
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 QUESTIONS
PRESENTED BY THE TRIBUNAL IN PO27**

May 11, 2020

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1. Gabriel Canada and Gabriel Jersey hereby submit these responses to the questions presented by the Tribunal in Procedural Order No. 27 dated March 10, 2020 (“PO27”).¹

(a) For each of Claimants’ BIT claims, at what exact point in time was the breach consummated? What precise measure attributable to Respondent resulted in the alleged breach for each claim?

2. Beginning in August 2011, the Government began publicly to re-consider whether it was willing to remain in its joint venture with Gabriel and allow the Roșia Montană Project to be implemented, notwithstanding that years earlier the State had entered into legally binding and valid agreements with Gabriel to form RMGC and had issued mining licenses to RMGC that gave rise to significant development obligations for RMGC entailing enormous investment over many years coupled with legally valid rights.

3. Following a drawn-out, publicly-aired, politicized decision-making process, and as detailed further below, on or about September 9, 2013, the Government decided on political grounds simply and without any due process or compensation to repudiate the State’s obligations in relation to the Roșia Montană Project and the associated underlying mining license and effectively to abandon RMGC, its joint venture. Its decision was taken outside of the administrative permitting process and without due process of law of any kind. Moreover, it was taken against a backdrop of baseless, outrageous and irresponsible public accusations of corrupt dealings by those at the highest level of Government that unfairly tainted Gabriel and RMGC and any politician who would support the Project. In this context, the introduction of a special law in Parliament – presented by the Government as support for the Project and treated by it as a test of the Project’s political acceptability while at the same time being publicly rejected by Prime Minister Ponta in his capacity as a member of Parliament – was the subject of large protests by members of the public, who perceived the special law as a shocking example of a back-room corporate handout promoted by a corrupt political class. Thus the Government’s political decision to repudiate the Roșia Montană License and to abandon RMGC was made.

¹ Abbreviations and terms used in Claimants’ prior pleadings will have the same meaning in this submission. In responding to the questions presented, Claimants respectfully refer the Tribunal to their earlier submissions for additional detail and reserve the right to respond further in post-hearing briefs. *See* Procedural Order No. 30 dated Apr. 28, 2020 ¶ 60 (“The Tribunal recalls that there will be an opportunity for both Parties to address any issues, including jurisdictional issues, in their Post-Hearing Briefs.”).

4. The political rejection of the Roșia Montană Project indeed was nothing short of a repudiation and taking of RMGC's project development rights, including the mining licenses issued to it, and an abandonment by the State of its entire joint venture with Gabriel. It was in breach of Gabriel's legitimate and reasonable expectations and was effected in an arbitrary and discriminatory manner.

5. Recognizing the obvious and inevitable legal consequences of its decision, described by Prime Minister Ponta as a "nationalization,"² and the State's undeniable resulting responsibility, those in Government evidently preferred politically to allow an ICSID tribunal to assess liability than to deal directly and transparently with the legal obligation to pay Gabriel compensation in view of the enormous investments made and rights acquired. Indeed, as Mr. Ponta stated repeatedly, as he knew that repudiation of RMGC's rights would give rise to liability, he did not want only a few senior politicians to be blamed, but wanted Parliament to act.³

6. Given the numerous culpable admissions shown in Claimants' opening by Prime Minister Ponta and other senior Government officials, it is obvious why Mr. Ponta was unwilling to be cross-examined and why Romania failed to offer any testimony in this arbitration from the long list of other senior officials whose contemporaneous statements lay bare the State's abandonment of the rule of law in its treatment of the Project and of Claimants' associated rights and investments.

7. As detailed further below in response to questions (c) and (e), the same measure – the treatment of RMGC's application for permitting as the basis for a drawn-out political assessment of whether and on what terms the Project should be done, which included repeated statements by those in Government that the State's joint venture with Gabriel was detrimental to the State, holding up the legal permitting process and failing to issue permitting on a timely basis, seeking

² Claimants' Opening Vol. 6 Slides 24-26; TV Interview of Victor Ponta, Sept. 11, 2013 (Exh. C-437 video) at 09:31-10:07, 25:11-26:24) (Prime Minister Ponta: "we should, under current laws, issue the environmental permit and the exploitation should begin," but instead, "we are basically performing a nationalization, we are nationalizing the resources").

³ Memorial ¶ 476 (citing Ponta: *I sent the Roșia Montană Project to the Parliament so we could not be sued*, Stiri.tvr.ro, dated Sept. 5, 2013 (Exh. C-460) ("Precisely because I considered that I should not do this, I sent the law to Parliament ... I would have then to pay I don't know how many billions in compensations to the company in question. ... I want the decision to be made by the Parliament."); Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-872) at 1 ("The most critical thing for me was that this vote be given by Parliament, as there will obviously be lawsuits, and I do not want the Government or the ministers, we, be held accountable for contracts and commitments undertaken by Mr. Băsescu and the previous governments.")).

to coerce improved economic benefits for the State, and which, in the context of baseless accusations of corrupt dealings by those at the highest level of Government regarding the Project, resulted in a political decision to reject the Project, repudiate RMGC’s mining licenses and project development rights, and to abandon RMGC without any due process or compensation – was a composite act that breached several articles of the BITs as of the date of the political rejection.

A. Gabriel Had a Legitimate Expectation that RMGC’s Environmental Permit Application Would Be Decided Solely on Expert Technical Assessments within an Administrative Process Governed by Law

8. The Romanian legal framework for environmental permitting is highly regulated and requires the Ministry of Environment to conduct an EIA in consultation with a TAC functioning under its coordination.⁴ When review of the EIA Report is complete, the Ministry of Environment must make a decision whether to issue the Environmental Permit and on what conditions, based on technical conclusions and the applicable legal criteria supported in the law.⁵ For large projects, such as the Roșia Montană Project, the Ministry of Environment makes its decision as a proposal to the Government, and the decision on the Environmental Permit is to be issued as a Government Decision signed by the Prime Minister based on the Ministry of Environment’s proposal.⁶

9. As the decision on the Environmental Permit is governed by administrative law, neither the Ministry of Environment nor the Government may impose conditions to issuing the Environmental Permit not found in law, and taking such a decision on any basis other than the strict legal requirements would be an abuse of power.⁷ Thus, the decision to issue or deny the

⁴ Claimants’ Opening Vol. 2 Slides 4-5; Mihai Presentation Slides 5-8; Tr. (Dec. 10, 2019) 2255:17-2256:6, 2257:7-14 (Mihai Direct) (explaining that the EIA procedure “is a regulated procedure” and “can only be conducted in compliance with the conditions under the applicable law to this procedure”); Memorial ¶¶ 190-195; Mihai § IV; Mihai II ¶ 9.

⁵ Claimants’ Opening Vol. 2 Slides 6-7; Mihai Presentation Slides 9-10; Tr. (Dec. 10, 2019) 2256:7-20, 2261:3-2263:1 (Mihai Direct) (observing that the decision of the Ministry of Environment “must be a reasoned one” and “should be motivated and grounded in the Law”); Memorial ¶¶ 196-200; Mihai ¶¶ 134-136, 139, 402-429, 477-480; Mihai II ¶¶ 9-19.

⁶ See Mihai § VIII.D (explaining that the Ministry’s proposal is binding on the government).

⁷ Claimants’ Opening Vol. 2 Slides 8-10; Mihai Presentation Slides 11-14; Tr. (Dec. 10, 2019) 2263:12-2267:5 (Mihai Direct); Mihai ¶¶ 402-429, 452-462, 472-504; Mihai II § III. See also Administrative Litigation Law 554/2004 (Exh. C-1767) Art. 2(1).

Environmental Permit may not be based on considerations of, for example, political expedience or the extent to which the Project will yield a financial benefit to the State.⁸

10. As described below in response to question (d), these legal principles are not disputed by Respondent's legal experts Professor Dragos and Professor Tofan.⁹

B. Beginning in August 2011, the Boc Government Repeatedly Asserted that the State's Contract with Gabriel Was Detrimental to the State and that Permitting for the Roşia Montană Project Would Be Subject to a Political Decision, but Only on Improved Economic Terms

11. In August 2011, the environmental permitting process for the Roşia Montană Project was nearing positive completion paving the way for its implementation. As Romanian law was clear that the Environmental Permit was to be issued by Government Decision to be signed by the Prime Minister, this would have required Prime Minister Boc, who as the former mayor of the university town of Cluj long opposed the mining Project,¹⁰ to endorse the pivotal Environmental Permit together with Minister of Environment Borbély and Minister of Culture Hunor, both senior members of the governing coalition Hungarian minority political party, UDMR.¹¹

12. Unwilling simply to allow the administrative permitting process to be completed, which would not leave any discretion to the Government as to whether the Project would be permitted and proceed to be implemented, the Boc Government conditioned the permitting process on political considerations in violation of the applicable legal framework. Notwithstanding that the Mining License itself embodied the Government's policy decision to permit mining in the area, subject to meeting the legal requirements, the Boc Government took the view that it must in effect re-evaluate politically whether and on what terms the Project could proceed. As reflected in numerous public statements by the key members of Government, the Government thus resolved that, in addition to meeting the legal requirements to obtain the Environmental Permit,

⁸ Tr. (Dec. 10, 2019) 2256:17-20 (Mihai Direct) (explaining that the decision of the Ministry of Environment "cannot be issued based on the potential preferences of the body called to act in the procedure"); Memorial ¶¶ 408-409, 515, 680; Mihai ¶¶ 407-411, 481-504. *See generally* §§ VI.B.2, VII.

⁹ *See infra* ¶ 124; Tr. (Dec. 11, 2019) 2721:17-2722:20 (Dragos Tribunal Questions); Tr. (Dec. 11, 2019) 2630:2-19 (Tofan Tribunal Questions).

¹⁰ As far back as 2006, Mr. Boc, then mayor of Cluj, had stated unequivocally that "personally" he was "against the mining project proposed by the Canadian company Gabriel Resources," and that "[i]f it were up to me, I wouldn't endorse this project. Unfortunately, it's not up to me." *The most powerful inhabitant of Cluj*, ZIUA de Cluj, Aug. 31, 2006 (Exh. C-848).

¹¹ Neighboring Hungary consistently opposed the Project. *See* Memorial ¶¶ 245-249, 258-259, 376.

the economic terms of the Project for the State had to be materially improved and the Government then would assess politically whether to permit the Project to proceed:

- a. Prime Minister Boc declared in a television interview on August 1, 2011 that he was “not a fan” of the Project, the State’s interest in the Project was inadequate and the current form of the contract was not favorable to the State, and that he would see how discussions evolve and would “reach a point of view.”¹²
- b. Minister of Environment Borbély stated to the Hungarian press on August 11, 2011, “There are still a number of requirements that need to be clarified before the acceptance of the environmental permit, because the contract in its current form is not advantageous enough for the Romanian State.”¹³
- c. President Băsescu declared on August 18, 2011 that the Project “must be done” and that “Romania needs it, provided the terms for the sharing of benefits from the exploitation of the gold and silver deposits in the area are renegotiated.”¹⁴
- d. Minister of Culture Hunor stated on August 24, 2011 that although the Cârnic ADC had been issued, he had not signed the order to remove it from the List of Historical Monuments “because there are many aspects that need to be discussed. First of all, the level of participation of the Romanian state in that company, and I am not going further until this aspect is clarified, and the Minister of Environment cannot go further either; this must be decided at the governmental level. It’s not the Minister of Environment and the Minister of Culture that give this project the go-ahead.”¹⁵
- e. Minister of Culture Hunor reiterated on August 25, 2011, “*Until the contract and the participation of the Romanian state in the joint venture are renegotiated, we cannot take another step, no matter what the step.*”¹⁶
- f. Prime Minister Boc stated again on August 26, 2011 that he was not a fan of the Project and that it “cannot be economically promoted” because the contract was “detrimental to the Romanian State” and “must certainly be discussed again.”¹⁷

¹² Claimants’ Opening Vol. 3 Slides 4-; TV Interview of Emil Boc, Aug. 1, 2011 (Exh. C-537 video) at 41:12-42:10.

¹³ Claimants’ Opening Vol. 3 Slides 6-7; *Verespatak: Romanian government to make a decision this year*, mr1-kossuth.hu, Aug. 11, 2011 (Exh. C-2912).

¹⁴ Claimants’ Opening Vol. 3 Slides 8-9; TV Interview of Traian Băsescu, Aug. 18, 2011 (Exh. C-628.01 video) at 00:00-00:18.

¹⁵ Claimants’ Opening Vol. 3 Slides 10-11; *Roşia Montană stirs up tensions in UDMR*, Ecomagazin.ro, Aug. 24, 2011 (Exh. C-508) at 1.

¹⁶ Claimants’ Opening Vol. 3 Slides 12-13; TV Interview of Kelemen Hunor, Aug. 25, 2011 (Exh. C-2913 video) at 00:05-00:17 (emphasis added).

¹⁷ Claimants’ Opening Vol. 3 Slides 14-15; TV Interview of Emil Boc, Aug. 26, 2011 (Exh. C-791.02 video) at 00:00-00:51. [REDACTED]

- g. Prime Minister Boc stated on August 29, 2011, “[W]hat is known, and is clear: The part pertaining to the benefits of the state is unsatisfactory for the Romanian state. *Epecially now, in the context of an increased price for gold. So, definitely, here the contract must be renegotiated from the perspective of benefits for the state, from such a dealing.* So, after we have the answer to these two questions, we can move on and discuss. . . . I am only saying that these two large topics must first have an answer. *So that afterwards, a final decision can be made whether to continue the project or not.*”¹⁸
- h. Prime Minister Boc stated on September 2, 2011 that “there are two matters to be fully clarified” about the Project. “First there is the environmental aspect and the relevant authorities must give an answer whether this project meets the environmental requirements applicable in the EU or not. Secondly, the current formula in the contract should be improved in order to bring additional benefits for the Romanian State.” The news article then states: “The Prime Minister stated that, *depending on these answers, he will formulate his final point of view, but until then, ‘. . . the project cannot be promoted under any conditions and without having a clear discussion about its implications, at all levels.’*”¹⁹

¹⁸ Claimants’ Opening Vol. 3 Slides 16-17; TV Interview of Emil Boc, Aug. 29, 2011 (Exh. C-2914 video) at 00:00-00:39 (emphasis added).

Mr. Boc cannot avoid the obvious as his own contemporaneous explanations made clear: the Government was following a politically-motivated unlawful process to decide whether the Project would be permitted and implemented.

¹⁹ *Emil Boc: The Roșia Montană Project must be addressed in full responsibility*, Agerpres.ro, Sept. 3, 2011 (Exh. C-1430) (emphasis added). Again putting the lie to the explanation proffered by Mr. Boc for his similar August 29 statement, once the “relevant authorities . . . give an answer whether this project meets the environmental requirements applicable in the EU or not,” there is nothing for him as Prime Minister to “formulate” in terms of his “final point of view.” In addition, consideration of the extent of improved economic benefits as part of forming his “final point of view” about the Project is also irrelevant to permitting.

- i. Minister of Environment Borbély stated on September 5, 2011 that the contract “must be negotiated” which interested him as a member of the Government.²⁰
- j. Minister of Culture Hunor confirmed to Parliament on October 5, 2011 that “The *decision regarding the Roşia Montană project is to be made at the Government level, based on economic and other considerations*, as well as based on the endorsements issued in accordance with the applicable legislation.”²¹
- k. Minister of Culture Hunor stated during an October 31, 2011 interview that “[A]t the present, the Government must make a decision because, in July, I started, so to say, a public debate, followed by other interventions, but, in my opinion, *unless the Government makes a decision, we cannot go further*,” and that, “[i]t is not Roşia Montană that will create a problem within UDMR. With us, opinions are divided, they have always been divided; we organized debates, and we will further do that, but there must be a governmental project, *this project must be assumed by the Government as a whole . . . along with PD-L, UNPR, UDMR and, then, we can proceed with it, but some more steps are still required, including a renegotiation of the contract with the investors*. Because things have evolved, including the price of gold. *Only then can we have a serious discussion on how to proceed further.*”²²
- l. Minister of Environment Borbély explained in a November 29, 2011 interview:

“Laszlo Borbely: I hope we reach a verdict [on the Project] in one, maximum two months.

Reporter: A yes/no verdict?

Laszlo Borbely: A yes/no verdict. This is also a political issue. So we have to take upon ourselves this ‘political cost.’”²³

13. The repeated unmistakable linking of the Project permitting to a renegotiation of the State’s economic interest as part of an eventual broader political decision whether the Project could be done – which as discussed below was emphasized again in December 2011 – brought Gabriel and RMGC to the table after the Government urgently mandated Minister Ariton to

²⁰ Claimants’ Opening Vol. 3 Slides 18-19; Radio Interview of László Borbély, Sept. 5, 2011 (Exh. C-2155) at 2 (audio file submitted in Romanian).

²¹ Claimants’ Opening Vol. 3 Slides 31-32; Letter from Minister of Culture to Parliament dated Oct. 5, 2011 (Exh. C-2918) (emphasis added).

²² TV Interview of Kelemen Hunor, Oct. 31, 2011 (Exh. C-2638 video) at 00:25-00:55, 01:12-02:17 (emphasis added).

²³ TV Interview of László Borbély, Nov. 30, 2011 (Exh. C-2639.02 video) at 00:22-00:38.

renegotiate and increase the State's economic benefits.²⁴ Indeed, rebuttal documents and [REDACTED] [REDACTED]²⁵ put the lie to the fiction in Respondent's witness statements submitted with its Rejoinder that it was Gabriel and RMGC that asked to meet with the Ministry of Economy, purportedly to make a general Project presentation, and freely offered the State a better deal.²⁶

14. The demand to increase the economic benefits for the State was intended to extract political advantage for those then in office.²⁷ The numerous statements make clear, however,

²⁴ See Claimants' Opening Vol. 3 Slides 21-24; Letter No. 20 from the General Secretariat of the Government to Minister of Economy Ariton dated Sept. 23, 2011 enclosing Tasks established at the Government meeting on Sept. 21, 2011 (Exh. C-2635) at 2. The timing of Prime Minister Boc's urgent mandate to Minister of Economy Ariton was clearly motivated by the fast approaching conclusion of the EIA review process, and by the desire to exert maximum coercive pressure on Gabriel/RMGC. [REDACTED]

²⁵ See Claimants' Opening Vol. 3 Slides 20, 25-27; [REDACTED]

²⁶ See Ariton ¶¶ 33, 40-50 (Mr. Ariton noting that upon mandating him to renegotiate, "Mr. Boc instructed me to reach out to RMGC/Gabriel," but then claiming that he met with Gabriel and RMGC on September 27, 2011 because RMGC "requested to meet with me to make a general presentation of the Project" and "defined" the subject of the meeting); Găman II ¶ 79 ("I believe that Messrs. [REDACTED] met with Mr. Ariton on 27 September 2011 to give a presentation of the Project"). [REDACTED]

²⁷ Prime Minister Boc's repeated linking of his insistence on an improved economic deal to public perception demonstrates that the demands were politically motivated and intended to curry favor with the public, which would form part of the Government's political calculus whether to allow the Project to proceed. [REDACTED]

that the economics ultimately would only be a factor in a political decision that the Government intended to make as to whether it would allow the Project to be implemented at all.

C. The Government Did Not Allow Environmental Permitting to Be Completed While It Demanded Greater Economic Benefits and Before It Had Made a Political Decision on Implementing the Project

15. The Boc Government made its demands clear to Gabriel and when, as of the last TAC meeting on November 29, 2011, there still was no agreement on improved economic terms for the State, the Government prevented the environmental permitting process from being completed.

16. The evidence demonstrates that it was the Government's demands and clear message that permitting depended upon meeting those demands that extracted successive improved "offers" from Gabriel to increase the State's economic interest in the Project.²⁸ The evidence is also clear that review of the EIA Report was expected to be completed at the TAC meeting scheduled for November 29, 2011.²⁹ [REDACTED] contemporaneous summary of RMGC's meeting with Minister Ariton on October 31, 2011 accordingly shows the company reasonably believed "the

[REDACTED]

See also, e.g., Ariton ¶ 26 (contending that public statements of senior officials "were part of an intense political debate, with each serving official trying, in my view, to show before the public and the opposition that they were the champions of the defense of the best interests of the Romanian people"). [REDACTED]

[REDACTED]

²⁸ *See Claimants' Opening Vol. 3 Slide 74 (overview of the forced renegotiation in 2011-2012). See generally Claimants' Opening Vol. 3 Slides 5-75. See also Claimants' Opening Vol. 3 Slides 5-75;* [REDACTED]

[REDACTED]; Reply § II; [REDACTED].

²⁹ *See Claimants' Opening Vol. 4 Slides 3-7; Reply ¶ 41(a)-(h);* [REDACTED].

last TAC meeting” would be held on November 29 and that it implored the Ministry of Economy that “we need to finalize the renegotiation asap – especially since two key ministers (Hunor and Borbely) mentioned publically they cannot move forward until renegotiation is completed.”³⁰

17. Gabriel accordingly submitted a revised “offer” in early November 2011 to increase the State’s shareholding in RMGC to 22.5%, without conditions precedent that Prime Minister Boc had found unacceptable.³¹ [REDACTED], this offer was motivated by the clear link between the government’s demands and obtaining the Environmental Permit.³² [REDACTED], Prime Minister Boc rejected Gabriel’s November 2011 offer because he was not content with a 22.5% shareholding and demanded a larger increase in the State’s benefits.³³

³⁰ Claimants’ Opening Vol. 3 Slides 38-39; [REDACTED]

³¹ Claimants’ Opening Vol. 3 Slide 40; [REDACTED]

[REDACTED] Ariton ¶¶ 63-70 (stating that Mr. Boc had criticized Mr. Ariton in the last Government meeting for presenting to the Government Gabriel’s previous draft agreement containing the conditions precedent); Boc ¶¶ 29-31 (confirming the same); [REDACTED]

³² [REDACTED]

³³ Claimants’ Opening Vol. 3 Slide 41; [REDACTED]

Prime Minister Boc in particular confirmed that he was not willing to “move forward” with the Project without higher benefits for the State.³⁴

18. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 38

19. [REDACTED] 40

³⁴ [REDACTED]

³⁵ Claimants’ Opening Vol. 3 Slides 42-43; [REDACTED]

³⁶ Claimants’ Opening Vol. 3 Slides 45-46; [REDACTED]; [REDACTED]

³⁷ Claimants’ Opening Vol. 3 Slides 47-48; [REDACTED]

³⁸ Claimants’ Opening Vol. 3 Slides 49-50; [REDACTED] See also Memorial ¶¶ 355-357; [REDACTED]

20. At the TAC meeting held that day, the Ministry of Environment completed its review of the EIA Report,⁴¹ and each TAC member provided favorable points of view on RMGC's written answers to the TAC's final questions and/or raised no objections to issuing the Environmental Permit.⁴² The TAC President therefore repeatedly confirmed that "all technical discussions, all the questions, all the solutions were discussed within the TAC," that there "are no more issues," that the EIA Report "checklist" would be sent to each Ministry "today," that "with this, the technical discussions about the Rosia Montana project come to an end," that "things are finalized in the TAC," and that after "three details" were addressed, he would "convene another TAC meeting for a final decision" on whether to issue the Environment Permit.⁴³ RMGC and Gabriel's contemporaneous understanding that the technical assessment was thus completed and that a decision on the Environmental Permit would be taken shortly thereafter is demonstrated by, among other things, emails sent on the day of and the day after the TAC meeting,⁴⁴ [REDACTED]

39 [REDACTED]

⁴⁰ See Claimants' Opening Vol. 3 Slide 51. [REDACTED]

⁴¹ Claimants' Opening Vol. 4 Slides 8-11, 19; Reply ¶ 41(i)-(k); Avram II ¶¶ 16-19; TAC Transcript dated Nov. 29, 2011 (Exh. C-486) at 2-7. See also Avram II ¶¶ 21-28 (describing statements at the TAC meeting about drafting the Environmental Permit and/or Permit conditions).

⁴² Claimants' Opening Vol. 4 Slides 12-18; Avram II ¶ 23; TAC Transcript dated Nov. 29, 2011 (Exh. C-486) at 23-29, 40-44.

⁴³ Claimants' Opening Vol. 4 Slides 20-23; TAC Transcript dated Nov. 29, 2011 (Exh. C-486) at 47-48, 51 (TAC President further stating "next TAC meeting" "in the near future" "for making the decision related to Rosia, whether it's being granted or not").

⁴⁴ [REDACTED].

[REDACTED],⁴⁵ and Gabriel's public disclosures for year-end 2011.⁴⁶

21. [REDACTED]

[REDACTED]⁴⁷ Gabriel therefore offered 25 and 6, subject to conditions it referenced only generally on November 30, 2011 relating to timing and implementation and elaborated in a draft agreement sent December 5, the next business day.⁴⁸

22. Contrary to the false narrative presented in the Rejoinder that Minister Ariton reported reaching agreement at a Government meeting on November 30, 2011, which purportedly meant the Government had no motive to block permitting as of that date,⁴⁹ [REDACTED] contemporaneous email sent five minutes after he spoke with Minister Ariton that day shows

⁴⁵ [REDACTED]

⁴⁶ See Gabriel 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 16 ("During the latest meeting of the TAC, it is understood that the analysis of all EIA chapters was completed and that the TAC concluded that all technical aspects have been clarified."); Gabriel Press Release dated Mar. 15, 2012 (Exh. R-219) at 1. See also, e.g., SRK NI 43-101 Technical Report dated Oct. 1, 2012 (Exh. C-128) at 61 ("A fourth TAC meeting in November 2011 which concluded the review of all chapters of the EIA and all additional information provided by RMGC between 2006 and 2011, at the end of which no further questions were posed by TAC representatives.").

⁴⁷ [REDACTED] See also Memorial ¶¶ 367-368; [REDACTED].

⁴⁸ Claimants' Opening Vol. 3 Slides 52-54, 60; Memorandum from Gabriel to the Ministry of Economy dated Nov. 30, 2011 (Exh. C-775.02); [REDACTED].

⁴⁹ Ariton ¶ 99; Boc ¶¶ 34, 37; Rejoinder ¶¶ 417-427. [REDACTED]

[REDACTED] That there was no deal on November 30 is clear from among other things the fact that Gabriel had not yet defined the conditions to its offer so the Government could not assess the offer, let alone accept it. [REDACTED]

Gabriel's proposal was *not* discussed at the Government meeting.⁵⁰ [REDACTED]

23. Without an acceptance by the Government of any of the “offers” presented in response to its economic demands that were part of the politicization of the decision-making process with respect to the Project, and thus without the Government’s political decision on the Project, the Government held up the permitting process and would not allow it to reach a conclusion.

24. The evidence shows the few follow-up “details” identified at the November 2011 TAC meeting were promptly addressed,⁵⁵ including the Ministry of Culture’s Point of View, which

⁵⁰ Claimants’ Opening Vol. 3 Slides 55-57; [REDACTED]

[REDACTED] Claimants’ Opening
Vol. 3 Slides 58-59

⁵¹ [REDACTED]

⁵² [REDACTED]

⁵³ [REDACTED]

Claimants’ Opening Vol. 3 Slides 60-61.

⁵⁴ Claimants’ Opening Vol. 3 Slides 62-65; [REDACTED]

[REDACTED] This new demand proves Respondent’s contention that a deal was reached is false.

⁵⁵ Claimants’ Opening Vol. 4 Slides 24-26; Memorial ¶ 365; Avram ¶¶ 100-113; Avram II ¶ 38; Tănase II ¶¶ 103, 109-110; Tănase III ¶ 52.

was its endorsement to issue the Environmental Permit.⁵⁶ The Ministry of Environment thus by law had to take its decision on the Environmental Permit by the end of January 2012.⁵⁷

25. In a clear pretext to avoid taking any decision, the Ministry of Environment refused to accept without confirmation, and the Ministry of Culture refused to confirm, that the Ministry of Culture's Point of View was its "endorsement."⁵⁸ Minister of Environment Borbély and Minister of Culture Hunor indeed confirmed publicly that the permitting process was fast approaching the end, but that the decisions of their ministries would also depend on the Government and their political party making a political decision whether to implement the Project:⁵⁹

- a. Minister of Environment Borbély explained during a December 18, 2011 televised interview:

"Reporter: [A]s far as I know, there are two issues here. There is this technical endorsement, which your Ministry grants, but it is, in the end, a political decision, which will be reached in the Government of Romania.

Laszlo Borbely: Right. And there is also a negotiation concerning the contract . . . as the Ministry of Economy has meanwhile started negotiations to have a more advantageous contract for Romania.

Reporter: The technical endorsement will be ready, as I understand, by the end of January – February. How long will it take for the Government to state its decision?

Laszlo Borbely: [Yes.] So, the Government, I have to come with a government decision and, in this case, the Government, obviously, will jointly assume this responsibility. But since you have talked about the politics, I am referring to the political point of view of UDMR. So, within UDMR, even if we have, from a technical point of view, all the aspects clarified, we must assume a political responsibility."⁶⁰

- b. Minister of Culture Hunor explained during a December 19, 2011 radio interview in response to a question about the stage of approvals regarding the Project:

⁵⁶ Claimants' Opening Vol. 4 Slides 27-30; Mihai ¶¶ 359-370; Mihai II § VI.A.1; Letter No. 2193 from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exh. C-446).

⁵⁷ Memorial ¶ 366; Reply ¶ 50; Mihai ¶¶ 371-374 (concluding the Ministry had to take a decision on the Environmental Permit by January 31, 2012, and a Government Decision consistent with that proposal had to be issued by March 8, 2012).

⁵⁸ Claimants' Opening Vol. 4 Slides 32-39; Memorial ¶¶ 365, 370-378; Reply ¶¶ 30, 63-71.

⁵⁹ Claimants' Opening Vol. 3 Slides 66-71. See also Reply ¶¶ 30-31; ¶¶ Memorial 375-378; [REDACTED].

⁶⁰ Claimants' Opening Vol. 3 Slides 66-67; TV Interview of László Borbély, Dec. 18, 2011 (Exh. C-633) at 2, video at 05:44-06:10 (emphasis added). Although not transcribed, Minister Borbély's "yes" ("da") answer is clearly audible on the video after the reporter says "by the end of January – February."

“Mr. Ariton went . . . to talk with the representatives of Gold Corporation about the State holdings and everything related to that contract that everyone talks about – but very few have read; probably somewhere early next year we will also have the results after these discussions. *We also need to make a decision in the Government*

*We haven’t made a decision in UDMR either. We will discuss and make a political decision. We have had many discussions, but we haven’t made any decision.”*⁶¹

- c. Minister of Environment Borbély repeated during a December 20, 2011 press conference:

“As far as Roşia Montană is concerned, there are two components: a technical one and a political one. I will not issue this endorsement unless I am 100% convinced that the Project meets all the European criteria. From the technical point of view, we still must receive certain explanations. It will be the most modern close[d] circuit installation in Europe, obviously if it will receive the green light.”

According to the press report, when “asked if Roşia Montană was discussed within UDMR, *Laszlo Borbely mentioned that no political decision has been taken so far on this topic.”*⁶²

- d. Minister of Environment Borbély explained further during a December 27, 2011 televised interview:

“Reporter: . . . When and if the environmental permit is granted, the project will be started. What is the status currently?

Laszlo Borbely: . . . So, the Romanian State, when it decided to grant the license, around 2000, and when it concluded *that contract, which I say is disadvantageous to the Romanian State. So it could have concluded a more advantageous contract, not to let it slip through their fingers. . . . At this time, we have had discussions in the Government and with the President* and I have said it very clearly, well, over these 2 years a lot more has happened than over 10 years, right?

Reporter: Right.

Laszlo Borbely: Good. It’s just that I, as Minister of the Environment, have to take a stand from the point of view of the environment, and I have said it very clearly that I will not grant this endorsement unless I am 100% convinced that it

⁶¹ Claimants’ Opening Vol. 3 Slides 68-69; Radio Interview of Kelemen Hunor, Dec. 19, 2011 (Exh. C-439) at 1-2 (audio file submitted in Romanian) (emphasis added).

⁶² *Laszlo Borbély: The Roşia Montană Project will be the most modern installation in Europe if approved*, Eurourbanism.ro, Dec. 21, 2011 (Exh. C-1505) at 1 (emphasis added).

corresponds to the provisions of the European Union, which are the highest standards, and that it will not harm the environment. We are now...

Reporter: How convinced are you?

Laszlo Borbely: 90%.

Reporter: 90%?

Laszlo Borbely: 90%.⁶³ *We will have another technical commission, 2 at most, but I am thinking one, for we have clarified these problems along the way. I have imposed, no one else has, after having gone to Sweden and I looked, this is a country which I believe is famous for defending its environment, I have seen that there are closed, monitored system, 100% safe, which reduce the cyanide level when it reaches the basin and the dilution, indeed, you can pretty much drink water from that basin. And then I imposed it, they had a higher percentage, which complied with the provisions of the Union, for it is 10. They had 5 to 7. I said no, reduce it below 3 or even less, because it is diluted, so that you can prove it to me and so that I can keep my head up high before Hungary, before everyone there in the area because even if a crack occurs, although this is a complex system of dikes by recirculation, so I will not go into the technical details. Well, that thing has happened, although there is a more important investment for them, therefore more money, with assurances that the company will not just vanish, that it will provide the money for environmental recovery in the first years of the investment, and not in the last years. These things were accepted by the investors.*

Reporter: Do we have a 'rock-solid' contract with the investor? . . .

Laszlo Borbely: The contract, I was not the one to take care of the contract. The Minister of Economy was. I know that there is another area that pertains not to the endorsement, but it is important, related to the renegotiation of the agreement. *They are under renegotiation. So, I say, if the Romanian State manages to get a more advantageous contract, if these environmental conditions are fulfilled, I will propose the endorsement to the Government.*"⁶⁴

⁶³ In the aftermath of the November 29, 2011 TAC meeting and the swiftness with which the few identified open issues were addressed, Minister Borbely's statement that he was 90% convinced (as well as the Ministry of Environment's refusal to accept without confirmation and the Ministry of Culture's refusal to confirm its Point of View was the "endorsement") was evidently intended to give the Government and the ruling coalition time for the political assessment they considered necessary to be made, as declaring the EIA process closed would have required a decision to issue the Environmental Permit had the Government followed the law. Indeed, Minister Borbely did not identify any issue about which he allegedly was not convinced.

⁶⁴ Claimants' Opening Vol. 3 Slides 70-71; TV Interview of László Borbely, Dec. 27, 2011 (Exh. C-637) at 1-2, video at 29:26-33:49 (emphasis added). Seeking to avoid what Minister Borbely clearly stated

Respondent did not present any testimony from Mr. Borbely, who in fact consistently distinguished renegotiation of the "contract" from the environmental obligations and financial guarantees for the Project, the latter of which were resolved. Indeed, immediately before he said a "more advantageous contract" was

“Reporter: When could this decision [regarding the Project] be taken?

Laszlo Borbely: . . . I am not part of the technical commission. We can have a verdict at the end of January. I am still expecting an answer from the Ministry of Culture. *The other component is a political one. You have seen that we are also under attack from within the Hungarian community, that we are the ones with the cyanide and so on We must assume this responsibility. I am speaking of the UDMR (the Democratic Union of Hungarians in Romania) and of the coalition.*”⁶⁵

26. [REDACTED]

[REDACTED]⁶⁶ Therefore, in late January 2012 Gabriel tried to unblock permitting by submitting another revised “offer” that gave the Government essentially what it had demanded.⁶⁷

27. The Boc Government never responded to Gabriel’s last proposal and it remains unclear what his Government’s ultimate decision would have been.⁶⁸ Although the Government thus

required, Minister Borbély stated that the “contract” did not pertain to technical issues, but was “important,” and that the Ministry of Economy (not he) was “the one to take care of the contract.” He also stated that his demands relating to environmental obligations (e.g., reducing the cyanide level) and financial guarantees were “accepted by the investors.” *See also, e.g., Laszlo Borbély: The Romanian State could’ve negotiated the Roșia Montană Contract in much better terms*, Business24.ro, Aug. 23, 2011 (C-629) at 1 (stating that “the Romanian State, when it negotiated this contract, it could’ve negotiated better” and “conclude[d] a more advantageous contract for the Romanian State,” which is “the responsibility of the Ministry of economy”); *id.* at 2 (confirming with regard to financial guarantees that RMGC “accepted, from principle, that the money for the rehabilitation to not be given to the Romanian State in the last years of mining, but from the first years of mining the gold deposit,” and “is about USD150-160 million”).

