej] and Roşia Montană projects, in compliance with all the environmental regulations, following that the Romanian Parliament decides on unblocking some projects and the final decision is yours.”); *id.* at 8 (Prime Minister Ponta stating with respect to the Project that “13 years – it’s 13 years, I think? – of going round various governmental structures is enough!”).

⁹³⁹ *Prime Minister Victor Ponta: 2013 targets: Investments of minimum EUR 10 billion and 50,000 jobs*, Government of Romania, dated July 11, 2013 (Exh. C-462) at 8 (Prime Minister Ponta) (emphasis added). *See also* Interview of Victor Ponta, Digi 24, dated July 18, 2013 (Exh. C-813) at 2-3 (Prime Minister Victor Ponta: “I will not vote for that project, I have my own convictions . . . I never changed that belief but I think I have a responsibility as a Prime Minister not to keep the project in the drawer as so many Governments did. Let’s put it on the table! There is no authority over the Parliament. If the Parliament following debates will decide to reject it, the case is closed.”).

940 [REDACTED]

941 [REDACTED]

942 [REDACTED]

[REDACTED]

461. In August 2013, the Government finalized the draft “Agreement on Certain Measures Regarding the Mining of Gold-Silver Ores in the Roșia Montană Perimeter” (“Draft Agreement”)⁹⁴⁵ and the draft “Law on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roșia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania” (“Draft Law”).⁹⁴⁶

462. The Draft Agreement provided that RMGC and Gabriel would increase the State’s shareholding in RMGC from 19.31% to 23% after issuance of the environmental permit and from 23% to 25% after issuance of authorizations required to begin the operational stage of the Project, and also increase the royalty rate from 4% to 6% for the duration of the Project.⁹⁴⁷ The Draft Agreement also included RMGC and Gabriel’s commitments to a number of undertakings, most of which already had been made in the EIA Report or during the EIA procedure including, among other things:

- to create and maintain an average of 2,300 direct jobs during the construction phase and 900 direct jobs during the operations stage;⁹⁴⁸

⁹⁴³ [REDACTED]

⁹⁴⁴ [REDACTED]

⁹⁴⁵ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roșia Montană Site dated Aug. 27, 2013 (Exh. C-519).

⁹⁴⁶ Draft Law on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roșia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania dated Aug. 27, 2013 (Exh. C-519).

⁹⁴⁷ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roșia Montană Site dated Aug. 27, 2013 (Exh. C-519) Arts. 1(1), 3(1); Tănase II ¶¶ 184-185; Henry ¶¶ 100-101.

⁹⁴⁸ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roșia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 2(3).

- to ensure, in addition to amounts already spent, a further total investment of US\$ 100 million to preserve and restore cultural heritage, including US\$ 70 million in Roşia Montană and US\$ 30 at the national level (if gold prices increased to US\$ 1,500 per ounce, the national investment would increase to US\$ 50 million and the total investment would increase to US\$ 120 million);⁹⁴⁹
- to eliminate, at RMGC's expense, historical pollution caused by the State's prior mining activities, which were still causing acid rock drainage and heavy metal contamination in the Project area;⁹⁵⁰
- to use Best Available Techniques or BAT in all its operations and fully comply with all Romanian and EU legal provisions, standards, and rules;⁹⁵¹
- to fully rehabilitate the environment in the Project area and establish a financial guarantee for closure and rehabilitation in the amount of US\$ 146 million;⁹⁵²
- to establish an environmental liability guarantee in the amount of US\$ 25 million;⁹⁵³
- to ensure a maximum cyanide concentration of 7 ppm at the point of discharge into the TMF;⁹⁵⁴

⁹⁴⁹ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 5(1). [REDACTED]

[REDACTED] See Tănase II ¶ 185, n.244. See also *supra* § VI.

⁹⁵⁰ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(1). [REDACTED], the Government was responsible for cleaning up historical pollution. See Henry ¶ 101, n.108; [REDACTED]

⁹⁵¹ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(2)(a), (h), (i).

⁹⁵² Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(2)(c)-(d).

⁹⁵³ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(2)(f).

- to cultivate 1,000 hectares of land in the area into a forest;⁹⁵⁵ and
- to carry out a range of sustainable economic and cultural development activities for the benefit of the Roşia Montană community.⁹⁵⁶

463. The Draft Agreement included a Project implementation calendar providing for issuance of the environmental permit in September 2013, issuance of construction permits in June 2014, and operations to start in November 2016.⁹⁵⁷

464. Among other things, the Draft Law (a) provided parliamentary approval of the Draft Agreement; (b) authorized the Government to conclude the Draft Agreement with Gabriel and RMGC within 15 days of the Draft Law’s passage;⁹⁵⁸ (c) declared the Project to be of “outstanding public interest” and of public utility; (d) authorized NAMR to extend the validity of the License by 20 years;⁹⁵⁹ and (e) contained provisions that would have amended or supplemented the Mining Law for all mining projects of outstanding public interest to facilitate and expedite implementation of such mining projects generally.⁹⁶⁰

⁹⁵⁴ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(3)(d). [REDACTED]

⁹⁵⁵ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Art. 6(4).

⁹⁵⁶ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Arts. 5(2), 7.

⁹⁵⁷ Draft Agreement on Measures for the Mining of Gold and Silver Ores in the Roşia Montană Site dated Aug. 27, 2013 (Exh. C-519) Annex 2; Tănase II ¶ 186; Henry ¶¶ 101.

⁹⁵⁸ Draft Law on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roşia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania dated Aug. 27, 2013 (Exh. C-519) Arts. 1-2; Tănase II ¶ 187; Henry ¶ 102.

⁹⁵⁹ Draft Law on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roşia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania dated Aug. 27, 2013 (Exh. C-519) Arts. 3, (4)1; Tănase II ¶ 187.

⁹⁶⁰ The proposed amendments to the Mining Law would have, among other things, allowed tax deductions on sustainable development expenses; facilitated the expropriation of land needed to conduct licensed mining activities; authorized mining license extensions of up to 20 years (rather than only in five year intervals); and extended the validity of endorsements and permits until the completion of all works for which they were issued. *See* Draft Law on Certain Measures Regarding the Mining of Gold and Silver Ores in the Roşia Montană Perimeter and on Stimulating and Facilitating the Development of Mining Activities in Romania

465. In subsequent testimony before Parliament about the negotiation of the Draft Law and the Draft Agreement, Minister Delegate Şova of the Department of Infrastructure Projects (which chaired the Negotiation Commission) repeatedly stated that the Draft Law and Draft Agreement benefited the Romanian State, not Gabriel or RMGC:

As a matter of fact, you will not find provisions in the law or in the agreement that favor Gabriel Resources or [RMGC], where the Romanian state also holds its share, and I uphold and emphasize this strongly. You will find provisions not in their favor, but which facilitate the development of the project, from expropriations, to concessions on lands that are connected with the mining exploitation. There is no provision in favor, but only provisions that facilitate the project development, of course, if such a decision is eventually made.⁹⁶¹

Minister Delegate Şova also acknowledged that there was limited negotiation and that Gabriel and RMGC instead were required to accept the Draft Agreement and the Draft Law that the State presented to them: “Basically, the representatives of [RMGC] were not called to a negotiation, they were called to be informed that they have to give these things to the Romanian State.”⁹⁶²

466. At the conclusion of this process, all responsible government Ministries reviewed and favorably endorsed the Draft Law and the Draft Agreement.⁹⁶³ In a Government Decision dated August 27, 2013, the Government approved the Draft Law and the Draft Agreement and submitted the Draft Law to Parliament to adopt with the Draft Agreement as its appendix.⁹⁶⁴ Prime Minister Ponta signed a lengthy Exposition of Reasons in support of this Government

dated Aug. 27, 2013 (Exh. C-519) Art. 5; Tănase II ¶ 187. As discussed above, the Inter-Ministerial Commission concluded, consistent with the views of Gabriel and RMGC, that these more general provisions would have facilitated the efficient implementation of all large mining projects in Romania, including the Roşia Montană Project, but were not necessary to implement the Project. See *supra* § VIII.A.1; Tănase II ¶¶ 159-160, 187; Henry ¶¶ 83, 102.

⁹⁶¹ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 8 (Minister Delegate of Infrastructure Projects Şova); *id.* at 23 (Minister Delegate Şova: “I repeat what I said in the beginning of the meeting, the agreement has only provisions for the Romanian State.”).

⁹⁶² Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 23 (Minister Delegate of Infrastructure Projects Şova).

⁹⁶³ Tănase II ¶¶ 183-184; Henry ¶ 103.

⁹⁶⁴ Romanian Government Decision No. E171 dated Aug. 27, 2013 (Exh. C-578).

Decision acknowledging, among other things, “the major positive effects” that would result from implementation of the Project.⁹⁶⁵

467. As the Government’s feckless decision to call upon Parliament to decide whether to permit the Project was an evident and unlawful dereliction by the Government of its obligations in law, it drew severe criticism from several senior officials and members of Parliament.⁹⁶⁶

468. As the Government had made clear in its many earlier statements that it would not send a draft law to Parliament if the Project did not meet all the applicable standards to support issuance of the environmental support, the Government Decision approving the Draft Law and Draft Agreement and sending them to Parliament was an admission that the Government supported issuance of the environmental permit.⁹⁶⁷

469. The UNESCO Parliamentary Commission, a standing commission of the Romanian Parliament, also had endorsed the Project just one week earlier.⁹⁶⁸ [REDACTED] as the Project was moving forward in 2013, anti-Project NGOs renewed calls to block

⁹⁶⁵ Government Exposition of Reasons dated Aug. 27, 2013 (Exh. C-817) at 1-2.

⁹⁶⁶ See, e.g., *The senators of the Administrative Committee voted against the Roşia Montană Project*, Agerpres.ro, dated Sept. 10, 2013 (Exh. C-1482) (PDL Senator Marius Bălu asking Minister of Environment Plumb why “she conditioned the environmental permit [on] the Parliament’s decision, arguing that he does not understand such statement as long as the Legislature does not have the role to validate agreements between the state bodies and the private parties,” which he viewed as the Government “running away from responsibility”); *President Băsescu’s Statements about Roşia Montană*, Evz.Ro, dated Sept. 2, 2013 (Exh. C-927) (President Traian Băsescu: “Dedicating a law to Roşia Montană is an act of cowardliness. There is no need for a law, a Government decision is enough. The current Government’s cowardliness is so typical.”); *PDL does not support the parliament commission in the case of Roşia Montană and requires the Government to assume the project*, Mediafax.ro, dated Sept. 13, 2013 (Exh. C-1468) (PDL President Vasile Blaga stating that “PDL wants the re-launch of the Romanian economy, wants the creation of new jobs, wants the reopening of mining, wants the gold exploitation at Roşia Montană,” but criticizing Prime Minister Ponta’s “inconceivable irresponsibility” for asking “the Parliament to give a political authorization” and calling him “a coward Prime Minister who does not assume anything”); *Kelemen Hunor: The Government should withdraw the Roşia Montană Project from Parliament*, Mediafax.ro, dated Sept. 19, 2013 (Exh. C-1447) (UDMR President and former Minister of Culture Kelemen Hunor: “I do not even say that this Project needs improvement, I say that the Government should take the responsibility of this draft law in full, and not the Parliament . . .”).

⁹⁶⁷ See Henry ¶¶ 104-105; Tănase II ¶ 189.

⁹⁶⁸ [REDACTED]

it by listing Roșia Montană as a UNESCO World Heritage Site.⁹⁶⁹ Reflecting the resounding local opposition to the UNESCO initiative, a group of 45 mayors from towns in the region surrounding the Project sent multiple letters expressing support for the Project and decrying what they described as NGO demagoguery aimed at blocking the Project under the false pretense of saving Roșia Montană’s cultural heritage.⁹⁷⁰

470. On August 20, 2013, members of the UNESCO Parliamentary Commission visited Roșia Montană where they and the Minister of Culture, Daniel Barbu, met with local authorities, NGOs, and representatives of RMGC.⁹⁷¹ Consistent with the views previously expressed by the Ministry of Culture in its endorsement of the environmental permit, in the Inter-Ministerial Commission, and in the TAC,⁹⁷² after the site visit, the Parliamentary Commission members conveyed their unanimous support for the Project and concluded that it was the most effective means of preserving and protecting the area’s cultural heritage as well as of supporting the regional economy.⁹⁷³

471. In light of these additional developments and given that the Annex to the Draft Agreement estimated that the environmental permit would be issued in September 2013, [REDACTED]

[REDACTED]

⁹⁶⁹ [REDACTED] As discussed above, the UNESCO initiative was considered by the Government two years earlier but was not pursued further at that time. *See supra* § VI.A.1.

⁹⁷⁰ [REDACTED] *See also, e.g.*, Letter from Local Mayors and Community Organizations to the Minister of Culture dated June 20, 2013 (Exh. C-1395); Letter from 45 Mayors to UNESCO Commission dated Aug. 20, 2013 (Exh. C-1264).

⁹⁷¹ Gligor ¶ 138.

⁹⁷² *See supra* § VIII.A (discussing the Ministry of Culture’s endorsement of the Project and the statements of Ministry of Culture Director of Cultural Patrimony Mircea Angelescu and State Secretary Radu Boroianu).

⁹⁷³ Gligor ¶¶ 138-140. *See also Message addressed to the miners of Roșia Montană by the Parliamentarians of the UNESCO Commission: “The project is getting a green light!”*, Albatv ro, dated Aug. 23, 2013 (Exh. C-1308) (reporting the Commission’s “unanimous” support).

⁹⁷⁴ Henry ¶ 105.

472. As described further below, however, the optimism was short lived, as Parliament promptly rejected the Draft Law and with it, once again, effectively, the Project.

B. Parliament Voted to Reject the Draft Law and With It, In Effect, the Project

1. The Minister of Environment, the Minister of Culture, and the President of NAMR Testified That the Project Met All Permitting Requirements, but Senate Committees Heeded a Political Call to Reject the Draft Law

473. Following the Government Decision endorsing and transmitting to Parliament the Draft Law and Draft Agreement on August 27, 2013, Gabriel and RMGC were subjected to a surreal and chaotic process that underscored the stark contrast between the administrative process for Project permitting governed by law and required to be conducted by the Ministry of Environment in consultation with the TAC members culminating in a Government Decision, and the political review of the Draft Law and of the Project by Parliament resulting from the Government's wholesale abandonment of law and the applicable legal framework.

474. Over the course of two weeks, the Prime Minister stated publicly, and the Minister of Environment, Minister of Culture, and the NAMR President reaffirmed in testimony before Parliament, that the Project met all the legal requirements to be permitted, but multiple Senate committees heeded the political call from Prime Minister Ponta and Senate President Crin Antonescu (the two leaders of the governing USL coalition) before hearings even began to reject the Draft Law with haste.⁹⁷⁶ A joint parliamentary special commission and later the full Parliament followed suit.⁹⁷⁷

⁹⁷⁵ Henry ¶ 106

⁹⁷⁶ Henry ¶¶ 108-115;

⁹⁷⁷ See *infra* § VIII.B.4.

475. In a vivid display of particularly arbitrary and capricious treatment the Project was receiving at the hands of the Government, within days of the Government Decision sending the Draft Law and Draft Agreement to Parliament, together with the Government's endorsement signed by Prime Minister Ponta, on August 31, 2013, the Prime Minister publicly repeated that he did not support the Project and would vote against it in Parliament.⁹⁷⁸ Prime Minister Ponta's Janus-faced effort to endorse the Project as a member and leader of the Government and at the same time to oppose it as a parliamentarian was perplexing and frustrating in the extreme for Gabriel and RMGC.⁹⁷⁹

476. Having set Parliament up as the final word on the Project's future, and the Prime Minister having announced his opposition to the Project on national television as a member of Parliament almost immediately upon sending the Draft Law there for consideration, the Government also created ideal conditions and essentially called to arms the ideologically anti-Project NGOs and political activists to organize and focus protests to influence the legislature in its vote on the Draft Law, which they treated as the battleground for the future of the Project.

477. Thus, as Parliament was set to begin hearings on the Draft Law/Draft Agreement, the anti-Project activists and NGOs that ideologically and zealously opposed the Project ramped up their level of protests, propaganda campaigns, [REDACTED] [REDACTED] directed at the Project, its supporters, RMGC, and Gabriel.⁹⁸⁰ In early September 2013, NGOs developed a national television advertising campaign against the Project and organized

⁹⁷⁸ Ponta: "I will vote against Roşia Montană project," Adevarul.ro, dated Aug. 31, 2013 (Exh. C-789) at 1 (Prime Minister Victor Ponta stating that he "will vote against this project" and reiterating that "[t]he pros and cons should be presented to Parliament which shall decide if we will make such a project or we reject it").

⁹⁷⁹ Henry ¶ 108 [REDACTED]

⁹⁸⁰ See supra § VII.B.2; [REDACTED]

street protests and demonstrations in Bucharest and even in other major European cities against mining and the Project.⁹⁸¹

478. Whether in response to the protests or for other reasons, Prime Minister Ponta purported to explain his reasons for sending the Draft Law to Parliament during a televised interview on September 5, 2013. The Prime Minister confirmed that the Government by law had to permit the Project because it met all permitting requirements, but because he did not want to do so, he sent the matter to Parliament through the Draft Law which, in his view, would insulate the Government from billions of dollars in liability to Gabriel were the Project not to proceed:

*I was obligated, under the law . . . under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law. Precisely because I considered that I should not do this, I sent the law to Parliament . . . That's the situation and this is why, had I done absolutely nothing, I would have then to pay I don't know how many billions in compensations to the company in question. I don't want to pay from your money, from the taxpayer's money, compensation for contracts starting with 1998. I want the decision to be made by the Parliament.*⁹⁸²

479. Consistent with the Prime Minister's statement that the Project met environmental permitting requirements, two days later, on September 7, 2013, the Minister of Environment, Rovana Plumb, publicly stated that the Project would be "the safest project of Europe" if it were implemented:

We devised a new project, we have negotiated in such a manner so as to secure an Agreement that, from my point of view, as Minister of Environment, may address all requirements under the European and not only, international environmental standards. Practically, we have taken all European environmental standards and we have observed all conditions imposed by the relevant European legislation.⁹⁸³

⁹⁸¹ [REDACTED] Henry ¶ 109. See also *The Chairman of the Parliamentary Commission on SIE: "Soros's NGOs are the catalyst of Piata Universitatii. Their financing may constitute a danger to national security"*, Gandul.info, dated Sept. 24, 2013 (Exh. C-1480) at 3 (Mihăiță Calimente, the Head of the Foreign Intelligence Service in the Parliament, stating that NGOs funded by George Soros were the "catalyst" for starting the protests and were a "threat to the national security").

⁹⁸² *Ponta: I sent the Roșia Montană Project to the Parliament so we could not be sued*, Stiri.tvr.ro, dated Sept. 5, 2013 (Exh. C-460) (Prime Minister Victor Ponta) (emphasis added).

⁹⁸³ *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană, depending on the decision of Parliament*, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) at 1 (Minister of Environment Rovana Plumb).

Underscoring the departure from lawful process, however, Minister Plumb nonetheless made clear that, despite the Ministry of Environment's positive assessment of the Project, the Government would only issue the environmental permit if Parliament approved the Draft Law:

The Ministry of Environment, through the Government, made a proposal that was sent to the Parliament and imposed all the environmental standards. *The Environmental Permit for Roșia Montană will be granted depending on the decision taken by the Parliament of Romania after public debates.*⁹⁸⁴

480. Two days later, on September 9, 2013, and in the wake of increasing anti-mining and anti-Project organized street protests, the two USL coalition leaders, Senator Antonescu and Prime Minister Ponta, publicly called on Parliament to reject the Draft Law. Although the proceedings in Parliament had not even begun, Senator Antonescu announced that the Project should be rejected:

Today, even though the talks in Parliament haven't even started, I have a firm and final point of view in relation to the Roșia Montană project. I think that the exploitation project at Roșia Montană cannot be supported. The project should be either withdrawn . . . or I think it should be rejected.⁹⁸⁵

Senator Antonescu stated that he reached this conclusion, "not for technical reasons," but in response to the protests taking place in Bucharest:

[O]bviously a government must not make decisions based on one protest or another, but there are protests and there are protests, there are public signals that have a weight that cannot be ignored. One cannot govern according to the street, but one cannot govern ignoring the street either. What I'm saying is that no one can ignore these people.⁹⁸⁶

⁹⁸⁴ *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană, depending on the decision of Parliament*, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) (Minister of Environment Rovana Plumb) (emphasis added).

⁹⁸⁵ *VIDEO Crin Antonescu's surprise-statement: The Roșia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) at 1 (Senate President Crin Antonescu).

⁹⁸⁶ *VIDEO Crin Antonescu's surprise-statement: The Roșia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) at 2 (Senate President Crin Antonescu).

481. Later that day, Prime Minister Ponta addressed reporters seated beside the President of the Chamber of Deputies, Valeriu Zgonea. The Prime Minister (the PSD President) acknowledged that there was “strong support for the project” in Alba County, but he nevertheless made clear that in view of political decisions taken by Senator Antonescu (the PNL President) and Vasile Blaga (the PDL President), the Project would not be permitted:

We thought it was necessary to have a parliamentary commission to call those who were for, as well as those who were against, in order to discuss with the draft law on the table. Meanwhile, the political leaders of two of the largest groups in the Parliament, namely Mr. Antonescu and Mr. Blaga, said they opposed, before a commission was set up. What should we do then? Should we set up a commission in order to convince Mr. Blaga and Antonescu? It was pointless. . . .

*But now, as there is no parliamentary support, Mr. Blaga and Mr. Antonescu expressed very clear opinions, then there is no point keeping the people confused. It will be debated and rejected at the Senate, then sent to the Chamber [of Deputies], whose President [Mr. Zgonea] sits next to me and will ensure a quick procedure and we know it very clearly that this project will not be done.*⁹⁸⁷

Prime Minister Ponta stated that, in his view, the “most critical thing” was that the decision be taken by Parliament, not the Government, so that neither he nor the Ministers in his cabinet would be held liable.⁹⁸⁸ He reiterated, however, that “[t]he political positions have been made public and they are very clear,” and he called for the swift rejection of the Project through expedited proceedings in the Senate and then in the Chamber of Deputies:

I want to make sure that the President of the Senate, Mr. Antonescu, will quickly include the draft law on the agenda of the Senate, and this will be rejected, as it will at the Chamber [of Deputies], and, thus, *this project is*

⁹⁸⁷ *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 1-2 (Prime Minister Victor Ponta) (emphasis added). See also *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 3 (Prime Minister Victor Ponta: “Well, a joint meeting is pointless. What is the point of a commission if the political leaders have spoken before the debate, why should there be a debate? To make them change their minds? I do not think they will change their minds.”).

⁹⁸⁸ *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 1, 3 (Prime Minister Victor Ponta: “The most critical thing for me was that this vote be given by the Parliament, as there will obviously be lawsuits, and I do not want that the Government or the ministers, we, be held accountable for contracts and commitments undertaken by [President] Băsescu and the previous governments . . . We will have lawsuits nevertheless, but, I repeat, I do not want that I personally, or other ministers, be accused of undermining the national economy. I want that the Parliament decides and, here you go, the political leaders have decided and only the vote must be given so that we can close this procedure.”).

*closed. As a Prime Minister I must find other solutions for foreign investments and creation of new jobs.*⁹⁸⁹

The Prime Minister also acknowledged that the State eventually may prefer simply to implement the Project on its own, without Gabriel as an investor, but it lacked the money to do so.⁹⁹⁰

482. The publicly reported statements of Romania's elected political and governmental leaders made it demoralizingly clear to Gabriel and RMGC that the Draft Law and Draft Agreement, and hence the Project, were politically dead on arrival at Parliament before the scheduled hearings even began.⁹⁹¹

483. The Senate Committee for Public Administration and Land Management held a previously scheduled hearing the next day, on September 10, 2013. During that hearing, senior Government officials testified that the Project met applicable permitting requirements:

- Minister of Environment Rovana Plumb: Minister Plumb testified with respect to the Project's planned use of cyanide processing that "no other technology in the world" was appropriate for processing the ore existing at Roșia Montană.⁹⁹² With respect to the location and design of the TMF, Minister Plumb testified that there was "no danger of cyanide infiltration in the groundwater due to the geological conditions" in the Corna Valley, where an impermeable "watertight layer" of clay

⁹⁸⁹ *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 1 (Prime Minister Victor Ponta) (emphasis added).

⁹⁹⁰ *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 2 (Prime Minister Victor Ponta: "Everybody, and rightfully, said why should the Canadians do it, why not the Romanians. Because we do not have the money, nor will we soon have, about a billion and a half dollars must be invested in the beginning. Hopefully, in five, ten years, the Romanian State will have this money. It doesn't today and it will not have them next year.").

⁹⁹¹ Henry ¶ 112; [REDACTED]

⁹⁹² *UPDATE Rovana Plumb: For Roșia Montană there is no other technology in the whole world than the cyanide-based ore / A negative report for the project and in the Senate Administration and Environmental Committee*, HotNews.ro, dated Sept. 10, 2013 (Exh. C-510) at 1-2 (Minister of Environment Plumb noting that RMGC would comply with the International Cyanide Management Code, "which sets forth mandatory management standards and conditions of this technology and which we imposed in the current draft law and which will be found, through the integrated environmental permit, which is passed by a government decision and for which a double monitoring will be in place, from all the specialists of the ministry of environment").

would prevent the contamination of the groundwater.⁹⁹³ She concluded that the Project complied “with all the mandatory requirements of the European law” and employed technology that “bears the lowest risks.”⁹⁹⁴

- NAMR President Ștefan Hârșu: President Hârșu confirmed that the ore at Roșia Montană could only be exploited using cyanide processing, that the Project was “one of the best projects in Romania,” and that he had “never seen a better project.”⁹⁹⁵
- Minister of Culture Daniel Barbu: Minister Barbu testified that Roșia Montană was an “ecological disaster” not suitable for tourism, and that if the Project were not implemented, the cultural heritage in the area discovered through the archaeological research funded by RMGC would be irreparably damaged and lost, and in the future would be known to Romanians only “from pictures.”⁹⁹⁶

484. Despite this uniformly favorable testimony about the Project from the two key Ministries for Project permitting and from the national mining regulator, the Senate Committee for Public Administration and Land Management and the Senate Committee for Legal Affairs both voted *unanimously* to reject the Draft Law that same day.⁹⁹⁷

⁹⁹³ UPDATE Rovana Plumb: For Roșia Montană there is no other technology in the whole world than the cyanide-based ore / A negative report for the project and in the Senate Administration and Environmental Committee, HotNews.ro, dated Sept. 10, 2013 (Exh. C-510) at 1 (reporting that Minister of Environment Plumb “stressed that this is also shown in the studies included in the six thousand pages of the environmental impact assessment study, the three thousand pages consisting in international and European reports drawn up by experts, professors, geologists, specialists”).

⁹⁹⁴ UPDATE Rovana Plumb: For Roșia Montană there is no other technology in the whole world than the cyanide-based ore / A negative report for the project and in the Senate Administration and Environmental Committee, HotNews.ro, dated Sept. 10, 2013 (Exh. C-510) at 2.

⁹⁹⁵ The senators of the Administrative Committee voted against the Roșia Montană Project, Agerpres.ro, dated Sept. 10, 2013 (Exh. C-1482) at 2 (NAMR President Ștefan Hârșu).

⁹⁹⁶ The senators of the Administrative Committee voted against the Roșia Montană Project, Agerpres.ro, dated Sept. 10, 2013 (Exh. C-1482) at 3 (Minister of Culture Daniel Barbu: “The ecological disaster is happening now! We are not talking about a paradise on idyllic pastures! We are talking about four excavated mountains, there are abandoned installations at Gura Roșie, scrap metal . . . Does anyone want to go on a family weekend in Roșia Montană?”).

⁹⁹⁷ Henry ¶¶ 113-115; [REDACTED]

485. Given that the only evidence the Senate committees appear to have heard was from senior Government officials who testified in strong support of the Project, the Senate committees clearly ignored the merits of the Project and instead answered the political call from Senator Antonescu, Mr. Blaga, and Prime Minister Ponta to reject the Draft Law.⁹⁹⁸

486. Following the stunning summary rejection of the Draft Law, Gabriel noted in the press that if the Project were rejected, Gabriel would bring international arbitration proceedings against the State for causing damage to it of up to US\$ 4 billion.⁹⁹⁹

2. Having Placed the Project on the Fast Track to Parliamentary Rejection, the Government Warned of the Potential Consequences of Rejecting the Project

487. Having succeeded in prompting the swift rejection of the Draft Law by the Senate committees and in placing it on the fast track to rejection by Parliament, Prime Minister Ponta saw fit to caution the public about the potential consequences for the State of rejecting the Draft Law and with it the Project.¹⁰⁰⁰

488. In a televised interview on Antena3 TV on September 11, 2013 (immediately after Gabriel's press statements about bringing arbitration claims), the Prime Minister responded to public concerns about cyanide use in the Project (confirming it was compliant with the stringent EU regulations), and presented revenue projections for the Project showing the Romanian State would receive the majority of the economic benefits:

I do not believe that it convinces those who are against [the Project] to be for [it], but I want them to know that mining is only possible using this technology [cyanide processing] which, according to European standards, is perfectly compatible with what is happening in Europe; 56% of the money is collected by the Romanian state and for us [the State] to do the

⁹⁹⁸ Henry ¶ 114; [REDACTED]

⁹⁹⁹ Henry ¶¶ 115-116; *Gabriel threatens Romania with billion-dollar lawsuit*, The Globe and Mail, dated Sept. 11, 2013 (Exh. C-1442).

¹⁰⁰⁰ Henry ¶¶ 116-118; [REDACTED]

investment, also using cyanide, we need 1.9 billion, which we do not have today.¹⁰⁰¹

Prime Minister Ponta also stated that, in the event of a dispute, Gabriel's lost profits were projected at US\$ 2.7 billion and RMGC already had invested US\$ 550 million "which they will obviously request from us."¹⁰⁰² He also explained that Romania would have to make significant investments (which RMGC would have made during Project implementation) to clean up historical pollution, preserve cultural heritage, and develop basic infrastructure in the area:

We, the Romanian state, must make investments of 430 million for the decontamination of existing TMFs and for all investments related to making the Roman galleries safer, water supply and sanitation, rehabilitation of infrastructure and all the other obligations incumbent on Romania, member state of the European Union. Namely, those from Gabriel will leave the place, but that does not mean that the cyanide filled TMFs and the destroyed area can be left as it is. We must invest using Romanian money. . . .

[T]he decontamination of TMFs, the Roman galleries, the infrastructure, [were] part of the obligations of the company if the project were done. If it is not we need to do them.¹⁰⁰³

489. Appearing again on Antena3 TV with Minister Delegate Șova the next day on September 12, 2013, Prime Minister Ponta emphatically stated that the Project would not be implemented if the Draft Law were rejected in Parliament: "I was rightfully asked about the financial consequences in case the project is not implemented, *and it's very clear that as a result of the law being rejected, the project will not be implemented.*"¹⁰⁰⁴

490. As to the financial consequences, the Prime Minister warned again that if the Project were rejected, the State would forgo projected profits of € 3.6 billion, would be exposed to legal claims for billions of dollars, and would be required to make investments totaling

¹⁰⁰¹ *Sinteza Zilei*— interview with Prime Minister Victor Ponta, Antena3, dated Sept. 11, 2013 (Exh. C-437) at 8 (Prime Minister Victor Ponta).

¹⁰⁰² *Sinteza Zilei*— interview with Prime Minister Victor Ponta, Antena3, dated Sept. 11, 2013 (Exh. C-437) at 8 (Prime Minister Victor Ponta).

¹⁰⁰³ *Sinteza Zilei*— interview with Prime Minister Victor Ponta, Antena3, dated Sept. 11, 2013 (Exh. C-437) at 8-9 (Prime Minister Victor Ponta).

¹⁰⁰⁴ *Victor Ponta and Dan Șova's statements regarding the bill on the Roșia Montană mining project, during a live press conference*, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 1 (Prime Minister Ponta) (emphasis added).

approximately € 480-500 million that RMGC would have made if the Project were implemented.¹⁰⁰⁵ He added that as Prime Minister, he had the obligation to present complete and accurate information about the Project, “as objectively as possible, after which, of course, we will make a political decision.”¹⁰⁰⁶

491. During the same interview, Minister Delegate Şova (like Prime Minister Ponta, a trained lawyer) said that “in case of a trial, the Romanian State will be in a very difficult position” because Gabriel’s investments to develop the Project were audited and “certified” and because calculating the value of its shares in RMGC was “quite straightforward, in terms of the amount of gold that is extracted and the share of the profit that [it] would have obtained [under] the exploitation license.”¹⁰⁰⁷ Minister Delegate Şova also said that he and the Prime Minister warned of the potential consequences of rejecting the Project, “because if we don’t speak, if we don’t issue warnings, we will wake up in two-three-four years’ time, if God forbid we get to that, with people saying that we didn’t warn them, that they didn’t know.”¹⁰⁰⁸

492. Highlighting the stark contrast between their roles in the administrative permitting process governed by law that should have resulted in issuance of the environmental permit, and the political parliamentary process in which the Government had placed the Project’s future, Minister Delegate Şova acknowledged that the Project complied with all of the requirements to be permitted, but nonetheless suggested that he might vote against the Draft Law in Parliament in solidarity with his political party:

How will I vote in the Romanian Parliament? If you ask me, there should naturally be a voting discipline, and *from a political point of view, I might vote against together with all my colleagues.* But if you ask what my opinion is – well *I believe that this project complies with environmental*

¹⁰⁰⁵ Victor Ponta and Dan Şova’s statements regarding the bill on the Roşia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 2 (Prime Minister Ponta).

¹⁰⁰⁶ Victor Ponta and Dan Şova’s statements regarding the bill on the Roşia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 3-4 (Prime Minister Ponta also stating, “I told you my point of view, and I am making my duty to inform you and all members of Parliament about the correct data of this project. We are making these data available to the Parliament.”).

¹⁰⁰⁷ Victor Ponta and Dan Şova’s statements regarding the bill on the Roşia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 4-5 (Minister Delegate Şova).

¹⁰⁰⁸ Victor Ponta and Dan Şova’s statements regarding the bill on the Roşia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 5 (Minister Delegate Şova).

requirements and [with] all the other requirements and should be done.
This is my personal opinion.¹⁰⁰⁹

493. Minister of Culture Barbu stated that he also supported the Project “from the technical standpoint,” but that if his political party (which was led by Senator Antonescu) were to vote against the Draft Law, as a Senator he would “vote against it as well.”¹⁰¹⁰ Minister of Environment Plumb echoed this sentiment by previously stating that, as a member of the Chamber of Deputies, she would not be guided by the Ministry of Environment’s technical assessment of the Project according to which the Project met all of the standards to be permitted, but instead would vote based on the wishes of her constituents.¹⁰¹¹

494. As Mr. Henry and Mr. Tănase discuss, Gabriel and RMGC wanted to implement the Project, not commence arbitration against the State, and it therefore was profoundly frustrating and disappointing to hear senior Government officials reconfirm the merits of the Project and the benefits it would bring to the State, but at the same time say that for reasons of political expediency they would not support it.¹⁰¹²

¹⁰⁰⁹ *Victor Ponta and Dan Șova’s statements regarding the bill on the Roșia Montană mining project, during a live press conference, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 6 (Minister Delegate Șova) (emphasis added).*

¹⁰¹⁰ *VIDEO The Minister of Culture: “As Minister, I will support the Roșia Montană Project. As National Liberal Party (PNL) member, I will vote against, as this is the decision of my party”, Adevarul.ro, dated Sept. 13, 2013 (Exh. C-1511) at 1 (Minister of Culture Daniel Barbu: “I will vote against - I am in a delicate position, from a technical standpoint I subscribed to this agreement, I am convinced that on the heritage side the project is absolutely fine. None of the national laws or international provisions on best practices for the preservation of heritage will be violated. As long as the PNL official decision is to vote against, I will vote against it as well.”).*

¹⁰¹¹ *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană, depending on the decision of Parliament, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) (Minister of Environment Rovana Plumb: “I am in the Parliament, but not as a natural person, but as an individual sent by a number of citizens from Colleege 2 Dambovita, with whom I will have a discussion, and depending on the mandate they will give me, I shall cast my vote in Parliament.”).*

¹⁰¹² Henry ¶¶ 117-118; Tănase II ¶¶ 199-201.

3. Prime Minister Ponta Assured Protesting Miners in Roșia Montană That Parliament Would Establish a Special Commission to Analyze the Draft Law

495. The local communities in and around Roșia Montană desperately wanted the Project to go forward and were also extremely frustrated and dismayed that the large protests in Bucharest, which were being orchestrated by activists who had no regard for or understanding of the people who would be most impacted by the fate of the Project, were gaining so much attention and were being used to justify political decisions against the Project.¹⁰¹³ As Ms. Lorincz describes, in early September 2013, thousands of people from the local communities petitioned and over 100 miners protested in support of the Project.¹⁰¹⁴ On the occasion of Miners' Day on September 8, 2013, more than 10,000 people, mostly from the local communities, assembled in Roșia Montană in support of mining and the Project, and a group of 50 mayors and parliamentarians representing communities in the region issued press statements urging support for the Project.¹⁰¹⁵

496. Following Prime Minister Ponta's statements that political decisions had been taken to reject the Draft Law even before parliamentary hearings had begun, on September 11, 2013 a group of more than 30 miners barricaded themselves underground in the Cătălina-Monulești gallery, located under the old town of Roșia Montană.¹⁰¹⁶ Feeling desperate that their voice was not being heard, the miners stayed underground and vowed to remain until Government leaders in Bucharest came to Roșia Montană to observe the local conditions and address their concerns.¹⁰¹⁷

497. The miners' protest received national television coverage, which motivated Prime Minister Ponta to visit Roșia Montană on September 15, 2013.¹⁰¹⁸ Notwithstanding his earlier

¹⁰¹³ [REDACTED]; Henry ¶¶ 119-121.

¹⁰¹⁴ Lorincz ¶ 85; Lorincz Annex A, Slides 5-8 (showing photos of the local communities protesting in support of the Project and RMGC); Gligor ¶¶ 144-145. *See also* Henry ¶¶ 119-120.

¹⁰¹⁵ Lorincz ¶ 85.

¹⁰¹⁶ Lorincz ¶ 87; Tănase II ¶ 202; Henry ¶ 120.

¹⁰¹⁷ Lorincz ¶ 87; Tănase II ¶ 203; Henry ¶ 121.

¹⁰¹⁸ Lorincz ¶ 87; Lorincz Annex A, Slide 9 (showing photos of the miners' protest and Ponta going underground to visit the miners barricaded underground).

statement that the political decisions already had been taken and that setting up a parliamentary commission to debate the Project thus would be “pointless,”¹⁰¹⁹ the Prime Minister promised the miners that a parliamentary commission would be convened and would visit Roșia Montană to hear their reasons for supporting the Project (as well as the views of those who opposed the Project) before making any decision.¹⁰²⁰

498. Seeing for himself the environmental damage and economic realities of Roșia Montană, as well as the cultural preservation work supported by RMGC on the mining galleries he visited, the Prime Minister publicly acknowledged that his earlier opposition to the Project was uninformed and inconsistent with the real conditions existing in the area:

[A]nyone who goes there just like I went, will come to the conclusion that all the illusions we had in Bucharest in front of our computers, that we will make tourism in mining areas and I don't know what else, well, all this is not true. So without the mining activities, those people will probably end just like the other mining areas did with depopulation and bankruptcy, some way or the other.¹⁰²¹

Prime Minister Ponta urged members of Parliament not to repeat his mistakes, and to make a fully informed decision about the Project and “not decide based on an automatic political vote.”¹⁰²²

¹⁰¹⁹ See *supra* § VIII.B.1; *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 1 (Prime Minister Victor Ponta).

¹⁰²⁰ *Victor Ponta's statements regarding Roșia Montană*, B1 TV, dated Sept. 15, 2013 (Exh. C-1483) at 1-2 (Prime Minister Victor Ponta: “I am talking about those 32 or 33 miners who locked themselves in the mine for 5 days and who were saying that ‘nobody listens to us, you only listen to the University Square . . . I made them the promise that I intend to keep that the MPs will come and discuss with them and that they will be listened to, this is what they asked me to do.’”).

¹⁰²¹ *Victor Ponta's statements regarding Roșia Montană*, B1 TV, dated Sept. 15, 2013 (Exh. C-1483) at 1 (Prime Minister Victor Ponta).

¹⁰²² *Victor Ponta's statements regarding Roșia Montană*, B1 TV, dated Sept. 15, 2013 (Exh. C-1483) at 2 (Prime Minister Victor Ponta: “Exactly, you said it right. I did something that honestly many people do. I was against a project without knowing it. And now I wish that all MPs be smarter than I was, that they get to know the project, to listen, to find out something that I didn't know before coming to Roșia Montană. We were saying that the mining should not be resumed . . . but for now in Roșia Montană there are three ponds full of cyanide. We wanted Roman galleries. I went down through those Roman galleries to get where the miners where. I think we will need one hundred million euro to put them in operation. So, just like you said, I want MPs not to be in favor or against this project because their party leader told them to, but to think by themselves based on all the available elements and to vote like that.”).

499. Unfortunately for Gabriel, RMGC, and the people of Roșia Montană, the Prime Minister's public statements regarding the need for a fully informed vote were disingenuous, not taken seriously by his colleagues in Parliament, or just too late to alter the path to parliamentary rejection on which the Government had set the Draft Law and hence the Project. Despite further positive testimony during the ensuing hearings from the Government's Ministers regarding the merits of the Project, Parliament rejected the Draft Law through a series of nearly unanimous political votes as discussed below.

4. Parliament Rejected the Draft Law and Senior Government Officials Accordingly Confirmed the Project Will Not Be Permitted

500. Two days after Prime Minister Ponta visited Roșia Montană, on September 17, 2013, Parliament established a 19-member joint parliamentary special commission ("Special Commission") to analyze the Draft Law and prepare a report for consideration of both chambers of Parliament.¹⁰²³ For several weeks in September and October 2013, the Special Commission presided over nationally televised hearings regarding the Project that were nothing but political theater.¹⁰²⁴ As had the Senate committees before it, the Special Commission (and later both chambers of Parliament) disregarded the testimony endorsing the Project from Government Ministers (whose Ministries had undertaken detailed expert reviews of the Project during the years of EIA procedure) and the testimony from the numerous leading independent technical experts retained by RMGC and Gabriel to design the Project, and simply rejected the Draft Law and Draft Agreement.¹⁰²⁵

501. Not only were the earlier proceedings before the Senate committees a harbinger of things to come from the Special Commission, but the Special Commission included members who were openly biased against the Project. The Chairman of the Special Commission was Darius Vâlcov, who had chaired the Senate Committee for Public Administration and Land Management that one week earlier had unanimously voted to reject the Draft Law; the

¹⁰²³ Tănase II ¶ 204, n.284 (noting that the Special Commission was intended to have 21 members, but the PDL party refused to appoint its two members to the Commission); Henry ¶¶ 122-123.

¹⁰²⁴ Henry ¶¶ 123-125; [REDACTED]

¹⁰²⁵ [REDACTED] Henry ¶¶ 126-128; [REDACTED]

Commission also included long-time Project opponent and former Minister of Environment Attila Korodi and other members who had expressed anti-Project views.¹⁰²⁶

502. Following the establishment of the Special Commission, anti-mining NGOs and militant anti-Project activists employed increasingly aggressive tactics to pressure and intimidate RMGC, Gabriel, and decision-makers in the Government and in Parliament.¹⁰²⁷ [REDACTED]

[REDACTED]

[REDACTED]¹⁰²⁹ Leaders of the “Save Roșia Montană” group shouted derisive chants and threw fake money at the Minister of Culture, Daniel Barbu, during a public event; when Minister Barbu attempted to leave the event in his car, protesters blocked the street, surrounded his car, and shattered the rear window with rocks.¹⁰³⁰ The so-called “civil society” was anything

¹⁰²⁶ [REDACTED] Henry ¶ 122; *Opinions of the parliamentarians in the Roșia Montană committee*, Casajurnalistului.ro, dated Sept. 20, 2013 (Exh. C-1466) (reporting positions taken against the Project and/or the Draft Law by Special Commission members Attila Korodi, Tudor Ciuhodaru, Toni Grebla, Ioan Chelaru, Petru Ehegartner, and Sorinel Gigel Stirbu, who previously commented on a blog in 2011 that he was against the Project and that “other companies willing to invest will be found, and under much better conditions for the Romanian state”).

¹⁰²⁷ [REDACTED]

¹⁰²⁸ [REDACTED] See also *The Members Proposed for the Special Committee for Roșia Montană. Contact them and ask them to reject the law!*, Salvati Roșia Montană (Exh. C-1517) (publication by the “Save Roșia Montană” group of the personal phone numbers of the members of the Special Commission).

¹⁰²⁹ [REDACTED] See also, e.g., *Gabriela Firea, terrorized by the anti-Roșia Montană protesters: threats with accidents, throat cutting, and acid thrown in her face*, Newstiriromania.ro, dated Sept. 25, 2013 (Exh. C-1443) at 1 (Senator Gabriela Firea: “I receive hundreds of such messages. Most of the threats are about accidents that could happen to me or my family, throat cutting, face mutilation, substances thrown on face and body.”). See also, e.g., *Gabriela Vranceanu Firea, threatened with DEATH because of the Roșia Montană Project*, Romaniatv.net, dated Sept. 25, 2013 (Exh. C-1444); *MPs members of the Roșia Montană Committee, threatened with death. “They said they will cut my throat”*, Antena3, dated Sept. 30, 2013 (Exh. C-1522) (reporting death threats against Special Commission members); *Death threats to MPs from the Roșia Montană Commission*, Ziare.com, dated Sept. 30, 2013 (Exh. C-1523) (same).

¹⁰³⁰ See *Culture Minister, Daniel Barbu, stoned in downtown by anti-RMP demonstrators, Minister’s car vandalized*, gandul.info, dated Oct. 17, 2013 (Exh. C-1524); Video of protesters against Minister of Culture Barbu dated Oct. 17, 2013 (Exh. C-1525); *Incident at Club A. The Culture Minister’s car vandalized*, Youtube.com, dated Oct. 17, 2013 (Exh. C-1526). See also VIDEO Daniel Barbu was booed by the anti-RMGC protestors in the Bucharest’s Old City Center. The Minister claims they vandalized his car, the

but, zealously protesting against the Project in conscious disregard of the facts, preferring to propagate their “flat Earth” view of mining, the use of cyanide, and the Roșia Montană Project generally.

503. From September 23 to October 15, 2013, the Special Commission held public hearings that were broadcast live on national television.¹⁰³¹ As noted above and summarized below, a parade of senior Government officials variously testified that the Project complied with all permitting requirements and international standards and would provide important environmental, cultural, economic, and social benefits that the State could not, and thus should be permitted:

- Minister of Environment Rovana Plumb: Consistent with her testimony two weeks earlier, Minister Plumb testified that the Project met “all environmental standards – the highest possible,” and that “*the entire team in the Ministry of Environment is sure that, by what we have requested in this Draft Law, we have secured all conditions for environmental protection.*”¹⁰³² Minister Plumb testified that the Project would clean up the severe historical pollution in Roșia Montană, which the State lacked the resources to do.¹⁰³³ She testified that RMGC would “use the latest technology to neutralize cyanide” to levels that were safe and far below the stringent EU standard that applied in Romania.¹⁰³⁴ She also

protestors denounce the appearance of instigators, Hotnews, dated Oct. 17, 2013 (Exh. C-1527) at 1 (Minister of Culture Daniel Barbu rebuking the protesters for “acting like neo-fascists”); *Ponta says he has nothing against peaceful protests: When you block a town or the country, WE INTERVENE. There is an EXTREMIST GROUP in Câmpeni inciting to violence*, Mediafax, dated Oct. 19, 2013 (Exh. C-1528) at 2 (Prime Minister Victor Ponta describing the protesters as “an extremist group that tries to create a violent provocation”).

¹⁰³¹ Tănase II ¶¶ 207-212 Avram ¶¶ 158-165.

¹⁰³² Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 42, 47 (Minister of Environment Plumb) (emphasis added).

¹⁰³³ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 3, 6 (Minister of Environment Plumb describing the historical pollution and stating that remediation of it would cost “300 million Euros only for Roșia Montană” which the Romanian State “cannot afford”).

¹⁰³⁴ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 3 (Minister of Environment Plumb stating that RMGC would ensure “a concentration of three parts per million in the tailings facility [TMF], one of the lowest levels in the EU” and “one third compared to the threshold provided in the EU Mining Waste Directive, which is ten parts per million”); *id.* at 7 (Minister Plumb observing that “a whole series of European and international experts worked on this Directive and on establishing the cyanide limits, collaborating and expressing their points of view, and this is how this limit [of 10 ppm] was

acknowledged that RMGC would fully comply with the International Cyanide Management Code, that cyanide would be “used only in a closed and controlled circuit and only within the plant perimeter,” and that cyanide transport would be “strictly controlled with maximum safety.”¹⁰³⁵

- TAC Vice President Octavian Pătrașcu: Mr. Pătrașcu, who also was the Director of the Ministry of Environment’s Impact Assessment and Pollution Control Department, testified that the site of the TMF in the Corna Valley “was selected based on the characteristics of the surrounding area” after “geotechnical drills emphasized that colluvium layer, as it is called, that is, that clay which can be used to line the bottom of the pond.”¹⁰³⁶ Mr. Pătrașcu explained that a team from the Geological Institute of Romania performed geological tests in the Corna Valley in December 2011 and confirmed that “there will be no seepage problems from the pond,” and the TMF design was approved by the Romanian authorities so “the tailings pond should not be a concern for us.”¹⁰³⁷
- Minister of Culture Daniel Barbu: Minister Barbu testified that the Project complied with applicable requirements and would provide important benefits to

established,” and “in the last three weeks, the EU Commission for Environment, Mr. Potočnik, has expressed his point of view – that in terms of the concentration of cyanide, if the limit imposed by the European Directive is observed, there will be no problems in terms of environmental protection”).

¹⁰³⁵ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 3 (Minister of Environment Plumb).

¹⁰³⁶ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 24 (TAC Vice President Octavian Pătrașcu).

¹⁰³⁷ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 8-9, 24 (TAC Vice President Octavian Pătrașcu). As discussed below, despite the Ministry of Environment’s conclusion that the TMF location was safe on the basis of extensive geological testing and studies of the Corna Valley, including by leading external experts and by the Geological Institute of Romania’s team of geologists, as well as exhaustive analysis of the TMF in numerous TAC meetings over six years, the Special Commission requested further study of the geological conditions in the Corna Valley based on testimony of the Geological Institute’s Director at that time, Ștefan Marincea, who repeated baseless claims contesting the authenticity of the Institute’s favorable endorsement in December 2011 and falsely accused RMGC of forging a map to erase geological faults within the Roșia Montană perimeter. See Transcript of Parliamentary Special Commission hearing dated Oct. 8, 2013 (Exh. C-1260) at 33-35, 47-48 (Ștefan Marincea). When later given the opportunity to substantiate his accusations, however, Mr. Marincea failed to propose terms of reference for a study of the area that he claimed was necessary, and the idea of such a study was subsequently abandoned. See *infra* § IX.A (explaining that neither Mr. Marincea nor any of the TAC members proposed terms of reference for a study of Corna Valley); [REDACTED]

the State through the preservation of Romania's cultural heritage, for which "we would have never had sufficient public funds."¹⁰³⁸ Minister Barbu testified that if the Project were not permitted, the cultural heritage at Roşia Montană would be lost.¹⁰³⁹ Consistent with the unanimous findings of the UNESCO Parliamentary Commission that visited Roşia Montană, he also testified that including Roşia Montană on the UNESCO World Heritage List was not realistic or appropriate.¹⁰⁴⁰

- Minister Delegate of Infrastructure Projects Dan Şova: Minister Delegate Şova testified that the Project was developed by "the best specialists in the world," and that it was "one of the major investment projects in . . . Romania with a very important . . . economic effect in the Romanian economy."¹⁰⁴¹ Minister Delegate Şova further testified that the Project would "turn the Roşia Montană mine into the most modern exploitation in Europe, and toughest in terms of the conditions imposed on the titleholder."¹⁰⁴² He also described the current Roşia Montană as "an ecological disaster" and "more like landscapes from the Moon than from the

¹⁰³⁸ Transcript of Parliamentary Special Commission hearing dated Sept. 23, 2013 (Exh. C-929) at 2 (Minister of Culture Barbu); *id.* at 6.

¹⁰³⁹ Transcript of Parliamentary Special Commission hearing dated Sept. 23, 2013 (Exh. C-929) at 22 (Minister of Culture Barbu: "I am afraid, Mr. Chairman, and I shall say it without any irony, if the works are stopped there, I don't care about one company in particular, all I am saying is public policy with regard to heritage, if the works on the patrimony buildings are stopped, I wouldn't want to see citizens in the street chanting 'Save the heritage of Roşia Montană! Galleries are flooded, houses collapse because there is no one to restore them. Churches are collapsing.'").

¹⁰⁴⁰ Transcript of Parliamentary Special Commission hearing dated Sept. 23, 2013 (Exh. C-929) at 3-4 (Minister of Culture Barbu: "[T]he urban centre of Roşia Montană, with its 41 buildings, does not include exceptional or unique elements, picturesque, of course, in a certain relationship with the natural environment, also affected. The historical centre includes insertions of buildings from the 60s and 70s, in brief communist apartment buildings that mutilate the assembly in part. It is not in a good preservation condition, it does not qualify for being proposed for inclusion on the list of the world heritage. With regard to underground galleries, if they are preserved, they will indeed represent an element not of uniqueness - there are other similar galleries in the Alps and in southern Spain, but of course this is a criterion of maximum value which can be capitalised. If these preserved mines - more than one kilometre of them, which are open right now, water being discharged constantly from them, you will see - if these mines are abandoned, in approximately three months they will be filled with water. Consequently, there will be nothing to include on any list.").

¹⁰⁴¹ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 19, 35 (Minister Delegate of Infrastructure Projects Şova).

¹⁰⁴² Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 9 (Minister Delegate of Infrastructure Projects Şova).

Earth,” noting that the historical pollution RMGC would clean up as part of implementing the Project was “very severe.”¹⁰⁴³

- Minvest Chief Engineer Victor Pătrășcoiu: Mr. Pătrășcoiu testified that the Project “complies with the best practices in the mining industry” and that Minvest supported its implementation.¹⁰⁴⁴ He also stated that the technologies proposed for mining and processing the ore were “modern and highly performing technologies, with high yield rates, in line with the highest safety standards throughout the duration of the project.”¹⁰⁴⁵
- NAMR President Gheorghe Duțu: President Duțu “issued a favorable opinion” of the Project, observing “that the assessment and all geological prospections were managed and funded by [RMGC], and carried out by authorized Romanian and foreign companies.”¹⁰⁴⁶
- Minister of Regional Development Nicolae-Liviu Dragnea: Minister Dragnea testified that the renegotiated royalty of 6% was “the highest royalty rate” in Europe, and acknowledged that there was no viable alternative to the Project for the sustainable development of Roșia Montană.¹⁰⁴⁷

¹⁰⁴³ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 27 (Minister Delegate of Infrastructure Projects Șova); Transcript of Parliamentary Special Commission hearing dated Oct. 15, 2013 (Exh. C-1531) at 11 (Minister Delegate of Infrastructure Projects Șova).

¹⁰⁴⁴ Transcript of Parliamentary Special Commission hearing dated Oct. 3, 2013 (Exh. C-558) at 85 (Minvest Chief Engineer Pătrășcoiu).

¹⁰⁴⁵ Transcript of Parliamentary Special Commission hearing dated Oct. 3, 2013 (Exh. C-558) at 85 (Minvest Chief Engineer Pătrășcoiu).

¹⁰⁴⁶ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 6-7.

¹⁰⁴⁷ Transcript of Parliamentary Special Commission hearing dated Oct. 2, 2013 (Exh. C-1620) at 9, 18 (Minister of Regional Development Dragnea: “Regarding development alternatives, sustainable development alternatives, sustainable development projects in that area, there are none at the moment.”).

- Minister of Agriculture Daniel Constantin: Minister Constantin testified that the Ministry of Agriculture supported the Project because of the “many advantages for the farmers in the neighboring areas.”¹⁰⁴⁸
- Minister Delegate of Budget Liviu Voinea: Minister Delegate Voinea expressed “a favourable endorsement on the draft law” and noted that the State lacked the resources to make the investment without RMGC.¹⁰⁴⁹
- Minister of Justice Robert Cazanciuc: Minister Cazanciuc testified that the Ministry of Justice endorsed the Project and the enactment of the Draft Law.¹⁰⁵⁰

504. Although it held three weeks of hearings and conducted a site visit to Roșia Montană, the Special Commission allocated only one hearing day (on October 3, 2013) for testimony by RMGC and its team of nearly 30 renowned Romanian and international external experts who appeared in person to present their findings about the Project and answer any questions from the Commission.¹⁰⁵¹

505. RMGC and its team of external experts professionally explained the environmental, cultural, economic, geological, and other aspects of the Project, and answered all

¹⁰⁴⁸ Transcript of Parliamentary Special Commission hearing dated Oct. 8, 2013 (Exh. C-1260) at 14 (Minister of Agriculture Constantin).

