INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

CLAIMANTS' REPLY COSTS SUBMISSION

January 6, 2023

Ţuca Zbârcea & Asociaţii

WHITE & CASE LLP

Counsel for Claimants

TABLE OF CONTENTS

Page

1. Claimants reply below to Respondent's Costs Submission.

A. Respondent Acknowledges That Costs Should "Follow the Event"

2. The Parties agree that the Tribunal has broad discretion to award costs and that it should apply the principle that "costs follow the event" as most ICSID tribunals have done.[1]

B. Respondent Is the Losing Party and So Should Bear All the Costs

3. Respondent argues that it should receive its "full costs" on the baseless premise that it will prevail in this arbitration.[2] Respondent's argument thus may be summarily rejected. The Tribunal has jurisdiction over all the claims presented.[3] On the merits, overwhelming evidence establishes that contrary to Romanian law Romania wrongly conditioned Project implementation on improved economic terms and a positive political decision from August 2011 onwards, blocked the completion of permitting for two years to force Gabriel to capitulate to its demands, and then in breach of both BITs repudiated Gabriel's Project Rights and the RMGC joint venture for political reasons while admitting that the State was "nationalizing the resources" and would have to pay billions in compensation to Gabriel.[4] For these reasons, Respondent not only must compensate Claimants for the tremendous loss its treaty breaches caused,[5] but applying the principle that costs follow the event, Respondent also must bear all the costs that Claimants reasonably incurred during this arbitration.[6]

4. Claimants demonstrated that their costs are reasonable for a lengthy, complex, high-stakes, contentious arbitration with an enormous evidentiary record.[7] Claimants also

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[1] Claimants' Costs Submission ¶¶ 2-5; Respondent's Costs Submission ¶¶ 3-4.

[2] Respondent's Costs Submission ¶¶ 5-8.

[3] *See, e.g.*, Memorial ¶¶ 834-841; Reply ¶¶ 310-460; Claimants' First Post-Hearing Brief ¶¶ 14-38.

[4] *See, e.g.*, Memorial ¶¶ 335-638; Reply ¶¶ 23-309; Claimants' First Post-Hearing Brief ¶¶ 39-212; Claimants' Second Post Hearing Brief ¶¶ 10-132.

[5] *See, e.g.*, Memorial ¶¶ 639-833, 842-926; Reply ¶¶ 461-748; Claimants' First Post-Hearing Brief ¶¶ 213-449; Claimants' Second Post Hearing Brief ¶¶ 159-285.

[6] Claimants' Costs Submission ¶ 6; Memorial ¶¶ 927-930.

[7] Claimants' Costs Submission ¶¶ 7-15, 17 (quantifying Claimants' costs and describing similar costs claimed and awarded in other large complex cases lasting many years, and further observing that Claimants are two separate juridical entities with separate claims subject to separate defenses each under a different treaty).

showed that factors outside their control, including Respondent's tactics throughout this case, have aggravated and significantly increased Claimants' costs.[8]

5. Respondent does not deny that these proceedings have been long and complex or that the evidentiary record is massive. Indeed, those facts are indisputable.[9]

6. While Claimants incurred higher costs than Respondent, many tribunals have recognized that claimants bear the burden of proof and, consequently, usually incur much higher costs.[10] Thus, the *Gemplus* tribunal observed that, "It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty."[11]

7. These factors explain the differing costs in this case. While Claimants prepared two detailed principal submissions loaded with supporting evidence, Respondent abusively withheld the vast majority of its evidence until its Rejoinder.[12] Thus, for example, while Claimants supported their Memorial with 1,747 factual exhibits and six witness statements with 577 pages of factual testimony and annexes, Respondent included only two short witness statements totaling 23 pages with its Counter-Memorial. The relatively greater burden presented by the non-disputing party submissions is another example as Claimants had to incur the costs to prepare three additional submissions totaling 159 pages to respond to three separate non-

[8] Claimants' Costs Submission ¶ 16.

[9] *See, e.g.*, Letter from Tribunal to Parties dated Apr. 12, 2022 at 2 (observing that "this case is especially large, complicated and cumbersome"); Letter from Respondent to Tribunal dated Nov. 21, 2021 at 3 (emphasizing "the length and complexity of these proceedings").

[10] Claimants' Costs Submission ¶ 12 n.13.