⁶⁵ TV Interview of László Borbély, Dec. 27, 2011 (Exh. C-637) at 3, video at 36:21-36:48 (emphasis added).

⁶⁶ [REDACTED]

[REDACTED] (“Minister Kelemen Hunor repeatedly stated that neither he nor Minister Borbély would take any action to permit the Project until the State’s financial stake was renegotiated and ‘clarified,’ which apparently would inform a ‘political’ decision by the Government coalition.”).

⁶⁷ Claimants’ Opening Vol. 3 Slides 73; [REDACTED]; [REDACTED]

⁶⁸ [REDACTED] As noted above, Prime Minister Boc previously had stated as Mayor of Cluj that “[i]f it were up to me, I wouldn’t endorse this project.” *The most powerful inhabitant of Cluj*, ZIUA de Cluj, Aug. 31, 2006 (Exh. C-848). His wife, Oana Boc, who participated in the fall 2013 protests, as well as President Băsescu, and former Minister of Economy Adrieian Videanu each stated contemporaneously that Prime Minister Boc blocked the Project and was the reason it did not go forward. [REDACTED]; *Emil Boc’s wife protested to save Roșia Montană*, Stiri de Cluj,

extracted conditional offers from Gabriel in furtherance of its political decision-making about the Project, none of those offers was accepted and the State's shareholding percentage and royalty remained unchanged. In any event, Prime Minister Boc and the PDL members of his Cabinet resigned on February 6, 2012 due to weeks of mass protests against the Government and its perceived incompetence and corruption.⁶⁹

D. Successive Governments Maintained the Same Approach to Project Permitting, Requiring Improved Economic Terms and a Political Decision to Agree to Implement the Project

28. The Ungureanu Government, although short-lived, maintained the political position that improved economic terms for the State were expected before the Project would be permitted.⁷⁰

[REDACTED]

29. Shortly after taking office in May 2012, Prime Minister Ponta confirmed that his Government would take the same politicized approach on the issue of permitting for the Roșia

Sept. 1, 2013 (Exh. C-1507); *President Băsescu's Statements about Roșia Montană*, Evz.ro, Sept. 2, 2013 (Exh. C-927); *Videanu: Prime Minister Emil Boc opposed the Roșia Montană project*, Cotidianul, Sept. 4, 2013 (Exh. C-857).

⁶⁹ [REDACTED]; Tr. (Dec. 13, 2019) 3206:5-3223:4 (Stoica Cross).

⁷⁰ Claimants' Opening Vol. 3 Slides 75-78; Memorial ¶¶ 381-394; Reply ¶¶ 32-35.

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

Montană Project, making clear that whether the Project would be permitted at all would depend not only on the obligations of the environmental law, but on renegotiation of the economic terms as well as on a broader political assessment of the Project. Moreover, having campaigned as opposition leader against the Government by accusing Gabriel and RMGC without basis of corruption,⁷⁸ he continued to insinuate that RMGC had been seeking to exert corrupt influences over the process. Thus he stated in May 2012 as to decisions regarding the Project:

The decisions are only related to the three conditions that we formulated when we were in opposition and which are included in the government program now. Firstly, absolute guarantees for environmental protection. Then a re-negotiation and finally a public presentation of what the benefit of the Romanian state means in this type of project, because the benefits of the private side are clear, but those of the Romanian state not as much. Thirdly, such a project should be fully detached of lobbying and political interest; such a project cannot be done for one politician, regardless of his name and the party he is in, but only for the people in the area and for Romania. When these three conditions are met – be it before the election, after the election or never – I cannot tell you at this moment.⁷⁹

30. Early the next month, Prime Minister Ponta announced that decisions on the Project would have to wait until after Parliamentary elections, stating “I want to discuss this matter in a serious manner next year.”⁸⁰ He also emphasized that “the Government’s position regarding the mining project remained unchanged,” and that Gabriel must “offer a larger share of the project to the state,” “give up political lobby activities,” thus again suggesting improper attempts at influencing decisions, and that to “go forward . . . these conditions are mandatory.”⁸¹

E. The Government Prevented Permitting From Advancing During 2012 While It Put Its Political Assessment of the Project on Hold

31. The record of contemporaneous evidence is clear that, as Prime Minister Ponta announced, the Government did not allow the environmental permitting process for the Project to

⁷⁸ Boutilier Presentation Slides 17-19; *Ponta: In the case of Roșia Montană, Băsescu is protecting his sponsors*, Mediafax.ro, Aug. 19, 2011 (Exh. C-2643) at 1; *Ponta: Roșia Project is and it is going to be blocked because not all the politicians can be bought*, Mediafax.ro, Oct. 6, 2011 (Exh. C-2645) at 1; *Victor Ponta: USL will support Minister Leonard Orban*, Cursdeguvernare.ro, Mar. 25, 2012 (Exh. C-2647) at 2-3).

⁷⁹ *The decisions related to Roșia Montană have nothing to do with elections, says Prime Minister Ponta*, Agerpres, May 10, 2012 (Exh. C-1481).

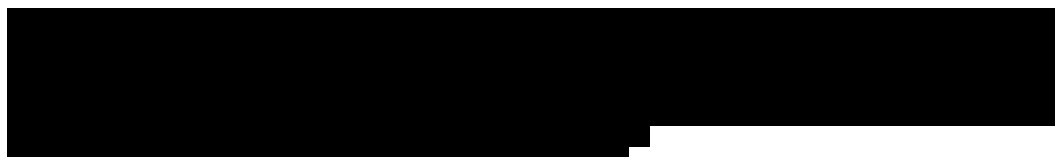
⁸⁰ Claimants’ Opening Vol. 3 Slides 78; *The Government postpones the decisions regarding Roșia Montană and the shale gas until the elections*, Realitatea.net, June 8, 2012 (Exh. C-641).

⁸¹ Claimants’ Opening Vol. 3 Slides 77; *The Government postpones the decisions regarding Roșia Montană and the shale gas until the elections*, Realitatea.net, June 8, 2012 (Exh. C-641).

be completed before the Government obtained the greater economic interest it demanded for the State and before it made a political assessment as to whether it would permit the Project to proceed at all, and these matters would not be, and were not, addressed prior to the Parliamentary elections that were to take place in late 2012.

32. Government officials repeatedly acknowledged in 2012 and 2013, however, that the technical assessment of the Environmental Permit had been completed at the November 29, 2011 TAC meeting and that a decision on the Environmental Permit needed to be taken. For example:

a.



b. In public statements in February, March, and April 2012, TAC President Anton repeatedly stated that the Ministry of Environment was waiting for the Ministry of Culture to confirm its endorsement.⁸³ Ministry of Culture officials also reportedly indicated that a “new endorsement” would be issued soon, but none was sent.⁸⁴

c. In an official note sent to Prime Minister Ponta in March 2013, Minister Şova reported that, “as far as the permitting process for the Rosia Montana mining project is concerned, the authorities have not taken any measures since November 2011.”⁸⁵ He further reported that, “by the end of 2011 all the EIA Report chapters, additional documentation required, and all TAC questions were answered. In the last TAC meeting, which took place in November 2011, TAC members concluded that all technical issues were clarified and that there were no further questions. Consequently, according to the procedure, the final meeting of TAC must be held for the adoption of the recommendation for the issuance of the Environmental Permit, which is the last step in the procedure before TAC.”⁸⁶

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⁸³ Claimants’ Opening Vol. 4 Slides 35-37.

⁸⁴ Claimants’ Opening Vol. 4 Slide 38. *See also* Procedural Order No. 10 dated June 8, 2018, Annex A, Request No. 8 (Respondent has no documents reflecting “the Ministry of Culture’s response, if any, to the Ministry of Environment’s requests in December 2011 and March 2012 for the Ministry of Culture to clarify that its December 7, 2011 ‘point of view’ letter was its ‘endorsement’ to issue the Environmental Permit.”).

⁸⁵ Note from Minister Şova to Prime Minister Ponta dated Mar. 6, 2013 (Exh. C-1903) at 35.

⁸⁶ Claimants’ Opening Vol. 4 Slide 50; Note from Minister Şova to Prime Minister Ponta dated Mar. 6, 2013 (Exh. C-1903) at 36; *id.* at 4 (“During 2010-2011, 5 meetings of the Technical Assessment Committee (TAC) took place and 3 other technical meetings. At the end of these meetings it was concluded that all technical aspects related to the Rosia Montana project had been clarified.”).

- d. In a meeting with the government's Inter-Ministerial Commission in March 2013, the then TAC President, Ministry of Environment State Secretary Elena Dumitru, advised that, "in the last meeting, in late November, TAC members concluded that the technical issues were clarified."⁸⁷
- e. At the next Inter-Ministerial Commission meeting, the Ministry of Culture acknowledged that the only reason it failed to confirm its endorsement in 2011-2012 was political blockage, as the Ministry of Environment "submitted a request under another government, other state secretaries in office and you received different answers. In short, if you ask for it now, you will receive it."⁸⁸
- f. In a report approved by the government on March 27, 2013,⁸⁹ the Inter-Ministerial Commission observed that "the permitting process for the Rosia Montana stagnates since November 2011."⁹⁰ The Commission further confirmed that "there are no impediments or significant obstacles" or objections to implementing the Project, and that the Ministry of Environment "can issue the Environmental Permit and any other details can be solved along the way."⁹¹
- g. At the next TAC meeting on May 10, 2013, the acting TAC President confirmed that the TAC had determined at its last meeting on November 29, 2011 that the Project EIA Report met the applicable requirements.⁹²
- h. In a May 2013 submission signed by Minister of Environment Plumb, the government notified the Aarhus Convention Compliance Committee that in

⁸⁷ Claimants' Opening Vol. 4 Slide 51; Transcript of Inter-Ministerial Commission Meeting dated Mar. 11, 2013 (Exh. C-471) at 20.

⁸⁸ Claimants' Opening Vol. 4 Slide 39; Transcript of Inter-Ministerial Commission Meeting dated Mar. 22, 2013 (Exh. C-482) at 6-7.

⁸⁹ Claimants' Opening Vol. 4 Slide 47; Government Information Note dated Apr. 28, 2013 (Exh. C-451) at 2 (noting that the Inter-Ministerial Commission's report was "presented and approved in the Government meeting of 27 March 2013").

⁹⁰ Claimants' Opening Vol. 4 Slide 43; Inter-Ministerial Commission Final Report dated Mar. 26, 2013 (Exh. C-2162) at 2.

⁹¹ Claimants' Opening Vol. 4 Slides 45-46; Inter-Ministerial Commission Final Report dated Mar. 26, 2013 (Exh. C-2162) at 9. *See also* Claimants' Opening Vol. 4 Slide 44; Memorial ¶¶ 414-418; Reply ¶¶ 59-61.

⁹² Claimants' Opening Vol. 4 Slides 77-79; Transcript of TAC Meeting dated May 10, 2013 (Exh. C-484) at 3-4 (Mr. Pătrașcu stating "the last TAC meeting took place on November 29, 2011, and the conclusion of the representative was that the Environmental Impact Assessment Report complies with the requirements from a technical point of view"); *id.* at 9 (Mr. Pătrașcu repeating that in November 2011 the TAC "concluded that, from a technical point of view, the EIA Report complies with the substantial and structural requirements"). While Mr. Pătrașcu indicated a few issues purportedly remained to be clarified, none was identified as open at the November 2011 TAC meeting, and each was "analyzed point by point" by the TAC in only two hours. *See* Claimants' Opening Vol. 4 Slides 80-82; Transcript of TAC Meeting dated May 10, 2013 (Exh. C-484) at 22.

November 2011, “members of the Technical Analysis Committee confirm that no questions with regard to technical aspects are outstanding.”⁹³

33. Thus, the contemporaneous record shows that issues that should have been addressed in short order, and indeed that were later promptly addressed, were delayed throughout 2012 for pretextual reasons.⁹⁴ Respondent’s various arguments to the contrary do not withstand scrutiny as they are based on misrepresentations of the record and of the legal requirements to obtain an Environmental Permit.⁹⁵ This includes Respondent’s arguments regarding the Ministry of Culture’s endorsement,⁹⁶ approval of the Waste Management Plan,⁹⁷ compliance with the Water Framework Directive,⁹⁸ the Urbanism Certificate,⁹⁹ an approved PUZ,¹⁰⁰ ADCs,¹⁰¹ surface rights,¹⁰² and a Water Management Permit.¹⁰³

⁹³ Claimants’ Opening Vol. 4 Slide 52; Romania Government Submission to Aarhus Convention Compliance Committee dated May 22, 2013 (Exh. C-2907) at 3.

⁹⁴ See, e.g., Claimants’ Opening’ Vol. 4 Slides 32-39; 57-61. See also Memorial ¶¶ 377-390; Reply ¶¶ 50-51.

⁹⁵ See generally Claimants’ Opening Vol. 4. See also Claimants’ Opening Vol. 2 Slide 13; Memorial ¶¶ 377-380; Reply ¶¶ 42-87, 92-135.

⁹⁶ Because the Ministry of Culture’s “endorsement” issued in April 2013 was the same in all material respects as its December 2011 “point of view”, the evidence shows (and the Ministry of Culture admitted in March 2013) that, but for political blockage, the Ministry’s approval for issuing the Environmental Permit (the only open issue from the November 29, 2011 TAC meeting that remained), should have been issued at the latest in 2012, as should have the Environmental Permit. Claimants’ Opening Vol. 4 Slides 26-30, 32-39, 53-56; Reply ¶¶ 62-71; Mihai II § VI.A.1; Schiau II § VI.A. See also Mihai ¶¶ 359-370.

⁹⁷ The evidence shows that the Government did not approve the Waste Management Plan in 2012 (which was not identified at the November 29, 2011 TAC meeting as necessary or missing), solely because of political blockage. See Claimants’ Opening Vol. 4 Slides 57-61; Memorial ¶¶ 392, 427-428; Reply ¶ 82; Avram ¶¶ 114-115, 127-128, 131; Avram II ¶¶ 55-62.

[REDACTED] Avram ¶ 115; Avram II ¶ 59. Romania failed to present that official (or anyone from his department) as a witness. Once re-submitted in 2013, the Waste Management Plan, which did not differ materially from the prior plan, was promptly approved. Avram ¶ 128; Avram II ¶ 60.

⁹⁸ Claimants’ Opening Vol. 4 Slides 17-18, 24-26, 62-74 (demonstrating the County Council Decision declaring that the Project was of “outstanding public interest” was requested by the TAC and sufficient to comply with legal requirements, and in any event, even if a Government Decision were needed, there is no good faith reason other than political blockage why such a declaration was not issued in 2011-2012); Reply ¶¶ 76-78. Mihai II § VI.A.3. See also Mihai ¶¶ 357-358.

⁹⁹ Claimants’ Opening Vol. 2 Slide 13; Memorial ¶ 263; Reply ¶ 98; Mihai § VII.C.1; Mihai II § V.C; Podaru § II.B.1.

¹⁰⁰ Claimants’ Opening Vol. 2 Slide 13; Reply ¶¶ 79-80, 98; Mihai ¶ 265; Mihai II § V.D; Podaru ¶¶ 132-151, 169; Podaru § II.B.3.

F. In 2013 the Ponta Government Maintained the Demand for Changed Economic Terms and Presented the Project for Political Decision

34. Following the year-end 2012 parliamentary elections, the Ponta Government re-engaged on the issue of the Roșia Montană Project. Prime Minister Ponta announced in January 2013 that his government maintained the position that the Project would not proceed without a renegotiation of the State’s shareholding and royalties, which he again insisted were “conditions” in addition to meeting environmental standards.¹⁰⁴ He said that Dan Șova as Minister of Infrastructure Projects would handle the matter and he also maintained that he had “not changed the public position or the personal one.”¹⁰⁵

35. Minister of Environment Plumb then confirmed that the Project would only go forward if it met environmental standards and following “a re-assessment of the benefits which the Romanian state, therefore which all of us, as citizens, have after the start of this project.”¹⁰⁶

36. [REDACTED]
[REDACTED]
[REDACTED]
¹⁰⁷ Minister Șova, who Respondent did not offer as a witness in this arbitration, explained in his testimony to Parliament that RMGC did not need a special law and that “[t]he law was made for the Romanian State, not for them.”¹⁰⁸

¹⁰¹ Claimants’ Opening Vol. 2 Slide 13; Reply ¶¶ 65-66; Mihai II § V.E; Podaru ¶¶ 119-131, 44

¹⁰² Claimants’ Opening Vol. 2 Slides 13, 15-37; Reply ¶¶ 651-666; Mihai § V.F; Podaru § II.B.2. *See also* Tr. (Dec. 3, 2019) 453:22-454:8 (Respondent’s Opening Tribunal Questions) (Respondent’s counsel confirming in response to Arbitrator Douglas’ question that “surface rights are a requirement only perhaps for the building permit in terms of express provisions relating to that that you’ll see in the Urban Certificate”).

¹⁰³ Claimants’ Opening Vol. 2 Slide 13; Mihai II ¶ 117, n.130.

¹⁰⁴ Claimants’ Opening Vol. 5 Slides 3-4; *Victor Ponta: Roșia Montană will move within the competence of the Ministry of Large Projects*, Hotnews.ro, Jan. 25, 2013 (Exh. C-831) (Ponta stating, “There are three conditions: environmental standards, royalties and participation of the Romanian state. When these three are met, it can begin. But for now, they are not met. . . We have to negotiate . . .”).

¹⁰⁵ *Id.*

¹⁰⁶ Claimants’ Opening Vol. 5 Slides 5-6; TV Interview of Rovana Plumb, Feb. 8, 2013 (Exh. C-1478 video) at 02:32 – 03:17.

¹⁰⁷ Claimants’ Opening Vol. 5 Slides 10-14; [REDACTED]

¹⁰⁸ Claimants’ Opening Vol. 5 Slides 15-16; Transcript of Parliamentary Special Commission dated Oct. 15, 2013 (Exh. C-1531) at 7-8 (Minister Șova also testifying that “the first issue we took into consideration” was

Notably, Mr. Ponta confirmed in his declaration that after the December 2012 referendum, his government “envisag[ed]” that Parliament would enact a “special law” for the Project.¹⁰⁹

37. The contemporaneous record leaves no doubt that the Government insisted on approval of a “special law” by Parliament as a condition for the Project to proceed as its preferred means of making a political decision as to whether the Project should be implemented, as reflected in many statements:

- a. Minister Şova stated on March 14, 2013 that the Project “will be subject to a law in the parliament” and that politicians, not the competent authorities, would make the final decision: “So, the parliament will have to vote. And the entire political spectrum will be able to criticize, to say whether they agree or not, to express their positions. Maybe the government will approve a project and then the parliament will say no. We want the political class to make a decision.”¹¹⁰
- b. Minister Şova stated on May 12, 2013 that the decision on the Project going forward “must be assumed by a Parliament,” and that the Government would not submit a draft law to Parliament unless the Project met the requirements to obtain the Environmental Permit.¹¹¹
- c. Minister Şova declared again on May 13, 2013 that “this project can only be promoted, if this choice is made, by means of a law in the Parliament of Romania,” and only if the Project first met all applicable requirements relating to environment and cultural heritage.¹¹²
- d. Prime Minister Ponta declared on May 13, 2013 that, with respect to the Project moving forward, “the decision is to be made by the Parliament of Romania,” and that “such important decisions should not be reached by a government” that “only reflects a part of the Parliament.”¹¹³

“what instrument can we use to defend the best interest of the Romanian State and, despite the fact there were many discussions between the ministries and the representatives of the Ministry of Justice, we reached a common position and established that we can only accomplish what we want by means of a law”).

¹⁰⁹ Claimants’ Opening Vol. 5 Slides 7-9; Ponta ¶ 30, § 4. See also Memorial ¶¶ 395-401 and Reply ¶¶ 172-175 (describing the December 2012 referendum).

¹¹⁰ Claimants’ Opening Vol. 5 Slides 18-19; *Dan Şova: Construction of Comarnic – Braşov motorway starts in October*, Financiarul.ro, Mar. 14, 2013 (Exh. C-824) at 7.

¹¹¹ Claimants’ Opening Vol. 5 Slide 21; TV Interview of Dan Şova, May 12, 2013 (Exh. C-871 video) at 04:00-04:58.

¹¹² Claimants’ Opening Vol. 5 Slides 22-23; TV Interview of Victor Ponta and Dan Şova, May 13, 2013 (Exh. C-772.02 video) at 03:42-05:30.

¹¹³ Claimants’ Opening Vol. 5 Slides 24-25; TV Interview of Victor Ponta and Dan Şova, May 13, 2013 (Exh. C-772.01 video) at 01:05-02:17.

- e. Prime Minister Ponta confirmed on May 23, 2013 that the Government rejected the “initial form” of the Project as to the environmental guarantees, the State’s shareholding, and the royalty level, and that after negotiations “these conclusions will be passed to the Parliament and the Parliament shall decide,” although he stated that he would “vote against the acceptance” of the Project.¹¹⁴
- f. State Secretary Năstase stated at a TAC meeting on May 31, 2013 that “all the conditions in the environmental permit and all the agreements” resulting from the “financial-economic negotiation” “will be part of the law that will be submitted to the Parliament for approval as the final deciding factor whether this project will be done or not. . . . [W]e are certain that, in the end, the Parliament will take the final decision if Romania will make this project or not.”¹¹⁵
- g. Minister Şova declared on June 8, 2013 that the Project’s compliance with environmental and cultural heritage “conditions” were “prerequisites” to submitting a draft law to Parliament, and that if these conditions were met, the government would submit a draft law and “a decision assumed by the entire political class in Romania will be made either with yes or no.”¹¹⁶
- h. Prime Minister Ponta stated on June 13, 2013 that the State’s shareholding and the royalties were “unacceptable” and that “we will demand” to change them. He also confirmed that “the Government will not take any kind of decision with respect to this project,” but instead would submit a draft law to Parliament, and “if it approves it fine, if it rejects it, fine as well,” although he stated again that “as a deputy I will vote against the project.”¹¹⁷

38. The Government established a Negotiation Commission to engage with Gabriel/RMGC on the State’s economic interest and other terms for implementing the Project.¹¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

¹¹⁴ Claimants’ Opening Vol. 5 Slides 26-27; TV Interview of Victor Ponta, May 23, 2013 (Exh. C-421.01 video) at 00:11-01:50.

¹¹⁵ Claimants’ Opening Vol. 5 Slides 29-30; Transcript of TAC Meeting dated May 31, 2013 (Exh. C-485) at 20.

¹¹⁶ Claimants’ Opening Vol. 5 Slide 33; *Interview of Dan Şova*, Adevarul.ro, June 8, 2013 (Exh. C-842).

¹¹⁷ Claimants’ Opening Vol. 5 Slides 36-37; TV Interview of Victor Ponta, June 13, 2013 (Exh. C-2680.01 video) at 00:00-01:23.

¹¹⁸ Claimants’ Opening Vol. 5 Slide 20; Government Information Note dated Apr. 28, 2013 (Exh. C-451) at 4-5, Arts. 2(1), 4(1), 5.

[REDACTED] 120

39. At the Negotiation Commission’s first meeting with Gabriel/RMGC, State Secretary Năstase stated that the government’s path forward was that “the project is approved by the Parliament. The project. So, mining in that area, everything we do, goes to the Parliament.”¹²¹ [REDACTED], and as the meeting transcript confirms, Gabriel objected to a Special Law for the Project:

[REDACTED] 22

Gabriel accordingly urged that any legislative proposal refer generally to the entire mining industry and *not* be a special law for RMGC or the Project.¹²³ Gabriel also communicated in writing that it wanted the Environmental Permit to be issued in accordance with the applicable legal procedure by Government Decision before any law was presented to Parliament.¹²⁴

40. During this time, the Ministry of Environment confirmed that the legal conditions for issuing the Environmental Permit were met. The Ministry of Environment reconfirmed that the

¹¹⁹ Claimants’ Opening Vol. 5 Slides 28, 31-32; [REDACTED].

¹²⁰ Claimants’ Opening Vol. 5 Slides 34-35; [REDACTED]. *See also* [REDACTED].

¹²¹ Claimants’ Opening Vol. 5 Slides 38-40; [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED]. *See also* Claimants’ Opening Vol. 5 Slides 35, 41.

technical assessment was completed,¹²⁵ directed each TAC member to submit conditions and measures that “will be included in the final decision and in the environmental permit,”¹²⁶ considered and published draft Permit conditions,¹²⁷ declared again at a final TAC conciliation meeting “that the analysis on the quality and conclusions of the EIA Report has been finalized” and the next meeting would be “for taking the decision,”¹²⁸ and prepared a 44-page draft Decision accepting the EIA Report and proposing issuance of the Environmental Permit.¹²⁹

41. Gabriel could not persuade the Government not to propose a special law or to take any decision on the Environmental Permit ahead or instead of submitting a special law to Parliament because that was the Government’s preferred vehicle to obtain a political decision on whether the Project would be implemented. At a press conference to announce his National Plan on Strategic Investments and Job Creation on July 11, 2013, Prime Minister Ponta thus declared that the Project would start “when the Parliament decides to, if it is started,” and that “we will send it to the Parliament and the Parliament will decide.”¹³⁰ A week later, Prime Minister Ponta confirmed again that the Government had succeeded in renegotiating with Gabriel and that “the Parliament

¹²⁵ Claimants’ Opening Vol. 4 Slides 77-83; Memorial ¶¶ 425-431; Transcript of TAC Meeting dated May 31, 2013 (Exh. C-485) at 18-19.

¹²⁶ Claimants’ Opening Vol. 4 Slide 84; Memorial ¶¶ 432-435; Letter from Ministry of Environment to TAC Members dated June 10, 2013 (Exh. C-554).

¹²⁷ Claimants’ Opening Vol. 4 Slide 85; Memorial ¶¶ 436-437; Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555).

¹²⁸ Claimants’ Opening Vol. 4 Slides 86-87; Memorial ¶¶ 438-445; Transcript of TAC Meeting dated July 26, 2013 (Exh. C-480) at 15. *See also* Mihai ¶¶ 87-96 (explaining that this conciliation meeting was the last step to taking a decision, that there is no requirement of unanimity within the TAC, that the views of the TAC members are merely consultative, and that the decision belongs to the Ministry of Environment); Mihai II ¶¶ 312-315; Tr. (Dec. 10, 2019) 2257:7-14, 2258:7-2259:22, 2261:3-11 (Mihai Direct). *See also* Tr. (Dec. 3, 2019) 418:2-420:5 (Respondent’s Opening) (counsel for Romania repeatedly refusing to answer Tribunal questions as to the meaning of “consensus”).

¹²⁹ Claimants’ Opening Vol. 4 Slides 88-89; Reply ¶ 90(h); Ministry of Environment Draft Decision on Issuance of Environmental Permit (Exh. C-2075).

[REDACTED]

Moreover, the draft Decision includes the same conditions proposed for public comment, which the Ministry of Environment published on its website, as well as several pages of “[r]easons substantiating taking of the decision” that refer to the applicable requirements met by the Project. Ministry of Environment Draft Decision on Issuance of Environmental Permit (Exh. C-2075) at 2-4.

¹³⁰ Claimants’ Opening Vol. 5 Slide 42; *Prime Minister Victor Ponta: 2013 Targets*, Government of Romania, July 11, 2013 (Exh. C-462) at 8.

will decide either to do the project or not to do the project. And then the decision is closed.”¹³¹ He also stated that the Environmental Permit “will be incorporated in the draft law and if the law is approved then it will go further for approvals, if not, it doesn’t.”¹³²

42. On August 27, 2013 the Government submitted the Draft Law and accompanying Draft Agreement to Parliament as approved by the Government and supported by an exposition of reasons signed by Prime Minister Ponta.¹³³ Reflecting the fact that since August 2011 the insistence on an improved economic stake was not an end in itself but instead inextricably part of the broader political decision-making process about the Project, the Government did not accept and finalize the offer, but included it as part of the Draft Agreement that would only be accepted and implemented if Parliament were to approve the special Draft Law.¹³⁴ As the Government repeatedly had emphasized that a draft special law would only be submitted to Parliament if the Project met all of the applicable environmental and cultural heritage requirements,¹³⁵ the Government’s submission of the Draft Law to Parliament confirmed yet again that the Project in fact met those requirements.¹³⁶

43. Shortly thereafter, Prime Minister Ponta announced that he would “vote against this project” and repeated that Parliament “shall decide if we will make such a project or we reject it.”¹³⁷ Mass street protests began the next day in Romania’s largest cities in reaction to the Government’s introduction of the special law, which, as detailed further below in response to question (d), was widely perceived as evidence of undue advantages for corporate special interests promoted by a corrupt political class.

¹³¹ Claimants’ Opening Vol. 5 Slide 43-44; TV Interview of Victor Ponta, July 18, 2013 (Exh. C-813 video) at 29:45-31:16 (Prime Minister Ponta further confirming that “The Parliament can make a different decision from the one made in the Government,” and that as a deputy in Parliament “I will not vote for that project, I have my own convictions.”).

¹³² Claimants’ Opening Vol. 5 Slide 45; TV Interview of Victor Ponta, July 18, 2013 (Exh. C-813) at 32:30-32:43.

¹³³ Claimants’ Opening Vol. 5 Slide 47; Draft Law dated Aug. 27, 2013 (Exh. C-519.01); Government Exposition of Reasons dated Aug. 27, 2013 (Exh. C-817).

¹³⁴ Draft Law dated Aug. 27, 2013 (Exh. C-519.01) Arts. 1(1), 1(2) (Draft Agreement “is hereby approved” and is “an appendix to this Law and shall be an integral part hereof”); *id.* at 12-22 (Draft Agreement).

¹³⁵ *See supra* ¶ 37. *See also Prime Minister Victor Ponta: 2013 Targets*, Government of Romania, July 11, 2013 (Exh. C-462) at 8.

¹³⁶ [REDACTED].

¹³⁷ Claimants’ Opening Vol. 5 Slides 49-50; *Ponta: “I will vote against Roşia Montană project,”* Adevarul.ro, Aug. 31, 2013 (Exh. C-789) at 1.

44. Further confirming that the Project met the applicable legal requirements for the Environmental Permit, which by law therefore had to be issued, Prime Minister Ponta acknowledged that he had consulted the Government and was “obligated under the law . . . to give approval and the Roșia Montană project had to start,” and that RMGC had “met all the conditions required by the law.”¹³⁸ Prime Minister Ponta stated, however, that he did not want to approve the Project, so he “sent the law to Parliament to submit it to a real debate.”¹³⁹

45. Minister of Environment Plumb similarly confirmed that the Project, if implemented, would be “the safest project of Europe,” and that it met “all requirements under the European and not only, international environmental standards.”¹⁴⁰ Yet Minister Plumb also confirmed that “[t]he Environmental Permit for Rosia Montana will be granted depending on the decision taken by the Parliament of Romania after public debates,” and that her vote in Parliament would depend on her constituents’ views.¹⁴¹

G. Having Tied the Project’s Acceptance to a Politically Untenable Special Law Promoted by the Government Yet Opposed by the Prime Minister as a Member of Parliament, Political Leaders Thereafter Definitively Rejected the Roșia Montană Project for Political Reasons

46. The political leaders of the governing coalition¹⁴² shortly thereafter called for the rejection of the Roșia Montană Project. On September 9, 2013, in a videotaped press conference held at the PNL political party headquarters, the PNL President, Senator Antonescu, announced that “although the discussions in Parliament have not yet started, I have a firm and definitive point of view on the Roșia Montană project,” and that his “obligation, as a political leader, is to make it known.”¹⁴³ Senator Antonescu declared that the “Roșia Montană mining project cannot

¹³⁸ Claimants’ Opening Vol. 5 Slides 50-51; Press Conference of Victor Ponta, Sept. 5, 2013 (Exh. C-460.02) at 1, video at 00:18-00:35.

¹³⁹ Press Conference of Victor Ponta, Sept. 5, 2013 (Exh. C-460.02) at 1, video at 00:35-00:42.

¹⁴⁰ Claimants’ Opening Vol. 5 Slides 52-53; *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană*, Hotnews.ro, Sept. 7, 2013 (Exh. C-556) at 1 (further stating “we have taken all European environmental standards and we have observed all conditions imposed by the relevant European legislation”).

¹⁴¹ Claimants’ Opening Vol. 5 Slide 54; *Rovana Plumb: The approval of Ministry of Environment for Roșia Montană* Hotnews.ro, Sept. 7, 2013 (Exh. C-556) at 1-2.

¹⁴² The government coalition, the Social Liberal Union (“USL”), was comprised of the National Liberal Party (“PNL”) headed by Senator Antonescu and the Social Democratic Party (“PSD”) headed by Prime Minister Ponta. Together this coalition held two-thirds of the seats in Parliament. See Memorial ¶¶ 387, 402.

¹⁴³ Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690.01) at 1, video at 00:29-00:49. See also Claimants’ Opening Vol. 5 Slides 55-59.

be supported,” and that he “reached this conclusion not for technical reasons, not because this project does not have the chance to be feasible or useful, but because there are major consequences and realities, which at this moment prevent the approval of this project.”¹⁴⁴ Senator Antonescu concluded that “this project, at this moment, must be rejected,” and that he would sustain this position “during the [PNL] party debates.”¹⁴⁵ Senator Antonescu acknowledged the “majority of the inhabitants of the Roșia Montană area who support the project,” but stated that this was “a national problem that needs to be answered nationally.”¹⁴⁶

47. Later that day, at the Palace of Parliament, Prime Minister Ponta announced that, in view of the statements of Senator Antonescu and the opposition leader and PDL President Vasile Blaga, he would “make sure” that first the Senate and then the Chamber of Deputies swiftly rejected the Draft Law that he and his Government had established was a condition for issuing the Environmental Permit and allowing the Project to proceed: “I want to make sure that the President of the Senate, Mr. Antonescu, will quickly include the draft law on the agenda of the Senate, and this will be rejected, as it will at the Chamber, and, thus, this project is closed. As a Prime Minister I must find other solutions for foreign investments and creation of new jobs.”¹⁴⁷

48. Moreover, when asked whether he would “speak at this time to PSD members of the Parliament so that they clearly vote, politically, ‘no,’” Prime Minister Ponta confirmed he would “of course” instruct his party to vote consistent with the political decision taken to reject it: “Of course, as long as this is the majority decision, yes. Not all of them, there will probably be PSD

¹⁴⁴ Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690.01) at 1, video at 01:07-01:51.

¹⁴⁵ Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690.01) at 2, video at 06:23-07:36 (stating that as “party chairman” and as a “presidential candidate,” “I wish and will do my best that this point of view be shared in the decision-making forum of the party, but I felt it was my duty to say this”). Senator Antonescu provided four reasons to reject the Project: (1) a “significant breach in the Romanian society” as “a significant number of citizens do not trust that such a project will be useful, that it will use the resources of this nation for its benefit,” which “is more important than a technical data;” (2) “a huge amount of suspicion” that “policy-makers in this action would not act in accordance with legitimate national public interests,” which “the top politicians” “deepened or amplified” by accusing each other of bribery; (3) it “is a government-initiated project, but the prime minister tells us that he will vote against it as a parliamentarian,” and the Ministry of Justice had objected to the Draft Law; and (4) “in terms of the environmental permit,” there is “a novel situation” in which, “on behalf of the government, the minister in charge tells us that whether or not [she] will give [her] approval depends on the outcome of the vote in parliament.” *Id.* at 1-2, video at 02:17-05:59.

