

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

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

Applicants

VS.

ROMANIA

Respondent

**ICSID CASE NO. ARB/15/31
ANNULMENT PROCEEDINGS**

**RESPONDENT'S REJOINDER COMMENTS
ON APPLICANTS' REQUEST
FOR CONTINUATION OF STAY OF ENFORCEMENT**

18 December 2024

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1 EXECUTIVE SUMMARY

- 1 In their Reply on the Request for Stay of 11 November 2024 (the “**Reply**”), the Applicants maintain their request that Romania be **unconditionally** prevented from enforcing the Award during the annulment proceedings.
- 2 However, the Applicants cannot exercise their right to seek annulment at Romania’s expense. Years of arbitration proceedings vindicated Romania’s position but cost it much in resources, energy and expense. Romania cannot be expected to kowtow to the Applicants simply because they have filed for annulment and to incur the related costs, without first recovering or, at the least, obtaining adequate security for, the amounts owed under the Award.
- 3 The Applicants’ admission that enforcement endeavors will be prone to failure, since “Gabriel does not have the means” to comply with the Award,¹ is highly problematic in two regards:
 - Despite an alleged lack of financial means, the Applicants filed procedural motions that generated costs and delay² and publicly disclosed having received funding and earmarked assets for the arbitration and annulment proceedings. **Their position is not credible** and it would be **most unfair** to allow them not to pay what they owe for the arbitration proceedings.
 - It also casts doubt on Romania’s prospects of recovering the costs related to the annulment proceedings, which are likely to be high if the Applicants’ conduct to date is any indicator of what is to come.
- 4 The Applicants cannot rely on their allegedly “severe financial distress”³ to avoid their legal obligations to Romania, nor can it serve as a basis for the Committee to continue the stay. Romania thus maintains that the Committee should lift the stay (**Section 2**) or, alternatively, condition it on the posting of security (**Section 3**).

¹ Reply, p. 8 (para. 22).

² The Applicants invited Prof. Dr. Scherer to step down, then requested her disqualification, requiring submissions from Romania, a suspension of the proceedings and postponement of the First Session by several months, only to withdraw that request.

³ Reply, p. 3 (para. 10).

2 THE COMMITTEE SHOULD LIFT THE STAY

2.1 The Applicable Legal Standard

- 5 The Applicants **do not challenge the test** set out by the Respondent:⁴ the Committee has discretion to assess whether the circumstances warrant a stay, which is not the case when – as here – there is a high risk (for Romania) of non-payment of the Award and no risk (for the Applicants) of non-recoupment if Romania were to enforce the Award and the Award were later annulled. The Respondent has five additional comments.
- 6 First, the Applicants wrongly seek to shift the burden of proof to Romania:⁵ they must first prove that a stay is warranted, as the case law on which they rely confirms.⁶
- 7 Second, the Applicants contrast (i) their “legitimate right” to request annulment and a stay of enforcement with (ii) Romania’s “right to payment”.⁷ However, there **is no right to a stay of enforcement**⁸ and Romania’s right to payment is not “subject to the [annulment] decision” and nothing “remains to be finally resolved”.⁹ As one committee recalled,

⁴ Comments on Stay, p. 2 *et seq.* (paras. 8, 11 and 15); Reply, p. 1 *et seq.* (paras. 2, 10, 16, and 19).

⁵ Reply, p. 3 *et seq.* (paras. 8 and 25). Romania “does not have to show circumstances that require the lifting of the stay”. *NextEra et al. v. Kingdom of Spain*, Decision on Stay dated 6 April 2020, at **RLA-226**, p. 23 *et seq.* (para. 80).

⁶ *STEAG v. Spain*, Decision on Stay dated 18 August 2022, at **AL-30**, p. 22 (para. 68); *Quiborax v. Bolivia*, Decision on Stay dated 21 February 2017, at **AL-33**, p. 16 (para. 43) (“it is up to the [party requesting the stay] to prove that circumstances exist that require the continuation of the suspension.”) (unofficial translation); see Comments on Stay, p. 4 (para. 14) (and authorities cited therein).

⁷ Reply, p. 2 *et seq.* (para. 7).

