
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

APPLICANTS' REPLY ON REQUEST FOR STAY

November 11, 2024

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1. In accordance with the agreed schedule, Applicants submit this Reply to Respondent's Comments on their Request for Continuation of Stay of Enforcement.

I. THE COMMITTEE'S DISCRETION TO CONTINUE THE STAY

2. The Committee may evaluate in its discretion whether the circumstances require a stay.¹ Respondent's arguments regarding an alleged high "legal standard" to be applied in assessing the circumstances is without basis in the ICSID Convention or Arbitration Rules.
3. Respondent refers to what some Committees have called the "pro-enforcement policy of the Convention" to suggest that the ICSID Convention disfavors granting a stay.² Nothing in the ICSID Convention or the ICSID Arbitration Rules supports such a conclusion.
4. Article 54 of the ICSID Convention provides that each Contracting State shall enforce an award rendered pursuant to the Convention as if it were a final judgment of a court of that State. The significance of Article 54 is that it makes clear that there is no role for disputes over enforcement of ICSID awards before national courts. Thus, the "pro-enforcement" policy refers to the fact that ICSID Contracting States must give effect to ICSID awards and not entertain enforcement disputes outside the parameters of the ICSID Convention.
5. This is also made clear in Article 53 of the ICSID Convention, as it provides that an ICSID award is not subject to appeal or to any remedy except interpretation, revision, and annulment as permitted by Articles 50, 51, and 52. In the context of such proceedings, far from disfavored, Article 53 expressly indicates that the award is binding on the parties "*except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of the Convention.*"³ The possibility of a stay of enforcement is envisioned in Article 50(2) for interpretation, in Article 51(4) for revision, and in Article 52(4) for annulment. For revision and annulment, a stay is granted automatically upon request, albeit provisionally. Thus, the ICSID Convention expressly contemplates and fully supports a

¹ Request for Stay ¶¶ 6-8.

² See Respondent's Comments on Stay ¶ 9.

³ ICSID Convention, art. 53(1) (emphasis added).

stay of enforcement pending decision on a post-award remedy, and there is no presumption or policy in favor or against granting a stay, as multiple *ad hoc* committees have confirmed.⁴

6. Respondent argues that a stay of enforcement pending an annulment decision requires a showing of “exceptional” circumstances.⁵ Nothing in the ICSID Convention or Arbitration Rules supports that assertion, however, and for that reason, ICSID *ad hoc* committees repeatedly have rejected such arguments.⁶
7. The Applicants here pursue their legitimate right envisioned in the ICSID Convention to request annulment of what is an egregiously flawed Award and to request a stay as the circumstances require.⁷ In assessing Respondent’s rights, it is significant that Article 53(2) of the Convention provides that for purposes of Articles 53, 54, and 55 of the ICSID Convention, *i.e.*, the provisions governing the binding nature and enforceability of the

⁴ Request for Stay ¶ 6; *STEAG v. Spain* (AL-30) ¶ 67 (“The Committee also agrees with prior committees which have determined that there exists no presumption either in favor of or against granting a continuation of the stay. Indeed, no such presumption is reflected in the relevant provisions of the ICSID Convention or ICSID Arbitration Rules.”); *Caratube v. Kazakhstan* (AL-26) ¶ 70 (“Nothing in the aforementioned articles provides for a presumption in favor or against the continuation of stay of enforcement.”); *Perenco v. Ecuador* (AL-27) ¶ 39 (“[T]here is neither a right to the stay of enforcement, nor a presumption in favour or against the stay.”), ¶ 64 (T)he provisions of the Convention exclude a presumption in favour or against a continued stay of enforcement.”); *Masdar Solar v. Spain* (AL-28) ¶ 63 (“[T]he language of Article 52(5) is neutral. It does not contain a rule in favor of, or against, the granting of a stay of enforcement.”).

⁵ See Respondent’s Comments on Stay ¶¶ 13-14.

⁶ Request for Stay ¶ 8. See also *Caratube v. Kazakhstan* (AL-26) ¶ 72 (“[N]othing in the text or context of the aforementioned provisions or the ICSID Convention suggests that the circumstances that the Committee must take into consideration to decide on if the continuation of the stay should require ‘unusual’ or ‘exceptional’ circumstances”); *Perenco v. Ecuador* (AL-27) ¶ 45 (“[T]he ICSID Convention does not demand ‘extraordinary circumstances’ for the stay to be granted.”), ¶ 67 (“[T] here is no indication that the exceptional character of the [annulment] application requires that the circumstances requiring the stay must also be exceptional.”); *Masdar Solar v. Spain* (AL-28) ¶ 66 (“[T]he Committee does not find in Article 52(5) or in Rule 54 an indication that the circumstances that require a stay must be ‘exceptional’”), ¶ 67 (“While stays of enforcement may be considered an exception to the general enforceability of ICSID awards, it does not follow that the relevant circumstances required to grant a stay should also be exceptional.”).

