INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Applicants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

APPLICATION FOR ANNULMENT

July 5, 2024

WHITE & CASE LLP

Counsel for Applicants

APPLICATION FOR ANNULMENT

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I. INTRODUCTION

1. Pursuant to Article 52 of the ICSID Convention and ICSID Arbitration Rule 50, Gabriel Resources Ltd. ("Gabriel Canada") and Gabriel Resources (Jersey) Ltd. ("Gabriel Jersey") (together "Gabriel," "Claimants," or "Applicants") submit this Application for Annulment of the Award issued on March 8, 2024 in ICSID Case No. ARB/15/31 (the "Award").

2. Gabriel seeks annulment of the Award in its entirety due to the fatal defects in the constitution of the tribunal and resulting serious departures from fundamental rules of procedure that denied Claimants the most basic right to have their claims decided fairly by an impartial tribunal that they reasonably could rely upon to exercise independent and impartial judgment.

3. If for any reason the Award is not annulled in its entirety (which it must be), in the alternative, Gabriel seeks annulment of the parts of the Award that address liability and costs due to separate fundamental and annullable defects, including the Tribunal majority's excess of powers, serious departures from fundamental rules of procedure, and failure to state reasons, as set forth in detail below.

4. Gabriel submits this application in accordance with ICSID Convention Article 52(2) "within 120 days after the date on which the Award was rendered."

5. Pursuant to ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2), Gabriel requests a provisional stay of enforcement of the Award.

6. In accordance with ICSID Arbitration Rule 50(1)(d), this application is accompanied by payment of the lodging fee of US$25,000.

A. Grounds for Annulment in Summary

7. The Award in this case must be annulled because the Tribunal majority lacked the qualities of independence and impartiality that the ICSID Convention requires. ICSID's Secretary-General appointed as President of the Tribunal Prof. Pierre Tercier, a Swiss national who had multiple personal, institutional, and professional connections to Respondent's party-

appointed arbitrator, Prof. Zachary Douglas, and to Respondent's Geneva-based counsel, LALIVE, as well as a decisional history overwhelmingly favoring respondent States in investment disputes. The result was a Tribunal majority lacking impartiality contrary to the most basic requirements set forth in the ICSID Convention.

8. This defect was further irreparably undermined when Respondent's party-appointed arbitrator, Prof. Douglas, failed to disclose that during the arbitration he acquired Swiss nationality overlapping with Prof. Tercier, and failed to disclose that during the arbitration he had taken on as a client an NGO that had been working in opposition to Gabriel's arbitration claims and to the mining project that was the main subject of the arbitration. Prof. Tercier and Prof. Douglas moreover both failed to disclose the extent of their relationships with each other and with Respondent's arbitration counsel LALIVE.

9. Any reasonable and informed third party in these circumstances justifiably would doubt that the Tribunal, compromised as it was, could fairly and impartially resolve the parties' dispute. The Tribunal thus was not properly constituted and there were serious departures from fundamental rules of procedure guaranteeing each party equal treatment and the right to be heard by an impartial and independent tribunal. The resulting Award is fatally defective for these reasons and must be annulled in its entirety.

10. If, however, for any reason the Award is not annulled in its entirety (which it must be), the majority's decisions on liability and on costs, issued over a 37-page dissent from Prof. Horacio Grigera Naón, must be annulled. That is because those parts of the Award suffer from multiple separate annullable defects including manifest excesses of power (manifestly disregarding the applicable law), multiple serious departures from fundamental rules of procedure, and failures to state reasons for decisions made on several of the most fundamental aspects of the claims presented.

11. These grounds are detailed below in this application and will be further elaborated during this annulment procedure.

B. The *ad hoc* Committee Should Be Appointed Following a Recommendation from the Secretary-General of the Permanent Court of Arbitration (PCA)

12. ICSID Convention Article 52(3) and ICSID Arbitration Rule 52(1) provide that the Chairman of ICSID's Administrative Council is to appoint an *ad hoc* Committee to rule on the present Application. ICSID's 2024 Background Paper on Annulment explains that "[t]he process for the appointment of *ad hoc* Committee members by the Chair usually involves consultations among ICSID counsel, case management Team Leaders and the Secretary-General."[1] In this case the ICSID Secretariat cannot be the source of recommendations to the Chair without compromising the integrity of the process.

13. The ICSID Secretariat has multiple conflicts that undermine its ability to play a role in the selection of the *ad hoc* Committee members.

a. The grounds for this Application for Annulment include that the Tribunal was not properly constituted from the moment when the Secretary-General appointed Prof. Tercier as Tribunal President. The ICSID Secretariat team should not advise or be involved in selecting the *ad hoc* Committee that will rule on the effects of the ICSID Secretary-General's appointment decision in the arbitration.

b. The new ICSID Secretary-General, Martina Polasek, is screened out of this case.[2]

c. ICSID's Team Leader and Acting Secretary-General for this case, Gonzalo Flores, shares compromising connections with the Tribunal majority that are at issue in this Annulment Application as addressed further below. These include that he is a member of the faculty, together with both Prof. Tercier and Prof. Douglas, of the Geneva Center for International Dispute Settlement MIDS program,[3] and that he delivered a video

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1 ICSID Background Paper on Annulment 2024 (AL-21) ¶ 42.

2 Ms. Polasek, the Secretary-General as of July 1, 2024, has recused herself and is excluded from any internal discussions or access to files in arbitrations involving White & Case LLP.

3 MIDS Faculty (A-47) (including Prof. Tercier, Prof. Douglas, and Gonzalo Flores). *See also, e.g.*, Letter from ICSID to Parties dated Dec. 21, 2015 (A-17) (signed by Mr. Flores as "Team Leader/Legal Counsel" on behalf of Secretary-General proposing consultation method for appointment of Tribunal President,); Email from ICSID to Parties dated Dec. 28, 2015 (A-18) (sent from Mr. Flores as "Team Leader / Legal Counsel"); Letter from ICSID to Parties dated May 25, 2016 (A-1) (signed by Mr. Flores as "Chief Counsel" on behalf of Secretary-General proposing appointment for Tribunal President); Letter from ICSID to Parties

tribute to Prof. Tercier at a birthday celebration for Prof. Tercier that took place during the arbitration and that was not disclosed as being organized by a group that included the Tribunal Assistant, Prof. Douglas, and two LALIVE attorneys.[4] The ICSID Team Leader's mutual connections with Prof. Tercier and Prof. Douglas should disqualify him from advising on the appointment of the *ad hoc* Committee in view of the grounds at issue in this Application, which are based in part on precisely such connections.

d. Prof. Douglas' undisclosed acquisition of Swiss nationality during the arbitration is another ground for annulment that should preclude the ICSID Secretariat team from advising on the selection of the *ad hoc* Committee members, because the Secretariat received notice of this material fact in 2023 whereas Claimants learned about it for the first time in the Award.[5]

14. To ensure the integrity of this process and that the appearance of independence and impartiality is not undermined, Gabriel accordingly urges that the Chairman appoint the *ad hoc* Committee members based on consultations with and a recommendation from the Secretary-General of the Permanent Court of Arbitration.

15. The PCA Secretary-General has made recommendations and played a consultative role in similar situations, including as to the selection of arbitrators, where, as here, it is needed, or even merely advisable, to safeguard the integrity of the process and the appearance thereof.[6] Proceeding in this manner is fully consistent with the ICSID Convention and the

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dated June 21, 2016 (A-2) (signed by Mr. Flores as "Acting Secretary-General" advising that Tribunal is deemed constituted).

4 Program for Celebration of the 80th Birthday of Prof. Pierre Tercier dated May 12, 2023 (A-48) (showing Gonzalo Flores appeared by video); Nhu-Hoang Tran Thang Linked-In Post (A-49) (showing event organizers included Prof. Douglas, LALIVE partner Catherine Anne Kunz, and LALIVE associate Trisha Mitra-Veber).

5 *Compare* Zachary Douglas Archived ICSID Profile last updated May 23, 2023 (A-50) (nationality is Australian) *to* Zachary Douglas Archived ICSID Profile last updated Oct. 17, 2023 (A-51) (nationality is Australian and Swiss).

6 *See, e.g.*, *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits dated Sept. 3, 2013 (AL-13) ¶¶ 20-24 (the Chairman of the ICSID Administrative Council appointed the presiding arbitrator based on a recommendation from the PCA Secretary-General); *Pey Casado v. Chile (I)*, ICSID Case No. ARB/98/2, PCA Secretary-General Recommendation dated Feb. 17, 2006 (AL-11) (the PCA Secretary-General made a recommendation to the Chairman of the ICSID Administrative Council on a proposal to disqualify two arbitrators); *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, PCA Case

ICSID Arbitration Rules, which do not require the Chairman's appointment decisions to be based on consultations with or a recommendation of the ICSID Secretariat. Indeed, a recommendation from the Secretary-General of the Permanent Court of Arbitration has been sought where doing so provided a requested measure of assurance that the process is in all respects fair and impartial.

II. BACKGROUND TO THE APPLICATION

A. Facts Leading to the Dispute

16. In the mid-1990s the Romanian State partnered with Gabriel to establish a joint-venture company called Roşia Montană Gold Corporation S.A. ("RMGC") to develop mining projects in the areas of Roşia Montană and Bucium in Romania. The parties entered into a shareholders agreement that provided Gabriel Jersey 80.69% and the State, through Minvest Roşia Montană S.A., 19.31% of the shares of RMGC.

17. The State issued mining licenses in the form of concession agreements pursuant to which RMGC was to develop what became known as the Roşia Montană Project (or "the Project") and the Bucium Projects (together "the Projects"); these were, respectively, the Roşia Montană License, an exploitation license, and the Bucium Exploration License.

18. The State's direct benefits included its ownership interest in RMGC under the shareholders agreement with Gabriel and a 4% royalty on Project revenues under the Roşia Montană License. The Projects also were among the largest investment projects in Romania and would have generated jobs, taxes, and other indirect benefits in an area of high unemployment and poverty. Gabriel, under the terms of the shareholders agreement, undertook to provide all the funding needed to develop the Projects.

19. Thus, Gabriel advanced development of the Roşia Montană Project, which in time proved to be among the world's largest undeveloped gold projects, investing (together with its investments in the Bucium Projects) over US$ 760 million.

No. IR-2019/1, PCA Secretary-General Recommendation dated Mar. 4, 2019 (AL-17) ¶¶ 39-40 (the PCA Secretary-General made a recommendation to the Chairman of the ICSID Administrative Council on a proposal to disqualify the tribunal).

20. As with most industrial projects, the critical permit for the Roşia Montană Project was the environmental permit. Environmental permitting decisions in Romania are made by the Ministry of Environment through an administrative process regulated by law. To make that decision, the Ministry of Environment chairs a consultative Technical Assessment Committee ("TAC") that conducts a technical review of the Project's Environmental Impact Assessment ("EIA"). The law provided that upon completion of the EIA review, the Ministry of Environment was to recommend issuance of the environmental permit establishing the conditions needed for environmental protection, or alternatively issue a reasoned decision denying the permit application. The Ministry would submit that recommendation for Government approval in the form of a Government Decision to be signed by the Prime Minister.

21. By mid-2011, with the benefit of Gabriel's massive investment, the substantial scope of the Project had been established and the environmental permitting procedure was nearing completion. With gold prices then at record highs, the Government (led by a Prime Minister generally opposed to mining) demanded "renegotiation" of its agreements with Gabriel. Through repeated public statements of the Prime Minister, Minister of Environment, Minister of Culture, and the President, as well as direct demands to Gabriel through the Minister of Economy, the Government demanded that Gabriel forfeit ownership of shares of RMGC and agree to a higher royalty payment to the State as conditions for permitting the Project to proceed.

22. Recognizing that the Project would be blocked if there were no agreement with the State, Gabriel was coerced into presenting offers with revised economic terms, but the Government collapsed in February 2012 without accepting the terms it had demanded. In May 2012, Romania established an interim Government led by Prime Minister Victor Ponta, who had long publicly opposed the Project and who had repeatedly asserted, without any basis, that Gabriel had bribed public officials who supported the Project. As soon as he entered office, Prime Minister Ponta announced that the Government would not consider permitting the Project until 2013, after national elections were held.

23. Thus, although the Ministry of Environment in consultation with the TAC completed its technical review for the Roşia Montană Project in November 2011 and repeatedly stated that a decision on permitting would be made in January or February 2012, so long as renegotiations with Gabriel remained unresolved and political decisions were pending, the Ministry of Environment halted the process, did not convene any TAC meetings in 2012, and did not take any permitting decision.

24. It was not until 2013 that the newly formed coalition Government, led by Prime Minister Ponta, reengaged with Gabriel. When it did so, the Government reconfirmed the demand for revised economic terms as a condition for permitting the Roşia Montană Project. The Government also made it clear in private meetings and on national television that a new economic agreement would need to be incorporated into a special draft law, and that the only way the Project would be allowed to proceed and be permitted was if Parliament enacted that law.

25. At the administrative level, after the Government approved an Inter-Ministerial Commission report concluding that there were no legal obstacles to development of the Project, the Ministry of Environment convened additional TAC meetings and in consultation with the TAC members prepared and published a draft decision approving issuance of the environmental permit and establishing the conditions and measures to include in that permit. The record is clear that the conditions supporting issuance of the environmental permit accordingly were met, a fact the Minister of Environment repeatedly confirmed in public statements and in written and oral testimony.

