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By email

Geneva, 18 October 2022

**Re: *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*
(ICSID Case No. ARB/15/31)**

Dear Mr. President,
Dear Members of the Tribunal,

Further to the Tribunal's email of 3 October 2022, the Respondent provides its comments regarding the submission by the *Centrul Independent pentru Dezvoltarea Resurselor de Mediu* (ICDER) and Greenpeace Romania (the "*Amici*") dated 18 September 2022.

The *Amici*'s submission addresses the final decision issued in that litigation, namely the Ploiești Court of Appeal decision of 16 February 2022, which

overturned the Buzău Tribunal decision of 10 December 2020 and ordered the annulment of the second Cârnic ADC.¹

The Respondent makes the following observations regarding the *Amici*'s submission.

Timing of Introduction of Ploiești Court of Appeal Decision into the Record in this Arbitration

On page 2, the *Amici* refer to the Tribunal's PO 35 dated 30 September 2021 "concerning the admissibility of new evidence" (which the Claimants had sought to introduce) and the Parties' ensuing submissions of October and December 2021 (respectively PHB3-Cl. and PHB3-Resp.). The *Amici* note that both Parties refer in their PHB3 to the Buzău Tribunal's decision of December 2020 (which upheld the validity of the ADC) as being final and irrevocable and that neither Party "refer[s] to the appeal, already ongoing at that time [*i.e.*, in October and December 2021]". The *Amici* incorrectly suggest that the Respondent misrepresented the status of the litigation, by omitting to mention in its PHB3-Resp. that the NGOs had by then appealed the Buzău Tribunal's decision.

Indeed, it was not until 26 January 2022, well after the filing of the Respondent's PHB3, that the Ploiești Court of Appeal admitted the appeal lodged by the NGOs.² Accordingly, while the *Amici* note that the appeal "was registered at the Ploiești Court of Appeal on 15 July 2021",³ it did not appear at the time of the Respondent's submission that the NGOs had lodged a valid appeal against the Buzău Tribunal decision of 10 December 2020, as the Buzău Tribunal had on 27 May 2021 communicated its decision to the Alba Directorate describing it as "final and irrevocable" and the deadline for appeal ("within 15 days from the communication") had passed.⁴

¹ *Amici* Submission dated 18 September 2022, p. 2; Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**.

² Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 98 (p. 97 of the Decision) ("[a]t the hearing of 26 January 2022, the Court dismissed the plea of time-barring of the second appeal invoked by the defendants (...)").

³ *Amici* Submission dated 18 September 2022, p. 2.

⁴ 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**, p. 1. In its statement of defense filed on 15 October 2021 with the Ploiești Court of Appeal, the Alba Directorate

However, it appears that the NGOs ultimately demonstrated that they had not been properly notified of the judgment and were therefore able to lodge their appeal after the deadline. The Respondent therefore produced the full and final court decision at the first opportunity it had, namely with its PHB4 of 19 September 2022.⁵

Conversely, the *Amici* are correct that the Claimants could have, but did not, refer to the Ploiești Court of Appeal decision in their PHB4-Cl. of 14 June 2022.⁶

Relevance of the Ploiești Court of Appeal decision to the Arbitration

In its PHB4-Resp. of 19 September 2022, the Respondent commented on the relevance of the Ploiești Court of Appeal decision to the arbitration. The Respondent here recalls four points.

First, the State (through the Alba Directorate) defended the Cârnic ADC throughout the court proceedings that culminated in the Ploiești Court of Appeal decision.⁷

Second, RMGC participated in these proceedings, alongside the Alba Directorate,⁸ up until 27 October 2015 when it informed the court that it had

argued that the NGOs had belatedly filed their appeal. See Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 90 (p. 89 of the decision) (“the respondent considered that the second appeal is filed late, since from the date of service of the civil sentence no. 770/2020 to the appellants in second appeal (23 March 2021) and until the date of filing of the second appeal (14 July 2021) more than 15 days had passed. Regarding the time when the second appeal term began to run, the respondent considered that the request for recomunication of the sentence made by the appellants in second appeal on 22 June 2021 cannot be taken into account, as the provisions of art. 93 of the Code of Civil Proceedings of 1865 were not observed...”).

⁵ PHB4-Resp., p. 18 (paras. 32-34).

⁶ See also PHB4-Resp., p. 18 (para. 32) (noting the Claimants’ failure to disclose this decision).

