AMICUS CURIAE SUBMISSION

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Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania

ICSID Case No.ARB/15/31

I. Introduction

For the last 20 years, the potential development of a gold mine in Roşia Montană has had a profound impact on the members of the local community due to concerns over its negative environmental and social implications. In the present submission, Alburnus Maior (AM), Centrul Independent pentru Dezvoltarea Resurselor de Mediu (ICDER), and Greenpeace Romania (collectively "the undersigned organizations") will present their views and particular knowledge on the mining project (the Project) planned by the Canadian-owned Gabriel Resources Ltd. and its Romanian subsidiary Roşia Montană Gold Corporation (RMGC) (collectively "the company") in and around the town of Roşia Montană.

Over the lifespan of the proposed Project, the undersigned organizations have used various strategies, including litigation, to ensure that both the Romanian state and the company respect the rights of the communities, and to remind them of the archeological, cultural, and environmental value of the area not only to the local communities but to the entire Romanian population. At times, the state and the company colluded to the detriment of the communities, and only were forced to follow the laws of Romania due to legal action brought by the undersigned organizations. Through these actions, they have protected the private property of the inhabitants of Roşia Montană as well as their classified cultural patrimony, defended their right to a healthy environment, and safeguarded their right to participate effectively in environmental decision-making.

This brief highlights that Romanian courts have definitively ruled on numerous aspects related to the legality of this mine. The undersigned organizations fear that their achievements before domestic courts[1] potentially will be rendered meaningless through the present arbitration, which might severely and negatively affect their rights and which takes place in an arena where there are no formal rights of representation for third parties. Since the submitting organizations possess first-hand knowledge of the developments of the Project and the legal decisions previously taken, the information presented in this brief will reveal first how the company failed to live up to its investor responsibilities as mandated under applicable international investment and human rights law, in particular by not properly engaging with the local community (II). Subsequently, submitting organizations will provide detail about how the company was unwilling and unable to conform to both domestic laws and European Union (EU) law related to mining activities (III). Lastly, the penultimate section will present the submitting organization's conclusions on how the above arguments should influence the tribunal's decision in the present arbitration (IV), and it is followed by the conclusion (V).

II. The claimant failed to comply with investor responsibilities under both international investment and international human rights law

This section demonstrates how the claimant has failed to comply with its obligations and responsibilities under international law, in particular under international investment law and international human rights law. It is worth recalling that despite the absence of an explicit provision on investor responsibilities in the bilateral investment treaty (BIT), past arbitral tribunals have noted that BITs are not an insurance policy against bad business judgments or business risk.[2] Where investors do not carry out adequate due diligence no one but the investor should bear the consequences of this. Such due diligence includes the due diligence of a proper businessman acting in a commercial context as well as the due diligence required to avoid negative human rights impacts as expected by a socially responsible investor. In the following sections submitting organizations will describe how the claimant neither carried out proper

[1] A list containing the most important cases before domestic courts can be found here: https://doc.rosiamontana.org/LitigationcasesRosia%20Montana.pdf.

[2] *See Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000); *MTD Equity v. Republic of Chile*, ICSID Case No. ARB01/7, Award, ¶ 178 (May 25, 2004).

due diligence on the feasibility of the Project (A) nor on adverse impacts on the rights of affected community members (B).

A. The company exhibited a lack of appropriate due diligence on Project feasibility

It is not the function of international investment law to "eliminate the normal risks of a foreign investor, or to place on [the state] the burden of compensating for the failure of a business plan […] dependent for its success on unsustainable assumptions."[3] It is thus "not reasonable […] to seek compensation for the losses suffered [by] making a speculative, or at best, a not very prudent investment."[4] While the government has certain responsibilities, tribunals have concluded that, in fact, "it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing in an unfamiliar environment."[5]

Here the claimant never carried out adequate due diligence regarding the feasibility of the Project. In order to develop its mining activities, the company had to obtain the surface rights covering the Project area and relocate or resettle the affected population. A report by the company indicates that the Project required the acquisition of 1,663.89 hectares of land and the physical displacement of about 974 households. Resettlement was offered to the Piatra Alba resettlement site or in the Recea neighborhood in Alba Iulia. Alternatively, people could relocate to a place of their choosing by selling their property and buying a new one elsewhere. The company was well aware from the outset that it had no guarantee that it would be able to force unwilling land- and home-owners to sell their property and residents to leave. Moreover, expropriation would only be possible if the Project was declared to be of public utility,[6] which was not guaranteed either. Yet, the claimant unreasonably assumed it had a viable project and underestimated the significance of the concerns of the local community. In reality, many problems existed that the company could have foreseen or at least should have adequately reacted to once they became apparent.

Throughout the early 2000s, Alburnus Maior, representing the interests of its members — inhabitants and property owners of the Roşia Montană, Corna, and Bucium villages — alongside other NGOs organized protests, gathered signatures, and demonstrated that they opposed the project. For example, on July 28, 2002, AM organized a public meeting attended by 350 families and members of NGOs who gathered in Roşia Montană and issued a declaration against the Project denouncing the open-pit mine, the use of cyanide, and the involuntary resettlement. Thus, at least from the year 2000 onwards, a relevant segment of local property owners had strong reservations about the Project and was against selling the property necessary for the development of the mine.[7] As noted in November 2003 by a member of a European Parliament delegation who visited the area: "the population here would like to stay and I am under the impression that a foreign company is hindering the functioning of local democracy."[8] Despite these visible expressions of local concerns, the company simply assumed it could gain all surface rights and improperly relied on the feasibility of resettlement or relocation of the people of Roşia Montană. This attitude continued even after the local NGOs started to directly communicate with the company and its shareholders. In June 2004, AM issued a public statement directed to shareholders explicitly warning them that its members did not intend to sell their homes, pastures, forests, churches, and cemeteries, which was followed by an October 2004 investor report, jointly prepared with other Romanian and international NGOs, addressing the proposal's inherent risks.[9]

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[3] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB/AF/00/3, Award, ¶ 177 (Apr. 30, 2004).
[4] *Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, ¶ 65(b) (July 26, 2001).
[5] *MTD Equity*, *supra* note 2, at ¶ 164.
[6] *See* Respondent's Counter-memorial, at ¶¶ 78-89 (Feb. 22, 2018), *Gabriel Resources & Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31 (providing information on the legal framework and the possibility to expropriate).
[7] Save Roşia Montană Campaign Chronology 2002-2013, https://www.rosiamontana.org/content/istoricul-campaniei-salvati-rosia-montana.
[8] Press Release, Alburnus Maior, Gabriel's Rosia Montana gold mining project: an obstacle to EU accession (Dec. 12, 2003), *available at* https://doc.rosiamontana.org/Press%20release%20AM%20EU%20Delegation%20Rosia%20Montana%202003.pdf.
[9] *See* Statement issued by Alburnus Maior for Gabriel Resources shareholders, June 16, 2003, *available at* https://doc.rosiamontana.org/2003InvestorsGBU.PNG; *see also* Alburnus Maior, "Anticipating Surprise – Assessing Risk, Investors Guide to Gabriel Resources Rosia Montana Mine Proposal (TSX:GBU)" (Oct. 2004), *available at* https://doc.rosiamontana.org/2004RiskAssessmentGBU.pdf.

Following this, they continued their direct communication with the company over the next several years, regularly presenting them with similar information packages.[10]

The contrast between the reality and the company's conception is striking. In a 2002 press release, the company highlighted that its resettlement and relocation program was successfully underway. Similarly, in its 2003 Second Quarter report, the company mentioned that it had adapted the relocation plan to conform to World Bank standards and stated that "although the overall program is currently proceeding slower than planned, Gabriel expects that the initial phases of the program will be completed on schedule."[11] Yet, by March 2016 this number had not significantly risen and remained at 78 percent of the homes and 60 percent of the surface rights in the Project area. As the claimant states: "Whilst the Company had reason to believe it could acquire all necessary surface rights to permit the operation of the Project, the Company's ability to secure all surface rights within the Project footprint required for implementation of the Project were subject to a number of risk factors not within the Company's control."[12] Given this struggle, the claimant at no time had the necessary surface rights to proceed with its Project.

Thus, the claimant lacked realistic alternatives to win over those members of the local community resisting the Project and to adequately explain how it would safeguard the archeological and environmental value of the area. The claimant never considered downsizing its Project in order to strike a balance between its vision and the local communities' concerns. Their actions instead reveal their misunderstanding of the importance of having alternative types of development for the region rather than only a large, open-pit gold mine. Instead of altering their plans, the claimant doubled-down on its vision — that the whole area would be entirely depopulated and dedicated solely to its mining project. It is precisely these misconceptions and reliance on its initial plan that led to the impossibility of realizing the Project.

B. The company lacked respect for the rights of the affected communities

Besides the general due diligence expected from a reasonable business, the normative framework on a company's responsibilities also puts increasing emphasis on an investor's due diligence for respecting human rights standards. Prior tribunals have relied on human rights arguments to decide disputes and have made it clear that human rights norms are part of the applicable rules of international law.[13] Here, the claimant failed to comply with existing norms on corporate social responsibility to respect human rights by not adequately engaging affected stakeholders and discrediting project critics (1) and by violating the right to adequate housing and living conditions of local residents (2).

1. The claimant failed to obtain the social license necessary to operate due to lack of adequate stakeholder engagement and the discrediting of project critics

Though nascent at the time the company began operations in Romania, social responsibility norms for companies generally, but also particularly in the mining sector, have developed over the past twenty years. Applicable at the time, the OECD Guidelines on Multinational Enterprises put forth basic responsibilities, including that "where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights […] also with respect to others affected

[10] The first statements directed to shareholders were published in 2002 and continued over the years. These briefings are accessible here: https://doc.rosiamontana.org/.

[11] Gabriel Resources Ltd., 2003 Second Quarter Report, p. 2 (2003), *available at* https://doc.rosiamontana.org/SecondQuarterProjectUpdate2003.pdf.

