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

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1. This submission responds to the questions posed by the Tribunal's letter to the Parties dated April 12, 2022 regarding post-2013 events.

1. HOW SHOULD THE TRIBUNAL CONSIDER POST-2013 EVENTS IN EVALUATING CLAIMANTS' PRINCIPAL CLAIM (SEE C-PHB, SECTION VIII.A) AND FIRST ALTERNATIVE CLAIM (SEE C-PHB, SECTION VIII.B)?

A. Both Claimants' Principal and First Alternative Claims Are Based on the Conclusion That the Project Rights Were Effectively Taken as of September 9, 2013, Before the Post-2013 Events

2. Claimants' principal claim is that the Government's repudiation of the Project Rights announced on September 9, 2013 was definitive and permanent, and was the result and culmination of, and cannot be separated from, the policy the Government adopted on August 1, 2011 and implemented consistently thereafter. The Government's consistent policy from August 2011 onward was to condition permitting and implementation of the Project on a political decision by the Government as to whether the Project would be done, which would be taken only after Gabriel met the State's demands to renegotiate and improve the economic terms of their joint venture. The Government's repudiation of the Project Rights, announced on September 9, 2013, was the political decision on the fate of the Project envisioned and required by the Government's policy adopted and followed since August 2011. The Government's treatment of the Project Rights thus was a composite act that began on August 1, 2011 and breached multiple provisions of both BITs as of September 9, 2013.[1] Compensation therefore was due as of September 9, 2013 (with interest running from that date), but the measure of compensation should be assessed by reference to the fair market value of the Project Rights on July 29, 2011, prior to the commencement of the wrongful conduct in August 2011.[2]

3. Claimants' first alternative claim is that, if the Government's repudiation of the Project Rights as of September 9, 2013 were not considered the culmination of a composite act that began in August 2011, the conclusion remains that the Government's decision announced on September 9, 2013 was a repudiation of the Project Rights and of the State's joint venture with

[1] C-PHB § VIII.A.

[2] C-PHB ¶¶ 270, 278, 285-287.

Gabriel, and breached the BITs.[3] In such case, compensation would be due as of September 9, 2013 (with interest running from that date), and the measure of compensation should be based on the fair market value of the Project Rights on that date, assessed without the impacts of the State's wrongful treatment of Gabriel's investment. This wrongful treatment includes the Government's sustained blocking of permitting decisions and other unfair treatment detailed in prior pleadings, which, even if not considered to constitute a composite act with the events culminating in September 2013, nonetheless breached the State's obligation to accord fair and equitable treatment beginning in August 2011 (and on November 23, 2011 for Gabriel Canada), and clearly included the threat of a taking.[4] This wrongful, publicly announced treatment negatively impacted the fair market value of the Project Rights starting in August 2011, as the Government demanded, *inter alia*, new economic terms from Gabriel in order to proceed.[5] By early 2012, the negative impacts of the Government's treatment on Gabriel's stock market capitalization were manifest.[6] The measure of compensation for this alternative claim therefore should be based on Gabriel's stock market capitalization using an "indexing" approach starting from a "last clean date" before the impacts of the wrongful treatment, until the date of the breach, September 9, 2013.[7]

4. Thus, neither Claimants' principal nor first alternative claim is based directly on what may be referred to as the "post-2013 events." The Government's decision that the Project would not be done, announced on September 9, 2013, had destroyed the value of Gabriel's Project

[3] C-PHB § VIII.B; C-PO27 ¶¶ 178-203.

[4] C-PHB ¶¶ 249, 271- 276, 278-280, 282-284, 286-289; C-PO27 ¶¶ 58-70; C-PHB-II ¶ 229.

[5] *See* C-PO27 ¶ 12; C-PHB ¶¶ 408-410, 412.

[6] C-PHB ¶¶ 412-413, 415; C-Opening (2020) vol.4.

[7] C-PHB ¶¶ 428, 439. In selecting the last clean date, the Tribunal may consider (i) July 29, 2011, the last trading day before the Government announced its policy conditioning the Project on a favorable renegotiation of the State's economic interest and a political decision by the Government to do the Project; (ii) November 23, 2011, the date the Canada BIT entered into force; (iii) November 29, 2011, the date of what would have been the final TAC meeting but for the Government's unlawful policy; or (iv) a date in early 2012, such as January 31, 2012, when the law obligated the Ministry of Environment to take a decision on the environmental permit, timing Minister of Environment Borbély also discussed publicly. *See infra* ¶¶ 55, 84. Although both parties earlier provided indexing calculations up to September 6, 2013, the last trading day before the Government's announced repudiation, the indexing should be done from the last clean date up to the date of breach, September 9, 2013. *See infra* ¶ 101 n.179.

Rights effectively as of that date. The post-2013 events therefore were not the events that gave rise to the breach and were not the cause of Gabriel's losses.

5. The post-2013 events are relevant to Claimants' principal and first alternative claims, however, for three reasons.[8] First, the post-2013 events establish that the measure culminating in the repudiation of the Project Rights on September 9, 2013 was definitive and permanent and, therefore, was a measure with effects equivalent to a taking of the Project Rights.

6. Second, the post-2013 events show that there was no formal act terminating the Project Rights or any compensation paid to Gabriel and, therefore, that the *de facto* taking of the Project Rights through what was effectively an oral edict issued by the Government on September 9, 2013 was unlawful.

7. Third, the post-2013 events include acts and omissions that confirm that the scope of the taking on September 9, 2013 extended generally to RMGC, the State's joint venture with Gabriel, and to the Bucium Projects as well as the Roşia Montană Project.

8. Claimants elaborate these points below.

B. The Post-2013 Events Establish That the Repudiation Decision Announced on September 9, 2013 Was Definitive and Permanent and, Therefore, Show That the Project Rights Were Subject to a Measure with Effects Equivalent to a Taking

9. As set out in detail in earlier submissions, on September 9, 2013 the political leaders of the governing coalition, Prime Minister Ponta and Senator Antonescu, made and announced on national television the Government's decision to reject the Roşia Montană Project and to renounce Gabriel's Project Rights without due process and without compensation.[9]

10. Subsequent events implemented the repudiation announced on September 9, 2013 and confirmed that it was permanent and definitive.[10]

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[8] C-PO27 ¶¶ 204, 206-207.

[9] C-Opening (2019) vol.5:55-64 (Ponta videos in PowerPoint, Antonescu video in C-690); C-PO27 ¶¶ 46-49; C-PHB ¶¶ 186-188.

[10] C-PO27 ¶¶ 50-52, 204-224.

11. The immediate aftermath of the repudiation on September 9, 2013 includes a series of events relating to Parliament's formal rejection of the Government's "Special Law," which the Government intended to be a proxy for whether or not the Project would be done. These events include:

a) On the instructions of the Government's coalition leaders,[11] on September 10, 2013 Senate committees voted unanimously to reject the Special Law despite the Minister of Environment, Minister of Culture, and NAMR President all testifying as to the Project's merits.[12]

b) Prime Minister Ponta confirmed 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."[13] Repeating warnings made on September 9, 2013,[14] Prime Minister Ponta and Minister Sova both warned again that the Government's decision to reject the Project would have "financial consequences" and would expose the State to billions of dollars in damages.[15]

c) Prime Minister Ponta said in October 2013 that the Parliamentary Special Commission would reject the Special Law if the vote were "purely political," and that "Plan B" was to explain to other investors that "only this project was rejected on a political criterion."[16]

[11] C-PO27 ¶¶ 47-48 (Prime Minister Ponta stating on September 9, 2013 that he would "make sure" that first the Senate and then the Chamber of Deputies swiftly rejected the Special Law, and that he would "of course" instruct his party to vote "no" consistent with the political decision taken to reject it).

[12] C-PO27 ¶ 50(a).

[13] C-PO27 ¶ 50(b).

[14] C-PHB ¶ 258 (Prime Minister Ponta stating on September 9, 2013 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").

[15] C-PHB ¶ 258.

[16] C-PO27 ¶ 50(c).

d) Despite extensive Government testimony that the Project met all applicable legal requirements, before any votes were cast Senator Antonescu and Prime Minister Ponta reconfirmed at a joint press conference on November 11, 2013 that the Special Commission and later the full Parliament would vote to reject the Special Law, stating "We have negotiated it politically."[17]

e) The Special Commission, Senate, and Chamber of Deputies carried out those instructions and rejected the Special Law in unanimous or nearly unanimous votes on November 11, 2013, November 19, 2013, and June 14, 2014.[18]

f) One day after the Special Commission voted, on November 12, 2013 Minister of Environment Plumb stated, "Of course Parliament's decision means the last word for us and we will observe it."[19]

g) In October 2014, Prime Minister Ponta reconfirmed again that "the Parliament rejected the law, so the exploitation will not be made, this is for sure."[20]

12. In light of these events, there can be no doubt in hindsight that the repudiatory oral decree announced by the Government through its coalition leaders on September 9, 2013 was tantamount to a *de facto* taking of the Project Rights. From that date forward the Project's rejection was a *fait accompli*, and the entire Parliamentary process was arranged as mere political theater to confirm and implement the repudiation announced on September 9, 2013.

