**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

**GABRIEL RESOURCES LTD.**

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

Claimants

**VS.**

**ROMANIA**

Respondent

**ICSID CASE NO. ARB/15/31**

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# RESPONDENT'S RESPONSE TO CLAIMANTS' OBSERVATIONS ON NEW EXHIBITS

6 DECEMBER 2021

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# 1 INTRODUCTION

1 For years, the village of Roşia Montană and the surrounding area have been in a socio-economic limbo. RMGC has held the mining license for Roşia Montană for 23 years, since December 1998, but has to date, failed to secure the permits and the social license to build and operate the Project. Meanwhile, this arbitration has been going on for more than six years.[1]

2 As a result of RMGC's failure to develop the Project, Roşia Montană has not benefitted from the economic development that the Project was expected to bring. The lack of economic development, in turn, has undermined the village's social fabric, including as a result of depopulation due to RMGC's purchase of properties to make way for the Project.

3 Romania cannot disregard the interests of the local population and let the area further languish until the conclusion of the arbitration and the resumption of the Project – if indeed it is the Claimants' and RMGC's intention to resume the Project. Romania has a duty to promote the socio-economic development of the area, in accordance with Romanian law and subject to RMGC's rights under the License. As repeated by the Respondent throughout this arbitration, if RMGC can meet the Project's requirements under Romanian law and if it can secure the social license, the Project can be implemented.[2]

4 In this context, UNESCO's decision on 27 July 2021 to inscribe the Roșia Montană Mining Landscape on the World Heritage List (the "**UNESCO listing**") is a positive development for Roșia Montană and the surrounding area. It will provide employment opportunities and funding for the preservation of the unique cultural heritage in the area,[3] until such time as RMGC obtains the necessary permits and the social license.[4]

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[1] Notice of Dispute requesting consultation dated 20 January 2015, at **Exhibit C-8**.

[2] PHB-Resp., p. 61 *et seq.* (paras. 203-205).

[3] See *infra*, para. 20.

[4] See *infra*, Section 2.

5 Through their application to introduce nine new exhibits (the "**New Exhibits**") and their Observations on the New Exhibits, the Claimants have focused on the public debate surrounding the UNESCO listing rather its legal effects.

6 The Claimants, however, do not address the actual impact of the UNESCO listing on the Project as a matter of international law and Romanian law. This is not a coincidence. The fact of the matter is that the UNESCO listing does not affect the Claimants' rights under the License. It does not change or add to the existing legal protections for the cultural and archeological heritage in Roşia Montană.[5]

7 Romania has yet to take any measures regarding the UNESCO listing. The Claimants wrongly speculate that Romania will breach the BITs when taking such measures; however, they remain silent on the legal implications of the UNESCO Convention and their interpretation of Romanian law is flawed.

8 RMGC still has a valid mining license, renewed in 2019, and State authorities have not revoked or otherwise modified any of the permits for the Project.[6] The Project is thus on the same track, and under the same legal regime, as it was before the UNESCO listing, and it remains for RMGC to advance it in accordance with Romanian law (**Section 2**).

9 As a result, the UNESCO listing cannot have any impact on the Tribunal's determinations as to jurisdiction, liability and quantum. These issues have been fully briefed in the arbitration, and the UNESCO listing is irrelevant to the determinations that the Tribunal must now make (**Section 3**).

10 Lastly, the New Exhibits do not support the Claimants' conspiracy theory that the UNESCO listing is the last step in Romania's coordinated effort to

[5] Rejoinder, p. 226 (para. 712).

[6] PHB-Resp., p. 191 (para. 752).

expropriate their investments.[7] The UNESCO listing is an attempt by the Romanian government to support the socio-economic development of a severely disadvantaged area in circumstances where the Claimants' attempts to develop the Project have stalled. This cannot and does not constitute a breach of the BITs (**Section 4**).

[7] The Claimants' argument that the resumption of the UNESCO application "immediately" after the first hearing belies the Respondent's argument that this application had no impact on RMGC's rights is also baseless. Claimants' Observations on New Evidence, p. 17 *et seq.* (para. 35); see also *id.*, p. 10 *et seq.* (para. 19-22) (Section IIB). The timing of the renewal of the UNESCO application and the Respondent's motives behind it, are ultimately irrelevant to ascertain whether the rights of RMGC have been impacted by the UNESCO application. Further, the State of Romania restarted the UNESCO application for reasons stated above (para. 3) and did not have to wait until either the Claimants deigned resuming the permitting process, or the issuance of the Tribunal's Award, whichever would come first.