¹⁴⁶ Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690.01) at 3, video at 09:59-10:49.

¹⁴⁷ Claimants’ Opening Vol. 5 Slides 60-61; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-872) at 1, video at 00:18-00:37.

members of the Parliament who will vote for, but it is very clear that the decision has now been made, then let's go to the Senate and close the project as soon as possible.”¹⁴⁸

49. At another press conference that same day with the President of the Chamber of Deputies, Prime Minister Ponta expressed the hope that Romania could do the Project someday without Gabriel: “Everybody, and rightfully, said why should the Canadians do it, why not the Romanians. Because we do not have the money, nor will we soon have, about a billion and a half dollars must be invested in the beginning. Hopefully, in five, ten years, the Romanian State will have this money. It doesn't today and it will not have them next year.”¹⁴⁹ He emphasized the Project was “a matter of jobs in the area and you know very well, at least in Alba County, there is strong support for the project,” but he explained: “What I wanted and I think I did well for a Prime Minister who wants to protect the Government, I did not want to make a decision myself, and lose the lawsuit and start looking for money from the Government. I wanted a decision of the Parliament.”¹⁵⁰ When the President of the Chamber of Deputies stated that he had intended to convene a special parliamentary commission and a reporter asked “who blocked the commission,” Prime Minister Ponta confirmed that setting up such a commission would be “a game we do not want to play, as we do not want to fool the people.”¹⁵¹ He emphasized that “we do not want to do this,” as there were “two political leaders who announced very clearly, and it is their right,” and that in view of the parliamentary majority against the Draft Law, “it is pointless to prolong things. There is the Senate and the commissions within the Senate who will pronounce a decision. The Senate rejects it and will be sent to the Chamber.”¹⁵²

50. Thus, on September 9, 2013, the political decision was taken to reject the Roşia Montană Project and thereby to repudiate RMGC's project development rights including the Roşia Montană Mining License without due process and without compensation. Subsequent events, as

¹⁴⁸ Claimants' Opening Vol. 5 Slides 62; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-872) at 2-3, video at 03:25-03:45.

¹⁴⁹ Claimants' Opening Vol. 5 Slides 63; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-793) at 2, video at 02:23-02:52.

¹⁵⁰ Claimants' Opening Vol. 5 Slides 63; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-793) at 2, video at 02:53-03:17.

¹⁵¹ Claimants' Opening Vol. 5 Slides 64; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-793) at 3, video at 08:09-08:20.

¹⁵² Claimants' Opening Vol. 5 Slides 64; Press Conference of Victor Ponta, Sept. 9, 2013 (Exh. C-793) at 4, video at 08:28-08:47.

elaborated further below in response to question (f), implemented the political rejection announced that day and confirmed that it was permanent and definitive, and moreover that it extended to the entirety of the State's joint venture with Gabriel in RMGC, thus including the Bucium Projects.¹⁵³ By way of brief summary:

- a. One day after the political rejection, Senate committees voted unanimously to reject the Draft Law despite the Minister of Environment, Minister of Culture, and NAMR President all testifying as to the Project's merits.¹⁵⁴
- b. Prime Minister Ponta again 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."¹⁵⁵
- c. In order to quell protests in Roșia Montană in support of the Project, Prime Minister Ponta then said he would convene the parliamentary special commission that days earlier he said would be "pointless."¹⁵⁶ This did not, however, change the political rejection already taken, as Prime Minister Ponta confirmed that there was no chance the Special Commission would approve the Draft Law if the vote were "purely political," and that his "Plan B" thus was to explain to other investors that "only this project was rejected on a political criterion."¹⁵⁷
- d. Consistent with that reality, a parade of Government officials including the Minister of Environment, Minister of Culture, and many others testified again that the Project met all applicable legal requirements,¹⁵⁸ but, before any votes were cast, Senator Antonescu and Prime Minister Ponta reconfirmed the political rejection at a joint press conference on November 11, 2013. Senator Antonescu declared that the Special Commission would give "its last breath of life today" by voting to reject the Draft Law, and Prime Minister Ponta confirmed that "the common position of USL is to reject the Draft Law" and that the full Parliament would reject it as well, stating "We have negotiated it politically."¹⁵⁹

¹⁵³ See generally Memorial ¶¶ 473-521; Reply ¶¶ 204-213; Claimants' Opening Vol. 6 Slides 17-58; Claimants' Opening Vol. 7. See also *infra* response to question (f).

¹⁵⁴ Claimants' Opening Vol. 6 Slides 18-22; Claimants' Opening Vol. 6 Slides 18-22; Memorial ¶¶ 473-486; Reply ¶¶ 204-207.

¹⁵⁵ Claimants' Opening Vol. 6 Slides 24-27; Interview of Prime Minister Ponta, Sept. 11, 2013 (Exh. C-437) at 09:31-10:07, 25:11-26:24, 1:06:30-1:07:35.

¹⁵⁶ Claimants' Opening Vol. 6 Slides 23-27, 32-35; Memorial ¶¶ 481, 495-499; Reply ¶ 208.

¹⁵⁷ Claimants' Opening Vol. 6 Slides 44-46; TV Interview of Victor Ponta, Oct. 5, 2013 (Exh. C-1504) at 03:04-03:45, 08:39-09:18.

¹⁵⁸ Claimants' Opening Slides 35-43, 47-49; Memorial ¶ 503; Reply ¶ 111.

¹⁵⁹ Claimants' Opening Vol. 6 Slides 50-53; USL Press Conference, Nov. 11, 2013 (Exh. C-2441) at 03:12-03:37, 14:34-15:19, 17:49-18:08.

- e. Those political orders were heeded and the Draft Law was rejected in a series of unanimous or nearly unanimous votes, first by the Special Commission on the night of the press conference (November 11, 2013), then by the Senate on November 19, 2013, and finally by the Chamber of Deputies later in June 2014.¹⁶⁰

51. While RMGC participated in good faith in the televised hearings before the Special Commission in the hope it might lead to a positive result,¹⁶¹ in hindsight it is evident that this process was mere political theater to confirm and implement the pre-determined political rejection announced on September 9, 2013. Moreover, while Respondent acknowledges as it must that the rejection of the Draft Law was legally irrelevant to the EIA process,¹⁶² the permanent, irrevocable effect of the political rejection cannot be reasonably denied. Thus, one day after the Special Commission voted according to the political orders reconfirmed by Senator Antonescu and Prime Minister Ponta at their joint press conference, Minister of Environment Plumb stated, “Of course Parliament’s decision means the last word for us and we will observe it.”¹⁶³ A year later, Prime Minister Ponta confirmed again that “the Parliament rejected the law, so the exploitation will not be made, this is for sure.”¹⁶⁴

52. That this political rejection and repudiation of legal rights extended not only to the Roșia Montană Project, but also to the State’s joint venture with Gabriel generally as well as to all of the associated rights and mining licenses previously granted to RMGC, including for the Bucium Projects, also is undeniable in hindsight. Indeed, on November 18 and 19, 2013, *i.e.*, one week after the Special Commission voted and the same day that the Senate voted, the Ploiesti public prosecutor extended to RMGC a criminal investigation of the “Kadok” group of companies for suspected money laundering and tax evasion, and froze one of RMGC’s bank accounts, which resulted in a notice in the Trade Registry that RMGC is “under criminal investigation,” thus

¹⁶⁰ Indeed, despite testifying in favor of the Project, Minister Plumb, Minister Barbu, and Minister Șova all refused to vote for the Draft Law as members of Parliament, consistent with their earlier statements that they would not vote for it if the political order was to reject it. Claimants’ Opening Vol. 6 Slides 28-31, 54; Memorial ¶¶ 487-521; Reply ¶¶ 208-213.

¹⁶¹ Memorial ¶¶ 504-505; Tanase II ¶¶ 210-211; Henry ¶¶ 123-125; Avram ¶ 165; Gligor ¶ 149; Lorincz ¶ 88.

¹⁶² See Reply ¶ 219. See also, *e.g.*, Counter-Memorial ¶¶ 369, 373-374, 531, 535; Rejoinder ¶ 869.

¹⁶³ Claimants’ Opening Vol. 6 Slides 55-56; Transcript of Interview with Rovana Plumb, Nov. 12, 2013 (Exh. C-828).

¹⁶⁴ Claimants’ Opening Vol. 6 Slides 57-58; Video of Prime Minister Ponta, Oct. 19, 2014 (Exh. C-416) at 01:39-01:57.

tarnishing its reputation.¹⁶⁵ From there, as elaborated in response to question (f) below, the Government consistently acted in accordance with its decision to terminate its joint venture with RMGC, including by repudiating RMGC's project development rights.

53. Thus, as described below, with the political repudiation announced on September 9, 2013, the course of politicized evaluation and decision-making as regards Gabriel's investments that had commenced with the Boc Government came to an effective conclusion on terms that constituted a breach of several articles of the relevant BITs.

H. The Politicized Permitting Process that Ended with the Rejection of the Roșia Montană Project and the State's Entire Joint Venture with Gabriel Breached Several Articles of the Relevant BITs

54. Romania's politicized treatment of RMGC's application for permitting of the Roșia Montană Project is the measure that resulted in breaches of the relevant BITs. The treatment commenced with the Boc Government's repeated pronouncements in that context that the State's contract with Gabriel was detrimental to the State, its delay of Project permitting while demanding improved economic benefits for the State, and its maintaining that the Government and the ruling coalition parties would have to make a political decision as to whether the Project would be implemented. The same treatment was continued by the Governments that followed. Permitting was not allowed to progress as first the Ungureanu Government and then the Ponta Government was not prepared to allow the administrative permitting process to be completed during 2012, nor to engage on political decision-making regarding the Project.

55. In 2013, the Ponta Government maintained the treatment of requiring improved economic benefits for the State and a political decision as conditions for whether permitting would move forward and the Project would be implemented. This was notwithstanding that the State earlier had entered into a joint venture with Gabriel and had issued mining licenses that reflected the State's earlier policy decision to permit mining in the area if permitting requirements were met, and that obligated RMGC to develop the Project accordingly. Presenting a special law for the Project to Parliament as the means for making the political decision was a further step in the constant politicization of the permitting process. That it was done in the context of repeated baseless accusations from the highest levels of government of corrupt influence peddling by

¹⁶⁵ Memorial § IX.C.1; Reply § V.D.

RMGC, which sparked and fueled public protests after the special law was presented to Parliament, led to the decision to reject not only the Roșia Montană Project, but also effectively to repudiate and put an end to the State's joint venture with Gabriel in RMGC.

56. The politicized treatment of RMGC's application for the Environmental Permit, which led to the rejection of the Project and the effective termination of the State's joint venture with Gabriel, was a composite act that breached several articles of the two relevant BITs as listed below. For each article of the BIT at issue, the breach occurred as of the date of the political repudiation, on or about September 9, 2013, as noted above. The State's acts and omissions occurring prior to that date were in breach of the applicable legal framework established in Romanian law for Project permitting, particularly insofar as the State delayed and placed extra-legal conditions on completing the permitting process.¹⁶⁶ In each respect, however, the State's treatment of Gabriel's investments prior to the political decision to reject was not sufficiently definitive to be considered as a treaty breach, including because overall treatment remained uncertain as it remained to be seen what and whether changes to the economic terms demanded by the State would be agreed and accepted,¹⁶⁷ whether they would be counter-balanced by proposed improvements in the legislative framework that would impact the Project, and whether the Project would be permitted to proceed.¹⁶⁸

57. As described above, the State began its course of conduct in August 2011, before the entry into force of the Canada BIT on November 23, 2011.¹⁶⁹ As the UK BIT entered into force on January 10, 1996,¹⁷⁰ there are no limitations as to the Tribunal's ability to take those earlier acts into account in relation to the State's obligations under the UK BIT. As regards the State's

¹⁶⁶ Notably, "[w]hile composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation." ILC Articles (CL-61), art. 15 cmt (9). In addition, conduct in breach of a municipal law obligation does not necessarily rise to the level of a treaty breach. As the ICJ observed analogously in its judgment in the ELSI case, "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law." *ELSI v. Italy* (CL-100) ¶ 128.

¹⁶⁷ Indeed, neither the Boc Government nor the Ungureanu Government nor the interim Ponta Government acted on the final conditional offer made by Gabriel and RMGC. *See supra* ¶¶ 26-30.

¹⁶⁸ For these reasons the three-year limitation included in the Canada BIT does not bar the claims presented as Gabriel did not reasonably acquire knowledge of the breach and the loss prior to July 30, 2012. *See Reply* § VII.A.4; Claimants' Opening Vol. 8, slides 19-42.

¹⁶⁹ *See Documents* evidencing Canada BIT's entry into force (Exh. C-2).

¹⁷⁰ *See Documents* evidencing UK BIT's entry into force (Exhs. C-3 and C-4).

obligations under the Canada BIT, the fact that some conduct occurred prior to November 23, 2011 does not prevent the Tribunal from taking those acts into account to establish the factual basis for the conduct that followed and as evidence of the State's intent.¹⁷¹

1. The Politicized Permitting Process that Ended with Rejection Was a Breach of Article 5 of the UK BIT and Article VIII(1) of the Canada BIT (Expropriation)

58. For all the reasons set forth above, at the hearing, in Claimants' Memorial and the Reply,¹⁷² the politicized approach taken to the permitting of the Roşia Montană Project, which led to the rejection of the Project and the effective termination of the State's joint venture with Gabriel, constituted a creeping and *de facto* expropriation of Gabriel's investments in RMGC, as Prime Minister Ponta admitted on national TV.¹⁷³

59. While the full scope of the *de facto* expropriation was not clearly evident to Gabriel at the time of the political rejection or after Parliament followed its political marching orders to reject the Draft Law, over time as the Government acted in numerous ways consistent with its decision to abandon its joint venture with Gabriel and not permit RMGC to advance any mining project, it became clear that RMGC and its project development rights in relation both to the Roşia Montană Project as well as to the Bucium Projects would not be honored and thus had been entirely frustrated.¹⁷⁴ Thus, as the date of the political repudiation of rights on September 9, 2013, Gabriel's investments made in and through RMGC were fully expropriated, that is, the licenses issued to RMGC for the Projects have no value, the loans to Minvest associated with

¹⁷¹ See ILC Articles on State Responsibility (CL-61), art. 15 cmt (11) ("In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).").

¹⁷² Memorial § XIV; Reply § XII; Claimants' Opening Vol. 8 Slides 24-30.

¹⁷³ Claimants' Opening Vol. 6 Slides 24-26; *Interview with Prime Minister Victor Ponta*, Antena3, dated Sept. 11, 2013 (Exh. C-437 video) at 09:31-10:07, 25:11-26:24) (declaring that, "by rejecting the mining we are basically performing a nationalization, we are nationalizing the resources).

¹⁷⁴ Claimants' Opening Vol. 8 Slides 27-29, Vol. 7 Slide 3; Memorial ¶ 799(f)-(h). See also *infra* response to question (f). See generally Memorial § IX; Reply §§ V, VI. Romania's rejection of the Roşia Montană Project and RMGC and its repudiation of the associated rights extended to the Bucium Projects, as evidenced by the State's failure to act on RMGC's applications for the exploitation licenses for the Tarniţa and Rodu Frasin deposits. In addition, since the feasibility of Rodu-Frasin was dependent on the Roşia Montană Project, the Government's repudiation of the Roşia Montană Project entailed the loss of the Rodu-Frasin project for that reason as well. Reply ¶ 562; Claimants' Opening Vol. 8 Slide 29.

recapitalizations of RMGC and which depend for their repayment on RMGC dividend payments have no value, extensive geological and mining data, engineering studies, and other technical data developed to guide development of the Projects have no value, properties acquired solely for purposes of project development have no material commercial value, and the shares in RMGC, whose sole income-producing assets were the license rights to develop the Projects, are worth nothing.¹⁷⁵

60. As this course of conduct was not done for a public purpose, under due process of law, or with payment of fair market value (or any compensation) to Gabriel,¹⁷⁶ Romania breached Article 5 of the UK BIT and Article VIII(1) of the Canada BIT – as it subjected Gabriel Jersey’s and Gabriel Canada’s investments to measures having effect equivalent to expropriation in breach of the requirements of those articles, as of the date of the political rejection and repudiation.

2. The Same Course of Conduct Was a Breach of Article 2 of the UK BIT and Article II of the Canada BIT (Fair and Equitable Treatment)

61. This same course of conduct also breached the obligation to accord fair and equitable treatment contained in Article 2 of the UK BIT and Article II of the Canada BIT.¹⁷⁷

62. In particular, whether treatment satisfies the obligation to accord fair and equitable must be considered in light of all the relevant circumstances, taking into account that a breach of this standard of treatment is characterized by conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.”¹⁷⁸ Romania’s treatment of Gabriel’s investments breached that standard as of the date of the political rejection and repudiation of rights. Prior to that date, the ultimate treatment that Gabriel’s investments would receive remained uncertain, as Romania either could have changed course and followed

¹⁷⁵ Memorial §IX.B; Reply § XII.B.

¹⁷⁶ Memorial § IX.C; Reply § XII.B.3.d-e.

¹⁷⁷ Memorial § X; Reply § VIII; Claimants’ Opening Vol. 8 Slides 24-30.

¹⁷⁸ Memorial ¶ 646 (citing *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated Apr. 30, 2004 (CL-139)).

the law or, alternatively, its political assessment could have resulted in a decision to approve, rather than reject, the Project.

3. The Same Course of Conduct Also Breached Article 2 of the UK BIT and Article II of the Canada BIT (Full Protection and Security)

63. This course of conduct as of the date of the political rejection and repudiation also breached the obligation to accord full protection and security contained in Article 2 of the UK BIT and Article II of the Canada BIT.¹⁷⁹ That is because the Government's decision to replace the legal administrative permitting process with a political decision-making process culminating in the political rejection was a denial of procedural justice. Denying the Claimants' investment the benefit of the legally applicable procedural permitting process and replacing it with a political process and decision culminated in a breach of the full protection and security standard as of the date of the political rejection and repudiation.¹⁸⁰ Prior to that date, it remained uncertain whether the State would allow the legal process ever to be applied to the Claimants' investments.

4. Non-Impairment by Unreasonable and Discriminatory Measures: Article 2(2) of the UK BIT and Article III(3) of the Canada BIT

64. The same course of conduct also constitutes an unreasonable or discriminatory measure that impaired Gabriel's investments in breach of Article 2(2) of the UK BIT and Article III(3) of the Canada BIT on the date of the political rejection and repudiation.¹⁸¹

65. The non-impairment standard set forth in Article 2(2) of the UK BIT prohibits impairment both by unreasonable as well as by discriminatory measures.¹⁸² As the tribunal in *Saluka v. Czech Republic* observed, this standard of treatment has no different meaning in this context than in the context of the fair and equitable treatment standard.¹⁸³ Thus, a State must not take measures that arbitrarily or unjustifiably impair an investor's legal rights or that willfully disregard due process and proper procedure.

¹⁷⁹ Memorial § XI; Reply § IX; Claimants' Opening Vol. 8 Slides 24-30.

¹⁸⁰ Memorial ¶¶ 711-713; Reply ¶¶ 513-516.

¹⁸¹ Memorial § XII; Reply § X; Claimants' Opening Vol. 8 Slides 24-30.

¹⁸² Memorial ¶ 718. *See also* Memorial ¶¶ 720-730.

¹⁸³ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated Mar. 17, 2006 (CL-97) ¶ 460. *See also* Memorial ¶ 721.

66. Gabriel's investments have been impaired because, rather than take a decision on the Environmental Permit as required by law, the State abandoned the administrative process and legal standards applicable to permitting and subjected the Project to an unfair political decision-making process ending in rejection and repudiation of rights.¹⁸⁴ The State also impaired Gabriel's investments in relation to the Bucium properties by refusing for obvious reasons of permanent political blockage to honor RMGC's right to obtain exploitation licenses for the Rodu-Frasin and Tarnița deposits.¹⁸⁵

67. The same course of conduct breached the prohibition against discriminatory treatment in Article 2(2) of the UK BIT and Article III(3) of the Canada BIT.¹⁸⁶ The State treated Gabriel's investments less favorably than investors in similar circumstances by deciding to base the decision whether to allow the Roșia Montană Project to proceed on political rather than on applicable legal criteria, while undertaking to treat other projects according to the law.

68. Thus, whereas the Certej,¹⁸⁷ Roșia Poieni,¹⁸⁸ and Cernavodă¹⁸⁹ projects were treated in accordance with the law in relation to their applications for environmental permits, there was a discriminatory refusal to allow the administrative procedure to be followed or to issue an environmental permit for the Roșia Montană Project. Likewise, while Romania acted on the application for an exploitation license for the Rovina project (and finalized 109 other exploitation licenses between 2011 and 2015), following the political rejection and repudiation of RMGC, Romania has refused to honor RMGC's applications for exploitation licenses for the Bucium Projects.¹⁹⁰

¹⁸⁴ Memorial ¶¶ 680-688, 734-735; Reply ¶¶ 485-502, 521.

¹⁸⁵ Memorial ¶¶ 684(d), 735(h); Reply ¶¶ 494, 521.

¹⁸⁶ See Memorial ¶ 719. See also Memorial ¶¶ 731-733.

¹⁸⁷ Reply ¶ 529.

¹⁸⁸ Memorial ¶¶ 736-737; Reply ¶¶ 530-531.

¹⁸⁹

Mihai II ¶ 301, n.356.

Letter from Ministry of Environment to National Company Nuclearelectrica dated July 4, 2008 (Exh. C-2416) (Ministry of Environment requesting the developer to "redo" the EIA report "within the environmental impact assessment procedure ... according to the provisions of Order No. 863/2002"); Mocanu ¶ 19.

¹⁹⁰ Reply ¶ 308, 528. [REDACTED]; Bîrsan II ¶¶ 216-218. See generally Memorial § IX.E; Reply § VI.

69. The Government has openly acknowledged the discriminatory treatment of Gabriel and its investments. When asked how the Government would proceed if the Project “is not done because of a negative vote in Parliament,” Prime Minister Ponta emphasized that he would “explain to all national and foreign investors, to all those which are involved in large projects, gas, offshore, submarine cable, uranium mines, to tell them that this, *only this project was rejected on a political criterion*, but that Romania remains a country open to investments, to major projects.”¹⁹¹ Clearer statements of discriminatory treatment are hard to imagine.

5. Failing to Observe Obligations: Article 2(2) of the UK BIT

70. Romania also breached Article 2(2) of the UK BIT as of the date of the political rejection and repudiation of rights as the political assessment of the Roşia Montană Project led to the State’s failure to observe the obligations undertaken with regard to Gabriel’s investments.¹⁹² These obligations include the State’s joint venture agreement with Gabriel in the form of RMGC and its Articles of Association, as well as the Roşia Montană License and the Bucium License.¹⁹³

(b) Did Claimants’ alleged losses occur (or begin to occur) at the same point in time that the breach is said to have been consummated in respect of each claim? Should Claimants’ alleged losses be quantified on the date upon which each breach is alleged to have occurred? If not, is the point in time when Claimants’ alleged losses occurred relevant to establishing liability for a breach in respect of each claim?

71. Claimants’ claims pertain to a single composite act by Respondent that breached multiple provisions of the BITs. The course of treatment to which Respondent subjected Claimants’ investments over time started in August 2011 and culminated in the complete and permanent political rejection of RMGC’s project development rights on or about September 9, 2013.¹⁹⁴ Because all of Respondent’s multiple breaches of the BITs arise from the same composite act, each breach has “occurred” over the same period of time through September 9, 2013 and each

¹⁹¹ Opening Vol. 6 Slides 44, 46; TV Interview of Victor Ponta, Oct. 5, 2013 (Exh. C-1504) at 6-7, video at 08:39-09:18 (emphasis added).

¹⁹² Memorial § XIII; Reply § XI. The MFN treatment provisions in Article III(1) of the Canada BIT entitle Gabriel Canada to the more favorable treatment extended in Article 2(2) of the UK BIT. Memorial ¶ 740, n.1488; Reply ¶ 533.

¹⁹³ Memorial ¶ 748.

¹⁹⁴ See *supra* response to question (a).

breach was “consummated” (in the sense of having ripened into what in hindsight unmistakably is a violation of Respondent’s BIT obligations) on the same date, *i.e.*, September 9, 2013.¹⁹⁵

72. Because the evidence shows that Romania’s complete repudiation of RMGC’s project development rights occurred on September 9, 2013, that date also marks the point in time when in hindsight the value of Claimants’ investments was destroyed. It does not follow, however, that September 9, 2013 is the appropriate date for quantifying the loss suffered by Claimants. Rather, the moment as of which Claimants’ loss is to be quantified must be selected so as to give effect to the basic rule that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”¹⁹⁶ The primary form of reparation is restitution,¹⁹⁷ which as the commentary to the ILC Articles explains refers to re-establishing the *status quo ante*, *i.e.*, the situation that existed prior to the occurrence of the wrongful act, and *not* to re-establishing the situation that would have existed if the wrongful act had not been committed.¹⁹⁸ This approach ensures that the analysis is an assessment of a factual situation and not a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed.¹⁹⁹ Where restitution is unavailable, the responsible State is under an obligation to compensate in an amount equal to the value that restitution would bear.²⁰⁰

73. Reisman and Sloane accordingly observe in their classic work concerning creeping expropriation that “the moment at which liability for an expropriation attaches . . . need not – and

¹⁹⁵ See ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 15 (“1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”); *id.* Art. 15, cmt. (10) (“Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission.”); Memorial ¶¶ 862-867.

¹⁹⁶ See Memorial ¶ 844. See also Memorial ¶¶ 853-854; ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 31(1) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”).

¹⁹⁷ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 35, cmt. (3). See also Memorial ¶ 847.

¹⁹⁸ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 35, cmt. (2). See also Memorial ¶ 847.

¹⁹⁹ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 35, cmt. (2). See also Memorial ¶ 848.

²⁰⁰ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 36, cmt. (3). See also Memorial ¶ 849.

in many cases . . . should not – be equated with the moment at which the value of expropriated property rights properly should be appraised for compensation purposes.”²⁰¹ Rather, in order to “give full effect to the venerable compensation principles articulated in *Chorzów Factory*,”²⁰² the moment of valuation should be “a point in time *before the host state’s conduct occasioned the depreciation in the value* of the foreign investment.”²⁰³ There are sound reasons for this approach.

74. As Reisman and Sloane observe, “[w]ere the critical moment of expropriation for purposes of valuation set at the date of the *last* of the series of deleterious governmental acts of malfeasance or nonfeasance that ‘ripened into a more or less irreversible deprivation of the [investment]’, then the fair market value of that investment may well be determined to be substantially less than were the critical moment set at the date of one of the earlier acts. The ironic, indeed perverse, results of that theory would be to reward States for accomplishing expropriation . . . furtively, either by a creeping or disguised series of regulatory acts and omissions of nebulous legality . . . or by evasion or abdication of the often politically difficult task of establishing an appropriate normative environment for investment.... Conversely, it would penalize foreign investors for attempting to avoid expropriation and sustain their investments by, *inter alia*, fortifying them with additional capital in the face of measures of nebulous legality. These results would be calamitous. . . . [T]hey contravene the venerable and general legal principle, common to municipal and international law, that a delictor may not benefit from its own delict.”²⁰⁴

75. Moreover, in setting forth the conditions that must be satisfied in order for an expropriation to be lawful, both the UK BIT and the Canada BIT require that compensation be provided based on the fair market value of the investment “immediately before the expropriation or before the impending expropriation became public knowledge” (per the UK BIT) and

²⁰¹ W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) at 128.

²⁰² W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) at 128.

²⁰³ W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) at 131 (emphasis added). *See also* Memorial ¶ 872.

²⁰⁴ W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) at 146 (emphasis in original).

“immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier” (per the Canada BIT).²⁰⁵ *A fortiori*, and in light of the rule that reparation must, as far as possible, wipe out all the consequences of the illegal act, it would not accord with the BITs or with international law to use a later date of valuation in a manner that would result in a lower amount of compensation for an *unlawful* expropriation.²⁰⁶

76. Further, for purposes of State responsibility and the obligation to make reparation, international law does not distinguish between the breach of an obligation relating to expropriation and the breach of other obligations relating to the treatment of foreign investment.²⁰⁷ Accordingly, the approach to the moment of valuation outlined above in connection with expropriation has been applied by investment treaty tribunals also with respect to breaches of other treaty undertakings, such as with respect to a denial of fair and equitable treatment. For example, the tribunal in *Gemplus v. Mexico* ruled that a series of acts by Mexico commencing with an unlawful requisition of the claimant’s operations and culminating 18 months later with the revocation of the investor’s concession constituted both a breach of

²⁰⁵ UK-Romania BIT (Exh. C-3) Art. 5; Canada-Romania BIT (Exh. C-1) Art. VIII(1); *see also* Memorial ¶¶ 821-828; *Rusoro Mining v. Venezuela* (CL-149) ¶¶ 756-757 (stating that the purpose of the treaty rule concerning lawful expropriation that compensation be assessed “immediately before the expropriation or at the time the proposed expropriation became public knowledge” is to “avoid that the price of the asset becomes contaminated by the information originating from the host State,” and noting that the effects of wrongful measures must be excluded from the valuation, “otherwise the State would be deriving advantage from its own wrong”).

²⁰⁶ *See* W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT’L L. 115 (2003) (CL-123) at 149 (noting that customary international law “dictates that valuation of expropriated property must exclude ‘any diminution in value attributable to wrongful acts’ of the expropriating government,” that “[t]he depressing effect on values of threats or acts of nationalization must be ignored in ascertaining the market value of subsequently nationalized enterprises,” and that “[v]aluation in such cases is ‘calculated as if the expropriation or other governmental act had not occurred and was not threatened’” (quoting various authorities)).

²⁰⁷ *See* Memorial ¶¶ 859-861; *see also, e.g., Gold Reserve v. Venezuela* (CL-81) ¶¶ 680-681 (having found that the State’s denial of fair and equitable treatment caused the loss of the entire value of Gold Reserve’s investment, the tribunal cited the *Chorzów Factory* principle that reparation should wipe out the consequences of the breach and reestablish the situation which would, in all probability, have existed if that act had not been committed, and stated that the “Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology”); *Crystallex v. Venezuela* (CL-62) ¶¶ 841-858 (“[G]iven the cumulative nature of the breaches that the Tribunal must compensate, and especially in view of its findings on FET that the Respondent’s conduct caused all the investments made by Crystallex to become worthless, the Tribunal will apply the full reparation standard according to customary international law;” and noting “it is well-accepted that reparation should reflect the ‘fair market value’ of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.”).

Mexico’s obligation to accord fair and equitable treatment and unlawful expropriation under the Mexico-France and Mexico-Argentina bilateral investment treaties.²⁰⁸ The tribunal ruled that “[b]oth under international law and (directly or by analogy) Article 5 of the two BITs [addressing the conditions of a lawful expropriation], the relevant date for assessing compensation is . . . the day preceding the unlawful Requisition,” which was the “first completed breach by the Respondent under both BITs, as regards both the FET standards and unlawful expropriation.”²⁰⁹

77. Similarly, in *Crystallex v. Venezuela*, the tribunal concluded that the overall effect of acts of various Government organs, starting with acts surrounding the denial of a permit on April 14, 2008, continuing through politically adverse statements of Government officials directed against the claimant’s investment, and culminating in the repudiation of the claimant’s concession contract on February 3, 2011, constituted a breach of the obligation to accord fair and equitable treatment and a creeping expropriation.²¹⁰ Referencing the customary international law requirement of full reparation,²¹¹ the tribunal held that the most appropriate valuation date for assessing compensation was the day before the first act in the series giving rise to the creeping expropriation, *i.e.*, April 13, 2008.²¹²

78. Further, importantly, the commentary to the ILC Articles makes clear that “[w]here the property in question or comparable property is freely traded on an open market, value is more readily determined,” and that “[w]here share prices provide good evidence of value, they may be utilized.”²¹³

79. Here, Gabriel Jersey and Gabriel Canada are respectively the direct and indirect majority shareholders of RMGC, owning 80.69% of RMGC’s shares.²¹⁴ Gabriel and RMGC at all relevant times have been solely focused on the development of the project development rights,

²⁰⁸ *Gemplus v. Mexico* (CL-156) ¶¶ 4-177 to 4-189, 7-68 to 7-78, 8-21 to 8-28.

²⁰⁹ *Gemplus v. Mexico* (CL-156) ¶¶ 12-43 to 12-53.

²¹⁰ *Crystallex v. Venezuela* (CL-62) ¶¶ 576-614, 623, 666-708, 961.

²¹¹ *Crystallex v. Venezuela* (CL-62) ¶¶ 841-853.

²¹² *Crystallex v. Venezuela* (CL-62) ¶¶ 854-858.

²¹³ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 36, cmt. (22) and n.553 (*citing INA Corp. v. Iran*).

²¹⁴ See Gabriel Resources Ltd. 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 4; Gabriel Resources Ltd. 2016 Annual Information Form dated Mar. 29, 2017 (Exh. C-1814) at 5. See also Compass Lexecon ¶ 26 (reproducing Gabriel’s share ownership structure from Gabriel Resources Ltd. 2011 Annual Information Form (Exh. C-1809 at 4)).

which were their sole asset.²¹⁵ At all relevant times, shares in Gabriel Canada were extensively traded on the Toronto Stock Exchange (TSX) and Gabriel Canada had been, and still is, subject to stringent TSX financial and compliance requirements and disclosure obligations as well as extensive reporting by market analysts.²¹⁶ Accordingly, the publicly traded value of the shares in Gabriel Canada prior to the measures at issue provides a non-speculative, real-world indicator of the value of Gabriel's investments.²¹⁷

80. In light of the creeping and gradual nature of Respondent's breaches of the BITs, taking place over two years, and considering that Respondent's complete rejection of RMGC's project development rights on September 9, 2013 is apparent only in hindsight, the diminution in Gabriel Canada's publicly traded value during the period from August 2011 to September 9, 2013 could not and does not reflect the full extent of the damages caused by Respondent's treaty violations as of that date. The evidence nevertheless demonstrates that the treatment to which Respondent subjected Claimants' investment starting in August 2011 significantly depressed the market value of the project development rights as reflected in Gabriel Canada's publicly traded value during the period leading up to September 9, 2013.

81. Specifically, as described above, after the November 29, 2011 TAC meeting and the prompt resolution of the few follow-up "details" identified at that meeting, the Ministry of Environment was legally obligated to take a decision on issuing the Environmental Permit by the end of January 2012,²¹⁸ which is when Minister Borbély said that the decision was likely to be taken (assuming the Government's political assessment after renegotiations was favorable).²¹⁹

²¹⁵ See Gabriel Resources Ltd. 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 5; Gabriel Resources Ltd. Interim Consolidated Financial Statements (Unaudited) for the period ended June 30, 2011 (Exh. C-1885) at 12-14; Gabriel Resources Ltd. 2016 Annual Information Form dated Mar. 29, 2017 (Exh. C-1814) at 6. See also Compass Lexecon ¶ 25; Compass Lexecon II ¶ 18. The assertions by Respondent's expert Dr. Burrows to the contrary are without basis.

²¹⁶ Memorial ¶¶ 898, 906-907; Reply ¶ 676.

²¹⁷ Memorial ¶ 898; Compass Lexecon ¶ 46 (explaining with reference to Gabriel Canada's market capitalization during the period immediately preceding the valuation date that "Gabriel Canada's market capitalization of US\$ 2,617 million represents an independent, objective and directly observable market measure of the value, for a minority shareholder, of the Project Rights, free of the impact of the Measures").

