

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES**

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

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

RESPONDENT'S SUBMISSION ON COSTS

16 December 2022

LALIVE

LDDP
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1 INTRODUCTION

- 1 The Respondent makes this Submission on Costs in accordance with the Tribunal's communications of 2 and 8 December 2022.
- 2 The Claimants should be held responsible for the costs of this arbitration and for the Respondent's legal fees and expenses. The Respondent accordingly requests an award in its favor of **RON 60,568,106.64**, **EUR 2,309,548.68**, and **USD 2,907,283.41**.

2 STANDARDS FOR THE ALLOCATION OF COSTS

- 3 The Tribunal's broad discretion when deciding on the allocation of costs is grounded in Article 61(2) of the ICSID Convention, which provides that the Tribunal "shall decide how and by whom [the Parties'] expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid." Article XIII(9) of the Canada-Romania BIT similarly confirms that a "tribunal may also award costs in accordance with the applicable arbitration rules".¹
- 4 The guiding principle in ICSID arbitration is that costs follow the event and accordingly the prevailing party should be reimbursed its reasonable costs.² When exercising their discretion to allocate costs, ICSID tribunals have also taken into account the circumstances of the case, including "the

¹ Canada-Romania BIT, at **Exhibit C-1**, p. 16 (Art. XIII (9)). The UK-Romania BIT is silent on the issue of costs.

² E.g., *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, at **Exhibit CLA-70**, p. 104 (para. 380) (referring to a "newly established and growing trend" that costs should follow the event); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/13/1, 22 August 2017, at **Exhibit CLA-250**, p. 289 (para. 1060) ("Applying the broad discretion conferred by Article 61(2), the Tribunal finds that the 'costs follow the event' approach is the most appropriate in the present case. (...) The Tribunal also notes that investment tribunals are increasingly favouring the 'cost follows the event approach'.").

procedural conduct of the parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily”³

3 COSTS CLAIMED

- 5 Applying the above principles, the Tribunal should make an award of full costs in the Respondent's favor and order that the Claimants bear their own costs.
- 6 First, as the Respondent has demonstrated in its submissions and at the hearings, the Claimants have failed to establish the Tribunal's jurisdiction.⁴ If the Tribunal agrees with the Respondent's case on jurisdiction, this will necessarily result in an award of the Respondent's costs in full.
- 7 Moreover, even assuming the Tribunal were to find that it does have jurisdiction over some of the claims, the Claimants struggled throughout the proceedings and ultimately failed to articulate a cogent factual and legal case or to establish any breach of the BITs.⁵ They also failed to establish a causal link between the alleged breaches of the BITs and their purported damages. RMGC's failure to secure and maintain a social license, among other factors would, in any event, have prevented the Project from going forward.⁶ Finally, the Claimants' quantification of their alleged damages is fundamentally divorced from reality, including because it is premised on a baseless valuation date, incorrectly uses the market capitalization of Gabriel Canada on this date as a proxy for the value of the Claimants' interest in RMGC, and disregards that this market

³ *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Reconsideration and Award, ICSID Case No. ARB/08/5, 7 February 2017, at **Exhibit CLA-198**, p. 244 *et seq.* (para. 620); *EDF (Services) Limited v. Romania*, Award, ICSID Case No. ARB/05/13, 8 October 2009, at **Exhibit CLA-103**, p. 108 *et seq.* (paras. 328-329); *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, Award, ICSID Case No. ARB/13/13, 27 September 2017, at **Exhibit CLA-246**, p. 383 (para. 1253).

⁴ PHB1-Resp., p. 2 *et seq.* (paras. 5-6); PHB2-Resp., p. 24 *et seq.* (Section 3).

⁵ See *e.g.*, Rejoinder, p. 1 *et seq.* (paras. 4-24); PHB1-Resp., p. 3 *et seq.* (para. 7); PHB2-Resp., p. 26 *et seq.* (Section 4).