## 2 THE UNESCO LISTING HAS NO IMPACT ON THE MINING PROJECT

11 As demonstrated below, Romania is not bound, either as a matter of international law (**Section 2.1**) or Romanian law (**Section 2.2**), to take any specific measures regarding the UNESCO listing that would interfere with RMGC's mining rights under the License.

### 2.1 As a Matter of International Law, Romania Is Not Bound to Take Any Specific Measures That Would Interfere with RMGC's Mining Rights

12 The legal regime governing the protection of cultural heritage is set out in the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972 (the "**UNESCO Convention**" or the "**Convention**"). The Convention imposes merely an obligation of "reasonable endeavors" on States Parties to the Convention and affords them broad discretion in adopting measures for the protection and conservation of their cultural heritage. The relevant provision is Article 5 of the Convention which provides, in relevant part:

> "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention **shall endeavour**, **in so far as possible**, **and as appropriate for each country**: (a) to adopt a **general policy** which **aims** to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; …"[8]

13 The UNESCO Convention does not place any specific obligations on States Parties in respect of cultural and natural heritage that is inscribed on the World Heritage List. The obligation to protect relates to cultural and natural heritage in general, irrespective of inclusion on that list.

[8] UNESCO World Heritage Convention, at **Exhibit R-691**, p. 3 (Article 5) (emphasis added).

Accordingly, the inscription of heritage on the World Heritage List does not impose on the States Parties any obligations, beyond those that they assumed when joining the Convention. However, the inclusion on the World Heritage List provides economic benefits to the States Parties by giving them access to international assistance, including financial assistance.[9]

14 Furthermore, while the States Parties are expected, under Article 6.1 of the Convention, to protect cultural and natural heritage as world heritage, this protection must "fully [respect] the sovereignty of the States on whose territory the cultural and natural heritage (…) is situated" and is "without prejudice to property right provided by national legislation".[10]

15 The World Heritage Committee, which is the main body in charge of the implementation of the Convention, has developed non-binding guidelines for the inscription of properties on the World Heritage List and for the provision of international assistance under the World Heritage Fund (the "**UNESCO Guidelines**" or the "**Guidelines**").[11] Pursuant to paragraph 97 of the Guidelines, "[a]ll properties inscribed on the World Heritage List must have adequate long-term legislative, regulatory, institutional and/or traditional protection and management to ensure their safeguarding".[12] However, the Guidelines do not specify how such protection should be achieved.

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[9] See *infra*, para. 20.

[10] UNESCO World Heritage Convention, at **Exhibit R-691**, p. 4 (Article 6.1). See also, UNESCO Operational Guidelines (2019), at **Exhibit R-692**, p. 11 (para. 15).

[11] UNESCO Operational Guidelines (2019), at **Exhibit R-692**, p. 9 (para. 1) ("The *Operational Guidelines for the Implementation of the World Heritage Convention* (hereinafter referred to as the *Operational Guidelines*) aim to facilitate the implementation of the *Convention concerning the Protection of World Cultural and Natural Heritage* (hereinafter referred to as the "*World Heritage Convention*" or the "*Convention*") by setting forth the procedures for: a) the inscription of properties on the World Heritage List and the List of World Heritage in Danger; b) the protection and conservation of World Heritage properties; c) the granting of International Assistance under the World Heritage Fund; and d) the mobilization of national and international support in favor of the *Convention*") (emphasis in original).

[12] *Id*. at p. 29 (para. 97).

16 Further, as set out in paragraph 156 of the UNESCO Guidelines, the World Heritage Committee may make "recommendations concerning the protection and management of the World Heritage property" at the time of inscription on the World Heritage List.[13] However, it does not have the power to impose any mandatory measures. Romania is thus not legally bound by the World Heritage Committee's recommendations regarding the Roşia Montană Mining Landscape.

17 Therefore, the Claimants' allegation that the UNESCO listing has removed "any uncertainty regarding the fact that mining in Roşia Montană is not permissible"[14] has no basis in the UNESCO Convention, the UNESCO Guidelines, or otherwise.