[12] Gabriel Resources Ltd., Annual Information Form of Gabriel Resources Ltd. for the Year Ended December 31, 2015, p. 32 (Mar. 29, 2016), http://www.gabrielresources.com/documents/GBU_AIF_2016_filing.pdf.

[13] *See, e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No.5 (Feb. 2, 2007); *Aguas Argentinas S.A. et al v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to a petition for Transparency and Participation as Amicus Curiae, ¶19 (May 19, 2005); *Aguas Provinciales de Santa Fe S.A. et al v. The Argentine Republic*, ICSID Case NO. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, ¶ 18 (Mar. 17, 2006); *Urbaser S.A. et al v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1193 et seq (Dec. 8, 2016); *see also* Silvia Steininger, *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*, Leiden J. of Int'l L. 33-58 (2018).

by their activities."[14] Subsequently, in 2008, the Human Rights Council (HRC) unanimously adopted the "protect, respect, and remedy" framework developed by the Special Representative of the Secretary General, Professor John Ruggie,[15] and in 2011 the HRC unanimously endorsed the "Guiding Principles on Business and Human Rights."[16] In the same year, the OECD Guidelines on Multinational Enterprises were updated to incorporate the standards established by the UN Guiding Principles.

According to the Framework adopted in 2008, a company's responsibility to respect human rights exists independent of States' duties and is defined by social expectations "as part of what is sometimes called a company's social license to operate".[17] Under the Framework, companies have the duty to identify, prevent, and address adverse human rights impacts. Such due diligence includes engaging in meaningful consultations with potentially affected people and other relevant stakeholders.[18] The International Council of Mining and Metals (ICMM) recognized this and welcomed the Ruggie report in 2008[19] as parts of it, for example those related to stakeholder engagement, were already incorporated in ICMM's 2003 principles, which tasked mining companies to "engage at the earliest practical stage with all likely affected parties to discuss and respond to issues and conflicts concerning the management of social impacts."[20] The claimant itself highlights its commitment to comply with these international standards on corporate social responsibility, citing in particular the OECD Guidelines and the ICMM principles on sustainable development.[21] It could thus be expected that the claimant would live up to its own promises, comply with these standards, and obtain the social license to operate by meaningfully engaging with the local communities in order to discuss and ***respond*** to their concerns. Submitting organizations respectfully suggest that based on the factual developments described below the company did not meaningfully engage with the community.

As mentioned above, in 2002, AM and other NGOs jointly released a public declaration against the proposed exploitation of resources in an open pit mine, the use of cyanide, and the forced relocation. Continuing to voice their concerns in the face of the lack of an adequate response from the company, from April to June 2003, members of AM alongside members from other partner organizations traveled to neighboring villages, where they informed the local people about the disastrous effects of the Project.[22]

The company's efforts to engage with those members of the local community who raised concerns were, however, limited. In April 2002, it held public meetings with the families from the affected area and, soon after, established the company's "Department for the Development of Community", which was officially tasked with handling relations with the local community. Yet, despite the generally promising nature of such efforts, this did not ensure that the community was sufficiently heard, as the above activities by the undersigned organizations show. The company only aggravated community relations by calling, at a very early stage in the Project development, upon the Local Council to authorize the General Urban Plan (PUG) for the Roşia Montană region, which defined the future of the region as a

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[14] Organisation for Economic Co-operation and Development [OECD], Guidelines for Multinational Enterprises, Commentary General Policies, ¶ 4 (2000 version).
[15] Human Rights Council Res. 8/7 (June 18, 2008).
[16] U.N. Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework," UN Doc A/HRC/17/31 (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter UN Guiding Principles on Business and Human Rights].
[17] U.N. Human Rights Office of the High Commissioner, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, ¶¶ 54-55, UN Doc. A/HRC/8/5 (Apr. 7, 2008).
[18] UN Guiding Principles on Business and Human Rights, *supra* note 16, at principle 18 and commentary.
[19] ICMM welcomes report by Special Representative of the UN Secretary-General on business and human rights (June 12, 2008), http://www.csrwire.com/press_releases/20120-ICMM-welcomes-report-by-Special-Representative-of-the-UN-Secretary-General-on-business-and-human-rights.
[20] International Council on Mining and Metals (ICMM), Sustainable Development Framework; ICMM Principles, Principle 9 (May 29, 2003), *available at* https://www.iucn.org/sites/dev/files/import/downloads/minicmmstat.pdf; *see also* ICMM, Sustainable Development Framework: ICMM Principles, Principle 9 (rev. 2015), https://www.icmm.com/website/publications/pdfs/commitments/revised-2015_icmm-principles.pdf.
[21] Claimants' Memorial, at ¶ 66 (June 30, 2017), *Gabriel Resources & Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31.
[22] Save Roşia Montană Campaign Chronology 2002-2013, *supra* note 7.

mono-industrial zone. As highlighted in the respondent's counter-memorial, this urban plan, adopted by the Council in July 2002, "asphyxiated Roşia Montană by preventing new economic activities, including the construction of a hotel, in the affected zone."[23] This also had a serious impact on how the government approached the local community. According to AM President Eugen David, "For 20 years the government left us on our own, they didn't invest in any infrastructure or other type of development, apart from mining because of this Project. There were no subsidies for farmers or support for local activities. […] I wanted to build a tourist pension to show tourism is possible in Roşia Montană, and I asked to build it, but I was denied."[24] The proposed mine also raised serious environmental issues because of the use of cyanide and construction of the tailings pond, among others, as well as a lack of benefits for the local community. The concerns over the use of cyanide loomed large given the damages caused by the Baia Mare spill in 2000. These concerns are similar to ones noted in other arbitral disputes. As pointed out in *Bear Creek v. Peru*, "the claimant failed to acknowledge that […] certain affected (or potentially affected) communities had serious concerns with the project because of its potential environmental risks and because they felt themselves to be excluded from its benefits."[25] The arbiter continues by stating that the claimant had early notice that numerous communities had strong objections, yet the company failed to take active – or in some instances, any – steps to address the concerns of those communities.[26] The claimant's actions in the present case are comparable, since the company acted as if a relevant part of the local community did not exist, despite the fact that it was this group's opposition that necessitated a re-thinking of its initial project design in order to accommodate their concerns.

Given the potential devastating impacts, opposition to the project grew beyond the boundaries of the local communities. Greenpeace CE, one of the undersigned organizations, organized a "Save Roşia Montană" information tour in July and August 2004 and gathered 27,000 signatures against the Project that were then sent to the Prime Minister of Romania.[27] Later, in an opinion poll initiated by the Romanian Parliament in 2007, 96 percent of the participants voted against the project.[28] In 2012, a referendum was finally held, but the claimant distorts the results of the local referendum in its memorial. Out of the entire population entitled to vote, only about 27 percent said they were in favor of mining in the region. The rest explicitly voted no or expressed their rejection by boycotting the referendum altogether.[29]

Although the company had yet to develop an idea or proposal for how to reach a compromise with those who clearly voiced their opposition, it started the permitting procedures in earnest by submitting its Project Presentation Report (PPR) to the environmental authorities in late 2004. Yet, the Romanian authorities were not publically transparent about the permitting procedure for the mining project and the company did nothing to alter this situation. On the first formal occasion to consult the public during the scoping phase of the project and shortly after the initial PPR was submitted, the company neither carried out the required consultations nor took into account the concerns raised in public statements criticizing its PPR.[30] Thus, the public was not granted sufficient access to basic information related to the project and the company's activities in Roşia Montană. Local residents and NGOs were constantly forced to

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[23] Respondent counter-memorial, *supra* note 6, at ¶ 129.
[24] Testimonies by Alburnus Maior members, Eugen David's testimony, *available at* https://doc.rosiamontana.org/MarturiimembriAM.pdf (Romanian version), https://doc.rosiamontana.org/TestimoniesbyAMmembersengl.pdf (English version).
[25] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion by Professor Philipp Sands QC, ¶ 35 (Sept. 12, 2017).
[26] *Bear Creek Mining Corp.*, *supra* note 25, ¶ 19.
[27] Save Roşia Montană Campaign Chronology 2002-2013, *supra* note 7; *see also* Curierul Naţional, "23.000 de semnaturi pentru oprirea lucrarilor la Rosia Montana (Aug. 2, 2004), http://curierulnational.ro/old/Eveniment/2004-08-02/23.000+de+semnaturi+pentru+oprirea+lucrarilor+la+Rosia+Montana (citing figures prior to the completion of collection of signatures and therefore only noting that 23,000 had been collected).
[28] Romanian Chamber of Deputies website, where the opinion poll was held, http://www.cdep.ro/informatii_publice/forum.dispPost?subid=1&tmpl=1.
[29] *See* Testimony of Mihai Goţiu, https://doc.rosiamontana.org/MihaiGotiuTestimony.pdf (English version), https://doc.rosiamontana.org/MarturieMihaiGotiu.pdf (Romanian version).
[30] Joint letter from Alburnus Maior and 34 other NGOs or individuals including members of the European Parliament to Sulfina Barbu, Ministry for Environment and Water Management, June 16, 2005, *available at* https://doc.rosiamontana.org/ScopingContestation.pdf.

petition competent courts in order to gain basic public information.[31] This lack of information on the Project development reinforced their anxiety about the company and government having already made their decisions prior to consulting with or considering the concerns of the community.

It is precisely this lack of adequate engagement and disregard for the concerns of local residents that caused and provoked even more resistance among the local community members. As arbiter Sands pointed out in *Bear Creek*: "the project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it. It is blindingly obvious that the viability and success of a project such as this [mining project in a remote area with several interconnected communities] […] was necessarily dependent on local support."[32] The same dictum applies to the present case.