¹⁰⁴⁹ Transcript of Parliamentary Special Commission hearing dated Oct. 1, 2013 (Exh. C-1694) at 2, 8, 15 (Minister Delegate of Budget Voinea responding to a question about “the Romanian State’s capacity to make this investment itself” and stating that “mining by the State requires significant investment, share capital increase, which the state cannot afford in terms of tax space”).

¹⁰⁵⁰ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 41 (Minister of Justice Cazanciuc testifying that “the Ministry of Justice is one of the endorsers to the project” and that, in terms of the legal requirements, “we feel that things are pretty clear”).

¹⁰⁵¹ Tănase II ¶¶ 210-211; Henry ¶¶ 123-125; Avram ¶ 165; Gligor ¶ 149; Lorincz ¶ 88. These experts included, among others, leading international mining consultancies such as SRK Consulting, MWH, AMEC, and Aurifex; leading experts on culture heritage issues such as Răzvan Theodorescu, a former Minister of Culture and member of the Romanian Academy, Alexandru Vulpe of the Romanian Academy, Professor Paul Damian, the Director of National History Museum of Romania, and David Jennings, formerly of Oxford Archeology and currently the CEO of the York Archeological Trust; as well as experts in sustainable development such as Professor Adrian Dinu Rachieru PhD from the Apuseni Mountains Development Research Center, Professor Achim Moise, the former Rector of the “December 1, 1918” Alba Iulia University, and Viorica Vâlcea, a sustainability expert who coordinated socioeconomic recovery programs in the region financed by the World Bank and the Romanian Government.

of the Special Commission's questions during the hearing and subsequently in writing.¹⁰⁵² Given the limited time made available, however, RMGC's external experts had only a few minutes each to make their presentations, and some of the experts were not able to make any presentation.¹⁰⁵³ Emblematic of the pre-determined outcome of the hearings, several Special Commission members, including Deputy Oana Manolescu and Senator Haralambie Vochițoiu, did not even feign interest in learning about the Project, and simply left the hearing room during RMGC's presentation.¹⁰⁵⁴

506. In contrast to the time made available and approach to RMGC, the Special Commission invited Project opponents and street protesters to appear with no particular knowledge or experience in the relevant subject matter or connection to Roșia Montană, and allowed them to engage in anti-Project diatribes or to make observations irrelevant to the matters before the Special Commission.¹⁰⁵⁵ In addition, despite the testimony of the Minister of Environment and the NAMR President that cyanide was safe and the only suitable method to process the ore at Roșia Montană, the Special Commission also invited an individual to testify at length about a largely unproven alternative method of mineral processing that could not have been used to process the ore at Roșia Montană.¹⁰⁵⁶

507. As the Special Commission continued to hold hearings, Prime Minister Ponta appeared on national television on October 5, 2013 and reiterated his oft-repeated comment that the Project would not be done if Parliament were to reject the Draft Law: *"It's clear that if the*

¹⁰⁵² Tănase II ¶¶ 210-211; Avram ¶ 165; Gligor ¶ 149.

¹⁰⁵³ Tănase II ¶ 210; Gligor ¶ 149. *See also* Letter from RMGC to Parliamentary Special Commission dated Oct. 10, 2013 (Exh. C-843) (enclosing the written views of RMGC's external experts who, "as the time allocated to presentations ran out, could not present . . . their relevant opinions during the discussions").

¹⁰⁵⁴ ██████████ *See also* Henry ¶ 125.

¹⁰⁵⁵ ██████████ Henry ¶ 125. As ██████████ recalls, watching the hearings live on national television was frustrating because many people invited to appear before the Special Commission knew nothing about the Project and made a host of irrelevant suggestions and observations. ██████████ *See also* Transcript of Parliamentary Special Commission hearing dated Oct. 11, 2013 (Exh. C-904) at 25-26 (Petru Bucur Volk offering as "an alternative proposal" to the Project that "[w]e kindly ask our colleagues and our American and NATO fellows to move the base from Deveselu to Roșia Montană").

¹⁰⁵⁶ ██████████ Henry ¶ 125.

parliament rejects the law, nothing will be done in Roșia Montană.”¹⁰⁵⁷ When asked if there was a “plan B” in case “this project is not done because of a negative vote in parliament,” Prime Minister Ponta stated that if Parliament were to reject the Draft Law and with it the Project, he would have to convince potential investors not to be scared off by the State having rejected the Project for “political” rather than technical or legal reasons:

My plan B, and there is such a plan, is to explain to all national and foreign investors, to all those which are involved in large projects, gas, offshore, submarine cable, uranium mines, *to tell them that this, only this project, was rejected on a political criterion* but that Romania remains a country open to investments, to major projects.¹⁰⁵⁸

508. On the last day of hearings, October 15, 2013, the Special Commission invited Minister Delegate Șova (who had testified two weeks earlier) to provide additional testimony. In view of statements made by RMGC during its presentation to the Special Commission that it did not require Parliament to enact the Draft Law for the Project to be permitted as it met all of the applicable requirements, the Special Commission Chairman, Senator Vâlcov, asked Minister Delegate Șova to provide his views on whether RMGC required the enactment of the Draft Law to obtain the environmental permit and implement the Project.¹⁰⁵⁹ Minister Delegate Șova stated: “Of course, [RMGC] does not need this law, as the current situation is convenient for them. *The law was made for the Romanian state, not for them.*”¹⁰⁶⁰

509. Three days later, Minister of Environment Plumb submitted a written response to a question from the Special Commission regarding the Ministry of Environment’s point of view on permitting the Project. Minister Plumb reiterated her testimony that the Project met the strictest environmental standards and permitting requirements:

¹⁰⁵⁷ Interview with Prime Minister Victor Ponta, Antena3 TV, dated Oct. 5, 2013 (Exh. C-1504) at 7 (Prime Minister Victor Ponta) (emphasis added).

¹⁰⁵⁸ Interview with Prime Minister Victor Ponta, Antena3 TV, dated Oct. 5, 2013 (Exh. C-1504) at 6 (Prime Minister Victor Ponta) (emphasis added).

¹⁰⁵⁹ During RMGC’s presentation, Senator Vâlcov asked RMGC this question and RMGC confirmed that it met the requirements and should be permitted regardless of whether the Draft Law was enacted. *See* Transcript of Parliamentary Special Commission hearing dated Oct. 3, 2013 (Exh.C-558) at 107-108.

¹⁰⁶⁰ Transcript of Parliamentary Special Commission hearing dated Oct. 15, 2013 (Exh.C-1531) at 7 (Minister Delegate of Infrastructure Projects Dan Șova) (emphasis added).

The government I am a member of has rejected the previous project and drafted a new project which includes environmental requirements to the highest European standards and improved benefits for Romania. As Minister of Environment, I was particularly tasked with inserting the strictest standards demanded by the European legislation in this project.¹⁰⁶¹

Confirming the Government's effort to avoid its legal obligation to decide to issue the environmental permit and otherwise to authorize the Project, and instead to offload that responsibility onto Parliament, Minister Plumb acknowledged that "[i]t was not the wish of the Government to make a decision – whether in favor or against" – in terms of permitting the Project.¹⁰⁶² She therefore confirmed the statements she previously made to the media that, despite meeting the highest environmental standards and the applicable standards to be permitted, the Ministry of Environment would decide to issue the environmental permit only if Parliament approved the Draft Law: "*The environmental agreement will only be issued provided the Parliament's approval of this draft law. . . . The decision thus rests with the Parliament of Romania.*"¹⁰⁶³

510. On November 11, 2013, the Special Commission voted unanimously (17-0 with two abstentions) to recommend that the Senate and Chamber of Deputies reject the Draft Law.¹⁰⁶⁴ In a nearly 100-page report obviously prepared in advance and issued that day, the Special Commission acknowledged that it had exceeded its limited mandate to examine the Draft Law and instead had assessed all aspects of the Project, including a host of technical issues it plainly was not competent to resolve.¹⁰⁶⁵

¹⁰⁶¹ Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-776).

¹⁰⁶² Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-776).

¹⁰⁶³ Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-776) (emphasis added).

¹⁰⁶⁴ Parliamentary Special Commission Vote dated Nov. 11, 2013 (Exh. C-664).

¹⁰⁶⁵ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 41 (acknowledging that the Special Commission "was mandated to issue an endorsement on the Draft Law," but that "the Commission considered it is opportune to create a framework for debate and analysis for the Roşia Montană mining project" and "wishes to clarify several aspects related to the Draft Law and the Roşia Montană mining project, through

511. The Special Commission’s report did not identify any flaws or gaps in the voluminous technical studies presented by RMGC concerning the Project or in the testimony of relevant ministries endorsing the Project and its compliance with permitting requirements. The Commission nonetheless recommended to the State authorities that they re-evaluate certain technical aspects of the Project,¹⁰⁶⁶ including: (a) the “potential risks” associated with using cyanide in mining; (b) the possibility of using an alternative technology to process the ore at Roşia Montană; (c) the design of the tailing management facility (or TMF) and its location in the Corna Valley; and (d) the impact on cultural heritage as well as the potential to include Roşia Montană as a UNESCO World Heritage Site.¹⁰⁶⁷ The Special Commission also recommended that State authorities investigate purported “suspicions” concerning, among other things, the lawfulness of RMGC’s establishment in 1997, the Government’s transfer of the License from Minvest to RMGC in 2000, and the expansion through addenda to the License of the exploitation perimeter from Minvest’s small project to the larger Project developed by RMGC.¹⁰⁶⁸

512. The Special Commission’s recommendations were clearly arbitrary, capricious, and motivated by politics, not grounded in fact. As set out in detail above, the technical issues identified for further review by the Special Commission had been the subject of numerous independent expert analyses and had been exhaustively, repeatedly, and positively addressed by the Government’s own technical experts during the EIA procedure, as well as with respect to UNESCO by Parliament’s own UNESCO Commission whose members unanimously rejected in August 2013 pursuing a listing for Roşia Montană as a UNESCO World Heritage Site. All of these issues were then specifically addressed again at the Special Commission hearings by Government officials and by RMGC and its independent experts.

513. Similarly, questions raised concerning the legality of RMGC’s establishment, the License transfer, and the expansion of the exploitation perimeter were baseless, and also had been [REDACTED]

recommendations and requests to the competent institutions,” including for “issues for which the Commission has not identified solutions, in particular those of a technical nature”).

¹⁰⁶⁶ Avram ¶¶ 167-168; Szentesy ¶¶ 91-94; Tănase II ¶¶ 213-216; Henry ¶¶ 126-128; Gligor ¶¶ 151-152.

¹⁰⁶⁷ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 71-74, 79-89.

¹⁰⁶⁸ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 62-65.

1069 In addition, NAMR President Duțu had testified unequivocally to the Special Commission that NAMR’s approval transferring the License from Minvest to RMGC as titleholder was “legal, in line with the procedures and also with the approval of the Ministry of Economy.”¹⁰⁷⁰

[REDACTED]

¹⁰⁶⁹ Tănase II ¶ 215.

¹⁰⁷⁰ Transcript of Parliamentary Special Commission hearing dated Sept. 24, 2013 (Exh. C-506) at 58 (NAMR President Gheorghe Duțu clarifying in response to a further question that the referenced “procedures” were “[f]rom the Mining Law. We have laws and standards, so the transfer can be done upon request, under certain terms, based on documentation, so, there is a procedure. We can send you this mechanism too. It’s a settlement between the parties.”).

[REDACTED] See Addendum No. 1 to Roșia Montană License dated Oct. 29, 1999 (Exh. C-408-C); Addendum No. 5 to Roșia Montană License dated Apr. 27, 2001 (Exh. C-412-C); Addendum No. 6 to Roșia Montană License dated June 21, 2004 (Exh. C-413-C). As Professor Bîrsan explains, NAMR had the authority on behalf of the State to establish and to modify the License perimeter. See Bîrsan ¶¶ 228-229.

[REDACTED] As discussed above, the License was subsequently transferred in October 2000 to RMGC at the proposal of Minvest, endorsed by the Ministry of Industry, approved by NAMR, and published in the Official Gazette. See *supra* § III.A.2; Ministry of Industry Note No. 2443 dated Oct. 9, 2000 (Exh. C-1007); NAMR Order No. 310/2000 on the Transfer of the Concession License for Exploitation No. 47/1999, published in the Official Gazette of Romania, Part I, No. 504 dated Oct. 13, 2000 (Exh. C-1089). The State thus necessarily was aware of and fully approved the expansion of the License perimeter and its subsequent transfer to RMGC.

¹⁰⁷¹ [REDACTED]

¹⁰⁷² [REDACTED]

514. While recommending rejection of the Draft Law and the reopening of various issues, the Special Commission recommended that Romania's legal framework be modified or supplemented to facilitate the implementation of large mining projects generally.¹⁰⁷³

515. Legally, the Project still could have been implemented regardless of whether the Draft Law was adopted, based on the uniform and repeated acknowledgement by the Government, including notably by the Ministry of Environment, that it met the legal requirements for permitting.¹⁰⁷⁴ As Professor Mihai confirms, neither the Government nor the Ministry of Environment had any legal basis to refuse to permit the Project – neither political considerations, public opinions expressed outside the EIA procedure (e.g. in the form of protests), the Special Commission's observations on the Draft Law, nor Parliament's rejection of the Draft Law, provided a lawful basis for the Government to refuse to issue the environmental permit.¹⁰⁷⁵ The Government's refusal to permit the Project both before and following Parliament's rejection of the Draft Law was a manifest excess of authority and an egregious violation of Gabriel's and of RMGC's legal and contractual rights.

516. Minister Delegate Şova himself warned Parliament during his testimony before the Special Commission that refusing to permit the Project for political reasons not grounded in law would violate RMGC's rights under the License and Gabriel's rights under investment treaties concluded by the Romanian State:

[T]he idea was falsely created that a rejection of this law puts an end to the exploitation at Roşia Montană. There is nothing more wrong. I repeat: there is a license valid until 2019 which, according to its own provisions . . . will be extended by 5 years at a simple request formulated by Gabriel Resources 60 days before the expiry of the license. This is the provision and you should be aware of it, in the sense that if Gabriel Resources wants to remain in Roşia Montană for gold exploitation based on this license, we have no legal possibility to chase them out. . . .

Moreover, the hypothesis has been put forward, and I want to strengthen this, what would happen if the Romanian state decides, for any reason, that this project is no longer done . . . Things are very simple: if we decide

¹⁰⁷³ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 89.

¹⁰⁷⁴ See Henry ¶ 128.

¹⁰⁷⁵ Mihai §§ VI.B.5, VIII.B-D.

tomorrow, as a state, with no reason – for if we decide with a reason, that is another discussion, for example, if the Technical Analysis Committee of the Ministry of Environment finally decides tomorrow that [RMGC] does not meet the environmental conditions, the case is closed. We won't do the exploitation. *But if we are not in such a hypothesis and we still decide, for whatever reason, objective, subjective, related to political decisions, not to do this project, I am telling you that we will be in breach of several agreements on the promotion and mutual protection of foreign investments.* Under Art. 11 of the Constitution, these Agreements are treated as international treaties incorporated into domestic law, meaning they give rise to direct obligations for the Romanian State.¹⁰⁷⁶

517. One day after the Special Commission issued its report, however, Minister of Environment Plumb reaffirmed on national television that although the Ministry of Environment “set the highest environment standards” for the Project “fully observing all the European and international criteria and standards for this type of investment that involves exploiting an ore deposit of our country,” Parliament’s decision on the Draft Law would determine the fate of the Project: *“Of course Parliament’s decision means the last word for us and we will observe it.”*¹⁰⁷⁷

518. On November 19, 2013, the Senate voted (119-3) to reject the Draft Law.¹⁰⁷⁸ The Chamber of Deputies voted (301-1) to reject the Draft Law also, but not until June 2014.¹⁰⁷⁹ Notably, Minister of Environment Plumb, Minister of Culture Barbu, and Minister Delegate

¹⁰⁷⁶ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 9-10 (Minister Delegate of Infrastructure Projects Şova referring to several such potentially applicable BITs and stating “I could simply quote from all of them. But let’s take the agreement on the promotion and mutual protection of investments with Canada. All these agreements, including the one with Canada, use two terms that maybe we, as laymen but also as lawyers, might have thought long gone: ‘expropriation and nationalization’. So, the agreements use the terms ‘expropriation of a foreign investment’ and ‘nationalization of a foreign investment’ and they say that if the State decides to expropriate or nationalize a foreign investment, it must pay damages.”) (emphasis added).

¹⁰⁷⁷ *Minister Plumb’s public statements on Antena 3, Sinteza Zilei*, dated Nov. 12, 2013 (Exh. C-828) (Minister of Environment Rovana Plumb) (emphasis added). [REDACTED]

¹⁰⁷⁸ Tănase II ¶ 218; Henry ¶ 129.

¹⁰⁷⁹ Tănase II ¶ 218; Henry ¶ 129.

Șova all testified in favor of the Project but refused to vote in favor of the Draft Law in their capacities as members of Parliament.¹⁰⁸⁰

519. Parliament soon also rejected proposed amendments to the Mining Law that would have improved the general legislative framework for all large mining projects.¹⁰⁸¹ Following that vote, on December 12, 2013 Prime Minister Ponta blamed his coalition partner, Senator Antonescu, for blocking that legislation for political reasons apparently aimed at preventing implementation of the Project:

The political battles have now more brutally than ever entered into the investments arena. I think it is really stupid to avoid an investment of one billion dollars for political battle reasons. And I think the political message given to the investors is a negative one. Rejecting the Mining Law for political battle reasons is a bad signal.¹⁰⁸²

520. Following these parliamentary votes, the Government refused to take any further action to permit the Project. Despite having completed the technical assessment of the Project in 2011, which was confirmed again in 2013, the Ministry of Environment without any legal basis reconvened the TAC several times yet again in 2014-2015 purportedly to consider issues raised by the Special Commission in its report but, as discussed below, these meetings lacked substance and no further analysis was ever conducted.¹⁰⁸³

521. Confirming the pointlessness of these meetings, Prime Minister Ponta unequivocally confirmed in a televised interview in October 2014 that the Project was dead: “*The Parliament rejected the law, so the exploitation will not be made.*”¹⁰⁸⁴

¹⁰⁸⁰ Voting Roll of Senate on Draft Law dated Nov. 19, 2013 (Exh. C-878); Voting Roll of Chamber of Deputies on Draft Law dated June 3, 2014 (Exh. C-879). *See also* ██████████ Henry, nn.125, 139.

¹⁰⁸¹ Tănase II ¶ 219; Henry ¶ 129.

¹⁰⁸² *Victor Ponta: Let’s try to defend major projects in Romania next year, big investors*, Stiri.TVR.ro, dated Dec. 12, 2013 (Exh. C-1537) at 2 (Prime Minister Victor Ponta). *See also* ██████████ (noting the Prime Minister’s “apparent reference to the Project”).

¹⁰⁸³ *See infra* § IX.A (discussing the 2014-2015 TAC meetings in which no meaningful progress was made in reviewing the EIA Report); ██████████

¹⁰⁸⁴ Informal interview of Prime Minister Ponta, Realitatea TV, dated Oct. 19, 2014 (Exh. C-416) at 5 (emphasis added). ██████████

IX. FOLLOWING REJECTION OF THE PROJECT, THE STATE CONTINUED TO ACT IN MANIFEST DISREGARD OF GABRIEL'S LEGAL RIGHTS LEADING TO THIS ARBITRATION

A. The Ministry of Environment Reconvened the TAC in 2014 Purportedly to Follow Up on Parliamentary Recommendations, but Ultimately Did Nothing

522. As discussed above, the Special Commission's report included recommendations that various technical issues related to the Project be analyzed further, including notably the suitability of the Corna Valley for the Project's tailings management facility or TMF.¹⁰⁸⁵ The main basis for this recommendation was the testimony of the former director of the Geological Institute of Romania, Ștefan Marincea, who, among other things, (a) claimed that the Corna Valley was an unsuitable location for the TMF; (b) impugned the Geological Institute's own endorsement of the Corna Valley location in 2011 issued under the leadership of Mr. Marincea's successor following site research by the Institute; and (c) falsely accused RMGC of forging a map to omit certain geological faults that would have shown the unsuitability of the Corna Valley location.¹⁰⁸⁶

523. In recommending further environment-related technical assessments, the Special Commission exceeded both its legal authority (which was limited to examining and reporting on the Draft Law) and its expertise.¹⁰⁸⁷ The Special Commission also arbitrarily ignored the testimony of senior Ministry of Environment officials and industry experts as well as the extensive underlying testing and analysis showing that the Corna Valley was a reliably sound and appropriate location for the TMF.

[REDACTED]

¹⁰⁸⁵ See *supra* § VIII.B.4.

¹⁰⁸⁶ Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 27-29, 64-65 (finding that the allegations raised by Mr. Marincea were "extremely serious"). See also Transcript of Parliamentary Special Commission hearing dated Oct. 8, 2013 (Exh. C-1260) at 34-36, 49 (Geological Institute of Romania Director Ștefan Marnicea claiming that RMGC forged the map to obtain the Geological Institute's endorsement from December 2011, and that the endorsement was a "gross fake" and "a criminal situation"). [REDACTED] RMGC filed a legal action for defamation against Mr. Marincea for falsely accusing the company of forgery in his testimony to the Special Commission and in subsequent statements on national television. A Romanian civil court dismissed RMGC's claim against Mr. Marincea without ruling on the truth of his statements, finding that Mr. Marincea's assertions were simply his personal opinion rather than false factual statements that could implicate the law of defamation. [REDACTED]

¹⁰⁸⁷ Mihai § VI.B.5; Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 2, 62.

524. As discussed further below, the Ministry of Environment (with long-time Project opponent Attila Korodi once again appointed Minister) convened TAC meetings in April and then in July 2014 purportedly to act on Parliament's recommendation for an additional study regarding the suitability of the Corna Valley TMF location. Such action by the Ministry of Environment had no basis in law as the EIA procedure should have ended following the November 29, 2011 TAC meeting; after the EIA procedure remained open without decision in 2011-2012 in violation of law, the EIA procedure should have ended again in mid-2013 when again the process was declared completed.

525. Not only did the Special Commission exceed its authority by recommending further technical studies but, as Professor Mihai explains, the Ministry of Environment exceeded its authority in accepting such recommendations.¹⁰⁸⁸ Both because there is no lawful role for Parliament in the EIA procedure and because the Ministry of Environment had already twice completed its assessment of the EIA Report in consultation with the TAC in 2011 and 2013 (thus obligating the Ministry of Environment to issue a decision concerning the environmental permit consistent with that assessment), the Ministry acted unlawfully in effectively re-opening the EIA procedure in 2014 at the recommendation of Parliament.¹⁰⁸⁹

526. [REDACTED] Mr. Marincea (and the Geological Institute under his leadership) had presented his unsubstantiated claims regarding the Corna Valley TMF repeatedly in TAC meetings. He had asserted that there was a need for further study (with the paid assistance of the Geological Institute) and had claimed the Geological Institute's own prior endorsement of that location was not reliable.¹⁰⁹⁰ The Ministry of Environment earlier had rejected Mr. Marincea's claims, which were at odds with, among other things, the voluminous scientific studies and analyses undertaken by RMGC's highly qualified independent external technical experts and reviewed by Ministry and other Government experts.¹⁰⁹¹

¹⁰⁸⁸ Mihai § VI.B.5.

¹⁰⁸⁹ Mihai § VI.B.5.

¹⁰⁹⁰ [REDACTED]

¹⁰⁹¹ [REDACTED] *See also supra* § VIII.A.4 (discussing the Ministry of Environment's rejection of Mr. Marincea's concerns in publishing environmental permit conditions in July 2013 and the TAC members' disagreement with his views at the TAC's "conciliation" meeting). Aside from

527. In his expert report submitted with this Memorial, Mr. Corser reaffirms that the Corna Valley site was appropriate for the TMF, as had been verified repeatedly thorough drilling programs accompanied by extensive testing and analyses, and that the allegations raised by Mr. Marincea were unfounded as there were no major fissures, fractures, or faults in the Corna Valley that would raise concerns about groundwater contamination or that could compromise the stability of the TMF as Mr. Marincea claimed.¹⁰⁹²

528. The Ministry of Environment should have declined the Special Commission's recommendations for further analysis of that issue on the basis that specialists within relevant ministries during the extensive EIA procedure already had exhaustively assessed these topics and the Ministry of Environment already had concluded that the TMF and its Corna Valley location were both sound.¹⁰⁹³ Under the leadership of long-time Project opponent Attila Korodi, however, the Ministry of Environment was all too eager to embrace a suggestion of additional study and thereby try to avoid the conclusion that, by law, the Ministry of Environment still had the obligation to take the decision to issue the environmental permit.¹⁰⁹⁴

529. Thus, without legal basis, the Ministry of Environment convened another TAC meeting on April 2, 2014 to discuss the Special Commission's report.¹⁰⁹⁵ At that meeting, RMGC objected to having issues reopened for reconsideration based on recommendations made by the Special Commission.¹⁰⁹⁶ Mr. Pătrașcu, who represented the Ministry of Environment in the TAC, agreed that Parliament's review of the Draft Law "had nothing to do with the [EIA]

Mr. Marincea's false accusation before Parliament that RMGC forged one of the maps of the Corna Valley on which it based its conclusions, Mr. Marincea failed to identify any purported flaw in the vast technical work or expert analysis supporting the proposed Corna Valley TMF location or in the TMF design.

¹⁰⁹² Corser § 3.3 (concluding that "any fissures were so insignificant that they could not transmit a quantity of water that could result in an environmental impact," and that "[t]he site investigations confirmed the suitability of the location for purposes of constructing the TMF, which was designed to withstand the largest conceivable earthquake that could occur at the Project site irrespective of the likelihood of occurrence").

¹⁰⁹³ See Mihai § VI.B.5.

¹⁰⁹⁴ [REDACTED]

¹⁰⁹⁵ [REDACTED] Henry ¶¶ 138-139; [REDACTED]

[REDACTED] Nonetheless, given that Gabriel by that time had invested so much developing and trying to advance the Project, Gabriel agreed that RMGC should participate." Henry ¶ 138.

¹⁰⁹⁶ Avram ¶ 171; Szentesy ¶ 96; Henry ¶ 139.

procedure.”¹⁰⁹⁷ But the new TAC President, Ministry of Environment State Secretary Mihai Făcă, stated that the Ministry of Environment would proceed to address issues raised by the Special Commission.¹⁰⁹⁸

530. The Ministry of Environment convened a subsequent TAC meeting on July 24, 2014 to discuss the requirements for the TMF study it proposed to undertake. TAC President Făcă asked the TAC members (both orally at the meeting and in writing soon thereafter) to submit the conditions they considered should govern the third party eventually selected to conduct the TMF study.¹⁰⁹⁹ The Ministry of Environment contacted the Geological Institute as well as Mr. Marincea, notably notwithstanding that he no longer represented the Geological Institute as he had by then been dismissed from his position, and sought input on terms of reference for the study Mr. Marincea had claimed was necessary.¹¹⁰⁰

531. Neither the TAC members nor Mr. Marincea responded to the Ministry of Environment’s requests.¹¹⁰¹ Mr. Marincea’s failure to support the very study he proposed puts the lie to his repeated, baseless criticisms regarding the Project.¹¹⁰²

¹⁰⁹⁷ Transcript of TAC meeting dated Apr. 2, 2014 (Exh. C-473) at 3, 7 (TAC Vice President and Director of EIA Department Octavian Pătrașcu).

¹⁰⁹⁸ Avram ¶ 171; Szentesy ¶ 96; Transcript of TAC meeting dated Apr. 2, 2014 (Exh. C-473) at 15 (TAC President Făcă stating that RMGC “should appreciate a little that we have met today” because the Ministry of Environment “could have waited – without convening any TAC meeting”). Revealing his antipathy towards the Project, Minister Korodi in a public statement in May 2014 baselessly criticized RMGC’s voluminous TMF studies prepared by industry experts as “superficial,” and announced that the Ministry of Environment would commission its own study to verify the impermeability of the TMF, which Minister Korodi estimated would take four months. [REDACTED]

¹⁰⁹⁹ Avram ¶¶ 173-174; Szentesy ¶ 98; Henry ¶ 140. *See also* Mihai § V.B.6 (noting that the Ministry of Environment’s call for an additional TMF study was “out of order”).

¹¹⁰⁰ [REDACTED]

¹¹⁰¹ Avram ¶¶ 174-177; Szentesy ¶¶ 98-101; Tănase II ¶ 230; Henry ¶¶ 141-142.

¹¹⁰² [REDACTED]

532. The Ministry of Environment convened another TAC meeting, but not until a further nine months later, in April 2015. At that meeting TAC President Făcă confirmed that all of the TAC members – including the Geological Institute – had ignored the Ministry’s request for proposed conditions for commissioning a further TMF study; the Ministry accordingly decided not to pursue the study.¹¹⁰³ Thus, with the non-excuse that a further TMF study should be conducted now gone, the Ministry of Environment was again unmistakably obligated to make its decision on the environmental permit, but it still failed to act.

533. It was becoming clear that indeed the Ministry of Environment would not act because, following Parliament’s rejection of the Draft Law, the Government’s rejection of the Project remained final. This reality had been presaged in public statements by senior Government officials, including by Prime Minister Ponta, before the parliamentary proceedings, and also acknowledged after and in light of them. That the Project was not going to be permitted was also acknowledged by lower level officials in private discussions with RMGC. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

534. Thus, although there was no lawful basis to withhold issuance of the environmental permit, the Ministry of Environment has refused to take the required decision and the Government has refused to permit the Project to proceed.

¹¹⁰³ Avram ¶ 177; Szentesy ¶¶ 99-100; Henry ¶ 142; Transcript of TAC meeting dated Apr. 27, 2015 (Exh. C-474) at 1-2 (TAC President Făcă: “I would like to inform you that we received absolutely nothing officially so far . . . [G]iven that we received nothing, I think that the decision will be (probably, I don’t know, we will inform you formally when the time comes) to waive such a study, because it is impossible for the Ministry [of Environment] alone to impose conditions on topics exceeding its competence.”); *id.* at 2 (TAC President Făcă: “I notice the fact that we received no idea or suggestion from your institution [the Geological Institute of Romania], which means that your formal position is that you don’t have any interest in the performance of such study. We, the TAC, take note of this position and it seems to us we can move forward.”).

¹¹⁰⁴ [REDACTED] See also Mihai §§ V.C.9-10 (discussing the Government’s unlawful rejection of the Project by failing to act and noting that “[n]o other TAC meeting has been organized to date, nor has the Ministry of Environment taken any decision in respect of the EP [environmental permit] for the Project, and no Government decision has been issued in this respect either”).

B. After Repeated Public Pronouncements That the Project Was Rejected, State Bodies Acted in Disregard of RMGC’s Acquired Rights

535. Throughout this time in which the Government made plain its decision to reject the Roșia Montană Project and Gabriel and RMGC’s role in developing it, in effect renouncing the agreements the State had entered into with Gabriel and RMGC and upon which Gabriel had relied in making its investments, the Government never issued any decision denying the environmental permit, never issued any decision revoking, terminating, or otherwise cancelling the Roșia Montană License, and never gave any indication of an intention to compensate Gabriel.

536. Nevertheless, following Parliament’s rejection of the Draft Law, which the Government stated repeatedly would mean the cancellation of the Roșia Montană Project, the State’s conduct consistently confirmed the effective termination of the Project as well as the State’s abrogation, in effect, of its agreement to participate as a shareholder in RMGC.

1. The Government Stopped Cooperating in Recapitalizing RMGC and Left Gabriel to Donate Funds to Minvest to Prevent RMGC’s Dissolution

537. Until the parliamentary proceedings in the fall of 2013, the State, through the Ministry of Industry and later the Ministry of Economy, participated in managing RMGC and developing the Project through its role as shareholder via Minvest.¹¹⁰⁵ Immediately after the Special Commission’s vote, however, the Ministry of Economy refused to allow Minvest to participate as shareholder in the recapitalization of RMGC that was needed in order to prevent the risk of RMGC’s dissolution.¹¹⁰⁶

538. As Claimants explained in their provisional measures submissions, Romania’s Companies Law requires commercial companies like RMGC to maintain a minimum “Asset Capital Ratio,” *i.e.*, the ratio of net assets to subscribed share capital.¹¹⁰⁷ If a company’s Asset

¹¹⁰⁵ Tănase II ¶¶ 19-22 (describing the “strong spirit of cooperation and collegiality”). *See also* Henry ¶¶ 12-13 (stating that one of his reasons for joining Gabriel in June 2010 was “that Gabriel had a willing and supportive partner in the Project in Minvest”).

¹¹⁰⁶ Henry ¶¶ 130-136; Tănase II ¶¶ 220-227. [REDACTED]

¹¹⁰⁷ [REDACTED] *See also* Birsan ¶ 77; Henry ¶ 131; Tănase II ¶¶ 221-222.

Capital Ratio falls below the required threshold, the company must take action by the end of the following financial year to restore its Asset Capital Ratio (either by increasing its net assets or decreasing its share capital) in order to avoid dissolution.¹¹⁰⁸

539. Single-purpose mining project companies like RMGC must incur significant exploration and project development expenses and do not generate any revenue (and thus continue to incur losses) until the project is implemented.¹¹⁰⁹ As such companies advance project development, therefore, they must adjust their net assets or share capital periodically to maintain the legally required Asset Capital Ratio.¹¹¹⁰

540. Given this undisputed requirement, RMGC's shareholders cooperated in maintaining the required Asset Capital Ratio either by subscribing additional RMGC shares (in 2004 and 2009) or by reducing RMGC's share capital (in 2011 and 2012).¹¹¹¹ For both share capital subscriptions in 2004 and 2009, RMGC issued new shares that the shareholders agreed to subscribe and pay for *pro rata*.¹¹¹² Because Minvest did not have sufficient financial resources to pay for its shares, the shareholders concluded loan agreements in which Gabriel Jersey extended interest-free loans to Minvest (to be repaid by Minvest out of its share of future Project dividends) to finance Minvest's purchase of its portion of the new shares.¹¹¹³

541. In 2013, RMGC notified Minvest and the Ministry of Economy that RMGC's Asset Capital Ratio had dropped below the minimum legal threshold and again needed to be

¹¹⁰⁸ [REDACTED] See also Bîrsan ¶ 77; Henry ¶ 131; Tănase II ¶¶ 221-222.

¹¹⁰⁹ Henry ¶ 132; Tănase II ¶ 223.

¹¹¹⁰ Henry ¶ 132; Tănase II ¶ 223.

¹¹¹¹ [REDACTED]; Henry ¶¶ 133-134; Tănase II ¶ 224; Bîrsan ¶ 77.

¹¹¹² [REDACTED]; Henry ¶ 134; Tănase II ¶ 224; Bîrsan ¶ 77.

¹¹¹³ [REDACTED]; Henry ¶ 134; Tănase II ¶ 224; Bîrsan ¶ 77. [REDACTED]

[REDACTED] Loan Agreement between Gabriel Jersey and Minvest dated Dec. 16, 2009 (Exh. C-91) Art. 2.1 (same). As noted above, at the time of its establishment and for a period of time thereafter, RMGC's shareholders included Gabriel Jersey, Minvest, and three other minority shareholders. See *supra* § II.C.1. Gabriel Jersey also extended interest-free loans to these other shareholders as well.

adjusted through a share capital subscription.¹¹¹⁴ Although the Ministry of Economy acknowledged that RMGC needed to be recapitalized to prevent the risk of dissolution, the Ministry for the first time asserted in November 2013 (after the Special Commission issued its report) that, despite being a shareholder of RMGC, Minvest did not have an obligation to purchase RMGC shares to maintain the Asset Capital Ratio and would not accept interest-free loans to finance such a purchase.¹¹¹⁵ The Ministry of Economy took the position that Gabriel should donate the funds to Minvest so that Minvest could purchase its portion of the shares to be issued with the funds donated by Gabriel.¹¹¹⁶

542. RMGC's Articles of Association provided that in the event of a share capital increase, each shareholder had the option to subscribe to its *pro rata* portion of newly issued shares and to pay for those shares at its own expense.¹¹¹⁷ If a shareholder declined to exercise its right of preference to acquire its shares, the shares could be offered for sale first to another shareholder and then to a third party.¹¹¹⁸ Nothing in the Articles of Association provided any basis for shares to be donated to a shareholder that refused to pay for them.¹¹¹⁹

¹¹¹⁴ [REDACTED]; Henry ¶ 135; Tănase II ¶¶ 224-225. *See also* Tănase II ¶ 225, n.322 [REDACTED]

¹¹¹⁵ [REDACTED]; Henry ¶ 135; Tănase II ¶ 225.

¹¹¹⁶ [REDACTED]; Henry ¶ 135; Tănase II ¶ 225.

¹¹¹⁷ RMGC Articles of Association updated on Nov. 1, 2013 (Exh. C-188) Art. 7.4.

¹¹¹⁸ RMGC Articles of Association updated on Nov. 1, 2013 (Exh. C-188) Art. 7.6.

¹¹¹⁹ Tănase II ¶ 226. Under Article 7.7 of the Articles of Association, Minvest's shareholding could not be diluted "as a result of a subsequent capital increase where Minvest Roșia Montană does not subscribe." RMGC Articles of Association updated on Nov. 1, 2013 (Exh. C-188) Art. 7.7. [REDACTED]

[REDACTED] Article 7.7 did not provide Minvest any right to obtain RMGC shares without paying for them. Nor could Minvest veto a share capital increase that was required to avoid RMGC's dissolution. *See* RMGC Articles of Association updated on Nov. 1, 2013 (Exh. C-188) Art. 9.2 ("Shares have equal value and give Shareholders equal voting rights and the right to participate in the distribution of benefits, proportionally with each shareholder's contribution to the share capital subscribed and fully paid, unless provided otherwise in these Articles of Incorporation, as well as any other rights provided in the present Articles of Incorporation or in the Company Law."), Art. 9.4 ("Shareholders must exercise their rights in good faith, in full observance of rights and

543. The Ministry of Economy’s demand that Gabriel “donate” the funds needed to maintain Minvest’s share capital was contrary to Minvest’s obligations as a shareholder,¹¹²⁰ was a departure from the past practice of the shareholders in 2004 and 2009, and was a further indication that the Government rejected the Project and had renounced its agreements with Gabriel in relation to RMGC and in relation to its Projects.

544. Although Gabriel rejected the Ministry of Economy’s position, the Ministry of Economy, in a further departure from past practice, refused to allow Minvest to accept an interest-free loan from Gabriel to cover the cost of Minvest’s share purchase.¹¹²¹ As Mr. Henry explains, not wanting to risk the dissolution of RMGC, and as Gabriel still hoped circumstances would improve in respect of the Project, Gabriel had no alternative to ensure RMGC’s survival and thus made an exceptional, one-time donation to Minvest of shares in RMGC with a total value of nearly US\$ 20 million.¹¹²²

legitimate interests of the Company and the other Shareholders. Holding shares involves the *ipso jure* adhesion to the Articles of [Association] of the Company.”).

¹¹²⁰ The Ministry of Economy understood that Minvest had an obligation as shareholder of RMGC to contribute *pro rata* to the company’s share capital, as reflected in the comments of the Minister of Economy, Andrei Gereă, while he was of the Special Commission Vice Chairman. *See* Transcript of Parliamentary Special Commission hearing dated Oct. 3, 2013 (Exh. C-558) at 136 (Special Commission Vice Chairman Andrei Gereă asking whether Gabriel would be “willing to give up the provision setting out the obligation for the state to contribute to the share capital increase” so that “the state would receive shares without money, without having to pay for these increases.”). RMGC’s counsel responded that such a proposal would be “contrary to the law, because the state can receive shares only by contributing one way or another.” *Id.* (RMGC counsel).

¹¹²¹ Henry ¶ 135; Tănase II ¶ 227.

¹¹²² Henry ¶ 136; Tănase II ¶ 227; Bîrsan ¶ 82

Henry ¶ 136, n.160; Tănase II ¶ 227, n.327. In 2016, when another share capital increase was needed, the Ministry of Economy again refused to permit Minvest to conclude a loan agreement with Gabriel, but also declined even a donation from Gabriel or to agree to alternative proposals that would maintain the participation quota of both shareholders without such a donation. *See* Henry ¶ 136, n.160; Tănase II ¶ 246.

2. NAMR Failed to Complete the Routine Administrative Task of Updating Annexes to the Roșia Montană License

545. As discussed above, in March 2013 NAMR [REDACTED]

[REDACTED]

¹¹²³

¹¹²⁴

546. [REDACTED]

[REDACTED]

¹¹²⁶

547. [REDACTED]

[REDACTED]

¹¹²⁷

Because Minvest remained party to the License as an Affiliated Company, Minvest's agreement

¹¹²³ See *supra* § VIII.A.2; Szentesy ¶¶ 102-106; NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roșia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C).

¹¹²⁴ NAMR Decision No. 11-13 dated Mar. 14, 2013 on the verification and registration of the resources/reserves of gold and silver ores in the Roșia Montană deposit as of Jan. 1, 2013 (Exh. C-1012-C); Szentesy ¶¶ 105-106; Bîrsan ¶¶ 215-220.

¹¹²⁵ Szentesy ¶¶ 106-107. See also Bîrsan ¶ 157 [REDACTED]

¹¹²⁶ Szentesy ¶ 106.

¹¹²⁷ Szentesy ¶ 108.

to the proposed addendum was sought, but Minvest's General Manager had been suspended, and so Minvest was not in a position to sign any addenda to the License.¹¹²⁸ In November 2013, after Minvest had appointed a new General Manager, RMGC re-sent the draft addendum to NAMR to update annexes to the Roşia Montană License.¹¹²⁹

548. By November 2013, however, following the hearings in Parliament and associated statements of senior Government officials that the Government had rejected the Project and would not issue the environmental permit, [REDACTED]
[REDACTED]¹¹³⁰ Also around that time, the Government issued an emergency ordinance to increase royalties for gold and silver to 6% in mining licenses, and NAMR asked RMGC to conclude an addendum to the License that would allow this increase to apply to the Project.¹¹³¹

549. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹³³

550. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹¹²⁸ Szentesy ¶ 108.

¹¹²⁹ Szentesy ¶ 109.

¹¹³⁰ [REDACTED]

¹¹³¹ Szentesy ¶ 109; Henry ¶ 144; Tănase II ¶ 231.

¹¹³² Henry ¶ 144; Tănase II ¶ 232.

¹¹³³ Szentesy ¶ 110; Henry ¶ 144; Tănase II ¶ 232.

¹¹³⁴ [REDACTED]

3. NAMR Refused to Act on RMGC's Bucium Exploitation License Applications in Blatant Disregard of RMGC's Acquired Rights

551. As discussed above,¹¹³⁵ having completed significant exploration programs at Bucium pursuant to RMGC's Bucium Exploration License and as authorized annually by NAMR, and having thereby identified two valuable deposits (Rodu-Frasin and Tarnița) that were technically and economically feasible for profitable development and exploitation, RMGC applied to NAMR in October 2007 for the verification and registration of the resources and reserves at Rodu-Frasin and Tarnița and for licenses to develop and exploit those two deposits.¹¹³⁶

552. As Professor Bîrsan explains, RMGC reasonably expected NAMR to act on these applications promptly.¹¹³⁷ As holder of the Bucium Exploration Licenses, RMGC had a direct and exclusive legal right to receive the requested exploitation licenses, and NAMR had a non-discretionary obligation to grant RMGC's applications in a reasonable period of time.¹¹³⁸ NAMR, however, did not act on these applications (and indeed still has not acted on these applications notwithstanding the passage of almost 10 years).

¹¹³⁵ See *supra* § V.C.

¹¹³⁶ Szentesy ¶¶ 124-125; Bîrsan § V.B.3. See also Tănase ¶ 9. See also SRK Report ¶¶ 116-118 (having reviewed the contemporaneous [REDACTED] and RSG analyses of the Bucium Rodu-Frasin and Tarnița deposits, Mike Armitage and Nick Fox of the SRK Consulting Group further confirm their conclusions and observe that the [REDACTED]

¹¹³⁷ See Bîrsan ¶ 401 (“[A]s public authority, NAMR is expected to act within a reasonable timeframe.”).

¹¹³⁸ Bîrsan § V.A.1 (observing that “the mining regulations grant the titleholder of an exploration license a special and exclusive right to obtain, without contest, exploitation rights over the resources/reserves discovered in the perimeter”); *id.* § V.B.1-V.B.2 (concluding that RMGC thus had the exclusive right under the Bucium Exploration License to obtain exploitation licenses, directly and without contest, for the resources it discovered during the exploration phase); *id.* § V.C (the existence of the exclusive right imposes on NAMR an obligation to grant exploitation licenses for the resources discovered, and NAMR may not refuse to do so for discretionary reasons). See also Bucium License (Exh. C-397-C) Art. 3.1.4 [REDACTED]

Art. 10.1 [REDACTED]

553. [REDACTED]

[REDACTED]¹¹⁴⁰

554. NAMR first acknowledged receipt of the application for exploitation licenses in February 2009, confirming that it had received “the documentation[] necessary to obtain” mining licenses for the Rodu-Frasin and Tarnița perimeters.¹¹⁴¹ NAMR asked RMGC at that time to make minor modifications to its environmental rehabilitation plans for the two perimeters.¹¹⁴² RMGC did so within several weeks.¹¹⁴³

555. [REDACTED] although RMGC continued to inquire as to the status of its pending Bucium applications, NAMR failed to respond to the inquiries.¹¹⁴⁴ As it is now nearly 10 years since RMGC filed its applications, there is no possible reasonable ground for NAMR’s unlawful failure to act.

556. As Professor Bîrsan explains, given the positive results of the exploration program and the reports demonstrating that exploitation would be technically and economically feasible, NAMR’s obligation in the law to grant the exploitation licenses was not a matter of

¹¹³⁹ NAMR Findings Report dated Oct. 7, 2008 (Exh. C-1056-C); Szentesy ¶ 126.

¹¹⁴⁰ NAMR Findings Report dated Oct. 7, 2008 (Exh. C-1056-C) at 3; Szentesy ¶ 127.

¹¹⁴¹ Letter No. 400808 from NAMR to RMGC dated Feb. 23, 2009 (Exh. C-1082); Szentesy ¶ 127.

¹¹⁴² Letter No. 400808 from NAMR to RMGC dated Feb. 23, 2009 (Exh. C-1082); Szentesy ¶ 127.

¹¹⁴³ Letter No. 61 from RMGC to NAMR dated Apr. 3, 2009 (Exh. C-1146); Szentesy ¶ 127.

¹¹⁴⁴ [REDACTED]

discretion.¹¹⁴⁵ Moreover, as Professor Bîrsan also observes, and as the Romanian High Court of Cassation and Justice has ruled, public authorities such as NAMR must conduct such administrative procedures within reasonable time periods, a fundamental obligation of the State that it has plainly violated in respect of the Bucium applications.¹¹⁴⁶

557. Even if NAMR's delinquency up through 2013 could be explained by sluggish, but good faith administration (which it credibly cannot), its non-action since the Government's evident rejection of mining by RMGC in the Project area (Bucium is an adjacent, neighboring property)¹¹⁴⁷ can only be understood as part and parcel of the Government's unlawful effective renunciation of its joint venture agreement in the form of RMGC and its abandonment and disregard of RMGC's and thus Gabriel's acquired project development rights generally.

C. With No Commercially Reasonable Options Left, Gabriel Took Steps to Minimize RMGC's Expenditures and Commenced This Arbitration, After Which the State's Abusive Conduct Intensified

1. One Week After the Special Commission Issued Its Report, the State Froze One of RMGC's Bank Accounts and Made RMGC the Subject of a Criminal Investigation That Is Still Ongoing Over Three and a Half Years Later

558. On November 18 and 19, 2013, one week after the parliamentary Special Commission issued its report recommending rejection of the Draft Law and the day the Senate voted in accordance with that recommendation, the Ploiești public prosecutor extended to RMGC an investigation of the "Kadok" group of companies for suspected money laundering and tax evasion, and froze one of RMGC's bank accounts in the amount of RMGC's contract with Kadok.¹¹⁴⁸

559. Given RMGC's limited commercial relationship with Kadok, making RMGC a subject of this criminal investigation was highly suspicious both temporally and substantively. As explained previously in connection with Claimants' request for provisional measures, RMGC

¹¹⁴⁵ Bîrsan § V.C.1.

¹¹⁴⁶ Bîrsan § V.C.2.

¹¹⁴⁷ [REDACTED]

¹¹⁴⁸ [REDACTED]; Tănase II ¶¶ 239-241.

purchased winter jackets from Kadok in 2012; the jackets were delivered to RMGC by Kadok and paid for by RMGC.¹¹⁴⁹ As Mr. Tănase attests, RMGC did not engage in money laundering or tax evasion in connection with its transaction with Kadok or have any reason to believe or suspect that Kadok was doing so.¹¹⁵⁰

560. Because RMGC had done nothing wrong and had nothing to hide, RMGC cooperated with the public prosecutor and provided testimony and contemporaneous documents showing that RMGC received the winter jackets from Kadok and paid for them.¹¹⁵¹ Based on the evidence, there was no basis to allege, let alone conclude, that the underlying transaction was fictitious or that RMGC used criminal proceeds to purchase the goods. Hence, any charge of tax evasion, fraud, or money laundering against RMGC would be groundless.¹¹⁵²

561. The fact and timing of the State's decision to make RMGC the subject of a criminal investigation (despite the lack of any apparent basis to have done so) was clearly not happenstance. As discussed above, after the Senate committees unanimously voted in September 2013 to recommend rejection of the Draft Law in accordance with a political request from Prime Minister Ponta and Senate President Antonescu, and contrary to testimony in support of the Project from Minister of Environment Plumb and other senior Government officials,¹¹⁵³ Mr. Henry, Gabriel's President and CEO, publicly threatened legal action against Romania seeking billions in damages if the Project were to be rejected.¹¹⁵⁴ Prime Minister Ponta and Minister Delegate Șova, in turn, warned the Romanian public of the legal risks the State would run if

¹¹⁴⁹ Tănase II ¶ 239; [REDACTED].

¹¹⁵⁰ Tănase II ¶ 239.

¹¹⁵¹ Tănase II ¶ 241; [REDACTED].

¹¹⁵² As Claimants previously explained, RMGC did not learn that it was the subject of a criminal investigation or that its assets had been seized from the Romanian authorities, but from its bank, which had been ordered by the authorities to freeze funds in RMGC's account. [REDACTED]

[REDACTED] *See*
Tănase II ¶¶ 239-240. [REDACTED]

¹¹⁵³ *See supra* § VIII.B.1.

¹¹⁵⁴ Henry ¶ 115.

Parliament were to reject the Draft Law, which the Government had indicated would mean rejection of the Project.¹¹⁵⁵

562. When the Special Commission unanimously recommended rejection of the Draft Law, the risks to the State were therefore apparent. The State prosecutor made RMGC the subject of the money laundering/tax evasion investigation one week later and on the same day that the Senate voted in accordance with the Special Commission’s recommendation to reject the Draft Law. Doing so conveniently provided the State with a basis to note in the Trade Registry that RMGC is “under criminal investigation,”¹¹⁵⁶ and thus tarnish its reputation, and also provided the State with the ability to extract documents and information from RMGC if and when useful to the State’s interests.

563. [REDACTED]

564. More than three and a half years since the State extended the Kadok criminal investigation to RMGC, no charges have been filed against RMGC or any of its officers or employees, but the investigation nevertheless remains open and RMGC’s bank assets remain frozen. The public Trade Registry also continues to indicate that RMGC is “under criminal investigation.”

¹¹⁵⁵ See *supra* § VIII.B.2.

¹¹⁵⁶ [REDACTED] See also RMGC Trade Registry excerpt dated Aug. 16, 2016 (Exh. C-125); RMGC Trade Registry History dated Feb. 12, 2016 (Exh. C-119).

¹¹⁵⁷ Tănase II ¶ 241; [REDACTED]

¹¹⁵⁸ Tănase II ¶ 241; [REDACTED]

2. With the State Having Unlawfully Deprived Gabriel Entirely of the Use, Benefit, and Value of Its Investments, Gabriel Took Steps to Minimize RMGC's Expenses and Commenced This Arbitration

565. Given the Government's rejection of the Project, its evident refusal to act on RMGC's license applications for Bucium, its evident rejection of its joint venture agreement with Gabriel as shareholder of RMGC, and its pursuit of a groundless criminal investigation of RMGC, Gabriel reluctantly concluded that it had to begin the difficult process of progressively downsizing RMGC's employees and operations in order to mitigate losses and reduce expenditures.¹¹⁵⁹

566. At the end of March 2014, RMGC announced that it would lay off 367 of its 481 employees and suspend a variety of cultural heritage preservation and social assistance programs;¹¹⁶⁰ further downsizing was required the following year when RMGC laid off an additional 70% of its workforce.¹¹⁶¹

567. [REDACTED] RMGC's retrenchment made necessary by the State's unlawful treatment of the Project was felt deeply in the local community.¹¹⁶² Most of RMGC's employees lost their jobs, many local suppliers for RMGC suffered financially, and many residents suffered and continue to suffer from the loss of the company's social and community assistance programs, which had been serving critical community needs.¹¹⁶³ What the community lost most of all, however, was hope.

568. Several years later, the State still has failed to offer any viable alternative to the local communities who desperately need a solution to rampant poverty, record unemployment, severe environmental contamination, deteriorating cultural heritage, and continuing

¹¹⁵⁹ Henry ¶ 137; Tănase II ¶¶ 228-229; Lorincz ¶¶ 89-92.

¹¹⁶⁰ Tănase II ¶ 229. *See also* Henry ¶ 137.

¹¹⁶¹ Tănase II ¶ 235. *See also* Henry ¶ 137.

¹¹⁶² [REDACTED]

¹¹⁶³ Lorincz ¶ 90. *See also* Tănase II ¶ 229 (noting that, as a result of the significant direct and indirect economic impact RMGC's project development activities had on Roșia Montană and the surrounding communities, RMGC estimated at the time of the initial retrenchment in March 2014 that the layoffs and suspension of activities would negatively affect approximately 1,000 families).

depopulation.¹¹⁶⁴ Similarly, with nothing constructive to offer and nothing left to oppose, the international network of NGOs that falsely claimed to represent and to wish to “save” the local community from the Project have declared success and doubtlessly moved on to the next battle in their global ideological crusade.

569. While seeking to minimize expenses, Gabriel nonetheless wished to maintain RMGC and its rights in good standing to allow for the possibility of an amicable resolution of its dispute with Romania.¹¹⁶⁵ To this end, Gabriel therefore retained a small staff at RMGC to ensure adequate resources to comply with RMGC’s ongoing corporate obligations and to ensure maintenance and compliance with RMGC’s rights, including under the Roșia Montană and Bucium Licenses.¹¹⁶⁶

570. Gabriel sought engagement with the Government in an effort to avoid commencing arbitration, but its overtures were met with silence. Thus, having been deprived completely of the value of its investments and its attempts to resolve its dispute with the State having been ignored, in January 2015 Gabriel sent notice to Romania of a dispute including under the Canada-Romania BIT and the UK-Romania BIT.¹¹⁶⁷ The State never acknowledged Gabriel’s notice or expressed any interest in discussions. Following the State’s continued failure to engage, Gabriel and Gabriel Jersey submitted their Request for Arbitration six months later, in July 2015.¹¹⁶⁸

¹¹⁶⁴ [REDACTED] See also [REDACTED] Henry ¶ 151.

¹¹⁶⁵ Henry ¶¶ 137, 146.

¹¹⁶⁶ Henry ¶¶ 137, 146. For that reason, in 2015 RMGC requested NAMR’s approval to suspend RMGC’s license obligation to conduct mining activities; NAMR granted this request. See *id.* ¶ 146; Letter from NAMR to RMGC dated Dec. 24, 2015 (Exh. C-1455). RMGC also continues to perform regular maintenance works, including to dewater and reinforce the structural supports in the Cătălina Monulești underground mining galleries that RMGC restored through extensive excavation and rehabilitation that is necessary in order to prevent their collapse and loss. As Mr. Gligor observes (and as Ministers of Culture Hunor and Barbu previously confirmed), if RMGC were to stop such work, the benefits of the extensive underground rehabilitation work completed by RMGC would rapidly be lost entirely. See Gligor ¶ 172.

¹¹⁶⁷ Henry ¶ 145; Letter from Gabriel addressed to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 (Exh. C-8).

¹¹⁶⁸ Henry ¶ 145; Request for Arbitration dated July 21, 2015. After commencing arbitration, in order to minimize expenses and reduce losses, RMGC decided to withdraw from legal proceedings relating to challenges brought by NGOs against permitting decisions of local, regional, and national authorities relating to the Project. See Henry ¶ 146, n.173.

571. As discussed below, the commencement of this arbitration was swiftly met with retaliatory and harassing investigations and other measures directed at RMGC with corresponding burdens placed on its remaining skeletal staff.