18 When it reactivated the UNESCO application, Romania explained to UNESCO that RMGC's License was still valid, stating that "RMGC has not met to date **but may still meet** the requirements under Romanian law to obtain the environmental and other permits necessary for the Roșia Montană mining project."[15] In other words, the nomination was made subject to RMGC's rights, in accordance with Article 6.1 of the UNESCO Convention, which makes clear that the State Parties' obligation to protect cultural and natural heritage is "without prejudice to property right provided by national legislation."[16]

19 Accordingly, as a matter of international law, the UNESCO listing does not prevent the Project from proceeding. Further, if RMGC secures the necessary permits and the social license for the Project, Romania may, if

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[13] *Id*. at p. 42 (para. 156).

[14] Claimants' Observations on New Evidence, p. 16 *et seq.* (para. 32).

[15] See Letter from Minister of Culture to UNESCO World Heritage Centre and ICOMOS Evaluation Unit dated 28 February 2020, at **Exhibit R-693**, p. 2 (emphasis added). See also, *id.* ("With respect to the 'special law' to which you refer, legislative amendments were proposed in 2013 that would have facilitated and expedited the regulatory approval process for the Roșia Montană mining project. These proposed amendments were rejected by the Romanian Parliament in 2014. However, the rejection of the Roșia Montană Law does not mean that the mining license is not valid.").

[16] See *supra*, para. 14.

appropriate, take steps to reduce the scope of the UNESCO listed area[17] or alternatively, it may request that the site be delisted.[18] However, since the UNESCO Convention does not impose any specific legal obligations relating to listed sites, such measures are not legally required under the Convention.

20 Whilst the UNESCO listing does not affect RMGC's mining rights, it provides tangible benefits to Romania. By virtue of the listing, Romania is eligible for assistance from the World Heritage Fund for the protection of the Roşia Montană Mining Landscape,[19] including financial assistance in the form of "low-interest or interest-free loans" and (if Romania can show exceptional circumstances and special reasons) "non-repayable subsidies".[20]

### 2.2 As a Matter of Romanian Law, Romania Is Not Bound to Take Any Specific Measures That Would Interfere with RMGC's Mining Rights

21 As demonstrated below, under Romanian law, any land management or urbanism measures that may be taken pursuant to the UNESCO listing would have to take into account existing mining rights (**Section 2.2.1**); it

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[17] UNESCO Operational Guidelines (2019), at **Exhibit R-692**, p. 45 (paras. 163-165). Pursuant to paragraph 164, the World Heritage Committee has the power to approve "minor modifications" to the boundaries of a World Heritage property, i.e. modifications which do not have "a significant impact on the extent of the property" nor affect their "Outstanding Universal Value". Further, paragraph 165 states that "[i]f a State party wishes to significantly modify the boundary of a property already on the World Heritage List, the State Party shall submit this proposal as if it were a new nomination (…) This provision applies to extensions, as well as reductions".

[18] *Id*. at p. 55 (Chapter IV.C).

[19] UNESCO World Heritage Convention, at **Exhibit R-691**, p. 11. Article 19 states: "Any State Party to this Convention may request international assistance for property forming part of the cultural or natural heritage of outstanding universal value situated within its territory." Article 20 further specifies that "international assistance provided for by this Convention may be granted **only to property forming part of the cultural and natural heritage which the World Heritage has decided, or may decide, to enter in one of the lists mentioned in paragraphs 2 and 4 of Article 11**", including the World Heritage List (emphasis added).

[20] *Id.* at p. 12 (Article 22(f)).

is still open to (and incumbent on) RMGC to submit urban plans for the Project (**Section 2.2.2)**; the UNESCO listing does not affect the Ministry of Culture's endorsement of the Project (**Section 2.2.3**) nor the existing ADCs or RMGC's right to request additional ADCs (**Section 2.2.4**); and the UNESCO listing also does not affect RMGC's right to seek the declassification of Roșia Montană from the LHM (**Section 2.2.5**).

### 2.2.1 Under Romanian Law, Any Land Management or Urbanism Measures that May Be Taken Pursuant to the UNESCO Listing Would Have to Take into Account Existing Mining Rights

22 The land management and urbanism rules for World Heritage sites are set out in Government Ordinance No. 47/2000 of 31 January 2000 ("**GO 47/2000**").[21]

23 This ordinance requires, for each World Heritage site, the elaboration of a "Program for Protection and Management" for five-year periods that includes "measures of an administrative nature and measures of technical nature with respect to [the] monuments and their protection zone".[22] The ordinance provides that this program is elaborated by the Ministry of Culture, endorsed by the National Commission of Historical Monuments and approved by Government Decision.[23] The ordinance does not set out a timeframe within which this program must be prepared and no program has yet been prepared in connection with the Roșia Montană site.

