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Note of Dissent

Ref: ICSID Case No. ARB/15/31: Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd ("Claimants" or "Gabriel") vs. Romania ("Romania" or "Respondent"))

I. Introductory

1. After giving anxious consideration to the text of the draft award on the merits shared by my colleagues in the Arbitral Tribunal (the "Draft"), I find myself in the need of issuing the following dissenting opinion.

2. Starting in mid-2011 and spanning at least through 2015, the conduct of the Respondent vis-à-vis the Claimants was predominantly politically motivated. The pursuit of political objectives, often indissolubly combined with the economic renegotiation of the conditions under which Gabriel undertook to carry out and complete the Roşiă Montană and Bucium projects (the "Project"), constituted the root cause of the Project's demise rather than environmental issues.

3. Political or economic motives or objectives cannot be an excuse not to comply with bilateral investment protection treaties ("BITs") provisions or to deny rights arising out of such provisions. State conduct, even if assuming different or varying manifestations, has to be evaluated holistically in order to determine if its common thread has been to consistently respond to the objective of privileging political or economic objectives or strategies in disregard of the investor's Treaty rights and concomitant State obligations and international law. An appropriate analysis of this situation from the perspective of BIT investment and investor guarantees and international law requires a connecting the dots exercise to assess continuing State conduct considered in its entirety.

4. Such approach does not entail an exercise having as its purpose or result a review of local law issues tantamount to an appeal on the merits of local law determinations incompatible with the role and scope of an international arbitral tribunal's authority functioning within a public international law framework and charged with the interpretation and application of international law. Local law issues or domestic situations governed by national law, considered as facts, may give rise to international law violations, including to a violation of bilateral investment treaties' obligations. This is precisely what happened in the present case.

5. A central requirement for the Project going forward – and which was a primary subject of inquiry at governmental level and of popular attention – was the granting of the Project's environmental permit. Without the environmental permit the Project was neither possible nor feasible. As pointed out by different government officers, including State Secretary Năstase and Prime Minister Ponta, above any other conditions, the approval of the environmental permit was determinative or a central element of the decision of whether the Project would be done or not[1]. Environmental issues were salient factors conditioning governmental conduct and public opinion sectors opposing the Project.

6. Facts and conduct concerning the granting or not of the environmental permit may give rise, in isolation or in tandem, to Treaty breaches. They are part and parcel of the existing record and constitute a substantial basis of the Claimants' case. Not considering them would constitute a due process breach. State conduct adversely affecting the carrying out or the finalization of the process leading to granting the environmental permit, including the expected final outcome of the process (i.e., granting the permit) may constitute a breach of the fair and equitable protection BIT standard ("FET") as claimed by the Claimants. As pleaded (and as it will be further explored), FET breaches may occur even if conduct in breach of FET does not qualify as a composite conduct under ARISWA (*Draft Articles on Responsibility of States for Internationally Wrongful Acts*) Article 15[2]. Further, FET violations are not limited to regulatory conduct. Non-regulatory conduct can also be illicit conduct in violation of FET.

7. As it will be shown in this Note, the Claimants' FET rights under the UK and Canada Romania BITs were breached by the failure of Romania, predominantly for political reasons, to complete the process for obtaining the environmental permit without fault attributable to the Claimants. On the other hand, the record does not permit to conclude that the requirements for granting the environmental permit had not been met and that this permit should not have been granted.

8. Motivation is established objectively by looking at actual conduct, it does not depend on establishing or not the existence of subjective intent or bad faith. Proof of the latter

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[1] Exhibit C-485, TAC meeting of 31 May 2013, at 20. Minister Ponta, TV declaration on 11 September 2013, at 3 (Exhibit C-437).

[2] Claimants Response to Questions Presented by the Tribunal in PO 27, paras. 61-62, at 38 & fol. Claimants' Reply and Counter-Memorial on Jurisdiction, paras. 462-502, at 209-215. Claimants' Memorial, paras. 639-653 at 277-285.

is not essential to establish a FET violation[3]. Thus, specific episodes of State conduct that considered in isolation would not qualify as a violation of FET may give rise to a FET violation when State conduct is considered in its entirety.

9. This Note only addresses Claimants' FET claim within the context set forth above. Although issues subject to this dissent may be also relevant at least in part in respect of the expropriation, umbrella clause and impairment claims, going through them would exceed the reasonable length and purpose of this dissent. In any event, I do not necessarily share the analysis carried out and conclusions reached by my colleagues in the Arbitral Tribunal in connection with the other claims.

II. The International Law Framework

10. The Claimants' case refers, in part, to Romania's conduct in breach of Article 15 ARISWA[4].

11. However, illicit conduct in violation of FET – the primary applicable international law rule -is not a pre-defined, statutorily-like, systematic type of conduct like genocide or apartheid mentioned in the commentary to Article 15 ARISWA, contained and defined in a convention as a crime under international law. Not committing genocide or apartheid is a primary obligation under international law which if not observed is subject to penal sanctions (like imprisonment)[5].

12. Thus, the fact that the commentary to ARISWA Article 15 only refers to apartheid or genocide as the type of primary international law rules covered by Article 15, does not exhaust: a) the type of primary international law rules consisting of conduct which if infringed leads to international law responsibility, when such primary rule - FET in the instant case - is incorporated into an international convention like a BIT, nor b) the types of conduct breaching such primary rule.

13. Whilst conduct defining FET or its violation is not the kind of systematic, pre-defined, criminal conduct characterized as a crime against humanity, as it is the case, for example, of conduct defined in the Genocide Convention, ARISWA Article 15

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[3] The *Loewen Group Inc and Raymond L Loewen vs. United States of America,* (ICSID Case No. ARB(AF)/98/3) Award of 26 June 2003 para. 132, at 38: "*Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.*"

[4] Exhibit CL-61.

[5] E.g., *Convention on the Prevention and Punishment of the Crime of Genocide*, Arts. I-III.

and its commentary could perhaps offer *guidance"*[6] to determine conduct leading to a breach of a "*particular primary rule"*[7] like FET. However, FET, as a primary obligation under international law, has its own, standalone, meaning, including in respect of the facts or circumstances giving rise to a FET violation. Therefore, ARISWA's Article 15 may only offer limited indications to determine a FET violation.

14. FET is characterized by "treatment" which covers both any kind of behavior or conduct or event, even considered in isolation, vis-à- vis somebody, and a continuing standard of conduct composed of actions and omissions expected from the host State in respect of the investment and, depending on the treaty letter or interpretation, also of the foreign investor[8]. The notion of "treatment" comprised by FET certainly evokes, *inter alia*, a pattern of continuing and running conduct as one of the FET standard defining traits.

15. Focusing now on the type of conduct leading to a FET violation, it may consist of standalone actions or omissions, or a sequence of actions or omissions which, although not identical (without its discrete constitutive elements necessarily and separately determining a violation of FET), holistically considered lead to concluding that they inform a continuing course of conduct constituting a violation of the FET primary rule because the required treatment standard under FET was not observed even if the "*...series of measures have been taken "without plan or coordination but* [have] *the prohibited effect"*[9]. Therefore, conduct in violation of FET "may" but not necessarily "must" be composed of individually wrongful acts under international law although certain discrete components of such conduct, or conduct considered on a standalone basis, may constitute a FET breach. Also, coordination or planning of such measures is not a requirement to conclude on whether FET has been violated or not.

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[6] J. Crawford, 2nd Report on State Responsibility, Document A/CN/498 and ADD, para. 111, at 34: *"(...) Both the primary rule and the circumstances of the given case will be relevant in deciding whether the wrongful act has a continuing character and, again, it is probably the case that a detailed definition cannot be offered in the abstract. On the other hand, guidance can be offered in the commentary, and the difficulty of applying a valid distinction in particular cases is not a reason to abandon the distinction".*

[7] J. Crawford, 2nd Report, para. 102, at 31.

[8] The Webster's Third New International Dictionary defines "treatment" as *"conduct or behavior towards another party", "a pattern of actions".*

[9] *Blusun SA, Jean-Pierre Lecorcier and Michal Stein vs. Italian Republic* (ICSID Case No. Arb/14/3 (2014) at para. 362: "*A breach of an obligation to 'encourage and create stable, equitable, favourable and transparent conditions for Investors' including 'to accord at all times ... fair and equitable treatment' could be breached by a single transformative act aimed at an investment, or by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect".*

Thus, it is not necessary to prove the existence of a conspiracy or concerted or coordinated planning by government authorities to establish a FET breach or to identify or find a governmental intention to terminate the Project. Different but converging actions are measures in violation of FET without the need of proving coordinated action or commonality of intent. The broad notion of "measure" covers this characterization of FET breaches, as well as FET breaches ensuing from isolated actions or omissions[10].

16. For the above reasons, it is artificial to establish an abrupt divide between conduct qualifying as FET (defined in accordance with general international law) and conduct in violation of FET (exclusively covered by ARISWA Article 15 commentary). Conduct in violation of FET is not analogous to the type of treaty pre-defined systematic conduct like apartheid or genocide, the only type of conduct referred to in the commentary to ARISWA Article 15[11]. A word of caution warns against reading in ARISWA more than what really the applicable international law rule is, its meaning and the consequences arising out of its violation[12]. Part of the problem- and possible confusion - is that arbitral awards refer to ARISWA Article 15 when what is really at stake is whether a FET breach has occurred and whether it has caused damages or not. An explanation for this is that the letter of ARISWA Article 15 (1) itself suggests that the type of conduct constituting a breach may not necessarily be of the systematic type covered by the commentary and includes cumulative or continuing conduct - actions or omissions - having in the aggregate incremental effects, i.e., like conduct that may lead to a FET breach[13].