[11] *Gemplus v. Mexico* (CL-156) ¶ 17-25. *See also, e.g.*, *Siag v. Egypt* (CL-108) ¶ 624 ("[T]his Tribunal agrees with the observation made in the [*ADC v. Hungary*] case, where the Tribunal rejected the submission 'that the reasonableness of the quantum of the Claimants' claim for costs should be judged by the amount expended by the Respondent.' This Tribunal further agrees that 'it is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.'"); *ADC v. Hungary* (CL-138) ¶ 535; *Hulley v. Russia* (CL-341) ¶ 1882.

[12] Claimants' Costs Submission ¶ 16(f).

disputing party submissions opposing their claims, while in contrast Respondent submitted three short letters totaling 13 pages.

C. Respondent's Request for Costs as the Losing Party Is Baseless

8. Anticipating that the Tribunal will issue an award in favor of Claimants, Respondent argues that it should receive its costs to respond to Claimants' provisional measures requests and to the Tribunal's questions, "[i]rrespective of the outcome of the case," purportedly because of Claimants' "conduct."[13] This is baseless. Claimants acted in good faith and did not do anything abusive that would warrant an award of costs to Respondent as the losing party.

1. Respondent Misrepresents the Necessity for and Outcome of Claimants' Provisional Measures Requests

9. Respondent requests ~ RON 4.5 million purportedly to respond to Claimants' "three unsuccessful" requests for provisional measures.[14] The amount Respondent requests is inflated and unreliable because it includes all of its costs from October 2015 to May 2016, before Claimants filed their first provisional measures request in June 2016, and because it suggests Respondent did not incur any costs preparing its defense during the first year of the arbitration.[15] Respondent also misrepresents the circumstances relating to Claimants' requests.

10. In the *first provisional measures request*, Claimants requested access to and use of core documents, including RMGC's licenses, that are essential to this arbitration, were strictly classified and confidential under Romanian law, and were otherwise inaccessible to Claimants' counsel and unable to be used in this arbitration. Respondent argues that Claimants filed a "premature and overly broad" request "instead of seeking to resolve the issue with the Respondent."[16] In fact, however, Claimants indicated as early as their Request for Arbitration in July 2015 that Respondent's consent to make these core documents available was necessary and that, if not forthcoming, Claimants would have to request provisional measures to permit

[13] Respondent's Costs Submission ¶ 11.

[14] Respondent's Costs Submission ¶¶ 11-15.

[15] *See* Respondent's Costs Submission, Annex § 2.2, Phase I.

[16] Respondent's Costs Submission on ¶ 13.

access.[17] Over the next eleven months, Claimants tried repeatedly to engage with Respondent to address the issue amicably and cooperatively, but Respondent dismissed those overtures.[18] It was only after Respondent stonewalled for nearly a full year that Claimants requested provisional measures in June 2016. Yet even then, Respondent opposed the request as a matter of law and refused to give any reasonable assurance that it would permit access to the documents needed, asserting that it would need six more months to evaluate the issue.[19] As late as the hearing, Respondent failed to provide assurance with regard to a great number of the documents that it would provide the necessary access.[20]

11. Respondent's contention that the Tribunal "rejected" Claimants' first provisional measures request also is misleading and incorrect.[21] In PO2 issued in October 2016, the Tribunal took note of the ongoing negotiations between the Parties and the progress made in recent months, and it ordered Respondent to declassify and provide access to all the remaining classified and confidential documents.[22] Thus, it was only following the request for provisional measures that Claimants obtained access to documents that were central to their ability to present their claims. If Respondent had engaged promptly and amicably after Claimants raised the issue in their Request for Arbitration, the Parties could have avoided the costs of two rounds of briefing and the oral hearing.

12. In the ***second provisional measures request***, Claimants sought to prevent serious aggravation of the dispute in two respects. First, Claimants asked the Tribunal to order Romania

[17] Claimants' Request for Arbitration ¶¶ 62-63.

[18] *See, e.g.*, Letter from Gabriel to NAMR dated Oct. 2, 2015 (Exh. C-22) (requesting that NAMR declassify the documents relating to the Project for purposes of the arbitration); Letter from RMGC to NAMR dated Oct. 30, 2015 (Exh. C-23); Claimants' First Provisional Measures Request ¶¶ 3, 11-12 (describing Claimants' repeated communications with Respondent's counsel); Claimants' Reply on First Provisional Measures Request ¶¶ 2-3, 19-24 (explaining that nearly one year after Claimants filed their Request for Arbitration, Respondent had failed to engage with Claimants on this topic in any way and that NAMR had not responded to Gabriel and RMGC's letters on the subject).