⁷ *Masdar Solar v. Spain* (AL-28) ¶ 90 (“recourse to annulment, including the entitlement to request a stay of enforcement, is a legitimate right provided for in Article 52 of the ICSID Convention.”); *Caratube v. Kazakhstan* (AL-26) ¶ 85 (“The Committee considers that parties to an international arbitration have the legitimate right to pursue the appropriate remedies when they consider that there are grounds to invoke such remedies.”); *Perenco v. Ecuador* (AL-27) ¶ 39 (“[T]he Committee concludes that a party to an award issued in an ICSID investment arbitration under the ICSID Convention has both the right to apply for annulment and the right to request the continuation of the stay.”). See also Request for Stay ¶¶ 11-12.

award, “award” is specifically defined to “include any decision interpreting, revising, or annulling such award pursuant to [the Convention].” Respondent’s right to payment as set forth in the Award, in other words, is expressly subject to the decision that will be issued in this proceeding, and thus remains to be finally resolved.

8. While Respondent argues that it is Applicants’ burden to prove the need for a stay,⁸ “each party has the burden to prove the circumstances th[ey] rely on to request the granting or termination of the stay.”⁹ Respondent therefore has the burden to prove a stay would prejudice it. There is no basis to presume a stay presents any prejudice to Respondent.

II. CIRCUMSTANCES IN THIS CASE REQUIRE CONTINUATION OF THE STAY

9. The circumstances that require a stay of enforcement are as indicated in Applicants’ Request and are in brief as follows.
10. Gabriel’s financial status is as publicly disclosed, consistent with Gabriel Canada’s obligations under applicable securities laws and as described in the Request for Stay.¹⁰ It is evident that Gabriel is experiencing severe financial distress and does not currently have available funds for its ongoing working capital needs, let alone sufficient funds to pay the substantial amount required for the Cost Award.¹¹
11. Notwithstanding its ongoing endeavors to strengthen its financial position, Gabriel’s current predicament, compounded by the unfavorable Award and Romania’s June 2024 calculated, arbitrary and unlawful decision to deny extension of the term of the Roşia Montană License,¹² *i.e.*, RMGC’s principal mining license, renders the procurement of funding for both the annulment proceedings and the continuation of Gabriel’s significantly

⁸ Respondent’s Comments on Stay ¶ 14.

⁹ *Caratube v. Kazakhstan* (AL-26) ¶ 76 (agreeing with the *ad hoc* committee in *Lemire v. Ukraine*).

¹⁰ Request for Stay ¶¶ 15-17.

¹¹ Request for Stay ¶ 24.

¹² *See* Request for Stay ¶ 23 n.25.

curtailed operations highly uncertain. There is no guarantee that Gabriel will be able to obtain necessary financing.¹³

12. Respondent's speculation¹⁴ that the same financing sources that funded Gabriel's expenses through the arbitration "will continue to do so" is without basis and wrong as a matter of fact. In the wake of the adverse Award and Romania's June 2024 unlawful decision to deny extension of the term of the Roşia Montană License,¹⁵ Gabriel's prospects for funding have diminished. That is because while Gabriel's investors have sought a just resolution to the dispute with Romania and therefore wish to seek annulment of what is a seriously defective Award, they also have been motivated by the preference for an amicable resolution that permits the eventual development of mining projects. Respondent's additional assertion that Applicants "have the ability to raise funds"¹⁶ is likewise based on speculation. In reality, the prospects for funding are uncertain.¹⁷
13. Given the substantial nature of the Cost Award and the fact that Gabriel has no source of revenue, Gabriel's ability to meet its basic working capital requirements as well as to financially support and pursue this annulment remedy will be severely threatened in the absence of a stay of enforcement.¹⁸ Respondent's speculation¹⁹ that because Gabriel commenced this process before a stay was in place, it will be able to complete it without risk and without the need for a stay is without basis. A provisional stay has been in place since this proceeding started in accordance with Article 52(5) of the ICSID Convention.

¹³ Request for Stay ¶ 17. As Gabriel announced in July 2024, it expected at that time that it had sufficient cash to fund the Group's working capital requirements and other associated costs through to September 2024. *Id.* While Gabriel has managed to postpone some obligations and thereby to continue to meet its most basic financial needs to date, Gabriel will require additional funding imminently to be able to continue to do so.