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[10] *The Loewen Group, Inc. and Raymond L. Loewen v United States of America* (ICSID Case No. ARB(AF)/98/3), The Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, at its para. 45 held (after quoting from a decision of the International Court of Justice) that: "*...in its ordinary sense the word measure is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby...*".

[11] The list may include *"...crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.* : International Court of Justice: *Materials on the Responsibility of States for International Wrongful Acts*, United Nations, New York 2nd. Ed (2023), ST/LEG/SER.B/25/REV.1, at 212.

[12] D. Caron, *The ILC Articles on State Responsibility :The Paradoxical Relationship Between Form And Authority* 96 AJIL (2002), 857, at 858:

"Three phenomena may be taking place. First, the ILC, perhaps from wisdom and perhaps from hubris, may be pushing the limits of its legitimacy to state what the law is. Second, the failure of some states to object to the General Assembly's decision not to submit the articles to a diplomatic lawmaking conference may be an indication of how dysfunctional they perceive such a conference to be. Third, the arbitrators and other decision makers to whom the articles are addressed (particularly the former) may give too much authority (and therefore influence) to the articles. As best as I can determine, all three of these phenomena are present".

[13] *Article 15. Breach consisting of a composite act*

17. As the Walter Bau vs. Thailand award (purportedly applying ARISWA Article 15) shows (CL-152, para. 12.43) cumulative or continuing conduct (not necessarily "systematic" or restricted to the four corners of a pre-existing definition or *Tatbestand* as conduct addressed in the ARISWA Article 15 Commentary) may by itself constitute a FET breach:

> *"The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations."*

18. This is also consistent with other cases referring to ARISWA Article 15 but concerned with the application of FET as a primary rule of international law and establishing conduct in breach of FET. For example, conduct in breach of FET is characterized as cumulative or continuing conduct oriented in the same direction or as conduct having "*continuing effects*", rather than conduct conditioned by definitions of international torts such as apartheid or genocide or "systemic" conduct like conduct informing such torts[14]. In fact, the FET standard under international law

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1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act

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[14] *El Paso Energy International Company vs. The Argentine Republic*, ICSID Case No. ARB/03/15, arbitral award of 31 October 2011, Exhibit CL-152, at paras. 515, 516, 518, also referring to ARISWA Article 15:

"*Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered (...) . According to the Tribunal, this series of measures amounts to a composite act, as suggested by the International Law Commission in its Articles on State Responsibility (Article 15) (...)* ***While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation ..." Such an analysis is not without precedent. The tribunal in Société Générale, for example, referred to the concept of composite act and stated clearly that acts that are not illegal can become such by accumulation (...) The Tribunal considers that, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A creeping violation of the FET standard could thus be described as a process extending over time comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result***". (My emphasis).

The same goes for the *Flemingo Dutyfreee Shop Private Limited and The Republic of Poland* UNCITRAL award of 12 August 2016, Exhibit RLA-132:

autonomously sets forth both the substantive conduct meeting the standard and conduct constituting the standard's violation. In the present case, the conduct eventually infringing the FET standard to be addressed is conduct starting in August 2011.

19. According to Article XVIII of the Canada Romania BIT, provided the breach takes place after the BIT came into force (because of the cumulative or continuing progression of conduct leading to the breach), conduct in itself not constituting a breach but predating the coming into force of the obligation the violation of which gave rise to the breach may still be taken into account, as guidance as provided in ARISWA Article 15 comment 10 *'...in order not to undermine the effectiveness of the prohibition"*. Specifically, according to the commentary to ARISWA Article 15, conduct attributable to Romania constituting a FET breach may include conduct predating the BIT's coming into effect for providing *"... a factual basis for later breaches or* [...] *evidence of intent*[15] and thus, as it happens in the present case in connection with a FET violation,, *"...events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State which is itself a breach"*[16]. On the other hand, conduct which took place after the coming into effect of the Canada-Romania BIT on 23 November 2011 may of course qualify as conduct in breach of FET under Article XVIII (6) of this BIT. For example, State conduct after this latter date, including pressures to induce renegotiation (e.g., Minister Boc's demand of 25 November 2011 through Minister Ariton of a 25% shareholding and a 6% royalty[17]) is conduct covered by this Treaty.

20. According to Article XIII 3 (d) of the Canada-Romania BIT[18], a claim is time-barred if more than three years have elapsed after the date of the alleged breach. Since this

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"536. The Tribunal observes that Article 3(2) of the Treaty requires fair and equal treatment "at all times". Claimant, referring to El Paso, is thus correct that a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until Article 3(2) is breached".

[15] ARISWA Article 15 (11).

[16] *Mondev International Ltd.vs United States of America* ICSID Case No. ARB (AF) 99/2, at para. 70.

[17] Unrebutted evidence: internal Gabriel email messages, Exhibit C-914. Minister Ariton confirmed this in his witness statement of 13 May 2029, paras. 82-83.

[18] *An investor may submit a dispute as referred to in paragraph 1 to arbitration in accordance with paragraph 4 only if:*

BIT claim was registered on 30 July 2015, the relevant day on which this period would have ended would be 30 July 2012. The Draft Award, for jurisdictional purposes, already establishes that Gabriel Canada must have acquired knowledge of both the alleged breach and of the damage caused by such breach after this latter date. As it will be shown, Gabriel met this requirement both jurisdictionally and as to the merits. Conclusory determinations on knowledge of these circumstances can only be reached after a full record on the merits in regard to the alleged breach of the FET standard, both as to the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and, more particularly, of the ensuing damage or actual loss.

21. The issue then becomes whether, by 30 July 2012, treatment inflicted on the Claimants had matured enough to conclude affirmatively on the existence of Claimants' knowledge in both respects, either for jurisdictional or merits purposes. As it will be further shown in this Note, such was not the case. Therefore, the three-year period set forth in this provision does not establish temporal limitations on the facts or circumstances alleged or that may be claimed or alleged on the merits (including those regarding an alleged continuing breach starting in August 2011) in support of a breach of the Canada-Romania BIT occurring after 23 November 2011.

22. As far as conduct covered by the UK-Romania BIT is concerned, the issue does not arise, because this BIT came into force on 22 March 1999 in respect of Gabriel Jersey[19].

23. The above considerations inform the analysis and conclusions that will follow. However, determining conduct in breach of FET is a different matter than, for damage compensation purposes, the date on which, as a result of such conduct, the Project became irretrievably and unequivocally destroyed or unfeasible.

III. Development

(a) Applicable Standards

24. According to Article II (2)(a) of the Canada-Romania BIT, FET treatment must be "*... in accordance with the international minimum standard of treatment of aliens, including fair and equitable treatment...*". Such treatment does not require treatment

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(d) Not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

[19] Actually, this BIT projects its application to investments made before its entry into force, although only to disputes arising out after its entry into force (Article 11 (1), (3)).

"...in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens". No similar or equivalent wording is found in the UK-Romania BIT. The *Neer* formulation (a case not concerning investment protection) does no longer reflect the standard, nor is it adapted to the special circumstances of the present case. The following excerpt from the *Philip Morris v. Uruguay* case[20] refers to more recent developments permitting:

"*....to identify* [*in typical fact situations*] *the following principles as covered by the FET standard: transparency and protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith. In a number of investment cases tribunals have tried to give a more definite meaning to the FET standard by identifying forms of State conduct that are contrary to fairness and equity."*

In this latter respect (fairness and equity), in another case it has been stated that[21]:

"273. The Tribunal deems it unnecessary to engage in an extensive discussion of the fair and equitable treatment standard. However, it does subscribe to the view expressed by certain (footnotes omitted) *tribunals that the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors."*

Such standards will be considered by looking at the conduct of Romania concerning Gabriel and its investment before and after 2013 from the respective perspective of the Canada Romania and UK Romania BITs.

(b) <u>The 2011 -2012 Context</u>

25. The record shows that there is a continuum of conduct attributable to Romania covered, as the case may be, by the Canada-Romania BIT and the UK-Romania BIT, adversely affecting Gabriel's efforts to obtain the environmental permit, i.e. a *sine qua non* for carrying out the Project.

26. An expression of such conduct was the Respondent privileging pressure on Gabriel to reduce its share participation in the Project and increase its royalty obligations, over pursuing the legal process leading to the granting of the environmental permit. Rather than exclusively undertaking direct renegotiations, the Respondent resorted in parallel

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[20] ICSID Case No. ARB/10/07. Award on the merits of 8 July 2016, at para. 320.

[21] *In The Proceeding Between Swisslion Doo Skopje (Claimant) And The Former Yugoslav Republic Of Macedonia (Respondent)* (ICSID CASE NO. ARB/09/16). Exhibit CL-53.

to political action in the public eye which added pressure on Gabriel to renegotiate. Whilst such pressure spanned throughout the 2011-2012 period, it was not accompanied by progress in the process concerning the granting of the environmental permit by the Government authorities, for reasons not attributable to Gabriel.

27. The renegotiation of the Project economic conditions did not originate in the economic sector of the Romanian Government but in Prime Minister Emil Boc[22], Minister of Environment Laszlo Borbély[23], and Minister of Culture Kelemen Hunor[24]

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[22] In a televised interview of 29 August 2011, Minister Boc declared that: *"But what is known, and is clear: The part pertaining to the benefits of the state is unsatisfactory for the Romanian state. Especially now, in the context of an increased price for gold. So, definitely, here the contract must be renegotiated from the perspective of benefits for the state, from such a dealing. So, after we have the answer to these two questions, we can move on and discuss".* Exhibit C-2914.