²¹⁸ Mihai ¶¶ 371-374 (concluding that the Ministry of Environment had until January 31, 2012 to take a decision on the Environmental Permit and the Government had until March 8, 2012 to issue a Government Decision consistent with the Ministry's proposal).

²¹⁹ See *supra* ¶ 25.

Thus, the prevailing expectation was that the Ministry of Environment would take a prompt decision on the Environmental Permit.²²⁰

82. For that reason, when the Ministry of Environment failed to take any decision, contrary to both law and market expectations, analysts in the first half of 2012 raised increasing concerns over time about whether the Environmental Permit would be issued in the reasonably near future or at all, and Gabriel Canada's target (and actual) share price declined materially.²²¹

²²⁰ See, e.g., Gabriel Press Release Nov. 2, 2011 (Exh. C-2573) at 3 (“[T]he Company understands that a further, and potentially final, TAC meeting is expected to be held in the next month. The Company is unable to give guidance on the time that it might take the TAC to release its recommendation following a final meeting. Ultimately, the EIA must be approved by a Cabinet decision of the Romanian Government who will, if satisfied, issue an Environmental Permit (‘EP’) for the Project. Gabriel understands that such decision process by the Cabinet could take a sixty day period from the TAC recommendation.”); Gabriel Press Release Dec. 29, 2011 (Exh. C-1437) (“A further meeting of the TAC took place on November 29, 2011 to discuss technical and other issues in respect of the Project. The Company is encouraged by the constructive nature of the discussions held and is awaiting formal feedback from the TAC as to whether further meetings or documentation will be requested.”); Alburnus Maior press release dated Jan. 22, 2012 (Exh. R-235) at 1 (stating that “in the following period the Ministry for Environment is expected to fulfill the above mentioned actions by emitting the authorization for the mining project”); Alburnus Maior press release dated Jan. 29, 2012 (Exh. R-236) at 1 (referring to “the imminent decision of Laszlo Borbely, the Minister of Environment and Forests, of emitting the environment approval for the mining project proposed for Rosia Montana”); Gabriel Resources Ltd. 2011 Annual Information Form dated Mar. 14, 2012 (Exh. C-1809) at 16 (“During the latest meeting of the TAC, it is understood that the analysis of all EIA chapters was completed and that the TAC concluded that all technical aspects have been clarified.”); Gabriel Press Release dated Mar. 15, 2012 (Exh. R-219) at 1.

²²¹ See, e.g., BMO Capital Markets, *Collapse of Romanian Gov't Creates Uncertainty for RM*, Feb. 6, 2012 (Exh. CRA-250) at 1 (reporting that “[t]he project seemed to be gaining traction and making progress over the past 18 months,” but “this progress seems in doubt today due to the collapse of the [Boc] government,” and that “BMO Research would not consider any weakness in Gabriel’s share price as a buying opportunity until such time there is clear direction that a stable government is in place”); BMO Capital Markets, *Gabriel Resources Ltd., Romanian Court Annuls Project Town Zoning Plan*, Apr. 5, 2012 (Exh. CRA-289) at 6 (reporting, incorrectly, that the “potential implication” of a Romanian court decision was that the urbanism certificate could be annulled which “in turn could delay the permitting process”);

[REDACTED]

[REDACTED] BMO Capital Markets, *Gabriel Resources Ltd., Further Comment on AICA Ruling Provided*, Apr. 9, 2012 (Exh. CRA-289) at 11 (“The TAC process to approve the EIA, although unaffected, has been ongoing since it restarted in September 2010 and the final meetings to consider EIA approval have been in the offing for a year. Overall, there has been very little measurable progress on the permitting on the Rosia Montana project over the last 12 months. While Gabriel has been working to advance the project, the permitting process itself continues to display uncertain and lengthy timelines.”); Macquarie Equities Research, *Gabriel Resources Ltd., More setbacks in Romania*, Apr. 9, 2012 (Exh. CRA-289) at 35 (acknowledging “the progress Gabriel has made in advancing the project and engaging officials at all levels of government,” but expressing “concern that the timing on the achievement of major milestones to advance the project remains in question,” and advising “caution” and a “Wait and see” approach, while lowering its target

83. Respondent's expert Dr. Burrows proffers an alternative theory that the decline in Gabriel Canada's publicly traded share price in the period from the July 29, 2011 valuation date until the end of 2013 was the result of a general decline in the share value of gold mining companies combined with a Gabriel-specific market correction for the Roşia Montană Project's increased costs and delayed timeline.²²² The intended takeaway of Dr. Burrows's theory is that the decline in Gabriel Canada's share price had nothing to do with Romania's wrongful conduct. However, Dr. Burrows's theory is based on mistaken assumptions. Indeed, evidence shows that the market value of Gabriel's shares unmistakably was negatively impacted by the very conduct that ultimately gave rise to the treaty breaches.²²³

84. In view of the fact that the State's malfeasance and nonfeasance eroded the fair market value of Gabriel's shareholding in the period leading up to and prior to the date when the conduct ripened into treaty breach, the measure of Gabriel's loss must be quantified with reference to the market value of its shareholding before those acts and omissions began. As Claimants have shown, that date is July 29, 2011, *i.e.*, a time immediately prior to the commencement of the Government's politicized course of treatment that gave rise increasingly

price for Gabriel Canada's stock from \$8 to \$4 and lowering its rating from "Outperform" to "Neutral" to reflect "a reduced [] 0.45x NAV target multiple *given the continuing uncertainty the company is facing in permitting Rosia Montana*" (emphasis added); Scotiabank, *Gabriel Resources Ltd., Former Minister of Enviro, Korodi Reappointed: Downgrading to 3-Sector Underperform*, Apr. 10, 2012 (Exh. CRA-289) at 40 (reporting that new Minister of Environment Korodi "was responsible for suspending the technical review of Rosia Montana in 2007" and "continued to express doubts about the potential environmental impact in an interview last year," that his appointment was "very negative despite the progress made to date" by the TAC, and that "[w]e would not own Gabriel until the government's position is clarified."); RBC Capital Markets, *Gabriel Resources Ltd., Q1/12 Update Highlights Uncertainty Regarding EIA Permit Timing*, May 14, 2012 (Exh. CRA-254) at 1 (reducing Gabriel Canada's target price from C\$9 to C\$4 and reporting that "[w]ith Parliamentary elections expected this November, we would be surprised to see any 'political urgency' to approve the EIA and we assume a 12 to 18 month delay in the EIA, with gold production in 2016");



²²² See Burrows II § III.F, ¶ 92.

²²³ See, e.g., Gabriel Resources Ltd., Market Commentary on Change in Minister of Environment and AICA Decision on LCD1/2009 (CRA-289) at 2-5 (describing investor and analyst concerns relating principally to the link between politics and permitting and emphasizing the need to "deliver on the environmental permit").

to concerns whether and/or on what terms the Government would allow the Roșia Montană Project to be permitted and implemented. Repeated comments by senior Government officials that the terms of the State's joint venture with Gabriel were not satisfactory, the statements that renegotiation was necessary precisely because the price of gold was so high,²²⁴ and assertions that a political decision would have to be taken as to whether the Project would be done, coupled with extensive delays in the permitting process, including *e.g.*, no decisions taken regarding the Project during 2012,²²⁵ all negatively affected the value of Gabriel's shareholding as progress on the Project was delayed in fact, and the market increasingly questioned whether Gabriel's rights would be respected and whether the Project ever would receive permits.

85. As described above in response to question (a), during this drawn out process, the Roșia Montană Project was denied a lawful permitting procedure and thus was denied issuance of a timely Environmental Permit, RMGC was subjected to repeated baseless insinuations of corrupt influence peddling, Gabriel's joint venture with the State was denounced as inadequate and detrimental to the State, Gabriel and RMGC were coerced into making repeated "offers" to increase the State's economic interest (which offers ultimately were never accepted), senior Government officials continued to question whether the Government would approve implementation of the Roșia Montană Project at all, and decisions on the Project and in relation

²²⁴ *See, e.g.*, TV Interview of Traian Băsescu, Aug. 18, 2011 (Exh. C-628) (President Băsescu stating that "the Roșia Montană project must be done," but only "provided the terms for the sharing of benefits from the exploitation of the gold and silver deposits in the area are renegotiated," and that "I was looking at the gold prices in the last five years: five years ago the gold price was 600 dollars per ounce, now it is 1,700 dollars per ounce and could well exceed 2,000-2,500 per ounce by the end of the year"); TV Interview of Traian Băsescu, Aug. 22, 2011 (Exh. C-1479) (President Băsescu making the point that prices had increased for gold by "200%" and for silver by "500%," and that the State's economic share of the Project both in terms of royalties and in terms of ownership was insufficient); TV Interview of Emil Boc, Aug. 29, 2011 (Exh. C-2914 video) at 00:00-00:10 (Prime Minister Boc stating, "[W]hat is known, and is clear: The part pertaining to the benefits of the state is unsatisfactory for the Romanian state. Especially now, in the context of an increased price for gold."); TV Interview of Kelemen Hunor, Oct. 31, 2011 (Exh. C-2638.02 video) at 01:25-01:43 (Minister of Culture Kelemen Hunor stating that the Project "must be assumed by the Government as a whole along with PD-L, UNPR, UDMR and, then, we can proceed with it, but some more steps are still required, including a renegotiation of the contract with the investors. Because things have evolved, including the price of gold"). *See also* TV Interview of László Borbély Dec. 27, 2011 (Exh. C-637) at 1-2, video at 30:04-33:49 ("So, the Romanian State, when it decided to grant the license, around 2000, and when it concluded *that contract, which I say is disadvantageous to the Romanian State. So it could have concluded a more advantageous contract, not to let it slip through their fingers. . . . At this time, we have had discussions in the Government and with the President and I have said it very clearly. . . .*") (emphasis added).

²²⁵ *E.g.*, *Government postpones the decisions regarding Roșia Montană and the shale gas until the elections*, Realitatea.net, June 8, 2012 (Exh. C-641) (Ponta stating "I want to discuss this matter in a serious manner next year. . . .").

to RMGC itself were continuously delayed and then ultimately rejected, which cumulatively led, step-by-step, to the complete frustration of Gabriel's investments. In other words, one cannot consider Gabriel's investments as unscathed up through September 8, 2013 by the conduct that ultimately culminated in the treaty breaches with the political rejection and repudiation the next day. As Reisman and Sloane recognize, "a creeping expropriation may be accomplished by a series of acts that, by themselves, appear innocuous or of ambiguous legality, but together plainly deprive the foreign investor of its property rights. . . . Only in the context of the entire series of events comprising the creeping expropriation could [the early event's] contribution to the creeping expropriation ultimately accomplished . . . be properly appreciated. The legality of certain expropriatory events, in short, may be less than clear where it is their cumulative effect that constitutes the expropriation."²²⁶ Indeed, even if the loss in fair market value Gabriel's investments incurred over that time was caused by Romania's wrongful conduct in combination with other factors not attributable to the State (which here is not the case), international law does not support the reduction of reparation for concurrent causes, except in cases of contributory fault on the part of the injured party,²²⁷ and here (as addressed further in response to question (d) below) there is no basis for a claim of contributory fault.

86. Therefore, in this case, in order to assess the value of the Claimants' shareholding absent the impacts of the wrongful acts, the Tribunal must consider the value of the shareholding prior to the commencement of the conduct that culminated into the treaty breaches.

87. Finally, the State's conduct ripened into breaches of the BITs (as described above in Section (a)) on the date of the political rejection. The political rejection prevented the

²²⁶ W. MICHAEL REISMAN & ROBERT D. SLOANE, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 (2003) (CL-123) at 149, n.156. See also *RosInvestCo. v. Russia* (CL-51) ¶ 410 ("The Tribunal considers that an assessment of whether Respondent breached the IPPA can only be effectively made if and after the conduct as a whole is reviewed, rather than isolated aspects.").

²²⁷ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 31, cmt. (12). As the ILC commentary observes, "Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them." *Id.* See also *Gemplus v. Mexico* (CL-156) ¶ 13-92 ("[A]s a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation – as was indicated in the *Sapphire* award regarding the 'behaviour of the author of the damage.'").

implementation of the Projects and thereby effectively rendered the project development rights worthless, resulting in the permanent loss of the value of the shares held respectively by Gabriel Canada and by Gabriel Jersey. That is, once the project development rights had been taken in effect, the value of the shares held by the Claimants became essentially worthless and Claimants' loss became irrevocable.²²⁸ The point in time when Claimants' losses became permanent is relevant to establishing liability because it was the State's ultimate repudiation of the project development rights that was simultaneously the cause of Claimants' certain and irreversible losses and thus the basis of liability in respect of each claim.

- (c) Does conduct attributed to Respondent equate to a systematic State policy or practice that may be characterized as a composite act in breach of the relevant BIT pursuant to Article 15 of the Articles of Responsibility of States for Internationally Wrongful Acts? The Parties may refer to commentary on state responsibility and/or Article 15 of the Articles on Responsibility of States for Internationally Wrongful Acts in developing their answers.**

88. As the evidence discussed more fully in response to questions (a) and (e) shows, the challenged course of conduct attributable to Respondent beginning in August 2011 and ending with the political rejection of the Roşia Montană Project, and with it the State's joint venture with Gabriel more generally, may be characterized as a composite act within the meaning of Article 15 of the Articles of Responsibility of States for Internationally Wrongful Acts, which resulted in breaches of several articles of the respective BITs.

89. Article 15 of the ILC Articles on State Responsibility concerns the breach of an international obligation by a State through a series of acts or omissions defined in aggregate as

²²⁸ Reply ¶¶ 631-632, 634. Gabriel Canada continued to be a publicly traded company following the political rejection and remains so today. The publicly traded value of Gabriel Canada at this time can reflect only the value the market assigns to the prospects for a resolution of this dispute. *See* Compass Lexecon II ¶¶ 17-22 (explaining that the project development rights were the only significant source of value reflected in Gabriel Canada's share price and that Dr. Burrows' assertions to the contrary are without basis).

wrongful.²²⁹ Thus, a composite act is to be distinguished, *e.g.*, from a series of isolated or unrelated acts the last of which may cross an impermissible threshold.²³⁰

90. Each of the several relevant articles of the BITs may be breached by conduct considered in the aggregate, *i.e.*, by a composite act. As Prof. Douglas has observed: “It is arguable that each of the common investment protection obligations in an investment treaty is capable of being breached by composite acts. For instance, a *de facto* or ‘creeping’ expropriation may well consist of a series of acts that ultimately would ‘justify an inference that the owner will not be able to use, enjoy, or dispose of the property.’”²³¹

91. Several commentators have recognized that an expropriation that takes place over time through a series of acts or omissions, *i.e.*, conduct amounting to a creeping expropriation, may be characterized as a composite act.²³² Likewise, investment tribunals have recognized that where acts and omissions considered in the aggregate constitute an expropriation, the State’s responsibility for the expropriation is reflected in the concept of a composite act as defined in Article 15 of the ILC Articles on State Responsibility.

92. For example, in *Crystallex v. Venezuela*,²³³ the tribunal observed that a creeping expropriation is reflected in the concept of a composite act as defined in Article 15 of the ILC Articles on State Responsibility.²³⁴ In that case, the tribunal identified “three broad groups of actions which, taken cumulatively,” led the tribunal to conclude that an expropriation had

²²⁹ ILC Articles (CL-61), art. 15(1). *See also* ILC Articles (CL-61), art. 15 cmt (2) (“Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct ... their focus is ‘a series of acts or omissions defined in aggregate as wrongful.’”).

²³⁰ ILC Articles (CL-61), art. 15 cmt (7) (“Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, *i.e.* an act defined in aggregate as wrongful.”).

²³¹ ZACHARY DOUGLAS, *INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009) (CL-336) at 335.

²³² *See* BRIGITTE STERN, *In Search of the Frontiers of Indirect Expropriation* (2007) (CL-337) at 36 (“Creeping expropriation can in fact be viewed as a composite act, as established by the International Law Commission in the Articles on State Responsibility (Article 15).”); ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009) § 7.15 (CL-339) (“State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC’s Articles on State Responsibility”); CHRISTOPH SCHREUER, *The Concept of Expropriation Under the ECT and other Investment Protection Treaties* (2006) (CL-338) at 109 (“Creeping expropriation takes place step by step through a series of actions. ... It has its counterpart in the law of State responsibility in the concept of a breach consisting of a composite act.”).

²³³ Memorial ¶ 789.

²³⁴ *Crystallex v. Venezuela* (CL-62) ¶ 669.

occurred.²³⁵ These were, actions surrounding the denial in an unfair manner of a permit,²³⁶ statements by government officials of the highest level that targeted the claimant’s investment and that resulted in its devaluation,²³⁷ and then termination of the investor’s concession contract, described by the government as a nationalization of the mineral resources.²³⁸ On this basis, the tribunal concluded that it was the “conjunction and progression of acts performed by different governmental organs” that had the “cumulative and incremental effect” equivalent to expropriation.²³⁹

93. In *Vivendi v. Argentine II*,²⁴⁰ the tribunal found that the State’s acts, consisting of a campaign disparaging the claimant’s investment in a manner that was not legitimate regulatory conduct, but rather was designed to force termination or renegotiation of the claimant’s concession, amounted to an expropriation.²⁴¹ The tribunal found that these actions had a devastating effect on the economic viability of the concession,²⁴² and that the investor had a right to expect that its partner, the Province, would not mount a damaging campaign to force it, on threat of rescission, to abandon contract rights and to renegotiate the concession based on the lower tariffs.²⁴³ The tribunal emphasized that senior politicians made public statements disparaging the investment in a manner that undermined the legitimacy of the concession agreement such that it became “utterly unrealistic” to suggest that the claimant could have maintained its investment.²⁴⁴ In this context, the tribunal observed that it is well-established that several acts taken together can breach the treaty obligation regarding expropriation, referring to Article 15 of the ILC Articles:²⁴⁵

Here, the Province’s actions – from the very opening months of the concession, continuing through its wrongful regulatory action and culminating in the unilateral amendments to the 8 April Agreement – had

²³⁵ *Crystallex v. Venezuela* (CL-62) ¶ 672.

²³⁶ *Crystallex v. Venezuela* (CL-62) ¶ 673.

²³⁷ *Crystallex v. Venezuela* (CL-62) ¶¶ 675-681.

²³⁸ *Crystallex v. Venezuela* (CL-62) ¶¶ 682-684.

²³⁹ *Crystallex v. Venezuela* (CL-62) ¶ 708.

²⁴⁰ Memorial ¶ 794. *Vivendi v. Argentina II* (CL-113) ¶¶ 7.5.22-7.5.33.

²⁴¹ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.22.

²⁴² *Vivendi v. Argentina II* (CL-113) ¶ 7.5.26.

²⁴³ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.27.

²⁴⁴ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.28.

²⁴⁵ *Vivendi v. Argentina II* (CL-113) ¶¶ 7.5.31-7.5.34.

the necessary consequence of forcing CAA to terminate the Concession Agreement. The provincial government was simply not prepared to countenance and support CAA's operation of the concession on the terms of the Concession Agreement as originally agreed. Ultimately, the Province simply left CAA with no choice. It could not continue in the face of mounting losses, under significantly reduced tariffs and with no reasonable prospect of improved collection rates. CAA's contractual rights under the Concession Agreement were rendered worthless by the Province's actions while its losses would only continue to mount. Vivendi suffered direct harm in its capacity as CAA's principal shareholder, with the value of its shareholding being eradicated.²⁴⁶

94. In *Siemens v. Argentina*,²⁴⁷ the tribunal described a creeping expropriation as a "process" or "steps" that eventually have the effect of an expropriation and stating that "[w]e are dealing here with a composite act in the terminology of ... Article 15 of the [ILC] Draft Articles. ..." ²⁴⁸ In that case the tribunal found that measures taken to renegotiate the claimant's concession contract coupled with a certain Decree 669/01, which terminated the concession contract, constituted an expropriation of claimant's investment. While the tribunal considered that Decree 669/01 could be considered an expropriatory act "by itself," the tribunal emphasized that the earlier measures "stand as part of a gradual process" that culminated in the expropriation, and also that it "cannot ignore the context in which Decree 669/01 was issued, nor separate this Decree from the other measures taken by Argentina in respect of the investment that culminated in its issuance."²⁴⁹

95. In *Biloune v. Ghana*,²⁵⁰ the tribunal concluded that although "the motivations for the actions and omissions of Ghanaian governmental authorities [we]re not clear," it was clear that "the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project."²⁵¹ Having found that the State's defense that those events were "independent and

²⁴⁶ *Vivendi v. Argentina II* (CL-113) ¶ 7.5.33.

²⁴⁷ *Siemens v. Argentina* (CL-102).

²⁴⁸ *Siemens v. Argentina* (CL-102) ¶¶ 263-266. See also Memorial ¶ 782.

²⁴⁹ *Siemens v. Argentina* (CL-102) ¶¶ 271, 273.

²⁵⁰ *Biloune v. Ghana* (CL-132). See also Memorial ¶ 784.

²⁵¹ *Biloune v. Ghana* (CL-132) at 209.

unrelated” and “not connected” was unconvincing, the tribunal concluded that the claimant’s investment had been “constructively expropriated.”²⁵²

96. Similarly, as also has been recognized by investment treaty tribunals, a breach of the fair and equitable treatment standard may result from a series of circumstances and/or the cumulative effect of a succession of impugned actions by the State that may be characterized as a composite act.²⁵³ Notably, Respondent “does not dispute the notion that a breach of FET may result from a combination of measures.”²⁵⁴

97. In *El Paso v. Argentina*,²⁵⁵ the tribunal observed that the obligation to accord fair and equitable treatment can be breached by a composite act and this may occur where various measures may be “seen in isolation as reasonable,” but “amount to a violation if their cumulative effect is considered.”²⁵⁶ As the tribunal explained:

[T]his series of measures amounts to a composite act, as suggested by the International Law Commission in its Articles on State Responsibility (Article 15). Such an analysis is not without precedent. The tribunal in *Société Générale*, for example, referred to the concept of composite act and stated clearly that acts that are not illegal can become such by accumulation: ‘While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation’²⁵⁷

Hence, the *El Paso* tribunal concluded “[t]hat, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard.”²⁵⁸

²⁵² *Biloune v. Ghana* (CL-132) at 209-210.

²⁵³ Memorial ¶¶ 650-651 (and authorities noted therein).

²⁵⁴ Rejoinder ¶ 201.

²⁵⁵ *El Paso v. Argentina* (CL-152).

²⁵⁶ *El Paso v. Argentina* (CL-152) ¶ 515.

²⁵⁷ *El Paso v. Argentina* (CL-152) ¶ 516 (citing *Société Générale v. The Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction dated Sept. 19, 2008, ¶ 91).

²⁵⁸ *El Paso v. Argentina* (CL-152) ¶ 518. See also *Fleming DutyFree v. Poland* (RLA-132) ¶ 536 (“referring to *El Paso*, [it] is thus correct that a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until Article 3(2) is breached”).

98. The *Walter Bau v. Thailand*²⁵⁹ tribunal also accepted the description of a breach by a composite act adopted by the *Société Générale* tribunal, *i.e.*, that “there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation.”²⁶⁰ In *Walter Bau*, the tribunal concluded that the State’s refusal to implement toll increases in relation to a concession contract followed by a decision to decrease tolls culminated in a breach by composite act of the obligation to accord fair and equitable treatment.²⁶¹ As the tribunal explained, “The Respondent’s argument that ‘creeping expropriation’ only, and not breaches of FET, can be defined by a series of acts is not correct. The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations.”²⁶²

99. The *Swisslion v. Macedonia* tribunal likewise referring to *Société Générale* accepted that there may be “a series of measures that collectively amount to a composite act in breach of the fair and equitable treatment standard.”²⁶³ In that case:

(i) the Ministry’s response, or more precisely, its lack of timely response, to successive requests by Swisslion for confirmation that its investments were being made or had been made in accordance with the Share Sale Agreement; (ii) the Ministry’s approximately one-year long consideration of whether or not there had been contractual compliance, during which time Swisslion continued to operate the business without being formally advised of the Ministry’s reservations; (iii) certain actions taken by the SEC; and (iv) the 24 December 2008 publication by the Ministry of the Interior of a criminal investigation initiated against Swisslion with no subsequent publication of the prosecutor’s decision not to proceed with the investigation, collectively constitute a breach of the fair and equitable treatment standard.²⁶⁴

100. In *OAO Tatneft v. Ukraine*, the tribunal also found that the conduct of the State was correctly characterized as a composite act within the meaning of Article 15 of the ILC Articles

²⁵⁹ *Walter Bau v. Thailand* (CL-255).

²⁶⁰ *Walter Bau v. Thailand* (CL-255) ¶¶ 9.84-9.85.

²⁶¹ *Walter Bau v. Thailand* (CL-255) ¶¶ 12.36-12.37.

²⁶² *Walter Bau v. Thailand* (CL-255) ¶ 12.43.

²⁶³ *Swisslion v. Macedonia* (CL-53) ¶ 275.

²⁶⁴ *Swisslion v. Macedonia* (CL-53) ¶ 276.

on State Responsibility in breach of the obligation to accord fair and equitable treatment.²⁶⁵ In that case, the Tribunal noted “a clear link between these series of events and that they all culminated in the taking over” of the claimant’s investment.²⁶⁶

101. In *Tecmed v. Mexico*, the Tribunal considered with reference to commentary from Articles 14 and 15 of the ILC Articles on State Responsibility whether conduct that began prior to the entry into force of the BIT could be considered “as a whole or as a unit” with later conduct to give rise to a treaty breach.²⁶⁷ The tribunal found in that case that the State’s conduct, both before and after the entry of force of the BIT, belonged to “one and the same course of conduct” that gave rise to a breach of the fair and equitable treatment standard.²⁶⁸

102. The *Rompetrol v. Romania* tribunal likewise accepted that “the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach,” when “the actions in question disclose some link of underlying pattern or purpose between them.”²⁶⁹ This is in contrast to what the tribunal described as “a mere scattered collection of disjointed harms.”²⁷⁰ In that case, the tribunal concluded that the evidence did not support the conclusion urged by the claimant that the several instances of prosecution against the claimant’s principal had been directed by the State in a coordinated campaign of harassment against the claimant.²⁷¹ The tribunal, however, did find that due to the “lengthy saga of the criminal investigations,” the respondent was aware that its actions “stood to harm the interests of [the claimant],” and as no steps were taken to avoid, minimize or mitigate that possibility of harm, the procedural irregularities during that investigation gave rise to a breach of the obligation of fair and equitable treatment.²⁷²

²⁶⁵ *OAO Tatneft v. Ukraine* (CL-260) ¶¶ 327-332, 412-413.

²⁶⁶ *OAO Tatneft v. Ukraine* (CL-260) ¶ 330.

²⁶⁷ *Tecmed v. Mexico* (CL-122) n.26.

²⁶⁸ *Tecmed v. Mexico* (CL-122) ¶ 172. As recognized by the commentary to Article 15 of the ILC Articles, a court or tribunal can take account of conduct occurring before the existence of an obligation for purposes other than establishing State responsibility, including “to establish a factual basis for the later breaches or to provide evidence of intent.” ILC Articles on State Responsibility (CL-61), art. 15 cmt (11).

²⁶⁹ *Rompetrol v. Romania* (CL-151) ¶ 271.

²⁷⁰ *Rompetrol v. Romania* (CL-151) ¶ 271.

²⁷¹ *Rompetrol v. Romania* (CL-151) ¶ 276.

²⁷² *Rompetrol v. Romania* (CL-151) ¶ 279.

103. Thus, while a “systematic State policy or practice” in breach of an obligation as referenced by the tribunal’s question could be characterized as a composite act, the commentary to Article 15 of the ILC Articles refers more broadly to a “series of acts or omissions defined in aggregate as wrongful.” The authorities discussed above support the conclusion that, in order for a combination of acts of malfeasance and/or non-feasance to be considered as a composite act, there must be “some link of underlying pattern or purpose between them” in contrast to a “scattered collection of disjointed harms.”²⁷³

104. In this case, there is an undeniable link of pattern and purpose – that also may be considered as a systematic State policy or practice – in the State’s conduct directed to the politicization of RMGC’s permit applications, and in particular in the treatment of RMGC’s application for an Environmental Permit for the Roșia Montană Project. The acts and omissions that form this composite act were in no sense disparate, isolated, or unrelated, but instead comprised a course of treatment undertaken by the Government with the object and purpose of assessing whether allowing the Project to be permitted and implemented was politically acceptable to the Government.

105. Temporally, the commentary to the ILC Articles clarifies that where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for purposes of State responsibility will be the first occurring after the obligation came into existence. In this case, while the UK BIT entered into force on January 10, 1996, the Canada BIT first entered into force November 23, 2011.²⁷⁴ This, however, need not prevent the tribunal from taking into account earlier actions or omissions in order to establish a factual basis for the later breaches or to provide evidence of intent.²⁷⁵ In other words, as the tribunal in *Chevron v. Ecuador*²⁷⁶ observed, “this does not mean that a breach must be based solely on acts occurring after the entry into force of the BIT. The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or

²⁷³ *Rompetrol v. Romania* (CL-151) ¶ 271.

²⁷⁴ See Exhs. C-2, C-3, and C-4.

²⁷⁵ ILC Articles (CL-61), art. 15 cmt (11).

²⁷⁶ *Chevron Corp. and Texaco Petroleum v. Republic of Ecuador*, PCA UNCITRAL Interim Award dated Dec. 1, 2008 (CL-340) (“*Chevron v. Ecuador*”).

facts pre-dating the BIT; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force.”²⁷⁷

106. As discussed further in response to questions (a) and (e), this politicization by the Government of the Project permitting process began in August 2011 with a series of obviously coordinated public statements, mainly by Prime Minister Boc, Minister of Environment Borbély, and Minister of Culture Hunor, that the Government would not allow the Project to proceed unless the State’s economic interest in the Project were increased and the Project met the requirements for the Environmental Permit. These were necessary, but not sufficient conditions, however, for the Government. Only once these two issues were addressed would the Government then move on to “discuss” and make a “final decision” whether the Project would proceed. This final decision would be purely political. Once the technical environmental permitting requirements were met, however, the Government did not have discretion under Romanian law to decide based on other factors, such as the political acceptability of the Project, whether to issue the Environmental Permit and allow the Project to proceed to implementation.

107. It is no accident that this conduct began when it did and focused on the issuance of the Environmental Permit.²⁷⁸ By August 2011, the positive end to the EIA review process was fast approaching. All parties reasonably viewed issuance of this Permit as a watershed moment for the Project after which it would proceed to be implemented. That is why Prime Minister Boc mandated Minister Ariton in September 2011 to renegotiate the State’s economic interest as a matter of urgency. Had the motive for doing so really been to show Government effort and resolve during the financial crisis, Prime Minister Boc surely would have issued this mandate during the height of the crisis, and especially at or around the time of imposing austerity measures in May 2010. He did not.²⁷⁹ Instead, he waited to do so until the successful end of the

²⁷⁷ *Chevron v. Ecuador* ¶ 283; *id.* ¶ 300-301 (rejecting the argument that a composite act must be based exclusively on post-BIT conduct and explaining that ILC Article 15 provides that the breach only occurs when acts or omissions “taken with the other actions or omissions” are sufficient to constitute the breach and does not establish that pre-BIT acts may not be taken into account in evaluating that a breach occurred).

²⁷⁸ *See supra* n.24.

²⁷⁹ *See* Tr. (Dec. 13, 2019) 3211:3-9 (Stoica Cross) (acknowledging his observations in Stoica Exh. 27 at 2 that “[t]he specter of the global financial crisis was largely ignored by Romanian politicians who were busy campaigning for the general and presidential elections of 2008 and 2009,” and that “those politicians campaigning were President Băsescu and Prime Minister Boc”); *id.* 3216:3-3217:5 (confirming his observations in Stoica Exh. 28 at 10 that, “[f]or electoral reasons’ and continuing on through ‘(i.e. local and general elections in 2008 and presidential elections in 2009), the governments of 2007-2009 ignored the global

EIA review process was in sight. Doing so provided maximum leverage over Gabriel and RMGC in the context of the permitting process and preserved the ability of the Government to make a political decision whether to issue the Permit and implement the Project.

108. There is no doubt that the motivation for and goal of increasing the State's economic interest in the Project were political for those in office.²⁸⁰ This reality is evident in the contemporaneous public statements of Prime Minister Boc regarding the need to discuss and decide whether the Project would be done after renegotiating the State's interest and the Project's having met the technical permitting criteria, in Minister Hunor's letter to Parliament to the same effect, and in Ministers Borbély's and Hunor's candid public acknowledgments about the political decision that would need to be made in the ruling coalition/Government to allow the Project to proceed. [REDACTED]

109. Because Prime Minister Boc did not accept any of the Gabriel/RMGC forced offers to increase the Government's economic stake, and the Ministry of Environment failed to reach closure on the open issues identified at the November 29, 2011 TAC meeting for that reason and because of the Ministry of Culture's related politically-motivated failure or refusal to acknowledge it had provided the requisite "endorsement" for the Project through its positive "Point of View," the Boc Government did not reach the point of having to make the political decision whether to allow the Project to proceed. The same can be said for the short-lived Ungeoreanu Government that followed. That decision fell to the Ponta Government.

110. One does not need to speculate about whether the Ponta Government continued the same course, pattern, or practice of political treatment commenced by the Boc Government in relation to issuing the Environmental Permit and, more fundamentally, of considering in that context whether the Project would be allowed to be implemented. The words and deeds of the Ponta Government unequivocally show that it did.

financial crisis signals"); *id.* 3218:15-3221:2 (acknowledging a study he coordinated in December 2011 found that "[t]wo thirds of respondents claimed household income was below the limit of a decent living," "support for Prime Minister Boc's Political Party, PDL, dropped from about 32 percent in the Parliamentary elections in November 2008 to 19 percent in December 2011," "only 19 percent of respondents had a good or very good opinion about Emil Boc," and "only 21 percent had a good or very good opinion about President Băsescu").

²⁸⁰ See *supra* n.27.

111. Soon after taking office, Prime Minister Ponta declared in June 2012 that “the Government’s position regarding the mining project remained unchanged,” specifically including requiring an increased economic interest for the State as well as a broader political assessment of the Project, in addition to adherence to the technical requirements for the Environmental Permit.²⁸¹ After refusing to address the Project for the remainder of 2012 until after year-end elections, and consistent with Prime Minister Ponta’s statement of unchanged approach to the Project, the Ponta Government picked up in 2013 where the Boc Government left off.

112. Beginning in February 2013 with the new Minister of Large Projects Dan Şova’s meeting with RMGC, and as repeated thereafter in numerous public statements of, among others, Prime Minister Ponta, Minister Şova and Minister of Environment Plumb, the Ponta Government’s approach continued that of the Boc Government, namely, the Environmental Permit would be issued and the Project allowed to proceed only if the State’s economic interest were increased (expressly by reference to the last offer for “25 and 6” demanded by and presented to the Boc Government), the Project met the technical permitting requirements, and the Project was approved politically to proceed.²⁸²

113. The Ponta Government’s intention to make a political decision as to Project approval was a continuation of the same approach the Boc Government stated was necessary. It was an approach not contemplated by the law as the law did not contemplate that a political decision would be taken as to whether the Project was to proceed. The Ponta Government preferred to take that decision by means of a vote by Parliament on a special law for the Project. That the means of obtaining the political decision for the Government involved a vote in Parliament regarding the Project does not decouple the Ponta Government’s approach from that adopted earlier by the Boc Government. Not only did Prime Minister Ponta affirm in 2012 that his Government’s position towards the Project “remained unchanged,” but the conduct of the Ponta Government shows that it remained linked and aligned in intent, object, and purpose with the approach outlined by the Boc Government regarding whether, based on and following a political

²⁸¹ *The Government postpones the decisions regarding Roşia Montană and the shale gas until the elections that are going to be organized in autumn*, Realitatea.net, June 8, 2012 (Exh. C-641). See also *supra* ¶¶ 29-30; Claimants’ Opening Vol. 3 Slides 77-78; *The decisions related to Rosia Montana have nothing to do with elections, says Prime Minister Ponta*, Agerpres, May 10, 2012 (Exh. C-1481).

