INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

GABRIEL RESOURCES LTD.

AND GABRIEL RESOURCES (JERSEY) LTD.

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

RESPONDENT'S REPLY TO CLAIMANTS' RESPONSE TO THE TRIBUNAL'S QUESTIONS REGARDING POST-2013 EVENTS

19 SEPTEMBER 2022

LALIVE

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1 EXECUTIVE SUMMARY

1 This submission sets out the Respondent's comments on the Claimants' submissions in response to the Tribunal's questions of 12 April 2022 (the "**PHB4-Cl.**").[1] The Respondent provides an Executive Summary of its responses to the Tribunal's questions. The remainder of the submission further expands on the Respondent's position and also comments on the Claimants' answers to the Tribunal's questions.[2]

The Tribunal's first question:

"How should the Tribunal consider post-2013 events in evaluating Claimants' principal claim (see C-PHB, Section VIII.A) and first alternative claim (see C-PHB, Section VIII.B)?"

When evaluating the principal and first alternative claims, the Tribunal may largely disregard post-2013 events.

First, by the Claimants' own admission, the post-2013 events do not form the basis of these claims. Indeed, the Claimants recognize that, for these claims, "post-2013 events … were not the events that gave rise to the breach and were not the cause of Gabriel's losses."

Second, even if these claims were based on post-2013 and, more specifically, post-2015 events, the Tribunal **would not have jurisdiction** to hear them (**Section 2**).

Third, **on the merits**, late/post-2013 events show that the Project Rights have remained intact (**Section 2.1**). Contrary to the Claimants' arguments, late/post-2013 events do not demonstrate or confirm the existence of an anterior BIT breach – let alone a repudiation of the Project or a taking of the Project Rights – in July 2011 or September 2013 (**Section 2.2**).

[1] This is, indeed, the Claimants' fourth submission since the September 2020 hearing. The Claimants filed a third post-hearing brief (their "Observations on New Evidence") on 29 October 2021 (the "**PHB3-Cl.**"), to which Romania responded on 6 December 2021 (the "**PHB3-Resp.**").

[2] Due to the page limit, the Respondent has focused this submission on only key points. Romania respectfully requests that the Tribunal not rely on the Claimants' selective narrative and that it independently analyse the evidence.

Fourth, on causation, late/post-2013 events show that there is no causal link between Romania's alleged breaches and the Claimants' alleged losses (**Section 2.3**).

The Tribunal's second question:

"What are the specific positions and/or claims of the Parties related to the post-2013 events as presented in Claimants' second alternative claim (see C-PHB, Section VIII.C)? What is the Claimants' position on when a breach of the BITs occurred in respect of their second alternative claim?"

The Respondent's position as to the second alternative claim can be summarized as follows.

First, as with the principal and first alternative claims, the Tribunal **lacks jurisdiction** over the second alternative claim insofar as it rests on post-2013 events that also post-date the Notice of Dispute (**Section 3.1**). (More broadly, the second alternative claim is **inadmissible** (**Section 3.2**)).

Second, the second alternative claim also fails on the **merits** (**Section 3.3**). There are no "post-2013 events" that, on the facts before the Tribunal, can amount to a breach of the BITs.

The Claimants suggest that some of the purported post-2013 acts or omissions "may" have amounted to a breach. Seven years after the Notice of Dispute, the Claimants still cannot point to a BIT breach (before, during or after 2013). They, however, have the burden of proving their claims, including of taking a position on the purported breach, providing evidence in support thereof, and establishing a cogent case. They have failed to do so.

There is also no evidence of any State policy or practice – before or after 2013 – to take or frustrate the Project Rights. Furthermore, none of the post-2013 events or categories of events identified by the Claimants were wrongful.

Third, the second alternative claim also fails on **causation** (**Section 3.4**). The full record of post-2013 events confirms that there is no causal link between Romania's alleged breaches and the Claimants' alleged losses.

The Tribunal's third question is:

"*In respect of damages, what specific positions and/or claims do the Parties have in connection with the post-2013 events? What is the Claimants' position on the quantification of damages for their second alternative claim?*"

For their primary claim, the Claimants argue that a composite act, which allegedly started on 1 August 2011, culminated in the alleged repudiation of the Project Rights on 9 September 2013, in breach of the BITs. For their first and second alternative claims, the Claimants contend that a single measure led to the alleged repudiation of the Project Rights. The Claimants further contend that, prior to the alleged repudiation of the Project Rights, Romania breached FET through its treatment of the Claimants' investment. For the quantification of the first and second alternative claims, the Claimants recognize that their claim must be quantified as of the alleged date of breach but argue that the valuation should be based on an *ex-ante* value of the Project Rights, which would exclude the impact of Romania's alleged breach of FET. To quantify their claims (as of 9 September 2013 for the first alternative claim and 27 July 2021 for the second alternative claim), they calculate the indexed public market capitalization of Gabriel Canada relative to its value on 29 July 2011.

However, the Claimants' use of indexation for their alternative claims lacks a legal basis, since the Claimants have not established that Romania's treatment of the Claimants' investment amounted to a prior breach of FET, separate from the alleged repudiation (**Section 4.1.1**).

Any compensation awarded by the Tribunal for the first or second alternative claims must be based on the FMV of the Project Rights immediately prior to the breach. Should the Tribunal find that the Project Rights have been repudiated, it should use Dr. Burrows' DCF valuation of **USD 156 million** for the Project [redacted]

[redacted] Even though these valuations were as of 29 July 2011, this value would not have increased thereafter given market trends (as evidenced by declines in the gold share indexes) and greater social opposition.

If the Tribunal accepts the Claimants' use of indexation, it should nevertheless disregard their quantifications as they contain errors that grossly overstate the value of the alleged losses (**Section 4.1.2**).

First, Gabriel Canada's stock market capitalization is not a valid proxy for the value of the Project Rights.

Second, Exhibit C-2991 – which includes an "Index Calculator" that will compute an indexed value of Gabriel Canada's market capitalization on a selected valuation date, based on a selected "last clean" date – contains a methodological error. In its reports, Compass Lexecon uses a trailing 90-day volume-weighted average to calculate Gabriel Canada's market capitalization (USD 2,617 million on 29 July 2011), whereas Exhibit C-2991 performs this calculation using the unadjusted share value on the selected "last clean date" (USD 2,956 million on 29 July 2011), thereby further overstating Gabriel Canada's value by more than USD 300 million. This error, as well as the other errors described below have been corrected in the spreadsheet prepared by CRA, which is submitted as Exhibit **CRA-307**.

Third, if the Tribunal were to accept the use of indexation, it must choose a "last clean date" that filters out the decreases in market capitalization for reasons that are unrelated to the alleged breach, such as NGO opposition to the Project and RMGC's lack of a social license. The Claimants' valuation date for its principal claim, 29 July 2011, is not a "last clean date" as the market capitalization on this date overstates the value of Gabriel Canada and would make Romania liable for decreases in value that are not attributable to the Respondent. Gabriel Canada's market capitalization on 23 and 29 November 2011 and 31 January 2012 suffers from similar issues.

The earliest starting point for indexation is the trailing 90-day volume-weighted average of Gabriel Canada's market capitalization as of **3 July 2012**, which is 90-days after the 4 April 2012 court decision which

confirmed the annulment of the Roşia Montană Local Council's attempt to retroactively re-approve the 2002 PUZ and PUG. Within a month of this decision, Gabriel Canada's capitalization collapsed due to the market's belated realization that the disclosed Project timelines were unrealistic. There could not have been any wrongful measures that affected Gabriel Canada's value prior to this date as RMGC did not meet the requirements for issuance of the environmental permit.

Fourth, if indexation is used, the MVIS index (not the S&P/TSX index) is the most appropriate, since adjusting for incorrect information would reduce Gabriel Canada's market capitalization well below the MVIS average value of USD 800 million.

Fifth, the Claimants commit another error by failing to subtract net assets (excluding mineral properties) from Gabriel Canada's market capitalization on the "last clean date". Instead, the Claimants deduct **actual** cash on hand on the date of the alleged breach from the **hypothetical** indexed market capitalization, thereby mixing "actual" and "but-for" scenarios.

Sixth, there is no basis to apply a 35% acquisition premium. Acquisition premiums have never been awarded in international investment arbitration, as they are not a standard feature of valuation analysis and are only justified when there is additional value to a buyer. The Claimants fail to provide any justification for an acquisition premium in this case.

The Claimants' alleged losses for their first alternative breach, using a trailing 90-day volume-weighted average of Gabriel Canada's market capitalization on 3 July 2012 as a starting point (minus USD 138 million in cash and assets held on that date) adjusted by the MVIS index as of 9 September 2013, would amount to **USD 445 million** (**Section 4.2**).

Using the same methodology but with a date of an alleged breach of 4 January 2017 (the date on which Romania submitted the nomination file to UNESCO), the Claimants' second alternative claim would amount to **USD 347 million** (**Section 4.3**).

* * *

2 The Respondent notes that all of the Tribunal's questions were addressed, in substance, to the Claimants (who, therefore, were also invited to respond to them first). This implies that the Claimants' case, as set out in their previous pleadings and at the oral hearing, indeed was "not straightforward and clear."[3] Accordingly, this additional round of pleadings effectively amounts to yet another opportunity for the Claimants to replead their case, as well as to produce additional evidence.[4]

3 The Respondent therefore maintains the position it set out in its Second Post-Hearing Brief[5] and its letter of 20 April 2022, including the position that the PHB4-Cl., the first and second alternative claims, and the new evidence (**C-2991**), are inadmissible.

2 QUESTION 1: "HOW SHOULD THE TRIBUNAL CONSIDER POST-2013 EVENTS IN EVALUATING CLAIMANTS' PRINCIPAL CLAIM … AND FIRST ALTERNATIVE CLAIM …?"

4 To the extent that the Tribunal may wish to consider "post-2013 events" in the context of the Claimants' principal and/or first alternative claims, it lacks jurisdiction over those events insofar as they occurred after January 2015 (**Section 2.1**); on the merits, post-2013 events do not support either the Claimants' principal claim or their first alternative claim (**Section 2.2**); and post-2013 events only confirm that, even if RMGC had secured the environmental permit by 2013, it would not have been able to secure the building permit (**Section 2.3**).

2.1 The Tribunal Lacks Jurisdiction Over the Principal and First Alternative Claims Insofar as They Are Based on Post-2015 Events

5 As demonstrated in the Respondent's previous submissions, the Tribunal lacks jurisdiction over most of the post-2013 events and thus must

[3] Letter from Tribunal dated 27 April 2022.