[23] *"I was not and I am not a fan of this Project - I have said it many times - but I am waiting, as the leader of the Government, for the official position of the experts. I believe that this Project currently has at least two major problems, one is related to the environment, and I am waiting to see what the experts' solution is, and one is related to economy, to the benefits this contract offers Romania. By far, this contract is poorly concluded for the present, in terms of Romania's interest. So, in this form, it cannot be economically promoted. That is, this contract is detrimental to the Romanian State and the current form must certainly be discussed again, but I will wait to see what the official position of the experts will be, as I am not an expert in the field".* Exhibit C-791.02. Also his televised declaration of 1 August 2011 (Exhibit C-537). In another interview of 5 September 2011 – this time on the radio - after stating that *"...he had no qualms with the Contract being declassified.",* Minister Borbély recognized that because of the State delaying for 10-12 years its decisions on the Project, the issue had become *"....highly politicized, and it's become a defining element of some people's discourse. (*Exhibit C-2155). By then, Minister Borbély's environmental issues seem to have been relegated to a secondary plane.

[24] In a TV interview of 25 August 2011, although Minister Hunor stated that *"Cârnic Mountain is on the list of cultural monuments, it is protected" despite the fact that National Commission of Archelogy discharged the Massif.."* (and thus that the discharge as protected monument still required his endorsement), he said that *"until the contract and the participation of the Romanian State in the joint venture are renegotiated, we cannot take another step, no matter what the step".* Exhibit C-2913 at 1. In another interview on 24 August 2011, Minister Hunor declared he would not sign the order to downgrade the Cârnic Mountain as a protected monument until the State defines its participation in the company handling the exploitation project in Roşia Montană (Exhibit C-508). Specifically, Minister Hunor's declaration (not denied or corrected by the Minister) went as follows:

The Minister of Culture, Kelemen Hunor, declares that he will not sign the order to downgrade the status of the Cărnic Mountain as a protected monument until the state defines its participation in the company handling the exploitation project in Rosia Montana; he added that Peter Eckstein-Kovacs needs to define his position.

(....)

According to the quoted source, the signing of the order regarding the downgrading of the Carnic Mountain will be made at the Government level. "I have not signed the order yet because there are many aspects that need to be discussed. First of all, the level of participation of the Romanian state in that company, and I am not going further until this aspect is clarified, and the Minister of Environment cannot go further

all belonging to the Executive Branch of the Romanian Government. In particular, already in 2006, when he was mayor of Cluj, Mr. Boc expressed his opposition to the Project[25]. Later, when answering questions of the press as Prime Minister, on 1 August 2011 Mr. Boc reiterated his opposition to the Project for environmental reasons and because *"...the current form of the contract* [was] *not the most favourable one to the Romanian State"*[26]. Only after public declarations including remarks regarding the need to renegotiate the economic terms and conditions of the Project (which included the Hungarian press, Hungary being opposed to the Project[27] and – as it is undisputed – Messrs. Borbély and Hunor held leadership positions in the UDMR political party representing the Hungarian minority and hostile to the Project), the actual, *tête-à-tête*, economic negotiations were undertaken by Economy Minister Ariton following directions from Prime Minister Boc[28], albeit in an already heavily politicized context, which continued during the direct economic negotiations process. Only President Traiant Băsescu privileged the economic advantages of the Project for Romania over the environmental concerns voiced by some in view of the already heavily contaminated actual situation of the mining area[29].

28. A common denominator of these public declarations is that Romanian authorities' views on the Project and its implementation were politically tainted and at the center of internal ruling political party's dissensions[30], that the renegotiation continued, in this first stage, through 26 January 2012 against the backdrop and under the influence of a heavily politically charged context, and that in such context economic, rather

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either; this must be decided at the governmental level. It's not the Minister of Environment and the Minister of Culture that give this project the go-ahead", declared Kelemen."

[25] Exhibit C-848.

[26] Exhibit C- 537.

[27] Minister of Environment Borbély declaration of 11 August 2011, Exhibit C-2912, although with general emphasis on cyanide concentration issues concerning the environment.

[28] Exhibit C-2156.

[29] Exhibit C-628.01.

[30] Public declarations of Mr. Borbély of 14 January 2010, C-851: "*Laszlo Borbély: No. It's a technical decision and I am not interested in any political point of view. It's a technical decision. If it complies with legislation, then it should move forward. They showed me some other examples. For example, in Sweden there are 3-4 mines based on cyanide, and in other states as well.* ***After all, obviously, they have supported their case. Host: If you make this decision, Mr. Borbély, regardless of what your partners in PD-L, your partners in UDMR think, regardless of their points of view. You will decide only technically, without taking into account the political discussions around this issue. Laszlo Borbély: But what does the politics have to do with it? Explain it to me. If you say "politics", say what could politics have to do with it. Host: Well, to say so, first there are positions of political parties. You know very well that PD-L supports this project and PNL is against it".*** (My emphasis).

than environmental, considerations were predominantly advanced by the Respondent's political decision to set the negotiations in a publicized context.

29. Politicization of the issues continued after the 29 November TAC meeting with the accompanying additional pressure on Gabriel to give in on economic issues, as evidenced by Minister of Environment Borbély in his TV declarations of 18 December 2011, in which he emphasized the political nature of the decision making process to approve or reject the Project over and above technical (environmental) considerations[31] :

> ***Laszlo Borbély**: 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.* ***Claudiu Pãndaru:** After that, because, as far as I know, there are two issues here. There is this technical endorsement which your Ministry grants, but it is, in the end, a political decision, which will be reached in the Government of Romania.* ***Laszlo Borbély**: Right. And there is also a negotiation concerning the contract. So, there is an inter-ministerial committee, which will need to have a meeting, as the Ministry of Economy has meanwhile started negotiations to have a more advantageous contract for Romania.* ***Claudiu Pãndaru:** The technical endorsement will be ready, as I understand, by the end of January - February. How long will it take for the Government to state its decision?* ***Laszlo Borbély: So, the Government, I have to come with a government decision and, in this case, the Government, obviously, will jointly assume this responsibility. But since you talked about the politics, I am referring to the political point of view of UDMR. So, within UDMR, even if we have, from a technical point of view, all the aspects clarified, we must assume a political responsibility. Claudiu Pãndaru: Do you assume this responsibility? Laszlo Borbély: Which means what? It, obviously, means that there are many who oppose this project. It will be .... , not just because it is an electoral year but we will have to discuss it within the UDMR. We haven't discussed it yet".*** (My emphasis).

30. As an example of the above, before and after the 29 November 2011 TAC meeting, reference is made to the already mentioned Minister of Culture Hunor's public declarations, subordinating the Cârnic ADC to the economic negotiation[32]. However, in his press release of 28 February 2007, Minister Hunor had conditioned the issuance of any decision relating to the Project area on the endorsement of the Environmental Impact Assessment ("EIA") report (submitted in May 2006) by the Ministry of Environment [33]. Nevertheless, on 19 December 2011 (after the 29 November 2011

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[31] Exhibit C-633.

[32] Exhibit C-508; *supra*, fn. 24 and corresponding text.

[33] Exhibit C- 911.

TAC meeting), Minister Hunor again indicated that Cârnic could not be removed from the list of Historical Monuments until after closure of the economic renegotiation had taken place and stated further, specifically referring once more to Roşiă Montană, related political issues, that: "*We have not made a decision in UMDR either. We will discuss and make a political decision. We have had many discussion, but we haven't made any decision*"[34]. The political component (internal processes within the UMDR party and its impact on determinations regarding Roşiă Montană) was highlighted again in 27 December 2011 declarations of environment minister Borbély[35]. This denotes the fluctuating - sometimes contradictory - political conduct of the Executive Branch of the Romanian Government but with the invariable consequence of inducing Gabriel to accept economic conditions, including declarations subordinating technical approvals relating to the protection of the cultural heritage or the environment to an economic renegotiation, or conditioning everything on a political decision.

31. Clearly, the dominant objective was to improve the economics of the Project from the Romanian perspective above any other considerations. The evidence confirms the connection between the economic negotiation and the progress of TAC meetings in view of the continuing references by top government authorities that furthering the environmental permitting process depended on the success of the economic negotiations as well as the subordination of the Project approval to resolving internal political matters[36]. The objective lack of progress in the consideration and eventually the issuance of the environment permit between July 2011 and May 2012, whilst the economic negotiations triggered by the Government were actively pursued and progressive concessions were obtained from Gabriel in the course of such negotiations, empirically confirm the preeminence assigned by the Government to the economic negotiation process and the adverse impact of politics on this process.

32. In fact, Romanian authorities treatment of environmental and non-environmental issues was larded with contradictions and permeated with political considerations in ways adversely affecting the issuance of the environmental permit and therefore prejudicial to Gabriel. An example of this is hide-and-seek games spanning December 2011/April 2012 between the Minister of Culture and the Minister of Environment, played in the public eye. The latter stated that he could not decide on the

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[34] Exhibit C-439.

[35] Exhibit C-637 at. 2.

[36] E.g. fn. 34 and its corresponding text.

environmental permit before a decision by the Minister of Culture to confirm that the point of view was an endorsement of the Project[37]. The Minister of Culture confirmed that that was the consequence of political issues, not of an objection to endorse the Project[38]. In earlier statements, this Minister affirmed that he could not take decisions on cultural issues before completion of a renegotiation of the economics of the Project (see fn. 24 *supra* and corresponding text). Another example is Minister of Culture Keleman Hunor public statement of 14 July 2011[39] favorably manifesting himself in regard to the Alba Directorate of Culture issuance of an ADC for a part of Cărnic Massif which would imply saving 80 % of the cultural heritage of the area, to be contrasted with his 24 August 2011 statement conditioning the Cârnic Massif declassification on the economic re-negotiation of the Project amidst political tensions within the UDMR party[40].