⁸ *Perenco v. Ecuador*, Decision on Stay dated 21 February 2020, at **AL-27**, p. 15 (paras. 39 and 43); *Masdar et al. v. Spain*, Decision on Stay dated 20 May 2020, at **AL-28**, p. 29 (para. 91); *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **AL-26**, p. 17 (para. 61).

⁹ Reply, p. 2 *et seq.* (para. 7); *Caratube et al. v. Kazakhstan*, Decision on Stay dated 12 December 2019, at **AL-26**, p. 18 *et seq.* (paras. 68-69 and 71); *Quiborax v. Bolivia*, Decision on Stay dated 21 February 2017, at **AL-33**, p. 15 (para. 40) (“Apart from this reservation [in Article 53], there is an obligation to abide and comply with the Award as long as the Committee does not annul it (...).”) (unofficial translation).

a party “has no right (...) to protection from enforcement efforts while pursuing an annulment proceeding”.¹⁰

8 Third, the Applicants’ depiction of the Award as “egregiously flawed” is denied and misplaced, where (as they agree) considerations on the merits of the Annulment Application should not affect the decision on the stay.¹¹

9 Fourth, it is undisputed that annulment proceedings are extraordinary;¹² accordingly, a stay is only warranted in “exceptional circumstances”.¹³

10 Finally, it is now *jurisprudence constante* that investment treaties and the ICSID framework are not insurance policies for foreign investors against business risk.¹⁴ The Applicants should bear the consequences of their actions as supposedly experienced investors with sophisticated legal counsel. In bringing the arbitration and expending some USD 60 million in costs (for which the Tribunal noted the “massive disparity” with Romania’s costs¹⁵), they assumed the risk that they might lose the arbitration and be ordered to reimburse Romania’s fees and costs. It was their burden to manage that risk, *i.e.*, to take measures to be able to make that reimbursement irrespective of their decision to file for annulment.

2.2 The Circumstances of the Case Require Lifting the Stay

11 The Applicants accept that the Committee must consider the risks of non-payment (**Section 2.2.1**) versus non-recoupment (**Section 2.2.2**) and the balance of hardship (**Section 2.2.3**),¹⁶ which favor lifting the stay.

¹⁰ *Libananco v. Turkey*, Decision on Stay dated 7 May 2012, at **AL-23**, p. 18 (para. 56).

¹¹ Reply, p. 2 *et seq.* (paras. 7 and 24); Comments on Stay, p. 5 (para. 16).

¹² Stay Request, p. 2 (para. 8) (“annulment may be an exceptional remedy”); Comments on Stay, p. 3 *et seq.* (para. 13) (and authorities cited therein).

¹³ See Comments on Stay, p. 3 *et seq.* (paras. 13-14).

¹⁴ See, *e.g.*, the oft-quoted *Maffezini v. Spain*, Award dated 13 November 2000, at **RLA-76**, p. 21 (para. 64).

¹⁵ Award, p. 359 (para. 1355).

¹⁶ See para. 5 and footnote 4 above.

2.2.1 The Applicants have confirmed the high risk (if not the certainty) of non-payment of the Award

- 12 While the Applicants emphasize their financial “predicament”,¹⁷ they appear to have access to funds, yet remain unwilling to provide any guarantees that they would pay the Award (not to mention Romania’s costs in these proceedings). This position is untenable.
- 13 The Applicants do not deny that a stay should be lifted in case of an objective and supported risk of non-payment,¹⁸ but argue “that a stay may be warranted even if there were a risk of non-compliance in case of non-annulment”.¹⁹ Their reliance on *STEAG v. Spain* is inapposite because the risk of non-payment (by a State, not investors) arose from conflicting legal obligations, not a lack of funds.²⁰
- 14 The Applicants also argue that Romania’s ability to collect payment “would not be impaired by continuation of the stay”.²¹ However, the test is not whether the risk of non-payment **evolves**, but rather that it **exists**.
- 15 The **risk of non-payment by the award debtor could not be more clear**: the Applicants do not deny having “no intention of paying a penny to Romania and plan[ning] to take any and all measures to avoid payment”.²²
- 16 However, contrary to the Applicants’ allegations,²³ they have access to funding:²⁴

¹⁷ Reply, p. 3 *et seq.* (para. 11).