13. This conclusion is further confirmed by the additional "post-2013 events" as described in Claimants' earlier submissions.[21] Following the events in Parliament, the Government consistently acted in accordance with its decision to repudiate RMGC's Project Rights and effectively end the State's joint venture with RMGC, including as follows:

[17] C-PO27 ¶ 50(d).

[18] C-PO27 ¶ 50(e); P-PHB n.516.

[19] C-PO27 ¶ 51; C-Opening (2019) vol.6:55-56.

[20] C-PO27 ¶ 51; C-Opening (2019) vol.6:57-58.

[21] *See generally* C-PO27 ¶¶ 206-207; Memorial ¶¶ 551-557; Reply ¶¶ 294-309.

a) The Ministry of Environment arbitrarily failed to issue the environmental permit and refused to take any decision at all on the permit, despite the Government's repeated acknowledgements in 2011 and again in 2013 that the technical assessment was complete and that all permitting requirements were met.[22]

b) The Ministry of Environment unlawfully convened pretextual TAC meetings in 2014 and 2015 at which it made significant misrepresentations to RMGC.[23]

c) Unlike its consistent practice before the Government's September 9, 2013 rejection, the Ministry of Economy thereafter failed to cooperate and participate in mandatory recapitalizations of RMGC required to prevent its dissolution.[24]

d) NAMR refused to act on RMGC's Bucium exploitation license applications despite the fact that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarniţa deposits and thus acquired the right to obtain exploitation licenses.[25]

e) State authorities launched retaliatory investigations of RMGC in November 2013 that remain ongoing and were clearly tied to and motivated by this arbitration.[26]

f) The Government proposed a 10-year moratorium on the use of cyanide expressly aimed at blocking the Project.[27]

g) The Ministry of Culture delineated the entirety of Roşia Montană as an historical monument, and applied for and obtained the inscription of the Project site as a UNESCO World Heritage site where no mining can take place.[28]

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[22] C-PO27 ¶ 206(a); C-PHB ¶¶ 63-161, 195-196. *See also* Memorial ¶¶ 529-534.

[23] C-PO27 ¶ 206(b).

[24] C-PO27 ¶ 206(c).

[25] Bîrsan-I § V.C; Bîrsan-II § IV; C-PO27 ¶¶ 206(d), 210. *See also* C-PHB ¶ 186 n. 382; Reply § VI. NAMR also refused to update annexes to the Roşia Montană License. Memorial ¶¶ 545-550.

[26] C-PO27 ¶¶ 52, 206(e); Reply ¶ 584.

[27] C-PO27 ¶ 206(f); Reply ¶ 586; Letter no. 2456 from Romanian Government to President of Chamber of Deputies dated Dec. 21, 2016 (C-913).

14. Given the totality of these developments, and in particular the inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site, it is undeniable that the repudiation of the Project announced on September 9, 2013 was definitive and permanent and that it therefore constituted a measure with effects equivalent to a taking.

15. To appreciate fully the significance of the post-2013 events relating to cultural heritage, these events must be viewed in light of the status in 2013 of (i) developments relating to the list of historical monuments and (ii) archaeological discharge decisions for Cârnic and Orlea. A full review of these events demonstrates that the Government's post-2013 decisions relating to cultural heritage in the area, including its decisions leading to the inscription of Roşia Montană as a UNESCO World Heritage site, were the result of the Government's decision on September 9, 2013 not to do the Project. But for the Government's repudiation decision announced that day, issues relating to cultural heritage would not have blocked the Project.

16. Developments relating to the list of historical monuments up through 2013 were as follows.

a) The first list of historical monuments, the 2004 LHM, reflected the archaeological research the State's culture authorities had completed by then in the Project area.[29] The 2004 LHM thus listed significant archaeological sites identified as historical monuments through that research; it did not include any sites in areas that the State culture authorities decided to archaeologically discharge as reflected in ADCs issued by the Ministry of Culture that encompassed the entire Project area, except for Orlea.[30]

[28] C-PO27 ¶¶ 206(g)-(h); C-PHB ¶¶ 197-200; Claimants' Observations on New Evidence dated Oct. 29, 2021 ("C-Observations").

[29] As required by law, Gabriel through RMGC provided the funding and support needed to allow the State's cultural authorities to complete that research. Memorial § III.B.

[30] Memorial ¶¶ 158(c), 161. *See also* C-Opening (2019) vol.2:40-62; Schiau-I § V.B; Schiau-II § IV.C. Thus, Respondent's argument (*e.g.*, Rejoinder ¶ 898) that the Project area was continuously under cultural heritage protection since 1991 is incorrect.

b) When the 2010 LHM was issued, it newly listed as historical monuments all the mining galleries in Cârnic as well as the entire locality of Orlea within a 2 km radius.[31] Those listings were not legally justified.[32]

i) Although the first Cârnic ADC had been annulled, Cârnic should have reverted to its earlier status as an archaeological site[33] because it had never been classified as an historical monument and, based on the archaeological research that had been performed, there was no basis to do so.[34]

ii) The Orlea listing described as having a 2km radius did not have any basis and the culture authorities later acknowledged that a software error caused this erroneous listing.[35]

When the 2010 LHM was issued, RMGC considered that those listings were the result of oversight or drafting error and would be corrected.[36] Correspondence among the institutions within the Ministry of Culture confirmed that the 2010 LHM contained errors that needed to be corrected.[37]

c) In July 2011, when the Ministry of Culture issued the second Cârnic ADC, Minister of Culture Kelemen Hunor stated that the Cârnic galleries would be removed accordingly from the LHM.[38]

d) In August 2011, however, consistent with the Government's new policy toward the Project, the Minister of Culture announced that he would not remove Cârnic from the LHM until "the level of participation of the Romanian state in that

[31] Memorial ¶¶ 315-318; Reply ¶¶ 253-254. *See also* C-Opening (2019) vol.7:6-7.

[32] Memorial ¶¶ 316-319, 331-333, 582, 587, 594; Reply ¶¶ 253-261, & n.576.

[33] Schiau-II ¶¶ 184-185.

[34] Memorial ¶ 331; Reply ¶ 256 & n.567.

[35] C-Opening (2019) vol.7:7-8. *See also* Schiau-II ¶ 206 n.315.

[36] Reply ¶¶ 254-255; Gligor ¶¶ 97-99.

[37] Memorial ¶ 332; Reply ¶ 260.

[38] Reply ¶ 258.

company [RMGC]… [was] clarified" and a decision was taken on the Project "at the governmental level."[39]

e) In furtherance of that unlawful policy, the record shows that from that time forward, multiple proposed corrections to the errors in the 2010 LHM were blocked by the Government at the political level.[40]

17. While the 2010 LHM did not prevent issuance of the environmental permit,[41] as of 2013 the list of historical monuments remained an obstacle that the Ministry of Culture needed to address before construction permits for the Project could be issued.[42] Had the Government not decided to reject the Project as announced on September 9, 2013, there is no doubt that the Government would have removed the obstacles to the eventual issuance of construction permits created by the 2010 LHM. Indeed, the law required it to do so by giving effect to the ADCs that had been issued and by declassifying historical monuments accordingly.[43]

18. As to the contested ADCs, the status of the second Cârnic ADC in 2013 was as follows.

a) Project opponents had relied on the uncorrected erroneous 2010 LHM to commence legal actions to challenge the second Cârnic ADC, including on the ground that the Cârnic galleries were listed on the 2010 LHM.[44] As of 2013, the second Cârnic ADC remained valid while the legal action seeking to annul it was pending.

b) The clerical errors that had resulted in the annulment of the first Cârnic ADC had been corrected in the second Cârnic ADC, which had been issued on the

[39] C-PHB ¶ 198; Reply ¶ 258.

[40] C-PHB ¶ 113; Reply ¶¶ 260-261.

[41] *See* C-PHB § IV.B.2 (PUZ not needed for an EP); C-PHB-II § II.B.3.

[42] That is because protection of historical monuments takes precedence in the urbanism law over industrial activities such as mining, and construction permits may be issued only when in conformity with the applicable urbanism plan. *See* C-PHB ¶¶ 113-116; Memorial ¶ 334. *See also* Podaru ¶¶ 174-180, 197-198, 202-203, 326, 329; Schiau-I ¶¶ 12-17; Bîrsan-II ¶¶ 84-99.

[43] Schiau-I ¶¶ 31-32, 79, 84, 116, 356. *See also* Memorial ¶ 158(d), ¶ 332, 4th bullet; Reply ¶ 613.