[19] *See* Respondent's Observations to Claimants' First Request for Provisional Measures ¶ 100(d); Claimants' Reply on First Request for Provisional Measures ¶ 25.

[20] *See* Tr.(Sept. 23, 2016)190:15-193:3 (R-Opening).

[21] *See* Respondent's Costs Submission ¶ 13.

[22] Procedural Order No. 2 dated Oct. 20, 2016 ¶ 35(b) (ordering Respondent to "declassify [the remaining classified documents] and/or cause the relevant third parties to declassify such documents").

to refrain from enforcing a patently unlawful VAT assessment via the seizure and hurried liquidation of RMGC's property that would have resulted in RMGC's bankruptcy and forced administration and that thus threatened to deprive Claimants of access to evidence to present their claims in this case. Respondent argues that the Tribunal found insufficient evidence that the VAT assessment was unlawful,[23] but it misleadingly refers only to the Tribunal's preliminary decision based on "incomplete" briefing as of August 19, 2016, a month before the hearing.[24] Respondent fails to mention that just one day before the hearing its own courts had quashed the VAT assessment.[25] For that reason, Claimants withdrew their request for provisional measures and the Tribunal did not rule on it.[26]

13. Second, Claimants requested an order to prohibit disclosure of information and documents from a sweeping "anti-fraud" investigation that began shortly after Claimants started this arbitration and, without any stated justification, demanded tens of thousands of pages of documents, including many that could only be relevant to this arbitration.[27] While Respondent argues that the Tribunal found "no evidence" that this investigation was retaliatory or abusive,[28] it disregards that the Tribunal appreciated Claimants' concerns about the sequence and timing of the start of the investigation and acknowledged that "Claimants may not be able to identify" additional evidence "given the confidentiality of the investigation."[29] The Tribunal also accepted Respondent's assurances that Romanian law prohibited disclosure for the arbitration of the information and documents collected during the investigation.[30] That is no basis to award any costs to Respondent, however, as the Tribunal found that similar concerns over the State's investigations were sufficiently compelling to redact sensitive witness testimony over Respondent's objections and to reject Respondent's request to reclassify parts of those witness

[23] Respondent's Costs Submission ¶ 14.

[24] *See* Tribunal's Reasoned Decision on Claimants' Request for Emergency Temporary Provisional Measures dated Oct. 21, 2016 ¶¶ 36-38. *See also* Letter from Tribunal to Parties dated Aug. 19, 2016.

[25] Tr.(Sept. 23, 2016)126:3-128:11 (Cl-Opening) (explaining that Claimants learned of the decision quashing the VAT assessment "from Respondent's email yesterday afternoon").

[26] Decision on Claimants' Second Request for Provisional Measures dated Nov. 22, 2016 ¶¶ 32, 90.

[27] Tănase I ¶¶ 5, 9-21, 32-33, Annex B; Claimants' Reply on Second Provisional Measures Request ¶¶ 15-20.

[28] Respondent's Costs Submission ¶ 14.

[29] Decision on Claimants' Second Request for Provisional Measures dated Nov. 22, 2016 ¶¶ 99, 102.

[30] Decision on Claimants' Second Request for Provisional Measures dated Nov. 22, 2016 ¶¶ 96-97, 102.

statements as not confidential.[31] In any event, the fact that Romania's "anti-fraud" and criminal investigations are still pending in 2023 with no findings made confirms that their sole purpose was to seek to tarnish RMGC and to search for an arbitration defense for the State, even if the illumination provided by Claimants' request for provisional measures on those investigations had a corrective impact.

2. The Tribunal Directed Questions in PO27 to Both Parties

14. Respondent requests costs of ~ RON 5.4 million arguing that the Tribunal asked its first round of questions in PO27 because Claimants allegedly failed "to properly state their case in their Memorial or Reply."[32] The Tribunal should reject this baseless request.

15. Respondent fails to provide a reliable basis to quantify its costs for its PO27 submission because it includes all its costs from the end of the December 2019 hearing until its submission in July 2020.[33] That overstates the costs of the submission because it includes costs from several months before the Tribunal issued PO27 in March 2020 and fails, for example, to deduct any costs to submit rebuttal documents, review and correct the hearing transcripts, or respond to the European Commission in April 2020.