¹⁸ Comments on Stay, p. 5 *et seq.* (paras. 19-20).

¹⁹ Reply, p. 8 (fn 36) (where the Applicants discuss the balance of interests between the parties).

²⁰ *STEAG v. Spain*, Decision on Stay dated 18 August 2022, at **AL-30**, p. 33 (paras. 103-105); see also *Continental Casualty v. Argentina*, Decision of Stay dated 23 October 2009, at **RLA-245**, p. 11 *et seq.* (para. 12).

²¹ Reply, p. 8 (para 22).

²² Comments on Stay, p. 7 (para. 25) and p. 13 (para. 48); Reply, p. 8 (para. 22), p. 3 (para. 10) (“Gabriel is experiencing severe financial distress and does not currently have (...) sufficient funds to pay (...) the Cost Award.”) and p. 4 (paras. 11-13) (“There is no guarantee that Gabriel will be able to obtain necessary funding”, its “prospects for funding have diminished [and] are uncertain” and it “has no source of revenue”); see also Comments on Stay, p. 6 (paras. 21-23) (and references therein).

²³ Reply, p. 3 *et seq.* (paras. 11-12).

²⁴ There might be other sources of funding, which are not public. See Comments on Stay, p. 11 (footnote 45); see also Gabriel Canada MD&A, Third Quarter 2024, at **R-703**, p. 12.

- Gabriel Canada secured a USD 1.5 million loan, as part of “a further funding round through a proposed private placement of securities in the near future”, under which “if launched, Gabriel may seek up to US\$4 million from investors”.²⁵
 - The Applicants have earmarked funds for payment of their legal fees relating to the Arbitration²⁶ and the annulment proceedings.²⁷
- 17 Yet, the Applicants refuse to guarantee that these funds would be available to Romania, should it be successful in the annulment proceedings.

2.2.2 The Applicants bear no risk of non-recoupment should the stay be lifted and the Award annulled

- 18 The Applicants argue that they face a risk of non-recoupment if the Award is enforced and then annulled. However, the case law on which they rely supports Romania’s position regarding **the risks of non-recoupment from investors, not States**.²⁸ No such risk exists given the Romanian laws governing the winding back of the enforcement of a judicial decision that is then annulled.²⁹ Romania makes the following additional comments.
- 19 First, the Applicants refer to the risk of non-recoupment “in light of” Romania’s “enforcement measures”, including “seizing Gabriel Jersey’s shares in RMGC with a view to liquidating RMGC’s assets”:³⁰

²⁵ Junior Mining Network, Gabriel Resources: US\$1.5 Million Loan dated 29 November 2024, at **R-704**, p. 1; Gabriel Canada MD&A, Third Quarter 2024, at **R-703**, p. 5, see also p. 11 (“Financing Activities”).

²⁶ Gabriel Canada MD&A, Third Quarter 2024, at **R-703**, p. 4, 8, and 11.

²⁷ Gabriel Canada MD&A, Third Quarter 2024, at **R-703**, p. 4.

²⁸ *MTD v. Chile*, Decision on Stay dated 6 June 2005, at **AL-22**, p. 10 (para. 29) (noting the risk that a State would not recover funds from an insolvent investor and highlighting the importance of “reasonable assurances that the award, if not annulled, will be complied with.”); *STEAG v. Spain*, Decision on Stay dated 18 August 2022, at **AL-30**, p. 3 *et seq.* (para. 94) (referring to the “inconvenience” for Spain to have to “navigat[e] through STEAG’s corporate structure” to recover amounts paid under the Award, if it were annulled.).

²⁹ Comments on Stay, p.8 (section 2.2.2).

³⁰ Reply, p. 5 *et seq.* (paras. 15-16).