[44] Reply ¶ 259.

unanimous recommendation of both the National Archaeological Commission and the expert archaeologists who had performed the research in the field.[45] RMGC therefore considered it highly likely that the legal challenge against the second Cârnic ADC would be rejected,[46] and in due course the challenge indeed was dismissed.[47]

c) Respondent has argued that the Ministry of Culture did not remove Cârnic from the 2010 LHM because of the pending legal challenge against the second Cârnic ADC. Not only is there is no evidence to support Respondent's argument, but the evidence refutes it.[48] In August 2011 the Minister of Culture expressly linked removal of the Cârnic ADC from the 2010 LHM to Gabriel meeting the Government's demands for more advantageous economic terms and to a political decision by the Government whether to do the Project. In addition, the court decision suspending the effects of the second Cârnic ADC was not issued until January 2014, several years after the Government refused to remove Cârnic from the LHM.[49]

19. The status of archaeological discharge decisions for Orlea in 2013 was as follows.

a) As listed on the 2004 LHM, Orlea was an area where research sufficient to support a discharge decision remained to be completed. The evidence shows that prior to February 2013 the Ministry of Culture would not issue the permits needed to complete such preventive archaeological research in Orlea.[50] In February 2013, however, the Ministry of Culture accepted a research plan proposed by NIH according to which such research would be undertaken, although not before July

[45] Reply ¶¶ 649-650; Gligor-II ¶¶ 75-78. In addition, Professor Schiau explains that annulment of the first Cârnic ADC was granted in an excess of power. Schiau-II § IV.D.2.

[46] Gligor-II ¶¶ 76-78. *See also* C-PHB ¶ 416; C-PHB-II ¶ 176(c).

[47] *See* C-Observations ¶¶ 44, 49 (noting that the challenge to the second Cârnic ADC was rejected in a court decision dated December 10, 2020, which decision thereafter was declared as being final and irrevocable). *See also* C-PHB-II ¶ 176(c).

[48] Reply ¶¶ 256-258, 260.

[49] Schiau-I ¶ 340.

[50] C-Opening (2019) vol.2:57-59; C-PHB ¶ 373.

2014, *i.e.*, after the Government submitted its Special Law to Parliament as a proxy vote on whether to permit the Project.[51]

b) But for the Government's repudiation of the Project Rights, RMGC reasonably expected that an ADC for Orlea in due course would have been issued.[52]

c) The 2010 LHM, however, erroneously had expanded Orlea so as to improperly overlap with areas subject to ADCs which, therefore, had not been included on the 2004 LHM.[53] The record shows that proposals made after August 2011 to correct that error were blocked politically.[54]

20. In sum, as of 2013, the second Cârnic ADC was subject to legal challenge but that challenge was expected to be rejected in due course; archaeological research needed to be completed for Orlea, which the Ministry of Culture in February 2013 agreed would be authorized; and the Ministry of Culture had admitted that the errors on the 2010 LHM required correction, including with respect to the incorrectly expansive description of Orlea.

21. But for the Government's repudiation of the Project Rights on September 9, 2013, these matters would not have blocked the Project. The legal challenge to the second Cârnic ADC was a risk that was taken into account in Gabriel's market capitalization,[55] and but for the Government's repudiation of the Project Rights, research would have been completed in Orlea.[56]

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[51] C-PHB ¶ 374.

[52] C-PHB ¶ 373; Gligor-II ¶¶ 102-109; Jennings-II ¶¶ 30-31. *See also* C-PHB ¶ 378 (status of Orlea taken into account by the market).

[53] C-Opening (2019) vol.7:7.

[54] *See supra* ¶ 16 (b).

[55] *See, e.g.*, C-Opening (2020) vol.2:2-14, 19 (extensive risk disclosures including as to NGO litigation and potential impact on Project timeline); C-PHB ¶¶ 354-358. *See also* Gabriel MD&A for Third Quarter 2011 dated Nov. 2, 2011 (R-314) at 5 (disclosing new NGO litigation filed in late September 2011 seeking cancellation of the second Cârnic ADC); *infra* ¶¶ 82-83 (Gabriel's market capitalization for the whole year of 2011 and as of November 23, 2011 were not materially different than its market capitalization as of July 29, 2011). The litigation against the second Cârnic ADC was a further impact of Respondent's wrongful conduct in failing to correct the 2010 LHM. C-PHB-II ¶ 176(c).

[56] C-PHB ¶¶ 373-377.

22. Similarly, but for the Government's repudiation of the Project Rights on September 9, 2013, the Ministry of Culture would have corrected the 2010 LHM. Simply giving legal effect to the ADCs that it had issued in the Project area by declassifying the listed historical monuments would have removed the errors listed in the 2010 LHM.[57] Following issuance of an ADC, the Ministry of Culture is obligated by law to declassify the relevant historical monument.[58] The Ministry of Culture therefore had an obligation to complete the declassification of discharged areas, which it was expected to do upon issuance of the environmental permit.[59]

23. After 2013, however, following the Government's repudiation of the Project Rights, the Ministry of Culture was not motivated to give effect to the ADCs that it had issued in the Project area and was not motivated to correct the admitted errors in the 2010 LHM.[60]

24. This manifestation of the Government's repudiation of the Project Rights can be seen in the context of litigation commenced by Project opponents to challenge the SEA endorsement needed to update the urbanism plan for the Project area. Project opponents sought annulment of the SEA endorsement on the ground that it was not prepared in accordance with the 2010 LHM.[61]

25. In mid-2014, without the benefit of hindsight and still hopeful that the announced decision rejecting the Project might change, RMGC intervened in the legal actions related to the challenged SEA endorsement to request a judicial ruling that the 2010 LHM was in error.[62] In a pleading filed in January 2015, the Ministry of Culture, as a defendant in those proceedings, argued to the court that the 2010 LHM was not an error, that the 2004 LHM it had issued was

[57] C-Opening (2019) vol.7:6-7; C-PHB ¶¶ 117- 126, 372-378 (regarding an ADC for Orlea). *See also* C-PHB-II ¶ 79.

[58] *E.g.*, Schiau-I ¶¶ 31-32, 79, 84, 116, 356.

[59] *See* C-Opening (2019) vol.2:58 (Ministry of Culture Feb. 28, 2007 press release stating it would not issue further decisions in the area of the Project until the Ministry of Environment endorsed the EP for the Project).

[60] Reply ¶ 261.

[61] C-PHB ¶ 116; Memorial ¶¶ 320, 333; Podaru ¶¶ 256, 260; C-Opening (2019) vol.7:12.

[62] Reply ¶¶ 262-263; Schiau-I ¶ 361; Podaru § IV.B.

"abusive," and that the 2015 LHM soon would "reinstate" Roşia Montană as an historical monument.[63]

26. On December 24, 2015, the Ministry of Culture issued the 2015 LHM, rendering the 2010 LHM litigation moot.[64] The Minister of Culture announced the 2015 LHM stating (consistent with the repudiation of the Project Rights in September 2013), that there would be no mining in Roşia Montană[65] and, in a January 9, 2016 Facebook post, also expressed support for a UNESCO application, "tagging" "Roşia Montană in UNESCO World Heritage."[66]

27. The 2015 LHM maintained the historical monuments as erroneously listed on the 2010 LHM, and added the location of the Alburnus Maior Archaeological Site as the "entire locality" of Roşia Montană "within a 2 km radius."[67]

28. The Ministry of Culture then prepared a study delineating the boundaries of the "Alburnus Maior Archaeological Site - Roşia Montană (a historical monument included on the 2015 List of Historical Monuments, Alba County, code AB-I-s-A-00065)" that it sent to the Alba County local authorities to be taken into account in preparing applicable urbanism plans.[68] The delineation study states that it was prepared for purposes of establishing the precise boundaries of the historical monument for the nomination of the Roşia Montană Mining Cultural Landscape to be inscribed on the UNESCO World Heritage List.[69]

29. The delineation study acknowledges that ADCs were issued in the subject area, but states that these were issued "in the past," that those discharge decisions "did not take into account an integrating approach to the area," and that:

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[63] Reply ¶ 264.

[64] Reply ¶ 269.

[65] C-Opening (2019) vol.7:18-25; Memorial ¶¶ 582-598; Reply ¶¶ 270-276.

[66] C-Observations ¶ 26; January 2016 Facebook post (C-822); C-Opening (2019) vol.7:18.

[67] Schiau-I ¶ 304; C-Opening (2019) vol.7:7, 25 (compare map of 2010 LHM with map of 2015 LHM).

[68] C-Observations ¶ 27; Ministry of Culture Letter dated Nov. 25, 2016 (C-2517); Ministry of Culture Letter dated Dec. 28, 2016 (C-2370) at 5; C-Opening (2019) vol.7:31-32.

[69] Ministry of Culture Letter dated Dec. 28, 2016 (C-2370) at 5; *id.* at 9 (noting that the "generic 2 km limit no longer applies after the limits of the site are specified").

> …considering that the archaeological discharges in question have not been followed by the declassification of the respective portions of the site, which maintained their status as historical monument, this documentation acknowledges that these areas belong entirely to the Archaeological Site Alburnus Maior -- Roşia Montană.[70]

The Ministry of Culture did not, however, annul or otherwise invalidate the ADCs.

30. On February 18, 2016, Romania submitted an application to UNESCO, placing the "Roşia Montană Mining Cultural Landscape" on UNESCO's Tentative List to be declared a World Heritage site.[71] Romania's application sought recognition of the landscape itself as the cultural heritage asset, stating that further mining "would inevitably entail the quasi-total and irreversible destruction of the cultural heritage and its setting."[72]

31. On January 4, 2017, Romania submitted the file supporting its application to UNESCO.[73] The nomination file includes a map of the nominated property and a protected buffer zone around it.[74]

32. Romanian law provides protection for UNESCO World Heritage sites that is distinct from the protections provided in the law generally for historical monuments; this protection applies also to properties for which a nomination file has been submitted to UNESCO.[75] Romanian law requires for all UNESCO properties and nominated UNESCO properties that special protection measures be established to ensure their conservation, and that those special protection measures be reflected in the urbanism plan for the area.[76]

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[70] Ministry of Culture Letter dated Dec. 28, 2016 (C-2370) at 32; C-Opening (2019) vol.7:31; C-Observations ¶ 27.