16. In addition, contrary to Respondent's assertion that the Tribunal directed its questions in PO27 only to Claimants,[34] the Tribunal directed its questions to both Parties. For example, the Tribunal's question (d) about how and to what extent public opinion should factor into its assessment of liability and damages invited Respondent to clarify its arguments regarding "social license." The fact that the Tribunal requested consecutive rather than simultaneous submissions does not change that conclusion. It simply shows that the Tribunal took care to ensure that Respondent would have the last word addressing the Tribunal's questions from the 2019 hearing as ordinarily would be the case.

[31] Procedural Order No. 11 dated June 14, 2018 ¶¶ 38-59, 66-75, 86, 107(1)-(2).

[32] Respondent's Costs Submission ¶¶ 16-19.

[33] *See* Respondent's Submission on Costs, Annex § 2.2, Phase IV.

[34] Respondent's Costs Submission ¶ 18.

17. Nor is there any basis for Respondent's argument that the Tribunal issued PO27 because Claimants had not explained "basic issues" relating to the timing of the breach, the resulting losses, and the date for assessing the value of the rights that were frustrated.[35] Claimants addressed these issues in detail in their principal submissions. Claimants stated plainly in their Memorial that Romania breached the treaties through a series of acts and omissions that constitute a composite act that "began in August 2011 and following the events of 2013 ripened into treaty violations that caused the complete deprivation of the value of Gabriel's investments."[36] Claimants explained that:

a. Romania's wrongful conduct "began in August 2011 when the Government plainly decided and in effect announced through the statements of the Prime Minister, the President, the Minister of Culture and the Minister of Environment, that it would not allow the Roşia Montană Project to proceed on the basis of the State's existing agreements with Gabriel and RMGC."[37]

b. After announcing that it would condition Project permitting and implementation on improved economic benefits and a positive political decision, the Government consistently "maintained" that policy and blocked the completion of the EIA process and the issuance of other permits throughout 2012-2013.[38]

c. In 2013, the Government made further coercive demands, "arbitrarily and in manifest disregard of the applicable legal framework governing Gabriel's investment effectively submitted the Project for review by Parliament, and then

[35] Respondent's Costs Submission ¶ 17.

[36] Memorial ¶¶ 887-889, 896.

[37] Memorial ¶ 890. *Id.* § VII ("Demanding a Greater Financial Stake in the Project, the Government Renounced Its Agreements with Gabriel and Blocked the Permitting Process").

[38] Memorial ¶¶ 891-893. *Id.* § VII.B ("Although Gabriel Had Offered to Submit to the Government's Demands, the Government Refused to Make Any Permitting Decision Concerning the Project Throughout 2012"); *id.* § VIII.A ("Following Elections the New Government Maintained the Abusive Position That the Project Would Not Be Permitted Unless Revised Economic Terms Were Agreed but Then, in Complete Abandonment of the Applicable Legal Framework, Added That Parliament Would Decide If the Project Would Proceed Under Any Terms").

. . . pronounced it rejected" before any Parliamentary vote, without issuing any "legal decision rejecting the Project."[39]

d. Eventually, after the passage of time and more unlawful and abusive behavior, in hindsight "it became clear that the Roşia Montană Project, the Bucium Projects, and indeed RMGC itself had been rejected entirely."[40]

18. Claimants further explained that compensation must re-establish the *status quo ante* that existed immediately before the composite act began so as not to reflect the impacts of the wrongful conduct and, consequently, should reflect the fair market value of Gabriel's Project Rights in Romania as of July 29, 2011.[41] Claimants demonstrated that Gabriel Canada's stock market capitalization provides the most reliable evidence of the fair market value of Gabriel's Project Rights as of July 29, 2011, from a minority shareholder's perspective, because it is a non-speculative, real-world measure of fair market value based on an average daily traded volume of over one million shares per day.[42]

19. In sum, Claimants presented their case fully in their Memorial and there is no basis to award to Respondent any of the costs it incurred to address questions that the Tribunal directed to both Parties.

3. Submissions Regarding Alternative Measures of Damages and the Effect of Romania's UNESCO Inscription Do Not Provide Any Basis for Respondent to Recover Costs

20. Respondent requests costs of ~ RON 1.6 million and US$ 169,160 purportedly to respond to questions presented by the Tribunal relating to alternative measures of damages and the impact of the July 2021 UNESCO inscription.[43] This is without basis. Respondent again fails to provide a reliable basis to assess costs it incurred responding to the Tribunal's questions

[39] Memorial ¶¶ 893-894. *Id.* § VIII ("The State Unlawfully Rejected the Project Outright and in Effect Terminated All of Gabriel's Contractual and Legal Rights Without Any Compensation").