¹⁴ Respondent's Comments on Stay ¶ 39.

¹⁵ *See* Request for Stay ¶ 23 n.25.

¹⁶ Respondent's Comments on Stay ¶ 39.

¹⁷ *See also* Request for Stay ¶ 21.

¹⁸ Request for Stay ¶ 25.

¹⁹ Respondent's Comments on Stay ¶ 39.

14. A decision to lift the stay of enforcement would risk pushing Gabriel into insolvency, thus resulting in irreparable harm and prejudice “beyond the inherent or normal effects” of having to meet an adverse payment obligation.²⁰ In addition, as RMGC’s majority shareholder and its sole source of funding since its formation in 1997, Gabriel’s insolvency would place RMGC’s continued viability at risk.²¹ Respondent’s comment,²² that, legally, RMGC is a separate entity, does nothing to undermine the point. RMGC itself has ongoing financial obligations, including, among others, to pay property taxes on the substantial real estate acquired to advance Project development. Although the Romanian State is the minority shareholder of RMGC, it has relied on Gabriel to provide the State with loans and donations to fund its capital contributions to RMGC.²³ If Gabriel stops funding RMGC, RMGC will have to enter insolvency proceedings.
15. As Romania’s authorities reportedly have announced,²⁴ and Respondent does not deny,²⁵ the State has commenced enforcement measures that are aimed at seizing Gabriel Jersey’s shares in RMGC with a view to liquidating RMGC’s assets, which prominently include RMGC’s real estate holdings, as a means of satisfying payment of the Cost Award.
16. In light of such measures, Respondent’s contention that there is “no risk of non-recoupment” if the stay is lifted and the Award is subsequently annulled rings hollow.²⁶ Respondent points to provisions of Romania’s Code of Civil Procedure that it claims would

²⁰ *Eyre and Montrose v. Sri Lanka* (AL-29) ¶ 14 (recognizing need for continuation of stay given applicants’ non-availability of funds and where otherwise applicants “would suffer prejudice beyond the inherent or normal effects”); *Churchill v. Indonesia* (AL-24) ¶ 35 (“The financial situation of the award debtor is a circumstance which may justify a stay if enforcement would have manifestly excessive consequences.”).

²¹ Request for Stay ¶ 23.

²² Respondent’s Comments on Stay ¶ 44

²³ See Award ¶¶ 194, 656. Indeed, to permit the State to maintain its 19.3% stake in RMGC, Gabriel provided the State with US\$ 39.5 million in loans as well as a nearly \$20 million donation for purposes of mandatory recapitalizations of RMGC required by Romanian law. The loans were intended to be repaid from future dividends generated by the Roşia Montană Project. However, the State has never repaid any of these amounts to Gabriel despite its definitive decision not to do the Project, as further confirmed by the revocation of the License in June 2024.

²⁴ Request for Stay ¶ 20.

²⁵ Respondent’s Comments on Stay ¶ 23 (stating that Romania “was compelled” to take such actions).

²⁶ See Respondent’s Comments on Stay ¶¶ 28-32.

ensure there is no such risk.²⁷ Even assuming, however, those provisions were applicable in relation to an ICSID award – which is not clear as Respondent does not identify any authority to support the conclusion that they would be applicable to the actions being taken by ANAF – given the nature of the enforcement measures underway, those provisions do nothing to alleviate the serious risk of irreparable harm to Gabriel of the State seizing Gabriel Jersey’s shares in RMGC. The provisions cited by Respondent state that any action to “unwind” an enforcement measure must be “without prejudice” to any *bona fide* third parties,²⁸ meaning that if the RMGC shares were sold to a third party,²⁹ Gabriel could not be returned to the *status quo ante*. Similarly, if the State took control of RMGC and then liquidated its assets, including its real estate holdings, and if the Award thereafter were annulled, the legal provisions referenced by Respondent would not be effective in restoring Gabriel. Rather, in that case, lifting the stay may simply push the parties into litigation regarding the measure of damage caused to Gabriel from the sale of RMGC’s assets. Any such litigation procedures in Romania likely would last multiple years.

17. Lifting the stay thus presents serious risks of non-recoupment for Gabriel, including burdensome litigation costs and complexities. Moreover, as without a stay the Award is enforceable in all 158 ICSID Contracting State jurisdictions, the risks to Gabriel are significant. There are no provisions of the ICSID Convention applicable to support Gabriel in any effort outside Romania to recoup monies paid in satisfaction of an ICSID Award, including as Romania is presumed to enjoy sovereign immunity.³⁰
18. It is also notable that Romania offers no assurance to Gabriel even as it threatens to liquidate RMGC’s assets. Instead, if the Award is annulled, Romania disingenuously

²⁷ Respondent’s Comments on Stay ¶¶ 28-30.