24 The ordinance also requires the elaboration of "documentation for urbanism and land management" (including a PUG and a PUZ) that reflects the provisions and regulations of urbanism and territorial development included in the "Program for Protection and Management"

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[21] Government Ordinance No. 47/2000 on the establishment of certain protection measures for the historical monuments part of the World Heritage List, published in Official Gazette of Romania, Part I, No. 45 dated Jan. 31, 2000, at **Exhibit C-2350**.

[22] GO 47/2000, at **Exhibit C-2350**, p. 2 (Articles 6(2)-(3)).

[23] *Id*. at p. 2 (Article 6(2)).

mentioned above within 12 months of its approval.[24] The elaboration of any urban plans that would reflect the UNESCO listing must comply with the Urbanism Law No. 350/2001 on land management and urbanism.[25] Pursuant to this law, the initiation and coordination of urban plans for World Heritage monuments is the responsibility of the Ministry of Development, Public Works and Housing.[26]

25 Law No. 350/2001 requires the submission of the proposed urban plans to various State authorities, including central and local authorities,[27] which may endorse (with or without conditions) or reject the proposed plan (or request modifications) in accordance with the law. The authorities responsible for endorsing any PUG or PUZ would be bound by law to ensure that RMGC's mining rights are reflected in those plans.[28] Further, pursuant to GO 47/2000, any urban plan for a World Heritage site must be approved by Government decision.[29] The Government would have to take into consideration RMGC's rights under the License before approving any urban plan for the UNESCO site.

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[24] *Id.* at p. 3 (Article 7(1)).

[25] Law 350/2001 on land development and urbanism (updated) dated 17 March 2016, at **Exhibit R-99**.

[26] *Id*. at p. 7 *et seq.* (Article 18($c^1$)).

[27] *Id*. at p. 54 (Annex 1, item $8^1$) (for World Heritage monuments, the land development plans and the general and zonal urbanism plans must be endorsed by the Ministry of Development, Public Works and Housing, the Ministry of Culture and "concerned central and territorial bodies").

[28] In particular, the local authorities including the Alba County Council and the Roșia Montană Local Council would be bound to ensure that RMGC's mining rights are reflected in accordance with the Mining Law No. 85/2003, published in the Official Gazette of Romania, Part I, No. 197 (resubmitted) dated 27 March 2003, at **Exhibit C-11**, p. 18 (Article 41(2): "[w]ithin 90 days from receiving the notification provided under paragraph (1) [i.e. the notification of entry into force of the exploitation licenses by the competent authorities to the county councils, the local councils and the county prefectures competent in the areas where the granted perimeters are located], **the county councils and the local councils will modify and/or update the existing land management plans and the general urbanism plans so as to allow the carrying out of all the operations necessary to the performance of the mining activities granted under concession**") (emphasis added).

[29] GO 47/2000, at **Exhibit C-2350**, p. 3 (Article 7(3)).

26 No urban plans (PUG or PUZ) reflecting the UNESCO listing have yet been prepared or submitted to State authorities. For the reasons stated above, a UNESCO urban plan would need to reflect the License, otherwise it could not be lawfully approved by the relevant authorities.

27 The Claimants allege that no building permit could be issued for the Project as long as the urbanism plan for the same area reflected a mandatory protection program for the UNESCO site.[30] However, Romanian law already required urbanism plans for the protection of the areas classified as historical monuments within the Project Area.[31] Irrespective of the UNESCO listing, the Project has always needed a declassification of those monuments.[32]

### 2.2.2 It Is Still Open to (and Incumbent on) RMGC to Submit Urban Plans for the Project

28 As the Respondent explained in its prior submissions, the approval of urban plans for an industrial area is required for the issuance of the environmental and building permits,[33] and it is the responsibility of the holder of an exploitation license to secure such approval.[34] RMGC,

[30] Claimants' Observations on New Evidence, p. 15 *et seq.* (para. 30).

[31] Article 47(3)(b) of Law 350/2001 on land development and urbanism (updated) dated 17 March 2016, at **Exhibit R-99**, p. 37 provides that the preparation of a Zonal Urbanism Plan shall be mandatory in case of "protected built-up areas and protected areas for monuments".

