INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

CLAIMANTS' POST-HEARING BRIEF

February 18, 2021

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I. INTRODUCTION

1. Gabriel responded to Romania's call for investment in the State's ailing mining sector and formed a joint-venture with the State expressly for the purpose of developing the Roşia Montană and Bucium mining projects in accordance with mining licenses issued by the State. Having made the public policy decision to promote mining in Roşia Montană and Bucium and having invited Gabriel to partner with the State to do so, the Government concluded contracts and issued licenses accordingly.

2. The State imposed contract and license obligations, respectively, on Gabriel to finance and RMGC to develop the Projects. Gabriel accepted those obligations and undertook to raise capital to finance RMGC's Project development. The Government in turn accepted the obligation to make decisions and advance all aspects of the permitting process (culture, environmental, and urbanism) in accordance with the law.

3. Through RMGC, its joint-venture with the State, Gabriel thus invested hundreds of millions of dollars in reliance upon the agreed contractual structure and licenses to develop the Projects, and did so in accordance with industry best practices.

a. RMGC, with NAMR's approval and in accordance with agreed annual work plans, worked with leading industry experts and global engineering consultancies to conduct extensive geological studies and to develop the mining and engineering plans.

b. RMGC funded extensive archaeological research, organized and supervised by the Ministry of Culture and other State culture authorities, which permitted the State to make informed archaeological discharge decisions in the Roşia Montană Project area with the support and guidance of leading Romanian and world-renowned international experts.

c. RMGC prepared extensive environmental studies, working with multiple leading industry experts to prepare a broad array of analyses and reports showing the Project met or favorably exceeded applicable legal standards.

d. RMGC developed plans and took steps to preserve and promote the area's cultural heritage and to acquire properties needed for Project development while supporting the local community. RMGC did so with the support and guidance of resettlement and social development experts who also worked with the EBRD and the IFC, incorporating best practices.

4. Project development activities and the permitting process advanced while various NGOs and others activists campaigned against it, such opposition being a common feature in major mining and infrastructure projects. The history of destructive State-run mining operations, exemplified by the neighboring heavily-polluting Roşia Poieni mine and the 2000 Baia Mare accident at an archaic formerly state-owned project then operated by a public-private joint-venture, provided fertile ground for Project opponents to try to equate improperly the environmentally-sound Project being developed by another public-private partnership, which would be the first modern mining project in Romania, with the uninformed practices of a by-gone era.

5. Whether influenced by NGO disinformation campaigns or for other reasons, as Project development advanced in line with best practices and strict EU standards, Government authorities at times delayed making decisions required by law to permit the mine, including by halting archaeological research in 2006 and suspending the EIA Process in 2007. While RMGC continued to promote the Project's benefits, the Government's unwillingness to make decisions over a prolonged time-period impeded the realization of those benefits and thus emboldened the NGOs and aggravated the controversies they sought to generate.

6. RMGC nevertheless continued to fulfill its annual work plans as required by the terms of its License and as agreed with NAMR, and Gabriel continued to invest in the Project through RMGC. Among other things, RMGC developed and constructed the Recea community; promoted the area's cultural heritage by preserving and opening the underground historic Catalina Monuleşti galleries, building a heritage museum in the historical town center, and completing substantial preservation and restoration works on historic properties in Roşia Montană; and completed construction of a pilot water treatment plant. RMGC succeeded in obtaining the overwhelming support of the local community.

7. Gabriel and RMGC advanced the Project to the stage where it enjoyed not only strong support in Alba County, but also national support, and successful Project implementation was well within reach. As the Roşia Montană Project was ready to obtain the all-crucial environmental permit ("EP"), the Government adopted a politicized approach to the permitting process that disregarded Gabriel's and RMGC's legal and contractual rights. Prioritizing the political preferences and positioning of those in office over what the law required, the Government embarked on a course of conduct in August 2011 that led ultimately to its insistence on the ill-fated Special Law, which allowed those in Government who had been on record as opposing the Project to avoid responsibility for issuing the EP, which by law they were required to do. The evidence shows there is no serious debate that the legal requirements were met and that the EP should have been issued, as multiple senior Government officials repeatedly acknowledged.

8. These same Government officials may not have foreseen the mass protests that followed the Government's introduction of what appeared to be a preferential deal for a Project and a company that the Prime Minister earlier had repeatedly (albeit unjustifiably) accused of corruption. Exalting politics over law and fueling the public's distrust and outrage, the Prime Minister vowed to oppose approval of the very law upon which his Government had insisted, and he and the Minister of Environment insisted that the EP would not be issued and the Project would not be done without Parliament's political blessing through its vote on the Special Law. The evidence shows, as Dr. Boutilier observes, that the 2013 protests were thus triggered by the Special Law and were directed against the Government and what was seen as a corrupt, incompetent, and entrenched political class. This conclusion is supported by the contemporaneous research and writing of Respondent's expert Dr. Stoica, his colleagues, and others, as well as by the observations of leading Romanian politicians.

9. The evidence also shows that the Government fully recognized, as Prime Minister Ponta admitted numerous times, that terminating the Project upon the rejection of the Special Law was contrary to law and would result in a lawsuit in which Romania would need to pay billions in damages.

10. Knowing and accepting the consequences of rejecting the Project on what Prime Minister Ponta described as a "political criterion" that would effectuate a "nationalization," Romania deliberately confirmed its chosen path not once, but three times. In succession, first the Senate committees, then the Special Commission, and finally the full Parliament implemented the political decision and direction of the Government and its ruling coalition to reject the Special Law and hence Gabriel's investment.

11. The injury Gabriel suffered as a result of Romania's wrongful conduct is undeniable, and the resulting measure of loss is readily established. The share price of Gabriel Canada ("GBU") was derived in all material respects from the market's assessment through millions of transactions of the value of the Project Rights. The fair market value of the Project Rights absent the wrongful measure therefore may be assessed objectively and reliably on the basis of actual contemporaneous market data, rather than on the *post hoc*, malleable, and outcome-driven analyses prepared by Respondent's legal team and retained experts for this arbitration.

12. As detailed in Claimants' submissions and below, Respondent's various arguments seeking to impugn the reliability of the actual market value of the Project Rights have no merit, and its alternative measures of value are flawed, principally because they improperly incorporate the impacts of Romania's wrongful conduct, which is why they fall so far below the actual market value.

13. The record evidence, fully and fairly considered, demonstrates beyond cavil the merits of Claimants' case. The various lines of defense created by Respondent's arbitration counsel in an effort to avoid liability or minimize the damage deny and distort what actually happened, cannot be sustained on the evidence, and thus serially collapse upon examination. In short, Romania's knowing and sustained departure from the rule of law in its treatment of Claimants' investment violated the BITs and entitles Claimants to the damages they seek.

II. THE TRIBUNAL HAS JURISDICTION OVER ALL CLAIMS PRESENTED

14. Respondent has objected to the Tribunal's jurisdiction on a number of grounds and the European Commission has submitted arguments based on the CJEU's *Achmea* Judgment. These various jurisdictional objections should be rejected.[1]

A. Gabriel Jersey's Claims

1. Gabriel Jersey Is a Covered Investor with a Covered Investment

15. In its Counter-Memorial, Respondent objected that it was not demonstrated that Gabriel Jersey qualified as a company eligible to invoke Article 7(1) of the UK BIT. Claimants demonstrated in the Reply that Respondent's objection was not timely and, as was evident from readily accessible public information as well as information specifically in Respondent's possession, the objection had no merit.[2] Respondent has not addressed that objection further.

16. Respondent also objected in its Counter-Memorial that it was not demonstrated that Gabriel Jersey made an investment in Romania. That objection also was not timely and was without merit. Respondent's principal contention was that Gabriel Jersey was merely a holding company and thus did not make an investment. As demonstrated in the Reply, that argument is wrong as a matter of fact and misguided in view of the requirements of the UK BIT.[3] Respondent refers to additional authorities in its Rejoinder but these do nothing to alter the conclusion that Respondent's objection on this basis is without merit.

17. Respondent argues in effect that Gabriel Jersey cannot be considered to have made covered investments because, Respondent contends, Gabriel Jersey was not the ultimate source of funds and was a passive shareholder. Investment treaty tribunals interpreting similarly worded treaty provisions have repeatedly rejected such arguments.[4] For instance, in *ADC v. Hungary*, the tribunal rejected an objection to jurisdiction on the ground that a Canadian parent,

[1] Reply §VII; Surrejoinder on New Jurisdictional Objection; Claimants' Opening-2019 vol.8:2-59; Claimants' Response to EC Brief Apr. 10, 2020.

[2] Reply §VII.B.1.

[3] Reply ¶¶400-407. *See also Rompetrol* (CL-244) ¶¶101-110 (rejecting similar arguments).

[4] Reply ¶¶402-407; Claimants' Opening-2019 vol.8:52.

and not the Cypriot claimants, was the "source of funds and the control" for the investment.[5] In *Saluka v. Czech Republic*, the tribunal rejected the claim that claimant "itself invested nothing" and "was merely a conduit" for its parent company,[6] and the *Hulley v. Russia* tribunal rejected the argument that "simple legal ownership of shares does not qualify as an investment."[7]

18. Respondent relies on *Standard Chartered Bank v. Tanzania*, a case involving a UK claimant with a Hong Kong subsidiary that acquired a credit note that was granted earlier by Malaysian banks to a Tanzanian borrower.[8] In that case, the tribunal considered that the BIT's reference to an investment made by the investor "implies some action [by the investor] in bringing about the investment."[9] The tribunal concluded that the BIT at issue required the claimant to demonstrate that "the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner," and that "[p]assive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient."[10]

19. Even if one were to accept the notion that the UK-Romania BIT requires some action by the claimant in bringing about the investment as described by the *Standard Chartered Bank* tribunal, a conclusion Claimants respectfully submit is not compelled by the terms of the UK-Romania BIT, that would not assist Respondent here. Gabriel Jersey was the party to the joint-venture agreements with the State via Minvest to form RMGC, including RMGC's articles of association; Gabriel Jersey was the direct, controlling shareholder of RMGC; Gabriel Jersey made multiple capital contributions to RMGC; and Gabriel Jersey entered into multiple loan agreements with Minvest to fund Minvest's capital contributions to RMGC.[11] Thus, there is no

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[5] (CL-138) ¶¶355-359.

[6] (CL-97) ¶¶210-211.

[7] (CL-243) ¶429.

[8] (RLA-131) ¶¶196-199.

[9] *Id.* ¶222.

[10] *Id.* ¶230.

[11] Reply ¶400 and n.806, ¶401 and n.809. *See also* Ministry of Industry Memorandum (C-1626) (describing early cooperation noting, *inter alia*, that Gabriel Jersey would finance the pre-feasibility study); Fax from Romanian Development Agency (C-1649) (approving establishment of joint-venture company between RAC Deva and Gabriel Jersey to exploit ore under RAC Deva's administration with a view to establishing a profitable enterprise and the social and economic development of the region); RAC Deva Letter approved by

basis to dispute that Gabriel Jersey made the investment in RMGC in the sense understood by the *Standard Chartered Bank* tribunal.

20. The other cases cited by Respondent likewise do not support its objection:

a. Contrary to Respondent's claim, the *Flemingo v. Poland* tribunal did not cite the *Standard Chartered Bank* award "with approval." Rather, the *Flemingo* tribunal rejected the objection that the claimant in that case could not be considered as an investor.[12] The *Flemingo* tribunal observed that the *Standard Chartered Bank* tribunal's conclusion that "holding" an investment did not qualify as a protected investment turned on the terms of the UK-Tanzania BIT that permitted arbitration only in relation to investment "in the territory" of the host State and that defined investment as limited to those "admitted" by the host State.[13] As the BIT at issue in the *Flemingo v. Poland* case did not have such language, the tribunal rejected the objection that the claimant's acquisition of shares of a company that had made an investment was insufficient.[14] In the present case, the UK-Romania BIT's reference to arbitration also is not like the UK-Tanzania BIT and, in any event, Gabriel Jersey "made" the investment as that term was understood even by the *Standard Chartered Bank* tribunal.

b. Respondent suggests that *Alapli v. Turkey* provides further support for the notion that "contributions by entities other than" the claimant do not qualify as covered investments. In *Alapli v. Turkey*, Arbitrator Park (also the President of the Tribunal in the *Standard Chartered Bank* case) maintained that to be an investment "of" an investor means the "investor must have made some contribution to the host state," and that there must have been "an action

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NAMR June 4, 1997 (C-1662) (requesting approval to establish joint-venture company with Gabriel Jersey, which NAMR approved); Ministry of Industry Letter (C-1664) (approving establishment of joint-venture company with Gabriel Jersey); Jersey Financial Services Department Declaration, filed with Romanian Trade Registry (C-1958) (certifying that Gabriel Jersey was incorporated in Jersey under the Companies (Jersey) Law 1991 on May 28, 1996).

[12] (RLA-132) ¶¶324-325.

[13] *Id.* ¶323.

[14] *Id.* ¶¶324, 335.

transferring something of value (money, know-how, contacts, or expertise) from one country to another."[15] Neither of his co-arbitrators agreed with that reasoning.[16] In any event, as the joint-venture partner of the State and the direct shareholder of RMGC, Gabriel Jersey made the investment at issue as that notion is understood by Professor Park.

c. Respondent refers to *Clorox v. Venezuela* in which the tribunal concluded that the acquisition by the Spanish claimant of shares of a locally incorporated Venezuelan company was not a covered investment where the Venezuelan company already had been established earlier by the claimant's U.S. parent company and a dispute with the host State already was foreseeable. The tribunal concluded that the Spanish claimant had not made an investment because it did not pay anything to acquire the shares.[17] It is a matter of public record, however, that since the filing of Respondent's Rejoinder, the *Clorox* award has been annulled by the Swiss Federal Tribunal, which concluded that the *Clorox* tribunal read requirements into the BIT that were not supported. Gabriel Jersey's investment in RMGC is not analogous in any event as, *inter alia*, Gabriel Jersey invested large sums of money both to acquire and invest in RMGC, and the source of Gabriel Jersey's capital is irrelevant to this analysis.

d. Respondent's reliance on a passage from *Toto v. Lebanon* regarding the notion of investment under Article 25 of the ICSID Convention is equally unavailing. The tribunal in that case concluded that the claimant's construction project met the requirements of an investment.[18] In any event, even if the Tribunal considered that an investment requires an investor to use "its own financial means … at its own financial risk," which are poorly defined notions that may be questioned,

[15] (RLA-133) ¶¶358, 360.

[16] *Id.* ¶¶390-391 (arbitrator Stern preferring a different rationale), dissent ¶¶3-4 (arbitrator Lalonde noting the different views among the tribunal members).

[17] (RLA-134) ¶¶830-831.

[18] (RLA-135) ¶86.

there is no question that Gabriel Jersey used its own financial means and put its capital at risk in making its investment in RMGC.

21. Thus, the questions put to Claimants' witnesses regarding the level of managerial control exercised by Gabriel Jersey in relation to RMGC were misguided as they fail to address any issue relevant to the Tribunal's jurisdiction under the UK BIT.[19]

2. UK BIT Article 7(1) Notice Requirement

22. Respondent argues that this Tribunal's jurisdiction does not extend to the consideration of facts and events that post-date the notice of dispute sent by Gabriel to Romania on January 20, 2015. Claimants demonstrated with their Reply those arguments are without merit.[20] Respondent does not add any further observations on this issue in its Rejoinder specific to Gabriel Jersey's claims. As Respondent presents this objection also in relation to Gabriel Canada's claims, the additional considerations and authorities discussed below in section II.B with regard to Gabriel Canada apply here as well.

3. Objections Based on the *Achmea* Judgment

23. Claimants addressed Respondent's objection on the basis of the *Achmea* Judgment in the Surrejoinder on New Jurisdictional Objection[21] and the EC's arguments in support of that objection in Claimants' Response to the EC Brief.[22] As those submissions make clear, the arguments presented by Respondent and the EC have been fully considered and roundly rejected by dozens of investment treaty tribunals. This Tribunal should reject the objection presented in this case as well.

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[19] Tr.(Dec. 3, 2019)663:12-19 (Henry Cross); Tr.(Dec. 4, 2019)771:12-774:5 (Tănase Cross); Tr.(Dec. 12, 2019)2802:12-2803:11 (Henisz Cross).

[20] Reply §VII.B.2; Claimants' Opening-2019 vol.8:55.

[21] Surrejoinder on New Jurisdictional Objection; Claimants' Opening-2019 vol.8:57.

[22] Claimants' Response to EC Brief Apr. 10, 2020.

B. Gabriel Canada's Claims

1. Gabriel Canada is a Covered Investor

24. In its Counter-Memorial, Respondent objected that it was not demonstrated that Gabriel Canada qualified as a company eligible to invoke Article XIII(1) of the Canada BIT. Claimants demonstrated in the Reply that Respondent's objection was not timely and, as was evident from abundant readily accessible public information as well as from exhibits submitted with the Memorial as well as with Respondent's own Counter-Memorial, the objection had no merit.[23] Respondent has not addressed that objection further.

2. Gabriel Canada Presents Claims on Its Own Behalf

25. Respondent repeatedly has confirmed that there is no dispute that Gabriel Canada is entitled under the Canada BIT to present claims on its own behalf and to seek compensation for its own losses.[24]

3. Canada BIT Article XIII(2) Notice Requirement

26. Respondent argues that to the extent that Gabriel Canada bases its claims on events that post-date the January 2015 notice of dispute, the claims are outside the Tribunal's jurisdiction. Claimants demonstrated that Gabriel Canada's claims complied with the notice requirement of Article XIII(2) of the Canada BIT, including as to events that post-date the January 2015 and the April 2015 notices of dispute.[25]

27. In its Rejoinder, Respondent largely failed to engage with Claimants' observations on this issue, and maintained that due to the alleged lack of notice as to Gabriel Canada's position relating to post January 2015 events, Romania has been deprived of the opportunity to "meaningfully exercise" its right to make an informed decision as to "whether it should remedy the alleged breach, negotiate with the investor, or defend the claims in the arbitration." Respondent's argument is frivolous. Claimants notified the Romanian State first in

[23] Reply §VII.A.1.

[24] Reply §VII.A.2; Rejoinder §2.1.1.

[25] Reply ¶¶333-344; Claimants' Opening-2019 vol.8:6-11. *See also Crystallex* (CL-62) ¶¶448-458 (rejecting objection that a new notice should have been delivered to address events post-dating the request for arbitration).

January 2015 and again in April 2015[26] that the failure to allow the Project to be implemented had given rise to a dispute and that Gabriel's rights to develop the Project were being denied in violation of the BITs. The events at issue that post-date the notices of dispute were taken by the Government with the deliberate and expressed intention to prevent Gabriel and RMGC from developing the Project in blatant disregard of Gabriel and RMGC's legal rights.[27] There is no basis to conclude that Romania was left in the dark about Gabriel's claims.[28] Respondent's notice objection thus must be dismissed.

4. Canada BIT Article XIII(3)(b) Waiver Requirement

28. Respondent argues that to the extent Gabriel Canada bases its claims on events that post-date Gabriel Canada's July 2015 waiver, the claims are outside the Tribunal's jurisdiction. Claimants demonstrated that Gabriel Canada's claims complied with the waiver requirement of Article XIII(3)(b) of the Canada BIT, including as to events that post-date the July 2015 waiver filed concurrently with the Request for Arbitration.[29]

29. Without accepting Respondent's objection on this ground, Gabriel Canada submitted an additional waiver that expressly covered all measures at issue in this arbitration as further evidence of its waiver and its scope.[30] The waivers submitted demonstrate that Gabriel Canada waived the right in an unqualified manner to initiate or continue any other dispute resolution proceeding in relation to the measures at issue in this arbitration. Gabriel Canada has

[26] Letters from Gabriel to President and to Prime Minister of Romania (C-8, C-9).

[27] Claimants' Opening-2019 vol.8:18-39; Claimants' PO27 ¶¶206-225.

[28] Indeed, Respondent's argument that it was denied notice that Gabriel's claim extends to Romania's application to list the "Roşia Montană cultural mining landscape" as a World Heritage site insofar as doing so further ensures the Project would not be developed stands out as particularly ill-conceived. Understanding full well that the UNESCO application is a further aggravation of the issues in dispute in this arbitration, the Government itself decided to request postponement of UNESCO's consideration of its application until the settlement of this ICSID arbitration. Press Release (C-1917). In 2020, the Government "reactivated" its UNESCO application.

[29] Reply ¶¶345-348; Claimants' Opening-2019 vol.8:12-18.

[30] Reply ¶348; Claimants' Opening-2019 vol.8:15, 18.

acted consistently with its waiver and has not initiated or continued any proceedings relating to the measures at issue in this case.[31]

5. Canada BIT Article XIII(3)(d) Three-Year Limitation Period

30. Respondent argues that Gabriel Canada's claims fall outside the three-year limitation period set forth in Article XIII(3)(d) of the Canada BIT insofar as Gabriel Canada's claims are based in part on conduct attributable to the State that occurred before July 30, 2012, *i.e.*, three years before July 30, 2015, when ICSID registered the Request for Arbitration.

31. Claimants have demonstrated that this objection fails because Gabriel Canada did not acquire knowledge of Romania's breach of the Canada BIT and that Gabriel Canada incurred loss as a result of that breach until after July 30, 2012.[32]

32. Before July 30, 2012, senior members of the Government made disparaging public statements regarding the Project, the State's agreement with Gabriel, and about RMGC and Gabriel, and demanded renegotiation before the Government would make any permitting decisions for RMGC and the Project.[33]

33. While the Government's conduct before July 30, 2012, particularly in hindsight, may be understood to be arbitrary and abusive, it was not reasonably clear at that time whether permitting in fact would remain blocked, whether a renegotiation would result in a revised agreement, or what the Government eventually would decide to do. In other words, Article XIII(3)(d) does not invite a hindsight analysis, whereas a hindsight analysis may be done when considering liability. The State's conduct viewed as of July 30, 2012 and not now in hindsight, although improper, would not have been considered sufficiently improper so as to constitute a breach of the Canada BIT.[34] Indeed, no investment treaty tribunal would have found

[31] Claimants' Opening-2019 vol.8:17 (demonstrating that Respondent's arguments regarding RMGC's challenge to VAT assessments are misplaced).

[32] Reply ¶¶350-358; Claimants' Opening-2019 vol.8:19-42; Claimants' PO27 ¶¶56-57.

[33] Claimants' PO27 ¶¶11-30.

[34] Moreover, Gabriel Canada could not have knowledge of a breach of the Canada BIT before November 23, 2011 when the Canada BIT entered into force. *Berkowitz v. Costa Rica* (CL-236) ¶220 ("A putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force.").

a breach of the Canada BIT on the basis of the facts as they were as of that point in time because the known facts were then still equivocal.

34. Moreover, Article XIII(3)(d) requires knowledge not only of a breach of the treaty, but also knowledge of resulting loss.[35] While as of July 30, 2012 the Government had maintained a demand for renegotiation, no agreement had been reached and outcomes remained uncertain. Thus, while Gabriel understood that there was a risk that the economics of its agreements with the State would have to change, whether a revised agreement would be reached and if so on what terms remained uncertain, and thus whether ultimately there would be loss to Gabriel remained uncertain.[36] Knowledge of the risk of loss is not sufficient to trigger Article XIII(3)(d).[37] Article XIII(3)(d) requires knowledge of an actual loss, which requires that the loss has been incurred. Even if an investment treaty tribunal as of July 30, 2012 would have concluded that the State's conduct was sufficiently abusive to constitute a breach of the Canada BIT (which it would not have), as of that point in time, there was not a sufficiently certain basis for any such tribunal to conclude that Gabriel by then already had sustained a resulting loss.[38]

35. Indeed, the purpose of Article XIII(3)(d) is to encourage investors to bring an investment treaty claim to arbitration once the investor *knows* – not suspects or fears – that there has been a breach and that the investor has suffered a recoverable loss. By July 30, 2012 events had not advanced to that point.

36. These considerations extend to Gabriel Canada's claims as they relate to Romania's treatment of RMGC's Bucium license applications. Gabriel's claims are not that the competent authorities delayed acting on RMGC's 2007 applications to obtain exploitation licenses, but rather that following the State's political repudiation in 2013 of the Roşia Montană

[35] *Berkowitz* (CL-236) ¶211 (discussing same requirement in the CAFTA and noting that "knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage," and that "[w]hile the text of Article 10.18.1 does not state in terms that the loss or damage in question must be as a consequence of the breach that is alleged, the Tribunal considers that this necessarily follows.").

[36] Reply ¶358.

[37] *Id.* ¶353.

[38] While Romania's wrongful conduct negatively impacts Gabriel's share price, most clearly by early 2012, those negative impacts would not have been seen as permanent as they would have been reversed once the Government issued the EP, which at that time reasonably was still expected. *Infra* §X.H.1.

Project and its joint-venture with Gabriel, the State would not issue any further mining licenses to RMGC, notwithstanding RMGC's legal rights in relation to Bucium.[39]

37. In any event, if the Tribunal were to conclude that as of July 30, 2012 Gabriel Canada must have recognized (1) that Romania's conduct was in breach of the Canada BIT, and (2) that breach had caused Gabriel Canada to incur certain loss, such that a claim on the basis of that conduct would fall outside the Tribunal's jurisdiction in view of Article XIII(3)(d) of the Canada BIT, the Tribunal would not be precluded from taking that earlier conduct into consideration in its assessment of Romania's conduct after that date.[40]

6. The Canada BIT's Substantive Protections

38. Respondent argues that Articles XVII(2) and (3) of the Canada BIT relating to environmental measures and Article XII(1) of the Canada BIT relating to taxation measures preclude Gabriel Canada's claims. Respondent's position, however, is without merit.[41]

III. BEGINNING IN AUGUST 2011, THE GOVERNMENT ANNOUNCED AND THEREAFTER MAINTAINED A POLICY WHEREBY IT WOULD NOT ADVANCE PROJECT PERMITTING ABSENT IMPROVED ECONOMIC TERMS AND A POSITIVE POLITICAL DECISION

39. Beginning in August 2011, the Government effectively adopted and thereafter maintained a policy whereby it would not advance Project permitting and allow the Project to proceed unless the State received improved economic terms and the Government and its ruling coalition deemed the Project politically acceptable. Engrafting these economic and political requirements onto the legal-administrative permitting process was unlawful and clearly affected permitting decisions by the Ministry of Environment and the Ministry of Culture. The policy prevented issuance in early 2012 and thereafter of the critical EP, and prevented the correction and update of the 2010 List of Historical Monuments which, among other things, spawned and supported NGO litigation. This policy also led the Government to tie Project permitting and implementation to Parliament's vote on a Special Law on which the Government had insisted

[39] Reply ¶¶371-375.

[40] *Id.* ¶¶369-370. *See also* ILC Articles (CL-61), Art. 13 cmt.(9).

[41] Reply ¶¶378-393; Claimants' Opening-2019 vol.8:43-48.

and then, together with the leaders of its ruling coalition, to terminate the Project and the State's joint-venture with Gabriel in September 2013 for political reasons amidst broad anti-Government protests sparked by the Government's submission of the Special Law to Parliament.[42] Prime Minister Ponta admitted that doing so amounted to a "nationalization" of the Project and its resources and exposed the State to liability for billions in damages.[43] The effective repudiation of the State's joint-venture with Gabriel entailed also the repudiation of RMGC's valuable Bucium Projects.[44]

40. This course of conduct is reflected in repeated public statements of Romania's senior officials during the relevant time-period, most of whom Romania declined to present as witnesses, and one of whom, Mr. Ponta, refused to be cross-examined, and by contemporaneous written communications of RMGC and Gabriel reflecting their interactions with the Government.

41. Unable to deny what its senior officials said, Respondent argues that public statements are not measures.[45] Respondent's argument is incorrect and misguided.

42. Public statements of senior government officials unquestionably can be evidence of a measure. The *Gold Reserve* tribunal found that "a stream of statements and public announcements" by senior government officials showed that the State had adopted a new policy that all future decisions regarding claimant's mining project would be taken by the highest authority and not by the competent ministries.[46] The *Crystallex* tribunal also observed that statements by senior government officials made it "clear to the Tribunal that a decision at the highest level of the Venezuelan state had been taken" to oust the claimant from its investment.[47]

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[42] Claimants' PO27 ¶¶8-53, 106-118, 175-195; Claimant's Opening-2019 vols.3-7; Reply §§II-V; Memorial §§VII-IX.

[43] Claimants' PO27 ¶50.b (C-437); Claimant's Opening-2019 vol.6:24-27.

[44] *Infra* §VI.A; Reply §VI.

[45] Respondent also reprises its groundless argument that the statements were merely "individual politicians" expressing "their personal view" and thus not relevant as evidence of the State's motives, which Claimants have previously addressed. Reply ¶¶618-619.

[46] (CL-81) ¶¶580-582, 588-591, 599-600.

[47] (CL-62) ¶¶683-684.

43. Public statements of officials also can be considered as part of a course of conduct in breach of treaty obligations. The *Crystallex* tribunal found that such statements considered with other actions effected a creeping expropriation.[48] The *Vivendi II* tribunal similarly found that the repeated public statements of authorities attacking the legitimacy of the claimant's concession and threatening rescission were part of an unlawful campaign designed to end the concession or force its renegotiation.[49] Respondent's authorities are not to the contrary. *Waste Management* and *UAB* both involved a single statement by a mayor that was never acted upon.[50]

44. Respondent argues that politicians had "made statements about the Project over the years," and that Claimants selected August 2011 to coincide with a favorable market capitalization for Gabriel. Respondent's arguments do not withstand scrutiny.

45. Unlike the earlier statements Respondent has identified,[51] the series of public statements beginning in August 2011 from the President, the Prime Minister, and the Ministers of Environment and Culture were obviously coordinated and clearly delivered the message that no permitting steps would be taken, and the Project would not proceed, absent a better economic deal and a favorable political assessment by the Government and its ruling coalition.[52] Before August 2011, senior Government officials were still insisting that the Government would assess the Project on technical merit, not on political considerations.[53]

46. In addition, by August 2011, it was apparent that the TAC proceedings were nearing a favorable conclusion. The TAC had met three times since resuming its meetings in

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[48] *Id.* ¶¶672, 675, 683, 685; *id.* ¶¶676-682; Claimants' PO27 ¶92.

[49] (CL-113) ¶¶7.4.19-7.4.42, 7.5.22-7.5.28, 7.5.34; Claimants' PO27 ¶93.

[50] *Waste Management* (CL-139) ¶¶56, 161; *UAB* (CL-252) ¶¶938-946. In *S.D. Myers*, the tribunal merely observed that State decisions may be shaped by many persons with differing perspectives and that the record as a whole must be considered in evaluating a State's intent for a claim of national treatment. (RL-51) ¶¶161, 194, 254.

[51] *E.g.*, C-874 and R-384 (statements that the State ought to consider trying to renegotiate Project benefits).

[52] Claimants' Opening-2019 vol.3:4-19, 66-71 (videos from August-December 2011 in PowerPoint submitted by Claimants); Claimants' PO27 ¶¶12, 25 (excerpts transcribed).

[53] *E.g.*, Interview May 28, 2009 (C-900) at 8 (Minister of Environment Barbu: "[I]t is not a political project, it is a project that must be technically evaluated."); Interview Jan. 14, 2010 (C-851) at 1 (Minister of Environment Borbély: "[Roşia Montană] has nothing to do with politics …. It's a technical decision.").

September 2010 and there were only two minor chapters of the EIA Report left to review.[54] Therefore, the Ministry of Environment shared with RMGC in September 2011 a list of "last issues,"[55] and Prime Minister Boc specifically mandated Minister Ariton to negotiate a better deal as a matter of urgency.[56]

47. Thus, by September 2011, the Government took action consistent with its public statements. Contrary to Mr. Boc's incredible testimony that every governmental mandate was urgent and that the financial crisis motivated him to instruct Minister Ariton in September 2011 to renegotiate, every mandate is obviously not urgent and Romania by then had turned the corner on the financial crisis as Mr. Boc let slip during a moment of candor.[57] With the TAC poised to complete its review favorably, the Ministry of Environment would soon have needed to recommend and the Government to approve issuance of the critical EP for the Project. Prime Minister Boc and the ruling coalition acted to exert maximum pressure on Gabriel to renegotiate the State's interest and to preserve the Government's ability to make a final political assessment on the desirability of the Project.[58]

48. Respondent contends that Claimants were eager to renegotiate because they purportedly recognized the Project could not meet "the applicable environmental legal framework," and thus willingly offered the Government better economic terms in exchange for changes in the law and a "contractual guarantee of permitting."

49. Respondent's argument is nothing more than a variation of its thoroughly discredited position that Claimants invited themselves to Bucharest in September 2011 to make a

[54] Claimants' Opening-2019 vol.4:3.

[55] *Id.* vol.4:4-6; *infra* §IV.

[56] Claimants' Opening-2019 vol.3:21-24.

[57] Claimants' PO27 ¶13 n.24.

[58] Claimants' PO27 ¶¶11-14, 107-108; *infra* ¶62. It is no accident that the Boc Government commenced the illegal course of conduct in August 2011. The singular importance of the EP is undeniable. Henry ¶62; Tr.(Oct. 1, 2020)916:15-917:5 (Jeannes-Redirect); Tr.(Oct. 1, 2020)814:11-20 (Cooper-Cross); Tr.(Oct. 3, 2020)1297:1-5 (Spiller-Tribunal); McCurdy ¶50.a (Respondent's expert confirming EP is "key milestone"); *infra* §X.H.1 ("permit bump" evidence); Henisz ¶¶38-41 (opponents resigned to defeat in early 2012 when it appeared EP would be issued); Claimants' Opening-2019 vol.6:24-25, vol.5:29-30, 50-51 (senior officials, including Prime Minister Ponta, equating issuance of EP with Project implementation). The evidence shows that another reason motivating the Government to make its demands in August 2011 was the then-prevailing high gold prices. Claimants' Opening-2020 vol.1:11-12.

general Project presentation and in that context offered to renegotiate. Claimants' rebuttal documents [redacted] leave no doubt that the Government summoned Gabriel to the Ministry of Economy to renegotiate, and that Gabriel went there on September 27 and 29, 2011, because of the numerous public statements since August 1 linking the EP and Project implementation to a new economic deal and a favorable political assessment.[59] Claimants were motivated to offer to improve the State's interest for that reason alone, not to obtain amendments to the legal framework. Thus, although Claimants had long supported general amendments to the Mining Law, they did not "renegotiate" until coerced into doing so in September 2011.[60]

50. This reality is also evident in the course and content of the "negotiations" themselves, which Claimants have explained previously at length.[61] Contrary to Respondent's characterization of a willing commercial give and take, the renegotiations were a one-way street in which Gabriel consistently bid against itself in an unsuccessful effort to meet Prime Minister Boc's evolving demands.[62]

51. As explained by Mr. Henry, Gabriel believed the existing economic terms were already favorable to the State. For that reason, and because of fiduciary duties to Gabriel's shareholders, Gabriel could not simply give away shares or royalties and obtain nothing in return,[63] which Minister Ariton acknowledged at the time.[64]

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[59] Claimants' PO27 ¶13 and nn.24-26; Claimants' Opening-2019 vol.3:20-27.

[60] Respondent wrongly argues that the absence of public protests by Gabriel to the Government's demands meant Gabriel was pleased to renegotiate. [redacted] Tănase-II ¶79; Tănase-III ¶¶11-12; Henry ¶25; Henry-II ¶¶13-14; Tr.(Dec. 4, 2019)838:16-839:13, 874:16-875:10, 892:1-3 (Tănase-Cross); Tr.(Dec. 3, 2019)582:15-583:11, 586:1-10 (Henry-Direct). That Gabriel had to reflect the State's demands in written "offers" to the Government did not mean Gabriel and RMGC were driving the renegotiations. Tr.(Dec. 3, 2019)587:10-22, 588:14-19 (Henry-Direct).

[61] Claimants' Opening-2019 vol.3:28-75; Claimants' PO27 ¶¶15-27; Reply §II.

[62] Claimants' Opening-2019 vol.3:74 (overview of forced renegotiation in 2011-2012); [redacted]

[63] Tănase-III ¶15; Tănase-II ¶¶91-92, 106; Henry-II ¶27; Henry ¶47.

[64] [redacted]

52. To that end, in its opening "offer" of October 5, Gabriel proposed increasing the State's shareholding from 19.3% to 22.5% if and when certain milestones in the form of conditions precedent were achieved, including the passage of long-pending general amendments to the Mining Law and the receipt of construction permits.[65] Contrary to Respondent's characterization, Gabriel did not seek guaranteed permitting. Under Gabriel's proposal, the State was not obligated to permit anything. The proposal made clear that the parties were only to make "best efforts" to fulfill the conditions precedent, and that Gabriel was not seeking any preferential treatment in permitting.[66] [redacted].[68]

53. With the expected last TAC meeting scheduled for November 29, 2011, and with Ministers Hunor and Borbély having stated publicly they would not proceed further with permitting without a renegotiated deal,[69] Gabriel dropped the conditions precedent and offered the same 22.5%, asking in return only an undertaking that the State would not seek further shareholding increases.[70] Prime Minister Boc rejected that proposal too and insisted through Minister Ariton on "25 and 6" ahead of the November 29, 2011 TAC meeting.[71]

[65] 2019 vol.3:33-34 (explaining proposal expressly stated that any legislative changes were *not* directed specifically to the Project). Contrary to Respondent's contentions, at no time did Gabriel or RMGC seek a special law for the Project. [redacted]

[66] Claimants' Opening-2019 vol.3:34.

[67] [redacted] *See also* [redacted]

[68] Claimants' Opening-2019 vol.3:35-39.

[69] Claimants' PO27 ¶¶12, 15-16; Claimants' Opening-2019 vol.3:6-7, 10-13, 18-19, 38-39.

[70] Claimants' PO27 ¶17; Claimants' Opening-2019 vol.3:40.

[71] Claimants' PO27 ¶¶17-19; Claimants' Opening-2019 vol.3:41-51.

54. The Government did not accept Gabriel's proposal in response to the "25 and 6" demand, which Gabriel made on November 30 and formalized on December 5.[72] Respondent's suggestion that the Boc Government "settled" for Gabriel's December 5 conditional offer of "25 and 6" is false. The Government did not accept the conditions Gabriel attached to reaching "25 and 6," and soon demanded in addition to "25 and 6" a 50-50 profit split over a certain production threshold.[73] Because the new demand for a 50-50 profit split blows up their false narrative that a deal was reached at "25 and 6" as of November 30, neither Mr. Boc nor Mr. Ariton bothered to mention that new demand in their witness statements. Mr. Ariton acknowledged the 50-50 demand during cross-examination.[74] Contrary to his misleading witness statement and to the false witness statement and hearing testimony of Mr. Boc, at the hearing Mr. Ariton also admitted that there was no agreement between Gabriel and the Boc Government to increase the State's interest on November 30, December 5, or at any time thereafter.[75]

55. As no agreement had been reached, the Government continued throughout December 2011 to make clear that, absent an agreement, the Government would not complete the process to issue the EP. Thus, in public statements between December 18 and December 27, 2011, Minister of Environment Borbély and Minister of Culture Hunor underscored the lack, and continuing importance, of a renegotiated economic agreement to moving forward with the EP and the Project.[76]

56. It was clear that without an agreement the Government would hold up permitting even though the few items identified as open at the November 29, 2011 TAC meeting were

[72] Claimants' PO27 ¶¶21-22; Claimants' Opening-2019 vol.3:52-65.

[73] Claimant's PO27 ¶22; Claimants' Opening-2019 vol.3:61-65.

[74] Tr.(Dec. 9, 2019)1933:7-17 (Ariton-Cross).

[75] *Id.* at 1925:17-1926:20 (Ariton-Cross) (admitting that because the November 30 offer was conditioned on matters not yet defined in that offer, the Government could not then fully assess it); *id.* 1933:1-17 (Ariton-Cross) (admitting the Government did not agree to accept the December 5 proposal presented by Gabriel and made a new demand); *id.* 1933:18-1937:17 (Ariton-Cross) (confirming Gabriel's January 2012 draft agreement met the Government's demands, except the Government wanted to amend the provision linking transfer of the final 1% of shares to issuance of the final construction permit).

[76] Claimants' PO27 ¶25; Claimants' Opening-2019 vol.3:66-71 (videos in PowerPoint). In a further pressure tactic, on December 27, 2011, the Government announced an increase of the royalty for precious metals from 4% to 8%, which it did not implement. *Id.* vol.3:72.

addressed.[77] Gabriel therefore made another revised "offer" to the Government in January 2012 that addressed the Government's demands for both "25 and 6" and a 50-50 profit split.[78] As Mr. Ariton admitted, the Boc Government did not accept this revised offer before it fell.[79] It therefore did not reach the point of making the political decision whether to allow the Project to proceed.[80]

57. Likewise, the short-lived Ungureanu Government that followed from February-April 2012 neither altered the policy of the Boc Government regarding the Project nor accepted Gabriel's January 2012 offer. Respondent's argument that "absence of action" by the Ungureanu Government means it did not continue the Boc Government's policy is not well-taken. Given the public pronouncements by the Boc Government and the continuing service of Ministers Borbély and Hunor in the Ungureanu Government, the Ungureanu Government clearly did not depart from the course set in August 2011. As Mr. Bode admitted, he was aware of the earlier negotiations, and neither he nor anyone else in the Government removed the conditions for improved economic terms and a political decision, conveyed a different position to Gabriel/RMGC, or accepted the terms of the January 2012 offer presented to it.[81]

58. The Ponta Government that took office in May 2012 expressly maintained the unlawful requirements of an improved economic deal and a favorable political decision for the EP to issue and the Project to proceed.[82] He also expressly declared in June 2012 that his Government would not address the Project until after year-end national elections in 2012.[83]

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[77] Claimants' PO27 ¶26; *infra* §IV (for why the lawful criteria for issuing the EP were met or would have been meet soon after the November 29, 2011 TAC meeting but for the Government's illegal conduct).

[78] Claimants' PO27 ¶26; Claimants' Opening-2019 vol.3:73-74.

[79] Tr.(Dec. 9, 2019)1933:18-1937:14 (Ariton-Cross); Ariton ¶114; Claimants' PO27 ¶27.

[80] Claimants' PO27 ¶109.

[81] Claimants' PO27 ¶28; Claimants' Opening-2019 vol.3:75.

[82] *Infra* §V.

[83] Claimants' PO27 ¶¶29-30, 110-111; Claimants' Opening-2019 vol.3:76-78. Mr. Ponta's arbitration "statement" claims that throughout his tenure as Prime Minister in 2012 he was "unaware of the negotiations that apparently took place in the fall of 2011 and early 2012 between Gabriel/RMGC and the Ministry of Economy." Ponta ¶23. This unexamined statement is not credible. Respondent does not even try to explain how in 2012 Prime Minister Ponta could have been in the dark about the existence of prior renegotiations and

59. The evidence thus unquestionably shows that at all relevant times beginning in August 2011 the Government maintained the unlawful requirements for issuance of the EP and Project advancement of an improved economic arrangement for the State (which did not happen in 2011-2012) and a favorable political decision by the Government and its ruling coalition (which never happened). Even after Gabriel and the Ponta Government agreed in principle to a revised economic arrangement in 2013, the Government made the agreement subject to Parliament's vote on the Special Law, thus underscoring the improper political dimension of the Government's demands.[84]

60. Respondent argues that Claimants allegedly have failed to explain the political motives that united successive Governments in pursuit of this policy with respect to the Project.[85]

61. Claimants are not required to prove the State's motive for engaging in the course of conduct to establish a breach of the BITs.[86] This is particularly true where, as here, there is overwhelming evidence showing what the State policy was towards the Project and how the State implemented it, with ultimately fatal consequences for Claimants' investment.

62. Claimants nonetheless have explained what the evidence shows about the political motivations underlying the Government's approach to the Project:

a. Mr. Boc: Mr. Boc had been the Mayor of Cluj, a university center with no mining tradition that was an epicenter of anti-mining views and anti-Project activism.[87] He and his wife were on the university faculty.[88] As Mayor of Cluj, Mr. Boc said

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at the same time declared that his approach "remained unchanged" from that of the prior Government to require increased royalties and shares as "mandatory" conditions for the Project to proceed.

[84] *Infra* §V; Claimants' PO27 ¶42. The required improved economic arrangement was meant to serve the political interests of those in power. Claimants' PO27 ¶14.

[85] Respondent misleadingly references eleven Governments in the period 2011-2020. All but the Boc, Ungureanu and Ponta Governments began their terms after commencement of this arbitration in July 2015 when the Project was dead.

[86] Memorial §§X-XIV; Reply §§VIII-XII.

[87] Tr.(Dec. 7, 2019)1728:1-4 (Boc Cross). *See also* Lorincz-II ¶119; Pop ¶¶67-75; Stoica ¶63.

[88] Boc ¶3.

in 2006 that "[i]f it were up to me, I wouldn't endorse this project."[89] This public anti-Project stance was not based on any "specialist" analysis, as RMGC did not submit the EIA Report until 2006.

By August 2011, with the favorable end of the EIA Process in sight, the Ministry of Environment would soon have to endorse, and Prime Minister Boc would be required to approve, the Government Decision to issue the EP. At the time, Mr. Boc was a deeply unpopular politician leading a Government with dismal approval ratings.[90] His best and likely only chance for a political future was back in Cluj.[91] In an effort to keep his political options open, and consistent with his public political view since he was Mayor of Cluj, Prime Minister Boc announced his dislike of the Project, denigrated the existing economic deal, and led the chorus of calls for a renegotiation of the State's interest that he said would inform his political "point of view" as to whether the Project would move forward.

After resigning in January 2012 due to mass protests against his unpopular Government, he returned to Cluj and promptly won another term as Mayor, a position he has held since June 2012. It is obvious that a professional politician like Mr. Boc would have known that approving the Project would not have been popular in Cluj. Whether he ever would have accepted any terms in the renegotiation and allowed the Project to proceed in view of his public anti-Project stance and life and political career in Cluj is unknown. What is known, however, is that in addition to the policy his Government adopted beginning in August 2011

[89] Claimants' PO27 ¶11 n.10; [redacted]

[90] Tr.(Dec. 13, 2019)3217:17-3219:1 (Stoica Cross) (confirming his December 2011 survey found 84% of Romanian respondents felt things were going in the wrong direction and only 11% said the direction was good); *id.* 3219:2-3220:1 (Stoica Cross) (confirming support for Mr. Boc and his political party was only 19%).