⁶ PHB1-Resp., p. 3 (para. 8); PHB2-Resp., p. 7 *et seq.* (Section 2).

capitalization was distorted by a speculative gold bubble [REDACTED]

- [REDACTED]⁷
- 8 The Respondent, on the other hand, acted diligently and efficiently throughout the proceedings to defend against unmeritorious claims, as reflected in its legal fees and expenses, which are reasonable. The award of the entirety of the Respondent's Costs is therefore justified.
- 9 As detailed in the Annex, the Respondent has incurred and claims the reimbursement of the following costs:

Description	EUR	RON	USD
ICSID/TRIBUNAL FEES			1,050,000
Respondent's share			1,050,000
LEGAL FEES AND EXPENSES⁸	90,095.22	58,789,118.30	40,162.50
LALIVE and LDDP legal fees	-	55,866,643.69	-
LALIVE and LDDP expenses	90,095.22	2,922,474.61	40,162.50
EXPERTS' FEES AND EXPENSES	2,219,453.46	1,778,988.34	1,817,120.91
Prof Dragos		543,408.62	
Dr Stoica		269,948.69	
Dr Pop		233,666.19	
Prof Tofan		197,353.77	
Prof Sferdian (also incl. Prof Bojin)		534,611.07	
Dr Burrows (also incl. Dr Brady)	483,833.01		1,462,880.44
CMA	696,155.56		
Dr Thomson	108,226.50		
Behre Dolbear	797,235.82		354,240.47
Mr McCurdy	134,002.57		
TOTAL	2,309,548.68	60,568,106.64	2,907,283.41

⁷ PHB1-Resp., p. 189 *et seq.* (Sections 5.2-5.4); PHB2-Resp., p. 85 *et seq.* (Section 6); see also PHB4-Resp., p. 40 (para. 102).

⁸ These amounts do not include the December 2022 and January 2023 invoices, which will be included in the Respondent's next submission.

- 10 The Respondent stands ready to provide any supporting documentation that the Tribunal may require.

4 THE CLAIMANTS' CONDUCT UNNECESSARILY CAUSED DELAYS AND INCREASED COSTS

- 11 Irrespective of the outcome of the case, the Tribunal should order the Claimants to bear the additional costs that the Respondent incurred because of the Claimants' conduct in the course of the arbitration. When allocating the costs, the Tribunal should specifically take into account the Claimants' three unsuccessful provisional measures applications (**Section 4.1**) and their failure to present their case in a timely and efficient manner (**Section 4.2**).

4.1 The Claimants' unsuccessful requests for provisional measures

- 12 The Respondent should be awarded its costs related to the Claimants' three applications for provisional measures, for which the Tribunal deferred its decisions on costs.⁹
- 13 In their **First Request for Provisional Measures** the Claimants sought to obtain authorization to use and disclose confidential and classified documents in RMGC's possession. The Respondent was in the same position and had already initiated the process of declassifying these documents. Yet, instead of seeking to resolve the issue with the Respondent, the Claimants filed a premature and overly broad request for provisional measures. The Tribunal rejected the request, referring to the Parties' then ongoing negotiations.¹⁰
- 14 The Claimants' **Second Request for Provisional Measures**, which also included a **Request for Emergency Temporary Measures**, related to taxation measures and anti-fraud investigations by the Respondent. As the

⁹ Procedural Order No. 2 dated 20 October 2016, p. 7 (para. 36); Tribunal's Decision Regarding the Claimants' Request for Emergency Temporary Provisional Measures dated 19 August 2016, p. 1 (para. (a)); Reasoned Decision on Claimants' Request for Emergency Temporary Provisional Measures dated 21 October 2016, p. 8 (para. 44); Decision on Claimants' Second request for provisional measures dated 22 November 2016, p. 25 (para. 114).

¹⁰ Procedural Order No. 2 dated 20 October 2016, p. 7 (para. 35).

