

AMICUS CURIAE SUBMISSION

**by Centrul Independent pentru Dezvoltarea Resurselor de Mediu
and**

Greenpeace Romania

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

ICSID Case No. ARB/15/31

I. Background

The Cârnic Massif is located in Roşia Montană/ Alba County/ Romania. It contains the highest amount of proven gold reserves and is central to the mine proposal's economic viability. At the same time, it also contains a high concentration of unique archaeological values. To date over 4 kilometers of Roman mine galleries dating from the second century CE have been unearthed. All in all, Carnic houses ancient, medieval, and modern galleries of which not all have yet been researched. Roşia Montană's cultural heritage, including the Cârnic Massif, has been classified as a monument of national interest on Romania's List of Historic Monuments (LHM) since 1992. Contrary to the Claimant's assertion, updates of this list in 2004, 2010, 2015 and 2020 are due to the Ministry for Culture and the Cult's legal obligation to update the LHM list every 5 years.¹ This process is unrelated to the permitting procedure for the gold mine proposal. Like every other legal entity active in Romania, the Claimant could challenge LHM's legality in court. However, it was only in December 2014 that Rosia Montana Gold Corporation (RMGC) initiated legal action challenging the 2010 LHM. It was unsuccessful.²

Article 11 of Romania's mining law states that "carrying out mining activities on the lands on which are located historical, cultural, and religious monuments, archaeological sites of important interest [...] is strictly forbidden."³ Given the protection status of large surfaces situated within the mine proposal's footprint, RMGC was legally required to carry out archaeological research over these surfaces to be able to request that their protection be lifted. This happens via the issuance an Archaeological Discharge Certificate (ADC). However, when immovable heritage is found, no ADC may be issued for that area as this would contravene applicable legislation.⁴

To carry out archaeological investigations in view of obtaining the ADCs necessary for the mine proposal, RMGC set up a research program with Romania's ministry for Culture and Cults (MCC) called Alburnus Maior. All research related to mining archaeology was carried out by archaeologists under the supervision of Beatrice Cauuet from Toulouse University. From as early as 2002 their archaeological campaign reports confirmed that unique Roman vestiges had been unearthed within Cârnic.⁵ Although the archaeologist in charge didn't recommend an archaeological discharge, RMGC requested it and MCC duly granted it with ADC No. 4/2004.

Considering this irregular decision, NGOs from Romania initiated legal proceedings against MCC's decision. The Brasov Court of Appeal subsequently annulled ADC No. 4/2004.⁶ Romania's Supreme Court confirmed the ruling via a final decision stating that: "The exploitation of parts of Cârnic is incompatible with the obligation to protect the Roman galleries discovered in the area. Their integrity would be affected [...] the area's underground is of great archaeological interest; being one of largest ancient Roman mining centers ever discovered."⁷

¹ Law 422/2001 on protecting historical monuments, art. 21(2), available at <http://legislatie.just.ro/Public/DetaliiDocument/76993?isFormaDeBaza=True&rep=True>.

² Braşov Court of Appeal, Judgement No. 54/2015 (May 28, 2015). Company appealed the judgement and then dropped the case, High Court of Justice and Cassation, Decision of 27.11.2015.

³ Mining Law No. 85/18.03.2003, art. 11 (Mar. 27, 2003).

⁴ See Respondent's Counter-memorial, *supra* note 6, at ¶¶ 91-92 (containing information on the applicable legal framework).

⁵ Béatrice Cauuet et al, National Research Program (Romania), Alburnus Maior, Ancient Gold Mines of Dacia, Roşia Montană District (Apuseni Mountains, Romania), Report 2002 (2002).

⁶ Brasov Court of Appeal, Sentence No. 157/F/CA (Nov. 26, 2007).

⁷ The High Court of Cassation and Justice, The Administrative and Fiscal Contentious Department, Decision No. 4607 (Dec. 9, 2008).

II. Contrary to both Parties' claims, ADC 9/2011 is annulled

With ADC No. 4/2004 annulled, RMGC needed a new one to be able to mine Cârnic via open pit mining. It slightly altered the initial perimeter and MCC issued ADC No. 9/14.07.2011 (No.9/2011). One of the undersigned organizations, the 'Centrul Independent pentru Dezvoltarea Resurselor de Mediu' (CIDRM), challenged this ADC together with two further Romanian NGOs. ADC No. 9/2011 was suspended by the Suceava Court of Appeal in April 2014.⁸ This case included new evidence submitted by the claimants; including a statement of significance.⁹ At the same time CIDRM and the two Romanian NGOs were seeking the annulment of ADC 9/2011 at the Buzău County Tribunal under file no. 8243/117/2011. With decision No 770 of 10 December 2020 the Buzău County Tribunal upheld ADC 9/2011. However, this decision was appealed by the NGOs, including one of the undersigned organizations. The appeal was registered at the Ploiesti Court of Appeal on 15 July 2021. The trial ended with final Decision No. 187 on 16 February 2022 ordering the annulment of ADC No. 9/14.07.2011.¹⁰ The Ministry for Culture's Alba Directorate was the respondent in the appeal case¹¹ and RMGC was an intervening respondent.¹²

On 30 September 2021 the Arbitral Tribunal issued Procedural Order No. 35 concerning the admissibility of new evidence. In consequence the Claimant¹³ and Respondent¹⁴ submitted new evidence. Both parties mention the Buzău County Court decision but none of them refer to the appeal, already ongoing at that time. Instead, both parties claim that the Buzău Court decision No. 770 dated 10 December 2020 which upheld archaeological discharge certificate No. 9/14.07.2011 is final and irrevocable.