[91] Tr.(Dec. 7, 2019)1729:2-5 (Boc Cross) ("[W]e had to take the severe austerity measures, to cut the salaries and pensions of 25 percent. On that moment, I said, 'My political career, it's over ....''); *id.* 1740:4-5 (Boc Cross) ("[I]n 2011, we had austerity measures … and we had a hundred thousand people on the streets."); New York Times Feb. 6, 2012 (C-2655) at 1 (reporting Prime Minister Boc resigned "[a]fter weeks of protests" and "a mood of public outrage," and that "the government had fallen below 20 percent approval rating"); (Stoica-28) at 1 (Stoica observing in 2012 that "the Romanian protests have generated a series of political changes which culminated in the resignation of the Prime Minister Emil Boc and his cabinet").

regarding the Project, Mr. Boc's wife, his former Minister of Economy Videanu, and President Băsescu all confirmed publicly that, as Prime Minister, Mr. Boc fought against the Project.[92]

b. Messrs. Borbély and Hunor: Minister of Environment Borbély and Minister of Culture Hunor were senior members of the UDMR ethnic Hungarian minority political party that was part of the ruling coalition in the Boc and Ungureanu Governments. In line with Hungary's opposition to the Project,[93] UDMR had previously announced its opposition to the Project and promoted a ban on using cyanide in mining, which was intended to block the Project.[94] Minister Borbély and Minister Hunor made clear in late 2011 that UDMR needed to make its own political decision whether to green-light the Project and accept the "political cost."[95] Minister Borbély wanted to "keep [his] head up high before Hungary."[96] Ministers Borbély and Hunor thus followed Prime Minister Boc's lead not only because they were members of his Cabinet and ruling coalition, but for their own party-related political reasons.

c. Mr. Ponta: Prime Minister Ponta's main political rival, President Băsescu, supported the Project. While he was an opposition leader in 2011-2012, Mr. Ponta had repeatedly (falsely) accused President Băsescu of accepting bribes from RMGC.[97] In the circumstances, Prime Minister Ponta could not allow himself or

[92] Claimants' PO27 ¶27 n.68.

[93] Hungary opposed the Project without even awaiting the results of any trans-boundary expert assessment of the Project. Memorial ¶¶245-249. Whether this Hungarian opposition stemmed from historical claims to the region in Transylvania where the Project was to be developed (C-225 at 11-12), or to unfounded comparisons between the state-of-the-art Project and the antiquated and failed State-run operation at Baia Mare, is not relevant. What is relevant is that for political reasons, UDMR was influenced by the anti-Project position taken by Hungary.

[94] Memorial ¶¶258-260.

[95] Claimants' PO27 ¶¶12.l, 25.a, 25.b, 25.d.

[96] *Id.* ¶25.d.

[97] Boutilier slides 17-19; Claimants' PO27 ¶29 and n.78; Tănase-III ¶66 and n.211; Interview Sept. 11, 2013 (C-437) at 2 (Prime Minister Ponta: "I was against the Roşia 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.").

his Government to be seen as approving the Project. He and his Government therefore made clear that Parliament would decide the future of the Project through its vote on the Special Law on which he insisted.[98]

Because he and his Government acknowledged that all of the legal requirements for the EP were met, Prime Minister Ponta adopted the tortured position of endorsing the Project on legal and technical grounds in his capacity as Prime Minister, and opposing it politically as a member of Parliament and as leader of the Social Democratic party.[99] Ministers Barbu (Culture), Plumb (Environment), and Şova (Large Projects) likewise endorsed the Project's legal and technical merit, but towed the political line when it came to voting on the Special Law as members of Parliament, knowing the vote would determine the Project's fate.[100]

d. Regardless of the positive support for the Project shown in local, regional, and national polls between 2011 and 2013,[101] Romania's political and governmental leaders chose to support a policy of arbitrary political expediency in disregard of Gabriel's legal rights and legitimate expectations in relation to its joint-venture with the State and its enormous investment in RMGC and the Project.

[98] *Infra* §V.

[99] Claimants' Opening-2019 vol.5:26-27, 36-37, 48-51, 60-64, vol. 6:24-25, 50, 52-53.

[100] *Id.* vol.5:52-54, vol. 6:19-20, 22, 28-31, 36-41, 43, 47-48. In fact, none of them voted in favor of the Special Law despite their testimony that the Project met the applicable requirements. *Id.* vol.6:54.

[101] *Id.* vol.4:91-98; Claimants' PO27 ¶¶127-141; Reply §IV.A; Boutilier slides 26-42.

IV. THE GOVERNMENT BLOCKED PERMITTING FROM BEING COMPLETED IN 2011-2012 BECAUSE IT FAILED TO REACH A RENEGOTIATED ECONOMIC DEAL AND MAKE A POLITICAL DECISION ON IMPLEMENTING THE PROJECT

63. The evidence demonstrates that by early 2012 the Ministry of Environment should have recommended issuance of the EP. It did not do so then or thereafter because the Government blocked the permitting process for purely political reasons, before deciding in September 2013, again for political reasons, not to do the Project at all.[102]

a. Leading up to what should have been the final TAC meeting on November 29, 2011 before the Ministry of Environment took a decision to recommend issuance of the EP, the Ministry of Environment identified all remaining issues in the EIA review process and RMGC addressed them.[103] RMGC therefore reasonably expected that the November 2011 TAC meeting would be "the last TAC meeting."[104]

b. The November 2011 TAC meeting demonstrates it was expected to be the last.[105] The TAC completed review of the EIA Report; each TAC member confirmed its satisfaction with RMGC's answers to the final questions and/or raised no further questions or objections; officials made repeated statements about drafting conditions for the EP; and TAC President Anton repeatedly said that the technical assessment was "finalized," that the EIA checklist would be circulated that day,

[102] Claimants' Opening-2019 vol.4; Claimants' PO27 ¶¶11-33; Memorial ¶¶352-366, 381-394, 414-448; Reply §III.

[103] Claimants' Opening-2019 vol.4:2-7; Reply ¶41.a-h.

[104] Claimants' Opening-2019 vol.3:38-39; Claimants' PO27 ¶16 and n.30.

[105] [redacted] Respondent wrongly contends Claimants have "withdrawn" this evidence of political interference and "failed to mention" it at the hearing. Claimants observed the evidence is consistent with what [redacted] because making sure the TAC would have to meet again maintained pressure on Gabriel to make financial concessions and gave the Boc Government time to make its political assessment. Tr.(Dec. 2, 2019)152:7-20 (Claimants' Opening). *See also* Reply ¶¶43-49. Political blockage and interference are the only reason the EP was not issued.

and that after "three details" were addressed, the TAC would meet "for a final decision" on whether to issue the EP.[106]

c. Contemporaneous communications show RMGC understood the technical assessment was completed and that it expected a prompt decision on the EP.[107]

d. The few "details" identified at the November 2011 TAC meeting were promptly addressed, including the Ministry of Culture's Point of View, which was its "endorsement" to issue the EP.[108] The Ministry of Environment therefore had to take its decision on the EP.[109]

e. The Government did not accept any of the "offers" presented in response to its economic demands or make a political decision on the Project, and so the Government did not allow the permitting process to come to conclusion. In a clear pretext to avoid having to take any decision, the Ministry of Environment refused to accept without confirmation, and the Ministry of Culture refused to confirm, that the Ministry of Culture's Point of View was its "endorsement."[110]

f. That the Government unlawfully conditioned issuance of the EP on economic and political criteria cannot be credibly contested. While Minister of Environment Borbély repeatedly confirmed in late November and December 2011 that a final decision on the EP would be taken in one or two months "maximum," he and

[106] Claimants' Opening-2019 vol.4:8-23; Reply ¶41.i-l. Respondent argues the TAC President "is not a member of the TAC and does not issue opinions or participate in the decision-making process" and "merely organizes and presides the meetings." In fact, the TAC President is the Ministry of Environment's State Secretary responsible for environmental protection and its authorized representative in the TAC. *See* Tr.(Dec. 9, 2019)1982:2-8 (Mocanu-Cross) (acknowledging TAC members are represented at the level of State Secretary and State Secretaries participate in the decision-making meetings); Mihai ¶84; TAC Regulation (C-564) Art. 7(1)(d). The TAC's clerical tasks were handled by Ms. Mocanu's department in the Ministry of Environment, which functions as the TAC's secretariat. (C-564) Arts. 5, 8. Respondent's assertion that Mr. Anton was "not a technical expert" is also incorrect. Mr. Anton is a trained chemical engineer. TAC meeting transcript (C-483) at 12-13.

[107] Claimants' PO27 ¶20; Claimants' Opening-2020 vol.4:25.

[108] Claimants' Opening-2019 vol.4:24-31.

[109] Claimants' PO27 ¶24.

[110] Claimants' Opening-2019 vol.4:32-39; Claimants' PO27 ¶25.

Minister of Culture Hunor also made clear that the decision would not be taken until after the Government increased its economic interest in, and decided politically whether to implement, the Project.[111]

g. In February, March, and April 2012, TAC President Anton repeatedly confirmed that all the EIA Report chapters had been analyzed, that the process was in "the final stage," and that the Ministry of Environment was only waiting for the Ministry of Culture to confirm its endorsement.[112]

h. Government officials thereafter repeatedly acknowledged that the technical assessment had been completed at the November 2011 TAC meeting, that a decision on the EP needed to be taken, and that the only reason the Ministry of Culture failed to confirm its endorsement before 2013 was political blockage.[113]

64. Prime Minister Ponta continued the Boc Government policy regarding the Project but imposed a political moratorium on Project-related decision-making in 2012 until after the year-end parliamentary elections.[114] Indeed, to the extent the authorities needed to review and approve RMGC's updated Waste Management Plan or considered it advisable to prepare a further research proposal for Orlea or take a Government Decision declaring the Project to be of outstanding public interest, the evidence shows the only reason this did not happen in 2012 was political blockage.

65. As summarized below, when it re-engaged on the Project in 2013, the Ponta Government confirmed that there were no legal impediments to issuing the EP, swiftly resolved all alleged issues, and confirmed the legal requirements for the Permit were met. Because

[111] Claimants' Opening-2019 vol.3:66-71 (videos in PowerPoint); Claimants' PO27 ¶25; Claimants' Opening-2020 vol.4:21-25.

[112] Claimants' PO27 ¶32(b); Claimants' Opening-2019 vol.4:35-37 (videos in PowerPoint).

[113] Claimants' PO27 ¶32; Claimants' Opening-2019 vol.4:38-52, 77-79.

[114] Claimants' PO27 ¶¶29-33; Claimants' Opening-2019 vol.3:76-78.

nothing material had changed about the Project since the end of 2011, these events confirm that the delays in 2011-2012 were pretextual.[115]

a. In a report approved by the Government, the Inter-Ministerial Commission that was convened in March 2013 determined that the permitting process "stagnates since November 2011," that "there are no impediments or significant obstacles" or objections to implementing the Project, and that the Ministry of Environment "can issue the Environmental Permit and any other details can be solved along the way."[116]

b. At its meeting on May 10, 2013, the TAC confirmed that it had determined in November 2011 that the EIA Report met the applicable requirements, and within two hours, it further confirmed that it had analyzed each purportedly open issue "point by point."[117]

[115] Claimants' PO27 ¶¶40-45; Claimants' Opening-2019 vol.4:76-90; Reply §III.B.

[116] Claimants' PO27 ¶32(f); Claimants' Opening-2019 vol.4:42-47. Respondent repeats its baseless assertion that the Inter-Ministerial Commission prepared its report with "limited information." In fact, the Inter-Ministerial Commission was comprised of many of the same Government authorities represented by many of the same officials who participated in the TAC in 2010-2011, including Ministry of Environment officials Pătraşcu, Pineta, and Constantin, Ministry of Development official Ginavar, NAMR official Hârşu, and Ministry of Culture official Angelescu. Memorial ¶¶414-418; Tănase-III ¶¶73-85. Respondent tries to minimize the importance of the Inter-Ministerial Commission's conclusions by arguing the Commission's report was a "non-binding informative note." The Commission, however, comprised key Government experts and the Government approved and thus endorsed the report's conclusions. The numerous subsequent statements by senior Government officials that the Project satisfied legal requirements for permitting and Government conduct consistent with those statements (e.g., obtaining from the TAC members and publishing for comment proposed conditions for the EP, and sending the Special Law to Parliament, which the Government said would occur only if the Project met permitting requirements), confirm the conclusions of the Inter-Ministerial Commission.

[117] Claimants' PO27 ¶32.g and n.92; Claimants' Opening-2019 vol.4:78-82. None of the allegedly open issues had been identified as such at the November 2011 TAC meeting. Claimants' Opening-2019 vol.4:80-81. The Government sought to put a fig leaf over the TAC's 18-month failure to meet and finalize its work by coming up with a few additional issues to address, which it did in a matter of hours at its May 10, 2013 meeting. Even assuming these issues were necessary to address to inform a decision on the EP, there is no reason other than wrongful political blockage that they were not addressed by early 2012.

c. From May to July 2013, the Ministry of Environment reconfirmed that the technical assessment was complete,[118] directed each TAC member to submit conditions and measures that "will be included in the final decision and in the environmental permit,"[119] considered and published draft Permit conditions,[120] declared again at a final TAC conciliation meeting "that the analysis on the quality and conclusions of the EIA Report has been finalized" and that the next meeting would be for "taking the decision,"[121] and prepared a draft Decision accepting the EIA Report and proposing issuance of the EP.[122] Thus, over the

[118] Claimants' Opening-2019 vol.4:83. *See also* Inter-Ministerial Group May 28, 2013 (C-1404.02) at 2 (TAC President Dumitru stating "a decisional meeting" on the EP could be scheduled a "few days" after the May 31, 2013 TAC meeting).

[119] Claimants' Opening-2019 vol.4:84.

[120] *Id*. vol.4:85. Respondent wrongly contends the Ministry of Environment did not publish draft EP conditions and did not get to the point of "deciding which conditions" to impose. In fact, the Ministry of Environment requested (C-554 and C-481 at 11) and the TAC members submitted letters proposing conditions, impact mitigation measures, and monitoring indicators to include in the EP. Avram ¶141 n.273; Avram-II ¶66 n.177. In its July 2013 public consultation note, the Ministry of Environment confirmed that its "proposal for measures and conditions on the issuance of the Environmental Permit" was elaborated, among other things, after "consulting and writing down the opinions of the Technical Assessment Committee (TAC)." (C-555) at 1; *id.* at 2 (taking into account the "points of view, measures and conditions" "as well as the final conclusions of the [regulatory] institutions represented within TAC," and explaining the Ministry of Environment initiated the public consultation to "1. Complete the decision-making phase; 2. Accept the final Report on the Environmental Impact Assessment Study submitted by the titleholder during the Environmental Impact Assessment procedure; [and] 3. Elaborat[e] the Decision for the issuance of the environmental permit by the Romanian Government for the Roşia Montană Mining Project"); Ministry of Environment Website (C-1751) at 6 (confirming it initiated "a public consultation on the conditions and measures to be included in the Environmental Permit for the Roşia Montană Project.").

[121] Claimants' Opening-2019 vol.4:86-87; Claimants' PO27 ¶40 n.128 (explaining this conciliation meeting was the last step to taking a decision, there is no requirement of unanimity within the TAC, the views of the TAC members are merely consultative, the decision belongs to the Ministry of Environment, and Respondent repeatedly refused to answer the Tribunal's questions as to the meaning of "consensus"); EIA Rules of Procedure (C-1774) Art. 30(3) (providing that, if TAC members express divergent views, the Ministry of Environment convenes a conciliation meeting "before issuing the final decision"); TAC June 23, 2010 (C-565) at 2 (decision on issuing EP "shall be made by common agreement," and the "TAC can have dissenting opinions that will be recorded"). Respondent notes the TAC President stated at the conciliation meeting "that the ongoing public consultation could result in observations from the public that would need to be reviewed." The deadline for public comment was July 30, 2013. The Ministry of Environment did not identify any public comments that required further discussion. Avram-I ¶¶142, 147-149.

[122] Claimants' Opening-2019 vol.4:88-89 (C-2075); Claimants' PO27 ¶40 n.129 [redacted]

span of two months of the TAC resuming meeting, the Ministry of Environment confirmed that the Project met the legal requirements for the EP.[123]

d. Prime Minister Ponta confirmed that the Project "met all the conditions required by the law" and, consequently, that he was "obligated under the law … to give approval and the Roşia Montană project had to start"[124] and, further, that "we should, under the current laws, issue the environmental permit and the exploitation should begin."[125]

e. Minister of Environment Plumb repeatedly stated that the Project, if implemented, would be "the safest project of Europe," and that it met "all requirements under the European and not only, international environmental standards."[126]

f. Minister of Culture Barbu said he was "convinced that on the heritage side the project is absolutely fine. None of the national laws or international provisions on best practices for the preservation of heritage will be violated."[127]

g. Minister Şova stated that the Project "complies with environmental requirements and with all the other requirements and should be done."[128]

h. A parade of Government officials testified to Parliament that the Project met all applicable legal requirements, including Minister of Environment Plumb,[129] Minister of Culture Barbu,[130] the TAC Vice President,[131] and many others.[132]

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[123] The Government repeatedly emphasized it would submit a draft Special Law to Parliament only if the Project met all of the applicable environmental and cultural heritage requirements for permitting. The Government's submission of the Draft Law to Parliament thus confirmed yet again that the Project met those requirements. Claimants' PO27 ¶¶37, 42.

[124] Claimants' PO27 ¶44; Claimants' Opening-2019 vol.5:50-51 (video).

[125] Claimants' PO27 ¶50(b); Claimants' Opening-2019 vol.6:24-25 (video)("normally, under current laws, I should issue the permit, as should have done the other governments.").

[126] Claimants' PO27 ¶45; Claimants' Opening-2019 vol.5:52-53. Claimants' Opening-2019 vol.6:55-56 (Minister Plumb confirming the Ministry of Environment "set the highest environmental standards to protect people, to mitigate the risks of such an investment, fully observing all the European and international criteria and standards for this type of investment").

[127] Claimants' Opening-2019 vol.6:30-31.

[128] *Id.* vol.6:28-29 (video).

66. If decision-making for Project permitting had been governed by law, not by politics, the Ministry of Environment would have proposed issuance of the EP in early 2012 and the Permit would have been issued promptly by Government Decision signed by the Prime Minister. Instead, the Government disregarded and violated the applicable legal framework by unlawfully conditioning the Permit on a political decision-making process.[133]

67. Respondent maintains that the Ministry of Environment was "nowhere near" making a decision on the EP after the November 2011 and July 2013 TAC meetings, that the permitting process was "ongoing" throughout 2012 and at all times thereafter, and that RMGC has not met the requirements to obtain the EP "to this day." Respondent thus asks the Tribunal to believe that all of the Romanian officials who stated repeatedly that all issues were addressed and/or that the Project met permitting requirements were either uninformed, misinformed, or acted beyond their competence. Respondent's arguments are at war with the overpowering record of evidence.

68. Seeking to shield its baseless narrative from even greater scrutiny, in addition to larding up its Rejoinder and later submissions and testimony with new arguments, Respondent chose not to submit testimony from any Minister of Environment,[134] any Ministry of Environment State Secretary who presided over the TAC,[135] anyone from any Ministry of Environment department responsible for the water, waste management, or other issues Respondent raises in this arbitration,[136] anyone from the Ministry of Culture,[137] or anyone from

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[129] *Id.* vol.6:19-20.

[130] *Id.* vol.6:37-38.

[131] *Id.* vol.6:42.

[132] *Id.* vol.6:18, 36; Claimants' PO27 ¶50.

[133] For the same reason, the Ministry of Culture failed to correct and update the 2010 LHM to reflect and align with ADCs issued for the Project. *Infra* §IV.B.2.

[134] E.g., Laszlo Borbély (2009-2012), Attila Korodi (2007-2008, 2012, 2014), Rovana Plumb (2012-2014), and Gratiela Gavrilescu (2014-2015). The Tribunal excluded from the record a letter signed by Ms. Gavrilescu that Respondent refused to resubmit as a witness statement. Tribunal Letter Sept. 24, 2019.

[135] E.g., Marin Anton (2010-2012), Elena Dumitru (2013-2014), and Mihail Fâcă (2014-2015).

[136] With the Memorial, Claimants specifically identified, e.g., Ministry of Environment officials Gheorghe Constantin (Water Department), Mihai Bizomescu and Ionut Georgescu (Waste and Hazardous Substances Management Department), and Mureş Water Basin Administration officials Lucia Brustur and David Csaba. Avram-I ¶¶115-118; Tănase-II ¶¶68-70.

the State water authority (ANAR). Respondent did not present *any witness* with decision-making authority on environmental permitting issues. Respondent's *sole* witness from the Ministry of Environment, Ms. Mocanu, did not have decision-making authority. She reported to TAC President Anton from September 2009 to June 2012, and admits she was not involved in the EIA Process between June 2012 and June 2014.[138]

69. As a further indication that Respondent's arguments have no merit, Respondent failed to produce *any documents* in response to the Tribunal's orders to produce all documents identifying, *inter alia*, (i) legal requirements that RMGC allegedly failed to meet that allegedly prevented a decision on the EP, (ii) conclusions of the Ministry of Environment, the Ministry of Culture, or the TAC that the EIA Report failed to meet applicable standards, (iii) the Ministry of Culture's response, if any, to the Ministry of Environment's requests to confirm its endorsement, and (iv) the Ministry of Culture's reasons for failing to finalize its endorsement in 2011-2012.[139]

70. The Tribunal should therefore bear in mind the evidence that Respondent has not submitted in evaluating the credibility of the arguments and evidence Respondent has presented.

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[137] E.g., Ministers of Culture Kelemen Hunor (2009-2012, 2014) and Daniel Barbu (2012-2013), and TAC representatives Csilla Hegedus, Emilian Gamureac, Daniel Chereces, Mircea Angelescu, and Vasile Timiş.

[138] Claimants' PO27 n.488; Mocanu ¶¶11, 16.

[139] PO10 Annex A, Claimants' Requests Nos. 3, 4, 8(i), 8(iii); Reply ¶¶54, 71. With its Rejoinder, Respondent belatedly submitted three Ministry of Environment letters to Parliament and third parties (R-469 to R-471) and [redacted] (R-472), [redacted]. The letters do not identify any alleged open issue or any need for further information from RMGC. They state that the "last request for information" was sent to RMGC in September 2011 and that the EIA procedure "is underway and will be finalized after a complete, careful and thorough analysis of all documentation by all decision-makers." (R-470) at 2; (R-469) at 3; (R-471) at 1. Thus, the letters refer to the final TAC questions from September 2011 (R-215), which RMGC already had answered to the TAC's satisfaction. Claimants' Opening-2019 vol.4:6-7, 12-18. The Ministry of Environment's comment that the EIA review was "underway" and that its decision would be based on "thorough analysis" merely reflects that it did not formally close the EIA Process. [redacted] (R-472) at 5. The EIA checklist is the last administrative step before the decision on the EP is taken. Mihai-I ¶¶118-125; Mocanu-II ¶¶61, 66. The other issues mentioned in the briefing note are not described as impediments and are discussed below. *Infra* §§IV.A, IV.B.2.

A. Only Politics Prevented a Decision on the EP by Early 2012

71. Respondent raises three issues it claims prevented issuance of the EP: (i) the Ministry of Culture's endorsement; (ii) RMGC's waste management plan; and (iii) the Waters Law transposing the Water Framework Directive. These were not impediments to permitting; but for the Government's political blockage, any alleged issues would have been resolved by early 2012.

1. Ministry of Culture's Endorsement

72. The Ministry of Culture's December 2011 Point of View was the requisite endorsement for the EP. Due to the political blockage through 2012, the Ministry of Culture refused to confirm that and instead waited until 2013 to issue another endorsement.[140]

a. At the November 2011 TAC meeting, the Ministry of Culture confirmed that it had no further questions for RMGC and would submit "a *final* point of view."[141]

b. The Ministry of Culture submitted its Point of View on December 7, 2011. The title of the document being irrelevant under Romanian law,[142] the Point of View satisfied the legal requirement for an endorsement because it: (i) responded to the Ministry of Environment's request for a "point of view about the issuance of the environmental permit;" (ii) was based on the legal provision requiring the Ministry of Culture's endorsement to issue the EP; (iii) set conditions to include in the EP; (iv) confirmed that the Ministry of Environment may take its decision to issue the EP; and (v) was the same in substance as the April 2013 "endorsement" that Respondent concedes is valid,[143] including its treatment of

[140] Claimants' Opening-2019 vol.4:16, 26-39, 53-56; Claimants' PO27 ¶33 n.96; Memorial ¶¶365, 370-377; Reply ¶¶62-71.

[141] Claimants' Opening-2019 vol.4:16 (emphasis added). Early in the November 2011 TAC meeting, Ms. Mocanu described telling the Ministry of Culture to bring its "endorsement" "today in TAC." Avram-II ¶16. In a clear pretext to avoid finalizing the EIA Process that day, the Ministry of Culture said it needed more time because its State Secretary left the country and "did not tell us anything." (C-486) at 28.

[142] Claimants' Opening-2019 vol.4:30.

[143] *Id.* vol.4:27-30 (comparing C-446 and C-655). The endorsement provides that RMGC shall fulfill the conditions to be included in the EP. The endorsement is not "conditional" and does not mention the Cârnic ADC litigation as Respondent wrongly suggests.

Orlea (which also is mirrored in the draft EP conditions published in July 2013).[144]

c. Respondent admits that the Ministry of Culture failed to respond to the Ministry of Environment's requests to confirm its endorsement in 2011-2012.[145]

d. Respondent did not produce any document identifying the Ministry of Culture's reasons for failing to finalize in 2011-2012 two draft "endorsements."[146]

e. In a meeting with the Inter-Ministerial Commission in March 2013, the Ministry of Culture acknowledged that the only reason it failed to confirm its endorsement in 2011-2012 was political blockage, explaining that the Ministry of Environment "submitted a request under another government, other state secretaries in office and you received different answers. In short, if you ask for it now, you will receive it."[147]

73. Respondent argues the Ministry of Culture had "valid reasons" not to confirm its endorsement until April 2013 after it approved a report describing the preventive archaeological research to be conducted at Orlea.[148] It is evident upon review, however, that the Ministry of Culture's request for a research report for Orlea was a pretext to justify the long delay in confirming its endorsement.

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[144] Claimants' Opening-2019 vol.4:55; *infra* §IV.B.3.

[145] PO10 Annex A, Claimants' Request No. 8(i); Counter-Memorial ¶246. Ms. Mocanu wrongly referred to a draft (C-638) that was not finalized and not sent.

[146] PO10 Annex A, Claimants' Request No. 8(iii); Reply ¶71 n.153. Respondent cites an Alburnus Maior press release in April 2012 (R-240) purportedly quoting Minister of Culture Hunor stating "the avi[z] for the entire Roşia Montană perimeter cannot be issued." Assuming *arguendo* that quote is accurate, it does not state that the Ministry of Culture was unable to issue its endorsement of the EP. It also is consistent with the fact that an ADC for Orlea was needed before mining could begin there, which is one of the conditions included in the Ministry of Culture's December 2011 Point of View, in its April 2013 endorsement, and in the draft EP conditions published in July 2013. Claimants' Opening-2019 vol.4:55; *infra* §IV.B.3.

[147] Claimants' Opening-2019 vol.4:38-39.

[148] Respondent contends the TAC "expressed concerns regarding the uncertain status of Orlea and Cârnic" at meetings in 2010 and March 2011. However, in July 2011 the Ministry of Culture issued the Cârnic ADC, and the position of Orlea was the same in December 2011 as in April 2013 and thus could not have justified differential treatment. Claimants' Opening-2019 vol.4:55; *infra* §IV.B.3.

74. The preliminary archaeological research required by law to issue the EP had been completed for Orlea in 2000, and additional research was conducted from 2001-2006 as detailed in the preliminary assessment report presented to the Ministry of Culture in August 2011 and referenced in the Ministry of Culture's December 2011 Point of View.[149] NHMR had proposed a five-year plan in October 2006 to complete an "exhaustive investigation" of Orlea.[150] No contemporaneous document from 2011-2012 suggests – and no Ministry of Culture witness was presented to testify – that an additional preventive research proposal for Orlea was needed for the Ministry of Culture to issue its endorsement.

75. In February 2013, the Ministry of Culture requested a research proposal for Orlea. In response, NHMR simply dusted off and repackaged the research proposal that had been submitted to the Ministry in August 2011 in advance of the December 2011 Point of View, and re-presented it. The Ministry of Culture thereafter promptly submitted its April 2013 endorsement of the EP.[151]

2. Approval of RMGC's Updated Waste Management Plan

76. RMGC's waste management plan was submitted to the TAC, reviewed in the EIA Process, met applicable requirements and, but for the improper political hold-up of permitting, the updated Waste Management Plan would have been approved promptly in early 2012 as later occurred in May 2013.[152]

a. In September 2011, the Ministry of Environment asked RMGC to submit an updated Waste Management Plan to account for a then-recent change in regulations; RMGC did so in December 2011.[153]

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[149] Claimants' Opening-2019 vol.4:55; Schiau slides 14-17.

[150] Claimants' Opening-2019 vol.2:59; Gligor-I ¶¶66-70.

[151] Claimants' Opening-2019 vol.4:56.

[152] Claimants' Opening-2019 vol.4:57-61; Claimants' PO27 ¶33 n.97; Memorial ¶¶392, 427-428; Reply ¶¶81-82. *See also* Order 2042/2010 (R-216), Annex No. 1, Arts. 4(3)-(12) (providing 30 days for Plan approval).

[153] Claimants' Opening-2019 vol.4:58. Respondent asserts wrongly the Ministry of Environment requested an updated Waste Management Plan a year earlier at a TAC meeting in September 2010. The waste management regulation (Order 2042/2010) was not issued until November 2010 and did not take effect until 2011. Minutes of the September 2010 TAC meeting show the representative of the General Inspectorate for Emergency

b. NAMR endorsed the updated Plan in March 2012, but the Ministry of Environment delayed acting upon it and, in April 2012, requested additional information.[154]

c. RMGC responded promptly and NAMR again gave its approval, confirming that "all the issues raised by Ministry of Environment . . . have been addressed."[155]

d. The Ministry of Environment waited until July 2012 and again requested more information.[156] By that time, Prime Minister Ponta had publicly declared that nothing would happen regarding the Project until after the year-end elections.[157]

e. An official in the Ministry of Environment's Waste and Hazardous Substances Management Department, Mihai Bizomescu, informed [redacted] that the Director, Ionut Georgescu, ordered him not to approve the Plan and that RMGC should not resubmit it again until the "political wind changes."[158]

f. When in March 2013 RMGC was asked to resubmit the Waste Management Plan for "proper review," RMGC did so.[159]

g. NAMR and the Ministry of Environment promptly approved the Plan.[160] At the May 10, 2013 TAC meeting, the Head of the Waste and Hazardous Substances

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Situations, Mr. Senzaconi, asked RMGC to update unrelated Project emergency preparedness documentation. (C-487) at 43; Tr.(Dec. 2, 2019)174:8-14 (Claimants' Opening). RMGC submitted those updates in October 2010 (C-392) and answered the General Inspectorate's final questions in October 2011. (C-593) at 68. At the November 2011 TAC meeting, Mr. Senzaconi confirmed the General Inspectorate was "happy with the answers and we don't have any unclear issues at the moment." (C-486) at 25.

[154] Claimants' Opening-2019 vol.4:59; Avram-I ¶114.

[155] *Id.*

[156] *Id.*

[157] Claimants' Opening-2019 vol.3:76-78, vol.4:59.

[158] *Id.* vol.4:59-60.

[159] *Id.* vol.4:60-61.

[160] *Id.* vol.4:61.

Management Department confirmed the plan "complie[d] with all the requirements and standards" and "the best available techniques."[161]

h. The Waste and Hazardous Substances Management Department also proposed conditions for the EP.[162]

77. Respondent contends RMGC "delayed" and did "not respond" to the Ministry of Environment's July 2012 information request "for 9 months." Respondent, however, did not present any testimony from Mr. Bizomescu, Mr. Georgescu, or anyone from the Waste and Hazardous Substances Management Department. Nor can Respondent dismiss RMGC's contemporaneous reporting of the events to the US Embassy in Bucharest.[163]

78. Finally, Respondent's assertion that the Ministry of Environment "reasonably exercised its discretion" to request additional information regarding the plan is contrary to the evidence. The issue is not whether the Ministry had the legal authority to request information if needed; the evidence shows the requests were pretextual, intended to delay permitting decisions.[164]

[161] Memorial ¶428.

[162] (C-2254) at 4.

[163] Respondent argues incorrectly that was an "internal" email about "a vague comment allegedly made in passing." Mr. Bizomescu made his statements in a meeting with [redacted]. Respondent's observation that the Minister of Environment did not change from May 2012 to 2013 is irrelevant. What changed over this time was only the Government's political decision-making.

[164] [redacted]

3. Compliance with Waters Law and Water Framework Directive

79. In view of the need to divert two small rivers for the Project, the Government accepted that the Alba County Council Decision declaring that the Project was of "outstanding public interest" met the requirement of the Waters Law and the Water Framework Directive. If a declaration at the national level were considered necessary, there is no reason other than political blockage why such a declaration was not made.[165]

80. Respondent argues that "neither the TAC nor the Ministry of Environment ever accepted" the Alba County Council "declaration or confirmed that it met the requirements of the directive." That is not correct.

a. RMGC obtained the outstanding public interest declaration from the Alba County Council following direction given by the Ministry of Environment and ANAR at a meeting in July 2011.[166]

b. At the November 2011 TAC meeting, the Ministry of Environment asked RMGC to "complete" its answer on Water Framework Directive compliance by submitting the County Council Decision, and ANAR confirmed that there were no further issues.[167] RMGC submitted the County Council Decision the next day.[168]

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[165] Claimants' Opening-2019 vol.4:17-18, 24-26, 62-74; Claimants' PO27 ¶33 n.98; Reply ¶¶76-78.

[166] Tănase-II ¶¶66-70. Respondent contends that in minutes of a meeting with the Ministry of Environment in September 2011, "RMGC acknowledged that the Project did not comply with the Water Framework Directive." Respondent mischaracterizes the minutes in which RMGC states immediately above the cited text that it reflects issues raised by the Ministry of Environment and "DOES NOT INCLUDE answers we verbally gave." (C-574) at 4. The Alba County Council issued its Decision shortly thereafter, which resolved the issue.

[167] Claimants' Opening-2019 vol.4:17-18; Avram-II ¶¶40-48. Respondent asserts misleadingly that ANAR representative Mr. Cazan said at the November 2011 TAC meeting that he "could not find" RMGC's answer on Water Framework Directive compliance, thus suggesting the matter was unresolved from ANAR's perspective. Respondent fails to mention the minutes show that Mr. Avram and Mr. Tănase then explained that RMGC answered "all the questions related to the Water Framework Directive – on approximately 17 pages," and the "only thing" not included was the County Council Decision. (C-486) at 24-25. The TAC President then stated, "Complete with the decision of the County Council because I also found the answer," Ms. Mocanu repeated "to submit the Decision of the County Council," and ANAR's Mr. Cazan subsequently confirmed, "we understood the questions, we understood the answers ... We will set conditions" and "From the point of view of waters, there aren't any issues." *Id.* at 25, 28, 39; Avram-II ¶44.

[168] Claimants' Opening-2019 vol.4:25.

c. TAC President Anton stated publicly that the County Council Decision satisfied the applicable requirements of the Water Framework Directive "because it is a work of local importance."[169]

d. Far from disputing RMGC's repeated statements that the Ministry of Environment asked for the County Council Decision and accepted it at the November 2011 TAC meeting,[170] the Ministry of Environment (represented by its Water Department Director, Gheorghe Constantin, who also attended the July 2011 meeting with ANAR and RMGC), confirmed to the Inter-Ministerial Commission during a March 2013 meeting that "we agreed with . . . the Decision of the County Council."[171] No Ministry of Environment official, including Ms. Pineta who attended the November 2011 TAC meeting, disagreed.

e. The chair of the Inter-Ministerial Commission (who later became a judge on Romania's constitutional court), observed that the County Council Decision had been accepted, that nothing in the law indicated it was insufficient or required reopening "the issues that were finalized or agreed in 2011," and that the outstanding public interest declaration may be made "at the local level."[172]

f. The Inter-Ministerial Commission observed that the Ministry of Environment's legal team did not identify any legal basis for proposing a Government Decision or other enactment, but merely "indicated that it would be a good idea," and acknowledged that "this aspect cannot prevent further development of the Project."[173] The Commission therefore concluded that "*de lege lata*, there is no

[169] *Id.* vol.4:66 (video).

[170] Inter-Ministerial Commission Mar. 12, 2013 (C-472) at 8-9; RMGC Letter Mar. 28, 2013 (C-2247) at 2; TAC May 10, 2013 (C-484) at 19-20; RMGC Letter May 30, 2013 (R-544) at 8; TAC May 31, 2013 (C-485) at 18.

[171] Claimants' Opening-2019 vol.4:67; Tănase-II ¶68. Respondent falsely asserts that TAC President Dumitru raised "RMGC's lack of compliance with the Water Framework Directive" at the March 11, 2013 meeting with the Inter-Ministerial Commission. Ms. Dumitru only said the Ministry of Environment would present its view on the issue in writing. (C-471) at 20.

[172] Claimants' Opening-2019 vol.4:69-72; Reply ¶78.

[173] *Id.*

legal ground calling for a need to pass a special enactment with a view to classifying the Rosia Montana Project in the category of works of outstanding public interest, and the decision of the Alba County Council is sufficient."[174]

g. The Government approved the Inter-Ministerial Commission report and thus affirmed that conclusion.[175]

81. Even assuming a Government Decision declaring the Project of outstanding public interest were needed, although Respondent concedes it is not required by law,[176] in view of the numerous ministerial and governmental acknowledgments that the Project was of outstanding public interest,[177] the Government would not have any grounded reason not to issue such a declaration.

82. Respondent contends that the Ministry of Environment described Water Framework Directive compliance "as an outstanding issue" in a letter to ANAR in January 2012, and that it then informed the Ministry of Economy in February 2012 "that the Project did not comply with the Water Framework Directive." The Ministry of Environment's letter to ANAR, however, confirms that the only question was whether the County Council Decision was sufficient.[178]

83. The Ministry of Environment's letter to the Ministry of Economy confirmed that three of the four requirements of the Water Framework Directive were "justified and met," stated that the only issue "still to be analyzed" was the outstanding public interest declaration, and invited the Ministry of Economy to consider initiating a declaration of public interest by Government Decision in view of, *inter alia*, the public interest in the exploitation of Romania's natural resources.[179]

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[174] *Id.*

[175] *Id.* vol.4:73.

[176] Tr.(Dec. 3, 2019)447:9-10 (Respondent's Opening).

[177] Claimants' Opening-2019 vol.4:74.

[178] (R-473) (referring to "HCL or GD," short for hotărârea consiliului local (local council decision) or government decision).

[179] (R-413).

84. Indeed, Minister of Economy Ariton had confirmed in four separate memoranda to Prime Minister Boc in 2011 that the Project would generate "major economic and social benefits," and that "due to the medium- and long-term economic and social benefits envisaged, the Project is of outstanding public interest."[180] [redacted] Minister Ariton, Minister Bode, and Mr. Găman all confirmed the Ministry of Economy's view that the Project was of outstanding public interest and that the Government should issue a declaration to that effect, if needed.[182]

85. Respondent argues that in [redacted]

86. The Government's contemporaneous communications through April 2012 thus show that the Ministry of Environment considered all of the Water Framework Directive requirements were met or would be met if the Ministry of Economy initiated a Government Decision declaring that the Project was of outstanding public interest, and that the Ministry of Economy agreed that the Project was of outstanding public interest and that a Government Decision should be issued.

87. Respondent contends that TAC requests, "including those of the Ministry of Environment and ANAR, are still outstanding." That is not true. RMGC responded to all of the

[180] (C-2156) at 1, 2-3; (R-403) at 1-2, 5; (R-404) at 5-6; (R-405) at 3.

[181] (R-406) at 3. *See also* Tr.(Dec. 6, 2019)1497:7-12 (Găman-Tribunal).

[182] Tr.(Dec. 3, 2019)1873:21-1877:9 (Ariton-Cross); Tr.(Dec. 11, 2019)2538:11-19, 2559:8-15 (Bode-Cross); Tr.(Dec. 6, 2019)1554:7-16, 1555:19-1556:15 (Găman-Cross); Bode ¶25; Găman-II ¶195.

[183] (R-472) at 5.

Ministry of Environment and ANAR's requests for information about the Project's compliance with the Water Framework Directive.[184]

88. As a purported example, Respondent asserts that RMGC provided "[n]o response" to a June 12, 2013 letter requesting clarifications on the Water Framework Directive. That letter refers to a meeting between RMGC and an inter-ministerial working group on May 28, 2013, where RMGC stated that these issues [redacted][185] RMGC sent a detailed response to ANAR two days later.[186] RMGC observed that if a Government Decision were desired, then the Ministry of Environment was competent to make the assessment, taking into account the licenses issued for the Project, and if its assessment were favorable, the Government could issue a declaration of outstanding public interest in the same Government Decision issuing the EP.[187]

89. At the May 31, 2013 TAC meeting, RMGC repeated this explanation.[188] Neither the Ministry of Environment nor ANAR objected, and the acting TAC President declared again that the technical assessment was completed.[189] On June 13, 2013, ANAR proposed draft conditions to include in the EP,[190] which Respondent omits from its purported timeline,[191] and

[184] *See, e.g.*, RMGC answers to TAC's final questions Oct. 11, 2011 (C-429) at 219-233; RMGC Letters Mar. 30, 2012 (R-474) and May 30, 2013 (R-544); Tr.(Dec. 5, 2019)1245:2-1246:2 (Avram-Cross).

[185] (C-1001) at 1, 3; [redacted] (C-1404.2) at 2; Avram-II ¶¶73-76.

[186] (R-544) at 9-10.

[187] *Id*.

[188] (C-485) at 16-18 (acting TAC President acknowledging the same issues were discussed repeatedly).

[189] *Id.* at 18-19.

[190] (C-2252).

[191] Respondent refers instead to another letter ANAR sent on June 13, 2013 to the Ministry of Environment and wrongly describes this letter as a request to RMGC for further information related to compliance with the Water Framework Directive. Respondent's Opening-2019 slide 79 (citing R-546). As Mr. Avram explained, that ANAR letter was not sent to RMGC and was "meant to be considered for [the] water permitting process" to obtain the Water Management Permit. Tr.(Dec. 5, 2019)1255:21-1257:12 (Avram-Cross). ANAR's representative, Mr. Gabor, acknowledged at the June 14, 2013 TAC meeting "that all these technical issues would be discussed at the later stage of the water permitting process." *Id.* 1257:15-1257:19; (C-481) at 5-6 (ANAR confirming with respect to those technical issues that they "can be addressed when the water management permit is granted").

which it seriously mischaracterizes.[192] The Ministry of Environment considered ANAR's proposed conditions,[193] and in July 2013 confirmed again in its Draft Decision recommending issuance of the EP that "[t]he mining Project observes the provisions of the Waters Law No. 107/1996 and the Water Framework Directive (Directive 2000/60/EC)."[194]

90. The Government's exposition of reasons recommending enactment of the Draft Law again confirmed that the Project met the requirements of the Water Framework Directive. In a note signed by Prime Minister Ponta and by all of the Ministers in his Cabinet, including Minister of Environment Plumb, the Government resolved "that the implementation of this Project is of outstanding national public interest."[195]

91. Finally, Respondent contends that EU Commissioner for Environment Janez Potočnik wrote that "the Project did not comply with the Water Framework Directive." That is incorrect and a mischaracterization of the cited memorandum. Respondent refers to a memorandum prepared by the Commissioner's staff to brief the Commissioner in advance of an October 3, 2013 meeting with Minister Plumb.[196] The paragraph quoted by Respondent is one of a list of "suggested messages," which was that the Project should have been included in the river basin management plan, but that it "could be included in the next River Basin Management Plan," or the existing Plan could be "revised."[197] The minutes of the Commissioner's actual meeting with Minister Plumb do not mention any comments regarding the River Basin Management Plan or requirements for issuing the EP, but do record that Minister Plumb assured

[192] Respondent claims that when the Ministry of Environment asked the TAC members to propose EP conditions, "ANAR immediately responded that RMGC still needed to comply with the Water Framework Directive and to provide: 'a document that would serve to justify in front of the European Commission that the requirements ... have been met for the ... project.'" That is wrong – the quoted statement is a condition that ANAR proposed to include in the EP. (C-2252) at 1.

[193] *Supra* ¶65.c, n.120; Ministry of Environment Public Consultation Note July 11, 2013 (C-555) at 1-2.

[194] Claimants' Opening-2019 vol.4:73.

[195] (C-817) at 6, 19; C-2461 at 6, 20. Respondent notes Minister Plumb testified to Parliament that the outstanding public interest declaration had to be in a law. There is no such requirement and Respondent does not contend otherwise.

[196] (C-2909). The exhibit includes as the last two pages minutes of the actual meeting held.

[197] *Id*. at 5.

that all environmental acquis were well taken care of in relation to the Project.[198] Moreover, as Claimants explained in response to the non-disputing parties' submission, amendment of the River Basin Management Plan is a reporting obligation incumbent on the State that may be fulfilled even after commencement of activities on bodies of water.[199] The Ministry of Environment expressed the same view in the TAC.[200]

B. Other Issues Respondent Has Identified Were Not Required for the EP

92. Respondent presents various arguments in this arbitration relating to the urbanism certificate, PUZ, ADCs, Water Management Permit, surface rights, and forestry issues, claiming these were impediments to issuing the EP. In reality, none of these issues justified or was cited as a reason for non-issuance of the EP.[201] Rather, these are *post hoc* arguments conceived by Respondent's arbitration counsel that have no merit.

93. Respondent does not identify any legal source for its contention that these were required for the EP. It argues instead that these requirements "can be inferred," or that "the TAC and the Ministry of Environment had the discretion to require them." As Professor Mihai authoritatively demonstrated, that is incorrect.[202]

94. The permitting requirements are governed strictly by law, and the law itself determines the scope of discretion granted to the permitting authorities. Neither the Ministry of Environment nor the Government has the power to impose additional requirements or to base the permitting decision on factors not established in the law.[203]

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[198] *Id*. at 10-11.

[199] Claimants' Comments on NDP Submission ¶146.

[200] TAC May 10, 2013 (C-484) at 18 (Ministry of Environment Water Department Director, Gheorge Constantin, stating, "Practically, out of the four conditions which must be concomitantly fulfilled, for three they are… fine, but one is up to us to include in the management plan – it is not a problem, the management plan is to be implemented in 2015, if the decision will be to make this Project, it will be included without any problems.").