[71] Memorial ¶ 604; C-Observations ¶ 10.

[72] Memorial ¶ 604. *See also id.* ¶¶ 604-607.

[73] UNESCO Nomination File (C-1892); C-Observations ¶ 10; Memorial ¶ 609; Ministry of Culture press release Jan 5, 2017 (C-897). *See also* Reply ¶ 277.

[74] UNESCO Nomination File (C-1892) at 10-11, 56 (showing boundary of nominated property outlined in red and boundary of the Roşia Montană Mining Landscape with buffer zone outlined in green).

[75] C-Observations ¶¶ 12-14; C-Opening (2019) vol.7:35.

[76] Podaru ¶¶ 345-347; GO no. 47/2000 (C-2350), Art. 3.

33. Thus, Romania's submission on January 4, 2017 of the Roşia Montană Nomination file to UNESCO triggered protections that required conservation of the Roşia Montană Mining Cultural Landscape through measures to be included in the urbanism plan for the area. As construction permits must be in conformity with the urbanism plan, protection measures ensuring the conservation of the landscape would preclude any construction permit for the Roşia Montană Project. These protections in Romanian law are described in the Roşia Montană UNESCO Nomination file as follows:

> The property is included in a wider area that is designated in view of its protection by urban planning regulations ….
>
> The more direct protection is granted by listing … in the Historic Monuments List….
>
> Under this protection framework, the responsibilities fall with the municipality, in respect to the protection through urban planning measures …
>
> According to the law, once a nomination is submitted, all provisions in place for World Heritage sites will apply to the respective property as well. These include the management system designed to protect all World Heritage properties in Romania. Roşia Montană will benefit from these provisions with the submission of the nomination file to UNESCO.[77]

34. Thereafter Romania requested a postponement of its UNESCO application in view of this arbitration,[78] which the Minister of Culture announced while noting that Roşia Montană nevertheless remained protected as an historical monument:

> Therefore, we are also protected by our laws and there can be no exploitation there, as you very well know, because in order to obtain an exploitation permit you need approvals from the Ministry of Environment, the National Agency for Mineral Resources, and most definitely, from the Ministry of Culture, and this will not happen. So, no exploitation is allowed here throughout this period, nothing will happen, except for Romania potentially losing 4.4. billion dollars.[79]

[77] UNESCO Nomination File (C-1892) at 90; *id.* at 114, 130-131; C-Observations ¶¶ 14, 28.

[78] C-Observations ¶ 15.

[79] Reply ¶ 281 (*quoting* C-1921) (emphasis added).

The UNESCO World Heritage Committee granted the request, on July 4, 2018, promptly referring the nomination file back to Romania.[80]

35. On January 31, 2020, one month after the hearing in this case – during which Respondent emphasized that the nomination file was no longer submitted to UNESCO[81] – Romania reactivated the UNESCO procedure by resubmitting the Roşia Montană UNESCO Nomination file for UNESCO's consideration.[82]

36. On July 27, 2021, UNESCO inscribed the nominated property, the Roşia Montană Mining Landscape, onto UNESCO's World Heritage List and simultaneously onto the List of World Heritage in Danger "pending the removal of threats to its integrity posed by possible extractive activities."[83]

37. Thus, a review of the post-2013 events confirms that the Government effectively terminated the Project Rights in accordance with its repudiatory announcement on September 9, 2013. All subsequent events leading up to and including Romania's inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site were the result of that decision not to do the Project and to end the State's joint venture with Gabriel.

38. The Government's post-2013 decisions regarding the cultural heritage in the area, including its eventual pursuit of a UNESCO World Heritage listing for Roşia Montană, also follow from and are due to the earlier decision to reject the Project Rights. That is evident from the fact that the possibility of seeking a UNESCO listing was not the reason the Government decided to reject the Project Rights.[84] Thus, these later decisions confirm that the repudiation of the Project Rights announced on September 9, 2013 was definitive, with effects equivalent to a taking.

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[80] C-Observations ¶ 16.

[81] *See* Tr.(Dec.3, 2019)556:12-14, 557:16 – 558:7 (R-Opening). *See also* Rejoinder ¶ 711.

[82] C-Observations ¶ 19.

[83] C-Observations ¶ 21.

[84] C-Observations ¶¶ 3-4; C-PO27 ¶ 218.

C. The Post-2013 Events Establish That the Repudiation of the Project Rights Was Unlawful and a Breach of the BITs

39. The post-2013 events also are significant because they show that the repudiation of the Project Rights was unlawful and was a breach of the BITs for at least two reasons.

40. First, the Government failed to issue any formal lawful act to terminate the Project Rights consistent with the decision announced orally on September 9, 2013. There likewise was no administrative decision taken post-2013 in relation either to the environmental permitting process for the Roşia Montană Project[85] or to the applications for exploitation licenses for the Rodu-Frasin and Tarniţa Bucium Projects.[86] Thus, the effects of the Government's decision, which included a sustained failure to act in administrative proceedings despite there being an obligation to act, show that the repudiation decision lacked transparency and was a denial of due process, including because it lacked legal basis or form.[87]

41. Second, the post-2013 events show that there also was never any compensation offered to Gabriel or RMGC for the taking of the Project Rights.[88]

42. Thus, irrespective of whether the Government's decision to renounce the Project Rights was for a public purpose – the evidence shows it was not, but rather was for perceived political expediency – the post-2013 events establish that the repudiation of rights was a breach of the BITs.

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[85] *See* Memorial §IX.A; Reply §V.A; C-PHB ¶¶ 195-196.

[86] *See* Memorial §IX.B.3; Reply § VI, ¶¶ 303-309, 562; C-PO27 ¶ 206(d); C-Opening (2019) vol.8:29.

[87] Memorial ¶¶ 815-816. *See also, e.g.*, *Crystallex* (CL-62) ¶ 593 ("For the Tribunal, Venezuela had the burden to elucidate the reasons for denying the Permit with some kind of supporting data to explain why it was reaching the conclusion it reached. This is especially important as a general matter because only a precise and reasoned denial could afford Crystallex a true opportunity to challenge that denial . . . or to remedy the deficiencies of the project if it was to resubmit a more 'adequate' EIS (as at that time the MOC continued to be in force and thus a corrected resubmission could not be ruled out)."). *See also infra* ¶¶ 59-62.

[88] Memorial ¶¶ 815-816. *See also* C-Observations ¶ 34.

D. The Post-2013 Events Establish That the Repudiation Encompassed the State's Joint Venture with Gabriel and All of the Projects

43. The post-2013 events confirm and demonstrate that the scope of the Government's repudiation announced on September 9, 2013 applied not only to the Roşia Montană Project, but also to the State's joint venture with Gabriel in RMGC, in which the Government had demanded a greater ownership interest, and extended therefore also to the Rodu-Frasin and Tarniţa Bucium Projects.[89]

44. Specifically, NAMR's continuing failure to this day to act or take any decision whatsoever on the Bucium exploitation license applications, without any explanation, is among the effects of the Government's repudiation decision.[90] In addition, the rejection of the Roşia Montană Project itself was fatal to the feasibility of the Rodu-Frasin Project as that deposit was to be developed together with the Roşia Montană Project.[91]

45. More broadly, the retaliatory investigations brought against RMGC beginning in November 2013 and continuing to this day and the failure to cooperate in recapitalizing the company as required by law to avoid dissolution, among other actions targeted at RMGC, also show that the State effectively abandoned its joint venture with Gabriel. In sum, the evidence shows that the central reason that the Projects did not advance after September 9, 2013 was that the Government decided and announced that day that the Project would not be done and that the State's joint venture with Gabriel was over.

[89] *See supra* ¶ 40.

[90] *See* Reply ¶¶ 303-309; Bîrsan-I ¶¶ 399-406; Bîrsan-II ¶¶ 209-218.

[91] C-PHB n.520.

2. WHAT ARE THE SPECIFIC POSITIONS AND/OR CLAIMS OF THE PARTIES RELATED TO THE POST-2013 EVENTS AS PRESENTED IN CLAIMANTS' SECOND ALTERNATIVE CLAIM (SEE C-PHB, SECTION VIII.C)? WHAT IS THE CLAIMANTS' POSITION ON WHEN A BREACH OF THE BITS OCCURRED IN RESPECT OF THEIR SECOND ALTERNATIVE CLAIM?

A. Summary of Claimants' Second Alternative Claim

46. Claimants' second alternative claim[92] is that if the Tribunal were to conclude that the Government decision announced on September 9, 2013, that the Project would not be done, should not be considered the date when the Government repudiated the Project Rights in breach of the BITs, then Romania's post-September 2013 conduct demonstrates it repudiated the Project Rights thereafter.[93]

47. For the reasons set out below, after September 9, 2013, the date when Romania's treatment most clearly completed the effective taking of the Project Rights in breach of the BITs was July 27, 2021, when, following Romania's application, the Roşia Montană Mining Landscape was inscribed on the UNESCO World Heritage List.