²⁸² See *supra* ¶¶ 34-45.

assessment, the Environmental Permit would be issued and the Project would be allowed to be implemented.

114. Thus, following the same pattern outlined and initially pursued by the Boc Government in 2011, the Ponta Government confirmed in 2013 that the Project met the permitting requirements and that the State's economic interest could be increased to the same "25 and 6" demanded by the Boc Government, and then implemented its plan to obtain a political decision on the Project through a Parliamentary vote on a special law for the Project. In substance, this is the same politicized approach to the Project that was pursued by the Boc Government, i.e., a final political decision whether to do the Project would be made if the Government's economic criteria and the law's permitting criteria were met. Prime Minister Boc resigned, however, before having to make that political decision, which contemporaneous public statements in 2011 indicate would have been made by the ruling coalition parties and the Government.

115. The Ponta Government announced that Parliament's vote on the special law for the Project, which the Government (not RMGC or Gabriel) insisted be presented to Parliament, would represent the political decision on whether the Project would be done, and the Government pledged publicly to follow that decision. Prior to sending the law to Parliament, Prime Minister Ponta indicated that he would not interfere with or direct politically the vote in Parliament through his position as leader of the PSD, one of the political parties in the ruling coalition.

116. As things evolved, however, Prime Minister Ponta and his co-leader of the ruling coalition, Senator Antonescu, did intervene politically and direct the outcome of the votes on the special law by instructing the members of the ruling coalition to vote against the special law with the recognition that this negative vote meant the Project would not be done. They did so in response to the street protests that were sparked by the Government's submission of the special law to Parliament, as discussed further in response to question (d). Contemporaneous statements from Senator Antonescu and President Băsescu, the contemporaneous research of Respondent's expert Prof. Stoica, as revealed through rebuttal documents and during cross-examination, and the expert opinion of Dr. Boutilier, are all aligned that the protests and the societal unrest they reflected were part of the developing anti-corruption movement and were primarily against what

was seen as a corrupt ruling political class that would try to cut a special deal for the Project in Parliament rather than have the Project permitted according to the normal administrative process.

117. The Ponta Government acted quickly to put out the political firestorm it started by engineering the political rejection of the special law even before the Senate committees that were to consider it held their first hearing. As a result, although the forum for the political decision about the Project was Parliament, the political instruction by the leaders of the ruling coalition was the substantive, driving force behind the rejection of the special law and hence of the Project. In this way, as envisioned and acknowledged to varying degrees by Ministers Borbély and Hunor and by Prime Minister Boc in 2011, those who in substance took the political decision whether the Project would be done were the leaders of the ruling coalition and the Ponta Government they supported and/or comprised.

118. Once that political verdict was rendered by Prime Minister Ponta and Senator Antonescu on September 9, 2013 and implemented through party “discipline” in Parliament, the special law was rejected by the Senate committees that considered it and the fate of the Project and the State’s joint venture with Gabriel was sealed and determined.²⁸³ The votes of the joint special commission and of the full Senate and Chamber of Deputies were also cast in line with party discipline to reject the special law.²⁸⁴ As is clear in hindsight, all subsequent treatment of the Project and of RMGC, including with respect to the non-issuance of the exploitation licenses for the promising Bucium Projects, was consistent with the political decision that the Roșia Montană Project would not be done and that RMGC would be and was abandoned by the State.

(d) How and to what extent should public opinion and its impact upon the political situation in Romania be factored into the assessment of liability and damages under the relevant BIT?

119. Public opinion and its impact upon the political situation in Romania arises in this case as a result of Respondent’s defenses, claiming that the Project/RMGC lacked a social license and/or relatedly that the protests that erupted after the Government’s submission to Parliament of a special law for the Project justified the political decisions of the political leaders to reject the

²⁸³ Claimants’ Opening Vol. 6 Slides 18-22; Memorial ¶¶ 473-486; Reply ¶¶ 204-207.

²⁸⁴ Claimants’ Opening Vol. 6 Slides 28-31, 35-54; Memorial ¶¶ 487-521; Reply ¶¶ 208-213.

Project and demonstrate that the Project could not be implemented. Respondent's defenses are legally misguided and factually baseless.

120. As summarized below, public opinion and its impact upon the political situation in Romania does not provide a defense to Respondent in the assessment of liability in this case. Similarly, public opinion and its impact upon the political situation in Romania cannot be factored into the assessment of damages because there is no basis in this case for any finding of contributory fault on the part of Gabriel or RMGC. Finally, as damages must be assessed absent the impacts of Respondent's wrongful conduct, which commenced with the conduct of the Boc Government, culminated in breaches of the respective BITs as of September 9, 2013, and continued wrongfully thereafter, damages must be assessed with reference to the value of Gabriel's investments prior to that conduct, i.e., as of July 29, 2011.

121. The primary basis of liability in this case is that having issued mining concessions to RMGC, a joint venture with the State, reflecting the State's public policy decision to develop mining in the licensed areas in accordance with its laws, the State, years later, effectively terminated the concessions and repudiated its joint venture, including by failing to complete the environmental permitting process and to issue the Environmental Permit for the Roșia Montană Project, notwithstanding that the competent authorities concluded repeatedly that the legal grounds for issuing the permit were met. It is essential to recall that there was no executive, administrative, or judicial decision terminating, rescinding, or withdrawing RMGC's mining concessions. Similarly, there was no executive, administrative, or judicial decision declining to issue the Environmental Permit. There is only a failure to act when there was an obligation to do so. Thus, there was no legal decision taken, whether on the basis of public opinion or indeed on any basis.

122. Moreover, public opinion is not a relevant legal criterion for whether to issue an environmental permit other than as regulated through the public consultation process. Romanian law requires the Ministry of Environment to make a proposal to the Government on the Environmental Permit based on technical conclusions and legal standards, not based on political factors or on public opinion.²⁸⁵ The Government is required to issue the permit thereafter on the

²⁸⁵ Mihai I ¶ 59; Mihai II ¶¶ 254-255 ("Respondent's statement that the Company knew and accepted that it had to obtain a 'social license' has no legal effect on an administrative procedure. Authorities in an administrative procedure are not free to add supplementary conditions to those written in the law based on the

basis of the applicable administrative and environmental law.²⁸⁶ There is no legal ground for the Government to make a decision on any other bases. Indeed, the principle of legality obliges administrative authorities to strictly observe the law and limits their “right of appreciation.”²⁸⁷

123. The Government Decision to issue the Environmental Permit is governed by administrative law and thus the limits of the Government’s “right of appreciation” is established by the applicable legal standards.²⁸⁸ Accordingly, the decision whether to issue the Environmental Permit must be based strictly on whether the applicable legal standards have been met; the authorities do not have discretion to impose additional requirements or to decide based on factors not expressly set forth as applicable under the law.²⁸⁹ Based on these limitations, the authorities could not exercise the right of appreciation to refuse to issue the Environmental Permit based on political factors or on public opinion.²⁹⁰

124. Respondent’s legal expert, Professor Dragos, agrees that “political considerations cannot, of course” be a part of the Ministry of Environment and TAC’s assessment.²⁹¹ Arbitrator

contention that the applicant knows, or accepts them. . . . Therefore, it is baseless and wrong under the law for the Respondent to suggest that the Company’s alleged failure to obtain or maintain a ‘social license’ prevented the Ministry of Environment from carrying out the EIA Process or deciding on the Environmental Permit, or that it would in any way have justified or excused the Ministry of Environment’s many violations of the EIA Rules of Procedure or its failure to take the decision required from it under the law.”). *See also* Claimants’ Opening Vol. 2 Slide 6.

²⁸⁶ Claimants’ Opening Vol. 2 Slides 6-7; Mihai I §§ IV.C.3.4., VIII.D.1., ¶ 453 (observing that “[i]n issuing an administrative deed *sensu stricto*, such as the Government decision on the EP, the Government must observe the legality principle, i.e., it must observe the applicable law in terms of procedure, as well as in terms of the substance of its decision.”).

²⁸⁷ Mihai Presentation Slide 13-14. *See also* Mihai II ¶ 249 (“administrative authorities [must] be bound by the law and [may] not act outside the express legal provisions.”).

²⁸⁸ *See* Claimants’ Opening Vol. 2 Slides 6-8; Mihai Presentation Slide 10 (“The Government decision on the issuance of the environmental permit, respectively on the rejection of the environmental permit application, is an administrative, not a political decision”).

²⁸⁹ *See* Claimants’ Opening Vol. 2 Slide 9 (Administrative Litigation Law 554/2004, Art. 2(1) defines an excess of power as “exercising the right of appreciation of the public authorities by violating the limits of competence provided by law”); Mihai Presentation Slide 14 (observing that “[i]n no case may the administrative authorities, on the basis of the ‘right of appreciation’, impose additional requirements for issuing a permit, etc.; they are not entitled to ‘add to the law’, as that would breach the principle of legality and the regulated procedure would become arbitrary and unpredictable.”).

²⁹⁰ *See* Claimants’ Opening Vol. 2 Slides 7-10; Mihai Presentation Slide 23. *See also* Mihai II ¶ 253-255.

²⁹¹ *See* Tr. (Dec. 11, 2019) 2722:1-20 (Dragos Tribunal Questions) (When asked by the President of the Tribunal whether the Ministry of Environment or the TAC could consider a “political position,” Professor Dragos testified: “No. I think--I think not.” He acknowledged that the EIA assessment “is only in technical terms,” and described that while public “considerations that are within the law” may be assessed, “political considerations cannot, of course, be part of this—these considerations.”).

Douglas also presented the following hypothetical to Respondent’s legal expert Professor Tofan: “Just imagine this: The Minister of the Environment is in the situation, checklist is completed, and he calls you, and he says, ‘Professor, I’ve still got doubts about this because of the public interest or something else. Do I have the discretion not to issue the permit?’ And what would your answer be?”²⁹² Professor Tofan responded that her “answer would be clearly ‘no’” and opined that the Committee had all of the elements it needed to take into account “including the public interest.”²⁹³ Professor Tofan also testified in agreement with Arbitrator Douglas’ proposition that “the Ministry of the Environment, once the TAC has given its consensus, can’t take a different view to the TAC as to whether or not the Project meets the public-interest requirement.”²⁹⁴

125. Romanian law provides a role in the environmental permitting process for public opinion through the public consultation process.²⁹⁵ The public consultation process is regulated by Romanian law under the direction of the Ministry of Environment.²⁹⁶ The Ministry of Environment approved RMGC’s public consultation plan, including, among other things, where and when public hearings would be held; how the public would participate; and where and how to make information publically available.²⁹⁷ The Ministry of Environment also selected questions for the Project proponent (RMGC) to address, and evaluated its responses within the context of the EIA procedure.²⁹⁸

²⁹² Tr. (Dec. 11, 2019) 2630:2-8 (Tofan Tribunal Questions).

²⁹³ Tr. (Dec. 11, 2019) 2630:9-19 (Tofan Tribunal Questions).

²⁹⁴ See Tr. (Dec. 11, 2019) 2632:15-2633:8 (Tofan Tribunal Questions).

²⁹⁵ See Tr. (Dec. 10, 2019) 2271:12-22 (Mihai Direct) (“The remarks, the comments of the public are taken into consideration in this [permitting] process, in this proceeding, by the Ministry of the Environment but in the form that are precisely regulated by the applicable law. Namely, the Minister of the Environment has the obligation to analyze these, if they wish, they may obtain information from the Project Titleholder, and the mere existence of comments from the public does not--do not--does not represent an obligation for the Ministry to adopt the position of the public.”). See also Mihai I ¶ 270; Mihai II ¶ 250.

²⁹⁶ See Public Consultation and Disclosure Plan dated June 2006 (Exh. C-269) at 12 (observing that “[t]he Ministry of Environment and Water Management (MEWM) is the competent authority for the EIA and the public consultation for the Roșia Montană Project (RMP). The responsibilities of MEWM are defined by MO 860/2002 with its further amendments and GD 918/2002 with its further amendments...”).

²⁹⁷ See Avram II ¶¶ 129-131 [REDACTED]

[REDACTED]. See also Public Consultation and Disclosure Plan dated June 2006 (Exh. C-269).

²⁹⁸ Mihai ¶¶ 108-110, 182-185, 199-201; Avram ¶¶ 51, 73-74; Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555) at 1 (noting that the Ministry of Environment’s proposed

126. RMGC conducted extensive public consultations on the EIA Report from July to August 2006 and again in 2011 following the recommencement of the EIA review process and submission of EIA updates requested by the Ministry of Environment.²⁹⁹ [REDACTED]

[REDACTED] .300 [REDACTED]

[REDACTED]³⁰¹ RMGC also conducted international public consultations in Budapest and Szeged, Hungary, in observation of procedures regarding potential cross-border impacts.³⁰² The Ministry of Environment, in consultation with the TAC, was obliged to review RMGC's responses to these questions and comments from both the 2006 and 2011 public consultations.³⁰³ Upon doing so, the Ministry determined that RMGC answered each question and comment to the satisfaction of the Ministry.³⁰⁴

127. There also is no basis to conclude that the Government lawfully withheld the Environmental Permit for Roșia Montană because of any alleged lack of a “social license” as Respondent contends. That is because no legal decision was taken to deny issuance of the Environmental Permit for any reason, and because there is no dispute that “social license” is not a legal concept,³⁰⁵ and there can be no dispute that it is not a legal requirement.³⁰⁶

conditions and measures for the Environmental Permit take into account “the opinions and proposals expressed by the public who participated to the public consultation phases and the answers and solutions proposed by the Titleholder”); Ministry of Environment Draft Decision Concerning the Application for Issuance of the Environmental Permit (Exh. C-2075) at 1 (same). [REDACTED]

²⁹⁹ See Claimants' Opening Vol. 2 Slide 12; See also Avram ¶¶ 48-52, 85-87; Avram II ¶¶ 129-134.

³⁰⁰ [REDACTED]

³⁰¹ [REDACTED]

³⁰² [REDACTED]

³⁰³ Tr. (Dec. 10, 2019) 2271:12-22 (Mihai Direct); Mihai ¶¶ 108-110.

³⁰⁴ See *supra* ¶ 20; Claimants' Opening Vol. 4 Slides 14-16; Reply ¶ 115; Avram ¶¶ 73-74; Avram II ¶ 133; Mihai ¶¶ 199-206.

³⁰⁵ [REDACTED]

[REDACTED] See also Thomson II ¶ 19 (“the social license concept is based in political reality rather than moral or legal principles.”).

management had undertaken significant efforts to raise the level of its social license starting in 2009,³¹³ and had succeeded in demonstrating the legitimacy of the company's approach and the illegitimacy of the opposition's approach to a large number of stakeholders.³¹⁴ Consistent with his on-site observations, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³¹⁵

132. Dr. Boutilier's conclusion that RMGC had a positive social license by 2011 is also consistent with the study funded by the European Commission and undertaken in April 2011 by the University of Exeter's Camborne School of Mines of seven mining projects, including the Roşia Montană Project.³¹⁶ That research team conducted lengthy on-site surveys and open-

312

[REDACTED]

Henisz ¶¶ 38-42.

313

[REDACTED]

See also

Claimants' Opening Vol. 4 Slide 93 (*citing* Tănase III ¶¶ 88-91; Lorincz II ¶¶ 2-14, 34-50, 79-120; Henisz ¶¶ 25-34).

314

[REDACTED]

315

[REDACTED]

³¹⁶ *See* Claimants' Opening Vol. 4 Slides 95-96 (*citing* Dr. Adey et al., Camborne School of Mines Study of Mining and Society, Apr. 2011 (Exh. C-2045). [REDACTED]

[REDACTED] Boutilier Presentation Slides 26-28 (describing study results); [REDACTED].

ended interviews of 97 local residents in Roșia Montană,³¹⁷ which established that the Roșia Montană Project outperformed all of the other mining projects studied in terms of local support, trust, and engagement.³¹⁸

133. Similarly, in December 2011, the “Munții Apuseni” Association for Socio-Economic Research and Development Center determined that an “overwhelming majority” (~ 85%) of Roșia Montană residents and over 75% of those surveyed in Zlatna, Baia de Arieș, Abrud, and Roșia Montană supported development of the Project.³¹⁹ Moreover, on December 9, 2012, the day of national elections, in the referendum held in Roșia Montană and 34 other communities in Alba County, a strong majority of the voters in Roșia Montană (79%) and the areas with mining traditions, *i.e.*, Abrud, Baia de Arieș, Bucium, Roșia Montană, and Zlatna (71%) voted to restart mining in the area and to implement the Project.³²⁰ Overall, in the 35 communities in Alba

³¹⁷ Dr. Adey et al., *Camborne School of Mines Study of Mining and Society*, Apr. 2011 (Exh. C-2045) at 11-12. [REDACTED]

³¹⁸ [REDACTED] Boutilier Presentation Slides 26-28; *Impact Monitoring of Mineral Resources Exploitation, Report on the Study of Mining and Society and Its Implications*, Apr. 2011 (Exh. C-2045) at 76 (“Roșia Montană has the highest percentage of respondents who had positive views about mining compared to all the other sites (Figure 16). Roșia Montană also stands out compared to other demo sites, as they had the highest percentage of respondents saying mining companies were meeting public expectations (Figure 17), the highest percentage of respondents feeling mining was an important part of their identity / heritage / tradition (Figure 18) and the highest number of responses indicating that people perceived that RMGC and the local government were sufficiently engaging local people (Figure 19).”); *id.* at 56, 76, 85, 87 (finding that over 95% of survey respondents in Roșia Montană felt positive about mining, and “that much of the opposition against the mine reopening comes from outside of the community and even outside of Romania”). An article cited by Dr. Thomson, in his second expert opinion, further supports these findings. Thomson II ¶ 103 *citing* Elizabeth Adey, *Social license to operate - trust before gold*, dated Jan. 15, 2014 (Thomson Exh. 77) at 1-2 (describing that “in relation to the SLO [Social License to Operate] question, 80% felt that RMGC and the local government were engaging them sufficiently in existing or future mine developments,” and that “[w]hile there are clearly some in the local community against the Project, the overall research findings show that the majority are supportive. Many were and remain frustrated at the length of time it’s taking the government to make a decision.”); Claimant’s Opening Vol. 4 Slides 95-96.

³¹⁹ *See* Claimants’ Opening Vol. 4 Slide 97; “Munții Apuseni” Association for Socio-Economic Research and Development Center, *Report regarding the impact of economic development on the quality of life in Zlatna, Baia de Arieș, Abrud, and Roșia Montană*, dated Dec. 2011 (Exh. C-2050) at 86. *See also id.* at 10 (finding that, “in Roșia Montană, an overwhelming majority of the investigated population – 81% – says that the reopening of the mine is the main opportunity for economic development of the town, at a great distance being tourism (5.2%) and animal husbandry (3.6%)”).

³²⁰ *See* Claimants’ Opening Vol. 4 Slide 97; *Memorandum on Job Creation by the Restart of Mining at the Apuseni Mountains and Especially in Roșia Montană from Alba County Council to President of Romania, Parliament of Romania, and Government of Romania* (Exh. C-794) at 6.

County that held the referendum, nearly two-thirds of the total (63%) voted to restart mining and to implement the Project.³²¹

134. In contrast, the analysis of Respondent's expert Dr. Thomson upon which Respondent heavily relies, does not provide a reliable basis for assessment.³²² [REDACTED]

[REDACTED]³²³ In addition, while Dr. Thomson claimed in his first report that he interviewed "local residents and former community leaders" purportedly to validate his conclusions,³²⁴ [REDACTED]

[REDACTED]³²⁵ [REDACTED], and his sparse interview notes ordered produced over Respondent's objections demonstrate, [REDACTED]

[REDACTED].³²⁶

³²¹ See Claimants' Opening Vol. 4 Slide 97; Boutilier Presentation Slides 33-35 (explaining the validity of the referendum results); Memorandum on Job Creation by the Restart of Mining at the Apuseni Mountains and Especially in Roşia Montană from Alba County Council to President of Romania, Parliament of Romania, and Government of Romania (Exh. C-794) at 6. See also December 9, 2012 referendum vote reports for Roşia Montană to relaunch mining in Apuseni Mountains (Exh. C-2859).

³²² [REDACTED]

³²³ [REDACTED] See also Reply ¶ 154. See also, e.g., Alexandrescu, Human Agency in the Interstices of Structure: Choice and Contingency in the Conflict over Roşia Montană, Romania. Ph.D. Thesis, University of Toronto, 2012 (Thomson Exh. 16) at 49, 144-145, 216 (acknowledging his "armchair activism" and that he does not have an "unbiased" view of the Project); Irina Velicu, To sell or not to sell: resistance neo-liberal globalization and the aesthetic post-communist subject. Ph.D. Thesis, University of Hawaii, 2011 (Thomson Exh. 18) at 49 (stating she made her "solidarity explicit" with Project opponents); [REDACTED]

³²⁴ Thomson ¶ 26.

³²⁵ [REDACTED]

³²⁶ Reply ¶¶ 155-156 (demonstrating Dr. Thomson interviewed only six people, A to F, including a former disgruntled employee (Mr. A), two longtime Project opponents (Mr. B and Mr. C), and a member of the opposition group Alburnus Maior (Mr. D)). [REDACTED]

[REDACTED]

135. Moreover, Dr. Thomson’s analysis cannot assist the Tribunal in answering the question presented here, because [REDACTED]

[REDACTED]

[REDACTED]³²⁹ By contrast, in his first report Dr. Thomson relied selectively on several

327 [REDACTED]

The Mayors of the 35 communities that held the December 2012 referendum explained in a memorandum endorsed by the Alba County Council that a massive snowstorm and outdated and overstated registration rolls similarly reduced the turnout and did not reflect the actual level of support for the Project. Memorial ¶ 400; Memorandum regarding 2012 referendum (Ex. C-794) at 5 (“Unlike any other day in the recent history of parliamentary elections, the weather conditions were extremely harsh on December 9th. The yellow snowfall and snowstorm code was in force from Saturday, December 8th, until Sunday, December 9th, 18.00 h. There were massive snowfalls in the area, most of them between 3 and 11 h in the morning of the elections and of the referendum. More than half of the 450 villages in the referendum footprint area were isolated, without access to the voting sections, and around 15,000 voters were stranded in their households.”). Without even a hint of irony in view of his own experience, Dr. Thomson refused to accept the Mayors’ explanation for the referendum turnout which he instead attributed to an alleged boycott. *See* Thomson I ¶ 103. *See also* Boutilier ¶ 117.vi-xiv (explaining that there is no credible evidence of an alleged boycott).

328 [REDACTED]

329 [REDACTED]

330 [REDACTED]

331 [REDACTED]

surveys, including one that showed the opposite of what he claimed.³³² After submitting his first report with its Counter-Memorial, Respondent requested all of the “surveys, reports, and/or studies” on “public awareness and support of the Project,” which it argued were “highly relevant” to assessing social license.³³³ It is evident from Dr. Thomson’s subsequent refusal to consider this evidence that he simply did not find support for his preferred narrative in the thousands of pages of surveys and polls produced in response to these requests.

136. The evidence on which Dr. Thomson does rely, including the work of Respondent’s expert Dr. Pop, confirms that the local communities strongly supported the Project, [REDACTED]

[REDACTED].³³⁴ [REDACTED]

[REDACTED]

[REDACTED].³³⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³³⁶

137. In addition, contrary to Respondent’s repeated assertions that RMGC allegedly lacked a social license in 2011-2013, [REDACTED]

³³² Thomson I ¶¶ 24, 42, 67, 71 (referring to surveys from 2002, 2006, and 2011, and in particular claiming that an “external study” in 2011 shows “a complete absence of social license”). *See also* Reply ¶ 152 (explaining that Dr. Thomson did not submit the referenced “external study” with his expert report, but instead referred to an academic paper that referred to another academic paper that referred to the study, and that the actual study by the “Munții Apuseni” Association in December 2011 (Exh. C-2050) shows that over 75% of four traditional Romanian mining towns as well as “the overwhelming majority of the [Roșia Montană] population surveyed – 84.6% – is in favour of the RMGC project development”); Boutilier ¶¶ 66, 117.e.vii (observing that “[a] support level of 85% is extremely high,” “seldom achieved,” and indicative of “at least an approval level of social license, if not higher,” and that, “[i]ronically, the empirical evidence against Thomson’s conclusion that there was no social license comes from the very study he indirectly cited”).

³³³ Procedural Order No. 10 dated June 8, 2018, Annex B at 44-47, Requests Nos. 26, 27 (arguing such surveys were “material to [the case’s] outcome since they will reflect an assessment of the Project’s level of support”).

³³⁴ *See, e.g.*, Alina Pop, *Roșia Montană: Social Representations around an Environmental Controversy in Romania*, 2014 ([Thomson Exh. 2] (“The majority of the Rosia Montana population favored the mining company, whereas the local NGOs fighting against the project continually lost local support.”). [REDACTED]

[REDACTED].³³⁵

[REDACTED].³³⁶

[REDACTED]

337

138. Thus, while accepting that RMGC had a social license, contradicting the position that Respondent has taken without basis, [REDACTED]

[REDACTED]

As Dr. Boutilier observes, “I have never seen a unanimous community in the context of a planned or operating mine. A dissenting minority is to be expected.”³⁴¹ [REDACTED]

[REDACTED]

139. While Dr. Thomson points to organized opposition to the Project, his scholarship on social license, co-authored with Dr. Boutilier, maintains that an “acceptance or tolerance” level of social license is “sufficient to allow a project to proceed and a mine to enjoy a quiet relationship with its neighbors,” and at that level of social license there are “lingering or recurring issues, threats, watchful monitoring, and the presence of antagonistic outside

337 [REDACTED].

338 [REDACTED].

339 [REDACTED]

340 [REDACTED]

³⁴¹ Boutilier ¶ 117.e.v.

342 [REDACTED].

NGOs.”³⁴³ The existence of an organized opposition therefore “indicates an acceptance level of Social License.”³⁴⁴ Dr. Thomson confirms that “[m]any mines, probably a majority of mines, . . . operate at the acceptance level, and very few . . . reach higher levels.”³⁴⁵ Thus, as Dr. Thomson has acknowledged, “Social license exists when there is a broad consensus that something is okay, but since the language is relatively loose and it is strongly emotional, it can be open to misuse by a small minority of people.”³⁴⁶

140. Further, as [REDACTED]
[REDACTED]³⁴⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁴⁸

141. [REDACTED]
[REDACTED]

³⁴³ Ian Thomson and Robert Boutilier, Social License to Operate, Chapter 17.2 in SME Mining Engineering Handbook, 2011 (Thomson Exh. 10) at at 1779. [REDACTED]

[REDACTED]. See also Robert Boutilier and Ian Thomson, The Social License: The Story of the San Cristobal Mine, 2019 (Thomson Exh. 47) at 48, Table 5.1 (explaining that the acceptance/tolerance level of social license “include[s] lingering and recurring issues, threats, watchful monitoring, and presence of antagonistic outside NGOs”).

³⁴⁴ [REDACTED]
[REDACTED]

See also Boutilier ¶ 117(d)(v) (noting that Dr. Thomson’s position that an organized opposition indicates a weak or absent social license is “not supported by any theory or academic research that [he is] aware of”).

³⁴⁵ [REDACTED]

³⁴⁶ *Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 2. [REDACTED]
[REDACTED]

³⁴⁷ [REDACTED] See also Boutilier §2.4 (discussing “recent literature that places the social license in the context of the dynamic relations among the company representing the private sector, the government representing the public sector, and both communities and outside NGOs representing the civic sector”); *id.* ¶ 30 (observing as to “the proper role of the public sector as a stakeholder” in tri-sector models of social license that, “Clearly from the perspective of a host government for a project, the government must follow the rule of law in its treatment of the project and not act to undermine it. More generally, it must avoid generating civic sector mistrust in how well the public sector is discharging its duties and responsibilities.”).

³⁴⁸ [REDACTED]; Boutilier Presentation Slides 15-23.

[REDACTED]

[REDACTED]

[REDACTED] 350

142. As to the subject of protests, the evidence demonstrates, and it is not disputed, that public opinion in Romania is characterized by a deep distrust of government, Parliament, and all political institutions.³⁵¹ Research coordinated by Respondent’s expert Dr. Stoica further demonstrates that there are very serious and entrenched societal concerns in Romania about corruption, economic inequality, and the lack of rule of law.³⁵² In that context, Dr. Stoica

349 [REDACTED]
[REDACTED]; *See also Social license open to political manipulation*, Farm Weekly, Sept. 17, 2016 (Exh. C-2863) at 1 (Dr. Thomson stating “Social License is open to political manipulation.”).

350 [REDACTED]

351 *See Claimants’ Opening Vol. 1 Slide 35.* [REDACTED] Tr. (Dec. 13, 2019) 3220:18-3221:2 (Stoica Cross) (confirming that his research organization, CURS, found in December 2011 that “only 6 percent of respondents had high levels of trust in Parliament” and “that only 7 percent had high levels of trust in political parties”); *id.* at 3218:19-3219:1 (Stoica Cross) (confirming that CURS also found in December 2011 that “84 percent felt things in Romania were going in the wrong direction” and “only 11 percent said the direction was good”); Tr. (Dec. 13, 2019) 3294:11-19 (Stoica Cross) (confirming that CURS in 2014 again “found political parties, Parliament, and the Government were ‘extremely unpopular’” with “confidence levels ranging from 6 percent for political parties up to 12 percent for the Government”).

352 *See, e.g.,* Daniel Sandu, Cătălin Augustin Stoica, Randu Umbres, *Romanian Youth: Concerns, Aspirations, and Life-Style, 2014* (excerpt) (Exh. C-2931) at 18-19, Table 3.3 (study of Romanian youth ages 15 to 29 reporting that “The two most important problems [] mentioned are corruption and poverty, each of them being perceived as very serious by almost two thirds of the respondents. They are followed by other economic problems such as the job insecurity, unemployment or high prices of energy as well as political issues such as the failure to properly implement the laws. . . . noteworthy is the relatively low seriousness young people associate with issues such as pollution, climate changes or threat of terrorism, which are greatly debated in the highly developed societies.”); *id.* at 139, Chart 8.5 (finding that people were most likely to protest about lack of jobs (28%), economic issues such as pay or poverty (24%), the health system (11%), and corruption (9%), and that “[a]ll other issues” including the environment were below 5% “and can be deemed rather secondary issues”). *See also* Tr. (Dec. 13, 2019) 3288:4-3292:15 (Stoica Cross) (confirming these findings).

repeatedly observed in his public writings that these systemic concerns about “political capitalism” motivated the mass protests that toppled the Boc government in early 2012:

What many of the protesters in the square denounced were the practices associated with this form of capitalism: access to resources based on corrupt informal connections, acquaintances, relationships, conditioning economic success to political protection, wrinkling or diversion of state resources to customers close to power, gaining impressive economic benefits through corrupt practices and intimidation strategies used by a predatory bureaucracy. All these things underlying political capitalism or ‘capitalism by sponsorship’ . . . have generated and is generating immense social disparities, socio-economic polarization and poverty of the majority of the population.³⁵³

143. Thus, while the protests in 2012 had a specific “triggering event,” namely, the resignation of the Minister of Health, Dr. Stoica concluded that “[a]bove all” the other underlying motivations, “as in other parts of the world, in Romania too, the protesters were united by their explicit criticism and rejection of all current politicians.”³⁵⁴

144. For the same reasons, and in the same context,³⁵⁵ the evidence shows that the mass protests that occurred in the fall of 2013 were caused by and directed at the Government’s presentation of the Draft Law to Parliament and the perception that the support for that law was corrupt.³⁵⁶ Before that event, opposition to the Project did not attract large numbers.³⁵⁷ There

³⁵³ Tr. (Dec. 13, 2019) 3214:19-3215:21 (Stoica Cross) (confirming these observations quoted in Stoica Exh. 28 at 18, and stating, “yes, this is my opinion”); *id.* at 3208:12-3209:1 (Stoica Cross) (confirming his observations in Exh. C-2930 at 2, “based on what protesters were telling me,” that “they believed Romania was marred by former Communist politicians’ survival which had resulted in a mock democracy which is controlled by a bureaucracy that is incompetent, highly politicized, and unaccountable to ordinary citizens, and in an economic system that rewards politically-connected individuals or firms and punishes honest, hard working entrepreneurs”); *id.* at 3209:18-3210:5 (confirming his observations in Exh. C-2930 at 2 that “The protesters’ opinions, as well as the opinion of the majority of Romanians, suggests that political capitalism still is alive and well in Romania”); *id.* at 3212:2-6 (confirming his observations in Stoica Exh. 27 at 1 that “during this time of economic hardship, the majority of Romanians became, again, dissatisfied with widespread corruption among politicians and state institutions”).

³⁵⁴ Tr. (Dec. 13, 2019) 3213:10-21 (Stoica Cross) (confirming his observations in Stoica Exh. 27 at 3); *id.* at 3221:13-3222:7 (Stoica Cross) (confirming that although many Romanians “shared the same view of the source of structural tensions,” it “took an event to build bridges” and a “spark ‘that allowed the convergence of public frustrations in relation to the current economic and political situation in the country’”).

³⁵⁵ *See* Tr. (Dec. 13, 2019) 3222:8-3223:4 (Stoica Cross) (confirming he predicted in Stoica Exh. 28 that it was possible protests would continue in 2013 “if another precipitating event occurs—a new spark that re-emerges the flame of existing popular dissatisfaction”).

³⁵⁶ Claimants’ Opening Vol. 6 Slides 4-17; Boutilier Presentation Slides 43-58; [REDACTED]

were no large-scale protests in December 2011, when the Minister of Environment stated publically that permitting was “in a final stage” and that the Environmental Permit endorsement might be issued “by the end of January” 2012.³⁵⁸ Nor were there any protests in July 2013 when the Ministry of Environment published draft Environmental Permit conditions.³⁵⁹ What changed was the government’s submission of a “special law” to Parliament. Indeed, there is no dispute that the 2013 protests were triggered by and directed at the Draft Law.³⁶⁰

145. [REDACTED]”³⁶¹

Specifically as it related to RMGC, and in response to statements made by President Băsescu in support of the Roșia Montană Project, in 2011 and 2012, Victor Ponta, the PSD political party president and the opposition leader at the time, campaigned for office by accusing (with

[REDACTED]

See also Boutilier ¶ 3(h), § 4. *See also* Reply § IV. C; *id.* ¶ 190 (noting that “because the Government’s unlawful derailing and politicization of the permitting process precipitated, magnified, and sustained the protests, the Government cannot rely in defense on the very protests its unlawful conduct provoked.”).

³⁵⁷ Claimants’ Opening Vol. 6 Slide 6; Jurca § 13.3 (describing only 11 “protests against the Project” between 2000 and 2012, ranging from “around 30” to “over 100” people); [REDACTED] Henisz Interview Notes dated 2011 (Exh. C-2462.02) at 2, 3, 5, 7, 60, 61, 82, 90, 91 (Project opponents confirming small and decreasing size of opposition).

³⁵⁸ *See* Claimants’ Opening Vol. 6 Slide 6 (*citing* Interviews of László Borbély, Dec. 18, 2011 and Dec. 27, 2011 (Exhs. C-633, C-637)). *See also* [REDACTED]

[REDACTED]

³⁵⁹ Claimants’ Opening Vol. 6 Slide 6; Ministry of Environment Note for Public Consultation dated July 11, 2013 (Exh. C-555). *See also* Tr. (Dec. 13, 2019) 3232:1-3233:18 (Stoica Cross) (testifying that he is not aware of any large-scale protests after the proposed measures and conditions for issuance of the Environmental Permit were published on the Ministry of Environment’s website on July 11, 2013, and further confirming that the Save Roșia Montană campaign’s chronology of events through September 1, 2013 does not list *any* protest events in July 2013). *See also* Save Roșia Montană campaign chronology (2002-2013) (Exh. R-451) at 14.