- Romania took precautionary (not enforcement) measures, in line with the Code of Fiscal Procedure, which also regulates how the Applicants can obtain the lifting of such measures (by providing security).³¹
 - Romania has never “threaten[ed]” to liquidate RMGC’s assets,³² and has no intention of, nor a legal basis for, doing so. If RMGC’s assets were liquidated, they would remain RMGC’s property (not that of its shareholders, which are only entitled to dividends distributed from the company’s net profit).³³ Furthermore, Romania cannot target the assets of a third party (such as RMGC) in satisfaction of the Award; it can only take measures against the assets of the Award debtors such as Gabriel Jersey’s shares in RMGC.
 - Gabriel Jersey should therefore not take any measure and/or action which may lead to diminishing the value of its shares in RMGC.
- 20 Second, the Applicants stress the “serious risk of irreparable harm to Gabriel of the State seizing Gabriel Jersey’s shares in RMGC” because Gabriel would not be returned to the *status quo ante* if Romania sold these shares to a third party or liquidated RMGC’s assets.³⁴ However:
- The Applicants’ suggestion that Romania is misapplying Romanian law is incorrect.³⁵ If the Award were annulled, the precautionary and enforcement measures taken by Romania would be automatically annulled.³⁶

³¹ Romanian Code of Fiscal Procedure (extracts), at **R-705** (Arts. 211 and 214); Comments on Stay, p. 6 (paras. 23-24) (referring to Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024, at **R-697**); see para. 30 below.

³² Reply, p. 6 *et seq.* (para. 18), see also p. 5 *et seq.* (paras. 15, 16 and 21).

³³ Romanian Company Law No 31/1990 (extracts), at **R-706** (Art. 66).

³⁴ Reply, p. 5 *et seq.* (para. 16).

³⁵ Reply, p. 5 *et seq.* (para. 16) (suggesting that the Code of Civil Procedure does not apply to ICSID awards). The Award is treated as a final judgment of a Romanian court, per Article 54 (1) and (3) of the ICSID Convention. The collection of the ensuing receivables (on the legal nature of which, see **R-697**, p. 2-3), including the institution of precautionary and enforcement measures, is governed by the Code of Fiscal Procedure. Where a judicial decision is annulled, the Code of Civil Procedure applies. Romanian Code of Civil Procedure (extracts), at **R-707** (Art. 2 (2)).

³⁶ Romanian Code of Civil Procedure (extracts), at **R-707** (Art. 643); see also Comments on Stay, p. 8 *et seq.* (section 2.2.2).

- If any rights (such as the shares) had been definitively acquired by a *bona fide* third party, Romania would be bound to provide the Applicants with the corresponding monetary value.³⁷
- 21 The Applicants have no qualms stating that “Romania offers no assurance to Gabriel even as it threatens to liquidate RMGC’s assets”.³⁸ No such risk exists; Romania has acted in accordance with its obligations and provided assurances of repaying the Applicants should the Award be enforced in Romania and subsequently annulled. The Applicants are the ones who failed to comply with their legal obligations and must give assurances.

2.2.3 Looking at the balance of hardships, the Stay should be lifted

- 22 The Applicants accept that “a stay is warranted where the prejudice of enforcement goes beyond the inherent and normal effects of an adverse ICSID award.”³⁹ However, enforcement would not prejudice them:⁴⁰
- Lifting the stay would not “risk pushing Gabriel into insolvency”;⁴¹ this risk exists irrespective of any enforcement effort, given Gabriel Canada’s statement that it has “no source of revenue”.⁴²
 - Gabriel Canada’s insolvency would not “place RMGC’s continued viability at risk”,⁴³ as this risk also exists regardless of any attempt to enforce the Award (which, in any event, cannot be directed against RMGC) given that RMGC has been operating at loss for years.⁴⁴
 - Nor would the Applicants’ access to justice be frustrated, as shown by the funding they have continued to receive.⁴⁵

³⁷ Romanian Code of Civil Procedure (extracts), at **R-698** (Art. 723).

³⁸ Reply, p. 6 *et seq.* (para. 18).

³⁹ Reply, p. 7 (para. 19); Comments on Stay, p. 9 *et seq.* (para. 35).

⁴⁰ Reply, p. 7 (para. 19).

⁴¹ Reply, p. 5 (para. 14).

⁴² Reply, p. 4 (para. 13). If and when the Annulment Application is dismissed, these funders are likely to seek reimbursement from Gabriel Canada.

⁴³ Reply, p. 5 (para. 14).