3. Following Commencement of This Arbitration, ANAF Initiated a Purported “Anti-Fraud” Audit and a VAT Assessment That Are Retaliatory and Abusive

572. As elaborated in the context of Claimants’ request for provisional measures, following Claimants’ initiation of this arbitration in July 2015, the State initiated in October 2015 a purported “anti-fraud” audit of RMGC and, in March 2016, commenced an audit of VAT payments from 2011-2015 leading to a VAT assessment of RON 27 million (~US\$ 6.7 million), plus interest and penalties. The VAT assessment was administratively quashed on the eve of the provisional measures hearing, but ANAF purported to re-do the audit [REDACTED]

[REDACTED]

[REDACTED]¹¹⁶⁹ The manner in which ANAF has continued to pursue these matters is consistent with and emblematic of the State’s political rejection of the Project in disregard of applicable law, and confirms their retaliatory and abusive link to this arbitration.

573. The State through ANAF commenced the October 2015 “anti-fraud” investigation of RMGC without providing any explanation or justification for the investigation; the ANAF investigators proceeded repeatedly to demand aggressively and with short deadlines the production of [REDACTED]

[REDACTED]¹¹⁷⁰ Certain requests were directed at topics that could be relevant, if at all, only to the subject matter of the arbitration, [REDACTED]

[REDACTED]¹¹⁷¹

1169 [REDACTED]

1170 [REDACTED]

1171 [REDACTED].

574. [REDACTED]

[REDACTED] ANAF's sweeping investigation leaves little doubt about the State's retaliatory search for arbitration defenses.

575. The nature of recent ANAF requests further confirms this pretextual use, and abuse, of the State's investigative power. [REDACTED]

[REDACTED]¹¹⁷⁴

576. [REDACTED]

[REDACTED] As discussed above, however, under the leadership of Attila Korodi, the Ministry of Environment unilaterally declared that an urbanism certificate issued to RMGC was *ipso jure* suspended which was its purported basis to suspend the EIA review procedure from 2007-2010, and the Ministry then urged the same result again in 2012, arguing that a valid urbanism certificate and an approved PUZ were necessary conditions for the EIA procedure to

¹¹⁷² Tănase II ¶¶ 238-241.

¹¹⁷³ Tănase II ¶ 242.

¹¹⁷⁴ Tănase II ¶ 242; Henry ¶ 147.

continue.¹¹⁷⁵ RMGC considered this position to be legally untenable, a view later endorsed by the Inter-Ministerial Commission convened by the Government in 2013 to review the Project.¹¹⁷⁶

577. It is also beyond coincidence and plainly motivated by this arbitration that, [REDACTED]

[REDACTED]

578. With respect to the VAT Assessment, suffice it to say that ANAF's re-do of the 2011-2015 VAT audit is largely a re-affirmation of what it had determined in its initial assessment [REDACTED]

[REDACTED]¹¹⁸⁰ As previously explained, before commencement of this arbitration, [REDACTED]

¹¹⁷⁵ See *supra* §§ V.A, D.

¹¹⁷⁶ See *supra* § VIII.A.1; Draft Informative Note on the Activity of the Inter-Ministerial Working Group Convened for the Roşia Montană mining project (Exh. C-553) at 6. See also Mihai § VII.C.1 (explaining that there is no basis in the law for the position that a renewed urbanism certificate was needed to continue the EIA procedure).

¹¹⁷⁷ [REDACTED]

¹¹⁷⁸ [REDACTED]

¹¹⁷⁹ [REDACTED]

¹¹⁸⁰ [REDACTED]

[REDACTED] As it successfully did with respect to the initial VAT Assessment, RMGC intends to challenge this latest iteration of ANAF's retaliatory and punitive audit.¹¹⁸¹

579. While the outcome of this re-assessment is disappointing and objectionable on multiple grounds, [REDACTED]

[REDACTED]

[REDACTED]¹¹⁸²

580. In so doing, ANAF does not even pretend to present a balanced discussion of the issues, but instead uncritically adopts [REDACTED]

[REDACTED]

[REDACTED]¹¹⁸³ ANAF's draft findings report thus presents a selective, biased, and results-oriented view of these issues apparently in the misguided belief that the conclusions it draws support its own retaliatory VAT re-assessment and will advance the State's cause in this arbitration.

581. The transparent, coordinated, and retaliatory misuse and abuse of State authority evident in the ANAF investigation and VAT audit of RMGC that followed from the State's bad

¹¹⁸¹ Tănase II ¶ 237 (noting that RMGC has filed its response to the preliminary findings report). *See also* Henry ¶ 148.

¹¹⁸² [REDACTED]

¹¹⁸³ *See supra* § VIII.

faith, political rejection of the Project and Claimants' subsequent initiation of this arbitration, is wholly unacceptable. [REDACTED]

[REDACTED] It also raises serious concerns about the bona fides of the ongoing "anti-fraud" investigation and what it may portend for RMGC and its employees over the course of these arbitration proceedings.

D. Since the Commencement of This Arbitration the State Has Taken Measures in Manifest Disregard of the License, the State's Own Prior Administrative Acts, and the Very Notion of the Project

1. With the Overt and Expressed Intention of Putting an End to the Project for Good, the Ministry of Culture Issued the 2015 LHM in Further Disregard of the Law and Its Own Prior Administrative Acts

582. On December 24, 2015, the Ministry of Culture issued the 2015 LHM,¹¹⁸⁵ which maintained and enlarged the erroneous descriptions of the historical monuments in Roșia Montană wrongly included and never corrected in the 2010 LHM that are discussed above.¹¹⁸⁶

¹¹⁸⁴ Tănase II ¶ 242

Henry ¶ 149.

See also

See Tănase II ¶¶ 243-245

¹¹⁸⁵ The 2015 LHM was issued by Order of the Ministry of Culture dated December 24, 2015, and was published on February 15, 2016. *See* Minister of Culture Order No. 2828 dated Dec. 24, 2015, published in the Official Gazette of Romania, Part I, No.113 dated Feb. 15, 2016 (Exh. C-1267). *See also* Schiau ¶ 302; Gligor ¶ 161.

¹¹⁸⁶ *See supra* § VI.A.2. As discussed above, among other things, the reference to "Orlea" in the 2010 LHM was erroneous because the "address" field should have said only "Orlea" as in the 2004 LHM, and should not have been modified by adding "the entire locality within a 2 km radius." Likewise, the reference to the "Galleries at Cârnic Massif" was erroneous because the "address" field should have said "Cârnic Massif – Piatra Corbului" and included the "STEREO 70 coordinates" as in the 2004 LHM to delimit the protected monument area, rather than omit those coordinates and suggest the entire Cârnic Massif area was protected. Schiau ¶¶ 294-

583. The 2015 LHM (a) removed the precise geographical “STEREO” coordinates indicating the location of several archaeological sites in Roșia Montană, and (b) included a new “address” for the Alburnus Maior historical monument in Roșia Montană, which it described as the “entire locality within a 2 km radius.”¹¹⁸⁷

584. As shown graphically in maps of the Project area,¹¹⁸⁸ the 2015 LHM thus perpetuated and extended the arbitrary descriptions of the archaeological sites in Roșia Montană designated as historical monuments that were contained in the 2010 LHM.¹¹⁸⁹

585. As no mining activities can be undertaken in the area established as an historical monument, the arbitrary designations in both the 2010 LHM and the 2015 LHM were incompatible with the Project as they both overlapped areas within the Project footprint for which the Ministry of Culture already had issued archaeological discharge certificates allowing for implementation of the Project.¹¹⁹⁰

586. Put differently, the expanded protection areas established in the 2010 LHM and the 2015 LHM prevent industrial development in areas within the Project footprint that the Ministry of Culture previously had cleared for industrial development through its prior archaeological discharge certificates. As Professor Schiau explains, these historical monument designations were unlawful because the Ministry of Culture is required by law to initiate the

301, 391-395. As also noted, anti-Project NGOs seized on these errors to bring legal challenges to various administrative permits or acts that had been issued in furtherance of the Project. *See* Schiau § VI.A.

¹¹⁸⁷ Schiau ¶ 304.

¹¹⁸⁸ 2015 List of Historical Monuments Map (Exh. C-1285) (showing impact of 2015 LHM on the Project area). *See also* 2010 List of Historical Monuments Map (Exh. C-1284) (showing impact of 2010 LHM on the Project area).

¹¹⁸⁹ *See* Schiau §§ V.C-D (discussing the errors in the 2010 LHM perpetuated and expanded in the 2015 LHM).

¹¹⁹⁰ *See supra* § III.C.1; Schiau §§ III.D, V.C-D (discussing the archaeological discharge certificates issued for Roșia Montană and the 2010 LHM and 2015 LHM); Gligor ¶ 39 (noting that “Between 2001 and 2008, the Ministry of Culture issued ADCs [archaeological discharge certificates] covering approximately 90% of the Project-impacted area. The ADCs issued covered the most relevant areas for the development of the Project, including for three of the four pits, the Cetate Pit, the Cârnic Pit, and the Jig Pit, for both surface and underground areas, as well as for the Corna Tailings Management Facility, among others.”). *See also* Gligor ¶ 162.

procedure to *declassify* historical monuments in a site that has been archaeological discharged.¹¹⁹¹

587. The Ministry of Culture acted deliberately in not correcting the overbroad and baseless 2010 LHM and in expanding the protection areas at Roșia Montană in the 2015 LHM. Despite repeatedly acknowledging errors in the 2010 LHM, which was intended as an update to the 2004 LHM to account for any intervening classification decisions,¹¹⁹² the Ministry of Culture did not correct the 2010 LHM. Instead, and despite the fact that there had not been any intervening classification decisions within the area of Roșia Montană,¹¹⁹³ the Ministry of Culture unlawfully purported to update the 2004 LHM even further in the 2015 LHM by describing the address of the Alburnus Maior historical monument in Roșia Montană (which previously did not have an address because it was just a general descriptor for the specific sites listed) as being “the entire locality within a 2 km radius.”¹¹⁹⁴ There was not any new information to support that added description of an “address.” The Ministry of Culture clearly intended that this designation would prevent the Project from ever being implemented, providing a tangible expression of the Government’s political and legal rejection of the Project.¹¹⁹⁵

588. The Ministry of Culture was perfectly well aware that its 2015 “update” of the 2004 LHM was moreover contrary to the conclusions of the archaeological research conducted through 2004 and the existing archaeological discharge certificates. In preparing the 2015 LHM,

¹¹⁹¹ Schiau §§ II.4, IV.B.

¹¹⁹² *See supra* §§ VI.A.2, VI.B.2.

¹¹⁹³ To the contrary, re-issuance of the archaeological discharge certificate for Cârnic in 2011 should have led to the declassification of any listed historical monument in the areas covered by the archaeological discharge certificate. *See supra* §VI.B.2.

¹¹⁹⁴ Schiau §§ V.D-VI.C (discussing how the Ministry of Culture perpetuated and augmented the 2010 LHM’s errors in the 2015 LHM).

¹¹⁹⁵ In court submissions made in January and March 2015 in which the National Institute of Heritage of the Ministry of Culture appeared seeking to rebut RMGC’s claim that the 2010 LHM was unlawful and needed to be corrected, in the context of litigation commenced by various anti-Project NGOs that had challenged zoning decisions and other administrative acts issued in respect of the Project, the National Institute of Heritage argued that the 2004 LHM had been prepared “abusively” and needed to be corrected through the challenged amendments to the 2010 and 2015 LHM. Schiau ¶¶ 352, 368. In so doing, the National Institute of Heritage expressly disavowed its own prior administrative acts without providing any factual or legal grounds for doing so, and urged the court to adopt a position clearly contrary to the law. The State’s litigation position was utterly without merit for the reasons explained at length by Professor Schiau in his legal opinion. *See generally* Schiau §§ VI.B-C (discussing RMGC’s challenges against the 2010 LHM).

the National Institute of Heritage (which is responsible for updating the seminal 2004 LHM every five years),¹¹⁹⁶ in October 2014 sent a draft of the 2015 LHM to the Alba Culture Directorate for comment, to which the Directorate responded in December 2014.¹¹⁹⁷ The draft 2015 LHM described the historical monument in Roșia Montană as having an address of “the entire locality with a 2 km radius.”¹¹⁹⁸ The Alba Culture Directorate strongly disagreed with and criticized the draft 2015 LHM.

589. The Alba Culture Directorate explained that the reference in the LHM to “Archaeological Site of Alburnus Maior – Roșia Montană” with reference code “AB-I-s-A-00065 does not refer to a standalone archaeological site,” but was merely a “title” below which was listed five separate protected historic monuments numbered “AB-I-s-A-00065.01 to AB-I-s-A-00065.05.”¹¹⁹⁹ Because “there is no standalone site ‘Archaeological Site of Alburnus Maior – Roșia Montană,’” the Directorate explained that “there is no reason to add the following phrase ‘*The entire locality, on a radius of 2 km*’ to the ‘Address’ column.”¹²⁰⁰

590. The Alba Cultural Directorate also observed that the proposed updated 2015 LHM lacked any basis in fact. As the Directorate explained, the extensive archaeological research undertaken through the Alburnus Maior National Research Program allowed for more accurate identification of the location of historical monuments in Roșia Montană, which led to the delineation of the five specific protected sites in the 2004 LHM organized under the “generic” heading “Archaeological Site of Alburnus Maior Roșia Montană.”¹²⁰¹ The Directorate therefore concluded: “it is not justified to add an ‘address’ to [this] generic name . . . and

¹¹⁹⁶ Schiau ¶¶ 119, 121-125, 278 n. 221. Although the LHM is prepared by the National Institute of Heritage, the order effectuating the LHM update is issued by the Ministry of Culture. See Schiau §§ IV.B, V.C.2 (describing the process for updating the list of historical monuments).

¹¹⁹⁷ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376). See also Gligor ¶ 159; Schiau ¶¶ 323-326.

¹¹⁹⁸ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376). See also Schiau ¶¶ 302-311; Gligor ¶¶ 161-162.

¹¹⁹⁹ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 2-3. See also Schiau ¶¶ 323-325.

¹²⁰⁰ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 2.

¹²⁰¹ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 2-3.

therefore the **phrase ‘The entire locality, on a radius of 2 km’ should be eliminated.** Such a location does not correspond to reality and would create many problems for the inhabitants in the area.”¹²⁰²

591. The Alba Culture Directorate also pointed to the fact that errors from the 2010 LHM remained uncorrected in the draft 2015 LHM, such as the overbroad reference to the “Cărnic Massif.”¹²⁰³ The Directorate underscored “the need that the archaeological sites at [Roșia Montană] should be correctly registered in the 2015 LHM, with the STEREO 70 coordinates, without mentioning the phrase *the entire locality, on a radius of 2 km*” for the entries for both Roșia Montană and Orlea.¹²⁰⁴

592. The Alba Culture Directorate prepared and sent with its response to the National Institute of Heritage a revised version of the draft 2015 LHM that included the precise STEREO 70 geographic coordinates for various listed monuments.¹²⁰⁵ As Professor Schiau observes, “[t]he NIH [National Institute of Heritage] was thus made abundantly aware by the local branch of the Ministry of Culture, the body competent to prepare the documentations regarding the sites in Roșia Montană, about the inaccuracies in the 2010 LHM and in the draft 2015 LHM then under preparation.”¹²⁰⁶

593. In issuing the 2015 LHM in December 2015 (following the commencement of this arbitration in July 2015), the National Institute of Heritage under the direction of the Ministry of Culture disregarded the Alba Culture Directorate’s reasoned commentary. As Professor Schiau aptly observes, “the description of the addresses of the listed historical

¹²⁰² Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 3 (emphasis in original).

¹²⁰³ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 3. *See also* Schiau ¶ 325; Gligor ¶ 159.

¹²⁰⁴ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 6 (emphasis in original).

¹²⁰⁵ Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture No. 1265 dated Dec. 22, 2014 (Exh. C-1376) at 7 (“We are sending enclosed, on hard copy (stamped and signed, page by page, and in electronic format, the 2015 [LHM], as proposed by the Alba County Directorate for Culture”).

¹²⁰⁶ Schiau ¶ 326.

monuments in the 2015 LHM is even more arbitrary and less precise than those listed in the 2010 LHM.”¹²⁰⁷

594. Like the 2010 LHM, the 2015 LHM is arbitrary and unlawful for several independent reasons.

- a) First, like the 2010 LHM, the 2015 LHM lacked any factual basis in the underlying archaeological research relating to Roșia Montană to “update” the 2004 LHM as it purported to do.¹²⁰⁸ There was thus no basis in fact, and thus none legally either, to remove the geographical coordinates indicating the location of the several identified historical monuments as listed in the 2004 LHM and that had been maintained in the 2010 LHM.¹²⁰⁹
- b) Second, like the 2010 LHM, the 2015 LHM blatantly disregarded the numerous valid archaeological discharge certificate issued by the Ministry of Culture that allowed industrial activities (mining) in the Roșia Montană perimeter.¹²¹⁰ As Professor Schiau explains, issuance of an archaeological discharge certificate is incompatible with the notion that the discharged area is an historical monument.¹²¹¹ The 2015 LHM wrongly subsumed archaeologically discharged areas within the baseless, expansive, and overlapping 2 km perimeters surrounding Roșia Montană and Orlea, and in the undefined area around the Cărnic Massif.¹²¹² Unlike the description of historical monuments contained in the 2010 and 2015 LHMs, the archaeological discharge certificates were premised

¹²⁰⁷ Schiau ¶ 311. *See also* Schiau § V.D.2 (describing the reasons the descriptions of the historical monuments in Roșia Montană included in the 2015 LHM lack legal basis and are arbitrary).

¹²⁰⁸ [REDACTED] Schiau ¶¶ 308-311, 328; Letter No. 1265 from the Alba Culture Directorate to NIH and the Ministry of Culture dated Dec. 22, 2014 (Exh. C-1376) at 2-3. *See also* Schiau ¶ 303 (observing that the 2015 LHM is an update of the 2004 LHM).

¹²⁰⁹ Schiau ¶¶ 308, 311, 328.

¹²¹⁰ Schiau § III.D [REDACTED] ([REDACTED] describing the archaeological discharge certificates issued in relation to the Project area).

¹²¹¹ Schiau ¶ 79.

¹²¹² Schiau § V.D, ¶ 390 (describing the content of the 2015 LHM and the reasons the descriptions of the historical monuments in Roșia Montană included in the 2015 LHM lack legal basis and are arbitrary).

upon the Ministry of Culture-directed extensive professional archaeological research showing that the discharged areas did not contain sites worthy of protection.¹²¹³

- c) Third, like the purported updates in the 2010 LHM, the purported updates in the 2015 LHM were in effect new historical monument designations made without regard to the law because they were not based on individual classification orders issued by the Ministry of Culture.¹²¹⁴ The absence of such orders follows from the fact that such orders must be supported by research, and none had been done in support of the 2015 LHM.

595. Given the arbitrary process followed, and the content and effect of the 2015 LHM, it is clear that the State issued it with the objective of blocking the Project.¹²¹⁵

596. Leaving no doubt as to the Ministry of Culture's aim, the Minister of Culture Vlad Alexandrescu enthusiastically announced the 2015 LHM through a post on his Facebook account highlighting, to the exclusion of thousands of other historical monuments throughout the country, the newly described protected sites at Roșia Montană and "tagging," that is, linking, his post to several well-known anti-Project NGOs.¹²¹⁶

597. Soon thereafter, Adrian Bălțeanu, an adviser to the Minister of Culture, emphasized that all of Roșia Montană and the surrounding 2 km radius would be a protected area, underscoring that "[a]t such a site, all mining activity is prohibited."¹²¹⁷ Coupled with Minister Alexandrescu's public support for the Project's NGO opponents,¹²¹⁸ including by

¹²¹³ See *supra* § III.B-C-1.

¹²¹⁴ Schiau ¶¶ 312, 328.

¹²¹⁵ [REDACTED]

¹²¹⁶ [REDACTED] See also Facebook post – Vlad Alexandrescu dated Jan. 9, 2016 (Exh. C-822) (tagging “FânFest Roșia Montană”, “Roșia Montană in UNESCO World Heritage”, “Roșia Montană 360”, “Alburnus Maior”, “We love Roșia Montană”, “Biciclisti pentru Roșia Montană”, and “Uniți Salvăm”).

¹²¹⁷ *Romanian village blocks Canadian firm from mining for gold*, The Guardian, dated Jan. 14, 2016 (Exh. C-1356); Gligor ¶ 164.

¹²¹⁸ [REDACTED]

endorsing them a few days later on social media,¹²¹⁹ and presenting them with an award for being the “tip of the spear in the fight against the cyanide mining project,”¹²²⁰ such statements leave no doubt that although no administrative decision has ever been issued denying the environmental permit for the Project, it was in fact, and given the Ministry of Culture decisions now effectively in law, denied without due process.¹²²¹

598. As if its arbitrary and abusive approach to the 2015 LHM were not enough, in September 2016, the Ministry of Culture continued its effort to use the historical monuments law as a weapon against the Project and to support the State’s position in this case. The Ministry thus requested that a number of churches in the Roşia Montană and Corna villages, additional houses in Roşia Montană, and all the artificial ponds in the area be newly classified as historical monuments.¹²²² Several of these churches and one of the ponds just happened to fall within the footprint of the planned tailings management facility (TMF) for the Project, an area that was already archaeologically discharged, while some other proposed monuments overlap with other parts of the Project’s footprint.¹²²³ In trying to sterilize large swaths of the Project footprint from development, the State continues to act in complete disregard of valid archaeological discharge certificates in pursuit of its evident goal of ensuring the Project will never be implemented.

¹²¹⁹ Facebook Profile – Vlad Alexandrescu “Likes” dated Jan. 12, 2016 (Exh. C-1362).

¹²²⁰ Facebook Post – Vlad Alexandrescu dated Jan. 16, 2016 (Exh. C-1277); *Vlad Alexandrescu, at the festivity of AFCN: FânFest, the biggest activist cultural event from Romania*, Agerpres.ro, dated Jan. 15, 2016 (Exh. C-965).

¹²²¹ In its zeal to develop an arbitration defense for this case and to ensure no future development of the Project, by arbitrarily creating massive, unjustified perimeters around purported historical monuments, the State (apparently unwittingly) encroached upon the perimeter of the neighboring State-owned, heavily polluting copper mine at Roşia Poieni. [REDACTED] Upon realizing what it had done, the Government made clear that the State operations at Roşia Poieni would continue unaffected. [REDACTED] *How the Minister of Culture cut the activity of Cupru Min with a pen. The Order by which Roşia Montană is declared an archaeological site includes an area of the copper quarry*, Adevarul.ro, dated Feb. 10, 2016 (Exh. C-1363).

¹²²² Gligor ¶ 169.

¹²²³ Gligor ¶ 165.

2. Romania's Submission of the "Cultural Mining Landscape Roșia Montană" To Be Declared a UNESCO World Heritage Site Is a Loud Declaration That the State Has Rejected the Project

599. As discussed above, in 2010-2011 the Ministry of Culture announced its intention to seek to have Roșia Montană listed as a UNESCO World Heritage Site, an objective supported by anti-Project activists and NGOs and staunchly opposed by the local community.¹²²⁴ The State did not pursue a UNESCO listing at that time.

600. In 2013, as the Project appeared to be gaining momentum, Project opponents again stoked interest in pursuing a UNESCO World Heritage listing for Roșia Montană; and the local community again overwhelmingly opposed such a listing and supported the Project.¹²²⁵ The topic spawned enough interest for the standing UNESCO Commission in the Romanian Parliament to conduct a site visit to Roșia Montană in August 2013.¹²²⁶ Following the site visit, the UNESCO Commission conveyed their unanimous support for the Project.¹²²⁷

601. Thereafter, Minister of Culture Barbu testified before the Senate committee and before the Special Commission in September 2013 in support of the Project as a means to restore and preserve Roșia Montană's cultural heritage.¹²²⁸ Minister Barbu also testified that a UNESCO listing for Roșia Montană was not realistic because the sites and monuments there lacked exceptional or unique elements, were poorly preserved, and a UNESCO listing lacked local support.¹²²⁹

¹²²⁴ See *supra* § VI.A.2; [REDACTED] Jennings ¶¶ 124-126.

¹²²⁵ See *supra* § VIII.A.5; [REDACTED] See also Jennings ¶¶ 121, 127.

¹²²⁶ See *supra* § VIII.A.5; Gligor ¶ 138.

¹²²⁷ See *supra* § VIII.A.5; Gligor ¶ 140.

¹²²⁸ See *supra* § VIII.B.4. See also generally Transcript of Special Commission Hearing dated Sept. 23, 2013 (Exh. C-929); Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 4. The Ministry of Culture also issued a public statement commenting positively on the research of Roșia Montană's cultural heritage undertaken by the Ministry of Culture with RMGC's funding, noting the provisions of the proposed Draft Agreement relating to cultural heritage protection, and explaining the reasons that made Roșia Montană a poor candidate for UNESCO listing. Ministry of Culture's Statements "Explanations concerning Roșia Montană heritage status" dated Sept. 16, 2013 (Exh C-1298); Gligor ¶¶ 146-147.

¹²²⁹ See *supra* § VIII.B.4; Transcript of Special Commission Hearing dated Sept. 23, 2013 (Exh. C-929) at 3-4; Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 4. See also Jennings § IX.A, ¶ 147 (explaining in detail why Roșia Montană does not meet the UNESCO criteria to be a World Heritage site).

602. In disregard of the testimony of Minister of Culture Barbu and other witnesses,¹²³⁰ and the unanimous views of Parliament's standing UNESCO Commission, the Special Commission in its report nonetheless concluded that questions remained about, among other things, the potential for Roșia Montană to be listed as a UNESCO World Heritage site.¹²³¹ Nonetheless, the Government again did not pursue a UNESCO listing at that time either.¹²³²

603. Approximately six months after Claimants filed their Request for Arbitration, however, in January 2016, right around the time that he announced the 2015 LHM, Minister of Culture Vlad Alexandrescu also publicly stated that the Ministry was considering a new initiative to include Roșia Montană as a UNESCO World Heritage Site.¹²³³ Soon thereafter, on February 5, 2016, Minister Alexandrescu announced on his Facebook page that the Ministry of Culture would initiate the process to include Roșia Montană on the UNESCO Tentative List of World Heritage Sites.¹²³⁴

604. On February 18, 2016, Romania submitted the initial application to UNESCO by placing the "Roșia Montană Mining Cultural Landscape" on UNESCO's "Tentative List" to be

¹²³⁰ In addition to the previously discussed testimony of Minister of Culture Barbu, former Minister of Culture Razvan Teodorescu, Professor Alexandru Volpe of the Romanian Academy, and Minister Delegate Dan Șova, all rejected the notion that Roșia Montană satisfied the criteria for a UNESCO listing as a World Heritage Site. *See, e.g.*, Transcript of Special Commission Hearing dated Oct. 3, 2013 (Exh. C-558) at 65 (former Minister of Culture Teodorescu testifying that a UNESCO listing for Roșia Montană "is one of the most stupid things that can be stated... but there are a lot of amateurs in Romania. A specific monument is included on the UNESCO heritage list – and this is said by a former minister of culture who entered himself quite a few important monuments on the UNESCO list – when it is something unique – whereas Rosia Montana is not unique, it is an interesting site for us, from many perspectives, but it is not something unique"); *id.* at 68 (Professor Vulpe testifying "I would say one thing about the attempt to add this whole monument on the UNESCO heritage list. For me this would be simply ridiculous. In the present situation, it will never be included on that list and this can be a pretext for postponing the project for another 10 years at least. That is for sure. This is why I have to say that it is simply madness to make such an attempt and you may be sure that there is no chance of success anyway. For a site to be accepted at UNESCO level, it needs to be finalized, to be open for visits, to have a unique character, at least from the scientific point of view. But this cannot be said about Rosia Montana."); Transcript of Special Commission Hearing dated Sept. 30, 2013 (Exh. C-507) at 37 (Minister Delegate Șova noting that UNESCO criteria are not met because the subject Roman galleries are not complete and intact).

¹²³¹ [REDACTED] Indeed, the Ministry of Culture not only testified before Parliament in favor of the Project and against a UNESCO listing, but it also had issued an endorsement in favor of an environmental permit for the Project. [REDACTED]

¹²³² Jennings ¶ 134.

¹²³³ *Interview with Vlad Alexandrescu*, Realitatea TV, dated Jan 11, 2016 (Exh. C-1369).

¹²³⁴ Facebook Post – Vlad Alexandrescu dated Feb. 5, 2016 (Exh. C-1365); Gligor ¶ 168.

declared a World Heritage site.¹²³⁵ As the description on UNESCO’s website reveals, Romania does not seek to justify the application by reference to the few individual sites or monuments deemed worthy of protection by Romania following extensive professional research at Roșia Montană, albeit for different purposes, under the auspices of the Ministry of Culture. Instead, Romania claims that the entire “mining cultural landscape” of Roșia Montană merits treatment as a site of “outstanding universal value” based on the evidence and effects of mining from the Roman, Medieval and Modern eras.¹²³⁶ Romania’s application thus states:

[T]his cultural landscape is threatened by irreversible changes following the ending of traditional mining operations and the associated social changes. The area is still rich in minerals and the proposed resumption of open cast mining with modern quarrying techniques would inevitably entail the quasi-total and irreversible destruction of the cultural heritage and its setting, which is the principal resource for the sustainable development of the area.¹²³⁷

605. Consistent with and as a further tangible evidence of the State’s rejection of the Project, albeit without any administrative decision, due process, or even offer of compensation, Romania’s UNESCO application thus makes abundantly clear that the State will not allow the Project to proceed as it considers that doing so would destroy the very “landscape” it is now seeking to list as a World Heritage site.¹²³⁸

606. The State reprised this notion in informational brochures it distributed through the Ministry of Culture in December 2016, describing the “cultural landscape” as broadly comprising “valleys, houses and churches, streets and mountains, rivers and ruins.”¹²³⁹ The State

¹²³⁵ See Screenshot of UNESCO website (Exh. C-1275) at 4 (showing submission by Romania on February 18, 2016 of *Roșia Montană Mining Cultural Landscape* for inclusion on the World Heritage tentative list for Romania); Gligor ¶ 168.

¹²³⁶ Screenshot of UNESCO website (Exh. C-1275) at 2-3.

¹²³⁷ Screenshot of UNESCO website (Exh. C-1275) at 4.

¹²³⁸ [REDACTED]

¹²³⁹ See Ministry of Culture informational brochure describing the Roșia Montană UNESCO application distributed to residents of Roșia Montană in December 2016 (Exh. C-1406) (noting “[i]f this cultural landscape, which includes the natural environment surrounding Rosia Montana, were to be destroyed, a great bond with our ancestors and an irreplaceable piece of our identity would also be broken”). See also Gligor ¶ 170.

further observed that “[a]ny business will be allowed to develop” at Roșia Montană “if it does not impact the natural and cultural landscape.”¹²⁴⁰

607. The State’s new approach to preservation of the entire Roșia Montană “mining cultural landscape” so defined is antithetical to the very notion of and incompatible with the Project and the Roșia Montană License and other related rights. It also completely ignores the numerous valid archaeological discharge certificates issued and approved by the State that allow for industrial development in large swaths of this same “mining cultural landscape.” Its action makes clear, as Claimants already well understood, that the State considers there were in effect no remaining Project rights, not in the Roșia Montană License, not in administrative procedures that were never permitted to come to a proper end, and not in any other right associated with RMGC’s years of development activities in the area. Having rejected the Project politically, the State’s actions further confirm that it rejected the Project with legal effect as well, albeit without due process and without compensation.

608. Perhaps because this UNESCO initiative so clearly conflicts with and eviscerates Gabriel’s legal rights, then Minister of Justice, Raluca Prună, warned through a comment posted on Minister of Culture Corina Șuteu’s Facebook page not to pursue the UNESCO initiative until the arbitration proceedings are over.¹²⁴¹ She later deleted this post.

609. Undeterred, on January 4, 2017, the Ministry of Culture submitted the full file “Cultural Mining Landscape Roșia Montană” to UNESCO,¹²⁴² and also has created a website to promote Romania’s UNESCO application.¹²⁴³

¹²⁴⁰ *Id.*

¹²⁴¹ *The Rosia Montana file enflames the ministers within the technocrat government. Why did Raluca Pruna erase a comment on Facebook*, Romaniacurata.ro, dated Dec. 28, 2016 (Exh. C-820) (including Facebook comment by Minister of Justice Raluca Alexandra Pruna to Minister of Culture Corina Șuteu’s post describing the steps taken by the Ministry of Culture to list Roșia Montană as UNESCO World Heritage Site noting “The wise thing would be not to make any decision. The submission of the file by Romania is a stance that would fit like a glove in the arbitration. For the investor in question and to the detriment of the state. Otherwise, bravo if the file is ready. Once the arbitration is finished, depending on the result and on the state’s decision, it could be submitted.”).

¹²⁴² Ministry of Culture website: Cultura.ro, The Rosia Montana file was submitted to UNESCO, dated Jan. 5, 2017 (Exh. C-897); Gligor ¶ 171; Tănase II ¶ 248; Henry ¶ 150. In a letter published on its website discussing the submission, the Ministry of Culture noted the file was submitted to UNESCO in light of the “10,121

610. As reflected in its UNESCO submission, the State's apparent intent is to showcase the effects of historical mining at Roșia Montană and prevent any intervention that would alter the current natural environment, thereby "preserv[ing] this treasure in the form left by history."¹²⁴⁴ Indeed, in its initial submission to UNESCO, Romania underscored among other things that "the barren mountains, the hillside mine entrances, the small overgrown waste dumps are very prominent and define the landscape," apparently to be preserved in its current state.¹²⁴⁵

611. As observed in the EIA Report and elsewhere, and as acknowledged over the years by senior Government officials, the effects of mining and the absence of economic opportunity at Roșia Montană, particularly following the cessation of Minvest's mining operations in 2006, left the area deeply and visibly scarred, polluted, and impoverished. Through the Project, RMGC committed to make massive investments to transform Roșia Montană into an inviting area for sustainable development through cultural tourism based on an integrated plan of cultural preservation, infrastructure development, and clean-up of historical pollution and environmental remediation, including the creation of green-scapes to replace the moon-scapes caused by historical, unremediated open-pit mining.

612. Consistent with its current pitch to UNESCO and related messaging by the State regarding cultural tourism at Roșia Montană, the State seems to have a markedly different vision for sustainable development than RMGC and its team of experts presented through the Project. In this regard, a website maintained by the nearby regional capital of Alba Iulia now touts the historic mining town of Roșia Montană as a tourist destination. Describing the history of mining, including the creation of "apocalyptic landscapes," and with photos of open pits,

signatures collected by a petition initiated by Comunitatea de-clic." Letter No. 2202 from Ministry of Culture dated Jan. 13, 2017 (Exh. C-1263). [REDACTED]

¹²⁴³ Website created by the Ministry of Culture to support the UNESCO application: rosiamontana.world (Exh. C-1282); Gligor ¶ 171.

¹²⁴⁴ Ministry of Culture informational brochure describing the Roșia Montană UNESCO application distributed to residents of Roșia Montană in December 2016 (Exh. C-1406) at 3. This history notably includes the recent history of the State's own open pit exploitation carried out at Rosia Montana from the 1970's until 2006, the effects of which were never remedied by the State but which, as discussed *supra* at § II.B.3, RMGC agreed to remedy through the Project.

¹²⁴⁵ Screenshot of UNESCO website (Exh. C-1275) at 3.

polluted waters, and a Roman mining gallery maintained by the State at the modest mining museum in Roșia Montană, the City of Alba Iulia now advertises:

Rosia Montana is not the most beautiful village you have ever visited. On the contrary, it is small and suffering as a ghost town. Although it lives on top of more than 300 tons of gold, the small community is struggling with poverty. This makes people's homes and the historic center of the village look even worse than the roman ruins. But with goods and bads, the place bears the traces of more than two millennia of life and mining activity and definitely it's worth a visit.¹²⁴⁶

613. Underscoring the State's decision to preclude any activity that would change this "apocalyptic" landscape, the City also observed that "the village has been designated a place of historic site of national interest and in 2016 the Ministry of Culture closed definitely the mining works here. Henceforth any intervention on the area was prohibited."¹²⁴⁷ The State's own political subdivision thus confirms that through the 2015 LHM, and the subsequent UNESCO initiative, the State has unquestionably terminated the Project.

3. The Government Proposed a 10-Year Moratorium on the Use of Cyanide in Gold and Silver Mining Projects That Has No Scientific Basis and Would Make the Project Economically Not Feasible

614. In another post-arbitration measure aimed squarely at and fundamentally incompatible with the Project, in December 2016 the Government proposed to Parliament to enact a 10-year moratorium on the use of cyanide in gold and silver mining projects.¹²⁴⁸

615. As explained above and as various Government officials (including successive NAMR Presidents and Minister of Environment Plumb) repeatedly acknowledged, the ore at Roșia Montană could only be economically processed using cyanide; no other technology was suitable, effective, and safe. In addition, the maximum cyanide levels for the Project (5-7 ppm at the point of discharge to the TMF and 3 ppm in the TMF) were well below the stringent EU

¹²⁴⁶ City of Alba Iulia Tourism Brochure "Welcome to Alba Iulia, the Other Capital. Visit the largest Citadel in Romania," City of Alba Iulia ©, available at <http://www.visitalbaiulia.com/roia-montan-where-people-walk-on-gold/> (Exh. C-1744).

¹²⁴⁷ City of Alba Iulia Tourism Brochure "Welcome to Alba Iulia, the Other Capital. Visit the largest Citadel in Romania," City of Alba Iulia ©, available at <http://www.visitalbaiulia.com/roia-montan-where-people-walk-on-gold/> (Exh. C-1744) at 1.

¹²⁴⁸ [REDACTED]

standard of 10 ppm applicable in Romania and the standard of 50 ppm applicable in many leading gold-producing countries such as the United States, Canada, and Australia.¹²⁴⁹

616. Following RMGC's submission of the EIA Report, in 2007 the UDMR party proposed a legislative ban on the use of cyanide in mining projects; then Minister of Environment, Attila Korodi, a leading member of UDMR, encouraged NGOs to rally behind the proposal to pressure Parliament to act before the Project received the environmental permit.¹²⁵⁰ NAMR opposed the proposed ban on the grounds that it was unjustified economically, unnecessary environmentally, and unquestionably aimed at stopping the Project.¹²⁵¹ The proposed legislative ban on cyanide was not enacted.¹²⁵²

617. A decade later, in December 2016, the Government dusted off and revived the proposed cyanide ban.¹²⁵³ In its Opinion to Parliament endorsing a moratorium on the use of cyanide in mining projects (but not other types of projects), the Government acknowledged that: (a) cyanide was used in the main European gold-producing countries (including Finland, Sweden, Greece, Portugal, Spain, Ukraine, and Turkey); (b) according to the European Commission, “the use of cyanide is currently the preferred method, for environmental as well as for economical reasons, for processing gold containing ores and is common practice around the world’ . . .”;¹²⁵⁴ (c) EU regulations applicable in Romania governing the use of cyanide were highly restrictive and designed, in the European Commission's view, “to ensure the protection of

¹²⁴⁹ See *supra* §§ IV.B.1.a, V.D.2, VI.A.3, VIII.A.3, VIII.B.1, 4 (discussing statements in TAC meetings and testimony to Parliament of Minister of Environment Rovana Plumb, Ministry of Environment State Secretary and TAC President Marin Anton, and NAMR President Gheorghe). See also *generally* van Zyl § IV.B (explaining that RMGC was committed to operating below already stringent international standards for cyanide management).

¹²⁵⁰ See *supra* § V.A.1.

¹²⁵¹ See *supra* § V.A.1.

¹²⁵² See *supra* § V.A.1.

¹²⁵³ See Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 1 (referring to the “legislative proposal to supplement Art. 4 of Law no. 85/2003 [the Mining Law], initiated by Senators Eckstein Kovacs Peter and Gheorghe Funar (Bp. 114/2007, Plx. 429/2007)”).

¹²⁵⁴ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 2.

the population's health and of the environment";¹²⁵⁵ and (d) there was no alternative technology for mineral processing proven to be safe and effective.¹²⁵⁶

618. The Government did not identify any new studies or scientific basis for disagreeing with the European Commission's conclusion that cyanide is safe and the preferred method of processing gold. The Government instead pointed to accidents at Certej in 1971 and at Baia Mare in 2000 – both of which took place at archaic facilities before the EU developed its restrictive Mining Waste Directive in 2006 – as well as to more recent smaller discharges at tailings facilities of “the old mines” developed by the State.¹²⁵⁷ None of these facilities was designed to meet the rigorous standards of the BAT-compliant Project TMF or to operate at the very low cyanide levels established for the Project.¹²⁵⁸

619. The Government also relied on a statement from the President of the Romanian Academy, who reiterated the claims he frequently espoused in the TAC meetings that the use of cyanide presented “risks” that were “still little known” and recommended “caution.”¹²⁵⁹ As discussed above, the views of the Romanian Academy, a steadfast opponent of the Project,

¹²⁵⁵ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 6-7 (“We would mention that currently the legislation in Romania is in line with the EU legislation concerning this technology and the European Commission's opinion: ‘The provisions of the European Union applicable to the use of cyanide in mining create one of the most restrictive regimes worldwide and is sufficiently regulated to ensure the protection of the population's health and of the environment.’”).

¹²⁵⁶ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 4 (observing that alternative processing technologies “are insufficiently developed on an industrial scale”).

¹²⁵⁷ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 2 (further referring to several accidents in other countries in the 1990s, also before the Mining Waste Directive was developed). Indeed, the Mine Waste Directive was specifically enacted in the aftermath of the referenced Baia Mare spill to require mine waste to be strictly regulated so that even if there were an accidental discharge, the environment and people's health would remain safe. *See van Zyl* § III.B; Answer given by Mr Potočnik on behalf of the Commission dated June 23, 2010 (Exh. C-513) (EU Commissioner of Environment Janez Potočnik stating that the EU Mining Waste Directive “includes precise and strict requirements ensuring an appropriate safety level of the mining waste facilities,” and that “[d]ue to the lack of better (in the sense of causing less impact on the environment) alternative technologies, a general ban on cyanide use would imply the closure of existing mines operating in safe conditions . . . [which] would be detrimental to employment without additional environmental and health added value”).

¹²⁵⁸ To Claimants' knowledge, the Certej mine did not even use cyanide.

¹²⁵⁹ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 2.

ignored the technical and scientific record supporting the Project's safe use of cyanide processing technology and were repeatedly dismissed by the Ministry of Environment and the other TAC members in both 2011 and again in 2013, including at the conciliation meeting where the Academy's observations were described by one TAC member as "delusional."¹²⁶⁰

620. Like the 2015 LHM and the Ministry of Culture's recent UNESCO initiative, the Government's proposal to impose a moratorium on the use of cyanide was clearly aimed at blocking the Project.¹²⁶¹ In its Opinion, the Government noted that implementation of the Project (which concerns one of the largest undeveloped gold mines in Europe) and another gold mining project at Certej "would turn Romania into the largest cyanide user in Europe."¹²⁶² The Government further observed that Roşia Montană and Certej were among the four mines where cyanide was proposed to be used to process gold and silver ores, and it emphasized that "[n]one of these sites holds an environmental authorization issued by the competent environmental authorities."¹²⁶³

621. While proposing a moratorium on the use of cyanide for 10 years, purportedly to enable further research and development of alternative processing technologies, the Government recommended that the moratorium "should be reviewed after 5 years" thus allowing for its extension.¹²⁶⁴ The Government further noted that the State need not proceed with "the rushed exploitation of the finite mineral resources" in the country, observing that "[m]ineral riches

¹²⁶⁰ See *supra* §§ VII.A.3, VIII.A.3-4. See also, e.g., Transcript of TAC meeting dated July 26, 2013 (Exh. C-480) at 15 (Ministry of Culture State Secretary Boroianu observing that the objections "[t]he things that are said in the report from the Academy, which denies the project, are delusional" and also "contradict the statements of the most important professionals of Romanian Academy").

¹²⁶¹ [REDACTED]

¹²⁶² Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 5.

¹²⁶³ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 5; *id.* at 6 (observing that certain mining projects were "aiming at using this technology, projects which are at an early stage of implementation (some do not even hold the necessary notices/authorizations)"). See also Press Statement of Government Spokesman Liviu Iolu dated Dec. 21, 2016 (Exh. C-1550) (Government spokesman Liviu Iolu: "Well, since there is no gold-silver exploitation that has an environmental permit, for instance, no exploitation can be done at this moment. So, through this moratorium it's . . . in any case, there are no gold-silver exploitation, no? Because there is no environmental permit for such exploitations.").

¹²⁶⁴ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 7.

belong to Romania and will continue to belong to Romania, and they can be valorized” in the future.¹²⁶⁵

622. Thus, while the Government’s proposed moratorium would render the Project economically not feasible, the Government could simply decide in five years – after the likely failure of its current UNESCO initiative and the expiry (barring extension) of the current term of the License in 2019 – to lift the moratorium and to mine the deposit at Roșia Montană itself using the same processing technology proposed and Project designs and exploration data developed by RMGC.

623. Whether politically-motivated by anti-Project animus or otherwise,¹²⁶⁶ it is of course the State’s prerogative to reject Gabriel and RMGC’s vision for the sustainable development of Roșia Montană in favor of its own approach reflected in the 2015 LHM, its UNESCO filing, and its proposed moratorium on the use of cyanide. Of course, the Tribunal is not asked to decide whether Roșia Montană qualifies as a World Heritage site, whether cyanide processing should be allowed, or whether the State’s actions are in the best interests of the Romanian people most affected by them or in any way advisable. Romania has the sovereign right to make all such decisions.

624. What the Tribunal must address is that, through its chosen course of conduct, the State has run roughshod over and serially violated Gabriel’s rights acquired through its investments in Project development and through RMGC and that were made in reliance upon Gabriel agreements with the State and licenses issued to RMGC, archaeological discharge certificates issued by the Ministry of Culture following extensive research funded by RMGC, and RMGC’s right to due process and full and fair consideration of permit and related applications on the basis of the applicable laws. For this, the State must compensate Gabriel.

¹²⁶⁵ Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 5.

¹²⁶⁶ Jennings ¶ 140 (concluding that “it is difficult not to conclude that the State’s recent interest in inscription [of Roșia Montană in the UNESCO World Heritage List] results not from a genuine commitment to heritage but rather reflects a manipulation of the Convention for short term political purposes”). *See generally id.* § IX.C (explaining that Romania’s recent application to include Roșia Montană on the UNESCO World Heritage List is not consistent with its failure to maintain and protect the site).

E. Having Rejected the Project Although It Met All Applicable Legal Requirements for Permitting and Having Simply Refused to Act on RMGC's Bucium License Applications, the State Has Been Unjustly Enriched

625. By in effect taking Gabriel's investments without compensation, the State has benefitted significantly and enriched itself unjustly.

626. Under Romania's Mining Law, all data and information concerning Romanian mineral resources belong to the State.¹²⁶⁷ As such, all of RMGC's annual work plans and budgets, geological reports and other technical documents related to the Roşia Montană License and the Bucium Exploration License – including the highly technical and valuable geological block models developed for the Projects, elaborate feasibility studies, the comprehensive EIA Report and supporting studies and management plans, sophisticated databases, and detailed exploration and engineering results obtained at Roşia Montană and Bucium that would facilitate project development – belong to the State and must be turned over to NAMR when the Licenses are terminated or expire.¹²⁶⁸ Gabriel spent hundreds of millions of dollars (resources that the State lacked and encouraged Gabriel to invest) financing RMGC's activities with the aim of exploiting the Roşia Montană and Bucium deposits, including by developing the extensive geological research and engineering design works that led to the creation of a wealth of technical information, studies, and designs.

627. Because the State owns this bounty of information that RMGC developed at great expense in the pursuit and satisfaction of its License rights and obligations, respectively, the State could sell this valuable asset to other mining companies interested in seeking exploration or exploitation licenses for the Roşia Montană and Bucium deposits, or it could grant exploitation licenses for those deposits to State-owned mining companies and use RMGC's data to avoid incurring the considerable exploration and technical design costs to develop the information itself.¹²⁶⁹

¹²⁶⁷ Bîrsan § V.B.2; Szentesy ¶ 133; Mining Law (Exh. C-11) Art. 5(1).

¹²⁶⁸ Szentesy ¶ 134.

¹²⁶⁹ Szentesy ¶¶ 135-137. *See also* Bîrsan ¶ 359 (explaining that titleholders of exploration licenses have the exclusive right under Romanian law to obtain an exploitation license for resources/reserves found in the exploration license area, because absent such a right, "there would be little interest from an operator to finance

628. Indeed, Government officials variously have suggested that the State would prefer to implement the Project without Gabriel (but simply lacked the resources to do so), or that the State could obtain more favorable financial terms than it agreed with Gabriel for the Project from other mining companies.¹²⁷⁰ Testifying before the Special Commission in September 2013, Minister Delegate Dan Şova also acknowledged that the exploration, research, and technical design work conducted by RMGC was extensive and costly and would be highly valuable to the State in the event RMGC would not be allowed to implement the Project:

I understand this it is the most complete exploration ever made in Romania on underground resources in a particular area of exploitation. So [NAMR] performed this activity and even if the project will not be continued, we have the advantage that we have the study and the information and that means that we know what is there.¹²⁷¹

Indeed, as the Government noted in support of its recently proposed cyanide use moratorium for gold and silver mining, the State need not proceed with “the rushed exploitation of the finite mineral resources” in the country, because the “[m]ineral riches belong to Romania and will continue to belong to Romania, and they can be valorized” in the future.¹²⁷²

on its own risk and responsibility exploration works only to produce data and information that the State owns only to be later put in the position to compete with other operators for obtaining an exploitation license”).

¹²⁷⁰ [REDACTED] See also, e.g., *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793) at 2 (Prime Minister Victor Ponta: “Everybody, and rightfully, said why should the Canadians do it, why not the Romanians. Because we do not have the money, nor will we soon have, about a billion and a half dollars must be invested in the beginning. Hopefully, in five, ten years, the Romanian State will have this money. It doesn’t today and it will not have them next year.”); *Victor Ponta and Dan Şova’s statements regarding the bill on the Roşia Montană mining project, during a live press conference*, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 7 (Minister Delegate Dan Şova: “If we want to extract gold on our own, so with our own resources, we need a 1.9 billion dollars investment.”); *Opinions of the parliamentarians in the Roşia Montană committee*, Casajournalistului.ro, dated Sept. 20, 2013 (Exh. C-1466) (reporting that Sorinel Gigel Stirbu commented on a blog in 2011 that “other companies willing to invest will be found, and under much better conditions for the Romanian state”); Transcript of Parliamentary Special Commission hearing dated Oct. 1, 2013 (Exh. C-1694) at 8 (Minister Delegate of Budget Voinea answering the Special Commission’s question “[c]oncerning the Romanian State’s capacity to make this investment itself”).

¹²⁷¹ Transcript of Parliamentary Special Commission hearing dated Sept. 30, 2013 (Exh. C-507) at 69-70 (Minister Delegate Dan Şova). See also *supra* §§ III.A-C (discussing scope of archaeological research and development of technical feasibility study for Project); Transcript of Parliamentary Special Commission dated Sept. 24, 2013 (Exh. C-506) at 48 (NAMR Director Duţu discussing scope of geological development works and research conducted by RMGC from 1999-2013).

¹²⁷² Letter No. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (Exh. C-913) at 5.

629. Thus, by refusing to act on RMGC’s environmental permit applications for the Roşia Montană Project and in effect terminating the Project, and by failing to act on RMGC’s exploitation license applications for the Bucium Rodu-Frasin and Tarniţa deposits, without any compensation to Gabriel, the State stands to be unjustly enriched by the highly valuable mining data developed at Gabriel’s expense.¹²⁷³

630. In addition, regardless of whether the State allows a mining project to be developed at Roşia Montană, the State already has benefited from the significant knowledge and understanding of the cultural heritage of the area that resulted from the vast program of archaeological and culture research funded by Gabriel and RMGC in the course of Project development. Having restored historical buildings and the Catalina Monuleşti Gallery in Roşia Montană, and having financed the most extensive privately funded archaeological research program ever undertaken in Romania, which identified cultural heritage assets, catalogued a tremendous database of artifacts and knowledge generally, located the precise coordinates of historical monuments in the area in order to obtain archaeological discharge certificates needed to develop the Project (which were later arbitrarily disavowed),¹²⁷⁴ Gabriel and RMGC made enormous contributions to the understanding, scholarship and research concerning Roşia Montană’s cultural heritage. Even now, the State is using and benefitting from this information to support its recently-filed application to designate Roşia Montană’s blighted “Mining Cultural Landscape” as a UNESCO World Heritage Site.¹²⁷⁵

631. Furthermore, as discussed above, RMGC constructed the 22-hectare Recea residential neighborhood, which included more than 130 modern homes and also was one of the first real estate development projects in Romania constructed from the beginning with completely modern infrastructure including underground water, gas, electricity, and sewer

¹²⁷³ [REDACTED] The fact that such data can be very highly valuable may be seen for example by the recent settlement agreement concluded in another case which included compensation for the mining data developed by the project developer. *See Venezuela agrees new terms with ICSID creditor*, Global Arbitration Review, dated June 19, 2017 (Exh. C-858) at 1 (noting settlement of dispute between Venezuela and Gold Reserve which included compensation of nearly US\$ 300 million to Gold Reserve for the value “of mining data for the Brisas gold deposit” developed by Gold Reserve).

¹²⁷⁴ *See supra* § IX.D.1.

¹²⁷⁵ *See supra* § IX.D.2.

networks and approximately 10 kilometers of roads and pavement.¹²⁷⁶ As part of its support for the local community and in furtherance of policy of responsible Project development, RMGC donated the entire infrastructure of the Recea neighborhood to the Alba Iulia mayoralty.¹²⁷⁷

632. Without any compensation to Gabriel for the complete deprivation of the use, enjoyment, and value of its investments, Romania's enjoyment of the fruits of Gabriel's investments is unjust.

F. While the State Has Unlawfully Refused to Issue an Environmental Permit for the Project and Taken Other Measures in Disregard and Violation of Claimants' Rights and Expectations, It Has Continued to Permit the Neighboring, Heavily Polluting State-Owned Mine at Roșia Poieni to Operate

633. Roșia Poieni is a large open-pit copper mine wholly owned and operated by the Romanian State through CupruMin SA Abrud ("CupruMin"). Roșia Poieni is directly adjacent to, and shares a border with, the Roșia Montană License perimeter, and has a footprint (~1,121 hectares) essentially the same size as that planned for the Project at Roșia Montană (~1,257 hectares).¹²⁷⁸

634. Perhaps best known internationally for photos showing a church being progressively submerged in its colorful and growing tailings pond,¹²⁷⁹ independent international experts have dubbed Roșia Poieni "the most significant regional polluter."¹²⁸⁰ [REDACTED] the severe pollution at Roșia Poieni is the combined result of the State operator pumping massive amounts of untreated mine waste contaminated with heavy metals into a

¹²⁷⁶ See *supra* §§ III.D, V.B; Lorincz ¶¶ 38-42; Lorincz Annex B (showing photographs of the Recea resettlement site).

¹²⁷⁷ Lorincz ¶ 41.

¹²⁷⁸ Avram ¶¶ 13, 180-185. See also Tănase II Annex A, at 2 (showing the close proximity between Roșia Montană and Roșia Poieni); Avram Annex B (photographs showing the state of the Roșia Poieni mine and tailings facilities); Szentesy ¶¶ 3, 121 (showing relative locations of the mining projects at issue).

¹²⁷⁹ Avram Annex B, at 8-12 (showing photographs of the partially submerged church in the Roșia Poieni between 2004 and 2016). Some earlier photos also show the cemetery next to the church being engulfed by the tailings pond. *Id.* at 11. [REDACTED]

¹²⁸⁰ Avram ¶ 180 (citing IGIE Report dated Nov. 30, 2006 (Exh. C-502) at 36).

tailings pond lacking either a natural or artificial liner,¹²⁸¹ and the indiscriminate creation of mountainous waste dumps around the Roșia Poieni mine that are prolific sources of acid rock drainage.¹²⁸² The result is an operation that produces a continuous cocktail of toxic runoff into the local watershed.

635. Despite a prior commitment to the contrary, the State continues to allow CupruMin to operate the Roșia Poieni mine in apparent violation of the EU Mining Waste Directive by requiring it to pay a monthly penalty to the State.¹²⁸³ Indeed, in September 2014, after a permitting process lasting only nine months, the State issued CupruMin a new environmental permit to operate the mine. In addition, as noted above, by issuing the 2015 LHM and arbitrarily designating the 2 km radius surrounding Roșia Montană as a historical monument, the State apparently unwittingly encroached upon the Roșia Poieni mine perimeter, but subsequently made clear that its operations at Roșia Poieni would continue unaffected.¹²⁸⁴

636. Recently, in April 2017, the Roșia Poieni tailings pond failed, allowing approximately 6,000 m³ of untreated tailings to be discharged into local rivers.¹²⁸⁵ Pictures and video taken that day show waterways covered in a thick grey sludge.¹²⁸⁶ In a muted response, the Government acknowledged the accident, but has continued to allow the polluting operations at Roșia Poieni to continue.¹²⁸⁷

637. As Mr. Henry states in his witness statement, the long history of mining in and around Roșia Montana [REDACTED] [REDACTED] were among the factors that led him to believe

¹²⁸¹ The proposed site for the Project's TMF had a natural clay liner; Roșia Poieni's facility did not have that or an artificial liner. [REDACTED]

¹²⁸² [REDACTED] (citing Water Baseline Report (Exh. C-205) at 27, 37-38).