Additionally, rather than trying to engage with the citizens of Roşia Montană in project design, the company actively attempted to subdue their voices by initiating a massive media campaign, intended to influence public opinion about the positive sides of the project. This campaign not only included numerous company-produced publications and advertisements, but also led to the silencing of those advocating against the project.[33] The company also directly tried to silence the media when it sued Ion Longin Popescu, a journalist at *Formula As*, who actively supported the opposition to the Project, asking for compensation for on the allegations that he discredited the company's public image and reputation and enunciated grave and unjust accusations. The court dismissed the case finding that the author's articles fell within the limits of freedom of expression. It also held that the Project, which was an issue of national public interest, had not benefitted from a public debate prior to its implementation.[34] As a result of the imbalance created by the company's activities, the National Council for Audio Visual (CNA), the institution in charge of ensuring free speech in the Romanian media, finally decided in 2013 to end the company's ability to air advertisements on all media channels due to the misleading information it included in them.[35] Lastly, the company directly threatened the communication channels of AM and the Save Roşia Montană campaign by trying to prohibit their use of the website rosiamontana.org. The company alleged that the website violated its intellectual property rights. However, it eventually dropped the case when public reaction backfired against them.[36]

Further aggravating the situation, the company attempted to intimidate actors from the local communities. First, it tried to quash public participation by harassing and intimidating members of the opposition, including through verbal aggression such as anonymous phone calls, live threats, and insults, and through physical violence from the locals and police force.[37] A company spokesperson also carried out a smear campaign on his blog, where he targeted protesters in general, as well as individual prominent opponents of the Project such as Eugen David and NGOs opposing the Project.[38]

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[31] A list containing the most important access to information court cases initiated by the undersigned NGOs can be found at https://doc.rosiamontana.org/Accesstoinformationlitigation.pdf.
[32] *Bear Creek Mining Corp.*, Partial Dissenting Opinion by Professor Philipp Sands QC, *supra* note 25, at ¶ 6.
[33] *See* Active Watch, 2013 Report on the freedom of the press in Romania, p 14, https://doc.rosiamontana.org/LibertateapreseiinRomania.pdf; *see also* Stephen McGrath, *Rosia Montana and Dirty Politics*, HUFFINGTON POST: UK EDITION, Oct. 21, 2013, http://www.huffingtonpost.co.uk/stephen-mcgrath/rosia-montana-and-dirty-p_b_4123235.html (noting that he (Stephen McGrath) was sent an email from the PR company working for Gabriel Resources after he wrote an article that was shared over 13,000 times in which it was suggested that information should be straightened out by them "before any articles are published" on Roşia Montană).
[34] Bucharest Civil Court, Decision No. 1016 of 09.12.2004.
[35] The National Council for Audio Visual (CNA), the institution in charge of guaranteeing free speech in Romanian media, decided in 2013 to end RMGC adverts from airing on all media channels due to their misleading information http://www.paginademedia.ro/2013/10/cna-stops-from-broadcasting-rosia-montanas-commercials.
[36] Bucharest Court of Appeal, File no. 4718/2004, Decision of Sept. 23, 2005.
[37] *See* Ofelia Zaha, *Roşia Montană, "A Step Towards Peace*," 8 Conflict Studies Quarterly 26, 31 (July 2014); *see also* Testimony by Stephanie Roth, *available at* https://doc.rosiamontana.org/MarturieStephanieRoth.PDF (in Romanian), https://doc.rosiamontana.org/TestimonyStephanieRoth.pdf (English translation); Testimonies by Alburnus Maior members, *supra* note 24, at Călin Caproş's testimony (including about the violent attack by company employees on AM's legal councilor).
[38] *See* the blog, http://www.catalinhosu.ro/„nu-ma-intereseaza-comunitatea.html; *see also* http://www.catalinhosu.ro/din-nou-despre-greenpeace.html.

This strategy was not limited to the NGOs, the company also attempted to silence experts who expressed negative or critical views on the project. Particularly striking is the case of two architects who drafted the management plan for the cultural patrimony to be included in the environmental impact assessment (EIA) report. The authors of the study, OPUS Architecture Studio Ltd., publicly denounced the company's use of its statements in a distorted manner that did not reflect its core conclusions.[39] The company then filed a complaint against them using the complaint mechanism at Romania's Architects Order. This professional oversight body did not share the company's concerns, but instead acquitted the two architects and essentially agreed that their findings and subsequent revelations were fully in line with the conduct of a reasonable and professional architect.[40] Thus, in addition to avoiding engagement with critical community voices in Roşia Montană, the company actively subdued critical voices not only of the local residents but also of other segments of the public locally and nationwide.

2. The company violated the right to adequate housing and living conditions

The tribunal in *Urbaser v. Argentina* pointed out that based on Article 30 of the Universal Declaration of Human Rights and Article 5(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the human rights for dignity, adequate housing, and living conditions "are complemented by an obligation on all parts, public, and private parties, not to engage in activity aimed at destroying such rights."[41]

Canada, the UK, and Romania are all parties to the ICESCR. According to the interpretation of this right by the Committee on Economic, Social, and Cultural Rights (CESCR), it is primarily understood as the right to live somewhere in security, peace, and dignity. Further, this right should be ensured to all persons irrespective of income or access to economic resources, and should encompass security of tenure, understood as protection against forced evictions, harassment, and other threats. Moreover, adequate housing should be in a location that allows access to employment options, health-care services, schools, and other social facilities.[42] The *Urbaser* tribunal continued its reasoning on investors' human rights obligations by stating that "an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties."[43] Thus, also in the case at hand, the company was obligated to refrain from violating the right to adequate housing and living conditions.

However, in working to gain surface rights and all the property in the Project area, the claimant failed to live up to its duty not to encroach upon the local residents' right to adequate housing and living conditions. As will be explained in more detail below, the claimant began relocation and resettlement earlier than recommended by international standards. In addition, the company put undue pressure on community members to sell their houses, made inappropriate promises to convince people to sell, and designed contracts to create a dependency that made people finally sell their houses for lack of any alternative. Finally, the company also destroyed the social fabric of the community and robbed a functioning community of its existing social institutions and services, such as doctors/hospitals, teachers/schools, and the local pharmacy, who were unduly influenced to give up their functions and move away.

In contravention of international norms embodied in the International Finance Corporation's (IFC) Performance Standard 5, the company started working to acquire the surface rights well in advance of the application for the environmental permit or corresponding impact assessments.[44] Performance Standard 5 addresses involuntary resettlement and requires the development of a resettlement strategy during the environmental and social impact identification stage. Despite the fact that this standard

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[39] Alburnus Maior, An Independent Expert Evaluation of the Environmental Impact Assessment Report for the Rosia Montana Mine Proposal, p. 115-16 (Aug. 2006), *available at* https://doc.rosiamontana.org/IndepEIAreporteval.pdf.

[40] Ordinul Arhitectilor din Romania, Filiala Bucuresti, Dossier No. 4866/26.11.2007, decision of 27.01.2009, *available at* https://doc.rosiamontana.org/OrderofArchitectsdecision.pdf.

[41] *Urbaser S.A. et al*, *supra* note 13, at ¶¶ 1196-98.

[42] Committee on Economic, Social and Cultural Rights, General Comment No. 4: the Right to Adequate Housing, UN-Doc. E/1992/23, at ¶¶ 7-8 (Dec. 13, 1991).

[43] *Urbaser S.A. et al*, *supra* note 13, at ¶ 1210.

[44] *See, e.g.*, International Finance Corporation [IFC], Performance Standard 5: Land Acquisition and Involuntary Resettlement (Jan. 1, 2012).

applies to involuntary resettlement and is therefore not clearly applicable in Roşia Montană, the company claimed to comply with these IFC Performance Standards.[45] However, instead of developing a resettlement strategy hand in hand with the impact assessment, the company began to acquire surface rights before submitting any impact assessment for the overall project at all and thus before confirmation that it could occur as proposed.

Starting in 2002, the company focused on acquiring private residential lands and elaborated its surface rights acquisition strategy, which consisted of using various tactics to pressure residents to move.[46] This included having most of Roşia Montană re-zoned into an industrial area exclusively reserved for mining (see further details on the PUG and Zonal Urban Plan (PUZ) in section III(A)(1)), which meant that other economic activity incompatible with the industrial area was forbidden. The company also started individually negotiating 'resettlement packages' with people.[47] The contracts included promises for new housing on company resettlement sites or relocation, and for the (paid) displacement of the family graves. People were also offered contracts with the mining company, with priority given to people who agreed to sell their property. However, these contracts were not always honored, as AM member Remus Cenuşă stated "Once that happened, the company made you redundant and fired you."[48]

Given that the Romanian authorities had yet to approve the Project, some locals refused to accept these resettlement offers. The company therefore sought to create a feeling of anxiety in the community and an atmosphere in the village that would force people to leave on the belief that staying was not an option. This strategy was made clear on March 23, 2006, when the CEO of Gabriel Resources, Alan Hill, confirmed in an interview that his company intended to expropriate anyone refusing to leave peacefully. "There is forced unemployment or forced expropriation. Which one do you want?" he asked.[49] This statement reflects the reality, and it is far from the promises that the company would acquire land "on a 'willing seller / willing buyer' basis [… as] it is RMGC's intention to comply with Romanian law and internationally recognized safeguards."[50]

The company continued to undermine the peace and security of Roşia Montană in the summer of 2002, when it purchased its first houses only to immediately demolish some, leaving the debris unattended.[51] The company further exacerbated the feeling of unease by purchasing properties located in the historical center and listed (or having the potential to be listed) as historical monuments of national importance and not maintaining them in order to justify their de-listing/de-classification. "Sometimes they have been 'helped' to deteriorate, stripped of any reusable building material or element – windows, doors, floors, tiles, sheet metal, etc. – so that they are transformed into ruins […] In 2010, following numerous denunciations of these deliberate destructions,[52] the mining company had to intervene with emergency measures, minimalist, while communicating on its mission of safeguarding a heritage whose disastrous state is at its expense [… in] all these many cases no sanction has been imposed on the part of state officials."[53] According to Costel Bîrla, a company employee who was part of the team demolishing the houses, "I knew I was participating in the collapse of the community. There wasn't a house that I didn't