26. Rather than issue the environmental permit as the law required, however, the Ponta Government confirmed in multiple televised public statements that it "rejected" the Project on the established commercial terms, that it would submit a draft law to Parliament incorporating revised economic terms, and that the Project would proceed only if Parliament agreed and passed the draft law. Prime Minister Ponta openly acknowledged that he was "obligated, under the law" to approve the Project as it "met all the conditions required by law," but he did not want to comply with that legal obligation and so called on Parliament to decide. The Minister of Environment also confirmed that the Project met

"all requirements under the European and not only, international environmental standards," but that issuance of the environmental permit would depend "on the decision taken by the Parliament of Romania after public debates."[7]

27. Romania thus coerced Gabriel to agree to revised terms as the Government demanded in the hope that Parliament would approve the draft law and permit the Project. Gabriel nevertheless expressly reserved its legal rights, including to present claims in international arbitration for losses and damages.

28. The Government proceeded to hold a political referendum on the Project accompanied by numerous televised political statements including from the Prime Minister who insisted he did not want to issue the permit and that he would vote against the draft law. After years of political leaders leveling baseless accusations of corruption against each other and against Gabriel, massive street protests broke out against a "special law" that many people suspected of being another corrupt Government deal.

29. In the face of the protests, the Government's coalition leaders called for the rejection of the draft law on national television. In a series of prearranged votes, Parliament then rejected the draft law. As Prime Minister Ponta and other senior Government Ministers emphasized, that meant the Project would not be done. Indeed, as Prime Minister Ponta explained, "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."[8] The Minister of Environment confirmed that "Parliament's decision means the last word for us, and we will observe it."[9]

30. No decision in any legal process was ever taken to reject RMGC's application for an environmental permit. The Ministry of Environment simply never issued any decision on

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7 Award ¶ 1120.

8 Interview of Prime Minister Ponta, Sept. 11, 2013 (C-437).

9 Award ¶ 1132.

the application, not even after convening a few additional TAC meetings in 2014 and 2015 during which the TAC discussed but never pursued a further geological study.

31. With the environmental permitting for the Project thus abandoned and terminated *de facto* by the Government, the Ministry of Culture in 2015 declared several new historical monuments in the Project area triggering mandatory cultural heritage legal protections under Romanian law incompatible with the mining project. The Government then applied for and obtained UNESCO World Heritage site listing for Roşia Montană as a protected landscape. This designation triggered additional mandatory legal protections under Romanian law to preserve the entire landscape as cultural heritage in priority over mining, rendering implementation of the Project legally impermissible notwithstanding the Ministry of Culture's earlier archaeological discharge certifications issued for the area.

32. Over the years, RMGC also had conducted extensive mineral exploration of the Bucium property. After identifying two sizable deposits that it demonstrated could be developed profitably, in 2007 RMGC applied for exploitation licenses that it had a right to obtain as the holder of the Bucium Exploration License. Despite advising RMGC in 2014 and in 2015 that a decision on the Bucium applications was imminent, the mining authority simply never acted on the applications which remain allegedly pending to this day.

33. Thus, there was never any decision in any legal process on RMGC's application for an environmental permit for the Roşia Montană Project or on its applications for the Bucium exploitation licenses. The State simply abandoned RMGC and walked away from its agreements with Gabriel without due process or any compensation.

B. The Arbitration

34. After providing Romania notice of the dispute in January 2015, on July 21, 2015, Gabriel Jersey, the direct shareholder of RMGC, and Gabriel Canada (the 100% shareholder of Gabriel Jersey since 1997) filed a Request for Arbitration that ICSID registered on July 30, 2015. The Request presented claims under the Agreement between the Government of the United Kingdom and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "UK BIT") and the Agreement between the

Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "Canada BIT") (together the "BITs").

35. Gabriel's principal claim was that Romania's treatment of its investment commencing in mid-2011 and culminating in or around September 2013 breached both Articles II, III, and VIII of the Canada BIT as well as Articles 2 and 5 of the UK-BIT, resulting in the complete frustration and effective taking of Gabriel's partnership with the State in RMGC to develop the Roşia Montană and Bucium Projects. Gabriel sought compensation of approximately US$ 3.2 billion, representing the loss to Gabriel of the fair market value of its interests in the Projects, assessed absent the negative effects of Romania's treaty violations.

36. On June 21, 2016, the tribunal was constituted with Horacio Grigera Naón (Argentine), appointed by Claimants, Zachary Douglas (Australian), appointed by Respondent, and Teresa Cheng (Chinese), President, appointed by the ICSID Secretary-General.

37. The proceedings were interrupted when Ms. Cheng resigned from the Tribunal on February 7, 2018.

38. On April 5, 2018, the Secretary-General reconstituted the Tribunal by appointing Pierre Tercier (Swiss) as President of the Tribunal.

39. The proceedings were declared closed on September 14, 2023.

C. The Award

40. The Tribunal issued its Award on March 8, 2024. The Tribunal concluded unanimously that it had jurisdiction over Claimants' claims and that the claims were admissible.[10] The Tribunal, by majority, rejected Claimants' claims on the merits.[11] On that basis, the majority awarded approximately US$ 10 million in costs to Respondent.[12] The Award is accompanied by a 37-page Note of Dissent by Prof. Grigera Naón.

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[10] Award ¶¶ 765, 829, 1183-1185, 1121, 1358(1).

[11] Award ¶¶ 768, 1321, 1358(2)(a).

[12] Award ¶¶ 1323-1357, 1358(2)(b)-(c).

41. The Award is flawed in numerous respects warranting annulment. These are detailed below.

III. GROUNDS TO ANNUL THE ENTIRE AWARD

42. The Award in this case must be annulled in its entirety because the Tribunal was not properly constituted. The failure to establish and maintain this most essential feature of a valid arbitration meant also that Claimants' fundamental rights to present their case to three persons who may be relied upon to exercise independent judgment and to equal treatment on a level playing field with Respondent was denied. These defects in the arbitration are fatal to the Award which consequently must be annulled in its entirety.

43. As addressed below, the Award therefore must be annulled in its entirety on two grounds: (i) the Tribunal was not properly constituted (ICSID Convention, Article 52(1)(a)); and (ii) there have been serious departures from fundamental rules of procedure (ICSID Convention, Article 52(1)(d)).

A. The Tribunal Was Not Properly Constituted

44. Annulment of the Award is warranted pursuant to Article 52(1)(a) of the ICSID Convention when the tribunal "was not properly constituted." Maintaining the integrity of the arbitration demands that a tribunal remain properly constituted for the entire arbitration, through issuance of the final award.[13]

45. Articles 40(2) and 14(1) of the ICSID Convention require that a tribunal be composed of persons "who may be relied upon to exercise independent judgment." While the English version of Article 14 of the ICSID Convention refers to "*independent judgment*," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial

[13] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶¶ 158, 168.

and independent.[14] Impartiality refers to the absence of bias or predisposition towards a party.[15]

46. Indeed, "there can be no greater threat to the legitimacy and integrity of the proceedings or of the award than the lack of impartiality or independence of one or more of the arbitrators."[16] For that reason, "the parties' confidence in the independence and impartiality of the arbitrators deciding their case is essential for ensuring the integrity of the proceedings and the dispute resolution mechanism as such."[17]

47. Showing that a person lacks the qualities stated in Article 14(1) of the ICSID Convention does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.[18] Thus, the standard that applies is "whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality."[19] The relevant perspective is that of a reasonable third party – an independent observer.[20]

48. ICSID Arbitration Rule 6(2) requires each arbitrator to sign a declaration attaching a statement of "past and present professional, business and other relationships (if any) with the parties" and "any other circumstance that might cause my reliability for independent

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[14] *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Orrego Vicuña dated Dec. 13, 2013 (AL-15) ¶ 65.

[15] *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Orrego Vicuña dated Dec. 13, 2013 (AL-15) ¶ 66.

[16] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 175.

[17] *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Annulment Decision dated May 5, 2017 (AL-16) ¶ 77.

[18] *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Orrego Vicuña dated Dec. 13, 2013 (AL-15) ¶ 66; *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated Feb. 5, 2016 (AL-12) ¶ 109.

[19] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated Feb. 5, 2016 (AL-12) ¶¶ 109, 111. *See also Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Annulment Decision dated May 5, 2017 (AL-16) ¶ 78.

[20] *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Ruling regarding participation of David Mildon QC dated May 6, 2008 (AL-7) ¶ 30.

judgment to be questioned by a party." Rule 6(2) also requires each arbitrator to acknowledge that by signing this declaration, they "assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

49. The Tribunal was not properly constituted here for five reasons.

a. First, the Tribunal was not properly constituted because ICSID's Secretary-General appointed Prof. Pierre Tercier, a Swiss national, as President of the Tribunal, notwithstanding his evident one-sided personal and professional connections to Respondent's party-appointed arbitrator, Prof. Douglas, and to Respondent's arbitration counsel, LALIVE, coupled with his decisional history overwhelmingly favoring respondent States in investment disputes. Prof. Tercier never should have been appointed Tribunal President given those personal and professional connections and his one-sided record of decisions.

b. Second, the Tribunal was not properly constituted because, as was only first disclosed in the Award, Prof. Douglas acquired Swiss nationality during the arbitration. Given the limitations on nationality that are central to the system of ICSID arbitration and that are designed to ensure neutrality in decision-making, Prof. Douglas' undisclosed acquisition of Swiss nationality is a material factor undermining the appearance of neutrality and thus the appearance of independence and impartiality among the members of the Tribunal. By failing to disclose his acquisition of Swiss nationality during the arbitration, Prof. Douglas denied Claimants and the other members of the Tribunal the opportunity to address this material change in circumstances.

c. Third, the Tribunal was not properly constituted because Prof. Douglas did not disclose that during the arbitration he took on as a client an NGO that was actively opposed both to the Roşia Montană Project, a principal subject of the arbitration, and to Gabriel's arbitration claims against Romania as well as to the system of investor-State arbitration. This undisclosed client relationship calls into serious question for any independent observer Prof. Douglas' independence and impartiality. This results in another failure to maintain a properly constituted tribunal.

d. Fourth, the Tribunal was not properly constituted because it has become clear that both Prof. Tercier and Prof. Douglas failed to make proper disclosures despite their obligation to do so. Indeed, Claimants have learned that the personal, business, and professional connections among Prof. Tercier, Prof. Douglas, and Respondent's arbitration counsel, LALIVE, are materially more extensive than anyone disclosed and are entirely incompatible, to any reasonable third-party observer, with an appearance of independence and impartiality. These circumstances constitute a further failure to maintain a properly constituted tribunal.

e. Fifth, the Tribunal was not properly constituted because the significant one-sided connections on the Tribunal in favor of Respondent were compounded by Prof. Tercier and Prof. Douglas' record of decision-making in investment treaty cases overwhelmingly favoring respondent States. Their decisional history in such cases coupled with all the other facts and circumstances further aggravated the appearance to any reasonable third-party observer that the majority's approach to decision-making would be characterized by in-group bias, and thus disproportionately sympathetic to Respondent in the case.

50. These factors were entirely at odds with the appearance to a reasonable third-party observer of independence and impartiality, thus mandating annulment of the Award.

1. ICSID's Secretary-General Appointed Professor Tercier Notwithstanding His One-Sided Connections to Respondent and One-Sided Record of Decisions Overwhelmingly Favoring Respondents

51. After the parties did not agree on the selection of a Tribunal President directly or through a ballot procedure, ICSID's Secretary-General appointed Ms. Teresa Cheng SC as the Tribunal President.[21] Neither party objected to the proposed appointment of Ms. Cheng, and she served as President of the Tribunal from June 21, 2016 until February 7, 2018, when she resigned.[22]

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[21] Award ¶ 210. The Secretary-General earlier had appointed Ms. Wendy Miles as Tribunal President, but Ms. Miles informed ICSID that she was not able to accept her appointment.

[22] Award ¶¶ 210, 256, 553-554.

52. The Secretary-General advised the parties that she intended to appoint Prof. Lucy Reed to replace Ms. Cheng as Tribunal President. Claimants objected because Prof. Reed had connections to both parties that "could be perceived as inappropriate and therefore could potentially affect the integrity of a final award in this case."[23] The Secretary-General provided Claimants' objections to Prof. Reed, and she did not accept the appointment.[24]

53. The Secretary-General then informed the parties that she intended to appoint Prof. Tercier, a national of Switzerland, as Tribunal President.[25] Prof. Tercier made the following disclosures. As to the parties, he disclosed that he had no connections to Gabriel, and that he was an arbitrator in a prior commercial case involving a Romanian State company; as to the parties' counsel, he disclosed that he was an arbitrator in several cases in which Claimants' counsel, White & Case, had appeared as counsel, and in several cases in which Respondent's counsel, LALIVE, had appeared as counsel; and as to the two other arbitrators, he disclosed that he had chaired several tribunals in which Prof. Grigera Naón was co-arbitrator, and that he "personally know[s]" Prof. Douglas, but had "never worked with him intensively."[26]

54. Claimants objected to Prof. Tercier's appointment based on the combination of his greater connections with Respondent's party-appointed arbitrator and counsel and his record of decisions in investor-State cases, which overwhelmingly favored State parties.[27] Claimants objected that Prof. Tercier's connections to Respondent's party-appointed arbitrator and counsel were one-sided and created an imbalance on the Tribunal because (i) Prof. Tercier had a personal connection with Respondent's party-appointed arbitrator, Prof. Douglas, but not with Claimants' party-appointed arbitrator; (ii) Prof. Tercier and Prof. Douglas both were on the faculty at the Geneva-based Graduate Institute of International and Development Studies, Master in International Dispute Settlement (MIDS) program; and

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23 Letter from Claimants to ICSID Secretary-General dated Feb. 20, 2018 (A-3).