⁴⁴ RMGC Financial Indicators 2021, at **R-708**; RMGC Financial Indicators 2022, at **R-709**; RMGC Financial Indicators 2023, at **R-710**.

⁴⁵ Reply, p. 4 (para. 13); see para. 16 above.

- 23 To the contrary, **Romania is the party at risk of being most prejudiced** by a continuation of the stay.⁴⁶ The Applicants’ lack of revenue, paired with the outside funding (which may be subject to reimbursement) and their unwillingness to pay or guarantee payment of the Award, demonstrate the grave risk that Romania faces should the stay be maintained – when the Committee rejects the Annulment Application, Romania will be left with little prospect of being able to enforce the Award.
- 24 The Applicants seek to undermine Romania’s potential prejudice by alleging that it could obtain satisfaction through “RMGC’s assets” which “remain sufficient to satisfy the Cost Award”, likely through the foreclosing of its real estate assets.⁴⁷ However, there is no legal basis for RMGC’s assets to be used to satisfy the Award.⁴⁸ RMGC can only be held liable out of its own assets for its own obligations, not those of its shareholders.⁴⁹ Under Romanian law, it would be a criminal offense for Gabriel Jersey to obtain from RMGC a guarantee for Gabriel Jersey’s debts.⁵⁰
- 25 Given the Applicants’ refusal to provide any assurances, combined with the manner in which they have conducted these proceedings to date,⁵¹ Romania cannot “wait until the conclusion of these proceedings”, as the Applicants propose⁵² before seeking enforcement. If the stay is maintained, there is a high risk that the Applicants will obtain funds for their own use in the annulment proceedings, without ensuring that sufficient funds are reserved to pay the Award, if upheld at the end of the annulment proceedings. **Allowing such unchecked allocation of resources essentially makes Romania the funder of the annulment proceedings** – this cannot be right.

⁴⁶ Comments on Stay, p. 9 (para. 34) and p. 13 (para. 48).

⁴⁷ Reply, p. 8 (para. 23).

⁴⁸ Comments on Stay, p. 11 *et seq.* (paras. 43-44); see para. 23 above.

⁴⁹ Romanian Company Law No 31/1990 (extracts), at **R-706** (Arts. 3 and 66).

⁵⁰ Romanian Company Law No 31/1990 (extracts), at **R-706** (Art. 272).

⁵¹ See footnote 2 above.

⁵² Reply, p. 8 (para. 22).

3 ANY CONTINUATION OF THE STAY MUST BE CONDITIONED ON THE POSTING OF SECURITY

- 26 The Applicants do not deny the Committee’s power to condition the stay on the posting of security,⁵³ but they argue that the circumstances warrant an **unconditional** continuation of the stay.⁵⁴
- 27 A conditional stay would purportedly “frustrate [their] ability to pursue annulment”, while Romania has not proven that it would be prejudiced by an unconditional stay.⁵⁵ However, **Romania’s prejudice is clear** given the Applicants’ refusal to comply with (or give assurances under) the Award, while the Applicants are still funding these proceedings.⁵⁶
- 28 The Committee must thus balance “the right of access to justice on the one hand and the right to enforcement on the other”⁵⁷ and should consider the Applicants’ alleged lack of funds, which in itself “is not an excuse for non-payment of the Award”,⁵⁸ their disregard of other factors that Romania previously noted,⁵⁹ and the possible duration of the proceedings.⁶⁰
- 29 The Applicants conclude that the posting of security would place Romania “in a better position than it would have been [in] had Gabriel not sought annulment”.⁶¹ This is unsupported in law⁶² and in fact:

⁵³ See Comments on Stay, p. 13 *et seq.* (paras. 50-53).

⁵⁴ Reply, p. 9 *et seq.* (paras. 25-29).

⁵⁵ Reply, p. 9 (paras. 25-27).

⁵⁶ See Section 2.2.1 above, notably para. 17.

⁵⁷ *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **AL-24**, p. 6 (para. 38); *STEAG v. Spain*, Decision on Stay dated 18 August 2022, at **AL-30**, p. 22 (para. 69);

⁵⁸ Reply, p. 9 (para. 26); *Churchill et al. v. Indonesia*, Decision on Stay dated 27 June 2017, at **AL-24**, p. 6 (para. 39).