²⁸ See Code of Civil Procedure (R-698), art. 723(2) (“The goods over which the enforcement was conducted shall be returned to the entitled person, without prejudice to the rights definitively acquired by bona fide third parties.”).

²⁹ As noted above and in the Request, RMGC holds a substantial portfolio of real properties and legal rights in relation to mining license applications. See Request for Stay ¶¶ 20, 23.

³⁰ The ICSID Convention does not impact the sovereign immunity enjoyed by States from execution. See ICSID Convention, art. 55 (“Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to the immunity of that State or of any foreign State from execution.”).

invites Gabriel to bring an action against it in its own courts where Gabriel can seek compensation for the damage that would have been caused by premature efforts to sell off Gabriel's and RMGC's assets.

III. THE BALANCE OF INTERESTS SUPPORTS A STAY

19. In this case, the balance of interests overwhelmingly supports continuing the stay. Given the size of the Cost Award, lifting the stay would put at risk Gabriel's ability to fund its basic working capital needs, avoid insolvency, and meet the on-going expense associated with pursuing the annulment remedy.³¹ Respondent acknowledges³² that ICSID *ad hoc* committees have recognized that a stay is warranted where the prejudice of enforcement goes beyond the inherent and normal effects of an adverse ICSID award. That is the situation here where the prejudice to the Applicants is greater than merely having to meet an adverse payment obligation.
20. In addition, as noted above, if the stay is lifted and the Award is annulled, Gabriel faces serious risks of non-recoupment.³³ ICSID *ad hoc* committees have recognized that difficulties in seeking recoupment in the event the Award is annulled is a factor that supports continuation of a stay.³⁴
21. Respondent argues³⁵ that it is not evident how enforcement actions taken against RMGC would impact Applicants' ability to attract funding and to proceed with the annulment. Respondent's argument ignores commercial realities. As noted above, Gabriel's investors seek a just resolution of the dispute with Romania, necessarily including annulment of the Award, but they also have been motivated by the prospect of a possible amicable resolution

³¹ *Caratube v. Kazakhstan* (AL-26) ¶ 96 (noting that a party requesting a stay "need not demonstrate that it would suffer catastrophic and irreversible consequences for its ability to conduct its affairs.").

³² Respondent's Comments on Stay ¶ 35.

³³ *See MTD Equity v. Chile* (AL-22) ¶ 29 (observing that a party seeking annulment "should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn out to be irrecoverable....").

³⁴ *See STEAG v. Spain* (AL-30) ¶ 94 ("The Committee is also mindful of the potential inconvenience for Spain if it were required to pursue a potentially complex process, navigating through STEAG's corporate structure, in order to recover amounts paid under the Award, if it were eventually annulled.").

³⁵ Respondent's Comments on Stay ¶ 42.

of the dispute that permits the eventual development of mining projects. The liquidation of the project company through which such development may occur therefore is a significant disincentive. Moreover, if the Award is annulled, enforcement measures taken against RMGC will have caused irreparable injury to RMGC and thus indirectly to Gabriel for which recoupment would not be effective.

22. In contrast, other than having to wait until the conclusion of these proceedings, Respondent's ability to collect payment of the Award if not annulled would not be impaired by continuation of the stay. Respondent's risk if the Award is not annulled is not materially different whether the stay of enforcement is or is not continued. In that regard, Respondent's complaints about Gabriel intentions to pay the Award if not annulled are misguided.³⁶ It is evident that Gabriel does not have the means to do so.
23. As Respondent is aware, however, if the Award is not annulled RMGC's assets remain sufficient to satisfy the Cost Award.³⁷ RMGC's real estate holdings, including land and buildings in the area in and around Roșia Montană, are valued at approximately US\$ 18.7 million.³⁸ In addition, as Applicants observed,³⁹ and Respondent did not dispute, Romania does not need to take measures of enforcement to ensure that Gabriel would not sell or assign its shares in RMGC.

³⁶ Respondent's Comments on Stay ¶ 48. *See also* Respondent's Comments on Stay ¶¶ 26-32. *See also STEAG v. Spain* (AL-30) ¶ 97 (observing that a stay may be warranted even if there were a risk of non-compliance in case of non-annulment and recognizing that "in *Enron v. Argentina*, as well as in *Continental Casualty Company v. Argentina*, the *ad hoc* committees granted the stay despite acknowledging a high risk of non-compliance with a party's obligations under Article 53 of the ICSID Convention.>").

³⁷ *See* Request for Stay ¶ 20.