24 Letter from Tribunal Secretary to Parties dated Feb. 22, 2018 (A-4).

25 Letter from ICSID Secretary-General to Parties dated Feb. 26, 2018 (A-5).

26 Letter from ICSID Secretary-General to Parties dated Feb. 26, 2018 (A-5).

27 Letter from Claimants to ICSID Secretary-General dated Mar. 5, 2018 (A-6).

(iii) Respondent's counsel, the LALIVE law firm, also was based in Geneva and shared professional connections with Prof. Tercier through the Swiss Arbitration Association (ASA).[28] Claimants objected that Prof. Tercier's decisions also gave rise to objective concerns of bias because he had by that time issued a final decision in 15 investor-State cases, and in every one of those cases, the tribunal either dismissed the claims entirely or awarded very little compensation, including in five cases where the claimant's party-appointed arbitrator dissented, and because three respondent States had appointed Prof. Tercier as party-appointed arbitrator, whereas a claimant had never done so.[29]

55. The Secretary-General conveyed Claimants' objections as well as comments from Respondent to Prof. Tercier, and Prof. Tercier submitted observations in reply.[30] Prof. Tercier repeated that he knew Prof. Douglas, but stated that their working relationship was limited to their teaching at the Graduate Institute of International and Development Studies (MIDS) program.[31] Prof. Tercier supplemented his earlier disclosures by stating that he had sat as an arbitrator in two cases with LALIVE partner Matthias Scherer, a senior named member of Respondent's arbitration team.[32] By contrast, no one on Claimants' counsel team has served with Prof. Tercier as an arbitrator and so has not served with him as a peer in confidential deliberations.[33] Prof. Tercier disclosed that in addition he had sat as an arbitrator in two cases with LALIVE partner and co-founder Michael Schneider, but, he added, Mr. Schneider was not involved in the present case;[34] there was, however, no basis for Prof. Tercier to assume that Mr. Schneider would not assist or advise his colleagues on this case.[35] With regard to his record of decision-making in investment arbitrations, Prof.

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28 Letter from Claimants to ICSID Secretary-General dated Mar. 5, 2018 (A-6) at 1-2.

29 Letter from Claimants to ICSID Secretary-General dated Mar. 5, 2018 (A-6) at 2-3.

30 *See* Letter from ICSID to Parties dated Mar. 8, 2018 (A-7).

31 Letter from ICSID to Parties dated Mar. 8, 2018 (A-7).

32 Letter from ICSID to Parties dated Mar. 8, 2018 (A-7).

33 Letter from Claimants to ICSID Secretary-General dated Mar. 16, 2018 (A-8) at 2.

34 Letter from ICSID to Parties dated Mar. 8, 2018 (A-7).

35 Indeed, Mr. Schneider had served with his LALIVE colleagues as Romania's counsel in the earlier *Rompetrol* ICSID arbitration. *See Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award dated May 6, 2013, cover page noting counsel (A-52).

Tercier did not deny the statistics presented about his record and his appointments, but maintained that he had only acted as arbitrator in a limited number of investor-State cases so that the statistics were not representative.[36]

56. Claimants maintained their objection to Prof. Tercier, urging the Secretary-General to propose a candidate who did not have one-sided relationships with Respondent's party-appointed arbitrator and counsel and who had a more balanced decisional history in investment cases.[37] Claimants also objected because the Secretary-General had transmitted to the proposed candidates correspondence that the parties directed to her to convey observations about the suitability of those candidates for the appointment and, in doing so, notwithstanding that this was not a challenge procedure, had invited a debate between Claimants and Prof. Tercier about his impartiality and independence and thus had created a further risk to the fairness of the procedure if Prof. Tercier were appointed.[38]

57. The Secretary-General decided to proceed with Prof. Tercier's appointment over Claimants' objections and invited the parties to withdraw their last communications if they did not wish them to be conveyed to Prof. Tercier.[39] To avoid further prejudice, Claimants accordingly withdrew their last letter objecting to Prof. Tercier's appointment from the record while reserving all their rights,[40] and the Tribunal was reconstituted.[41]

58. Thus, ICSID's Secretary-General reconstituted the Tribunal in circumstances where a reasonable and informed third party would conclude that there was a material imbalance of personal and professional connections among the members of the Tribunal and the parties, all to the side of the Respondent, compounded by an evident predisposition of a majority of the Tribunal to rule in favor of the Respondent. A reasonable and informed

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36 Letter from ICSID to Parties dated Mar. 8, 2018 (A-7).

37 Letter from Claimants to ICSID Secretary-General dated Mar. 16, 2018 (A-8).

38 Letter from Claimants to ICSID Secretary-General dated Mar. 16, 2018 (A-8).

39 Letter from ICSID to the Parties dated Mar. 27, 2018 (A-9).

40 *See* Letter from Claimants to ICSID dated March 29, 2018 and Letter from ICSID to the Parties dated Mar. 30, 2018 (A-10).

41 Award ¶ 259. *See* Letter from ICSID to the Parties dated April 5, 2018 with attachments (A-11).

third party therefore would justifiably doubt that the Tribunal possessed the requisite qualities of impartiality and independence.

59. For that reason, the Tribunal was not properly constituted from the time of Prof. Tercier's appointment. Given that Claimants already had objected to this appointment, Prof. Tercier was given the opportunity to comment on the objection, and the Secretary-General rejected the objection, Claimants did not have at that time a further effective right of challenge under the ICSID Convention.[42]

2. Professors Tercier and Douglas Made a Few, Inadequate Disclosures During the Arbitration

60. During the arbitration, in 2019, Prof. Douglas disclosed that he was planning to attend the annual LALIVE Lecture and dinner;[43] in 2021, Prof. Tercier disclosed that he joined the law firm of Peter & Kim;[44] and in 2023, Prof. Tercier disclosed that that he was mentoring a LALIVE associate based in London as part of the ICCA Mentoring Programme.[45]

61. Neither Prof. Tercier nor Prof. Douglas made any other disclosures.

62. It now is obvious, as detailed below, that Prof. Tercier and Prof. Douglas both breached their disclosure obligations and that circumstances were materially more significant than disclosed. Indeed, the Award made it clear, and follow-on research revealed, that Prof. Douglas and Prof. Tercier failed to disclose material circumstances that would cause any reasonable and informed third party justifiably to doubt the independence and impartiality

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[42] Under Article 58 of the ICSID Convention, if the unchallenged arbitrators are divided on a disqualification proposal, the Chairman of ICSID's Administrative Council decides. In practice, the Chairman makes that decision in consultation with the ICSID Secretary-General, and for that reason proposing disqualification would have been futile in this case. *See, e.g.*, Ibrahim Shihata and Antonio Parra, "The Experience of the International Centre for Settlement of Investment Disputes," *ICSID Review—Foreign Investment Law Journal* (1999) (AL-2) at 310 (explaining that the Chairman's appointing authority function "is in practice performed on the recommendation of the Secretary-General"); *Participaciones Inversiones Portuarias v. Gabon*, ICSID Case No. ARB/08/17, Decision on Proposal to Disqualify dated Nov. 12, 2009 (AL-3) (where arbitrators Paulsson and Stern divided on a disqualification proposal, Secretary-General Kinnear decided on behalf of the Chairman of the Administrative Council).

[43] Email from Tribunal Secretary to Parties dated Apr. 30, 2019 (A-14).

[44] Email from Tribunal Secretary to Parties dated Jan. 14, 2021 (A-15).

[45] Email from Tribunal Secretary to Parties dated Feb. 14, 2023 (A-16).

of the Tribunal. Their failures to make material disclosures discussed below again compel the conclusion that the Tribunal was not properly constituted.

3. Claimants Learned Only by Reading the Award that Professor Douglas Had Failed to Disclose that He Acquired Swiss Nationality During the Arbitration

63. When the Tribunal was reconstituted, Prof. Douglas was an Australian national[46] and thus the appointment of Prof. Tercier, a Swiss national, as President, was neutral as to nationality. As disclosed to the Parties for the first time in the Award,[47] Prof. Douglas acquired Swiss nationality in August 2023.

64. As a central feature of ICSID arbitration, the provisions of the ICSID Convention and the ICSID Arbitration Rules place restrictions on the nationality of arbitrators and *ad hoc* committee members that may be appointed, intended to ensure neutrality in the decision-making process.[48] Thus, the ICSID Convention prohibits a majority of the members of a tribunal from having the same nationality as a party, unless the parties have agreed on the appointment of each individual member of the tribunal.[49] In addition to ensuring neutral nationalities among parties and the members of the arbitral tribunal, the ICSID Convention prohibits any *ad hoc* Committee member from being a co-national with a party or from having the same nationality as any member of the tribunal that rendered the award.[50]

65. These restrictions exist in recognition of the fact that nationality is an important feature of neutrality and assurance of impartiality in the system. As the ICSID 2024 Background Paper on Annulment explains, the restrictions on nationality "serve as a crucial safeguard

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46 *See* Award ¶ 210.

47 Award ¶ 553.

48 *See, e.g.*, ICSID Convention Arts. 13(2), 38, 39, 52(3); ICSID Arbitration Rules 1(3), 3(1)(a)(i), 3(1)(b)(i); Report of the Executive Directors ¶ 36.

49 ICSID Convention Art. 39.

50 ICSID Convention Art. 52(3).

against potential biases and conflicts of interest" and thus maintain "the integrity and impartiality of the proceedings."[51]

66. In view of this, had Prof. Douglas been a Swiss national in 2018, there can be no serious doubt that the ICSID Secretary-General would not have appointed Prof. Tercier as President over Claimants' objections.

67. Prof. Douglas failed to disclose that he had applied for or was intending to apply for Swiss nationality.[52] He also later failed to disclose that he had obtained Swiss nationality. As these facts were not disclosed, Claimants were not given the opportunity to challenge the apparent lack of neutrality from having a Tribunal where the President shared nationality with one (but not both) of the party-appointed arbitrators.

68. Prof. Douglas' acquisition of Swiss nationality during the arbitration was a material fact in any event, but even more so given the significant one-sided connections among Prof. Tercier, Prof. Douglas, and Respondent's Geneva-based counsel that already justified doubts to a third-party observer about the impartiality of the tribunal.

69. The fact of Prof. Douglas' undisclosed acquisition of Swiss nationality during the proceeding and the resulting undisclosed overlapping nationality between Respondent's party-appointed arbitrator and the President of the Tribunal is thus a ground for annulment of the Award.

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[51] ICSID Background Paper on Annulment 2024 (AL-21) ¶ 45.

[52] Nor is Swiss nationality acquired overnight; it may be a lengthy process that takes over 10 years for ordinary naturalization. Switzerland State Secretary for Migration (SEM), *How do I become a Swiss citizen?* (last modified Jan. 31, 2024) (A-53) (explaining that ordinary naturalization requires living for at least 10 years in Switzerland).

4. Professor Douglas Also Failed to Disclose that During the Arbitration He Took on Roşia Montană Project Opponent "Friends of the Earth" as a Client

70. The Award's notification of Prof. Douglas' undisclosed Swiss nationality made clear that material disclosures that should have been made were not. Claimants therefore reviewed matters further, although it is not a party's burden to investigate matters that the arbitrators had an obligation to disclose but failed to do so.

71. ICSID Arbitration Rule 6(2) is clear that the arbitrators have a duty to disclose past and present professional, business, and other relationships with the parties, and any other circumstance that might cause his or her reliability to be questioned by a party, and that this obligation is a continuing one, applicable throughout the arbitration. The rule exists so that the parties can rely on those disclosures. As ICSID's Deputy Secretary-General explained, it is unreasonable to burden a party to investigate facts the arbitrators fail to disclose.[53]

72. Following issuance of the Award, Claimants thus also learned that during the arbitration, at least as early as in 2022, Prof. Douglas took on as a client the NGO "Friends of the Earth."[54] Friends of the Earth for many years has actively opposed the Roşia Montană Project, Gabriel's arbitration claims in this case, and the system of investor-State arbitration generally. This is evident in the reports of two of Respondent's expert witnesses and in multiple exhibits submitted in this arbitration.[55] It also is clear from the social media

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[53] *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (AL-8) ¶¶ 24-25 (ICSID Deputy Secretary-General rejecting Respondent's argument that Claimant was on constructive notice of various facts in the public domain as doing so would "relieve the arbitrator of the continuing duty to disclose," and noting in relation to conference materials that were available to counsel prior to making the challenge that it would be "unreasonable to burden a party with the expectation that its counsel will read every line of every page of every CV provided at a conference").

[54] *See, e.g.*, Friends of the Earth X Post dated Dec. 7, 2022 (A-54) ("Huge thanks to our legal team Jessica Simor KC @JMPSimor, Prof. Zachary Douglas KC, Kate Cook & Gayatri Sarathy."); *Friends of the Earth v. UKEF*, Court of Appeal Judgment dated Jan. 13, 2023 (A-55) at 1 (listing counsel).

[55] *See, e.g.*, Pop ¶ 47 [redacted] Thomson II ¶ 70 [redacted] NGO Statement dated Jan. 2007 (Exh. Pop-15) (Friends of the Earth signing an anti-Project statement asserting, "From the outset, the proposed Rosia Montana gold mine project

posts of Friends of the Earth following issuance of the Award celebrating the dismissal of Gabriel's claims in this case.[56]

73. Thus, while sitting as an arbitrator in the arbitration, Prof. Douglas took on as a client an NGO that actively advocated for the defeat of Gabriel's claims and for the elimination of investor-State arbitration generally. Reflecting the significance of this representation, Prof. Douglas includes his work for Friends of the Earth on his online biographical list of public and private international law cases where he acted as "[l]ead counsel."[57] This material undisclosed client work undertaken during the arbitration of a party with a sustained and active interest in the subject of the arbitration calls into question to any independent observer Prof. Douglas' independence and impartiality.