[201] Claimants' Opening-2019 Vol.2:6-14; Claimants' PO27 ¶¶8-10, 33 nn.99-103; Reply ¶¶ 66, 79-80, 98, 499, 645-646; Mihai slides 11-19; Podaru slides 2-15.

[202] Claimants' Opening-2019 Vol.2:4-14; Claimants' PO27 ¶¶8-10, 122-124.

[203] Claimants' PO27 ¶¶8-10, 122-124; Claimants' Opening-2019 Vol.2:6-10.

95. Respondent's case for each issue is that "State officials timely put RMGC on notice of the requirement, requested information, and followed up with RMGC when they considered that RMGC's answer was incomplete or unsatisfactory," and that "RMGC invariably did not respond to or delayed in responding to these requests." Respondent's narrative is false. The record is clear that RMGC consistently responded to the Ministry of Environment's requests, and that the competent authorities acknowledged these issues could be addressed at a later stage and were not impediments to issuing the EP.

1. Urbanism Certificate

96. Contrary to Respondent's assertion that "RMGC needed, but did not have in place, a valid Urban Certificate," an urbanism certificate is an informational deed not required to issue an EP.[204] Thus, in its report approved by the Government, the Inter-Ministerial Commission confirmed, "maintaining of a valid urbanism certificate for the entire duration of the procedure is not necessary for conducting the Environmental Impact Assessment procedure with respect to the Rosia Montana Project, initiated in 2004."[205]

97. RMGC had a valid urbanism certificate at all times between 2010-2018 as Respondent acknowledges.[206] In an attempt to justify the failure to take a decision on the EP, Respondent claims that there was alleged "uncertainty" about the status of the UC caused by *unsuccessful* NGO challenges to these *valid* urbanism certificates. This argument is unsupported by any contemporaneous evidence. It also ignores the Government-endorsed conclusion of the Inter-Ministerial Commission that an UC was not a requirement and that the UC was valid.

[204] Claimants' Opening-2019 vol.2:13; Claimants' PO27 ¶33 n.99; Reply ¶¶98, 644-645; Mihai slide 16; Podaru slides 7-10.

[205] (C-2162) at 7. *See also* TAC May 10, 2013 (C-484) at 20 (acting TAC President Pătraşcu confirming "the urbanism certificate is a purely informative act on the situation of the land and its position.").

[206] Mihai-II § V.C; Podaru ¶¶85-118; Respondent's Opening-2019 slide 65 (acknowledging that UC 87/2010 was valid from April 30, 2010 to April 30, 2013, that UC 47/2013 was valid from April 22, 2013 to April 22, 2016, and that UC 98/2016 was valid from April 26, 2016 to April 25, 2018).

2. PUZ

98. The PUZ is town planning documentation that must be issued by local authorities once necessary endorsements are obtained. The Roşia Montană and Abrud Local Councils approved the PUZ (and PUGs) for the Project in 2002,[207] and that 2002 PUZ remained valid at all relevant times.[208] In 2006, RMGC began to seek endorsements for an updated PUZ to reflect updates to the Project design, including expanded protected areas.[209]

99. There are two main issues regarding the PUZ. First, the PUZ is not a prerequisite for the EP; therefore, even a lack of an updated PUZ was not an obstacle to completing the EIA Process and to issuing the EP.[210] Second, RMGC did not obtain the remaining endorsements for the updated PUZ solely due to the Government's political blockage; but for wrongful treatment of Gabriel's investment, an updated PUZ would have been obtained readily.

100. As to the first issue, in April 2010, Romania's senior mining official, Mr. Găman, made a presentation to Prime Minister Boc, Minister of Environment Borbély, Minister of Culture Hunor, Minister of Economy Videanu, and other Government officials, including the local officials responsible for approving the amended PUZ.[211] Mr. Găman acknowledged on cross-examination that he advised the Government that the PUZ procedure could be completed

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[207] Lorincz-II ¶34; Podaru ¶¶224-242; Mihai-II ¶180.

[208] While courts in 2008 and 2012 invalidated Roşia Montană local council decisions approving the 2002 PUZ, the PUZ itself remained valid until May 2016. Podaru ¶243.

[209] Podaru ¶¶244-252.

[210] Claimants' Opening-2019 vol.2:13; Claimants' PO27 ¶33 n.100; Reply ¶¶79-80; Mihai slide 17; Podaru slides 13-15.

[211] Tr.(Dec. 6, 2019)1537:20-1539:16 (Găman-Cross). Contrary to Respondent's mischaracterization in the Rejoinder, Mr. Găman confirmed that this "was not an RMGC presentation," that he was familiar with it and had delivered it previously, and that "the presentation was good. There were no comments about the accuracy of this presentation." *Id.* 1540:4-1542:10, 1544:4-1546:8. Respondent's new contention that Mr. Găman prepared the presentation in his capacity as a member of RMGC's Board and not as a representative of the Ministry of Economy lacks any basis. Mr. Găman was a member of RMGC's Board *in his capacity* as a representative of the Ministry of Economy and was appointed to RMGC's Board by then Minister of Economy Videanu. Găman-I ¶10. Minister of Economy Videanu also organized the April 2010 meeting at the Ministry of Economy, and Mr. Găman made his presentation at that meeting at "Minister Videanu's request." Tr.(Dec. 6, 2019)1538:8-18, 1541:22-1542:4 (Găman-Cross). The presentation thus has the Ministry of Economy logo and a Romanian flag, not any RMGC logos. *Id.* 1545:7-13. The Ministry of Economy also could verify any information provided to it by RMGC. Indeed, Mr. Găman was General Director of the Directorate for Mineral Resources that had responsibility for Romania's entire mining sector, and his "deputy," Grigore Pop, was the Ministry of Economy's representative in the TAC. *Id.* 1518:5-21; Găman-I ¶6.

after the EP was issued: "Yes. That was my understanding and the understanding of the company about the Project's evolution."[212] None of the officials present at that meeting disagreed.[213]

101. While Respondent asserts that the Ministry of Environment "repeatedly requested that RMGC provide the PUZ, including at the November 2011 TAC meeting," in reality the Ministry of Environment agreed at the November 2011 TAC meeting that approval of an updated PUZ was not required to issue the EP.[214] While Ms. Mocanu testified *for the first time during direct examination* that the Ministry of Environment allegedly was "waiting for RMGC to provide ... the approved PUZ" after the November 2011 TAC meeting,[215] she admitted she is not competent to discuss urban planning issues,[216] and her new testimony is both unsupported and indeed refuted by the transcript of that TAC meeting.

102. When the Ministry of Development referred to the PUZ at the November 2011 TAC meeting, TAC President Anton confirmed the PUZ related to "the next step, to the construction permit."[217] Respondent cites to an isolated comment of an official who suggested that the updated PUZ had to be approved before the Environment Permit was issued and omits that the rest of the TAC members disagreed. The Ministry of Development clarified that it was merely raising "a risk" that further assessment may be needed if the PUZ were to require changes

[212] Tr.(Dec. 6, 2019)1547:21-1548:9 (Găman-Cross); Ministry of Economy Presentation Apr. 2010 (R-464) at 64-65; Tr.(Dec. 6, 2019)1547:1-20 (Găman-Cross) (confirming his presentation that if the EIA procedure restarted in May 2010, the EP could be issued "within a few months" by August 2010); *id.* 1681:21-1682:7 (Găman-Redirect) (confirming the PUZ procedure would start "in April, and it goes on for the entire period of 2010 until the beginning of 2011").

[213] Tr.(Dec. 6, 2019)1549:6-1550:15 (Găman-Cross).

[214] Respondent refers to two letters sent to RMGC in 2010. The first (R-188) asked RMGC to verify the "real estate asset" in the PUZ referenced in the new urbanism certificate to ensure it was consistent with the mining site description in the EP application. RMGC provided the requested information, and the Ministry of Environment resumed the EIA procedure. Tr.(Dec. 5, 2019)1206:14-1209:17 (Avram-Cross). The second (C-591 at 4-6) included a request of the Ministry of Development for information about the status of the PUZ approval process in view of the potential it could lead to changes to the Project's technical plans. RMGC provided the requested information and explained that PUZ approval is required only for construction permits. (C-593) at 43-44; Tr.(Dec. 5, 2019)1211:8-1216:22 (Avram-Cross). No reply was communicated to RMGC, and any question was resolved at the November 2011 TAC meeting.

[215] Tr.(Dec. 9, 2019)1964:16-1965:6 (Mocanu-Direct).

[216] Mocanu-II ¶24.

[217] (C-486) at 40-41.

to the Project after the EP was issued, and with respect to RMGC's answers to its questions, the Ministry of Development acknowledged, "you realize we don't have any objections."[218] Ms. Mocanu agreed "that the PUZ will have to be approved in the form that we took into consideration at this moment."[219] TAC President Anton and Ms. Mocanu then reconfirmed that the PUZ was not necessary for the EP:

> Marin Anton, TAC Chairman: Yes, but it is not related to the environment procedure.
>
> Dragos Tanase, RMGC: The environmental assessment procedure is not related to the urban planning procedure.
>
> Marin Anton, TAC Chairman: Yes, they are two different procedures.
>
> Dorina Mocanu, MMP: Yes, only that if the PUZ is approved in a different form than the one considered now, during the project stage, so, if something is changed in the PUZ, we will have to resume this process....[220]

103. Mr. Găman (whose direct subordinate, Mr. Pop, represented the Ministry of Economy at the November 2011 TAC meeting and stated then that all requirements were met[221]), prepared a note to Minister Bode in April 2012 confirming that the Ministry of Environment could take its decision regarding the EP before approval of the amended PUZ.[222]

104. Respondent refers to an [redacted] That note was not communicated to

[218] *Id*. at 41.

[219] *Id*.

[220] *Id*. at 42. *Id.* at 43-44 (confirming that, "From the technical stand point, all is clear with the Ministry of Development."). TAC President Anton also observed that, even if PUZ approval led to changes, further EIA review would be unnecessary unless the changes were "significant," e.g., removing the area's designation as "mono-industrial" or moving a pit or the TMF. *Id.* at 43; Podaru ¶¶156-169 (risk of such "severe" changes "was in fact very low").

[221] Tr.(Dec. 6, 2019)1518:5-21 (Găman-Cross); Claimants' Opening-2019 vol.4:13.

[222] (R-406) at 4. Respondent contends [redacted] Tr.(Dec. 6, 2019)1664:7-10 (Găman-Cross).

[223] (R-472) at 5.

RMGC and its context is not explained. The record is silent on any Government action on Project permitting until the Inter-Ministerial Commission meetings in March 2013.

105. At those Inter-Ministerial Commission meetings, RMGC explained the TAC had accepted that approval of an updated PUZ was not required for issuance of the EP.[224] None of the authorities disagreed. The Ministry of Development noted as it had previously that approval of an updated PUZ was not required for the EP, while noting the "risk of having to reconfirm the environmental permit, at least in theory."[225]

106. Respondent cites to an isolated comment in the Inter-Ministerial Commission report that the Ministry of Environment indicated it was "important" for the PUZ "to be approved in view of the issuance of the Environmental Permit."[226] Respondent omits the next two sentences that confirm that RMGC and the Ministry of Environment's legal team met to discuss the PUZ, that "a conclusion was reached that the existing PUZ is valid," and, in these circumstances, that the Ministry of Environment "can issue the Environmental Permit and any other details can be solved along the way."[227]

107. In further correspondence RMGC repeated that the "EIA should continue in parallel with the PUZ 2006 approval process, without being conditional on the latter," and that the issue was "settled" at the November 2011 TAC meeting.[228] RMGC repeated that at the May

[224] Inter-Ministerial Commission Mar. 22, 2013 (C-472) at 18.

[225] *Id.* at 18-21. *Id.* at 22 (Inter-Ministerial Commission President Teodoroiu stating "the Ministry of Development tried to draw our attention not on any violation … any violation of law *[Anca Ginavar: but on some risks]*, but on some risks linked to the calendar and the sequence of the stages."). Respondent contends TAC President Dumitru said at that meeting that RMGC needed to resolve "the absence of environmental endorsement for the PUZ (and thus the absence of PUZ for the Project Area)." She did not say that. She noted the SEA Endorsement was being challenged in court. *Id.* at 20. *See also* Inter-Ministerial Commission Report (C-2162) at 8 (the SEA Endorsement "is valid, since there is no court decision so far ordering its suspension or annulment," and "[t]he existence of disputes before the courts of law in relation to this permit cannot affect its validity and cannot be a cause for delaying/suspending" the EIA Process).

[226] Inter-Ministerial Commission Report (C-2162) at 8.

[227] *Id.* at 8-9; RMGC Email Mar. 26, 2013 (C-2246) at 4 [redacted] Tr.(Dec. 5, 2019)1221:12-1222:4 (Avram-Cross) (confirming that "during those debates, this issue has been clarified," and all of the alleged impediments "were discussed, closed. And then at the end of [the] Commission meetings, there were no impediments to move forward.").

[228] RMGC Letter Mar. 28, 2013 (C-2247) at 4-5; Tr.(Dec. 5, 2019)1222:5-1224:16 (Avram-Cross) (rebutting Respondent's incorrect assertion that the requested litigation update was not provided).

10, 2013 TAC meeting.[229] The Ministry of Environment did not reply to RMGC's letter, and none of the TAC members disagreed with RMGC's statements when the acting TAC President invited their points of view.[230]

108. Minister of Environment Plumb confirmed to the Aarhus Compliance Committee in May 2013 that PUZ approval is not required to issue the EP.[231] The Ministry of Environment also acknowledged in its Draft Decision recommending issuance of the EP that the "Project observes the urbanism documentations ... taking also into account the Titleholder's initiative to prepare and propose for endorsement an urbanism documentation in the form of a zonal urbanism plan...."[232]

109. As to the second issue, RMGC would have obtained an updated PUZ if the Project had not been politically blocked.

110. As noted above, the updated PUZ reflected updates to the Project design that reduced the Project's impacts and enhanced cultural heritage protections compared to the 2002 PUZ.[233] RMGC prepared an updated PUZ for the industrial area to reflect these design changes and the historical monuments identified in the 2004 LHM.[234] The local authorities prepared a corresponding protected area PUZ for the historical town center.[235]

111. By November 2011, RMGC had secured 19 of the 22 endorsements required for approval of the updated industrial area PUZ, and 10 of the 13 endorsements required for approval of the protected area PUZ for the historical town center.[236] The same three remaining

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[229] (C-484) at 20.

[230] *Id.* at 20-21; Tănase-III n.265.

[231] (C-2907) at 6 (EP and approved PUZ are two of the "main steps to be completed" for a construction permit and "are not listed in a chronological order, as chronology is not imposed under Romanian legislation").

[232] (C-2075) at 2.

[233] Szentesy-I ¶¶48-50; Szentesy-II ¶22 n.41; Lorincz-II ¶52; Podaru ¶167.

[234] Podaru slide 21; Podaru ¶¶243-252.

[235] Podaru ¶¶314-315.

[236] RMGC 2011 Report (C-1115) at 68-70. This includes the Strategic Environmental Assessment (SEA) Endorsement. Avram-I ¶¶78-84; Podaru ¶¶256-259. The law subsequently changed to require a further endorsement by the Ministry of Agriculture, which RMGC also obtained. RMGC 2013 Report (C-1117) at 122 (item 17).

endorsements were needed for both the updated industrial area PUZ and the protected area PUZ.[237] As RMGC explained at the November 2011 TAC meeting, the most significant remaining endorsement was from the Commission on Historical Monuments, after which the other two endorsements would follow.[238]

112. The Ministry of Culture already had expressed a favorable point of view on the updated PUZ in April 2010 as part of the SEA procedure.[239] But, as Minister Hunor announced in August 2011, the Ministry of Culture would not do anything to advance the Project.

113. In July 2011 when the second Cârnic ADC was about to be issued, Minister of Culture Hunor stated that the 2010 LHM would be updated to remove Cârnic.[240] After Prime Minister Boc Government made clear in public statements, however, that permitting for the Project would not proceed without a renegotiated deal and a positive political assessment, Minister Hunor announced on August 24 and again on August 25, 2011, and later repeated, that he would not remove Cârnic from the 2010 LHM, or take any other step towards permitting the Project, until the renegotiation was completed and a political decision was taken regarding the Project.[241] Thus, although the Ministry of Culture's technical experts repeatedly acknowledged that the descriptions in the 2010 LHM including as to Orlea were overbroad and the result of

[237] Respondent argues a fourth endorsement was needed in 2013 from the Mureş Water Basin Administration. Mr. Avram explains that the Mureş Water Basin Administration gave its endorsement in August 2010, but after two years the endorsement expired. Avram-I ¶¶116-117. [redacted] explained that when RMGC applied to renew it, Lucia Brustur, Chief of the Permits and Authorizations Bureau in the Mureş Water Basin Administration, told him that she had been directed not to renew the endorsement by her supervisor, David Csaba. *Id.* Respondent did not offer any testimony in response and declined to cross-examine Mr. Avram on this subject. In its Rejoinder, Respondent incorrectly argued that RMGC had to acquire surface rights to obtain renewal of the endorsement. RMGC provided proof of ownership of the lands in the Project area, and referenced two letters confirming the water authority's agreement that RMGC's ownership of the riverbed lands would be established at the design stage after issuance of the EP. Avram ¶116 (C-567 referring to C-2837 at 2 and R-496 at 2). That is all the law required. Order 799/2012 (R-239) Art. 7(c)(3).

[238] (C-486) at 43. Article 2.4 of GM-010-2000 (the PUZ regulation) required all other endorsements to be obtained before the last two endorsements from the Ministry of Development Territorial Department and from the County Council Chief Architect could be obtained. Hence, without the endorsement of the Commission of Historical Monuments, the final two PUZ endorsements could not be obtained.

[239] Podaru ¶261.

[240] Claimants' Opening-2019 vol.7:10.

[241] *Id.* vol.3:10-13, vol.7:10-13.

"clerical errors," correcting the LHM required approval at the level of the Minister, which was politically blocked.[242]

114. From August 2011 onward, therefore, the Ministry of Culture would not endorse the updated PUZ, particularly as the PUZ had to align with the LHM in effect.[243]

115. In June and July 2013, the Urbanism and Protected Areas Division of the National Commission for Historical Monuments held meetings and consultations to review the PUZ documentation.[244] Based on that review, the Ministry of Culture prepared favorable draft endorsements for the amended PUZ and for the protected area PUZ.[245] Finalizing these endorsements depended upon acceptance of the Special Law.[246]

116. Thus it was the Government's refusal to issue administrative approvals for political reasons that prevented updates of the LHM and final approval of the updated PUZ, which in turn fueled the NGO litigation that eventually led to the annulment of the SEA Endorsement in 2016.[247]

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[242] Claimants' Opening-2019 vol.7:4-16; Claimants' PO27 ¶212; Reply ¶¶253-261. NIH's draft letter to Minister Hunor (C-1336) proposing correction of these errors was signed by two of the three competent officials, but was not finalized. Gligor ¶121. *See also* Claimants' Opening-2019 vol.7:13; Podaru ¶¶290-293.

[243] Podaru §§III-IV.

[244] Podaru n.417; Ministry of Culture Draft Endorsement: Protected Area PUZ (C-2578) at 3; Ministry of Culture Draft Endorsement: Industrial Area PUZ (C-2579) at 3.

[245] *Id.*

[246] In view of the Ministry of Culture's endorsements of the EP in December 2011 and April 2013, its endorsement of the updated PUZ as part of the SEA process, the ADCs issued, and Minister of Culture Barbu's testimony to Parliament endorsing the cultural aspects of the Project, the Project unquestionably met all substantive standards for cultural heritage. Like the Ministry of Environment, the Ministry of Culture required only the political green light to issue the decisions the facts and the law compelled.

[247] NGOs challenged the SEA Endorsement due to its failure to reflect the historical monuments as listed in the 2010 LHM. Podaru ¶260. The courts annulled the SEA Endorsement in May 2016 relying on the legality of the 2010 LHM which, starting in January 2015, the culture authorities defended by referring to the 2004 LHM, which reflected the ADCs in the Project area, as an "abuse." Claimants' Opening-2019 vol.7:4-16; Podaru §IV.B; Schiau §VI.

3. ADC for Orlea

117. RMGC obtained ADCs for the entire Project area except Orlea, where mining was not due to take place until year 7 or year 8 of operations.[248]

118. The lack of an ADC for Orlea was not an impediment to issuing the EP because ADCs are not required for that Permit, only for construction permits.[249] The preventive archaeological research needed to support an ADC also is not required to obtain the EP. All that was needed for the EP to be issued was *preliminary* archaeological research (which was completed for Orlea in 2000 and again in 2001-2006), and the Ministry of Culture's endorsement (which RMGC obtained in December 2011 and again in April 2013 as discussed above).[250]

119. Respondent argues that the authorities made it clear to RMGC that it needed an ADC for Orlea to obtain the EP. The authorities took no such position. On the contrary, the Ministry of Culture and the Ministry of Environment repeatedly confirmed that the EP could be issued and, because the Project could be developed in phases, an ADC for Orlea would be needed only for construction to start at Orlea.

a. In a June 16, 2010 letter forwarded by Ms. Mocanu on behalf of the Ministry of Environment, the Ministry of Culture confirmed, "As regards the archaeological discharge certificate, we hereby communicate to you that this is not necessary in consideration for the issuance of the environmental permit."[251]

b. At a TAC meeting on June 23, 2010 (not attended by RMGC), the Ministry of Culture stated that the EIA Process and the procedure to issue ADCs "are two entirely different procedures."[252]

c. In the Ministry of Culture's December 2011 Point of View, the Ministry of Culture proposed conditions for issuing the EP. In so doing, it observed that, in

[248] Claimants' Opening-2019 vol.2:49-55; Reply § V.B.1; Schiau ¶¶90-91.

[249] Claimants' Opening-2019 vol.2:13; Claimants' PO27 ¶33 n.101; Mihai slide 19; Podaru slide 11.

[250] Claimants' Opening-2019 vol.4:28, 55. *See supra* §IV.A.1.

[251] (C-2421).

[252] (C-565) at 2.

view of "the development of this project in phases" and "the fact that the industrial facilities will be built, operated and decommissioned/demolished in phases" over "a number of years," RMGC would have to complete preventive archaeological research "before beginning exploitation and construction," including "for the industrial facilities to be open in the Orlea area in year 8 of the project."[253]

d. In its April 2013 "endorsement," the Ministry of Culture again observed that, in view of the Project's "development in stages" and "the fact that the industrial facilities will also be built, operated and demolished/decommissioned in stages, across a number of years," RMGC would have to obtain, "prior to beginning constructions in each stage of the industrial facilities proposed ... (including those facilities planned to be opened in the Orlea area in year 8 of the project)," all the approvals "necessary to realize the constructions planned for the stage in question," and, therefore, the Project "may be developed within the Orlea area only subject to the issuance, prior to the issuance of the building permit for the Orlea area, of one or several archaeological discharge certificates for the areas with archaeological heritage in the Orlea Massif."[254]

e. In a May 2013 letter to the Aarhus Compliance Committee, Minister of Environment Plumb confirmed that "archaeological discharge certificates are neither required for the purpose of the environmental impact assessment procedure, nor for the issuance of an environmental permit; rather archaeological discharge certificates are necessary solely for the issuance of a building permit."[255]

f. In June 2013, the Ministry of Culture proposed conditions and measures "to be included in the Environmental Permit," including that, "prior to the commencement and operation works in Orlea area (taking into account the

[253] (C-446) at 3.

[254] (C-655) at 3-4.

[255] (C-2907) at 9.

development of the Project in stages, and the fact that the industrial facilities will be built, operated and decommissioned/closed in phases, throughout several years, including the fact that the construction and operation works for the Orlea area are planned for year 8 of the Project), [RMGC] shall complete the preventive archaeological research for the historical monuments and archaeological sites in the Orlea area," and shall obtain all the approvals "necessary to develop the constructions."[256]

g. In the draft EP conditions published in July 2013, the Ministry of Environment concluded that, "[p]rior to the construction and exploitation works in Orlea area (considering the Project's development in stages, the fact that the mine sites are to be built, operated and decommissioned/closed in stages, during several years, including the fact that in Orlea the construction and exploitation works [are] scheduled for year 8 of the Project)," RMGC "shall complete the preventive archaeological research for" Orlea and "shall secure all necessary" approvals "for conducting its construction works...."[257]

h. In a September 2013 press release, the Ministry of Culture stated, "The area for which the archaeological discharge certificate has not yet been issued is Orlea area. This area is proposed for mining starting with year 8 of the Project, meaning in at least 12 years from now, and only if the preventive archaeological research to be conducted until then would allow the archaeological discharge."[258]

120. Respondent contends the Ministry of Environment asked RMGC to submit an ADC for Orlea in its September 22, 2011 letter transmitting the TAC's final questions. Respondent's argument is materially misleading. It is undisputed that the Ministry of Environment sent an updated copy of that same letter on September 26, 2011 that specifically

[256] (C-661) at 2-3.

[257] (C-555) at 25-26. These draft EP conditions refute Respondent's speculation that "the TAC would have likely made issuance of the [EP] conditional upon an ADC for Orlea." The Ministry of Environment did *not* propose to make the EP conditional upon an Orlea ADC – it made construction and operation of the Orlea pit conditional upon obtaining an Orlea ADC consistent with the Ministry of Culture's endorsements and the law.

[258] (C-1298) at 2.

omitted the very sentence on which Respondent now relies.[259] The Ministry of Environment accordingly did *not* maintain a request for an Orlea ADC in September 2011; it promptly withdrew that request. Although Respondent is well aware of the September 26 letter, it misleadingly omits to mention in its written submissions (including in its PO27 submission) that it withdrew the referenced sentence in the September 22 letter. Such is Respondent's approach to the record.

121. Although she discussed the September 26 letter in her written statement,[260] [redacted] She was copied on both emails sent from the Ministry of Environment to RMGC on September 22 and September 26, 2011 transmitting the initial and corrected versions of this letter.[263] Other than an intention to mislead the Tribunal, there was no reason to wait until the hearing to raise new allegations about this letter. There also are serious doubts about the authenticity of the document on which she relies, which obviously is not an "original" of the September 22 letter.[264]

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[259] The first letter (C-575) was sent to RMGC by email on September 22, 2011 (C-2955). It was replaced by a corrected letter (R-215) sent to RMGC by email on September 26, 2011 (C-2956). [redacted] Tr.(Dec. 3, 2019)407:12-21 (Respondent's Opening) (acknowledging C-575 was sent to RMGC on September 22, 2011, and "R-215, which does not contain that sentence underlined in red and which the Ministry of Environment sent to RMGC on 26 September 2011. So, this modified version of the letter deleted an express request for a water management permit and the ADC for Orlea.").

[260] Mocanu-II ¶86.

[261] [redacted]

[262] [redacted]

[263] (C-2955); (C-2956).

[264] [redacted] In fact, R-689 skips from question 101 to question 106 on the signature page – an anomaly Respondent tried to conceal by changing "106" to "102" in its translation of the exhibit. *Compare* (R-689) PDF 31-32 (Romanian) *to* PDF 14 (translation). By contrast, the letters sent to RMGC on September 22 and September 26, 2011 are both numbered consecutively and end at question 102.

122. Further discrediting Ms. Mocanu's testimony that the September 22 letter was the Ministry's official version, the Ministry of Environment confirmed in many contemporaneous communications and even on its own website that it sent the TAC's final questions to RMGC on September 26, 2011.[265] Respondent also submitted the letter sent on September 26, 2011 as R-215 with its Counter-Memorial, which shows it considered that was the official version. Ms. Mocanu likewise confirmed that the Ministry of Environment sent the TAC's questions to RMGC on September 26, 2011.[266]

123. The record accordingly is clear that the official letter was sent on September 26, 2011, without any reference to an Orlea ADC. Indeed, even if one were to accept [redacted] it would be irrelevant because not only did the Ministry of Environment re-transmit the letter to RMGC on September 26, 2011 without that reference but, at all times thereafter, treated that version of the letter as the operative one in communications with the TAC, the public, and RMGC.

124. Respondent's further assertion that the authorities "made clear on other occasions, both before and after this letter, that RMGC needed to provide ... an ADC for Orlea," is misleading and incorrect. At the December 2010 TAC meeting, the Ministry of Culture asked RMGC its plans for Orlea. RMGC explained that the Project would be developed in stages and that mining would start at Orlea only in year 7 or year 9, and only if it obtained an ADC.[267]

125. Seeking to create the illusion of open issues, Respondent points to a Ministry of Environment representative's statement at the next TAC meeting in March 2011 that it required

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(C-575.RO) at 16-17; (C-2955.RO) PDF 17-18; (R-215) PDF 30-31; (C-2956.RO) PDF 17-18. In addition, the signature page on R-689 (PDF 32) has a darker footer, different page number alignment, an additional dark vertical line on the right side of the page, and additional horizontal lines not found on any other page of that document.

[265] *E.g.*, Ministry of Environment Letter to RMGC Oct. 28, 2011 (C-835); Ministry of Environment Letter to TAC Nov. 15, 2011 (R-476); TAC Nov. 29, 2011 (C-486) at 2; Ministry of Environment Website (C-1751) at 5.

[266] Mocanu-II ¶86.

[267] (C-476) at 59.

"a clear situation from the Ministry of Culture for the Orlea and Cârnic pits," but Respondent omits that these issues were clarified. For Cârnic, the Ministry of Culture issued an ADC in July 2011.[268] For Orlea, the Ministry of Culture explained at the March 2011 TAC meeting that it would endorse issuance of the EP and include conditions related to subsequent ADCs.[269]

126. Thus, the Ministry of Culture was consistently clear that the EP could be issued upon condition that an ADC would be obtained before mining at Orlea could begin,[270] and the record is clear that the Ministry of Culture and the Ministry of Environment accepted that an ADC for Orlea was not a prerequisite or an impediment to issuing the EP.

4. Water Management Permit

127. Contrary to Respondent's arguments that RMGC needed a Water Management Permit to obtain the EP, a Water Management Permit is required only for a construction permit.[271] The Ministry of Environment acknowledged that the Water Management Permit was not required for the EP.[272]

128. The need for a Water Management Permit was never cited as a reason for not issuing the EP and Respondent only raised this ill-considered argument in its Rejoinder.

129. Ms. Mocanu did not identify a Water Management Permit among the issues she contends was unresolved after the November 2011 TAC meeting or in her discussion of the

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[268] Memorial ¶328.

[269] (C-483) at 47 (Angelescu describing "solution" also used for citadel restoration); *id.* at 48 (repeating "it must not necessarily be only white or black," and TAC President Anton stating, "Correct."); *id.* at 90-91 (TAC President Anton confirming the Ministry of Culture was "very clear," "they don't need to submit anything").

[270] While Respondent asked Ms. Mocanu about a March 14, 2013 letter (C-834 at 1 point 1) on redirect examination, she was not involved in the EIA procedure in 2013 and has no firsthand knowledge of that letter. Tr.(Dec. 9, 2019)2052:1-13(Mocanu-Redirect); Mocanu-II ¶¶201, 228. That letter requested an ADC for Orlea *or* the Ministry of Culture's endorsement, which it provided. Respondent also refers to Ministry of Environment letters to the Ministry of Culture dated August 5, 2011 (C-1382), December 6, 2011 (C-444), and April 1, 2013 (C-1350). Those letters were not to RMGC and did not request anything from it. Instead the Ministry of Environment asked the Ministry of Culture to clarify the status of Orlea and to submit the endorsement needed to issue the EP. The Ministry of Culture complied with these requests and issued its endorsement on December 7, 2011 and again on April 10, 2013. *Supra* § IV.A.1.

[271] Mihai-II n.130; Waters Law (C-2407.1) Art. 49(3).

[272] Claimants' Opening-2019 vol.2:13; Claimants' PO27 ¶33 n.103.

Water Framework Directive.[273] The only mention of a Water Management Permit is her quote of the sentence from the September 22, 2011 letter (discussed above), which was deleted in the corrected letter sent on September 26, 2011, a material fact Ms. Mocanu omitted from her testimony.[274]

130. [redacted] If that were true, Respondent would have raised this point in the Counter-Memorial and supported it with contemporaneous documents and testimony from the competent officials at ANAR and the Ministry of Environment's Water Department. There is no credible evidence to support that statement.

131. Respondent then argues that "State authorities had made clear on other occasions, both before and after this letter, that RMGC needed to provide a water management permit" to qualify for the EP.[276] That also is not correct. Respondent refers to a statement from a June 2010 TAC meeting that RMGC did not attend and therefore could not be a request made to RMGC.[277] There was no mention of the Water Management Permit at the November 2011 TAC meeting when ANAR confirmed it had no further issues.

132. Respondent seeks to rely on a letter dated May 16, 2013 sent from ANAR to the Ministry of Environment, which it presented to Ms. Mocanu on redirect examination even

[273] Mocanu-II ¶¶177-202.

[274] Mocanu-II n.153. Referring to ¶¶56-66 of her first statement and ¶¶181-202 of her second statement, Respondent contends Ms. Mocanu testified "that the water management permit was required." That is not true. These references are to Ms. Mocanu's discussion of the Corna river diversion and the Water Framework Directive. There is no discussion of a Water Management Permit in either of Ms. Mocanu's statements, and no statement that it was required to obtain an EP.

[275] Tr.(Dec. 9, 2019)1964:16-1965:6 (Mocanu-Direct), 2035:11-2036:6 (Mocanu-Cross).

[276] Respondent (2019 slide 79) incorrectly refers to certain documents relating to the water management permit for the PUZ, which is a different permit issued at the regional level that RMGC already obtained. Avram-I ¶¶116-118.

[277] Tr.(Dec. 10, 2019)2318:2-2319:19 (Mihai-Cross). *See also* Tănase-II n.74 (confirming the TAC "met without RMGC" at that meeting); Ministry of Environment Letter to RMGC June 29, 2010 (C-552) (informing RMGC that the TAC met on June 23, 2010).

though she was not involved in the EIA procedure at that time and had never seen the letter.[278] Contrary to Ms. Mocanu's uninformed assertions, the letter does not request a Water Management Permit from RMGC or say that it is required to issue the EP. It states that the use of waterways including the Corna River must be regulated by a Water Management Permit,[279] which is not disputed.

133. Respondent simply ignores that on May 22, 2013, Minister of Environment Plumb signed the Government's submission to the Aarhus Compliance Committee that states that a Water Management Permit is required for issuance of a construction permit.[280]

134. Respondent cites to ANAR's comment at the May 31, 2013 TAC meeting that documentation for a Water Management Permit had not yet been submitted. Respondent omits that RMGC had observed that the Water Management Permit "is not within the scope of TAC procedure," which was not contested.[281] ANAR's "final remark" at that meeting was that it "will issue" the Water Management Permit, based on "documentation that will be presented and submitted," if it satisfies the applicable legal requirements.[282] ANAR did not say that a Water Management Permit was needed for the EP, and the acting TAC President noted ANAR's comment and, referring to the EP, invited ANAR "to help us with measures, conditions, indicators from your field of activity so as to potentially include them in a final agreement."[283] ANAR thereafter submitted the conditions it proposed to include in the EP.[284] At the next TAC meeting, ANAR confirmed again that the issues it had raised "can be addressed when the water management permit is granted," that the criteria it identified would have to be met "in order to

[278] Tr.(Dec. 9, 2019)2048:6-2051:21 (Mocanu-Redirect) (referring to R-542 and stating it was the "first time" seeing the ANAR letter).

[279] (R-542) at 3.

[280] (C-2907) at 5-6.

[281] (C-485) at 17.

[282] *Id.* at 21.

[283] *Id.* at 22.

[284] ANAR Letter June 13, 2013 (C-2252).

obtain the water management permit, and provided these conditions are met we shall discuss the parameters and so on at that time."[285]

5. Surface Rights

135. Surface rights are required to obtain construction permits and RMGC would have been able to do so when needed.[286] There is no legal requirement to acquire all surface rights in the Project area to obtain an EP.[287]

136. Respondent concedes there is no legal basis for its arguments. At the hearing counsel stated, "surface rights are a requirement only perhaps for the building permit...."[288] Prof. Dragoş stated it would be "recommendable" to acquire surface rights before the EP.[289]

6. Forestry Issues

137. RMGC committed to reforest approximately 1,000 hectares – four times larger than the area that would be deforested – to protect the biodiversity in the area in accordance with legal requirements.[290]

138. Respondent argues without basis that RMGC did not have rights over enough of the land to request its removal from the forestry circuit and that this was an obstacle to obtaining the EP. Removal of land from the forestry circuit is required for construction permits, not for the

[285] TAC June 14, 2013 (C-481) at 5-6; Tr.(Dec. 5, 2019)1255:21-1257:19 (Avram-Cross) (noting that, at the TAC meeting, "the General Manager of ANAR, Mr. Gabor, acknowledged that all these technical issues would be discussed at the later stage of the water permitting process."). ANAR also stated "the only issue that remained to be solved and must be solved is strictly related to the legal regime of the lands." (C-481) at 5. The land under the riverbeds was to be transferred from ANAR to the State entity responsible for coordinating the Project to be used for the Project. ANAR Letter June 13, 2013 (R-546) at 3.

[286] *Infra* §X.E.2.a.

[287] Claimants' Opening-2019 vol.2:13 (C-2907 at 5-6); Claimants' PO27 ¶33 n.102.

[288] Tr.(Dec. 3, 2019)453:22-454:8 (Respondent's Opening-Tribunal).

[289] Tr.(Dec. 11, 2019)2691:11-21, 2693:1-8 (Dragoş-Cross); Dragoş slide 5.

[290] Avram-II ¶¶105-107.

EP as the Government confirmed contemporaneously,[291] and Ms. Mocanu acknowledged in cross-examination.[292]

139. At the November 2011 TAC meeting, the Ministry of Environment's Forestry Department agreed with RMGC that land could be removed from the forestry circuit after issuance of the EP.[293] In an internal letter produced by Respondent, the Ministry of Environment confirmed in January 2012 that RMGC would prepare documentation for the "permanent removal of the lands *specified in the environmental permit* from the forestry circuit," demonstrating that removal of lands from the forestry circuit follows the EP which at that time was expected to be issued imminently.[294]

C. Other Alleged Issues Were Not Impediments to the EP

140. At the 2020 hearing, Respondent argued that "areas of technical uncertainty" prevented the Ministry of Environment from issuing the EP, including (i) cyanide transportation and management, (ii) the alleged risk of TMF failure and seepage, and (iii) the alleged absence of information regarding post-mining land use.[295] These arguments are meritless.

[291] Ministry of Environment Aarhus Letter May 22, 2013 (C-2907) at 6 ("approval of land use change (change of forestry or agricultural designation of land) ... is one of the pre-requisite documents for issuance of building permit"); [redacted] (R-406) at 4-5 [redacted]; Government Note Mar. 6, 2013 (C-1903) at 36 (same).

[292] Tr.(Dec. 9, 2019)2042:7-12 (Mocanu-Cross) ("delisting of those lands from the forest circuit is a document required to obtain the Building—the Construction Permit"). Respondent's expert Ms. Wilde also withdrew criticism of this topic. Wilde-II ¶219.

[293] (C-486) at 27.

[294] (C-2241) (emphasis added). *See also* Avram-II n.276; Tr.(Dec. 5, 2019)1196:15-1198:8 (Avram-Cross).

[295] Respondent's alleged "open issue" relating to "[t]he lack of sufficient research at Orlea" is addressed in §§IV.A.1, IV.B.3.

1. Cyanide Transportation and Management

141. Respondent argues that RMGC failed to address concerns regarding the cyanide transport route. The evidence shows, however, that:

a. Gabriel was one of the first signatories to the International Cyanide Management Code ("Cyanide Code").[296]

b. RMGC developed a Cyanide Management Plan with transportation and management safeguards in accordance with the Cyanide Code.[297]

c. RMGC engaged in extensive public consultations regarding the safe use and transport of cyanide.[298]

d. Government officials acknowledged that RMGC's cyanide management plans met European and international standards.[299]

142. Respondent also wrongly suggests RMGC did not adequately address the IGIE's recommendations relating to cyanide. Although the Ministry of Environment did not provide a copy of the 2006 IGIE Report to RMGC or ask RMGC to do anything regarding the recommendations in it, RMGC obtained a copy on its own and proactively prepared responses addressing the IGIE's comments.[300] The TAC analyzed RMGC's responses at the November 29, 2011 TAC meeting, and none of the TAC members raised any concerns.[301]

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[296] Memorial ¶214; Tr.(Sept. 28, 2010)169:13-17 (Respondent acknowledging that "good practice for mining companies meant compliance with the code").

[297] Claimants' Opening-2020 vol.5:16-22; Memorial ¶¶214-215; Avram-II ¶¶89-95; Lambert ¶¶27-36, 41-57.

[298] Memorial ¶¶251-253; Avram-II ¶¶129-134; Lambert ¶¶85-92.

[299] Memorial ¶¶211-218, 483, 503-506; Reply ¶¶122-124; Avram-II ¶¶89-95.

[300] Memorial ¶¶244-250.

[301] Reply ¶41 n.62. Respondent misleadingly asserts that "RMGC did not designate the cyanide transportation route in the EIA Report despite IGIE's request and even though, as Mr. Avram admits, '[t]his information should be in the Environmental Permit.'" In fact, Mr. Avram's comment related to cyanide detoxification, not transport. Tr.(Dec. 5, 2019)1117:1-1118:12 (Avram-Cross). Transport route alternatives were assessed in the EIA Report, with a final route to be established after the construction period. Avram-II ¶¶89-95. *Infra* §IX (rebutting Respondent's erroneous argument that IGIE concluded RMGC failed to sufficiently inform the public on cyanide use and transportation).

143. Respondent wrongly asserts that the TAC "request[ed] further information regarding the cyanide transportation route" at the November 2011 TAC meeting and that RMGC did not address the TAC's concerns. The Ministry of Transport simply stated at that meeting that RMGC should "comply with all the legal provisions related to the transport of hazardous substances and cyanide" and include in its documentation "a detailed chapter about how these provisions will be observed."[302] Mr. Avram confirmed that RMGC undertook in the EIA Report to observe these legal provisions, indicated where the requested information could be found, and noted that additional documentation would be prepared for purposes of obtaining the construction permits.[303]

144. Respondent wrongly asserts that the TAC discussed the "lack of an identified cyanide transportation route and plan" at the May 10, 2013 TAC meeting and that RMGC "declined to provide further information, notwithstanding the TAC's request." RMGC answered the question regarding cyanide transport,[304] and there was no further request.[305]

145. Respondent mischaracterizes an exchange at that same TAC meeting in an effort to support an argument raised in its Rejoinder that the use of a cyanide storage facility at Zlatna would have resulted in delays not accounted for in the Project timeline. As the transcript from the TAC meeting states, however, RMGC was merely "consider[ing] the *possibility* of building a transfer and storage terminal on the railway" in Zlatna.[306] RMGC had the option of on-site

[302] (C-486) at 33.

[303] *Id. See also id.* at 36 (TAC President Anton stating that "once you commit to comply with the law, it's clear that you'll comply with the entire relevant legislation"); *id.* at 44 (Ministry of Transport confirming it "agree[d] with this project").

[304] Avram-II n.245; TAC May 10, 2013 (C-484) at 12-13 (RMGC explaining it "did in fact contact the Constanţa Port").

[305] Respondent displayed at the 2020 hearing (slides 25, 37) a "possible route" for cyanide transport generated by Respondent's counsel using Google Earth. This route is inconsistent with those proposed in the EIA. EIA updated Ch. 4.10: Transportation (C-389) at 20. Respondent counsel's map inaccurately lengthened the route and exaggerated the risks associated with cyanide transport.

[306] TAC May 10, 2013 (C-484) at 13 (emphasis added).

cyanide storage, as the EIA Report expressly confirms.[307] Respondent avoided asking Claimants' witnesses anything on this topic.

146. Moreover, in a letter sent the day of that May 10, 2013 TAC meeting, the Ministry of Transport communicated to the Ministry of Environment that, so long as RMGC complied with the relevant legislation, it "consider[ed] that the transportation of the solid cyanide required for the ore extraction process may be carried out under safety and security conditions."[308]

147. Confirming cyanide transport had been addressed sufficiently for the EP stage, the Ministry of Environment proposed EP conditions providing that RMGC "shall assess each alternative route before … establishing the final route for the first sodium cyanide transport *at the end of the construction period*."[309]

148. Respondent refers to an alleged request by the Parliamentary Special Commission in November 2013 to "assess the possibility of using the alternative technology of cyanidation through flotation." As the Ministry of Environment and NAMR had testified, the planned use of cyanide was safe, would be managed and transported responsibly, and was the only suitable method to process the ore at Roşia Montană.[310]

149. Respondent asserts that, "[i]n April 2014, [the TAC] discussed the need for clarification regarding the storage of hazardous substances through the port of Constanţa." In fact, when the Ministry of Transport raised a question about the possible storage of cyanide at the Constanţa Port, the Ministry of Environment clarified that these issues were to be addressed

[307] Claimants' Opening-2020 vol.5:21. Moreover, Respondent's premise that a storage facility at Zlatna would require its own lengthy EIA has no basis in the record. The letter from Minister of Environment Gavrilescu relating to this issue (CMA-123) was struck from the record because Minister Gavrilescu was unwilling to be cross-examined. It also is not credible that permitting a storage facility of relatively modest scale would take over 3.5 years as Respondent suggests. Claimants' Opening-2020 vol.5:21. Respondent's time estimate for permitting such a facility is based on the experience of another project known as the Kronochem plant. Wilde-II ¶¶136-137. The Kronochem plant was a formaldehyde processing plant with a capacity of 60,000 tons a year that is not comparable in scale or scope to any potential Zlatna facility. *Compare* Kronochem EP (CMA-133) at 2 *to* AMEC Transport Review (C-943) at 43, 56.

[308] (CMA-60).

[309] (C-555) at 2, 45 (emphasis added); Draft EP Decision (C-2075) at 1, 34-35 (same).

[310] Memorial ¶¶500-512.

after the environmental permitting phase.[311] No other questions were raised at the TAC meeting regarding cyanide transport.

150. Ms. Mocanu asserted for the first time at the hearing that the Ministry of Environment was waiting for information regarding the "transportation of cyanide on Romanian roads" before it could take a decision on the EP.[312] Her testimony is not credible; she did not indicate in either of her witness statements that cyanide transportation issues were an impediment to permitting, and it is inconsistent with contemporaneous statements that RMGC's plans for cyanide transport and management met applicable requirements for the EP and would be finalized at the end of construction.