[32] See *infra*, para. 31.

[33] Rejoinder, p. 77 *et seq.* (paras. 253-257); PHB-Resp., p. 27 *et seq.* (paras. 70-77).

[34] Counter-Memorial, p. 21 *et seq.* (para. 68). See also, Article 54(2) of Law 350/2001 on land development and urbanism (updated) dated 17 March 2016, at **Exhibit R-99**, p. 44: "[z]oning urbanism plans and detailed urbanism plans, save for those stipulated in paragraph (1) [i.e. zoning urbanism plans for central areas, protected areas in their entirety and protection areas for monuments as well zoning and detailed urbanism plans concerning the implementation of public-interest targets] **shall be financed by individual or legal entity stakeholders**" (emphasis added).

however, has yet to submit an (updated) draft PUZ to the competent authorities, together with all of the necessary endorsements.[35]

29 The UNESCO listing does not prevent RMGC from doing so and it remains incumbent on RMGC to do so.

### 2.2.3 The UNESCO Listing Does Not Affect the Ministry of Culture's Endorsement of the Project

30 To obtain the environmental permit for the Project, RMGC needed to secure the endorsement of the Ministry of Culture. It did so in April 2013.[36] Neither the UNESCO application nor the UNESCO listing has affected this endorsement.[37] The Ministry of Culture has not retracted or revoked it and it thus remains valid and enforceable. The Ministry of Culture thus continues to endorse the Project, subject to the fulfillment of certain conditions, relating to the protection and preservation of historical monuments and cultural heritage.[38]

### 2.2.4 The UNESCO Listing Does Not Affect the Existing ADCs or Prevent RMGC From Requesting Additional ADCs

31 Roşia Montană has throughout the years been protected both as an archaeological site and as a historical monument. The Project has thus always needed ADCs and a declassification of the site (from the LHM).

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[35] To this day, RMGC has not obtained the necessary endorsements for the PUZ for the Project Area. See Respondent's Opening Statement (First Hearing), p. 51 *et seq*; PHB-Resp., p. 26 *et seq.* (paras. 64-68).

[36] Respondent's Opening Statement (First Hearing), p. 35 *et seq*; Rejoinder, p. 173 *et seq.* (Section 3.6.1.2); Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655** and GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 3 *et seq.*

[37] Counter-Memorial, p. 160 *et seq.* (para. 417).

[38] Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 3 *et seq.*; Rejoinder, p. 174 (para. 551); PHB-Resp., p. 23 *et seq.* (para. 57).

These procedures are related, in that the obtention of an ADC is the first step in the procedure to declassify a historical monument.[39]

32 Under Romanian law, the obtention of an ADC allows the lifting of the mining prohibition over archeological sites. To secure the environmental permit (and in turn the building permit), RMGC needed to secure and maintain certain ADCs.[40]

33 Although NGOs challenged for years several of the ADCs,[41] including mainly the Cârnic ADC,[42] today RMGC holds eleven ADCs.[43] The UNESCO listing does not affect the validity of those ADCs.

34 RMGC still also needs to apply for and secure an ADC for Orlea, which was one of the conditions attached to the Ministry of Culture's endorsement of the Project.[44] The UNESCO listing does not affect RMGC's need for this ADC, nor does it affect RMGC's ability to obtain that ADC.

35 The Claimants have pointed to no authority to support their incorrect proposition that the UNESCO listing would prevent a site from being discharged pursuant to an ADC, thereby "prohibiting any possible construction permit for the Project."[45] The Claimants' position is unsupported and incorrect as a matter of Romanian law. Under

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[39] R. PO27 Reply, p. 116 (para. 286).

[40] Counter-Memorial, p. 31 *et seq.* (Section 2.3.6).

[41] Counter-Memorial, p. 363 *et seq.* (Annex IV, lines 2, 5, 9, 15, 19, 24-25, 28, 30, 39, 42, 66-67, 72, 75).

[42] The second ADC issued for Cârnic (ADC 9/2011) was also challenged by NGOs, but the Romanian courts recently confirmed its validity (in a final and irrevocable manner in 2020, thus accepting the State authorities' position in the challenge). Decision No. 770/2020 of Buzău Tribunal dated Dec. 10, 2020 enclosed by Letter from the Buzău Tribunal to the Alba County Culture Department dated 27 May 2021, at **Exhibit C-2990**.