74. Prof. Douglas' client work for Friends of the Earth is even more problematic because of the following facts.

a. Several NGOs, including ClientEarth, the Center for International Environmental Law (CIEL), the European Center for Constitutional and Human Rights, and Greenpeace Central and Eastern Europe, submitted Non-Disputing Party applications in the case.[58]

b. The Tribunal admitted their submission over Claimants' objections.[59]

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in Romania has been beleaguered by scandals, operational problems, and vehement local, national, and international opposition. If constructed by Toronto-based Gabriel Resources, Rosia Montana would become Europe's largest open-pit gold mine operation and transform the densely inhabited Rosia Montana valley into four open-pit mines. Just a few kilometers south of Rosia Montana, Gabriel Resources owns an even larger concession in Bucium."); Letter from Stop TTIP! to European Parliament dated July 5, 2015 (Exh. C-2889) (signed by Friends of the Earth "to prevent the conclusion of TTIP and CETA" because investor-State dispute settlement is "a threat to democracy and the rule of law").

56 *See* Friends of the Earth X Post dated Mar. 11, 2024 (A-56).

57 Prof. Zachary Douglas KC 3VB Biography (A-57) at 5.

58 Non-Disputing Party Application and Submission dated Nov. 2, 2018.

59 Procedural Order No. 19 dated Dec. 7, 2018.

c. These NGOs engage in a regular practice of teaming together and with Friends of the Earth in their advocacy of common causes.[60]

d. Their common advocacy included opposition to the Roşia Montană Project and to investor-State arbitration.[61] Prof. Douglas' client, Friends of the Earth, issued a press release in 2012 stating that "local campaign groups" were challenging Gabriel's plans to develop the Roşia Montană Project "with the support of the Friends of the Earth Europe network," and that Friends of the Earth "will continue to pressure" the leaders of the Romanian Government coalition political party Democratic Union of Hungarians in Romania (UDMR), which at that time included both the Minister of Environment and the Minister of Culture, "calling on them to put their public image, and the environment before the interests and profits of Gabriel Resources."[62] During the arbitration, in 2019, Prof. Douglas' client, Friends of the Earth, relied on the Non-Disputing Party Submission in the arbitration and on the Non-Disputing Parties' websites to publish a 75-page pamphlet that highlighted Gabriel's case against Romania as its first story "of how the rich and powerful hijacked justice" using investor-State arbitration.[63] Prof. Douglas' client, Friends of the Earth, together with the Gabriel Non-Disputing Parties, ClientEarth and CIEL, also signed a joint statement in 2022 calling for "immediate action" to "urgently get rid of the ISDS system."[64]

e. Prof. Douglas was a longtime member of Matrix Chambers since 2006.[65]

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60 *E.g.*, ClientEarth Press Release dated Feb. 20, 2024 (A-58) (describing the "second time the three organizations – Friends of the Earth, ClientEarth and Good Law Project" teamed up to challenge the UK government on its climate change policy).

61 *See, e.g.*, Claimants' Comments on Non-Disputing Parties' Application dated Nov. 23, 2018 ¶¶ 15-17, 39, 88, 92, 95, n. 97 (citing Exhs. C-2865, C-2866, C-2867, C-2868, C-2869, C-2870, C-2871, C-2881, C-2889, C-2890, and C-2891).

62 Friends of the Earth Press Release dated Feb. 23, 2012 (A-59).

63 Friends of the Earth, Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice, June 2019 (A-60) at 14-19 ("Suing to Force Through a Toxic Goldmine: Gabriel Resources vs Romania").

64 Global Statement on ISDS and climate, 2022 (A-61) (signed by, *inter alia*, CIEL, ClientEarth, and 15 affiliated "Friends of the Earth" entities).

65 Letter from ICSID to the Parties dated Nov. 20, 2015 enclosing statement and Prof. Douglas CV (A-62) (showing Prof. Douglas was a member of Matrix Chambers since 2006).

f. Three other members of Matrix Chambers, including its founding member Jessica Simor KC, started working on the matter for Friends of the Earth when it began in 2020.[66] While Prof. Douglas' name first appears on a legal submission for Friends of the Earth on November 8, 2022,[67] six days after he left Matrix Chambers,[68] it would be surprising if Prof. Douglas first became involved in this Matrix Chambers matter only a few days after he left Matrix.[69]

g. Since March 2022, including while Prof. Douglas was a member of Matrix Chambers, Ms. Simor and two other members of Matrix Chambers represented the Gabriel arbitration Non-Disputing Party ClientEarth in another matter together with Friends of the Earth,[70] concurrently with Prof. Douglas' work for Friends of the Earth. At the

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66 Friends of the Earth Press Release dated June 2021 (A-63) (explaining that legal challenge began in September 2020 and that "Friends of the Earth are represented by: Jessica Simor QC, Kate Cook, Anita Davies (all of Matrix Chambers), and Leigh Day LLP"). *See also* Matrix Chambers - Jessica Simor KC (A-64); Matrix Chambers - Kate Cook (A-65); Matrix Chambers - Anita Davies (A-66).

67 *See Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Appellant's Supplementary Skeleton Argument dated Nov. 8, 2022 (A-67) at 24.

68 *Senior arbitration talent departs Matrix Chambers for 3 Verulam Buildings in London*, Global Legal Post, Nov. 2, 2022 (A-68) (reporting that Prof. Douglas left Matrix Chambers to join 3 Verulam Buildings).

69 *See also* Maxtrix Chambers - Core Values (A-69) (Matrix website emphasizing that its "core values" include include "**Working together**" which means that "[a]lthough our lawyers are individual practitioners, they are committed to teamwork and co-operation in delivering legal services, including through sharing legal knowledge and experience," and also promoting its "**democratic structure**" where "[a]ll Members of Matrix have an equal say in the running of the organisation").

70 *See, e.g.*, Client Earth Press Release dated May 3, 2024 (A-70) (stating that "in March 2022, we teamed up with Friends of the Earth and Good Law Project" to challenge the UK government's net zero strategy, that the government revised its climate plan after a favorable court ruling in July 2022, and that "in February 2024 we went back to court, alongside our partners Friends of the Earth and Good Law Project"); *Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin), Judgment dated July 18, 2022 (A-72) at 1 (listing counsel including David Wolfe QC, Catherine Dobson and Nina Pindham, instructed by Leigh Day for Friends of the Earth, and Jessica Simor QC and Emma Foubister, instructed by ClientEarth); Client Earth Second Press Release dated May 3, 2024 (A-71) ("Friends of the Earth was represented in this case by David Wolfe KC of Matrix Chambers," Catherine Dobson, Nina Pindham, "and by Rowan Smith and Julia Eriksen at the law firm Leigh Day," and "Client Earth was represented in this case by Jessica Simor KC and Emma Foubister of Matrix Chambers"). *See also* Matrix Chambers - David Wolfe KC (A-73); Matrix Chambers - Emma Foubister (A-74).

same time, Prof. Douglas worked with another Matrix member who is married to the CEO of Gabriel Non-Disputing Party ClientEarth.[71]

h. In sum, Prof. Douglas did client work for Friends of the Earth, an anti-Roşia Montană Project NGO that partnered repeatedly with the Non-Disputing Parties opposing Gabriel's claims in this arbitration, including by retaining a counsel team from Matrix Chambers.

75. Prof. Douglas' undisclosed client advocacy for a publicly anti-Roşia Montană Project NGO in these circumstances undermined the Tribunal's independence and impartiality.

76. Advocacy on the part of a tribunal member in other cases for clients with interests at issue in the arbitration has been recognized as creating an impermissible conflict for continuing service on the tribunal.[72] For example, in the *Vito Gallo v. Canada* NAFTA arbitration, arbitrator Christopher Thomas disclosed that he had done a "small amount" of legal work reviewing advice provided to Mexico on certain trade and investment matters not involving NAFTA.[73] The ICSID Deputy Secretary-General, who was the authority ruling on the challenge in that case, observed that arbitrator Thomas' legal work for Mexico risked creating justifiable doubts as to his impartiality and independence and that arguments to the effect that the legal work for Mexcio was *de minimi*s "misses the point" because "[w]here arbitral functions are concerned, any paid or *gratis* service provided to a third party with a right to intervene can create a perception of a lack of impartiality. The amount

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[71] Matrix Chambers - Toby Fisher (A-89) (describing his environmental law practice including "ongoing litigation" for Friends of the Earth); Toby Fisher LinkedIn Post (A-101) (posting that his wife Laura Clarke OBE is ClientEarth's CEO). *See also, e.g.*, *In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction*, Opinion dated Feb. 10, 2023 (A-102) (co-authored by Prof. Douglas, by two Matrix members including Toby Fisher, and by one other lawyer); Toby Fisher LinkedIn Post (A-103) (linking the opinion "with Prof Zachary Douglas KC, Brenda Heather-Latu and Jessica Jones" and stating "We'll be speaking to the opinion in a number of fora in coming days and weeks" and "see other posts for registration details"); Toby Fisher LinkedIn Post (A-104) (thanking Prof. Douglas for organizing an event on the topic with the Geneva Graduate Institute and posting registration details).

[72] *See Grand River Enterprises v. United States*, Letter from ICSID Secretary-General to Prof. James Anaya dated Nov. 28, 2007 (AL-6) (ICSID Secretary advising arbitrator Anaya that his advocacy for clients in other international fora regarding the United States' other international commitments was incompatible with his service in the NAFTA arbitration at issue).

[73] *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (AL-8) ¶ 11.

of work done makes no difference. What matters is the mere fact that work is being performed."[74] The ICSID Deputy Secretary-General noted that the arbitrator's "judgment may appear to be impaired by the potential interest of the advised …party," that if the advised party "were formally to intervene … this would necessarily lead to the reconstitution of the tribunal," and that the arbitrator's "involvement" was "problematic."[75] The ICSID Deputy Secretary-General considered that "[i]t would be next to impossible for Mr. Thomas to avoid altogether … the appearance of an inability to distance himself fully from the interests of Mexico," and that "from the point of view of a 'reasonable and informed third party' …, i.e., a 'fair minded, rational, objective observer,' … there would be justifiable doubts about Mr. Thomas' impartiality and independence" were he to continue as arbitrator while he also did legal work for Mexico.[76]

77. By contrast here, Prof. Douglas did not disclose his work for anti-Roşia Montană Project NGO Friends of the Earth, breaching his disclosure obligation and thus depriving Claimants as well as the other members of the Tribunal of the knowledge and the opportunity to address the issue.

78. Prof. Douglas' undisclosed client work for Friends of the Earth during the arbitration thus is a further reason the Award must be annulled for lack of a properly constituted Tribunal.

5. Connections among the Tribunal President, Respondent's Party-Appointed Arbitrator, and Respondent's Counsel Were Not Adequately Disclosed and Were Incompatible with Fundamental Notions of Independence and Impartiality

79. As noted above, in view of the failures to disclose that became evident upon issuance of the Award, Claimants sought to obtain a more complete understanding of the circumstances at issue. Claimants' review has revealed a degree of personal and professional connections beyond the arbitrators' disclosures and well beyond what any informed third party reasonably would trust to deliver an impartial, unbiased proceeding.

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74 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (AL-8) ¶ 32.

75 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (AL-8) ¶ 33.

76 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (AL-8) ¶¶ 35-36.

80. While some interaction among specialists in the field may be expected, as the *Eiser ad hoc* committee recognized, it is obvious that the more connections there are, the more likely the connections will surpass the limits of what may be tolerated while still maintaining the appearance to a reasonable third party of independence and impartiality.[77] Moreover, what is reasonable must be considered not from the perspective of someone from among a circle of arbitration insiders,[78] but from the perspective of a true third party, one whose substantial interests have been submitted for adjudication via a process expected to be conducted by truly independent and impartial persons.[79]

81. In this context, the principle is well established that a lawyer's relationships are to be identified with his or her law firm.[80] Thus, in disqualification decisions, it is accepted that "in considering a possible lack of impartiality or independence, a partner in a law firm had to be identified with his partners, at least insofar as their professional activities were concerned."[81] This is reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration, which likewise provide that an "arbitrator is in principle considered to bear the identity of the arbitrator's law firm" and that "the relevant

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77 *See Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 217 ("[I]t is true that arbitrators, lawyers and experts doing investment arbitrations live on the same planet. Some interaction is, therefore, inevitable. Nevertheless, it is obvious and it is to be expected that the more "connections" there are between them, across cases and, particularly, in different roles, the more chances there are that these may give rise to conflicts.").

78 *See* Pierre Tercier, *Au 'club' des arbitres*, Chapter 23 in Stories from the Hearing Room: Experience from Arbitral Practice, Essays in Honour of Michael E. Schneider (Bernd Ehle, Domitille Baizeau eds.), Wolters Kluwer 2015 (A-75) (describing Prof. Tercier's view of how intimate bonds of personal friendship are formed by arbitration colleagues working together).

79 *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Ruling regarding Participation of David Mildon QC dated May 6, 2008 (AL-7) ¶¶ 30-31 (deciding that Respondent could not add Mr. Mildon, a barrister from the same Chambers as the Tribunal President, to Respondent's counsel team due to the justifiable apprehension of partiality created from the perspective of Claimant, for whom the London Chambers system was foreign).

80 *Blue Bank International & Trust v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposals to Disqualify a Majority of the Tribunal dated Nov. 12, 2013 (AL-14) ¶ 66 (recognizing the principle that a lawyer's relationships are to be identified with his or her law firm).