48. For purposes of this second alternative claim, Claimants maintain that Romania's treatment of Gabriel's investment in RMGC and of the Project beginning in August 2011 (and on November 23, 2011 for Gabriel Canada) breached Romania's obligation to accord fair and equitable treatment, and clearly included the threat of a taking that negatively impacted the value of the Project Rights. This impact was most evident after January 31, 2012 when a decision on the environmental permit should have been, but was not, made.[94]

B. Post-2013 Events Relevant to the Second Alternative Claim

49. As described above, Romania's post-2013 acts and omissions include statements of senior members of Government, failures to act extending over the course of years while there had been a continuing legal obligation to act, and other consistent conduct reflecting a decision

[92] C-PHB § VIII.C.

[93] *See also* Memorial §§ IX.A-B, D; Reply §§ V-VI; C-PO27 ¶ 208 *et seq*.

[94] Memorial ¶ 366; C-Opening (2020) vol.4:22 (*citing* C-633 (interview of Minister of Environment Borbély on November 29, 2011)). *See also* C-PHB ¶¶ 409-422 (demonstrating link between Project permitting and GBU's market capitalization and impact of hold-up from late 2011 through September 9, 2013).

that the Projects would not be done and the State's joint venture with Gabriel was over. Thus although Romania did not repudiate the Project Rights *de jure* through a written decision or on the basis of law, the post-2013 events unmistakably show that such decision had been made in substance *de facto*. While some vestigial legal rights remain, they do so only in form.

50. Claimants submit that the UNESCO inscription is the most significant event postdating the Government's repudiation of the Project Rights on September 9, 2013. Claimants' appreciation of the significance of the post-2013 events leading to that inscription has evolved as Romania steered the developments relating to its UNESCO application over the course of this case.[95]

51. The entire UNESCO application process unfolded during the pendency of this arbitration. Claimants learned from public pronouncements while preparing their Memorial that Romania submitted the application.[96] Claimants did not have a copy of the nomination document or the correspondence regarding the Ministry of Culture's delineation study until Claimants were preparing their Reply.[97] By that time, Romania also had asked UNESCO to postpone its application, leaving the process and its outcome uncertain, including as to timing.[98]

52. During the oral hearing in December 2019 Respondent represented that the nomination file was no longer submitted to UNESCO.[99] One month after the hearings, however, Romania resubmitted the nomination file to UNESCO, and UNESCO inscribed the Roşia Montană Mining Landscape as a World Heritage site only on July 27, 2021, after post hearing briefs had been filed.[100]

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[95] To the extent Respondent maintains its jurisdictional objections in relation to claims based on events that post-date the January 2015 notice of dispute, Claimants refer the Tribunal to their prior submissions in response. *See* C-PHB §§ II.A.2, II.B.3-4.

[96] *See* Memorial § IX.D.2.

[97] Gligor-II ¶¶ 110-117; Reply ¶¶ 273-275.

[98] Gligor-II ¶¶ 112-113, 118-125. *See also* Counter-Memorial ¶ 417 (noting that the UNESCO application was in its "early stages and its outcome is uncertain").

[99] Tr.(Dec.3, 2019)556:12-14, 557:16 – 558:7 (R-Opening). *See also* Rejoinder ¶ 711.

[100] *See generally* C-Observations.

53. In light of the full record of events, if the Tribunal were to conclude that the Government's conduct as of September 9, 2013 did not effect a *de facto* taking of the Project Rights or otherwise frustrate them in their entirety in breach of the BITs, then that breach most clearly occurred thereafter on July 27, 2021, when UNESCO inscribed the Roşia Montană Mining Landscape as a World Heritage site following Romania's resubmission of its application to UNESCO on January 31, 2020.[101]

54. Claimants review below in chronological order several dates associated with Romania's post-2013 acts and omissions that the Tribunal may consider as the moment when the Project Rights were effectively taken or otherwise entirely frustrated in breach of the BITs.

1. Voting Down the Special Law

55. Following the Government's September 9, 2013 pronouncement rejecting the Project and instructing the Senate Committees urgently to vote to reject the Special Law, which those Committees did unanimously the next day on September 10, there were several additional votes in Parliament that followed the governing coalition's instructions to reject the Special Law, namely:

a) the Special Commission voted unanimously (17-0 with two abstentions) to reject the Special Law on November 11, 2013;

b) the Senate voted (119-3) on November 19, 2013 to reject the Special Law; and

c) the Chamber of Deputies voted (301-1) on June 14, 2014 to reject the Special Law.[102]

These further votes were as directed by the leaders of the coalition Government, as Prime Minister Ponta and Senator Antonescu confirmed in their joint press conference held before the Special Commission vote on November 11, 2013.

[101] *See supra* ¶ 35.

[102] C-PHB ¶ 251, n.516.

56. The undeniable link between the outcome of the vote on the Special Law and the fate of the Project was forged by the many statements throughout 2013 by Prime Minister Ponta, Minister Şova, Minister of Environment Plumb, Minister of Culture Barbu, and other senior Government officials, who insisted that the Project would proceed only if Parliament voted to approve the Special Law. In implementing the policy in place since August 2011, the Government thus decided to treat Parliament's vote on the Special Law as the political decision whether the Project would be done. Following the street protests, however, the Government itself made the decision announced on September 9, 2013 to repudiate the Project Rights. The Parliamentary votes that took place thereafter were pre-arranged by the ruling Government coalition to give effect to that decision. As Senator Antonescu made clear before the Special Commission vote in November 2013 rejecting the Special Law, the leaders of the Government's ruling coalition had "negotiated it politically."[103]

57. In these circumstances, the dates of the Parliamentary votes to reject the Special Law do not more clearly mark when the Project Rights were repudiated and the BITs were breached than does the decision announced on September 9, 2013. This is because the formal rejection of the Special Law, which occurred progressively through the votes taken on the dates referenced above, did not provide a basis in law to cancel the Project or to repudiate the Project Rights.

2. Failures to Take Administrative Actions That Were Due

58. Similarly, if one were to disregard the fact that the Ministry of Environment was legally obligated to take its decision on the environmental permit by the end of January 2012,[104] having purported to continue the administrative process, the Ministry of Environment was legally obligated to take a decision at the latest by August 12, 2013, but did not do so.[105]

59. That is, after the Ministry of Environment reconvened the TAC in May 2013, the TAC reconfirmed that the permitting process and its review and assessment of the EIA Report

[103] C-PO27 ¶ 50.d; C-PHB ¶ 192.

[104] Memorial ¶ 366; C-Opening (2020) vol.4:22-23 (*citing* C-633 (interview of Minister of Environment Borbély on December 18, 2011 stating a decision on the EP by the end of January)). *See also* C-PO27 ¶¶ 24-25; C-PHB ¶¶ 64-65, 412-413.

[105] Memorial ¶ 446; Mihai-I § VIII.B.4, ¶ 397.

had been "finalized."[106] The Ministry of Environment then prepared and published for public consultation draft environmental permit conditions and held a final TAC conciliation meeting on July 26, 2013.[107] Professor Mihai demonstrates that in light of these events the Ministry of Environment therefore was obligated to take its decision on the environmental permit by August 12, 2013.[108]

60. The ongoing failure to issue the environmental permit or any administrative decision on the permit during or after 2013, punctuated by what turned out to be pretextual TAC meetings in 2014 and 2015, is further evidence of the repudiation of the Project Rights, but does not suggest a date for breach of the BITs other than September 9, 2013.

61. The Government's ongoing failure to issue the exploitation licenses for Bucium or to take any decision on RMGC's license applications is to the same effect. In short, the evidence shows that other than a pro-forma meeting at RMGC's insistence with NAMR in 2015, following which nothing happened, even though progress was made for other companies, no action was ever taken on RMGC's Bucium licenses.[109] While Romania has maintained that these applications remain pending, its arguments lack credibility and must be rejected.

62. Although it may be difficult to determine when an ongoing failure to act undermines protected rights to such a degree that it effects a taking, the evidence shows that the failure to act on the environmental permit and the Bucium license applications was due to the interference of the Government beginning in 2011 and culminating in the decision announced on September 9, 2013.[110] The evidence shows that the frustration of the Project Rights was not caused by the mere passage of time without completion of these administrative procedures, but

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[106] C-PHB ¶¶ 65(a)-(c).

[107] C-PHB ¶ 65(c). *See also id.* ¶¶ 65(d)-(h).

[108] Mihai-I § VIII.B.4, ¶ 397.

[109] Reply ¶¶ 303-309. *See also* Bîrsan-I ¶¶ 399-406; Bîrsan-II ¶¶ 209-218.