2. Tailings Management Facility

151. Respondent also wrongly argues that TAC concerns about TMF failure and seepage remained unresolved and prevented issuance of the EP. The contemporaneous evidence overwhelmingly confirms the Ministry of Environment and TAC accepted that RMGC's TMF design met applicable requirements.[313]

152. Respondent does not deny the TMF design was technically sound.[314] Respondent argues that the "TAC raised on numerous occasions concerns regarding the permeability of the bottom of the pond and the question of the choice of a liner for the pond," and that this issue allegedly remained open in 2012 and prevented the Ministry of Environment from taking a decision on the EP.

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[311] (C-473) at 10 (Ministry of Environment noting that the questions raised by the Ministry of Transport will "be surely considered as conditions which must be complied with when the Project reaches its maturity, when there will actually be operations going on. For now, we are at the phase of design; we are talking about conditions related to the construction of this Project.").

[312] Tr.(Dec. 9, 2019)2035:11-2036:6 (Mocanu-Cross).

[313] Claimants' Opening-2020 vol.5:23-27; Memorial ¶¶219-225, 382, 483, 503; Reply ¶¶125-126; Szentesy-II ¶¶44-64; *generally* Corser; Corser-II; van Zyl ¶¶59-63.

[314] Claffey-I ¶24; Claffey-II ¶¶11, 32; Behre Dolbear-II ¶118.

153. When the TAC completed its technical assessment at the November 2011 TAC meeting, no TAC member identified open TMF concerns.[315] TAC President Anton explained that, during the European Parliament Committee on Petitions ("PETI") visit to Romania, the PETI requested information about many subjects, including the "waterproofing of the tailings pond."[316] The minutes from the PETI visit produced by Respondent (which were endorsed by TAC President Anton and Ms. Mocanu, among others) confirm that, in response to the PETI's questions, the Ministry of Environment clarified that "clay lining seems to be a viable alternative, none of the synthetic lining materials can withstand like a natural material."[317]

154. The representative from the Geological Institute of Romania also confirmed at the November 2011 TAC meeting that the Institute had "received answers to a lot of questions," that the "results are those expected and good for the future," and that it would clarify remaining questions "in the near future .... This won't take long, and doesn't stop the project from moving forward."[318] After studying geotechnical, hydrological, and monitoring data for the Corna Valley and performing fieldwork, testing, and structural mapping at the proposed TMF site and upstream from it, the Institute issued a favorable endorsement for the EP, observing that the "basin on the tailings dam from Corna Valley doesn't show any faults, fissures or other anomalies which could trigger or facilitate the occurrence of seepage or could affect the stability of the tailings management facility."[319]

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[315] During cross-examination, Respondent referred Mr. Avram to a letter from the National Hydrology and Water Management Institute sent the day after the November 2011 TAC meeting (R-686) to suggest the TAC had concerns regarding the permeability of the TMF basin. The National Hydrology and Water Management Institute was not a TAC member and was not competent to opine on TMF issues, which is why the letter concluded that the "specialists in the field can make a decision concerning which sealing is the most effective." Tr.(Dec. 5, 2019) 1143:2-1146:21 (Avram-Cross).

[316] (C-486) at 45.

[317] (C-2240) at 4; Ministry of Environment Letter Apr. 25, 2012 (C-2244) at 7 (noting the "clay [liner] solution [for the TMF] was considered as a more viable and efficient option, as the geomembranes ran the risk of breaking up"); Avram-II ¶26.

[318] (C-486) at 24-26.

[319] (C-636) at 2, 5; Szentesy-II ¶56. Respondent refers to a comment by the Geological Institute at the July 2013 TAC meeting expressing alleged concerns about seepage at the Project site. (C-480) at 4. Although in December 2011 the Geological Institute had endorsed the TMF site and the issuance of the EP based on the on-site analyses of its geologists, in 2013 Ștefan Marincea as Director of the Institute sought to disavow its December 2011 endorsement. The Ministry of Environment, however, did not accept Mr. Marincea's

155. In 2013 the Ministry of Environment's draft conditions for the EP included that the "tailings dam basin will be sealed by compacting colluvium for waterproofing according to BAT,"[320] consistent with the Project's TMF design. Numerous Government officials repeatedly confirmed that there was "no danger of cyanide infiltration in the groundwater due to the geological conditions" and that an impermeable "watertight layer" of clay would prevent groundwater contamination.[321]

156. Respondent's arbitration expert Behre Dolbear suggests that a dry-stack tailings facility could have been considered as an alternative to the TMF. There is no dispute that the experts at the Ministry of Environment never required a dry-stack tailings approach and instead repeatedly approved the TMF design and issued dam safety permits.[322]

157. Respondent's TMF expert Dermot Claffey does not support Behre Dolbear's suggestion and does not mention dry-stack tailings in his two reports. Behre Dolbear declined to respond in its second report to Claimant's TMF expert Pat Corser, who explained that RMGC specifically considered a dry-stack approach and determined that such an approach was not appropriate due to climate conditions at the site.[323] Behre Dolbear's assertion at the hearing that a dry-stack approach could be placed "in any weather condition" is not credible. Behre Dolbear did not reference any analysis supporting the conclusion that dry-stack would be appropriate for

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unsupported views, and reconfirmed that the technical assessment for the Project was complete and that a decision on the Permit needed to be taken. Memorial ¶¶433-445; Szentesy-II ¶¶56-64; Avram-I ¶¶139-148.

[320] (C-555) at 4, 16; Draft EP Decision (C-2075) at 5, 15. Respondent refers to the Parliamentary Special Commission's proposal to the Ministry of Environment in November 2013 "to assess the advisability of performing an independent study on the issue of the permeability of the tailings pond basin." Although the Ministry of Environment reconvened the TAC in 2014 purportedly to address the Special Commission's recommendation, it ultimately did nothing. Reply ¶¶216-224; *infra* §VI.A.

[321] Memorial ¶¶222-225, 382, 483, 503; Avram-II ¶¶71.iii, 71.v; Government Note Mar. 6, 2013 (C-1903) at 20-21. Respondent argues that the "question of the liner would have been addressed as part of the conditions attached to the Environmental Permit" and "that the geomembrane liner could have been a requirement for permitting." Respondent ignores that the Ministry of Environment already published the proposed conditions and measures for the EP. Those proposed conditions and the Ministry of Environment's Draft Decision recommending issuance of the EP expressly reflect the Ministry's acceptance that the TMF basin would be sealed with compacted colluvium according to BAT and in line with RMGC's designs. (C-555) at 4, 16; (C-2075) at 5, 15.

[322] Memorial ¶¶225, 273-279; Reply¶¶ 126, 572.

[323] Corser-II ¶¶77-82.

the Project;[324] Mr. Corser, in contrast, referenced a study published in 2017 showing that the climate and operating conditions at the Roşia Montană Project fell outside of the parameters of known projects that employed a dry stack approach.[325]

3. Post-Mining Land Use

158. Contrary to Respondent's claim that the "absence of information regarding the post-closure land use" prevented issuance of the EP, the Project's post-closure land use was considered in detail in the EIA Report and was not an impediment to permitting.[326]

159. While Respondent asserts that the "TAC raised questions about the after-use of the site in 2010 and 2011," none of the purported TAC statements and questions related to the Project area's after-use. The statements to which Respondent refers relate to the Project's financial guarantees, which were robust and accepted by the Ministry of Environment.[327]

160. Respondent mischaracterizes Dr. Kunze's statement that "it is not the financial responsibility of the mining company to fund and/or implement the *final* after-use plan," as purported evidence that RMGC did not account for closure costs to restore the land to a state that allows the intended after-use.[328] Dr. Kunze did not say that RMGC would not fund works associated with enabling particular land uses, which are included in RMGC's closure cost

[324] Behre Dolbear relies on a 2011 publication of Dr. Davies (BD-13). Dr. Davies confirms, however, that a conventional TMF – not dry-stack tailings – would be optimal in a wet climate like Roşia Montană. He explains that conventional TMFs "make up by far the majority [of] all existing tailings facilities" and "remain the best" solution "for the majority of operating and proposed mines around the world." (BD-13) at 1, 4. He observes "the two most common reasons to select dry stacked filtered tailings" as an alternative are (i) to recover water in "arid" climates where water is scarce and highly regulated, "e.g. Chile, Australia, and Mexico," and (ii) "where terrain/foundation conditions contraindicate conventional impoundments." (BD-13) at 3. Neither circumstance existed because Roşia Montană is wet (not arid) and its geological conditions were well-suited to a TMF.

[325] Corser-II ¶¶77-82.

[326] Kunze-II ¶¶32-41, 64-68. *See also* Dodds-Smith-II ¶¶71-72 (acknowledging that post-mining land-uses such as forestry, agricultural, and tourism are "entirely reasonable and logical"); Memorial ¶¶227-235; Reply ¶131; Avram ¶¶29-30.

[327] Memorial ¶¶231-235, 417, 462; Reply ¶131; Dodds-Smith ¶24 (acknowledging RMGC's environmental financial guarantee was "reasonable").

[328] Kunze-II ¶64.

estimate.[329] Dr. Kunze observed that mining companies are not expected to fund after-uses such as restaurants and boat rentals, an observation with which Respondent's expert agreed.[330]

161. Finally, Respondent's reference to a draft EIA checklist to suggest that the Ministry of Environment considered as inadequate information provided by RMGC relating to the "reinstatement and subsequent use of lands," is misleading. Respondent admits that the draft checklist did not reflect the views of the Ministry of Environment.[331]

V. IN 2013 THE PONTA GOVERNMENT MAINTAINED THE DEMAND FOR NEW ECONOMIC TERMS AND IMPOSED THE "SPECIAL LAW" AS A PROXY FOR THE GOVERNMENT'S POLITICAL DECISION

162. The Ponta Government maintained the policy that the Project would not proceed without an increase of the State's shareholding and royalties and without a political decision, which it insisted would be made by Parliament through a vote on a "Special Law." Gabriel objected to a "Special Law" and to conditioning the EP on a vote in Parliament, and urged the Government instead to support general legislative amendments that would benefit the entire mining industry. The Government acknowledged it was obligated by law to issue the EP but the Ministry of Environment refused to recommend issuance of, and the Government refused to decide to issue, the Permit without Parliament enacting the Special Law. The Government acknowledged that a political decision not to do the Project exposed the State to billions in damages.[332]

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[329] Dr. Dodds-Smith contends RMGC's plans did not cover elements in "the Biodiversity Management Plan (such as ecological corridors including meadow belts and scrub (woodland) belts)." However, the cost for a self-sustained ecosystem that starts with grassland for erosion protection and then develops into more complex vegetation patterns (scrub, woodland) was accounted for in the cost estimate. *See* WISUTEC Memorandum (C-1607.01) at 35, 37 (item "Erosion control (seeding)"); Kunze-II ¶¶64-67.

[330] Kunze-II ¶¶35, 64-68; Dodds-Smith-II ¶77 (acknowledging that "there are instances where the post-mining land-use might incorporate development opportunities that have an independent economic justification (such as hotels, residential or industrial developments), and, in these situations, it would be unreasonable to expect the mining company to finance such initiatives").

[331] Reply ¶50 n.104; Rejoinder ¶319 (draft checklist "was not an official Ministry document"); Mocanu-II ¶68 ("Ms. Hintea indeed could not have undertaken a comprehensive update" to reflect RMGC's responses to TAC's final questions or conclusions at November 2011 TAC meeting).

[332] Claimants' PO27 ¶¶34-53; Claimants' Opening-2019 vols.5-6 (videos of 2013 events in PowerPoint); Memorial §VIII; Reply §IV.

163. Respondent's contention that Gabriel wanted and asked for a Special Law does not withstand scrutiny. Respondent failed to present for examination Prime Minister Ponta, Senator Antonescu, Minister Şova, Minister of Environment Plumb, Minister of Culture Barbu, or anyone else involved in these events.[333] It is obvious why. These officials repeatedly admitted that the Government would not move the Project forward despite its meeting the applicable permitting requirements unless Parliament approved a Special Law.

164. Without expressly denying the Ponta Government conditioned the Project on Gabriel agreeing to its economic demands, Respondent suggests "there would have been no need to condition the Project's progress on that basis," purportedly because "the economic benefits requested by the Government in 2013 were the same as the ones previously agreed in 2011." Respondent thus repeats its fiction that the parties agreed on economic terms in 2011. The evidence proves no agreement was reached in 2011-2012.[334]

165. In May and June 2012, Prime Minister Ponta declared that increasing the State's shares and royalties remained mandatory "conditions," but would not be addressed until after parliamentary elections.[335] He maintained these conditions after the elections.[336] Minister of Environment Plumb confirmed this policy and that "a re-assessment of the benefits" was required for the Project to proceed.[337] Minister Şova (who headed the new Government Department responsible for the Project) conveyed the Government's demand for renegotiations directly to RMGC.[338] To implement this demand, the Government established a Negotiation Commission with a mandate, among other things, to increase the State's participation, royalties, and economic benefits related to the Project.[339] Gabriel did not put its January 2012 "offer" of

[333] Respondent's references to the unexamined "statement" it submitted for Mr. Ponta should be disregarded.

[334] *Supra* §III; Claimants' PO27 ¶¶21-30.

[335] Claimants' PO27 ¶¶29-30; Claimants' Opening-2019 vol.3:76-78.

[336] Claimants' PO27 ¶34; Claimants' Opening-2019 vol.5:3-4.

[337] Claimants' PO27 ¶35; Claimants' Opening-2019 vol.5:5-6 (video).

[338] Claimants' PO27 ¶36; Claimants' Opening-2019 vol.5:13.

[339] Claimants' Opening-2019 vol.5:21.

25 and 6 back on the table, but "offered" instead 22 and 5.[340] The Government insisted that 25 and 6 represented its "minimum conditions."[341]

166. Respondent denies the Ponta Government conditioned issuance of the EP on Parliament's approval of the Special Law. Respondent ignores the numerous videotaped and transcribed statements of Prime Minister Ponta, Minister Şova, Minister of Environment Plumb, and other senior Government officials repeatedly declaring that the Government would not issue the EP or allow the Project to proceed unless Parliament approved the "Special Law."[342] Although he refused to be examined, the Tribunal heard what Prime Minister Ponta said in real-time.

167. Respondent's assertion that "[n]either the Ministry of Environment nor the TAC ever informed RMGC that the EP would not be issued unless Parliament approved the Rosia Montana Law" is false. At the TAC meeting on May 31, 2013, State Secretary Năstase (the senior official in Minister Şova's Department and Chairman of the Negotiation Commission) confirmed that a draft law would be sent to Parliament that would decide if the Project would be implemented:

> Let us not forget that, after the Ministry of Environment gives the recommendation on the environmental permit, provided all the drafts are complied with and all the endorsements are obtained, a draft law will be made which will be submitted to debates in the Parliament.
>
> Together with all the conditions in the environmental permit and all the agreements that must be involved in this Project, leaving aside that we will also make a financial-economic negotiation of this Project, not only from the point of view of the royalty and of the State's share in [RMGC], but also from the point of view of other economic-financial aspects that are of particular relevance for the Romanian State.
>
> All of these will be part of the law that will be submitted to the Parliament for approval as the final deciding factor whether this project will be done or not. In Parliament it will be possible to make observations and analyses

[340] *Id.* vol.5:28.

[341] *Id.* vol.5:31-32.

[342] Claimants' PO27 ¶¶36-37, 41, 43-45 (excerpts transcribed); Claimants' Opening-2019 vol.5:7-54, vol.6:24-27, 44-46, 55-58 (videos in PowerPoint).

> in the commissions and we are certain that, in the end, the Parliament will take the final decision if Romania will make this project or not.[343]

168. Respondent contends that State Secretary Năstase made this statement to the TAC "in error" and that it "did not reflect the policy of the Government." None of the other TAC members corrected State Secretary Năstase or suggested he was mistaken at any of the TAC meetings. Nor did the lawyers from the Leaua law firm who heard State Secretary Năstase say the same thing two weeks later at a Negotiation Committee meeting with RMGC.[344] This is because the statement was not in error, but reflected the Government's views.[345]

169. Minister of Environment Plumb also repeatedly stated that the EP would not be issued if Parliament rejected the Special Law. She confirmed in early September 2013 that "[t]he EP for Rosia Montana will be granted depending on the decision taken by the Parliament of Romania."[346] Thus, on September 9, 2013, Senator Antonescu, the co-leader of the Government coalition, said one reason for the protests was that, "in terms of the environmental permit, which is essential for such a subject ... the minister in charge tells us that whether or not [she] will give [her] approval depends on the outcome of the vote in parliament."[347]

170. Minister Plumb reaffirmed the next day in Senate testimony that the Project met the permitting requirements, but the Ministry of Environment "will issue the environmental permit, only after the vote to be cast in the Parliament."[348] Minister Plumb testified later in September 2013 that the Project safely addressed the key environmental protection issues and met all permitting requirements.[349] In a formal written response to a question posed by Senator

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[343] Claimants' Opening-2019 vol.5:29-30.

[344] *Id.* vol.5:38-39 ("So, the project is approved by the Parliament. The project. So, mining in that area, everything we do, goes to the Parliament.").

[345] Respondent notes the Draft Law did not include EP conditions or provide for approval of that Permit. In February 2013, however, Minister Şova had told RMGC that the EP likely would be an annex to the Draft Law. *Id.* vol.5:13. Although the Government conditioned issuance of the EP on Parliament's approval of the Draft Law, the Government ultimately did not formally present the EP to Parliament for approval. Tănase-III ¶¶132-136; Tr.(Dec. 4, 2019)994:8-995:18 (Tănase-Cross).

[346] Claimants' Opening-2019 vol.5:52-54.

[347] *Id*. vol.5:55-59.

[348] *Id.* vol.6:18-22.

[349] *Id*. vol.6:39-43.

Marian, Minister Plumb again explained the Government's position, stating "[t]he government I am a member of has rejected the previous project and drafted a new project which includes environmental requirements to the highest European standards and improved benefits for Romania," but that it "was not the wish of the Government to make a decision – whether in favor or against," and, therefore, "[t]he environmental agreement will only be issued provided the Parliament's approval of this draft law…. The decision thus rests with the Parliament of Romania."[350] There could not be clearer evidence of Government policy.

171. Respondent's argument that the Government had "no motive to block the permitting process for the Project pending a 'political decision'" and "no reason to withhold" the EP after Gabriel agreed to satisfy its economic demands, is irrelevant and wrong. It is irrelevant because regardless of the State's motivations, it is the impact that is decisive.[351] It is wrong because the Government was not simply motivated to obtain a larger share of economic gains, but rather senior members of the Government were motivated to make decisions that they perceived to be in their own political interests and the Government's actions followed accordingly.[352]

172. Respondent presents various arguments that it was Gabriel that asked for a Special Law, but the evidence shows that is not so.

173. First, Respondent asserts that "Claimants opted for the parliamentary route." Gabriel did not approach the Government asking for anything. As in the fall of 2011, Gabriel responded to the Government's demands to renegotiate. Gabriel's management and directors

[350] (C-1529) at 2.

[351] *E.g.*, Memorial ¶¶647, 769, 773-777.

[352] *Supra* §III. [redacted] Prime Minister Ponta indeed repeatedly stated – consistent with the political position he had staked out before leading the Government – that he personally would vote against approval of the Special Law – thus highlighting that the Government's actions were driven by the particular political interests of those who occupied office at the time, rather than what the law required. Claimants' Opening-2019 vol.5:26-27, 36-37, 48-49.

were concerned about liability to shareholders were they to simply give away financial benefits without obtaining some benefit in return. Gabriel therefore asked the Government in October 2011 and again in June 2013 to support amendments to the Mining Law and the Tax Code that would benefit the entire mining industry.[353] The Senate had unanimously passed the proposed amendments to the Mining Law in 2009 with the support of the Patromin mining association (representing over 25 mining companies) and with the endorsement of the Government.[354]

174. Gabriel and RMGC supported those general Mining Law amendments not only in view of the Roşia Montană Project, but because RMGC also intended to develop two projects in Bucium and hoped to be able to develop others in the future.[355] Gabriel did not need, however, any legislative changes to implement the Project.[356] [redacted] testimony on this point is unrebutted. [redacted] Minister Şova similarly testified to Parliament that RMGC "does not need this law, as the current situation is convenient for them. The law was made for the Romanian State, not for them."[358]

175. Second, Respondent contends "neither RMGC nor the Claimants ever objected" to a Special Law. The Draft Law included a number of provisions that would have facilitated and potentially would have expedited Project implementation had it been enacted, e.g., by clarifying certain issues and by streamlining the expropriation procedure.[359] While Gabriel supported general legislation to implement such changes, Gabriel made clear that it did not want

[353] *Id.* vol.3:33-34, vol.5:34-35; [redacted]

[354] [redacted]

[355] [redacted]

[356] [redacted]

[357] [redacted]

[358] Claimants' Opening-2019 vol.5:15-16. The "statement" of Mr. Ponta also acknowledges his Government – not Gabriel – "envisaged" the Special Law. Ponta ¶30, §4.

[359] [redacted]

a Special Law for the Project, and that it wanted the EP issued by Government Decision before, and independent of, any vote in Parliament.[360]

176. When State Secretary Năstase stated at the first Negotiation Commission meeting on June 14, 2013 that a law specific to the Project would be submitted to Parliament, Gabriel urged the Government to reconsider. Speaking clearly, but diplomatically in the wake of prior statements of senior Government officials that the Parliamentary route was the only path forward for the Project, [redacted]

177. [redacted]

178. Gabriel could not persuade the Government to give up a Project-specific Special Law because it was the Government's chosen vehicle to take a political decision on the Project. State Secretary Năstase therefore reiterated that "there will be a special law."[365]

179. Third, Respondent argues that Gabriel did not object to the "Project-specific nature of the Rosia Montana Law," but merely sought "to avoid triggering State aid" "to ensure

[360] Claimants' PO27 ¶¶39, 41; Claimants' Opening-2019 vol.5:15, 35, 38-41.

[361] (C-1536) at 64.

[362] *Id.*

[363] *Id.* at 65.

[364] *Id.* at 65-66.

[365] *Id.* at 66.

that it would pass." That is not correct. It was in fact the Government's lawyer, Mrs. Leaua, who expressed concerned whether some of the proposed general legislative amendments, including regarding proposed tax exemptions and the term of license extensions, would be considered State aid.[366]

180. Fourth, Respondent argues that clarifications sent in July 2013 to Gabriel's request to extend the validity of the License for 20 years reflect "demands that they knew could only be implemented through legislation specific to the Project." That is false. Gabriel's clarifications confirm that this request was to be implemented by an "amendment of the general legislative framework so as to allow the extension of mining licenses by more than 5 years," followed by an "addendum to the mining license."[367]

181. Fifth, Respondent argues that Gabriel's comments on the Government's initial draft of the Special Law (which proposed to include declarations that the Project was of public utility and of outstanding national interest) "reinforced its Project-specific nature." In fact, Gabriel had made clear that the declaration of public utility and outstanding national interest should be made by Government Decision.[368] There was no reason for a declaration of public utility or outstanding national interest to be made by law. The Government also confirmed at the time that the exploitation and processing of mineral resources were already defined by the Expropriation Law "as public utility activities."[369]

182. Sixth, Respondent repeats its debunked argument that Gabriel sought "a guarantee of permits" including the PUZ and construction permits.[370] Neither the Draft Law nor the Draft Agreement guaranteed any permits to RMGC or relaxed applicable requirements. Nor did Gabriel seek a guarantee of permits. In its final offer, Gabriel underscored the Government's [redacted]"[371] The Draft

[366] *Id.* at 15, 54, 56, 64, 66.

[367] (C-826.2) at 6, §5.1.

[368] *Id.* at 7, §5.4.

[369] Government Exposition of Reasons Aug. 27, 2013 (C-817 and C-2461) at 6.

[370] Tănase-III ¶¶151-158 (rebutting same).

[371] Claimants' Opening-2019 vol.5:34.

Agreement linked the proposed share increases to milestones, e.g., to the issuance of permits within a timeframe "not significantly delayed" as compared to an indicative schedule.[372] That provision would only be relevant if the Government significantly delayed issuing permits RMGC was legally entitled to receive. If RMGC did not meet applicable permitting requirements, the State's shareholding would be irrelevant as permits would not be issued and the Project would not be done.

183. Seventh, Respondent argues that Gabriel devised the Special Law to give it "the ability to proceed with construction prior to obtaining an [ADC]," purportedly to avoid the possibility of legal challenges to the Cârnic ADC delaying construction. Respondent acknowledges that the Draft Law "does not explicitly state that an ADC is not required prior to the issuance of a building permit," but argues it can be inferred from Article 7(3).[373] Respondent is mistaken. That provision confirms preventive archaeological research, the type needed to support an ADC, must be conducted by RMGC.[374] It does not change the requirements or prohibitions of GO 43/2000, the law that prohibits works that may affect archaeological sites in the absence of an ADC.[375]

184. Finally, Respondent argues that Gabriel did not object to "the submission of the draft law to Parliament." As discussed above, Gabriel disagreed with and objected to a Special Law, but the Government insisted there was no other path forward and made Parliament's approval of the Draft Law a precondition to issuing the EP and proceeding with the Project. Gabriel accordingly either could reject the Government's approach and sue the State (which would have ended the Project), or it could hope that the Parliamentary path the Government demanded would lead to the Project being implemented.[376]

[372] (C-519) at 12-13 Art. 1.

[373] Tr.(Dec. 3, 2019)550:4-16 (Respondent's Opening).

[374] (C-519) Art.7(3). *E.g.,* Schiau ¶¶49, 59-60, 87.

[375] GO 43/2000 (C-1701) Arts.5(2), 25; Schiau ¶¶19-20.

[376] [redacted]

185. In the circumstances, Gabriel reasonably tried to work within the Government's approach, but reserved all of its rights.[377] Gabriel did not therefore assume the risk that the Government would terminate the Project following protests against the Special Law that the Government itself had demanded. As the contemporaneous statements of Prime Minister Ponta make clear, it was the Government that knowingly and voluntarily assumed the risk that it would have to pay billions in compensation to Gabriel for rejecting the Project and Gabriel's investments based on the outcome of a political process that the Government engineered and that Prime Minister Ponta recognized amounted to a nationalization.[378]

VI. THE GOVERNMENT DEFINITIVELY REPUDIATED THE ROŞIA MONTANĂ PROJECT AND THE RMGC JOINT-VENTURE

A. Government Made a Political Decision to Repudiate Gabriel's Investments

186. In response to protests sparked by the Government's submission of the Special Law to Parliament,[379] the politicized evaluation and decision-making that began in August 2011 under the Boc Government culminated in a definitive political repudiation of Gabriel's investments by the Ponta Government. On September 9, 2013, the ruling coalition co-leaders, Senator Antonescu and Prime Minister Ponta, called on Parliament to swiftly reject the Special Law and made clear that a political decision had been taken that the Roşia Montană Project would not be done.[380] Senate committees, the Special Commission, and the full Parliament successively heeded those political orders, and Prime Minister Ponta acknowledged on national television that the State was "performing a nationalization" of the resources at Roşia Montană.[381] The Government's conduct thereafter confirmed the fact and scope of its repudiation, extending to the State's joint-venture with Gabriel generally, including the valuable Bucium Projects.[382]

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[377] [redacted]

[378] *Infra* §IX; Claimants' Opening-2019 vol.6:54-57 (video).

[379] *Infra* §VI.B.

[380] Claimants' PO27 ¶¶46-49; Claimants' Opening-2019 vol.5:55-64.

[381] Claimants' PO27 ¶50; Claimants' Opening-2019 vol.6:18-54; Memorial §VIII.B; Reply §IV.D.

[382] Claimants' PO27 ¶¶50-53, 204-225; Claimants' Opening-2019 vol.6:55-58, vol.7; Memorial §IX; Reply §§V-VI; Szentesy-II ¶¶68-76 (NAMR's failure to act on RMGC's requests for Bucium exploitation licenses).

187. Respondent argues that Senator Antonescu and Prime Minister Ponta did not call to reject the Special Law on September 9, 2013, but "were merely expressing their view that the law would likely be rejected by Parliament." Senator Antonescu and Prime Minister Ponta's statements on September 9, 2013 are set out in videos and detailed excerpts in Claimants' earlier submissions.[383] Senator Antonescu gave "a firm and definitive point of view on the Rosia Montana project," which was that "this project, at this moment, must be rejected." He said he "reached this conclusion not for technical reasons" and despite the local community "who support the project," but had an "obligation" to make his position known and would sustain it "during the [PNL] party debates."[384]

188. Prime Minister Ponta then announced he would "make sure" Parliament swiftly rejected the Special Law, "and, thus, this project is closed. As a Prime Minister I must find other solutions for foreign investments and creation of jobs."[385] He said he "of course" would instruct his party "so that they clearly vote, politically, 'no,'" and while he too acknowledged "strong support for the project" in Alba County, he expressed hope that the State could someday do the Project without "the Canadians."[386] Thus, the leaders of the ruling Government coalition, which held two-thirds of the seats in Parliament, instructed their respective political parties to reject the Special Law and with it the Roşia Montană Project.

189. Respondent argues that Parliament voted on the "the Rosia Montana Law (not the Project)," and that the Government did not reject the Project either in September 2013 or thereafter. It is undeniable, however, that the Government insisted on presenting a Special Law to Parliament and emphasized that it would not issue the EP or allow the Project to proceed unless Parliament approved the Special Law.[387] Thus, while Parliament's vote on the Special Law was legally irrelevant to the EIA Process as a matter of Romanian law, the Government

[383] Claimants' PO27 ¶¶46-49; Claimants' Opening-2019 vol.5:55-64 (Ponta videos in PowerPoint, Antonescu video in C-2690).

[384] Claimants' PO27 ¶46; Claimants' Opening-2019 vol.5:55-59.

[385] Claimants' PO27 ¶47; Claimants' Opening-2019 vol.5:60-61 (videos).

[386] Claimants' PO27 ¶¶48-49; Claimants' Opening-2019 vol.5:62-64 (videos).

[387] *Supra* §V.

made clear through numerous statements that the Project would not be done without Parliament's approval of the Special Law.

190. Respondent's argument that Gabriel did not disclose the repudiation of its investment is misguided for two reasons. First, Gabriel disclosed on September 9, 2013 that Prime Minister Ponta and other senior officials reportedly said the Special Law "is to be rejected before debate," that Gabriel was "urgently seeking confirmation of the actual statements made and clarification of the impact on the proposed permitting of the Project," and therefore advised "caution in the trading of its shares."[388] Market analysts repeated those warnings,[389] and Gabriel's market capitalization immediately fell by over 50% on September 9, 2013.[390] Gabriel then told the media on September 11, 2013 it would bring claims "for up to $4-billion" if Parliament "does reject the project" as Prime Minister Ponta announced.[391]

191. Second, as its contemporaneous statements show, Gabriel feared that those statements meant what they said, but as there had been no formal legal act of rejection, what actually would follow then remained uncertain. It was only after the passage of time that the nature and effect of the repudiation became undeniable.

192. Thus, although on September 15, 2013, Prime Minister Ponta said he would convene a Special Commission, he later confirmed that if the vote were "purely political," Parliament would reject the Special Law and he would explain to other investors that "only this project was rejected on a political criterion."[392] As they had done on September 9 before the Senate committee hearings began on the Special Law,[393] Prime Minister Ponta and Senator Antonescu again intervened to ensure the Special Commission vote would be purely political. Before any votes were cast, they announced on November 11, 2013 that first the Special Commission and later the full Parliament would vote to reject the Special Law, stating it was

[388] (C-1440).

[389] (C-2123).

[390] Claimants' Opening-2020 vol.4:49; *infra* §X.H.1.

[391] (C-1442) at 2.

[392] Claimants' PO27 ¶50.c; Claimants' Opening-2019 vol.6:32-34, 44-46 (videos).

[393] Claimants' PO27 ¶50.a; Claimants' Opening-2019 vol.6:18-22.

"the common position of USL" and "[w]e have negotiated it politically."[394] Thus, after testifying in favor of the Project, Minister of Environment Plumb, Minister of Culture Barbu, and Minister Şova all refused to vote for the Special Law as members of Parliament, and the Special Law was voted down nearly unanimously.[395]

193. Respondent's contention that "Parliament's rejection of the Roşia Montană Law did not affect the EIA permitting procedure, which remains open to this day" is quintessential form over substance as the Government first confirmed in word and then over time in deed that it meant what it said: Parliament's "no" on the Special Law would mean a "no" on the Roşia Montană Project and the State's contracts with Gabriel.[396] One day after the Special Commission rejected the Special Law, Minister of Environment Plumb confirmed, "Of course Parliament's decision means the last word for us and we will observe it."[397] Prime Minister Ponta also repeated that "the Parliament rejected the law, so the exploitation will not be made, this is for sure."[398]

194. The Government conduct thereafter demonstrated that was the case.[399]

195. In 2013 the TAC had reconfirmed that the technical assessment was completed and that the next TAC meeting would be to take a decision on the EP.[400] Draft EP conditions had been published, a draft Decision recommending issuance of the EP had been prepared, and the senior members of Government had testified to Parliament that the applicable legal requirements for permitting were met.[401] When the next TAC meeting was convened in April

[394] Claimants' PO27 ¶50.d; Claimants' Opening-2019 vol.6:50-53 (videos).

[395] Claimants' PO27 ¶50.e n.160.

[396] Respondent notes Gabriel disclosed that the Special Commission did "not propose a rejection of the Project." Gabriel disclosed on November 14, 2013 that the Government had "deferred the decision on the environmental permitting of the Project until after the conclusion of the Parliamentary Review," and that until it could engage with the Government "regarding the ultimate outcome of the Parliamentary Review, Gabriel cannot provide any assurances or estimates … as to the impact of such resolution on the permitting progress of the Project." (C-1438).

[397] Claimants' PO27 ¶51; Claimants' Opening-2019 vol.6:55-56.

[398] Claimants' PO27 ¶51; Claimants' Opening-2019 vol.6:57-58 (video).

[399] Claimants' PO27 question (f).

[400] *Supra* §IV.

[401] *Id.*

2014, there was no legitimate basis to do anything but take the long-overdue decision on the EP.[402] While the meetings in 2014 focused on the purported need to commission a study on the TMF basin permeability discussed in the Special Commission report, another full year passed without any study. Then, in April 2015, the Ministry of Environment announced in another TAC meeting that TAC members never provided conditions for the study and so it could not be done, which turned out not to be true.[403] Ms. Mocanu's assertion that the TAC letters "did not contain in fact conditions for the study" is refuted both by the letters and by Respondent's own submissions.[404] Her testimony that the Ministry of Environment is "still looking at the development of this study" more than six years later is neither credible nor reasonable.

196. Even assuming that the Ministry of Environment had identified through the EIA Process some alleged failure to meet applicable permitting requirements (which it did not as responsible officials repeatedly said all requirements were met), the law required the Ministry to issue a reasoned decision denying the EP so that RMGC could either bring an administrative challenge or seek to cure any alleged deficiency.[405] For example, for the State-majority-owned Cernavodă nuclear power project, Ms. Mocanu confirmed that there was a "willingness to make a decision," the Ministry of Environment notified deficiencies that were remedied, "there were no delays," and the "process was carried out according to the law."[406] Such was not the case for Roşia Montană.

197. In January 2015 the Ministry of Culture, in court proceedings regarding the 2010 LHM, disavowed its own prior administrative decisions regarding archaeological discharge in

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[402] *E.g.*, Tr.(Dec. 6, 2019)1674:4-1675:18 (Găman-Cross) (confirming Ministry of Economy's view at the April 2014 TAC meeting that "the decisions that were taken and the discussions that were held in the TAC up to the date when it was established that all technical matters were finalized are sufficient").

[403] Memorial ¶¶529-532; Reply ¶¶221-222; Avram-II ¶¶79-87; Szentesy-II ¶¶65-67.

[404] Avram-II ¶84 n.219 (citing letters); Counter-Memorial ¶375 n.638 ("TAC members communicated in mid-2014 their tentative conditions for a possible study").

[405] Reply n.112; Mihai-I ¶¶134-144. *E.g.*, *Crystallex* (CL-62) ¶ 593 ("only a precise and reasoned denial could afford [the investor] a true opportunity to challenge that denial . . . or to remedy the deficiencies of the project if it was to resubmit a more 'adequate' [EIA report]").

[406] Tr.(Dec. 9, 2019) 2014:10-13, 2016:5-7 (Mocanu Cross); Mihai-II ¶301 n.356; Ministry of Environment Letter July 4, 2008 (C-2416) ("request to redo" Cernavodă EIA report).

the Project area;[407] it then announced a year later upon issuance of the 2015 LHM that now there would be no mining in Roşia Montană.[408] Respondent contends the Ministry of Culture "acted reasonably" and that "the LHMs were consistent with the ADCs at the time." Respondent's contention is not well-taken.

198. While the ADC for Cârnic had been annulled when the 2010 LHM was issued, that is not a complete response because the 2010 LHM also included a description of Orlea that disregarded multiple valid ADCs and was acknowledged by the Government as an error that needed correction.[409] Also, by July 2011, a second ADC for Cârnic had been issued, and Minister of Culture Hunor confirmed that Cârnic would accordingly be removed from the 2010 LHM; in August 2011, however, consistent with the Government's new "policy," Minister Hunor announced he would not authorize an update to and correction of the 2010 LHM until renegotiation occurred and the Government decided to start the project.[410] That correction and update never happened.[411]

199. Similarly, although the second Cârnic ADC had been challenged and its effects suspended when the Ministry of Culture issued the 2015 LHM in January 2016, that does not justify or explain the 2015 LHM, which purportedly restored the so-called 1992 LHM without regard for any of the other ADCs issued and in full force and effect in the Project area.[412]

200. Respondent argues that "RMGC could and still can mine in the Project area, if it first obtains the requisite ADCs and if the declassification process is completed." RMGC

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[407] Claimants' PO27 ¶212; Claimants' Opening-2019 vol.7:15-16; Schiau §§V.D.2, VI.B-C; Podaru §IV.B.2.4.

[408] Claimants' PO27 ¶213; Claimants' Opening-2019 vol.7:18-22.

[409] Claimants' Opening-2019 vol.7:6-8, 13; Memorial ¶¶329-334; Reply ¶¶253-262; Gligor-I ¶¶94-98, 116-121; Schiau §§V.C, V.D.2.

[410] Claimants' Opening-2019 vol.7:10-11. Respondent cannot legitimately rely on the court's rejection of RMGC's challenges to the 2010 LHM because that court decision was based on the Ministry of Culture's January 2015 bad faith position that its own 2004 LHM was an abuse and by its false accusation that RMGC sought to mine the area without an ADC. *Id.* vol.7:14-16. Respondent says nothing about that and, tellingly, failed to present any witness from the Ministry of Culture in this arbitration.

[411] *Supra* §IV.B.2; Claimants' Opening-2019 vol.7:12-25; Schiau §§V.D.2, VI; Podaru §IV.B.2.

[412] Claimants' Opening-2019 vol. 7:23-25; Claimants' PO27 ¶¶212-213; Schiau §§V.D, VI.B-C; Podaru §§IV.C.2, IV.C.4.

obtained the requisite ADCs for all areas of the Project, including Cârnic (twice),[413] except for Orlea.[414] Respondent's declassification argument cannot be accepted because there is no reason, other than the earlier repudiation of Gabriel's investments, why the Ministry of Culture beginning in January 2015 took the position that the 2004 LHM (which recognized the ADCs that had been issued in the Project area)[415] was an "abuse."[416] Nor is there any reason, other than the earlier repudiation of Gabriel's investments, why the Ministry of Culture's delineation documentation for the 2015 LHM shows the entire Project perimeter falling within the boundaries of the historical monument and expressly purports to dismiss the effects of the valid ADCs issued for the Project.[417] Respondent also does not address its UNESCO application, intended to prevent any future mining in the area.[418]

B. The Treatment of Gabriel's Investment Led to the 2013 Protests

201. Respondent argues that the Government's conduct was reasonable because the Project attracted opposition and moreover that RMGC and Claimants are to blame for that opposition. These arguments are misguided and cannot provide a defense for Respondent.[419]

202. The evidence shows that the Project consistently enjoyed strong support from local communities in and around Roşia Montană, had achieved strong support nationally, and maintained a "social license" at least from 2011 onward when the Project should have received its EP.[420] RMGC succeeded in obtaining strong support for the Project notwithstanding that it had to overcome the headwinds generated by the Government's wrongful refusal to allow

[413] Memorial ¶650 and n.1248.

[414] Memorial ¶169; Gligor-II ¶¶102-109; Jennings ¶¶30-31, 41-47; Claimants' Opening-2020 vol.5:31; *supra* §IV.B.3 (Government repeatedly confirming Project to be developed in stages with works at Orlea scheduled for year 8 of operations).

[415] Claimants' Opening-2019 vol.2:52-53, 61-62.

[416] Claimants' PO27 ¶212.

[417] *Id.* ¶¶213, 216.

[418] *Id.* ¶214; Claimants' Opening-2019 vol.7:26-39.

[419] Claimants' PO27 question (d); Reply §§ III.C, IV.A-C; Claimants' Opening-2019 vol.4:91-98, vol.6:2-16.

[420] Claimants' PO27 ¶¶129-133; Claimants' Opening-2019 vol.4:94-98; Reply §IV.A; Boutilier §3; Henisz ¶¶38-42; Tanase-III ¶¶86-128; Lorincz-II ¶¶91-116 .

permitting to advance and the crossfire of repeated baseless accusations of corrupt dealings with RMGC that Romania's political leaders aimed at each other.[421]

203. Respondent's evidence does not support any contrary conclusion. Indeed, because the contemporaneous evidence so clearly revealed the Project's significant support during the relevant time period, Dr. Thomson could only cite a few biased publications and *post hoc* interviews of a pre-selected, non-representative handful of local residents in his effort to support Respondent's case.[422] On cross-examination Dr. Thomson was unable to sustain Respondent's contention that the Project did not have a social license, conceding that "if you're trying to suggest that the Company did not have a Social License, that is not what I've said."[423]

204. Respondent's arguments about opposition to the Project fail to overcome the fact that opposition to mining projects is common and is an aspect that many projects must and do manage.[424] Indeed, opposition, including protests and property holdouts, is consistent with the acceptance or tolerance level of social license at which most mining projects operate, with few reaching any greater level of support.[425]

205. There were no large-scale protests before the Government submitted the Special Law to Parliament and conditioned issuance of the EP and Project implementation on Parliament's vote.[426] Indeed, there were no mass protests when in early 2012 it appeared to all concerned that the EP would soon be issued.[427] There were no mass protests in July 2013 when

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[421] Claimants' PO27 ¶¶140-141, 145-147; Boutilier slides 17-21.

[422] Claimants' PO27 ¶¶134-139; Boutilier §5.

[423] Tr.(Dec. 12, 2019)3077:4-6 (Thomson-Cross). Dr. Thomson characterizes the social license as "unstable" – including in the hypothetical presence of a single holdout among millions of supporters. This novel notion is absent from Dr. Thomson's publications. Claimants' PO27 ¶¶138-139; Boutilier ¶117(d)(v).

[424] Boutilier §2, ¶117(e)(v); Tr.(Oct. 1, 2020)907:13-20 (Jeannes-Cross) ("It's part of our jobs. I mean, there is always social opposition to mining. It's just the nature of what we do. We dig holes in the ground, and there's going to be a meaningful portion of the population that doesn't agree with that, and you have to deal with it."); *id.* 917:20-22 (Jeannes-Redirect); Tr.(Oct. 3, 2020)1250:14-16 (Spiller-Cross) ("NGO opposition is always something that mining companies have to handle. Always.").

[425] Claimants' PO27 ¶¶138-139; *infra* ¶341 n.705 (testimony of Boutilier, Henisz, Jeannes, Cooper, Armitage, and Spiller that holdouts and opposition are common in mining projects).

[426] Claimants' PO27 ¶144; Claimants' Opening-2019 vol.6:6.

[427] *Id.*

the Ministry of Environment published draft EP conditions for the Project.[428] This proves that the subject of the protests was the perception, fueled by the Prime Minister himself, that the Special Law was a sweetheart deal for a project the Prime Minister claimed was engaged in corrupt dealings and that he did not support, but nevertheless submitted to Parliament for a vote.[429]

206. The overwhelming weight of the evidence compels the conclusion that Romanians came to the streets in the fall of 2013 to protest their Government and political leaders triggered by the Special Law which was seen as the product of a corrupt political class. This is the central thesis of Dr. Boutilier, who points to examples before and after the Special Law of Romanians taking to the streets by the thousands to protest government conduct.[430] It is supported also by the contemporaneous research of a team led by Respondent's expert, Dr. Stoica,[431] by the contemporaneous research and writings of activist Dr. Victoria Stoiciu,[432] by the contemporaneous observations of leading Romanian politicians,[433] and by the banners and signs carried by the protesters themselves.[434]

207. Respondent argues that "negative public opinion" prevented RMGC from obtaining permits and surface rights and motivated Claimants to propose and support the Special Law. The evidence shows, to the contrary, that RMGC was able to obtain the necessary surface rights,[435] that it was nothing other than the Government's politically motivated decision-making that delayed permitting, including *inter alia* the EP and the updated PUZ,[436] and that it was the

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[428] *Id.*

[429] Claimants' PO27 ¶¶142-160; Claimants' Opening-2019 vol.6:2-16.

[430] Boutilier §4, slides 43-58.

[431] Claimants' PO27 ¶151; Romanian Youth Study, 2014 (C-2931) at 131 (research coordinated by Stoica confirming that, "Even though nominally they were attributed to precise causes, such as the dismissal of Raed Arafat in 2012 or the mining facility at Rosia Montana in 2013, these protests had constantly a political attitude directed in particular to anti-establishment.").

[432] Claimants' PO27 ¶153.

[433] *Id.* ¶¶149-150; Claimants' Opening-2019 vol.6:13-16.

[434] Claimants' PO27 ¶148; Claimants' Opening-2019 vol.6:8-12.

[435] *Infra* §X.E.2.a.

[436] *Supra* §IV.

Government's leaders who demanded the Special Law for their own particular political reasons, despite RMGC's urging to proceed otherwise.[437]

208. Respondent's arguments suggesting that from the early years of Project development RMGC and Claimants failed to accommodate concerns raised by NGOs like Alburnus Maior are misguided. From the outset, RMGC and Claimants worked diligently and with expert professional guidance to address concerns of the local community,[438] and as the record reflects, RMGC's engagement became more effective over time, and its social license strengthened.[439] Even Dr. Thomson had to concede on cross-examination that "the situation at Rosia Montana improved substantially from 2006 onwards."[440]

209. RMGC and Claimants also responded to public concerns and requests of Romanian officials to mitigate Project impacts and took many important steps to ensure the Project met the needs of the local community as well as the State's national interests.[441] Among other things, RMGC:

a. reduced the Project footprint, including to increase the buffer area around the Roşia Montană historical town center, reducing gold reserves by approximately 500,000 ounces;[442]

b. adjusted the approach to calculating compensation to property owners in response to community feedback;[443]

c. built the Recea residential neighborhood in Alba Iulia; invested in local exhibitions, restaurants and hotels; implemented the "Good Neighbour" Program to ensure care and assistance for vulnerable community members; and created a

[437] *Supra* §V.