[4] Not surprisingly, the Claimants have taken advantage of the opportunity and submitted new evidence prepared by their experts at Compass Lexecon (**C-2991**); PHB4-Cl., 32 (para. 90) ("Claimants provide herewith an updated excel file, prepared by Compass-Lexecon").

[5] PHB2-Resp., 5 (para. 19) and 85 (para. 181).

disregard them. Specifically, the Tribunal lacks jurisdiction (under both BITs) over the claims and events that post-date the Notice of Dispute dated **20 January 2015**.[6]

6 For the principal and first alternative claims, the Claimants admit that "post-2013 events … were not the events that gave rise to the breach and were not the cause of Gabriel's losses."[7] Stated differently, the principal and first alternative claims are not based on post-2013 events (whether they pre-date or post-date the Notice of Dispute).

7 In any event, the Claimants do not point to any post-2013 acts or omissions by Romania that would support the principal or first alternative claims, *i.e.*, that would support the argument that a breach occurred in September 2013 (see **Section 2.2**).

8 The first alternative claim is also inadmissible on a separate and independent basis.[8] The Claimants only introduced their first alternative claim (which was based on an entirely new date of alleged breach of the BITs) in their responses to the Tribunal's questions following the December 2019 hearing.[9] The Respondent strongly objected, noting that it was "too late to introduce new claims,"[10] and further complained in correspondence[11] and its post-hearing briefs,[12] noting that the admission of the claim would constitute a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention. To this day, the Claimants have failed to provide any justification for their belated submission.

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[6] Counter-Memorial, 176 (Sections 8.1.3 and 8.2); Rejoinder, 12 (Sections 2.1.2 and 2.2.2); PHB1-Resp., 2 (para. 6).

[7] PHB4-Cl., 2 (para. 4).

[8] The Claimants' second alternative claim is similarly inadmissible. *Infra*, Section 3.2.

[9] Cl. PO27 Answers, 1 (paras. 3, 56, 84 and 120).

[10] **Tr. 2020**, 145:10-147:7.

[11] Respondent's Letter dated 1 October 2020; Respondent's Letter dated 4 October 2020; Respondent's Letter dated 30 October 2020.

[12] PHB1-Resp., 2 (para. 5); PHB2-Resp., 24 (para. 55).

2.2 On the Merits, Neither the Principal Claim nor the First Alternative Claim Are Supported by Late/Post-2013 Events

9 For both the principal and first alternative claims, the Claimants acknowledge that post-2013 events "were not the events that gave rise to the [purported] breach" and "were not the cause of Gabriel's losses."[13] They nevertheless wrongly argue that late/post-2013 events "confirm" that there was a "definitive and permanent" repudiation of the Project Rights on 9 September 2013.[14]

10 However, late/post-2013 events do not support any alleged breach in September 2013.[15] On the contrary, late/post-2013 events show that RMGC still holds all of its rights.

2.2.1 Late/Post-2013 Events Show that the Project Rights Are Intact

11 Should the Tribunal be inclined to consider late/post-2013 events to assess the claims that a breach occurred in September 2013, it should consider all late/post-2013 evidence on record. The Claimants' selection of late/post-2013 events is incomplete and misleading.

12 The Claimants fail to recall, *inter alia*, that the License was renewed in **2019**.[16] The renewal of the License alone confirms that the Project is alive and disproves the Claimants' claims.[17] The Claimants have lost nothing (since 2013 or otherwise) – neither the License, nor their assets relating to the Project, including real estate.[18] The Claimants also fail to recall that Gabriel Canada did not impair the value of its allegedly worthless assets until **March 2016**, *i.e.*, years after the purported breach.[19] This shows that,

[13] PHB4-Cl., 2 (para. 4).

[14] PHB4-Cl., 3 (para. 5).

[15] Although the Tribunal's questions are directed at "post-2013" events, the Claimants also refer to several (late) 2013 events. PHB4-Cl., p 4 (paras. 9, 11, 16-24, 55-56, 58-59).

[16] **R-666**; PHB2-Resp., 20 (para. 50).

[17] **Tr. 2019**, 358:16-359-11; Rejoinder, 41 (Sections 4 and 7).

[18] PHB1-Resp., 137 (paras. 500-501).

[19] Rejoinder, 291 (paras. 912-916).

prior to 2016, the Claimants themselves did not consider that the Project Rights had been repudiated.

13 The Claimants try to rationalize their post-2013 behavior by claiming that they did not have "the benefit of hindsight" and that they were "hopeful that the announced decision rejecting the Project might change".[20] However, this excuse is contradicted by the fact that, years later, the Claimants sought (and obtained) the renewal of the License, and does not explain how the alleged destruction of the value of their investment could have occurred without their knowledge.

14 The Claimants also fail to acknowledge the numerous permits Romanian authorities have issued or renewed since 2013. Those permits include (i) dam safety permits and endorsements by the Ministry of Environment issued in December 2014 and October 2017 (which remained valid until their expiration in October 2019);[21] and (ii) urban certificates (with UC 47/2013 remaining valid until 2016 and, in turn, UC 98/2016 remaining valid until 2018).[22]

15 The Claimants also fail to recall that State authorities (including the Ministry of Culture, the Alba County Council and the Ministry of Environment) have defended in court ADCs, urban certificates, and urban plans issued (or approved) for the Project – in proceedings initiated by NGOs. As of September 2013, State authorities had been involved in 78 such proceedings (including six that were still ongoing).[23] Since September 2013, State authorities have continued defending the Project in litigation brought by NGOs.[24]

16 Numerous Project endorsements/approvals remain valid and have neither expired nor been otherwise modified since 2013, including the Ministry of

[20] PHB4-Cl., 12 (para. 25).

[21] RMGC did not seek to renew the permits. PHB2-Resp., 20 (para. 50); **C-2213**.

[22] For a more exhaustive list, see PHB2-Resp., 21 (para. 50); see also Rejoinder, 181 (para. 577); **R-290** (RMGC has not applied for a prolongation of the validity of this UC).

[23] PHB2-Resp., 22 (para. 51); Counter-Memorial, 363 (Annex IV rows 1-78); Rejoinder, 322 (paras. 994-995).

[24] See **R-289**; Counter-Memorial, 145 (paras. 383-385).

Culture's April 2013 endorsement,[25] the February 2013 Orlea Research Plan for preventive archaeological research (which RMGC has yet to initiate),[26] and ten ADCs.[27]

17 The Claimants also fail to mention their statements in late-2013 and 2014 reflecting their understanding that the Project was alive and that the environmental permitting process was ongoing (notwithstanding the rejection of the Roşia Montană Law).[28] This is fatal to the Claimants' attempt to manufacture a treaty claim after the fact.

2.2.2 The Claimants' Selection of Late/Post-2013 Events Do Not Evidence a Taking On or As of 9 September 2013

18 To support their argument that a BIT breach occurred on or as of 9 September 2013,[29] the Claimants point to various "post-2013 events".

19 The Claimants do not produce a shred of evidence that these events are related to a purported (prior) repudiation of the Project. None of the purported events were accompanied by any decisions or statements that they were being taken pursuant to a (prior) repudiation of the Project. They could not since there is no such governmental decision or policy.

20 Many of the "events" that the Claimants purport to rely upon are not events at all, but political **statements** – without any implementing conduct – made in late 2013 and 2014 in the context of the vote on the Roşia Montană Law.[30] Similarly, none of the statements refer to a prior governmental decision – on or around 9 September (or at any time) – to "repudiate" or in any way reject the Project.

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[25] PHB1-Resp., 22 (paras. 50-51); **C-655**.

[26] PHB1-Resp., 23 (para. 57); **R-221**.

[27] See **C-669** to **C-671** and **C-673** to **C-679**.

[28] *Infra*, para. 24.

[29] The Respondent has already demonstrated at length that the Claimants have failed to prove a BIT breach on or as of 9 September 2013. Rejoinder, 168 (Section 3.6); PHB1-Resp., 58 (Sections 2.1.6 and 2.4.6); R. PO27 Reply, 3 (Section 2).

[30] PHB4-Cl., 4 (paras. 11(b)-(d) and (f)-(g)).

21 Furthermore, the Claimants take statements out of context.[31] For example, they misleadingly suggest that Prime Minister Ponta indicated on 11 September 2013 that Romania was nationalizing the Project,[32] when he was in fact explaining that a hypothetical cancellation of the Licence would amount to nationalization.[33]

22 The Claimants also wrongly suggest that Minister of Environment Plumb indicated that, should Parliament reject the Roşia Montană Law, the Ministry of Environment would reject the Project.[34] Minister Plumb, however, merely noted that Parliament's decision would be considered by the Ministry of Environment.[35] The Claimants also fail to mention that Minister Plumb reiterated before the Joint Special Committee in September 2013 that the Ministry of Environment was "not asking the Romanian Parliament to issue the environmental permit", since it was "the sole responsibility of the [TAC] in view of initiating and proposing the environmental permit."[36] She was thus making clear that the outcome of the vote on the Roşia Montană Law was separate from that of RMGC's application for the environmental permit.

23 Conversely, the Claimants omit to mention the statements of Romanian officials as well as the Claimants' own statements (i) supporting the Roşia Montană Law and the Project in 2013 and thereafter (see **Section 3.3 below**) and/or (ii) dissociating the outcome of the Roşia Montană Law vote from that of the Project.[37]

24 For instance, in late 2013, even after the Joint Special Committee recommended the rejection of the Roşia Montană Law, Gabriel Canada conveyed its understanding to the market that the environmental review of

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[31] PHB2-Resp., 67 (para. 151); for a detailed response to the Claimants' mischaracterization of the political statements at issue, see PHB1-Resp., 107 (paras. 385-394).

[32] PHB4-Cl., 4 (para. 11(b)).

[33] PHB2-Resp., 65 (para. 146).

[34] PHB4-Cl., 5 (para. 11(f)).

[35] **C-828**; *see also* PHB1-Resp., 65 (para. 216).

[36] **C-506**, 31; see also *id*, 39 (Ms. Plumb also made clear that, if the Law were rejected, RMGC still needed to *inter alia* secure a declaration of outstanding public interest, for purposes of the Water Framework Directive, and to provide the agreed environmental, financial guarantees).