81 LCIA Reference No. UN96/X15 (May 29, 1996), *available at* 27 Arb. Int'l 317-319 (2011) (AL-4) ¶ 4.1.

connections with a party may include activities other than representation in a legal matter."[82]

82. Moreover, an appearance of partiality towards counsel is the same as an appearance of partiality towards a party – and this can take the form of affinity between a law firm, its partners, and an arbitrator.[83]

83. The connections at issue here include business relationships among Prof. Tercier, Prof. Douglas, and LALIVE through the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program. The nature and extent of these connections compromise the independence and impartiality of Prof. Tercier and Prof. Douglas and were not disclosed.

a. In addition to the fact that Prof. Tercier and Prof. Douglas have both been longtime members of the faculty of the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program,[84] they both play a leadership role in the organization and governance of the program. Prof. Douglas is a full-time faculty member, a member of the CIDS Council, "the overarching body supervising both the CIDS and the MIDS,"[85] a member of the MIDS Governance Committee, which "oversees all matters regarding the structure and functioning of the program,"[86] and a member of the MIDS Program Committee.[87] Prof. Tercier has been

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82 IBA Guidelines on Conflicts of Interest in International Arbitration (AL-19), Explanation to General Standard 6 at 11.

83 *See Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Orrego Vicuña dated Dec. 13, 2013 (AL-15) ¶¶ 79-80 (appearance of impartiality in relation to the party's counsel extended to appearance of impartiality toward the party). *See also* Appeal no. 23-10.972 dated June 19, 2024, Court of Cassation (France) (AL-20) (upholding decision to annul arbitral award based on impartiality demonstrated by personal friendship between arbitrator Clay and counsel Gaillard).

84 MIDS Faculty (A-47) (MIDS website).

85 CIDS The Center (A-76) (CIDS website).

86 CIDS Governance (A-77) (CIDS website).

87 *E.g.*, MIDS 2022-2023 program brochure (A- 78).

featured among the principal faculty members of the MIDS program since 2008 and is a member of the MIDS Advisory Board.[88]

b. Shortly after accepting his appointment as Tribunal President in this case, Prof. Tercier appointed the Tribunal Assistant in the case who is a graduate of the Graduate Institute of International Law and Development Studies.[89]

c. Soon after that, Prof. Tercier chaired a discussion at the University of Geneva among Professors of the MIDS program that featured Prof. Douglas as a speaker.[90] This type of joint activity for the MIDS program suggests a degree of consistent collaboration among faculty members.

d. Prof. Tercier and Prof. Douglas did not disclose that Respondent's arbitration counsel, the Geneva-based LALIVE law firm, is a principal supporter of MIDS. MIDS is a Geneva-based program that is a partnership between the University of Geneva and the Graduate Institute of International and Development Studies in Geneva. Pierre Lalive, the eponymous founding partner of LALIVE, was dean of the University of Geneva and a professor at MIDS.[91]

e. LALIVE provides on-going material support to the Graduate Institute of International and Development Studies and to the MIDS program. LALIVE's support is featured on the firm's website describing its academic activities as "a vital strand of the firm's DNA and culture."[92] This includes the firm's showcase LALIVE Lecture, an annual collaboration co-organized and co-hosted with the Graduate Institute of International

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88 *See, e.g.*, MIDS 2020-2021 Program Brochure (A-79) at 3; MIDS 2023-2024 Program Brochure (A-80) at 3.

89 *See* Letter from Tribunal to Parties dated Apr. 14, 2018, enclosing Maria Athanasiou CV (A-12). Claimants did not object to the appointment of Ms. Maria Athanasiou after Claimants requested that she "confirm whether she is a former student of Prof. Douglas" and "should disclose any connections with the Parties, their counsel, and other members of the Tribunal." Letter from Claimants to Tribunal dated Apr. 23, 2018 (A-13). Ms. Athanasiou did not make any disclosures. Letter from ICSID to the Parties dated Apr. 25, 2018, enclosing Ms. Athanasiou Declaration dated Apr. 25, 2018 (A-81).

90 Program - Université de Genève, *The Settling of International Disputes at the Crossroads*, Sept. 27, 2018 (A-82).

91 LALIVE, About us - Heritage, Professor Pierre Lalive (A-83) (LALIVE website).

92 LALIVE, About us - Academia (A-84) (LALIVE website).

and Development Studies, and also includes a broader partnership between the institutions, "LALIVE and the MIDS," described by LALIVE as "[b]uilding on our strong relationship with the Graduate Institute of International and Development Studies and the University of Geneva."[93] The partnership includes scholarships for MIDS, conducting seminars for MIDS students, and offering internships to MIDS students, with LALIVE noting that the firm counts nine of its lawyers, including five partners, who trained at the Graduate Institute.[94] Thus, LALIVE advertises on its website its association with and support of the Graduate Institute and the MIDS program as a distinguishing feature of the firm.

f. Likewise, on its part, the Graduate Institute of International and Development Studies prominently features the financial, participatory, and material support it receives from LALIVE as a material selling point of the MIDS program, which it advertises in the program's marketing brochures,[95] on its website,[96] and in the Graduate Institute's Annual Reports.[97]

g. While, as noted above, Prof. Douglas disclosed in 2019 that he intended to attend the LALIVE lecture and dinner, he made a point of saying that he could not confirm whether members of the LALIVE team would attend.[98] Yet he did not explain in his disclosure that the Graduate Institute was a co-organizer and co-sponsor of the annual event together with LALIVE. Prof. Douglas failed to make any subsequent disclosure

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93 LALIVE, About us - Academia (A-84) (LALIVE website).

94 LALIVE, About us - Academia (A-84) (LALIVE website). As LALIVE's website indicates there are fewer than 25 partners in the whole firm, that too is a significant connection.

95 *E.g.,* 2022-2023 MIDS brochure (A-78) (noting "[t]hanks to a partnership with LALIVE" the program features a "LALIVE Training Seminar," a half-day training seminar "with the firm's leading lawyers.").

96 Partnership MIDS & LALIVE (A-85) (CIDS website).

97 *E.g.*, CIDS Annual Report 2022 (A-86) at 28 ("MIDS and LALIVE have been partners since the inception of the MIDS program. The partnership encompasses several critical components, including the practical training seminar on commercial arbitration organized as part of the MIDS program each year. LALIVE also commits to offering internships to approximately four or five MIDS students each year. Moreover, the law firm offers a full scholarship for one student, covering MIDS tuition fees and living expenses in Geneva for the duration of the one-year program. Lawyers from the firm also participate as arbitrators during the Academic Retreat.").

98 Email from Tribunal Secretary to Parties dated Apr. 30, 2019 (A-14).

in 2022 or in 2023 when he participated in the program again as the Graduate Institute's representative and introduced the program headliners together with LALIVE's representative and founding partner Michael Schneider.[99]

h. The extent of LALIVE's association with and financial and material support for the academic institution that is the longtime professional home of Prof. Douglas is incompatible with an appearance to any reasonable third-party observer of Prof. Douglas' independence and impartiality – a circumstance compounded in this case by the fact that Prof. Tercier is also a prominent member of the MIDS faculty.

i. Indeed, neither Prof. Douglas nor Prof. Tercier disclosed LALIVE's on-going partnership with and support of the academic institution at which they both are associated. It is important to emphasize in this respect that while there is nothing improper about this level of mutual collaboration and support between a law firm and an academic institution, it is a significant factor for disclosure, and it is relevant to the question of who may acceptably be appointed as an arbitrator in a case where there is not informed consent regarding such factors.

84. Prof. Tercier also developed professional connections undermining an appearance of impartiality through the Swiss Arbitration Association (ASA), an organization with which LALIVE strongly associates itself, as also reflected prominently on its website.[100] The ASA, which holds an annual multi-day conference in Gevena, was co-founded by Pierre Lalive and led after that by LALIVE co-founder Michael Schneider.[101] Since then, it continuously has included numerous LALIVE partners in its leadership, including a senior member of Respondent's arbitration team, Noradele Radjai. At the same time, Prof.

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[99] Report on LALIVE Lecture of Sept. 29, 2022 (A-87) (describing the lecture held in 2022 at the Graduate Institute of International Studies introduced by LALIVE's Michael Schneider and by Prof. Douglas); Report on LALIVE Lecture of May 4, 2023 (A-88) (describing the lecture held in 2023 introduced by LALIVE's Michael Schneider and by Prof. Douglas and noting that "Each year, the Graduate Institute of International and Development Studies (HEID) and LALIVE have organized and co-hosted the LALIVE Lecture at the HEID. The first one took place in 2007.").

[100] LALIVE, About us - Academia (A-84) (LALIVE website, describing prominent association with ASA).

[101] Michael Schneider, President's Message, A word about ASA, 29 ASA Bulletin 4, 779-780 Dec. 2011 (A-42) (LALIVE partner Michael Schneider, then the ASA President, emphasizing that Pierre Lalive co-founded the ASA and later served as ASA President).

Tercier was a long-standing member of the Board of Directors of ASA and undoubtedly a regular contributor to its conferences and publications.[102]

85. Prof. Tercier is also a longtime member of the Advisory Board of the ASA Bulletin, the ASA's quarterly journal that Pierre Lalive founded.[103] During Prof. Tercier's time on the Advisory Board, the ASA Bulletin's editors have included multiple partners of the LALIVE law firm, including the longtime Editor in Chief, Matthias Scherer, who is a senior member of Respondent's arbitration team,[104] as well as Respondent's lead Romanian counsel, Crenguța Leaua, who has been a member of the ASA editorial staff since 2019.[105] Prof. Tercier did not disclose the extent of his professional connections to LALIVE partners though the activities of the ASA or the ASA Bulletin.

86. Prof. Tercier also had strong connections to the founding members of the LALIVE law firm that he did not disclose. In this context, it is relevant to consider that LALIVE is a relatively small, specialist law firm with less than 25 partners in total, and that it is strongly identified with its principal founder, Pierre Lalive.[106] Prof. Tercier was the person selected in 2011 to conduct an in-depth video interview of Pierre Lalive in commemoration of

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[102] *See*, *e.g.*, ASA Special Series No. 29 (ASA 2007 Annual Conference) (A-43); ASA Special Series No. 35 (ASA 2009 Annual Conference) (A-44); ASA Special Series No. 38 (ASA 2011 Annual Conference) (A-45); ASA Special Series No. 46 (ASA 2018 Annual Conference) (A-46).

[103] *See* Michael Schneider, President's Message, A word about ASA, 29 ASA Bulletin 4, 779-780 Dec. 2011 (A-42).

[104] Other LALIVE partners on the editorial staff have included Domitille Baizeau, who was an Editor from 2007 until 2014, and Catherine Anne Kunz, an Editor since 2015.

[105] *See, e.g.*, ASA Bulletin, Vol. 19, Issue 2 (2001) (A-19); ASA Bulletin, Vol. 20, Issue 1 (2002) (A-20); ASA Bulletin, Vol. 21, Issue 1 (2003) (A-21); ASA Bulletin, Vol. 22, Issue 1 (2004) (A-22); ASA Bulletin, Vol. 23, Issue 1 (2005) (A-23); ASA Bulletin, Vol. 24, Issue 1 (2006) (A-24); ASA Bulletin, Vol. 25, Issue 1 (2007) (A-25); ASA Bulletin, Vol. 26, Issue 1 (2008) (A-26); ASA Bulletin, Vol. 27, Issue 1 (2009) (A-27); ASA Bulletin, Vol. 28, Issue 1 (2010) (A-28); ASA Bulletin, Vol. 29, Issue 1 (2011) (A-29); ASA Bulletin, Vol. 30, Issue 1 (2012) (A-30); ASA Bulletin, Vol. 31, Issue 1 (2013) (A-31); ASA Bulletin, Vol. 32, Issue 1 (2014) (A-32); ASA Bulletin, Vol. 33, Issue 1 (2015) (A-33); ASA Bulletin, Vol. 34, Issue 1 (2016) (A-34); ASA Bulletin, Vol. 35, Issue 1 (2017) (A-35); ASA Bulletin, Vol. 36, Issue 1 (2018) (A-36); ASA Bulletin, Vol. 37, Issue 1 (2019) (A-37); ASA Bulletin, Vol. 38, Issue 1 (2020) (A-38); ASA Bulletin, Vol. 39, Issue 1 (2021) (A-39); ASA Bulletin, Vol. 40, Issue 1 (2022) (A-40); ASA Bulletin, Vol. 41, Issue 1 (2023) (A-41).

[106] *See* LALIVE, About us - Heritage, Professor Pierre Lalive (A-83) (LALIVE website); LALIVE, People (A-90) (LALIVE website counting fewer than 25 partners).

ICCA's 50th Anniversary,[107] and reflecting personal admiration and friendship, Prof. Tercier contributed a chapter to a *Liber amicorum* for LALIVE partner Michael Schneider, edited by two other LALIVE partners, in which Prof. Tercier describes the friendly personal connections he has cultivated with colleagues on past tribunals and his especially warm regard for Mr. Schneider.[108]

87. Prof. Tercier did not disclose that for many years Mr. Schneider and LALIVE partner Bernd Ehle have been lecturing at the University of Fribourg's Institute for International Business Law, where Prof. Tercier also has continued to teach as Emeritus Professor,[109] or that Prof. Tercier sat together with LALIVE partner Mr. Schneider to judge the final round of the Frankfurt Investment Arbitration Moot Competition in March 2021.[110]

88. Prof. Tercier and Prof. Douglas both failed to disclose that they have been serving together since 2020 on a tribunal in another investor-State case where Prof. Douglas is Respondent's party-appointed arbitrator and Prof. Tercier is President.[111] This case is not before ICSID and information about it is not readily accessible.