³⁸ *See* Report on Estimation of the Taxable Value of the Buildings Owned by RMGC as of Dec. 31, 2019 prepared by SC Axaconsult SRL dated Jan. 23, 2020 (A-113) at 21 (independent valuation report assessing the total value of residential buildings ("R") owned by RMGC at RON 10,466,005 and non-residential buildings ("N") at RON 9,033,015, *i.e.*, a total of RON 19,499,020, or approximately **US\$ 4.2 million**), and RMGC Calculation of 2024 Land Value (A-114) (estimating total land value at RON 66,877,758, *i.e.*, approximately **US\$ 14.5 million**, based on value in different categories of land based on the minimum-per-square-meter values established by the Romanian National Public Notary Union for purposes of assessing tax owed upon land sale at (http://www.unnpr.ro/files/expertize2024/CNPAlbaIulia/Alba_2024.pdf)).

³⁹ Request for Stay ¶ 29.

24. Finally, Respondent's argument⁴⁰ that continuation of the stay would be unfair because Respondent will incur costs in this proceeding is misguided because the Committee cannot base its decision on any assumptions about the merits of the annulment application.

IV. THE COMMITTEE SHOULD CONTINUE THE STAY WITHOUT CONDITIONS

25. The factors and circumstances outlined above warrant continuing the stay and further support granting that stay unconditionally. Respondent has not discharged its burden of proving that any stay granted should be conditioned on a provision of security and that, if it is not ordered, Respondent will suffer a prejudice.⁴¹

26. Applicants do not have the financial capacity to post security in the form of either a security bond or a bank guarantee as Respondent urges, as both would require funds in the stated amount, which Applicants do not have. Moreover, a requirement to post security carries additional costs that also would not be recoverable.⁴² For these reasons, any such requirement would frustrate Applicants' ability to pursue annulment.⁴³

27. A decision whether to require security must be based on the applicant's own ability to fulfill the condition without undermining the ability to pursue annulment.⁴⁴ Here, given the substantial amount of the Cost Award, escrowing the funds due would cause the Applicants the same irreparable harm as lifting the stay would cause.

28. In any event, in this case, financial security is not needed to safeguard Respondent's rights if the Award is not annulled because, as explained above, RMGC's assets remain sufficient

⁴⁰ Respondent's Comments on Stay ¶ 47.

⁴¹ See *Pey Casado v. Chile* (AL-32) ¶ 29 ("Claimants bear the burden of proving that security should be ordered and that, if it is not ordered, they will suffer a prejudice."); *Quiborax v. Bolivia* (AL-33) ¶ 43 ("[I]t is up to the Claimants to prove the need to provide security if the Committee decides to continue the stay.") (translation of counsel from the Spanish original).

⁴² See *9REN Holding Sàrl v. Spain* (AL-34) ¶¶ 139-140 (observing among the reasons not to require security is that it "would also involve costs for Spain that could not be recovered, should the Award be annulled").

⁴³ See *Churchill v. Indonesia* (AL-24) ¶ 38 ("Such right [to pursue annulment] cannot be impaired by the conditions imposed for the continuation of the stay.").

⁴⁴ See *Libananco v. Turkey* (AL-23) ¶¶ 51, 59; *Churchill v. Indonesia* (AL-24) ¶ 39.

to cover the Cost Award. There is no basis to conclude that Respondent's prospects of enforcement will be undermined during these proceedings.

29. A requirement to post security therefore not only would impose unworkable and, as such impermissible, conditions on the Applicants' right to pursue the annulment remedy, it would place Respondent in a better position than it would have been had Gabriel not sought annulment, which is not justified.⁴⁵

V. REQUEST FOR RELIEF

30. For the reasons set forth in the Request for Stay and above, Applicants request the Committee (a) to order continuation of the stay of enforcement of the Award, without conditions and without a request for Applicants to post security, until a decision on annulment is rendered in these proceedings; and (b) to order Respondent to bear the costs related to the Request for Stay.

Respectfully submitted,



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⁴⁵ See *Libananco v. Turkey* (AL-23) ¶¶ 60-61 (where there was no evidence that a stay would impair Respondent's chance of enforcement, the committee concluded that requiring security would affect the Applicant in a disproportionate manner). See also *Eyre and Montrose v. Sri Lanka* (AL-29) ¶ 14 (observing that a grant of security would place the Respondent in an advantageous position which will be unjustified); *9REN v. Spain* (AL-34) ¶ 138 (deciding against condition of security for stay as it "would presumably leave 9REN better off than it would be without the annulment," and observing that the *CMS v. Argentina* committee concluded similarly).