[37] PHB2-Resp., 48 (para. 116); PHB1-Resp., 107 (para. 386).

the Project still needed to be completed in any event.[38] Also, in **early 2015**, RMGC was still recognizing in its annual management report that the environmental permitting process remained underway and that it was in "**frequent contact with the various ministries and levels of government … and ha[d] not been given any information to suggest that the [Project] w[ould] not go ahead**".[39]

25 To argue that there was a BIT breach on or as of 9 September 2013, the Claimants refer to certain subsequent events,[40] none of which confirm or even suggest a taking of the Project Rights or repudiation of the Project (on or as of 9 September 2013 or otherwise):

a) Despite their suggestion to the contrary,[41] the Claimants fail to point to any indication that MPs who voted against the law did so because of a Government decision on or around 9 September 2013 (or at any other time). Moreover, the Roşia Montană Law was an extraordinary law designed to facilitate the Project. Its rejection by Parliament in November 2013/June 2014 does not evidence a repudiation of the Project (by the Parliament or the Government);

b) Romania's non-issuance of the environmental permit – since 2013 and otherwise – does not evidence a repudiation of the Project on or as of September 2013; as of late 2013, RMGC had not (and still has not) met the permitting requirements, as it was reminded on many occasions, including in late/post-2013;[42]

c) The TAC meetings in 2014 and 2015 were not "pretextual"; the TAC reiterated its concerns regarding aspects of the Project that RMGC still needed to address, including the water management permit, the modified PUZ, surface rights, the TMF, and the status

[38] Rejoinder, 167 (paras. 523, 530); see also **R-539**, 5; **R-540**, 2 (noting, in March 2014, that the Government deferred decision on the environmental permit until after Parliament's review).

[39] See **Respondent's Opening 2019**, 93; **C-1570.03**, 6 and 16; **C-1570.04**, 21 (emphasis added); on Gabriel Canada's statements; see also Rejoinder, 5 (para. 20); PHB1-Resp., 108 (paras. 390-393).

[40] PHB4-Cl., 5 (para. 13).

[41] PHB4-Cl., 4 (paras. 11(a) and 11(d)).

[42] PHB2-Resp., 69 (para. 154).

of Orlea and Cârnic;[43] in this regard, the Claimants fail to recall that:

i) in January and March 2014, RMGC and Gabriel Canada recognized, respectively, that RMGC still needed to apply for and secure several endorsements for the PUZ;[44]

ii) even though (1) the Romanian authorities (and the public) had an ongoing concern regarding cyanide management, (2) Mr. Henry recognized in 2013 that a cyanide audit was necessary, and (3) Wardell Armstrong proposed in late September 2013 to undertake that audit, RMGC did not follow through;[45]

iii) in late 2013 and 2014, State authorities reiterated concerns about the Project's lack of compliance with the Water Framework Directive and the need for a water management permit. Yet, RMGC never submitted the necessary documentation;[46]

d) The Claimants' complaint that Romania purportedly failed to cooperate in the recapitalizations of Minvest is unfounded; Minvest RM safeguarded Minvest's status as co-owner of the Project to avoid its own dissolution;[47]

e) Romania has not failed to act in relation to the Bucium applications, since 2013 or otherwise;[48] the Claimants have not denied that RMGC remained inactive about these applications between April 2009 and July 2014;[49]

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[43] PHB2-Resp., 69 (para. 154); **Respondent's Opening 2019**, 39 (referring to **C-473**, 16).

[44] **Respondent's Opening 2019**, 59-60.

[45] **Respondent's Opening 2020**, 39-44.

[46] PHB2-Resp., 35 (para. 80); **C-2909**; **R-545**; **Respondent's Opening 2019**, 79-82.

[47] Rejoinder, 284 (paras. 889-896); **Respondent's Opening 2019**, 227.

[48] Counter-Memorial, 162 (Section 7); Rejoinder, 228 (paras. 720-746); **Respondent's Opening 2019**, 231; *Infra*, Section 2.2.3.

[49] Rejoinder, 233 (paras. 733-736).

f) Romanian authorities did not launch "retaliatory" investigations against RMGC in November 2013; those investigations did not target RMGC (but involved 43 companies) and complied with Romanian law;[50] and

g) In 2016, the Government did not "propose" a cyanide moratorium; it issued an opinion on two draft laws proposed by certain senators and members of Parliament. The draft laws were not adopted by Parliament and have had no impact on the Project.[51]

26 According to the Claimants, the Government's post-2013 "decisions" relating to cultural heritage were "blocked politically" since August 2011 (further to the Government's alleged "new policy") and the result of the alleged September 2013 decision not to do the Project.[52]

27 However, the Ministry of Culture did not block or decide to block the Project in either August 2011[53] or September 2013.[54] Nor did the Government.[55] The Ministry of Culture's April 2013 endorsement of the Project remained valid throughout 2013 and remains valid to this day. This endorsement in and of itself disproves any suggestion that the Ministry blocked the Project.

28 As to cultural heritage, the Claimants allege that "[post-2013] events must be viewed in light of the status in 2013" of (i) "developments relating to the [LHM]" and (ii) "[ADCs] for Cârnic and Orlea".[56] The Claimants' new position[57] seems to be that these "matters would not have blocked the

[50] Rejoinder, 281 (paras. 880-885); see also Reasoned Decision on Claimants' Request for Emergency Temporary Provisional Measures dated 21 October 2016.

[51] Rejoinder, 288 (paras. 901-902); Reply, 248 (para. 586) (the moratorium is "not a keystone of Claimants' case").

[52] PHB4-Cl., 7 (paras. 15, 16(d) and (e), 19(c), and 21-22).

[53] Rejoinder, 94 (Section 3.3.2.7).

[54] Rejoinder, 212 (Section 3.6.2).

[55] Rejoinder, 135 (Section 3.5).

[56] PHB4-Cl., 7 (paras. 15-38).

[57] Contrast PHB4-Cl., 11 (paras. 20-22) (noting Claimants' alleged expectation "as of 2013" that the NGO litigation against the Cârnic ADC would be rejected, that an ADC for Orlea would be issued, and that the 2010 LHM would be corrected) with Memorial, 62 (para. 167) (noting

Project" but that following the Government's purported repudiation of the Project Rights in September 2013, the Ministry of Culture "was not motivated to give effect to the ADCs … and correct … the LHM".[58] The Claimants' attempt to differentiate between the cultural authorities' actions before and after September 2013 (to demonstrate the purported repudiation of the Project) is not supported by the facts: the Ministry of Culture did not block the Project in 2011, 2013 or at any time.[59]

29 **Regarding the 2010 LHM**, although recognizing the necessity of amending the LHM list before "the eventual issuance of construction permits",[60] the Claimants wrongly allege that Romania obstructed the amendment process. Under Romanian law, the LHM amendment process involves the Ministry of Culture, the NIH, and the decentralized Alba Directorate. After exchanges between these authorities in 2012-2014 (*i.e.*, a year after the alleged repudiation of the Project Rights), there was no consensus regarding the nature and scope of the modifications to be made to the LHM. While the Alba Directorate shared RMGC's views, the NIH proposed to revert to the delimitations of the 1991 LHM (because the Alburnus Maior archaeological site included in the 1991 LHM had incorrectly been divided in the 2004 LHM) and thus to include the 2km radius around the Roşia Montană archaeological site.[61] Although the outcome of this process (namely the 2015 LHM) may not be to the Claimants' liking, it does not evidence any wrongful conduct on the part of Romania. The adoption of the 2015 LHM – by the Ministry of Culture – was the last step in a deliberative process that began before 2013, involving the Alba Directorate, the NIH and the Ministry of Culture.

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the Ministry of culture's arbitrary refusal prior to 2013 to authorize the Orlea preventive research), 128 (paras. 324-325) (alleging that the Ministry of Culture improperly withheld the Cârnic ADC in 2011 pending Claimants' agreement to increase its financial contribution for heritage protection), 132 (paras. 332-333) (alleging that the Ministry of Culture failed to correct the 2010 LHM), and 158 (para. 384) (alleging that the Ministry of Culture was withholding its endorsement in 2012 pending the commercial renegotiations).

[58] PHB4-Cl., 7 (paras. 15 and 23).

[59] *E.g.*, *supra*, para. 16 (showing that the cultural authorities issued/did not revoke approvals in favor of the Project even after the alleged September 2013 repudiation).

[60] PHB4-Cl., 9 (para. 17).

[61] Rejoinder, 217 (paras. 690-695).

30 The Claimants' arguments regarding the modification of the 2010 LHM[62] lack merit:

a) The 2010 LHM reflected the ADCs delivered at the time. The generic delimitation of 2km around Orlea reflected the absence of research in that area;[63]

b) Leaving aside that Minister of Culture Hunor's statement of August 2011 (that he would not declassify Cârnic before the Government obtained a better economic deal)[64] was a mere statement to the press, the Claimants fail to consider that the Alba Directorate had not yet initiated the declassification process at the time (it did so in November 2012); it was thus premature for the Minister to discuss the finalization of that process;[65]

c) Romanian courts were always available to RMGC to seek redress if it believed the authorities had misapplied Romanian law. In December 2014, RMGC initiated legal proceedings against the NIH with regard to the modification of the LHM, but subsequently waived them;[66]

d) The Brașov Court of Appeal upheld the lawfulness of the 2010 LHM in a decision which the Claimants have not challenged nor claimed to constitute a BIT breach.[67] The Claimants' focus on the State's position in those proceedings is misguided,[68] especially where RMGC participated in the proceedings and thus had the opportunity to challenge these views;[69]

e) The Claimants wrongly allege that the "uncorrected erroneous 2010 LHM" facilitated litigation against the Project; NGOs have challenged

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[62] PHB4-Cl., 8 (paras. 16-19).

[63] Rejoinder, 213 (paras. 679-683).

[64] PHB4-Cl., 8 (paras. 16(d) and 18(c)). Minister Hunor was not suggesting that he was involved in any possible renegotiations. See Rejoinder, 115 (para. 375).

[65] Rejoinder, 216 (para. 685-686 and 688).

[66] Counter-Memorial, 82 (para. 218); Rejoinder, 220 (para. 695).

[67] Rejoinder, 221 (paras. 697-701).

[68] PHB4-Cl., 12 (para. 25).

[69] Rejoinder, 221 (para. 699); PHB2-Resp., 71 (para. 156, first bullet).

permits for the Project on numerous grounds, the 2010 LHM being just one;[70]

f) When the 2015 LHM was published, the Minister of Culture did not state that "there would be no mining in Roşia Montană" (as the Claimants wrongly state) .[71] One of his **advisors** reportedly stated that "at such a site, all mining activity is prohibited", which was accurate in the sense that RMGC had not secured the permits for the Project;[72] he did not say that "there would be no mining in Roşia Montană";[73] and

g) The Claimants wrongly allege that the Ministry of Culture was required but failed to declassify areas covered by ADCs,[74] since neither Cârnic nor Orlea were "discharged areas" in September 2013: for Orlea, insufficient research had been undertaken (as RMGC has yet to initiate the necessary preventive research); and for Cârnic, NGO litigation led to the cancellation of the first Cârnic ADC in December 2008 and was then ongoing in relation with the second (since September 2011).[75]

31 **Regarding the Cârnic ADC**, the Claimants downplay any risk that existed in 2013 in relation to this ADC. The Claimants allege that the NGO legal challenge, which was pending in 2013, would be rejected, that "in due course the challenge indeed was dismissed",[76] and that the Ministry of Culture should have given effect to the ADC and declassified Cârnic

[70] PHB4-Cl., 9 (paras. 18(a) and 24). See also Counter-Memorial, 54 (Section 3.4); Rejoinder, 138 (paras. 454, 563, 696, and 715).