Tribunal found, the Claimants raised unsubstantiated allegations that these measures were “abusive and retaliatory” and were an attempt to obtain information from RMGC outside of the arbitral process.¹¹ The Tribunal found that the Claimants had produced “insufficient evidence for the Tribunal to conclude that the VAT Assessment [wa]s not in accordance with Romania law” and that there was no “evidence as to what documents have been improperly or abusively seized or that the witnesses have been asked questions beyond the ambit of the relevant anti-fraud investigation”.¹²

- 15 The Claimants’ three requests led to unnecessary and extensive submissions (the Claimants’ filing of over one hundred factual and legal exhibits), procedural exchanges and a hearing in Washington D.C. They caused the Respondent to incur legal fees of **RON 4,309,024.99** and expenses of **RON 230,722.69**.¹³ The Claimants should be ordered to bear all of these costs.

4.2 The Claimants’ failure to timely present their case increased the length and complexity of the post-hearing procedure

- 16 The Claimants have continuously altered their case theory and claims, including, remarkably, after the 2019 Hearing, in their Answers to the PO27 questions,¹⁴ in their opening of the 2020 Hearing,¹⁵ and in their

¹¹ Reasoned Decision on Claimants' Request for Emergency Temporary Provisional Measures dated 21 October 2016, p. 7 *et seq.* (paras. 37-38); Decision on Claimants’ Second request for provisional measures dated 22 November 2016, p. 22 *et seq.* (para. 99).

¹² *Ibid.*

¹³ For a more detailed breakdown, see Annex, p. 2, 3 and 7-8 (“Phase I”).

¹⁴ In their Answers to the PO27 questions, the Claimants introduced a new date of breach “on or about September 9, 2013”. Cl. PO27 Answers, p. 36 (para. 56); see also R. PO27 Reply, p. 2 (para. 8) (“despite this fundamental change in their case theory, the Claimants continue to rely on a valuation date – in July 2011 – that is more than two years before the alleged treaty breaches were purportedly committed (in September 2013).”); PHB4-Resp., p. 7 (para. 8).

¹⁵ At the 2020 Hearing, the Claimants requested that the Tribunal award a different amount from that claimed in the Memorial and the Reply, calculated by reference to a different valuation date. **Tr. 2020**, Day 1, p. 105:5-12 and p. 38:21-39:4 (Claimants’ Opening); **Claimants’ Opening Presentation (Second Hearing) - Vol. 4**, Slide 55; **Claimants’ Opening Presentation (Second Hearing) - Vol. 1**, Slide 29; see also Respondent's Letter dated 1 October 2020, p. 1 *et seq.*

PHBs.¹⁶ However, the Claimants never even attempted to excuse their failure to properly state their case in their Memorial or Reply.¹⁷ The Claimants' inability to articulate their case and multiple attempts at biting the apple have significantly increased the length of the post-hearing phase of the proceedings, caused prejudice to the Respondent's procedural rights and resulted in the Respondent having to bear substantial additional costs, in the amount of **RON 6,981,231.30** in legal fees and **RON 24,305.64** in expenses as well as **USD 169,160** in expert expenses.

4.2.1 The Claimants should bear the costs that the Respondent incurred in addressing the PO 27 questions

- 17 The Respondent does not call into question the Tribunal's prerogative to pose questions to the Parties upon the conclusion of a hearing. However, the Tribunal's questions in PO27 necessarily reflect the Claimants' failure to articulate their case prior to and at the 2019 Hearing, including on such basic issues as the date of the alleged breach,¹⁸ the timing of the alleged losses, the measures allegedly resulting in the purported breach, and the relevant point in time to quantify the alleged losses.¹⁹ If the Claimants had a case, they should have addressed these issues in their Memorial.

¹⁶ In their first PHB, the Claimants introduced a new second alternative claim. PHB1-Cl., p. 98 *et seq.* (para. 231); see also PHB2-Resp., p. 1 (para. 2) ("the Claimants' case has continuously shifted as they have searched for new ways to state their case – and it has again shifted in the Claimants' Post-Hearing Brief.") and p. 85 (para. 180) ("The continuous changes to the Claimants' case on valuation date is one of the prime manifestations of the lack of substance of their claims."); PHB4-Resp., p. 26 (para. 55).