89. Prof. Tercier and Prof. Douglas also both failed to disclose the extent to which they "personally" know each other, or what Prof. Tercier meant by that in his initial disclosure. While the full scope of their relationship may never be known, at least to Applicants, their kinship is evident from connections between Prof. Tercier and Prof. Douglas' wife Marion Colombani. In 2018 Ms. Colombani co-founded Fondation Opaline, a Geneva-based charitable organization focused on environmental issues,[112] and in its activity report for

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107 An Interview with Prof. Dr. Pierre Lalive (A-91).

108 *See* Pierre Tercier, *Au 'club' des arbitres*, Chapter 23 in Stories from the Hearing Room: Experience from Arbitral Practice, Essays in Honour of Michael E. Schneider (Bernd Ehle, Domitille Baizeau eds.), Wolters Kluwer 2015 (A-75) (describing Michael Schneider personally in warm terms).

109 LinkedIn Post of University of Fribourg's Institute for International Business Law and comment of Bernd Ehle (A-92); Prof. Tercier CV, annexed to Letter from ICSID to the Parties dated Apr. 5, 2018 (A-11).

110 *See* Posting from final round March 2021 Frankfurt Investment Arbitration Moot Competition (A-93).

111 *See Wang Jing v. Ukraine*, PCA (UNCITRAL), registered Dec. 5, 2020, Jus Mundi summary (A-94).

112 Swiss Trade Register Records of Constitution for Fondation Opaline dated Apr. 5, 2018 (A-95) (Marion Colombani co-founder); Geneva Corporate Registry Records for Fondation Opaline dated June 28, 2024 (A-96).

2019 Fondation Opaline thanked Pierre Tercier as one of the few dozen individual donors described as the organization's "Godfathers and Godmothers."[113]

90. In a further reflection of the camaraderie and personal and professional interconnection among Prof. Tercier, Prof. Douglas, and LALIVE, in May 2023 the Tribunal Assistant Maria Athanasiou, Prof. Douglas, LALIVE partner Catherine Anne Kunz, and LALIVE associate Trisha Mitra-Veber worked on the organizing committee that planned an event celebrating Prof. Tercier on his 80th birthday.[114] No disclosures were made about that event, although it included a video tribute honoring Prof. Tercier by ICSID Deputy Secretary-General and Gabriel case team leader Gonzalo Flores.[115] The event was described on the LinkedIn posts of Ms. Nhu-Hoang Tran Thang, a longtime colleague of both Prof. Tercier and of LALIVE,[116] who notably "liked" four LinkedIn posts made by Respondent's Romanian arbitration team and by the LALIVE team announcing the result in the Gabriel arbitration.[117]

91. These cumulative significant personal, institutional, professional, and business connections reflect a level of regular interaction, dependence, familiarity, and friendship all on one side that cannot in any reasonable way be reconciled with the requirement of maintaining the appearance of impartiality and independence and therefore compel the conclusion that the Tribunal in this case was not properly constituted.

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113 Fondation Opaline Activity Report for 2019 (A-97) at 6.

114 Nhu-Hoang Tran Thang LinkedIn Post (A-49).

115 Program for Celebration of the 80th Birthday of Prof. Pierre Tercier dated May 12, 2023 (A-48).

116 Ms. Thang's LinkedIn bio (A-98) indicates that she worked for Prof. Tercier's arbitration firm from 2012-2016, for LALIVE's Geneva team from 2016-2019, and then at Prof. Tercier's current firm Peter & Kim in Geneva from 2020-2023. It is not known whether Ms. Thang worked on the Gabriel case while she worked with the LALIVE law firm.

117 LinkedIn Posts of Leaua Damcali Deaconu Paunescu - LDDP, Prof. Crenguta Leaua, and Baptiste Rigaudeau (A-99) (liked by Nhu-Hoang Tran Thang).

6. The Majority's Personal and Professional Connections with Each Other and with Respondent's Counsel and Their One-Sided Record of Decisions Created the Conditions for a Biased Echo-Chamber Rather than Deliberations Among Independent and Impartial Arbitrators

92. The significance of all the factors set out above is further aggravated by the fact that although appointed as President of the Tribunal, Prof. Tercier's record of decision-making in investor-State cases overwhelmingly has favored State parties, even more so than it did when Claimants objected to his appointment six years ago.

93. As noted above, at the time of his appointment in 2018, Prof. Tercier had acted as arbitrator in 15 investor-State cases that had ended with a final decision. In all those cases, the tribunal either dismissed the claims entirely or awarded very little compensation, including in five decisions by majority over a dissent of the claimant's party-appointed arbitrator.

94. Since then, Prof. Tercier has decided six more investor-State cases that all ended in a complete dismissal or very low compensation, with three of them again by majority over a dissent or declaration of the claimant's party-appointed arbitrator. Thus, having now decided 21 investor-State cases, Prof. Tercier has ruled overwhelmingly in favor of the State—eight times over a dissent or declaration of the claimant's party-appointed arbitrator.[118] Reflecting this tendency, Prof. Tercier has been a party-appointed arbitrator in four ICSID cases, but only for the respondent State and never for the claimant.[119]

95. Prof. Douglas' record of decision-making favoring States in investment treaty cases is even more pronounced, with at least 22 cases decided in favor of the State party and none in favor of an investor.

96. In these circumstances, which include the undisclosed overlapping nationality of Prof. Tercier and Prof. Douglas, Prof. Douglas' undisclosed work for an anti-Gabriel NGO, and all the connections between Prof. Tercier, Prof. Douglas, and Respondent's counsel noted above, any reasonably informed third party justifiably would doubt that a Tribunal

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[118] Prof. Tercier's largest award to date is only US$ 20.8 million, and that was a unanimous award in *Air Canada v. Venezuela*, ICSID Case No. ARB(AF)/17/1.

[119] ICSID, Prof. Pierre Tercier (last updated Aug. 17, 2023) (A-100).

including Prof. Tercier sitting together with Prof. Douglas could approach deliberations in this case with the requisite qualities of independence and impartiality that the ICSID Convention requires.

97. These factors thus further compel the conclusion that the Tribunal was not properly constituted in accordance with Article 52(1)(a) of the ICSID Convention and that the resulting Award must be annulled in its entirety on that basis.

B. Serious Departures from Several Fundamental Rules of Procedure

98. Under Article 52(1)(d) of the ICSID Convention, a party may request annulment of an award if "there has been a serious departure from a fundamental rule of procedure." The decisions of numerous annulment Committees confirm that fundamental rules of procedure include, among others, (i) an independent and impartial tribunal; (ii) the right to be heard; and (iii) the equal treatment of the parties.[120]

1. Lack of Independent and Impartial Tribunal

99. As to the right to an independent and impartial tribunal, the *Eiser v. Spain* committee observed:

> [I]ndependence and impartiality of an arbitrator is a fundamental rule of procedure. This means that the arbitrator has a duty not only to be impartial and independent but also to be perceived as such by an independent and objective third party observer. This duty includes the duty to disclose any circumstance that might cause his reliability for independent judgment to be reasonably questioned by a party. In this respect, this Committee subscribes to the *EDF* committee's views that "[i]t is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal." There can be no right to a fair trial or a right of fair defense without an independent and impartial tribunal.[121]

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120 ICSID Background Paper on Annulment 2024 (AL-21) ¶ 105 (citing annulment decisions).

121 *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 239 quoting *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated Feb. 5, 2016 (AL-12) ¶ 123.

The circumstances summarized in the section above demonstrate that a reasonable and informed third party would justifiably doubt that the Tribunal majority was independent and impartial in this case thus constituting a serious departure from a fundamental rule of procedure requiring annulment of the Award.

2. Denial of Right to Be Heard

100. The lack of a reliably independent and impartial Tribunal also necessarily is a serious departure from the fundamental right to be heard. The right to be heard implicates concepts of integrity, fairness, and natural justice that are not met where, as in this case, two of the three arbitrators have the same nationality and extensive and continuing personal and professional connections to each other and to Respondent's arbitration counsel, one of the arbitrators while sitting on the Tribunal has been doing client work for an NGO that has been engaging in advocacy opposed to the Claimants' arbitration claims, and the two arbitrators also have a decisional history in investment treaty arbitrations consistently favoring respondent States.

3. Denial of Equal Treatment

101. The fundamental rule of procedure requiring that the parties must be assured of equal treatment is also undermined when two of the three arbitrators have extensive personal, institutional, professional, and business connections to one side, the same nationality, and a decisional history of ruling consistently for one side that call into question their impartiality and independence. Equal treatment, moreover, is entirely undermined when one of the arbitrators, while sitting on the tribunal, undertakes client work for an NGO engaged in advocacy opposed to the Claimants' arbitration claims.

102. Here, the lack of equal treatment resulting from Prof. Douglas' undisclosed client work for Friends of the Earth, together with the Tribunal majority's extensive connections with each other and with Respondent's arbitration counsel, their failure to disclose a material change in nationality and other facts bearing on their independence and impartiality, and their one-sided record of deciding cases, constitutes a serious departure from a fundamental rule of procedure requiring equal treatment between the parties.

4. The Departures Were Serious Requiring Annulment

103. As the *Eiser ad hoc* committee observed, a departure from a fundamental rule of procedure is serious when it produces a material impact on the award, and while the applicant is not required to prove that the departure from the rule was decisive for the outcome, it must demonstrate "the impact the issue may have had."[122]

104. In this case, the undisclosed overlapping nationality and relationships undermining tribunal independence and impartiality and Prof. Douglas' undisclosed client work for an NGO that stridently opposed Gabriel's claims in the arbitration, undoubtedly may have had material impacts on the Award, as Prof. Grigera Naón's 37-page dissent makes perfectly clear. In circumstances such as the present, the *Eiser ad hoc* committee emphasized:

> When one of the most basic requirements of justice, such as the right to an independent and impartial tribunal, is disregarded, an award cannot stand and must be annulled in its entirety.[123]

105. The serious departures from the fundamental rules of procedure that are necessary to ensure a fair process render the Award in this case fatally defective. They require that the Award be annulled in its entirety.

IV. GROUNDS TO ANNUL THE AWARD IN PART

106. In the event the Award is not annulled in its entirety (which it must be), the part of the Award dealing with liability together with the decision (based on the liability ruling) to award costs to Respondent ("the majority's liability decision") suffers from other fundamental defects separately mandating annulment.

107. That is, in addition to the fundamental flaws that warrant annulment of the Award in its entirety, the majority's liability decision is irretrievably flawed for multiple additional, separate reasons requiring annulment. Specifically, wholly apart from the problems with the Tribunal that infect the entire Award for that reason, the majority liability decision itself

[122] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 252.

[123] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 254.

separately warrants annulment because: (i) the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52(1)(b)); (ii) there have been serious departures from fundamental rules of procedures (ICSID Convention, Article 52(1)(d)); and (iii) the Award fails to state the reasons on which it is based (ICSID Convention, Article 52(1)(e)).

108. The Applicants thus, in the alternative, seek annulment of Award paragraphs 767-1357 and 1358.2, except for the unanimous decisions at Award paragraphs 1183-1185, 1220-1223 and 1358.1 relating to jurisdiction and admissibility.

A. Manifest Excess of Power

109. There are grounds for annulment of an Award under Article 52(1)(b) of the ICSID Convention where the tribunal has "manifestly exceeded its powers." A failure to apply the applicable law may constitute a manifest excess of powers.[124]

110. The majority manifestly disregarded the applicable Romanian legal framework in its assessment of liability. It did so in relation to its assessment of (i) Romania's treatment of Gabriel's and RMGC's contract rights; (ii) the environmental permitting process; (iii) RMGC's application for Bucium exploitation licenses; and (iv) the UNESCO designation.

111. The majority also manifestly disregarded the applicable international law in its assessment of liability, including by (i) not considering the cumulative effects of the State's treatment of Gabriel's investment; (ii) basing liability on Gabriel's alleged contemporaneous non-objection to the State's treatment; (iii) basing liability on the State's alleged non-intention to harm; and (iv) failing to consider the State's omissions, including the State's failure to take a decision on whether to issue the environmental permit for Roşia Montană and its failure to take any decision on the exploitation licenses for Bucium. By thus manifestly disregarding the applicable international law, the majority ultimately assessed liability based on non-legal reasons contrary to Article 42(3) of the ICSID Convention.

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[124] *Enron Creditors Recovery Corp. and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment dated Jul. 30, 2010 (AL-10) ¶ 67; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment dated June 29, 2010 (AL-9) ¶ 159.

112. These defects warrant annulment of the majority's liability decision, which includes the award of costs to Respondent.

1. The Majority Disregarded the Applicable Romanian Legal Framework in Its Assessment of Liability

113. The majority acknowledged the law that was applicable to decide the case on the merits, noting the applicability in various respects of both international law and Romanian law. It observed that pursuant to Article 42(1) of the ICSID Convention, the Tribunal was required to decide the dispute "in accordance with such rules of laws as may be agreed by the parties" and that "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[125] It then observed in respect of Gabriel's claims that:

> Article XIII(7) of the Canada-Romania BIT provides that "[a] tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Accordingly, the Tribunal will apply the Canada-Romania BIT itself and the applicable rules of international law to decide Gabriel Canada's claims in this arbitration.
>
> The UK-Romania BIT does not contain a choice of law clause. Therefore, pursuant to the second sentence of Article 42(1) of the ICSID Convention (set out in para. 563 above), in deciding Gabriel Jersey's claims in this arbitration, the Tribunal shall apply Romanian law and such rules of international law as may be applicable.
>
> This being said, Romanian law may also be considered generally to determine, where appropriate, the scope and extent of the rights and obligations of the Parties alleged to give rise to the existence of an "investment" for jurisdictional purposes, as well as those alleged to give rise to the claims on the merits.[126]

114. The majority recognized that the Parties' dispute concerned whether Romania's treatment of Claimants' investment "was made in accordance with the rule of law or based on political considerations and without regard to the applicable legal processes and respect for

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[125] Award ¶ 563.