[45] *See* Responses from RMGC to public comments on the EIA, p. 164, http://www.mmediu.ro/new/wp-content/uploads/Rosia_Montana/01_E/Volume%205.pdf (commenting that "All relocations will be conducted according to the Resettlement and Relocation Action Plan, which fully complies with World Bank standards for involuntary resettlement of individuals").
[46] *See* Respondent's Counter-memorial, *supra* note 6, at ¶ 84 (citing in footnote 98 to the 2006 (Stantec) RRAP, at Exhibit C-463, p. 42).
[47] *See* Testimonies by Alburnus Maior members, *supra* note 24, at Eugen David's testimony.
[48] Testimonies by Alburnus Maior members, *supra* note 24, at Remus Cenuşă testimony.
[49] "Case study, local communities – Rosia Montana: Gold Mine Proposal Provokes International Opposition," http://www.fao.org/fileadmin/user_upload/nr/sustainability_pathways/docs/leaflet.doc.
[50] Roşia Montană Gold Corporation, Management of Social Impacts: Resettlement and Relocation Action Plan, Vol. 1: Main Report, p. 1 (Feb. 2006), http://www.gabrielresources.com/documents/RRAP.pdf.
[51] *See* Interview with Architect Ştefan Bâlici, http://www.observatorulurban.ro/interviu-patrimoniu-rosia-montana-ara-2.html?fbclid=IwAR0DWseeXfSWFrgeJqLCbqpldIEfOf6b6UjgvLhW700BfbQ7NMFgyKPfEd4#4.
[52] *See* Statement by The International Union of Architects adopted in Torino (July 4, 2008), http://www.simpara.ro/GB/Comunicat-UIA-2008-196.htm?fbclid=IwAR3tltztAWPNnrshFzlrxFu1NG3uAoTwzGNqfuQ_X1Gj6n-4YRsDhkMg_8I.
[53] Ioana Iosa, *'L'effet Rosia Montana' : montée en confiance et en compétence de la société civile roumaine* (Apr. 14, 2017), http://www.participation-et-democratie.fr/fr/content/leffet-rosia-montana-montee-en-confiance-et-en-competence-de-la-societe-civile-roumaine.

feel sorry for. I also demolished houses of my friends with whom I grew up. That's not an easy thing to do. I destroyed such houses during many summers. I called them and said, "Look, I demolished your house!" Many would want to come back but they now don't have anything left to come back to. There is nothing left to do."[54]

Given this pressure, over time, a number of Roşia Montană residents gradually sold their land and property to the company for various reasons: lack of jobs or profit caused by the mono-industrial area designation, desire for a lifestyle away from stress and anxiety, and children's needs to attend different schools, among others. In 2004, when the company submitted its first PPR and started consultation procedures, it had already obtained approximately 30 percent of the necessary properties. Given the need for surface rights, the company continued to turn to new tactics to acquire property. For example, it convinced the church and the priest to give awards to the people who sold their land for money. According to Remus Cenuşă, "They received crosses and awards at mass. Those of us who didn't were seen as sinners. I am a carpenter — I made many parts of the church, the pews, the crosses, and I was treated as an outsider and felt ashamed."[55] The company also used purchase options designed "to keep people on the leash" by giving people "an advance payment on their house (3% of total price) for a year and kept it if the company did not exercise its purchase right. This type of contract was then prolonged later on and people fall into a sort of dependency."[56] Despite this increased pressure, the purchase of property gradually slowed due to members of AM and the Orthodox, Catholic, Protestant, and Unitarian Churches, which were large land and property owners, refusing to surrender their property to the company. According to their own figures, in 2007 the company only owned options on 73 percent of the homes situated in the Project area. By 2009, 700 families had sold their properties, 257 houses had been demolished, and 25 tombs had been relocated.[57] From the total number of households that were included in the plan, they had thus completed the relocation of close to 80 percent of them.

While working to obtain surface rights, the company also took steps to attack pillars of the community that are critical to the right to adequate housing, such as employment options, health-care services, schools, and other social facilities. Călin Caproş, a member of AM, testifies, "The family doctor was paid to close business. He was […] caught while drunk. There was a defamation campaign in the press and he was blackmailed for 900 million Lei to leave Roşia Montană."[58] Similarly, teachers were targeted: "Every time there was a meeting, employees of the company would infiltrate, telling the teachers that the families are leaving and that soon there won't be children attending the school anymore, so they should leave as well. But they should not worry because the company would give them money and a new job."[59] In addition to attacking the health and educational systems of Roşia Montană, as noted above, the company tried to get the churches to sell their property, including cemeteries.[60] By displacing and relocating graveyards, the company intentionally tried to disconnect people from their heritage and the area where their families had lived for generations. Displacing doctors, teachers, and churches undermines the right to adequate housing as describe by the CESCR. Furthermore, the company undermined families' sense of security by trying to break up families, for example by convincing children to sell,[61] so that the whole family would leave.[62] As AM member, Călin Caproş, in his

[54] Oana Moisil, Am vorbit cu foşti angajaţi care exploatau Roşia Montană despre ţepele pe care le-au luat (Sept. 22, 2016), https://www.vice.com/ro/article/kb897m/tepe-angajati-la-rosia-montana?fbclid=IwAR0NVQ7HOHrzQ9JaOCncgzqLPJFh_j9dIO_4oeXvOEJUj9Xw5y7WQvS1aFQ

[55] Testimonies by Alburnus Maior members, *supra* note 24, at Remus Cenuşă testimony.

[56] *Id.*

[57] *See* Asociaţia Arhitectură Restaurare Arheologie, Roşia Montană documente de arhitectură, http://www.simpara.ro/rosia-montana-documente-arhitectura-II-510.htm?fbclid=IwAR2yt34CFTIkSGypq-ciXutDiYyiqCe5RKlNbl-nFZXgGalUWvUXbfndlok; Statement by The International Union of Architects adopted in Torino, *supra* note 52.

[58] Testimonies by Alburnus Maior members, *supra* note 24, at Călin Caproş testimony.

[59] *Id.*

[60] Law no. 102/2014 on cemeteries, human crematories, and funeral services, arts. 7(4), 11 (mandating that the closedown or decommissioning of graveyards fulfills some specific requirements).

[61] Testimonies by Alburnus Maior members, *supra* note 24, at Eugen David testimony (according to Eugen David, "The company convinced children to encourage their parents to sell their houses, and to put their parents in old person's home.").

[62] *See* The Gaia Foundation, *In Defence of Life*, YOUTUBE, (Apr. 14, 2016), https://www.youtube.com/watch?v=mKT8SBFP1Bc (section on Roşia Montană beginning at 16:08); Corporate Europe Observatory (CEO), *Gold-digging with Investor-State Lawsuits: Canadian mining corporation sues to force Romanians to accept toxic Roşia Montană goldmine*", 3 (Feb. 2017) (quoting an interview with Zeno Cornea at 17:47 in the video 'In

testimony, noted "You have lucky ones, and the unlucky ones: the lucky ones are the families that stayed united because everybody agreed to refuse to sell."[63]

After years of the company buying properties and undermining the social fabric, depopulation haunts the area. This has led to decreased employment opportunities as explained by Călin Caproș: "In the end, I lost my business, a pharmacy, because fewer and fewer people came, and it became unviable."[64] This pressure on individuals to sell and creation of an atmosphere of insecurity and poor employment opportunity demonstrates that the company stripped the Roşia Montană inhabitants of all their infrastructure and left them on their own. In the words of Romania's Presidential Committee on Built Heritage, Historic and Natural Sites, "The deplorable state of today's Roşia Montană is the result of forced population impoverishment, the hindering of local people's initiatives to develop private economic activities or agro-tourism, the result of demolitions under the auspices of the law or in its contempt, of lying propaganda and manipulation of the population (including with inadmissible ethnic accents) in the name of an economic investment … ."[65] The undersigned organizations respectfully submit that such practice violates the local residents' right to adequate housing.

III. The company failed to comply with domestic and EU laws

International investment law jurisprudence indicates that investors are required to comply with the laws of the country and not engage in any unlawful conduct such as fraud, corruption, or deceitful conduct, even if there is no specific legal requirement in the BIT.[66] In the case at hand, however, the Canada-Romania BIT defines investment as any asset owned or controlled in accordance with the home country's laws, thereby making this requirement explicit. In addition, the BIT explicitly allows the Romanian government to enforce its laws aimed at the protection of the environment or human health.[67] The following section (A) details that the claimant has never been able to fulfill the legal requirements necessary to comply with EU and Romanian law on the protection of the environment and other public interests in relation to its proposed mining project and, on several occasions, Romanian courts suspended or revoked necessary interim decisions by Romanian authorities due to the company's non-compliance with applicable laws.

Moreover, according to Article II(5) of the Canada-Romania BIT, Canada and Romania recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly, a contracting party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for an investment. The following section (B) provides details on the proposed "special law," which was an attempt by the company and government to secure and enact an agreement on the proposed mining project. However, it was never enacted due to massive public resistance in Romania. This fortunately unsuccessful attempt demonstrates both the claimant's and certain parts of the government's ignorance of Article II(5) of the BIT and the public interests encapsulated and protected by it. By revealing the irregularities of the agreement and proposed special law, submitting organizations as well as other NGOs and Romanian citizens safeguarded the standards related to the protection of the environment, natural monuments, sites, and objects of archeological and cultural value, and to the protection of human health and sustainable development of the local community.

A. The company never obtained the permits necessary to realize the Project

The company bases its claims on the Exploitation Concession License (No. 47/1999) under which it carried out exploration and development activities in order to obtain further permits that would eventually allow it to start operations. Yet, as opposed to what the claimant's memorial states, the

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Defence of Life' "They divided us. There was a point where brothers didn't get along anymore, kids no more with their parents…").

[63] Testimonies by Alburnus Maior members, *supra* note 24, at Călin Caproș testimony.

[64] *Id.*

[65] Presidential Commission for Built Heritage, Historic, and Natural Sites, p. 29 (Sept. 2009), http://old.presidency.ro/static/rapoarte/Raport%20CPPCSINR.pdf?fbclid=IwAR0IN5KEOFnn3DJ1E806V2W4ZOF_hl8OKxBElw9mA6R5yowepX2T2rNqKkA.