[71] PHB4-Cl., 13 (para. 26).

[72] **C-1356**.

[73] Rejoinder, 223 (paras. 702-708). The Minister of Culture's tagging of NGOs in a Facebook post does not demonstrate opposition to the Project but served the purpose of informing the NGOs of his answers to Professor Piso, the President of the Roşia Montană Cultural Foundation, who had publicly raised cultural heritage issues with the Ministry.

[74] PHB4-Cl., 12 (para. 22).

[75] Rejoinder, 214 (paras. 681-683 and 689). See also **Respondent's Opening 2019**, 40-41 (timelines) and 42 (map showing areas not covered by a valid ADC).

[76] PHB4-Cl., 9 (para. 18(b)).

"following issuance of [the] ADC" in July 2011.[77] These propositions are misguided.[78]

32 The NGO challenge to the Cârnic ADC was ultimately upheld. Indeed, although it was dismissed on 10 December 2020,[79] the Claimants fail to disclose that the Ploieşti Court of Appeal overturned that decision and **annulled the ADC on 16 February 2022**.[80] This decision brings to an end eleven years of litigation; it is now incumbent on RMGC to propose a new ADC for Cârnic.

33 In 2013, the Claimants could not reasonably assume that the NGO challenges to the (second) Cârnic ADC would be dismissed.[81] Indeed, some of the grounds raised by Project opponents (such as the fact that areas had been discharged without being fully researched)[82] had successfully led to the annulment of the first Cârnic ADC.[83] In the end, the court annulled the ADC on two other grounds, unrelated to the issues raised by the Claimants in the arbitration.[84]

34 The Claimants have not complained about this decision or more generally about the court proceedings, including by raising any sort of due process argument (in the proceedings or in this arbitration). And, as previously noted, the Claimants have not alleged that any of the court decisions relating to the Project amount to a breach of FET or denial of justice.[85]

35 **Regarding the Orlea ADC**, the Claimants recognize that "research … remained to be completed" but inexplicably blame in the arbitration the Ministry of Culture for not issuing the permits for the preventive

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[77] PHB4-Cl., 12 (para. 22).

[78] *Supra*, para. 30(g) (in relation with the proposition that the Ministry of Culture should have declassified Cârnic once the ADC was issued).

[79] PHB4-Cl., 9 (para. 18(b) and footnote 47).

[80] **R-694**.

[81] PHB4-Cl., 9 (para. 18(b)).

[82] See Counter-Memorial, 83 (para. 219).

[83] See Counter-Memorial, 63 (para. 167).

[84] The arguments have been raised since 2012, when RMGC was an intervening party. See **C-2990**, 23 and 27.

[85] See Rejoinder, 2 (footnote 1) and 222 (para. 701 and footnote 990).

archaeological research earlier (prior to February 2013).[86] The Claimants only have themselves to blame for the lack of ADC for Orlea (since 2013 and in general), since:

a) The Ministry did not delay prior to issuing those permits in February 2013;[87]

b) The Claimants do not deny that RMGC was required to initiate the research at Orlea (not State authorities) and that, even though it secured an approval for the research in February 2013, it did not carry out this research thereafter or apply for an ADC for Orlea. The Claimants admit that the research plan was accepted in February 2013 and included a tentative agenda for research to start in July 2014, and that RMGC could have but did not undertake this research;[88]

c) The Claimants try to justify this failure by implying that it was futile to initiate research after the purported political repudiation of the Project in September 2013.[89] However, this position is not credible if any credence is given to Gabriel Canada's contemporaneous public disclosures, which assured investors that "RMGC will commence the application process for an ADC for Orlea in due course".[90] This argument is also contradicted by the Claimants' and RMGC's post-2013 representations that the Project was alive;[91]

d) RMGC's decision not to conduct the Orlea research was not driven by any contemporaneous understanding that the Project had been rejected, but rather by the Claimants' new focus on arbitration in light of RMGC's continued inability to meet permitting requirements;[92] and

e) The Ministry of Culture's position *vis-à-vis* Orlea has been consistent. Its endorsement of the Project has always been conditional on RMGC

[86] PHB4-Cl., 10 (para. 19(a)).

[87] **Respondent's Opening 2019**, 43.

[88] PHB4-Cl., 10 (para. 19(a)).

[89] *Ibid*.

[90] **C-1811**, 28.

[91] *Supra*, paras. 17 and 24.

[92] Rejoinder, 209 (para. 667).

securing an ADC for Orlea.[93] Neither the Ministry of Culture's endorsement, nor the Orlea Research Plan have ever been revoked.

36 Moreover, the Claimants have no basis to state that "RMGC reasonably expected that an ADC for Orlea in due course would have been issued"[94] especially given the likelihood of significant discoveries in this area.[95] RMGC's failure to start the research and obtain an ADC also affected the area's characterization in the LHM and the potential need to modify the footprint of the Project.[96]

37 The Claimants refer to a delineation study of the Roşia Montană archaeological site, which the Ministry of Culture commissioned in late 2016 to establish the precise limits of the site instead of the generic 2km radius that figures in the LHM around this historical monument, and complain that it covered areas that had been archaeologically discharged.[97] The study, however, explains why the delineated area also includes discharged areas: an area can be covered by an ADC (because of the expectation that no further artifacts will be found) but nevertheless remain on the LHM or be proposed as a UNESCO site (because it belongs to a wider integrated landscape).[98]

38 **Regarding the UNESCO listing**,[99] the Claimants argue that the decisions leading to the UNESCO inscription "were the result of the Government's decision on September 9, 2013 not to do the Project".[100] However, there was no decision in September 2013 "not to do the Project" and there was no decision at that point in time to propose Roşia Montană as a UNESCO site. When the Ministry of Culture reactivated the application in late

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[93] PHB1-Resp., 23 (para. 57 third bullet).

[94] PHB4-Cl., 10 (para. 19(b)).

[95] PHB1-Resp., 52 (paras. 161-162); PHB2-Resp., 78 (para. 170).

[96] PHB1-Resp., 52 (paras. 159 and 163-164); Rejoinder, 189 (para. 606).

[97] PHB4-Cl., 13 (paras. 28-29); **C-2370**, 5. The Claimants' suggestion that the Ministry of Culture should have invalidated the ADCs is inapposite where the ministry cannot invalidate an ADC, this can only be done by courts to decide on a challenge to annul an ADC, as happened with the first and second Cârnic ADC.

[98] **Dragos LO II**, 112 (paras. 482-497); see also **CMA - Claughton Report I**, 5 (paras. 18-26).

[99] PHB4-Cl., 13 (paras. 30-38).

[100] PHB4-Cl., 7 (para. 15).

January 2020, that was nearly seven years after the alleged breach in September 2013. The Ministry of Culture did not in any way link the reactivation of the UNESCO application to a prior Government decision (in September 2013 or otherwise) "not to do the Project".

39 The Respondent has already explained the reasons behind its reactivation of the UNESCO application.[101] For years, the village of Roşia Montană (and the surrounding area) has been paralyzed and in socio-economic limbo due to RMGC's failure to develop the Project. The UNESCO listing lays the groundwork for funding and development opportunities in case RMGC definitively abandons the Project and/or until such time as it secures the permits and social license for the Project. It is a positive development which does not affect RMGC's mining rights.

40 The Claimants suggest that there was inconsistent conduct on the part of the Respondent and its counsel in stating at the hearing in December 2019 that the nomination file was "no longer submitted to UNESCO".[102] However, the Respondent correctly represented the status of the UNESCO process at the time.

41 The Claimants maintain that the UNESCO protection regime "would preclude any construction permit" that must be "reflected in the urbanism plan for the area".[103] However, as previously explained, Romanian law already required urbanism plans for the protection of the areas classified as historical monuments within the Project Area.[104] The Project has always needed a declassification of those monuments and the UNESCO listing has not changed that.[105] Further, the UNESCO listing does not affect RMGC's right to seek the declassification of the Project Area from the list of historical monuments.[106] Thus, the Claimants' assessment as to the effect

[101] PHB3-Resp., 1 (paras. 1-4).

[102] PHB4-Cl., 16 (para. 35).

[103] See PHB4-Cl., 14 (paras. 32-33).

[104] PHB3-Resp., 10 (para. 27); **R-99**, 37 (Art. 47(3)(b)) (providing that the preparation of a PUZ shall be mandatory in case of "protected built-up areas and protected areas for monuments").

[105] PHB3-Resp., 10 (para. 27).

[106] PHB3-Resp., 13 (Section 2.2.5).

of the UNESCO listing as a matter of Romanian law is manifestly erroneous.

2.2.3 Post-2013 Events Do Not Evidence a Repudiation of Romania's Joint Venture with the Claimants or the Bucium Project

42 The Claimants argue that post-2013 events show that the Government's purported repudiation of the Project in September 2013 encompassed the joint venture with the Claimants and the Bucium Project.[107]

43 The Respondent did not abandon the joint venture with the Claimants – before or after 2013 – and has showed in many ways its support of the joint venture and the Project since late 2013.[108]

44 The Respondent has already addressed at length the Claimants' arguments about (i) allegedly retaliatory investigations against RMGC in November 2013 and (ii) Minvest's alleged failure as of November 2013 to participate in the recapitalization of RMGC.[109]

45 As regards **Bucium**, it remains unclear whether the Claimants allege that NAMR's purported failure to take a decision was a breach in itself (*i.e.*, as it falls within the scope of the alleged repudiation) or constituted a consequence ("is among the effects") of the alleged repudiation.[110] In any event, NAMR's actions have always complied with Romanian law;[111] the Claimants were responsible for much of the delay and have never lodged any complaint with the Romanian authorities or in court to enjoin a decision from NAMR.[112] Further, once they realized RMGC would neither obtain the social license (following the massive street protests of 2013) nor satisfy the permitting requirements for the Project, they reignited their

[107] PHB4-Cl., 18 (paras. 43-45).

[108] *Supra*, Section 2.2.1; R. PO27 Reply, 114 (Section 7); PHB2-Resp., 20 (Section 2.5).