¹²⁸³ [REDACTED]

¹²⁸⁴ See *supra* § IX.D.1; [REDACTED] See also *How the Minister of Culture cut the activity of Cupru Min with a pen. The Order by which Roșia Montană is declared an archaeological site includes an area of the copper quarry*, Adevarul.ro, dated Feb. 10, 2016 (Exh. C-1363).

¹²⁸⁵ *Measures aiming to countervail the effects of the accidental pollution on the Arieș River*, Ministry of Waters and Forests, dated Apr. 4, 2017 (Exh. C-449).

¹²⁸⁶ Avram ¶ 186. See also Avram Annex B, at 15 (showing a photograph of the environmental damage caused by the Roșia Poieni tailings facility spill).

¹²⁸⁷ [REDACTED]

that the prospects of successfully developing the modern, environmentally-friendly Project appeared robust when he joined Gabriel in June 2010.¹²⁸⁸

638. In an unlawful reversal of fortune and dashing of Gabriel's legitimate expectations, seven years later, Gabriel is filing a Memorial in an ICSID arbitration while the massively polluting, neighboring State-owned Roșia Poieni has just enjoyed a record year of copper production.¹²⁸⁹ Whereas the State failed to permit Gabriel's Project that the Prime Minister, Minister of Environment, and other senior officials all acknowledged would operate safely and in accordance with the most stringent European and Romanian environmental requirements, the State at the same time has renewed Roșia Poieni's permit to continue operating despite its unchecked pollution and its antiquated facilities that likely contributed to the recent tailings facility failure.¹²⁹⁰

X. ROMANIA'S FAILURE TO ACCORD FAIR AND EQUITABLE TREATMENT

639. The obligation to accord fair and equitable treatment to covered investments is among the most basic obligations undertaken by States Parties to investment treaties. As the overwhelming weight of legal authority demonstrates, while the obligation is expressed in different formulations in different treaties, with some referring expressly to international or customary international law and some not, there is no material difference in the content of the standard as applied.

640. As detailed below, Romania's treatment of Gabriel's investments was an egregious violation of its obligation to accord fair and equitable treatment to Gabriel's investments and thus constituted a breach of Romania's obligation as set out both in the Canada-Romania BIT and in the UK-Romania BIT.

¹²⁸⁸ Henry ¶¶ 6-13.

¹²⁸⁹ *Romania Cupru copper Mine posts the highest annual output ever*, MiningSee.eu, dated Feb. 17, 2017 (Exh. C-1538) at 1 (reporting that CupruMin "recorded last year the largest annual copper production in its history").

¹²⁹⁰ *See Press Release regarding the failure at the Sesei Valley tailing pond*, Ministry of Economy, dated Apr. 4, 2017 (Exh. C-455) at 1 (reporting that "a technical failure occurred . . . [which] generated the accidental pollution of Sesei Valley brook with a mixture of water and sterile, which reached the Arieș river."). *See also* Avram ¶ 182 (noting, among other things, concerns over the structural integrity of the existing Roșia Poieni tailings dam).

641. Romania’s cumulative treatment of Gabriel’s investment constituted a blatant violation of Romania’s obligation to accord fair and equitable treatment, in particular, (i) beginning in August 2011 when the Government plainly decided to reject the economic terms of the State’s long-standing agreements with Gabriel, upon which Gabriel reasonably and legitimately had relied to invest hundreds of millions of dollars in project development, and when the Government abusively and unlawfully began to block the administrative permitting process, and (ii) eventually as the Government revealed that it had fully rejected the Project notwithstanding its admitted technical merits and compliance with applicable legal standards, without any due process, without any proper legal decision and thus without any transparency, and without any compensation whatsoever, and moreover in fact had forsaken all of Gabriel’s investments in RMGC.

A. The Obligation to Accord Fair and Equitable Treatment

1. The Terms of the BITs

642. Article 2 of the UK-Romania BIT provides that “[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment”¹²⁹¹

643. Article II of the Canada-Romania BIT provides that “[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment....”¹²⁹²

644. Annex D of the Canada-Romania BIT provides “[f]or greater certainty, ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the customary international law minimum standard of treatment of aliens.”¹²⁹³

¹²⁹¹ UK-Romania BIT (Exh. C-3) Art. 2(2).

¹²⁹² Canada-Romania BIT (Exh. C-1) Art. II(2).

¹²⁹³ Canada-Romania BIT (Exh. C-1) Annex D.

2. The Content of the Standard

a. General Observations Regarding the Standard

645. The *Saluka* tribunal observed that “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’” and that a breach of this obligation implies “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”¹²⁹⁴ The tribunals in *Occidental v Ecuador* and *MTD v Chile* both endorsed Judge Schwebel’s observation that fair and equitable treatment is “a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality.”¹²⁹⁵ The *Saluka* tribunal considered that fair and equitable treatment means more specifically that:

A foreign investor protected by the Treaty may in any case properly expect that the [...State will] implement[] its policies *bona fide* by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. ...

[A]ccording to the ‘fair and equitable treatment’ standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.¹²⁹⁶

646. The *Waste Management* tribunal’s description of the content of the standard, which has been extensively endorsed, is as follows:

¹²⁹⁴ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated Mar. 17, 2006 (CL-97) (“*Saluka v. Czech Republic*”) ¶ 297. See also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006 (CL-85) (“*Azurix v. Argentina*”) ¶ 360 (ordinary meaning is “just, even-handed, unbiased, legitimate”); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated Feb. 6, 2007, ICSID Case No. ARB/02/8 (CL-102) (“*Siemens v. Argentina*”) ¶ 290 (“In their ordinary meaning, the terms ‘fair’ and ‘equitable’ mean ‘just,’ ‘even-handed,’ ‘unbiased,’ ‘legitimate.’”).

¹²⁹⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated May 25, 2004 (CL-86) (“*MTD v. Chile*”) ¶ 109 (quoting Judge Schwebel); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated Oct. 5, 2012 (CL-71) (“*Occidental v. Ecuador*”) ¶ 405 (citing *MTD v. Chile* ¶ 109 and the reliance on Judge Schwebel).

¹²⁹⁶ *Saluka v. Czech Republic* (CL-97) ¶¶ 307-308.

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.¹²⁹⁷

Notably, the *Waste Management* tribunal was addressing Article 1105 of the NAFTA, which like the Canada-Romania BIT, sets out the obligation to accord fair and equitable treatment with reference to the customary international law minimum standard of treatment.¹²⁹⁸

647. Several tribunals have emphasized that the fair and equitable treatment standard is “unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question,” but that such intention and bad faith “can aggravate the situation but are not an essential element of the standard.”¹²⁹⁹

648. Relatedly, the fact that State action may be in furtherance of a legitimate public policy, such as environmental protection, does not make investment protections inapplicable:

Environmental regulations, including assessments, will inevitably be of great relevance for many kinds of major investments in modern times. The mere fact that environmental regulation is involved does not make investor protection inapplicable. Were such an approach to be adopted—and States Parties could have chosen to do so—there would be a very major gap in the scope of the protection given to investors.¹³⁰⁰

¹²⁹⁷ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated Apr. 30, 2004 (CL-139) (“*Waste Management v. Mexico*”) ¶ 98.

¹²⁹⁸ The NAFTA Free Trade Commission’s July 31, 2001 interpretation of Article 1105 provides that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party;” and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” *Waste Management v. Mexico* (CL-139) ¶ 90.

¹²⁹⁹ E.g., *Azurix v. Argentina* (CL-85) ¶ 372 (citing *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated May 12, 2005 (“*CMS v. Argentina*”) ¶ 284).

¹³⁰⁰ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Decision on Jurisdiction and Liability dated Mar. 17, 2015 (“*Bilcon v. Canada*”) (CL-69) ¶ 597.

Similarly, the *Gold Reserve v. Venezuela* tribunal “acknowledge[d] that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted,” but emphasized that “this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions.”¹³⁰¹

649. Thus, while there is no dispute that States retain the right to exercise regulatory powers when they conclude investment treaties, by entering into such treaties, States undertake to exercise those powers in accordance with the standards set forth in those treaties. As the tribunal in *ADC v. Hungary* noted, when a State enters into a BIT, “it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State’s right to regulate.”¹³⁰²

650. Whether treatment was fair and equitable “is a matter of appreciation by the Tribunal in light of all relevant circumstances; ... [a] judgment of what is fair and equitable cannot be reached in the abstract: it must depend on the facts of the particular case.”¹³⁰³

651. A breach of the standard “need not necessarily arise out of individual isolated acts but can result from a series of circumstances,”¹³⁰⁴ or, as the *Rompetrol v. Romania* tribunal noted, “the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual

¹³⁰¹ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated Sept. 22, 2014 (“*Gold Reserve v. Venezuela*”) (CL-81) ¶ 595.

¹³⁰² *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated Oct. 2, 2006 (CL-138) (“*ADC v. Hungary*”) ¶ 423. See also *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated Apr. 4, 2016 (CL-62) (“*Crystallex v. Venezuela*”) ¶¶ 583-584 (observing that while it is not for investment treaty tribunal to second-guess reasons put forward for public administration’s decisions, deference to policy-makers “cannot be unlimited,” otherwise treaty protections would be rendered “nugatory,” and citing *Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award dated May 16, 2012, ¶ 247, noting the same).

¹³⁰³ *Saluka v. Czech Republic* (CL-97) ¶ 285 (citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated Oct. 11, 2002 (“*Mondev v. USA*”) ¶ 118).

¹³⁰⁴ *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/29, Award dated Aug. 27, 2009 (CL-87) (“*Bayindir v. Pakistan*”) ¶ 181 (citing *CMS v. Argentina* ¶ 280; *Azurix v. Argentina* ¶ 372; *Waste Management v. Mexico* ¶ 93).

actions, taken on their own, would not surmount the threshold for a Treaty breach.”¹³⁰⁵ Other tribunals have ruled similarly.¹³⁰⁶

b. Romania’s Obligation to Accord Fair and Equitable Treatment Is the Same in Both BITs

652. The fact that the obligation to accord fair and equitable treatment in Article II of the Canada BIT¹³⁰⁷ is formulated with reference to the customary international law minimum standard of treatment of aliens does not lead to different conclusions regarding the content of the standard. Nor does the fact that Annex D of the Canada-Romania BIT provides “[f]or greater certainty,” that “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the customary international law minimum standard of treatment of aliens,” as that fact does not exclude other ways in which a State may deny fair and equitable treatment.

653. Many tribunals have observed that the content of the customary minimum standard of treatment, as it has evolved over time, is not materially different from the content of the fair and equitable treatment standard as it is applied by investment treaty tribunals today.¹³⁰⁸

¹³⁰⁵ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated May 6, 2013 (CL-151) (“*Rompetrol v. Romania*”) ¶ 271.

¹³⁰⁶ *See, e.g., Gold Reserve v. Venezuela* (CL-81) ¶ 566 (“The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered. In particular, the Tribunal agrees that even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures.”); *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated Oct. 31, 2011 (CL-152) (“*El Paso v. Argentina*”) ¶ 459 (“The fact that none of the measures analysed ... were regarded, in isolation, as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina.”) and ¶¶ 518-519 (finding measures in the aggregate and over time constituted breach of fair and equitable treatment standard, “in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard.”).

¹³⁰⁷ Canada-Romania BIT (Exh. C-1) Art. II(2).

¹³⁰⁸ *See, e.g., Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated Aug. 22, 2016 (CL-149) (“*Rusoro v. Venezuela*”) ¶¶ 520-521 (The customary international minimum standard “has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether ... the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.”); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated July 29, 2008 (CL-140) (“*Rumeli v. Kazakhstan*”) ¶ 611 (The tribunal “shares the view of several

The NAFTA tribunal in *Merrill & Ring v. Canada* described the situation as one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard, which is a “a requirement that aliens be treated fairly and equitably in relation to business, trade and investment;” that “it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*;” and that “the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”¹³⁰⁹

654. Consistent with the view that the fair and equitable treatment standard as it is applied by investment treaty tribunals today reflects the evolution of the customary international law minimum standard of treatment, the *Waste Management* tribunal’s articulation of the standard has been endorsed by numerous tribunals as describing the content of the generally accepted standard. This includes other tribunals, which like *Waste Management*, were addressing fair and equitable treatment provisions that are expressly tied to the customary international law minimum standard of treatment.¹³¹⁰ It, however, also includes tribunals

ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”); *Azurix v. Argentina* (CL-85) ¶ 361 (“[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated July 24, 2008 (CL-106) (“*Biwater v. Tanzania*”) ¶ 592 (“[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”); *Saluka v. Czech Republic* (CL-97) ¶ 291 (“[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.”).

¹³⁰⁹ *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated Mar. 31, 2010 (CL-153) (“*Merrill v. Canada*”) ¶¶ 209-210. See also *Bilcon v. Canada* (CL-69) ¶ 435 (citing *Merrill v. Canada*).

¹³¹⁰ E.g., *Bilcon v. Canada* (CL-69) ¶¶ 442-443 (“The formulation of the ‘general standard for Article 1105’ by the *Waste Management* Tribunal is particularly influential... While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one.”); *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum dated May 22, 2012 (CL-154) (“*Mobil v. Canada*”) ¶ 141 (“The [*Waste Management*] tribunal identified the customary international law standard.”); *Merrill v. Canada* (CL-153) ¶ 199 (“*Waste Management* also identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which ‘offends judicial

addressing fair and equitable treatment provisions containing a general reference to international law,¹³¹¹ as well as those without any such express references.¹³¹²

propriety'"); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award dated Dec. 19, 2013 (CL-159) ("*TECO v. Guatemala*") ¶ 455 ("The Arbitral Tribunal agrees with the many arbitral tribunals [including *Waste Management*] and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law."); *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award dated Apr. 18, 2013 (CL-160) ("*Abengoa v. Mexico*") ¶ 641 ("The Tribunal refers to the Waste Management tribunal's opinion") (counsel translation); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated Jun. 29, 2012 (CL-161) ("*RDC v. Guatemala*") ¶ 219 ("The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case."); *Chemtura Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award dated Aug. 2, 2010 (CL-162) ("*Chemtura v. Canada*") ¶¶ 122, 215 ("In line with *Mondev*, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard" ... and agreeing with the *Waste Management II*, *Mondev*, and *ADF* tribunals that a violation need not be outrageous to breach Article 1105); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award dated Sept. 18, 2009 (CL-163) ("*Cargill v. Mexico*") ¶ 283 ("The central inquiry therefore is: what does customary international law currently require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards"); *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits dated Aug. 3, 2005 (CL-164) ("*Methanex v. USA*") Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management v. Mexico* with approval); *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award dated Nov. 15, 2004 (CL-165) ("*GAMI v. Mexico*") ¶ 95 ("The ICSID tribunal in *Waste Management II* made what it called a 'survey' of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a 'general standard for Article 1105.'").

¹³¹¹ E.g., *Gold Reserve v. Venezuela* (CL-81) ¶¶ 568-573 (noting that "[i]n *Waste Management v. Mexico* the tribunal summarized its position on the FET standard" and citing this summary with approval); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated Sept. 12, 2014 (CL-166) ("*Perenco v. Ecuador*") ¶ 558, n. 878 ("as has been found by many other investment treaty tribunals presented with the task of ascertaining the standard's meaning – even where the applicable treaty contains no reference to customary international law – there is much to be said for the general approach stated by the tribunal in *Waste Management*"); *OKO Pankki Oyj et al v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award dated Nov. 19, 2007 (CL-167) ("*OKO Pankki v. Estonia*") ¶ 239 ("It is therefore helpful to consider what arbitration tribunals have decided in practice, in specific cases, particularly in ... *Waste Management* ..."); *El Paso v. Argentina* (CL-152) ¶ 348 ("There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith. This has been aptly stated by the tribunal in *Waste Management*."); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated Oct. 3, 2006 (CL-91) ("*LG&E v. Argentina*") ¶¶ 127-128 ("[T]he fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host State. . . this view is reflected in. . . *Waste Management*."); *Azurix v. Argentina* (CL-85) ¶¶ 368-373 (referring to *Waste Management* in discussing the modern interpretation of the fair and equitable treatment standard).

¹³¹² E.g., *Biwater v. Tanzania* (CL-106) ¶¶ 597-600 (citing the NAFTA cases of *Waste Management v. Mexico* and *International Thunderbird v. Mexico*, and stating that their "description of the general threshold for violations of this standard is appropriate"); *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case

655. In any event, in this case, to the extent the Tribunal considers that Gabriel Canada enjoys less robust and favorable treatment than Gabriel Jersey by virtue of Article II of the Canada-Romania BIT's reference to the customary international law minimum standard of treatment, Gabriel Canada is entitled to benefit from the more favorable guarantees of fair and equitable treatment in Romania's BIT's with third party States, including the UK-Romania BIT by operation of the Most-Favored-Nation ("MFN") Treatment provision in Article III (1) of the Canada-Romania BIT.¹³¹³

No. 2010-18/BCB-BZ, Award dated Dec. 19, 2014 (CL-168) ("*British Caribbean Bank v. Belize*") ¶ 282 (citing *Waste Management v. Mexico* for the proposition that "fair and equitable treatment is frequently noted to include a prohibition on conduct that is 'arbitrary,' 'idiosyncratic,' or 'discriminatory'" and noting that "[t]here is an inherent logic to this association"); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction dated Dec. 15, 2014 (CL-169) ¶ 337 (citing *Waste Management v. Mexico* for the proposition that "a violation of the obligation to accord fair and equitable treatment involves 'arbitrary . . . , notoriously unfair behavior . . . idiosyncratic' or that 'involves a lack of due process.'") (counsel translation); *Convia Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award dated May 21, 2013 (CL-170) ¶ 604 ("The Tribunal is then in agreement with what has been affirmed by other arbitral tribunals [including *Waste Management v. Mexico*] in which the FET serves as the legal basis to protect foreign investors from arbitrary, inconsistent, not transparent and capricious behavior attributable to host States.") (counsel translation); *Rupert Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted) dated July 15, 2011 (CL-171) ("*Binder v. Czech Republic*") ¶ 445 (citing *Waste Management v. Mexico* for the assertion that "[t]he state's failure to observe the legitimate expectations of the investor that it has itself induced will amount to a breach of the fair and equitable treatment standard"); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award dated Oct. 8, 2009 (CL-103) ("*EDF v. Romania*") ¶ 216 ("[O]ne of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made ... It comes into consideration whenever the treatment attributable to the State is in breach of representations made by it which were said to be reasonably relied upon by the Claimant. This concept was stated by the tribunal in *Waste Management*."); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award dated Nov. 3, 2008 (CL-105) ("*National Grid v. Argentina*") ¶ 173 ("*Waste Management* considered it 'relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.'"); *Siemens v. Argentina* (CL-102) ¶ 299 ("[Under] *Waste Management II*, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment."); *Saluka v. Czech Republic* (CL-97) ¶ 302 ("The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations . . . [as] [t]he tribunal in *Waste Management* [] stated."); *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted) dated June 26, 2009 (CL-173) ¶ 203 (noting approvingly that *Saluka v. Czech Republic* endorsed and commended *Waste Management v. Mexico*'s threshold for infringement of the fair and equitable treatment standard as a useful guide); *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award dated Dec. 11, 2013 (CL-174) ("*Micula v. Romania*") ¶ 522 ("There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard . . . [a]s stated by the *Waste Management II* tribunal.").

¹³¹³ Canada-Romania BIT (Exh. C-1), Art. III(1) ("Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third state."). See *Bayindir v. Pakistan* (CL-87) ¶¶ 148, 150, 153-160 (where Turkey-Pakistan BIT did not contain an obligation to accord fair and

c. Respect for Acquired Rights

656. The *Eureko v. Poland* tribunal considered that the “guarantee of fair and equitable treatment according to international law ... ‘requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor in making the investment...’”¹³¹⁴

657. Arbitrary modifications to the legal framework on which the investor reasonably relied therefore could give rise to a breach of the standard – as the *PSEG v. Turkey* tribunal described:

Recent awards have applied this standard to the assessment of rights affected by inconsistent State action, arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor’s business and the need to secure a predictable and stable legal environment. This includes most significantly the issue of legitimate expectations which, as the Tribunal in *Tecmed* concluded, requires a treatment that does not “detract from the basic expectations on the basis of which the foreign investor decided to make the investment.”¹³¹⁵

The *PSEG* tribunal held that the investors’ legitimate expectations were violated in the context of the State’s negotiations with PSEG over the terms pursuant to which the company would be permitted to develop a coal mine and electric power plant project due in part to “the numerous changes in the legislation and inconsistencies in the administration’s practice....”¹³¹⁶ The

equitable treatment, tribunal held that that BIT’s MFN provision, which is similar to the MFN provision in this case, permitted Claimant to invoke the fair and equitable treatment protection from other Pakistan BITs); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award dated May 18, 2010 (CL-157) (“*ATA v. Jordan*”) ¶¶ 73, 125 n.16 (where Turkey-Jordan BIT did not contain an obligation to accord fair and equitable treatment, interpreting a similarly worded MFN provision to permit claimant to invoke such provision from another BIT).

¹³¹⁴ *Eureko B.V. v. Republic of Poland, Ad hoc*, Partial Award dated Aug. 19, 2005 (CL-89) (“*Eureko v. Poland*”) ¶¶ 231-235 (citing *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated May 29, 2003 (“*Tecmed v. Mexico*”) ¶ 154).

¹³¹⁵ *PSEG Global, Inc. and Konya Ingin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated Jan. 19, 2007 (CL-175) (“*PSEG v. Turkey*”) ¶ 240 (citing *Tecmed v. Mexico* ¶ 154; *MTD v. Chile* ¶ 164; *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN 3467, Final Award dated July 1, 2004 (“*OEPC v. Ecuador*”) ¶ 183).

¹³¹⁶ *PSEG v. Turkey* (CL-175) ¶ 252.

“roller-coaster effect” of these legislative changes was aggravated in that case by the State’s “fail[ure] to address the consequences of such changes in the negotiations [with PSEG]....”¹³¹⁷

658. Similarly in *OEPC v. Ecuador*, the tribunal found that “by revoking preexisting decisions [relating to entitlement to VAT refunds] that were legitimately relied upon by the investors to assume its commitments and plan its commercial and business activities,” the State “frustrated OEPC’s legitimate expectations on the basis of which the investment was made and has thus breached the obligation to accord it fair and equitable treatment.”¹³¹⁸

659. In *CME v. Czech Republic* it was breach of the standard for the State regulator to act in a manner that had the effect of undoing its prior approvals for the legal structure upon which the investor relied in making its investment.¹³¹⁹ The tribunal found that it was “unacceptable under the requirements of the [BIT] which does not allow reversal and elimination of the legal basis of a foreign investor’s investment by just taking the view that an administrative body’s formal resolution, the corner-stone for the security of the investment, was simply wrong.”¹³²⁰ Thus, the tribunal concluded that “by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest,” the Czech Republic had failed to accord fair and equitable treatment.¹³²¹

¹³¹⁷ *Id.* ¶¶ 250-251.

¹³¹⁸ *OEPC v. Ecuador* (CL-186) ¶ 181. *See also CMS v. Argentina* (CL-176) ¶¶ 274-281, 284 (fair and equitable treatment standard requires “stability and predictability” in relation to legal and contractual commitments).

¹³¹⁹ *See generally CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated Sept. 13, 2001 (CL-116) (“*CME v. Czech Republic I*”) ¶¶ 460-574.

¹³²⁰ *Id.* ¶ 467.

¹³²¹ *Id.* ¶ 611. *See also Eureko v. Poland* (CL-089) ¶¶ 36-40, 192-194, 232-233 (After privatization had become a “major political issue,” the State breached the fair and equitable treatment standard when it unilaterally issued a resolution that the State would maintain control of claimant’s investment. Thus the State “consciously and overtly, breached the basic expectations of Eureko that are at the basis of its investment in PZU and were enshrined in the [Contract].” The tribunal held that, in so doing, the State unlawfully “acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.”).

d. Arbitrary Modifications to Permitting Standards

660. Arbitrary modifications to the standards and criteria that apply to permitting decisions not grounded in the applicable laws may violate the obligation to accord fair and equitable.

661. For example, *Bilcon v. Canada* involved an environmental permitting process for a mining project in Nova Scotia Canada. The tribunal considered that the investors reasonably expected the application for an environmental permit would be assessed on its merits and that the project site was not effectively zoned against development.¹³²² Where the permit however was denied on the basis that it was contrary to the “community core values,” which was not a concept set out in the applicable law, the tribunal concluded the investor was wrongly encouraged “to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, ... [and] encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case.”¹³²³ Regarding the decision-making process, the *Bilcon* tribunal observed:

To the extent that the notion of “community core values” is construed as representing the level of local support for a project, the Tribunal concludes that there is no mandate in federal Canada’s environmental assessment system or the Nova Scotia regime for a review panel to make recommendations on such a basis. The function of a review panel is to gather and evaluate scientific information and input from the community and to assess a project in accordance with the standards prescribed by law, not to conduct a plebiscite.¹³²⁴

Thus, the tribunal considered that the standards by which the environmental permitting decision was taken was arbitrary and unlawful:

The *Waste Management* test mentions arbitrariness. The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law. ...

¹³²² See *Bilcon v. Canada* (CL-69) ¶ 447.

¹³²³ *Id.* ¶¶ 452-453.

¹³²⁴ *Id.* ¶ 508.

Viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a “no go” zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.¹³²⁵

662. Similarly, in *Gold Reserve v. Venezuela*, the tribunal found there was a lack of fair and equitable treatment because decisions regarding permits and licenses were made on the basis of political policies and not applicable legal rules;¹³²⁶ and because although all substantive conditions for signing of the permit were met, the Ministry of Environment refused to sign, reflecting a lack of transparency as to the real reason, which was that the decision was to be taken entirely as a matter of political preferences, which also displayed a lack of good faith.¹³²⁷

663. In *Metalclad v. Mexico*, the tribunal found that where the Mexican Government “issued federal construction and operating permits” for a landfill and “issued a state operating permit which implied its political support for the [Claimant’s] landfill project,” the investor “was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill.”¹³²⁸ When the municipal government thereafter issued a “stop work order” on the grounds that Metalclad failed to obtain a necessary municipal construction permit,¹³²⁹ the tribunal held that Metalclad was denied fair and equitable treatment. That was because while the investor reasonably expected that it had satisfied the applicable permitting requirements, the State had “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment.”¹³³⁰

¹³²⁵ *Id.* ¶¶ 591-592.

¹³²⁶ *Gold Reserve v. Venezuela* (CL-81) ¶ 581.

¹³²⁷ *Id.* ¶¶ 587-588.

¹³²⁸ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated Aug. 30, 2000 (CL-131) (“*Metalclad v. Mexico*”) ¶¶ 78, 89.

¹³²⁹ *Id.* ¶ 87.

¹³³⁰ *Id.* ¶¶ 89, 99. The *Metalclad* tribunal, comprised of Sir Elihu Lauterpacht, former U.S. Attorney General Benjamin Civiletti, and President of the OAS Inter-American Judicial Committee Jose Luis Siqueiros, was unanimous in coming to the conclusion that there was a violation of the fair and equitable treatment standard based on a lack of transparency. This finding is no longer binding on the parties to that dispute as it was later set aside by the Supreme Court of British Columbia, Canada in a heavily criticized decision. *See, e.g.*, DAVID

664. Similarly, in *MTD v. Chile*, after receiving government approval to invest for purposes of developing a real estate project in a particular location specified both in its application and investment license, the investors were advised that development in the specified location was “against the urban policy of the government.”¹³³¹ The tribunal concluded that the initial investment approval “would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view” and held on that basis that the State treated the investors unfairly and inequitably “by authorizing an investment that could not take place for reasons of its urban policy.”¹³³²

665. Recognizing that policies that may change over time, the *Bilcon v. Canada* tribunal observed that investors’ rights must be respected in the process:

As lessons of experience are learned, as new policy ideas are advanced, as governments change in response to democratic choice, state authorities with the power to change law or policy must have reasonable freedom to proceed without being tasked with having breached the minimum standard under international law. That freedom is not absolute; breaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not preceded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.¹³³³

In the *Bilcon* case the investor was not treated fairly and equitably because “[t]here was no indication in either the encouragements from government or in the laws themselves that the

WILLIAMS, *International Commercial Arbitration and Globalization: Review and Recourse against Awards Rendered under Investment Treaties*, 4 J. WORLD INV. 251, 264, 266 (2003) (CL-188); HENRI ALVAREZ, *Judicial Review of NAFTA Chapter 11 Arbitral Awards*, in FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION 103, 109 n.12 (2011) (CL-189); WILLIAM S. DODGE, *Commentary on Metalclad Case*, 95 AM. J. INT’L L. 910, 916-917 (2001) (CL-190). In fact, however, the *Metalclad* award’s description of the obligation of transparency and its application was consistent with the general principle confirmed by prior arbitrators that international responsibility could be based on a lack of transparency. See DODGE, 95 AM. J. INT’L L. at 917 (CL-190). This was subsequently reaffirmed in the *Waste Management* award, which endorsed the principle that a violation of the fair and equitable treatment standard in NAFTA Chapter 1105 could arise from “a complete lack of transparency and candour in an administrative process.” *Waste Management v. Mexico* (CL-139) ¶ 98.

¹³³¹ *MTD v. Chile* (CL-86) ¶¶ 160-167, 189.

¹³³² *Id.* ¶¶ 163, 188.

¹³³³ *Bilcon v. Canada* (CL-69) ¶ 572.

Whites Point area was a “no go” zone for projects of the kind Bilcon was pursuing, regardless of their individual environmental merits, carefully and methodically assessed.”¹³³⁴

e. Administrative Decisions Must Respect Due Process Rights

666. Tribunals have recognized that administrative decisions, including in regards to permitting, must respect basic principles of due process. In *Tecmed v. Mexico*, for example, the relevant state agency’s decision not to renew the claimant’s permit breached the obligation to provide fair and equitable treatment, because the agency failed to provide the investor with advance notice that its permit might not be renewed and did not provide the investor an opportunity either to justify its actions or to solve any alleged deficiencies:

During the term immediately preceding the Resolution [denying renewal of the Permit], INE did not enter into any form of dialogue through which Cytrar or Tecmed would become aware of INE’s position with regard to the possible non-renewal of the Permit and the deficiencies attributed to Cytrar’s behavior – including those attributed in the process of relocation of operations – which would be the grounds for such a drastic measure and, thus, Cytrar or Tecmed did not have the opportunity, prior to the Resolution, to inform of, in turn, their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies to avoid the denial of renewal and, ultimately, the deprivation of the Claimant’s investment.¹³³⁵

667. In *Rumeli v. Kazakhstan*, which involved an investment in a joint venture to develop a mobile telephone network, the State’s Investment Committee terminated the investment contract, but did so with a “summarily reasoned” assessment without providing the investor “a real possibility” to respond.¹³³⁶ The tribunal concluded that the “process that led to the [termination] lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle.”¹³³⁷

668. In *Crystallex*, in reviewing whether the denial of the environmental permit for the mining project was a lack of fair and equitable treatment, the tribunal emphasized that it must

¹³³⁴ *Id.* ¶ 589.

¹³³⁵ *Id.* ¶ 173.

¹³³⁶ *Rumeli v. Kazakhstan* (CL-140) ¶¶ 147-148, 617.

¹³³⁷ *Id.* ¶ 618.

“assess whether there have been serious procedural flaws which have resulted in the Permit being arbitrarily denied, or in the investor being treated non-transparently or inconsistently throughout the process and thereafter.”¹³³⁸ In that case the tribunal found the State’s treatment to be unlawful because, *inter alia*, the permit was denied on the basis of “a few pages of nebulous statements,” which the tribunal found to be “so fundamentally deficient” as to frustrate Crystallex’s legitimate expectation that the mining project would be evaluated in accordance with applicable legal standards and in a fair manner:

The Tribunal is unable to see how thousands and thousands of pages submitted by Crystallex, ensuing from years of work and millions of dollars of costs, could be so blatantly ignored in both the Romero Report and the subsequent Permit denial letter.... The huge efforts spent by Crystallex in cooperative coordination, at least up to a certain time, with its main partner, the CVG, entitled Crystallex to have its studies properly assessed and thoroughly evaluated.¹³³⁹

669. Fair and equitable treatment requires that administrative proceedings be conducted transparently and in good faith. The State’s decision-making in regard to the environmental permit in the *Crystallex* case violated the obligation to accord fair and equitable treatment also due to the “non-transparent and inconsistent conduct on the part of the Ministry of Environment to invite the investor to pay a substantial bond and the environmental taxes through the 16 May 2007 letter, [while] at the time of the Romero Report—i.e. eight months before—the same Ministry *had already come to the conclusion that the Permit had to be denied.*”¹³⁴⁰ The permit decision-making process also was unlawful because the “process was not anymore solely a matter of technical assessment at the level of the competent ministerial offices,” as the law required, but simply had become a political decision of the President.¹³⁴¹

¹³³⁸ *Crystallex v. Venezuela* (CL-62) ¶ 585.

¹³³⁹ *Id.* ¶ 597.

¹³⁴⁰ *Id.* ¶ 598.

¹³⁴¹ *Id.* ¶ 600.

f. Maladministration or Feckless Regulatory Conduct

670. International tribunals have recognized that in some circumstances, maladministration or feckless or negligent regulatory conduct can constitute a failure to accord fair and equitable treatment. In *PSEG v. Turkey*, the tribunal found that “[s]hort of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants” that violated the fair and equitable treatment standard:

The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.¹³⁴²

671. Similarly, in *Saluka v. Czech Republic*, the State failed to treat Saluka’s investment in a bank, IPB, fairly and equitably, when Saluka sought to secure state aid to increase the bank’s capital.¹³⁴³ After responding with a variety of inconsistent, shifting, and ambiguous responses from the relevant State bodies, the State ultimately refused to provide state aid to IPB, instead placing IPB into forced administration.¹³⁴⁴ A state-owned bank, CSOB, however, subsequently acquired IPB and received considerable aid from the Government.¹³⁴⁵ The tribunal held that these circumstances demonstrated that the State had failed to consider in an “unbiased, even-handed, transparent and consistent way” Saluka’s good faith proposals to resolve the bank crisis, and moreover by “unreasonably refus[ing] to communicate with IPB and Saluka/Nomura in an adequate manner”¹³⁴⁶ failed to provide fair and equitable treatment.¹³⁴⁷

¹³⁴² *PSEG v. Turkey* (CL-175) ¶ 246.

¹³⁴³ *Saluka v. Czech Republic* (CL-97) ¶¶ 89-90, 95, 107.

¹³⁴⁴ *Id.* ¶¶ 134, 407, 420-421.

¹³⁴⁵ *Id.* ¶¶ 136-158.

¹³⁴⁶ *Id.* ¶¶ 407, 499.

672. An abuse of regulatory authority likewise is not fair and equitable treatment. In *Tecmed v. Mexico* the tribunal concluded that, having been awarded the right to operate a hazardous waste landfill by the authorized local authority, Tecmed was denied fair and equitable treatment when a federal agency authorized only to address environmental issues rejected Tecmed's application for renewal due to political reasons.¹³⁴⁸ The tribunal held that the requirement to provide fair and equitable treatment means that the State must employ "the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."¹³⁴⁹ In this regard the decision of the *Metalclad v. Mexico* tribunal is similar:

Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.¹³⁵⁰

673. In *PSEG v. Turkey*, where PSEG had obtained the Ministry's approval to increase the capacity of the power plant it was authorized to construct, once a new law was passed that was intended to provide new benefits for such power projects, the Government deprived PSEG of this approval by "prevent[ing] the finalization of the supplementary contracts and attempt[ing] to force the Claimants to give up concession rights in connection with the negotiations on the

¹³⁴⁷ See also *OEPC v. Ecuador* (CL-186) ¶¶ 184-186 (State breached obligation to provide fair and equitable treatment by changing laws "without providing clarity about its meaning and extent," but then also the practice and regulations were "inconsistent with such changes" with the result that investors could not make informed decisions).

¹³⁴⁸ See *Tecmed v. Mexico* (CL-122) ¶¶ 164, 173.

¹³⁴⁹ *Id.* ¶ 154.

¹³⁵⁰ *Metalclad v. Mexico* (CL-131) ¶ 86. See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated Jan. 14, 2010 (CL-107) ("*Lemire v. Ukraine I*") ¶ 262 (a measure is arbitrary and thus unlawful when, *inter alia*, it "is not based on legal standards but on discretion, prejudice or personal preference," it is "taken for reasons that are different from those put forward by the decision maker," or it is "taken in wilful disregard of due process and proper procedure").

application [of the new law].”¹³⁵¹ The tribunal held that the State’s conduct was unlawful because the Ministry’s “demands for a renegotiation went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue in this context or even within [the Ministry’s] authority.”¹³⁵²

g. Coercive Renegotiations and Otherwise Acting to Undermine Investments

674. Indeed, coercive actions aimed at forcing a renegotiation of contract terms also is a breach of the requirement to provide fair and equitable treatment and a party’s consent to modification of its investment in a situation of unlawful pressure does not make the government’s unlawful acts legal.¹³⁵³ The *CME* tribunal referred in this context to the statement of Professor Detlev Vagts, noting that, “[t]he threat of cancellation of the right to do business might well be considered coercion....”¹³⁵⁴

675. The *Vivendi II* tribunal observed that a government that openly opposes an agreement concluded with a foreign investor and expresses a desire to terminate it raises doubts that it is willing or able to provide fair and equitable treatment to that investor.¹³⁵⁵ In that case, after a new administration entered office, the investor’s concession was subjected to “repeated threats of recession” and an “impermissible campaign to reverse the privatisation or force [the investor] to renegotiate.”¹³⁵⁶ The administration publicly questioned the legitimacy of the project’s billing practices, and voided certain bills sent by the project, with the result that many of the project’s customers stopped paying their invoices.¹³⁵⁷ In this context, the *Vivendi II* tribunal explained that while it is “entirely proper” for a new administration “to seek to

¹³⁵¹ *PSEG v. Turkey* (CL-175) ¶ 227.

¹³⁵² *Id.* ¶ 247. See also *Crystallex v Venezuela* (CL-62) ¶ 578 (“a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker”).

¹³⁵³ *CME v. Czech Republic I* (CL-116) ¶ 516.

¹³⁵⁴ *Id.* ¶ 517.

¹³⁵⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award dated Aug. 20, 2007, ICSID Case No. ARB/97/3 (CL-113) (“*Vivendi v. Argentina IP*”) ¶¶ 7.4.21-22.

¹³⁵⁶ *Id.* ¶ 7.4.37.

¹³⁵⁷ See *id.* ¶¶ 7.4.22-37.

renegotiate a concession agreement in a transparent non-coercive manner, it is clearly wrong (and unfair and inequitable in terms of the BIT)” to seek renegotiation of a concession “through threats of rescission ... after having wrongly deprived the concessionaire’s billings of formal legitimacy.”¹³⁵⁸ The tribunal concluded that “[u]nder the fair and equitable standard, there is no doubt about a government’s obligation not to disparage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation.”¹³⁵⁹

676. In *Biwater Gauff v. Tanzania*, the State breached the “do no harm” standard and with it the obligation to provide fair and equitable treatment when although the tribunal found that termination of the investor’s Lease Contract was “inevitable,”¹³⁶⁰ the State proceeded to do so in an abusive manner, including a Government Minister issuing a press release and a television declaration announcing the termination of the investor’s Lease Contract as an accomplished fact with the consequence of “effectively, and publicly ... undermining [the project] in the general public’s eye, and disabling it from progressing the contractual process in an ordinary fashion”;¹³⁶¹ and the Government’s “unilateral”, “unreasonable and unjustified” withdrawal of a VAT exemption on purchases that the investor’s project had been entitled to and “which adversely impacted upon [the project’s] rights, and its ability to continue to perform.”¹³⁶²

¹³⁵⁸ *Id.* ¶ 7.4.31.

¹³⁵⁹ *Id.* ¶ 7.4.39. See also *LG&E v. Argentina* (CL-91) ¶¶ 68, 71, 136 (State violated obligation to provide fair and equitable treatment by “forcing the licensees to renegotiate public service contracts, and waive the right to pursue claims against the Government, or risk rescission of the contracts”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability dated Dec. 27, 2010 (CL-67) (“*Total v. Argentina I*”) ¶¶ 337-338 (State violated obligation to provide fair and equitable treatment by effectively forcing investors to convert interests in power plant “by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses”); *National Grid v. Argentina* (CL-105) ¶ 179 (State breached the fair and equitable treatment standard, in part by conditioning renegotiation of public utility contract on the company’s renunciation of its legal remedies).

¹³⁶⁰ *Biwater v. Tanzania* (CL-106) ¶ 518.

¹³⁶¹ *Id.* ¶¶ 497-500.

¹³⁶² *Id.* ¶¶ 501-502.

B. Romania Failed to Accord Fair and Equitable Treatment to Gabriel's Investments

677. Viewed in light of the applicable legal standard, as described above, Romania's cumulative treatment of Gabriel's investments unquestionably was a breach of Romania's obligation to accord fair and equitable treatment. Indeed, Romania's conduct towards Gabriel's investments reflects such a flagrant and fundamental departure from basic notions of fairness, respect for acquired rights and contractual undertakings, transparency, procedural propriety, due process, and the rule of law as to constitute a maximal violation of the minimum standard of treatment.

678. The evidence shows that the State sought foreign investment for its mining industry and, in particular, invited Gabriel to invest in Romania in partnership with the State to help modernize, revitalize and expand the mining operations at Roșia Montană and thus to continue the 2000-year history and tradition of mining in the area. The fact that the State pursued mining operations at Roșia Montană until 2006, and continues to do so to this day at the neighboring and heavily polluting Roșia Poieni copper mine, albeit using primitive and outdated technology, further demonstrates the reasonableness of Gabriel's expectations that the mining licenses that the State granted to RMGC would be supported and reflected the State's policies for the area. With the reasonable expectation of support by the State, and indeed in partnership with the State, Gabriel focused on developing a significant, modern mine to fully exploit the mineral resources at Roșia Montană (and Bucium) in an efficient, economical, sustainable and environmentally responsible manner that far surpassed what the State could ever have done on its own given its limited resources (financial and technological). To this end, among other things:

- a) The State approved of and participated as an equity partner in the creation of RMGC with Gabriel to carry out the envisioned Projects, and agreed first in cooperation agreements and later in RMGC's Articles of Association on the respective shareholding of Gabriel and the State in the venture.¹³⁶³

¹³⁶³ See *supra* § II.C.1 (discussing State's establishment of RMGC as joint venture with Gabriel to address need for foreign capital to develop and implement mining projects at Roșia Montană and Bucium).

b) The cooperation agreements that preceded the Roşia Montană License and the Bucium Exploration License, [REDACTED] specifically contemplated and provided for their transfer to RMGC, which occurred in accordance with Romanian law and with the approval of all relevant Romanian authorities.¹³⁶⁴ Among other things the License established the royalty, [REDACTED] at 4% of gross project revenue.¹³⁶⁵

c) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹³⁶⁶

d) Similarly, the Ministry of Culture oversaw and directed extensive preventive archaeological research in the planned Project perimeter, funded by Gabriel through RMGC and, in reliance on such research (which showed only a handful of sites worthy of protection), issued a series of archaeological discharge certificates that allowed for industrial development (mining) within the Project area for which research was completed.¹³⁶⁷

e) In accordance with terms of reference issued by the Ministry of Environment, RMGC retained a team of renowned external Romanian and international

¹³⁶⁴ See supra §§ II.C.2.a [REDACTED], II.C.3 (discussing NAMR's issuance and transfer of the Bucium Exploration License to RMGC in accordance with law and with Ministry of Industry's endorsement), III.A.2 (discussing NAMR's transfer of the Roşia Montană License to RMGC in accordance with law and with Ministry of Industry's endorsement).

¹³⁶⁵ Addendum No. 7 to Roşia Montană License dated Oct. 14, 2009 (Exh. C-414) Art. II [REDACTED]
[REDACTED]

¹³⁶⁶ See supra § III.A.3; Szentesy ¶¶ 32-35. See also SRK Report ¶ 35.

¹³⁶⁷ See supra § III.B, III.C.1.

technical experts to prepare, at great expense and effort, a comprehensive, professional EIA Report that addressed all relevant aspects of Project design and development, and submitted it to the Ministry of Environment for review.¹³⁶⁸

- f) The Project, as designed, met or positively surpassed all applicable Romanian and EU standards and employed EU-approved Best Available Techniques to responsibly exploit the world class mineral resources at Roșia Montană. The Project reflected an integrated and well-funded plan that would remediate historical pollution [REDACTED] preserve cultural heritage, and create or enhance the area's infrastructure, all of which would combine to lay the foundation for the long-term sustainable economic development of the Roșia Montană community and its environs.¹³⁶⁹
- g) RMGC also developed and implemented a comprehensive and compassionate community development and relocation program, made very substantial investments in the local communities, and acquired surface rights over the majority of property within the Project area, and was well placed to acquire the remainder upon the successful conclusion of the EIA review process and issuance of the environmental permit.¹³⁷⁰

679. In this regard, upon making and pursuing their investments in Romania, Gabriel reasonably and legitimately expected that the State would honor and respect its contractual commitments and agreements with Gabriel and with RMGC, and that it would assess the Project permitting fairly, transparently, in good faith, and in accordance with the applicable law and administrative process, notably including the State's review of the EIA Report under the auspices of the Ministry of Environment in consultation with the TAC.

¹³⁶⁸ See *supra* §§ II.A (discussing leading external experts retained by Gabriel to develop the Project), IV.A.2 (discussing development of EIA Report through Romanian EIA experts certified by the Ministry of Environment working in collaboration with leading international experts and consultants).

¹³⁶⁹ See *supra* §§ II.A (discussing Gabriel's commitment to comply with all requirements of Romanian and EU legislation and industry best practices), IV.B.1-2 (discussing Gabriel and RMGC's approach to implementing industry best practices for Project with respect to key environmental issues and cultural heritage).

¹³⁷⁰ See *supra* §§ III.D, V.B.

680. Romanian law required that upon completion of a positive technical review of the merits of the Project through the EIA process, the Ministry of Environment was to take a decision on the issuance of the environmental permit and submit a proposal to the Government, which was to implement the Ministry of Environment's endorsement through a Government Decision. The law did not provide a role for Parliament in the permitting process. Nor did it provide that an environmental permit could be denied on the basis of political whim or expediency or to coerce more advantageous financial terms for the State.¹³⁷¹ At various times in the permitting process senior Government officials publicly reaffirmed that the EIA procedure was a technical administrative process uninfluenced by politics.¹³⁷² Given the hundreds of millions of dollars spent, and the enormous efforts expended, Gabriel was entitled to have its studies properly assessed and thoroughly evaluated in accordance with applicable laws, regulations and rules of administrative procedure.

681. The evidence is clear and compelling, however, that beginning in August 2011 the State through an unlawful series of acts and omissions, first rejected the economic terms of its long-standing agreements with Gabriel and RMGC and ultimately rejected the Project as designed and presented by Gabriel and its independent experts, and did not issue the environmental permit or allow the Project to proceed despite its acknowledged compliance with the applicable permitting requirements. The Government's complete rejection of the Project extended to RMGC generally, including its Bucium Exploration License rights.

682. As summarized below, the Government successively blocked the permitting process in support of its coercive and ultimately successful attempts to wrest from Gabriel an offer for a greater shareholding in RMGC and a higher royalty rate, in manifest disregard of the State's contractual agreements that formed the basis for Gabriel's investment. Thereafter, the Government completely jettisoned the lawful permitting process. Apparently for reasons of political expediency and a desire to avoid political accountability, the Government took the

¹³⁷¹ See *supra* § IV.A.1 (discussing the administrative procedure established by law for issuance of the environmental permit). See also generally Mihai § IV (same).

¹³⁷² See *supra* § IV.A.1.c (quoting public statements from 2009-2013 made by Minister of Environment Sulfina Barbu, Ministry of Environment spokesperson Dragoş Năcuţă, Minister of Environment László Borbély, Ministry of Environment State Secretary and TAC President Marin Anton, and Minister of Environment Rovana Plumb, stating e.g. the decision is technical and "has nothing to do with politics").

arbitrary decision to place the fate of the Project in Parliament's hands and to abide by Parliament's political judgment whether to endorse or, in the alternative, effectively terminate the Project. In sum:

- a) Following resumption of the EIA process in September 2010, the Ministry of Environment in consultation with the TAC favorably reviewed the EIA Report in meetings held from September 2010 to March 2011.¹³⁷³ Following negotiations with the Ministry of Culture leading to RMGC's agreement to increase significantly investments to preserve cultural heritage, the Ministry of Culture in July 2011 re-issued the archaeological discharge certificate allowing mining in the Cărnic Massif.¹³⁷⁴ Not only did the Project have momentum towards permitting, but Project economics were robust with gold prices increasing and Gabriel's market value in July 2011 pegged at more than C\$ 3 billion, making the Project a trophy asset and Gabriel an attractive investment, including for major mining companies.¹³⁷⁵
- b) In hindsight it is clear that the following month, August 2011, marked the beginning of the end for the Roșia Montană Project and Gabriel's associated substantial investments in Romania. In that month, the Government in word and deed made clear that the EIA procedure would proceed no further unless Gabriel agreed to the State's demand for increased shareholding in RMGC and a higher royalty percentage.¹³⁷⁶ The Government thereafter affirmatively intervened in and blocked the permitting process from concluding while it sought to rewrite the contracts upon which Gabriel reasonably and legitimately had relied in making its investments.

¹³⁷³ *See supra* § V.D.

¹³⁷⁴ *See supra* § VI.B.1.

¹³⁷⁵ *See supra* § VI.A.1.

¹³⁷⁶ *See supra* § VII.A.1 (discussing statements of Prime Minister Boc, President Băsescu, Minister of Environment Borbély, and Minister of Culture Hunor, all of whom publicly declared that the Project would not be permitted unless Gabriel submitted to the Government's coercive and abusive demands to renegotiate and increase the State's financial interest in the Project).

- c) In November 2011, the Ministry of Environment State Secretary and TAC President convened what he intended to be the final TAC meeting before a decision would be taken to issue the environmental permit. [REDACTED]

[REDACTED]

- d) Thus, despite the TAC President clearly stating on the record at the November 2011 meeting that the technical review of the Project was complete, the EIA procedure did not proceed to conclusion in that the Ministry of Environment did not take a decision on the environmental permit and the permit did not issue, all in manifest and deliberate disregard of Romanian law. Derailing and holding the permitting process hostage in this manner to maintain leverage over Gabriel and RMGC to strong-arm financial concessions for the State was a coercive, unlawful abuse of power.

- e) Although Gabriel succumbed to the pressure and attempted to meet the Government's extortionist demands through an offer conveyed in January 2012, the Government fell in February 2012.¹³⁷⁸ The Government thereafter refused to allow any permitting to proceed throughout 2012, making Gabriel wait for national elections to occur, when the Government would be ready to continue its coercive re-negotiation on which the fate of RMGC and the Roșia Montană Project appeared to hinge.¹³⁷⁹ A local referendum held in Alba County held at the

¹³⁷⁷ See *supra* § VII.A.3 (discussing the Government's ultimatum to increase the State's shareholding in RMGC to 25% and the royalty to 6% or not to do the Project at all, and actions taken by the Government to block the Ministry of Environment from taking decision to issue the environmental permit as required by law).

¹³⁷⁸ See *supra* § VII.A.4.

¹³⁷⁹ See *supra* § VII.B.1.

time of the national elections at the end of 2012 and in the middle of a snowstorm, which resulted in significant logistical disruption for voters and materially suppressed voter turnout, still showed overwhelming local support for mining in general, and the Project in particular.¹³⁸⁰

- f) Following the national elections, when the Government returned its attention to Gabriel and the Project, it confirmed its rejection of the Project on the terms initially agreed and reiterated its demand for a new and improved economic deal. The Government, however, also added that even if new economic terms were agreed and all permitting requirements were met, the Project would only move forward if Parliament so permitted. The vehicle for the Government's seeking Parliament's blessing for the Project came in the form of the Draft Law, which the Government indicated would be presented to Parliament only if the Government obtained a new economic deal and was satisfied the Project met all environmental and legal requirements for permitting.¹³⁸¹
- g) Having no commercially rational alternative, Gabriel tried to work within the framework dictated by the Government and offered to increase the State's shareholding in RMGC and the License royalty rate to the levels demanded.¹³⁸² Consistent with its intent to send to Parliament only a Project that satisfied all applicable legal permitting requirements, the Government through its Inter-Ministerial Commission reviewed the Project and confirmed in March 2013 that there were no legal or administrative impediments for the Project to proceed and, in consultation with the TAC, confirmed again in May and July 2013 that the

¹³⁸⁰ See *supra* § VII.B.2.

¹³⁸¹ See *supra generally* § VIII.A (discussing statements made in the press, [REDACTED] and in TAC meetings by Prime Minister Ponta, Minister Delegate Şova, Minister of Environment Plumb, and State Secretary Năstase, all of whom made clear that the Government refused to comply with administrative permitting process established by law, and that the Project would only be permitted if Gabriel and RMGC submitted to the Government's demands for increased shares and royalties, if the Project met all applicable legal requirements, and if Parliament decided to enact the Draft Law).

¹³⁸² See *supra* § VIII.A.5 (discussing Gabriel and RMGC's submission to the State's economic demands and the Government's endorsement of the resulting Draft Law/Agreement via Government Decision).

technical review was both complete and positive.¹³⁸³ The Ministry of Environment went a step further than it did in 2011 and in July 2013 published for public comment the conditions for environmental compliance it would include in the environmental permit when issued.¹³⁸⁴

- h) Rather than proceed to issue the environmental permit as the law required and despite acknowledging through its Inter-Ministerial Commission in 2013 that the technical review was both complete and positive, the Government instead endorsed and sent the Draft Law and accompanying Draft Agreement to Parliament. Although in form the Parliament was only asked to review the Draft Law, in substance the Government made clear that Parliament's vote on the Draft Law would serve as a proxy for a decision as to whether the Government would in effect terminate the Project altogether or issue the environmental permit to which it was clearly entitled and allow it move forward. Proceeding in this manner and putting into question whether license rights would be respected was arbitrary and reflected a flagrant disregard of Gabriel's acquired rights and the legal regime governing Gabriel's investment.
- i) The Government thus proceeded without any regard for the huge efforts expended by Gabriel over the many years and the hundreds of millions of dollars that Gabriel invested to develop the Project, to design it to meet all applicable legal standards, and to present it through a rigorous multi-year EIA procedure. The Government's approach was wholly contrary to Gabriel's reasonable expectation of treatment in accordance with the law.
- j) Although the decision whether the State would honor the License and its agreement with Gabriel or would renounce them was not expressly put to parliamentary hearing and vote, the Government made express that Parliament in fact would be deciding the fate of the Project. Once the matter was sent to the legislature to decide, the wide gulf between law and politics was unmistakable.

¹³⁸³ See *supra* §§ VIII.A.1, VIII.A.3.

¹³⁸⁴ See *supra* § VIII.A.4.

- k) Within days of the Government sending the Draft Law to Parliament and before hearings even began, the Prime Minister on August 31, 2013 publicly repeated his position that despite endorsing the Project as a member of the Government, he did not support the Project as a Member of Parliament and would vote against it in Parliament.¹³⁸⁵ The Prime Minister’s contorted attempt to keep one foot on the boat and another on the dock – a feat also attempted by several other members of the Government who had publicly endorsed the Project on its technical merits but announced that they would not vote for the Project for political considerations¹³⁸⁶ – was an overt demonstration of the arbitrary and unfair treatment the Project received.
- l) Days later, as protests mounted from anti-mining, anti-Project and anti-Government activists that were called to arms as the Project was tossed into the political arena created by the Government’s abandonment of the applicable legal process, the Prime Minister in a televised address acknowledged the Project met “all the conditions required by law” for permitting but, because he did not want the Government to be accountable for issuing the environmental permit as the law

¹³⁸⁵ See *supra* § VIII.B.1; *Ponta*: “I will vote against Roșia Montană project,” Adevarul.ro, dated Aug. 31, 2013 (Exh. C-789) at 1 (Prime Minister Victor Ponta stating that he “will vote against this project” and reiterating that “[t]he pros and cons should be presented to Parliament which shall decide if we will make such a project or we reject it”).