[110] *See* Sohn & Baxter (CL-65) at 559 ("Whether an interference with the use, enjoyment, or disposal of property constitutes a 'taking' or a 'taking of use' will be dependent upon the duration of the interference. Although a restriction on the use of property may purport to be temporary, there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property. Considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary."); OECD Draft Convention (CL-134) at 125, cmt. to Art. 3.

rather was caused by the decision reached earlier by the Government that these Projects would not be done.[111]

3. Issuance of the 2015 LHM

63. The statements accompanying and supporting issuance of the 2015 LHM were further unequivocal indications that the Government had rejected the Project and thus also may be considered.[112] The issuance on December 24, 2015 of the 2015 LHM, however, should not be seen as the date when the Project Rights were repudiated in breach of the BITs. Although the 2015 LHM expanded the description of Roşia Montană as an historical monument, it did not alter the nature of the obstacle previously imposed by the 2010 LHM. Moreover, as discussed, but for the Government's repudiatory decision announced on September 9, 2013, the 2010 LHM would have been corrected and the 2015 LHM unquestionably would not have been issued in its objectionable, unlawful form.[113]

64. Respondent has argued that the list of historical monuments, as such, was not an obstacle to the Project because declassification of historical monuments remained possible to the extent that ADCs remained valid.[114] Following the Government's repudiation of the Project in September 2013, however, it was not credible to expect that the Ministry of Culture would give effect to the ADCs and declassify the affected historical monuments.[115] Thus, the real blockage was not the LHM, but the Ministry of Culture's continued failure to declassify the listed historical monuments as required by law.[116] Following the earlier repudiation of the Project Rights, it is not credible to expect that would have happened.

65. The real significance of the 2015 LHM was as preparation for the proposed UNESCO nomination file. This is evident from:

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[111] Memorial ¶ 763 (*citing* authorities observing that in the absence of a formal expropriation, the tribunal must look behind appearances and investigate the realities of the situation).

[112] C-Opening (2019) vol.7:18; Gligor-I ¶¶ 163-165.

[113] *See* Memorial ¶ 158(d), ¶ 332; Reply ¶ 613.

[114] *See* Counter-Memorial ¶ 417.

[115] *See* C-PHB ¶ 200.

[116] *See* Schiau-I ¶¶ 31-32, 79, 84, 116, 356.

a) the Minister of Culture's January 9, 2016 Facebook post announcing the 2015 LHM and expressing support for a UNESCO application, "tagging" "Roşia Montană in UNESCO World Heritage;"[117] and

b) the Ministry of Culture study delineating the boundaries of the "Alburnus Maior Archaeological Site - Roşia Montană (a historical monument included on the 2015 List of Historical Monuments, Alba County, code AB-I-s-A-00065)," which states that the study was prepared for purposes of establishing the precise boundaries of the historical monument for the nomination of the Roşia Montană Mining Landscape to be inscribed on the UNESCO World Heritage List.[118]

4. The UNESCO Application and Inscription

66. On February 18, 2016, Romania nominated the "Roşia Montană Mining Cultural Landscape" to be inscribed onto the UNESCO World Heritage List, thus placing the site onto Romania's UNESCO Tentative List.[119] On January 4, 2017, Romania submitted the nomination file to UNESCO in support of its application.[120]

67. Romanian law mandates special protections for UNESCO World Heritage sites.[121] Special protection measures must be established to ensure the conservation of such sites and must be reflected in the applicable urbanism plans with priority over industrial uses such as mining. This requirement is distinct from the protections in place in relation to historical monuments generally and, by virtue of Article 15 of GO 47/2000, extends to those historical monuments "for which Romania has submitted the file for their inclusion on the World Heritage List."[122] Thus, having submitted the nomination file, Romania triggered the conservation requirements in GO 47/2000 for the mining landscape nominated in the UNESCO application.

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[117] January 2016 Facebook post (C-822); C-Opening (2019) vol.7:18.

[118] Ministry of Culture Letter dated Dec. 28, 2016 transmitting delineation study (C-2370) at 5.

[119] Memorial ¶ 604; C-Observations ¶ 10.

[120] UNESCO Nomination File (C-1892); Ministry of Culture press release Jan 5, 2017 (C-897).

[121] C-Observations ¶¶ 12-13.

[122] C-Observations ¶ 13 (*citing* GO 47/2000, Art. 15 (C-2350)).

68. On June 28, 2018, however, Romania requested the UNESCO World Heritage Committee to refer the Roşia Montană nomination file back to Romania and, on July 4, 2018, the World Heritage Committee did so.[123] Respondent submits that the effect of that decision was that "the file [wa]s no longer 'submitted to the UNESCO World Heritage Committee'" and that Article 15 of GO 47/2000 therefore did not apply.[124] In Respondent's view, the legal impediment to issuing a construction permit for the Project that was put in place on January 4, 2017 upon submission of the UNESCO nomination file was removed on July 4, 2018 when the UNESCO file was no longer submitted to the UNESCO World Heritage Committee for inclusion on the World Heritage List.[125] In other words, Romania contends that its initial application created a legal impediment to the Project that was lifted shortly thereafter and thus was only temporary.

69. The circumstances changed on January 31, 2020, when Romania resubmitted the Roşia Montană UNESCO Nomination file, thus reactivating its application and triggering again the protections in Article 15 of GO 47/2000.[126] The decision to resume the procedure was taken by the Government, including the Prime Minister,[127] and was followed by steps to implement the protections into the urbanism plan for the area as required by Romanian law.[128]

70. On July 27, 2021, UNESCO inscribed the "Roşia Montană Mining Landscape" onto UNESCO's World Heritage List.[129] The Roşia Montană Mining Landscape, as delineated in the Ministry of Culture's delineation study and described in Romania's Nomination file,[130] thereby became a permanent UNESCO World Heritage site that is subject to conservation protections under Romanian law, including via the urbanism plan for the area. Conservation of the Roşia Montană Mining Landscape clearly excludes the mining Project as UNESCO also

[123] C-Observations ¶¶ 15-16.

[124] C-Observations ¶ 17. *See also* Rejoinder ¶ 711.

[125] *See also* Rejoinder ¶ 711; Tr.(Dec.3, 2019)556:12-14, 557:16 – 558:7 (R-Opening).

[126] C-Observations ¶ 19 (*citing* Ministry of Culture press release dated Jan. 31, 2020 (C-2982)).

[127] *Id.*

[128] *Id.* (*citing* Ministry of Culture press release dated Feb. 5, 2020 (C-2983)).

[129] C-Observations ¶ 21 (*citing* UNESCO's July 27, 2021 announcement (C-2984)).

[130] UNESCO Nomination File (C-1892) at 10-11, 56.

inscribed the site on the List of World Heritage in Danger "due to threats posed by plans to resume mining which would damage a major part of the inscribed Mining Landscape."[131]

71. As of January 31, 2020, while the UNESCO application was merely pending, as Respondent earlier observed, it was uncertain whether the application would be accepted and, thus, whether the obstacle to the Project created by the Romanian law requirement that nominated sites be conserved would be permanent.[132]

72. From July 27, 2021, however, any such uncertainty was removed and the legal impediment to obtaining any construction permit for the Project became permanent.[133]

73. As the legal impediment derives from the UNESCO listing of the landscape, it is of a different character than the legal impediment created by the list of historical monuments, which recognizes the archaeological value of certain sites.[134] Thus, Minister of Culture Gheorghiu explained in a July 2021 interview that the UNESCO protections of the landscape would not be lifted even if the archaeological sites listed as historical monuments on the 2015 LHM were declassified in accordance with the archaeological discharge certificates issued in the Project area.[135]

C. Claimants' Second Alternative Claim Is That a Breach of the BITs Occurred on July 27, 2021, the Date of the UNESCO Inscription

74. For the reasons set forth above, Claimants' second alternative claim is that if the Tribunal does not find that the Project Rights were taken as of September 9, 2013, it should find they were taken as of July 27, 2021, the date of the UNESCO inscription.

75. In so finding, the Tribunal also should recognize that the Government's treatment of Gabriel's investment prior to that date including, the obstruction of Project permitting from August 2011, the announced decision on September 9, 2013 rejecting the Project and RMGC,

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[131] *Id.*

[132] *See* C-Observations ¶ 32 (*citing* Counter-Memorial ¶ 417 (Respondent observing that the outcome of the UNESCO application was uncertain)). *See also* Gligor-II ¶¶ 112-113, 118-125.

[133] C-Observations ¶ 32.

[134] *See* C-Observations ¶¶ 27, 30-31. *See also* Delineation study (C-2370) at 32.

[135] C-Observations ¶ 31.

and the continued failure to permit the Projects over a sustained period thereafter, was wrongful either as part of the taking that culminated in the UNESCO inscription or as a lack of fair and equitable treatment.

76. Thus, the UNESCO inscription was the culmination of a Government policy and course of conduct in relation to the Project that began in August 2011 and continued thereafter that, after blocking permitting, led to a decision by the Government on the political level to reject the Project and the State's joint venture with Gabriel. This rejection in turn caused the Government not to complete any aspect of permitting in relation to the Project Rights, and instead to seek the UNESCO listing, which imposed a permanent legal obstacle on the Project and completed the taking of the Project Rights without due process and without compensation.[136]

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

A. Damages in Connection with a Treaty Breach Based on Post-2013 Events

77. For Claimants' principal and first alternative claims, the date of the breach, when compensation was due, is September 9, 2013.[137] For Claimants' second alternative claim, as discussed above, that date is July 27, 2021.