[109] PHB4-Cl., 18 (para. 45); Rejoinder, 284 (paras. 879-885) (investigations) and (paras. 886-896) (recapitalization). The Claimants have not brought a claim in connection with the VAT investigations. See R. PO27 Reply, 118 (footnote 472).

[110] PHB4-Cl., 18 (paras. 43-44).

[111] Rejoinder, 228 (paras. 720-736 and 739-744).

[112] *Supra*, para. 25e).

interest in Bucium only in anticipation of the arbitration.[113] As they confirm now,[114] the two projects were interdependent and just as they stopped progressing the Project, the Claimants also stopped progressing the Bucium applications, instead focusing on the arbitration.

2.3 The Late/Post-2013 Events Confirm that There Is No Causal Link Between the Alleged Breaches and the Claimed Losses

46 Should the Tribunal consider late/post-2013 events in relation to the Claimants' primary or first alternative claims, it must also consider these events in terms of causation.

47 The Claimants must prove that, had the environmental permit been issued in 2011 or 2013, and in the absence of further alleged breaches of the BITs, RMGC would "in all probability" or "with a sufficient degree of certainty" have obtained all necessary approvals and the Project would be operating profitably.[115]

48 Even if RMGC had obtained an environmental permit in 2011, 2013, or thereafter, the late/post-2013 evidence further confirms that RMGC would in any event have not obtained financing or a building permit due to its failure to obtain a social license, its inability to secure the necessary surface rights, and its inability to meet the permitting requirements. Most importantly:

a) Years of social opposition culminated in the massive street protests held between September 2013 and February 2014, also known as the "Romanian autumn".[116] The social opposition to the Project has continued unabated;[117]

b) Since 2013, Project opponents have continued to challenge in court permits for the Project (including the Cârnic ADC, the environmental

[113] Rejoinder, 235 (paras. 737-738).

[114] PHB4-Cl., 18 (para. 44).

[115] Rejoinder, 302 (Section 8).

[116] Counter-Memorial, 130 (paras. 342-356) and 354 (Annex III); Rejoinder, 331 (para. 1017); PHB1-Resp., 135 (paras. 493-496).

[117] *E.g.*, **Pop Opinion**, 13 (paras. 42 and 49); **Stoica Opinion**, 51 (paras. 101 and 125).

endorsement for the PUZ, and the urban certificate).[118] Gabriel Canada noted in its 2014 Annual Management Report that the objective of the NGOs' litigation was to "sto[p] the Roşia Montană Project";[119]

c) Roşia Montană residents have repeatedly reiterated since 2013 that they would not sell their property confirming the need for an expropriation procedure;[120]

d) While the Claimants included "EU grants" as part of their expected financing, such financing would not have been available since the Project did not comply with the Water Framework Directive;[121]

e) In 2018, Alburnus Maior, Greenpeace Romania, and the ICDER submitted *amicus curiae* applications in the arbitration, confirming their opposition and that of local residents to the Project;[122]

f) The litigation of the Cârnic ADC (2011-2022) shows the tenacity of the NGOs and would have prevented the issuance of a building permit even if the environmental permit had been issued at some point during that period; and

g) The 2022 court decision cancelling the Cârnic ADC alone shows that Gabriel Canada's public disclosure in May 2011 that the Project would pour first gold by 2014 was unrealistic.[123]

49 The Tribunal should accordingly dismiss the Claimants' principal and first alternative claims due to their failure to establish the causal link between a purported breach in August 2011 or September 2013 and the alleged losses.

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[118] **Respondent's Opening 2019**, 41, 61, 66, and 70 (litigation timelines).

[119] **C-1570.03**, 9.

[120] R. PO27 Reply, 98 (para. 244); Rejoinder, 324 (para. 1000) (referring to the witness statements of Messrs. Cămărășan, Cornea, Devian, Jurcă, Golgoţ, and Petri, and Ms. Jeflea); PHB1-Resp., 39 (paras. 111-117 and 456) (also referring to the second witness statements of Ms. Jeflea and Messrs. Cămărășan, Devian, Golgoţ, and Jurcă).

[121] **Respondent's Opening 2020**, 137; **Tr. 2020**, 241:3-17.

[122] **C-2875**.

[123] Rejoinder, 377 (paras. 1108 and 1122-1125); PHB1-Resp., 206 (paras. 801-804).

3 QUESTION 2: "WHAT ARE THE SPECIFIC POSITIONS AND/OR CLAIMS OF THE PARTIES RELATED TO THE POST-2013 EVENTS AS PRESENTED IN CLAIMANTS' SECOND ALTERNATIVE CLAIM …? WHAT IS THE CLAIMANTS' POSITION ON WHEN A BREACH OF THE BITS OCCURRED IN RESPECT OF THEIR SECOND ALTERNATIVE CLAIM?"

50 Post-2013 events also do not support the Claimants' second alternative claim.

51 As with the principal and first alternative claims, the Tribunal lacks jurisdiction over the second alternative claim insofar as it rests on events that post-date the Notice of Dispute (**Section 3.1**) and more broadly, the second alternative claim is inadmissible (**Section 3.2**).

52 On the merits, there is not a single post-2013 event that could conceivably amount to a breach of the BITs (**Section 3.3**). The claim therefore stands to be dismissed.

53 In any event, as with the principal and first alternative claims, post-2013 events confirm that the Project was not viable and that there is no causal link between the alleged breach and the alleged losses (**Section 3.4**).

3.1 The Tribunal Lacks Jurisdiction Over the Second Alternative Claim Insofar as It Is Based on Post-2015 Events

54 For the second alternative claim, the Claimants argue that "the Tribunal **may** consider … several dates associated with Romania's post-2013 acts and omissions… as the moment when the Project Rights were **effectively** taken …"[124] They then refer to various "events", most of which occurred in or after 2015. The Tribunal, however, does not have jurisdiction over the second alternative claim insofar as it is based on events that post-date 20 January 2015 for the reasons stated in Section 2.1 above, and in previous submissions.[125]

[124] PHB4-Cl., 21 (para. 54) (emphasis added).

[125] PHB3-Resp., 15 (Section 3.1).

3.2 The Second Alternative Claim (Both in Its Original Formulation and as Reformulated) Is Inadmissible

55 The Claimants articulated (albeit superficially) a second alternative claim for the first time in their PHBs, *i.e.*, after the hearings.[126]

56 The Respondent objected, noting that the claim was late[127] and that its admission would amount to a breach of a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention.[128] The Claimants have not presented any response to that objection. Notably, they do not deny that the second alternative claim is a new claim.[129]

57 Nevertheless, the Tribunal in its 12 April 2022 letter provided another opportunity for the Claimants to develop this new claim.[130]

58 The Claimants have seized upon this opportunity to propose yet **another, different formulation** of their case: whilst the Claimants had claimed in their PHB1 dated 18 February 2021 that the purported frustration of the Project Rights had occurred with the issuance of the 2015 LHM or the UNESCO nomination in February 2016 (or other dates linked to alleged failures in relation to the Bucium license application and the environmental permit),[131] they now say that the alleged breach "most clearly occurred" on 27 July 2021, *i.e.*, when UNESCO inscribed Roşia Montană as a World

[126] PHB1-Cl., 106 (Section VIII.C). Although the Tribunal noted that this claim was presented "for the first time" in the Claimants' "Responses to the Tribunal's Questions set out in Procedural Order No. 27 and Post-Hearing Briefs", the Claimants' first attempt at articulating this claim as a further alternative claim only occurred in their PHB1 (*i.e.*, after the hearings). In any event, it is undisputed that the second alternative claim was submitted after the Claimants' Reply, and is therefore inadmissible under Rule 40(2) of the ICSID Arbitration Rules.

[127] PHB2-Resp., 5 (para. 19).

[128] PHB2-Resp., 85 (para. 181).

[129] The Claimants initially tried to characterize their second alternative **claim** as merely an argument for an alternative **valuation date**. See PHB1-Cl., 99 (para. 231). However, the Tribunal has rejected this characterization, referring to it in its letter as "the second alternative claim". See Letter from Tribunal with further questions dated 12 April 2022, 2.

[130] Letter from Tribunal with further questions dated 12 April 2022, 2; *supra*, para. 2.

[131] PHB1-Cl., 106 (paras. 250-252).

Heritage site, whilst maintaining that the breach might also have occurred earlier.[132]

59 The second alternative claim (both in its original and new formulation) falls foul of Rule 40(2) of the ICSID Arbitration Rules and is therefore inadmissible.[133]

3.3 In Any Event, the Second Alternative Claim Lacks Merit

60 When asked when the purported breach of the BITs occurred in respect of their second alternative claim, the Claimants are still unsure.

61 First, they state that "after September 9, 2013, the date when Romania's treatment **most clearly** completed the effective taking of the Project Rights in breach of the BITs was July 27, 2021…"[134] They also refer to several "dates" that "the Tribunal **may** consider as the moment when the Project Rights were **effectively** taken…"[135] The Claimants do not take a definitive position as to the alleged date of breach and fail to meet their burden of proof.

62 Second, the Claimants' uncertainty as to when the purported post-2013 breach occurred is evidenced by their **further change of position**. The Claimants' new position that a breach "most likely occurred" on 27 July 2021[136] contradicts their position in their PHB1, where they asserted that the breach occurred either with the issuance of the 2015 LHM or the UNESCO nomination in 2016 (or earlier).[137] The Claimants could have pleaded a new date of breach in their PHB3 dated 29 October 2021 (which was filed after the UNESCO listing) but they did not.[138] This latest change

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[132] PHB4-Cl., 21 (para. 53).

[133] Rule 40(2) provides: "An incidental or **additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial**, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding." (emphasis added).

[134] PHB4-Cl., 19 (para. 47) (emphasis added).

[135] PHB4-Cl., 21 (para. 54) (emphasis added).

[136] PHB4-Cl., 19 (paras. 47 and 53).

[137] PHB3-Cl., 18 (paras. 38-39).

[138] See PHB3-Cl., 18 (para. 39).

of position thus appears to be driven solely by tactical considerations related to the performance of gold share indexes.[139] It is, in any event, inconsistent with the Claimants' own case[140] and lacks credibility.

63 Indeed, it is an unrebuttable demonstration of the inherent weakness of the Claimants' claims that they have to rely on events that took place six years after the start of this arbitration as the alleged factual basis of their claims.