[66] *Gustav Hamester Gmbh & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010).

[67] Respondent's Counter memorial, *supra* note 6, at ¶ 479 et seq.

company never fulfilled the legal conditions to successfully conclude the urban zoning and planning procedures (1), to obtain the archeological discharge certificates (2), and to secure the environmental permit (3).

1. The company never successfully completed the urban zoning and planning procedure

As mentioned earlier, in July 2002, the Local Council of Roşia Montană approved a new PUG and PUZ, which declared the area a mono-industrial zone.[68] As highlighted in a letter from the mayor to one of the residents applying for a license to operate a pension in the area, according to the PUG, "any living and sociocultural functions are forbidden".[69] This effectively would have ended all activities incompatible with the company's mine proposal and would have created a monopoly over the development of private properties located under the entire project footprint. AM challenged the approval of both decisions, which Romanian courts declared void since local councilors who voted were not barred from voting despite the fact that they had a conflict of interest, given that their family members, including spouses, were employed by the company.[70] Later, following a court action by AM and ICDER, the PUG and PUZ approved in 2002 through LCD 45 and 46/2002 were irrevocably annulled by the competent court.[71]

In 2009 the local council introduced and passed LCD 1/2009, which was worded exactly the same as the voided LCD 45 and 46/2002, for the sole purpose of resurrecting the PUG and PUZ. AM again challenged this decision in court and the company intervened as an affected party in both proceedings in an effort to try to uphold the administrative decisions. Yet, as had happened before, the final appeal judgment suspended LCD 1/2009 since the applicant did not provide the necessary documentation to justify it and, in particular, did not take into account legislative changes since 2002.[72] To obtain the necessary PUZ, the company also needed a strategic environmental assessment (SEA) from the local authorities. However, contrary to what the claimant avers, it did not comply with the domestic law, and the company's SEA approval no. 04 SB of 28 March 2011 by local authorities was also annulled by Romanian courts in 2016.[73]

Relatedly, the company obtained several Urbanism Certificates (UCs) over the course of the years to apply for the construction permit and proceed with the environmental permitting procedure.[74] ICDER challenged UC No. 105/27.07.2007, valid until 27 July 2008, and it was suspended indefinitely and irrevocably by order of the Timişoara Court of Appeals, due to the company's's negligence in compiling the necessary documentation.[75] Following the suspension of this UC in 2008,[76] it took the company more than a year and a half, until May 2010, to produce the necessary documents to reinitiate the environmental permitting procedure. The claimant submitted a new UC No. 87/30.04.2010 issued by Alba County Council, valid until April 30, 2013. Only then was the Ministry for Environment able to reconvene and continue the environmental impact evaluation procedure. Therefore, contrary to the claimant's assertions, this shows that Romania did not "impose unjustified administrative delays in the permitting process" but rather the claimant itself failed to submit the necessary documentation to allow for the continuation of the process.

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[68] On the applicable laws to obtain a PUG, PUZ and PUD, *see* Respondent's Counter-memorial, *supra* note 6, at ¶¶ 58-69.
[69] Letter by Mayor to Eugen David (Dec. 5, 2003), *available at* https://doc.rosiamontana.org/EDavid.pdf.
[70] Alba County Court, File No. 1411/107/2007, Judgment 842/CA/2007; Alba Court of Appeal, Judgment 4537/117/2009 (confirming illegality); *see also* Respondent's Counter-memorial, *supra* note 6, at ¶ 65.
[71] Cluj County Tribunal, File no. 735/117/2011, Judgement no. 3756 (Nov. 26, 2015); Cluj Court of Appeal, Decision no. 619 (May 9, 2016) (rejecting the appeal by the Roşia Montană Town Hall).
[72] Alba County Court**,** Judgment No. 1059/CAF/2011 (deciding in the first instance); Alba County Court, Decision No. 24.05.2011 (deciding on appeal).
[73] Covasna County Tribunal, File no. 8318/117/2011, Judgement of 15 April 2014; Brasov Court of Appeal, Decision no. 215/2016 (Mar. 10, 2016) (rejecting the appeal by the company). A summary of the court verdict by the Covansa tribunal can be found at https://doc.rosiamontana.org/Covasnaverdict.pdf.
[74] For legal framework applying to the urbanism certificate, *see* Respondent's Counter-memorial, *supra* note 6, at ¶¶ 70-77.
[75] Timişoara Court of Appeal, Verdict of 12.03.2009.
[76] Timis County Court, No. 820/AC/2008 of 21.10.2008.

AM and ICDER further sought the annulment of the subsequent UC No. 47/22.04.2013, valid until April 22, 2015, before the Cluj Tribunal. The Bistriţa-Năsăud County Court found for AM in October 2016.[77] Therefore, the claimant has never possessed a valid UC.

2. The company never obtained the Archaeological Discharge Certificate (ADC) for the Carnic and Orlea parts of the Project

The Carnic Massif contains the highest amount of proven gold reserves and therefore is central to the project's economic viability. At the same time, Carnic also contains a high concentration of Roman and pre-Roman archeological heritage. As the statement of significance for UNESCO prepared by renowned scholars from Oxford highlights "it is, in this important respect, unique."[78] Unsurprisingly, Roşia Montană's cultural heritage, including the Carnic Massif, has been classified as a monument of national interest on Romania's List of Historic Monuments (LHM) since 1992. Contrary to the claimant's assertion, updates of this list in 2004, 2010, and 2015 the Ministry for Culture and the Cults (MCC) were due to its legal obligation to update Romania's LHM every 5 years.[79] This process is not connected to the company's permitting procedure. Like every other legal entity in Romania, the claimant always had the option to challenge the legality of the LHM in court. However, only in December 2014 did the company initiate a legal action challenging the validity of the 2010 LHM, but it was unsuccessful.[80]

Article 11 of Romania's mining law states "carrying out mining activities on the lands on which are located historical, cultural, and religious monuments, archaeological sites of important interest […] is strictly forbidden."[81] Given the protection status of large surfaces within the Project footprint, the company was legally required to carry out archaeological research on these sites to request that their protection be lifted. However, if and when immovable heritage is found, no Archeological Discharge Certificate (ADC) may be issued for that area because this would contravene applicable legislation.[82]

In order to secure the relevant ADCs, the company set up a partnership with the MCC and financed all archaeological investigations to be carried out by a team from Toulouse University. Despite the university team's confirmation that unique Roman vestiges within Carnic were unearthed,[83] the company still submitted a request for Carnic's archaeological discharge and MCC subsequently granted ADC No. 4/2004. Given that both company-commissioned research and independent research confirmed the presence of unique archeological sites in the Project area, AM initiated legal proceedings against MCC's decision. The Brasov Court of Appeals consequently annulled ADC No. 4/2004,[84] which the Supreme Court confirmed and in doing so stated: "The exploitation of parts of Carnic is incompatible with the obligation to protect the Roman galleries discovered in the area. Their integrity would be affected […] the area's underground is of great archaeological interest; being one of largest ancient Roman mining centers ever discovered."[85] However, the company applied for a new ADC, which MCC issued with ADC 9/2011. Again, AM and ICDER challenged this ADC in court, and it was suspended by the Suceava Court of Appeals in April 2014 following new evidence produced by the undersigned organizations, in particular the statement of significance written by scholars from Oxford.[86] AM and ICDER are also seeking the annulment of ADC 9/2011 in court and the case is pending in the Buzău County Tribunal under file no. 8243/117/2011.

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[77] Bistrita-Nasaud County Court, Decision of 7th October 2016.
[78] Statement of Significance, Carnic Massif, Rosia Montana, jud Alba Romania, September 2010 with additional summary July 2011, p. 7.
[79] Law 422/2001 on protecting historical monuments, art. 21(2), *available at* http://legislatie.just.ro/Public/DetaliiDocument/76993?isFormaDeBaza=True&rep=True.
[80] Braşov Court of Appeal, Judgement No. 54/2015 (May 28, 2015). Company appealed the judgement and then dropped the case, High Court of Justice and Cassation, Decision of 27.11.2015.
[81] Mining Law No. 85/18.03.2003, art. 11 (Mar. 27, 2003).
[82] *See* Respondent's Counter-memorial, *supra* note 6, at ¶¶ 91-92 (containing information on the applicable legal framework).
[83] Béatrice Cauuet et al, National Research Program (Romania), Alburnus Maior, Ancient Gold Mines of Dacia, Roşia Montană District (Apuseni Mountains, Romania), Report 2002 (2002), *available at* https://doc.rosiamontana.org/Ancientgoldmines2002.pdf.
[84] Brasov Court of Appeal, Sentence No. 157/F/CA (Nov. 26, 2007).
[85] The High Court of Cassation and Justice, The Administrative and Fiscal Contentious Department, Decision No. 4607 (Dec. 9, 2008).
[86] Suceava Court of Appeal, Sentence 4379/2014 (Apr. 15, 2014).

Additionally, the company entered into a 'cooperation' agreement with Romania's Institute of Heritage, a specialized public authority subordinate to the Ministry of Culture and National Heritage (NIH), which was responsible for finalizing the list of national monuments. To try and secure complete permitting of its Roşia Montană gold mine at a time when the Ministry was asked to grant the second and therefore highly controversial ADC over the Carnic Massif, the company and NIH signed a confidential PPP contract in which they agreed that the company, in return for the Ministry's support, would invest 70 million dollars in the conservation of Roşia Montană's patrimony and beyond.[87] This attempt proved unsuccessful, as the cooperation contract was leaked unleashing significant public outcry that made it impossible for the contract and its changes to be realized. It was also an example, confirmed by the Romanian Intelligence Service (SRI) in its letter to Senator Vlad Alexandrescu,[88] of how the company attempted to influence various government decisions in pursuit of its objective. Investigative journalists also showed that in 2013, the company made several direct and indirect payments to influential Romanian politicians or to their counselors; most of whom are now either facing or have been sentenced on multiple corruption charges.[89] Such behavior is at odds with Article I(g) of the Canada-Romania BIT defining investment as only those assets made in accordance with local laws[90] and with jurisprudence by arbitration tribunals requiring investors to comply with local laws and prohibit any corrupt or deceitful practices.