78. While compensation is due on the date of the breach, the amount of compensation due should be assessed on the basis of the fair market value of the Project Rights measured without the impacts of Romania's treaty violations or threats thereof.[138]

79. That is achieved by basing the amount of compensation on the fair market value of the Project Rights before the wrongful conduct commenced, *i.e.* the *ex ante* value.[139]

[136] C-Observations ¶¶ 23-39.

[137] C-PO27 ¶ 50, 53, 56, 59, 71; C-PHB § VIII.A-B.

[138] Memorial ¶¶ 822-828, 851-855; C-PO27 ¶ 72; C-PHB ¶¶ 272, 276, 283, 408.

[139] C-PHB ¶¶ 271-272.

80. Regardless whether the *ex ante* value is higher or lower than the value on the date of the breach, compensation based on the *ex ante* value ensures that compensation wipes out the damage caused by the wrongful conduct over time up to the date of the breach and thus does not allow the wrongdoer to benefit from its wrongful conduct.[140]

a) When the *ex ante* value is lower than the value on the date of the breach, compensation at the *ex ante* level may need to be supplemented (*e.g.,* by the increase in value up to the date of the breach where the loss caused by the wrongful conduct includes the benefit of that increased value).[141]

b) Where the *ex ante* value is higher than the value on the date of the breach, compensation at the *ex ante* level ensures reparation for all loss caused by the wrongful conduct. Respondent's argument that the price of gold fell as the Government's wrongful interference progressed from 2011 through 2013 does not provide a basis to avoid full compensation for all of the loss caused by Romania's wrongful conduct.[142]

81. The best evidence of the fair market value of the Project Rights is the market capitalization of Gabriel Canada (GBU).[143] The *ex ante* value is the measure of Gabriel's market capitalization prior to the commencement and public threats of the wrongful conduct.[144]

82. The evidence shows that the value of the Project Rights on July 29, 2011 is the *ex ante* value because that was the date immediately prior to when senior members of Government announced that the agreements with Gabriel and RMGC must be renegotiated before Project permitting could occur.[145] It is reasonable to conclude that those negative public statements made by senior members of Government, repeatedly calling for a hold on permitting pending

[140] C-PHB ¶¶ 277-278.

[141] Memorial ¶¶ 848-849.

[142] *See* C-PHB ¶ 288 and C-PHB-II ¶ 228 (regarding changes in the price of gold over time).

[143] C-PHB ¶¶ 290-292, 294.

[144] *See* C-PHB ¶ 284.

[145] C-PHB ¶¶ 42-45, 408-409.

renegotiation with Gabriel, negatively impacted Gabriel's publicly-traded share price.[146] Compass-Lexecon's assessment of the fair market value of the Project Rights on that date is based on the weighted average of GBU's market capitalization over the 90 days leading to and including July 29, 2011, to smooth out volatility in the share price, *i.e.*, US$ 2,617 million.[147] As Compass-Lexecon also showed, the weighted average of GBU's market capitalization over the whole year of 2011, *i.e.*, US$ 2,568 million, is not materially different.[148]

83. Although the Canada BIT entered into force on November 23, 2011,[149] the Tribunal can take note of the *ex ante* value of the Project Rights on July 29, 2011 for purposes of assessing damages caused by conduct following November 23, 2011 that frustrated the Project Rights in breach of the Canada BIT.[150] GBU's market capitalization as of November 23, 2011 was US$ 2,503 million,[151] which may be considered the *ex ante* measure of value of the Project Rights in relation to Gabriel Canada's claim if the Tribunal were to conclude it could not consider earlier dates.[152]

84. Had the Government allowed the permitting process to follow its lawful course, a decision on the environmental permit should have been made by January 31, 2012, as Prof. Mihai explains and Minister of Environment Borbély at the time confirmed.[153] Thereafter, as action on the environmental permit clearly should have been taken but was not, Gabriel's share price fell sharply, reflecting the negative impacts of the unlawful holdup.[154] As permitting remained uncertain over the next several months, Gabriel's share price did not recover and

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[146] *See*, *e.g.*, Memorial ¶ 675; C-PHB ¶¶ 286, 408.

[147] C-PHB ¶ 293.

[148] C-PHB ¶ 293 (*citing* Compass-Lexecon 2020 Hearing Presentation Slide 9 (showing 90-day weighted average up to and including July 29, 2011 was US$ 2,617 million and 2011 annual weighted average was US$ 2,568 million)).

[149] The Canada BIT entered into force November 23, 2011. RfA n.1 (*citing* (C-2)); Reply n. 770.

[150] C-PHB ¶¶ 238 n.502, 287, 427.

[151] GBU market capitalization Blomberg data (C-2860.04 xlsx) (line 8477, column E).

[152] C-PHB ¶¶ 287, 427. *See also id.* ¶ 439 n. 897. *See also* C-PHB-II ¶ 229.

[153] Memorial ¶ 366; C-Opening (2020) vol.4:22 (*citing* C-633 (interview of Minister of Environment Borbély on November 29, 2011)). *See also* C-PHB ¶¶ 412-413.

[154] *E.g.*, C-PHB ¶¶ 413-421; C-Opening (2020) vol.4:52.

instead dropped by over 50% on September 9, 2013 alone, from which it never recovered.[155] This underscores that the measure of the fair market value of the Project Rights as of a date after 2011, most strikingly from early 2012 onwards, must correct for the negative impacts of the wrongful conduct.[156]

85. In order to assess what the fair market value of the Project Rights would have been on a date after early 2012 absent the impacts of the wrongful conduct, an indexing approach may properly be used.[157] That is, the Tribunal may consider what GBU's market capitalization would have been had it progressed from a last clean date in line with the broader market, as reflected in several indices that track the publicly traded value of gold mining companies.[158]

a) As Compass-Lexecon explains, the S&P/TSX index is the most appropriate index to apply for this purpose in this case because GBU was itself included in the S&P/TSX index and its market capitalization prior to the impacts of Romania's treaty violations was in the median of companies listed on that index.[159]

b) Respondent's expert Dr. Burrows accepts that an indexing method may be used to extrapolate the value of the company on later dates (subject to his objection regarding the information available to the market as of mid-2011), but maintains that it would be appropriate to use the average of the S&P/TSX index and the MVIS index to do so.[160]

86. Notably, the indexing approach does not remove the negative impacts of the wrongful conduct entirely because it does not take account of the increase in value the Project Rights would have realized, but for the wrongful conduct, upon the issuance of the

[155] C-PHB ¶ 422. *See also* C-Opening (2020) vol.4:52 (showing Gabriel's actual market capitalization over this time period relative to what Gabriel's market capitalization would have been if it had progressed in line with various market indices from July 29, 2011).

[156] C-PHB ¶ 428.

[157] C-PHB ¶ 289, §X.H.2.

[158] C-PHB ¶ 428; CompassLex 2020 Hearing Presentation, slide 49.

[159] C-PHB ¶¶ 433-434 (explaining the relevance of the S&P/TSX index to this analysis).

[160] CRA 2020 Hearing Presentation, slide 57. *See also* C-PHB ¶ 437.

environmental permit.[161] Thus, indexing as applied in this case yields a significantly lower measure of what Gabriel's market capitalization would have been on any date after early 2012 absent the wrongful conduct.[162]

87. This indexing approach may be used to assess Claimants' damages based on the value of the Project Rights as of July 27, 2021 (the date of the UNESCO inscription) absent the impacts of Romania's treaty violations leading up to that date.

B. Quantification of Damages in Relation to the Second Alternative Claim

88. Claimants described how, based on the data in the record, GBU's market capitalization on any given date could be indexed to extrapolate the value it would have had on a later date, had GBU's share price moved in line with the general market, with reference to several gold mining market indices.[163]

89. The data needed to perform those calculations is publicly available and 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). The data from those exhibits was consolidated in the "chart data" tab of the excel file attached to Claimants' email to Ms. Marzal dated September 26, 2020 accompanying Claimants' hearing demonstratives. The data in Claimants' exhibits and thus in the excel file was through March 31, 2020.

90. In order to permit the Tribunal to calculate indexed values for GBU's market capitalization for dates after March 31, 2020, including for the later dates associated with the UNESCO inscription, Claimants provide herewith an updated excel file, prepared by Compass-Lexecon, that includes the same data referenced above updated through April 30, 2022. The

[161] Market analysts anticipated that Gabriel's share price would have increased by a further 18% to 50% once the environmental permit was granted. C-PHB ¶ 412.

[162] *See also* C-PHB ¶ 435.

[163] C-PHB ¶ 439 & n. 897.

excel file also includes a worksheet with a tab labeled "Index Calculator" that performs the indexing calculation directly.[164]

91. To calculate an indexed market capitalization for GBU using the Index Calculator:[165]

a) select the "last clean date" and the valuation date;

b) select the index or indices, keeping in mind that selecting more than one index will provide an average of those selected.

92. Doing so for July 27, 2021, the date of the UNESCO inscription, using the Index Calculator tab of C-2991, selecting July 29, 2011 as the last clean date, July 27, 2021 as the valuation date, and the S&P/TSX index, yields a derived market capitalization of GBU of **US$ 2,009 million**.

