



Gabriel Resources: Prospecting for ISDS gold

After Romania prevented Canadian company Gabriel Resources from opening an open-pit gold and silver mine on environmental grounds Gabriel Resources brought a US\$4.4 billion claim, bypassing domestic courts.

Problem Analysis

This case shows how the mining company Gabriel Resources has manipulated governments and laws, for private gain and with public loss. It also shows the power of people in opposing mega mining projects.

Since 1997, the Canadian mining company Gabriel Resources has pressured Romania to allow the construction of the largest open-pit gold and silver mine in Europe, the Roșia Montană Project. Due to strong lobbying and protests by local, national and international citizens and organisations, the project in Roșia Montană is currently on hold.

Gabriel Resources is suing Romania for US\$4.4 billion in an investor-state dispute settlement (ISDS) procedure because of Romania's alleged failure to issue the permits needed to operate the gold and silver mine in the historic Romanian village of Roșia Montană. The case shows how companies have access to a parallel corporate-friendly court system where they can bypass domestic courts and sue governments for billions of taxpayers money in compensation for public interest measures.

Not only is there an absence of home state accountability, Canada's former ambassador to Romania later worked for the company as a lobbyist and several other government representatives have actively advocated for the mine.

Company

Main Company: Gabriel Resources Ltd.

Head office: Toronto, Ontario, Canada

Subsidiary: The Project is owned through Rosia Montana Gold Corporation S.A. (RMGC), in which Gabriel holds an 80.69% stake with the balance held by the Romanian State.¹

Company background

Publicly owned

Top 5 shareholders: Electrum Strategic Holdings LLC, BSG Capital Markets PCC Ltd., The Baupost Group LLC, Newmont Mining Corp., Kopernik Global Investors LLC²

President & CEO (income): Jonathan Henry (US\$780,000)³

Non-Executive Chairman & Director (income): Keith Hulley (US\$121,500)⁴

Annual profit: -4 billion in the past years" GR claims.^{5,6}

Annual turnover: US\$17.8 million (Estimated)

Presence: Romania, UK (office), Canada (hq)

Number of employees: 250–1,000⁷

Company activity

Mining; Since 1997, the Company's principal focus has been the exploration and development of the Roșia Montană gold and silver project in Romania (the "Roșia Montană Project"). More recently, the ICSID arbitration has become the core focus of the Company.⁸

Country and location in which the violation occurred

Romania, Roșia Montană

Hungary is the downstream country in case of pollution

Summary of the case

Since 1997, the Canadian mining company Gabriel Resources has pressured Romania to allow the construction of what would be the largest open-pit gold and silver mine in Europe, the Roșia Montană Project. Residents living in and around the town of Roșia Montană, environmentalists and concerned citizens from all over Romania and Hungary have fought against the proposal for a multi-billion-dollar mining project, which would be harmful for their community and the surrounding environment.

Local inhabitants have already been driven away by the plans. The mine would destroy three villages, level four mountains, displace 2,000 people and leave behind a lake of heavy metals and cyanide-contaminated waste.⁹ The cyanide sludge would pollute the surrounding environment and nearby rivers, endangering the livelihood of 6,000 people living downstream from the proposed mining project.¹⁰ The Environmental Impact Assessment (EIA) procedure for the project started in 2004 and is still being finalised.

Concerns over possible pollution from the mining project is fuelled by memories of an earlier disaster. In 2000, a storage lake near the Romanian town of Baia Mare burst a dyke, releasing 130,000 cubic metres of cyanide-tainted water. Romania was found in breach of the European Convention on Human Rights (ECHR) because the Romanian authorities had failed in their duty to assess the risks which the mining company's activity might entail, and to take suitable measures to protect the rights of those concerned, in particular their right to enjoy a healthy and protected environment.^{11,12}

Gabriel Resources, whose only activity is the development of this project, secured the Roşia Montană Project with secretive government contacts and lucrative advertising contracts with local media.^{13,14} The concession license for exploiting the gold and silver ore from the Roşia Montană area was largely declared classified information by Mihail Ianas – the former president of the National Agency for Ore Resources. Although there have been countless requests to declassify the license and the contract signed by the Romanian state with the mining company, they remain classified to this day.¹⁵

Due to strong lobbying and protests by local, national and international citizens and organisations, the investment for the Roşia Montană Project is currently on hold. The government's proposal for a law that would bypass laws and allow for this exploitation was rejected by Parliament in 2013 following the largest protest in Romania since the fall of communism. In 2016, the Romanian government tabled a proposal for a ten-year moratorium on the use of cyanide in mining, but this law is stuck in Parliament. In early 2017, the government officially submitted a request to the United Nations to declare Roşia Montană a UNESCO World Heritage Site.