Given the unique archeological heritage in Roşia Montană, since 2010, AM and the Save Roşia Montană campaign have publicly called for the inclusion of Roşia Montană in the UNESCO list of world heritage sites.[91] As early as 2002, ICOMOS, the formal advisor to the World Heritage Committee of UNESCO, has constantly monitored and voiced its concern over the developments in Roşia Montană.[92] In early 2015, the Romanian MCC included all areas of Roşia Montană on Romania's tentative list for UNESCO and submitted the dossier for it to become a UNESCO world heritage site the year after.[93] However in 2018, Romania asked for a referral of consideration of Roşia Montană as a UNESCO World Heritage Site, thus putting a hold on the decision. Drawing on statements by the competent authorities, it is clear that this was done out of fear that a UNESCO listing may negatively influence the present proceedings.[94]

3. The company did not fulfil the requirements to obtain the environmental permit and failed to provide access to information and public participation

The claimant in the present arbitration knowingly invested in Romania by offering a project that, at the time, was the first of its kind in magnitude and scale, and knowing that there would be a significant number of different laws applicable to it. Following Romania's accession to the EU, additional legal standards entered the domestic field with which the investor had to comply. Among those new EU standards were norms for the protection of the environment, e.g., the Water Framework Directive or the Waste Management Directive. As elaborated below, past arbitral tribunals have pointed out that investor responsibilities include the necessity for management to be fully aware of the regulatory environment in which they operate, and to foresee any regulatory change that is likely as a result of the manner in which that regulatory environment operates. It also includes the requirement to follow any applicable regulatory requirements, including the obligation to take relevant professional advice. As will be explained below, in the present case, the claimant was not prepared to comply with the regulatory

[87] Protocol de Cooperare (July 15, 2011), http://www.activewatch.ro/Assets/Upload/files/Protocol%20de%20cooperare%20-%20INP-RMGC.pdf (original Romanian version of the Cooperation Agreement between RMGC and NIH) (an English translation can be found at http://issuu.com/stephaniedanielleroth/docs/protocol_cooperation_rmgc_nih).
[88] Letter from Romanian Intelligence Service to Senator Vlad Alexandrescu, *available at* https://doc.rosiamontana.org/raspuns%20SRI%20RM.jpg (in Romanian), https://doc.rosiamontana.org/letter%20SRI%20RM.pdf (English translation).
[89] Rise Project, Pe Cine A Plătit RMGC In 2013, https://www.riseproject.ro/articol/pe-cine-a-platit-rmgc-in-2013/.
[90] Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Rom., art. I(g), May 8, 2009 [hereinafter Canada-Romania BIT].
[91] "Vrem ca Roşia Montană să fie inclusă in Patrimoniul Universal UNESCO," https://www.rosiamontana.org/content/vrem-ca-ro-ia-montan-s-fie-inclus-n-patrimoniul-universal-unesco?language=en.
[92] Statements by ICOMOS, *available at* https://doc.rosiamontana.org/Statementsresolutionsheritage.pdf.
[93] Respondent's Counter-memorial, *supra* note 6, at ¶ 416.
[94] Letter from the Permanent Delegation of Romania to UNESCO to the Members of the World Heritage Committee (June 28, 2018), *available at* https://doc.rosiamontana.org/referalrequest.pdf.

environment and even less so to adapt to the changing regulatory landscape. Neither the Romanian government nor the Romanian public should now have to take the blame for such shortcomings.

To develop the mine, the claimant needed an environmental permit.[95] Romania's environmental authorities had never dealt with a project of this size, so the Romanian Minister for the Environment asked for support under EU PHARE to obtain advice on the EU procedures and the conditions the Project would need to meet. The result was a detailed report containing guidelines that became the reference point for the EIA proceedings.[96] In light of Romania's commitment as a Member State to EU law, AM submitted regular updates to relevant EU bodies such as DG Environment and Members of the European Parliament to inform them about the shortcomings of the EIA procedure. Hence, from early on, official EU representatives voiced concerns regarding the Project.[97] In addition, the European Parliament's Committee for the Environment, Public Health and Food Safety (ENVI) visited Romania several times. Among its conclusions after a fact-finding visit in 2003 ENVI stated, "the scale of the Project and the controversial nature of some of its features mean that the Project's future development should continue to be carefully monitored by the European Parliament in terms […] of its conformity with relevant EU environmental law."[98] In its country report in 2004, it drew special attention to the Project demanding "environmental impact assessments to be carefully conducted to evaluate the risks involved; notably as regards potential cyanide contamination." Yet, these calls did not appear to reach or were ignored by the state or the company as evidenced by the following.

On December 14, 2004, the company submitted a request to obtain the environmental permit for its Project and a PPR, which started the EIA procedure. The PPR triggered 7,000 comments, primarily from local residents and other Romanian citizens. Also, AM sent a letter to the Ministry for Environment to formally contest the PPR, listing several shortcomings in the report related to lack of documentation and lack of information related to specific risks, such as health impacts on the local population, among other aspects.[99] In line with applicable legislation and the EU PHARE guidelines, as well as international law as discussed above, the subsequent scoping phase of the EIA procedure required public participation. In practice, however, no participation took place during the scoping phase,[100] and the scoping list was finalized without taking into account any of the public comments or recommendations, including those by independent experts. Such failures to involve and consult those affected continued over the course of the EIA procedure created further distrust.

In May 2006, the company submitted the EIA Report, which initiated the main assessment phase. The EIA Report triggered over 21,000 comments from not only Romanian citizens and NGOs, but also from abroad. AM made several oral and written presentations during this phase.[101] AM highlighted the following concerns, among others: the EIA was illegal due to lack of an UC; the waste management legislation was ignored; impacts on biodiversity were poorly researched and contradictory; adequate strategies for community development were lacking; negative impacts on water sources were poorly researched and understated; and resettlement and relocation plans were ill-designed and, as discussed previously in section II(B)(2), contravened World Bank Group standards. In addition, Arheoterra Consult, a company without the necessary professional credentials and not accredited to do research on

[95] *See* Respondent's Counter-memorial, *supra* note 6, at ¶¶ 74-77 (providing information on the applicable legal framework).
[96] *See* EU PHARE, Report on environmental impact assessment procedure implementation, *available at* https://doc.rosiamontana.org/manualphare.pdf.
[97] *See* European Parliament, Debates, One-minute speeches on matters of political importance (Dec. 13, 2004), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20041213+ITEM-009+DOC+XML+V0//FR; European Parliament, Parliamentary Questions, Answer given by Mr. Verheugen on behalf of the Commission (Oct. 6, 2004), http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2004-1803&language=EN.
[98] Summary Note of the Environment Committee delegation, Fact Finding Visit to Romania on 7-9 December 2003, on the proposed New Roşia Montană GMP, *available at* https://doc.rosiamontana.org/summary%20note%20environment%20committee%20delegation%20EU%20parliament%20visit%20romania-rosia_montana.pdf.
[99] Letter from Alburnus Maior to Ministry for Environment and Water Management regarding the Project Presentation Report (PPR) (Jan. 5, 2005), *available at* https://doc.rosiamontana.org/PPRContestation.pdf.
[100] *See* Joint letter from Alburnus Maior and 34 other NGOs or individuals including members of the European Parliament to Sulfina Barbu, Ministry for Environment and Water Management, *supra* note 30.
[101] *See generally* An Independent Expert Evaluation of the Environmental Impact Assessment Report for the Rosia Montana Mine Proposal, *supra* note 39.

the evaluation of cultural patrimony conducted the study of the archeological and cultural patrimony. Therefore, the methods applied lacked scientific rigor and showed that further research was necessary to comprehensively assess the cultural and archeological patrimony of all affected areas, including Orlea and Corna. The company also relied on a report commissioned from OPUS-Architecture Studio Ltd.; however it was done in such a distorted, decontextualized, and tendentious manner, that the authors of the study publicly denounced it, stating "the most important conclusions devised by our company, are missing, incomplete or have been used in a context different from their original one."[102] Most relevant is the analysis of community issues which begins with a lack of a coherent and continuous definition of the affected communities and continues by defending unfounded assumptions, including that jobs are dependent largely on the mining sector. As the submission of independent experts by AM shows: "although people are active in sectors other than mining (e.g. agriculture, tourism), none of these alternative economic activities can be proven"[103] since they are virtually non-existent due to the area's status as a mono-industrial zone.

Finally, according to the EIA Report, an independent organization held discussions with the various interest groups in Roşia Montană. Yet, the report does not provide verifiable sources for this statement, nor does any member of AM remember such discussions. However, an independent expert who analyzed this part of the EIA report concluded that "the data according to which support for the Project comes from the youth, business men, trained professionals and the Roma, whereas Project opponents are the elderly and the women, are completely false and cannot be substantiated."[104] Indeed, the membership of AM demonstrates that resistance to the Project cuts through all ages, sexes, and professional occupations. The company's approach only shows the negligence with which the company proceeded to advertise its Project while disregarding the realities on the ground.