33. `In sum, four relevant aspects need to be emphasized. In the first place, the Respondent privileged the renegotiation of the economic terms of the Project over processing and eventually granting the environmental permit. As seen above, positive State action to implement the Project from a cultural or an environmental perspective depended on the Claimants accepting new economic terms unilaterally imposed by the Respondent. Further to (and as additional confirmation of) the considerations set forth in the preceding paragraphs), already in his 24 August 2011 interview,[41] Culture Minister Kelemen Hunor had stated that neither the Minister of Culture nor the Minister of Environment are to take decisions taking precedence over the economic renegotiation of the Project (referring to the declassification of the Cârnic Massif as depending on the success of the economic renegotiation undertaken by the Romanian government[42]), and not on the protection of the cultural heritage.

34. Secondly, the economic renegotiation, from its start, took place within the context of a heavily politicized process which did not require being channeled, as it was, through public media. Rather than opting for direct negotiations with Gabriel, the Romanian government transformed the process into a political one under the public lens. The record does not show that, prior to this thread of political declarations, there

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[37] Exhibits C-445, C-637, at 3, C-438 at 10, C-778 at 5, C-436 at 1.

[38] Exhibit C-472, at 7.

[39] Exhibit C-1345.

[40] Exhibit C-1310, at 1-2.

[41] Fn. 24 *supra* and corresponding text.

[42] Exhibit C-1310, at 1- 2.

was any serious or consistent attempt by the State to hold negotiations directly with Gabriel to renegotiate economic conditions. Thus, the economic renegotiation attempted by the Romanian government since 2011 was permeated with political considerations/political strategies or political class interests invariably present throughout the renegotiation process and which can only be properly understood and gauged by also taking into account the surrounding political environment.

35. Thirdly, internecine political differences regarding the Project within the leading political party in Romania, for which Gabriel is not responsible, were not conducive to properly addressing Project issues in isolation of political differences[43].

36. Fourthly, although there were no valid reasons not to actively pursue the process relating to the granting of the environmental permit during the 2008-2012 period, the Government concentrated its efforts on eagerly pursuing an economic renegotiation of the Project.

37. Finally, although it is true that political declarations in the public eye from State authorities do not constitute by themselves conduct in violation of a BIT, such is not the case when a continuous string of such declarations or statements, proffered at the highest levels of the government, directly target the investor or its investment, do not specifically address in any detail technical issues (except, at most, a generic and technically unspecified occasional reference to arsenic contamination) regarding the granting of the environmental permit and are aimed, for example, at modifying pre-agreed legal and economic conditions concerning the investment (namely, the Gabriel Jersey/Minvest Exploitation Concession License as to the Gabriel Jersey royalty obligation percentage and the Gabriel Jersey percentage participation in the share capital of RMGC established in RMGC's Articles of Association and Bylaws) required by the State and accepted by the investor prior to investing. Such persistent Romanian authorities conduct attributable to Romania was not discontinued after 2012.

38. It is within this general context that matters concerning the issuance of the environmental permit, including those addressed in the 29 November 2011 TAC, are to be situated.

39. Prior to this TAC meeting (in May 2007), Gabriel had responded to 5610 questions from the public on the Project and the EIA Report submitted to it[44]. There is no sign

[43]Exhibit C-508, press note of 24 August 2011 revealing disputes concerning the removal of the Carnic Mountain from the list of historical monuments within the Democratic Hungarian Alliance of Romania party.

[44] Exhibit C-2907 *Aarhus Report* issued by Minister of the Environment Rovana Plumb on 26 February 2013, at 2.

that its answers were unacceptable or questioned by anybody. Gabriel answered additional 102 questions put to it by the Ministry of the Environment prior to the TAC meeting[45].

40. At this meeting, where only the last two chapters of the EIA report were analyzed (the other chapters had already been the subject of previous TAC meetings), there was no sign that Gabriel's answers of 11 October 2011[46] to the Minister of the Environment 102 questions had been challenged by any TAC member, nor formulation of new ones at the end of this meeting[47].

41. More specifically, issues in connection with the issuance of the environmental permit were addressed and answered by Gabriel, including answers regarding the concentration of cyanide to questions or remarks from Ms. Dorina Mocanu and Ms. Dana Pineta of the Ministry of the Environment and Mr. Marin Anton, TAC Chairman. Gabriel explained that the Project met the European Directive of ten parts per million and would even satisfy the three parts per million standard[48].

42. In any case, soon after the 29 November TAC meeting, on 27 December 2011, Mr. Borbély recognized that Gabriel had accepted to reduce the cyanide percentage concentration to 3 parts per million[49]. This was confirmed in different instances, for example by TAC President Anton[50] and, even later, during the parliamentary process regarding the passing of the Special Law, in the course of which Minister Plumb informed that the Government imposed on Gabriel a cyanide level of three parts per

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[45] Exhibit R-215: the 102 questions.

[46] Exhibit C-441.

[47] Exhibit C-486.

[48] Exhibit C-486 at 12.

[49] Exhibit C-637 at 2. Further, the issues mentioned on 3 September 2011 (Exhibit C-1430) by Prime Minister Boc regarding compliance with European Directives on cyanide contamination were addressed without observations from Ms.Mocanu (Environment) during the TAC meeting. Indeed, on 5 September 2011, Minister of Environment Borbély recognized that the percentage of cyanide concentration proposed by Gabriel in the EIA Report was half of the requirement under European legislation (Exhibit C-2155 at 1).) In fact, the further reduction of cyanide percentage to 3% referred to by the Minister and voiced through public media did not have practical significance in terms of environmental protection (as stated by Minister Sova, fn.58 *infra*) and can only be explained because of the political image to be projected to the public sought by the Government; and b) the technical quality and accuracy of the EIA Report on environmental matters, and most particularly in respect of the safe utilization of cyanide, was not questioned (*infra* fn. 100: declaration of Minister Rovana Plumb on 10 September 2013, Exhibit C-510 at 2).

[50] Exhibit C-438 at 22.

million, although, as Minister Plumb added - *"...the EU Commissioner for Environment Mr. Potocknic, has expressed his point of view –that in terms of concentration of cyanide, if the limit imposed by the European Directive is observed, there will be no problems in terms of environmental protection"*. He *'...stated very clearly that at the moment there is no intention at the European Union level, on behalf of the European Commission to ban this type of procedure based on cyanide"*[51]. In any event, as accepted by the environmental authority, the cyanide technology *"...used by the operator is created in compliance with the best practice criteria in the field"*[52].

43. On the other hand, nothing in the TAC regulations require that TAC meetings be attended by all TAC members for the TAC to be able to issue a recommendation to the Minister of the Environment to accept or reject the environmental permit. As a matter of fact, all the relevant governmental sectors were present and issued comments at the end of the 29 November 2011 TAC[53].

44. As shown in the minutes of the 29 November 2011 TAC, no further questions or objections to the issuance of the environmental permit were raised by the Ministry of Economy, the National Environment Protection Agency, the NAMR, the Ministry of Internal Affairs, the Geological Institute of Romania, the Ministry of Health, the Ministry of Environment Forestry and Biodiversity Departments, the ANAR, the Ministry of Culture, the Ministry of Agriculture, the Ministry of Regional Development, the Ministry of Transport[54].

45. The evidence also shows that the Ministry of Culture's refusal to give a green light to the cultural issues concerned with the granting of the environmental permit on or about the 29 November 2011 TAC was politically motivated (see minutes of the

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[51] Answers to questions put to Minister Rovana Plumb, Exhibit 506 at 3-4, 6, 7.

[52] Answer by Minister Rovana Plumb, Exhibit C-506 at 14.

[53] Exhibit C-486 at 23-44.

[54] Exhibit C-486, at 23 & fol. Incidentally, although in the 29 November 2011 TAC the TAC President Mr. Anton provided for the preparation of a check list of pending legal issues, there are no traces that such check list (Exhibit C-2272) was among the issues delaying the final TAC in which the yes or no was to be given to the environmental permit , and its importance is highly doubtful in view of the fact that: a) it was prepared informally by Ms. Hintea, an employee of the Ministry of Environment who did not testify as a witness, b) the check list is neither dated nor signed; c) it is not endorsed or issued by the Minister of Environment; and d) its apparent absence did not prevent later expressions at the level of the Inter-Ministerial Commission or TAC meetings that environmental issues had been satisfied. No evidence either that a check list was officially done and conveyed to Gabriel for compliance (Transcript 9 December 2019, Volume 7, Ms. Mocanu testimony at 1971-1981) .

Inter-Ministerial Commission, declaration of the Minister of Culture: the Ministry of the Environment *"...submitted a request under another government, other state secretaries in office and you received different answers. In short, if you ask it now, you will receive it"*[55]). Further, there are no substantial differences between the Point of View issued by the Culture Minister on 7 December 2011 and the 2013 Culture Ministry endorsement. The treatment of Orlea in both documents is the same. Therefore, requirements concerning the granting of the environmental permit had been already fulfilled as early as December 2011.

46. As far as Orlea is concerned, steps foreseen were carried out as planned by the NAMR. The preventive archaeological research had been finalized by 2005. The development intention of Orlea (at stage 2 of the Project, i.e. after completion of the environmental assessment and granting of the environmental permit) was to be investigated, such investigation, already at an exhaustive, not merely preliminary, level, was to be completed in 2007-2012[56]. This means that actual development of Orlea (but not obtaining the environmental permit) depended on such exhaustive research. Thus the declaration of Orlea as a historical monument did not condition the obtaining of the environmental permit.