³⁶⁰ *See, e.g.*, Rejoinder ¶ 1017 (acknowledging that as a “result of the Government’s submission of the Roșia Montană Law to Parliament, massive street protests ensued”); Thomson II ¶ (viii) (the 2013 protests were “provoked by the introduction of the Roșia Montană Law”); Stoica ¶¶ 97, 115; 188 (“[t]he triggering event of the 2013 protests ... was the submission by the Ponta Government of a draft law regarding this project to the Parliament, on August 28, 2013”); Pop ¶¶ 10, 87 (“[t]he chief reason of the protests, which were thereafter held on a regular basis during the entire autumn, was to fight against the ‘Roșia Montană Law’ ...”).

³⁶¹ *See* Boutilier ¶ 3(h); [REDACTED] Boutilier Presentation Slides 47-55.

absolutely no basis) President Băsescu and unnamed others of supporting RMGC only after having accepting bribes.³⁶²

- a. In August 2011, Victor Ponta argued that the “Gold Corporation should make public all the sponsored political figures, whether from PSD, PNL or PDL, because we know for sure that Băsescu was sponsored, and probably also Roberta Anastase. Otherwise, we risk having in Romania the worst case of lobby and political corruption.”³⁶³
- b. In October 2011, Victor Ponta claimed that “since 1997 [the Project] is blocked and it is going to be blocked because not all the politicians can be bought, as it is the case for Traian Basescu, the President, and like others from all the parties.”³⁶⁴
- c. In March 2012, Victor Ponta asserted that “[i]t is very clear that currently the company from Rosia Montana has in Traian Basescu a political lobbyist who is directly interested in that project and I believe has found lobbyists in all parties, including in my party, because it bought the entire advertising area from the media market. . . . In our case everything is done under the table. This is deeply illegal and deeply incorrect.”³⁶⁵

146. Thereafter, Prime Minister Ponta stated that the Project met all legal requirements for permitting, that his Government was sending a special law to Parliament, that he personally intended to vote against the law, but that Parliament would decide whether or not the Project would proceed.³⁶⁶ On August 27, 2013, the Government submitted the Draft Law to Parliament with a lengthy exposition of reasons supporting its enactment signed by Prime Minister Ponta and all of the responsible Ministers, and protests shortly began.³⁶⁷

147. President Băsescu promptly accused Prime Minister Ponta of corrupt support from RMGC, stating: “Now, I ask him: Ponta, how much money did you get to sign up Roșia

³⁶² See Boutilier ¶¶ 102-103; Boutilier Presentation Slides 17-19.

³⁶³ Boutilier Presentation Slide 17 (*citing Ponta: In the case of Roșia Montană, Băsescu is protecting his electoral campaign sponsors*, Mediafax.ro, dated Aug. 19, 2011 (Exh. C-2643) at 1).

³⁶⁴ Boutilier Presentation Slide 18 (*citing Ponta: Roșia Project is and it is going to be blocked because not all the politicians can be bought*, Mediafax.ro, dated Oct. 6, 2011 (Exh. C-2645) at 1).

³⁶⁵ Boutilier Presentation Slide 19 (*citing Victor Ponta: USL will support Minister Leonard*, *Cursdeguvernare.ro*, dated Mar. 25, 2012 (Exh. C-2647) at 2-3).

³⁶⁶ See *supra* ¶¶ 40-45; Claimants’ Opening Vol. 5 Slides 10, 13, 18-19, 21-27, 42-45; Memorial ¶¶ 473-481; Reply ¶¶ 204-205.

³⁶⁷ Claimants’ Opening Vol. 5 Slide 47; Stoica ¶ 188.

Montană? Now is the moment to ask him what he was asking me too: Ponta, how much money did you get for Roșia Montană?”³⁶⁸

148. Images from the protests show plainly the crowds rallying around banners with anti-corruption, anti-government messaging such as “Gold Corp = Guvern Corupt,” “Government of treason has put an end to patience,” “Revolution starts in Rosia Montana,” “We Don’t Trust Our GOLDvernment,” “Break the circle in the streets: Lying mass media, ignorant people, corrupt politicians,” and “All Romanians against treason!”³⁶⁹

149. In this regard, on September 9, 2013, Senator Crin Antonescu, the leader of the Senate and co-leader of the ruling coalition, and notably not a witness in this arbitration, observed that there was “a great amount of suspicion that political decision-makers in this matter would not act according to the legitimate national public interests,” and that “the feeling of a great part of the public opinion in Romania” is that officials “have been bought,” noting that “the top politicians have thrown accusations that deepened or amplified this feeling.”³⁷⁰ President Băsescu likewise observed that sending a special law to Parliament “was the spark that started these protests,” which were “against the political class” and “not only related to Roșia Montană.”³⁷¹

150. After the protests, on October 22, 2013, Senator Antonescu again acknowledged that “[i]f we have protests, in University Square as well as in other places, they have only one thing in common, which is not ecology, it’s not some economic ultra-nationalism ..., it’s the

³⁶⁸ Boutilier Presentation Slide 20 (*citing President Băsescu’s Statements about Roșia Montană*, Evz.Ro, Sept. 2, 2013 (Exh. C-927) at 2). *See also* Boutilier Presentation Slide 21 (*citing C. Fierbinteanu, Băsescu: Ponta is a deeply corrupt prime minister*, Mediafax.ro, dated Dec. 5, 2013 (Exh. C-2803) at 1-2 (President Băsescu stating “Victor Ponta is a deeply corrupt Prime Minister, who tries to hide his thievery under legal acts,” and that “he is corrupt because he wanted to hide behind a Rosia Montana law.”)).

³⁶⁹ Claimants’ Opening Vol. 6 Slides 8-12 (further showing large banners stating “The Romanian press is full of lies” and signs about Prime Minister Ponta and/or Minister Șova as well as anti-capitalism signs). *See also* Boutilier ¶ 3(h) (observing that “[a]lthough there were elements of anti-Project themes in the 2013 protests, the protests were a manifestation of the broad anti-corruption social movement”).

³⁷⁰ Claimants’ Opening Vol. 5 Slides 55-56; Reply ¶ 198; Boutilier ¶ 105; *VIDEO Crin Antonescu’s statement*, Hotnews.ro, Sept. 9, 2013 (Exh. C-832) at 1-2; Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690).

³⁷¹ Claimants’ Opening Vol. 6 Slides 13-14 *linking to* Interview of Traian Băsescu, Pro TV, dated Sept. 29, 2013 (Exh. C-2864.02) at 01:21-01:30, 02:23-02:45.

dissatisfaction with and suspicion against those who govern, those of today and of yesterday, which risks becoming [an] anti-system [movement].”³⁷²

151. Similarly, in 2014 Respondent’s expert Dr. Stoica coordinated a research study of Romanians aged 15 to 29 that concluded, “This topic is all the more interesting that a relative increase in the number of protests organized by the civil society, especially in Bucharest and other large cities, was recorded in the past years. Even though nominally they were attributed to precise causes, such as the dismissal of Raed Arafat in 2012 or the mining facility at Rosia Montana in 2013, these protests had constantly a political attitude directed in particular to anti-establishment.”³⁷³ Dr. Stoica’s own research thus confirms Dr. Boutilier’s central thesis. As Dr. Boutilier observes, “I agree with that. I agree with this portrayal that the continuity part of all of these protests was mistrust of Government. ... There was always a cause that was the spark, and what they sparked was this fuel that was already there across the decade.”³⁷⁴

152. As Dr. Boutilier observes, mass street protests against government corruption have continued in Romania. For example, in November 2015 approximately 25,000 people “protested the corruption that allegedly caused dozens of deaths in a fire at the Colectiv nightclub, which led to the resignation of Prime Minister Victor Ponta’s government.”³⁷⁵ In early 2017, “a series of massive nationwide protests, the greatest in Romania’s history at this point,” had the same anti-corruption theme and prompted another government to resign.³⁷⁶ And, after 50,000 to 100,000 people held a massive anti-corruption rally in Bucharest in January 2018, large anti-corruption protests continued throughout the year.³⁷⁷

³⁷² Claimants’ Opening Vol. 6 Slides 15-16, Video: *Crin Antonescu: Mistrust in the Government is the reason for the protests in the University Square*, Digi 24, dated Oct. 22, 2013 (Exh. C-2692.1) at 0:00-0:22.

³⁷³ Daniel Sandu, Cătălin Augustin Stoica, Randu Umbres, *Romanian Youth: Concerns, Aspirations, and Life-Style*, 2014 (excerpt) (Exh. C-2931) at 131.

³⁷⁴ Claimants’ Opening Vol 6. Slide 7 (*citing* Boutilier ¶ 3(h), § 4); Boutilier Presentation Slides 51-55

[REDACTED] Boutilier Presentation Slides 52-54 (discussing Diana Margarit’s findings as to common theme of protests).

³⁷⁵ [REDACTED] Boutilier Presentation Slide 56; Boutilier ¶ 93.

³⁷⁶ [REDACTED] Boutilier Presentation Slide 57; Boutilier ¶¶ 94-96.

³⁷⁷ [REDACTED] Boutilier Presentation Slide 58; Boutilier ¶ 96.

153. Looking back on all of the protests from 2012-2017, including the 2013 protests at issue in this case, Dr. Victoria Stoiciu, who attended the 2013 protests together with Dr. Stoica³⁷⁸ and was the co-coordinator of his 2014 research study,³⁷⁹ concluded that although the protests were attended by diverse groups of liberals, nationalists, leftists, ecologists, and even extreme right groups with different points of emphasis, “What was at stake in every protest was the opposition against the political establishment as a whole, against the political system in place. This anti-system narrative was not diluting, nor was it diminishing the ideological heterogeneity of the protests, but made the co-existence of different ideological groups possible.”³⁸⁰

154. Thus, the evidence demonstrates that “although there were elements of anti-Project themes in the 2013 protests, the protests were a manifestation of the broad anti-corruption social movement that formed part of the ongoing post-Communist transition to democracy and the rule of law in Romania and elsewhere in Eastern and Central Europe.”³⁸¹

155. Indeed, the evidence supports the conclusion that the protests were directed against a proposed special law opposed by the Prime Minister but presented by the Government, purportedly specially to benefit a company and a project that was repeatedly and unfairly tainted by the Prime Minister among others as being corrupt, and that had been made the subject of numerous and extensive public debates over an extended period of time, while the Government refused to allow permitting to advance while insisting a political decision would have to be made. This was not a mass opposition to the Project, it was a mass opposition to legislation for perceived corrupt special interests.

156. Respondent’s experts do not credibly support a contrary conclusion. For example, rebuttal documents and the cross-examination of Dr. Stoica demonstrate that he was not a neutral

³⁷⁸ Tr. (Dec. 13, 2019) 3260:3-11 (confirming that he is friends with Dr. Victoria Stoiciu) (Stoica Cross); *id.* at 3260:15-18 (acknowledging his announcement during the September 1, 2013 protests to “[t]ell Victoria [Stoiciu] we are already on the carriageway and ask her to come quick”); *id.* at 3265:11-17 (affirming that “Mircea Kivu, Victoria Stoiciu, and Mihai Bumbes” were “leading the march, holding a large banner” and that he “[took] off trying to catch up with them.”)

³⁷⁹ Tr. (Dec. 13, 2019) 3283:2-14 (Stoica Cross) (affirming that for the 2014 “Romanian Youth study done by CURS for the Friedrich-Ebert-Stiftung Foundation” (FES), he was the “Research Coordinator” for CURS and Dr. Stoiciu was the “Research Coordinator” for (FES)).

³⁸⁰ Tr. (Dec. 13, 2019) 3280:4-3281:8 (Stoica Cross) (reviewing Dr. Stoiciu’s observations in Stoica Exh. 30 at 5 and confirming “That is what she wrote. That’s her opinion.”).

³⁸¹ See Claimants’ Opening Vol. 6 Slide 7 (*citing* Boutillier ¶ 3(h), § 4); [REDACTED].

“participant-observer” at the protests as he asserted in his opinion,³⁸² but instead is himself an activist who is enthusiastically aligned with the protest movement. Thus, among other things, Dr. Stoica attended the protests against the Boc government in 2012,³⁸³ he was one of “only four people” who went to the one-year anniversary of those protests,³⁸⁴ he was texting and speaking by phone with Claudiu Craciun, the “master of ceremonies” of the September 1, 2013 protest, as the events at that protest “were unfolding;”³⁸⁵ he participated in occupying the carriageway at University Square (later writing “Carriageway occupation mission accomplished!”) and then, after taking pictures, ran to catch up with his “friends” including Mihail Bumbes, one of the four people who started the protests by chaining himself to the government building on August 28, 2013;³⁸⁶ and, a few days later, he signed a petition calling for the rejection of the Draft Law.³⁸⁷

157. Moreover, while arguing in his opinion that “Save Roșia Montană” activists allegedly “stood out” at the 2012 protests that toppled the Boc government,³⁸⁸ he relied on excerpts of only one or two sentences from lengthy chapters of a book he edited, none of which supported his conclusion in context or even in the misleading form he presented them.³⁸⁹ He also referred to a study he coordinated in 2012, purportedly to show that protesters opposed the Project,³⁹⁰ but he

³⁸² See Stoica ¶ 132.

³⁸³ Tr. (Dec. 13, 2019) 3182:3-15 (Stoica Cross).

³⁸⁴ Tr. (Dec. 13, 2019) 3182:18-22 (Stoica Cross).

³⁸⁵ Tr. (Dec. 13, 2019) 3262:14-16; 3263:20-3264:2 (Stoica Cross). See also Cătălin Augustin Stoica, *Blog Post: Impressions From the Protest in Bucharest*, dated Sept. 1, 2013 (Stoica Exh. 45) at 2.

³⁸⁶ Tr. (Dec. 13, 2019) 3264:7-3265:16; 3269:7-18 (Stoica Cross).

³⁸⁷ Tr. (Dec. 13, 2019) 3269:19-3270:4, 3271:3-9 (Stoica Cross) (confirming he signed the petition submitted as Exh. C-2933 calling “for the immediate withdrawal of the law bill concerning Rosia Montana and for the start of a dialogue with the civil society”); *id.* at 3272:19-3273:3 (confirming he did not mention in his opinion that he signed this petition, allegedly because he “did not remember”).

³⁸⁸ Stoica ¶¶ 62, 187 (relying on Stoica Exhs. 22-24); Tr. (Dec. 13, 2019) 3184:16-3185:2 (Stoica Cross).

³⁸⁹ See, e.g., Tr. 3185:17-3188:17 (Stoica Cross) (demonstrating with respect to Stoica Exh. 22, that Dr. Stoica submitted only sentence from a chapter of his book that was almost 50 pages, that Respondent objected to requests to submit a complete copy of that chapter, and that the one sentence does not indicate the “Save Rosia Montana” group stood out at the 2012 protests, but says one lawyer went to Victory Square to pass out flyers); *id.* at 3188:18-3193:19 (Stoica Cross) (demonstrating with respect to Stoica Exh. 23, that Dr. Stoica submitted two sentences four pages apart from a chapter of his book that was more than 30 pages, that Respondent again objected to requests to submit a complete copy of the chapter, and that in the pages between the two excerpted sentences the author referred to “a common motive for dissatisfaction” that was “opposition to the ruling party in Romania,” which Dr. Stoica omitted because he “did not consider them to be relevant”).

³⁹⁰ Stoica ¶ 69 (referring Center for Urban and Regional Sociology, Nationwide Public Opinion Poll, Aug-Sept. 2012 (Stoica Exh. 25); Stoica Presentation Slide 17 (same)).

omitted pages of that study reflecting that *not one of the protesters surveyed* said the “most important” issue was in any way related to the Project.³⁹¹

158. Similarly, while arguing that the “main theme” of the 2013 protests was “environmental,” Dr. Stoica in his opinion acknowledges that “one of the central slogans of the September 2013 protests was ‘Corporations do not legislate;’” and states that “Specifically, this slogan expressed protesters’ concern vis a vis the fact that a corporation (RMGC, in this case) might ‘buy off’ (corrupt) MPs and other officials in order to have them pass laws favoring specific, private business interests.”³⁹² Dr. Stoica’s selective references in his opinion to publications he purports to cite for support further underscore the point. For example, while referring to Dr. Victoria Stoiciu’s publication to support his argument that the protests were mainly focused on environmental concerns, he omitted the conclusion of her paragraph in which she states that the opposition was against the political establishment, stating on cross-examination that he did not agree with her conclusion.³⁹³ Similarly, on cross examination Prof. Stoica acknowledged that he chose not to exhibit the study he coordinated in 2014 of young people in Romania aged 15-29,³⁹⁴ which shows that the issues of greatest concern were corruption and poverty and in which he concluded that it was “noteworthy ... the relatively low seriousness young people associate with issues such as pollution [and] climate changes.”³⁹⁵ While Prof. Stoica claimed he did not cite the study because the age group does not represent the majority of Romania’s population, his study

³⁹¹ Tr. (Dec. 13, 2019) 3200:14-20 (Stoica Cross) (confirming Stoica Exh. 25 was not a complete copy of his study); *id.* at 3200:21-3201:5 (confirming Exh. R-660 is the same study with two additional pages); *id.* at 3201:6-3202:1 (confirming one of the pages he omitted, Exh. R-660 at 4, shows only 1% of the 1,100 survey respondents said stopping the Project was “most important to them”); *id.* at 3204:10-3205:10 (confirming the other page he omitted, Exh. R-660 at 5, shows that none of the survey respondents who actually participated in the protests said “stopping the Project or anything about the Project was most important to them”).

³⁹² Stoica ¶ 117.

³⁹³ Tr. (Dec. 13, 2019) 3280:16-3281:16 (Stoica Cross) (acknowledging he omitted from his opinion Dr. Victoria Stoiciu’s conclusion at Stoica Exh. 30 at 5, even while relying on other text in the same paragraph of her work, because “I disagree with her opinion.”).

³⁹⁴ Tr. (Dec. 13, 2019) 3286:16-19 (Stoica Cross) (admitting he did not submit the study Claimants submitted as a rebuttal document as Exh. C-2931, allegedly because he “didn’t see the relevance”).

³⁹⁵ Tr. (Dec. 13, 2019) 3290:16-3291:19 (confirming this “noteworthy” finding he made in his study at Exh. C-2931 at 19, but stating he did not include it in his opinion because it was “a study conducted in 2014, after the protests in 2013,” and did not fit his “instructions”); *id.* at 3292:16-17 (Stoica Cross) (confirming finding made in Exh. C-2931 at 139, Chart 8.5 that only three percent identified the environment as the issue they care about most.).

confirms that the protests were initiated by large groups of young people.³⁹⁶ Indeed, Prof. Stoica struggled but failed to distance himself credibly from the fact that the study's conclusion was entirely aligned with Dr. Boutilier's opinion in this arbitration, because, as noted above, the study concluded with the observation that with regard to the increasing number of protests in Bucharest and other large cities in Romania, "[e]ven though nominally they were attributed to precise causes, such as the dismissal of Raed Arafat in 2012 or the mining project of Rosia Montana in 2013, these protests had constantly a political attitude directed in particular to anti-establishment and were initiated by large groups of young people."³⁹⁷

159. Dr. Pop's observations likewise ultimately aligned with Dr. Boutilier as she confirmed that the principal slogan from the protests, "united we save rosia montana," soon thereafter became the banner for a new political party in Romania, "United we Save Romania," or USR, a political party with an anti-corruption platform.³⁹⁸ Rebuttal documents moreover confirmed that

³⁹⁶ Tr. (Dec. 13, 2019) 3286:9-20 (Stoica Cross); Daniel Sandu, Cătălin Augustin Stoica, Randu Umbres, Romanian Youth: Concerns, Aspirations, and Life-Style, dated 2014 (Exh. C-2931) at 131.

³⁹⁷ See Tr. (Dec. 13, 2019) 3294:20-3296:2 (Stoica Cross) (arguing that he was not the author of that chapter of the study and that the conclusion stated at Exh. C-2931 at 131 as to the "anti-establishment" common theme of the 2012 and 2013 protests was "not [his] words"). The conclusion, however, is based on and reflects the research Dr. Stoica coordinated, and he does not contest any of those research findings. See *id.* at 3288:4-3291:1, 3291:20-3293:12, 3294:9-19 (Stoica Cross) (confirming findings in Chart 8.5 and Tables 3.3, 8.6, and 8.11). Moreover, Dr. Stoica coordinated the research for the study and wrote its foreword with Dr. Victoria Stoiciu. See Tr. (Dec. 13, 2019) 3285:1-3286:2. As noted, she reached the same conclusion about the common theme of the protests in her written work. Tr. (Dec. 13, 2019) 3280:4-3281:8 (Stoica Cross) (discussing Dr. Stoiciu's conclusion in Stoica Exh. 30 at 5). And, reflecting the collective contributions of the study, Dr. Stoica and Dr. Stoiciu refer in the foreword to "our efforts" as well as "our conclusions." *Id.* at 3286:3-15 (discussing Exh. C-2931 at 6). See also, e.g., Daniel Sandu, Cătălin Augustin Stoica, Randu Umbres, Romanian Youth: Concerns, Aspirations, and Life-Style, dated 2014 (Exh. C-2931) at 19 (multiple references to "our research" in support of observations); *id.* at 140 (observations "confirmed by our data"); *id.* at 146 (conclusion "confirmed by the data of our survey").

³⁹⁸ Tr. (Dec. 13, 2019) 3379:22-3382:21 (Pop Cross) (Dr. Pop testifying that the USR political party was inspired by the Save Roșia Montană campaign and "formed in response to those who were unhappy about the way that Romania was governed," and that USR has "undertaken a number of specific anti-corruption initiatives"). See also Tr. (Dec. 13, 2019) 3354:10-3359:18 (Pop Cross) (demonstrating that the academic work of the authors of the article submitted as Exh. R-93, on which Dr. Pop relies, is focused on corruption); *id.* at 3364:21-3371:9 (demonstrating that with respect to the protests, Exh. R-93 at 9 in fact observes, among other things, that "Ponta's about-face from the promises he has made during his election campaign to scrutinize the project was too much even for the disillusioned Romanian public," that "[t]he Rosia Montana Mining Project demonstrated how vested interests (including the media, local officials, and even national politicians) who benefit from graft and abuse will try to circumvent rule of law and the democratic processes," and that "one thing is clear. Intolerance of corruption and impunity is growing in Romania.").

Dr. Pop is an enthusiastic member of the USR political party, reflecting she too is biased on this subject.³⁹⁹

160. Finally, while Dr. Thomson provides an opinion on this topic, his only experience with protests in Romania, ironically, is that after his failed site visit to Roșia Montană, he drove to dinner in Cluj where he witnessed a protest “against government corruption.”⁴⁰⁰

161. While the protests that accompanied the Government’s submission of a special law to Parliament explain that the political leaders directed the MPs to vote to reject the law, there is no basis in law why the failure of that legislation to gain support should have meant the termination in effect of the Roșia Montană Project. Indeed, there was no decision that followed rejecting RMGC’s application for an Environmental Permit and no decision withdrawing the Roșia Montană License. There was only a political decision to abandon the Project and RMGC. As Minister of Environment Rovana Plumb said in November 2013, “Parliament’s decision means the last word for us and we will observe it.”⁴⁰¹ Prime Minister confirmed nearly a year later, “the Parliament rejected the law, so the exploitation will not be made, this is for sure.”⁴⁰²

162. Nothing in the law can support any conclusion other than that the State is fully responsible for having decided to terminate the Roșia Montană Project and with it its joint venture with Gabriel notwithstanding that the Project fully complied with applicable legal requirements. The State did not do so pursuant to any legal grounds, as evidenced by the absence of any legal decision. Nor is there any basis to conclude that public opinion in Romania justified the political rejection of the Roșia Montană Project and RMGC. There was no national referendum on the subject, nor was there any basis in law for one. Indeed, national surveys were broadly supportive of the Project.⁴⁰³ [REDACTED]

³⁹⁹ See Alina Pop Facebook Post dated May 23, 2019 (Exh. C-2934) (showing Dr. Pop with messages stating “I vote for USR Plus!” and “Yes, yes, yes, in case you didn’t know!”); Tr. (Dec. 13, 2019) 3379:22-3383:18 (Pop Cross) (confirming she made this Facebook post and that she is a member of the USR political party).

⁴⁰⁰ [REDACTED]

⁴⁰¹ Claimants’ Opening Vol. 6 Slides 55-56 (citing Minister Plumb’s public statements on Antena 3, Sinteza Zilei, Nov. 12, 2013 (Exh. C-828)).

⁴⁰² Claimants’ Opening Vol. 6 Slides 57-58 (citing Informal interview of Prime Minister Ponta, Realitatea TV, Oct. 19, 2014 (Exh. C-416)).

⁴⁰³ Boutilier ¶ 3(g), §§ 3.1.1, 3.2; Boutilier Presentation Slides 37-42; [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED] 404 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 405

163. Likewise, there was no basis in law for Parliament’s vote on the Draft Law to function as a proxy for the State’s decision whether to do the Project.⁴⁰⁶ The record does not support Respondent’s argument that the protests that followed the submission of the Draft Law to Parliament were motivated by an alleged broad popular opposition to the Project as distinct from the groundswell of opposition to what was widely perceived to be a corrupt special law promoted by and designed to benefit a corrupt political class.⁴⁰⁷ Respondent’s arguments in this regard moreover fail on the ground that the State was obligated to make decisions regarding the Roşia Montană Project and RMGC on the basis and in the framework of the applicable legal regime. Gabriel and RMGC did not ask for or want a special law,⁴⁰⁸ which as Minister Şova testified to Parliament, “was made for the Romanian State, not for them [Gabriel/RMGC],”⁴⁰⁹ nor can the State blame Gabriel and RMGC for the lack of political support garnered by the special law against the backdrop of baseless and unjustified accusations of corrupt dealings with politicians repeatedly leveled against RMGC.⁴¹⁰

404 [REDACTED]

405 [REDACTED]

⁴⁰⁶ See Mihai ¶¶ 277-283; Mihai II ¶ 349. See also Reply ¶¶ 476-478 (citing *Bilcon v. Canada* (CL-69) finding Canada failed to provide fair and equitable treatment where it failed to assess eligibility for an environmental permit on the basis of the applicable legal standards).

⁴⁰⁷ Even if it were correct, which it is not, that the idea of the Project led to mass protests, the State did not even purport to follow a lawful procedure for terminating the mining concessions with just compensation.

⁴⁰⁸ Claimants’ Opening Vol. 5 Slides 9-17.

⁴⁰⁹ Claimants’ Opening Slide 16 quoting Transcript of Parliamentary Special Commission hearing dated Oct. 15, 2013 (Exh. C-1531) at 7-8 (Minister Şova further testifying that RMGC “does not need this law, as the current situation is convenient for them,” and that “the first issue we took into consideration” was “what instrument can we use to defend the best interest of the Romanian State and, despite the fact that there were many discussions between the ministries and the representatives of the Ministry of Justice, we reached a common position and established that we can only accomplish what we want by means of a law”). [REDACTED]

⁴¹⁰ As the authorities discussed in Memorial ¶¶ 674-676 demonstrate, the State, at a minimum, must follow a “do no harm” standard in regard to public concessions. Those considerations have special resonance in this

164. Thus, public opinion cannot be a defense to Romania's liability, in whole or in part. Nor can Respondent even claim that its expropriation of Gabriel's investments was for a valid public purpose, because the protests were a response to the Government's decision to promote a special law, actively opposed by the Prime Minister, against the backdrop of serious and unfounded allegations of corrupt dealings, rather than to treat the Project in the context of the applicable legal regime.⁴¹¹

165. As regards the assessment of damages, the basic premise remains that Romania is under an obligation to make full reparation for the injury caused by its wrongful act and to reestablish the situation which would have existed if that act had not been committed.⁴¹² In this case that means assessing the value of Gabriel's investments before they were subjected to a drawn-out political assessment accompanied by delayed permitting not contemplated in the law of whether the State would allow the Roşia Montană Project to be implemented, during which time Gabriel's investments were under threat, in effect, of expropriation.⁴¹³ Indeed, even if the loss in the fair market value of Gabriel's investments incurred over that time was caused by Romania's wrongful conduct in combination with other factors not attributable to the State (which here is not the case), international law does not support the reduction of reparation for concurrent causes, except in cases of contributory fault on the part of the injured party,⁴¹⁴ and here there is no basis for a claim of contributory fault.

case where the Project at issue was developed pursuant to a public concession to exploit the State's resources, which embodied the State's determination that exploitation was in the public interest and because RMGC was a joint venture the State itself established and participated in as a shareholder for that purpose.

⁴¹¹ In fact, in announcing the political decision to reject the Project Prime Minister Ponta and Senator Antonescu both expressly acknowledged that the Project had strong local community support. *See* Claimants' Opening Vol. 5 Slide 55; Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690) at 3, video at 10:01-10:15 (acknowledging "the arguments and interests of many, apparently, of a majority of the inhabitants of the Rosia Montana area who support the project"); Claimants' Opening Vol. 5 Slide 63, video of Prime Minister Ponta, Sept. 9, 2013 (Exh. C-793) at 02:23-03:17 (stating that one of the "disadvantages" of rejecting the Project was that "you know very well, at least in Alba County, there is strong support for the project.").

⁴¹² ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 31, cmt. (3).

⁴¹³ *See supra* response to question (b).

⁴¹⁴ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 31, cmt. (12). As the ILC commentary observes, "Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them." *Id.*

166. Respondent seeks to invoke as a defense the notion of contributory fault in the context of its (failed) arguments regarding social license. Its argument fails as a matter of fact because the evidence shows that (i) the Project had a social license during the 2011-2013 time period, (ii) there were no mass protests when the Project was due to be permitted, and (iii) the protests that occurred in 2013 were a response to the Government's promotion of a special law for the Project considered by the public to be a corrupt corporate handout.

167. Respondent's contributory fault argument also fails as a matter of law because Gabriel's losses were not caused by any failure on the part of Gabriel or RMGC to fulfill a legal obligation. The notion of contributory fault, which is addressed in Article 39 of the ILC Articles on State Responsibility, is limited to circumstances where the injured party has breached a legal obligation and materially contributed to its damage through its own unlawful conduct.⁴¹⁵ Thus, the tribunal in *Gemplus v. Mexico* observed that contributory fault requires "a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and not any act or omission falling short of such culpability."⁴¹⁶ Similarly, in *Caratube v. Kazakhstan*, where the respondent argued that damages should be reduced based on a contributory fault, the tribunal observed "that it must adopt a restrictive approach in that a mere contribution to causation is not enough, in the absence of willful or negligent, reproachable behavior by [the claimant], thereby materially contributing to its damage."⁴¹⁷ Thus, the *Caratube* tribunal found that although the claimant's "contractual performance under the Contract was 'sub-standard,'" the sub-standard contract performance did not constitute "willful, negligent, reproachable behavior by [the claimant], by which the latter materially contributed to its damage."⁴¹⁸

168. In this case, Claimants have not breached any legal obligation, and Respondent does not contend otherwise. On the contrary, as NAMR has acknowledged, RMGC has complied with all of its legal obligations under the Mining License and the Bucium Exploration License.⁴¹⁹

⁴¹⁵ ILC ARTICLES ON STATE RESPONSIBILITY (CL-61) Art. 39. See also Reply ¶ 642 n.1231 and authorities cited therein.

⁴¹⁶ *Gemplus v. Mexico* (CL-156) ¶¶ 11.12 – 11.16.

⁴¹⁷ *Caratube v. Kazakhstan* (CL-246) ¶ 1192.

⁴¹⁸ *Caratube v. Kazakhstan* (CL-246) ¶¶ 1193-1195.

⁴¹⁹ Claimants' Opening Vol. 1 Slides 53-80; [REDACTED].

RMGC fulfilled its legal obligations to fund the State’s archaeological research of the area,⁴²⁰ and it engaged leading external experts and consultants to prepare feasibility studies and technical documentation for the Projects as well as an EIA Report for the Roșia Montană Project.⁴²¹ The technical documentation for the Roșia Montană Project was verified and approved by NAMR,⁴²² and the EIA Report for the Project and the technical documentation for the Bucium exploitation license applications also would have been approved by the competent authorities, but for Respondent’s treaty breaches. In addition, RMGC completed extensive public consultations under the coordination of the Ministry of Environment, as described above, and Dr. Thomson accepts that starting at least in 2006 RMGC implemented a community sustainable development program and other significant support that meaningfully enhanced its relationship with the local community.⁴²³

169. While Respondent argues that “RMGC failed to secure the social license to operate,” RMGC did not have any legal obligation to obtain a social license. Moreover, the evidence demonstrates that RMGC had a social license when the Project was ready to be permitted in 2011-2013, a fact which Respondent’s own social license expert does not deny. Respondent therefore has failed to meet, and cannot meet, its burden of proof as to the existence of any basis for contributory fault, as Respondent has not alleged any breach of a legal obligation for which Claimants or RMGC could be found culpable and, *a fortiori*, has not demonstrated that Claimants contributed to the injury sustained through any unlawful conduct.

170. Respondent’s references to various authorities purportedly addressing social license do not support a finding of contributory fault in this case. For example, while Respondent argues that the tribunal in *Copper Mesa v. Ecuador* held that “the claimant was co-responsible for the social conflict, which prevented the completion of the environmental permitting,”⁴²⁴ its

⁴²⁰ Claimants’ Opening Vol. 2 Slides 39, 42-48; Memorial ¶¶ 13, 141-161; Reply ¶¶ 238-241; Gligor ¶¶ 16-34.

⁴²¹ Claimants’ Opening Vol. 2 Slides 11-12; Memorial ¶¶ 15-16, 59-66, 125-126, 134-140, 201-253, 286-289, 301-302; Reply ¶¶ 133-134; Henry ¶ 8; Avram ¶¶ 35-38; Avram II ¶¶ 108-114; Szentesy ¶¶ 20-23, 36-53, 119-123.

⁴²² Claimants’ Opening Vol. 1 Slide 68; Memorial ¶¶ 419-424; Reply ¶ 90.a; Szentesy ¶¶ 102-106; Szentesy II ¶¶ 7-15.

⁴²³ Claimants’ Opening Vol. 4 Slides 93-96 (*citing* Tănase III ¶¶ 88-91; Lorincz II ¶¶ 2-14, 34-50, 79-120; Henisz ¶¶ 25-34).

⁴²⁴ Rejoinder ¶ 959 (asserting this “had consequences at the level of both causation and quantum”).

description is materially incomplete and misleading. In *Copper Mesa*, the local communities vigorously protested against the mine project and set up illegal roadblocks and other impediments that blocked the claimant's efforts to engage in community consultations; the claimant responded by employing armed men who used tear gas and fired weapons at local villagers and officials, which recklessly escalated the violence; and the mining authorities terminated the mining concessions without compensation on the ground that the required community consultations had not been carried out.⁴²⁵ Thus, the *Copper Mesa* tribunal held that the termination without compensation constituted an unlawful expropriation and a breach of fair and equitable treatment, but that the claimant had contributed in part to its losses through criminally wrongful and reprehensible conduct, stating:

[A] foreign investor . . . should not resort to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accident or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands. Yet, this is what happened. . . . Claimant's senior personnel in Quito were guilty of directing violent acts committed on its behalf, in violation of Ecuadorian criminal law. Their resort to subterfuge and mendacity aggravated those acts.⁴²⁶

171. In light of these facts which have no possible comparison to the facts of this case, the *Copper Mesa* tribunal observed that "the general approach taken in all [earlier] decisions, whether treated as causation, contributory fault (based on wilful or negligent act or omission) or unclean hands, is materially the same, deriving from a consistent line of international legal materials."⁴²⁷ Referring to ILC Article 39, the tribunal concluded that "the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands."⁴²⁸

172. Similarly, while Respondent contends that the tribunal in *South American Silver v. Bolivia* found that the claimant's conduct contributed to "social opposition to the project" that

⁴²⁵ *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 4.264, 4.265, 4.316, 4.317, 6.57, 6.79. See also Reply ¶ 642

⁴²⁶ *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 6.99-6.100 (finding that "[t]he consequences could have led to serious injury and loss of life. The adverse response from members of the local communities, already hostile, was inevitable.").