The shortcomings in the EIA process also have been brought to the Aarhus Convention Compliance Committee (ACCC) twice, including once successfully. AM submitted a complaint and several updates to the ACCC on the shortcomings in the EIA,[105] including: lack of public consultation at scoping stage; lack of valid UC and SEA; inaccessibility of EIA report at the places mentioned by convening authority; and improper consultations on the EIA. The complaint further detailed information about the improper nature of the consultations, including the poor choice of locations for consultations with directly impacted, disadvantaged communities; transcripts of consultations showing that representatives of the Project often refused to answer questions posed by the public; evidence that speakers were limited to five minutes, which was an insufficient time to comment on a document of 3,500 pages; evidence that company employees wearing "security" t-shirts managed the events and intervened to stop members of the public who expressed their grievances; and a list of comments and questions received during consultations that was incomplete and deficient.[106] Since the EIA procedure was not completed at the time (and still isn't), the Aarhus Committee postponed its consideration of the concerns raised and has yet to take a final decision on it. However, claimant's inability to obtain a valid UC led to a *de jure* suspension of the EIA procedure until the submission of the new UC No. 87/30.04.2010. Therefore, in 2007, the Ministry for Environment officially suspended the environmental permitting procedure since the applicant lacked valid urbanism and archeological discharge certificates. The company reacted by bringing a court case against the Minister for the Environment, Attila Korodi. This attempt proved unsuccessful as the courts agreed with the Ministry's approach and dismissed the case on the merits.[107]

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[102] *See id.* at pgs 115-16.
[103] *Id.* at p. 124.
[104] *Id.* at p. 125.
[105] Aarhus Convention Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania, ECE/MP.PP.C.1/2015/10 (Dec. 11, 2015), https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_08.09.2017_new.compressed.pdf (located on p. 658 of the linked document).
[106] Alburnus Maior, Submission to the Aarhus Convention Compliance Committee (Feb. 2007), https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_08.09.2017_new.compressed.pdf.
[107] Bucharest Court of Appeal, File No. 8037/2/2007*, Decision No. 86/2013 of 14.01.2013; *see also* Mihai Goţiu, Ce sanse are (de fapt, NU are) Gabriel Reources sa obtina miliarde de dolari despagubiri de la Romania in cazul Rosia Montana (May 3, 2014), http://www.romaniacurata.ro/ce-sanse-are-de-fapt-nu-are-gabriel-resources-sa-obtina-miliarde-de-dolari-

The Ministry for Environment then resumed the EIA procedure when the company submitted a revised EIA report in an attempt to comply with EU standards, following which new consultations started.[108] In relation to this second phase of the EIA procedure, Greenpeace Romania submitted a request to the Aarhus Compliance Committee in March 2012. The request detailed the government's failure to provide certain information related to the Project, in particular the ADC and underlying archeological studies, the mining licenses and related mining information, and the lack of public participation throughout the administrative procedure leading to the issuing of the ADC. The ACCC published its findings in 2015 and essentially agreed with Greenpeace, finding that Romania was largely not in compliance with its Aarhus obligations.[109] The Committee concluded that there was a failure to share requested mining-related information, failure to provide for any public participation in issuing the ADC, and failure to have a proper process for information requests.[110] These findings underscore the fact that the company, and Romania by not ensuring compliance, violated the communities' rights to public participation and access to information.

The undersigned organizations constantly had to force both state and company into compliance with the applicable domestic, EU, and international laws in order to find out about the Project parameters, which in turn allowed them to challenge those aspects of it that were violating applicable rules. Throughout, the company has never managed to procure all the relevant documentation and planning to satisfy applicable legislation, and to this day, the environmental permitting procedure is still not concluded.

B. The company unsuccessfully attempted to derogate from existing legal conditions by encouraging the adoption of a special law in their favor

The setbacks in the permitting procedure as described above led the company and the Romanian government to negotiate an agreement that would allow the Project to move forward. This agreement between the company and Prime Minister Ponta was never published. Yet on August 27, 2013, the Romanian government officially requested the Romanian Parliament to vote on a special law, based on this agreement and applicable only to this Project, declaring that the Roşia Montană mine proposal was of special national public interest and public utility (RM special law).[111] Citizens across the country reacted to the proposed RM special law and took action on an unprecedented scale. In September 2013, due to rising public pressure, the Romanian Parliament established a Special Joint Committee of the Chamber of Deputies and of the Senate for the issuance of an opinion on the Draft Law. Facing public pressure and public statements by MPs against the proposed law, RMGC's CEO, Jonathan Henry, stated that if "the lower house [of parliament] does reject the Project, we will go ahead with formal notification to commence litigation for multiple breaches of international investment treaties for up to $4-billion."[112]

Monitoring the developments, the EU Commission launched an EU Pilot on September 13, 2013, asking the Romanian authorities for the text of the Draft Law and of the Agreement, the objectives of the law in view of the pending authorization process, information on whether it contained provisions which could be seen as derogations from relevant national environmental legislation transposing EU law, information on the reasons for considering the Project as of public utility and national public interest, and a detailed description and justification of how Articles 4(7)(8) of the Water Framework Directive applied.[113] On October 3, 2013, Romania's Minister for the Environment Rovana Plumb visited the EU

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despagubiri-de-la-romania-in-cazul-rosia-montana/?fbclid=IwAR0SvBmUHkHASeHqw7rHLOEdnasvCD5U6qwfJApjIC-T4RAxJ6DPrUnyhKI.

[108] Respondent's Counter-memorial, *supra* note 6, at ¶ 153.

[109] *See* Aarhus Convention Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania, *supra* note 105.

[110] *See id.* at ¶ 92.

[111] Project de lege privind unele măsuri aferente exploatării minereurilor auro-argentifere dein perimetrul Roşia Montană şi stimularea şi facilitarea dezvoltării activităţilor miniere în România, Art. 3, L475/2013 (Aug. 29, 2013), https://senat.ro/legis/lista.aspx?nr_cls=L475&an_cls=2013 (proposed law on certain measures associated with the exploitation of gold-silver ores in the Rosia Montana perimeter and on stimulating and facilitating the development of mining activities in Romania).

[112] Gabriel threatens Romania with billion-dollar lawsuit, THE GLOBE AND MAIL, Sept. 11, 2013, https://www.theglobeandmail.com/report-on-business/international-business/european-business/gabriel-resources-ceo-vows-to-sue-if-romania-kills-europes-biggest-gold-mine/article14240950/

[113] Roşia Montană – EU Pilot 5581/13/ENVI, http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm

Commissioner for the Environment, declaring that the reason behind the RM special law was to meet the requirements set under Article 4(7) of the Water Framework Directive, i.e. "when a project entails change of morphology of a river course, it has to be of overriding public interest."[114] As can be seen from the EU Commission's documents prepared for the meeting, "the Project should only go ahead if all the conditions under the Water Framework Directive article 4(7) are fulfilled. The Project being of 'overriding public interest' is only one condition. The Project should have also been included in the river basin management plan and therefore subject to a public consultation."[115] However, this was not the case. As has been described throughout, once again there was a failure to engage in a public consultation process. Additionally, a letter from Romania's Minister for Environment released under the EU Pilot Project further shows that the company never submitted a request for a water management permit for the mine proposal, which was necessary under the Water Framework Directive to obtain the environmental permit.[116] Thus, the Project did not fulfil the requirements of the Water Framework Directive and so, even if the RM special law passed, it would not mean the Project complied with the applicable law.

In substance the RM special law proposed unconstitutional provisions to save the Project.[117] Firstly, it declared the Project to be one of overriding public interest, which was in blatant violation of the relevant laws as the laws related to what was in the public interest did not foresee such a declaration being applicable for gold mining projects.[118] That declaration would allow the company to further violate peoples' rights to adequate housing and directly acquire any public property found in the perimeter of its mining area, without a public auction, which breaches the principle of equal treatment, non-discrimination, and free competition. It would further obligate the government to start the expropriation procedures within 30 days from the moment the mining company requested it and would allow the government to expropriate any household and land in the mining area, after which they would be given to the company. The Special Law also facilitated the destruction of historical landmarks and cultural, religious, and archaeological sites of great interest, as it would remove the need for ADCs or the relocation of historical monuments. The use of forest and pasture lands, located in the area but protected under additional laws, would further be exempted from protection.[119] Last but not least, the RM special law would even make the right of access to justice and equitable process for citizens or organizations completely ineffective and illusory. The law would have abolished the possibility to legally obtain an invalidation of permitting documents since according to Article 9(a) in only 30 days after the court declares something invalid, the issuing authority has the obligation to issue a new administrative act to replace the invalidated act.

Thus, the RM special law would have cleared the way for the mining company to go forward with the Project in complete disregard of all the past rulings by domestic courts and of environmental protection laws, would have seriously hampered the ability of the community to force both the state and company to comply with relevant laws, and would have ignored two decades of local community resistance against the Project. Given the seriousness of the proposed changes the proposed law was adopted neither by the senate nor by the chamber of deputies, and thus did not go into effect.

IV. Legal implications of the *Amici*'s perspective for the present arbitration

[114] Memorandum to Commissioner Janez Potočnik on Meeting with the Romanian Minsiter for Environment and Climate Change, Ms Rovana Plumb, Ref. Ares(2013)3183674, p. 10 (Oct. 3, 2013), *available at* https://doc.rosiamontana.org/RPlumb.pdf [hereinafter EU Memorandum for Plumb Meeting]; *see generally* Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, art. 4(7) [hereinafter Water Framework Directive].
[115] EU Memorandum for Plumb Meeting, *supra* note 114, at p. 5.
[116] Letter from Romania's Minister for Environment, GESTDEM 6365, (stating "Until present, no documentation has been submitted to the Romanian Waters Administration for the issuance of the water management permit for Roşia Montana.").
[117] This paragraph draws on analysis prepared by the lawyers for the Save Rosia Montana campaign. *See* Dr. Liviu Marius Harosa, Stefania Simion, Anca Ciupa, & Alexandra Cristoloveanu, Analysis of the draft law to permit the Rosia Montana mining proposal, https://doc.rosiamontana.org/SummaryLegalAnalysis.pdf.
[118] Romanian Law No. 33/1994 on expropriation for public utility projects, arts. 7, 8.
[119] For declassification of the pastures, *see* Government Special Decree no. 34/2013 on the organisation, administration and harnessing of permanent pastures and on the amendment and modification of Land Property Law no. 18/1991, arts. 5, 51.

The above factual and legal information should have consequences for the present arbitration. Based on past jurisprudence on international investment law, the Tribunal lacks jurisdiction since the subject matter of the dispute necessarily implicates the application of EU law which is outside of the Tribunal's competence in light of the recent Court of Justice of the European Union (CJEU) decision in *Achmea* (A). Secondly, if the Tribunal comes to the conclusion that the company failed to comply with applicable domestic and EU law as well as international standards on investor responsibilities, the Tribunal should decline jurisdiction for lack of a protected investment or alternatively deny the claim on the merits (B).