¹³⁸⁶ See *supra* § VIII.B.2. See also, e.g., *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană, depending on the decision of Parliament*, Hotnews.ro, dated Sept. 7, 2013 (Exh. C-556) (Minister of Environment Rovana Plumb stating that the Project would be “the safest project of Europe” and complied with “all requirements under the European and not only, international environmental standards,” but that as a member of Parliament, she was “an individual sent by a number of citizens from College 2 Dambovita, with whom I will have a discussion, and depending on the mandate they will give me, I shall cast my vote in Parliament.”); *VIDEO The Minister of Culture: “As Minister, I will support the Roșia Montană Project. As National Liberal Party (PNL) member, I will vote against, as this is the decision of my party”*, Adevarul.ro, dated Sept. 13, 2013 (Exh. C-1511) at 1 (Minister of Culture Daniel Barbu: “I will vote against - I am in a delicate position, from a technical standpoint I subscribed to this agreement, I am convinced that on the heritage side the project is absolutely fine. None of the national laws or international provisions on best practices for the preservation of heritage will be violated. As long as the PNL official decision is to vote against, I will vote against it as well.”); *Victor Ponta and Dan Șova’s statements regarding the bill on the Roșia Montană mining project, during a live press conference*, Antena3, dated Sept. 12, 2013 (Exh. C-643) at 6 (Minister Delegate Șova: “How will I vote in the Romanian Parliament? If you ask me, there should naturally be a voting discipline, and from a political point of view, I might vote against together with all my colleagues. But if you ask what my opinion is – well I believe that this project complies with environmental requirements and [with] all the other requirements and should be done.”).

required, he sent the Draft Law to Parliament, in the apparent misguided belief that doing so would shield the Government from owing billions in compensation to Gabriel if the Draft Law and hence the Project were rejected by Parliament and thus by the Government.¹³⁸⁷

- m) Thereafter, but before any parliamentary hearings began, and as activist-orchestrated street protests continued, the Senate President and the Prime Minister, political leaders for the ruling coalition, called on Parliament affirmatively to reject the Draft Law and the Project.¹³⁸⁸ Parliament heeded the call.
- n) Despite testimony from all relevant Ministers and other senior Government officials unequivocally endorsing the merits of the Project and confirming its compliance with all applicable legal requirements, the Senate committees that initially reviewed the Draft Law, and the subsequent Special Commission created to placate the miners of Roșia Montană and to end their desperate protest, unanimously recommended rejection of the Draft Law in September and November 2013, respectively.¹³⁸⁹ Both houses of Parliament eventually did so in nearly unanimous votes as well, with the Senate rejecting the Draft Law in November 2013 and the Chamber of Deputies following suit in June 2014. Even the Ministers who testified to the Project merits refused to vote in favor.¹³⁹⁰

¹³⁸⁷ See *supra* § VIII.B.1; *Ponta: I sent the Roșia Montană Project to the Parliament so we could not be sued*, Stiri.tvr.ro, dated Sept. 5, 2013 (Exh. C-460) (Prime Minister Victor Ponta: “I was obligated, under the law, and I am trying to explain this to those who want to hear me, that under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law. Precisely because I considered that I should not do this, I sent the law to Parliament to submit it to a real debate. That's the situation and this is why, had I done absolutely nothing, I would have then had to pay I don't know how many billions in compensation to the company in question.”).

¹³⁸⁸ See *supra* § VIII.B.1; *VIDEO Crin Antonescu's surprise-statement: The Roșia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832) (Senate President Crin Antonescu); *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793) (Prime Minister Victor Ponta); *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) (Prime Minister Victor Ponta).

¹³⁸⁹ See *supra* §§ VIII.B.1, VIII.B.3-4.

¹³⁹⁰ In particular, Minister of Environment Plumb, Minister of Culture Barbu, and Minister Delegate Șova all refused to vote in favor of the Draft Law and instead did not vote at all. See *supra* § VIII.B.4; Voting Roll of

683. Executing the judgment of the Roman forum so expressed, the Government made it clear that the Project would not proceed, yet did not issue any legal decision nor make any offer of compensation.¹³⁹¹ The State, not Gabriel, now stands to benefit from the treasure trove of Project-related data Gabriel's investments generated of both a technical and cultural nature and, to this extent, is unjustly enriched through its unlawful actions.¹³⁹²

684. Consistent with this political death sentence, the State proceeded in various ways following Parliament's progressive rejection of the Draft Law to act in disregard of Gabriel's acquired rights and legitimate expectations and abusively and arbitrarily toward Gabriel's investments, thus confirming over time the complete rejection of RMGC and its Projects and the evisceration of Gabriel's acquired rights. Among other things:

- a) The State, as Gabriel's joint venture partner in RMGC, stopped cooperating in appointing members to RMGC's Board or in mandatory recapitalizations of RMGC required under Romanian company law, forcing Gabriel to donate funds to the State to prevent RMGC's dissolution and currently leaving it without a resolution to avoid this risk.¹³⁹³
- b) The State through NAMR failed to take the routine ministerial act of updating the Roşia Montană License with annexes consistent with NAMR's administrative decision to validate and approve the resources and reserves at Roşia Montană.¹³⁹⁴

Senate on Draft Law dated Nov. 19, 2013 (Exh. C-878); Voting Roll of Chamber of Deputies on Draft Law dated June 3, 2014 (Exh. C-879). [REDACTED]

¹³⁹¹ See *supra* § VIII.B.4, IX.A (discussing statements of Government officials that Project was dead because Parliament rejected Draft Law, and of Ministry of Environment officials who said the TAC was "paralyzed" because although "the Ministry of Environment had not identified any technical issues that would prevent issuance of the EP [environmental permit]," the "decision was blocked at the political level"). See also, e.g., *Minister Plumb's public statements on Antena 3*, Sinteza Zilei, dated Nov. 12, 2013 (Exh. C-828) (Minister of Environment Rovana Plumb: "Of course Parliament's decision means the last word for us and we will observe it."); Informal interview of Prime Minister Ponta, Realitatea TV, dated Oct. 19, 2014 (Exh. C-416) at 5 (Prime Minister Ponta: "The Parliament rejected the law, so the exploitation will not be made.").

¹³⁹² See *supra* § IX.E (discussing State's unjust enrichment).

¹³⁹³ See *supra* § IX.B.1.

¹³⁹⁴ See *supra* § IX.B.2.

- c) Rather than issue the environmental permit in accordance with law as it should have done given the Government's repeated confirmations that the Project met the standards for permitting, the Government convened pointless and pretextual TAC meetings in April and July 2014 purporting to address technical issues raised by Parliament, which, however, led nowhere as the Ministry of Environment confirmed at the last TAC meeting held, in April 2015.¹³⁹⁵
- d) The State through NAMR refused to act on RMGC's Bucium exploitation license applications in clear violation of law and in violation of Gabriel's legitimate expectations having invested years and millions of dollars developing the Bucium properties and demonstrating their feasibility for exploitation and very significant value.¹³⁹⁶

685. Since the filing of this arbitration, the State has taken even more brazen actions that are completely incompatible with Gabriel's rights and with the very notion of the Project. Most notably:

- a) In issuing the 2015 LHM, the Ministry of Culture failed to correct and indeed compounded the acknowledged errors in the 2010 LHM by arbitrarily defining and expanding historical monuments within the Project footprint in complete disregard of the numerous archaeological discharge decisions previously issued by the Ministry that allowed mining in these same areas.¹³⁹⁷
- b) The Government's application to turn the entire area of Roșia Montană into a UNESCO World Heritage Site was and remains an express acknowledgement that the Government has rejected the Project and has renounced all of RMGC's acquired rights, as was its sponsorship of a bill to impose a moratorium on the use of cyanide in mining projects.¹³⁹⁸

¹³⁹⁵ *See supra* § IX.A.

¹³⁹⁶ *See supra* § IX.B.3.

¹³⁹⁷ *See supra* § IX.D.1.

¹³⁹⁸ *See supra* §§ IX.D.2-3.

- c) Without any plausible basis in fact, the State also abused its authority by making RMGC the subject of a criminal money laundering and tax evasion investigation one week after the Special Commission issued its Report and recommended rejection of the Draft Law and after Gabriel had warned of its intention to commence arbitration were the Project to be rejected.¹³⁹⁹ Reflecting the pretextual, arbitrary, and retaliatory nature of the decision to make RMGC a subject of this investigation, the State kept the investigative hammer cocked and did nothing to pursue it against RMGC until Gabriel commenced this arbitration. Soon thereafter, the State pulled the trigger and unleashed a scorched-earth investigation to extract documents and information from and harass RMGC and its employees and suppliers. The initial and redone VAT Assessments are equally baseless and retaliatory; in its most recent incarnation, the VAT Assessment expressly relies on statements from known Project opponents and is plainly directed at trying to manufacture defenses for the State in this arbitration.¹⁴⁰⁰

686. The foregoing course of conduct by Romania, beginning in August 2011 cumulatively and over time egregiously violated the State's obligation under the BITs to afford Gabriel's investments fair and equitable treatment.

687. It displayed a complete disregard for and ultimately an overt renunciation of Gabriel's rights and legitimate expectations. Romania flagrantly disregarded and renounced those rights, without transparency, by abuse of power, through coercive renegotiation, and without due process. Romania disregarded the legal framework upon which Gabriel relied in making its investments, it abandoned the administrative process and legal standards that Gabriel reasonably expected were applicable, and the Government entirely disregarded and even revoked in effect its own prior decisions that established the basis and reasons for Gabriel's investments.

688. Even after Gabriel submitted to the coercive and unlawful demands of the Government for new economic terms for the investment, the Prime Minister together with the co-leader of his ruling coalition publicly advocated for Parliament to reject the Draft Law and,

¹³⁹⁹ See *supra* § IX.C.1.

¹⁴⁰⁰ See *supra* § IX.C.3.

thereafter, the Government ensured the renunciation of the Project. Notwithstanding that the Tribunal need not find that the State's conduct displayed bad faith in order to find that it has denied Gabriel's investment fair and equitable treatment, the record in this case reveals a startling lack of good faith.

XI. ROMANIA FAILED TO PROVIDE FULL PROTECTION AND SECURITY

689. The obligation to provide full protection and security refers to the general obligation of the host State of a foreign investment to enforce its laws and make available appropriate legal remedies to redress harms in a reasonable manner. The historical origins of the standard show that it always has been centrally focused on the host State's obligation to provide legal security for foreign persons as well as their property.

690. As detailed below, Romania's treatment of Gabriel's investments was a violation of Romania's obligation to provide full protection and security to Gabriel's investments as set forth both in the Canada-Romania BIT and in the UK-Romania BIT.

691. Romania's cumulative treatment of Gabriel's investment constituted a violation of Romania's obligation to provide full protection and security which had the effect of depriving Gabriel of the value of its investments entirely, as the State (i) coercively demanded renegotiation of the economic terms of the agreements with Gabriel, depriving Gabriel of the security of its contractual legal rights; (ii) failed to apply the legal and regulatory framework to permitting decisions for the Project, deliberately depriving Gabriel's investments of the protection and security of the law in an attempt to shield the State from liability, and leaving Gabriel's and RMGC's legal rights to be honored or not as a matter of political whim; and (iii) refusing to issue administrative decisions in regard to either the environmental permit for the Project or the Bucium exploitation license applications, thus depriving Gabriel of any administrative act to challenge legally.

A. The Obligation to Accord Full Protection and Security

1. The Terms of the BITs

692. Article 2 of the UK-Romania BIT provides that “[i]nvestments of nationals or companies of each Contracting Party shall at all times... enjoy full protection and security in the territory of the other Contracting Party.”¹⁴⁰¹

693. Article II of the Canada-Romania BIT provides that “[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including... full protection and security,” and that “[t]he concept[] of... ‘full protection and security’... do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”¹⁴⁰²

694. Annex D of the Canada-Romania BIT provides further that “‘full protection and security’ requires the level of police protection required under the customary international law minimum standard of treatment of aliens.”¹⁴⁰³

2. Full Protection and Security Extends to Legal Protection and Security for All Covered Investments

695. The obligation to accord full protection and security requires the State to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments; in that sense, it is said to be a standard of due diligence. As Dolzer and Stevens have described, “the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment.”¹⁴⁰⁴

696. Some investment treaty tribunals have emphasized that the obligation to provide full protection and security applies in respect of protection of investments from physical harm.

¹⁴⁰¹ UK-Romania BIT (Exh. C-3) Art. II.2.

¹⁴⁰² Canada-Romania BIT (Exh. C-1) Art. II (a) and (b).

¹⁴⁰³ Canada-Romania BIT (Exh. C-1) Annex D.

¹⁴⁰⁴ RUDOLF DOLZER AND MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1995) (CL-111) at 61.

For example, in *Saluka v Czech Republic*, the Tribunal said the standard applies “essentially when the foreign investment has been affected by civil strife and physical violence.”¹⁴⁰⁵

697. Other tribunals, however, have held that while the standard certainly includes the obligation to provide police protection, it relates broadly to the State’s obligation to provide protection and security to investments through the enforcement of laws and by maintaining and making available a legal system capable of providing adequate remedies against harms more generally.¹⁴⁰⁶

698. These tribunals focus on the fact that a good faith interpretation of the ordinary meaning of the treaty terms does not support the conclusion that the obligation is limited to protection against physical harm. For example, in *Vivendi II v. Argentina*, the tribunal held:

[T]he text of Article 5(1) does not limit the obligation to providing reasonable protection and security from ‘physical interferences’... If the parties to the BIT had intended to limit the obligation to ‘physical interferences’, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security.¹⁴⁰⁷

699. Similarly, in *Azurix v Argentina* the tribunal held that “when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”¹⁴⁰⁸ The *Biwater Gauff v Tanzania* tribunal elaborated that “when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of ‘full security’

¹⁴⁰⁵ *Saluka v. Czech Republic* (CL-97) ¶ 483.

¹⁴⁰⁶ CHRISTOPH SCHREUER, *Full Protection and Security*, J. INT’L DISP. SETTLEMENT (2010) (CL-112) at 1 (“[m]ore recently tribunals have found that provisions of this kind also guaranteed legal security enabling the investor to pursue its rights effectively.”).

¹⁴⁰⁷ *Vivendi v. Argentina II* (CL-113) ¶ 7.4.15. See also *id.* ¶ 7.4.16 (finding that interpreting the standard to guarantee legal and economic security “is consistent with the decisions of recent international tribunals”).

¹⁴⁰⁸ *Azurix v. Argentina* (CL-85) ¶ 408.

only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”¹⁴⁰⁹

700. Some tribunals have noted in addition that in the context of a treaty that defines investments as including intangible property, it is incompatible to limit protection and security only against physical harms. As the *Siemens v. Argentina* tribunal reasoned, “[i]t is difficult to understand how the physical security of an intangible asset would be achieved.”¹⁴¹⁰ The *National Grid v. Argentina* tribunal also held that where investment was “broadly defined to include intangible assets,” there was “no rationale for limiting the application of a substantive protection of the Treaty to . . . physical assets.”¹⁴¹¹

701. Consistent with that observation, in *CSOB v. Slovakia*, where the investor had extended a loan to a Slovak state entity (SI) whose losses were to be covered by Slovakia so as to enable SI to repay the loan, the Tribunal had no doubts that the investor’s rights arising from this arrangement were covered by the Czech-Slovak BIT’s provision on full protection and security. The Tribunal said:

The Slovak Republic’s denial of CSOB’s title to request from the Slovak Republic that SI’s losses are covered would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic’s commitment to let CSOB ‘enjoy full protection and security’ as stated in Article 2(2) BIT¹⁴¹²

¹⁴⁰⁹ *Bivater v. Tanzania* (CL-106) ¶ 729. See also *id.* ¶ 730 (the full protection and security standard is not “limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself”).

¹⁴¹⁰ *Siemens v. Argentina* (CL-102) ¶ 303. While the provision considered by the tribunal in *Siemens* refers to “full protection and legal security,” the tribunal made its observation about intangible assets before considering the impact of the term “legal security” on its analysis in that case. In that case the tribunal concluded that the initiation of renegotiations for the sole purpose of reducing costs for the host State, unsupported by any declaration of public interest, affected the legal security of *Siemens* investment. *Id.* ¶ 308.

¹⁴¹¹ *National Grid v. Argentina* (CL-105) ¶ 187. In that case, the tribunal found that changes introduced in the applicable regulatory framework governing the investment, which effectively dismantled that framework, and the uncertainty generated thereby for the claimant’s investment were contrary to the State’s obligation to accord full protection and security. *Id.* ¶ 189.

¹⁴¹² *Československa Obchodní Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award dated Dec. 29, 2004 (CL-115) (“*CSOB v. Slovak Republic*”) ¶ 170.

702. In *CME v. Czech Republic*, the tribunal found that the State had breached the obligation to provide full protection and security where the decision of a regulatory authority (the Media Council) had created a legal situation that enabled the investor's local partner to terminate the contract on which the investment depended. Referring to the obligation to accord full protection and security, the Tribunal held:

The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic.... The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.¹⁴¹³

703. While the terms of the Canada-Romania BIT provide that the obligation to provide "full protection and security" ... do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens,"¹⁴¹⁴ the conclusion that the obligation extends to legal protection and security and is not limited to providing protection and security against physical harm remains valid. The provision in Annex D of the Canada-Romania BIT that "full protection and security" requires the level of police protection required under the customary international law minimum standard of treatment of aliens"¹⁴¹⁵ does not detract from that conclusion. While clarifying that the obligation requires a certain level of police protection, Annex D is not reasonably read as signaling a level of treaty protection that is less than required as a matter of the customary international law minimum standard of treatment of aliens.

704. As recently rigorously demonstrated by Professor George Foster in a detailed monograph analyzing the origins of the full protection and security obligation,¹⁴¹⁶ the customary

¹⁴¹³ *CME v. Czech Republic I* (CL-116) ¶ 613. See also *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated June 1, 2009 (CL-108) ("*Siag v. Egypt*") ¶ 448 (treaty claim based on the guarantee of "full protection in the territory of the other Contracting Party" applied in the context of an expropriation of the claimant's investment by executive resolutions contrary to repeated court rulings that the expropriation was illegal).

¹⁴¹⁴ Canada-Romania BIT (Exh. C-1) Art. II (b).

¹⁴¹⁵ Canada-Romania BIT (Exh. C-1) Annex D.

¹⁴¹⁶ GEORGE FOSTER, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT J. TRANSNAT'L L. 1095 (2012) ("FOSTER") (CL-110).

international law minimum standard of treatment includes an obligation to provide protection and security for foreigners' persons and property not only in relation to physical harm, but more generally and specifically including legal protection against harm to persons and property. As Foster summarizes the customary international law standard:

Protection and security obliges the host state to act with due diligence as reasonably necessary to protect foreigners' persons and property, as well as to possess and make available an adequate *legal system*, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation.¹⁴¹⁷

705. As such, the standard is distinct, but overlaps with the customary obligation to provide fair and equitable treatment, which by contrast “concerns the manner in which the state treats the investment when interacting with it, requiring that the state act reasonably and in good faith.”¹⁴¹⁸ Conduct that can violate both standards thus includes a denial of justice or an arbitrary application of the law.¹⁴¹⁹

706. By tracing commentary, state practice, and *opinio juris*, Foster demonstrates that the customary obligation to exercise reasonable diligence to provide protection and security was never limited exclusively to police protection in relation to physical harms, but also included the exercise of reasonable due diligence to ensure that legal protection and security was provided against economic losses.¹⁴²⁰ Among the several notable examples cited is the claim of the United States before the International Court of Justice in the *ELSI* case in which the United States presented claims against Italy on behalf of the U.S. company Raytheon under the U.S.-Italy FCN Treaty, which provided that nationals of each State would receive “the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.”¹⁴²¹ The United States claimed that the Italian courts' failure to decide a legal petition sufficiently promptly was a breach of the full protection and security obligation as it was a denial of “procedural justice,” resulting from the

¹⁴¹⁷ FOSTER (CL-110) at 1103, 1137 (emphasis in original).

¹⁴¹⁸ *Id.*

¹⁴¹⁹ *Id.*

¹⁴²⁰ FOSTER (CL-110) at 1116-1149.

¹⁴²¹ FOSTER (CL-110) at 1143 (*citing* US-Italy FCN Treaty).

lack of an adequate remedial mechanism.¹⁴²² Although the Court ruled against the United States on this claim on the ground that the sixteen month delay at issue was not sufficiently grave to be contrary to the international standard of treatment, the treatment of the claim shows that the United States argued and the ICJ accepted that the obligation to provide full protection and security includes legal security.¹⁴²³

707. Thus, upon analysis, the UK-Romania BIT and the Canada-Romania BIT contain the same standard and thus the same obligation for Romania to provide full protection and security to covered “investments” or “returns of investors,” as they case may be, and neither treaty demands more or less from the Contracting States Parties.¹⁴²⁴

B. Romania Failed to Accord Full Protection and Security to Gabriel’s Investments

708. Through its acts and omissions set out in detail above, Romania failed to provide physical or legal protection and security to Gabriel’s investments and therefore violated its obligation under the BITs to accord full protection and security.

709. As discussed above, the obligation to provide full protection and security under investment treaties unquestionably requires the State to protect and secure investments from physical harm. Here so-called “civil society” activists inundated [REDACTED] Government officials and members of Parliament, with threats of violence and even death, both against them and their families.¹⁴²⁵ [REDACTED] members of Parliament and Government officials were legitimately afraid of being physically

¹⁴²² FOSTER (CL-110) at 1143 (*citing* Elettronica Sicula SpA (ELSI) (US v It.) ¶ 110, 1989 ICJ 15).

¹⁴²³ *See also* FOSTER (CL-110) at 1144.

¹⁴²⁴ In the event, however, that the Tribunal considers the full protection and security protections in the Canada-Romania BIT to be limited in substance, Gabriel Canada is entitled under the MFN treatment provision in Article III(1) of the Canada-Romania BIT to the more expansive protections contained in Romania’s treaties with third States, including the UK- Romania BIT. *See supra* ¶ 677. In any event, Romania’s obligations to Gabriel Jersey under the UK BIT are in no way diminished by Romania’s agreement with Canada regarding the standard of treatment to be accorded to investors such as Gabriel Canada.

¹⁴²⁵ *See supra* §§ VIII.B.1, VIII.B.4; [REDACTED]

assaulted because of their affiliation with the Project or their perceived support for it.¹⁴²⁶ Indeed, after the Minister of Culture, Daniel Barbu, testified to the Special Commission endorsing the cultural benefits of the Project, activists with the so-called “Save Roşia Montană” group accosted him during a public event, surrounded his car to prevent him from leaving, and shattered the rear window of his car with rocks.¹⁴²⁷

710. Although Government officials criticized the militant activists for “acting like neo-fascists” and described them as “an extremist group that tries to create a violent provocation,”¹⁴²⁸ the State did not protect Gabriel or its investment from these violent provocations. Instead, through a disregard of legal process, the Government created an environment that fostered and focused the ability of activists not only to organize and orchestrate street protests, but also to employ aggressive, threatening, and sometimes violent tactics against the Project with seeming impunity.

711. As discussed above, the State abandoned the administrative process and legal standards applicable to permitting the Project, which provided ample but regulated opportunity

¹⁴²⁶ [REDACTED]

See also, e.g., Gabriela Firea, terrorized by the anti-Rosia Montana protesters: threats with accidents, throat stabbing, acid solutions thrown on her face, Newstiriromania.ro, dated Sept. 25, 2013 (Exh. C-1443) (Senator Gabriela Firea: “I receive hundreds of such messages. Most of the threats referred to accidents to me or my family, throat stabbing, face mutilation, solutions thrown on the face and body.”); *Gabriela Vranceanu Firea, threatened with DEATH because of the Rosia Montana Project*, Romaniatv.net, dated Sept. 25, 2013 (Exh. C-1444); *MPs members of the Rosia Montana Committee, threatened with death. “They said they will cut my throat”*, Antena3, dated Sept. 30, 2013 (Exh. C-1522) (reporting death threats against Special Commission members); *Death threats to MPs from the Rosia Montana Commission*, Zaire.com, dated Sept. 30, 2013 (Exh. C-1523) (same).

¹⁴²⁷ [REDACTED] *See also, e.g., Minister of Culture, Daniel Barbu, attacked with stones in downtown Bucharest by anti-Roşia Montană demonstrators. Minister’s car vandalized*, Gandul.info, dated Oct. 17, 2013 (Exh. C-1524); Video of protesters against Minister of Culture Barbu dated Oct. 17, 2013 (Exh. C-1525); *Incident at Club A. The Culture Minister’s car vandalized*, Youtube.com, dated Oct. 17, 2013 (Exh. C-1526).

¹⁴²⁸ VIDEO *Daniel Barbu was booed by the anti-RMGC protestors in the Bucharest’s Old City Center. The Minister claims they vandalized his car, the protestors denounce the appearance of instigators*, Hotnews, dated Oct. 17, 2013 (Exh. C-1527) at 1 (Minister of Culture Daniel Barbu rebuking the protesters for “acting like neo-fascists”); *Ponta says he has nothing against peaceful protests: When you block a town or the country, WE INTERVENE. There is an EXTREMIST GROUP in Câmpeni inciting to violence*, Mediafax, dated Oct. 19, 2013 (Exh. C-1528) at 2 (Prime Minister Victor Ponta describing the protesters as “an extremist group that tries to create a violent provocation”).

for public comment, in favor of the essentially standardless political forum of the popularly elected Parliament to judge the future of the Project. The Government's feckless decision to abdicate to Parliament the Government's responsibility to decide whether to implement or effectively terminate the Project¹⁴²⁹ was not only an abuse of power, but the hearings in Parliament set up by the Government as determinative of the future of the Project, served as a call to arms for activists and extremists, who orchestrated demonstrations and protests to influence the politicized process. The Prime Minister's very public statements opposing the Project in his capacity as a member of Parliament almost immediately after the Government endorsed and sent the Draft Law to Parliament certainly emboldened Project opponents.¹⁴³⁰ Government and parliamentary leaders then pointed to the protests and demonstrations as one of the purported bases for urging Parliament to reject the Project swiftly despite its confirmed merits and benefits, and the Special Commission invited demonstrators off the street to the hearings and allowed them to make lengthy and nationally televised speeches, thus further fomenting opposition to and antipathy towards the Project.¹⁴³¹ In so doing, the State encouraged and rewarded aggressive tactics against the Project which constituted an intentional failure and a lack of due diligence to protect Gabriel's investments.

712. In addition, the State failed in its obligation to provide legal protection and security to Gabriel's investment. Among other things:

¹⁴²⁹ See *supra* § VIII (discussing the Government's abandonment of the administrative permitting process established by law by which the environmental permit was to be issued by Government Decision based on the specialized technical decision taken by the Ministry of Environment, and insistence that permitting instead be determined by Parliament's decision on the Draft Law).

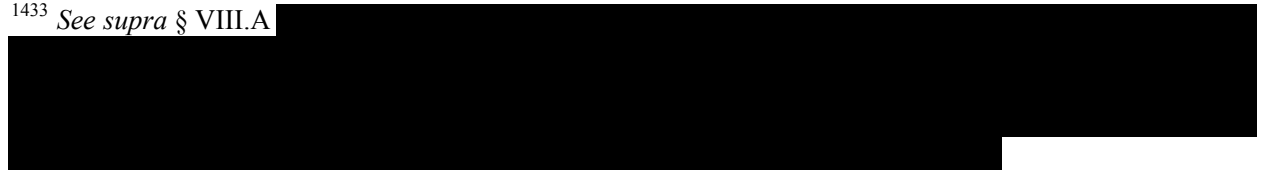
¹⁴³⁰ See *supra* VIII.B.1; *Ponta: "I will vote against Roșia Montană project,"* Adevarul.ro, dated Aug. 31, 2013 (Exh. C-789).

¹⁴³¹ See *supra* § VIII.B.1 (discussing the statements of Senator Antonescu and Prime Minister Ponta calling for the swift rejection of the Draft Law and with the Project not for technical or legal reasons, but as a result of the street protests in Bucharest). See also *VIDEO Crin Antonescu's surprise-statement: The Roșia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832); *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793); *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 1.

- a) The State failed to honor and sought coercively to renegotiate the economic terms of its agreements with Gabriel and RMGC depriving Gabriel of the legal stability of those agreements upon which it had relied and invested.¹⁴³²
- b) The State refused to take administrative decisions required by law particularly (but not only) in respect of RMGC's application for the environmental permit. The State's abusive failure to act was a denial of procedural justice that frustrated Gabriel's resort to remedial mechanisms in the absence of an administrative decision to contest, and thus left Gabriel vulnerable to the State's ransom demands.
- c) The State's refusal to issue a decision on permitting was acknowledged as being motivated by a desire to avoid legal accountability and responsibility in favor of a political decision of Parliament. While administrative decisions to issue or deny permits are subject to administrative challenge, decisions of Parliament to enact or reject legislation may only be challenged on limited grounds not applicable to RMGC. The Government acknowledged that its reasons for seeking parliamentary action on the Project included avoiding administrative challenge.¹⁴³³ The Prime Minister himself added that he wanted the decision to be made by Parliament precisely to avoid liability.¹⁴³⁴

¹⁴³² See *supra* § VII A. 1 (discussing the Government's unlawful demands in August 2011 to increase the State's financial interest in the Project as a condition to permitting); *Bîrsan* § III.C (discussing the Romanian law and License provisions establishing the legal stability of the License).

¹⁴³³ See *supra* § VIII.A



¹⁴³⁴ *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 1, 3 (Prime Minister Victor Ponta: "The most critical thing for me was that this vote be given by the Parliament, as there will obviously be lawsuits, and I do not want that the Government or the ministers, we, be held accountable for contracts and commitments undertaken by [President] Băsescu and the previous governments . . . We will have lawsuits nevertheless, but, I repeat, I do not want that I personally, or other ministers, be accused of undermining the national economy."). See also *Ponta: I sent the Roșia Montană Project to the Parliament so that we cannot be sued*, STIRI.TVR.RO, Sept. 5, 2013 (Exh. C-460) (Prime Minister Ponta: "That's the situation and this is why, had I done absolutely nothing, I would have then had to pay I don't know how many billions in compensation to the company in question. I don't want to pay from your money, from the taxpayer's

- d) The State refused to take any administrative decision in regard to RMGC's applications for exploitation licenses for the Bucium mineral deposits thus further frustrating RMGC's and thus Gabriel's resort to adequate legal recourse against the State's tacit rejection and repudiation of RMGC's and thus Gabriel's legal rights in relation to Bucium.¹⁴³⁵
- e) The State issued the 2010 LHM that arbitrarily amended the 2004 LHM on which Gabriel relied in making substantial investments. Although the State repeatedly admitted the 2010 LHM contained material "errors," it refused to correct those errors to align the LHM with the results of the archaeological research and with its own archaeological discharge decisions, as it was required to do by law.¹⁴³⁶ The State also refused to take action required by law to update the 2010 LHM to reflect the issuance of the archaeological discharge certificate for Cârnic.¹⁴³⁷ Instead, the State compounded the errors and enacted the 2015 LHM, which was clearly incompatible with and intended to deprive Gabriel of its License rights, and then argued in court that its own 2004 LHM was an "abuse."¹⁴³⁸ The State's refusal to comply with administrative process and applicable law and refusal to correct admitted errors enabled and encouraged anti-Protect activists to submit numerous judicial actions based on the erroneous descriptions contained in the

money, compensation for contracts concluded starting with 1998. I want the decision to be made by the Parliament.").

¹⁴³⁵ See *supra* § IX.B.3 (discussing the State's refusal to act, now for almost 10 years, on RMGC's Bucium exploitation license applications in blatant disregard of RMGC's acquired rights); Bîrsan § V.C; [REDACTED]

¹⁴³⁶ See *supra* § VI.A.2 (discussing the significant, arbitrary changes in the 2010 LHM which the State repeatedly acknowledged were errors requiring correction, but nonetheless refused to correct).

¹⁴³⁷ See *supra* §§ VI.B.2, VII.A.1 (discussing the Ministry of Culture's refusal to update the 2010 LHM despite issuance of the archaeological discharge certificate for Cârnic, and Minister of Culture Kelemen Hunor's statement that no change would be made until the State's financial interest was "clarified"); Schiau § II.4, ¶¶ 22, 79, 116-117.

¹⁴³⁸ See *supra* § IX.D.1 (discussing the State's overt and express intent to block the Project through the abusive and unlawful 2015 LHM).

2010 LHM seeking to annul local permits and local zoning decisions issued in anticipation of the Project by local State authorities.¹⁴³⁹

f)

[REDACTED]

g)

The State through ANAF has conducted retaliatory investigations of RMGC that lack any plausible grounding in fact or law following the commencement of this arbitration. [REDACTED]

¹⁴³⁹ See supra §§ III.E, VI.B.2, IX.D.1 (discussing local zoning decisions taken and the challenges brought by NGOs against those decisions and other administrative acts based on the 2010 LHM).

¹⁴⁴⁰ See supra § IX.C.3; [REDACTED]

¹⁴⁴¹ See supra § IX.C.3; Tănase II ¶¶ 243-245 [REDACTED]

713. Thus, the State's actions, including through its administrative and criminal bodies, have withdrawn and withheld legal protections from Gabriel's investment in violation of its obligation to provide full protection and security under the BITs. These wrongful failures of protection have cumulatively caused the complete deprivation of the use, value, and enjoyment of Gabriel's investments.

XII. UNREASONABLE OR DISCRIMINATORY MEASURES

A. The Non-Impairment Standard

714. The obligation not to impair investments by unreasonable or discriminatory measures, such as the one contained in the UK-Romania BIT, as UNCTAD has observed, "has its origins in the 1959 Abs-Shawcross Draft Convention on Investments Abroad and is repeated in the 1967 OECD Draft Convention on the Protection of Foreign Property. Both texts set out a general FET [fair and equitable treatment] standard and additionally prohibit impairment of property through unreasonable or discriminatory measures."¹⁴⁴³

715. Indeed, the principle that a State must not impair the legal rights of aliens by unreasonable or arbitrary measures is established in custom as a principle of international law. As described by A. Verdross in his Hague Academy lecture in 1931, "[t]he principle of respect for the acquired rights of aliens is... part of the general law of nations," and thus "[a] State ... violates the law of nations if it arbitrarily impairs the acquired rights of foreigners, either by depriving them of their private rights without sufficient reason, or by applying a retroactive law

¹⁴⁴² See *supra* § IX.C.3.

¹⁴⁴³ UNCTAD Series on Issues in International Investment Agreements II, *Fair and Equitable Treatment* (2012) (CL-191) at 31, 37, n.13.

to them. Even if such acts are not directed against persons on account of their status as foreigners, but are based on general laws applicable to nationals.”¹⁴⁴⁴

716. Similarly, with regard to discriminatory measures, the obligation set forth in the Canada-Romania BIT for the Contracting Parties to grant covered investments treatment that is no less favorable than the treatment provided to investments of its own investors in like circumstances, sometimes referred to as “national treatment,” is analogous insofar as it prohibits discriminatory treatment.¹⁴⁴⁵

717. As detailed below, Romania impaired Gabriel’s investments by unreasonable or discriminatory measures in many of the same ways that it denied fair and equitable treatment and full protection and security. Here too, Romania’s unreasonable and in some contexts also discriminatory measures over time impaired Gabriel’s investments, depriving them entirely of any value.

1. The Terms of the BITs

718. Article 2(2) of the UK –Romania BIT provides that “[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.”¹⁴⁴⁶

719. Article III(3) of the Canada-Romania BIT provides that “[e]ach Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments.”¹⁴⁴⁷

¹⁴⁴⁴ A. VERDROSS, *Les Règles Internationales Concernant Le Traitement Des Etrangers*, 37 RECUEIL DES COURS 325, 358-359 (1931) (CL-192) (counsel translation).

¹⁴⁴⁵ In addition, pursuant to the MFN treatment provision in Article III(1) of the Canada-Romania BIT, Gabriel Canada is entitled to the benefits of the non-impairment obligation in the UK-Romania BIT and to any other more favorable substantive guarantees contained in Romania’s BITs with third party States. *See supra* ¶ 677.

¹⁴⁴⁶ UK-Romania BIT (Exh. C-3) Art. 2(2).

¹⁴⁴⁷ Canada-Romania BIT (Exh. C-1) Art. III(3).

2. Unreasonable Measures

720. Measures, which include both acts and omissions,¹⁴⁴⁸ that impair the management, maintenance, use, enjoyment or disposal of investments may result in a significant or even total deprivation in the value of an investment. When those measures are unreasonable or discriminatory, they violate this standard of treatment.

721. In *Saluka v. Czech Republic*, the tribunal observed that “[t]he standard of ‘reasonableness’ has no different meaning in this context than in the context of the ‘fair and equitable treatment’ standard with which it is associated; and the same is true with regard to the standard of ‘non-discrimination.’ The standard of ‘reasonableness’ therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor.”¹⁴⁴⁹

722. Many tribunals have recognized that measures are “unreasonable” within the meaning of such treaty provisions when they are “arbitrary” or “unjustified,” and that these terms may be used interchangeably.¹⁴⁵⁰ In that regard, the decision of the International Court of Justice in the *ELSI* case provides relevant guidance:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.¹⁴⁵¹

¹⁴⁴⁸ *Saluka v. Czech Republic* (CL-97) ¶¶ 458-459 (“[t]he term ‘measures’ covers any action or omission of the Czech Republic”).

¹⁴⁴⁹ *Saluka v. Czech Republic* (CL-97) ¶ 460. See also *Rumeli v. Kazakhstan* (CL-140) ¶¶ 679-680.

¹⁴⁵⁰ CHRISTOPH SCHREUER, *Protection against Arbitrary or Discriminatory Measures, in THE FUTURE OF INVESTMENT ARBITRATION* (2009) (CL-98) at 183; URSULA KRIEBAUM, *Arbitrary/Unreasonable or Discriminatory Measures, in INTERNATIONAL INVESTMENT LAW* (2015) (CL-99) at 792-793 (“Treaties contain three different wordings as far as the ‘arbitrary’ element is concerned: ‘arbitrary’, ‘unreasonable’ and ‘unjustifiable’. Tribunals seem to use these terms synonymously.”).

¹⁴⁵¹ *Elettronica Sicula S.p.A. (ELSI) (US v Italy)*, Judgment dated July 20, 1989, reprinted in 1989 ICJ REP. 15, (CL-100) ¶ 128. See also *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award dated Oct. 12, 2005 (CL-101) ¶ 176 (“The BIT gives no definition of ... the notion ‘arbitrary’ ... reference can again be made to the decision of the ICJ in the *ELSI* case.”); *Siemens v. Argentina* (CL-102) ¶ 318 (referring in this context to *ELSI* case and its emphasis on the willful disregard of law).

Some investment tribunals have defined “arbitrary” in this context as follows:

- (i) a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- (iii) a measure taken for reasons that are different from those put forward by the decision maker; or
- (iv) a measure taken in willful disregard of due process and proper procedure.¹⁴⁵²

Other tribunals have underscored that a measure is unreasonable or arbitrary if it is something done “capriciously,” or “without an adequate determining principle.”¹⁴⁵³

723. Thus, in *Eureko v. Poland* the tribunal considered Poland’s conduct unreasonable where it refused to honor its contractual commitment “for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.”¹⁴⁵⁴

724. Similarly, in *Siemens v. Argentina*, the tribunal found that the State’s failure to grant an authorization to operate an immigration control system was unreasonable where the State’s failure frustrated performance of the investor’s contract without a rational legal basis after the investment was made and the system was operational.¹⁴⁵⁵

725. It is not enough, however, for a State to show it was motivated by rational policy, as the *Micula v. Romania* tribunal elaborated:

... for a state’s conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state’s acts have been appropriately tailored to the

¹⁴⁵² E.g., *EDF v. Romania* (CL-103) ¶ 303; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, Award dated June 7, 2012 (CL-104) ¶ 157.

¹⁴⁵³ *National Grid v. Argentina* (CL-105) ¶ 197.

¹⁴⁵⁴ *Eureko v. Poland* (CL-89) ¶ 233.

¹⁴⁵⁵ *Siemens v. Argentina* (CL-102) ¶ 319.

pursuit of that rational policy with due regard for the consequences imposed on investors.¹⁴⁵⁶

The tribunal in *AES Summit v. Hungary* observed to the same effect that:

A rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable... there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it.¹⁴⁵⁷

726. Measures that deny due process will be considered unreasonable, as shown in *Azurix v. Argentina*, where, *inter alia*, public authorities calling for the non-payment of claimant's bills even before the regulatory authority had made a decision and denying claimant access to the information on the basis of which it was being sanctioned, were found to violate the standard.¹⁴⁵⁸

727. In *Biwater v. Tanzania* where the state prematurely (and inaccurately) announced the termination of the investor's contract with the state, thereby undermining the investor's ability to continue its operations, the tribunal concluded that the State's conduct was unreasonable and

[could not] be justified *ex post facto* by the need to inform the public of an important decision... [The] press conference exceeded the bounds of normal information, included severe criticisms of BGT which were at least in part clearly motivated by political considerations. Moreover, the statements at the press conference obviously impaired the management of BGT's investment....¹⁴⁵⁹

728. Similarly, in *Saluka v. Czech Republic*, the tribunal found that the State violated its non-impairment obligation by "unreasonably" making negative public statements to harm the claimant's investment (in that case making statements about a bank that easily could cause depositors to begin to make withdrawals), and where there were press articles reporting

¹⁴⁵⁶ *Micula v. Romania* (CL-174) ¶ 525.

¹⁴⁵⁷ *AES Summit Generation Ltd. and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated Sept. 23, 2010 (CL-193) ¶ 10.3.9.

¹⁴⁵⁸ *Azurix v. Argentina* (CL-85) ¶ 393.

¹⁴⁵⁹ *Biwater v. Tanzania* (CL-106) ¶ 696. *See also id.* ¶ 696 (public statements that harmed the investment were motivated by political considerations, were an abuse of public authority, and thus were found to be unreasonable measures).

confidential information that was not publicly available and “there is even reason to believe that certain information was deliberately leaked to the press by ‘sources’ in the CNB and the Ministry of Finance.”¹⁴⁶⁰ The *Saluka* tribunal also considered measures were unreasonable where “[t]here [wa]s some indication that the Government ‘sources’ deliberately engineered the circulation of negative information about IPB in order to precipitate IPB’s failure.”¹⁴⁶¹

729. In *Lemire v. Ukraine*, the tribunal emphasized that although not every violation of domestic law necessarily translated into an arbitrary or discriminatory measure under international law, a blatant disregard of a law or rule will do so.¹⁴⁶²

730. As observed by the *Siag v. Egypt* tribunal, given that the phrase “unreasonable or discriminatory measures” uses the disjunctive “or” instead of the conjunctive “and,” either “unreasonable” or “discriminatory” measures may violate this provision of the UK BIT.¹⁴⁶³

3. Discriminatory Measures

731. There is no requirement to prove discriminatory intent in order to conclude that a State’s measures are discriminatory.¹⁴⁶⁴ As the tribunal in *Biwater v. Tanzania* observed, a measure is discriminatory when it provides “the foreign investment with a treatment less favorable than domestic investment.”¹⁴⁶⁵ The tribunal in *Plama v. Bulgaria* explained that discriminatory treatment “entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds,”¹⁴⁶⁶ and the *Saluka v. Czech Republic*

¹⁴⁶⁰ *Saluka v. Czech Republic* (CL-97) ¶¶ 465, 479.

¹⁴⁶¹ *Saluka v. Czech Republic* (CL-97) ¶ 481.

¹⁴⁶² *Lemire v. Ukraine I* (CL-107) ¶ 385.

¹⁴⁶³ *Siag v. Egypt* (CL-108) ¶ 457.

¹⁴⁶⁴ *Electrabel S.A. v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated Nov. 30, 2012 (CL-109) ¶ 7.152 (“The Tribunal does not consider that ... there is a separate requirement to prove discriminatory intent by Hungary... or that evidence of discrimination based on nationality is required.”).

¹⁴⁶⁵ *Biwater v. Tanzania* (CL-106) ¶ 695 (citing *ELSI*, ¶ 128).

¹⁴⁶⁶ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated Aug. 27, 2008 (CL-177) ¶ 184.

tribunal noted that this standard “requires a rational justification of any differential treatment of a foreign investor.”¹⁴⁶⁷

732. Providing more favorable administrative treatment to domestic companies may constitute discriminatory measures in breach of this standard. In *Lemire v. Ukraine*, the tribunal found that the State’s decisions denying the investor radio licenses and awarding them to a competitor associated with the government constituted an arbitrary and discriminatory measure.¹⁴⁶⁸ Similarly, in *Saluka v. Czech Republic* the tribunal found that the State’s refusal to provide financial assistance to the bank owned by the foreign investor while providing such assistance to several State-owned banks was discriminatory conduct.¹⁴⁶⁹

733. Similarly, clauses on national treatment, such as Article III(3) of the Canada-Romania BIT, are meant to provide a level playing field between the foreign investor and the local company. As Dolzer and Schreuer explain, “the purpose of the clause is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.”¹⁴⁷⁰ Thus, in *Feldman v. Mexico*, the tribunal found that the State’s tax rebate system favored domestic companies over a foreign investor engaged in the same business.¹⁴⁷¹ As Newcombe and Paradell explain, “[f]rom a legal perspective, national treatment guarantees equality before the law and equal administration of the law (administrative equality) and equal protection of the law (formal equality).”¹⁴⁷²

¹⁴⁶⁷ *Saluka v. Czech Republic* (CL-97) ¶ 460.

¹⁴⁶⁸ *Lemire v. Ukraine I* (CL-107) ¶¶ 369, 419-421

¹⁴⁶⁹ *Saluka v. Czech Republic* (CL-97) ¶ 467.

¹⁴⁷⁰ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012) (CL-88) at 198.

¹⁴⁷¹ *Marvin Roy Feldman Karpas v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award dated Dec. 16, 2002 (“*Feldman v. Mexico*”) (CL-136) ¶ 170 (“In the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors in like circumstances.”).

¹⁴⁷² ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* (2009) (“NEWCOMBE & PARADELL”) (CL-143) § 4.6.

B. Romania's Unreasonable or Discriminatory Measures

734. Romania egregiously violated its obligation not to impair Gabriel's investment through unreasonable or discriminatory measures, and treated Gabriel's investments less favorably than Romanian investments in similar circumstances, such as those of State-owned CupruMin, which continues to operate the neighboring Roșia Poieni copper mine.

735. Romania's actions and omissions in respect of Gabriel's investments were so obviously taken in willful disregard of due process and proper procedure that there is no doubt that they were "unreasonable" under any standard. Among other things:

- a) The Government repeatedly refused to complete the EIA procedure and issue the environmental permit as required by law. The Ministry of Environment acknowledged at TAC meetings in November 2011, May 2013, and July 2013 that the technical review of the EIA Report and the Project was complete, and senior officials stated publicly and reaffirmed in testimony to Parliament that the legal requirements for permitting were met.¹⁴⁷³ Despite admitting its legal obligation to permit the Project, the Government nevertheless refused without legal basis to act and has not taken any decision on the environmental permit application that RMGC filed over 12 years ago.
- b) Having refused to take the administrative decision on the environmental permit required by law, the State through a continuous course of conduct blocked permitting, renounced its earlier agreements with Gabriel and RMGC in reliance upon which Gabriel had invested hundreds of millions of dollars, and coercively demanded in 2011 and again in 2013 a different financial arrangement to extract greater financial benefits for the State as a condition to permitting the Project. Specifically, the State held the crucial environmental hostage and blocked other

¹⁴⁷³ See *supra* §§ VII.A.3 (discussing completion of technical assessment in November 2011, but Ministry of Environment's failure to take decision on the environmental permit as required by law until after economic renegotiations demanded by the Government), VIII.A.3-5 (discussing Ministry of Environment's reconfirming the technical assessment was complete in May and July 2013, publishing draft conditions for the environmental permit, and endorsing Government Decision to approve Draft Law/Agreement and submit to Parliament), IX.B.1, IX.B.4 (discussing statements and testimony of Minister of Environment Plumb as well as other senior Government officials confirming the Project met all applicable standards to be permitted).

permitting decisions starting in August 2011 and indefinitely thereafter, and made clear that it would not permit the Project unless Gabriel agreed to increase the State's shareholding in RMGC and the royalty payable to the State under the License.¹⁴⁷⁴

- c) Senior officials including Romania's President, Traian Băsescu, and Prime Minister Emil Boc and Prime Minister Victor Ponta, among others, repeatedly exploited their authority to press the State's coercive demands for renegotiations and to underscore publicly that the State would not consider implementing the Project on the terms it agreed to previously with Gabriel as reflected in the RMGC Articles of Association and as set forth in the License.¹⁴⁷⁵ The politically motivated public statements of Romania's heads of State and Government and other officials damaged the Project, impaired Gabriel's legal rights as well as its legitimate expectations to have its investment assessed under the applicable legal standards, and impaired the market value of Gabriel's investments.
- d) The State abandoned the administrative process and legal standards applicable to permitting the Project under Romanian law and effectively called upon Parliament to decide whether the State would honor at all or instead effectively terminate its agreements with Gabriel and effectively abrogate Gabriel's acquired rights.¹⁴⁷⁶

¹⁴⁷⁴ See *supra* §§ VII.A.1 (explaining Government's abusive blocking of Project and refusing to take administrative decisions required by law, e.g. to issue environmental permit and to correct the errors in the 2010 LHM, in order to coerce Gabriel and RMGC to submit to demands for larger economic interest), VIII.A.1 (discussing Government's maintaining of its abusive position that Project would remain blocked and would not be permitted unless, among other things, revised economic terms were agreed).

¹⁴⁷⁵ See *supra generally* §§ VII-VIII (discussing public statements in 2011-2013 of, among others, Prime Minister Boc, President Băsescu, Minister of Environment Borbély, Minister of Culture Hunor, Prime Minister Ponta, and Minister Delegate Şova, all of whom repeatedly publicly stated that the Project would only be permitted, if at all, provided that Gabriel and RMGC acceded to economic renegotiation demands).

¹⁴⁷⁶ See *supra generally* § VIII.A-B (discussing statements made in the press, in meetings with RMGC, in TAC meetings, and in testimony and written answers to Parliament where Prime Minister Ponta, Minister Delegate Şova, Minister of Environment Plumb, and State Secretary Năstase make clear repeatedly that the Government refused to comply with administrative permitting process established by law and abdicated decision-making responsibility to Parliament to decide on enacting Draft Law as proxy for deciding on issuance of environmental permit and implementation of Project).

- e) After sending the Draft Law and Draft Agreement to Parliament to decide the fate of the Project, Prime Minister Ponta and his coalition leader, Senate President Antonescu, issued statements through the media urging Parliament to reject the Project with dispatch, not for any technical or legal reason, but for unabashedly “political” reasons.¹⁴⁷⁷
- f) After issuing archaeological discharge certificates and the 2004 LHM based on the recommendations of experts and the results of extensive archaeological research, the State arbitrarily issued the 2010 LHM and abusively refused to correct admitted errors in the 2010 LHM consistent with its discharge decisions as required by law.¹⁴⁷⁸ The State then issued the 2015 LHM, which lacked any legal or scientific basis and plainly disregarded both the discharge decisions previously issued (upon which Gabriel and RMGC relied), and RMGC’s legal rights under the License. The State also took the position in litigation that its own prior administrative acts – i.e. the 2004 LHM and, necessarily by extension, the archaeological discharge decisions it issued in relation to the Project area – were “an abuse,” although it never revoked those discharge decisions.¹⁴⁷⁹
- g) Although RMGC submitted its final resource and reserve calculations to NAMR in October 2006, the State failed to act for nearly seven years, without explanation or basis, on RMGC’s application to homologate the resources and reserves,

¹⁴⁷⁷ See *supra* § VIII.A.1. See also VIDEO Crin Antonescu’s surprise-statement: *The Roşia Montană project has to be rejected. One cannot govern according to the street, but it is impossible to govern ignoring the street*, Hotnews.ro, dated Sept. 9, 2013 (Exh. C-832); *Statements made by PM Victor Ponta*, Digi TV, dated Sept. 9, 2013 (Exh. C-793); *Interview of Prime Minister Victor Ponta*, B1TV, dated Sept. 9, 2013 (Exh. C-872) at 1.

¹⁴⁷⁸ See *supra* §§ III.B-C (discussing the extensive archaeological research conducted leading to issuance of archaeological discharge certificates and issuance of 2004 LHM consistent with those decisions and research results), VI.A.2 (discussing significant, arbitrary changes to 2004 LHM contained in 2010 LHM and State’s acknowledgment of errors in 2010 LHM but refusal to correct those errors).

¹⁴⁷⁹ See *supra* § IX.D.1 (discussing the State’s litigation position claiming 2004 LHM prepared “abusively” and needed to be challenged which as Professor Schiau explains was utterly without merit). See also generally Schiau §§ VI.B-C (discussing RMGC’s legal challenges against 2010 LHM and State’s litigation position).

issuing its approval, verifying and registering the resources and reserves for the Roșia Montană deposit only in March 2013.¹⁴⁸⁰

- h) The State failed to act at all on RMGC's exploitation license applications filed nearly a decade ago with respect to the Rodu Frasin and Tarnița deposits at Bucium despite RMGC's absolute and exclusive right to obtain such licenses under the Mining Law and the Bucium Exploration License.¹⁴⁸¹
- i) The State's refusal to take an administrative decision on the environmental permit application for over 12 years and its failure to act on RMGC's Bucium exploitation license applications for over a decade also have unjustly enriched the State. Having blocked the Project and Gabriel's development of the valuable Rodu Frasin and Tarnița deposits, the State may keep (without providing any compensation to Gabriel) hundreds of millions of dollars' worth of geological, engineering and mining data and designs developed by Gabriel in reliance on procedures and legal standards that the State blatantly disregarded.¹⁴⁸²
- j) Having rejected the Project unlawfully the State also is unjustly enriched by the wealth of knowledge and understanding of the area's cultural heritage obtained through the systemic research that was the largest in terms of scope and costs ever conducted in Romania and that was funded by Gabriel through RMGC, as well as

¹⁴⁸⁰ See *supra* § VIII.A.3 (discussing NAMR's issuance in March 2013 of long overdue 2013 Approval of Resources/Reserves verifying and registering resources and reserves for Project set out in Feasibility Study and Technical Documentation submitted in 2006).

¹⁴⁸¹ See *supra* § IX.B.3 (discussing the State's refusal to act, now for almost 10 years, on RMGC's Bucium exploitation license applications in blatant disregard of RMGC's acquired rights); Bîrsan § V.C; [REDACTED] See also Bucium License (Exh. C-397-C), Art. 3.1.4 [REDACTED]

¹⁴⁸² See *supra* § IX.E; [REDACTED]

from the significant restorations including to historic mining galleries, already conducted by RMGC in Roșia Montană.¹⁴⁸³

- k) The State also benefits unjustly from RMGC's donations to the mayoralty of Alba Iulia the newly built infrastructure constructed for the 22-hectare Recea residential neighborhood, developed by Gabriel through RMGC in reasonable expectation that RMGC's Project development rights would be treated in accordance with law.¹⁴⁸⁴

736. The State also clearly has provided less favorable treatment to Gabriel's investments than it has to State-owned mining operations. As discussed above, the State has permitted the heavily polluting State-owned copper mine at Roșia Poieni, which is adjacent to Roșia Montană, to continue to operate in clear violation of the EU Mining Waste Directive throughout this time and even despite the recent breach to its tailings facility.¹⁴⁸⁵ Thus, while the State has refused to issue an environmental permit for the Project despite acknowledging its environmentally sound design, meeting or surpassing requirements in Romanian and EU law and its compliance with applicable permitting requirements, it has authorized its own operations to perpetuate the environmental disaster next door at Roșia Poieni.

737. Moreover, when the Government announced its arbitrary and abusive 2015 LHM and published a map (on the Facebook page of the Minister of Culture) designating the entirety of Roșia Montană as a historical monument within a 2 kilometer radius, the State appeared to encroach upon the perimeter of the Roșia Poieni mine; the Government quickly made clear, however, that Roșia Poieni's operations could continue unaffected.¹⁴⁸⁶ The State's treatment of

¹⁴⁸³ See *supra* § IX.E. See also III.B (discussing scope of archaeological research undertaken through Alburnus Maior National Research Program funded by RMGC); Gligor ¶¶ 25-37 (discussing scope of research funded by RMGC and research results); Jennings § V.A.

¹⁴⁸⁴ See *supra* § IX.E; Lorincz ¶¶ 38-42 (discussing construction of Recea residential neighborhood and donation of infrastructure to Alba Iulia mayoralty).

¹⁴⁸⁵ See *supra* § IX.F; [REDACTED]

¹⁴⁸⁶ See *supra* § IX.F; [REDACTED] See also *How the Minister of Culture cut the activity of Cupru Min with a pen. The Order by which Roșia Montană is declared an archaeological site includes an area of the copper quarry*, Adevarul.ro, dated Feb. 10, 2016 (Exh. C-1363).

the Project relative to its own operations at Roșia Poieni thus is manifestly lacking in good faith and is clearly discriminatory.

XIII. ROMANIA FAILED TO OBSERVE ITS OBLIGATIONS

738. The investment treaty undertaking to observe any obligations entered into with regard to covered investments reflects the basic principle common to most if not all legal systems: the obligation to honor legal commitments. The clause enshrines the general principle of “*pacta sunt servanda*”, “a cornerstone of the legal security of economic transactions and the basis for contract law in national and international law.”¹⁴⁸⁷

739. Romania’s conduct at issue in this case includes its complete failure to observe the obligations it entered into with regard to Gabriel’s investments. Romania has failed to observe its joint venture agreement with Gabriel in the form of RMGC and its Articles of Association, and it has failed entirely and most basically to observe the obligations it entered into with regard to the Roșia Montană License and the Bucium Exploration License.