64 The Claimants' uncertainty as to the purported breach is further established by their enumeration of additional measures "that the Tribunal may consider as the moment when the Project Rights were effectively taken",[141] specifically (i) the "voting down of the Special Law"; (ii) alleged "failures to take administrative actions that were due"; and (iii) the 2015 LHM.[142]

65 Third, the Claimants' allegations rest upon the purported existence of a "Government policy and course of conduct in relation to the Project that began in August 2011 and continued thereafter", which allegedly "led to a decision by the Government on the political level to reject the Project" and subsequently "caused the Government not to complete any aspect of permitting in relation to the Project Rights."[143] However, the absence of any such policy is evident from the record of not only pre-2013 but also post-2013 events (**Section 3.3.1**). Moreover, the post-2013 events enumerated by the Claimants are not wrongful (**Section 3.3.2**).[144]

3.3.1 There Has Never Been a Government Policy to Take or Frustrate the Project Rights (as Further Shown by Post-2013 Events)

66 The Claimants' selection of post-2013 events involve an array of alleged acts or omissions, at different moments in time, by a broad spectrum of actors, including the Senate, the Chamber of Deputies, the Joint Special

[139] See, the evolution in the gold share indexes in **C-2991**, tab "C-2091.02".

[140] *Infra*, para. 85.

[141] PHB4-Cl., 21 (para. 54).

[142] PHB4-Cl., 21 (paras. 54-65) (citing "acts and omissions that the Tribunal may consider as the moment when the Project Rights were effectively taken or otherwise entirely frustrated").

[143] PHB4-Cl., 28 (para. 76).

[144] PHB4-Cl., 22 (paras. 57, 60, and 62).

Committee, the Special Commission, various Government Ministers, the Ministries of Environment and of Culture, civil servants involved in the TAC procedure, the NAMR, decentralized State agencies (such as the Alba Directorate), and scientific bodies attached to the Ministry of Culture (such as the NIH and the National Committee for Archaeology). The Claimants have failed to establish that the late/post-2013 acts, omissions and/or "events" of which they complain were driven by any sort of policy or practice.

67 Throughout this arbitration, the Respondent has consistently shown that the State acted in accordance with Romanian law, supporting the Project to the extent that it could, before and after 2013.[145]

68 The Claimants allege that the UNESCO listing was "the culmination of a Government policy and course of conduct in relation to the Project that began in August 2011 and continued thereafter" to "reject the Project and the State's joint venture with Gabriel".[146] They have, however, produced no evidence that the UNESCO nomination in February 2016, the submission of the nomination file in January 2017, its referral back to Romania in July 2018, and its reactivation in late January 2020 are part of a State policy or practice. They vaguely say that the alleged rejection of the Project that began in August 2011 "in turn caused the Government … to seek the UNESCO listing"; however, the alleged causal relationship between these two sets of circumstances is based on nothing but inference and speculation. Further, the conduct in question spans a period of ten years, during which there were multiple successive changes of Government and Prime Ministers. The theory that the actions of these successive Governments were part of a State policy or practice is simply not credible.

[145] *E.g.*, Rejoinder, 5 (paras. 19, 365-367, 426, 609, 723, and 1056); R. PO27 Reply, 27 (paras. 69, 110, 153, and 224).
[146] PHB4-Cl., 28 (para. 76).

3.3.2 None of the Late/Post-2013 Events Selected by the Claimants Are Wrongful Under Romanian or International Law

69 As demonstrated below, there is nothing wrongful about the purported acts and omissions listed by the Claimants.

The "voting down of the Special Law"

70 The Claimants do not allege that the rejection of the Roşia Montană Law by the Special Commission, the Senate and the Chamber of Deputies between November 2013 and June 2014 was wrongful under Romanian or international law.[147] This should be the end of the argument. If these events were not wrongful as a matter of international law, they are irrelevant to the determination of a breach of the BITs.

71 The Claimants try unsuccessfully to link those votes to purported political statements "insist[ing] that the Project would proceed only if Parliament voted to approve" the Roşia Montană Law.[148] There was, however, nothing "pre-arranged" or untoward about these votes.[149] The MPs hailed from different political groups and voted freely, in accordance with Romanian law.

72 The Respondent has also repeatedly shown that (i) political statements are not measures for the purpose of determining a breach of international law; and (ii) the rejection of the Roşia Montană Law was not a rejection of the Project.[150] Political statements do not represent any decisions taken by the government; in Romania, as elsewhere, governmental decisions are taken in a formal session, in accordance with a strictly defined procedure. The Claimants recognize as much when they state that "the formal rejection of the Special Law, which occurred progressively through the votes taken on the dates referenced above, **did not provide a basis in law to cancel the Project or to repudiate the Project Rights**."[151]

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[147] PHB4-Cl., 21 (para. 55).

[148] PHB4-Cl., 22 (para. 56).

[149] *Ibid.*

[150] *Supra,* Section 2.2.2.

[151] PHB4-Cl., 22 (para. 57) (emphasis added).

73 The Claimants again disregard statements by the same politicians which indicated that, regardless of the outcome of the vote on the Roşia Montană Law, the Project needed to comply with Romanian environmental laws and regulations.[152]

Alleged "[f]ailures to take administrative actions that were due"

74 The Claimants refer to the "ongoing failure to issue the environmental permit or any administrative decision on the permit during or after 2013, punctuated by what turned out to be pretextual TAC meetings in 2014 and 2015".[153]

75 However, the Ministry of Environment was under no obligation to issue the environmental permit given that RMGC had not and still has not met the requirements for the issuance of the permit.[154] It was also within its margin of discretion when deciding to continue the TAC process to give RMGC an opportunity to meet those requirements.[155]

76 As stated above, the TAC meetings held in 2014 and 2015 were not "pretextual",[156] and the Claimants have not presented any evidence to show that they were.

77 The Claimants also allege that the alleged "failure to issue the exploitation licenses for Bucium or to take any decision on RMGC's license applications" corroborates "the decision reached earlier by the Government [the alleged 9 September 2013 "oral decree"] that these Projects would not be done."[157]

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[152] PHB2-Resp., 48 (para. 116); Rejoinder, 187 (para. 599), 200 (para. 641) and 204 (paras. 654 and 656).

[153] PHB4-Cl., 23 (para. 60) (emphasis added).

[154] *Supra*, para. 25; PHB2-Resp., 69 (para. 154).

[155] **Tr. 2019**, 2856:5-21 and 2629:22-2633:8 (Tofan).

[156] *Supra*, para. 25c).

[157] PHB4-Cl., 23 (paras. 61-62).

78 Both the premise and the conclusion are incorrect. First, the Claimants have failed to show that NAMR did anything wrongful in relation to the Bucium Applications.[158]

79 Second, the Claimants have provided no evidence that NAMR's conduct has been influenced or interfered with by the Government.[159] The Claimants have failed to provide a shred of evidence to support their allegations.

The issuance of the 2015 LHM

80 The Claimants only raise the 2015 LHM to set the stage for their complaints regarding the UNESCO listing. Indeed, they admit that the 2015 LHM was not "the real blockage" and its adoption should not be "seen as the date when the Project Rights were repudiated in breach of the BITs".[160]

81 The Claimants suggest that the problem was rather the Ministry of Culture's "continued failure to declassify the listed historical monuments as required by law".[161] The Respondent commented on the declassification process in Section 2.2.2 above. In any event, the declassification process can be initiated for Orlea before an ADC is obtained.

The Claimants' rights were unaffected by the UNESCO listing

82 The Claimants wrongly allege that, as per Romania's purported admission, the submission of the UNESCO nomination file created a legal impediment to the issuance of the building permit.[162] The Respondent has not made any such admission and would have had no basis to do so since it has consistently noted that neither the 2017 submission nor the 2021

[158] *Supra*, para. 45.
[159] Rejoinder, 229 (paras. 722-723).
[160] PHB4-Cl., 24 (paras. 63-65).
[161] PHB4-Cl., 24 (para. 64).
[162] PHB4-Cl., 26 (para. 68).

listing impacted RMGC's ability to pursue and secure the building permit.[163]

83 The Claimants' assertion that the UNESCO listing created a "legal impediment to obtaining any construction permit" relies on political statements, not on governmental decisions or Romanian law.[164] As already explained, the Project has always needed a declassification of the areas listed as historical monuments; the UNESCO listing does not affect RMGC's right to seek a declassification of those areas.[165]

84 The Claimants only have themselves to blame for RMGC not securing the permits for the Project, whether it be the environmental permit or the building permit. For instance, as at the time of the UNESCO submission in 2017, RMGC still needed to secure permits and endorsements in connection with water management, the PUZ, ADCs, and the surface rights for the Project – as well as, most importantly, secure a social license.[166]

85 The UNESCO listing (on 27 July 2021) cannot amount to a breach because it represents a decision and measure by UNESCO, not Romania. The Claimants use this date purely for tactical reasons – in an attempt to inflate their alleged losses – but it has no justification in international law. On the Claimants' own case, any breach would have occurred on 4 January 2017 (*i.e.*, the date on which Romania submitted the nomination file to UNESCO). Indeed, according to the Claimants, "Romania triggered the conservation requirements" for UNESCO sites as soon as Romania submitted that file,[167] not later.

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[163] The Claimants cite Rejoinder, 226 (para. 711); and **Tr. 2019**, 556:12-14, 557: 16-558:7 (R-opening). The Respondent explained that the issue of the effect of the UNESCO submission was moot in circumstances where the nomination file had been referred back to Romania but did not discuss the effect of the UNESCO protection regime as a matter of Romanian law.

[164] PHB4-Cl., 26 (paras. 68, 72, and 73).

[165] *Supra*, para. 41; PHB3-Resp., 11 (Sections 2.2.4-2.2.5).

[166] **Respondent's Opening 2020**, 14.

[167] PHB4-Cl., 25 (paras. 66-67).

3.4 The Late/Post-2013 Events Confirm that There Is No Causal Link Between the Alleged Breaches and the Claimed Losses

86 For the reasons set out in Section 2.3 above, the post-2013 events do not constitute the basis of a breach but rather show the absence of any causal link between the Claimants' alleged breaches and losses.

87 The Claimants' quantification of their second alternative claim also imputes to Romania the decrease in value of the Project Rights stemming from measures that are not internationally wrongful. The second alternative claim presupposes that the Tribunal does not find any breach of the BIT stemming from Romania's measures in 2013 but finds that Romania's measures related to the UNESCO listing resulted in a breach of the BIT on 27 July 2021.[168] Yet the Claimants make no attempt whatsoever to determine the alleged losses specifically caused by this latter breach (in isolation of the alleged breach in 2013), assuming instead that the Tribunal would use Gabriel Canada's overstated market capitalization as of 29 July 2011 as a starting point for an indexation calculation. Nevertheless, given that the second alternative claim is based on the assumption that Romania's measures as of September 2013 did not breach the BIT (and therefore were not internationally wrongful), only the measures related to the UNESCO listing itself can be considered for the purposes of assessing the alleged losses stemming from this claim. Indeed, there is no causal link between measures that predate the UNESCO listing process and the alleged losses caused by this purported breach.