47. In any case, as far as the environmental permitting process is concerned, the Minister of Culture gave his endorsement in 2013 although, as this Minister confessed, it had not been granted before because of political reasons (see para. 45 *ut supra*).

48. Later conduct attributable to the Respondent confirmed that the environmental permit was ready for submission to the consideration of the Ministry of Environment in November 2011 / beginning of 2012 for final approval or rejection. For example, declarations of Infrastructure Minister Sova[57]of 6 March 2013, who played a major role in the 2013 Special Law negotiation, show that the 29 November 2011 TAC reached the maturity point allowing the Minister of Environment to issue or not the environmental permit[58]. [redacted]

[55] Exhibit C-472 at 6-7.

[56] Exhibit C-1375, NAMR Report of 2 October 2006, at 12-13, 16-17, 5.

[57] The Roşiă Montană Portfolio was moved to Mr. Sova's Ministry in January 2013.

[58] Exhibit C-1903 at 36. As also stated by Minister Sova, the Project ensured a 5/7 cyanide allowance, more than covered by the 10 maximum allowance under both Romanian and European law and that although Romania imposed an even lower 3 cyanide allowance *"... the difference in health and safety is not significant between those limits"*. Exhibit C-1903 at 8.

[redacted][59]. The Ministry of Environment confirmed that the members of that TAC meeting found that the technical issues had been clarified. This was further confirmed in TAC meetings of 10 May 2013[60].

49. Whilst, as shown by the circumstances described in paras. 39-48 above, no relevant activity concerning the granting the environmental permit took place during the period spanning after the 29 November 2011 TAC through June 2012, the relentless and continuing politically engineered pressure of the Romanian Government on the Claimants to obtain economic concessions, which started even before November 2011, did not let up through June 2012. Whatever environmental concerns could still exist not to grant the permit, the real objective was to impose new economic conditions on the Claimants, rather than caring for issues regarding the granting of the environmental permit.

50. In sum, the Respondent's conduct throughout this period evinces the Respondent's attitude favoring the pursuit of governmental objectives with a negative impact on the process concerning the approval of the environmental permit. This pattern of conduct was not discontinued later. However, at this point in time, it was not possible to predict or conclude that the environmental permit would not be granted in violation of the FET standard and that the Project would thereby become unfeasible, nor was it possible to predict or conclude on damages or loss eventually ensuing from such breach.

(c) <u>The Post-June 2012 Period: The Generation And Fate Of The Special Law</u>

51. In line with such general course of conduct, as from June 2012, political considerations adversely affecting the granting of the environmental permit became even more acute and unequivocally proved to be the decisive factor conditioning the Respondent's conduct in this regard.

52. In June 2012, Prime Minister Ponta suspended the consideration of the Project, including the environmental approval process, until after the parliamentary elections[61]. *Inter alia,* the water management plan was not endorsed as it should have

[59] Exhibit R-406, only subject to the Ministry of Culture endorsement. Actually, such endorsement had taken place by December 2011 already.

[60] Exhibit C-484 at 3.

[61] Exhibit C-641.

been in May 2012 because of Minister Ponta's decision – which can only be attributed to political reasons (his confirmation as Minister through his party prevailing in the forthcoming 2012 elections and, as he expressed, the fact that unfortunately environmental and business development issues "*...have been absorbed into the political campaign...*") - to put it in the freezer until the parliamentary elections' outcome[62]. In fact, this postponement did not obey to a strategy to favor the Project; on the contrary, as following developments showed, it served the purpose of burying it given Mr. Ponta's personal aversion to the Project.

53. The record shows Mr. Ponta's radical opposition to the Project, which was part and parcel of the internecine wars between President Băsescu (who had not pre-conceived ideas against the Project) and Minister Ponta (who opposed the Project and accused President Băsescu of having been bribed by Gabriel, of which there is no evidence in the record)[63]. Nothing more distant from environmental or technical concerns.

54. On 26 March 2013, the Inter-Ministerial Group for the Roşiă Montană Mining Project issued its Final Report which concluded that: (a) there were no impediments nor significant obstacles, legislative or institutional, to the development of the Project; and (b) the institutions represented in the meeting (which included the Ministry of Environment) did not raise any objections to the development of the Project[64]. As to the declaration of public interest for the Roşiă Montană Project required for granting the environmental permit, the Inter-Ministerial Group stated that, *de lege lata,* the public interest declaration by the Alba County of December 2011 was sufficient for developing the Project although *de lege ferenda* a *"legal enactment'* would be advisable[65].

55. At this stage, political considerations acquired a new dimension. Although the Romanian Government continued to exert pressure on the Claimants to obtain better economic conditions for the implementation of the Project, it now decided to address the issuance of the permit from a still more clearly delineated and unabashed political perspective either because the executive branch did not want to assume the responsibility of going ahead with the Project or because it was concerned with

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[62] Exhibit C-641.

[63] *"V.P.: I was against the Rosia Montana project, at the beginning, without knowing almost anything about the project, because it was supported by Traian Băsescu. I told myself that if Traian Băsescu supported it, it must be bad".* Ponta interview of 11 September 2013, Exhibit C-437.

[64] Exhibit C-2162: 26 March 2013 Meeting of the Inter-Ministerial Group, at 9.

[65] Exhibit C-2162 at 6.

NGO's actions and propaganda adverse to the Project or with suspicions of the Romanian people in respect of the integrity of the political process regarding Project approval. Gabriel is not responsible for any of these circumstances.

56. In this new context, to address its political concerns, the Government wanted a Special Law approving the Project rather than pursuing the legal path within the context of existing laws and regulations. [redacted][66]. Minister Sova expressed (more about this will be said further below) that the law was made for the Romanian State, not for Gabriel[67]. The Government wanted a political decision by the political class, as Minister Sova also made clear[68], and not based on the normal legal and technical process for the consideration of the environmental permit. The Claimants sought general modification of the mining legislation, but not a specific law for the benefit of the Project only. The Respondent wanted a political solution to be assumed by the Parliament[69], and this required a Special Law for only the Project.

57. [redacted]

[66] Exhibit C-779.14 February 2013, at 1.

[67] Exhibit C-1531.15 October 2013, at 8.

[68] Exhibit C-824.7 March 2013, at 7-8.

[69] Exhibit C-871 at 2-3 (12 May 2013); Exhibit C-772.02 at 2 (13 May 2013).

[redacted][70].

58. This of course, once more, squarely placed the Project approval, including the issuance of the environmental permit and the renegotiation of the Project's economics, within a political context, i.e., outside the procedures set forth for Project approval under the existing legal framework, and despite the fact that the TAC meeting of 10 May 2013 found that no technical issues were pending after the November 2011 TAC meeting in connection with the EIA Report, i.e., for granting the environmental permit. Although issues concerning the Waste Management Plan, the financial guarantee, the Water Framework Directive and the PUZs remained open[71], these issues concerned construction or Project development, not environmental permitting. On the other hand, as it was made very clear, despite occasional side references, TAC meetings were not primarily concerned with cultural patrimony or heritage issues[72] but undoubtedly had direct responsibilities concerning the Project's environmental permitting.

59. The situation thus imposed on Gabriel was perverse also for the following reason.

60. In the meeting of 15 October 2013 of the Joint Special Committee of the Chamber of Deputies and of the Senate[73], Mr. Vălcov, Chairman of the Committee acknowledged Gabriel's firm objection to the Special Law: *"During the hearing with RMGC, when asked to answer directly if they needed this law to obtain the environmental permit and to move ahead, they said NO* [Sic]*"*. He then expressed that he had "*...analyzed this law and all the materials we had at our disposal, the documents and the meetings we had during these 3 weeks, and I honestly believe that amending the license and several other laws is sufficient to avoid having this law"*. He then asked: *"Do you think this law is really necessary"*?

Minister Sova answered as follows:

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[70] Exhibit C-1536 at 64-66.

[71] Exhibit C-484, at 3-4.

[72] Exhibit C-473, TAC meeting of 2 April 2014 at 3.

[73] Exhibit C-1553 at 7.

"My answer is very simple and I also have a joke on this topic, If you will allow me, Chairman. Of course Roşia Montană Gold Corporation does not need this law, as the current situation is convenient for them. The law was made for the Romanian State, not for them".

61. Although the Special Law was finally not passed, the above is an illustration and confirmation of the Respondent's conduct to prevent Gabriel from relying on the normal permitting procedures to obtain an environmental permit under the existing legal system, which is a violation of FET in itself insofar it intentionally seeks to force upon the foreign investor a new legal regime when there was no legal obstacle to maintaining the existing regime (for example for granting the environmental permit) on the basis of which it had invested and also a confirmation of the continuing FET violation that had already culminated on 9 September 2013. In this respect, Minister Sova himself further confirmed on 12 September 2013 that the Project met the required environmental standards[74].

62. There is some irony in the fact that the Respondent's position is now that, anyway, Gabriel may still rely on the existing licensing and permitting system under Romanian law to satisfy all necessary legal requirements to carry out the Project, a further confirmation of Gabriel's position that the Special Law was not needed and was exclusively aimed at addressing governmental political concerns. It is difficult to fathom how could Gabriel consider further pursuing the obtaining of the environmental permit against the backdrop of an existing legal system that a Parliament Joint Special Commission of the Chamber of Deputies and of the Senate had found to be larded with defects and insufficiencies. In fact, an undisguised objective of the new legislation was to rebalance the situation regarding the Project in favor of Romania's interest (and this through a legal enactment specifically pursuing such purpose) without compensation[75]. An additional undisguised objective was to preempt Gabriel form raising the issue of retroactive imposition on Gabriel of new conditions by forcing Gabriel to amend the existing license as a legal obligation[76].