A. The Requirement to Observe Obligations Entered into with Regard to Investments

740. Article 2(2) of the UK BIT provides:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.¹⁴⁸⁸

Such treaty provisions are commonly referred to as “umbrella clauses” because they bring contractual and other commitments under the protective umbrella of an investment treaty.¹⁴⁸⁹

741. As the tribunal in *SGS Société Générale de Surveillance S.A. v. Paraguay* observed with regard to a similarly worded umbrella clause in the Switzerland-Paraguay BIT,

¹⁴⁸⁷ See NEWCOMBE & PARADELL (CL-143) § 9.2.

¹⁴⁸⁸ UK-Romania BIT (Exh. C-3) Art. 2(2). Pursuant to the MFN treatment provision in Article III(1) of the Canada BIT, Gabriel is entitled to the benefits of Article 2(2) of the UK BIT and to any other more favorable substantive guarantees contained in Romania’s BIT with third party States. See *supra* ¶ 677.

¹⁴⁸⁹ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012) (CL-88) at 166.

any failure by the State to observe its obligations to covered investments constitutes a breach of the provision. The tribunal rejected the argument that to breach this provision a further finding that the State abused its sovereign authority was needed, noting “we see no basis on the face of the clause to believe that it should mean anything other than what it says – that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State’s party’s investors.”¹⁴⁹⁰

742. In *Al-Bahloul v. Tajikistan*, where a contract between the investor and a State entity contemplated that the State would issue oil and gas exploration licenses for certain areas, the tribunal found a violation of the umbrella clause where the State failed to do so.¹⁴⁹¹ In *Garanti Koza v. Turkmenistan*, the tribunal explained that “an act of an organ of a state that results in the breach of a contractual obligation relating to an investment ... come[s] within the reach of [the umbrella clause], especially where the immediate cause of the breach is an action by an organ of the state other than the agency that is the party to the agreement.”¹⁴⁹²

743. The protections of an umbrella clause may extend to any obligations undertaken by the State, including where a State enters into contractual obligations through an entity with an independent legal personality.¹⁴⁹³ Investment treaty tribunals also have recognized that a forum selection clause in a contract does not preclude claims regarding the obligations undertaken in that contract under an umbrella clause.¹⁴⁹⁴

744. Investment tribunals also have recognized that such clauses create obligations not only in respect of commitments made in contracts, but also in respect of commitments made in laws and regulations. The *Eureko v. Poland* tribunal considering a nearly identical umbrella

¹⁴⁹⁰ *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award dated Feb. 12, 2012 (CL-90) (“*SGS v. Paraguay*”) ¶ 72.

¹⁴⁹¹ *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated Sept. 2, 2009 (CL-95) ¶¶ 263-268.

¹⁴⁹² *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated Dec. 19, 2016 (CL-96) ¶ 330.

¹⁴⁹³ See *Eureko v. Poland* (CL-89) ¶¶ 119, 129, 134, 245 (umbrella clause obligation applies to contractual undertakings entered into by the State Treasury notwithstanding that the Treasury had an independent legal personality as a matter of Polish law).

¹⁴⁹⁴ See, e.g., *SGS v. Paraguay* (CL-90) ¶ 177; *Eureko v. Poland* (CL-89) ¶¶ 92-114.

clause held that the term “[a]ny’ obligations is capacious; it means not only obligations of a certain type, but ‘any’ – that is to say, *all* – obligations entered into with regard to investments of investors of the other Contracting Party.”¹⁴⁹⁵ Similarly, the *SGS v. Paraguay* tribunal held that the umbrella clause there at issue “has no limitations on its face—it *apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc.*”¹⁴⁹⁶

745. Thus, in *Khan Resources v. Mongolia*, the tribunal held that the State breached the umbrella clause at issue when it breached article 8.2 of Mongolia’s Foreign Investment Law, reasoning that “the terms ‘any obligations’ [in the umbrella clause] encompass the statutory obligations of the host state and in this case, Mongolia’s obligations under the Foreign Investment Law.”¹⁴⁹⁷

746. Similarly, in *LG&E v. Argentina*, the tribunal concluded that Argentina had violated the umbrella clause in the U.S.-Argentina BIT by abrogating guarantees in its statutory and regulatory framework:

Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the

¹⁴⁹⁵ *Eureko v. Poland* (CL-89) ¶ 246 (emphasis added). The umbrella clause in the Netherlands-Poland BIT at issue in *Eureko* provides: “Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.” *Id.* ¶ 77.

¹⁴⁹⁶ *SGS v. Paraguay* (CL-90) ¶ 167 (emphasis added). The umbrella clause in the Switzerland-Paraguay BIT at issue in *SGS* provides: “Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.” *Id.* ¶ 162. See also *Bureau Veritas Inspection Valuation Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction dated May 29, 2009 (CL-197) ¶ 141 (“The words ‘any obligation’ are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations.”).

¹⁴⁹⁷ *Khan Resources Inc., Khan Resources B.V. & CAUC Holding Company Ltd. v. The Government of Mongolia & MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits dated Mar. 2, 2015 (CL-77) (“*Khan v. Mongolia*”) ¶¶ 295-296, 366 (quoting *Khan Resources Inc., Khan Resources B.V. & CAUC Holding Company Ltd. v. The Government of Mongolia & MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction dated July 25, 2012, ¶ 438). The umbrella clause at issue in *Khan* provides: “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.” *Id.* ¶ 100.

meaning of [the umbrella clause], by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause.¹⁴⁹⁸

In *Duke Energy v. Ecuador* tribunal ruled that the State violated the umbrella clause in the U.S.-Ecuador BIT by breaching obligations it had undertaken vis-à-vis the claimant under power purchase agreements and Ecuadorian law.¹⁴⁹⁹

B. Romania Failed to Observe Obligations Entered Into with Regard to Gabriel's Investments

747. Romania failed to observe obligations entered into with regard to Gabriel's investments in multiple ways.

748. The State concluded three foundational agreements with Gabriel and RMGC giving rise to rights and obligations: (a) the agreements establishing and organizing RMGC concluded between Gabriel Jersey and the State through Minvest as shareholders of RMGC,¹⁵⁰⁰ (b) the Roşia Montană License issued by the State as grantor of the exploitation mining concession to RMGC as the concessionaire; and (c) the Bucium Exploration License issued by the State as grantor of the exploration concession to RMGC as the concessionaire.¹⁵⁰¹ The State

¹⁴⁹⁸ *LG&E v. Argentina* (CL-91) ¶ 175. The umbrella clause in the U.S.-Argentina BIT at issue in *LG&E* provides: "Each party shall observe any obligation it may have entered into with regard to investments." *Id.* ¶ 169. See also *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated May 22, 2007 (CL-92) ¶¶ 275-277 (found that breaches of the obligations "undertaken both under contract and law and regulation in respect of the investment have resulted in the breach of the protection provided under the umbrella clause" in the U.S.-Argentina BIT") (later annulled on other grounds).

¹⁴⁹⁹ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated Aug. 18, 2008 (CL-94) ¶ 325. The umbrella clause in the U.S.-Ecuador BIT at issue in *Duke Energy* provides: "Each party shall observe any obligation it may have entered into with regard to investments." *Id.* ¶ 317.

¹⁵⁰⁰ See *supra* § II.C.1 (discussing establishment of RMGC as joint venture between Gabriel and the State); Articles of Association and Bylaws of Euro Gold, authenticated under Nos. 847 and 848 dated June 11, 1997 (Exh. C-143). See also Bîrsan § II (describing agreements establishing RMGC).

¹⁵⁰¹ See *supra* §§ II.C.2, II.C.3, III.A (discussing NAMR's issuance of Roşia Montană License and Bucium Exploration License and NAMR's transfer of title to both Licenses to RMGC). See also Roşia Montană License (Exh. C-403-C); Addendum No. 3 to Roşia Montană License dated Oct. 14, 2000 (Exh. C-410-C) [REDACTED]; Bucium License (Exh. C-397-C); Addendum No. 1 to Bucium License dated July 28, 1999 (Exh. C-398-C) [REDACTED]. As Professor Bîrsan explains in detail in his legal opinion, mining licenses including both the Roşia Montană License and the Bucium Exploration License are concession agreements between the State as grantor and the titleholder of the license as concessionaire. See Bîrsan § III.D.

failed to observe the obligations it entered into in each of these agreements with regard to Gabriel's investments.

749. As reflected in RMGC's Articles of Association in effect from July 22, 2011, and thus when the State's unlawful course of conduct resulting in the total deprivation of Gabriel's investments began,¹⁵⁰² and also still today, by agreement of the shareholders and in view of their contributions to RMGC, Gabriel Jersey owned 80.6855% of the RMGC shares and the State through Minvest owned the other 19.3142% of the shares.¹⁵⁰³

750. The State as a shareholder of RMGC through Minvest accepted an express obligation to act in good faith and to respect the rights and legitimate interests both of RMGC and of Gabriel as its joint venture partner: "Shareholders must exercise their rights in good faith, in full observance of rights and legitimate interests of the Company and the other Shareholders. Holding shares involves the *ipso jure* adherence to the Articles of Association of the Company."¹⁵⁰⁴ In that context, the State through Minvest also accepted the obligation as shareholder not to take actions that would support, either directly or indirectly, the dissolution of RMGC.¹⁵⁰⁵

751. The Roșia Montană License, which is a concession agreement concluded with the State, provides RMGC with the right to develop and exploit the resources and reserves in the Roșia Montană License perimeter and imposes the obligation on the State to honor that right.¹⁵⁰⁶

¹⁵⁰² See *supra* ¶ 704(b) (explaining that in hindsight it is clear that August 2011 marked the beginning of the end for the Roșia Montană Project and Gabriel's associated substantial investments in Romania) and *infra* ¶¶ 854, 927, 930 (determining a valuation date of July 29, 2011).

¹⁵⁰³ RMGC Articles of Association updated on July 22, 2011 (Exh. C-184) Art. 6.2.

¹⁵⁰⁴ RMGC Articles Association updated on July 22, 2011 (Exh. C-184) Art. 9.4.

¹⁵⁰⁵ See RMGC Articles of Association updated on July 22, 2011 (Exh. C-184) Art. 15.2 ("Shareholders agree that none of them shall request and/or support, either directly or indirectly, within the Company or outside it, the dissolution of the Company in case there is a decrease of the share capital, irrespective of the quantum of such decrease, until after the moment of Commencement of Commercial Production, if applicable."). See also *supra* § IX.B.1 (discussing the aftermath of the Special Commission's vote to recommend rejecting the Draft Law, including the State's refusal to cooperate in recapitalizing RMGC as required to avoid its dissolution, and in that context the State's obligations as shareholder of RMGC).

¹⁵⁰⁶ See *supra* §§II.C.2 (discussing the rights and obligations of the Titleholder under the License), III.A.2 (discussing NAMR's transfer of the License to RMGC as Titleholder); Bîrsan §§ IV.B-C; Addendum No. 3 to Roșia Montană License dated Oct. 14, 2000 (Exh. C-410) Art. 2.5

In addition, the agreed price of the concession, following mutually agreed amendment, was a royalty of 4% payable by RMGC to the State.¹⁵⁰⁷ Those essential provisions could not be amended without the agreement of both parties in the form of an Addendum to the License.¹⁵⁰⁸

752. The Bucium Exploration License is also a concession agreement concluded with the State pursuant to which RMGC was granted the right to explore mineral resources and to obtain an exploitation license for those resources discovered and demonstrated to be feasible for exploitation.¹⁵⁰⁹ The Bucium Exploration License expressly provides that:

[REDACTED]

This provision underscores the State's obligation to act in good faith on the exploration license titleholder's application for the exploitation license for mineral resources discovered.¹⁵¹¹

753. As set forth in detail above, the State acted in manifest disregard of its obligations undertaken in its agreement with Gabriel in regard to RMGC, reflected in RMGC's Articles of Association, and plainly failed to observe its obligations entered into with regard to Gabriel's

[REDACTED]

¹⁵⁰⁷ See *supra* § II.C.2.b; Bîrsan § IV.C.2 (explaining that the License obligates the Titleholder to pay a royalty based on the value of annual mining production which is the price of the concession offered by the State); Addendum No. 7 to Roşia Montană License dated Oct. 14, 2009 (Exh. C-414) Art. II [REDACTED]

¹⁵⁰⁸ See *supra* § II.C.2.b; Bîrsan §§ III.C-D, IV.C.2; Addendum No. 3 to Roşia Montană License dated Oct. 14, 2000 (Exh. C-410) Art. 2.22 [REDACTED]

¹⁵⁰⁹ See *supra* § II.C.3; Bîrsan § V.

¹⁵¹⁰ Bucium License (Exh. C-397-C) Art. 3.1.4.

¹⁵¹¹ Bîrsan V.C (explaining that NAMR may not refuse to grant an exploitation license for discretionary reasons where exploration works demonstrate exploitation to be feasible, and that NAMR must grant the exploitation license within a reasonable time period).

investments in the Roșia Montană License and the Bucium Exploration License, including as follows:

- a) Through repeated public statements beginning in August 2011 by the Prime Minister, the President, the Minister of Environment, and the Minister of Culture, the Government declared that it would not honor its obligation under the License to permit RMGC to exploit the Roșia Montană resources and reserves in return for a 4% royalty, nor would it honor its agreement, reflected in RMGC's Articles of Association, as to the respective shareholdings between Gabriel and the State. The State instead made clear that RMGC would have to agree unconditionally to pay greater royalties and Gabriel would have to relinquish and cede shares in RMGC to the State without compensation if the Project was to be permitted to proceed.¹⁵¹²
- b) In November 2011, the State [REDACTED] [REDACTED] intervened unlawfully to prevent the TAC President from taking a decision to complete the EIA procedure and recommend issuing the environmental permit, coercing Gabriel and RMGC to offer to submit to the State's economic demands.¹⁵¹³
- c) Throughout 2012, the Government blocked any progress on any project permitting, failing in its obligation to respect Gabriel and RMGC's acquired rights in relation to the Project and to fulfill its obligations under the law.¹⁵¹⁴
- d) In January 2013, the Government reiterated the State's renunciation of the economic terms of its agreements in regard to Gabriel's investments, both in relation to its agreement with Gabriel as to the shareholding in RMGC, as reflected in RMGC's Articles of Association, as well as with regard to the agreed

¹⁵¹² See *supra* § VII.A.1.

¹⁵¹³ See *supra* §§ VII.A.3-4.

¹⁵¹⁴ See *supra* § VII.B.

royalty provisions in the Roșia Montană License.¹⁵¹⁵ Without any practical or commercially reasonable option, Gabriel and RMGC again offered to submit to the State's economic demands.¹⁵¹⁶

- e) Following Parliament's rejection of the Draft Law, the Government proclaimed, and in a series of subsequent acts and omissions treated, the Project as rejected even though it had admitted that all legal conditions for permitting were satisfied.¹⁵¹⁷ Although never issuing a formal decision, through its conduct as it continued, the Government has made clear that it has no intention to honor the Roșia Montană License.¹⁵¹⁸ Thus, the Government failed to observe its obligation entered into with regard to the Roșia Montană License concession agreement to allow RMGC to mine the reserves demonstrated to be feasible as approved, verified, and registered by NAMR.¹⁵¹⁹
- f) The State failed to observe its obligations to participate in good faith as a shareholder in RMGC, as reflected in RMGC's Articles of Association, by refusing to participate in the administration and management of RMGC, including e.g., by refusing to re-appoint members to reconstitute the company's Board of Directors;¹⁵²⁰ and by refusing to participate in recapitalizations necessary to comply with the requirements of the Companies Law, and thus indirectly supporting the dissolution of the company and thereby coercing Gabriel into

¹⁵¹⁵ See *supra* § VIII.A.

¹⁵¹⁶ See *supra* § VIII.A.5.

¹⁵¹⁷ See *supra* §§ VIII.B.4 (discussing statements of Prime Minister Ponta and Minister of Environment Plumb confirming Parliament's decision on Draft Law would be followed and Project therefore would not be permitted), IX (discussing various actions taken by the State following Parliament's rejection of the Draft Law that are in manifest disregard of obligations under the License and the Articles of Association).

¹⁵¹⁸ *Id.*

¹⁵¹⁹ *Id.* See also *id.* § VIII.A.2 (discussing NAMR's approval in March 2013 of the resources and reserves for the Project giving rise to RMGC's rights to exploit those resources and reserves); Birsan § V.B.

¹⁵²⁰ See *supra* § IX.B.1; [REDACTED]

“donating” RMGC shares valued at nearly US\$ 20 million in order to avoid the risk of RMGC’s dissolution.¹⁵²¹

- g) The State failed to observe its obligations entered into in the Bucium Exploration License. By refusing to act on RMGC’s applications for exploitation licenses for the Rodu Frasin and Tarnița deposits within the Bucium Exploration License perimeter, both of which RMGC demonstrated to be feasible for exploitation through costly exploration, research, and geological studies,¹⁵²² the State failed to observe its obligation to grant RMGC the exploitation licenses to which RMGC is entitled at law and pursuant to the Bucium Exploration License itself.¹⁵²³

754. These failures by the State to observe the obligations it entered into with regard to Gabriel’s investments cumulatively have resulted in the total deprivation of the value of Gabriel’s investments.

XIV. ROMANIA EXPROPRIATED CLAIMANTS’ INVESTMENTS UNLAWFULLY

755. While international law recognizes the State’s right to expropriate property, that right is limited. The obligation to compensate for a taking of foreign property has been widely accepted as one of the basic limitations on the State’s right to expropriate. Accordingly both treaties oblige Romania not to expropriate unless certain conditions, including the obligation to compensate, are fulfilled.

756. It also has been recognized that expropriation can occur indirectly and through a series of acts or course of conduct. Both treaties thus expressly provide that measures having an effect equivalent to expropriation are accompanied by the same limitations that apply to direct takings and thus likewise entail the obligation, *inter alia*, to compensate.

757. As detailed below, Romania’s conduct beginning in August 2011 ultimately gave rise to an indirect, creeping expropriation of Gabriel’s investments. Moreover, the expropriation

¹⁵²¹ See *supra* § IX.B.1.

¹⁵²² See *supra* § V.C (discussing RMGC’s successful eight-year exploration program confirming feasibility of exploiting the Rodu Frasin and Tarnița deposits); SRK Report § 7.

¹⁵²³ See *supra* § IX.B.3; Bîrsan § V.

was unlawful as Gabriel's investments were not taken for a public purpose, were taken without due process and without any compensation whatsoever.

A. The Principles Regarding Expropriation and Measures Having an Equivalent Effect

1. The Treaty Provisions on Expropriation

758. The UK BIT provides in Article 5¹⁵²⁴:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

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

759. The Canada BIT similarly provides in Article VIII(1)¹⁵²⁵:

Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as

¹⁵²⁴ UK-Romania BIT (Exh. C-3) Art. 5.

¹⁵²⁵ Canada-Romania BIT (Exh. C-1) Art. VIII(1).

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

The Canada BIT, Annex B, which applies to Article VIII, provides further¹⁵²⁶:

The Contracting Parties confirm their shared understanding that:

(a) The concept of “measures having an effect equivalent to nationalization or expropriation” can also be termed “indirect expropriation.” Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

(b) The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the severity of the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
- (ii) the extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations, and
- (iii) the character of the measure or series of measures including their purpose and rationale; and

(c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, nondiscriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

¹⁵²⁶ Canada-Romania BIT (Exh. C-1) Annex B.

2. Measures May Effect an Expropriation Indirectly and Incrementally

760. The provisions of both BITs are express that expropriation may result from “measures having effect equivalent to nationalization or expropriation,”¹⁵²⁷ that the concept “can also be termed ‘indirect expropriation,’”¹⁵²⁸ and that “[i]ndirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”¹⁵²⁹

761. “Measures having effect equivalent to ... expropriation,” as contemplated in both BITs, may include both actions and omissions. This follows from a good faith reading of the ordinary meaning of the term “measure” in context, particularly in view of the fact that it is established that conduct that may give rise to State responsibility includes both acts and omissions.¹⁵³⁰

762. That expropriation encompasses not only forced transfers of title, but also other types of interference with property is well established. As the 1961 Harvard Draft Convention classically provided, “[a] ‘taking of property’ includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to

¹⁵²⁷ UK-Romania BIT (Exh. C-3) Art. 5; Canada-Romania BIT (Exh. C-1) Art. VIII(1).

¹⁵²⁸ Canada-Romania BIT (Exh. C-1) Annex B.

¹⁵²⁹ Canada-Romania BIT (Exh. C-1) Annex B.

¹⁵³⁰ While the Canada BIT provides expressly that “‘measure’ includes any law, regulation, procedure, requirement or practice” (Canada-Romania BIT (Exh. C-1), Art. I(i)), the definition notably is not exclusive, and there is no basis to conclude that it indicates a different understanding. *See* DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, Text Adopted by the International Law Commission with Commentaries (2001) (“ILC ARTICLES ON STATE RESPONSIBILITY”) (CL-61) Art. 2 and cmt. (4) (“Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an ‘omission’ from the surrounding circumstances which are relevant to the determination of responsibility. For example in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed in the ‘inaction’ of its authorities which ‘failed to take appropriate steps’, in circumstances where such steps were evidently called for. In other cases it may be the combination of an action and an omission which is the basis for responsibility.”). *See also*, e.g., *Eureko v. Poland* (CL-89) ¶¶ 185-186 (rejecting notion that the term “a measure taken” in the BIT at issue was “meant to exclude omissions from the ambit of the Treaty,” underscoring, *inter alia*, that “the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions” and observing that “[m]any international arbitral tribunals have so held”).

justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.”¹⁵³¹

763. Many international tribunals have recognized, as the Iran-United States Claims Tribunal observed, that “[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”¹⁵³² The European Court of Human Rights has ruled that “[i]n the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of [I]t has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants.”¹⁵³³ In so ruling, it followed the same line as the Inter-American Court of Human Rights.¹⁵³⁴

¹⁵³¹ LOUIS B. SOHN & R.R. BAXTER, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Draft No. 12, Art. (10)(3)(a), in 55 AM. J. INT’L L. 545 (1961) (CL-65) at 553. See also United Nations Conference on Trade and Development (“UNCTAD”), *Taking of Property* (2000) (CL-72) at 3-4, 20 (“The taking of property by Governments can result from legislative or administrative acts that transfer title and physical possession. Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets. Generally speaking, the former can be classified as ‘direct takings’ and the latter as ‘indirect takings.’ Direct takings are associated with measures that have given rise to the classical category of takings under international law. They include the outright takings of all foreign property in all economic sectors, takings on an industry-specific basis, or takings that are firm specific In contrast, some measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor[.]. Some particular types of such takings have been called ‘creeping expropriations’, while others may be termed ‘regulatory takings’. All such takings may be considered ‘indirect takings’.... It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences.”).

¹⁵³² *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 of June 29, 1984, reprinted in 6 IRAN-U.S. CL. TRIB. 219 (1986) (CL-117) at 225. See also *Harza Engineering Co. v. Islamic Republic of Iran*, Award No. 19-98-2 of Dec. 30, 1982, reprinted in 1 IRAN-U.S. CL. TRIB. 499, 504 (1983) (CL-118) at 504 (“[A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.”); *Starrett Housing Corp. v. Islamic Republic of Iran*, Award No. ITL 32-24-1 of Dec. 19, 1983, reprinted in 4 IRAN-U.S. CL. TRIB. 122 (1985) (CL-119) at 154 (“[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated”).

¹⁵³³ *Sporrong v. Sweden*, Ser. A. No. 52, Judgment dated Sept. 23, 1982 (CL-120) ¶ 63 (excerpt).

¹⁵³⁴ *Ivcher-Bronstein v. Peru*, Judgment of the Inter-American Court of Human Rights dated Feb. 6, 2001 (CL-121) ¶ 124 (“To determine whether Mr. Ivcher was deprived of his property, the Court should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.”) (excerpt).

764. Many significant investment treaty awards are to similar effect. In *Middle East Cement*, the tribunal noted that “[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as ‘creeping’ or ‘indirect’ expropriation.”¹⁵³⁵ Similarly, the *Tecmed* tribunal observed that although indirect expropriation does “not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.”¹⁵³⁶

765. As Professor Reisman and Robert Sloane explain:

[F]oreign investments may be expropriated ‘indirectly through measures tantamount to expropriation or nationalization.’ This phrase ... also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs – and by which governments can, in effect but not name, now be deemed to have expropriated a foreign national’s investment. The major innovation of the ‘tantamount’ clause, found in substance in almost all BITs, therefore consists in extending the concept of indirect expropriation to an egregious failure to create or maintain the normative ‘favourable conditions’ in the host state.¹⁵³⁷

Thus, both BITs recognize that even when investors retain title to their investments, where investments are subjected to measures equivalent to expropriation, the legality requirements set forth in the treaties that apply to expropriations must be met.

¹⁵³⁵ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated Apr. 12, 2002 (CL-83) (“*Middle East Cement v. Egypt*”) ¶ 107.

¹⁵³⁶ *Tecmed v. Mexico* (CL-122) ¶ 114 (stating that although indirect expropriation does “not have a clear or unequivocal definition, it is generally understood that [it] materialize[s] through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect”). See also *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated Dec. 14, 2012 (CL-187) (“*Burlington v. Ecuador*”) ¶ 397 (“When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control.”).

¹⁵³⁷ MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, in 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) (“REISMAN & SLOANE”) at 118-119.

a. Contract and Other Intangible Rights May Be Expropriated

766. As investment is defined under both BITs to include intangible property rights,¹⁵³⁸ it follows that an expropriation of such rights must comply with the BITs' provisions on expropriation.

767. Numerous authorities confirm that rights and interests under licenses or contracts may be expropriated and that such expropriations occur when a State uses its governmental authority to deprive a foreign investor of the use, enjoyment or value of such rights. As Christie observed in his classic study of the subject, "contract and many other so-called intangible rights can, under certain circumstances, be expropriated, even by indirect interference"¹⁵³⁹

768. Wortley explained more than 50 years ago, the "prevalent opinion" among States has been "that a State was internationally responsible for enacting legislation incompatible with or obstructive of the terms of concessions or contracts with foreigners, for example, by imposing impossible conditions on them," and that "when the contract or concession with which legislation is irreconcilable has been concluded or granted by the legislating State itself, that State is responsible and must make reparation if its legislative organ thereafter enacts legislation which is incompatible with such contract or concession or prevents its fulfillment."¹⁵⁴⁰

769. In the *Norwegian Shipowners' Claims* case, the Permanent Court of Arbitration held that the requisition by the United States of certain ships being built in U.S. shipyards had the effect of taking also associated contracts, finding, "whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question

¹⁵³⁸ See UK-Romania BIT (Exh. C-3) Art. I(a); Canada-Romania BIT (Exh. C-1) Art. I(g).

¹⁵³⁹ G.C. CHRISTIE, *What Constitutes a Taking of Property Under International Law?*, in 38 BRIT. Y.B. INT'L L. 307 (1962) (CL-124) ("CHRISTIE") at 318-319.

¹⁵⁴⁰ B.A. WORTLEY, *Expropriation in Public International Law* (1959) (CL-125) at 112-113.

were being or were to be constructed.”¹⁵⁴¹ Similarly, in the *Shufeldt Claim* case, the tribunal held that legislation that invalidated a concession agreement was a compensable taking.¹⁵⁴²

770. The Iran-United States Claims Tribunal in the *Amoco* case ruled that expropriation “may extend to any right which can be the object of a commercial transaction,”¹⁵⁴³ and the ICSID tribunal in *SPP v. Egypt* held that “The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. Clearly, those rights and interests were of a contractual rather than *in rem* nature. ... Moreover, it has long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interest in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also ‘expropriated the contractual rights’ of the operating company.”¹⁵⁴⁴

771. The *Vivendi II* tribunal observed that “it has been clear since at least 1903, in the *Rudolff case*, that the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property.”¹⁵⁴⁵ In *CME v Czech Republic*, the tribunal found that the claimant’s contract rights had been expropriated indirectly through interference by a regulatory authority, the Media Council:

The Respondent’s view that the Media Council’s actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License ... always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant’s and its predecessor’s

¹⁵⁴¹ *Norwegian Shipowners’ Claims (Norway v. United States)*, Award dated Oct. 13, 1922, 1 RIAA 307 (CL-126) at 325.

¹⁵⁴² *Shufeldt Claim, Ad Hoc*, Award dated July 24, 1930, reprinted in 2 R.I.A.A. 1083, 1094-1098 (1949) (CL-127) (excerpt).

¹⁵⁴³ *Amoco Int’l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Award dated July 14, 1987, 15 Iran-US CTR 189 (CL-128) (“*Amoco v. Iran II*”) ¶ 108.

¹⁵⁴⁴ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated May 20, 1992 (CL-129) (“*SPP v. Egypt*”) ¶¶ 164-165.

¹⁵⁴⁵ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.18.

investment as protected by the Treaty. What was destroyed was the commercial value of the investment....¹⁵⁴⁶

772. As Wälde and Kolo observed, the modern rules regarding investment protection are not aimed only at the protection of tangible property, but recognize and protect the value of property that comes from “the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return.”¹⁵⁴⁷

b. A State’s Intention Is Not Dispositive

773. While intent to deprive a foreign investor of the use, benefit, or value of its investment may be relevant to determine whether there has been a wrongful interference, it is not ultimately a State’s intention, but the effect of its measures that determines whether interference rises to the level of an expropriation. Thus, a State’s intention is not dispositive as to the characterization of measures as effecting an expropriation. Indeed, as the tribunal in *Renta 4 v. Russia* observed, “[i]ndirect expropriation, of course, does not speak its name. It must be deduced from a pattern of conduct, observing its conception, implementation and effects as such, even if the intention to expropriate is disavowed at every step.”¹⁵⁴⁸

774. As Christie observed in his study on expropriation:

The *Norwegian Claims* and the *German Interests in Polish Upper Silesia* cases show that a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.¹⁵⁴⁹

¹⁵⁴⁶ *CME v. Czech Republic I* (CL-116) ¶ 591.

¹⁵⁴⁷ THOMAS WÄLDE & ABBA KOLO, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 INT’L AND COMP. L. Q. 811 (2001) (CL-130) (“WÄLDE & KOLO”) at 835.

¹⁵⁴⁸ See also *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC Case No. 24/2007, Award of July 20, 2012 (CL-194) (“*Renta 4 v. Russia*”) ¶ 45.

¹⁵⁴⁹ CHRISTIE at 311.

775. In *Metalclad v. Mexico*, for example, the tribunal held that expropriation includes “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”¹⁵⁵⁰ In *Biloune v. Ghana*, the tribunal held that Ghana was liable for expropriating Mr. Biloune’s investment even though “[t]he motivations for the actions and omissions of Ghanaian governmental authorities [we]re not clear.” The tribunal held that “... [it] need not establish those motivations to come to a conclusion in the case. What is clear is that [the acts of the Government] had the effect of causing the irreparable cessation of work on the project.”¹⁵⁵¹ Similarly in *Siemens v. Argentina*, the tribunal rejected the argument that it should consider the State’s lack of intent to expropriate, observing that the BIT “refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate.”¹⁵⁵²

776. The tribunal in *Vivendi II* explained that a State’s intent is at most a secondary consideration:

There is extensive authority for the proposition that the state’s intent, or its subjective motives are at most a secondary consideration. While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state’s intent, is the critical factor.¹⁵⁵³

As Reisman and Sloane observe, States may effect an expropriation “in ways that may seek to cloak expropriatory conduct with a veneer of legitimacy,” and therefore “tribunals have increasingly accepted that expropriation must be analyzed in consequential rather than formal terms.”¹⁵⁵⁴ Thus, they explain that “[w]hat matters is the effect of governmental conduct – whether malfeasance, misfeasance or nonfeasance, or some combination of the three – on

¹⁵⁵⁰ *Metalclad v. Mexico* (CL-131) ¶ 103.

¹⁵⁵¹ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, Award on Jurisdiction and Liability of Oct. 27, 1989, reprinted in 95 INT’L L. REP. 183 (1994) (“*Biloune v. Ghana*”) (CL-132) at 209.

¹⁵⁵² *Siemens v. Argentina* (CL-102) ¶ 270.

¹⁵⁵³ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.20 (emphasis in original) (footnotes omitted).

¹⁵⁵⁴ REISMAN & SLOANE (CL-123) at 121.

foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate.”¹⁵⁵⁵

777. The *Tecmed* tribunal similarly emphasized that even where a State intends to take an action for a well-intentioned reason, such as to protect the environment, if it does so in a manner that is disproportionate to the public purpose need or that imposes an excessive burden on an investor, it will be considered an expropriation that gives rise to the duty to compensate:

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised The requisite balance will not be found if the person concerned has had to bear ‘an individual and excessive burden’ The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto.¹⁵⁵⁶

Thus, the *Tecmed* tribunal explained, “we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the [BIT], even if they are beneficial to society as a whole — such as environmental protection —, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.”¹⁵⁵⁷

c. An Expropriation Effected Incrementally Is a Composite Act

778. An indirect expropriation, which takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is referred to as a “creeping” expropriation.¹⁵⁵⁸

779. Viewed in isolation, the measures might not have an expropriatory effect – it is the effect in the aggregate that must be considered. The comments to the 1967 OECD Draft

¹⁵⁵⁵ REISMAN & SLOANE (CL-123) at 121.

¹⁵⁵⁶ *Tecmed v. Mexico* (CL-122) ¶ 122 (citing the European Court of Human Rights in the case of *James et al.*).

¹⁵⁵⁷ *Id.* ¶ 121.

¹⁵⁵⁸ B.H. WESTON, “Constructive Takings” under International Law: A Modest Foray into the Problem of “Creeping Expropriation,” 16 VA. J. INT’L L. 103 (1975) (“WESTON”) (CL-133).

Convention on the Protection of Foreign Property, which describe its provisions as covering “creeping nationalization,” explain that under these provisions, “measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation.”¹⁵⁵⁹

780. In addition, the deprivation may be evident only in hindsight, as Reisman and Sloane observe:

Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor’s property rights.¹⁵⁶⁰

781. A “creeping” expropriation is thus one that occurs taking into account a series of acts and/or omissions in the aggregate; and when such an expropriation is effected in breach of the legality requirements set forth in the BITs, it is a “composite act” as described in Article 15 of the ILC Articles on State Responsibility.¹⁵⁶¹

782. As the *Siemens v. Argentina* tribunal observed, an expropriation can happen incrementally, over time:

By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The

¹⁵⁵⁹ *OECD Draft Convention on the Protection of Foreign Property*, 7 ILM 117 (1968) (CL-134) at 126.

¹⁵⁶⁰ REISMAN & SLOANE (CL-123) at 123-124.

¹⁵⁶¹ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 15(1) (“The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.”). *See also, e.g., Crystallex v. Venezuela* (CL-62) ¶ 669 (“State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC’s Articles on State Responsibility”).

preceding straws may not have had a perceptible effect but are part of the process that led to the break.¹⁵⁶²

783. Reisman and Sloane observe that a wide variety of measures might cumulatively result in an expropriation:

Without concurrently purporting to take title to property or to appropriate a foreign investor's commercial rights, a state might, for example ... refuse to hold feckless administrators to account for failure to carry out their assigned tasks. A wide variety of measures – including taxation, regulation, denial of due process, delay and non-performance, and other forms of governmental malfeasance, misfeasance, and nonfeasance – may be deemed expropriatory if those measures significantly reduce an investor's property rights or render them practically useless.¹⁵⁶³

784. In *Biloune v. Ghana*, for example, the tribunal ruled claimant's investment had been expropriated where the government issued a "stop work order" after not taking any action "for well over a year" where government authorities had made representations upon which the investor reasonably had relied to commence construction and the government knew that the claimant was so proceeding.¹⁵⁶⁴ In *Goetz v. Burundi*, the revocation of a "free zone regime" fiscal certificate constituted a measure having an expropriatory effect as it forced the Claimants to halt all their activities which deprived their investments of all their value.¹⁵⁶⁵

785. Tribunals in a number of cases have found that measures leading to and including a denial of a license or a permit gave rise to an expropriation of the claimant's investment.

¹⁵⁶² *Siemens v. Argentina* (CL-102) ¶ 263. See also *Vivendi v. Argentina II* (CL-113) ¶ 7.5.31 ("It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached"); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated Sept. 16, 2003 (CL-135) ¶ 20.22 ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property.").

¹⁵⁶³ REISMAN & SLOANE (CL-123) at 123.

¹⁵⁶⁴ *Biloune v. Ghana* (CL-132) at 207-210.

¹⁵⁶⁵ *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award dated Feb. 10, 1999, reprinted in 6 ICSID REP. 3 (2004) (CL-137) ¶ 124.

786. For example, in *Middle East Cement v. Egypt*, the claimant had been granted a license to import and store cement in floating silos as a “free zone project.”¹⁵⁶⁶ Where the State subsequently issued a decree that banned the import of cement, the tribunal held that even though the investor retained “nominal ownership” of its license, the license was deprived of its value and as such was expropriated.¹⁵⁶⁷

787. In *Metalclad v. Mexico*, the claimant obtained rights to develop a landfill project that was fully approved and endorsed by the federal government.¹⁵⁶⁸ After Metalclad began to construct the landfill, however, the municipal government issued a “stop work order” alleging that Metalclad had failed to obtain a necessary municipal construction permit.¹⁵⁶⁹ As the municipality’s denial of the construction permit was “without any basis in the proposed physical construction or any defect in the site,” the tribunal found that the claimant’s investment had been subjected to a “measure tantamount to expropriation.”¹⁵⁷⁰

788. In *Tecmed v. Mexico* after the Claimant had obtained a permit of indefinite duration to operate a hazardous landfill, the government changed the permit to one that was “subject to renewal,” and then refused to renew it on the claimed basis that the Claimant’s project violated environmental regulations.¹⁵⁷¹ In assessing whether an expropriation had occurred, the tribunal considered whether the measures taken were “proportional to the public interest presumably protected thereby and to the protection legally granted to investments[.]”¹⁵⁷² The tribunal found that, in fact, the Claimant’s “operation of the Landfill never compromised the ecological balance, the protection of the environment or the health of the people, and all the infringements committed were either remediable or remediated or subject to minor penalties;”¹⁵⁷³ and moreover that “it is irrefutable that there were factors other than compliance or non-

¹⁵⁶⁶ *Middle East Cement v. Egypt* (CL-83) ¶ 98.

¹⁵⁶⁷ *Id.* ¶¶ 103, 106-107.

¹⁵⁶⁸ *Metalclad v. Mexico* (CL-131) ¶¶ 78-80.

¹⁵⁶⁹ *Id.* ¶ 87.

¹⁵⁷⁰ *Id.* ¶ 104.

¹⁵⁷¹ *Id.* ¶¶ 31-51, 57, 171.

¹⁵⁷² *Id.* ¶ 122.

¹⁵⁷³ *Id.* ¶ 148.

compliance by [the Claimant] with the Permit's conditions or the Mexican environmental protection laws and that such factors had a decisive effect in the decision to deny the Permit's renewal. These factors included 'political circumstances.'"¹⁵⁷⁴ The tribunal concluded that the State's action was disproportionate, that the circumstances could not justify the decision not to renew the Claimant's permits, and that as the State's refusal to renew the permit deprived the Claimant's investment of any economic use, it constituted an expropriation.¹⁵⁷⁵

789. In *Crystallex v. Venezuela*, the tribunal found that Venezuela had expropriated the claimant's investment where the government had denied an environmental permit for the claimant's mining project in circumstances that the tribunal underscored were fundamentally unfair;¹⁵⁷⁶ "government officials of the highest level targeted Crystallex's investment with statements that resulted in a gradual devaluation of the investor's investment," and which paved the way for the termination of claimant's mining concession;¹⁵⁷⁷ and where it was clear to the Tribunal that "a decision at the highest level of the Venezuelan state" had been taken to oust Crystallex from the mining project in order to return the project to the State and that the statements by government officials effected an incremental encroachment of the Claimant's contractual rights and resulted in a gradual yet significant decrease of the value of the Claimant's investment."¹⁵⁷⁸ Taken together, the tribunal concluded the claimant's investment had been expropriated.¹⁵⁷⁹

790. Tribunals have emphasized that a failure to respect acquired rights even when regulating matters of public policy may give rise to an expropriation. In *ADC v. Hungary*, for instance, where the claimants had a contract to manage and operate two passenger terminals at

¹⁵⁷⁴ *Id.* ¶ 127.

¹⁵⁷⁵ *Id.* ¶ 117. *See also id.* ¶ 149 ("[I]t would be excessively formalistic, in light of the above considerations, the Agreement and international law, to understand that the Resolution is proportional to such violations when such infringements [by the Claimant] do not pose a present or imminent risk to the ecological balance or to people's health, and the Resolution, without providing for the payment of compensation as required by Article 5 of the Agreement, leads to the neutralization of the investment's economic and business value and the Claimant's return on investment and profitability expectations upon making the investment.").

¹⁵⁷⁶ *Crystallex v. Venezuela* (CL-62) ¶ 673.

¹⁵⁷⁷ *Id.* ¶ 675.

¹⁵⁷⁸ *Id.* ¶ 683.

¹⁵⁷⁹ *Id.* ¶ 701.

the Budapest airport and had invested approximately US\$ 17 million into this project with the expectation of recouping their investment through the revenue to be generated by operating the terminals,¹⁵⁸⁰ the tribunal held the claimants' investment was expropriated when the Government issued a decree stating that the claimants would no longer be permitted to operate the terminals, and that they would be run instead by a majority State-owned entity.¹⁵⁸¹ In response to the argument that the State was validly exercising its right "to regulate its domestic economic and legal affairs,"¹⁵⁸² the tribunal explained that "[i]t is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it."¹⁵⁸³

791. "Measures tantamount to expropriation" also may include what Reisman and Sloane call "consequential expropriations," where investment may be deemed to have been expropriated as a consequence of "the host state's failures to create, maintain, and properly manage the legal, administrative, and regulatory normative framework contemplated by the relevant BIT."¹⁵⁸⁴ That is, when an investment is made in reliance upon the existence of a properly functioning regulatory regime, it may be observed that "feckless or corrupt bureaucracies, lack of political will at the leadership level, negligence or failure to make timely decisions incumbent on the state by virtue of contracts or concession agreements, and so forth,"¹⁵⁸⁵ may amount in certain circumstances to an expropriation.

792. In *Metalclad*, for example, the tribunal held that "taken together with the representations of the Mexican federal government, on which Metalclad relied, ... the absence of

¹⁵⁸⁰ *ADC v. Hungary* (CL-138) ¶ 325.

¹⁵⁸¹ *Id.* ¶¶ 172-190.

¹⁵⁸² *Id.* ¶ 423.

¹⁵⁸³ *Id.* ¶ 424.

¹⁵⁸⁴ REISMAN & SLOANE (CL-123) at 128-129.

¹⁵⁸⁵ REISMAN & SLOANE (CL-123) at 129.

a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount[ed] to an indirect expropriation.”¹⁵⁸⁶

793. In *Tecmed*, the pretextual and disproportionate denial of an environmental permit constituted an expropriation because the Claimant had been “radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [investment] or to its exploitation – had ceased to exist.”¹⁵⁸⁷ Similarly, in *Waste Management*, the tribunal explained that concession contract rights may be deemed to have been expropriated when the “whole enterprise is terminated or frustrated.”¹⁵⁸⁸

794. In *Vivendi II*, where the tribunal found that the State had “mounted an illegitimate campaign” against the concession that had a “devastating effect on the economic viability of the concession” that effectively drove the investor out of business, ultimately leaving the investor “no other rational choice,” and thus forcing the investor to notify the government that it was rescinding the concession agreement,¹⁵⁸⁹ the totality of the circumstances constituted an expropriation.¹⁵⁹⁰

B. Romania Subjected Gabriel’s Investments Incrementally to Measures Having an Effect Equivalent to Expropriation

795. Articles 5 and VIII(1) of the respective BITs regulate the manner in which “investments” or “returns of investors,” may be expropriated. In this context, and fully consistent with the provisions of the BITs defining investment,¹⁵⁹¹ “investment is not a single

¹⁵⁸⁶ *Metalclad v. Mexico* (CL-131) ¶ 107.

¹⁵⁸⁷ *Tecmed v. Mexico* (CL-122) ¶ 115.

¹⁵⁸⁸ *Waste Management v. Mexico* (CL-139) ¶ 172.

¹⁵⁸⁹ *Vivendi v. Argentina II* (CL-113) ¶¶ 7.4.19, 7.5.26.

¹⁵⁹⁰ *Id.* ¶ 7.5.34. See also *Rumeli v. Kazakhstan* (CL-140) ¶¶ 113-120, 142-146, 151-155. See also *Biwater v. Tanzania* (CL-106) ¶¶ 485, 519 (finding that the totality of the actions taken by the State entirely undermined the claimant’s ability to perform and thus constituted an expropriation of the claimant’s investment).

¹⁵⁹¹ See UK-Romania BIT (Exh. C-3), Art. I(a), which defines investment as including “(ii) shares in and stock and debentures of a company and any other form of participation in a company;” “(iii) claims to money or to any performance under contract having a financial value;” “(iv) intellectual property rights, goodwill, technical processes and know-how;” “(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;” and Canada-Romania BIT (Exh. C-1), Art. I(g), which defines investment as including “(ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;” “(iii) money, claims to money, and claims

right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.”¹⁵⁹² Thus, in this case, as Professor James Crawford explained in a statement adopted by the tribunal in *ADC v. Hungary* in analogous circumstances, “what was expropriated was that bundle of rights and legitimate expectations.”¹⁵⁹³

796. Gabriel had a bundle of rights and legitimate expectations in relation to its investments in RMGC and in particular in respect of the Roșia Montană Project and the Bucium Projects. Through a series of measures, acts, and omissions, Romania ultimately deprived Gabriel entirely of the value, benefit, use and enjoyment of its rights and investments, as Gabriel’s rights to develop through RMGC the Projects were frustrated and in effect taken entirely.

797. The expropriation of Gabriel’s investments in the Roșia Montană Project and in the Bucium Projects was creeping and indirect and thus constituted measures having an effect equivalent to expropriation.

798. As the authorities cited above make clear, whether Romania intended to expropriate Gabriel’s investments is not determinative, although in this case, the State knowingly and intentionally rejected the Roșia Montană Project and has knowingly and deliberately deprived Gabriel of the value of its investments in the Bucium Projects.

799. The Canada-Romania BIT provides in its Annex B that the determination whether a measure or series of measures constitute an indirect expropriation “requires a case-by-case, fact based inquiry that considers, among other factors,” (i) “the severity of the economic impact” of the measure, (ii) the extent to which the measures “interfere with distinct, reasonable,

to performance under contract having a financial value;” “(v) intellectual property rights;” and “(vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.”

¹⁵⁹² *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, Award dated May 18, 2010, ICSID Case No. ARB/08/2 (CL-157) ¶ 96.

¹⁵⁹³ *ADC v. Hungary* (CL-138) ¶¶ 303-304. See also *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated Sept. 13, 2006, (CL-158) ¶ 67 (“The Tribunal considers that ... the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.”).

investment-backed expectations,” and (iii) the character of the measure, including their “purpose and rationale.”¹⁵⁹⁴ Here, all of these factors lead unequivocally to the conclusion that Gabriel’s investments have been indirectly expropriated.

- a) The evidence is unassailable that the Government unlawfully, and in support of its coercive attempts to wrest from Gabriel a greater economic take from the Project, first blocked, and then ultimately rejected, the Roșia Montană Project. Gabriel’s investments in relation to the neighboring Bucium Projects were pulled into the political maelstrom that swirled around RMGC, and were also effectively blocked and rejected.
- b) While the State had treated Gabriel’s investments abusively and unfairly in a number of significant respects before August 2011, including by unlawfully suspending the EIA process from 2007 to 2010,¹⁵⁹⁵ unlawfully blocking issuance of the dam safety permits,¹⁵⁹⁶ and delaying issuance of archaeological research permits for Orlea¹⁵⁹⁷ and the reissuance of the archaeological discharge certificate for Cârnic,¹⁵⁹⁸ by mid-2011, Gabriel and RMGC successfully overcame these obstacles to the point that the technical review of the Project through the EIA procedure was nearly complete and the Project was proceeding apace towards permitting.
- c) The beginning of the end came on August 1, 2011, when like the quickening breeze that forms part of but precedes the arrival of a typhoon, the Prime Minister then began to criticize the State’s previously agreed economic take from the Project.¹⁵⁹⁹ His statements were promptly echoed and amplified by the President,

¹⁵⁹⁴ Canada-Romania BIT (Exh. C-1), Annex B.

¹⁵⁹⁵ *See supra* § V.A.1.

¹⁵⁹⁶ *See supra* § V.A.2.

¹⁵⁹⁷ *See supra* § III.C.2.

¹⁵⁹⁸ *See supra* § VI.A.3.

¹⁵⁹⁹ *See supra* § VII.A.1. *See also Boc: I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed*, Mediafax, dated Aug. 1, 2011 (Exh. C-627); *Interview of Emil Boc*, TVR1, dated Aug. 1, 2011 (Exh. C-537); *Emil Boc: The decision on the Roșia Montană mining project must be substantiated based on documents, not stories*, Agerpres.ro, dated Sept. 2, 2011 (Exh. C-791); *Emil*

the Minister of Environment, and the Minister of Culture, and repeated statements were made to the press and on television that were variations on the President's clear statement that, as far as the State was concerned, for the Project to proceed, it was "mandatory to renegotiate."¹⁶⁰⁰ The Minister of Culture thus announced that neither he nor the Minister of Environment, whose ministries were most critical to Project permitting, would permit the Project until the level of the State's participation was "clarified."¹⁶⁰¹ Particularly in hindsight, it is evident from these statements that the Government effectively held the Project's permitting hostage and made a clear and deliberate decision that it would not allow the Project to proceed unless Gabriel met the State's ransom for more RMGC shares and higher royalties.

- d) The Government then affirmatively acted on that decision in November 2011 when the Government in a concerted manner abusively intervened in the administrative permitting process to prevent its completion and with it the issuance of the environmental permit. To this end, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶⁰² Although Gabriel and RMGC eventually succumbed to the pressure and acceded to the Government's demands, the Government continued to block the permitting process, effectively holding the Project in suspended animation throughout 2012.¹⁶⁰³ The Government's failure to issue the crucial environmental permit to RMGC following the Ministry of Environment's favorable completion of the technical

Boc: The Roşia Montană Project must be addressed in full responsibility, Agerpres.ro, dated Sept. 3, 2011 (Exh. C-1430).

¹⁶⁰⁰ See *supra* § VII.A.1. See also, e.g., *Traian Băsescu – visit to Roşia Montană*, dated Aug. 29, 2011 (Exh. C-1503) at 2 (President Traian Băsescu: "It is mandatory to renegotiate.").

¹⁶⁰¹ See *supra* § VII.A.1. See also *Roşia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs*, Ecomagazin.ro, dated Aug. 24, 2011 (Exh. C-508).

¹⁶⁰² See *supra* § VII.A.3.

¹⁶⁰³ See *supra* §§ VII.A.4, VII.B.

assessment of the EIA Report in November 2011 and its *de facto* suspension of the EIA procedure throughout 2012 were both unlawful.¹⁶⁰⁴ When the Government re-engaged, it did so by throwing out the rule book, and with it, the rule of law. After extracting an agreement for increased shares and royalties and confirming that all of the legal and technical requirements for permitting were met, the Government forced the Project down an arbitrary political path. Rather than issue the environmental permit and allow the Project to proceed as the law required, the Government simply refused to do so and instead put the Project's future in Parliament's hands through the proxy of the Draft Law.¹⁶⁰⁵ The Government made clear that it would translate a parliamentary "No" on the Draft Law into a "No" on the entire Project. In doing so, the Government completely disregarded and abandoned the legal regime governing Gabriel's investment.¹⁶⁰⁶

- e) For admitted political reasons, the Prime Minister and the Senate leader, who headed the ruling coalition Government, pre-emptively and effectively called upon Parliament to reject the Draft Law, and by proxy the Project, which Parliament did nearly unanimously in a series of votes taken by Senate committees, the Special Commission, and later both chambers of Parliament.¹⁶⁰⁷ These political votes completely disregarded the Government's own specialized assessment and endorsement of the Project's merits, including through the laudatory parliamentary testimony of key Ministers and other Government officials.
- f) Consistent with its stated intent to treat the negative parliamentary vote on the Draft Law as determinative of the Project's future, the State thereafter engaged in a pattern of abusive and unlawful conduct that was wholly incompatible with and disregarded entirely Gabriel's acquired rights in relation to RMGC, to the Project, and to the Bucium Projects.

¹⁶⁰⁴ See Mihai § VIII.A.

¹⁶⁰⁵ See *supra* § VIII.A.

¹⁶⁰⁶ See Mihai § VIII.B.

¹⁶⁰⁷ See *supra* § VIII.B.

- g) Among other things, the Ministry of Environment held additional TAC meetings without legal basis, going through the motions so as to appear to be providing further process in 2014 and in 2015, although the Government already had withdrawn support for the Project;¹⁶⁰⁸ the State-owned Minvest stopped cooperating as shareholder in RMGC;¹⁶⁰⁹ and the State prosecutor commenced abusive and groundless [REDACTED] investigations of RMGC.¹⁶¹⁰ This unlawful course of conduct has continued since the filing of the arbitration. The Government proposed a moratorium on the use of cyanide in mining that is clearly incompatible with and would prevent implementation of the Project.¹⁶¹¹ The Government also has confirmed that it considers utterly meaningless RMGC's development and exploitation License for mining within the Roșia Montană perimeter, most of which is subject to still valid archaeological discharge certificates, by pronouncing the entire area of Roșia Montană an historical monument and thus precluding any activity that would disturb the landscape,¹⁶¹² and by actively pursuing its application to list Roșia Montană's "cultural mining landscape" as a UNESCO World Heritage Site.¹⁶¹³
- h) Through its actions, the State has effectively abandoned its shareholder agreement with Gabriel as well as the License, and has abandoned the parties' joint venture company, RMGC. The State's continued refusal to move forward on RMGC's applications for exploitation licenses for the Bucium Projects cannot be viewed credibly as anything other than the intentional rejection, together with the Roșia Montană Project, of the Bucium Projects.

800. Just as the State's intention is not determinative of whether there has been an expropriation, as the tribunal in *Biloune v. Ghana* observed in finding an expropriation in that

¹⁶⁰⁸ See *supra* § IX.A.

¹⁶⁰⁹ See *supra* § IX.B.1.

¹⁶¹⁰ See *supra* § IX.C.1.

¹⁶¹¹ See *supra* § IX.D.3.

¹⁶¹² See *supra* § IX.D.1.

¹⁶¹³ See *supra* § IX.D.2.

case, one need not plumb the Government’s motivations to conclude on this record that the Government’s conduct unquestionably caused the irreparable and total loss of Claimants’ investments and other factors support the conclusion that this loss was an expropriation.¹⁶¹⁴

801. As Reisman and Sloane observe in the context of what they refer to as “consequential expropriations,” arising for example from a failure to regulate, “[t]he ultimate expropriatory effect of these failures will be painfully apparent, and at least in retrospect, the causes can be identified: for example, feckless or corrupt bureaucracies, lack of political will at the leadership level, negligence or failure to make timely decisions incumbent on the state by virtue of contracts or concession agreements, and so forth. But in consequential expropriations, while there exists, to borrow terms from criminal law, an *actus reus* and a *corpus delicti*, there may not exist a *mens rea*, an intent to expropriate.”¹⁶¹⁵

802. In this case, however, there plainly was an intention to reject the Roșia Montană Project along with RMGC’s neighboring Bucium Projects, and the impacts of the State’s conduct, consistent with that intention, was not merely a consequential effect of so-called regulatory action and inaction directed to achieve other public purpose goals. Here action and deliberate inaction followed the intention to put an end to the Projects that the Government had rejected.

C. Romania Expropriated Gabriel’s Investments in Breach of the Treaties

803. Romania’s treatment of Gabriel’s investments cumulatively constituted an expropriation of its investments in RMGC. While the BITs’ provisions recognize the States’ authority to expropriate property, the BITs make clear that the States may only do so in accordance with the provisions of Articles 5 and VIII(1) respectively. A failure to meet *any* of the treaty legality requirements is a breach of the respective BITs.

804. To comply with such provisions in a BIT, an expropriation must be effected (i) for a public purpose; (ii) under due process of law; (iii) in a non-discriminatory manner; and

¹⁶¹⁴ *Biloune v. Ghana* (CL-132) at 209.

¹⁶¹⁵ REISMAN & SLOANE (CL-123) at 129.

(iv) against prompt, adequate and effective compensation, and these requirements must be fulfilled cumulatively.¹⁶¹⁶

805. In this case, Gabriel's investments not only were subject to measures having an effect equivalent to expropriation, but Romania's expropriation of Gabriel's investments failed to fulfill any of the BITs' legality requirements. In short, the expropriation of Gabriel's investments was not effected for a legitimate public purpose, it was not effected under due process of law, it was discriminatory, and it was not effected against prompt, adequate and effective compensation or any compensation at all – indeed, Romania has unjustly enriched itself in the process.¹⁶¹⁷ Thus Romania expropriated Gabriel's investments in breach of Article 5 of the UK-Romania BIT and in breach of Article VIII(1) of the Canada-Romania BIT, as detailed below.