[438] Reply ¶¶161-163; Lorincz-II ¶¶2-24, 63-71.

[439] Claimants' PO27 ¶¶129-133; Claimants' Opening-2019 vol.4:93-98; Reply ¶¶164-178; Boutilier slides 24-44; Henisz ¶¶23-42.

[440] Tr.(Dec. 12, 2019)3100:20-22 (Thomson-Cross).

[441] Claimants' Opening-2019 vol.4:93; Reply ¶¶116, 161-169.

[442] Szentesy-I ¶¶48-50; Szentesy-II ¶22 n.41.

[443] Lorincz-II ¶¶25-33.

skills enhancement fund to provide households with education and professional training support;[444]

d. increased support for cultural heritage preservation including on national heritage projects outside of Roşia Montană;[445]

e. restored historic buildings in Roşia Montană, rehabilitated more than 200 meters of underground Roman mining galleries at Cătălina Monuleşti accessible to the public, and budgeted to spend US$ 70 million on cultural heritage preservation in Roşia Montană;[446]

f. built a water pilot treatment facility to show how the Project would treat acid rock drainage to drinkable water standards;[447] and

g. undertook to decrease the TMF cyanide levels to a monthly maximum average of 3ppm, well below the legal requirement of 10ppm.[448]

210. Respondent suggests that RMGC ignored "many" comments received during public consultations in the context of the EIA, which allegedly reflected "concerns" about the Project, including "some" that "remain outstanding until this day." Contrary to Respondent's arguments, RMGC responded diligently to the questions and concerns raised by the public as well as those raised in the TAC.[449]

211. Respondent speculates that there might have been less opposition if RMGC and Claimants had incorporated other design changes, such as use of a geo-membrane liner or dry-stack tailings. There is no evidence to support such speculation and it is not disputed that the

[444] Lorincz-II ¶¶51-62, 79-83; Tanase-III ¶90.f; Memorial ¶172; Reply ¶167.

[445] Memorial §§IV.B.2, VI.B.

[446] *Id.* Reply ¶ 167. Memorial ¶238, 326-327.

[447] Memorial ¶¶228-229; Reply ¶167.

[448] Memorial ¶353.

[449] Memorial ¶¶251-253; Avram-II ¶¶129-134; Lorincz-II ¶¶51-60.

Project was designed and reviewed by leading industry experts and that it met and in many respects exceeded legal requirements and industry standards.[450]

212. In short, the Government's failure to follow the law in its treatment of Gabriel's investment is not excused by the existence of Project opponents. If the Government considered that RMGC was not developing the Projects in accordance with its legal obligations, the State could have taken action accordingly. There is no such claim made, as there is no question that RMGC consistently fulfilled its legal obligations. Likewise, if the Government considered that it no longer wished to pursue the mining projects that RMGC was licensed to develop in partnership with the State, it was open to the Government to make that policy decision, to terminate its agreements with Gabriel and RMGC lawfully, and to pay compensation accordingly. As the State granted RMGC licenses reflecting its policy decision to develop mining in Roşia Montană and Bucium, which induced and indeed obligated Gabriel to invest hundreds of millions of dollars to develop the Projects, the Government had an obligation to support the licensee by making all permitting decisions in accordance with law. No amount of opposition to the Project excuses the Government's failure to do so.[451]

VII. ROMANIA BREACHED THE BITS

213. Claimants respectfully refer the Tribunal to their earlier pleadings demonstrating that Romania breached several articles of the BITs.[452] In light of arguments Respondent presented in its later submissions, Claimants offer the following further observations.

[450] Claimants' Opening-2019 vol.2:11; Claimants' Opening-2020 vol.5; Memorial §IV.B.

[451] Claimants' PO27 question (d).

[452] Memorial §§X-XIV; Reply §§VIII-XII; Claimants' PO27 ¶¶54-70.

A. Expropriation

214. The politicized permitting process that ended with repudiation of the Roşia Montană Project and RMGC, the State's joint-venture with Gabriel, including RMGC's rights to obtain exploitation licenses for the Bucium deposits, was a measure having an effect equivalent to expropriation that was implemented contrary to Article 5 of the UK BIT and Article VIII(1) of the Canada BIT, including its Annex B.[453]

215. With regard to the Roşia Montană Project, the evidence is overwhelming that although the Project met the legal requirements for the EP, the Government ultimately decided the Project would not be done.[454] This was effectively an expropriation of the Roşia Montană License contrary to the terms of both BITs. The fact that the Government is not willing to allow the Project to be implemented is dispositive.[455] The fact that RMGC obtained a five-year extension of the Roşia Montană License does not detract from that conclusion.[456]

216. With regard to the Bucium Projects, the evidence is clear that notwithstanding RMGC's contractual and legal rights to obtain exploitation licenses for the valuable Rodu Frasin and Tarniţa Bucium deposits,[457] the State is unwilling to issue those licenses to RMGC, has repudiated RMGC's rights in that regard, and thus has effectively expropriated RMGC's legal entitlement to the Bucium exploitation licenses.[458] While NAMR's failure to act leaves no written decision for the Tribunal to review, the State's repudiation of RMGC's rights in relation to the Bucium licenses is no less real.[459] The fact that *six years* now have passed with no word

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[453] Memorial §XIV; Reply §XII; Claimants' PO27 ¶¶58-60.

[454] *Supra* §§IV, VI.A.

[455] Memorial ¶¶762-765, 767 (investment may be expropriated indirectly through interference with use or enjoyment); *id.* ¶771 (citing *CME v. Czech Republic* noting the fact that "the original License … always has been held by the original Licensee and kept untouched, is irrelevant. … [w]hat was destroyed was the commercial value of the investment").

[456] Szentesy-II ¶¶77-78. As Gabriel has maintained consistently (*e.g.* Memorial ¶569), it prefers to reach an amicable resolution of this dispute, and maintaining a license in force may facilitate such a resolution. RMGC Letter to NAMR June 18, 2019 (C-2957) at 2 (RMGC agreeing to conclude addendum to the license extending its term "in the hope that there will be an amicable resolution of the dispute that will permit RMGC to develop the Roşia Montană Project").

[457] Bucium Exploration License (C-397-C) Art. 3.1.4; Bîrsan-II §IV; Claimants' Opening-2019 vol.1:69-80.

[458] Memorial §IX.B.3; Reply §§VI, XII.B.2.

[459] Memorial ¶761 n.1530 (an omission may be a measure having an effect equivalent to expropriation).

from NAMR regarding the Bucium exploitation licenses for Rodu Frasin and Tarniţa cannot be disregarded.[460] In contrast, where not politically obstructed, NAMR has issued comparable licenses within seven months.[461] Respondent's argument that "it remains open" whether RMGC's applications "will be successful," is misguided because RMGC has a right to obtain exploitation licenses and the notion that the applications remain open lacks any credibility. Respondent's failure to present any witness from NAMR and its failure to call Ms. Szentesy for cross-examination is telling.

217. The State's repudiation of the Project Rights included an effective expropriation of Gabriel's loans to Minvest,[462] of Gabriel's contract right to obtain management fees from RMGC,[463] of RMGC's goodwill, and of the intellectual property, technical processes and know-how reflected in the numerous technical and engineering studies and reports prepared by RMGC for use as licensee in relation to the Roşia Montană Project and the Bucium Projects.[464]

218. Having taken those investments, Romania also effectively expropriated Gabriel's shareholding in RMGC and the property acquired by RMGC to develop the Project, as the value of these assets was derived from the prospect that the Project would be developed.[465]

219. Moreover, the evidence shows that the State repudiated RMGC, its joint-venture with Gabriel, as it rejected the agreement whereby Gabriel remained the 80.69% shareholder and the State's shareholding stood at 19.31%.[466] The State's failure to cooperate with Gabriel as a

[460] Reply ¶306.

[461] Szentesy-II ¶76.

[462] Memorial ¶540 (Gabriel's loans to Minvest were to be repaid out of Project proceeds). *See also* Compass-I ¶94 (describing Gabriel's loans to Minvest).

[463] Compass-I ¶96 (discussing Gabriel's contract rights under RMGC's Articles of Association to management fees); Memorial ¶¶770-772 (discussing expropriation of contract rights).

[464] Memorial ¶¶626-629; SRK-I ¶¶112-115 (describing engineering reports prepared for Rodu Frasin and Tarniţa).

[465] Reply ¶¶596-597; Memorial ¶¶795-796 (whereas Gabriel had a bundle of rights and legitimate expectations in relation to its investment in RMGC, the impact of Romania's conduct was effectively to deprive Gabriel entirely of the value, benefit, use, and enjoyment of its investment as a whole).

[466] Memorial §VII; Reply §II; Claimants' PO27 ¶¶15-27; *supra* §III.

shareholder in RMGC,[467] its launching and maintaining retaliatory and abusive criminal and purported anti-fraud investigations of RMGC,[468] and its failure to issue the Bucium exploitation licenses despite RMGC's right to obtain them under both its license and the law,[469] is further evidence of the State's repudiation of its joint-venture with Gabriel.

220. Respondent incorrectly argues that Claimants must show that the value of their shares directly and indirectly in RMGC have been affected "to an extent that engages with the standard of expropriation." Claimants submit that the severe deterioration in the value of Gabriel Jersey and Gabriel Canada's shares, respectively, supports the conclusion that the shares themselves in effect have been expropriated.[470] That conclusion, however, is not necessary to support Claimants' expropriation claims in this case.

221. Respondent's argument conflates the object of the unlawful expropriation (the investment that was subjected to the expropriatory measure) and the resulting loss and/or damages incurred by the claimant investor that was caused by that wrongful act. Investments of

[467] Claimants' PO27 ¶206.c. Respondent's arguments regarding the State's refusal to permit Minvest RM to accept interest-free loans from Gabriel payable out of future dividends have no merit and demonstrate that, following Parliament's rejection of the Special Law, the State was no longer willing to act in good faith as a shareholder of RMGC. First, Respondent is wrong to argue that Minvest RM could not accept a loan in connection with RMGC's capital increase without creating a negative net asset value for itself, because the accompanying increase in shareholding would have increased Minvest RM's asset value in an amount equal to the value of the debt reflected in the loan such that there would not have been any change in Minvest RM's net asset value. Indeed, when Minvest RM was spun-off, Minvest's shares in RMGC as well as the loans earlier extended both were transferred to Minvest RM, which did not thereby obtain a negative asset value. GD 275/2013 (C-95). Second, Respondent is wrong when it asserts that the spin-off occurred at Claimants' request. The Government did the spin-off for its own reasons. As the Government Decision authorizing the spin-off states, it was to enable the Ministry of Economy to transfer administration of the State's interest in RMGC to the Department of Infrastructure Projects and Foreign Investments. GD 275/2013 (C-95), art. 3. Third, Respondent's argument that Gabriel could have forgiven loans to RMGC and/or donated funds to Minvest RM to avoid RMGC's dissolution is not well-taken because there would be no way for Gabriel ever to have earned back or earned any returns on such an "investment." Respondent's argument that Gabriel could have provided funds to develop the Roşia Montană Project effectively as a gift to the State to avoid dilution of Minvest or dissolution of RMGC is not a serious legal argument but simply repeats the State's bad faith position.

[468] Claimants' PO27 ¶206.e. These investigations, apparently considered potentially useful for the State's defense in the arbitration, are still active and ongoing, *more than seven years* since they were commenced in November 2013.

[469] Claimants' PO27 ¶206.d; Bucium Exploration License (C-397-C) Art. 3.1.4.

[470] Reply ¶¶630, 632. While Respondent argues that for there to be an expropriation Claimants' shareholding must be "completely deprived of the attributes of property," legal authorities, including those cited by Respondent, consistently confirm that a "substantial" deprivation is sufficient.

Gabriel Jersey and Gabriel Canada, some of which were held indirectly through RMGC, were subjected to a measure equivalent to expropriation in breach of the UK and Canada BITs, respectively. As a result of that breach, Gabriel Jersey and Gabriel Canada each suffered losses in the form of the diminution in the value of the shares they held.[471]

222. Respondent argues that the fact that Gabriel did not write down the value of its assets before 2015 as reflected in its securities disclosures shows that Gabriel recognized there was no expropriation and that its assets could be sold on an advantageous basis. That is incorrect because it was not fully evident in real time that the Project Rights were repudiated and would not be honored, including because there was never any formal decision taken or indeed any due process accorded. Only after the passage of time and viewed in hindsight did the fact and the scope of the State's conduct become clear. Nor is there any merit to Respondent's argument that Gabriel and/or RMGC could sell "on an advantageous basis" the rights to develop the Projects or the assets that derived their value from those rights because, as Dr. Burrows acknowledged on cross-examination,[472] doing so would require the State to be willing to allow the Projects to be implemented, which the evidence demonstrates it is not.

B. Fair and Equitable Treatment

223. Romania failed to accord fair and equitable treatment to Gabriel's investment.[473] Notwithstanding the various arguments Respondent presents, it cannot avoid that conclusion.

224. For example, Respondent's argument that fair and equitable treatment as set forth in the Canada BIT can only be understood with reference to two arbitral awards rendered in 2009 has no merit. Its contention that treatment must be "egregious" and even "shocking" to breach the standard cannot be accepted, but even if it were, Romania's treatment of Gabriel's investment is nothing short of egregious and shocking.

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[471] Reply ¶¶327-329, 633-634.

[472] Tr.(Oct. 4, 2020)1376:9-1377:8 (Burrows-Cross) (confirming that for RMGC to obtain the economic value from the surface rights it acquired through a sale to another future developer would require the State to permit development of the mine).

[473] Memorial §X; Reply §VIII; Claimants' PO27 ¶¶61-62.

225. In addition, Respondent's repeated argument that the failure to issue the EP falls within a "margin of appreciation," that the Tribunal should "defer" to the "decision" of the State authorities, and that consideration should be given to the precautionary principle, has no relevance in this case. This is not a case where a decision on the merits of an environmental assessment was taken and is subject to challenge. The evidence is overwhelming that the competent authorities concluded that the conditions for the EP were met, but that the Government decided to terminate the Project on political grounds.

C. Full Protection and Security

226. Romania failed to provide full protection and security to Gabriel's investment.[474] As detailed in two rigorous monographs discussing the historical origins of the standard,[475] as well as in a significant number of investment treaty awards cited in Claimants' prior pleadings,[476] full protection and security is not limited to police protection against physical harms; although many authorities focus on that prominent aspect, the standard also encompasses legal protection and security, including against wrongful conduct taken by State actors. As Claimants have shown,[477] the series of arbitrary and unlawful acts and omissions attributable to the State in this case constituted a failure to exercise the basic due diligence required by the full protection and security standard to provide essential protection for Gabriel's investment.

D. Non-Impairment by Unreasonable and Discriminatory Measures

227. Romania's conduct constituted an unreasonable or discriminatory measure that impaired Gabriel's investment in breach of obligations under both BITs.[478] In stark contrast to its political repudiation of Gabriel's investment, between 2011-2015 Respondent issued (i) over 100 exploitation licenses based on exploration results under exploration licenses, (ii) an environmental permit for the Certej project ~35 kilometers from Roşia Montană (accepting conclusions of a cumulative environmental impact study of that project and of the Roşia

[474] Memorial §XI; Reply §IX; Claimants' PO27 ¶63.

[475] Foster (CL-110); Junngam (CL-268).

[476] Memorial §XI.A; Reply §IX.A.

[477] Memorial §XI.B; Reply §IX.B; Claimants' PO27 ¶63.

[478] Memorial §XII; Reply §X; Claimants' PO27 ¶¶64-69.

Montană Project that RMGC commissioned during the EIA Process), and (iii) water and environmental operating permits to the large, accident-prone neighboring State-run Roşia Poieni copper mine, which is the region's most significant polluter.[479] While Respondent cannot and so does not deny that RMGC's Projects received treatment that was different in material respects from the others discussed, Respondent offers the proposed justification that Roşia Poieni, for example, was subject to a different legal regime for environmental permitting. The facts show, however, that while other projects may have been treated in accordance with the applicable legal regime, RMGC's projects unjustifiably were not, leading Prime Minister Ponta to explain that his "Plan B" was to explain with regard to Roşia Montană that "only this project was rejected on a political criterion."[480]

E. Failing to Observe Obligations

228. Claimants have shown that Romania failed to observe obligations entered into with regard to Gabriel's investment.[481] Romania entered into obligations with regard to Gabriel's investment through RMGC's Articles of Association, the Roşia Montană License, and the Bucium Exploration Licenses.[482] The State repeatedly acknowledged that it was party to the joint-venture agreements with Gabriel (reflected in the RMGC Articles of Association), as it demanded a greater shareholding percentage of that venture.[483] The State also entered into obligations with regard to Gabriel's investment by entering into the license agreements with RMGC, Gabriel's investment. [redacted]

[479] Reply §X.B; Avram-II ¶¶138-146; Claimants' Opening-2019 vol.1:25-27.

[480] Claimants' Opening-2019 vol.6:46.

[481] Memorial §XIII; Reply §XI; Claimants' PO27 ¶70.

[482] Respondent's argument that Gabriel's only investment is its shareholding wrongly confuses the investments subject to the BITs' protections (some of which were held indirectly through RMGC) and the nature of the loss incurred by Claimants.

[483] Memorial ¶748 n.1500; Reply ¶¶545-553.

[484] [redacted]

[redacted][5]

229. Romania has repudiated its obligation to Gabriel in relation to its joint-venture, RMGC, and has repudiated and disavowed in effect the Roşia Montană License and its obligation to grant the exploitation licenses for Bucium. The terms of Article 2(2) of the UK BIT are clear that it covers obligations entered into with regard to investments of covered investors; there is nothing in the treaty requiring "contractual privity" as Respondent argues. Moreover, this is not a case of a simple commercial breach of a contract, but of the State's repudiation of the very agreements themselves, which is a most fundamental failure to observe obligations.

230. Finally, Respondent's argument that the MFN clause in Article III(1) of the Canada BIT does not attract the more favorable treatment accorded to Gabriel Jersey under the UK BIT in Article 2(2) is without merit. While "treatment" in Article III(1) is not defined in the Canada BIT, the assumption of a treaty obligation towards a third State is a sufficient manifestation of treatment. As a matter of general international law, a treaty obligation assumed towards a third State may constitute treatment for the purpose of the MFN clause.[486]

VIII. TIMING OF THE TREATY BREACHES

231. As addressed below, the subject conduct commencing in August 2011 is properly characterized as a composite act that breached several provisions of both BITs. Alternatively, if not viewed as a composite act, Romania's treatment of Gabriel's investment breached the same several provisions of the BITs as of September 9, 2013, the date of the political repudiation of the Project Rights. Alternatively, if not considered in breach of the BITs as of September 9,

[485] [redacted]

[486] *Rights of Nationals of the USA in Morocco* (RL-150) at 190-197 (although the Court found that the more favorable rights accorded by Morocco to France and Great Britain had ceased to apply at the relevant time, the fact that the rights were enshrined in treaties with those States otherwise would have sufficed for the purpose of establishing "treatment"); Newcombe & Paradell (CL-143) at 226 ("The MFN clause will apply where any third state investment or investor is entitled to more favourable treaty protections than those afforded to an investment or investor under the basic treaty. In these cases, the fact that *any* third state investors or investments *are* or *could* be entitled to more favourable treaty protections is sufficient to put the investor or investments in like circumstances for the purpose of applying the MFN clause."); Memorial ¶655 n.1313.

2013, the conduct that followed demonstrates that there has been a repudiation of RMGC and the Project Rights in breach of the same several provisions of both BITs.

A. The Politicized Permitting Process That Ended with the Rejection of the Roşia Montană Project and the State's Joint-Venture with Gabriel Was a Composite Act That Breached Both BITs

232. As the legal requirements for the EP for the Roşia Montană Project were nearing completion, the Government adopted a politicized approach to permitting evidenced by the repeated public statements of senior members of the Government beginning in August 2011. These statements disparaged the Project economics, including in light of the higher gold prices prevailing at that time, and made clear that a decision on permitting required a new economic agreement with Gabriel and a political decision by the Government.[487]

233. The Government's refusal for these reasons to take steps that would advance the Roşia Montană Project included, but was not limited to, the EP.[488] It extended to steps by the Ministry of Culture needed for the Project, such as its refusal for political reasons to confirm its endorsement for the EP,[489] its failure to correct and update the 2010 LHM to align with the ADCs issued in relation to the Project,[490] and its failure to issue its endorsement of the PUZ for the Project area.[491] As Minister of Culture Hunor emphasized in August 2011 with regard to the 2010 LHM after the second Cârnic ADC had been issued the previous month:

> 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 either; this must be decided at the government level. The Minister of Environment or the Minister of Culture are not the ones to start this Project.[492]

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[487] Claimants' PO27 ¶12; *supra* §III.

[488] *Supra* §IV.

[489] Claimants' PO27 ¶¶12.j-k, 24-25; *supra* §IV.A.1.

[490] Claimants' Opening-2019 vol.7:6-16; Reply ¶¶258-261; Claimants' PO27 ¶183, n.447.

[491] *Supra* §IV.B.2.

[492] Claimants' Opening-2019 vol.3:10-11. *Id.* vol.3:12-13 (video of Minister Hunor stating the next day, "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.").

The Ministry of Culture's failure to reconcile the 2010 LHM with the ADCs issued in relation to the Project provided the basis for NGOs to challenge urbanism plans in the Project area because the 2006 PUZ (as well as the SEA Endorsement) that were to accommodate the Project did not reflect the historical monuments listed (erroneously) in the 2010 LHM.[493]

234. Thus, the Government would not allow permitting of the Project to advance, delaying progress until the Government reached agreement with Gabriel on improved economic terms and made a political decision as to the Project. Although Gabriel ultimately was willing to agree to the economic terms demanded by the Government, the Government insisted that Parliament decide whether the Project would be done by means of a vote on a Special Law.[494] When the Special Law sparked mass protests against the Government for failing to follow the rule of law and for supporting what many considered to be a corrupt deal to benefit RMGC and the Project,[495] the political leaders rejected the law and with it the Project and RMGC.[496]

235. In hindsight, one may conclude that it was on or about September 9, 2013 that the Government decided in effect to terminate RMGC's license rights and the State's obligations in relation to its joint-venture with Gabriel in RMGC generally.[497] The impact of the State's political repudiation of RMGC and the Roşia Montană Project, however, was not fully evident at the time because there was no formal decision or implementing legal process of any kind to accompany the political reality. It was only following subsequent events that the fact and the scope of the effective repudiation of RMGC's rights in relation to both the Roşia Montană Project and the Bucium properties became clear.[498]

236. Romania's unlawful treatment of Gabriel's investment thus was not marked by formal decrees or other expressed government decisions to which the Tribunal can cite to

[493] Claimants' Opening-2019 vol.7:9-12; Schiau-I §VI; Podaru §IV.

[494] *Supra* §V.

[495] *Supra* §VI.B.

[496] *Supra* §VI.A.

[497] Claimants' PO27 question (a).

[498] Claimants' PO27 question (f).

"bookend" the beginning and the end of the politicized process. The absence of formal signposts marking the Government's decisions, however, does not diminish their existence and effects.

237. The evidence starting in August 2011 unmistakably shows that the Government imposed requirements on permitting not grounded in law, effectively adopting a policy approach toward RMGC and the Roşia Montană Project that it thereafter maintained and acted upon consistently. The conduct breached the State's obligations under the two BITs when, in furtherance of its "policy," the Government for political reasons alone decided that the Roşia Montană Project would not be done and abandoned RMGC, its joint-venture with Gabriel,[499] repudiating also its obligations under the law in relation to the Bucium properties.[500]

238. As such, the course of actions and omissions in connection with the Government's "policy" of politicizing permitting decisions relating to the Roşia Montană Project and RMGC was a composite act that breached several provisions of the BITs as of the date of the political rejection (September 9, 2013).[501] Specifically, the composite act consists of:

a. Coercing renegotiation of the State's interest in the Roşia Montană Project and its joint-venture with Gabriel by threatening not to and then failing to advance permitting decisions concerning the Project on the basis of applicable legal requirements;

b. In that context, publicly denouncing the terms of the Project and the State's agreement with Gabriel as not beneficial for the State;[502]

c. Failing to act on permitting decisions concerning the Project on the basis of applicable legal requirements pending a political decision by the Government as

[499] Claimants' PO27 question (c).

[500] Memorial §IX.B.3; Reply §VI; Claimants' PO27 ¶¶50-52, 59-70, 118, 168, 194-224; Bîrsan-II §IV.

[501] Claimants' PO27 ¶¶104, 106-118.

[502] Although not an issue for Gabriel Jersey's claim, insofar as Romania's conduct commenced before the entry into force of the Canada BIT on November 23, 2011, such conduct may be considered for "purposes of understanding the background, the causes, or scope of the violation of the BIT that occurred after the entry into force." *Walter Bau* (CL-255) ¶¶9.73, 9.85 (*citing Société Generale*). *See also* Claimants' PO27 ¶57; ILC Articles (CL-61) Art. 13 cmt.(9) (observing that facts occurring prior to the entry into force of a particular obligation cannot give rise to liability, but may be taken into account where they are otherwise relevant).

to whether the Project would be done, including within the EIA Process leading to the EP, as well as with regard to the Ministry of Culture's endorsement, Waste Management Plan approval, updates and corrections to the 2010 LHM relating to areas subject to ADCs, and issuance and renewal of PUZ endorsements;

d. Subjecting not only the EP decision for the Roşia Montană Project to a Special Law, but the decision whether the Project would be done at all;

e. In that context, taking a public position against and preventing adoption of the Special Law;

f. Repudiating and in effect taking RMGC's Project Rights upon and as a consequence of the rejection of the Special Law without a valid public purpose, without due process, and without any compensation; and

g. Subjecting Gabriel's investment to a politicized permitting process while undertaking to treat other mining projects according to law.

239. This was not a hodgepodge of disjointed events as Respondent suggests. Rather, it was a consistently applied political policy that the Government, starting in August 2011, announced and thereafter followed until it reached the point of the Government's political rejection of the Roşia Montană Project and its joint-venture with Gabriel.

240. Following the rejection of the Special Law by Parliament and with it the repudiation of RMGC's Project Rights, the State consistently and overtly acted to confirm the fact and scope of its repudiation of RMGC's Project Rights in breach of the BITs, as previously detailed.[503] This further conduct included, most significantly and in summary, the continued failure to issue the EP for the Roşia Montană Project or to take any decision in relation to it; the refusal to act on RMGC's Bucium exploitation license applications; pronouncing the 2004 LHM an abuse; issuing the 2015 LHM declaring the entirety of Roşia Montană an historical monument where no mining can be permitted; and applying to list the Roşia Montană cultural mining

[503] Claimants' PO27 ¶¶50-53, 204-207.

landscape as a UNESCO World Heritage site without any regard for RMGC's rights under the Roşia Montană License and the massive investments made to develop the Project.

241. There is no dispute that to constitute a composite act, there must be "some link of underlying pattern or purpose" between the acts and/or omissions at issue. Respondent argues that the conduct at issue is disparate and unrelated and that it is unlikely that so many State actors would act with a consistent policy approach. The evidence proves otherwise, and overwhelmingly shows a consistent policy approach by the Government commencing in August 2011 to the permitting of the Projects, which moreover was ensured by the fact that each significant permitting decision required political support at the ministerial level, and could not be decided by technical staff.[504]

242. Respondent also seeks to raise the bar by arguing that to be a composite act, the "violation" must be "systematic," which requires that it "would have to be carried out in an organized and deliberate way." Here, Respondent misleadingly cites to the ILC's commentary on Article 40. Article 40 does not address what is meant by a composite act, but rather applies to "serious" breaches by a State of "an obligation arising under a peremptory norm of general international law," which are considered "serious" if they involve a "systematic" failure by the responsible State to fulfill the obligation.[505] The commentary to Article 40 thus is not an elaboration of what is meant by composite act, but rather, as the text makes clear, an elaboration of what is meant by a serious breach of a peremptory norm of international law.

243. Thus, Respondent is wrong to suggest the Tribunal must find that the conduct at issue was "carried out in an organized and deliberate way," although in this case the evidence shows that from August 2011, successive Governments did take a consistent and deliberate approach to the treatment of the Projects.

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[504] For example, although in February 2012 the Ministry of Culture State Secretary, Vasile Timiş, confirmed that he had prepared the requested EP endorsement and submitted it "to the office of the minister," he indicated that he "could not give … a very clear deadline" for when a decision would be taken since he had "not been issued a written mandate for it." Memorial ¶¶383-385.

[505] Respondent's PO27 ¶207 n.352 (citing ILC Articles (RLA-33) "p. 113" without indicating that is a cite to ILC Article 40, cmt.(8)).

244. Although the ILC commentary notes that composite acts covered by Article 15 include "genocide, apartheid or crimes against humanity, systematic acts of racial discrimination,"[506] the subject of Article 15 is not limited to such acts. There can be no dispute that an aggregation of acts and/or omissions regarding the treatment of an investment may constitute a composite act in breach of obligations under an investment treaty when the cumulative character of the conduct constitutes the breach.[507]

245. Indeed, in *Walter Bau v. Thailand*, it was then-Professor James Crawford who argued as counsel for the claimant, authoritatively referring to ILC Article 15, that the State's treatment of the claimant's investment in a toll-road project should be viewed cumulatively as a composite act that breached the investment treaty at issue.[508] The tribunal agreed, concluding that the convergence of various "acts of non-feasance over a long period of time" together with other acts that harmed the economic viability of claimant's investment, including by members of the government as well as by Respondent's representatives on the Board of the investment vehicle, were "continuing/composite wrongful acts" that breached the obligation to provide claimant's investment fair and equitable treatment.[509]

246. Thus, unlike the *Pac Rim v. El Salvador* case, which involved a continued practice of not granting certain mining applications and where the nature of the omission did not change over time,[510] in this case, although the Government for many months refused to allow permitting to advance, the breach is not a continued failure to grant permits. Rather, it is the political rejection and effective termination of the Roşia Montană Project, as expressly announced and reconfirmed many times, and the repudiation of the State's joint-venture with Gabriel in RMGC, as thereafter revealed.[511]

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[506] ILC Articles (CL-61) Art.15 cmt.(2).

[507] Claimants' PO27 ¶¶90-103; Memorial ¶¶778-789.

[508] (CL-255) ¶¶9.53-9.61, 9.83-9.88.

[509] *Id.* ¶¶12.26-12.27, 12.31, 12.35-12.36, 13.2; Claimants' PO27 ¶98.

[510] (CL-225) ¶¶2.88, 2.92.

[511] Claimants' PO27 ¶¶50-53, 204-207; *id.* ¶¶206.c-d and citations therein (repudiation of obligations as shareholder of RMGC and of Bucium Projects).

B. Alternatively, the State's Conduct Culminating in an Effective Taking of the Project Rights as of September 9, 2013 Breached Both BITs

247. If the Tribunal were to conclude, contrary to the evidence, that Romania's treatment of Gabriel's investment in RMGC starting in August 2011 and culminating in the repudiation of the Project Rights in September 2013 cannot be characterized as a composite act, the conclusion remains that Romania's treatment of Gabriel's investment breached both BITs for all the reasons already extensively addressed.[512]

248. In particular, even if not considered as a composite act, the conclusion remains that the Romanian Government repudiated the Project Rights, in hindsight as of September 2013, without due process and without any compensation, in breach of both BITs. Moreover, the repudiation of the Project Rights cannot be seen as justified by any valid public purpose as it was the Government's wrongful failure to make permitting decisions the law required coupled with numerous unwarranted and irresponsible accusations of corruption implicating Gabriel and RMGC that created the circumstances that led to the mass protests.[513]

249. The unlawful repudiation of the Project Rights followed wrongful conduct that included coercive demands for renegotiations and an extended refusal to advance any permitting decision relating to the Roşia Montană Project in accordance with applicable legal standards and procedures, coupled with numerous public statements that put the Government's willingness to permit the Project, including to take decisions relating to historical monuments in the Project area, into question. That earlier conduct, if not considered as an aspect of a larger composite act, in the alternative, must be recognized as a failure to accord fair and equitable treatment,[514] the

[512] Claimants' PO27 question (e).

[513] *Supra* §VI.B; Claimants' PO27 ¶¶144-150, 161-163; Reply §IV.C; Boutilier slides 16-22. The conduct that followed the rejection of the Special Law moreover demonstrated that the Project Rights thereby had been effectively taken. Claimants' PO27 ¶¶204-207.

[514] Memorial §X; Reply §VIII; Claimants' PO27 question (a) §H.2. *See also* Claimants' PO27 ¶¶50-53 and question (e).

impacts of which in the context of assessing the measure of damages caused, is addressed further below.[515]

C. Alternatively, Romania's Treatment of Gabriel's Investment Following the Rejection of the Special Law Demonstrates That There Has Been a Political Repudiation of RMGC and Its Project Rights in Breach of Both BITs

250. If the Tribunal were to conclude that the evidence does not establish, in hindsight, a complete and permanent frustration of Claimants' investment in RMGC as of the date of the political rejection (September 9, 2013), or as of the formal rejection of the Special Law in Parliament that followed,[516] subsequent events demonstrate that, contrary to the law, RMGC's Project Rights have not been and will not be honored, and that Gabriel's investment thus effectively has been taken and otherwise subjected to treatment in breach of both BITs.[517]

251. If the Tribunal were to conclude that Gabriel's investment was not entirely frustrated as of September 9, 2013, or on another date associated with the rejection of the Special Law, the subsequent dates on which events made clear that RMGC's Project Rights have been frustrated include the following:

a. The Ministry of Culture's issuance on December 24, 2015 of the 2015 LHM, declaring, without regard to the ADCs that had been issued in the Project area, the entirety of Roşia Montană an historical monument where no mining can be permitted;[518] and

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[515] For Gabriel Canada's claim, *see supra* n.34. Also, in terms of Gabriel Canada's claim, the nature and effects of the conduct prior to July 2012, viewed as of that time, were not sufficient to trigger the three-year limitation period set forth in Article XIII(3)(d) of the Canada BIT. *Supra* §II.B.5.

[516] Claimants' PO27 ¶50 (describing further press conference on November 11, 2013, Special Commission vote rejecting the special law that evening, Senate vote rejecting the special law on November 19, 2013, and Chamber of Deputies vote rejecting the Special Law on June 14, 2014).

[517] Claimants' PO27 question (f); Claimants' PO27 ¶¶58-70.

[518] Memorial §IX.D.1; Reply §V.B.5; Claimants' Opening-2019 vol.7:17-21, 23-25; Claimants' PO27 ¶¶213, 216-217, 221, 223. The fact that the Ministry of Culture did not formally "withdraw" its endorsement of the EP for the Roşia Montană Project does not detract from this conclusion. Mining activities are prohibited in areas designated as an historical monument. Schiau-I ¶14; Reply §V.B.7. Respondent's argument in effect that the pronouncement of the entire area as an historical monument is not significant is not remotely credible, particularly given the Government's failure to give effect to the ADCs in the Project area. Reply ¶¶273-274.

b. Romania's submission on February 18, 2016 of its application to UNESCO to list the "Roşia Montană Cultural Landscape" as a UNESCO World Heritage site, without any regard to RMGC's Roşia Montană License or to Gabriel's massive investments to develop the Project through RMGC.[519]

252. The failure since March 2015 to take any action on RMGC's Bucium exploitation license applications[520] and the failure by the Government to complete the EP process for Roşia Montană notwithstanding the patently pre-textual TAC meetings held in 2014-2015[521] may be considered as well.

IX. ROMANIA'S WRONGFUL CONDUCT CAUSED GABRIEL INJURY BY EFFECTIVELY TERMINATING THE PROJECT RIGHTS

253. Having effectively terminated the Roşia Montană Project and frustrated RMGC's legal rights to obtain the Bucium exploitation licenses in breach of its BIT obligations, Romania's wrongful conduct deprived RMGC of the rights to develop these projects and caused injury to Gabriel as the value of Gabriel's direct and indirect shareholding in RMGC was derived from those Project Rights.[522]

254. Respondent argues that, like the claimant in *Bilcon v. Canada*, Gabriel claims that it lost the opportunity to have RMGC's eligibility for the EP assessed in a fair and non-arbitrary manner. From there, Respondent argues that Claimants cannot establish that RMGC would have obtained the EP or, if it had obtained the EP, that RMGC would have obtained all of the other approvals and permits to implement the Project profitably. Respondent concludes Claimants have not established that Respondent has caused Gabriel to lose the value of the Project Rights. Respondent's arguments are misguided.

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[519] Memorial §IX.D.2; Reply §V.B.6; Claimants' Opening-2019 vol.7:26-35; Claimants' PO27 ¶¶214-217, 222-223.

[520] Memorial §IX.B.3; Reply §VI, ¶¶303-309, 562 (noting also that for the Rodu Frasin deposit, as its feasibility was dependent upon its development together with the nearby Roşia Montană Project, the rejection of the Roşia Montană Project entailed the rejection of Rodu Frasin as well); Claimants' PO27 ¶206(d); Claimants' Opening-2019 vol.8:29.

[521] Memorial §IX.A; Reply §V.A; *supra* §VI.A.

[522] Reply §XIII.A.1; Claimants' Opening-2020 vol.1:4.

255. This case is not like *Bilcon*. Claimants' case is not that RMGC was denied the opportunity to have its eligibility for the EP assessed fairly. Nor is it uncertain whether, if fairly evaluated, an environmental permit would have been forthcoming.[523] The record is clear that RMGC's eligibility for the EP was established and accepted.[524] In addition, the Ministry of Environment in July 2013 published the proposed conditions and measures to be included in the EP, which also were included in a draft Decision accepting the EIA Report and proposing issuance of the EP.[525] Those conditions and measures confirmed that the environmental aspects of the Project were fully acceptable to the Government and were consistent with the Project as designed.[526]

256. Nor is it Claimants' case merely that the EP was not issued even though it should have been. Claimants' case is that the Government wrongfully terminated the Roşia Montană Project, notwithstanding its eligibility to obtain the EP. There is no doubt that effectively taking and eviscerating the Project Rights caused Claimants' injury. In addition, RMGC effectively has been deprived of its legal and contractual right to obtain the Bucium exploitation licenses.[527]

257. Nor are there serious questions about RMGC's ability, absent Romania's wrongful conduct, to have obtained the endorsements needed for the urbanism plans and the construction permits to develop the Project.[528] In addition, the fact that Gabriel was publicly-traded means that the value of its shares was based on the value the market attributed to the Project Rights taking into account all risks associated with Project development. Respondent's arguments regarding the adequacy of the information available to the market are without merit, and in any event are relevant only to the evidence of the quantum, not to the fact of, loss.

258. Here, the Government accepted contemporaneously that repudiating Gabriel's investments would cause enormous damages. On September 9, 2013, Prime Minister Ponta

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[523] (RLA-198) ¶168.

[524] *Supra* §IV.

[525] (C-555); (C-2075).

[526] Memorial ¶¶436-437; Tănase-II ¶175.

[527] *Supra* §VII.A.

[528] *Supra* §IV.B.2; Reply §XIII.A.2; *infra* ¶410 n.839.

acknowledged that "we will definitely have a lawsuit" with potentially billions of dollars of damages that "[w]e will probably all pay and I think it is fair to say this, that we will all eventually pay."[529] He confirmed again on September 11, 2013 that "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."[530] As to "the financial consequences," he said the next day that RMGC had invested "about 550 million euros" to develop the Project and that Gabriel's lost profits were US$ 2.7 billion.[531] Minister Şova likewise warned of billions of dollars of damages.[532] Minister Şova also testified to Parliament that rejecting the Project for "no reason" or "related to political decisions" would breach the State's investment treaty obligations prohibiting "expropriation and nationalization" and would mean that the State "must pay damages."[533]

259. Thus, unlike the claimant in *Bilcon*, it is certain that Gabriel incurred the loss of the value of the rights to develop the Projects, as reflected in its direct and indirect shareholding of RMGC. The quantum of that loss is discussed further below.

260. Respondent argues that it should not be held liable for all the loss because, it claims, Claimants and RMGC contributed to the loss. Respondent's principal argument is that Claimants and RMGC are to blame for the fact that there were opponents to the Project and that Respondent therefore should be excused, at least in part, from having adopted the wrongful course of conduct. This argument disregards the facts.[534]

261. Having decided to promote mining in Roşia Montană and Bucium and inviting Gabriel to partner with the State to do so, the Government concluded contracts and issued licenses accordingly. The State thus imposed contract and license obligations respectively on

[529] (C-793) at 2; Claimants' Opening-2019 vol.5:50-51 (video of Prime Minister Ponta acknowledging on September 5, 2013 the possibility of paying "billions in compensation" to Gabriel if nothing were done and confirming the Government was "obligated under the law … to give approval and the Roşia Montană Project had to start").

[530] Claimants' PO27 ¶50.b; Claimants' Opening-2019 vol. 6:24-27.

[531] (C-643) at 1-2, video 04:03-07:01.

[532] *Id.* at 4-6, video 17:19-18:41, 20:25-23:11.

[533] (C-507) at 9-10.

[534] Claimants' PO27 question (d); *supra* §VI.B.

Gabriel to finance and RMGC to expend very substantial sums to develop the Projects. The Government in turn accepted the obligation to make decisions and advance all aspects of the permitting process (culture, environmental, and urbanism) in accordance with the law.

262. Rather than make the decisions the law required, Government officials repeatedly delayed doing so.[535] These failures to act by the Government aggravated and sustained whatever controversies existed regarding the Project.[536] Gabriel and RMGC nevertheless succeeded to advance the Project to the stage where it enjoyed strong support and successful Project implementation was within reach.

263. There is no basis to blame Gabriel and RMGC for the fact that there were opponents to the Project. Gabriel worked reasonably, diligently, and in good faith to design the Project in line with best available technologies and best industry practices and to engage stakeholders responsibly.[537] As mining projects generally face opposition, the basic reason for the opposition was the Government's decision to develop mining in the license area in the first place, followed by the Government's delays in permitting, which then prevented the benefits of mining from being realized and thus simultaneously weighed down Project support and buoyed the opposition.

264. Thus, there is no basis to refer to the doctrine of contributory fault, as Respondent argues. Contributory fault applies where there has been "some willful or negligent act or

[535] This included the Ministry of Environment's suspension of the EIA Process from 2007-2010 contrary to Romanian law, its unlawful withholding of Dam Safety Permits for the same three years, the Ministry of Culture's arbitrary refusal after 2006 to issue the permits needed to complete the archaeological research necessary for discharge decisions for Orlea, and the refusal to correct and update the 2010 LHM, which also had the effect of blocking approval of the updated PUZ for the Project because the SEA Endorsement for the PUZ was challenged due to its divergence from the 2010 LHM, and the refusal of the Ministry of Culture to issue its endorsement of the updated PUZ. Memorial §III.C.2 (termination of research program); *id.* §V.A.1 (EIA suspension); *id.* §V.A.2 and Szentesy-II ¶¶31-43 (Dam Safety Permits); Claimants' Opening-2019 vol.7:10-12 (2010 LHM); *supra* §IV.B.2 (PUZ).

[536] *E.g.*, Claimants' Opening-2019 vol.3:70-71 (video of Minister of Environment Borbély stating on December 27, 2011 that "in Hungarian there is the story of the red rooster, which never ends," that "Roşia Montană is also a story that never ends," which shows "the incapacity of the Romanian state, to manage this problem."); *id.* vol.5:43-44 (video of Prime Minister Ponta stating on July 18, 2013 that "we've kept the project for 13 years without the Government of Romania saying if it's black or white," and that he would ask Parliament to decide whether to implement it so as "not to keep the project in the drawer as so many Governments did.").

[537] Memorial §IV; Reply ¶¶114-116, 161-168; Claimants' Opening-2020 5:9-28.

omission."[538] Contrary to Respondent's argument, "not every action or omission which contributes to the damage suffered is relevant;" rather, there must be at a minimum a "lack of due care" by the injured party for its own property rights.[539] The evidence does not support any such conclusion in relation to Gabriel and RMGC.

265. Respondent's contention that RMGC contributed to the harm because it "failed to comply with Romanian and international law" in various respects is unavailing:

a. Respondent claims that RMGC promoted media campaigns found to be in breach of Romanian laws. RMGC, however, was never sanctioned or reprimanded. Respondent misleadingly refers to an October 2013 decision directed at the mining trade union to change one of its commercials.[540]

b. Respondent claims RMGC failed to submit a valid UC, leading to the unlawful 2007-2010 suspension by the Ministry of Environment of the EIA process. In fact, RMGC was caught between local authorities, who issued a UC, and the Ministry of Environment, who refused to accept it.[541] Not only is there no basis to fault RMGC for that dysfunctional interaction between Romania's competent authorities, but Romanian courts have since confirmed with finality that a UC is not subject to legal challenge as RMGC has consistently maintained.[542]

c. Respondent argues that NGO complaints led the PETI to express concerns regarding compliance with the EU waste management directive. In fact, the PETI reports conclude, based on the responses from the Romanian authorities, that "measures have been taken to ensure full application of EU legislation," and "no breaches of EU legislation can be identified."[543]

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[538] ILC Articles (CL-61) Art.39 cmt.(1); Claimants' PO27 ¶¶165-174.

[539] *Id.* cmt.(5).

[540] Tănase-III n.327.

[541] Memorial §V.A.1.

[542] *Supra* §IV.B.1; Podaru ¶66; Mihai-II ¶137 (*citing* C-2425 holding UC not relevant to EIA procedure).

[543] (R-205) at 4.

266. Romania also wrongly contends that Claimants and RMGC "failed to comply with certain best practices" in Project development. The evidence shows that Claimants and RMGC diligently incorporated best practices in all aspects of Project development, which necessarily included soliciting and obtaining feedback from stakeholders to ensure efforts were progressively responsive to community needs.

a. Respondent contends that engagement with the local community in the early years was ineffective and "fatal" for the Project. Although the concepts of social license were introduced in the mining industry only after 2008,[544] Ms. Lorincz describes RMGC's intensive and diligent efforts beginning in 2000 and consistently thereafter to engage with the local community in a socially supportive and responsible way, and how RMGC succeeded in earning the trust and support of the vast majority of the local community.[545] From the outset, leading international experts who had worked with the EBRD and the IFC worked with RMGC to design responsive community engagement policies in line with international best practices.[546] The fact is that the local community overwhelmingly supported the Project to an extent rarely observed in mining projects.[547] The small minority opposition stemmed from a general lack of trust in Government institutions as much as any other factor.[548]

b. Respondent claims that the IGIE concluded that RMGC failed to inform the public sufficiently on cyanide use. In fact, the IGIE commended RMGC for the "considerable effort of the company on promoting the Project" and suggested the

[544] Thomson-I ¶16 (SLO only first presented at mining conference in 2008); Tr.(Dec. 12, 2019)2980:8-17 (Boutilier-Tribunal) (noting SLO model not even published until 2009).