93. To make this calculation manually without using the Index Calculator tab, referring only to the data as assembled in the updated exhibit data reproduced in the C-2991 excel file, the following steps are done:[166]

(i) GBU's market cap at July 29, 2011 (tab C-2680.04, column [E], row 8360), US$ 2,955.94 million,

(ii) Multiplied by S&P/TSX at July 27, 2021 (tab C-1853.04, column [D], row 6426), 288.65,

(iii) Divided by S&P/TSX at July 29, 2011 (tab C-1853.04, column [D], row 2775), 424.80,

(iv) Equals: US$ 2,008.55 million

94. In order to calculate damages equal to the fair market value of the Project Rights based on GBU's market capitalization, Compass-Lexecon made two adjustments.[167] First,

[164] *See* Index Calculator, submitted herewith as **C-2991**. Claimants note the Tribunal's direction to refrain from submitting new documents other than what seems indispensable. Tribunal Direction to the Parties dated April 12, 2022. The only new information in the Index Calculator, apart from automating the arithmetic, is the updated data from April 1, 2020 through April 30, 2022 as noted above. *See also* C-Observations ¶ 40.

[165] Index Calculator (C-2991). *See also* C-PHB ¶ 439 & n. 897.

[166] *See* C-PHB ¶ 439 & n. 897.

Compass-Lexecon deducted cash and cash equivalents that Gabriel Canada held in mid-2011 in addition to the Project Rights, and second, Compass-Lexecon added an acquisition premium.[168] These adjustments are discussed further below.

95. In assessing the value of the Project Rights as of July 29, 2011, Compass-Lexecon deducted cash held at that time by Gabriel.

a) As of June 30, 2011, Gabriel Canada held US$ 183 million in cash and cash equivalents.[169] Gabriel transferred these cash resources to RMGC over time based on RMGC's cash requirements.[170] Based on Gabriel's consolidated financial statements, Compass-Lexecon summarized the amounts through 2016 that Gabriel Canada invested annually through RMGC in order to maintain the Project Rights.[171]

b) Compass-Lexecon's summary shows that after July 29, 2011, *i.e.*, from mid-2011 until the end of 2016, Gabriel invested in total a further US$191 million in RMGC to maintain the Project Rights.[172]

Therefore, in order to derive the fair market value of the Project Rights based on GBU's market capitalization for valuation dates after 2016, there is no basis to make a deduction in relation to the cash, because by 2016 Gabriel had invested that further cash into RMGC in order to maintain the Project Rights.

96. To assess the value of the Project Rights as of July 29, 2011, Compass-Lexecon added an acquisition premium of 35%. That is because the market capitalization of Gabriel most

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[167] CompassLex-I ¶ 46.

[168] CompassLex-I ¶¶ 6, 53.

[169] CompassLex-I ¶ 46.

[170] CompassLex-I ¶ 46 n. 61.

[171] CompassLex-I ¶ 24 (*citing* C-1876).

[172] Based on the summary of amounts invested by Gabriel into RMGC as set forth in C-1876, the total amount Gabriel transferred to RMGC in each year was (in US$ 000s): 66,557 in 2011; 59,140 in 2012; 40,889 in 2013; 27,928 in 2014; 17,818 in 2015; and 12,177 in 2016. Thus, counting half for 2011, by the end of 2016, Gabriel had invested a further US$ 191,230,000 into RMGC.

directly reflects the value of the Project Rights from a minority shareholder perspective,[173] and the evidence shows that the fair market value of the Project Rights includes a premium over Gabriel's stock market capitalization.[174] Respondent's mining expert, Mr. Guarnera, who also is a mining valuation expert, confirmed in a public valuation report unrelated to this case that he prepared that such premia in the industry typically range from 20% to over 50%.[175] In its valuation, Compass-Lexecon concluded that a 35% premium is a necessary component of a fair market value measure of the Project Rights.[176]

97. Taking these factors into account, the quantification of damages for Claimants' second alternative claim based on the fair market value of the Project Rights as of July 27, 2021 absent the impacts of Romania's treaty violations, based on the indexed GBU market capitalization from a last clean date of July 29, 2011, would be as follows:

a) From US$ 2,009 million, as noted above, no cash adjustment would be needed, because by July 2021, the cash that Gabriel had held since 2011 already had been invested into RMGC to maintain the Project Rights.

b) Adding a 35% premium, as Compass-Lexecon explains, to derive the fair market value of the controlling interest in the Project Rights results in an addition of a further US$ 703 million.

c) Thus, the total principal damage due as of July 27, 2021 is US$ 2,712 million.

d) Interest at the rate of US Prime + 2% compounded annually would be due and payable from the valuation date, July 27, 2021, up through the date of payment.[177]

[173] C-PHB ¶ 296.

[174] C-PHB ¶¶ 295-313; CompassLex 2020 Hearing Presentation, slides 18-20.

[175] C-PHB ¶ 301.

[176] C-PHB ¶ 306. *See also* C-PHB-II ¶¶ 265-277.

[177] C-PHB ¶¶ 447-449; C-PHB-II ¶ 280.

98. Claimants' second alternative claim thus is summarized as follows:

Claimants' second alternative claim

GBU market capitalization indexed via S&P/TSX from July 29, 2011 to July 27, 2021	US$ 2,009 million
– cash and cash equivalents	--
Subtotal	US$ 2,009 million
+ acquisition premium (35%)	US$ 703 million
Damages to Claimants	**US$ 2,712 million**
Plus interest at US Prime + 2% compounded annually to run from July 27, 2021 until date of payment	

99. For ease of reference, Claimants provide immediately below the calculations for Claimants' principal and first alternative claims.

100. Claimants' principal claim as summarized by Compass-Lexecon is as follows:[178]

Claimants' principal claim

GBU market capitalization (90-day trailing average as of July 29, 2011)	US$ 2,617 million
– cash and cash equivalents	US$ 183 million
Subtotal	US$ 2,434 million
+ acquisition premium (35%)	US$ 852 million
Damages to Claimants	**US$ 3,286 million**
Plus interest at US Prime + 2% compounded annually to run from September 9, 2013 until date of payment	

[178] CompassLex-II ¶ 90.

101. Claimants' first alternative claim, based on GBU's market capitalization from July 29, 2011, indexed with reference to the S&P/TSX index to the date of the breach, September 9, 2013, is as follows.[179] Referring to the data as assembled in the Index Calculator:[180]

(i) GBU's market cap at July 29, 2011 (tab C-2680.04, column [E], row 8360: US$ 2,955.94 million),

(ii) Multiplied by S&P/TSX at September 9, 2013 (tab C-1853.04, column [D], row 3548: 207.63),

(iii) Divided by S&P/TSX at July 29, 2011 (tab C-1853.04, column [D], row 2775: 424.80),

(iv) Equals: US$ 1,444.78 million

102. Therefore, the quantification of damages for Claimants' first alternative claim based on the fair market value of the Project Rights as of September 9, 2013 absent the impacts of Romania's treaty violations, based on the indexed GBU market capitalization from a last clean date of July 29, 2011, would be as follows:

a) From the indexed GBU market capitalization of US$ 1,445 million, a cash adjustment of US$ 60 million may be made, because from the US$ 183 million Gabriel held in mid-2011, by September 2013 Gabriel had invested a further US$ 123 million into RMGC to maintain the Project Rights.[181]

[179] Although Claimants earlier provided indexing calculations up to September 6, 2013, the last trading day before the Government's repudiatory announcement (C-PHB ¶ 435), the indexing should be done from the last clean date up to the date of breach, September 9, 2013. Claimants therefore hereby provide a corrected calculation of their first alternative claim. The September 9, 2013 date is correct because using the indexing method removes the impacts of Romania's treaty violations (other than, as noted above, in relation to the fact that but for the wrongful conduct, a decision on the environmental permit would have been issued prior to September 9, 2013). *See supra* ¶ 3 n.7.

[180] C-2991. *See also* C-PHB ¶ 439 & n. 897

[181] Based on the summary of amounts invested by Gabriel into RMGC, as set forth in C-1876, Gabriel transferred to RMGC (US$ 000): 66,557 in 2011; 59,140 in 2012; and 40,889 in 2013. Thus, counting 50% for 2011 (US$ 000) (33,278.50), 100% for 2012 (59,140) and 75% for 2013 (30,666.75) means that by September 2013, Gabriel had invested a further ~US$ 123 million of the earlier US$ 183 million into RMGC.

b) Adding a 35% premium, as Compass-Lexecon explains, to derive the fair market value of the controlling interest in the Project Rights results in an addition of a further US$ 485 million.

c) Thus, the total principal damage due as of September 9, 2013 is US$ 1,870 million.

d) Interest at the rate of US Prime + 2% compounded annually would be due and payable from the valuation date, September 9, 2013 up through the date of payment.[182]

103. Claimants' first alternative claim thus is summarized as follows:

Claimants' first alternative claim

GBU market capitalization indexed via S&P/TSX from July 29, 2011 to September 9, 2013	US$ 1,445 million
– cash and cash equivalents	US$ 60 million
Subtotal	US$ 1,385 million
+ acquisition premium (35%)	US$ 485 million
Damages to Claimants	**US$ 1,870 million**
Plus interest at US Prime + 2% compounded annually to run from September 9, 2013 until date of payment	

* * * *

[182] C-PHB ¶¶ 447-449.

Respectfully submitted,

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