1. The Expropriation Failed to Satisfy the Public Purpose Requirement

806. To comply with the BITs, an expropriation or measures tantamount to expropriation must be for a legitimate public purpose, and a mere assertion by the State in that regard will not be dispositive.

807. The *ADC v. Hungary* tribunal explained: “If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”¹⁶¹⁸ In that case, Hungary claimed that the legislation that served as the basis for the taking of the claimants' investment was “important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law[.]” The evidence showed, however, that the Government's real motivation was to take

¹⁶¹⁶ DOLZER & SCHREUER (CL-88) at 99-100. *See also Siag v. Egypt* (CL-108) ¶ 428 (noting in regard to a similar treaty provision that it is clear “that all conditions must be met lest an expropriation be deemed unlawful”).

¹⁶¹⁷ *See supra* § IX.E.

¹⁶¹⁸ *ADC v. Hungary* (CL-138) ¶ 432.

the claimants' concession to operate an airport terminal to pave the way for a more lucrative deal for the State.¹⁶¹⁹

808. The *Siag v. Egypt* case demonstrates that a State must be transparent regarding the purpose of the expropriation. In that case the State “failed to satisfy the ‘public purpose’ limb”¹⁶²⁰ of the BIT because whereas it argued that the expropriated land was later used to transport gas to Jordan, the decree taking the land was based on an alleged failure of the claimant to honor its contractual commitments. The tribunal emphasized that the BIT required “that the public purpose [be] the reason the investment was expropriated.”¹⁶²¹

809. Similarly, in *Siemens v. Argentina*, while the tribunal acknowledged that Argentina faced a dire fiscal situation and noted that an expropriation based on a related emergency law that followed could be in the public interest, the tribunal was not persuaded that the actions at issue in fact were taken on that basis. Rather the evidence showed that Argentina began taking the actions that culminated in the deprivation of the claimant's property in order “to reduce the costs . . . of the Contract” and “as part of a change of policy,” and that reference instead to the emergency law “became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis.”¹⁶²²

810. As the decision in *CME v. Czech Republic* demonstrates, while a State might use its regulatory powers to effect an expropriation, the public interest requirement is not satisfied when an expropriation follows an abuse of those powers:

[D]eprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general

¹⁶¹⁹ *Id.* ¶¶ 304, 433, 476. See also *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award of Mar. 31, 1986 (CL-141) at 338 (“There was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good. On the contrary, evidence was given to the Tribunal that areas of the concession taken away from LETCO were granted to other foreign-owned companies”).

¹⁶²⁰ *Siag v. Egypt* (CL-108) ¶¶ 432-433.

¹⁶²¹ *Id.* ¶¶ 429-31.

¹⁶²² *Siemens v. Argentina* (CL-102) ¶ 273.

welfare of the (host) State. The Council's actions and inactions, however, cannot be characterized as normal broadcasting regulator's regulations in compliance with and in execution of the law, in particular the Media Law. Neither the Council's actions in 1996 nor the Council's interference in 1999 were part of proper administrative proceedings. They must be characterized as actions designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment ... [.]¹⁶²³

In that case the tribunal held that the Media Council's actions, which were not aimed at implementing the applicable law in the manner for which it was intended, were not a part of proper administrative proceedings, were characterized by actions that had the effect of removing the legal protections reasonably relied upon by the investor and amounted to expropriation, and could not be considered to have been taken in the public interest within the meaning of the BIT.¹⁶²⁴

811. In this case, the expropriation of Gabriel's investment was not for a legitimate public purpose. The most immediate denial, the failure to issue the environmental permit for the Roşia Montană Project, cannot satisfy the public purpose requirement, as the Government made clear that the Project fully satisfied all the applicable legal requirements for the permit.¹⁶²⁵ Moreover, abusing power to extract a more lucrative deal for the State, as Romania did, is not a legitimate public purpose. In fact, there has not been any "purpose" articulated for the Government's rejection of the Roşia Montană Project or for its maladministration in respect of the Bucium Projects, as the Government never issued any decision, let alone one explaining the grounds that motivated its actions. Gabriel is left to speculate the reasons.¹⁶²⁶ The lack of

¹⁶²³ *CME v. Czech Republic I* (CL-116) ¶ 603.

¹⁶²⁴ *Id.* ¶¶ 604-609. See also *BP Exploration Co. v. Libyan Arab Republic*, Award dated Oct. 10, 1973, reprinted in 53 ILR 297, 329 (CL-142) (sole arbitrator ruling that expropriation not effected for valid public purpose when it is "made for purely extraneous political reasons and [is] arbitrary and discriminatory in character").

¹⁶²⁵ Indeed, and on the contrary, the Government endorsed the public purpose of the Project by, among other things, including it in the National Plan of Strategic Investment and Job Creation in July 2013, and by preparing and endorsing the Draft Law in August 2013 which declared the Project to be of "outstanding public interest." See *supra* § VIII.A.5.

¹⁶²⁶ See *Crystallex v. Venezuela* (CL-62) ¶ 593 ("For the Tribunal, Venezuela had the burden to elucidate the reasons for denying the Permit with some kind of supporting data to explain why it was reaching the conclusion it reached. This is especially important as a general matter because only a precise and reasoned

transparency as to the decisions taken leads necessarily to the conclusion that Romania's expropriation fails to satisfy the public purpose requirement.

2. The Expropriation Was Not Effected Under Due Process of Law

812. To comply with the BITs' requirements, an expropriation cannot be motivated by discriminatory intent and must be effected under due process of law. The due process requirement, however, is not necessarily satisfied by the requirements of the State's municipal law, but incorporates an international standard of due process. As Rudolf Dolzer and Margrete Stevens observe in their study of bilateral investment treaties:

[I]t may be assumed that where the term 'due process of law' is incorporated in a treaty its use is not necessarily identical to what might be the case in domestic law. In an international instrument, the requirement would suggest that the investor for example has the right to advance notification and a fair hearing before the expropriation takes place; and that the decision be taken by an unbiased official and after the passage of a reasonable period of time.¹⁶²⁷

813. As the *ADC* tribunal observed, if an expropriation is taken outside of a legal procedure, one cannot conclude it was effected under due process of law:

'[D]ue process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that '*the actions are taken under due process of law*' rings hollow.¹⁶²⁸

denial could afford Crystallex a true opportunity to challenge that denial (as the denial letter itself states) or to remedy the deficiencies of the project....").

¹⁶²⁷ RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1995) ("DOLZER & STEVENS") (CL-111) at 106.

¹⁶²⁸ *ADC v. Hungary* (CL-138) ¶ 435 (emphasis in original). See also *Siag v. Egypt* (CL-108) ¶¶ 441-442 (where government resolution that in effect terminated contract for alleged failure to meet contractual obligations but that was issued "without any legal basis, in all respects" was found to be an expropriation without due process).

814. The mere existence of a court system available to review expropriatory conduct is not sufficient to satisfy this requirement. As Newcombe and Paradell observe, the “better view is that due process is properly viewed as an obligation of conduct,” which means that “any defect in process, even if reviewable or correctable, amounts to a breach of due process.”¹⁶²⁹

815. The expropriation of Gabriel’s investment was not effected under due process of law. Due process of law suggests an actual legal procedure where legal standards and administrative procedure rules apply. There was no decision taken in any legal context – no government decision, no administrative decision, no judicial decision. The fate of the Project was decided entirely outside of the legal arena – it was taken in the political arena in complete disregard of any notions of due process. Gabriel and RMGC were not afforded any legal process, let alone the process that was due. Thus, the expropriation is also completely lacking in transparency. Moreover, the expropriation of Gabriel’s investments is a discriminatory act that stands in sharp contrast to the neighboring and heavily polluting State-owned Roşia Poieni copper mine, which is permitted to continue to operate and does so to this day.¹⁶³⁰

3. Romania Has Failed to Pay Any Compensation and Moreover Has Been Unjustly Enriched

816. Both BITs require that expropriation, whether direct or resulting from measures having an equivalent effect, be made against prompt, adequate and effective compensation. The failure to provide compensation at the time of an expropriation renders it unlawful.¹⁶³¹

¹⁶²⁹ NEWCOMBE & PARADELL (2009) (CL-143) § 7.34.

¹⁶³⁰ See *supra* § IX.F.

¹⁶³¹ See, e.g., *Burlington v. Ecuador* (CL-187) ¶¶ 543-544 (observing that “[m]any tribunals have held that the lack of payment is sufficient for the expropriation to be deemed unlawful” and ruling that because “Ecuador made no ‘prompt, adequate and effective’ payment to compensate for the expropriation of [claimant’s] investment, ... the Tribunal cannot but conclude that Ecuador’s expropriation was unlawful”); *Mondev v. USA* (CL-145) ¶ 71 (“It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation.”); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits dated Sept. 3, 2013 (CL-199) ¶¶ 361-402 (finding that, even though an offer of compensation was made by respondent, the failure to negotiate in good faith for compensation on the basis of fair market value rendered the expropriation

817. Even when a State expropriates for a valid public purpose, to be lawful, the State must comply with the other legality requirements, including the obligation to compensate.¹⁶³²

This point was underscored by the tribunal in *Santa Elena v. Costa Rica*:

[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.¹⁶³³

818. The tribunal in the *SPP v. Egypt* case, which involved the cancellation of a planned tourist development near the Egyptian pyramids and the subsequent nomination by

unlawful); *Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award dated Apr. 22, 2009 (CL-144) (“*Funnekotter v. Zimbabwe*”) ¶ 107 (“the Tribunal concludes that Zimbabwe breached its obligation under Article 6(c) of the BIT to pay just compensation to the Claimants.”); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated Dec. 8, 2000 (CL-82) (“*Wena Hotels v. Egypt*”) ¶ 101 (“[T]he Tribunal concludes that Egypt violated its obligation under Article 5 of the IPPA, by failing to provide Wena with ‘prompt, adequate and effective compensation’ for the losses it suffered as a result of the seizures of the Luxor and Nile Hotel.”). See also *Amoco v. Iran II* (CL-128) at 292 (concurring opinion of Brower, J.) (stating that Judge Brower would have ruled the expropriation unlawful because “the requirement of applicable international law, and specifically that spelled out in Article IV(2) of the Treaty of Amity for ‘just compensation [which] shall be in an effectively realizable form and shall represent the full equivalent of the property taken’” was not satisfied); *Starrett Housing Int’l, Inc. v. Iran*, Award 314-24-1 dated Aug. 14, 1987, 16 IRAN-US CTR 112, 240-241 (1988) (CL-146) (concurring opinion of Holtzmann, J.) (“[H]ad the Tribunal considered it necessary to address the issue of the lawfulness of the expropriation, it would have had to have found that, notwithstanding the underlying legislative action, the expropriation was unlawful because Iran utterly ignored its international legal obligation under Article IV, paragraph 2, of the Treaty to make ‘adequate provision . . . at or prior to the time of taking for the determination and payment [of just compensation].”).

¹⁶³² See, e.g., *Siemens v. Argentina* (CL-102) ¶ 273 (finding that an expropriation was contrary to the applicable BIT in part because “compensation has never been paid on grounds that, as already stated, the Tribunal finds that are lacking in justification”); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated June 16, 2010 (CL-156) (“*Gemplus v. Mexico*”) ¶ 8-25 (“The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation.”).

¹⁶³³ *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award dated Feb. 17, 2000 (CL-74) ¶¶ 71-72.

Egypt of the pyramid fields, including the project site, for inclusion on the UNESCO World Heritage list, recognized the same principle when it held:

In the Tribunal's view, the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation.¹⁶³⁴

Moreover, the compensation must be in the amount required by the BIT.¹⁶³⁵

a. Compensation Must Amount to Fair Market Value

819. Here, both treaties require that compensation must amount to the “genuine value of the investment.”¹⁶³⁶ In this context “genuine value” as expressed in the BITs is understood as fair market value.

820. For example, in *Rusoro v. Venezuela*, the tribunal observed:

The Tribunal is tasked with establishing the “genuine value” (in the terminology of Article VII of the BIT) of Rusoro's expropriated investment... the Tribunal accepts, that the genuine value is equivalent to the fair market value of the enterprise, i.e. the price at which a willing buyer would buy, and a willing seller would sell, no party being under any type of duress and both parties having good information about all relevant circumstances involved in the purchase.¹⁶³⁷

¹⁶³⁴ *SPP v. Egypt* (CL-0129) ¶ 154. In that case, the Egyptian government's decision to cancel the project and to issue, in accordance with Egyptian law authorizing expropriation of property when necessary to protect antiquities, a decree declaring the lands on the project site to be public property, was held to be a lawful expropriation. *Id.* ¶¶ 156, 158. There was no dispute that Egypt was entitled to cancel the project for the purpose of protecting antiquities and that it had done so. The issue in the case was whether the cancellation was an expropriation, including of the rights to develop the project, and the amount of compensation due. The tribunal held that the cancellation was an expropriation that included an indirect expropriation of the contract rights associated with the project and that compensation of the value of those rights was due accordingly. *Id.* ¶¶ 164-168, 182-183.

¹⁶³⁵ *See Rumeli v. Kazakhstan* (CL-140) ¶¶ 705-706 (even though the taking “was made ‘for a public purpose,’ namely the administration of justice and the execution of the laws of the host State,” and that it was made “in accordance with due process of law,” it was nevertheless unlawful because “the valuation placed on Claimants' shares [by the host State] was manifestly and grossly inadequate compared to the compensation which the Tribunal there [sic] holds to be necessary in order to afford adequate compensation under the BIT and the FIL.”).

¹⁶³⁶ UK-Romania BIT (Exh. C-3), Art. 5; Canada-Romania BIT (Exh. C-1), Art. VIII(1).

¹⁶³⁷ *Rusoro v. Venezuela* (CL-149) ¶ 751.

Similarly, in *CME v. Czech Republic*, the tribunal held that the provision of the BIT at issue requiring compensation for expropriation at a level representing the “genuine value of the investment” means fair market value of the investment.¹⁶³⁸

b. Compensation Must Be Assessed Without Expropriatory Impacts

821. Both treaties also make clear that the genuine or fair market value of the investment is to be assessed immediately prior to the expropriation; *i.e.*, per the UK BIT: “immediately before the expropriation or before the impending expropriation became public knowledge,”¹⁶³⁹ and per the Canada BIT: “immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier....”¹⁶⁴⁰

822. The treaties thus incorporate the general principle of international law that compensation must be based on a value that does not consider the effects on value of the expropriatory conduct. As Charles Brower and Jason Brueschke explain in regard to compensation for expropriation in their study of the jurisprudence of the Iran-United States Claims Tribunal:

The first rule is that the effects of the taking itself and any acts related to that taking, including the threat thereof, that may have depressed the value of the property or enterprise on the date of the taking may not be considered in the valuation.¹⁶⁴¹

¹⁶³⁸ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated Mar. 14, 2003 (CL-147) (“*CME v. Czech Republic IP*”) ¶¶ 490-502 (provision of BIT requiring compensation for expropriation at a level representing the “genuine value of the investment” means fair market value of the investment). *See also Crystallex v. Venezuela* (CL-62) ¶ 845 (“monetary damages must be assessed by reference to the fair market value (which is both the standard required under customary international law, and the one applicable under the BIT which speaks of “genuine value” or “valeur réelle” or “valor genuino”)); *BG Group plc v. Argentina*, UNCITRAL, Final Award dated Dec. 24, 2007 (CL-148) ¶¶ 245, 420 (where BIT required that compensation for expropriation “shall amount to the genuine value of the investment,” tribunal concluded that “the Treaty defines such compensation ... as the genuine, or fair market, value of the investment”); *Funnekotter v. Zimbabwe* (CL-144) ¶¶ 47, 130 (concluding that provision of BIT requiring compensation that shall represent the “genuine value of the investments,” “must be determined on the basis of the market value” of the investments).

¹⁶³⁹ UK-Romania BIT (Exh. C-3) Art. 5.

¹⁶⁴⁰ Canada-Romania BIT (Exh. C-1) Art. VIII(1).

¹⁶⁴¹ CHARLES N. BROWER & JASON D. BRUESCHKE, *The Iran-United States Claims Tribunal* (1998) (CL-150) at 546-547 (*citing Shahin Shaine Ebrahimi v. Iran*, Award No. 560-44/46/47-3 dated Oct. 12, 1994, *reprinted*

823. Thus, for example, in *Amoco v Iran*, where the Iran-US Claims Tribunal found that the process of expropriation was “exceptionally lengthy,” spanning more than 20 months before it was “completed” by formal notification on December 24, 1980, in order to ensure that the amount of compensation did not reflect the diminution in value caused by the expropriatory conduct, the Tribunal awarded compensation based on the value as of July 31, 1979, the date such acts commenced.¹⁶⁴²

824. In the investment treaty context, for example, in *EDF v. Argentina*, the tribunal noted that where the BIT required that compensation for expropriation amount to the genuine value of the investment, “this value must be established under ‘normal’ conditions prior to any threat by the host state.”¹⁶⁴³

825. The tribunal in *Rusoro v. Venezuela* explained that the purpose of the rule that the value of expropriated property should be established at the time “immediately before the expropriation or at the time the proposed expropriation became public knowledge” is:

to avoid that the price of the asset becomes contaminated by the information originating from the host State. The fair market value which the State must pay is that which an innocent, uninformed third party would pay, having no knowledge of the State’s pre-expropriation (but post-investment) policy towards the expropriated company and its sector.¹⁶⁴⁴

in 30 IRAN-U.S. CL. TRIB. 170, 206 (1994) ¶ 107 (“a government cannot justify non-payment (or inadequate payment) for valuable property on the ground that prospective buyers would have been lacking because of the expropriation itself or the threat thereof”); *Saghi v. Iran*, Award No. 544-298-2 dated Jan. 22, 1993, *reprinted in* 29 IRAN-U.S. CL. TRIB. 20, 46 (1993) ¶ 79 (“any diminution of value caused by the deprivation of property itself should be disregarded”); *Starrett Housing Corporation v. Iran*, Award no. 314-24-1 dated Aug. 14, 1987, *reprinted in* 16 IRAN-U.S. CL. TRIB. 112, 202 (1987) (noting that the effects of measures falling within the category of acts of taking or threats of taking must, under international law, be excluded in determining compensation for expropriated property); *American Int’l Group Inc. v. Islamic Republic of Iran*, Award No. 93-2-3 dated Dec. 19, 1983, *reprinted in* 4 IRAN-U.S. CL. TRIB. 96, 107 (it is “necessary to exclude the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value”); *INA Corporation v. Iran*, Award No. 184-161-1 dated Aug. 13, 1985, *reprinted in* 8 IRAN-U.S. CL. TRIB. 373, 380 (CL-180) (compensation must “disregard[] any diminution of value due to the nationalization itself or the anticipation thereof.”)).

¹⁶⁴² See *Amoco v. Iran II* (CL-128) ¶¶ 132, 185, 266-267.

¹⁶⁴³ *EDF Int’l S.A., SAUR Int’l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated June 11, 2012 (CL-155) ¶¶ 1231-1232.

¹⁶⁴⁴ *Rusoro v. Venezuela* (CL-149) ¶ 756.

826. In *Kardassopoulos & Fuchs v. Georgia*, the tribunal found that the date of expropriation was February 20, 1996, when a certain Decree No. 178 was adopted,¹⁶⁴⁵ but it also found that an earlier Decree No. 477, adopted on November 11, 1995, had “laid the groundwork” for the expropriation and had placed the claimant’s rights already at that time “in serious question.”¹⁶⁴⁶ Consistent with the BIT’s compensation requirement, the tribunal concluded that compensation had to be established with reference to the value of the investment as of the first act of the expropriation:

The Tribunal therefore finds that the appropriate standard of compensation from which to approach the calculation of the damage sustained by Mr. Kardassopoulos is the [fair market value] of the early oil rights (including export rights) as of 10 November 1995. Whilst this pre-dates the expropriation effected by Decree No. 178, the Tribunal considers that the circumstances of this case require it to value Mr. Kardassopoulos’ investment as of the day before passage of Decree No. 477 precisely to ensure full reparation and to avoid any diminution of value attributable to the State’s conduct leading up to the expropriation. This compensation is, in effect, the amount that Mr. Kardassopoulos should have been paid as a result of the compensation process which the Respondent was obliged to put in place promptly after the taking of the Claimants’ investment.¹⁶⁴⁷

827. Similarly, in *Gemplus et. al. v. Mexico*,¹⁶⁴⁸ where the tribunal found that a series of acts led to the expropriation of claimants’ investment, the tribunal held that the relevant date for assessing the value of the expropriated property under the BITs at issue was the day preceding the first wrongful act that together with other subsequent acts led ultimately to the expropriation.¹⁶⁴⁹

828. In their study of the principles that must apply to the valuation of expropriated property in the context of indirect and creeping expropriation, Reisman and Sloane likewise

¹⁶⁴⁵ *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award dated Mar. 3, 2010 (“*Kardassopoulos v. Georgia*”) (CL-68) ¶¶ 388, 517.

¹⁶⁴⁶ *Id.* ¶ 388.

¹⁶⁴⁷ *Id.* ¶ 517.

¹⁶⁴⁸ *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated June 16, 2010 (CL-156).

¹⁶⁴⁹ *Id.* ¶¶ 12-43 – 12-45 (deciding that compensation should be assessed as of June 24, 2001, the day preceding the first wrongful act of June 25, 2001, which act led to a subsequent revocation).

underscore the importance of not awarding compensation based on a measure that takes into account the diminutions in value that result from actions that might only in hindsight be understood to have been part of a series of measures that eventually led to the expropriation of property.¹⁶⁵⁰

c. Romania Failed to Proffer Compensation as Required by the BITs

829. The above principles show that to comply with the BITs' provisions on expropriation, Romania was obligated to proffer compensation to Gabriel in the amount of the fair market value of its investments assessed immediately prior to the expropriation of its investments. Compensation in the amount of the value assessed as of that date was required to ensure that compensation was not diminished by the State's conduct leading up to the expropriation, including threats of such action.

830. In this case, Romania expropriated Gabriel's investments through a series of actions over time. Those actions began, as announced, on August 1, 2011,¹⁶⁵¹ when the Prime Minister, the President, the Minister of Culture, and the Minister of Environment made statements communicating the Government's decision not to allow the Project to proceed on the basis of Gabriel and RMGC's existing agreements and demanding that the terms of the Project and the State's agreements regarding RMGC be renegotiated to increase the State's financial stake.

¹⁶⁵⁰ See generally REISMAN & SLOANE (CL-123).

¹⁶⁵¹ See *supra* § VII.A.1. See also Boc: *I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed*, Mediafax, dated Aug. 1, 2011 (Exh. C-627) (Prime Minister Boc); *Interview of Emil Boc*, TVR1, dated Aug. 1, 2011 (Exh. C-537) (Prime Minister Boc); *Traian Băsescu: Romania needs the Roșia Montană Project, provided the terms for sharing of benefits are renegotiated*, Agerpres ro, dated Aug. 18, 2011 (Exh. C-628) (President Băsescu); TVR1, Special Edition – interview with Traian Băsescu, TVR1, dated Aug. 22, 2011 (Exh. C-1479) (President Băsescu); *László Borbély: The Romanian State could've negotiated the Roșia Montană Contract in much better terms*, Business24 ro, dated Aug. 23, 2011 (Exh. C-629) (Minister of Environment Borbély); *Roșia Montană stirs up tensions in UDMR: Kelemen Hunor shows the door to Eckstein-Kovacs*, Ecomagazin.ro, dated Aug. 24, 2011 (Exh. C-508) (Minister of Culture Hunor); *Traian Băsescu – visit to Roșia Montană*, dated Aug. 29, 2011 (Exh. C-1503) (President Băsescu); *Basescu: Had I negotiated the Roșia Montană contract in 1997, the State would have certainly got more*, Ziarul Financiar, dated Aug. 31, 2011 (Exh. C-926) (President Băsescu); *Emil Boc: The decision on the Roșia Montană mining project must be substantiated based on documents, not stories*, Agerpres ro, dated Sept. 2, 2011 (Exh. C-791) (Prime Minister Boc); *Emil Boc: The Roșia Montană Project must be addressed in full responsibility*, Agerpres ro, dated Sept. 3, 2011 (Exh. C-1430) (Prime Minister Boc).

831. The series of acts and omissions that followed thereafter and over time culminated in an expropriation, with the first acts, as may be seen clearly in hindsight, unmistakably taken in August 2011, indicating that, to be lawful and in accordance with the BITs' requirements, compensation should have been proffered to Gabriel in the amount of the fair market value of its investments immediately before then, *i.e.*, as of July 29, 2011.

832. Compensation has not been offered in that amount – nor indeed in any amount – notwithstanding the enormous losses caused to Gabriel by the taking of its investments.

833. Not only has there not been any compensation offered to Gabriel, none has even been formally acknowledged as owing notwithstanding Prime Minister Ponta's public statements noting that the Project met all the requirements to be permitted and billions in compensation would be owing if it were rejected.¹⁶⁵² Moreover, as detailed above, as a result of the State's expropriation of Gabriel's investments without any compensation whatsoever, the State is substantially and unjustly enriched as it now retains the fruits of Gabriel's very substantial investments.¹⁶⁵³

¹⁶⁵² *Ponta: I sent the Roșia Montană Project to the Parliament so we could not be sued*, Stiri.tvr.ro, dated Sept. 5, 2013 (Exh. C-460) (Prime Minister Victor Ponta: "I was obligated, under the law . . . under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law. Precisely because I considered that I should not do this, I sent the law to Parliament . . . That's the situation and this is why, had I done absolutely nothing, I would have then had to pay I don't know how many billions in compensation to the company in question."). *See also supra* § VIII.B.2 (discussing public statements of Prime Minister Ponta and Minister Delegate Șova warning of the potential consequences of rejecting the Project, including that Gabriel's lost profits at that time were projected at US\$ 2.7 billion); *Sinteza Zilei– interview with Prime Minister Victor Ponta*, Antena3, dated Sept. 11, 2013 (Exh. C-437) (Prime Minister Victor Ponta); *Victor Ponta and Dan Șova's statements regarding the bill on the Roșia Montană mining project, during a live press conference*, Antena3, dated Sept. 12, 2013 (Exh. C-643).

¹⁶⁵³ *See supra* § IX.E.

XV. GABRIEL CANADA AND GABRIEL JERSEY BOTH HAVE STANDING TO PRESENT THIS CLAIM

A. Gabriel Canada

834. Gabriel Canada is a corporation duly constituted under the laws of the Yukon Territory, Canada.¹⁶⁵⁴ Gabriel Canada is thus an “enterprise” within the meaning of Article I(b) of the Canada-Romania BIT.¹⁶⁵⁵ Gabriel Canada has made investments in Romania and thus is an “investor” of Canada within the meaning of Article I(h)(ii) of the Canada-Romania BIT.¹⁶⁵⁶ Gabriel Canada had made investments in Romania as defined by Article I(g) of the Canada-Romania BIT.¹⁶⁵⁷

835. Article XIII of the Canada-Romania BIT thus provides that Gabriel Canada may submit its claims that measures taken and not taken by Romania breached the provisions of the Canada-Romania BIT and that Gabriel Canada has incurred loss and damage by reason of or arising out of those breaches.¹⁶⁵⁸

836. Gabriel Canada’s losses entail, most prominently, the loss of the value of the rights to develop the Roşia Montană Project and the Bucium Projects, the rights to which it enjoyed through its indirect ownership interest in RMGC.¹⁶⁵⁹

¹⁶⁵⁴ Gabriel Canada was originally incorporated under the Company Act of British Columbia, Canada under the name “PIC Prospectors International Corporation,” it later changed its name to “Starx Resources Corp.,” and in April 1997 it was continued under the Yukon Business Corporations Act changing its name to Gabriel Resources Ltd. On April 11, 1997, Gabriel Canada acquired all of the issued and outstanding shares of Gabriel Jersey at which time Gabriel Jersey became the wholly owned subsidiary of Gabriel Canada and Gabriel Canada indirectly acquired interests in the Roşia Montană Project and the Bucium Projects. Gabriel Resources Ltd. 1999 Annual Information Form dated Apr. 17, 2000 (Exh. C-1797) at 7.

¹⁶⁵⁵ Canada-Romania BIT (Exh. C-1), Art. I(b)(i).

¹⁶⁵⁶ Canada-Romania BIT (Exh. C-1), Art. I(h)(ii). *See also id.*, Art. I(b)(i) defining “enterprise” as “any entity constituted or organized under applicable law”

¹⁶⁵⁷ Canada-Romania BIT (Exh. C-1) Art. I(g) defines “investment” as “any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws and, in particular, though not exclusively, includes:... (iv) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.”

¹⁶⁵⁸ *See* Canada-Romania BIT (Exh. C-1) Art. XIII(1)-(2).

¹⁶⁵⁹ *See, e.g.*, Gabriel Resources Ltd., 2010 Annual Information Form, dated March 9, 2011 (Exh. C-1808) at 4, 5 (providing a chart of Gabriel’s business organization structure).

837. As detailed in the Request for Arbitration, Gabriel Canada provided timely notice of the dispute to Romania in an effort to reach an amicable settlement of the dispute; and Gabriel Canada satisfied the requirement set forth in Article XIII(3)(b) of the BIT to waive its right to initiate or continue any other proceeding in relation the measures that are in breach of the Canada-Romania BIT before the courts or tribunals of Romania or in a dispute settlement procedure of any kind.¹⁶⁶⁰

838. The three-year limitation period contained in Article XIII(3)(d) of the Canada-Romania BIT is satisfied in relation to the claims presented because, in light of the “creeping” nature of Romania’s treaty violations, the cumulatively unlawful and ultimately destructive effect of Romania’s conduct became apparent only within three years of the date Gabriel Canada commenced arbitration.¹⁶⁶¹ Thus, not more than three years elapsed from (i) the date Gabriel Canada first acquired knowledge of Romania’s breaches that form the basis of the claims presented in this arbitration and the full consequences of those breaches for Gabriel Canada’s investments and (ii) the date it commenced arbitration.

B. Gabriel Jersey

839. Gabriel Jersey is a company incorporated under the laws of the Bailiwick of Jersey.¹⁶⁶² Gabriel Jersey thus is a “company” within the meaning of Article 1(d) of the UK-Romania BIT.¹⁶⁶³ Gabriel Jersey made investments in Romania as defined by Article 1(a) of the UK-Romania BIT.¹⁶⁶⁴ Article 7 of the UK-Romania BIT thus provides that Gabriel Jersey may

¹⁶⁶⁰ Request for Arbitration ¶¶ 46-47.

¹⁶⁶¹ See, e.g., *Rusoro v. Venezuela* (CL-149) ¶ 213 (noting with respect to similar 3-year limitation in Canada-Venezuela BIT that the relevant date for time bar purposes is when claimant obtained actual or constructive knowledge of measures as well as of their consequences for its investment); *id.* ¶ 229 (noting that conduct occurring outside of 3-year limitation may be considered as part of a unitary composite breach when sufficiently linked to later conduct occurring within the 3-year period).

¹⁶⁶² Gabriel Jersey was incorporated in 1996 under the laws of the Bailiwick of Jersey, UK and has been an indirectly wholly-owned subsidiary of Gabriel Canada since April 1997. See Gabriel Resources Ltd. Consolidated Financial Statements for the year ended Dec. 31, 1997 (Exh. C-1815) at 2-3.

¹⁶⁶³ UK-Romania BIT (Exh. C-3) Art. 1(d)(i) (defining “companies” in respect of the United Kingdom as “corporations ... incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended”). The UK-Romania BIT was extended to the Bailiwick of Jersey by an exchange of notes on Mar. 22, 1999. Exchange of Notes (Exh. C-3).

¹⁶⁶⁴ UK-Romania BIT (Exh. C-3) Art. 1(a) defines “investment” as “every kind of asset admitted in accordance with the laws and regulations in force in the territory of the Contracting Party in which the investment is made

submit the dispute concerning Romania's BIT obligations in relation Gabriel Jersey's investments to arbitration.¹⁶⁶⁵

840. Gabriel Jersey's losses entail, most prominently, the loss of the value of the rights to develop the Roșia Montană Project and the Bucium Projects, the rights to which it enjoyed through its ownership interest in RMGC.¹⁶⁶⁶

841. While Gabriel Canada and Gabriel Jersey do not seek to collect double compensation, each Claimant is equally entitled to present a claim in respect of its respective loss and each is entitled to obtain an award in its favor in the full amount of its respective loss.¹⁶⁶⁷

XVI. GABRIEL IS ENTITLED TO COMPENSATION IN THE AMOUNT NEEDED TO WIPE OUT ALL THE CONSEQUENCES OF ROMANIA'S TREATY BREACHES

842. Romania's treaty breaches, as described above, caused enormous damage, depriving Gabriel of the entire value of its investments in Romania. That is so regardless of whether this Tribunal considers that Romania's conduct breached the obligation to accord fair and equitable treatment to Gabriel's investments, constituted an indirect expropriation in breach of Romania's BIT obligations, or some other breach or combination of breaches including of the obligations set forth in Article II and Article III of the Canada-Romania BIT and/or Article 2 of the UK-Romania BIT.

and in particular, though not exclusively, includes ... (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any performance under contract having a financial value; ... (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

¹⁶⁶⁵ UK-Romania BIT (Exh. C-3) Art. 7. *See also* Request for Arbitration ¶¶ 54-55.

¹⁶⁶⁶ *See, e.g.*, Gabriel Resources Ltd., 2011 Annual Information Form, dated March 14, 2012 (Exh. C-1809) at 5 (providing a chart of Gabriel's business organization structure). Gabriel Jersey is the majority shareholder in RMGC. Since 2011, Gabriel Jersey has owned 80.69% of the outstanding shares of RMGC. Share Purchase Agreement dated July 22, 2011 (Exh. C-1672); General Meeting of Shareholders Resolution of July 22, 2011 (Exh. C-1652). *See also* Birsan § II.D.1.

¹⁶⁶⁷ *See Suez v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction dated Aug. 3, 2006 (CL-52) ¶ 51 (acknowledging that while "the Respondent's concern about the danger of double recovery to the corporation and to the shareholders for the same injury is to be noted, ... the Tribunal believed that any eventual award in this case could be fashioned in a way to prevent double recovery").

843. Gabriel, accordingly, seeks an award that fully compensates for all the damage caused by the loss of the entire value of its investments in the Roșia Montană Project and the Bucium Projects as set forth below.

A. Romania Is Under an Obligation to Make Full Reparation for the Injuries Caused by Its Treaty Breaches

844. A State has the obligation to make full reparation for the injuries caused by its wrongful acts. This principle is expressed in Article 31(1) of the International Law Commission (ILC)'s Articles on State Responsibility:

The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.¹⁶⁶⁸

This rule extends to obligations set forth in treaties or conventions, as reflected in the Permanent Court of International Justice's decision in the *Chorzów Factory* case:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.¹⁶⁶⁹

The Court specified the content of the obligation to make reparation in the following frequently cited passage:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, *wipe out all the consequences* of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.¹⁶⁷⁰

845. This basic principle of international law has been affirmed and applied in hundreds of cases since then. As the *ADC v. Hungary* tribunal observed, “there can be no doubt

¹⁶⁶⁸ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 31.

¹⁶⁶⁹ *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 8 (Jurisdiction), July 26, 1927, P.C.I.J. Series A, No. 9 (1927) (“*Chorzów Factory Judgment No. 8*”) (CL-114) at 21.

¹⁶⁷⁰ *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 13 (Merits), Sept. 13, 1928, P.C.I.J. Series A, No. 17 (1928) (“*Chorzów Factory Judgment No. 13*”) (CL-172) at 47 (emphasis added).

about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”¹⁶⁷¹

846. Reparation may take a number of forms, as Article 34 of the ILC Articles on State Responsibility provides, “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination....”¹⁶⁷²

847. Restitution involves the re-establishment as far as possible of the situation that existed prior to the commission of the internationally wrongful act.¹⁶⁷³ As such, it reflects the essential principle cited above that reparation must, as far as possible, *wipe out all the consequences* of the illegal act. It is thus the primary form of reparation.¹⁶⁷⁴ As the commentary to the ILC Articles explains, however, “[t]he concept of restitution is not uniformly defined. According to one definition, it consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act;”¹⁶⁷⁵ according to the other definition, it is “the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed.”¹⁶⁷⁶

848. The ILC Articles adopt the former, more narrow definition, “which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed.”¹⁶⁷⁷ The ILC Articles, however, also make clear that “[r]estitution in this narrow sense may of course

¹⁶⁷¹ *ADC v. Hungary* (CL-138) ¶ 493; *id.* ¶¶ 486-495 (surveying numerous international cases and other sources of international law reasserting the validity of the *Chorzów Factory* formulation). *See also Vivendi v. Argentina II* ¶ 8.2.5 (“There can be no doubt about the vitality of this [*Chorzów Factory*] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice”).

¹⁶⁷² ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 34.

¹⁶⁷³ *Id.* Art. 35.

¹⁶⁷⁴ *Id.* Art. 35, cmt. (3).

¹⁶⁷⁵ *Id.* Art. 35, cmt. (2).

¹⁶⁷⁶ *Id.* Art. 35, cmt. (2).

¹⁶⁷⁷ *Id.* Art. 35, cmt. (2).

have to be completed by compensation in order to ensure full reparation for the damage caused.”¹⁶⁷⁸

849. The ILC Articles make clear that insofar as restitution is either not meaningfully available or not sufficient to fully repair the loss, the responsible State is under an obligation to compensate for the damage caused. To that end Article 36 of the ILC Articles provides:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.¹⁶⁷⁹

This is the principle set forth by the Court in the *Chorzów Factory* case in the frequently quoted passage, which follows the one cited above:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁶⁸⁰

Thus, the principles of reparation require, where an award of restitution is not available or reasonably possible, an award of compensation in an amount corresponding to the value that (i) would re-establish the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act, and (ii) would cover additional damage caused, if any.

¹⁶⁷⁸ *Id.* Art. 35, cmt. (2).

¹⁶⁷⁹ *Id.* Art. 36.

¹⁶⁸⁰ *Chorzów Factory Judgment No. 13* (CL-172) at 47. *See also* Canada-Romania BIT (Exh. C-1), which provides in Article XIII(9) in relevant part, “A tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.”

850. As numerous investment treaty tribunals have recognized, these principles of customary international law regarding reparation apply in the context of investment treaty breaches.¹⁶⁸¹

1. When Damage Includes the Loss of the Value of an Investment, Reparation Must Cover Its Fair Market Valuation Immediately Prior to the Wrongful Act

851. When the injury caused by the wrongful conduct includes that the investor has been deprived entirely of the value of its investments, reparation, in the form of compensation, must cover the restitution value of those investments, meaning, as noted above, its value immediately prior to the wrongful act, which in turn is to be assessed on the basis of its fair market value.¹⁶⁸²

852. Lost value should be compensated on the basis of fair market value. As the commentary to the ILC Articles on State Responsibility explains: “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”¹⁶⁸³

853. In addition, in order to provide damages sufficient to “wipe out the consequences” of the unlawful acts and provide full reparation, the fair market value must be assessed without reference to the effects of the State’s wrongful conduct. This is also necessary to be consistent

¹⁶⁸¹ See e.g. *Gold Reserve v. Venezuela* (CL-81) ¶¶ 678-681; *Crystallex v. Venezuela* (CL-62) ¶ 846-850; *Rusoro v. Venezuela* (CL-149) ¶ 640; *ADC v. Hungary* (CL-138) ¶ 495; *Siemens v. Argentina* (CL-102) ¶ 352; *Siag v. Egypt* (CL-108) ¶ 582; *Biwater v. Tanzania* (CL-106) ¶ 774.

¹⁶⁸² Where additional damage was caused beyond the value of the investment immediately prior to the wrongful act, as noted above, an award of additional compensation may be necessary.

¹⁶⁸³ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 36, cmt. (22), (citing, *inter alia*, *AIG* at 106 (“valuation should be made on the basis of the fair market value of the shares”), *Starrett Housing* at 201 (“The Tribunal agrees with the Expert’s valuation concept, methods and approach. He set out to determine the fair market value [of the investment] ...”). See also *ADC v. Hungary* (CL-138) ¶ 499 (“the Tribunal concludes that it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments”); *CMS v. Argentina* (CL-176) ¶ 402 (“the general concept upon which commercial valuation of assets is based is that of ‘fair market value’”).

with the general principle that a State may not invoke its own illegal act to diminish its liability, *nullus commodum capere de sua injuria propria*.¹⁶⁸⁴

854. That general principle of law is reflected, for example, in the award of the Iran-US Claims Tribunal in *Phillips Petroleum* in which the tribunal held that there should be no reduction in the value placed on the venture at issue on account of “threats of expropriation or from other actions by the Respondents related thereto.”¹⁶⁸⁵ Indeed, based on analogous principles, the Iran-US Claims Tribunal repeatedly observed that compensation for an expropriation is owed on the basis of the fair market value of the property absent expropriatory effects.¹⁶⁸⁶

855. Thus when assessing value of property lost due to wrongful conduct, its fair market value should be assessed on the date immediately prior to the wrongful conduct to ensure that reparation will re-establish the *status quo ante* and to avoid taking account of any depressive effects of the conduct.

a. Expropriation in Breach of Treaty Requirements

856. Like most BITs, Article VIII of the Canada-Romania BIT and Article 5 of the UK-Romania BIT include the compensation conditions under which property may be expropriated in accordance with the BIT. Those compensation provisions, however, do not apply to claims for reparation due when the State has violated those treaty provisions.¹⁶⁸⁷ Where

¹⁶⁸⁴ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (2006) (“CHENG”) (CL-181) at 149.

¹⁶⁸⁵ *Phillips Petroleum Company Co. v Islamic Republic of Iran*, IUSCT, Award no. 425-39-2, dated June 29, 1989 (CL-178) (“*Phillips Petroleum v. Iran*”) ¶ 111.

¹⁶⁸⁶ See, e.g., *American International Group, Inc. et al. v. Iran*, Award No. 93-2-3 dated Dec. 19, 1983 (CL-179) (Iran-US Claims Tribunal holding that, in valuing a going concern, it must disregard “the effects of the very act of nationalization” and “the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value”); *INA Corp v. Iran*, Award No. 184-161-1 dated Aug. 13, 1985 (CL-180) (Iran-US Claims Tribunal defining “fair market value” as the “amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof”). See also *supra* ¶¶ 821-822 (describing that this same rule is incorporated into Article VIII of the Canada-Romania BIT and Article 5 of the UK-Romania BIT).

¹⁶⁸⁷ *ADC v. Hungary* (CL-138) ¶ 481 (“The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these [sic] cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation

a treaty has been breached, the customary international law principles of reparation discussed above apply.

857. Thus the *Biwater* tribunal held in the context of an expropriation that it found did not comply with the provisions of the BIT at issue:

Full reparation entitles the unlawfully expropriated investor to restitutionary damages which include, but are not limited to, the fair market value of the unlawfully expropriated investment as determined by the application of an appropriate valuation methodology. In addition, the unlawfully expropriated investor is entitled to damages for the consequential losses suffered as a result of the unlawful expropriation.¹⁶⁸⁸

Other tribunals have ruled similarly.¹⁶⁸⁹

858. In any event, the compensation due for an unlawful expropriation cannot be any less than would be due in accordance with the treaty's provisions for a lawful expropriation,¹⁶⁹⁰ as Judge Brower observed in his concurring opinion in the *Amoco* case, “[N]o system of law sensibly can be understood as intending to reward unlawful conduct.”¹⁶⁹¹ As described

with damages for an unlawful expropriation.”); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated Feb. 7, 2017 (CL-198) ¶ 160 (“In the Tribunal’s view, the appropriate standard of compensation in this case is the customary international law standard of full reparation. Article III(1) [of the applicable BIT] only describes the conditions under which an expropriation is considered lawful; it does not set out the standard of compensation for expropriations resulting from breaches of the Treaty.”).

¹⁶⁸⁸ *Biwater v. Tanzania* (CL-106) ¶ 775.

¹⁶⁸⁹ E.g., *Siag v. Egypt* (CL-108) ¶ 540 (the BIT “does not purport to establish a *lex specialis* governing the standards of compensation for wrongful or unlawful expropriations”). See also *Crystallex v. Venezuela* (CL-62) ¶ 846; *Siemens v. Argentina* (CL-102) ¶ 349; *Vivendi v. Argentina II* (CL-113) ¶¶ 8.2.3-8.2.5.

¹⁶⁹⁰ See *Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award dated Dec. 19, 2013 (CL-182) ¶¶ 1460-1461 (ruling where there was a breach of Article 10(1) of the Energy Charter Treaty (ECT) that “damages to be awarded... shall not be lower than what the ECT prescribes for a lawful expropriation.”).

¹⁶⁹¹ *Amoco Int’l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award dated Dec. 30, 1982, Concurring Opinion of J. Brower, 1 Iran-US CTR 493 (CL-183) (“*Amoco v. Iran P*”) ¶ 18 n.22. See also REISMAN & SLOANE (CL-123) at 148 (“BITs and comparable multilateral investment treaties should, as a matter of both the intent of their drafters and the policies that animate them, be construed to deter, not reward, unlawful expropriation of all kinds.”); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017) (CL-184) ¶ 3.81 (“As a matter of principle, such an effect appears to be necessary because the financial consequences of lawful and unlawful behaviour would otherwise be the same. This would not be in the interest of legal justice and run counter the general preventive function of law.”).

above,¹⁶⁹² a lawful expropriation in accord with the BITs entails compensation in the amount of the fair market value of the investment assessed immediately prior to the expropriation. Thus, reparation for an unlawful expropriation in breach of the BITs requires restitutionary damages at a level no less than the amount of the fair market value of the property immediately prior to the expropriation.

b. Other Treaty Breaches

859. The principles of reparation set out above apply equally in respect of losses caused by other treaty breaches. Thus compensation must be at a level that provides full reparation; meaning, it must “wipe out the consequences” of the unlawful act. This begins with providing the value that restitution (in the sense of restoring the *status quo ante*) would bring, and adding further compensation to that if necessary.

860. When a treaty breach causes the complete deprivation of the use, enjoyment, and value of property rights, regardless whether the treaty breach is characterized as an expropriation, compensation must be based on the fair market value of the property rights at issue assessed immediately prior to the wrongful act, so as to re-establish the *status quo ante* without taking into account of any impacts on value of the wrongful act.

861. Thus, for example, the *Gold Reserve* tribunal, having found that the State’s denial of fair and equitable treatment caused the loss of the entire value of Gold Reserve’s investment, held that “the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate in the present circumstances.”¹⁶⁹³ The tribunal elaborated as follows:

The relevant principles of international law applicable in this situation are derived from the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case that reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment,

¹⁶⁹² See *supra* § XIV.C.3.b (setting out treaty requirements relating to compensation for lawful expropriation).

¹⁶⁹³ *Gold Reserve v. Venezuela* (CL-81) ¶ 680.

the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.¹⁶⁹⁴

Many other tribunals have ruled similarly.¹⁶⁹⁵

2. Where the Wrongful Act Is a Treaty Breach Consisting of a Composite Act the Rule that Reparation Must Re-establish the *Status Quo Ante* Still Applies

862. Where a breach occurs as a result of a series of acts or omissions or course of conduct, it is referred to as a composite act, which is also described in Article 15 of the ILC Articles on State Responsibility.¹⁶⁹⁶

863. As discussed above,¹⁶⁹⁷ a “creeping” expropriation is a composite act as it is effected through a series of acts and omissions considered in the aggregate. When the expropriation is effected in breach of treaty obligations, it is a wrong consisting of a composite act within the meaning of Article 15 of the ILC Articles on State Responsibility.¹⁶⁹⁸

864. Similarly, a denial of fair and equitable treatment or other treaty violation can result from a course of conduct or a series of acts or omissions, and may thus likewise be a wrong consisting of a composite action within the meaning of ILC Article 15.¹⁶⁹⁹

¹⁶⁹⁴ *Gold Reserve v. Venezuela* (CL-81) ¶ 681.

¹⁶⁹⁵ *E.g.*, *Crystallex v. Venezuela* (CL-62) ¶¶ 846, 850 (“Given the cumulative nature of the breaches that the Tribunal must compensate, and especially in view of its findings on FET that the Respondent’s conduct caused all the investments made by Crystallex to become worthless, the Tribunal will apply the full reparation standard according to customary international law;” and noting “it is well-accepted that reparation should reflect the ‘fair market value’ of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.”). *See also* *PSEG v. Turkey* (CL-175) ¶ 307; *CMS v. Argentina* (CL-176) ¶ 410; *Vivendi v. Argentina II* (CL-113) ¶ 8.2.10; *Azurix v. Argentina* (CL-85) ¶¶ 424-425, 442; *Gemplus v. Mexico* (CL-156) ¶ 12-52; *Sempra v. Argentina* (CL-93) ¶¶ 403-404; *Rumeli v. Kazakhstan* (CL-140) ¶ 792; *Occidental v. Ecuador* (CL-71) ¶¶ 704-707.

¹⁶⁹⁶ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 15.

¹⁶⁹⁷ *See supra* ¶¶ 778-783.

¹⁶⁹⁸ *See Crystallex v. Venezuela* (CL-62) ¶ 669. *See also* *Rusoro v. Venezuela* (CL-149) ¶ 223 *et seq.*

¹⁶⁹⁹ *See El Paso v. Argentina* (CL-152) ¶ 518; *Rompotrol v. Romania* (CL-151) ¶ 271. *See also supra* ¶¶ 673, 783-785, 801-817.

865. ILC Article 15 addresses when a composite act is deemed to have occurred. It provides as follows:

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.¹⁷⁰⁰

866. Thus, Article 15(1) provides that a composite act “occurs” at the time when the last act or omission occurs, which, taken with the other acts or omissions, is sufficient to constitute a breach of the obligation, without necessarily having to be the last in the series.¹⁷⁰¹ Article 15(2) in turn makes clear that once the breach occurs, it is “dated to the first of the acts in the series.”¹⁷⁰²

867. As the commentary to the Article notes, this is so notwithstanding that at the time the first act occurs its “status” may be “equivocal until enough of the series has occurred to constitute the wrongful act;”¹⁷⁰³ once the breach occurs, however, it is “[to] be regarded as having occurred over the whole period from the commission of the first action or omission.”¹⁷⁰⁴ The commentary also states that if this were not so, “the effectiveness of the prohibition would thereby undermined.”¹⁷⁰⁵

868. The timing of a composite act has consequences for the application of the principles of reparation. As restitution requires re-establishing the *status quo ante*, the situation as it was before the wrongful act, when the wrongful act is a composite act consisting in a series

¹⁷⁰⁰ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 15.

¹⁷⁰¹ *Id.* Art. 15, cmt. (8).

¹⁷⁰² *Id.* Art. 15, cmt. (10).

¹⁷⁰³ *Id.* Art. 15, cmt. (10).

¹⁷⁰⁴ *Id.* Art. 15, cmt. (10).

¹⁷⁰⁵ *Id.* Art. 15, cmt. (10).

of acts and omissions over time, restitution requires re-establishing the situation as it was prior to the first act in the series.

869. In the context of either (a) a creeping expropriation in breach of treaty obligations or (b) a series of acts or omissions that result in a denial of fair and equitable treatment or other treaty violation causing the loss of the value of an investment, restoring the *status quo ante* thus requires compensation in the amount of the value of the investment immediately prior to the first act in the series.¹⁷⁰⁶

870. In *Gemplus v. Mexico*, therefore, where the tribunal found that a series of acts in the aggregate constituted both a breach of the fair and equitable treatment standard and an unlawful expropriation, the tribunal, referring to Article 15 of the ILC Articles of State Responsibility, identified the first act in the series as the date for assessing compensation.¹⁷⁰⁷

871. Similarly, in *Crystallex v. Venezuela*, where the tribunal concluded, also with reference to ILC Article 15, that the State's conduct amounted to a creeping expropriation of the claimant's mining rights,¹⁷⁰⁸ the tribunal held that the most appropriate valuation date for assessing compensation was the first act in the series giving rise to the creeping expropriation.¹⁷⁰⁹

872. As Reisman and Sloane observe in their classic commentary on this issue, where there is a creeping expropriation or other wrongful composite act that effects a taking of property, therefore, the date for assessing the amount of compensation due is not the date when the conduct finally ripens into a taking, as by then the value of property has been impacted by the wrongful acts.¹⁷¹⁰

¹⁷⁰⁶ In order to provide full reparation and to wipe out the consequences of the breach, if compensation in that amount is not sufficient to cover the loss incurred, further compensation may be needed to do so.

¹⁷⁰⁷ *Gemplus v. Mexico* (CL-156) ¶¶ 12-43 – 12-45.

¹⁷⁰⁸ *Crystallex v. Venezuela* (CL-62) ¶¶ 669, 673-708.

¹⁷⁰⁹ *Id.* ¶¶ 673, 855.

¹⁷¹⁰ REISMAN & SLOANE (CL-123) at 128 (noting that while a creeping expropriation requires a fact-sensitive inquiry to determine the moment when conduct ripens into an expropriation, “that moment need not—and in many cases, we suggest ... should not – be equated with the moment at which the value of expropriated property rights properly should be appraised for compensation purposes. ...[T]he latter moment should be

873. The importance of assessing compensation at the amount of the fair market value of the asset immediately prior to the actions that give rise to the breach is to ensure that the effects of the wrongful conduct do not impair valuation and thus the effectiveness of reparation. The *Rusoro* tribunal underscored this point when it observed in this context that the effects of wrongful measures must be excluded “otherwise the State would be deriving advantage from its own wrong.”¹⁷¹¹ The tribunal also emphasized that this is also the reason why the treaty rule for expropriation requires that compensation be assessed “immediately before the expropriation or at the time the proposed expropriation became public knowledge,” as “[t]he purpose of this rule is to avoid that the price of the asset becomes contaminated by the information originating from the host State.”¹⁷¹²

874. With these principles in mind, the date for assessing the fair market valuation of Gabriel’s investments is discussed further below.

established in a manner that will enable a tribunal seized with a claim based on a creeping expropriation to give full effect to the venerable compensation principles articulated in *Chorzów Factory*.”); *id.* at 146 (“Were the critical moment of expropriation for purposes of valuation set at the date of the *last* of the series of deleterious governmental acts of malfeasance or nonfeasance that ‘ripened into a more or less irreversible deprivation of the [investment]’, then the fair market value of that investment may well be determined to be substantially less than were the critical moment set at the date of one of the earlier acts. ... These results would be calamitous. In the first place, they contravene the venerable and general legal principle, common to municipal and international law, that a delictor may not benefit from its own delict. Second, contrary to the objectives of BITs, they would encourage foreign investors promptly to resort to compulsory dispute-resolution at an early stage rather than seek to resolve matters amicably through negotiation with the host state—lest the investor risk losing potential compensation as the fair market value of its investment progressively depreciates with each subsequent measure ‘tantamount to expropriation’. It would be implausible to ascribe an intention to produce such results to the drafters of BITs. It would also be wholly inconsistent with the general principles of international law on compensation ... for which *Chorzów Factory* remains the lodestar.”); *id.* at 147 (noting that focusing for purposes of compensation on “‘the day when the interference has ripened into a more or less irreversible deprivation of property rather than on the beginning date of the events’ – may threaten to work a manifest injustice in circumstances of creeping or consequential expropriations: It conflates the ‘moment of expropriation’ with what might be denominated the ‘moment of valuation’, the date on which the fair market value of an investment so expropriated should be assessed for purposes of determining the ... compensation required by customary international law.... There is no reason why the results of these two analyses should be temporally congruent.”).

¹⁷¹¹ See *Rusoro v. Venezuela* (CL-149) ¶ 757.

¹⁷¹² See *Rusoro v. Venezuela* (CL-149) ¶ 756. See also *supra* § XIV.C.3.b.

3. Compensation Must Include Interest at an Appropriate Commercial Rate on the Principal Sum Due Running to the Date of Payment of the Award

875. It is firmly established, as recognized in Article 38 of the ILC Articles on State Responsibility, that interest may be necessary to ensure full reparation for wrongful conduct. Article 38 provides:

1. Interest on any principal sum payable ... shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.¹⁷¹³

The view that an award of interest is an integral element of the full reparation principle under international law has been widely shared by international tribunals.¹⁷¹⁴ Here, Article XIII(9)(a) of the Canada-Romania BIT expressly provides that in settlement of disputes between investors and States, the Tribunal may award monetary damages and “any applicable interest.”¹⁷¹⁵

876. Where the principal sum due is quantified earlier than the date of the award, interest must run from that earlier date. As the commentary to ILC Article 38 explains, “[a]s a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.”¹⁷¹⁶

¹⁷¹³ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 38.

¹⁷¹⁴ See ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 38, cmt. (2) (“[S]upport for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence”). See also *Crystallex v. Venezuela* (CL-62) ¶ 930 (“The substantive international legal obligation to pay interest on monies due is well established. An authoritative statement of the position is to be found in Article 38(1) of the ILC Articles”); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated July 28, 2015 (CL-63) ¶ 943 (“Pre-Award interest is granted in order to ensure full reparation (see Articles on State Responsibility...)”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award dated Nov. 27, 2013 (CL-64) (“*Total v. Argentina II*”) ¶ 251 (“[I]t is undisputable that the delay incurred by the creditor... in receiving the payment of the amount of money due to it must be compensated through the awarding of interest at an appropriate rate. This is required... ‘to the extent that is necessary to ensure full reparation’”). See also ELIHU LAUTERPACHT and PENELOPE NEVILL, *The Different Forms of Reparation: Interest*, in *The Law of International Responsibility* (2010) (“LAUTERPACHT & NEVILL”) (CL-66) at 614.