[43] PHB-Resp., p. 115 (paras. 420-422); Map of Roşia Montană Site - Nomination for UNESCO 2017 and Archaeological Discharge, at **Exhibit C-1908**.

[44] Letter from Ministry of Culture to Ministry of Environment dated 10 April 2013, at **Exhibit C-655**, p. 3 *et seq.*; Rejoinder, p. 174 (para. 551); PHB-Resp., p. 23 *et seq.* (para. 57).

[45] Claimants' Observations on New Evidence, p. 16 (para. 31).

GO No. 43/2000, which regulates the protection of cultural heritage, nothing prevents ADCs from being obtained for UNESCO sites (or portions thereof).[46]

### 2.2.5 The UNESCO Listing Does Not Affect RMGC's Right to Seek the Declassification of Roșia Montană From the List of Historical Monuments

36 The UNESCO listing neither affects the procedure under Romanian law to declassify historical monuments nor RMGC's rights in this regard. RMGC may and still needs to seek to declassify the Project Area.[47]

37 The Claimants rely on recent statements by the Minister of Culture during a radio interview to argue that, under Romanian law, the declassification of a UNESCO site (following the issuance of an ADC) would not be possible.[48] The argument, however, rests solely on press reports,[49] not on Romanian law, which permits the declassification of sites regardless of their UNESCO status, as explained above.[50]

38 The Claimants argue that "Romania's application to UNESCO was fundamentally at odds with the Project that was designed to resume open pit mining at Roșia Montană in accordance with the License issued to RMGC and the ADCs earlier issued by the Ministry of Culture."[51] In

[46] GO 43/2000 (as republished in November 2006), at **Exhibit C-1701**, p. 2 *et seq.* (Articles 2(1)(i) and 6(5)).

[47] See Rejoinder, p. 287 *et seq.* (paras. 898-900); PHB2-Resp., p. 71 *et seq.* (para. 156).

[48] Claimants' Observations on New Evidence, p. 16 (para. 31).

[49] PHB-Resp., p. 79 (para. 264) (political statements do not constitute measures capable of leading to a finding of liability under international law).

[50] See *supra* para. 35.

[51] Claimants' Observations on New Evidence, p. 6 *et seq.* (para. 11); see also para. 14: "the indisputable effect of the UNESCO application was that it gave rise to a further layer of protection to the subject historical monument, in accord with a legally required program for protection and management of the site to be incorporated into the urbanism plan for the area, that is fundamentally incompatible with RMGC's mining license, with the ADCs issued (and re-issued in the case of Cârnic) by the Ministry of Culture, and with the entire Roşia Montană Project".

support of this argument, the Claimants cite *inter alia* to GO No. 47/2000.[52]

39 However, this ordinance, which indicates measures that can be implemented with respect to historical monuments and World Heritage sites, makes no mention of ADCs or the declassification of historical monuments.

40 The Claimants argue that, although required to do so under Romanian law, the Ministry of Culture will not act to declassify historical monuments following the issuance of ADCs,[53] or following the recognition of their validity by the Romanian courts.[54] However, the Claimants cannot point to any evidence that the Romanian authorities have chosen to disregard Romanian law in this regard or that they intend to disregard the recent decision of the Buzău tribunal recognizing the validity of the second Cârnic ADC. The Claimants' argument is based on mere speculation.

41 Indeed, although under Romanian law, RMGC would be entitled to request the competent authority to resume the declassification of any historical monument for which it obtained an ADC,[55] the Claimants are unable to provide any evidence that RMGC has done so, in particular in relation to the Cârnic ADC. Likewise, RMGC has never applied for an ADC for the Orlea massif.[56]

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[52] Claimants' Observations on New Evidence, p. 8 (para. 14, n. 33).

[53] *Id*. at p. 15 (para. 29).

[54] *Id*. at p. 22 (para. 50).

[55] See Law 422/2001 (as republished on 20 November 2006), at **Exhibit C-1703**, p. 6 *et seq.* (Articles 13 and 19) and Law No. 554/2004 on administrative litigation, at **Exhibit C-1767**, p. 4 (Article 8).

[56] Respondent's Opening Statement (First Hearing), p. 42 *et seq.*; PHB-Resp., p. 52 *et seq.* (paras. 156-166).