⁴²⁷ *Copper Mesa Mining v. Ecuador* (RLA-54) ¶ 6.97 (observing that "the Tribunal draws no distinction between these different concepts for this case," and "prefers to refer only to Article 39 of the ILC Articles").

⁴²⁸ *Copper Mesa Mining v. Ecuador* (RLA-54) ¶¶ 6.97, 6.102.

caused the State authorities to issue a decree terminating the concession,⁴²⁹ Respondent fails to acknowledge that the town hall (*Cabildo*) of the indigenous communities in the project area issued a resolution declaring that the company's "presence was illegal," that "it had violated the collective rights of the Indigenous Communities," and that it "had engaged in abuses, rapes and threats, and created division between the communities."⁴³⁰ In view of further "violent clashes" including the abduction and physical assault of policemen as well as physical injury and at least one death,⁴³¹ the tribunal determined that the decree was enacted for a public purpose and was for a social benefit, that is, to end the "grave social conflict in the Project area," which was "a supervening situation, generated in part by the Company's conduct, against which the State had to take action to restore public order and thus protect the life and integrity of the population in the area and [the Company's] employees."⁴³² In contrast, there is no basis to claim in this case that Claimants or RMGC engaged in wrongful or illegal conduct that generated social opposition to the Project (moreover, in this case Gabriel's investments were not terminated due to social opposition to the Project).⁴³³

173. The *Bear Creek v. Peru* award, to which Respondent refers,⁴³⁴ concludes there was no basis for a finding of contributory fault by the claimant as the claimant complied with all legal requirements relating to local community outreach activities and the respondent failed to meet its burden of proof otherwise.⁴³⁵ Respondent here argues that the tribunal in that case also "considered the question of the social license relevant to the quantification of damages."⁴³⁶ What the *Bear Creek* tribunal considered, however, was the fair market value of the Santa Ana Project *immediately prior to the wrongful act, i.e.*, whether the project was perceived as "viable by the time Supreme Decree 032 was adopted."⁴³⁷ In that case, the tribunal was not persuaded

⁴²⁹ Rejoinder ¶ 967.

⁴³⁰ *South America Silver v. Bolivia* (RLA-162) ¶ 115. See also *id.* ¶ 113 (noting that community members reported that the claimant caused environmental pollution in their "sacred places").

⁴³¹ *South America Silver v. Bolivia* (RLA-162) ¶¶ 162, 502.

⁴³² *South America Silver v. Bolivia* (RLA-162) ¶ 656.

⁴³³ See also Claimants' Opening Vol. 6 Slides 23-24, 27 (pictures and video of protests in Roşia Montană in support of Project).

⁴³⁴ See Rejoinder ¶¶ 960-964.

⁴³⁵ *Bear Creek Mining v. Peru* (RLA-53) ¶¶ 567-568.

⁴³⁶ Rejoinder ¶ 961.

⁴³⁷ *Bear Creek Mining v. Peru* (RLA-53) ¶ 599.

that a hypothetical purchaser of the Santa Ana Project would have assessed the project as being capable of being put into operation given the extent of the opposition and the reasons for it. In this case, however, the evidence shows that, but for and prior to the wrongful act of Respondent, which commenced with the conduct of the Boc Government, culminated in breaches of the respective BITs as of September 9, 2013, and continued wrongfully thereafter, the Roșia Montană Project was recognized by the market as being not only capable of being put into operation, but highly valuable.

174. The several other authorities referenced by Respondent are not relevant.⁴³⁸

- (e) Do Claimants maintain that the process leading to the submission of a draft law to Parliament in August 2013 and its subsequent rejection by Parliament was a standalone breach of the relevant BIT or an element of a wider course of conduct that resulted in a breach of the BIT? Was there any breach of Romanian law in the process leading to the submission of the draft law and its ultimate rejection by Parliament?**

175. For the reasons explained in response to questions (a) and (c), the process leading to the Government's submission of the Draft Law to Parliament in August 2013 (and culminating in political orders to members of Parliament in the ruling coalition to reject the Draft Law), was an element of the wider course of conduct begun by the Government in August 2011 that ultimately resulted in breaches of the BITs.⁴³⁹ That wider course of conduct entailed subjecting the Roșia Montană Project to a process of unlawful political decision-making as to whether and on what terms the Project would be permitted. That political decision-making process was announced by the Boc Government and the on-going administrative permitting procedures were thereafter delayed and put on hold as the Government demanded to change the Project economics as a

⁴³⁸ Respondent cites to pleadings of the Respondent in *Lone Pine v. Canada* (Rejoinder ¶ 966) and to a media article discussing an ICC case based on contract claims governed by Kenyan law, which it submits as an exhibit rather than a legal authority as the tribunal's actual decision is not public. Rejoinder ¶¶ 969-970 (*citing* Exh. R-578). Not only is the media report unreliable hearsay, but even assuming its description is accurate, a decision on contract claims governed by Kenyan law is not relevant here. In any event, in contrast to this case, there apparently were "no consultations" at the local level, which led the local authorities to incite the local community to protest against the project. Respondent also repeats its reference to the *Pac Rim v. El Salvador* case in which the tribunal did not mention "social license," but found that the claimant's claim could not be sustained because it "had no legal entitlement under the Mining Law" to obtain an exploitation concession for its project. *Pac Rim v. El Salvador* (CL-212) ¶ 10.4. *See also* Reply ¶ 640.

⁴³⁹ Memorial § XVI.C.1; Reply ¶¶ 356-375; Claimants' Opening Vol. 8 Slides 25-28; *supra* responses to questions (a) and (c).

minimum condition for allowing the Project to proceed and before it would make the political decision as to whether the Project would be implemented.

176. The collapse of the Boc Government before reaching the point of taking that ultimate political decision, followed by the short-lived Ungureanu Government, prolonged the process of political decision-making, as did the announced decision of the newly-appointed Prime Minister Victor Ponta in June 2012 to postpone any decisions on the Roșia Montană Project until after year-end Parliamentary elections.⁴⁴⁰ Consistent with Prime Minister Ponta's statement also in June 2012 that the Government's position towards the Project would remain unchanged, when the Ponta Government engaged on the issue in early 2013, it continued and completed the politicized decision-making process regarding the Project that had been commenced by the Government in 2011, which resulted in a political decision not to do the Project and a repudiation of RMGC's rights.

177. More specifically, in addition to the legal permitting requirements, the Ponta Government also required the Project to pass muster politically, which required improved economic terms and a decision that the Project was politically acceptable to the Government and the ruling party or coalition. The Ponta Government thus confirmed that the Project met applicable legal requirements for the Environmental Permit, extracted improved economic terms from Gabriel and RMGC, and chose to make the Government's political decision on whether the Project would be done turn on whether Parliament approved a special law for the Project, upon which the Government had insisted.⁴⁴¹ The Government's submission of the special law to Parliament with the announced intention that the vote on the law would be a proxy on the Project's future sparked mass public protests, largely against the Government, not against the Project, as explained in response to question (d). This, in turn, led the leaders of the ruling coalition, Prime Minister Ponta and Senator Antonescu, to direct the political rejection of the special law and hence the Project in Parliament, with consequent breaches of the respective BITs. That political

⁴⁴⁰ Claimants' Opening Vol. 3 Slides 75-78; *The Government postpones the decisions regarding Roșia Montană and the shale gas until the elections*, Realitatea.net, June 8, 2012 (Exh. C-641).

⁴⁴¹ Because the applicable permitting regime did not provide any legal basis for the Government to make a political decision as to whether the Project would be done, the entire approach commencing in August 2011 was without basis in, and in breach of, Romanian law. As Romanian law does not regulate the process for taking an extra-legal political decision, however, the fact that the Ponta Government decided to make that political decision through a Parliamentary vote on a special law did not constitute a further breach of law beyond the extra-legal hurdles to Project advancement imposed by successive Governments since 2011.

decision was the culmination of the Government's politicized approach to treating the Project commenced in August 2011.

178. Alternatively, if the Tribunal does not agree that the weight of the evidence demonstrates that the events from 2011-2013 comprise a pattern of politicized treatment of the permitting process for the Roșia Montană Project, leading to its political repudiation, the Ponta Government's political decision, which was made via submission of the Draft Law to Parliament in August 2013 (and subsequent political orders to members of Parliament to reject the Draft Law and with it the Project), may be considered on a stand-alone basis as resulting in breaches of the respective BITs. In either case, subjecting the Project to a political decision-making process regarding whether it should be permitted to proceed had no basis in and was contrary to Romanian law, as explained by Professor Mihai and summarized above.⁴⁴²

179. The Mining License held by RMGC reflects the policy decision of the State to allow mining at Roșia Montană, provided the Project met lawful permitting requirements. On the basis of the obligations of development imposed on RMGC as license holder, Gabriel invested hundreds of millions of dollars through RMGC over many years to develop the Project to meet the lawfully applicable permitting requirements, notably including for the pivotal Environmental Permit.

180. It is undisputed between the legal experts that, in reviewing the EIA Report and deciding whether to recommend issuance of the environmental permit, the Ministry of Environment cannot lawfully consider matters other than the applicable technical criteria and standards, including, but not limited to, the economic interest of the Government in or the political advisability or desirability of a project.⁴⁴³ Once the relevant technical criteria and standards are satisfied, the Minister of Environment must recommend issuance of the environmental permit to the Government, and the Government must issue the environmental permit through a Government Decision signed by the Prime Minister.⁴⁴⁴

⁴⁴² Mihai ¶¶ 272-291, 402-416, 481-504; Mihai II §§ III, VI.B.2, VII.B. *See generally* Mihai §§ IV, VI, VIII.

⁴⁴³ Mihai Presentation Slides 10-14; Tr. (Dec. 10, 2019) 2256:17-20, 2263:12-2267:5 (Mihai Direct); Mihai ¶¶ 272-291, 402-429, 481-504; Mihai II §§ III, VI.B.2, VII.B. *See also* Tr. (Dec. 11, 2019) 2721:17-2722:20 (Dragoș Tribunal Questions); Tr. (Dec. 11, 2019) 2630:2-19 (Tofan Tribunal Questions).

⁴⁴⁴ *See supra* ¶¶ 8-9, 122-123; Tr. (Dec. 10, 2019) 2261:3-2263:1 (Mihai Direct); Mihai § VIII.D.

181. As discussed above in response to question (a), the evidence shows RMGC and Gabriel reasonably expected in the summer and fall of 2011 that the next TAC meeting, eventually scheduled for November 29, 2011, would be the last before a decision was taken to recommend issuance of the environmental permit.⁴⁴⁵ That the EIA review process was on the verge of successful completion also certainly did not escape the notice of Prime Minister Boc, who was not a fan of and opposed the Project since his days as mayor of Cluj.

182. In this context, as explained in detail in Claimants' written submissions and as shown during Claimants' opening and above, beginning in August 2011, Prime Minister Boc, joined by, among others, Minister of Environment Borbély and Minister of Culture Hunor (who were primarily responsible for endorsing issuance of the Environmental Permit and who also were senior members, and in Minister Hunor's case, the President, of the UDMR political party that formed part of the ruling coalition), made clear in numerous public statements that the Government's willingness to permit the Project to proceed was linked not only to the Project's meeting the applicable environmental criteria, but also to an increase in the State's economic interest, *following which a political decision on the Project would be made*.⁴⁴⁶ This position was an effective rejection of the already generous benefits from the Project that would flow to the State from the State's ownership interest in RMGC through Minvest and from the royalty payments provided by the Mining License. It is evident, however, that obtaining an increased economic interest for the State was a necessary, but not sufficient, factor in the political calculus that the Government and its constituent coalition party leaders and parties would make on whether to give the Project the political go-ahead. Indeed, only after extracting an offer for an increased economic stake and confirming the Project met the lawful permitting criteria would the Government and ruling parties discuss and decide politically whether to proceed with the Project.

183. Creating these two political hurdles – improved economics for the State and a positive political verdict on the Project – was contrary to the applicable legal permitting regime and had the effect of delaying (and ultimately preventing) issuance of the Environmental Permit even though the technical permitting requirements were met. It also had the effect of preventing the

⁴⁴⁵ Claimants' Opening Vol. 4 Slides 3-7; Reply ¶ 41(c)-(h); [REDACTED].

⁴⁴⁶ See *supra* ¶¶ 12, 25; Memorial ¶¶ 337-343, 348-350, 355-357, 367-369, 378; Reply ¶¶ 23-29. See also Claimants' Opening Vol. 3 Slides 4-72.

Ministry of Culture from updating the 2010 LHM to reflect, *inter alia*, the issuance of the second Cârnic ADC.⁴⁴⁷

184. Given its consistent rejection of/refusal to accept the successive improved economic “offers” presented by Gabriel/RMGC to try to unblock the permitting process and its consistent demands for more shares and higher royalties, the Boc Government never got to the point of having to make the final political decision about the Project before Prime Minister Boc was forced to resign on February 6, 2012, due to street protests unrelated to the Project.⁴⁴⁸

185. As admitted by former Minister of Economy Bode on cross-examination,⁴⁴⁹ the short-lived successor Ungureanu Government, in which Messrs. Hunor and Borbély continued to serve as Ministers of Culture and of Environment, respectively, and which assumed office on February 9, 2012, did not withdraw the conditions to permitting established by Prime Minister Boc’s Government before the Ungureanu Government fell in April 2012.

186. Like Prime Minister Boc, Prime Minister Ponta also declared publicly his opposition to the Project before becoming Prime Minister, including by accusing senior officials and political rivals who supported the Project of being corrupt.⁴⁵⁰ Upon assuming office, Prime Minister Ponta expressly continued the approach to the Project adopted by the Boc Government, declaring in early June 2012 that “the Government’s position regarding the mining project *remained unchanged*.”⁴⁵¹ Prime Minister Ponta also stated, however, that he wanted “to postpone decision” on the Project until after the 2012 parliamentary elections that would take place in December.⁴⁵² The contemporaneous record confirms that the need for (and absence of) the “political endorsement” of the Project was at play throughout 2012. As discussed above, but for

⁴⁴⁷ See Reply ¶¶ 258-260. Notably, the failure to update and correct the 2010 LHM led to the annulment of various urbanism plans in the Project area. Claimants’ Opening Vol. 7 Slides 9-12; Schiau Presentation Slides 11-12; Podaru Presentation Slides 22-25.

⁴⁴⁸ [REDACTED]

⁴⁴⁹ [REDACTED]

⁴⁵⁰ *Supra* ¶¶ 29-30.

⁴⁵¹ *Government postpones the decisions regarding Roșia Montană*, Realitatea.net, June 8, 2012 (Exh. C-641) (emphasis added).

⁴⁵² *Id.*

this political blockage, the Environmental Permit would have been issued in 2012 had the Government acted in accordance with Romanian law. Indeed, because the Ponta Government refused to take any decision about the Project essentially until 2013, the last economic “offer” presented by Gabriel/RMGC in January 2012 went unaddressed even though Prime Minister Ponta had reaffirmed in May/June 2012 that increasing the State’s economic interest was one necessary condition for the Project to move forward.

187. Consistent with Prime Minister Ponta’s declaration after becoming Prime Minister in 2012 that the Government’s position regarding the Project “remained unchanged,” when his Government turned its attention back to the Project in 2013, it also conditioned allowing the Project to proceed not only on the Project meeting legally required technical environmental permitting criteria, but also on increasing the State’s economic interest in the Project and on a final political approval for the Project.

188. With respect to increasing the State’s economic interest, the Ponta Government considered as mandatory that Gabriel and RMGC first agree to offer the same “25 and 6” interest demanded by the Boc Government. [REDACTED]

189. Unlike the Boc and Ungureanu Governments, the Ponta Government got to the final political decision-making stage of the process commenced in 2011. The Government’s approach of conditioning Project permitting and advancement on political acceptance, starting with the Boc Government, was consistently in breach of Romanian law.⁴⁵⁴

190. The Ponta Government decided that it would use Parliament as the vehicle for its political decision on whether to permit the Project to proceed. To this end, the Government structured and insisted on a process whereby the Government would draft and present to Parliament a special law, the vote on which would be treated by the Government as the final political decision on whether the Project would be done and, relatedly, whether the draft

⁴⁵³ [REDACTED]

⁴⁵⁴ See generally Mihai ¶¶ 272-291, 302-306, 402-416, 481-504; Mihai II §§ VI.B.2, VII.B.

agreement revising and increasing the State's economic interest in it would be accepted.⁴⁵⁵ The evidence is clear that the Ponta Government thus not only refused to allow the Project to be permitted in accordance with the applicable legal requirements, but also insisted on a final, affirmative political decision for the Project, as proposed with the economic terms demanded by the State, to proceed, for which there was no basis in the applicable Romanian legal regime.

191. Numerous contemporaneous televised and other statements or testimony of Prime Minister Ponta, Minister of Large Projects Şova, and Minister of Environment Plumb, among other officials, show unequivocally that the Project met the requirements for the Environmental Permit and that, under the law, the Government was required to issue the Permit and allow the Project to proceed. Prime Minister Ponta twice admitted this unalterable truth in televised interviews less than a week apart.⁴⁵⁶ Minister Şova made similar admissions.⁴⁵⁷ Minister of Environment Plumb's public statements and testimony before Parliament were to the same effect.⁴⁵⁸ Prime Minister Ponta also unapologetically admitted in televised interviews that, in view of RMGC's Mining License to develop the Project, a "no" vote on the special law by Parliament and the resulting refusal by the Government to permit mining at Roşia Montană,

⁴⁵⁵ Claimants' Opening Vol. 5 Slides 19, 33; *Dan Şova: Construction of Comarnic – Braşov motorway starts in October*, Financiarul.ro, Mar. 14, 2013 (Exh. C-824) at 7 (Minister Şova: "We want the political class to make a decision."); *Interview of Dan Şova*, Adevarul.ro, June 8, 2013 (Exh. C-842) (Minister Şova: "[A] decision assumed by the entire political class in Romania will be made either with yes or no.").

⁴⁵⁶ Claimants' Opening Vol. 5 Slides 50-51; *id.* Vol. 6 Slides 24-25; Press Conference of Victor Ponta, Sept. 5, 2013 (Exh. C-460.02) at 00:18-01:03 (Prime Minister Ponta acknowledging that was "obligated under the law . . . to give approval and the Roşia Montană Project had to start" and that it had "met all the conditions required by the law"); TV Interview of Victor Ponta, Sept. 11, 2013 (Exh. C-437) at 09:31-10:07 (Prime Minister Ponta acknowledging that "we should, under current laws, issue the environmental permit and the exploitation should begin").

⁴⁵⁷ Claimants' Opening Vol. 6 Slides 28-29; Press Conference of Victor Ponta and Dan Şova, Sept. 12, 2013 (Exh. C-643) at 23:29-23:55 (Minister Şova acknowledging that the Project "complies with environmental requirements and with all the other requirements and should be done").

⁴⁵⁸ Claimants' Opening Vol. 5 Slide 52; *id.* Vol. 6 Slides 35, 47-49; *Rovana Plumb: The approval of Ministry of Environment for Roşia Montană*, Hotnews, Sept. 7, 2013 (Exh. C-556) at 1 (Minister Plumb confirming that the Project, if implemented, would be "the safest project of Europe," and that it met "all requirements under the European and not only, international environmental standards"); Letter No. 4396/RP from Ministry of Environment to Parliament of Romania dated Oct. 18, 2013 (Exh. C-1529) at 2 (Minister Plumb confirming that the Project complied with "the strictest standards demanded by the European legislation."). *See also* Memorial ¶¶ 42, 500-518.

would amount to a “nationalization” of the resources and give rise to lawsuits in which Romania would have to pay billions to the investors.⁴⁵⁹

192. Romania thus unquestionably knew and accepted the risk it was running by intentionally and blatantly jettisoning law in favor of politics in its treatment of the Project, the repudiation of RMGC’s rights and of Gabriel’s investments. The Ponta Government also did more than simply toss the Project’s future to Parliament and let the political chips fall where they may. Once protests against the Government’s special law began, the political leaders balked and announced that the special law must be rejected.⁴⁶⁰

193. As they admitted in televised interviews, Prime Minister Ponta and Senator Antonescu, the leaders of the political parties in the Government’s ruling USL coalition, twice invoked party discipline and arranged for the political rejection of the special law and hence of the Project, first by the committees in the Senate, then by the Special Commission, and finally by the plenum of the Senate;⁴⁶¹ the Chamber of Deputies followed suit in due course.⁴⁶² The political leaders’ reasons for repudiating RMGC’s project development rights had nothing to do with the merits or utility of the Roșia Montană Project, as Senator Antonescu conceded,⁴⁶³ but was the consequence of RMGC and the Project having been subjected to a politicized decision-making process over an extended period of time with repeated assertions that the contract with Gabriel was detrimental to

⁴⁵⁹ Claimants’ Opening Vol. 6 Slides 24, 26-27; *id.* Vol. 5 Slides 50-51 51; TV Interview of Victor Ponta, Sept. 11, 2013 (Exh. C-437) at 25:11-26:24, 1:06:30-1:07:35) (Prime Minister Ponta stating that by rejecting the Project “we are basically performing a nationalization, we are nationalizing the resources” and that if Parliament rejects the Project, “it will not be done”); Press Conference of Victor Ponta, Sept. 5, 2013 (Exh. C-460.02) at 00:18-01:03 (Prime Minister Ponta stating that if the Government had done nothing it would have “had to pay I don’t know how many billions in compensation”).

⁴⁶⁰ Claimants’ Opening Vol. 5 Slides 55-64.

⁴⁶¹ Claimants’ Opening Vol. 5 Slides 61-64; *id.* Vol. 6 Slides 18-22, 51-53. Consistent with and underscoring the political nature of the decision to reject the Draft Law (and hence the Project), ministers who had uniformly supported the merits of the Project in testimony before Parliament and in public statements candidly indicated that they would not vote in favor of the law in Parliament if that were the decision of their political party leaders. Claimants’ Opening Vol. 6, Slides 17-31. The statements of Minister of Environment Plumb are illustrative, as she variously admitted in contemporaneous public statements and/or in testimony before Parliament that the Project met the strictest standards for permitting, that the Government/executive branch did not want to take any decision regarding the Project, that the Environmental permit would only be issued if Parliament were to approve the special law, and, in agreement with Prime Minister Ponta, that Parliament should reject the special law. Claimants’ Opening Vol. 6 Slides 19-22, 35, 47-49.

⁴⁶² Claimants’ Opening Vol. 6 Slide 54.

⁴⁶³ Claimants’ Opening Vol. 5 Slide 56.

the State and while at the same time subjecting RMGC to baseless and unjustified accusations of corrupt influence peddling.⁴⁶⁴

194. The rejection of the special law that followed left the Project and RMGC, including the valuable Bucium properties, politically dead in the water as became increasingly clear over time. This reality was first confirmed by the contemporaneous statements of, among others, Minister of Environment Plumb⁴⁶⁵ and Prime Minister Ponta⁴⁶⁶, and then by the subsequent conduct of the State, which demonstrated that the State had repudiated RMGC's rights and abandoned its joint venture with Gabriel altogether.⁴⁶⁷

195. The politicization of the permitting process for the Roșia Montană Project and the decision that there would need to be a final political decision whether the Project would be done was a policy that began under the Boc Government and was continued by the Ponta Government as part and parcel of the same course of conduct. That course of conduct led to breaches of the respective BITs when the Project, and with it, RMGC, were rejected on political grounds without due process and without compensation to Claimants in accordance with law. As Prime Minister Ponta replied when asked what his "Plan B" would be if Parliament voted against the special law and the Project were therefore not done, he would "explain to all national and foreign investors . . . that this, only this project was rejected on a political criterion."⁴⁶⁸

196. Alternatively, if the Tribunal were to consider the process leading to the submission of the special law to Parliament, which was the manner in which the Ponta Government chose to take its political decision on whether the Project could proceed, to be separate from and unrelated to that which preceded it since 2011, which it was not, this conduct may nonetheless be considered a stand-alone breach of the respective BITs. The call for what was effectively a Parliamentary referendum on the Project through its vote on a special law was a further wrongful aspect of a political decision-making process that itself had no basis in law.

⁴⁶⁴ See generally Claimants' Opening Vol. 5 Slides 10, 13, 18-19, 21-27, 42-45, 48-59; *id.* Vol. 3 Slides 66-67, 76-78; Boutilier Presentation Slides 17-21; Boutilier ¶¶ 100-105. See also *supra* § (d).

⁴⁶⁵ Claimants' Opening Vol. 6 Slides 55-56.

⁴⁶⁶ Claimants' Opening Vol. 6 Slides 57-58.

⁴⁶⁷ See *infra* response to question (f).

⁴⁶⁸ Claimants' Opening Vol. 6 Slide 46; TV Interview of Victor Ponta, Oct. 5, 2013 (Exh. C-1504 video) at 08:39-09:18.

197. As explained above, the Government failed to allow the legal-administrative permitting process to advance while it proceeded politically to evaluate whether and on what terms it would allow the Project to be implemented. It refused to recommend issuance of and to issue the Environmental Permit through a Government Decision once all of the legal requirements for doing so were met (which first occurred shortly after the November 2011 TAC meeting but, for present purposes, also occurred after the July 26, 2013 TAC conciliation meeting). The Government then effectively used Parliament to make a political decision that it did not want in form to take itself on whether the Project would be done.

198. As Professor Mihai explains, the Government's course of conduct in relation to the permitting process was in breach of Romanian law in several respects – principally due to its failure to allow the administrative process to be completed in a timely manner, but also due to its demand that the economics be changed as a condition of proceeding and its interjection of a final political decision as to whether the Project would be permitted to proceed at all.⁴⁶⁹ While Professor Mihai also observes that, to the extent the Government delegated to Parliament the decision whether to issue the Environmental Permit for the Project, such a delegation was in breach of the constitutional separation of powers,⁴⁷⁰ numerous statements of senior officials, including of Prime Minister Ponta, demonstrate that it was not the administrative act of issuing the Government Decision granting the Environmental Permit that was delegated, but rather a political decision as to whether this Project was to be implemented on any terms.⁴⁷¹

⁴⁶⁹ Mihai ¶¶ 272-291, 402-416, 481-504; Mihai II §§ III, VI.B.2, VII.B. *See generally* Mihai §§ IV, VI, VIII.

⁴⁷⁰ Mihai ¶¶ 272-291; Mihai II §§ III, VII. *See also* Tr. (Dec. 10, 2019) 2334:22-2342:2 (Mihai Tribunal Questions) (Prof. Mihai confirming that the Special Parliamentary Commission usurped Parliament of its decisional role and exceeded its mandate by conducting investigations of matters not within the remit of Parliament); Mihai II ¶¶ 414-427.

⁴⁷¹ Claimants' Opening Vol. 5 Slides 10, 13, 18-19, 21-27, 42-45, 48-59; RMGC Memo of Meeting with Minister Delegate Şova dated Feb. 14, 2013 (Exh. C-779) at 1-2 (Şova: the Government would send Parliament "a draft law specifically designed to approve" the Project); *Dan Şova: Construction of Comarnic – Braşov motorway starts in October*, Financiarul.ro, Mar. 14, 2013 (Exh. C-824) at 7 (Şova: the Project "will be subject to a law in the parliament" and "parliament will have to vote" as "[w]e want the political class to make a decision" on the Project); TV Interview of Dan Şova, May 12, 2013 (Exh. C-871) at 04:00-04:58 (Şova: the decision on the Project "must be assumed by a Parliament"); TV Interview of Dan Şova, May 13, 2013 (Exh. C-772.02 video) at 03:42-05:30 (Şova: "this project can only be promoted, if this choice is made, by means of a law in the Parliament"); TV Interview of Victor Ponta, May 13, 2013 (Exh. C-772.01 video) at 01:05-02:17 (Ponta: "the decision is to be made by the Parliament" as "such important decisions should not be reached by a government which . . . only reflects a part of the Parliament"); TV Interview of Victor Ponta, May 23, 2013 (Exh. C-421.01) at 00:11-01:50 (Ponta: "these conclusions will be passed to the Parliament and the Parliament shall decide"); *Prime Minister Victor Ponta: 2013 Targets*, Government of Romania, July 11, 2013 (Exh. C-

199. The Ponta Government thus completed the drawn-out political decision-making process begun by the Boc Government by submitting a proposed special law to Parliament against a backdrop of repeated politically-motivated allegations of corruption and self-dealing. When this approach generated a wave of protests by people lacking faith in and opposing what was perceived to be a self-dealing law promoted by a corrupt political class, the Government's leader, Prime Minister Ponta, and his co-leader of the ruling coalition, Senator Antonescu, through their political instructions to members of the ruling coalition parties in Parliament, made the political decision to reject the law and with it the Project and the State's joint venture with Gabriel.

200. The State did not follow that political decision to reject the Project with the initiation of any legally-regulated process to withdraw RMGC's licenses or otherwise to expropriate Gabriel's investments in RMGC. The State simply abandoned all legal obligation in relation to RMGC and by inaction refused to honor its legal rights with respect to the Project and the valuable Bucium properties whose exploitation licenses were also never issued despite RMGC's legal entitlement to them under Romanian law.⁴⁷²

201. Thus, while the end of the political decision-making process is most accurately and naturally seen as an element of the wider course of conduct started earlier, if it were viewed separately and without regard to the conduct that precedes it, it nonetheless must be recognized as a breach of the relevant BITs on several grounds as it was an arbitrary and discriminatory decision contrary to the applicable legal regime to repudiate Gabriel's investments.

202. From the foregoing, the course of conduct or process leading to the submission of the draft special law to Parliament – which Claimants posit was part of the politicized pattern of conduct towards the Roșia Montană Project, RMGC, and Claimants that began in August 2011 –

462) at 8 (Ponta: the Project would start “[w]hen the Parliament decides to, if it is started,” and “we will send it to the Parliament and the Parliament will decide”); TV Interview of Victor Ponta, July 18, 2013 (Exh. C-813 video) at 29:45-31:16, 32:30-32:43 (Ponta: “[T]he Parliament will decide either to do the project or not to do the project.”); Ponta: “*I will vote against Roșia Montană project,*” Adevarul.ro, Aug. 31, 2013 (Exh. C-789) at 1 (Ponta: “Parliament . . . shall decide if we will make such a project or we reject it.”); Press Conference of Victor Ponta, Sept. 5, 2013 (Exh. C-460.02) at 00:18-01:03 (Ponta: he did not want to approve the Project as required by law, so he “sent the law to Parliament to submit it to a real debate”); Rovana Plumb: *The approval of Ministry of Environment for Roșia Montană*, Hotnews, Sept. 7, 2013 (Exh. C-556) at 1-2 (Plumb: “[T]he Environmental Permit for Roșia Montană will be granted depending on the decision taken by the Parliament.”); Press Conference of Crin Antonescu, Sept. 9, 2013 (Exh. C-2690) at 1-2, video at 01:07-01:51 (Antonescu: calling for the rejection of the Project by Parliament “not for technical reasons”).

⁴⁷² See generally Memorial ¶¶ 61-63, 88-102, 115-122, 286-291, 551-557; Reply § VI; Bîrsan § V; Bîrsan II § IV.

and its subsequent rejection by Parliament, was in breach of Romania law in the following respects:

- a. The Government's conditioning consideration and approval of the Environmental Permit and Project implementation more generally on increasing the State's economic interest in the Project and on the political advisability or acceptability of the Project, from August 2011 onward;
- b. In this context, the Minister of Environment's conditioning the Ministry's recommendation to issue the Environmental Permit on increasing the State's economic interest in the Project and on the political advisability or acceptability of the Project;
- c. The Ministry of Environment's failure to allow permitting to advance and thereafter to recommend issuance of the Environmental Permit after all lawful permitting conditions were met following the 29 November 2011 TAC meeting, and the Government's failure to issue the Environmental Permit through a Government Decision at the latest in 2012;
- d. The Ministry of Environment's refusal to accept, and the Ministry of Culture's refusal to confirm until April 2013, that the Ministry of Culture's December 2011 point of view on the Project was its endorsement required to issue the Environmental Permit and, similarly, the Ministry of Environment's failure for political reasons to act on the Waste Management Plan for the Project until 2013;
- e. The Ministry of Environment's failure to allow permitting to advance and to recommend issuance of the Environmental Permit to the Government after all lawful permitting conditions were confirmed again as met at the latest following the 26 July 2013 TAC conciliation meeting, and the Government's failure to issue the Environmental Permit through a Government Decision and thus allow the Project to advance;
- f. Relatedly, in 2013, the Minister of Environment's conditioning the Ministry's recommendation to issue the Environmental Permit on increasing the State's economic interest in the Project and on Parliament's approval of a special law for the Project;
- g. In 2013, the Government's conditioning issuance of the Environmental Permit and Project implementation more generally on the State's increasing its economic interest in the Project and on the Project being politically advisable or acceptable, including through Parliament's approval of a special law for the Project;
- h. To the extent that the Government abdicated its lawful permitting duties to Parliament;⁴⁷³ and

⁴⁷³ Professor Mihai also explains how the approach of the Joint Special Commission to reviewing and reporting on the draft law also was improper under Romanian law. Mihai II § VII.B.5.4.

- i. The Ministry of Environment's and the Government's on-going failure after Parliament rejected the special law to fulfill their respective legal obligations to allow permitting to advance and to issue the Environmental Permit and allow the Project to proceed, to issue the exploitation permits for the Bucium properties, and instead to allow the political rejection of the Project to derail and displace the rule of law.

203. The end result, a political rejection of the Roșia Montană Project and, more generally, a repudiation of rights and the State's joint venture with Gabriel, which included development of the Bucium properties, was contrary to Gabriel's legitimate expectation that its investments in RMGC would be treated in accordance with law. Instead, RMGC's Project development rights were negated and the State abandoned its joint venture with Gabriel in RMGC.⁴⁷⁴

- (f) Do Claimants maintain that there was a breach of the relevant BIT after the rejection of the draft law by Parliament by reference to acts of Respondent occurring solely during the period after that rejection (i.e., independently of any acts leading up to that rejection)? If so, what precise act/s are said to constitute the breach?**

204. Although it was not evident in real time that the rejection of the Draft Law by Parliament that was directed for political reasons by the political leaders of the ruling coalition (Prime Minister Ponta and Senator Antonescu) meant the permanent rejection of the Project and the complete repudiation in effect of Claimants' investment in RMGC, the acts and omissions of Respondent occurring after that time made this reality fully apparent.⁴⁷⁵ Claimants' principal case thus is that Respondent's conduct culminating in the political rejection of the State's joint venture agreement with Gabriel in RMGC together with the Roșia Montană and Bucium Projects, albeit without any formal decision rejecting them, without due process, and without compensation, was a breach of multiple articles of the BITs, as of the date that the political rejection was announced on September 9, 2013.⁴⁷⁶

205. Thus, as discussed above in response to question (a), Senator Antonescu and Prime Minister Ponta held a joint press conference on November 11, 2013 reconfirming the political rejection, the Special Commission heeded their political orders and voted that evening to reject

⁴⁷⁴ See also *supra* response to question (a).

⁴⁷⁵ The events that followed the political rejection were consistent with the Government's decision that the Project would not be done and its joint venture with Gabriel was over. See *generally* Memorial § IX; Reply §§ V, VI; Claimants' Opening Vol. 7.