⁵⁹ Comments on Stay, p. 15 *et seq.* (para. 54) (and authorities cited therein); see also, *e.g.*, *9REN v. Spain*, Decision on Stay dated 19 November 2021, at **AL-34**, p. 41 (paras. 134 and 136).

⁶⁰ *Libananco v. Turkey*, Decision on Stay dated 7 May 2012, at **AL-23**, p. 17 (para. 54).

⁶¹ Reply, p. 10 (para. 29).

⁶² *Eyre et al. v. Sri Lanka*, Decision on Annulment dated 2 December 2020, at **AL-29**, p. 4 *et seq.* (para. 14) (granting “the security would place the Respondent in an advantageous position”, but only in light of an undertaking regarding availability of funds, the “relatively small” amount due and the short timeline of the annulment proceedings).

- If the Applicants had not filed for annulment, they would not have benefitted from the (now extended) automatic provisional stay⁶³ and Romania could already have sought to enforce the Award;
 - Even if Gabriel posted security, Romania could still not access these funds if enforcement is stayed.
 - Romania's rights are not safeguarded through RMGC's assets.⁶⁴
- 30 As a result, Romania maintains its request (which the Applicants have disregarded) that they be ordered to deposit the amount of the Award, plus interest, into an **escrow account** within 30 days of the Committee's decision on the stay.⁶⁵ In the alternative, the Applicants should be ordered to post a security issued by a third party, as debtor guarantor, which waives the benefit of discussion and division, through a **payment undertaking**, or other undertaking in authentic form, accompanied by a real guarantee.⁶⁶ The Respondent is prepared to discuss suitable terms for the escrow arrangement, financial guarantee, or other form of security the Committee may find appropriate.

4 PRAYERS FOR RELIEF

- 31 For the foregoing reasons, Romania respectfully reiterates its prayers for relief set out in its Comments of 1 November 2024. In addition, as part of its alternative prayer, Romania requests the posting of a security through payment into an escrow account or in the form of a guarantee, as described in paragraph 3030 above, or another form of security to be discussed with the Committee. In any event, the Committee should order Gabriel Jersey not to take any measure and/or action which may lead to diminishing the value of its shares in RMGC.

⁶³ Under the ICSID Convention, the provisional stay should not last more than 30 days following the committee's constitution. Here, the Parties extended this deadline to allow the briefing of the committee. This timeframe has now been pushed back further due to the Applicants' disqualification request, during which time they continue to benefit from the stay.

⁶⁴ Reply, p. 9 *et seq.* (para 28); see para. 19 (second bullet) above.

⁶⁵ Comments on Stay, p. 16 *et seq.* (paras. 56-57); see also *Sempra Energy v. Argentina*, Decision on Stay dated 5 March 2009, at **RLA-234**, p. 14 *et seq.* (paras. 83 and 104-113).

⁶⁶ Romanian Code of Fiscal Procedure (extracts), at **R-705** (Art. 24); see also, Comments on Stay, p. 15 (para. 54) (and authorities cited therein).

Respectfully submitted,
18 December 2024
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RESPONDENT'S LIST OF FACTUAL EXHIBITS

Exhibit No.	Description	Date
R-703	Gabriel Canada MD&A, Third Quarter 2024	
R-704	Junior Mining Network, Gabriel Resources: US\$1.5 Million Loan	29 November 2024
R-705	Romanian Code of Fiscal Procedure (extracts)	
R-706	Romanian Company Law No. 31/1990 (extracts)	
R-707	Romanian Code of Civil Procedure (extracts)	
R-708	RMGC Financial Indicators 2021	31 December 2021
R-709	RMGC Financial Indicators 2022	31 December 2022
R-710	RMGC Financial Indicators 2023	31 December 2023

RESPONDENT'S LIST OF LEGAL AUTHORITIES

Exhibit No.	Description
RLA-245	<i>Continental Casualty Company v. Argentine Republic</i> , Decision on Argentina's Application for a Stay of Enforcement of the Award, ICSID Case No. ARB/03/9, 23 October 2009