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[74] Exhibit C-643 declarations of Mr. Sova during a joint press conference with M. Ponta, at 6:

DS: How will I vote in the Romanian Parliament? If you ask me, there should naturally be a voting discipline, and from a political point of view, I might vote against together with all my colleagues. But if you ask what my opinion is – well I believe that this project complies with environmental requirements and will all the other requirements and should be done. This is my personal opinion.

Mr. Sova's further remarks at 8 of this document concern improvements in regard to the existing general legal regime concerning the Project, not the granting of the environmental permit under the existing legal regime.

[75] Exhibit C-1531 at 7.

[76] Exhibit C-1531 at 7.

Further, it is noteworthy to point out the confused conduct of the Government in this respect shown by the Minister of the Environment Ms. Plumb who contradictorily stated (as will be more specifically addressed further below), on one hand, that whatever the fate of the Special Law, Gabriel could still continue its application to obtain the environmental permit, but on the other, that the rejection of the Special Law meant that such permit was not going to be granted. All these circumstances are incompatible with the FET standard as illustrated by the *Philip Morris* and *Swisslion* awards referred to before.

63. After the 10 May 2013 TAC meeting, by letter of 10 June 2013, the TAC President, Elena Dumitru, invited TAC members to a meeting to be held on 14 June 2013 and to provide comments for the Project implementation to be incorporated into the Project authorization[77]. The meeting took place as planned[78], and after discussing pending issues, the President, in compliance with the TAC rules[79], requested the TAC members to send in, within 5 days, their conditions for the development of the Project, including environmental conditions, i.e., their point of view on these issues[80]. No comments were received. Accordingly, on 11 July 2013, the Ministry of Environment issued a public consultation notice[81], reminded that the public consultation process ended on 30 July 2013, and that the next step was a meeting to take the decision[82]. Since the 30 July 2013 consultation process deadline had lapsed without receiving any comments, including comments from the Romanian Academy and the Geological Institute of Romania, the Ministry of Environment prepared a draft decision accepting the environmental report and the issuance of the environmental permit[83] but the meeting to approve the proposal and elevate it for approval/rejection by the Prime Minister did not take place. The reason for that was that the Romanian Government, again for political reasons, had unilaterally decided – as early as June 2013 - to choose a different, political (and not technical) path, namely, to defer the approval of the environmental permit to Parliament in the form of a Special Law, as confirmed by public declarations of Prime Minister Ponta and

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[77] Exhibit C-554.

[78] Exhibit C-481.

[79] Minutes of TAC meeting of 23 June 2010, at 2, Exhibit C-565.

[80] Exhibit C-481.

[81] Exhibit C-555.

[82] Exhibit C-480, 26 July 2013 TAC meeting.

[83] Exhibit C-2075.

others (see following paras. 64-73). Therefore, the decision of the Prime Minister on the environmental permit was once again left aside for political considerations.

64. Minister Ponta publicly said that the decision of whether the Project was to move forward belonged to the Romanian Parliament[84].

65. In public statements, Mr. Ponta said that Parliament would decide but that he was going to vote against the law[85]. He insisted that Gabriel should give more economic participation to the Romanian State in the Project[86].

66. In the same tack, State Secretary Năstase stated in a TAC meeting of 31 May 2013 that the Parliament decision will be the deciding factor of whether the Project will be done or not[87].

67. In turn, Minister Sova said that a decision in Parliament by the entire political class will determine if the Project will be made, yes or no[88].

68. [redacted][89]. This is a far cry from the Special Law which, for political reasons, the Ponta Government unilaterally decided to pursue.

69. Mr. Ponta's swift reaction to the [redacted] came in a 13 June 2013 interview in a Romanian TV channel rejecting the proposal and indicating that the

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[84] Exhibit C-772.01, 13 May 2013.

[85] Exhibit C-421.1, 23 May 2013, at 1.

[86] *Ibidem, loc.cit.*

[87] Exhibit C-485, at 20.

[88] Exhibit C-842, 8 June 2013.

[89] Exhibit C-781.

Government would not take any decision and would submit a draft law concerning the Project to the Romanian Parliament[90].

70. Gabriel's insistence on general legislation for the entire mining industry during the first negotiation commission meeting shortly afterwards - on 14 June 2013 - was not heeded by the Government[91]. As shown above, Gabriel unequivocally opposed the Special Law.

71. Further, on 11 July 2013, the Government had included the Project in its National Plan on Strategic Investment and Job Creation[92]. During the press conference referring to the Project, Mr. Ponta stated that the Project would start "*...when the Parliament decides to, if it is started*" and that "*we will send it to the Parliament and the Parliament will decide*"[93].

72. Only in view of the fact that the only path offered by the Government to go ahead with the Project, now as a *fait accompli* announced by the Government, was the Special Law, Gabriel gave in to governmental pressure and accepted such path as a possible option [redacted][94].

73. This was followed by the 18 July 2013 interview of Mr. Ponta, in which he says that the government had completed its negotiation with Gabriel, and that "*the Parliament will decide either to do the project or not do the project. And then the decision is closed*"[95].

74. Further, he made public declarations on 31 August 2013 indicating once more that he would vote against the Project, and that Parliament "*shall decide if we will make such a project or we reject it*"[96]. Shortly afterwards, on 5 September 2013, he publicly declared "*that he had to approve the Roşiă Montană Project because it met all the*

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[90] Exhibit C-2680.

[91] Exhibit C-1536.

[92] Exhibit C-910.

[93] Exhibit C-462, 11 July 2013.

[94] Exhibit C-2433.

[95] Exhibit C-813, at 2.

[96] Exhibit C-789 at 1.

legal requirements", and therefore had to send it for Parliamentary approval for a real debate to take place that would shield Romania from a claim of billions of US$[97].

75. In turn, Minister of Culture Daniel Barbu declared that as Minister, *"I will support the Roşiă Montană Project. As National Liberal Party (PNL) member, I will vote against it as this is the decision of my Party"*[98].

76. The same was said by Minister Plumb (environment) as to parliamentary approval[99]. On 10 September 2013, Minister Plumb further stated that *"....as shown in the studies included in six thousand pages of the environmental assessment study* [the EIA Report submitted in May 2006], *there is no risk of cyanide infiltration"*[100] and, accordingly, that the use of cyanide was safe and would not be in violation of European law, but agreed with Mr. Ponta that Parliament should reject the Project[101].

77. Senator Antonescu and coalition co-leader declared on 9 September 2013 that he would vote against the Project not for technical reasons, but because of lack of public trust in the Government, internecine war among politicians accusing each other of accepting bribes from RMGC, Prime Minister Ponta's declaration that he would vote against his Government draft law – which would render approval of the Special Law doubtful or at least fragile in view of the Prime Minister's adverse voting position, whose party further held 70 % of the Parliamentary vote (notwithstanding M. Ponta's statement to the press that voting would not be subject to party line instructions)[102] - and Minister Plumb's statement that the draft law approval would depend on the Parliament's vote[103].

78. This was followed by Mr. Ponta's declarations on the same 9 September 2013, who in view of his coalition leader Antonescu declaration and also the opposition leader declaration Mr. Vasile Blaga, he was sure (no longer, on his part, a supposedly

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[97] Exhibit C-460.

[98] In his declarations at Cluj, he said, specifically that *"I am convinced that on the heritage side the project is absolutely fine. None of the national laws provisions or best practices for the preservation of heritage will be violated. As long as the PNL official decision is to vote against it, I will vote against it as well"*. Exhibit C-1511.

[99] Exhibit C-556, 7 September 2013.

[100] Exhibit C-510, at 2.

[101] Exhibit C-510, at 3.

[102] Exhibit C-813.

[103] Exhibit C-2690.

neutral attitude as to the future approval or rejection of the Project) that the Senate and Chamber of Deputies would reject the Draft Law "*...and thus the Project is closed*"[104] and, indeed, as he also expressed: *"But now, as there is no parliamentary support, Mr. Blaga and Mr. Antonescu expressed very clear opinions, then there is not point in keeping the people confused. It will be debated and rejected in the Senate, then sent to the Chamber, whose President sits next to me and will ensure a quick procedure and we know very clearly that the project won't be done*"[105]. Thus, the entire political class, for political reasons, evidenced its alignment against the Project and engineered its demise through previously announced concerted action.

79. Therefore, on 9 September 2013 the leaders of the political parties controlling the Romanian Parliament sounded the death knell of the Project and of the procedure to obtain the environmental permit. Later voting in the Parliament to such effect was just the implementation of a political decision already then irrevocably taken. Consequently, the Parliament rejection on 9 September 2013 of the Special Law was "*...itself a* [FET] *breach*" of both the UK-Romania and Canada Romania BITs. On 9 September 2013, it became clear that the environmental permit would not be granted since the Draft Law would not be passed, that the Project became unfeasible or, in other words, that it was irretrievably and unequivocally destroyed and, therefore, that irreversible damage ensued. Everything that happened later, including the rejection of the Draft Special Law by the Romanian Parliament, is just a confirmation of the breach on that date.