A. The Tribunal lacks jurisdiction since the matter necessarily implicates the application and interpretation of EU law

In its Additional Preliminary Objection, the Romanian government focused heavily on the intra-EU dimension of the recent CJEU judgement in *Achmea*.[120] While it is clear on the basis of the CJEU's reasoning that the UK-Romania BIT is incompatible with EU law, the implications of *Achmea* extend further to the Canada-Romania BIT.[121] The reasoning of the Court is indeed applicable to the present dispute without distinction between intra- and extra-EU BITs, as such a distinction, based on the origin of the capital, would be completely arbitrary. Both the UK and Canada BITs include investor-state arbitration provisions that allow disputes to be removed from the jurisdiction of Romanian courts, and consequently from the CJEU. Instead, arbitral tribunals can resolve these disputes and thus, in doing so, also resolve questions of EU law.

More specifically, as the dispute resolution provision in Article 7 of the UK-Romania BIT is silent about the applicable law, the application of the residual rules provided for in the arbitration rules chosen by the parties to the dispute will resolve the matter. In the case at hand, the ICSID rules require the Tribunal to apply the law of the contracting state and international law.[122] Similarly, Article XIII (7) of the Canada-Romania BIT contains an applicable law clause that provides for the application and interpretation of the BIT and the rules and principles of international law.[123] Even if the BIT does not provide for the application and interpretation of the domestic law of Romania, it is nevertheless susceptible to lead to the application and interpretation of EU law, as EU laws form part of the rules and principles of international law that the Tribunal will have to apply. The CJEU made clear that even if the question before the tribunal is only whether the BIT has been violated and not specifically focused on the validity of EU law, the Tribunal may be called on to interpret or apply EU law. For the CJEU, the mere fact that the applicable law that the Tribunal must "take account of" could include EU law (as either domestic law or international law) is sufficient to consider that such arbitration clauses may violate EU law.[124]

In the case at hand, the company claims that "the State has refused to issue an environmental permit for the Project despite acknowledging its environmentally sound design, meeting or surpassing requirements in Romanian and EU law and its compliance with applicable permitting requirements."[125] However, as demonstrated above, the claimant never fulfilled the legal requirements necessary to obtain the desired permits and licenses. Yet, despite numerous court judgments confirming these irregularities, the claimant still claims to have complied with all laws. The Tribunal will need to resolve the dispute between the parties by determining the meaning of the relevant provisions, as well as their legal effect. This means that the Tribunal will have to take the Romanian legislation incorporating the EIA Directive and the Water Framework Directive into account when making its decision. For instance, the Tribunal will have to look into the specific provisions of the EIA Directive in order to determine if the appropriate procedure was followed in accordance with EU law. This includes the determination of legal requirements, such as obtaining the urban plans, urban certificates, and the environmental permit, as

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[120] Case C-284/16, *Slovak Republic v. Achmea BV*, Judgment of the Court (Grand Chamber) (Mar. 6, 2018), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284.

[121] Laurens Ankersmit & Layla Hughes, *Implications of Achmea: How the Achmea Judgment Impacts Investment Agreements with Non-EU Countries* (Center for International Environmental Law (CIEL) & ClientEarth, Apr. 2018), https://www.ciel.org/reports/implications-of-achmea/.

[122] ICSID Convention, Regulations and Rules, ICSID/15, art. 42(1) (Apr. 2006).

[123] Canada-Romania BIT, *supra* note 90, at art. XIII(7) (providing that "A tribunal established under this Article shall decide the issues in dispute in accordance with *this Agreement and applicable rules of international law*.").

[124] *Achmea*, *supra* note 120, at ¶ 40.

[125] Claimants' Memorial, *supra* note 21, at ¶ 736.

well as the surface rights. Furthermore, the Tribunal would need to determine whether the claimant complied with environmental standards and satisfied the derogation requirements under the Water Framework Directive. This assessment will depend mostly on the Tribunal's interpretation of the present Directives, and more generally of EU law. In light of *Achmea*, such an application or an interpretation of EU law by the Tribunal is likely to affect the autonomy of the EU legal order. In addition, EU Member State courts will have limited ability to review the Tribunal's awards. Even though the dispute is under ICSID (and not under UNCITRAL as in *Achmea*), there is no reason that CJEU concerns about UNCITRAL tribunals do not apply to ICSID tribunals, which are seemingly even more removed from the supervision of EU courts, with awards not being subject to review by any domestic court.

Therefore, although the conclusion reached by the CJEU in *Achmea* was given in the intra-EU context, there is nothing that prevents this reasoning from applying to arbitration clauses in extra-EU BITs. Consequently, the Tribunal should decline to exercise jurisdiction over this dispute.

B. The claimant's failure to comply with applicable domestic and EU law, as well as investor responsibilities under international law, necessitates a rejection of the claims

The Tribunal should also take into account the information provided above on the company's conduct as it equally impacts the outcome of this dispute.

The perspective of the local community is vital to the matter at hand. Relevant members of the local community have long had serious concerns about the proposed project related to its environmental risks, risks for the protection of the historical and archeological value embedded in Roşia Montană, the sustainable development of the area, and the proposed relocation and resettlement of the people. The claimant entered Romania with an unreasonable project that at no time included respect for this perspective. It was overly optimistic in terms of feasibility, did not include any meaningful engagement with local community voices, and violated the residents' right to adequate housing and living conditions. It also never complied with applicable domestic and EU law, which is why the company never obtained the necessary permits to start operations. The company's conduct furthermore revealed instances of misconduct by distorting or not disclosing relevant information to competent authorities and of undue influence in decision-making bodies. In addition, advocating for the "special law" inherently included the intention to circumvent the application of both provisions in the BIT related to respecting environmental and health laws and domestic law.

The company, at times, tried to use domestic courts to have its view of the situation recognized and consistently intervened in the cases lodged by the undersigned organizations. However, domestic courts primarily upheld applicable domestic law and found the company in non-compliance. As the *Azinian v. Mexico* tribunal elaborated, "it is a fact of life everywhere that individuals may be disappointed in their dealings with national authorities, and disappointed yet again when national courts reject their complaints … NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment."[126] Undersigned organizations agree and request the Tribunal to consider the above behavior in determining the outcome of the dispute at hand.

Past tribunals have analyzed what impact investor conduct should play for the assessment of arbitration claims. Following the argumentation in this brief, the Tribunal may find that the claimant in this arbitration did not comply with applicable domestic law and at times may have even acted in clear disregard of the law or with the intention to circumvent its application. Looking at past jurisprudence, other tribunals have decided that where company behavior is not in accordance with the law, the activities may not qualify as an investment that can be protected under the applicable BIT. As was pointed out in a recent decision in *Cortec Mining v. Kenya*, "ICSID and the BIT protects only 'lawful investments.' The text and purpose of the BIT and the ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws protecting fundamental public interests such as the environment."[127] Based on this assumption, the tribunal denied jurisdiction over the claim, which relied on an exploration permit that was declared null and void by

[126] *Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, ¶ 83 (Nov. 1, 1999).
[127] *Cortec Mining Kenya Limited et al v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, ¶ 333 (Oct. 22, 2018).

local courts.[128] In addition, unlawful conduct as an element of the principle of good faith may also have an influence on the merits of the case. In *Churchill Mining v. Indonesia*, the tribunal concluded that fraudulent conduct could not only affect the jurisdiction of the tribunal, or the admissibility of (all or some) claims, but also the merits of the dispute and may hence lead to a dismissal of all claims.[129]

Further, the claimant failed to act with proper due diligence related to the feasibility of the project and its potential human rights impacts for the local community. As was pointed out above, both aspects of due diligence are by now embedded as a relevant benchmark for investor behavior. Recalling the dictum of the tribunal in *Olguín v. Paraguay* on the first aspect, it is "not reasonable … to seek compensation for the losses suffered [by] making a speculative, or at best, a not very prudent investment."[130] As for the second aspect, the tribunal in *Urbaser v. Argentina* highlights that companies have corporate social responsibility obligations that include commitments to comply with human rights in the framework of those entities' operations conducted in foreign countries.[131] Further tribunals, when examining alleged investment treaty violations, have taken into account an investor's lack of due diligence and unconscionable conduct and, as a consequence, either denied that a breach had taken place or reduced the damages in consideration of the investor's misconduct.[132] Based on this jurisprudence, the Tribunal should similarly take into account the lack of due diligence by the company both on project feasibility and community impacts and the non-compliance and attempted circumvention of domestic and EU laws.

V. Conclusion

The undersigned organizations would like to highlight that the considerations presented above should play a crucial role in the Tribunal's assessment of the alleged bilateral investment treaty violations put forward by the claimant. In fact, unconscionable investor behavior should be reprimanded instead of being protected, and the Tribunal's decision is not only important for the particular case at hand but also as a signal for future investors attempting to abuse the protection offered by BITs. As the dissenting arbiter in the *Bear Creek* arbitration summarized, "many environmental and other permits were still to be granted, and the nature and extent of the opposition made it clear that there was no real possibility of the Project soon obtaining the necessary 'social license'."[133] The same is true here and in large part provoked by the claimant's own behavior, for which it should assume the consequences.

Respectfully submitted on November 2, 2018 by,

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[128] *Id.*
[129] *Churchill Mining PLC & Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (Dec. 6, 2016).
[130] *Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, ¶ 65(b) (July 26, 2001).
[131] *Urbaser*, *supra* note 13, at ¶ 1195.
[132] On all these possibilities, *see* Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 ICLQ 527 (2006); *see also Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Amicus Curiae Submission of the Lawyers' Environmental Action Team (LEAT) et al, ¶¶ 99-108 (Mar. 26, 2007).
[133] *Bear Creek Mining Corp.*, Partial Dissenting Opinion by Professor Philipp Sands QC, *supra* note 25, at ¶ 38.