88 The Tribunal should accordingly dismiss the Claimants' second alternative claim due to their failure to establish the causal link between the purported breaches and the alleged losses.

[168] PHB4-Cl., 21 (para. 53).

4 QUESTION 3: "IN RESPECT OF DAMAGES, WHAT SPECIFIC POSITIONS AND/OR CLAIMS DO THE PARTIES HAVE IN CONNECTION WITH THE POST-2013 EVENTS? WHAT IS THE CLAIMANTS' POSITION ON THE QUANTIFICATION OF DAMAGES FOR THEIR SECOND ALTERNATIVE CLAIM?"

4.1 The Claimants' New Case on Quantum Is Inadmissible and Flawed

89 The Claimants' continuously shifting case on quantum demonstrates that their claims are meritless. Their **three** alternative claims, all introduced after the Respondent's Rejoinder, are inadmissible for the reasons explained in the Respondent's post-hearing briefs.[169]

90 For both their first and second alternative claims, the Claimants argue that the Tribunal should use an "indexing" approach, starting with a "last clean date" of 29 July 2011 (or, in the alternative, 23 or 29 November 2011, or 31 January 2012)[170] until the date of the alleged breach, then add a 35% acquisition premium.[171] The first and second alternative claims only differ in the alleged date of breach, respectively 9 September 2013 and 27 July 2021.[172]

91 For the reasons set out below, the Tribunal cannot rely on the Claimants' quantification of their first and second alternative claims.

4.1.1 There Is No Justification for Using Indexation as the Respondent Did Not Breach FET

92 For their first alternative claim, the Claimants accept that "compensation would be due as of September 9, 2013 (with interest running from that date), and the measure of compensation should be based on the fair market value of the Project Rights on that date, assessed without the impacts of

[169] PHB2-Resp., 85 (para. 181).

[170] PHB4-Cl., 29 (para. 82); PHB4-Cl., 2 (footnote 7).

[171] PHB4-Cl., 34 (para. 96).

[172] PHB4-Cl., 21 (para. 53).

the State's wrongful treatment of Gabriel's investment."[173] The Claimants justify indexation by arguing that, even if measures prior to September 2013 are not part of a composite act culminating in the repudiation of the Project Rights, they nevertheless constitute a breach of FET. According to the Claimants, this prior breach requires the Tribunal to assess, as of 9 September 2013, the indexed value of Gabriel Canada relative to its value on the date of the breach of FET.[174]

93 The Claimants raise similar arguments with respect to their second alternative claim: starting in August 2011 (or alternatively November 2011 or January 2012), Romania's treatment of the Claimants' investment allegedly breached its obligation to provide FET.[175]

94 In other words, the Claimants' case on quantum for both their first and second alternative claims is predicated on the Tribunal finding that Romania breached FET prior to the alleged repudiation of the Project Rights. This is a transparent attempt to reverse-engineer a claim to leverage Gabriel Canada's overstated market capitalization in 2011.

95 The Claimants' new case on FET fails. They do not allege a composite breach of FET and therefore must identify the specific measure at issue, and then prove that it caused a breach of FET. The Claimants fail to do so, vaguely pointing to the "Government's sustained blocking of permitting decisions and other unfair treatment detailed in prior pleadings, which … breached the State's obligation to accord fair and equitable treatment beginning in August 2011 (and on November 23, 2011 for Gabriel Canada)."[176] However, the Claimants fail to explain how the political statements made in August 2011 (the only "measures" that they allege at the time – although political statements obviously cannot by any stretch of imagination amount to "measures"), by themselves, amount to a breach of FET. There is therefore no basis for using indexation as of 29 July 2011 (nor could there be given the political statements at issue were not

[173] PHB4-Cl., 2 (para. 3).
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*

wrongful,[177] even assuming they constituted "measures" capable of breaching Romania's international obligations[178]).

96 The Claimants similarly fail to establish that a breach of FET occurred on their alternate "last clean dates" of 23 and 29 November 2011, and 31 December 2012:

a) The Claimants merely identify 23 November 2011 as "the date the Canada BIT entered into force" without explaining why a breach occurred on this date;[179]

b) The Claimants allege that 29 November 2011 was "the date of what would have been the final TAC meeting but for the Government's unlawful policy"[180], but the evidence establishes that by that date the Ministry of Environment was nowhere near deciding on the environmental permit;[181] and

c) The Claimants allege that the Minister of Environment was required to issue an environmental permit by 31 January 2012.[182] Yet, this argument has been utterly disproven,[183] as recognized by

[177] Rejoinder, 109 (Section 3.4.1).

[178] PHB2-Resp., 56 (para. 128).

[179] PHB4-Cl., 2 (footnote 7).

[180] *Ibid.*

[181] PHB1-Resp., 14 (Section 2.1.2).

[182] PHB4-Cl., 30 (para. 84). The Claimants also rely on the false claim that Minister Borbély confirmed in an interview dated 29 November 2011 that the decision on the environmental permit should have been made by 31 January 2012. In fact, Minister Borbély's statement regarding the TAC endorsement was expressly conditional: "How long do you estimate it will take before this technical endorsement is granted? Laszlo Borbely: It may be until the end of January, this depends on the colleagues within the commission. We might clarify these aspects by the end of January." **C-633**, 2. Indeed, RMGC did not – and still has not – met all of the requirements for the issuance of the environmental permit, including the lack of an urban certificate and a water management permit. *Supra*, para. 25.

[183] PHB4-Cl., 9 (Section 2.1). It was not legally possible for the Ministry of Environment to issue the environmental permit in January 2012, since RMGC did not (i) secure the endorsement of the Ministry of Culture until 2013, (ii) secure a waste management plan until 2013, (iii) have approved urban plans, (iv) have a valid urban certificate, (v) comply with the Water Framework directive, (vi) secure all requisite surface rights, (vii) provide information on reforestation, and (viii) address critical technical issues. Any one of these issues prevented the issuance of the

the Claimants' argument that the Minister of Environment was legally obligated to take a decision by 12 August 2013.[184] Both arguments rely on the opinion of Prof. Mihai,[185] who has never been involved in an EIA Procedure and is not qualified to express any opinions on administrative law matters.[186] His opinion was also contradicted by the evidence of Profs. Tofan and Dragoș, whose expertise in the area remains unquestioned.

97 The Claimants do not provide an unindexed valuation of the Project Rights as of their alleged dates of breach, thereby failing to meet their burden of proof. In the unlikely event that the Tribunal were to find the Project Rights to have been *de facto* expropriated, it should use Dr. Burrows' DCF valuation of USD 156 million for the Project,[187] [redacted][188] Although these valuations are as of 29 July 2011, they would not increase thereafter given the general market trends (as evidenced by the declines in the gold share value indexes) and the growing social opposition against the Project. Moreover, due to the Claimants' belated and inadmissible claims, the Respondent has been unable to submit expert evidence establishing the FMV of the Project Rights on the dates of breach alleged in the Claimants' first and second alternative claims. Accordingly, any uncertainty regarding the quantum of the first and second alternative claims must be resolved in favour of the Respondent.

Environment Permit and there is no basis to claim that all eight would have been resolved by January 2012.

[184] PHB4-Cl., 22 (para. 58).

[185] During the hearing, Prof. Mihai exhibited a superficial understanding and recollection of his opinion and admitted that an unidentified team helped him draft his opinions. PHB1-Resp., 47 (para. 143).

[186] PHB1-Resp., 12 (para. 23).

[187] **CRA Presentation**, 30.

[188] **CRA Presentation**, 81.

4.1.2 The Claimants' Indexation Methodology Is Flawed

98 Even assuming the Tribunal were inclined to rely on indexation, it should in any event disregard the Claimants' calculations as they contain errors that grossly overstate the value of the alleged losses.

99 First, **indexation is not appropriate in this case**, as (i) Gabriel Canada's market capitalization is not a valid proxy for the Claimants' alleged losses since the Project Rights have not lost all value[189] and the value of the Claimants' shareholding in RMGC does not correspond to the value of the Project Rights;[190] and (ii) the decrease in Gabriel Canada's value between July 2011 and the date of the alleged repudiation of the Project Rights was not caused by Romania's allegedly wrongful measures.[191]

100 Second, **the Claimants' use of indexation is methodologically unsound**. The "Index Calculator" submitted as **Exhibit C-2991** contains a methodological error. As the Tribunal will recall, Compass Lexecon uses a trailing 90-day volume-weighted average of Gabriel Canada's share price to determine its public market capitalization:

> "To smooth out any short-term volatility that Gabriel Canada's stock might have exhibited in the period prior to the Valuation Date, we focus in our damages analysis on Gabriel Canada's market capitalization in the 90 calendar days leading to, and including, the Valuation Date, which … averaged US$ 2,617 million."[192]

101 In contrast, **Exhibit C-2991** uses the unadjusted market capitalization based on the share value on the selected "last clean date" (USD 2,956 million on 29 July 2011) as a starting point for indexation, thereby incorporating volatility and overstating by more than USD 300 million Gabriel Canada's market capitalization on the dates selected by the Claimants. This mistake, as well as the other errors described below, have

[189] PHB1-Resp., 191 (Section 5.22).
[190] PHB1-Resp., 195 (Section 5.4.1.1).
[191] PHB2-Resp., 103 (Section 6.2.5).
[192] **CL Report I**, 26 (para. 45).

been corrected in the spreadsheet prepared by CRA, which is submitted as Exhibit **CRA-307**.

102 Third, **the Claimants' starting points for indexation (in July and November 2011, and January 2012) are not "last clean dates" and massively overstate the value of Gabriel Canada**. Gabriel Canada's market capitalization in July 2011 was grossly overstated, primarily due to a speculative gold bubble [redacted][193]

103 Assuming the Tribunal were to rely on indexation, the earliest starting point for indexation is the trailing 90-day volume-weighted average of Gabriel Canada's market capitalization as of **3 July 2012**, 90-days after the 4 April 2012 court decision which confirmed the annulment of the Roşia Montană Local Council's attempt to retroactively re-approve the 2002 PUZ and PUG.[194] The 4 April 2012 decision, which granted a claim brought by several NGOs (including Alburnus Maior) and thus was a consequence of the social opposition to the Project, caused Gabriel Canada's share price to drop by 72.4% in a little more than a month [redacted][195] Using Compass Lexecon's methodology, the 90-day volume-weighted average of Gabriel Canada's share price accounts for the market volatility that followed the 4 April 2012 decision. [redacted][196]

[193] PHB1-Resp., 195 (Sections 5.4.1.2 and 5.4.1.3).