[126] Award ¶¶ 564-566 (emphasis removed).

vested rights."[127] The majority further acknowledged that "[i]n undertaking this Project with all its known risks, Claimants could expect that the process for such undertaking, including the issuance of the Environmental Permit for the Project, would be fair, just, and in accordance with the law."[128]

115. It thus was clear to the majority that Gabriel's claims necessarily were based on the Romanian law applicable to RMGC and the various permitting and licensing procedures at issue as an essential element of any liability determination. Yet the majority manifestly disregarded that applicable legal framework throughout its assessment of liability. Indeed, the majority emphasized that "it is adjudicating the present case ***under international law***," which it then explained by stating that "its mandate is not to review the merits of a State's decision by reference to the applicable domestic law and the facts, but to determine whether the State acted in accordance with its international obligations insofar as Claimants' investments are concerned."[129] By proceeding this way, the majority disregarded the Romanian legal framework as a necessary element in the assessment of liability in this case, which is a fundamental defect in its approach.

a. Gabriel and RMGC's Contractual Rights

116. Gabriel's principal claim was based on the Government's coercive demands to change the economic terms of its agreements with Gabriel, including the parties' percentage ownership in RMGC and the royalty rate that would be applied to the Roşia Montană Project production. Claimants claimed that the Government's demands were coercive because the Government repeatedly conditioned its willingness to progress Project permitting on Gabriel meeting its economic demands. The Award acknowledges that as of August 2011, Gabriel and the State held their respective shareholdings in RMGC in accordance with the shareholders agreement embodied in RMGC's Articles of Association and that under the Roşia Montană License, which was a concession agreement, the royalty

[127] Award ¶ 6.

[128] Award ¶ 944.

[129] Award ¶ 945 (emphasis in original).

from production was set at 4%.[130] The majority concluded that Gabriel's claim lacked merit because, *inter alia*, the State "needed to revisit" the issue of the Project's economics, that "this was one aspect that had to be clarified,"[131] and that "outstanding issues relating to the Project" included "the economic issues."[132] In so concluding the majority manifestly disregarded the applicable law pursuant to which Gabriel had established contract rights for its shareholding of RMGC and RMGC had established contract rights for the royalty levels, both of which moreover were subject to the protections set forth in the BITs.

b. Environmental Permitting Process

117. With regard to the environmental permitting process, the majority accepted that the EIA process is an administrative permitting procedure based on assessment of an EIA Report, subject to procedures established in law.[133] It was undisputed that while there was a requirement for public consultation, the applicable legal requirements for an environmental permit do not include economic or political factors.[134] The Award confirms that in July 2013 the Ministry of Environment prepared a draft decision proposing to issue the environmental permit,[135] and in September 2013 Prime Minister Ponta acknowledged, "I was obligated, under the law, and I am trying to explain this to those who want to hear me, that under the current law I had to give approval and the Roşia Montană Project had to start. They have met all the conditions required by the law."[136]

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130 Award ¶¶ 11, 120, 947.

131 Award ¶¶ 949, 951, 954.

132 Award ¶ 955.

133 Award ¶ 19.

134 This was made clear by the Romanian law experts of both Parties. *See, e.g.*, Tr. (Dec. 11, 2019) 2630:2-19 (Respondent's Romanian Law Expert Tofan responding to Tribunal Questions); Tr. (Dec. 11, 2019) 2722 (Respondent's Romanian Law Expert Dragoş responding to Tribunal Questions). *See also* Award ¶ 1230 (quoting TAC President Mihai Faca, a State Secretary from the Ministry of Environment, stating that other "issues, such as contractual issues or issues related to the relationship with the Romanian State, royalties, etc. These are issues there is no point for us to discuss here in the TAC, as we only deal with the environmental protection….").

135 Award ¶ 55.

136 Award ¶ 1119.

118. Yet the majority's liability decision was based on what it considered was the "proper context" for addressing the claims in the case,[137] which it stated, in manifest disregard of the applicable law, included, *inter alia*, that the EIA Process "was intrinsically linked to politics,"[138] that "the preparation of the EIA was therefore a complex process … touching not only on environmental, social and cultural issues, but also on legal, economic and political ones,"[139] and that "one cannot limit the EIA Process to its technical aspects and conclude those matters were resolved … [T]his was a massive project with much at stake, the public interest was important, and the process was therefore influenced by all sides, whether ultimately justified or not."[140] Thus, in manifest disregard of the applicable law, the majority's liability decision assessed Gabriel's claims as they related to the environmental permitting process based on the majority's characterization of that process as one intrinsically linked to extra-legal factors, including principally politics.[141]

c. Bucium Applications

119. With regard to the administrative procedure conducted by the Romanian mining authority, NAMR, to issue the Bucium exploitation licenses, the majority's liability decision manifestly does not apply the applicable law, or any law at all. The Award notes that RMGC applied for the Bucium exploitation licenses in 2007,[142] and referring to correspondence from NAMR from 2008, 2009, and 2015, the Award notes that [redacted] [143] The Award also notes that the applications were still pending at the time (and still are today).[144]

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137 Award ¶ 774.

138 Award ¶ 783.

139 Award ¶ 784.

140 Award ¶ 980.

141 *E.g.*, Award ¶ 1196.

142 Award ¶ 197.

143 Award ¶¶ 17, 1158.

144 Award ¶ 198.

120. The majority's liability decision relating to Bucium is limited to a few brief observations. The majority (i) cites comments that were made during the environmental permitting for Roşia Montană that emphasized that Bucium is a separate project, (ii) cites comments from Gabriel's public securities filings stating the Bucium licenses were expected, and (iii) asserts that NAMR expressed support for Roşia Montană and RMGC.[145] The majority then simply concludes, without any reference to the legal framework applicable to the Bucium licenses, or even to any law at all, that there is no evidence of wrongdoing by NAMR.[146] Thus, the majority fails to apply any law at all to analyze the fact that no decision was taken at all on RMGC's application for the Bucium licenses.

d. UNESCO

121. The majority manifestly disregarded the law in its assessment of the impacts of the UNESCO designation. On July 27, 2021, at the request of the Romanian Government, UNESCO listed the Roşia Montană mining landscape as a protected World Heritage site and simultaneously included it on the List of World Heritage in Danger because of the threat posed by open-pit mining.[147]

122. The majority recognized that UNESCO-designated cultural heritage sites are specially protected under Romanian law and are prioritized over mining in urbanism plans.[148] The UNESCO designation thus triggered mandatory legal protections under Romanian law to preserve the landscape as cultural heritage in priority over mining.[149] Although the Ministry of Culture issued archaeological discharge certificates (ADCs) that discharge an

[145] Award ¶ 1163.

[146] Award ¶ 1163.

[147] Award ¶¶ 188, 1287, 1292, 1293.

[148] Award ¶¶ 182, 1288.

[149] Podaru ¶ 346 (describing the law that requires the Government to establish a protection and management program for UNESCO World Heritage sites which are also to be incorporated into the urbanism plans for the site). *See also* Award ¶ 1300.

area of its status as an *archaeological site*, the ADCs issued for the Project area did not discharge the Project area's classification as a culturally significant *landscape*.[150]

123. The UNESCO designation required, as a matter of Romanian law, that a protection and management program be put in place to protect the entire *landscape* of Roşia Montană, to be incorporated into the urbanism plan for the area. As the Roşia Montană Project envisioned open-pit mining at four different deposits in the area, the Project could not be compatible with a protection and management plan that Romanian law required be put in place to safeguard the landscape encompassing those deposits. That is clear both from Romania's UNESCO application, which referred to the danger that open-pit mining would cause to the landscape, and from the fact that UNESCO accordingly inscribed the Roşia Montană Mining Landscape onto the List of World Heritage in Danger.[151]

124. The majority manifestly disregarded the applicable law in finding nothing to support the conclusion that the UNESCO listing created legal impediments that were fatal to implementation of the Project.[152]

2. The Majority Disregarded the Applicable International Law in Its Assessment of Liability

125. The majority manifestly disregarded the law in several additional respects in its decision on liability.

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[150] *See* Interview of Minister of Culture Bogdan Gheorghiu and others, Radio Guerilla, July 8, 2021 (C-2986) (in response to the question whether there can be a UNESCO designation of the site if it had been archaeologically discharged, Minister of Culture Bogdan Gheorghiu explained, "[y]es, because there isn't only an archaeological heritage, but also a landscape heritage").

[151] Romania's UNESCO Nomination Document (C-1892) at 131 (stating that the PUG [urbanism plan] objective for the area "is to ensure the desired state of conservation of the property while making the transition from industrial zoning, in support of open pit mining and processing, to that of heritage-lead [sic] zoning appropriate to a nominated World Heritage property"); UNESCO July 27, 2021 announcement (C-2984) (inscribing the Roşia Montană Mining Landscape onto the List of World Heritage in Danger "pending the removal of threats to its integrity posed by possible extractive activities").

[152] Award ¶ 1296.

a. Cumulative Effect

126. In deciding what is described as Gabriel's principal claim that Romania's treatment of Gabriel's investment was a composite act in breach of the BITs, the majority accepted that a composite act may be composed of a series of acts, none of which individually breaches the BIT, but when considered together or cumulatively constitute a breach.[153]

127. The majority, however, manifestly disregarded that very same principle of law when deciding that the several acts it focused on did not individually breach the BIT and on that basis concluded that there could not be a composite act breach. The majority thus manifestly failed to apply the law when it decided that it cannot conclude there was "a series of *wrongful acts or omissions* that might constitute a composite act."[154] In other words, the majority accepted that a series of acts or omissions when considered cumulatively may breach an international obligation, regardless of whether the several acts or omissions in the series were wrongful individually. Yet in its analysis of liability, the majority focused on whether the acts or omissions identified individually were wrongful, and having decided that they were not, concluded in manifest disregard of the law that they thus did not constitute "a series of wrongful acts or omissions that might constitute a composite act."[155]

128. In its assessment of what is described as Gabriel's first alternative claim, although the majority states as a conclusion that the "culminative effect of these disparate acts" does not rise to the level of a breach,[156] there is no indication of the majority considering the "culminative effect" of the acts and omissions at issue anywhere in its liability decision.[157]

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153 Award ¶¶ 826, 936.

154 Award ¶ 1166 (emphasis added).

155 *Id.*

156 Award ¶ 1198.

157 Award ¶ 1187 (stating cumulative impacts must be considered, but not doing so).

b. Contemporaneous Objection

129. The majority acknowledged that the law does not require an investor to object when its rights are impaired, but manifestly failed to apply the law as it based its liability decision in pivotal respects on Gabriel's alleged non-contemporaneous objection to Romania's denial of its legal rights, effectively ruling in manifest disregard of law that Gabriel tacitly waived its treaty rights.[158]

c. Intention to Harm

130. The majority acknowledged that the State may breach a BIT even where there is no intention to harm, but manifestly disregarded that basic principle of law when it decided that there was no liability in this case because, allegedly, there was no intention to harm the Project.[159]

d. Omission as Basis for Liability

131. The majority recognized that acts as well as omissions may constitute conduct in breach of the BITs.[160] Yet the majority manifestly failed to apply the law as its liability decision simply ignores entirely the most notorious omission in the case, *i.e.*, Romania's failure to make any decision on the Roşia Montană environmental permit.[161]

e. Decision Contrary to ICSID Convention Article 42(3)

132. Ultimately, the majority decided liability based on its subjective notion of *ex aequo et bono* contrary to Article 42(3) of the ICSID Convention and to the Tribunal's mandate to decide the dispute based on the law. This is evident from the fact that the majority concluded there could be no liability in this case for the equitable, non-legal reasons that Gabriel's contemporaneous public statements allegedly did not include objections to the State's conduct, State actors allegedly did not intend to harm the Roşia Montană Project, and the

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158 *E.g.*, Award ¶¶ 1167, 1236-1237, 1240-1241.

159 *E.g.*, Award ¶¶ 852, 854, 893, 894, 910, 931, 936 in contrast with ¶ 1319. *See also* Award ¶¶ 1074, 1090, 1166, 1238, 1245, 1269.

160 *E.g.*, Award ¶¶ 820, 826, 828, 852, 892, 929.

161 *E.g.*, Award ¶¶ 961, 981-982, 1094, 1148, 1163, 1188, 1192, 1198, 1213, 1215, 1227, 1244.

State allegedly did not benefit from its conduct.[162] It is also evident from the majority's disregard of law in numerous respects noted above, and from its treatment of the claims presented and its wholesale disregard of the testimonial evidence presented as described below. This conclusion also is consistent with and supported by the evidence of the majority's lack of impartiality.

B. Serious Departures from Fundamental Rules of Procedure

133. There are grounds for annulment of an Award under Article 52(1)(d) of the ICSID Convention, where there has been "a serious departure from a fundamental rule of procedure." This ground recognizes the necessity of providing each party the right to be heard, which encompasses the right for its evidence and argument to be considered on all issues affecting its legal position and for it to be provided a fair opportunity to confront the evidence presented by the other party.

134. The majority's liability decision is the product of serious departures from fundamental rules of procedure warranting annulment in three principal respects: (i) the majority failed to address the claims presented by never addressing the fundamental and undisputed fact that there was never any decision made on RMGC's applications for the environmental permit for Roşia Montană or for the exploitation licenses for the Bucium deposits; (ii) the majority failed to engage with substantial portions of the evidentiary record relied upon by Claimants; and (iii) the Claimants were denied the opportunity to confront a wide-ranging 24-page witness statement submitted with the Rejoinder from former Prime Minister Ponta, a central figure in the events at issue, which was admitted into the record over Claimants' objection notwithstanding that Claimants were denied the right to cross-examine the witness.