⁷ *E.g.*, Answer of Alba County Culture Department to the Preliminary Complaint dated 16 September 2011, at **Exhibit C-1720**; see Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 12 *et seq.* (p. 11-15 of the decision) (setting out the Alba Directorate’s statement of defence), p. 24-26 (p. 23-25 of the decision) (setting out the Alba Directorate’s “written point of view”) and p. 105 (p. 104 of the decision) (describing the Alba Directorate’s statement of defence); see also Decision No. 4379/15 April 2014 of Suceava Court of Appeal in case file No. 789/117/2012, at **Exhibit C-1726**, p. 6 and p. 7 (showing that the State also defended the legality of the ADC in the litigation relating to the suspension of this ADC).

⁸ *E.g.*, Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 16 *et seq.* (p. 15-18 of the decision) (setting out RMGC’s “accessory motion to intervene in favor of the defendant, the Alba County Directorate”), p. 26-32 (p. 25-31 of the decision) (setting out RMGC’s

waived the legal action.⁹ As the Claimants indicated in the present arbitration, they decided to withdraw RMGC from Romanian court litigation as of 17 July 2015, date of filing of the Request for Arbitration.¹⁰

Third, as already noted,¹¹ the two arguments which the Ploiești Court of Appeal found decisive in this case, and which the *Amici* quote in their submission,¹² have been raised by the NGOs since 2012, *i.e.*, including at the time when RMGC was an intervening party in this litigation.¹³

The Ploiești Court of Appeal's decision noted RMGC's arguments, including its position on the National Archaeological Committee's competence to issue an approval in the ADC procedure¹⁴ and the irrelevance of the urban certificate at that stage.¹⁵ The Court took these arguments, as well as the evidence produced by RMGC, into account when reaching its decision.¹⁶

RMGC thus had the opportunity to address the NGO's arguments and defended its position before the Romanian courts. While the Buzău Tribunal had ruled in

"Response to the supplement to the legal action"), p. 37 (p. 36 of the decision) (mentioning that RMGC submitted "written submissions and "evidence submissions" on 8 April 2013).

⁹ See *e.g.*, Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 38 (p. 37 of the decision) ("By the resolution of 27 October 2015 the application for waiver of the legal examination filed by the intervener S.C. ROȘIA MONTANĂ GOLD CORPORATION S.A. was noted".).

¹⁰ Gabriel Canada's Waiver in Support of Its Request for Arbitration dated 17 July 2015, at **Exhibit C-6**; Reply, p. 157 *et seq.* (paras. 345-348).

¹¹ PHB4-Resp., p. 18 (note 84).

¹² *Amici* Submission dated 18 September 2022, p. 2.

¹³ Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 19 (p. 18 of the decision) (noting that the Cluj Tribunal granted on 23 April 2012 RMGC's accessory motion to intervene to dismiss as unfounded the NGOs' annulment request against the second Cârnic ADC), p. 23 (p. 22 of the decision) (setting out the NGOs' criticisms of the National Archaeological Committee's approval, in the "supplement to the legal action" which they filed in September 2012, see p. 19 [p. 18 of the decision]) and p. 37 (p. 36 of the decision) (mentioning RMGC's submissions of April 2013), and p. 38 (p. 37 of the decision) (mentioning RMGC's application for waiver of the proceedings in October 2015).

¹⁴ Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 16 *et seq.* (p. 15 and 27-30 of the decision).

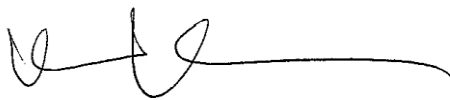
¹⁵ Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 31 (p. 30 of the decision).

¹⁶ Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 103 *et seq.* (p. 102-109 of the decision) (on the arguments relating to the National Archaeological Committee) and p. 110-115 (p. 109-114 of the decision) (on the arguments relating to the urban certificate).

favour of the Alba Directorate and upheld the arguments that RMGC had presented,¹⁷ the Ploiești Court of Appeal ruled the other way.

Fourth, the continuing litigation before the Romanian courts – and indeed the *Amici* submission itself – show that the Project continues to face social opposition and lacks a Social License. The Claimants’ failure to draw the Tribunal’s attention to these developments is telling – they flatly contradict the Claimants’ case that the failure of the Project is the fault of the Romanian State.

Yours sincerely,



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¹⁷ See *e.g.*, Decision No. 187 of the Ploiești Court of Appeal dated 16 February 2022, at **Exhibit R-694**, p. 57-58 (p. 56-57 of the decision) (setting out the Buzău Tribunal’s views on the National Archaeological Committee’s approval).