[545] Lorincz-I; Lorincz-II.

[546] Lorincz-I ¶¶22, 24.

[547] Lorincz-II; Boutilier §§2-3.

[548] NDP Submission at 1 ("Over the lifespan of the proposed Project, the undersigned organizations have used various strategies ... to ensure that both the Romanian state and the company respect the rights of the communities ... At times, the state and the company colluded to the detriment of the communities…."); Boutilier §IV.

release of more understandable explanations, which RMGC thereafter provided through fact sheets, information centers, and its website.[549]

c. Respondent wrongly argues that not finalizing the cyanide transportation route impugned the feasibility of the Project by hindering the review and acceptance of the Project.[550] Nothing in the Cyanide Code suggests that cyanide transportation routes are to be finalized at the pre-operational stage of Project development.[551] RMGC was ahead of the schedule contemplated by the Cyanide Code as it completed detailed analyses of route options including recommendations on preferred routes.[552] Respondent acknowledges that Gabriel took the extraordinary step of voluntarily seeking pre-operational certification under the Cyanide Code,[553] but asserts that if an audit had been completed sooner, it might have addressed the public's alleged concerns. This is entirely speculative and ignores that Gabriel already was a signatory to the Cyanide Code, had committed to complying with all Cyanide Code requirements, and that leading international experts and Minister of Environment Plumb testified before Parliament as to the Project's compliance with the Code.[554] The evidence shows that RMGC was well-positioned to receive pre-operational certification under the Cyanide Code before operations started and had taken steps to ensure it would be complying with the Code's requirements in all respects.[555]

d. While Ms. Wilde criticizes aspects of the EIA Report, it was prepared by a team of leading international firms and well-known industry experts following

[549] IGIE Report (C-376) at 64; Tr.(Dec. 5, 2019)1111:7-12 (Avram-Cross).

[550] *Supra* §IV.C.1.

[551] Reply ¶¶122-123; Claimants' Opening-2020 vol.5:16-22.

[552] *Id.*; Avram-II ¶¶89-95.

[553] Respondent's Opening-2020 slides 40-44; Blackmore (Errata) ¶¶58-60 (agreeing that pre-operational certification is not required under the Cyanide Code and confirming that only three mining companies have previously sought pre-operational certification); Lambert ¶22.

[554] Memorial ¶¶214-218, 483, 503; Lambert; van Zyl ¶49; *supra* §IV.C.1.

[555] Lambert; van Zyl ¶48.

international best practices.[556] The Project was being developed in line with IFC/World Bank Equator Principles.[557] Contrary to the speculative press reports cited by Respondent regarding IFC project funding, correspondence from the IFC [redacted].[558]

267. In short, Respondent's argument that Gabriel and RMGC share the blame for the Government's wrongful treatment of Gabriel's investment, or that Gabriel and RMGC are otherwise responsible in part for the losses caused by the Government's repudiation of the Project Rights and its joint-venture with Gabriel, has no merit.

X. COMPENSATION

268. Having frustrated RMGC's rights to develop the Roşia Montană Project and the Bucium Projects in breach of both BITs, Respondent's conduct caused Gabriel to incur the loss of the value of its investment held through its direct and indirect 80.69% shareholding of RMGC whose value was derived entirely from the value of those Project Rights.

A. Compensation Must Be Assessed on the Basis of the Fair Market Value of the Lost Project Rights

269. Lost value should be compensated on the basis of fair market value.[559] The fair market value is the price a hypothetical buyer and seller, both with reasonable knowledge and neither under compulsion, would accept.[560]

[556] Memorial §IV; Reply ¶¶133-134; Avram-II ¶¶108-114.

[557] Memorial ¶66; Technical Report (C-128) PDF 69.

[558] IFC Letter (C-2146); Henry-II ¶¶5-6.

[559] Memorial ¶852.

[560] Compass-I ¶¶37-38.

B. Damages Should Be Assessed By Reference to July 29, 2011 to Ensure Full Reparation

270. The Tribunal should assess Gabriel's damages by reference to the value of its shareholding in RMGC as of July 29, 2011, the date immediately before the conduct began that led to the complete frustration of Gabriel's investment in RMGC, to ensure full compensation for Romania's breaches.

271. Having breached its treaty obligations, Romania is under an obligation to ensure full reparation for the losses caused by its breaches. The basic rule of reparation is restitution, in the sense of restoring the *status quo ante* or paying compensation equal thereto, plus compensation for any loss not covered by the restitution.[561] This rule applies regardless of which treaty provision has been breached.[562]

272. Where the loss is the value of property interests, restitution means compensation based on the *ex ante* value, *i.e.*, the value immediately before the wrongful conduct. The purpose of assessing the value *ex ante* is to assess loss absent the impacts of the wrongful measure. Full reparation requires the lost value to be assessed absent the impact not only of the measure itself, but also of the risk or threat of such a measure.[563]

273. Analogously, the common BIT provision that provides that compensation for an expropriation must be based on the value of the investment immediately before the expropriation or before the impending expropriation became public knowledge reflects the principle that compensation should be assessed without the impacts of the measure.[564] In the event of an expropriation in breach of a BIT's requirements, however, the customary international law rule of reparation applies, which includes compensation in the amount of the *ex ante* value, but also includes compensation for additional loss, if any, caused by the measure.

274. Respondent wrongly asserts that "there is no support" for the distinction between the primary obligation to pay compensation as an element of an expropriation permitted by the

[561] ILC Articles (CL-61), Art. 31, Art. 35 cmt.(2), Art. 36(1); Memorial ¶¶844-850; Reply ¶¶667-671.

[562] Memorial ¶¶859-61; Reply ¶672.

[563] Memorial ¶¶822-828, 851-855.

[564] *Id.* ¶821.

BITs and the secondary obligation to provide reparation for a breach of the expropriation provisions of the treaty. Numerous tribunals have recognized the distinction.[565]

275. Respondent also asserts that the distinction in any event is "of no relevance" because ILC Article 31 (reparation) establishes a secondary obligation "identical to that created under BITs in case of expropriation." The distinction is relevant, however, because the two obligations are not identical. While both standards refer to compensation based on the *ex ante* value of the expropriated investment, reparation includes compensation for additional damage, if any, caused by the unlawful expropriation.[566]

276. With regard to the date of valuation, Respondent argues that it must be the date when the breach is consummated because "to the extent all breaches require an irreversible damage for consummation ... the date of a breach is also the date when the alleged losses occurred or started to occur." Respondent's argument is not correct, however, because conduct that causes loss may not be considered a breach at the time, but only when combined with later conduct is seen cumulatively as a breach. In such circumstances, reparation must cover all the loss caused by the conduct since the conduct began. Moreover, full reparation must include compensation for loss incurred due to the risk or threat of the breach.

277. Assessing value *ex ante* means considering the value of the investment absent the impacts of all conduct recognized as wrongful, even if the conduct was not recognized as a treaty breach at that time. Thus, Respondent argues mistakenly that "[b]ecause there was no 'malfeasance' or 'nonfeasance'... before 9 September 2013," Romania cannot be held responsible for any losses caused before that date. That argument is mistaken because the nature of a composite act is that when the first action occurs it is not in breach of the obligation, but when combined with later action, it is.[567] As the *Walter Bau v. Thailand* tribunal explained:

> The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing

[565] *Id.* ¶¶856-858 (discussing authorities); *also, e.g.*, *Kardassopoulos* (CL-68) ¶¶506-514; *Vivendi* (CL-113) §8.2.

[566] ILC Articles (CL-61) Art. 35 cmt.(2), Art. 36(1).

[567] ILC Articles (CL-61), Art. 15 cmt.(10).

> 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, when the treaty obligation will have come into force.[568]

278. Where wrongful conduct extends over time, the Tribunal must decide based on the facts of the case when the wrongful conduct began so that an *ex ante* value can be assessed.

279. In *Amoco v. Iran*, the Iran-US Claims Tribunal considered what the date of valuation should be in relation to an expropriation that "was the outcome of a lengthy process," where "the precise character of this process was, at the beginning and for a rather longer period of time, ambiguous."[569] In that case, the tribunal concluded that Amoco's interests were expropriated through a process that started in April 1979, but that was not concluded until December 24, 1980, when the Khemco Agreement was declared null and void, twenty months after an "exceptionally lengthy" process that had "changed orientation over time."[570]

280. The tribunal took note of the fact that before August 1, 1979, a declaration was made that Iran intended to purchase Amoco's interests and a negotiation to that end had begun, although as of August 1, 1979 there had not been an expropriation.[571] To assess compensation equal to the full value of the property taken, however, the tribunal considered that in July 1979 Iran engaged in conduct that interfered with certain of Amoco's rights, and thus that measures "definitely took effect," which although not an expropriation, "should be considered to have some bearing on the Claimant's right to compensation."[572] Thus, the tribunal concluded that compensation should be assessed as of July 31, 1979, rather than December 24, 1980 when the expropriation was consummated.[573]

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[568] (CL-255) ¶9.85 (quoting *Société Generale* ¶91).

[569] (CL-128) ¶125.

[570] *Id.* ¶¶128, 132, 182.

[571] *Id.* ¶¶126-127.

[572] *Id.* ¶181.

[573] *Id.* ¶¶181-182.

281. *Crystallex v. Venezuela* involved conduct that began with actions surrounding the denial of a permit in April 2008. The tribunal concluded those actions denied the claimant's investment fair and equitable treatment, but did not yet amount to an expropriation.[574] That conduct was then followed by months during which statements from governmental officials at the highest level were directed at the claimant's investment and "paved the way" for its termination.[575] The statements effected "an incremental encroachment" of the claimant's contract rights and resulted in a gradual yet significant decrease in the value of claimant's investment.[576] The government thereafter rescinded claimant's contract in February 2011.[577] The tribunal concluded that the cumulative progression of the acts leading to the rescission was a measure equivalent to expropriation.[578] The tribunal held that damages should be assessed by reference to April 2008, although the investment was not expropriated at that time, due to the fact that the State's conduct by then had denied the claimant's investment fair and equitable treatment and in view of the negative impacts that the Respondent's conduct had thereafter on the claimant's investment.[579] Moreover, to assess value as of April 2008, the tribunal concluded that assessment of the value of claimant's investment had to be based on a "last clean date" in June 2007, nearly a full year before the acts giving rise to the expropriation and denial of fair and equitable treatment, in order to avoid negative impacts of the wrongful conduct.[580]

282. In *Kardassopoulos v. Georgia* where a certain decree no. 178 was "a classic case of direct expropriation," the tribunal considered that a decree issued several months earlier that had "laid the groundwork" for decree no. 178 was relevant for assessing compensation because claimant's rights were "in serious question" as of the date of the first decree.[581] The tribunal held that "[w]hilst this pre-dates the expropriation effected by Decree No. 178, the Tribunal considers that the circumstances of this case require it to value Mr. Kardassopoulos' investment as of the

[574] (CL-62) ¶¶673-674.

[575] *Id.* ¶675.

[576] *Id.* ¶683.

[577] *Id.* ¶684.

[578] *Id.* ¶708.

[579] *Id.* ¶855.

[580] *Id.* ¶891. *Infra* §X.H.2.

[581] (CL-68) ¶388.

day before passage of Decree No. 477 precisely to ensure full reparation and to avoid any diminution of value attributable to the State's conduct leading up to the expropriation."[582]

283. Thus, while Respondent argues that the valuation date "must be fixed based on the date of consummation of the breach," and that "the only exception to that rule occurs when an expropriation is preceded by a public announcement that the expropriation is going to take place," the authorities instead show that the date of valuation must be fixed so as to ensure that reparation fully compensates for the impact of the wrongful measure, including impacts due to the risk or threat of the measure.[583]

284. In this case, the evidence shows that by August 2011 and for months thereafter, as revealed by repeated statements by senior members of the Government, a decision had been taken that the Government would not honor the State's joint-venture agreement with Gabriel or RMGC's contract rights, and that the Government would force a renegotiation. These repeated disparaging statements directed at Gabriel's investment, which also indicated that the Government would not allow permitting to advance, called into question the contractual basis for Gabriel's investment and the Government's willingness to make legally required permitting decisions for the Projects.[584] These steps were improper and formed part of the conduct that ultimately led to the complete frustration of Gabriel's investment in breach of both BITs.

285. As such, in order to ensure full reparation to Gabriel, the date as of which the value of Gabriel's interest in the Project Rights should be assessed is July 29, 2011, the date that precedes the beginning of the measure that commenced in August and led to the complete and unlawful taking of the Project Rights.

286. July 29, 2011 is the appropriate valuation date in view of the composite nature of the course of conduct at issue. It is also the appropriate date if the State's public statements denouncing the terms of its agreements with Gabriel and its coercive demands for renegotiation, coupled with its threatening not to, and then failing to, advance permitting decisions were viewed

[582] *Id.* ¶517.

[583] Reisman & Sloane (CL-123) at 149 and n.156.

[584] Claimants' PO27 ¶12.

separately as a denial of fair and equitable treatment or as signals to the market of the risk and threat of the unlawful conduct to come. Those actions began to interfere with Gabriel's investments and should be taken into consideration when assessing damages.[585]

287. While for Gabriel Canada's claim the State's conduct prior to November 23, 2011 cannot be considered as a basis for liability,[586] the State's conduct continued unchanged after November 23, 2011, including in view of the TAC meeting held November 29, 2011 and thereafter.[587] Thus, for purposes of Gabriel Canada's claim, the value of Gabriel's interest in the Project Rights before the commencement of the State's conduct beginning in August 2011 may be considered as part of the factual basis for the later claim.[588] In any event, the date of valuation for Gabriel Canada's claim also may be considered as of November 23, 2011 insofar as the evidence, discussed further below, shows that the fair market value of Gabriel's interest in the Project Rights based on the average market capitalization of Gabriel Canada over the entire year of 2011 did not materially change.[589]

288. In view of the fact that the price of gold declined over the period of time leading to the political rejection of Gabriel's investment, Respondent argues that a 2011 valuation date would be a "windfall" to Gabriel. It was the State, however, not Gabriel, that decided when to interfere with Gabriel's investment, and the evidence shows it was motivated by the high gold prices prevailing at that time.[590] Compensation that takes account of the value of Gabriel's interest in the Project Rights at the time of the State's interference is entirely compensatory and cannot reasonably be characterized as a windfall or as punitive.[591]

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[585] *E.g.*, *Crystallex* (CL-62) ¶¶673-674; *Kardassopoulos* (CL-68) ¶517.

[586] ILC Articles (CL-61) Art. 13 cmt.(9), Art. 15 cmt.(11).

[587] Claimants' PO27 ¶¶18, 25; *supra* §§III-IV.

[588] *Walter Bau* (CL-255) ¶9.85 (quoting *Société Generale* ¶92).

[589] Compass slide 9; Claimants' Opening-2020 vol.1:9-10; *infra* §X.C.1.

[590] Claimants' Opening-2020 vol.1:11-12.

[591] Indeed the gold price today is considerably higher than it was in 2011. Tr.(Oct. 2, 2020)1045:11-1046:6 (Brady-Cross) (establishing gold price today at US$ "1900 plus an ounce"); Tr.(Oct. 4, 2020)1374:14-16 (Burrows-Cross) (same).

289. If the Tribunal were to conclude that damages must be based on the value that Gabriel's investment would have had as of the date the State's conduct ripened into a taking of Gabriel's investment (September 9, 2013) absent any impacts of the State's wrongful conduct leading up to that point in time, then adopting the "indexing approach" discussed below would be most appropriate.[592]

C. GBU's Stock Market Capitalization

1. GBU's Stock Market Capitalization as of July 29, 2011 Is the Fair Market Value of the Project Rights from a Minority Shareholder Perspective Free of the Impacts of the Wrongful Acts

290. This case is practically unique among investment treaty cases in that the Tribunal does not need to assess complex expert analyses of the fair market value of the rights at issue in order to assess damages. Respondent also observes it is rare.[593] That is because it is not often that there is a publicly traded company, trading on a market with sufficient liquidity, whose share price is derived essentially from the subject asset, and whose share price may be observed absent the impacts of the wrongful measure.[594] Thus, in most cases where a stock market measure has been rejected, it was because the Respondent urged acceptance of the value reflected in the publicly traded share price at a time impacted by the wrongful measure.[595]

291. In this case, as Compass explains, throughout 2011, GBU's shares were publicly traded on the TSX.[596] The Project Rights were GBU's only material asset and thus the sole driver of its traded value.[597] Over one million shares of GBU's shares on average traded daily,

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[592] *Infra* §X.H.

[593] Rejoinder ¶1097.

[594] Claimants' Opening-2020 vol.1:13-28; Compass-I §IV.2; Compass slides 4-16; Memorial §§ XVI.C.2, XVI.C.3.a; Reply §XIII.C.

[595] *E.g.*, *Copper Mesa* (RLA-54) ¶7.15 (where respondent maintained "the use of traded share data, when available … should be the primary and generally the only basis for valuing the assets of a company").

[596] Reply ¶¶676-677; Compass slides 4-5.

[597] *Infra* §X.E.1; Reply ¶¶680-682; Compass slides 10-11.

reflecting a robust market.[598] GBU was covered by multiple market analysts and attracted sophisticated and experienced sector shareholders,[599] reflecting a market of informed investors.

292. Thus, GBU's stock market capitalization is an actual fair market valuation, reflecting real transactions and not an estimate of what a hypothetical transaction would be.[600] The stock market measure thus reflects the market's assessment of the various risks and uncertainties facing the company. As Dr. Spiller explained in response to Tribunal questions, the principal driver of value reflected in the share price of a gold mining company where resources and reserves are established is the value of the gold, which is known, and this stands in contrast to companies, such as Tesla, where the share price reflects assessments about more uncertain fundamentals such as whether future innovation will materialize.[601] While GBU's share price as of July 2011 (before the wrongful conduct) reflected the market's assessment of the risk associated with obtaining permitting, Dr. Spiller explained that the share price reflected "some probability of a permit," but not more than the average probability.[602]

293. Compass's stock market measure is based on the weighted average of Gabriel's market capitalization over the 90 days leading to and including the Valuation Date to smooth out any short-term volatility in the share price.[603] Compass also calculates the weighted average of

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[598] Compass-I ¶44.

[599] Reply ¶¶676, 702-703; Compass slide 12.

[600] Tr.(Oct. 1, 2020)865:22-866:2 (Jeannes-Direct) ("public market capitalization" is "the value that the market was placing on the asset."); Tr.(Oct. 3, 2020)1097:13-1098:11 (Compass-Direct) ("the Gabriel stock price incorporated, in essence, all available information and expectation on production, gold price of cost, and the risk," and the Tribunal therefore "doesn't require any type of assumptions about discount rates or gold prices or production levels or a timeline. In essence, the stock market capitalization of Gabriel represents the consensus of millions of transactions over the shares of what can be thought as the Projects. … Gabriel's market capitalization provides a direct assessment of the value of the … underlying Projects," which "is much more reliable than any other method that requires substantial assumptions."); Reply §XIII.C.

[601] Tr.(Oct. 3, 2020)1281:12-1283:13(Spiller-Tribunal).

[602] *Id.* 1297:18-1298:17 (Spiller-Tribunal) ("I don't believe that it will be priced in more than the average ... if you're assuming that there is ... some probability of a permit and the price incorporates that assumption"). Accordingly, for mining companies waiting for a permit Dr. Spiller explained, "companies will gain anything between 30 to 100 percent when a permit is granted." *Id.* 1297:1-5 (Spiller-Tribunal); *infra* §X.H.1 ("permit bump" expected for Gabriel until early 2012).

[603] Compass Slide 9; Tr.(Oct. 2, 2020)1098:15-21 (Compass-Direct); Compass-I ¶45.

Gabriel's market capitalization over the whole year and demonstrates it is not materially different.[604]

294. Dr. Burrows agrees that a market capitalization may be the most reliable indicator of value and has used that method himself in another investment treaty case relating to a gold mining company, notably assuming in that case that the market had correct information.[605] Indeed, as other tribunals have recognized, when available and not impacted by the threat of expropriation, an actual market measure derived from a stock exchange is the best indicator of value.[606]

2. The Fair Market Value of the Project Rights Includes a Premium over Gabriel's Stock Market Capitalization

295. Compass explains why the fair market value of the Project Rights includes a premium over Gabriel's stock market capitalization, referred to as an acquisition premium.[607]

296. In short, the stock market capitalization of a company such as Gabriel is derived from the publicly traded share price of the company, which reflects the value of the company's assets from a minority shareholder perspective.[608] Whereas the publicly traded share price of a company like Gabriel is the best measure of the fair market value of a minority stake in the company (as it reflects the price at which such shares were actually bought and sold), the share price does not necessarily reflect the value of control over the company's assets that some

[604] Compass Slide 9; Tr.(Oct. 2, 2020)1098:22-1099:11 (Compass-Direct).

[605] Tr.(Oct. 4, 2020)1371:8-1372:20 (Burrows-Cross).

[606] *E.g. Amoco* (CL-128) ¶¶217-218; Reply ¶¶678-679 n.1309; ILC Articles (CL-61) Art.36 cmt.(22) and n.553 (noting where comparable property is freely traded on an open market value is more readily determined and where share prices provide good evidence of value they may be utilized).

[607] Compass-I §IV.2.1; Compass-II §III; Memorial ¶¶912-913; Reply ¶¶705-714.

[608] Compass-I ¶¶5 ("Under normal conditions, the price of a publicly traded company's shares (referred to as the stock price) reflects the market's assessment of the value, to a minority shareholder, of the company's underlying assets... As a consequence, the stock price and, by extension, the market capitalization of Gabriel Canada (i.e., the stock price multiplied by the number of issued common shares) represented the market's value of the value of Gabriel's investments in Romania from a minority shareholder's perspective."); *id.* ¶¶41-42; Compass-II ¶11, 51.

buyers, particularly major mining companies, assign to such control. To capture that value, one must consider the price at which control over such assets is bought and sold.[609]

297. The evidence shows that the market for shares of gold companies, such as Gabriel, does not fully capture the value of control of the underlying project assets; buyers and sellers of a controlling interest in gold projects value such control at a higher level than the value of a minority shareholding in the company.

298. As Charles Jeannes explains, major gold companies pay a premium over the market capitalization of a junior company holding rights to a valuable gold project.[610] That is because viable gold deposits are rare in nature and the high-risk business of exploration and project development is usually undertaken by junior mining companies, while the major mining companies focus on exploiting deposits and supplying gold to the market. The continued viability of a major mining company depends on the major's successful acquisition of new gold properties as the major's existing reserves are depleted.[611] Competition among major mining companies seeking to acquire rights to increasingly rare, attractive gold deposits drives up the price at which acquisition of such project rights will transact.[612]

299. The market for such acquisitions is distinct from and smaller than the market for shares representing a minority stake in these companies, and the competition to acquire control of attractive deposits is significant. As Mr. Jeannes explains, nearly every acquisition in the gold

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[609] Tr.(Oct. 3, 2020)1301:7-1302:14 (Spiller) ("[T]he stock price is the Fair Market Value of a share. That is, if we are in a commercial dispute, for example, about a transaction for a 10 percent of the shares, then we look at the stock price, and that's a really good assessment of Fair market Value. ... I say the Fair Market Value of a share is the stock price. It's because there are thousands of those transactions done every day, and we can rely on the beauty of large samples ... lots of people transacting on this asset, which is the share ... The underlying asset is transacted sporadically. It is only transacted when we have an acquisition; and, therefore, we have to look at those – at that set of transactions which are definitely for the underlying asset, not exclusively for the cash flow associated with that for a minority shareholder. And, as a consequence, the set of transactions is different, and you rely on the fact on the large number.").

[610] Tr.(Oct. 1, 2020)858:2-859:10, 865:22-867:13 (Jeannes-Direct); Jeannes ¶¶11-28; Cooper ¶¶13-17. Respondent's expert Mr. McCurdy acknowledged "it would have been more plausible to see a major mining company" acquire the Project assets than other type of investor. Tr.(Oct. 2, 2020)977:22-978:11 (McCurdy-Cross).

[611] Jeannes ¶¶13-14; Tr.(Oct. 1, 2020)857:5-858:1 (Jeannes-Direct).

[612] Jeannes ¶¶15-19; Tr.(Oct. 1, 2020)858:5-859:10 (Jeannes-Direct).

sector at that time included a significant acquisition premium over the publicly traded prices for shares reflecting the market's demand for control of promising gold deposits.

> I did, I believe, probably more deals than anybody in the business during this time frame. I was in charge of business development at Glamis Gold and Goldcorp before becoming CEO, and none of the deals that we ever did was accomplished without paying a significant premium.
>
> … [A]ll the majors were making acquisitions during this period. I can't think of any deal that was done where a major acquired a junior company without paying a significant premium… [I]f you wanted to get it done, you had to pay a premium.[613]

300. Similarly, Barry Cooper, a former senior market analyst at CIBC covering precious metals, observed that shareholders of a company with a promising viable project would require a premium in excess of 30% to conclude the sale.[614] As Compass confirms, transactions involving acquisitions between July 2010 and June 2011 of majority or controlling stakes in metal mining companies included a median acquisition premium of 34%, and those involving non-producing gold targets had a median premium of 56%.[615]

301. Respondent's experts do not dispute the fact that payment of an acquisition premium is the norm in the industry.[616] Respondent's expert Mr. Guarnera, a mining valuation expert,[617] explains in a public valuation report prepared for another mining company that "[t]he value applied to corporate entities as part of an acquisition will frequently include a 'Control Premium' if the acquisition of a part or all of the entity results in effective control of the entity," and that "[t]he Control Premium typically ranges from 20 percent to over 50 percent."[618]

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[613] Tr.(Oct. 1, 2020)858:20-859:10, (Jeannes-Direct); *id.* 865:22-866:7 ("[Y]ou had to be able to pay some meaningful premium or the seller wasn't going to sell to you. There would be no reason for them to sell below market value...").

[614] Cooper ¶33.

[615] *See* Compass-I ¶48; Compass-II ¶43 (summarizing additional studies detailing acquisition premia in the resources sector that generally fall in range of 30%-50% historically).

[616] Brady ¶7 ("When Newmont is acquiring a mining company it expects to pay a premium to the public share price. This premium is necessary to induce the shareholders to sell."); Burrows-II ¶97 ("there is no disputing that acquisitions of public companies typically are made at a premium to prevailing market prices").

[617] Tr.(Sept. 30, 2020)628:11-630:5 (Behre Dolbear-Cross).

[618] Tr.(Sept. 30, 2020)625:13-22 (Behre Dolbear-Cross); (C-2588) at 92.

302. Indeed, a report prepared by PricewaterhouseCoopers of acquisitions in the gold industry notes that 2010 had been a record year for acquisitions in the gold sector, that 2011 also was an outstanding year, that in June 2011 Standard Chartered Bank estimated that the world's six largest mining companies were expecting to amass US$ 144 billion in cash, meaning a lot of cash would be on hand for securing new supplies and replacing reserves, that through November 2011 acquisition premiums on average were a "whopping 54%" and at an "all-time high," and that PwC expected to see high premiums in the gold sector through 2012.[619]

303. The Project Rights held by Gabriel through RMGC were highly attractive assets as they included rights to develop Roşia Montană, one of the largest undeveloped gold deposits in Europe with mineral reserves of 10.1 million ounces of gold and 47.6 million ounces of silver,[620] as well as the promising Bucium (Rodu-Frasin and Tarniţa) properties, [redacted]

304. As Jonathan Henry explained, these Project Rights were seen in the industry as trophy assets, [redacted] As Gabriel CEO, Mr. Henry was asked to attend several conferences in North America, South America, and Europe, and spoke to packed audiences with standing room only about the Roşia

[619] (CRA-197) at 15; Tr.(Oct. 2, 2020)975:19-977:21 (McCurdy-Cross).

[620] SRK-I §§3-4. The Roşia Montană deposit includes measured and indicated mineral resources containing approximately 17.1 million ounces of gold and 81.1 million ounces of silver (inclusive of mineral reserves) and further inferred mineral resources containing approximately 1.4 million ounces of gold and 4.1 million ounces of silver, [redacted]. SRK-I ¶2 [redacted]

[622] Henry ¶31; Henry-II ¶¶98 nn.22, 103.

[623] Tr.(Dec. 3, 2019)590:15-591:14 (Henry-Direct).

Montană and Bucium Projects.[624] For Mr. Henry, it was clear that "the investment community was monitoring our progress very closely at that time."[625] Mr. Jeannes confirmed, [redacted] Also reflecting the attractive quality of the Project assets is the fact that Gabriel retained Newmont, the world's largest gold mining company, and other large sophisticated shareholders throughout this time-period.[627] Indeed, as Compass observes, the composition of Gabriel's shareholding is a further indication that a potential acquirer would have to pay a substantial premium over the stock price to obtain agreement on a sale of the Project Rights at the Valuation Date.[628]

305. As Dr. Spiller explained, one would not expect to see an acquisition of Gabriel's interests just before the EP was expected.[629] Indeed, expecting the permit would be issued shortly, several market analysts valued Gabriel at a significant premium over its stock market value.[630] [redacted]

[624] *Id.* 591:15-20.

[625] *Id.* 591:18-20.

[626] Tr.(Oct. 1, 2020)880:4-881:9 (Jeannes-Direct).

[627] Memorial ¶56.

[628] Compass-I ¶52 n. 74; Tr.(Oct. 1, 2020)730:17-731:7 (Cooper-Direct) (discussing Gabriel's shareholders); Compass slide 12 (noting also that Baupost increased its shareholding 2011).

[629] Tr.(Oct. 3, 2020)1296:6-1297:13 (Spiller-Tribunal) ("when you're close to get a permit, you're not going to sell. ...if you think that you're going to get a permit in six months, you don't do it because there is going to be a big increase in price once you de-risk the Project of the permit ... I would not expect Management to entertain an acquisition unless we already solved the permitting.").

[630]Reply ¶713; Claimants' Opening-2020 vol.4:20; Tr.(Oct. 3, 2020)1110:6-11 (Compass-Direct); Compass slide 20; *infra* §X.H.1.

[631] (C-1846) at 6.

[redacted] Some analysts also observed that acquisition by a major could lead to material cost savings for the Project.[633]

306. Assessing analogous acquisitions over the relevant time-period, Compass concludes that a 35% acquisition premium is a necessary component of a fair market value measure of the Project Rights, particularly when the premia paid in analogous transactions of non-producing gold companies between 2005 and 2011 is considered.[634]

307. In view of the overwhelming evidence that an acquisition premium is a standard feature of transactions in which a controlling stake in a gold project is acquired, including as of the Valuation Date, Respondent argues the Project Rights in this case would not have been considered attractive enough to be acquired and thus to support an acquisition premium over Gabriel's market capitalization.[635] Such an argument, however, would be correct only if one were impermissibly to take the State's wrongful treatment of Gabriel's investment into account. Viewed as the law requires, absent the State's wrongful conduct, the evidence is unmistakable that investors would have considered the Project Rights as a highly attractive acquisition target and, thus, that a fair market value measure of the Project Rights based on a stock market measure must include an acquisition premium.

308. Dr. Burrows points to academic literature regarding the reasons acquisition premia may be paid in corporate acquisitions generally, *i.e.*, not relating to acquisitions in the precious metal mining space. He argues that, in theory, such premia may be paid when the acquirer expects to generate additional value through particular synergies, when the acquirer obtains asymmetric information revealing hidden value, when the acquirer expects to improve management, or when the acquirer overpays.

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[632] Claimants' Opening-2020 vol.2:41, vol.4:20; Compass-II ¶50.c.

[633] *E.g.*, (CRA-56) at 2 [redacted]
Compass-II ¶46.e.

[634] Compass-I ¶¶47-53, 104-108; Compass-II ¶¶43-51.

[635] As noted, Dr. Burrows "do[es] not contest the observation that when buyers buy companies they often have to pay a premium to the public market value." Burrows-II ¶97. He argues in effect that because some assets are not acquired, it is misleading to consider the value evidence of only those assets that are acquired, suggesting that one should not assume that but for the wrongful acts, the Project Rights would have been attractive enough to have been acquired.

309. Contrary to Dr. Burrows' theorizing, the record evidence shows that acquisition premia are paid in the gold mining space for the predominant reason that major mining companies are competing to acquire control of viable gold mining projects, which are both rare and needed for major mining companies to thrive.[636]

310. As Mr. Jeannes observes, the several significant gold company acquisitions involving Goldcorp while he was CEO demonstrate that none of the theoretical factors about which Dr. Burrows hypothesizes were determinative or conclusive in practice.[637]

a. In August 2006, Goldcorp acquired Glamis Gold at a 35% premium representing approximately US$ 3 billion.[638] Despite Respondent's argument that the premium in that case was due to expected management synergies, it is not credible that management synergies would be worth US$ 3 billion; indeed a contemporaneous report shows that Goldcorp expected to generate synergies valued at US$ 20 million from the acquisition of Glamis Gold.[639] Similarly, Respondent's observation that Glamis was not a junior mining company at the time of acquisition[640] also is not relevant as it is evident that Goldcorp acquired Glamis for the same principal reason that drives companies to pay large premia, *i.e.*, in order to ensure the acquirer's pipeline of gold projects.[641]

[636] Compass-II ¶46.a-b (describing actual gold mining transactions involving sizable premia paid based on the need to add reserves to the acquiring company's pipeline, including Frontier Pacific Mining acquired in 2008 at a 42% premium, Riddarhyttan Resources acquired in 2005 at a 43% premium, Underworld Resources acquired in 2010 at a 44% premium, and Andean Resources acquired in 2010 at a 46% premium); *id.* ¶46.c-d (observing that certain acquisitions anticipated some value from synergies including Cumberland Gold acquired in 2007 at a 20% premium, Terrane Metals acquired in 2010 at a 35% premium, and Richfield Ventures acquired in 2011 at a 55% premium).

[637] Tr.(Oct. 1, 2020)859:11-865:5, 872:3-878:11 (Jeannes-Direct); Jeannes ¶¶20-26.

[638] Jeannes ¶19.

[639] UBS Report on Goldcorp (CRA-276) at 4 (noting most significantly that after acquiring Glamis and others, Goldcorp had become the third largest gold producer, and that it expected to generate synergies of US$ 20 million from the Glamis acquisition).

[640] Tr.(Oct. 1, 2020)913:20-914:16 (Jeannes-Cross).

[641] Shortly before its acquisition by Goldcorp, Glamis acquired Western Silver (whose primary asset was the Peñasquito mining project) for ~US$ 1 billion, at a premium of ~40%. Jeannes ¶19.

b. In July 2008, Goldcorp acquired Gold Eagle at a 36% premium for a total of US$ 1.5 billion.[642] While some location synergies might have allowed Goldcorp to pay more than its competitors, it is not credible that any such synergies would have justified a premium at that level – rather it was the competition for access to an attractive deposit.[643]

c. In February 2010, Goldcorp acquired Canplats at a 41% premium.[644] [redacted]

d. In September 2010, Goldcorp acquired Andean Resources at a 56% premium for a total consideration in excess of US$ 3 billion.[647] As Goldcorp announced contemporaneously, Andean's principal asset, the Cerro Negro gold project in Argentina, was acquired to contribute to Goldcorp's "growth pipeline."[648] [redacted]

[642] Jeannes ¶16.

[643] Tr.(Oct. 1, 2020)913:11-18 (Jeannes-Cross) ("[T]here were other companies that didn't have assets in the neighborhood who were also interested in buying it. It was a nice stand-alone deposit whether you had facilities there or not.").

[644] Jeannes ¶17.

[645] Tr.(Oct. 1, 2020)873:6-874:14 (Jeannes-Direct).

[646] *Id.* 872:3-873:5.

[647] Jeannes ¶18; Tr.(Oct. 1, 2020)860:5-861:1 (Jeannes-Direct).

[648] *Id.*

[649] Tr.(Oct. 1, 2020)863:8-21 (Jeannes-Direct).

[redacted]

311. Respondent's argument that Goldcorp must have "overpaid" for its acquisitions was shown to be without basis. As Mr. Jeannes observes, when Goldcorp is compared to its industry peers, including Newmont, Barrick, Agnico Eagle, Kinross and other major mining companies, rather than to the general stock market, Goldcorp out-performed its peer group by more than double the rate of growth, growing 1400% from January 2001 to January 2011.[652]

312. In addition, Dr. Spiller explained why Dr. Burrows' synergy thesis cannot explain the payment of significant premia in a competitive bidding environment, namely, because it would require one to accept the unlikely possibility that all competitors expected to realize such synergies.[653]

313. Thus, an assessment of the fair market value of the Project Rights as of the Valuation Date must include a premium over the publicly traded market value in order to capture the price at which a hypothetical willing buyer and willing seller of the Project Rights in all probability would transact. That is because transactions involving the acquisition of a controlling interest in such assets consistently attract purchase prices materially above the share price of the project company, and the Project Rights in this case had the qualities that would have

[650] *Id.* 863:22-865:5.

[651] *Id.* 861:2-862:20 [redacted].

[652] *Id.* 874:20-878:11; Tr.(Oct. 1, 2020)892:22-893:7 (Jeannes-Cross) ("if you compared us to our peers rather than to the general market, you would see a much different picture over that time frame"); Goldcorp 2010 Annual Report (C-2087) at 2.

[653] Tr.(Oct. 3, 2020)1261:14-1262:15 (Spiller-Cross) ("[I]f you think about synergies, synergies relate to the relationship between the buyer and the assets of the buyer and the assets of the seller, but if I'm the only buyer I'm not going to pay anything above the stock price, nothing. Just a little bit because nobody else is... But if there are multiple buyers, my synergies are not his synergies, cannot be that. So, they're paying because control provides a different aspect of a management that is not appropriated by a minority shareholder. So, the companies start bidding and prices go up, but it's not that they don't pay purely because of the synergies. Synergies--and particularly for mining companies, people buy for the resources. People don't buy for growth opportunities and other financial benefits or the combination. They buy because these are assets in the ground, you have resource, you have Reserves, and you buy for that.").

led to a transaction price as of the Valuation Date well above Gabriel's publicly traded share price.

D. Other Measures Validate the Stock Market Capitalization Measure

314. Comparison to the other measures of value provides further confidence as to the fair market value of the Project Rights as of the July 29, 2011 valuation date.

1. Relative Market Multiples of Publicly Traded Companies

315. As a check on the results from the stock market capitalization method, Compass also estimated the value of the Project Rights using a relative market multiples methodology, a standard valuation method used within the mining industry.[654]

316. Compass relied on market data from 77 non-producing publicly-traded gold mining companies, from which it calculated a "multiple" representing the value the market ascribed to one ounce of gold from each company, and then determined the median market multiple from the group of other non-producing companies. Applying that median multiple to the Roşia Montană and Bucium Projects yielded a value broadly consistent with the stock market capitalization measure based on GBU's share price as of July 29, 2011.[655] As Compass explains, this measure is a robust indicator of value that is not affected materially even if various additional filters to the sample set suggested by Dr. Burrows were applied.[656]

2. Price to Net Asset Value (P/NAV)

317. Compass also assessed value using the Price to Net Asset Value ("P/NAV") approach.[657] A P/NAV valuation measure is an income-based measure that is widely used by gold mining industry analysts and is similar to a discounted cash flow ("DCF").[658] P/NAV is preferred over a traditional DCF for valuing gold companies because P/NAV incorporates a

[654] Compass-I §IV.3.1; Compass-II §IV; Compass slides 22-31.

[655] Compass-II ¶92, Table 5; Compass slides 24, 31.

[656] Compass-II ¶¶57-71.

[657] Compass-I §IV.3.2; Compass-II §V; Compass slides 32-38.

[658] Compass-II ¶¶72-73.

standardized discount rate to account for the unique nature of gold as an asset whose value does not correlate consistently with the stock market.[659]

318. For its P/NAV analysis, Compass used gold price and discount rate parameters derived from a set of 154 analyst reports covering 65 gold mining companies, derived the median P/NAV multiple from the companies in the sample (0.86), and applied that median P/NAV multiple to the specific NAV calculated for Roșia Montană, which was derived from the economic model for the Project that was verified by SRK as part of its independent review of the Roșia Montană Project in 2012.[660] Compass then adds the value it obtains for Bucium using the relative market multiples method.[661]

319. As Compass explains, this income-based measure produced an implied valuation consistent with the stock market capitalization method even across a variety of adjustments to the sample set and parameters, including ones suggested by Dr. Burrows.[662]

3. Behre Dolbear's "Rule of Thumb"

320. Behre Dolbear's "rule of thumb" provides further support for the fair market value of the Project Rights as of the Valuation Date. As described in a valuation report prepared in 2006 for mining company Anglo Asian, Behre Dolbear analyzed a database of hundreds of transactions in the precious and base metal industry between 1990-2003 and observed that, on average, exploration phase precious metal properties with an inferred resource trade at 2.5% of the current per-ounce gold price, properties with a measured and indicated resource trade at 5% of the per-ounce gold price, those where feasibility has been demonstrated trade at 10% of the per-ounce gold price, and operating properties trade at 20% of the per-ounce gold price.[663]

[659] Compass-II ¶¶74-78, 98; Compass slides 33, 41, 56.

[660] Compass-I ¶¶81-87; Compass slides 34, 37.

[661] Compass-I ¶¶88-89, Table 9; Compass-II ¶72 n.158.

[662] Compass slides 9, 38; Compass-II ¶¶79-84, 93, Table 6.

[663] Compass-II ¶70, Figure 4 (*citing* C-2588 at 43-44, 93).

Respondent's expert Mr. Guarnera, who also is a mining valuation expert, has relied on this "rule of thumb" as a complementary method of valuation in other cases.[664]

321. Applying Behre Dolbear's "rule of thumb" here as of the Valuation Date when the per-ounce gold price was US$ 1,628.50,[665] yields a valuation of US$ 2,126,111,299.70 for the Project Rights (without assigning any value to the copper or silver resources). That calculation is based on 80.69% of the value of (a) the Roşia Montană Project consisting of 10.1 million ounces Proven and Probable Reserves of gold, 7 million ounces Measured and Indicated Resources of gold, and 1.4 million ounces of Inferred Resources of gold;[666] [redacted]

4. Dr. Burrows' "Naïve" DCF

322. Dr. Burrows also demonstrates that the stock market capitalization method is supported. Through what he refers to as a "naïve" DCF, he demonstrates that accepting Gabriel's estimated timeline (which Mr. Găman also twice endorsed as achievable),[667] the cost projections in the 2009 Micon report prepared for the Project, and prevailing gold prices, implies a value of Gabriel of US$ 2.510 billion.[668] If the 2009 assumed costs were increased "to July 2011 values using mining cost indices," Dr. Burrows' DCF measure would imply a value of Gabriel of US$ 2.128 billion.[669]

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[664] Tr.(Sept. 30, 2020)628:11-632:17 (Behre Dolbear-Cross) (acknowledging using this "rule of thumb" method for the Anglo Asian mining properties report and as one of the methods in *Glamis Gold*); (C-2588) at 99 (Behre Dolbear using rule of thumb valuation method for report prepared in connection with Anglo Asian's IPO on the London Stock Exchange).

[665] Gold Market Data (C-2861) line 4343 (column F).

[666] Memorial ¶¶59, 62. For Roşia Montană (US$ 1,628.50 * 10.1 million at 10%) + (US$ 1,628.50 * 7 million at 5%) + (US$ 1,628.50 * 1.4 million at 2.5%) = US$ 2,271,757,500. [redacted]

[667] *Infra* §X.E.2.

[668] Burrows-II ¶¶84-85.

[669] *Id.* ¶85 n.73.

323. Although Dr. Burrows maintains that the "naïve" DCF" incorporates costs that are too low and an expectation of gold price that is too high, his DCF calculation is overly conservative in at least two significant respects. First, Dr. Burrows assumes a 10.2% discount rate,[670] which, as Dr. Spiller observes, is a high rate for a gold mining company.[671] Second, Dr. Burrows' DCF measures do not assign any value to the Bucium Projects.[672] That is a significant omission, because, as Behre Dolbear confirms, mineral resources, such as those found at Bucium, can have significant market value.[673]

324. For example, Behre Dolbear assigned a market valuation of approximately US$ 250 million in 2005 to the Anglo Asian project, which consisted of inferred copper resources of about 2.4 million tonnes and inferred gold resources of 7.2 million ounces.[674] [redacted]

325. As another example, in February 2010 Goldcorp paid over C$ 300 million to acquire Canplats Resources, which had measured and indicated resources of 3.5 million ounces of gold and inferred resources of 0.55 million ounces of gold, but no reserves;[677] similarly, in July 2008 Goldcorp acquired Gold Eagle Mines for more than US$ 1 billion when Gold Eagle

[670] (CRA-216); Tr.(Oct. 4, 2020)1389:19-21 (Burrows-Cross).

[671] Tr.(Oct. 3, 2020)1289:4-6 (Spiller-Tribunal) ("What is the Discount Rate appropriate for a gold-mining company? Is it 10 percent? I doubt it."); Compass-II ¶¶98-99.

[672] (CRA-216); Tr.(Oct. 4, 2020)1389:22-1390:4 (Burrows-Cross).

[673] Tr.(Sept. 30, 2020)619:13-18 (Mr. Guarnera confirming he "absolutely" agrees the mineral resources can have significant market value) (Behre Dolbear-Cross); Tr.(Oct. 4, 2020)1390:5-8 (Burrows-Cross) (agreeing contingent rights to develop a mineral resource property may have market value).

[674] Tr.(Sept. 30, 2020)620:17-621:8, 623:2-7 (Behre Dolbear-Cross); (C-2588) at 10, 46.

[675] SRK slides 15-18.

[676] SRK-I ¶¶117-118.

[677] Jeannes ¶17.

did not have any reported mineral reserves or resources, but drilling had indicated the potential for gold.[678]

326. In February 2011, Newmont acquired Frontier for C$ 2.3 billion, a company without any reserves, but with measured and indicated resources of 4.2 million ounces of gold and inferred resources of 1.7 million ounces of gold.[679] As Dr. Brady confirmed, in evaluating the price it was willing to pay, Newmont would have run DCFs on the target that would include various scenarios, taking the resources into account, but also including more optimistic scenarios, as the resources described alone would not yield a DCF value equal to the C$ 2.3 billion paid.[680]

327. Finally, in an acquisition scenario, the DCF that would be most relevant would be one that reflected the value of the asset in the buyer's hands. Where the transaction is assumed to be a major buying a junior mining company, the buyer likely would benefit from cost savings that it would expect to realize in the operation of the mine, and the value of the asset also would be assessed on the basis of the buyer's lower cost of capital, all of which would result in a higher DCF value than assumed by Dr. Burrows' assessment.[681] By comparison, Dr. Burrows' DCF assumes costs from Gabriel's perspective, not from that of a prospective buyer.