III. Conclusion

The prospective *amici* would like to highlight that the considerations presented above should play a crucial role in the Tribunal's assessment as the Ploiesti Court of Appeal's final Decision No. 187 from 16 February 2022¹⁵ is significant for several reasons.

The Ploiesti Court of Appeal Ploiesti stated in its final decision that:

"Analysing the grounds of illegality raised by the appellants-claimants in their appeal, the Court finds that an important ground of illegality relates to the *issuance of the archaeological discharge Certificate No. 9 of 14.07.2011 without the approval of the National Committee of Archaeology.*

The Court finds that *in the present case there is no proof of the existence of a decision of the National Committee of Archaeology approving the issuance of archaeological discharge Certificate No 9/2011. This entails the invalidity of the said certificate since Letter No 1718 of 13.07.2011 issued by the Ministry of Culture and National Heritage*" (Point VIII of the appeal).

" Another important reason of illegality invoked by the appellants-claimants refers to the fact that the archaeological research undertaken did not consider the status of the galleries of the Cârnic Massif as a monument classified in group A, for which *the investor should have obtained a new urban planning certificate.* In that regard, the appeal states that Roşia Montană has been declared a protected site and that, in Annex 3, point 1(1) of Law No 5/2000, the Roman galleries of the gold mining operations in the village of Roşia Montană, commune of Roşia Montană, have been classified as heritage of national interest. The evidence of Roman mining at Cârnic is part of a series of extensive and important underground mining complexes within the Roman Empire in Roşia Montană" (pag.117) (...)

⁸ Suceava Court of Appeal, Sentence 4379/2014 (Apr. 15, 2014)

⁹ Statement of Significance, Cârnic Massif, Rosia Montana, jud Alba Romania, September 2010 with additional summary July 2011, p. 7. Source: <https://users.ox.ac.uk/~corp0057/Raport-Oxford-Rosia-Montana-MD1.pdf>

¹⁰ The case file can be found here https://portal.just.ro/42/SitePages/Dosar.aspx?id_dosar=1170000000058531&id_inst=42

¹¹ https://portal.just.ro/42/SitePages/Dosar.aspx?id_dosar=1170000000058531&id_inst=42

¹² https://portal.just.ro/42/SitePages/Dosar.aspx?id_dosar=1170000000058531&id_inst=42 page 2

¹³ Claimant's Observations on New Evidence (October 29, 2021) [English \(Original\)](#)

¹⁴ Respondent's Observations on New Evidence (December 6, 2021) [English \(Original\)](#)

¹⁵ Decision No. 187 of 16 February 2022 can be consulted in [Romanian \(Original\)](#) and in [English \(authorized translation\)](#)

Accordingly, the Court holds that, in the present case, it was necessary for the competent local public authority to issue the town planning certificate, as an administrative operation prior to the issuance of the administrative act represented by archaeological discharge Certificate No 9/2011, a town planning certificate reflecting the legal regime of the area proposed for discharge. Considering the aforementioned regulations, the plea of illegality raised by the appellants-claimants is well founded, in the sense that the archaeological discharge certificate was issued unlawfully in absence of a town planning certificate.

Since the pleas of illegality relating to the invalidity of the archaeological discharge certificate for lack of approval by the National Archaeological Committee and the lack of a town planning certificate raised by the appellants-claimants have been found to be well founded, the Court considers it superfluous to examine the other pleas in law raised by the appellants in their appeal.”

In 2021 the Roşia Montană mining landscape was added by UNESCO to its list of World Heritage sites as it is the” most intensive and technically diverse gold mining complex recorded anywhere in the Roman empire.”¹⁶ Yet being added to the list of World Heritage sites does not add any protection status¹⁷ other than what the site already enjoys under Romanian law since 1992. This also explains why a UNESCO nomination is unrelated to the ability to obtain ADCs, as has been done for the Roşia Montană Project since 2004.

The ability for NGOs to challenge state decisions such as ADC’s in court are part of the essence and practice of the rule of law. The undersigned organizations have since long carried out litigation activities related to permitting the mine development as proposed by Gabriel Resources and the Romanian Government in a joint venture called RMGC. This includes ADC 9/2011. RMGC intervened in support of the respondent in almost all cases. It is the reason of the rule of law to be able to contest state decisions in a court of law. And this is how and why permits related to the Project and including all ADC’s for the Cărnic Massif were annulled.

Respectfully submitted on 18 September 2022 by,

Dan Mercea
President
Centrul Independent pentru Dezvoltarea
Resurselor de Mediu
contact@miningwatch.ro
+40 364 104 706
Str. Traian No. 69-71 apt 27
Cluj Napoca / Romania

Valentin Salageanu
Executive Director
Greenpeace Romania
valentin.salageanu@greenpeace.org
+40 735 165 472
Louis Blanc No.16
Bucharest / Romania



¹⁶ <https://whc.unesco.org/en/list/1552/>

¹⁷ According to Art. 7 of the Convention on the Protection of World Heritage, international protection of the world cultural and natural heritage means the **establishment of a system of international co-operation and assistance** to support States Parties to the Convention in their efforts to conserve and identify that heritage: <https://whc.unesco.org/en/conventiontext/>