80. On the other hand, the aggregate conduct that began in 2011, that prevented the granting of the environmental permit for the Project and finally culminated on 9 September 2013, only acquired its full meaning and reached its point of maturity by then. Such continuum of State conduct since August 2011, prompted by political reasons and adversely affecting the granting of the environmental permit, also breached FET under the UK-Romania BIT. In the case of the Canada Romania BIT, only conduct after the entry into force of this Treaty is in violation of the FET obligation thereunder.

81. In a declaration on 11 September 2013, Mr. Ponta recognized that under the current laws he should have issued the permit, but the responsibility was too high and had to entrust the decision to the Parliament[106].

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[104] Exhibit C-872, at 1.

[105] Exhibit C-793, at 1.

[106] Exhibit C-437 at 3.

82. As mentioned before, on 12 September 2013 Minister Sova (infrastructure) indicated that he would follow the party line and vote against the Special Law despite the fact that the Project complied with environmental requirements[107]. Minister Barbu (culture) held the same position: the Project is good from the technical and cultural standpoint, but will follow the party line and vote against it[108].

83. In the Joint Special Commission Hearing of the Romanian Chamber of Deputies and Senate of November 2013, Minister of Culture Daniel Barbu, Minister of Environment Plumb, NAMR President Dutu, Minister of Infrastructure Sova, Minister of Justice Cazancl, Minister of Agriculture Constantin, Minister of Environment Pătrascu, all testified in favor of the technical and other aspects of the Project[109]. As to the economic terms (that Gabriel had finally accepted), the Minister of Regional Development and Public Administration Dragnea declared that there is no precedent in Europe of a royalty as high as the one Gabriel would have to pay under the Special Law[110].

84. However, Mr. Ponta admitted in a declaration of 5 October 2013 that if vote in Parliament was purely political, the Project would not pass. If Parliament rejects the Project nothing will be done in Roşia Montană. He refers to the political vote as a consequence of people protesting in the street. He says that the Government should explain national and foreign investors that this project, exceptionally, was rejected for political reasons[111]. In another declaration of 11 November 2013, Mr. Ponta confirmed that the rejection of the draft law had been politically negotiated by Mr. Antonescu and himself[112].

85. Obviously, for political reasons, the Draft Special Law was rejected in November 2013 (Senate) and June 2014 (Deputies).

86. Minister Plumb had declared on 12 November 2013 that the environmental permit won't be issued since, she said, *the Parliament decision means the last word for us*

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[107] Exhibit C-643, at 6.

[108] Exhibit C-1511.

[109] Exhibit C-557.

[110] Exhibit C-557 at 16.

[111] Exhibit C-1504, at 6-7.

[112] Exhibit C-2441.

and we will observe it" [113],which contradicts her statement that the issuance of the environmental permit did not depend on the passing of the Special Law[114].

87. In a 14 October 2014 interview, Mr. Ponta confirmed that since "*the Parliament rejected the law, so the exploitation will not be made*"[115].

88. The Draft Special Law path treaded by the political class is an example of the politicization of the process frustrating the normal environmental permitting process under Romanian law to the detriment of the Claimants' FET protection rights under both BITs.

89. The conclusions of the Joint Special Commission of the Chamber of Deputies and of the Senate for the Endorsement of the draft Special Law set forth needed changes in the existing legal framework in respect of projects like the Project, which were raised to justify the rejection of the Draft Special Law. Such changes may be perhaps appropriate from the perspective of a statesman laying out political action to overcome deficiencies in the existing legal framework, but cannot efface or justify the immediate adverse impact of the rejection of the Special Law on Gabriel's pre-existing rights as investor protected by the BITs finally consummated on 9 September 2013 and further confirmed by the Special Law rejection. Such conclusions were as follows[116]:

> *"The Commission considers that the Draft Law under review does not satisfactorily coverall the complex requirements regarding the exploitation of mineral resources in Romania and, consequently, proposes its rejection.*
>
> *Taking into account the gaps in the current legislation, which disregards the specificities of projects of the magnitude of the mining project under discussion, the Commission recommends that the legislative framework is supplemented with measures to stimulate the implementation of mining projects of such magnitude. The Commission considers it is necessary to establish correct partnership conditions between the majority shareholder and the State-owned Romanian company, in compliance with the imperative Community norms and the principles of sustainable development in the areas where the project is to be developed.*
>
> *The Commission appreciates the modifications of the conditions of the initial Agreement (License) proposed by the Government of Romania, considering they are a true improvement compared to the license in force and able to ring economic benefits for the Romanian State.*

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[113] Exhibit C-828.

[114] Exhibit C-506 at 31: *"....the environmental permit is subject to this analysis carried out by the Technical Assessment Committee and that, by asking Parliament to make a decision in respect of the Draft law, we are not asking it to issue the environmental permit".*

[115] Exhibit C-416 at 5.

[116] Exhibit C-557.

By this Report, the Commission proposes a series of actions meant to set up a coherent legal framework able to support the negotiation position of the Romanian State in other projects of such size.

The Commission considers it is necessary to review alternative scenarios for the establishment of the royalties and of the State participation in the case of mining exploitations, taking into account the example of other states.

The Commission draws the attention on potential violation of the legislation in force throughout the development of the mining project at Roşia Montană. Hence, the Commission will forward this Report to the competent authorities in order to ensure the full legality of the Roşia Montană project and for the investigation, where necessary, of the alleged illegal actions.

The Commission considers that a broader legal framework is required to be subject to a parliamentary debate, concerning gold and silver mining projects, which would enable the development of the mining industry in Romania and attracting investors.

The Commission recommends the declassification of the License and of the classified documents related to this mining project (except for the maps and the documents regarding the deposit).

The Commission asks the competent ministries and the institutions involved in assessing the Roşia Montană project to examine all the aspects identified following the hearings held within the Commission and comprised in this Report, and to initiate procedures accordingly.

The subject matter of the Draft Law aims at regulating certain measures related to the exploitation of gold and silver deposits in the Roşia Montană perimeter, as well as in view of stimulating and facilitating the development of mining activities in Romania.

The main measures proposed by the Initiator are the approval of the Agreement on certain measures related to the exploitation of gold and silver deposits in the Roşia Montană perimeter, the declaration of the mining project as being of public utility and outstanding national interest, the mandating of certain public entities to fulfill the proposed measures, as well as the amendment of certain enactments regarding expropriations and construction permits.

The Draft Law falls under the category of organic laws, as per the provisions of Art.73 para. (3) of the Constitution of Romania, republished. Upon finalizing the debates, the members of the Joint Special Commission of the Chamber of Deputies and of the Senate for the endorsement of the Draft Law regarding certain measures related to the exploitation of gold and silver deposits in the Roşia Montană perimeter and the stimulation and facilitation of the development of mining activities in Romania, decided to reject the Draft Law under examination".

90. Thus, to reject the Special Law concerning Gabriel's Project, the Joint Commission predominantly relied on deficiencies in the general legal framework in Romania to regulate projects like Gabriel's, deficiencies for which Gabriel, which relied on the existing legal framework when investing, is of course not responsible. The Commission's recommendations are *de lege ferenda* to improve in the future Romanian legislation in connection with mining projects. In fact, such modifications have been postponed to an uncertain future the materialization of which seems unpredictable. Undoubtedly, inexistent legislation or regulations may not be brought to bear to deny investor's rights under applicable Treaties and international law in connection with its existing investments.

91. Illustrations of such *de lege ferenda* statements are found at: pages 46-47 (amendments of exploitation licenses); page 49 (lack of coherent legal framework regarding royalties); page 74 (legislation on exploitation technologies in the mining industry and exhortation to different ministries to take action in regard to industrial research and testing of anti-pollution technologies).

92. With respect to other areas, different Romanian ministries were directed to take future specific actions, without any evidence that any such actions have been undertaken or, if so, their outcome: a) page 67, to verify statements of the Romanian Geological Institute (Mr. Marincea), on potential risks associated with the use of cyanide in mining operations and alternative technologies; b) page 69: competent ministries to verify statements of different institutions and the civil society as to safety of the dam, the tailings pond and the seismic risks in the area, as well as the performance of an independent study on permeability of the tailings pond; c) page 72: clarification by competent ministries of diverging view points on cleaning historical pollution ; d) page 74: amend legislation to ensure that exploitation of certain minerals does not compromise the exploitation of other minerals plus recommendation to different Ministries to research and test non-polluting technologies in regard to ore separation; e) page 75, exhortations to the authorities of the Romanian State and unidentified specialists to verify environmental risks and identify solutions to eliminate them; f) page 77: recommendation to "competent ministries" to analyze and solve legislative problems and avoid the creation of precedents that might pose a risk for the national heritage; g) page 79, Ministry of Culture to organize a public consultation with renowned Romanian and foreign specialists to present a competent point of view on the potential perils in regard to the cultural and historical heritage in Roşiã Montana; h) page 82, clarification by the Ministry of Culture of certain questions of relevance to the discharge of areas concerning the cultural heritage.

93. In respect of other matters (like monitoring of the public works by the Ministry of Culture, page 83 or monitoring blasts that could affect religious monuments), page 85, these recommendations did not concern the issuance of the environmental permit but the conduct of exploitation activities.

94. In respect of cyanide contamination, Gabriel explained at page 66 that the cyanide percentage levels of 3 parts per million within the clear water level area of the pond (the point of contact with the environment) would be attained. Despite remarks of Mr. Marincea of the Romanian Geological Institute concerning fractures at the tailings pond which would affect its impermeability (and possible allow filtration of cyanide waters) the Minister of the Environment Ms. Plumb did not make any reference to this matter except that if the said cyanide percentage level were respected no

environmental problems would ensue, nor did Mr. Sova, also present and who, by the way, had already clearly indicated that the cyanide percentage levels, even above the three parts per million level, did not cause environmental problems[117]. As explained before, there was ample evidence well before this meeting that cyanide contamination concerns were unjustified in view of the technical processes to be utilized in the Project.