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[678] Jeannes ¶16.

[679] Tr.(Oct. 2, 2020)1061:14-1067:12 (Brady-Cross).

[680] *Id.*

[681] Tr.(Oct. 1, 2020)882:16-19 (Jeannes-Direct) [redacted]; *id.* 925:4-11 (Jeannes-Tribunal) ("we had pretty good information as to what things should cost … we would plug that in and … sometimes had to factor things like well, we do this at 20,000 [tonnes] per day versus 15, so let's factor it up…."). *See also* Tr.(Oct. 2, 2020)1064:19-1065:9 (Brady-Cross) (stating Newmont would factor in "synergies" and "upside" into the DCFs run on a target when assessing compensation for an acquisition).

5. Considerations for a Hypothetical Buyer

328. Mr. Jeannes explained how in practice these various valuation measures are considered in the context of a hypothetical acquisition by a gold major. The buyer will run a DCF on the target and compare it to the target's market capitalization. As noted above, the DCF would be calculated from the buyer's costs and financing perspective and would take mineral resources as well as mineral reserves into account. The purchase price would be based on the target's market capitalization plus a premium, which frequently is higher than the DCF measure. Acquiring the target for a price above the DCF measure may be economically advantageous for the buyer's shareholders given the purchasing power of the buyer's shares, as indicated where its P/NAV is higher than the target's P/NAV, and when the buyer exchanges its shares as part of the acquisition.

329. As Mr. Jeannes explained, "you start at the Market Price because you know you're never going to buy it below that, and then you run your various models to determine how much of a premium you can pay and what you can afford, basically and have it still be value added to it."[682] He also explained, "once you run your DCF, you then compare it to the market capitalization. And if the market is valuing the Company at higher than its Discounted Cash Flow or Net Asset Value, then you look to the …multiples, the relative multiples. And if you're trading at a higher multiple, that means that you can use your shares. They have a currency that's higher than the shares you're trading them for, and it gives you the opportunity to do a deal that's still accretive to your Shareholders."[683]

330. Dr. Spiller elaborated, commenting on Mr. Jeannes' testimony, "they start with the market capitalization; they look at the market price of the company. Then they do a DCF. And then, if the DCF doesn't conform with the market price, they look at it again, and they look at what extent they do – and here he said 'we look at multiples.' This is the P/NAV… They

[682] Tr.(Oct. 1, 2020) 923:7-12 (Jeannes-Tribunal); *id.* 865:22-867:13 (Jeannes-Direct).

[683] Tr.(Oct. 1, 2020) 922:14-923:3 (Jeannes-Tribunal); *id.* 866:8-867:5 (Jeannes-Direct) ("[I]n many instances, these companies traded at a multiple of their Net Asset Value…. [I]n most instances, the major mining companies traded at a much higher price to net asset multiple, so you could use your shares to acquire their shares and have it still be value additive to your company.").

look at the P/NAV of the target company … and this is what he said: 'If my P/NAV is higher than the P/NAV I have to pay, then I acquire it because it goes' – it's 'accretive.'"[684]

331. Notably, as one analyst observed, [redacted] As Mr. Jeannes explained, "all of our acquisitions were primarily share acquisitions, so we would use our shares in exchange for the shares of the junior, and it didn't involve cash."[686] These are among the reasons, as Messrs. Jeannes and Cooper explain, why acquisitions of gold mining companies and projects often occur at levels well above the valuations obtained by using a DCF measure alone.[687]

E. Respondent's Arguments Against Reliance on the Stock Market Capitalization Method Are Meritless

332. Recognizing that Gabriel's market capitalization is a non-speculative, contemporaneous measure of the fair market value of a minority interest in Gabriel's Project Rights, Respondent desperately seeks to impugn its reliability as a fair market value measure. First, Dr. Burrows argues that the market capitalization was artificially inflated because it allegedly reflected: (i) the value of assets beyond Gabriel's Project Rights; (ii) [redacted] and/or (iii) share purchases by naïve investors influenced by temporarily high gold prices. Second, Respondent argues that a hypothetical buyer, who both parties agree would be a major mining company, would have adopted the timeline reflected in Respondent's arbitration-inspired "Counterfactual Scenario," assumed higher costs and lower gold prices and, consequently, would

[684] Tr.(Oct. 3, 2020)1287:7-21 (Spiller-Tribunal).

[685] [redacted]

[686] Tr.(Oct. 1, 2020)888:14-17 (Jeannes-Cross).

[687] *Id.* 867:6-13 (Jeannes-Direct) ("[Y]ou can't just stop at doing a DCF model… [T]hese were highly sought after opportunities. There are not many new gold deposits discovered in the world every year; and, if you want to acquire them, you have to pay a premium, and you're not going to be able to justify that if all you look at is the DCF model."); Cooper ¶¶29-32.

have valued Gabriel's rights at a tiny fraction of GBU's market capitalization. Respondent's arguments are speculative and contrary to the evidence.

1. GBU's Only Material Assets Were the Project Rights

333. As Compass confirms and market analysts emphasized contemporaneously, the Project Rights were Gabriel's only material asset and the one driving the value of its market capitalization. The value assigned to any other assets was immaterial.[688] GBU's market capitalization thus reflected the value the market assigned to the rights to develop the Roşia Montană and Bucium Projects.

2. Gabriel's Estimated Timeline Was Reasonable Whereas the Bases for Respondent's "Counterfactual" Are Not

334. As of the Valuation Date, Gabriel's securities disclosures contained an estimated Project timeline reflecting management's belief that "first pour" would occur at the end of 2014. Respondent's leading mining official, Mr. Găman, twice endorsed this timeline contemporaneously as achievable in presentations to senior Government officials, who also did not question or object to this estimate.[689]

335. [redacted]

[688] Tr.(Oct. 3, 2020)1096:15-21, 1100:9-17 (Compass-Direct), 1183:2-1184:2 (Spiller-Cross); Reply ¶681; Compass-II ¶¶17-22; Compass slides 10-11. *See also* Tr.(Oct. 4, 2020)1377:13-1378:13 (Burrows-Cross); [redacted]

[689] Claimants' Opening-2020 vol.2:22-28.

336. We first explain why the main components of Respondent's "Counterfactual" relating to surface rights, NGO litigation/permitting delays, and financing, are not well-founded. We then explain that material facts and risks of delay associated with these issues were disclosed to investors such that the resulting market capitalization was informed and reliable.

a. Surface Rights

337. Contrary to Respondent's contention, expropriation was not inevitable and it was available to the extent needed.[690]

338. Before the Government suspended the EIA Process in 2007, RMGC already had acquired approximately 78% of the affected properties amounting to approximately 990 hectares.[691] RMGC reasonably expected to acquire all remaining affected properties when it recommenced its acquisition program once the EP was issued.[692]

339. Even if expropriation of some property were necessary, it would not have delayed the Project as Respondent alleges. In view of RMGC's plan for phased construction, there was adequate time to pursue expropriation without material delay because the land of potential holdouts was only implicated in later phases.[693] Respondent's assertion that property holdouts would have prevented even the first phase of Project development is unsupported.[694] As

[690] Claimants' Opening-2019 vol.2:15-37; Claimants' Opening-2020 vol.2:35-38; Memorial §§III.D, V.B; Reply §XIII.A.2.b.

[691] Claimants' Opening-2019 vol.2:25; Memorial §III.D; Lorincz-I ¶¶12-50; Lorincz-II ¶¶25-33, 121. Respondent's assertion that RMGC had "given up trying to acquire properties in Roşia Montană since February 2008" mischaracterizes the Company's attitude and efforts. RMGC's decision to defer additional surface rights acquisitions until after it received its EP resulted from the Government's unlawful suspension of the EIA process in September 2007, which blocked the Project and caused significant uncertainty, forcing RMGC to cut costs and lay-off workers. The local community strongly opposed the Government's actions and urged it to resume the EIA Process and implement the Project. Lorincz-II ¶¶72-78, 84-90; Tănase-II ¶¶23-42.

[692] Claimants' Opening-2019 vol.1:26; Lorincz-I ¶¶50-58; Lorincz-II ¶¶121-131; Tr.(Oct. 1, 2020)825:7-20 (Cooper-Cross). There is no basis to suggest that RMGC would not have obtained the forest land surface rights it needed. *Supra* §IV.B.6; Bîrsan-II ¶¶79-80.

[693] Claimants' Opening-2020 vol.2:37-38.

[694] The map produced in Respondent's Rejoinder in support of its position is inaccurate and grossly misleading. Rejoinder Figure 1 at 357 (and Annex at 3). The designations for the properties of Respondent's witnesses are significantly larger than in reality, covering at times 30 to 40 houses instead of just one. [redacted]

explained by Claimants' witnesses, the few properties for which expropriation may have been necessary if efforts at negotiation and lobbying failed included: (1) properties located in Orlea, where mining would not commence until at least year seven of operations; (2) uninhabited plots, including micro protest plots, located under the low-grade stockpile site; and (3) properties located in the path of an electric line that could have been rerouted.[695] Considering that these potential holdout properties were needed only at a later stage of the Project, RMGC had ample time to acquire the surface rights through negotiation/lobbying or, if necessary, through expropriation.[696]

340. In an attempt to enlarge the surface rights RMGC needed to acquire, Respondent incorrectly claims that RMGC needed to acquire properties in the Roşia Montană historical center or the protected (buffer) zone around it. To obtain construction permits, RMGC needed only to obtain rights to land where construction would occur.[697] RMGC purchased certain properties in the historical center and the buffer area to reach agreement with some property owners who preferred to condition selling their property in the Project-impacted area on RMGC also purchasing their properties in the historical center and buffer area.[698] The EIA Report, urbanism plans, and public consultations consistently made clear, however, that RMGC did not need to acquire property in the designated protected areas, which included the historical center that was to remain zoned as residential, and the buffer zone.[699] [redacted]

[695] Claimants' Opening-2020 vol.2:38; Lorincz-II ¶¶132-140; [redacted] *id.* 1433:12-16.

[696] Claimants' Opening-2020 vol.2:38; [redacted]

[697] Claimants' Opening-2020 vol.5:34-43; Bîrsan-I §IV.C.1; Podaru ¶¶42, 247.

[698] Lorincz-I ¶50; Lorincz-II ¶121, n.293; Thomson-86 at 8 ("There are a number of owners that have land outside of the project footprint that condition the sale of properties in area [zone] 1 with the purchase of properties in zones 2, 3, 4.").

[699] Claimants' Opening-2020 vol.5:36; Podaru ¶247.

[700] [redacted]

Respondent's witness Mr. Jurca likewise confirmed that RMGC did not need to acquire houses in the protected areas, including his home in the historical center.[701]

341. Contrary to Respondent's contentions, there is no question that the Project was of public utility and that RMGC would have acquired any expropriated land.[702] As Professor Bîrsan explains, it was entirely possible to complete the expropriation process within one year.[703] Moreover, once property was expropriated, RMGC would have acquired the surface rights through a concession over other interested parties, considering that (i) RMGC was the only qualified bidder and (ii) the Government recognized RMGC's legitimate interest in obtaining concession rights over the lands.[704] Respondent's contention that property holdouts would have materially delayed or blocked the Project is not credible. Property holdouts and opposition are commonplace in mining projects and thus not a material impediment to project implementation.[705] Indeed, Dr. Armitage has been involved in more than 50 projects where there were holdouts, and not one failed to proceed to implementation because someone refused to sell land.[706]

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[701] Claimants' Opening-2020 vol.5:40. Similarly, RMGC did not need to acquire Mr. Cornea's house in the historical center or his property at Văidoaia because they were both in the Protected Area. *Id.* vol.5:41.

[702] Claimants' Opening-2019 vol.2:27-37; Reply ¶¶ 653-662. *See also* Tr.(Dec. 4, 2019)1054:18-1055:8 (Tănase-Tribunal); Tr.(Dec. 10, 2019)2194:9-2195:16 (Bîrsan-Direct); *supra* §V.

[703] Claimants' Opening-2020 vol.2:39 (Respondent's experts Profs. Sferdian and Bojin also opining "the best-case scenario for the expropriation process would last approximately one year").

[704] Claimants' Opening-2019 vol.2:32-37.

[705] Claimants' PO27 ¶138; Tr.(Dec. 12, 2019) 2820:1-11(Henisz-Cross) (property holdouts were present at the vast majority of mine sites visited); Tr.(Sept. 29, 2020)458:8-21 (SRK-Redirect); *id.* 429:6-12 (SRK-Cross) ("[I]t would be entirely usual for people to say they weren't prepared to sell, even if at some point they would."); *id.* 427:15-429:1 (SRK-Cross) (After affirming SRK's belief that the remaining 155 households would be acquired within a year, Mr. Armitage explained "I have been involved in many projects at this stage of development; and, in many cases, if not all cases, not all the surface rights would have been acquired at the Feasibility Study stage. So, to me, it doesn't come across as a big issue…"); Tr.(Oct. 1, 2020)821:6-18 (Cooper-Cross) (property holdouts are common); Tr.(Oct. 1, 2020)907:13-20 (Jeannes-Cross); Boutilier §2, ¶117.e; Tr.(Oct. 3, 2020)1250:14-16, 1251:20-1252:1 (Spiller-Cross).

[706] Tr.(Sept. 29, 2020)458:8-21 (SRK-Redirect). Respondent wrongly suggested during cross-examination of Mr. Jeannes that "social opposition" stopped Glamis Gold's Imperial project. *Glamis* (CL-7) did not involve land acquisition or property holdouts. Rather, the case involved Native American sacred sites and a requirement imposed by the Government to protect those sites by imposing a backfilling requirement that rendered the project uneconomic. The *Glamis* case thus is not at odds with industry experience that property holdouts rarely remain an obstacle to project development.

b. NGO Litigation

342. Respondent contends that due to alleged social opposition manifested through NGO litigation, a hypothetical buyer would assume far more significant delays than Gabriel's securities disclosures suggested, namely those reflected in Respondent's proposed Counterfactual timeline. Respondent's contentions, however, are invalid.

343. First, Respondent relies on hindsight and points to litigation challenging the SEA endorsement of the PUZ that started in September 2011 (after the Valuation Date) and ended in March 2016, as the basis to claim that a longer timeline for dealing with NGO litigation must be assumed.[707] There is no reasonable basis to assume, however, that a hypothetical buyer in July 2011 would have anticipated this type of litigation delay. In any event, as discussed below, the [redacted]

344. Second, the litigation arising from the NGO challenge to the SEA endorsement of the PUZ is itself an impact of Respondent's wrongful conduct, which therefore must be disregarded in any damages assessment. That litigation followed and was fueled by Respondent's wrongful refusal through the Ministry of Culture to update and correct the 2010 LHM as part of its political blockage of permitting. Emblematic of the political repudiation of the Project, the Ministry of Culture thereafter decided in 2015 in the context of court proceedings ancillary to the SEA challenge to attack its own 2004 LHM as an "abuse" that would be corrected in the 2015 LHM.[708] Thus, such "delays" in obtaining approval of the PUZ cannot be factored into any legitimate timeline a hypothetical buyer of the Project Rights would have assumed in a scenario free of the State's wrongful conduct.

345. Third, Respondent's contention that the NGO "litigation campaign led to over 80 main court and administrative proceedings filed against the Project," is overstated and grossly

[707] Claimants' Opening-2020 vol.2:32.

[708] *Supra* §§IV.B.2, VI.A; Claimants' Opening-2020 vol.2:32-34; Reply §V.B.4; Podaru §IV.B; Schiau-I §VI.A; Schiau-II §IV.D-E.

misleading as this number includes both petitions *in favor* of the Project[709] and multiple phases of the same litigation.[710]

346. Fourth, Respondent's argument that NGO litigation "had the overall effect of blocking the Project" is also misguided. Between early 2010 and May 2013, RMGC won all lawsuits except one,[711] which was an April 2012 decision that, as discussed below, was not relevant to the EIA Process or to Project permitting.[712]

c. Financing

347. Respondent's argument suggesting that Gabriel would have had difficulties or delays obtaining financing is unavailing.[713] It is based on Mr. McCurdy's opinion, submitted with the Rejoinder so as to prevent Claimants from responding with expert evidence on these issues.[714] Respondent instructed Mr. McCurdy to address only the likelihood of Gabriel obtaining one form of financing, non-recourse project financing;[715] he therefore did not opine on

[709] For example, a number of petitions were brought by pro-Project supporters and RMGC against the Ministry of Environment and others specifically requesting resumption of the EIA Process. Counter-Memorial Annex IV, Nos. 40, 43, 76.

[710] For example, the litigation surrounding the annulment and suspension of UC 205/2007 alone appears six times in Respondent's list. Counter-Memorial Annex IV, Nos. 34-38, 41.

[711] CIBC May 17, 2013 (C-2119) at 1 (noting "a 19th positive court decision for the progress of the Project" out of 20 legal challenges since early 2010); TAC May 10, 2013 (C-484) at 20 (Dragoş Tănase: "practically, we won all relevant lawsuits, we have final and irrevocable decisions, both on the PUZs and on the urbanism certificate; in some cases, such as [the Urbanism] Certificate 87, this was won in court three or four times."); Tr.(Oct. 1, 2020)815:7-816:3 (Cooper-Cross) ("[W]e were aware of the litigation. However, our view on the litigation is that Gabriel had already been successful in dismissing an awful lot of that litigation. There had been a few that had been withheld in the Court. But, by and large, when the Environmental Permit got approved, it was our view that a lot of that litigation would, then, no longer be valid...").

[712] *Infra* §X.H.1.

[713] Claimants' Opening-2020 vol.2:40-43.

[714] Tr.(Oct. 2, 2020)969:9-971:19 (McCurdy-Cross) (establishing that his report responded to Claimants' Memorial and that nothing prevented Respondent from submitting his evidence with the Counter-Memorial).

[715] *Id.* 971:20-973:7 (opinion limited to evaluating Gabriel's "ability to obtain debt financing (project finance)," *i.e.* "non-recourse or limited recourse" financing).

other forms of financing identified contemporaneously as available to Gabriel,[716] or on the likelihood of Gabriel being acquired by a major that could self-finance the Project.[717]

348. As discussed above, the parties agree that any hypothetical buyer in all probability would have been a major. Mr. Jeannes confirms that a major would not seek external debt financing, but instead would use its own sources of capital:

349. Mr. Jeannes confirmed that in his career at Placer Dome, Glamis Gold, and Goldcorp, they never once needed traditional non-recourse project financing to build a mine.[719] Respondent's expert Behre Dolbear also acknowledged that "sometimes large mining companies will, on their own, if they have a property they're developing, and they have the cash to do it, will do the financing of that property."[720]

350. Moreover, even if Gabriel were to finance the Project, Respondent's allegations regarding the time needed to obtain financing are incorrect because financing could have been arranged in parallel with other pre-construction work and RMGC's acquisition of the remaining

[716] *Id.* 973:12-16, 978:12-979:11, 983:5-21 (discussing equity and bond financings and alternative financing structures that he did not consider for the Project).

[717] *Id.* 973:8-11.

[718] Tr.(Oct. 1, 2020)882:16-883:6 (Jeannes-Direct); *id.* 888:3-19 (Jeannes-Cross)

[719] Tr.(Oct. 1, 2020)883:7-884:3 (Jeannes-Direct)

[720] Tr.(Sept. 30, 2020)569:19-570:4 (Behre Dolbear-Cross).

surface rights, not sequentially as Respondent claims.[721]

351. Gabriel also had other sources of financing available to it besides non-recourse project financing. As Mr. Jeannes describes, Gabriel's "high quality rare assets resulted in share performance that would have allowed them to sell equity, take that cash and then develop the Project."[725] Mr. McCurdy and Dr. Burrows both acknowledged that by the Valuation Date, Gabriel had raised over US$ 700 million through the issuance of equity and the exercise of warrants, and it had over US$ 175 million cash on hand.[726]

352. Contemporaneously,

[721] Claimants' Opening-2020 vol.2:40-43. As with many other arguments, Respondent saved for its Rejoinder the contention that "it was unlikely that the Project would obtain financing for even an initial phase." Nothing prevented Respondent from raising this argument earlier. Tr.(Oct. 2, 2020)970:1-971:2 (McCurdy-Cross).

[722] Claimants' Opening-2020 vol.2:40, 42-43.

[723] *Id.* vol.2:42-43.

[724] Tr. (Oct. 2, 2020)984:16-989:21 (McCurdy-Cross); *id.* 989:22-990:21

[725] Tr.(Oct. 1, 2020)882:7-15 (Jeannes-Direct).

[726] Tr.(Oct. 2, 2020)974:1-14 (McCurdy-Cross); Burrows-I ¶61 (emphasizing Gabriel had significant access to capital already including several financing alternatives for a "go-it-alone" strategy).

[727] Claimants' Opening-2020 vol.2:41.

[728] (C-1875) PDF 36-37.

[redacted][729] Mr. McCurdy's opinion, which is focused on the prospects for obtaining non-recourse project financing, is simply not relevant.

353. Moreover, contrary to Mr. McCurdy's opinion, there are contemporaneous indications non-recourse project financing was available, if necessary.[730] Mr. McCurdy suggested Gabriel would have had difficulty obtaining debt financing because of a failure to meet the Equator Principles and because of significant social opposition and permitting problems and risks. He admitted on cross-examination, however, that he did not assess compliance with the Equator Principles, and he was instructed by Respondent's counsel to assume the circumstances he claimed would deter lenders.[731] His report thus is not grounded on the facts or on any true Counterfactual scenario absent the impacts of the wrongful conduct.

3. The Market Was Well Informed about the Risks Facing Project Development

354. Claimants have shown that the market was well-informed of the risks of Project development such that GBU's stock market capitalization is an informed and reliable assessment of the value of the Project Rights as of the Valuation Date. [redacted]

355. Gabriel's disclosures were not "boilerplate," as Respondent contends, but well explained the material facts and risks of delay and potential disruption to the Project associated with, among other things, surface rights acquisition and procedures for expropriation,[733] NGO

[729] Claimants' Opening-2020 vol.2:42.

[730] *Id.* vol.2:40-43; Société Générale Apr. 19, 2014 (C-2945) slides 7, 9 (noting "many commodity markets remain attractive," particularly for "copper and gold" projects).

[731] Tr.(Oct. 2, 2020)1001:6-12; 1005:19-1007:14 (McCurdy-Cross); 2012 Technical Report (C-128) PDF 69 (confirming Equator Principles compliance).

[732] Claimants' Opening-2020 vol.2; Reply ¶¶676, 683-696; Henry-II ¶¶67-113.

[733] Claimants' Opening-2020 vol.2:7-8; Reply ¶¶687-688, 690; Tr.(Oct. 3, 2020)1251:15-1253:19 (Spiller-Cross).

opposition and litigation (including with respect to land use and zoning issues),[734] as well as cultural heritage issues.[735] Gabriel's disclosures also specifically addressed the risks these and other issues presented to the commencement of construction, to the estimated Project timeline, to Project costs, and to the ability of RMGC to implement the Project at all.[736] Moreover, Gabriel included special cautionary language warning investors not to place undue reliance on inherently uncertain "forward looking statements" by management, such as those related to timing and cost estimates.[737]

356. There also was abundant information published by market analysts,[738] international and Romanian media, and anti-Project NGOs that contributed to the total mix of information available to the market about Gabriel and the Project.[739] Anti-Project NGOs published since the early 2000s negative information about the Project, including information specifically directed at potential investors, describing all manner of Project risks, including cost increases, financing challenges, property holdouts, NGO lawsuits, permitting delays, and social

[734] Claimants' Opening-2020 vol.2:9-14, 32; Henry-II ¶¶82-88; Reply ¶¶684-691. Respondent also [redacted] both because social and NGO opposition is a common feature of mining projects generally, and because RMGC had a "social license." *Supra* §§VI.B, X.E.2.a; Claimants' PO27 question (d).

[735] *E.g.*, Gabriel 2010 Annual Information Form (C-1808) at 21. It is undisputed that the Chance Finds Protocol was available on Gabriel's website. Compass-II ¶28 n.65. Contrary to Respondent's repeated yet fundamentally misguided contention, [redacted] Respondent's arguments regarding that topic are wrong and the Tribunal is encouraged to review the evidence on this point. Claimants' Opening-2020 vol.5:33.

[736] Claimants' Opening-2020 vol. 2:6-18.

[737] *Id.* vol.2:18. Dr. Burrows' speculation that [redacted]

[738] Cooper ¶¶20-28. [redacted] Compass slide 5; Tr.(Oct. 1, 2020)805:1-14, 820:8-825:20, 828:20-829:1 (Cooper-Cross).

[739] Henry-II ¶70; *e.g.*, New York Times Jan. 3, 2007 (C-1897); Toronto Globe and Mail Oct. 28, 2010 (Thomson-75).

opposition.[740]

357.

358.

[740] *E.g.*, Alburnus Maior Guide to Gabriel Investors Oct. 2004 (Thomson-85); Alburnus Maior Statement to Gabriel Shareholders June 16, 2003 (R-598).

[741]

[742] Henry-II ¶69.

[743] Claimants' Opening-2020 vol.2:20-21.

[744] Tr.(Oct. 1, 2020)836:11--838:4 (Cooper-Redirect), 780:18-781:8 (Cooper-Cross); Tr.(Oct. 1, 2020)891:7-18 (Jeannes-Cross).

4. [redacted]

[redacted]

[745] Claimants' Opening-2020 vol.3.

[746] *Id.* vol.3:3-4.

[747] Claimants' Opening-2020 vol.3:5-6; Tr.(Oct. 2, 2020)953:9-12(McCurdy-Direct); Behre Dolbear-II Figure 3.1; Tr.(Sept. 30, 2020)638:1-640:16 (Behre Dolbear-Cross).

[748] Claimants' Opening-2020 vol.3:7-11.

[749] In his second report, Dr. Burrows misrepresented what market analysts said about increased costs and gave the false impression that they merely restated the company's 2009 cost estimates. Claimants' Opening-2020 vol.3:8-11. Despite his purported eleventh-hour corrections to his second report at the hearing that he made as a result of the misrepresentations Claimants pointed out, his analysis remains false and misleading. For example, in his second report he contended that [redacted] Claimants' Opening-2020 vol.3:10. Dr. Burrows' purported corrections are nothing more than materially misleading legerdemain.

361. [redacted]

5. Dr. Burrows' Gold Bubble Theory Is Speculative and Baseless

362. Dr. Burrows speculates that Gabriel's market capitalization may have been impacted by what he contends was a "speculative bubble" in the price of gold and that "it is quite possible" that Gabriel's share prices was impacted by investors using "the high spot prices of gold instead of the much lower expectations of knowledgeable industrial participants in the gold mining business." This speculation is irrelevant and baseless for at least three reasons.[753]

363. First, Dr. Burrows confirmed the speculative nature of his opinion by admitting he does not know what Gabriel's investors were actually thinking about gold prices and that they

[750] *Id.* vol.3:12-14. [redacted] In his second report, Dr. Burrows conceded that the analyst reports in early November 2011 "were in the general range of the later cost disclosure when the SRK report was released." Burrows-II ¶77. [redacted]

[751] Claimants' Opening-2020 vol.3:13, 15. Gabriel's market capitalization in November 2011 was in line with its weighted average market capitalization for 2011 and with its 90-day weighted average as at the Valuation Date. *Supra* §X.B; Claimants' Opening-2020 vol. 1:10.

[752] Claimants' Opening-2020 vol.3:16-17.

[753] Reply ¶¶692-704.

may have made value decisions based on lower gold price assumptions when they bought or sold Gabriel shares.[754]

364. Second, Mr. Jeannes – the only witness with actual experience leading the acquisition of mining companies – explained that a major mining company would have determined the price it would be willing to pay based on a gold price assumption closer to spot than long-term measures.[755]

365. Third, the numerous acquisitions of junior mining companies in the same time-period at prices well above the market capitalization of the target companies demonstrate conclusively that sophisticated market participants valued those companies at those levels, and that Dr. Burrows' speculation is incorrect.[756] Indeed, there is no basis to assert that gold prices were in a bubble,[757] which suggests prices not aligned with value.

366. Thus, the relatively higher gold prices prevailing at the Valuation Date does not support a conclusion that Gabriel's market capitalization did not reflect the value the market assigned to the underlying Project Rights.

[754] Tr.(Oct. 4, 2020)1375:15-1376:1(Burrows-Cross).

[755] Tr.(Oct. 1, 2020)870:8-872:2 (Jeannes-Direct); *id.* 867:14-870:7 (explaining a major mining company would never use the long-term mine planning or reserve prices assumed by Dr. Burrows). Dr. Brady did not negotiate acquisitions for Newmont and was not part of the team that did due diligence. Tr.(Oct. 2, 2020)1062:5-1063:5(Brady-Cross). [redacted] *Id.* 1040:5-17.

[756] Compass-II §II.4 and Figure 2; Jeannes ¶¶33-36; Cooper ¶¶45-47.

[757] Gold prices today are higher than they were in 2011. Tr.(Oct. 2, 2020)1046:4-6 (Brady-Cross) (gold today at US$ 1900); Tr.(Oct. 4, 2020)1374:14-16 (Burrows-Cross) (gold today at US$ 1900).

6. Gabriel Attracted and Retained Knowledgeable Industry Participants as Shareholders

367. The fact that Gabriel attracted and retained sophisticated investors as shareholders throughout this time is strong evidence that the market was well informed of the value of the Project Rights.

368. Following due diligence that Dr. Brady testified would have been as extensive as if Newmont were purchasing the company,[758] Newmont made several significant acquisitions of Gabriel stock, including purchasing 15 million shares in 2004, exercising warrants for 15 million more shares in December 2005, purchasing an additional 6.2 million shares in 2007, and acquiring millions more shares through a syndicate in 2008.[759] Newmont eventually acquired and retained over 50 million shares in Gabriel, which represented a 13.3% interest in the company as of the Valuation Date.[760] On Respondent's evidence, most of Newmont's purchases and diligence occurred during the nadir of RMGC's social license. That Newmont continued to buy and hold significant interests in Gabriel confirms the value it assigned to the Project Rights notwithstanding development risks.

369. In addition, in two purchases made during 2011, Baupost – another highly sophisticated sector investor – increased its shareholdings in Gabriel by over 4.8 million shares.[761]

[758] Tr.(Oct. 2, 2020)1073:6-1074:8 (Brady-Redirect) (asked how due diligence would "differ when Newmont is investing in a company versus acquiring a company," and stating "It would be a similar type of analysis" even for "an internal development project" that would "evaluate all aspects of social, governmental, geology, all the technical aspects of the company, or the project."); *id.* 1049:14-1051:13 (Brady-Cross) (confirming Newmont would not invest if it "didn't look promising at … the time of the investment decision."). [redacted]; Technical Report (C-128) PDF 55 §17.2.3.

[759] Gabriel 2004-2007 Financial Statements (C-1823) PDF 10, (C-1824) at 13, (C-1825) PDF 15.

[760] Compass slide 12.

[761] *Id*.

F. There Is No Credible Basis to Challenge the Feasibility of the Project

370. Respondent contends that the feasibility of the Project ultimately was doubtful and this would impact value. The so-called "feasibility" issues Respondent raises for purposes of this arbitration tellingly were not identified as such by the numerous specialists who assessed the Project for the Government and for RMGC and Claimants contemporaneously. Claimants have addressed most of these alleged issues in responding to other arguments raised by Respondent,[762] and address the remainder below. As context, Claimants observe that:

a. The feasibility of the Project was repeatedly confirmed contemporaneously by leading expert consultants and by the State.[763]

b. All technical issues for the EP were thoroughly addressed and resolved to the TAC's satisfaction.[764]

c. The State through NAMR completed a detailed technical assessment and approved or "homologated" the reserves. In March 2013, NAMR verified the Project's resources and reserves set forth in the Feasibility Study and Technical Documentation, and registered the reserves for the State.[765]

d. Leading industry experts (including from SRK) contemporaneously confirmed the reserve calculations.[766]

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[762] *Supra* §X.E (addressing social license, project financing, surface rights, and NGO litigation issues in the context of discussing Respondent's arguments regarding disclosures); §IV.C (addressing cyanide transport and storage and TMF issues in the context of discussing environmental permitting).

[763] Claimants' Opening-2020 vol.5:7; SRK slide 14; Memorial ¶¶59-60, 123-140, 206-209, 419-424; Szentesy-II ¶¶7-21; *generally* SRK-I; SRK-II.

[764] *Supra* §IV.

[765] Memorial §VIII.A.2; Szentesy-II ¶¶10-15, 20-21. Behre Dolbear did not acknowledge or address NAMR's review and approval of the resource and reserve measures. At the hearing, Behre Dolbear conceded that they did not disagree with NAMR's conclusion. Tr.(Sep. 30, 2020)591:9-11 (Behre Dolbear-Cross) ("Q: [I]n your view, the NAMR got that [the homologation decision verifying the Project's reserves] wrong? A: No, I did not say they got that wrong.").

[766] Memorial §§II.A, IV.A.2.b; SRK-I §§4.2-4.4, 5-6; SRK-II ¶¶4-18, 49-50; Szentesy-II ¶¶16-19. [redacted]

e. The State engaged AECOM, an international expert consultancy, to review and independently assess the Project. AECOM endorsed the Project's feasibility and reached conclusions consistent with those of SRK, writing that "the risk associated with the reserves is estimated to be low" and that the possibility of lower profits is "improbable, as the feasibility study appears to be very conservative."[767]

371. Examination of the issues Respondent raises in the arbitration shows its feasibility arguments lack substance. Moreover, the associated material risks to the Project were disclosed to the market such that Gabriel's market capitalization reflects the market's assessment of the value of the Project Rights taking such risks into account.

1. An ADC for Orlea Was Reasonably Expected

372. Respondent argues that the Project faced a risk whether an ADC would be issued for Orlea, and that "[t]o this day, RMGC has not applied for an ADC for Orlea." These arguments disregard the evidence on this issue.[768]

373. Orlea always was planned to be developed later in the life of the Project, with work not expected to begin until year 7 of operations or later.[769] In October 2006, the Ministry of Culture terminated archaeological research at Orlea, announcing shortly thereafter in February 2007 that it would not issue further decisions until the Ministry of Environment endorsed the EP.[770] The Ministry of Culture thereafter authorized only field surveys in the area, which is not sufficient to support a discharge decision.[771] When during the EIA Process in 2011 the Ministry of Environment requested the Ministry of Culture's endorsement to issue the EP, the NHMR assembled a report, which RMGC submitted to the Ministry of Culture, summarizing the

[redacted] SRK-II ¶¶15, 50, 118, n.128; Henry-II n.220.

[767] AECOM Assessment June 21, 2013 (C-2199) at 11-12; *id.* at 15 (sensitivity analysis "demonstrates that the project is very robust in terms of change in [the] key parameters"); Szentesy-II ¶19; SRK-II ¶¶15, 49, 92, 98.

[768] Claimants' Opening-2020 vol.5:29-32.

[769] *Supra* §IV.B.3.

[770] Memorial §III.C.2; Claimants' Opening-2019 vol.2:56-59.

[771] Memorial ¶¶164-166; Gligor-I ¶¶75-76.

research that had been completed in Orlea, which showed that new significant finds were unlikely.[772] The Ministry of Culture issued its first endorsement of the EP accordingly.[773]

374. Before issuing another endorsement in 2013, the Ministry of Culture requested a research proposal for Orlea that was paced to avoid presenting a request for a discharge decision until the Project was underway.[774] NHMR submitted a proposal in February 2013 contemplating a multi-year phased approach to the research, and requesting the Ministry of Culture to issue the land evaluation authorization for the stage "preliminary to the project."[775] Under the proposed program, preventive archaeological research would not be performed until July 2014.[776] On March 1, 2013 the Ministry of Culture approved that program.[777] It then again endorsed the EP.[778]

375. Significantly, the NHMR research program for Orlea approved by the Ministry of Culture expressly "aimed at conducting a thorough documentation … under an approach observant of the 'preservation by record' concept."[779] That approach was fully consistent with the expectation, based on the significant prior research already completed, that an ADC for the area would be warranted.[780]

376. In March 2013, NAMR verified the Project's mineral reserves, which included the reserves found in Orlea, thereby confirming the expectation that the Project would include exploitation in Orlea.[781]

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[772] Reply ¶¶65-67; Gligor-II ¶¶79-101; (C-1484) at 125 (describing the relatively poor state of conservation of the vestiges on the site, which were significantly affected by constant past mining operations).

[773] *Supra* §IV.A.1.

[774] Gligor-II ¶¶93-95. Respondent disregards that evidence.

[775] (R-222) (enclosing R-221 with "stages of research" set out at p.12).

[776] (R-221) at 13.

[777] (R-223); Claimants' Opening-2019 vol.4:56.

[778] *Supra* §IV.A.1.

[779] (R-221) at 5; Gligor-II ¶108.

[780] Claimants' Opening-2020 vol.5:31 (C-1484 at 125); Jennings-II ¶¶30-31; Gligor-I ¶¶76-79; Gligor-II ¶¶103-109.

[781] Claimants' Opening-2020 vol.5:31; Reply ¶648 n.1242.

377. Respondent's argument that RMGC had not requested authorization for the preventive research to support a discharge decision therefore is not well-taken and in any event is misleading and inaccurate in light of the facts. Further research was not conducted at Orlea in view of the Government's pronouncements beginning on September 9, 2013 that mining would not be permitted at Roşia Montană.

378. In any event, as of the Valuation Date, Gabriel's disclosures made clear that the Roşia Montană Project envisioned exploitation of four deposits, Cetate, Cârnic, Jig, and Orlea, that RMGC had obtained ADCs for most of the Project area, and that RMGC would commence the application for an ADC for Orlea in due course.[782]

2. Respondent's New Blasting Arguments Are Erroneous

379. In the rebuttal procedure after the 2019 hearing and again during the 2020 hearing, Respondent introduced new arguments that (1) RMGC needed to acquire properties in Roşia Montană that would be rendered uninhabitable by blasting during Project operations, and (2) blasting mitigation measures proposed in the EIA Report would have caused delays not reflected in RMGC's mine production schedule. These arguments are erroneous.

380. As discussed above, the contemporaneous Project documentation made clear – and [redacted] both confirmed – that RMGC did not need to acquire surface rights in the historical town center, which was to remain zoned as residential, or in the protected buffer area surrounding it.[783]

381. Respondent did not conduct redirect examination of Mr. Jurca about his testimony that his home in the protected area did not need to be acquired. Nor did it question any of the Romanian law experts (who testified after Ms. Lorincz and Mr. Jurca during the hearing) about which properties needed to be acquired.

382. After the hearing, Respondent instead introduced a new expert report, of Mr. McLoughlin of Behre Dolbear, on blasting, purportedly to respond to the evidence regarding the

[782] Reply ¶648; Claimants' Opening-2020 vol.5:32; vol. 2:6.

[783] *Supra* §X.E.2.a; Claimants' Opening-2020 vol. 5:34-43.

properties RMGC needed to acquire to obtain construction permits. Mr. McLoughlin's report is misguided.[784] It is based on the unsupported and incorrect assumption that if houses were to become temporarily uninhabitable during Project operations, RMGC would be required to acquire them even if the owners did not wish to sell. Whereas RMGC would be required to compensate such property owners for any damage caused, including the temporary loss of habitability, such owners would not be obligated to sell their property to RMGC if they did not wish to do so.[785]

383. Respondent also argues that for the historical town center to remain habitable, blasting needed to follow certain best practices; relying on Mr. McLoughlin's report, Respondent contends these practices were not incorporated into the Project's plans, would have materially delayed the mine plan, and would have made the Project uneconomic.

384. Public consultations relating to the PUZ and in the context of preparing the EIA Report informed RMGC's plan to establish protected areas (including the historical town center and buffer zones) to safeguard, *inter alia*, from the effects of blasting.[786] The impacts of blasting were extensively and expertly studied and addressed in the EIA Report and in its updates.[787] The Ministry of Environment and the TAC, which included NAMR, scrutinized blasting impacts in the EIA Process.[788] The Ministry of Health also conducted an extensive health impact study, cited in the Ministry of Culture's EP endorsement, concluding that none of the houses in the historical town center would be uninhabitable during the Project.[789] It is not credible to suggest that the approach to and effects of the planned blasting were not considered contemporaneously and reflected in the Project's mine plans.

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[784] Claimants' Opening-2020 vol.5:34-43.

[785] *Id.* vol.5:43. The EIA Report Chapter on Noise and Vibration specifically notes that some households may choose to retain dwellings in the protected zones. *Id.* vol.5:38.

[786] Gligor-II ¶52; Gligor ¶¶40-41; *supra* §IV.B.2 (discussing updates from 2002-2006 in Project design and urbanism plans to expand protected areas).

[787] Claimants' Opening-2020 vol.5:37-38; Avram-II ¶¶96-100; Gligor-II ¶¶53-54; EIA Report Ch. 4.3 Noise and Vibration (C-213); 2007 Ipromin Study (C-341); 2010 Ipromin Studies (C-382); Wilde-II ¶152 (noting that the "Ipromin studies constituted a proper assessment of impacts").

[788] Avram-II ¶¶98-100; Gligor-II ¶54; TAC meeting transcripts (C-477) at 9-10, (C-476) at 8, 13, 38, 67 (C-483) at 34, 37-40, 56-58, (C-486) at 20-21.

[789] Claimants' Opening-2020 vol.5:37.

385. During the 2020 hearing, Respondent posed questions on various blasting issues to Messrs. Armitage and Fox of SRK, who are not blasting engineers,[790] purporting to identify inconsistencies between the Project mine plan and various potential blasting mitigation measures described in the EIA Report. Thereafter, addressing on direct examination what was claimed to be "new information learned from SRK's testimony," Behre Dolbear and Dr. Burrows proffered additional opinions regarding the feasibility and costs of the Project.[791] The questions posed by Respondent's counsel, and the follow-on views proffered by Behre Dolbear and Dr. Burrows, were predicated on inaccurate assumptions and are flawed and unreliable.[792]

386. Respondent sought to demonstrate that potential blast mitigation measures would have increased costs beyond what was contemplated. Respondent, however, provides no support for its contention that Project costs would have increased if Ipromin's proposal were followed to use smaller 125 mm blast holes in certain instances to mitigate the effect of blasting on protected structures.[793] As explained by Mr. Fox of SRK, there is no reason to assume that smaller blast holes would result in increased costs "[b]ecause there are many variables that would go into the calculation ... [including that] smaller drillholes might not cost as much to drill as larger drillholes with different equipment."[794] In any event, any cost increase would not have been

[790] Mr. Fox repeatedly confirmed that he was not a blasting expert and that the documents shown to him would have been considered by another member of the SRK team who was. Tr.(Sept. 29, 2020)378:21, 382:6-7, 386:19-20, 389:11-12, 401:18-19, 403:14, 409:14-15, 413:21-22 (SRK-Cross).

[791] Claimants maintain their objection that Respondent was granted an unequal opportunity at the 2020 hearing to present new expert opinions on new topics beyond the rebuttal topics that had been indicated in advance. In contrast, Claimants' experts were permitted to respond only to very limited rebuttal topics with reference to identified rebuttal documents. Allowing Respondent's experts to proffer new additional opinions, while not allowing Claimants' experts the same or equivalent opportunity, is unfair and improper. Email to the Parties dated Oct. 1, 2020; Tr.(Oct. 2, 2020)938:7-939:12 (Tribunal Ruling); *id.* 940:1-3 (Claimants' maintaining objection); Tr.(Oct. 4, 2020)1435:1-9 (same). Respectfully, permitting an expert to expound on new topics is not equivalent to permitting an expert to correct or retract an earlier opinion based on new information heard, as the Tribunal suggested should be permitted.

[792] The testimony presented on this topic by Behre Dolbear and Dr. Burrows is also unreliable and untested because, as noted above, it is based on testimony from a person without the requisite expertise in relation to documents with which he was not familiar.

[793] While Respondent suggests that mine adit technology could result in higher levels of labor and material, that was one of many technologies being considered. 2010 Ipromin Studies (C-382) PDF 63 (noting that in zone II "variations of the technology with extended loads, with mine adits *or* with boreholes with 125 mm in diameter shall be applied *or* the technology provided under the project shall be used but with a reduction of the explosive load per blast stage") (emphasis added); 2007 Ipromin Study (C-341) at 41 (same).

[794] Tr.(Sept. 29, 2020)414:12-22 (SRK-Cross).

material given that the areas potentially requiring smaller blast holes (zone II) comprise about fifteen percent of the mine site, as Respondent acknowledges,[795] and smaller blast holes would have been needed only within a portion of that limited range of areas.[796]

387. To argue potential blasting mitigation measures discussed in the EIA Report would reduce and delay production, Respondent also incorrectly suggested in its questions that RMGC was limited to a single blast per pit per day. These erroneous arguments are not supported by any witness who contemporaneously reviewed RMGC's plans. The Ministry of Environment's proposed conditions for the EP banned blasting only "during night time," and did not restrict the allowable number of blasts per day.[797] The EIA Report that Respondent relies upon similarly contains no such restriction. Where the EIA Report speaks of prohibiting "more than one blast per pit or quarry per workday," this is understood by experts in the industry as referring to a blast time, *i.e.*, limiting blasting to one defined period of time (usually 15 to 20 minutes in length). Thus, the next sentence of the EIA Report confirms that "blasting will be conducted within a specific time window."[798] Other EIA Report studies make clear that multiple blasts would be conducted on a daily basis.[799]

388. Respondent also sought to establish that the Project's production schedule could not be met because of the EIA Report's proposal for limits on explosive load and the use of smaller 125 mm diameter blast holes in certain zones delineated by Ipromin. As Ipromin's reports explain, the zones proposed for restricted blasting measures were provisional and were to be adapted "in accordance with the practical results obtained during the mining operations" as mining approaches the sites in need of protection measures.[800] There is no basis to suggest that

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[795] *Id.* 404:8-11.

[796] 2007 Ipromin Study (C-341) at 45 (noting zone II "covers about 15% and includes small quantities of ore [that] require[] breaking by blasting"); Tr.(Sept. 29, 2020)407:4-8 (SRK-Cross) (same); 2010 Ipromin Studies (C-382) PDF 59-63 (noting 125 mm diameter blast holes are needed only in some cases, *e.g.*, zone IIA).