135. These defects warrant annulment of the majority's liability decision, including the award of costs to Respondent.

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[162] Award ¶¶ 1312, 1319-1320. *See also* Award ¶ 1196.

1. The Majority Failed to Address the Claim Presented

136. It is basic to the right to be heard and to present one's case that the claim and the evidence presented in support is to be addressed by the tribunal. The majority's liability decision is defective as it fails to address the most fundamental aspects of Claimants' claim and significant portions of the evidence presented in the case.

137. The principal claim presented was that Romania breached the BITs because the Government refused to issue permitting decisions for the Roşia Montană Project based on the legally applicable permitting procedures. Instead, the Government stalled permitting pending politically motivated, unilaterally demanded renegotiations, the Government demanded a parliamentary vote proclaimed to be a *de facto* decision on the whole Project, and then, following negative votes in Parliament, as demonstrated by the obviously abandoned process, no decision on the essential environmental permit for Roşia Montană or on the Bucium exploitation licenses was ever taken.

138. While the majority purported to consider Claimants' claim in the context of what it referred to as the "principal claim" and the "first alternative claim," the majority's liability decision did not rule on the claim presented, but rather recast the claim as a strawman complaint that there was a series of wrongful acts and omissions leading up to September 9, 2013. The majority then concluded that none of these acts or omissions individually rose to the level of a BIT violation, but never addressed the fundamental and undisputed fact that there was never any decision made on the environmental permit for Roşia Montană or on the exploitation licenses for the Bucium deposits. This failure is a serious departure from a fundamental rule of procedure, the right to be heard, and as such warrants annulment.

2. The Majority Failed to Address the Evidence Presented

139. The wholesale failure by the majority to consider the evidence emphasized and relied upon is an additional serious departure from the fundamental rule of procedure, the right to be heard, and a separate defect warranting annulment. The stark absence of any discussion of the testimonial evidence in the majority's liability decision is remarkable.

140. In its conclusions on the demands for renegotiation beginning in 2011, the majority accepts that the Government demanded renegotiation, but does not address or engage with any of the testimonial and contemporaneous email evidence that the demands for renegotiations and associated threats of non-permitting coerced Gabriel to agree to change the economic terms of the agreements with the State.

141. The majority does not address the evidence, including testimonial evidence, that described Claimants' interactions with Government officials during the period from the end of November 2011 until March 2013 and that impacted Gabriel's decision in 2013 to agree to changes in the agreements with the State while maintaining its objection to the draft law and expressly reserving its legal rights including reference to international arbitration to recover losses and damages suffered.

142. The majority does not address the undisputed evidence that there was never any decision on the environmental permit or on whether to terminate the EIA procedure. The majority also does not address the undisputed evidence that there was never any decision on the Bucium exploitation licenses, even as the arbitration proceeded for years from 2015 through 2024.

143. In the context of UNESCO's designation of the Roşia Montană Mining Landscape as a World Heritage site, the majority does not address the evidence that designation of the landscape as the recognized cultural heritage was distinct from the classification of the area as an archaeological site. This evidence included the statement of the Minister of Culture, who noted that because the designated cultural heritage was the landscape, the archaeological discharge of the site via earlier issued ADCs was not determinative, and the references in Romania's UNESCO application and in UNESCO's decision that state clearly that open-pit mining would be incompatible with preservation of the mining landscape.

3. Claimants Were Denied the Right to Confront Material Adverse Testimony in Cross-Examination

144. After submitting only two brief fact witness statements with its Counter-Memorial, Respondent submitted 14 witness statements with its Rejoinder, among which was a 24-page witness statement from former Prime Minister Victor Ponta, a central figure in the events that formed the basis of the claims in the case. Mr. Ponta stated in his witness statement that he was "not available to appear before the Arbitral Tribunal to confirm the content of this statement."

145. Claimants requested that his witness statement be struck from the record.[163] The Tribunal took note that Mr. Ponta would not be available to testify during the hearing but saw "no reason to refuse the admissibility of Mr. Ponta's witness statement," stating that the Tribunal would assess the evidentiary value of the statement "at a later stage in the proceedings and in light of the entire record."[164]

146. There is no indication in the majority's liability decision how the majority assessed the evidentiary value of Mr. Ponta's witness statement. Thus, the Tribunal admitted a lengthy testimonial statement into the record from a central figure in the case that was submitted only with the Rejoinder, when Claimants' opportunity to submit rebuttal evidence was severely limited, and moreover in circumstances that deprived Claimants of any opportunity for cross-examination. Doing so was a serious departure from a fundamental rule of procedure, the right to be heard and to confront adverse witness testimony through cross-examination.

147. Given the centrality of Mr. Ponta's role in the events forming the basis for the claims in this case and the wide-ranging 24-page witness statement that was admitted into the record notwithstanding Claimants' inability to confront his testimony, this defect is serious and

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[163] Claimants' Letters to the Tribunal dated July 19, 2019 and August 20, 2019; Procedural Order No. 23; Claimants' Letters to the Tribunal dated September 19, 2019 and September 23, 2019. Award ¶¶ 333, 335-338, 343-344.

[164] Award ¶ 345; Letter from the Tribunal to the Parties dated September 24, 2019.

warrants annulment of the majority's liability decision including the award of costs to Respondent.

C. Failure to State Reasons

148. Article 52(1)(e) of the ICSID Convention provides that where an award fails to state the reasons upon which it is based, the award is subject to annulment. The requirement to state reasons is "not satisfied by either contradictory or frivolous reasons,"[165] and where "there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow."[166]

149. The reasoning purporting to support the majority's liability decision is defective for its failure to state reasons supporting its conclusion: (i) that demands for revised economics were not linked to permitting; (ii) that the environmental permitting process was not wrongful; (iii) that there was no wrongdoing regarding the Bucium applications; (iv) generally about "how things turned out"; (v) that the UNESCO designation did not create a legal impediment for the Roşia Montană Project; and (vi) relating to the assessment of liability in other central respects.

150. These defects in reasoning warrant annulment of the majority's liability decision as well as necessarily the award of costs to Respondent.

1. The Majority's Conclusion that Demands for Revised Economics Were Not Linked to Permitting

151. The majority's liability decision is premised on its conclusion that there was no link between the Government's demand for revised economic terms in its agreements with Gabriel and the progress of permitting decisions for RMGC and the Roşia Montană Project. The majority's reasoning on this issue, however, is inadequate in critical respects. The majority fails to state how it considered Claimants' witness testimony regarding its

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165 *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on Application for Partial Annulment dated Dec. 14, 1989 (AL-1) ¶ 5.09.

166 *Víctor Pey Casado v. Chile*, ICSID No. Case No. ARB/98/2, Decision on Annulment dated Dec. 18, 2012 (AL-5) ¶ 86.

communications with Government officials on this topic. Given the centrality of the issue and the evidence presented, that failure is significant.

152. Having recognized that the economics were established in the State's existing agreements with Gabriel and RMGC, the majority fails to state reasons for its conclusion that "the economic issues" were among those that were "open" and "outstanding," that the State "needed to revisit the issue," and that the economics "was one aspect that had to be clarified."[167] The little reasoning that the majority does offer on this issue is contradictory as it acknowledges that "some Ministers (the Minister of Culture and Minister of Environment in particular)," notably the leaders of the two most important ministries for permitting, considered that "the outstanding issues relating to the Project (principally the environmental issues and the economic issues) needed to be addressed at a Governmental level before further progress could be made."[168] It is also contradictory when denying there was any link, the majority states there was no "inappropriate link between the environmental and financial aspects of the Project," but then states that these same aspects "were two issues of importance for the implementation of the Project, where the status of one could also affect the other."[169]

2. The Majority's Conclusion that the Environmental Permitting Process Which Did Not Produce Any Decision Was Not Wrongful

153. The majority's liability decision is also premised on its conclusion that the environmental permitting process for the Roşia Montană Project "was not wrongful."[170] The majority concludes that there was nothing wrong with the several further TAC meetings that were convened in 2014 and 2015. The majority, however, does not say anything at all about the fact that no further TAC meetings were held after that and no decision ever was issued on the environmental permit. There is a complete absence of reasoning about the fact that the environmental permitting process for the Roşia Montană Project was abandoned without

[167] Award ¶¶ 951, 954, 955.

[168] Award ¶ 955.

[169] Award ¶ 959.

[170] Award ¶¶ 978, 981-982, 1094, 1165, 1244.

any decision. Thus, the majority does not state anywhere whether it was lawful for no decision on the permit to be taken, and what reasons if any justify that lack of decision.

3. The Majority's Conclusion regarding the Bucium Exploitation Licenses

154. With regard to RMGC's application for the Bucium exploitation licenses, the majority recognized in its decision that [redacted] and stated that the applications were still pending.[171] The majority concluded that there was no evidence of wrongdoing in regard to Bucium citing a few brief reasons:[172] (i) it refers to comments that were made during the environmental permitting for Roşia Montană that emphasized that Bucium is a separate project, (ii) it refers to comments from Gabriel stating that the Bucium licenses were expected, and (iii) it asserts that NAMR expressed support for Roşia Montană and RMGC.[173] The majority's reasoning thus is inadequate as it is incomplete and illogical and fails entirely to address the applicable legal regime governing the application process and the significance of the fact that the licenses were not issued and no decision has ever been taken on the applications at any time.[174]

4. The Majority's Unexplained Conclusion regarding "How Things Turned Out"

155. The majority's failure to state reasons is underscored in its "causation considerations" where it states that "the nature of the Project, with its social, public, political and other elements, made the case a difficult and not a simple one, and therefore brought in the interests of many stakeholders," and then asserts that "this ultimately explains how things turned out, for better or for worse."[175] This conclusion, however, is not explained as the majority does not say what it means by "how things turned out." The majority's liability decision does not explain whether it considered that an environmental permit was denied,

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171 Award ¶¶ 17, 198, 1160.

172 Award ¶ 1192.

173 Award ¶ 1163.

174 *See also* Award ¶¶ 1207, 1213, 1215.

175 Award ¶¶ 1312.

or whether it considered that the procedure was terminated and if so when and how, whether it even considered the fact that RMGC never withdrew its request for an environmental permit, or whether it considered that the EIA process with its last TAC meeting in 2015 still remains pending today in 2024, notwithstanding that no decision of any type was ever made. The majority's liability decision is silent on this critical issue.

5. The Majority's Conclusion regarding UNESCO

156. The majority's liability decision fails to state reasons in relation to its conclusion regarding the designation of the Roşia Montană Mining Landscape as a UNESCO World Heritage site. The decision fails in its reasoning to address that the subject of the UNESCO designation is the mining landscape, the protection of which both Romania's UNESCO nomination document as well as UNESCO's designation expressly state is incompatible with open-pit mining and thus with the Roşia Montană Project. Thus, the majority also fails in its reasoning to address that ADCs discharge the site of its status as an archaeological site, but do not affect the site's designation as a protected landscape. Consequently, the majority's liability decision fails to state reasons regarding its conclusion that there is no impediment that would render implementation of the Roşia Montană Project legally impossible.[176]

6. The Majority's Assessment of Liability in Other Central Respects

157. The majority's liability decision also fails to state reasons for dismissing what it describes as the principal claim based on a composite act. The majority's reasoning is inadequate when its states that a composite act that breaches a BIT obligation may be composed of a series of acts, none of which individually breaches the BIT, but then states, contradictorily, that the several acts it discusses did not individually breach the BIT and, on that basis, concludes that there could not be a composite act breach. The Award's reasoning that it cannot conclude there was "a series of wrongful acts or omissions that might constitute a composite act," having accepted that a composite act that breaches a BIT obligation need

[176] *See* ¶¶ 121-124 *supra*.

not be composed of a series of acts or omissions that are each wrongful, is contradictory and illogical.[177]

158. The majority's reasoning is inadequate and contradictory when it explains that the law does not require an investor to object when its rights are impaired but then nevertheless concludes in pivotal respects that Gabriel's alleged non-contemporaneous objection to Romania's denial of its legal rights leads to the conclusion that Romania's conduct was not in breach of the BITs.[178]

159. The majority's reasoning is also inadequate and contradictory when it states that a State may breach a BIT even where there is no intention to harm an investment, but then contradictorily concludes that there was no liability in this case because it concluded there was no intention to harm the Roşia Montană Project.[179]

V. REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

160. Article 52(5) of the ICSID Convention provides that "[i]f the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request." ICSID Arbitration Rule 54(2) provides that "[i]f an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award."

161. In accordance with these rules, Applicants request a provisional stay of enforcement of the Award.

[177] *See* ¶¶ 126-128 *supra*.

[178] *See* ¶ 129 *supra*.

[179] *See* ¶ 130 *supra*.

VI. REQUEST FOR RELIEF

162. For the reasons set forth above, Applicants respectfully request that the Committee:

a. stay the enforcement of the Award pending the Committee's decision on this Application;

b. annul the Award in its entirety on the grounds set forth in Section III above;

c. alternatively, on the grounds set forth in Section IV above, annul the Award in the parts containing the majority's decisions on liability and on costs in Sections IV and V of the Award (paragraphs 767-1357) together with the majority's decision at paragraph 1358.2, except for the unanimous decisions at Award paragraphs 1183-1185 and 1220-1223; and

d. order Respondent to pay all of Applicants' costs in these annulment proceedings, including the Applicants' legal fees and expenses, with interest.

163. Applicants reserve their right to supplement and further develop the grounds in this application during the annulment proceedings.

Respectfully submitted,

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