95. Separate consideration deserves the former Director of the Romanian Geological Institute, Ştefan Marincea, accusations of fraudulent modification of project documents (pages 62-65). In different instances, Mr. Marincea had expressed adverse views regarding the Project along those lines at a TAC meeting he attended[118].

96. Be that as it may, there is no trace of court or other investigations that were actually undertaken with reference to Mr. Marincea's statements as a result of the Special Commission's recommendation to such effect at page 65 of its proceedings and conclusion, despite the importance assigned by the Special Commission to these allegations. There is no evidence in the record that after years of these allegations being extant, they have led anywhere.

97. On the other hand, PUZ or urban certificate legal issues were not addressed or mentioned, in connection with the granting of the environmental permit, in the Meetings of the Negotiations Commission of 14 June 2013[119], the opinions of the parliamentarians in the Roşia Montanã Committee[120]; the hearing of the Minister of Culture of 23 September 2013[121], the Meeting of the Joint Special Commission of the Chamber of Deputies and the Senate of 24 September 2013 (except for what will be addressed below)[122], the Meeting of the same Joint Special Commission of 8 October 2013[123] and its Meetings of 15 October 2013[124] and November 2013[125].

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[117] Exhibit C-1903 at 36 (*supra*, fn. 58).

[118] Of 14 June 2014, Exhibit C-481 at 6-7.

[119] Exhibit C-1536.

[120] Exhibit C-1466.

[121] Exhibit C-929.

[122] Exhibit C-506.

[123] Exhibit C-1260.

[124] Exhibit C-1531.

[125] C-557.

98. The only exception is the following excerpt of Minister of the Environment Ms. Rovana Plumb declaration at the Meeting of the Joint Special Commission of the Chamber of Deputies and the Senate of 24 September 2013[126]:

"*Moreover, the Ministry of Environment has two filters in terms of environmental compliance for this exploitation. In the first stage, we have an environmental permit which is adopted by Government Decision and is subject to an analysis made by the Technical Assessment Committee that includes all ministries, including the Institute of Geology and the Romanian Academy. The second filter: the environmental permit is given for construction, because for the actual exploitation stage there is a second filter which is called operational environment integrated approval, which is also adopted by way of Government Decision, at the proposal of the competent regulatory authority in the environmental field.*

Consequently, there are two filters until this exploitation can start, regardless who will be the operator - the environmental permit, which is based on the views of experts, through this Technical Assessment Committee, and which imposes environmental standards and conditions so that constructions may begin in view of starting activity; the second filter is the operational environment integrated approval, based on the same procedure and which imposes the necessary environmental standards and conditions for the activity as such to begin.

The operational environment integrated approval must take into account the PUZ and all the other elements.

The environmental permit only deals with imposing the environmental conditions and standards for launching the project, meaning the construction phase. So, there are two filters. The reason why we did not issue the environmental permit so far: because the Technical Assessment Committee needs a few more sessions for the specialists to express their points of view, for the Academy to state its point of view, for the Geological Institute, the other ministries that are members to the Technical Assessment Committee express their points of view on the project, and we have not granted it because it is conditional upon the financial guarantees for the environment imposed by this".

99. These statements of the Minister of Environment show that the PUZ is not necessary for the issuance of the environmental permit, the first stage; the PUZ is necessary for

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[126] C-506 at 21.

the second operational stage, which is the one immediately dealing with construction. Minister Plumb confirmed again, in her Report to the Aarhaus Compliance Committee, that the PUZ approval is necessary for construction/building only[127]. As to the reasons she invokes for not granting the environmental permit, they are not substantiated by the record, as elaborated elsewhere in this Note, and contradict her statements that the Project met the necessary environmental approval requirements.

100. Thus, by rejecting the Special Law, and at the same time pointing out to real or supposed deficiencies in the existing Romanian legal framework on which Gabriel relied for nine years or more to obtain the Project approval and implementation, including securing the environmental permit, the Respondent resorted to the admitted shortcomings of its own legal system, as it was when Gabriel's investment was made, to put an end to the Project.

101. As to environmental issues, what followed after the rejection of the Draft Special Law confirmed Minister Ponta and Minister Plumb statements that the rejection of the Special Law, resulting from political decisions dating back to 9 September 2013, had put an end to the Project and, obviously, to the consideration or granting of an environmental permit for the Project.

102. In the TAC informal meeting of 2 April 2014[128], the TAC Chairman Mihail Fâcă made clear that the TAC was concerned only with environmental protection, and not other issues. In his invitation to comment on the Special Commission Report of the Senate and Chamber of Deputies, Amalia Şerban of the Ministry of Health only raised reservations regarding the Special Law within the context of the Joint Parliamentary Commission Report referred to above (paras.93-97), not the Project. In turn, Octavian Pătrascu of the Environment Ministry said that it was not for the Parliamentary Commission to make judgments on the EIA Procedure since these are matters falling within the Environmental Ministry authority. The representative of the Ministry of Economy Mr. Sorin Gaman, stated that since in successive previous TAC meetings all technical matters had been finalized, the Ministry favored taking now a decision on the Project. The representative of the Geological Institute of Romania Marcel Măriantu shared the view of the Special Commission that the current legal framework regarding the implementation of a mining project needed to be supplemented, which led to a follow up by Octavian Pătrascu of the Ministry of the Environment who explained that reservations of a general nature regarding the activity of exploitation and management of natural resources was not within the TAC

[127] Exhibit C-2907, at 3-4.

[128] Exhibit C-473.

remit solely concerned with the specifics of the Project. The comments of Emil Radu of the National Institute of Hydrology and Water Management concerned the Special Law, not the Project, and as far as hydrological issues are concerned, he indicated that through cooperation the Institute's and Gabriel views could be accommodated in an agreement of both Parties on these matters. Although Csilla Hegedus of the Ministry of Culture referred to the discharge certificate no.9 2011 and that any decision on the revocation or suspension of said certificate should be suspended until an irrevocable court decision be reached on this matter, this was not considered in the parliamentary political process culminating in the rejection of the Special Law.

103. Ensuing TAC meetings showed that there were no issues pending regarding the environmental permit, and that after more than nine years' discussion on the environmental permit, the exchanges became circular, as highlighted in the TAC meeting of 27 April 2015, in which the TAC Chairman expressed his frustration in view of the lack of interest of certain TAC members in attending meetings and voicing their views. In fact, all the issues had been already addressed and what was appropriate at this stage, if there was a real resolve to go ahead with the Project, was simply to call for a final TAC meeting followed by a proposal to be considered by the Minister of Environment (Ms. Plumb) to grant the environmental permit, as forcefully asked by Gabriel's representatives[129].

104. As to the issues raised at the previous TAC meeting of 24 July 2014 in which the opinions of the Geological Institute and Mr. Marincea regarding the conditions that would govern a study of the impermeability of the tailings pond were to be considered, no TAC members and neither the Institute nor Mr. Marincea responded or provided any opinions[130]. However, in the 24 July 2014 TAC meeting, Gabriel learnt that, following one of the *de lege ferenda* proposals of the Joint Special Commission of the Chamber of Deputies and of the Senate for the Endorsement of the Special Law mentioned above, it had been decided to have a study of the permeability of the tailings management facility basin carried out. That study would be paid by Romania. Gabriel rightly objected to the study by pointing out, *inter alia*, that it was not included in the applicable legal procedures, it would take at least five years, and that the Commission had not recommended the study but only that the convenience of such study be analyzed[131].

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[129] Exhibit C-474.

[130] Exhibit C-479.

[131] Exhibit C-557, at 26-27.

105. These post-rejection of the Draft Special Law episodes set out in paras. 101-104 above show that no real or serious path for the final consideration and eventual granting of the environmental permit for the Project was open and is a confirmation of the failure to go forward on the environmental permit procedure despite its having already long reached its ripeness stage, for reasons only attributable to the Respondent. This also further shows that: a) conduct adversely affecting the granting of the environmental permit began in August 2011 and culminated on 9 September 2013; and b) the rejection of the Special Law confirmed that on 9 September 2013 the environmental permitting process and, indeed, the Project itself, came to a final end.

IV. Conclusion

106. Thus, I conclude that: a) the rejection of the Special Law on 9 September 2013, for all practical purposes thwarting the environmental permit process or approval, breached the FET standard under both the Canada-Romania and the UK-Romania BITs; and b) continuing conduct attributable to Romania described in this Note of Dissent which culminated in the denial of the environmental permit, is also a violation of the FET standard under both the Canada Romania and the UK Romania BITs. However, in the case of the Canada-Romania BIT (see paras. 19-21 above): a) conduct attributable to Romania after this BIT's coming into force on 23 November 2011 infringes the FET standard although conduct predating such date constitutes factual evidence of the FET breach and evidences intent leading to such breach as from 23 November 2011; and b) the three-year limitation period set forth in Canada Romania BIT Article XIII 3 (d) does not bar, in the instant case, Gabriel's claims on the merits under this BIT premised on facts or conduct prior to 30 July 2012 nor deprive the Arbitral Tribunal of jurisdiction on claims premised on such conduct or facts. In the case of the UK-Romania BIT, the FET breach started on or about 1 August 2011[132]. Arbitral fees and costs on the Respondent.

[*Signed*]
Horacio A. Grigera Naón

Date: 8 March 2024

[132] *Supra,* para.27 and its text (Prime Minister Boc and Minister Borbély declarations).