# 3 THE UNESCO LISTING HAS NO IMPACT ON THE TRIBUNAL'S DETERMINATIONS AS TO JURISDICTION, LIABILITY OR QUANTUM

42 The Claimants acknowledge that the UNESCO listing does not alter their claims.[57] Instead, they argue that the UNESCO listing "confirm[s] and remove[s] any claimed uncertainty that the Government in fact had previously already fully repudiated the Roşia Montană Project and the State's joint venture with Gabriel in RMGC."[58]

43 The Claimants further argue that, should the Tribunal conclude that the Government had not previously terminated the Project, the UNESCO application would bring the Project to an end, with definitive effect under Romanian law, in breach of the BITs.[59]

44 As demonstrated above, the Claimants' allegations lack any factual or legal basis under the UNESCO Convention or Romanian law. Moreover, as the Respondent has repeatedly explained, the Tribunal lacks jurisdiction over claims relating to events that took place after 20 January 2015, the date the Claimants issued the Notice of Dispute (**Section 3.1**). Even assuming the Tribunal had jurisdiction over such claims, Romania has not breached the BITs by requesting the inscription of Roşia Montană in the World Heritage list (**Section 3.2**). The Claimants have also failed to prove the quantum of their alleged loss (**Section 3.3**).

## 3.1 The Tribunal Lacks Jurisdiction Over Any Claims Flowing from the UNESCO Application

45 As the Respondent explained in its letter to the Tribunal objecting to the submission of the New Exhibits[60] and earlier submissions,[61] the UNESCO

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[57] Claimants' Observations on New Evidence, p. 3 (para. 6).

[58] *Id*. at p. 17 *et seq.* (para. 35).

[59] *Id*. at p. 3 (para. 6) and p. 18 *et seq.* (para. 39).

[60] Respondent's Letter to Tribunal dated 14 September 2021, p. 2.

[61] Counter-Memorial, p. 176 *et seq.* (Sections 8.1.3 and 8.2); Rejoinder, p. 12 *et seq.* (Sections 2.1.2 and 2.2.2); PHB-Resp., p. 2 *et seq*. (para. 6).

application and listing are outside the scope of the Notice of Dispute,[62] and occurred after the filing of the Request for Arbitration. Accordingly, the Claimants' arguments were not raised before the Tribunal in compliance with the notification requirements of the BITs and are outside the scope of the Tribunal's jurisdiction (or, alternatively, they are inadmissible).

46 Acknowledging the weakness of their case on jurisdiction, the Claimants attempt to retroactively include the events relating to the UNESCO application and listing within the confines of their notification. They argue that they notified Romania of a dispute arising out of the allegation that Romania had prevented implementation of the Project for political reasons, and that "the record is clear that the [UNESCO application] is integrally connected to the political repudiation of the Roşia Montană Project."[63]

47 This argument is meritless. The UNESCO application has no connection with the rejection of the Roşia Montană law by the Romanian Parliament in 2013, which the Claimants wrongly allege amounted to a repudiation of the Project. Quite the opposite, Romania made it clear to UNESCO that RMGC's License was valid and that the Project could go forward if RMGC secured the necessary permits.[64] The sole purpose of the UNESCO application is to provide some economic relief to the Roşia Montană area.

### 3.2 The UNESCO Application Did Not Breach the BITs

48 As demonstrated in Section 2 above, the UNESCO listing does not affect the Claimants' Project rights. *A fortiori*, the UNESCO application, in itself, could not have had any impact either. The Claimants' allegations in relation to the UNESCO listing are based on mere speculation, without any effort to analyze the issue in light of the UNESCO Convention or Romanian law. By extension, they have not even begun to demonstrate that Romania has breached its obligations under the BITs.

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[62] Notice of Dispute requesting consultation dated 20 January 2015, at **Exhibit C-8**.

[63] Claimants' Observations on New Evidence, p. 19 (para. 42).

[64] See *supra*, para. 18.

### 3.3 The Claimants Have Failed to Prove the Quantum of their Alleged Damages

49 The Claimants acknowledge that the UNESCO application does not affect their case on quantum.[65] They nevertheless argue that, should the Tribunal conclude that the Claimants' alleged damage must be assessed with reference to the "developments" relating to the UNESCO application (as opposed to the Claimants' valuation date in 2013), "an assessment may be done by using an indexing approach to observe the progression of Gabriel's market capitalization from a 'last clean date' to the valuation date."[66]

50 This new argument is inadmissible and unsupported as a matter of international law and incorrect as a matter of international valuation standards. It also suffers from the same flaws as the Claimants' prior arguments relating to new valuation dates.[67] The Claimants also fail to explain how a valuation date of 29 July 2011 – a date years before the UNESCO application was made – could be in any way relevant for the present purposes.