⁴⁷⁶ See *supra* response to question (a).

the Draft Law, and Minister of Environment Plumb stated the very next day, “Of course Parliament’s decision means the last word for us and we will observe it.”⁴⁷⁷ A year later, Prime Minister Ponta confirmed again that “the Parliament rejected the law, so the exploitation will not be made, this is for sure.”⁴⁷⁸

206. In addition to these clear statements that the political rejection of RMGC’s project development rights with respect to the Roșia Montană Project was definitive and irrevocable, in hindsight it is evident that, at least from November 2013 onward, the Government consistently acted in accordance with its decision also to abandon the State’s joint venture with Gabriel, including in relation to the Bucium Projects. The Government’s post-Parliamentary conduct consistent with and further confirming this political rejection of all of the associated rights and mining licenses issued to RMGC included:

- a. Arbitrarily failing, even to this day, to issue the Environmental Permit for the Roșia Montană Project (or take any decision on it) despite the Government’s repeated acknowledgments that the technical assessment was completed and all permitting requirements were met;⁴⁷⁹
- b. Unlawfully convening pretextual TAC meetings in 2014 and 2015 after permitting requirements were met, ostensibly to commission a technical study to address questions improperly raised by the parliamentary Special Commission in excess of its mandate, and then plainly misrepresenting to RMGC the reasons for not conducting the study;⁴⁸⁰
- c. Failing to cooperate in mandatory recapitalizations of RMGC required to prevent its dissolution by demanding for the first time in November 2013, after the Special Commission voted that Gabriel “donate” funds to the State, which was contrary to Minvest’s obligations as a shareholder and a departure from the consistent past practice of the shareholders;⁴⁸¹

⁴⁷⁷ Claimants’ Opening Vol. 6 Slides 50-56; USL Press Conference, Nov. 11, 2013 (Exh. C-2441) at 03:12-03:37, 14:34-15:19, 17:49-18:08; Transcript of Interview with Rovana Plumb, Nov. 12, 2013 (Exh. C-828). As described above in response to question (a), the Senate and the Chamber of Deputies subsequently heeded the same political orders and rejected the Draft Law in nearly unanimous votes on November 19, 2013 and in June 2014, respectively. *See supra* ¶ 50.e.

⁴⁷⁸ Claimants’ Opening Vol. 6 Slides 57-58; Video of Prime Minister Ponta, Oct. 19, 2014 (Exh. C-416) at 01:39-01:57.

⁴⁷⁹ Memorial ¶¶ 520, 533-534; Reply ¶ 216.

⁴⁸⁰ Memorial ¶¶ 522-534; Reply ¶¶ 219-230.

⁴⁸¹ Memorial ¶¶ 537-544; Reply ¶¶ 285-289.

- d. Refusing to act on RMGC's Bucium exploitation license applications, even to this day, notwithstanding that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarnița deposits and acquired the right to obtain the exploitation licenses;⁴⁸²
- e. Launching and maintaining retaliatory and abusive criminal and purported anti-fraud investigations of RMGC that began on November 18 and 19, 2013, *i.e.*, one week after the Special Commission voted and the same day that the Senate voted, that are still on-going even to this day, and that are increasingly shown to be tied to and motivated by this arbitration;⁴⁸³
- f. Proposing a 10-year moratorium on the use of cyanide expressly aimed at the Project;⁴⁸⁴
- g. Pronouncing the 2004 LHM an abuse, failing to correct admitted errors in the 2010 LHM, and enacting the 2015 LHM, which declared the entirety of Roșia Montană as an historical monument where no mining can be permitted;⁴⁸⁵ and
- h. Filing an application for World Heritage status with UNESCO that is wholly incompatible with Claimants' rights to develop the Project and that prevents as a matter of Romanian law any mining development or related construction in the covered area.⁴⁸⁶

207. Thus, although RMGC still holds the rights associated with the Roșia Montană and Bucium Projects, those rights have existed in form only since the date of the political rejection on September 9, 2013, as the evidence overwhelmingly confirms that Romania will not honor those rights and has frustrated RMGC's use and enjoyment of them.

208. Should the Tribunal conclude, however, that the evidence does not establish that there was in effect a complete and permanent frustration of Claimants' investments in RMGC as of the date of the political rejection, or as of the formal rejection of the Draft Law by Parliament that followed in November 2013 and June 2014, then the Tribunal must recognize that Respondent's subsequent conduct separately demonstrates that there has been a political repudiation of RMGC

⁴⁸² Memorial ¶¶ 551-557; Reply ¶¶ 294-309. *See also* Birsan II § IV.

⁴⁸³ Memorial ¶¶ 558-564, 572-581; Reply ¶¶ 290-293.

⁴⁸⁴ Memorial ¶¶ 614-624; Reply ¶ 586.

⁴⁸⁵ Memorial ¶¶ 582-598; Reply ¶¶ 270-276.

⁴⁸⁶ Memorial ¶¶ 599-613; Reply ¶¶ 277-284.

and the Projects so as to frustrate Claimants' investments in RMGC in breach of the several provisions of the relevant BITs.

209. This conclusion follows from all of the post-parliamentary acts and omissions listed above. In particular, the continued sustained failure over these past nearly seven years since the events of 2013 to take any further good faith, non-pretextual administrative action in relation to the Roșia Montană Environmental Permit is clear evidence of the frustration of RMGC's project development rights derived from the Roșia Montană License. The fictional narrative conceived of by Respondent's arbitration counsel that the environmental permitting process remains open to RMGC⁴⁸⁷ is not only affirmatively contradicted by the evidentiary record, but the remarkable absence of any testimony in this arbitration from any senior official from the Ministry of Environment confirms this arbitration narrative is not supportable.⁴⁸⁸

210. Likewise, the continued sustained failure over the same time period to act on RMGC's applications for the Bucium exploitation permits is a frustration of RMGC's acquired Bucium Project development rights.⁴⁸⁹ Here again, the argument proffered by Respondent's arbitration counsel that NAMR's review of the Bucium exploitation license files is on-going⁴⁹⁰ is not a good faith representation of fact and has no basis in reality. It is no surprise that Respondent could not persuade any representative of NAMR to appear in this arbitration to provide testimony in support of that fiction.

⁴⁸⁷ See e.g. Counter-Memorial ¶ 374 ("As these meetings confirmed, the EIA Review Process was and remains open."); Rejoinder ¶ 525 (repeating that "the EIA Review Process remains open").

⁴⁸⁸ Indeed, when given the opportunity to provide testimony in this arbitration subject to cross-examination, rather than agree to appear, Deputy Prime Minister and Minister of Environment Grațiela Leocadia Gavrilescu withdrew her letter from the record. See Procedural Order No. 23 dated Sept. 6, 2019 § VII, ¶ 3 (ruling that Respondent may resubmit letter signed by Minister Gavrilescu proffered as exhibit CMA-123 as a witness statement; otherwise "CMA-123 and any references thereto shall be stricken from the record altogether"); Letter from Tribunal to Parties dated Sept. 24, 2019 at 2 (confirming that "Exhibit CMA-123 and any references thereto shall be stricken from the record"). Although Respondent's witness Dorina Mocanu is an employee of the Ministry of Environment, she acknowledges that she was not involved in the EIA procedure during the critical period between June 2012 and June 2014. Mocanu II ¶ 228. [REDACTED]

⁴⁸⁹ Memorial § IX.B.3; Reply § VI.

⁴⁹⁰ See e.g. Counter-Memorial ¶ 433 ("RMGC's Bucium Applications are still pending The authorities will inform RMGC when a decision is reached in accordance with the applicable laws."); Rejoinder ¶ 723 ("NAMR is still in the process of reviewing the Bucium Applications and therefore has not yet been able to take a decision on the Bucium Applications.").

211. The complete frustration of RMGC's project development rights is further demonstrated by the actions taken progressively to declare the entire Roșia Montană License perimeter a protected historical monument where mining is legally impermissible. Notably, and again not surprising, Respondent could not persuade any official from the Ministry of Culture to provide a statement in this arbitration. The actions taken by the competent culture authorities include the following.

212. First, in January 2015, the State expressly and arbitrarily disavowed its own prior administrative decisions regarding the archaeological discharge of the Project area. Despite repeatedly acknowledging that the 2010 LHM improperly extended protection areas in Roșia Montană and representing to RMGC that the errors would be corrected in the 2015 LHM,⁴⁹¹ the State took litigation positions that were antithetical to the Project in proceedings commenced by RMGC to correct those errors. Specifically, beginning in January 2015, the State culture authorities argued that the 2004 LHM (the list issued by the Ministry of Culture reflecting the results of the archaeological research funded, as required by law, by RMGC) was "abusive" and that the soon-to-be-issued 2015 LHM would "reinstate" the 1992 Draft LHM (a draft list that had never been formally issued or approved, that preceded the knowledge accumulated from the extensive archaeological research undertaken by the Ministry of Culture and funded by RMGC, and that allegedly designated all of Roșia Montană as an historical monument).⁴⁹²

213. Second, in January 2016, the State adopted a 2015 LHM that listed the entirety of Roșia Montană as an historical monument.⁴⁹³ As no mining activities can be undertaken in the area established as an historical monument, that declaration was incompatible with the Project.⁴⁹⁴ The 2015 LHM was arbitrary and unlawful because it expanded the descriptions of historical monuments in the Project area without any additional archaeological research or classification procedure and without regard to the numerous archaeological discharge decisions previously issued by the Ministry that allowed mining in these same areas.⁴⁹⁵ Announcements by senior Ministry of Culture officials upon the issuance of the 2015 LHM leave no doubt that the 2015

⁴⁹¹ Claimants' Opening Vol. 7 Slides 8, 13; Memorial ¶¶ 332-333, 587; Reply ¶¶ 260-261.

⁴⁹² Claimants' Opening Vol. 7 Slides 14-16; Memorial ¶¶ 712(e), 735(f); Reply ¶¶ 262-269.

⁴⁹³ Claimants' Opening Vol. 7 Slides 23-25; Memorial ¶¶ 582-586; Reply ¶ 270; 2015 List of Historical Monuments Map (Exh. C-1285).

⁴⁹⁴ Schiau ¶¶ 16-17, 94-120. Podaru ¶¶ 325, 350-356; Birsan II § III.A.3. *See also* Reply ¶¶ 235, 282.

⁴⁹⁵ Memorial ¶ 594; Reply ¶¶ 270, 272.

LHM was motivated by the political rejection of the Project and the expressed intention to prevent it from being implemented.⁴⁹⁶ To make the point clearly, the Minister of Culture’s senior advisor emphasized that, “[a]t such a site, all mining activity is prohibited.”⁴⁹⁷

214. Third, in February 2016, Romania submitted the State’s application to list “the Roșia Montană Cultural mining landscape” as a World Heritage site.⁴⁹⁸ The State’s application is clear that it is in lieu of permitting the Project to proceed.⁴⁹⁹ As Professor Podaru also explains, the State’s application to UNESCO triggers protections under Romanian law that prohibit mining in the area and that thus are fundamentally incompatible with the Project.⁵⁰⁰

215. Romania’s July 2018 request to the UNESCO World Heritage Committee to postpone, but not withdraw, consideration of its application pending completion of this ICSID arbitration

⁴⁹⁶ Claimants’ Opening Vol. 7 Slides 18-22; Memorial ¶¶ 596-597; Reply ¶ 271.

⁴⁹⁷ *Romanian village blocks Canadian firm from mining for gold*, The Guardian, dated Jan. 14, 2016 (Exh. C-1356) (quoting Minister of Culture senior advisor Adrian Bâlțeanu); Claimants’ Opening Vol. 7 Slide 21.

⁴⁹⁸ Claimants’ Opening Vol. 7 Slides 27-28, 33-34. After Romania’s submission to UNESCO, the Ministry of Culture commenced classification procedures for additional historical monuments in the Project area, including some properties that fall under the Tailings Management Facility, an area that already had been archaeologically discharged. Memorial ¶ 598.

⁴⁹⁹ Memorial ¶¶ 603-613 (noting that Romania’s submission to UNESCO makes clear that the State will not allow the Project to proceed); Reply § V.B.6 - V.B.7; [REDACTED]; Claimants’ Opening Vol. 7 Slides 27-39. See Screenshot of UNESCO website (Exh. C-1275) at 4 (showing Romania’s submission noting that “[t]he area is still rich in minerals and the proposed resumption of open cast mining with modern quarrying techniques would inevitably entail the quasi-total and irreversible destruction of the cultural heritage and its setting, which is the principal resource for the sustainable development of the area.”); Ministry of Culture informational brochure describing the Roșia Montană UNESCO application distributed to residents of Roșia Montană in December 2016 (Exh. C-1406) at 1-2 (noting “[i]f this cultural landscape, which includes the natural environment surrounding Rosia Montana, were to be destroyed, a great bond with our ancestors and an irreplaceable piece of our identity would also be broken,” and that “[a]ny business will be allowed to develop, if it does not impact the natural and cultural landscape”); ICOMOS Report for the World Heritage Committee dated Apr. 2018 (Exh. C-1919) at 24 (stating that “[t]he main threat to the property remains the intention of the mining company to resume large scale mining,” and that “a desired state of conservation for Roșia Montană must include provisions to end the threats facing the property as regards the resuming of the mining activity.”); Facebook post – Vlad Alexandrescu dated May 11, 2018 (Exh. C-1911) (the former Minister of Culture and USR Senator Alexandrescu announced on his Facebook page that ICOMOS recommended that Roșia Montană be included on the UNESCO list and that “ICOMOS expresses its concern regarding plans to restart large-scale mining at Roșia Montană. ICOMOS also indicates that the historical site faces a specific and proven imminent danger that could lead to significant loss of historical authenticity and cultural significance.”).

⁵⁰⁰ Podaru ¶¶ 345-358; Claimants’ Opening Vol. 7 Slide 35 (noting that GO 47/2000 provides that the protection measures for historical monuments included on the World Heritage List *also apply* to the historical monuments for which Romania has applied to list as World Heritage sites); Reply ¶ 283.

did not eliminate those protections as a matter of Romanian law.⁵⁰¹ Moreover, and contrary to Respondent's representations at the December 2019 hearing that the UNESCO application is not before UNESCO,⁵⁰² it is undisputed and a matter of public record that on January 31, 2020 Romania requested to resume the procedure to list Roșia Montană as a World Heritage site.⁵⁰³

216. Fourth, precisely as legally required as a consequence of the UNESCO application, the State took steps to ensure that the urbanism plans for the Roșia Montană area prohibit mining activities.⁵⁰⁴ To support its UNESCO application, the Ministry of Culture specifically directed the NIH to delineate the boundaries in Roșia Montană declared on the 2015 LHM to be a historical monument.⁵⁰⁵ The delineation documentation shows the entire Project perimeter falling within the boundaries of the historical monument and expressly purports to dismiss the effects of the ADCs that were lawfully issued covering most of the area.⁵⁰⁶ The Ministry of Culture has emphasized that the delineation of the historical monument for Roșia Montană must be reflected in the urbanism plan and that, under the law, cultural heritage assets must be given priority over mining.⁵⁰⁷

217. Thus, the 2015 LHM and the UNESCO application have made it legally impossible as a matter of Romanian law for RMGC to obtain a construction permit for the Project.⁵⁰⁸ As Professor Podaru explains, urbanism plans must include protection areas for the protection and

⁵⁰¹ Reply ¶¶ 280-281; Claimants' Opening Vol. 7 Slides 36-39; *Ivașcu on Roșia Montană: We are, in any case, protected by our laws and no one can exploit there*, Agerpres.ro, dated July 5, 2018 (Exh. C-1921) (Minister of Culture referring to the decision to postpone the UNESCO application and stating with reference to applicable Romanian laws that "[w]e are also protected by our laws and there can be no exploitation there ... [s]o, no exploitation is allowed there throughout this period....").

⁵⁰² Tr. (Dec. 3, 2019) Dec. 2019 555:19-558:7 (Respondent's Opening).

⁵⁰³ Letter from Claimants to Tribunal dated Feb. 5, 2020; Letter from Respondent to Tribunal dated Feb. 13, 2020 at 2 (admitting "Romania's recent decision to reinstate [sic] the UNESCO application process"). *See also* Letter from Tribunal to Parties dated Feb. 17, 2020 (finding that "it is up to the Parties, in consultation with the Tribunal, to decide whether, and if so, in which form and at what time they will address" the reactivation of Romania's nomination of the "Roșia Montană Mining Landscape" as a World Heritage site).

⁵⁰⁴ Claimants' Opening Vol. 7 Slides 30-32, 35.

⁵⁰⁵ Reply ¶¶ 273-276; Letter from Ministry of Culture to Mayorality of Roșia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370), map of boundary at 34; Ministry of Culture Endorsement dated Dec. 14, 2016 of the delineation documentation (Exh. C-2369).

⁵⁰⁶ Claimants' Opening Vol. 7 Slides 31-32; Letter from Ministry of Culture to Mayorality of Roșia Montană Commune and Alba Culture Directorate dated Dec. 28, 2016 (Exh. C-2370), at 32, 34.

⁵⁰⁷ Claimants' Opening Vol. 7 Slide 30; Letter from the Minister of Culture to the Prime Minister and Mayor of Roșia Montană dated Dec. 8, 2016 (Exh. C-2517).

⁵⁰⁸ Reply ¶¶ 282-283.

management of sites “for which Romania has submitted to the UNESCO World Heritage Committee the file for their inclusion on the World Heritage List.”⁵⁰⁹ Since, as is undisputed, urbanism plans, as a matter of Romanian law, must prioritize cultural heritage protection areas over mining licenses, and since RMGC cannot obtain a construction permit without an urbanism plan that allows for and accommodates the Project, the 2015 LHM and the UNESCO application render the Project impossible under Romanian law.⁵¹⁰ Government officials have repeatedly confirmed that any mining in the License area is prohibited.⁵¹¹

218. Nor is there any basis to claim that Claimants accepted the risk that the State would decide to prohibit mining in the Roșia Montană Project area in favor of cultural heritage protection. Quite to the contrary.

- a. Based on the extensive research, funded as required by law by RMGC as the project developer and performed by expert archaeologist teams under the supervision of the Ministry of Culture between 2001 and 2008, the Ministry of Culture lawfully issued archaeological discharge certificates (“ADCs”) for approximately 90% of the Project-impacted area, thus allowing mining activities to be conducted in the entire Project area except, as yet, the Orlea pit, which was to be mined in year 8 of the Project.⁵¹² The ADCs reflected the State’s expert assessment and legally binding decision in relation to the potential cultural heritage assets in the area.⁵¹³
- b. The 2004 List of Historical Monuments issued by the Ministry of Culture, and which was fully consistent with the Project as designed, reflected the Ministry of

⁵⁰⁹ Podaru ¶¶ 349-357. *See also* Claimants’ Opening Vol. 7 Slide 35.

⁵¹⁰ Podaru ¶¶ 351-358. Indeed, Respondent also contends that the environmental permitting cannot proceed without urbanism plans in place that support the Project. Counter-Memorial ¶¶ 58-62, 229; Rejoinder ¶¶ 252-258. Thus, in Respondent’s submission, the 2015 LHM and the UNESCO application thereby also make an environmental permit for the project legally impossible.

⁵¹¹ Claimants’ Opening Vol. 7 Slide 21 (Minister of Culture senior advisor Adrian Bălțeanu emphasizing that “[a]t such a site, all mining activity is prohibited”); *See, e.g.*, Memorial ¶¶ 597, 612-613; Reply ¶¶ 271, 281; [REDACTED], *Romanian village blocks Canadian firm from mining for gold*, The Guardian, dated Jan. 14, 2016 (Exh. C-1356); Facebook Post – Vlad Alexandrescu dated Jan. 16, 2016 (Exh. C-823) (Minister Alexandrescu posted a picture of a map with a hand-drawn two-kilometer circle around Roșia Montană and a message stating: “[t]he new protection area of the archaeological site from Roșia Montană, following the classification of the entire Roșia Montană locality as an A category site within a 2 km radius.”); City of Alba Iulia Tourism Brochure “Welcome to Alba Iulia, the Other Capital. Visit the largest Citadel in Romania” (Exh. C-1744) at 1 (observing that “the village has been designated a place of historic site of national interest and in 2016 the Ministry of Culture closed definitely the mining works here. Henceforth any intervention on the area was prohibited.”); *Ivașcu on Roșia Montană: We are, in any case, protected by our laws and no one can exploit there*, Agerpres.ro, dated July 5, 2018 (Exh. C-1921) at 2.

⁵¹² Gligor ¶¶ 16-41; Gligor II ¶¶ 10-16, 39; Schiau § III.D; Memorial §§ III.B - III.C.1; Reply § V.B.1.

⁵¹³ Schiau §§ III.C-III.D; Schiau II ¶¶ 68(e), 224; Memorial ¶¶ 156-160; Reply ¶¶ 237-243.

Culture's knowledge acquired from the archaeological research, was consistent with the issued ADCs, and was itself a further administrative act upon which Gabriel and RMGC reasonably could rely.⁵¹⁴

- c. The Ministry of Culture's endorsements in the period 2000-2010 of the urbanism plans for the Project area, each of which expressly contemplated the Project, provided further evidence of the State's decisions regarding the cultural heritage assets in the Project area upon which Gabriel and RMGC reasonably could rely.⁵¹⁵ Those successive endorsements also demonstrate that the State did not consider that the entire area already was designated as a protected historical monument since 1992 as Respondent in this arbitration has argued.⁵¹⁶
- d. After ADC 4/2004 for the Cărnic Massif underground area was annulled, following a re-evaluation of the merits of the ADC, the Ministry of Culture on July 14, 2011 issued a second ADC for the Cărnic area, ADC 9/2011.⁵¹⁷ The Ministry of Culture thus reconfirmed its decision to discharge the area, clearing the way for mining in Roșia Montană.⁵¹⁸

⁵¹⁴ See Reply § V.B.2; Schiau § V.B.

⁵¹⁵ See Gligor II ¶¶ 11-16; Podaru § III.D; 2000 PUG, General Urbanism Plans for Roșia Montană Commune Villages Vol. I dated Oct. 2000 (Exh. C-1890) at 9 (endorsing the Project as an integral part of the Roșia Montană Commune and noting that the Roșia Montană Mining Exploitation License gave RMGC the "exclusive right to carry out mining activities in Roșia Montană for an initial duration of 20 years" which could be extended by successive 5-year periods); 2000 PUG, General Urbanism Plans for Roșia Montană Commune Villages Vol. II dated 2000 (Exh. C-1889) at 5-6 (acknowledging the existence of cultural heritage values in the area and noting that the CPPCN feasibility study will oversee their identification and location as well as recommend protection measures when needed); General Urbanism Plan of Roșia Montană Commune Vol. I, Project No. 4548, dated Apr. 2002 (Exh. C-1893); General Urbanism Plan of Roșia Montană Commune Vol. II, Project No. 4548, dated Apr. 2002 (Exh. C-1894); Zonal Urban Plan for the Industrial Development Area Roșia Montană Gold Corporation S.A., Project No. 4548 drafted by Proiect Alba S.A dated Apr. 2002 (Exh. R-101); Endorsement from the Ministry of Culture No. 177 dated June 20, 2002 (Exh. R-103) (endorsing the 2002 PUG for Abrud and Roșia Montană); Endorsement from the Ministry of Culture dated June 20, 2002 (Exh. C-1895) (endorsing the 2002 PUZ for Roșia Montană); Endorsement dated July 1, 2002 of the Commission for the Protection of Natural Monuments (Exh. C-1896); 2006 PUZ Vol. I, Presentation Memorandum, as updated in 2010 (Exh. C-2130); 2006 PUZ Vol. II, Local Urbanism Regulation, as updated in 2010 (Exh. C-2131); Letter from Alba County Culture Department to Sibiu Regional EPA dated Apr. 19, 2010 (Exh. C-1901) (favorably endorsing the 2006 PUZ which was prepared for the area to accommodate the Project and which reflected specifically the areas that had been discharged to permit mining).

⁵¹⁶ See generally Schiau II ¶ 9(b), 208-210, 213, § III.B; Podaru ¶¶ 240, 298-307.

⁵¹⁷ Memorial ¶ 328; [REDACTED]; Schiau ¶ 91. Archaeological Discharge Certificate No. 9/2011 (Cărnic underground) (Exh. C-680).

⁵¹⁸ See INTERVIEW: Kelemen: *If Roșia Montană Gold Corporation does not invest US\$ 70 million in heritage I can stop the Project*, Mediafax.ro, dated July 28, 2011 (Exh. C-893) at 3 (Minister of Culture Kelemen Hunor confirmed that the issuance of the Cărnic ADC "was an objective decision based on expertise."); *Kelemen on the Archaeological Discharge Certificate for Roșia Montană: a legal procedure*, Mediafax.ro, dated July 14, 2011 (Exh. C-1345) at 1 (Minister of Culture Hunor affirmed that it involved "a legal procedure that observed all the necessary legal steps."). The fact that the second ADC for the Cărnic area is presently subject to legal challenge does not detract from these observations. That is so for several reasons. First, the Ministry of Culture has not taken action to annul the Cărnic ADC. Second, it is only as a defense in this

- e. The Ministry of Culture endorsed issuance of the Environmental Permit for the Project.⁵¹⁹
- f. Having considered proposals to seek UNESCO World Heritage status for Roșia Montană prior to Parliament's rejection of the Draft Law,⁵²⁰ the State did not do so. Indeed, in August 2013, Romania's UNESCO Parliamentary Commission, after visiting Roșia Montană, conveyed its unanimous support for the Project.⁵²¹ Accordingly, in September 2013, Minister of Culture Daniel Barbu, testifying before the Parliamentary Special Commission, emphasized that including Roșia Montană on the UNESCO World Heritage List was not appropriate due to the lack of local support for the initiative and the poor state of past preservation of the area's cultural heritage.⁵²²

219. Thus, but for the fact that Romania effectively repudiated Claimants' investments in RMGC as of the date of the political rejection, Romania's subsequent repudiation of Claimants' investments in RMGC, evidenced in its conduct thereafter, would be sufficient to do so and thus to constitute breaches of the relevant BITs for most of the same reasons.

220. That is, Romania's continued failure to complete the environmental permitting process for the Roșia Montană Project is a continuing wrong that deprives Claimants of the benefit, use and enjoyment of their investment without due process.⁵²³ That failure alone is a measure having

arbitration that Respondent has elected to submit an expert opinion presenting arguments against the ADC. See Claughton ¶¶ 6, 45, 52-53, 58, 68, 85. Third, it was only following the political rejection of the Roșia Montană Project that the State's culture authorities, who are the defendants in the action relating to the Cârnic ADC, maintained in judicial proceedings that the Ministry of Culture's prior administrative decisions in relation to the Roșia Montană Project were "abusive." See Reply ¶ 650.

⁵¹⁹ Claimants' Opening Vol. 4 Slides 27-30; Letter from the Ministry of Culture to the Ministry of Environment dated Dec. 7, 2011 (Exhibit C-446); Letter from Ministry of Culture to Ministry of Environment dated Apr. 10, 2013 (Exh. C-655); Memorial ¶¶ 372-374; Reply ¶¶ 68-73; [REDACTED]; Mihai § VIII.A.2.2.2; Schiau II ¶¶ 268-270.

⁵²⁰ Memorial ¶¶ 309-314; [REDACTED] (describing that a 2010 UNESCO proposal triggered resounding Project support from the local communities, resulting in approximately 30,000 signatures and letters in favor of the Project and against the UNESCO initiative).

⁵²¹ Memorial ¶¶ 469-470; [REDACTED] (describing that in August 2013, Romania's UNESCO Parliamentary Commission, after visiting Roșia Montană, conveyed its unanimous support for the Project). See also *Message addressed to the miners of Roșia Montană by the Parliamentarians of the UNESCO Commission*, Albatv.ro, dated Aug. 23, 2013 (Exh. C-1308) (reporting the Commission's "unanimous" support).

⁵²² Transcript of Parliamentary Special Commission Hearing dated Sept. 23, 2013 (Exh. C-929) at 3-4, 12 (Minister of Culture Barbu); Parliamentary Special Commission Report dated Nov. 2013 (Exh. C-557) at 4. See also Transcript of Special Commission Hearing dated Sept. 30, 2013 (Exh. C-507) at 18 (Minister Șova noting that UNESCO criteria are not met because the subject Roman galleries are not complete and intact).

⁵²³ See Mihai § VIII.A (describing why the Ministry of Environment should have taken a decision on the Environmental Permit shortly after the November 29, 2011 meeting); VIII.B (detailing why by the July 26, 2013 TAC meeting there was no question that the TAC review was completed and that the Ministry of

an effect equivalent to expropriation of RMGC's project development rights in the Roşia Montană Project and of the Bucium Rodu-Frasin Project (to the extent that its feasibility was dependent on the Roşia Montană Project), in breach of Article 5 of the UK BIT and Article VIII(1) of the Canada BIT. It also is a failure to accord fair and equitable treatment to Gabriel's investment in RMGC, in breach of Article 2 of the UK BIT and Article II of the Canada BIT.

221. The State's continued failure to recognize the legal effect of the ADCs issued in the Project area is also a continuing wrong that frustrates Claimants' ability to advance the permitting necessary to develop the Roşia Montană Project.⁵²⁴ Indeed, having declared the entirety of the Project area as an historical monument, expressly without regard to the previously issued ADCs which remain in effect,⁵²⁵ Romania ensures as a matter of law that permitting for the Project remains legally impossible.⁵²⁶

222. The State's application to list Roşia Montană as a UNESCO World Heritage site likewise triggers protections that make Project permitting impossible as a matter of law.⁵²⁷ It also provides plain evidence of the State's decision not to permit the Roşia Montană Project contrary to Gabriel's legitimate expectations otherwise.⁵²⁸

Environment was obligated to take a decision on the Environmental Permit); Mihai II §§ VI.A-B; Memorial ¶¶ 200, 363-366, 436-448; Reply §§ III.A-B.

⁵²⁴ See Podaru ¶ 279, § IV.C.2; Schiau II § IV.E.

⁵²⁵ Letter from Ministry of Culture to Mayoralty of Roşia Montană Commune dated Dec. 28, 2016 enclosing delineation documentation (Exh. C-2370); Claimants' Opening Vol. 7 Slides 23-25, 30-32.

⁵²⁶ See Podaru § IV.C.4 (describing how the 2015 LHM and the UNESCO application render adoption of urbanism plans, and thus issuance of any construction permits for the Project impossible); Reply ¶¶ 235, 282-283, 493, 521. Moreover, Respondent contends (incorrectly in Claimants' submission) that the EIA permitting process cannot progress until local zoning plans are put in place to accommodate the Project. See, e.g., Counter-Memorial ¶ 60 (arguing that "the urban plans should be in place prior to the issuance of the environmental permit, since the very purpose of the EIA is to assess how a given project will integrate into and affect its geographic surroundings"); Rejoinder ¶ 252 ("the Ministry of Environment was not in a position to issue the environmental permit in January 2012, because RMGC had not yet secured from the Roşia Montană Municipality the approval of the PUZs for the Project industrial area and the surrounding protected areas (including the historical center)"). The Urbanism Law, however, requires that such zoning plans prioritize protection areas for listed historical monuments over mine license perimeters. Podaru ¶¶ 350-356. Thus, Respondent's own submissions lead to the conclusion that the 2015 LHM and the UNESCO application operate so as to prevent any further permitting of the Roşia Montană Project.

⁵²⁷ Podaru ¶¶ 345-351, 357-358; Schiau II ¶¶ 251-264; Reply ¶¶ 283-284, 515(j)(iv), 521, 587-588.

⁵²⁸ Podaru ¶¶ 345-349, 357-358; Schiau II ¶¶ 255-264; Reply ¶¶ 283-284, 515(j)(iv), 521, 587-588.

223. Thus, Romania’s treatment of Gabriel’s investments after the announcement of the political rejection and the confirmatory parliamentary rejection of the Draft Law, and in particular its declaration in 2015 that the entire area of Roșia Montană is an historical monument followed by its application to UNESCO, which ensures that the Project, as a matter of Romanian law, cannot be implemented, but for the earlier conduct effectively expropriating RMGC’s project development rights, would itself be a *de facto* expropriation of those rights (without due process and without compensation) and a denial of fair and equitable treatment, in breach of the BITs. Romania’s UNESCO application and the Minister of Culture’s directions to the Prime Minister and to the Mayor of Roșia Montană regarding the delineation of the perimeter of the historical monument in Roșia Montană underscore that mining will not be permitted in the area,⁵²⁹ that these steps are definitive.⁵³⁰

224. Similarly, the State’s continued refusal to act on RMGC’s Bucium exploitation license applications over the nearly seven years since Parliament’s rejection of the Draft Law, notwithstanding that there is no dispute that RMGC successfully demonstrated the feasibility of the Rodu-Frasin and Tarnița deposits, wrongfully denies RMGC the benefit, use, and enjoyment of those rights and leaves no room for any conclusion other than that RMGC, the State’s joint venture with Gabriel, having itself been effectively abandoned, has been deprived of those rights

⁵²⁹ Letter from the Minister of Culture to Prime Minister Cioloș and Mayor Furdui dated Nov. 25, 2016 (Exh. C-2517) (referring to the State’s UNESCO application and the historical monument in the area of Roșia Montană, citing Article 11 of the Mining Law stating that mining on lands where historical monuments are located is strictly forbidden and concluding that “the priority for reflection in the urbanism and land management documentations belongs to the perimeter of the archaeological site classified in the List of Historical Monuments, because, by way of interpretation of the will of the lawmaker, the protection of this site prevails over the mining activities”). *See also* Delineation document for historical monument transmitted from Ministry of Culture to Roșia Montană Mayoralty and Local Council dated Dec. 28, 2016 (Exh. C-2370) (delineating the entirety of the Roșia Montană area as a protected historical monument, acknowledging that ADCs were issued in the area “in the past” and stating misleadingly that one “has been annulled in court,” that the ADCs were “taken from the strict and localized perspective,” and therefore “considering that the [ADCs] in question have not been followed by the declassification of the respective portions of the site” this documentation acknowledges the area as an historical monument). *See also* Claimants’ Opening Vol. 7 Slides 30-32.

⁵³⁰ In this regard, Respondent’s argument that urbanism plans in the area of the license must be put in place to accommodate the license before an environmental permitting process can even be undertaken, while at the same time arguing that the designation in 2015 of Roșia Montană as an historical monument does not prevent implementation of the Project because the Ministry of Culture will address requests to declassify the area when RMGC obtains the permits to do the Project, lacks any credibility and is emblematic of Respondent’s bad faith in the presentation of its case in this arbitration. *See, e.g.*, Counter-Memorial ¶¶ 60, 417; Rejoinder ¶ 252.

as well.⁵³¹ Romania's disregard of RMGC's rights in respect of Bucium is a measure with effects equivalent to expropriation and a denial of fair and equitable treatment in breach of the respective BITs as well as a breach of the other treaty provisions as detailed above.⁵³²

225. Finally, whereas Respondent contends that this Tribunal does not have jurisdiction to consider facts and events that post-date Claimants' January 20, 2015 notice of dispute, Respondent's objection on these grounds lack merit.⁵³³

⁵³¹ Memorial ¶¶ 551-557; Reply ¶¶ 294-309; Birsan II § IV.B (confirming that RMGC had the exclusive right under the Bucium License to obtain exploitation licenses for the exploitation demonstrated to be feasible); Birsan § V.B (describing the nature of RMGC's right to obtain exploitation rights in the Bucium perimeter and noting that RMGC satisfied the conditions precedent for obtaining the exploitation licenses by submitting to NAMR a Final Report for the Bucium License in July 2007 which NAMR accepted prior to RMGC's submission of its license application within the required term).

⁵³² See *supra* ¶¶ 58-70.

⁵³³ See Reply §§ VII.A.3, VII.B.2; Claimants' Opening Vol. 8 Slide 6-18.

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