[40] Memorial ¶¶ 894-895. *Id.* § IX ("Following Rejection of the Project, the State Continued to Act in Manifest Disregard of Gabriel's Legal Rights Leading to This Arbitration").

[41] Memorial ¶¶ 862-874, 886, 897.

[42] Memorial ¶¶ 898-914.

[43] Respondent's Costs Submission ¶¶ 20-24.

because Respondent includes costs from the three months before the Tribunal presented those questions to the Parties in April 2022.[44]

21. Cynically repeating its baseless grounds for annulment, Respondent also argues that the Tribunal's questions related to "new claims" that allegedly prejudiced "Respondent's right to due process."[45] While Claimants presented alternative arguments as to the measure of damages, the Tribunal in PO34 rejected Respondent's argument that Claimants had presented a "new claim." The Tribunal found that Claimants had made "alternative submissions in the event the Tribunal decides to assess damages on a different date" than July 29, 2011, which would reduce the amount of compensation, "while repeating their case that compensation should be based on the value of the Project Rights as of" July 29, 2011.[46]

22. Indeed, Claimants presented alternative arguments regarding the measure of damage caused by Romania's wrongful conduct that were permitted as rebuttal to the expert report of Dr. Burrows first presented by Respondent with its Rejoinder purporting to demonstrate the value of the Project Rights as of the end of 2013 by reference to a gold mining index.[47] Claimants' further alternative arguments were presented as permitted by the Tribunal in response to the UNESCO inscription obtained by Romania in July 2021. While Respondent argued without basis that the Tribunal's later questions deprived Respondent of due process, the Tribunal already has rejected that argument.[48]

23. Finally, Respondent's arguments that it has been deprived of due process[49] are baseless attempts to invent grounds for annulment that do not exist. It is undisputed that the

[44] *See* Respondent's Submission on Costs, Annex § 2.2, Phase VII.

[45] Respondent's Costs Submission ¶¶ 20-22, n.22.

[46] Procedural Order No. 34 dated Oct. 22, 2020 ¶¶ 58-61.

[47] CRA-II ¶¶ 86-92, Figure 2.

[48] Letter from Tribunal to Parties dated Apr. 27, 2022. Respondent also wrongly contends that Claimants made a "third alternative" claim for sunk costs in their Post-Hearing Brief. Respondent's Costs Submission ¶¶ 20-21. In fact, as noted in the Memorial and the Reply, Claimants observed that the enormous amounts invested by Gabriel to develop the Projects provide further evidence of their substantial value. *See* Claimants' Post-Hearing Brief ¶¶ 440-445; Memorial ¶¶ 4, 62-63; Reply ¶ 2(d).

[49] *E.g.*, Respondent's Costs Submission ¶¶ 16, 21.

Tribunal has the authority to ask questions of the Parties at any time during the proceedings.[50] Nor were the questions "unanticipated," as Respondent wrongly asserts.[51] The record is clear that Respondent has been given ample process at each stage of the proceeding, including even by granting its request for a five-week extension purportedly to permit it to complete a procurement procedure to re-engage its expert.[52]

D. Amended Statement of Costs and Request for Relief

24. Claimants opposed these costs submissions as unnecessary, but the Tribunal ordered them at Respondent's insistence.[53] Claimants accordingly request that the Tribunal award their full costs of these proceedings, including the additional US$ 155,291 for White & Case's legal fees to prepare the two costs submissions, thus totaling US$ 63,961,210, plus interest from the date of the Award up through the date of payment.

Respectfully submitted,

White & Case LLP

WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
USA

Counsel for Claimants

Ţuca Zbârcea & Asociaţii
Victoriei Square
4-8 Nicolae Titulescu Ave.
Sector 1, Bucharest 011141
Romania

January 6, 2023

[50] ICSID Convention Article 44; ICSID Arbitration Rule 19. *See also* Respondent's Costs Submission ¶ 17 ("The Respondent does not call into question the Tribunal's prerogative to pose questions to the parties upon the conclusion of a hearing.").

[51] Respondent's Submission on Costs ¶ 23. *See* Email from Tribunal to Parties dated June 1, 2021 (expressly reserving the possibility of additional questions and a further hearing).

[52] Email from Tribunal to Parties dated July 22, 2022.

[53] Letters from Claimants to Tribunal dated Nov. 17 and 25, 2022. *See also* Email from Tribunal to Parties dated Dec. 2, 2022.