Since 2015 Gabriel Resources has been suing the Romanian government before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for denying the permits, seeking US\$4.4 billion in

damages.¹⁶ According to the company, denying the permits constitutes a breach of the bilateral investment agreements Romania signed with Canada and the UK respectively. After the inception of the ISDS case in 2015, Alburnus Maior, Greenpeace Romania and the Independent Centre for the Development of Environmental Resources (ICDER) contacted the ICSID Tribunal to request access to information as prospective *amici curiae*.¹⁷ "After today's confirmation of Gabriel seeking US\$4.4 billion in damages, this case is an issue for the country as a whole. It is taxpayers money that would pay for the damages. Together we need to make sure that the government is determined to win, because right now it doesn't look like it at all," said Eugen David, president of Alburnus Maior.¹⁸

In July 2017, Romania served Gabriel Resources with an outstanding VAT tax bill of US\$8.6 million, related to the purchase of goods and services between 2011 and 2016, and warned that the company could also be liable for millions more in interest and penalties.¹⁹

In October 2017, DeSmog Canada exposed that Canadian officials have been actively advocating for the mine since 2007. The revelations were based on internal correspondence from the Canadian Department of Foreign Affairs and International Trade relating to the Roşia Montană mine and going back to 2004. The communications were obtained through a Freedom of Information request by the NGO Mining Watch Romania. In a 2008 email, a trade commissioner with Foreign Affairs and International Trade Canada clearly stated: "Our embassies in Bucharest, Brussels and London have provided extensive support to Gabriel Resources, such as offering business development advice and facilitating meetings with key decision makers." The documents show that the former Canadian ambassador to Romania later joined the board of Gabriel Resources and that he also worked as a lobbyist for the company and used connections inside the ministry to push for the project.²⁰

Endnotes

1 Gabriel Resources Ltd, at <http://www.gabrielresources.com> (accessed at 23-11-2017)

2 "Gabriel Resources Ltd. (GBU), Business Summary," 4-Traders, at <http://www.4-traders.com/GABRIEL-RESOURCES-LTD-1410110/company/> (accessed at 23-11-2017)

3 "Notice of 2016 Annual Meeting of Shareholders - Management Information Circular," Gabriel Resources Ltd., 25 May 2016, p. 32 at <http://www.gabrielresources.com/documents/2016GBUInformationCircular-27.05.16-FINALMASTER.pdf>, (accessed at 23-11-2017)

4 Ibid., p. 32

5 Adam Cernea Clark, "Whose Sovereignty? Gabriel Resources v.

Romania," Huffington Post, undated, at https://www.huffingtonpost.com/adam-cerneia-clark/whose-sovereignty-gabriel_b_7939596.html (accessed at 23-11-2017)

6 "Management's Discussion and Analysis," Gabriel Resources Ltd. at <http://www.gabrielresources.com/site/documents/GBUCombinedMDAandFS-Dec2016.pdf> (accessed at 23-11-2017)

7 "Notice of 2017 Annual Meeting of Shareholders - Management Information Circular," Gabriel Resources Ltd., 17 May 2017, at <http://www.gabrielresources.com/site/documents/2017GBUManagementInformationCircular.PDF> (accessed at 23-11-2017)

8 Gabriel Resources Ltd at <http://www.gabrielresources.com> (accessed at 23-11-2017)

9 James Wilt, "Why A Canadian Mining Company Is Suing Romania for \$4.4 Billion," Desmog Canada, 19 October 2017, <https://www.desmog.ca/2017/10/19/why-canadian-mining-company-suing-romania-4-4-billion> (accessed at 30-11-2017)

10 Corporate Europe Observatory (CEO), "Gold-digging with Investor-state Lawsuits," February 2017, at https://corporateeurope.org/sites/default/files/attachments/gold_digging_with_investor_state_lawsuits.pdf (accessed at 30-11-2017)

11 "One year on: Romania's cyanide spill," BBC News, 31 January 2001, at <http://news.bbc.co.uk/2/hi/europe/1146979.stm> (accessed at 30-11-2017)

12 "Press release issued by the Registrar, Chamber Judgment TÂTAR v. ROMANIA," European Court of Human Rights, 27 January 2009 at <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=003-2615810-2848789&filename=Chamber%20judgment%20Tatar%20v.%20Romania%2027.01.09.pdf> (accessed at 30-11-2017)

13 Corporate Europe Observatory (CEO), "Gold-digging with Investor-state Lawsuits," February 2017, p. 6 at https://corporateeurope.org/sites/default/files/attachments/gold_digging_with_investor_state_lawsuits.pdf

14 Shaazka Beyerle and Tina Olteanu, "How Romanian People Power Took On Mining and Corruption," Foreign Policy, 17 November 2016 at <http://foreignpolicy.com/2016/11/17/how-romanian-people-power-took-on-mining-and-corruption-rosia-montana> (accessed at 30-11-2017)

15 "Rosia Montana," Mining Watch Romania, undated at <http://miningwatch.ro/en/romana-rosia-montana> (accessed at 30-11-2017)

16 "Gabriel files for international arbitration against Romania," Gabriel Resources Ltd., 21 July 2015 at <http://en.rmgc.ro/media/press-releases/gabriel-files-for-international-arbitration-against-romania.html> (accessed at 30-11-2017)

17 Someone who is not a party to a case but assists a court by offering information that bears on the case. The decision on whether to admit the information lies at the discretion of the court.

18 "Gabriel: you can always ask but it doesn't mean we will let you get it! Alburnus Maior announces ICSID submission," Alburnus Maior Association, Rosia Montana, 30 June 2017, at <https://www.rosiamontana.org/content/gabriel-you-can-always-ask-it-doesn-t-mean-we-will-let-you-get-it?language=en> (accessed at 30-11-2017)

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