51 As stated previously, the admission of the Claimants' new quantification would also amount to a breach of a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention as Romania has not had the opportunity to adduce evidence in response to the suggested indexation approach.

## 4 COMMENTS ON THE NEW EXHIBITS

52 While the Claimants suggest that the New Exhibits are relevant and material to the merits of the dispute,[68] they barely address their contents. Instead, they reference these documents to support their broad argument

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[65] Claimants' Observations on New Evidence, p. 18 (para. 38) ("The basis for Gabriel's claims including as to compensation thus remains as pleaded in Claimants' earlier submissions.").

[66] *Id*. at p. 19 (para. 40).

[67] PHB-Resp., p. 221 *et seq*. (Section 5.8).

[68] See Claimants' Letter to Tribunal dated 5 August 2021, p. 2; Claimants' Letter to Tribunal dated 7 September 2021, p. 3.

that there has been a political repudiation of the Project.[69] This is not surprising as even a cursory review shows that the documents do not support the Claimants' case.

53 **Exhibit C-2982**: This exhibit contains no indication that RMGC's mining rights were affected by the UNESCO application or that the Government sought to change the legal regime applicable to the Project. On the contrary, as the Minister of Culture states, "by registration in the UNESCO List, the legal protection regime already established is not changed".[70]

54 **Exhibit C-2983**: This exhibit contains no reference to the Project or RMGC and thus does not support the Claimants' argument that the Project can no longer secure the necessary permits.

55 **Exhibit C-2984**: This exhibit only includes the presentation of the UNESCO listing and makes no reference to the License or the Project. As explained above at Section 2.1, the UNESCO listing leaves Romania with discretion as to the measures to be taken to implement the listing.

56 **Exhibit C-2985**: This exhibit makes no reference to RMGC or the Project. It is simply an acknowledgment of the UNESCO listing and an indication of future preservation steps that may be considered with respect to Roşia Montană.

57 **Exhibit C-2986**: This exhibit contains an interview of the Minister of Culture, during which he confirmed that the UNESCO listing does not change the legal regime of protection over Roşia Montană.[71] The Minister of Culture's reference to an alleged statement from the Minister of Environment is hearsay, and in any event, press reports cannot be considered reliable evidence. In particular, the Minister of Culture does

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[69] Claimants' Observations on New Evidence, p. 16 *et seq.* (paras. 32-33).

[70] Press Release from Ministry of Culture dated 31 January 2020, at **Exhibit C-2982**, p. 1.

[71] Interview of Minister of Culture Bogdan Gheorghiu and others, Radio Guerilla dated 8 July 2021, at **Exhibit C-2986**, p. 2 ("So, the inclusion or non-inclusion [of Roșia Montană on the UNESCO World Heritage List] doesn't change its legal regime at all. At the time of that acceptance for the Romanian state to commence the mining exploitation, it was part of the national heritage.").

not explain in what context and for what purpose the purported statement was made.

58 **Exhibit C-2987**: This exhibit contains a statement from the Romanian President made on Facebook which makes no mention of RMGC's rights under the License or the Project. It is thus irrelevant to the issues before the Tribunal.

59 **Exhibit C-2988**: This exhibit contains the transcript of an interview of the Romanian Prime Minister which makes no mention of RMGC's rights under the License or the Project. It is thus irrelevant to the issues before the Tribunal.

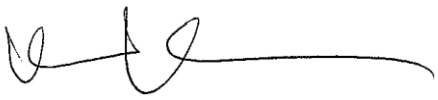
60 **Exhibit C-2989**: This exhibit makes no mention of RMGC's rights under the License or the Project. It is thus irrelevant to the issues before the Tribunal.

61 **Exhibit C-2990**: The decision dated 10 December 2020 of the Buzău Tribunal rejecting another NGO challenge against the second Cârnic ADC in a "final and irrevocable" manner shows that RMGC has been able to protect its rights – and that Romania has defended the ADC – before Romanian courts.

Respectfully submitted,

6 December 2021

For and on behalf of Romania



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