¹⁷ Respondent's Letter dated 4 October 2020, p. 3 (2nd paragraph); PHB4-Resp., p. 7 (para. 8).

¹⁸ **Tr. 2019**, p. 293:16-18 (Claimants' Opening) ("The exact date in which the breach ultimately occurs, no, I don't think you do need to know (..."); see also generally **Tr. 2019**, p. 288:2-294:17.

¹⁹ R. PO27 Reply, p. 1 (paras. 2-3); see also PHB1-Resp., p. 189 (para. 747) ("Prior to the hearing, the Claimants tellingly never identified the date of the alleged breach of the BITs."); PHB2-Resp., p. 5 (para. 17) ("At this late stage of the proceedings, the Claimants still equivocate as to how precisely – and when – Romania committed a treaty breach."); PHB2-Resp., p. 85 (para. 180) ("The continuous changes to the Claimants' case on valuation date is one of the prime manifestations of the lack of substance of their claims. They require more than 50 paragraphs to explain their current position (PHB-Cl., 98 (paras. 231-246, 247-249, 250-252, 270-289 and 408-426)) which (...) contradicts itself and their prior arguments.").

- 18 Furthermore, as the content and subject matter of the PO27 questions show, the questions were primarily addressed to the Claimants. This is also reflected in the fact that the Tribunal did not request simultaneous, but consecutive, submissions.²⁰
- 19 The Claimants' failure to articulate their case forced the Respondent to respond to a case that was not properly stated, with the resulting additional costs. The Respondent was also constantly required to address new arguments and claims raised by the Claimants. Accordingly, the Claimants should be ordered to bear the additional costs incurred by the Respondent between the end of the first hearing (13 December 2019) and its submission of its answers on 13 July 2020, *i.e.*, legal fees of **RON 5,391,700.70** and expenses of **RON 17,433.39**.²¹

4.2.2 The Claimants should bear the costs that the Respondent incurred as a result of the Claimants' belated introduction of alternative claims

- 20 The Claimants initially sought compensation based on the alleged fair market value of their investment as of 29 July 2011. They subsequently and belatedly introduced no less than three alternative claims,²² albeit in a cursory manner, claiming compensation based on (i) the alleged indexed value of their investment "on or about 9 September 2013" (the first alternative claim), (ii) the alleged indexed value of their investment as of a date to be determined by the Tribunal (the second alternative claim), or (iii) their alleged sunk costs (the third alternative claim).²³
- 21 While the Tribunal allowed the Claimants' "new arguments concerning the valuation date of 6 September 2013",²⁴ this does not excuse their late

²⁰ See *e.g.*, R. PO27 Reply, p. 2 (para. 9).

²¹ For a more detailed breakdown, see Annex, p. 2, 5 and 14-15 ("Phase IV").

²² The Respondent maintains its objection that the belated introduction of these new claims violates Article 52(1)(d) of the ICSID Convention. Respondent's Letter dated 4 October 2020, p. 7; Respondent's Letter dated 30 October 2020, p. 1 *et seq.*; PHB2-Resp., p. 85 (para. 181); PHB3-Resp., p. 17 (para. 51); Respondent's Letter dated 20 April 2022, p. 3; PHB4-Resp., p. 7 (para. 8) and p. 26 (para. 56); see also PHB1-Resp., p. 221 (para. 857).

²³ See footnotes 14-16 above; see also PHB2-Resp., p. 5 *et seq.* (paras. 19-20).