¹⁷¹⁵ Canada-Romania BIT (Exh. C-1), Art. XIII(9)(a).

¹⁷¹⁶ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 38, cmt. (2).

877. To compensate the injured party, as the ILC Articles on State Responsibility also recognize,¹⁷¹⁷ interest must run until the date the obligation to pay is fulfilled, *i.e.*, until the date of payment. As Sir Elihu Lauterpacht and Penelope Neville observed in their review of the principles relating to interest, the principle that interest must be awarded until the date of payment was recognized multilaterally in the Decision of the Governing Council of the United Nations Compensation Commission of December 18, 1992,¹⁷¹⁸ and more generally that “[i]nternational courts and tribunals for the most part now award post-award interest, including the regional human rights courts, the European Union courts, and arbitral tribunals.”¹⁷¹⁹ This principle also has been affirmed by many investor-State arbitral tribunals.¹⁷²⁰

878. The rate of interest must be set at the level necessary to ensure full reparation in the circumstance and, as such, requires a case-specific assessment. As the commentary to ILC Article 38 explains, “[t]he interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.”¹⁷²¹

879. The circumstances of this case include that the UK BIT provides in Article 5 that expropriation must be accompanied by compensation, which “shall include interest at a normal commercial rate until the date of payment.”¹⁷²² Similarly, the Canada BIT provides in

¹⁷¹⁷ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 38, cmt. (2).

¹⁷¹⁸ LAUTERPACHT & NEVILLE (CL-66) at 615 (*quoting* Decision of the Governing Council of the United Nations Compensation Commission of Dec. 18, 1992, S/AC.26/1992/16 as follows: “Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.”).

¹⁷¹⁹ LAUTERPACHT & NEVILLE (CL-66) at 617.

¹⁷²⁰ *E.g.*, *Kardassopoulos v. Georgia* ¶ 677 (“[I]nterest is to be awarded at such a rate so as to achieve full reparation and runs from the date when the principal sum should have [been] paid until the obligation to pay is fulfilled.”); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated Mar. 28, 2011 (CL-70) ¶ 364 (“*Lemire v. Ukraine II*”) (“Interest shall continue to accrue, until all amounts owed in accordance with this Award have been finally paid.”); *Occidental v. Ecuador* (CL-71) ¶ 847 (“[T]he Tribunal concludes that... interest should run until the date of payment of the present Award, in accordance with established practice...”).

¹⁷²¹ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 38, cmt. (10).

¹⁷²² UK-Romania BIT (Exh. C-3), Art. 5. *See also* *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award dated May 6, 2016 (CL-73) ¶ 511 (nothing that where “the Treaty is silent on interest applicable to an award of compensation for

Article VIII(1) that compensation for expropriation shall be payable “at a normal commercial rate of interest.”¹⁷²³ As both BITs thus require compensation to include interest at a normal commercial rate until the date of payment in the case of a lawful expropriation, any award of compensation in this case must be accompanied by interest at least at that level.¹⁷²⁴

880. The overwhelming majority of international tribunals award interest on a compound basis. In the investor-State dispute context, the appropriateness of awarding compound interest as a measure of compensation due under international law principles was first discussed in *Santa Elena v. Costa Rica*,¹⁷²⁵ in which the tribunal observed:

[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.¹⁷²⁶

881. Following that award Lauterpacht and Nevill observed, even as of 2010, that “the balance of investment treaty tribunal practice has shifted towards awarding compound interest

breach of the FET standard ..., the Tribunal finds guidance on the matter in Article 38 of the ILC Articles on State Responsibility”).

¹⁷²³ Canada-Romania BIT (Exh. C-1) Art. VIII(1).

¹⁷²⁴ See IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017) (CL-184) ¶ 3.81 (noting that compensation for unlawful conduct cannot be at a level less than would be owed for a lawful taking, noting that “the financial consequences of lawful and unlawful behavior would otherwise be the same,” and that “[t]his would not be in the interest of legal justice and run counter the general preventive function of law.”).

¹⁷²⁵ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award dated Feb. 17, 2000 (CL-74) (“*Santa Elena v. Costa Rica*”) ¶ 106 (concluding that “Claimant is entitled to an award of compound interest adjusted to take account of all the relevant factors”). See LAUTERPACHT & NEVILL (CL-66) at 618-19 (discussing same).

¹⁷²⁶ *Santa Elena v. Costa Rica* (CL-74) ¶ 104.

where requested by the claimant.”¹⁷²⁷ Since then, the vast majority of tribunals award compound interest.¹⁷²⁸

882. That is because, as the tribunal in *Wena Hotels v. Egypt* observed, “it is neither logical nor equitable to award the claimant only simple interest.”¹⁷²⁹ The tribunal in *Middle East Cement v. Egypt* stated:

[I]nternational jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to

¹⁷²⁷ LAUTERPACHT & NEVILL (CL-66) at 620 n. 29 (listing 19 case examples).

¹⁷²⁸ E.g., *Micula v. Romania* (CL-174) ¶ 1266 (“The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been had it never been injured.”); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award dated Apr. 9, 2015 (CL-75) ¶ 65 (“[I]nternational tribunals manifest a growing tendency to apply compound rather than simple interest in damage calculations”); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award dated Mar. 2, 2015 (CL-76) ¶ 519 (“Compound interest is increasingly recognised in the field of investment protection as better reflecting current business and economic reality, therefore actual damages suffered by a party.”); *Khan v. Mongolia* (CL-77) ¶ 425 (“It is also consistent with recent practice to compound interest, rather than to award it on a simple basis (as used to be the prevailing view).”); *Renta 4 v Russia* (CL-194) ¶ 226 (“[T]he Tribunal considers that the Claimants’ position should prevail on the footing that the proper measure of compensation under general principles of international law should put them in the position that they would have been in had there been compliance with the BIT, that is to say compensation would have been paid to the Claimants upon expropriation of Yukos and they would have been in a position to earn interest thereon. The tribunal accepts that as a matter of realism this includes the compounding of interest; see John Gotanda, “A study on Interest”, VI Dossiers of the ICC Institute of World Business Law 19-28 (2008) and the authorities cited therein.”); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated Sept. 16, 2015 (CL-78) ¶ 524 “[A] review of arbitral decisions shows that compound interest has been deemed to ‘better reflect[] contemporary financial practice’ and to constitute ‘the standard of international law in [] expropriation cases.’ The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal.”); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award dated Dec. 17, 2015 (CL-80) ¶¶ 555-556 (“The Tribunal has little difficulty accepting that interest should be compounding. In modern practice, tribunals often compound interest, and the Claimant referenced a number of such awards. The Claimant’s list dated from 2009, and there would be no difficulty in expanding it by reference to awards handed down in the intervening six years. In essence, compounding interest reflects simple economic sense. Business people invest money and expect some yield from it.”); *Total v. Argentina II* (CL-64) ¶ 261 (“The trend towards granting compound interest in investment awards reflects the different status and position of investors in such disputes from that of States in inter-States disputes, since investors operate in a commercial environment.”). See also *Gold Reserve v. Venezuela* (CL-81) ¶ 854; *Crystallex v. Venezuela* (CL-62) ¶ 935.

¹⁷²⁹ *Wena Hotels v. Egypt* (CL-82) ¶ 129.

simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.¹⁷³⁰

The tribunal stated similarly in *Continental Casualty v. Argentina*:

The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment; and under many national laws recently enacted, an arbitration tribunal is now expressly empowered to award compound interest.¹⁷³¹

883. With these principles in mind, the award of interest necessary to compensate the Gabriel in this case is discussed further below.

B. The Measure of Loss Suffered Due to the Wrongful Conduct Need Not Be Demonstrated with Certainty

884. The *Chorzów Factory* case makes it clear that reparation is designed to “reestablish the situation which would, *in all probability*, have existed if that act had not been committed.”¹⁷³² Thus, the standard of proof for establishing the amount of damages suffered must be treated like any other fact in the case – it must be demonstrated as being more probable than not.

885. Rejecting the argument that the amount of damages must be proved to a “certainty,” the *Gold Reserve v. Venezuela* tribunal explained as follows:

The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative

¹⁷³⁰ *Middle East Cement v. Egypt* (CL-83) ¶ 174.

¹⁷³¹ *Continental Casualty Co. v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award dated Sept. 5, 2008 (CL-84) ¶ 309. See also, e.g., *Azurix v. Argentina* (CL-85) ¶ 440 (“The Tribunal considers that compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor.”); *MTD v. Chile* (CL-86) ¶ 251 (“The Tribunal considers that compound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor.”); *Wena Hotels v. Egypt* (CL-82) ¶ 129 (“[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations.”); *Siag v. Egypt* (CL-108) ¶ 595 (“the Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.”).

¹⁷³² *Chorzów Factory Judgment No. 13* (CL-172) at 47 (emphasis added).

or merely “possible”, as both Parties acknowledge. In the Tribunal’s view, all of the authorities cited by the Parties – including by Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. In particular, those cases that discuss the requirement for “certainty” do so in the context of distinguishing “proven” damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability.¹⁷³³

As Professor Gotanda explains in his Hague Lectures on general principles of law relating to damages, “the certainty rule applies to only the fact of damages, not to the amount of damages,” noting that this is so in a wide range of jurisdictions.¹⁷³⁴ Several investor-State tribunals have noted this general principle as well.¹⁷³⁵

C. Gabriel’s Claim for Compensation

886. Taking into consideration the principles of reparation discussed above, Gabriel’s claim for compensation is presented below. In short, Gabriel seeks compensation based on the amount of the fair market value of its investments in Romania immediately prior to Romania’s wrongful conduct forming the basis of Gabriel’s claims in this arbitration, *i.e.*, the value of its investments as of July 29, 2011. The measure of Gabriel’s damages, and thus its claim for

¹⁷³³ *Gold Reserve v. Venezuela* (CL-81) ¶ 685.

¹⁷³⁴ JOHN GOTANDA, *Damages in Private International Law*, 326 RECUEIL DES COURS 77 (2007) (CL-185) (noting this rule applies, *e.g.*, in England (at 102), Belgium and other European civil law countries “generally” (at 111-112), Canada (at 117-118), the United States (at 127), Brazil and other Latin American civil law countries “generally” (at 131), Australia and New Zealand (at 135-136), and India (at 138)). *See also* CHENG (CL-181) at 239 (observing with respect to the computation of damages that “human endeavours can only aspire to approximate accuracy and truth, but not to the absolute”).

¹⁷³⁵ *See, e.g., SPP v. Egypt* (CL-129) ¶ 215 (“[I]t is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.”); *Tecmed v. Mexico* (CL-122) ¶ 190 (“any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain”); *Vivendi v. Argentina II* (CL-113) ¶ 8.3.16 (“it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.”). *See also Gemplus v. Mexico* (CL-156) ¶ 13-92 (“[A]s a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent’s wrongs and unfairly defeat the claimant’s claim for compensation – as was indicated in the *Sapphire* award regarding the ‘behaviour of the author of the damage.’”).

compensation, is supported by the Expert Report of Compass Lexecon submitted with this Memorial.

1. Romania's Wrongful Conduct, a Composite Act That Began in August 2011 and That Culminated In a Breach of Several of the BITs' Provisions, Destroyed the Value of Gabriel's Investments

887. Romania's conduct was wrongful as a matter of international law, as it was in breach of the provisions of both the Canada-Romania BIT and the UK-Romania BIT as demonstrated above.

888. Neither BIT sets out the remedy for a breach of its provisions,¹⁷³⁶ although the Canada-Romania BIT provides in its Article XIII(9) that this Tribunal has the authority to award monetary damages and any applicable interest. The well-established principles directing compensation in an amount sufficient to offset all of the damage caused by the breaches of the treaty as detailed above therefore apply.

889. Romania's treaty violations arose from the cumulative effects of the State's conduct over time, causing ultimately the complete deprivation of the use, benefit, and value of Gabriel's investments, including the rights to develop the Roșia Montană Project and the Bucium Projects. Whether the conduct is characterized as a denial of fair and equitable treatment, an indirect, creeping expropriation, or other breach of Article II or Article III of the Canada-Romania BIT or Article 2 of the UK-BIT, what is at issue is a series of acts and omissions that taken together and over time constitute a composite act as addressed in Article 15 of the Articles of State Responsibility.

890. As detailed in the previous sections, although Gabriel encountered unreasonable and unlawful delays in the course of project development, progress towards permitting nevertheless was being made and by mid-2011 the Roșia Montană Project was well on track to receive the environmental permit. The wrongful conduct that gave rise to the treaty breaches at issue in this case began in August 2011 when the Government plainly decided and in effect

¹⁷³⁶ As noted above, the PCIJ held in *Chorzów Factory* (Jurisdiction), "[r]eparation ... is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." *Chorzów Factory Judgment No. 8* (CL-114) at 21.

announced through the statements of the Prime Minister, the President, the Minister of Culture and the Minister of Environment, that it would not allow the Roșia Montană Project to proceed on the basis of the State's existing agreements with Gabriel and RMGC.¹⁷³⁷

891. While that act itself was abusive, the record shows that Gabriel, albeit plainly coerced, attempted to find a way forward to minimize damage and made an offer that it hoped would satisfy the State's demands.¹⁷³⁸ The Government's failure to respond and proceed, however, prevented any resolution of the matter. Instead the Government maintained what was an unlawful suspension of the EIA process throughout 2012, and blocked other permits and approvals during that time.¹⁷³⁹

892. Even then, however, although Gabriel's investments were being subjected to further unlawful treatment and its rights were being frustrated, Gabriel held onto to hope that it could find a way to satisfy the State's demands and minimize damage to its investments.¹⁷⁴⁰

893. Even throughout 2013, when the Government (i) made further demands and engaged in further coercive tactics with Gabriel and RMGC, (ii) arbitrarily and in manifest disregard of the applicable legal framework governing Gabriel's investment effectively submitted the Project for review by Parliament, and then (iii) pronounced it rejected, there was no actual legal decision rejecting the Project. These circumstances left at least some question for Gabriel as to whether there was any hope the Government still would honor its agreements with Gabriel and RMGC.¹⁷⁴¹

¹⁷³⁷ See *supra* § VII.A.1. The first call to reject the Project and the State's agreements with Gabriel was made by Prime Minister Boc on August 1, 2011. See *Boc: I am not a fan of the Roșia Montană Project, the contract is not advantageous and it should be re-discussed*, Mediafax, dated Aug. 1, 2011 (Exh. C-627) (Prime Minister Emil Boc); *Interview of Emil Boc*, TVR1, dated Aug. 1, 2011 (Exh. C-537) at 1 (Prime Minister Emil Boc).

¹⁷³⁸ See Henry ¶¶ 6-60; Tănase II ¶¶ 105-118.

¹⁷³⁹ See *supra* § VII.B.

¹⁷⁴⁰ See Henry ¶¶ 66-70; Tănase II ¶¶ 128-135.

¹⁷⁴¹ See Henry ¶¶ 84-129; Tănase II ¶¶ 161-201. See also REISMAN & SLOANE (CL-123) at 144 (“[I]nvestors will often be either unaware or inclined to resist the conclusion that a host state has, by an act or acts of nebulous legality (the economic effects of which remain unknown at the time), initiated what will ultimately constitute an expropriation. Often, foreign investors will be anxious to rescue or fortify their investments in the face of discrete harmful acts or regulatory omissions. . . . In these circumstances investors anxious to save their investment may well be inclined to sink further capital into them in an effort to compensate for the

894. Indeed, although the Senate voted to reject the Draft Law in November 2013, the Chamber of Deputies' vote was not taken until June 2014.¹⁷⁴² The Ministry of Environment convened further TAC meetings in April and in July 2014 and still again in April 2015, during which time the Ministry claimed to be preparing to commission a further study relating to the location of the Project's tailings management facility.¹⁷⁴³

895. Only in hindsight it is clear these further TAC meetings were convened just to give the appearance of further process, particularly when viewed with the additional statements from the Government confirming the Project had been rejected and the failure of the Government and NAMR to respond to RMGC or Gabriel on matters relating to the Roșia Montană Project, the Bucium Projects, or RMGC. It was thus only after the passage of time and more unlawful and abusive behavior¹⁷⁴⁴ that it became clear that the Roșia Montană Project, the Bucium Projects, and indeed RMGC itself had been rejected entirely.¹⁷⁴⁵

896. Recognized as a composite act, whether as a series of measures tantamount to expropriation or a series of acts and omissions constituting a lack of fair and equitable treatment or combination of other treaty violations that cumulatively resulted in the total deprivation of the

harmful governmental interferences or other measures tantamount to expropriation. This is particularly so where an investor reasonably believes, based on knowledge of the prevailing political and economic conditions, that the host state will not provide 'prompt, adequate, and effective' compensation. Investment of further capital in such cases reflects a desperate attempt to save the investment, and under the circumstances, may be the only rational and responsible course of action."), at 145 ("Victims of creeping or consequential expropriations therefore may recognize expropriatory conduct at a relatively early stage, but resist yielding to it for as long as possible, hoping to reverse it.").

¹⁷⁴² See *supra* § VIII.B.

¹⁷⁴³ See *supra* § IX.A.

¹⁷⁴⁴ See *supra* § IX.C, IX.D.

¹⁷⁴⁵ See Henry ¶¶ 145-146. See also REISMAN & SLOANE (CL-123) at 123-124 ("Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights."); *id.* at 128 ("The gradual and sometimes furtive nature of the acts and omissions that culminate in a creeping expropriation tends to obscure what tribunals ordinarily denominate the 'moment of expropriation.'"); *id.* at 132 ("But hindsight, of course, is notoriously lucid. Only in retrospect does it become evident that, regardless of the state's intent, the cumulative impact of its interferences with property rights would inevitably culminate in an aggregate effect tantamount to expropriation."); *id.* at 143 ("In the circumstances of a creeping or consequential expropriation, however, where the state takes property rights indirectly and unlawfully, it becomes difficult if not impossible to discern when, precisely, the foreign investor 'irretrievably lost' the value of its investment.").

value of Gabriel's investments,¹⁷⁴⁶ it is evident that the conduct giving rise to the violations at issue began in August 2011 and following the events of 2013 ripened into treaty violations that caused the complete deprivation of the value of Gabriel's investments.¹⁷⁴⁷

897. Gabriel seeks to be compensated in an amount that would wipe out the consequences of Romania's breaches and re-establish the *status quo ante*. This requires compensation in the amount of the fair market value of Gabriel's investments on the date immediately prior to the treaty breaches at issue, i.e. July 29, 2011. Compensation based on the value of Gabriel's investments immediately prior to the wrongful conduct at issue is the only reliable way to ensure that the depressive effects on value of the wrongful conduct are not taken into account, which is particularly relevant in this case as the wrongful conduct at issue was publicly announced.

2. Immediately Prior to Romania's Wrongful Conduct, the Value of the Rights to Develop the Roşia Montană Project and the Bucium Projects Was High and Future Prospects Were Strong

898. As Gabriel Canada is a publicly traded company on the Toronto Stock Exchange (TSX), Gabriel has been subject to stringent TSX financial and compliance requirements and disclosure obligations throughout the relevant time period.¹⁷⁴⁸ As Gabriel has been solely

¹⁷⁴⁶ See *supra* ¶¶ 673, 783-785, 801-817.

¹⁷⁴⁷ As such, the requirement in Article XIII(3)(d) of the Canada-Romania BIT (Exh. C-1) that an investor may submit a dispute to arbitration only if "not more than three years have elapsed from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage," is plainly met by Gabriel Canada as Gabriel Canada submitted its claims to arbitration on July 21, 2015, the date of the Request for Arbitration, well within three years of when Gabriel Canada first acquired or reasonably could have acquired knowledge of the violations of the Canada-Romania BIT here at issue.

¹⁷⁴⁸ Henry ¶ 3. As Mike Armitage and Nick Fox of SRK Consulting describe, these disclosure requirements include filing a comprehensive public report, referred to as an "NI 43-101 Technical Report," prepared by an independent expert referred to as a "Qualified Person," concerning a company's mining projects. SRK Report ¶ 16. In 2009 a group of leading mining consulting firms conducted an independent audit of the Roşia Montană Project and issued the 2009 NI 43-101 Technical Report for the Project. Technical Report on the Rosia Montana Gold Project, Transylvania, Romania, 4 Mar. 2009 (Exh. C-127). Thereafter, SRK independently audited the Roşia Montană Project and issued the 2012 NI 43-101 Technical Report. SRK Consulting, Technical Report on the Roşia Montană Gold and Silver Project, Transylvania, Romania, 1 Oct. 2012 (Exh. C-128). See SRK Report ¶¶ 36-37. The Bucium projects, both the Rodu-Frasin project and the Tarniţa project, were described in detail in public securities filings as well. See, e.g., Gabriel Resources Ltd., 2011 Annual Information Form for the Year Ended Dec. 31, 2011 dated Mar. 14, 2012 (Exh. C-1809) at 45-

focused on developing its investments in Romania through RMGC,¹⁷⁴⁹ Gabriel Canada's publicly traded value in the period immediately prior to the measures at issue, provides a non-speculative, real-world observable indicator of the value of Gabriel's investments.¹⁷⁵⁰

899. As Gabriel CEO Jonathan Henry observes, by July 2011, and particularly once the Ministry of Culture agreed to issue the ADC for the Cârnic massif,¹⁷⁵¹ permitting for the environmental permit for the Roşia Montană Project seemed to be progressing to conclusion, and Gabriel had expanded its management team and positioned itself to bring the Projects into production.¹⁷⁵²

900. Analysts covering the market, including those who had visited the Project site, recognized the Roşia Montană Project as one of the largest and most economically robust undeveloped gold projects in the world, and together with the Bucium Projects, the value of Gabriel's stock price, reflecting the underlying value of the rights to develop the Projects, was expected to increase substantially upon issuance of the environmental permit for the Roşia Montană Project.¹⁷⁵³ [REDACTED]

[REDACTED]¹⁷⁵⁴ Other market analysts also reported that the value of Gabriel's shares, reflecting the value of its investments in the Project and Bucium

49; Gabriel Resources Ltd., 2010 Annual Information Form for the Year Ended Dec. 31, 2010 dated Mar. 9, 2011 (Exh. C-1808) at 28.

¹⁷⁴⁹ See Gabriel Resources Ltd., 2011 Annual Information Form for the Year Ended Dec. 31, 2011 dated Mar. 14, 2012 (Exh. C-1809) at 5. By 2011 Gabriel's investments in Romania were focused solely on the Roşia Montană Project and the Bucium Projects. See Gabriel Resources Ltd., 2011 Annual Information Form for the Year Ended Dec. 31, 2011 dated Mar. 14, 2012 (Exh. C-1809) at 6, 7, 30.

¹⁷⁵⁰ See Compass Lexecon ¶ 41.

¹⁷⁵¹ See *supra* § 328.

¹⁷⁵² Henry ¶¶ 27-29.

¹⁷⁵³ Henry ¶ 30. See also Compass Lexecon ¶ 44.

¹⁷⁵⁴ [REDACTED]

Projects, would be expected to increase sharply (in the range of 30-50%) upon issuance of the environmental permit.¹⁷⁵⁵

901. In July 2011, Gabriel's traded share price, reflecting the recognized market value of Gabriel's investments in the Roşia Montană Project and Bucium Projects, was nearly C\$ 8 per share and its market capitalization was more than C\$ 3 billion.¹⁷⁵⁶ [REDACTED]

[REDACTED] The fact that Gabriel's major shareholders included at the time Newmont Mining, Electrum, Paulson & Co., BSG, and Baupost, all highly experienced natural resource investors, also was a strong indication that Gabriel's project development rights were highly valuable assets.¹⁷⁵⁸

902. Gold prices also were increasing at that time, a fact noted repeatedly by President Băseşcu in August 2011 when the Government began broadcasting its decision to demand an increased stake for the State in RMGC generally as well as for the Roşia Montană Project particularly. Explaining the reason he considered that the "sharing of benefits" had to be

¹⁷⁵⁵ See, e.g., [REDACTED]

¹⁷⁵⁶ See, e.g., [REDACTED] At the time the Canadian dollar was trading above parity with the US dollar and therefore C\$ 3 billion was equivalent to in excess of US\$ 3 billion.

¹⁷⁵⁷ Henry ¶ 31 [REDACTED]

¹⁷⁵⁸ Henry ¶ 31.

“renegotiated,” President Bănescu made the point very clearly, explaining, “I was looking at the gold prices in the last five years: five years ago the gold price was 600 dollars per ounce, now it is 1,700 dollars per ounce and could well exceed 2,000-2,500 per ounce by the end of the year.”¹⁷⁵⁹ In a televised interview a few days later, the President again made the point stating that prices had increased for gold by “200%” and for silver by “500%,” and that because of that, the State’s economic share of the Project both in terms of royalties and in terms of ownership was insufficient.¹⁷⁶⁰

903. The Government’s wrongful and very public treatment of Gabriel’s investments, and particularly as it progressed thereafter, had certain negative impacts on its market value.¹⁷⁶¹ This fact underscores that compensation on the basis of the value of Gabriel’s investments on any date later than July 29, 2011 would not provide full compensation for the injury caused by Romania’s wrongful conduct.

3. Gabriel’s Claim for Compensation Is Based Upon Highly Reliable Evidence of the Fair Market Value of Its Investments

904. Gabriel’s damages entail the lost fair market value of the rights to develop the Roşia Montană Project and the Bucium Projects (referred to here as the “Project Rights”) as of July 29, 2011 (referred to here as the “Valuation Date”).¹⁷⁶² The measure of Gabriel’s damages is detailed in Compass Lexecon’s expert report and is based on highly reliable evidence of value.¹⁷⁶³

a. Stock Market Capitalization Method

905. Compass Lexecon explains that a “fair market valuation requires calculating the price at which a hypothetical willing buyer and a hypothetical willing seller would voluntarily

¹⁷⁵⁹ *Traian Bănescu: Romania needs the Roşia Montană Project, provided the terms for sharing of benefits are renegotiated*, Agerpres.ro, dated Aug. 18, 2011 (Exh. C-628).

¹⁷⁶⁰ TVR1, Special Edition – interview with Traian Bănescu, TVR1, dated Aug. 22, 2011 (Exh. C-1479).

¹⁷⁶¹ Indeed, as Mr. Henry notes, once it became clear that the Romanian State was blocking the permitting process, discussions with potential investors in Gabriel stopped demonstrating without question the severely negative impact of Romania’s wrongful conduct on the value of Gabriel’s investments. *See* Henry ¶ 32.

¹⁷⁶² *See* Compass Lexecon ¶ 37.

¹⁷⁶³ *See generally* Compass Lexecon.

transact the business under no compulsion to buy or sell.”¹⁷⁶⁴ In the case of publicly traded companies, the market stock price constitutes “the price at which willing buyers and willing sellers are actually agreeing to transact non-controlling stakes in a company”¹⁷⁶⁵ and reflects “all available information and expectations on production, costs and prices, as well as the market’s perception of risk.”¹⁷⁶⁶ As such, the “share price of a publicly traded company reflects the market consensus of the value, to a minority shareholder, of the company’s underlying assets.”¹⁷⁶⁷

906. Gabriel Canada is a publicly-traded company with shares listed on the TSX, the leading trading exchange for mining companies.¹⁷⁶⁸ As a publicly-traded company subject to Canadian and TSX reporting regulations and requirements, Gabriel Canada has provided regular and comprehensive disclosures to the market concerning the status of the development of the Roşia Montană Project and the Bucium Projects.¹⁷⁶⁹ Gabriel Canada’s disclosures to the market also included extensive technical reports on the Project, prepared by independent technical experts pursuant to the stringent Canadian securities regulation known as the “NI 43-101,”¹⁷⁷⁰ in which the experts certified to the investing public the existence, quantity, and quality of the Project’s mineral resources and mineral reserves¹⁷⁷¹ as well as that the Project “is both

¹⁷⁶⁴ Compass Lexecon ¶ 39.

¹⁷⁶⁵ Compass Lexecon ¶ 41.

¹⁷⁶⁶ Compass Lexecon ¶ 41.

¹⁷⁶⁷ Compass Lexecon ¶ 41. *See also* Compass Lexecon ¶ 5 (stating that the “price of a publicly traded company’s shares (referred to as the stock price) reflects the market’s assessment of the value, to a minority shareholder, of the company’s underlying assets”).

¹⁷⁶⁸ *See supra* ¶ 56. *See also* Compass Lexecon ¶ 43; Henry ¶ 3.

¹⁷⁶⁹ *See, e.g.*, Gabriel Resources Ltd., Annual Information Form for the Year Ended Dec. 31, 2010 (Exh. C-1808); Gabriel Resources Ltd., Annual Information Form for the Year Ended Dec. 31, 2011 (Exh. C-1809).

¹⁷⁷⁰ *See* SRK Report ¶¶ 16-26. *See also generally* Technical Report on the Roşia Montană Gold Project, Transylvania, Romania dated Mar. 4, 2009 (Exh. C-127); SRK Consulting, Technical Report on the Roşia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128); Canadian National Instrument 43-101 – Standards of Disclosure for Mineral Projects (Exh. C-137). NI 43-101 requires mining companies publicly traded in Canada to “prepare and file comprehensive disclosures concerning their mining projects by way of an independent technical report prepared . . . by an independent expert.” SRK Report ¶ 17.

¹⁷⁷¹ *See* SRK Report ¶¶ 24-25, 36 & §§ 4.2-4.3.

technically feasible and economically viable.”¹⁷⁷² Gabriel also was covered extensively by market analyst reports.¹⁷⁷³ The market therefore was well-informed concerning the developments relating to the Roşia Montană Project and the Bucium Projects.

907. As Compass Lexecon explains, during the period preceding the July 29, 2011 Valuation Date,¹⁷⁷⁴ Gabriel Canada’s shares were extensively publicly traded, with an average daily traded volume of over one million shares at a daily value of CAD 7.7 million (equivalent to US\$ 7.9 million) from January 1, 2011 through the Valuation Date.¹⁷⁷⁵ Gabriel Canada’s volume-weighted average market capitalization for the same time period was US\$ 2,621 million.¹⁷⁷⁶ As of the Valuation Date, Gabriel Canada’s stock price had increased to US\$ 7.79 per share and its market capitalization to US\$ 2,956 million.¹⁷⁷⁷ These increases followed “news regarding the advancement of the Projects, such as the receipt of an archaeological discharge certificate (ADC) on July 14, 2011,”¹⁷⁷⁸ which was interpreted by the market “as a sign of progress in the company obtaining the necessary permitting for the development of the Projects.”¹⁷⁷⁹

¹⁷⁷² SRK Report ¶¶ 36-37 (quoting Technical Report on the Roşia Montană Gold Project, Transylvania, Romania dated Mar. 4, 2009 (Exh. C-127), at 188); SRK Consulting, Technical Report on the Roşia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128), at 91).

¹⁷⁷³ See, e.g., BMO Capital Markets, Gabriel Resources, *Key Certificate Granted in Permitting Process*, July 14, 2011 (Exh. C-1841); Macquarie Equities Research, Gabriel Resources, *Permit Possibilities are Improving*, July 14, 2011 (Exh. C-1866); Cormark Securities Inc., Gabriel Resources Ltd., *Granted Archaeological Discharge Certificate*, July 15, 2011 (Exh. C-1425).

¹⁷⁷⁴ See *supra* ¶¶ 682(b), 831.

¹⁷⁷⁵ Compass Lexecon ¶ 44.

¹⁷⁷⁶ Compass Lexecon ¶ 45 n.59. The term “market capitalization” refers to the stock price multiplied by the number of issued common shares. Compass Lexecon ¶ 5.

¹⁷⁷⁷ Compass Lexecon ¶ 44.

¹⁷⁷⁸ Compass Lexecon ¶ 44.

¹⁷⁷⁹ Compass Lexecon ¶ 44. See also, e.g., [REDACTED]

908. As Compass Lexecon observes, because the “Project Rights were Gabriel Canada’s sole prospective income-producing assets”¹⁷⁸⁰ and the “sole objective of Gabriel and RMGC was the development of the Project Rights,”¹⁷⁸¹ the “stock price and, by extension, the market capitalization of Gabriel Canada (i.e., the stock price multiplied by the number of issued common shares) represented the market’s view of the value of Gabriel’s investments in Romania from a minority shareholder’s perspective.”¹⁷⁸²

909. Because Gabriel Canada’s foregoing stock prices and market capitalizations preceded the onset of Romania’s violations of the BITs and the market’s knowledge thereof, they are free of any impact of Romania’s BIT violations.¹⁷⁸³ Compass Lexecon concluded that, “preceding the Valuation Date, the stock price of Gabriel Canada represented an independent, objective, and directly observable market measure of the value, for a minority shareholder, of the Project Rights, free of the impact of the Measures.”¹⁷⁸⁴ For that reason, Compass Lexecon “rel[ie]d upon Gabriel Canada’s stock price” preceding the Valuation Date “as the primary basis to assess damages to Claimants.”¹⁷⁸⁵

910. In calculating Gabriel’s damages, Compass Lexecon therefore used as the starting point Gabriel Canada’s average market capitalization observed for the period of ninety days leading up to and including the Valuation Date, which amounts to US\$ 2,617 million.¹⁷⁸⁶

¹⁷⁸⁰ Compass Lexecon ¶ 42.

¹⁷⁸¹ Compass Lexecon ¶ 5.

¹⁷⁸² Compass Lexecon ¶ 5. *See also* Compass Lexecon ¶¶ 41-42 (similar).

¹⁷⁸³ *See supra* ¶¶ 682(b), 831.

¹⁷⁸⁴ Compass Lexecon ¶ 5. *See also* Compass Lexecon ¶ 42 (similar).

¹⁷⁸⁵ Compass Lexecon ¶ 5. Notably, the stock market capitalization method “requires no assumptions or estimates of resources, commodity prices, discount rate, or costs.” Compass Lexecon ¶ 101.

¹⁷⁸⁶ Compass Lexecon ¶ 45. Compass Lexecon explains that this approach smooths out any short-term volatility that Gabriel Canada’s stock might have exhibited in the period prior to the Valuation Date. Compass Lexecon ¶ 45. Notably, this market capitalization is significantly lower than the US\$ 2,956 million market capitalization observed as of the Valuation Date (*see* Compass Lexecon ¶ 44) and lower also than the US\$ 2,621 million average market capitalization observed for the period from January 1, 2011 through the Valuation Date (*see* Compass Lexecon ¶ 45 n.59). This underscores the reasonableness and conservative nature of Compass Lexecon’s assessment of value.

911. Compass Lexecon made the following adjustments to this amount. First, Compass Lexecon deducted US\$ 183 million in cash and cash equivalents held by Gabriel Canada as of the Valuation Date apart from its assets in Romania.¹⁷⁸⁷

912. Second, Compass Lexecon made an adjustment to account for the fact that “[i]n transactions where majority stakes or entire companies are acquired, it is well documented that acquisition prices tend to be higher than the stock price prior to the announcement of the acquisition, resulting in what is known as an ‘acquisition premium.’”¹⁷⁸⁸ Indeed, acquisition premia are so prevalent in the mining industry that they are monitored and regularly reported by independent services tracking the terms of corporate transactions involving publicly traded mining companies.¹⁷⁸⁹ As Compass Lexecon observes, one such study reported by Factset MergerStat for over 80 transactions involving mining companies in the July 2010 to June 2011 time period reflects a median acquisition premium paid in 30 metal mining transactions amounting to approximately 34% of the stock price and a median acquisition premium for non-producing gold companies (such as Gabriel) amounting to approximately 56% of the stock price.¹⁷⁹⁰ Furthermore, when focusing on the 36 transactions involving non-producing gold company targets reported by these services in the 2005 to 2011 time period, the observed median acquisition premium was 39%.¹⁷⁹¹ Compass Lexecon concluded that acquisition premia “are a standard feature of transactions in the gold mining industry so that one cannot assess fair market value without taking this factor into account.”¹⁷⁹² The prevalence of significant acquisition premia for transactions involving the purchase of majority stakes or entire companies with development rights to significant gold projects over the years leading up to the Valuation Date demonstrates that no hypothetical seller would voluntarily sell and no hypothetical buyer would

¹⁷⁸⁷ Compass Lexecon ¶ 46.

¹⁷⁸⁸ Compass Lexecon ¶ 47.

¹⁷⁸⁹ See Compass Lexecon ¶¶ 48-49.

¹⁷⁹⁰ See Compass Lexecon ¶ 48. Compass Lexecon focused on the median (as opposed to an average) because the median is “less impacted by outlier observations and thus eliminates potential bias from those outliers.” Compass Lexecon ¶ 63 n.86. The median is the “midpoint value of the observations comprising the sample (i.e., it is the value for which there are an equal number of higher and lower observations).” Compass Lexecon ¶ 63 n.86. Thus, for example, in a data set including the values 1, 1, 4, 6, 15, 20, 23, the median amounts to 6, whereas the average amounts to 10.

¹⁷⁹¹ See Compass Lexecon ¶ 49.

¹⁷⁹² Compass Lexecon ¶ 50.

reasonably expect to be able to buy except at a price factoring in such a premium, which therefore must be an essential element in any fair market valuation in the gold mining sector.

913. In the present case, considering that Gabriel lost the value of the Project Rights in their entirety, “to value the Project Rights as a whole, Gabriel Canada’s market capitalization (which reflects a minority shareholder interest) must be adjusted by an acquisition premium at the level that would be expected to be generated in a hypothetical sale of the Project Rights.”¹⁷⁹³ Based on the acquisition premia observed during the relevant time period and based on other sources, Compass Lexecon concluded that “35% is a reasonable premium to apply to the market capitalization of Gabriel Canada as of the Valuation Date.”¹⁷⁹⁴ This acquisition premium is “consistent with the premiums expected by analysts covering the mining sector for potential transactions involving Gabriel Canada during the period leading up to the Valuation Date.”¹⁷⁹⁵

914. Compass Lexecon thus concluded that Gabriel’s damages based on the lost value of the Project Rights as of the July 29, 2011 Valuation Date amount to US\$ 3,286 million.¹⁷⁹⁶

b. Additional Valuation Methods

915. As demonstrated above, the stock market capitalization method provides a robust, independent, objective, and directly observable market measure of the value of Gabriel’s lost Project Rights and avoids speculative elements that a post-hoc valuation method inevitably would include, and is particularly pertinent in the present case, given that Gabriel was focused exclusively on the development of the Project Rights. Nevertheless, in order to provide an additional level of confidence as to the fair market value of the Project Rights that may be

¹⁷⁹³ Compass Lexecon ¶ 51. Compass Lexecon also observes that Gabriel Canada’s shareholders included “five corporate shareholders (two large investment funds and three companies with global mining investment portfolios)” who “had a substantial ownership stake in Gabriel Canada” and that it therefore “is reasonable to expect that a potential acquirer would have to pay a substantial premium over the stock price to obtain their agreement to transfer their stakes in the company.” Compass Lexecon ¶ 52 & n.74.

¹⁷⁹⁴ Compass Lexecon ¶ 52.

¹⁷⁹⁵ Compass Lexecon ¶ 52



¹⁷⁹⁶ Compass Lexecon ¶ 53.

directly observed, Compass Lexecon applied “two additional valuation methods widely used in the mining industry: the relative market multiples of publicly traded companies method and the price to net asset value (P/NAV) method.”¹⁷⁹⁷ These methods “yield[ed] results consistent with the stock market capitalization method.”¹⁷⁹⁸

i. Relative Market Multiples of Publicly Traded Companies

916. The relative market multiples method is a “standard valuation method widely used in the mining industry.”¹⁷⁹⁹ The method involves (i) determining the quantity of the mineral resources available to the company in question and (ii) multiplying the mineral resources by the value (referred to as the relative market multiple) of a unit of mineral resources derived from a sample of similar mining companies.¹⁸⁰⁰ In other words, the method “relies on the market to determine the value of an ounce of mineral resource, and applies this value to the project’s mineral resources.”¹⁸⁰¹ As such, the method reflects the reality that the value of a mining company “is driven ultimately by its ability to identify, develop, and exploit minerals,”¹⁸⁰² and that the “amount of mineral resources and mineral reserves that a company has the rights to explore or exploit is a fundamental driver of value.”¹⁸⁰³

917. Here, the mineral resources and mineral reserves of the Roşia Montană Project and the Bucium Projects provide a particularly reliable basis for valuation, for a number of reasons.

918. First, as SRK Consulting demonstrates, the Project’s mineral resources and mineral reserves had been determined based on “an extensive exploration programme of sampling and assaying . . . and geological and economic modelling conducted and verified by

¹⁷⁹⁷ Compass Lexecon ¶ 54.

¹⁷⁹⁸ Compass Lexecon ¶ 54.

¹⁷⁹⁹ Compass Lexecon ¶ 55.

¹⁸⁰⁰ Compass Lexecon ¶ 8, 55-56.

¹⁸⁰¹ Compass Lexecon ¶ 8.

¹⁸⁰² Compass Lexecon ¶ 56.

¹⁸⁰³ Compass Lexecon ¶ 56.

leading specialists.”¹⁸⁰⁴ Second, the Project’s mineral resources and mineral reserves were comprehensively reviewed and certified to the investing public by two separate groups of independent experts in the NI 43-101 technical reports published in 2009 and 2012.¹⁸⁰⁵ Third, SRK Consulting concluded in its expert report that the “Project’s mineral resources and mineral reserves as reported in the 2009 NI 43-101 Technical Report and the 2012 NI 43-101 Technical Report were determined by procedures that met or exceeded industry standards and are reasonable and reliable.”¹⁸⁰⁶ Fourth, contemporaneous analyses noted the potential for the discovery of further mineralization at the Project with additional drilling and further exploration.¹⁸⁰⁷ Fifth, importantly, as noted above, the Project’s mineral resources and mineral reserves were recognized and registered by the NAMR in 2013.¹⁸⁰⁸ Sixth, as regards the Bucium Projects, SRK Consulting explains that the Bucium Projects’ mineral resources were determined by leading mining consulting specialists in a “professional manner” and were appropriately estimated.¹⁸⁰⁹ Seventh, in light of the increases in metal prices since the Bucium Projects’ mineral resources were estimated, SRK Consulting observes that the Bucium Projects’ mineral resources constitute a “conservative basis” upon which to “assess the economic potential of the Bucium properties as of 2011-2012.”¹⁸¹⁰

919. Accordingly, Compass Lexecon used the mineral resources and mineral reserves of the Roșia Montană Project and the Bucium Projects reported in the contemporaneous reports as the basis of its relative market multiples analysis.¹⁸¹¹

¹⁸⁰⁴ SRK Report ¶ 46. *See also generally* SRK Report §§ 4.2, 4.3 (discussing the Project’s mineral resources and mineral reserves).

¹⁸⁰⁵ *See* SRK Report ¶¶ 53-63 (discussing Technical Report on the Roșia Montană Gold Project, Transylvania, Romania dated Mar. 4, 2009 (Exh. C-127) and SRK Consulting, Technical Report on the Roșia Montană Gold and Silver Project, Transylvania, Romania dated Oct. 1, 2012 (Exh. C-128)).

¹⁸⁰⁶ SRK Report ¶ 65.

¹⁸⁰⁷ *See* SRK Report ¶ 60.

¹⁸⁰⁸ *See supra* ¶ 423.

¹⁸⁰⁹ SRK Report ¶ 116.

¹⁸¹⁰ SRK Report ¶ 118.

¹⁸¹¹ *See* Compass Lexecon ¶¶ 64, 71 & §§ III.2.1-III.2.2. In order to apply the relative market multiple to the Roșia Montană Project’s and the Bucium Projects’ secondary metals, Compass Lexecon converted the non-gold mineral resources and mineral reserves of the Roșia Montană Project and the Rodu-Frasin Project into their gold equivalent and the non-copper mineral resources of the Tarnița Project into their copper equivalent.

920. In determining the relative market multiple, Compass Lexecon compiled a large sample of publicly traded exploration, development, and producing gold mining companies whose market capitalization data was available as of the Valuation Date and identified a subset of 84 comparable publicly traded development-stage companies.¹⁸¹² Compass Lexecon then: computed the market multiples of the companies in the subset by dividing each company's enterprise value by its gold ounce mineral resource equivalent; determined the median of these market multiples; and multiplied the Roşia Montană Project's and the Rodu-Frasin Project's mineral resources and mineral reserves by the median multiple.¹⁸¹³ Compass Lexecon applied the same methodology on a copper company basis to the mineral resources of the copper-based Tarnița Project.¹⁸¹⁴ Compass Lexecon then made adjustments to account for Gabriel's equity stake in RMGC, the lost value of loans extended by Gabriel to RMGC and other shareholders, and the acquisition premium.¹⁸¹⁵

921. This calculation yielded the amount of US\$ 3,261 million as of the July 29, 2011 Valuation Date,¹⁸¹⁶ which is almost identical to the US\$ 3,286 million damages calculated using the stock market capitalization method. Compass Lexecon concluded that the result of the relative market multiples method "provide[s] strong support to our primary damages assessment."¹⁸¹⁷

ii. Price to Net Asset Value (P/NAV)

922. As Compass Lexecon explains, the P/NAV method is widely used by analysts who cover the gold mining industry and involves essentially a combination of "an income

See Compass Lexecon ¶¶ 64, 70. Compass Lexecon also weighted the various categories of mineral resources and mineral reserves according to the degree of geological and economic confidence associated with them by assigning a 100% weight to mineral reserves, a 50% weight to measured and indicated mineral resources, and a 25% weight to inferred mineral resources. Compass Lexecon ¶ 57.

¹⁸¹² Compass Lexecon ¶¶ 61-63.

¹⁸¹³ Compass Lexecon ¶¶ 62-65.

¹⁸¹⁴ Compass Lexecon ¶¶ 66-71.

¹⁸¹⁵ Compass Lexecon ¶¶ 72-74.

¹⁸¹⁶ Compass Lexecon ¶ 74.

¹⁸¹⁷ Compass Lexecon ¶ 101.

approach analysis . . . with information from publicly traded comparable companies.”¹⁸¹⁸ When used to value a gold mining company, the method involves (i) determining the company’s net asset value (“NAV”) by estimating its future cash flows using a constant real gold price and a standardized real discount rate,¹⁸¹⁹ (ii) deriving the ratio, referred to as the P/NAV multiple, of publicly traded stock prices (“P”) of comparable publicly traded companies to the companies’ net asset values,¹⁸²⁰ and (iii) multiplying the NAV of the company in question by the P/NAV multiple.¹⁸²¹ The method is specifically designed to “capture the economic value of the mineral resources and mineral reserves of an exploration, development, or producing mining company”¹⁸²² and accounts for the “unique attributes of mining companies”¹⁸²³ arising from gold’s role as a safe haven and store of value.¹⁸²⁴

923. In applying the P/NAV method, Compass Lexecon calculated the NAV of the Roşia Montană Project by applying a standardized real discount rate and long-term real gold price it derived from P/NAV analyses of comparable companies published by analysts around the Valuation Date, *i.e.*, 5% and US\$ 1,350 per ounce of gold, respectively,¹⁸²⁵ to the projected production schedule and cost estimates of the Roşia Montană Project obtained from the economic model underlying the 2012 NI 43-101 technical report.¹⁸²⁶ To obtain an implied value of the Project Rights, Compass Lexecon added the valuation results for the Bucium Projects

¹⁸¹⁸ Compass Lexecon ¶ 10.

¹⁸¹⁹ See Compass Lexecon ¶¶ 76-80. A real discount rate is net of inflation, whereas a nominal discount rate includes inflation. See Compass Lexecon ¶ 76 n.96. Thus, for example, assuming an inflation rate of 5%, a real discount rate of 5% would correspond to a nominal discount rate of 10%.

¹⁸²⁰ See Compass Lexecon ¶¶ 79-80.

¹⁸²¹ Compass Lexecon ¶ 80.

¹⁸²² Compass Lexecon ¶ 75.

¹⁸²³ Compass Lexecon ¶ 75.

¹⁸²⁴ Compass Lexecon ¶ 77.

¹⁸²⁵ Compass Lexecon ¶¶ 81-83, 87. Compass Lexecon derived the standardized real discount rate and long-term real gold price from the real discount rates and long-term gold price assumptions reported in 156 analyst reports covering 66 gold companies for a period within 15 days before and after the Valuation Date. Compass Lexecon ¶ 82. Notably, the spot price of gold on the Valuation Date was US\$ 1,629 per ounce. Compass Lexecon ¶ 83 n.110. Compass Lexecon explains that it used the US\$ 1,350 per ounce gold price to “maintain consistency with the assumptions implicit in the analysts’ NAV assessments” and that this gold price is “specific to the P/NAV analysis and not necessarily applicable under other valuation methods.” Compass Lexecon ¶ 83 n.110.

¹⁸²⁶ See Compass Lexecon ¶ 86.

obtained in the relative market multiples analysis,¹⁸²⁷ and made adjustments for Gabriel's equity stake in RMGC,¹⁸²⁸ Gabriel's contractual entitlement to a 5% management fee,¹⁸²⁹ the lost value of loans extended by Gabriel to RMGC and other shareholders, and the acquisition premium.¹⁸³⁰ This calculation yielded the amount of US\$ 2,845 million.¹⁸³¹ Compass Lexecon concluded that the result of the P/NAV method "provide[s] strong support to our primary damages assessment."¹⁸³²

D. Total Taking Interest Into Account

924. As Compass Lexecon confirms, in the circumstances of this case, a normal commercial rate corresponds to the 12-month London Interbank Offered Rate (LIBOR) plus 4%,¹⁸³³ subject to annual compounding.¹⁸³⁴

925. Awarding interest running from the July 29, 2011 Valuation Date, as from that date forward Gabriel was deprived of the use, enjoyment, and progressively the full value of the Project Rights, through the date of payment of the award is a necessary component of full reparation in this case to compensate Gabriel for the time it was not in possession of the compensation due.

926. On the basis of the figures set forth above, Gabriel's total loss in principal amount, measured as of the Valuation Date of July 29, 2011, amounts to US\$ 3,286 million.¹⁸³⁵

¹⁸²⁷ Compass Lexecon ¶ 88. Compass Lexecon did so because the Bucium Projects do not have detailed economic models close to the Valuation Date. Compass Lexecon ¶ 88 n.117.

¹⁸²⁸ See Compass Lexecon ¶ 88.

¹⁸²⁹ As of the Valuation Date, Gabriel had the contractual right to an operator fee of 5% of RMGC's gross revenues from mining operations. See RMGC Articles of Association, as amended through July 22, 2011, Art. 11.2.2(e) (Exh. C-184) ("The Extraordinary General Meeting of Shareholders shall have the power to decide on the following aspects: . . . f) Appointment of an operator responsible for the Company's operations, from among Gabriel's Affiliates and approval of such operator's fee or remuneration, which may not exceed 5% of the gross revenues."). See also Compass Lexecon ¶ 88.

¹⁸³⁰ See Compass Lexecon ¶ 88.

¹⁸³¹ Compass Lexecon ¶ 89.

¹⁸³² Compass Lexecon ¶ 101. Compass Lexecon also considered various other valuation methods and concluded that they were not applicable in the present circumstances. See Compass Lexecon ¶¶ 90-91.

¹⁸³³ Compass Lexecon ¶ 99. See *supra* § XVI.A.3.

¹⁸³⁴ Compass Lexecon ¶ 100 ("Commercial rates are subject to compounding, depending on the periodicity with which interest is paid."). See also *supra* ¶¶ 880-882.

Updated by a normal commercial rate of interest, Gabriel's loss, as of June 30, 2017, amounts to US\$ 4,377 million.¹⁸³⁶

XVII. RESPONDENT SHOULD BEAR THE COSTS OF THIS PROCEEDING

927. Romania's conduct has caused Claimants substantial damage, including the need to devote significant resources to present this claim in arbitration. Claimants request this Tribunal, in accordance with the ICSID Convention and the ICSID Arbitration Rules,¹⁸³⁷ to order Romania to bear the costs incurred by Claimants in connection with this proceeding, including attorney's fees, expert witnesses' fees, the Tribunal members' fees and expenses, and the costs of the Centre.

928. Article 61(2) of the ICSID Convention together with Rule 28(1) of the ICSID Arbitration Rules gives ICSID tribunals broad discretion to allocate costs between the parties.¹⁸³⁸ The *von Pezold v. Zimbabwe* tribunal observed in this regard:

While the guidance may be minimal, it is crystal clear from the wording of the Article that it confers on ICSID tribunals broad and unfettered discretion in assessing and allocating the costs of an arbitration proceeding. This has been recognized by numerous ICSID tribunals.

The Tribunal also notes that in a number of ICSID precedents, the tribunal, in the exercise of its discretion, has ruled that the starting point in an award of costs is that it should reflect the relative success of parties in the proceeding and that, if a party has clearly prevailed, there is no reason

¹⁸³⁵ Compass Lexecon ¶ 101, Table 10.

¹⁸³⁶ Compass Lexecon ¶ 102.

¹⁸³⁷ Article 61(2) of the ICSID Convention provides that "the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid." Rule 28(1) of the ICSID Arbitration Rules provides that "the Tribunal may, unless otherwise agreed by the parties, decide . . . with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties." The Canada-Romania BIT (Exh. C-1) expressly confirms in its Article XIII(9) that the Tribunal "may also award costs in accordance with the applicable arbitration rules."

¹⁸³⁸ See, e.g., *ADC v. Hungary* (CL-138) ¶ 530 ("It is clear from Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules that the Tribunal has a wide discretion with regard to costs.").

in principle why that party should not be paid his costs by the unsuccessful party.¹⁸³⁹

929. The principle that the losing party should pay costs has become common practice in investor-State disputes, as reflected in the decisions of many arbitral tribunals.¹⁸⁴⁰ The *ADC v. Hungary* tribunal underscored that an award of costs may be a necessary element of compensation:

In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality experts on quantum. The Tribunal is not surprised at the total of the costs incurred by the Claimants. Members of the Tribunal have considerable experience of substantial ICSID cases as well as commercial cases and the amount expended is certainly within the expected range. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.¹⁸⁴¹

930. As Claimants have demonstrated in this Memorial and will demonstrate in further submissions, an award of costs to Claimants is fully justified and necessary to make Claimants whole.

¹⁸³⁹ *von Pezold v. Republic of Zimbabwe* (CL-63) ¶¶ 1001-1002.

¹⁸⁴⁰ See, e.g., *Rusoro v. Venezuela* (CL-149) ¶¶ 865, 878 (observing “the criterion, often used in investment arbitration, that the losing party should make a significant contribution to the payment of the arbitration fees and the costs and expenses incurred by the prevailing party,” and requiring the losing party to bear US\$ 3.3 million of the successful party’s costs in the arbitration); *Hrvatska v. Slovenia* (CL-80) ¶¶ 584-586, 599, 610, 612, 614 (finding that “the prevailing trend in investment treaty arbitration is that the successful party recover some or all of its costs,” and requiring the losing party to bear US\$ 10 million of the successful party’s arbitration costs and legal and other reasonable costs incurred in connection with the arbitration); *Gold Reserve v. Venezuela* (CL-81) ¶¶ 860, 862 (noting “a number of cases” that have “awarded costs on a ‘loser pays’ basis,” and requiring the losing party to bear US\$ 5 million of the successful party’s legal costs and expenses); *Kardassopoulos v. Georgia* (CL-68) ¶¶ 689, 692 (noting that “ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs,” and requiring the losing party to bear US\$ 7.9 million of the successful parties’ costs, including legal fees, experts’ fees, administrative fees, and the fees of the tribunal).

¹⁸⁴¹ *ADC v. Hungary* (CL-138) ¶ 533.

XVIII. REQUEST FOR RELIEF

931. For all the reasons set forth above, Claimants Gabriel Canada and Gabriel Jersey, reserving the right to amend these submissions following further pleadings in this case and in light of such further considerations of fact and law as may be adduced, respectfully request the following:

- a) That the Tribunal under the Canada-Romania BIT:
 - i) Hold that Respondent breached its obligations under Article II of the BIT;
 - ii) Hold that Respondent breached its obligations under Article III of the BIT;
and
 - iii) Hold that Respondent breached its obligations under Article VIII of the BIT; and further
- b) That the Tribunal under the UK-Romania BIT:
 - i) Hold that Respondent breached its obligations under Article 2 of the BIT;
and
 - ii) Hold that Respondent breached its obligations under Article 5 of the BIT;
and further
- c) That the Tribunal
 - i) Award Claimants compensation in the total amount of US\$ 3,285,656,649 plus interest compounded annually running from July 29, 2011 up through the date of payment of the Award so established at a rate of 12-month LIBOR + 4% ;
 - ii) Award Claimants compensation on such other basis as the Tribunal may deem to be warranted;

- iii) Award Claimants the amount of legal fees and costs incurred in these proceedings; and
- iv) Award Claimants interest on the amount of legal fees and costs awarded running from the date of the Award up through the date of payment.

Respectfully submitted,



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