[194] **R-207**.

[195] PHB2-Resp., 103 (Section 6.2.5).

[196] PHB1-Resp., 192 (Section 5.4.1.2).

Accordingly, the Tribunal should make a further adjustment to reflect the impact of these factors.[197]

104 Fourth, **the S&P/TSX index is not appropriate for valuing the Project Rights**. The Claimants misrepresent the evidence, alleging that Dr. Burrows "maintains that it would be appropriate to use the average of the S&P/TSX index and the MVIS index" to value Gabriel Canada.[198] Dr. Burrows unequivocally stated that the "MVIS Index is the correct index for extrapolating the market capitalization of the Company from 2011 to 2013."[199] The Claimants disregard Dr. Burrows' explanation that using the average of the S&P/TSX index and the MVIS index would only be appropriate if one accepted Gabriel Canada's inflated market capitalization as of July 2011:

> "In the TSX Global Gold Index, as of 2011, the companies had an average value of $4.494 billion; the MVIS Index--the MVIS Index companies had an average value of $0.793 billion; Gabriel's 90-day average market cap on July 29, 2011, which we of course argue was inflated, was $2.617 billion, pretty much exactly in between the MVIS and TSX Indexes.

[redacted]

105 Fifth, **the Claimants fail to subtract the value of Gabriel Canada's net assets from its market capitalization on the "last clean date"**. To value the Project Rights, Compass Lexecon subtracted Gabriel Canada's cash and cash equivalents from its market capitalization on the Valuation Date.[201] The Claimants now abandon this methodology, arguing that,

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[197] The Respondent is not in a position to quantify the extent of this overstatement since it has not been afforded the opportunity to produce evidence on this point.

[198] PHB4-Cl., 31 (para. 85(b)).

[199] **CRA Presentation**, 56.

[200] [redacted]

[201] **CL Report I**, 6 (para. 6).

because they spent cash to maintain the Project Rights from 2011 to 2016, cash on hand should not be deducted from valuation dates after 2016.[202] They also deduct only USD 60 million from Gabriel Canada's indexed market capitalization as of September 2013, because "Gabriel had invested a further US$ 123 million into RMGC to maintain the Project Rights."[203]

106 The Claimants' argument is flawed. The Claimants provide no evidence that the payments to RMGC were in fact spent on maintaining the Project Rights.[204] Even if such expenditures were evidenced, they remain irrelevant to the assessment of the Project Rights' FMV. Compass Lexecon deducted cash and cash equivalents held by Gabriel Canada because they were separate from the Project Rights.[205] Finally, by deducting **actual** cash and cash equivalents held on the date of valuation from an **indexed** market capitalization of Gabriel Canada on that date, the Claimants improperly mix hypothetical and actual values.

107 If an indexed value of Gabriel Canada is a valid proxy for the Project Rights (*quod non*), then at a minimum all net assets (excluding mineral properties) must be deducted from its market capitalization. As both CRA and Compass Lexecon confirm, any award should deduct the value of the assets not expropriated, as only the mineral rights were allegedly expropriated.[206] All other assets (not just cash) must be deducted from the market capitalization to yield a market estimate of the value of the mineral rights. However, deducting total net assets (excluding mineral properties) on Gabriel's balance sheet would not account for the residual value of RMGC's land – which on the Claimants' own case has not been expropriated and which value is included in Gabriel Canada's mineral

[202] PHB4-Cl., 34 (para. 95).

[203] PHB4-Cl., 37 (para. 102(a)).

[204] PHB4-Cl., 37 (footnote 181). This argument is especially egregious given Claimants' opposition to Romania's document production request related to these sunk costs, which was denied by the Tribunal for lack of relevance and materiality. PHB2-Resp., 108 (para. 219).

[205] **CL Report I**, 27 (para. 46).

[206] **Tr. 2020**, 1343:7-15 (Burrows); **Tr. 2020**, 1165:1-15 (Spiller).

properties[207] – nor any other value that investors may have placed on Gabriel Canada in addition to the Project Rights.[208]

108 An indexed estimate of the value of the Project Rights at a later date (*e.g.*, 9 September 2013) should start with the value of the Project Rights at the earlier date (*e.g.*, 3 July 2012). As noted above, the Parties' experts agree that Gabriel Canada's market capitalization is greater than the value of the Project Rights, since the former includes the value of the net assets that are not alleged to have been expropriated. To avoid mixing "actual" and "hypothetical" values, the net assets (excluding mineral properties) must be deducted on the "last clean date", thereby removing these assets from the equation during indexation. The indexation would then get applied only to the value of the Project Rights. The application of indexation to market capitalization results in indexation of all assets (including the un-expropriated net assets), which makes no sense.

109 Sixth, **there is no basis whatsoever for applying an acquisition premium**. Acquisition premiums have never been awarded in international investment arbitration as they are not a standard feature of valuation analysis, and are only justified when there is additional value to a buyer.[209] There is no legal or factual justification to incorporate them here.

110 Each of these issues have been corrected in the Excel spreadsheet produced by CRA, Exhibit **CRA-307**. The "**Summary_1stAltClaim**" and "**Summary_2ndAltClaim**" tabs, provide an overview and a direct line-by-line comparison of the Parties' respective scenarios related to the Claimants' first and second alternative claims.

111 The full functionality of the Compass Lexecon's spreadsheet is reproduced in the "**Index Calculator**" tab, with additional options allowing for the correction of the Claimants' erroneous methodology. To use the Index Calculator of Exhibit **CRA-307**, the Tribunal should click on the "**Index Calculator**" tab, and select:

[207] **CRA Report II**, 19 (paras. 47-48).
[208] PHB2-Resp., 88 (para. 188).
[209] PHB1-Resp., 214 (Section 5.4.3).

a) a Last Clean Date (cell H:5);

b) a Valuation Date (cell H:6);

c) the "Trailing 90-day Vol. Weighted Avg. Market Cap" or the "Spot Market Cap" as of the Last Clean Date (cell H:8);

d) the deduction of "Cash and Equivalents" or "Net Assets, excl. Mineral Properties" (cell H:10);

e) whether this deduction occurs at the "Beginning" or "End" of indexation (cell H:12);

f) whether to apply an acquisition premium, "0%" or "35%" (cell H:26); and

g) which index to apply (or combination thereof) (cells C:32 through C:35).

112 The result is automatically calculated once all options are selected.

113 In the "**GBU Balance Sheet Items**" tab, CRA provides quarterly Gabriel Canada balance sheet data by line item for the period from 31 March 2011 through 31 December 2021. These data are taken from Gabriel Canada's public disclosures, and supplement data from 2011 to 2017 already in the record (quarterly data for Q1-Q2 2011 and Q1-Q3 2017, and annual data for 2011-2016).[210] These data are used to compute data presented in the "GBU Public Market Cap" tab on "Cash and Equivalents" and "Net Asset, excl. Mineral Properties".

114 In the "**GBU Public Market Cap**" tab, CRA presents quarterly data for the period from 31 March 2011 through 31 December 2021 for Gabriel Canada Cash and Equivalents, Net Assets (excluding mineral properties), and Gabriel Canada market capitalization (spot and trailing 90-day volume-weighted average). This tab also presents data on Gabriel Canada's public market capitalization, less cash and equivalents (for both the spot market capitalization and the trailing 90-day volume-weighted average market capitalization), and Gabriel Canada's public market

[210] See Exhibits **CRA-43** through **CRA-53**.

capitalization, less net assets, excluding mineral properties (for both the spot market capitalization and the trailing 90-day volume-weighted average market capitalization).

115 In the "**CAD-USD FX**" tab, CRA presents data on the Canadian dollar-USD exchange rate for each business day from 1 January 1996 through 31 August 2022. These data include data up to 12 October 2017 already in the record,[211] supplemented by data from Bloomberg for dates after 12 October 2017.

116 In the "**90-day Vol. W. Avg. Mkt Cap**" tab, CRA reproduces data already in the record on Gabriel Canada's public market capitalization and traded volume for every trading day from 1 January 2000 through 30 April 2022.[212] These data are used to calculate the "GBU trailing 90-day volume-weighted average market cap."

4.2 The Claimants Incorrectly Calculate Their Alleged Losses for Their First Alternative Claim

117 As explained above, the Claimants' alleged losses for their first alternative claim are USD 156 million for the Project, [213] [redacted] [214]

118 Assuming the Tribunal were to accept the use of indexation of the value of the Project Rights based on public market capitalization, the Claimants' alleged losses, using a trailing 90-day volume-weighted average of Gabriel Canada's market capitalization on 3 July 2012 as a starting point (minus the USD 138 million in net assets held on that date) adjusted by the MVIS index as of 9 September 2013, would amount to USD 445 million.

[211] See **CRA-10**.

[212] See **C-2991**, tab "C-2860.04".

[213] **CRA Presentation**, 30.

[214] **CRA Presentation**, 81.

Claimants' Alleged Losses for First Alternative Claim (if indexation accepted)	
Trailing 90-day Vol. Weighted Avg. Market Cap as of 03-Jul-12	USD 855 million
- Less: Net Assets, excl. Mineral Properties, per GBU Balance Sheet as of 03-Jul-12	(USD 138 million)
Value of Project Rights as of 03-Jul-12	USD 717 million
Value of Project Rights Adjusted by MVIS Global Junior Gold Mining Index as of 09-Sep-13 (indexed relative to 03-Jul-12)	USD 445 million

4.3 The Claimants Incorrectly Calculate Their Alleged Losses for Their Second Alternative Claim

119 The Claimants' alleged losses are the same as for their first alternative claim, USD 156 million for the Project. [redacted]

120 Using the same methodology as above, but with a date of breach of 4 January 2017 (the date on which Romania submitted the nomination file to UNESCO),[215] the alleged losses for the Claimants' second alternative would be USD 347 million if indexation of public market capitalization is accepted.

Claimants' Alleged Losses for Second Alternative Claim (if indexation accepted)	
Trailing 90-day Vol. Weighted Avg. Market Cap as of 03-Jul-12	USD 855 million
- Less: Net Assets, excl. Mineral Properties, per GBU Balance Sheet as of 03-Jul-12	(USD 138 million)
Value of Project Rights as of 03-Jul-12	USD 717 million
Value of Project Rights Adjusted by MVIS Global Junior Gold Mining Index as of 04-Jan-17 (indexed relative to 03-Jul-12)	USD 347 million

[215] *Supra*, para. 85.

Respectfully submitted,

19 September 2022

For and on behalf of Romania

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