[797] Public Consultation Note (C-555) at 7; Draft EP Decision (C-2075) at 8.

[798] EIA Report Ch. 4.3 Noise and Vibration (C-213) at 104.

[799] 2010 Ipromin Studies (C-382) PDF 48 ("The high displacement capacity and local conditions require that blasting be conducted daily in several working faces in the operational pits."); 2007 Ipromin Study (C-341) at 25 (same, and also providing for a "daily quantity of explosive" to be used "within at least 3 panels").

[800] 2007 Ipromin Study (C-341) at 30; 2010 Ipromin Studies (C-382) PDF 52, 66. Respondent tried to establish that the 2007 and 2010 Ipromin studies did not take into account certain buildings in the protected

the mine production schedule could not be adapted in view of potential blasting mitigation measures, particularly as the limited zones proposed for restricted blasting were largely toward the edges of the pits and would be mined later in the mine life.[801]

389. Respondent's *post hoc* arguments about blasting also cannot be reconciled with the fact that NAMR, which was a TAC member and fully advised of the technical plans relating to the Project as well as of the EIA Report and related mitigation measures, homologated the resources and reserves for the Roşia Montană Project based on Ipromin's 2010 Feasibility Study and the 2010 Mine Development Plan, which describe in detail the mine production schedule and planned blasting technologies.[802] Those studies in fact confirm that the envisioned daily production rate could be achieved with 125 mm diameter blast holes.[803] In yet another example of Respondent's arbitration defenses finding no support in the contemporaneous work of its own State experts, NAMR did not raise the concerns that Respondent now advances at the eleventh-hour in this proceeding.

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zone and therefore "if blasting restrictions devised by Ipromin were extended to all those structures in the protected zone, the size of those blasting zones could only increase." As the 2010 EIA Report update makes clear, however, the Ipromin studies took into account "*all* the protected zones and structures in the Rosia Montana region." (C-382) PDF 3, 6 (emphasis added); (C-341). RMGC committed to continually monitor blasting effects and to adapt blasting technology and operations as needed to ensure the protection of structures within the protected area. Noise and Vibration Management Plan (C-212) at 17-19; (C-382) PDF 64.

[801] 2006 IMC Mine Feasibility Study (C-984) PDF 42, 48, 53-66 [redacted] ; Public Consultation Note (C-555) at 7-8 (the "impact of blasting operations noise and vibration will be regularly monitored and, as the case may be, measures to adjust the blasting plans will be initiated").

[802] Memorial §VIII.A.2; Szentesy-II ¶¶7-12.

[803] 2007 Ipromin Study (C-341) at 28; 2010 Ipromin Studies (C-382) PDF 51; 2010 Feasibility Study (C-976) at 61; 2010 Mine Development Plan (C-1004) at 42.

G. Dr. Burrows' Assessments Are Not Reliable Indicators of Fair Market Value

1. Dr. Burrows' DCF Valuation

390. Dr. Burrows presents a DCF measure of the value of Gabriel's interest in the Roşia Montană Project,[804] assessing a value that is 6% of Gabriel's market capitalization as of the Valuation Date.[805] Compass explains why it is entirely unreliable.[806] In short, it is fundamentally at odds with the market measures of value because it impermissibly incorporates the impact of Respondent's wrongful measure, particularly its timeline assumption, and it adopts speculative assessments as to cost items imagined for this arbitration in lieu of the assessments conducted contemporaneously by leading industry experts and accepted by the Government.

391. Specifically, Dr. Burrows assumes multi-year delays to complete Project permitting and reach first pour of gold based on instructions from Respondent's arbitration counsel.[807] Dr. Burrows confirmed that the timeline assumption has a significant impact on the outcome of his analysis.[808] Dr. Burrows' analysis disregards the fact that contemporaneously Respondent twice endorsed RMGC's timeline as achievable, and that the timeline he incorporates impermissibly assumes the impacts of Respondent's wrongful conduct.[809]

392. Dr. Burrows also incorporates assumptions impacting costs based on criticisms of the Project from Respondent's technical experts in the arbitration. Claimants established these arguments have no merit as they are contradicted by the contemporaneous assessments of multiple leading industry experts.[810]

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[804] This measure does not assign any value to Bucium.

[805] Compass slide 40.

[806] Compass-II Appendix A; Reply §XIII.D.1; Compass slides 40-43.

[807] Compass-II ¶104; Tr.(Oct. 4, 2020)1379:4-6 (Burrows-Cross) ("There was a timeline I was given. I was instructed to assume that timeline."); *id.* 1383:19-22 ("Q: You're not offering an opinion on whether Gabriel's estimated timeline was achievable? A: No, I'm not – not an independent opinion. I'm relying on counsel, plus Behre Dolbear.").

[808] Tr.(Oct. 3, 2020)1422:4-6 (Burrows-Tribunal) ("We had a significantly longer time scale, and that's material.").

[809] *Supra* §X.E.2; Claimants' Opening-2020 vol.2:15-43.

[810] Reply ¶¶725-726; SRK-II §§4-8; Kunze-II §V.B (closure costs); Corser-II (TMF design); Szentesy-II ¶¶33, 44-64 (same); Jennings-II §V (cultural heritage preservation costs).

393. Dr. Burrows calculates the DCF using a "mine planning" gold price that is partly based on an outdated survey and, moreover, does not reflect the higher gold price that a hypothetical buyer would use in an acquisition, which leads to a further understatement of the Project's value.[811] Respondent's expert Dr. Brady confirmed the approach followed by Dr. Burrows would not be used in any actual acquisition scenario.[812] Mr. Jeannes also explained that a buyer in an acquisition scenario would base gold price assumptions on materially higher prices, "usually closer to spot."[813]

394. Finally, as Compass explains, Dr. Burrows uses an unreliable and unrealistically high discount rate, which has a further significant negative impact.[814]

2. Dr. Burrows' Relative Market Multiples

395. Dr. Burrows presents a market multiples approach to valuation of the Roşia Montană Project that, as Compass explains, is deeply flawed.[815]

396. Dr. Burrows begins by identifying four companies and two transactions that he considers are not comparable to Roşia Montană. To account for differences among these six comparators, he applies various convoluted *ad hoc* adjustments based on his subjective assessment of elements asserted to be relevant to value, although he has no expertise to support such assessments or the adjustments.[816] Moreover, his adjustments incorporate the timeline assumptions that he was instructed to assume and that factor in the negative impacts of Respondent's wrongful conduct, as well as technical assumptions regarding increased costs

[811] Compass slides 42-43; Compass-II ¶¶107-114.

[812] Brady ¶6 (explaining that Newmont's approach regarding gold price is to obtain a consensus projection of bankers and independent agencies, such as Oxford Economics and Murenbeeld). Dr. Brady chose not to provide any evidence as to what those projections were. Tr.(Oct. 2, 2020)1068:1-1069:12 (Brady-Cross).

[813] Tr.(Oct. 1, 2020)867:14-871:10 (Jeannes-Direct) (explaining that the gold price used to value an acquisition target would be based on a range of forecasts to arrive at a baseline, which was "always materially higher than the reserve price or long-term mining price, higher than the long-term analyst consensus, somewhere between there and spot – usually closer to spot.").

[814] Tr.(Oct. 3, 2020)1126:18-1128:9 (Compass-Direct); *id.* 1289:4-6 (Spiller-Tribunal); *supra* §X.D.4.

[815] Compass-II Appendix B; Compass slides 25-30; Reply ¶729.

[816] Compass-II Appendix §B.1.

based on Respondent's arbitration arguments, which are contradicted by contemporaneous expert assessments.[817]

397. Dr. Burrows uses a similar deeply flawed approach in his multiples analysis of the value of the Bucium projects.[818]

3. The Distressed Foricon Sale

398. In his second report, Dr. Burrows refers to the fact that in July 2011 Gabriel Jersey acquired a 0.23% interest in RMGC from Foricon S.A., a Romanian company that held a small minority interest in RMGC.[819] Dr. Burrows observes that the price Gabriel Jersey paid to Foricon for the shares is inconsistent with the publicly traded value of Gabriel Resources at that time.[820] Indeed, it is inconsistent. The question is whether the Foricon transaction provides evidence of the fair market value of the Project Rights. The evidence shows that it does not.

399. [redacted] and as the evidence shows,[822] in mid-2011 Foricon already was in significant debt to Gabriel in relation to prior RMGC capital increases. Because it was over-indebted and in financial distress, it was unable to participate in further share capital increases in which it would have been obligated to participate were it to remain a shareholder of RMGC. Foricon thus was under pressure to reach a deal to liquidate its holdings. In addition, Gabriel had a preemption right to acquire Foricon's shares in the event of any share transfer.[823]

400. In these circumstances, Foricon agreed to sell its shares to Gabriel and to extinguish its outstanding debt for an amount that Gabriel considered was significantly less than

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[817] Compass slide 27; Compass-II ¶¶122-124, Table 8.

[818] Compass-II Appendix §B.2.

[819] Memorial ¶95 n.86.

[820] In July 2011 Gabriel acquired Foricon's 0.23% interest in RMGC in exchange for a cash payment of US$ 1.15 million plus release of US$ 474,000 of debt that Foricon owed to Gabriel from prior capital increases.

[821] [redacted]

[822] Foricon Insolvency Judicial Administrator Report (C-2950) ("In 2012, Foricon S.A. sold its shares in [RMGC] and, in 2013, its shares in [Deva Gold] to cover the liquidity gap and the debt accrued up to that moment.").

[823] RMGC Articles of Association (C-180) §10.4 (granting Gabriel a preemption right to acquire Foricon's shares and to meet the terms of any sale or transfer offer relating to the shares).

the full value of those shares.[824] [redacted]

401. There is no dispute that fair market value is the price at which a hypothetical buyer and seller would voluntarily transact, where neither is under a compulsion to buy or sell.[828] As Dr. Spiller observed, in a case where the seller is under a compulsion to sell, it is not a fair market value transaction.[829]

402. Dr. Burrows accepts that the Foricon sale price might not be a fair market value measure, but maintains that the transaction is a "useful datapoint" because, he postulates, if the consideration offered by Gabriel were below market value, Foricon could have identified another buyer, willing to pay more for its shares.[830] Dr. Burrows' theory, however, falls apart in reality.

403. While it may have been in Foricon's interest to find another potential buyer willing to pay a higher amount for its shares, it would have been nearly impossible actually to find one. That is because Foricon would have had to locate a buyer willing to undertake the time

[824] [redacted]

[825] [redacted]

[826] [redacted]

[827] Gabriel Consolidated Financial Statements for periods ended June 30, 2012 and 2011 (CRA-45) at 33.

[828] Burrows-I ¶23.

[829] Tr.(Oct. 3, 2020)1295:6-1296:3 (Spiller-Tribunal) (observing in response to a question from Arbitrator Douglas that "my understanding … is that Foricon at the time was in distress and had to sell as it couldn't do the capital [increase], and that Gabriel had preemptive rights as a consequence Foricon couldn't sell to anybody but essentially to Gabriel, on top Foricon had a significant loan with Gabriel. So, my understanding is that Gabriel was able to extract a very good deal from Foricon, which, as you know, when there are preemptive rights, normally prices are substantially discounted, and that's what it is. This is not a fair-market transaction between two unrelated parties. And, furthermore, it's not Fair Market Value because Foricon was in distress.").

[830] Tr.(Oct. 4, 2020)1405:15-20 (Burrows-Cross).

and effort to assess and negotiate a share purchase knowing it would have had no assurance that it actually would be able to acquire the shares because Gabriel had the right to match the terms of any offer. The likelihood of Foricon doing so was even more remote because any party who wished to invest in RMGC had the simpler and less onerous option of purchasing shares of Gabriel Canada, which were publicly-traded and which did not carry the obligation to participate in RMGC's occasional calls for a capital increase.

404. Thus, other than Gabriel, Foricon would have had serious difficulty finding a buyer. The necessary conclusion therefore is that the Foricon's distressed transaction price does not provide evidence of the fair market value of the Project Rights.[831]

4. The Consideration Proposed in Response to the State's Coercive Economic Demands

405. In his second report, Dr. Burrows also points to the [redacted]

406. While Dr. Burrows was "instructed" that "these negotiations were arm's-length voluntary negotiations," they were no such thing.[834] [redacted]

[831] That Respondent chose to wait for its Rejoinder to raise this argument suggests Respondent did not want it scrutinized in light of more fully developed facts. And for good reason. Even within the limited rebuttal procedure, the evidence Claimants introduced showed this argument is utterly baseless.

[832] [redacted]

[833] Without any Romanian law support, Dr. Burrows wrongly assumes that the Romanian contract law requirement for "fair and reasonable consideration" must be equivalent to the economic standard of "fair market value." It is axiomatic, however, that contractual consideration may be valid without providing equivalent economic value.

[834] *Supra* §III.

[redacted] Indeed, contrary to his second statement submitted with the Rejoinder, [redacted]

407. In short, this aspect of the State's coercive dealings with Gabriel provides no evidence of the fair market value of the Project Rights.

H. Any Assessment of Loss after July 29, 2011 Must Be Based on a Valuation of the Project Rights Free of the Impacts or Threats of Wrongful Conduct

1. Romania's Wrongful Conduct Impacted the Market Value of Gabriel's Project Rights

408. Romania's wrongful treatment of Gabriel's investment, which began with its politically-motivated blocking of permitting in August 2011, announced in repeated public statements of senior members of the Government, and which culminated in treaty breaches two years later, must not be taken into account in any measure of the market value of the Project Rights.[837] The Government's many statements that the agreements with Gabriel and RMGC were not favorable to the State and must be renegotiated before permitting could occur would have been taken into account by any hypothetical buyer from August 2011 onward. Any hypothetical buyer of the Project Rights would take into account the extent of the Government's support for and commitment to the Projects and the joint-venture in RMGC.[838] As damages must be assessed free of the impacts of the wrongful measure, any assessment that is made after the July 29, 2011 valuation date must be done in a manner that excludes the impacts of the State's wrongful treatment of Gabriel's investment or the threat of such treatment.

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[835] [redacted]

[836] [redacted] Moreover, there is no dispute that Gabriel later agreed to eliminate the request altogether. Găman-II ¶180; Ariton ¶114; [redacted] Gabriel and the State never concluded any transaction to increase Minvest's shares in RMGC.

[837] Claimants' Opening-2020 vol.4.

[838] Tr.(Oct. 1, 2020)927:7-13 (Jeannes-Tribunal) (describing the team that would be involved in due diligence for an acquisition including "some government and community affairs people").

409. As detailed above, Gabriel's market capitalization provides highly reliable evidence of the value of Gabriel's investment as of July 29, 2011. After July 29, 2011, however, Gabriel's market capitalization cannot reasonably or reliably be considered free of the impacts of the subject measure as the market was progressively taking into consideration the impacts of the Government's policy position towards the Roşia Montană Project and Gabriel. As detailed further below, the evidence shows that while the market initially may have remained cautiously optimistic that the Project would be permitted and the Government's demands for renegotiation would not materially impact the prospects for the Projects, as weeks then months passed and the EP was not forthcoming, the market lost confidence, fearing extended permitting delays and Government ambivalence to permitting.

410. It is undisputed that issuance of the EP is a critical milestone in the life cycle of any mining project.[839] This was especially true for the Roşia Montană Project given the Government's history of improper delay. Empirical data and market analyst reporting confirm Gabriel's share price was directly tied to the progress of the EIA Process.[840]

411. When Minister of Environment Korodi improperly and arbitrarily suspended the EIA Process on September 13, 2007, Gabriel's share price fell 38%.[841] Conversely, resumption of the EIA Process three years later led market analysts to upgrade Gabriel from "No Fly List to Short List" and to observe that "success lies with EIA approval."[842] Gabriel's share price and its

[839] Claimants' Opening-2020 vol.4:3; Tr.(Oct. 1, 2020)916:10-917:4 (Jeannes-Redirect) (explaining that once the EP is issued, "then all the other myriad of permits that you need in every jurisdiction to go forward tend to fall in line"); Tr.(Oct. 1, 2020)814:13-20 (Cooper-Cross) ("[T]he Environmental Permit or the EIA, was the domino that needed to fall, and all of the other permits would come into play, some of which were local, but the key one was at the Federal level because, once that got approved, then the other permits, in our view, would come very easily because the approval had been given at the top Government."); Tr.(Oct. 2, 2020)961:11-19 (McCurdy-Direct), 983:22-984:12 (McCurdy-Cross) (acknowledging EIA approval would have been a key milestone in permitting the Project); Henry-II ¶62 (observing that, "in the mining industry, it is generally understood that obtaining the Environmental Permit is a key milestone and inflection point for any mining project," and "once the Environmental Permit is issued, other permits tend to follow more readily.").

[840] Claimants' Opening-2020 vol.4; *e.g.*, *id.* vol.4:20 [redacted]

[841] Gabriel's share price dropped from US$ 3.43 to US$ 2.71 on September 13, 2007. (C-2860.01) ("Bloomberg GBU Stock Data" tab, column D, rows 6944-6945).

[842] Claimants' Opening-2020 vol.4:4-6.

target price in analyst reports accordingly increased as the TAC review neared completion ahead of the "potentially final" TAC meeting in November 2011.[843]

412. Had the Government allowed the permitting process to follow its lawful course after the November 2011 TAC meeting, the Ministry of Environment would have recommended issuance of the EP in early 2012. As Minister Borbély publicly confirmed that the decision on the EP would be made within that timeframe,[844] Gabriel's share price reflected that possibility.[845] Market analysts during this time predicted Gabriel's share price would increase a further 18% to 50% once the EP was granted,[846] consistent with typical "permitting bumps" in the industry.[847]

413. Gabriel's market capitalization, however, declined sharply, from US$ 2.79 billion on December 1, 2011 to US$ 2.35 billion on March 1, 2012, and then to US$ 484.6 million on May 15, 2012.[848] The evidence shows this decline was due to the market's diminishing expectations regarding the Government's willingness to permit the Project, as expectations of an imminent permitting decision in early 2012 were dashed, and as 2012 continued, concerns increased that the EP would not be issued in the near-term, or at all.[849]

414. Respondent points to a court decision announced on April 5, 2012 and argues that the market's "concern was not the permitting process," but allegedly was "NGO and social opposition to the Project."[850] Several factors demonstrate Respondent is incorrect.

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[843] *Id.* vol.4:7-19.

[844] *Id.* vol.4:17-26. Project opponents expected an imminent decision to issue the EP. *Id.* vol.4:27.

[845] *Supra* §X.C.1; Tr.(Oct. 3, 2020)1297:18-1298:17 (Spiller-Tribunal) (GBU's share price reflected "some probability of a permit," but not more than the average probability).

[846] Claimants' Opening-2020 vol.4:3, 4:16, 4:20, 4:26.

[847] Tr.(Oct. 3, 2020)1297:1-5 (Spiller-Tribunal) (testifying "companies will gain anything between 30 to 100 percent when a permit is granted"); Claimants' Opening-2020 vol.4:16 [redacted] *Crystallex* (CL-62) ¶¶808, 893 (Gold Reserve's stock price increased by 49% on the day it received its EP; Crystallex's stock price also increased by 27% that day "because the market expected Crystallex would also be receiving its permit shortly thereafter.").

[848] Claimants' Opening-2020 vol.4:30.

[849] *Id.* vol.4:28-47.

[850] Dr. Burrows refers to media articles on micro-protests in Cluj in November 2011 and in Bucharest in January 2012 ranging from "about a dozen" to "about 30" people. The largest event described is a protest of

415. First, Gabriel's share price already was falling sharply in the weeks before the court decision as, contrary to Minister Borbély's earlier statements, no decision on the EP had been made in early 2012. In its periodic disclosures filed after trading on March 14, 2012, Gabriel explained that the EIA review "was completed" and "all technical aspects [were] clarified" at the last TAC meeting, but it was awaiting "confirmation of this status" and was "unable to provide guidance" as to the timing of a decision "or whether the TAC will require any further meetings."[851] Market analysts reported that Gabriel was "still awaiting the EIA approval" and that meeting the Government's financial demands "may be necessary in order to receive the necessary permits."[852] For no reason other than this hold-up and political blockage, Gabriel's share price fell by over 18% from March 15 to April 4, 2012 – far more than relevant indices.[853]

416. Second, the 23% drop in Gabriel's share price on April 5, 2012 is consistent with analyst warnings in 2011 that "the market reaction to the previous stoppage of the TAC process in September 2007 points to a downside risk of ~35% if there is an abrupt suspension in the permitting process."[854] By contrast, earlier litigation resulting, e.g., in the annulment of the first Cârnic ADC, which had no effect on the EP, had no effect on Gabriel's share price.[855]

417. The market reaction on April 5 had nothing to do with the actual limited effects of the court decision; it instead was a response to the mischaracterized description of the decision by Project opponents as a negative development in the EIA Process, the trajectory of which had

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hundreds of people in Roşia Montană *in support of the Project*. Burrows-II ¶87. It is not credible to suggest these tiny events impacted Gabriel's market capitalization. Dr. Burrows' arguments about Project costs and timeline also are incorrect. *Supra* §X.E.

[851] Claimants' Opening-2020 vol.4:31.

[852] *Id.* vol.4:32.

[853] Gabriel's market capitalization fell 18.1% from US$ 2.14443 billion after trading on March 14, 2012 to US$ 1.7567 billion after trading on April 4, 2012. (C-2860.01) ("Bloomberg GBU Stock Data" tab, column E, rows 8589, 8610). During that time, relevant indices fell only 5.7% (XAU, US$ 177.23 to US$ 167.10), 7.0% (S&P/TSX, US$ 371.07 to US$ 345.23), and 9.5% (Junior Gold Mining, US$ 2,212.92 to US$ 2,003.07). (C-1853.04) ("Bloomberg" tab, rows 3004, 3025).

[854] Claimants' Opening-2020 vol.4:16.

[855] Gabriel announced the annulment of the Cârnic ADC after trading on December 9, 2008. Gabriel Press Release (R-198). Its share price went up in the days after that announcement. (C-2860.01) ("Bloomberg GBU Stock Data" tab, column D, rows 7398 et seq).

already been put in doubt by Government inaction.[856] The press reported inaccurate claims by NGO counsel that the court decision imperiled the environmental permitting process.[857] While observing that press reports were "unclear," market analysts stated that the "potential implication is that the current urbanistic certificate itself could again be in jeopardy of being annulled" which "in turn could delay the permitting process."[858]

418. The impact on Gabriel's share price of the April 5 court decision thus was due to concerns over its impact on the Project's permitting, and recalled the prior improper environmental permitting delay from 2007-2010. That share price decline would have been avoided altogether or subsequently corrected had the Ministry of Environment acted as the law required and recommended issuance of the EP.

419. Third, subsequent events amplified (and eventually confirmed) the market's concerns of another political hold-up in the EIA Process. Before the next trading day (April 9, 2012), Minister of Environment Borbély (who had predicted endorsement of the EP in early 2012), resigned. He was replaced on April 10 by Mr. Korodi who, during his prior tenure as Minister of Environment from 2007-2008, encouraged anti-Project activists to lobby politicians to enact a cyanide ban to block the Project, and then suspended the EIA Process on bogus grounds.[859] In addition to commenting negatively on the change of Ministers, market analysts emphasized that, contrary to expectations, the EIA Process had stalled since the last TAC meeting and its status was uncertain:[860]

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[856] Respondent wrongly contends the April 5 court decision annulled the PUZ. The court invalidated a 2009 local council decision re-approving the 2002 PUZ. It did not invalidate the 2002 PUZ, which remained valid. The amended and updated PUZ (which was to supersede the 2002 PUZ), had 19 of 22 endorsements needed for approval and would have been fully approved but for the Ministry of Culture's politically-motivated refusal to update and correct the 2010 LHM. Claimants' Opening-2020 vol. 4:34; *supra* §IV.B.2.

[857] Claimants' Opening-2020 vol.4:33.

[858] BMO Apr. 5, 2012 (CRA-289) at 6. That speculation was legally baseless. Claimants' Opening-2020 vol.4:34. While Gabriel explained that the April 5 court decision was irrelevant to environmental permitting, it could not explain the Government's failure to recommend issuance of the EP in over four months since the November 2011 TAC meeting.

[859] Memorial §V.A.1; Szentesy-II ¶¶31-43; Podaru ¶66; Mihai-II ¶137.

[860] Claimants' Opening-2020 vol.4:35.

a. CIBC reported on April 8, 2012 that Minister Borbély had resigned and that he was "a key decision maker in GBU's environmental permitting process." It added that Gabriel would "consider the implications of the court decision once the reasons" were published, and that "Despite GBU indicating that the permitting process continues, we believe the risk profile of GBU has increased."[861]

b. [redacted]

c. [redacted]

d. [redacted]

420. These contemporaneous analyst reports demonstrate that the market's overriding concern was focused on the outcome and timing of the EIA Process. Gabriel's internal analysis similarly reflects its major shareholders' view that "the only thing that is going to bring [the]

[861] (CRA-289) at 16.

[862] Claimants' Opening-2020 vol.4:36.

[863] *Id.* vol.4:37.

[864] *Id.* vol.4:38.

share price back is to get TAC across the line and get the environmental permit."[865] In other words, only the Government acting according to the law would restore Gabriel's market capitalization and allow the Project to be implemented. That, unfortunately, did not happen.

421. Fourth, Gabriel's share price continued to decline and never recovered because the Government soon confirmed the EIA Process was politically blocked, which in turn confirmed the market's fears:

a. After Prime Minister Ponta's appointment in early May 2012, market analysts observed that "little if any permitting progress should be anticipated ahead of the new parliamentary election in November."[866]

b. In its Q1 2012 reporting in May 2012, Gabriel confirmed the standstill and uncertainty in the EIA Process since the last TAC meeting, including that it was still "awaiting formal confirmation from the TAC that all technical aspects have been clarified to its satisfaction." Gabriel also disclosed that former ministers had publicly identified new purported issues not previously discussed with RMGC, which are addressed above.[867] This disclosure led to another round of negative analyst reports predicting significant delays in the EIA Process and to further declines in Gabriel's share price.[868]

c. Prime Minister Ponta in early June 2012 added to and confirmed the uncertainty and delay by announcing a political moratorium on all Project/permitting decisions until after the year-end Parliamentary elections.[869] Gabriel accordingly

[865] *Id.* vol.4:39.

[866] *Id.* vol.4:40.

[867] *Id.* vol.4:41. Respondent misleadingly asserts this disclosure "acknowledged outstanding issues in connection with the EIA review process." Gabriel was clear that the EIA review and technical assessment were completed to the TAC's satisfaction at the November 2011 TAC meeting and that the new issues were raised only in "recent weeks" in "public statements attributed to prior Government ministers." *Id.* *Supra* §§IV.A, IV.B.3 (addressing issues raised).

[868] Claimants' Opening-2020 vol.4:42-44.

[869] *Id.* vol.4:45; Claimants' PO27 ¶¶29-30; Memorial ¶¶387-390.

disclosed and market analysts reported Prime Minister Ponta's statements that no permitting decisions would be made at least until after the elections.[870]

422. After the year-end Parliamentary elections, the unlawful events of 2013 led to the Government's political repudiation of the Roşia Montană Project and the destruction of the value of Claimants' investment effectively on September 9, 2013 (as seen with hindsight). As Dr. Burrows acknowledged, the effect of the announcements that day was "immediate" as Gabriel's market capitalization fell by over 50% on September 9, 2013 to a mere US$ 251.89 million and "never recovered."[871]

423. Respondent denies that the announcements on September 9, 2013 caused Gabriel's share price to collapse that day, blaming instead "social opposition to the Project" purportedly reflected in the street protests on September 1 and September 8. The evidence, however, is otherwise.

424. The Ponta Government had repeatedly insisted publicly on a political decision on the Project through a vote on the Special Law in Parliament. Therefore, when the Ministry of Environment published draft EP conditions and the Government included the Project in its National Plan for Strategic Investment and Job Creation, both on July 11, 2013, analysts shrugged off these milestones and commented that "progress is likely only to be evident in the outcome of the vote on the project expected this fall."[872]

425. Accordingly, when Senator Antonescu and Prime Minister Ponta predetermined and directed the vote in Parliament and announced the political repudiation of the Project on September 9, 2013, Gabriel considered it necessary to issue a press release that day disclosing that Prime Minister Ponta and other senior officials had called for the Draft Law "to be rejected before debate."[873] Gabriel noted it was "urgently seeking confirmation of the actual statements made and clarification of the impact on the proposed permitting of the Project," and advised

[870] Claimants' Opening-2020 vol.4:46-47.

[871] *Id.* vol.4:48-49; CRA-II ¶¶91-92.

[872] Claimants' Opening-2020 vol.4:48.

[873] (C-1440) at 1.

"caution in the trading of its shares."[874] Market analysts repeated that ominous warning on September 9, 2013, which they likewise attributed to the public statements of Prime Minister Ponta and other senior officials.[875]

426. The sell-off of Gabriel's stock on September 9, 2013 occurred because of the Government-directed political rejection of the Special Law and with it the Project. There is no evidence that the market reaction was due to the street protests of September 1 and 8, which were in any event caused by, and directed at, a political class perceived as corrupt and not following the rule of law.[876]

2. Indexing Provides a Conservative Approach to Assessing the Value of the Project Rights in 2013 Absent the Impacts of Romania's Wrongful Conduct

427. As explained above, compensation should be based on the value of the Project Rights as of July 29, 2011, immediately before the conduct began that led to the repudiation of Gabriel's investment in breach of the BITs.[877]

428. If, however, the Tribunal were to conclude that damages should be assessed as of the date the State's conduct ripened into a wrongful taking of Gabriel's investment (September 9, 2013) or as of another date after July 29, 2011, compensation cannot be based on the actual market value of Gabriel's investment at that later date because Romania's wrongful conduct severely tainted and depressed the actual market value of the Project Rights as reflected in GBU's share price, most strikingly from early 2012 onwards.[878] To avoid allowing Romania to benefit from its own wrongful conduct and to wipe out the consequences of its treaty breaches, the Tribunal may consider what the value of the Project Rights would have been as reflected in

[874] *Id.*

[875] [redacted]

[876] *Supra* §VI.B.

[877] *Supra* §X.B. For Gabriel Canada's claim, the State's conduct before November 23, 2011 cannot be considered as a basis for liability, but the value of Gabriel's investment before August 2011 may be considered as part of the factual basis for the claim based on conduct as of November 23, 2011. The evidence shows that the fair market value of the Project Rights based on GBU's average market capitalization over the entire year of 2011 did not materially change. Compass slide 9; Claimants' Opening-2020 vol.1:9-10.

[878] *Supra* §X.H.1.

GBU's market capitalization had it progressed in line with gold sector market indices after the "last clean date" absent the impacts of the wrongful conduct.[879] Such an approach necessarily is an approximation, as it assumes that GBU's share value would have moved in line with the broader market. The approach eliminates all company-specific and Romania-specific impacts on value after the "last clean date."[880]

429. Investment treaty tribunals have accepted and applied similar indexing approaches to approximate the value of a publicly-traded company absent the impacts of the State's wrongful conduct.

430. In *Quasar de Valores v. Russia*, for example, the tribunal observed that "[i]t is a familiar tenet of international law that compensation cannot be reduced on the basis that anticipation of expropriating conduct has depressed the market value of the asset."[881] The tribunal accordingly used share price movements of four Russian oil and gas competitors to forecast the value the claimants' shares in Yukos would have had at the valuation date "but for the Respondent's expropriatory measures."[882]

431. In *Crystallex v. Venezuela*, the tribunal found that events starting with the denial of the Environmental Permit on April 14, 2008 and ending with the termination and take-over of the investment nearly three years later constituted an unlawful creeping expropriation and a violation of FET. The tribunal determined that "the most appropriate valuation date" was April 13, 2008, "the date that coincides with the culmination of the events surrounding the Permit denial which the Tribunal has found to be both a self-standing breach of FET and the first important act giving rise to the creeping expropriation."[883] The tribunal did not, however, assess value based on Crystallex's actual stock market capitalization as of that date. The tribunal

[879] Claimants' Opening-2020 vol.4:51-58.

[880] *See Amoco* (CL-128) ¶217 (observing that a "most disturbing" occurrence is where the market value at the time of the taking is polluted, e.g., by "an anticipated nationalization," the effects of which "can be nullified by the choice of a market price at a date when such information was not yet public.").

[881] (CL-49) ¶199.

[882] *Id.* ¶¶193, 215.

[883] (CL-62) ¶855 ("It is beyond peradventure that the Claimant's investment in Las Cristinas was negatively impacted with the denial of the Permit, and this fact would no doubt have been considered by a hypothetical buyer of Crystallex's investment.").

observed that it instead "must start with the last price before the wrongful acts which negatively affected the company's share price, and then calculate what would have been the value as of the valuation date if Crystallex had been unimpeded by Respondent's conduct."[884]

432. The *Crystallex* tribunal determined that the "last clean date" was nearly a year earlier, *i.e.*, June 14, 2007, because after that that date, "the actual stock price of Crystallex became affected by the absence of positive news on permitting."[885] The tribunal therefore tracked "Crystallex's actual share price movement up to the last trading date that was free of any threat of unlawful act," June 14, 2007, and then made "it evolve according to a relevant industry index," which it considered "appropriate to reflect a but-for scenario."[886] Here, applying the same methodology, Compass used four gold indices to depict "what would have been the evolution" of GBU's market capitalization from the last clean date (July 29, 2011) "if it would have followed that particular index."[887]

433. As Compass explains, the most appropriate market index to approximate the progression of GBU's market capitalization but for the State's wrongful conduct is the S&P/TSX Global Gold Total Return Index. Gabriel was listed on the TSX, it was part of that same S&P/TSX index, and as at July 29, 2011, GBU's market capitalization (~US$ 3 billion) compared favorably to the median market capitalization of the 64 mining companies included in the S&P/TSX index, which was US$ 1.2 billion.[888]

434. By contrast, the MVIS Global Junior Gold Mining Index suggested by Dr. Burrows would not provide as reliable an approximation of the but-for value for GBU. That is because Gabriel was not included in the junior gold mining index and its market capitalization "was substantially larger than the largest company in [that] index."[889] Neither market analysts

[884] *Id.* ¶891.

[885] *Id.*

[886] *Id.*

[887] Tr.(Oct. 3, 2020)1132:6-11 (Compass-Direct); Compass slide 49; Claimants' Opening-2020 vol.4:57.

[888] Tr.(Oct. 3, 2020)1094:15-1095:5 (Compass-Direct); Compass slides 4, 52; [redacted]

[889] Tr.(Oct. 3, 2020)1134:1-10 (Compass-Direct); Compass slides 49, 57; Claimants' Opening-2020 vol.4:53.

nor the market considered Gabriel as a "junior" mining company in this context given the tremendous size and value of the Roşia Montană Project and the Bucium Projects.[890]

435. Had it progressed in line with peer companies in the S&P/TSX index from July 29, 2011, GBU's market capitalization would have been US$ 1.459 billion on the last trading day (September 6, 2013) before the State's wrongful conduct ripened into treaty breaches.[891] That indexed value would be a conservative basis to assess the but-for value of the Project Rights as of September 6, 2013 because, but for Romania's wrongful conduct, RMGC already would have received the EP, which would have resulted in a significant share price increase over its pre-permit share price level, which is the level captured by the indexing approach.[892] Moreover, as Dr. Spiller explains, the indexed pre-permit market capitalization value "would reflect exclusively the value from a minority shareholder" and "ought to take also into account the Acquisition Premium."[893]

436. There is no dispute about the utility of this indexing approach in principle. Dr. Burrows acknowledged on cross-examination that in *Eco Oro v. Colombia* he used indexing to adjust the stock market capitalization from the last clean date to the valuation date:

> In that case, I looked for a public market cap that was clean, that was not affected by later information, and … I took [that] value and I extrapolated it to the Valuation Date.[894]

437. Dr. Burrows testified that it would be "appropriate" to extrapolate value as of September 6, 2013 using an average of Gabriel's market capitalization indexed to the S&P/TSX

[890] Tr.(Oct. 3, 2020)1179:7-1180:21 (Compass-Cross).

[891] Claimants' Opening-2020 vol.4:57; Claimants' email to Ms. Marzal dated Sept. 26, 2020 transmitting demonstratives and Excel file supporting the values on Claimants' demonstratives. Compass prepared Claimants' opening demonstratives with the indexing calculations. Tr.(Oct. 3, 2020)1140:21-1141:4 (Dellepiane-Cross). Values for the indexed GBU market cap are in the Excel file, under the "Chart Data" tab, columns [AD]-[AG], line 9130 (for Sept. 6, 2013), column [AD] (for S&P/TSX).

[892] *Supra* §X.H.1 (evidence of expected permit bump); Claimants' Opening-2020 vol.4:58.

[893] Tr.(Oct. 3, 2020)1134:11-17 (Compass-Direct).

[894] Tr.(Oct. 4, 2020)1372:2-20 (Burrows-Cross); CRA-II ¶8, Figure-2.

index and to the MVIS junior mining index, which according to his calculations is US$ 1.124 billion.[895]

438. Dr. Burrows' contention that the indexed value is "overstated," purportedly because Gabriel's market capitalization as of July 29, 2011 was inflated by inaccurate information about the Project's costs and timeline, is baseless for the reasons explained above.[896] To the contrary, indexing is conservative because it does not account for a "permit bump."

439. Finally, if the Tribunal were to conclude that damages should be assessed on the basis of GBU's market capitalization indexed from a date other than July 29, 2011 and/or to a date other than September 6, 2013, the indexing calculation is simple and all the data needed is already in the record.[897] There is no need for further evidence or expert submissions.[898]

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[895] Burrows slide 57.

[896] *Supra* §X.E.

[897] That data was submitted as (C-2860.04.xlsx) (GBU market capitalization data), (C-1853.04.xslx) (S&P/TSX, Philadelphia stock exchange, and MVIS index data), and (C-2091.02.xlsx) (NYSE Arca Gold BUGS index data). All the data is consolidated in the "Chart Data" tab of the Excel file attached to Claimants' email to Ms. Marzal dated Sept. 26, 2020 transmitting Claimants' hearing demonstratives. The "Chart Data" tab of that Excel file shows GBU's market cap indexed from July 29, 2011 to all subsequent dates in columns [AD]-[AG]. Thus, if the Tribunal were to find that the last clean date is July 29, 2011, no calculation is required; the Tribunal may find the adjusted market cap at any subsequent date by cross-referencing the row corresponding to that date and the relevant index(es) in columns [AD]-[AG]. For other last clean dates, the adjusted market value is equal to (i) Gabriel's stock market capitalization as of the last clean date, (ii) multiplied by the index level as of the valuation date, (iii) divided by the index level as of the last clean date. To illustrate, if the Tribunal were to decide to use the S&P/TSX index to adjust GBU's market cap from November 29, 2011 to September 6, 2013, the calculation would be: (i) GBU market cap at November 29, 2011 (row 8483, column [L]: US$ 2.49032 billion), (ii) multiplied by S&P/TSX at September 6, 2013 (row 9130, column [AD]: 1,458.51), (iii) divided by S&P/TSX at November 29, 2011 (row 8483, column [AD]: 2,913.82) = US$ 1,246,527,453.03. The Parties also easily could provide an excel to the Tribunal that performs the calculation in any combination, *i.e.*, starting from any value and ending on any date, and indexing with any of the indices or an average of them.

[898] The Tribunal rightly determined that Claimants have not presented a "new claim," that the arguments as to a valuation date of September 6, 2013 "are admissible," and that "reducing damages is an exercise that the Tribunal has the authority to undertake in any event when considering … the relevant request for relief." PO34 ¶¶59-61. In response to the Tribunal's question as to how to proceed (PO34 ¶¶62-64), Respondent opted to address the arguments presented in its Post-Hearing Briefs. Respondent's Oct. 30, 2020 letter.

I. The Substantial Amounts Gabriel Invested in the Projects Provide Further Evidence of Their Value

440. The sums invested by Gabriel to develop the Projects provide further evidence of their substantial value. Gabriel Canada's audited financial statements confirm that from 1997-2016, Gabriel invested a total of ~US$ 760 million to develop the Roșia Montană Project and the Bucium Projects.[899] The principal sum expended, however, does not represent the full value of the monies expended, as that sum does not include any return whatsoever, in the form of interest or otherwise, on the principal, which was invested over a nearly 20-year time period. Thus, while standing alone "a 'sunk investment' approach is not appropriate," considered with an allocation of interest, "such an approach can serve as a 'bottom line' below which compensation should not fall."[900]

441. Investment treaty tribunals accept audited financial statements as *prima facie* reliable evidence of amounts invested.[901] Respondent does not argue otherwise, and Dr. Burrows does not deny Gabriel invested ~US$ 760 million without obtaining any returns, whether in the form of interest or otherwise.

442. As Dr. Burrows confirms, RMGC's audited financial statements show RMGC invested US$ 535.9 million from 2003-2014.[902] Indeed, as shareholder of RMGC, the State approved RMGC's budgets and financial statements each year.[903] Prime Minister Ponta confirmed at a joint press conference with Minister Şova on September 12, 2013 that RMGC had invested "about 550 million" to develop the Projects based on "official notifications about the actual investments – not publicity or others, but investments in the environment, infrastructure and organization of the mining operations done by the company between 1997 and 2012."[904]

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[899] Compass-II Appendix C; Summary of Amounts Spent (C-1876); Memorial ¶63.

[900] *Khan* (CL-77) ¶409.

[901] *Bear Creek* (RLA-53) ¶658; *Copper Mesa* (RLA-54) ¶¶7.27-7.28; *Crystallex* (CL-62) ¶¶829, 911-913; *Siemens* (CL-102) ¶368; *PSEG* (CL-175) ¶¶320, 331; *Metalclad* (CL-131) ¶124.

[902] Burrows-I ¶170; Burrows-II ¶39; Burrows slide 93.

[903] Tănase-II ¶21.

[904] (C-643) at 1, video at 04:03-05:04. *Id.* at 5, video at 20:38-20:52 (Minister Şova: "The investments already carried out and certified by the investor Roşia Montană Gold Corporation together with Gabriel Resources amount to 550 million dollars.").

Minister Şova thereafter testified to Parliament that "financial certificates" confirmed RMGC invested US$ 550 million "in favor of Roşia Montană community and in several environmental actions and in many actions related to cultural and archeology heritage. Most of the money were invested in exploring the area."[905]

443. While Dr. Burrows identifies limited exploration and development costs incurred in early years for other properties (US$ 2.9 million) and certain project management and overhead fees (US$ 2.5 million), he also claims that corporate, general, and administrative costs (US$ 123.5 million) incurred by Gabriel should not be considered. The corporate, general, and administrative costs incurred by Gabriel over the nearly 20-year time-period of its investment, however, are directly related to the Project Rights as they are the costs associated with raising the capital needed to develop the Project Rights. Indeed, at all times Gabriel had the obligation in its joint-venture agreement with the State to finance all of RMGC's activities to develop the Projects.[906] Gabriel established and maintained the corporate structure that enabled it to do so, including raising capital by listing on the TSX and complying with all associated obligations. Gabriel's principal objective throughout this time has been the development of the Project Rights.[907]

444. Dr. Burrows asserts without basis that expenditures incurred in 2015-2016 are not related to the Project Rights. That, however, is incorrect. Although the State's conduct by 2015 made it clear that it would not permit RMGC to develop the Projects, Gabriel reasonably sought to maintain RMGC in good standing as a licensee in the hope of reaching an amicable resolution with the State.[908]

445. Finally, contrary to Dr. Burrows' contention that any assessment of damages based on "historical costs" should exclude the value of land in the Project area, mining equipment, and know-how on the Projects held by RMGC, the value of such assets, including

[905] Special Commission Sept. 30, 2013 (C-507) at 33.

[906] Claimants' 2019 vol.1:50.

[907] Compass-II ¶18; *supra* §X.E.1.

[908] Memorial ¶569; Henry-I ¶146; Szentesy-II ¶77; *supra* ¶215 n.456.

land in the Project area, is immaterial without the Project Rights for which they were acquired.[909] In addition, under Romanian law, the know-how (feasibility studies, mining plans, etc.) belongs to the State, which further underscores the tremendous unjust enrichment caused by Romania's wrongful conduct.[910]

J. Interest

446. To ensure full reparation, compensation must include interest at a normal commercial rate on a compound basis running from the date compensation is measured until the date the obligation to pay is fulfilled.[911]

447. As Compass explains, the 12-month LIBOR plus a 4% premium and the Prime Rate plus a 2% premium are normal commercial rates in the mining industry.[912] In contrast with the risk-free interests urged by Respondent, which do not reflect commercial reality for a mining company, the commercial rates identified by Compass are consistent with the commercial cost of financing for gold corporations (5.1%), for companies in the EMEA Region (4.9%) and corporations generally rated "BB" (5.3%).[913]

448. As Compass also explains, there is no economic basis in this case for simple interest.[914] Dr. Burrows does not disagree and explains that he was "instructed" to use simple interest for his calculation.[915]

449. Respondent observes that international law does not mandate compound interest. While the law is flexible enough to address all circumstances, there is no basis to dispute that where compound interest is necessary to ensure full reparation, as it is here, the law requires that

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[909] Tr.(Oct. 4, 2020)1376:9-18 (Burrows-Cross) (acknowledging that the value of such assets depends upon the State permitting the Project); *supra* §X.E.1.

[910] Memorial ¶¶625-632; Reply ¶628.

[911] Memorial §XVI.D; Reply §XIII.F.

[912] Compass slide 46; Compass-I §V; Compass-II §VI; Compass Updated Interest Calculation (C-2597-C) ("Interest" tab) and (C-2597.01). As Dr. Spiller explained, "LIBOR may be discontinued in December 2021, so the Prime Rate plus 2 will provide a similar assessment." Tr.(Oct. 3, 2020)1131:13-15 (Compass-Direct).

[913] Compass-II ¶¶85-86; Tr.(Oct. 3, 2020)1130:19-1131:1 (Compass-Direct).

[914] Reply §XIII.F.1; Compass-II ¶88.

[915] Burrows-II ¶224.

it be awarded as an element of compensation.[916] As the awards of numerous investment treaty tribunals over the last 20 years demonstrate, it is only in exceptional cases that compound interest is not necessary to compensate an investor for the time value of money.[917]

Respectfully submitted,

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[916] ILC Articles (CL-61) Art. 38(1) and cmt.(10) ("The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.").

[917] MARBOE (CL-184) §§6.237-6.248; MARBOE (CL-253) at 74-75 (explaining that investment treaty tribunals increasingly recognize that most financing and investment vehicles available to parties in transnational business involve compound interest, and that compound interest better compensates for actual damages suffered since it better reflects contemporary financial practice); Reply §XIII.F.