²⁴ Procedural Order No. 34 dated 22 October 2020, p. 11 (Section III.1).

introduction in the Claimants' responses to the PO27 questions, nor their later development at the 2020 Hearing and in the PHBs.²⁵ The belated introduction of the second and third alternative claims in the Claimants' PHBs are similarly unjustifiably late and thus also prejudicial to the Respondent's right to due process.²⁶

- 22 First, the lack of substantiation of the alternative claims resulted in the Tribunal's questions of April 2022. At this very late stage of the proceedings (more than two years after the first hearing), the Claimants had failed to explain how to "consider post-2013 events in evaluating Claimants' principal claim (...) and first alternative claim" (question 1), on what date the breach occurred in relation with the Claimants' second alternative claim (question 2), and how these events were to be considered in terms of quantum (question 3).²⁷ Moreover, similarly to the PO27 questions, the scope of these questions and the consecutive schedule of the Parties' submissions, show that these questions were primarily addressed to the Claimants, which again underscores their failure to properly state their case.²⁸ However, this did not deter the Claimants from again shifting their claims in their fourth PHB: they again, inadmissibly, presented a new formulation of their second alternative claim.²⁹
- 23 Second, the Respondent was required to carry out a new public procurement process to extend Dr Burrows' mandate and to pay additional fees to cover this unanticipated work.³⁰ The additional public procurement process was a direct consequence of the Claimants' belated claims.

²⁵ PHB1-Cl., p. 105 *et seq.* (paras. 247-249); see also PHB4-Resp., p. 7 (para. 8) ("The Claimants only introduced their first alternative claim (which was based on an entirely new date of alleged breach of the BITs) in their responses to the Tribunal's questions following the December 2019 hearing.").

²⁶ PHB1-Cl., p. 106 *et seq.* (paras. 250-252) and p. 180 (para. 440); see also PHB4-Resp., p. 26 (para. 55) ("The Claimants articulated (albeit superficially) a second alternative claim for the first time in their PHBs, *i.e.*, after the hearings.").

²⁷ Letter from Tribunal with further questions dated 12 April 2022, p. 2 *et seq.* (questions 1, 2 and 3).

²⁸ Respondent's Letter dated 20 April 2022, p. 2; PHB4-Resp., p. 6 (para. 2).

²⁹ PHB4-Cl., p. 21 (para. 53); see also PHB4-Resp., p. 26 *et seq.* (paras. 58-59).

³⁰ As explained in Respondent's Letter to Tribunal dated 15 July 2022.

- 24 The Claimants should thus be ordered to bear the costs incurred by the Respondent between its third PHB (6 December 2021) and its fourth PHB (19 September 2022), *i.e.*, legal fees of **RON 1,589,530.60** and expenses of **RON 6,872.25**,³¹ as well as **USD 169,160** for the services of Dr Burrows.³²

5 PRAYER FOR RELIEF

- 25 Pursuant to Article 61(2) of the ICSID Convention and for the reasons stated above, the Respondent respectfully requests that the Tribunal order the Claimants to bear their own costs, and to fully indemnify, jointly and severally, the Respondent for its costs, including legal fees and expenses, incurred in connection with this arbitration, in the amount of **RON 60,568,106.64**, **EUR 2,309,548.68**, and **USD 2,907,283.41**.
- 26 Regardless of the outcome of the case, the Respondent requests that the Tribunal order the Claimants to:
- a) compensate the Respondent for its legal fees of **RON 4,309,024.99** and expenses of **RON 230,722.69**, incurred in connection with the Claimants' unsuccessful provisional measures applications;
 - b) compensate the Respondent for its legal fees and expenses of **RON 6,981,231.30** (legal fees) and **RON 24,305.64** and **USD 169,160** (expenses), incurred to defend against the Claimants' belated alternative claims; and
 - c) bear their own costs in relation thereto.
- 27 The Claimants should be ordered to pay simple interest on the amounts awarded to the Respondent, at a risk-free rate as from the date of the Award.³³

³¹ For a more detailed breakdown, see Annex, p. 2, 6 and 16 ("Phase VIII").


³² Annex, p. 19 (Fees and Expenses of Dr Burrows – Invoice No 1078895).

³³ Rejoinder, p. 399 *et seq.* (Section 9.3.2).

Respectfully submitted,

16 December 2022

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